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## Editorial Board/Notes and Comments

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## NOTES AND COMMENTS

### Contracts—Statutory Modification of Consideration

Twenty states have enacted statutes modifying as a whole the common-law requirement of consideration in connection with written contracts. This list is exclusive of those which, like North Carolina,<sup>1</sup> have adopted legislation changing particular judicial applications of the rules of consideration. Nor does it include statutory changes in the common-law effects of seals, some of which make the presence of the seal presumptive evidence of consideration.<sup>2</sup> The statutes in

<sup>1</sup>N. C. ANN. CODE (Michie, 1927) §895, commented upon in (1929) 8 N. C. L. REV. 71 and in (1930) 9 N. C. L. REV. 30; and N. C. ANN. CODE (Michie, 1927) §990.

<sup>2</sup>For a list of such states, see 1 WILLISTON, CONTRACTS (1919) §218.

question are of three types: (1) those which declare "a written instrument is presumptive evidence of consideration," "is evidence of consideration," or "shall import a consideration";<sup>3</sup> (2) those which give unsealed written promises the effect which sealed contracts had at common law, i. e., enforceability without consideration;<sup>4</sup> and (3) the Uniform Written Obligations Act,<sup>5</sup> which recites that "a written release or promise hereafter made and signed by the person releasing or promising shall not be invalid or unenforceable for lack of consideration, if the writing also contains an additional express statement that the signer intends to be legally bound."

This third type of statute is of recent origin and has been enacted in but two states. It has not yet become involved in litigation, but has aroused much discussion.<sup>6</sup> The statutes of type (2) are reminiscent of the view propounded by Lord Mansfield in *Phillans v. Van Mierop*,<sup>7</sup> decided in 1765, that a promise was binding merely because it was in writing, without any consideration or seal. The first type of statute is based upon the probability<sup>8</sup> that consideration is present

<sup>3</sup> "Presumptive Evidence," CAL. CIV. CODE (Deering, 1927) §1614; IDAHO COM. STAT. (1919) §5663; MONT. REV. CODE (1921) §7512; OKLA. COM. STAT. (1921) §5027; NORTH DAK. COM. STAT. (1913) §5881; SOUTH DAK. REV. CODE (1919) §848.

"Evidence of consideration," ALA. CIV. CODE (1923) §7662; TENN. ANN. CODE (Shannon, 1917) §3214; KY. STAT. (Carroll, 1922) §§471, 472.

"Imports a consideration," IOWA CODE (1927) §9440; KAN. REV. STAT. ANN. (1923) c. 16, §107; LA. CIV. CODE (1920) §1894; MO. REV. STAT. (1919) §2160; TEX. STAT. (1920) Art. 7093.

<sup>4</sup> "Every contract in writing shall import a consideration in the same manner and as fully as sealed instruments have heretofore done." ARIZ. CIV. CODE (1913) §5564; MISS. ANN. CODE (Hemingway, 1927) §9005; N. M. ANN. STAT. (1915) §2181; WYOM. COM. STAT. ANN. (1920) §4598; see *McLeod v. State*, 69 Miss. 221, 13 So. 268 (1891); *Bank of Artesia v. Home Ins. Co.*, 16 N. M. 66, 113 Pac. 815 (1911).

<sup>5</sup> Approved by the National Conference of Commissioners on Uniform State Laws in August 1925; (1925) HANDBOOK NATIONAL CONFERENCE UNIFORM STATE LAWS, 214. Enacted in Pennsylvania in 1927; 1927 P. L. 985; PA. STAT. (Supp. 1928) §16016a. Enacted in Utah in 1929.

<sup>6</sup> Attacked in (1928) 14 AM. BAR ASSO. J. 348; (1926) 21 ILL. L. REV. 185; defended (1928) 14 AM. BAR ASSO. J. 554; (1927) 76 U. PA. L. REV. 580.

<sup>7</sup> 3 Burr. 1663 (1765); The House of Lords in *Rann v. Hughes*, 7 T. R. 350, n. (a) (1778) rejected *Pillans v. Van Mierop*, and said, "if contracts be merely written and not specialties they are parol and a consideration must be proved." North Carolina, as do all states which do not have statutes modifying consideration for written instruments, follows *Rann v. Hughes*. In *Green v. Thornton*, 49 N. C. 230 (1856), Battle, J. said, "putting the contract in writing, if not under seal, will not help it."

<sup>8</sup> It is generally agreed that a presumption may be based on probability (when A and B are repeatedly found together, when A appears, B will be presumed); or may be created as a method of fairly apportioning the production of evidence (when facts are most familiar to one party, a presumption with regard to those facts and operating against the party will induce him to

in most written contracts. A study of the procedural usefulness of that sort of legislation, as indicated by the cases decided thereunder, is the object of this note.

To avail himself of the presumption created by the statute the party relying on the contract must establish that the writing is of the opponent's making. This accomplished, the presumption is operative, and if the opponent would avoid its effect, he must show there is no consideration. The party relying on the contract will allege an agreement in writing,<sup>9</sup> or if the nature of the contract is such that a writing is required, he need allege only the making of a contract.<sup>10</sup> It is unnecessary to allege a consideration.<sup>11</sup> This is a consequence of the statute, for the common-law<sup>12</sup> and code<sup>13</sup> rule is that the presence of consideration must be alleged. If the opponent does not deny the allegation, the instrument's execution is deemed admitted,<sup>14</sup> and when thus admitted it need not be introduced in evidence.<sup>15</sup> If the opponent admits the execution and attacks the instrument for lack of consideration, he must deny not only the particular consideration

divulge the facts); or the presumption may originate as a means of handicapping an anti-social contention (the presumption of legitimacy). The presumption of consideration to support a writing belongs to the first group and has its source in probability. It may be termed a rebuttable, mandatory presumption. That is, the party against whom it works may offer evidence to rebut the inference, but if no evidence is offered and the allegation giving rise to the presumption (the allegation of making of a written agreement) is either admitted or proved, the jury must find in accord with the inference. See, Chafee, *Progress of the Law, Evidence* (1921) 35 HARV. L. REV. 302, 311; McCormick, *Presumptions and Burden of Proof* (1927) 5 N. C. L. REV. 291, 303; Bohlen, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof* (1920) 68 U. PA. L. REV. 307, 314.

<sup>9</sup> A contract which is not entirely in writing is regarded as an oral contract and the proponent must allege and prove the consideration. *Flores v. Baca*, 25 N. M. 424, 184 Pac. 532 (1919); a "writing" may be a telegram, *Western Twine Co. v. Wright*, 11 S. D. 521, 78 N. W. 942, 44 L. R. A. 438 (1899); or it may be an entry in minutes of a meeting, *Delta County v. Blackburn*, 90 S. W. 902 (Tex. Civ. App. 1905).

<sup>10</sup> *Cuthill v. Peabody*, 19 Cal. App. 304, 125 Pac. 926 (1912).

<sup>11</sup> *Kenigsberg v. Reiniger*, 159 Iowa 548, 141 N. W. 407 (1913); *Williams v. Hall*, 79 Cal. 564, 21 Pac. 965 (1889); Mo. REV. STAT. (1919) §2160; Baldwin's Supp. to Carroll's Kentucky Stat. (1928) §42; it has been declared that if such is unnecessarily alleged it must be proved, *Bronston v. Lakes*, 135 Ky. 173, 121 S. W. 1021 (1909). However, Tennessee requires that the consideration be alleged in suits on all contracts except negotiable paper; the statute changes the burden of proof but not the rules of pleading. See *Roper v. Stone, Cooke* (Tenn.), 497, 499 (1813).

<sup>12</sup> See SHIPMAN, COMMON LAW PLEADING (1923) 240.

<sup>13</sup> See CLARK, CODE PLEADING (1928) 190-191, 162, 154; McINTOSH, N. C. PRAC. AND PROC. (1929) 396-397.

<sup>14</sup> *Bruner v. St. Louis and Santa Fe Ry.*, 52 Okla. 349, 152 Pac. 1103 (1915).

<sup>15</sup> *St. Louis and Santa Fe Ry. v. Driggers*, 65 Okla. 297, 166 Pac. 703 (1917).

which the proponent possibly unnecessarily alleged, but must specifically deny that there is any consideration.<sup>16</sup> Should, however, the opponent answer that the recital of consideration in the instrument is incorrect and the proponent reply confessing the incorrectness but alleging the existence of other consideration, the original presumption is destroyed.<sup>17</sup> If failure of consideration as distinguished from want of consideration is the ground of defense the opponent must show the extent of failure. The proponent is not required to show that the consideration still has some value after the opponent has indicated a partial failure. And if total failure is required for avoiding the instrument, as in the case of an account stated, the proponent wins unless the party attacking shows total failure. These rules are the same as those at common law.<sup>18</sup> The opponent must not only plead lack or failure of consideration,<sup>19</sup> but must offer evidence which sustains his contention, and if he does not offer such evidence, though the proponent has done no more than prove execution of the writing, it is error for the court not to direct for the proponent on this issue.<sup>20</sup>

The states which declare the writing "presumptive evidence" also enact that "the burden of showing want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it";<sup>21</sup> and this construction is placed on the other statutes of type (1) by the courts. The cases do not provide a clear-cut determination of what is "the burden" which is thus placed on the opponent. In some states the effect of the statutes has been to require the party attacking the writing to "prove by a preponderance of evidence" that the writing is unsupported by consideration.<sup>22</sup> And this has meant that if the evidence is confusing, if there is equally as

<sup>16</sup> *Cordes v. Hardin*, 27 Cal. App. 474, 150 Pac. 650 (1915).

<sup>17</sup> *Whitaker v. Holcomb*, 177 Ky. 279, 198 S. W. 533 (1917).

<sup>18</sup> *Merchants Nat. Bank v. Carmichael*, 50 Cal. App. 749, 196 Pac. 76 (1921); *Powell v. Sturgeon*, 299 S. W. 274 (Tex. Civ. App. 1927).

<sup>19</sup> For the method of pleading lack or failure of consideration at common law and under the codes, see *SHIPMAN*, *op. cit. supra* note 12 at 322; *CLARK*, *op. cit. supra* note 13 at 145, 395, 424; *McINTOSH*, *op. cit. supra* note 13 at 483; *Greer v. Latimer*, 47 S. C. 176, 25 S. E. 136 (1896).

<sup>20</sup> *Bruner v. St. Louis and Santa Fe Ry.*, *supra* note 14.

<sup>21</sup> Idaho, Montana, North Dakota, Oklahoma, South Dakota.

<sup>22</sup> *Keating v. Morrissey*, 6 Cal. App. 163, 91 Pac. 677 (1907) (must overcome and dispel the presumption); *Combs v. Combs*, 130 Ky. 827, 114 S. W. 334 (1908) (clear and convincing proof); *First Presbyterian Church v. Dennis*, 178 Iowa 1352, 161 N. W. 183 (1917) (must show by a preponderance of evidence); *Shelton v. St. Louis Ry.*, 131 Missouri App. 560, 110 S. W. 627 (1908) (presumption must be overthrown by competent proof); *Ford v. Drake*, 46 Mont. 314, 127 Pac. 1019 (1912) (preponderance of evidence); *First Nat. Bank v. Radke*, 51 N. W. 246, 199 N. W. 930 (1924) (same); *Ball v. White*, 50 Okla. 429, 150 Pac. 901 (1915) (same).

much to support a finding of consideration as there is to support the contrary, then the party relying on the writing is entitled to the verdict. In other states the courts do not talk of preponderances and the cases seem to involve the question whether the party attacking must produce evidence sufficient to raise a question.<sup>23</sup> When his evidence thus rebuts the presumption he is safe from having a verdict directed against him. It is significant, however, that in these cases the opponent had offered little or no evidence and the courts may not have talked of preponderances because it was altogether unnecessary. The result is that half of the courts have said the opponent has the "burden of persuasion,"<sup>24</sup> and, while the position of the other courts is uncertain it seems likely that in a proper case they will take the same view.

The Uniform Written Obligations Act, our type (3), was intended for adoption, and types (2) and (1) are actually found only in states which have abolished the common-law efficacy of the seal on private contracts. All three types were designed to alleviate the awkwardness in which lawyers found themselves when seals were abolished and they were deprived of a formal substitute for consideration in legitimate but gratuitous transactions. Statutes of type (1) also expedite judicial proceedings on contracts in that they recognize the usual situation and require the party who relies on the less frequent case to establish the lack of consideration. It is only in this latter connection that such legislation could contribute much in a state like North Carolina, where the original force of the seal remains unimpaired. It is believed, however, that this gain would be considerable, and it is therefore suggested that the General Assembly enact a statute reading substantially as follows:

"In actions or counterclaims upon contracts completely in writing, it shall not be necessary for the party suing or claiming thereon to make any allegations with reference to consideration for the contract. Want of consideration, in such cases, shall constitute a de-

<sup>23</sup> *Western Twine Co. v. Wright*, 11 S. D. 521, 78 N. W. 942 (1899).

<sup>24</sup> The view that the proponent has always the burden of persuasion is supported by the weight of authority in cases not involving this statutory presumption. See WIGMORE, EVIDENCE, §§2485, 2487; THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT COMMON LAW, 383; Note (1925) 35 A. L. R. 1370. However, the view that the opponent, who is required to plead lack of consideration, has the burden of persuading the jury is consistent with the observation that "The burden of persuasion is usually determinable at the end of the pleadings, upon the basis that he who pleads a fact (as distinguished from one who denies a previous allegation) has the burden of convincing the jury of its truth." See McCormick, *op. cit. supra* note 8 at 306.

fense, which must be specially pleaded, supported by evidence, and sustained by the greater weight of the evidence."

E. M. PERKINS,  
M. T. VAN HECKE.

**Bills and Notes—Acceleration Clause in Mortgage as  
Affecting Maturity of Notes—Distribution of  
Proceeds of Foreclosure Sale**

A recent North Carolina case indicated by dictum that a holder of a negotiable note which referred on its face to a mortgage containing an acceleration provision was bound by the terms of such provision. The same case held that where the foreclosure was accelerated, all notes secured by the mortgage should share *pro rata* in the proceeds of the sale.<sup>1</sup> Thus there is raised the question of North Carolina's attitude in the situation where a note, unconditional on its face, is secured by a mortgage or deed of trust in which a clause of acceleration is written.

It is well settled that an acceleration provision in a mortgage securing a bond or note containing no such stipulation, operates upon the bond or note, at least to the extent of rendering the debt due for the *purpose of foreclosing* upon default.<sup>2</sup> This rule applies where the default is in a payment of interest,<sup>3</sup> of principal,<sup>4</sup> or of one of a

<sup>1</sup> Bank of Clinton v. Goldsboro Savings and Trust Company, 199 N. C., 582, 155 S. E. 261 (1930).

This note does not consider the matter of notice as affecting either the negotiability of the instrument or the rights of the holder. It would seem that an endorsee who is in other respects a holder in due course should not be subjected to defenses contained in a mortgage solely because the note secured contains a reference to the mortgage. This view would facilitate negotiation, and would seem compatible with N. C. ANN. CODE (Michie, 1927) §3037, providing that

"To constitute a notice of an infirmity in the instrument or defect in the title of the person negotiating the same the person to whom it is negotiated must have had *actual knowledge* of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith."

See note in 34 A. L. R. 1377 (1925); Brannan, NEGOTIABLE INSTRUMENTS LAW (4th ed. 1926) §57, p. 489.

As to the effect of public records on one's character as a holder in due course see Foster v. Augustanna College, 92 Okla. 96, 218 Pac. 335 (1923); 37 A. L. R. 860 (1925); Brannan, NEGOTIABLE INSTRUMENTS LAW (4th ed. 1926) §56, p. 458.

<sup>2</sup> Hyman v. Devereux, 63 N. C. 624 (1869); Barbee v. Scoggins, 121 N. C. 136, 28 S. E. 259 (1897); Gore v. Davis, 124 N. C. 234, 32 S. E. 554 (1899).

<sup>3</sup> Commonwealth Farm Loan Co. v. Caudle, 203 Ky. 761, 263 S. W. 24 (1924); Gore v. Davis, *supra* note 2.

<sup>4</sup> Barbee v. Scoggins, *supra* note 2; Miller v. Mariner, 187 N. C. 449, 121 S. E. 770 (1924).

series of notes maturing periodically.<sup>5</sup> In all such cases, failure to meet the obligation gives the holder a right to foreclose and apply the proceeds, not merely to that portion of the debt which is then due, but to the entire indebtedness.<sup>6</sup>

The courts are divided on the question as to whether or not a default would mature the debt for purposes other than foreclosing. The majority hold that where a note is secured by a mortgage in which is written a clause of acceleration, the two instruments are to be construed together. The acceleration provision thus enters into and becomes a part of the note, so that the maturity of the note is advanced in like manner with the maturity of the mortgage, not only for the purposes of foreclosure, but for all purposes.<sup>7</sup> The effect of this would be that, should a sale by foreclosure fail to yield the entire indebtedness, an action would lie for the deficit.<sup>8</sup>

Most acceleration clauses provide in substance that should there be a default in payment of principal or interest, the holder may declare the entire indebtedness due, and proceed to foreclose. A few clauses, however, provide as follows: "Should the mortgagor default in the payment of any installment of principal or interest as the same shall become due, the mortgagee may proceed to foreclose, and apply the proceeds, or so much of them as may be necessary, to the payment of the debt." Even in jurisdictions adopting the majority rule, it is doubtful if the latter class of provisions, omitting as they do any reference to the maturity of the notes, should serve to cause the indebtedness in its entirety to become due for all purposes. If the aim of the courts is to give effect to the intention of the parties, it would appear that this type of acceleration provision should serve only to allow an immediate foreclosing, since to allow an action for any deficit would be to add by possibly unwarranted implication a right not ceded by the debtor. And it is so held in several jurisdictions.<sup>9</sup>

Opposed to the rule laid down by the majority that an acceleration provision in a mortgage accelerates also the indebtedness secured thereby, is a line of cases holding that where a note is unconditional

<sup>5</sup> *Whitehead v. Morrill*, 108 N. C. 65, 12 S. E. 894 (1891).

<sup>6</sup> *Whitehead v. Morrill*, *supra* note 5.

<sup>7</sup> *Durham v. Rasco*, 30 N. M. 16, 227 Pac. 559 (1924); *Note* (1925) 34 A. L. R. 848.

<sup>8</sup> *Fox v. Gray*, 105 Iowa 133, 75 N. W. 339 (1898); *Wilson v. Kirclean*, 143 Wash. 342, 255 Pac. 368 (1927).

<sup>9</sup> *Hall v. Jameson*, 151 Cal. 606, 91 Pac. 518 (1907); *Trask v. Karrick*, 94 Vt. 70, 108 Atl. 846 (1920); but see *Coffin v. Younker*, 196 Iowa 1021, 195 N. W. 591 (1923). (This case would seem to indicate that in Iowa a declaration that the indebtedness is due is a condition precedent to foreclosure.)



on its face, its maturity cannot be accelerated by any provision existing in a separate instrument.<sup>10</sup> North Carolina has definitely sided with this minority,<sup>11</sup> although an earlier decision seemed to indicate otherwise.<sup>12</sup>

In this state we proceed upon the theory that one holding a note secured by a mortgage has, in effect, a double remedy to recover his debt—a suit in equity to subject the land to its payment, and an action at law upon the note. A recovery may be had on the one, even though there may be some technical difficulty to a recovery upon the other.<sup>13</sup> When the clause is in the mortgage alone, it is held, in this jurisdiction, that the provision is in direct conflict with the face of the note itself, and it cannot be supposed that the parties intended to introduce a secret clause into the negotiable instrument. In such a case the force of this provision is spent in allowing a foreclosure of the mortgage and a sale of the property.<sup>14</sup> If the acceleration clause appears on the face of the note, however, the power of foreclosure is accelerated with the indebtedness even though no provision to that effect appears on the mortgage. This results from the equitable doctrine that the mortgage follows the debt.<sup>15</sup>

<sup>10</sup> *Burnside v. Craig*, 140 Minn. 404, 168 N. W. 175 (1918); *Winne v. La Hart*, 155 Minn. 307, 193 N. W. 587 (1923); *Baird v. Meyer*, 55 N. D. 930, 215 N. W. 542 (1927).

<sup>11</sup> *Capehart v. Dettrick*, 91 N. C. 344 (1884); *Meadows Co. v. Bryan*, 195 N. C. 398, 142 S. E. 487 (1928); *Brown v. Osteen*, 197 N. C. 305, 148 S. E. 434 (1929).

<sup>12</sup> In *Gore v. Davis*, 124 N. C. 234, 32 S. E. 554 (1899) the note sued on was dated Oct. 19th, 1897, payable three years after date, but the interest was made payable semi-annually. The mortgage to secure the debt specified, "If default shall be made in payment of said note or interest on the same or any part of either at maturity" the creditor could proceed to sell the land, and out of the proceeds of the sale "pay said bond and interest on the same." The defendant failed to pay the interest which fell due April 19th, 1898. It was held, "by the conditions of the mortgage the principal and interest became due. The demurrer of the defendant, that this action for judgment on the note and foreclosure of the mortgage was premature, was properly overruled." It is probable, however, that here the action was simply for foreclosure and for application of the proceeds to the entire indebtedness.

While under the present rule in North Carolina an independent action could not be maintained on a note until the maturity of the note as evidenced on its face, where the only clause accelerating the debt is written into the mortgage, yet it does not appear untenable that a recovery of any deficit which the property failed to yield might be allowed as part of the remedy of foreclosure by virtue of N. C. ANN. CODE (Michie, 1927) §507. This statute provides for a complete settlement of the rights of all parties in a proceeding to foreclose. See also *Kiger v. Harmon*, 113 N. C. 406, 18 S. E. 515 (1893); *McIntosh*, *NORTH CAROLINA PRACTICE AND PROCEDURE* (1929) §431.

<sup>13</sup> *Capehart v. Dettrick*, *supra* note 11; *Long v. Miller*, 93 N. C. 227 (1885); *McIntosh*, *op. cit.*, *supra* note 12, §161.

<sup>14</sup> *Capehart v. Dettrick*, *supra* note 11.

<sup>15</sup> *Humphreys v. Stevens*, 191 N. C. 101, 131 S. E. 383 (1926).

In those states holding that an acceleration provision in a mortgage serves to allow only a foreclosure on default, it seems that clauses providing that on default the indebtedness shall become due, and those which direct only a foreclosure are on an equal footing. Both serve only to accelerate the foreclosure without maturing the note for other purposes.<sup>16</sup>

Once it is determined that an acceleration provision allows a foreclosure at a premature date, but leaves the note itself unmatured, an interesting problem is presented as to the distribution of the proceeds of the foreclosure sale. Should they be applied only to the payment of such notes or instruments as on their face have matured; should the proceeds be placed in the custody of the court pending the maturity of the entire obligation, and then be distributed *pro rata*; or should the proceeds be distributed *pro rata* among the holders at once? To devote the proceeds to only those notes which have matured would be to give unjustly a preference to certain notes at the expense of the holders of the others. Obviously this would be contrary to the intention of the maker, who intended the mortgage to secure the entire debt. If, on the other hand, the proceeds are to be ratably distributed among the holders of the various notes, it would be useless and cumbersome to follow the second above procedure, and tie up the funds in court pending a future distribution that could as effectively be made at once. Thus the best procedure is to allow a *pro rata* distribution of the proceeds of the sale at once, and this is the practice adopted by the North Carolina courts.<sup>17</sup> One case held that if, in a series of notes, the payee himself held the later ones unassigned; in a contest between himself and a holder of the earlier notes, the indorsee of the earlier notes would be entitled to be paid in

<sup>16</sup> *Whitehead v. Morrill*, 108 N. C. 65, 12 S. E. 894 (1891) (providing only for power of sale on default); *Brown v. Osteen*, 197 N. C. 305, 148 S. E. 434 (1929) (providing for maturity of debt on default).

Certain acceleration clauses provide that a default shall mature the indebtedness or power to foreclose. Others state that a default shall allow the mortgagee to *exercise* the power of foreclosure, or allow him the *option* to declare the indebtedness due. All of these seem to be considered by the North Carolina courts as simply raising an option in the mortgagee, which may be waived by him. It is also held that an exercise of the power to foreclose on default does not constitute an exercise of the option to declare the note due, so as to start the running of the statute of limitation on the note. Such foreclosure does not therefore bar a subsequent action for any deficit.

*McINTOSH, op. cit. supra* note 12, §169 (6); *Walter v. Kilpatrick*, 191 N. C. 458, 132 S. E. 148 (1926). See generally Note (1925) 34 A. L. R. 897; *Taylor v. National Bank*, 63 Fla. 631, 57 So. 678 (1912).

<sup>17</sup> *Kitchin v. Grandy*, 101 N. C. 86, 7 S. E. 663 (1888).

full.<sup>18</sup> It should be noted, however, that this apparent priority results not from the relation between the endorsee and the mortgagor, but because such endorsee would be entitled to full payment from the endorser by reason of his endorsement. Priority of assigned notes was properly denied in the principal case where the endorsement was without recourse.<sup>19</sup>

W. S. MALONE.

**Conditional Sales—Registration—Priority of Conditional Vendor's Claim to Fixtures against Purchaser of Real Estate under Foreclosure of Prior Mortgage**

In the case of *Standard Motors Finance Company v. Weaver et al.*,<sup>1</sup> the plaintiff had sold by registered conditional sales contract, a sprinkler system to the owner of real property which was encumbered by a prior mortgage. The defendant became purchaser of the realty at the foreclosure sale, subsequent to the installation of the sprinkler system. Action to compel delivery of the sprinkler to the plaintiff. *Held*, for plaintiff.

By the majority rule, where a chattel has been sold under a title-retention agreement and affixed to real estate, the claim of the conditional vendor to such chattel is superior to that of a prior mortgagee of the realty if the article is removable without material injury to the realty.<sup>2</sup> Since the security of the prior mortgagee is not injured, he having advanced nothing on faith of an interest in the newly acquired property, the question of notice to the prior mortgagee of the conditional sales agreement and retention of title is not to be considered. On the other hand, it is equally well settled that where the owner of the realty upon which the chattel has been affixed, subsequently sells or mortgages the realty to a good faith purchaser or mortgagee without notice, such mortgagee or purchaser will prevail over the conditional sales vendor.<sup>3</sup> The conditional vendor having so

<sup>18</sup> See *Whitehead v. Morrill*, 108 N. C. 65, 68, 12 S. E. 894 (1891).

<sup>19</sup> *Bank of Clinton v. Trust Co.*, 199 N. C. 582, 155 S. E. 261 (1930).

<sup>1</sup> 199 N. C. 178, 153 S. E. 861 (1930).

<sup>2</sup> *Cox v. New Bern Lighting and Fuel Co.*, 151 N. C. 62, 67 S. E. 477 (1909); *Standard Dry Kiln Co. v. Ellington*, 172 N. C. 481, 90 S. E. 564 (1916); *Holt v. Henley*, 232 U. S. 637, 34 Sup. Ct. 459, 58 L. ed. 767 (1913); *Detroit Steel Cooperage Co. v. Sisterville Brewing Co.*, 233 U. S. 712, 34 Sup. Ct. 753, 58 L. ed. 1166 (1913).

<sup>3</sup> *J. H. Day Co. et al. v. Public Savings Ins. Co. of America*, 151 N. E. 361 (Ind. 1926); *Oakland Bank of Savings v. California Pressed Brick Co.*, 183 Cal. 295, 191 Pac. 524 (1920); *Union Bank and Trust Co. v. Fred W. Wolfe Co.*, 114 Tenn. 255, 86 S. W. 310, 108 Am. St. Rep. 903 (1905); see Note (1921) 13 A. L. R. 461.

placed the property that it appears to be a part of the realty is estopped to deny that it is realty as against a subsequent good faith purchaser or mortgagee. The principal case would seem to come within the first of the two doctrines stated above. Although the defendant was in a sense a good faith purchaser, yet being a purchaser under the prior mortgagee he stands in the same position as the mortgagee,<sup>4</sup> and therefore should be likewise bound by the terms of the conditional sales agreement without regard to notice. In an earlier case the North Carolina court held that an unrecorded conditional sales contract was binding as against a prior mortgagee of the realty.<sup>5</sup> On the basis of this decision, the result reached in the instant case necessarily would have been the same had the plaintiff's conditional sales contract been unrecorded.<sup>6</sup>

A recent Georgia decision<sup>7</sup> serves as an example of the second class of cases under consideration, and raises the issue of notice to a subsequent purchaser of the realty. The owner of real property installed thereon bathroom fixtures purchased from the plaintiff by a conditional sale agreement. The plaintiff registered the sales contract as a chattel mortgage. Later the defendant became purchaser of the realty, and in an action by the plaintiff to recover the fixtures, *held*, registration of the conditional sales contract in the chattel mortgage records was not sufficient to put the defendant on notice, and as a purchaser in good faith subsequent to the annexation and without notice, he was entitled to retain the fixtures. The holding seems to be supported by considerable authority.<sup>8</sup> The case provides an ex-

<sup>4</sup> *Kohler Co. v. Brasun*, 222 N. Y. App. Div. 338, 226 N. Y. Supp. 60 (1927); *Central Union Gas Co. v. Browning*, 210 N. Y. 10, 103 N. E. 822 (1913); *Craine Silo Co. v. Alden State Bank*, 218 N. Y. App. Div. 263, 218 N. Y. Supp. 143 (1926); 13 CORN. L. Q. 434 (1928); see 3 JONES, MORTGAGES (8th ed. 1928) §2122.

<sup>5</sup> *Standard Dry Kiln Co. v. Ellington*, *supra* note 2. But see *Clark v. Hill*, 117 N. C. 11, 23 S. E. 91, 53 Am. St. Rep. 574 (1895) (Action by conditional vendor of fixture against grantee of purchaser of realty under foreclosure of prior mortgage; held that since the conditional sale was unrecorded the title to the fixture went to the prior mortgagee and from him to the purchaser, and judgment given for defendant. The case is not referred to either in the *Dry Kiln Co.* Case or in the *Standard Motors Finance Co.* Case).

<sup>6</sup> *Cf. Industrial Bank of Richmond v. Holland Furnace Co. et al.*, 153 S. E. 309 (W. Va. 1930).

<sup>7</sup> *Skinner et al. v. Stewart Plumbing Co.*, 155 S. E. 97 (Ga. 1930).

<sup>8</sup> *Tibbetts v. Horne*, 65 N. H. 242, 23 Atl. 145, 23 Am. St. Rep. 31, 15 L. R. A. 56 (1889); *Elliott v. Hudson*, 18 Cal. App. 642, 124 Pac. 103 (1912); EWELL, FIXTURES, 486 (2nd ed.). *Contra: Liddell Co. v. Cork et al.*, 120 S. C. 481, 113 S. E. 327, 23 A. L. R. 800 (1922); *Sword v. Low*, 122 Ill. 487, 13 N. E. 826 (1887); *Eaves v. Estes*, 10 Kan. 314, 15 Am. Rep. 345 (1872); *Monarch Laundry Co. v. Westbrook*, 109 Va. 382, 63 S. E. 1070 (1909); see 2a UNIFORM LAWS ANNOTATED (1924) §67.

cellent illustration of the inadequacy of the general statutory provisions, such as prevail in Georgia<sup>9</sup> and North Carolina<sup>10</sup> for the registration of conditional sales, with reference to notice regarding the status of chattels which are subsequently to be affixed to real estate. The plaintiff registered the sales contract precisely according to the requirements of the statute, yet fulfillment of these requirements failed to give notice to the defendant since the defendant could not be bound to search the personal property records to determine the state of title of the fixtures, ostensibly a part of the realty. The Georgia and North Carolina type of statute applies to conditional sales of *all* chattels, and does not anticipate the circumstance of annexation of the chattel to realty. It seems that relief from this difficulty could be had most readily by the adoption of an act similar in form to section seven of the Uniform Conditional Sales Act,<sup>11</sup> providing that conditional sales of chattels to be affixed to realty should be registered in a separate record book in the office of the Register of Deeds for the locality in which the chattels are to be attached, together with a short description of the realty to which the chattels are to be attached.

J. G. ADAMS, JR.

#### **Constitutional Law—Elections—Race Discrimination—Party Rules Excluding Negroes from Voting in Primaries**

The Constitution of Virginia provides that the legislature shall enact such laws as are necessary and proper for the regularity and purity of general and primary elections.<sup>1</sup> A statute passed pursuant thereto provides that persons not disqualified by reason of other requirements in the party to which he belongs may vote at the primary.<sup>2</sup> The State Democratic Committee excluded all negroes from the party primaries. In a case brought by a qualified negro voter against the primary election judges it was held that the above statute is invalid as authorizing the disqualification of voters in primary elections by discriminatory tests based on color contrary to the Federal Constitutional Amendments Fourteen and Fifteen.<sup>3</sup>

A political party is an unincorporated voluntary association of persons sponsoring certain political principles and is in no sense a

<sup>9</sup> GA. ANN. CODE (Michie, 1926) §§3259, 3319.

<sup>10</sup> N. C. ANN. CODE (Michie, 1927) §3312.

<sup>11</sup> 2a UNIFORM LAWS ANN. (1924) §64.

<sup>1</sup> CONST. VA. (1902) §36.

<sup>2</sup> CODE VA. (1919) §228, as amended by Acts 1924, c. 286.

<sup>3</sup> *Bliley v. West*, 42 F. (2d) 101 (C. C. A. 4th, 1930).

governmental agency.<sup>4</sup> Yet, because of the public importance of securing proper party nominations, the regulation within reasonable limits of party primary elections is universally held to be the proper subject of state legislation under the general power of the state to supervise the entire election system.<sup>5</sup> The general tendency of primary election laws is to protect the rights of voters in much the same manner as in general elections.<sup>6</sup> The test of party affiliation may be imposed or left to the determination of the party itself.<sup>7</sup> It is said that it was not intended by the primary laws to intrude unreasonably upon domestic affairs of political parties, not agencies of the state, nor were such matters within the subject of the Federal Constitution in declaring who are qualified to vote.<sup>8</sup>

The Fourteenth and Fifteenth Amendments apply only to the wrongs of states or of some governmental agency acting for the state; if the wrong is that of a private individual or group, no action may be maintained thereunder.<sup>9</sup> The right of a political party to make discriminatory tests apply to primaries depends upon the extent to which primaries have become a part of the electoral machinery of the state. There is a split of authority upon the question whether primary elections are included in the word "election" as used in general constitutional and statutory provisions.<sup>10</sup>

<sup>4</sup> *Robinson v. Holman*, 181 Ark. 428, 26 S. W. (2d) 66 (1930); *Newberry v. U. S.*, 256 U. S. 232, 41 Sup. Ct. 469, 65 L. ed. 913 (1921); *U. S. v. Gradwell*, 243 U. S. 476, 37 Sup. Ct. 407, 61 L. ed. 857 (1916); *Waples v. Marrast*, 108 Tex. 5, 11, 184 S. W. 180, L. R. A. 1917A 253 (1916).

<sup>5</sup> See *Peo. v. Board of Election Comm's.*, 221 Ill. 9, 77 S. E. 321, 5 ANN. CAS. 562 (1906); *Ladd v. Holmes*, 40 Ore. 167, 66 Pac. 714, 91 Am. St. Rep. 457 (1901); *Winston v. Moore*, 244 Pa. 447, 91 Atl. 520, L. R. A. 1915A 1190, ANN. CAS. 1915C 498; Note 41 L. R. A. (N. S.) 133.

<sup>6</sup> *Peo. v. King's Cty. Dem. Comm's.*, 164 N. Y. 335, 58 N. E. 124, 51 L. R. A. 674 (1900); *Peo. v. Strassheim*, 240 Ill. 279, 88 N. E. 821, 22 L. R. A. (N. S.) 1135 (1900).

<sup>7</sup> *State v. Felton*, 77 Ohio 554, 84 N. E. 85, 12 ANN. CAS. 65 (1908); *Peo. v. Kings Cty. Dem. Comm's.*, *supra* note 6; *Hager v. Robinson*, 154 Ky. 489, 157 S. W. 1138 (1913).

<sup>8</sup> See *Wilkinson v. Henry*, 128 So. 362, 366 (Ala. 1930) citing 2 COOLEY, CONST. LIM. (8th ed. 1927) 1360, 1370; *U. S. v. Gradwell*, *supra* note 4; *U. S. v. Newberry*, *supra* note 4.

<sup>9</sup> Civil Rights Cases, 109 U. S. 3, 3 Sup. Ct. 18, 27 L. ed. 835 (1883); *James v. Bowman*, 190 U. S. 127, 23 Sup. Ct. 678, 47 L. ed. 979 (1903); see *Guinn v. U. S.*, 238 U. S. 347, 354, 35 Sup. Ct. 926, 59 L. ed. 1340, L. R. A. 1916A 1124 (1915).

<sup>10</sup> A primary is not an election: *State v. Flaherty*, 23 N. D. 313, 136 N. W. 76 (1912); *State v. Simmons*, 117 Ark. 159, 174 S. W. 238 (1915); Note (1909) 18 L. R. A. (N. S.) 412. A primary is an election: *Peo. v. Board Election Comm's.*, *supra* note 5; *Britton v. Election Comm's.*, 129 Cal. 337, 61 Pac. 1115, 15 L. R. A. 115 (1901). Note (1930) 15 CORN. L. Q. 262, 265, "A survey of the decided cases shows that ten states hold that a primary election

It is clear that a state can not directly exclude the negro from voting in a party primary, a Texas statute of this purport having been declared unconstitutional.<sup>11</sup> The instant case holds that the Virginia Legislature is unable to authorize the doing of an act which it could not do directly and that the attempt is one at delegation of legislative power, itself unconstitutional. A later Texas statute<sup>12</sup> authorizing the political parties to make their own requirements for members voting in primaries has been upheld.<sup>13</sup> The right of the Democratic Party to exclude negroes from their primaries in Arkansas was affirmed in a recent case (the Federal Supreme Court refusing certiorari, stating that it had no jurisdiction.)<sup>14</sup> The Texas and Arkansas laws permit the same result as the Virginia statute, but the discrepancy of decisions as to their validity may be explained somewhat by the status of the primary in these states. In Virginia the expenses of the primary are paid from public funds, and the primary is "an inseparable part of the election of the state."<sup>15</sup> In the other two states the primaries can not be paid for by public money, and are not regarded as elections within the meaning of constitutional provisions and statutes thereunder relating to suffrage.<sup>16</sup> In the absence of statutes to the contrary, political parties are governed by their own usages and have an inherent power to regulate their own affairs.<sup>17</sup> As long as the primary is not made a part of the state election system

is not an 'election,' while on the other hand, twelve states hold that a primary election is an 'election.'"

<sup>11</sup> TEX. REV. CIV. STAT. (Vernon, 1925) art. 3107 in part read, "In no event shall a negro be eligible to participate in a Democratic primary election in the state of Texas." In *Nixon v. Herndon*, 273 U. S. 536, 47 Sup. Ct. 446, (1926) declaring the statute invalid, Justice Holmes said, "We find it unnecessary to consider the Fifteenth Amendment, because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth. That Amendment, while it applies to all, was passed, as we know, with a special intent to protect the blacks from discrimination against them."

<sup>12</sup> REV. ST. TEX. 1925, art. 3107 (re-enacted 1927), "Every political party in this state through the state executive committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party."

<sup>13</sup> *Grigsby v. Harris*, 27 F. (2d) 942 (D. C. Tex. 1928); *Nixon v. Condon*, 34 F. (2d) 464 (D. C. Tex. 1929).

<sup>14</sup> *Robinson v. Holman*, *supra* note 4 (certiorari denied Nov. 24, 1930, U. S. Daily, Nov. 26, 1930, at 2945).

<sup>15</sup> *Com. v. Wilcox*, 111 Va. 859, 69 S. E. 1031 (1911).

<sup>16</sup> *Nixon v. Condon*, *supra* note 13; *Waples v. Marrast*, *supra* note 4; *Robinson v. Holman*, *supra* note 4. But see Note (1930) 15 CORN. L. Q. 262; and Note (1930) 43 HARV. L. REV. 467 (that Va. decision should apply also to Texas).

<sup>17</sup> See *Socialist Party v. Uhl*, 155 Cal. 776, 792, 103 Pac. 181 (1908); Note (1927) 5 TEX. L. REV. 393 (as to status of primary in Texas).

and incorporated therein by statutory provisions and regulations, the party would seem to be empowered to make its own requirements for primary voting in accord with any conception of the Fourteenth and Fifteenth Amendments yet advanced.

TRAVIS BROWN.

### Contempt—Liability of Former Agent for Violation of Injunction in Independent Capacity

An injunction prohibited "the defendant (John Staff) his agents, employees, associates and confederates" from infringing complainant's patent. One Joseph Staff was originally a party to the suit, as were two other Staffs, but the latter were not served and the suit was dismissed as to Joseph upon the defendant's proof that he was not a partner but a salesman. Joseph left the defendant's employ and established a business for himself, in the conduct of which he infringed complainant's patent. The District Court, in proceedings begun by the complainant in connection with the original suit, fined Joseph for contempt. On appeal to the Circuit Court of Appeals, the order was reversed in an opinion by Judge Learned Hand.<sup>1</sup>

A party defendant to an injunction suit may be dealt with for contempt, though he violates the injunction in a new guise.<sup>2</sup> Members of a class, collectively enjoined in an equitable or statutory<sup>3</sup> representative suit, may be held in contempt for individual disobedience.<sup>4</sup> But when an injunction issues against a named defendant, and his agents, employees, associates, etc., these groups are not thereby made parties for this purpose.<sup>5</sup> They are included in the terms of the order to prevent the defendant from circumventing the

<sup>1</sup> *Alemite Mfg. Co. v. Staff*, 42 Fed. (2d) 832 (C. C. A. 2nd, 1930).

<sup>2</sup> *Donaldson v. Roksament Co.*, 176 Fed. 368 (C. C. E. D. N. Y. 1910); *Bernard v. Frank*, 179 Fed. 516 (C. C. A. 2nd, 1910); *Smith v. Yates*, 244 Fed. 793 (C. C. A. 2nd, 1917).

<sup>3</sup> See CLARK, CODE PLEADING (1928) 276-282. The North Carolina statute, N. C. CODE ANN. (Michie, 1927) §457, has been narrowly construed. *Tucker v. Eatough*, 186 N. C. 504, 120 S. E. 57 (1923); *Citizen's Co. v. Asheville Typographical Union*, 187 N. C. 42, 121 S. E. 31 (1924).

<sup>4</sup> *Supreme Tribe of Ben Hur v. Cauble*, 255 U. S. 356, 366, 41 Sup. Ct. 338, 41 L. ed. 673 (1921); *Am. Steele & Wire Co. v. Wire Drawers' Union*, 90 Fed. 598 (C. C. N. D. Ohio, 1898).

<sup>5</sup> *Mexican Ore Co. v. Guadalupe Mining Co.*, 47 Fed. 351 (D. N. J. 1891); *Dadmirian v. Gullian*, 79 Fed. 784 (D. N. J. 1897); *Playing Card Co. v. Spalding*, 92 Fed. 368 (S. D. N. Y. 1899); *Donaldson v. Roksament Stone Co.*, 178 Fed. 103 (E. D. N. Y. 1910); *Bliss Co. v. Atlantic Handle Co.*, 212 Fed. 190 (D. Mass. 1913).



decree by acting through them. And they,<sup>6</sup> or, for that matter, strangers<sup>7</sup> to the original suit, commit a contempt if they knowingly act in aid of the party enjoined. Conversely, when a stranger to the suit acts in a genuine independent capacity in doing the act he knows the injunction defendant was prohibited from doing, he does not violate the injunction and cannot strictly be guilty of contempt.<sup>8</sup>

Here agreement of authority ends. Where the contempt proceeding is primarily to punish a respondent for disrespect of the court in doing that which he knows the court was doing all in its direct power to stop, a number of cases<sup>9</sup> have upheld fines and jail terms imposed upon strangers apparently acting quite independently. This has been particularly so in connection with strike injunctions.<sup>10</sup> And even where the principal purpose of the contempt proceeding was to coerce a respondent into giving the original complainant either monetary or specific relief, several discerning courts,<sup>11</sup> motivated by a belief that otherwise a subterfuge would be condoned, have reached a similar result. That is to say, the disagreement is not so much over the requirements of due process as it is over the flagrancy of the defiance of the order, the *bona fides* of the apparent independence of action, and the actual probabilities of connivance, in the particular case.

The facts of the decision under review strongly suggest the possibility that Judge Learned Hand's brilliantly expressed fear of

<sup>6</sup> *Sickles v. Borden*, 4 Blatchf. (U. S.) 14, Fed. Cas. no. 12, 833 (S. D. N. Y. 1857); *In re Lennon*, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. ed. 1110 (1897); *L. E. Waterman Co. v. Standard Drug Co.*, 202 Fed. 167 (C. C. A. 6th, 1913); *Janney v. Pancoast International Ventilator Co.*, 124 Fed. 972 (C. C. E. D. Pa. 1903).

<sup>7</sup> *Seward v. Patterson*, 76 Law T. (N. S.) 215 (1897); *Counkey v. Russell*, 111 Fed. 417 (C. C. Ind. 1901); *Bessette v. Conkey*, 194 U. S. 324 (1904); *Garrigan v. U. S.*, 163 Fed. 16 (C. C. A. 7th, 1908); *Lawson v. U. S.*, 297 Fed. 418 (C. C. A. 8th, 1924); *State v. City of Pittsburg*, 80 Kan. 710, 104 Pac. 847 (1909); *People ex rel Stearns v. Marr*, 181 N. Y. 463, 74 N. E. 431, 106 Am. St. Rep. 562, 3 Ann. Cas. 25 (1905).

<sup>8</sup> *Omelliah v. American Cap Front Mfg. Co.*, 195 Fed. 539 (D. C. N. Y. 1912); *M'Call v. Bladworth*, 290 Fed. 365 (C. C. A. 2nd, 1923); *Berger v. Superior Court*, 175 Cal. 719, 167 Pac. 143 (1917); *Boyd v. State*, 19 Neb. 128, 26 N. W. 925 (1886); *Rigas v. Livingston*, 178 N. Y. 20, 70 N. E. 107 (1904); *Strawberry Island Co. v. Cowles*, 75 Misc. 279, 140 N. Y. S. 333 (1912); *In re Zimmerman*, 134 App. Div. 591, 119 N. Y. Supp. 275 (1909); *Slater v. Merritt*, 75 N. Y. 268 (1878).

<sup>9</sup> *Chisolm v. Caines*, 121 Fed. 397 (C. C. S. C. 1903), criticized in (1903) 17 HARV. L. REV. 133; *In re Reese*, 107 Fed. 942 (C. C. A. 8th, 1901); *Lawson v. U. S.* *supra* note 7.

<sup>10</sup> See FRANKFURTER AND GREENE, THE LABOR INJUNCTION (1930) 123-130.

<sup>11</sup> *Wimpy v. Phinizy*, 68 Ga. 188 (1881); *Janey v. Pancoast International Ventilator Co.*, *supra* note 6; *Campbell v. Magnet Light Co.*, 175 Fed. 117 (C. C. N. Y. 1909).

judicial tyranny represents a deliberate adherence to strict notions of due process at the cost of the immediate needs of justice.

H. B. PARKER.

### Contracts—Consideration—Privilege of Cancellation

An automobile dealer's contract provided for cancellation by the manufacturer without notice in the event of the dealer's death or insolvency; on sixty days notice if any question arose threatening a satisfactory business relationship; on ten days notice if the agency ceased to deal exclusively in the manufacturer's products. If any monthly allotment of cars was not shipped "for any reason whatsoever," that allotment could be cancelled by the manufacturer without any responsibility in damages. The manufacturer cancelled the entire contract on the ground that the dealer was no longer an exclusive agent. Upon the dealer's suit for damages, the jury found that the agency had not ceased to be exclusive. The manufacturer contended that the contract was void for lack of mutuality. *Held*, the contract was valid.<sup>1</sup>

The "mutuality" necessary in a suit for damages for breach of a contract is not to be confused with the "mutuality" required in connection with a suit for specific performance. In the former instance it usually has to do with consideration.<sup>2</sup> The question does not arise when there is some independent consideration other than the cancellable promise,<sup>3</sup> nor when the party who once had the privilege of withdrawal has performed.<sup>4</sup>

When the power to cancel is dependent upon some condition beyond the control of him who is to exercise it, such as, in the present case, the dealer's death or insolvency, it seems to be almost uniformly

<sup>1</sup> *Chevrolet Motor Co. v. Gladding*, 42 F. (2d) 440 (C. C. A. 4th, 1930).

<sup>2</sup> *Maurer Steel Barrel Co., Inc. v. Martin*, 1 F. (2d) 687 (C. C. A. 3rd, 1924); *Electric Management & Engineering Corp. v. United P. & L. Corp.*, 19 F. (2d) 311 (C. C. A. 8th, 1927). For full discussions of the subject, see Van Hecke, *Specific Performance of Inspection Incident to Option* (1928) 12 MINN. L. R. 1; Corbin, *The Effect of Options on Consideration* (1925) 34 YALE L. J. 571.

<sup>3</sup> *Louisville & N. R. R. Co. v. Cox*, 145 Ky. 667, 141 S. W. 389 (1911) (injured employee waived cause of action in consideration of promise of permanent employment); *Chrisman v. Southern Cal. Edison Co.*, 83 Cal. App. 249, 256 Pac. 618 (1927) (\$1.00 paid for option to purchase). But cf. *Velie Motor Car Co. v. Kopmeier Motor Car Co.*, 194 Fed. 324 (C. C. A. 7th, 1912) ("\$1.00 each to other paid" imports no consideration. Might have been a transfer of same dollar).

<sup>4</sup> *Gile v. Inter-State Motor Car Co.*, 27 N. D. 108, 145 N. W. 732 (1914); 1 WILLISTON, CONTRACTS (1920) §106.

held that the contract is not wanting in consideration.<sup>5</sup> Likewise, when the cancellation becomes effective only after the lapse of a specified period of time,<sup>6</sup> consideration is present. The promisor is bound at least for a time, and it cannot be said that his promise is illusory.

But when there is an absolute privilege of immediate cancellation, or a stipulation against responsibility for failure to perform, the courts generally refuse to give effect to the contract on the theory that the promisor can arbitrarily refuse to perform if he chooses, and is therefore under no duty.<sup>7</sup>

However, when such contracts are *bona fide* business transactions, some courts will look at them against their respective business backgrounds and hold that the parties did not intend to permit an arbitrary refusal to perform, but that the cancellation clause was a protection against unforeseeable commercial difficulties which might arise, to be exercised only in a legitimate situation.<sup>8</sup> Thus, the North Carolina Supreme Court, although it once made an intimation to the contrary,<sup>9</sup> in 1926 upheld a contract similar to the one in the instant case. It was held that the retention by both parties of the absolute power of cancellation did not deprive the contract of consideration.<sup>10</sup>

<sup>5</sup> *Moon Motor Car Co. of N. Y. v. Moon Motor Car Co.*, 29 F. (2d) 3 (C. C. A. 2nd, 1928) (option to cancel upon "the violation of any of the conditions"); Corbin, *op. cit. supra* note 2, at 589. But see *Huffman v. Paige-Detroit Motor Car Co.*, 262 Fed. 116, 118 (C. C. A. 8th, 1919).

<sup>6</sup> *Philadelphia Ball Club v. Lajoie*, 202 Pa. 210, 51 Atl. 973 (1902) (option to cancel on ten days notice); *Oldfield v. Chevrolet Motor Co.*, 198 Iowa 20, 199 N. W. 161 (1924) (option to cancel on five days notice); 1 WILLISTON, CONTRACTS §140. But see *Oakland Motor Car Co. v. Indiana Automobile Co.*, 201 Fed. 499, 504 (C. C. A. 7th, 1912) (one ground for holding contract invalid was privilege of cancellation on thirty days notice). In *Chevrolet Motor Co. v. McCullough*, 6 F. (2d) 212 (C. C. A. 9th, 1925) only nominal damages were allowed because of five day cancellation clause.

<sup>7</sup> *Velie Motor Car Co. v. Kopmeier Motor Car Co.*, *supra* note 3 (vendor had option to cancel); *Weil v. Chicago Tool Co.*, 138 Ark. 534, 212 S. W. 313 (1919) (vendor was not liable for failure to ship any order.); 1 WILLISTON, CONTRACTS §§104, 105; 1 PAGE, CONTRACTS (2nd ed. 1922) §572.

<sup>8</sup> *Handley-Mack Co. v. Godchaux Sugar Co.*, 2 F. (2d) 435 (C. C. A. 6th, 1924) (vendor not responsible for delivery unless "raws" received; implied obligation to use reasonable diligence to obtain the raws); *U. S. Expansion Bolt Co. v. Marmerstein*, 181 App. Div. 790, 169 N. Y. Supp. 244 (1918) (vendor not liable if unable to perform; no privilege to act arbitrarily); *cf. Dildine v. Ford Motor Co.*, 159 Mo. App. 410, 140 S. W. 627 (1911) (prices and discounts subject to change; no privilege to act capriciously); *Wood v. Lucy, Lady Duff-Gordon*, 222 N. Y. 88, 118 N. E. 214 (1917) (assumption of exclusive agency implies a promise to use reasonable efforts to carry out its purpose).

<sup>9</sup> *Erskine et al. v. Chevrolet Motor Co. et al.*, 185 N. C. 479, 117 S. E. 706 (1923) (The case turns on a subsequent oral agreement not to cancel. However, it is assumed that a contract very similar to the one in the principal case would be void.).

<sup>10</sup> *Fawcett v. Fawcett*, 191 N. C. 679, 132 S. E. 796 (1926).

The principal case is supported by the weight of authority as to its views on all of the contract provisions except that relating to cancellation of monthly allotments of cars. As to that, it is submitted that the Circuit Court of Appeals, in holding that "the contract properly construed confers to discretionary right on the seller to refuse to sell the cars and parts," has caught the true spirit of such contract provisions. Instead of a literal interpretation of the bare language, the court first put the transaction in its proper atmosphere, and then determined the business significance of the terms used. In 1929, the North Carolina court took a similar position in a less extreme case.<sup>11</sup>

It should be noted, however, that the problem before the court was not one of finding consideration for the defendant's promise, but whether the defendant had ever made a promise capable of breach. The two situations have frequently been confused in the cases. While perhaps theoretically alike, in that a cancellable promise would be juristically the same whether made by the present plaintiff or defendant, the two situations are actually distinct as to the way in which they invoke the court's attention. In the consideration case, the defendant who has broken his unconditional promise insists that the contract is void because the plaintiff retained a cancellation privilege which, however, he has not exercised. In the other case, the present one, the defendant has cancelled, and the question is mainly whether he has acted in accordance with the terms of the contract. Here, the dealer had neither died nor become insolvent; the jury had found that the reason given for cancellation did not exist; the court, on the ground of election, refused to permit the use of the sixty day clause; and the court was not in a mood to listen sympathetically to the defendant's final desperate plea that the whole contract be regarded as a nullity because of the privileges and immunities retained by itself.

HUGH L. LOBDELL.

### **Criminal Law—Bad Checks—Criminal Liability of Principal for Overdraft by Agent**

Defendant employed an agent to buy oysters and gave him unlimited authority to draw checks upon defendant's bank account. In

<sup>11</sup> *Wellington-Sears & Co. v. Dize Awning and Tent Co.*, 196 N. C. 748, 147 S. E. 13 (1929), noted in (1929) 8 N. C. L. REV. 78 (Contract deprived vendee of power to cancel entire contract if seller defaulted on instalment deliveries. Vendee breached.).

payment for oysters delivered to defendant, the agent drew a check which was returned for insufficient funds. Defendant was indicted for a violation of the bad check law.<sup>1</sup> *Held*, not guilty. Defendant was not present when the check was drawn; so there is no evidence that he had actual or implied knowledge of the insufficiency of funds.<sup>2</sup>

It is too well settled for dispute that a person causing a crime to be committed through an innocent agent is himself a principal to the crime although he was not present at the time and place thereof;<sup>3</sup> so the vital question is whether the unlimited authority given the agent to draw checks upon defendant's account is sufficient evidence to warrant a finding that defendant knew his funds were insufficient to pay such checks.

The bad check law is an exercise of the police power and it does not require that a criminal intent be shown.<sup>4</sup> The purpose of such a statute is to require a degree of diligence for the protection of the public which will make violation exceedingly improbable.<sup>5</sup> It is often said to be the duty<sup>6</sup> of the principal to see to it that such statutes are not violated by his agents in the course of their employment.<sup>7</sup>

If a principal instructs his agent to draw checks within a certain limit and the agent exceeds that limit, it would seem that the principal should incur no criminal liability.<sup>8</sup> However, it would also seem that giving an agent unlimited authority to draw checks upon a principal who had authorized him to buy a particular commodity should place upon the principal the risk of anticipating such checks as the

<sup>1</sup> N. C. ANN. CODE (Michie, 1927) §4283 (a).

<sup>2</sup> *State v. Baker*, 199 N. C. 578, 155 S. E. 249 (1930).

<sup>3</sup> CLARK & MARSHALL, CRIMES (2d ed. 1912) 260; *State v. Morey*, 138 Atl. 474 (Me. 1927).

<sup>4</sup> *State v. Yarboro*, 194 N. C. 498, 506, 508, 140 S. E. 216 (1927).

<sup>5</sup> Mechem, *Liability of a Principal for the Penal or Criminal Acts of his Agent* (1912) 11 MICH. L. REV. 93, 103; *People v. Robey*, 52 Mich. 577, 18 N. W. 365, 52 Am. Rep. 270 (1884).

<sup>6</sup> Liability would, perhaps, be a more accurate term, since the principal is made responsible regardless of his care in such a case.

<sup>7</sup> Mechem, *op. cit. supra* note 5, at 104; CLARK & MARSHALL, *op. cit. supra* note 2, at 265 (g); *Com. v. Morgan*, 107 Mass. 199 (1871) (agent prints a libel); *Ex parte Turnbull*, 21 New S. Wales L. R. 414 (1900) (servant gives unstamped receipt); *Meigs v. State*, 114 So. 448 (Fla. 1927) (agent unlawfully possessed fish); *State v. Kittelle*, 110 N. C. 560, 565, 15 S. E. 103 (1892) (sale of liquor to minors. The court reasoned thus: Either a principal is responsible for illegal sales by his clerk or he has no authority to sell through the medium of a clerk. Any other view would be illogical and a virtual repeal of the law.); and see generally Note (1919) 43 L. R. A. (N. S.) 2.

<sup>8</sup> *Mores v. State*, 6 Conn. 9 (1825); CLARK & MARSHALL, *op. cit. supra* note 3, at 262; *State v. Neal*, 133 N. C. 689, 54 S. E. 756 (1903).

agent might reasonably be expected to draw.<sup>9</sup> And that a failure to so anticipate would be evidence from which the jury might imply knowledge.<sup>10</sup> Otherwise, "the appointment of an agent may result in a convenient and effective method of abolishing the statute."<sup>11</sup>

If in addition to the evidence in the instant case, it had appeared that the commodity to be purchased would reasonably have cost five hundred dollars and that the principal's bank account at no time showed a deposit of over one hundred dollars, might not the jury have been permitted to infer the knowledge required by the statute? The instant case goes no further than to hold that giving an agent unlimited authority to draw checks upon the principal's account is not alone sufficient.

SUSIE SHARP.

### Husband and Wife—Estate by Entirety—Title by Estoppel

In a recent case<sup>1</sup> land was deeded to one F. M. Knight and his wife, L. E. Knight, as tenants by the entirety. Subsequently, the husband made a deed of the land to his wife. Two years later the wife made a deed to her husband and to herself, but the acknowledgment failed to comply with the provisions of the North Carolina statute,<sup>2</sup> and with the Constitution of North Carolina.<sup>3</sup> All the conveyances were duly registered. The wife died before her husband.

<sup>9</sup> *Com. v. Morgan*, *supra* note 6; CLARK & MARSHALL, *op. cit. supra* note 3, at 264, "He will be liable for his agent's act to the same extent as if they were authorized by him, if they are due to want of proper care and oversight on his part, or other negligence in reference to the business which he has intrusted to the agent."

An apprehensive husband who allows his wife to draw upon his bank account might eliminate any possible danger to himself from her possible overdrafts by permitting her a bank account of her own.

The rule with reference to "joint bank accounts" might depend upon the legal effect of such deposits. See generally Note L. R. A. 1917C 548. One joint depositor, however, checks upon the account in his own right and not by authority from the other and would be liable only when he had "actual or implied knowledge."

<sup>10</sup> If the statute means that *actual* knowledge is required and nothing short of it will sustain a conviction, the instant case is clearly correct, and it will be almost impossible to violate the act through an agent unless the check is issued under the direction and in the presence of the principal. If such a narrow construction is to be put on the statute it should be amended to cover situations where the defendant ought to have known of the insufficiency of funds if he did not. The instant case, however, says, "to convict him for a crime under the statute, either actual or *implied* knowledge is necessary when the check is delivered."

<sup>11</sup> *Supra* note 2, at p. 582.

<sup>2</sup> *Capps v. Massey*, 199 N. C. 196, 154 S. E. 52 (1930).

<sup>3</sup> N. C. ANN. CODE (Michie, 1927) §2515.

<sup>4</sup> N. C. CONST., Art. X, §6.

Plaintiffs, heirs at law of the husband, brought this action against the defendants, heirs at law of the wife, to recover the land. *Held*, defendants were owners of the land.

The original deed to the husband and wife created an estate by the entirety in them, to which the incident of survivorship still attaches in this State.<sup>4</sup> The estate may not be conveyed or encumbered by one spouse without the assent of the other, or become subject to a lien or proceeding to sell in satisfaction of any judgment against one of them during their joint lives (thus the right of survivorship in the other is protected).<sup>5</sup> However, the husband is entitled to the usufruct of the land during the period that is held by the entirety; he can mortgage, lease, or convey it for the term of their joint lives.<sup>6</sup> But he may not thereby impair the rights of the surviving spouse.<sup>7</sup>

The first question presented by the instant case is whether or not the deed from the husband to the wife created an estoppel against the husband, and therefore against those claiming under him. Although he could not alone effectively convey the entire estate to a third person, yet it has been held that where the husband conveyed by warranty deed without the joinder of his wife and survived her, the grantee acquired title by way of estoppel.<sup>8</sup> It is well settled that the intention of the grantor to convey and the intention of the grantee to accept a particular estate may form the basis of an estoppel.<sup>9</sup> In the instant case the Court held that the deed conveyed the husband's usufruct in the estate and that the warranty estopped him, and therefore his heirs, as to the fee. This position seems well substantiated.<sup>10</sup>

The second question raised in this case is whether the deed from the wife to her husband and herself was void. It is required by

<sup>4</sup> *Phillips v. Hodges*, 109 N. C. 248, 13 S. E. 769 (1891).

<sup>5</sup> *Bruce v. Nicholson*, 109 N. C. 202, 13 S. E. 790 (1891); *Gray v. Bailey*, 117 N. C. 439, 23 S. E. 318 (1895); *Bank v. McEwen*, 160 N. C. 414, 76 S. E. 222 (1912).

<sup>6</sup> *Greenville v. Gornto*, 161 N. C. 341, 77 S. E. 222 (1913); *Dorsey v. Kirkland*, 177 N. C. 520, 99 S. E. 407 (1919); *Moore v. Trust Co.*, 178 N. C. 118, 100 S. E. 269 (1919).

<sup>7</sup> *Bynum v. Wicker*, 141 N. C. 95, 53 S. E. 478 (1906); *Bruce v. Nicholson*, *supra* note 5.

<sup>8</sup> *Hood v. Mercer*, 150 N. C. 699, 64 S. E. 897 (1909); *Davis v. Bass*, 188 N. C. 200, 124 S. E. 566 (1924).

<sup>9</sup> *Crawley v. Stearns*, 194 N. C. 15, 138 S. E. 403 (1927); *Bynum v. Wicker*, *supra* note 7; *West v. Murphy*, 197 N. C. 488, 149 S. E. 731 (1929).

<sup>10</sup> *Eastern Bank and Trust Co. v. Broughton*, 193 N. C. 320, 136 S. E. 876 (1927); *Crawley v. Stearns*, *supra* note 9; *Dorsey v. Kirkland*, *supra* note 6; *Moore v. Trust Co.*, *supra* note 6; see *Enyeart v. Kepler*, 118 Ind. 34, 20 N. E. 539 (1889) and *Cullinan v. Clark*, 46 Misc. 188, 93 N. Y. Supp. 256 (1904) (that husband can convey estate to wife).

statute that the probate officer certify, at the time of the execution of the contract and the wife's private examination, that the contract is not unreasonable and injurious to her.<sup>11</sup> This condition precedent to the validity of the deed was not fulfilled. Accordingly, the attempted conveyance was void and could not operate as an estoppel against defendants.<sup>12</sup> It has been held that such a deed will constitute color of title,<sup>13</sup> but apparently the husband in the principal case did not live to hold adversely for seven years after its execution.

At one time in this jurisdiction it was considered that a deed of the husband alone was absolutely void,<sup>14</sup> but this position has been relaxed to the extent that his deed will estop him.<sup>15</sup> This relaxation may be attributed to the fact that the husband's deed is not entirely invalid because it does convey the usufruct of the estate during the joint lives of the spouses. But, the wife in the instant case was not estopped by her deed because it did not fulfill the statutory requirements under which she could make a valid conveyance. There seemed to be a justifiable policy involved in balancing a possible estoppel as to the wife against the statutory and constitutional provisions in regard to married women's conveyances. The conclusion reached by the Court emphasizes the importance of giving full effect to these restrictions upon a married woman's right to convey realty, for otherwise, the estoppel would serve to accomplish indirectly that which she may not do directly, i. e., avoid strict compliance with the statutes.

C. E. REITZEL, JR.

### Judgments—Vacation for Fraud—Perjury

An action was brought to set aside and declare invalid a judgment recovered against the plaintiff for debauching and alienating the affections of the defendant's wife. The court concluded that the action was based essentially upon "false testimony," and held that sufficient extrinsic fraud to support the cause of action was not involved; that where the fraud is intrinsic, pointing to false swearing, it must appear that the witness has been convicted of perjury.<sup>1</sup>

<sup>11</sup> N. C. ANN. CODE (Michie, 1927) §2515, *supra* note 2.

<sup>12</sup> *Smith v. Ingram*, 130 N. C. 100, 40 S. E. 984 (1902); *Wallin v. Rice*, 170 N. C. 417, 87 S. E. 239 (1915); *Scott v. Battle*, 85 N. C. 184, 39 Am. Rep. 694 (1881); *Sims v. Ray*, 96 N. C. 87, 2 S. E. 443 (1887).

<sup>13</sup> *Norwood v. Totten*, 166 N. C. 649, 82 S. E. 951 (1914); *Whitten v. Peace*, 188 N. C. 298, 124 S. E. 571 (1924); *Garner v. Horner*, 191 N. C. 539, 132 S. E. 290 (1926).

<sup>14</sup> *Gray v. Bailey*, *supra* note 5.

<sup>15</sup> *Davis v. Bass*, *supra* note 8.

<sup>1</sup> *McCoy v. Justice*, 199 N. C. 602, 155 S. E. 452 (1930).



A court loses control of its judgments when the term in which they are rendered comes to an end and, in North Carolina, relief therefrom can only be had by appeal, motion, or an independent action.<sup>2</sup> The latter replaces and is, in essence, the same as the relief formerly granted by equity. Chancery did not act in an appellate capacity.<sup>3</sup> The original judgment was not questioned, but its enforcement was enjoined because of some matter that the court did not or could not consider. Under the modern practice the judgment is actually attacked, injunctive relief being ancillary, but the policy, requiring that there be an end to litigation and favoring the finality of judgments, militates against any reconsideration of matters at issue in the original action. The plaintiff must show that it will be against conscience to enforce the judgment;<sup>4</sup> that no adequate legal remedy exists;<sup>5</sup> that he has a meritorious cause of action or defense which was not taken advantage of in the original action because of some circumstance not attributable to his own neglect—that, in the event of a new trial, the result will in all probability be different;<sup>6</sup> and that he has not been guilty of laches in seeking relief.<sup>7</sup>

Fraud is one of the most common grounds for equitable interference and in North Carolina can only be taken advantage of by an independent action.<sup>8</sup> But as a result of the policy which frowns upon two litigations of the same matter, it must be extrinsic or col-

<sup>2</sup> In North Carolina fraud is the only important ground for equitable relief which exists today, for practical purposes. The others come within the purview of §600 of N. C. CODE ANN. (Michie, 1927) permitting a judgment obtained by mistake, inadvertence, surprise, or excusable neglect to be set aside within a year after notice thereof upon the motion of the aggrieved party. An irregular judgment, one rendered contrary to the practice of the court, may be set aside upon a motion made within a reasonable time. See McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE (1929) §§649-656.

<sup>3</sup> Fentress v. Robbins, 4 N. C. 610 (1817); Peace v. Nailing, 16 N. C. 289 (1829).

<sup>4</sup> Pickford v. Talbott, 225 U. S. 651, 32 Sup. Ct. 687, 56 L. ed. 1240 (1912); Marine Ins. Co. v. Hodgson, 7 Cranch 332, 3 L. ed. 362 (1813); Hansen v. Mann, 5 N. C. 410 (1810); Jones v. Jones, 4 N. C. 547 (1817).

<sup>5</sup> Embry v. Palmer, 107 U. S. 10, 2 Sup. Ct. 31, 27 L. ed. 349 (1882); Mottu v. Davis, 153 N. C. 160, 39 S. E. 63 (1910).

<sup>6</sup> N. C. Mut. and Prov. Ass'n v. Edwards, 168 N. C. 378, 84 S. E. 139 (1915); Bissel v. Bozman, 17 N. C. 154 (1831); Koop v. Acken, 90 Neb. 77, 132 N. W. 721 (1911); Cantwell v. Thatcher Bros. Banking Co., 47 Utah 150, 151 Pac. 986 (1915).

<sup>7</sup> Dyche v. Patton, 56 N. C. 332 (1857); Perry v. Rue, 31 La. Ann. 287 (1879); Gray v. Barton, 62 Mich. 186, 28 N. W. 813 (1886); Schulteis v. Trade Press Pub. Co., 191 Wis. 164, 210 N. W. 419 (1926).

<sup>8</sup> Stocks v. Stocks, 179 N. C. 285, 102 S. E. 306 (1920); Jernigan v. Jernigan, 178 N. C. 84, 100 S. E. 184 (1919); Simmons v. Box Co., 148 N. C. 344, 62 S. E. 435 (1908); Carter v. Rountree, 109 N. C. 29, 13 S. E. 716 (1891).

lateral and not intrinsic.<sup>9</sup> Thus the fraud must be instrumental in preventing a party from presenting his cause of action or defense. If it relates to the merits of the case, it is not sufficient.<sup>10</sup> "It must be borne in mind that it is not fraud in the cause of action, but fraud in its management, which entitles a party to relief."<sup>11</sup>

Perjury is, without a doubt, fraud. However, since it seldom exists apart from the merits of the case, it is intrinsic and is not a sufficient ground for setting aside a judgment.<sup>12</sup> This is the broad rule as laid down in most jurisdictions, but in many of the cases relief would have been refused for some other reason—negligence, laches. It is said that a litigant must expect false testimony, especially where a false claim is made, and that if he fails to controvert it in the original action, he cannot have a second chance.<sup>13</sup> But, it seems that the policy against relitigation would be amply safeguarded by requiring him to exercise a high degree of care in refuting such testimony and that to arbitrarily deny relief is unnecessary. A few cases attempt to distinguish between perjury as to matters directly in issue and perjury relating to the "history of the case," i. e., where there is a concocted cause of action.<sup>14</sup> In some cases, relief is granted where the court has been imposed upon.<sup>15</sup> In all cases where perjury is recognized as a ground for setting aside a judgment, it

<sup>9</sup> *Mottu v. Davis*, *supra* note 5; *McCoy v. Justice*, *supra* note 1; *U. S. v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93 (1878); *Nelson v. Meehan*, 155 Fed. 1 (C. C. A. 9th, 1907); *McKechney v. Chicago*, 194 Ill. App. 539 (1915); *Michael v. Am. Nat. Bank*, 84 Ohio St. 374, 95 N. E. 905 (1911).

<sup>10</sup> *Cantwell v. Thatcher Bros. Banking Co.*, *supra* note 8; *Williamson v. Jerome*, 169 N. C. 215, 85 S. E. 300 (1915).

<sup>11</sup> 3 FREEMAN, JUDGMENTS (5th ed. 1925) §1233.

<sup>12</sup> *U. S. v. Throckmorton*, *supra* note 9; *Colburn v. Denison*, 149 Wash. 591, 271 Pac. 885 (1928); *Graves v. Graves*, 132 Iowa 199, 109 N. W. 707, 10 L. R. A. (N. S.) 216 (1906); *Pico v. Cohn*, 91 Cal. 129, 25 Pac. 970, 25 Am. St. Rep. 159 (1891); *Friese v. Hummel*, 26 Ore. 145, 37 Pac. 458 (1894); Note (1926) 21 ILL. L. REV. 833; Note (1927) 12 CORN. L. Q. 385.

<sup>13</sup> *Pico v. Cohn*, *supra* note 12.

<sup>14</sup> *Bolden v. Sloss-Sheffield Steel & Iron Co.*, 215 Ala. 334, 110 So. 574 (1925) (It was learned that a "wife" who had recovered damages for the death of her "husband" was not a wife. Relief was granted to "protect the court."); *Chicago R. I. & P. R. Co. v. Callicotte*, 267 Fed. 799 (C. C. A. 8th, 1920) (Recovery in action for personal injuries by the use of drugs causing temporary paralysis. Held extrinsic fraud.); *El Reno Fire Ins. Co. v. Sutton*, 41 Okla. 297, 137 Pac. 700 (1913) (Recovery for loss of goods by fire which had been previously removed from the country. Held extrinsic fraud.) The basis of the distinction seems to lie in the fact that the injured party was kept from defending the case by the other party's false testimony. Nevertheless, the fraud is intrinsic in that it concerns the merits of the case.

<sup>15</sup> *Ex Parte Cade*, 220 Ala. 666, 127 So. 154 (1930); *Johnson v. Building & Loan Ass'n.*, 133 Ill. App. 213 (1907); *Electric Plaster Co. v. Blue Rapids City Township*, 81 Kan. 730, 106 Pac. 1079 (1910); *Pugh v. Ahrens*, 179 Ark. 829, 19 S. W. (2d) 1030 (1929).

must have been a material, if not controlling, factor in the original action.<sup>16</sup> The proof thereof must be clear and convincing and not merely impeaching evidence.<sup>17</sup> A conviction is necessary in North Carolina<sup>18</sup> and it is not sufficient if procured upon the sole testimony of the complaining party.<sup>19</sup> Sometimes it is required that the successful litigant be the author of the false testimony or a party thereto.<sup>20</sup>

It is submitted that a rule permitting a judgment to be set aside where its enforcement would be against conscience, as in Wisconsin, is much more in keeping with equitable principles than the generally prevailing one.<sup>21</sup> Especially is this true of perjury which, although usually involved in the merits of the case, may be just as effective in preventing a party from obtaining the benefit of a meritorious cause of action or defense as some extrinsic fraud.<sup>22</sup>

T. C. SMITH, JR.

### Mortgages—Registration—Priority

Two recent North Carolina cases involve fundamentally the recording statutes. In *Story v. Slade*,<sup>1</sup> two mortgages were placed on the land and the second instrument had "second mortgage" written after the description. The first instrument was filed for registration but before it had been indexed and cross-indexed the second instrument was fully recorded. The court found the second instrument to have priority since the reference to the unindexed mortgage

<sup>16</sup> *Koop v. Acken*, *supra* note 6; *Sargeant Co. v. Baublis*, 127 Ill. App. 631 (1906); *Peagram v. King*, 9 N. C. 605 (1823); *Mottu v. Davis*, *supra* note 5; *Kinsland v. Adams*, 172 N. C. 765, 90 S. E. 899 (1916).

<sup>17</sup> *Boring v. Ott*, 138 Wis. 260, 119 N. W. 865 (1909); *Myers v. Smith*, 59 Neb. 30, 80 N. W. 273 (1899); *Robertson v. Freebury*, 87 Wash. 558, 152 Pac. 5 (1915) (admission not enough); *McBride v. Cowen*, 90 Okla. 130, 216 Pac. 104 (1923) (parol testimony alone insufficient); *Cleveland Iron Mining Co. v. Husby*, 72 Mich. 61, 40 N. W. 168 (1888) (written documents or conviction of perjury necessary).

<sup>18</sup> *McCoy v. Justice*, *supra* note 1; *Kinsland v. Adams*, *supra* note 16; *Mottu v. Davis*, *supra* note 9; *Dyche v. Patton*, *supra* note 7; *Moore v. Gulley*, *supra* note 8; *Dyche v. Patton*, *supra* note 7 (conviction not necessary if witness dead or otherwise unobtainable for prosecution); *Burgess v. Lovengood*, 55 N. C. 457 (1856); *Peagram v. King*, *supra* note 16.

<sup>19</sup> *Horne v. Horne*, 75 N. C. 101 (1876).

<sup>20</sup> *Julien v. West*, 96 Cal. App. 356, 274 Pac. 421 (1929); *Camp v. Ward*, 60 Vt. 286, 14 Atl. 461 (1897); *Stanley v. Spann*, 21 S. W. (2d) 305 (Tex. Civ. App. 1929) (false testimony must be willful).

<sup>21</sup> 3 FREEMAN, *loc. cit.* *supra* note 11; *Laun v. Kipp*, 155 Wis. 260, 145 N. W. 183 (1914); *Boring v. Ott*, *supra* note 17.

<sup>22</sup> *Boring v. Ott*, *supra* note 17; *Note* (1891) 25 Am. St. Rep. 165; 12 CORN. L. Q. 285.

<sup>1</sup> 199 N. C. 596, 155 S. E. 256 (1930).

was insufficient to make the former subject to the latter. In *Lawson v. Key*,<sup>2</sup> the question was one of priority between a second and third deed of trust when the third deed of trust bore on its face: "This being the same lands conveyed this year to the Greensboro Joint Stock Land Bank in a deed of trust for \$1,392 and a second deed of trust to R. F. Hemmings for \$1,400." The warranty clause therein recited that the premises were free and clear from any and all incumbrances, "except as above stated." In fact, the second deed of trust was for \$4,167.60. The court held the third instrument to have priority since it was registered first and the language used was insufficient to indicate an intention to make the third instrument subordinate to the second one.

The majority of jurisdictions<sup>3</sup> permit notice aliunde to take the place of registration, since the purpose of the statute is merely to give notice of conveyances and encumbrances and is not designed to give persons, who have had notice otherwise and who have neither suffered injury nor been misled, an undue advantage.<sup>4</sup> Thus it is argued that, when the parties know of the equitable rights of others in the property, to permit them to obtain priority by recording first would enable them to take advantage of the registry laws and would lead perhaps to fraud. At the same time it would penalize rather heavily a failure to pursue the technical course laid down by the statute.<sup>5</sup>

The minority<sup>6</sup> (which includes North Carolina) has taken the view that the statute has a double purpose, first, to give notice of conveyances and encumbrances; second, to exclude the necessity of parol proof upon the question whether or not another person has had notice

<sup>2</sup> 199 N. C. 664, 155 S. E. 570 (1930).

<sup>3</sup> ALA. CIV. CODE (1923) §6887; (1927) 2 ALA. L. J. 36; CAL. CIV. CODE (Deering, 1927) §1217; *Slaker v. McCormick-Saeltzer Co.*, 179 Cal. 387, 177 Pac. 155 (1918); ILL. STAT. ANN. (Callaghan's, 1924) c. 30, §§31, §30; *Interstate Bld'g and Loan Ass'n of Bloomington v. Ayers*, 177 Ill. 9, 52 N. E. 342 (1898); MICH. COMP. LAWS (Cahill, 1915) §11721; MO. REV. STAT. (1919) §2200. But cf. §2256 (chattel mortgages); (1926) 11 ST. LOUIS L. REV. 42; S. C. CODE OF LAWS (1922) c. LXVII (5312) §1; TEX. REV. CIV. STAT. (1925) art. 6627; VA. CODE ANN. (1919) §5194; (1927) 5 CAN. BAR REV. 696; 1 JONES ON MORTGAGES (8th ed. 1928) §670.

<sup>4</sup> *Hart v. Farmers' and Mechanics' Bank*, 33 Vt. 252 (1860); *Westerly Savings Bank v. Stillman Manufac. Co.*, 16 R. I. 497, 17 Atl. 918 (1889).

<sup>5</sup> *Russell-Coleman Oil Mill v. Johnson*, 287 S. W. 134 (Tex. Civ. App. 1926).

<sup>6</sup> *Ridings v. Johnson*, 128 U. S. 212, 9 Sup. Ct. 72, 32 L. ed. 401 (1888); ARK. DIG. STAT. (Crawford & Moses, 1921) §7381; *Reidmiller v. Comes*, 158 Ark. 21, 249 S. W. 354 (1923); PA. STAT. (Supp. 1928) §8845a; (1927) 164 L. T. 62; 1 JONES ON MORTGAGES (8th ed. 1928) §671.

of prior equities.<sup>7</sup> This view furnishes a clear and certain standard of decision, incapable of variation and easy of application, and thereby eliminates a very fruitful source of litigation with reference to land titles and priority of liens.<sup>8</sup> Therefore North Carolina has held that no notice, however full and formal, will supply the place of registration.<sup>9</sup>

There is, however, in North Carolina a deviation from this view, based upon an implied trust created by the intention of the parties as shown in the second instrument.<sup>10</sup> Thus, if the prior unregistered instrument is referred to with sufficient certainty<sup>11</sup> in the subsequent paper, the court will construe a trust in favor of the former, and the lack of recordation can have no effect. This construction is the median line and seems to derive the best principles from the two extremes stated above and gives an elasticity which is in keeping with equitable principles and consonant with policy. Therefore where the second recorded instrument *on its face* clearly gives notice, the necessity of parol evidence does not arise and the North Carolina policy is fully complied with.

*Story v. Slade* was decided in keeping with the strict North Carolina rule and rightly so, since parol evidence would have been necessary to construe the notice derived from the face of the second mortgage.

It is submitted that *Lawson v. Key* might well have been classed in the implied trust group to the extent, at least, of the amount (\$1,400) mentioned on the face of the third deed of trust. This would not have been too great an extension of that rule as the court has held,<sup>12</sup> "the words, 'that the same are free from all incumbrances

<sup>7</sup> *Fleming v. Burgin*, 37 N. C. 584 (1843).

<sup>8</sup> *Blevins v. Barker*, 75 N. C. 436 (1876); *Building Association v. Clark*, 43 Ohio 427, 2 N. E. 846 (1885).

<sup>9</sup> *Robinson v. Willoughby*, 70 N. C. 358 (1874); *North State Piano Co. v. Spruill & Bro.*, 150 N. C. 168, 63 S. E. 723 (1909); *Story v. Slade*, *supra* note 1; *Lawson v. Key*, *supra* note 2.

<sup>10</sup> *Hinton v. Leigh*, 102 N. C. 28, 8 S. E. 890 (1889); *Commercial & Farmers' Bank v. Vass*, 130 N. C. 590, 41 S. E. 791 (1902); *Avery County Bank v. Smith*, 186 N. C. 635, 120 S. E. 215 (1923). But *cf.* *Savings Bank & Trust Co. v. Brock*, 196 N. C. 24, 144 S. E. 365 (1928); (1928) 7 N. C. L. REV. 95.

<sup>11</sup> In *Hardy v. Fryer*, 194 N. C. 420, 139 S. E. 833 (1924), the requisites of sufficiency were set forth as follows: (1) The creditor holding the prior unregistered incumbrance must be named and identified with certainty. (2) The property must be conveyed "subject to" or in subordination to, such prior incumbrance. (3) The amount of such prior incumbrance must be definitely stated. (4) The reference to the prior unregistered incumbrance must amount to a ratification and adoption thereof.

<sup>12</sup> *Commercial & Farmers' Bank v. Vass*, *supra* note 10.

whatever except as above stated,' clearly demonstrate that the land was conveyed by the mortgage in subordination to a charge in favor of the vendor." It is true that the words "subject to"<sup>13</sup> are missing, but it is submitted that there is no peculiar necromancy in those particular words and that it is the intention of the parties which is sought after and not a distinction depending upon a technical use of words. The liberal view might well be taken in finding implied trusts, especially when it does not conflict with the policy of the recordation statutes.

HUGH BROWN CAMPBELL.

### Sunday Laws—Amusements as Violation—Admission Charges Under Guise of Voluntary Contributions for Charity

Albany Theatre exhibited moving pictures on Sunday, proceeds going to the American Legion fund for neglected children, after expenses of operating the show were deducted. *Held*, violation of the Georgia Sunday law (making it a misdemeanor for any person to pursue his business, or the work of his ordinary calling, on the Lord's Day, works of necessity or charity only excepted<sup>1</sup>), whether admission was charged or contributions were voluntary.<sup>2</sup>

Though the statutory designations of Sunday as a day of rest and prohibition of the doing of specified acts on that day are, in effect, a modified restatement of the Fourth Commandment, which directs abstention from labor on the Sabbath, they are essentially civil, rather than religious, regulations.<sup>3</sup> Their constitutionality is upheld, as being a legitimate exercise of the police power.<sup>4</sup> The regulation of Sunday activities is not only within the powers of the states, but

<sup>13</sup> *Avery County Bank v. Smith*, *supra* note 10.

<sup>1</sup> GA. PENAL CODE, §416 (Michie, 1926).

<sup>2</sup> *Albany Theater, Inc., et al. v. Short, Solicitor General, et al.*, 154 S. E. 895 (Ga. 1930).

<sup>3</sup> *Hennington v. Georgia*, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. ed. 166 (1896); *Swann v. Swann*, 21 Fed. 299 (C. C. E. D. Ark. 1884); *Ex parte Koser*, 60 Cal. 177 (1882); *Richmond v. Moore*, 107 Ill. 429, 47 Am. Rep. 445 (1883); *Rodman v. Robinson*, 134 N. C. 503, 47 S. E. 19, 101 Am. St. Rep. 877, 65 L. R. A. 682 (1904); *State v. Powell*, 58 Ohio St. 324, 50 N. E. 900, 41 L. R. A. 854 (1898); *Specht v. Commonwealth*, 8 Pa. St. 312, 48 Am. Dec. 518 (1848); *Note* (1894) 22 L. R. A. 721.

<sup>4</sup> *Petit v. State of Minnesota*, 177 U. S. 164, 20 Sup. Ct. 666, 44 L. ed. 716 (1900); *Brunswick-Balke-Collander Co. v. Evans et al.*, 228 Fed. 991 (D. C., Ore. 1916).

may also be granted to a local government, generally a municipality.<sup>5</sup> In the absence of a statute participation in innocent amusements on Sunday is lawful.<sup>6</sup>

There are three types of statutory provisions under which Sunday amusements are attacked. The first type prohibits the performance of work and labor in one's ordinary calling on the Sabbath. Though the cases are in slight conflict the prevailing view is that conducting moving picture shows involves labor within the prohibition of the Sunday laws,<sup>7</sup> but it is not "servile labor" within the meaning of a Sunday statute prohibiting such labor,<sup>8</sup> and it is not a work of necessity.<sup>9</sup> It has been held that the operation of a moving picture show on Sunday near an army camp is within a statute forbidding the performance of labor or services other than daily necessities or charity.<sup>10</sup> Professional baseball players engaged in an exhibition game on Sunday, for which they received no additional compensation, and to which no admittance fee was charged, were held to be "laboring" within the meaning of a statute making it a misdemeanor for any person, on Sunday, to labor at any trade or calling.<sup>11</sup> With slight variations statutes prohibiting "worldly employment, labor, or busi-

<sup>5</sup> *Power v. Nordstrom et al.*, 150 Minn. 228, 184 N. W. 967, 18 A. L. R. 733 (1921); *Ex parte Johnson*, 20 Okla. Crim. 66, 201 Pac. 533 (1921).

<sup>6</sup> Legislation on Sunday observance originated in Rome in 321 A.D., when Constantine the Great required all Judges and inhabitants of cities to rest on the venerable day of the Sun. Under Theodosius II, 425 A.D., games and theatrical exhibitions were prohibited on Sunday, and about a century later all labor was prohibited on that day. In England laws of a similar character were in force in the reign of Athelstan, 925 to 940 A. D. 25 R. C. L. 1413, 1414; 37 Cyc. 540.

The Common Law did not prohibit the doing on Sunday of any act which otherwise was lawful, *Dury v. Defontaine*, 1 Taunt. 131, 127 Eng. Rep. 781 (1808) (allowing the sale of goods on Sunday); Note Am. Cas. 1918B, 387; 25 R. C. L. 1413, 1414; see *Eden v. People*, 161 Ill. 296, 43 N. E. 1108, 52 Am. St. Rep. 365, 366 (1896); *City of Marengo v. Rowland*, 263 Ill. 531, 105 N. E. 285, 286, Am. Cas. 1915C, 198, 199 (1914).

The evolution of the English Law on Sunday observance may be noticed in a series of Sunday Observance Acts. 1 Car. 1, c. 1 (1625) (prohibiting extra-parochial sports); 3 Car. 1, c. 2 (1627) (trade of carriers or butchers); 29 Car. 2, c. 7 (1677) (trade generally); 21 Geo. 3, c. 49 (1871) (public entertainments).

<sup>7</sup> Note (1919) 4 A. L. R. 382, 385.

<sup>8</sup> *Binkley v. State*, 19 Okla. Crim. 199, 198 Pac. 884 (1921).

<sup>9</sup> *Rosenbaum v. State*, 131 Ark. 251, 191 S. W. 388, L. R. A. 1918B, 1109 (1917); *State v. Ryan*, 180 Conn. 582, 69 Atl. 536 (1908); *Capital Theater Co. v. Commonwealth*, 178 Ky. 780, 199 S. W. 1076 (1918).

<sup>10</sup> *Rosenbaum v. State*, *supra* note 9.

<sup>11</sup> *Crook et al. v. Commonwealth*, 147 Va. 593, 136 S. E. 565 (1927).

ness" have been applied to football,<sup>12</sup> baseball,<sup>13</sup> and moving pictures.<sup>14</sup>

The second type of statute relates to the nature of the amusement. While the cases are divided the better view is that moving picture shows come within the meaning of the words "and such other amusements" following a statutory definition of public amusements as circuses, theatres, etc.,<sup>15</sup> yet baseball has been held not within the designation "game of any kind"<sup>16</sup> or "sports."<sup>17</sup> Moving pictures come within the meaning of various other statutory definitions of amusements.<sup>18</sup>

The third type of statute deals with the sale of tickets to the amusement. The sale of theatre tickets has been held to come within a statute prohibiting the sale of "goods, wares, or merchandise" on Sunday.<sup>19</sup> The contrary result was reached under a statute prohibiting the sale of "any Commodity."<sup>20</sup>

In spite of the fact that the statutes are criminal or penal in nature the courts seem to have no hesitancy in saying that they are applicable to changed conditions. The fact that the prohibitive act was passed before the invention of moving pictures was held to be immaterial, if they come within the classification defined.<sup>21</sup> A contrary holding was

<sup>12</sup> *Walsh et al. v. State*, 33 Del. 514, 139 Atl. 257, 56 A. L. R. 810 (1927).

<sup>13</sup> *Levering et al. v. Williams et al.*, 134 Md. 48, 106 Atl. 176, 4 A. L. R. 374 (1919); *Commonwealth ex rel. Woodruff v. American Baseball Club of Philadelphia*, 290 Pa. 136, 138 Atl. 497, 53 A. L. R. 1027 (1927); *Crook et al. v. Commonwealth*, *supra* note 11. But it has been held that the managing, promoting, and playing of a public game of baseball to which an admission is charged is not engaging in any labor within the prohibition of a Sunday law. *Territory v. Davenport*, 17 N. M. 214, 124 Pac. 795, 41 L. R. A. (N. S.) 407 (1912).

<sup>14</sup> *State v. Ryan*, *supra* note 9; *State v. Kelly*, 129 Kan. 849, 284 Pac. 363 (1930); *State v. Blair*, 130 Kan. 863, 288 Pac. 729 (1930); *Capital Theater Co. v. Commonwealth*, *supra* note 9; *Dillard v. State*, 104 Neb. 209, 175 N. W. 668 (1920); *State v. Rosenberg, et al.* 115 Atl. 203 (N. J. 1915).

<sup>15</sup> *Ex parte Lingenfelter*, 64 Tex. Crim. 30, 142 S. W. 555, ANN. CAS. 1914C, 765 (1911); *Zucarro v. State*, 82 Tex. Crim. 1, 197 S. W. 982, L. R. A. 1918B, 354 (1917); compare *City of Clinton v. Wilson*, 257 Ill. 580, 101 N. E. 192 (1913).

<sup>16</sup> *State v. Prather*, 79 Kan. 513, 100 Pac. 57, 131 Am. St. Rep. 339, 21 L. R. A. (N. S.) 23 (1909).

<sup>17</sup> *Territory v. Davenport*, *supra* note 13.

<sup>18</sup> *Crawford v. City of Pascagoula*, 123 Miss. 131, 85 So. 181 (1920) (statute prohibited showing of "plays of any kind"); *People ex rel. Bender v. Joyce et al.*, 174 App. Div. 574, 35 N. Y. Crim. 309, 161 N. Y. Supp. 771 (1916) (same, "... or shows"); *Richards v. State*, 110 Ohio St. 311, 143 N. E. 714 (1924) (same, "theatrical performance").

<sup>19</sup> *State v. Blair*, *supra* note 14.

<sup>20</sup> *Binkley v. State*, *supra* note 8.

<sup>21</sup> *Zucarro v. State*, *supra* note 15; *Richards v. State*, *supra* note 18 (but moving pictures had come into existence at the time of the last amendment).



had in the case of baseball.<sup>22</sup> In an extremely liberal construction the Pennsylvania Court held its censorship statute to include the spoken words of moving picture entertainments.<sup>23</sup>

The charging, or omission to charge, an admission fee has been the determinative factor in the question of the violation of statutes.<sup>24</sup> Sunday baseball<sup>25</sup> and moving picture shows<sup>26</sup> have been expressly prohibited where an admission fee is charged. They have similarly been held to come within the prohibitive statute whether an admission fee was charged or not.<sup>27</sup> The fact that the patrons were admitted for what they chose to put in a conveniently located receptacle was held to be but a subterfuge and does not take the case out of the statute.<sup>28</sup>

It seems that the charity aspect, as presented in the instant case, has been present in but one other case, which went even further than the Georgia Court to declare it within the statute. A concert, for which admission was charged, was given immediately preceding a baseball game; between the two events the gates were opened to the public, free of all charge; the net proceeds went to a charitable organization, and the court held the baseball game to be within the statute forbidding public sports or shows on Sunday.<sup>29</sup> The demands on organized charitable institutions which are created by the present economic depression might well have been a justification for an opposite result in the instant case.

MILLS SCOTT BENTON.

#### Trade Regulation—Contracts in Restraint of Trade— Employee's Covenant Not to Compete—

In a contract for services as manager of a clothing business the employee covenanted not to compete within a fifteen mile radius of the store for two years after the termination of the employment. Within the two year period the employee became connected with a

<sup>22</sup> State v. Nashville Baseball Ass'n., 141 Tenn. 456, 211 S. W. 357, 4 A. L. R. 368 (1919).

<sup>23</sup> *In re* Fox Film Corp., 145 Atl. 514 (Pa. 1929), commented on in (1929) 7 N. C. L. Rev. 487.

<sup>24</sup> Note (1909) 21 L. R. A. (N. S.) 23; Note L. R. A. 1916B, 1130.

<sup>25</sup> State v. Hogleiver, 152 Ind. 652, 53 N. E. 921, 45 L. R. A. 504 (1899); Note L. R. A. 1916B, 1130.

<sup>26</sup> Consolidated Enterprisers, Inc., *et al.* v. State, 150 Tenn. 148, 263 S. W. 74 (1924).

<sup>27</sup> City of Ames v. Gerbracht, 194 Ia. 267, 189 N. W. 729 (1922).

<sup>28</sup> *Saveg v. State*, 25 S. W. (2d) 865 (Tex. 1930).

<sup>29</sup> *People v. Ebbets et al.*, 36 N. Y. Crim. 117, 172 N. Y. Supp. 599 (1917)

rival of his former employer located in an adjoining building. *Held*, order restraining the employee from further breaching the covenant affirmed.<sup>1</sup>

Agreements not to compete<sup>2</sup> incorporated in contracts for the sale of a business<sup>3</sup> or for a term of employment<sup>4</sup> are commonly upheld, obviously on the theory that the social interest in selling property or services advantageously outweighs the same interest in free competition. Vinje, J. in *Eureka Laundry Co. v. Long*<sup>5</sup> argues that the validity of restrictive covenants in the sales and employment contracts should be determined by the same test. But the pronouncement that the courts look with less favor on agreements restraining employees<sup>6</sup> seems to indicate a feeling that there is an underlying difference between the covenants in the two kinds of contracts.

A difference in the equality of the bargaining parties is apparent, if the sales contract is thought of as an agreement between merchant chiefs and the employment contract as an agreement between a captain of industry and an independent wage earner, but this difference becomes less marked, if the sales contract is pictured as a transaction between a national store organization and a small local merchant and the employment contract as between organized labor and the employer.

However, a fundamental difference is found in the nature of the basic transactions. The vendor bargains away his right to compete as an essential element in the sale of his good will, and his good will is an item of property intimately connected with the business sold. The employee sells his services, and the good will involved in the restrictive covenant is that of the employer, which he seeks to protect thereby after the services are over, so that the period of non-competition, which gives meaning to the sale of good will, has no connection

<sup>1</sup> *Moskin Bros. v. Schwartzberg*, 199 N. C. 539, 155 S. E. 154 (1930). (An additional provision of the covenant, that the employee would not compete within a fifteen mile radius of any other store owned by the employer, was not called in question, but on the authority of *Samuel Stores v. Abrams*, 94 Conn. 248, 108 Atl. 541 (1919), 9 A. L. R. 1450 (1920), it was unenforceable.)

<sup>2</sup> WILLISTON, *CONTRACTS* (1920) §§1633-1664; Carpenter, *Validity of Contracts not to Compete* (1928) 76 U. OF PA. L. REV. 244.

<sup>3</sup> *Morehead Sea Food Co., Inc., v. Way*, 169 N. C. 679, 86 S. E. 603 (1915) (sale of fish business in M. and covenant not to compete for 10 years within 100 miles of M.); Note (1929) 8 N. C. L. REV. 90.

<sup>4</sup> Recent cases cited in note 9, *infra*.

<sup>5</sup> 146 Wis. 205, 131 N. W. 412 (1911).

<sup>6</sup> *A. Fink & Sons, Inc., v. Goldberg*, 101 N. J. Eq. 644, 139 Atl. 408 (1927) (injunction granted to enforce covenant by salesman of meat products not to solicit orders for any competitor of his employer within certain counties for one year after the termination of the employment).

with the sale of services as such.<sup>7</sup> The contract of sale contemplates the period of non-competition as a thing bought; the contract of employment contemplates the period of non-competition as a shield against attacks on the employer's good will by the employee, and as the employer cannot acquire this shield by an agreement not to compete *per se*,<sup>8</sup> if he is entitled to acquire it as an incident of the contract, it must be on the ground that the employment changes the situation between the contracting parties. It is apparent that a window washer, for example, is no better able to compete against a bank that hires him after than before the employment, and that a restrictive covenant (if conceivable) should not be enforced in such a situation.

But in two types of cases the employment does change the situation between the parties, i. e., where in the course of the employment the employee (1) comes into personal contact with the employer's customers or clients,<sup>9</sup> and (2) acquires personal knowledge of trade or business secrets.<sup>10</sup> In the first case the employee represents the

<sup>7</sup> For example, if a druggist sells his good will and opens another store the next day, his good will follows him and the vendee has failed to get what he has bought, but, if a window washer sells his services to A for one day and works for B the next, the work done for A is none the less valuable.

<sup>8</sup> *Samuel Stores v. Abrams*, *supra* note 1.

<sup>9</sup> Restrictive covenants in the following cases were enforced: *Alexson v. Columbine Laundry Co.*, 81 Colo. 254, 254 Pac. 990 (1927) (driver of laundry wagon); *International Fire Ins. Co. v. Carrington*, 241 Ill. App. 208 (1926) (fire insurance salesman); *Eigelback v. Boone Loan and Ins. Co.*, 216 Ky. 69, 287 S. W. 225 (1926) (manager of a loan company); *Mason v. Thos. W. Briggs & Co.*, 221 Ky. 127, 297 S. W. 1106 (1927) (newspaper man); *Edgcomb v. Edmonston*, 257 Mass. 12, 153 N. E. 99 (1926) (shorthand writer engaged in law reporting); *Walker Coal and Ice Co. v. Westerman*, 263 Mass. 235, 160 N. E. 801 (1928) (driver of ice wagon); *Athletic Tea Co. v. Cole*, 16 S. W. (2d) 735 (Mo. App. 1929) (house to house salesman of coffee and tea); *A. Fink & Sons, Inc. v. Goldberg*, *supra* note 6 (retail salesman of meat products on rural route); *Scaldron's Sons, Inc. v. Susskind*, 132 Misc. 406, 229 N. Y. Supp. 209 (1928) (optometrist); *Southern Properties, Inc. v. Carpenter*, 299 S. W. 440 (Tex. Civ. App. 1927) (driver of ice wagon); *Putnam v. Taylor*, 1927 1 K. B. 741 (manager of tailor shop).

In *Byers v. Trans-Pecos Abstract Co.*, 18 S. W. (2d) 1096 (Tex. Civ. App. 1929), the court refused to enforce a restrictive covenant against an abstracter, who during the time employed by the company had acquired knowledge of their business, clientele, books, records, and methods, distinguishing the case from those involving ice and laundry wagon drivers on grounds of differences in the personal relations between the respective employees and their employer's customers.

<sup>10</sup> Restrictive covenants in the following cases were enforced: *Ideal Laundry Co. v. Gugliemone*, 151 Atl. 617 (N. J. L. 1930) (floor supervisor of ironing department acquired knowledge of improved ironing machinery); *Davey Tree Expert Co. v. Back*, 244 N. Y. Supp. 239 (1930) (tree surgeon acquired knowledge of secret scientific facts); *Eagle Pencil Co. v. Jannsen*, 135 Misc. 534, 238 N. Y. Supp. 49 (1929) (draftsman engaged to draw secret mechanical devices).

employer and the employer's good will becomes associated in the public mind with the representative. Here the transfer of the representative to a rival would cause the employer a loss of good will against which nothing would protect but a period of non-competition, it being impracticable to enforce covenants not to solicit or accept the employer's customers. During the period of non-competition the good will associated with the employee would be inactive and the employer would be able to have his good will become associated with the employee's successor with the smallest possible loss occasioned by the transfer. In the second case the employee is placed by virtue of his employment in a position to do the employer an injury, which no amount of competition before the employment would have equalled. It should be noted, however, that the knowledge acquired must be secret in the sense that competitors do not have it, and not merely in the sense that it would not be known to persons outside the business.<sup>11</sup>

The test of the validity of restrictive covenants in contracts for the sale of a business as laid down by the North Carolina court is whether the restriction is for the reasonable protection of the vendee's business.<sup>12</sup> This is adequate in view of the fact that the period of non-competition is bought, but this test on principle is not applicable in the case of a contract of employment. There the period of non-competition is not bought, but put into the agreement to prevent the employer's being subjected by reason of the employment to competition which would not otherwise have been possible. The test of the validity of an employee covenant should be whether the employer is so subjected, and not, as is sometimes stated, whether the covenant provides for the protection the employer's business requires.<sup>13</sup>

The result of the instant case can be justified under the suggested test as the employee came into personal contact with the employer's customers. The case, however, was decided on the authority of *Scott v. Gillis*,<sup>14</sup> which upheld a restrictive covenant between public accountants. The court pointed out no difference between employee and vendee covenants and, after reviewing North Carolina cases involving sales contracts, applied the test there used to the one in hand.

<sup>11</sup> *Byers v. Trans-Pecos Abstract Co.*, *supra* note 9 (employee had access to all the files of the office, but this information not considered secret).

<sup>12</sup> *Morehead City Sea Food Co., Inc. v. Way*, *supra* note 3.

<sup>13</sup> Restrictive covenants in employment contracts are enforceable as in sales contracts "whenever it appears that the restraint sought is no greater than the fair protection of the plaintiff's business requires." *Edgcomb v. Edmonston*, *supra* note 9, 153 N. E. at 101.

<sup>14</sup> 197 N. C. 223, 148 S. E. 315 (1929).