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NOTES AND COMMENTS

Aeronautics—Trespass—Airplane Flight Over Another's Land.

The defendants' airplanes in landing glided at altitudes of five to one hundred feet over the plaintiff's land. Plaintiff brought actions, seeking both damages for trespass and an injunction against future flights. The court held that the flight of the airplanes did not constitute trespass and in the absence of actual damage no injunction would lie.[1]

The ancient maxim *cuius est solum, eius est usque ad caelum,* "he who owns the soil owns it to the sky,"[2] has been generally followed and

[1] Hinman v. Pacific Air Transport, Hinman v. United Air Lines Transport Corp., 84 F. (2d) 755 (C. C. A. 9th, 1936). The facts of the two cases are substantially the same, and both cases are disposed of on the same appeal.
[2] 1 Co. LITT. §4a; 2 BL. COMM. 18.

the courts have applied it in cases of shooting across land,[3] the thrusting of an arm across a boundary line,[4] the kicking by one horse of another through a boundary fence,[5] the extension of telephone cross-arms over a boundary,[6] the extension of wires across land,[7] the projection of eaves over the boundary,[8] the leaning of a wall over the line,[9] or the projection of a bay window.[10] These were all held to be trespasses on the theory that *any* intrusion into the air space above the land of another constituted a technical trespass.

The rapid increase in the use of the airplane has shown the *ad caelum* doctrine to be inadequate to cope with the problem of determining the relative rights of the land owner and the aviator with respect to the air space.[11] A strict and unqualified application of this doctrine would seriously handicap the progress of aviation in that persons could not fly without exposing themselves to innumerable law suits.

The English case of *Pickering v. Rudd*[12] first mentioned the problem, and there the court by way of dictum stated that the flight of a balloon over another's land would be a technical trespass for which nominal damages would be allowed.[13] Since this early decision the English courts have not reconsidered the problem, but a statute now prohibits actions by a land owner against an aviator if the flights are conducted in a reasonable and ordinary manner.[14]

A review of the American decisions reveals only one case[15] which would seem to give full effect to the *ad caelum* doctrine. There the court held that flights at one hundred feet over the plaintiff's land constituted trespasses for which nominal damages could be recovered.[16]

On the other hand, several theories for applying the law of trespass

[3] Herrin v. Sutherland, 74 Mont. 241, 241 Pac. 328 (1925).
[4] Hannabalson v. Sessions, 116 Iowa 457, 90 N. W. 93 (1902).
[5] Ellis v. Loftus Iron Co., L. R. 10 C. P. 10 (1874).
[6] Cumberland Teleph. and Teleg. Co. v. Barnes, 30 Ky. L. Rep. 1290, 101 S. W. 301 (1907).
[7] Butler v. Frontier Teleg. Co., 186 N. Y. 486, 79 N. E. 716 (1906).
[8] Mayer v. Flynn, 46 Utah 598, 150 Pac. 962 (1915).
[9] Barnes v. Berendes, 139 Cal. 32, 69 Pac. 491 (1903).
[10] Codman v. Evans, 5 Allen 308 (Mass. 1862).
[11] Thurston, *Trespass to Air Space* in HARVARD LEGAL ESSAYS (1934) 501.
[12] 1 Stark. 56 (Nisi Prius, 1815). [13] *Id.* at 59.
[14] BRITISH AIR NAVIGATION ACT OF 1920, §9(1). "No action shall lie in respect of trespass or in respect of nuisance, by reason only of the flight of aircraft over any property at a height above the ground, which, in view of all the circumstances of the case is reasonable, or the ordinary incidents of such flight, so long as the provisions of this Act . . . are duly complied with."
[15] Smith v. New England Aircraft Corp., 270 Mass. 511, 170 N. E. 385 (1930).
[16] Smith v. New England Aircraft Corp., 270 Mass. 511, 530, 170 N. E. 385, 393 (1930). "The facts show intrusion upon the land of the plaintiff by flight of aircraft. . . . These interferences create in the ordinary mind a sense of infringement of property rights which cannot be minimized or effaced. . . . Air navigation, important as it is, cannot rightfully levy toll upon the legal rights of others for its successful prosecution."

to the flight of aircraft have been advanced which restrict the doctrine of *ad caelum* to a marked degree.

(1) In *Swetland v. Curtis Airport Corporation*[17] the plaintiff sought to enjoin flights over his land, claiming that such flights were trespasses regardless of the height at which they were made. The court *held* that a land owner has protectable property rights in the lower stratum of air and that flights through this zone might constitute trespass, but that a land owner has no such rights in the upper column of air. This solution to the problem has been termed the "zone theory," and under it the scope of possible trespass is limited by that of effective possession.[18]

(2) Also there is the "privilege theory" or "right of way theory" which concedes to the owner of the land the ownership of the air space above his land to an infinite height but reserves the right of flight through the space so long as such flights are properly conducted.[19] The Uniform State Law for Aeronautics is consistent with this view.[20]

The foregoing theories, though technically distinguishable from each other, reach substantially the same result and together constitute the weight of authority.

[17] 55 F. (2d) 201 (C. C. A. 6th, 1932).

[18] POLLOCK, TORTS (13th ed. 1929) 362.

[19] RESTATEMENT, TORTS (1934) §§159, 194.

§159—"A trespass, actionable under the rule stated in §158, may be committed on, beneath, or above the surface of the earth."

§194—"An entry above the surface of the earth, in the air space in the possession of another, by a person who is traveling in an aircraft, is privileged if the flight is conducted—

(a) For the purpose of travel through the air space or for any other legitimate purpose,

(b) In a reasonable manner,

(c) At such a height as not to interfere unreasonably with the possessor's enjoyment of the surface of the land and the air space above it, and

(d) In conformity with such regulations of the State and Federal aeronautical authorities as are in force in the particular state."

[20] The pertinent sections of the UNIFORM STATE LAW are as follows:

"*Section 3. Ownership of Space.* The ownership of the space above the lands and waters of this State is declared to be vested in the several owners of the surface beneath, subject to the right of flight described in Section 4.

"*Section 4. Lawfulness of Flight.* Flight in aircraft over the lands and waters of this State is lawful, unless at such a low altitude as to interfere with the then existing use to which the land or water is put by the owner, or unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath. . . ." N. C. CODE ANN. (Michie, 1935) §§191(l), 191(m).

It is generally held that the minimum height regulations promulgated by the Department of Commerce, under the AIR COMMERCE ACT OF 1926, 44 Stat. 568 (1926), 49 U. S. C. A. §§171-184 (1934) have no effect on the right of the surface owner either as to trespass or nuisance but are merely traffic regulations. Neiswonger v. Goodyear Tire and Rubber Co., 35 F. (2d) 761 (N. D. Ohio 1929); (1932) 20 CALIF. L. REV. 666; see Swetland v. Curtis Airport Corp., 55 F. (2d) 201, 203 (C. C. A. 6th, 1932).

It has been held that an intrusion by an airship into the air space is not a violation of a statute pertaining to trespass on property. Commonwealth v Nevin and Smith, 2 Pa. D. and C. 241 (1922); ZOLLMAN, CASES ON AIR LAW (1930) 5.

(3) The principal cases are not determined on the basis of either of the above theories, but rather the court seems to advance still another, and what appears to be a more flexible doctrine, that the land owner has property rights in the air space only to a height consistent with his actual enjoyment and use of the land; the court stating that "the air is like the sea in that it is capable of ownership only in so far as one may take possession of it, utilize it and enjoy it."[21]

The general law of nuisance is applicable under any of the foregoing theories, and regardless of whether the flight of planes constitutes trespass, such flights may be enjoined if they create nuisances.[22]

The doctrine, that travel through the air space is similar to travel on navigable waters, enables the court in the principal cases to reach the same result as would have been reached by applying either the "zone theory" or the "privilege theory." But under the doctrine here presented the invasion of the air space by aircraft in flight is not trespass at all, rather there must be actual interference with the use and enjoyment of the air space. While this is a very definite boon to aviation it is also a reasonable theory for the protection of the land owner, who can recover for actual injuries but not for invasions of proprietary interests in the air space.[23]

JOHN TAYLOR SCHILLER.

Bills and Notes—False Impersonation.

The defendant, a clerk of court, had in his custody a sum of money for one *Y*. *X*, an impostor and brother of *Y*, represented himself as *Y* to the defendant, clerk of court, who believing him to be *Y* and without making further inquiry, gave the impostor a check payable to his brother. The impostor, still representing himself as his brother *Y*, obtained the indorsement of plaintiff to his own false indorsement in the name of *Y*, and later cashed the check at a bank. The plaintiff, indorser, having made good the check to the bank, sued the drawer, clerk of court. *Held:* Judgment for the defendant drawer. The court felt that the plaintiff's loss was due to his own negligence in not identifying the impostor, and since the impostor's indorsement was a forgery he could not transfer any property in the check.[1]

[21] Hinman v. Pacific Air Transport, Hinman v. United Air Lines Transport Corp., 84 F. (2d) 755, 758 (C. C. A. 9th, 1936).

[22] Thrasher v. City of Atlanta, 178 Ga. 514, 173 S. E. 817 (1934) (the flight of airplanes over plaintiff's land stirred up a great amount of dust).

[23] For other treatments of the subject see Bouvé, *Private Ownership of Navigable Airspace Under the Commerce Clause* (1935) 21 A. B. A. J. 416; Flagg, *Airspace Ownership and the Right of Flight* (1932) 3 J. AIR. L. 400; Logan, *Recent Developments in Aeronautical Law* (1934) 5 J. AIR L. 548; Wherry and Condon, *Air Travel and Trespass* (1934) 68 U. S. L. REV. 78; (1934) 3 BROOKLYN L. REV. 350; (1934) 4 DETROIT L. REV. 103; (1935) 6. J. AIR L. 622; (1931) 16 MINN. L. REV. 305.

[1] Keel v. Wynne, 210 N. C. 426, 187 S. E. 571 (1936).

The North Carolina decision is contrary to an almost unanimous weight of authority. The majority rule is[2] that where a drawer delivers a check to an impostor payee, believing him to be the true payee, the impostor's later indorsement of the instrument in the name of the real payee is regarded as a genuine indorsement in relation to the rights of subsequent persons dealing in good faith with the instrument. The loss must be borne by the drawer.

This rule is based upon two doctrines—that of "actual intent" and of estoppel. In the former the drawee or bona fide holder is said to have carried out the actual intent of the drawer, for in making out the check and handing it to the physical being present, the drawer thereby primarily intended to transfer the property to such person rather than to the one named as payee on the paper, visible presence being a more certain means of identification than verbal or written designation. Thus the drawee has paid the very person intended by the drawer to receive payment. On the other hand, where the impersonation is accomplished by mail, telegraph, or other indirect means of communication, the drawer's intent is usually said to be to negotiate with the named payee rather than with the impostor, therefore in this type of case most courts hold the drawee liable instead of the drawer.[3] There appears to be no

[2] United States v. Nat. Exchange Bank, 45 Fed. 163 (C. C. E. D. Wis. 1891); Cureton v. Farmers' State Bank, 147 Ark. 312, 227 S. W. 423 (1921); Missouri Pac. R. R. v. M. M. Cohn Co., 164 Ark. 335, 261 S. W. 895 (1924); Ryan v. Bank of Italy Nat. Trust and Savings Ass'n, 106 Cal. App. 690, 289 Pac. 863 (1930); Milner v. First Nat. Bank of Waynesboro, 38 Ga. App. 668, 145 S. E. 161 (1928); Moore v. Moultrie Banking Co., 39 Ga. App. 687, 148 S. E. 311 (1929); Uriola v. Twin Falls Bank and Trust Co., 37 Idaho 332, 215 Pac. 1080 (1923); Famous Shoe and Clothing Co. v. Crosswhite, 124 Mo. 34, 27 S. W. 397 (1894); Hoffman v. American Exchange Nat. Bank, 2 Neb. (Unof.) 217, 96 N. W. 112 (1901); Montgomery Garage Co. v. Manufacturers' Liability Ins. Co., 94 N. J. Law 152, 109 Atl. 296 (1920); McHenry v. Old Citizens' Nat. Bank, 85 Ohio St. 203, 97 N. E. 395, 38 L. R. A. (N. S.) 1111 (1911); Land-Title and Trust Co. v. Northwestern Nat. Bank, 196 Pa. 230, 46 Atl. 420 (1900); Heavey v. Commercial Nat. Bank, 27 Utah 222, 75 Pac. 727 (1904); Defiance Lumber Co. v. Bank of California, 180 Wash. 533, 41 P. (2d) 135 (1935). Accord: Citizens' Union Nat. Bank v. Terrel, 244 Ky. 16, 50 S. W. (2d) 60, 64 (1932).

Text writers explicitly state the majority view as the law of impersonation where the instrument is given to the person present with the intent that he himself should receive it. BRANNAN, NEGOTIABLE INSTRUMENTS LAW (5th ed. 1932) §306; 3 R. C. L. 544, 1007; 7 C. J. 686; Notes (1923) 22 A. L. R. 1230; (1928) 52 A. L. R. 1326.

Contra: Miners' and Merchants' Bank v. St. Louis Smelting and R. R., 178 S. W. 211 (Mo. 1915); Tolman v. American Nat. Bank, 22 R. I. 462, 48 Atl. 480 (1901); Rolling v. El Paso and S. W. Ry., 127 S. W. 302 (Tex. 1910); Simpson v. Denver & R. G. R. R., 43 Utah 105, 134 Pac. 883 (1913) (However, the court said here that the intent of the instant drawer was to give the check to the true payee rather than to the impostor who was actually present, and thus distinguished this case from those following the majority rule. The facts do not warrant such a distinction.).

[3] (1929) 8 N. C. L. REV. 76 (Where payee is fictitious, and this fact is not known to the drawer, the drawer is not held liable.); (1923) 23 COL. L. REV. 495; (1923) 8 CORN. L. Q. 360; (1923) 37 HARV. L. REV. 149; (1923) 22 MICH. L. REV.

real distinction between the intent in such cases. In both, the actual condition is one of mixed or double intent. It is true that at the time the instrument is drawn and delivered the drawer intends it for the person present or for him with whom he has been in communication. But at the same time, as he believes that the impostor is the real payee, he intends the instrument for such impostor only because of his basic assumption that the impostor is in fact the true payee. Therefore, the drawer has an equal primary intention of delivering the paper to the real payee. His intentions are thus so inseparable that to say one is more dominant than the other is to make a purely arbitrary choice. Thus the cases cannot reasonably be decided upon the intent theory, and the doctrine itself resolves into a mere means of rationalization for the purpose of supporting a desired result rather than being a basis for logically reasoned decisions. It is the means to an end, not the cause of an effect.[4]

The estoppel doctrine is usually invoked along with that of intent. As between two innocent parties the one must bear the loss whose mistake proximately made such loss possible. The fallacy of this doctrine is clearly shown when its application is attempted. It is claimed that the drawer, by placing the instrument in the hands of the impostor, thereby makes it possible for him to take advantage of innocent third parties. This would certainly be true if the innocent party witnessed the actual delivery or received reliable information concerning it. But in the majority of cases the means by which the impostor obtained the instrument are unknown or purely conjectural to the subsequent holder or indorser. How then reasonably can there be any substantial connection between the negligence of the drawer and the later imposition upon an innocent person, since a bare possession, nothing more appearing, is not in itself sufficient indicia of ownership to protect an innocent purchaser?[5] It would more logically follow that the negligence of the acceptor or indorser in failing to identify properly the holder of the in-

61; (1923) 7 MINN. L. REV. 582; (1931) 5 U. OF CIN. L. REV. 212. *Contra:* (1900) 14 HARV. L. REV. 60 (forgery by agent of drawer); (1932) 6 U. OF CIN. L. REV. 463.

[4] In the "passing the buck" cases, where a drawer is not satisfied as to the identity of a payee, and instead of giving him cash, delivers to him a check drawn in the name of the real depositor, but the money is to be paid only when he has properly identified himself at the bank, the courts hold the drawer not liable. Such a result seems clearly wrong from an equitable viewpoint, since it allows the drawer to shift wilfully the responsibility from himself to another. Because the act of the drawer is intentional, he should be estopped from asserting mere negligence of a subsequent cashing party. Western Union Teleg. Co. v. Bimetallic Bank, 17 Colo. App. 229, 68 Pac. 115 (1902); Gallo v. Brooklyn Savings Bank, 199 N. Y. 222, 92 N. E. 633 (1910).

[5] BRANNAN, NEGOTIABLE INSTRUMENTS LAW (5th ed. 1932) §467; Western Union Teleg. Co. v. Bimetallic Bank, 17 Colo. App. 229, 68 Pac. 115 (1902); (1924) 30 A. L. R. 1492.

strument is the motivating cause of his own injury.[6] Therefore the doctrine of estoppel looks to be a no more satisfactory ground upon which to base the majority holding than its supplementary ground of "primary or actual" intent.

Our court apparently relied upon *Tolman v. American National Bank*[7] and Section 23 of the Negotiable Instruments Law.[8] In the Tolman case the court held that the drawer of a check, given to an impostor, was not liable on the same to a bank which cashed it. The basis for this decision was that the above holding was the common law before it had been changed in this country by decisions to the contrary, and that Section 23 was intended to bring the law on this subject back to its original status. The Rhode Island court in so holding was in error as to the status of the common law on the subject. The cases which the court relied upon to establish the so-called common law were not in point. Consequently, if there was a mistake as to what the prior existing law was, the court's interpretation of the Negotiable Instruments Law upon the basis of such law, would likewise be in error.[9]

Since the equities are evenly balanced, in respect to the rights of all parties concerned in cases of false impersonation, the result reached by the North Carolina court is probably as desirable from the equitable standpoint as that obtained under the majority rule.[10] The strongest point in favor of a result holding the drawer liable where the instrument is passed to the impostor personally is that such a holding has been the prevailing rule of law over an extended period of time.

[6] (1932) 20 Geo. L. J. 231.

[7] 22 R. I. 462, 48 Atl. 480 (1901).

[8] N. C. Code Ann. (Michie, 1935) §3003. "When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority."

[9] The fallacy of the Tolman Case and the inapplicability of Section 23 to false impersonation cases where the impostor is actually present before the drawer has been pointed out in detail. McKeehan, *A Review of the Ames-Brewster Controversy*, 41 Am. L. Reg. (N. S.) 499, 505 (1902); Brannan, The Negotiable Instruments Law with Comments and Criticisms (1908) §128.

The fact that the impostor is liable in criminal prosecution for forgery is no reason for holding that the instrument is to be treated as a forgery where it is obtained with the consent of the drawer. It should be handled as a case of fraud in a civil action. (1920) 34 Harv. L. Rev. 76, 77.

The courts distinguish between a forged check, in which case the statute is applicable, and a forged indorsement where there is an intent to transfer the property to the impostor (even though he may not be physically present) in which case the statute is not controlling. Halsey v. Bank of N. Y. and Trust Co., 270 N. Y. 134, 200 N. E. 671 (1936); Defiance Lumber Co. v. Bank of California, 180 Wash. 533, 41 P. (2d) 135, 138 (1935).

[10] A practical purpose might be served in the present case by holding the clerk of court liable in that it would tend to make public officials more careful in performing their official duties. Due to our steady increase of governmental activity, such a result could be highly beneficial.

A distinction might also be drawn between the situation where the bona fide holder is an accommodation party and where he is a holder in due course in the regular course of a business. In the latter case he is not as free to act since he is dependent to a great extent upon the public good-will for his livelihood and hesitates to do a thing that would make anyone antagonistic towards him, such as being too strict about cashing checks given in payment of sales. Generally, where practical, the courts try to promote ease in business transactions. Such argumentative advantages would not be available to one giving no consideration. Since the plaintiff in the present case was an accommodation indorser our court might use this point to distinguish the case if it were considering one where the drawee was a holder in due course.

Since the court did not mention the strong majority rule, nor an early North Carolina case squarely in accord therewith,[11] and failed in the present decision to explain clearly the basis for its result, it leaves some doubt as to what might be done with this phase of the law of false impersonation in the future.

W. C. HOLT.

Constitutional Law—Immunity of Federal Agency—Investigation of Federal Agency by State Senate.

A committee appointed by the Senate of the State of Pennsylvania to investigate the "organization, administration, and functioning of the Works Progress Administration in Pennsylvania"[1] subpoenaed several WPA officials to appear before the committee and bring with them certain official WPA records. The federal government sought to enjoin the committeemen from proceeding with the investigation. The injunction was granted as the committee had no jurisdiction to investigate the WPA, it being a federal agency.[2]

When the Works Progress Administration was established by the President in 1935 the federal government gave official assurances to the states that the former would care for all employables on relief rolls at the time of the creation of WPA if the states would care for the remaining unemployed. Federal moneys were allocated to administrative units of the WPA in each state, including Pennsylvania, and agencies were created to disburse funds to effectuate the purposes of the act. On the

[11] Elliott v. Smitherman, 19 N. C. 338 (1837). The drawer of a negotiable instrument was held liable when he handed it to the impostor personally, and the latter afterwards transferred it to an innocent third party.

[1] The Works Progress Administration was established May 6, 1935, by the President by Executive Order No. 7034, pursuant to the authority vested in him under the "Emergency Relief Appropriation Act of 1935," approved April 8, 1935, Pub. Res. No. 11, 74th Cong., 49 Stat. 115, 15 U. S. C. A. §728 note (1935).

[2] United States v. Owlett, 15 F. Supp. 736 (M. D. Pa. 1936).

faith of these assurances Pennsylvania had already appropriated a substantial sum of money for unemployment relief. This appropriation proved inadequate to serve the State's relief needs for the reason that the WPA, allegedly, had failed to live up to its side of the bargain. At the time of the attempted investigation the Legislature of Pennsylvania, at an extraordinary session in 1936, was faced with the problem of raising additional revenue for the alleviation of unemployment. The governor had demanded that the legislature impose an additional burden of $70,000,000 on the people to provide relief for the next nine months. The State and its local units had in the past made substantial contributions to the WPA and it was therefore materially interested in seeing that the WPA was being operated in a proper and efficient manner. Furthermore, the State wanted to know if the funds which it had supplied to the WPA to relieve unemployment were being expended in the interests of a political organization.[3] Also, in order to keep down to a minimum the increase in the tax load of an already heavily taxed people and to legislate intelligently in regard to relief, it was necessary for the legislature to ascertain to what extent the WPA could handle the unemployment problem. These motives, among others, seem to justify the attempted investigation. It is not difficult to see that a state would be reluctant to relinquish all control over funds contributed to the WPA.[4] Moreover, it seems that the State should be entitled to know how its funds and those of its municipal subdivisions, contributed to particular WPA projects, were being expended. Therefore, one wonders why an investigation of this character, if *bona fide,* should be denied the State.[5]

When a legislative body has occasion to acquire certain knowledge of facts pertaining to proper subjects of legislation, either branch of the legislative body, or one of its committees, has the power to summon persons to attend as witnesses any meeting which it has the power to

[3] By the WPA General Letter No. 8, March 13, 1936, sent to all State Works Progress Administrators, the Federal Administrator, Harry L. Hopkins, made it convincingly clear that the WPA was not to be operated for the political interests of any group.

[4] State participation in the WPA program is wholly voluntary. The situation is analagous to that which arose under the so-called "Maternity Act," which provided for federal appropriations to be apportioned among those states which voluntarily complied with its provisions for the purpose of coöperating with the states to reduce maternal and infant mortality. Massachusetts v. Mellon, 262 U. S. 447, 43 Sup. Ct. 597, 67 L. ed. 1078 (1923).

[5] Upon reading the reply affidavits submitted by the Senate committee (which were rejected by the court) one is convinced that John Q. Public would gladly have welcomed a general WPA exposé. The State's case was weakened by the fact that the Senate committee was informed by letter that the WPA was prepared to coöperate with the State and to supply legislative bodies thereof with such information as might have been necessary to assist them properly to design measures to meet their relief requirements.

hold, and, if the person so summoned wilfully fails to appear, he may be punished for contempt.[6] The investigatory power of a legislative body is limited to obtaining information on matters which fall within its proper field of legislation.[7]

However, it is well established that a federal instrumentality is immune from state control.[8] This principle of immunity applies to official papers and records of the federal government,[9] and prevents a state from obstructing or interfering with employees of the United States in the discharge of their official duties.[10] It was admitted that the WPA was a federal agency; hence, the Legislature of Pennsylvania could neither pass legislation dealing directly with the WPA nor investigate in a manner which would interfere with its administration. Therefore, to the extent that subpoenaing the employees of the Works Progress Administration and demanding the production of records would obstruct the operation of that federal agency, injunctive relief was proper.[11] But the court in the principal case decreed that the respondents be restrained from "conducting *any* investigation" into the Works Progress Administration. It is not difficult to conceive an inquiry initiated by a state in order to guide the legislative body in the consideration of legislation properly before it, without the aid of employees or official records of the Works Progress Administration, that would in no way interfere with the federal agency. Hence, the court's decree is broader than was absolutely necessary to protect the federal government. The blanket injunction completely guarded the WPA from the spotlight of any state legislative investigation.[12]

E. C. SANDERSON.

[6] McGrain v. Daugherty, 273 U. S. 135, 47 Sup. Ct. 319, 71 L. ed. 580 (1927); *Ex parte* Battelle, 207 Cal. 227, 277 Pac. 725 (1929); *In re* Gunn, 50 Kan. 155, 32 Pac. 470, 948 (1893); Burnham v. Morrissey, 14 Gray 226 (Mass. 1859); *Ex parte* Parker, 74 S. C. 466, 55 S. E. 122 (1906).

[7] People v. Keeler, 99 N. Y. 463, 2 N. E. 615 (1885); Commonwealth v. Costello, 21 Pa. Dist. R. 232 (1912).

[8] Dobbins v. Erie County, 16 Pet. 435, 10 L. ed. 1022 (U. S. 1842); United States v. Tarble, 13 Wall. 397, 20 L. ed. 597 (U. S. 1871); Tennessee v. Davis, 100 U. S. 257, 25 L. ed. 648 (1879); Van Brocklin v. State of Tennessee, 117 U. S. 151, 6 Sup. Ct. 670, 29 L. ed. 845 (1885); Flaherty v. Hanson, 215 U. S. 515, 30 Sup. Ct. 179, 54 L. ed. 307 (1910).

[9] Boske v. Comingore, 177 U. S. 459, 20 Sup. Ct. 701, 44 L. ed. 846 (1900); *Ex parte* Sackett, 74 F. (2d) 922 (C. C. A. 9th, 1935); 25 Op. Atty. Gen. 326 (1905).

[10] Osborne v. Bank of U. S., 9 Wheat. 738, 6 L. ed. 204 (U. S. 1824); Strayhorn, *The Immunity of Federal Officers from State Prosecutions* (1928) 6 N. C. L. REV. 123.

[11] See *In re* Debs, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. ed. 1092 (1895).

[12] Had the problem been considered as a purely political one the court might have refused to intervene. Luther v. Borden, 7 How. 1, 12 L. ed. 581 (U. S. 1849); Pacific States Teleph. and Teleg. Co. v. Oregon, 223 U. S. 118, 32 Sup. Ct. 224, 56 L. ed. 377 (1912). See Massachusetts v. Mellon, 262 U. S. 447, 483, 43 Sup. Ct. 597, 599, 67 L. ed. 1078, 1083 (1923).

Contracts—Effect of Death of Promisor.

A share-cropper died before commencing performance of his contract with defendant. Plaintiff, widow and administratrix of the deceased, requested defendant to furnish the necessary supplies and permit the two minor sons of the cropper to perform the contractual obligations. On defendant's refusal she sued for the full value of the cropper's share in the unmade crop. Recovery was denied.[1]

As to the effect of death of one party to a contract, the rules of law are of long standing. Where the contract is not personal in nature, the obligations survive the death of either party.[2] And where the agreement is personal in nature, the death of either promisor generally excuses both parties from further obligation.[3] Acceptance of these rules has been quite uniform. In application, however, there is less unanimity of opinion, because of the lack of an adequate standard for determining what contracts are, or are not, personal in nature.[4] A contract to render services as an attorney,[5] or to manage an invention,[6] or a drug store,[7] or to act as busines manager of a band,[8] or to care for and support another[9] has been held to be terminated by the death of either party. The following types of contracts have been

[1] Taylor v. Rainwater, 187 S. E. 704 (Ga. 1936).

[2] Dumont v. Heighton, 14 Ariz. 25, 123 Pac. 306 (1912); Mackey v. Clark Rig. Bldg. Co., 5 Cal. App. (2d) 44, 42 P. (2d) 341 (1935); Toland, Adm'r v. Stevenson, 59 Ind. 485 (1887); Burch v. Bush, 181 N. C. 125, 106 S. E. 489 (1921); Hall v. Durham Loan and Trust Co., 200 N. C. 734, 158 S. E. 388 (1931); *In re* Troutwine's Estate, 178 Atl. 302 (Pa. 1935); Edelen Transfer and Storage Co. v. Willis, 16 Tenn. App. 99, 66 S. W. (2d) 214 (1932); Volk v. Stowell, 98 Wis. 385, 74 N. W. 118 (1898).

[3] Givhan v. Dailey's Adm'x, 4 Ala. 336 (1842); Herren v. Harris, Cortner and Co., 201 Ala. 577, 78 So. 921 (1918); Smith v. Preston, 170 Ill. 179, 48 N. E. 688 (1897); Campbell v. Faxon, Horton and Gallagher, 73 Kan. 675, 85 Pac. 760, 5 L. R. A. (N. S.) 1002 (1906); Marvel v. Phillips, 162 Mass. 399, 38 N. E. 1117 (1894); Donlan v. City of Boston, 223 Mass. 285, 111 N. E. 718 (1916); Lacy v. Getman, 119 N. Y. 109, 23 N. E. 452 (1890); Rubin v. Siegel, 188 App. Div. 636, 177 N. Y. Supp. 342 (1919); Siler v. Gray, 86 N. C. 566 (1882); Folquet v. Woodburn Public Schools, 146 Ore. 339, 29 P. (2d) 554 (1934); Blakeley v. Sousa, 197 Pa. 305, 47 Atl. 286 (1900).

[4] Stacy, C. J., in Burch v. Bush, 181 N. C. 125, 127, 106 S. E. 489, 490 (1921), stated, "The line of demarcation between a personal contract, which is terminated by death, and one which the personal representatives of the deceased are required to fulfill is not very clearly defined. The reasons for this become obvious and apparent upon a moment's reflection. Two elements which enter into the making of a contract, namely, the intention and understanding of the parties, are not subject to any fixed standard of 'weights and measures.' They are invisible and intangible things, variable with time and place, and undeterminable by any constant or set formula. Hence, no hard and fast rule can be established for their ascertainment."

[5] Clifton v. Clark, Hood and Co., 83 Miss. 446, 36 So. 251 (1904); Sargent v. McLeod, 209 N. Y. 360, 103 N. E. 164, 52 L. R. A. (N. S.) 380 (1913).

[6] Marvel v. Phillips, 162 Mass. 399, 38 N. E. 1117 (1894).

[7] Campbell v. Faxon, Horton and Gallagher, 73 Kan. 675, 85 Pac. 760, 5 L. R. A. (N. S.) 1002 (1906).

[8] Blakeley v. Sousa, 197 Pa. 305, 47 Atl. 286 (1900).

[9] Siler v. Gray, 86 N. C. 566 (1882).

held to survive the death of either party: a contract of tenancy,[10] a contract to repeair,[11] to take a certain amount of water for a fixed term,[12] to erect a building.[13] Thus, since the problem is one of interpretation, it is to be suspected that the decisions are often influenced by what the court considers the better policy.

The confusion in the cases centers around the rule that the death of either party to a personal contract generally excuses both parties from further performance. If the obligations are personal as to both parties, and they frequently are, the death of either should dissolve the contract. Where the obligations of the deceased party alone are personal, the contract is properly held to have been terminated by death.[14] The chief difficulty arises in those cases in which the duties of the surviving party are personal, and those of the deceased are not. In the comparatively small number of cases in which this issue is directly involved perhaps the greater number hold that a contract personal as to one party is necessarily so as to the other.[15] The more sensible point of view is taken by a small minority.[16] This latter group has been ably supported by Professor Williston.[17] These courts consider the obliga-

[10] Alsup v. Banks, 68 Miss. 664, 9 So. 895, 13 L. R. A. 598 (1891); Becker v. Walworth, 45 Ohio St. 169, 12 N. E. 1 (1877).

[11] Chamberlain v. Dunlop, 126 N. Y. 45, 26 N. E. 966 (1891).

[12] Drummond v. Crane, 159 Mass. 577, 35 N. E. 90, 23 L. R. A. 707 (1893).

[13] MacDonald v. O'Shea, 58 Wash. 169, 108 Pac. 436, Ann. Cas. 1912A 420 (1910).

[14] Givhan v. Dailey's Adm'x, 4 Ala. 336 (1842); Smith v. Preston, 170 Ill. 179, 48 N. E. 688 (1897); Marvel v. Phillips, 162 Mass. 399, 38 N. E. 1117 (1894); Donlan v. City of Boston, 223 Mass. 285, 111 N. E. 718 (1916); Folquet v. Woodburn Public Schools, 146 Ore. 339, 29 P. (2d) 554 (1934).

[15] Campbell v. Faxon, Horton and Gallagher, 73 Kan. 675, 85 Pac. 760, 5 L. R. A. (N. S.) 1002 (1905); Harrison v. Conlan, 92 Mass. 85 (1865); Homan v. Redick, 97 Neb. 299, 149 N. W. 782 (1914); Lacy v. Getman, 119 N. Y. 109, 23 N. E. 452 (1890); Arming v. Steinway, 35 Misc. Rep. 220, 71 N. Y. Supp. 810 (1901); Kenny v. Doherty, 230 N. Y. 44, 129 N. E. 201 (1920); Casto v. Murray, 47 Ore. 57, 81 Pac. 883 (1905); Yerrington v. Green and Another, 7 R. I. 589 (1863).

[16] In Toland, Adm'r v. Stevenson, 59 Ind. 485 (1877), the estate of the deceased employer was held liable for services performed after his death. The court then added that if the plaintiff had died before the completion of the contract, his death would probably have discharged it, because the services, which perhaps required personal skill, could not have been performed by his executor. 3 WILLISTON, CONTRACTS (1st ed. 1924) §1941; RESTATEMENT, CONTRACTS (1932) §459, illust. 11; (1930) 6 IND. L. J. 122; Kelly v. Thompson Land Co., 112 W. Va. 454, 164 S. E. 667 (1932). Other cases bearing on this view are Hughes v. Cross, 166 Mass. 61, 43 N. E. 1031 (1896); Barnett v. Towne, 196 Mass. 487, 82 N. E. 698 (1907); Pugh v. Baker, 127 N. C. 2, 37 S. E 82 (1900); Hall v. Durham Loan and Trust Co., 200 N. C. 734, 158 S. E. 388 (1931); Volk v. Stowell, 98 Wis. 385, 74 N. W. 118 (1898).

[17] "The assumption frequently made in the cases that because the contract of the employee is personal, that of the employer necessarily must be, seems wholly unfounded. There is no necessity logical or legal for both the promises in a bilateral contract to be personal in character because one is. The promise of a painter to paint a landscape is discharged by his physical inability to paint, but the death or illness of one who has contracted to buy the painting will not free his

tions of both parties to the contract. If they find that the personal representatives of the deceased party could perform the contract as well as could the deceased, the agreement is held to survive.

Even though a contract is not personal in its nature, the parties may, by express stipulation, exclude substituted performance. The death of either would, of course, then terminate the agreement.[18] But where the contract, personal by nature, contains an express provision that it is to be binding upon the personal representatives of either of the parties, the death of one of the parties thereto has been held to discharge the agreement.[19]

The decisions in North Carolina approve, in general, the aforementioned rules. But the agreement survives if the obligations of the deceased party are not of a personal nature. Thus the North Carolina court has in effect, though not expressly, followed the argument of Professor Williston. For example, in the recent case of *Hall v. Durham Loan and Trust Co.*,[20] an employer's estate was held liable for a clerk's salary accruing after the death of the employer, the court stating that the contract was not personal on the part of the deceased. The same point of view has been expressed in other cases.[21]

In the principal case, though it should have done so, the court did not base its decision upon whether or not the contract was personal in nature. Instead, the following factors were considered decisive: the fact that the cropper could not show full performance, that his illness

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estate from liability. Similarly in contracts of employment the nature of the employer's undertaking should be considered in each case. If the character of the employment was such that the employer had free power to delegate the oversight of the work to another and no personal coöperation on his part is needed for the proper fulfilment of the contract, there seems no reason why his death should affect the continued obligation of the contract." 3 WILLISTON, CONTRACTS (1st ed. 1924) §1941.

[18] See Schultz and Co. v. Johnson's Adm'r, 44 Ky. 497, 501 (1845); Cox v. Martin, 75 Miss. 229, 239, 21 So. 611, 613 (1897); Siler v. Gray, 86 N. C. 566, 570 (1882).

[19] Marvel v. Phillips, 162 Mass. 399, 38 N. E. 1117 (1894); Browne v. Fairhall, 213 Mass. 290, 100 N. E. 556, 45 L. R. A. (N. S.) 349 (1913); Cutler v. United Shoe Machinery Corp., 274 Mass. 341, 174 N. E. 507 (1931); Homan v. Redick, 97 Neb. 299, 149 N. W. 782 (1914); *cf. In re* McIntosh's Estate, 182 Iowa 23, 159 N. W. 223 (1916).

[20] 200 N. C. 734, 158 S. E. 388 (1931) (plaintiff was clerk in a tobacco warehouse).

[21] In Pugh v. Baker, 127 N. C. 2, 37 S. E. 82 (1900), a farm laborer, having performed his contract in part after his employer's death, sued the employer's estate for wages. The court did not mention the personal or non-personal nature of the agreement, but based its decision merely upon the ground that the contract survived the death of the employer. That the contract was not personal as to the deceased would seem to be implicit in the decision. In the case of Burch v. Bush, 181 N. C. 125, 106 S. E. 489 (1921), the court held that a contract to cut timber and manufacture it into lumber was not personal in its nature and survived the death of the promisor, as such seemed to be the intentions of the parties. See also Siler v. Gray, 86 N. C. 566 (1882).

and death afforded no legal excuse for nonperformance, and that the defendant landlord, in refusing to allow the cropper's sons to perform, had not committed a breach. Had the contract been treated as not personal, its obligations would have survived. Then a refusal by defendant to allow the personal representatives to perform would have constituted a breach. Thus the questions of full performance and nonperformance would have been irrelevant. But if the contract had been deemed personal, death of the cropper would have discharged it. Then defendant's refusal to permit the children to perform would not have been a breach. Here, likewise, the questions of full performance and nonperformance would not have been relevant. However, ample justification for the actual decision probably may be found in the many personal factors that influence the making of a contract between a landlord and his share-cropper.[22] Apparently in the instant case the court was influenced by the personal nature of the agreement. To have articulated this point would have clarified its cloudy and uncertain manner of reasoning.

C. M. IVEY, JR.

Contracts—Gold Clause.

Under the terms of a lease made in 1890, lessee agreed to pay 139,320 grains of pure gold quarter-yearly, or at the lessor's option $6,000 in currency. Until December, 1933, the lessor accepted currency payments under the option. In that month, however, he notified the lessee to deliver gold or to pay $10,158.75 in currency, the alleged market value of the gold at the time. Lessee made five payments of this amount, protesting each time the excess above $6,000 and finally in February 1935 demanded a refund. Thereupon the lessor notified the lessee to deliver gold bullion in London or vacate. The lessee brought this action for relief, claiming the right to pay $6,000, and asking that the lessor be enjoined from attempting to collect more than this amount and from demanding gold. The court rejected the contention of the lessee that since Congress had declared gold clauses illegal,[1] lessee could perform under the alternative provision for currency regardless of the lessor's option. The court further held that the Joint Resolution of June 5, 1933, declaring gold clauses illegal did not apply to the contract before it which was a commodity and not a money contract.

[22] In Pope v. Dickerson, 205 Ala. 594, 595, 89 So. 24, 25 (1921), the court stated, "The contract was therefore based upon a personal trust in the skill and competency of the intestate as a farmer, and it was fatally breached by his early and complete physical disability by reason of a chronic dropsy, to discharge his obligations under the contract. This disability withdrew from him that personal superintendence of the preparation of the soil and the planting and cultivation of the crops which was necessary for success and mutual profit. . . ." *Cf.* California Packing Corp. v. Lopez, 207 Cal. 600, 279 Pac. 664, 64 A. L. R. 1418 (1929).

[1] 48 Stat. 113 (June 5, 1933), 31 U. S. C. A. §463 (Supp. 1935).

The lessee was ordered to pay and the lessor to accept $10,158.75 quarterly.[2]

The contention of the court that the contract involved was one which called for payment in gold as a commodity seems to rest on a firm legal foundation.[3] The use of gold or silver clauses in leases, notes, and other contracts is not rare in business nor controversy concerning them unusual in law.[4] Very few of these are gold bullion contracts. The cases, without exception, have held, or said by dictum, that gold bullion and gold dust are commodities and not money.[5] This view has been acquiesced in by legal writers[6] and legislators.[7] But in spite of this weight of authority the case is not as simple as the learned Judge held it to be.[8] The difficulty arises when we consider the purposes of the Joint Resolution of June 5, 1933, and the true nature of the gold clause whether it be for gold dollars of a given weight and fineness or for bullion or dust.

[2] Emery Bird Thayer Dry Goods Co. v. Williams, 15 Fed. Supp. 938 (W. D. Mo. 1936).

[3] The other aspects of the case are not considered in this comment.

[4] See Note (1895) 29 L. R. A. 512 for an extensive treatment of cases involving various types of gold or silver obligations.

[5] Essex Co. v. Pacific Mills, 14 Allen 389, 396 (Mass. 1867). "The contract by which the defendant engaged to deliver two hundred and sixty ounces of silver, of a specified fineness . . . , was a contract for the delivery of a commodity, and not for the payment of money. The alternative which it allowed, to pay or deliver an equivalent in gold was not adopted; and if it had been, it merely provided for the substitution of another commodity." Bank of Commonwealth v. Van Vleck, 49 Barb. 508, 522 (N. Y. 1867). "Therefore, . . . when a person promises for any valid consideration to return gold or silver, instead of the national currency, he is bound to return those specific things, precisely as he would be bound to return a specific quantity and quality of cotton. . . . There can be no possible difference." Roberts v. Smith, 58 Vt. 492, 494, 4 Atl. 709, 710 (1886). In holding a note payable in bullion to be non-negotiable the court said: "The instrument declared upon was not even a promise to pay a given sum in specific articles, but only to pay 'one ounce of gold'. It stands for consideration as though it were a promise to pay one bushel of wheat." In discussing a gold coin contract the U. S. Supreme Court recently distinguished these holdings. Norman v. B. and O. R .R., 294 U. S. 240, 302, 55 Sup. Ct. 407, 413, 79 L. ed. 885, 899 (1934). "We are of the opinion that the gold clauses now before us were not contracts for payment in gold coin as a commodity, or in bullion, but were contracts for the payment of money."

[6] Even in considering the Gold Clause Cases, bullion has been thought of as excepted. John P. Dawson, *The Gold Clause Decisions* (1935) 33 MICH. L. REV. 647, 669. "Contracts for delivery of a specified quantity of gold bullion (in other words contracts dealing with gold as a commodity) would clearly fall outside the scope of the resolution."

[7] Illustrative of this are the debates in Congress on gold legislation in the spring of 1933. 77 CONG. REC. 4902 (1933). "Mr. Fletcher—A dollar is a dollar under the decree of the Government whether it has one gold content or another. Let us keep away from commodity contracts. They throw no light on the issue here." *Id.* at 1894. "Mr. Connally—I might suggest that when a debtor and a creditor make a contract with reference to money—I am not now speaking of bullion contracts; I am speaking of contracts calling for dollars—. . ."

[8] Emery Bird Thayer Dry Goods Co. v. Williams, 15 Fed. Supp. 938, 946 (W. D. Mo. 1936). "Perhaps it was unnecessary to have written so much concerning this simple case. It is a simple case."

In the three Gold Clause cases[9] the U. S. Supreme Court held that the Joint Resolution of June 5, 1933, was constitutional. One purpose of the legislation was to prevent gold clause creditors from reaping unearned benefits from the devaluation of the dollar and thereby embarrassing Congress in the exercise of its powers over money.[10] If gold bullion contracts are made an exception to the law, it would seem that this purpose could easily be defeated as to all future contracts,[11] [12] and the Resolution rendered in future effect a nullity. The question upon which the case should depend is whether a gold bullion contract can be brought within the class of obligations "payable in money of the United States."[13] [14]

To do this, two things are necessary: first to recognize that the real purpose of the gold clause is not to insure the delivery of a commodity —gold—but to protect the creditor against unfavorable fluctuations in the value of currency;[15] and second to give judicial sanction to the economic fact that gold is money.[16] Gold whether coined or uncoined

[9] Norman v. B. and O. R. R., 294 U. S. 240, 55 Sup. Ct. 407, 79 L. ed. 885 (1934); Nortz v. U. S., 294 U. S. 317, 55 Sup. Ct. 428, 79 L. ed. 907 (1934); Perry v. U. S., 294 U. S. 330, 55 Sup. Ct. 432, 79 L. ed. 912 (1934). These cases involved the more usual types of gold clauses, *i.e.* those calling for a sum of money in gold.

[10] U. S. CONST. Art. I, §8. John P. Dawson, *The Gold Clause Decisions* (1935) 33 MICH. L. REV. 647, 676. "The value of gold has been deliberately and artificially raised by the Government, in the course of a concerted effort to induce a general rise in prices. . . . The gain to creditors would represent an increment owed not to their own industry or to an equivalent value contributed by them, but to governmental action undertaken in the public interest."

[11] That Congress did intend its effect to extend into the future is made clear in the Resolution itself: "Every obligation heretofore or hereafter incurred. . . ." 48 Stat. 113(a) (June 5, 1933), 31 U. S. C. A. §463(a) (Supp. 1935).

[12] There is, of course, the additional consideration of undue hardship on a few debtors when others are being relieved. However, in accepting the lease on those terms, the lessee knew that it was accepting a different and perhaps harder contract than was usual.

[13] 48 Stat. 113 (June 5, 1933), 31 U. S. C. A. §463(b) (Supp. 1935). "As used in this resolution the term obligation means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States."

[14] (1936) 22 WASH. UNIV. L. Q. 124 suggests that the case should have been controlled by the consideration that since the Government would confiscate gold if it were paid and allow the lessor only $6,000 in currency in return, therefore the real equivalent of the gold is that amount. This, however, would not bring gold bullion contracts within the scope of the Joint Resolution which, it is submitted, would be a more desirable result.

[15] Post and Willard, *Power of Congress to Nullify Gold Clauses* (1933) 46 HARV. L. REV. 1225, 1239. "This construction gives to the contract the primary effect the parties intended which is to protect the creditor against fluctuations in the value of money. The Supreme Court has recognized this to be the primary purpose of the gold clause. What the creditor wants is not gold coin but gold value."

[16] 18 R. C. L. 1266, 1267. "It (money) is a generic term and covers everything which by common consent represents property, and passes as such currently from hand to hand, whether it be . . . the gold and silver of the world or the paper money of modern Europe and America." The confusion which results from the close identity of gold and money is well illustrated by two decisions of the Supreme

not only is the basis of our monetary system, but before 1933 circulated to some extent in both forms as money. "The almost universal use of gold as a standard of value in international transactions impresses it to a peculiar degree with the quality of money. The power to maintain the parity of all kinds of U. S. currency would need only a slight extension to include this regulation of parity with gold bullion, the basic international standard."[17] By recognizing judicially the peculiar monetary quality of gold it is possible to bring gold bullion contracts, which are truly value and not commodity obligations, within the scope of the Joint Resolution, thus relieving the few bullion debtors of their excessive burdens and making it unnecessary for Congress to enact further legislation to protect its monetary policy from such contracts.

JAMES W. DORSEY.

Insolvency—Receivership—Types of Insolvency.

Plaintiffs brought suit in a Pennsylvania state court against the Conneaut Lake Company for services performed. While suit was in progress a simple contract creditor of the Lake Company filed a bill in a federal district court praying that a receiver be appointed for the company. The bill alleged that the company was unable to meet the claims of creditors. The company admitted this allegation and consented to the appointment. Defendant was named receiver.[1] Plaintiffs subsequently had judgment in their action in the state court.[2] They petitioned the district court for leave to issue execution on this judgment, asking that the receiver's appointment be declared void for want of jurisdiction because the bill upon which it was made did not allege that the Lake Company was insolvent. *Held:* though the figures in the bill showed assets in excess of liabilities the appointment was proper. A corporation unable to pay its current obligations is insolvent in the equitable sense, and an allegation of such insolvency is sufficient for the purpose of appointment of a receiver.[3]

Court of the U. S. In Bronson v. Rodes, 7 Wall. 229, 250, 19 L. ed. 141, 146 (U. S. 1868) it said: "A contract to pay a certain number of dollars in gold or silver coins is, therefore, in legal import nothing else than an agreement to deliver a certain weight of standard gold, to be ascertained by a count of coins. . . . It is not distinguishable, as we think, in principle from a contract to deliver an equal weight of bullion." Again in Gay v. U. S., 13 Wall. 358, 20 L. ed. 606 (U. S. 1871) the court held that gold coins were articles of commerce and therefore commodities.

[17] John P. Dawson, *The Gold Clause Decisions* (1935) 33 MICH. L. REV. 647, 678.

[1] Peoples-Pittsburgh Trust Co. v. Hirsch, 65 F. (2d) 972 (C. C. A. 3d, 1933).

[2] Ketchum v. Conneaut Lake Co., 309 Pa. St. 224, 163 Atl. 534 (1932).

[3] Ketchum v. McDonald, 85 F. (2d) 436 (C. C. A. 3d, 1936). The bill further alleged that a receiver was necessary to preserve the property as a unit to sustain its value and prevent loss to creditors.

"Insolvency" has two meanings: (1) insufficiency of assets, at a fair valuation, to pay all outstanding obligations, and (2) inability to meet obligations as they mature in the usual course of business. Such inability might exist although the value of the assets greatly exceed the amount of liabilities; for instance, the assets might not be readily salable. The first is the definition adopted by the National Bankruptcy Act,[4] and is in accord with popular understanding. In fields of law other than bankruptcy the second is frequently used, especially in equity, and is embodied in the Uniform Sales Act.[5] In determining solvency or insolvency as a ground for the appointment of a receiver, however, equity has employed neither definition to the exclusion of the other,[6] occasionally using (1),[7] more often (2),[8] sometimes both.[9] Few cases arise in which (1) is asserted as the sole type of insolvency. Creditors have no reason to complain so long as their claims are being met, and stockholders are hopeful that the corporation will work its way out of difficulty, or are disinterested because they have no expectancy of sharing in any surplus resulting from liquidation. In those cases purporting to apply (1) alone in appointing a receiver (2) is usually present also, though the latter may remain undiscussed.[10] Courts hesitate to liquidate a corporation paying its debts as they mature notwithstanding the fact that its assets are less than its liabilities. Where both conditions obtain a decree of insolvency seems unavoidable.

There is usually room for doubt in determining when a corporation should be declared insolvent by definition (2).[11] The claims allegedly

[4] 35 Stat. 838 (1909), 11 U. S. C. A. §1 (1927).

[5] U. S. A. §76.

[6] Sill v. Kentucky Coal and Timber Development Co., 11 Del. Ch. 93, 97 Atl. 617 (1916).

[7] Nowell v. International Trust Co., 169 F. 497 (C. C. A. 9th, 1909); Parsons v. Monroe Mfg. Co., 4 N. J. Eq. 187 (1842); Wood and Nathan Co. v. American Machine and Mfg. Co., 62 Atl. 768 (N. J. Eq. 1908).

[8] Atwater v. American Exchange Nat. Bank, 152 Ill. 605, 38 N. E. 1017 (1893); Merriman and Wasson Co. v. Eagle Pencil Co., 199 N. E. 243 (Ind. 1936); Uhl v. Wexford Co., 275 Mich. 712, 267 N. W. 775 (1936); Dep't Store Co. v. Gaus-Langenberg Hat Co., 17 N. M. 112, 125 Pac. 614 (1912); Illinois Refining Co. v. Illinois Oil Co., 130 Okla. 27, 264 Pac. 904 (1928); Davis v. Consolidated Coal Co., 41 Wash. 480, 84 Pac. 22 (1906).

[9] Whitmer v. Wm. Whitmer and Sons, 11 Del. Ch. 222, 99 Atl. 428 (1916); Shaw v. Standard Piano Co., 86 N. J. Eq. 137, 97 Atl. 281 (1916).

[10] It is not enough that assets are less than liabilities if the corporation "be still prosecuting its line of business, with reasonable prospect and expectation of continuing to do so; in other words, if it be in good faith what is called a going business." Corey v. Wadsworth, 99 Ala. 68, 78, 11 So. 350, 353 (1892); see Kynerd v. McCarthy, 3 F. (2d) 32, 33 (C. C. A. 5th, 1924); Parsons v. Monroe Mfg. Co., 4 N. J. Eq. 187 (1842) (test 1 was applied, but (2) was present).

[11] "Insolvency is not always a fact to be ascertained by simple arithmetic, leaving no room for doubt or difference of opinion. It is very rarely indeed that the financial situation of a corporation is so clearly defined that it continues solvent up to a given instant, and is immediately thereafter insolvent. In almost all such cases there is a period of struggle during which effort is made to rescue the enter-

unpaid may be in dispute.[12] The funds of the corporation may be ample to meet maturing claims, but rendered unavailable by a foreign receivership, instituted on other grounds.[13] The corporation may be able to pay current expenses, but only by borrowing money,[14] or by drawing on the individual resources of the directors.[15] The number of situations which may arise under varying commercial conditions and in different kinds of business make formulation of definite rules impossible. Circumstances constituting insolvency for one corporation may be considered only temporary financial embarrassment for another.[16] The real question to be determined is whether there is a reasonable prospect that the business may be continued successfully and the creditors ultimately satisfied.[17] Naturally the courts are more prone to declare insolvent a corporation which has ceased to do business than one still actively trying to carry out the purpose for which it was organized.[18] The mere willingness of the corporation to be adjudged insolvent may influence the court to decree accordingly, even in cases where the oppo-

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prise from threatened insolvency." Coffman v. Maryland Publishing Co., 167 Md. 275, 284, 173 Atl. 248, 252 (1934); see 15 FLETCHER ON CORPORATIONS (Rev. ed. 1932) §7360.

[12] If the dispute is serious, and it appears to the equity judge that the claim is thereby rendered doubtful, it should not be considered. McKee v. Standard Minerals Corp., 18 Del. Ch. 97, 156 Atl. 193 (1931). If insolvency is determined on the basis of disputed claims, and claims are later disallowed by the receiver, the rejection will defeat the decree upon which appointment was made. Manning v. Middle States Oil Co., 11 Del. Ch. 93, 137 Atl. 79 (1927). In Illinois Refining Co. v. Illinois Oil Co., 130 Okla. 27, 264 Pac. 904 (1928) appointment was made on bill of non-judgment creditor whose claim was being disputed in another action, and subsequently was defeated in entirety. Illinois Oil Co. v. Illinois Refining Co., 12 P. (2d) 535 (Okla. 1932).

[13] That officers are unable to disburse assets does not render the corporation insolvent, for creditors can present their claims to the receiver in foreign jurisdiction. Bruch v. National Guarantee Credit Corp., 13 Del. Ch. 180, 116 Atl. 738 (1922).

[14] The fact that debtor borrows money to pay obligations does not prevent a finding of insolvency, but such borrowing is consistent with solvency, since it shows that debtor still has credit. Coffman v. Maryland Publishing Co., 167 Md. 275, 173 Atl. 248 (1934); Catlin v. Vichachi Mining Co., 73 N. J. Eq. 286, 67 Atl. 194 (1907); *cf.* Cassels Mills v. First Nat. Bank of Gadsden, 187 Ala. 325, 65 So. 820 (1914); see Alpha Hardware and Supply Co. v. Ruby Mines Co., 97 Cal. 508, 275 Pac. 984 (1929); Menager v. Exchange Nat. Bank, 159 Okla. 278, 15 P. (2d) 35 (1932).

[15] A bank dependent upon the individual resources of its directors for payment of its debts, is insolvent. Oakley v. Paterson Bank, 2 N. J. Eq. 173 (1839).

[16] Though unable to pay its debts immediately, a corporation may not be insolvent if its assets will shortly become more valuable and salable by reason of nearby improvements. Brenton and McKay v. Peck, 39 Tex. Civ. App. 224, 87 S. W. 898 (1905).

[17] Corey v. Wadsworth, 99 Ala. 68, 11 So. 350 (1892); Whitmer v. Wm. Whitmer and Sons, 11 Del. Ch. 222, 99 Atl. 428 (1916); Cook v. East Trenton Pottery Co., 53 N. J. Eq. 29, 30 Atl. 534 (1894).

[18] Chisolm v. Carolina Agency Co., 88 S. C. 438, 70 S. E. 1035 (1911); see Cook v. East Trenton Pottery Co., 53 N. J. Eq. 29, 30 Atl. 534 (1894).

site result might have appeared equitable.[19] This approach is reflected in state statutes authorizing appointment of equity receivers in cases where a corporation is insolvent, or has suspended business for want of sufficient funds to continue operations, and it does not appear that business may shortly be resumed without prejudice to creditors and stockholders.[20]

With attention focused upon the desirability of continuing or discontinuing the corporation, courts not infrequently lose sight of the consequences of the particular type of insolvency then before them. Appointments are sometimes made upon petition of a stockholder where both types of insolvency are present, and the petitioner is therefore without equitable interest in the resultant liquidation.[21] Only where the insolvency is of type (2), and there is reason to believe that some surplus will remain after payment of creditors should a stockholder be entitled to institute a receivership.[22] This laxity in scrutinizing the equitable standing of the plaintiff is further illustrated by consent appointments on bills of non-judgment creditors.[23] Often appointments are made without clear proof that the company is so insolvent that a receiver is necessary to prevent loss to creditors.[24] Mere showing of inability to meet obligations in the usual course of business does not show need for a receiver. Should not the creditor be required to show insolvency in the sense that the corporation does not have sufficient property accessible to legal process to satisfy its creditors—especially where the other creditors are eager to proceed by execution, or to foreclose their security? A few courts have thought so,[25] though the majority of cases have required no such showing, either ignoring the

[19] Commerce Trust Co. v. Woodbury, 77 F. (2d) 478 (C. C. A. 8th, 1935); Davis v. Consolidated Coal Co., 41 Wash. 480, 84 Pac. 22 (1906); *cf.* Rogers v. Bancokentucky, 18 Del. Ch. 23, 156 Atl. 217 (1931).

[20] CALIF. CODE (Deering, 1933 Supp.) §564; OHIO CODE ANN. (Throckmorton, 1929) §11894; N. J. COMP. STATS. (1925 Supp.) c. 47, §65.

[21] Parsons v. Monroe Mfg. Co., 4 N. J. Eq. 187 (1842); Wright v. American Finance and Securities Co., 85 N. J. Eq. 181, 96 Atl. 387 (1915).

[22] Gila Water Co. v. Witbeck, 29 F. (2d) 175 (C. C. A. 9th, 1928).

[23] Cassels Mills v. First National Bank of Gadsden, 187 Ala. 325, 65 So. 820 (1914); Dep't Store Co. v. Gaus-Langenberg Hat Co., 17 N. M. 112, 125 Pac. 614 (1912); Illinois Refining Co. v. Illinois Oil Co., 130 Okla. 27, 264 Pac. 904 (1928); cf. Harkin v. Brundage, 276 U. S. 36, 48 Sup. Ct. 268, 72 L. ed. 457 (1928); Delaney Producing and Refining Co. v. Crystal Petroleum Products Corp., 88 Cal. 784, 264 Pac. 521 (1928); Edison v. Fleckenstein Pump Co., 249 Mich. 234, 228 N. W. 705 (1930). North Carolina allows appointments on suits of non-judgment creditors even where debtor objects. Summit Silk Co. v. Kinston Spinning Co., 154 N. C. 422, 70 S. E. 820 (1911).

[24] Commerce Trust Co. v. Woodbury, 77 F. (2d) 478 (C. C. A. 8th, 1935); Illinois Refining Co. v. Illinois Oil Co., 130 Okla. 27, 264 Pac. 904 (1928); Davis v. Consolidated Coal Co., 41 Wash. 480, 84 Pac. 22 (1906).

[25] Brenton and McKay v. Peck, 39 Tex. Civ. App. 224, 87 S. W. 898 (1905). In Cassels Mills v. First Nat. Bank of Gadsden, 187 Ala. 325, 65 So. 820 (1914) the court recognized the desirability of requiring such proof by petitioner, but held it waivable.

need for it entirely or tacitly assuming that it could have been made. This burden of proof would not render it impossible for creditors to demonstrate inadequacy of legal process in all cases where the fair value of the debtor's assets exceeds its liabilities because experience demonstrates that property brings less than its fair value on forced sale. Logically it should be sufficient to show that when the debtor's assets are assessed at their fair value the amount by which they exceed liabilities is small in proportion to the total capital invested in the business, the required margin varying directly with the amount so invested.[26] Too real to be ignored is the difficulty of predicting precisely what a forced sale may bring; but a fair degree of accuracy is possible and some articulate attempt seems equitably indispensable. To the objection that denial of receivership may precipitate a race of creditors it seems sufficient to answer that unless the majority of creditors have joined in the petition, if there is reasonable probability that all creditors may obtain satisfaction by legal process such a race would be financially more satisfactory than a too-expensive equity receivership.

PAUL F. MICKEY.

Statute of Frauds—Oral Contracts to Convey or Devise—Part Performance—Damages.

The original English Statute of Frauds received no welcome in the Court of Chancery. The statute was aimed at controlling the jury, and Chancery had no jury. For nearly three centuries before the enactment of the statute, the Chancellor had protected the vendee who had changed his position in reliance upon an oral land contract,[1] by awarding him specific performance. Hence the doctrine that part performance will lift the bar of the statute.[2]

The rules regarding part performance, as they have developed in jurisdictions outside of North Carolina, are as variant as their results are unpredictable. Uniformly, part payment is insufficient to remove the bar of the statute.[3] Roughly, the variations as to how much part performance is sufficient to make specifically enforceable the oral contract may be categorized as follows: (1) The English doctrine of posses-

[26] In Cook v. East Trenton Pottery Co., 53 N. J. Eq. 29, 30 Atl. 534 (1894) the court said a margin of $50,000 for a corporation with assets of $550,000 would be insufficient, though a $25,000 margin was adequate for a corporation having assets of $65,000.

[1] BARBOUR, *History of Contract in Early English Equity*, 4 OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY (1914), parts reprinted in 2 COOK, CASES ON EQUITY (2d ed. 1932) 1-4.

[2] The statute of frauds was designed to prevent fraud and not to perpetrate fraud. POMEROY, SPECIFIC PERFORMANCE OF CONTRACTS (3d ed. 1926) §71.

[3] Purcell v. Coleman, 4 Wall. 513, 18 L. ed. 435 (U. S. 1866); Fulton v. Jansen, 99 Cal. 587, 34 Pac. 331 (1893); Glass v. Hulbert, 102 Mass. 24 (1869); Sleeth v. Sampson, 237 N. Y. 69, 142 N. E. 355 (1923).

sion.[4] (2) Part payment plus possession.[5] (3) Possession and valuable improvements.[6] (4) The Massachusetts fraud rule:[7] To allow the defendant to rely on the statute after the plaintiff has acted on the faith of the oral contract so that he would be irreparably injured would be to permit the statute to be made an instrument of fraud. (5) The New York rule:[8] The acts of part performance must refer to *the* contract as alleged in the complaint. The purpose of this rule is to preserve the policy of the statute which is considered more important than the hardship to the plaintiff. The latter seems a determining factor under the Massachusetts rule. This doctrine denies relief even though the plaintiff would suffer a great hardship.[9] (6) Acts of part performance must be referable to *a* contract.[10] (7) Doctrine of part performance rejected in its entirety.[11]

[4] There are only a few square holdings on the point. In most of the cases the facts reveal in addition acts other than the mere taking of possession. Buckmaster v. Harrop, 13 Ves. Jr. 456, 6 Rev. Rep. 132 (1807); Neale v. Neale, 1 Keen 672 (1837); Miller v. Finlay, 5 L. T. Rep. N. S. 510 (1861); Redden v. Jarmon, 16 L. T. Rep. N. S. 449 (1867); Bradley v. Loveday, 98 Conn. 315, 119 Atl. 147 (1922); Steenrod v. Wheeling Ry., 27 W. Va. 1 (1885).

[5] Townsend v. Vanderwerker, 160 U. S. 171, 16 Sup. Ct. 258, 40 L. ed. 383 (1895); Merrell v. Witherby, 120 Ala. 418, 23 So. 994 (1898); RESTATEMENT, CONTRACTS (1932) §197. Many states have the doctrine that either part payment or possession alone will not take the case out of the statute. That the combination of these facts makes either of them more effective to create an equity in favor of the purchaser is open to question. WALSH, EQUITY (1930) §78; HANDLER, CASES ON VENDOR AND PURCHASER (1933) 30 points out that the English doctrine was adopted by the preliminary draft of the RESTATEMENTS OF CONTRACTS (1932) §194, but that the final draft adopted the rule of possession plus part payment.

[6] Calanchini v. Branstetter, 84 Cal. 249, 24 Pac. 149 (1890); Andrew v. Babcock, 63 Conn. 109, 26 Atl. 715 (1893); Cutsinger v. Ballard, 115 Ind. 93, 17 N. E. 206 (1888); Atkinson v. Akin, 197 Mich. 289, 163 N. W. 1024 (1917); RESTATEMENT, CONTRACTS (1932) §197.

[7] Burns v. Daggett, 141 Mass. 368, 6 N. E. 727 (1886). Pomeroy points out that the reason for granting specific performance where the vendee cannot be given adequate damages is to prevent fraud. POMEROY, SPECIFIC PERFORMANCE OF CONTRACTS (3d ed. 1926) §104.

[8] Phillips v. Thompson, 1 Johns. Ch. 131 (N. Y. 1814) (The rule is clearly stated, but language in subsequent cases makes doubtful whether the acts must refer to *the* contract or merely *a* contract.); Wooley v. Stewart, 222 N. Y. 347, 118 N. E. 847 (1918); Burns v. McCormick, 233 N. Y. 230, 135 N. E. 273 (1922); Plunkett v. Bryant, 101 Va. 814, 45 S. E. 742 (1903); POMEROY, SPECIFIC PERFORMANCE OF CONTRACTS (3d ed. 1926) 107n. §107, (2) ("If this were the true rule, then the whole doctrine of enforcing a verbal contract which has been part performed, would rest upon a most vicious reasoning in a circle, since the acts of part performance would be relied on to prove the agreement, while their character *as* acts of part performance would at the same time be proved by the agreement.").

[9] Burns v. McCormick, 233 N. Y. 230, 135 N. E. 273 (1922) (plaintiff gave up his home and sold out his business in reliance upon the promise of defendant).

[10] Bradley v. Loveday, 98 Conn. 315, 119 Atl. 147 (1922).

[11] Dean v. Cassiday, 88 Ky. 572, 11 S. W. 601 (1889); Fox v. Stanford, 13 Smedes & M. 93 (Miss. 1849); Barnes v. Brown, 71 N. C. 507 (1874); Goodloe v. Goodloe, 116 Tenn. 253, 92 S. W. 767 (1905).

At first North Carolina[12] in *Ellis v. Ellis*[13] held that part performance would justify a decree of specific performance. The court argued that if there were no valid contract the possession of the vendee made him a trespasser and certainly the vendee could show he entered by agreement in order to defend the action of trespass.[14] Therefore, he could show the same agreement for any other purpose. On rehearing the court reversed itself and held that a conveyance should not be ordered because the court could not admit oral proof of the contract.[15] Since this decision the court has consistently refused to decree specific performance at the suit of either the vendee[16] or vendor,[17] though the oral contract to convey has been partly performed.

Though his contract is unenforceable, the purchaser in North Carolina is not entirely without remedy. In the long course of decisions the court has evolved a palliative which is usually fairly adequate. Where the purchaser has paid the consideration to the vendor, he is entitled to recover this.[18] It would be inequitable to permit the vendor to keep both the land and the consideration paid. Where the vendee enters and makes improvements upon the property,[19] he is entitled to recover the

[12] The North Carolina statute of frauds here involved is to be found in N. C. CODE ANN. (Michie, 1935) §988. For an earlier discussion of the problem treated herein see (1922) 1 N. C. L. REV. 48.

[13] 16 N. C. 180 (1828) (The court took the position that no mischief could arise from its construction of the statute since the doctrine of part performance would be limited to those cases where the acts were unequivocally referable to *the* contract.).

[14] The argument that the vendee would be exposed to liability for trespass is without merit as the vendee is at least a tenant at will, Harris v. Frink 50 N. Y. 24 (1872), or a licensee, Drake v. Wells, 93 Mass. 141 (1865), and it would be quite impossible for the vendor to hold him as a trespasser.

[15] Ellis v. Ellis, 16 N. C. 341 (1829).

[16] Allen v. Chambers, 39 N. C. 125 (1845); Plummer v. Adm'r of Owens, 45 N. C. 254 (1852); Barnes v. Teague, 54 N. C. 278 (1854); Ballard v. Boyette, 171 N. C. 24, 86 S. E. 175 (1915).

[17] Hall v. Misenheimer, 137 N. C. 183, 49 S. E. 104 (1904).

[18] Chambers v. Massey, 42 N. C. 286 (1851); Murdock v. Anderson, 57 N. C. 77 (1858); Capps v. Holt, 58 N. C. 153 (1859); Barnes v. Brown, 71 N. C. 508 (1874); Smith v. Stewart, 83 N. C. 406 (1879); Wilkie v. Womble, 90 N. C. 254 (1863); Fortesque v. Crawford, 105 N. C. 29, 10 S. E. 910 (1889); Durham Consolidated Land and Improvement Co. v. Guthrie, 116 N. C. 381, 21 S. E. 952 (1895) (If the vendor indicates to the vendee his willingness to convey, providing the vendee pays the balance on the purchase price, and the vendee delays unreasonably in fulfilling such condition, the vendee cannot recover the money he has paid because the defendant admits the contract. This is true even though the vendor is presently unable to convey. The reason for the holding was based upon the fact that it would have been unreasonable to require defendants to hold their property in an unproductive state until it suited the pleasure of the plaintiffs to make the first move.); Vick v. Vick, 126 N. C. 123, 35 S. E. 257 (1900); Ford v. Stroud, 150 N. C. 362, 64 S. E. 1 (1909); Ballard v. Boyette, 171 N. C. 24, 86 S. E. 175 (1915); Carter v. Carter, 182 N. C. 186, 108 S. E. 765 (1921).

[19] The cost of the improvement to the vendee is immaterial. Daniel v. Crumpler, 75 N. C. 184 (1876); North v. Bunn, 128 N. C. 196, 38 S. E. 814 (1901); Johnson v. Armfield, 130 N. C. 575, 41 S. E. 705 (1902).

vendor's gain but not his (the vendee's) loss.[20] The vendor's gain is the enhanced value of the premises by reason of the improvements.[21] Were he not allowed to recover this the vendor would be unjustly enriched. If the vendor agrees to pay for the improvements placed upon the land it is held that his promise is not invalid under the statute.[22]

For the time the vendee was in possession he must pay a reasonable rent.[23] This is determined by what the land would have rented for in

[20] Ellis v. Ellis, 16 N. C. 398 (1830); McCracken v. McCracken, 88 N. C. 273 (1882) (Where the vendor has no desire to use the improvements and is willing for the vendee to remove them the vendee can recover nothing.); Jordan v. Furnace Co., 126 N. C. 143, 35 S. E. 247 (1900) (If the premises have not been improved the vendee can recover nothing, although he might have been put to considerable expense.); Chambers v. Massey, 42 N. C. 286 (1851) (The vendee is entitled only to compensation for improvements made by him on the premises before filing suit, or before he was informed that the vendor would not convey the premises to him under the contract.); North v. Bunn, 128 N. C. 196, 38 S. E. 814 (1901); Johnson v. Armfield, 130 N. C. 575, 41 S. E. 705 (1902) (Nor is he entitled to compensation for betterments placed on the land before the contract to convey was made. A promise to convey after the improvements were made could not have induced him to put them there. It is the inducement that gives the equitable right to reimbursement for them.); Wood v. Tinsley, 138 N. C. 507, 51 S. E. 59 (1905) (The vendee can assert no equity against a subsequent purchaser for value holding under a duly registered deed, and who bought even with notice of the vendee's equity. In such a case the holder of the registered title would have no record notice of the oral contract to convey.); Kivett v. McKeithan, 90 N. C. 106 (1883); Richmond & Danville R. R. v. Durham & Northern Ry. and Raleigh & Gaston R. R., 104 N. C. 658, 10 S. E. 488 (1889) (If the plaintiff is a licensee, he is not entitled to compensation for the revocation of the license.).

[21] Baker v. Carson, 21 N. C. 381 (1836); Albea v. Griffin, 22 N. C. 9 (1838); Plummer v. Adm'r of Owens, 45 N. C. 254 (1852); Love v. Neilson, 54 N. C. 339 (1854); Winton v. Fort, 58 N. C. 251 (1859); Pitt, Adm'r v. Moore, 99 N. C. 85, 5 S. E. 389 (1887); Fortesque v. Crawford, 105 N. C. 29, 10 S. E. 910 (1889); Vann, Ex'r v. Newsom, 110 N. C. 122, 14 S. E. 519 (1891); Fields v. Moody, 111 N. C. 353, 16 S. E. 239 (1892); Luton v. Badham, 127 N. C. 96, 37 S. E. 143 (1900); Kelly v. Johnson, 135 N. C. 647, 47 S. E. 674 (1904); Ford v. Stroud, 150 N. C. 362, 64 S. E. 1 (1909); Ballard v. Boyette, 171 N. C. 24, 86 S. E. 175 (1915); Smithdeal v. McAdoo, 172 N. C. 700, 90 S. E. 907 (1916); Ferrell v. Mining Co., 176 N. C. 475, 97 S. E. 386 (1918); Carter v. Carter, 182 N. C. 186, 108 S. E. 765 (1921); Perry v. Norton, 182 N. C. 585, 109 S. E. 641 (1921); Union Central Life Ins. Co. v. Cordon, 208 N. C. 723, 182 S. E. 496 (1935).

[22] Houston v. Sledge, 101 N. C. 640, 8 S. E. 145 (1888); Ferrel v. Mining Co., 176 N. C. 475, 97 S. E. 386 (1918). Were the agreement treated as a contract to sell the improvements, it would seem the promise would be invalid unless in writing. This is true as a contract to sell the improvements appears to be a contract to sell an interest in land.

[23] Albea v. Griffin, 22 N. C. 9 (1838); Chambers v. Massey, 42 N. C. 286 (1851); Capps v. Holt, 58 N. C. 155 (1859); Smith v. Stewart, 83 N. C. 406 (1879); Fortesque v. Crawford, 105 N. C. 29, 10 S. E. 910 (1889); Durham Consol. Land and Improvement Co. v. Guthrie, 116 N. C. 382, 21 S. E. 952 (1895); Vick v. Vick, 126 N. C. 123, 35 S. E. 257 (1900); Luton v. Badham, 127 N. C. 96, 37 S. E. 143 (1900); Ford v. Stroud, 150 N. C. 362, 64 S. E. 1 (1909); Union Central Life Ins. Co. v. Cordon, 208 N. C. 723, 182 S. E. 496 (1935); Hedgepeth v. Rose 95 N. C. 42 (1886). Where the vendee goes into possession under an oral contract to convey in consideration of companionship and support, the vendor is entitled to rent only from the date of demand for possession, and not from the time the vendee took possession. His contract in the inception was a

its condition as the vendee received it.[24] To allow the vendor rent on the value of the improved land would be permitting him to profit by repudiating the contract. Where the vendee is in possession and the vendor brings ejectment, before he is entitled to relief the vendor must first return the consideration paid and compensate the vendee for the improvements placed upon the land.[25]

Where the vendor elects to recognize the oral contract to convey, the vendee can not recover for improvements. In such a case the vendee has no option, but must take a conveyance or nothing at all.[26] The contract is not void except at the instance of the party who is permitted to and does plead the statute.

The vendee's recovery does not depend upon whether the vendor admits or denies the contract. At one time, when the vendee sued for specific performance, or in the alternative, the return of the consideration and compensation for improvements, and the vendor denied the contract and pleaded the statute of frauds, the vendee could recover nothing, as the court would not admit proof of the contract when the defendant denied it. However, if the vendor admitted the contract but pleaded the statute the vendee could recover the consideration paid and compensation for improvements.[27] Under this doctrine the vendee's recovery depended merely upon the pleadings of the vendor. Fraudulent practices would obviously result from such a rule and it is fortunate that the rule has been abolished.[28]

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gratuity and cannot be changed into a debt. The case is not analogous to one in which a person enters into possession under an oral contract of purchase which is later repudiated. There the transaction is a nullity, and the parties are put *in statu quo* as far as may be. Defendants possession up to demand was not a nullity, but rightful and legal, and as no compensation was to be given for the use it cannot now be required.

[24] Pass v. Brooks, 125 N. C. 129, 34 S. E. 228 (1899).

[25] Baker v. Carson, 21 N. C. 381 (1836); Albea v. Griffin, 22 N. C. 9 (1838); Daniel v. Crumpler, 75 N. C. 184 (1876); Pass v. Brooks, 125 N. C. 129, 34 S. E. 228 (1899). A few cases merely give the vendee a lien on the premises for the amount due him. Tucker v. Markland, 101 N. C. 422, 8 S. E. 169 (1888); Fields v. Moodey, 111 N. C. 353, 16 S. E. 239 (1892) (no writ of possession issued until payment by agreement of parties); North v. Bunn, 122 N. C. 766, 29 S. E. 776 (1897).

[26] Foust v. Shoffner, 62 N. C. 242 (1860); Green v. N. C. R. R., 77 N. C. 95 (1877); Syme, Adm'r v. Smith, Adm'r, 92 N. C. 338 (1884); Durham Consol. Land and Improvement Co. v. Guthrie, 116 N. C. 383, 21 S. E. 952 (1895).

[27] Dunn v. Moore, 38 N. C. 364 (1844); Sain v. Dulin, 59 N. C. 196 (1862); McCracken v. McCracken, 88 N. C. 273 (1882). Seemingly inconsistent with the equitable rule is the fact that none of the cases controverts the vendee's right to recover in a court of law whatever money may have been paid in furtherance of the contract on his part. Dunn v. Moore, 38 N. C. 364 (1844).

[28] Luton v. Badham, 127 N. C. 96, 37 S. E. 143 (1900) (Justice Douglas dissenting at p. 104: No cases allow recovery for improvements where the vendee has surrendered possession.); Love v. Atkinson, 131 N. C. 544, 548, 42 S. E. 966, 967 (1902); Ford v. Stroud, 150 N. C. 362, 365, 64 S. E. 1, 3 (1909); Perry v. Norton, 182 N. C. 585, 588, 109 S. E. 641, 643 (1921).

Where one orally contracts to convey or devise land in consideration of services and later breaches the contract the vendee may recover the reasonable value of his services if he has performed his part of the agreement.[29] It is often difficult to ascertain the value of such services and the relationship of the value of the land to the value of the services presents a problem. The value of the land sheds some light on the vendor's estimate of the value of the services and is admissible, but it is not controlling.[30]

In *Redmon v. Roberts*[31] suit was brought by an illegitimate child against her father's estate for his failure to fulfill a promise to her mother to leave plaintiff a share in his estate equal to that of his legitimate children in consideration of the mother's foregoing bastardy proceedings. The court by dictum stated the rule of damages would be the value of the property agreed to be devised. The benefit to the intestate could not be measured in money, and there appears to be no way to determine the amount of recovery in such a case except by the standard fixed by the parties to the contract. Such a rule when confined within its proper limitations would unquestionably be a satisfactory method of determining damages. Unfortunately, the rule was applied in *Hager v. Whitener*[32] where there was an action for damages for failure to devise land in consideration of services. The doctrine should have no applicability in such a case as the value of the services can more easily be computed. The court apparently has lately reverted to its former position[33] and now holds that the value of the land is merely some evidence of the value of the services whether the action be either for

[29] Whetstine v. Wilson, Adm'r, 104 N. C. 384, 10 S. E. 471 (1889); Andrews v. Andrews, 122 N. C. 352, 29 S. E. 351 (1898); Lipe v. Houck, 128 N. C. 115, 38 S. E. 297 (1901); Tussey v. Owen, 139 N. C. 457, 52 S. E. 128 (1905); Failcloth v. Kenlaw, 165 N. C. 228, 81 S. E. 299 ((1914); Patterson v. Franklin, 168 N. C. 75, 84 S. E. 18 (1915); McCurry v. Purgason, 170 N. C. 463, 87 S. E. 244 (1915); Deal v. Wilson, 178 N. C. 600, 101 S. E. 205 (1919); Hayman v. Davis, 182 N. C. 563, 109 S. E. 554 (1921); Perry v. Norton, 182 N. C. 585, 109 S. E. 641 (1921); Brown v. Williams, 196 N. C. 247, 145 S. E. 233 (1928); Grantham v. Grantham, 205 N. C. 363, 171 S. E. 331 (1935); Lipe v. Trust Co., 207 N. C. 794, 178 S. E. 665 (1935); Norton v. McLelland, 208 N. C. 137, 179 S. E. 443 (1935).

[30] Faircloth v. Kinlaw, 165 N. C. 228, 81 S. E. 299 (1914); see Tussey v. Owen, 139 N. C. 457, 461, 52 S. E. 128, 129 (1905).

[31] 198 N. C. 161, 165, 150 S. E. 881, 885 (1929).

[32] 204 N. C. 747, 169 S. E. 645 (1933). The court stated plaintiff was not suing on *quantum meruit* but was suing for breach of contract. If the action is for breach of contract it is based upon the assumption that there is a valid contract, and if the court assumes that, it is recognizing the agreement is valid at law but not in equity. The contract is void according to the statute. The action should be allowed only as in *quantum meruit*.

[33] Hager v. Whitener, *supra* note 33 has not been expressly overruled by subsequent decisions. None of the later cases, however, have followed it. It may be

damages[34] or specific performance.[35] If the plaintiff were permitted to recover the value of the land without regard to the value of the services the court would be practically allowing a recovery for breach of contract void under the statute.

Thus it becomes apparent that the North Carolina doctrine has the virtue of carrying into effect the actual purpose of the statute of frauds. Unlike the many states which have departed from the letter of the statute only to turn to an unpredictable doctrine of part performance, this state has evolved a reasonably predictable course of action. But this policy, as most others, has its disadvantages. Although in the ordinary run of cases a quasi-contractual recovery for benefits conferred by the purchaser is substantially adequate, in hard cases he will suffer from it. For example, if in consideration of the vendor's promise to convey land by will, the purchaser disposes of a profitable business enterprise and takes care of the defendant thereafter, his recovery is limited to the value of the services performed. For the loss of the business the purchaser in North Carolina is left "holding the bag."

C. C. BENNETT.

Suretyship—Property Surety.

Plaintiff signed her husband's note as accommodation surety, and with the joinder of her husband executed a mortgage on her separate property as security. On default, the mortgage was foreclosed and the husband, with his own money, purchased at foreclosure sale. *Held:* husband took no title for himself, the land being impressed with a constructive trust in favor of his wife as he owed the duty to indemnify her as surety.[1]

Where one mortgages or pledges his separate property to secure the debt of a third person, the courts are uncertain whether the property pledged[2] or the owner of such property[3] is to be called the surety. They

distinguished from later cases on the ground that the action was for breach of contract, and not in *quantum meruit*.

[34] Lipe v. Trust Co., 207 N. C. 794, 178 S. E. 665 (1935); Norton v. McLelland, 208 N. C. 137, 179 S. E. 443 (1935).

[35] Grantham v. Grantham, 205 N. C. 363, 171 S. E. 331 (1933).

[1] Speight v. Trust Co., 209 N. C. 563, 183 S. E. 734 (1936).

[2] *In re* Blanchard, 253 Fed. 758 (D. N. J. 1918); Price v. Reed, 124 Ill. 317, 15 N. E. 754 (1888); Gahn v. Niemcewicz, 11 Wend. 312 (N. Y. 1833); Hinton v. Greenleaf, 113 N. C. 6, 18 S. E. 56 (1893).

[3] Cross v. Allen, 141 U. S. 528, 12 Sup. Ct. 67, 35 L. ed. 843 (1891); Spear v. Ward, 20 Cal. 659 (1862); Eberhart v. Eyre-Shoemaker, 70 Ind. App. 658, 134 N. E. 227 (1922); Matthews v. Matthews, 128 Me. 495, 148 Atl. 796 (1930); Knight v. Whitehead, 26 Miss. 245 (1853); Stevens v. First Nat. Bank, 117 Okla. 148, 245 Pac. 567 (1926); Fowler v. Barlow, 102 Vt. 99, 146 Atl. 77 (1929); Leffingwill v. Freyer, 21 Wis. 392 (1867).

agree that the absence of personal liability will not prevent a principal-surety relationship.[4] It is sometimes stated generally that the property surety occupies the same position as a personal surety.[5] However, there are situations where a personal surety would be liable but property standing as surety would not, and vice versa. Thus, if a person sign on the face of a negotiable note to accommodate the maker and add the word "surety" after his signature, a binding extension of time by the holder to the maker has been held not to discharge the surety under the Negotiable Instruments Law, since he is a party "primarily" liable and does not have the defenses available to a party "secondarily" liable under Negotiable Instruments Law, §120, which defenses include a binding extension of time.[6] No such reasoning could operate to preclude property standing as surety from being discharged, for such property could not be called a "party" to the instrument, "primarily" liable or otherwise. Again, in some jurisdictions, a married woman cannot become a personal surety for her husband, but can hypothecate her separate property on his behalf.[7] While a material alteration of the instrument will discharge a personal surety thereon,[8] a mortgage or pledge given by a third party as security is not discharged where the alteration was without fraudulent intent, as the mortgage will remain good for the original debt of which the altered instrument was merely evidence.[9]

There are, on the other hand, many situations in which the law as to personal and property surety is the same. Where the Negotiable Instruments Law is not involved, the property so pledged or mortgaged is released from the obligation by a binding extension of time without the owner's consent,[10] except where the creditor honestly believes that the pledge security belongs to the debtor.[11] A release of any additional security held by the creditor will discharge the property standing as surety to the extent of the prejudice to its owner.[12] Also, it appears

[4] Schiska v. Shramm, 151 Ore. 647, 51 P. (2d) 668 (1935).

[5] 1 BRANDT, SURETYSHIP AND GUARANTY (3rd ed. 1905) §43; ROWLATT, PRINCIPAL AND SURETY (2d ed. 1926) 8.

[6] Cellers v. Meachem, 49 Ore. 186, 89 Pac. 426 (1907); see Rouse v. Wooten, 140 N. C. 557, 53 S. E. 430 (1906). But see BRANNON, NEGOTIABLE INSTRUMENTS LAW (3rd ed. 1920) 313; 2 DANIEL, NEGOTIABLE INSTRUMENTS LAW (6th ed. 1919) §1312, n. 50.

[7] Goll v. Fehr, 131 Wis. 141, 111 N. W. 235 (1907); see 1 JONES, MORTGAGES (8th ed. 1928) §149.

[8] Neff v. Horner, 63 Pa. 327 (1869); Washington Finance Corp. v. Glass, 74 Wash. 653, 134 Pac. 480 (1913).

[9] Fowler v. Barlow, 102 Vt. 99, 146 Atl. 77 (1929); see Cheek v. Nall, 112 N. C. 370, 17 S. E. 80 (1893).

[10] Christner v. Brown, 16 Iowa 130 (1864); Hinton v. Greenleaf, 113 N. C. 6, 18 S. E. 56 (1893).

[11] See Eberhart v. Eyre-Shoemaker, 78 Ind. App. 658, 134 N. E. 227 (1922).

[12] Van Hosen v. Gelfen, 103 N. J. Eq. 234, 143 Atl. 137 (1928); Leffingwell v. Freyer, 21 Wis. 392 (1867).

that the pledgor or mortgagor should have the same right as a personal surety to give notice, either statutory[13] or under *Pain v. Packard*,[14] that the creditor sue the principal debtor before resorting to the surety's property. Or, he may file a bill in equity to compel the principal debtor to exonerate him from liability by payment, provided no rights of the creditor are thereby prejudiced.[15]

The principal is precluded from acquiring good title to the surety's property when the same is sold on foreclosure to satisfy the debt. Where the debtor buys in, as in the principal case, equity will declare the purchase void,[16] and impress the property with a constructive trust in favor of the surety, since the debtor, by his attempt to purchase, is merely paying a debt primarily his.[17]

O. W. CLAYTON, JR.

Taxation—Homestead Exemption.

Within the last three years the United States has witnessed a widespread movement for legislation and constitutional amendments exempting homestead property, in varying degrees, from taxation. The exemptions have been effected in Florida,[1] Louisiana,[2] Mississippi,[3] and Texas[4] by exempting from taxes varying amounts of the assessed val-

[13] N. C. CODE ANN. (Michie, 1935) §3967.

[14] 13 Johns. 174 (N. Y. 1816). After the debt is due surety may notify creditor to sue principal; failure discharges surety to extent of his prejudice under *Pain v. Packard;* entirely under the North Carolina statute. See Note (1928) 37 YALE L. J. 971 for states that have this doctrine by decision or by statute.

[15] Searcy v. Shows, 204 Ala. 218, 85 So. 444 (1920); Bearse v. Lebowich, 212 Mass. 344, 99 N. E. 175 (1912); Dobie v. Fidelity Co., 95 Wis. 540, 70 N. W. 482 (1897); see St. Croix Timber Co. v. Joseph, 142 Wis. 55, 124 N. W. 1049, 1052 (1910).

[16] Madgett v. Fleenor, 90 Ind. 517 (1883); see Perry v. Yarborough, 56 N. C. 66, 68, 69 (1856).

[17] Pond v. Wadsworth, 24 Ala. 531 (1854); McCollum v. Boughton, 132 Mo. 601, 34 S. W. 480 (1896); Perry v. Yarbrough, 56 N. C. 66 (1856).

[1] FLA. CONST. art. X, §7a. The first $5,000 of assessed value in every homestead, urban or rural, land and buildings, exempt from taxation by state and all local governments. Homesteads must be owned by heads of families who are citizens of and reside in the state of Florida. "Provided that the title to said homestead may be vested in such head of a family or in his lawful wife residing upon such homestead, or in both." Exemption effective 1934.

[2] LA. CONST. art. X, §4. The first $2,000 of assessed value in every homestead, urban and rural, land and buildings, exempt from taxation by the state, all parishes, all special districts, city of New Orleans, New Orleans School District, and New Orleans Levee Board. Exemption effective only to the extent that replacement revenues are provided. Homestead must be owned by the head of a family or person having a person or persons dependent upon him. Exemption effective 1935.

[3] MISS. LAWS (1935) Ex. Sess. S. B. 20. The first $2,500 of assessed value in every homestead, urban and rural, land and buildings, exempt from taxation by the state. The quantity of land not to exceed 160 acres. Exemption effective 1935.

[4] TEX. CONST. art. VIII, §1a. The first $3,000 of assessed valuation of all "resident homesteads as now defined by law," not to exceed 200 acres, exempt from taxation by state government.

uation of such property. Minnesota[5] has provided for a lower assessment rate up to the value of $4,000. West Virginia[6] provides a maximum tax rate of one per cent of assessed value, beyond which homestead property may not be taxed. In 1935 bills proposing constitutional amendments allowing tax exemptions on homesteads were considered and rejected by the legislatures of at least thirty states.[7] Constitutional amendments giving the state legislatures discretionary power to exempt homestead property to varying extents have been adopted in Arkansas,[8] North Carolina,[9] New Mexico,[10] Oklahoma,[11] and Utah.[12]

In the November election, North Carolina approved an amendment which gave the legislature power to exempt homesteads from taxation up to a tax valuation of $1,000, but did not require the legislature to grant any exemption at all. The property so exempted must be "held and used as the place of residence of the owner." The word "owner" is not defined.[13]

At least five major problems might arise in North Carolina in connection with the application of the homestead tax exemption.

1. It is exceedingly difficult to estimate the effect of homestead tax exemption on the revenue of North Carolina counties and municipal-

[5] MINN. LAWS (1933) c. 359. The first $4,000 of value in all homesteads is assessed at 25 per cent of full value, if platted or urban, and at 20 per cent if rural or unplatted. Non-homestead property is assessed at higher percentages. All governments in the state are affected. Effective 1934. The statute has been held not unconstitutional as violating uniformity clause of the state constitution. Apartment Operators' Ass'n v. City of Minneapolis, 191 Minn. 365, 254 N. W. 443 (1934). It was also held not unconstitutional as discriminating against non-resident land owners. Logan v. Young, 191 Minn. 371, 254 N. W. 446 (1934).

[6] WEST VA. CONST. art. X, §1. Homesteads taxed at not more than 1 per cent of assessed value, non-homestead property taxed at not more than 1.5 per cent if outside of and at not more than 2 per cent if within, a municipality. Homestead property must be the home occupied by the owner exclusively for residential purposes, or farm occupied and cultivated by the owner or a bona fide tenant. This exemption applies to all governments. Effective 1933.

[7] TAX BITS (now TAX POLICY) April, 1935, p. 5.

[8] ARK. CONST. amend. 23. Exemption of first $1,000 of assessed valuation from state general property taxes and city taxes. Legislature given discretion up to $2,500. Approved Nov. 3, 1936.

[9] N. C. CONST. art. V, §5; P. L. N. C. 1935, c. 444.

[10] N. M. CONST. art. VIII, §5. Up to the first $2,500 of assessed value of all homesteads at the discretion of the legislature, exempt from taxation by apparently all governments.

[11] OKLA. CONST. amend. adopted Sept. 24, 1935. The legislature is given power to fix the limits of the homestead tax exemption. Having once acted, the legislative enactment will be effective for twenty years and thereafter until repealed, and the amount of exemption may be increased but not decreased. The exemption affects all governments. For a discussion of the Oklahoma amendment, see 14 TAX MAG. 79 (1936); Oklahoma Tax Commission, bull. no. 18.

[12] UTAH CONST. art. XIII, §2. Up to $2,000 of value of all homesteads at the discretion of the legislature, exempt from taxation by apparently all governments. Approved Nov. 3, 1936.

[13] See note 9, *supra*.

ities.[14] A survey, conducted in nine North Carolina counties by local officials and compiled by the Institute of Government, found that if the full exemption of $1,000 should be granted, there would be an average loss of approximately 14.31 per cent of the total tax valuation in those counties.[15] It is quite probable that the legislature will not grant the maximum exemption at first, and if that be so, the corresponding loss of revenue will, of course, be smaller. Poorer counties will probably, on the average, suffer a greater percentage of loss in revenue than the wealthier counties.

A survey was conducted by the Oklahoma Tax Commission to determine the probable effect of the homestead tax exemption in that state. The study, carried out in each of the seventy-seven counties in Oklahoma, was made possible through the coöperation of the tax assessor and other local officials in each county. It shows an average reduction of 6.2 per cent in assessed valuation in all Oklahoma counties, if the exemption is set at $500. At a $1,000 exemption the average reduction is given at 10.1 per cent.[16] These figures are admittedly conservative. A noticeable fact is that the figures vary widely from one county to another. Therefore the revenue in some counties would be much more affected than in others.[17] In Kansas, when there was a discussion on the question, the Civic Research Institute made a study of the effect of the proposals in that state and found that, at an exemption of $1,500, counties would lose from 8 per cent to 54 per cent of their total tax revenues, and municipalities would lose from 6 per cent to 70 per cent of their total tax revenues.[18]

2. Several perplexing legal questions will probably arise. The question as to what constitutes ownership, for purposes of tax exemption, is very difficult to determine. In *Coombs v. People*,[19] the Illinois court said, "The word 'owner' as applied to land has no fixed meaning which can be declared to be applicable under all circumstances and as to any and every enactment. It usually denotes a fee simple estate, but has been defined to include one who has the usufruct, control or occupation of land, with a claim of ownership, whether his interest be an absolute fee or a less estate." Will the courts permit a person holding a life estate in land to come under the exemption? Is

[14] For analysis of the economic effect in North Carolina, see POPULAR GOV'T, 9 GUIDEBOOK SERIES (Dec. 1936).

[15] 3 POPULAR GOV'T 17 (1936); 4 POPULAR GOV'T 16 (1936).

[16] Oklahoma Tax Commission, bull. no. 18, p. 12.

[17] For a study of the effect of homestead tax exemption on the total tax to be collected in Tuscaloosa County, Alabama, see Alabama, University of. Bureau of business research. Committee on government research. Studies of Legislative Problems in Alabama. Mimeographed serv. no. 5, pt. 2.

[18] Civic Research Institute, 114 West Tenth Street, Kansas City, Mo. *The Exemption of Homesteads from Taxation*, December, 1935. Pp. 21, 25.

[19] 198 Ill. 586, 588, 64 N. E. 1056, 1057 (1902).

a person the owner of the land who is in possession under a valid and specifically enforceable contract to buy? Is the court going to consider an equitable interest in the land as ownership? These questions will have to await the decision of the North Carolina legislature and courts. The act which creates the exemption, when it sets the amount of exemption, should also define the terms used, specifying which elements of ownership are to be required. Although the legislature cannot entirely eliminate litigation on the question, it can materially aid the courts by being as specific as possible in drafting the law.

Another legal problem which may arise in connection with the question of ownership is whether a large land owner may increase his tax exemption by conveying land to various tenants or to his children and receiving purchase money mortgages in return. In that case the tenant would be the record title owner, but usually would have little possibility of paying for the land. The children would probably get the land eventually anyway as the heirs of the land owner. In the case of the tenants, the courts would probably require good faith on the part of the landowner. In any event it would be a risky procedure; for example, the land might greatly increase in value. The tenant could then resell, pay off the mortgage and take a profit.

3. A problem that has been frequently litigated in Florida since the passage of the homestead tax exemption law there concerns the effect of the law on taxes levied for payments on governmental debts incurred prior to the adoption of the amendment. It has been uniformly held that the homestead tax exemption amendment is unconstitutional in so far as it would jeopardize taxation for the payment of debts incurred prior to its adoption.[20] The same result has been reached in West Virginia.[21] Discussing this question, the Florida court in *Long v. St. John*[22] said, "The newly exempted homestead property as well as non-exempt property was taxable and subject to taxation when the bonds were issued, and such homestead property continues to be taxable proportionately for such bonded debt purposes, until otherwise lawfully provided by law, or the debt is satisfied; therefore such homestead property should be so assessed for such purposes, in the absence of a valid law providing otherwise." The Florida Supreme Court in two cases[23] has held that where new bonds were issued to refund old bonds, it was simply a continuation of the old obligation and homestead

[20] State v. Carey, 121 Fla. 515, 164 So. 199 (1935); State v. Boring, 121 Fla. 781, 164 So. 859 (1935); State v. Port of Palm Beach Dist., 121 Fla. 746, 164 So. 851 (1935); Long v. St. John, 170 So. 317 (Fla. 1936).

[21] Keeny v. Kanawha County Court, 115 West Va. 243, 175 S. E. 60 (1934).

[22] 170 So. 317 (Fla. 1936).

[23] Folks v. County of Marion, 121 Fla. 17, 163 So. 298 (1935); State v. City of Pensacola, 166 So. 851 (Fla. 1936); see also Boatright v. City of Jacksonville, 117 Fla. 477, 158 So. 42 (1934).

property was still taxable for debt service. In each of these cases it was stipulated in the resolution of the taxing unit which authorized such refunding bonds that the property which was taxable at the time of the issuance of the original bonds should continue to be taxed for debt services on the refunding bonds. This stipulation was also referred to on the face of the refunding bonds. It was pointed out in *Folks v. County of Marion*[24] that the refunding bonds could not be sold on the open market for the purpose of retiring the old bonds, but must be exchanged, as a continuation of the old obligation. But it was held in another case[25] that homestead property could not be taxed for debt service on refunding bonds which were executed prior to but delivered to the bondholders subsequent to the effective date of the adoption of the constitutional amendment. The court said that since there was no stipulation that the same property, subject to taxation for the original bonds, was to remain subject to taxation for the refunding bonds, the constitution and laws in effect when such refunding bonds were issued will control. Hence the homestead property was held exempt. The United States Supreme Court has consistently held that the states by legislation or constitutional enactments cannot impair prior contract obligations.[26]

4. Another problem arises as to the parties who have the right to bring suit. Because of the lack of cases in other jurisdictions, Florida will have to be consulted again to determine what has actually been done. Litigants are naturally divided into two groups, *i.e.* those in favor of including homestead property in assessments for tax purposes, and those against such procedure. Usually the bondholder, because he desires ample security for his bonds, and the county and municipality, because they are interested in keeping the tax rate low, and in retiring indebtedness, are the parties who favor the inclusion of homestead property. In two Florida cases,[27] bondholders were allowed to sue as relators seeking writs of mandamus to have homestead property included in a tax levy for the purpose of debt service on bonds. In each case part of the bonds were in default and the bondholders alleged there would be insufficient taxes raised if homestead property were not included in the levy. A municipality[28] successfully sued the state to have an issue of refunding bonds validated, so that the burden would not be so great on taxpayers as it would be if the original bonds had to be paid at their several maturities.

[24] 121 Fla. 17, 163 So. 298 (1935).

[25] Fleming v. Turner, 122 Fla. 200, 165 So. 353 (1935).

[26] New Orleans Gas Light Co. v. Louisiana Light Co., 115 U. S. 650, 6 Sup. Ct. 252, 29 L. ed. 516 (1885); see also U. S. CONST. ART. I, §10.

[27] State v. Boring, 121 Fla. 781, 164 So. 859 (1935); State v. Port of Palm Beach Dist., 121 Fla. 746, 164 So. 851 (1935).

[28] State v. City of Pensacola, 166 So. 851 (Fla. 1936).

On the other hand, an owner[29] of homestead property against which a tax had been levied, seeking to escape taxation, brought suit in which he joined the county tax assessor, county commissioners, an owner of non-exempt property in the county, and a holder-owner of bonds of the county, the latter two parties, members of large classes having a common interest in the subject matter of the suit, being made parties defendant by order of the court for the purpose of representing those classes. He alleged that there was sufficient non-homestead property to provide the necessary tax moneys at a proper assessment, but was unsuccessful on the merits. The court apparently assumed, without discussion, that the parties were proper.

The state's attorney in *Folks v. County of Marion*,[30] joined with a homestead owner unsuccessfully to resist a suit brought by a county for validation of refunding bonds. In North Carolina, if the Florida cases are followed, at least three parties would be able to bring suit to determine whether homestead property should be taxed for payments on bonded indebtedness incurred prior to passage of the exemption statute: (1) a person owning and occupying homestead property; (2) a holder-owner of county or municipal bonds in default; or (3) a county or municipality, under authority of Consolidated Statutes 2492 (55-57),[31] which gives a county or municipality the right to institute an action to determine the validity of bonds or refunding bonds proposed to be issued. These statutes do not permit actions to validate bonds already issued. Possibly an owner of non-homestead property would have a protectable interest because of the possibility of higher taxes.

5. The North Carolina Legislature very probably would be able, if it desired, to grant a nearly unlimited exemption to homestead property by means of the newly adopted classification amendment,[32] which requires only that taxation be uniform on each class of property taxed. This could possibly be done by assessing homestead property at, say, 25 per cent of its true value. Hence, if homesteads had already been exempted to the extent of $1,000, a homestead worth $4,000 would be exempt entirely. The assessed value of the $4,000 homestead, at 25 per cent of its true value would be $1,000. Since we have assumed an outright exemption of $1,000, the property would then be entirely exempt from taxation. It is quite possible that the North Carolina Supreme Court, perceiving the real intent of any such procedure, would hold any such legislation unconstitutional as attempting to override the maximum exemption set by the constitution. The legislature could probably enact that homestead property over and above the outright exemption shall be taxed at, say, one per cent, whereas other real property might be

[29] Long v. St. John, 170 So. 317 (Fla. 1936).
[30] See note 24, *supra*.
[31] N. C. CODE ANN. (Michie, 1935).
[32] N. C. CONST. art. VII, §9; P. L. N. C. 1935, c. 248.

taxed at two per cent. Under these circumstances a homestead assessed at $3,000 would be exempt $1,000 by outright exemption. The tax on the remaining $2,000 would be at one per cent rather than two per cent, hence, in effect the total exemption of the homestead would be $2,000, since homesteads would be taxed at one half the rate levied on other property. By reclassification the legislature could grant the substantial equivalent of tax exemption on homesteads without using the homestead amendment. By this method, however, some rate of taxation, however small, would have to be levied on homestead property over and above the outright limitation; hence, all homesteads could never be entirely exempt.

The purpose of the homestead tax exemption is to encourage home ownership. The question whether this form of encouragement is desirable may be waived. Suffice it to say that since the amendment has been passed, the legislature will probably enact a law at the next regular session fixing the amount of the exemption. Because of the popular appeal of homestead tax exemption to the people, once the legislature has granted an exemption, there is small likelihood of its being diminished. The goal of the North Carolina legislature in setting the amount of the exemption should be to set it at a point where it will help the largest number of home owners, and at the same time will do the least harm to county and municipal governments. Since a high exemption would result in a serious impairment of the functions of local government in some counties, it is submitted that the legislature should grant a relatively small exemption at first to determine the effect on municipal and county government incomes. Later the figure can be set, on the basis of actual experience, at the amount where it will do the most good and the least harm. That figure is now problematical.

James M. Verner.

Taxation—Situs of Boats.

Plaintiff, a nonresident corporation, purchased certain boats from a resident of defendant city, who had theretofore listed and paid personal property taxes thereon to the defendant city. After the purchase of the boats, plaintiff continued to use them on the sounds and rivers of this state and the commonwealth of Virginia. Plaintiff did not remove the boats to the state of its incorporation, but continued to return them each week-end to defendant city. In plaintiff's action to recover personal property taxes paid under protest to defendant on said boats, *held* the evidence was sufficient to be submitted to the jury on the question whether the boats acquired a situs within the city for purposes of taxation. Judgment was affirmed.[1]

[1] Texas Co. v. Elizabeth City, 210 N. C. 454, 187 S. E. 551 (1936) (The opinion does not state whether or not the boats were in defendant city on April 1, the tax listing date.).

The instant case is aptly illustrative of some of the difficulties which confront the courts when they are called upon to settle matters of taxation of personal property. The ancient rule expressed in the maxim *mobilia sequuntur personam, i.e.,* moveables follow the person, has in modern times, because of the increase in the amount and variety of personal property, yielded more and more to the law of the place where the property is kept and used.[2]

The general rule in regard to boats is the same as that of other tangibles,[3] and it is usually held that a vessel is taxable at the domicile of the owner unless it has clearly established another situs.[4]

In its first decisions on the taxation of boats the United State Supreme Court held that the port of registry, *i.e.,* the home port, was the situs for taxation, unless the boat had clearly established an actual situs elsewhere.[5] The more recent decisions have held that in the absence of an actual situs that the boats are taxable not at the port of registry but at the domicile of the owner.[6] To acquire an actual situs it was held that the boat must spend its time *wholly* within the "new" jurisdiction.[7] In the most recent case on this question the court staunchly held to the "domicile" rule, and even allowed the state of Kentucky to tax ocean going boats belonging to a corporation of that state, although the boats had never been in Kentucky, and because of their size could never come there.[8] This case illustrates the reluctance on the part of the court to adjudge a taxable situs for boats other than that of the owner's domicile.

The instant case is one of first impression in North Carolina. The court stated, "The *situs* of personal property for purposes of taxation

[2] Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. ed. 613 (1891); State v. Pittsburgh Plate Glass Co., 147 Minn. 339, 180 N. W. 108 (1920).

[3] For a treatment of taxation of boats see: COOLEY, TAXATION (4th ed. 1924) §453; Fischer, *The Doctrine of the Federal Courts as to the Situs of Personal Property for Purposes of Taxation* (1927) 13 ST. LOUIS L. REV. 58, 60; Moore, *The Doctrine of the Federal Courts as to the Situs of Personal Property for Purposes of Taxation* (1927) 14 VA. L. REV. 31, 37; Brandeis, *The Listing and Assessing of Property for County and City Taxes in North Carolina* (1936) 3 POPULAR GOV'T 69, 74.

[4] Ayer and Lord Ice Co. v. Kentucky, 202 U. S. 409, 26 Sup. Ct. 679, 50 L. ed. 1082 (1906); Southern Pac. Co. v. Kentucky, 222 U. S. 63, 32 Sup. Ct. 13, 56 L. ed. 96 (1911); Norfolk and W. Ry. v. Board of Public Works, 97 Va. 23, 32 S. E. 779 (1899).

[5] Hays v. Pacific Mail S. S. Co., 17 How. 596, 15 L. ed. 254 (U. S. 1855); Morgan v. Parham, 16 Wall. 471, 21 L. ed. 303 (U. S. 1873); see Old Dominion Steamship Co. v. Virginia, 198 U. S. 299, 25 Sup. Ct. 686, 49 L. ed. 1059 (1905).

[6] Ayer and Lord Ice Co. v. Kentucky, 202 U. S. 409, 26 Sup. Ct. 679, 50 L. ed. 1082 (1906); Southern Pac. Co. v. Kentucky, 222 U. S. 63, 32 Sup. Ct. 13, 56 L. ed. 96 (1911).

[7] Old Dominion Steamship Co. v. Virginia, 198 U. S. 299, 25 Sup. Ct. 686, 49 L. ed. 1059 (1905).

[8] Southern Pac. Co. v. Kentucky, 222 U. S. 63, 32 Sup. Ct. 13, 56 L. ed. 96 (1911).

is ordinarily the domicile of the owner. Where, however, the owner maintains said property in a jurisdiction other than that of his domicile, in the conduct of his business within such jurisdiction, the *situs* of said property for purposes of taxation is its actual *situs*, and not that of his domicile."[9]

Stated in the abstract, the above sentence seems on its face to be in accord with the federal cases. However, as used to explain the result reached by the court, it appears to be a modification of the rule. Whether the court thought the facts in the instant case distinguishable from the federal cases, or whether the court was attempting to modify the rule is purely conjectural. No explanation was given. With the result reached there is no quarrel, but did the court mean that it is not necessary for a boat to spend its time wholly within the new jurisdiction, or did they mean that for all practical purposes the boats here involved spent their time within this state? The opinion is far from being clear. The court was deciding a federal question, and yet it referred in no way to the federal decisions on the subject.

To support its decision the court cited one of its own recent cases involving the taxing by a county of solvent credits of a nonresident company.[10] This case held that the property had acquired a "business situs"[11] in the county and was thus taxable there. The court by citing this case attempted to draw an analogy between intangibles and boats. This is the first time that the two have been compared so far as the writer has been able to find. There are obvious differences between boats and intangibles, and the problem of the situs of each is not the same. The court does not explain the analogy.

The court in citing *Johnson Oil Company v. Oklahoma*[12] draws another analogy—this time between boats and "rolling stock." In this case the court allowed Okahoma to tax a fleet of tank cars owned by an Illinois corporation, but held that it could only tax the average number of cars habitually within the state. In the instant case the plaintiff made no objection to the amount of the assessment (which was for the full value of all the boats), but contested solely the right of defendant to tax the property at all. It would seem that the Johnson Oil Case lays down an equitable rule in that it allows a state to tax that part of the property that is actually used in the state. But in cases where the cars were regularly within both states on the same days would they be taxable in both states? Probably not. In no case should the propor-

[9] Texas Co. v. Elizabeth City, 210 N. C. 454, 456, 187 S. E. 551, 552 (1936).

[10] Mecklenburg County v. Sterchi Bros. Stores, 210 N. C. 79, 185 S. E. 454 (1936).

[11] For discussions of "business situs" see Wheeling Steel Corp. v. Fox, 56 Sup. Ct. 773, 80 L. ed. Adv. op. 809 (U. S. 1936); Comment (1935) 4 FORDHAM L. REV. 352.

[12] 290 U. S. 158, 54 Sup. Ct. 152, 78 L. ed. 238 (1933).

tionate amounts exacted by the various states total more than an assessment of the whole. Double taxation is not unconstitutional, but there is a disposition on the part of courts to disallow it.

Taxation of boats gives rise to three distinct situations: (1) Ocean going boats—To tax these boats in states other than that of the owner's domicile on any rule which used as its basis the time spent in the state or miles which the boats traveled therein would obviously be impractical. It is reasonable to assume that courts will continue to hold these boats taxable at the domicile of the owner, since any other rule would not enable a full assessment. (2) Boats spending a vast majority of time in one state with very infrequent voyages to another—There are two possibilities here. The courts might continue to use the domicile rule, or the boats might be taxable solely in the state where the overwhelming majority of time was spent. The latter rule is the more reasonable because for all practical purposes the boat would be said to have acquired an actual situs in that state. (3) Where a boat spends *most* of its time in one state, but visits one or more other states regularly—This is the situation in the instant case. One possible result, other than the one reached by our court, is that the state visited (Virginia in the instant case) would be given a proportionate amount of the assessment worked out on the principle of the Johnson Oil Case or some other similar rule, using time or mileage in the state as the means of fixing an equitable proportion. Or the courts might apply the domicile rule to this set of facts. Where the boat visits several states other than the one in which it spends the majority of the time, it is not likely that any of these several states would share in the taxation because of the impracticability of any such rule.

It is at least doubtful that the United States Supreme Court will modify the domicile rule as laid down in its previous decisions. If it does not, the instant decision cannot stand in so far as it conflicts with that rule. No implication of a tendency toward modification can be found in the opinions of the Supreme Court but in cases similar to the instant one a strict application of the domicile rule would be inequitable. A modification to some extent would be desirable.

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THE NORTH CAROLINA STATE BAR

The January meeting of the Council of the North Carolina State Bar will occur too late for inclusion of a summary of its proceedings in the February issue of the LAW REVIEW.