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THE SUMMER SCHOOL—The plans for the 1928 Summer Session of the University of North Carolina School of Law have been completed. The first term will begin June 13 and end July 21. The second term will begin July 23 and will end August 29. The faculty for the first term will consist of Mr. Justice Brogden, of the Supreme Court, who will teach the subject of Code Procedure; Professor Edmund M. Morgan, of the Harvard Law School, who will teach the subject of Evidence; Associate Professor Wesley A. Sturges, of the Yale Law School, whose subject will be Credit Transactions, dealing largely with the law of Conditional Sales, Suretyship and Bankruptcy; Professor M. S. Breckenridge, of the regular faculty, whose subject is Agency, and Dean McCormick, of the regular faculty, who will teach Personal Property, including Bailments. In the second term, Mr. Justice Connor, of the Supreme Court, will have the subject of Constitutional Law; Professor Morgan will continue the subject of Evidence, and Professor James Lewis Parks, the author of the American Case-Book Series "Cases on Mortgages," will teach

that subject; Professor Wettach, of the regular faculty, will teach Torts; and Professor Coates, of the regular faculty, the subject of Criminal Law.

The general plan of the Summer School follows that which was adopted in the unusually successful summer school which was given in the Law School last summer. One-third of a year's work may be covered in the summer, and if a student begins the study of law in the Summer School, he can complete the work for his degree in a little over two years by attending the law school continuously.

The requirements for admission are the same in the summer as in the regular session, except that members of the bar who do not wish to receive credit toward a degree will be admitted without restriction. Opportunity for supervised reading in preparation for the bar examination in August will be afforded.

NOTES

CONSTITUTIONALITY OF WORTHLESS CHECK STATUTES

In the recent case of *State v. Yarboro*,¹ the defendant gave a check in payment for professional services rendered in the past. He had no money on deposit and no understanding or arrangement with the bank for the payment of this check. He was convicted of a misdemeanor under a statute which provided that,

It shall be unlawful for any person . . . to draw, make, utter or issue and deliver to another, any check or draft . . . knowing at the time of making, drawing, uttering, issuing, and delivering . . . that the maker or drawer thereof has not sufficient funds . . . or credit . . . with which to pay the same upon presentation (Pub. Laws 1927, ch. 62).

A motion in arrest of judgment was granted, and the state appealed. A divided court held the statute valid as not in contravention of the constitutional prohibition against imprisonment for debt.

During the formative period of primitive society when the creditor's rights came to be recognized, there seem to be no limits which the law set upon them. If he is entitled to the debt at all, he is entitled to seize the goods of the debtor; and if the debtor has no goods, he is entitled to his services, which entailed the possession of his person, including his wife, his children and his slaves, and the right extended even to power over his life. The creditor was in fact

¹ 194 N. C. 498, 140 S. E. 216 (1927).

the master of the life and liberty of his debtor.² But as early as 326 B.C. the Lex Poetelia³ alleviated the condition of the debtors to the extent of preventing their summary imprisonment, and thus abolished enslavement of debtors for the future.⁴ By the Statute of Merchants, enacted by the English Parliament in 1282, the creditor was allowed upon proving the obligation to seize the person of his debtor and commit him to the Tower. This practice flourished⁵ until a statute of 1838 afforded partial relief,⁶ but it was not until 1868 that the system was finally abolished.⁷

Likewise the practice of imprisoning the debtor to enforce payment of debts has prevailed in America, but to a more limited extent. At the present time it is generally abolished by constitution and statute, except when there is an element of fraud.

The early American State constitutions took the first step in this direction by providing that except in cases of fraud the body of the debtor shall not be confined in prison after delivering up his estate for the use of his creditors.⁸ Under this provision when a creditor had a legal demand against a debtor, he was first required to estab-

² By the Twelve Tables (Roman Law) the creditors might cut the body of their debtor into pieces and share it among themselves pro rata. Holmes, *The Common Law*, p. 14; Hadley, *Introduction to Roman Law*, Lect. 10.

³ Cicero, *De Rep.*, 2. 34. 59; Arnold, *History of Rome*, Vol. 2, c. 32. Buckland, *A Manual of Roman Private Law*, p. 259. However, this law affected only contract debtors and not judgment debtors.

⁴ The Mosaic laws of debt are interesting as indicative of the state of society to which they belong and as combining a degree of leniency and severity which is foreign to our law. A poor Israelite could be sold by his creditor to one of means, but he served as a hired servant, not as a bond slave, and was set at liberty when the year of jubilee arrived. (Lev. xxv. 39.) If pledges such as raiment were given for debt, it must be returned at nightfall if necessary for covering; and a widow's garments could not be taken in pledge. (Ex. xxii, 26, 27.) However, children were often pledged (Job xxiv. 9) and even given into slavery, in payment for debt. (2 Kings iv, 1.) But if an Israelite became poor, it was a duty to lend to him, and no interest was to be exacted either in money or in produce. When the sabbatical year arrived, i.e., at the end of every seven years, there was a general remission of debts as between Israelites, and the near approach of the year of remission was not recognized as an excuse for declining to lend to an indigent brother. (Deut. xv. 1-11.)

⁵ For the 18 months prior to the commercial panic of 1825, 101,000 writs of debt were issued by the English courts. In 1827 nearly 6,000 persons were committed in London alone for debt. Walpole, *History of England from 1815*, Vol. 4, c. 17; Harper, *Book of Facts*, "debtors."

⁶ May, *Constitutional History of England* (Widdleton's Ed.), Vol. 2, pp. 267-268.

⁷ Statutes, 32 & 33 Vict., c. 62.

⁸ Constitutions of: N. C., § 39 (1776); Pa., Art. ix, § 16 (1792); Ky., Art. xii, § 17 (1792); Tenn., Art. iv, § 18 (1796); Ga., Art. iv, § 7 (1798); Miss., Art. i, § 18 (1817); Ala., Art. i, § 18 (1819); R. I., Art. i, § 11 (1842); N. J., Art. i, § 17 (1844); Tex., Art. i, § 15 (1845).

lish it at law by a judgment, and then have a *fieri facias* issued thereon. If this writ was returned, *nulla bona*, the law provided a further remedy in the writ of *capias ad satisfaciendum* which imprisoned the debtor to compel him to apply in satisfaction of his debts property which could not be reached by *fi. fa.*⁹ Under this section the debtor having delivered up his property for the use of his creditors or taken the oath of insolvency was released from imprisonment.¹⁰

This writ, however, did not lie at common law against certain privileged persons,¹¹ and its application to the masses was partly relieved of its severity and rigor by the leniency and common sense of the courts.¹²

To obviate the evil incident to the writ of *ca. sa.* the majority of American State constitutions finally provided in substance: there shall be no imprisonment for debt, except in cases of fraud.¹³ This provision is self-explanatory. Not all imprisonment is prohibited; only that for debt, arising *ex contractu*, and without fraud.¹⁴ But the exception, allowing full latitude for the enforcement of the fraud statutes, does not destroy the prohibition. It does not permit imprisonment through the operation of the criminal law by making it a crime to fail in paying a debt.

No difficulty arises where the act is tainted with fraud, for in such cases the act is expressly taken out of the protection of the constitution.¹⁵ The American States are seemingly unanimous in

⁹ *Powell v. Howell*, 63 N. C. 283 (1868).

¹⁰ P. L. 1773, c. 4; *Burton v. Dickens*, 7 N. C. 103 (1819); *Jordan v. James*, 10 N. C. 110 (1824); *S. v. Manuel*, 20 N. C. 144, 153 (1838); *Williams v. Floyd*, 27 N. C. 649 (1845).

¹¹ Blackstone, Commentaries, Vol. 3, p. 414.

¹² 1 Inst. 289, where a defendant in 13 Edw. III was discharged from such a *capias* because he was of so advanced an age and could not endure imprisonment.

¹³ The only states not having a similar constitutional provision are: Conn., Del., La., Mass., Md., Me., N. H., N. Y., Va., Vt., and W. Va.

¹⁴ Imprisonment for debt: 1 N. C. L. Rev. 229 (1923). It has no application to debt arising *ex delicto*: *Long v. McLean*, 88 N. C. 3 (1883); *Stidham v. Du Bose*, 128 S. C. 318, 121 S. E. 791 (1924); *S. v. Dowling*, 110 So. 522 (Fla. 1926). Fraud must be alleged and proved: *Clafin & Co. v. Underwood*, 75 N. C. 485 (1876); *Stewart v. Bryan*, 121 N. C. 46, 28 S. E. 18 (1897); *Ledford v. Emerson*, 143 N. C. 527, 55 S. E. 969, 10 L. R. A. (n. s.) 362 (1888).

¹⁵ Cases not within prohibition against imprisonment for debt:

Refusing to pay alimony: *Barclay v. Barclay*, 184 Ill. 375, 56 N. E. 636, 51 L. R. A. 351 (1900); *Lamar v. Lamar*, 123 Ga. 821, 51 S. E. 763, 107 Am. St. Rep. 169, 3 Ann. Cas. 294 (1905); *Ex parte Davis*, 101 Tex. 607, 111 S. W. 394, 17 L. R. A. (n. s.) 1140, and note (1908).

Non-support of wife: *S. v. Dixon*, 138 Tenn. 195, 196 S. W. 486 (1917)

condemning the obtaining of property by false pretenses and cheats.¹⁶ Under this general classification appear the fore-runners of the present bad check laws, which were aimed at the practice of securing property by deception.¹⁷ Consequently the *sine qua non* of criminality under this type of statute is (1) fraudulent intent¹⁸ and (2) obtaining presently something of value.¹⁹ The constitutionality of this legislation depends upon the provision requiring proof of fraud, and where the statute does not require fraud,²⁰ or where fraud is presumed without allowing testimony in rebuttal,²¹ the statute is unconstitutional; whereas, identical statutes have been held valid when requiring a *mens rea*.²²

There is another type of legislation, not related to the foregoing group of crimes, condemning the obtaining of property by false pretenses and cheats, the purpose of which is to discourage overdrafts, check kiting, and generally to avert the mischief to trade and commerce which the circulation of worthless checks inflicts. This legislation is generally known as the "Worthless Check Acts" and may be divided into two classes, viz., those requiring an "intent to de-

Refusing to pay money decreed for support of husband: Livingston v. Superior Court, 117 Cal. 633, 49 Pac. 836, 38 L. R. A. 175 (1897).

Refusing to pay money decreed for support of minor child: Fussell v. S., 166 N. W. 197 (Neb. 1918).

Obtaining lodging, etc. by fraud: S. v. Barbee, 187 N. C. 703 (1924); *Smith v. S.*, 141 Ga. 482, 81 S. E. 220, Ann. Cas. 1915c, p. 999 (1914); *Ex parte Milecke*, 52 Wash. 312, 100 Pac. 743, 21 L. R. A. (n. s.) 259, and note (1909).

Removing baggage subject to lien for unpaid bills: S. v. Engle, 156 Ind. 339, 58 N. E. 698 (1900).

Refusing to pay taxes: S. v. Widman, 72 So. 782 (Miss. 1916).

Libel: Moore v. Green, 73 N. C. 394, 21 Am. Rep. 470 (1875).

Fines and cost for violating criminal law: S. v. Manuel, *supra* note 10; *S. v. Wallin*, 89 N. C. 578 (1883). Although at common law fines were a proper subject for an action of "debt."

But penalty for violating municipal ordinances is a debt: Board of Education v. Henderson, 126 N. C. 689, 35 S. E. 228 (1900).

¹⁶ N. C. Cons. Stat. 4277 et seq.; 33 Hen. VIII, c. 1, §§ 1 & 2; 30 Geo. II, c. 24, § 1.

¹⁷ N. C. Cons. Stat. 4283; 3 N. C. L. Rev. 141 (1925).

¹⁸ *S. v. Mangum*, 116 N. C. 998 (1895); *S. v. Davis*, 150 N. C. 851 (1909); *S. v. Matthews*, 121 N. C. 604 (1897); *S. v. Phifer*, 65 N. C. 321 (1871). But no crime where defrauded party knew of fraud or ought to have known it. *S. v. Moore*, 111 N. C. 667 (1892); *S. v. Whedbee*, 152 N. C. 770 (1910).

¹⁹ *S. v. Freeman*, 172 N. C. 925 (1916).

²⁰ *S. v. Williams*, 150 N. C. 802, 63 S. E. 949 (1909); *Minton v. Early*, 183 N. C. 199, 111 S. E. 347 (1922); *Ex parte Hollman*, 79 S. C. 9, 60 S. E. 19, 21 L. R. A. (n. s.) 242, and note (1908).

²¹ *Bailey v. Alabama*, 219 U. S. 219, 31 Sup. Ct. 145, 55 L. Ed. 191 (1911).

²² *S. v. Norman*, 110 N. C. 484, 14 S. E. 968 (1892); *Ledford v. Emerson*, *supra*, note 14; *Ex parte Riley*, 94 Ala. 82, 10 So. 528 (1892); *S. v. Vann*, 150 Ala. 66, 43 S. E. 357 (1907); *Lamar v. S.*, 120 Ga. 312, 47 S. E. 958 (1904); *Banks v. S.*, 124 Ga. 15, 52 S. E. 74, 2 L. R. A. (n. s.) 1007 (1905).

fraud,"²³ which constitute the majority of such statutes,²⁴ and those penalizing the giving of such checks without expressly requiring such intent. Where such intent is required the courts uphold the constitutionality of the statute on the ground that the imprisonment is not for mere non-payment of debt but for practicing the fraud specified therein.²⁵ Some jurisdictions support the statute on the theory that the offense is not connected with debt, but consists in resorting to a practice which the legislature regarded as demoralizing to business and the penalizing of such practices as a valid exercise of police power.²⁶ Other jurisdictions hold that unless the statute requires such an intent, it is invalid as in contravention of the constitutional provision against imprisonment for debt; in which cases the courts construe the requisite intent into the statute.²⁷

The North Carolina worthless check legislation began with an orthodox fraud statute,²⁸ and was later supplemented by a non-fraud statute,²⁹ imposing conditional criminal liability, which evolved into the present non-fraud criminal statute.³⁰ The present statute does not require a fraudulent intent, nor the obtaining of credit or property, nor does it allow days of grace. And in this respect the North Carolina law differs from the great majority of American worthless

²³ These statutes would appear at first glance to be identical with those against obtaining property by false pretenses. But the present statutes are more comprehensive in that they would include any kind of fraud, such as giving a worthless check to secure a delay while debtor absconds with his property.

²⁴ States not requiring such fraudulent intent as an element of the offense are: North Carolina, North Dakota; also the following which allow days of grace: Arkansas, Iowa, Mississippi, South Dakota, Vermont, West Virginia and Kansas, the latter allowing an abatement of the action upon showing an account within 30 days.

²⁵ *Hollis v. S.*, 152 Ga. 182, 108 S. E. 783 (1921); *S. v. Alphonse*, 154 La. 950, 98 So. 430 (1923); *Commonwealth v. McCall*, 186 Ky. 301, 217 S. W. 109 (1919); *S. v. Pilling*, 53 Wash. 464, 102 Pac. 203, 132 Am. St. Rep. 1080 (1909); *S. v. Meeks*, 247 Pac. 1099 (Ariz. 1926).

²⁶ *S. v. Avery*, 111 Kan. 588, 207 Pac. 838, 23 A. L. R. 453 (1922); *S. v. Yarboro*, *supra*, note 1.

²⁷ *Neidlinger v. S.*, 17 Ga. App. 811, 88 S. E. 687, 23 A. L. R. 459 (1916), in which the court said that to construe the statute otherwise, "the act would be in effect nothing more than a means of enforcing promises and other civil obligations, and of collecting debts by the processes of the criminal law—which is utterly abhorrent to our public policy as announced by the courts and as embodied in the Constitution of our state." (Case criticized in *S. v. Avery*, *supra*, note 26.)

The Georgia legislature has since expressly incorporated into the statute the words, "with intent to defraud," Ga. L. 1919, p. 220.

²⁸ N. C. Cons. Stat. 4283, P. L. 1907, amended 1909.

²⁹ N. C. P. L. 1925, c. 4; 5 N. C. L. Rev. 75 (1926); 6 N. C. L. Rev. 179 (1925); *S. v. Edwards*, 190 N. C. 322, 130 S. E. 10 (1925); *S. v. Corpening*, 191 N. C. 751, 133 S. E. 14 (1926).

³⁰ N. C. P. L. 1927, c. 62.

check laws.³¹ The statute penalizes the purported payment of a past due obligation without regard to fraudulent intent or detriment to the payee.

The constitutionality of the statute was supported in the instant case by a three to two decision, with each member of the court writing a separate opinion. The majority of the court base their argument on the theory that giving a worthless check is an offense entirely distinct from the debt. But apparently desiring to strengthen their position, they supplemented this argument by assuming that the giving of such a check is in effect a fraud, thereby confusing two distinct theories in support of the statute.³²

The instant case did not involve the question of post-dated checks, so it is interesting to note their probable status under the present act. According to the rules of statutory construction, they are clearly included by implication. The present statute makes no reference to post-dated checks, whereas the prior statute expressly excepted them.³³ Further the term "draft" would perhaps include such checks.³⁴ The courts have divided on the question of whether a fraudulent intent is controlling on the applicability of the statute to post-dated checks.³⁵ However, the specific evils which the statute

³¹ *Supra*, note 24.

³² The three majority opinions do not clearly distinguish between the two theories, nor state which of the two they adopt; i.e., whether giving the check is a criminal act entirely separate from debt, or whether giving a check without sufficient funds is a false representation and hence without constitutional protection. The theories are distinctive, in fact antithetic, and obviously the act cannot be both. It would appear that the opinions incline toward different views.

³³ Lewis', *Sutherland Statutory Construction* (second Ed.), Vol. I, p. 521.

³⁴ 8 C. J. 106, § 192.

³⁵ Post-dated checks where statute requires an intent to defraud. Post-dated checks included: *People v. Bercovitz*, 163 Cal. 636, 126 Pac. 479, 43 L. R. A. (n.s.) 667 (1912); *Commonwealth v. Woolis*, 15 Del. Co. Rep. 549 (Pa. Quar. Sess., Blair Co., 1921); *People v. Westerdahl*, 316 Ill. 86, 146 N. E. 737 (1925). *Contra*: *S. v. Barone*, 118 Atl. 779 (N. J. 1922); *Territory v. Forrest*, 26 Hawaii 695 (1923). *Cf. S. v. Winter*, 98 S. C. 294, 82 S. E. 419 (1914).

Post-dated checks where intent to defraud is not required. Post-dated checks included: *S. v. Avery*, *supra*, note 26; *S. v. Johnson*, 116 Kan. 390, 226 Pac. 758 (1924). *Contra*: *Lovell v. Eaton*, 133 Atl. 742 (Vt. 1925); *Smith v. S.*, 147 Ark. 49, 226 S. W. 531 (1921).

Telling payee that there are no present funds, prevents applicability of statute to post-dated checks: *Neidlinger v. S.*, *supra*, note 27; *Strickland v. S.*, 27 Ga. App. 772, 110 S. E. 39 (1921); *White v. S.*, 27 Ga. App. 774, 110 S. E. 40 (1921); *People v. Wilkins*, 67 Cal. App. 758, 228 Pac. 367 (1924); *Ex parte Griffin*, 257 Pac. 458 (Cal. 1927). Statutes against obtaining property by false pretenses do not include post-dated checks: *Brown v. S.*, 166 Ind. 85, 76 N. E. 881 (1906); *S. v. Ferris*, 171 Ind. 562, 86 N. E. 993 (1909); 34 W. Va. L. Q. 207, 208 (1928).

was designed to remedy follow from the giving of a worthless post-dated check regardless of the intent. But, nevertheless, the court may hold the statute inapplicable to such checks because of the unfavorable and far reaching results, on the basis that to include them would be to render an act which was intended to subserve a useful purpose unconstitutional and void.³⁶ Yet to exclude post-dated checks would be in practical effect to render the statute ineffectual, because it would be easy to escape liability by dating all checks one day ahead.³⁷

The question now arises, is the decision in the instant case sound? If the constitutionality of the statute is admitted, the result naturally follows. But in the present case the court was faced with an easy problem and it was relatively simple to uphold the statute. The evils incident to promiscuous circulation of worthless paper are generally recognized, and the court is likely to feel instinctively that such a statute should be upheld. It then finds itself forced to resort to highly technical reasoning to support its decision. The majority opinions say that the constitutional prohibition is inapplicable because it is not imprisonment for debt at all, but rather imprisonment for uttering a worthless check. However, the court admits that the purpose of the constitutional provision was to abolish the evils of the *capias ad satisfaciendum*. If this statute even partially restores those evils, then it is unconstitutional within the spirit if not the letter of the constitution.³⁸ Under the spirit of the constitution the state

³⁶ A person could give a check dated three months in advance, having no funds at present, be guilty of a crime under the statute, be convicted, serve his term, yet have money on deposit to honor the check upon its due date.

³⁷ 6 N. C. L. Rev. 181 (1928).

³⁸ Imprisonment for debt of Col. Wm. Barton (who captured the British General Prescott, July 10, 1777), drew from Whittier his fine poem, "The Prisoner for Debt"; in which the poet exclaims,

"What has the gray-haired prisoner done?
Has murder stained his hands with gore?
Not so; his crime's a fouler one;
God made the old man poor!

* * * * *

Down with the law that binds him thus!
Unworthy freemen, let it find
No refuge from the withering curse
Of God and human-kind!
Open the prison's living tomb,
And usher from its brooding gloom
The victims of your savage code
To the free sun and air of God;
No longer dare as crime to brand
The chastening of the Almighty's hand."

may impose imprisonment as a punishment for fraud, but it may not imprison one man for failing to pay his debt to another by punishing him as a criminal if he makes an improvident and futile attempt.

Under our present statute the debtor's predicament in some cases is worse than before the abolition of imprisonment for debt, when he in effect held the keys to the prison in his possession, and could take advantage of the insolvent debtor's oath to escape confinement. But today a creditor need only coerce or beguile his innocent debtor, unversed in the technicalities of the law, to give him a check as purported payment of his debt, or merely as evidence of the indebtedness, and thereby invoke the aid of the criminal courts in collecting the account,³⁹ and there is no "open-sesame" to the prison doors.

It is further reasoned that the mere giving of a worthless check or draft is a fraud, because there is a false representation of a fact which the giver might have ascertained, and that therefore the imprisonment is in fact for fraud, and hence expressly excepted from the protection of the constitution. The position is questionable, because in order to constitute actionable fraud the following facts must appear: (1) That there were false representations of a subsisting material fact,⁴⁰ (2) that they were intended to deceive, (3) that they did deceive, and (4) that damage followed proximately the deception.⁴¹ The offense under the present statute is fatally lacking in some of these essential elements because there need be no fraudulent intent, nor need damage result,⁴² and finally, as a matter of evidence, the fact of fraud need not be alleged and proved.⁴³ Hence if the statute is to be supported on the ground that it penalizes fraud, the North Carolina court would have had less difficulty in reaching this conclusion if it had followed the Georgia court and construed an intent to defraud into the statute.

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³⁹ The prosecuting attorneys in some districts refuse to prosecute such actions on the ground that it is degrading the criminal courts by converting them into collecting agencies.

⁴⁰ Making an untruthful representation (as the giving of a worthless check) is not of itself fraudulent; it must be accompanied by a fraudulent intent, 12 R. C. L. 239, 241. But the court apparently disregards the other elements of the offense.

⁴¹ Cooley, *Torts*, p. 475 and citations.

⁴² For actionable fraud damage must result: *Carpenter Paper Co. v. News Pub. Co.*, 63 Neb. 59, 87 N. W. 1050, 1051 (1901); *Hodges v. Coleman*, 76 Ala. 103 (1884); Cooley, *Torts*, p. 62 and citations.

⁴³ Fraud not a presumption, but a fact to be proved: *Shafer v. Shafer et al.*, 85 Md. 554, 37 Atl. 167, 169 (1897); Words and Phrases, Vol. 3, "Fraud," p. 2946.

EQUITABLE RESTRICTIONS ON THE USE OF PROPERTY

Equitable restrictions in the narrow sense of the phrase are restrictions enforceable only on equitable principles. If recorded the right involved is as binding against otherwise bona fide purchasers as any legal property interest as far as notice is concerned.¹ And it is enough to bind a purchaser of the res if the restrictions are contained in a recorded deed through which he derived title.² So as the law stands parties creating equitable restrictions may make them as binding as a legal right subject to an exception to be noted.³ As here considered equitable restrictions are restrictions binding on the property subject thereto and not mere personal obligations.

No particular form of provision or stipulation is essential to the creation of equitable restrictions. They may appear in the form of covenants⁴ or simple contracts,⁵ reservations⁶ or conditions.⁷ It has been held that such restrictions may be imposed upon property by a verbal reference to a building scheme.⁸ But if the right created is to be deemed an interest in real property a writing is necessary to satisfy the Statute of Frauds. Accordingly it has been held in North Carolina that the agreement creating the restrictions must be in writing,⁹ which, it is thought, is the better opinion.¹⁰ Unless the intent of the parties is clear the binding force of the restrictions is necessarily left to judicial construction. That result is the more undesirable when considered with the fact that the parties to the restrictive agreement might easily provide that the burden and the benefit be annexed to the respective res into whosoever hands they should pass.¹¹

¹ Ames, Specific Performance for and against Strangers to the Contract (1903), 17 Harv. L. Rev. 174.

² *Peck v. Conway*, 119 Mass. 546 (1876).

³ See *infra* note 6. The exception suggested is the rule that equitable restrictions will not be specifically enforced where there has been such a change in the character of the neighborhood as to defeat their purpose and render it inequitable to grant such relief. On this point note the searching analysis of the authorities by Brogden, J. in *Starkey v. Gardner*, 194 N. C. 74 (1927).

⁴ *Francis v. Ziering*, 112 N. Y. Supp. 647 (1908).

⁵ *Dorr v. Harrigan*, 101 Mass. 531 (1869).

⁶ *Peck v. Conway*, *supra*, note 2.

⁷ *Parker v. Nightingale*, 6 Allen (Mass.) 341 (1863); *Ayling v. Kramer*, 133 Mass. 12 (1882); 16 Mich. L. Rev. 99.

⁸ *Tallmadge v. Bank*, 26 N. Y. 105 (1862).

⁹ *Davis v. Robinson*, 189 N. C. 589, 127 S. E. 697 (1925).

¹⁰ This point will hardly be much-agitated because it is simply more practical and suitable to the purpose to create the restrictions by a writing, as in a deed of property or under a building plan, either of which may be recorded.

¹¹ *Rogers v. Hosegood* (1900), 2 Ch. 388. If the intention of the parties is not clear "the ownership and character of buildings in the neighborhood, plans,

Real property, businesses, and even chattels have been made the subjects of equitable restrictions. As to real property no comment is necessary here. The benefit¹² of equitable restrictions may be annexed to a business and it would seem that the same is true of the burden.¹³ One eminent writer explains this result as an application of the equitable principle 'that the incident will pass with the principal thing without any formal assignment.'¹⁴ That is a good analysis of the running of the benefit and the same reasoning may be applied to the case where the burden is on the business, aside from the objection that there should be a dominant tenement, hereinafter discussed.

Equitable restrictions have been upheld as to personality in the case of patents and copyrights.¹⁵ The monopolistic nature of such interests, however, distinguishes them in this regard from ordinary chattels. There is no reason for allowing such restraints upon the latter. As to them there is usually no such legitimately peculiar interests to protect. It follows that restrictive agreements as to chattel property should not be enforced in the same manner as equitable restrictions on realty.

In England equity will enforce a restrictive agreement as to real estate as against persons other than the parties thereto "only when it is restrictive of the use of the land."¹⁶ The English rule has been

building schemes, the existence of similar restrictions upon other lots, even parol agreements among neighbors may be shown as bearing upon the probable intention of the contracting parties." 5 Harv. L. Rev. 278, cited in 16 Mich. L. Rev. 100.

¹² *John Bros. Abergarw Brewery Co. v. Holmes* (1900), 1 Ch. 188; *Francisco v. Smith*, 143 N. Y. 488, 38 N. E. 980 (1894). See also 24 Harv. L. Rev. 574.

¹³ 24 Harv. L. Rev. 575.

¹⁴ Pound, *Progress of the Law* (1919), 33 Harv. L. Rev. 813. At page 819 the writer says: "There is no more than a personal claim against covenantor, but that claim is an incident of the business and will pass therewith because its purpose and intent can only be carried out in that way and equity looks to that as the substance and not to its form." In *Rosen v. Wolff*, 152 Ga. 578, 110 S. E. 877 (1922), it was said that the equity of one seeking to enforce a restrictive covenant in favor of a business was based upon privity of conscience, citing 31 Yale L. Jour. 131.

¹⁵ *Murphey v. Christian Press Publishing Co.*, 38 App. Div. 426, 56 N. Y. Supp. 597 (1899). The court enforced the restrictions on the analogy of so-called negative easements in real property. Contra: *Garst v. Hall & Lyon Co.*, 179 Mass. 588, 61 N. E. 219 (1901), where it was held that an agreement not to resell a patent medicine for less than a price fixed by the manufacturer bound only the purchaser who was a party thereto. The same result has been reached by the United States Supreme Court on the ground, however, that under the patent laws an attempt by a manufacturer to fix the resale price was futile. *Bauer v. O'Donnell*, 229 U. S. 1 (1912).

¹⁶ 2 Tiffany, *Real Property* 1428, and cases cited.

applied with approval in New York.¹⁷ However, there is good American authority to the effect that the principles of equitable servitudes extend to affirmative as well as restrictive agreements.¹⁸ It has been suggested that in such cases enforcement is either granted or refused according to the principles of specific performance.¹⁹ That is not entirely acceptable, however, if we take the interest involved to be a property right.²⁰ Like many other property rights it is created by contract, making it none the less an interest surviving apart from the contract of its creation. The rules of specific performance of contracts are no more applicable than in the protection of other equitable property rights such as an equitable charge, for example. The courts generally do not accept that conclusion.²¹ There are properly more limitations upon the creation and enforcement of servitudes requiring affirmative acts than is true of restrictive ones because they more seriously affect the alienability of the servient res and their protection is more repugnant to personal liberty.²²

May there be equitable restrictions in gross, or in other words, where the burden attaches to the servient tenement and the benefit is merely personal without any dominant tenement? It has already been suggested that such might be so where the servient res was a business. In theory this is a perfectly valid concept because an equitable servitude is not an easement but a flexible property right of equitable nature.²³ Practically it would be difficult to get a court

¹⁷ *Miller v. Clary*, 210 N. Y. 127, 103 N. E. 1114 (1913).

¹⁸ 3 Pomeroy, *Equity Jurisprudence*, sec. 1295, cited approvingly in *Sharp v. Cheatham*, 88 Mo. 498, 57 Am. Rep. 433 (1885). That court said: "There would seem to be but little of either justice or sound reason in the doctrine which enforces the equities arising from the agreement of parties to refrain from doing certain acts toward a certain subject-matter, and yet refuse to enforce a similar agreement by compelling the performance of acts embraced within its terms."

¹⁹ "Any agreement that equity will enforce between the contracting parties will equally be enforced as a restriction against the purchaser of the land." 5 Harv. L. Rev. 277.

²⁰ Clark, *Principles of Equity* 109.

²¹ *Windemere-Grand Improvement and Protective Ass'n. v. Bank*, 205 Mich. 539, 172 N. W. 29 (1919).

²² Here there is truly a suggestion of considerations involved in specific enforcement of contracts. Equity may refuse specific performance of an affirmative contract where the difficulties in the way of effectually enforcing performance are great or there will be undesirable interference with the defendant's personal liberty.

²³ It is true that one must have an interest in the enforcement of the restrictions to be entitled to the assistance of equity but why has not a party such an interest when he transfers his land subject to restrictions, thereby reserving that much of the total property interest in the land, which interest he is entitled to have protected?

of equity to enforce such an interest because the primary purpose of equitable restriction is to protect or make more beneficial other property. Yet, according to the decisions, where there is a dominant tenement the tenant in possession may have the protection of equity without showing actual damages. Prof. Clark cites an Illinois case as an example of the enforcement of equitable restrictions in gross.²⁴ This well-reasoned opinion is not in accord with the weight of authority.²⁵ The English rule also requires a dominant tenement.²⁶ There has been no decision on the point in North Carolina, but since the North Carolina court regards equitable restrictions as negative easements it seems that it would probably follow this latter view.²⁷

The parties who may enforce equitable restrictions may be classified as follows:²⁸

1. Transferees of property retained by covenantees to which the benefit has attached.²⁹
2. The owners of land involved in mutual restrictive agreements.³⁰
3. The grantee and his grantees of real property for the benefit of which the original grantor made a restrictive agreement with reference to the realty retained by him.³¹
4. The several owners of lots sold under a general building scheme or plan.³² Here the restrictions are enforceable by the owners of any lot against the owner of any other lot.

²⁴ *Van Sant v. Rose*, 170 Ill. App. 572, 103 N. E. 194 (1912) discussed in Clark, *Principles of Equity* 125. Clark suggests that the Illinois court gave relief on the theory of preventing unjust enrichment. Rather, however, the court held that the vendor who required the execution of the covenants thereby reserved an interest that he was entitled to have protected independently of the existence or non-existence of a dominant tenement.

²⁵ "A court of equity will not enforce a restrictive covenant assigned unless the effect of the enforcement of the restrictive covenant will be to protect property held by the complainant at the same time of the suit." *Radio Corp. of America v. De Forest Radio Telep. and Teleg. Co.*, 127 Atl. 678 (N. J.) (1925). I confess that I do not see the logic of this result.

²⁶ *London County Council v. Allen* (1914), 3 K. B. 642.

²⁷ *Davis v. Robinson*, *supra* note 9.

²⁸ We are not here concerned with parties in legal privity as to the restrictive agreement. In such case legal remedies are open to the parties.

²⁹ *Hemsley v. Marlborough Hotel Co.*, 62 N. J. Eq. 164, 50 Atl. 14 (1901).

³⁰ *Codman v. Bradley*, 201 Mass. 361, 87 N. E. 591 (1909).

³¹ *Nicoll v. Fenning*, 1 Ch. D. 258 (1881); *Rosen v. Wolff*, *supra* note 14; *Brown v. Huber*, 80 Ohio St. 183, 88 N. E. 322 (1909).

³² *Johnston v. Garrett*, 190 N. C. 835, 130 S. E. 835 (1925). Difficulty has been encountered in finding a satisfactory theory of enforcement to sustain the case where a subsequent purchaser under a general plan is allowed to enforce the restrictions against a former one. The simplest explanation is that the burden and benefit extend to the whole subdivision at the outset so that a

5. The owners of real property never owned by the grantor but intended to be benefited by the restrictions imposed on the land transferred.³³

In general the right of persons other than the original covenantee to enforce the restrictions depends upon whether the parties to the restrictive agreement intended to benefit the property now held by them and not simply the covenantee personally.³⁴ So one seeking to enforce the restrictions must show that his property was intended to be benefited.³⁵ That intent, if not apparent, is found from a construction of the agreement in connection with all the circumstances surrounding its execution.³⁶ It is settled that the construction most unfavorable to the dominant owner will be adopted because the law favors the free use and full ownership of property.³⁷

The benefit of an equitable servitude may be annexed to an equitable estate.³⁸ The holder in possession of the particular estate may enforce the servitude without showing any damages,³⁹ but a remainderman must show actual injury to his interest to get relief in equity.⁴⁰ A tenant for years may enforce the servitude.⁴¹

In England it has been held that a covenantee for whom alone the benefit was originally intended, where the power to do so was conferred by the agreement, might annex the benefit to the land in a subsequent transfer thereof.⁴² That doctrine has not been adopted in this country.⁴³ Though under a general building scheme the restrictions are enforceable inter-lot, they are not enforceable intra-lot,

subsequent purchaser simply buys land to which the benefit is already annexed. In this connection see *McKenzie v. Childers*, 43 Ch. D. 265 (1888) and 19 Col. L. Rev. 187.

³³ *Hays v. St. Paul M. E. Church*, 196 Ill. 633, 63 N. E. 1040 (1902).

³⁴ *Berryman v. Hotel Savoy Co.*, 160 Cal. 559, 116 Pac. 677, 37 L. R. A. (N. S.) 5 (1911).

³⁵ *McNicholl v. Townsend*, 73 N. J. Eq. 76, 67 Atl. 938 (1907).

³⁶ *Hays v. St. Paul Church*, *supra* note 33; see also note 11, *supra*.

³⁷ *Marsh v. Marsh*, 90 N. J. Eq. 244, 106 Atl. 810 (1919).

³⁸ *Rogers v. Hosegood*, *supra* note 11.

³⁹ *Lord Manners v. Johnson*, 1 Ch. D. 673 (1875); *Van Sant v. Rose*, *supra* note 24.

⁴⁰ *Johnstone v. Hall*, 2 Kay and Johnson 414 (1856).

⁴¹ *Johnson v. Robertson*, 156 Iowa 64, 135 N. W. 585 (1912). Here a tenant for years was allowed to enforce the servitude on the theory that the restrictive agreement created an equitable servitude enforceable by anyone interested in the property. See also *Taite v. Gosling*, 11 Ch. D. 273 (1879).

⁴² *Renals v. Cowlishaw*, 9 Ch. D. 125 (1876); *Chambers v. Randall* (1923), 1 Ch. 149.

⁴³ That it has no virtue for either the covenantor or covenantee has been conclusively demonstrated by Dean Ames. See 17 Harv. L. Rev. 174.

that is, by the several owners of parts of a single lot that has been subdivided, as against each other.⁴⁴

In general, those who may claim the benefit must have an interest in the dominant tenement,⁴⁵ but a mere occupant may be bound who has no interest in the servient tenement.⁴⁶ "The burden of the restrictive agreement, unless expressly limited to the covenantor, falls upon every possessor of the res except a purchaser for value without notice of the agreement, or a possessor subsequent to such a bona fide purchaser."⁴⁷ Notice is required, of course, because transfer to a bona fide purchaser cuts off equities. It is sufficient notice if the restrictive agreement is recorded in the line of title of the party to be bound.⁴⁸ It has been held in North Carolina that to bind subsequent purchasers of the servient tenement the restrictive agreement must be recorded.⁴⁹

Equitable restrictions may be discharged in the following ways: 1—By release.⁵⁰ 2—Purchase of the servient tenement by a bona fide purchaser without notice. 3—Changes in the character of the neighborhood defeating the purpose of the restrictions.⁵¹ 4—Laches.⁵² 5—Implied waiver by the party owning the benefit either by acquiescence in defendant's breach or by his own breach of the restrictions.⁵³ 6—Condemnation under eminent domain.⁵⁴

⁴⁴ *King v. Dickeson*, 40 Ch. D. 596 (1889). The lot subdivided is subject in all its parts to the original restrictions but subdividing does not create any mutual restrictions among the several parts.

⁴⁵ *Johnson v. Robertson*, *supra* note 41.

⁴⁶ *Mander v. Falcke* (1891), 2 Ch. 554.

⁴⁷ 17 Harv. L. Rev. 177. An adverse possessor would be bound even though the statutory period had run as to the land. *In re Nisbet* (1906), 1 Ch. 386.

⁴⁸ *Peck v. Conway*, *supra* note 2.

⁴⁹ *Davis v. Robinson*, *supra* note 9. And under the North Carolina recording act no notice will take the place of registration. *Fertilizer C. v. Lane*, 173 N. C. 184, 91 S. E. 953 (1917). On the other hand it has been held that a sign on property sold with the words: "this is Morningside, exclusive residential section, with adequate restrictions" bound the purchaser so that he could not erect a business structure on the premises. *Raven v. Laurens*, 139 S. E. (Ga.) 546 (1927).

⁵⁰ *Myers Park Homes C. v. Fall*, 184 N. C. 426, 115 S. E. 184 (1922).

⁵¹ *Starkey v. Gardner*, *supra* note 3; *Windemere-Grand Ass'n. v. Bank*, *supra* note 21; *Jackson v. Stevenson*, 156 Mass. 496, 31 N. E. 691 (1891).

⁵² *Orne v. Fridenberg*, 143 Pa. 487, 22 Atl. 832 (1891). Simply delaying to sue should not per se preclude the plaintiff. The analogy of the Statute of Limitations should be followed here so far as consistent with the equities between the parties.

⁵³ 74 Univ. Pa. L. Rev. 314 and cases cited. Unless it appears that a party by violating the restrictions himself intended to waive their benefit it is doubtful whether the courts should raise an implied waiver. That is true because the fact that A violates a right that B has in his land is no conclusive reason for saying that he waives similar rights that he owns in B's land. The courts

Although the whole subject of equitable servitude is perplexingly confused, probably the most confusion has arisen in the matter of explaining their nature. Their development is generally regarded as a piece of judicial legislation beginning with the English case of *Tulk v. Moxhay* in 1848.⁵⁵ The theory of that case, enforcement to prevent against enrichment, has been definitely rejected, as shown by the holding that one who buys the dominant tenement without notice of the restrictions may have the benefit.⁵⁶ Again they have been treated as covenants running with the land and as negative easements.⁵⁷ The North Carolina Court has on one occasion termed them the former⁵⁸ and on another the latter.⁵⁹ Neither analogy is entirely adequate. For instance covenants running with the land are not enforceable where privity of estate is wanting and neither such covenants nor easements are applicable to personalty as equitable servitudes may be.⁶⁰ Dean Ames leans to the constructive trust theory announced in 5 Harv. L. Rev. 274 in explaining the running of the burden.

It has been assumed throughout by the writer that an equitable restriction or servitude is a property interest.⁶¹ Again it is an equitable interest having a character of its own not at all dependent upon convenient analogies. It is a distinct type of property interest, the product of modern Anglo-American, urban economic life. The most recent development in the regulation of city growth is away from this individual private method toward public regulations by

adhere too closely to principles of specific performance of contracts in these cases with a minimum of emphasis upon the fact that they are dealing with property rights.

⁵⁴ Note 61, *infra*.

⁵⁵ 2 Phillips 774.

⁵⁶ Clark, Principles of Equity 117-118; *Rogers v. Hosegood*, *supra*, note 11.

⁵⁷ *London and Southwestern Ry. Co. v. Gomm*, L. R. 20 Ch. D. 562, 583 (1882).

⁵⁸ *Johnston v. Garrett*, *supra* note 32.

⁵⁹ *Davis v. Robinson*, *supra* note 9.

⁶⁰ 17 Harv. L. Rev. 182. The writer fully states the weaknesses in the analogies considered.

⁶¹ Two significant cases may be mentioned in support of this position. In *Flynn v. R. R.*, 218 N. Y. 140, 112 N. E. 913 (1916) it was held that the violation of equitable restrictions by a railroad for its corporate purposes amounted to a taking of private property for which compensation must be made or a perpetual injunction would issue. In *Allen v. Detroit*, 167 Mich. 464, 133 N. W. 317, 36 L. R. A. (N. S.) 890 (1911) it was held that a city which bought property subject to equitable restrictions could not erect buildings thereon in violation of the restrictions without first purchasing the property right involved or condemning it for public purposes. For the view that it is not a property right see *Wilson Co. v. Gordon*, 224 S. W. (Tex.) 703 (1920).

zoning under the police power,⁶² a subject beyond the scope of this note.

J. B. FORDHAM.

IMPEACHMENT OF A VERDICT BY AFFIDAVIT OR TESTIMONY OF A JUROR

It has long been settled law in North Carolina that a verdict of the jury may not be impeached by an affidavit or testimony of one of the jurors.¹ In the early eighteenth century a verdict might have been impeached by such testimony, but in 1785 Lord Mansfield laid down the doctrine that a verdict might not be so impeached.² This doctrine became more fully established in the English law by a full expression of the view given by a later Mansfield in 1807.³

Since the first adoption of this doctrine our Court has affirmed it on numerous occasions. The cases of this kind seem to fall into three divisions or classifications. The first of these applies to mistakes in deliberation, which includes misapplying the judge's charge and misapplying the evidence.⁴ All courts which have adopted the Mansfield view refuse to admit affidavits in such instances. The second and most common of the divisions refers to misconduct of the jury. This division includes such things as bribery, undue influence, and conveying private information in the jury room by one of the jurors.⁵ Here also our Court in rejecting the juror's impeaching

⁶² Van Hecke, Zoning Ordinances and Restrictions in Deeds (1928), 37 Yale L. Journ. 407.

¹ *Suttrell's Executors v. Dry's Executors*, 5 N. C. 94 (1805).

² *Vaise v. Delaval*, 1 T. R. 11, K. B. (1785).

³ *Owen v. Warburton*, 1 B. & P. N. R. 326, 329 (1807).

⁴ *Bellamy v. Pippin*, 74 N. C. 46 (1876) (jury did not consider all of the evidence in finding damages); *State v. Smalkwood*, 78 N. C. 560 (1878) (verdict by compromise); *State v. Royal*, 90 N. C. 755 (1884) (certain person who the jurors thought should have testified did not do so and this caused them to arrive at a different verdict); *Jones v. Parker*, 97 N. C. 33, 2 S. E. 370 (1887) (misunderstood the charge); *Johnson v. Allen*, 100 N. C. 131, 141, 5 S. E. 666 (1888) (method of arriving at damages); *Purcell v. Railroad*, 119 N. C. 728, 26 S. E. 161 (1896) (quotient verdict); *McDonald v. Pless*, 238 U. S. 264, 35 Sup. Ct. 783 (1915) (quotient verdict).

⁵ *State v. McLeod*, 8 N. C. 344 (1821) (misconduct); *State v. Tilghman*, 33 N. C. 513 (1850) (misconduct was shown but not by affidavits which was held good for a new trial but not a mistrial); *Love v. Moody*, 68 N. C. 200 (1873) (affidavit admitted with that of an attorney to show tampering); *State v. Brittain*, 89 N. C. 481, 504 (1883) (undue influence); *Lafoon v. Shearin*, 95 N. C. 391, 394 (1886) (conveying information in the jury room by one of the jurors); *State v. Harper*, 101 N. C. 761, 7 S. E. 730 (1888). (Improper approach—wrong officer in charge—officer present at deliberations); *State v. Hall*, 181 N. C. 527, 106 S. E. 483 (1921) (misbehavior).

affidavit holds with the other courts. The third division deals with the absence of actual assent to the verdict and misrecording of the verdict.⁶ In this instance our Court has been more restrictive in the past than have the other courts adopting the Mansfield view. Other courts have not, as a general rule, gone this far; they have excluded the testimony of the jurors as to the first two divisions but have admitted such testimony in the case where the jurors did not actually assent to the verdict rendered.

By the above line of cases it seems that the Mansfield view has become firmly entrenched in our law. It appears, however, that the Court has in one or two instances deviated slightly from the established view. The Court has said that the setting aside of the verdict is within the discretion of the judge.⁷ From this may it be inferred that the judge may consider the affidavits⁸ to see whether he would be justified in setting aside the verdict? It may be that the affidavits offered by jurors to impeach their verdict may not be received as legal evidence of grounds for new trial as a matter of right, but that they may raise a reasonable suspicion or doubt in the mind of the judge so that he may in his discretion set aside the verdict. The Court has made no actual statement of any such exception but the language used by the Court might lead to such an inference.⁹

Practically all jurisdictions, there being a few exceptions,¹⁰ have adopted the Mansfield view and it has become so firmly a part of the law that it is very improbable that it would be repudiated by judicial decision. The first statement of this generally accepted rule was made by the Iowa Court in 1866.¹¹ The view taken by the Iowa Court is the same as that adopted by Wigmore in his work on Evidence.¹² This modification receives authorization as an analogy to the well-known Parol Evidence Rule. In applying that rule of evidence the verdict is taken as an act done, whether the verdict be a

⁶ *Suttrell's Executors v. Dry's Executors*, 5 N. C. 94 (1805) (did not assent to the verdict); *State v. Smallwood*, 78 N. C. 560 (1878) (did not assent to result of verdict); *Jones v. Parker*, 97 N. C. 33, 2 S. E. 370 (1887) (did not concur in the verdict but misunderstanding charge probably controlling element); *State v. Best*, 111 N. C. 638, 15 S. E. 930 (1892) (agreed to verdict through a misunderstanding of the result of the verdict); *Miller v. Bank*, 176 N. C. 152, 155, 96 S. E. 977 (1918) (intended to find a different verdict).

⁷ *Miller v. Bank*, 176 N. C. 152, 155, 96 S. E. 977 (1918).

⁸ *Miller v. Bank*, 176 N. C. 152, 155, 96 S. E. 977 (1918).

⁹ Iowa (perhaps), Kansas, Nebraska (perhaps), Ohio (perhaps), Tennessee, Texas (statutory), and Federal Courts.

¹⁰ *Wright v. Telegraph Co.*, 20 Iowa 195, 210 (1866).

¹¹ Wigmore; *Evidence*, pages 103 to 146.

written one or not. No evidence may be taken to modify this act done, but it is competent to show that the act was not the will of the parties, the jurors, by reason of the absence of essential formalities—the failure of the act to correspond with private intention, and also, as in the case of deeds and contracts, fraud and other misconduct invalidating the instrument, in this instance the verdict. This view would still exclude the evidence offered by the jurors in the first classification given above, that of mistakes in deliberation, but would not exclude such evidence in the second and third divisions. Those who contend for the Mansfield view say that to allow the introduction of the affidavits of the jurors would open the door to much corruption and fraud. Yet the accepted rule allows the affidavit of any person other than a juror to show that the verdict was improperly arrived at¹² and this when the proceedings of the jury are supposedly secret.

The North Carolina Court in a recent case¹³ breaks away to a slight extent from its former holding. In this case, upon the polling of the jury, a juror started to state that he did not concur in the verdict but he stopped and then stated that he did assent to it. Later he gave an affidavit that he did not understand that he could voice any objections to the verdict, the judge not being present, and also that he had voted for the verdict because all of the other jurors were against him and because a mistrial is a great expense to the county. The judge in the lower court accepted the affidavit and upon hearing in the Supreme Court the order for a new trial given in the lower court was affirmed. The Court said in regard to the acceptance of the affidavit that it was not to impeach the verdict but was “explanatory” of it. The affidavit here would seem to come within the third division above, that of the absence of actual assent to the verdict. In this case the Court seems to be tending toward the more liberal view of affidavits of jurors as regards verdicts and the view which is adopted by the majority of the courts, as to the third division pointed out above. The Court has not made a distinct break with the Mansfield view and in fact states that the affidavit of a juror may not be accepted to impeach a verdict, but certainly such action as in this case¹⁴ inclines toward the direction of the modified rule and is not in exact harmony with the hard and fast ruling heretofore adopted by our Court that in no event is the affidavit of a juror acceptable.

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¹² *Love v. Moody*, 68 N. C. 200 (1873).

¹³ *In re Sugg*, 194 N. C. 638 (1927).

¹⁴ *In re Sugg*, 194 N. C. 638 (1927).

MENTAL CAPACITY TO MAKE A WILL

The question of mental capacity in connection with testamentary disposition has sometimes been compared with capacity to make a contract, and even with criminal capacity.¹ The contract analogy is a closer one and has apparently been approved in some cases.² Although the two cases involve different factors, still capacity to dispose of property at death and capacity to enter a legal transaction have much in common. But criminal capacity, which is usually held to involve the capacity to distinguish right from wrong, is decidedly different.³

The question of the ability of the testator to understand the nature and situation of his property and his relations to those around him is considered of importance in determining whether he did or did not have ability to make a will. If with reference to these things he is able to understand what he is about, then that is sufficient.

Not infrequently it appears that a person has a delusion, or delusions, with reference to a certain subject or subjects, but unless this is of a kind to affect his property, it is usually held not to disqualify.⁴ A delusion is a belief in a condition of affairs the existence of which no rational person would believe. For instance, a person might believe in spiritualism, or the doctrines of Swedenborg,⁵ and still have ample ability to understand the management of his property and his relations to those dependent upon him. However, he may think so constantly and persistently upon such a subject as to become a mono-maniac and, therefore, lacking in the necessary testamentary power.

A great many of the cases in which wills have been contested upon the ground of lack of testamentary capacity have also involved the question of undue influence, and this may account for some confusion in the cases where that element is not involved. Undue influence is a fraudulent influence,⁶ involving some element of coercion and the substitution of one person's volition for another. Of course,

¹ *Slaughter v. Heath*, 127 Ga. 747, 57 S. E. 69 (1907).

² Mordecai, *Law Lectures*, 2d ed., p. 1240; Schouler, *Wills*, sec. 68.

³ Page, *Wills*, sec. 94. In this connection see the views of the N. H. and Ala. courts in *State v. Jones*, 59 N. H. 369, 9 Am. Rep. 242 (1871); *Parsons v. State*, 81 Ala. 577, 2 Sou. 854, 60 Am. Rep. 193 (1866).

⁴ *Owen v. Crumbaugh*, 228 Ill. 380, 81 N. E. 1044, 119 Am. State Rep. 442 (1907).

⁵ *Scott v. Scott*, 212 Ill. 597, 72 N. E. 708.

⁶ *Wingrove v. Wingrove*, 11 P. D. 81. But undue does not mean improper, *Meyers v. Hanger*, 98 Mo. 433, 11 S. W. 974.

where a person is mentally weak, it is much easier to influence him, but the test of his mental capacity is not, and should not be, affected by this fact, unless there is evidence to prove there was an attempt to persuade him to make a will different from what he would otherwise have done. A person has testamentary capacity if he has a clear understanding of the nature and extent of his act, of the kind and value of the property devised, of the persons who are the natural objects of his bounty, and of the manner in which he desires to dispose of the property to be disposed of.⁶ If a person has sufficient mentality, as determined by this test, he may make as many wills as he chooses, changing the disposition of his property as often as he sees fit. The question then arises as to the importance of considering such changes, in arriving at a conclusion upon the issue of *devisavit vel non*.

In the case of the late Justice George H. Brown⁷ such a change had been made. The testator had long considered the disposition of his estate by will that he wished to make and, in fact, had made a will accordingly, providing for his near blood relations. Shortly before his death, however, he made another will, leaving out of consideration these relations and giving his entire property to his wife.

Mr. A. D. McLean testified that his opinion that Judge Brown was mentally incapable was based in part on a letter written by Judge Brown before his alleged mental decline began. This letter showed his original intention. The caveators insisted that it was important for the jury to consider this, and the trial court permitted its introduction in evidence and charged that in considering the caveators' contentions "it is the right and duty of the jury . . . to contrast the two alleged wills as bearing on the issue of mental capacity."

The Supreme Court, on appeal by the propounder, affirmed by a three to two decision the verdict of the jury against the last will, thereby approving the introduction of the letter in evidence.

So far as the question of fact concerning the mental power of the testator in this case is involved, it is clear that the jury felt that they were bound to find from the evidence that Judge Brown's mental condition toward the end of his life was not sufficient to meet the test hereinbefore referred to, and the trial court instructed the jury that the burden was on the caveators to show that he was not of sound mind and disposing mentality at this time.

⁶ *In re Will of Creecy*, 190 N. C. 301, 129 S. E. 822 (1925).

⁷ *In re Brown*, 194 N. C. 583, 140 S. E. 193 (1927).

In reaching its conclusion the jury was doubtless influenced by a comparison of the provisions of the two wills, as referred to in Judge Brown's letter introduced in evidence. There are two possible explanations of the change in disposition of property. One is that Judge Brown simply decided that he would prefer for his widow to have complete control of the disposition of his property after his death; the other is that his mentality was failing, that he was subject to melancholia and hallucinations which led him to make a change that he did not understand and really would not have made if he had appreciated the true situation. The jury, doubtless, thought it strange that a person of Judge Brown's keen mentality in the prime of life should clearly show one settled and unvarying purpose as to the disposition of his property by will, and then shortly before his death make such a complete change without any satisfactory explanation. Unquestionably, if undue influence had been involved, this would have been a material factor^{7a} and it is possible that there may have been some confusion in the law applied, due to the fact as suggested by Justice Brogden in his dissenting opinion,⁸ that in the majority of cases undue influence and mental capacity were both involved. This view would doubtless be correct if there has been no other evidence except that concerning the two alleged wills, because certainly neither the first nor the second bears within itself any marks of lack of capacity. So it has been held that the amount and disposition of the testator's property at the date of his will are not alone pertinent questions to be considered;⁹ but where there is other evidence independent of this, is it not necessary for the jury, in order to reach a correct conclusion and properly apply the test laid down, to have an opportunity to compare the provisions of both papers?^{10a}

^{7a} *In re Arnold*, 147 Cal. 583, 82 Pac. 252; *Love v. Johnston*, 34 N. C. 355.

⁸ 194 N. C. at p. 603.

⁹ *In re Storer's Will*, 28 Minn. 9, 8 N. W. 827 (1881).

^{10a} *Hughes v. Hughes Executor*, 31 Ala. 519 (1858); *Hammond v. Dike*, 42 Minn. 273, 44 N. W. 61, 18 Am. St. Rep. 503; *Burrows v. Burrows*, 1 Hagg. 109; *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668. In the last cited case the provisions of the two wills are similar and for the argument that the rule should be the same where they are dissimilar, see especially *Hughes v. Hughes Executor*, *supra*, at p. 524: "If the conformity tend to establish the will, does not the non-conformity tend to impair its validity?" *Brown v. Mitchell*, 88 Tex. 350, 31 S. W. 621, 36 L. R. A. 64, sometimes cited as *contra*, turns largely upon the question of expert testimony. Also if the lapse of time between the two papers has been too great, they are sometimes excluded on that ground. *Kimber v. Kimber* (Ill. 1925), 148 N. E. 293 (5 yrs.). Care should be taken to distinguish between the *sufficiency* and *admissibility* of such evidence and considerable discretion concerning admissibility should be allowed the trial judge. Schouler, *Wills* (5 ed.) sec. 185, p. 210; also