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Notes and Comments

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A note by Robert R. Bond, a law student in the North Carolina College for Negroes, appears in this issue.

Footnotes which contain material other than a mere listing of sources and authorities are indicated throughout this REVIEW *by an asterisk placed after the footnote number.*

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NOTES AND COMMENTS

Army and Navy—Selective Service—When Is Induction Complete?

Habeas Corpus. Petitioner contended that he was unlawfully deprived of his liberty and held for army service. He stated that he was a conscientious objector and urged that claim before his local draft board. Being overruled, he appealed to the state board; and again being denied, he presented himself at the induction center to which he had been directed. There he was given a physical examination and notified of his acceptance for service in the army and was commanded to stand and take the oath of induction. He refused, and was ordered to the guard house, and this proceeding followed.

After an interesting discussion of the petitioner's social philosophy and background, the court agreed with the draft board that he was not a conscientious objector but a combination of Socrates[1] and Mohandas

[1] Like Socrates, he "thought the law was unjust, but . . . didn't feel the call to evade it."

Gandhi,[2] and "an over-educated, egotistical, scholastic slacker." He contended that he was not finally inducted and subject to military authority till he took the oath of induction. However, it was held that he became a soldier subject to military jurisdiction when he was accepted for service by the government, irrespective of his personal desires or mental attitude. Habeas corpus denied.[3]

At another point in the opinion, the court stated that *notice* of acceptance operated as induction. Thus it is not clear whether actual notice is necessary, but, from its discussion taken as a whole, it would seem that this court would not require notice. With this, the officials of the Army and the Selective Service appear to be in full accord. Maj. Charles R. Jonas, North Carolina State Director of Selective Service, has said that after the Selective Service delivers the draftee to the induction station "The question of induction . . . is one for the army to determine. . . . Billings [petitioner] probably could have been returned to his local board by the recruiting and induction officer, and he could have been prosecuted [by the civil authorities] for refusal to submit himself for induction [which is just what the petitioner contended for]. The recruiting and induction officer decided to proceed otherwise, and apparently his procedure has met with the approval of the court."[4]

If this be the law, it is different from the law under the Selective Draft Act of 1917[5] which required notice of physical qualification for service.[6*] One case under that act, however, tends to substantiate the principal case in holding that no oath was necessary to induction;[7] but this was based on an express statutory provision that all enlistees and draftees were subject to military law from the date that their notices of call required them to report,[8] and the notices themselves contained such a statement. This applied whether or not the notice was ever actually received.[9] If the address to which the notice was mailed was correct,[10] then the mailing constituted complete notice.[11]

[2] Like Gandhi, he said if the Germans and Japanese occupied our country, he would not resist, but he would not cooperate with the invaders.

[3] *Ex parte* Billings, 46 F. Supp. 663 (D. C. Kan. 1942).

[4] Letter to the author (January 15, 1943).

[5] 40 STAT. 76 (1917), *as amended*, 40 STAT. 534 (1918), 40 STAT. 885 (1918), 40 STAT. 995 (1918), 50 U. S. C. A. p. 165 (1927).

[6*] Ver Mehren v. Sirmyer, 36 F. (2d) 876 (C. C. A. 8th, 1929). It is important to note the difference between the induction process under the act of 1940 and the act of 1917. Under the present act the draftee is inducted at the hands of the army after he presents himself at the induction center. Under the 1917 act, induction was completed at the hands of the local board before the draftee reported for active duty. After induction the inductee was mailed his notice ordering him to report on a certain date and informing him that he would be subject to military jurisdiction as of that date. However, his induction could not be complete without notice of physical qualification.

[7] Franke v. Murray, 248 Fed. 865, L. R. A. 1918E 1015 (C. C. A. 8th, 1918).

[8] Second Article of War, 41 STAT. 787 (1920), 10 U. S. C. A. §1473 (1927).

[9] United States v. McIntyre, 4 F. (2d) 823 (C. C. A. 9th, 1925).

[10] *Ex parte* Goldstein, 268 Fed. 431 (D. C. Mass. 1920).

[11] United States v. McIntyre, 4 F. (2d) 823 (C. C. A. 9th, 1925).

Neither the Selective Training and Service Act of 1940[12] nor the Service Extension Act of 1941[13] sets out the procedure for induction. Authority to prescribe the rules and regulations necessary to carry out the provisions of the act is delegated to the President. The regulations now in effect and in effect at the time the petitioner presented himself at the induction center merely provide, "At the induction center, the selected men found acceptable will be inducted into the land or naval forces."[14] There is no requirement for the giving of an oath.

There was, however, an earlier regulation,[15] to which the above is an amendment, that did provide that "An officer . . . will administer a prescribed oath to each of the men. He will then inform them that they are members of the land and [or] naval forces. . . ." This regulation was promulgated October 22, 1940. The amendment above was made December 31, 1941. Between these dates and under the authority of the first order, it was held that induction did include swearing allegiance,[16] but the petitioner's cause was heard more than nine months after the amendment was made.

This amendment, eliminating the requirement of an oath, said the court in the principal case, "undoubtedly was . . . to avoid question being raised and to avoid waste of army time and effort in resisting such improvident proceedings as the one here."[17*] However, there is a dictum to the effect that the court would be of the same opinion even if the earlier regulation were still in effect. The giving of an oath, it was said, is a mere formality. It is only required by statute to be given to voluntary enlistees.[18]

After the induction process was completed in the last war, the inductee became subject to the jurisdiction of the court martial even though his application for exemption had been improperly denied and his induction was therefore unlawful.[19] The present act provides that: "No person shall be tried by any . . . court martial . . . unless such person has been actually inducted. . . ."[20] Here lawful induction is no more a prerequisite to military jurisdiction than under the earlier act. Thus, there is no reason to suspect that the holding on this point will now be any different. Though he is not subject to military law till inducted, the registrant, and also non-registrant, is considered to have complete

[12] 54 STAT. 885 (1940), 50 U. S. C. A. Appendix, §301 *et seq.* (Supp. 1942).
[13] *Id.* §351 *et seq.*
[14] SELECTIVE SERVICE REGULATIONS (2d Ed. 1941) ¶633.9.
[15] 4 SELECTIVE SERVICE REGULATIONS §429 (1940).
[16] Stone v. Christensen, 36 F. Supp. 739 (D. C. Ore. 1940).
[17*] The writer does not necessarily agree with the court's criticism of the petitioner and feels that such criticism could well be omitted from the opinion.
[18] Article of War 109, 41 STAT. 809 (1920), 10 U. S. C. A. §1581 (1927).
[19] *Ex parte* Tinkoff, 254 Fed. 912 (D. C. Mass. 1919).
[20] Selective Training and Service Act §11 (1940), 54 STAT. 849 (1940), 50 U. S. C. A. Appendix, §311 (Supp. 1942).

knowledge of the act and of the regulations made pursuant to it,[21] and the mailing to the registrant of any communication concerned with the act constitutes notice of the contents whether or not it is ever actually received.[22] Ignorance of the law, no matter for what reason, is no excuse.[23]

After the draft board mails the registrant his notice of classification, he has five days to request an opportunity to appear before the board in person.[24] If he does not speak English, he may appear with an interpreter, but he cannot be represented by an attorney.[25] The purpose of this is probably to avoid prejudice to those unable to pay attorney's fees. From the decision of the local board, the registrant may appeal to the State Board of Appeal.[26] At that hearing the registrant has no right to appear. The decision is based wholly on the record sent up from the local board. Finally, the appeal may lie to the President in certain specified cases.[27]

On receipt of new evidence the local board may reclassify the registrant at any time before induction,[28] and the same appellate procedure lies from a reclassification as lies from the original classification.[29]

In order to minimize any hardships and injustices caused by this procedure, Government Appeal Agents[30] and Advisory Boards have been established.[31] There is an Appeal Agent for each local board. His duties are twofold: (1) to give registrants legal advice concerning appeal and (2) to protect the interests of the government by appealing any classification he thinks should be appealed. Advisory Boards, appointed by the governor of each state, have the sole function of aiding the registrant in preparing his questionnaires, claims, etc. However, the functions of these agencies are unfortunately inadequate because of the general lack of knowledge of their existence.

Even though this procedure permits a fair hearing and the decision of the local board is expressly made final except where appeal is authorized by the regulations,[32] the courts will grant review after exhaustion of the remedies provided in the act[33] in those cases where the board

[21] 1 SELECTIVE SERVICE REGULATIONS §155 (1940).
[22] *Id.* §158.
[23] Lekto v. Scott, 251 Fed. 767 (E. D. N. Y. 1918) (petitioner had inadequate knowledge of English).
[24] 3 SELECTIVE SERVICE REGULATIONS §368 (1940).
[25] *Id.* §368.
[26] *Id.* §§370-378.
[27] *Id.* §§379-381.
[28] *Id.* §387.
[29] *Id.* §388.
[30] 1 SELECTIVE SERVICE REGULATIONS §135 (1940).
[31] *Id.* §145.
[32] Selective Training and Service Act §10 (1940), 54 STAT. 893 (1940), 50 U. S. C. A. Appendix, §310 (Supp. 1942).
[33] Johnson v. United States, 126 F. (2d) 242 (C. C. A. 8th, 1942); United States v. Kowal, 45 F. Supp. 301 (D. C. Del. 1942). Same applied under 1917 act. Napore v. Rowe, 256 Fed. 832 (C. C. A. 9th, 1919). It was further held under that act that after exhaustion of the remedies, resort to the courts must be prompt.

acted arbitrarily,[34] where it had no jurisdiction[35] or where there was no evidence to support the finding of the board.[36*] Also, where a defendant is charged with violation of the Selective Service Act by failing to comply with the orders of the local board, he may defend on the same grounds.[37] However, in the last war, it was difficult to prove any of the prerequisites to judicial protection,[38] and there is no reason to believe that it will be easier now.[39]

Review by certiorari is not permitted because the functions of the draft boards are legislative and administrative and not judicial.[40] Injunction will not lie[41] because the petitioner is claiming a violation of merely personal rights and because equity will not interfere to control the action of public officials constituting inferior quasi judicial tribunals on matters within their jurisdiction. Therefore, it appears that the only course open to the aggrieved registrant is to wait until he is inducted and then sue out a writ of habeas corpus and attempt to convince the court that the board denied him a fair hearing.

The constitutionality of legislation calling for compulsory military service in time of war has many times been questioned and always sustained,[42] but the Selective Training and Service Act of 1940 is the first peace time compulsory service bill in the history of our nation. This fact has furnished new fuel for attacks on the ground of unconstitutionality. It is not doubted that Congress has the power to raise and support armies

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Two months was too long to delay. *Ex parte* Blazekovic, 248 Fed. 327 (E. D. Mich. 1918).

[34] United States v. Grieme, 128 F. (2d) 811 (C. C. A. 3d, 1942); *ex parte* Hurtflis, 245 Fed. 413 (E. D. N. Y. 1918).

[35] United States v. Newman, 44 F. Supp. 817 (E. D. Ill. 1942); United States *ex rel.* Bartalini v. Mitchell, 248 Fed. 997 (E. D. N. Y. 1918).

[36*] Application of Greenberg, 39 F. Supp. 13 (D. C. N. J. 1941); *ex parte* Platt, 253 Fed. 798 (W. D. N. Y. 1917). If there is any evidence at all to support the board, the court is without jurisdiction to review. United States v. Buttecali, 46 F. Supp. 39 (S. D. Tex. 1942).

It has been said that the court has no jurisdiction at all to review the action of the local board because it is purely administrative and not quasi judicial. Petition of Soberman, 37 F. Supp. 522 (E. D. N. Y. 1941). However, that case appears to have been based erroneously on an earlier decision that a writ of certiorari would not issue to review the classification of the board. United States *ex rel.* Roman v. Rauch, 253 Fed. 814, 816 (S. D. N. Y. 1918). The better view seems to be that the court may not substitute its own judgment for that of the draft board, but it may determine whether a fair hearing has been afforded. Micheli v. Paulin, 45 F. Supp. 687 (D. C. N. J. 1942).

[37] United States v. Newman, 44 F. Supp. 817 (E. D. Ill. 1942).

[38] *Ex parte* Kusweski, 251 Fed. 997 (N. D. N. Y. 1918).

[39] Filmio v. Powell, 38 F. Supp. 183 (D. N. J. 1941).

[40] Drumheller v. Berks County Local Board No. 1, 130 F. (2d) 610 (C. C. A. 3d, 1942). It was suggested under the 1917 act that certiorari would be appropriate. Angelus v. Sullivan, 246 Fed. 54, 68 (C. C. A. 2d, 1917). However, the courts refused to permit it. *Re* Kitzerow, 252 Fed. 865 (E. D. Wis. 1918).

[41] Angelus v. Sullivan, 246 Fed. 54, 64-66 (C. C. A. 2d, 1917); Totus v. United States, 39 F. Supp. 7 (E. D. Wash. 1941).

[42] Selective Draft Cases, 245 U. S. 366, 38 S. Ct. 159, 62 L. ed. 349, L. R. A. 1918C 361, ANN. CAS. 1918B 856 (1917).

in peace time,[43] but it has been argued that the power to compel service can only follow a declaration of war. Fortunately, this argument has not been successful.[44] The power given to Congress is plenary. There is no such limitation placed upon it. To so limit would preclude our preparing for battle, though we knew battle was to come, until it was too late. This thought is not new to our times. Alexander Hamilton writing in *The Federalist*[45] remarked that "the ceremony of a formal declaration of war has of late fallen into disuse." He then pointed out the mistake of waiting for an attack before issuing the legal warrant for protective measures.

It is only by the grace of the legislature that certain classes of citizens including conscientious objectors are exempt from service. Under the present act objectors receive more liberal treatment than under the 1917 Act in that they are not required to be members of a religious sect. However, their objections must be based on their "religious training and belief."[46] Thus, it still appears that no one without a religious belief may be exempt even though he may have the strongest moral convictions against combat. But, if one is entitled to an exemption, he does not have to prove it affirmatively before his local board as he did under the 1917 Act.[47] In fact, the present administrative tendency is to permit few exemptions to be waived, and those may only be waived in writing.[48] The requirement of military service, the "supreme and noble duty of citizenship,"[49] could, should Congress so desire, be exacted of every citizen without exception. In upholding the constitutionality of the Confederate Conscription Law, the Virginia court said: "The citizens have a right collectively and individually to the services of each other to avert any danger which may be menaced. The manner in which the service is to be apportioned among them and rendered by them, is a matter for the legislature. The government, as the agent and trustee of the people, is charged with the whole military strength of the nation, in order that it may be employed so as to ensure the safety of all."[50]

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[43] U. S. CONST. Art. I, §8, ¶12.

[44] United States v. Lambert, 123 F. (2d) 395 (C. C. A. 3d, 1941); United States v. Herling, 120 F. (2d) 236 (C. C. A. 2d, 1941).

[45] No. XXV (1787).

[46] Selective Service and Training Act §4(g) (1940), 54 STAT. 885 (1940), 50 U. S. C. A. Appendix, §301 *et seq.* (Supp. 1942).

[47] Napore v. Rowe, 256 Fed. 333 (C. C. A. 9th, 1919).

[48] Geraghty, *Judicial Protection of Individuals Under the Selective Training and Service Act of 1940* (1941) 36 ILL. L. REV. 310, 314, n. 34.

[49] Selective Draft Cases, 245 U. S. 366, 38 S. Ct. 159, 62 L. ed. 349, L. R. A. 1918C 361, ANN. CAS. 1918B 856 (1917).

[50] Burroughs v. Peyton, 16 Gratt. 470, 487 (Va. 1864).

Another of our Southern courts waxed poetic in holding that a soldier forced to serve was not a slave. It said, "Nations do not pension slaves to commemorate their valor. They do not 'give in charge their names to a sweet lyre'; nor does 'sculpture in her turn give bond in stone and ever during brass to guard and immortalize the trust.'" Story v. Perkins, 243 Fed. 997, 998-999 (S. D. Ga. 1917).

Divorce—Enforcement of Consent Judgment for Payment in Lieu of Alimony by Contempt Proceeding—Imprisonment for Debt

H instituted action against *W* for divorce from bed and board. No pleadings were filed, but a consent judgment was entered which provided *inter alia* that *H* and *W* should live separate and apart and that *H* should pay to *W*, "in lieu of alimony, or other marital rights or obligations," regular monthly installments of money until a named total had been paid. The judgment further provided that *H* should pay additional monthly installments in stated amounts to a third person as trustee, the purpose of these payments being to liquidate the principal of an obligation due by *H* and *W* and secured by a deed of trust upon the home of *W*. The preamble to the judgment recited that *W* had advanced certain moneys to *H* which he used in his business and recognized his obligation to repay. The following provision was inserted in the order: "The money payments provided herein shall be more than a simple judgment for debt. They shall be as effectively binding upon the plaintiff [*H*] as if rendered under and by virtue of the authority of Section 1667, Consolidated Statutes of North Carolina, and the failure of the plaintiff [*H*] to make the payments . . . shall . . . subject him to such penalties as may be required by the court, in case of contempt of its orders." *H*, after having made some of the payments, refused to comply further with the terms of the judgment, and was committed to jail for contempt. The North Carolina Supreme Court, two judges dissenting, upheld the commitment on appeal.[1]

This note will deal with the propriety of enforcing the judgment in the instant case by contempt proceedings.[2*]

[1] Edmundson v. Edmundson, 222 N. C. 181, 22 S. E. (2d) 576 (1942).

[2*] Three other problems were dealt with in the case:

(1) It appeared that the judgment was signed by the resident judge out of the county and out of the district in which the case was pending at a time when, by the law of rotation, he was holding the courts of another district. The court decided that under the authority of N. C. CODE ANN. (Michie, 1939) §§1436, 1438, 598 the judge could properly sign the order under such circumstances.

(2) Since the judgment was entered by consent with no pleadings ever having been filed, there was never any allegation that *H* was at fault. In the absence of such an allegation, *H* questioned the validity of the order for him to pay money. The court held that since the order was entered by consent, a judgment might be entered as to any matter of which the court had general jurisdiction, without regard to pleadings, citing Keen v. Parker, 217 N. C. 378, 8 S. E. (2d) 209 (1940); Holloway v. City of Durham, 176 N. C. 550, 97 S. E. 486 (1918).

(3) The citation for contempt was heard by a special judge. The record seemed to indicate that the hearing might have been held after the term of court for which the special judge had been commissioned had expired. In the absence of exception or assignment of error based upon contrary showing, the majority of the court did not go into the matter. Devin, J., however, wrote a dissenting opinion saying that the court should, *ex mero motu*, make investigations to determine whether or not the special judge had authority to hear the citation at the time. Seawell, J., concurred in this dissent. Edmundson v. Edmundson, 222 N. C. 181, 188, 22 S. E. (2d) 576, 581 (1942).

It is unquestioned that a judgment for alimony may be enforced in North Carolina by contempt,[3] and this is true although the judgment is entered by consent.[4] All jurisdictions in the United States, except Missouri,[5] hold that imprisonment for willful refusal to pay alimony does not violate the constitutional provisions forbidding imprisonment for debt.[6] The problem presented in the principal case is to determine whether the judgment was in reality a judgment for alimony or whether it was merely an order to pay a debt. If it was the latter, *H* could not be constitutionally imprisoned for failure to make the payments.[7]

Justice Seawell, in his dissenting opinion,[8] argued that the judgment was for the payment of a debt rather than for alimony. This appears to the writer to be the most logical interpretation of the facts and the judgment. The majority opinion proceeds upon the assumption that the agreement was made and the judgment entered solely in contemplation of providing subsistence for *W*. This, argues the majority, makes the judgment one, in effect, for alimony; and, since the parties plainly consented that the judgment should have the same force and effect as if it had been rendered under the authority of the statute providing for alimony without divorce,[9*] subjects *H* to citation for contempt upon willful failure to pay. To bring the payments to be made to the trustee in order to release the encumbrance on *W's* house within their line of reasoning, the court said that a house in which to live reasonably came within the meaning of subsistence.

If it had been true that the parties entered into the consent judgment for the sole purpose of securing means of subsistence to the wife, one could hardly take issue with the conclusion. But the judgment plainly recited that the payments were to be made "in *lieu* of alimony, or other *marital rights or obligations.*"[10] This expressly excludes alimony; it emphasizes the idea that *H* is agreeing to make the payments, not because he recognizes that the marriage relation has imposed upon him a duty to do so, but for some other reason. He probably would not have consented to a decree for alimony as such, for, being the plaintiff in the

[3] Little v. Little, 203 N. C. 694, 166 S. E. 809 (1932); Pain v. Pain, 80 N. C. 322 (1879).

[4] Dyer v. Dyer, 212 N. C. 620, 194 S. E. 278 (1937).

[5] Harrington v. Harrington, 233 Mo. App. 390, 121 S. W. (2d) 291 (1938); Coughlin v. Ehlert, 39 Mo. 285 (1866).

[6] 2 SCHOULER, MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS (6th ed. 1921) §1835.

[7] N. C. CONST. Art. I, §16.

[8] Edmundson v. Edmundson, 222 N. C. 181, 192, 22 S. E. (2d) 576, 584 (1942).

[9*] N. C. CODE ANN. (Michie, 1939) §1667, providing that if any husband shall separate himself from his wife and fail to provide her and the children of the marriage with necessary subsistence according to his means and condition in life, or if he shall be a drunkard or a spendthrift, or be guilty of any misconduct or acts that would constitute cause for divorce, either absolute or from bed and board, the wife may institute an action for alimony without divorce.

[10] Italics supplied.

action for divorce from bed and board, he probably did not consider himself the party at fault.

Why, then, did *H* agree to make the payments? Evidently they were intended at least partly to satisfy the debt, referred to in the preamble to the judgment, which *H* owed to *W*. If *H* and *W* did not intend that this judgment should discharge the indebtedness, the obligation remains unsatisfied, and *W* can maintain a contract action against *H*. Unless they intended that the debt should be discharged by the agreement on the part of *H* to make the payments stipulated in the judgment, there was no reason at all for referring to this debt in the preamble. The court failed to mention the reference to the debt at all, and has held, by implication from its holding that no debt within the constitutional prohibition was satisfied by the judgment, that the debt is still owed by *H* to *W*. This was plainly not in accord with the intent of the parties. A well-reasoned Michigan case held that an award of money which was partly for alimony and partly for other purposes could not be enforced by contempt where the amount to be paid as alimony was not plainly separated from the other money payments provided in the award.[11] Thus, since at least part of the payments agreed to by *H* were intended to discharge the debt, the judgment should not have been enforced by contempt.

Justice Seawell called attention to another defect in the court's analysis of the problem.[12] The statute under which the parties agreed that *H* might be punished for contempt has been held to apply only to independent suits for alimony.[13] The instant proceeding was begun as an action for divorce from bed and board. Therefore, if the judgment were in reality one for alimony, it could not have been awarded under that statute in such a proceeding. Nor could alimony be awarded under the statute allowing alimony to the wife upon a decree of divorce from bed and board,[14] since there was no divorce to which such alimony is incident.

The Supreme Court of Arizona held that a court could not enforce by contempt a judgment ordering a husband to make payments to a third person in order to pay off a mortgage on the house in which the wife was to live, since alimony consists of payments to be made to the wife and not to a third person.[15] These payments were of the same nature as those to be made by *H* in the principal case. Since the obligation secured by the deed of trust upon *W's* home was due by both *H* and

[11] Sturgis v. Sturgis, 300 Mich. 438, 2 N. W. (2d) 454 (1942).
[12] Edmundson v. Edmundson, 222 N. C. 181, 192, 22 S. E. (2d) 576, 584 (1942).
[13] Shore v. Shore, 220 N. C. 802, 18 S. E. (2d) 353 (1942); Silver v. Silver, 220 N. C. 191, 16 S. E. (2d) 834 (1941); Dawson v. Dawson, 211 N. C. 453, 190 S. E. 749 (1937).
[14] N. C. CODE ANN. (Michie, 1939) §1665.
[15] Collins v. Superior Court In and For Maricopa County, 48 Ariz. 381, 62 P. (2d) 131 (1936).

W, it would seem that the provision for these payments was inserted in the judgment at least partly with the idea of having *H* pay off the part of the debt due by *W*. When considered in this light, it becomes plain that this provision was also one for the payment of debt, although it may, as the court suggested, have also contemplated providing the wife with a house in which to live.

It is submitted that the court erred in upholding the citation for contempt. Although *H* consented that failure to pay might subject him to contempt proceedings under the statute relating to alimony without divorce, his consent could not give a court jurisdiction to imprison him for debt. He might just as well, as Justice Seawell suggests, "have agreed that a default in the payment of the debt should subject him to punishment under any criminal statute which may be found in the books."[16]

JOEL DENTON.

Liability of Sureties—Extent to Which Liability Established Against Principal Determines the Liability of Surety

Action by creditor against both principal and surety. The principal had made a statement admitting liability but such statement was made after default and without the principal knowing of his rights. *Held:* The surety has the right to stand on his contract and the statement of the principal is not binding on the surety.[1]

Assuming that the surety has no defenses of his own the extent to which he may use defenses of the debtor is extremely limited. Ordinarily any defense, not personal to the debtor, is available to the surety in an action on the surety bond[2] but some cases seem to hold that a surety cannot make use of a defense (of the debtor) which the principal waives or otherwise precludes himself from making.[3] While this doctrine does not apply to cases involving fraud or collusion between debtor and creditor,[4] it does seem to extend the liability of the surety, for if a

[16] Seawell, J., dissenting in Edmundson v. Edmundson, 222 N. C. 181, 192, 22 S. E. (2d) 576, 584 (1942), cited *supra* note 1.

[1] Chozen Confections, Inc. v. Johnson, 221 N. C. 224, 19 S. E. (2d) 866 (1942).

[2] The Peoples Bank v. Loven, 172 N. C. 666, 90 S. E. 948 (1916); United States Fidelity & Guaranty Co. v. Town of Dothan, 174 Ala. 480, 56 So. 953 (1911); Bear v. Duval Lumber Co., 112 Fla. 240, 150 So. 614 (1933); Greenwood v. Greenwood, 44 Ga. App. 848, 163 S. E. 318 (1932); Benson v. Alleman, 220 Iowa 731, 263 N. W. 305 (1935); Iowa Bonding & Casualty Co. v. Wagner Co., 203 Iowa 179, 210 N. W. 775 (1926); City National Bank of Columbus, Ohio v. Jordan, 139 Iowa 499, 117 N. W. 758 (1908); State v. Duggan, 102 W. Va. 312, 135 S. E. 270 (1926).

[3] Burwell v. First National Bank, 86 Ind. App. 581, 159 N. E. 15 (1928); Union State Bank v. American Surety Co., 324 Mo. 438, 23 S. W. (2d) 1038 (1930); M. S. Cohn Gravel Co. v. Southern Surety Co., 129 Okla. 171, 264 Pac. 206 (1928); Rathgaber v. Horton, 52 S. D. 436, 218 N. W. 148 (1928).

[4] City National Bank of Columbus, Ohio v. Jordan, 139 Iowa 499, 117 N. W.

debtor has a defense and takes advantage of it then in many instances the surety will be discharged. Whether or not a waiver of defense is to be binding on the surety should depend on the nature of the defense. There are defenses which go to the validity of the principal contract, *e.g.*, no consideration, illegality. If there is a failure of consideration the surety may take advantage of this fact as a defense[5] even though the principal has not set it up first. To permit a waiver of this defense by the principal to bind the surety will in effect change the surety's contract upon which he has a right to stand. It will deprive the principal of the use of the property from which it was contemplated that the principal would secure funds with which to pay his debt. The surety's liability would be for a contract which either never existed in the case of total failure of consideration or only partially existed in the case of partial failure of consideration. Where the defense is illegality the courts will refuse to grant a plaintiff their aid.[6] And to permit a waiver of such defense would in effect allow a plaintiff to recover upon a contract in violation of law. Some defenses arise, not from the nature of the bargain, but from the nature of the parties, *e.g.*, infancy. This defense, if the debtor is the infant, is not available to the surety even after the principal sets it up,[7] and rightly so, for this may be the very reason the creditor secured a surety before parting with his goods. However, there is an exception to this rule where the infant both renounces the contract and returns the consideration so that the creditor is placed in status quo;[8] but proof on this issue is on the surety and is in the end a failure of consideration. Then there are cases which present defenses arising because of wrongs perpetrated on one of the parties, *e.g.*, fraud or duress. It is not within the scope of this note to deal with defenses which accrue to the surety in his own right such as where the fraud is on him. Where there is fraud on the principal the surety may not avail himself of the defense unless the principal first sets it up.[9] If, then, this defense is waived by the principal it will not be available to the surety. The reasoning of the court is that the defense of fraud is personal to the principal and he may waive the fraud and insist on enforcement of the contract and the surety may not make this election to set up the defense for the principal. But this reasoning seems to be fallacious for the surety has

758 (1908); Taylor-Fichter Steel Const. Co. v. Fidelity & Casualty Co. of N. Y., 258 App. Div. 235, 16 N. Y. S. (2d) 218 (1940).

[5] Forsythe v. United States Fidelity & Guaranty Co., 130 Misc. Rep. 569, 224 N. Y. Supp. 330 (1927).

[6] Walker v. Graham, 228 Ala. 574, 154 So. 806 (1934); Schur v. Johnson, 2 Cal. App. (2d) 680, 38 P. (2d) 844 (1935).

[7] McKee v. Harwood Automobile Co., 204 Ind. 233, 183 N. E. 646 (1933).

[8] Lagerquist v. Bankers' Bond & Mortgage Guaranty Co., 201 Iowa 430, 205 N. W. 977, 43 A. L. R. 585 (1933).

[9] Burwell v. First Nat. Bank, 86 Ind. App. 581, 159 N. E. 15 (1928); Rathgaber v. Horton, 52 S. D. 436, 218 N. W. 148 (1928).

the right to stand on his contract.[10] This would include the right to have the contract on which he became surety as it was when he became surety which would include the defense of fraud available to the principal. The defense of duress should likewise be treated. Any other view allows the creditor to profit by his own wrong. And even if the principal is willing to waive defenses of fraud or duress as to himself and insist on enforcement of the contract the creditor should not be allowed to retain the additional security of the surety.

Assuming again that the surety has no defenses of his own, and assuming further (1) that there are admissions by the principal of his liability under a contract, (2) that the creditor has secured a judgment against the debtor, then to what extent are these binding on the surety?

First, as to admissions of liability by the principal. The availability of an admission of the principal against the surety should be determined by the nature of the admission. If the admission is urged merely as a waiver of defense, then the above discussion of waiver should be applied. But, if the admission be urged as proof that there never was any defense or that it does not now exist, a different doctrine should be applicable. While the surety may not object to the principal remaining bound,[11] he has a right to stand on his own contract.[12] In other words a surety is not bound by what a principal says he has or has not done but on the contrary he is bound by what the principal actually does.[13] The outcome of a case involving liability of surety, then will be determined by proof or disproof of the alleged liability of the principal. In this connection the competency of evidence will go a long way toward controlling the outcome of the case, and it is at once apparent how much influence an admission of liability by the principal will have if such admissions are competent. It is common to find a court saying that admissions of indebtedness by a debtor are admissible against his surety,[14] and there are cases which contain general statements that admissions of the principal are not admissible against the surety.[15] But from an examination of the

[10] Randall v. Gunter, 181 Miss. 332, 179 So. 362 (1938); Cohen v. Hurwitz, 142 N. Y. Supp. 305 (1913); State v. Duggan, 102 W. Va. 312, 135 S. E. 270 (1926).

[11] United States v. Shea-Adamson Co., 21 F. Supp. 831 (D. Minn. 1937); Van Kirk v. Adler, 111 Ala. 113, 20 So. 336 (1896); M. S. Cohn Gravel Co. v. Southern Surety Co., 129 Okla. 171, 264 Pac. 206 (1928).

[12] Randall v. Gunter, 181 Miss. 332, 179 So. 362 (1938); Cohen v. Hurwitz, 142 N. Y. Supp. 305 (1913); State v. Duggan, 102 W. Va. 312, 135 S. E. 270 (1926).

[13] Chelmsford Co. v. Demerest, 7 Gray (Mass.) 1 (1856); Kellum v. Clark, 97 N. Y. 390 (1884); Hatch v. Elkins, 65 N. Y. 489 (1875).

[14] Graves v. Aetna Insurance Co. of Hartford, Conn., 215 Ala. 250, 110 So. 390 (1927); Smith v. Republic Underwriters, 152 Kan. 305, 103 P. (2d) 858 (1940); Atlas Shoe Co. v. Bloom, 209 Mass. 563, 95 N. E. 952 (1911); Cook County Liquor Co. v. Brown, 31 Okla. 614, 122 Pac. 167 (1912); W. T. Rawleigh Co. v. Graham, 4 Wash. (2d) 407, 103 P. (2d) 1076 (1940).

[15] United States v. American Surety Co. of New York, 56 F. (2d) 734 (C. C. A. 2d,1932); Chicago Portrait Co. v. O'Nean, 6 Ga. App. 425, 65 S. E. 161 (1909);

cases admissibility seems to be determined with reference to the time the statement was made, *i.e.*, if the statement was made after a breach or default by the debtor such admissions are not competent evidence,[16] while if the statement was made during the life of the contract it is admissible.[17] The admissions after default are, in a sense, treated as hearsay,[18] and the admissions made during the formation of the contract as part of the res gestae.[19] The distinction between admissions after default and those made during the formation of the contract is understandable under the res gestae doctrine. But the reason for admitting statements made between the time of completion of the transaction and the time of default is less clear, for there appears no reason to make such statements binding on the surety since the principal is not the agent of the surety. And also there should be a rule that the principal may not act to the prejudice of his surety. Courts seem to follow the reasoning that a principal is less likely to make a statement admitting liability before default than after. But it would seem to be the reverse, for why would a person admit that he is liable as of the time of such statement more quickly than he would admit liability that is to become absolute in the future? A creditor should have to prove that a debt is owing from the principal by original evidence excluding statements of the principal made after the transacting of the business.[20]

Great Western Life Assurance Co. v. Shumway, 25 N. D. 268, 141 N. W. 479 (1913); Armstrong v. Goldberg, 190 Wash. 210, 67 P. (2d) 328 (1937).

[16] Graves v. Aetna Insurance Co. of Hartford, Conn., 215 Ala. 250, 110 So. 390 (1927) (Admissions of indebtedness by principal after being declared in default held not binding on surety); Atlanta Journal Co. v. Knowles, 24 Ga. App. 745, 102 S. E. 191 (1920) (An admission of a principal that an account was correct, due, and unpaid held not admissible in a suit against the surety, where made after the principal had been dismissed as the plaintiff's agent); Citizen's National Bank of Leighton v. Kupres, 106 Pa. Super. 164, 161 Atl. 466 (1932) (In action on note wherein defendant obtained rule to open judgment by confession, defendant's declarations, in absence of guarantor on day after alleged fraud, held properly excluded).

[17] United States v. American Surety Co. of New York, 56 F. (2d) 734 (C. C. A. 2d, 1932) (Admissions made by principal in transacting business for which surety is bound are competent evidence against surety); Scovill Mfg. Co. v. Cassidy, 275 Ill. 462, 114 N. E. 181 (1916) (Admissions made in regular course of the guaranteed business by the president and general manager of a corporation as to the amount of its indebtedness to a guarantee held competent against guarantors in suit on guaranty, although made shortly before bankruptcy).

[18] Padavic v. Vanderboom, 207 Ill. App. 600 (1917) (A statement made by the maker of a note to a collector for the payee, out of the presence of the surety, at the time of presentation of the note for payment, that he would fix the matter with the payee, is purely hearsay as to the surety). However, notice that Illinois holds admissions by the principal made in regular course of business to be admissible. Schovill Mfg. Co. v. Cassidy, 275 Ill. 462, 114 N. E. 181 (1916), cited *supra* note 17.

[19] Dietrich v. Dr. Koch Vegetable Tea Co., 56 Okla. 636, 156 Pac. 188 (1916) (Declarations and conduct of the principal become a part of the res gestae and admissible against surety, where they were made during the transaction of the business for which the surety is bound, but not otherwise).

[20] *See* Hatch v. Elkins, 65 N. Y. 489, 496 (1875).

Second, as to the effect of a judgment against the principal in an action against the surety. Here too, there is an apparent division of authority. Some courts seem to hold that judgment against the principal is not binding on the surety[21] while other cases hold it to be only prima facie evidence of a breach by the principal,[22] and still others hold that the judgment is conclusive as to the liability of the surety.[23] An analysis of these cases will reveal that judgment is binding on the surety if he is surety on a bond such as a replevin bond, while if the suretyship contract is for the faithful performance of a contract, *i.e.*, business deal, then judgment against the principal is only prima facie evidence of a breach of the principal contract. This distinction is justified, for where a person is surety on a replevin bond usually breach of the bond depends simply on the existence of a judgment against the principal. Judgments rendered on business deals are determined only on evidence produced in court by the parties. Those cases which hold that a judgment against the principal is not binding on the surety deal with exceptions to the two rules above, such as where the defense is payment,[24] where the surety is entitled to defend in his own right,[25] or where the surety obligation is for less than the judgment.[26]

While set-offs and counterclaims are not defenses it may be well to point out here that a surety, when used alone, may not avail himself of a set-off or counterclaim that a principal might use.[27] This doctrine seems to be based upon the fact that a counterclaim is an independent right of action belonging to the principal which he may or may not wish to invoke. The doctrine, however, has been extended to prohibit the surety from counterclaiming for usurious payments by the debtor[28] but North Carolina allows a surety to set-off such usurious payments.[29] It was also extended, in what appears to be a very poor decision, to a case where the defendant was surety for the return of the purchase price and the buyer had not exercised reasonable care in handling the purchased

[21] Speight Box & Panel Co. v. Ipock, 217 N. C. 375, 8 S. E. (2d) 243 (1940); J. E. McCoy & Son v. Atkins, 172 Ark. 365, 288 S. W. 886 (1927); Randall v. Gunter, 181 Miss. 332, 179 So. 362 (1938).

[22] Moses v. United States, 166 U. S. 571, 600, 17 S. Ct. 682, 693, 41 L. ed. 1119, 1129 (1896); Sauer v. Detroit Fidelity & Surety Co., 237 Mich. 697, 213 N. W. 98 (1927); *see* United States v. American Surety Co. of New York, 56 F. (2d) 734, 735 (C. C. A. 2d, 1932).

[23] Brewer v. Kirk, 256 Ky. 822, 77 S. W. (2d) 34 (1935); Giatas v. Demoulas, 271 Mass. 51, 170 N. E. 921 (1930).

[24] Randall v. Gunter, 181 Miss. 332, 179 So. 362 (1938); *see* Merrill v. Equitable Surety Co. of N. Y., 131 Misc. 541, 227 N. Y. Supp. 266, 273 (1928).

[25] Speight Box & Panel Co. v. Ipock, 217 N. C. 375, 8 S. E. (2d) 243 (1940).

[26] Moses v. United States, 166 U. S. 571, 600, 17 S. Ct. 682, 693, 41 L. ed. 1119, 1129 (1896); J. E. McCoy & Sons v. Atkins, 172 Ark. 365, 288 S. W. 886 (1927).

[27] National Surety Co. v. George E. Breece Lumber Co., 60 F. (2d) 847 (C. C. A. 10th, 1932).

[28] Savage v. Fox, 60 N. H. 17 (1880). *Contra:* Cole v. Hills, 44 N. H. 227 (1862).

[29] Peoples Bank v. Loven, 172 N. C. 666, 90 S. E. 948 (1916).

goods,[30] the court holding that the surety could not set off the amount of damage to the goods caused by such negligent handling.

In *Chozen Confections, Inc.* v. *Johnson*[31] where the admission was made by the principal after default and also without the principal having knowledge of his rights, it is submitted that the North Carolina Supreme Court has reached the only proper and just conclusion.

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[30] Graham v. Middleby, 213 Mass. 437, 100 N. E. 750, 43 L. R. A. (N.S.) 977 (1913).
[31] 221 N. C. 224, 19 S. E. (2d) 866 (1942).