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NOTES

UNCERTAINTY OF DISCOUNTER'S RIGHTS AGAINST HIS TRANSFERROR

The buyer of a negotiable instrument at a discount not only speculates on the maker's solvency but also takes a chance on his legal right to hold the seller—a chance which seems not to be generally understood. Assume a note for \$100 to have been made by *M* payable to *P* or order one year from date. If this note is valid and non-usurious between *M* and *P*, a transfer thereof by *P*'s endorsement, even at a considerable discount, would make the transferee a holder in due course who could recover the full amount from *M* at matur-

ity.¹ It is when the holder, failing to collect from *M*, turns upon *P* that his legal difficulties arise.

If *P* had endorsed without recourse that would have been an end of matters so far as his liability goes—except of course for his warranties.² If, however, he endorses without qualification, as he is likely to do, it would seem technically that he incurs the usual endorser's liability which is to pay the amount of the note at maturity if the maker does not—and some courts so hold.³

But if, by the way of specific example, the above \$100 note had been sold by *P* to *H* for \$50 because *P* doubted *M*'s solvency and *H* was willing to take a 50% chance, it seems harsh to make *P* pay 100% and give *H* a \$50 profit when *M* proves irresponsible and *H*'s speculation proves a loser outside of what *P* may be required to pay. Indeed, if the discounter, *H*, can recover in full from a responsible endorser in such a case, there is no speculation at all but a certainty of recovering \$100 from someone. As might be expected therefore some courts have said that *H* can recover from *P* on his endorsement only the \$50 which *H* paid and interest,⁴ though he might recover the \$100 in full from *M*.

These views are plainly irreconcilable. They measure the extent of *P*'s obligation on his endorsement and fix it at two different figures. From the standpoint of the buyer, *H*, the first mentioned rule allowing him the full face value would seem most advantageous but in some states announcing that rule the advantage is an illusion because of the presence of a new factor—that of usury.

P's endorsement under the rules of the law merchant, it will be recalled, serves two legal purposes: (1) it transfers title to *H*, and (2) it binds *P* to pay *H* if the maker does not and if due notice be

¹ *Catron v. Bostic*, 123 Va. 355, 96 S. E. 845, 850 (1918); although purchase at a large discount may be evidence of bad faith, *Tod v. Wick Bros.*, 36 Ohio St. 370 (1883); *Ogden, Neg. Instr.* 2 ed., pp. 153-154; *Brannan, Neg. Instr. Law*, 4 ed., pp. 453-455.

² N. I. L. §838, 65.

³ 43 L. R. A. (N. S.) 234 (5); *State Bank of Northfield v. N. W. Secur. Co.*, 159 Minn. 508, 199 N. W. 240 (1924); *Coast Finance Corp. v. Powers Furn. Co.*, 105 Ore. 339, 209 Pac. 614 (1922), transfer of conditional sales contract which court seems to treat as a negotiable instrument; analogy drawn to sale of chattel with warranty of soundness,—a different "warranty" from those provided in N. I. L. §65. See also *Aldrich v. McClay*, 75 Ark. 387, 87 S. W. 812 (1905); *Cook v. Forker*, 193 Pa. 461, 44 Atl. 560 (1899).

⁴ Cases cited in note 43 L. R. A. (N. S.) 234 (4); also *Stevenson v. Unkefer*, 14 Ill. 103, 105, *semble*, per *Caton, J.* Cf. *Stober v. Ehrhardt*, note 7, *post*. So by statute in Oregon. 2 *Olson's Ore. Laws* §7991. The parties seem to have stipulated for this measure of recovery in the *Sedbury Case*, *post*, note 7.

given.⁵ The second of these resembles somewhat the issuance of a new note by *P* himself⁶ in terms about as follows (assuming the sale of the \$100 note described above to have been made at \$50): Six months from date for \$50 received I promise to pay *H* or order \$100 with interest at 6% per annum, provided *M* does not pay a note of like tenor today endorsed by me to *H* (signed) *P*. North Carolina looks at this as in effect a loan to *P* of \$50 in return for his promise to pay \$100 and interest on a certain contingency.⁷ Viewed in this light it is obviously a usurious transaction and *H*'s recovery from *P* can be practically wiped out by the double defense provided for borrowers under the code.⁸

Beyond observing that the parties in such cases seldom look upon the transaction as a loan but rather as a sale with a guaranty,⁹ it is not

⁵ N. I. L. §66, last par.

⁶ *Boiserard v. Fogartie*, 2 Brev. 199 (S. C. Const. Ct. 1807). Or of a bill drawn by *P* on *M*. *Cowles v. McVickar*, 3 Wis. 725, 731 (1854).

⁷ *Sedbury v. Duffy*, 158 N. C. 432, 74 S. E. 355 (1912) and cases there cited under former N. C. usury statute which made the entire obligation void. *Accord*, *Bank of Radford v. Kirby*, 100 Va. 498, 42 S. E. 303, 305 (1902); *Finance & Ins. Agcy. v. Herren*, 139 Wash. 499, 247 Pac. 948 (1926) under special statutory rule. "The discounting of commercial paper where the borrower makes himself liable as maker, guarantor or indorser shall be considered as a loan for the purposes of this chapter." 2 Rem. Comp. Stat. Wash. 1922, §7299. No other such statute has been found. *Accord* in result but on evidence and a finding of fact that the transaction though in form a sale was actually intended and understood as a loan. *Stober v. Ehrhardt*, 223 Ill. App. 543 (1922); *Smith v. Hart*, 39 Mich. 515 (1878) per *Graves, J.* Of course no devices to cloak a usurious loan will be allowed to stand. See *e.g.* *Hollowell v. So. Bldg. & Loan Ass'n.*, 120 N. C. 286, 26 S. E. 781 (1897), "dues"; *Ripple v. Mtge. and Acptnc. Corp.*, 193 N. C. 422, 137 S. E. 156 (1927), "finance charges"; *Indep. Lbr. Co. v. Gulf St. Bank*, 299 S. W. 939 (Tex. Civ. App. 1927), "inspection and appraisal charges"; *Hirsch v. Arnold*, 318 Ill. 28, 148 N. E. 882 (1925), "commission." See also *Campbell*, "Usury and Annuities of the 18th Century," 44 LAW QUAR. REV. 473 (Oct. 1928). That equity will not cancel the instrument on application by endorser who obtained the discount, see *Armstrong v. Gibson*, 31 Wis. 61, 66 (1872).

⁸ C. S. 2306. The statute provides (1) a forfeiture of all interest where a usurious amount is reserved, and (2) a forfeiture of interest plus a liability to pay back double the amount where usury has been paid. A discount may be regarded either as deducting interest in advance (the popular and business idea) or as borrowing a lesser sum than that stated as principal in the note and a promise to pay the larger sum at a future date. If the former view be adopted the usury has been paid and the double penalty is operative at once. If the latter interpretation be accepted, as may perhaps be inferred from *Ragan v. Stephens*, 178 N. C. 101, 100 S. E. 196 (1919) and the cases therein cited, then the usury has only been reserved and the lender stands to lose only his entire interest—a loss he will hesitate to expose himself to, although not so serious a one as that pictured above in the text. See *Coffin*, *Usury in California*, 16 CAL. L. REV. 386, 390 (1928).

⁹ See *State Bank of Northfield v. N. W. Security Co.* *supra* note 3: "Both thought of the transaction as a sale." The question is properly one of fact in each case and is commonly dealt with as such. *Ibid*; *The State Bank v. Coquil-*

here proposed to quarrel with this result, but only to point out certain consequences of the rule which the discounter of commercial paper must take into his calculation. (1) As has been pointed out, he cannot recover from his transferror the amount of the note or even the amount he has paid the transferror but only the amount of the note and interest minus double the amount of the discount which he subtracted when he bought the note. Thus if he bought at half price he forfeits the whole. (2) Being guilty of a usurious and illegal contract, he cannot, it seems in North Carolina, hold the endorser on even the usual warranties of a seller¹⁰—which would include the genuineness of the instrument at its inception. (3) There seems no very practical way of avoiding the objectionable results in North Carolina. (a) To take either without endorsement, or, as already noted, by endorsement without recourse,¹¹ would avail nothing and furthermore the former course would prevent *H* from becoming a holder in due course as against *M*.¹² (b) A new style endorsement might be devised as follows: "I hereby transfer the

lard, 6 Ind. 232 (1855); *Peoples Bank and Tr. Co. v. Fenwick Sanitarium*, 130 La. 723, 58 So. 523, 524-525, (1912); *Stober v. Ehrhardt*, *supra* note 7 at p. 547. *Accord*, *Finance & Ins. Agcy. v. Herren*, *supra* note 7, although under the Washington Statute therein cited, the transaction would seem to be made conclusively usurious exactly as is held without special statute in North Carolina. But the rule in Washington does not extend to the purchase of non-negotiable instruments. *Martin v. McAvoy*, 130 Wash. 641, 228 Pac. 694 (1924); *Thompson v. Koch*, 62 Wash. 438, 113 Pac. 1110 (1911). It would probably be otherwise in North Carolina since C. S. 2306 is not limited to commercial paper. See also *Dickson v. City of St. Paul*, 105 Minn. 165 117 N. W. 426 (1908); *Priest v. Garnett*, 191 S. W. 1040 (Mo. App., K. C. 1917); *Vail v. Heustis*, 14 Ind. 607, 609 (1860); *Capital City Ins. Co. v. Quinn*, 73 Ala. 558, 561 (1883); *Campbell v. Morgan*, 111 Ga. 200, 36 S. E. 621 (1900). The statement in the text above that "the parties seldom look upon the transaction as a loan" should perhaps be modified in cases where a bank is concerned. A bank extends accommodation to its depositor by discounting third parties' paper for him as well as by direct loans to him. It is the depositor's responsibility which is chiefly depended upon and probably the discounting transaction is considered by the bank as one means of extending him credit. The North Carolina banking law does, however, make a distinction between loans and discounts in determining what is "money borrowed" and in calculating the loan limit of a bank to any one customer. C. S. 220 (d). And see note, "What is discounting?" 8 VA. L. REV. 366 (1922).

¹⁰ *Sedbury v. Duffy*, 158 N. C. 432, 74 S. E. 355 (1912), cited and explained in the recent opinion of Connor, J., *Pratt v. Am. Bond & Mtge. Co.*, 196 N. C. 294, 298, 154 S. E. 396, 398 (1928).

¹¹ N. I. L. §§65, 66. Taking by endorsement without recourse, however, would at least leave the endorser bound on his warranties under N. I. L. §65 even in N. C. since the discount in that style is not illegal and the rule of the *Sedbury Case* *supra* note 10, would not apply. What is lost is the general endorser's liability—the promise to pay if the maker does not.

¹² N. I. L. §§30, 49.

within note to *H* and in case it is not paid at maturity and due notice is given me, I promise to pay to *H* or order the amount I have received therefor with lawful interest from this date" (signed) P. But a glance at such an uncommercial sounding formula would doubtless discredit it with dealers in commercial paper. (4) The defense of usury being available against holders in due course,¹³ the purchase of instruments even at full value from second endorsers instead of the payee would always be exposed to such an unknown defense by a prior endorser in case of resort to him. The excellence of a prior endorser's name might prove an illusory security. (5) The discount of paper even at a rate of 6% or less is clearly usurious as to the transferee if the paper already draws interest. (6) An accommodation endorser may set up the same defense as can his accommodated transferee and the obtaining of a good name as security is therefore not proof against loss.¹⁴

Let this state of the law once become generally known and it will curtail the circulation of and dealing in medium quality paper since in order profitably to conduct discounting operations without loss at market rates in anything but prime paper the buyer will be forced to look entirely to the credit of the maker. Had the Supreme Court of North Carolina adopted the view that the endorser would be bound to pay the amount he received plus legal interest it is believed the result would have been more acceptable to the business community.¹⁵

M. S. BRECKENRIDGE.

NORTH CAROLINA AND THE RESTATEMENT OF CONTRACTS: CONDITIONAL ACCEPTANCES AND COUNTER-OFFERS

Sections 60 and 38 of the *Restatement of Contracts*,¹ with their accompanying Comments, provide:

Section 60. *Purported Acceptance Which Adds Qualifications.*

¹³ *Faison v. Grandy*, 126 N. C. 827, 36 S. E. 276 (1900); 6 N. C. L. REV. 502. See *Bradshaw v. Van Valkenburgh*, 97 Tenn. 320, 37 S. W. 88 (1896).

¹⁴ *Rucksdeschall v. Seibel*, 126 Va. 359, 101 S. E. 425, 430 (1919); *Osborne v. Fridrich*, 134 Mo. App. 449, 114 S. W. 1045 (1908).

¹⁵ Concurring opinion of Brown, J. in *Sedbury v. Duffy*, *supra* note 7.

¹ RESTATEMENT OF THE LAW OF CONTRACTS. Official Draft. The American Law Institute (1928). Reviewed in this issue at p. 227.

A reply to an offer though purporting to accept it which adds qualifications or requires performance of conditions, is not an acceptance but is a counter-offer.²

Comment:

a. A qualified or conditional acceptance is a counter-offer, since such an acceptance is a statement of what the person making it is willing to do in exchange for what the original offeror proposed to give. A counter-offer is a rejection of the original offer. (See Section 38 and Comment thereon.) An acceptance, however, is not inoperative as such merely because it is expressly conditional, if the requirement of the condition would be implied from the offer, though not expressed therein.

Section 38. Counter-offer by Offeree is a Rejection.

A counter-offer by the offeree relating to the same matter as the original offer is a rejection of the original offer, unless the offeree at the same time states in express terms that he is still keeping the original offer under advisement.³

Comment:

a. A counter-offer amounts in legal effect to a statement by the offeree not only that he is willing to do something different in regard to the matter proposed, but also that he will not agree to the proposal of the offeror. A counter-offer must fulfill the requirements of original offers. There is none unless there is a manifestation sufficient to create a power of acceptance in the original offeror. This distinguishes a counter-offer from a mere inquiry regarding the possibility of different terms, a request for a better offer, or a comment upon the terms of the offer. Likewise, an offer dealing with an entirely new matter and not made in substitution for the original offer is not a counter-offer.

What is the relationship between these provisions and the North Carolina decisions in this field?

Differences in price, not in turn agreed to, have prevented contracts in two cases. In *Gregory v. Bullock*,⁴ the offer was to buy pine at \$.50 per M. The reply insisted upon \$1.25. In *Morrison v. Parks*,⁵ the offer was to sell mill-culls at \$8.00 per M. The reply stipulated \$4.50.

New specifications as to what might be termed the identity or character of the subject matter featured in three cases. In *Cozart*

² *Ibid.* p. 75.

³ *Ibid.* p. 57. Compare §73, at p. 86: "The late or defective acceptance is a counter-offer which must in turn be accepted by the original offeror in order to create a contract."

⁴ 120 N. C. 260, 26 S. E. 820 (1897).

⁵ 164 N. C. 197, 80 S. E. 85 (1913).

v. Herndon,⁶ the offer was to buy land. The seller agreed, "with this consideration, however, that I reserve . . . all and every kind of wood and timber on the place for my own exclusive use and benefit." The original offeror, a corporation, in a directors' meeting, accepted the proposition, but failed to notify the seller before revocation. Held, no contract. In the *Morrison* case, referred to above, the offer was to sell log-run oak. The buyer agreed to take the 4/4 oak. No contract. And in *Lamborn v. Woodward*,⁷ the offeror, a broker, offered, subject to confirmation, to sell sugar at a price per pound. The buyer accepted, for 200 bags, 100 lb. bags, but when the seller tendered 57 bbls., an equivalent in quality and amount, the buyer was held entitled to reject. The seller had not agreed to the new term respecting form of package, and the buyer, catering to rural merchants, could not use sugar in barrel units.

In two cases, the acceptance was for a different quantity. In *Wilson v. Storey Lumber Co.*,⁸ the order was for three carloads of lumber. The answer promised to ship one, possibly three. One was shipped. No contract. In *Cherokee Tanning Co. v. W. U. Tel. Co.*,⁹ the seller asked if the buyer could use about 1500 bbls. The buyer wired "accept your offer 1500 bbls.," etc. While the case was mainly decided on the ground that the inquiry was not an offer capable of acceptance, the court suggested that, assuming it was, the acceptance, to have been sufficient, should have been for all barrels on hand, not to exceed 1500. In the absence of proof of previous relations or of the actual number of barrels available, this would, if anything had depended upon it, have seemed an unnecessary refinement, for "about" might mean a little less, a little more, or just 1500. Did not the buyer choose one available alternative?

So, with new conditions as to time. In *Golding v. Foster*,¹⁰ the buyer wired: "Ship (potatoes) today. Wire car number." The seller replied, "Will ship Monday (three days later)." They were actually sent three days after a further inquiry. In *Spruill v.*

⁶ 114 N. C. 252, 19 S. E. 158 (1894). Compare *Foust v. Kuykendall*, 160 N. C. 332, 76 S. E. 82 (1912) (different plots land. Judicial sale.)

⁷ (C. C. A., 4th) 20 F. (2d) 635 (1927).

⁸ 180 N. C. 271, 104 S. E. 531 (1920).

⁹ 143 N. C. 376, 55 S. E. 777 (1906). Compare *Clark v. East Lake Lumber Co.*, 158 N. C. 139, 73 S. E. 793 (1912) (offer all land, 167,555 a., more or less, warranty deed; acceptance provided clear and undisputed title whole of 167,550 a.)

¹⁰ 188 N. C. 216, 124 S. E. 160 (1924).

Trader,¹¹ *A* proposed to *B* that if *B* would ship corn on *A*'s boats then en route, *A* would guarantee a price at New York. *B* did not ship on any of those vessels, but later shipped corn on other vessels belonging to *A* and plying between the same points. In both cases, the result was no contract, but the first was put on the ground of conditional acceptance, the second, that the offer had lapsed. Both offers looked to unilateral contracts. The announcement in the first case, however, of intent to ship later than the day specified, was a rejection, in effect, while the offer was still available.

In *Jacobi v. Vietor*,¹² the Federal Court had this situation: The buyer asked for quotations from the selling agent of a mill, requesting a price guaranty. The seller gave the quotations, but refused to guarantee prices. The buyer ordered a supply, without reference to a guaranty. The order was accepted by the mill. Then, in a letter accompanying the formal order, the buyer stated that he understood he was guaranteed. The seller promptly refused to meet this condition. The buyer repudiated the contract, and a directed verdict for the seller in an action for damages was upheld. The court decided that the attempted qualification in no way affected the buyer's previous unconditional acceptance, but at most amounted to a subsequent offer, not accepted, to modify the terms of a contract. If something had depended upon the point, the court might well have regarded the buyer, not as the offeree, but as the offeror, and his order, not as an acceptance of a supposed offer made by the quotations, but as the original offer, which could only be accepted by either the seller or the mill. If that be so, an additional reason for the result would be that the qualification came from the wrong party to amount to a conditional acceptance.

In *Wilkins v. Vass Cotton Mills*,¹³ new matter in an acceptance was likewise viewed as a separate offer, not rendering the acceptance conditional, but under these circumstances: The buyer telephoned, asking for an offer on 10,000 24s and 20s. The seller wired an offer to sell those goods at a price stated. The buyer wired: "Accept order. Make it 25,000 if can make 16s and 18s." The seller replied that it could not increase the order and did not make numbers below twenty. In an action against the seller, the court found a contract as to the 10,000 24s and 20s, both parties' wires indicating they

¹¹ 50 N. C. 39 (1857).

¹² (C. C. A., 4th) 11 F. (2d) 30 (1926).

¹³ 176 N. C. 72, 97 S. E. 151 (1918).

understood the 16s and 18s to be the subject of a separate offer, independent of the acceptance of the other.

In neither case could the new matter have been construed as a rejection of the proposal of the offeror or as a substitution therefor. Similarly harmless were certain obvious and immaterial inquiries in *Cozart v. Herndon*¹⁴ and in *Standard Sand and Gravel Co. v. McClay*.¹⁵ In both, the intent to abide by the offer, if the request were fruitless, was clear.

Of greater difficulty, are *Hall v. Jones*,¹⁶ *Rucker v. Sanders*,¹⁷ and *Greene v. Jackson*.¹⁸ In the *Hall* case, the seller, in Bluefield, W. Va., offered North Carolina land at a given price, cash. The buyer, living near the land, accepted, enclosed one dollar to bind the trade, and promised to have the deed made out and mailed within fifteen to twenty days to the seller for his signature. The seller was then to send the deed to the buyer's bank in escrow, "or, if you prefer, I will come to Bluefield, which would add to my cost. If satisfactory, let me know and acknowledge receipt." In an action against the seller, this was held to be a conditional acceptance. The offer being for cash, required payment at the seller's residence. And of course the seller might have made out his own deed. Moreover, a cash transaction should have been completed immediately, and the buyer's acceptance proposed a two weeks delay at least. But was it clear that the buyer thus definitely indicated a refusal to meet the seller's terms? At his own expense, he expressed a willingness to go where the seller lived, if the other plan was not satisfactory. The point is, not that the acceptance differed from the offer, that is clear; but whether the buyer was not merely inquiring as to or tentatively suggesting a manner of closing the deal that would protect and be convenient for both, subject wholly to the other's consent, meanwhile remaining willing to carry out the deal immediately at the seller's home if desired.¹⁹

¹⁴ Note 6 (higher price).

¹⁵ 191 N. C. 313, 131 S. E. 754 (1926) (earlier shipment).

¹⁶ 164 N. C. 199, 80 S. E. 228 (1913). Compare § 61, at p. 76: "If an offer prescribes the place, time or manner of acceptance, its terms in this respect must be complied with in order to create a contract. If an offer merely suggests a permitted place, time or manner of acceptance, another method of acceptance is not precluded."

¹⁷ 182 N. C. 607, 109 S. E. 857 (1921).

¹⁸ 190 N. C. 789, 130 S. E. 732 (1925).

¹⁹ Compare §62, at p. 77: "An acceptance which requests a change or addition to the terms of the offer is not thereby invalidated unless the acceptance is made to depend on an assent to the changed or added terms."

The case rose to bother the court in *Rucker v. Sanders*. There the subject matter was corporate stock. The seller wrote, offering his stock for a price stated. The buyer wrote: "Accept. Just draw on me here with stock attached to draft, and I will honor. Advise me you have drawn." In an action against the seller, held, this was an unconditional and unqualified acceptance. The item respecting the draft was not a condition, but a mere suggestion as to the manner of closing. The *Hall* case was sought to be distinguished, because of the there suggested delay and of the request for a reply. The late Chief Justice Clark dissented, partly because the offer was for cash at Smithfield while the acceptance was for payment at Greensboro, but mainly because the proposed plan of payment put the risk of loss, through possible default of the bank, upon one entitled by the strict law to receive currency at home. There was no indication that a bank draft or check would not have been acceptable. The "sight draft attached" device was, however, as distinct a departure as the escrow device in the *Hall* case. Nor was it couched as tentatively; indeed, it smacked more of direction than of request or suggestion. With deference, it is submitted that the court might better have viewed the new matter in the *Hall* case as a mere inquiry, in the *Rucker* case, as a rejection.

Greene v. Jackson was this: The owner of a proposed building offered to erect an additional floor, according to the design of the architect, at a cost of not to exceed five thousand dollars, and to lease it to the architect for a term of years at a rental based upon the actual cost. The architect accepted, "with the understanding that I shall have full access to the accounts and methods of determining said cost." Contractors were required to submit separate bids for this studio-floor, but in the erection, it was found practically impossible to keep separate accounts. Therefore, when, a year and a half later, the building was entirely and properly completed, the owner proposed to arbitrate on the basis of estimates. The architect stood on his asserted right to have access to the accounts. It was held, in an action against the owner for damages, that there was a contract. While the reporter in the head-note regards the new term relating to access to the cost accounts as immaterial and as relating only to method, it is impossible to tell from the opinion whether this is the view of the court, or whether, on the other hand, the court believed that it amounted to a counter-offer that was assented to by the own-

er's going ahead with the building. A third view would seem most appropriate, namely, that the new term merely expressed what, in view of the relation between the parties, would be implied from the offer.

On the whole, therefore, it can be said that the Supreme Court of North Carolina, in dealing with cases of conditional acceptances and counter-offers, has in effect subscribed to the principles quoted at the beginning of this note from the *Restatement of Contracts* and the accompanying Comments. Perhaps different results might have been reached in *Hall v. Jones* and *Rucker v. Sanders*, had the *Restatement* then been available and brought to bear. That, however, is unlikely, for at best the *Restatement* can only be a guide to the appropriate rule. It can have little effect on the analysis of facts in a close case.

M. T. VAN HECKE.

CRIMINAL LAW—MOB DISTURBANCE AND A FAIR TRIAL

On an indictment for murder the prisoner was convicted of first degree murder. During the trial proceedings the father and uncle of the deceased girl seized the prisoner and attempted to drag him from the bar, a part of the crowd attempting to assist. The sheriff rescued the prisoner, took him to the jury room and on his return to the courtroom fired his pistol into the ceiling in order to quiet the tumult. The presiding judge then ordered the sheriff to prevent any further demonstrations and warned the audience that another attempt would be met with force. The local militia was summoned and formed a cordon around the prisoner. The jury seemed undisturbed and were charged not to be influenced by what had occurred. There were no further demonstrations. These facts appear in a memorandum of the trial judge attached to case on appeal. The defendant neither made any objections to the disturbances nor presented any motion for a new trial. The appellate court decided that there were no grounds for a new trial. Two judges dissented.¹

The theory of the majority of the court may be summarized as follows: The defendant, having made no exceptions, had no constitutional right to a new trial,² because it does not appear that the

¹ *State v. Newsome*, 195 N. C. 552, 143 S. E. 187 (1928).

² *Frank v. Mangum*, 237 U. S. 309, 35 S. Ct. 582, 59 L. Ed. 969 (1915). This court held that criminal prosecution in a state court, based on law not repugnant to the Federal Constitution and conducted according to the settled

trial became a nullity or that the court and the jury were swept to a "fatal end."³ The counsel for the defendant did not say that fear prevented them from making objections and asking for exceptions.⁴ Since there was no decision made on the question by the trial judge, the appellate court said that there was nothing to review,⁵ for a supervisory power may be exercised only upon application and issuance of a remedial writ.⁶

The minority view agrees with that of the majority in only one detail: that the conduct of the bystanders was utterly unwarranted and indefensible. On all other questions they are in diametric opposition. This divergence in opinion seems to arise from a fundamental difference in view points. This difference is best expressed in the very words of the two factions. As one of the judges agreeing with the majority, Justice Adams says: "But, in our solicitude to suppress the mob, we must guard against undermining the foundation of principles which constitute the very structure of the law."⁷ Justice Brogden, for the minority, says: "Under the law as written the life of the defendant can be taken by the state, if found guilty after a fair and impartial trial, but, when the state takes life, it ought to take it as befits the peace and dignity of a great state, and this only can be done when the constitutional safeguards set by our fathers have been observed and applied in the trial of the accused."⁸

course of judicial proceeding as established by the laws of the state, so long as it includes notice, hearing, and an opportunity to be heard before a court of competent jurisdiction, is in accordance with the due process of law as required by the Fourteenth Amendment.

³ *Moore v. Dempsey*, 261 U. S. 86, 43 S. Ct. 265, 67 L. Ed. 543 (1923). This case is an instance of a trial proceeding that was a travesty, a mockery of justice. Five negroes were on trial for murder. The defendant's counsel was arrested by a mob. Only the presence of troops prevented the mob from lynching the prisoners shortly after their arrest. A committee of seven whipped and tortured negro witnesses until they would say what was wanted. During the trial the court and neighborhood was filled with the mob. The counsel did not dare to make any motions for change of venue, to challenge a jurymen, or to ask for separate trial. The trial lasted only three-quarters of an hour.

⁴ *State v. Harrison*, 145 N. C. 408, 59 S. E. 867 (1907); *State v. Wilcox*, 131 N. C. 707, 42 S. E. 536 (1902). While one of the defendant's counsel was making the closing argument one hundred people left the court room by concert, and soon after a fire alarm was given, causing several more people to leave. On appeal the counsel for the defendant stated that if the verdict had been set aside the defendant would have met with instant and violent death. It was held that this excuse was sufficient to justify the Attorney General in consenting to consider the motion as having been entered properly.

⁵ N. C. Constitution, Art. 4, §8; N. C. Consol. Stat. (1919), §638.

⁶ N. C. Constitution, Art. 4, §8; *State v. Jefferson*, 66 N. C. 309 (1872).

⁷ *State v. Newsome*, 195 N. C. 552, p. 575, 143 S. E. 187, p. 199 (1928).

⁸ *State v. Newsome*, 195 N. C. 552, p. 582, 143 S. E. 187, p. 203 (1928).

The first fears an uncertain and variable jurisdiction if exceptions may be entered, for the first time, upon appeal. The second defends the sacredness of human life.

The minority seem to support themselves both in reason and in sentiment. The proceedings and administration of justice, especially in trials for capital felonies, must be not only unprejudiced, unbiased and fair, but also, free from the suspicion of outside influence.⁹ With human life in the balance, shall the blind goddess become deaf because she has not heard the tiny voice of an exception? Must a human life be forfeited for the failure, inadvertent or otherwise, of counsel to voice an objection? Granting that counsel did gamble on the verdict, the appellate court should disdain to play for such high stakes.

The humanitarian viewpoint is that there should be no conclusiveness in the failure of the trial court to exercise its powers of granting a new trial, though no motion was made therefor. Admittedly, there are no reasons for ordering a new trial when it appears that the disturbance in the court room was promptly rebuked if the jury was not prejudiced against the defendant.¹⁰ But when prejudice does appear, or when it may be inferred from the facts, then the stigma should be removed by a new trial. It seems to be well settled that an affirmative countenancing of disturbances, or a refusal to sustain objections to breaches of privilege,¹¹ is a valid ground on which to seek a new trial. If an affirmative countenancing is prejudicial, it does not follow that an affirmative discountenancing destroys prejudice. How can a judge so rebuke a demonstration and

⁹ State v. Wilcox, *supra* note 4.

¹⁰ State v. Harrison, *supra* note 5 (applause following the sharp retort of the solicitor was reproved by the court and one man arrested); State v. Vann, *supra* note 8 (ripple of laughter and slight applause caused the judge to rebuke the audience and instruct the jury not to be influenced); Bowles v. Commonwealth, 103 Va. 816, 48 S. E. 527 (1904) (applause); Debny v. State, 45 Neb. 856, 64 N. W. 446 (1895) (applause at the end of speech of prosecuting attorney); Green v. Commonwealth, 26 Ky. L. Rep. 1221, 83 S. W. 638 (1904) (applause at humorous statement); State v. Wimby, 119 La. 139, 43 So. 984 (1907) (manifestation of grief by a relative of deceased).

¹¹ State v. Tucker, 190 N. C. 708, 130 S. E. 720 (1925); State v. Murdock, 183 N. C. 779, 111 S. E. 610 (1922); Coble v. Coble, 79 N. C. 589 (1878). It seems to be well settled in North Carolina that exceptions to alleged breaches of privilege, made by counsel, must be entered before verdict or called at the time to the attention of the court, or the court requested to give an instruction in regard to them, if the defendant wishes to present them on appeal. The theory seems to be that a party cannot speculate on the verdict and then complain about his failure to ask that the opposing counsel be arrested in their comment on the case. State v. Powell, 106 N. C. 635, 11 S. E. 191 (1890); State v. Lewis, 93 N. C. 581 (1885); State v. Suggs, 89 N. C. 527 (1883).

so instruct a jury as to overcome the prejudice to the prisoner when the disturbance was of such a nature as to disqualify the jurors for the proper and unbiased discharge of their duties? The court may not be swept to a "fatal end" by public passion and expression, counsel may not be prevented from entering objection on account of fear of mob violence, and yet the infectious spirit of mob mood can warp the minds of the jurymen. What are the probable effects on the minds of a jury, who recognize a hostile attitude toward the defendant, when they reflect on their probable situation in the community should the verdict be for acquittal? The probable, if not inevitable, effect is that they are biased. Human nature is all too prone to follow the line of least resistance. Even their own declarations are not indices to their mental condition. Granting that the mental processes of jurors cannot be exactly determined, it seems that the trial judge should order a mistrial in the event there is a substantial suspicion of mob influence.

Granting again that the proper place to order a mistrial is in the process of the trial of the cause, and that the judge is vested with the authority to order such when necessary to attain the end of justice,¹² his failure to do so should not operate to prevent the appellate court from having an opportunity to remedy the defect, in view of the paramount importance of preserving the freedom of trials from outside pressure.

A. K. SMITH.

BILLS AND NOTES—BAILEE'S LIABILITY FOR THEFT BY SERVANT—
AGENT'S USE OF PRINCIPAL'S FUNDS TO PURCHASE STOLEN
SECURITIES FROM HIMSELF

Plaintiff's messenger, in delivering bonds to the defendants, Chicago brokers, by mistake left also twenty-three \$1,000 U. S. Victory bonds of the plaintiff at the defendants' clerk's window. The

¹² In maintaining a fair and impartial trial the presiding judge may withdraw a juror and order a mistrial in a trial for a capital felony where it is necessary for exact justice to be done. The facts constituting the reason why the mistrial was ordered must be set forth on the record in order that they may be reviewed in the event there is an appeal. *State v. Cain*, 175 N. C. 825, 95 S. E. 930 (1918); *State v. Guthrie*, 145 N. C. 492, 59 S. E. 652 (1907); *State v. Tyson*, 138 N. C. 627, 50 S. E. 456 (1905). These cases relax the rule as presented in *State v. Bass*, 82 N. C. 570 (1880), to the effect that the jury cannot be discharged before verdict in a trial for a capital felony except on consent of the prisoner or upon some great necessity. These cases also broaden the extent of the exceptions to the rule of former jeopardy.

clerk upon discovery of the mistake, appropriated the plaintiff's bonds, concealing the error from the messenger. The messenger reported to the plaintiff, and the plaintiff notified the defendants and the commercial world of the loss. The defendants' clerk thereafter abstracted from a shipment of other bonds being sent to defendants' New York office, twenty-three \$1,000 U. S. Victory bonds of the same issue, and substituted for them the bonds of the plaintiff. Plaintiff sued for conversion and recovered by directed verdict. On appeal, *held* that judgment be affirmed. *Childs and Co. v. Harris Tr. and Sav. Bk.*¹

Until the defendant through its servants became aware of the presence of the plaintiff's bonds in its establishment,² it owed no duty of care. When the bonds were discovered, the defendant became at most a gratuitous bailee and an unwilling one. There is authority that theft by the agent of even a voluntary gratuitous bailee does not make the principal liable to the depositor.³ It is a judicial commonplace that a gratuitous bailee or mandatary is not liable for a loss or destruction of the subject-matter of the bailment without his fault.⁴ Clearly the clerk's act was not the bank's act. As mis-

¹ 27 F. (2d) 633 (C. C. A. 7th. 1928).

² Some courts would hold, however, that the knowledge of the employee cannot be imputed to the defendant, since the employee's plan to appropriate the bonds was formed simultaneously with their receipt from the messenger. "Where an officer is guilty of fraud, the bank is not as a general rule chargeable with notice of the facts connected with the fraudulent transaction, and which for that reason would probably have been concealed by the officer." 7 C. J. 533; *Knobloch v. Germania Sav. Bk.*, 50 S. C. 259, 27 S. E. 962 (1897); *Real Estate Tr. Co. of Phila. v. Washington*, 191 Fed. 566, 113 C. C. A. 124 (1911), certiorari denied 223 U. S. 724, 32 Sup. Ct. 525 (1911); *American Tr. Co. v. Anagnos*, 196 N. C. 327, 145 S. E. 619 (Dec. 14, 1928), where president of bank acts in own interest, knowledge not imputable to bank to render it holder of instrument with notice; *Corp. Com. v. Bank of Jonesboro*, 164 N. C. 357, 79 S. E. 308 (1913), knowledge of cashier of own transaction in defalcation of funds not imputable to bank; *MECHEM, AGENCY* (2nd Ed., 1914), §1815; *MORSE, BANKS AND BANKING* (6th ed., 1928 by Voorhees), §§104, 109 (1928).

³ *Foster v. Essex Bk.*, 17 Mass. 479, 9 Am. Dec. 168 (1821); *Brown v. Lynchburg Nat. Bk.*, 109 Va. 530, 64 S. E. 950 (1909); *Holmes v. First Nat. Bk.*, 101 N. J. 401, 128 Atl. 150 (1925), theft of bonds by cashier, bank not liable.

⁴ A gratuitous bailee is held to the use of degree of diligence and attention ordinarily adequate to performance of his undertaking (*Pennington v. Farmers and Mer. Bk.*, 144 Tenn., 188, 231 S. W. 545, 17 A. L. R. 1213 (1921)). North Carolina would require an accommodation bailee to exercise only "slight care," and hold him liable for only "gross negligence." *State Prison v. Hoffman*, 159 N. C. 564, 76 S. E. 3 (1912); *Perry v. Seaboard Air Line Ry. Co.*, 171 N. C. 158, 88 S. E. 156, L. R. A. 1916 E 478 (1916).

The distinction which courts make as to degrees of negligence is unnecessary, as all bailees are required to use the care which a prudent man would use under like circumstances. The fact that the bailment is gratuitous or for hire is one

appropriation of a special deposit by a bank employee is outside the scope of his employment, the doctrine of *respondeat superior* is held not to apply.⁵ No liability for such misappropriation is generally predicated in the absence of a certain degree of negligence by the bank in the selection or supervision of its servants or in care of its deposits by keeping them in a reasonably safe place.⁶ The degree of negligence necessary to charge the principal will vary according to the nature of the bailment, whether gratuitous or for hire, but it is to be observed that some courts hold a bank a bailee for hire upon very slight or incidental advantage.⁷ There has arisen in common carrier cases a rule that the master is liable irrespective of the rule

of the circumstances entering into such a question. See *Kubli v. First Nat. Bk.*, 293 Ia. 833, 840, 186 N. W. 421 (1922). The difference in the liability, when such exists, lies in extent of their respective implied undertakings. Both of them, if their profession or situation is such as to imply skill, are liable for neglect to use it. See note 4 A. L. R. 1196 on liabilities of gratuitous bailees.

⁵ *Foster v. Essex Bk.*, *supra* note 2; *Merchants' Nat. Bk. v. Guilmartin*, 88 Ga. 797, 15 S. E. 831 (1892); *Holmes v. First Nat. Bk.*, *supra* note 2.

Although acting while employed by defendant and during business hours, employee acted solely for his personal interests. Whether or not the act is within scope of agent's employment depends not solely on nature of act, but also on intent with which it was done. *Lloyd v. Nelson etc. Co.*, 60 Ohio St. 448, 54 N. E. 471 (1899), agent while doing janitor service kicked ladder from under plaintiff; *Wood v. Detroit etc. Ry. Co.*, 52 Mich. 402, 18 N. W. 124 (1884); *Ill. Cent. Ry. Co. v. Latham*, 72 Miss. 32, 16 So. 757 (1894), brakeman pushed passenger off train for failure to pay fare, defendant not liable; *Seaboard Air Line Ry. Co. v. Gleason*, 21 F. (2d) 883 (C. C. A. 5th 1927), railroad not liable where agent, whose duty was to give information as to arrival of cotton, gave false information for fraudulent transaction of his own, despite act of August 29, 1916, §22, 39 Stat. 542, 49 U. S. C. A. §102, which holds principal for agent's issue of forged bills of lading. See 6 Tex. Law Rev. 239 (1928).

It has been suggested that if agent's act was actually a way of doing master's business, however ill-advised, or from what motives adopted, the master should be held liable: *Toledo Wab. & Wa. Ry. v. Harmon*, 47 Ill. 298 (1868), railroad liable where engineer wilfully allowed steam to escape on plaintiff; *Mott v. Consumer's Ice Co.*, 73 N. Y. 543 (1878), principal liable for agent's act while engaged in his business whether done wantonly or wilfully; *Billman v. Indianapolis etc. Ry. Co.*, 76 Ind. 166 (1881), facts showing excuse or reasonable necessity for blowing whistle renders principal liable; *Greerhough v. U. S. Life Ins. Co.*, of N. Y., 96 Vt. 47, 117 Atl. 332 (1922), apparent authority renders principal liable for agent's misappropriation of bond which he without authority required of sub-agent.

⁶ *Holmes v. First Nat. Bk.*, *supra* note 2; *Smith v. First Nat. Bk.*, 99 Mass. 605 (1868); *Scott v. Nat. Bk.*, 72 Pa. St. 471 (1873). Cf. *Preston v. Prather*, 137 U. S. 604, 11 Sup. Ct. 162 (1890); *Gray v. Merriman*, 148 Ill. 179, 35 N. E. 810 (1893). MORSE, BANKS AND BANKING, §102 (e).

⁷ *Trustees of Elon College v. Elon Bk. and Tr. Co.*, 182 N. C. 298, 109 S. E. 6 (1921). Also see *Hall v. Conaway*, 252 S. W. 1105 (1923), bank liable for cashier's improper hypothecation of bonds of bank customer; *Grenada Bk. v. Moore*, 131 Miss. 339, 95 So. 449 (1923).

of *respondeat superior*, where, having a contractual duty to carry the passenger and his belongings safely he delegates its performance to a servant, and the servant himself wilfully injures the passenger.⁸ Consideration of the policy underlying this rule has prompted a modern tendency to extend it to other undertakings of a public nature. Thus it has been held that a telegraph company was liable for the fraud of an agent in sending a false message, inasmuch as the position of trust in which the defendant had placed him enabled him to perpetrate the fraud.⁹

The defendant in the instant case, however, had no contractual obligation with the plaintiff. Neither was he an insurer of the plaintiff's bonds, nor negligent in employment or retention of the dishonest employee.

If the clerk had first stolen the bonds of the defendant and upon receiving the plaintiff's bonds, had used them to replace his theft from the defendant, the defendant which received the plaintiff's bonds would then be forced to restore them or to pay.¹⁰ What then is the effect of the clerk's exchange in the fashion given here? The defendant seeks to show that the clerk's act in removing the plaintiff's bonds was a theft from the plaintiff (for which, as before indicated, the defendant would not be liable) and that his transfer to the defendant for other bonds of like value was a sale of negotiable paper to defendant as buyer for value. But here the defendant seeks to ratify its agent's act in paying out defendant's bonds for those of the plaintiff. The court then correctly holds that the knowledge of

⁸ *Craker v. Chi. and N. W. Ry.*, 36 Wis. 657 (1875). See *Pennington v. Farmers Bk.*, *supra* note 3. Gist of action is principal's failure to perform his duty. Cf. *Lewis v. N. Y. etc. Ry.*, 183 Mass. 175, 66 N. W. 803 (1903).

⁹ *McCord v. Tel. Co.*, 39 Minn. 181, 39 N. W. 315 (1888), *Bank of P. A. v. Pac. Postal Tel. Co.*, 103 F. 841 (C. C. N. D. Calif. 1900). It is to be observed, however, that in the principal case, it was more the negligence of the plaintiff's messenger in leaving the bonds, that made it possible for defendant's clerk to commit fraud, than it was the position in which defendant had placed the clerk.

¹⁰ Obviously, since defendant would not be holder in due course. While the equities of parties against clerk would be equal in such case, equities would not be in same res, and equities of two parties against a third cannot be balanced to equalize equities between the parties themselves. See *Brown v. Southwestern Farm Mortgage Co.*, 112 Kans. 192, 210 Pac. 658 (1922); president of defendant company stole bonds from defendant, sold them to plaintiff without notice, stole same bonds from plaintiff and secretly restored them to defendant, thereby concealing the fraud from defendant for six months—plaintiff recovered bonds.

its agent is charged to the defendant.¹¹ So while it then becomes a holder for value, it is not a holder without notice, hence not a holder in due course within the provision of the Negotiable Instruments Law.¹²

It was not necessary, therefore, to predicate anything on the additional fact which was in evidence that the defendant's New York office was negligent in ascertaining the exchange of the bonds by failing to check the serial numbers of the shipment of bonds with the accompanying list.

JOHN H. ANDERSON, JR.

¹¹ Defendant is charged with agent's knowledge here because at the time he attempts to ratify agent's act he has *actual* knowledge of all circumstances connected therewith. MORSE, BANKS AND BANKING, §110.

But had the agent been authorized at time of his act to make exchange of bonds with customers, and had he then made the exchange with himself, would defendant have been charged with agent's knowledge of equities acquired outside the scope of his employment? It seems not under the present majority view. MECHEM, AGENCY (2d ed.), §1815. Where agent acting in own interest transfers instrument to principal directly or through another agent acting for principal, knowledge of equities acquired by first agent outside scope of employment is not imputed to principal. *Innerarity v. Mer. Nat. Bk.*, 139 Mass. 332, 1 N. E. 282 (1885); *Guarantee Inves. Co. v. Athens, etc. Co.*, 152 Ga. 596, 110 S. E. 873 (1922). But where the agent who makes sale to principal also acts for him in accepting the instrument, while it is sometimes held in accord with the above, *American Tr. Co. v. Anagnos*, *supra* note 1; *American Surety Co. v. Panly*, 170 U. S. 133, 18 Sup. Ct. 552 (1898); 2 MECHEM, AGENCY (2d ed.), §1815, there is strong tendency to say the principal is charged with agent's knowledge, 1 MORSE, BANKS AND BANKING, §112b; 2 MECHEM, AGENCY (2d ed.), §1802 *et seq.* When effect of agent's acts is in controversy, his adverse actions toward principal do not protect principal provided act was in scope of agency. Same rule should prevail where effect of agent's knowledge is in dispute (2 MECHEM, §1822).

¹² *Smith-Hurd Rev. Stats. Ill. c. 98, §72; N. I. L. §52 (4); N. C. C. S. §3033 (4).*