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SPECIAL PLEAS OF AFFIRMATIVE DEFENSES BY DEFENDANT IN CRIMINAL CASES

Civil pleading at common law labored in almost metaphysical detail to narrow issues of both law and fact. But perhaps as an echo of the severity of criminal justice,[1] the pleadings of a defendant in a criminal trial were so constructed as to give him wide latitude in defense, through the means of a single simple plea. Under the plea of not guilty he could, and in most states

[1] See MINNESOTA CRIME COMMISSION REPORT (1927) 28.

now still can, and must,[2] raise such issues as insanity,[3] alibi,[4] self-defense,[5] intoxication,[6] and the statute of limitations.[7] At common law he was, however, forced to plead *autrefois acquit* and *convict* specially in bar,[8] and today eleven jurisdictions have expressly incorporated this practice into their statutes.[9] In one case such a statute was interpreted to allow the defense of former jeopardy under a plea of not guilty,[10] a result which cannot arise in the seven states which have an additional, inclusive [11] plea of former jeopardy.[12] The states which have no statute on the subject almost uniformly perpetuate the common-law practice by judicial decision,[13] but an exception has been made when all the facts are of record and may be judicially noticed.[14] The

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[2] Special pleas of matter which might come in under not guilty are properly disallowed. State v. Karagavoorian, 32 R. I. 477, 79 Atl. 1111 (1911); Stacks v. State, 20 Ala. App. 462, 103 So. 70 (1925).

[3] State v. Speyer, 207 Mo. 540, 106 S. W. 505 (1907); Johnson v. State, 57 Fla. 18, 49 So. 40 (1909).

[4] See Allbritton v. State, 94 Ala. 76, 77, 10 So. 426 (1892).

[5] State v. Linden, 154 La. 65, 97 So. 299 (1923).

[6] People v. Collins, 30 Cal. App. 656, 159 Pac. 229 (1916).

[7] James v. State, 110 Ark. 170, 160 S. W. 1090 (1913); People v. Bailey, 103 Misc. 366, 171 N. Y. Supp. 394 (Sup. Ct. 1918).

[8] 2 BISHOP, NEW CRIMINAL PROCEDURE (1913) § 806.

[9] ALASKA COMP. LAWS (1913) § 2208; ARK. DIG. STAT. (Crawford & Moses, 1921) § 3074; IOWA CODE (1927) § 13799; KY. CRIM. CODE (Carroll, 1927) § 172; MINN. STAT. (Mason, 1927) § 10695; N. Y. CRIM. CODE (Bender, 1928) § 332; OHIO CRIM. CODE (Patterson, 1924) § 13447; OKLA. COMP. STAT. ANN. (1921) § 2617; ORE. LAWS (Olson, 1920) § 1500; S. D. REV. CODE (1919) § 4780; WASH. COMP. STAT. (Remington, 1922) § 2108.

[10] People v. Cage, 48 Cal. 323 (1874).

[11] The plea of former jeopardy may include *autrefois acquit* and *convict*. See State v. Keerl, 33 Mont. 501, 515, 85 Pac. 862, 865 (1906).

[12] ARIZ. PEN. CODE (1913) § 989; CAL. PEN. CODE (Deering, 1923) § 1016; IDAHO COMP. STAT. (1919) § 8879; MONT. REV. CODES (Choate, 1921) § 11907; NEV. REV. LAWS (1912) § 7106; N. D. COMP. LAWS ANN. (1913) § 10746; UTAH COMP. LAWS (1917) § 8898.

[13] Territory v. Labato, 17 N. M. 666, 134 Pac. 222 (1913), *aff'd sub. nom.* Lovato v. State, 242 U. S. 199, 37 Sup. Ct. 107 (1916), L. R. A. 1917A 1233. The purpose of this type of plea has been indicated as notice to the opposing side. See State v. Johnson, 11 Nev. 273, 276 (1876); State v. Reilly, 94 Conn. 698, 703, 110 Atl. 550, 552 (1920) (notice by state; increased penalties for repeated offense). But see Davis v. State, 152 Ind. 145, 148, 52 N. E. 754, 755 (1899), perhaps explained by IND. ANN. STAT. (Burns, 1926) § 2230.

[14] State v. White, 71 Kan. 356, 80 Pac. 589 (1905); People v. Taylor, 117 Mich. 583, 76 N. W. 158 (1898); Riggs v. State, 96 S. W. 25 (Tex. Cr. App. 1906); Belter v. State, 178 Wis. 57, 189 N. W. 270 (1922); see George v. State, 59 Neb. 163, 168, 80 N. W. 486, 487 (1899); Jackson v. State, 11 Okla. Cr. 523, 527, 148 Pac. 1058, 1060 (1915). But former jeopardy must be raised by special plea when the indictment is not the same though in the same court and before the same judge. People v. Bennett, 114 Cal. 56, 45 Pac. 1013 (1896); see State v. Cross, 44 W. Va. 315, 319, 29 S. E. 527, 528 (1898).

special plea is tried separately in advance of the issue of not guilty,[15] and will not alone survive the withdrawal of a plea of not guilty in favor of a plea of guilty.[16] Only four states definitely allow the defense of former jeopardy under a plea of not guilty.[17] The other common-law special plea, that of pardon,[18] has survived in statute [19] and case [20] law, and a special plea may be necessary to set up an immunity from prosecution.[21] These were the compulsory special pleas,[22] and while the defendant was at liberty to plead the statute of limitations specially, this course was merely optional with him.[23]

The function of compulsory special pleading of affirmative defenses may be to narrow the issues by exclusion of all save those pleaded; to give notice of the defense to be relied on, and perhaps, incidentally, to separate the issues for the consideration of the jury. On the theory of notice, special pleas amounting to an outline of defense have been urged,[24] as a method of more nearly equalizing the position of the state and the defendant.[25] Fur-

[15] See United States v. Hopkins & Co., 228 Fed. 173, 175 (S. D. N. Y. 1912); Parsons v. State, 179 Ala. 23, 24, 60 So. 864, 865 (1913).

[16] People v. Strickler, 167 Cal. 627, 140 Pac. 270 (1914).

[17] People v. Hawkinson, 324 Ill. 285, 155 N. E. 318 (1927); Barker v. State, 188 Ind. 263, 120 N. E. 593 (1918); State v. Salter, 256 S. W. 1070 (Mo. App. 1923) (under a broad not guilty plea); State v. Conlin, 27 Vt. 318 (1855); and perhaps Morrisey v. People, 11 Mich. 327 (1863).

[18] CLARK, CRIMINAL PROCEDURE (2d ed. 1918) § 139.

[19] NEB. COMP. STAT. (1922) § 10118; OHIO CRIM. CODE (Patterson, 1924) § 13630; WYO. COMP. STAT. ANN. (1920) § 7492.

[20] See Michael v. State, 40 Ala. 361, 370 (1867); United States v. Schreck, 6 Alaska 412, 418 (1921); State v. Blalock, 61 N. C. 242, 247 (1867). *Contra*: Powers v. Commonwealth, 110 Ky. 386, 61 S. W. 735 (1901). It may be pleaded at any time. See Territory v. Richardson, 9 Okla. 579, 590, 60 Pac. 244, 247 (1900). And perhaps it may be raised on motion. See United States v. Wilson, 32 U. S. 150, 163 (1833).

[21] Scribner v. State, 90 Okla. Cr. 465, 132 Pac. 933 (1913); State v. Sine, 91 W. Va. 608, 114 S. E. 150 (1922).

[22] Another might be added in a plea of non-identity in escape. See Thomas v. State, 6 Miss. 20, 31 (1840).

[23] 2 BISHOP, *op. cit. supra* note 8, § 799 (5). Some cases seem to require a special plea. People v. Murphy, 296 Ill. 532, 129 N. E. 868 (1921); see State v. McIntire, 58 Iowa 572, 573, 12 N. W. 593 (1882); Commonwealth v. Ruffner, 28 Pa. 259, 260 (1857); *cf.* State v. Thrasher, 79 Me. 17, 7 Atl. 814 (1887) (cannot be raised on motion in arrest of judgment). Others refuse to allow it at all. State v. Johnson, 217 N. W. 205 (S. D. 1927); *cf.* United States v. Barber, 219 U. S. 72, 31 Sup. Ct. 209 (1911) (result from statute on continuing conspiracy). The special plea does not warrant a separate preliminary trial of the issue. State v. Snyder, 182 Mo. 462, 82 S. W. 12 (1904).

[24] See Millar, *The Function of Criminal Pleading* (1922) 12 J. CRIM. L. 500, 503; Freeman, *Should the Defendant in a Criminal Case File a Written Pleading Outlining His Defense?* (1924) 8 MINN. L. REV. 357.

[25] Accordingly in those states where the prosecution must furnish the defendant with a list of its witnesses, the defendant is to reciprocate with a list of his witnesses. Millar, *op. cit. supra* note 24, at 504. This has been

thermore, it seems that the plan would have the merit of saving the state the unnecessary expense of preparation for undisputed issues.

It is obvious that any breaking up of the inclusive plea of not guilty must come through statutory change. In the past only one jurisdiction has been at all thorough in the process. In Scotland it is not "competent for the person accused to state any special defense unless a plea of special defense shall be tendered and recorded. . ." [26] and under the Scotch statute there must be pleas for alibi, insanity and self-defense.[27] This seems admirably to fulfill the purpose of notice to the prosecution. The defense must be outlined, and the requirement in the statutory section that the defendant furnish the prosecution a list of his witnesses, and in certain cases what they are to prove,[28] practically confines his case to the issues pleaded. In this way the issues might be said to be narrowed, but not exactly by the same process of exclusion as that of the common-law "rule" against duplicity of pleading in criminal cases,[29] which, incidentally, has caused some courts trouble in connection with special defenses.[30] The Scotch statute leaves untouched the question of separation of issues for the jury.

Legislation in this country has stopped far short of the range of the Scotch statute. No provisions for special pleas of self-defense, alibi, or the statute of limitations have been found. There is, however a requirement of a special plea of the defense of insanity in seven states; [31] three more have express provision for a special plea optional with the defendant; [32] and in at least

done. Wash. Laws 1925, 420, § 2, amending WASH. COMP. STAT. (Remington, 1922) § 2050; 50 & 51 VICT. c. 29, § 36 (1887). While this might jeopardize a defendant by subjecting his witnesses to popular disfavor and intimidation before trial, it would seem to do no more than to balance the situation which now exists where the state alone must furnish to the defendant a list of its witnesses.

[26] 50 & 51 VICT. c. 29, § 36 (1887).

[27] RENTON & BROWN, CRIMINAL PROCEDURE ACCORDING TO THE LAW OF SCOTLAND (1909) 73.

[28] *Ibid.* 319.

[29] 2 BISHOP, *op. cit. supra* note 8, § 748.

[30] Special pleas have not been allowed with a plea of not guilty. Rex v. Banks, [1911] 2 K. B. 1095, Ann. Cas. 1912A 439; See State v. Ward, 49 Conn. 429, 436 (1881).

[31] ALA. CRIM. CODE (1923) § 4572; Cal. Laws 1927, c. 677; Colo. Laws 1927, c. 90, §§ 1, 2, 3; IND. ANN. STAT. (Burns, 1926) § 2230; Ohio Laws 1927, § 13608; WASH. COMP. STAT. (Remington, 1922) § 2174; WIS. STAT. (1927) c. 357, § 11.

[32] NEB. COMP. STAT. (1922) § 10164; N. H. Laws 1926, c. 369, § 2; N. Y. CODE CRIM. PROC. (Gilbert, 1928) § 336. In New York evidence of insanity may be received without the special plea. People v. Joyce, 233 N. Y. 61, 134 N. E. 836 (1922). GA. PEN. CODE (1926) § 976 would appear to allow a special plea of insanity at the time of the offence, but such plea has been stricken without error. Alford v. State, 137 Ga. 458, 73 S. E. 375 (1911).

one other state it is probable that such a special plea would not be stricken.[33] This is the extent of legislative action.[34]

While the statutes requiring the compulsory plea of insanity are quite dissimilar, they have certain homogeneous characteristics. Under them, in the absence of such a plea, no evidence of insanity can be introduced,[35] no argument on the subject made,[36] and charges on the issue are properly refused.[37] Except for the Colorado and the Ohio statutes, they apply only to the defense of insanity at the time of commission of the offense charged.[38] The Washington statute further requires in the plea a statement as to whether or not the defendant is sane at the time of the trial.[39] A written plea is required, except in California and Colorado.[40] It is generally to be interposed at the time of arraignment and plea to the indictment or information, but may be allowed later in the discretion of the court.[41] In every state except Colorado, and perhaps Ohio,[42] the form is that of a separate plea rather than a specification under the plea of not guilty. And uniformly, the plea is not exclusive, it may be interposed with other pleas;[43] moreover, California expressly provides that the plea alone, without an accompanying plea of not guilty, admits the commission of the act charged.

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[33] ME. REV. STAT. (1916) c. 139, § 1.

[34] There have been two as yet unadopted proposals for special pleas of insanity: in the LOUISIANA PROPOSED CODE OF CRIMINAL PROCEDURE (1910) arts. 292-298, reprinted in (1913) 3 J. CRIM. L. 890 at 900; and in the MISSOURI CRIME SURVEY (1926) 371. The provisions which they contain are discussed *infra*.

[35] Walker v. State, 136 Ind. 663, 36 N. E. 356 (1894); Baker v. State, 209 Ala. 142, 95 So. 467 (1923).

[36] Walker v. State, 91 Ala. 76, 9 So. 87 (1891). And the special issue need not be submitted to the jury. McVey v. State, 169 Wis. 72, 171 N. W. 666 (1919).

[37] Matthews v. State, 16 Ala. App. 514, 79 So. 507 (1918).

[38] This may be implied from a provision for summary inquisition in the case of insanity at the time of trial. *Cf.* ALA. CRIM. CODE (1923) § 4575; WIS. STAT. (1927) c. 357, § 13.

[39] An original plea of sanity at trial waives a later defense of insanity at trial. State v. Schrader, 135 Wash. 650, 238 Pac. 617 (1925).

[40] The original Wisconsin statute, WIS. REV. STAT. (1878) § 4697, required the "filing" of a plea—now it is merely to be "interposed"; but there is nothing to indicate that writing is not required.

[41] See Knott v. State, 202 Ala. 360, 362, 80 So. 442, 444 (1918). In Washington it must be made before the issues are submitted to the jury. State v. Wilson, 69 Wash. 235, 124 Pac. 1125 (1912). In Indiana the court is apparently very liberal in allowing late pleas. See Barber v. State, 197 Ind. 88, 96, 149 N. E. 896, 899 (1925) (on day of trial). A late plea will often be refused if unaccompanied by affidavits of merit. See Goodman v. State, 15 Ala. App. 161, 162, 72 So. 687, 688 (1916).

[42] The Ohio plea is in the form of a notice to the judge in writing "upon plea pleaded." A separate plea is indicated.

[43] Its withdrawal does not withdraw other pleas. State v. Quinn, 56 Wash. 295, 105 Pac. 818 (1909).

A separate trial of the special issue in advance of trial on the merits was stipulated by the original Wisconsin statute[44] but the provision has been abandoned. Such trial is discretionary in Colorado.[45] California provides for a preliminary trial on the merits in which the defendant is conclusively presumed to be sane, and, if the verdict therein is in favor of the prosecution, for a subsequent separate trial of the insanity issue, in which the same or a new jury can be used at the discretion of the court.[46] One of the leading purposes of these statutes has been the separation for the jury of the issues of insanity and the merits,[47] thus narrowing the possibility of acquittal through sympathy or prejudice. All the states under discussion have provisions for special verdicts in case of insanity,[48] but only the

[44] WIS. REV. STAT. (1878) §§ 4697, 4699. It was error on the trial of the special issue, for the jury to consider any question save sanity alone. Hoiss v. State, 79 Wis. 513, 48 N. W. 517 (1891). The same jury was required for both parts of the trial, but this was subject to waiver by the defendant. Osborn v. State, 143 Wis. 249, 126 N. W. 737 (1910). The advance trial of insanity has been criticized. (1927) 31 LAW NOTES 44.

[45] Colo. Laws 1927, c. 90, § 3. The case "in the discretion of the court, may be either set for trial on the insanity issue alone and the defendant committed to the . . . State Hospital . . . or held for trial, dependent on the verdict of the jury, or be tried on the main case."

[46] This provision for two juries may be open to objection in that there would be an added chance of sympathy verdicts from the possibility of the larger number of jurors before whom the case might be tried. There might also be a question of the constitutionality of allowing a separate jury on the insanity issue, thus making it possible for twenty-four jurors instead of the jealously guarded number twelve to sit on the trial of the case. Trial by any number over twelve has been held error. State v. Hudkins, 35 W. Va. 247, 13 S. E. 367 (1891). And apparently no waiver of constitutional privileges by the defendant can here be implied. But the common-law special pleas were originally triable by special jury, and now are so in the court's discretion. See State v. Hudkins, *supra* at 250, 13 S. E. at 367. It might be argued that insanity now being a special plea, the same discretion should be allowed in its trial. The Revisers of the original Wisconsin statute apparently adopted this reasoning implicitly. See WIS. REV. STAT. (1898) note to § 4700. But this argument might be weakened by the fact that the common-law special pleas differ from the plea of insanity in that they are not only conclusive in themselves, but have always been considered as quite distinct from the merits. At any rate the provision seems of relatively little practical importance; a new jury would be only added delay and expense, and would furthermore seem unnecessary in almost any case if the separation of issues accomplishes the shortening of trial expected of it. See REPORT OF THE COMMISSION FOR THE REFORM OF CRIMINAL PROCEDURE (Cal. 1927) 16. Even if it be unconstitutional it would not threaten the constitutionality of the whole section because it is clearly separable from the main body.

[47] See Maxwell v. State, 89 Ala. 150, 165, 7 So. 824, 829 (1889); REPORT OF THE COMMISSION FOR THE REFORM OF CRIMINAL PROCEDURE (Cal. 1927) 16; WIS. REV. STAT. (1898) note to § 4700, containing the Revisers' defense of their statute.

[48] Provisions are found either in the section with the plea stipulation, or

California, and possibly the Colorado,[49] statutes seem to have special procedure as well.

The further purpose of notice to the state that the defense will be raised has been an influential consideration,[50] but in the American statutes, except where the defendant must furnish the state with a list of his witnesses, it is ill accomplished, for he may interpose as many pleas as he will and thus leave the state no better prepared for his actual defense than would be the case under a simple inclusive plea of not guilty.

In conclusion, the purpose of notice to the state of the defendant's case seems best fulfilled by a statute such as that of Scotland, which covers all defenses that might conceivably surprise the prosecution, and, by the exchange with the state of the respective witness lists, prevents the possibility of every defendant pleading all the defenses with no intention of using many of them. Only in this way, or by the common-law rule against duplicity of pleading are the issues narrowed so as to save the state expense in preparing its case. The weakness of the American statutes from the standpoint of notice seems to lie in the fact that the defendant can plead all the pleas and leave the state no better informed than if there were no statute. But notice is necessary chiefly in alibi cases, and as the American statutes are confined to the defense of insanity, it may not be a major consideration in them. Still, it may be thought advisable to require a perfunctory notice of other defenses in addition to a detailed outline of alibi.[51]

The strict function of special pleading ceases here. But in the matter of insanity, separation of issues for trial intrudes itself. If no other manner of dealing with insanity is contemplated, a provision such as that of the California statute[52] may be of value. It may well be that the influence of the jury's sympathy and prejudice will be felt less when there are separate, distinct provinces to consider. And it may be that this procedure will ultimately shorten the time of trials. Yet the true answer to these questions is in conjecture. And it must be remembered that the reform contemplated here goes no further than a mere rearrangement of the order of trial; the same witnesses and the same evidence will be used; there is no recognition of the real incapacity of the jury to cope with the question of insanity. The

directly following the plea section, and in IND. ANN. STAT. (Burns, 1926) § 2292.

[49] In Colorado this procedure is discretionary. See *supra* note 45.

[50] REPORT OF THE COMMISSION FOR THE REFORM OF CRIMINAL PROCEDURE (Cal. 1927) 16; see Walker v. State, *supra* note 35, at 668, 36 N. E. at 357. Notice is explicit in the Ohio statute. *Supra* note 19.

[51] See Millar, *The Reform of Criminal Pleading in Illinois* (1917) 8 J. CRIM. L. 337, 360.

[52] *Supra* note 31.

appointment of expert witnesses by the court,[53] or the preliminary psychiatric examination of certain defendants[54] seem to come nearer the root of the trouble, and by a more modern attack.[55]

WHAT POWERS CAN A SETTLOR RETAIN IN A TRUST WITHOUT RENDERING IT SUBJECT TO INHERITANCE TAXATION?

The purpose of inheritance tax legislation is to tax the privilege of passing[1] or receiving property at death. The transfer of property during the life of the donor falls outside the provisions of the tax. Thus, within limits prescribed by statute, gifts inter vivos[2] and trusts created during the life of the settlor for a valid consideration[3] do not form part of the settlor's estate for taxation purposes. Where, however, the settlor creates a trust but retains some interest connected with the trust property for himself during life, the question arises whether such trust is properly within the provisions of inheritance tax statutes.

A settlement may be made whereby the settlor retains either the income of or the supervision over the trust funds, he may retain the power of revocation, the power to change beneficiaries, or to vote shares forming part of the trust fund. In such cases does the trust become taxable as part of the decedent's estate?

The statutes governing the matter unfortunately do not define what powers, if any, the grantor may retain. Under federal[4] and state statutes generally[5] it is provided that transfers of property "intended to take effect in possession or enjoyment at or after" the death of the settlor shall be taxed. This rough test

[53] *Cf.* Ohio Laws 1927, § 13608. The combination of this provision with that of a separate trial would seem most effective, although the appointment is left with a legal and not a medical body.

[54] Mass. Acts 1925, c. 169.

[55] Comment (1929) 38 YALE L. J. 368.

[1] The taxable interest is "not the interest to which some person succeeds on a death, but the interest which ceases by reason of the death." Holmes, J., in Edwards v. Slocum, 264 U. S. 61, 63, 44 Sup. Ct. 293 (1924). Cardozo, J. defined the tax as "a charge upon the creation of a right. It is not a charge upon the fruition in enjoyment or possession." Matter of Schmidlapp's Estate, 236 N. Y. 278, 140 N. E. 697, 698 (1923). "The tax is not laid on the property transferred nor the transfer. The tax has been held to be on the right to transmit or on the transmission at the beginning." Coolidge v. Nichols, 4 F. (2d) 112, 115 (D. Mass. 1925).

[2] The taxability of gifts is treated in Comment (1926) 35 YALE L. J. 859; (1927) 36 YALE L. J. 1028.

[3] The taxation of trusts for which a valid consideration has been received is treated in Comment (1926) 35 YALE L. J. 601, 604 *et seq.*

[4] The Federal Estates Tax of 1919, 40 STAT. 1097 (1919), 26 U. S. C. § 1094 (1926).

[5] *Cf.* N. Y. ANN. CONS. LAWS (Cahill, 1923) c. 61, § 220 (4); MASS. GEN. LAWS (1921) c. 65, § 1; ILL. REV. STAT. (Cahill, 1927) c. 120, § 396.

has proved to be inadequate in many respects. The term "take effect" as has been pointed out is "not a phrase of art" [6] and its interpretation has led to considerable confusion in the decisions.[7] Some consistency may be found in the decisions of the courts, however, if the terms of the trusts created by the settlors are analyzed with refernce to their effect upon their taxability. The retention of certain powers [8] by the settlor has been held not necessarily to render the trust subject to taxation under the inheritance tax statutes.[9] By splitting up the concept of property in the trust into its constituent legal relations, each of them will be found to have been given a certain limited legal significance. This also raises the question of policy, namely: what particular property interest or interests in the trust should be taxed, or conversely, what powers should be retainable by a settlor without rendering a trust taxable?

It is the view of the majority of courts that where trusts provide that the net income of the fund shall be payable to the settlor during his life, the trusts come within the terms of the typical statutes and are taxable,[10] in spite of the fact that a "valid" trust is created. It has been urged that this is an irrational treatment of the trust problem, which has been adopted because the courts have been contented to rely solely upon tax cases for precedents, and that trusts "if complete and valid" are not properly subject to an inheritance tax.[11] It is difficult to see

[6] Frew v. Bowers, 12 F. (2d) 625, 627 (C. C. A. 2d, 1926).

[7] In a case involving the taxation of a trust of almost $20,000,000 Knox, J. declared: "The matters of general law that are here involved have already received attention by a number of courts. The results have been far from uniform, and anything that I may say will not make it so. Until the Supreme Court speaks, the law is, and will remain, in a state of splendid confusion. Therefore I will not undertake to analyse the prior decisions . . ." Farmers Loan & Trust Co. v. Bowers, 15 F. (2d) 706, 709 (S. D. N. Y. 1926).

[8] Such powers as enumerated above.

[9] *Infra* notes 16, 20.

[10] "It is significant that, in every reported case of the Court of Appeals where the gift was taxed, the enjoyment of income was retained by the donor." Matter of Cochrane, 117 Misc. 18, 29, 190 N. Y. Supp. 895, 902 (Surr. Ct. 1921), *aff'd*, 202 App. Div. 751, 194 N. Y. Supp. 924 (2d Dep't 1922); Matter of Green, 153 N. Y. 223, 47 N. E. 292 (1897); Crocker v. Shaw, 174 Mass. 266, 54 N. E. 549 (1899); McCaughn v. Girard Trust Co., 11 F. (2d) 520 (C. C. A. 3d, 1926); People v. Northern Trust Co., 330 Ill. 238, 161 N. E. 525 (1928).

Where only a part of the income is retained by the grantor the tax is imposed upon a proportionate share of the trust fund. Bradley v. Nichols, 13 F. (2d) 857 (D. Mass. 1926) (tax imposed on half the trust fund, where grantor retained half the income); Tips v. Bass, 21 F. (2d) 460 (W. D. Tex. 1927) (grantor reserved annuity, the corresponding share of the trust fund was taxed); State v. Welch's Estate, 235 Mich. 555, 209 N. W. 930 (1926) *semble*.

[11] This view has been advanced by Stimson, *When Revocable Trusts are*

on grounds of policy why cases involving the question whether trusts have been validly created so as to cut off claims of curtesy and dower should govern where a problem of taxation is involved. The mere fact that the courts have classified certain trusts as "valid" for one purpose should not be controlling. If trusts of any type are to be subject to inheritance taxation, it would certainly seem that those which in effect most nearly resemble testamentary disposition should be the first to be taxed. When the settlor retains power over the income of the trust fund, he enjoys an important property interest, and the courts consistently hold that such an interest is taxable on transfer at death.

Where the settlor reserves the power of revocation but does not retain the income from the trust fund there is some conflict of opinion as to whether the trust is taxable. Under the federal Estates Tax [13] and some state statutes [14] it is specifically provided that such a trust is taxable. The same result has occasionally been reached by judicial decision independently of such statutory provision.[15] The majority of cases hold, however, that the re-

Subject to an Inheritance Tax (1927) 25 MICH. L. REV. 839. See also Notes (1926) 75 U. OF PA. L. REV. 168; (1925) 74 U. OF PA. L. REV. 176.

The following cases have been cited as authority for the proposition that a "valid" trust may be created despite the retention of the income during the life of the settlor and that such trusts should not be taxable. Stone v. Hackett, 78 Mass. 227 (1858) (trust held valid as against dower claim, though the grantor retained a life income); Lines v. Lines, 142 Pa. 149, 21 Atl. 809 (1891) *semble;* Windolph v. Girard Trust Co., 245 Pa. 349, 91 Atl. 634 (1914) (as against a curtesy claim where the settlor retained a life income). According to Professor Stimson, *op. cit. supra*, the courts should go beyond strictly tax cases for precedents, and the above cases are cited as illustrations. The courts, however, do not feel obligated to regard the cestui's interest in the trust as vesting for all purposes on similar facts. Thus, a cestui was held not to have acquired any enjoyment of a trust fund for purposes of taxation in Matter of Bostwick, 160 N. Y. 489, 55 N. E. 208 (1899). The same trust was subsequently, however, held to vest ownership in the beneficiary for purposes of satisfying the requirements of the rule against perpetuities. N. Y. Life & Trust Co. v. Cary, 191 N. Y. 33, 83 N. E. 598 (1908).

[12] Cases cited *supra* note 11.

[13] 40 STAT. 1097 (1919), 26 U. S. C. § 1094 (1926); THURBER, FEDERAL ESTATE TAX (1921) 52. Under the Bureau regulations of the Federal Tax Commission, it is provided where the power of revocation is retained "the entire property transferred should be included in the gross estate . . ."

[14] *Cf.* N. Y. ANN. CONS. LAWS (Cahill, 1923) c. 61, § 220 (4).

[15] The leading case cited for holding such trusts taxable is Matter of Bostwick, *supra* note 11. While citing no cases in support of its stand the court stressed the argument of policy of preventing evasion of taxation by some technical transfer. But in this case, as in the cases that followed it, the settlor retained "dominion" over the trust in addition to the power of revocation. *Cf.* Matter of Hoyt's Estate, 86 Misc. 696, 149 N. Y. Supp. 91 (Surr. Ct. 1914). In New England Trust Co. v. Abbott, 205 Mass. 279, 91 N. E. 379 (1910), the court professed to follow the Bostwick case and the

tention by the settlor of the power of revocation alone will not, in the absence of express statutory provision, render the trust subject to taxation as part of the settlor's estate.[16] "The power of revocation," it has been said, "is neither an estate nor property and cannot pass at death." [17] It would seem that the taxability of the extinction of a power of revocation in the settlor by death is a question for the legislature which can provide for the taxation of trusts where such power is retained, if it is deemed that this will further the purposes of inheritance taxation.

The retention by the settlor of control over the trust but not over the income thereof has led to further conflict.[18] Where in

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cases *infra*, and held a revocable trust taxable. The following cases sometimes cited for holding a revocable trust taxable all contained the added factor that the grantor retained an income to himself out of the trust fund: Bullen v. Wisconsin, 240 U. S. 625, 36 Sup. Ct. 473 (1916); Crocker v. Shaw, *supra* note 10; Matter of Green, *supra* note 10; People v. Kelley, 218 Ill. 509, 75 N. E. 1038 (1905); Matter of Brandreth, 169 N. Y. 437, 62 N. E. 563 (1902); Wright's Appeal, 38 Pa. 507 (1861); Lines' Appeal, 155 Pa. 378, 26 Atl. 728 (1893); Matter of Fulham, 96 Vt. 308, 119 Atl. 433 (1923). Reish v. Commonwealth, 106 Pa. 521 (1884), does not involve a trust deed, but a conveyance with a reservation of income by the grantor. In Seibert's Appeal, 110 Pa. 329, 1 Atl. 346 (1885), the beneficiary of the trust was to be named in the will of the settlor. In Du Bois Appeal, 121 Pa. 368, 15 Atl. 641 (1888), the cestui undertook to settle all claims that might arise against the grantor in contract or in tort.

In New York there have been a number of decisions which profess to distinguish the Bostwick case, *supra* note 11, and hold that the retention of power of revocation does not render the trust taxable. Matter of Cochrane, *supra* note 10; Matter of Kountze, 120 Misc. 289, 198 N. Y. Supp. 442 (Surr. Ct. 1923). By statute, N. Y. ANN. CONS. LAWS (Cahill, 1923) c. 61, § 220 (4), the retention of the power of revocation has been made to render the trust taxable.

[16] "The right to revoke, unexercised, is a dead thing. Its presence in a deed does not alter the character of the instrument or the estate granted . . ." In re Dolan's Estate, 279 Pa. 582, 589, 124 Atl. 176, 178 (1924). This view is supported by Masury's Estate, 28 App. Div. 580, 51 N. Y. Supp. 331 (2d Dep't 1898), *aff'd*, 159 N. Y. 532, 53 N. E. 1127 (1899); People v. Northern Trust Co., 289 Ill. 475, 124 N. E. 662 (1919); Matter of Cochrane, *supra* note 10; Matter of Carnegie, 203 App. Div. 91, 196 N. Y. Supp. 502 (1st Dep't 1922), *aff'd* 236 N. Y. 517, 142 N. E. 266 (1923); Matter of Miller's Estate, 236 N. Y. 290, 140 N. E. 701 (1923); Dexter v. Jackson, 243 Mass. 523, 137 N. E. 877 (1923); *cf.* State Street Trust Co. v. Friebe, 209 Mass. 373, 95 N. E. 851 (1911) (the taxability of a trust does not depend on whether power to revoke has or has not been inserted).

[17] See In re Dolan's Estate, *supra* note 16, at 590, 124 Atl. at 179.

[18] Under the Federal Estates Tax Regulations of 1919 it was provided that where the grantor reserved the "power to control the administration of the trust, as by reserving power to change trustees, the trust period, the trust property, or the respective interests of the beneficiaries in such property," the trust was taxable. Subsequently, in 1921, this provision was omitted from the regulations and the present rule seems to be that only the power of revocation will render the estate taxable. THURBER, *op. cit. supra* note 13, at 52, 393. *Cf.* Reinecke v. Northern Trust Co., 24 F. (2d) 91 (C. C. A. 7th, 1927), *cert.* granted, 48 Sup. Ct. 436 (1928).

addition to the power of revocation the settlor retains the power to change the beneficiaries, modify the trust deed, vote shares forming part of the trust fund, and similar powers, it has been held that he has such a "dominion" over the trust funds as to bring it within the spirit of the Estates Tax.[19] Some courts, however, disregard even these indicia of "possession and enjoyment" in the settlor and hold such trusts free from inheritance taxation.[20]

The time set by the settlor for the final dissolution of the trust is of considerable importance in view of the statutory reference to "at or after death." There are numerous dicta to this effect in cases involving trusts where the settlor retained the income to himself.[21] Following such dicta a federal district court[22] has held trusts taxable even where no income is retained by the settlor, if the date of distribution is "at or after" the death of the settlor. This view has been questioned in New York.[23] The majority of courts go at least so far as to hold that where the dissolution is contingent on some event other than that of the settlor's death, the trust is not taxable, even though this event may not occur until after his death.[24] The United States Supreme Court[25] has recently held a trust not taxable even though

[19] Matter of Bostwick, *supra* note 11. But *cf.* Matter of Kountze, *supra* note 15 (where the power to revoke, to vote shares, modify the trust, and withdrawal of trust property was retained, yet no tax was imposed).

[20] Matter of Ferris' Estate, 121 Atl. 692 (N. J. 1923) (where only the value of the voting power of the shares retained by the grantor was taxed).

[21] "The death of the donor was the event which made the transfer complete and effective and secured the nieces the possession and enjoyment of the property." Matter of Green, *supra* note 10, at 228, 47 N. E. at 293. But this trust also involved the retention of the income by the grantor. "We see no difference in principle between property passing by deed intended to take effect in possession and enjoyment on the death of the grantor and property passing at will. In either case it is the privilege of disposing of property after the death of the grantor or testator which is taxed . . ." Crocker v. Shaw, *supra* note 10, at 267, 54 N. E. 549 at 550.

[22] Coolidge v. Nichols, *supra* note 1 (grantor retained no interest in the trust which was to be dissolved on death; held taxable). This case was taken to the federal Supreme Court, 274 U. S. 531, 47 Sup. Ct. 710 (1927), but not on the issue here considered. *Cf.* New England Trust Co. v. Abbott, *supra* note 15 (power of revocation reserved).

[23] Where income and remainder are out of the grantor, vesting at death, the death does not affect the disposition of the estate. Matter of Kountze, *supra* note 15.

[24] Matter of Masury, *supra* note 16 (where entire fund was to vest on a specific date, whether the grantor was living or not); People v. Northern Trust Co., *supra* note 10, *semble;* Fidelity Trust Co. v. Lucas, 7 F. (2d) 146 (W. D. Ky. 1925) *semble;* People v. Northern Trust Co., *supra* note 16 (distribution of trust upon the death of the last surviving child of grantor); Dexter v. Jackson, *supra* note 16.

[25] Shukert v. Allen, 273 U. S. 545, 47 Sup. Ct. 461 (1927) (since the trust, becoming effective in 30 years, was not affected "whether he lives or

the income from it was to accumulate for the beneficiary until a date considerably beyond the grantor's expectancy of life. A dictum in the case [26] indicates that an "immediate and out and out" transfer took place with the creation of the trust.

In conclusion, it would seem that under the inheritance tax statutes generally a tax will be imposed upon a trust as part of the decedent's estate where the settlor retains the income for himself. There is also a strong tendency, except in a few jurisdictions, to hold trusts taxable where powers amounting to "effective dominion" over the trust are retained by the settlor even though they do not include the reservation of income. On the other hand, the majority of courts in the absence of statutory provision will not impose the tax upon trusts where only the power of revocation has been retained, whether the income passes immediately to the cestui or is to accumulate and vest at some future time, provided, it would seem, that the death of the grantor is not made the contingency upon which the distribution of the trust shall take place.

WAIVER OF THE DEFENSES OF THE STATUTE OF LIMITATIONS AND BREACH OF CONDITIONS IN INSURANCE POLICIES

The "waiver" of a defense created by a statute of limitations is almost invariably said to "revive" the debt. The recent case of *Potter v. Prudential Life Insurance Company* [1] is typical in this respect. After the term limited for bringing the action had expired, repeated demands for payment on a life insurance policy were made during a period of two years. The defendant insurance company at no time expressed an intention to utilize the statutory defense, but attempted to justify its failure to pay on the ground that there was insufficient proof of the insured's death. In an action upon the policy, the insurer's failure to repudiate its duty to pay was held to be tantamount to an acknowledgment of the obligation and a waiver of the defense. The court said that the insurer's "silence would be evidentiary of the existence of the debt. . . . The acknowledgment itself does not revive the debt, but out of it the law raises or implies a promise to pay . . . when the condition upon which the acknowledgment was made has been fulfilled, the law will imply the promise and revive the debt." [2] Thus the defendant's duty is regarded as extinguished by operation of the statute, and created anew by an implied promise.[3]

dies," the interest of the cestuis was held to vest immediately). See State v. Welch's Estate, *supra* note 10, at 566, 209 N. W. at 934 ("Her (grantor's) death made no difference in the rights of the parties . . . the trust did not end with her death").

[26] Shukert v. Allen, *supra* note 25, at 547, 47 Sup. Ct. at 461.

[1] 142 Atl. 891 (Conn. 1928).

[2] *Ibid.* 895.

Most courts, it seems, explain the waiver similarly, implying from the acknowledgment a promise to pay, for which the old obligation is sufficient consideration.[4] The acknowledgment must not be inconsistent with the fictitious promise, and is insufficient if accompanied by any expression of an unwillingness to pay.[5] Some courts seem to have required a new express promise to pay.[6] The further step of requiring a new consideration for the waiver has been taken in one case.[7]

Whether the debt can be regarded as extinguished by the statute of limitations seems questionable. In a number of situations, debts have in effect been recognized as existing after the lapse of the statutory period. Thus, it is generally held that unless the statute of limitations is specially pleaded, a "barred" claim may be enforced[8] even though the complaint, on its face, shows the statutory period to have run.[9] When there is a waiver of the

[3] The court found an acknowledgment, although mere failure to deny responsibility is not usually considered equivalent thereto. Cambridge v. Holhart, 10 Pick. 232 (Mass. 1831); Connell v. Buchanan, 7 Blackf. 537 (Ind. 1845); Warren v. Perry, 5 Bush. 447 (Ky. 1869); 1 WOOD, LIMITATIONS (4th ed. 1916) § 73. It is usually said that the acknowledgment must be "clear, plain, unambiguous." *Ibid.* § 70; see Bell v. Morrison, 1 Pet. 351, 362 (U. S. 1828).

[4] See Phillips v. Phillips, 3 Hare 281, 289 (1844); Lambert v. Schmalz, 118 Cal. 33, 34, 50 Pac. 13 (1897); Bellamy v. Okla. Farm Mtge Co., 278 S. W. 180 (Tex. Crim. App. 1925); (1925) 4 TEX. L. REV. 389. "The courts have by construction, declared that such claim still furnishes a sufficient consideration on which a new agreement may be grounded, binding the parties. . . ." Belote v. Wynne, 7 Yerg. 534, 543 (Tenn. 1835). *Cf.* 1 WILLISTON, CONTRACTS (1920) § 161.

[5] The case most often cited is Bell v. Morrison, *supra* note 3, in which Justice Story said: "If . . . a promise is to be raised by implication of law from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission of a previous subsisting debt which the party is liable and willing to pay." *Ibid.* 362. See 1 WOOD, *op. cit. supra* note 3, §§ 69, 70.

[6] Chapman v. Barnes, 93 Ala. 433, 9 So. 589 (1891); George W. Holm Co. v. Griffin, 112 N. C. 356, 16 S. E. 1023 (1893); Slaughter's Succession, 108 La. 492, 32 So. 379 (1902).

[7] Small v. Jones, 138 Ga. 521, 75 S. E. 605 (1912) (express agreement to waive insufficient); *cf.* Warren v. Walker, 23 Me. 453 (1844); see Price v. Seymour, 52 Wis. 272, 275, 9 N. W. 71, 74 (1881) (after holding that an express promise to pay would "revive" a barred claim, the court doubted "how any promise not based upon some new consideration could revive and give life to such extinguished debt or obligation").

[8] Selles v. Pagan, 8 F. (2d) 39 (C. C. A. 1st, 1925); Brownrigg v. Frees, 196 Cal. 534, 238 Pac. 714 (1925); Brozell v. Hearn, 33 Ga. App. 606, 127 S. E. 479 (1925); see Conti v. Fisher, 48 R. I. 33, 36, 134 Atl. 849, 850 (1920), where it is said that "when a defendant or respondent makes no claim to the benefit of the Statute of Frauds, either by pleading or otherwise, the court *sua sponte* does not interpose it for him."

[9] Shane v. Peoples, 25 N. D. 188, 141 N. W. 737 (1913); Whitworth v. Detroit & L. Ry., 81 Mich. 98, 45 N. W. 500 (1890) (judgment on a note could not be questioned on the ground that the face of the note showed it

defense, the original debt is declared upon [10] and considered the basis of the cause of action.[11] A surety, who may be forced to pay a claim "barred" as against his principal [12] may have reimbursement.[13] A mortgage given as security may be foreclosed even though the statute has run against the principal obligation.[14] A creditor may have an insurable interest in the life of his debtor although the latter has the statutory defense,[15] and when the creditor is owed two debts, one of which is "barred," he may apply a general payment on account to the latter.[16] Moreover, an accrued statutory defense may be removed by statute without violating any constitutional guaranty,[17] and a claim against which the statute has run in the jurisdiction of its creation may be enforced in another jurisdiction having a different statutory period.[18]

From the foregoing it seems manifest that the running of a statute of limitations does not *ipso facto* extinguish the obliga-

to be outlawed, in absence of special plea); *cf.* Murphy v. Murphy, 71 Cal. App. 389, 235 Pac. 653 (1925) (holding that it is error for the court to apply the statute of its own motion). In general, see Atkinson, *Pleading The Statute of Limitations* (1927) 36 YALE L. J. 914.

[10] Kelly v. Leachman, 3 Idaho 629, 33 Pac. 44 (1893); Vinson v. Palmer, 45 Fla. 630, 34 So. 276 (1903); Leaper v. Tattan, 16 East 420 (1847); *cf.* 1 WILLISTON, *op. cit. supra* note 4, § 196. But some cases hold that suit must be upon the new promise. Rodgers v. Byers, 127 Cal. 528, 60 Pac. 42 (1900); 1 WILLISTON, *loc. cit. supra* note 4, at n. 82.

[11] Dean v. Hewitt, 5 Wend. 257 (N. Y. 1830); Carshore v. Huyck, 6 Barb. 583 (N. Y. 1849); see Nelson v. Patterson, 229 Ill. 240, 82 N. E. 229 (1907); see Lord Atkinson in *Spencer v. Hemmerde,* [1922] A. C. 507, 524: "I find the great preponderance of the cases is against regarding the new promise as a new cause of action and it seems to me that reason also is against it." *Cf.* cases *supra* note 9.

[12] Willis Bros. v. Chewing, 90 Tex. 617, 40 S. W. 395 (1907); 1 SPENCER, SURETYSHIP AND GUARANTY (1913) § 204.

[13] Reid v. Flippin, 47 Ga. 273 (1872); Charbonneau v. Bounet, 98 Tex. 167, 82 S. W. 460 (1904); 1 SPENCER, *op. cit. supra* note 12, § 124.

[14] Smith v. Washington County Ry., 33 Gratt. 242 (Va. 1880); Hulbert v. Clark, 128 N. Y. 295, 28 N. E. 638 (1891); *cf.* Higgins v. Scott, 2 B. & Old. 413 (1831) (lien on goods); see Note (1893) 21 L. R. A. 550; 2 WOOD, *op. cit. supra* note 3, § 222.

[15] Chicago Title & Trust Co. v. Haxton, 129 Ill. App. 626 (1906); 1 MAY, INSURANCE (3d ed. 1891) § 108.

[16] Miles v. Foukes, 5 Bing. N. C. 455 (1839); BUSWELL, LIMITATIONS (1889) § 81.

[17] Campbell v. Holt, 115 U. S. 620, 6 Sup. Ct. 209 (1885); Robinson v. Robins Dry Dock & Repair Co., 238 N. Y. 271, 144 N. E. 579 (1924). But there is authority to the contrary in state courts. See (1923) 23 COL. L. REV. 497; Note (1899) 45 L. R. A. 609. And the contrary is almost universally held where the statute refers to actions to recover real property. Attorney General v. Revere Copper Co., 152 Mass. 444, 25 N. E. 605 (1890); see Campbell v. Holt, *supra* at 623, 6 Sup. Ct. at 211.

[18] Pulsifer v. Greene, 96 Me. 438, 52 Atl. 92 (1902); GOODRICH, CONFLICT OF LAWS (1927) 167.

tion,[19] *i. e.*, the duty to perform, or the right[20] to its enforcement. When suit is directly upon the debt or obligation, however, the statutory defense enables a defendant to extinguish his still-existing duty by affirmative action, that is, by pleading the statute. Thus, the running of the statute merely adds a new power-liability[21] relation.

It appears that a power may be waived without consideration. Thus a power of appointment in real property law may be so "released" (or waived).[22] A joinder with remaindermen in a bill asking for a sale of the lands for partition has been held sufficient for that purpose.[23] Similarly, the power to terminate a landlord-tenant relation,[24] and the powers created in a surety by the creditor's extension of time to the principal;[25] in a debtor

[19] See Hulbert v. Clark, *supra* note 14, at 297, 28 N. E. at 638, where it is said that "The debt and the obligation to pay the same remain, and the arbitrary bar of the statute alone stands in the way of the creditor seeking to compel payment." See 1 WOOD, *op. cit. supra* note 3, § 63a, n. 1, citing a number of cases as holding that only the remedy is barred.

As additional support for this proposition, it may be noted that a waiver starts a new period of limitations which is measured by the nature of the original obligation. Bayliss v. Street, 51 Idaho 627, 2 N. W. 437 (1879); 1 WILLISTON, *op. cit. supra* note 4, § 185. Also a waiver does not create a new contract within the rule that the statute does not run on contracts between husband and wife made during coverture. Enwright v. Griffith, 169 Wis. 284, 172 N. W. 156 (1919).

[20] The term "right" is used as the correlative of duty and to signify "an enforceable claim to performance (action or forbearance) by another." Corbin, *Legal Analysis and Terminology* (1919) 29 YALE L. J. 163, 167. See HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS (1923) 6, 36.

[21] A power is "the legal relation of A to B when A's own voluntary act will cause new legal relations either between B and A or between B and a third person." Corbin, *op. cit. supra* note 20, at 168. The legal relation of *B* under such circumstances is a liability. When the power given by the statute of limitations is used, the plaintiff's liability is extinguished and a new immunity-disability relation is thereby created.

[22] Hancock-Malcom v. Burford-Hancock, 74 L. T. R. (N. S.) 658 (1896); 44 & 45 VICT. c. 41, § 52 (1881) (permitting powers simply collateral to be released by deed); Grosvenor v. Bowen, 15 R. I. 549, 10 Atl. 589 (1887) (to *A* for life with power of appointment and in default of appointment to *A*'s heirs at law. *A* and the heirs were held capable of conveying a fee in the property, the power having been released by the conveyance).

[23] Thornington v. Thornington, 82 Ala. 489 (1886).

[24] See Dendy v. Michall, 4 C. B. (N. S.) 376, 387 (1858) (bringing action for rent accruing after breach of condition held conclusive of an intention to treat the relation as still subsisting); 2 TIFFANY, LANDLORD AND TENANT (1912) 1389-1390; *cf.* Cleve v. Mazzoni, 19 Ky. L. Rep. 200, 45 S. W. 88 (1898) (acceptance of rent after action brought to enforce termination of the relation was not a waiver).

[25] Bramble v. Ward, 40 Ohio St. 267 (1883); Fowler v. Brooks, 13 N. H. 240 (1842) (implied promise to pay sufficient); SPENCER, *op. cit. supra* note 12, § 231 (recognizing that the promise is a waiver of a defense and not the making of a new obligation).

by bankruptcy proceedings; [26] and in one who contracted while under the disability of infancy [27]—all being powers to extinguish a still-existing duty may be waived without any consideration.

According to this analysis, the duty or debt in the instant case was not revived; instead this newly created and outstanding power of the defendant, by the exercise of which he could have extinguished his duty, was waived, the insurer's silence under repeated requests for payment being considered sufficient evidence of a waiver.[28]

It has been urged that the doctrine of waiver is an insufficient explanation of this result because the new promise, express or implied, is the measure of the plaintiff's right; in other words, the defendant can make the effect of his promise or acknowledgment dependent upon conditions which he may specify at the time.[29] But as the courts recognize an unconditional waiver of the power, there is no reason for their refusing to recognize one which is conditional,[30] especially in view of the fact that some courts recognize a waiver as to only a portion of the amount claimed.[31] In several cases, furthermore, a condition has been disregarded after a clear acknowledgment of the debt's existence had been found.[32] Many courts hold that an unconditional acknowledgment coupled with an offer of compromise will constitute a waiver to the entire claim.[33] Another objection sometimes

[26] Brooks v. Paine, 25 Ky. L. Rep. 1125, 77 S. W. 190 (1903); International Harvester Co. v. Lyman, 90 Minn. 275, 96 N. W. 87 (1903).

[27] Cohel v. Baer, 134 Ind. 375, 32 N. E. 920 (1893); Edgerly v. Shaw, 25 N. H. 514 (1852); 1 WILLISTON, *op. cit. supra* note 4, § 154.

[28] Arnold, The *Statute of Limitations In The Law of Suretyship* (1922) 17 ILL. L. REV. 1, 10: "Whether the words and acts of the defendant (the evidence of an alleged acknowledgment or promise) constitute a waiver is a question of construction for the court; that the debtor did not intend to release his statutory defense seems to be immaterial." See Spencer v. Hemmerde, *supra* note 11, at 525-526.

[29] 1 WILLISTON, *op. cit. supra* note 4, § 204.

[30] As, for instance, a power created by a discharge in bankruptcy. *Cf.* International Harvester Co. v. Lyman, *supra* note 26.

[31] Hannah v. Hawkins, 5 Lea. 240 (Tenn. 1880) (an offer to pay the balance on a note payable in specie, without any offer of deduction on account of prior payments in currency, held to waive the defense to the extent of the offer); Graham v. Kigs, 29 Pa. 189 (1857) (an unaccepted offer to pay the principal of a claim without interest precluded the statutory defence as to the principal only); *cf.* Edgerly v. Shaw, *supra* note 27 (similarly as to the power arising from disability of infancy).

[32] Western Casket Co. v. Estrada, 116 S. W. 113 (Tex. Civ. App. 1909) ("I can take care of your account in monthly installments. . . . [This is] the only bill I owe in the world."); Strong v. Andras, 34 App. D. C. 278 (1910); see Foster v. Smith, 52 Conn. 449, 451 (1885).

[33] Pratt v. McNell, 40 Kan. 1, 18 Pac. 925 (1888) (an offer to exchange another note for one held against defendant); Marcum v. Terry, 146 Ky. 145, 142 S. W. 209, 37 L. R. A. (N. S.) 885 (1912) (offer to exchange a tax receipt held against plaintiffs land in satisfaction); Teasley v. Bradley, 110 Ga. 497, 35 S. E. 782 (1910).

urged is that the defense of the statute of limitations to an action based on tort cannot be waived.[34] But since the duty to pay for the tort was assumed to have been extinguished by the running of the statutory period, and since at common law a promise to pay for a tort would not sustain an assumpsit action, it was not surprising that the courts denied effect to a new promise to pay.[35] This rule today is purely arbitrary, and appears to have little justification in policy.

A striking application of the suggested analysis may be found in the field of insurance. A policy often provides that the breach of a specified condition or conditions shall completely annul the contract.[36] Courts refuse to hold that a breach of such condition *ipso facto* terminates the right-duty relation.[37] Instead, the breach is held to create in the insurer a power to extinguish its duty either by express repudiation before action brought[38] or by affirmative plea afterwards.[39] Accordingly, this power may be waived without consideration or elements of an estoppel;[40] the insurer's intention to do so is said to be controlling.[41] Hence, slight circumstances are often seized upon to declare a waiver.[42] Thus a request for proofs of loss;[43] silence after notice of

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[34] Nelson v. Petterson, 229 Ill. 240, 82 N. E. 229 (1907); Peterson v. Breitage, 88 Iowa 418, 55 N. W. 86 (1893); Note (1908) 13 L. R. A. (N. S.) 912.

[35] Hurst v. Parker, 1 B. & Old. 92 (1817); 1 WILLISTON *op. cit. supra* note 4, § 186. *Cf.* Goodwyn v. Goodwyn, 16 Ga. 114 (1854); Oothout v. Thompson, 20 Johns. 277 (N. Y. 1829).

[36] See cases cited *infra* notes 37-46.

[37] Ville v. Germania Ins. Co., 26 Iowa 9 (1868); Southern Nat. Ins. Co. v. Barr, 148 S. W. 845 (Tex. Civ. App. 1912).

[38] Security Ins. Co. v. Cook, 99 Okla. 275, 227 Pac. 402 (1924); Clouer v. Banker's Life Co., 117 Kan. 683, 232 Pac. 1068 (1925).

[39] This is the general rule. Moody v. Ins. Co., 52 Ohio St. 12, 38 N. E. 1011 (1894); Austin v. Prudential Health & Accident Ins. Co., 124 Me. 232, 127 Atl. 276 (1925).

[40] Southland Life Ins. Co. v. Hopkins, 219 S. W. 254 (Tex. Civ. App. 1920); Kerr v. Aetna Casualty & Surety Co., 124 Okla. 112, 254 Pac. 105 (1926); State Life Ins. Co. v. Finney, 216 Ala. 562, 114 So. 132 (1927).

[41] Bowman v. Surety Fund Life Ins. Co., 119 Minn. 118, 182 N. W. 991 (1921); Germania Fire Ins. Co. v. Pitcher, 160 Ind. 392, 64 N. E. 921 (1902); Note (1902) 16 HARV. L. REV. 217; see Kerr v. Aetna Casualty & Surety Co., 124 Okla. 112, 254 Pac. 105, 109 (1926); Kennedy v. Maury, 6 Ga. App. 816, 819, 66 S. E. 29, 31 (1900) ("waiver depends upon what one himself intends to do . . ."). Of course the defendant's acts determine his intention for this purpose. Therefore, defendant's acts may constitute a waiver even though he declares, at the time, that he does not intend to waive any defenses. DeFrancesco v. Ins. Co., 105 Conn. 162, 134 Atl. 789 (1926).

[42] The attitude of the particular court toward these conditions will largely determine what circumstances will be sufficient. *Cf.* Royal Ins. Co. v. Drury, 150 Md. 211, 132 Atl. 635 (1926); Arnold v. American Ins. Co., 148 Cal. 660, 84 Pac. 182 (1906).

[43] Bowman v. Surety Fund Life Ins. Co., *supra* note 41; *cf.* Royal Ins.

breach;[44] an unaccepted offer to receive part payment of an overdue premium;[45] and a demand of payment of a note given for an overdue premium[46] have been held sufficient.

It has been said that "such decisions lose sight of the fact that this is a case of subjecting the insurer to a new liability with no compensating advantage."[47] Frequent dicta of an earlier date are in accord[48] and therefore argue that a waiver must be based upon consideration or elements of an estoppel.[49] But it is believed that there are practically no cases so holding,[50] and, since conditions in insurance policies are often merely studied defenses having no substantial foundation in justice,[51] that such a view has no justification on the ground of policy.

RIGHT OF CREDITOR TO APPOINTMENT OF RECEIVER FOR DEBTOR CORPORATION

In the recent case of *Delaney Co. v. Crystal Products Co.*,[1] a creditor sought the appointment of a receiver for a corporation alleged to be in an insolvent condition. The action was predicated on the statutory provision[2] that, "a receiver may be appointed . . . when a corporation is in imminent danger of insolvency." The court held that this provision did not authorize the appointment of a receiver for a creditor who had not reduced his claim to judgment.[3]

Co. v. Drury, *supra* note 42 (request for an estimate as to replacement cost, and for names of prior owners of the property).

[44] Kely v. Peoples Nat. Fire Ins. Co., 262 Ill. 158, 104 N. E. 188 (1914).

[45] Southland Life Ins. Co. v. Hopkins, *supra* note 40.

[46] Washburn v. Union Cent. Life Ins. Co., 143 Ala. 485, 38 So. 1011 (1905).

[47] 2 WILLISTON, *op cit. supra* note 4, § 764; *cf.* Corbin, *Conditions in the Law of Contracts* (1919) 28 YALE L. J. 754, 755, where it is said that "where the waiver consists of a mere voluntary assent there is no consideration of any sort, and yet a new duty is thereby created where no such duty previously existed."

[48] Smith v. Saratoga Mut. Fire Ins. Co., 3 Hill 508, 511 (N. Y. 1842); Ins. Co. v. Lacroix, 45 Tex. 158, 168 (1876); *cf.* Duval v. Metro. Life Ins. Co., 82 N. H. 543, 546, 136 Atl. 400, 403 (1927).

[49] Ins. Co. v. Wolff, 95 U. S. 326 (1877); Kennedy v. Grand Fraternity, 36 Mont. 325, 92 Pac. 971 (1907); Gibson Electric Co. v. Liverpool & London Globe Ins. Co., 159 N. Y. 418, 54 N. E. 23 (1899); Joye v. South Carolina Mutual Ins. Co., 54 S. C. 375, 32 S. E. 446 (1899).

[50] The facts in cases which seem to require a consideration or estoppel, will often be found to involve a substituted agreement. For instance, in Lantz v. Vermont Mutual Life Ins. Co., 139 Pa. 546, 21 Atl. 80 (1891), the parties agreed to extend the period for payment of premium notes and therefore the strong language of the court, as applied to the facts, was correct.

[51] See Royal Ins. Co. v. Drury, *supra* note 42.

[1] 264 Pac. 521 (Cal. 1928).

[2] CAL. CODES OF CIV. PROC. (Deering, 1923) § 564 (5).

[3] The court also refused to sustain the contention that the assets of a corporation constitute a "trust fund" for a creditor.

The appointment of a receiver is part of what has been designated at times as a "creditor's bill."[4] The purpose of the bill is to obtain satisfaction of the creditor's claim by resorting to assets attainable only through the power of equity. Such corporate interests as choses in action,[5] power to exercise an option to purchase,[6] and rights of redemption[7] have been reached in this manner. Must the petitioning creditor first have attained a judgment at law to receive such equitable relief? The United States Supreme Court has answered in the affirmative on the ground that the debtor corporation is entitled to a jury trial to determine the issue of debt.[8] Its decision has been followed generally in the federal courts, but not without dissent.[9] When a judgment would appear useless or unobtainable,[10] or seems

[4] Such appointment is ancillary to a main suit, which must be pending. It cannot be the sole desideratum. Price v. Bankers' Trust Co., 178 S. W. 745 (Mo. 1915); 1 SMITH, RECEIVERS (Tardy's ed. 1920) 50.

[5] Hincke Printing Co. v. Bailey, 263 Pac. 719 (Colo. 1928); Homan v. Fir Products Co., 123 Wash. 260, 212 Pac. 240 (1923).

[6] Eastern Bridge Co. v. Worcester Auditorium Co., 216 Mass. 426, 103 N. E. 913 (1914) (debtor's interest in a lease containing an option to purchase held a right to property, reached by a statutory creditor's bill).

[7] Ball v. Peper Cotton Press Co., 141 Mo. App. 26, 121 S. W. 798 (1909) (right of redemption of pledgor); Gilcreast v. Bartlett, 74 N. H. 29, 64 Atl. 767 (1906) (right of redemption of mortgagor). For an extensive note on the interests that may be reached by a creditor's bill, see ANN. CAS. 1914B 946. It is often broadly stated that any interest which cannot be seized under the process of execution in the particular jurisdiction is subject to a creditor's bill. SMITH, *op. cit. supra* note 4, § 277.

[8] Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712 (1890); Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. 977 (1892). The latter decision refused to recognize a statute of Mississippi, which did away with the necessity for a judgment. The right to jury trial and the distinction between law and equity in the federal courts were assigned as reasons. See 16 ROSE, NOTES 538. For a similar point of view, that to give a creditor the equitable remedy before obtaining a judgment would lead to "unnecessary and perhaps fruitless and oppressive interruption to the exercise of the debtor's rights," see Tennent v. Battey, 18 Kan. 324, 327 (1877); Farmers' State Bank v. Lemley, 105 Kan. 15, 180 Pac. 238 (1919).

[9] Canton Roll & Machine Co. v. Rolling Mill Co., 155 Fed. 321 (C. C. N. D. W. Va. 1907); Viquesney v. Allen, 131 Fed. 21 (C. C. A. 4th, 1904); and Davidson-Wesson Co. v. Parlin & Orendorff Co., 141 Fed. 37 (C. C. A. 5th, 1905), follow Cates v. Allen, *supra* note 8. This holding was departed from in Darragh v. Wetter Mfg. Co., 78 Fed. 7 (C. C. A. 8th, 1897), where a simple contract creditor had a receiver appointed as provided for under the Arkansas statute. This decision was followed in Jones v. Mutual Fidelity Co., 123 Fed. 506 (C. C. D. Del. 1903), holding that to require a judgment at law is inconsistent with the equitable right created by the Delaware statute. *Cf.* Ky. Wagon Co. v. Jones & Hopkins Co., 248 Fed. 272 (C. C. A. 5th, 1918) (creditor with a trust in his favor does not need a judgment).

[10] Nunnally v. Strause, 94 Va. 255, 26 S. E. 580 (1897) (debtor corporation insolvent and abandoned); Lion Bonding Co. v. Karatz, 280 Fed. 532 (C. C. A. 8th, 1922) (corporation property in imminent danger of

otherwise injudicious,[11] the courts do not require prior adjudication of the creditor's claim. By a mere failure to interpose an answer to the creditor's bill the corporation is deemed to waive any necessity for the existence of a judgment.[12] Likewise, when the creditor has a trust fund or other lien in his favor even the federal courts will grant a receivership, other facts warranting such action.[13] The problem is worked out in some states through the code cause of action in which the relief sought by the creditor's bill is obtained after the merits of the creditor's claim have been decided.[14] In a few states, the statutes expressly exclude the need of an existing judgment at law.[15] But when the statute merely enumerates the grounds for appointing a receiver, as in the California statute, without discussing the qualification of the complainant,[16] judicial interpretation differs. Some courts, as illustrated in the instant case, have interpolated the rule used before the statute and insist on the existence of

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dissipation); Albany Steel Co. v. So. Agricultural Works, 76 Ga. 135 (1886) (insolvent scheme to defraud creditor); Shuck v. Quackenbush, 75 Colo. 592, 227 Pac. 1041 (1924) (debtor a fugitive from justice); United States v. Pann, 23 F. (2d) 714 (S. D. Cal. 1927) (corporate property fraudulently distributed to shareholders).

[11] Re Metropolitan Ry. Receivership, 208 U. S. 901, 28 Sup. Ct. 219 (1908) (receiver appointed when a refusal would cause inconvenience to those using the defendant's road in New York City); Weiss v. Haight Co., 148 Fed. 399 (C. C. D. Mass. 1906) (debtor running a bucket shop).

[12] Cassels Mills v. First Nat. Bank, 187 Ala. 325, 65 So. 820 (1914); Northwestern Bank v. Mickelson-Shapiro Co., 134 Minn. 422, 159 N. W. 948 (1916); 3 COOK, CORPORATIONS (6th ed. 1908) § 863. In American Can Co. v. Erie Preserving Co., 171 Fed. 540, 541 (C. C. W. D. N. Y. 1909), the court said, "where a defendant has waived the objection that a complainant is not a judgment creditor there is no longer room for doubting the jurisdiction of a federal court of equity to appoint a receiver."

[13] Ky. Wagon Co. v. Jones Mfg. Co., *supra* note 9 (creditor with a trust fund); Warren v. Kilgroe, 176 Ala. 476, 58 So. 432 (1912) (assets of insolvent corporation declared by statute to be a trust fund for creditors); United States v. Pann, *supra* note 10 (property of a corporation distributed to shareholders is trust fund for creditors).

[14] Huntington v. Jones, 72 Conn. 45, 43 Atl. 564 (1899); Armstrong Grocery Co. v. Banks, 185 N. C. 149, 116 S. E. 173 (1923). Early New York cases are *contra:* Crippen v. Hudson, 13 N. Y. 161 (1855) ("the union of legal and equitable jurisdiction in the supreme court does not furnish any reason for departing from the well established rule"); Beardsley Scythe Co. v. Foster, 36 N. Y. 560 (1867).

[15] Summit Silk Co. v. Kinston Spinning Co., 154 N. C. 431, 70 S. E. 820 (1911); N. C. CONS. STAT. ANN. (1919) § 1208; Coombs v. Watson, 32 Ohio St. 228 (1877); OHIO GEN. CODE (Page, 1926) § 11894; Dillard Co. v. Smith, 105 Tenn. 372, 59 S. W. 1010 (1900); TENN. ANN. CODE (Shannon, 1917) § 6100.

[16] Such statutes merely provide that a receiver may be appointed whenever a corporation is insolvent.

a judgment at law,[17] but a majority of the courts have held that such statutory provision abrogates the requirement.[18]

Assuming that a creditor has a judgment or that the case is one where it is not needed, what type of facts must exist to entitle the creditor to have a receiver appointed? In the absence of statutory provision, insolvency alone is not sufficient.[19] But it would be unlikely that the only allegation in the plaintiff's complaint would be the insolvency of the debtor corporation. So, when the insolvent corporation is also charged with fraud,[20] or is seeking illegally to divert corporate assets from creditors;[21] or it is shown in other ways that a receiver is necessary to conserve the corporate assets, a receiver will be appointed.[22] Solvency *per se* does not bar the right to a receiver, but in such cases strong and convincing evidence is required to show that a receiver is necessary to protect corporate creditors.[23] At present, the grounds which warrant the appointment of a corporation receiver at the instance of creditors are often expressly enumerated by statute.[24] The following provision is frequently

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[17] In addition to the instant case see Cook v. Leona Mills Lumber Co., 106 Ore. 520, 212 Pac. 785 (1923).

[18] Abilene Tel. Co. v. S. W. Tel. Co., 185 S. W. 356 (Tex. Civ. App. 1916); Jones v. Page, 26 N. M. 440, 194 Pac. 883 (1920); Portage Brick Co. v. No. Brick Co., 189 Ind. 639, 128 N. E. 847 (1920); Jones v. Mutual Fidelity Co., *supra* note 9 (Delaware statute, similar to that of California, interpreted as inconsistent with the contention that a judgment at law is necessary).

[19] Armour Fertilizer Works v. First Nat. Bank, 87 Fla. 436, 100 So. 362 (1924); Forsell v. Pittsburg & Montana Copper Co., 42 Mont. 412, 113 Pac. 479 (1911); HIGH, RECEIVERS (4th ed. 1876) § 18; 2 JONES, INSOLVENT CORPORATIONS (1908) 1487. For cases under the statutes, see *infra* note 26.

[20] Carpenter v. Landman, 192 Mich. 544, 159 N. W. 322 (1916); Barnard Mfg. Co. v. Ralston Co., 71 Wash. 659, 129 Pac. 389 (1913).

[21] Dalsheimer v. Graphic Arms Co., 86 N. J. Eq. 49, 97 Atl. 497 (1916) (corporation was attempting to transfer its stock to a Delaware corporation to effect a change in situs).

[22] Provident Relief Ass'n v. Vernon, 19 F. (2d) 709 (Ct. of App. D. C. 1927) (insurance company was wilfully mismanaged; protracted litigation existed between shareholders); United States Shipbuilding Co. v. Conklin, 126 Fed. 132 (C. C. A. 3d, 1903) (gross mismanagement and breach of trust by directors); 1 SMITH, *op. cit. supra* note 4, at 731.

[23] Adams v. Farmers' Nat. Bank, 167 Ky. 506, 180 S. W. 807 (1915) (gross mismanagement and fraud of directors); Schipper Bros. Coal Mining Co. v. Economy Coal Co., 277 Pa. 356, 121 Atl. 193 (1923) (disagreement between two shareholders, owning all shares, causing the business to be run at a loss); Lieberman v. Superior Court, 72 Cal. App. 18, 236 Pac. 570 (1925) (fraud of corporate directors, sequestration of past profits, deterioration in oil well by failure to use). But *cf.* Carson v. Allegany Window Glass Co., 189 Fed. 791 (C. C. D. Del. 1911) (irregularities and mismanagement involving no fraud or wilful neglect of duty not sufficient to warrant a receivership).

[24] The California statute is typical. CAL. CIV. CODE (Deering, 1923)

found: "in all other cases where a receiver has been appointed by a court of equity." [25] The statutes codified the usual grounds for the appointment of a receiver and added others.[26] Inasmuch as receivership is considered a stringent remedy, depriving the directors of control and upsetting the corporate structure, the courts have committed themselves to strict rules of pleading and proof.[27]

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§ 564: "A receiver may be appointed by the court in which an action is pending.

(1) In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim. . . .

(2) In an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property, where it appears that the mortgaged property is in danger of being lost, removed, or materially injured. . . .

(5) In the cases where a corporation has been dissolved or is insolvent, or is in imminent danger of insolvency, or has forfeited its corporate rights. . . .

(7) In all other cases where receivers have heretofore been appointed by the usages of courts of equity."

To the same effect, see IND. ANN. STAT. (Burns, 1926) § 1300; CONN. GEN. STAT. (1918) § 3443; N. Y. CONS. LAWS ANN. (2d ed. 1917) c. 23, § 306; DEL. REV. CODE (1915) § 3883.

[25] See *supra* note 24. But even without such a provision, the courts do not interpret the statutory provisions as exclusive. Northwestern Bank v. Michelson-Shapiro Co., *supra* note 12; see Merrifield v. Burrows, 153 Ill. App. 523, 525 (1910).

[26] Cronan v. District Court, 15 Idaho 184, 96 Pac. 768 (1908) (insolvency alone sufficient ground); Jones v. Page, *supra* note 18, *semble;* Ala. Ry. v. Tolman, 200 Ala. 499, 76 So. 381 (1917) (assets of insolvent corporation are trust fund for creditors. But *cf.* Hobson v. Pac. States Mercantile Co., 5 Cal. App. 94, 89 Pac. 866 (1907) (although insolvency alone is ground for appointing a receiver, the appointment must be ancillary to a main suit, according to the established equity rule); Price v. Bankers' Trust Co., *supra* note 4, *semble.*

Under the Delaware statute, DEL. REV. CODE (1915) § 3883, insolvency alone is sufficient ground for the appointment of a receiver. Adler v. Campeche Laguna Corp., 257 Fed. 789 (D. Del. 1919). But the statute excepts cases of corporations for public improvement. Thoroughgood v. Georgetown Water Co., 9 Del. Ch. 84, 77 Atl. 720 (1910). Judicial interpretation has been strict. In Whitmer v. Whitmer & Sons, 11 Del. Ch. 222, 99 Atl. 428 (1916), a receiver was denied where the facts of insolvency were disputed, and in Jones v. Maxwell Motor Co., 13 Del. Ch. 76, 115 Atl. 312 (1921), although all the jurisdictional facts were sufficient, it was held within the discretion of the chancellor to refuse to appoint a receiver.

[27] A general allegation of fraud is insufficient. Smith v. Birmingham Disinfectant Co., 174 Ala. 374, 56 So. 721 (1911); Sunshine Consolidated Oil Co. v. Prechel, 268 S. W. 1051, 1053 (Tex. Civ. App. 1924) ("while the petition contains a conclusion that the corporation is insolvent, no sufficient facts are alleged to show such insolvency. . . . While certain indebtedness of the corporation is alleged, there is no allegation as to the value of its assets."); Bijur v. Bijur Motor Appliance Co., 121 Atl. 6 (N. J. Eq. 1923); HIGH, *op. cit. supra* note 19, at 186.