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Notes and Comments

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The following students have been elected to the Order of the Coif: William J. Adams, Jr., J. M. Little, Jr., and Frank Parker Spruill, Jr.

The Winston-Salem Foundation Award, an honorary loan fund established in 1932, was awarded for next year to Hugh L. Lobdell.

The Henry Strong Educational Foundation Award, an honorary loan fund just established, has been awarded to Emmett C. Willis, Jr. as the first recipient.

NOTES AND COMMENTS

Banks and Banking—Insolvency as Bar to Defense of Fraud in Action on Statutory Liability.

In an action by the Commissioner of Banks to recover a statutory assessment, defendant stockholder set up, as defense and ground for rescission of his subscription, the fraud of the bank's president inducing the purchase. Two and a half years elapsed between defendant's subscription and the insolvency of the bank, during which time dividends amounting to twelve per cent a year were received and retained by defendant and his name appeared as stockholder on the books of the bank. *Held:* Defense and counterclaim allowed, for otherwise the defrauding bank president would benefit, as depositor, creditor, and subscriber, by his own fraud.[1]

Authorities differ as to whether insolvency of a bank will prevent one of its stockholders from showing, as against the receiver, that fraudulent misrepresentations by the bank's agents[2] induced his purchase. What are probably the better reasoned decisions, viewing the double liability as imposed solely for the benefit of creditors[3] and hence not subject to be prejudiced by acts of the bank of which creditors had no knowledge, deny[4] to a shareholder the right of pleading such fraud, after failure of the bank, either as defense[5] to the

[1] Hood v. Martin, 203 N. C. 620, 166 S. E. 793 (1932).

[2] Promoters come within this classification. Stone v. Walker, 201 Ala. 130, 77 So. 554 (1917); Green v. Stone, 205 Ala. 381, 87 So. 862 (1921). But see note (1910) 24 HARV. L. REV. 147.

[3] Equities of other stockholders may influence the result. Meholin v. Carlson, 17 Idaho 742, 107 Pac. 755 (1910).

[4] Some courts consider the stockholder "estopped" as against creditors. Blackert v. Lankford, 740 Okla. 61, 176 Pac. 532 (1918); Farmers' State Bank v. Empey, 35 S. D. 107, 150 N. W. 936 (1915); see Baird v. Anderson, 60 N. D. 444, 235 N. W. 150, 152 (1931). But see Wehby v. Spurway, 30 Ariz. 274, 246 Pac. 759, 762 (1926) (holding estoppel unnecessary).

[5] Although the stockholder may seek redress against the defrauding party in a separate suit, in the receiver's action he cannot set-off or counterclaim

receiver's action to recover a statutory assessment[6] or as a ground for rescission of the subscription[7] or stock purchase.[8] It makes no difference that the fraud was not discovered[9] or could not, by the exercise of reasonable diligence, have been uncovered[10] prior to the

for the fraud against his double liability. Lantry v. Wallace, 182 U. S. 536, 21 Sup. Ct. 878, 45 L. ed. 1218 (1901); Taylor v. American Nat. Bank, 2 F. (2d) 479 (1924); Dyar v. Mobley, 170 Ga. 65, 152 S. E. 74 (1930); Smith v. Groesbeck, 54 S. D. 350, 223 N. W. 308 (1929); Note (1932) 41 YALE L. J. 583.

[6] Anderson v. Cronkleton, 32 F. (2d) 170 (C. C. A. 8th, 1929); Litchfield Bank v. Church, 29 Conn. 137 (1860) ("Stockholders, who hold themselves out as constituting the bank, should bear the loss"); Meholin v. Carlson, *supra* note 3; Com. of Banks v. Cosmopolitan Trust Co., 253 Mass. 205, 148 N. E. 609 (1925); State Bank v. Gotschall, 121 Ore. 92, 254 Pac. 800 (1927); Smith v. Bradshaw, 54 S. D. 158, 222 N. W. 683 (1928) ("Deceit by officers of the bank or the government is no defense, but defendant must look to them for redress"); Duke v. Johnson, 123 Wash. 43, 211 Pac. 710 (1923); 7 C. J. §101; see Lantry v. Wallace, 182 U. S. at 549, 21 Sup. Ct. at 883, 45 L. ed. at 1225; Rathbun v. Goldman, 164 Minn. 507, 205 N. W. 436, 437 (1925).

"A stockholder's liability upon a stock assessment is a matter between him and creditors of the banks, . . . and his responsibility therefor must be determined by the fact of his ownership and what he permitted or caused the bank's records to show concerning it, and not by what was said and done by the bank's officers to induce him to become such." Wehby v. Spurway, *supra* note 4, 246 Pac. at 761. See also Winsett v. Spurway, 30 Ariz. 287, 246 Pac. 763 (1926).

[7] Ryan v. Mt. Vernon Nat. Bank, 224 Fed. 429 (C. C. A. 2d, 1915); Salter v. Williams, 219 Fed. 1017 (D. N. J. 1914); Note (1932) 41 YALE L. J. 583; CLARK, CORPORATIONS (8th ed. 1923) §164.

"It is contrary to legislative policy for protection of depositors . . . that stockholders, who appear to be such on the books of the trust company at the time it goes into . . . liquidation, may repudiate liability to creditors because they have been defrauded. . . . [A stockholder] is in a better position to protect himself than the depositors and other creditors who could only rely on . . . the stockholders' liability". Bittenbender v. Cosmopolitan Trust Co., 253 Mass. 230, 148 N. E. 619, 620 (1925).

A counterclaim seeking rescission after insolvency of the bank is usually set up primarily to avoid the statutory liability. It differs from a mere defense on the same ground in that return of the purchase price is sought.

It is well settled in England that after insolvency fraud cannot be pleaded to avoid liability. Oakes v. Turquand, L. R. 2 H. L. 325 (1867); CLARK, CORPORATIONS (8th ed. 1923) §163.

[8] The rule denying the right to rescind after the bank's insolvency applies only to subscriptions, not to purchases of stock. Merrill v. Florida Land Co., 60 Fed. 17 (C. C. A. 5th, 1893); Litchfield Bank v. Peck, 29 Conn. 384 (1860); Note (1931) 65 U. S. L. REV. 291. *Contra:* Brooks v. Austin, 206 S. W. 723 (Tex. Civ. App. 1918) ("The argument that other stockholders should not profit by the fraud of their officers does not apply when the fraud is by an outsider"). No distinction is recognized in Farmers' State Bank v. Empey, *supra* note 4. Since the capital of the bank is in no way impaired by rescission of a stock transfer between two individuals, the majority rule appears to be preferable.

[9] Meholin v. Carlson, *supra* note 3; Note (1932) 41 YALE L. J. 583.

[10] Scott v. Latimer, 89 Fed. 843 (C. C. A. 8th, 1898). *Contra:* Smith v. Jones, 173 Ky. 776, 191 S. W. 500 (1917).

insolvency. Nor will the case be altered by the fact that rescission has been obtained, either informally[11] or by judgment.[12]

A second line of cases, however, adhering to what is termed the American rule, and acting on the theory that the bank's fraud vitiates the contract at the purchaser's option,[13] holds that insolvency alone will not prevent rescission.[14] This result is frequently reached when the court considers that insolvency followed the purchase so closely as not to allow time for investigating the affairs of the bank.[15] In the leading case announcing this doctrine there was the additional significant finding that the creditors had waived their claims against the subscribers.[16]

A close analysis of the seemingly opposite views leads to the conclusion that, in practical effect, there exists little or no difference between the two. Both agree in general that the fraudulent contract is voidable only,[17] and that it cannot be revoked where the defrauded party is chargeable with lack of diligence in discovering the fraud, with laches in asserting his claim,[18] or with acts giving rise to

[11] Farmers' State Bank v. Empey, *supra* note 4.

[12] Blackert v. Lankford, *supra* note 4 (shareholder's name remained on the books); see Bundy v. Wilson, 66 Colo. 253, 180 Pac. 740, 741 (1919).

Even a rescission prior to the insolvency may be avoided as being an illegal transfer within the time limit before bankruptcy. Wehby v. Spurway, *supra* note 4; Note (1932) 41 YALE L. J. 583.

[13] The general rule—that a repudiated contract is void *ab initio*—is not applied so as to prejudice rights of creditors. Wehby v. Spurway, *supra* note 4. But see Chapman v. Penix, 274 S. W. 187, 189 (Tex. Civ. App. 1925).

[14] Newton Bank v. Newbegin, 74 Fed. 135 (C. C. A. 8th, 1896); People v. Cal. Safe Deposit Co., 19 Cal. App. 414, 126 Pac. 516 (1912); Gress v. Knight, 135 Ga. 60, 68 S. E. 834 (1910); Note (1926) 41 A. L. R. 674; (1919) 5 IOWA L. BULL. 59; (1910) 24 HARV. L. REV. 147; BALLANTINE, CORPORATIONS (1927) 149.

After rescission, the stockholder becomes a creditor of the bank, subject to paramount claims of depositors and other creditors who dealt with the bank in good faith relying upon his subscription. Green v. Stone, *supra* note 2.

[15] Stone v. Walker, *supra* note 2 (stock held six months, between the purchase and the insolvency); Rathbun v. Goldman, *supra* note 6 (stock held nine months); Morrisey v. Williams, 74 W. Va. 636, 82 S. E. 509 (1914) (stock held one month).

[16] Newton Nat. Bank v. Newbegin, *supra* note 14. In that case a stockholder of six months standing brought suit for rescission while the bank was operating as a solvent, going concern, under a reorganization plan; creditors had agreed to compromise their claims, accepting in satisfaction obligations of the reorganized bank. The court found that creditors had thereby waived their claims against stockholders.

[17] Stufflebeam v. De Lashmutt, 101 Fed. 367 (C. C. D. Ore. 1900); Com. of Banks v. Cosmopolitan Trust Co., *supra* note 6.

[18] Williams v. Stone, 25 F. (2d) 831 (C. C. A. 4th, 1928); Meholin v. Carlson, *supra* note 3; Reid v. Owensboro Savings Bank, 141 Ky. 444, 132 S. W. 1026 (1911); Foster v. Broas, 120 Mich. 1, 79 N. W. 969 (1899). See Smith v. Groesbeck, *supra* note 5.

an estoppel,[19] or where rights of innocent third parties have intervened.[20] It is in regard to the pleading and proof essential to this last factor that the dispute arises. Unless the statute clearly provides, as does the one in North Carolina,[21] that stockholders are liable for *all* debts,[22] the outcome of a particular case is likely to depend upon the presence or absence of intervening, good faith creditors.[23] Only in one or two instances have rights of subsequent claimants been affirmatively denied.[24]

The burden of showing absence of such creditors should fall upon the stockholder, since the ordinary presumption is that debts are constantly being created by a solvent bank;[25] but some courts, considering the information peculiarly within the knowledge of the bank,

[19] Scott v. Deweese, 181 U. S. 202, 21 Sup. Ct. 585, 45 L. ed. 822 (1901); Ryan v. Mt. Vernon Nat. Bank, *supra* note 7; Alsop v. Conway, 188 Fed. 568 (C. C. A. 6th, 1911); Scott v. Latimer, *supra* note 10; Little v. Owensboro Savings Bank, 150 Ky. 331, 150 S. W. 334 (1912); Reid v. Owensboro Savings Bank, *supra* note 18; Com. of Banks v. Carrier, 202 N. C. 850, 165 S. E. 678 (1932).

[20] MORSE, BANKS AND BANKING (6th ed. 1928) §671 A; note (1919) 5 IOWA L. BULL 59.

[21] "Stockholders of every bank . . . shall be individually responsible . . . for all contracts, debts, and engagements of such corporation. . . ." N. C. CODE ANN. (Michie, 1931) §219 (a).

[22] Anderson v. Cronkleton, *supra* note 6; Lantry v. Wallace, 97 Fed. 865 (C. C. A. 8th, 1899); Foster v. Broas, *supra* note 18; see Bundy v. Wilson, *supra* note 12, 180 Pac. at 742.

[23] Com. of Banks v. Cosmopolitan Trust Co., *supra* note 6; Farmers' State Bank v. Empey, *supra* note 4; Chapman v. Harris, 275 S. W. 75 (Tex. Civ. App. 1925); Davis v. Burns, 173 S. W. 476 (Tex. Civ. App. 1914); Burleson v. Davis, 141 S. W. 559 (Tex. Civ. App. 1911); Morrisey v. Williams, *supra* note 15 (stating that transferor of stock remains liable for debts that accrued while he held the stock); (1919) 5 IOWA L. BULL. 59; (1910) 24 HARV. L. REV. 147; see Taylor v. Am. Nat. Bank, *supra* note 5, at 482; Gress v. Knight, *supra* note 14 (stating that prior creditors might defeat rescission by showing laches, estoppel, or that the shareholder allowed increase of indebtedness and lessening of assets); FLETCHER, CORPORATIONS (1917) §636. But see (1908) 22 HARV. L. REV. 58.

[24] Litchfield Bank v. Peck, *supra* note 8; Marion Trust Co. v. Blish, 170 Ind. 686, 84 N. E. 814 (1908) (holding that receiver can assert only rights common to all creditors).

"If creditors' rights in the capital were no greater than defendant's before appointment of a receiver, they surely are no greater after. Rights of both are fixed by law, not by change from solvency to insolvency of the bank". Salter v. Williams, 244 Fed. 126 (C. C. A. 3rd, 1917), reaching the curious and somewhat illogical result of allowing rescission after the shareholder had paid his assessment and disclaimed intention to sue for its recovery.

[25] Smith v. Bradshaw, *supra* note 6; Farmers' State Bank v. Empey, *supra* note 4; Chapman v. Harris, *supra* note 23. See Anderson v. Cronkleton, *supra* note 6, at 172; Lantry v. Wallace, *supra* note 22, at 867; Stufflebeam v. De Lashmutt, *supra* note 17, at 371; Newton Nat. Bank v. Newbegin, *supra* note 14, at 140 (stating that lapse of a considerable time between subscription and insolvency will obviate the necessity of showing debts incurred).

require proof by the receiver of intervening liabilities.[26] Most courts do not, however, require a showing that such were incurred in reliance upon the subscription in issue.[27] Probably the best practical result is reached by the few courts which neatly avoid the whole difficulty by considering rights of creditors as intervening at the time of the bank's insolvency.[28] Indeed, the courts might well cease to talk of intervening equities; the proneness to presume either absence or presence of creditors and reliance on the subscription makes such requirement largely superfluous.

The conclusion seems to be that, while insolvency alone may not bar a plea of fraud,[29] yet when taken in connection with other factors which are inevitably present, it will serve to exclude such evidence. In other words, although it is material only on the question of intervention of creditors' rights, the practical certainty of a finding of such claims renders academic the possibility of superior equity on the part of the shareholder.

[26] Smith v. Jones, 173 Ky. 776, 191 S. W. 500 (1917) (stock held seven months); see Stone v. Walker, *supra* note 2, at 561; Gress v. Knight, *supra* note 14.

"It is not to be inferred that creditors parted with anything on the faith of plaintiff's money fraudulently held by the bank; to allow the receiver to retain the proceeds of the fraudulent sale would be to give creditors the fruits of a gross fraud, which would make them *particeps criminis*". Merrill v. Fla. Land Co., *supra* note 8, stock held six months).

The amount of new indebtedness that must be shown varies. Excess over the value of stock subscribed, though not necessarily a "large proportion", was held sufficient in Wilkes v. Knight, 142 Ga. 458, 83 S. E. 89 (1914); any creditors becoming such in reliance upon the shareholder's apparent ownership sufficed in Farmers' State Bank v. Empey, *supra* note 4; "considerable" subsequent liability was required in Newton Nat. Bank v. Newbegin, *supra* note 14, and Morrisey v. Williams, *supra* note 15; see BALLANTINE, CORPORATIONS (1927) 149; and "substantial" intervening debts were enough in Gress v. Knight, *supra* note 14.

[27] Reid v. Owensboro Savings Bank, *supra* note 18; Bittenbender v. Cosmopolitan Trust Co., *supra* note 7 ("Creditors have presumably relied in part upon the stability of stockholders' liability"); Davis v. Burns, *supra* note 23; Burleson v. Davis, *supra* note 23 ("By subscribing, defendants induced depositors and creditors to become such, relying on the subscriptions"); see Lantry v. Wallace, *supra* note 22, at 867 ("One reason defendant was solicited to become a stockholder was that his influence would attract patronage to the bank. And it is probably true that some persons became creditors because of defendant's connection with the bank"); BALLANTINE, CORPORATIONS (1927) 149. *Contra:* Stufflebeam v. De Lashmutt, *supra* note 17 (stock held one month) ("Where there is no room for inference that credit was given on the faith of defendant's ownership of stock, he should be allowed to rescind whether there are intervening creditors or not"); see People v. Cal. Safe Deposit Co., *supra* note 14, at 519.

[28] Scott v. Deweese, *supra* note 19; Salter v. Williams, *supra* note 24; Com. of Banks v. Cosmopolitan Trust Co., *supra* note 6.

[29] As pointed out in Note (1927) 51 A. L. R. 1203, it is difficult to determine how far insolvency controls a decision that fraud is barred as a defense, since such actions are only brought after insolvency.

It is readily apparent that the instant case is considerably out of line with the authority as outlined above. The fact set-up seems to furnish adequate basis, in connection with the bank's insolvency, for protecting the equities of depositors, creditors, and other stockholders. The distinction pointed out by the court between the instant case and *Corporation Commissioner* v. *McLean*[30] would, in accordance with authority,[31] further impeach the result of the instant case. The court's reliance on the fact that the defrauding bank president would profit by his own fraud—described by the court as "the egg that spoils the omelet"—is, from the standpoint of innocent creditors, as unsatisfactory as it is unique. The court sems to have disregarded entirely the plain wording, as well as the evident intent of the North Carolina "double liability" statute.[32]

JAMES M. LITTLE, JR.

Banks and Banking—Power of Banks to Pledge Assets to Secure Depositors.

Plaintiff railroad had deposited its funds in defendant national bank on condition that the bank should furnish corporate surety bonds, which it did. While the bank was still solvent, it induced the railroad to accept a substitution of Liberty bonds owned by the bank for the surety bonds which secured the deposit. The bank failed, and this action is against the receiver who has failed to surrender the Liberty bonds. *Held:* The action cannot be maintained; the agreement by which the bank pledged some of its assets to secure private funds was beyond the power of the bank, and unenforceable.[1]

[30] 202 N. C. 77, 161 S. E. 854 (1932). The tenor of this case is distinctly in accord with the stricter view: "It is only when it is shown that a person whose name appears on the books of the corporation as a stockholder, is not in fact an owner of stock, that such person is not subject to the statutory liability. . . . The only issues of fact which may be raised by such appeal and determined in the Superior Court, ordinarily, are: (1) Was the appellant a stockholder of the insolvent banking corporation at the date of his assessment? (2) If so, how many shares of the capital stock of said corporation did appellant own at said date? . . . Having received all the benefits arising from the ownership from stock . . . it is not unjust that they should now bear their share of the burden imposed by law upon them by reason of their ownership of said stock."

[31] See note 8 *supra*.

[32] *Supra* note 21. The case is perhaps supportable by North Carolina authority dealing with corporations other than banks. Chamberlain v. Trogden, 148 N. C. 140, 61 S. E. 628 (1908).

A recent enactment, P. L. 1933, ch. 159, provides for a surplus fund in lieu of the additional liability imposed upon bank stockholders. The statute is mandatory as to banks organized after its ratification, and those then in operation are given the option of coming within its provisions.

[1] Texas & P. R. Co. v. Pottorff, 63 F. (2d) 1 (C. C. A. 5th, 1933).

The principal case and a prior case arising out of the failure of the same bank but involving the pledging of assets to secure *public* deposits, which pledge was upheld,[2] illustrate the distinction which courts often make between pledges securing private, and those securing public, deposits. It is generally conceded that a bank has the power to borrow money and to secure the obligation by pledging its assets,[3] and some courts have made no distinction between a loan and a deposit since a debtor-creditor relationship arises in both cases.[4] Other courts have rejected the loan analogy,[5] and have refused to sustain the pledges as an implied or incidental power of the bank.[6]

[2] Pottorff v. El Paso-Hudspeth Counties Road Dist., 62 F. (2d) 498 (C. C. A. 5th, 1933).

[3] Auten v. U. S. Nat. Bk. of N. Y., 174 U. S. 125, 19 Sup. Ct. 628, 43 L. ed. 920 (1899); Citizens Bk. v. Bk. of Waddy, 126 Ky. 169, 103 S. W. 249 (1907); Carter v. Brock, 162 La. 12, 110 So. 71 (1926); Cantley v. Little R. Drainage Dist., 2 S. W. (2d) 607 (Mo. 1928); Schumacker v. Eastern Bk. & Trust Co., 52 F. (2d) 925 (C. C. A. 4th, 1931); Bulton v. Sanguinetti, 11 Pac. (2d) 1085 (Ariz. 1932); 1 MORSE, BANKS AND BANKING (6th ed. 1928) §§48 and 63. Controversy has recently arisen over the power of the receiver of an insolvent bank to borrow from the Reconstruction Finance Corporation by pledging assets. North Carolina, in Bales v. Hood, 203 N. C. 56, 164 S. E. 828 (1932), held that an equity court through its general authority over receivers could authorize such a pledge. Utah, in Riches v. Hadlock, 15 Pac. (2d) 283 (1932), held that the state statute took away from the courts such power in the case of insolvent banks. It will be perceived that neither court bases its decision upon the power of the bank to borrow money, but solely upon the power of an equitable or statutory receiver.

[4] Ward v. Johnson, 95 Ill. 215 (1880); Williams v. Hall, 30 Ariz. 581; 249 Pac. 755 (1926). In Page Trust Co. v. Rose, 192 N. C. 673, 135 S. E. 795 (1926), Connor, J., in a dictum said: "The relation between the bank and its depositor is that of debtor and creditor; we perceive no distinction on principle between one who deposits money with a bank, subject to check, and one who loans money to the bank for a definite time, as regards this question. There is no statute in this State forbidding a transfer or assignment by a bank of its property as security for one who is a depositor in the bank. Whether a sound public policy forbids such transfer or assignment must be determined by the General Assembly and not by this court." At the 1933 Session of the North Carolina General Assembly, House Bill No. 401, providing, "Any bank or banking institution authorized by law to receive deposits, if in the judgment of its board of directors or its executive committee it is advisable and to the best interests of such banking institutions to do so, is authorized to secure and protect its liability to any depositor by pledging for such purpose such of its assets as may be designated by its board of directors or executive committee . . . ," received an unfavorable committee report. Thus, it would seem that the North Carolina General Assembly has indirectly disapproved such a pledge to secure a private deposit.

[5] Hunt v. Hopley, 120 Iowa 695, 95 N. W. 205 (1903); Divide County v. Baird, 55 N. D. 45, 212 N. W. 236 (1926), 51 A. L. R. 296 (1927); State Bank v. School Dist., 174 Minn. 286, 219 N. W. 163 (1928), 65 A. L. R. 1407 (1930); Farmers' & Merchants' Bk. v. School Dist., 174 Minn. 286, 219 N. W. 163 (1928).

[6] Commercial Bk. & Tr. Co. v. Citizens Tr. & G. Co., 153 Ky. 566, 156 S. W. 160 (1913), 45 L. R. A. (n. s.) 950 (1913), Divide County v. Baird, *supra* note 5.

Pledges to secure public deposits are often permitted by statute, either directly by giving the authority to the bank,[7] or indirectly by authorizing the public officials to deposit only upon taking security.[8] In the absence of statute, the decided weight of authority is that a bank, state or national, has the power to pledge its assets to secure a public deposit,[9] or to indemnify the sureties upon a bond given to secure such deposits.[10] Of course, a valid pledge may not be made

[7] City of Portland v. St. Bk. of Portland, 107 Ore. 267, 214 Pac. 813 (1923); Cameron v. Christy, 286 Pa. 405, 113 Atl. 551 (1926); Cameron v. Alleghaney County Home, 287 Pa. 326, 135 Atl. 133 (1926); Schormick v. Butler, 172 N. E. 181 (Ind. 1930); Bliss v. Mason, 237 N. W. 581 (Neb. 1931). As to the power of national banks, see 12 U. S. C. A. §90, as amended June 25, 1930.

[8] First Am. Bk. & Tr. Co. v. Palm Beach, 96 Fla. 247, 117 So. 900 (1928); Pixton v. Perry, 269 Pac. 114 (Utah, 1928); Huntsville Tr. Co. v. Noel, 12 S. W. (2d) 751 (Mo. 1928); Tyrrell County v. Holloway, 182 N. C. 64, 108 S. E. 337 (1921); Page Tr. Co. v. Rose, *supra* note 4; Hood v. Board of Financial Control, 203 N. C. 119, 164 S. E. 831 (1932). That the situation in North Carolina for such deposits may shortly be changed can be seen from the following: "A bill to permit member banks of the Federal Reserve System to accept deposits of State, County and Municipal governmental units without having to post depository bonds or other security was passed by the Senate yesterday and sent to the House of Representatives. However, the bill is contingent upon the passage of pending legislation in Congress which would have the Federal Government guarantee 100 per cent. payment of such deposits in member banks." *Raleigh News and Observer,* May 3, 1933, at 2.

[9] Richard v. Osceola Bk., 79 Iowa 707, 45 S. W. 294 (1890); Williams v. Hall, *supra* note 4; Cameron v. Christy, 286 Pa. 405, 113 Atl. 551 (1926); Andrew v. Adebolt Savings Bk., 203 Iowa 1335, 214 N. W. 559 (1927); Austin v. Lamar County, 11 S. W. (2d) 553 (Tex. 1928); Williams v. Earhart, 34 Ariz. 565, 273 Pac. 728 (1929); Application of Broderick, 252 N. Y. Supp. 68 (1931); *In re* Bank of Spencerport, 255 N. Y. Supp. 482 (1932); Sneeden v. City of Marion, 58 F. (2d) 341 (E. D. Pa. 1932). *Contra:* Divide County v. Baird, *supra* note 5; Farmers' & Merchants' Bk. v. School Dist., *supra* note 5; Ark.-La. Highway Co. v. Taylor, 177 Ark. 440, 6 S. W. (2d) 533 (1928), noted in (1928) 42 HARV. L. REV. 272; Foster v. City of Longview, 26 S. W. (2d) 1059) (Tex. 1930); Wood v. Imperial Irr. Dist. 17 Pac. (2d) 28 (Cal. 1933); Bliss v. Pathfinder Irr. Dist., 122 Neb. 303, 240 N. W. 291 (1932).

Since this comment was written, two cases of interest have been decided. In Sneeden, Rec'r., v. City of Marion, 64 F. (2d) 721 (C. C. A. 7th, 1933), it was held that an Illinois national bank did not have power to pledge certain of its assets to secure the deposits of a city operating under the commission form of government. But Mays v. Bd. of Comm'rs., Okla. Sup. Ct. No. 20269, May 16, 1933, (1933) U. S. WEEKLY L. J. 262, held that "national banks are empowered to pledge assets to secure deposits of public funds without specific statutory authority therefor, since such power is incidental to the banking business."

[10] McFerson v. Nat. Surety Co., 72 Colo. 482, 212 Pac. 489 (1923); Page Tr. Co. v. Rose, *supra* note 4; U. S. Fidelity Co. v. Village of Bassfield, 148 Miss. 109, 114 So. 26 (1927); Ainsworth v. Kruger, 80 Mont. 468, 260 Pac. 1055 (1927); Grigsby v. People's Bank, 158 Tenn. 182, 11 S. W. (2d) 673 1928); Melaven v. Hunker, 299 Pac. 1075 (N. M. 1931); *cf.* Mothersead v. U. S. Fidelity & Guaranty Co., 22 F. (2d) 644 (C. C. A. 8th, 1927), certiorari denied, 276 U. S. 637, 48 Sup. Ct. 421, 72 L. ed. 744 (1927). *Contra:* Com-

after the bank has become insolvent, since it would amount to an unlawful preference.[11]

Questions as to the validity of pledges to secure private deposits have not reached the appellate courts nearly so often as have those involving public deposits. Many states prohibit private pledges by statute.[12] Where there are no statutes, most of the early cases uphold private pledges;[13] but later decisions are practically unanimous in holding that such pledges are against public policy and void.[14] The question did not arise as to a national bank until 1931, and then in a strong opinion the court held such a pledge void.[15] The principal case follows and approves that case.

The arguments most often advanced against allowing assets to be pledged by the bank are: (1) to allow pledging gives extra protection to the secured at the expense of the unsecured;[16] (2) the public is deceived by the financial statements which seldom, if ever, state that assets are pledged;[17] (3) the pledgee, if a large depositor, is given a

mercial Bk. & Tr. Co. v. Citizens Tr. & G. Co., *supra* note 6; Schornick v. Butler, 172 N. E. 181 (Ind. 1930).

[11] Rice v. City of Columbia, 143 S. C. 516, 141 S. E. 705 (1928); Farmers Savings Bk. v. Bergin, 52 S. D. 1, 216 N. W. 597 (1927), aff'd on rehearing, 53 S. D. 296, 220 N. W. 859 (1928); Parks v. Knapp, 29 F. (2d) 547 (C. C. A. 8th, 1928), certiorari denied, 278 U. S. 660, 49 Sup. Ct. 250, 73 L. ed. 567 (1929); *cf.* City of Louisville v. Columbia Tr. Co., 245 Ky. 704, 54 S. W. (2d) 40 (1932); Hood v. Board of Financial Control, *supra* note 8 (pledge upheld on ground public officials had no notice).

[12] IDAHO CODE (1932) §25-507; MINN. STAT. (Mason, 1929) §7699-14; N. D. COMP. LAWS ANN. (Supp. 1925) §5191A 1; S. D. Laws 1919, c. 124, p. 109; ORE. CODE ANN. (1930) §22-801; UTAH COMP. LAWS (1917) §1006; KAN. REV. STAT. ANN. (1923), c. 9, §142.

[13] Ahl v. Rhoads, 84 Pac. 319 (1877); Ward v. Johnson, 95 Ill. 215 (1880); Bank of Chautauqua v. First National Bank of Sedan, 98 Kan. 109, 157 Pac. 392 (1916); *Ex parte* Dist. Grand Lodge, 147 S. C. 103, 144 S. E. 841 (1928); Peurifoy v. Westminster Loan Co., 148 S. C. 100, 145 S. E. 706 (1928) (question of power was apparently not raised in either of the South Carolina cases).

[14] Porter v. Canyon County Farmers' Mut. Fire Ins. Co., 45 Idaho 522, 263 Pac. 632 (1928); Balt. & O. Ry. v. Smith, 48 F. (2d) 861 (W. D. Pa. 1931), aff'd, 56 F. (2d) 799 (C. C. A. 3rd, 1932). See Carter v. Brocks, 162 La. 12, 110 So. 71, 73 (1926).

[15] Balt. & O. Ry. Co. v. Smith, *supra* note 14, with comment (1932) 41 YALE L. J. 1076.

[16] Commercial Bk. & Tr. Co. v. Citizens Tr. & G. Co., *supra* note 6.

[17] Divide County v. Baird, *supra* note 5; Grigsby v. People's Bank, *supra* note 10, where the court suggested that it was the duty of the banking department to require such pledges to be stated in reports. However, unless published, the depositing public might still be deceived, and, if published, such a statement might prove disastrous to the bank, as suggested in Commercial Bk. & Tr. Co. v. Citizens Tr. & T. Co., *supra* note 6.

power over the bank which is undesirable.[18] It is believed that the courts are increasingly accepting these reasons as outweighing the rather vague notion of "superior public rights" under which such pledges to the public have been sustained, and that there is even less reason for sustaining the pledges to secure private depositors. Expressions of doubt, and often of open disapproval, are coming from the courts, as well as from commentators, as to the validity of allowing assets to be pledged whether to secure a public depositor or a private depositor.[19]

The banks themselves are becoming increasingly interested. At the recent meeting of the executive council of the American Bankers' Association the following was placed in the program for banking reform: "Deposits of public funds in banks should have the same status as private deposits, and should not be accorded special and additional security."[20] It is submitted that such a plan is desirable from the standpoint of sound banking, and would benefit the banks, the depositors, and the public.

HERMAN S. MERRELL.

Bankruptcy—Compositions—A Suggestion for Federal Legislation.

In these days of economic stress it has become highly desirable to find some method, less disastrous to the debtor than bankruptcy, of relieving the insolvent debtor of his excessive debts. On first appearance it would seem that the common law composition with creditors might go a long way toward meeting this demand.

A common law composition with creditors is an agreement between an insolvent debtor and two or more of his creditors,[1] whereby

[18] Commercial Bk. & Tr. Co. v. Citizens Tr. and G. Co., *supra* note 6. The courts seldom mention this reason. However, it is believed to be a material one, since a large depositor, heavily secured, would be in a position largely to dictate to the bank. On the other hand, large corporations doing business in numerous localities may refuse to patronize the smaller local banks unless given security. The best remedy for this situation, under present banking laws, seems to be to permit surety bonds without a pledge, which only decrease the amount of the bank's profits instead of actually taking away general assets upon which all depositors have a right to rely equally. See Coöp. Ass'n v. First State Bank, 168 Minn. 28, 209 N. W. 631 (1926).

[19] See Balt. & O. Ry. v. Smith, *supra* note 14, at 867; Schumacker v. Eastern Bk. & Tr. Co., *supra* note 3 at 927. Note (1931) 79 U. OF PA. L. REV. 608; (1929) 77 U. OF PA. L. REV. 916; (1932) 41 YALE L. J. 1076; (1932) 10 NEB. L. BULL. 327; (1928) 2 DAK. L. REV. 68.

[20] THE TARHEEL BANKER, May, 1933, at 30; TIME, April 24, 1933, at 47.

[1] Schroeder v. Pissis, 128 Cal. 209, 60 Pac. 758 (1900) ("It is not necessary that all the creditors of a debtor should sign a composition agreement in order

the creditors agree to discharge the whole of their respective claims upon payment of a dividend less than the full amount of the claim.[2] The consideration for the promise to accept a lesser sum in discharge of the larger sum lies in the reciprocal promises of the other assenting creditors.[3] The original claim is not discharged until the agreement to pay the lesser sum is satisfied, although the right of action thereon is temporarily suspended. If notes given as a part of the dividend are not paid on maturity, the accepting creditor is remitted to his original claim.[4] The utmost good faith is required of the debtor and if he is guilty of any fraud the composition falls and the assenting creditors are remitted to their original claims.[5]

The fraud which appears most often is that of giving a secret preference to one or more of the assenting creditors. Of course, if the non-preferred creditors know of the preference when they enter the agreement, the preference is valid and the non-preferred creditors cannot avoid the agreement.[6] Likewise, if a non-preferred creditor accepts a payment under the agreement, after he has learned of the preference, he is held to have waived his right to rescind.[7]

Where the preference was secret it is the almost universal rule[8]

to make it valid and binding. It is sufficient if two or more creditors sign."); Crawford v. Krueger, 201 Pa. 348; 50 Atl. 931 (1902).

[2] For other definitions of a composition with creditors, see *In re* Nachman Co., 6 F. (2d) 427, 439 (C. C. A. 2d, 1925); Seaweard v. DeArmond, 101 Ore. 30, 34, 198 Pac. 916 (1921).

[3] First Nat. Bank v. Ware, 95 Me. 388, 50 Atl. 24 (1901); Cohen v. P. E. Harding Const. Co. 41 R. I. 242, 103 Atl. 703 (1918).

[4] Clarke v. White, 12 Pet. 178, 9 L. ed. 1046 (U. S. 1838); Farmers' Bank of Dardanelle v. Sellers, 167 Ark. 152, 267 S. W. 591 (1925). A few cases have refused to permit the creditor to reassert his original claim even though the note given him as a part of his dividend has not been paid on maturity. This ruling, in each case, was based on the ground that the note had been taken as payment, thereby intimating that had the note been accepted merely as a promise to pay an installment under the composition agreement, the general rule would have been followed. Bartlett v. Woodworth-Mason Co., 69 N. H. 316, 41 Atl. 264 (1898); Swartz v. Brown, 135 App. Div. 913, 119 N. Y. Supp. 1024 (1909).

[5] Storms v. Horton, 77 Conn. 334, 59 Atl. 421 (1905); Ball v. McGeoch, 81 Wis. 160, 51 N. W. 443 (1892).

[6] Dillon v. Ennis, 205 S. W. 191 (Mo. 1918); Continental Nat. Bank of Chicago v. McGeoch, 92 Wis. 286 (1896).

[7] Farmers' Bank of Dardanelle v. Sellers, *supra* note 4.

[8] A careful search disclosed three cases holding that the non-preferred creditors remain bound by the composition even though there was a secret preference, but at least two of these have been overruled. Bartlett v. Blaine, 83 Ill. 25, 25 Am. Rep. 346 (1876); Page v. Carter, 16 N. H. 524, 41 Am. Dec. 726 (1844); Babcock v. Dill 43 Barb. 577 (N. Y. 1865); in addition, a dictum in a leading case states that so long as the preference agreement remains executory the non-preferred creditors remain bound. Hanover Nat. Bank Of City of N. Y. v. Blake, 142 N. Y. 404, 37 N. E. 519, 27 L. R. A. 33, 40 Am. St. Rep. 607 (1894).

that the non-preferred creditors are remitted to their original claims[9] and may credit any amount received under the composition as a part payment and sue for the balance.[10] This rule is open to the objection that it permits the first non-preferred creditor to learn of the fraud to come in and deplete the assets in the hands of the debtor to the detriment of his fellow non-preferred creditors. This objection appears sound in those cases in which all of the creditors are bound by the agreement, but in those cases in which there are creditors who never entered the agreement, the objection loses force in that it does not appear that the non-preferred creditors will suffer any more acutely from the fact that this fellow non-preferred creditor gets his full claim than from the fact that the non-assenting creditors get their full claims. The last argument in turn loses force when it is noted that creditors of an insolvent debtor will very rarely enter into a composition unless all, or at least a specified group representing substantially all of the creditors become parties. In any case it would seem a good rule, as held in a few cases,[11] that in any action by a non-preferred creditor to rescind the composition agreement, all the non-preferred creditors must be joined.

As to the preference itself, it is void; if executory it cannot be enforced,[12] and if executed it can be recovered by the debtor.[13] Thus the debtor, who was a party to the fraud practiced on the non-preferred creditors, along with the preferred creditor, is allowed to profit by his own wrongful act in that, in most cases, if the preference were not promised, the preferred creditor would not have joined the composition and the debtor would have been liable for his full claim. Indeed, as between the debtor and preferred creditor, the equities seem to be with the creditor who was entitled to his full

[9] Kullman v. Greenbaum, 92 Cal. 403, 28 Pac. 674 (1891); Powers Dry Goods Co. v. Harlin, 68 Minn. 193, 71 N. W. 16 (1897).

[10] *In re* Chaplin, 115 Fed. 162 (E. D. Mass. 1902); Burgess v. Simpson Grocery Co., 128 Ga. 423, 57 S. E. 717 (1907).

[11] Cheveront v. Textor, 53 Md. 296 (1879); Evans, Fite, Porter and Co. v. Bell, 83 Tenn. 569 (1885).

[12] Batchelder & Lincoln Co. v. Whitmore, 122 Fed. 335 (C. C. A. 1st, 1903); Brown v. Nealley, 161 Mass. 1, 36 N. E. 464 (1894).

[13] Brown v. Everett-Ridley-Ragan Co., 111 Ga. 404, 36 S. E. 813 (1900). An exception to this rule is found in New York. The New York cases unanimously hold the preference void and refuse to enforce it when executory. Klaw v. Famous Players-Lasky Corp., 239 N. Y. 592, 147 N. E. 209 (1924); Burk v. Wright, 226 App. Div. 274, 235 N. Y. Supp. 105 (1929), but where the preference has been executed, the debtor is not allowed to recover the sum paid as a preference on the ground that the parties being *in pari delicto* the courts will leave them as it finds them. Solinger v. Earle, 82 N. Y. 393 (1880); Mehr v. Starr, 138 N. Y. Supp. 317 (1912).

claim and gave it up for the promised dividend and preference, which in most cases added together is somewhat less than the full claim. The only favorable side of the rule reached seems to be that the non-preferred creditors can attack these assets if in the hands of the debtor, and this is in turn subject to the criticism above set forth.

In respect to the dividend due to the preferred creditor under the composition agreement, the overwhelming majority of courts holds that, while the non-preferred creditors can assert their original claims after the fraud is discovered, the preferred creditor is bound by the agreement, and his recovery is limited to the dividend therein provided, which he is permitted to retain.[14]

The fact that on discovery of the preference the non-preferred creditors may race for the assets lends instability to the composition and impairs its usefulness as an insolvency device. It would seem a sound rule, and a deterrent to secret preferences, to hold the debtor bound to pay both the preference and the preferred creditor's dividend, the payment, however, to be made, not to the preferred creditor, but to the non-preferred creditors as a bonus above the specified dividends. Of course, if this rule were applied, it follows that the non-preferred creditors should be deprived of their right to rescind the composition agreement. This would make it impossible for the first non-preferred creditor to learn of the fraud to get an advantage in the race for the debtor's remaining assets, and would seem to reach a generally desirable result.

Assuming such results to be established, there remains but one obstacle preventing the composition from becoming an effective device for relieving harassed debtors, namely, inability to bind the non-assenting parties by compulsion. This obstacle might easily be removed by a statutory measure analogous to that provided for in bankruptcy compositions.[15]

A composition, if its legal handicaps are removed as above suggested, has at least three distinct advantages over bankruptcy proceedings:

(1) The composition permits the debtor to retain control of his assets, while in the bankruptcy proceedings the assets are turned over to a referee to administer.

[14] Bank of Commerce v. Hoeber, 88 Mo. 37, 57 Am. Rep. 359 (1885); Gross, Kelly & Co. v. Bibo, 19 N. M. 495, 145 Pac. 480 (1914). One case was found which permitted the preferred creditor, on being deprived of the preference, to sue on his original claim. Stewart v. Blum, 28 Pa. 225 (1857).

[15] 30 STAT. 549 (1898); 36 STAT. 839 (1925), 11 U. S. C. A. §30 (1926).

(2) After a discharge through a composition the debtor usually is able to continue right on in his old established business, whereas bankruptcy proceedings commonly destroy his business and force him to start all over.

(3) A composition of this nature can be effected within a few days with little or no cost of administration, while the administration of a bankrupt's estate generally takes a relatively long period and often is so expensive that in the case of small estates there is nothing at all left for distribution to the creditors.[16]

The National Bankruptcy Act as it stood before the Amendment of March 3, 1933, provided that the bankrupt might offer either before or after adjudication, terms of composition to his creditors after, but not before, he has been examined in open court, or at a meeting of his creditors, and has filed in court the schedule of his property and list of his creditors required to be filed by bankrupts.[17] The inability to bind the non-assenting creditors by compulsion found in the common law composition is eliminated under the bankruptcy composition by a provision that the composition may be confirmed, thus binding all the creditors, whenever it has been accepted in writing by the majority of the creditors representing a majority in amount of such claims.[18]

As regards the method of dealing with the problem of hidden assets and secret preferences, it is doubtful if that provided for in the bankruptcy composition is any more satisfactory than the present method of the common law composition. The Bankruptcy Act provides merely that the judge may set aside the composition upon the application of the parties in interest filed at any time within six months after the composition has been confirmed if it shall appear that fraud was practiced in procuring the composition.[19] The estate is then automatically administered in bankruptcy, a result which maintains equality but is no better than can be reached under a common law composition by anyone of the non-preferred creditors starting bankruptcy proceedings after learning of the fraud. It further appears that this provision under the bankruptcy composi-

[16] The high cost of administering small estates in bankruptcy, as well as the length of time necessary, is clearly shown in the charts prepared and used by Mr. Billig in his article, *Extra Judicial Administration of Insolvent Estates: A Study of Recent Cases* (1930) 78 U. OF PA. L. REV. 293.

[17] *Supra* note 15.

[18] *Supra* note 15.

[19] 30 STAT. 550 (1898), 11 U. S. C. A. §31 (1926).

tion is weak in that it limits the right to attack the composition to six months.

The composition in bankruptcy undoubtedly overcomes some of the weaknesses manifested in the common law composition as it now stands, but is far from a desirable method of meeting the present day need. It is too formal, it has attached to it the stigma of bankruptcy, and it does not satisfactorily deal with the problems of hidden assets and secret preferences, for which reasons compositions in bankruptcy have been relatively seldom resorted to.[20]

Section 73 of the Bankruptcy Act enacted by Amendment March 3, 1933,[21] provides for compositions by debtors. This amendment was enacted for the express purpose of aiding debtors to avoid bankruptcy. It follows generally the terms of the earlier provision for compositions in bankruptcy, is open to the same criticism, and seems to offer no advantage not avaliable under the earlier provision.[22]

Due to the prevalent dissatisfaction with bankruptcy proceedings, some years ago the National Credit Men's Association set up a system of liquidating insolvent estates known as "friendly adjustment," which seems to be working with some success.[23] As a legal device it amounts to a common law composition with the creditors accepting their *pro rata* share of the assets in full discharge of their claims. Of course, if any creditor or the debtor does not assent, the estate will have to go through bankruptcy, but the Association, so far, seems to have had marked success in getting all the parties to assent.

The method of liquidation is analogous to that of bankruptcy in that the assets are turned over to a third party to administer, in this case a liquidating agent of the Association. The outstanding advantages claimed for the "friendly adjustment" are that it car-

[20] See, Report By the Attorney General (Prepared By The Solicitor General) To The President On The Bankruptcy Act And Its Administration In the Courts Of The United States, Dated December 5, 1931, at page 10. ("Unfortunately the composition machinery is so cumbersome and so easily abused by minority creditors that it is quite unattractive to honest debtors, as evidenced by the fact that scarcely one per cent of the cases in bankruptcy terminate in compositions.")

[21] 11 U. S. C. A. Supp. §202 (1933).

[22] *Supra* note 15.

[23] For a more thorough study of "friendly adjustments," see Billig, *What Price Bankruptcy: A Plea For "Friendly Adjustment"* (1929) 14 CORN. L. Q. 413, and Billig, *supra* note 16. For an adverse criticism of "friendly adjustments," see Gamer, *On Comparing "Friendly Adjustment" and Bankruptcy* (1931) 16 CORN. L. Q. 35.

ries out the liquidation much more rapidly than is usual in bankruptcy, and that it pays larger dividend to the creditors. The rapidity of administration is accounted for by the fact that the Association maintains permanent liquidating forces which keep in close contact with prospective purchasers of an insolvent's stock, while the higher dividend is due to the lower cost of administration which in every case is a flat ten per cent.

It has been objected that there is too great a chance for fraud in this type of liquidation, but it would seem that the local agency of the Association is in at least as good position as the court to ascertain the true state of the debtor's affairs. The real objections to "friendly adjustments," in respect to our present need, seem to be that under this plan ten per cent of the assets, which might well be saved to the debtors, is paid to some outside party, and that, as is true of a bankruptcy proceeding, the debtor is commonly put out of business.

From the purely practical standpoint, it seems that in many cases the parties themselves could effectuate a composition which, by saving the costs of a bankruptcy proceeding or of a friendly adjustment, would reserve to the debtor sufficient assets to enable him to continue on in his business and at the same time pay to the creditors larger dividends than would either a bankruptcy or a "friendly adjustment."

It would seem that a Federal statute reaching such a desirable result and still containing sufficient checks against fraud might well be worked out along the following lines:

(1) An insolvent debtor may at any time send to each of his creditors a schedule of his assets and a list of his creditors, together with notice of a creditor's meeting to be held not less than ten days, and not more than twenty days, hence, for the purpose of working out, if possible, the terms of a composition.

(2) If, at the meeting of the creditors, terms of composition are arranged which are satisfactory to the debtor and to a majority of the creditors representing a majority in amount of the claims, who signify their assent by signing an agreement embodying the terms arranged, all of the creditors shall be automatically bound. There shall be reserved to any non-assenting creditor the right to apply within ten days to a court of equity of the United States sitting in chambers to set aside the agreement for good cause shown.

(3) If no non-assenting creditor applies to have the agreement

set aside within the ten day period, or, if on such application a decision favoring the validity of the agreement is handed down, the agreement shall be binding as of the date assented to as required, and the rights of the parties shall thereafter be limited to the terms of the agreement and the terms of this act.

(4) If the parties cannot reach an agreement as to the terms of the composition, or if on application of a non-assenting creditor, the agreement is set aside, the estate shall on the petition of any interested party, be automatically declared bankrupt.

(5) A copy of the composition agreement, containing the signatures of the assenting creditors and of the debtor, together with a verified list of all the debtor's creditors and a verified schedule of his assets shall be filed by the debtor with the U. S. district court, for purposes of record.

(6) If the debtor fails to make any payment as provided for in the agreement, any creditor may cause the estate to be administered in bankruptcy, but the claims to be filed by the creditors who were bound by the composition agreement shall be those provided for in the composition and not the original claims. If, however, there is a surplus remaining after all claims, both those provided for in the composition and those subsequently acquired against the debtor, have been paid in full, the surplus shall be paid *pro rata* to the creditors bound by the composition until their original claims are paid in full.

(7) If at any time within five years after the composition became binding, assets which were fraudulently hidden at the time of the composition, including any fraudulent conveyance made within three years prior thereto, are discovered, on the application of any interested party such assets shall be recovered and paid *pro rata* to the creditors bound by the composition as a bonus above the dividend agreed upon in the composition, even though the effect of such payment is to pay such creditors more than their original claims with interest. Further, the debtor shall be subject to a criminal action.

(8) If, at any time within five years after the composition became binding, a secret preference to one of the creditors is diserence and the dividend to the preferred creditor shall be recovered and paid *pro rata* to the other creditors bound under the composition, as a bonus above the dividend agreed upon in the composition even though the effect of such payment is to pay such creditors more than their original claims with interest. Further, both the debtor and the preferred creditor shall be subject to criminal actions.

It is submitted that an act based on the above suggestions would go a long way toward meeting the present need for relieving hard pressed debtors without destroying their businesses and without working undue hardships on their creditors; and that such an act might well be enacted by Congress as a system of relief alternate to bankruptcy.

IRVIN E. ERB.

Bills and Notes—Interpretation of "All Prior Endorsements Guaranteed."

A draft was endorsed without authority by an attorney of the payee and deposited for collection in a bank which forwarded it with "all prior endorsements guaranteed" to the drawee who on the back of the draft had reserved the right to determine the authority of an attorney endorsing it. *Held:* Under these particular facts, the collecting bank by its endorsement guaranteed to the drawee only the genuineness of the prior endorsement and not the authority of the endorser.[1]

Incited by the decision in two cases in which the drawee bank could not recover back the money paid on a forgery, where the collecting bank had used a restrictive endorsement, the New York Clearing House in 1896 adopted a rule requiring its members to send no paper through the exchange which was restrictively endorsed, unless all prior endorsements were guaranteed.[2] Their lead has since been followed by practically every clearing house in the country.

Adequate protection is afforded to an endorsee who is a holder in due course both in the case of forgeries and unauthorized prior

[1] Holloway v. Barbee *et al.*, 203 N. C. 713, 166 S. E. 895 (1932). Inquiry has revealed that this case is regarded by some as holding that "all prior endorsements guaranteed," guarantees to the drawee only the genuineness of prior endorsements and not the authority of the endorser. This is an erroneous view since the court decides no more than that such endorsement guarantees only the genuineness of prior endorsements where the drawee has assumed the risk of the authority.

The bank is designated as a drawee in this comment, since under §87 of the N. I. L., "Where an instrument is made payable at a bank, it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon."

[2] First National Bank of Belmont v. First National Bank of Barnesville, 58 Ohio St. 207, 50 N. E. 723 (1898). Many of the clearing houses no longer use the form "all prior endorsements guaranteed," but the members contract to assume such responsibility. Some of the forms in use are: "endorsements guaranteed," "previous endorsements guaranteed," "absence of endorsements guaranteed," "absent endorsement hereby supplied and guaranteed."

endorsements by the Negotiable Instruments Law.[3] But under that law, the drawee is not a holder in due course.[4] The transaction between the collecting bank and the drawee is one of payment and not of purchase.[5]

Nevertheless where the collecting bank is the owner of the instrument, if the drawee bank pays money on a forged or unauthorized endorsement, it is permitted to recover from the collecting bank on the ground of implied warranty of genuineness,[6] an implied promise to refund money paid under a mistake of fact[7] or negligence.[8] However, where the paper is restrictively endorsed by the collecting bank, it being merely agent and not owner, the absence of either an express or implied warranty necessitates a special guarantee for the protection of the drawee.[9] The situation is now dealt with by the use of the endorsement, "all prior endorsements guaranteed." Such guarantee is meant to give to the drawee the same safeguards which are enjoyed by an endorsee for value under an unrestrictive endorsement. It is addressed to both drawee and subsequent purchaser and its guarantee to the former as to prior endorsements includes

[3] NEGOTIABLE INSTRUMENTS LAW §66. Packard v. Windholz, 88 App. Div. 365, 84 N. Y. Supp. 666 (1903); Leonard v. Draper, 187 Mass. 563, 73 N. E. 644 (1905).

[4] National Bank of Commerce v. Farmers' & Merchants' Bank, 86 Neb. 841, 128 N. W. 522 (1910); First National Bank v. Brule National Bank, 38 S. D. 396, 161 N. W. 616 (1917); Woodward v. Savings & Trust Co., 178 N. C. 184, 100 S. E. 304 (1919); American Hominy Co. v. Millikan National Bank, 273 Fed. 550 (S. D. Ill. 1920); First National Bank v. U. S. National Bank, 100 Ore. 264, 197 Pac. 547 (1921). Presentation to the drawee for payment is not a negotiation of the check; for payment transmits the paper from a negotiable instrument into a mere cancelled voucher. Bank of Pulaski v. Bloomfield State Bank, 226 N. W. 119 (Iowa 1929); Louisa National Bank v. Kentucky National Bank, 239 Ky. 302, 39 S. W. (2d) 497 (1931).

[5] Neal v. Coburn, 92 Me. 139, 42 Atl. 348 (1898); National Bank of Commerce v. Mechanics American National Bank, 148 Mo. App. 1, 127 S. W. 429 (1910).

[6] Crocker-Woolworth National Bank v. Nevada Bank, 139 Cal. 564, 73 Pac. 456 (1903); Wellington National Bank v. Robbins, 71 Kan. 748, 81 Pac. 487 (1905); Moler v. State Bank of Bigelow, 176 Minn. 449, 223 N. W. 780 (1929); Anglo-California Trust Co. v. French American Bank, 108 Cal. App. 354, 291 Pac. 621 (1930); First National Bank v. Federal Reserve Bank of Minneapolis, 88 Mont. 589, 294 Pac. 1105 (1931).

[7] First National Bank v. City National Bank, 182 Mass. 130, 65 N. E. 24 (1902).

[8] Bank of Pulaski v. Bloomfield State Bank, *supra* note 4. NEGOTIABLE INSTRUMENTS LAW §196: "The rules of the Law Merchant shall govern in any case not provided for in this act." However, in the absence of negligence, the case would have been similarly decided on the ground of implied warranty or mistake of fact.

[9] Crocker-Woolworth National Bank v. Nevada Bank, *supra* note 6.

everything that its does to the latter.[10] The courts have held it to cover the genuineness of prior endorsements[11] (*i. e.* not forgeries), missing endorsements[12] and endorsements signed without authority by another.[13] It has also been said to guarantee any discrepancy or irregularity in prior endorsements.[14] The purpose of such endorsement is generally conceded to be to guarantee the genuineness, validity and regularity in every respect as an inducement to the drawee to pay.[15] The interpretation of such endorsement by both the clearing houses[16] and the Banker's Bank Collection Code[17] is in harmony with the above.

It is submitted that to construe the endorsement in any other way would be inconsistent with its *raison d'être.* The drawee's inability because of distance to determine easily for itself the validity of prior endorsements is no greater in the case of forgeries than in the case of unauthorized endorsements. However, the result in the principal case is not opposed to the foregoing authority. The court decides that here, the bank guaranteed only the genuineness of the endorsement, apparently on the ground that the drawee waived the protection of a portion of the guarantee by expressly reserving the right to determine the authority of the endorser. But it would seem that such reservation of right was more indicative of a desire for additional security than of a waiver.[18]

CECILE L. PILTZ.

[10] State v. Broadway National Bank, 153 Tenn. 113, 282 S. W. 194 (1926); Philadelphia National Bank v. Fulton National Bank, 25 Fed. (2d) 995 (N. D. Ga. 1928).

[11] Second National Bank v. Guarantee Trust & Safe Deposit Co., 206 Pa. 616, 56 Atl. 72 (1903); Philip Greer & Bros. Lumber Co. v. First National Bank, 143 Miss. 454, 109 So. 274 (1926); First National Bank of Winnesboro v. First National Bank of Quitman, 299 S. W. 856 (Tex. 1927); Real Estate-Land Title & Trust Co. v. United Security Co., 303 Pa. 273, 154 Atl. 593 (1931).

[12] City Trust Co. v. Botting, 139 Misc. Rep. 684, 248 N. Y. Supp. 204 (1930).

[13] McKinnon v. Boardman, 170 Fed. 920 (C. C. A. 2d, 1909); Endlich v. Bank of Black Creek, 200 Wis. 175, 227 N. W. 866 (1929). As to stock exchange rule see: Clarkson Home for Children v. Mo., K. & T. Ry. Co., 182 N. Y. 47, 74 N. E. 571 (1905).

[14] 2 PATON'S DIGEST (1926) §2755 (a). Where a payee is named "J. F. Smith" and the endorsement is "John Smith."

[15] An inquiry conducted among some of the outstanding banks in the country revealed this to be the prevalent view.

[16] First National Bank v. U. S. National Bank, *supra* note 4; Merchants' National Bank v. Continental National Bank, 98 Cal. App. 523, 277 Pac. 354 (1929).

[17] BANK COLLECTION CODE, §4. The code, to date, has become law in 18 states.

[18] The drawee doubtless would not have paid the draft had the bank's

Conditional Sales—Vendor's Right to Possession Before Default.

A recent North Carolina case[1] involved the retaking of an automobile by the vendor under a conditional sales contract. Brogden, J., speaking for the court, says that a conditional sale is in effect a chattel mortgage; and that "the law confers upon the mortgagee the right of possession which he may exercise before or after default. . . ."[1a] The clear import of this statement is that the vendor in a conditional sales contract has the right to possession before default, as in the case of a chattel mortgage.

A conditional sale and a purchase-money chattel mortgage are used for practically the same purposes. Even the forms are hard to distinguish. These facts alone would cause confusion in placing the various transactions in one or the other of the two categories. Moreover, when this field of the law was developing, most states required chattel mortgages to be registered but had no such provision concerning conditional sales.[2] This added to the confusion since the courts, in order to protect innocent third parties who had relied upon the appearance created by possession, resorted to strained construction to bring the transaction within the class requiring registration.[3]

North Carolina had its share of this confusion and conflict[4] until

endorsement been lacking or expressly restricted to a guarantee of "genuineness" of prior endorsements.

Furthermore, while it is recognized that this is not a sale, a pertinent analogy can be drawn in the field of sales. Hawkins v. Pemberton, 51 N. Y. 198 (1872) (vendor will not be permitted to say that he does not intend what his warranty explicity declares); Smith v. Hale, 158 Mass. 178, 33 N. E. 493 (1893) (purchaser may examine article himself and at the same time take warranty from vendor); Tennessee Roofing Co. v. Ely, 159 Tenn. 628, 21 S. W. (2d) 398 (1929) (as to latent defects the buyer may take and enforce an express warranty notwithstanding the fact that he has personally examined the goods); see also 1 WILLISTON, SALES, (2d ed. 1924) §208.

The double security of warranties and personal inspection may be desirable for several reasons. Oak Lawn Sugar Co. v. Sparks Bros. Mule Co., 159 Mo. App. 496, 141 S. W. 698 (1911) (purchaser realizes his liability to mistaken judgment); Brown v. Matthews, 14 Ala. App. 428, 70 So. 287 (1915) (existence of some special knowledge on the part of vendor).

[1] State v. Stinnett, 203 N. C. 829, 167 S. E. 63 (1933).

[1a] 203 N. C. at 832, 167 S. E. at 64.

[2] Young v. Phillips, 202 Mich. 480, 168 N. W. 549 (1918); Ballew v. Smith, 32 N. C. 176 (1849).

[3] Tague v. Guaranty State Bank of Drumright, 82 Okla. 197, 202 Pac. 510 (1921).

[4] Ashe, J., says in Frank v. Hillard, 95 N. C. 117, 119 (1886): "We have had a good many cases before this court like that presented by the record in this case, and there has been some conflict in these decisions which we find it difficult to reconcile."

the passage of a statute in 1883 requiring conditional sales to be registered in the same manner and with the same effect as chattel mortgages.[5] That is, in order for a vendor who had retained title by way of security to assert this title against innocent purchasers, the title-retention contract would have to be registered. But the legislature declared no intention of abolishing the distinction between conditional sales and chattel mortgages.[6]

However, the language in the instant case is applied to facts that involve neither a question of registration nor a policy of protecting innocent third parties. The controversy here is between the original parties to the transaction. Neither this statute nor decisions under this statute would apply. Therefore, the question of the right of possession under a conditional sale contract before default would depend upon the normal construction given such contracts.

It is almost universally held that the transfer of possession and the right to possession before default are essential elements of a conditional sale.[7] The very purpose of this kind of transaction is to give the purchaser the use of the property while it is being paid for. The Uniform Conditional Sales Act provides that "the buyer shall have the right when not in default to retain possession of the

[5] N. C. CODE ANN. (Michie, 1931) §3312.

[6] Brem v. Lockhart, 93 N. C. 191 (1885), seems to be the first case involving this statute. There is no intimation in that case that the distinction between conditional sales and chattel mortgages had been abolished. In Tufts v. Griffin, 107 N. C. 47, 12 S. E. 68, 10 L. R. A. 526 (1890), the court decides that as between the parties a given transaction amounts to a conditional sale and does not mention a chattel mortgage.

However, in more recent cases the court has intimated that the two transactions were the same. Whitlock v. Auburn Lumber Co., 145 N. C. 120, 58 S. E. 909 (1907); Standard Dry Kiln Co. v. Ellington, 172 N. C. 481, 90 S. E. 564 (1916). In Harris v. S. A. L. Ry. Co., 190 N. C. 480, 130 S. E. 319, 49 A. L. R. 1452 (1925), the court says that to all intents and purposes, the title retaining contract is a chattel mortgage. But the case only decided that one who negligently injured a chattel held under a registered conditional sale contract could settle either with the vendee in default or the vendor and that a settlement with one precluded recovery by the other.

[7] First National Bank v. Marlow, 71 Mont. 461, 230 Pac. 374 (1924); Phelen v. Stock Yards Bank, 134 Okla. 13, 276 Pac. 175 (1928); Kingland Plow Co. v. Joyce, 194 Mo. App. 367, 184 S. W. 490 (1916); Firestone Tire and Rubber Co. v. Anderson, 190 Iowa 439, 180 N. W. 273 (1920); Defiance Machine Wks. v. Gill, 170 Wis. 477, 175 N. W. 940 (1920); Young v. Phillips, 203 Mich. 566, 169 N. W. 822 (1918).

See also (1929) 13 MINN. L. REV. 247, which says that a vendee under a conditional sales contract has two rights, that of possession, and that of acquiring title.

See *contra:* General Motors Acceptance Corp. v. Goldboges, 260 Ill. App. 474, 481 (1931).

goods. . . ."[8] The North Carolina Supreme Court, in *Tufts v. Griffin*,[9] which was decided seven years after the passage of the conditional sales recordation statute, states that the vendee has a right to the "actual legal and rightful possession" with a right to the title upon payment of purchase price; and further, that the "vendor could not interfere with possession 'until a failure to perform condition.'"

Therefore, it appears that the court in taking one type of transaction and placing it in the category of another transaction, then giving it all the attributes of this other transaction—a dangerous procedure at best—has adopted a theory which cannot be supported by direct authority in our own or in other jurisdictions.

WILLIAM MEDFORD.

Constitutional Law—Protection of Rights Acquired in Reliance on Overruled Decision.

A significant factor in the change and growth of Anglo-American law is the overruling of prior judicial decisions. The overruling process, though unquestionably salutary in the course of time, engenders immediate difficulties. One of these difficulties—the adjustment of acts done and rights vested in reliance on the decision overruled—faced the United States Supreme Court in the case of *Great Northern Ry. Co. v. Sunburst Oil Co.*[1]

The Supreme Court of Montana, in *Doney v. Northern Pacific Ry. Co.*,[2] had indicated a certain procedure to be followed by shippers in suits against carriers to recover overcharges for freight. Plaintiff in the *Great Northern* case, in bringing suit against defendant carrier, had followed the procedure indicated in the *Doney* case. On the appeal of the *Great Northern* case to the Montana Supreme Court, that tribunal held that the rulings of the *Doney* case were erroneous, and would not be followed in the future, but that nevertheless they

[8] UNIFORM CONDITIONAL SALES ACT §2. See (1922) 2 ORE. L. REV. 1 for discussion of the scope of the purpose of this act.

[9] *Supra* note 4. See also Whitlock v. Lumber Co., *supra* note 6, at 126, 58 S. E. at 911, where the court quotes with approval from 3 CENT. L. J. 413 as follows: "There is no doubt but that title and the right of property by the terms of the note remained in the seller while possession and right to possession were in defendant (buyer)." This was in the absence of a specific provision in the contract as to which party was to have possession.

[1] Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U. S. 358, 53 Sup. Ct. 145, 77 L. ed. (Advance Opinions) 173 (1932).

[2] Doney v. Northern Pacific Ry. Co., 60 Mont. 209, 199 Pac. 432 (1921).

were law until reversed and would control the rights of shippers and carriers who had relied on them. The Montana court thus gave its ruling a prospective effect but refused to give it a retrospective effect. The carrier appealed to the United States Supreme Court, insisting that the Montana court's judgment was unconstitutional as violating due process of law. But it was *held* that the Montana court had not transcended constitutional guaranties in defining the limits of its adherence to precedent.

The difficulties attendant on the overruling of a decision are traceable to varying theories of the judicial function, to the doctrine of *stare decisis,* and to the efforts of the courts to protect vested rights.

The classical Blackstonian postulates that law exists as a sort of Platonic absolute or ideal and that judges can merely declare this universal law through decisions which are no more than its evidence[3] have been assailed for some time by the exponents of the antipodal realistic view that judges can and do make law.[4] Most courts, however, still purport to accept the Blackstonian or Declaratory theory.[5] The logic of this theory demands not only that an overruled decision be considered an erroneous declaration of the law and hence a nullity, but also that the overruling decision be given a retroactive effect.[6] Constitutional guaranties against the retroactive effect of laws ex-

[3] 1 BL. COMM. *68-72.

Judicial expressions of allegiance to the Blackstonian doctrine are manifold. The following example from Ray v. Western Pennsylvania Natural Gas. Co., 138 Pa. St. 576, 20 Atl. 1065, 1067 (1891) is typical: "The courts . . . are not infrequently constrained to change their rulings. . . . In so doing the doctrine is not that the law is changed, but that the court was mistaken in its former decision, and that the law is, and really always was, as it is expounded in the later decision. . . . The members of the judiciary in no proper sense can be said to make or change the law. They simply expound it and apply it to individual cases."

[4] See, for example, FRANK, LAW AND THE MODERN MIND (1930) 33, 121, and 328; Frank, *Are Judges Human?* (1931) 80 U. OF PA. L. REV. 17, 233; Carpenter, *Court Decisions and the Common Law* (1917) 17 COL. L. REV. 593.

GRAY, THE NATURE AND SOURCES OF THE LAW (2d ed. 1927) 232, 233: "The only thing I am concerned with is the fact. Do the judges make Law? I conceive it to be clear that, under the Common Law System, they do make Law."

Justice Cardozo has said: "I take judge-made Law as one of the realities of life." Quoted in FRANK, *op. cit. supra* at 328.

See *infra* note 18.

[5] FRANK, *op. cit. supra* note 4, at 32; (1915) 29 HARV. L. REV. 80.

[6] See quotation *supra* note 3, and Harbert v. Monongahela River R. Co., 50 W. Va. 253, 40 S. E. 377 at 378 (W. Va. 1901). Freeman, *Protection Afforded Against the Retroactive Operations of an Overruling Decision* (1918) 18 COL. L. REV. 230 at 232.

tends only to the written law—*i.e.*, statutes.[7] Since contract and property rights often vest on the faith of a judicial pronouncement, courts feel an understandable reluctance in overruling a decision. This reluctance has expressed itself in two courses of judicial conduct: (1) the courts resort to a stricter adherence to the doctrine of *stare decisis;*[8] (2) when justice requires that vested rights be saved, the courts pitch logic overboard and proceed to protect these rights.[9]

The rule of *stare decisis,* binding on inferior courts and a persuasive moral force on supreme courts, has often impeded the healthful growth of the law.[10] The Declaratory theory with its logical mandate of retroactivity causes a stricter adherence to *stare decisis;*[11] because of this correlation, therefore, the Declaratory theory together with the rule of *stare decisis* unduly restrict the development of the law through intelligent judicial pruning.[12]

[7] Although the language of the "municipal bond cases" indicated that the Supreme Court thought that to give an overruling decision a retroactive effect would violate the contract clause of the Constitution (see for example Gelpcke v. Dubuque, 1 Wall. 175, 17 L. ed. 520 (1864), and Douglass v. Pike County, 101 U. S. 677, 25 L. ed. 968 (1880)), later cases have made it clear that the prohibition against impairing the obligations of contracts applies only to legislative acts and not to judicial decisions. Central Land Co. v. Laidley, 159 U. S. 103, 16 Sup. Ct. 80, 40 L. ed. 91 (1895); Bacon v. Texas, 163 U. S. 207, 16 Sup. Ct. 1023, 41 L. ed. 132 (1896); see GRAY, *supra* note 4, at 259. Many state courts, however, have construed the municipal bond cases as though they were decided under the contract clause. Freeman, *supra* note 6 at 236 and 243.

See Shepherd's Point Land Co. v. Atlantic Hotel, 134 N. C. 397, 399, 46 S. E. 748, 749 (1904).

The constitutional provision against *ex post facto* laws is directed against legislative acts only and has no application to judicial decisions. Ross v. Oregon, 227 U. S. 150, 33 Sup. Ct. 220, 57 L. ed. 458 (1913).

[8] Freeman, *supra* note 6, at 233; Kocourek, *Retrospective Decisions and Stare Decisis and a Proposal* (1931) 17 A. B. A. J. 180.

[9] See *infra* note 14.

[10] As applicable to this contention, witness the following passages:

"It is safe to say that there are many hundreds of legal rules, especially those of a ceremonial type, which by general consent of the bar need to be overhauled. The obstructive influence of the rule of Stare decisis is beyond calculation." Kocourek, *supra* note 8, at 180.

"The history of our law shows repeated instances where courts have failed, through an unreasoning conservatism, to cut away technicalities utterly meaningless and having their origin in conceptions long since passed away; and the law as a science has suffered accordingly." Thayer, *Judicial Legislation: Its Legitimate Function in the Development of the Common Law* (1891) 5 HARV. L. REV. 172 at 200. The last-quoted passage was not written on the subject of *stare decisis,* but it is reasonable to believe that the learned author implicitly recognized *stare decisis* as one of the causes of the "unreasoning conservatism."

[11] Kocourek, *supra* note 8 at 181.

[12] *Ibid.* There is no intention of implying that the rule of *stare decisis* is not desirable when it is intelligently, and not too strictly, applied.

Some courts follow the Declaratory theory to its logical conclusion and do not interfere with the retroactive operation of the overruling decision.[13] Usually, however, rights acquired in reasonable or justifiable reliance on the overruled decision are protected, either upon the ground that the case before the court presents an exception to the retroactive rule, or that citizens are entitled to rely on judicial decisions and have their rights secured.[14] The approach

[13] Stockton v. Dundee Mfg. Co., 22 N. J. Eq. 56 (1871); Hibbits v. Jack, 97 Ind. 570 (1884); Allen v. Allen, 95 Cal. 184, 30 Pac. 213 (1892); Storrie v. Cortes, 90 Tex. 283, 38 S. W. 154 (1896); Falconer v. Simmons, 51 W. Va. 172, 41 S. E. 193 (1902) (court declares overruling decision retroactive, and says that party's rights as fixed by overruled decision are not saved, but for purposes of convenience in disposing of appeal allows result which would have been dictated by overruled decision); Crigler v. Shepler, 79 Kan. 834, 101 Pac. 619 (1909).

In other cases, the decision was put upon the ground that no contract or property rights had vested in reliance on the earlier decision. Center School Township v. State *ex rel.* Board of School Com'rs, 150 Ind. 168, 49 N. E. 961 (1898); Mountain Grove Bank v. Douglas County, 146 Mo. 42, 47 S. W. 944 (1898); Lewis v. Symmes, etc., 61 Ohio St. 471, 56 N. E. 194 (1900); Gross v. Board of Com'rs, 158 Ind. 531, 64 N. E. 25 (1902).

The following cases are also of interest: Swanson v. City of Ottumwa, 131 Iowa 540, 106 N. W. 9 (1906) ("There is no showing that appellant . . . relied upon any of the so-called opinions of this court. . . "); Herron v. Whitely Malleable Castings Co., 47 Ind. App. 335, '92 N. E. 555 (1910) (draws distinction between case where earlier decision enunciated an established rule of property or contract, and case where decisions relied on are "conflicting, not well considered, or made so recently . . . that [the contract or property right] could not reasonably be presumed to have been . . . acquired upon the faith of the earlier decision"). Oliver Co. v. Louisville Realty Co., 156 Ky. 628, 161 S. W. 570 (1913) foreign corporation that had not complied with law of forum unsuccessfully invoked *stare decisis*). See Bradshaw v. Duluth Imperial Mill Co., 52 Minn. 59, 53 N. W. 1066 at 1068 (1892) (could have been no reliance on overruled case because of time of its decision). And see Freeman, *supra* note 6, at 239.

[14] Menges v. Dentler, 33 Pa. St. 495 (1859); Haskett v. Maxley, 134 Ind. 182, 33 N. E. 368 (1863); Harris v. Jex, 55 N. Y. 421 (1874); Vermont & C. R. Co. v. Vermont Central R. Co., 63 Vt. 1, 21 Atl. 262 (1890); Farrior v. New England Mortgage Security Co., 92 Ala. 176, 9 So. 532 (1891); Hill v. Brown, 144 N. C. 117, 56 S. E. 693 (1907). Freeman, *supra* note 6, 240 *et seq.*; (1915) 29 HARV. L. REV. 80.

Mr. Freeman (*supra* note 6) after an exhaustive analysis of the cases, has offered the following summary:

"1. In cases originating in the federal courts, the last decision of a state court, overruling former decisions, will not be followed where to do so would interfere with rights acquired in reliance upon the first decisions.

"2. The state courts, on one theory or another, almost universally protect property rights acquired in reliance upon a statute or constitutional provision as then interpreted by the courts. [Courts often say that the exception to the retroactive operation of an overruling decision is limited to instances in which the earlier decision or decisions construed constitutions or statutes, and there was reliance upon such decision or decisions. Thus in Falconer v. Simmons, *supra* note 13 at 196, it is said that "a mere decision expressive of general or common law will not protect even a contract valid under that common law, tested by a prior decision, against the effect of a subsequent change

of the North Carolina court to the problem has been typical. Although recognizing, either expressly or by implication, the Blackstonian rule that the overruling decision operates retrospectively, and that the overruled decision is a nullity, the court has not failed to uphold rights acquired by virtue of reliance on the first decision.[15]

Some legal thinkers believe that the practical application of the Declaratory theory, and its cognate doctrine, *stare decisis,* although leading to "undesirable results in particular cases" works a "fairer

of decision." And see Wilkinson v. Wallace, 192 N. C. 156, 158, 134 S. E. 401, 402 (1926); (1927) 5 N. C. L. REV. 170, 171. But, as Mr. Freeman points out, it would seem that the exception should be extended to changes in construction of the common law as well as of written law; and some courts have made such an extension. Jones v. Woodstock Iron Co., 95 Ala. 551, 10 So. 635 (1891); Hill v. Brown, *supra;* par. 4 *infra.*]

"3. Men are not punished as criminals for acts which were done when the highest court of the state had declared them lawful. ["Although it is settled that the constitutional prohibition of *ex post facto* laws, like the provision against impairing the obligation of contracts, prevents only legislative acts and not judicial decisions, the courts, following a perfect analogy, should not allow an overruling decision to operate retroactively, wherever a statute could not do so." (1915) 29 HARV. L. REV. 80 at 82.]

"4. The tendency is to extend the same protection to rights acquired in reliance upon decisions interpreting the common or unwritten law." See par. 2, *supra.*

[15] State v. Bell, 136 N. C. 674, 49 S. E. 163 (1904) (earlier decision construing statute overruled and a new construction announced for the future, but defendant awarded new trial and permitted to attempt defense under law of overruled case); Hill v. Brown, *supra* note 14 (overruling decision not given retroactive effect on ground that law of earlier decision was "practically a dormant stipulation in the contract"); Fowle v. Ham, 176 N. C. 12, 96 S. E. 639 (1918) (decision overruling earlier case and making indexing of deeds essential to registration not given retroactive effect, because parties had relied on earlier decision); Wilkinson v. Wallace, 192 N. C. 156, 134 S. E. 401 (1926) (holds that two former overruling decisions were prospective, not retrospective, in effect as applied to facts presented; noted in (1927) 5 N. C. L. REV. 170; see concurring opinion of Walker, J., in State v. Fulton, 149 N. C. 485, 491 63 S. E. 145, 146 (1908). In Ely v. Norman, 175 N. C. 294, 95 S. E. 543 (1918), three judges concurred in the result stated in the principal opinion but added that a former decision of the court should be overruled. This conclusion of the majority, however, operated only prospectively. See State *ex rel.* Bryant Mfg. Co. v. Hester, 177 N. C. 609, 611, 98 S. E. 721, 722 (1919).

There are numerous expressions in North Carolina cases to the effect that titles or vested interests acquired in reliance on earlier decisions will be protected. See Hill v. Railroad, 143 N. C. 539, 573-582, 55 S. E. 854, 866-869 (1906); Young v. Jackson, 92 N. C. 144, 148 (1885); Kirby v. Boyette, 118 N. C. 244, 258, 24 S. E. 18, 19 (1896); Jones v. Williams, 155 N. C. 179, 189, 71 S. E. 222, 227 (1911); Threadgill v. Wadesboro, 170 N. C. 641, 644, 87 S. E. 521, 522 (1916).

In Mason v. Nelson Cotton Co., 148 N. C. 492, 62 S. E. 625 (1908), the court does not depart from the general rule that the overruling decision must be given a retroactive effect, saying that exceptions against retroactive operation should not be extended to an erroneous declaration of general mercantile law.

average of justice" in the long run.[16] Others contend that it is desirable to protect all rights that have vested from reliance on a judicial decision, and that judicial theory, as well as judicial practice, should be shaped toward this end.[17] The latter view, it is believed, is the more compelling. How, then, can the protection of all rights against the retroactive operation of an overruling decision be realized? It has been repeatedly pointed out that the fictional theory that judges do not make law should be abandoned.[18] With the abandonment of this theory will go the logical implication of retroactivity, and an obstacle to enlightened judicial thought and action will be removed. After the unqualified acceptance of the reality that judges do make law, the bonds of the rule of *stare decisis* should be loosened to the extent that the courts will not be cramped in effecting desirable departures from precedent.

Admittedly it is futile to believe that such a metamorphosis of juristic thought will occur in the near future. The Declaratory theory is too firmly implanted in our case law to be uprooted without a great deal more spading. Therefore, lest it be supposed that our avowed aim of protecting all rights which have vested in reliance upon an overruled decision is altogether illusory, other more practical means of realizing this aim should be considered.

First, the courts may adopt the view that a judicial decision can operate to deprive a person of his liberty or property without due process of law.[19] Since this view would require some recasting of constitutional thought, it would not be altogether easy of realization, but does not seem wholly impracticable.

In the second place, it has been suggested[20] that a statute be

[16] Moschzisker, *Stare Decisis in Courts of Last Resort* (1924) 37 HARV. L. REV. 409.

[17] Freeman, *supra* note 6.

[18] Austin alluded to the Blackstonian concept as a "childish fiction employed by our judges, that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing, I suppose, from eternity and merely *declared* from time to time by the judges." 2 AUSTIN, JURISPRUDENCE (3d ed. 1869) 655. That Austin's views have found wide acceptance among writers on jurisprudence, see Gray, *supra* note 4, at 222; Carpenter, *supra* note 4 at 595.

FRANK, *op. cit. supra* note 4; Carpenter, *supra* note 4; (1915) 29 HARV. L. REV. 80.

See dissenting opinion of Mr. Justice Holmes in Kuhn v. Fairmont Coal Co., 215 U. S. 349, 370, 30 Sup. Ct. 140, 147, 54 L. ed. 228, 238 (1909).

[19] Freeman, *op. cit. supra* note 6, at 251.

[20] Kocourek, *supra* note 8, suggests the following statute:

"An Act Declaring the Effect of Judicial Decisions of the Supreme Court.

adopted allowing a supreme court to decide a case by what it believes to be a more just rule than has theretofore been pronounced, except where the former rule is the basis of reliance. The immediateness with which the change would be made recommends this method. Whether it would survive the criticism that it permits an invasion of the judicial province by the legislature, however, is problematical.

A third way out of the dilemma is that which the Montana court adopted in the principal case. That is, the court may announce a new rule for regulating future transactions while applying the old rule to the case being decided. One objection urged to this solvent is that the announcement of the new rule—the prospective ruling—must necessarily be only a dictum.[21] However, it is believed that this objection is not a serious one: the court may give a binding effect to its prospective ruling if it so desires. The United States Supreme Court now holds that the state's adoption of this view does not abrogate due process. Although such a procedure does violence to the Declaratory theory of the law, it has a definite pragmatic sanction in that it allows the court to protect vested rights and at the same time announce a more just rule to be followed in the future. The course of the Montana court would doubtless be more generally followed were it possible to give the *coup de grâce* to antiquated dogma and useless fiction.

W. J. ADAMS, JR.

Sec. 1. The final judicial decisions of the Supreme Court are
(a) Decisive of the rights of the parties.
(b) Declarative of the rules of law for future application which govern the questions raised on the facts presented and decided.
Sec. 2. (1) If the Supreme Court believes that a declaration of rule of law theretofore made by the Supreme Court or by any inferior court is unjust, it will decide the instant case in accordance with the juster rule except
(a) Where the former rule is a basis of reasonable and justifiable reliance applicable to the facts of the instant case, or
(b) Where application of a new rule in its judgment will be unduly disturbing to a standard of reasonable and justifiable reliance as to the existence of non-existence of legal relations of other persons not then before the court.
(2) When the Supreme Court refuses to depart from an existing rule in favor of what it pronounces a juster rule on the questions adjudicated, the expression of that view is evidence for future cases of the existence of reasonable reliance.
Sec. 3. Nothing herein shall abridge the duty of inferior courts to apply the declarations of law made by superior courts."

[21] (1902) 15 HARV. L. REV. 667 at 668.

Contracts—Modifications in Common Law Joint Liability.*

At common law joint obligors had to be sued jointly[1] with a few exceptions.[2] This strict rule was applied to parties who were jointly liable on a bill or note[3] and a few states still follow it.[4] Others have relaxed its severity.

* The general scope of this note is limited to the joinder and non-joinder of co-obligors in an action on a joint contract or negotiable instrument. Some consideration is given to substantive rules. There are a number of questions which might arise concerning the general subject. For example, it might be questioned whether the statutes making joint contracts joint and several include negotiable instruments, as in Delaware, *infra* note 19. Also, a number of states have a statute saying that "of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants." This statute is usually interpreted as referring to the necessity that all the plaintiffs have the same interest and all the defendants likewise. It does not refer to the necessary parties who must sue or be sued, but refers only to those who are actually involved in the suit. N. C. CODE (Michie, 1931) §457 is a statute of this type. On partnership liabilities, see Burdick, *Joint and Several Liability of Partners* (1911) 11 COL. L. REV. 101. On notice to joint indorsers, see note (1925) 11 CORN. L. Q. 57. On the effect of the death of a joint obligor, see (1929) 9 ORE. L. REV. 76. As to payment to one joint payee, see Note (1929) 8 N. C. L. REV. 46.

[1] 1 CHITTY, PLEADING 42; BLISS, LAW OF PLEADING (3d ed. 1894) §91; CLARK, CODE PLEADING (1928) 257; McINTOSH, N. C. PRACTICE AND PROCEDURE (1929) §235; 20 R. C. L. 677; 8 C. J. 849; §1110; 47 C. J. 85, §169. If only one joint obligor were sued, he could demur or plead in abatement for non-joinder of necessary parties. If he did not object and plaintiff obtained a judgment against him, the plaintiff lost his rights in regard to the other joint obligors; the judgment against one merged the debt of all. BLISS, *op. cit. supra* §92. As to what are considered joint, several, and joint and several promissory notes see: BIGELOW, THE LAW OF BILLS, NOTES AND CHECKS (3d ed. 1928) §§162, 164; 8 C. J. 66-69, §§96-104. The Restatement of the law of contracts follows the common law. 1 CONTRACTS RESTATEMENT (Am. L. Inst. 1932) c. 5, pp. 129-150.

[2] If one of the joint obligors was out of the jurisdiction or was under a disability such as infancy at the time of making the contract, or had been discharged by operation of law after the contract had been made, or was a dormant partner, plaintiff could sue the other joint obligors. CLARK, CODE PLEADING (1928) 257-258 and cases there cited; same material, CLARK AND BROWNELL, *Joinder of Parties* (1927) 37 YALE L. J. 28, at 41-54.

[3] RANDOLPH, COMMERCIAL PAPER §1665; 8 C. J. 849, §1110.

[4] Florida, Georgia, and South Carolina have direct holdings which follow the common law rule.

Nelson v. Ziegfeld, 131 So. 316 (Fla. 1930).

Graham v. Marks, 95 Ga. 38, 21 S. E. 986 (1894); Almand v. Hathcock, 140 Ga. 26, 78 S. E. 345 (1913) (prom. note); Gate City Cotton Mills v. Alexander, 143 Ga. 42, 43, 84 S. E. 118 (1915); Elrod v. Camp, Flanigan and Toole, 150 Ga. 48, 102 S. E. 357 (1920); Dickenson v. Hawes, 32 Ga. App. 173, 122 S. E. 811 (1924); Exchange Bank of Savannah v. Harper, 35 Ga. App. 786, 134 S. E. 789 (1926); Smith v. Moore, 45 Ga. App. 708, 165 S. E. 765 (1932); Locher v. Gray, 168 S. E. 909 (Ga. 1933). Georgia also holds that rendition of a judgment against one of several joint obligors merges the entire cause of action and bars any subsequent suit on the same contract against the other debtors. Scarborough & Co. v. Yarborough, 13 Ga. App. 792, 79 S. E. 1131 (1913). An exception to the general rule is made by statute in Georgia pro-

A number of states which still hold that joint obligors must be sued jointly have added the provision that non-joinder can be taken advantage of only by a plea in abatement or by demurrer;[5] otherwise the defendant will waive the defect.[6] The plaintiff can then

viding that the plaintiff may proceed by attachment against the joint obligor who is liable to attachment, without making the other joint obligors parties to his declaration in attachment. GA. CODE (Michie, 1926) §5067; Clark v. Maddox, 41 Ga. App. 807, 154 S. E. 728 (1930). A note signed by apparent principal makers reciting, "We promise to pay," is *prima facie* a joint undertaking, Locher v. Gray, *supra*. Also on the subject, see Evans v. Williams, 29 Ga. App. 126, 113 S. E. 703 (1922).

Boykin v. Watson's Administrators, 3 Brev. 260 (S. C. 1812) (contract); *id.*, 1 Tread. Const. 157 (S. C. 1812); Ayer v. Wilson, 2 Mill, Const. 139, 12 Am. Dec. 677 (S. C. 1818) (contract) (non-joinder bars the action); McCall v. Price, 1 McCord 82 (S. C. 1821) (bond). However, by statute if the action is against two or more defendants jointly indebted upon contract and the summons is served on one or more but not on all, the plaintiff may proceed against the defendant served unless the court directs otherwise, [this much of the statute was held constitutional in Allnut v. Lancaster, 76 Fed. 131 (C. C. D.S.C. 1896), and a statute similar to it in Hanley v. Donoghue, 116 U. S. 1, 6 Sup. Ct. 242, 29 L. ed. 242 (1885)] and a judgment can be recovered against all the defendants jointly which is enforceable against the joint property of all and the separate property of the one served. S. C. CODE (Michie, 1932) §438. See, also, *infra* note 15. It is also provided that if a judgment is so obtained, those who were not originally summoned may be summoned to show cause why they should not be bound in the same manner as if they had been originally summoned. S. C. CODE (Michie, 1932) §810.

Idaho, Massachusetts, Ohio, and Wyoming probably also follow the common law.

An Idaho case contains the statement that a promissory note executed and signed by two persons and reading "we promise to pay" is on its face a joint and several liability. Tritthart v. Tritthart, 24 Idaho 186, 133 Pac. 121 (1913); but an earlier case says that all parties jointly liable on a contract must be made defendants in an action on it. People v. Sloper, 1 Idaho 159 (1867) (appearance bond). IDAHO CODE (Lee, Ross, and Lukens, 1932) §5-510 provides that if the action is against two or more defendants jointly liable on a contract and the summons is served on one or more but not on all, the plaintiff may proceed against the defendants served as if they were the only ones, and by §12-201 if a judgment is recovered against those served, those not originally summoned and not appearing may be summoned to show cause why they should not be bound by the judgment.

Bazell v. Belcher, 31 Ohio St. 572 (1877); Hamilton v. Ohio State Bank & Trust Co., 20 Ohio App. 493, 152 N. E. 731 (1925) (prom. note).

Wyoming, with a code of practice based on Ohio's, probably follows Ohio on this point, WYO. COMP. STAT. ANN. (1920) §§5531 to 6452, and see Fisher v. Chadwick, 4 Wyo. 379, 34 Pac. 899 (1893).

The United States Supreme Court will dismiss an appeal if the judgment sought to be reviewed is joint and both or all the joint parties do not join in the appeal. Hartford Accident & Indemnity Co. v. Bunn, 285 U. S. 169, 52 Sup. Ct. 354, 76 L. ed. 685 (1932), and will deny a writ of certiorari if the judgment sought to be reviewed is joint and the record fails to disclose summons and severance. Missouri State Life Insurance Company v. Johnson, 53 Sup. Ct. 404, 77 L. ed. 655 (1933).

[5] As to the effect of these pleas, see CLARK, CODE PLEADING (1928) 341, 342, 410-414.

[6] Bledsoe v. Irvin, 35 Ind. 293 (1871) (prom. note); Boots v. Boots, 84 Ind.

proceed to judgment against the non-objecting defendant, but with either of two results: one group of states holds that such judgment would merge the debt of the other obligors;[7] another group has passed laws providing that a judgment against one co-obligor does not discharge the rest.[8] Several states have statutes providing that

171 (1882); Sharp v. Baker, 51 Ind. App. 547, 99 N. E. 44 (1912) (prom. note).

Dennett v. Chick, 2 Greenl. 176 (Me. 1823) (prom. note); Hughes v. Littlefield, 18 Me. 400 (1841) (prom. note); Hapgood v. Watson, 65 Me. 510 (1876) (prom. note); see also ME. REV. STAT. (1930) c. 95, §§105, 106.

Maurer v. Midmey, 25 Neb. 575, 41 N. W. 395 (1889); Beeler v. First Nat. Bank of Larned, 34 Neb. 348, 51 N. W. 857 (1892) (prom. note); Perkins County v. Miller, 55 Neb. 141, 75 N. W. 577 (1898) (official bond); Bates-Smith Inv. Co. v. Scott, 56 Neb. 475, 76 N. W. 1063 (1898). Nebraska also provides that if service cannot be had on all, action may proceed against those served. Fox v. Abbott, 12 Neb. 328, 11 N. W. 303 (1882) (action on judgment); Bowen v. Crow, 16 Neb. 556, 20 N. W. 850 (1884); Council Bluffs Sav. Bank. v. Griswold, 50 Neb. 753, 70 N. W. 376 (1897); Gyger v. Courtney, 59 Neb. 555, 81 N. W. 437 (1900); Young v. Joseph Bros. & Davidson, 5 Neb. (Unof.) 559, 99 N. W. 522 (1904) (bond); Wolfenburger v. Britt, 105 Neb. 773, 181 N. W. 932 (1921); the voluntary release of one of two joint makers of a promissory note will release the other. Banking House of Castetter v. Rose, 78 Neb. 693, 111 N. W. 590 (1907). Where a judgment against joint debtors is sought to be revived, all those jointly liable should be made parties to the action; but where all are made parties and a summons is issued against all, the fact that one or more of the parties cannot be found will not abate the action against those found and properly served. Clark v. Commercial Nat. Bank of Columbus, 68 Neb. 764, 94 N. W. 958 (1903).

Markoe v. Seaver, 2 Wis. 148 (1853) (prom. note).

[7] Kamm v. Harker, 3 Ore. 208 (1870) (prom. note); Ryckman v. Manerud, 68 Ore. 350, 136 Pac. 826 (1913), Ann. Cas. 1915C 522; Anderson v. Stayton State Bank, 82 Ore. 357, 159 Pac. 1033 (1916).

WASH. COMP. STAT. (Remington, 1922) §143; Warren v. Rickles, 129 Wash. 443, 225 Pac. 422 (1924); Pacific Southwest Trust & Savings Bank v. Mayer, 138 Wash. 85, 244 Pac. 248 (1926). Also a joint judgment against two or more persons for a tort committed by their employee, though reversed as to one of the parties appealing, remains in force as against another not appealing. Shreeder v. Davis, 43 Wash. 129, 86 Pac. 198 (1906). Also a judgment on a joint obligation is a bar to an action thereon against obligors not parties to the judgment. Warren v. Rickles, 129 Wash. 443, 225 Pac. 422 (1924).

[8] MD. PUB. GEN. LAWS (1924) art. 50, §10; Brown v. Warram, 3 Harr. & J. 572 (Md. 1815) (prom. note); Pike v. Dashiell's Adm'r., 7 Harr. & J. 466 (Md. 1823) (prom. note); Merrick v. Trustees of Bank of Metropolis, 8 Gill 59 (Md. 1849) (prom. note); State v. Wheeler, 14 Md. 108 (1859) (official bond); Kent v. Holliday, 17 Md. 387 (1861) (bill of exchange) (and if complaint shows there is a co-obligor, the non-joinder must be accounted for or the complaint is bad); Lorrey v. Bailey, 43 Md. 10 (1875); Westheimer v. Craig, 76 Md. 399, 25 Atl. 419 (1892) (contract); Rosenthal v. Heft, 159 Md. 302, 150 Atl. 850 (1930); on subject generally, see MD. PUB. GEN. LAWS (1924) art. 26, §§14, 21; art. 50, §§1 through 12.

Robertson v. Smith, 18 Johns. 459, 9 Am. Dec. 227 (N. Y. 1821); Delaware County Nat. Bank v. King, 109 App. Div. 553, 95 N. Y. Supp. 956 (1905); Jones v. Gould, 200 N. Y. 18, 92 N. E. 1071 (1910); Trusts & Guarantee Co. v. Sawyer, 146 App. Div. 63, 130 N. Y. Supp. 582 (1911); Hawksworth v. Durant, 93 Misc. Rep. 149, 156 N. Y. Supp. 1026 (1916) (contract); O'Con-

an action cannot be abated or defeated for non-joinder of defendants.[9] Three states further provide that the court can order the other co-obligors joined, apparently on its own motion;[10] and one state allows a defendant named in any action to sue out, as of course, a writ of *scire facias* to bring upon the record as an additional defendant any other person alleged to be jointly liable with him and the suit then proceeds as though all of the parties had originally been joined.[11] Other states which still require that co-obligors be joined in an action have other variations of the common law rule in that: (1) if all the joint obligors are not summoned and plaintiff obtains judgment against those summoned, he may later proceed

nell v. Ryan, 127 Misc. Rep. 350, 216 N. Y. Supp. 590 (1926); N. Y. CONS. LAWS (Cahill, 1930) ch. 12, §232.

Keller v. Blasdell, 1 Nev. 491 (1865); NEV. COMP. LAWS (Hillyer, 1929) §3701.

Miller v. Reed, 27 Pa. St. 244 (1856); Mintz v. Tri-County Natural Gas Co., 259 Pa. 477, 103 Atl. 285 (1918); PA. STAT. (1920) §§12798, 12799, 12803, 16643, 16646, 16652.

UTAH, LAWS 1929, c. 61, §2. Also, in Utah, if the action is against two or more defendants jointly liable and all are not served, the plaintiff may proceed to judgment against the one or ones served, UTAH COMP. LAWS (1917) §6558, and then the others may be summoned to show cause why they should not be bound by the judgment, *Id.* §6874.

VT. GEN. LAWS (1917) §§1827, 1828. However, in Vermont, the common law rule that the death of a joint promisor left the survivor liable for the whole debt, which rule applies to the husband and wife when joint debtors, is still in effect. Congdon v. Torrey, 95 Vt. 38, 112 Atl. 202 (1921).

WIS. STAT. (1931) §113.02.

[9] CONN. GEN. STAT. (1930) §5646.

MICH. COMP. LAWS (1929) §14021. See also on this subject, Searles v. Reed, 63 Mich. 485, 29 N. W. 884 (1886); Dumanoise v. Townsend, 80 Mich. 302, 45 N. W. 179 at 180 (1890); Dillenbeck v. Simons, 105 Mich. 373, 63 N. W. 438 (1895); Beasore v. Stevens, 155 Mich. 414, 119 N. W. 431 (1909); McKnight v. Lowitz, 196 Mich. 368, 163 N. W. 94 (1917).

N. H. PUB. LAWS (1926) c. 334, §10.

Bright v. Hand, 16 N. J. L. 273 (1837); Grazioso v. Hirschfield, 128 Atl. 541 (N. J. 1925); Lieberman v. Brothan, 55 N. J. L. 379, 26 Atl. 828 (1893) (prom. note); Blessing v. McLinden, 81 N. J. L. 379, 79 Atl. 347 (1911); Lapayowker v. Levitzky, 130 Atl. 627 (N. J. 1925); N. J. COMP. STAT. (Supp. 1924) §163-285.

N. Y. CIV. PRAC. ACT (Cahill, 1931) §192; O'Connell v. Ryan, 127 Misc. Rep. 350, 216 N. Y. Supp. 590 (1926); see also *supra* note 8.

Providence County Savings Bank v. Vadrias, 25 R. I. 295, 55 Atl. 754 (1903); R. I. GEN. LAWS (1923) §4871.

VT. GEN. LAWS (1917) §§1798, 1830; see also *supra* note 8.

VA. CODE ANN. (Michie, 1930) §6102; see also *infra* note 17.

W. VA. CODE (1930) c. 56, art. 4, §34.

[10] N. J. COMP. STAT. (Supp. 1924) §163-284; see also Blessing v. McLinden, 81 N. J. L. 379, 79 Atl. 347 (1911); and *supra* note 9.

R. I. GEN. LAWS (1923) §4871; see also *supra* note 9.

VT. GEN. LAWS (1917) §1830; see also *supra* notes 8, 9.

[11] Act of June 22, 1931. Pa. P. L. 663 (No. 236); see also *supra* note 8.

against the rest as though they were alone liable;[12] or (2) if the action is against two or more jointly liable and all are not served, a judgment may be rendered against all which is good against the joint property of all and the individual property of the ones served,[13] and when the judgment is docketed, those not summoned may be ordered to show cause why they should not be bound;[14] or (3) one of several joint obligors can confess judgment whether or not the others have been served with a summons, and it is enforceable against the joint property of all and the separate property of the one confessing.[15]

One state has a law providing that a principal obligor in a contract may be sued either alone or jointly with any other partly liable thereon.[16]

A group of states, even more liberal, has enacted procedural statutes providing that a plaintiff may sue any one or more of the parties to a joint contract,[17] with three more states adding a further

[12] IND. ANN. STAT. (Burns, 1926) §§340, 341; Martin v. Baugh, 1 Ind. App. 20, 27 N. E. 110 (1891) (prom. note); Capital City Dairy Co. v. Plummer, 20 Ind. App. 408, 49 N. E. 963 (1898) (prom. note); see also *supra* note 6.

[13] WASH. COMP. STAT. (Remington, 1922) §236; see also *supra* note 7.

[14] WASH. COMP. STAT. (Remington, 1922) §436; see also *supra* notes 7, 13.

[15] ORE. CODE ANN. (1930) §2-1203; see also *supra* note 7.

South Carolina, *supra* note 4, and Washington, *supra* note 13, have similar statutes as well as New York, N. Y. CIVIL PRAC. ACT (Cahill, 1931) §§1197-1201, and North Carolina, N. C. CODE ANN. (Michie, 1931) §497. They all provide in substance that if the action is against several jointly liable and all are not served, a judgment can be rendered good against the joint property of all and the individual property of those served. It is questioned whether these statutes are constitutional if applied to any joint debtors except partners in that they seem to allow a plaintiff to deprive a joint debtor of his share of joint property without giving him a day in court. For, as said in a comment in (1926) 26 COL. L. REV. 771, at 772, "although serving one partner might be sufficient notice to the others of an action against the firm, it seems clear that service upon one of several persons who are connected only by the fact that they became jointly indebted in one transaction cannot be sufficient notice to those not served that the plaintiff is trying to procure a judgment which can be executed against, and is a lien on, all the property which they own jointly with him who was served."

[16] TEX. REV. CIV. CODE (Vernon, 1925) art. 1986; Hinchman v. Riggins, 1 White & W. Civ. Cas. Ct. App. §§294 & 295 (Tex. 1882); Miller v. Sullivan, 89 Tex. 480, 35 S. W. 362 (1896); Brainerd v. Bute, 93 Tex. 137, 44 S. W. 575 (1898), 53 S. W. 1017 (1899); Clark v. Turk, 50 S. W. 1070 (Tex. 1899) (contract); McDonald v. Cabiness, 100 Tex. 615, 102 S. W. 721 (1907) (contract).

[17] IOWA CODE (1927) §10975 (including parties to negotiable paper); Poole, Gillam & Co. v. Hintrager, 60 Iowa 180, 14 N. W. 223 (1882); Cole v. Harvey, 142 Iowa 574, 120 N. W. 97 (1909) (contract).

KY. CODES ANN. (Carroll, 1932) Civil Prac. §27; Hughes v. Gray, 1 Ky. Opin. 1 (1866); Gossom v. Badgett, 6 Bush 97 (Ky. 1869) (bill of exchange); Williams v. Rogers, 14 Bush 776 (Ky. 1879); Daugherty v. Bell Nat. Bank, 175 Ky. 513, 194 S. W. 545 (1917) (prom. note).

Sec. 2 of Act 103 of 1870, printed at p. 19 of Acts of Louisiana of 1871, reads: "Hereafter, in all suits against joint obligors it shall be unnecessary to make all the obligors parties to the suit, but each of the joint obligors may be sued and judgment obtained against them separately for the proportion of the debt or obligation due by them respectively, whether all are joined in the suit or not." This is also §1932 of the LA. GEN. STAT. (Dart, 1932). According to Alpha v. Rose, 171 La. 753, 132 So. 222 (1931), the law in Louisiana is that it is not necessary to make all the joint obligors parties to a suit on a joint obligation; see also Carolina Portland Cement Company v. Southern Wood Distillates and Fiber Company, 137 La. 469, 68 So. 831 at 833 (1915). However, there seems to be some confusion on this point so far as the statutes are concerned. Sec. 2085 of the LA. CIV. CODE (Dart, 1932) reads: "In every suit on a joint contract, all the obligors must be made defendants, and no judgment can be obtained against any, unless it be proved that all joined in the obligation, or are by law presumed to have done so." This is the same as §2080 of the CODE of 1825 and is as enacted in the REV. CIV. CODE of 1870. There are a number of annotations under this section, but they are of cases before 1871. The following two sections of the CODE (Dart, 1932) also refer to joint obligors: §2086 says that the judgment on joint obligations must be rendered against each defendant separately for his proportion of the debt, and §2087, that even though one of the joint obligors has performed his part he must be joined in the suit. The only reference at this place in the CIV. CODE as published in 1932 to the present law is the first annotation which reads "obligors sued separately, see Dart's Stat. 1932, §1932." Thus, a person unfamiliar with Louisiana law would be led to believe by looking at the CODE that Louisiana still has what is substantially the English common law rule. And a person using the GEN. STAT. (Dart, 1932) to find law on this point would have difficulty because §1932 is indexed under "bonds," subdivision "judicial proceedings," further subdivision "separate action against joint obligors."

Further confusion arises from the fact that Act 103 of 1870, referred to *supra,* is entitled "Relative to bonds taken in cases of arrest, attachment, sequestration and provisional seizure, and to suits against joint obligors." The first section of the Act [which is §1931 of the GEN. STAT. (Dart, 1932)] concerns the giving of bonds as indicated by the title. Now the question arises as to whether §2 of the Act refers to all joint obligations or only to joint bonds given under §1 (and in the GEN. STAT. §1932 is titled "Parties to suit on bonds") or whether §3 of Act 103 of 1870 which repeals all laws in conflict with the provisions of the Act repeals not only §2085 of the CODE but also §§2086 and 2087.

GEN. STAT. §1932 does not have the usual effect when a suit against one of several joint obligors is allowed because the suit must be against the joint debtor for his proportion of the debt. In Alpha v. Rose, *supra,* the plaintiff brought suit against one of two joint debtors for one-half of unpaid attorney's fees.

However, the joint obligation seems to be seldom used in Louisiana any more; and when there are two or more obligors, they are generally bound either severally or *in solido,* thus eliminating this problem if a lawyer draws the contract (letter from Louisiana attorney to writer).

MISS. CODE ANN. (1930) §2028; Thompson v. The Planters' Bank, 2 Smedes & M. 476 (Miss. 1844) (prom. note); Crump & Co. v. Wooten, 41 Miss. 611 (1868) (prom. note); White's Garage v. Boyd, 149 Miss. 383, 115 So. 334 (1928).

N. C. CODE ANN. (Michie, 1931) §459; Davis v. Sanderlin, 23 N. C. 389 (1841) (prom. note); Lane v. Richardson, 79 N. C. 159 (1878); Rufty v. Claywell, Powell & Co., 93 N. C. 306 (1885).

Sec. 459 of the N. C. CODE (Michie, 1931) was originally passed in 1797 and then read, "That in all cases of joint obligations, or assumptions of co-partners in trade, or others, such suits may be brought, and prosecuted on the

and desirable provision for joining the other parties or consolidating the actions under some circumstances.[18]

A number of states have passed statutes changing the common law conception of joint contracts as a matter of substantive law and have thus affected the procedure. Some declare that joint obliga-

same against the whole, or any one or more of such persons making such obligations, assumptions, or agreements; any law or usage heretofore to the contrary notwithstanding." P. L. 1797, c. 475, §2. This was in force, with various slight changes in the wording, until 1868 when it was left out of the Code of Civil Procedure adopted in that year. This omission was pointed out in Merwin v. Ballard, 66 N. C. 168 (1871), and the legislature of 1871-72 then passed the statute as it is to-day. P. L. 1871-72, c. 24, §1.

There are promissory notes used in North Carolina which contain, among other things, provisions that "each of the makers, endorsers, sureties and guarantors hereof hereby agrees that in the event any suit . . . may be instituted or prosecuted in any Court to enforce the payment of this obligation . . . such suit may be . . . prosecuted against such of said makers . . . as the holder hereof may elect to sue or proceed against, and *the one or ones so sued or proceeded against hereby expressly waive the right to require that any other maker . . . shall be made a party to any such suit.*" (Author's italics). The first provision merely says what is provided by §459 of the N. C. CODE, *supra*. But the latter provision, in italics, seems to interfere with the Court and attempt to restrict its power to add parties. It would seem that this provision is of no effect because if the one sued does violate his agreement and ask to have another party joined and the plaintiff objects, the Court can nevertheless in the exercise of its discretion order the other parties to be joined and disregard the plaintiff's objection. See N. C. CODE ANN. (Michie, 1931) §460. And in jurisdictions like Arizona, the District of Columbia, Minnesota, and Rhode Island, where the Court is specifically given power to order additional parties who are liable to be brought in, this provision would seem to be of no value.

VA. CODE ANN. (Michie, 1930) §§6263, 6265; Colley v. Summers Parrott Hardware Co., 119 Va. 439, 89 S. E. 906 (1916) (prom. note); Reed & Rice Co. v. Wood, 138 Va. 187, 120 S. E. 874 (1924) (contract); see also *supra* note 9.

[18] ARIZ. CODE (Struckmeyer, 1928) §3836: " . . . the Court may, however, require the plaintiff to bring in as defendants all parties jointly liable on the obligation in the action, and any subsequent judgment shall be for the amount unsatisfied." U. S. Fidelity & Guaranty Co. v. Alfalfa Seed & Lumber Co., 38 Ariz. 48, 297 Pac. 862 (1931) (contractor's bond).

D. C. CODE (1929) tit. 24, c. 10, §261 makes joint obligations joint and several; by *id.* tit. 24, c. 9, §251, plaintiff may sue one of several joint obligors, "but if separate actions be brought unnecessarily against the several parties to such contract, the said actions may on motion be consolidated, and the plaintiff shall be allowed the costs of one action only." Burdette v. Bartlett, 95 U. S. 637, 24 L. ed. 534 (1877); White v. Connecticut General Life Ins. Co., 34 D. C. App. 460 (1910) (prom. note).

Under MINN. STAT. (Mason, 1927) §9411, plaintiff may sue one or more of joint obligors, including parties to negotiable paper, . . . "provided, that the Court, upon its own motion or on application of any interested party, may require the plaintiff to bring in as defendants all the parties jointly liable on the obligation in suit." Sundberg v. Goar, 92 Minn. 143, 99 N. W. 638 at 639 (1904) (bond); Hoatson v. McDonald, 97 Minn. 201, 106 N. W. 311 (1906); Frykland v. Great Northern Ry. Co., 101 Minn. 37, 111 N. W. 727 (1907); Morgan v. Brach, 104 Minn. 247, 116 N. W. 490 (1908) (contract); Singer v. Singer, 173 Minn. 57, 214 N. W. 778, 216 N. W. 789 (1927).

tions are to be construed as though they were joint and several.[19] Others have provided that "where all the parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several,"[20] although

[19] ARK. DIG. STAT. (Crawford & Moses, 1921) §6229; Johnson v. Byrd, Fed. Cas. No. 7,376 (1841) (prom. note); Hamilton v. Buxton, 6 Ark. 24 (1845) (contract); Walker & Faulkner v. Walker, 7 Ark. 541 (1846) (bill of exchange); Burgen v. Dwinal, 11 Ark. 314 (1851) (contract); Hicks v. Branton, 21 Ark. 186 (1860) (contract); Bradford & Co. v. Toney, 30 Ark. 763 (1875) (prom. note); Sawin v. Kenny, 93 U. S. 289, 23 L. ed. 926 (1876) (contract); Meledon v. Leflore, 62 Ark. 387, 35 S. W. 1102 (1896) (prom. note); LaMew v. Wilson-Ward Co., 106 Ark. 340, 153 S. W. 261 (1913) (prom. note); Heard v. Farmers' Bank of Hardy, 295 S. W. 38 (Ark. 1927) (prom. note).

COLO. ANN. STAT. (Mills, 1930) §4155; Mattison v. Childs, 5 Colo. 78 (1879) (prom. note); Hughes v. Fisher, 10 Colo. 383, 15 Pac. 702 (1887); Hamill v. Ward, 14 Colo. 277, 23 Pac. 330 (1890) (prom. note); Warren v. Hall, 20 Colo. 508, 38 Pac. 767 (1894); Smith v. Woodward, 51 Colo. 311, 117 Pac. 140 (1911). However, this rule seems to be restricted in the case of a partnership obligation in that a judgment on it must be rendered against the co-partnership jointly and the partner summoned or appearing, whether the summons is served on all or one or more. Jones v. Langhorne, 19 Colo. 206, 34 Pac. 997 (1893); Blythe v. Cordingly, 20 Colo. App. 500, 80 Pac. 495 (1905).

ILL. STAT. ANN. (Callaghan, 1924) c. 76, par. 3; *id.* c. 98, par. 88; *id.* c. 110, par. 39; Gage v. Mechanics' National Bank of Chicago, 79 Ill. 62 (1875) (joint guarantors of promissory note held liable jointly and severally); Kaestner v. First. Nat. Bank, 170 Ill. 322, 48 N. E. 998 (1897) (joint guarantors of prom. note); Northeastern Coal Co. v. Tyrrell, 133 Ill. App. 472 at 477 (1907) (dictum construing c. 76, par. 3 as applying to negotiable instruments before the N. I. L.); Harrison v. Thackaberry, 248 Ill. 512, 94 N. E. 172 (1911) (prom. note, case cited Kaestner v. Bank as construing c. 76, par. 3 and did not decide point by c. 98, par. 88); Hochschild v. Goddard Tool Co., 233 Ill. App. 56 at 62 (1924) (says c. 98, par. 88 did not change the prior law in Illinois that the obligation of a firm could not be set off against an individual claim of one of the partners); Wisner v. Catherwood, 225 Ill. App. 471 (1922) (says c. 110, par. 39 allowing discontinuance as to a joint defendant does not change or modify the rule that an intermediate number of joint obligors, more than one or less than all, cannot be sued upon the joint obligation).

Delaware has a statute which makes an obligation, or written contract, of several persons joint and several, unless otherwise expressed, DEL. REV. CODE (1915) §2628; but the court refused to apply this statute in an action against one of the joint makers of a negotiable promissory note and gave judgment against the plaintiff, Gale v. Myers, 4 Houst. 546 (Del. 1873); but even if the court had held that the statute applied and was intended to include promissory notes, the question arises whether or not the words "we promise to pay" expresses a specific intention to make it joint.

[20] CAL. CIV. CODE (Deering, 1931) §1659.

MONT. REV. CODE (Choate, 1921) §7550; Wibaux v. Grinnell Live-Stock Co., 9 Mont. 154, 22 Pac. 492 (1889).

N. D. COMP. LAWS ANN. (1913) §5919.

OKLA. COMP. STAT. ANN. (Bunn, 1921) §5062; Outcault v. Collier, 8 Okla. 473, 58 Pac. 642 (1899) (prom. note) (says that obligations appearing to be joint will be presumed to be joint and several until such presumption is in some manner overcome, thus seeming to add a further judicial presumption to that raised by the statute); Schowalter v. Beard, 10 Okla. 454, 63 Pac. 687

three of them have restricted this statute by providing that ordinarily an obligation imposed upon several persons is presumed to be joint and not several unless it comes within the class just mentioned.[21]

Another group of states has both procedural and substantive law statutes which not only declare that a joint contract is to be deemed joint and several but also expressly provide that a plaintiff may sue any one or more of joint contractors.[22]

(1900); McMarter v. City Nat. Bank of Lauton, 23 Okla. 550, 101 Pac. 1103, 138 Am. St. 831-n. (1909) (prom. note, construes other statutes in connection with §5062); Continental Gin Co. v. Huff, 25 Okla. 798, 108 Pac. 369 (1910) (prom. note); Rutherford v. Holbert, 42 Okla. 735, 142 Pac. 1099 (1914) (contract); Bilby v. Gibson, 133 Okla. 196, 271 Pac. 1026 (1928) (contract).

S. D. COMP. LAWS (1929) §889.

[21] CAL. CIV. CODE (Deering, 1931) §1431; Harrison v. McCormick, 69 Cal. 616, 11 Pac. 456 (1886) (contract); Farmers' Exch. Bank v. Morse, 129 Cal. 239, 61 Pac. 1088 (1900) (held that in the case of a note joint in form, made under an agreement in terms joint, no intention to make the note joint and several appearing, the presumption of §1659, *supra* note 20, will not be indulged, but the note will be treated as joint and hence all parties thereto must be made defendants in an action thereon); Bartlett Estate Co. v. Fraser, 11 Cal. App. 373, 105 Pac. 130 (1909) (held that a note reading "we promise to pay" was a joint note and had to be enforced according to its express terms). However, in Leonard v. Leonard, 138 Cal. xix, 70 Pac. 1071 (1902) it was held that where a note was given by two persons to obtain money for the benefit of one of them, the obligation was joint as well as several, §§1659 and 1431 being cited. Also, in Gummer v. Mairs, 140 Cal. 535, 74 Pac. 26 (1903), the court held that a writing signed by two persons who had purchased certain land, taking title in themselves, obligating them to pay an additional sum therefor on specified conditions, was their joint and several promise, bringing the case within §1659. Woods v. Berry, 111 Cal. App. 675, 296 Pac. 332 (1931) says that in an action on a joint obligation, all persons jointly liable must be united as defendants. See also McKee v. Cunningham, 2 Cal. App. 684, 84 Pac. 260 (1906), and Bell v. Adams, 150 Cal. 772, 90 Pac. 118 (1907) (contract).

N. D. COMP. LAWS ANN. (1913) §5767; Grovenor v. Signor, 10 N. D. 503, 88 N. W. 278 (1901) (prom. note with "we promise to pay" held joint); Clements v. Miller, 13 N. D. 176, 100 N. W. 239 (1904) (court held that in the absence of language in a contract showing a contrary intention, the obligations of parties to a contract are presumed to be joint and not several); see also, *supra* note 20.

S. D. COMP. LAWS (1929) §725; Central Banking and Trust Co. v. Posey, 22 S. D. 223, 116 N. W. 1126 (1908) (it was assumed in the case that a promissory note signed by several people was joint and not joint and several). See also *supra* note 20.

[22] ALA. CODE (Michie, 1928) §5719; Duramus v. Harrison & Whitman, 26 Ala. 326 (1855) (prom. note); Willis v. Neal, 39 Ala. 464 (1864) (prom. note); Lewis v. Grace, 44 Ala. 307 (1870) (prom. note); McKee v. Griffin, 60 Ala. 427 (1877) (official bond); Steed v. McIntyre, 68 Ala. 407 (1880) (contract); Steed v. Barnhill, 71 Ala. 157 (1881) (prom. note); Carothers v. Callahan, 207 Ala. 611, 93 So. 569 (1922) (prom. note).

District of Columbia, see *supra* note 18.

KAN. REV. ST. ANN. (1923) §§16-101, 16-104; Board Comm'rs. Jefferson Co. v. Swain, 5 Kan. 225 (1870) (contract); Rose v. Williams, 5 Kan. 292 at 296 (1870) (prom. note); Prints v. Jacobin, 12 Kan. 50 at 55 (1873) (prom. note); Whitlanhall v. Korber, 12 Kan. 618 (1874) (prom. note);

The confusion which exists on this point because of the number of variations among the several states concerning this subject can readily be seen. In view of the purpose of the National Conference of Commissioners on Uniform State Laws to obtain uniform laws throughout the United States,[23] it seems that the problem of the joinder of joint obligors, including not only those who make joint negotiable instruments but also those who make other joint contracts, should be dealt with by it more fully than has been done in the present Uniform Joint Obligations Act and Uniform Negotiable Instruments Act.

Section 2 of the Uniform Joint Obligations Act provides that "a judgment against one or more of several obligors, or against one or more of joint, or of joint and several obligors shall not discharge a co-obligor who was not a party to the proceeding wherein the judgment was rendered."[24] It appears that this Act has not gone far enough in dealing with the aforementioned confusion and in resolving it into a uniform rule. This could be attained by changing the Act so as to read:

"All contracts which, by the common law, are joint only, shall be construed to be joint and several."[25]

Furthermore, the pertinent section of the Negotiable Instruments Law provides only that "joint payees or joint indorsees who indorse are deemed to indorse jointly and severally."[26] Illinois and

Howard v. Yost, 6 Kan. App. 374, 50 Pac. 1098 (1897) (release of one joint maker does not release any of the others); Bank of Topeka v. Eaton, 95 Fed. 355 (C. C. D. Mass. 1899) (contract).

Mo. REV. STAT. (1929) §§2953, 2956; McElroy v. Ford, 81 Mo. App. 500 (1899); State v. Flora, 109 Mo. 293, 19 S. W. 95 (1892) (prom. note); Bagnell Timber Co. v. Mo., K. & I. Ry. Co., 242 Mo. 11, 145 S. W. 469 (1912) (contract); McArthur v. Fruit Supply Co., 191 S. W. 1126 (Mo. 1917) (contract); Welch-Sandler Cement Co. v. Mullins, 31 S. W. (2d) 86 (Mo. 1930).

N. M. STAT. ANN. (Courtright, 1929) §§105-110, 105-112.

TENN. ANN. CODE (Williams, Shannon, Harsh, 1932) §§8611, 8613; Sully v. Campbell, 99 Tenn. 434, 42 S. W. 15 (1897) (prom. note).

W. VA. CODE (1930) c. 46, art. 5, §9; *id.* c. 55, art. 8, §7. See also *supra* note 9.

[23] Its constitution, art. I, §2, says that "its object shall be to promote uniformity in state laws on all subjects where uniformity is deemed desirable and practicable." HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (1932) 542; *id.* 540.

[24] 9 U. L. A. 215.

[25] This is the form of the pertinent statute in Kansas and Missouri. KAN. REV. STAT. ANN. (1923) §16-101; MO. REV. STAT. (1919) §2155.

[26] 5 U. L. A. 472; BRANNAN, THE NEGOTIABLE INSTRUMENTS LAW ANNOTATED (5th ed. 1932) 33. For minor and erroneous variations of the language of this section, see *ibid.*

West Virginia have settled the questions concerning the joinder or non-joinder of parties to negotiable paper by amending the last part of this section so as to make all joint parties jointly and severally liable.[27] The statute as enacted by these two states has taken away the arbitrary distinction made between joint payees and joint indorsees on the one hand and joint makers, drawers, and acceptors on the other[28] and tends to make joint notes more readily negotiable by making them more easily collectible. It has also achieved a simplification of procedure.

It is submitted that the last sentence of Section 68 of the Uniform Negotiable Instruments Act be amended so as to read:

"All parties jointly liable on a negotiable instrument are deemed to be jointly and severally liable."[29]

ROBERT H. SCHNELL.

Contracts—Sufficiency of Consideration for Industrial Pension.

The president of a corporation wrote an old employee on the day of his retirement, commending him for his fine service and stating that he would receive $100 per month as long as he maintained his "present attitude of loyalty to the company and its officers" and was "not engaged in any competitive occupation." Payments were made from 1927 until 1931, when plaintiff was notified that the company no longer intended to continue them. Plaintiff did not enter any occupation. Suit is based on the letter as a contract. The lower court sustained, and the upper overruled a demurrer.[1]

Four possible legal effects are inherent in such a letter: (1) It may be a conditional gratuity which is not binding.[2] (2) It may be

[27] ILL. STAT. ANN. (Callaghan, 1924) c. 98, par. 88; W. VA. CODE (1930) c. 46, art. 5, §9.

[28] See (1900) 14 HARV. L. REV. 241, 252, and (1901) 10 YALE L. J. 84, 94, as to the Ames-Brewster Controversy concerning the N. I. L. Specific amendments to the N. I. L. have been suggested by Ames in (1903) 16 HARV. L. REV. 255, by Britton in (1928) 22 ILL. L. REV. 815, and by Kent in (1928) 22 ILL. L. REV. 833, but apparently they have overlooked the desirability and necessity of amending §68.

[29] As in Illinois, *supra* note 27.

[1] Langer v. Superior Steel Corp., 161 Atl. 571 (Pa. Super. Ct. 1932).

[2] Kirsey v. Kirsey, 8 Ala. 131 (1845) (promise to support widowed sister-in-law and her children). *Contra:* Prince v. Alabama State Fair, 106 Ala. 340, 17 So. 449, 28 L. R. A. 716 (1895) (promise to send a picture for exhibition); Richards Ex'rs. v. Richards, 46 Pa. 78 (1863) (promise to furnish money to a friend to complete payments on land). I WILLISTON, CONTRACTS (1st ed. 1920) 330, §148.

an offer to pay plaintiff not to compete and not to disclose trade secrets. Such an offer would be binding if accepted by plaintiff, provided it did not unreasonably restrain trade, nor tend to make plaintiff a public charge.[3] (3) It may be an offer in consideration of past performances. This would not be binding on defendant, for the consideration is past.[4] (4) Such a letter, if the condition is fulfilled, provided this works a detriment to the promisee and a benefit to the promisor, and is induced by and is in reliance on, the promise, may estop the defendant to deny that it is binding on him.[5]

This contract is thus enforceable under either (2) or (4).

Thus the real difficulty is to determine whether the letter proposes (1) a conditional gratuity,[6] or proposes, (2) compensation for forbearing to compete and to disclose trade secrets.[7] This depends upon proof of a definite request and promise to forbear, followed by a forbearance which is the thing bargained for, the *quid pro quo,* and not an incidental benefit;[8] or in the language of the *Restatement of the Law of Contracts,*[9] section 90: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite or substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

This seems to be the first litigation of this sort of an industrial

[3] McCall Co. v. Wright, 198 N. Y. 143, 91 N. E. 516 (1910), 31 L. R. A. (N. S.) 249 (1911) (ancillary to employment, contract not to disclose selling plans); Magnolia Metal Co. v. Price, 65 App. Div. 276, 72 N. Y. Supp. 792 (1901) (restraining divulgence of ingredients of metal, customers lists, and sales contracts).

[4] I WILLISTON, *op. cit. supra* note 1, 323, §144, *Contra:* Stuht v. Sweesy, 48 Neb. 767, 67 N. W. 748 (1896) (later promise to pay for constructing a community wall, enforced on doctrine of relation, *i. e.,* that consideration continued until the promise to pay).

[5] Mass. Bonding & Insurance Co. v. Vance, 180 Pac. 693, 15 A. L. R. 981 (Okla. 1918) (estoppel to deny existence of insurance after accepting premiums); Rickets v. Scothorn, 57 Neb. 51, 77 N. W. 365, 42 L. R. A. 794, 73 Am. St. Rep. 491 (1898) (abandoned employment in reliance on gratuitous promissory note); *cf.* Shaw v. Philbrick, 129 Me. 259, 151 Atl. 423 (1930), 74 A. L. R. 290 (1931) (offer of money to prevent redemption of mortgage).

[6] Which seems to be indicated by the language: "The directors have decided that you will receive a pension . . . commendation for your long and faithful service . . . evidences of esteem" . . . which the company will "bestow."

[7] As seems to be indicated by the language: "As long as you live and preserve your present attitude of loyalty . . . and are not employed in any competitive occupation."

[8] Shaw v. Philbrick, *supra* note 5; Hamer v. Sidway, 124 N. Y. 538, 27 N. E. 256, 12 L. R. A. 463, 21 Am. St. Rep. 693 (1891) (promise to pay if boy would abstain from attractive vices); I WILLISTON, *loc. cit. supra* note 1.

[9] Am. L. Inst. 1928; cited in principal case.

pension.[10] The problem is similar to that presented by the employees' bonus cases, for both concern employment policies.[11] The latter, however, are usually offered as "an inducement to continuous service and loyalty."[12] No criticism can be made of the result reached in the instant case, but the cases relied on are those involving gifts to friends,[13] relatives,[14] and charitable institutions.[15] It would have been more accurate had the court recognized that it was dealing with an employment problem arising from a clash between the corporation's labor policy and the depression, so as to have founded its decision on the cases dealing with the relation between corporations and their employees, such as the workmen's bonus and benefit cases.

McB. FLEMING-JONES.

Evidence—Admissibility of Secondary Evidence of Collateral Writing.

In a recent North Carolina case, the defendant was tried for the murder of an employee of *A* corporation. There was evidence that the defendant had made threats against the employees of *B* corporation, and secondary evidence was offered to prove the contents of a writing merging the corporations. *Held:* Secondary evidence of the writing is admissible, since the matter is collateral.[1]

A slight majority of the North Carolina cases admit secondary evidence of the contents of a writing where they are collateral to

[10] *Cf.* cases collected Am. Dig. Sys., Master and Servant, Key nos. 72, 78; Note 28 A. L. R. 338.

[11] Promises to pay sums in addition to the stipulated or contract wage, when offered to induce employees to refrain from leaving employment, are binding on the employer. Fuller Co. v. Brown, 15 F. (2d) 672 (C. C. A. 4th, 1926) (shipyard laborers); Roberts v. Mays Mills, 184 N. C. 406, 114 S. E. 530, 28 A. L. R. 338 (1922) (cotton mill operatives induced to stay, wrongfully discharged). *Contra:* Russell v. Johns-Manville Co., 53 Cal. App. 572, 200 Pac. 668 (1921) (laborer induced to stay and incur financial liability, discharged); Cowles v. Morris & Co., 330 Ill. 11, 161 N. E. 150 (1928) (workers allowed to lose amount paid as premiums for pensions, etc., bonuses, when employer absorbed by other corporation). A bonus, however, must be determinate or determinable. Donovan v. Bull Mountain Trading Co., 60 Mont. 87, 198 Pac. 436 (1921) (store manager to receive bonus "commensurate with earnings" of company).

[12] Johnson v. Fuller & Johnson Mfg. Co., 183 Wis. 68, 197 N. W. 241 (1924) (promise to factory worker of bonus in lieu of raise in wage).

[13] Richards Ex'rs. v. Richards, *supra* note 2.

[14] Kirsey v. Kirsey, *supra* note 2.

[15] Presbyterian Board of Foreign Missions v. Smith, 209 Pa. 361, 58 Atl. 689 (1904) (promise of contribution, on which missionary society has relied in assuming liabilities, is binding).

[1] State v. Casey, 204 N. C. 411, 168 S. E. 512 (1933).

the issue.[2] A minority use the same reasoning, bolstered with the makeshift that "the rule that parol evidence cannot be allowed as to the contents of a written instrument applies only in actions between the parties to the writing."[3] This, as Wigmore has shown,[4] is a confusion of two exceptions to two separate rules—the exception to the "Best Evidence" rule allowing secondary evidence where the terms of the writing sought to be proven are collateral to the case,[5] and the exception to the "Parol Evidence" rule allowing parol evidence to contradict, vary, or add to the terms of a written instrument when the suit is not between the parties to the instrument.[6]

This confusion has no important practical effect, however, for the theory of the admissibility of secondary evidence of collateral writings seems flexible enough to justify the reception of such evidence without the mistaken application of the exception to the "Parol Evidence" rule.[7]

JAMES O. MOORE.

[2] State v. Capps, 71 N. C. 93 (1874); Mulholland v. York, 82 N. C. 510 (1880); Carrington v. Allen, 87 N. C. 354 (1882) (Defendant offered to prove payment by plaintiff of a note. *Held:* rule of production does not apply, as the instrument is collateral. This reasoning is erroneous. To prove the payment is not to prove the document's contents, and therefore the rule of production does not apply).

2 WIGMORE, EVIDENCE (2d ed. 1923) §1254; Faulcon v. Johnston, 102 N. C. 264, 9 S. E. 394 (1889), 11 Am. St. Rep. 737 (1890); State v. Ferguson, 107 N. C. 841, 12 S. E. 574 (1890); McMillan v. Baxley, 112 N. C. 578, 16 S. E. 845 (1893); State v. Surles, 117 N. C. 721, 23 S. E. 324 (1895); Robinson v. McDowell, 130 N. C. 246, 41 S. E. 287 (1902); Belding v. Archer, 131 N. C. 287, 42 S. E. 800 (1902); State v. Hayes, 138 N. C. 660, 50 S. E. 623 (1905); Andrews v. Grimes, 148 N. C. 437, 62 S. E. 519 (1908); Rabon v. Atlantic Coast Line R. R. Co., 149 N. C. 59, 62 S. E. 743 (1908); State v. Neville, 157 N. C. 591, 72 S. E. 798 (1911); Herring v. Ipock, 187 N. C. 459, 121 S. E. 758 (1924); Edwards v. Nunn, 194 N. C. 492, 140 S. E. 84 (1927). This doctrine, though orthodox, gives rise to a wide variety of unpredictable results.

[3] State v. Credle, 91 N. C. 640 (1884); Carden v. McConnell, 116 N. C. 875, 21 S. E. 923 (1895); Archer v. Hooper, 119 N. C. 581, 26 S. E. 143 (1896); Ledford v. Emerson, 138 N. C. 502, 51 S. E. 42 (1905); Whitehurst v. Padgett, 157 N. C. 424, 73 S. E. 240 (1911); Holloman v. Southern Ry. Co., 172 N. C. 372, 90 S. E. 292 (1916), L. R. A. 1917C, 416, Ann. Cas. 1917E, 1069; Morrison v. Hartley, 178 N. C. 618, 101 S. E. 375 (1919); Miles v. Walker, 179 N. C. 479, 102 S. E. 884 (1920); Hall v. Giessell, 179 N. C. 657, 103 S. E. 392 (1920); Davis v. N. C. Ship-building Co., 180 N. C. 74, 104 S. E. 82 (1920); Mahoney v. Osborne, 189 N. C. 445, 127 S. E. 533 (1925).

[4] 2 WIGMORE, EVIDENCE (2d ed. 1923) §1253.

[5] *Ibid.*

[6] 5 *id.* §2446. This form of statement is criticized as not sound in principle.

[7] State v. Hayes, *supra* note 1.

Evidence—Establishing Identity and Agency of Antiphonal Speaker.

The witness dialed the telephone number of an insurance office. A man answered. Upon the witness stating that he wanted to substitute one car for another in an insurance policy he was asked to wait a minute. A conversation ensued with a woman unknown to the witness. *Held:* Conversation admissible in evidence.[1]

The mere fact that a conversation is conducted through a telephonic system does not render it inadmissible in either civil[2] or criminal[3] cases. The problem, in the main, is to identify the person with whom the conversation was held and thus establish a foundation for relevancy. Evidence authenticating the antiphonal speaker by recognition of his or her voice is generally held to be sufficient proof of identity,[4] despite the possibility of error created by the mechanical transmission. And it is sufficient identity if such recognition dawns upon the witness at any time before the evidence is offered.[5] Such witness is not required to swear to definite and certain recognition. Where he states that he is satisfied in his own mind as to the identity of the voice, but could not swear to it, the evidence is competent. Completeness of identification goes to the weight of the evidence and not to the admissibility.[6]

Evidence other than voice recognition may establish sufficient identity,[7] though it subjects the court to multifarious situations with uncertain limits. Of course, where the witness answers a telephone call and there is no evidence to authenticate the antiphonal speaker, except that he states his name, the evidence is inadmissible as hearsay.[8]

[1] Zurich General Accident and Liability Ins. Co. v. Baum, 165 S. E. 518 (Va. 1932).

[2] Gates v. Mader, 316 Ill. 313, 147 N. E. 241 (1925).

[3] State v. Nixon, 111 Kan. 601, 207 Pac. 854 (1922).

[4] Merritt v. United States, 264 Fed. 870 (C. C. A. 9th, 1920) (reversed on confession of error, in 255 U. S. 579, 41 Sup. Ct. 375, 65 L. ed. 795 (1921)); Griffin Mfg. Co. v. Bray, 193 N. C. 350, 137 S. E. 151 (1927).

[5] People v. Strolla, 191 N. Y. 42, 83 N. E. 573 (1908); People v. McDonald, 177 App. Div. 806, 165 N. Y. Supp. 41, 44 (1917): "When a witness gives his opinion of the identity of a voice heard over the telephone...., it matters not whether the knowledge which enables him to form such opinion was obtained before or after the voice over the wire was heard." People v. Dunbar Contracting Co., 215 N. Y. 416, 109 N. E. 554.

[6] State v. Nixon, *supra* note 3.

[7] Robilio v. United States, 291 Fed. 975 (C. C. A. 6th, 1923) (certiorari denied in 263 U. S. 716, 44 Sup. Ct. 137, 68 L. ed. 522 (1923)).

[8] State *ex rel.* Strohfeld v. Cox, 325 Mo. 901, 30 S. W. (2d) 462 (1930); Griffin Mfg. Co. v. Bray, *supra* note 4; People v. Thompson, 231 Mich. 256, 203 N. W. 863 (1925).

But it has been held that where the caller states his name and in addition agrees to meet the witness at a certain place, and does so, the transaction as a whole establishes sufficient identity.[9] And many courts have held that if the caller expresses an acquaintance with some transaction known to the witness a *prima facie* case of identity may be established.[10] Where a letter has been mailed to or received from the caller who expresses familiarity with the substance of the letter, identification is sufficient.[11] Evidence obtained from the record at the central telephone office, tending to show that the call came from the telephone of the one purported to have called, renders the conversation admissible, even though the evidence is not conclusive.[12] Where the witness, unable to speak to the person for whom he calls, leaves a message for the party to call him and later someone purporting to be that party calls the witness the facts and circumstances render the conversation admissible.[13]

The courts make a meritorious distinction between those cases in which the witness is called and the party calling is not recognized but represents himself to be a certain individual and a case wherein the witness calls a telephone number and receives a reply purporting to be from the party called.[14] In the latter case there is not the chance of premeditated fraud as where the witness is called. And such facts and circumstances are sufficient to make a *prima facie* case of identity.[15] These *prima facie* cases include not only the calling of a private number but also the calling for some particular person in a business office.[16]

The courts are liberal as to the identification necessary where a party calls a place of business maintaining a telephone and is answered by a stranger purporting to have authority to deal with the caller. The conversation is admissible under two presumptions

[9] State v. Daffy, 179 Minn. 439, 229 N. W. 558 (1930).
[10] *E. g.* Chubb v. Sodler, 284 Fed. 910 (C. C. A. 9th, 1922).
[11] See Van Piper v. United States, 13 F. (2d) 961, 968 (C. C. A. 2d, 1926)
[12] Am. & British Mfg. Corp. v. New Idria Mining Co., 293 Fed. 509 (C. C. A. 1st, 1923).
[13] International Harvester Co. v. Caldwell, 198 N. C. 751, 153 S. E. 325 (1930).
[14] See Meyer Milling Co. v. Strohfied, 224 Mo. 508, 20 S. W. (2d) 963 (1929).
[15] Epperson v. Rostatter, 90 Ind. 8, 168 N. E. 126 (1929). *Cf.* State v. Burleson, 198 N. C. 61, 150 S. E. 628 (1929) (where the person answering said she was not the person called but would call the desired party and later another person answered purporting to be the desired party, *held,* sufficient evidence of identity); *In re* Estate of Wood v. Tyler, 256 Ill. App. 401 (1930)
[16] Rice v. Fidelity & Casualty Co., 250 Mich. 398, 230 N. W. 181 (1930)

The first one, based on the accuracy of the telephonic system, is that the person is in the business office called; the other is that such person was authorized to transact the particular business over the telephone. This latter presumption is based on the fact that when the business unit maintains a telephone in its office it impliedly invites the public to deal with it by such means and that during office hours some person with authority to transact the particular business will answer the telephone.[17] The burden is thus on the party called to show that the person replying had no authority.[18] These presumptions are unnecessary when pursuant to the conversation action is taken which only an authorized agent could take.[19] In some particular businesses the presumption may be that the person answering the telephone is not authorized to deal with the subject in litigation.[20] Some judicial authorities do not recognize this presumptive agency rule at all.[21] Thus to prove agency without the aid of this presumption will necessitate identifying (in person) the telephonic speaker.

[17] Potomac Ins. Co. v. Armstrong, 206 Ky. 434, 267 S. W. 188, 189 (1924): "The law is not only a practical, but a progressive, science, and takes cognizance of the modern methods of communication and the means used therefor. When an individual or corporation engaged in a particular line of business installs in its office a telephone, whereby it may be connected through the telephone system with a large number of people, presumably it invites them to do business with it through that means of communication, and presumably it thereby advertises to the business world that it at all times has in its office some person to communicate with others as to its particular line of business, and deal with them through that method of communication. It would in many instances hamper the transaction of its business, and cast suspicion upon the validity of the agreements made from its office over the telephone if it was incumbent upon the other party to establish the identity of the person to whom he talked, and his authority to represent the corporation or individual. On the contrary, the fair presumption is that such individual or corporation has always at its office somebody authorized to speak for it in the transaction of its particular line of business. . . . Out of this modern method of doing business has grown a modification, to the extent indicated, of the general rule that one dealing with one professing to be the agent of another does so at his peril, and must not only establish the agency before holding the principal liable, but must establish the extent of such agency. . . ."

[18] Western Union Teleg. Co. v. Campbell, 212 S. W. 720 (Tex. Civ. App. 1919) (the presumption becomes conclusive in the absence of proof to the contrary).

[19] Commercial Casualty Ins. Co. v. Lawhead, 62 F. (2d) 927 (C. C. A. 4th, 1933) (where the call to an insurance agency requested a change in a policy and the one calling received by mail a policy containing the change promised in the conversation).

[20] Robinson v. Lancaster Foundry Co., 152 Md. 81, 136 Atl. 58, 50 A. L. R. 1196 (1927) (where the general rule was recognized but limited under the facts of the case as there was nothing on which to base the presumption but rather presumption of no authority to pay maturing negotiable paper).

[21] Lacoma & E. Lumber Co. v. A. B. Field & Co., 100 Wash. 79, 170 Pac. 360 (1918).

A complex problem arises where a person in a telephone conversation recognizes the voice of the antiphonal speaker and turns the telephone over to the witness who does not identify the speaker. It has been held that the witness may testify to the subsequent conversation, as it is hardly probable that another succeeded the speaker at the other end of the line.[22] Identification was sufficiently established in a case in which the defendant, conversing with a third party, asked to speak to the witness and later admitted to the third party that he had done so.[23]

A different case arises where a bystander attempts to give testimony tending to show the identity of the speaker at the other end of the line. In the absence of personal knowledge as to the identity such evidence may be hearsay.[24] But "a telephone conversation between the parties, and upon this subject matter in litigation, having been testified to by one of the parties, may also be testified to by a bystander, so far as he heard it."[25]

The decision in the instant case seems to be in line with the general trend of judicial opinion. A presumption of agency is substantiated by the fact that the party first answering the telephone called another to take the particular message. For the court not to consider the practical use of the telephone in the commercial world and to require further identity of the antiphonal speaker than a presumptive showing of his agency would be to restrict business to the rules established before the coming of the telephone.

W. E. ANGLIN.

Evidence—Jury's Deliberations as Privileged.

The defendant, a juror indicted for contempt, was charged with concealing or misstating facts bearing upon ineligibility during her *voir dire* examination. Testimony of other jurors as to what defendant said during the deliberations in the jury room was admitted as evidence that her answers were false and evasive and that she was biased and prejudiced at the time of the examination. *Held:*

[22] Marton v. United States, 60 Fed. (2d) 696 (C. C. A. 7th, 1832).
[23] People v. Albritton, 110 Cal. 188, 294 Pac. 76 (1930).
[24] Pitt Lumber Co. v. Askew, 185 N. C. 87, 116 S. E. 93 (1923) (where a bystander was allowed to testify as to what he actually heard but could not give substantive testimony as to the identity of the one at the other end of the line).
[25] Kent v. Cobb, 133 Pac. 424 (Colo. 1913). *Cf.* Sanders v. Griffin, 191 N. C. 447, 132 S. E. 157 (1926) (where the bystander gave testimony as to what he heard as original evidence).

the testimony was properly admitted as corroborative evidence, supplementing and confirming the case that would exist without it.[1]

The admissibility of the testimony of a juror relating to happenings in the jury room is generally raised on motion to set aside the verdict and is generally disallowed.[2] The writer has found only one case other than the instant one where such evidence was proposed to show the juror guilty of contempt for false answers on his *voir dire* examination. In the case of *In re Nunns*[3] the contemnor was a juror in a trial upon an indictment for keeping a disorderly house. On the *voir dire* examination he said that he did not know the defendants and knew nothing of their place. Evidence of jurors was admitted to prove that he stated in the jury room that he did know the defendants and that their place was correct and proper.

The commentators who have considered this problem are apparently opposed to the result reached by these two cases. They seem to conclude, without citing any cases directly to that effect, that statements made to a fellow-juror are privileged and cannot be disclosed against the juror's consent.[4]

[1] Clark v. United States, 53 Sup. Ct. 465, 77 L. ed. (Advance Opinions) 515 (1933).

[2] McDonald and U. S. Fidelity & Guaranty Co. v. Pless, 238 U. S. 264, 35 Sup. Ct. 783, 59 L. ed. 1300 (1915); Hicks v. U. S. Shipping Board Emergency Fleet Corp., 14 F. (2d) 316 (S. D. N. Y. 1926); Central of Georgia Ry. Co. v. Holmes, 223 Ala. 188, 134 So. 875 (1931); Valentine v. Pollak, 95 Conn. 556, 111 Atl. 869 (1920); Ballance v. Dunnington, 246 Mich. 36, 224 N. W. 434 (1929); Miller v. Gerard, 200 App. Div. 870, 192 N. Y. Supp. 884 (1922); Campbell v. High Point, T. & D. R. Co., 201 N. C. 102, 159 S. E. 327 (1931); Teeters v. Frost, 145 Okla. 273, 292 Pac. 356 (1930); Eyak River Packing Co. v. Huglen, 143 Wash. 229, 255 Pac. 123 (1927); Vaise v. Delaval, 1 T. R. 11, K. B. (1785); 5 WIGMORE, EVIDENCE (2d ed. 1923) §2354, n. 1 (rule prevails except in possibly six jurisdictions); note (1928) 6 N. C. L. REV. 315. *Contra:* Composh v. Powers, 75 Mont. 493, 244 Pac. 298 (1926) (statute permits where the verdict was reached by resort to determination by chance); Jones v. Wichita Valley Ry. Co., 195 S. W. 890 (Tex. Civ. App. 1917) (statute allows testimony but not affidavits); Owen v. Warburton, 1 Bos. & P. N. R. 326 (1807); *cf.* Hyman v. Eames, 41 Fed. 676 (C. C. D. Colo. 1890).

[3] 188 App. Div. 424, 176 N. Y. Supp. 858 (1919); *cf. In re* Cochran, 237 N. Y. 336, 143 N. E. 212, 32 A. L. R. 433 (1924) (where juror stated additional facts, proposed acquittal if bond were given for defendant's good behavior, and, though he believed the defendant guilty, refused to convict, the court refused to punish him for contempt on the ground that the conduct was privileged).

[4] 5 WIGMORE, EVIDENCE (2d ed. 1923) §2346 ("Under the Parol Evidence rule, the juror's testimony is excluded only when it is offered to prove facts nullifying the verdict, on a motion for a new trial. But under the Privileged Communications rule, the juror's testimony would be excluded for any purpose whatever, . . . for example, where upon another trial he was a witness and his bias was offered to be shown by his expressions during retirement with the former jury.") HUGHES, EVIDENCE (1907) 302; 5 JONES, EVIDENCE (2d ed. 1926) §2212; UNDERHILL, CRIMINAL EVIDENCE (3d ed. 1923) §311.

While public policy should protect the freedom of debate and expression of opinion on the merits of the case in order that the evidence may be thoroughly considered,[5] such policy does not require the protection of a juror who gives additional evidence as in the case of *In re Nunns*.[6] Although Mr. Wigmore contends that no such limitation should be placed upon privileged communications,[7] it would seem to be the better rule that statements of personal knowledge, which should be given by the juror as a witness in open court under oath and upon cross-examination, should not be privileged. Therefore, it is believed that it would be more desirable to adopt a middle view, namely, that only certain communications should be privileged.

In the principal case the Circuit Court of Appeals,[8] though admitting that there was authority *contra,* was content to say that such communications should not be privileged. The Supreme Court did not deny that such a privilege existed or that the communications were those that should be protected, but held that since the defendant had fraudulently entered into the relation giving rise to the privilege she was not entitled to the protection of that privilege. It was thought that the policy of protecting jurors from disclosure of the course of their deliberations was outweighed by the necessity of preserving the jury from corrupting influences, and this view is believed to be sound.

JULE MCMICHAEL.

Negligence—Duty of Guest in Automobile.

Plaintiff was the guest of the defendant in the rear seat of the latter's automobile. Although the plaintiff was aware that the night was foggy and the road narrow and winding, she did not protest the defendant's maintenance of a dangerous rate of speed. Defendant lost control of the car, which went over an embankment, and the plaintiff was injured. *Held:* No recovery; an automobile guest, failing to protest the driver's action in encountering possible danger, reasonably apparent to both, is guilty of contributory negligence.[1]

[5] In the case of *In re* Cochran, *supra* note 3, 143 N. E. at 213, the court said: "It is not alone as to the final result—the verdict—that they are protected. Public policy requires that they be given the uttermost freedom of debate as it requires in the case of the Legislature."

[6] *Supra* note 3.

[7] WIGMORE, EVIDENCE §2354 (b); *cf. In re* Cochran, *supra* note 3.

[8] 61 F. (2d) 695 (C. C. A. 8th, 1932).

[1] Adams v. Hutchinson, 167 S. E. 135 (W. Va. 1932).

It is now well settled that such contributory negligence on the part of a gratuitous passenger or guest is not the negligence of the driver imputed to the guest, where the latter has no control over the car or driver,[2] but the independent negligence of the guest arising from his duty to take some precaution for his own safety.[3] The weight of authority is to the effect that both driver and guest must exercise reasonable care under the circumstances,[4] although the guest is usually held to a lesser degree of care than the driver.[5] Authority is somewhat at variance, however, as to what conduct should be required of the guest in order to fulfill his duty. New York imposes on the guest a duty to keep as strict a lookout for danger as the driver.[6] Wisconsin requires the guest to keep a proper lookout, holding, however, that what constitutes such a lookout depends upon the circumstances of the case, and that the guest is not held to the same degree of care in this respect as the driver.[7] Connecticut holds that a guest on the rear seat has no duty to keep a lookout.[8] Whatever may be the duty of the guest to maintain a watch so as to discover danger, he is generally required to warn the driver of obvious danger,[9] unless the driver apparently is cognizant of the peril and

[2] Albritton v. Hill, 190 N. C. 429, 130 S. E. 5 (1925); Nash v. Seaboard Air Line R. Co., 202 N. C. 30, 161 S. E. 857 (1932); Charnock v. Reusing Lighting and Refrigerating Co., 202 N. C. 105, 161 S. E. 707 (1932); 2 R. C. L. 1207.

[3] Blanchard v. Maine Cent. R. Co., 116 Me. 179, 100 Atl. 666 (1917); Schroeder v. Public Service Ry. Co., 118 Atl. 337 (N. J. 1921); Howe v. Corey, 172 Wis. 537, 179 N. W. 791 (1920); HUDDY, AUTOMOBILES (8th ed. 1927) 974.

[4] Quierolo v. Pac. Gas & Elec. Co., 114 Cal. 610, 300 Pac. 487 (1931); Round v. Pike, 102 Vt. 324, 148 Atl. 283 (1930); Grifenhan v. Chicago Rys. Co., 299 Ill. 590, 132 N. E. 790 (1921).

[5] Hoen v. Haines, 85 N. H. 36, 154 Atl. 129 (1931); Clarke v. Connecticut Co., 83 Conn. 219, 76 Atl. 523 (1910).

[6] Read v. N. Y. C. & H. R. R. Co., 219 N. Y. 660, 114 N. E. 1081 (1915) (guest held contributorily negligent for failure to look out at grade crossing); Noakes v. N. Y. C. & H. R. R. Co., 195 N. Y. 543, 88 N. E. 1126 (1909) (failure to look out at grade crossing).

[7] Krause v. Hall, 195 Wis. 565, 217 N. W. 290 (1928) (guest riding with collar over face to keep out night air held not contributorily negligent in failing to see obstruction in road); Glick v. Baer, 186 Wis. 268, 201 N. W. 752 (1925) (guest found contributorily negligent in not seeing obstruction in road).

[8] Weidlich v. N. Y., N. H. & H. R. Co., 93 Conn. 438, 106 Atl. 323 (1919) (guest not contributorily negligent for failure to look out at grade crossing).

[9] Tenn. Cent. R. Co. v. Vanhoy, 143 Tenn. 312, 226 S. W. 225 (1920) (guest held contributorily negligent in not warning driver of approach of train); Hill v. Philadelphia Rapid Transit Co., 271 Pa. 232, 114 Atl. 634 (1921) (guest contributorily negligent in failing to warn driver of obvious danger from street car).

striving to avoid it,[10] and to protest the driver's negligent or unlawful acts.[11] However, there are two views even as regards these duties: (1) Some courts hold that they are absolute duties on the guest's part and that failure to warn or protest is contributory negligence as a matter of law.[12] The principal case represents an application of this strict rule. (2) The other view prevailing is that whether a guest by failing to warn or protest is wanting in due care is a question for the jury.[13] This view shows a realization of the fact that in many instances the highest degree of care may be silence and inaction.[14]

There also may be a duty on the guest to request the driver to stop the car and allow him to get out, if his warning or protest goes unheeded, but this generally depends upon the circumstances.[15] The guest assumes the risk arising from defects in the vehicle known to him.[16] If he knows that the driver is incompetent, due to inexperience[17] or intoxication, [18] he may be contributorily negligent in continuing to ride with him.

Although the result in the present case is probably correct, the court, in attempting to establish a fixed rule of law to which every guest must conform, is taking a decided step away from the present trend toward the application of the general rules of negligence in such cases. The impracticability of inflexible rules of conduct in these cases, where there is such variability of pertinent facts, is ob-

[10] Schlossstein v. Bernstein, 293 Pa. 245, 142 Atl. 325 (1928); Smith v. A. & Y. R. Co., 200 N. C. 177, 156 S. E. 508 (1931).

[11] Renner v. Tone, 273 Pa. 10, 116 Atl. 512 (1922) (driving on wrong side of road); Joyce v. Brockett, 237 N. Y. 561, 143 N. E. 743 (1923) (driver maintaining excessive speed); Martin v. Pennsylvania R. Co., 265 Pa. 282, 108 Atl. 631 (1915) (driver's failure to observe stop, look and listen law).

[12] Herold v. Clendenin, 161 S. E. 21 (W. Va. 1931); Clise v. Prunty, 108 W. Va. 637, 152 S. E. 201 (1930); Hardie v. Barrett, 257 Pa. 42, 101 Atl. 75, L. R. A. 1917F, 444 (1917); Renner v. Tone, *supra* note 11 at 514.

[13] Curran v. Anthony, 77 Cal. 462, 247 Pac. 236 (1926); Codner v. Stowe, 201 Iowa 800, 208 N. W. 330 (1926); Lawrason v. Richards, 129 So. 250 (La. 1930); Quierolo v. Pac. Gas & Elec. Co., *supra* note 4 at 489; Nelson v. Nygren, 181 N. E. 52 (N. Y. 1932) (guest went to sleep with knowledge and consent of driver), noted in (1933) 31 MICH. L. REV. 717.

[14] See Herman v. R. I. Co., 36 R. I. 447, 90 Atl. 813, 814 (1920).

[15] Clark v. Traver, 237 N. Y. 544, 143 N. E. 736 (1923); King v. Pope, 202 N. C. 554, 163 S. E. 447 (1932); Chambers v. Hawkins, 233 Ky. 211, 25 S. W. (2d) 363 (1930).

[16] O'Shea v. Lavoy, 175 Wis. 456, 185 N. W. 525 (1921); Clise v. Prunty, *supra* note 12 at 202.

[17] Cleary v. Eckart, 191 Wis. 114, 210 N. W. 267, 51 A. L. R. 576 (1926).

[18] Lynn v. Goodwin, 170 Cal. 112, 148 Pac. 927, L. R. A. 1915E, 588; Wayson v. Ranier Taxi Co., 136 Wash. 274, 239 Pac. 559 (1925); Schwartz v. Johnson, 152 Tenn. 586, 280 S. W. 32, 47 A. L. R. 323 (1926).

vious. The trend toward consideration of all of the circumstances seems decidedly the more rational view.

J. A. KLEEMEIER, JR.

Parent and Child—Suit by Child Against Parent Carrying Liability Insurance.

An unemancipated minor sues her father to recover for injuries alleged to have been sustained while riding in a school bus owned by the father and operated by him under a contract with the school board. The action is one of *assumpsit* and is based upon the theory that the father breached his contract with the board to use due care in transporting pupils. Both the father and the board carry liability insurance. *Held:* A directed verdict for defendant reversed; plaintiff may maintain the action. Since the defendant is protected by insurance in his vocational capacity, the action is not an unfriendly one and family harmony will not be disrupted.[1]

Authorities are not in agreement as to the common law rule regarding suits by minors against their parents for torts.[2] This uncertainty arises from the fact that no case involving the point has ever been litigated in England.[3] The first decision in this country appeared in 1891.[4] The problem has been before the courts several times since that date.[5] With striking uniformity courts of the United

[1] Lusk v. Lusk, 166 S. E. 538 (W. Va. 1932). Noted in (1933) DUKE BAR ASS. J. 51.

[2] Those who contend that such suits were not allowable rely on the total absence of cases involving the point, as showing the general understanding of minors' rights in this respect. Furthermore, they say, the very idea of such a recovery was repugnant to the sanctity and harmony of the English family. Lo Galbo v. Lo Galbo, 138 Misc. Rep. 485, 246 N. Y. Supp. 565 (1931); Damiano v. Damiano, 143 Atl. 3 (N. J. 1928); Belleson v. Skilbeck, 185 Minn. 537, 242 N. W. 1 (1932). Others, quoting from old English text writers to the effect that a minor could sue his father for a malicious injury, assert that this demonstrates the state of the English mind with regard to infants' rights. They also take the view that it is wholly unreasonable to assume from a lack of decisions that the remedy would have been denied had a proper case been presented. Dunlap v. Dunlap, 84 N. H. 352, 150 Atl. 905 (1930), 71 A. L. R. 1055 (1931), citing 2 ADDISON, TORTS (4th ed.) 727; CLERK AND LINDSALL, TORTS (8th ed.) 199; POLLOCK, TORTS (12th ed.) 128. Note (1930) 79 U. OF PA. L. REV. 80.

[3] 1 SCHOULER, THE LAW OF DOMESTIC RELATIONS (6th ed. 1921) 718, n. 49; Note (1923) 23 COL. L. REV. 686.

[4] Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891), 13 L. R. A. 682 (1891); McCurdy, *Torts Between Persons in Domestic Relations* (1929) 43 HARV. L. REV. 1030, 1082.

[5] For a good review of the cases see Small v. Morrison, 185 N. C. 577, 118 S. E. 12 (1923), 31 A. L. R. 1135 (1924). Note (1923) 30 COL. L. REV. 686; (1929) 43 HARV. L. REV. 1030 (a most careful and comprehensive study of

States have denied recovery. The application of the rule has been so rigid that recovery is denied in the case of malicious and excessive punishment[6] and even in the case of the rape by a father of his daughter.[7] Inroads have been made into the rule denying recovery,[8] however, in the case of a minor, but emancipated child;[9] of suits

the subject). The most recent cases are Bulloch v. Bulloch, 45 Ga. App. 1, 163 S. E. 708 (1932); Belleson v. Skilbeck, *supra* note 2.

[6] Smith v. Smith, 81 Ind. App. 566, 142 N. E. 128 (1924).

[7] Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905), 68 L. R. A. 893 (1905).

[8] Perhaps it would be wise to make a fourth category on the basis of the two forceful dissents in Small v. Morrison, *supra* note 5, and in Wick v. Wick, 192 Wis. 260, 212 N. W. 787 (1927), 52 A. L. R. 1113 (1928). In the latter case Crownhart, J., points out that the constitution of Wisconsin, art. 1, §9, provides for the relief of *any* person for injuries to his property, person, or character. He says, at 788, that no court at common law ever said an infant was without a remedy in the case of an injury due to the parent's negligence. "Indeed there is no doubt that the infant may sue the parent to preserve his property rights. The court now declares a public policy which forbids an infant for suing for wrongs inflicted upon the infant by the parent. But courts may not make public policy contrary to the organic law of the land. The constitutional provision is as broad and comprehensive as the English language is capable of expressing." The dissent of Clark, C. J., in the Small case includes the rationale of the Lusk case, and in addition, persuasively urges that neither common law nor statutes deny the child a right to sue his parent in tort. See *infra* note 11.

A case in point was recently decided under the civil law of Quebec. Fidelity & Casualty Co. v. Marchand, [1924] (Can.) S. C. R. 86, 13 B. R. C. 1135. The plaintiff (Marchand) had injured his infant son by the negligent operation of his automobile. The father, having insurance, got the son to institute a suit for damages, and a judgment having been recovered, the father paid it without resorting to an appeal or without giving the insurance company time in which to do so. The case cited is the father's suit against the insurance company to recover the amount of the judgment he had been "forced" to pay his son. The court held that this payment before appeal was in clear violation of the terms of the policy and denied recovery. The court, however, by way of *dicta* approved the son's recovery from his father, saying that it seemed to be a proper ruling under art. 1053 of the civil code. Mignault, J., said, at 1146, that the rule of the code "is in as wide terms as possible and renders every person capable of distinguishing right from wrong responsible for damage caused by his fault to another. There is here no limitation, no exception of persons, and the class of those to whom compensation is due is as wide as that of the persons on whom liability is imposed. It seems therefore sufficient to say *lex non distinguit,* however repugnant it may seem that a minor child should sue his own father, although it would probably be equally repugnant that a child injured by his father's negligent act, perhaps maimed for life, should have no redress for the damage suffered."

[9] Taubert v. Taubert, 103 Minn. 247, 114 N. W. 763 (1908), sanctions the rule that an emancipated minor may sue his parent, but the case was remanded to determine whether in point of fact the plaintiff had been emancipated or not. In Lo Galbo v. Lo Galbo, *supra* note 2, the court held that a widow may maintain an action for damages for the death of her husband, the defendant's father, since the father himself could have maintained a suit for his injuries had they not proved fatal. The court says in effect that the reverse of this would also be true—that a suit by an emancipated minor would have been allowed.

against one *in loco parentis*;[10] and in negligence cases where the parent has insurance.[11]

The reasons most frequently relied upon in support of the rule denying recovery are: (1) "public policy" (*i.e.*, the policy of seeking to preserve family unity and harmony);[12] (2) the supposed common law authority for the rule;[13] (3) the availability of a remedy

[10] Treschman v. Treschman, 28 Ind. App. 206, 61 N. E. 961 (1901) (suit against stepmother for grave and permanent injuries, the result of chastisement); Clasen v. Pruhs, 69 Neb. 278, 95 N. W. 640 (1903) (suit against an aunt, with whom plaintiff resided, for damages because of improper care, and severe and brutal whippings); Steber v. Norris, 188 Wis. 366, 206 N. W. 173 (1925) (suit for damages for injuries caused by severe whippings administered by one in whose care the plaintiff was left for the summer).

[11] The case of Dunlap v. Dunlap, *supra* note 2, is not as strong as the instant case. The defendant father employed his infant son during the summer. He, the father, carried employer's liability insurance, the premiums of which were computed at an agreed percentage of the pay roll. The defendant furnished a list of the employees, and the amounts of their pay, from time to time, including the plaintiff's name. The agent of the insurance company knew the relationship existing between the parties. The court, in summarizing its opinion, said, at 195: "It [parental immunity from infant's suits] is imposed for the protection of family control and harmony, and exists only where a suit or the prospect of a suit might disturb the family relations. . . . It does not apply to an emancipated child, or to a case where liability in fact has been transferred to a third party." *Cf. supra* note 8 regarding the dissent of Clark, C. J., in Small v. Morrison.

[12] Stacy, J., in writing the majority opinion in Small v. Morrison, *supra* note 5, said, 185 N. C. at 584, 118 S. E. at 15: "From the very beginning the family in its integrity has been the foundation of American institutions, and we are not now disposed to depart from this basic principle. . . . Hence in a democracy or a polity like ours, the government of a well ordered home is one of the surest bulwarks against the forces that make for social disorder and civic decay. It is the very cradle of civilization, with the future welfare of the commonwealth dependent, in a large measure, upon the efficacy and success of its administration." In Matarese v. Matarese, 47 R. I. 131, 131 Atl. 198 (1925), 42 A. L. R. 1360 (1926), the court said, at 199: "Anything that brings the child into conflict with the father or diminishes the father's authority or hampers him in its exercise is repugnant to the family establishment and is not to be countenanced save in positive provisions of the statute law. Any proceeding tending to bring discord into the family and disorganize its government may well be regarded as contrary to the common law and not to be sanctioned by the courts. Such conflict would arise by recognizing the right of a minor child to bring an action against the father to recover damages for torts alleged to have been committed by the father in the course of the family relation, and resulting in personal injury to the child."

[13] *Supra* note 2. As indicated, the existence of a rule at common law denying a recovery by the infant is problematical. Those who believe in its existence give as the rule's basis: (1) policy; (2) the analogy of the inability of a husband or wife to sue the other at common law. But this analogy is not a true one for the reason that in theory the two spouses were identical. Such was not true, however, of the relationship which existed between the father and child.

under the criminal law.[14] The strongest and most frequently employed argument is the one of policy.[15] In practically all cases in which the defendant has had insurance such element has been lightly brushed aside as a wholly irrelevant consideration,[16] but under the present decision it has been treated as one of decided importance.

Strictly viewed, the holding of the present case extends only to a situation where the parent is protected by insurance in his vocational capacity, but the court's rejection of refined distinctions suggests that it would sanction other suits where the defendant has insurance covering liability outside his vocational sphere.[17] It appears quite clear that the case does not go beyond this point; to do so would infringe upon the holding of the same court in *Securo v. Securo*[18] (denying the child's cause of action where the parent himself has to pay the judgment), a result the West Virginia court did not intend.[19] Inasmuch as the policy which is the core of the rule denying recovery when child sues parent is dissolved by the element of insurance, it appears that the court, in allowing the action to be maintained, has reached a result that is as logical as it is laudable.

WILSON BARBER.

Public Utilities—Regulation of Private Contract Carriers.

A recent decision of the United States Supreme Court[1] marks the successful culmination of a long series of efforts on the part of the

[14] In Hewlett v. George, *supra* note 4, the court said, 9 So. at 887, 13 L. R. A. at 684: "The state, through its criminal laws, will give the minor child protection from personal violence and wrongdoing, and this is all the child can be heard to demand." Matarese v. Matarese, *supra* note 12, at 199.

[15] One of the most celebrated and widely commented upon cases is that of Wick v. Wick, *supra* note 8, and it contains an excellent statement of the policy argument. *Cf. supra* note 12. Note (1926) 1 ST. JOHN'S L. REV. 209; Note (1926) 11 MARQUETTE L. REV. 164.

[16] Small v. Morrison, *supra* note 5; Ledgerwood v. Ledgerwood, 114 Cal. App. 538, 300 Pac. 144 (1931). The suit was by a mother against her infant son, the court saying the presence of insurance is irrelevant. The rule would have been the same had the parties been reversed.

[17] The court speaking through Hatcher, J., said, at 539: "When no need exists for parental immunity, the courts should not extend it as a mere gratuity. Without such an extension, nothing stands in the way of this action. It is familiar law that a child may bring to account the parent for wrongful disposition of the child's own property. It must not be said the courts are more considerate of the property of the child than of its person (when unaffected by the family relationship)."

[18] 110 W. Va. 1, 156 S. E. 750 (1931).

[19] In the Lusk case the court said, at 539: "They [counsel for plaintiff] recognize that Securo v. Securo opposes a recovery from the father. But they would differentiate this case. . . ." The distinction was allowed by the court.

[1] Stephenson v. Binford, 287 U. S. 251, 53 Sup. Ct. 181, 77 L. ed. 203 (1932).

states to bring contract motor carriers within the scope of the regulatory powers of the state. In this case the Court upheld a Texas statute[2] which requires that contract motor carriers shall obtain permits from the Railroad Commission before operating on the state highways, and that such permits shall not be issued if the Commission be of the opinion "that the proposed operation of any such contract carrier will impair the efficient public service of any authorized common carrier then adequately serving the same territory." The act further empowers the Commission to prescribe minimum rates "which shall not be less than the rates prescribed for common carriers for substantially the same service." The statute was attacked mainly on the ground that it would compel contract carriers to dedicate their property to a public use, and thus take their property without just compensation. The Court sustained this statute, obviously designed to control the business of contract carriage, by adroitly treating it as a measure to preserve the highways and promote safety thereon.

With the tremendous growth of commercial motor transportation, it became apparent that if there was to be a uniform transportation system functioning smoothly and adequately, the motor transportation agencies would have to be brought within the regulatory powers of the government. The regulation of common carriers by motor presented little difficulty, since the regulation of common carriers generally had long been recognized.[3] However, it was soon found that this left unregulated a great and ever-increasing body of motor carriers—the private contract carriers.[4] One of the first efforts to control this group was in Michigan, where the state simply enacted that all persons engaged in the transportation of persons or property for hire by motor vehicles upon the state highways should be

[2] TEX. LAWS 1929, c. 314, as amended by TEX. LAWS 1931, c. 277.

[3] Chicago B. & Q. R. R. Co. v. Iowa, 94 U. S. 155, 24 L. ed. 94 (1876); Peik v. Chicago & N. W. Ry. Co., 94 U. S. 164, 24 L. ed. 97 (1876); Terminal Taxicab Co. v. Dist. of Col., 241 U. S. 252, 36 Sup. Ct. 583, 60 L. ed. 984 (1916); Dresser v. City of Wichita, 96 Kan. 820, 153 Pac. 1194 (1915).

[4] See Brown & Scott, *Regulation of the Contract Motor Carrier* (1930) 44 HARV. L. REV. 530 at 534, n. 13, indicating that there are nearly twice as many contract carriers as there are common carriers by motor.

A contract carrier is generally defined as one who is employed by a definite number of persons to transport goods or persons for compensation. To constitute a common carrier there must be a dedication of property to public use of such character that the service is available to the public generally and indiscriminately, and the carrier must hold himself ready to serve the public indifferently to the limit of his capacity. Hissem v. Guran, 112 Ohio St. 59, 146 N. E. 808 (1925); HUDDY, AUTOMOBILES (8th ed. 1927) §196.

common carriers and subject to complete regulation.[5] In *Michigan Public Utilities Comm. v. Duke*,[6] the United States Supreme Court held this act unconstitutional as violative of the Fourteenth Amendment, saying that the state could not by mere legislative fiat convert a contract carrier into a public utility.

In two subsequent decisions[7] the Court held invalid attempts of California and Florida to subject contract carriers to regulation, not by declaring them to be common carriers, but by providing that they should be subject to the same regulations as common carriers. In the *Cahoon* case,[8] though the Florida court had explicitly said that the act did not convert contract carriers into common carriers[9] the Court met this pronouncement by saying that "no separate scheme of regulation can be discerned in the terms of the act with respect to those considerations of safety and proper operation affecting the use of highways which may appropriately relate to private carriers as well as to common carriers."

The fatal vice of these early attempts at regulation of contract carriers seems to have been in the failure to devise separate schemes for the regulation of each class of carrier.[10] In the Texas statute the two types of carriers are treated individually, and a distinct scheme of regulation is imposed upon each. Thus, though virtually the same regulations are imposed upon each class, it cannot be said that there is an attempt to convert contract carriers into common carriers. By this reasoning, the Court was able to distinguish its previous decisions, and to consider, "unembarrassed by any previous ruling," whether the state had the power to impose regulations upon carriers who were doing business only under private contracts.

It is clear that the state has certain powers of regulation arising from the public control of the highways, such as regulations tending to preserve the roads and provide for the safety of the traveling

[5] MICH. LAWS 1923, No. 209 §§1-3.

[6] 266 U. S. 570, 45 Sup. Ct. 191, 69 L. ed. 445, 36 A. L. R. 1105 (1925), noted in (1925) 38 HARV. L. REV. 980.

[7] Frost & Frost Trucking Co. v. R. R. Comm. of Cal., 271 U. S. 583, 46 Sup. Ct. 605, 70 L. ed. 1101, 47 A. L. R. 457 (1926), noted in (1926) 40 HARV. L. REV. 131; Smith v. Cahoon, 283 U. S. 553, 51 Sup. Ct. 582, 75 L. ed. 1264 (1931), noted in (1931) 31 COL. L. REV. 1194, (1932) 30 MICH. L. REV. 629.

[8] *Supra* note 7.

[9] Cahoon v. Smith, 99 Fla. 1174, 128 So. 632, at 634 (1930).

[10] See Brown & Scott, *op. cit. supra* note 4, at 538 *et seq.*, where it is pointed out that perhaps these early failures were due to the rapid growth of motor transportation and the haste of the legislatures to bring it under control. Indeed, most states merely enacted a general regulatory statute applying both to common carriers and to private carriers, or else simply amended the old statute so as to include contract carriers within its scope.

public.[11] It was upon this theory that the Court sustained the Texas act. The Court conveniently closes its eyes to the fact that the statute is undeniably a regulation of the business of carriage, for the act not only requires the securing of a permit "the issue of which is dependent upon the condition that the efficiency of common carrier service then adequately serving the same territory shall not be impaired," but it also provides for rate fixing by the commission.[12]

The result reached in the principal case seems eminently desirable. However, it is believed that the same result could have been reached by a frank recognition that the business of contract carriers, viewed in their relation to common carriers, is a business affected with a public interest, and thus subject to regulation.[13] An adequate transportation system cannot be maintained if a part of that system is allowed to go unregulated. All the various transportategral parts of a system so bound together and so interdependent that if an adequate and efficient system cannot be maintained because of the inharmonious functioning of one, then, that part may be regulated.[14]

ROBERT A. HOVIS.

[11] Packard v. Banton, 264 U. S. 140, 44 Sup. Ct. 257, 68 L. ed. 596 (1924); Buck v. Kuykendall, 267 U. S. 307, 45 Sup. Ct. 324, 69 L. ed. 623, 38 A. L. R. 286 (1924); Ogden & Moffett Co. v. Mich. P. U. Comm., 58 F. (2d) 832 (E. D. Mich. 1931); Barbour v. Walker, 126 Okla. 227, 259 Pac. 552 (1927); Rutledge Coöp. Ass'n. v. Baughman, 153 Md. 297, 138 Atl. 29 (1927).

[12] The lower federal court in upholding the statute frankly admits that it is a regulation of business, saying: "Here is a case of a clear, a simple, a complete declaration of policy that the public has an interest in the business of carriage for hire over the highways of the state, a prohibition of the right to engage in such business except under a franchise, and an affixing to the enjoyment of a franchise the condition that the holder must become an integral part of the transportation system of the state, and must submit to the regulations applicable to his franchise as to rates and practices." Stephenson v. Binford, 53 F. (2d) 509, at 514 (S. D. Tex. 1931).

[13] This seems to have been the basis of the decision in the lower court. Stephenson v. Binford, *supra* note 12 at 514, 515. See an excellent note in (1931) 80 U. OF PA. L. REV. 1008, where the writer develops this idea more at length.

[14] The action of Congress in wielding the commerce power is somewhat analogous to the method suggested of extending public utility regulation. Thus, the Federal Safety Appliance Act has been held to apply to intrastate trains operating on interstate railroads so as to afford greater safety to interstate trains. Southern Ry. Co. v. U. S., 222 U. S. 20, 32 Sup. Ct. 2, 56 L. ed. 72 (1911). Likewise, federal control of interstate rates has been construed to extend to the adjustment of intrastate rates, so as to make the latter bear a proportionate part of the burden of maintaining an adequate interstate system. R. R. Comm. of Wis. v. Chicago, B. & Q. Ry. Co., 257 U. S. 563, 42 Sup. Ct. 232, 66 L. ed. 371 (1921). For further extensions of the commerce power, see Board of Trade v. Olsen, 262 U. S. 1, 43 Sup. Ct. 470, 67 L. ed. 839 (1922); Tagg Bros. v. U. S., 280 U. S. 420, 50 Sup. Ct. 220, 74 L. ed. 524 (1930).

Public Utilities—Valuation of Leased Property and Jointly Owned Property.

Mandamus[1] to compel the Interstate Commerce Commission to ascribe a definite value under section 19a of the Commerce Act to complainant's interest in: (a) the joint use, with the owner, of twelve miles of track, under a perpetual lease, rental being adjusted every five years by agreement, and in case of failure to agree, by arbitration; (b) the Grand Central Terminal under perpetual lease up to 50 per cent of the terminal's capacity, used by complainant with the owner, rental being complainant's share of the operating expenses and that proportion of 4½ per cent interest on the cost of construction which the use made by complainant bears to the total use; (c) the Boston terminal arising from ownership of 80 per cent of the stock in the Terminal Company, and the use of 75 per cent of the terminal's total use, rental being proportioned to use and the aggregate rental paid by all the carriers to equal, in addition to each user's share of the operating expenses, the interest on outstanding bonds and 4 per cent on the capital stock. *Held:* The duty to ascribe a definite value was not so clearly and definitely imposed by statute[2] as to be enforceable by mandamus.[3]

The present case leaves open the important question of how regulatory bodies shall value for rate making purposes the property not owned by the utility, but used by it in the public service. The Interstate Commerce Commission uses the following methods of valuation where there is a division of interest between ownership and use: (1) jointly owned and jointly used property is ascribed to the respective carriers in conformity with their agreement as to ownership, and in the absence of agreement as to ownership, in proportion to use;[4] (2) property owned by a common carrier, but used jointly

[1] Interstate Commerce Commission v. New York, N. H. & H. Ry. Co., 287 U. S. 178, 53 Sup. Ct. 106, 77 L. ed. 132 (1932).

[2] Valuation Act of 1913, 37 STAT. 701, 49 U. S. C. A. §19a. §19a requires the commission to determine the value of all the property owned or used by the carrier for its purposes as a common carrier. §15a (2) provides for the establishment of rates that will earn an aggregate annual net railway operating income equal to a fair return upon the aggregate value of the railway property of such carrier held for and used in the service of transportation. §15a (1) provides that "net operating income" means railway operating income including in the computation debits and credits arising from equipment rents and joint facility rents.

[3] Three judges dissented but reserved their reasons until the question of correct valuation is raised in a rate controversy.

[4] Lessees Buffalo Creek Ry., 141 I. C. C. 1, 5 (1927); Central Ry. of New Jersey, 149 I. C. C. 659, 682 (1929).

with others for common carrier purposes is valued as property of the owning carrier only;[5] (3) property exclusively used by a carrier and owned by some other party, is valued as the property of the user.[6]

Where property owned by some other party is partly used by a carrier the use is not valued; where such property is wholly used by a carrier the use is valued, indeed, the full value of the property is ascribed to the user. This seems inconsistent;[7] if the whole use of the property carries with it the whole valuation of the property for rate purposes, why does not part of the use carry part of the value?

The basic theory in determining what property of a public utility should be valued for the purpose of allowing the utility to charge rates which will earn a fair return on that value, is that property used or useful in furnishing utility service will be included in the valuation. If this theory were consistently followed, property leased in whole or in part would be valued during the period of the lease and to the extent of the lease as the property of the lessee utility. The rental should not be considered as an operating expense of the lessee utility, neither should it be considered as income of the lessor utility, for rate purposes. The lessee's stockholders would thus profit if the rent were less than a fair return on the fair value of the property, for the rates of the lessee, so far as possible, would be so fixed as to allow a fair return on that fair value, and the rent being less, lessee's stockholders would have the difference. Lessor's stockholders would be paying this difference. That is, if the lease had not been made, lessor would have been entitled to a fair return on the fair value of the leased property; instead lessor now receives the rent, which is less. Accordingly, lessee's stockholders profit by a lease advantageous to lessee, and lessors stockholders lose. Conversely, if the lease were disadvantageous to lessee, in the sense that the rent were more than a fair return on the fair value of the leased property, lessee's stockholders would lose and lessor's would gain. The rate paying public would not be affected at all by the question of which utility made the better bargain. They would pay precisely

[5] *Ex parte* No. 42, 84 I. C. C. 1 (1923); Texas Midland Ry., 75 I. C. C. 1, 21, 23 (1918).

[6] Texas Midland Ry., *supra* note 5, 20, 122; Georgia Ry., 125 I. C. C. 551, 561 (1927); Minneapolis, St. Paul & S. Ste. M. Ry. Co., 143 I. C. C. 547, 592 (1928).

[7] Esch, *Valuation of Leased Railroad Property* (1924) 33 YALE L. J. 272, 279.

what they ought to pay, a fair return on the fair value of the property, and they would pay that return to the utility using the property in their service.

On the other hand if any method is followed whereby the value of the leased property is included in the rate base of the lessor, it follows that the rent must be included as operating income of the lessor, otherwise its customers would be paying a full return on property already earning a return. By corollary, the rent must be deducted as an operating expense of the lessee. The result is that where the rent is more than a fair return on the fair value of the leased property, the customers of the lessee pay too much, that is, more than a fair return on the fair value of the property used in utility service, and the customers of the lessor pay too little. Conversely, when the rent is less than a fair return on the fair value of the rented property, the customers of the lessor pay too much; they pay the difference between a fair return on the property and the rent.

The decisions of state regulatory bodies on the right of lessee utilities to have the leased property valued in the rate base are not in harmony. In the *Chicago Elevated Railways* case the Illinois Commission refused to allow the lessee the value of the leased property and said, "In the absence of improper payments as rentals the public is not concerned with the acts of the companies between themselves, and the public has discharged its full duty when it reimburses the carrier for all proper expenses paid out as rentals."[8] On the other hand, the New York Commission has said that, "the trend of decision indicates that property leased by a public utility, used exclusively in its business, proved to be used or useful, should be valued on the same basis as the other property, the rental for such property under the lease being excluded from operating expenses."[9]

[8] *Re* Metropolitan West Side Elevated Ry. Co., P. U. R. 1921B, 229; Bay State Rate Cases, P. U. R. 1916F, 221 (Mass.). For cases refusing to allow value to favorable contracts generally see: Pub. Serv. Com. v. Flathead Valley El. Co., P. U. R. 1926C, 822 (Mont.); Fuhrmann v. Cataract Power and Conduit Co., 3 P. S. C. 2d D. (N. Y.) 656, cited in WHITTEN, VALUATION OF PUBLIC SERVICE CORPORATIONS (2d. ed. 1928) 77.

[9] *Re* United Traction Co., P. U. R. 1927D, 637; Landon v. P. U. Com., P. U. R. 1918A, 31 (S. C.); Moore v. Valley Ry. Co., P. U. R. 1919F, 493 (Pa.); *Re* Cinn. Gas & El. Co., P. U. R. 1916F, 416 (Ohio); Milwaukee El. Ry. & Lt. Co. v. City, P. U. R. 1919D, 504 (Wis.). For cases allowing value to favorable contracts see, Valparaiso Lighting Co. v. P. S. Com., 190 Ind. 253, 129 N. E. 13, P. U. R. 1921B, 325 (Ind.); Duluth Street Ry. Co. v. Minn. Com., 4 F. (2d) 543, P. U. R. 1925D, 226 (Minn.); San Joaquina Co. v. Stanislaus County, 233 U. S. 454, 34 Sup. Ct. 652, 58 L. ed. 1041 (1914).

The writer has been unable to find any case where a state regulatory body has been sustained in refusing to consider in the rate base any leasehold shown to be of substantially greater value than the rental paid.

Proceeding upon the theory that an advantageous lease has value, rather than upon the theory, above advocated, that leased property should be valued as property of the lessee, it would seem that the complainant in the instant case would have little reason to object to the Commission's refusal to value the twelve miles of track under (a), *supra,* since the rental is adjusted every five years, by arbitration if necessary. Such a lease could hardly have any value in excess of the rental paid, and the value assigned to the total of complainant's property as a going concern. It would seem, however, that complainant's interest in the Grand Central Terminal under (b), *supra,* might be of substantial value, since complainant pays as rental a rate of interest on the original cost somewhat less than the rate of return allowed under the recapture provision of the Commerce Act,[10] and under *Smyth v. Ames*[11] and the *O'Fallon*[12] case, is entitled to a return upon the present value rather than original cost. The same is true of the interest in the Boston Terminal, (c) *supra,* where only 4 per cent is paid upon a proportionate share of the capital stock used for the construction of the terminal.

In order to prevent all such difficulties arising from a disparity between rent and a fair return on fair value, it would seem both practicable and desirable to have the Interstate Commerce Commission police the rentals paid for leased property, as is now done in a few of the states in the case of leases by local utilities.[13] If such supervision were exercised and the rental fixed at a fair return upon the fair value of the leased property,[14] it would make little difference

[10] 41 STAT. 488-491, 49 U. S. C. A. §15a (6) (1920).

[11] Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819 (1898).

[12] St. Louis & O'Fallon Ry. Co. v. U. S., 279 U. S. 461, 49 Sup. Ct. 384, 73 L. ed. 798 (1929).

[13] West Jersey and Seashore Ry. Co. v. Board of P. U. Com., 87 N. J. L. 170, 94 Atl. 57 (1915). The New Jersey statute provides, "No public utility . . . shall without the approval of the Board [of Public Utility Commissioners] sell, *lease,* [author's italics] mortgage or otherwise dispose of or incumber its property, franchises, privileges, or rights, or any part thereof; nor merge or consolidate its property, franchises, privileges, or rights, or any part thereof, with any other utility . . . ." N. J. COMP. STAT. (Supp. 1924) p. 2887, §167-24 (H).

[14] Where the lessee is unable to earn a fair return on the fair value of its property, the rent might be fixed at a figure which would pay the rate of return on the value of the leased property which the utility is able to earn on its other property.

whether such property was included in the rate base inventory of the owner or in that of the lessee, since the ultimate result upon both the utilities and the public would be the same. An Act of Congress giving the Commission similar authority over all leases of lines and equipment as it now possesses over extensions and withdrawals[15] and over security issues[16] would perhaps produce the end desired.

HERMAN S. MERRELL.

Quasi-Contracts—Filling Stations—Recovery by Lessee for Defects in Equipment.

Plaintiff orally contracted to purchase gasoline and oil daily from defendant at one cent per gallon above tank wagon prices, the one cent being paid as rent for the premises and tanks and gasoline pumps. Within sixty days plaintiff found he was losing money and a series of complaints to the defendant suggesting that there was a leak in the tanks elicited as many assurances from the defendant that there could be no leaks. Finally defendant dug up the tanks and found a leak therein. Plaintiff alleged defendant was under a duty to inspect the tanks and to keep them in repair, and sued for loss sustained by the leakage. Defendant's demurrer to the complaint was overruled and this was sustained on appeal.[1]

The possibility that suit upon the facts above might be successfully based on landlord and tenant law does not present itself. It is settled law that in the absence of a covenant to the contrary, there is no duty on the lessor to keep the premises in repair.[2] And it is generally held that the lessor does not impliedly covenant that the premises are suitable for the use which the lessee intends to put them to.[3]

The North Carolina court based its decision on the implied contract growing out of the assurances by the defendant and the reliance thereon by the plaintiff. The opinion emphasized the generality with which a cause of action for money received may be

[15] 41 STAT. 477, 49 U. S. C. A. §1 (18) (1920).
[16] 41 STAT. 494, 49 U. S. C. A. §20a (1920).
[1] Andrews v. National Oil Co, 204 N. C. 268, 168 S. E. 228 (1933).
[2] I TIFFANY, LANDLORD AND TENANT 87; Richmond v. Standard Elkhorn Coal Co., 222 Ky. 150, 300 S. W. 359 (1927), 58 A. L. R. 1423 (1929); Smithfield Improvement Co. v. Coley-Bardin, 156 N. C. 255, 72 S. E. 312 (1911), 36 L. R. A. (N. S.) 907.
[3] Duffy v. Hartsfield, 180 N. C. 151, 104 S. E. 139 (1920); Federal Metal Bed Co. v. Alpha Sign Co., 289 Pa. 175, 137 Atl. 189 (1927); Plaza Amusement Co. v. Rothenberg, 159 Miss. 800, 131 So. 350 (1930); Smithfield Improvement Co. v. Coley-Bardin, *supra* note 2.

alleged,[4] unfortunately without extensive reference to North Carolina authorities dealing with the action.[5]

Only one case similar on its facts to the principal case has been found.[6] The Mississippi court specifically recognized the usual situation wherein the lessor, unless he covenants to the contrary, is under no duty to repair the premises and did not question the soundness of this doctrine. However, it pointed out that the leasing of a filling station under terms whereby the lessee was to sell only the products of the lessor and use the premises only for this purpose made the relationship more than a mere landlord and tenant relation. The court concluded that the enterprise was a joint business in which both parties were interested and allowed a recovery, holding that the lessor impliedly warranted the fitness of the equipment. Stress was laid upon the fact that the lessor had once previously attempted to repair the pumps as showing that the parties recognized the existence of an implied warranty. Thus by rather unusual reasoning the Mississippi court reached what seems to be a desirable result.

The usual standard form contract used by distributors leasing filling stations contains no clause wherein the lessor assumes the responsibility for repairing the equipment.[7] The actual practice in this respect, however, is that the distributor will, upon complaint by the lessee, make reasonable efforts to remedy the defect; but this assumption of duty seems to rest upon a desire to promote efficiency and expedite sales rather than upon any contractual basis.[8] In view

[4] "When defendant is proved to have in his hands the money of the plaintiff which *ex equo et bono,* he ought to refund, the law conclusively presumes that he has promised to do so. . . . The defendant insists that fraud is not sufficiently pleaded, but the facts warrant a recovery for money had and received, and the complaint by liberal construction, is broad enough to support such a theory."

[5] Money paid voluntarily with a knowledge of the facts cannot be recovered back. Commissioners of Macon Co. v. Commissioners of Jackson Co. 75 N. C. 240 (1876); Brummitt v. McGuire, 107 N. C. 351, 12 S. E. 191 (1890); Bank v. Taylor, 122 N. C. 569, 29 S. E. 831 (1898). But a payment under a mistake of fact may be recovered. Pool v. Allen, 29 N. C. 120 (1846); Worth v. Stewart, 122 N. C. 258, 29 S. E. 579 (1898); Simms v. Vick, 151 N. C. 79, 65 S. E. 621 (1909), 24 L. R. A. (N. S.) 517, 18 Ann. Cas. 669; Sanders v. Ragan, 172 N. C. 612, 90 S. E. 777 (1916). Money paid under a contract, continuance of which was induced by defendant's false representations may be recovered. Whitehurst v. Insurance Co. 149 N. C. 273, 62 S. E. 1067 (1908); Jones v. Insurance Co. 151 N. C. 56, 65 S. E. 611 (1909).

[6] Louisiana Oil Corp. v. Rayner, 159 Miss. 783, 132 So. 739 (1931), 83 A. L. R. 1426 (1933).

[7] Information given writer by various filling station operators.

[8] *Ibid.*

of the rapid growth of this relatively new business and the frequency with which the lessee finds himself in the position of the plaintiffs in the two cases noted, the decisions in these cases allowing recovery and the bases upon which the cause of action was worked out are highly significant.

J. C. EAGLES, JR.

Receivers—Enjoining Other Suits—Judgments in Other Suits as Liens.

An action in the nature of a creditors' bill was brought by a simple contract creditor against a debtor alleged to be solvent. The debtor joined in plaintiff's request for the appointment of a receiver. A receiver was appointed, and the court enjoined further prosecution of pending suits brought by other creditors. On motion, the restraining order was vacated and the court ordered that those creditors who had brought their actions prior to the receivership proceedings be permitted to proceed to judgment and that their judgments be claims in the receivership prior to the claims of the general creditors. *Held:* The order allowing the priority was correct.[1]

Generally, an equity court appointing a receiver has inherent power to protect his possession of the debtor's property. Interference with that possession may be enjoined at the time of the appointment[2] or later upon petition by the receiver in the receivership proceedings.[3] One interfering with his possession is subject to punishment for contempt, and this is true even where there is no injunctive order.[4] The property is not subject to attachment,[5] garnishment,[6] or execution[7] without the consent of the court, but execu-

[1] Dillard v. Walker, 204 N. C. 67, 167 S. E. 632 (1933).

[2] Cherry v. Insull Utility Investments, 58 F. (2d) 1022 (N. D. Ill. 1932).

[3] Virginia, T. & C. Steel & Iron Co. v. Bristol Land Co., 88 Fed. 134 (C. C. W. D. Va. 1898); Lake Shore & M. S. Ry. Co. v. Felton, 103 Fed. 227 (C. C. A. 6th, 1900); Westinghouse Electric & Mfg. Co. v. Richmond Light & R. Co., 267 Fed. 493 (E. D. N. Y. 1920).

[4] *In re* Marcus, 21 F. (2d) 480 (W. D. Pa. 1924); Coker v. Norman, 162 Ga. 351, 133 S. E. 740 (1926).

[5] Central Trust Co. v. Wheeling & L. E. R. Co., 189 Fed. 82 (C. C. N. D. Ohio 1911); Carroll v. Cash Mills, 125 S. C. 332, 118 S. E. 290 (1923); see Ewing v. Ewing Planing Mill, 183 Iowa 711, 167 N. W. 607 (1918).

[6] Fleeger v. Swift, 122 Kan. 6, 251 Pac. 187 (1926).

[7] Mercantile Trust Co. v. Baltimore & O. R. Co., 79 Fed. 389 (C. C. E. D. Pa. 1897); Pelletier v. Greenville Lumber Co., 123 N. C. 596, 31 S. E. 855, 68 Am. St. Rep. 837 (1898); see Shapiro v. Wilgus, 55 F. (2d) 234, 235 (C. C. A. 3d, 1931); *cf.* Meyers v. Washington Heights Land Co., 107 W. Va. 632, 149 S. E. 819 (1929).

tion must be allowed when there was a seizure before the receiver's appointment.[8]

When a receiver is appointed the courts often in their discretion enjoin further prosecution of pending suits[9] or the prosecution of any suit subsequent to the receivership.[10] These injunctions may restrain actions against the debtor[11] or actions in other courts against the receiver on causes of action arising before his appointment.[12] A restraining order may also be procured on the receiver's petition in the receivership suit,[13] or in a separate action.[14] A state court may enjoin a suit in another state,[15] and an order of a federal court may stay proceedings in a state court.[16]

The receiver holds the property of the debtor subject to all valid liens properly executed and recorded at the time of his appointment.[17] One who has no lien when the receiver is appointed cannot thereafter do anything to obtain a lien on the property and thereby gain a preference over other creditors entitled to share equitably in the distribution of the estate.[18] It is specifically held that after the appointment of a receiver a creditor may not obtain priority over other creditors by obtaining a judgment against the debtor.[19] This is true though such judgment may have been entered

[8] Duval v. T. P. Ranch Co., 151 La. 142, 91 So. 656 (1922).

[9] Central Surety & Ins. Corp. v. Bagley, 44 F. (2d) 808 (S. D. Cal. 1930).

[10] Quinn v. Bancroft-Jones Corp., 12 F. (2d) 958 (W. D. N. Y. 1926); *In re* French, 181 App. Div. 719, 168 N. Y. Supp. 988 (1918).

[11] *In re* Yaryan Naval Stores Co., 214 Fed. 563 (C. C. A. 6th, 1914).

[12] Burke v. Ellis, 105 Tenn. 702, 58 S. W. 855 (1900); see Central Trust Co. of N. Y. v. East Tenn. V. & G. Ry. Co., 59 Fed. 523, 528 (C. C. D. Ky. 1894).

[13] *In re* New Jersey Refrigerating Co., 97 N. J. Eq. 358, 127 Atl. 198 (1925).

[14] Davis v. Butters Lumber Co., 132 S. C. 233, 43 S. E. 650 (1903).

However, it has been held that an injunction will not lie at the instance of the receiver to enjoin creditors who prior to the receivership proceedings garnished the funds of the debtor, and that their judgments recovered should be given priority in the order in which the actions were begun. Rickman v. Rickman, 180 Mich. 224, 146 N. W. 609 (1914); *cf.* Roberts v. Letchworth, 127 Ark. 490, 192 S. W. 375 (1917) (one appointed receiver cannot continue attachment suit against deptor but must suspend suit and present claim for allowance).

[15] Davis v. Butters Lumber Co., *supra* note 14.

[16] Central Surety & Ins. Corp. v. Bagley, *supra* note 9; *cf.* Riehle v. Margolies, 279 U. S. 218, 49 Sup. Ct. 310, 73 L. ed. 669 (1929).

[17] Vanderwall v. Vanco Dairy Co., 200 N. C. 314, 156 S. E. 512 (1931); see *In re* K-T Sandwich Shoppe of Akron, Inc., 34 F. (2d) 962, 963 (N. D. Ohio 1929).

[18] New York v. Maclay, 53 Sup. Ct. 323, 77 L. ed. (Advance Opinions) 416 (1933); see *In re* K-T Sandwich Shoppe of Akron, Inc., *supra* note 17.

[19] Quinn v. Bancroft-Jones Corp., *supra* note 10; Britten v. Sheridan Oil Co., 205 Iowa 147, 217 N. W. 800 (1928); *Ex parte* International Harvester Co., 137 S. C. 124, 134 S. E. 530 (1926).

by leave of court,[20] or the suit in which it was rendered was begun before the receiver was appointed and took possession.[21] The creditor gets no lien when his judgment was not actually entered of record or registered until after the appointment of the receiver,[22] and such a judgment cannot be made a lien by entry *nunc pro tunc* as of a time before the appointment.[23] But the creditors may acquire such judgment liens in the case of a receivership *pendente lite* where the sole purpose is to preserve the property, or collect income from it, such as a receivership in a mortgage foreclosure,[24] as distinguished from a receivership for the general administration of the debtor's assets.

The court in the principal case was content to say that judgments are liens and as such are given priority under the statute.[25] This evades the question whether prosecution of the suits to judgment should have been enjoined, and evades also the general rule that the usual statutory priority of judgment creditors is absent when their judgments are entered after a receiver is appointed. In an earlier North Carolina decision the court in a well reasoned opinion specifically considered the latter problem and reached the result that a creditor who had begun a suit against a corporation before a receiver was appointed could not by prosecuting the action to judgment after the appointment obtain a lien and thereby gain a preference over the general creditors.[26]

JULE MCMICHAEL.

[20] Cowan v. Pa. Plate-Glass Co., 184 Pa. 1, 38 Atl. 1075 (1898).

[21] Lang v. Macon Construction Co., 101 Ga. 343, 28 S. E. 860 (1897); Odell Hardware Co. v. Holt-Morgan Mills, 173 N. C. 308, 92 S. E. 8 (1917).

[22] Ferris v. Chic-Mint Gum Co., 14 Del. Ch. 270, 125 Atl. 343 (1924).

[23] Odell Hardware Co. v. Holt-Morgan Mills, *supra* note 21.

[24] Johnson v. Garner, 233 Fed. 756 (D. Nev. 1916).

Where a receiver was appointed in a mortgage foreclosure it was held that creditors were entitled to sue at law and by judgments acquire a preference, but not after the court amended its decree and took steps to distribute the property among the creditors. Moore v. Southern States Land & Timber Co., 83 Fed. 399 (C. C. S. D. Ala. 1896).

[25] N. C. CODE ANN. (Michie, 1931) §614.

[26] Odell Hardware Co. v. Holt-Morgan Mills, *supra* note 21. True, this case was decided under the statute relating to corporations. N. C. CODE ANN. (Michie, 1931) §1210. But the same statute would apparently apply to receivers of other insolvent debtors. N. C. CODE ANN. (Michie, 1931) §860: "The article Receivers, in the chapter entitled Corporations, is applicable, as near as may be, to receivers appointed hereunder."