Recent Decisions

CONTRACTS — OPEN PRICE AGREEMENTS — FAIR TRADE LAWS

Seller brought an action for breach of contract upon buyer's refusal to accept electric irons pursuant to contract. Buyer contended the contract was void because seller reserved the right to change prices, to be ". . . . shown in the company's current price sheet, and as established from time to time by the company." Buyer agrees to ". . . merchandise the company's products at full list price and in accordance with the Fair Trade Act. . . ." *Held,* for defendant. The court said a contract cannot be enforced where the price is conditioned entirely on the will of one of the parties—". . . it was essential to its validity that it should have been mutually obligatory upon both parties." *Taller & Cooper v. Illuminating Electric Co.,* 172 F. 2d 625 (7th Cir. 1949).

Noted writers have called attention to the confused use of mutuality in the cases, one writer saying that requiring mutuality is an unnecessary way of stating that there must be a valid consideration, WILLISTON, CONTRACTS §141 (2d ed. 1936), while another states that ". . . the doctrine of mutuality of obligation not only is not supported by most of the actual decisions but has outlived any possible period of usefulness." The modern doctrine of constructive conditions makes mutuality unnecessary. GRISMORE, LAW OF CONTRACTS §68 (1947). A promise need not be legally binding to constitute sufficient consideration. RESTATEMENT, CONTRACTS §84(E). The proper inquiry should be whether the promise is so indefinite as to render it illusory.

It is not absolutely necessary to name a price in the contract, since the court will fix a reasonable price in its absence. *Patterson-Ballagh Corp. v. Byron Jackson Co.,* 145 F. 2d 786 (9th Cir. 1944). No objection has been made to contracts with price based on material and labor costs. *E. F. Prichard Co., Inc. v. Heidelberg Brewing Co.,* 307 Ky. 833, 212 S.W. 2d 293 (1948); *American Weekly, Inc. v. Hauston Printing Corp.,* 134 F. 2d 447 (5th Cir. 1943). Contracts with prices based on factors beyond seller's control, such as market price or prices set by competitors, are also valid. *South Carolina Cotton Growers Coop. Assn. v. Weil,* 220 Ala. 568, 126 So. 637 (1929); *Holly Sugar Corp. v. Fritzler,* 42 Wyo. 446, 296 Pac. 206 (1931). Thus there is no requirement that the price be definitely ascertainable when the contract is made.

Other courts have upheld contracts where the parties agreed that the seller could change prices via new price schedules. *Pure Oil Co. v. Tucker,* 70 F. Supp. 766 (S.D. Iowa 1947); *Standard*

Oil Co. v. Wright Oil Service Co., 26 F. 2d 895 (4th Cir. 1928); *Kings County Packing Co. v. Sunland Sales Coop. Assn.*, 279 Pac. 1036, 100 Cal. App. 126 (1929). Even where both list price and discount rate could be changed by the seller, the contract was upheld. *Ken-Rad Corp. v. R. C. Bohannan, Inc.*, 80 F. 2d 251 (6th Cir. 1935). Finally, the Court of Appeals for the Seventh Circuit, which wrote the principal opinion, upheld an open price contract in *Buggs v. Ford Motor Co.*, 113 F. 2d 618 (7th Cir. 1940), *cert. denied* 311 U.S. 688, and recently fully approved the rule. *Anderson & Brown Co. v. Anderson*, 161 F. 2d 974, 977 (7th Cir. 1947). With the majority of other cases and its own decisions against it, there appears little justification for the decision in the instant case.

Not only do the cases support open price contracts, but reason as well, for the seller ". . . is not free to fix prices at will, if he has any expectation of ever selling them again." Prosser, *Open Price in Sales Contracts*, 16 MINN. L. REV. 733 (1932). The contract in effect is one to sell at the lowest price given to any other, which provision has been upheld. *Mantell v. International Plastic Harmonica Corp.*, 138 N.J. Eq. 562, 49 A. 2d 290 (1946). It has been suggested that the requirements of good faith and fair dealing should be injected into such contracts. *Calif. Prune & Apricot Growers v. Wood & Selick*, 2 F. 2d 88 (S.D. N.Y. 1924). The court in the instant case did not consider the problem of good faith the buyer had, however, accepted a shipment on which the seller had already increased the price to that here involved, thus indicating that the buyer did not think the increase unreasonable.

Absent legal justification for vitiating the contract on the basis of contract law, the decision may represent an attack on the validity of fair trade laws, the buyer having agreed to sell "at full list price in accordance with the Fair Trade Act . . ." The act in question is the Illinois Fair Trade Act, ILL. ANN. STAT. c. 121½, §188 (1948 supp.), which was upheld by the United States Supreme Court. *Old Dearborn Distributing Corp.* v. *Seagram Distillers Corp.*, 299 U.S. 183 (1936). Resort to state law in interstate contracts was made possible by the Miller-Tydings Enabling Act which removes such agreements from the prohibition of the federal anti-trust and unfair competition laws. 50 STAT. 693; 15 U.S.C. §1. The Illinois Act states:

> (1) That the buyer will not resell such commodity except at the price stipulated by the vendor.

Whether the words "price stipulated" means the original price in the contract, or refer to a subsequent price schedule, has not been decided. The Ohio Act is similar to that of Illinois, except that a "minimum price" is stipulated by the vendor. OHIO GEN. CODE §6402–3 (A) (1945). In Ohio the very common practice of

changing prices by publishing price schedules under the original contract has never been questioned. Requiring a new contract for each fluctuation would be unduly burdensome. Since the contract in the instant case is a common practice under Fair Trade Acts, the decision is a serious attack on the efficacy of Fair Trade Agreements.

Jack R. Alton

ACCRUED INTEREST ON CUMULATIVE PREFERRED DIVIDENDS—A DEBT OR AN ADDITIONAL OBLIGATION

Plaintiffs, Trustees in Liquidation of a South Carolina Corporation, claimed an income tax deduction for that portion of the proceeds from the sale of the last asset, real estate, paid to the holders of first preferred stock in partial liquidation of accumulated interest on cumulative dividends thereon. This stock was ordinary in all respects except that it included a provision for annually compounded interest on unpaid dividends. Regular dividend payments had been made, without formal declaration, for several years following its issue, but no earnings were made and no dividends were declared or paid for seven years immediately preceding dissolution of the corporation in 1927. As authority for the deduction, plaintiff relied on 53 STAT. 12 (1939), 26 U.S.C. §23(b) (1940), which allows a deduction for "All interest paid or accrued within the taxable year on indebtedness. . . ." From a judgment for the defendant, Collector of Internal Revenue, in the district court, *Burton* v. *Bowers*, 79 F. Supp. 418 (E.D.S.C. 1948), plaintiff appealed. *Held*, affirmed. The payments were not "interest paid or indebtedness," where the corporation did not declare dividends or have any earnings in years in which alleged interest on preferred dividends accrued. Provisions for payment of compound interest on cumulative preferred dividends in preferred stock certificates does not convert the obligation of a corporation to its preferred stockholders into an indebtedness due a creditor, but merely goes to the amount of dividends to be paid if and when payable, and defines the rights of preferred stockholders against other stockholders in the event of liquidation, *Burton v. Bowers*, 172 F. 2d 429 (4th Cir. 1949).

The distinction between interest payments and dividends is of great importance to corporations because of the deductibility of the former for income tax purposes, 53 STAT. 12 (1939), 26 U.S.C. §23(b) (1940). The character of the payment is determined by the nature of the security upon which it is made, *i.e.* if the security evidences an indebtedness, the payment is interest; but if the security represents a capital contribution, it is a dividend.

No comprehensive rule has been devised to effect this determination but certain criteria have evolved which singly or collectively

sway the courts one way or the other: name given to the security, intent of the parties, certainty of payment, maturity date, fund out of which payment is to be made, right to share in profits, subordination to claims of creditors, voting rights and subjectibility to risk of loss. Of course, in tax cases the factor of tax avoidance plays an important role in judicial weighing of the criteria above. As a result, a test involving the reasonableness of the ratio of debt to capital in the corporate financial structure has recently been formulated. *Talbot Mills* v. *Commissioner of Internal Revenue,* 3 T.C. 95 (1944), *aff'd,* 146 F. 2d 809 (1st Cir. 1944), *aff'd* 326 U.S. 521 (1945).

Plaintiff's contention in the principal case that the interest provision made the dividends owed the stockholders an indebtedness could not have been sustained unless the nature of the security itself had been affected thereby, as the dividends owed could not possibly have become a debt in the absence of earnings or a fund out of which they were payable, *Miller* v. *Ratterman,* 47 Ohio St. 141, 24 N.E. 496 (1890), *New York, L. E. and W. R. Co.* v. *Nickals,* 119 U.S. 296 (1886). If the nature of the security itself had been changed by the provision, the "dividends" would have become "interest" and hence an indebtedness, and the amount in controversy would have become deductible as interest on the "interest." 53 STAT. 12 (1939), 26 U.S.C. §23(b) (1940). Moreover, it would appear that the "interest," the erstwhile dividend, would itself have become deductible under these circumstances. The court, however, concluded that the nature of the security involved capital contribution and had not been changed. Factors considered in arriving at this determination included: the terminology employed, "preferred stock," the uncertainty of payment of the principal; the absence of a fixed maturity date; the fact that "dividends" were to be paid only out of earnings; and the subordination of the obligations concerned to the claims of general creditors.

No mention was made by the court of the intent of the parties in formulating the interest provision itself. An argument might have been proferred that the parties intended to establish a debtor-creditor relationship as evidenced by the fixed, periodical return on principal therewith provided for, but whether such an argument would have swayed the court in its determination is doubtful, especially since this was a tax case. The argument could readily have been answered by cataloguing the interest provision as an attempt to guarantee dividends, thereby rendering it inoperative in the absence of earnings, *Miller v. Ratterman, supra. See* note, 123 A.L.R. 856 (1939), 18 C.J.S., CORPORATIONS, §228 (1939).

Stimulated by the holding of the principal case are queries as to the possibility of a debtor-creditor relationship arising as a product

of the interest provision either as to the deferred dividends when earnings or funds from which they might be payable are present, or as to the interest itself, in which event the interest might be deductible from gross income as an ordinary expense.

The court in the principal case quoted extensively and with approval from *Drayton-Mills* v. *Commissioner of Internal Revenue*, 19 B.T.A. 76 (1930), where interest on deferred dividends provided for in preferred stock certificates was held to be an additional dividend and so not deductible either as interest on an indebtedness or as an ordinary expense. From an examination of the facts of the *Drayton-Mills* case, *supra*, it does not appear whether there was any fund available from which dividends could have been paid during the years in which the interest in controversy accrued. Significant, however, is the fact that the corporation kept its accounts on the accrual basis, but did *not* accrue the interest on the deferred dividends. No account relative thereto was set up and no entry made until the dividend was declared and its payments with interest authorized. This indication of the intent of the parties undoubtedly influenced the board in its decision.

A preferred stockholder is ordinarily not a creditor of the corporation, except as to dividends already declared, even though the stock may be secured by a mortgage or may bear a guaranteed dividend. 18 C.J.S., CORPORATIONS, §228 (1939). The declaration of dividends is ordinarily within the discretion of the directors of a corporation, *Smith* v. *Aultman & Taylor Co.*, 25 Ohio C.C. (N.S.) 561 (1916), *Aff'd without opinion* 95 Ohio St. 415, 116 N.E. 1086 (1917); In re *Railway Light and Power Co.*, 3 Ohio App. 253, 21 Ohio C.C. (N.S.) 95 (1914). A corporation having the power to issue preferred stock and to fix the terms and conditions on which it shall be issued may, however, provide for the payment of a certain rate of dividends on stock when earned, regardless of any declaration by the directors, *Warburton* v. *John Wanamaker Philadelphia*, 329 Pa. 5, 196 Atl. 506 (1938). Therefore, if an agreement dispensing with the necessity of declaration is present, it is possible for a debtor-creditor relationship to arise as to dividends when they become payable. The interest provision in controversy could be interpreted as the basis from which such an agreement might be implied: it amounts to a recognition of the stockholder's right to a return whenever dividends are payable, and it constitutes an agreement to pay for the continued use of such unreturned funds. The presence of other factors such as the failure to make entries or keep accounts recognizing the accrued interest, as in the *Drayton-Mills* case, *supra*, might lead the court to reject this construction in the particular case.

A contract guaranteeing the payment of dividends was held

void as against public policy because of its influence on the discretion of a director and accompanying interference with his fiduciary character in *Thomas* v. *Matthews*, 94 Ohio St. 32, 113 N.E. 669 (1916). While this decision might shed doubt on the validity of such an agreement in Ohio, the case is readily distinguishable in that an individual contract of a director was involved as opposed to a provision in a stock certificate.

The question remains as to whether a debtor-creditor relationship might exist under such a provision as to the interest itself. Can such interest be considered as a separate obligation of the corporation, or must it be treated as an additional dividend if the nature of the security is held to remain unaffected as a capital contribution?

A preferred stockholder cannot be both creditor and stockholder by virtue of his ownership of stock alone. *Hazel Atlas Glass Co.* v. *Van Dyk and Reeves*, 8 F. 2d 716 (2nd Cir. 1925), *cert. denied, Van Dyk* v. *Young*, 269 U.S. 570 (1925); *Armstrong* v. *Union Trust and Savings Bank*, 248 Fed. 268 (9th Cir. 1918). He may be one or the other but not both unless a statute or charter provision authorizing the issue of extraordinary preferred stock comes into the picture. *Augusta Trust Co.* v. *Augusta, H. and G. R. C.*, 134 Me. 314, 187 Atl. 1 (1936). Therefore, if the interest provision will not effect a change in the nature of the security, it cannot operate to create a separate relationship even though such might be the intent of the parties as evidenced by the fixed nature of the return provided for. Even this fixation argument is weak in the principal case since the provision is for "compound" interest and thus indicates an expectancy of possible delay in payment. No consideration apart from the contribution to capital could be found to sustain the interest obligation on the theory that a separate contract existed in relation thereto.

It is submitted that such an interest provision as that involved in the principal case is incapable of itself effecting a change either in the nature of the security involved or in the stockholder-corporation relationship as to the interest therein provided. It is merely one more factor bearing upon the determination of the court as to the basic nature of the security involved and is important in this respect only as considered in conjunction with the criteria enumerated above, the degree of import being relatively contingent upon the type of controversy in which the question arises. However, some significance might attach to the provision independently in the form of a waiver of the necessity for declaration of dividends by directors when funds from which they might be paid are available.

Bernard P. Bernardo

CORPORATIONS—COMPENSATION—OFFICER-DIRECTORS

Plaintiff stockholder filed a derivative action in equity to recover $51,000 additional compensation paid to defendant Tom Girdler by defendant corporation. After a judgment for plaintiff in the trial court, the parties have stipulated that the salaries paid were reasonable in amount and that the conduct of the directors was in no way deceitful or fraudulent. The primary issue upon appeal was whether the additional compensation was unlawful as an ultra vires act. *Held*, the action was lawful. *Holmes* v. *Republic Steel Corp.*, 84 N.E. 2d 508 (Ohio App. 1948).

It is now the well-settled rule that directors of a corporation cannot recover compensation, in any form, for their services when rendered in the line of their duty as such, whether *eo nomine* as directors, officers, members of committees, or otherwise, *unless* compensation for such services is expressly provided for or agreed upon in a statute, charter, or by a resolution of stockholders *before* the services are rendered. *Upright* v. *Brown*, 98 F. 2d 802 (2d Cir. 1938), *Stevens* v. *Ind. Comm.*, 346 Ill. 495, 179 N.E. 102 (1932), *Henry Wood's Sons Co.* v.*Schaefer*, 173 Mass. 443, 53 N.E. 881 (1899), *Ten Eyck* v. *Pontiac, O. & P. A. R. Co.*, 74 Mich. 226, 41 N.W. 905 (1889), 13 Am. Jur., Corp., §1027 (1941). The power to vote a salary to any director is never an inherent power of the board of directors. *Holder* v. *Lafayette, B. & M. Co.*, 71 Ill. 106 (1897), *Godley* v. *Crandall & G. Co.*, 212 N.Y. 121, 105 N.E. 818 (1914).

Although the board of directors may be given the power to fix their own salaries, their action may be invalidated by the participation of the director, whose salary is fixed, in the vote or meeting fixing his own compensation. *Briggs v. Gilbert Grocery Co.*, 116 Ohio St. 343, 156 N.E. 494 (1927), *State* ex rel. *Squire* v. *Miller*, 62 Ohio App. 43, 23 N.E. 2d 321 (1939), 175 A.L.R. 578. According to one writer, Ohio is in the minority by holding such action void, instead of voidable. 6 Ohio St. L. J. 66 (1939). The defendant in the principal case took no part in the voting or discussion of his salary so that problem cannot be raised on the facts.

The resolution of the board of directors stated that the salary of defendant as chairman was fixed at the rate of $175,000 per year, *"plus any additional amount, if any, as the board of directors may determine prior to December 31, 1940."* (Emphasis supplied.) It is the contention of the plaintiff that such resolution is an ultra vires act. The court found the authority for the board of directors to fix officers' compensation in the New Jersey statutes and went on to find the additional compensation or bonus was, along with the annual salary, *fixed* by this resolution. N.J.S.A. 14:3-1 (e) (1937).

An act or contract of a corporation is ultra vires when it is

beyond the powers expressly or impliedly conferred upon the corporation. *Central Trans. Co.* v. *Pullman P. C. Co.*, 139 U.S. 24 (1890), *Cleveland & M. R. Co.*, v. *Furnace Co.*, 37 Ohio St. 321 (1881). Thus, if one determines there was no express agreement to pay the bonus to defendant, the resolution passed in December, 1940, would be clearly ultra vires because the directors cannot vote themselves "back pay" as compensation for services theretofore rendered. *Briggs* v. *Gilbert Grocery Co., supra, State* ex rel. *Squire* v. *Miller, supra, State* ex rel. *Lawrence* v. *People's Mut. Ben. Ass'n.*, 42 Ohio St. 579 (1885), *Holder* v. *Lafayette B. & M. R. Co., supra, Thauer* v. *Gaebler*, 202 Wis. 296, 232 N.W. 561 (1930). The trial court determined this to be the situation and in so holding stated, ". . . that board of directors shall fix compensation of all officers did not require directors to specify in the resolution the exact amount an officer of the corporation was to be paid, but, if they did not, then they were required to establish a formula by which it could be computed without mistake or misunderstanding." *Holmes* v. *Republic Steel Corp.*, 69 N.E. 2d 396 (Ohio C.P. 1946). Strict interpretation of such agreements has been adopted in other jurisdictions and is probably rooted in the notion that a director is a fiduciary of the corporation and where self-interests of directors appear the courts should be wary in order that a corporation may not be milked thereby. *Althouse* v. *Colliery Co.*, 227 Pa. 580, 76 Atl. 316 (1910), *Brophy* v. *Amer. Brewing Co.*, 211 Pa. 596, 61 Atl. 123 (1905), *Kilpatrick* v. *Penrose F. B. Co.*, 49 Pa. 118 (1865).

One bit of testimony in the principal case was stressed by the trial court and overlooked by this court. Defendant Girdler was asked on the stand, "You had no agreement to get more?" His answer was, "I had no agreement of any kind whatever about any additional compensation." This would seem to substantiate the trial court's finding of no express contract.

The modern tendency is to uphold bonus agreements on the theory that they are a valid incentive to corporate management to increase profits and thereby incidentally benefit themselves. *Rogers* v. *Hill*, 289 U.S. 582 (1932), *Putnam* v. *Shoe Corp.*, 307 Mo. 74, 269 S.W. 593 (1925), *Bennett* v. *Madison Sales Co.*, 264 Ky. 728, 95 S.W. 2d 604 (1936). In fact, the principal case is an example of how a court may strain to make an express contract out of vague and uncertain words to uphold such a broad general policy. Upon these same or similar facts it is possible that the Ohio Supreme Court, with its heritage of strictness in dealing with such matters, could find such action of the board of directors to be ultra vires.

David W. Hart

DOMESTIC RELATIONS — COMMON LAW MARRIAGE

Plaintiff, in an action for divorce, sought to prove the marital status of the plaintiff and defendant by establishing a common law marriage. It was shown that the parties in good faith agreed to become husband and wife and held themselves out as such during twelve days that they cohabited at a tourist camp. There was no holding out by the parties as husband and wife in the immediate community in which they lived upon return from the tourist camp sojourn, but the plaintiff later entered a hospital where she and the twins, there born to her and defendant, were registered under defendant's name. Defendant appealed from a decree of divorce granted to the plaintiff, contending that the decree was not supported by the evidence and contrary to law. *Held,* Judgment affirmed. The plaintiff did establish a common law marriage relationship with the defendant. *Gatterdam* v. *Gatterdam,* 85 N.E. 2d 526 (Ohio App. 1949), *appeal dismissed,* 151 Ohio St. 551 (1949).

Before proceeding to the appellant's argument that no marital relationship was established, the court of appeals disposed of the appellee's objection to its jurisdiction by holding that the court of appeals was not precluded from weighing evidence on the ground that the defendant's motion for new trial was premature because it was filed after the opinion of the trial court and before the judgment entry. This somewhat liberal construction of Ohio General Code Section 11578 is found in an earlier case where such early filing of a motion for new trial was given effect. In re *Lowry's Estate,* 140 Ohio St. 223, 42 N.E. 2d 987 (1942).

Common law marriages are recognized and valid in Ohio. *Carmichael* v. *State,* 12 Ohio St. 553 (1861); *Umbenhower* v. *Labus,* 85 Ohio St. 238, 97 N.E. 832 (1912); *Johnson* v. *Wolford,* 117 Ohio St. 136, 157 N.E. 385 (1927); *Lumas* v. *Lumas,* 26 Ohio App. 502, 160 N.E. 480 (1927). But as a matter of public policy such marriages are not favored. In re *Redmond,* 135 Ohio St. 554, 21 N.E. 2d 659 (1939).

The stepping stones frequently associated as essential to establishment of a common law marriage are an agreement or consent to become husband and wife immediately at the time of agreement and cohabitation accompanied by mutual assumption openly of marital duties and obligations. The rule has been announced in Ohio that to constitute a common law marriage, an agreement *in praesenti* must be followed by cohabitation as husband and wife, and the parties must be treated and reputed as being married in the community and circle in which they move. *Carmichael* v. *State, Supra; Johnson* v. *Wolford, Supra; Markley* v. *Hudson,* 143 Ohio St. 163, 54 N.E. 2d 304 (1944); *Howard* v. *Central National*

Bank, 21 Ohio App. 74, 152 N.E. 784 (1926); *Lumas* v. *Lumas, supra; Respole* v. *Respole,* 70 N.E. 2d 465 (Ohio C.P. 1946).

Mutual promises to marry in the future, not present in the principal case, though made between parties competent to contract, and followed by cohabitation as husband and wife, are not, in themselves, a valid marriage. *Duncan* v. *Duncan,* 10 Ohio St. 181 (1859); *Umbenhower* v. *Labus, Supra.*

The court in the principal case, after careful analysis, cites with approval those authorities and decisions which embrace the theory that cohabitation and repute of marriage are not an essential of the legality of the relationship, but merely evidence of an essential; *i.e.,* consent. 2 Kent's *Commentaries* 86, 87; 33 Am. Jur. 199; *Peters* v. *Peters,* 73 Colo. 271, 215 Pac. 128 (1923); *Lefkoff* v. *Sicro,* 189 Ga. 554, 6 S.E. 2d 687 (1939); *Norrell* v. *Norrell,* 220 Ind. 398, 44 N.E. 2d 97 (1942); *Hulett* v. *Carey,* 66 Minn. 327, 69 N.W. 31 (1896).

Under the statutes and decisions of the eighteen states which authorize common law marriage, including Ohio, the weight of authority holds that to constitute such marriage there must be a present agreement between a man and woman, eligible to enter such relationship, to take each other as man and wife, and this must be followed by hohabitation. KEEZER, *Marriage and Divorce* §20 (3d ed. 1946).

The court's discussion in the principal cases advocating the view that cohabitation and repute of marriage are evidentiary must be viewed as little more than a well considered dictum in view of the factual existence of cohabitation and at least a limited holding out as husband and wife. For a decision to be authority for the proposition that a marriage is complete by the contract, the case must not embrace in its facts cohabitation or any form of consummation, since it would not then be a case of marriage by contract only.

Appellant contended that the relationship was illicit in its inception and so continued at all times. This view was not accepted by the trial court and was likewise rejected by the court of appeals. The fact that the legitimacy of children was involved appeared to play its usual role even though the birth and presence of the twins were not permitted to change the factors essential to the common law marriage. Equally persuasive was the fact that the plaintiff was not seeking property rights but on the contrary was seeking the dissolution of a marital relationship she claimed existed.

The growing unpopularity of common law marriage is shown by the fact that in recent years it has ceased to exist in Delaware, Minnesota, Nebraska, Nevada, and New Jersey by express pro-

hibitory legislation, and has been judicially repudiated elsewhere. KEEZER, *Marriage and Divorce* §30 (3d ed. 1946).

Until the abrogation of common law marriage by express legislation in Ohio a sound judicial approach to its maintenance must be found and applied with pattern-like consistency. For purposes of public policy and to prevent fraud, strong proof of the marriage contract should be required. As a practical matter this proof is usually supplied by showing cohabitation and a holding out as man and wife. However, where the contract is conclusively proved by other evidence, the absence of proof of cohabitation and a holding out should not be allowed to defeat the marriage, particularly where the rights of innocent persons are involved.

Lowell B. Howard

SPECIFIC PERFORMANCE—ORAL CONTRACT TO MAKE WILL

In performance of her part of an oral contract with one Harper, whereby he agreed to bequeath and devise to her one-half of his estate, plaintiff served as his housekeeper, cook, practical nurse, business associate and secretary for about two years prior to his death, at which time she learned that he had died intestate. In an action in the nature of specific performance brought against Harper's administratrix, *held*: An oral contract to make a will is unenforceable by virtue of Ohio General Code Section 10504–3a, and payment of consideration consisting of pecuniarily compensable services will not remove such a contract from the operation of the section. *Snyder* v. *Warde*, 151 Ohio St. 426 (Court of Appeals reversed and judgment of Common Pleas Court affirmed).

Payment of the consideration is not sufficient to take an oral contract out of the statute of frauds. *Sites v. Keller*, 6 Ohio 483 (1834), *Pollard* v. *Kinner*, 6 Ohio 528 (1834). This is just as true where the consideration consists of personal services. *Hodges* v. *Ettinger*, 127 Ohio St. 460, 189 N.E. 113 (1934). Contracts or agreements to make a will with reference to both real and personal property are within the statute of frauds. *Howard* v. *Brower*, 37 Ohio St. 402 (1881); *Shahan, Ex'r* v. *Swan*, 48 Ohio St. 25, 26 N.E. 222 (1891). Notwithstanding the established rule, specific performance of a contract in parol may be had on the ground that the consideration has been paid in personal services, not intended to be and not susceptible of being measured by a pecuniary standard, *Shahan, Ex'r* v. *Swan, supra, Newbold* v. *Michael*, 110 Ohio St. 588, 144 N.E. 715 (1924); or on the grounds that the contract has been so far executed that a refusal would operate as a fraud upon the party who has performed and would result in a denial of just compensation. *Newbold* v. *Michael, supra.*

The result in the principal case is in accord with the rule enunci-

ated in *Newbold* v. *Michael, supra,* the Supreme Court merely holding that while the calculation of the value of the services performed might be complicated it did not change their character so as to make them non-compensable by pecuniary standards. The court, in a carefully considered opinion by Judge Stewart, went further, however, and considered but left for an appropriate future decision the question of whether an oral contract to make a will could ever, under any circumstances, be removed from the bar of Ohio General Code Section 10504–3a. Since the general statutes of frauds (Ohio General Code Sections 8620 and 8621) had been in effect in Ohio since 1810 the contention was made that the enactment by the General Assembly in 1935 of Section 10504–3a was an absolute expression of the legislative intent to require, without exception, any agreement to make a will or a devise or bequest by will to be in writing in order to be enforceable. The inclusion of the section in the chapter designated "Wills" rather than in the chapter designated "Statutes on Frauds and Perjuries" was pointed out as indicia that a distinction was being made from the general statutes of frauds, whereby the new section constituted a rule of evidence as as to make any and all oral agreements to make a will absolutely unenforceable. The syllabus in *Ayres* v. *Cook,* 140 Ohio St. 281, 43 N.E. 2d 287 (1942), which states that proper partial performance will take an oral agreement out of the operation of Section 10504–3a, is commented upon, but since that case involved a contract entered into prior to the enactment of the statute and did not involve any question of personal services, the court indicated that it would not hesitate to re-examine the rule of law as there enunciated when the issue properly arose.

The Court of Appeals for Medina County, however, granted a decree of specific performance on an oral contract to devise real estate by will, holding that the doctrine of partial performance applied notwithstanding Ohio General Code Sections 8621 and 10504–3a, and citing *Ayres* v. *Cook, supra,* as authority, *Emley, Ex'r v. Selepchek,* 76 Ohio App. 257, 63 N.E. 2d 919 (1945).

The reasons for statutory enactments are manifold, but not the least among them is the desire to express statutorily a rule of law having its origin in judicial construction. Thus the General Assembly, in enacting Ohio General Code Section 10504–3a, may merely have been restating the rule that the general statute of frauds applied to wills, while at the same time prescribing the proper procedure for making agreements regarding the making of wills. It is felt that this possibility should be kept in mind when the question left unanswered in the principal case properly arises, and, in the absence of more clear and convincing proof of the legislative intent than is there presented, should prevail to

uphold the equitable doctrine of partial performance presently so deep-rooted in our law.

Arthur J. Prendergast, Jr.

TORTS — ACTION BY CHILD FOR PRE-NATAL INJURIES

An infant brought an action through her next friend against defendant bus company for injuries received while plaintiff was in her mother's womb. Her mother, while pregnant, was a paying passenger on defendant's bus when she was injured by defendant's alleged negligent act, which plaintiff claims also caused permanent injuries to her at a time when she was viable, *i.e.* capable of existing independently of her mother. Demurrer by the defendant was sustained by the trial judge. This judgment was reversed by the Court of Appeals and the case certified to the Supreme Court because of a conflict with a decision of another Court of Appeals. *Held,* for plaintiff, affirming the Court of Appeals decision. Plaintiff was capable of independent existence at the time of the injury and therefore was a person, entitled to the protection of Section 16, Article I of the Ohio Constitution, providing that the courts shall be open to afford a remedy to any person injured. *Williams, an Infant* v. *The Marion Rapid Transit, Inc.*, 152 Ohio St. 114, — N.E. 2d —(1949).

This decision is directly contrary to the great number of American decisions dealing with this problem. Judge Matthias, writing for a unanimous court, reviewed those precedents before holding that a cause of action existed. A Massachusetts opinion written by then Chief Justice Holmes is the basis for denial of recovery in cases of this type. *Dietrich, Adm'r* v. *Inhabitants of Northampton,* 138 Mass. 14, 52 Am. Rep. 242 (1884). In that case a woman, between four and five months advanced in pregnancy, was injured, causing the child to be prematurely born shortly thereafter. It died after surviving a few minutes. In an action brought by the administrator, the existence of a cause of action was denied. It should be noted that the child was not viable, nor did it survive the accident. Nevertheless, subsequent cases used the broad language of the opinion to deny recovery where the child was viable and did survive. One case, typical of those denying recovery, listed the reasons as follows:

1. lack of authority;
2. practical inconvenience and possible injustice;
3. no separate entity apart from the mother, and therefore no duty of care;
4. no person or human being in *esse* at the time of the accident.

Drobner v. *Peters*, 232 N.Y. 220, 133 N.E. 567 (1921).

Judge Matthias ably answered these arguments in his opinion.

Authority was found in a Canadian case allowing recovery, *Montreal Tramways* v. *Le Veille,* 4 D. L.R. 337 (1933), and in a California case allowing a cause of action based on a statutory provision that "a child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth." CAL. CIV. CODE §29 (1941), *Scott* v. *McPheeters,* 33 Cal. App. 2d 629, 92 P. 2d 678 (1939), *aff'd* ——— Cal. 2d ———, 93 P. 2d 562 (1939). A recent federal case, not cited by Judge Matthias, denied a summary judgment in favor of defendant doctor, being sued for injuries received when plaintiff infant was being taken from its mother's womb. *Bonbrest* v. *Kotz,* 65 F. Supp. 138 (1946). *See* note, 32 VA. L. REV. 1203 (1946). The injury, however, was directly to the child during birth, not prior to birth as in the principal case.

In answering the argument that injustice may result from granting a cause of action, Judge Matthias said ". . . it seems clear that adequate safeguards could be established by requiring sufficient proof by competent medical evidence, which is possible at least in many cases." The basis for the holding of the principal case, that a viable foetus is a person, disposes of the other arguments of the *Drobner* case.

The opinion did not consider another problem which has prevented recovery in two similar cases. It has been held that a child cannot recover for pre-natal injuries suffered while its mother was a paying passenger on a public conveyance because the contract for transportation extended to the mother only. *Nugent* v. *Brooklyn Heights Ry. Co.,* 139 N.Y.C. 367, 154 App. Div. 667, *Appeal dismissed* 209 N.Y. 515 (1913); *Walker* v. *Great Northern Ry.,* L.R. 28 Ir. 69 (1890). The Ohio Supreme Court did not follow these decisions, correctly, it would seem, for a contractual relation is not necessary to bring the tort action.

Even if the principal case is adopted generally, other problems may arise. If the unborn child, though viable, is killed in the accident, can his administrator bring an action for wrongful death? Since, by the principal decision, the unborn child is a person, it would seem that there should be such an action. Further, the court, at p. 120 of the opinion, intimates that such an action would survive, saying in reference to the decision in the *Dietrich* case, *supra,* "The significant fact, however, is that the child could not survive and no right of action therefore accrued to the child, which could survive in favor of the child's representative." However, the principal decision on its facts would not warrant a wrongful death action, for here the child did survive. Judge Matthias said, "Let us be reminded that in the instant case we are dealing with a viable child, one capable of living and which demonstrated its capacity to

survive by surviving," at p. 128. Had the child died, how could any damages to the survivors be assessed? Damages, *e.g.*, for possible future support, would be extremely speculative. In view of this, survival might justifiably be made a condition subsequent to the right to bring the action.

If the injury occurs before the foetus is viable, but the foetus is later born suffering the effects of the injuries, is there a cause of action in favor of the child? Although human sympathies would dictate an affirmative answer, it seems clear from the principal decision that there is no cause of action by the child because it was not a person at the time of injury. However, when the occasion arises, the Ohio Supreme Court may well allow the mother to recover for the injuries to the child, since at the time of the accident, the child was a part of her. Otherwise, the injuries would go uncompensated.

The principal decision then, appears to be the first in an American court of last resort, *in the absence of statute,* allowing a cause of action to the child for pre-natal injuries suffered while viable. The Supreme Court of Ohio has commendably broken away from precedents based on dicta and outmoded medical ideas. The facts in the instant case differ from those in the *Dietrich* case, *supra,* in that here the child was viable at the time of injury and now survives unable to care for itself as a result of the accident. The decision aligns the law of torts with the law of property and the criminal law, which long have considered the foetus an entity. PROSSER, TORTS 189–190 (1941). Justice Holmes' concept of the common law —"the felt necessities of the times," has triumphed over his own decision of sixty-five years ago.

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