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NOTES AND COMMENTS

AN AGENCY THEORY OF MECHANICS LIENS—In a recent North Carolina case,¹ a husband entered into a contract with his wife to build a theater on her own land. The wife paid the husband the full amount in advance. The plaintiff furnished materials to the husband for the building of the theater and brought suit to subject the wife's land to a lien for the amount due from the husband for the materials furnished.

If a lien for labor done and for materials furnished is to exist against an owner of land, it is clear that the lien claimant must conform to the provisions of the statute of the state where the land is.

"There is a great diversity of provisions in the statutes. . . . No two states are alike. . . . There are to be found in them several distinct plans or theories. Yet, as substantially the same

¹*Rose v. Davis* (1924) 188 N. C. 355; 124 S. E. 576.

end is sought in all of them and substantially the same constitutional and legal limitations apply everywhere, the statutes agree in substance in their more important features, though these may be stated differently."²

Ordinarily, a mechanic's lien is said to attach when the owner (1) contracts with a contractor to build on or to improve his land, or (2) consents to the contractor's making such improvements.³ When materials or labor are furnished to the principal contractor, the person furnishing them is generally regarded by the statutes as a sub-contractor⁴ and the principal contractor as the agent of the owner for the purpose of establishing privity between the owner and the sub-contractor. The lien being a creature of the statute and not of contract,⁵ furnishing materials to the principal contractor is in effect furnishing them to the agent of the owner and is sufficient to establish a privity for the purpose of the lien.

It is well settled in North Carolina that the basis for a mechanic's lien is the relation of creditor and debtor between the owner and the person furnishing labor or materials.⁶ When this relation is established then the claimant may have a lien for the amount of the debt. Judge Allen delivering the opinion of the North Carolina Court said: "The lien for labor done and materials furnished is given by statute to enforce the payment of a debt and the general principle underlying the lien laws is that the relation of debtor and creditor must exist and that there can be no lien without a debt."⁷

At this point, it may be well to consider in a general way what gives rise to the relation of creditor and debtor between the owner and the material man. Where the principal contractor has (1) a contract with the owner to improve his land, or (2) where the owner has consented to such improvements, and, in either case, a material man furnishes materials to the principal contractor, upon the latter's default in paying for the materials, the material-man "is substituted to the rights of the contractor" to the extent of his claim.⁸

² Jones, *Liens*, Vol. II, par. 1186.

³ *Brick Co. v. Pulley* (1915) 168 N. C. 371, 84 S. E. 357.

⁴ C. S., sec. 2437.

⁵ *Beach v. Huntsman* (1908) 42 Ind. App. 205, 85 N. E. 523.

⁶ *Boone v. Chalfeld* (1895) 118 N. C. 916, 24 S. E. 730; *Weathers v. Borders* (1899) 124 N. C. 610, 32 S. E. 881; *Foundry Co. v. Aluminum Co.* (1916) 172 N. C. 704, 90 S. E. 923.

⁷ 172 N. C. 704, 705.

⁸ *Brick Co. v. Pulley* (1915) 168 N. C. 371, 375, 84 S. E. 357.

It is clear that the lien does not attach by reason of the owner's contract or consent to the imposition of the lien. It seems that the essence of an arrangement between an owner and a contractor for building or making repairs on his land is that the contractor is obliged, or intended, to deal with sub-contractors in doing the work and securing materials. Therefore it seems to be correct to say that the principal contractor is the agent of the owner for the purpose of creating valid debts to which the various mechanics' lien laws attach liens. As long as there is a principal-agent relationship between the owner and the contractor, then the contractor may, by dealing with a subcontractor for work or materials, create a debtor-creditor relation between owner and subcontractor, and hence a lien may arise. This is true although the owner may prohibit dealings with a particular subcontractor or may limit the scope of the contractor's authority.⁹ What the cases mean to say is not that the owner, by contract or consent to the imposition of the lien, is liable to the lien, but that by contract or consent creates an agency, and the agent may, under certain circumstances as to notice and other statutory requisites, and acting within the apparent scope of his authority, create a debt, and thus enable the subcontractor to impose a lien on the principal's property.

"The right to a lien is confined to work, labor and materials required by the principal contractor. To that extent, by force of the statute, the owner makes the principal contractor his agent to bind his property, but no further."¹⁰ "The statute itself has established a direct contractual relation between the material man and the owner; so that furnishing materials to the contractor is in effect furnishing them to the owner . . . since the principal contractor is agent of the owner for the purpose of the statute."¹¹

In the ordinary case, where the owner and contractor are both *sui juris*, if a contractor has an express or implied contract with the owner of property to improve or build on it, a subcontractor may, by working for or furnishing materials to the contractor, subject the owner's property to a lien for his claim. This is only in the event that the principal contractor has failed to pay for such services or materials, and, in addition, the subcontractor has furnished the

⁹ This is similar to the agency cases where private instructions are given to an agent, which are held not to be binding on third parties without notice.

¹⁰ *Siebrecht v. Hogan* (1898) 99 Wis. 437, 75 N. W. 71, 73.

¹¹ *Osborn v. Logus* (1895) 28 Ore. 302, 42 Pac. 997, 1001.

owner with proper statutory notice of his claim.¹² The object of the statute is to provide a ready and available means whereby persons furnishing labor or materials may have adequate security.¹³ Furnishing materials to the contractor is, in effect, furnishing them to the owner through a duly authorized agent. This gives rise to a debt against the owner in favor of the subcontractor, which, in turn, forms the basis for a lien.

Mere knowledge that work is being done or materials furnished on one's property does not enable the person furnishing the labor or materials to obtain a lien, since there is no privity between the owner and the person furnishing the labor or materials. If, in such a case, a material man furnishes materials to a contractor, and the contractor fails to pay for them, the owner's property may not be subjected to a lien therefor.¹⁴ Since the material man is said to be substituted to the rights of the contractor to the extent of his claim, he is in no better position than the contractor, who is not acting in any representative capacity for the owner of the land. There is no valid debt against the owner in favor of the material-man. Upon which a statutory lien may be based, although there may be a quasi-contractual action for the reasonable value of the improvements on the owner's land.

When the owner of land is a married woman, further considerations are presented. Formerly, a married woman could not be bound by any contract affecting her real or personal estate, unless it was executed in the manner prescribed by law. The requirements for such a contract, with certain exceptions, were the written consent of the husband and privity examination of the wife. If these formalities were lacking, the contract, as affecting her estate, was invalid.¹⁵ Consequently there was no valid debt upon which a lien could be based. The Court in numerous cases emphasized the language of the lien statute, which provides for a "lien for the payment of all debts contracted for work done or materials furnished."¹⁶ Since the married woman was incapable of contracting in such cases,

¹² *Brick Co. v. Pulley* (1915) 168 N. C. 371, 84 S. E. 357; *Porter v. Long* (1924) 187 N. C. 629, 122 S. E. 483; *Clark v. Edwards* (1896) 119 N. C. 115, 25 S. E. 794.

¹³ *Grissom v. Pickett* (1886) 98 N. C. 54, 3 S. E. 921.

¹⁴ *Weir v. Page* (1891) 109 N. C. 220, 13 S. E. 773; *Nicholson v. Nichols* (1894) 115 N. C. 200, 20 S. E. 294.

¹⁵ *Flaum v. Wallace* (1889) 103 N. C. 296, 9 S. E. 567; *Farthing v. Shields* (1890) 106 N. C. 289, 10 S. E. 998; *Loan Assn. v. Black* (1896) 119 N. C. 323, 24 S. E. 481; *Ball v. Paquin* (1905) 140 N. C. 83, 52 S. E. 410.

¹⁶ C. S., sec. 2433.

there could be no debt to support a lien. In *Farthing v. Shields*,¹⁷ the court held that the power of a married woman to charge her real estate is measured by her power to dispose of the same; hence, if she had expressly charged the debt on her lands with the written assent of her husband, it would be of no avail without her privy examination. A thorough discussion of this may be found in *Ball v. Paquin*¹⁸ and in the cases there cited by Judge Connor.

The law was changed, and these cases were overruled, by the adoption of a statute in 1901, providing that the section in regard to mechanics and material mens' liens, ". . . applies to the property of a married woman when it appears that such building was built or repaired on her land with her consent or procurement. In such case she shall be deemed to have *contracted* for such improvements."¹⁹ This new section was held to be constitutional in *Finger v. Hunter*,²⁰ thus making it possible to charge a married woman's property with a lien for labor or materials furnished for improvements to her real estate without any of the formalities previously required. The law was further changed by the Martin Act²¹ in 1911, which conferred upon married women a complete capacity to contract with third persons. Since then, she is as free to deal with third persons for improvements to her land, as if she were unmarried. Further, it is no longer necessary for a husband to join with his wife in contracting for such improvements. The fact that the owner of land is a married woman does not make any difference, when she is dealing with third parties, as far as the imposition of mechanics' or material mens' liens is concerned.

In order for a husband to subject the separate property of his wife to a lien for improvements placed thereon by him, there must be a contract executed according to the formalities of section 2515 of the Consolidated Statutes. This section provides that, "No contract between a husband and wife made during coverture shall be valid to affect or charge any part of the real estate of the wife. . . . unless such contract is in writing and is duly proved as is required for conveyances of land; and upon the examination of the wife separate and apart from her husband . . . it shall appear to the satisfaction of such officer that the wife freely executed

¹⁷ *Farthing v. Shields* (1890) 106 N. C. 289, 10 S. E. 998.

¹⁸ *Ball v. Paquin* (1905) 140 N. C. 83, 52 S. E. 410.

¹⁹ C. S., sec. 2434.

²⁰ *Finger v. Hunter* (1902) 130 N. C. 529, 41 S. E. 890.

²¹ C. S., sec. 2507.

such contract. . . .” While the Martin Act and section 2434 of the Consolidated Statutes abrogated the above formalities in the cases when a married woman contracts with persons other than her husband, they did not change the law with respect to the requirements of section 2515, above quoted, in the case where a married woman contracts with her husband for improvements to her separate property, and the husband seeks a lien for himself.

In *Kearney v. Vann*,²² a husband built on his wife’s land under a contract with her, in which the requirement as to privy examination of the wife, according to section 2515, was omitted. The husband, having furnished materials, was attempting to secure a lien on the wife’s land for the amount due on the materials. The wife had given the husband a note for \$700.00 in payment of work and materials furnished which had not been paid. It was held that the property of the wife is not liable or subject to a lien for the husband’s claim. Section 2434, above quoted, was held not to apply to contracts between husband and wife. The requirements of section 2515 had not been complied with. Thus the labor and materials furnished to the separate property of the wife by her husband were presumed to be a gift.

From the above reasoning, it would seem to follow that the husband might obtain a lien on his wife’s land in the situation where the wife has contracted with a third party for the improvement of her land, and such third party has secured materials or labor from the husband. The husband, as a subcontractor, would be in a better position than the husband, as a principal contractor. Although no case involving these identical facts has been found, it would seem that section 2515 of the Consolidated Statutes applies only to contracts entered into directly between husband and wife, and that the husband, as a subcontractor, is entitled to a lien under the provisions of the lien statutes.

If the husband contracts with the wife to repair or build on her land, and a third person furnishes labor or materials, may such a subcontractor have a lien on the wife’s land in case the husband fails to pay for the labor or materials? It is clear that the husband is not able to subject the separate property of his wife to a lien in his own favor by furnishing labor or materials to improve her property, unless a contract is executed by the wife in strict compliance with the terms of section 2515.²³ What is the effect of this

²² *Kearney v. Vann* (1911) 154 N. C. 311, 70 S. E. 747

²³ See preceeding note.

section when a third party is seeking to subject the wife's land to a lien by reason of having furnished labor or materials to the husband, who has contracted with his wife to improve her land? In other words, is a formal contract between husband and wife necessary where a third party and not the husband is seeking to impose a lien?

Looking at the statutes and the cases in North Carolina, the conclusion seems to be that section 2515 has nothing to do with the case where a third party is seeking to impose a lien on the wife's land, but embraces only contracts between husband and wife.²⁴ As already discussed, no formal contract is necessary between a land owner and contractor, to make improvements on the land, in order that a subcontractor may get a lien. The essential thing is that the land owner and contractor be in a principal-agent relation.

The reason why the subcontractor is put in a better position than the husband, in the above instance, is due to the fact that the wife may consent or procure improvements on her property through her husband with or without a formal contract. By section 2434 of the Consolidated Statutes, the general lien law applies to the property of married women, whenever a wife consents to or procures improvements on her land and "in such case, she shall be deemed to have contracted for such improvements." Thus by the very words of the statute, a contractual relationship between the married woman and the subcontractor is established. This gives rise to a valid debt in favor of the subcontractor upon which his lien may attach. What actually happens is that by the consent or procurement of the wife, the husband is given power, as her agent, to improve her property by dealing with third persons for work and materials. No formal contract is needed to establish such an agency, the wife's consent being sufficient. The lien for labor or materials is thus imposed by reason of her consent to this agency of her husband. Consequently, the relation of debtor and creditor between the wife and the subcontractor is established through the husband's acts as agent of the wife. Consent of the wife to the imposition of the lien is not material. Neither is it essential that she consent to the particular improvement or to any particular subcontractor. Her consent is to the acts of her husband, as her agent, and those acts may lead to the imposition of a lien on her property by force of the general lien statutes.

²⁴ *Payne v. Flack* (1910) 152 N. C. 600, 68 S. E. 16; *Rose v. Davis* (1924) 188 N. C. 355, 124 S. E. 576; C. S., secs. 2433, 2434.

In *Payne v. Flack*,²⁵ the wife contracted with her husband for repairs on her land, and he secured materials from the plaintiff, who was seeking to enforce a lien. It appeared that the wife had paid the husband in full for the repair work, before the plaintiff gave notice of his claim, as required by statute. The court held that the wife's land was not subject to this lien, Clark, C. J., saying,

"This is not a case of a married woman standing silent when improvements are being placed on her house, receiving benefits, and then defying the contractor because she had made no valid express contract. In such case, the statute now makes her property subject to lien, upon the implied contract arising upon her conduct, as it would in regard to any one else under the same circumstances. But here she paid the contractor in full before receiving notice from the subcontractors, the material men, and is freed from liability to them as any one else would be under the same state of facts."

In *Rose v. Davis*,²⁶ the facts of which were stated at the beginning of this note and which are similar to those in *Payne v. Flack*, it was also held that the wife's land was not subject to a lien in favor of the material man, who had dealt with the husband. The court, speaking through Judge Stacy, said:

"This conclusion rests, not upon the fact that the property in question is owned by a married woman, for liens may now be acquired against the property of married women (C. S. 2434), but it is bottomed on the circumstance of no notice to the owner before settlement with the contractor. (C. S. 2438) Plaintiff seeks to meet this position by saying that, as the contractor was paid in advance, he had no opportunity of giving any notice to the owner prior to settlement with the contractor, and hence it should be held that none was necessary. In answer to this, it is sufficient to say that liens are statutory, and the statute gives no lien to a subcontractor or laborer in such a case."

The clear inference, in both of the above cases, is that if proper statutory notice were given, then a lien should attach to the wife's land in favor of the subcontractor who furnishes labor or materials to the husband.

G. H. J.

MANNING V. ATLANTIC AND YADKIN RAILWAY COMPANY—This recent case¹ was of such state wide interest (involving the so-called "dismemberment" of the old Cape Fear and Yadkin Valley Railroad) that there has been a demand from lawyers as well as laymen of the state for a concise statement of the facts and the law. The purpose of this note is to give that statement in brief form, without attempting any analysis of the authorities followed.

²⁵ *Payne v. Flack* (1910) 152 N. C. 600, 601, 68 S. E. 16.

²⁶ *Rose v. Davis* (1924) 188 N. C. 355, 356, 124 S. E. 576.

¹ *Manning v. Atlantic and Yadkin Railway Co.* (1924) 188 N. C. 648, 125 S. E. 555.

The general opinion was that Attorney General Manning brought the action in the name of the State to question the authority of the Atlantic Coast Line Railway Company and the Southern Railway Company to lease and divide the old Cape Fear and Yadkin Valley Railway. This is true, but a more intricate and involved set of facts is found in the history of the case.

In 1852 the General Assembly incorporated the Western Railroad Company which by its charter was authorized to build a railroad between Fayetteville and the coal regions in Moore and Chatham Counties.² The County of Cumberland and the Town of Fayetteville each subscribed \$100,000. Individuals subscribed \$135,000. Under another statute, the State gave more than \$600,000 and later, by a bond issue in 1868, subscribed an additional sum of \$500,000.

In 1879 the name of the Western Railway Company was changed, by authority of the General Assembly, to the Cape Fear and Yadkin Valley Railway Company, and legally stood in the place of the old Company. The new Company was also authorized to consolidate with the Mount Airy Railroad Company and to complete the roads.³

In 1883 there was a further reorganization of the road by the General Assembly which authorized further extensions and branches.⁴ Later the South Carolina Pacific Railway running from Bennettsville, S. C., to the North Carolina line was leased. Thus the system from Wilmington to Mount Airy with numerous branch lines was operated by the Cape Fear and Yadkin Valley Railway Company until its dissolution. The road was valued at over \$7,000,000, of which sum the State had donated and subscribed over \$1,000,000.

On June 1, 1886 the Cape Fear and Yadkin Valley Railway Company executed to the Farmers Loan and Trust Company of New York as trustee, a deed of trust of all its property and franchise to secure a bond issues of \$3,054,000; and on Oct. 1, 1889 it executed a consolidated mortgage on its property and franchise to secure an additional bond issue of \$1,848,000.

In March, 1894, a default was made in the payment of interest, and the Farmers Loan and Trust Company brought suit in the

² Laws 1852, ch. 147.

³ Pub. Laws 1879, ch. 67.

⁴ Pub. Laws 1883, ch. 190.

Circuit Court of the United States for the Eastern District of North Carolina to foreclose the first mortgage.

On the day the bill was filed, John Gill was appointed receiver of the Cape Fear and Yadkin Valley Railway and took possession of its property. In the suit, an attempt was made to force a sale of the property in division and thereby dismember the system, but the court refused to permit such a sale and ordered the property sold as an entirety,⁵ the reason being, among others, that an act, passed to amend section 698 of the Code, provided that a corporation created in consequence of a sale or conveyance of corporate property under a deed of trust should succeed to the franchise rights and privileges of the first corporation only in case the first corporation was sold as an entirety.

The case came up for rehearing and later went to the Circuit Court of Appeals but the decision was affirmed in both cases.⁶

The Commissioners appointed under the decree of the United States Court sold the property to the officers of the Wilmington and Western Railroad Company (now Atlantic Coast Line) for \$3,125,000. These officers requested the conveyance to be made to the Atlantic and Yadkin Railway Company, which was done. This Company was incorporated by the General Assembly and the entire transaction ratified by an act of February 23, 1899. Thus the property of the Cape Fear and Yadkin Valley Railway Company was sold as an "entirety" to the Atlantic and Yadkin Railway Company pursuant to the decree of the United States Court.

On May 13, 1899, the directors of the Atlantic and Yadkin Railway Company, by deed sold outright that portion of the railroad between Wilmington and Sanford to the Wilmington and Weldon Railroad Company. Later the Southern Railway Company acquired all the stock of the Atlantic and Yadkin Railway Company and so became the owner of that part of the road running from Sanford to Mount Airy.

In 1913 the General Assembly passed a resolution, reciting the alleged dismemberment of the Atlantic and Yadkin Railway and empowered the Corporation Commission to investigate it. The Corporation Commission did subpoena witnesses and caused the books and papers of the corporation to be examined but nothing more was done.

⁵ *Farmers Loan and Trust Co. v. C. F. & Y. V. Ry. Co.* (1897) 82 Fed. 344.

⁶ *Low v. Blackford* (1898) 87 Fed. 392.

In 1923 the General Assembly passed a resolution authorizing the Attorney General to investigate and report the alleged dismemberment without delay, "and institute such action or actions as may be desirable or necessary to dissolve the alleged illegal dismemberment of said road, in order that it may be restored as a continuous east and west line as contemplated by the State in the granting of the original charter." This action was brought in pursuance of this resolution.

The plaintiff in his complaint alleged substantially as follows:

That the said purchase and dismemberment of the Cape Fear and Yadkin Valley Railway Company was contrary to law, in that it was conceived in fraud and for the purpose of evading the decree of the court which authorized the sale of said property as an entirety.

That it was for the purpose of deceiving and misleading the Legislature of North Carolina and evading the act of 1897, which made a sale under deed of trust, contingent on the sale of the property in its entirety.

That it was for the purpose of working a great injury to the people of North Carolina, and especially those living in the vicinity of the road.

That the said deed of the Atlantic and Yadkin Railway to the Wilmington and Weldon Railroad Company (now the Atlantic Coast Line) was fraudulent and contrary to law and therefore void and should be surrendered and cancelled.

That the property formerly composing the Cape Fear and Yadkin Valley Railway Company and purchased by the Atlantic and Yadkin Railway Company should be operated and its franchise enjoyed as an entirety.

To these allegations, the defendant demurred, contending:

That neither the plaintiff nor the State of North Carolina have any interest in the alleged cause of action.

That the complaint does not allege any facts, showing conspiracy to violate any law or public policy of the state, any fraud in the purchase or dismemberment of the railroad, the evasion of any acts of the Legislature, or the working of any injury to the people of the State.

That certain rules of the Interstate Commerce Commission have not been complied with. Also that certain federal laws, as the Anti-Trust Act, are involved which would defeat the jurisdiction of the State Court.

That the plaintiff has not shown good faith and due diligence since the sale of the Cape Fear and Yadkin Valley Railway was confirmed May 3, 1899, and that decree was not questioned until May, 1923, when this action was instituted. Such gross laches should estop the plaintiff from maintaining this action.

That since the foreclosure sale of the Cape Fear and Yadkin Valley Railway was in strict conformity to the decree of the Circuit Court of the United States, the said property was legally vested in the said purchasers and their successors in title, and that the rights of bondholders and other third parties are now involved.

Of the contentions involving federal questions, the court refused to consider any of them on the ground of lack of jurisdiction.

The demurrer of the defendants was sustained, first, on the ground that the sale by the Atlantic and Yadkin Railway Company to the Wilmington and Weldon Railroad Company was authorized by law and was therefore valid.

By the Private Laws of 1899, Chap. 98, sec. 6, the Atlantic and Yadkin Railway Company was authorized to consolidate with any other railroad company organized under the laws of the State on such conditions as might be agreed upon by and between the stockholders of the said companies. The court decided that, by virtue of this act, the first company had the power to sell and the second company had the power to purchase. They held that this statute must be construed according to the intention of the Legislature and not as to popular meaning. "The Legislature was presumed to know the facts, and, since it authorized the sale in question, its intention to do so must be conclusively presumed."⁷ The fact that all the leases, mergers, and sales were not specifically authorized by amendments to the charters of the railroads made no difference. "The important thing is the grant of power, not the mode in which the power was granted."⁸

As to the allegations of fraud, the Court held that they were merely general allegations and not specific enough to be considered. Fraud could not be inferred when not specifically alleged. The demurrers did not admit fraud because the complaint did not show it.

The second proposition decided by the Court was that the plaintiff was estopped by laches to prosecute the action.

They held that the ancient maxim "*Nullum tempus occurrit regi*" obtains with us only in exceptional cases. As a main proposition of law, C. S. 420 was quoted "The limitations prescribed by law apply to civil actions brought in the name of the State or for its benefit in the same manner as to actions by or for the benefit of private parties." The court held this to be the law in this State in the absence of a specific statute to the contrary in a particular case.

The plaintiff contended that the doctrine of laches as administered by courts of equity was anagalous to statutes of limitations and that the defendants' misuser, nonuser and usurpation of corporate powers constituted a continuing cause of action to which no statute of limitations could apply.

⁷ 188 N. C. 648, 660.

⁸ 188 N. C. 648, 660.

The Court held contrary; that "independently of the statute of limitations, the doctrine of laches has existed since the beginning of equity jurisdiction. It rests on the principle that nothing can call into exercise the powers of a court of chancery but conscience, good faith and *reasonable diligence*."⁹

A quarter of a century had elapsed since the dismemberment took place, and the court held that this was sufficient time to bar the plaintiff from maintaining the action, on the grounds, that a failure to bring the action before constituted *gross laches*. How long a time would be sufficient to bar the action was not considered by the court, but it held that "each case is to be determined according to its own peculiar circumstances and the question of laches is addressed to the sound discretion of the Chancellor."¹⁰

Mr. Justice Clarkson concurred in the result solely on the grounds of "laches," thinking that to overturn the dismemberment would work too great a hardship on innocent purchasers and bondholders.¹¹

W. T. H.

MORTGAGEE'S INTEREST IN INSURANCE POLICY UNDER STANDARD MORTGAGE CLAUSE—It is customary whenever a mortgage is placed on real estate for the owner to take out insurance in which he is the beneficiary; and then to protect the mortgagee, by attaching to the policy the standard mortgage clause. The effect of this "rider" is to protect the mortgagee to the extent of his interest. No act or omission by the mortgagor, *unknown to the mortgagee*, can affect the mortgagee's interest in the insurance contract. In a recent North Carolina case,¹ the mortgagor sold the insured property, contrary to a clause in the policy providing that, "If any change, other than by death of the insured, takes place in the . . . title . . . of the subject of the insurance . . . This Company is not liable for damage or loss occurring." The Court said, in regard to the right of the mortgagee under the standard mortgage clause, "It is a generally accepted position that this clause operates as a separate and distinct insurance of the mortgagee's interest, to the extent at least of not being invalidated by any act or omission on the part of the owner or mortgagor, *unknown to the mortgagee*; and according to

⁹ 188 N. C. 648, 665.

¹⁰ 188 N. C. 648, 665.

¹¹ 188 N. C. 648, 667.

¹ *Bank v. Assurance Co.* (1924) 188 N. C. 747, 125 S. E. 631.

the clear weight of authority this affords protection against the previous as well as the subsequent acts of the mortgagor or assured."² The standard mortgage clause is almost universally held to act as an independent contract between the insurer and mortgagee.³ Therefore if the mortgagor does any act whatever which will breach his contract of insurance with the company because of a condition in his policy, such as, misrepresenting his ownership in the insured property,⁴ increasing the fire risk, failing to pay premiums,⁵ or, as in the above case, conveying away his title in the insured property,⁶ it will not prevent the mortgagee from recovering in case of loss.

If the ownership changes *with the mortgagee's knowledge*, then he cannot recover unless he notifies the company of such change, because of a provision in the standard mortgage clause which says, "The mortgagee or trustee must notify this Company of any change of ownership . . . which shall come to the knowledge of the mortgagee or trustee."⁷

In *Bank v. Assurance Company*,⁸ Stacy J., presented the following quaere, "Whether the original parties to the contract could have canceled or rescinded the entire policy including the standard mortgage clause without the consent of the mortgagee or trustee mentioned therein." The North Carolina court has rendered no decision on this point but cited two cases relative to it. The first was an Iowa case⁹ in which the Court held that where a third person by agreement in writing with a mortgagor, agreed to settle and discharge the mortgage debt when it became due, that he might, at any time before the mortgagee assented to and accepted such arrangement, cancel the same and be relieved of any liability because of his promise to pay such debt. In a Wisconsin case,¹⁰ under facts similar to those in the Iowa case, except that the mortgagee assented to the arrangement by which a third party undertook to pay the mortgage

² 188 N. C. 747, 751.

³ *Hastings v. Insurance Co.* (1878) 73 N. Y. 141; *Reed v. Fireman's Ins. Co.* (1911) 81 N. J. L. 523, 80 At. 462; *Eddy v. London Assur. Co.* (1894) 143 N. Y. 311; *Syndicate Ins. Co. v. Boston et al.* (1894) 65 Fed. 165.

⁴ *State Ins. Co. v. Trust Co.* (1896) 47 Neb. 62, 66 N. W. 9 (false statement as to incumbrances).

⁵ *Francis v. Buttlr Fire Insur. Co.* 7 R. I. 159.

⁶ *Phoenix Ins. Co. v. Trust Co.* (1894) 41 Neb. 834, 60 N. W. 133, 25 L. R. A. 679.

⁷ *Continental Insurance Co. v. Anderson* (1899) 107 Ga. 541, 33 S. E. 887; *Cole v. Germania Ins. Co.* (1885) 99 N. Y. 36, 1 N. E. 38.

⁸ (1924) 188 N. C. 747, 754.

⁹ *Gilbert v. Sanderson* (1881) 56 Iowa 349, 9 N. W. 293, 41 Am. Rep. 103.

¹⁰ *Basset v. Hughes* (1877) 43 Wis. 319.

debt, the Court said that after knowledge of and assent to the new arrangement by the mortgagee, nothing that the original parties may do can affect his right of action on the new contract. These are the only cases cited as bearing on the question. It is evident that they are not directly in point, as they do not deal with insurance contracts or questions arising under the standard policy relative to cancellation. There seems to be one case in point in Maine, where A mortgaged his property to B and took out insurance with the defendant Company, attaching a standard mortgage clause in favor of B. Later B took possession of the property as mortgagee, and A canceled the insurance policy without B's knowledge. The Court held that B could recover from the Insurance Company and that the cancellation as to B was invalid.¹¹ In support of its decision, the Court cited a number of cases all holding that no act or breach of the contract by the insured could effect the interest of the mortgagee. The Court also contends that the provision in the standard mortgage clause stating that in order to cancel, the Insurance Company must give the mortgagee and the insured ten days notice, sustains their holding, since no notice was given to the mortgagee. There is a very strong dissenting opinion in this case, which claims that the cases cited are not in point, and also that the insurance policy expressly says that the *insured* may cancel at will and does not mention the mortgagee. Therefore the provision in the standard mortgage clause saying that the *Company* in order to cancel, must give ten days notice to the insured and the mortgagee, is not applicable, because in the case at bar, the insured and not the Company canceled the policy. The dissenting opinion concluded that the insured had the power to cancel and thereby defeat the mortgagee's interest in the policy.

A Michigan case¹² adds an interesting phase to the situation. It was there held, that although the insured may have a legal right to cancel the policy he had taken out for a surety's protection, he had no equitable right to do so, and that the surety had an equitable interest (measured by his interest in the first policy) in a second policy taken out after the cancellation, in which a third party was made the beneficiary. It seems that if there had been no second policy the surety's right against the Insurance Company would have been defeated because the Court goes on the premise that the insured

¹¹ *Gilman v. Ins. Co.* (1914) 112 Me. 528, 92 At. 721.

¹² *Miller v. Aldrich* (1875) 31 Mich. 408.

had a legal right to cancel; therefore this case is in accord with the dissent in the Maine case, in so far as the *legal* right of the insured to cancel is involved.

In conclusion, a Maine decision directly in point with the question presented by Stacy J., holds that the insured could not cancel and thus deprive the mortgagee of his interest in the policy, but there is a strong dissent which is based on sound reasoning, supported by the Michigan case which holds that the insured has a legal right to cancel but no equitable right to do so. The cases that the North Carolina Court cited relative to this quaere, if followed, intimate that it would hold that the insured could not cancel his policy without the consent of the mortgagee. However, if the case actually arose, an opposite result is altogether possible.

C. B. M.

RECENT TYPES OF ADMINISTRATIVE ACTION IN NORTH CAROLINA—(1) *State Highway Commission*—Chapter 2 of the Public Laws of 1921 created the State Highway Commission and empowered it to carry out the provisions of the act; namely, the construction of a state system of highways. The Commission was to consist of a State Highway Commissioner and nine commissioners, one from each construction district, to be appointed by the Governor with the confirmation of the Senate. When not in session, the State Highway Commissioner is vested with the powers of the Commission.

In general, it is authorized to take over any road and "widen, relocate, change or alter the grade or location" of it.¹ A map is attached to the bill showing the proposed roads to be taken over for the state highway system. But it is provided that the Commission "may change, alter, add to or discontinue the roads so shown provided no roads shall be changed altered or discontinued so as to disconnect county-seats, principal towns, state or national parks or forest reserves, principal state institutions and highway systems of other states".² Other powers incidental to carrying out the provisions of the act are specifically granted, and the Commission furthermore is given "power and authority to make rules and regulations for carrying out the true intent and purposes of this act".³

The map attached to the bill showed a highway from Durham to Oxford, county-seats, through Stem. The Highway Commission

¹ Pub. Laws of 1921, Chap. 2, sec. 10 (b).

² Pub. Laws of 1921, Chap. 2, sec. 7.

³ Pub. Laws of 1921, Chap. 2, sec. 4, sec. 10.

after investigation and hearings, decided to construct the road from Durham to Oxford through Creedmoor. Plaintiff sought to enjoin the Commission from constructing the road through Creedmoor, and the Court denied the injunction.⁴ Adams, J., delivering the opinion of the Court, says that the action of the Commission may not be controlled by the court unless there is an abuse of discretion, as long as the Commission keeps within the limits of the powers granted it by the legislature. But the power of the Commission to change or discontinue roads is limited by the proviso that they shall not disconnect county-seats, principal towns, etc. He holds that the question of what is a principal town is a question for judicial determination, and the Court finds that Stem is not a principal town within the meaning of the act and therefore upholds the Highway Commission. Stacy, J., concurring in the result, says that what are principal towns is to be determined by the Commission exercising sound but not arbitrary judgment and subject to judicial review only in cases of abuse of discretion. Clarkson, J., dissenting, says that the principal towns referred to in the act are those shown on the map and that under no circumstances may a road disconnect these.

Besides the powers referred to above, the Commission is given other broad powers in relation to construction, letting of contracts, taking over roads, acquiring materials, enforcing legal rights, regulation of use of highways, establishing traffic census bureaus, maintenance of highways, naming and making the roads, beautifying them, and securing federal aid in construction.⁵

In case of taking over a road, the Commission must give notice and if objection is made, the Commission hears the objection under rules and regulations laid down by it for governing the proceedings, and determines the most practical and desirable route. Their decision is final.⁶

It is thus obvious that the Highway Commission is an administrative body similar in many respects to the Corporation Commission. Indeed in the first case that arose, *Road Commissioners v. Highway Commission*,⁷ Clark, C. J., says, "Furthermore, in a broad view, the state in the construction of these highways is acting through an administrative body". The act creating the Highway Commission did not as in the case of the Corporation Commission provide for judicial

⁴ *Cameron v. State Highway Commission* (1924) 188 N. C. 84, 123 S. E. 465.

⁵ Pub. Laws of 1921, Chap. 2, sec. 10.

⁶ Pub. Laws of 1921, Chap. 2, sec. 7.

⁷ *Road Commission v. Highway Commission* (1923) 185 N. C. 56, 115 S. E. 886.

review. The Supreme Court seems to hold that if the Highway Commission keeps within the scope of the powers granted, the Court may interfere only in case of abuse of discretion, that is, unreasonable action.

(2) *Corporation Commission—Bank Examiners*—The Corporation Commission was given authority to appoint bank examiners whose duties were to make examination of banks.⁸ The examiners were given the power to take possession of banks for purpose of making a thorough examination. They might compel attendance and examine under oath officers, directors, stockholders and individuals in regard to the affairs of the bank. If they found the bank in an unsafe condition the Corporation Commission might authorize the bank examiners, upon giving bond, to take possession of the property of the bank until the Corporation Commission received and acted upon the report of the examiner. The Commission might then apply for appointment of a receiver or it might grant the bank 60 days to make good the deficiency or loss.⁹ The examiner also has the power to arrest without a warrant any officer guilty of a violation of the criminal laws relating to banks and banking and to hold him until a warrant can be served.¹⁰

In 1921 a new banking law was adopted¹¹ re-enacting to some extent the powers of the Corporation Commission and giving it greater power in regard to banks. Among other things it provides that the Commission may take possession of the business and property of any bank to which this act is applicable when it has violated its charter, is conducting business in an unauthorized or unsafe manner, has an impairment of capital stock and other like cases. Such banks may with the consent of the Corporation Commission resume business upon such terms and conditions as may be approved by it.¹² It further provides that “. . . . it shall be its duty (Corporation Commission's) to execute and enforce through the Chief State Bank Examiner, the State Bank Examiners and such other agents all laws relating to banks as defined by this act.”¹³ The sections of the Consolidated Statutes above mentioned are virtually re-enacted.¹⁴

⁸ C. S., sec. 249.

⁹ C. S., sec. 250, 253.

¹⁰ C. S., sec. 254.

¹¹ Pub. Laws of 1921, Chap. 4.

¹² Pub. Laws of 1921, Chap. 4, sec. 16.

¹³ Pub. Laws of 1921, Chap. 4, sec. 63.

¹⁴ Pub. Laws of 1921, Chap. 4, secs. 72, 73, 74, 75, 76, 77, 78.

In the case of *Taylor v. Everett*,¹⁵ the State Bank Examiner, having made an audit of the People's Bank, found that there was an impairment of its capital stock. This is one of the cases in which the Corporation Commission may take possession of the bank, and it has authority to allow the bank to resume business upon such conditions as it may provide. The directors agreed to comply with the conditions laid down by the State Bank Examiner, whereupon he allowed them to continue business. A question arose as to the liability of the directors on the contract to one who was subrogated to the rights of the bank as beneficiary of the contract. They were held liable. In delivering the opinion, Connor, J., says, "A condition thus existed under which the State Bank Examiner, acting under the authority of the Corporation Commission, was empowered by law to take possession of the business and property of the People's Bank and to determine upon what terms and conditions it might resume business the Commission or the bank examiner acting under its authority, instead of first taking possession of the bank and thus closing it, may impose terms and conditions upon which the bank may continue business. . . ."¹⁶

It does not clearly appear whether the conditions were imposed by the Corporation Commission or the State Bank Examiner acting under authority from the Corporation Commission. But from an examination of the facts and opinion it is probable that they were imposed by the Chief State Bank Examiner. The case speaks of a letter from the State Bank Examiner in which he stated the terms upon which the Bank might resume business. If this is correct it seems to be a reasonable conclusion from the case that the Bank Examiner, acting under his general authority, but without the express direction or approval of the Corporation Commission, has power to impose conditions upon which a bank may continue or resume business.

What is the practice in regard to the imposition of these conditions is not known. It may be that the Bank Examiner has the conditions approved by the Corporation Commission before they are offered to the bank. It would appear, however, from a careful reading of the case that the Commission authorizes the state bank examiners to impose such conditions as are needed. Thus the Bank deals directly with the Bank Examiner and not with the Corporation Com-

¹⁵ *Taylor v. Everett et al.* (1924) 188 N. C. 247, 124 S. E. 316. See also *Trust Co. v. Burke* (1924) 189 N. C. 69, 126 S. E. 163.

¹⁶ 188 N. C. 247, 259.

mission. The Court in *Taylor v. Everett* intimates that this procedure is valid. This would seem to be a very practical way of dealing with the problem. The Examiner is an expert in the affairs of banks. The Corporation Commission does not profess to be. He is the one who understands most clearly the affairs of the bank, having made the examination; therefore he is better qualified to say what are just conditions. Immediate action may be necessary and the delay in referring to the Commission might cause further complications. Suppose, however, the bank should object to the conditions imposed by the examiners and appeal to the Commission. It seems quite clear that the action of the Commission would control, as the power to impose the conditions is vested in the Corporation Commission by the statute. The statute further says that the Commission shall enforce the law "through the Chief State Bank Examiner, the State bank examiners and such *other agents*—" ¹⁷ thereby treating the bank examiners merely as agents of the Commission.

The two cases discussed illustrate the modern tendency of the courts to uphold administrative action where it is reasonable.¹⁸ A statement of Justice Stacy in *Cameron v. Highway Commission* will illustrate this. He says, "Road building is not a matter of drawing lines upon a map; it partakes of scientific rather than legislative or judicial engineering."¹⁹ It seems settled that the court will review the action of the Highway Commission only in case of abuse of discretion or exceeding their authority. As to the Corporation Commission, while there may be an appeal in certain cases so as to obtain a trial de novo in the Superior Court,²⁰ the decision of the Commis-

¹⁷ Pub. Laws of 1921, Chap. 4, sec. 63.

¹⁸ *Rounfort Co. v. Delaney* (1911) 230 Pa. 377, 79 Atl. 653 (upholding action of Factory Inspector in requiring alterations in factory for fire protection); *Cockroft v. Mitchell et al.* (N. Y. 1919) 187 App. Div. 190 (upholding order of Industrial Commission requiring additional means of exit in 16 story building used for manufacturing); *Borgnis v. Falk Co.* (1911) 147 Wis. 327, 133 N. W. 209 (upholding action of Workmen's Compensation Board); *Mutual Film Co. v. Ohio Industrial Commission* (1915) 236 U. S. 230 (upholding moving picture censorship); *Intermountain Rate Cases* (1914) 234 U. S. 476 (upholding power of Interstate Commerce Commission); *Hocking Valley Railway Co. v. Public Utilities Com.* (1915) 92 Ohio St. 9, 110 N. E. 521 (upholding action of Public Utilities Commission). There are many more cases similar to the above. See *Labor Law Administration in Pennsylvania* by Robert H. Wettach (1922) 70 U. of Pa. L. Rev. 277 for cases involving administrative action in industry.

¹⁹ 188 N. C. 84, 90.

²⁰ *Commission v. Railroad* (1912) 161 N. C. 270, 271, 76 S. E. 554; see article by Charles L. Nichols, *Judicial Review of North Carolina Corporation Commission* (1924) 2 N. C. L. Rev. 69, 78.

sion is given great weight and presumed prima facie to be correct.²¹ In a great majority of the cases, their action is also upheld unless it is unreasonable.²² The power allowed bank examiners acting under the Corporation Commission is another illustration of the liberal view of the powers of administrative bodies. No more do the courts discuss the objection to administrative bodies that they are unconstitutional because of a delegation of legislative power or because they violate the doctrine of separation of powers.²³ They are a very efficient and, you might even say, indispensable means of administering law. Whatever may be the theories, government through administrative tribunals has worked and will undoubtedly continue to expand to wider fields.

C. W. P.

²¹ C. S., sec. 1098.

²² See discussion in Mr. Nichol's article, 2 N. C. L. Rev. 69, 80.

²³ 2 N. C. L. Rev. 69, 72, discussing *Express Co. v. Railroad Co.* (1892) 111 N. C. 463, 16 S. E. 393; *Film Corporation v. Industrial Commission* (1914) 236 U. S. 230, 245; *Intermountain Rate Cases* (1914) 234 U. S. 476, 486.