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Note and Comment

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NOTE AND COMMENT

ATTORNEY'S INTEREST IN HIS CASE UNDER A CONTRACT FOR CONTINGENT FEES.—Absolute protection for an attorney who has given services in a cause wherein he runs the risk of receiving no compensation for his efforts would require that he be considered as having an equitable assignment of the specified percentage of the judgment from the filing of the first paper, and that he have the right to carry the case through to final judgment, on his own behalf, any desire of his client to discontinue, dismiss or compromise to the contrary notwithstanding. On the other hand, the courts frequently say that the client should have a maximum power of control of his case at all times, and that compromise should be actively favored, as a matter of public policy. There is authority for almost every conceivable position between these extremes.

While an agreement to assist in the prosecution of a criminal charge for a fee contingent upon conviction is invalid as against public policy, *Baca* v. *Padilla* (N. M., 1920), 190 Pac. 730, and formerly any contract to carry on a civil action for a contingent fee was bad, as champertous, *Elliott* v. *McClelland*, 17 Ala. 206; *Slade* v. *Rhodes*, 22 N. C. 24; *Ackert* v. *Barker*, 131 Mass. 436, at the present time it is very generally held that if there is no fraud or undue influence at the making of such contract, it is valid.

However, in some few jurisdictions it must not expressly appear in the contract that the attorney's services are to be gratuitous in case of failure. 2 THORNTON, ATTORNEYS AT LAW, 667. Generally the attorney must not agree to pay the costs of the suit, *Kelly* v. *Kelly*, 86 Wis. 170, but to the effect that this can sometimes be done, see *Hassell* v. *Van Houten*, 39 N. J. Eq. 105; *Brown* v. *Bigne*, 21 Ore. 260; *Bentinck* v. *Franklin*, 38 Tex. 458. See, also, 10 MICH. L. REV. 490. If, as part of the contract, the client agrees that he will not settle or compromise without the attorney's consent, the whole contract will be held bad as champertous, *Davy* v. *Fidelity & Casualty Ins. Co.*, 78 Ohio St. 256; *Davis* v. *Webber*, 66 Ark. 190; *Davis* v. *Chase*, 159 Ind. 242, or the contract will be divided, and the agreement not to compromise only held void. *Granat* v. *Kruse*, 114 Ill. App. 488; *Potter* v. *Ajax Min. Co.*, 22 Utah 273. In a few instances the courts have indicated that the whole contract was valid. *Hoffman* v. *Vallejo*, 45 Cal. 564; *Taylor* v. *St. Louis Transit Co.*, 198 Mo. 715; *Smits* v. *Hogan*, 35 Wash. 290. An agreement that if the client should settle without the attorney's consent the attorney should receive a stipulated amount has been held valid. *Syme* v. *Terry & Tench Co.* (N. Y.), 125 App. Div. 610. See *Hall* v. *Orloff* (Cal. App., 1920), 194 Pac. 296, *contra*. To the effect that an agreement not to compromise may or may not be good, according to the good or bad faith of the parties, see *Lipscomb* v. *Adams*, 193 Mo. 530. An agreement for contingent fees in a divorce suit is void, as it is against public policy to create any obstacle to settlement of the marital differences. *McCurdy* v. *Dillon*, 135 Mich. 678; *McConnell* v. *McConnell*, 98 Ark. 193.

If we start, then, with a valid contract between attorney and client that the former will conduct the case either for a certain percentage of the fruits of the litigation, or for a sum certain, contingent upon success, we have the questions, what right or interest has the attorney in the cause of action, and what can he do if the client seeks to dismiss, discontinue or compromise without his consent and in disregard of his rights. Aside from special statutory provisions, his rights are fixed by the retaining lien, the charging lien and the doctrine of equitable assignment.

The retaining lien is a product of the common law, may be general or particular, depends upon possession, is not assignable and is passive only. 2 THORNTON, ATTORNEYS AT LAW, 970. Changes by recent statute have been comparatively slight. Its application in the case of a contingent fee contract is governed by the same rules as in case of a contract for a fixed and certain fee.

The charging lien is the product of statute and judicial legislation, is particular only, does not depend upon possession, is sometimes assignable, and can be actively enforced. It is equitable in nature, and is, in a way, the arbitrary exercise of power by the court for the protection of its officer, the attorney. 2 THORNTON, ATTORNEYS AT LAW, 975. Changes by recent statute have been great and varied. To draw from the cases any definite general rules as to the extent of the protection thus given the attorney is extremely difficult, not only because of these varied statutes, but also because the courts frequently fail to make it clear whether the compromise without

the consent of the attorney occurred before verdict, between verdict and the entry of judgment, or pending an appeal after entry of judgment, and also because the courts very generally fail to make proper distinction between the charging lien and the doctrine of equitable assignment. It is frequently impossible to determine from an opinion whether it rests upon the one theory or the other, or a mixture of the two. As is very ably pointed out in *Nichols* v.*Orr,* 63 Colo. 333, the two doctrines should be distinct. Property charged with a lien can be sold subject to the lien; under equitable assignment it can be sold only with the consent of the assignee. A lien is a charge *upon* property; an equitable assignment gives an interest *in* the property. It was said in *Gillette* v. *Murphy,* 7 Okla. 91, where the attorney claimed both an equitable assignment and a lien, that these two claims were inconsistent. Under the charging lien theory the attorney may have a lien upon the judgment secured in the cause or upon the compromise settlement; under the equitable assignment theory he should have an interest in the cause of action and in the fruits of litigation. He can always intervene when necessary to protect his interest under an equitable assignment; he is sometimes permitted to intervene to protect his lien. *Payton* v. *Wheeler,* 13 Ga. App. 326.

To notice some of the more important rulings regarding the charging lien, in the absence of a special statute providing to the contrary, the lien does not attach until after judgment. *Jackson* v. *Stearns,* 48 Ore. 25; *Hanna* v. *Island Coal Co.,* 5 Ind. App. 163; *Coughlin* v. *N. Y. C. & H. R. Co.,* 71 N. Y. 443 (a case much cited and often followed, but no longer accurately representing New York law, because of statutes); *Kusterer* v. *Beaver Dam,* 56 Wis. 471; *Henchey* v. *Chicago,* 41 Ill. 136; *Hutchinson, Adm'r,* v. *Pettes,* 18 Vt. 614; *In re Baxter & Co.,* 154 Fed. 22. But there are now several statutes, nearly all of recent date, under which it has been held that the lien attaches upon institution of the suit. *Payton* v. *Wheeler,* 13 Ga. App. 326; *Robertson & Cleary* v. *Shutt,* 72 Ky. 6659; *Peri* v. *N. Y. C. R. Co.,* 152 N. Y. 521; *Broadbent* v. *Denver & R. G. R. Co.,* 48 Utah 598; *Wait* v. *Railroad,* 204 Mo. 491. While in *Farmer* v. *Stillwater Water Co.,* 108 Minn. 41, it is said that the charging lien attaches upon verdict, this is denied in *Tyler* v. *Superior Court,* 30 R. I. 107, and *Cline Piano Co.* v. *Sherwood et al.,* 57 Wash. 239, where it is held that the lien does not attach until judgment is entered. So far as the charging lien is concerned, under an ordinary statute (if there be such a thing) it would seem that the client can settle out of court and stop the suit at any time, but if the lien has attached it will be protected. But if the settlement was collusive and in fraud of the attorney's rights, some courts have been inclined to follow the suggestion in *Coughlin* v. *N. Y. C. & H. R. Co., supra,* and, ignoring logic and the theoretical limitations of the lien, they have exercised an arbitrary and undefined power and have prevented the client from dismissing or discontinuing even before the lien has attached. *Jackson* v. *Stearns,* 48 Ore. 25; *National Exhibition Co.* v. *Crane* (N. Y.), 54 App. Div. 175. If the compromise occurs before the lien has attached, no collusion being shown, the attorney can recover

the reasonable value of his services on a *quantum meruit*. *Badger* v. *Mayer*, 2 Misc. Rep. 533; *Re Winkler*, 139 N. Y. Supp. 755.

When the compromise occurs after the lien has attached, it must be determined what it attaches to—the judgment, if there be one, or the settlement. In many jurisdictions the attorney is entitled to the agreed percentage of the settlement only, *Barcus* v. *Gates*, 130 Fed. 364 (affirmed, 136 Fed. 184), and he is not entitled to the reasonable value of his services in the place thereof. *Crosby* v. *Hatch*, 155 Iowa 312. But to the effect that he is entitled to the agreed percentage of the judgment, especially if the settlement was collusive, see *Desaman* v. *Butler Bros.*, 118 Minn. 198. In some courts the matter turns upon whether the judgment is final or not. If it is, then the attorney is entitled to the agreed percentage of the judgment, *Chreste* v. *Louisville R. Co.*, 167 Ky. 75; *Serwer* v. *Sarasohn*, 86 N. Y. Supp. 838; if it is not, but an appeal is pending, then the amount of the settlement controls. *Corcoran* v. *Geo. Kellogg Structural Co.*, 166 N. Y. Supp. 269; *Stephens* v. *Metropolitan St. R. Co.*, 157 Mo. App. 656.

If the contract was for a fixed sum, contingent upon success, the attorney may recover only the reasonable value of his services when a compromise occurs before final judgment, *Pratt* v. *Kerns*, 123 Ill. App. 86, but in other jurisdictions apparently he can recover the amount stipulated for. *Hall* v. *Gunter*, 157 Ala. 375; *Ingersoll* v. *Coram*, 211 U. S. 335.

If, in the compromise agreement, the opponent agrees to pay the attorney's fees for the client, there is a nice question as to whether the attorney's percentage is to be reckoned on the basis of the amount paid the client or on the basis of the sum total which the opponent must pay attorney and client together. *Schmitz* v. *S. Covington & C. St. R. Co.*, 131 Ky. 207; *Neu* v. *Brooklyn Heights R. Co.*, 99 N. Y. Supp. 290, hold that it is the former; *Sutton* v. *Chicago R. Co.*, 258 Ill. 551; *Johnson* v. *Great Northern R. Co.*, 128 Minn. 365, that it is the latter; and the latter view would seem to be the more logical.

In a recent case, *Kellogg* v. *Winchell* (D. C., 1921), 273 Fed. 745, the court of appeals of the District of Columbia held, when the client undertook to dismiss the attorney after judgment against him and pending an appeal, the contract being for contingent fees, that the attorney had an interest in the case and could prosecute it to final judgment on his own behalf. There are many cases in accord. While it is not always so stated, the basis for such holding should be, logically, the doctrine of equitable assignment,—that is to say, when the attorney agrees to carry on an action for a percentage of the recovery, or for a fixed sum contingent upon success, he becomes assignee of an equitable interest in the cause, if such cause is assignable in his jurisdiction, and is entitled to intervene when necessary to protect his interest. Sometimes the courts so refer to it; at other times they call the attorney's interest a lien. The courts of the same state frequently will call it an equitable assignment in one case and a lien in the next, and permit intervention in both. In the following cases there was an express equitable assignment of a portion of the recovery to the attorney,

and in each it was held good as such: *Gulf, Colorado & Santa Fe R. Co.* v. *Miller,* 21 Tex. Civ. App. 609; *Schubert* v. *Herzberg,* 65 Mo. App. 578; *Dupree* v. *Bridgers,* 168 N. C. 424. In *Terney* v. *Wilson,* 45 N. J. L. 282, an express agreement that the attorney was to have a lien on the recovery was said to amount to an equitable assignment. 2 THORNTON ATTORNEYS AT LAW, 734-5. But other courts say that the contingent fee contract is of itself an equitable assignment. In the following cases the above conclusion was reached without express words of assignment: *Cain* v. *Hockensmith Wheel & Car Co.,* 157 Fed. 992; *Potter* v. *Ajax Mining Co.,* 22 Utah 273; *Sivley* v. *Sivley,* 96 Miss. 134; *Weeks* v. *Wayne Circuit Judges,* 73 Mich. 256; *Johnson* v. *McCurry,* 102 Ga. 471; *Kern* v. *Chicago, M. & P. S. R. Co.,* 201 Fed. 404; *Burkhart* v. *Scott,* 69 W. Va. 694; *Phillips* v. *L. & N. R. Co.,* 153 Fed. 795; *Griggs* v. *Chicago, R. I. & P. R. Co.* (Neb., 1920), 177 N. W. 185; *Middlestadt* v. *City of Minneapolis,* 147 Minn. 186. In the following cases the attorney's interest was called a lien, but he was allowed to intervene to protect that interest: *Fuller* v. *Lanett Bleaching Co.,* 186 Ala. 117; *Wait* v. *Railroad,* 204 Mo. 491; *Corson* v. *Lewis,* 77 Neb. 449; *Schutt* v. *Bush,* 210 Mich. 495; *Payton* v. *Wheeler,* 13 Ga. App. 326. But in *Knipe* v. *Wheelehan,* 160 N. Y. Supp. 1012, while it was recognized that the attorney had a lien he was not allowed to continue the action in his own behalf. It is denied by some authorities that there can be an equitable assignment without express words of assignment. *Stearns* v. *Wollenberg,* 51 Ore. 88; *Howard* v. *Ward,* 31 S. D. 114. And in many jurisdictions it is denied that a contingent fee contract, either with or without special words of assignment of a portion of the recovery, gives any interest, legal or equitable, in the cause of action. *Weller* v. *Jersey City, etc., Ry.,* 68 N. J. Eq. 659; *Gillette* v. *Murphy,* 7 Okla. 91; *Nichols* v. *Orr,* 63 Colo. 333. See, further, 21 C. J. 343; 4 CYC. 49; 4 CYC. 1022; WEEKS, ATTORNEYS AT LAW (Ed. 2), Sec. 355; 8 MICH. L. REV. 328.

It is submitted that the view that an attorney has an interest in the civil cause from its institution is sound. The objection to putting any obstacle in the way of compromise is recognized, but since we allow the contingent fee contract, the policy of leaving the attorney who has expended his time, skill and money in the cause to the caprice of a fickle-minded client who purposes to settle for "a song," in utter disregard or direct fraud of the attorney's rights, does not appeal to one's sense of fairness, nor is it conducive to the smooth and efficient administration of justice. As was said in *Weeks* v. *Wayne Circuit Judges, supra,* "It is true that courts look with favor upon a compromise and settlement made by the parties to a suit with the consent of all parties concerned, to prevent the vexation and expense of further litigation, but the rule only applies where the rights and interests of all the parties concerned, both legal and equitable, have all been respected, and in good faith observed. Parties cannot assume that attorneys have no rights, without inquiry."

There is an unmistakable tendency in the direction of affording greater protection to attorneys under contingent fee contracts, which tendency is shown both in legislation and decision. Perhaps a good "safety valve" is

to be found in the suggestion of the Wisconsin court, *Gowran* v. *Lennon*, 154 Wis. 566, that the attorney should be allowed to go on with the suit, after the client's attempted compromise, only when the client is unable at that time to settle the attorney's claim for fees. Undoubtedly, there are some cases in which public policy so strongly demands an absolute right on the part of the client to settle regardless of his attorney's wishes, that nothing can be permitted to stand in the way. Such, for instance, are cases involving marital differences, etc. In such cases the contract for contingent fees might be deemed valid if it were to be considered as carrying an implied condition subsequent to the effect that the client can settle with his opponent at any time and thus discharge the contingent fee contract with the attorney.

D. H. B.

CONTINUING TRESPASS AND REPEATED WRONG.—The case of *Amstutz* v. *King et al.*, recently decided in the supreme court of Ohio, shows the difficulties under which the courts are laboring in their efforts to get away from the conclusions of the "strong" decisions on the question of law indicated in the title. This case has been reported without opinion, and therefore will not be published in the Ohio State Reports until the bound volume is put out. It is understood that it is to appear in Volume 102, Ohio State Reports. The notation of the court is as follows: "This case is affirmed on the authority of *Gillette* v. *Tucker*, 67 Ohio St. 106 (1902), and *Bowers* v. *Santee*, 99 Ohio St. 361 (1919)." The facts in the case were apparently undisputed in the lower court. The petition of the plaintiff alleged that she employed Dr. King and Dr. Shuffield to perform an abdominal operation on her, on March 9, 1916. *All relationship between these physicians and the patient ceased soon after the operation.* On September 3, 1917, a gauze sponge passed from her body, having been left in the abdomen at the time of the operation. The petition was filed April 30, 1918. By the law of Ohio, "Action for malpractice * * * shall be brought within one year after the cause of action thereof accrued." G. C. 11225. The petition was demurred to on the ground that the statute of limitations had run. The lower court sustained the demurrer and judgment was rendered against the plaintiff. The supreme court has recently affirmed the judgment of the lower court, four members of the court concurring and three judges dissenting.

As the case is reported without opinion, we are thrown back upon the two cases cited as precedents to determine the theory of the decision. The case of *Gillette* v. *Tucker* (1902), 67 Ohio St. 106, is identical in its physical facts with the instant case. In each case the surgeon in charge left a sponge in the wound when the incision was closed. The important juridical fact which differentiates the cases is found in the words italicized above; namely, that in the last case the professional relations between the plaintiff and defendant ceased soon after the time of the operation, while in the earlier case such a relation continued up to a point of time within the year before suit was brought. The case of *Gillette* v. *Tucker* was originally decided by an evenly divided court, thus affirming the decision of the circuit court. This decision was in favor of Mrs. Tucker, the patient, who claimed to have been

injured by the negligent treatment of the surgeon. The decision in *Gillette* v. *Tucker* was later reversed in the case of *McArthur* v. *Bowers*, 72 Ohio St. 656 (1905). No opinion is given in this last case. The notation is simply, "Judgment reversed and that of the common pleas affirmed on the doctrine of the dissenting opinion in *Gillette* v. *Tucker*." Finally, in the case of *Bowers* v. *Santee*, 99 Ohio St. 361 (1919), the court said: "We * * * most respectfully disagree with and disapprove the *McArthur* case and we approve and reaffirm the doctrine announced in the *Gillette* case." The doctrine thus finally adopted by the Ohio court is that expressed in the opinion of Mr. Justice Price, at page 133 of the report, which therefore demands a more careful consideration. Price, J., bases his argument on the case of *Perry County* v. *Railroad Co.*, 43 Ohio St. 451 (1885). In this case the injury complained of was one to property, the destruction of a bridge. The court here said: "From the time the injuries complained of were committed * * * the duty of defendant to restore the bridge to its former usefulness and safety was a continuous and subsisting obligation, and each day's failure to make full restoration was a fresh breach of such obligation; and lapse of time cannot avail to interpose a bar to recovery." It has been before argued at considerable length in this REVIEW (Cf. 19 MICH. L. REV. 380) that the theory of the *Perry Co.* case, and consequently that of all the cases since decided in the Ohio court based upon it, is that of a "repeated" wrong, each repetition of which constitutes a new cause of action. If the theory of the instant case, one in which the injury is to the person, is based on the *Perry Co.* case, which is one of injury to property, it is evident that the case of *Clegg* v. *Dearden*, 12 Ad. and El. (n. s.) 575 (1848), and the long course of decisions based on this case, including the troublesome one, *The National Copper Co.* v. *The Minnesota Mining Co.*, 57 Mich. 83 (1885), cannot be used as precedents for the instant case, because the decision in the *Perry Co.* case is directly contrary to the decision of the English court in the case of *Clegg* v. *Dearden, supra,* on the same state of facts. (Cf. 19 MICH. L. REV. 378.)

The question then arises whether the Ohio court has adopted a theory of decision in this case different from that of the court in *Gillette* v. *Tucker* and *Bowers* v. *Santee*. The significant fact in the instant case which differentiates it from the two cases above cited is that in the present case the surgeon did not continue in charge of the case after the operation, with its negligent inclosing of the sponge in the wound, and therefore had no opportunity after that time to correct the negligence of *leaving* the sponge in the wound, hence the statute of limitations begins to run from the time when his last act of negligence occurred and the statutory period had elapsed before the petition was filed in the case. As this case is decided by a divided court, and as it leaves us with a verdict in favor of the defendant instead of with the plaintiff as in the two cases cited as precedents for this decision, we are still confronted with the question as to what the proper ground of decision is in such cases. In the *Gillette* case and in the *Bowers* case the court apparently assumes that a new cause of action arises each day that the foreign body is *left* in the wound. This is shown by Judge Price's use

of the *Perry Co.* case. And as suit is brought within a year after its removal the plaintiff is not barred of her recovery by the lapse of the statutory period. But in the *Amstutz* case, because the surgeon ceases to treat the patient soon after the operation, he is held responsible for the successive irritations caused by the foreign body only up to the time when by removal of the foreign body he might have prevented further irritation. As his last opportunity to correct his blunder was more than a year before suit was brought, the statute was a bar to the recovery; *i. e.*, in the *Amstutz* case the statute begins to run not from the time that the last wrong was inflicted upon the plaintiff but from the time that the surgeon had the last opportunity to correct his original blunder.

The practical result of this decision is to put a very important limitation upon the chance for recovery in the malpractice cases. This limitation is, in fact, incorporated in the decision in the *Gillette* case and in the *Bowers* case. Price, J., says in 67 Ohio St. 133: "The facts in the case at bar show a continuous obligation upon the plaintiff in error, *so long as the relation of employment continued.*" Cf. also *Fronce* v. *Nichols,* 22 O. C. C. 539, 12 O. C. D. 472 (1901); *Perkins* v. *Trueblood,* 180 Cal. 437 (1919); *Miller* v. *Ryerson,* 22 Ont. Rep. 369; *Calumet Elec. St. Ry. Co.* v. *Mabie,* 66 Ill. App. 235 (1896). The Ohio court then seems to be committed to the doctrine that *leaving* the sponge in the wound is a new wrong which gives rise to a new cause of action, but that the last wrong for which the surgeon can be held responsible is the one committed on the last day in which he has charge of the case and consequently has his last opportunity to remedy the wrong, and this seems the doctrine also of the courts above cited. On this point they are at variance with the Pennsylvania court, which holds that "the statute runs against an injury committed * * * from the time of the actual discovery" of the wrong. This in a case where the injury was to land. *Lewey* v. *Frick Coke Co.,* 166 Pa. St. 536, 547 (1895). The holding of the Michigan court in a malpractice case was in accord with that of the Pennsylvania court and contrary to that of the instant case on this point. *Groendal* v. *Westrate,* 171 Mich. 92 (1912). This last case was decided under a statute which said that "the action may be commenced at any time within two years after the person who is entitled to bring the same shall discover that he has such cause of action," if the defendant shall have fraudulently concealed the fact from the plaintiff. We are thus left with all the courts in accord as to the doctrine of "repeated wrong" in the malpractice cases, but at variance on the point as to whether the statute begins to run from the date of discovery of the wrong by the plaintiff or from the date of the last opportunity for the defendant to remedy the wrong. The more liberal rule of the Pennsylvania and Michigan courts would seem to be more in accordance with justice, and in close analogy to those cases in which the statute of limitations is suspended or interrupted during the time when the plaintiff cannot assert his right because of excusable ignorance of its existence or because of some legal bar to its assertion, as when property has been removed from the jurisdiction and the plaintiff is ignorant of its whereabouts. Cf. *Gatlin* v. *Vaut et al.,* 6 Ind. T. 254, 91 S. W. 38, (1906). This is

none the less true when the plaintiff is in ignorance without fault on his part than when his ignorance is caused by the fraudulent concealment of the true state of affairs by the act of the defendant, as in the Ohio and Pennsylvania cases cited above. The plaintiff should not be barred of his right unless he knows of its existence and can take legal steps to vindicate it. As the decision in the instant case is by a divided court, it might be possible that the Ohio court would change its ruling on this point if the issue were squarely presented to it. J. H. D.

LANDLORD AND TENANT—TERMINATION OF TENANCIES FROM YEAR TO YEAR CREATED BY HOLDING OVER.—The plaintiff was a tenant in possession of an office suite held under a three years' written lease at a yearly rental, payable in equal monthly installments. He held over for nearly thirteen years, paying rent regularly. Section 11812, Compiled Laws of Michigan, 1915, reads: "And in all cases of tenancy from year to year, a notice to quit, given at any time, shall be sufficient to terminate said lease at the expiration of one year from the time of the service of such notice." It was *held* (two judges dissenting), that the landlord could terminate the plaintiff's tenancy at the end of the year period, without notice. The injunction asked for was refused. *Rice* v. *Atkinson, Deacon, Elliott Co.* (1921), 215 Mich. 371.

In the majority opinion we find the following pertinent language: "While a tenant paying an annual rental who holds over after his term has expired with the acquiescence of his landlord is frequently called a tenant from year to year, I am persuaded that such tenancy does not possess all the attributes of one from year to year. * * * The question, however, is one of authorities, and to them I shall now call attention." In considering the authorities, the court first quotes from CYC.: "In some cases a distinction seems to have been made between those tenancies from year to year arising from leases for indefinite terms, and those arising from a holding over by the tenant after the expiration of a lease for a specified term. Thus, it has been held that a tenant who occupies demised premises for several years after the termination of his lease creates each year a new term expiring at the close of the current year, and requiring no notice for its determination." 24 CYC. 1381. Two cases are there cited in support of that view. *Adams* v. *City of Cohoes,* 127 N. Y. 175; *Gladwell* v. *Holcomb,* 60 Ohio St. 427. So far as the language used by the author in CYC. is concerned, it must be noted that he said no more than that "some cases" have made a distinction. The next text-writer quoted is McAdam, and it must be conceded that he supports the view taken by the majority in the principal case. MCADAM ON LANDLORD AND TENANT (Ed. 4), p. 667. Three New York cases are cited by McAdam in support of his view. *Adams* v. *City of Cohoes, supra; Park* v. *Castle,* 19 How. Pr. 29; *Rorbach* v. *Crossett,* 46 St. R. 426, [19 N. Y. Supp. 450]. The court next relies upon Taylor: "When a tenant for a year, or any other ascertained period, holds over without permission, no notice is of course necessary, since, without some fresh agreement, express or implied, the tenancy by its own terms is at an end." 2 TAYLOR ON LANDLORD AND TENANT (Ed. 9), p. 52. Analysis of that statement will certainly reveal that

it is not in point. On the same page Taylor says: "A tenant for years, also, who holds over, so as to create a tenancy from year to year, by implication and without any specific act of recognition by the landlord, is entitled to notice before he can be ejected." It will be necessary to quote only a part of the court's extract from the next text-writer: "A distinction has been made by the authorities as to the necessity for a notice to quit between that class of cases where the tenancy is of an indefinite duration or for an indefinite number of years, as was the universal character of these tenancies from year to year in their original condition, and the class of tenancies from year to year which arises when a tenant holds over with the consent of his landlord after the expiration of a definite term. * * * In theory a tenant from year to year under an indeterminate lease has in each current year a growing interest in the year next ensuing, which cannot be arbitrarily destroyed by his landlord without notice to quit. Where, however, a tenant holds over after the expiration of a definite term, and by so doing creates a tenancy from year to year, no year of the tenancy thus created by holding over arises out of or is connected with the year which precedes it, but each year of the holding over creates a new and separate contract for a year between the parties which, being for a fixed and definite period, may, according to the rule, be terminated without notice." 1 UNDERHILL ON LANDLORD AND TENANT, p. 157. It is rather obvious that the extract from Underhill can mean no more than that there is a division of authorities upon the point involved. In that connection, Underhill cites two cases which support the rule and two opposed to it. *Gladwell* v. *Holcomb, supra; Adams* v. *City of Cohoes, supra* (accord); *Peehl* v. *Bumbalek,* 99 Wis. 62; *Roberson* v. *Simons,* 109 Ga. 360 (*contra*). The court's last text citation is to the same effect as that from Underhill. 16 RULING CASE LAW 1167. *Gladwell* v. *Holcomb* and a note in 25 L. R. A. (n. s.) 849 are cited in R. C. L. Examination of the note in L. R. A. reveals no new authorities. A few pages beyond the court's quotation from R. C. L. appears the following: "Still, in case of a tenancy for a term of years, if the tenant holds over with the consent of the landlord, a new tenancy from year to year may arise which will necessitate a notice to quit to terminate it." 16 R. C. L. 1173.

An appraisal of the authoritative value of the above extracts from the text-writers will make it necessary to examine the cases cited by them. The New York cases will be first considered. In *Park* v. *Castle, supra,* there was a verbal lease for one year, and the tenant held over for about eleven months, paying rent. The landlord then gave notice that he would terminate the lease at the end of that year. The tenant claimed the right to six months' notice as a tenant from year to year. The court said: "There can be no doubt but that the defendant, by holding over after the expiration of the year for which he hired the farm, without any new agreement, but by the permission of the plaintiff, became a tenant from year to year. The authorities agree in regard to this proposition." The court decided that notice to terminate at the end of the period was not necessary, but placed its decision squarely upon its interpretation of a New York statute. "I think the term of a tenant, from year to year, should be regarded as ended, within the

meaning of the Revised Statutes authorizing the summary removal of tenants, at the expiration of each year he holds over the original term. It is so, in fact, especially since no verbal contract for leasing is good for a longer period than one year. (2 R. S., 135, §8.)" *Rorbach* v. *Crossett,* 19 N. Y. Supp. 450, and *Adams* v. *City of Cohoes, supra* (the most cited New York case), are to the same effect as *Park* v. *Castle,* and they rely upon that case as authority. The question of "notice to quit" was not directly involved in the case of *Kennedy* v. *City of New York,* 196 N. Y. 19. We are justified, then, in dismissing the New York cases as irrelevant, in that they were decided under a statute which the courts considered obviated the necessity of notice to quit.

Gladwell v. *Holcomb, supra,* is considered to be the *leading case* in point. There was a written lease for one year in that case and the tenant held over for six years, paying rent. Four months before the end of this six years of holding over the landlord gave notice that the tenant should quit at the end of the period. The court took the view that a tenancy from year to year was created by the holding over, but that it could be terminated without notice, advancing the theory that this sort of tenancy from year to year was in fact successive tenancies for year periods. The court recognized that this was a case of first instance in Ohio, and it cited no other case squarely in point. Its decision seems to have been prompted by a consideration other than that of a rule concerning notice. "If six months, or any number of months notice, before the end of the year were required to terminate the tenancy, then, upon the failure to give such notice, a new implied agreement, with the tenant in possession under a former one, would immediately arise, for another year commencing in the future, which could not less certainly be obnoxious to the statute [of frauds] than an express parol agreement for a future lease; and an agreement of that kind not accompanied with actual possession taken under it has been repeatedly held invalid."

The difficulty which the courts had with the Statute of Frauds, in *Park* v. *Castle* and *Gladwell* v. *Holcomb,* seems not to have troubled most of the courts. With reference to tenancies from year to year created by holding over, it has been said: "Promises of this character are implied by *law* from the acts of the parties, rather than from any supposed special agreement between them. They do not, therefore, come within the evil of the statute of frauds, and are commonly adjudged to be excepted from its operation." *Singer Manufacturing Co.* v. *Sayre,* 75 Ala. 270.

Turning to the Michigan decisions, the court cites one case which it considers to be directly in point. *Teft* v. *Hinchman,* 76 Mich. 672. In that case the tenant held under a verbal lease for two years. At the expiration of this term the landlord gave notice to quit. Tenancy from year to year is not even mentioned in the opinion. Although it is not clear, it seems that the court was of the opinion that the holding for the second year was valid by reason of the verbal lease plus an actual occupation for the period of the lease. Judge Morse said: "The second year Hinchman was holding the same as under a verbal lease for one year. At the end of it he required no notice to terminate it." What is said in a later Michigan case would

seem to indicate that the Michigan court considers that a verbal lease for more than a year, plus actual occupation for the full period, will make a valid lease for the full term, at least so far as to obviate the necessity of a notice to terminate at the end of the term for which the verbal lease was made. *Barlum* v. *Berger,* 125 Mich. 504. In that case there was a verbal lease for a five-year period, reserving a monthly rent. The tenant held over, paying rent each month. The court said: "This was not a tenancy from year to year. It was a tenancy continuing five years from June 1, 1894, and terminating June 1, 1899. While the agreement was not in writing, yet it was fully performed by the parties, and therefore cannot now be treated as a void lease." It was held that the paying of a monthly rent after the expiration of the term created a tenancy from month to month and the tenant was entitled to one month's notice to quit as provided for by statute in the case of tenancies from month to month. In *Ganson* v. *Baldwin,* 93 Mich. 217, Morse, C. J., said: "This agreement, however, as testified to by complainant, was good for a year, and, while acquiesced in by her, the defendant must be considered as holding from year to year. *Schneider* v. *Lord,* 62 Mich. 141; *Huntington* v. *Parkhurst, 87 id.* 38. The defendant was therefore entitled to a year's notice to quit." It is a very significant fact that this statement of the rule comes from the same judge who wrote the opinion in *Teft* v. *Hinchman, supra.* The cases and text-writers have not cited *Teft* v. *Hinchman* as supporting the rule contended for in the principal case.

Tenancies from year to year are generally held to arise in three types of cases: 1. Expressly. 2. Where the tenant enters and holds under a lease made void by the statute of frauds. 3. Where the tenant holds over after the expiration of a lease for years. *Teft* v. *Hinchman, supra,* may be considered as a case of the second type, and even if the Michigan court had expressly characterized the term in question as a tenancy from year to year, it could have found authority to the effect that such a tenancy initiated under a void lease could be terminated by either party to it, without notice, at the time when the void lease would expire by its terms. TIFFANY ON LANDLORD AND TENANT, pp. 250, 251.

A distinction between tenancies from year to year, such as that made by Underhill (see extract from Underhill, *ante*), on the theory that "a tenant from year to year under an indeterminate lease has in each current year a growing interest in the year next ensuing, which cannot be arbitrarily destroyed by his landlord without notice to quit," would seem to be very hard to justify, in that the right and obligation to hold for another year comes into being by operation of law at the moment when the time for giving the six months' notice to quit expires. The same error is found in *Gladwell* v. *Holcomb* and 16 R. C. L., p. 1167.

It is to be regretted that the court, in the principal case, did not have before it the opinion of the best recent text-writer. Mr. Tiffany says: "The weight of authority is to the effect that if the previous tenancy was for one or more years, the new tenancy thus created 'by implication' is, presumptively, one from year to year." TIFFANY ON LANDLORD AND TENANT, p. 1482.

He cites cases from England and *eighteen* of our states, including Michigan, in support. Again: "Conceding that the new tenancy, created by a permissive holding over, is in the particular case periodic, it can, by the weight of authority, be determined only by notice, as in the case of a similar periodic tenancy otherwise created." *Id.*, p. 1487. Here cases from *eight* states are cited. Tiffany observes that *Gladwell* v. *Holcomb, supra,* is *contra. Id.*, p. 1488. An examination of the cases cited by Tiffany discloses that in all of those jurisdictions he has really found authority for his conclusions.

Concerning the origin of tenancies from year to year, Lord Kenyon, C. J., said in *Doe* v. *Porter,* 3 D. & E. *13: "The tenancy from year to year succeeded to the old tenancy at will, which was attended with many inconveniences. And in order to obviate them the courts very early raised an implied contract for a year, and added that the tenant could not be removed at the end of the year without receiving six months' previous notice." An old but very high authority deciding the question raised in the principal case is *Right* v. *Darby* (1786), 1 Term Rep. 159, in which Lord Mansfield, C. J., said: "If there be a lease for a year, and by consent of both parties the tenant continue in possession afterwards, the law implies a tacit renovation of the contract. They are supposed to have renewed the old agreement, which was to hold for a year. But then it is necessary for the sake of convenience, that, if either party should be inclined to change his mind, he should give the other half a year's notice before the expiration of the next *or any following year.*" In the same case Buller, J., observes that the same rule applies to houses as applies to lands, and with reference to notice to quit says: "This doctrine was laid down as early as the reign of Henry the Eighth."

In the principal case the court might have advanced *good reasons* for abrogating the well-settled rule requiring "notice to quit" in the case of tenancies from year to year created by holding over; but if the question is really "one of authorities," as the court stated, it is certainly difficult to justify its decision. G. S.

OPERATION AND EFFECT OF RECORDING.—While the operation of the recording acts is not uncommonly said to result in a preference of the earlier recorded instrument on the ground that under the circumstances the later grantee takes "with notice," the true view in the normal case would seem to be that the earlier grantee is preferred because priority in time gives priority in right—and by recording, he has done all that is required to *preserve* that favored position. Recording does not ordinarily *give* preference, it merely *safeguards* priority. Reference is here made to the normal case because it is, of course, true that there are certain special cases, not necessary to notice here, in which, independently of the recording acts, priority in time does not necessarily give priority in right. And there are other cases, one type of which will be discussed herein, in which it is important to observe that recording does give *notice.*

If A conveys land to B, who records, and later A executes a deed of the same land to X, B's rights are superior to X, not because X took with

notice, but because B, without any reference to recording or the statutes, had priority of time and therefore of right and has not been guilty of any omissions which might have lost him such favored position. So if A conveys lot one to B together with an easement over A's remaining lot two, and B records, a subsequent purchaser of lot two from A takes subject to the easement, and the reason is the same as in the case above. So, also, if A in his deed of lot one to B creates in his favor an equity—for example, a building restriction—in his remaining lot two, and A later confers upon X an equitable interest—for example, by contract of sale—in lot two, B is preferred as against X for the reason given above. There are situations in which as between competing equities priority of time does not confer priority of right (see ASHBURNER, PRINCIPLES OF EQUITY, pp. 78, *et seq.*; 2 TIFFANY ON REAL PROPERTY [Ed. 2], §566c), but the case supposed is not one of these.

But if in the last case A for value conveys to X a legal estate, the question becomes of vital importance as to whether X had "notice" of B's equitable interest in lot two. Assuming lack of actual notice or knowledge in X, the case turns on whether he was charged with notice by the fact that B's deed was on record. That he is not charged with notice was held in *Judd* v. *Robinson*, 41 Colo. 222, 14 Ann. Cas. 1018, and in *Glorieux* v. *Lighthipe*, 88 N. J. L. 199, Ann. Cas. 1917 E, 484. In these cases the ground for the decision is that the deed to B is not in X's "chain of title"; the New Jersey court further considering that "subsequent purchasers" as used in the statute as to whom recording gives notice includes only subsequent purchasers from the same grantor *of the same land*. On the contrary, it has been held that under the circumstances stated X is charged with notice. *Lowes* v. *Carter*, 124 Md. 678; *King* v. *Union Trust Co.*, 226 Mo. 351; *Whistler* v. *Cole*, 143 N. Y. Supp. 478. In the recent case of *McQuade* v. *Wilcox*, 215 Mich. 302 (1921), the latter view was unnecessarily adopted. The powerful support of Professor Tiffany is thrown with the latter group of cases. 2 TIFFANY ON REAL PROPERTY [Ed. 2], 2188.

The apparent conflict in the cases is due to a difference of opinion as to what is included in one's "chain of title." When it is said that one is charged with notice of provisions in instruments properly recorded it must be understood that such notice applies only to instruments in the "chain of title." *Simonson* v. *Wenzel*, 27 N. D. 638; *Losey* v. *Simpson*, 11 N. J. Eq. 246; *Rankin* v. *Miller*, 43 Iowa 11.

The determination as to what is included in one's chain of title, whether for the purpose of deciding the question of notice or the invalidity of a transfer as against a subsequent grantee, mortgagee, etc., must, after all, turn on the theory of the recording system and the reasonableness of the burden thrown upon the searcher of the records. Unquestionably the basic idea of the system is the creation of a public record of instruments of title from which a prospective purchaser of a tract of land may with reasonable certainty assure himself as to the safety of dealing with a given person. How far the system falls short of effecting this ideal is another story. In the cases proposed at the beginning of this note, X, under the usual grantor-grantee index system, presumably would find on the records a deed of lot

two to A; it would then be incumbent upon him to look through the index of grantors for deeds executed by A. His attention would be directed to the deed from A to B, which on a casual inspection would appear to affect only lot one, in which X is not interested. Should he be expected to examine that deed or its record so thoroughly that *in the light of the circumstances* (some of which may very well not appear except outside the instruments and records) he should realize that there was an equitable restriction on A's remaining lot two? Right here is where the two lines of authority diverge. Against the view approved by the principal case it may be urged that a tremendous burden is placed on the searcher of titles, whether he be prospective purchaser, attorney, or abstracter. On the other hand, it may very truly be said that the efficacy of efforts to restrict a given area will be very much increased by following such doctrine.

It was said above that the Michigan court unnecessarily gave its approval to the doctrine announced. It was unnecessary because the defendant in the case—the one who occupied the position of X in the case supposed—had only the equitable interest of a contract vendee. As between B and X, both having mere equities, B's priority of time gives him the favored position which he preserved in the principal case by taking all the steps required by the law to *preserve* such priority, namely, recording. The case should not have been decided on the matter of *notice.* R. W. A.