appointment to membership will not be based on political patronage. But on the other hand there may be those who are attracted by power which may be wielded for their own selfish benefits. Expense accounts may even be fabricated. To thwart this possibility it has been suggested that acceptance by an appointee of a position on the board be made mandatory. With this provision in addition to the provisions already included in the statutes, the boards ought to be composed of a competent membership. As an added check, the legislatures have also provided for sufficiently long terms and appointments in rotation so that one political administration can not during any one period exert too much influence on the board.

A board to be truly advisory must in a great part be free from restrictions and restraints. If one is controlled in the advice he gives it is no longer his advice. Therefore an advisory board must function as its own initiative dictates. For that reason it can not assure an effective attainment of its objectives, because its success in a great part is dependent on its personnel. The advisory board is no panacea of all administrative defects but is a valiant attempt to shear the administrative department of its potential inherent deficiencies.

LOWELL M. GOERLICH

MORTGAGES

PAROLE RELEASE OF AN EQUITY OF REDEMPTION

On March 1, 1916, Mungeon Cooney delivered to the plaintiff, Frederick Orth, a mortgage on certain real estate. Cooney died testate in 1920, leaving all his property to his widow, and appointing her executrix. In 1927 the widow died intestate leaving her son, Wayne Cooney, her sole heir. Apparently the condition of defeasance within the mortgage was broken by the failure to meet interest payments, although such payments were made by Wayne Cooney up to March 1, 1931. In 1934 Orth and Wayne Cooney made an oral agreement whereby the mortgagee was to accept a release of the equity of redemption in return for the cancellation of the mortgage indebtedness. When the deed was tendered, Orth refused to accept it and later filed an application as creditor of Mungeon Cooney for letters of administration *de bonis non* of the estate of Mungeon Cooney. This application was denied in the Probate Court of Hardin County and allowed on error to the Common Pleas Court. The Court of Appeals reversed the judgment of the Common Pleas Court and affirmed that of the Probate Court. The Appellate Court held that an executory parol contract is

sufficient to release the equity of redemption in a mortgage under the statute of frauds and therefore to extinguish the applicant's claim and terminate his status as a creditor. *Cooney* v. *Orth*, 20 Ohio L. Abs. 570 (1936).

The problem of the validity of an oral release has been dealt with in two ways. In some instances courts have resorted to the concept of title, and in others, have applied the doctrine of estoppel.

There are three recognized theories in respect to the general nature of a mortgagee's interest in the land. By the first, the title theory, legal title to the mortgaged land is considered to be in the mortgagee upon execution of the mortgage instrument subject, however, to a condition, subsequent payment. By the second, the lien theory, no more than a lien passes to the mortgagee. Legal title is not vested in him until foreclosure. By the third theory, an intermediate one, title is said to pass upon default of the condition set forth in the mortgage and before foreclosure. Several text writers have classed Ohio as a "title theory" state. Jones on Mortgages, (8th Ed.), sec. 51; Pomeroy's Equity Jurisprudence (4th Ed.), sec. 1187; Tiffany on Real Property, sec. 600. Others have placed this state in the intermediate category. Campbell on Mortgages, p. 24; 27 Ohio Jurisprudence, sec. 135; whereas Charles White in 3 Cincinnati Law Review 305 (1929) repudiates both classifications and puts Ohio in the lien group. While cases are to be found supporting both lien and intermediate views, the latter is most frequently found in the decisions. *Kerr* v. *Lydecker*, 51 Ohio St. 240, 37 N.E. 267, 23 L.R.A. 842 (1894); *Bradfield* v. *Hale*, 67 Ohio St. 316, 65 N.E. 1008 (1902); *Fidelity Mortgage Co.* v. *Mahon*, 31 Ohio App. 151, 166 N.E. 207 (1929).

Were the three theories of the mortgage capable of being followed to their logical conclusions, want of a writing would be a defense to an action brought in a lien state on an oral agreement to release an equity of redemption. In these jurisdictions legal title remains in the mortgagor and any attempt to transfer his interest is an attempt to convey a fee within the statute of frauds. On the other hand this would seem to be no defense to an action brought in a title state, for here legal title has already vested in the mortgagee by the execution of the mortgage. In the intermediate states the mortgagee has a lien before, but legal title after default. Thus parol agreements within the intermediate theory, after condition broken, and the title theory at any time, would not appear to come within the statute. Nevertheless, the courts have failed to reach conclusions consistent with these theories. The difficulty arises when it is seen that the right of the mortgagor to redeem represents an equitable interest in land. Where this is recognized, such interest is within

the statute and therefore, no matter which theory obtains, any executory parol contract under which the right of redemption is to be released in return for the cancellation of the mortgage debt is unenforceable. *Borcherdt* v. *Favor*, 16 Colo. App. 406, 66 Pac. 251 (1901); *Smith* v. *Burnam*, Fed. Cas. No. 130139 (1838); *Holmes* v. *Holmes*, 86 N.C. 205 (1882); *Marble* v. *Marble*, 5 N.H. 374 (1831); *Montpelier Savings Bank* v. *Follett*, 68 Neb. 416 (1903).

In a number of states a broad application has been made of the doctrine of estoppel to aid in solving the problem, but the cases to which this may be applied are limited to a comparatively narrow sphere. This is made up of instances where an absolute deed is given by way of mortgage and subsequently the parties thereto orally agree to extinguish both the debt and the equity of redemption. In these cases a majority of the courts have indirectly enforced the oral agreement by refusing to declare the instrument a subsisting mortgage. *Kemper* v. *Campbell*, 44 Ohio St. 210, 6 N.E. 566 (1886); *West* v. *Reed*, 55 Ill. 242 (1870); *Sears* v. *Gilman*, 199 Mass. 384 (1908); *Ferguson* v. *Boyd*, 169 Ind. 537, 81 N.E. 71 (1907); *Green* v. *Butler*, 26 Cal. 595 (1864).

In a portion of these states the courts hold that a parol release of the equity, accompanied by surrender of the contract of defeasance operates as a waiver of the right of redemption. The surrender of the legal evidence by which the existence of the mortgage could have been proved, vests an indefeasible title in the mortgagee on the theory that the mortgagor is thereafter estopped from asserting his right. *Trull* v. *Skinner*, 17 Pick. (Mass.) 213 (1835); *Stall* v. *Jones*, 47 Neb. 406, 66 N.W. 653 (1896); *Watson* v. *Edwards*, 105 Cal. 70, 38 Pac. 527 (1894); *Hutchison* v. *Page*, 246 Ill. 71, 92 N.E. 71 (1910).

On the other hand a strong minority, composed largely of lien states, refuses to uphold any transfer of the equity save by an instrument in writing. *Odell* v. *Montross*, 68 N.Y. 499 (1875); *Reich* v. *Dyer*, 91 App. Div. 240, 86 N.Y. Supp. 544 (1904); *Howe* v. *Carpenter*, 49 Wis. 697, 6 N.W. 357 (1880); *Van Keuren* v. *McLaughlin*, 19 N.J. Equity 187 (1868).

In Ohio Gen. Code 8620 it is provided that "No lease, estate, or interest either of freehold or of term of years, or any uncertain interest of, in or out of lands, tenements or hereditaments shall be assigned or granted except by deed or note in writing signed by the party so granting it * * *," and in sec. 8621 it is further provided that no action may be brought on any contract for the sale of lands, or any interest therein unless such agreement is in writing. The court in the principal case, relying exclusively upon the authority of *Shaw* v. *Walbridge*, 33 Ohio St. 1 (1877), failed to see two fundamental factors which distinguished

that case from the one at bar. In the *Shaw* case there was an executed contract, while in the present case it was wholly executory. Furthermore the suit in that case was instituted by a mortgagor, attempting to assert a right of redemption after its release pursuant to the terms of the contract, whereas here the mortgagor was endeavoring to extinguish the mortgage indebtedness by his parol contract so as to deprive the mortgagee of his status as a creditor of the estate entitled to letters of administration. The effect in the latter case is to force into the mortgagee an interest in lands.

The Ohio Supreme Court has expressly recognized the distinction between an executed and executory contract in question involving the statute of frauds. Although the former has been held enforceable, the latter has been expressly declared unenforceable as being within the statute. *Bumiller* v. *Walker*, 95 Ohio St. 344, 116 N.E. 797, L.R.A. 1918B (1917). Therefore, authority does not sustain an estoppel based solely on an executory parol contract where neither party has substantially relied, and since application of the concept of locus of title has been subordinated to the view that the equity of redemption is an interest in land which cannot be transferred without a writing, it would seem that the appellate court erred in permitting the morgage debt to be extinguished. The practical effect of the decision is to allow a transfer of an interest in land in contravention of the statute.

ROBIN W. LETT.

NEGLIGENCE

LIABILITY OF INSURANCE COMPANY WHEN DRIVER OF CAR IS FOUND GUILTY OF WILFUL MISCONDUCT

Louis Brinsky, a passenger in a truck owned and operated by Meyer and Silekovitz, was injured in a collision with a truck owned by the Fro-Joy Baker-Tabor Ice Cream Company. The Common Pleas Court of Lake County found Meyer and Silekovitz guilty of wilful and wanton conduct, thereby taking the case out of the operation of the Guest Act (Ohio Gen. Code 6308-6) and allowed recovery. Brinsky then filed a supplemental petition against the defendant, the American Casualty Company, alleging that Meyer and Silekovitz carried a liability policy which obligated the defendant to pay the judgment. The policy contained a clause relieving assured from "liability imposed by law upon the assured, for damages on account of bodily injuries, including death resulting therefrom, accidentally suffered or alleged to have been suffered by any person. . . ." *Held*, Defendant insurance company is not liable