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## Editorial Board/Notes and Comments

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# The North Carolina Law Review

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## NOTES AND COMMENTS

### Banks and Banking—Right of Depositor to Direct Application of Deposit in Insolvent Bank.

A depositor in an insolvent bank requested the liquidating agent to apply his deposit to certain of his notes adequately secured by indorsements. This request was refused and the deposit was applied to another note of the depositor's inadequately secured by a deed of trust. *Held*: the depositor could have the deposit applied in accordance with his directions.<sup>1</sup>

As a general rule, a depositor who is indebted to a bank is entitled to set-off the amount to his credit against his indebtedness.<sup>2</sup> This

<sup>1</sup>In re Merchant's Bank of Durham, 204 N. C. 472, 168 S. E. 676 (1933) noted in (1933) 86 A. L. R. 993.

right of set-off is mutual, and where a depositor's debt to a bank is due, the bank has the right to apply the deposit as a payment, *pro tanto*, on the indebtedness.<sup>3</sup> If the bank is insolvent, the great weight of authority is that the depositor may set-off his deposit therein against his bona fide indebtedness to the bank,<sup>4</sup> even though the indebtedness was not due at the time the bank closed its doors.<sup>5</sup> A corresponding right exists in favor of the bank in case of the depositor's insolvency.<sup>6</sup>

The right of the depositor to direct the application of the set-off to a particular debt is not so well established, as there seems to be only one other case on this point,<sup>7</sup> and this was relied on by the court in the instant decision.

The bank being solvent, the depositor would have the right to apply his deposit to the payment of such of his debts to the bank as he should choose.<sup>8</sup> This is in line with the well established rule of the application of payments.<sup>9</sup> Since it is held that the insolvency of the bank does not affect the right of set-off, it would seem to follow that it does not affect the right of the depositor to direct its application, provided such direction was made prior to any application by the receiver.<sup>10</sup> Support for this rule is found in the analogous field of

<sup>3</sup> *Steelman v. Atchley*, 98 Ark. 294, 135 S. W. 902 (1911); *New First National Bank v. Rhodes Produce Co.*, 58 S. W. (2d) 742 (Mo. 1933).

<sup>4</sup> *Trust Co. v. Trust Co.*, 188 N. C. 766, 125 S. E. 536 (1924); *Graham v. Warehouse Co.*, 189 N. C. 533, 127 S. E. 540 (1925); *Trust Co. v. Spencer*, 193 N. C. 745, 138 S. E. 124 (1927); *Coburn v. Carstarphen*, 194 N. C. 368, 139 S. E. 596 (1927).

<sup>5</sup> *Davis v. Manufacturing Co.*, 114 N. C. 321, 19 S. E. 371 (1894); *Steelman v. Atchley*; *Coburn v. Carstarphen*, both *supra* note 3. The receiver of an insolvent bank is merely an assignee, and choses in action pass subject to any right of set-off existing at the time of his appointment. This right of set-off is to be governed by the state of things existing at the moment of insolvency and not by conditions thereafter created. *Williams v. Johnson*, 50 Mont. 7, 144 Pac. 768 (1914).

<sup>6</sup> *Steelman v. Atchley*, *supra* note 2; *Knaffle v. Knoxville Banking Co.*, 128 Tenn. 181, 159 S. W. 838 (1913). The effect of insolvency of a bank is to make deposits due and actionable. *Williams v. Johnson*, *supra* note 4.

<sup>7</sup> *Hodgin v. Bank*, 124 N. C. 540, 32 S. E. 887 (1899). *Contra*: *Homer v. National Bank of Commerce*, 140 Mo. 225, 41 S. W. 790 (1897).

<sup>8</sup> *Hughes v. Garrett*, 150 Ark. 404, 234 S. W. 265 (1921).

<sup>9</sup> *First National Bank v. Rhodes Produce Co.*, *supra* note 2.

<sup>9</sup> *Lee v. Morley*, 154 N. C. 244, 70 S. E. 385 (1911); *Stone Co. v. Rich*, 160 N. C. 161, 75 S. E. 1077 (1912).

<sup>10</sup> The creditor's right to make the application applies only where the debtor has had an opportunity of exercising this right. *Jones v. Williams*, 39 Wis. 300 (1876). The right to apply payments is one existing strictly between the original parties, and no third person has any authority to insist on an appropriation of the money in his own favor, where neither the debtor nor the creditor has made or required any such appropriation. *Wyandotte Coal Co. v. Wyandotte Paving Co.*, 97 Kan. 203, 154 Pac. 1012 (1916).

bankruptcy, where the rights of the parties to direct application of payments remain unimpaired by the debtor's subsequent bankruptcy.<sup>11</sup>

The effect of this decision is: first, to allow the depositor-debtor to secure the benefit of the full amount of his deposit, while the depositor against whom the bank has no claim receives only a pro rata share; and, second, to allow the depositor, by directing the application to the notes adequately secured, to leave the bank with the inadequately secured note, and thus further reduce dividends to the ordinary depositor.<sup>12</sup> At first blush this seems inequitable, but is this really so?

When both parties are solvent, the allowance of set-off is obviously fair and expedient, since it avoids circuity of action and multiplicity of suits; but when one of the parties becomes insolvent the rights of the creditor who is also a debtor to set-off his claims against his obligations comes into conflict with the equitable right of the general creditors to share equally in the assets. But, as usually considered, the assets of the insolvent bank consist not of all the obligations which it holds, but only of the balance due after deducting the deposits.<sup>13</sup> Therefore, in the absence of statutes, the allowance of set-off is no violation of the rule of equality among creditors.<sup>14</sup> To hold otherwise would require the depositor to pay his own debt to the insolvent in full, and receive only a dividend on the debt due from the insolvent to him.

As to the second phase of the problem, it is, according to the usual view, the depositor who is exercising the right of set-off, and not the insolvent bank. It is he who in effect is making the payment. It is fundamental that the debtor has the right to have his payments applied to debts of his own choice.<sup>15</sup> If in fact a set-off is a payment, there appears to be no logical reason why he should be deprived of that right by the insolvency of his creditor.

However, the view might be taken that set-off, being mutual, is not strictly a payment by either party, but rather an extinction of mutual

<sup>11</sup> *In re Johnson*, 125 Fed. 838 (E. D. N. C. 1903); 4 REMINGTON, BANKRUPTCY (3rd ed. 1923) 1475-1478.

<sup>12</sup> For purposes of this contention it is assumed that the depositor is insolvent and the loan inadequately secured, or at least so regarded by the receiver. Otherwise the application would be immaterial.

<sup>13</sup> *State v. Brabston*, 94 Ga. 95, 21 S. E. 146 (1894); *Miles v. Bossert*, 92 Ind. App. 10, 173 N. E. 656 (1930).

<sup>14</sup> *Bassett v. City Bank and Trust Co.*, 115 Conn. 1, 160 Atl. 60 (1932).

<sup>15</sup> *Lee v. Morley*; *Stone Co. v. Rich*, both *supra* note 9. Treating set-off as a payment, an interesting question arises as to when it becomes a payment.

debts. If this is true would it not be better to determine the debts to be extinguished by the equities of the particular case, rather than to leave such determination to the depositor?

Business men as well as courts seem frequently to regard bank deposits as cash on hand rather than as a debt owed by the bank.<sup>16</sup> It is interesting to conjecture on whether the court in the instant case would have reached a like result had the parties been ordinary mutual creditor and debtor instead of depositor and insolvent bank.

HERBERT H. TAYLOR, JR.

### Brokers—Conditions Precedent to Right to Commissions.

In a recent federal case, the plaintiff sued to recover broker's commissions on a sale of Florida real estate. The agreement imposed the condition that they were "payable out of the second payment on the said sale." Between the time of the sale and the due date for the second payment, the Florida boom crashed; and, rather than take the property back, the defendant-owner compromised with the buyer for a sum less than that owing to the plaintiff for commissions. *Held*, Soper, J., dissenting, plaintiff should be awarded the entire amount collected on the compromise.<sup>1</sup> The case raises the problem of the performance of express conditions precedent in real estate brokers' contracts.

The classic condition precedent in these contracts is that the broker obtain a purchaser ready, willing, and able to buy on the terms specified.<sup>2</sup> Thus, in most cases the position of the broker is that of a middleman whose job is to bring together the vendor and the purchaser. This situation, of course, may be, and often is altered by contract as when the making of a binding contract<sup>3</sup> or the payment of the purchase money<sup>4</sup> is made a condition precedent to the duty to pay commissions. The rule in such cases is that the condition must be complied with before a recovery can be had.<sup>5</sup> The only general ex-

<sup>16</sup> Most bank statements, and statements of other businesses, carry this item: "Cash on hand and on deposit with banks."

<sup>1</sup> *Kendrick v. Speck*, 67 Fed. (2d) 295 (C.C.A. 4th, 1933).

<sup>2</sup> *Ennis v. Cator*, 174 S.W. 947 (Tex. Civ. App. 1915) (Purchaser provided by broker refused administrator's deed. *Held*, no recovery as he was not ready and willing).

<sup>3</sup> *Espalla v. Warren*, 197 Ala. 601, 73 So. 23 (1916); *Taylor v. Freedman*, 103 N. J. L. 403, 135 Atl. 867 (1927).

<sup>4</sup> *Van Norman v. Fitchette*, 100 Minn. 145, 110 N. W. 851 (1907). Also in this category are listed the agreements under which the broker takes all above a specified sum. *Lewis v. Briggs*, 81 Ark. 96, 98 S. W. 683 (1906).

<sup>5</sup> *Supra* notes 3 and 4.

ception is that the owner may not himself prevent the occurrence of the condition.<sup>6</sup> The principal case comes within this exception on the grounds of waiver.

There are, however, certain cases in which the rigidity of the rule thus stated has been somewhat modified. These may be grouped under three heads: (1) where there has been an occurrence substantially equivalent to the condition precedent;<sup>7</sup> (2) where the owner has been benefited by the services, the broker has sometime been allowed to recover the full commission on a theory approaching *quantum meruit*;<sup>8</sup> and (3) where the broker has incurred expense before the agency was revoked.<sup>9</sup> Here the broker is reimbursed. In the first two classes, however, the recovery allowed has been either the entire commission or nothing.<sup>10</sup> There has seldom been an attempt to pro rate the benefits<sup>11</sup> or to make the award responsive to the actual facts.<sup>12</sup>

It would seem, in theory at least, that this is wrong. When an owner hires a broker under an ordinary contract, their minds meet on the idea that the commissions are to be paid for the contingent benefits that the owner will receive by meeting a purchaser ready, willing, and able. On the other hand, when a condition must be met, the idea is rather that payment is for the concrete completed benefit which the owner then will have received; so much so, indeed, that unless the specified benefit is received, the broker in these contracts, does not usually get paid for his work. Thus the subject-matter of

<sup>6</sup> Several theories are adopted as the basis of this exception: (1) Implied contract on part of owner. *Atkinson v. Pack*, 114 N. C. 597, 19 S. E. 628 (1894); (2) Waiver of the condition. *Tarbell v. Bomes*, 135 Atl. 604 (R. I. 1927); (3) Estoppel. *Kenzig v. Cibula*, 40 Ohio App. 557, 179 N. E. 423 (1931).

<sup>7</sup> *Helmke v. Prasifka*, 17 S. W. (2d) 463 (Tex. Civ. App. 1929) (Hypothecation for full value after default of purchaser on notes held substantially equivalent to payment). But see *Trimue v. McCaleb*, 172 Ark. 137, 287 S. W. 740 (1926) (Cancellation of notes when insolvent purchaser deeds back property is not payment as contemplated in the contract); *Coleman v. Edgar Lumber Co.*, 155 Ark. 275, 244 S. W. 41 (1922) (Foreclosure will not replace a specified payment for a condition precedent.)

<sup>8</sup> *Lesser v. W. B. McGerry & Co.*, 8 P. (2d) 1058 (Cal. App. 1933); *Dermod v. N. J. Realities*, 101 N. J. L. 334, 128 Atl. 265 (1925).

<sup>9</sup> *Gossett v. McCracken*, 189 N. C. 115, 126 S. E. 117 (1925). *Contra*: *Abbott v. Hunt*, 129 N. C. 403, 40 S. E. 119 (1901).

<sup>10</sup> *Supra*, notes 7, 8 and 9.

<sup>11</sup> But see *Gilder v. Davis*, 137 N. Y. 504, 33 N. E. 599 (1893). (Broker was awarded 5% of the down payment which was forfeited. Contract called for 5% of the sale price.)

<sup>12</sup> Note suggestion in (1932) 32 COL. L. REV. 1194, at 1199 to the effect that in forfeiture cases recovery should be based on whether or not the deposit which was forfeited took into account the broker's commissions. The suggestion was repudiated in *Amies v. Wesnofsky*, 255 N. Y. 156, 174 N. E. 436 (1931).

the contract is the actual benefit to the owner. If a substantial substitute for the specified benefit is received, or if it is materially diminished it would seem that the broker should recover an amount proportionate to the revised conditions.

It may be objected that this is impractical either (1) because it would lead to uncertainty in the law, or (2) because it would be too difficult to determine the ratio. The answer to the first is that this would be no more uncertain than in other fields, such as construction contracts, where recovery is allowed upon substantial performance.<sup>13</sup> The answer to the second is that a similar job is being done in other cases by *quantum meruit*. It is submitted, therefore, that although the court in the principal case is in accord with the majority, the result suggested by the dissent would have been the more satisfactory disposition of the problem before it.

PETER HAIRSTON.

### Conflict of Laws—Construction of the Law of a Sister State.

Defendant drove his automobile at 45 to 50 miles an hour over ridges of soft sand or "camel backs" along a Virginia beach until within a few feet of a known and visible obstruction in the form of a wrecked vessel protruding out of the sand. Plaintiff's intestate, a gratuitous guest in the rumble seat, protested several times at the rate of speed because those in the rumble were "bouncing . . . all the time." When defendant swerved the car to avoid hitting the wreck, the car overturned and plaintiff's intestate was killed. Suit was brought in North Carolina. The court, applying the rule of *lex loci*,<sup>1</sup> held, the defendant liable for the guest's death because of gross negligence.<sup>2</sup> North Carolina adheres to the orthodox rule that, with regard to questions of common law, the court of one state will follow the decisions of another state in which the cause of action had its situs;<sup>3</sup> in the instant case, the court declared that it must be governed by Virginia decisions.<sup>4</sup> Virginia now follows<sup>5</sup> the Massachusetts

<sup>13</sup> *Jacobs & Young, Inc. v. Kent*, 230 N. Y. 239, 129 N. E. 889 (1921).

<sup>1</sup> *Howard v. Howard*, 200 N. C. 574, 158 S. E. 101 (1931); GOODRICH, *CONFLICT OF LAWS* (1927) §92.

<sup>2</sup> *Wise v. Hollowell*, 205 N. C. 286, 171 S. E. 82 (1933).

<sup>3</sup> See *Harrill v. S. C. & G. Extension R. Co.*, 135 N. C. 601, 615, 47 S. E. 730; Note (1931) 73 A. L. R. 897.

<sup>4</sup> *Wise v. Hollowell*, *supra* note 2, at 288 ("The accident . . . occurred . . . in Virginia. The measure of the defendant's duty and the question of his liability for negligence must be determined by the law of that state.")

<sup>5</sup> *Boggs v. Plybon*, 157 Va. 30, 160 S. E. 77 (1931).

rule<sup>6</sup> in holding that an automobile host is liable to a gratuitous guest only in the event of gross negligence.

This presents once more the old question as to what is gross negligence, and more particularly, what is gross negligence in Virginia. In the principal case, the trial court charged the jury that, to hold the defendant liable, they must find him guilty of "wanton and culpable negligence." The court defined *wanton* as "implying reckless and criminal indifference to consequences or to the rights of others," and *culpable* as "a heedless indifference to right and safety of others."<sup>7</sup> In the majority opinion approving this charge on appeal, the court cited a North Carolina case<sup>8</sup> and a general law dictionary.<sup>9</sup> Similarly, the dissenting judge declared that gross negligence was not evidenced in the fact situation in the instant case, not because of non-conformity to any Virginia definition of wanton and culpable negligence, but rather because the facts failed to measure up to a definition set forth in still another North Carolina case.<sup>10</sup>

On the other hand, the Virginia court, in reviewing cases in which recovery was sought for accidents taking place in North Carolina, has not only followed the rule found in North Carolina cases allowing recovery by gratuitous guests for ordinary negligence,<sup>11</sup> but also has approved North Carolina, and not Virginia, definitions of ordinary negligence.<sup>12</sup> Thus, it would seem that when North Carolina attempts to adjudicate the rights of parties on the basis of a Virginia conception of the degree of negligence requisite to establish liability, it should not content itself with adopting the Virginia label of wanton, gross, or

<sup>6</sup> Enunciated in *Massaletti v. Fitzroy*, 228 Mass. 487, 118 N. E. 168 (1917). The court in this case defines and distinguishes *slight*, *ordinary*, and *gross* negligence.

<sup>7</sup> *Wise v. Holloway*, *supra* note 2, at 289.

<sup>8</sup> *Everett v. Receivers*, 121 N. C. 519, 27 S. E. 991 (1897), cited in the principal case, *supra* note 2, at 290.

<sup>9</sup> BLACK, LAW DICTIONARY, 304, 1217, cited in the principal case, *supra* note 2, at 290.

<sup>10</sup> *State v. Cope*, 204 N. C. 28, 167 S. E. 456 (1933), cited in principal case, *supra* note 2, at 291.

<sup>11</sup> See *Albritton v. Hill*, 190 N. C. 429, 130 S. E. 5 (1925). In some states the liability of a motorist to a gratuitous guest has, by judicial decisions, been limited to gross negligence, *Massaletti v. Fitzroy*, *supra* note 6; *Epps v. Parish*, 26 Ga. App. 399, 106 S. E. 297 (1923). In other states the limitation of liability to cases of gross negligence has been effected by statute, CONN. GEN. STAT. (1930) §1628; IOWA CODE (1927) §5026-b1; MICH. COMP. LAWS (1929) §4648; VT. PUB. LAWS (1929) No. 78. For a proposed North Carolina statute, see (1930) 9 N. C. L. REV. 47.

<sup>12</sup> *Baise v. Hollifield*, 158 Va. 498, 164 S. E. 657 (1932); *Baise v. Warren*, 158 Va. 505, 164 S. E. 655 (1932); see *Clark v. Parker*, 171 S. E. 600 (Va. 1933) (decided on basis of plaintiff's contributory negligence.)



culpable negligence, and then proceed to define these terms on the basis of North Carolina law, but should rather look to Virginia decisions for an interpretation of these terms. The Virginia court has decided several cases involving the question of gross negligence of an automobile host.<sup>13</sup> Theoretically, the proper criteria for ascertaining the Virginia definition of gross negligence would have been found in these cases. Actually, they shed little light on the general subject as they were all decided on the basis of particular fact situations. At least one case, by analogy, indicates that the Virginia court might have arrived at a result different from the North Carolina court.<sup>14</sup>

To define ordinary negligence in a manner that will satisfy all persons and all situations is well-nigh impossible. The introduction of "gross" negligence has had the primary effect of adding confusion to an already complicated subject.<sup>15</sup> For example, in the principal case, the court approved of "criminal indifference" as a constituent of gross and culpable negligence, and yet declared a few sentences later that negligence could be culpable without being criminal. One English judge has declared: "I . . . see no difference between *negligence* and *gross negligence*—that it (*is*) the same thing, with the addition of a vituperative epithet."<sup>16</sup> Perhaps, in the instant

<sup>13</sup> *Boggs v. Plybon*, *supra* note 5 (In which the court laid down the test of the defendant automobile host's liability as being whether or not the defendant knowingly and wantonly added to those perils which may ordinarily be expected and held it not to be gross negligence that defendant inadvertently drove so far over on right side of road that he ran off the side of the road into a soft shoulder and collided with a telephone pole); *Jones v. Massie*, 158 Va. 121, 163 S. E. 63 (1932), (where recovery was sought for injuries received in an accident resulting from defendant's failure to see a drainage depression in the street, *held*, as a matter of law that defendant was not guilty of gross negligence, although he could have seen the defect in the pavement, and stopped the car in time to prevent the accident, had he been keeping a proper look-out). Two other Virginia cases decided, after the trial, but prior to the handing down of the appellate decision in the principal case involved similar situations. *Collins v. Robinson*, 160 Va. 520, 169 S. E. 609 (1933) (defendant held liable for gross negligence in an accident resulting from driving—in violation of a statute—on the wrong side of the road around a curve at night, knowing another car was approaching from the opposite direction because of the reflection of its lights, although he could not see it); see *Young v. Dyer*, *infra* note 14.

<sup>14</sup> *Young v. Dyer*, 170 S. E. 737 (Va. 1933) (In an accident resulting in a car overturning on a sharp curve when defendant was driving 50 miles an hour along an unfamiliar curving highway, despite a mild warning uttered by plaintiff, defendant was not guilty, as a matter of law, of gross negligence in the absence of circumstances indicating that the curve could not be negotiated at such speed, or in the absence of vehement protests by the guest. The court declared that failure to be alert and observant and to operate a car at a low rate of speed might be ordinary negligence, but is not gross negligence.).

<sup>15</sup> This objection was recognized by the Virginia court when first adopting the gross negligence rule. *Boggs v. Plybon*, *supra* note 5. Nevertheless, the court decided to set up and differentiate between degrees of negligence.

<sup>16</sup> *Wilson v. Brett*, 11 M. & W. 113, 115, 152 Eng. Rep. 737, 739 (1843).

case and in similar cases, the court could more nearly approximate the law of a foreign jurisdiction if, drawing from decided cases in the foreign state, it would charge the jury as to illustrative analogous fact situations, rather than as to misleading substantive definitions.

HARRY W. MCGALLIARD.

### Conflict of Laws—Jurisdiction—Res Judicata.

A surety after an ex parte judgment against it on a supersedeas bond, made a general appearance and moved to vacate for lack of jurisdiction. The motion was granted but on appeal to the state Supreme Court, the order was reversed. The surety then sought to enjoin the enforcement of the judgment in the federal district court. On certiorari to review the decision of the Circuit Court of Appeals which reversed the district court's denial of the injunction, *held*, as there has been an actual adjudication of the trial court's jurisdiction, that issue is *res judicata*.<sup>1</sup>

The clause of the constitution which requires that full faith and credit be given by each state to the judicial proceedings of other states, applies only to those judgments rendered by courts which had jurisdiction over both the parties and the subject matter. Therefore the jurisdiction of a court rendering a judgment is said always to be open to inquiry where it is drawn in question collaterally in another state.<sup>2</sup>

This broad rule is, however, limited by numerous exceptions. Where the question of the court's jurisdiction is squarely presented for its consideration, either by a general or special appearance and motion to dismiss<sup>3</sup> or a motion to vacate<sup>4</sup> and the issue is determined

<sup>1</sup> *American Surety Co. v. Baldwin*, 287 U. S. 156, 53 Sup. Ct. 78, 77 L. ed. 231 (1932). The effect of this case from a procedural standpoint is that the jurisdiction of a court remains open to attack only if the defendant makes no appearance at all or if he appeals at every step on an adverse holding on the question of jurisdiction until the U. S. Supreme Court passes on it.

<sup>2</sup> *Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 897 (U. S. 1872); *National Exchange Bank v. Wiley*, 195 U. S. 257, 25 S. Ct. 70, 49 L. ed. 184 (1904); *Old Wayne Mutual Life Assoc. of Indianapolis v. McDonough*, 204 U. S. 8, 27 Sup. Ct. 236, 51 L. ed. 345 (1907); *Bonnett-Brown Corp. v. Cable*, 195 N. C. 491, 142 S. E. 772 (1928).

<sup>3</sup> *Chicago Life Ins. Co. v. Cherry*, 244 U. S. 25, 37 Sup. Ct. 492, 61 L. ed. 966 (1917). (The issue as to jurisdiction was raised and adjudicated after a full hearing in the former case. The matter was thought to stand differently from a tacit assumption or mere declaration in the record that the court had jurisdiction); *Sipe v. Copwell*, 59 Fed. 970 (C. C. A. 6th, 1894); *Thomas v. Virden*, 160 Fed. 696 (C. C. A. 2d, 1903); *Northwestern Casualty & Surety Co. v. Conaway*, 210 Iowa 126, 230 N. W. 548 (1930).

For cases dealing with a contested hearing as to whether or not the cor-

by a contested hearing, such adjudication is held to be *res judicata* in a sister state. Likewise, when lack of jurisdiction has been interposed as a defense to a suit on a foreign judgment, a finding by the court in favor of the jurisdiction of the first state will become *res judicata* in a third state.<sup>5</sup> Similarly the question is thereafter closed to attack in the first state.<sup>6</sup> In all of these situations a finding of jurisdiction will be held conclusive, regardless of how erroneous it may be.<sup>7</sup> The theory on which such result is reached nowhere appears in the opinions of the courts. It has been suggested that the solution lies in the concept of a limited and ultimate jurisdiction.<sup>8</sup> By a special or general appearance and a motion to dismiss or vacate, the limited jurisdiction of the court is invoked. But such action is in addition a submission of the issue of the court's own ultimate jurisdiction, that is, its power to give a valid judgment on the merits, or the ultimate jurisdiction of the court which rendered the foreign judgment. It is this determination which is *res judicata* in the courts of a sister state.

Some courts say that an affirmative showing of jurisdiction in the judgment record or in the officer's return is conclusive of the

poration was doing business in the state see: *Baldwin v. Iowa State Traveling Men's Ass'n.*, *infra* note 8; *Michigan v. Virginia Fire and Marine Ins. Co.*, 10 Fed. 696 (E. D. Va. 1882); *Supell-Vinner-Jordan v. Crite Mills*, 51 F. (2d) 1028 (C. C. A. 8th, 1931); *Sartain v. Avery Co.* 217 Ill. App. 286 (1920) (The question of jurisdiction held to be open since the court had taken no action on the plea to jurisdiction); *Hall v. Wilder Mfg. Co.*, 316 Mo. 812, 293 S. W. 760 (1927).

<sup>4</sup> *John Simmon Co. v. Sloan*, 104 N. J. L. 612, 142 Atl. 15 (1928); *Finkelstein v. Wm. H. Block & Co.*, 124 Misc. Rep. 610, 208 N. Y. Supp. 401 (1925). *Contra*: *Marshall v. Owen & Co.*, 171 Mich. 232, 137 N. W. 204 (1902) (*Held*, denial of a motion to vacate a judgment being merely interlocutory and not a final judgment it does not prevent a collateral attack in a sister state); *Howard v. Smith*, 3 Jones & S. 131 (N. Y. 1872).

<sup>5</sup> *Degge v Baxter*, 69 Colo. 122, 169 Pac. 580 (1917).

<sup>6</sup> *Bailey v. Wilson*, 52 Misc. Rep. 644, 103 N. Y. S. 1021 (1907); *Hanna v. Stedman*, 230 N. Y. 326, 130 N. E. 566 (1921); *Harju v. Anderson*, 133 Wash. 506, 234 Pac. 15 (1925).

<sup>7</sup> *Northwestern Casualty & Surety Co. v. Conaway*, *supra* note 3; *Littlefield v. Paynter*, 111 Kan. 201, 206 P. 114 (1922); *Tyson's Adm'x. v. Ill. Cent. R. Co.*, 151 Ky. 185, 151 S. W. 404 (1912). *Contra*: *Ray v. Pilot Fire Ins. Co.*, 128 S. C. 323, 121 S. E. 779 (1924).

<sup>8</sup> (1928) 41 HARV. L. REV. 1055; see *Baldwin v. Iowa State Traveling Men's Assoc.*, 283 U. S. 522, 51 Sup. Ct. 517, 75 L. ed. 1244 (1931) (The special appearance gives point to the fact that the respondent entered the Missouri court for the very purpose of litigating the question of jurisdiction); *Northwestern Casualty & Surety Co. v. Conaway*, *supra* note 3 (The court clearly had jurisdiction to determine whether or not defendant was immune from service of process. The filing of the motion to quash necessarily invoked jurisdiction of the court for that purpose).

issue<sup>9</sup> but the weight of authority favors the view that the record recital may be assailed by proof that no jurisdiction was obtained.<sup>10</sup> Indeed it would seem contradictory to say that a judgment may always be attacked for lack of jurisdiction but that its record cannot be impeached. Further, a finding of jurisdiction is binding in a sister state where it is the result of the construction of a statute by the highest tribunal of the first state.<sup>11</sup> In some states an appeal from an adverse ruling on a motion to attack jurisdiction submits the person of the defendant to the jurisdiction of the court, so as to render moot the validity of the order appealed from.<sup>12</sup> Other courts hold that an appeal on the merits submits appellant to the jurisdiction of the court and renders the judgment unimpeachable in a sister state for lack of jurisdiction.<sup>13</sup> In one case where a party unsuccessfully prosecuted two appeals in which the question of jurisdiction was not presented it was held that the defense of lack of jurisdiction was foreclosed on the ground that a failure to make a defense by a party who is in court is generally equivalent to making the defense and having it overruled.<sup>14</sup> Still another concluding factor is found where a defendant makes a special appearance to object to jurisdiction in a state which by statute makes such appearance a general appearance and submission to the jurisdiction of the court.<sup>15</sup>

The treatment to be given a finding of jurisdictional facts by the courts of a sister state presents another problem. Some courts distinguish between jurisdictional and quasi-jurisdictional facts, the former concerning the jurisdiction of the person and the subject matter and the latter dealing with facts which have to be alleged and

<sup>9</sup> *Rice v. Metropolitan Life Ins. Co.*, 152 Ark. 498, 238 S. W. 772 (1922); *Smolinsky v. Fed. Reserve Life Ins. Co.*, 126 Kan. 506, 268 Pac. 830 (1928).

<sup>10</sup> *Thompson v. Whitman*, *supra* note 2; *Steer v. Iowa State Traveling Men's Assoc.*, 199 Iowa 118, 201 N. W. 328 (1924); *Bonnett-Brown Corp. v. Cable*, *supra* note 2; *Price v. American Surety Co. of New York*, 59 S. W. (2d) 426 (Tex. Civ. App. 1933).

<sup>11</sup> *American Ry. Express Co. v. F. S. Royster Guano Co.*, 273 U. S. 274, 47 Sup. Ct. 355, 71 L. ed. 642 (1925); *Grubb v. Public Utilities Comm.*, 281 U. S. 470, 50 S. Ct. 374, 74 L. ed. 972 (1930); *Glos v. Sankey*, 148 Ill. 536, 36 N. E. 628 (1893).

<sup>12</sup> *Chinn v. Foster-Milburn Co.*, 195 Fed. 158 (W. D. N. Y. 1912); *Marshall v. Owen & Co.*, *supra* note 4. *Contra*: *Bank of Jasper v. First National Bank*, 258 U. S. 112, 42 Sup. Ct. 202, 66 L. ed. 490 (1922); *Rush v. Childers*, 209 Ky. 119, 272 S. W. 404 (1925); *John Simmons Co. v. Sloan*, *supra* note 4.

<sup>13</sup> *Bank of Jasper v. First National Bank*, *supra* note 12; *Roach v. Privett*, 90 Ala. 391, 7 So. 808 (1890); *Merrimac Mfg. Co. v. Bubb*, 119 Ark. 443, 178 S. W. 403 (1915). *Contra*: *Jones v. Jones*, 108 N. Y. 415, 15 N. E. 707 (1888).

<sup>14</sup> *Gila Bind Reservoir & Irrigation Co. v. Gila Water Co.*, 205 U. S. 279, 27 Sup. Ct. 495, 51 L. ed. 801 (1905).

<sup>15</sup> *Mo. K. & T. Ry. Co. v. Goodrich*, 213 Fed. 339 (C. C. A. 8th, 1914).

proven before the court can act. Such courts hold that the finding of a quasi-jurisdictional fact by a court cannot be collaterally attacked in another state.<sup>16</sup> Other courts designate all facts which must be alleged and proven before proceeding to judgment as jurisdictional facts. Of the courts taking such view, some say that the finding is invulnerable to collateral attack<sup>17</sup> while others rule that a court cannot by a finding of jurisdiction in its favor preclude an inquiry.<sup>18</sup> Practically all courts agree, that a judgment may be attacked in another state where a court is fraudulently induced to assume jurisdiction,<sup>19</sup> or where the judgment was obtained by fraudulently procuring a party's appearance in the foreign state.<sup>20</sup> There is, however, some intimation that even under such circumstances a finding of jurisdictional fact will be considered final in a sister state since the existence of fraud would necessarily be investigated and determined by the court making the finding.<sup>21</sup>

In cases concerning divorce the question of the conclusiveness of a finding of jurisdictional fact is complicated by the divergent views as to what constitutes jurisdiction for divorce. Many states hold

<sup>16</sup> *Noble v. Union River Logging Rd. Co.*, 147 U. S. 165, 173, 13 Sup. Ct. 271, 37 L. ed. 123 (1893); *Stuart v. Dickinson*, 290 Mo. 576, 235 S. W. 446 (1921) (domicile in divorce); *Roszell Bros. v. Continental Coal Corp.*, 235 Fed. 343 (W. D. Ky. 1916) (principal place of business in bankruptcy suit).

<sup>17</sup> *Rice v. Metropolitan Life Ins. Co.*, *supra* note 9 (action for appointment of administrator); *Torrey v. Bruner*, 60 Fla. 365, 53 So. 337 (1910) (domicile in the probate of a will); *Barnes v. Brownslee*, 97 Kan. 517, 155 Pac. 962 (1916) (probate of a will, held, as the jurisdiction of the court depended on due service of a citation, the fact that jurisdiction was exercised implies a finding that legal notice was given); *City of St. Louis v. United Ry. Co. of St. Louis*, 263 Mo. 387, 174 S. W. 78 (1914) (The United States Supreme Court necessarily decided that it had jurisdiction before it took the case and therefore the issue is *res judicata*); *Citizens' Bank & Trust Co. v. Moore*, 215 Mo. App. 212, 263 S. W. 530 (1924) (In the appointment of a guardian of a minor, the finding of residence of the minor is conclusive); *James Mills Orchards Corp. v. Frank*, 137 Misc. Rep. 407, 244 N. Y. S. 473 (1930) (Where the length of time allowed for answering was increased *pro rata* with the distance the party lived from the court house, held, since the court probably passed on the time and distance and found facts giving it jurisdiction the judgment is not subject to collateral attack on the ground that the judgment was entered before the time for answer expired).

<sup>18</sup> *Sullivan v. Kenney*, 148 Iowa 361, 126 N. W. 349 (1910); *Morressey v. Rodgers*, 137 Kan. 626, 21 P. (2d) 359 (1933); *Tulle v. Flint*, 186 N. E. 222 (Mass. 1933); *CONFLICT OF LAWS RESTATEMENT* (Am. L. Inst. 1926) §490.

<sup>19</sup> *Simmons v. Simmons*, 19 F. (2d) 690 (App. D. C. 1927); *Gordan v. Hillman*, 47 Cal. App. 571, 191 Pac. 621 (1920); *Wagoner v. Wagoner*, 287 Mo. 567, 229 S. W. 1064 (1921); *State v. Herron*, 175 N. C. 754, 94 S. E. 698 (1917).

<sup>20</sup> *Dunlap & Co. v. Cody*, 31 Iowa 260, 7 Am. Rep. 129 (1871); *Greenbaum v. Greenbaum*, 147 Misc. Rep. 411, 263 N. Y. Supp. 774 (1933).

<sup>21</sup> *Noble v. Union River Logging Rd. Co.*, *supra* note 16; *Barnes v. Brownslee*, *supra* note 17.

that if one of the parties to the action is domiciled therein, that is sufficient to confer jurisdiction to enter such decree. Of these some hold that the adjudication of domicile is always open to attack.<sup>22</sup> Others say that since the existence of a bona fide domicile had to be alleged and proved before the court could entertain jurisdiction, its existence was necessarily determined and is therefore binding.<sup>23</sup> Still others hold that adjudication as to domicile will be treated as conclusive on the ground of comity.<sup>24</sup> Of course when the question of jurisdiction has been raised and determined on a contested hearing, it is *res judicata*.<sup>25</sup> Another view is that the offending party consents to have his interest in the marriage status determined in the state where the non-offending spouse is domiciled. Such courts permit an inquiry into the justification for the acquiring of the separate domicile by the non-offending party, when a foreign decree is offered.<sup>26</sup>

The result reached in the principal case on the point of jurisdiction seems to be desirable. There is no reason why a person who has had due process should be permitted to retry the issue of jurisdiction. For the purpose of avoiding litigation and the confusion which is bound to follow where the original adjudication was one either in personam or affecting status, it would seem that an adjudication of jurisdiction on a contested hearing or the finding of a jurisdictional fact, should possess the quality of finality.

CECILE L. PILTZ.

### Conditional Sales—Vendee's Right to Possession Before Default.

A note given for a mule contained the stipulation that the mule was to remain the property of the seller, until the note was paid in full. The court held this to be a chattel mortgage and added that although ordinarily the mortgagee was entitled to possession, here

<sup>22</sup> *Andrews v. Andrews*, 188 U. S. 14, 23 Sup. Ct. 237, 47 L. ed. 366 (1903); *Dunham v. Dunham*, 162 Ill. 489, 44 N. E. 841 (1896).

<sup>23</sup> *In re James' Estate*, 99 Cal. 374, 33 Pac. 1122 (1893); *Lieber v. Lieber*, 239 Mo. 1, 143 S. W. 458 (1911); *Fairchild v. Fairchild*, 53 N. J. Eq. 678, 34 Atl. 10 (1896).

<sup>24</sup> *Mathews v. Mathews*, 139 Ga. 123, 76 S. E. 855 (1912); *Perkins v. Perkins*, 225 Mass. 82, 113 N. E. 841 (1916); *Howey v. Howey*, 240 S. W. 450 (Mo. 1922).

<sup>25</sup> *Blakeslee v. Blakeslee*, 213 Ill. App. 168 (1919); *Crane v. Deacon*, 253 S. W. 1068 (Mo. 1923).

<sup>26</sup> *Delanoy v. Delanoy*, 216 Cal. 27, 13 P. (2d) 719 (1932); *Thompson v. Thompson*, 89 N. J. Eq. 70, 103 Atl. 856 (1918).

there was an implied agreement that the right to possession was to be in the mortgagor.<sup>1</sup>

The treatment of this conditional sale as a chattel mortgage is in accordance with the North Carolina Court's repeated refusal to recognize any distinction.<sup>2</sup> But the court having reached such result became dissatisfied with the legal effect, which is to give the possession to the conditional vendor, whom the court calls the mortgagee.<sup>3</sup> An implied agreement, that the mortgagor was to have possession, found from facts outside the note, furnished a convenient solution.

Such implications may of course be drawn from the wording of the contract.<sup>4</sup> But if no provision for possession can be found in the mortgage, the legal implication that the mortgagee is to have possession becomes as much a part of the contract as if it were written.<sup>5</sup> And such legal effect may not be varied by implications from facts outside the instrument.<sup>6</sup> A decision of its own to this effect was overlooked by the North Carolina Court.<sup>7</sup>

An analogous situation is found where a parol agreement, that the mortgagor is to retain possession, prior to or contemporaneous with the written contract, is introduced to vary the legal consequences of the mortgage. According to the better opinion such evidence is inadmissible<sup>8</sup> except where fraud or mistake can be proved.<sup>9</sup> And in a

<sup>1</sup> *Grier v. Weldon*, 205 N. C. 575, 172 S. E. 200 (1934).

<sup>2</sup> (1931) 11 N. C. L. Rev. 321.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Hardeson v. Plummer*, 152 Ala. 619, 44 So. 591 (1907); *Phillips v. Hart-selle*, 17 Ala. App. 79, 81 So. 857 (1919); *Clay v. Wren*, 34 Me. 187 (1852); *Hall v. Sampson*, 35 N. Y. 274, 91 Am. Dec. 56 (1866).

<sup>5</sup> *East Birmingham Land Co. v. Dennis*, 85 Ala. 565, 5 So. 317 (1889); *City of Covington v. Kanawha Coal & Coke Co.*, 121 Ky. 681, 89 S. W. 1126 (1906); *Cannon Coal & Mercantile Co. v. Universal Metal Co.*, 26 Okla. 615, 110 Pac. 720 (1910); *Bryan v. Duff*, 12 Wash. 233, 40 Pac. 963 (1895).

<sup>6</sup> *Wakeman v. Banks*, 2 Conn. 445 (1818); *Jamieson v. Bruce*, 6 Gill & J. 72, 26 Am. Dec. 557 (Md. 1834); *Mason v. Sault*, 93 Vt. 412, 108 Atl. 267 (1919); see *East Birmingham Land Co. v. Dennis*, *supra* note 5. *Contra*: *Jackson v. Hopkins*, 18 Johns 487 (N. Y. 1820); *Hill v. Winnsboro Granite Corp.*, 112 S. C. 243, 99 S. E. 836 (1919) (The court called a conditional sale a chattel mortgage and then found that there was an implied agreement that the mortgagor was to have possession, from the fact that the mortgagor was left in possession.)

<sup>7</sup> *Hinson v. Smith*, 118 N. C. 503, 24 S. E. 541 (1896) (*Held*, the fact that the mortgagor was given possession did not amount to such a stipulation that he should have such possession as would defeat the mortgagee's right to take possession at any time); see *Himphill v. Ross*, 66 N. C. 477 (1872).

<sup>8</sup> *Davis v. Lassiter*, 20 Ala. 561 (1852); *Case v. Winship*, 4 Blackf. 425, 30 Am. Dec. 664 (Ind. 1837); *Robison v. Royce*, 631 Kans. 886, 66 Pac. 646 (1901); see *North River Ins. Co. of N. Y. v. Waddell*, 112 So. 336 (Ala. 1927) (Parol evidence that title was to remain in the vendor not admissible); *Thomson v. Langston*, 45 Cal. App. 415, 187 Pac. 970 (1920) (Oral understanding

real estate mortgage, an oral agreement concerning the right to possession, is held to be within the statute of frauds.<sup>10</sup> However, such result can be obviated by partial performance; that is by putting the mortgagor into possession.<sup>11</sup> A result contrary to the foregoing decisions is reached where the oral stipulation for possession is subsequent to the mortgage.<sup>12</sup>

The principal case is an excellent example of confusion confounded. Had the court held the instrument to be a conditional sale, which it actually was, and followed the usual rule in conditional sales, the result it groped for would have followed as a matter of course. But because it treats conditional sales as chattel mortgages, in order to give the vendee the right to possession, it was necessary to find an implied agreement. Since no such agreement appears in the contract, it must have been implied from extrinsic facts, but the court gives us no clue as to what they were. True the mortgagor actually had possession and an implied agreement has been drawn from such a fact, but the North Carolina Court has previously refused such inference. And if the fact outside the mortgage from which the court drew its implication was the usual understanding of the parties to a conditional sale, that the conditional vendee is to have possession, what becomes of the court's contention that there is no distinction between a conditional sale and a chattel mortgage?

CECILE L. PILTZ.

### Contempt—Administrative Acts of Judges.

A United States District Judge, who was under the statutory duty of collecting certain fees and accounting for their expenditure, sent, in this connection, a letter of instructions to the District Marshal. Because of disrespectful language contained in his reply the Marshal was adjudged guilty of contempt by the District Court. Reversed,

of the parties that mortgage was not to be enforced, constitutes no defense to a mortgage foreclosure); *Lion Brewing Co. v. Fricke*, 204 App. Div. 470, 198 N. Y. Supp. 491 (1923). *Contra*: *Butts v. Privett*, 36 Kans. 711, 14 Pac. 247 (1887); *Pierce v. Stevens*, 30 Me. 184 (1849) (Such agreement does not contradict the mortgage); *Moore v. Hurtt*, 124 N. C. 27, 32 S. E. 317 (1899).

<sup>10</sup> *Berthold v. Fox*, 13 Minn. 50, 97 Am. Dec. 243 (1868); see *Sargent v. Cooley*, 12 N. D. 1, 94 N. W. 576 (1902).

<sup>11</sup> *Norton v. Webb*, 35 Me. 218 (1853); see *Hawkins v. Stoddard*, 132 Ga. 265, 63 S. E. 852 (1909).

<sup>12</sup> *Parker v. Hubble*, 75 Ind. 580 (1881).

<sup>13</sup> *Edwards v. Wray*, 12 Fed. 42 (C. C. Ind. 1882); *Rich v. Jackson*, 4 Bro. C. C. 514, 519, 29 Eng. Rep. 1017, 1020 (1794).



held, criticism of a judge's ministerial act does not constitute contempt of court.<sup>1</sup>

This case raises the question of the power of judges acting in administrative or ministerial capacities, to punish for contempt. In most instances it has been held that there can be no contempt when the judges are not performing strictly judicial functions and the following acts have been held not to be contempt of court: (1) criticism by an expert accountant of the bookkeeping of a county judge who was required by statute to keep account of the collection and expenditure of certain fees and emoluments;<sup>2</sup> (2) addressing an insulting demand to a justice of the peace for the payment of a judgment collected by him for the demanding party;<sup>3</sup> (3) addressing offensive language to a justice of the peace concerning the allowance of a poor rate;<sup>4</sup> (4) disturbing the acts of a parish judge while he officiated as sheriff;<sup>5</sup> (5) making a loud and angry demand upon a justice of the peace while he was writing an official letter;<sup>6</sup> (6) calling a magistrate a liar with reference to his absence from an election when the other magistrates elected a person other than the offender to a certain office.<sup>7</sup>

Other courts, however, have ruled that the power to punish for contempt existed where: (1) twelve law students paid \$2,000 to have records in the office of the Clerk of the Supreme Court changed so as to give them passing grades on a bar examination;<sup>8</sup> (2) a ward of a court was removed from the custody of the person with whom the ward had been residing under the authority of the court;<sup>9</sup> (3) a judge was criticized for his refusal to appoint a co-receiver;<sup>10</sup> (4) an executor refused to file his report with the clerk of the court, serving ex-officio as probate judge.<sup>11</sup>

It is noteworthy that of the cases which restrict the contempt proceeding to protection of judicial functions<sup>12</sup> all but one were decided before 1869 and that three of those which extend its appli-

<sup>1</sup> *Statter v. United States*, 66 F. (2d) 819 (C. C. A. 9th, 1933).

<sup>2</sup> *Hamma v. People*, 42 Colo. 401, 94 Pac. 326 (1908).

<sup>3</sup> *Fitler v. Probasco*, 2 Browne 137 (Pa. 1810).

<sup>4</sup> *Ibid.*

<sup>5</sup> *Detournion v. Dormenon*, 1 Mart. 137 (La. 1810).

<sup>6</sup> *Winship v. State*, 51 Ill. 296 (1869).

<sup>7</sup> *Ex parte Chapman*, 4 Ad. & El. 773, 111 Eng. Rep. 974 (1836).

<sup>8</sup> *State v. Albin*, 118 Ohio St. 527, 161 N. E. 792 (1928).

<sup>9</sup> *Wellesley v. The Duke of Beaufort*, 2 Russ. & M. 639, 39 Eng. Rep. 538 (1831).

<sup>10</sup> *Ex parte Craig*, 282 Fed. 138 (C. C. A. 2d, 1922).

<sup>11</sup> *In re Hege*, 205 N. C. 625 (1934).

<sup>12</sup> See *Grandy v. State*, 13 Neb. 445, 449, 14 N. W. 143, 145 (1882).

cation have arisen since 1916. This might be said to indicate a tendency to make the contempt weapon available to judges engaged in administrative functions, but on closer inspection it appears that in two of the cases of the latter class cited above the administrative action of the judge was in furtherance of pending litigation, while in the other two cases the judge was involved in duties traditionally thought of as within the judicial power. There is thus little reason to believe that any one of these courts would have reached an opposite result on the facts presented in the principal case.

Because of the summary character of the proceeding in contempt cases, the limited appellate review permitted, the absence of jury trial, and because a judge may be both prosecutor and judge, many might insist that the power to punish for contempt of court should not be extended so as to be available to judges performing non-judicial functions. It should be remembered, however, that judges have been chosen to perform these administrative duties because of their places of dignity, respect and authority in the community. The role which is being played by judges and courts in our complex society is rapidly being extended to include an enormous number of administrative duties distinct from judicial proceedings;<sup>13</sup> some of these are: collection and disbursement of fees and fines; appointment and removal of officers; supervision of elections; and granting licenses. If disrespectful attacks may be made with impunity upon judges in these non-judicial capacities, an adverse reaction upon their judicial office is inevitable.<sup>14</sup> Is it not desirable to extend the power of judges to punish for contempt of court to the same degree that the range of their duties has been increased?

JOHN R. JENKINS, JR.

### Contempt—Violation of Void Order.

Within ten days after a foreclosure sale the defendant increased the bid and at a resale purchased the property. He failed to pay the purchase price and was attached for contempt of court. He was subsequently exonerated of the contempt but was ordered to pay into

<sup>13</sup> DODD, *STATE GOVERNMENT* (2d. ed. 1928) 303-305; WILLOUGHBY, *PRINCIPLES OF JUDICIAL ADMINISTRATION* (1922) 220.

<sup>14</sup> *In re Cheeseman*, 49 N. J. L. 137, 6 Atl. 513 (1886).

Blackstone expresses this realization when he says that contempts may be committed "by anything, in short, that demonstrates a gross want of that regard and respect which, when once courts are deprived of, their authority is entirely lost among the people." 4 *COMMENTARIES ON THE LAWS OF ENGLAND* (Christian ed.) 285.

court an amount stated to have been received by him as rents. He denied having received this money. On an appeal to the Superior Court the defendant was again ordered to pay these rents, which the record showed had been collected by his wife, the owner of the foreclosed property. On appeal *held*, since the order was void failure to comply therewith did not constitute contempt.<sup>1</sup>

Disobedience of a judicial order never constitutes contempt if the court order is void, because of want of jurisdiction of parties<sup>2</sup> or subject matter,<sup>3</sup> or because made under an unconstitutional statute,<sup>4</sup> or because there was denial of due process of law,<sup>5</sup> or because contrary to public policy.<sup>6</sup> If, however, the order be merely inadvertent, erroneous or voidable violation is regarded by most courts as constituting contempt.<sup>7</sup> Some courts relax the rigidity of the rule by declaring the violated order void, when it is in fact only irregular.<sup>8</sup> Others, however, simply excuse violation of some erroneous judgments without extending this immunity to all.<sup>9</sup> Most courts hold that appeal is the proper relief, and not violation with a later defense based on the impropriety of the order<sup>10</sup> on the ground that the order is bind-

<sup>1</sup> *In re Longley*, 205 N. C. 488, 171 S. E. 788 (1933).

<sup>2</sup> *Pennell v. Superior Court*, 87 Cal. App. 375, 262 Pac. 48 (1927); *Ex parte Laughlin*, 213 S. W. 154 (Mo. App. 1919).

<sup>3</sup> *Ex parte Caylor*, 22 Ala. App. 592, 118 So. 145 (1928); *State v. Gordon*, 105 Wash. 326, 177 Pac. 773 (1919).

<sup>4</sup> *State v. Reid*, 174 Wis. 536, 183 N. W. 992 (1921).

<sup>5</sup> *Ex parte Irwin*, 320 Mo. 20, 6 S. W. (2d) 597 (1928) (no hearing); *Sinquefield v. Valentine*, 160 Miss. 61, 133 So. 210 (1931) (no notice).

<sup>6</sup> *People v. Burke*, 72 Colo. 486, 212 Pac. 837 (1923) (A statute provided that a named manner of electing corporation directors was the public policy of the state. The court order in question provided for election in a different manner. On appeal, *held*, the order could be violated with impunity since it was void as being contrary to public policy.)

<sup>7</sup> *People v. Morley*, 72 Colo. 421, 211 Pac. 643 (1922); *State v. Erickson*, 66 Wash. 639, 120 Pac. 104 (1912).

<sup>8</sup> *Armour Grain Co. v. Pittsburg Ry. Co.*, 320 Ill. 156, 150 N. E. 650 (1926) (A statute required oral answers to interrogatories filed in certain cases. The lower court held the statute applied to the defendant corporation and fined it for contempt in refusing to answer. On appeal, the court ruled the statute did not apply to a corporation as such and reversed the contempt on the ground that the order was a "nullity".)

<sup>9</sup> *McCann v. Jordan*, 24 P.(2d) 457 (Cal. 1933); *In re Berman*, 173 App. Div. 689, 160 N. Y. Supp. 79, 81 (1916) (An order was made directing the payment of funds by the defendant-assignee to a receiver. Upon refusal to comply with the order the defendant was cited for contempt and found guilty. The appellate court said: "Since the order directing the assignee to turn over the assets to the receiver was unauthorized and contrary to the statute, the assignee was right in resisting its enforcement, and the order punishing him as for contempt must fall with the order which he refused to comply with"); *Di Raffaele v. Gerkhardt*, 217 App. Div. 187, 216 N. Y. Supp. 255 (1926).

<sup>10</sup> See *Brougham v. Oceanic Steam Navigation Co.*, 205 Fed. 857, 860 (C. C. A. 2d, 1913) ("But if a court have jurisdiction to make an order it must

ing until vacated or reversed. But in passing judgment, the error in the order is often considered in mitigation of punishment.

The basis of the decision of the principal case is that the order was void. Was it? The court had jurisdiction of the parties and the subject matter and the order was based on the clerk's mistaken notion that the defendant could be made to pay over money collected by his wife. This made the order merely reversible for error of law. It was not a nullity.

Detailed regulation of contempt is provided for by statute in North Carolina.<sup>11</sup> For the consideration of the principal case several sections were available: Section 978 (4) of the code, although relied on by the court, is a division of the section framed to cover direct contempts wherein the initiative is assumed by the solicitor; Sections 985 (2) and (7) and 727 deal with constructive contempts wherein the plaintiff in an original suit invokes contempt proceedings in an effort to enforce his judgment. But since section 727 expressly excuses inability to perform it is submitted that the principal case should have so handled.<sup>12</sup>

WILSON BARBER.

### Criminal Law—Repeal of a Statute as Affecting Prosecutions Thereunder.

The United States Supreme Court recently held that all prosecutions for violation of the prohibition laws, including proceedings on

be obeyed, no matter how clearly it may be erroneous. Errors must be corrected by appeal and not by disobedience. A person proceeded against for violation of an injunction can never set up as a defense that the court erred in issuing it. He must go further and make out that in law there was no injunction because the court had no right to adjudicate. These principles have been laid down over and over again . . ."; *O'Brien v. People*, 216 Ill. 354, 75 N. E. 108, 113 (1905) ("It is a well known rule of law that, in proceedings for contempt in failing to obey an order of court, the respondent may question the order which he is charged with refusing to obey only insofar as he can show it to be absolutely void, and cannot be heard to say that it was merely erroneous, however flagrant it may appear to be. The judgments of courts cannot be attacked collaterally for mere irregularities.").

<sup>11</sup> N. C. CODE ANN. (Michie, 1931) §§978-986. §663 provides that disobedience to a judgment requiring any act other than payment of money or delivery of real or personal property may be punished as for contempt.

<sup>12</sup> N. C. CODE ANN. (Michie, 1931) §727 provides as follows: "Any person, party or witness, who disobeys an order of the court, judge or referee, duly served, may be punished by the judge as for contempt. In all cases of commitment under this article the person committed may, in case of inability to perform the act required, or to endure the imprisonment may be discharged from imprisonment by the judge committing him, or the judge having jurisdiction, on such terms as are just."

appeal, continued or begun after ratification of the Twenty-first Amendment, must be dismissed.<sup>1</sup> The Court, quoting Chief Justice Marshall, says that "it has long been settled, on general principles, that after the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, unless some specific provision be made for that purpose by statute."<sup>2</sup>

The rule relied on in the present case was enunciated as early as Hale's *Pleas of the Crown*,<sup>3</sup> where, in commenting on a statute, the author says, "It is . . . observable . . . that when an offense is made treason or felony by an act of parliament, and then those acts (*sic*) are repealed, the offenses committed before such repeal, and the proceedings thereupon are discharged by such repeal . . . unless a special clause in the act of repeal be made enabling such proceeding . . .". Practically the same language is found in the subsequent work, Hawkins' *Pleas of the Crown*.<sup>4</sup> Later, in *Miller's Case*,<sup>5</sup> a dictum of the court broadens the rule to cover any offense. The language of Chief Justice Marshall in *Yeaton v. U. S.*,<sup>6</sup> quoted in the instant decision, is the authority most frequently cited in this country. This decision was followed by a great many cases giving effect to "the established doctrine." Research revealed only one reported decision to the contrary—an early case in a lower court of Connecticut.<sup>7</sup>

What might be called the "common law rule" has been relied upon to free the defendant where, at the time of the repeal of the statute, he had not been indicted;<sup>8</sup> where he had been apprehended indicted, but not yet put on trial;<sup>9</sup> where he had been convicted and had not yet appealed;<sup>10</sup> where, after conviction, his appeal had been docketed in the supreme court;<sup>11</sup> and where his case had been argued in the supreme court, but the judgment had not yet been affirmed.<sup>12</sup> The rule has not been applied where repeal comes after the highest

<sup>1</sup> U. S. v. Chambers, 54 Sup. Ct. 434 (1934).

<sup>2</sup> Yeaton v. U. S., 5 Cranch 281, 283, 3 L. ed. 101 (1809).

<sup>3</sup> 1 HALE'S PLEAS OF THE CROWN (Wilson ed. 1778) 291.

<sup>4</sup> 1 HAWKINS' PLEAS OF THE CROWN (6th ed. 1788) c. 40, §6.

<sup>5</sup> 1 Wm. Bl. 451, 96 Eng. Repr. 259 (1764).

<sup>6</sup> *Supra* note 2.

<sup>7</sup> Rex v. Hanson, 1 Root 59 (Conn. 1773) (decision limited to situations where the crime was an offense at common law).

<sup>8</sup> Commonwealth v. Marshall, 28 Mass. 358 (1831).

<sup>9</sup> State v. Cress, 49 N. C. 421 (1857).

<sup>10</sup> State v. Nutt, 61 N. C. 20 (1866).

<sup>11</sup> U. S. v. Tynen, 78 U. S. 88, 20 L. ed. 153 (1870).

<sup>12</sup> Keller v. State, 12 Md. 322 (1858).

court has affirmed the conviction, the matter then being *res judicata*, and beyond the judicial power.<sup>13</sup>

What might be called the "statutory rule" was also enunciated as far back as Hale's *Pleas of the Crown*. In the passage from this author quoted above it will be noticed that when there is a "saving clause", the defendant is not discharged. Evidently, even at that time, judges and legislators were not in full accord on the question of whether or not repeal of a statute should end prosecutions for its violation.

The mildest form of legislative dissent from the rule applied by the courts would seem to be exemplified by an enactment providing that amendment of a statute shall not constitute repeal.<sup>14</sup> The next form is shown by the inclusion in a repealing act of a clause allowing punishment of offenses previously committed against the particular statute repealed.<sup>15</sup> Then comes the form of statute which has now been adopted in many jurisdictions—a general saving clause applicable to the repeal of any statute.<sup>16</sup> Finally, in a few states, there are constitutional provisions providing that repeal of a statute shall not be a bar to prosecutions thereunder for offenses committed before the repeal.<sup>17</sup>

In applying the common law rule, courts seldom state any

<sup>13</sup> State v. Addington, 2 Baily 516 (S. C. 1831) (defendant convicted and sentenced to death; was pardoned upon condition he leave the state. The statute under which he had been convicted was then repealed. Later, he was found within the state. Held, execution must proceed, the matter is *res judicata* and beyond the judicial power); Ex parte Andres, 237 S. W. 238 (Tex. Crim. App. 1922) (defendant convicted and conviction affirmed. Statute then repealed, and defendant makes application for writ of *habeas corpus*. Denied); cf. Aaron v. State, 40 Ala. 307 (1867) (original plans for defendant's execution having gone astray, he was again brought before the court. Upon performing its statutory duty to "inquire into the case," the court found that the statute under which the defendant was convicted had now been repealed, and that it could not again pass sentence. A saving clause in the repealing act was denied effect on ground that, final judgment having been passed before repeal, this was not a "pending prosecution" within the clause. The court thus seems to blow both hot and cold).

A unique application of the rule is found in Utah, where, if judgment has been affirmed by an appellate court, even though an intermediate court, before the repeal, requirements of the rule are held to have been met. On subsequent appeal to the Supreme Court, the judgment will be allowed to stand. *Salina City v. Lewis*, 52 Utah 7, 172 Pac. 286 (1918).

<sup>14</sup> N. C. CODE ANN. (Michie 1931) § 3950.

<sup>15</sup> *People v. Sloan*, 2 Utah 326 (1878).

<sup>16</sup> *People v. Pratt*, 67 Cal. App. 606, 228 Pac. 47 (1924); *Lower v. State*, 109 Neb. 590, 191 N. W. 674 (1923). Texas has a statute adopting the common law rule, *Sheppard v. State*, 1 Tex. App. 522 (1877).

<sup>17</sup> FLA. CONST. (1885) ART. 3, §32; N. M. CONST. (1911) ART. 4, §33; OKLA. CONST. (1907) ART. 5, §54.

theory upon which the rule is based. At times they say the repealing statute "acts as a bar to the prosecution", or "takes away the authority to punish", or "operates as a legislative pardon". These would seem to be merely restatements of the result reached. Judge Washington offers a more satisfactory explanation: "The end of punishment is not only to correct the offender, but to deter others from committing like offenses . . . if the legislature has ceased to consider the act . . . an offense, these purposes are no longer to be answered, and punishment is then unnecessary."<sup>18</sup> Behind the statutory rule there is probably the feeling that at least one purpose of punishment is to instill respect for law as such, and that by punishing this defendant for violation of the repealed statute, violations of other statutes will be discouraged.<sup>19</sup>

The Court in the principal case was evidently not bound by the provisions of the United States statute which embodies a general savings clause,<sup>20</sup> the constitutional provisions involved being on a plane above the enactments of Congress. The net effect of the adoption of the Twenty-first Amendment, however, is the same as if Congress had repealed the prohibition laws—in which event the statutory saving clause would have applied. It is conceivable that the Court might have held that, the present situation being within the spirit of the saving statute, past offenses must be punished.<sup>21</sup>

HUGH L. LOBDELL.

#### Death—Limitation of Actions—Effect of Concealment of Cause of Action Under Wrongful Death Statute.

The plaintiff's intestate was killed by the alleged wrongful act of the defendant power company in 1926. In 1933 an action was brought by the plaintiff as administrator against the power company, the acting coroner, and the undertaker, alleging a conspiracy on their part to conceal the death from the decedent's relatives, in pursuance of

<sup>18</sup> Anonymous, Fed. Cas. No. 475 (1804).

<sup>19</sup> It would be interesting to know to what extent the pardoning power has been used where the statute under which sentence was being served had been repealed; to know whether the common law rule or the statutory rule has been carried out.

<sup>20</sup> 16 STAT. 432 (1871), 1 U. S. C. A. §29 (1927) ("The repeal of any statute shall not have the effect to release . . . any penalty . . . incurred under such statute, unless the repealing Act shall so expressly provide. . . .")

<sup>21</sup> Cf. *Funk v. U. S.*, 54 Sup. Ct. 212 (1933) (the court overthrows previous rule on competency of witness, looking largely to state statutes as indicative of present day policy).

which conspiracy the death certificate was not registered, and the relatives were not informed of the death until within a year before the commencement of this action. *Held*, a demurrer to the complaint was properly sustained.<sup>1</sup>

The result of the so-called "Death Acts"<sup>2</sup> was the creation of a new statutory right of action,<sup>3</sup> which must be brought in strict compliance with the statute which grants it. The time limit is not a statute of limitations,<sup>4</sup> and circumstances which might toll such a statute will not permit an action for wrongful death after the expiration of the prescribed period.<sup>5</sup> The limitation is a condition annexed to the cause of action, not a mere defense,<sup>6</sup> and the plaintiff must show compliance with this provision in order to make out a *prima facie* case.<sup>7</sup>

<sup>1</sup> *Curlee v. Duke Power Co.*, 205 N. C. 644, 172 S. E. 329 (1934).

<sup>2</sup> The forerunner of such legislation in this country was the English statute [9 and 10 Vict., c. 93 (1846)] popularly known as "Lord Campbell's Act". Similar statutes, though differing somewhat in their provisions, have now been adopted in most of the states in this country. For example: N. C. CODE ANN. (Michie, 1931) §160.

<sup>3</sup> *Baker v. Bolton*, 1 Camp. 493, 170 Eng. Rep. 1033 (1808) ("In a civil Court, the death of a human being could not be complained of as an injury; and in this case the damages, as to the plaintiff's wife, must stop with the period of her existence."). But see *Sullivan v. Union Pacific R. Co.*, Fed. Cas. No. 13, 599 (C. C., Neb., 1874); Note (1900) 70 Am. St. Rep. 687.

<sup>4</sup> It has been held, however, that the limitation is also a time limit to procedure, and, hence, a non-resident suing for a death occurring in Florida must bring his action within the one-year period prescribed by the North Carolina statute, and is not entitled to the two years allowed by the Florida statute. *Tieffenburn v. Flannery*, 198 N. C. 397, 151 S. E. 857 (1930) commented upon (1930) 8 N. C. L. REV. 452.

<sup>5</sup> *Kostoras v. Hines*, 80 N. H. 500, 119 Atl. 332 (1922); cf. *Texas & P. R. Co. v. Gay*, 88 Tex. 111, 30 S. W. 543 (1895). There is a split of authority on the question of whether concealment of a cause of action, as in the principal case, will have the effect of tolling a statute of limitations. That it will have such effect: *Bailey v. Glover*, 88 U. S. 346, 22 L. ed. 636 (1874) (bill to set aside fraudulent conveyances); *American Tobacco Co. v. People's Tobacco Co.*, 204 Fed. 58 (C. C. A. 5th, 1913) (an unlawful agreement to injure plaintiff's business); *Lightner Mining Co. v. Lane*, 161 Cal. 689, 120 Pac. 771 (1912) (trespass to land); *Lieberman v. First National Bank of Wilmington*, 18 Del. 416, 45 Atl. 901 (1900) (action on fidelity bond). That it will not: *Murray v. Chicago & N. W. R. Co.*, 92 Fed. 868 (C. C. A. 8th, 1899) (for freight rate discrimination); *Hamilton v. Shepperd*, 7 N. C. 115 (1819) (fraud in the sale of a land warrant); *Baines v. Williams*, 25 N. C. 481 (1843) (conversion); *Blount v. Parker*, 78 N. C. 128 (1878); cf. *Engel v. Fischer*, 102 N. Y. 400, 7 N. E. 300 (1886) (defendant concealed his person rather than the cause of action); *McBride v. Burlington, C. R. & N. R. Co.*, 97 Ia. 91, 66 N. W. 73 (1896).

<sup>6</sup> *Contra*: *Wall v. Chesapeake & Ohio R. Co.*, 200 Ill. 66, 65 N. E. 632 (1902); *Chiles v. Drake*, 2 Metc. 146, 74 Am. Dec. 406 (Ky. 1859).

<sup>7</sup> *The Harrisburg v. Rickards*, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. ed. 358 (1886); *Johnson v. Phoenix Bridge Co.*, 197 N. Y. 316, 90 N. E. 953 (1910); *Neely v. Minus*, 196 N. C. 345, 145 S. E. 771 (1928); Note (1920) 8 A. L. R. 145.



However, the authorities are not in accord as to when the cause of action accrues. It has been held that, since the right of action is dependent upon the deceased's ability to sue, had he lived, no action can be maintained for his death if the statute of limitations on his own personal-injury action has run before his death.<sup>8</sup> Other decisions, under statutes providing that the action is to be conducted in his name, have declared that the limitation will not run until the appointment of the personal representative, since until that time there was no one who might maintain the action.<sup>9</sup> But the majority view is that the death is the cause of action,<sup>10</sup> and the limitation must be computed from that time.<sup>11</sup> This would seem the more reasonable construction. It occasions no hardship, for even in the states where the action is prosecuted by the personal representatives the beneficiaries are in a position to compel his appointment.

<sup>8</sup> *Flynn v. N. Y., N. H. & H. R. Co.*, 283 U. S. 53, 51 Sup. Ct. 357, 75 L. ed. 837 (1930) (action under Federal Employer's Liability Act); *Howard v. Bell Telephone Co. of Pa.*, 306 Pa. 518, 160 Atl. 613 (1932). *Contra*: *Dameron v. Southern R. Co.*, 44 Ga. App. 432, 161 S. E. 641 (1931). This question is exhaustively treated in Note (1932) 80 U. of PA. L. REV. 993.

<sup>9</sup> *Crapo v. City of Syracuse*, 183 N. Y. 395, 76 N. E. 465 (1906); *cf. Meekin v. Brooklyn Heights R. Co.*, 164 N. Y. 145, 58 N. E. 50 (1900).

<sup>10</sup> This statement, though found in many of the decisions, may be subject to some qualifications. It has been held that a release given, or judgment obtained, by the deceased during his lifetime will preclude a recovery for wrongful death. *Strode v. St. Louis Transit Co.*, 197 Mo. 616, 95 S. W. 851 (1906) (release); *Edwards v. Interstate Chemical Co.*, 170 N. C. 551, 87 S. E. 635 (1915); Note (1927) 27 COL. L. REV. 228; *cf. Michigan Central R. Co. v. Vreeland*, 227 U. S. 59, 68, 33 Sup. Ct. 192, 57 L. ed. 417 (1912) ("This cause of action was independent of any cause of action which the deceased had, and includes no damages which he might have recovered for his injury if he had survived. It is one beyond that which the decedent had—one proceeding upon altogether different principles. It is liability for the loss and damage sustained by the relatives dependent upon decedent. It is therefore a liability for the pecuniary damage to them, and for that only."); *Hartness v. Pharr*, 133 N. C. 566, 45 S. E. 901 (1903); *Mitchell v. Talley*, 182 N. C. 683, 109 S. E. 882 (1921). However, the administrator cannot be substituted as plaintiff in an action commenced by the deceased, *Harper v. Commissioners of Nash County*, 123 N. C. 118, 31 S. E. 384 (1898), nor can this be done by amending the complaint so as to make the action one for wrongful death, *Bolick v. Railroad*, 138 N. C. 370, 50 S. E. 689 (1905). It would seem more consistent to say that a release or recovery by the deceased will not bar an action for wrongful death, and a minority have so held: *Mahoning Valley R. Co. v. Van Alstine*, 77 Ohio St. 395, 83 N. E. 601 (1908) (administrator's action under survival statute was held not to bar a subsequent action for wrongful death); *Schumacher, Rights of Action Under Death and Survival Statutes* (1924) 23 MICH. L. REV. 114.

<sup>11</sup> *Louisville, E. & St. L. R. Co. v. Clarke*, 152 U. S. 230, 14 Sup. Ct. 579, 38 L. ed. 442 (1894) (held also that the common-law "year and a day" rule in murder cases does not apply); *Taylor v. Cranberry Iron & Coal Co.*, 94 N. C. 525 (1886); *Gulledge v. Seaboard Air Line R. Co.*, 147 N. C. 234, 60 S. E. 1134 (1908) (controversy over the administration will not extend the time); (1927) 22 ILL. L. REV. 329.

In holding the action under the death statute to be barred, the court was clearly correct in the light of the North Carolina decisions. There is, however, another question of some importance suggested by the facts, but not discussed in the opinion. Can the plaintiff recover for the alleged conspiracy? There is a statutory duty imposed upon the coroner and the undertaker to record the death certificate,<sup>12</sup> and at least a moral obligation to notify the relatives of the deceased, which duties, it is alleged, have been neglected in pursuance of a conspiracy. Furthermore, the plaintiff, or those whom he represents, have suffered an injury as a result of such conduct. Although some courts have refused their aid on the grounds that damages would be speculative,<sup>13</sup> there is a very respectable line of authority allowing an action for fraud where, as a result of the defendant's fraudulent misrepresentations or concealment, the plaintiff has failed to prosecute some valid cause of action before it has become barred by the statute of limitations,<sup>14</sup> or useless to him for some other reason.<sup>15</sup> This has been permitted even where the lost right of action was one for wrongful

<sup>12</sup> N. C. CODE ANN. (Michie, 1931) §§7094, 7096, and 7112 (4). Moreover, the spouse or next of kin has a *quasi* property right in the body for the purpose of giving it a proper burial, *Finley v. Atlantic Transport Co., Ltd.*, 220 N. Y. 249, 115 N. E. 715 (1917), and a wrongful interference with this right, or unlawful mutilation of the corpse, is actionable, *Floyd v. Atlantic Coast Line R. Co.*, 167 N. C. 55, 83 S. E. 12 (1914) (mutilation); *Gadbury v. Bleitz*, 133 Wash. 134, 233 P. 299 (1925) (undertaker holding body as security for debt); *cf. Nichols v. Central Vermont R. Co.*, 94 Vt. 14, 109 Atl. 905 (1919).

<sup>13</sup> *Austin v. Barrows*, 41 Conn. 287 (1874); *Whitman v. Seaboard Air Line R. Co.*, 107 S. C. 200, 92 S. E. 861 (1917); *cf. Lomax v. Southwest Mo. Electric R. Co.*, 106 Mo. App. 551, 81 S. W. 225 (1904) (An action cannot be maintained for fraud in inducing the plaintiff to execute a release for personal injuries. Since the fraud vitiated the release, the original cause of action remained in the plaintiff, and no damage has been suffered); *Presnall v. McLeary*, 50 S. W. 1066 (Tex. Civ. App. 1899).

<sup>14</sup> *Marshall v. Buchanan*, 35 Cal. 264, 95 Am. Dec. 95 (1868); *Camm & Hedges Co. v. Bank of Covelo*, 275 Pac. 828 (Cal. App., 1929); *Danielson v. Bank of Scandinavia*, 201 Wis. 392, 230 N. W. 83 (1930); *cf. Tulloch v. Haselo*, 218 App. Div. 313, 218 N. Y. S. 139 (1926) (Dentist concealed negligent acts until after statute of limitation had run on malpractice action. Held, as the gravamen of the plaintiff's cause of action is malpractice, the action is barred).

<sup>15</sup> *Brown v. Castles*, 11 Cush. 348 (Mass. 1853); *O'Gorman v. Haber*, 50 R. I. 35, 147 Atl. 882 (1929) (creditor caused to refrain from attachment until debtor could remove property from the state); *cf. Garcia v. Fantauzzi*, 20 F. (2d) 524 (C. C. A., 1st, 1927); *Sovereign Camp, W. O. W. v. Feltman*, 226 Ala. 390, 147 So. 396 (1933) (beneficiary allowed to sue for fraud in inducing insured to surrender benefit certificate); *Mlnazek v. Libera*, 83 Minn. 288, 86 N. W. 100 (1901); *Dulin v. Bailey*, 172 N. C. 608, 90 S. E. 775 (1916) (Action for spoliation of a will, which caused the probate of a former will, held, plaintiff may maintain an action in tort against the wrongdoer without first setting up the will for probate) commented upon (1917) 30 HAR. L. REV. 527.

<sup>16</sup> *Desmaris v. People's Gaslight Co.*, 79 N. H. 195, 107 Atl. 491 (1919).

death.<sup>16</sup> If the plaintiff can furnish clear proof that the former right of action did exist,<sup>17</sup> there would seem to be no unanswerable reason why he should not find redress; and to hold otherwise would reward the defendant for his own wrongdoing.

JOEL B. ADAMS.

### Evidence—Due Process—Right of the Accused to Accompany Jury When It Views the Scene of the Crime.

In a recent case<sup>1</sup> the Supreme Court of the United States held that due process under the 14th Amendment did not invalidate the rule applied in Massachusetts whereby the defendant in a criminal case is denied the right to accompany the jury when it takes a view of the scene of the alleged crime. The majority opinion emphasized that due process under the 14th Amendment dictates a fair result in each case<sup>2</sup> regardless of procedure. The minority argument that the mandate is for a procedure which assures that the result, whatever it may be, will be reached in a fair way<sup>3</sup> seems the more logical in view of the facts in the principal case.<sup>4</sup>

The exhaustive opinions leave little to be said on the due process problem. Still the case affords an opportunity to collate the leading decisions on views and to discuss the various problems coincident thereto with especial reference to the North Carolina authorities. A search indicates that this subject has not been gone into very thoroughly in recent years with the consequence that the authorities on pertinent points are rather scattered.

The right to a view has a long historical background and is now embodied in statutes in many jurisdictions.<sup>5</sup> The case of *State v. Perry* establishes it as an inherent right within the discretion of the

<sup>17</sup> *Urtz v. N. Y. Central & H. R. R. Co.*, 202 N. Y. 170, 95 N. E. 711 (1911).

<sup>1</sup> *Snyder v. Commonwealth of Massachusetts*, 54 S. Ct. 330 (1934).

<sup>2</sup> The court assumed that defendant could not have spoken had he attended the view, and that his right of cross-examination protected him to assure that the correct place had been examined.

<sup>3</sup> *Snyder v. Commonwealth of Massachusetts*, *supra* note 1, at 344 (Procedural due process has to do with the manner of the trial; dictates that in the conduct of judicial inquiry certain fundamental rules of fairness be observed; forbids the disregard of those rules; and is not satisfied if the result is just, although the hearing was unfair).

<sup>4</sup> The recent case of *Powell v. State of Alabama*, 287 U. S. 45, 77 L. ed. 78, 53 S. Ct. 55 (1932) wherein it was held that due process under the 14th Amendment guaranteed a right to representation by counsel affords an interesting comparison, both as to reasoning and result, to the principal case.

<sup>5</sup> *MISS. CODE ANN.* (1930) §2367; *VA. CODE ANN.* (Michie, 1930) §6013; *W. VA. CODE* (1923) c. 116 §30; see *CODE OF CRIMINAL PROCEDURE* (Am. L. Inst. 1926) (Proposed Final Draft) c. 14, §297 and c. 19, §329.

judge in North Carolina.<sup>6</sup> There is no statutory provision in this State.<sup>7</sup>

Massachusetts and Minnesota are the only states which deny a fundamental right in the defendant to accompany the jury.<sup>8</sup> Other states have reached the conclusion that he does not have to be present usually by interpretation of two state constitutional provisions: the right to be confronted by the witnesses<sup>9</sup> and the right to be present at the trial.<sup>10</sup>

Apparently the question of the defendant's right to accompany the jury has never been raised in this State. It seems that he accompanies them as a matter of course. Nor as a practical matter should the question become pertinent.<sup>11</sup> However, should it be, the cases leave the solution with regard to rights under the state constitution somewhat speculative.

Under the confrontation provision the pertinent question is whether or not the view constitutes evidence. The majority of the cases indicate that it is.<sup>12</sup> The North Carolina cases leave the

<sup>6</sup> *State v. Perry*, 121 N. C. 533, 27 S. E. 997 (1897); see *State v. Gooch*, 94 N. C. 897 (1886) (cited frequently as the first North Carolina view case but apparently is not in point).

<sup>7</sup> N. C. CODE ANN. (Michie, 1931) §573(3) providing for a compulsory reference when the case is one "which requires a personal view of the premises" does not refer to a jury trial. *Kelly v. Enterprise Lumber Co.*, 157 N. C. 175, 72 S. E. 957 (1911). For intimation *contra*: *Long v. Byrd*, 169 N. C. 658, 86 S. E. 574 (1915).

<sup>8</sup> *Commonwealth v. Dascalakis*, 246 Mass. 12, 140 N. E. 470 (1923); *Commonwealth v. Belenski*, 276 Mass. 35, 176 N. E. 501 (1931); *Commonwealth v. Snyder*, 185 N. E. 376 (1933); *State v. Rogers*, 145 Minn. 303, 177 N. W. 358 (1920); 3 WIGMORE, EVIDENCE (1923) §1803 (Professor Wigmore apparently agrees with this view).

<sup>9</sup> N. C. CONST. (1868) ART. I, §11.

<sup>10</sup> Adopted by decision in North Carolina. *State v. Crayton*, 28 N. C. 164 (1845); *State v. Thomas*, 64 N. C. 74 (1870); *State v. Kelly*, 97 N. C. 404, 2 S. E. 185 (1887).

<sup>11</sup> Obviously as a usual thing there is no reason for denying the privilege. The Massachusetts and Minnesota rulings seem arbitrary. The possibility of mob violence might justify it [3 WIGMORE, EVIDENCE (1923) §1803]. But in such instance the defendant would rarely insist on the privilege. It seems that the desperate character of the defendant might also justify denying him the privilege.

<sup>12</sup> *Freeman v. Commonwealth*, 226 Ky. 850, 10 S. W. (2d) 827 (1928); *Watson v. State*, 61 S. W. (2d) 476 (Tenn. 1933); *Noell v. Commonwealth*, 135 Va. 600, 619, 115 S. E. 679 (1923); *State v. McCausland*, 82 W. Va. 525, 96 S. E. 938 (1918). *Contra*: *Close v. Samm*, 27 Iowa 503 (1869); *Chute v. State*, 19 Minn. 271 (1873); *Yeager v. State*, 137 Okla. 27, 278 Pac. 665 (1929). The principal case argued it was immaterial that the view was called evidence. See 2 WIGMORE, EVIDENCE (1923) §1168; (1929) 24 ILL. L. REV. 355. It seems that a view by the jury for purposes of valuing land is always evidence. (1900) 13 HARV. L. REV. 692; (1907) 7 COL. L. REV. 432.

matter in some doubt. Dicta in two cases indicate that it is evidence,<sup>13</sup> and in two other cases actual evidence was taken at the view.<sup>14</sup> Yet the leading case on views in this state treats a view as a background against which the jury may better apply the evidence introduced.<sup>15</sup> Consistency with this theory should demand that the view be taken previously to the introduction of evidence, but in this case the view was taken after the close of the evidence.

The privilege to be present at all stages of the trial raises the question whether a view is a part of the trial. On this point the cases split, one line holding the view a temporary discontinuance of the trial,<sup>16</sup> the other holding it an integral part of the trial.<sup>17</sup> The North Carolina cases leave the point in dispute, but they tend to indicate, and one actually held,<sup>18</sup> that it is a part of the trial. Since the right to be present is so zealously guarded in this State as to include preliminary matters like examination of the jury,<sup>19</sup> it would seem by analogy that North Carolina would hold the view a part of the trial for this purpose.

Assuming the privilege of accompanying the jury to exist, may it be waived? Here again the cases are not in accord, and the methods whereby it may be waived vary.<sup>20</sup> Should the view be considered a part of the trial in North Carolina, which seems the more probable holding, the principles applied in this State with regard to waiver of presence in misdemeanors, felonies, and capital felonies would control.<sup>21</sup> Can the court compel the defendant to go with the jury?

<sup>13</sup> *Hampton v. Norfolk and Western R. Co.*, 120 N. C. 534, 543, 27 S. E. 96 (1897); *State v. Jones*, 175 N. C. 709, 95 S. E. 576 (1918).

<sup>14</sup> *State v. Stewart*, 189 N. C. 340, 127 S. E. 260 (1925); *State v. Lawrence*, 196 N. C. 562, 146 S. E. 395 (1928).

<sup>15</sup> *State v. Perry*, *supra* note 6.

<sup>16</sup> *People v. Thorne*, 156 N. Y. 286, 50 N. E. 947 (1898); *State v. Rogers*, *supra* note 8; *cf. State v. Hilsinger*, 167 Wash. 427, 9 P(2d) 357 (1932).

<sup>17</sup> *Benton v. State*, 30 Ark. 328, 350 (1875); *Noell v. Commonwealth*; *State v. McCausland*, both *supra* note 12.

<sup>18</sup> *State v. Stewart*, *supra* note 14, (holding that a view did not constitute a violation of a statute providing "A Superior Court shall be held by a judge thereof at the courthouse in each county." [N. C. CODE ANN. (Michie, 1931) §1443].

<sup>19</sup> *State v. Dry*, 152 N. C. 813, 67 S. E. 1000 (1910).

<sup>20</sup> By express waiver: *Kanner v. U. S.*, 34 F. (2d) 863 (C. C. A. 7th, 1929); *People v. Thorne*, *supra* note 16. By failure to ask permission; *People v. White*, 30 Cal. App. 156, 128 Pac. 417 (1912); *cf. Chance v. State*, 156 Ga. 428, 119 S. E. 303 (1923). *Contra*: *Freeman v. Commonwealth*; *State v. McCausland*, both *supra* note 12; see *Carney v. Commonwealth*, 181 Ky. 443, 205 S. W. 408 (1918).

<sup>21</sup> *State v. Jenkins*, 84 N. C. 813 (1881); *State v. Dry*, *supra* note 19; *State v. Matthews*, 191 N. C. 378, 131 S. E. 743 (1926).

Apparently it could, if presence were held not waivable. But there have been holdings to the contrary.<sup>22</sup>

The cases indicate that views have been used relatively infrequently in North Carolina.<sup>23</sup> The earlier decisions raised the objection that opportunities for irregularities were increased under such circumstances.<sup>24</sup> Other objections go to the fact that the premises may have changed since the crime. This is a weighty argument today since crowded dockets may postpone the trial and since the best evidence in many instances would be a photograph.<sup>25</sup> Another objection, frequently raised, is that a view, regardless of what it is called, amounts to evidence<sup>26</sup> and therefore the record on appeal is impaired. However, today the limitations naturally attendant upon the record are fully recognized, and so this objection seems entitled to little weight.

JOE EAGLES.

#### Jurisdiction—Assignee for Collection—Use of the Trust Device to Gain Access to the Federal Courts.

A bond issue of a Texas municipality was in the hands of a large number of persons, all of whom were citizens of states other than Texas, but no one of whose holdings equalled \$3,000. These holders, under a bondholders's protective agreement "sold, assigned and transferred" all their "right, title and interest" in the bonds to the plaintiffs, who constituted a committee of the bondholders. No consideration passed from the plaintiffs to the prior holders. By the terms of the agreement, the committee was authorized to collect all moneys due on the bonds; borrow money and pledge the bonds as security therefor; and to conduct litigation thereon if necessary. The District court denied jurisdiction on the ground that plaintiffs were mere agents for collection. On appeal, reversed. *Held*, the jurisdictional amount was present, since the agreement constituted a valid transfer,

<sup>22</sup> *State v. Mortenson*, 26 Utah 312, 75 P. 562 (1903) (advancing the novel theory that compelling defendant to accompany the jury would violate the privilege not to testify against himself since the mien and reactions of the defendant at the scene of the crime would be evident to the jury).

<sup>23</sup> *Jenkins v. Wilmington and Weldon R. Co.*, 110 N. C. 438, 15 S. E. 193 (1892); *Brown v. Southern Railway Co.*, 165 N. C. 392, 81 S. E. 450 (1914). These appear to be the only North Carolina cases not elsewhere cited in this note wherein a view was mentioned.

<sup>24</sup> *Hampton v. Norfolk and Western R. Co.*, *supra* note 13.

<sup>25</sup> For a discussion of photographs as evidence in North Carolina, *State v. Matthews*, *supra* note 21; (1929) 7 N. C. L. Rev. 443.

<sup>26</sup> *Snyder v. Commonwealth of Massachusetts*, *supra* note 1; *Close v. Samm*, *supra* note 12; 2 WIGMORE, EVIDENCE (1923) §1168; (1930) 24 Ill. L. R. 355.

the plaintiffs holding title to the bonds as trustees of an express trust.<sup>1</sup>

Even though diversity of citizenship is present, an assignor cannot avoid the objection that his claim is below the jurisdictional amount of \$3,000 by assigning his claim, if the assignment or transfer is made merely for the purpose of collection. The assignor, it is said, remains the beneficial owner and real party in interest, while the assignee is merely an agent for collection.<sup>2</sup> However, if such an assignment is absolute and the assignor parts with all his interest in the assigned claims, the action may be maintained by the assignee on the aggregated claim even if the assignment is expressly made for the purpose of collection,<sup>3</sup> since if the assignment is absolute, the motive which induced it in no way affects the right of the assignee.<sup>4</sup>

The assignment in the principal case would seem to fall within the first mentioned rule, since the agreement, while expressly transferring title in the bonds to the plaintiff, indicates that the real purpose of the transfer was to enable the plaintiffs, who could meet the requirement as to jurisdictional amount, to sue and collect thereon.<sup>5</sup> This view is further supported by the fact that no consideration passed from the plaintiffs to the original holders for the bonds.<sup>6</sup> The transaction would also seem colorable in view of the fact that if the real title were transferred to the plaintiffs to enable them to maintain the suit,

<sup>1</sup> Bullard v. City of Cisco, Texas, 54 S. Ct. 177 (1933).

<sup>2</sup> Waite v. Santa Cruz, 184 U. S. 302, 22 S. Ct. 327, 46 L. Ed. 552 (1902); 18 STAT. 470, 472 (1875) 28 U. S. C. A. 80 (1926) ("If in any suit commenced in a District court . . . it shall appear to the satisfaction of said court . . . that such suit does not really and substantially involve a dispute . . . properly within the jurisdiction of said District court, or that the parties have been improperly made or joined . . . for the purpose of creating a case cognizable . . . [in such court] . . . said District court shall proceed no further therein, but shall dismiss the suit or remand it, as justice may require . . ."); DOBIE, FEDERAL PROCEDURE (1928) §58.

<sup>3</sup> O'Neill v. Wolcott Mining Co., 174 Fed. 527 (C. C. A. 8th, 1909); Ky. Wagon Mfg. Co. v. Jones & Hopkins Mfg. Co., 248 Fed. 272 (C. C. A. 5th, 1918).

<sup>4</sup> Kreider v. Cole, 149 Fed. 647 (C. C. A. 3rd, 1907); O'Neill v. Wolcott Mining Co., *supra* note 3.

<sup>5</sup> Williams v. Nottawa, 104 U. S. 209, 26 L. Ed. 719 (1881); Woodside v. Beckham, 216 U. S. 117, 30 S. Ct. 367, 54 L. Ed. 408 (1910); Mutual Adjustment Co. v. Pac. Telephone & Telegraph Co., 288 Fed. 198 (W. D. Wash. 1923). These are all cases in which the claims were admittedly assigned to the plaintiff for collection and were dismissed for want of jurisdiction. The agreement in the principal case seems to effect the same purpose, the difference being that in the principal case the plaintiffs did not allege that the assignment was made for collection, but in fact, insisted that it was not.

<sup>6</sup> Farmington v. Pillsbury, 114 U. S. 138, 5 S. Ct. 807, 29 L. Ed. 114 (1885); Woodside v. Beckham, *supra* note 5; Fountain v. Town of Angelica, 12 Fed. 8 (N. D. N. Y. 1882).

further stipulations as to what could be done with the bonds by the plaintiffs would have been unnecessary.<sup>7</sup> The court, however, calls the plaintiffs trustees and thus offers a means of avoiding the effect of the above rule as set out in its former decisions,<sup>8</sup> since assignors need only to phrase their transaction in a fashion similar to the agreement in the principal case, which in effect accomplishes the same purposes of an agency for collection.

If suits brought by assignees for collection should be prohibited, the effect of this decision is bad for the reasons mentioned. It is submitted, however, that if the requisite diversity of citizenship exists, the purposes of federal jurisdiction will be better served by the effect of this decision, since small bondholders, into whose hands bonds from the same issue have fallen, should be permitted to sue on such bonds in the federal courts. This is supported by the reasons that led to the creation of federal courts,<sup>9</sup> and is especially desirable in view of the recent movement toward making the federal court "a

<sup>7</sup> The agreement in the principal case contained further provisions that "the committee (plaintiffs) may . . . take or participate in, or settle, compromise or discontinue any action for the collection of any of the bonds . . . or the protection, enforcement or foreclosure of any legal or equitable lien securing same . . . The committee may give such directions, execute such papers and do such acts as the committee may consider wise in order to preserve or enforce the rights . . . or serve the interests of the depositors (prior holders)." It was also provided that the agreement should not remain in force for longer than five years unless extended as authorized in the agreement; that the committee might terminate the agreement at any time by giving notice to the prior holders; and as regards the proceeds realized on the bonds, it was stipulated that upon the termination of the agreement, the securities, cash and property held by the committee were to be distributed among the prior holders according to the amount of their deposited bonds, provided each holder pay his share of all expenses and indebtedness incurred by the committee.

<sup>8</sup> *Supra* notes 2 and 5.

<sup>9</sup> See J. J. Parker, *The Federal Jurisdiction and Recent Attacks Upon It* (1932) 18 A. B. A. J. 433 at 437 ("one of the principal arguments in favor of federal jurisdiction . . . is that its existence is essential to furnish the non-resident an impartial tribunal in which his controversy may be tried. I do not believe that federal judges are men of higher character than state judges, or that jurors in federal courts are more intelligent or more impartial as a general proposition. But there is this difference: the state trial judge is generally a local man with a local outlook. The federal trial judge has jurisdiction over a wide territory; his action is subject to review as of right by a court having jurisdiction over a number of states. The jury in the state court comes from the county of the resident party; the federal jury is drawn from a wide territory and usually knows no more about the plaintiff and his attorney than about the defendant and his attorney"); Howland, *Shall Federal Jurisdiction of Controversies Between Citizens of Different States Be Preserved* (1932) 18 A. B. A. J. 499 at 501 ("If bias and prejudice has vanished as between states, it would seem that it must have vanished as between counties in the same state. Nevertheless, the statutes are still in force carefully guarding the rights of citizens against bias and prejudice between counties and districts in the same state.")



rich man's court" by increasing the jurisdictional amount.<sup>10</sup> The present ruling moreover, would seem to save litigants money by avoiding a multiplicity of suits. On the other hand, it might be answered that the same purpose could be accomplished by the plaintiffs' resort to representative suits in a state court, or defendants' resort to a bill of peace. In any event, the instant case does have the decided advantage of enabling small scattered bondholders to place their investment into hands where it can best be managed, and the assignment statute still exists to safeguard the federal courts from other kinds of suits based on aggregated claims.<sup>11</sup>

E. D. KUYKENDALL, JR.

### Landlord and Tenant—Leases—Removal of Trade Fixtures.

An original lease provided that the tenant would be allowed to remove at the termination of the lease any trade fixtures he might place on the premises. Before the term had expired a new lease was entered into for a second term. No provision was inserted in the second lease giving the tenant the right to remove trade fixtures placed on the premises during the first term. The case went to the Supreme Court on the validity of a permanent injunction restraining the tenant from removing the fixtures which had been annexed to the premises during the original term. *Held*, error in not continuing the temporary restraining order to the hearing. The Supreme Court seemed to take the view that the tenant's right to remove the fixtures was not lost by his failing to provide for their removal in the second lease, especially if the tenant could show that such was the intention of the parties.<sup>1</sup>

By early common law that which was affixed to the realty became a part of the realty.<sup>2</sup> Thus, if a tenant annexed a chattel, regardless of its character, to the realty his title thereto was forever abandoned to the landlord unless he had expressly contracted in his lease for the right to remove. The patent inequities of this rule gradually

<sup>10</sup> Note (1933) 31 MICH. L. REV. 59 at 71.

<sup>11</sup> 1 STAT. 76 (1789) 28 U. S. C. A. 41(1) (1926) ("... No District court shall have cognizance of any suit [except upon foreign bills of exchange] to recover upon any promissory note or other chose in action in favor of any assignee, ... unless such suit might have been prosecuted in such court ... if no assignment had been made.").

<sup>1</sup> *Springs v. Atlantic Refining Co.*, 205 N. C. 444, 171 S. E. 635 (1933).

<sup>2</sup> See Lord Mansfield in *Lawton v. Salmon*, East. 22 Geo. 3, B. R., 1 H. Bl. 259 (1789) ("All the old cases agree that whatever is connected with the freehold, even though put up by the tenant, belongs to the heir.").

impressed the judges, so that by the middle of the eighteenth century an exception was being universally recognized in the case of trade fixtures.<sup>3</sup> The courts began to allow these to be removed as a matter of right even though there was no express provision for their removal contained in the lease. This right, however, was strictly construed, most courts holding that the chattels had to be removed before the landlord's right to the premises accrued, and that any chattels remaining on that date were lost to the tenant.<sup>4</sup> A few courts softened this rule to permit the tenant to remove within a reasonable time after his right to the premises had expired.<sup>5</sup>

This remains the law today, the problem becoming vital at the point where the lease terminates before the tenant has removed the fixtures. Three possible situations might arise with varying results.

First, the tenant might unqualifiedly relinquish possession to the landlord at the expiration of his term. In this case it is a well settled rule of law that the fixtures become the absolute property of the landlord.<sup>6</sup> Of course the tenant may by contract reserve the right to remove for a given length of time following his term, but we are not here concerned with such a situation.

Second, the tenant might remain in possession after his term expires without executing a new lease. In this situation it would seem to follow that the chattels, not having been removed before the termination of the lease, the title thereto vested immediately in the landlord, and the tenant had lost his right of removal. The courts, however, seem to view such retention of possession as a sort of continuation of the original lease, the tenant retaining in effect the rights he had thereunder, and hold that the tenant retains his right to remove so long as he remains in possession.<sup>7</sup>

<sup>3</sup> *Ibid.* ("But there has been a relaxation of the strict rule for the benefit of trade, and many things may now be taken away which could not be formerly, such as erections for carrying on any trade.")

<sup>4</sup> *Stoke v. Upton*, 40 Mich. 581, 29 Am. Rep. 560 (1879); *Blake-McFall Co. v. Wilson*, 98 Ore. 626, 193 Pac. 902 (1920); *Poole's Case*, 1 Salk. 368, 91 Eng. Rep. 320 (1704); *Lyde v. Russell*, 1 B. & Ad. 394, 109 Eng. Rep. 834 (1830). *Contra*: *Pemberton v. King*, 13 N. C. 376 (1828) ("If the removal is made after the expiration of the term, the tenant is, in respect to his entry, only a trespasser").

<sup>5</sup> *Shellar v. Shivers*, 171 Pa. 569, 33 Atl. 95 (1895); *Preston v. Briggs*, 16 Vt. 124 (1844); *Gartland v. Hickman*, 56 W. Va. 75, 48 S. E. 14 (1904).

<sup>6</sup> *Beers v. St. John*, 16 Conn. 322 (1844); *McCracken v. Hall*, 7 Ind. 30 (1855); *Carlin v. Ritter*, 68 Md. 478, 6 Am. St. Rep. 467 (1888); *Shepard v. Spaulding*, 4 Met. 416 (Mass. 1842); *Bickwith v. Boyce*, 9 Mo. 560 (1845); *The State v. Elliott*, 11 N. H. 540 (1841); *Radey v. McCurdy*, 209 Pa. 306, 58 Atl. 558 (1904).

<sup>7</sup> *Sampson v. Camperdown Cotton Mills*, 64 Fed. 939 (C. S. C. 1894); *Woods*.

Third, the tenant might continue in possession but execute a new lease. It is in this situation that litigation arises most frequently. According to the supposed majority rule, the tenant's right to remove the chattels terminates with his original lease, regardless of whether or not such lease contained a provision permitting removal during the term.<sup>8</sup> This rule is followed even though the tenant executed the new lease before his first term ran out. Unless the new lease specifically provides that the chattels annexed during the former term may be removed by the tenant during this succeeding term, these courts will refuse to let the tenant thereafter remove such fixtures. This, on the theory that the acceptance of the new lease was an effectual surrender of the old, together with the estate and all other rights which the old lease secured to him.

On the other hand, more liberal courts consider this situation in which the tenant's possession is undisturbed—the only change being the new lease by which he acquires right to possession—as analogous to the second situation above described; and they hold that the tenant, despite the absence of any express stipulation to that effect in the new lease, may remove during the new term any trade fixtures he may have put on the land during the first term.<sup>9</sup> Of course, he may during his second term remove any chattels annexed during that term. The rule declaring against removal is generally described as the majority rule in this third situation, but an exhaustive search of the cases leads one to believe that more jurisdictions actually follow the rule favoring the tenant.<sup>10</sup>

v. Haywards Bank, 10 Cal. App. 93, 106 Pac. 730 (1909); Fenimore v. White, 78 Neb. 520, 111 N. W. 204 (1907); Lewis v. Ocean Nav., etc., Co., 125 N. Y. 341, 26 N. E. 301 (1891); Darrah v. Baird, 101 Pa. 265 (1882); Weeton v. Woodcock, 7 M. & W. 13, 151 Eng. Rep. 659 (1840) ("The rule to be collected from the several cases decided on this subject seems to be this, that the tenant's right to remove fixtures continues during his original term, and *during such further period of possession by him, as he holds the premises under a right still to consider himself as tenant*").

<sup>8</sup> Merritt v. Judd, 14 Cal. 59 (1859); Chicago Sanitary Dist. v. Cook, 169 Ill. 184, 48 N. E. 461 (1897); Heddrich v. Smith, 103 Ind. 203, 53 Am. St. Rep. 509 (1885); Carlin v. Ritter, *supra* note 6; Watriss v. First Nat'l Bank, 124 Mass. 571, 26 Am. Rep. 694 (1878); Gilbert v. Sons of Abraham, 59 N. J. L. 160, 35 Atl. 1121 (1896); Loughran v. Ross, 45 N. Y. 792, 6 Am. Rep. 173 (1871).

<sup>9</sup> Bergh v. Herring-Hall-Marvin Safe Co., 136 Fed. 368 (C. C. A. 2d., 1905); Zeppar v. Reppy, 15 Colo. 260, 25 Pac. 164 (1890); Daly v. Simonson, 126 Iowa 716, 102 N. W. 780 (1905); Thomas v. Gayle, 134 Ky. 330, 120 S. W. 290 (1909); Kerr v. Kingsbury, 39 Mich. 150, 33 Am. Rep. 362 (1878); Sassen v. Haegle, 125 Minn. 441, 147 N. W. 445 (1914); Red Diamond Clothing Co. v. Steidmann, 82 Neb. 302, 117 N. W. 714 (1908); Radey v. McCurdy, *supra* note 6; Shields v. Hansen, 201 Wis. 349, 230 N. W. 51 (1930).

<sup>10</sup> *Supra* note 8 for authorities supporting so-called "majority" view. *Supra*

To the writer it seems that the most equitable results are arrived at by those courts which take into consideration the terms of the new lease.<sup>11</sup> If it is substantially the same as the old, it is generally considered as a continuation thereof, and the tenant's right to remove the fixtures is by implication incorporated into the terms of the new lease. But if the new lease is upon new terms, and new conditions are inserted therein, the tenant forfeits the fixtures to the landlord unless he specifically reserves the right of removal.

In the principal case the North Carolina Court had before it for the first time this particular problem involving removal of trade fixtures. The court, in holding that the tenant should not lose his right of removal under such circumstances, was lining up with the "minority" view; but from any view point it would appear that the rule favoring the tenant is not only the more equitable, but is also expressive of a policy tending to encourage trade.

J. CARLYLE RUTLEDGE.

#### Negotiable Instruments—Effect of Provision for Interest on Unpaid Interest Payments.

The plaintiff, in a federal district court of Pennsylvania, seeks to recover as a holder in due course of six promissory notes executed and delivered in Florida. Each contained these provisions: "with interest thereon at 7 per cent per annum from date until fully paid. Interest payable semi-annually . . . Deferred interest payments to bear interest from maturity at 10 per cent per annum payable semi-annually." *Held*: The notes are non-negotiable because the amounts

note 9 for authorities supporting so-called "minority" view.

<sup>11</sup> *Ross v. Campbell*, 9 Colo. App. 38, 47 Pac. 465 (1896) (A new lease entered into as the most convenient method of extending the then existing term. *Held*, it was not such a termination of the lease as to bar the tenant's right to afterwards remove fixtures already annexed by him); *Baker v. McClurg*, 198 Ill. 28, 64 N. E. 701 (1902) (New lease a reiteration of the former lease except that it gave permission to the lessee to assign the lease. *Held*, tenant did not forfeit his right to remove trade fixtures placed on the premises under the original lease); *Hedderich v. Smith*, *supra* note 8 (The rent reserved for the new term was different from the old; tenant covenanted to repair and surrender the premises at the end of the term without waste. *Held*, tenant was in as of a new estate, which must be measured by the condition of things existing when it commenced; no reservation having been made in the new lease, the tenant lost all rights to the fixtures); *Carlin v. Ritter*, *supra* note 6 (New lease was the first written lease; it was not to effect an extension upon the terms of the existing lease, but to create a new tenancy upon new and different terms. *Held*, trade fixtures placed on the premises prior to the new lease became the property of the landlord upon the tenant's entering upon the new tenancy without reserving his rights in the fixtures).

are uncertain and the plaintiff, therefore, is not a holder in due course.<sup>1</sup>

Although asserting its right to construe the Uniform Negotiable Instruments Law unbound by local interpretation, the court—in absence of direct federal authority—did rely upon two state decisions.<sup>2</sup> In these two cases the New Jersey and Pennsylvania courts held somewhat similar notes to be non-negotiable. Provisions for one rate of interest “until fully paid” and for a higher rate on “deferred payments” were construed as irreconcilable in application to the principal, thereby rendering the amount uncertain. The Pennsylvania court intimates that had one rate of interest run until maturity instead of until “fully paid”—thereby eliminating the ambiguity—the notes would have been negotiable. But in still another case the New York court, declaring identical notes to be negotiable, construed “deferred payments” to refer only to unpaid interest, holding that the higher rate of interest on overdue interest payments was a readily ascertainable and therefore certain sum.<sup>3</sup>

The draftsmanship in the principal case is more skilful. Ambiguity is avoided by the insertion in the notes of the word “interest” in relation to “deferred payments”. The court, however, ignores the New York holding and blindly applies the result reached in the Pennsylvania and New Jersey cases, which are not authorities on the point involved.

To hold a note non-negotiable because of an ambiguity in the rate of interest would not be new to the federal court,<sup>4</sup> though unpolitic if the amount could reasonably be construed as certain.<sup>5</sup> But to hold that a provision for interest on interest due before maturity of the principal renders the amount uncertain, is contrary not only to what little authority there is on the point<sup>6</sup> but also to the construction placed on “sum certain” under the law merchant and the Uniform Negotiable Instruments Law.<sup>7</sup>

<sup>1</sup> *Burns Mortg. Co. Inc. v. Fried*, 67 F. (2d) 352, (C. C. A. 3rd, 1933).

<sup>2</sup> *New Miami Shores Corp. v. Duggan*, 9 N. J. Misc. R. 620, 155 Atl. 262 (1931) approved in (1932) 17 Ia. L. Rev. 408; *First Nat. Bank of Miami v. Bosler*, 297 Pa. 353, 147 Atl. 74 (1929).

<sup>3</sup> *Lessen v. Lindsey*, 238 App. Div. 262, 264 N. Y. Supp. 391 (1933).

<sup>4</sup> *Ashcraft v. Bream*, 2 F. Supp. 344 (E. D. Pa., 1932).

<sup>5</sup> *Lessen v. Lindsey*, *supra* note 3.

<sup>6</sup> *Brown v. Vossen*, 112 Mo. App. 676, 87 S. W. 577 (1905); *Lessen v. Lindsey*, *supra* note 3; *Continental & Commercial Nat. Bank of Chicago v. Jefferson*, 51 S. D. 477, 215 N. W. 533 (1927); *Baker v. Sartori*, 66 Wash. 260, 119 P. 611 (1911).

<sup>7</sup> *Notes* (1919) 2 A. L. R. 139; (1927) 51 A. L. R. 294; (1929) 58 A. L. R. 1281.

It has been held by the majority of courts that the sum payable is a "sum certain", under section 1, subsection 2 of the Negotiable Instruments Law, despite provisions for: (1) interest on unpaid interest coupons;<sup>8</sup> (2) interest on interest coming due and unpaid upon maturity of principal;<sup>9</sup> (3) Increased interest on principal from maturity;<sup>10</sup> (4) increased interest from date if principal is unpaid at maturity;<sup>11</sup> (5) conditions precedent to payment of interest on certificates of deposit;<sup>12</sup> (6) payment of interest at stipulated periods before maturity.<sup>13</sup>

Amidon, J., in *Cudahy Packing C. v. State Nat. Bank*,<sup>14</sup> clearly expresses the attitude of most courts on this question: "The rule requiring commercial certainty in commercial paper was a rule of commerce before it was a rule of law. It requires commercial, not mathematical, certainty. An uncertainty which does not impair the functions of negotiable instruments in the eyes of business men ought not to be regarded by the courts."

An insistence upon literal interpretation of the Negotiable Instruments Law can easily make it a barrier to commercial progress, thereby defeating its very purpose.<sup>15</sup> In the principal case, unfortunately, the literal test is applied to what is a commercially certain sum. Without reference to more extrinsic evidence than is required in notes calling for payments of interest before maturity, the courts could easily ascertain the defaults in interest payments and compute interest thereon.

The holding is particularly unfortunate in that it may establish a precedent for all federal courts, if the doctrine of *Swift v. Tyson*<sup>16</sup>

<sup>8</sup> *Gelpecke v. Dubuque*, 1 Wall. 175, 17 L. ed. 520 (U. S. 1864); *De Hass v. Roberts*, 70 Fed. 227 (C. C. A. 3rd, 1895).

<sup>9</sup> *Fox v. Crane*, 43 Cal. App. 559, 185 Pac. 415 (1919); *Gilmore v. Hirst*, 56 Kan. 626, 44 Pac. 603 (1896); *Cherry v. Sprague*, 187 Mass. 113, 72 N. E. 456 (1904); *Lister v. Donlan*, 81 Mont. 571, 281 Pac. 348 (1929); *Sharpe v. Schoenberger*, 44 S. D. 402, 184 N. W. 209 (1921).

<sup>10</sup> *Chicago Railway Equipment Co. v. Merchants Nat. Bank*, 136 U. S. 268, 10 Sup. Ct. 999, 34 L. ed. 349 (1890); *Lister v. Donlan*, *supra* note 9; *Citizen's Savings Bank of Columbus v. Landis*, 37 Okl. 530, 132 Pac. 1101 (1913); *Sharpe v. Schoenberger*, *supra* note 9.

<sup>11</sup> *Farm Mortgage & Loan Co. v. Martin*, 51 S. D. 421, 214 N. W. 816 (1927); *Union Nat. Bank of Massillon v. Mayfield*, 71 Okl. 22, 174 Pac. 1034 (1918).

<sup>12</sup> *Hatch v. First Nat. Bank*, 94 Me. 348, 47 Atl. 908 (1900); *White v. Wadhams*, 204 Mich. 381, 170 N. W. 60 (1918).

<sup>13</sup> *Commercial Nat. Bank v. Consumers Brewing Co.*, 16 App. D. C. 186 (1900); *Taylor v. American Bank*, 63 Fla. 631, 57 So. 678 (1912).

<sup>14</sup> 134 Fed. 538, 541 (C. C. A. 8th, 1904).

<sup>15</sup> *Beutel, Negotiability by Contract* (1933) 28 ILL. L. REV. 205.

<sup>16</sup> 16 Pet. 1, 10 L. ed. 865 (U. S. 1842).

is to be interpreted as enabling federal courts to construe uniform state statutes declaratory of the common law independent of local precedents.<sup>17</sup>

W. V. SHEPHERD.

### Usury—Affirmative Relief for the Debtor.

The defendant procured a loan of \$4,000 from an investment company. He executed a deed of trust on Blackacre to X to secure payment of one long term note for \$4,000 and eight short term first mortgage notes of \$60 each. All were made to the investment company. On the long term note interest was at 6% and began two years after date, while the short term notes bore no interest until maturity. After \$1,426 had been paid, the plaintiff bought the land under a foreclosure sale. In an action brought to eject the defendant, he set up a counterclaim in which he demanded a forfeiture of all interest on the grounds that the notes were usurious. *Held*, Because the defendant had not paid the principal and legal interest, it was proper to dismiss the counterclaim.<sup>1</sup>

Statutes pertaining to usury are designed to discourage the making of usurious loans no matter what the form of the transaction may be.<sup>2</sup> Following this principle it has been held that a debtor may set up the defense of usury where he has been forced by the creditor to subscribe to an endowment life insurance policy,<sup>3</sup> to pay the plaintiff's attorney's fees,<sup>4</sup> and to sign as surety on another note held by the creditor.<sup>5</sup> It has also been held that usury is a valid defense to a note in the hands of a purchaser before maturity without notice.<sup>6</sup> In short, it seems that the court is ever ready to inflict a penalty upon one who attempts to extract more than 6% interest. In contrast with

<sup>17</sup> Fordham, *The Federal Courts and the Construction of Uniform State Laws*, (1929) 7 N. C. L. REV. 423.

<sup>1</sup> North Carolina Mortgage Corp. v. Wilson, 205 N. C. 493, 171 S. E. 783 (1933) (The result was also supported on the grounds that a counterclaim to recover usurious interest is improper in an action to recover possession of land).

<sup>2</sup> Ripple v. Mortgage & Acceptance Co., 193 N. C. 422, 137 S. E. 156 (1927); Pratt v. American Bond & Mortgage Co., 196 N. C. 294, 146 S. E. 135 (1928).

<sup>3</sup> Carter v. Life Insurance Co. of Va., 122 N. C. 338, 30 S. E. 341 (1898).

<sup>4</sup> Williams v. Rich, 117 N. C. 235, 23 S. E. 257 (1895).

<sup>5</sup> Windor Nat. Bank v. Graham, 38 Ga. App. 552, 144 S. E. 357 (1928).

<sup>6</sup> Faison v. Grandy, 126 N. C. 827, 36 S. E. 276 (1900) (Modified for another reason in 128 N. C. 438, 38 S. E. 897 (1901); Federal Reserve Bank of Richmond v. Jones, 205 N. C. 698, 172 S. E. 185 (1934); cf. Cox v. Harrison, 172 S. E. 417 (S. C. 1934) (defense of usury is not available in an action to foreclose a chattel mortgage)).

this strict policy there exists a situation in North Carolina by which a creditor may collect legal interest on a usurious loan and thus evade the penalty prescribed by the statute. Under the equitable maxim of "he who seeks equity must do equity", a debtor is entitled to no affirmative relief until he has tendered payment of the principal and legal interest.<sup>7</sup> A creditor may be able to collect the usurious interest by threatening foreclosure of collateral security. It is true that if he does, the debtor can recover twice the amount of interest,<sup>8</sup> provided the action is brought within two years.<sup>9</sup> Thus, it may be seen that an application of the equitable maxim does not injure a debtor if he takes due advantage of his legal remedies. It is to be regretted, however, that such incompatible policies exist within one state.

Historically there seems no justification for the inconsistency. Until 1866 a usurious contract was totally void.<sup>10</sup> It was in order to avoid the effect of such a severe penalty that a rule was developed holding the statute inapplicable when the debtor sought affirmative relief.<sup>11</sup> The act of 1866<sup>12</sup> reduced the penalty to a loss of interest. It also provided that this penalty applied whether the action was "at law or in equity". Justice Clark, in an excellent dissent,<sup>13</sup> has pointed out that it was not until the old line of cases had been followed that the attention of the court was called to the fact that this act was apparently intended to alter the rule that to entitle a debtor to affirmative relief he must pay legal interest. The acts of 1876-77<sup>14</sup> and of 1895<sup>15</sup> contained the provision that the charging of a usurious rate caused a forfeiture of all interest. If the obligation were usurious, there is no legal interest under these statutes.<sup>16</sup> By this time, however, the old rule was too well established to be abrogated although several attempts were made to do so.<sup>17</sup>

<sup>7</sup> *Waters v. Garris*, 188 N. C. 305, 124 S. E. 334 (1924); *Jonas v. Home Mortgage Co.*, 205 N. C. 89, 170 S. E. 127 (1933).

<sup>8</sup> *Sloan v. Piedmont Fire Insurance Co.*, 189 N. C. 690, 128 S. E. 2 (1925); N. C. CODE ANN. (Michie, 1931) §2306.

<sup>9</sup> *Sloan v. Piedmont Fire Insurance Co.*, *supra* note 8; N. C. CODE ANN. (Michie, 1931) §442 (2).

<sup>10</sup> N. C. Laws 1741, c. 28.

<sup>11</sup> *Taylor v. Smith*, 9 N. C. 465 (1823); *Ballinger v. Edwards*, 39 N. C. 449 (1847).

<sup>12</sup> N. C. Laws 1865-66, c. 24.

<sup>13</sup> *Churchill v. Turnage*, 122 N. C. 426, 30 S. E. 122 (1898).

<sup>14</sup> N. C. Laws 1876-77, c. 91.

<sup>15</sup> N. C. Laws 1895, c. 69.

<sup>16</sup> See *Churchill v. Turnage*, *supra* note 13 (dissent).

<sup>17</sup> *Ward v. Sugg*, 113 N. C. 489, 18 S. E. 717 (1893); see *Moore v. Beaman*, 112 N. C. 558, 564, 17 S. E. 676 (1893); *Churchill v. Turnage*, *supra* note 13 (dissent); *Owens v. Wright*, 161 N. C. 127, 76 S. E. 735 (1912) (dissent); *Corey v. Hooker*, 171 N. C. 229, 88 S. E. 236 (1916) (dissent).



The maxim of "he who seeks equity must do equity" has been applied in other states to effect the same result as is reached in North Carolina. In New York,<sup>18</sup> Alabama,<sup>19</sup> and Virginia<sup>20</sup> the rule has been changed by statute so as to relieve the debtor from having to pay interest on a usurious loan under any conditions. In Minnesota,<sup>21</sup> Texas,<sup>22</sup> and Florida<sup>23</sup> the same result has been reached by judicial interpretation. The Supreme Court of Idaho, under a statute almost identical with ours, has held that the debtor need tender no interest when he invokes the assistance of a court of equity.<sup>24</sup>

As has been stated, the law in North Carolina on the subject appears to be settled. Were it not so, a different interpretation might be placed upon the present statute. Because it is hardly likely to be done, however, it is submitted that Section 2306 of the Code be amended by inserting this provision. "Nor shall any court require or compel the payment or deposit of any interest as a condition of granting affirmative relief to the borrower in any case of usurious loans forbidden by this section."

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### Property—Effect of Condition That Grantor Convey Title Free from Encumbrances.

A contract for the sale of land required the vendor to deposit in escrow by a certain date a deed and abstract showing title in the vendor free and clear of all encumbrances. There was in fact an outstanding sheriffs' certificate of sale of part of the property, which was bought in by the vendee before the date stipulated for performance. *Held*, in a claim in bankruptcy by the vendor for the escrow funds, that the vendor was not thereby relieved from performance of the

<sup>18</sup> N. Y. CON. LAWS, (Cahill, 1930) §377.

<sup>19</sup> Reynolds v. Lee, 180 Ala. 76, 60 So. 101 (1912); ALA. CODE ANN. (Michie, 1928) §8567.

<sup>20</sup> Rockdeschall v. Seibel, 126 Va. 359, 101 S. E. 425 (1919); VA. CODE ANN. (Michie, 1930) §5554.

<sup>21</sup> Travernicht v. Kingston, 156 Minn. 442, 195 N. W. 278 (1923).

<sup>22</sup> Yonack v. Emery, 4 S. W. (2d) 293 (Tex. Civ. App. 1928) (The court without comment accepted the fact that a tender of the principal was sufficient).

<sup>23</sup> Mortgage Securities Corp. v. Levy, 11 F. (2d) 270 (C. C. A. 5th 1926); Robbins v. Blanc, 105 Fla. 625, 142 So. 223, 225 (1932) ("He who seeks equity must do equity, so it is an essential part of a bill to redeem a mortgage that it offer in express terms to pay the amount due with costs." But the principal is all that is due on a usurious contract).

<sup>24</sup> Cleveland v. Western Loan & Savings Co., 7 Idaho 477, 63 Pac. 885 (1901); Cornelison v. U. S. Building & Loan Ass'n., 50 Idaho 1, 292 Pac. 243 (1930).

condition to furnish an abstract showing title in himself free from encumbrances.<sup>1</sup>

Performance of a stipulation in a contract requiring such an abstract is a condition precedent to the vendee's liability,<sup>2</sup> and the mere fact that the vendor actually has perfect title is not sufficient if the abstract does not so show it.<sup>3</sup> As there was not strict compliance with the condition in the principal case the main problem is the effect, if any, of the vendee's voluntary acquisition of outstanding title upon the non-performance of the condition precedent by the vendor.

Where the vendee is in possession under an executory contract of sale at the time he acquires the outstanding encumbrance or interest, it is generally held that this inures to the vendor's benefit and may not be set up against him by the vendee, for the reason that a person is estopped to deny the title of one from whom he derives possession.<sup>4</sup> This rule probably does not apply to the present case as it does not appear that the vendee was ever in possession, but there are two other principles which seem particularly applicable. First, the general rule that non-performance of conditions precedent will be excused if performance was hindered or prevented by the acts or faults of the other party.<sup>5</sup> Under the contract here the vendor has until a certain date to perfect his title,<sup>6</sup> and it should be the duty of the vendee not to hinder or prevent him from so perfecting title.<sup>7</sup>

<sup>1</sup>United States Tungsten Mines Co., Ltd. v. Laughran, 67 F. (2d) 226, (C. C. A. 9th 1933).

<sup>2</sup>Spooner v. Cross, 127 Ia. 259, 102 N. W. 1118 (1905); Brown v. Widen, 103 N. W. 158 (Ia. 1905).

<sup>3</sup>Hayne v. Fenton, 321 Ill. 442, 15 N. E. 877 (1926); Lessenich v. Sellers, 119 Ia. 314, 93 N. W. 348 (1903); Austin v. Shipman, 160 Mo. App. 206, 141 S. W. 425 (1911).

<sup>4</sup>Mumford v. Pearce, 70 Ala. 452 (1881); Lewis v. Boskins, 27 Ark. 61 (1871); BIGELOW, ESTOPPEL (6th ed. 1913) 590; cf. George v. Roach, 7 La. Ann. 594 (1852) (this doctrine does not apply where the vendor never had and gave no possession, and was aware of an outstanding title and knew that he was selling the property of another.)

<sup>5</sup>Catanzo v. Jackson, 198 Ala. 302, 73 So. 510 (1916) (failure to produce an architect's certificate held excused where the other party had discharged the architect.); Kenzig v. Cibula, 40 Ohio App. 557, 179 N. E. 423 (1930) (broker held entitled to commission from party withdrawing from contract where performance of the contract was a condition precedent to broker's right to commission). 2 WILLISTON, CONTRACTS (1920) 1305.

<sup>6</sup>Handley v. Tibbetts, 16 S. W. 131 (Ky. 1891); Smith v. McMahon, 197 Mass. 16, 83 N. E. 9 (1907); Mincey v. Foster, 125 N. C. 541, 34 S. E. 644 (1899).

<sup>7</sup>Patterson v. Meyerhofer, 204 N. Y. 96, 97 N. E. 472 (1912); Bulkin v. Baird & Roper, 73 N. C. 283 (1875) (held that the vendee impliedly agrees not to hinder the vendor in perfecting title); see MAUPIN, MARKETABLE TITLES TO REAL ESTATE (3rd ed. 1921) 878 ("The purchaser will not be allowed to forestall the vendor by acquiring an outstanding right and setting it up adversely to the latter.").

However, a similar North Carolina case,<sup>8</sup> although recognizing such a duty on the vendee, held that the excuse of the breach of condition by the vendor, resulting from the hindrance by the vendee did not entitle the vendor to performance by the vendee, but only to recovery for his labor and expense in trying to perform. At least one court,<sup>9</sup> though, allowed the vendor in effect to enforce performance by the vendee by awarding the vendor the difference between the contract price and the amount paid for the outstanding interest by the vendee. It might be argued that there was no actual hindrance or prevention by the vendee if he was willing to convey or assign the outstanding interest to the vendor before the date for performance of the condition. However, as the purpose of the condition requiring an abstract is to assure the vendee that he will get perfect title,<sup>10</sup> a strict compliance with the contract by such a conveyance and re-conveyance could have no effect in this respect, and should not be required by a court of equity unless the vendee has insisted upon it in time for performance by the vendor.

A second objection to the present decision is to be found in the well settled principle that where by the conduct of one party to a contract, entitled to the performance of a condition, the other party has been led to believe that such performance will not be required until too late to perform, the party so conducting himself is barred from asserting the right he had.<sup>11</sup> The vendee's acceptance of conveyance from the third party may have led the vendor to believe that he was accepting this in lieu of strict performance of the contract, especially if the vendor was instrumental in procuring the conveyance from the third party to the vendee, which seems probable here.

It would seem, therefore, that the court might better have held that there was a substantial performance of the contract by the vendor, entitling him to a payment of the funds deposited in escrow. A deduction from such funds, as in the cases where the vendee is in possession,<sup>12</sup> of the amount paid for the outstanding interest or its reasonable value would amply protect the vendee's interests.

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<sup>8</sup> *Bulkin v. Baird & Roper*, *supra* note 7 (to the effect that although the vendor is excused from liability for non-performance of the condition he may not enforce performance by the vendee); *cf.* *Barcello v. Hapgood*, 118 N. C. 712, 24 S. E. 124 (1896) (in a rescission suit by the vendee the court allowed him to recover only the expense incurred in buying up outstanding encumbrance. It is not clear, however, whether the vendee was in possession or not.)

<sup>9</sup> *Patterson v. Meyerhofer*, *supra* note 7 (vendee outbid the vendor at a sale of the outstanding interest).

<sup>10</sup> *Fagan v. Hook*, 142 Mich. 219, 105 N. W. 155 (1905).

<sup>11</sup> *BIGELOW, ESTOPPEL* (6th ed. 1913) 717.

<sup>12</sup> *Mumford v. Pearce*; *Lewis v. Boskins*, both *supra* note 4.

### Vendor and Purchaser—Forfeiture Clause in Land-Sale Contracts.

An installment contract for the sale of land provided in case of purchaser's default that "this contract shall be forfeited and terminated" and that all payments should be retained by the vendor "in full satisfaction and liquidation of all damages". The purchaser defaulted and set up the forfeiture provision as a defense to an action at law for the balance due. *Held*: The vendor had the option to terminate the contract and retain the payments or the right to a full performance.<sup>1</sup>

Damages for the purchaser's breach may be classified according to their terms: namely, (1) where the vendor is expressly given the option to terminate the contract and retain the payments or to enforce the contract to complete the sale;<sup>2</sup> (2) where the purchaser is expressly given the right to forfeit the payments as an alternative to his performance;<sup>3</sup> (3) where the purchaser's default is to make the contract null and void and cause a forfeiture of all payments made;<sup>4</sup> and (4) where the provision for forfeiture of payments is not accompanied by any stipulation as to continuance of the contract.<sup>5</sup>

The courts generally enforce the express provisions of the contracts falling within the first two classes. Contracts falling within the last two classes are open to judicial construction on the question of whether the purchaser can default and set up the forfeiture provision as a defense against the vendor's action to recover the balance due. The construction accorded contracts of the latter two classes is marked by the lack of unanimity.

In construing contracts of the third class the majority of courts hold that "void" means "voidable" at the election of the vendor.<sup>6</sup> The instant case follows this majority by holding, in effect, that "terminated" means "terminable" at the option of the vendor. On the contrary, the fact that the contract provides that it shall be "null and void" upon the purchaser's default has been regarded as indicative of an intention to give the purchaser the option to forfeit or to perform.<sup>7</sup>

Contracts providing for the forfeiture of payments as liquidated

<sup>1</sup> *Biscagne Shores, Inc. vs. Cook*, 67 F. (2d) 144 (C. C. A. 3rd, 1933).

<sup>2</sup> *Wandell v. Johnson*, 71 Mont. 73, 227 Pac. 58 (1924).

<sup>3</sup> *Cooley v. Call*, 61 Utah 203, 211 Pac. 977 (1922).

<sup>4</sup> *T. B. Patter Realty Co. v. Derby*, 75 Ore. 563, 147 Pac. 548 (1915) (where default made the contract "null and void as to both parties.")

<sup>5</sup> *Dealy v. Klapp*, 199 App. Div. 150, 191 N. Y. Supp. 457 (1922).

<sup>6</sup> *Stewart v. Griffith*, 217 U. S. 323, 30 S. Ct. 528, 54 L. ed. 782 (1909).

<sup>7</sup> *Davis v. Isenstein*, 257 Ill. 260, 100 N. E. 940 (1913).

As to contracts of the fourth class the courts do not ordinarily preclude the vendor from enforcing full performance merely because of provision for a forfeiture as liquidated damages.<sup>8</sup> Such provision is considered as fixing the damages, should the vendor elect to consider that the purchaser's default as a breach of the contract.<sup>9</sup> Thus the general rule gives the vendor the option to terminate the contract upon the purchaser's default. The reasons for such a rule are that the defaulting purchaser cannot take advantage of his own neglect and thereby have an option destroying mutuality<sup>10</sup> and creating a unilateral contract;<sup>11</sup> and that the forfeiture clause is security to the vendor for prompt performance on the part of the purchaser rather than a substitute for performance, because the substance of the agreement is the sale.<sup>12</sup> It may be presumed, therefore, that the option of terminating the contract belongs to the vendor.<sup>13</sup>

An action at law for the balance of the purchase money is in effect a specific performance of the contract<sup>14</sup>—and courts of equity generally construe these forfeiture clauses the same as do the courts of law.<sup>15</sup>

Aside from the vendor's right to enforce the contract after the purchaser's breach, the question arises whether the court will enforce the provision giving the vendor the right to *all* payments as liquidated damages. Where the "liquidated damages" as stipulated are excessive the court may construe the provision therefor as a penalty and then determine the actual damage to the vendor.<sup>16</sup> Also the attempt to determine damages by agreement may be considered void by reason of statutes.<sup>17</sup>

The North Carolina court of equity with "an enlightened conscience will not be swift to sustain an undertaking to pay liquidated damages, where there has been no injury and no loss."<sup>18</sup> Statutory

<sup>8</sup> *Keltering v. Eastlock*, 130 Iowa 498, 107 N. W. 177 (1906); *Lyman v. Gedney*, 114 Ill. 388, 29 N. E. 282 (1885).

<sup>9</sup> *Deshian v. Keshishian*, 64 Cal. App. 440, 221 Pac. 669 (1923).

<sup>10</sup> *Mason v. Caldwell*, 10 Ill. 196, 48 Am. Dec. 330 (1848).

<sup>11</sup> See *Westervelt v. Huiskamp*, 101 Iowa 195, 70 N. W. 125 (1897).

<sup>12</sup> *Chambers v. Anderson*, 51 Kan. 385, 32 Pac. 1098 (1893); *Kensely v. Robinson*, 111 Kan. 300, 206 Pac. 877 (1922).

<sup>13</sup> *Cape May Real Estate Co. v. Henderson*, 231 Pa. 82, 79 Atl. 982 (1911) (clear, precise, and unequivocal language is necessary to give purchaser the option.)

<sup>14</sup> *Crom v. Henderson*, 182 Ia. 89, 165 N. W. 397 (1917).

<sup>15</sup> *Note* (1924) 32 A. L. R. 584.

<sup>16</sup> *Stark v. Shemada*, 187 Cal. 785, 204 Pac. 214 (1922) (regarding personal property.)

<sup>17</sup> CAL. CIV. CODE (Deering, 1931) §1670.

<sup>18</sup> *Crawford v. Allen*, 189 N. C. 434, 127 S. E. 521 (1925) (purchaser granted specific performance after he had breached the agreement.)

provisions in some states relieve a defaulting party from a forfeiture upon his "making full compensation to the other party, except in cases of a grossly negligent, willful, or fraudulent breach of duty."<sup>19</sup> Other statutes give the defaulting purchaser a period of grace by requiring the vendor to serve notice of his intention to declare the forfeiture.<sup>20</sup>

In contracts for the sale of personal property the Uniform Conditional Sales Act provides in case of the purchaser's default after he has paid half of the purchase price, or in any event on notice from the purchaser, for a public sale and distribution to the purchaser after payment of expenses and of the balance due the vendor.<sup>21</sup> This result might be reached in North Carolina as to contracts regarding realty. Our court has repeatedly said that the relation between vendor and purchaser "is substantially that subsisting between a mortgagor and a mortgagee",<sup>22</sup> and that "a purchaser of land stands in the position of mortgagor as to the purchase-money where the title has been reserved."<sup>23</sup> Yet, on another occasion, our court has said that the purchaser does not have the right, "as of course," to have the land sold to pay the debt; "nor will a Court of Equity decree a sale of it for such purpose, *unless it is made to appear that the land will sell for a sum sufficient to pay the debt.*"<sup>24</sup> (*Italics supplied*).

Where a large part of the purchase money has been voluntarily paid or where the vendor has recovered judgment for several installments it is a harsh rule to allow the vendor to retain the land and also purchase-money amounting to excessive damages for the purchaser's breach. This unjust result may be obviated by any of three ways: (1) by disregarding the provision for liquidated damages and determining the actual damage sustained by the vendor; (2) by statutory enactment providing for a sale of the land and distribution according to the equities; or, (3) by treating the relation between vendor and purchaser as one of mortgagor and mortgagee and requiring a foreclosure sale.

W. E. ANGLIN.

<sup>19</sup> CAL. CIV. CODE (Deering, 1931) §3275; Note (1930) 18 CALIF. L. REV. 681 (referring in margin to identical statutes in Montana, North Dakota and South Dakota).

<sup>20</sup> IOWA CODE (1931) §§12389-12394; MINN. STAT. (Mason, 1927) §9576.

<sup>21</sup> 2 UNIFORM LAWS ANN. (1924) 158 [§19].

<sup>22</sup> Crawford v. Allen, *supra* note 18.

<sup>23</sup> Bank v. Pearson, 119 N. C. 494, 26 S. E. 46 (1896).

<sup>24</sup> Allen v. Taylor, 96 N. C. 37, 40, 1 S. E. 462 (1887).