

4-1-1936

## Editorial Board/Notes and Comments

North Carolina Law Review

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>Part of the [Law Commons](#)

---

### Recommended Citation

North Carolina Law Review, *Editorial Board/Notes and Comments*, 14 N.C. L. REV. 274 (1936).Available at: <http://scholarship.law.unc.edu/nclr/vol14/iss3/3>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact [law\\_repository@unc.edu](mailto:law_repository@unc.edu).

The  
North Carolina  
Law Review

VOLUME XIV

APRIL, 1936

NUMBER 3

EDITOR IN CHARGE

J. H. CHADBOURN

ASSOCIATE FACULTY EDITORS

M. S. BRECKENRIDGE  
ALBERT COATES  
FRANK W. HANFT  
FREDERICK B. MCCALL

A. C. MCINTOSH  
J. E. MULDER  
E. M. PERKINS  
R. H. WETTACH

M. T. VAN HECKE

STUDENT BOARD OF EDITORS

N. A. TOWNSEND, JR., *Editor-in-Chief*

ALEX B. ANDREWS, III  
MAURICE V. BARNHILL, JR.  
ROBERT BOOTH  
B. IRVIN BOYLE  
O. W. CLAYTON

J. WILLIAM COPELAND  
FRANKLIN T. DUPREE, JR.  
J. D. MALLONEE, JR.  
PAUL F. MICKEY  
S. J. STERN

STATON P. WILLIAMS

*The contributions of the student editors in this issue have been written under the supervision of individual members of the law faculty. Publication of signed contributions from any source does not signify adoption of the views expressed by the LAW REVIEW or its editors collectively.*

The LAW REVIEW makes the following announcements:

The following student editors have been selected from the second year class: Alex B. Andrews, III, O. W. Clayton, J. William Copeland, and Paul F. Mickey.

B. Irvin Boyle has been selected as a student editor from the third year class.

N. A. Townsend, Jr. has been selected as Student Editor-in-Chief for the remainder of this year.

NOTES AND COMMENTS

**Agency—Independent Contractors—Inherent Danger as Question for Judge or Jury.**

The liability of an employer, principal, for acts of his agent is said to be avoided if the employer engages the services of an independent contractor. But it is equally established that one cannot escape liability by entering into an independent contract, if the work to be done by the contractor is "inherently or intrinsically dangerous."

Is this question of inherent danger one for the court or for the jury? It is commonly said that questions of law are for the court and matters of fact for the jury; which means, in general, that when the question is one of law the court decides. If the facts relevant to that

question are in dispute, he will submit alternative charges to the jury as to how to find, depending upon which interpretation they put upon the disputed facts (*e.g.* probable cause in action of malicious prosecution).<sup>1</sup>

If it is a so-called question of fact for the jury, then the judge will charge the jury abstractly with general definitions and standards, leaving to them the application thereof (*e.g.* negligence).<sup>2</sup>

An examination of the cases should reveal either that the courts state that they are treating this general question of inherent danger as: (1) fact for the jury (as negligence is treated), or (2) law for the court (as probable cause is treated). Unfortunately such clarity is not to be found. The courts do not say which view they take.

The overwhelming majority of courts seem to rule merely, whether, on the facts of the case at hand, there is or is not inherent danger, without saying it is a question of fact or law.

For instance, in a typical case,<sup>3</sup> the delivery boy for the defendant coal company caused injury to the plaintiff by allowing a coal chute cover to be raised under her without any warning as she walked over it. As to the question of whether the employer could escape liability due to his independent contract for delivering coal, or must forego his defense because of the inherently dangerous nature of the work involved, the court said: "We are of the opinion that the work was of a hazardous character and inherently dangerous." And again: "Accepting as correct the definition of intrinsically dangerous work, . . . we hold that the work to be performed in this instance was of an inherently dangerous character."

In deciding the problem on the facts of the cases, the courts do not necessarily imply that it is being treated as a question of law, because there are two possible explanations for deciding the problem themselves:

I. The question of inherent danger might be regarded as one of law for the court (like probable cause).

II. Or, the question of inherent danger might be regarded as one of fact for the jury; yet, on the particular facts involved, the court might be deciding as if it were a question of law merely because reasonable minds could not differ.<sup>4</sup> in which case it would become a law question

<sup>1</sup> 5 WIGMORE, EVIDENCE (2nd. ed. 1923) §2554.

<sup>2</sup> 5 WIGMORE, EVIDENCE (2d ed. 1923) §2552.

<sup>3</sup> *Cole v. Durham*, 176 N. C. 289, 97 S. E. 33 (1918).

<sup>4</sup> In *Wetherbee v. Partridge*, 175 Mass. 185, 55 N. E. 894 (1900), the court said: "In some cases of blasting under an independent contract we might go no further than to hold that there was a question for the jury whether the danger was so great as to make the defendant liable. But in the case at bar the danger was so obvious that only one conclusion was possible." In *Norwalk Gas Co. v. Borough of Norwalk*, 63 Conn. 495, 28 Atl. 32 (1893) the lower court charged that the

for the court anyway.<sup>5</sup>

If the latter is a true picture it would seem that inherent danger is being treated like negligence, in that it is generally a question of fact for the jury, but with special rules applicable to special situations, such as the rules of negligence *per se*.

The rulings are sometimes so confused and contradictory that they appear to approve both the court and the jury as solely qualified to decide the question. A North Carolina case<sup>6</sup> represents the ultimate in confusion arising from the nebulous state of the law on this subject. The defendant employed an independent contractor to make an excavation adjacent to the abutting wall of the plaintiff. In the course of the work the plaintiff's wall was damaged. *Held*: judgment for the plaintiff. Although the initial discussion seemed to regard it as a question of law, the court approved a part of a charge requested by the defendant and implying that it was a jury question. Next, the court cited with approval a Maryland case with a similar fact situation<sup>7</sup> wherein the court declared: "The question whether such injury reasonably might have been anticipated as a probable consequence of the excavation was a question of fact for the jury."

Antithetically, the North Carolina Supreme Court then approved the charge given below,<sup>8</sup> which inferred that the decision was one of

question of inherent danger was one for the jury. The Supreme Court disapproved the charge, saying: "We think, also, that the operation of blasting with dynamite is intrinsically dangerous; that the court should have taken judicial notice that it is so; and that the charge on this point is not correct."

<sup>5</sup> Although the cases in which the court will decide are determined on their particular facts and cannot be categorized, yet there are certain types of questions which are usually regarded as for the court rather than for the jury. For instance, when blasting is involved: *Hunter v. Southern Railway Co.*, 152 N. C. 682, 68 S. E. 237 (1910) (building a railway); *Arthur v. Henry*, 157 N. C. 393, 73 S. E. 206 (1911) (rocks thrown on plaintiff's house); *Watson v. Black Mountain Ry. Co.*, 164 N. C. 176, 80 S. E. 175 (1913) (redrilling charged holes); *Greer v. Construction Co.*, 190 N. C. 632, 13 S. E. 739 (1925) (building a highway). Similarly, lumbering operations employing steam driven trains; *Strickland v. Montgomery Lumber Co.*, 171 N. C. 755, 88 S. E. 340 (1916); *Simmons v. Roper Lumber Co.*, 171 N. C. 220, 93 S. E. 736 (1917). Excavating or obstructing thoroughfares: *Woodman v. Metropolitan Ry. Co.*, 149 Mass. 335, 21 N. E. 482 (1889); *Bailey v. City of Winston*, 157 N. C. 252, 72 S. E. 966 (1911); *Carrick v. Southern Power Co.*, 157 N. C. 378, 72 S. E. 1065 (1911); *Dunlap v. Raleigh, Charlotte and Southern Ry. Co.*, 167 N. C. 669, 83 S. E. 703 (1914); *Peters v. Carolina Cotton & Woolen Mills, Inc.*, 199 N. C. 753, 155 S. E. 867 (1930). (involving electricity); *Montgomery v. Gulf Refining Co.*, 168 La. 73, 121 So. 578 (1929) (involving delivery of gasoline). Types of work which courts will usually declare not to be inherently dangerous: *Vogh v. Geer*, 171 N. C. 672, 88 S. E. 874 (1916) (erection of a concrete building); *Gadsden v. Craft*, 173 N. C. 418, 92 S. E. 174 (1917) (construction of a bridge).

<sup>6</sup> *Davis v. Summerfield*, 133 N. C. 325, 45 S. E. 654 (1903).

<sup>7</sup> *Bonaparte v. Wiseman*, 89 Md. 42, 4 Atl. 918 (1899).

<sup>8</sup> "... the court also charges you that the employment of an independent contractor, who is competent and skillful, to make an excavation on a lot in near proximity to a neighbor's house in a populous city . . . does not relieve the

law for the court. In thus approving these two apparently contrary charges, the court seems to contradict itself and presents a typical example of the current confusion.<sup>9</sup>

The present non-committal vagueness leaves open the possibility that more courts will eventually state that inherent danger, like negligence, is a question of fact and that it has been decided by the courts in the particular instances, only because reasonable minds could not differ.

Such a trend, however, would but add to the existing uncertainty and could be eliminated by having the courts commit themselves definitely that inherent danger is a question of law for the court.

This would be much more desirable than treating it as fact because the traditional susceptibility of the jury to emotional influences would work an unfair hardship on the defendant, who is usually a corporate employer. This situation, in addition to the technical and confused nature of the problems commonly involved, would seem to indicate that the courts are much better qualified to make such decisions than are the juries, and as the courts have repeatedly shown their desire to decide such questions, their clear intent should be crystallized into a routine policy thereby eliminating much of the presently prevalent confusion on this subject.

ALEX B. ANDREWS III.

### Contracts—Rescission—Marriage as Consideration.

Plaintiff conveyed to defendant land worth \$15,000 in exchange for her oral promise to marry, live with, and care for him so long as both should live. Six months after the marriage defendant left him under circumstances showing no fault on his part. Plaintiff sued for cancellation of the deed, alleging fraud. There was some evidence from which fraud might have been inferred.<sup>1</sup> *Held*; defendant's motion for nonsuit was properly granted.<sup>2</sup>

---

proprietor from the obligation . . . to see that the contractor protects his neighbor's wall . . . or to give timely notice."

<sup>9</sup> In *Scales v. Llewellyn*, 172 N. C. 494, 90 S. E. 521 (1916), the court below submitted the question to the jury as one of fact. The Supreme Court held that the lower court applied an improper test for inherent danger, and also inferred that the question was not for the jury, but for the court.

<sup>1</sup> Witnesses testified that shortly before leaving plaintiff, defendant declared she had married him only until she could do better, that she did not love plaintiff when she married him, and that she was not going to stay with the "old devil" much longer.

<sup>2</sup> *Whitley v. Whitley*, 209 N. C. 25, 182 S. E. 658 (1935). The facts present a new chapter in love's old story, which will probably be remembered long after the legal aspects of the case are forgotten. Plaintiff testified: "We had a marriage contract which was not in writing. She agreed to marry me if I would give her the tract of land described in the deed, and I told her I would give her the

The appeal presented one direct question: viewed in the light most favorable to the plaintiff, was there sufficient evidence of fraud to be submitted to the jury.<sup>3</sup> Seemingly disregarding this issue, the court purported to base its decision upon three grounds: (1) that marriage was good consideration for the contract; (2) that defendant's promise was at most a condition subsequent, breach of which would not affect the validity of the deed; and (3) that plaintiff could not restore the status quo. The relevancy of the first two is questionable, but the third might ultimately decide the case, even if plaintiff succeeded in proving fraud.

While marriage has long been regarded as valuable consideration for a contract,<sup>4</sup> the courts have differed as to the time when full value of this consideration is passed. Most of the holdings adopt the view that performance of the ceremony constitutes complete performance,<sup>5</sup> but there is respectable authority for the proposition that marriage

---

land if she would take care of me her lifetime or my lifetime. We were in the cow shed. She was milking, and we shook hands on it across the cow's back. I gave her the land, and we were married the next day. She lived with me six months, and then left my home."

"I had a conversation with her the day she left. I told her that I had an uncle in Stanly County and that he lived to be 105 years old, and then cleared a new ground. I told her I believed I was going to live that long. When I said that she come up and hit me in the eye. My foot slipped, and I got penned up between the walls of the house, and she beat me over the head until she got satisfied and quit. Within 30 minutes she left my house and has never been back since."

<sup>3</sup> *Gates v. Max*, 125 N. C. 139, 34 S. E. 266 (1899); *Madry v. Moore*, 161 N. C. 295, 77 S. E. 241 (1913); *Lawske v. Norfolk Southern R. Co.*, 191 N. C. 473, 132 S. E. 160 (1925); *Ledford v. Tallassee Power Co.*, 194 N. C. 98, 138 S. E. 424 (1927). See also *McINTOSH*, *NORTH CAROLINA PRACTICE AND PROCEDURE* (1929) §565 (4).

<sup>4</sup> In *Johnston v. Dilliard* 1. S. C. 93 (1792), marriage was said to be "the highest consideration known to law." In the law of fraudulent conveyances where the question commonly arises, it has been necessary to give it great weight as consideration to defeat the claims of creditors. *Aufdemkamp v. Pierce*, 4 Cal. App. (2d) 250, 40 Pac. (2d) 599 (1935); *De Hierapolis v. Reilly*, 168 N. Y. 585, 60 N. E. 1110 (1901) (Conveyance to wife in consideration of marriage, but with fraudulent intention on part of the husband, held valid, since wife was ignorant of fraud).

<sup>5</sup> (1) In many cases marriage was not the entire consideration. *Turner v. Warren*, 160 Pa. 336, 28 Atl. 781 (1894) (wife agreed to devise marriage portion back to husband after marriage); *Metz v. Blackburn*, 9 Wyo. 481, 65 Pac. 857 (1901) (ranch conveyed to wife in consideration of marriage and her promise to educate husband's minor son). (2) In others there was no question of default in marriage vows, and the precise issue was not squarely presented. *Leib v. Dabraver*, 60 Misc. Rep. 866, 111 N. Y. Supp. 650 (1908) (promise to pay \$2,000 if promisee married promisor's daughter); *Arnold v. Estis*, 92 N. C. 163 (1885) (deed from father to daughter and her intended husband as inducement to the marriage); (3) But a few of the cases have passed directly on the issue. *Sidney v. Sidney*, 3 P. Wms. 269, 24 Eng. Rep. 1060 (1734) (specific performance granted wife who deserted husband and lived in adultery with another); *Barnes v. Barnes*, 110 Cal. 420, 42 Pac. 904 (1895); *Jackson v. Jackson*, 222 Ill. 46, 78 N. E. 19 (1906); *Schnepfe v. Schnepfe*, 134 Md. 330, 92 Atl. 891, Ann. Cas. 1916D, 988 (1914).

comprises a continuing obligation,<sup>6</sup> and that mere performance of the ceremony does not translate an antenuptial contract into a unilateral undertaking by the husband.<sup>7</sup> Such cases define marriage as a mutual agreement for cohabitation in which "each party has a right to the society and services of the other, and if these are refused the marriage rights and duties are thereby disregarded and violated."<sup>8</sup> The desirability of applying the second definition in a case like the present is apparent, since the logic of the first would lead to the absurdity of allowing the wife to depart with the husband's property immediately after performance of the marriage ritual.

But even accepting the contention that marriage means nothing more than mere submission to the rites, there was in the present contract express embodiment of the additional consideration that defendant should care for the husband as long as both lived.<sup>9</sup> One may question the validity and necessity of classifying this promise broadly as a condition subsequent, since no condition appeared in the deed,<sup>10</sup> no stipulation was made in the oral contract that a violation should permit rescission,<sup>11</sup> and no acts were done from which a condition might be implied in fact. But it may be justifiably regarded as a condition implied by law,<sup>12</sup> for the promise to perform services was such a substantial part of the contract that "the parties would have intended it to operate as such<sup>13</sup> if they had thought about it at all, and justice requires that it should so operate."<sup>14</sup> Under this construction the court would not be bound to grant rescission,<sup>15</sup> as it would be if the

<sup>6</sup> *York v. Ferner*, 59 Iowa 487, 13 N. W. 630 (1882); *Veeder v. Veeder*, 195 Iowa 587, 192 N. W. 409, 29 A. L. R. 191 (1923); *Judd v. Judd*, 192 Mich. 198, 158 N. W. 948 (1916), *rehearing denied*, 160 N. W. 548 (1916) (after conveyance wife obtained divorce *pro confesso* while in another state).

<sup>7</sup> *New Jersey Title Guarantee and Trust Co. v. Parker*, 85 N. J. Eq. 557, 96 Atl. 574 (1916).

<sup>8</sup> *York v. Ferner*, 59 Iowa 487, 13 N. W. 630 (1882).

<sup>9</sup> *Supra*, note 2.

<sup>10</sup> An estate on condition subsequent cannot be created by a deed having no clause of forfeiture, reverter, or re-entry. *Hall v. Quinn*, 190 N. C. 326, 130 S. E. 18 (1925). An oral condition is nugatory. *Adams v. Logan County*, 11 Ill. 339 (1849).

<sup>11</sup> Although an oral condition cannot be created to work a reverter or forfeit an estate, the parties to a contract may provide that certain happenings shall justify rescission of that contract. *Nashville and Northwestern Railroad Co. v. Jones*, 42 Tenn. 404 (1865).

<sup>12</sup> The reason for such implication is clearly set out in *Bank of Columbia v. Hagner*, 26 U. S. 455, 464, 7 L. ed. 219, 223 (1828): "A different construction would in many cases lead to the greatest injustice, and a purchaser might have payment of the consideration enforced upon him, and yet be disabled from procuring the property for which he paid it. . . . The seller ought not to be compelled to part with his property without receiving the consideration."

<sup>13</sup> *i. e.*, a condition subsequent.

<sup>14</sup> *Corbin, Conditions in the Law of Contracts* (1919) 28 YALE L. J. 739, 744. See also, BLACK, RESCISSION AND CANCELLATION (1916) §213.

<sup>15</sup> "The law having imposed the condition, irrespective of the will of the

condition were express.<sup>16</sup> But such relief is usually granted where it would be inequitable to deny it, and especially where there is an element of fraud.

In holding that the plaintiff could not restore the status quo, the court probably referred to his inability to return the defendant to an unmarried state, though the decision is inarticulate on this point.<sup>17</sup> The statement, in the opinion, of the general rule that a party is not entitled to rescission when unable to restore the status quo, is accurate,<sup>18</sup> but its applicability here is questionable. As well recognized as the rule itself, is the exception that where the inability results from no act of the plaintiff, the relief should be granted if called for by the facts,<sup>19</sup> particularly if the impossibility results from the fault, fraud, or wrongful conduct of the defendant.<sup>20</sup> A New York case<sup>21</sup> illustrates both the force and relevancy of the exception. Before marriage the husband had by duress induced the wife to execute deeds to them as tenants by entirety of certain real estate. In the wife's suit for cancellation, the husband, setting up the general rule, denied that the wife was entitled to cancellation because the marriage could not be annulled. The court overruled this defense on the ground that the impossibility was occasioned by the defendant's fraud, and that he could not set up the results of his own wrong to prevent rescission by the innocent plaintiff.<sup>22</sup>

parties, it can deal with the creation as it pleases." 2 WILLISTON, CONTRACTS (1920) §669. But the only purpose of creating the fiction is rationalization of relief, and rescission should logically follow.

<sup>16</sup> The intention of the parties must be carried out unless against public policy. *Schumann v. Mark*, 35 Minn. 379, 28 N. W. 927 (1886); *Carney v. Barnes*, 56 W. Va. 581, 49 S. E. 423 (1904).

<sup>17</sup> In *Jackson v. Jackson*, 222 Ill. 46, 78 N. E. 19 (1906) the court said "the husband is not now in position to reclaim the land, as he cannot restore the appellee to the unmarried state in which he found her at the time of the conveyance."

<sup>18</sup> *Andrews v. Hensler*, 72 U. S. 254, 18 L. ed. 737 (1867); *May v. Loomis*, 140 N. C. 350, 52 S. E. 728 (1905); *Bolick v. Prudential Ins. Co.*, 206 N. C. 144, 156, 173 S. E. 320, 327 (1934).

<sup>19</sup> *Thachrah v. Haas*, 119 U. S. 499, 7 Sup. Ct. 311, 30 L. ed. 486 (1886); *Payne v. Hiram Lindsey Co.*, 71 Wash. 293, 128 Pac. 678 (1912). See also BLACK, *op. cit.*, *supra*, note 14, §618; 3 WILLISTON, *op. cit.*, *supra*, note 15, §1530.

<sup>20</sup> *Consumers Coal and Fuel Co. v. Yarbrough*, 194 Ala. 482, 69 So. 897 (1915); *Felt v. Bell*, 205 Ill. 213, 68 N. E. 794 (1903); *Paquin v. Milliken*, 163 Mo. 79, 63 S. W. 417, 1092 (1901); *Hammond v. Pennock*, 61 N. Y. 145 (1874); *Liland v. Truets*, 19 N. D. 551, 125 N. W. 1032 (1910); *Hilton v. Advance Thresher Co.*, 8 S. D. 412, 66 N. W. 816 (1896).

<sup>21</sup> *Ring v. Ring*, 127 App. Div. 411, 111 N. Y. Supp. 713 (1908), *aff'd*, 199 N. Y. 574, 93 N. E. 1130 (1910).

<sup>22</sup> The court quoted, *Masson v. Bault*, 1 Denio 69 (N. Y., 1845), as follows: "If, therefore, he has so entangled himself in the meshes of his own knavish plot that the party defrauded cannot unloose him, the fault is his own, and the law only requires that the injured party restore what he has received, and as far as he can, undo what has been done in the execution of the contract. . . .



At most the principal case means one of two things: (1) that under the most favorable view of the evidence plaintiff failed to show fraud, or (2) that even though fraud were proved plaintiff was not entitled to rescission because of inability to restore the status quo. If it be the first, one can only question the result in view of the evidence in the record tending to show fraud.<sup>23</sup> If it be the second, there is good authority in North Carolina for the general proposition,<sup>24</sup> but the narrow question now presented has heretofore never been decided in this jurisdiction.<sup>25</sup> It is suggested that under the rules reviewed above the court might well have recognized an exception.

On the merits of his case the plaintiff seems entitled to some sort of relief.<sup>26</sup> But since the contract was oral legal redress is inaccessible.<sup>27</sup> A possible alternative is cancellation for failure of consideration.<sup>28</sup> Partial failure of consideration is not ordinarily a ground for rescission,<sup>29</sup> and the rule is inflexible where full compensation may be

---

That is all honesty and fair dealing requires of him. If this fail to extricate the wrongdoer from the position he has assumed, it is in no sense the fault of the intended victim, and whatsoever consequences may follow should rest on his head alone."

<sup>23</sup> *Supra*, note 1. Under the decisions of this state, upon motion to dismiss, "if there is more than a scintilla of evidence tending to prove plaintiff's contention, it must be submitted to the jury, who alone can pass on the weight of the evidence." *Cox v. Norfolk & C. R. Co.*, 123 N. C. 604, 31 S. E. 848 (1898); *Gates v. Max*, 125 N. C. 139, 34 S. E. 266 (1899); *Lamb v. Perry*, 169 N. C. 436, 86 S. E. 179 (1915); *Campbell v. Washington Light and Power Co.*, 171 N. C. 768, 88 S. E. 630 (1916); *Nowell v. Barnsight*, 185 N. C. 142, 116 S. E. 87 (1923). See also *McINTOSH*, *loc. cit. supra*, note 3.

<sup>24</sup> *May v. Loomis*, 140 N. C. 350, 52 S. E. 728 (1906); *Brown v. Osteen*, 197 N. C. 305, 14 S. E. 434 (1929); *Bolick v. Life Ins. Co.*, 206 N. C. 144, 173 S. E. 320 (1934).

<sup>25</sup> Search reveals only two holdings squarely on the point: *Barnes v. Barnes*, 110 Cal. 420, 42 Pac. 904 (1895) (where the marriage relationship had been maintained for seven years); *Jackson v. Jackson*, 222 Ill. 46, 78 N. E. 19 (1906).

<sup>26</sup> That a wife in default on marriage contract should not be allowed to retain property settled upon her in consideration of marriage, irrespective of fraud, seems to have been recognized by the N. C. Legislature. N. C. CODE ANN. (Michie, 1935) §2523. "If a married woman . . . wilfully or without just cause abandon her husband and refuses to live with him, and is not living with her husband at his death . . . she shall thereby lose . . . all right and estate in the property of her husband settled upon her upon the sole consideration of marriage, before or after marriage."

<sup>27</sup> An ordinary action for damages is barred by the statute of frauds, and chance for recovery in an action for fraud and deceit is entirely speculative, since deemed to be based on affirmance of the contract.

<sup>28</sup> Several states have expressly provided by statute that a party to a contract may rescind the same where the consideration for his obligation fails in whole or in part. CAL. CIV. CODE (Deering, 1931) §1689; MONT. REV. CODE (Choate, 1921) §7565; N. D. COMP. LAWS ANN. (1913) §5934; OKLA. COMP. STAT. ANN. (1910) §5077; S. D. COMP. LAWS (1929) §904. For construction of statute see *Sterling v. Gregory*, 149 Cal. 117, 85 Pac. 305 (1906); *Conlin v. Osborn*, 161 Cal. 659, 120 Pac. 755 (1911).

<sup>29</sup> *Peale v. Marion Coal Co.*, 190 Fed. 376 (C. C. M. D. Pa., 1911); *Perry v.*

obtained in damages.<sup>80</sup> But the rule has been relaxed and relief granted where the exigencies of the particular case seem to so demand.<sup>81</sup>

Since the trial these remedial difficulties have been simplified. It appears that plaintiff's death pending appeal brought the case within a statute enabling recovery of marriage settlements from a wife in default on the marriage contract at the time of her husband's death.<sup>82</sup> An action on the statute by the personal representative of the deceased plaintiff is not *res adjudicata* by the non-suit in the principal case, notwithstanding the former was made party plaintiff in the appeal. A cause of action on the statute arose only at the death of the husband and could not be set up by amendment to an action instituted by the deceased himself.<sup>83</sup>

PAUL F. MICKEY.

### Constitutional Law—Taxation—Privileges and Immunities of Federal Citizenship.

In *Colgate v. Harvey*,<sup>1</sup> a Vermont statute imposing, on the citizens of that state, an income tax on interest from loans bearing interest at five per centum or less, but providing that the act should not apply to any loans made within the state, was held unconstitutional as being repugnant to the Fourteenth Amendment of the Federal Constitution. The court held that the exemption of loans made within the state was a denial of the "equal protection clause"<sup>2</sup> because the exemption was unreasonable and arbitrary, it had no substantial relation to the object of the statute, and, as a practical matter, exempted loans made within the state might be invested elsewhere. The court went further to proclaim that the privilege of acquiring and owning investments outside the state and receiving income therefrom was a privilege of federal citizenship

Quackenbush, 105 Cal. 299, 38 Pac. 740 (1894); *Selby v. Hutchison*, 9 Ill. 319 (1847); *Miller v. Phillips*, 31 Pa. St. Rep. 218 (1858).

<sup>80</sup> *Gatlin v. Wilcox*, 26 Ark. 309 (1870).

<sup>81</sup> *Aubrey v. Clark*, 148 U. S. 345, 13 Sup. Ct. 617, 37 L. ed. 475 (1892); *Gatlin v. Wilcox*, 26 Ark. 309 (1870); *Campbell Printing Press Co. v. Marsh*, 20 Colo. 22, 36 Pac. 799 (1894); *Taylor v. Taylor*, 259 Ill. 524, 102 N. E. 1086 (1913); *Williams v. Butler*, 58 Ind. App. 47, 105 N. E. 387, *rehearing denied*, 52 Ind. App. 47, 107 N. E. 300 (1914); *Mason v. Baret*, 1 Denio 69 (N. Y. 1845); *Callonon v. Powers*, 199 N. Y. 268, 92 N. E. 747 (1910).

<sup>82</sup> *Supra* note 26. In the only case applying the statute since enactment, it was construed very strictly against the wife [*Phillips v. Wiseman*, 131 N. C. 402, 42 S. E. 861 (1902)]. It seems that only a distorted interpretation by reading in equitable doctrines discussed in this note could defeat its operation in a case like the present.

<sup>83</sup> *Bolick v. Southern R. Co.*, 138 N. C. 412, 50 S. E. 689 (1905).

<sup>1</sup> 56 Sup. Ct. 252, 80 L. ed. 225 (1935).

<sup>2</sup> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

guaranteed by Section 1 of the same Amendment,<sup>3</sup> and that the tax would be invalid as abridging this privilege, even if not discriminatory.

The court's interpretation of the clause which forbids state abridgment of the privileges or immunities of citizens of the United States is a startling innovation. The interpretation not only stands alone without precedent, but is also in conflict with prior decisions.

Shortly after the termination of the Civil War and the emancipation of the negroes, the Fourteenth Amendment was added to the Constitution of the United States.<sup>4</sup> At that time, there was no real reason for the creation of further rights, and the purpose of the "privileges and immunities clause" was doubtless an effort to extend citizenship and to broaden the scope of its benefits to a greater number of persons, rather than to enhance citizenship or to vary the quality of rights. The first and leading interpretation of the clause herein discussed was set forth in the *Slaughter-House Cases*.<sup>5</sup> Since that decision, the clause has been so narrowly construed that it has merely served citizens by furnishing an additional guaranty of those privileges and immunities which they had prior to the adoption of the Fourteenth Amendment,<sup>6</sup> *i.e.*, it made express the protection of those rights which had previously existed by implication. The Supreme Court has repeatedly ruled that privileges and immunities of citizens of the United States are those inherent in the very nature and character of our national government—the provisions of its Constitution, and laws and treaties made in pursuance thereof.<sup>7</sup> These

\* "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . ." This provision is not to be confused with U. S. CONSTITUTION, Art. IV, §2, providing, "The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States. . . ." It is well established that this clause affords a citizen no protection as to action by his own state. Thus it has no application to the principal case.

<sup>3</sup> Proposed by Congress June 13, 1866. Effectively ratified July 9, 1868.

<sup>4</sup> 83 U. S. 36, 21 L. ed. 394 (1873).

<sup>5</sup> See *id.* at 96, 21 L. ed. at 415, Mr. Justice Field dissenting stated if the clause, ". . . only refers, as held by the majority of the court in their opinion, to such privileges and immunities as were before its adoption specifically designated in the Constitution or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage." *Minor v. Happersett*, 88 U. S. 162, 171, 22 L. ed. 627, 629 (1874); *United States v. Cruikshank*, 92 U. S. 542, 554, 23 L. ed. 588, 592 (1875); *In re Kemmler*, 136 U. S. 436, 448, 10 Sup. Ct. 930, 934, 34 L. ed. 519, 524 (1889); *In re Lockwood*, 154 U. S. 116, 117, 14 Sup. Ct. 1082, 1083, 38 L. ed. 929, 930 (1893).

<sup>6</sup> See *Slaughter-House Cases*, 83 U. S. 36, 72-74, 77-80, 21 L. ed. 394, 407-410 (1873); *In re Kemmler*, 136 U. S. 436, 448, 10 Sup. Ct. 930, 934, 34 L. ed. 519, 524 (1889); *McPherson v. Blocker*, 146 U. S. 1, 38, 13 Sup. Ct. 3, 11, 36 L. ed. 869, 878 (1892); *Giozza v. Tiernan*, 148 U. S. 657, 661, 13 Sup. Ct. 721, 723, 37 L. ed. 599, 601 (1892); *Duncan v. Missouri*, 152 U. S. 377, 382, 14 Sup. Ct. 570, 571, 572, 38 L. ed. 485, 487 (1893); *Orr v. Gilman*, 183 U. S. 278, 286, 22 Sup.

privileges and immunities embody the right to assemble for the purpose of petitioning Congress for the redress of a grievance,<sup>8</sup> to vote for a member of Congress and presidential electors without race discrimination,<sup>9</sup> to establish homesteads by remaining on unoccupied public land,<sup>10</sup> to be protected from unlawful violence while in the custody of a United States marshal,<sup>11</sup> and to inform the authorities of the United States as to the violation of its laws.<sup>12</sup> These rights, however, were declared by the Supreme Court in the determination of federal prosecutions against individuals for conspiracy to invade the civil rights of citizens of the United States,<sup>12a</sup> and not in actions contesting the validity of state statutes. The Fourteenth Amendment is inapplicable in these cases, for by its express provisions, it applies only to action by a state.

Prior to the instant case, forty-four cases have been brought before the Supreme Court in which state statutes were assailed on the grounds that they infringed on the "privileges and immunities clause,"<sup>13</sup> and yet the court has not found an abridgement in a single instance. Among the statutes involved were those requiring students of a state university to complete a course in military science, and tactics,<sup>14</sup> prohibiting Greek-letter fraternities or other societies in state educational institutions,<sup>15</sup> forbidding possession<sup>16</sup> or sale<sup>17</sup> of intoxicating liquors, deny-

Ct. 213, 217, 46 L. ed. 196, 201 (1901); *Twining v. New Jersey*, 211 U. S. 78, 97, 29 Sup. Ct. 14, 19, 53 L. ed. 97, 105 (1908); *Maxwell v. Bugbee*, 250 U. S. 525, 537, 538, 40 Sup. Ct. 2, 5, 63 L. ed. 1124, 1130 (1919); *Ownbey v. Morgan*, 256 U. S. 94, 131, 41 Sup. Ct. 433, 438, 65 L. ed. 837, 846 (1920); *Prudential Ins. Co. v. Cheek*, 259 U. S. 530, 539, 42 Sup. Ct. 516, 520, 66 L. ed. 1044, 1052 (1921); *Hamilton v. Regents*, 293 U. S. 245, 261, 55 Sup. Ct. 197, 203, 79 L. ed. 343, 352 (1934); Note (1891) 14 L. R. A. 579. The United States can only grant and secure to its citizens those rights which are expressly or by reasonable implication placed under its jurisdiction.

<sup>8</sup> *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588 (1875) (indictment against an individual for conspiracy).

<sup>9</sup> *Ex Parte Yarbrough*, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. ed. 274 (1883) (conspiracy); *Wiley v. Sinkler*, 179 U. S. 58, 21 Sup. Ct. 17, 45 L. ed. 84 (1900).

<sup>10</sup> *United States v. Waddell*, 112 U. S. 76, 5 Sup. Ct. 36, 28 L. ed. 673 (1884) (conspiracy).

<sup>11</sup> *Logan v. United States*, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. ed. 429 (1891) (conspiracy).

<sup>12</sup> *In re Quarles*, 158 U. S. 532, 15 Sup. Ct. 959, 39 L. ed. 1080 (1894) (conspiracy).

<sup>12a</sup> 35 STAT. 1092 (1909); 18 U. S. C. A. §51 (1927).

<sup>13</sup> See cases cited in *Colgate v. Harvey*, 36 Sup. Ct. 252, 266, n. 2, 80 L. ed. 225, 242, n. 2 (1935).

<sup>14</sup> *Hamilton v. Regents*, 293 U. S. 245, 55 Sup. Ct. 197, 79 L. ed. 343 (1934).

<sup>15</sup> *Waugh v. Board of Trustees*, 237 U. S. 589, 35 Sup. Ct. 720, 59 L. ed. 1131 (1914).

<sup>16</sup> *Crane v. Campbell*, 245 U. S. 304, 38 Sup. Ct. 98, 62 L. ed. 304 (1917).

<sup>17</sup> *Bartemeyer v. Iowa*, 85 U. S. 129, 21 L. ed. 929 (1873); *Crawley v. Christensen*, 137 U. S. 86, 11 Sup. Ct. 13, 34 L. ed. 620 (1890); *Giozza v. Tiernan*, 148 U. S. 657, 13 Sup. Ct. 721, 37 L. ed. 599 (1892); *Cox v. Texas*, 202 U. S. 446, 26 Sup. Ct. 671, 50 L. ed. 1099 (1905). It is undoubtedly a right of every citizen

ing the right to use the United States' flag for advertising purposes,<sup>18</sup> and requiring segregation of races in conveyances.<sup>19</sup> The court has held further that the right to practice law,<sup>20</sup> the right of suffrage,<sup>21</sup> and the rights designated under the first eight Amendments were not protected by the clause.<sup>22</sup>

The prerequisite for the application of the clause on numerous occasions has been the pointing out of the provision of the Constitution, or the laws, or treaty which the statute violated;<sup>23</sup> a mere contention that a privilege or immunity was violated was deemed too general.<sup>24</sup> Such a rule accounts for the uncontradicted inapplicability of the clause. Since the single fact that the Constitution and laws of the United States created a privilege or granted an immunity was, of itself, sufficient to put the privilege or immunity beyond the reach of unfriendly state legislation, the pleading of the clause as protection was superfluous, being a resort only when the party aggrieved by a state law could find no federal guaranty of right based upon a specific provision of the Constitution but when he felt that an inalienable right had been violated. Naturally, in these instances, the clause proved of no avail. It is evident that had the clause herein discussed added constructively to the substantive privileges and immunities afforded to citizenship prior to its adoption, the court would have been presented with cases which involved such infringement, especially when we consider the multiplicity of state statutes for the past sixty-five years.

The rule of the instant case, no abridged statute having been set forth, seems extremely undesirable, for as pointed out by Mr. Justice Stone in his able minority opinion,<sup>25</sup> ". . . the clause becomes an in-

---

of the United States to pursue any lawful trade or business under such restrictions as are imposed on all persons of the same age, sex, and condition.

<sup>18</sup> *Halter v. Nebraska*, 205 U. S. 34, 27 Sup. Ct. 419, 51 L. ed. 696 (1906).

<sup>19</sup> *Plessy v. Ferguson*, 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. ed. 256 (1895).

<sup>20</sup> *Bradwell v. Illinois*, 83 U. S. 130, 21 L. ed. 442 (1872); *In re Lockwood*, 154 U. S. 116, 14 Sup. Ct. 1082, 38 L. ed. 929 (1893).

<sup>21</sup> *Minor v. Happersett*, 88 U. S. 162, 22 L. ed. 627 (1874).

<sup>22</sup> By the unvarying decisions the first eight Amendments to the Constitution of the United States are restrictive only of national action. See *Walker v. Sauvinet*, 92 U. S. 90, 23 L. ed. 678, 679 (1875) (trial by jury is not a privilege or immunity of citizens of the United States); *Presser v. Illinois*, 116 U. S. 252, 266, 6 Sup. Ct. 580, 584, 29 L. ed. 615, 619 (1885) (right to bear arms); *McElvaine v. Brush*, 142 U. S. 155, 158, 12 Sup. Ct. 156, 157, 35 L. ed. 971, 973 (1891) (cruel and unusual punishment); *Maxwell v. Dow*, 176 U. S. 581, 606, 20 Sup. Ct. 448, 455, 44 L. ed. 597, 602 (1899) (trial by a jury of eight jurors); *Twining v. New Jersey*, 211 U. S. 78, 92, 29 Sup. Ct. 14, 19, 53 L. ed. 97, 103 (1908) (exemption from self-incrimination).

<sup>23</sup> See *Presser v. Illinois*, 116 U. S. 252, 266, 6 Sup. Ct. 580, 585, 29 L. ed. 615, 619 (1885).

<sup>24</sup> *Cox v. Texas*, 202 U. S. 446, 26 Sup. Ct. 671, 50 L. ed. 1099 (1905).

<sup>25</sup> *Colgate v. Harvey*, 56 Sup. Ct. 252, 267, 80 L. ed. 225, 237 (1935). Mr. Justice Brandeis and Mr. Justice Cardozo concurred in the dissent.

exhaustible source of immunities, incalculable in their benefit to taxpayers and in their harm to local government, by imposing on the states the heavy burden of an exact equality of taxation wherever transactions across state lines may be involved."

S. J. STERN, JR.

### Federal Procedure—Conflict of Laws—Conformity to State Declaration of Its Public Policy.

The plaintiff, a resident of New Jersey, brought suit in the Federal District Court in New York alleging that the defendant, a resident of the latter state, had alienated the affections of his wife. The defendant moved to dismiss the complaint on the ground that it was contrary to the public policy of New York as expressed in a statute<sup>1</sup> which abolished the state remedy for alienation of affections. The motion was denied because the allegations in the complaint did not show that the tort occurred in New York. The court held that the law of New Jersey which still permitted such an action<sup>2</sup> would apply if the evidence showed that the wrong took place in that state because the action was transitory and governed by the law of the place as distinguished from the law of the forum.<sup>3</sup>

It is, of course, elementary that the Rule of Decisions Act<sup>4</sup> requires federal courts to apply the laws of the state in which they sit and that such laws were interpreted by *Swift v. Tyson*<sup>5</sup> as including only statutory and local judge-made law, excluding judge-made general law. The inquiry in the instant case thus involves a determination of what laws would be applicable if the suit were brought in a New York state court and which of these laws would demand conformity under the classification of *Swift v. Tyson*. Suit in New York on a foreign cause

<sup>1</sup>Laws of New York, 1935, c. 263. The statute contains the novel provision that any person who, as either party or attorney, begins an action barred by the article shall be guilty of a felony punishable by a fine of not less than \$1000 or not more than \$5000, or by imprisonment of not less than one year or not more than five years, or by both fine and imprisonment.

<sup>2</sup>The law of New Jersey is substantially the same as that in force in New York, but it provided that actions which had already accrued could be brought within 60 days of the effective date (June 27, 1935) of the statute. Laws of New Jersey, 1935, c. 279. The suit in the instant case was not barred as it was filed on August 22, 1935, five days prior to the expiration of the 60 day period.

<sup>3</sup>*Wawrzin v. Rosenberg*, 12 F. Supp. 548 (E. D. N. Y. 1935). The venue seems to have been proper since the defendant was a resident of New York. 36 STAT. 1101 (1911), 28 U. S. C. A. §112 (1927).

<sup>4</sup>1 STAT. 92 (1789), 28 U. S. C. A. §725 (1927).

<sup>5</sup>41 U. S. 1, 10 L. ed. 865 (1842). This entire field has been thoroughly and efficiently covered in several texts. See DOBIE, HANDBOOK OF FEDERAL JURISDICTION AND PROCEDURE (1st ed. 1928) 558-576; 6 HUGHES, FEDERAL PRACTICE JURISDICTION & PROCEDURE (1st ed. 1931) 173-314. But cf. *Burns Mortgage Co. v. Fried*, 292 U. S. 487, 54 Sup. Ct. 813, 78 L. ed. 1380 (1934) (a significant recent decision involving a uniform state law).

of action would involve the familiar rule that a state will not entertain a foreign cause of action contrary to its own public policy.<sup>6</sup> In which of the categories of *Swift v. Tyson* this rule would be placed makes no difference because it is followed in all states. But what of a federal court's conformity to the state's determination of what is against its public policy? In *Hartford Fire Insurance Co. v. Chicago, M. & St. P. Ry. Co.*<sup>7</sup> where the Supreme Court was engaged in the construction of a lease contract, it was said, "Questions of public policy as affecting the liability for acts done, or upon contracts made and to be performed within one of the states of the Union,—when not controlled by the Constitution, laws, or treaties of the United States, or by the principles of mercantile or commercial law or of *general jurisprudence*,<sup>8</sup> of national or universal application,—are governed by the laws of the state as expressed in its own constitution and statutes, or declared by its highest court." Thus when confronted by a question of policy in connection with a principle of *general jurisprudence* the federal courts are not bound to follow the decisions of the state court.<sup>9</sup> Since a problem in conflict of laws is regarded as a matter of general law<sup>10</sup> it would seem that related questions of policy should not depend upon decisions of the state courts, and they have been so considered in one group of cases of which *Evey v. Mexican Central Ry. Co.*<sup>11</sup> is typical. In that

<sup>6</sup> 3 BEALE, CONFLICT OF LAWS (1st ed. 1935) 1647; RESTATEMENT, CONFLICT OF LAWS (1934) §612.

<sup>7</sup> 175 U. S. 91, 100, 20 Sup. Ct. 33, 37, 44 L. ed. 84, 89 (1899).

<sup>8</sup> Italics mine.

<sup>9</sup> *Black & White Taxi Co. v. Brown & Yellow Taxi Co.*, 273 U. S. 690, 47 Sup. Ct. 472, 71 L. ed. 842 (1928); *Citizen's Nat'l Bank of Orange, Va. v. Waugh*, 78 F. (2d) 325 (C. C. A. 4th, 1935) (attorney's fee provision in a note).

<sup>10</sup> *First National Bank of Chicago v. Mitchell*, 92 Fed. 565 (C. C. A. 2nd, 1899) (surety contract by married woman); *Dygart v. Vermont Loan and Trust Co.*, 94 Fed. 913 (C. C. A. 9th, 1899) (usurious note); *Guernsey v. Imperial Bank of Canada*, 188 Fed. 300 (C. C. A. 8th, 1911) (manner of giving and sufficiency of notice of dishonor of a negotiable instrument).

<sup>11</sup> 81 Fed. 294 (C. C. A. 5th, 1897). But cf. *Mexican Nat'l Ry. Co. v. Slater*, 115 Fed. 593 (C. C. A. 5th, 1902), *aff'd*, 194 U. S. 120, 24 Sup. Ct. 581, 48 L. ed. 900 (1904) (The decision conforms to the Texas rule regarding the enforcement of actions arising under the Mexican law, and while the Evey case is 'not expressly overruled, it probably does not constitute applicable law at present.). Other cases in this group are: *Greaves v. Neal*, 57 Fed. 816 (C. C. D. Mass. 1893) (assignment for benefit of creditors); *Dexter v. Edmands*, 89 Fed. 467 (C. C. D. Mass. 1898) (case involved Kansas law which imposed liability for corporate debts upon stockholders); *Lauria v. E. I. Du Pont De Nemours & Co.*, 241 Fed. 687 (E. D. N. Y. 1917) (Virginia wrongful death statute; the court formulated the following rule for measuring policy: "To justify a court in refusing to enforce a right of action which had accrued under the laws of another on the ground that it contravenes the policy of the forum, it must appear that it is contrary to good morals or natural justice, or that for some other good reason its enforcement would be prejudicial to the general interest of the people of the state."); *Curtis v. Campbell*, 76 F. (2d) 84 (C. C. A. 3rd, 1935); cf. *Stewart v. B. & O. Ry. Co.*, 168 U. S. 445, 18 Sup. Ct. 105, 42 L. ed. 537 (1897); *James-Dickinson Farm Mortgage Co. v. Harry*, 273 U. S. 119, 47 Sup. Ct. 308, 71 L. ed. 569 (1926) (action of fraud

case suit was brought in a federal district court in Texas upon a cause of action accruing under the Mexican wrongful death statute. However, there is a second group of cases which regard policy as a local problem concerning which the state decisions are conclusive. Among this group is *Parker v. Moore*<sup>12</sup> where the Circuit Court of Appeals for the Fourth Circuit followed a decision of the South Carolina Supreme Court involving a cotton futures contract which, even though valid in the state where it was made, was held to be unenforceable in South Carolina for reasons of local public policy. A similar case is *Dougherty v. Gutenstein*<sup>13</sup> in which a federal district court in New York adhered to a state decision of policy relative to the survivorship of personal injury actions. In a third group the applicable manifestations of state policy were considered by the federal courts, but the cases give no indication as to whether they are conclusive of the issue or not.<sup>14</sup>

But in the instant case the declaration of policy is made by a statute rather than a decision. It reads in part as follows: ". . . it is hereby declared as the public policy of the state that the best interests of the people of the state will be served by the abolition of such remedies. . . . It shall be unlawful for any person . . . to file . . . any process or pleading, in any court of the state, setting forth or seeking to recover a sum of money upon any cause of action abolished or barred by this article, whether such cause arose within or without the state." Since under the decision of *Swift v. Tyson* the federal courts must follow applicable state statutes it would seem that this declaration of public policy would compel the dismissal of the complaint even though the

---

based upon a Texas statute which imposed liability upon all persons who received a benefit from the wrong); *Mosby v. Manhattan Oil Co.*, 52 F. (2d) 364 (C. C. A. 8th, 1931); *Jarrett v. Wabash Ry. Co.*, 57 F. (2d) 669 (C. C. A. 2nd, 1932) (Ontario contributory negligence statute).

<sup>12</sup> 115 Fed. 799 (C. C. A. 4th, 1902).

<sup>13</sup> 10 F. Supp. 782 (S. D. N. Y. 1935). Other cases in this group are: *McCue v. Northwestern Mutual Life Ins. Co.*, 167 Fed. 435 (C. C. A. 4th, 1908), *rev'd on other grounds*, 223 U. S. 234, 32 Sup. Ct. 220, 56 L. ed. 419 (1912) (life insurance policy); see *Northern Pacific Ry. Co. v. Kempton*, 138 Fed. 992 (C. C. A. 9th, 1905); *Gallagher v. Florida East Coast Ry. Co.*, 196 Fed. 1000 (S. D. N. Y. 1912) (Florida wrongful death statute); *Missouri Pacific Ry. Co. v. Larussi*, 161 Fed. 66 (C. C. A. 6th, 1908); *Davis v. Jointless Firebrick Co.*, 300 Fed. 1, 3 (C. C. A. 9th, 1924); *Bradford Electric Light Co. v. Clapper*, 51 F. (2d) 992, 996 (C. C. A. 1st, 1931).

<sup>14</sup> *Texas & Pacific Ry. Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. ed. 829 (1892) (state decisions relative to policy are cited and followed); *Northern Pacific Ry. Co. v. Babcock*, 154 U. S. 190, 14 Sup. Ct. 978, 38 L. ed. 958 (1894) (a decision of the Minnesota Supreme Court was followed, the case having been tried in a federal court in that state); *Bond v. Hume*, 243 U. S. 15, 37 Sup. Ct. 366, 61 L. ed. 565 (1917) (the court mentioned the fact that no state decisions or statutes were cited but gave no indication as to what it would have done had some been supplied); *Bradford Electric Light Co. v. Clapper*, 286 U. S. 145, 52 Sup. Ct. 571, 76 L. ed. 1026 (1932); *Gaston v. Western Union Telegraph Co.*, 266 Fed. 595 (N. D. Ga. 1920) (state decisions were discussed and followed).



cause of action did arise in New Jersey.<sup>15</sup> Nor should this result be deterred by such cases as *Swett v. Givner*<sup>16</sup> which was decided in 1934 by a United States District Court sitting in Illinois. That was an action for wrongful death which had occurred in Ontario, and the Illinois statute prohibited actions in the state courts based upon a death which occurred in another jurisdiction. The court held that it was not bound to adhere to the state's policy as expressed in the statute. The cases may be distinguished on the ground that the Illinois statute does not contain the explicit declaration of policy found in the New York law. The principal case may have been predicated, in part, upon the assumption that, as has since been decided by the New York Supreme Court,<sup>17</sup> the New York statute is unconstitutional. That decision went on the ground that the legislature had no power to abolish a common law remedy without providing an adequate substitute for meritorious cases. As to that, the commentators are in conflict.<sup>18</sup>

N. A. TOWNSEND, JR.

#### Insurance—Exemption of Disability Payments in Bankruptcy.

*L* held a life insurance policy to which was attached a supplementary contract of disability insurance made the same day. *L* became permanently disabled and was paid, up until he was adjudicated a bankrupt, disability payments to the extent of \$174.52 per month. *Held*, that the disability payments, except for state statutory exemption of \$40.00 per month, became an asset of the bankrupt's estate; that §70 (a) of the Bankruptcy Act<sup>1</sup> did not exempt these payments, such sec-

<sup>15</sup> See *Northern Pacific Ry. Co. v. Kempton*, 138 Fed. 992 (C. C. A. 9th, 1905) (the court respected a statute of the *lex fori* which barred the use in contracts of a clause restricting the time in which suit might be brought for a breach to a period less than the statute of limitations); *Grossman v. Union Trust Co.*, 228 Fed. 610 (C. C. A. 5th, 1916), *aff'd*, 245 U. S. 412, 38 Sup. Ct. 147, 62 L. ed. 368 (1918).

<sup>16</sup> 5 F. Supp. 739 (N. D. Ill. 1934).

<sup>17</sup> *N. Y. Times*, March 1, 1936, §1, at 1. It should be noted that the New York Supreme Court is a trial court of general jurisdiction.

<sup>18</sup> *Hibschman, Can "Legal Blackmail" Be Legally Outlawed?* (1935) 69 U. S. L. Rev. 474; Note (1935) 22 VA. L. Rev. 205.

<sup>1</sup> 30 STAT. 544, 566 (1898), 11 U. S. C. A. §110 (1927). "(a) The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all . . . (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him. When any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy

tion applying only to legal reserve life insurance with a cash surrender value; that disability insurance did not become life insurance by being attached to the life policy, the two contracts being executed as distinct instruments; and that these payments were not after acquired property or future earnings.<sup>2</sup>

The cases dealing with exemption of disability insurance, due to the fact that such policies have only recently become of common use, are relatively few in number. A federal court was first confronted with the question as to whether disability insurance payments passed to the trustee in the case of *In re Matschke*,<sup>3</sup> in which the court held that the claim to the payments was property of the bankrupt, the right to collect which he could have assigned prior to his death, and which therefore passed to the trustee in bankruptcy. The same question was passed upon again in *In re Kern*,<sup>4</sup> the court holding that the disability clause in a life policy was in effect an annuity payable to the bankrupt upon a contingency which had happened, and that it was not life insurance in any sense of the term, which of course necessitated its passing to the trustee. The recent case of *In re Rechtman*,<sup>5</sup> also stands for the proposition that disability payments are not exempt under §70 (a) (5), as well as for the fact that the recent amendment to the New York Insurance Law,<sup>6</sup> specifically exempting disability insurance, is not retroactive in effect. Therefore, the law is well-established that disability insurance is not exempt in the absence of state legislation to that effect. It makes no difference that the disability clause is a part of the life insurance policy,<sup>7</sup> although the lan-

---

free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets."

<sup>2</sup> *Legg v. St. John*, 56 Sup. Ct. 336 (1936).

<sup>3</sup> *In re Matschke*, 193 Fed. 284 (E. D. N. Y. 1912) (the bankrupt, stricken with paralysis in January 1909, died in June of same year, involuntary petition in bankruptcy being filed in April, 1909. The wife as administratrix received the proceeds of an insurance policy which by its terms insured the bankrupt against permanent disability from paralysis. By terms of policy the company had one year within which to pay the policy if it saw fit. *Held*, proceeds of the disability policy matured prior to the bankruptcy and were assets passing to the trustee).

<sup>4</sup> *In re Kern*, 8 F. Supp. 246 (S. D. N. Y. 1934).

<sup>5</sup> *In re Rechtman*, 11 F. Supp. 347 (E. D. N. Y. 1935) (bankrupt guaranteed payment of all liabilities of a certain corporation and subsequently became entitled to disability insurance payments; it was held that the rights of the creditors accrued upon date of execution of the agreement, and such date being prior to the date of amendment of New York Insurance Law exempting from creditors' claims disability payments under life policies in favor of insured, the amendment had no effect unless it was retroactive, which it could not be).

<sup>6</sup> N. Y. CONS. LAWS (Cahill, Supp. 1934) c. 30, §55b.

<sup>7</sup> *In re Matschke*, 193 F. 284 (E. D. N. Y. 1912); *In re Kern*, 8 F. Supp. 246 (S. D. N. Y. 1934); *In re Rechtman*, 11 F. Supp. 347 (E. D. N. Y. 1935).

guage of the principal case expresses an inference to the contrary by emphasizing the fact that here the disability contract was not a part of the life policy. The common type of argument advanced to support the conclusion that disability payments pass to the trustee in bankruptcy is that when Congress enacted the insurance proviso of §70 (a) (5) in 1898, it did not intend to exempt disability insurance as incidents of ordinary life insurance policies, since it was not until much later that policies with this feature became common.<sup>8</sup> It is true that there is nothing in the Bankruptcy Act which indicates the intention of Congress to withhold from the trustee disability payments;<sup>9</sup> but on the other hand, one might logically argue that since Congress did not have in mind this type of insurance it is not an asset intended to come within the purview of the Act. However, to preclude such an argument, it has been said<sup>10</sup> that the Act cannot be construed so narrowly as to exclude any vested interest constituting an asset available to a creditor merely on the ground that this asset is not expressly enumerated in §70. In other words, the doctrine of "*Expressio unius exclusio alterius*" does not apply.

In the principal case the court said that the disability payments were not "after-acquired" property or "future earnings" so as to prevent them from passing to the trustee, the interest being vested presently, and the payment only postponed. It seems to be well established that if the interest is vested so that the bankrupt could have transferred the same it is not after-acquired property, and passes to the trustee in bankruptcy, even though it is payable in the future.<sup>11</sup> Wages earned prior to the filing of the petition are not exempt,<sup>12</sup> and

<sup>8</sup> *In re Kern*, 8 F. Supp. 246 (S. D. N. Y. 1934).

<sup>9</sup> *In re Kern*, 8 F. Supp. 246 (S. D. N. Y. 1934).

<sup>10</sup> *In re Baudouine*, 96 Fed. 536 (S. D. N. Y. 1899).

<sup>11</sup> *In re Baudouine*, 96 Fed. 536 (S. D. N. Y. 1899) (where bankrupt was beneficiary under a will which gave him rents and profits for life); *In re Wright*, 157 Fed. 544 (C. C. A. 2nd, 1907) (where bankrupt had a contract having several years to run which entitled him to an interest in renewal premiums subject to right of the company to terminate); *Pollack v. Meyer Bros. Drug Co.*, 233 Fed. 861 (C. C. A. 8th, 1916) (where bankrupt had a vested remainder in trust fund after death of holder of present interest); *Chandler v. Nathans*, 6 F. (2d) 725 (C. C. A. 3rd, 1925) (where bankrupt had an unassignable unliquidated claim against treasury department for refund of excess income tax payments); *Vellacott v. Murphy*, 16 F. (2d) 700 (C. C. A. 5th, 1927) (where testamentary trust was to terminate in ten years at which time bankrupt was to receive certain part of trust estate). *Contra: In re Furness*, 75 F. (2d) 965 (C. C. A. 2nd, 1935) (where bankrupt was one of testamentary trustees and had not applied to the Surrogate for his commission, his right thereto was inchoate until liquidated under New York law).

<sup>12</sup> *In re Wright*, 157 Fed. 544 (C. C. A. 2nd, 1907) (where bankrupt was entitled to an interest in renewal premiums when collected, on policies previously written, but premiums had not yet been collected); *In re Evans*, 253 Fed. 276 (W. D. Tenn. 1918) (where bankrupt received increased wages by virtue of

if there is only a possibility of payment for services rendered up to the time of petition, though the sum is to be subsequently paid, the claim passes to the trustee,<sup>13</sup> it being what is termed a possibility connected with an interest.<sup>14</sup> However, if the wages are earned in the future, they are exempt.<sup>15</sup>

It seems, however, that since disability payments are in lieu of wages, the court might have fairly construed those payments accruing in the future to be in the nature of future earnings. Such a conclusion would only be consonant with the policy argument that exemption statutes should be liberally construed to protect the bankrupt's family and dependents,<sup>16</sup> and to prevent such burden from falling upon the public.<sup>17</sup> An analogy is found in the statement of Justice Cardozo<sup>18</sup> that benefits under the Workmen's Compensation Act were a substitute for wages during whole or at least part of the term of disability.

Section 6 of the Bankruptcy Act,<sup>19</sup> provides in substance that all property exempted by virtue of state legislation does not pass to the trustee in case of bankruptcy. Various types of insurance exemptions have been established in the several states.<sup>20</sup> Some of the states<sup>21</sup>

---

promise made before, but considered after, bankruptcy); *In re Brown*, 4 F. (2d) 806 (C. C. A. 2nd, 1924).

<sup>13</sup> *In re Brown*, 4 F. (2d) 806 (C. C. A. 2nd, 1924). Receiver of a corporation performed two-thirds of his work before becoming bankrupt, and was paid after date of adjudication. *Held*, that two-thirds of the amount paid passed to the trustee; that though a receiver has no right of claim of compensation prior to termination of proceedings in which he is receiver, there was a possibility of payment for services rendered up to time of petition in bankruptcy.

<sup>14</sup> *Williams v. Heard*, 140 U. S. 529, 543, 11 Sup. Ct. 885, 888, 35 L. ed. 550, 556 (1890). *Contra: In re Furness*, 75 F. (2d) 965 (C. C. A. 2nd, 1935).

<sup>15</sup> *In re Karns*, 148 Fed. 143 (S. D. Ohio 1905); *Progress Bldg. & Loan Co. v. Hall*, 220 Fed. 45 (C. C. A. 4th, 1914); *In re Green*, 213 Fed. 542 (E. D. N. Y. 1914); *In re Brown*, 4 F. (2d) 806 (C. C. A. 2nd, 1924).

<sup>16</sup> *In re Newberger*, 1 F. Supp. 685 (W. D. Ohio 1917) [where it was said courts encourage a reasonable amount of insurance for the protection of one's family. (The same argument should apply to disability insurance, for a person permanently disabled cannot care for his family if he has no other income)]; *In re Welch*, 8 F. Supp. 838 (D. N. D. 1934); *In re O'Pava*, 235 Fed. 729 (N. D. Iowa 1916).

<sup>17</sup> *In re Hewit*, 244 Fed. 245 (N. D. Ohio 1917).

<sup>18</sup> *Surace v. Danna*, 248 N. Y. 18, 161 N. E. 315 (1928). There it was said rehabilitation of man, not the payment of his ancient debts, was the theme of the statute, and its animating motive.

<sup>19</sup> 30 STAT. 548 (1898), 28 U. S. C. A. §24 (1926). "The provisions of this title shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for six months or the greater portion thereof immediately preceding the filing of the petition."

<sup>20</sup> (a) Some states exempt the proceeds of life policies in one or more of the following instances: where payable (sometimes expressly where assigned) to wife, to widow, to husband, to married woman, to child, or to dependents. ALA. CODE (Michie, 1928) §8277 (for benefit of wife or children, if annual

premium does not exceed \$1,000; and if premium exceeds \$1,000 then proportionate exemption); ARIZ. CODE (Struckmeyer, 1928) §1738 (13) (payable to a surviving wife or child, not exceeding \$10,000); IOWA CODE (1935) §8776 (payable to surviving widow, not to exceed \$5,000); MASS. LAWS ANN. (1933) c. 175, §126 (for benefit of wife or children); MICH. COMP. LAWS (1929) §12452 (for benefit of married woman on which annual premium does not exceed \$300); MINN. STAT. (Mason, 1927) §9447 (14) (payable to wife or child not exceeding \$10,000); MO. REV. STAT. (1929) §5736 (taken out by a married woman on any person provided she pays premiums out of her own property); MO. REV. STAT. (1929) §5739 (for benefit of wife; but annual premiums not to exceed \$500); N. H. Pub. Laws (1931) c. 175 (payable to married woman); N. J. COMP. STAT. (1910) p. 2850, §39 (payable to married woman); N. C. CONST., art. X, §7 (for benefit of wife and children); S. C. CODE (1932) §7985 (payable to married woman; annual premium must not exceed \$500); S. D. COMP. LAWS (1929) §9310, as amended by Public Laws of 1931, c. 170 (payable or assigned to husband, wife, or child, proceeds not to exceed \$5,000).

(b) Where the proceeds of an annuity or life policy are retained by the company under terms of the policy or a supplemental agreement any principal or interest paid thereunder is exempt, in some states, from creditors of the insured, if the policy or supplemental agreement so provides. COLO. ANN. STAT. (Mills, 1930) §3606; MASS. LAWS ANN. (1933) c. 175, §119A; VT. PUB. LAWS (1933), tit. 31, c. 277, §7014.

(c) In the following states policies by a person on his own life, or life of another, in favor of a person other than himself are exempt in favor of beneficiary as against creditors of the insured or person effecting same, whether or not right to change beneficiary has been reserved: ALA. GEN. ACTS (1932) No. 160; ARK. ANN. STAT. (Castle, Supp. 1931) §5989a; DEL. PUB. LAWS (1931) c. 52.

(d) In the following states benefits under policies held with health and accident companies are exempt from debts and liabilities of policy holder or beneficiary: ARK. ANN. STAT. (Castle, Supp. 1927) §5989; GA. CODE ANN. (Harrison, 1933) §56-1007; IOWA CODE (1935) §8776 (benefits not to exceed \$15,000); NEB. COMP. STAT. (Supp. 1933) §44-1130; VA. CODE (Michie, 1935) §4219; WASH. REV. STAT. ANN. (Remington, 1932) §569.

(e) Oklahoma exempts policies held with industrial companies: OKLA. COMP. STAT. (Supp. 1926) §6908-9.

(f) Idaho exempts benefits of policy on life of debtor if he is head of a family: IDAHO CODE (1932) §8-204 (annual premiums must not exceed \$250).

(g) The following states exempt benefits paid by mutual and assessment companies from debts of policy holder: ARK. ANN. STAT. (Castle, Supp. 1927) §6016k (but total benefits must not exceed \$1,000); MO. REV. STAT. (1929) §5752; NEV. COMP. LAWS (Hillyer, 1929) §3593.

(h) Some states exempt the proceeds of endowment policies in one or more of the following instances: where payable to assured, to beneficiary other than person taking the policy, to husband, to wife, or to dependent relative. IOWA CODE (1935) §8776 (payable to assured); MASS. LAWS ANN. (1933) c. 175, §125 (payable to beneficiary other than person taking policy); OHIO CODE (Baldwin, Supp. Sept., 1933) §9394 (payable to wife, child, or any dependent relative); S. D. COMP. LAWS (1929) §9310, as amended by Public Laws of 1931, c. 170 (payable to assured, but total benefits must not exceed \$5,000).

(i) The following states exempt cash surrender value of life policies from claims of creditors of insured: FLA. COMP. LAWS (1927) §7066; MICH. COMP. LAWS (1929) §12451; MISS. CODE ANN. (1930) §1756; N. D. COMP. LAWS (1913-1925) §8718a; ORE. CODE ANN. (1930) §46-514.

(j) Exemption of casualty insurance was found in the following states: ME. REV. STAT. (1930) c. 60, §173; MICH. COMP. LAWS (1929) §12470; R. I. GEN. LAWS (1923) c. 261, §20.

(k) In the following states exemption of annuities was found in one or more of the following instances: where for benefit of wife, of child, of dependent, of creditor, or of annuitants. OHIO CODE (Baldwin, Supp. Sept., 1933) §9394 (for benefit of wife, child, dependent, or creditor); PA. STAT. ANN. (Purdon, 1930)

have included among their exemptions disability insurance. Of these disability exemption statutes, New York takes probably the most liberal view and makes no limitation as to the amount of such payments and subjects the proceeds thereof only to payment for necessities contracted for after the commencement of the disability.<sup>22</sup> The California legislature assumed an intermediate position and limited the maximum amount that could be paid to the insured as well as subjected one-half of that amount to any debts incurred by the beneficiary, his wife, or family for necessities.<sup>23</sup> The most conservative viewpoint is

tit. 40, §515, as amended P. L. 1935, No. 337, §1 (a contract of annuity not to exceed \$100 per month for benefit of annuitants); TENN. CODE (Shannon, 1932) §8458 (for benefit of wife, child or dependent relative).

(l) The following states provide for the exemption of group insurance: COLO. ANN. STAT. (Mills, 1930) §36061; Ind. Acts (1935) c. 162, §168; MASS. LAWS ANN. (1933) c. 175, §135; N. C. CODE ANN. (Michie, 1935) §6466 (d); OHIO CODE (Baldwin, Supp. June, 1935) §9426-4; PA. STAT. ANN. (Purdon, 1930) tit. 40, §534.

(m) The following states provide for the exemption of benefits from fraternal benefit societies: ALA. CODE (Michie, 1928) §8478; ARK. STAT. ANN. (Castle, Supp. 1927) §6069g; ARIZ. REV. CODE (Struckmeyer, 1928) §1738 (15); CONN. GEN. STAT. (1930) §4269; GA. CODE (Harrison, 1933) §46-213; Ind. Pub. Acts (1935) c. 162, §196; IOWA CODE (1935) §8796; KAN. REV. STAT. (Supp. 1933) c. 40, §414; KY. STAT. (Carroll, 1930) §681c-21; LA. GEN. STAT. (1932) §4155; ME. REV. STAT. (1930) c. 61, §17; MD. CODE ANN. (Bagby, 1924) art. 49A, §167; MICH. COMP. LAWS (1929) §12499; MINN. STAT. (Mason, 1927) §9447 (15); MONT. REV. CODE (Choate, 1921) §6326; MO. REV. STAT. (1929) §6011; N. H. PUB. LAWS (1926) c. 283, §117; N. J. COMP. STAT. (1709-1900) p. 200, §19; N. M. CODE ANN. (Courtright, 1929) §71-321; N. C. CODE ANN. (Michie, 1935) §6510; OKLA. COMP. STAT. ANN. (Bunn, 1921) §6786; R. I. GEN. LAWS (1923) c. 261, §20; TEX. STAT. ANN. (Vernon, 1926) §4847; UTAH REV. STAT. (1933) §43-9-34; WASH. REV. STAT. (Remington, 1932) §7279; WYO. REV. STAT. (1931) 46-121.

(n) Cal. Amend. to Stat. and Codes (1935) c. 723, §19 (690.19) (benefits on any life policy on which annual premium does not exceed \$500; if premium exceeds \$500 then proportionate exemption).

<sup>22</sup> Ark. Acts (1933) No. 102; Cal. Amend. to Stat. and Codes (1935) c. 723, §20 (690.20); Miss. CODE ANN. (1930) §1755, as amended by Public Laws 1932, c. 138; NEB. COMP. STAT. (Supp. 1933) tit. 44, §1130; PA. STAT. ANN. (Purdon, 1930) tit. 40, §766; Wis. Laws (1935) c. 492, §1.

<sup>23</sup> N. Y. CON. LAWS (Cahill, Supp. 1934) c. 30, §55-b. "No money or other benefit paid, provided or allowed to be paid, provided or allowed by any stock or mutual life, health or casualty insurance corporation on account of disability from injury or sickness of any insured person shall be liable to execution, attachment, garnishment, or other process or to be seized, taken, appropriated, or applied by any legal or equitable process or operation of law to pay any debt or liability of such insured person whether such debt or liability was incurred before or after the commencement of such disability, but this section shall not affect the assignability of any such disability benefit otherwise assignable, nor shall this section apply to any money income disability benefit in an action to recover for necessities.

<sup>24</sup> Cal. Stat. and Amend. to the Codes (1935) c. 723, §20 (690.20) "All moneys, benefits, privileges, or immunities, accruing or in any manner growing out of any disability or health insurance, if the annual premiums do not exceed five hundred dollars, and if they exceed that sum like exemption shall exist which shall bear the same proportion to the moneys, benefits, privileges, and immunities so accruing or growing out of such insurance that said five hundred dollars bears to the whole;

expressed by the Wisconsin statute, which limits the total benefits to be paid to one hundred and fifty dollars per month.<sup>24</sup>

It is submitted that the same public policy that induced the states to make the widespread exemptions of life insurance as set forth in footnote 20 below, and which moved the courts to encourage the taking of such insurance, should likewise lead to exemption of the proceeds of disability policies. Payments under these policies take the place of earnings, and come at a time when they are even more needed than normal earnings. Future earnings are exempt; so should these disability payments be exempt. The present decision precludes a construction of the Bankruptcy Act making such an exemption; therefore, the exemption must come through state legislation. Furthermore, the payments should be free from ordinary process brought by creditors. For these reasons it is urged that North Carolina and other states join in the movement for such exemptions by passing legislation similar to that of New York, California or Wisconsin, depending upon the extent to which each state desires to go in making the exemptions.

STATON P. WILLIAMS.

#### **Mortgages—Subrogation—Payment Under a Mistake of Fact By Party Not Liable.**

Husband and wife were joint owners of a tract of land on which they executed two mortgages. The husband died, and the widow attempted to sell the entire tract to Johnson in consideration of his assuming the mortgages and paying her the difference between the value of the land and amount of the two mortgages. The record indicated the joint ownership, but apparently Johnson was ignorant of the fact. He subsequently paid the mortgages, and afterwards the heirs of deceased husband brought this bill for partition. John sought subrogation to the rights of the mortgagees so as to be able to require petitioners to pay one-half of the mortgages before being granted the partition. The court refused to allow the subrogation on the ground that his assumption of the debt had made him primarily liable.<sup>1</sup>

Subrogation, not being dependent upon contract, is a creature of

but where debts are incurred by the beneficiary of such policy, or his wife or family for the common necessities of life, one half of such benefits, privileges, or immunities so accruing is nevertheless subject to execution, garnishment or attachment to satisfy debts so incurred."

<sup>24</sup> Wis. Laws (1935) c. 492, §1. "All sums due or to become due and payable or paid to any person by any life insurance company or association, for partial, total, temporary or permanent disability under any contract or policy of insurance, but not exceeding one hundred fifty dollars per month."

<sup>1</sup> Duke et al. v. Kilpatrick et al., 163 So. 640 (Ala. 1935).

equity and was invented to do substantial justice between the parties.<sup>2</sup> The principle was created as a means of placing one who has paid the obligation of another in the position of a creditor.<sup>3</sup> For example: Where one has discharged an outstanding encumbrance on realty, such being released of record, and there is a subsequent lien of record of which he had no actual knowledge, the party so paying usually asks equity to revive the encumbrance discharged and subrogate him to the position of the first encumbrance holder in order that he may gain priority over the subsequent lien.<sup>4</sup>

A majority of the courts are committed to the view set forth in the instant case.<sup>5</sup> These jurisdictions state that equitable subrogation will only be granted where: (1) the party paying occupied the position of a surety; or (2) the payment was made under an agreement with the debtor or creditor that he should receive and hold an assignment of the debt as security; or (3) the party paying stood in such a relation to the encumbered premises that his interest could not otherwise be sufficiently protected.<sup>6</sup>

There is, however, a strong line of authority which will not deny relief to the party who seeks subrogation merely because he had assumed and paid a debt upon which he was not liable.<sup>7</sup> For example: Where X, the purchaser of Blackacre, assumed and later paid a first mortgage

<sup>2</sup> *Dothan Grocery v. Dowling et al.*, 204 Ala. 224, 85 So. 489 (1920) ("subrogation is a mode which equity adopts to compel ultimate discharge of a debt by him who in equity and good conscience ought to pay it, nor is it dependent on privity or contractual relations"); *Moring v. Privott*, 146 N. C. 558, 60 S. E. 509 (1908); *Huggins v. Fitzpatrick*, 102 W. Va. 224, 135 S. E. 19 (1926).

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

<sup>4</sup> *Prestridge v. Lazar*, 132 Miss. 168, 95 So. 837 (1923) (allowed subrogation as the debt should have, in equity, been satisfied by another).

<sup>5</sup> *Storer v. Warren et al.*, 98 Ind. 616, 192 N. E. 325 (1934); *Goodyear v. Goodyear*, 72 Iowa 329, 33 N. W. 142 (1887) (basing decision further on fact that party who assumed and paid had constructive notice of the junior lien); *Smith v. Feltner*, 259 Ky. 833, 83 S. W. (2d) 506 (1935); 2 JONES, MORTGAGES (8th ed. 1928) §1119; POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) §797 ["... The rule (against subrogation) also applies to a grantee of the mortgagor who takes a conveyance of land subject to the mortgage and expressly assumes and promises to pay it as a part of the consideration. He is thereby made the principal debtor. ... If he pays off the mortgage it is extinguished."].

<sup>6</sup> *Wilkins v. Gibson*, 113 Ga. 31, 38 S. E. 374 (1901) (facts fell within the rule as junior encumbrancer discharged senior encumbrancer, to protect his interest); *Home Savings Bank of Chicago et al. v. Bierstadt*, 168 Ill. 618, 48 N. E. 161 (1897) (subrogation allowed due to agreement by lender with mortgagor that lender was to get first lien, he being ignorant of a second lien); *Kuhn v. National Bank*, 74 Kan. 456, 87 Pac. 551 (1906) (where there was assumption of mortgage, court refused subrogation as no interest to protect and no agreement).

<sup>7</sup> *Matzen v. Shaeffer*, 65 Cal. 81, 3 Pac. 92 (1884) (purchaser at execution sale assumed mortgage); *Tibbetts v. Terrill et al.*, 26 Colo. A. 64, 140 Pac. 936 (1914), Note (1915) 15 Col. L. Rev. 171; *Williams v. Libby*, 118 Me. 80, 105 Atl. 855 (1919) (problem of constructive notice discounted as assuming grantee was sick); *Dixon v. Morgan*, 154 Tenn. 389, 285 S. W. 558 (1926); Note (1925) 37 A. L. R. 384.



on the land without knowledge of a recorded junior lien, X will be subrogated to the rights of the mortgagee whom he paid, and his mortgage will be prior to that of the junior lienor.<sup>8</sup> These courts reason that the mortgage was assumed and discharged while the grantee was laboring under a mistake of fact; *i.e.*, the assuming grantee, ignorant of the subsequent encumbrance, believed he was assuming the only mortgage. They add that equity will grant relief when an obligation or transaction has arisen from a mistake as to the true state of affairs,<sup>9</sup> and to allow subrogation works no hardship on the junior lien holder unless he had altered his position in reliance upon the discharge of the prior encumbrance. His security, when he acquired it, was subject to this superior encumbrance, and it would seem inequitable that a benefit should be gained as a result of another man's innocent mistake.<sup>10</sup>

In the following situation the courts have generally allowed subrogation although the party paying was not a party secondarily liable: (1) where one, who had no knowledge of a subsequent lien, has advanced money to discharge a prior lien and received a new mortgage as security;<sup>11</sup> (2) where the junior lien holder, ignorant of an intervening mortgage, has discharged the senior encumbrance;<sup>12</sup> (3) where grantee who took "subject to" a mortgage and who later paid off the obligation did not know of a subsequent encumbrance.<sup>13</sup>

It is stated in most jurisdictions that equity will refuse subrogation

<sup>8</sup> *Dixon v. Morgan*, 154 Tenn. 389, 285 S. W. 558 (1926).

<sup>9</sup> *Capital National Bank v. Holmes*, 43 Colo. 154, 95 Pac. 314 (1908); *Dixon v. Morgan*, 154 Tenn. 389, 285 S. W. 558 (1926). But see *Citizens Mercantile Co. v. Eason*, 158 Ga. 604, 123 S. E. 883 (1924); *Lamoille County Savings Bank v. Belden*, 90 Vt. 535, 98 Atl. 1002 (1916) (holding that one is negligent by not looking up records).

<sup>10</sup> *Tibbetts v. Terrill et al.*, 26 Colo. A. 64, 140 Pac. 936 (1914); *Smith v. Dinsmon*, 119 Ill. 656, 4 N. E. 648 (1886); see *Platte Valley Cattle Co. v. Bosserman-Cate Live Stock & Loan Co.*, 202 Fed. 692 (C. C. A. 8th, 1912). But see *Troyer v. Bank of De Queen*, 170 Ark. 703, 218 S. W. 14 (1926) (holding that it makes no difference that holder of second lien would be in no worse position if subrogation were granted and that there was constructive notice of the second lien); *Rice v. Winters et al.*, 45 Neb. 517, 63 N. W. 830 (1895) (advancing the idea that upon the discharge of the first lien the junior lienor has a vested right).

<sup>11</sup> *Emmert v. Thompson*, 49 Minn. 386, 52 N. W. 35 (1892); *Wallace v. Benner*, 200 N. C. 124, 156 S. E. 795 (1931); 2 JONES, *op. cit. supra* note 5, §1114 (where there is no express agreement that lender is to get a first lien he is volunteer and not entitled to subrogation. But if there is an agreement that he is to get first lien and there are no intervening equities, then subrogation is applicable.). *Contra*: *Fort Dodge Bldg. & Loan Ass'n v. Scott*, 86 Iowa 435, 53 N. W. 283 (1892) (failure to observe records is negligence and defeats subrogation).

<sup>12</sup> *Farmers National Bank v. Glidday et al.*, 119 Kan. 317, 239 Pac. 752 (1925); *Frisbee v. Frisbee*, 46 Me. 444, 29 Atl. 111 (1894) (holding payment made to protect interest); see *Bank of U. S. v. Peter*, 38 U. S. 123, 10 L. ed. 89 (1839).

<sup>13</sup> *Darrough v. Kraft Co. Bank*, 125 Cal. 272, 57 Pac. 983 (1899) (protection of interest in property); *Moring v. Privott*, 146 N. C. 558, 60 S. E. 509 (1908) (mistake of fact). *Contra*: *Hayden v. Huff*, 60 Neb. 625, 83 N. W. 920 (1900) (charged with laches in failure to examine records).

where the party seeking it is a mere volunteer,<sup>14</sup> or is guilty of culpable negligence.<sup>15</sup> The majority of courts hold that mere failure to examine the records and discover the existence of the intervening lien does not constitute culpable negligence.<sup>16</sup>

North Carolina has not ruled on the problem presented by the principal case. However, in *Capehart v. Mhoon*, *P* thought that he was surety on an administration bond and paid under such belief. Actually he was not liable and could have ascertained this by looking up the records. The court held that payment was made under a mistake of fact that allowed *P* to recover his payments by subrogating him to the rights of the widow of deceased.<sup>17</sup> It would seem to follow that North Carolina would grant relief where a payment has been made under a mistake of fact as to the obligation assumed.

In a recent decision by the North Carolina Supreme Court it was held that the grantor was primarily liable although there had been an express assumption of the mortgage by the grantee.<sup>18</sup> It might be argued, in view of this decision, that an assuming grantee who has discharged the debt is in effect a party secondarily liable and within the scope of the usual rule allowing subrogation where an obligation, for which another is primarily liable, is paid. This argument fails in the light of former decisions which have expressly held the assuming grantee primarily liable.<sup>19</sup> Thus the North Carolina rule is peculiar in that both grantor and assuming grantee are primarily liable on the debt. If subrogation should be granted in a situation similar to the principal case it would have to be on the basis of a "mistake of fact."<sup>20</sup>

<sup>14</sup> *Ragland v. Board of Missions*, 224 Ala. 325, 140 So. 435 (1932) (called a volunteer as party paying had no interest to protect and under no obligation to pay); *Federal Land Bank of Columbia v. Barron*, 173 Ga. 242, 160 S. E. 228 (1931) (no agreement that lender to receive first lien and thus a volunteer); *Flannay v. Utley*, 9 Ky. L. 581, 3 S. W. 412 (1887) (a volunteer as party paying was not secondarily liable); *Wallace v. Benner*, 200 N. C. 124, 156 S. E. 795 (1931) (states the general rule that if a mortgagor requests loan, then lender is not volunteer). But see *Pons v. Yazoo R. Co.*, 131 La. 313, 59 So. 721 (1912).

<sup>15</sup> *Tibbetts v. Terrill et al.*, 26 Colo. A. 64, 140 Pac. 936 (1914).

<sup>16</sup> *Emmert v. Thompson*, 49 Minn. 386, 52 N. W. 35 (1892); *Dixon v. Morgan*, 154 Tenn. 389, 285 S. W. 558 (1914) ("Culpable negligence is the failure to perform some duty. . . . It does not arise from one's failure to look up the records."); Note (1931) 70 A. L. R. 1396. *Contra*: *Connor v. Welch*, 51 Wis. 431, 8 N. W. 260 (1881); *Ragan v. Standard Scale Co.*, 128 Ga. 544, 58 S. E. 31 (1907); *cf. Joyce v. Dauntz*, 55 Ohio St. 538, 45 N. E. 900 (1896) (where it was held that knowledge of the junior lien does not prevent subrogation).

<sup>17</sup> *Capehart v. Mhoon*, 58 N. C. 178 (1859) (*P* wanted to be subrogated so that he could recover his payments made to the widow from those who were sureties in fact).

<sup>18</sup> *Commercial National Bank of Charlotte v. Carson*, 207 N. C. 495, 177 S. E. 335 (1934); Note (1935) 13 N. C. L. Rev. 337.

<sup>19</sup> *Parlier v. Miller*, 186 N. C. 501, 119 S. E. 898 (1923); *Keller v. Parish*, 196 N. C. 733, 147 S. E. 9 (1929).

<sup>20</sup> *Moring v. Privott*, 146 N. C. 558, 60 S. E. 509 (1908) (The grantee had taken "subject to" a mortgage which he thought was the only encumbrance on the

In the instant case it seems clear that the heirs, the proponents of the action, are in the relative position of a subsequent lien holder. The result reached by the Alabama Court is inequitable and unjust. Johnson, as evidenced by his paying off the entire amount of both mortgages, was laboring under a mistake of fact as to his title. If the Alabama Court had allowed subrogation the heirs would have been in precisely the same situation they occupied before the mortgages were assumed and paid. Refusal of subrogation allows the heirs to profit at the expense of the grantee's innocent mistake.

J. WILLIAM COPELAND.

### **Municipal Corporations—Right to Insure in Mutual Insurance Organizations.**

Plaintiff, on behalf of himself and other taxpayers of the district, brought this action to restrain the Superintendent of Public Instruction from accepting and paying a premium on a policy of insurance on school property issued by a mutual fire insurance company. The policy provided for an annual premium of \$12.35, plus a contingent liability limited to the amount of one premium, payable only when the assets of the company did not meet its current liabilities. Plaintiff alleged that such a contract would violate the constitutional provision<sup>1</sup> that "no . . . municipal corporation shall contract any debt, pledge its faith or loan its credit . . . except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein." Furthermore, it was contended that the acceptance of this policy would make the school board a stockholder in a private organization. *Held*: Taking the mutual policy did not lend the credit of the school district; that in any event the expense was a "necessary" one; and the school district did not become a stockholder in a private organization.<sup>2</sup>

This case is one of first impression in North Carolina. In other jurisdictions the power of municipal corporations to insure in mutual companies has been challenged on a number of grounds. First, several states, like North Carolina, have constitutional or statutory provisions which set out in substance that neither the state nor any political subdivision thereof shall pledge its faith or loan its credit to any individual, company, institution, or association, except for governmental undertak-

land, and he later paid this mortgage off. There was in fact a second mortgage and the court allowed subrogation, saying that the grantee was laboring under a mistake of fact.). It seems, if a grantee could be laboring under a mistake of fact when he took "subject to" a mortgage which he later paid, that an assuming grantee could be under a mistake of fact as to the mortgage he assumed and paid.

<sup>1</sup> N. C. CONST. art. VII, §7.

<sup>2</sup> *Fuller v. Lockhart*, 209 N. C. 61, 182 S. E. 733 (1935).

ings.<sup>3</sup> Under such provisions it is argued that since by a mutual insurance contract a member would be liable for assessments, in the absence of sufficient assets, to pay losses incurred by other members, the municipality by taking a mutual policy would thus lend its credit contrary to the constitutional prohibition. However, the courts have found otherwise where these contingent assessments are limited in amount.<sup>4</sup> The reason, as laid down in *Miller v. Johnson*,<sup>5</sup> is that, where the assessment is limited to some such sum as five times one premium, this contingent assessment merely represents an arrangement where there is a maximum contingent liability by way of premium, but only one-fifth thereof need originally be collected, and the balance need never be collected unless some extraordinary losses occur. However, an unlimited contingent liability might amount to a pledge of credit.<sup>6</sup>

Second, it is contended that a member of a mutual insurance company becomes a stockholder therein, and thus the municipal corporation by purchasing a policy would become a stockholder in a private company in violation of its inherent powers. But it seems settled that the mere payment of premiums and (limited) contingent assessments does not make the municipal corporation a stockholder within the definition of the technical prohibition.<sup>7</sup> Nor does the bare fact that under certain

<sup>3</sup> CAL. CONST. art. IV, §31; art. XII, §13; IDAHO CONST. art. XII, §4; MICH. CONST. art. VIII, §25; art. X, §12, 13; MO. CONST. art. IX, §6; MONT. CONST. art. 13, §1; N. Y. CONST. art. VII, §1; art. VIII, §10; PA. STAT. ANN. (Purdon, 1936) tit. 16, §§4160-501; WASH. CONST. art. VII, §5; WYO. CONST. art. XVI, §6.

<sup>4</sup> *Miller v. Johnson*, 48 P. (2d) 956 (Cal. 1935) ("The lending of credit, if any, is by the insurance company to the public body."); *French v. Mayor of Millville*, 66 N. J. L. 392, 49 Atl. 465 (1901), *aff'd*, 67 N. J. L. 349, 51 Atl. 1109 (1902); *Johnson v. School Dist. No. 1*, 128 Ore. 9, 270 Pac. 764 (1928), *rehearing denied*, 128 Ore. 9, 273 Pac. 386 (1929) (court here decided the question of public credit solely on the fact there was no contingent liability in the policy); *Downing v. School Dist. of Erie*, 297 Pa. 474, 147 Atl. 239 (1929) (contract really amounted to a loan of credit to the school district); *Burton v. School Dist. No. 19*, 47 Wyo. 462, 38 P. (2d) 610 (1934); 1 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 469, note; 1 COOLEY'S BRIEFS ON INSURANCE (2nd ed. 1927) 104; 3 DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911) §976, note; 5 McQUILLAN, MUNICIPAL CORPORATIONS (2nd ed. 1928) 959; see *People v. Stanley*, 193 Cal. 428, 225 Pac. 1 (1924).

<sup>5</sup> 48 P. (2d) 956 (Cal. 1935).

<sup>6</sup> *School Dist. No. 8 v. Twin Falls County Mut. Fire Ins. Co.*, 30 Idaho 400, 164 Pac. 1174 (1917). Statute authorizing the establishment of mutual insurance companies in Idaho provided that "policies issued by the company must state specifically that liability of each member is not limited." Under such a requirement a school board might incur an indebtedness in excess of the income or revenue provided for it in any one year, thus violating IDAHO CONST. art. VIII, §3. Hence, such contracts would be void. North Carolina expressly provides that this contingent liability cannot be less than the amount of one annual premium. N. C. CODE ANN. (Michie, 1935) §6351.

<sup>7</sup> *Miller v. Johnson*, 48 P. (2d) 956 (Cal. 1935); *Carlton v. So. Mutual Ins. Co.*, 72 Ga. 371 (1884) (suggests by dictum that the use of the word "stockholder" in the charter and policy of a mutual organization is not a use in such a technical sense as to prohibit municipal corporations from participating); Dalzell

conditions a mutual organization may pay dividends to its members make the municipal corporation a corporate stockholder.<sup>8</sup>

Third, frequently by statute, or the provisions of the charter, by-laws, or the policy itself, the company is given a lien on the insured property for unpaid assessments.<sup>9</sup> Therefore, it is urged, this policy would be void. It is against public policy for a body politic to give a lien on its property.<sup>10</sup> However, the courts have met this objection by transferring and making enforceable such a lien against funds set aside for that particular purpose.<sup>11</sup>

It seems evident that mutual insurance organizations are becoming more and more popular as a means of protection, largely because of the relatively small cost of participation. It is not surprising that the courts tend to enable municipalities to effect this economy by upholding such contracts, in the absence of any express constitutional or statutory provisions to the contrary.<sup>12</sup>

O. W. CLAYTON.

v. Bourbon County Board of Education, 193 Ky. 171, 235 S. W. 360 (1921) (school board is a "person" within statute providing that any person may become a member); French v. Mayor of Millville, 66 N. J. L. 392, 49 Atl. 465 (1901), *aff'd*, 67 N. J. L. 349, 51 Atl. 1109 (1902); Johnson v. School Dist. No. 1, 128 Ore. 9, 270 Pac. 764 (1928); see New York Life Ins. Co. v. Street, 265 S. W. 397 (Tex., 1924) (mere act of purchasing a policy does not make the member a stockholder).

<sup>8</sup> Carlton v. So. Mutual Ins. Co., 72 Ga. 371 (1884); see Johnson v. School Dist. No. 1, 128 Ore. 9, 270 Pac. 764 (1928) (the contract here would seem to give dividends in the form of non-assessable policies when the assets of the company exceed \$200,000).

<sup>9</sup> Ky. STAT. (Carroll, 1922) §712; Mutual Assurance Co. v. Faxon, 19 U. S. 606, 5 L. ed. 342 (1821) (Virginia statute giving lien on insured property); Farmers' Home Ins. Co. v. Carey, 130 Ky. 602, 113 S. W. 841 (1908) (statute does not provide lien for membership fees but only for assessments); see York County Mutual Fire Ins. Co. v. Bowden, 57 Me. 286 (1869); Huggins v. Home Mut. Fire Ins. Co., 107 Miss. 650, 65 So. 646 (1914) (statute giving lien for both unpaid premiums and assessments held constitutional); Halfpenny v. Peoples' Fire Ins. Co., 85 Pa. 48 (1877); South Carolina Mut. Fire Ins. Co. v. Price, 56 S. C. 407, 34 S. E. 696 (1900) (action on lien for assessment equitable in nature).

<sup>10</sup> Noonan v. Hastings, 101 Ky. 312, 41 S. W. 32 (1897); Ausbuck v. Schardien, 20 Ky. Law Rep. 178, 45 S. W. 507 (1898); Page Trust Co. v. Carolina Const. Co., 191 N. C. 664, 132 S. E. 804 (1926) (no lien on school property for labor and material furnished in construction of building).

<sup>11</sup> Dalzell v. Bourbon County Board of Education, 193 Ky. 171, 235 S. W. 360 (1921). Liens against municipal corporations were held to attach particular funds in: Los Angeles Stone Co. v. National Surety Co., 178 Cal. 247, 173 Pac. 79 (1918) (attached surety bond put up by contractor); Alexander Lumber Co. v. Farmer City, 272 Ill. 264, 111 N. E. 1012 (1916) (mechanic's lien runs against funds due a contractor in hands of the city); N. A. Williams Co. v. McCarthy, 284 Ill. 604, 120 N. E. 485 (1918) (materialmen's lien attaches bonds issued to pay contractor); Noonan v. Hastings, 101 Ky. 312, 41 S. W. 32 (1897); Garrison v. Borio, 61 N. J. E. 236, 47 Atl. 1060 (1901) (lien is given on contract price of improvements); Butts v. Randall, 145 Misc. Rep. 708, 260 N. Y. Supp. 713 (1932).

<sup>12</sup> Some states have passed statutes authorizing municipal corporations to insure in mutual insurance companies. For example: MICH. COMP. LAWS (1929) §7385; PA. STAT. ANN. (Purdon, 1936) tit. 53, §1761.

**Real Property—Powers of Appointment—Proper Execution—  
Lapse Statutes—Estoppel.**

A deeded land to B for life with a remainder over to B's children, if any, upon her death; if no children then in fee simple or otherwise to such persons as B by will should appoint. B, for a consideration, conveyed the land to C and recited in the instrument the exercise of power as given by A's deed. C sold to the present defendant; then C died, leaving the plaintiff as his only heir at law. Subsequently, B died without issue and devised the same property to C, reciting the power of appointment in the will. The plaintiff now brings an action of ejectment to recover the property from defendant and bases her claim on the lapse statute, which provides that living issue of a predeceased devisee shall take as if he inherited directly from his deceased ancestor. *Held*: reversing trial court, for plaintiff, on the ground that she was substituted as appointee. Title passed to plaintiff from the donor of the power; and the appointee took nothing under donee's will and only a life estate under the deed.<sup>1</sup>

To attain the result of the instant case it was necessary for the court to sustain the plaintiff's contention as to the applicability of the lapse statute to testamentary appointments. This problem is presented to the courts in two situations in connection with powers of appointment. (1) In cases where the donee predeceases the donor, the issue of the donee has been substituted for him and allowed to take the property, if the power was general and the donee could have claimed a fee;<sup>2</sup> or the property, in order to prevent intestacy, was allowed to pass according to the donee's will.<sup>3</sup> The general rule, however, is that a power lapses, or never comes into existence if the donee dies before the person who created the power.<sup>4</sup> (2) Where the appointee

<sup>1</sup> *Newton v. Bullard*, 182 S. E. 614 (Ga. Sup. Ct. 1935).

<sup>2</sup> *Schieffelin v. Kessler*, 5 Rawle 115 (Pa. 1835).

<sup>3</sup> *Condit v. Dehart*, 62 N. J. Ch. 18, 40 Atl. 726 (1898); *In re Piffard's Estate*, 111 N. Y. 410, 18 N. E. 78 (1888), *aff'g*, 42 Hun. 34 (N. Y. 1886) (in the latter case the court refused to sustain the power as such, saying the property passed by the donor's will, although it went to persons designated in donee's will); *cf.* *Wallace v. Deihl*, 202 N. Y. 156, 95 N. E. 646 (1911), *modifying judgment in* 134 App. Div. 942, 118 N. Y. Supp. 149 (1909) (where issue of a contingent remainderman, who had predeceased the donor, were claiming against a donee who had the power to appoint the residuum, it was held that the property had lapsed and fallen in the residuum).

<sup>4</sup> *In re McCurdy's Estate*, 197 Calif. 276, 240 Pac. 498 (1925); *Curley v. Lynch*, 206 Mass. 289, 92 N. E. 429 (1910); FARWELL, *POWERS* (7th ed.) §226; SUGDEN, *POWERS* (8th ed.) 460. But consider the following cases where it is held that the power necessarily ceases on the death of the grantee when no one else is authorized to execute it: *Supreme Colony v. Towne*, 87 Conn. 644, 89 Atl. 264 (1914); *Hotchkiss v. Elting*, 36 Barbour 38 (N. Y. 1861); *Chambers v. Tulane*, 9 N. J. Eq. 146 (1852); *Coleman v. Beach*, 97 N. Y. 545 (1885); *Stamper v. Venable*, 117 Tenn. 557, 97 S. W. 812 (1906); 49 C. J. 1250.

predeceases the donee of a testamentary power the lapse statutes have been applied to allow the issue of the appointee to take in order to prevent whole or partial intestacy, as the case may be,<sup>5</sup> and also in order to satisfy obligations existing at the time the appointment takes effect.<sup>6</sup> However, if the donee provides that the devise shall lapse such proviso is enforceable.<sup>7</sup> In considering the applicability of the lapse statutes the courts have adhered strictly to the letter of the statute.<sup>8</sup> There are some writers who feel that the statutes should have no application in cases where the donee is given a life estate with a general power of appointment, since the donor makes the donee wait until the latter's death to exercise the power and, therefore, intends the donee to appoint only to persons who survive him.<sup>9</sup> It is submitted that the lapse statute should not have been applied in the instant case, as it was used for the purpose of letting the plaintiff take as substituted appointee under the donee's will;<sup>10</sup> but in order to circumvent an estoppel, and to defeat the defendant, who was a purchaser for value from the deceased appointee, the court resorted to the doctrine that the plaintiff took by way of purchase from the party creating the power and, therefore, was in by virtue of the donor's deed rather than by the donee's will.<sup>11</sup>

A power is regarded as general when, as in the case at hand, its exercise is not restricted by the donor to particular objects or ben-

<sup>5</sup> *Thompson v. Pew*, 214 Mass. 520, 102 N. E. 122 (1913); *In re Lyndall's Estate*, 2 Pa. Dist. R. 476 (1892); *Daniel v. Brown*, 156 Va. 563, 159 S. E. 209, 75 A. L. R. 1383 (1931); cf. *Duke of Malborough v. Lord Godolphin*, 2 Ves. 61 (1750); PAGE, WILLS (2d ed. 1926) §1249; JARMAN, WILLS (5th ed. 1880) §642.

<sup>6</sup> *Stevens v. King*, 2 Ch. 30 (1904). (The donee of the power had received more than her aliquot share of property under a settlement in which the appointee had made distribution. The court held that the moral obligation to repay the excess, which was a personal loss to the appointee, was sufficient to sustain the power here so as to prevent lapse.)

<sup>7</sup> *In re Beaumont's Estate*, 147 Misc. Rep. 118, 263 N. Y. Supp. 427 (1933).

<sup>8</sup> See *Lincoln Trust Co. v. Adams*, 107 Misc. Rep. 639, 177 N. Y. Supp. 889, 891 (1919) (The court said any claims of the heirs at law could be eliminated, since there was no statute which could save an appointment to a first cousin from lapse when the appointee dies before the will takes effect.); *Burrus v. Nelson's Executor*, 132 Va. 17, 110 S. E. 254 (1922) (where an administrator of a deceased appointee attempted to get the property).

<sup>9</sup> PAGE, WILLS (2d ed. 1926) §1171; ROOD, WILLS (2d ed. 1926) §758; SIMES, LAW OF FUTURE INTEREST (1936) §259; THOMPSON, CONSTRUCTION OF WILLS (1928) §363.

<sup>10</sup> *Thompson v. Pew*, 214 Mass. 520, 102 N. E. 122 (1913); *In re Lyndall's Estate*, 2 Pa. Dist. R. 476 (1892); *Daniel v. Brown*, 156 Va. 563, 159 S. E. 209, 75 A. L. R. 1383 (1931); PAGE, WILLS (2d ed. 1926) §1249; JARMAN, WILLS (5th ed. 1880) §642.

<sup>11</sup> For this doctrine see: *Jackson v. Franklin*, 179 Ga. 840, 177 S. E. 731, 97 A. L. R. 1071 (1934); *Christy v. Pulliam*, 17 Ill. 59 (1855); *In re Harbeck's Will*, 161 N. Y. 211, 55 N. E. 50 (1900); KALE, FUTURE INTERESTS (2d ed. 1920) §610; Simes, *Devolution of Title* (1928) 22 ILL. L. REV. 480.

eficiaries;<sup>12</sup> and it is none the less general because it is exercisable only by testamentary documents.<sup>13</sup> It would seem that a person having a life estate plus a general power of appointment should have a fee, since he could sell the life estate and appoint the remainder to the same party. The donee takes a fee, however, only where the devise is in general terms with the power annexed.<sup>14</sup> If, as in the instant case, the quantity of the first taker's estate is expressly defined or limited for life, the existence of the power will not enlarge the life estate into a fee under the great weight of authority<sup>15</sup> because the power is considered neither an estate nor property in itself.<sup>16</sup> Some few jurisdictions take a contrary viewpoint based on the theory that an absolute power of disposition when added to a life estate enlarges the latter into a fee.<sup>17</sup>

Where the majority doctrine is adhered to, the power must be exercised in strict conformity with the instrument creating it, and,

<sup>12</sup> *Whitlock and Rose v. McCaughan*, 21 F. (2d) 164 (C. C. A. 3rd, 1927); *Frank v. Frank*, 305 Ill. 81, 137 N. E. 51 (1922); *In re Lawrence's Estate*, 136 Pa. 354, 20 Atl. 521 (1890); for a discussion see Comment (1932) 17 CORN. L. Q. 287.

<sup>13</sup> *Lesser v. Burnett*, 46 F. (2d) 756 (C. C. A. 4th, 1931); *Johnstone v. Commissioner Internal Revenue*, 76 F. (2d) 55 (C. C. A. 9th, 1935); *St. Matthews Bank v. De Charette*, 259 Ky. 802, 83 S. W. (2d) 471 (1935); *Lyon v. Alexander*, 304 Pa. 288, 156 Atl. 84 (1931).

<sup>14</sup> *Howard v. Carusi*, 109 U. S. 725, 3 Sup. Ct. 575, 27 L. ed. 1089 (1884); *Evans v. Folks*, 135 Mo. 397, 37 S. W. 126 (1896); *Downey v. Bordan*, 36 N. J. Law 460 (1872), *aff'd* 35 N. J. Law 74 (1871); Note (1928) MICH. L. R. 703; SICES, LAW OF FUTURE INTERESTS (1936) §252. For a general classification see THOMPSON, CONSTRUCTION OF WILLS (1928) §598.

<sup>15</sup> *Downie v. Downie*, 4 Fed. 55 (C. C. D. Ind. 1880); *Mathis v. Glanson*, 149 Ga. 752, 102 S. E. 351 (1920); *Homans v. Foster*, 232 Mass. 4, 121 N. E. 417 (1919); *Chewning v. Mason*, 158 N. C. 578, 74 S. E. 357, 39 L. R. A. (N. S.) 805 (1912); *Cagle v. Hampton*, 196 N. C. 470, 146 S. E. 88 (1929); *Leaming v. Huffman*, 96 N. J. Eq. 249, 124 Atl. 704 (1924); *Coles v. Dressler*, 315 Ill. 142, 146 N. E. 162 (1924); *Podarit v. Clark*, 118 Iowa 264, 91 N. W. 1091 (1902); *Mountjoy v. Kassleman*, 225 Ky. 55, 7 S. W. (2d) 512 (1928). Notes (1925) 36 A. L. R. 1177; (1932) 76 A. L. R. 1153.

<sup>16</sup> *Carver v. Jackson*, 29 U. S. 1, 7 L. ed. 61 (1830); *Patterson v. Lawrence*, 83 Ga. 703, 10 S. E. 355, 7 L. R. A. 143 (1889); *Steiff v. Seibert*, 128 Iowa 746, 105 N. W. 328 (1905); *Burleigh v. Clough*, 52 N. H. 267 (1872); *Chewning v. Mason*, 158 N. C. 578, 74 S. E. 357, 39 L. R. A. (N. S.) 805 (1912).

<sup>17</sup> *Gibson v. Gibson*, 213 Mich. 31, 181 N. W. 41 (1921), criticized and implicitly overruled in *Quarton v. Barton*, 249 Mich. 474, 229 N. W. 465 (1930); *Ement v. Blair*, 121 Tenn. 240, 118 S. W. 685 (1908); *Bristow v. Bristow*, 138 Va. 67, 120 S. E. 859 (1924); *Wiant v. Lynch*, 104 W. Va. 507, 140 S. E. 487 (1927). THEOBALD, WILLS (8th ed. 1927) c. XXXIX, §III shows the English authorities to be in accord with this minority view. For a general discussion see Comment (1935) 13 N. C. L. REV. 521. But cf. *Ironsides v. Ironsides*, 150 Iowa 628, 130 N. W. 414 (1911) (where the testator gave his wife an estate for life, and the "remainder of the estate" [interpreted to mean the remainder after the life estate] was to be at her disposal, the court held she took a fee since she was given the use of the property for life plus the only additional power, that of disposal, that could exist in any one prior to death. The majority rule was recognized by the court, but the peculiar language in the instrument was determinative of the result reached).



therefore, if the power is testamentary, an attempted execution thereof by deed is ordinarily held invalid.<sup>18</sup> However, equity has not refused relief where the power, which by its terms called for the use of a deed, was exercised by will,<sup>19</sup> but it has refused to act in the converse situation, reasoning that the donor intended the power to be revocable until the donee's death.<sup>20</sup> The strictness of these decisions in the latter type of case may be attributed in part to the fact that the litigation involved the rights of volunteers, and hence the law emanating from the cases perhaps presupposed the protection of the rights of an appointee for value or a purchaser for value from such an appointee.<sup>21</sup> Some jurisdictions in order to protect creditors, incumbrancers and purchasers, as well as to settle title and make the property freely alienable, have enacted legislation to give the donee, who has a life estate with absolute power of disposition, a fee absolute as regards the above classes.<sup>22</sup> The

<sup>18</sup> *Hannan v. Slush*, 5 F. (2d) 718 (E. D. Mich. 1925); *Pope v. Safe Deposit and Trust Co.*, 163 Md. 239, 161 Atl. 404 (1932); *BURDICK, REAL PROPERTY* (1914) 737; *TIFFANY, REAL PROPERTY* (2d ed. 1920) 1078. For a collection of authorities on this point see *THOMPSON, CONSTRUCTION OF WILLS* (1928) §601. But consider these cases where the instrument creating the power designated the time for disposal as "at the death" or "decease" of the donee, and it was held that the disposition was not restricted to a testamentary one, because no specific mode of exercising the power was designated: *Christy v. Pulliam*, 17 Ill. 59 (1855); *Sinke v. Muncie*, 110 Kan. 345, 203 Pac. 1102 (1922); *Sherill v. Querbacker*, 182 Ky. 626, 206 S. W. 876 (1918); *Kimball v. Sullivan*, 113 Mass. 345 (1873); *Tillet v. Nixon*, 180 N. C. 195, 140 S. E. 352 (1920). *Contra*: *Weir v. Smith*, 62 Texas 1 (1884), *cf. In re Gardner*, 140 N. Y. 122, 35 N. E. 439 (1893).

<sup>19</sup> *Sneed v. Sneed Ambl.*, 64 (Ch. 1747); *Wade v. Paget*, 1 Bro. Ch. 363 (Ch. 1784); *Darlington v. Pultney Comp.*, 260 (Ch. 1775); *Bruce v. Bruce L. R.*, 11 Eq. 371 (1871); *Tollet v. Tollet*, 2 P. Wms. 489 (Eq. 1728). *TIFFANY, REAL PROPERTY* (2d ed. 1912) §287; *SUGDEN, POWERS* (8th ed.) §558. But *cf. Jochers v. Hochmeyer*, 203 Ala. 621, 84 So. 709 (1920).

<sup>20</sup> *Wilkes v. Burnes*, 60 Md. 64 (1882); *Bentham v. Smith*, Cheves Eq., 33 (S. C. 1819); *TIFFANY, REAL PROPERTY* (2d ed. 1912) 636; *FARWELL, POWERS* (7th ed.) 332; *THOMPSON, CONSTRUCTION OF WILLS* (1928) 773.

<sup>21</sup> *FARWELL, POWERS* (7th ed.) 264; *semble KALE, FUTURE INTERESTS* (2d ed 1920) p. 471. However, where the proper instrument is used and the defect is one of form, equity will aid the appointee if it is a charity (*Sayre v. Sayre*, 7 Hare 377) (V. C. 1849); or is a person entitled to be provided for by the donee, such as a wife or legitimate child [*Ward v. Stanard*, 82 App. Div. 386, 81 N. Y. Supp. 906 (1903); *Fothergill v. Fothergill*, 1 Eq. Cas. 222 (1702)]; or if the person has paid value [*Beatly v. Clark*, 20 Calif. 11 (1862); *Mutual Life Ins. Co. of N. Y. v. Everett*, 40 N. J. Eq. 345, 3 Atl. 26 (1885)]; but not if the appointee is a mere volunteer [*Sargeson v. Sealey*, 2 Atl. 411 (Ch. 1742)]. But see *Lynn v. Lynn*, 33 Ill. App. (1889) (the court refused to aid execution in favor of a grandchild); and *Wooster v. Cooper*, 59 N. J. Eq., 45 Atl. 381 (1899) (equitable relief was refused a nephew).

<sup>22</sup> *ALA. CODE* (1928) §6927-6931; *MICH. COMP. LAWS* (1929) §13003-13005; *MINN. GEN. STS.* (Mason, 1927) §8115-8119; *CONSOL. LAWS OF N. Y.* (Cahill, 1931) c. 52, §151; *OKLA. REV. LAWS* (1921) §8522-8526; *S. D. REV. CODE* (1929) §426-430; *WIS. STAT.* (1931) §232.10-232.12. For a discussion of this type of statute see *THOMPSON, REAL PROPERTY* (1924) §2208. For cases interpreting and applying the N. Y. Statute (which is the model one) in the situation where the donee of a general testamentary power deeds the property, see: *Hume v. Randall*, 141 N. Y. 499, 36 N. E. 402 (1894); *Deegan v. Wade*, 144 N. Y. 573, 39 N. E. 692 (1914).

law, however, has not completely forgotten the purchaser for value even where there are no statutes to protect him, as it has refused to allow the donee of the power to exercise it to the prejudice of the rights of others whose rights have been created by virtue of prior transactions with the donee.<sup>23</sup> This view seems sound in light of the fact that even in the case of a release, where ordinarily no consideration is passed, the donee's deed operates as an estoppel to the subsequent exercise of a general testamentary power.<sup>24</sup> And in the principal case the additional factor of consideration is present to establish the defendant's equity. Professor Gray has pointed out the inconsistency of allowing a donee of a general testamentary power to release it *inter-vivos* and not allowing him to appoint it by deed.<sup>25</sup> The decisions have not totally disregarded this point of legal logic, and, as a result, purchasers from a donee of a general testamentary power may derive good title by deed;<sup>26</sup> and this is so even where the donee has only an equitable life estate.<sup>27</sup> It is submitted, in the instant case, that since the donee had a

<sup>23</sup> *Johnston v. Yates*, 39 Ky. 491 (1893); *Langley v. Conlan*, 212 Mass. 135, 98 N. E. 1064 (1912) (where the donee of a general testamentary power mortgaged the property, he was not allowed to subsequently exercise the power so as to prejudice the rights of the mortgagee, and the court said that this rule would prevail in spite of the fact that this appointee would take from the donor); *Brown v. Renshaw*, 57 Md. 67, 69 (1881); *Legget v. Doremus*, 25 N. J. Eq. 122, 127- (1874); *In re Hancock*, 2 Ch. 173 (1896); *Foakes v. Jackson*, 1 Ch. 807 (1900). Cf. *Grosevenor v. Bowen*, 15 R. I. 49, 10 Atl. 589 (1887) (where specific performance was granted to a donee of a general testamentary power who had contracted to convey a fee simple).

<sup>24</sup> *Thorington v. Thorington*, 82 Ala. 489, 1 So. 716 (1887); *Hill v. Hill*, 81 Ga. 516, 8 S. E. 879 (1889); *Baker v. Wilmert*, 288 Ill. 434, 123 N. E. 627 (1919); *Johnston v. Harriss*, 202 Ky. 193, 259 S. W. 35 (1924); *Tillet v. Nixon*, 180 N. C. 195, 104 S. E. 352 (1920); *Grosevenor v. Bowen*, 15 R. I. 549, 10 Atl. 589 (1887); *Atkinson v. Dowling*, 33 S. C. 414, 12 S. E. 93 (1890); *Hume v. Hoard*, 5 Grat. 374 (Va. 1849); *Foakes v. Jackson*, 1 Ch. 807 (1900); 49 C. J. 1288. Also see 44 and 45 *Victoria C.* 41 §52 (1881).

<sup>25</sup> Gray, *Release and Discharge of Powers* (1911) 24 HARV. L. REV. 511, 531. Professor Simes points out that to allow a release makes the property freely alienable, and, since the donee is usually under no duty to the donor, he should be permitted to extinguish the power in order to make the property alienable. The donee would not defeat the desires of donor any more by extinguishing the power than he would by releasing it. SIMES, *LAW OF FUTURE INTERESTS* (1936) §289.

<sup>26</sup> *Beatley v. Clark*, 20 Cal. 11 (1862); *Baker v. Wilmert*, 288 Ill. 434, 123 N. E. 627 (1919) (where it was held that a general testamentary power, if not coupled with a trust, could be extinguished); *Johnston v. Yates*, 39 Ky. 491 (1893); *Mountjoy v. Kasseleman*, 225 Ky. 55, 7 S. W. (2d) 572 (1928); *Underwood v. Cane*, 176 Mo. 1, 75 S. W. 451 (1903); *Lyon v. Alexander*, 304 Pa. 288, 156 Atl. 84 (1931) (in which the court held that the extinguishment of a general testamentary power could take any form); *Grosevenor v. Bowen*, 15 R. I. 549, 10 Atl. 589 (1887); *Hume v. Hoard*, 5 Grat. 374 (Va. 1849); *Freeman's Administrator v. Butters*, 94 Va. 406, 26 S. E. 845 (1897) (in which the court said that the defense of being a bona fide purchaser would be a valid one); *Foakes v. Jackson*, 1 Ch. 807 (1900).

<sup>27</sup> *McFall v. Kirkpatrick*, 236 Ill. 281, 86 N. E. 139 (1908) (where the defendant was a purchaser from an appointee-purchaser). But see the following cases where the donee contracted to will the property to a party who parted with value on the faith of such a promise, and, on his failure to will the property, the court refused

general power and the appointee was a purchaser for value, the latter could have been given an indefeasible fee which would have protected the defendant as purchaser from the appointee.

In the event the appointee had lived, he would have taken the property by the donee's will, in which case his title would have enured to the defendant by virtue of the doctrine of feeding the estoppel.<sup>28</sup> Granting that there is sufficient privity for the plaintiff, as heir of the appointee, to take under the donee's will by virtue of the lapse statutes,<sup>29</sup> although for other purposes he takes from the donor,<sup>30</sup> the same privity should have been sufficient to bind him as to the deceased appointee's transactions with a purchaser for value. Therefore, the plaintiff should have been estopped to claim through the appointee, by virtue of the donee's will, as against the defendant's title which was derived for value through the appointee's deed.

B. IRVIN BOYLE.

### Torts—Liability of Public Officers—Malice.

In an action against the defendants as county commissioners to recover for personal injuries alleged to have been suffered by plaintiff when assaulted by other prisoners in the county jail, demurrer to the complaint was sustained on appeal.<sup>1</sup> It seems that it was customary for the prisoners to hold a "Kangaroo Court" to try new prisoners on fictitious charges, impose a so-called fine, and if such fine was not paid the prisoner before the kangaroo court was assaulted. It was alleged that defendants knew of the custom and failed to provide for the safety of the prisoners by ordering and establishing proper rules and regulations as required by C. S. §1317. *Held*, this was a discretionary duty and in the absence of an allegation that the defendants acted corruptly or with malice, a demurrer to the complaint should be sustained.

The case of *Betts v. Jones*<sup>2</sup> might well be considered with the prin-

specific performance of the contract and granted damages in lieu thereof: *O'Donnell v. Barbey*, 129 Mass. 453 (1880); *Winton v. Pratt*, 228 Mass. 468, 117 N. E. 919 (1917); *cf.* *Security Trust and Safe Deposit Co. v. Ward*, 10 Del. Ch. 408, 93 Atl. 435 (1915); *Beyfus v. Lawley*, L. R. App. Cas. 411 (1903) *SIMES, LAW OF FUTURE INTERESTS* (1936) §265.

<sup>28</sup> *Oliver v. Holt*, 141 Ga. 126, 80 S. E. 630 (1913).

<sup>29</sup> *Thompson v. Pew*, 214 Mass. 520, 102 N. E. 122 (1913); *In re Lyndall's Estate*, 2 Pa. Dist. R. 476 (1892); *PAGE, WILLS* (2d ed. 1926) §1249; *JARMAN, WILLS* (5th ed. 1880) 642.

<sup>30</sup> *Jackson v. Franklin*, 179 Ga. 840, 177 S. E. 731 (1934); *Christy v. Pulliam*, 17 Ill. 59 (1855); *In re Harbeck's Will*, 161 N. Y. 211, 55 N. E. 50 (1900); *KALE, FUTURE INTERESTS* (2d ed. 1920) §610; *Simes, Devolution of Title* (1928) 22 ILL. L. REV. 480.

<sup>1</sup> *Moye v. McLawhorn, Smith, Cox, Williams, and Dudley*, 208 N. C. 812, 182 S. E. 493 (1935).

<sup>2</sup> *Betts v. Jones et al.*, 203 N. C. 590, 166 S. E. 589 (1932).

cial case. In that case action was brought against individual members of a school committee to recover for the death of plaintiff's intestate caused by the negligence of the driver of a school bus selected by the defendants over the protests of the patrons of the school that he had the reputation of being a "rough, reckless, driver, dissipated, wild and rattling boy, rough and drinking." The complaint alleged that such selection was wilful, wrongful, malicious, and corrupt. *Held*, on demurrer, that the complaint stated a sufficient cause of action. At the later trial of this action defendant's motion to dismiss, or for judgment of nonsuit was allowed, which holding was reversed on appeal, the court, by Stacy, C. J., saying "Malice in law is presumed from tortious acts, deliberately done without just cause, excuse, or justification, which are reasonably calculated to injure another or others."<sup>3</sup> The evidence was sufficient to warrant an inference of malice and the submission of the issue to the jury.

The question of the liability of a public officer for the wrongful act of a corporate body of which he is a member, or for his own wrongful act, has not often been presented to the courts for adjudication,<sup>4</sup> but the rule seems to be that where a public officer must exercise judgment and discretion in the performance of his official and governmental duties, he is not individually liable for a breach of such duty unless he acts corruptly or with malice.<sup>5</sup> Various reasons have been advanced in support of this rule, some of which are: (1) public policy of encouraging responsible men to fill public office,<sup>6</sup> and (2) since the state commands one to exercise discretion, it would not be fair to penalize him should his judgment err.<sup>7</sup>

Judicial officers are immune from civil liability while purporting to perform their functions as such within their jurisdiction.<sup>8</sup> "It is of the

<sup>3</sup> *Betts v. Jones et al.*, 208 N. C. 410, 181 S. E. 334 (1935).

<sup>4</sup> 22 R. C. L. 487.

<sup>5</sup> *Commercial Trust Co. of Hagerstown v. Burch et al.*, 267 Fed. 907 (S. D. Ga. 1920); *Hipp v. Ferrall et al.*, 173 N. C. 167, 91 S. E. 831 (1917) (action for injuries resulting from highway commission's failure to repair a bridge. *Held*, public officials exercising discretion are not liable unless they act corruptly and with malice); *Spruill v. Davenport*, 178 N. C. 364, 100 S. E. 527 (1919); *Carpenter v. Atlanta and C. A. L. Ry. Co.*, 184 N. C. 400, 114 S. E. 693 (1922) (public officer not liable for neglect to exercise discretionary powers unless he acts corruptly or with malice); *Hale v. Johnston*, 140 Tenn. 182, 203 S. W. 949 (1918); *HARPER, LAW OF TORTS* (1st ed. 1933) 668.

<sup>6</sup> *Commercial Trust Co. of Hagerstown v. Burch et al.*, 267 Fed. 907 (S. D. Ga. 1920), cited note 5, *supra* (not only would it be difficult to get responsible men to fill public office, but there would be constant temptation to yield officially to unlawful demands, less private liability be asserted and enforced).

<sup>7</sup> Note (1931) 17 VA. L. R. 817, 818.

<sup>8</sup> *Bradley v. Fisher*, 80 U. S. 335, 20 L. ed. 646 (1871); *Alzea v. Johnson*, 231 U. S. 106, 34 Sup. Ct. 27, 58 L. ed. 142 (1913); *Cunningham v. Dillard*, 20 N. C. 485 (1839) (no action against a justice of the peace for taking insufficient security because no action can be supported against a judge or justice of the peace, acting

highest importance to the proper administration of justice that a judicial officer in exercising the authority vested in him, shall be free to act upon his own convictions without apprehension of personal consequence to himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be respectable or useful."<sup>9</sup> Some jurisdictions, influenced by the above rule, have designated certain public officers as quasi-judicial and have given them a conditional immunity,<sup>10</sup> thus reaching the same result as in the cases where the officer's duty is discretionary.

However, by the great weight of authority a public officer is not individually liable in cases where the duty is ministerial in character and of a public nature unless the statute creating the office expressly provides for such liability,<sup>11</sup> but if the duty is also for the benefit of an individual the officer may be held personally liable even though there is no such provision in the statute.<sup>12</sup> This liability extends to a non-feasance as well as a misfeasance.<sup>13</sup>

In the principal case the demurrer to the complaint was sustained because of the absence of an allegation of malice or corruption,<sup>14</sup> which

---

judicially and within the sphere of his jurisdiction, even though there is malice present); HARPER, *op. cit. supra* note 5, at 667, n. 91.

<sup>9</sup> Bradley v. Fisher, 80 U. S. 335, 347, 20 L. ed. 646, 649 (1871), cited note 6, *supra*.

<sup>10</sup> Templeton v. Board et al., 159 N. C. 63, 74 S. E. 735 (1912) (in action against county commissioners for failure to repair a bridge held, officer termed quasi-judicial, and interests of public policy which operate to render the judicial officer exempt from civil liability for his judicial acts apply also to these quasi-judicial officials); HARPER, *op. cit. supra* note 5, at 688 (all other officials act within the protection of a conditional privilege only, and if they act outside their strict authority or solely from malice or for a purpose inconsistent and foreign to the purposes and policy of the legal privilege of their office, they render themselves liable to a civil action for damages to persons harmed by such improper conduct. This rule applies to a great number of lower executives and to administrative officers exercising what are frequently called quasi-judicial powers).

<sup>11</sup> Hipp v. Ferrall et al., 173 N. C. 167, 91 S. E. 831 (1917), cited note 5, *supra* (no individual liability where duties are of public nature and imposed entirely for the public benefit unless the statute provides a penalty); Carpenter v. Atlanta and C. A. L. Ry. Co. et al., 184 N. C. 400, 114 S. E. 693 (1922), cited note 5, *supra* (no individual liability in case of breach of ministerial duty unless statute fixes penalty).

<sup>12</sup> Hipp v. Ferrall et al., 173 N. C. 167, 91 S. E. 831 (1917), cited note 5, *supra* (where duties imposed for benefit of individual, officer may be liable for breach).

<sup>13</sup> Commercial Trust Co. of Hagerstown v. Burch et al., 267 Fed. 907 (S. D. Ga. 1920), cited note 5, *supra* (officer liable for nonfeasance as well as misfeasance in case of neglect of ministerial duty).

<sup>14</sup> Moye v. McLawhorn, Smith, Cox, Williams and Dudley, 208 N. C. 812, 182 S. E. 493 (1935), cited note 1, *supra*.

is required<sup>15</sup> and which was present in the *Betts* case.<sup>16</sup> There is a possible distinction between the two cases in that in the principal case there was a nonfeasance<sup>17</sup> while in the *Betts* case there was a misfeasance;<sup>18</sup> in the former there was a failure to perform an alleged duty while in the latter the defendants actually hired the incompetent driver. However, it is immaterial whether the breach of duty is a nonfeasance or a misfeasance.<sup>19</sup> Since it has been determined that malice must be alleged in the complaint<sup>20</sup> and proven on the trial<sup>21</sup> it is necessary for the court to formulate a charge to the jury to serve as a guide for their determination of the issue. It is submitted that the following definition, modified to suit each case, is adequate: "The malice required, need not be express ill will toward deceased, or a conscious disregard of his welfare, but a promiscuous disregard of the interest and welfare of the inmates of the workhouse would be sufficient—that disregard of public duty which results from general recklessness, as well as express ill will."<sup>22</sup> The defendants had entered upon the discharge of their duties as county commissioners, and it would seem by the terms of the statute<sup>23</sup> that they owed an active duty both to the public and to the individual prisoner. They had knowledge of the fact that the prisoners had held "Kangaroo Courts" in the past, and they could reasonably expect that such a court would be held to "try" the plaintiff. It would seem that defendants totally disregarded the interest and welfare of prisoners in the county jail, including plaintiff, and it is submitted that there is sufficient evidence in the principal case, as well as in the *Betts* case, to justify an inference of malice. Since the principal case was not determined upon its merits, but rather upon the sufficiency of the complaint, the plaintiff should be permitted to begin a new action<sup>24</sup> as the time for

<sup>15</sup> *Templeton v. Beard et al.*, 159 N. C. 63, 74 S. E. 735 (1912), cited note 10, *supra* (complaint which failed to allege malice upon part of county commissioners held not sufficient).

<sup>16</sup> *Betts v. Jones et al.*, 203 N. C. 590, 166 S. E. 589 (1932), cited note 2, *supra*.

<sup>17</sup> *Hale v. Johnston*, 140 Tenn., 182, 203 S. W. 949 (1918), cited note 5, *supra* (nonfeasance is the omission of an act which a person ought to do).

<sup>18</sup> *Hale v. Johnston*, 140 Tenn. 182, 203 S. W. 949 (1918), cited note 5, *supra* (misfeasance is the improper doing of an act which a person might lawfully do).

<sup>19</sup> *Hale v. Johnston*, 140 Tenn. 182, 203 S. W. 949 (1918) cited note 5, *supra* (guard beat convict to death, commissioners having knowledge of the fact that guard was in the habit of beating prisoners. *Held*, immaterial whether breach of duty was nonfeasance or misfeasance).

<sup>20</sup> *Templeton v. Beard et al.*, 159 N. C. 63, 74 S. E. 775 (1912), cited note 15, *supra*.

<sup>21</sup> *Hipps v. Ferrall*, 173 N. C. 167, 91 S. E. 831 (1917), cited note 5, *supra*.

<sup>22</sup> *Hale v. Johnston*, 140 Tenn. 182, 203 S. W. 949 (1918), cited note 5, *supra*.

<sup>23</sup> N. C. CODE ANN. (Michie, 1935) §1317 (the board of commissioners of the several counties shall from time to time order and establish such rules and regulations for the government and management of the prisons as may be conducive to the interests of the public and the security and comfort of the persons confined).

<sup>24</sup> *McIntosh*, N. C. PRACTICE AND PROCEDURE IN CIVIL CASES (1st ed. 1929)

amending his complaint has elapsed.<sup>25</sup> If the new complaint makes a proper allegation of malice the plaintiff should be able to get his case to the jury.

J. D. MALLONEE, JR.

\* \* \* \* \*

## HOPE REVIVED FOR HOLDERS OF SEALED NOTES

Further light, and perhaps some shadows as well, are cast upon the problem of sealed negotiable instruments by the dictum in the recent case of *Jefferson Standard Life Ins. Co. v. Morehead*.<sup>1</sup> Said Mr. Chief Justice Stacy in listing exceptions to the parol evidence rule: "The rule . . . is not violated, . . . Fifth, by showing that an instrument apparently under seal is a simple contract; provided there is no recital of a seal in the instrument, such as 'witness my hand and seal,' and it is not required by law to be under seal."

This is reassuring, for it lays at rest, so far as the clearest sort of a dictum can lay anything at rest, the question heretofore mooted<sup>2</sup> of whether a printed recital would conclusively establish the adoption of a printed seal adjacent to the signing line. An instrument with such a recital is now seen to be a sealed instrument beyond the reach of contradictory parol evidence.

But the reassurances go further and extend some ray of hope to him who holds an instrument devoid of recital, *i.e.*, one exactly like that on which the holder was beaten in *Williams v. Turner*.<sup>3</sup> The dictum concludes, "Of course, in any event, the maker would have the burden of overcoming the presumption arising from the presence of a seal." The trial courts are warranted in understanding that the burden here spoken of is the burden of proof and that the maker, to rebut it, must offer evidence of a disclosed intent not to execute a sealed instrument or adopt the seal. No mere internal, undisclosed intention on the matter

---

469 (if the plaintiff's action is dismissed upon demurrer for some formal defect, he may bring another action correcting such defect).

<sup>25</sup> N. C. CODE ANN. (Michie, 1935) §515; *McKeel v. Latham*, 202 N. C. 318, 162 S. E. 747 (1932). *McINTOSH*, N. C. PRACTICE AND PROCEDURE IN CIVIL CASES (1st ed. 1929) 466, *supra* note 24 (if the demurrer is sustained, the plaintiff may, within ten days after the return of the judgment, or within ten days after the certificate of the supreme court on appeal, ask for leave to amend his complaint, giving three days' notice of such motion; and if he fails to make such motion, or leave is not granted, judgment will be entered dismissing the action).

<sup>1</sup> 209 N. C. 174, 176, 183 S. E. 606, 607 (1936).

<sup>2</sup> Note (1935) 14 N. C. L. REV. 80, 82 at footnote 4.

<sup>3</sup> 208 N. C. 202, 179 S. E. 806 (1935).

should be permitted to go in. And since a disclosed intent not to seal will be as seldom present as the opposite—a disclosed intention to seal—the trial judge can consistently with *Williams v. Turner*, as now illuminated, direct for the holder on this issue in many cases.

In the earlier comment *Williams v. Turner* was pictured as saying substantially that a negotiable instrument with a printed symbol “(SEAL)” is not a sealed instrument in the absence of additional evidence of intention to adopt the seal.<sup>4</sup> That statement went too far. It should be that such an instrument *is* a sealed instrument in the absence of evidence of a contrary intent—a more satisfactory state of the law, though not nearly as satisfactory as a flat rule permitting no such evidence at all.<sup>5</sup> In the light of this additional opinion *Williams v. Turner* is seen to stand for very little. It represents principally an interpretation<sup>6</sup> of the trial judge’s finding of fact.

Nevertheless there is still room for legislation and that fact lends interest to an early statute which first gave recognition to the present-day inutility of private seals and then validated all unsealed instruments which had formerly required seals.<sup>7</sup> That statute was soon repealed<sup>8</sup> but might serve as a starting point in considering new legislation.

<sup>4</sup> Note (1935) 14 N. C. L. REV. 80, at footnote 3.

<sup>5</sup> The rule of RESTATEMENT, CONTRACTS, (1932) §98. See Note (1935) 14 N. C. L. REV. 80, at footnote 3.

<sup>6</sup> Misinterpretation, it is believed.

<sup>7</sup> P. L. N. C. 1879, c. 142:

AND WHEREAS, the reason for using private seals has long since ceased, and the present forms of deeds is complex and lengthy, thereby unduly increasing the cost of registration; therefore,  
*The General Assembly of North Carolina do Enact:*

Section 1. That all instruments hitherto requiring a private seal shall be as good and available in law for all purposes as if sealed; and all instruments not requiring an official seal shall be as valid to all intents and purposes in law as if the same had been sealed.

<sup>8</sup> P. L. N. C. 1881, c. 196.