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William F. Cahill, B.A., LL.B., J.C.D.

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SOLUTION OF THE PROBLEM CASES

WILLIAM F. CAHILL, B.A., LL.B., J.C.D.*

NEARLY ALL THE questioned conduct of our hypothetical attorneys is the conduct of lawyers acting in a strictly representative capacity. These men are to commence or prosecute actions or to plead defenses. Except in the case of Mary Smith's administrator, the rights and powers here to be exercised are given by the law, not to the attorneys themselves, but to their clients. The attorneys, as agents, are to exercise the legal rights and powers of their clients — they are to be, in the moralist's term, cooperators¹ in their clients' acts. Therefore the first step in the process of evaluating morally the lawyers' concurring conduct must be to establish the moral quality of the acts by which the clients exercise the rights and powers given them by law.

The moral quality of the acts which the clients propose and in which the attorneys are to cooperate will appear more clearly if we first describe the moral background of those acts, by establishing whether or not the clients are morally obliged to forbear making the defenses, bringing the actions, or employing the tactics suggested. The moral obligations here pertinent may be examined in three stages. The primary moral obligations are those which arise directly from natural law.² The secondary moral obligations are those which arise out of just human laws, considered as precepts of the moral order.³ Then we must consider whether, at the time the clients are to act, and the attorneys to cooperate with them, some of the primary and secondary moral obligations may have been extinguished.⁴

The Parties' Primary Moral Obligations

The primary moral obligations⁵ of Mary Smith seem to be these. By her contract with the White Co., she bound herself to pay for

*Priest of the Diocese of Albany. Professor of Law, St. John's University School of Law.

¹ See p. 52 *infra*.

² See pp. 34, 36 col. 2 *infra*.

³ See p. 27 *infra*.

⁴ See pp. 35-39 *infra*.

⁵ See note 2 *supra*.

the 1956 car upon certain terms; by breaching that obligation, she may have incurred an additional duty — to make good the harm her act of breach unjustly caused the Company. As far as natural law is concerned,⁶



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she might discharge these obligations by fulfilling the contract and compensating the Company's special damages or, with the Company's consent, by returning the car and making whole the Company's loss on the entire transaction. Mary Smith is similarly obliged to fulfill her contract with Jane and to repair the harm she caused Jane by breaching the contract. Mary Smith is obliged to do what she can to correct the false impression she has given others in respect to Jane's character and conduct. Further, she is obliged to repair or compensate the material damages she unjustly and efficaciously caused by slandering Jane.⁷

John Jones is bound morally to pay the balance of his mortgage debt, at least \$3,500, to the A.B.C. Inc. or to its successors. For any remedial right, such as a power of sale, the A.B.C. must rely upon the positive law, for the statement does not indicate that Jones has created any such right by special promise in the mortgage instruments.

The Cola Corporation is morally obliged to compensate the claimant of File B for any damage its agents or employees, acting with the knowledge and consent of the Cor-

poration's responsible managers, caused him unjustly, efficaciously, and with theological fault. The Corporation has, of course, no such obligation to the claimants of File A or File C.

The Parties' Secondary Moral Obligations

These are obligations which arise out of human law. The legal obligations of just laws become moral obligations in virtue of the natural principle that binds men to live in society and to pursue in their conduct society's common good.

All human laws impose standards of conduct. Conduct which violates no legal standard is said to be legally permissible or, in a negative and improper sense, it is called lawful conduct. But properly speaking, conduct is lawful when it conforms to a legal standard, and it is unlawful when it violates such a standard. Even when they are used properly, the terms lawful and unlawful have different senses, which must be clearly distinguished in reference to the problem cases here examined.

Conduct is lawful or unlawful, in the strict sense, if that conduct, as such, is commanded or forbidden by law. Although a line of conduct, as such, is neither commanded nor forbidden by law, the conduct may be called lawful or unlawful in a broad but proper sense. In this sense, conduct is lawful when the performance of the conduct is a condition precedent to the enjoyment of a legal right or to the imposition of a legal obligation. Thus, for example, recording a deed is lawful conduct, not in the strict sense that the conduct itself is a legal obligation, but in the broader sense, that the property interest represented by the deed is given certain protections of the law only

⁶ See p. 36 *infra*.

⁷ See pp. 55-56 *infra*.

when the deed conferring that interest is recorded. The law of penal or exemplary damages imposes standards of conduct directly, as such, where as the law of compensatory damages imposes broader standards of conduct. This law does not forbid negligence or breach of contract per se. But when damage follows upon such breaches of the legal standards of conduct, the person who violated the standards is obliged by the law to "respond in damages."

Just laws, then enter into the moral order and create moral obligations proportioned to the legal duties those laws impose. Conduct commanded or forbidden as such by a just law is, accordingly moral or immoral conduct. Conduct which the law makes a prerequisite to the imposition of a legal obligation is not, as such, moral or immoral — it is a condition which must exist before the law will create a moral obligation. Thus, the laws which concern us in these hypotheticals — the laws of contract and tort damages, the recording statutes, and the laws which give actions for debt and for foreclosure — establish standards of conduct whose fulfillment or violation are conditions prerequisite to the incurring of legal and moral obligations.

Anterior to any conduct in compliance with or violative of the specific standards of conduct established by these several laws, a person who is legally subject to a civil jurisdiction has a moral duty to suffer the coercions lawfully and justly employed by that authority to determine claims made under its laws. This moral duty exists though the claim made against him in a given case be utterly baseless.⁸

Mary Smith, upon violating the legal standard of conduct imposed by the law of

slander, with consequent harm to Jane, incurred a legal and moral obligation running to Jane as well as to the state.⁹ The content of this obligation is that Mary Smith must suffer the coercion incidental to the lawful process by which Jane may seek judgment for damages. If such judgment should be given justly against Mary, she would have two further moral obligations — to pay the successful plaintiff the damages decreed, and to suffer the lawful coercion incidental to execution of the judgment. We will later show that Mary incurred no legal liability by breaching her contracts.¹⁰

John Jones, when he defaulted in his mortgage payments, incurred secondary moral duties in respect to the action for debt and the foreclosure action. Jones was bound by two further obligations created by law. When his mortgagee complied with the recording act, Jones became bound to suffer the record lien as an encumbrance upon his title, and to use none but legal means to clear his title of that encumbrance.¹¹

Although the claims against the Cola Corporation represented by Files A and C are without foundation in fact or in law, the Cola Corporation has a moral duty to suffer the coercion incidental to lawful examination of those claims.¹²

If those unjust claims should be finally determined against the Corporation, it would be morally obliged to satisfy the judgments, but this duty would run to the society only, and not to the claimants. Unlawful resistance to, or evasion of, the process of execution of the judgment would be immoral, but would not deprive the claimants of anything which strictly and

⁹ See p. 36 *infra*.

¹⁰ See pp. 12-13 *infra*.

¹¹ See p. 35 *infra*.

¹² *Ibid*.

⁸ See p. 35 *infra*.

morally belonged to them.

On the contrary, if the founded claim of File B were justly and finally adjudicated against the Corporation, its duty to pay the judgment would run, not only to the civil society, but to the claimant. Unlawful evasion of this duty would not only be immoral in itself; it would leave the Corporation with a moral duty to compensate the claimant upon the terms of the judgment, though lawful execution of the judgment had been successfully evaded.

The Moral Effect of the Procedural Laws Referred to in the Cola Case

These laws typify the laws which give causes of action and govern the evolution of actions.¹³ Such laws impose directly two chief moral obligations — the party given the action is bound to pursue his remedy in accordance with the legal requirements of procedure and proof, and the party defendant is bound to suffer the law's just coercion, not only in the eventual execution of just judgment taken against him, but in the lawful processes which enable the court to examine and determine the claim. These two duties do not directly alter the defendant's pre-existing moral duty to the claimant, if he have such a duty. If he is bound in conscience to restore the other's property or to repair or compensate the other's damages, this obligation is in no direct way altered by the law which gives to the other a cause of action to enforce his claim. The two duties directly created by law may, however, affect the pre-existing moral obligation indirectly. Absent the law, the person obligated might have had a choice of means with which to perform his moral duty of restitution, but the intervention of the law may limit his choice.

¹³ *Ibid.*

A person who has, with theological fault, so injured another as to cause loss of employment, for example, is obliged in conscience to repair that loss. The person so obliged might compensate, to the perfect satisfaction of natural justice, by a money payment, or by persuading the former employer to take back his servant, or by finding another job for the person deprived. But when the law threatens enforcement of damage compensation by no other means than money payment, and the one injured will not save the offending party from the law's menace by giving a legal release in exchange for a morally adequate reparation, the offending party may postpone performance of his primary moral duty to make restitution. His attempt to perform by means other than money payment will not satisfy the law and, though he pays the money morally due, he may be still exposed to the trouble and expense of suit. If the injured person's refusal of morally adequate reparation is unreasonable, and his pursuit of legal coercion imposes unjust hardship, the conscientious duty of restitution may suffer diminution or may even be extinguished entirely.

The laws mentioned in the Cola Corporation problem specify the obligations of the claimants under a general principle of morals that those who invoke the aid of the courts to enforce their rights shall do so on the law's terms. Aside from considerations of the basic justice of their claims, A, B, and C, as persons who seek the law's aid, are obliged to meet the law's requirements in respect to making proper pleading, establishing the court's jurisdiction, showing the adequacy of service, and suffering appeal from the judgment of the trial court. These requirements, in their fullness, are not mandatorily exacted by the law itself, for the law empowers the defendant to waive some

of them. But a defendant has no moral duty created by the law itself to make these waivers. If he had such a duty in any case it would arise from the moral obligation not to diminish the recovery of a plaintiff whose claim is certainly just, in its factual and legal foundation and in the manner and amount of its demand. The claims here are not of this character, therefore the Cola Corporation violates no moral obligation in resisting them by refusing to exercise the waivers to which the law empowers it.

It follows that the Corporation's act is not evil in its moral object. The statement suggests no intent, nor any indirect effect or other circumstance, which would make the concrete acts of the Corporation morally evil.

Moral Effect of the Law of Infancy in the White Co.'s Action Against Mary Smith

This law empowers Mary Smith to avoid her contract, made with the White Co., for the conditional purchase of the 1956 car. The power may be definitively exercised by suit for rescission or by raising the defense of infancy in suit brought by the Company to enforce the contract. The direct legal effects in either case are to extinguish those duties of the parties which arose out of their agreement, to oblige an adult party to return to the infant all money and property received under the contract, and to oblige the infant to return to the other party all money and property received under the contract and which in one form or other remains in the infant's hands. In some few jurisdictions, the infant cannot rescind if he does not make the other entirely whole; in a few others, the depreciation of property held by the infant is charged off against the

money which the other must return to him. Where the power of rescission is given in respect of property contracts, the state is unquestionably competent — in contrast to the state's grant of power to avoid a contract of marriage valid *ab initio*, which is incompetent as it is opposed to natural law. The power of voiding property contracts given to infants seems to be directed to the common good, for it has the effect of making infants secure in their property rights, even against the effects of their own immaturity and though there be no wrongful or overreaching conduct in the other party. The test of equitableness is better met where the measure of the infant's recovery is limited, at least to some extent, by considerations of deterioration or of the intangible benefits he has had from the contract. Yet the generally accepted measure of recovery which so strongly favors the infant is not radically inequitable, in view of the opportunity everyone has to avoid serious loss — by refusing to contract with infants, except in respect of necessities and of items of small value.

If Mary Smith pleads the defense of infancy, the primary and secondary moral obligations relating to her dealings with the White Co. will be extinguished. A just law which empowers its subject to free himself from legal obligations and which, upon his doing so, imposes contrary legal and moral obligations upon other persons, clearly extinguishes the moral obligations of the subject.¹⁴ If the law which empowers an infant to avoid her contract did not release her moral obligations thereunder, the law would be unjust and morally ineffective in binding the other party to give up the benefits he has received under the contract. Though the person who contracted in infancy has a pri-

¹⁴ See p. 38, col. 2 *infra*.

mary moral duty to perform her contract, it does not follow that she acts wrongfully when she acts to obtain a legally and morally effective release from that obligation.

Therefore, the act of Mary Smith in making the plea of infancy to avoid her contract obligations to the White Co. will not be evil in its moral object. We shall see that Mary's act is not evil by reason of its indirect effects or of her intent.

Moral Effect of the Statute of Frauds in Jane's Contract Action Against Mary Smith

The procedural laws make the protection of the Statute of Frauds available to the defendant who pleads the defense in answering a complaint which does not allege a merely oral contract, or who shows the legal inefficiency of a complaint which does allege a merely oral contract.

There is some difficulty in determining precisely the legal and moral status of a contract which is within the Statute of Frauds and is not conformed to the Statute's requirements. There are a few American jurisdictions in which the local statutes declare "void" a contract such as Mary Smith's oral agreement to buy Jane's \$500 car. If our hypothetical jurisdiction has such a statute and if its terms are most strictly construed by the courts of that jurisdiction, Mary's contract with Jane was void *ab initio*.¹⁵ But such strict construction of the Statute of Frauds, even in jurisdictions where the clause applicable to contracts for the sale of goods uses the word "void," would be so unusual that the law of our hypothetical jurisdiction must not be assumed to have voided the problem contract at its inception.

¹⁵ See p. 38, col. 1 *infra*.

There is good warrant for the view which holds that in most American jurisdictions, a contract obnoxious to the Statute is voidable at the option of either party thereto,¹⁶ and that this problem contract would have been voided by Mary's refusal to purchase the car as agreed. This view of the Statute's legal effect seems to follow logically from the holding of our courts with respect to the measure of damages in such cases and with respect to the title in goods transferred pursuant to a contract which is later repudiated. When either party to a contract for the sale of goods repudiates the agreement, title in the goods, if it had passed to the buyer, reverts in the seller. And it is said that because the party repudiating a contract obnoxious to the Statute does no legal wrong, the other cannot recover damages upon the measure of his loss from the nonperformance, but only upon the reasonable value of what he had done under the contract.

Yet we are not prepared to say that the moral effect of the Statute of Frauds is free of the requirement of good faith which the moralists insist is necessary for the moral effectiveness of laws which transfer property interests by prescription.¹⁷ An adverse possessor of land does not make his title morally good if he enters or occupies with the consciousness of violating a moral duty. We believe that one who repudiates a contract obnoxious to the Statute of Frauds, knowing that he is failing in the primary moral duty of justice, does not obtain release from his moral obligations which arose out of the contract. This matter differs in important aspects from the disaffirmance of an infant's contract. The law of infancy, by giving the affirmative action to disaffirm, indicates its intent to offer the infant means

¹⁶ See p. 38, col. 2 *infra*.

¹⁷ See p. 32, col. 1 *infra*.

to free himself entirely from his contract burdens. The defensive aid which the law gives to an infant who has disaffirmed by nonperformance seems to be offered as an alternative means, by which the infant can free himself without assuming the burden of an affirmative suit. In contrast, the intent of the Statute of Frauds seems not be that of directly offering the parties a means of achieving freedom from obligation, but rather to save time and trouble for the courts, and to penalize the imprudent contractant who does not trouble to get a memorandum of his agreement. Therefore, we believe that while the disaffirming infant is not barred morally from the act which will obtain for him a full legal and moral discharge of his contract duties, the person repudiating his obligations under an oral contract whose existence he does not question is acting in such bad faith that he cannot benefit in the moral order from a legal avoidance of his contract.

And so we are of opinion that, in the moral order at least, the Statute of Frauds has only the effect of making unenforceable the obligations created by the oral contract.¹⁸ Thus, it discharges the defendant from the secondary moral duty to suffer the coercion incidental to the plaintiff's suit for specific performance or for the full measure of damages for the breach. The defendant's good faith is not required here, except to the extent that he shall not destroy the written memorandum if one exists, and he shall not, by lying, assert that a lost memorandum never existed. If he maintains this minimal good faith, he may morally have the Statute's protection against litigation of his opponent's larger claims. He is still, in a proper case, subject to a quantum meruit action.

¹⁸ See p. 35 *infra*.

This effect of the Statute, to make the larger claim unenforceable, is just and, so, morally effective. If a law is justified by its general effect, it does not lose its moral force because, in a given case, the desired effect is not achieved. It is said that the Section of the Statute of Frauds which governs contracts for the sale of goods serves the social need to avoid litigation of commercial matters having slight significance in the society's economy and in the economic security of its members in general, where the lack of written proofs makes the legal process difficult, lengthy, and uncertain. And this Section's effects seem not inequitable when one considers that they follow only when the parties have neglected to avail themselves of the easy and commonly known means of a written memorandum to protect their rights. Reasonable arguments have been made to the contrary, urging that the general effect of the Statute is inequitable and adverse to the common good. But where the over-all effect of an existing law is not clearly and certainly shown to be contrary to the common good, or seriously inequitable, one who applies the law must hold it just, in accordance with the presumption of rectitude in the legislature's exercise of political wisdom. It is true, of course, that the judicial or legislative lawmaker may properly alter the law on a merely probable showing that the law is inequitable or does not promote the common good.

That Mary Smith made a lying and slanderous excuse for breaking this contract, may reasonably be taken to indicate that she repudiated the agreement with a subjective conviction that she was doing a moral wrong. Her repudiation and her present plea will not release her from her primary moral obligation to perform her

agreement, or from her primary moral obligation to repair the damage Jane has suffered by Mary's morally wrongful refusal to purchase the car.

Yet Mary does no moral wrong, *per se*, in refusing to suffer the legal coercion incidental to Jane's suit upon this contract. If Mary had persuaded Jane that no memorandum was necessary, one could readily see why Mary should not now plead the Statute of Frauds to get the benefit of her own deceit. But where it is Jane's own ignorance or negligence which has occasioned Mary's power to avoid suit, it is hard to say that Mary's employment of that power is an act immoral in its very object.

Of course, Mary's plea of the Statute is evil in this case if we assume, as the statement seems to warrant, that Mary intends to give Jane nothing unless she is legally compelled to do so. Here, Mary's act is morally vitiated by her evil intent and by the evil indirect effect that Jane's damage, for which Mary has full moral responsibility, will not be repaired.

Moral Effect of the Statutes of Limitation in the Contract Actions of the White Co. and of Jane Against Mary Smith, in the Tort Action of Jane Against Mary, and in the Actions in Debt and Foreclosure Against John Jones

The plea of the Statute of Limitations, in its effectiveness to extinguish moral obligations, is similar to the plea of the Statute of Frauds and quite unlike the plea of infancy. The infancy plea extinguishes all secondary moral obligations, and even those primary obligations which arose out of the rescinded contract. But the moral effect of the plea of

limitations is limited, like that of the plea of the Statute of Frauds. When he successfully pleads limitations, the defendant is freed only of his moral obligation to suffer the coercive process by which the claim made against him might have been adjudicated.¹⁹

Armed with the final judgment which recognizes the validity of his statutory defense, he can prevent the plaintiff from having trial and judgment upon the claim against whose litigation the period of limitation has run. Of course, if the plaintiff has had judgment upon his principal cause of action, and it is only an action upon the judgment that is barred by limitations, the moral obligations imposed by the just judgment will not be extinguished by the interposition of the plea of limitations in a supplementary proceeding.

It is sometimes said that the running of the Statute of Limitations extinguishes substantive legal rights. That statement, if it be taken literally, involves the fallacy of "*Post hoc, ergo propter hoc.*" Substantive rights are, in some cases, extinguished at the same moment that the period of limitations, applicable to an action to enforce those rights, expires. But the failure of the remedy does not cause to be extinguished the right which the remedy was given to enforce. The classic case is that of adverse possession of realty. It is not the Statute of Limitations, but some other statute or some judge-made law which extinguishes title in the "owner" and creates title in the "occupier."

Moral obligations, whether they were created by the acts of the parties under moral law alone, or by the acts of the parties under a just human law,²⁰ can be extinguished by human law. But that can be done only by a competent and just human law

¹⁹ *Ibid.*

²⁰ See p. 34 *infra*.

which operates to impose obligations contrary to the pre-existing obligations.²¹

Moral obligations which are primary — arising without the aid of human laws — persist whether the human law always declined to enforce them or, having once offered to enforce them, now withdraws its offer. Moral obligations correlative to moral rights acquired by compliance with competent and just human law endure in the moral order, though the human law later refuse to coerce their performance. Of course, if one has not availed himself of a human law by whose operation legally coercible moral obligations could have been imposed upon a person subject to that law, and the legal system now makes its coercive process unavailable for that purpose, the moral obligation in question cannot now be created.

Jurisprudential concepts closely parallel to those stated here premise the constitutional doctrine announced by the Supreme Court of the United States in the case of *Campbell v. Holt*²² and elaborated in other cases and in other courts. A statute which revives a cause of action outlawed by limitations must be predicated upon the assumption that the substantive rights which the action enforces survived when the enforcing action was outlawed.

The legislature is competent to revive a cause of action outlawed by the statute of limitations, except in those cases where a contrary obligation respecting the same subject matter has become coercible by reason of the expiration of the period of limitation. Revival statutes are incompetent when the outlawed action is one to recover real or personal property. In this latter con-

text, there are given to the possessor causes of action which secure his enjoyment of the property against the owner, and the actions are given to the possessor in the very instant in which the owner's causes against the possessor are barred by limitations.

In none of the actions here considered as affected by statutes of limitation does the law give to the defendant, by reason of the expiration of the period of limitation, a cause of action to enforce against the plaintiff an obligation contrary to the obligation which the plaintiff's action sought to coerce. None of these actions pertinent to the problems proposed is an action to recover property, real or personal. This is obvious with respect to the actions which seek damages for breach of contract or for tort, and with respect to the debt action of Jones's mortgagee. The foreclosure action, if we may assume that judgment for the mortgagee would have the effect of requiring a sale of the property, is not a possessory action. And in nearly all of our States, that is the effect of foreclosure.

The running of the statute on the mortgagee's action to foreclose does not, in and of itself, cancel the mortgagee's lien of record. The power given to the mortgagee by the recording act, to have his lien recorded, and the right which the law secures to him, to have that record stand until removed by his executing a satisfaction piece or by decree of court, are a legal power and a legal right coercive of the mortgagor's obligation to pay his debt. They have value to the mortgagee even after his action in foreclosure is barred by limitations, because they make it possible for him to bargain for settlement of the debt by offering a satisfaction piece which will clear the mortgagor's title and give it a better market value. This power and right are not extinguished by the

²¹ See pp. 35-37 *infra*.

²² 115 U. S. 620 (1885).

running of limitations, but the expiration of the period of limitations is taken as a starting point by the statute which gives the mortgagor an action to have cancelled the record lien. It is important to observe that neither this statute nor judgment for the mortgagor in an action thereunder imposes any obligation which is contrary to the mortgagor's obligation to pay his debt. Further, the action given by this statute is not an action for possession of property.

Therefore, in these cases, the expiration of the several periods of limitation has only the effect of empowering the defendants to prevent enforcement against them of the plaintiffs' claims.²³ The only moral obligations discharged by the running of these periods are the defendants' secondary moral obligations to suffer the lawful coercions incidental to adjudication of the plaintiffs' claims.

No one has, from natural law, power to enforce his claim by an action at law. He has that power, if at all, by gift of competent human law. A human law which is not just is incompetent to extinguish a moral right acquired by exercise of a legal power, but even an unjust law is effective to limit or revoke a legal power it has created. The law of limitations does not directly revoke or limit the power to enforce a claim by an action at law, it does so by empowering the defendant to bar enforcement of the claim. The defendant, exercising this power, never does a wrongful act *per se*, for he does not directly deprive the claimant of anything which the law cannot take from him at will. The defendant's act of exercising this power may well be wrongful in the concrete — it is so when he acts with morally evil intent, or in disregard of his moral duty to prevent the evil effect which his act indirectly pro-

²³ See p. 35 *infra*.

duces in a given case. But his act is not morally evil in its object.

It does not appear that the statutes of limitation applicable in these problem cases are unjust. The state is not bound to enforce every moral obligation at all costs. If the enforcement involves proportionately great harm to the common good,²⁴ the state need not impose it, or having imposed it may justly give a defense to bar it. Long delayed litigation harms the common good, because it makes for insecurity of the citizens in their enjoyment of property and in their exercise of enterprise, and also because it creates unreasonable difficulties for the defendants and for the courts by raising questions at a time when the pertinent proofs may well have been lost, partially or entirely. A limitation is not inequitable²⁵ if the period allowed is reasonably long with respect to the subject matter. In those tort matters where the element of causality is not susceptible of a clear proof even a few years after the event, shorter periods are not inequitable.

Therefore the acts, by which the defendants in our hypotheticals will invoke the defense of the Statute of Limitations, are not evil in their moral objects. When the several actions are thus terminated the parties' secondary moral obligations will be extinguished, but their primary moral obligations will not be affected.

Moral Effects of the Statute Which Gives John Jones an Action to Have Cancelled of Record the Lien of an Outlawed, Though Unpaid Mortgage

Obviously the right of a mortgagee to

²⁴ See p. 32 *infra*.

²⁵ See p. 33, col. 2 *infra*.

maintain his record lien, even after his action on the debt and his foreclosure action have been outlawed by limitations, is a valuable right. It enables him to bargain for a compromise of the debt when the mortgagor desires to clear his record title.

In the ordinary actions given an owner of real property to remove the record lien as a cloud on his title, the statutes or the courts in most of our States require that the owner offer proof that the debt underlying the lien has been paid in fact. We shall assume that in Jones's state the usual actions to quiet title require proof that the debt has been fully paid.

Jones's state gives a statutory action to cancel of record the lien of his mortgagee. To give substance to the problem we must assume that the statute of the hypothetical state is similar to some actual statute. We will assume that Jones's action is given by a statute similar to Section 500 of the New York Real Property Law, as that Section has stood since the amendment of 1948 added Subdivision (4). That subdivision gives, in specific terms, an action to cancel and discharge of record a mortgage where the action to foreclose is outlawed by limitations, unless the mortgagee or his successor shall be in possession of the property at the time the plaintiff's action is commenced. The subdivision declares that payment or non-payment of the mortgage debt shall be immaterial.

The statutory action seems to extinguish justly the corporate mortgagee's valuable right to maintain the record lien. The mortgagee's right arose under the state's recording act. This right has natural law content only in virtue of the general principle which empowers civil society to coerce performance of the natural moral obligation of debt which arose when Jones took ownership of

the real property from the Corporation without paying the full price, and promised to pay the balance upon the terms of the mortgage. The statement does not suggest that Jones, in his mortgage agreements, undertook to let the record lien stand until he paid the debt. We may assume that the statute which creates Jones's action to cancel the record lien is a just law, not incompetent, and directed equitably to the common good. The mortgagee's right was created by coercive law, and that law is competent to extinguish it. The extinction of the right is directed to the common good as it serves the social interest in the free alienability of real property. It has the same equitableness as the statute of limitations which extinguishes the mortgagee's rights to have coercion of the debt obligation by actions on the bond and to foreclose. That the statute tends to foster injustice where it gives the action for cancellation of the lien to the original mortgagor could be argued reasonably, yet that conclusion seems to us not so compellingly certain as to override the presumption that the legislature has acted justly, at least within the limits of political wisdom, by abolishing a right which its predecessors created when they passed the recording acts.

Therefore the moral object of Jones's act in commencing the statutory action is not evil. The decree he seeks will not, however, alter or extinguish his moral obligation to pay the balance of his debt.

Jones's mortgage is not "void upon its face." The dissolution of a corporation does not extinguish its property rights or its choses in action. For purposes of enforcing debts and other obligations due a corporation, the corporation is held to survive dissolution and a receiver is empowered to obtain enforcement. Assets thus realized are

distributed to the corporation's creditors or successors, as their interests may appear.

Conclusions as to the Cola Corporation Attorney

We have shown the moral righteousness of the corporation's conduct in refusing to waive its procedural rights in the suits brought by A and B, and in deciding to appeal the judgment given in C's favor. There is therefore, no question of their attorney cooperating in a client's wrongdoing. Nor does it appear that the attorney's act is evil in its object, in its accidental circumstances, or in his intent.

One caveat is offered. If the attorney employs fraud, chicane, or even frivolity in the delaying tactics by which he seeks to advance his client's causes, his will embraces the moral evil which characterizes these expedients.²⁶

Conclusions as to Mary Smith's Administrator

The administrator may, in good conscience, plead the defenses proposed in the actions which will have survived Mary Smith's death and which will be brought against her estate.

The administrator's conduct does not come under the moral rules which govern cooperation in the wrongdoing of another. He is acting in his own name, though fiduciary duties limit the freedom he would have if he acted in his own personal interest.

We have established that pleading the several defenses in the actions which will be brought against the Smith estate is not conduct evil in its moral object.²⁷ To perform his duties as a fiduciary, and to earn his

²⁶ See p. 49, col. 1 *infra*.

²⁷ See pp. 44-47 *infra*.

fees, must be assumed to be the intent of the administrator's activities — that intent is not morally evil, indeed it is virtuous, in some degree at least.²⁸ Moral circumstances,²⁹ accidental to the object of his acts, in which the will of the man who is administrator may embrace evil, do not appear — unless his acts have some evil indirect effect³⁰ which he is morally obliged to prevent. The acts by which the administrator will make the defenses will not, of course, prevent the White Company from recovering the car Mary Smith purchased from them, nor will they prevent the Company from retaining enough of her payments to cover the car's depreciation, if the rule of the Smith jurisdiction so provides. The administrator's intervention will prevent the recovery of damages by the White Co. and by Jane.

Under the survival acts, the contract actions can be brought against the estate of the decedent, and the estate has the secondary moral obligation to suffer the legal coercion incidental to prosecution of these actions. The acts by which the administrator will interpose the defenses of infancy in the White Co. action and that of the Statute of Frauds in Jane's contract action are acts not evil in their moral object. We may safely assume that the administrator will act without evil intent. Judgment for the estate will discharge its secondary moral obligations and will direct return of the 1956 car to the White Co. The administrator's interposition of the defenses may have evil indirect effects — neither the Company nor Jane will be compensated for any damages Mary culpably caused them. But the administrator has no moral duty to prevent these effects because he has no opportunity of

²⁸ See pp. 48-49 *infra*.

²⁹ See p. 50, col. 1 *infra*.

³⁰ See pp. 50-52 *infra*.

preventing them. The law will not permit him to pay out moneys of the estate to satisfy claimants who cannot legally establish their claims, and if the administrator fails to make the defenses available to the estate he will be removed and the defenses entered by his successor.

Therefore, the administrator's acts, by which he will interpose the several defenses are not morally evil, in their objects, in their indirect effects or other accidental circumstances, or in his intent.

Conclusions as to Mary Smith's Attorney

In a moral evaluation, the acts by which the attorney will plead the several defenses in Mary Smith's behalf must be viewed as acts by which he cooperates³¹ in her wrongdoing, and as acts from which there will follow evil indirect effects as to Jane.³²

It seems clear that Mary Smith is determined not to pay anything to the White Co. or to Jane, unless she is legally compelled to do so. On the other hand, Mary Smith's primary moral obligations bind her to repair harm she has caused efficaciously, unjustly, and with that malice which is described as theological fault.

Mary appears to have no moral duty to make restitution of harm to the White Co. She refused to perform her contract with them, but because of the law of infancy her refusal had the character of a disaffirmance which is effective in the moral order to free her of the obligations which arose from that contract. Her remaining duty is to return their car which was the subject of the contract, and she is prepared to do that.

On the other hand, it is apparent that

³¹ See pp. 52-54 *infra*.

³² See pp. 50-52 *infra*.

Mary is morally bound to make restitution of the damages Jane suffered when Mary refused to buy Jane's sedan as she had agreed to do. This breach, in spite of the possible legal effectiveness of the Statute of Frauds to avoid the contract, did not release Mary from her contract obligations. That Mary lyingly excused her act indicates that she knew she was violating Jane's strict rights. In the circumstances, she must have foreseen that her refusal to buy the car would cause some loss to Jane.³³

Mary must have foreseen also that the lie she told would unjustly harm Jane, so Mary is bound to repair the harm she caused in this respect as well.³⁴

The moral principles which govern cooperation in wrongdoing³⁵ and acts which have indirect evil effects³⁶ must be applied to this situation in order to determine whether the attorney is permitted morally to undertake Mary Smith's defense.

He will plead the legal defenses in her behalf. In discussing the moral effects of the law of infancy, the Statute of Frauds and the Statute of Limitations, it has been shown that to plead these defenses is not an act morally evil in its object.³⁷

The attorney will act without evil intent.³⁸ It does not appear that he desires Mary to evade her moral duties, nor does it seem that he wishes Jane to be deprived of what is justly hers. His intent, as far as appears, is to keep the good will of his client, Mary Smith's father.

³³ See pp. 55-56 *infra*.

³⁴ *Ibid*.

³⁵ See pp. 52-54 *infra*.

³⁶ See pp. 50-52 *infra*.

³⁷ See pp. 12-13, 15 *supra*; *cf.* p. 51, col. 2 (Condition 1) and p. 54, col. 1 (Condition 1) *infra*.

³⁸ See p. 51 (voluntarium in causa) and p. 52, col. 1 (Condition 2) and p. 54, col. 1 (Condition 1) *infra*.

The attorney is certainly aware that Mary intends to evade her moral obligations, and he must know that Jane will get no restitution if Mary succeeds in defending these actions. Thus, he foresees that his act of defending Mary Smith will aid Mary's wrongdoing and will result in Jane's unjust deprivation.

In this situation, it remains to inquire whether the attorney has such reasonable and proportionate cause for undertaking Mary's defense as will morally warrant him in cooperating with Mary's wrongful conduct and in permitting Jane to suffer harm.³⁹ The hardship he will suffer by refusing to defend Mary Smith must be weighed against the evil of Mary's conduct and the evil Jane will suffer.

In this case the causal relation⁴⁰ between the attorney's act and the evils which will follow upon it is quite close, and it is practically certain⁴¹ that if he defends Mary Smith she will realize her evil intent to give Jane nothing. We will take that Mr. Smith will no longer retain the attorney if he refuses to defend Mary. Thus, our examination of reasonable and proportionate cause is reduced to a comparison⁴² between the act the attorney is asked to perform and the hardship his refusal must entail, on the one hand, and Mary's malice and Jane's loss, on the other.

Mary is violating very serious and very strict moral obligations imposed by the virtues of veracity and justice. On the attor-

³⁹ See p. 51, col. 1 (Condition 2), p. 52, col. 1 (Condition 4), and p. 54, col. 1 (Condition 3) *infra*.

⁴⁰ See p. 52, col. 2 (Item 2) and p. 54, col. 2 (Item 2) *infra*.

⁴¹ See p. 52, col. 2 (Item 3) and p. 54, col. 2 (Item 3) *infra*.

⁴² See p. 52, col. 2 (Item 1) and p. 54, col. 2 (Item 1) *infra*.

ney's side, it should be pointed out that the act he is contemplating is a usual and customary one in his profession. As such, it needs less justification than if he were to undertake, in behalf of this wrongdoer, some quite extraordinary assistance. While Jane's loss may be very considerable, the attorney's loss of his retaining client deserves special weight because it will affect quite directly his means of livelihood.

It is, therefore, our opinion that the attorney will not act immorally if he undertakes Mary Smith's defense.

We believe, however, that the attorney has a clear duty to call to the attention of Mary Smith and her father the malice of her dispositions, and the grave injustice of their effects on Jane. He should urge that Mary acknowledge her misrepresentation of Jane's character, that Mary or her father help Jane to get back her job or to find new employment, and that they make some fair compensation to Jane for the material harm she has suffered. This duty — if Mary Smith and her father are not utterly unreasonable people — involves no serious hardship or risk of hardship for the attorney.

Conclusions as to the Attorney for John Jones

Since it appears that Jones's act of bringing suit for a decree cancelling the record lien is not evil in its object, we need examine only his intent⁴³ and his act's indirect effects⁴⁴ — no other accidental moral circumstances of his act appear to be evil.

Clearly, Jones's intent is not to pay the balance of his debt at this time. It is not clear whether he intends ever to pay that

⁴³ See pp. 48-49 *infra*.

⁴⁴ See pp. 50-52 *infra*.

balance in full. Jones has a duty to seek out his creditor, but he does not have a duty, at this time, to pay anything to or make a composition with any person — for it does not now appear who is entitled to receive payment of the debt or to forgive any part of it. The moral title to demand or forgive the debt will depend upon the law and the facts pertinent to the financial position of the dissolved corporation and to Richard Roe's decedent estate.

It seems quite certain that Jones has not been, up to now, discharged of his debt obligation or of any part thereof. If Thomas Roe, as his refusal to deal with Jones seems to indicate, has renounced any inheritance of A.B.C., Inc. stock, his refusal to help Jones get a release and effectuate payment is not an act binding upon the corporation or its successors. On the other hand, Alfred's offer to settle with Jones was conditional, and its condition precedent was not fulfilled, so that offer could not discharge Jones, even partially.

Whether or not the success of Jones's statutory action will have the indirect effect of depriving the corporation and its successors

of any payment upon the debt Jones morally owes, is quite uncertain.

We can only say that Jones's attorney should question the client as to his intentions. If Jones seems inclined to perform his moral duties as they may appear upon honest and competent investigation and negotiation, the attorney may commence the action. If that is not Jones's disposition, we believe that the attorney should not concur in the act of Jones, which will be wrongful because of its certain or probable, and seriously evil, indirect effects.⁴⁵ The person or persons entitled will lose all hope of payment or compromise of Jones's debt which amounts to at least \$3,500. The attorney's hardship, the loss of a fee which must be, in comparison with the creditor's loss, very small, seems not to warrant the attorney's cooperation in Jones's unjust and uncharitable act. Though the attorney is not bound in justice to safeguard the mortgagee, he has an obligation of charity to refrain, when no proportionate hardship is involved, from acts harmful to others.⁴⁶

⁴⁵ *Ibid.*

⁴⁶ See p. 53, col. 1 and p. 54, col. 1 *infra*.