Notre Dame Law Review

Volume 18 | Issue 2 Article 5

12-1-1942

Contributors to the December Issue/Notes

Warren A. Deahl

W. J. Rafferty

Timothy M. Green

Bernard F. Grainey

CONTRIBUTORS TO THE DECEMBER ISSUE

ANTON-HERMANN CHROUST, J.U.D., 1929. University of Erlangen (Germany) Ph.D., 1931, University of Munich (Germany); S. J. D., 1933, Harvard Law School, contributor of several articles to law reviews and philosophical magazines in Germany and the U. S. A. Formerly research student at the Harvard Law School.

WALTER BURGWYN JONES, LL.B., University of Alabama, 1909; Member of the Bar of the Supreme Court of the United States; Member American Bar Association; Member Montgomery Bar Association; Member House Judiciary Committee Legislature, 1919; Member Alabama State Highway Commission, 1919; Vice-President, Board City Commissioners of Montgomery, 1919-1920; President Board of Jury Supervisors Montgomery County, Alabama, 1923-1931; Judge Fifteenth Judicial Circuit Alabama; Judge Supreme Court of Alabama. Editor of the "Alabama Lawyer."

ROBERT N. WILKIN, LL.B., 1908, University of Virginia. Author of "The Spirit of the Legal Profession" (1908). Judge of the Supreme Court of Ohio, 1934. United States District Judge for the Northern District of Ohio.

NOTES

DEATH—SIMULTANEOUS DEATH AND THE DEVOLUTION OF PROPERTY.—*In General.* Simultaneous death is an exception to the law of average deaths, and yet it is startling to realize how often it does occur. Simultaneous death, for our purposes in this note, constitutes a common disaster wherein the person seized of property and his beneficiary, either at law or by instrument, perish without sufficient evidence to show which survived. Our intention is to examine the effects this occurrence works in the devolution of property.

Under the Civil Law. Our problem is not new, for the Roman law or civil law had fixed rules in regard to survivorship to aid the courts in the distribution of property. Where two or more persons perished in a common disaster, without evidence of survivorship, the civil law presumed that when a father and son so died, if the son was above the age of puberty, he survived his father. If all in the group were over sixty, the youngest was presumed to have survived. Between the sexes

in the same age class, the male was presumed to have survived unless there was a disparity in their health, in which case the weaker was deemed to have predeceased the stronger.[1] Only two states in the United States apply this rule: California [2] and Louisiana.[3]

Under the Common Law. Many states adhere to the common law rule. Different cases vary in the technical statement of the principle, but the better decisions declare that there is no presumption whatsoever, either that one survived the other, or that both died simultaneously. Yet the property is distributed "as if the deaths were simultaneous."[4] The great majority of cases then place the burden of proof on the party alleging survivorship; from the lack of evidence his claim generally fails.[5]

The lack of any presumption of survivorship or of simultaneous death works in devolution by descent in the following manner: where two persons perish in a common disaster and there is no evidence showing survivorship, where one would normally inherit from the other, the property of each descends as though the other had never existed. This is on the theory, as in the case of *In re Sweeney's Estate,*[6] that the property of a co-deceased father never vested in his co-deceased daughter or vice-versa. The consequences are the same when the parties involved are husband and wife.[7]

The distribution of property held in an estate by entirety presents two views at common law. *McGhee v. Henry* [8] declares that property

---

1 16 Am. Jur. 33; 14 Ann. Cas. 718; Hildebrandt v. Ames, 27 Tex. Civ. App. 377, 66 S. W. 128 (1901); In re Hermann, 75 Misc. 599, 136 N. Y. S. 944 (1912).

2 Hollister v. Cordero, 76 Cal. 649, 18 Pac. 855 (1888); Carmondy v. Powell, 32 Cal. App. (2d) 56, 89 Pac. (2d) 158 (1939).

3 Successions of Langles, 105 La. 39, 29 So. 739 (1900).

4 Russell v. Hallett, 23 Kan. 276 (1880); McComas v. Wiley, 134 Md. 572, 108 Atl. 196 (1919); Carpenter v. Severin, 201 Ia. 969, 204 N. W. 448, 43 A. L. R. 1340 (1925); Vaughan v. Borland, 234 Ala. 414, 175 So. 367 (1937); In re Sweeny's Estate, 78 Pa. S. Ct. 417 (1922); St. John v. Andrews Institute for Girls, 191 N. Y. 254, 83 N. E. 981 (1908); In re Strong's Will, 171 Misc. 445, 12 N. Y. S. (2d) 544 (1939); In re Willbor, 20 R. I. 126, 51 L. R. A. 863, 78 Am. St. Rep. 842 (1897); 16 Am. Jur. 33; 41 Am. Dec. 523.

5 McKinney v. Depoy, 213 Ind. 361, 12 N. E. (2d) 250 (1938); Cobler v. Prudential Life Insurance Co., 108 Ind. App. 641, 31 N. E. (2d) 678 (1941); In re Evan's Estate, 228 Ia. 908, 291 N. W. 460 (1940); In re Burza's Estate, 151 Misc. 577, 272 N. Y. S. 248 (1934), 155 Misc. 44, 279 N. Y. S. 90 (1935); In re Macklin's will, 177 Misc. 432, 30 N. Y. S. (2d) 706 (1941); Garbee v. St. Louis-San Francisco Ry. Co., 220 Mo. App. 1245, 290 S. W. 655 (1927); McCall v. Thompson, 155 S. W. (2d) 161 (Mo. 1941); Carpenter v. Severin, 201 Ia. 969, 204, N. W. 448, 43 A. L. R. 1340 (1925); In re Strong's Will, 171 Misc. 445, 12 N. Y. S. (2d) 544 (1939). For a different view: Kansas P. R. Co. v. Miller, 2 Colo. 442 (1874); Middeke v. Balder, 198 Ill. 590, 64 N. E. 1002 (1902); Walton & Co. v. Burchel, 121 Tenn. 715, 121 S. W. 391 (1907).

6 78 Pa. S. Ct. 417 (1922).

7 McComas v. Wiley, 134 Md. 572, 108 Atl. 196 (1919).

8 144 Tenn. 548, 234 S. W. 509, 18 A. L. R. 103 (1921).

held by entirety passes in the case of simultaneous death as if the husband and wife were tenants in common; that is, each group of heirs is to get one half. Distribution is the same where the property is personalty and held in joint tenancy.[9] The other view is set out in the more recent case of *In re Strong's Will*,[10] wherein the court declares that the property held by entirety is distributed, in case of the simultaneous death of the tenants of an estate by entirety, on the theory of contribution,—not on the theories of tenancy in common or joint tenancy; that only where there is a lack of sufficient evidence to show the respective contributions of the husband and of the wife would the law raise a presumption that each contributed one-half of the property, in which case the respective groups of heirs would each get one-half of the estate. The court says that the property held by entirety distributed in this manner, in the event of simultaneous death, would pass as if the husband and wife were "constructive tenants in common." For several reasons the court refuses to allow the property held by entirety to pass as in a tenancy in common or joint tenancy where the evidence of contribution is sufficient. An estate by entirety is distinguished from the other tenancies because of the irrevocable right of survivorship in both the husband and the wife. The simultaneous death of the tenants by entirety "frustrates" this right of survivorship; thus contribution is held to be justified. Unlike a divorce case, in the case of "the simultaneous death of both spouses, there is no survivor; nor can one then transfer anything to the other; and the marriage bond is dissolved more absolutely, one might say, than by a decree of divorce." By this distinction, the court refuses to follow *Williams v. Safety Savings & Loan Association*.[11] Furthermore a tenancy in common does not result from an estate by entirety on simultaneous death for tenancy in common can refer only to the respective heirs or legatees of the spouses; and there may not be property for one set of heirs or legatees to succeed to to hold as tenants in common, because when shown by appropriate evidence what each spouse originally contributed in creating the entirety, the heirs of each spouse will get the contribution or proportion put in by their ancestor and that only. The result could feasibly be one hundred per cent to the husband's heirs, because of his initial contribution, and nothing would devolve upon the heirs of the non-contributing wife.

Insurance. The influence of simultaneous death on the disposition of property held in the form of life and accident insurance policies is interesting. Where the named beneficiary and the insured are involved in a common disaster the burden of proof is of capital importance, for it determines in most cases to which estate the proceeds of the policy shall go. The problem fundamentally is one of construction of the in-

9 Vaughan v. Borland, 234 Ala. 414, 175 So. 367 (1937).
10 171 Misc. 445, 12 N. Y. S. (2d) 544 (1939).
11 228 Mo. App. 135, 58 S. W. (2d) 787 (1933).

surance contract, the courts generally being influenced by the intent of the insured as evidenced in the instrument.[12] And some courts examine the circumstances surrounding the insured when executing the instrument, considering especially the natural objects of his bounty. In short, the contract of insurance is treated like a will.[13]

The numerical majority of cases hold that the burden of proof rests upon the beneficiary's representatives to show his survival, where the contract of insurance states, "if any beneficiary shall die before the insured, the interest of such beneficiary shall vest in the insured." [14] This results in the proceeds of the policy passing to the representatives of the insured, or by intestacy to the heirs. Variations in the wording of the insurance contract have not worked noticeable change in the decisions. For further examples, "$5,000 to the beneficiary, if living, if not, then to assured's executors, administrators, or assigns;" [15] the proceeds are payable to the beneficiary "if she survives the insured; otherwise to the insured's executors, administrators, or assigns." [16]

The principles supporting the general rule are worthy of attention. Whether there is a reservation in the insurance contract permitting the insured to change the beneficiary at will is of first importance. Many of the decisions hold that where there is such a reservation the intent of the insured is that the beneficiary has no vested interest in the policy — merely an expectancy — and thus in a common disaster the representatives of the beneficiary bear the burden of proving the beneficiary's survivorship; [17] therefore, the proceeds pass to the representatives of

---

12 In re Cava's Estate, 174 Misc. 750, 21 N. Y. S. (2d) 999 (1940); Roberts v. Hardin, 179 Ga. 114, 175 S. E. 362 (1934).

13 Dunn v. Amsterdam Casualty Co., 141 App. Div. 478, 126 N. Y. S. 229 (1910); In re Burza's Estate, 151 Misc. 577, 272 N. Y. S. 248 (1934), 155 Misc. 44, 279 N. Y. S. 90 (1935); Morgan v. Sackett, 172 Misc. 855, 16 N. Y. S. (2d) 583 (1939).

14 Middeke v. Balder, 198 Ill. 590, 64 N. E. 1002 (1902); Males v. Sovereign Camp W. W., 30 Tex. Civ. App. 184, 70 S. W. 108 (1902); Fuller v. Linzee, 135 Mass. 468 (1883); Fleming v. Grimes, 142 Miss. 522, 107 So. 420, 45 A. L. R. 618 (1926); McKinney v. Depoy, 213 Ind. 361, 12 N. E. (2d) 250 (1938); Morgan v. Sackett, 172 Misc. 855, 16 N. Y. S. (2d) 583 (1939); Dunn v. New Amsterdam Casualty Co., 141 App. Div. 478, 126 N. Y. S. 229 (1910); In re Burza's Estate, 151 Misc. 577, 272 N. Y. S. 248 (1934), 155 Misc. 44, 279 N. Y. S. 90 (1935); Colovos v. Gouvas, 269 Ky. 752, 108 S. W. (2d) 820 (1937). *Contra*: (*onus on insured*): Watkins v. Home Life & Accident Insurance Co., 137 Ark. 207, 208 S. W. 587 (1919); Cowman v. Rogers, 73 Md. 403, 21 Atl. 64, 10 L. R. A. 550 (1891); In re Cava's Estate, 174 Misc. 750, 21 N. Y. S. (2d) 999 (1940).

15 McGowan v. Menkin, 223 N. Y. 509, 119 N. E. 877, 5 A. L. R. 794 (1918); McKinney v. Depoy, 213 Ind. 361, 12 N. E. (2d) 250 (1938). *Contra*: U. S. Casualty Co. v. Kacer, 169 Mo. 301, 69 S. W. 370, 58 L. R. A. 36 (1902).

16 McKinney v. Depoy, 213 Ind. 361, 12 N. E. (2d) 250 (1938); Baldus v. Jeremias, 296 Pa. 313, 145 Atl. 820 (1929); In re Macklin's Will, 177 Misc. 432, 30 N. Y. S. (2d) 706 (1941).

17 McGowan v. Menkin, 223 N. Y. 509, 119 N. E. 877, 5 A. L. R. 794 (1918); Fleming v. Grimes, 142 Miss. 522, 107 So. 420, 45 A. L. R. 618 (1926); Sovereign

the insured, though there are a few cases to the contrary.[18] The contrary is true where the insured has not reserved the right to change the beneficiary; that is, the beneficiary is deemed to have a vested interest in the proceeds which is not defeated in a simultaneous death of the beneficiary and the insured; [19] but even this is controverted in a recent decision.[20] Other cases hold that this reservation in the policy grants only a conditional interest which becomes absolute or vested upon proof of survivorship,[21] which is another way of saying the same thing. A few jurisdictions assert that death of itself, even if simultaneous, makes the interest of the beneficiary absolute whether there is a reservation clause or not.[22] The soundest reason, which has not received much express judicial notice, is that the presence of a reservation clause makes it apparent that the insured intended the natural objects of his bounty to take under the policy, and in the event of their inability to take the proceeds upon the insured's death the said proceeds are to go to his representatives to put his estate in order.[23] Certainly public policy supports this view.

When a policy provides for successive beneficiaries, that is $1,000 to *A* if living; otherwise to *B*, and the insured and *A* perish in a common disaster, the representatives of *A* must overcome the burden of proving the survivorship of *A* to take under the policy. Since there is insufficient evidence supporting the claims of *A's* representatives, the proceeds of the policy devolve upon *B*, the second beneficiary, at least unless *A* has a vested interest.[24]

Camp W. W. v. McKinnon, 48 Fed. (2d) 383 (1913); Miller v. McCarthy, 198 Minn. 497, 270 N. W. 559 (1936); Balder v. Jeremias, 296 Pa. 313, 145 Atl. 820 (1929); McKinney v. Depoy, 213 Ind. 361, 12 N. E. (2d) 250 (1938); In re Macklin's Will, 177 Misc. 432, 30 N. Y. S. (2d) 706 (1941).

18 Watkins v. Home Life & Accident Ins. Co., 137 Ark. 207, 208 S. W. 587 (1919); Roberts v. Hardin, 179 Ga. 114, 175 S. E. 362 (1934).

19 U. S. Casualty Co. v. Kacer, 169 Mo. 301, 69 S. W. 370, 58 L. R. A. 436 (1902); Cowman v. Rogers, 73 Md. 403, 21 Atl. 64, 10 L. R. A. 550 (1891).

20 Colovas v. Gouvas, 269 Ky. 752, 108 S. W. (2d) 820, 113, A. L. R. 881 (1937).

21 Middeke v. Balder, 198 Ill. 590, 64 N. E. 1002 (1902); Males v. Sovereign Camp W. W., 30 Tex. Civ. App. 184, 70 S. W. 108 (1902); Fuller v. Linzee, 135 Mass. 468 (1883); McGowan v. Menkin, 223 N. Y. 509, 119 N. E. 877, 5 A. L. R. 794 (1918); Fleming v. Grimes, 142 Miss. 522, 107 So. 420, 45 A. L. R. 618 (1926); Carpenter v. Severin, 201 Ia. 969, 204 N. W. 448, 43 A. L. R. 1340 (1925); Colovos v. Gouvas, 269 Ky. 752, 108 S. W. (2d) 820 (1937); McKinney v. Depoy, 213 Ind. 361, 12 N. E. (2d) 250 (1938); In re Macklin's Will, 177 Misc. 432, 30 N. Y. S. (2d) 706 (1941).

22 Cowman v. Rogers, 73 Md. 403, 21 Atl. 64 (1891).

23 Dunn v. New Amsterdam Casualty Co., 141 App. Div. 478, 126 N. Y. S. 229 (1910); In re Burza's Estate, 151 Misc. 577, 272 N. Y. S. 248 (1934), 155 Misc. 44, 279 N. Y. S. 90 (1935); Morgan v. Sackett, 172 Misc. 855, 16 N. Y. S. (2d) 583 (1939).

24 Colovos v. Gouvas, 269 Ky. 752, 108 S. W. (2d) 820 (1937); Fuller v. Linzee, 135 Mass. 468 (1883); McGowan v. Menkin, 223 N. Y. 509, 119 N. E.

Wills. The disposition of property by testamentary instrument is controlled primarily by the manifest intent of the testator. When he and his devisee perish in a common disaster the court will construe the whole will and carry into effect the declared intent of the testator so long as it is clearly expressed and consistent with the general rules of law.[25] The claims of the beneficiary to a devise in a testamentary instrument, which has not provided for simultaneous death, are usually prejudiced—that is the gift is said to lapse—because the law raises a presumption that when a devisee has died during the lifetime of the testator, the testator does not intend the gift to be taken by any other person. Except when there is a clear intent that the devisee is to take in any event, this rule applies.[26]

A purview of the cases reveals the decisions apparently fall into two groups. Each group applies different principles but the results are the same. The first group, consisting of a few cases, exclusively bases the validity of the devise upon the import of the testator's intention manifest in his will. When it is doubtful whether the beneficiary is to take the devise in a case of simultaneous death, the devise is held to have lapsed and the property passes intestate to the representatives or heirs of the testator. The second group, constituting the numerical majority of decisions, first construes the intent of the testator, and in most cases where the testator has failed to provide for simultaneous death, these decisions place the onus of proving the survivorship of the devisee on his representatives. From the lack of evidence as to the order of death, the representatives fail in this proof and the property passes intestate as previously explained.

The theory upon which the latter decisions are based is given in *In re Lott.*[27] The burden of proof rests on the party alleging survivorship because in the absence of any effectual disposition of the beneficiary's interest in the property, the next of kin is entitled to it by prima facie title on the principle that the next of kin is to be preferred to strangers. Therefore the person seeking to dispose the next of kin of such title is bound to prove a perfect title in himself. The court adopts the theory from an English case.[28]

877, 5 A. L. R. 794 (1918); In re Macklin's Will, 177 Misc. 432, 30 N. Y. S. (2d) 706 (1941); McKinney v. Depoy, 213 Ind. 361, 12 N. E. (2d) 250 (1938); Sovereign Camp W. W. v. McKinnon, 48 Fed. (2d) 383 (1913). *Contra*: Watkins v. Home Life & Accident Ins. Co., 137 Ark. 207, 208 S. W. 587 (1919); U. S. Casualty Co. v. Kacer, 169 Mo. 301, 69 S. W. 370, 58 L. R. A. 436 (1902); Roberts v. Hardin, 179 Ga. 114, 175, S. E. 362 (1934).

25 Pray v. Belt, 7 L. ed. 309 (1828).

26 In re Fowles, 222 N. Y. 222, 118 N. E. 611 (1918); In re Jenkin's Estate, 161 Misc. 359, 291 N. Y. S. 988 (1936), *aff'd,* 298 N. Y. S. 836 (1937).

27 65 Misc. 422, 121 N. Y. S. 1102 (1909).

28 Underwood v. Wing, 4 De Gex, M. & G. 633.

The cases in which the testator made his intention sufficiently manifest to avoid the presumption of a lapse are noteworthy. In *Young Women's Christian Home v. French* [29] the testatrix devised all of her estate to her son with the limitation that one-half of the income thereof was to go to her husband. It also provided that if she survived both her husband and son all of her estate should go to the charity. In the event her husband survived both herself and their son the estate was also to go to the charity upon his death. The court reasoned that the apparent intent of the testarix was to dispose of all of her property to three devisees—in the event the husband and son failed to take upon her death the Home was to get it—and thus the court held this intention sufficiently manifest to avoid a lapse of the gift to the Home. And in *Fitzgerald v. Ayres* [30] a husband and wife made separate wills both devising their property to each other but if the primary devisee died "before" the testator then their adopted son was to take under both wills. The court felt that the intention of the testratix and testator was to have the property pass to the adopted son, and not to third persons. Here it seems the court was impressed by extrinsic evidence in construing the will. The court did not mention 'burden of proof', which most courts have stressed in the cases of insurance policies and the cases involving wills, and concluded that these wills were to take effect as if each contained only the bequest to their adopted son, citing *In re Willbor* as authority.

However, the court in *In re Willbor* [31] declared there was insufficient intent manifest in either of the wills to avoid a lapse of the legacies. In this case each of three sisters executed wills devising all of the testatrix's property to her two surviving sisters, or to the survivor of them, and to their heirs and assigns forever, and also certain legacies to be paid after all had died. All three sisters perished in a fire which consumed their home. There was no evidence of survivorship. The court said there was insufficient time for the devises to take effect, since the right of succession to the estates was determined as if death was simultaneous. Thus the wills stood as if they contained only the bequests to the legatees subsequently named, and the balance of the property (which did not vest) passed intestate. It is pertinent to note that the court did not mention or suggest how this lapse could be avoided.

In re Jenkin's Estate [32] involves a will evidencing insufficient intent to substitute or avoid a lapse of a devise. The will provided, "I give and bequeath to my dear wife . . . , to her and her heirs forever the sum of $15,000." These words were declared words of limitation and not of substitution; therefore the gift lapsed. In order to effect a sub-

29 187 U. S. 401, 47 L. ed. 233 (1903).
30 179 S. W. 289 (Tex. Civ. App., 1915).
31 20 R. I. 126, 78 Am. St. Rep. 842, 51 L. R. A. 863 (1897).
32 161 Misc. 359, 291 N. Y. S. 988 (1936), *aff'd,* 298 N. Y. S. 836 (1937).

stitution, the court suggested, the will must contain a "plain expression of intention" for the courts will not strain an interpretation to keep the will from lapsing. The plain expression of intention may be supplemented by extrinsic evidence—testator's kin, state of his affections—which from the facts it seems influenced this decision. The testator's children by a former wife were contesting the devisee's collateral heirs' rights to the gift and by construing the terms to be words of limitation, thus causing the legacy to lapse, the property then passed to the children of the former wife as in intestacy.[33]

It is another matter when the testator has had the foresight to provide expressely in his will that in the event he and his devisee perish in a comman disaster with insufficient evidence as to who survived, it is to be presumed that he predeceased his devisee, because such express provision has been upheld by Justice Cardozo, in *In re Fowles,* as avoiding a lapse.[34] By circumscribing a lapse the bequest stands and the representatives of the deceased devisee take under the testamentary provision. This appears to be the only case to date in which the testator has expressly anticipated in his will the death of the devisee and himself in a common disaster. Notwithstanding this dearth of supporting authorities the decision is consonant with sound reason for the testator has taken all of the means at his command to show the disposition of his property as he wishes.

The cases constituting the numerical weight of authority, where there is no express provision in a will with regard to simultaneous death, hold that since there is no presumption of survivorship or of simultaneous death where the testator and the devisee perish in a common disaster, the burden of proving survivorship is upon the devisee's representatives, who by the nature of the case fail in such proof. Consequently the gift falls and passes as in intestacy.[35]

The case of *Carpenter v. Severin* [36] serves as a good illustration of this group of cases. The issue concerns the disposition of the testator's property. A husband and wife made mutual wills without specific provision for simultaneous death. They perished in a common disaster. Held, since there was no presumption of survivorship in a common disaster, the burden of proof was on the party alleging survivorship.

[33] See: In re Macklin's Will, 177 Misc. 432, 30 N. Y. S. (2d) 706 (1941), for *dicta* in accord.

[34] 222 N. Y. 222, 118 N. E. 611 (1918).

[35] Carpenter v. Severin, 201 Ia. 969, 204 N. W. 448 (1925); In re Kimmey's Estate, 326 Pa. 33, 191 Atl. 47 (1937); In re Strong's Will, 171 Misc. 445, 12 N. Y. S. (2d) 544 (1939); In re Lott, 65 Misc. 422, 121 N. Y. S. 1102 (1909); In re Burza's Estate, 151 Misc. 577, 272 N. Y. S. 248 (1934), 155 Misc. 44, 279 N. Y. S. 90 (1935); St. John v. Andrews Institute for Girls, 191 N. Y. 254, 83 N. E. 981 (1908); In re Macklin's Will, 177 Misc. 432, 30 N. Y. S. (2d) 706 (1941).

[36] 201 Ia. 969, 204 N. W. 448 (1925).

Thus simultaneous death of the testator and devisee prevented either sets of heirs from receiving the benefit of the devise to their ancestor; although, it did not prevent the respective heirs from succeeding to individually owned property at the death of their ancestor. Plaintiffs in this case pleaded a statute providing: "'if a devisee dies before the testator" the result is "his heirs shall inherit the property devised to him." The court refused to find that simultaneous death cases came within the provisions of this statute. However, for an interesting comparison, a recent New York case, *In re Macklin's Will*,[37] under a statute similar to the Iowa statute, alters the common law so that the devisee's wife and children take the devise made to said devisee. Aside from the fact that the New York statute more clearly favors the blood heirs of the devisee, the cases are distinguishable from the standpoint that in the New York case the devisee's immediate family survived him, whereas in the Iowa case the collateral heirs survived.

When the property disposed in a will is held by entirety, from the few cases on this subject it unanimously appears that neither spouse is seized of any interest that can be disposed of by a will which contains no provision as to simultaneous death. Each owns the whole estate subject only to the irrevocable right of survivorship of the other spouse. And this is true whether there is one unilateral will or whether there are mutual or reciprocal wills.[38] The estate in such case is held to pass to the respective spouse's heirs either on the theory of proportionate contribution [39] or by presumption of law, namely fifty per cent to each group.[40]

Now the salient point evident in the wills involved in these cases is that there is no express provision made to take effect in the event of the simultaneous death of the testator and devisee. Furthermore, a statement by the court in the Strong case emphatically implies that if the testator provides expressly for the disposition of his share of the extinguished entirety, upon the demise of both he and his wife in a common disaster, the court would honor his testamentary directions. The statement of the court follows: "Simultaneous death not having been provided for, portions of these will . . . have failed of effect; with the result that some of the husband's residuary estate into which his contributed interest in the extinguished entirety necessarily fell, must now be regarded as having become the property of his heir as in intestacy."

Simultaneous death frustrates or extinguishes the estate by entirety; shares or interests alone remain. It seems reasonable that the husband

37 177 Misc. 432, 30 N. Y. S. (2d) 706 (1941).

38 Levenson v. Levenson, 229 App. Div. 402, 242 N. Y. S. 165 (1930); In re Strong's Will, 177 Misc. 445, 12 N. Y. S. (2d) 544 (1939).

39 In re Strong's Will, 177 Misc. 445, 12 N. Y. S. (2d) 544 (1939).

40 McGhee v. Henry, 144 Tenn. 548, 234 S. W. 509, 18 A. L. R. 103 (1921); Vaughan v. Borland, 234 Ala. 414, 175 So. 367 (1937); In re Strong's Will, 177 Misc. 445, 12 N. Y. S. (2d) 544 (1939).

or wife, or both, can make a testamentary disposition of their respective shares in the extinguished entirety as each desires, so long as they expressly stipulate that such disposition is to take effect in the event of simultaneous death. For instance the testator and testatrix in a joint will can devise their shares in case of simultaneous death to her invalid mother; or, they can devise their respective shares to different persons: his share to his brother, and her share to her mother. It seems logical that similar dispositions can be made validly in separate or individual wills, subject to the necessity of expressly stipulating that the said devise be effective if simultaneous death occurs. Similarly, the one spouse alone can dispose validly of his share of the extinguished entirety, in the event of a simultaneous death, so that his share would pass testate; while his wife's share would pass intestate, (assuming a fifty-fifty division of the estate by entirety) either because of the failure to provide expressly for simultaneous death in the event she has executed a will, or because she has failed to execute a will altogether. Yet, when the share or shares of the extinguished entirety are determined on the theory of contribution, one spouse might feasibly have nothing to devise. Thus where the wife makes a devise of her "share" it would be void, since she had not contributed to the creation of the entirety.

In passing it may be said that a party desiring to have his share go to a certain relative or friend, in the event the entirety is extinguished by simultaneous death, he might set up a trust for this purpose. It must be noted, however, that the title could not vest in the trustee at the time of the execution of the trust agreement for it would be void—neither spouse has a moiety that he can convey unless the other spouse join in such conveyance.[41] On the other hand this would not be necessary if the one spouse sets up a trust to take effect in the event of the simultaneous death of both himself and his wife. Title in this instance would not pass to the trustee until the entirety has been extinguished by the simultaneous death.

Uniform Simultaneous Death Statutes. In 1941 Indiana, among other states, adopted the Uniform Simultaneous Death Act.[42] The design of this law is to correct the injustices resulting from applications of the common law rule in certain situations. It is our purpose to interpret in what measure the common law has been affected. Unfortunately there have been no decisions since the statute's enactment to determine the extent of the influence of the act.

"Where title to property or devolution depends upon priority of death and there is no sufficient evidence that the persons have died otherwise than simultaneously, the property of each shall be disposed of as if he had survived, except as provided otherwise in this act," con-

41 McGhee v. Henry, 144 Tenn. 548, 234 S. W. 509, 18 A. L. R. 103 (1921).
42 Burn's Stat. Anno. Supp. §§ 6-2356, 2363 (1941)

stitutes the first provision of the statute. This means that in the event, for example, as in several common law cases,[43] of a husband and wife perishing in a common disaster without evidence as to the order of death, the individually owned property of the husband will devolve upon his heirs and, the individually owned property of the wife will devolve upon her heirs. Under the saving clause, "This act shall not apply in the case of wills, living trusts, deeds, or contracts of insurance wherein the provision has been made for distribution of property different from the provisions of this act," the common law holdings are unaffected where the testator manifestly intends that the gift shall not lapse upon his perishing in a common disaster with his devisee.[44] But, in view of the presumption this in effect raises in favor of the testator having survived as to his property, the surest means of avoiding the failure of a legacy or bequest would be to expressly provide for the contingency of simultaneous death in the will; as was done in the case of *In re Fowles*[45] previously noted; or, as suggested herein, in the case of property held by entirety.

The next section provides that where there are two or more beneficiaries designated to take successively by reason of survivorship, and they perish in a common disaster, the property shall be divided into as many equal portions as there are successive beneficiaries. And, these portions are to be distributed respectively to those who would have taken in the event each beneficiary had survived. *Fleming v. Grimes*[46] appears to be a case within the compass of this provision. Several of the beneficiaries and the insured perished in a tornado; the heirs of the insured were held entitled to the proceeds of the policy. Of course under this provision of the statute the common law rule as advanced in the Fleming case is changed; each beneficiaries' representatives take a portion of the gift. Presumably in carrying out the expressed intent of the insured the statute brings about an equitable result.

Section three stipulates that where the property is held in joint tenancy, and the tenants die simultaneously, the property is distributed one-half as if one had survived and one-half as if the other had survived. If there are more than two joint tenants and all die simultaneously, the property is distributed in the proportion that one bears to the whole number of joint tenants. Since estates by entirety devolve in the same manner as joint tenancies in so far as survivorship is concerned, this statute by implication applies to estates by entirety. This statute does

43 McComas v. Wiley, 134 Md. 572, 108 Atl. 196 (1919); In re Sweeney's Estate, 78 Pa. S. Ct. 417 (1922).

44 In re Fowles, 222 N. Y. 222, 118 N. E. 611 (1918); Fitzgerald v. Ayres, 179 S. W. 298 (Tex. Civ. App., 1915); Young Women's Christian Home v. French, 187 U. S. 401, 47 L. ed. 233 (1903).

45 In re Fowles, 222 N. Y. 222, 118 N. E. 611 (1918).

46 142 Miss. 522, 107 So. 420, 45 A. L. R. 618 (1926).

not alter the common law rule as advanced in *McGhee v. Henry* [47] and *Vaughan v. Borland* [48] but it does change the common law rule based on contribution as advanced in *In re Strong's Will* [49] and *In re Kaupper.*[50]

Section four provides that where the insured and his beneficiary, in life or accident insurance policy cases, die simultaneously, the proceeds of the policy are distributed as if the insured had survived the beneficiary. This does not alter the common law majority holding [51] but it removes argument of vested or expectant interests. And as in civil law cases, this raises a presumption but not on the grounds of physical qualifications.

The last section, previously cited, permits express exceptions to be made to this statute.

Warren A. Deahl.

INTERVENING RIGHTS IN REISSUED PATENTS.—A patent is divided into two parts, namely, the specifications which disclose what the patented invention is, and the claims which constitute the only legal protection accorded the patentee. In other words, the specifications may disclose a very broad patent, but if the claims are narrowed in various particulars, the protection accorded by the patent is restricted to the narrowing limitations of the claims. Sometimes the original claims of a patent are defective for some reason, and in that case the statute under certain conditions permits a reissue patent to be secured. This is covered by 35 U. S. C. A., 64. "Whenever any patent is wholly or partly inoperative . . . if the error has arisen by inadvertence, accident or mistake . . . the commissioner shall cause a patent for the same invention, and in accordance with the corrected specifications, to be reissued to the patentee, for the unexpired part of the term of the original patent."

In general, there are three classes of valid reissues, namely:

1. A reissue correcting ambiguous or otherwise defective descriptions in a patent without changing its scope.

2. A narrowed reissue, designed to eliminate matter in the original patent, which the patentee had no right to claim as new. In this case the reissue asks for an invention which is narrower in scope than that claimed in the original patent.

---

47 144 Tenn. 548, 234 S. W. 509, 18 A. L. R. 103 (1921).
48 234 Ala. 414, 175 So. 367 (1937).
49 177 Misc. 445, 12 N. Y. S. (2d) 544 (1939).
50 125 N. Y. S. 878, 94 N. E. 1095 (1910).
51 228 Mo. App. 135, 58 S. W. (2d) 787 (1933).

3. Broadened reissue, granted where the claims of the original patent are narrower than the actual invention of the patentee, as described in the specifications of the original patent. The reissue's broadened claims, however, can include only what is disclosed in the specifications of the original patent. Broadened reissues are not expressly authorized by the statute but have been expressly approved by the Supreme Court in many cases. In general, a broadened reissue must be applied for within two years from the date of the original patent.[1] Therefore, in considering intervening rights under broadened reissues, it should be particularly noted whether the reissue is actually applied for within two years. If not, then the case is entirely different from that when the broadened reissue was so applied for.

Intervening rights by their nature can arise only in the case of a broadened reissue. This doctrine of intervening rights relates to the rights which a person may acquire by acts committed prior to application for a broadened reissue, which acts did not infringe the claims of the original patent, but do infringe the broadened claims of the reissue. In this connection it should be noted that intervening rights are a matter of equitable consideration and the court grants them in order to do equity. There are several groups of cases wherein the doctrine is frequently advanced, and should be carefully distinguished. Where the original failure to make the claims sufficiently broad is not the result of inadvertence,[2] where the patentee has been guilty of laches,[3] or where the application for the reissue embraces a different invention from that originally disclosed,[4] obviously no right of reissue exists.

Many of the problems with regard to intervening rights are unsettled. There are roughly five questions that might be put forward:

1. When must intervening rights be acquired, before the application for the reissue or before the reissue is actually granted? Most of the cases say that they must be acquired before the application for the reissue. The unmistakable inference from the decisions is that action after the date of application would be insufficient. Even where there has been actual reliance by the defendant before the application is filed it is believed the case is inapposite. The intervenor knows as a matter of law, and almost certainly as a matter of fact, that the patentee has

---

1 Miller v. Bridgeport Brass Co., 104 U. S. 350, 26 L. Ed. 783 (1882). The statute itself does not specify the time within which application for a reissue must be made.

2 Miller v. Bridgeport Brass Co., 104 U. S. 350, 26 L. Ed. 783 (1882); Coon v. Wilson, 113 U. S. 268; Dunham v. Dennison Mfg. Co., 154 U. S. 103, 38 L. Ed. 924 (1894), 28 L. Ed. 963 (1885).

3 Supreme Mfg. Co. v. Security Mfg. Co., 299 Fed. 65 (1924), certiorari denied, 266 U. S. 614, 69 L. Ed. 469 (1924); Otis Elevator Co. v. Atlantic Elevator Co., 47 F. (2d) 545 (1931).

4 Miller v. Bridgeport Brass Co., 104 U. S. 350, 26 L. Ed. 783 (1882); Parker & Whipple Co. v. Yale Clock Co., 123 U. S. 87, 31 L. Ed. 100 (1887).

a right to a reissue.[5] Hence any reliance upon the limited scope of the original claims seems unreasonable, at least within the two year period during which the right to a reissue presumptively exists.

2. Do intervening rights stop as of the date of the application for the reissue or do they continue throughout the life of the patent? The cases thus far decided by the various circuit courts of appeal have established certain rules as applied to various situations. Clearly the patentee, by his reissue, loses all rights to an accounting for the intervening period.[6] Where the defendant has constructed certain expensive machines which are now covered by the patent, the presumed license permits him to continue to use the machines already built and to sell the products thereof.[7] And where the defendant had on hand a large supply of a product brought by the reissue into the scope of the patent, he was allowed to dispose of that supply.[8] At least one circuit court case has held that, where the defendant has built up a large business in the manufacture and sale of the device, in reliance upon the apparent dedications in the patent, his license permitted him to continue to manufacture and sell.[9]

3. How broad is the nature of intervening rights? Would the defendant have a right to build new plants or would he be limited to production in plants already existing at the time of the reissue? In the most recent case decided by the Supreme Court, *Sontag Chain Stores Co., Ltd. v. National Nut Company of California,*[10] the court gave intervening rights only with regard to machines manufactured and operated after grant of the original patent and before application for the reissue. This has been the trend of the cases leading up to the *Nut Company* case.

4. Are intervening rights granted only where the patent owner, knowing of the defendant's actions, attempted to enlarge his patent by virtue of the reissue so as to cover the defendant's actions? There is considerable basis in the cases for arguing that since intervening rights are merely an equitable grant, they are restricted to a case where the owner of a patent actually knew of the defendant's conduct, which did not violate the original patent, and the owner therefore took out the reissue in order to cover what the defendant was doing. Although this question is not discussed in detail in the *National Nut Company* case, the court did point out in two or three instances that "the enlarged claims were presented with knowledge of the accused machine and a

---

5 Ashland Fire Brick Co. v. General Refractories Co., 27 F. (2d) 744 (1928).

6 Abercrombie & Fitch Co. v. Baldwin, 245 U. S. 198; 38 S. Ct. 104, 62 L. Ed. 240 (1917).

7 Ashland Fire Brick Co. v. General Refractories Co., 27 F. (2d) 744 (1928).

8 Bull Dog Floor Clip Co. v. Munson Mfg. Co., 19 F. (2d) 43 (1927).

9 Autopiano Co. v. American Player Action Co., 222 F. 276 (1915); Christman v. New York Air Brake Co., 1 Fed. Supp. 211 (1928).

10 310 U. S. 281, 60 S. Ct. 961, 84 L. Ed. 1204 (1940).

definite purpose to include it." Defendant's operations in the field have often motivated the patentee in seeking his reissue.[11] Here the finding may rest on a showing that there was no inadvertence, accident or mistake in the original grant, for such a showing makes more reasonable the defendant's reliance upon the apparently intended dedication. The fact that the patentee, by his reissue seeks to appropriate as part of his invention subsequent improvements in the art does not affect the legality or illegality of the reissue [12] but is relevant to the issue of estoppel.[13]

5. What conduct of an infringer is sufficient to create intervening rights? It is certain that a substantial investment in the industry made during the intervening period is the requirement.[14] Seemingly, mere laboratory experiments are insufficient to raise an estoppel,[15] because in such a case no cause of action accrued prior to the reissue, and the statute applies only to "causes arising thereafter." So also is payment of application fees for another patent, while plaintiff's patent was pending, without further investment.[16]

W. J. Rafferty.

LESSOR'S LIABILITY FOR TENANT'S INJURIES; BASED UPON AN IMPLIED HABITABILITY AGREEMENT, WHERE THE PREMISES ARE LET FURNISHED.—In view of the fact that many defense workers and their families are obliged by circumstances, too obvious to mention, to seek shelter and housing in poorly furnished and repaired apartments and houses, it would be well to inquire into the lessor's liability for personal injuries to the lessee's person or to his family and invitees for injuries due to defective furnishings and appurtenances in such dwellings.

A leading recent case on this subject is *Hacker v Nitschke,*[1] where, in an action for damages for personal injuries received when the lessee in using a ladder to ascend to the upper berth of a bed fell, the court held for the tenant. The fall was the result of loose screws fastening the clamps on the top of the ladder, which clamps held the ladder to the top of the upper berth. The Massachusetts court, in holding for the tenant, relied on the theory of *Ingalls v Hobbs,*[2] saying by way of

---

11 Ashland Fire Brick Co. v. General Refractories Co., 27 F. (2d) 744 (1928).
12 White v. Dunbar, 119 U. S. 47.
13 General Refractories Co. v. Ashland Fire Brick Co., 15 F. (2d) 215 (1926), (Reversed on other grounds — above cited.)
14 Ashland Fire Brick Co. v. General Refractories Co., 27 F. (2d) 744 (1928).
15 City of Milwaukee v. Activated Sludge, Inc., 69 F. (2d) 577 (1934).
16 American Automotoneer Co. v. Porter, 232 F. 456 (1916).

1 39 N. E. (2nd.) 644; ..... Mass. .....; 139 A. L. R. 259 (1942).
2 156 Mass. 348; 31 N. E. 286; 16 L. R. A. 51; 32 Am. St. Rep. 460 (1892).

dicta, that one who lets for a short term of a few days, weeks or months, [3] a fully furnished house supposedly equipped for immediate occupancy as a dwelling without the necessity of any fitting up or furnishing by, the tenant, impliedly agrees that the house and its appurtenances are suitable for occupation at that time.

The present case is not taken out of the principle of *Ingalls v Hobbs,* supra, because of the fact that the tenant brought some bed linen, silverware, and a few other articles of personal convenience, nor did the fact that the tenant was shown through the house before she leased it prevent the application of the principle, at least as to such defects as could be found on ordinary examination of the house. In the present case, the tenant was entitled to go before the jury on the basis of a breach of contract and her rights did not depend upon proof of any negligence of the defendant.

One of the leading English cases on this question is *Smith v Marrable,* [4] which was affirmed by *Ingalls v Hobbs,* supra. In the English case there was an implied condition in the letting of a furnished house at a watering place for a term of five or six weeks that it should be ready for occupation. In so construing, the court said that the lessee might repudiate his lease. This doctrine was supported by the later English cases of *Wilson v Finch-Hatton,* [5] and *Bird v Greville.* [6]

In *Wilson v Finch-Hatton,* supra, Pollock, B., said, "that when a person takes a furnished house for a brief period of time it is clear that he expects to find it reasonably fit for occupation from the day on which he intended to enter and the lessor was aware that this was the view entertained by the tenant. If this was not so, what limit could be imposed to the time during which the tenant might be kept out of possession and how long would he have to wait while the value of his tenancy was still diminishing?" The rent paid for the house was not merely rent for the use of the realty but a sum paid for the accommodation afforded by the use of the house with all the appurtenances and contents during the period for which it was taken. It is not enough that a landlord in letting a furnished house honestly believes that the house is in a fit state for habitation, the house itself must be reasonably habitable. However, in *Charsley v Jones,* [7] the court held an implied

[3] Young v Povich, 121 Me. 141; 116 At. 26; 29 A. L. R. 48 (1922) where there was a lease of a dwelling for a temporary purpose which raised an implied warranty that the dwelling was reasonably safe and fit for use and habitation. The lease, for eight months, of a furnished apartment at a summer resort, was for a temporary purpose within the aforesaid rule, but it was for the jury to decide whether such a lease under all circumstances and conditions was a lease for a temporary purpose.

[4] 11 Mees and W. 5; 152 Eng. Reprint 693 (1843).

[5] L. R. 2 Exch. Div. 336; 46 L. J. Exch. N. S. 489 (1877).

[6] 1 Cab. and El. 317 (1884).

[7] 5 Times L. R. 412; 53 J. P. 281 (1889).

covenant for fitness for habitation arising from the letting of a furnished house does not extend to the external conditions not attributable to the fault of the lessor, such as odors from adjacent premises, [8] or to a condition not existing at the time the lease was made, but which came into being after the title to the leasehold premises had vested under an executed lease, though before the commencement of the term,[9] and there is no implied agreement that they shall continue fit for habitation during the term. [10] In *Charsley v Jones,* supra, it was held that the tenant was entitled to recover the rent paid and such other expenses as he was put to by reason of the sickness in his family, where there was a breach of an implied undertaking that the premises were fit for human habitation.

The law implies, in the absence of an agreement to the contrary, a warranty by the landlord as to the habitability and fitness of the premises. This warranty, it is said, is not only one springing by just and necessary implication from the contract and lease but it is a warranty tending in the most striking manner to the public good and preservation of public health and therefore should be extended rather than restricted.

It is to be noted, that the lessee may, upon discovery of an existing fact that would dispel the implied warranty, repudiate his lease on the ground that the premises were not reasonably safe for human habitation. *Collin v Hopkins,* [11] held that where the previous occupant of the leased premises had had pulmonary tuberculosis, the lessee was entitled to treat such fact as a breach of an implied warranty that the premises were reasonably fit for habitation at the date set for occupancy.

In *Hacker v Nitschke,* supra, the implied agreement covered furnishings and a breach of the agreement yielded tort damages for personal injuries, notwithstanding the fact that the action was for a breach of contract. In considering the holding in the present case, it must be observed that the house was completely furnished and that the term of the lease was short, so that it was readily seen that the lessee was anxious to take immediate possession of the premises and that the lessor understood the wishes of the lessee as such.

There are good reasons why an implied habitability covenant should apply to one who hires a furnished room or a furnished house for a few days, a few weeks, or even a few months. Its fitness for immediate

---

8 Franklin v Brown, 118 N. Y. 110; 6 L. R. A. 770; 23 N. E. 126 (1889); where an odor nuisance existed on adjacent premises belonging to a stranger of which neither the landlord nor the tenant was aware when the lease was made.

9 Edwards v McLean, 122 N. Y. 302; 26 N. E. 483; 4 A. L. R. 1459; 13 A. L. R. 818; 29 A. L. R. 52; 34 A. L. R. 711 (1890).

10 Sorson v Roberts, 2 Q. B. 395; 65 L. J. Q. R. S. 37 (1895).

11 2 K. B. 617; 34 A. L. R. 703 (1923).

use of a particular kind, as indicated by its appointments is a far more important element entering into the contract than when there is a mere lease of real estate. One who lets for a short term, a house provided with all the furnishings and appointments necessary for immediate residence, may be supposed to contract in reference to a well understood purpose of the hirer to use it as a place of habitation. An important part of what the hirer pays for is the opportunity to enjoy it without delay and without the expense of preparing it for use. It is very difficult and often impossible for one to determine on inspection whether the house and its furnishings are fit for the use for which they are immediately wanted and the doctrine of *caveat emptor,* which is ordinarily applicable to a lease of real estate, would often work injustice if applied to cases of this kind. It would be unreasonable to hold, under such circumstances, that the landlord does not impliedly agree that what he is letting is a house suitable for occupation in its condition at that time.

Timothy M. Green.

RIGHT OF A SURETY ON A GOVERNMENT BUILDING CONTRACT TO PRIORITY ON PROGRESS PAYMENTS AND RETAINED PERCENTAGES HELD BY THE GOVERNMENT.—Under Fed. statute [1] anyone entering into a contract with the United States for the construction or repairs on any public building or work is required to execute a penal bond, with good and sufficient securities, with the additional obligation that such a contrator shall promptly pay all laborers and material men who supply him with labor or material for the contract. Similar statutes place contractors under a like burden in all states.

Payments on many such projects are made as the work progresses, with the government retaining a certain percentage until the completion of the contract. In case of default on the part of the contractor the government may either complete the work or demand that the surety complete it. If the surety is called upon to complete the work the question arises as to whether or not the surety is entitled to a priority in the progress payments due and unpaid, and to the retained percentages over general creditors and assignees of the contractor. There is no question but that the surety is entitled to all future progress payments as they become due, but a question arises as to his superior rights to the retained percentages and to any progress payments which may have been due the original contractor at the time of default. It is the rights of the surety to these due, but unpaid, progress payments and

[1] 40 U. S. C. A. 270.

retained percentages as to general creditors or assignees of the original contractor that we will discuss herein.

The general rule as to retained percentages is found in *Prairie State Bank v. United States*.[2] In this case one Hitchcock was a surety on a building contract entered into by Sundberg & Co. with the United States. After beginning the contract Sundberg & Co. borrowed money from the Prairie State Bank and assigned money to be due from the United States. Whether the money borrowed was used to pay debts arising from the building contract was not proven. Sundberg defaulted, and Hitchcock completed the work. The court held that Hitchock had not only a right of subrogation to the same rights of Sundberg & Co. to the retained percentages, but he also was subrogated to the same rights the United States would have had to it had the United States completed the work itself. On the other hand the bank was a mere volunteer and under no compulsion to loan its money.

In *City of Texarkana v. F. W. Offenhauser & Co.*[3] two general creditors of a contractor holding a contract with the city attempted to garnishee retained percentages held by the city. The contractor had defaulted, and the surety had completed the work. The city had paid the retained percentages to the surety. In holding for the surety the court held that the surety on a contractor's bond who completes the contract in accordance with its terms, upon default of his principal, is subrogated to the rights of the obligees in the bond to the extent necessary to reimburse himself and has an equity in the funds due the contractor, under the terms of the contract, superior to that of any general creditor, assignee, or one who loans money to the contractor to pay for labor or materials necessary to complete the work.

In *Street v Pacific Indemnity Company* [4] a surety on a road contract who was bound to pay materialmen and laborers, was held subrogated to the rights of laborers and materialmen who had filed stop notices against the road fund, as against the contractor's trustee in bankruptcy, where the contractor had defaulted and the surety had completed the contract and had collected from the contractee the amount due for the performance of the contract. In this case the surety had expended more than such amount in completing the work and in paying for labor and materials. This decision was on the theory that the rights of the surety relate back to the time of the original contract and not to the time of paying laborers and materialmen. In a recent case, *United States Fidelity and Guaranty Co. v. John R. Alley and Company*,[5] the court ruled that a surety on a state highway contractor's bond who had

2 164 U. S. 227, 17 S. Ct. 142, 41 Fed. 412 (1896).
3 182 Ark. 140, 31 S. W. (2d) 140 (1940).
4 61 Fed. 106 (1932).
5 34 F. Supp. 604 (1940).

paid claims for the labor and material was subrogated to the rights of the laborers and materialmen to funds in the possession of the State Highway Commission, and the surety's lien upon such funds was superior to liens asserted by bank for an amount allegedly due on contractor's notes covering a loan, and by general creditors for merchandise purchased by, and for services rendered to, the contractor.

While on the question of retained percentages the great majority of decisions follow the rule laid down in *Prairie State Bank v. United States*,[6] that the surety has prior claim to such retained percentages, some courts attempt to distinguish in the case of one who loans to the contractor for the specific purpose of paying materialmen and laborers. In this case the loan is used to reduce the liability of the surety, and the contention is raised that such a creditor should have a superior claim to that of the surety. Such cases fall into two categories: those in which the creditor takes an assignment from the contractor on the retained percentages, and those in which the creditor takes an assignment from the laborers and materialmen.

In those cases where the creditor merely took an assignment from the contractor the great majority of cases hold that, as against the surety, the creditor has an inferior right. Thus in *Riverside State Bank v. Wentz* [7] the court held that a surety on a contractor's bond, who had paid the claims of materialmen, became subrogated to their rights, and that the rights so acquired by the surety in the retained percentages were superior to the rights of a bank which had loaned money to the contractor for use in the prosecution of the work and had taken an assignment of the proceeds from estimates to become due to the contractor.

A few cases, which give a party loaning money to the contractor for the purpose of meeting obligations to laborers and materialmen priority over a surety, do so because the surety has acquiesced in the assignment. Thus in *First National Bank v. United States Fidelity and Guaranty Company* [8] the court said: "the surety company having by such arrangement induced the plaintiff to make the advances to the contractors in reliance upon the agreement of the contractor consented to and agreed by the surety, it would not be consistent with equity and good conscience to permit the surety company to collect and retain a portion of the moneys so assigned and hypothecated to the bank to reimburse it for money so loaned and which remained unpaid."

Other cases holding for the creditor as against the surety do so only if the creditor was obliged to make the loan. Such a ruling was fol-

[6] 164 U. S. 227, 17 S. Ct. 142, 41 Fed. 412 (1896).

[7] 34 F. Supp. 419 (1929).

[8] 127 Ore. 147, 271 P. 57 (1928).

lowed in *New Amsterdam Casualty Co. v. Wurtz.*[9] Here there was a construction contract with a bond for performance. There was a contract indemnifying the surety. The arrangement between the creditor bank and the contractor was that all money received by the contractor on the contract should be deposited in an account from which no money should be drawn except for labor and materials used on the construction contract; and that, if such deposits were insufficient to carry on the work the bank would make advances to the contractor, on his notes, crediting such to his account. The arrangement with the bank was performed by both parties. The court held the equity of the bank superior to that of the surety because its advances had, *pro tanto,* discharged the liabilities of the principal and surety and because the bank was bound by contract to finance the principal.

Where the party loaning money to the contractor directly paid the laborers and materialmen and took assignments from them some courts have given such a party a superior claim to that of a surety.[10] The courts so holding have hinged their ruling on the fact that the surety is in no way injured. If the party loaning to the contractor had not done so the surety would have been liable to laborers and materialmen for that additional amount.

Many courts in giving preference to the assignee bank have emphasized the fact that if the bank were not given preference it would discourage such loans, and thus not only generally hamper the financing of such building contracts but would increase the number of failures on the part of contractors thus increasing the liability of sureties.

The great majority of cases will not allow an assignee to obtain a claim superior to that of the surety. A very recent decision in New York followed this general rule.[11]

An examination of cases holding both for and against the surety shows that many courts ignore the rights of the surety arising from the very nature of the suretyship relation and make it a problem of prior assignments. Some of these hold that the surety's assignment is from the time he is called upon to pay and is thus later in time than the assignment of the creditor assignee. Other courts hold the assignment is from the time of the making of the contract and is thus prior in time. The better reasoned cases, however, emphasize the fact that the surety's rights arise by subrogation, and that a specific assignment, although often made, adds nothing to the surety's rights, but that the surety had a prior right dating from the time of his becoming surety.

---

9 145 Minn. 438, 177 N. W. 664 (1920).

10 Third Nat. Bank v. Detroit Fidelity & Surety Co., 65 Fed. 548 (1933); United States Fidelity & Guaranty Co. v. United States, 231 U. S. 237, 34 S. Ct. 88, 58 L. Ed. 200 (1913).

11 Century Cement Mfg. Co. v. Fiore, 36 N. Y. S. (2d) 332 (1942).

When we turn to "progress payments" earned by the contractor before default but still in the hands of the contractee we find a greater split of authority. Many cases hold that the rule laid down in *Prairie State Nat. Bank v. United States* [12] applies to progress payments as well as to retained percentages. This case emphasizes the fact that the surety is not only subrogated to the rights of the principal but he is also subrogated to the rights which the contractee has to any securities which it can assert against the principal. If the creditor completes the work himself he is entitled to all funds still in his hands necessary to complete the work. The surety is likewise so entitled. This decision has been frequently adhered to and in a recent case [13] the court stated: "where a surety of a construction contractor, upon the contractor's default, completes the contract, and the contractee has funds in his hands earned by the contractor, the surety is entitled to be subrogated to the rights which the contractee, upon the contractor's default, could assert against such funds, to the extent necessary to reimburse the surety for the outlay made to complete the contract. This right to the funds embraces not only retained percentages, but other funds earned by the contractee. It extends to any earned funds held by the contractee, because on default by the contractor, the contractee upon completion of the contract itself, could recoup its loss from any funds in its hands earned by the contractor."

In *First Nat. Bank of Seattle v. City Trust Safe Deposit & Surety of Philadelphia* [14] the bond of a contractor was conditioned for the completion of the contract and the payment of all claims against the contractor for labor and materials. The contract provided for monthly payments of 70 per cent of the estimates as the work progressed, and the retention by the city of 30 per cent until after completion of the contract, to secure the payment of laborers and materialmen. The contractor abandoned the work, having earned about $3,900, which was unpaid, and leaving outstanding claims for labor and materials amounting to $3,100. The city called upon the surety, which assumed and completed the contract, paying all claims against the contractor for labor and materials. Prior to the abandonment of the work, the contractor had borrowed money from a bank, and assigned to it all sums to become due from the city during certain months, and the bank had notified the city of the assignment. The court held that the surety was subrogated, to the extent necessary to protect it from loss, to all the rights which the city might have asserted against the fund in its hands, and that such rights were not limited to the 30 per cent, reserved under

12 164 U. S. 227, 17 S. Ct. 142, 44 Fed. 412 (1896).

13 Standard Acc. Ins. Co. of Detroit v. Fed. Nat. Bank, 112 F. (2d) 692 (1940).

14 First Nat. Bank of Seattle v. City Trust Safe Deposit of Philadelphia, 114 F. 529 (1902).

the contract, but extended to the entire fund, which the city might, notwithstanding the assignment, have declared forfeited, and applied to reduce its damages, if it had been compelled to complete the work, which it must have done, but for the action of the surety. The surety's right was superior in law and equity to that of the bank under its assignment, by which it took no greater right than the contractor, as against either the city or surety.[15]

There is authority, however, which refuses to accept the *Prairie State Bank* Case [16] as being in point in cases involving progress payments. These courts definitely distinguish between progress payments and retained percentages, and, while granting the right of the surety to retained percentages, refuse to admit his right to priority in progress payments.

The leading case in so distinguishing between progress payments is *Kane v. 1st Nat. Bank.*[17] This case, however, while dogmatically declaring that the contractor is entitled to progress payments over the surety and that they constitute no trust for the surety, cites no authority to substantiate its holding. This case has, nevertheless, been frequently cited, and forms the basis for similar rulings in the case of *Third Nat. Bank v. Detroit Fidelity & Surety Company.*[18] In the recent case of *Town of River Junction v. Maryland Casualty Company,*[19] this decision was dissented to by Judge Hutcheson who clearly showed the applicability of the *Prairie State* case to the facts involved herein.

In examining the cases we see that the confusion which has arisen on this subject stems from two misconceptions. On the question of the rights of a party loaning money to the principal to pay laborers and materialmen and taking assignments from the contractor over the surety, the difficulty arises because of tracing the surety's rights to an assignment rather than to the very relationship of principal and surety. Some courts by dating the assignment back to the time of the surety contract arrive at the same result as they would by properly tracing the surety's rights to the surety contract. Other courts, however, by saying that the surety's assignment accrues at the time he is called upon to pay, arrive at a verdict adverse to the rights of the surety.

It is often true that, as the court pointed out in *River Junction v. Maryland Casualty Co.*,[20] loans to the principal for payment of laborers and materialmen will prevent bankruptcy of the principal and lessen the liability. In such a case, however, the party making the loan should,

15 Lacy v. Maryland Casualty Co., 32 F. (2d) 48 (1929).
16 164 U. S. 227, 17 S. Ct. 142, 41 Fed. 412 (1896).
17 56 F. (2d) 534 (1932).
18 65 F. (2d) 540 (1933).
19 110 F. (2d) 278 (1940).
20 110 F. (2d) 278 (1940).

instead of relying upon merely an assignment from the principal, also obtain permission from the surety to make the loan and obtain priority over the surety to that amount.[21]

The other point of confusion, the attempt to have different rules applicable to retained percentages and progress payments, arises from a misunderstanding of the dual relationship of the surety relation under the statutes regulating government building. Laborers and materialmen have an action against the principal and against the surety. Thus the surety is, upon paying, subrogated to the rights of the materialmen and laborers against the principal. The materialmen and laborers have another possibility of recovery, however. They have an action against the property into which went their labor and materials.[22] Thus in a very true sense the contractee is a surety for the contractor for his own exoneration. By paying the materialmen and laborers, the original surety is subrogated to all the rights of the contractee, and not merely to the retained percentages, one of the purposes of which is to create a fund for the reimbursement of the surety.[23]

In view of the peculiar nature of the suretyship contract the surety should have a superior right not only to retained percentages but also to progress payments earned but uncollected. The case of *Prairie State Bank v. United States* [24] should apply to retained percentages and progress payments indiscriminately, and the surety who is called upon to answer for his principal should have a preferred status not only as against general creditors but also as against assignees of the principal.

Bernard F. Grainey.

THE RIGHT OF PRIVACY.—Surely today in the midst of a world conflict we are all aware of political, social, and economic changes that affect our daily mode of living. Such changes bring with them new complexities that tend to enhance man's relations with his fellowman and resultant exigencies arise for the creation of new legal rights. Society has always foregone such changes, and fifty-two years ago,[1] though the metamorphosis was not so pronounced, such changes were taking place.

The "gay 90's" saw America with its large cities, and its peoples congregating in closer proximity to each other. New inventions flooded

21 First Nat. Bank v. United States Fidelity & Guaranty Co., 127 Ore. 147, 271 P. 57 (1928).

22 164 U. S. 227, 17 S. Ct. 142, 41 Fed. 412 (1896).

23 Standard Acc. Ins. Co. v. Fed. Nat. Bank, 122 F. (2d) 692 (1940).

24 164 U. S. 227, 17 S. Ct. 142, 41 Fed. 412 (1896).

1 The year 1890 is generally thought of as the "birthday" of the right of privacy.

the markets and industry was quick to capitalize on such helpmates whenever it was practical to do so, newspaper publishers encouraged the growth of "sensationalism" in their publications, and advertising was gaining recognition as an important ally of business. These changes through their various ramifications tended to lay bare—as sacrificial of offerings—the personalities of people. Photographs of individuals were, without proper authorization, used for sales-display purposes in advertising certain products. Their names were used for similar purposes, and their private lives through the channels of journalistic media were unduly publicized to the discomfort of the individuals concerned.

Warren and Brandeis [2] comprehended the sudden vulnerability of what Judge Cooley called the right "to be let alone" [3]—"right under certain circumstances to protect one's name and physiognomy from becoming public property." [4] They wrote, "Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closed shall be proclaimed from the house-tops.' " [5] They clearly saw that an exigency had arisen and that there was an urgent need for the creation of a new legal right. Existing remedies were inadequate; there could be no recovery when a non-defamatory statement concerning an individual was true though its publication caused the individual undue mental suffering, nor could there be recovery for a published falsehood concerning an individual when that statement was neither libel *per se* nor the cause of a pecuniary loss to the individual concerned. Surely these were wrongful acts and the injured parties were entitled to redress in the courts based upon a new set of legal principles.

Warren and Brandeis had given the *right to privacy* an identity, and an individuality, a definition, but in substance the right had been recognized in the tribunals of ancient Greece and Rome, and in English decisions as an inherent part of such kindred rights as freedom from libel and slander. The ancient common law doctrines protected man against physical invasions of life and property interests, but the trend has been toward a fuller recognition of "man's spiritual nature, of his feelings and intellect." [6] This increased liberalism of the courts was destined to play an important role in giving additional recourse to man and render his private life less vulnerable to the public eye and avail him of the right to enjoy life as well as live it. Thus, redress was provided for unwarranted invasions of intangible interests as well as those of a tangible nature. By the middle of the fourteenth century courts had rendered

2 Warren and Brandeis, *The Right to Privacy*. 4 Harvard L. Rev. 193.
3 Cooley on Torts, 2nd ed., p. 29.
4 39 Michigan L. Rev. 526.
5 Warren and Brandeis, *The Right to Privacy*, 4 Harvard L. Rev. 195.
6 Warren and Brandeis, *The Right to Privacy*, 4 Harvard L. Rev. 193.

their first judgments for civil assault, and slander. This "new liberalism" was carried into the field of nuisances where recourse was provided for the abatement of odors, noise, smoke, and dust that were discomforting to individuals. Similarly, the courts broadened their concept of "property rights" and gave protection to exclusive ownership of literary and artistic creations as well as goodwill, trademarks, and trade secrets. The gap in the law was now in reduced proportions—it was but a short leap from the recognition of intangible *property* rights to the recognition of intangible *spiritual* rights.

But the courts were reluctant to recognize the right of privacy. A few words of Johnathann Swift clearly express their problem:

> "A strong dilemma in a desperate case!
> To act with infamy, or quit the place."

When faced with the issue, the courts had to make a decision upon two opposing interests. Should truth, which has through its free dissemination enabled man to continually progress and has protected him from oppression, be suppressed so that the *individual* should not be distressed by undue publicity of his person? It was a question of giving to the individual *as such* a portion of those rights which he possessed in a collective sense. Too much sovereignty given to either interest would render an undesirable result. In the world today, there are societies where the individual *as such* is completely subordinate to the state. There also exist completely dis-united societies where the individual is supreme. The whole fundamental philosophy underlying our American "collectivistic" society imports a fair compromise between such opposing views.

Our courts have found it difficult to make such a compromise, and have attempted to evade the question whenever possible. As has been alluded to, the need for the recognition of the *right of privacy* was not urgent in an extreme sense,[7] and many courts therefore refused to grant recovery because there was no precedent upon which to predicate a decision. In justifying such a view, the courts say in essence that "Invasion of privacy and unwarranted notoriety are beyond the domain of positive law, and a person is protected against such wrongs only by a *voluntary* observance by others of the code of common decency."[8]

---

[7] Recovery in many instances can be based on the grounds of libel and slander even for the following situations as cited by Warren and Brandeis: "The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and the vicious, but has become a trade which is pursued with industry as well as effrontery. To satisfy a prurient taste, the details of sexual relations are spread broadcast in the columns of the daily newspapers. To occupy the indolent, column upon column is filled with idle gossip, which can be procured by intrusion upon the domestic circle." 4 Harvard L. Rev. 196.

[8] Anno: 138 A. L. R. 35.

One of the first American decisions [9] (1890) to bear at least a semblance to the privacy doctrine was reported in an early issue of the *New York Times.* [10] The New York Supreme Court had granted a temporary injunction restraining the defendant from photographing the plaintiff (without the latter's consent) while she appeared scantily dressed in a Broadway show. At the trial, the plaintiff failed to present herself and the court in accordance—found no necessity to issue an opinion. Other decisions bearing a tendency towards a recognition of the right to privacy were quick to follow. Just a year later, another New York court showed evidence of a more liberal view towards the privacy dogma.[11] In 1893, we find an opinion holding that "Private Rights must be respected as well as the wishes and sensibilities of people." [12] And in the following year, a federal district court held that the plaintiff had waived his right of privacy by becoming a public character. [13] Then in 1895 in *Schuyler v Curtis,* [14] the court recognized that the individual is possessed of some right to protect his privacy from the innumerable pages of public print. Finally, in *Atkinson v Doherty* we see the first American decision *directly concerned* with the so-called right to privacy. A cigar manufacturer used the name and likeness of a deceased person as a label for a brand of cigars. In denying the prayer for an injunction, the court of equity in effect repudiated the privacy doctrine. The court said — probably in reliance upon a current English decision [15] — that it could restrain such use of one's name and likeness *only* upon the grounds of libel.

In 1902 a four-to-three decision, [16] intending to repel any further consideration of this legal "foundling" and declare such right void for practical purposes, acted as a boomerang. The court refused to enjoin the unauthorized use of the plaintiff's likeness in connection with the advertising of flour although the plaintiff (female) was caused thereby much distress and humiliation. The court reasoned: such right was not recognized by any of the great common law writers (Blackstone, Kent, etc.) nor sustained by precedent, and that the recognition of such right would lead to an overwhelming amount of litigation. Justice Gray

9 Manola v Stevens, unreported case.

10 Issues of June 15, 18, 21 in the year 1890.

11 Mackenzie v Soden, Mineral Springs Co., 18 N. Y. S. 240.

12 Marks v Jaffa, 6 Misc. 290, 26 N. Y. S. 908.

13 Corliss v Walker, 64 F. 280.

14 42 N. E. 22.

15 Dockrell v Dougall, 78 L. T. Rep. 840 Queens Bench Division. The defendant, in advertising his product, a medicine called *Sallyco,* used the name of the plaintiff, a physician, as follows: "Dr. Morgan Dockrell, a physician to St. John's Hospital, London, is prescribing *Sallyco* as an habitual drink. Dr. Dockrell says nothing has done his gout so much good." The court held there was no injury to the plaintiff's property or reputation and plaintiff could recover on no other grounds.

16 Roberson v Rochester Folding Box Co. 171 N. Y. 538 (1902).

rendered a strong dissenting opinion and cited the arguments advanced by Warren and Brandeis. There could be only one answer to meet the exigency caused by new social and commercial conditions, said the justice, and that is the recognition of the right of privacy based upon the extension of the legal principles that protect one's person from attack. The majority opinion though was the law in New York and its reception was exceptionally unpopular.

The press raised a storm of disapproval and created agitation for a remedial statute to rectify a very undesirable situation. A much distraught justice was greatly affected by a critical editorial appearing in the *New York Times* [17] and broke court precedent by writing an article defending the decision. But public dissent was so overwhelming that at its very next session the New York legislature enacted a statute (Laws 1903, chap. 132) establishing a right of action for those persons whose name or likeness was used for advertising purposes without their written consent. This statute is as follows:

"A person, firm, or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or, if a minor, of his or her parent or guardian, is guilty of a misdemeanor." (N. Y. Civil Rights Law, Sec. 50) "Any person whose name, portrait or picture is used within this state for advertising purposes or for purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such a manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion, may award exemplary damages. But nothing contained in this act shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting in or about his or its establishment specimens of the work of such establishment unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed." Id. Sec. 51.

The constitutionality of this statute was upheld in *Rhodes v Sperry & Co.* [18] (1908) and this decision was *finally affirmed,* after two other affirmations in lower appellate courts, by the United States Supreme Court. [19]

---

17 Issue, August 23, 1902.
18 193 N. Y. 223, 85 N. E. 1907.
19 220 U. S. 502.

Then in 1905 the Supreme Court of Georgia rendered the initial decision [20] recognizing the independent existence of the right of privacy and accorded it proper legal protection. This court held that an invasion of one's private rights was actionable, regardless of special damages to person, property, or character. And probably in reliance upon the opinion of Mr. Justice Gray in the *Roberson case,* [21] the court stated: "So thoroughly satisfied are we that the law recognized within proper limits as a legal right, the right of privacy, and that the publication of one's picture without his consent by another as an advertisement, for the mere purpose of increasing the profits and gains of the advertiser, is an invasion of this right, that we venture to predict that the day will come when The American Bar will marvel that a contrary view was ever entertained by judges of eminence and ability . . . ."

This optimism has been partially justified in view of the courts that have given recognition to the existence of the right of privacy as a common law doctrine. New Jersey, [22] Kansas, [23] Kentucky, [24] California, [25] North Carolina, [26] Missouri, [27] District of Columbia, [28] Ohio, [29] Oregon, [30] and Pennsylvania, [31] have all since taken judicial cognizance of the right as an independent right with a definite character. The Supreme Court of Arkansas, by *dicta,* has approved of the doctrine. [32] And the legislatures of Utah [33] and Virginia, [34] in addition to New York, have lent their approval in the nature of statutory enactment providing legal protection to the right of privacy.

There has by no means been universal acceptance of the right of privacy. Some courts did advert to the right, but without committing themselves as to their views, and then base their decisions on other grounds. The court in *Miller v Gillespie* [35] inferred that it would grant equitable relief, *under proper circumstances,* for an invasion of the right of privacy. And in *Hillman v Star Publishing Co.* [36] the court stated: "We find that plaintiff's case does not fall *within any of the*

20 Pavesich v New England Life Ins. Co., 122 Ga. 190, 50 S. E. 68 (1905).
21 171 N. Y. 538 (1902).
22 Edison v Edison Polyform & Mfg. Co., 73 N. J. Eq. 136 (1907).
23 Kunz v Allen, 102 Kan. 883, 172 Pac. 532 (1918).
24 Foster-Milburn Co. v Chinn, 134 Ky. 424, 120 S. W. 364 (1909).
25 Melvin v Reid, 112 Cal. App. 285, 297 Pac. 91 (1931).
26 Flake v Greensboro News Co., 212 N. C. 780, 195 S. E. 55 (1938).
27 Munder v Harris, 153 Mo. App. 652, 134 S. W. 1076 (1911).
28 Peed v Washington Times Co., 55 Wash. L. Rep. 182 (1927).
29 Friedman v Cincinnati Local Joint Executive Bd., 20 Ohio Ops. 473 (1941).
30 Hinish v Meier & Frank Co., 113 Pac. 438 (1941).
31 Clayman v Bernstein, 38 Pac. D&C 543 (1940).
32 Mabry v Kettering, 89 Ark. 551, 17 S. W. 746 (1909).
33 The Utah Statute is similar in most respects to the New York Privacy Act.
34 Va. Code Anno. (Michie & Sublett, 1936) Sec. 5782.
35 196 Mich. 423, 163 N. W. 22 (1917).
36 64 Wash. 691, 117 Pac. 594 (1911).

rules so far recognized by the courts permitting a recovery for an invasion of the so-called right of privacy." In neither case did the court define or explain their respective positions concerning those circumstances and rules that were applicable to the privacy doctrine. Rhode Island,[37] in following the holding of the *Roberson* case [38] expressly denied the existence of the right to privacy. And in a majority of the states, the existence of the right of privacy is an undetermined question.[39] Those states that have taken a stand on the privacy question have, by an overwhelming majority, adopted the view that there is a legally enforceable right of privacy. Most of these cases arose over the issue involving the publication of pictures for commercial purposes without the consent of the owner.[40] However, there were other situations in which the right of privacy has been accorded legal protection. The unauthorized use of the name of an author has been held to violate the New York Statute.[41] In *Mau v Rio Grande Oil, Inc.*,[42] a radio broadcasting company and the commercial sponsor of a program were assessed damages for invading the plaintiff's right to privacy through the medium of the air waves. Motion pictures — especially news-reels — have been guilty of violating the right. Public humiliation of a debtor has been actionable[43] as has been the shadowing of a person by private detectives in such a manner as to attract public attention.[44] The unwarranted placing of one's picture in the rogue's gallery has accorded damages to the injured party.[45] Relief has been granted against eavesdropping (the usual case is the abatement of wiretapping),[46] and for wrongful disclosures of telegrams, private papers, and records.[47]

All of these cases and the many others concerning the right to privacy have given the right a definite legal character. Each additional case tended to add new legal principles to the privacy doctrine — principles

37 Henry v Cherry and Webb, 30 R. I. 13, 73 Atl. 97 (1909).

38 171 N. Y. 538 (1902).

39 138 A. L. R. 33.

40 Semler v Ulten Publications, 170 Misc. 551, 9 N. Y. S. (2d) 319 (1938); Miller v Madison Square Garden Co., 176 Misc. 714, 28 N. Y. S. 811 (1941); Lahiri v Daily Mirror, 162 Misc. 776, 295 N. Y. S. 382 (1937). Most of the cases concerning this matter involved an infringement of the New York Statute.

41 Eliot v Jones, 66 Misc. 95, 120 N. Y. S. 989, Affirmed; 140 App. Div. 911, 125 N. Y. S. 1119 (1910).

42 28 Fed. Supp. 845 (1939).

43 Brents v Morgan, 221 Ky. 765, 299 S. W. 967 (1927). A note in 55 A. L. R. in connection with this case states: "It has been quite generally held, however, that a method used in attempting to obtain payment of a debt, which tends to impute dishonesty to the debtor, to throw him into disgrace and ridicule, or to invade his right of privacy, gives a right of action for damages."

44 Epstein v Epstein (1906) T. H. 87.

45 Itzkovitch v Whitaker, 115 La. 479, 30 So. 499 (1905).

46 Rhodes v Graham, 238 Ky. 225 37 S. W. 46 (1931).

47 Anno: 138 A. L. R. 97.

that were to act as limitations to its future application. Generally, the right was limited to the living, and surviving relatives were denied recovery on account of publicity concerning deceased persons. The courts had construed the privacy right to be *personal,* and were inclined to follow the common law rule that "property" rights survive, but "personal" rights die with the person. This was unfortunate as most legal scholars hold this common law doctrine to be unsound in principle. The ancient distinction between personal and property rights is fallacious because all rights are *essentially* personal. The entire concept of property deals with the *rights of persons* towards that property and any distinction could only be unreal. Courts realize now the error of reason made by their predecessors and can see no beneficial reason why such a cause of action should not survive. This change of attitude has been reflected in some recent decisions, the most common are those in which damages have been awarded to relatives for some unwarranted publicity to their deceased kin. [48] Another limitation upon the privacy doctrine holds that there is no violation of the right where the plaintiff has published the matter complained of or has consented to its publication. Such consent, either express or implied, amounts to a waiver or a relinquishment of the right. *Garden v Parfumerie* [49] is the only case that has considered the question of revoking consent in such instances. The court there held that consent to use of a name or photograph of a person was a mere license and could be revoked at any time. This holding seems to be unjustifiable in that it penalizes persons who have acted in good faith. The only logical presumption is that the courts will discard such a notion and adopt the more conscionable view that in the absence of any provision such consent could not be revoked at will.

A violation of the right of privacy does not exist in the dissemination of news and news events, nor in the discussion of events of the life of a person in whom the public has a rightful interest, nor where information would be a public benefit, as in the case of a candidate for public office. The right can only be violated by paintings, writings, pictures, or other permanent publications or reproductions, and not by mere word of mouth. The right is denied to corporations and institutions since it was primarily designed to protect the feelings and sensibilities of human beings rather than safeguard property and business interests. [50] A further limitation upon the right restricts recovery to conduct that is offensive only to persons of *ordinary* sensibilities [51] as the court in *Schuyler v Curtiss* [52] stated: ". . . . . there must be some reasonable and plausible ground for the existence of this mental distress

48 Douglas v Stokes, 149 Ky. 506, 149 S. W. 849.
49 151 Misc. 692, 271 N. Y. S. 187 (1933).
50 American Jurisprudence, Vol. 41, 936.
51 American Law Inst. Restatement of Torts, Vol. 4, Sec. 867.
52 147 N. Y. 434, 42 N. E. 22 (1895).

and injury (caused by the unauthorized publication of one's likeness in public print). It must not be the creation of mere caprice nor of pure fancy, nor the result of a super-sensitive and morbid mental organization." [53] The privacy doctrine is also limited in its relation with public personages — persons who by their prominence have dedicated their lives to the public, and have thereby waived any claim to the right of privacy. [54] All of these limiting principles have tended to give form and body to what was originally a vague legal concept. They crystalized and made into a body of law a group of thoughts and ideas concerning the right to privacy.

Almost a half-century has passed since the birth of the right of privacy as a legal doctrine. [55] It grew in response to a "need" brought about by modern life. It was the answer of justice to a mode of carefree conduct exhibited by those in control of such American institutions as the daily newspaper, the movies, the radio, the telephone, and the telegraph. Historically, the privacy doctrine presented a constant struggle between two opposing interests; the interest of the individual *per se* and the interest of society. True, this struggle had its effect upon the courts and they had been reluctant to commit themselves. But, today the courts fully recognize the right of privacy. They now for the first time feel no obligation to indulge in lengthy statements of apology. They issue their decisions firmly, simply, and straight to the point. This is the final stage in the acceptance of any new legal doctrine. The fear of the New York court, in the *Roberson* case, that a recognition of the right to privacy would lead to a deluge of litigation now seems to have been unfounded. There have been comparatively few cases involving the right of privacy, and in these cases the courts generally administered good judgment in their application of the doctrine. And today, as the doctrine of the right to privacy advances into maturity, the words of Justice Gray [56] ". . . . that the day will come when the American bar will marvel that a contrary view was ever entertained by judges of eminence and ability. . . . ," attain an added significance.

Jerome Gold.

---

53 The court further went on to say, "Such a class of mind might regard the right as interfered with and violated by the least reference even of a complimentary nature to some illustrious ancestor without first seeking for and obtaining the consent of descendants. Feelings that are thus easily and unnaturally injured and distressed under such circumstances are too sensitive to be recognized by any purely earthly tribunal."

54 Martin v F. I. Y. Theatre Co., 26 Ohio L. Abs. 67.
Corliss v Walker, 64 Fed. 280, 31 L. R. A. 283.

55 Pavesich v New Eng. Life Ins. Co., 122 Ga. 190, 50 S. E. 68 (1905).

56 Per dissenting opinion in the *Roberson* case.