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RECENT CASE COMMENTS

BANKS AND BANKING—PAYMENT OF CHECK IN EXCHANGE WHEN DRAWEE CANNOT PAY IN CASH—Where a drawee bank, which on presentment of a check for payment did not have enough cash on hand to pay it, gave the collecting bank a draft on a correspondent in payment, which was later dishonored, it was held that there was no legal payment and the debt for which the check was given was not discharged. *Moore & Dawson v. Highway Eng. & Const. Co.*¹

In the course of the opinion it was asserted that there was a vital distinction between the facts of this case and those of the recent case of *Dewey v. Margolis*,² which was referred to in a recent number of this review.³ The difference on the facts is that the drawee bank in the *Dewey* case paid the check by a draft on another bank at a time when it could have paid in cash. And it was there held that as to the drawer the check was paid.

The decision in the case under comment is entirely sound. If the collecting agent had demanded cash it would have gotten no better results. The facts of the *Dewey* case present a much more controversial question. It appeared that neither the drawer nor the payee were at fault but one of them was bound to lose. As a matter of legal theory it is difficult to say who should be the loser. The payee was not responsible for the unauthorized acts of his agent such as accepting anything other than cash in payment.⁴ The drawer would rely on the proposition that since he had undertaken only that the check be paid in cash upon presentment he was discharged when without his concurrence the payee's agent accepted a draft instead of cash in payment. The payee does have a remedy against his agent for any loss consequent upon his unauthorized conduct,⁵ which is not open to the drawer, and thus it might be

¹ *Moore & Dawson v. Highway Eng. & Const. Co.*, 196 N. C. 142, 144 S. E. 692 (1928).

² 195 N. C. 307, 142 S. E. 22 (1928).

³ (1928) 6 N. C. L. Rev. 466, 470.

⁴ *Federal Reserve Bank v. Malloy*, 264 U. S. 160, 44 S. Ct. 196, 31 A. L. R. 1261 (1923).

⁵ *Ibid.* The North Carolina court follows the so-called Massachusetts rule that the collecting bank is directly responsible to the owner of the check as distinguished from the New York rule that the primary bank in the chain of collection is an independent contractor. *Bank of Rocky Mount v. Floyd*, 142 N. C. 187, 55 S. E. 95 (1906). The two rules are clearly stated in *First*

urged as a practical matter that the loss should fall upon the payee. Yet would not that tend to discourage creditors from accepting checks on small-town banks?⁶ And under such a holding is it not conceivable that the court would rule against the payees in a number of separate cases like the Dewey case where their checks had been presented on the same day and paid in exchange when the drawee had enough cash on hand to pay any one of them but not enough to pay all of them or one check equal in amount to all of them? There is certainly an area of doubt in working out the theory behind such a decision.

It does not appear that in the Dewey case the drawee bank was insolvent when the check was presented. Common observation leads one to suggest that it was in such condition as a matter of fact even though it continued business. Counsel for the payee in such cases might well investigate the point and, if possible, show that the drawee was insolvent at the time of presentment. In such case the loss would already have fallen upon the drawer. An insolvent bank has no right to pay out funds, though if it does pay out cash to one ignorant of the insolvency the payment is irrevocable.⁷

It may be urged with force that the notorious practise among banks to pay checks in exchange ought to be recognized in law. In such case the collecting bank would not be in default in taking exchange. And the drawer being bound by the usage, unless he had specified that payment be made in cash only, would not be discharged if the exchange draft were dishonored.⁸ It would probably require legislation to effect the change.

J. B. FORDHAM.

National Bank of Denver v. Federal Reserve Bank of Kansas City, Mo., 6 F. (2d) 339, 341 (C. C. A. 8th., 1925).

⁶ It is worthy of note that the primary bank in the chain of collection usually undertakes to limit the liability of itself and its correspondents for accepting drafts in payment by stipulation on its deposit slips. A common stipulation reads: "This bank or its correspondents may send items, directly or indirectly to any bank including the payor, and accept its draft or credit as conditional payment in lieu of cash." If binding such a stipulation would leave the payee without a remedy even as against the collecting bank.

⁷ Hayes v. Beardsley, 136 N. Y. 299, 32 N. E. 855 (1892).

⁸ And this result has been reached in a case under the North Carolina statute, N. C. Code of 1927, §220 (aa), which gives drawee banks the option to pay all checks drawn upon them in exchange unless it be specified thereon to the contrary "when any such check is presented by or through any Federal Reserve Bank, Post Office, or Express Company, or any respective agent thereof." Cleve v. Craven Chemical Co., 18 F. (2d) 711 (C. C. A. 4th, 1927).

BANKS AND BANKING—POWERS OF NATIONAL BANKS TO ENGAGE IN BUSINESS—ULTRA VIRES CONTRACTS—C Bank, acting as financial agent of B County, executed a bond, pursuant to statute, in favor of B County, with A Bank as surety, the A Bank to receive part of the deposits of said county as consideration for becoming surety. Upon default of C Bank, A was sued as surety. *Held*: A national bank's contract of suretyship is ultra vires and void. *Board of Commissioners of Brunswick County v. Bank of Southport*.¹

A corporation is limited in its activities to the powers granted by its charter, or by the laws of the jurisdiction in which it is organized, or to those powers incidental to the full enjoyment of those expressly granted.² This applies to banks organized under the National Banking Act, which act defines the powers expressly given and those incidental thereto.³ Under *incidental powers* the courts have allowed the national banks multifarious privileges. They have been permitted to make contracts of guaranty or suretyship, for their own benefit, when necessary to dispose of some property taken as security for money loaned,⁴ to warrant commercial paper that passes through their hands,⁵ and the like. A contract of suretyship or guaranty for the benefit of another, even for valuable consideration, is held to be outside the powers of a national bank, unless such a contract is necessary to protect the bank, for "banks are not eleemosynary institutions. They may lend their money, but not their credit."⁶ Where a bank has made loans, and later takes over other property as additional security, rather than force banks to dump on the market property which has been pledged to them as additional security for loans previously made, the courts have allowed them to take over the property and so handle it as to make it profitable. Thus, a bank has been allowed to take over a road construction contract after the

¹ 196 N. C. 198, 145 S. E. 227 (1928).

² *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 11 S. Ct. 478, 35 L. Ed. 55 (1891).

³ U. S. C. A., Title 12, Banks and Banking, §24 (7): ". . . To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion, by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this chapter. . . ."

⁴ *Norton Grocery Co. v. Peoples National Bank*, 144 S. E. 501 (Va. 1928).

⁵ *People's Bank v. Manufacturers' National Bank*, 101 U. S. 181, 25 L. Ed. 907 (Ill. 1879).

⁶ Note 4, *supra*.

contractors to whom loans were made became insolvent, and to guarantee the payment of materialmen;⁷ to take over a drug store, form a partnership, and continue the drug business;⁸ to actively engage in the creamery business;⁹ to have timber sawed according to specifications furnished by the purchaser;¹⁰ to buy real estate;¹¹ to enter into the automobile agency business;¹² to hold legal title to gladiola bulbs on trust to liquidate a debt to the bank;¹³ and to make other similar agreements. The tendency to allow a national bank to do what an individual could do in the protection of its business seems sound. When it engages in business undertakings other than those necessary to protect its legitimate interests then existing, all agreements made in furtherance of such business are ultra vires. The federal rule, generally adopted in construing the contracts of national banks, holds that such contracts are absolutely void, not because they are immoral in themselves, but because the bank has no power to make them.¹⁴ An executory contract of such a nature may be repudiated at any time. The plaintiff suing a national bank on such a contract, although executed on the part of the plaintiff, cannot recover, even if he has acted to his detriment. The plaintiff may recover only on a *quantum meruit*.¹⁵ Even then the plaintiff must show by direct evidence some benefits to the bank, to the extent of which its recovery will then be limited.¹⁶ "The more plainly

⁷ Note 4, *supra*.

⁸ Snow Hill Bank v. Odum Drug Co., 188 N. C. 672, 125 S. E. 394 (1924). This was not a national bank, however.

⁹ Emich v. Earling, 134 Wis. 565, approved on writ of error in 218 U. S. 27, 30 S. Ct. 672, 54 L. Ed. 915 (1908).

¹⁰ Patterson & Edy Lumber Co. v. Bank of Mobile, 203 Ala. 536, 84 So. 721, 10 A. L. R. 1037 (1919).

¹¹ U. S. C. A., Title 12, Banks and Banking, §29.

¹² American Exchange National Bank v. Lacy, 188 N. C. 25, 123 S. E. 475 (1924).

¹³ Knowlton v. Fourth Atlantic National Bank, 162 N. E. 356 (Mass. 1928).

¹⁴ Note 2, *supra*. "All contracts made by a corporation beyond the scope of those powers are unlawful and void, and no action can be maintained upon them in the courts, and this upon three distinct grounds: The obligation of every one contracting with a corporation, to take notice of the legal limits of its powers; the interest of the stockholders, not to be subjected to risks which they have never undertaken; and, above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law."

¹⁵ Citizens Central National Bank v. Appleton, 216 U. S. 196, 30 S. Ct. 364, 54 L. Ed. 443 (1910), quoting with approval the case given in note 2, *supra*.

¹⁶ Consolidated National Bank of Tucson v. Anglo and London Paris National Bank of San Francisco, 269 Pac. 68 (Ariz. 1928); Western National Bank v. Armstrong, 152 U. S. 346, 14 S. Ct. 572, 38 L. Ed. 470 (1893); Aldrich v. Chem. National Bank, 176 U. S. 18, 20 S. Ct. 498, 44 L. Ed. 611 (1900).

parties understand that when they enter into contracts of this nature they place themselves outside the protection of the law, so far as that protection consists in aiding them to enforce such contracts, the less inclined will they be to enter into them."¹⁷ The business man should be wary of contracts with banks, unless he is sure they have power to make them, for the bank has every advantage, being liable only for the benefits actually received.

J. W. CREW.

BILLS AND NOTES—CHECKS—PAYMENT UNDER MISTAKE AS CERTIFICATION—An "order" check given by a tobacco warehouseman to a farmer came into the hands of a wrongful holder who presented it for payment at the drawee bank. The bank in accordance with a prior written request of the warehouseman to honor all checks drawn to order just as if they were made payable to bearer, paid it without requiring any indorsement or identification. And the farmer, payee, now sues to recover the amount of the check. *Held*, that the special authority given could not affect the rights of the payee and that the conduct of the bank in paying the unindorsed check, retaining it, and charging it to the depositor's account, was in effect an acceptance, rendering the drawee liable to the true owner. *Dawson v. National Bank of Greenville*.¹

The result reached by the court is undoubtedly correct.² The agreement between the drawer and the drawee, although made for the convenience of the payee (*viz*: to relieve him from complying with the requirements of indorsement and identification) should in no way affect his rights as the holder of an order instrument. Therefore, the bank should be liable to him for wrongfully paying the check other than in accordance with its terms. The correctness of the court's reasoning however, in holding that the bank's conduct amounted "in effect" to an acceptance is questionable and might conceivably be productive of undesirable results in other fact situations.

The view that a mistaken payment and subsequent charging of a check to the drawer's account amounts to an acceptance, although

¹⁷ *First National Bank of Maux v. McKown*, 176 Pac. 245 (Okla. 1918), citing *McMullen v. Hoffman*, 174 U. S. 639, 669, 19 S. Ct. 851, 43 L. Ed. 1117 (1899).

¹ *Dawson v. First National Bank of Greenville*, 196 N. C. 134, 144 S. E. 833 (1928).

² *Pickle v. Muse*, 88 Tenn. 380, 12 S. W. 919 (1890).

adopted in some states,³ has been criticized by several courts⁴ and by authors.⁵ The error of such a view seems to lie in the failure to distinguish between presentment for payment and presentment for acceptance. In *First National Bank v. Whitman*⁶ Mr. Justice Hunt says, "The two things are essentially different. One is a promise to perform an act, the other an actual performance. A bank or an individual may be ready to make an actual payment of a check while unwilling to make a promise to pay at a future time." The unfortunate result which might arise from considering payment an acceptance can be illustrated as follows: A drawee bank pays a five hundred dollar check to a person in wrongful possession and discovers after charging it to the drawer's account that his balance is only fifty dollars and that he is insolvent. To consider this mistaken payment as an acceptance would make the bank liable for another five hundred dollars to the true payee; whereas, to treat it as a payment only, which it actually was intended to be, would make the bank liable to the rightful owner only for the value of the instrument so converted.

It is submitted that the bank's conduct in the instant case should be treated as a conversion, since the section of the N. I. L. concerning constructive acceptance does not properly apply.⁷ "The check belonged to the plaintiff and if upon demand for its surrender, the bank refuses to deliver it he would be entitled to redress against the bank for conversion."⁸ While in the present situation there would be no difference in the result whether the decision was based on acceptance

³ *Chamberlain Metal, etc., Co. v. Bank of Pleasanton*, 96 Kan. 611, 160 Pac. 1138 (1916); *Seventh National Bank v. Cook*, 73 Pa. 483, 13 Am. Rep. 751 (1873); *Pickle v. Muse*, *supra*, note 2. Cf. *Security Commercial and Sav. Bank of San Diego v. Southern Tr. & Com. Bank*, 241 Pac. 945, 74 Cal. App. Rep. 734 (1925).

⁴ *First National Bank v. Whitman*, 94 U. S. 343 (1876); *State Bank of Chicago v. Mid-City T. & S. Bank*, 293 Ill. 599, 129 N. E. 498 (1920); *Lone Star Trucking Co. v. City National Bank*, 240 S. W. 1000 (Tex. Civ. App., 1922).

⁵ Brannan, N. I. L. (4th ed. 1926) p. 842; Aigler, *Rights of Holder of Bill of Exchange Against Drawee*, 38 HARV. LAW REV. 856, 878 (1925).

⁶ *First National Bank v. Whitman*, *supra*, note 4.

⁷ *Kentucky Title Savings Bank v. Dunavan*, 205 Ky. 801, 266 S. W. 667 (1924); *Kansas City Casualty Co. v. Westport Ave. Bank*, 191 Mo. App. 287, 177 S. W. (1092) (1915); *Spaulding v. First National Bank*, 205 N. Y. Supp. 492 (1924); *Bentley, Murray & Co. v. La Salle St. Trust & Sav. Bank*, 197 Ill. App. 322 (1916); *Fidelity & D. Co. v. Bank of Charleston*, 267 Fed. 367 (C. C. A. 4th 1921); *Seigel v. Kevinsky*, 157 N. Y. Supp. 340, 93 Misc. 541 (1916).

⁸ Brannan, N. I. L. 4 ed., §189, p. 908 (1926); *Kentucky Title Sav. Bank & Trust Co. v. Dunovan*, *supra* note 7.

or conversion, to be in accord with the better reasoning and to provide a more comprehensive general rule, the latter view is preferable.⁹

LAWRENCE WALLACE.

CONFLICT OF LAWS—DOMICILE—RESIDENCE FOR VOTING—In a contest for the office of Mayor, plaintiff received one vote less than defendant. School teachers who remained in the town during the school term and, in vacation, returned to the homes of their parents were allowed to vote. The constitution requires every elector to reside in the district in which he offers to vote. *Held*, Residence as here used means domicile and what constitutes domicile is a matter of law. Thus the court did not err in sustaining plaintiff's objection to a question asked several of the teachers whether it was their purpose to make the town their *legal* residence. *Gower v. Carter*.¹

When accurately used residence is not synonymous with domicile,² but its meaning in a legal phrase must be determined in each case.³ Residence implies the fact of actual abode which is more or less permanent⁴ and may or may not be identical with domicile.⁵ Domicile is the residence of a person at a particular place with the intention to remain there for an indefinite length of time;⁶ it is "the place with which a person has a settled connection for legal purposes, either because his home is there or because it is assigned to him by law";⁷ it is "where a man sits down with the thought of remaining".⁸ Residence for however long a time it may be continued cannot constitute a person's domicile without the intention of indefinitely

⁹ Note, 14 A. L. R. 764, 768 (1921). And see, going so far as to allow *the drawee* to recover in trover from one who collected the check for the wrongful holder from the drawee bank, *Gustin-Bacon Mfg. Co. v. First Nat. Bk. of Englewood*, 306 Ill. 179, 137 N. E. 793 (1922).

¹ *Gower v. Carter*, 195 N. C. 697, 143 S. E. 513 (1928).

² *Town of Roanoke Rapids v. Patterson*, 184 N. C. 132, 113 S. E. 603 (1922); *Talley v. Commonwealth*, 127 Va. 516, 103 S. E. 612 (1920); GOODRICH, CONFLICT OF LAWS (1927) §18.

³ CONFLICT OF LAWS RESTATEMENT (Am. L. Inst. 1925) §12; GOODRICH, CONFLICT OF LAWS (1927) §19.

⁴ Beale, *Residence and Domicile* (1918) 4 Iowa Law Bulletin 1.

⁵ *Farmer v. Phillips*, 12 Ga. App. 732, 78 S. E. 353 (1913).

⁶ *Reynolds v. Cotton Mills*, 177 N. C. 412, 99 S. E. 240 (1919); *Presson v. Presson*, 38 Nev. 203, 147 Pac. 1081 (1915).

⁷ CONFLICT OF LAWS RESTATEMENT, §10. Cf. *Hannon v. Grizzard*, 89 N. C. 115 (1883).

⁸ *In Re Kalpochnikoff*, 28 F. (2d) 288 (E. D. Pa., 1928).

making it his home,⁹ or "without any present intention of removing therefrom."¹⁰

The word *resident* in the naturalization act,¹¹ in the poor laws,¹² in the statute of limitations,¹³ in the election laws,¹⁴ and in statutes referring to taxation¹⁵ and jurisdiction¹⁶ has been held synonymous with domicile. However, for the purpose of attachment *residence* is not identical with domicile but means actual residence.¹⁷ The interpretation must be left to the context and especially to a consideration of the purpose of the statute.¹⁸

The instant case is clearly correct and raises the same problem which arises when students attempt to vote in university towns. If the student returns to his father's home during vacations and is dependent in part or in whole upon his father for support he has no domicile at the university.¹⁹ But where an adult student has left his parent's home and, having no other, has chosen the college town for his home it is his domicile even though he has no intention of remaining there indefinitely.²⁰

⁹ *Horne v. Horne*, 31 N. C. 99 (1848); *Reynolds v. Cotton Mills*, *supra* note 4; *GOODRICH, CONFLICT OF LAWS* (1927) §24; but see *JACOBS, LAW OF DOMICILE*, §171.

¹⁰ *Putnam v. Johnson*, 10 Mass. 488 (1813).

¹¹ *In re Kalpochnikoff*, *supra* note 6.

¹² *Madison v. Guilford*, 85 Conn. 55, 81 Atl. 1046 (1911); *State v. Dodge Co.*, 56 Wis. 79, 13 N. W. 680 (1882).

¹³ *Farrow v. Farrow*, 162 Ia. 87, 143 N. W. 856 (1913). *Hallet v. Bassett*, 100 Mass. 167 (1868). *Contra Hunter v. Bremer*, 256 Pa. 257, 100 Atl. 809 (1917).

¹⁴ *State v. Grizzard*, *supra* note 5; *Gower v. Carter*, 195 N. C. 697, 143 S. E. 513 (1928); *Moffett v. Hill*, 131 Ill. 239, 22 N. E. 821 (1889); *Berry v. Wilcox*, 44 Neb. 82, 62 N. W. 249 (1895). Cf. *State v. Joyce*, 123 La. 633, 49 So. 219 (1909).

¹⁵ *Brookover v. Kase*, 41 Ind. App. 102, 83 N. E. 524 (1908); *Pendleton v. Commonwealth*, 110 Va. 229, 65 S. E. 536 (1909).

¹⁶ *Schlawig v. De Peyster*, 83 Iowa 323, 49 N. W. 843 (1891). *Contra Atkinson v. Washington and Jefferson College*, 54 W. Va. 32, 46 S. E. 253 (1903). *Sudler v. Sudler*, 121 Md. 46, 88 Atl. 26 (1913); *Gilbert v. David*, 235 U. S. 561, 35 Sup. Ct. 164, (1914); *Presson v. Presson*, *supra* note 5.

¹⁷ *Wheeler v. Cobb*, 75 N. C. 21 (1876); *Biggers v. Bank of Ringgold*, 144 S. E. 397 (Ga. 1928); *Kanawha Banking & Trust Co. v. Swisher*, 144 S. E. 294 (W. Va. 1928). One domiciled in a state who is temporarily absent on business or pleasure is not a nonresident within meaning of attachment laws. *Brann v. Hanes*, 194 N. C. 571, 140 S. E. 292 (1927).

¹⁸ *CONFLICT OF LAWS RESTATEMENT* §12(1).

¹⁹ *Ibid.*, §20.

²⁰ *Ibid.*, §24(10); *Berry v. Wilcox*, *supra* note 13; *Klutts v. Jones*, 21 N. M. 720, 158 Pac. 490 (1916) school teachers; *People v. Osborne*, 170 Mich. 143, 135 N. W. 921 (1912).

A model charge in student cases may be found in a carefully framed opinion of the Supreme Judicial Court of Massachusetts, as follows:

"If he has a father living; if he still remains a member of his father's family; if he returns to pass his vacation; if he is maintained and supported by his father; these are strong circumstances, repelling the presumption of a change of domicil. . . . But if, having a father or mother, they should remove to the town where the college is situated, and he should still remain a member of the family of the parent; or if, having no parent, or being separated from his father's family, not being maintained or supported by him; or, if he has a family of his own, and removes with them to such town; or by purchase or lease takes up his permanent abode there, without intending to return to his former domicil; if he depend on his own property, income or industry for his support;—these are circumstances, more or less conclusive, to show a change of domicil, and the acquisition of a domicil in the town where the college is situated. In general, it may be said that an intent to change one's domicil and place of abode is not so readily presumed from a residence at a public institution for the purpose of education, for a given length of time, as it would be from a like removal from one town to another, and residing there for the ordinary purposes of life; and therefore stronger facts and circumstances must concur to establish the proof of change of domicil, in the one case than in the other. But where the proofs of change of domicil, drawn from the various sources already indicated, are such as to overcome the presumption of the continuance of the prior domicil, such preponderance of proof, concurring with an actual residence of the student in the town where the public institution is situated, will be sufficient to establish his domicil, and give him a right to vote in that town, with other municipal rights and privileges."²¹
S. SHARP.

CRIMINAL LAW—ABANDONMENT—ALTERNATIVE AND CONDITIONAL JUDGMENTS—In a recent North Carolina case, the defendant was convicted of the abandonment of his wife and minor children. He was ordered to pay into court \$90.00 monthly for their support, to give bond in the sum of \$1000.00 to secure these payments, and to be confined in the county jail for two years, *capias* not to issue, however, unless the defendant defaulted in his monthly payments. *Held*, judgment affirmed, subject to modifications in two minor particulars. *State v Vickers*.¹

²¹ Opinion of Justices, 5 Met. 587, 589 (Mass. 1843).

¹ *State v. Vickers*, 196 N. C. 239, 145 S. E. 175 (1928).

The North Carolina statute² provides that upon conviction in abandonment cases, the trial judge may at his discretion make such order as will in his judgment best provide for the support of the wife and children, out of the property or earnings of the defendant. Frequently, in practice, these orders are ambiguous and indefinite. Thus, in the principal case, the trial judge was directed to make the judgment more definite as to the duration of the period of payments and as to the amount to be paid when the children reached majority.

It was contended by defense counsel in the principal case that the judgment was bad as being a suspended judgment and as being in the alternative. The term suspended judgment is used in two distinct senses. In one, the trial court postpones for a time, which may be either of definite or indefinite duration, the pronouncement of sentence.³ In the other, sentence is pronounced immediately, but the execution is delayed.⁴ Both types are resorted to in order to grant the defendant an opportunity to comply with various conditions, whose performance will relieve him from further penalty. This distinction, however, is not a limitation upon the discretionary power of the trial judge in abandonment cases. He may use either plan, as seems best in the particular case.

On the other hand, the courts have not as a rule upheld, either in criminal cases or in civil cases at common law, judgments in the alternative.⁵ Thus, in a prosecution for forcible trespass, an order to make restitution of personal property or to go to jail was held improper.⁶ Similarly, in a prosecution for assault to commit rape an order to pay a fine or to go to jail was found similarly defective.⁷ Likewise, a judgment for plaintiff in an action for the possession of land, was held invalid because it was to be stricken out if defendant filed a certain bond within a designated period.⁸ The reason usually given is the historical requirement of definiteness and certainty in common-law judgments. In equitable proceedings, however, con-

² N. C., C. S. (1919), §4449; CODE (1927) §4449.

³ State v. Hardin, 183 N. C. 815, 112 S. E. 593 (1922); note (1911) 33 L. R. A. (N. S.) 112. The enforcement of the suspended sentence is discussed in (1923) 1 N. C. L. Rev. 116.

⁴ State v. Schlichter, 194 N. C. 277, 139 S. E. 448 (1927).

⁵ BISHOP, NEW CRIMINAL PROCEDURE, (2 ed. 1913), §1307; FREEMAN, JUDGMENTS, (5 ed. 1925), §79.

⁶ State v. Bennet, 20 N. C. 170 (1838).

⁷ State v. Perkins, 82 N. C. 682 (1880).

⁸ Puette v. Mull, 175 N. C. 535, 95 S. E. 881, (1918); Strickland v. Cox, 102 N. C. 411, 9 S. E. 414, (1889); In re Deaton, 105 N. C. 59, (1890).

ditional and alternative decrees and orders have always been upheld.⁹ The statute providing for the handling of abandonment cases seems to have contemplated the incorporation of this characteristic of the decree, by the consolidation of a sort of equitable specific performance of the marital duty of support with the sanctions of the criminal law.¹⁰

The question, therefore, is not whether the judgment is in the alternative, but whether the trial court abused its discretion in securing the obedience of its order for support of the payments both by the filing of a bond and by the suspended execution of a criminal sentence. Actually, the order in the principal case was in the alternative in the extreme. Technically, this was not so. The election between the imprisonment of the defendant and the collection of the bond, or both, was not the privilege of the defendant, but of the family. And there was only one punishment provided, the jail sentence. The double sanction, it is submitted, was not too harsh. For, upon default, jailing the defendant would not assure the continuance of the family's support. The bond, however, provided a resource for this purpose. The affirmance of the judgment in its more important aspects, therefore, represents a liberal interpretation of the apparent purpose of the statute.

N. S. SOWERS.

RAILROADS—RIGHT-OF-WAY—NATURE AND EXTENT OF EASEMENT—INJUNCTIONS—The plaintiff granted to the defendant railroad company a right-of-way over his land, with a provision in the deed that the company might make necessary erections and do all other things necessary and convenient for the operation of the railroad. The defendant fenced in the land, built thereon a shanty for its employees, and signified its intention to erect other houses. The plaintiff seeks to enjoin the defendant from carrying out these projects and from cultivating the land. The lower court granted the injunction with the proviso that the company might use the completed shanty until "final hearing". The Supreme Court disallowed the injunction except as to prohibiting cultivation. *Hodges v A. C. L. Ry.*¹

⁹ *Daughtry v. Reddick*, 40 N. C. 261, (1848); FREEMAN, JUDGMENTS, (5 ed. 1925), §79.

¹⁰ Compare N. C., C. S. (1919), §1667; CODE (1927) §1667; *State v. Faulkner*, 185 N. C. 635, 116 S. E. 168, (1923); and *Dye v. Dye*, 9 Colo. App. 320, 48 Pac. 313, (1879).

¹ *Hodges v. A. C. L. Ry.*, 196 N. C. 66, 144 S. E., 528 (1928).

In a case like this, the chief question is what is necessary for carrying out the purposes of the grant. The land is supposed to be used for nothing except the purposes of the grant.² That an injunction may be granted in cases of improper use of a right of way is well established.³ Whether the use is necessary or not is primarily a question for the railroad company to decide.⁴ The courts have authorized railroads to do anything which will facilitate transportation.⁵ They may permit the installation of a telegraph line which will serve the railroad,⁶ make fills necessary for the maintenance of a safe road-bed regardless of the natural drainage of the land,⁷ elevate the tracks,⁸ and make such other changes in the land as may be necessary to its reasonable use.⁹ However, they may not excavate dirt for purposes of sale,¹⁰ dig pits beyond the narrow limits necessary to the maintenance of the road-bed, or remove any part of the land to the land of another,¹¹ even though the excavated dirt is to be used for the completion of fills at other places.¹²

The decision in the principal case is in accord with the authorities cited above. Houses for employees are certainly necessary for the operation of a railroad, and in erecting them the company acted in good faith and within its rights. The use of the right of way for agricultural purposes is unnecessary and the company denied that they ever had any such intention; so the court was correct in sustaining this part of the restraining order.

CHARLES S. MANGUM, JR.

WILLS—MUTUAL AND RECIPROCAL WILLS—RELIEF AGAINST REVOCATION—In the recent Georgia case of *Clements v. Jones*,¹ it appeared that one Walker (whose heirs and next of kin are the

² *Alabama Great Southern Ry. v. McWhorter*, 202 Ala. 455, 80 So. 839 (1919).

Robertson v. Bertha Mineral Co., 128 Va. 93, 104 S. E. 832 (1920).

Hodges v. Western Union Telegraph Co., 133 N. C. 225, 45 S. E. 572 (1903).

³ *Hales v. A. C. L. Ry.*, 172 N. C. 104, 90 S. E. 11 (1916).

⁴ *Chatham R. R. v. Olive*, 142 N. C. 257, 55 S. E. 263 (1906).

⁵ *Hohl v. Iowa Cent. Ry.*, 162 Ia. 66, 143 N. W. 850 (1913).

⁶ *American Tel. and Tel. Co. v. Smith*, 71 Md. 535, 18 Atl. 910 (1889). Cited and approved in *Hodges v. Western Union Tel. Co.* *Supra* note 2.

⁷ *Harrelson v. Kansas City and A. Ry.*, 151 Mo. 482, 52 S. W. 368 (1899).

⁸ *Gillespie v. Buffalo, R. and P. Ry.*, 226 Pa. 31, 74 Atl. 738 (1909).

⁹ *Whitewater Lumber Co. v. Prather*, 211 Ala. 361, 100 So. 549 (1924).

¹⁰ *Nashville, C. and St. L. Ry. v. Karthaus*, 150 Ala. 633, 43 So. 791 (1907).

¹¹ *Whitewater Lumber Co. v. Prather*, *supra* note 9.

¹² *Hendrix v. Southern Ry.* 162 N. C. 9, 77 S. E. 1001 (1913).

¹ 144 S. E. 319 (Ga. 1928).

plaintiffs) and the defendant (his step-mother), on the same day and before the same witnesses, executed their respective wills, in which each devised and bequeathed to the other, real and personal property. It was alleged by the plaintiffs that this was done "as part of a general scheme" between the testators, and that the will of the the deceased "had as its consideration the execution and publication of the will of the defendant." Upon a demurrer to a petition seeking that the defendant be enjoined from conveying the property received under the will of the deceased, and that a trust for the benefit of the plaintiffs be impressed upon the property embraced in the defendant's will, it was *held* that the judgment of the trial court, sustaining the demurrer, must be affirmed, for failure on the part of the plaintiff to allege the existence of a clear and definite contract.

In most of the litigation involving relief against a threatened revocation of wills, whether single, joint,² or mutual and reciprocal wills,³ the parties plaintiff have been persons designated in the will as beneficiaries.⁴ The principal case is unique, in that the plaintiffs were not thus mentioned in either will. The court does not discuss their status. They may, however, have had an interest because of other allegations relating to fraud in the inducement to execute a certain contemporaneous deed. Even so, it is hard to see how the plaintiffs had any claim upon the carrying out of the alleged obligation of the defendant to abide by her will. Thus, in contrast with the principal case, many of the decisions in this field have dealt with a situation where the testators had willed their property to each other for life, with remainder over.⁵ Others have been cases where it was the deceased who had broken the supposed contract, and the survivor was claiming against heirs or other devisees.⁶

² See *Stevens v. Myers*, 91 Ore. 114, 177 Pac. 37, 2 A. L. R. 1155 (1918).

³ For general discussion see *Frazier v. Patterson*, 243 Ill. 80, 90 N. E. 216, 27 L. R. A. (N. S.) 508, 17 Ann. Cas. 1003 (1909); *Wright v. Wright*, 215 Ky. 394, 285 S. W. 188 (1926); (1915) 28 Harv. L. Rev. 246; E. C. Goddard, *Mutual Wills*, (1919) 17 MICH. L. REV. 677.

⁴ See annotation (1919) 2 A. L. R. 1193, 1200, for a collection of cases.

⁵ *Baker v. Syfritt*, 147 Iowa 49, 125 N. W. 998 (1910); *In re Rolf's Estate*, 193 Cal. 594, 226 Pac. 608 (1924); *Carmichael v. Carmichael*, 72 Mich. 76, 40 N. W. 173, 1 L. R. A. 596, 16 Am. St. Rep. 528 (1888); *Rastetter v. Hoenninger*, 214 N. Y. 66, 108 N. E. 210 (1915); *Phillip v. Phillip*, 96 Misc. 471, 160 N. Y. Supp. 624 (1916); *Morgan v. Sanborn*, 225 N. Y. 454, 122 N. E. 696 (1919); *Doyle v. Fischer*, 183 Wis. 599, 198 N. W. 763, 33 A. L. R. 733 (1924).

⁶ *Brown v. Johanson*, 69 Colo. 400, 194 Pac. 943 (1921); *Menke v. Dewe*, 117 Kan. 207, 230 Pac. 1065 (1924); *Canada v. Ihmsen*, 33 Wyo. 439, 240 Pac. 927, 43 A. L. R. 1010 (1925); *Hadwen v. Myles*, [1925] 1 Ch. 75, 132 L. T. R. 658 (1925).

Where mutual and reciprocal wills contain internal evidence that each has been executed in consideration of the execution of the other, according to a definite contract, all courts agree that relief may be had against threatened or actual revocation of either will. Similarly, in the situation where, outside of the text of the wills, the parties have entered into an express contract to make such a testamentary disposition of their property.⁷ If that contract has not been in writing, and the wills have disposed of land, two grounds have been resorted to in order to obviate the difficulty of the Statute of Frauds. One is that the wills themselves constitute the contract for this purpose.⁸ The other is the doctrine of part performance, operating upon the death of one testator and the receipt by the other of benefits under his will.⁹

A few courts have found sufficient evidence of the existence of a contract in the mere facts of simultaneous execution of the wills and of close family relationship between the testators.¹⁰ Especially has this been so where the two wills have been embodied in one jointly executed instrument.¹¹ Most courts, however, have insisted upon more unequivocal circumstances, when an express contract could not be shown, before they have been willing to find a contract implied in fact.¹² The North Carolina court has adopted this view.¹³

⁷ See annotation (1926) 43 A. L. R. 1020, 1024, for a collection of cases.

⁸ *Brown v. Johanson*, *supra* note 6.

⁹ *Carmichael v. Carmichael*, *supra* note 5; *Larrabee v. Porter*, 166 S. W. 395 (Tex. Civ. App. 1914); see E. C. Goddard, *op. cit. supra* note 3, at 683; PAGE, *THE LAW OF WILLS* (2d. ed. 1926) §95; (1907) 20 HARV. L. REV. 315.

¹⁰ See *Stevens v. Myers*, *supra* note 2, where the testator and his wife executed mutual wills of identical import, leaving property to each other, and expressing the purpose that when they both should die their son and daughter should have all of their property. On the theory that the mere execution of such wills proves their contractual character, the testator, who survived the wife and took her property, was prevented from making another will and thereby disinheriting his daughter. Accord: *Brown v. Johanson*, *supra* note 6.

¹¹ *Frazier v. Patterson*, *supra* note 3. There are numerous cases to the effect that the terms of a joint will, or the circumstances under which it was executed, may show the existence of a contract, directly or by inference. *Campbell v. Dunkelberger*, 172 Iowa 385, 153 N. W. 56 (1915); *Rastetter v. Hoenninger*, *supra* note 5; *Doyle v. Fischer*, *supra* note 5.

¹² *Edson v. Parsons*, 155 N. Y. 555, 50 N. E. 265 (1898) is a leading case. Two sisters made similar wills at the same time, bequeathing their property to each other, and making their brother the ultimate residuary legatee. After the death of one the survivor made a different will. Upon the latter's death the brother sought to establish the provisions of the first will, as a contract between the sisters ultimately to give their property to him. It was held that the circumstances failed to establish such a contract. See annotation (1926) 43 A. L. R. 1020, 1027, for a collection of cases.

¹³ See *Ginn v. Edmundson*, 173 N. C. 85, 91 S. E. 696 (1917), and cases there cited.

The court in the principal case would therefore seem to be supported by the great weight of authority in being unable to find any allegation that the defendant was under contract either in the allegation that the wills were executed as part of a general scheme, or in that reciting that the deceased had received a consideration for making his will. Moreover, the parties were not, as has usually been the case, husband and wife; and the wills were not embraced within a single instrument. And the court was probably reluctant, as between the uncles and aunts of the decedent and his specific devisee, to upset a disposition made under a will apparently free from fraud or undue influence, while probate was pending.

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