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## Editorial Board/Notes and Comments

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## NOTES AND COMMENTS

### Attorneys—Disbarment by Trial Court on Own Motion.

D attorney was convicted in a North Carolina superior court of an attempt to commit the crime against nature and sentenced to prison. At the same time the judge entered an order striking his name from the rolls of attorneys practicing in North Carolina. Upon appeal the conviction and disbarment were affirmed.<sup>1</sup> The supreme court recognized that the State Bar Act of 1933<sup>2</sup> provides one procedure for disbarment

<sup>1</sup> State v. Spivey, 213 N. C. 45, 195 S. E. 1 (1938).

<sup>2</sup> N. C. CODE ANN. (Michie, 1935) §§215(1)—(18).

but held that this is not exclusive and does not infringe upon the inherent power of the courts to disbar for cause. This had been explicitly set forth in a 1937 amendment to the State Bar Act.<sup>3</sup>

A power on the part of the courts to disbar attorneys has existed since earliest times,<sup>4</sup> independently of statute, as an essential attribute of the courts' control over their own officers.<sup>5</sup> Thus, the North Carolina Court, in cases arising *before* the State Bar Act, intimated that the statutes declaring grounds for disbarment at that time did not limit its common-law power to disbar for professional misconduct or for other reasons deemed proper by the court, though not covered by the statute.<sup>6</sup> In two cases *subsequent* to the enactment of the State Bar Act, the North Carolina Supreme Court exercised its innate disbaring power upon petition by the attorney general.<sup>7</sup> A state supreme court's power to disbar, even though the integrated bar has the power also, is affirmed by a recent case<sup>8</sup> in Nevada, a state which has practically the same state bar machinery as North Carolina, including a provision similar to the 1937 amendment. The highest courts in cases from other states now having integrated bars bolster the above decisions by holding that their co-operation with their respective bar set-ups does not mean that their natural power to disbar is abolished.<sup>9</sup> In a large number of decisions the rule has been firmly established that where there is no integrated bar having power to disbar a state supreme court has the inherent power to

<sup>3</sup> N. C. CODE ANN. (Michie, Supp. 1937) §215(19).

<sup>4</sup> 2 THORNTON, ATTORNEYS AT LAW (1914) 1167.

<sup>5</sup> *Ex parte* Brounsall, 2 Cow. Rep. 829 (K. B. 1778) (where court of King's Bench struck name of attorney, convicted of a felony, off the roll, saying it was within the court's discretion to do so when practitioner became unfit); see *Ex parte* Garland, 4 Wall. 333, 378, 18 L. ed. 366, 370 (U. S. 1866); *State v. Kirke*, 12 Fla. 278, 286 (1869); *State v. Mosher*, 128 Iowa 82, 87, 103 N. W. 105, 107 (1905); *State v. Flynn*, 160 La. 483, 486, 107 So. 314, 315 (1926); *Danforth v. Egan*, 23 S. D. 43, 119 N. W. 1021, 1023 (1909); 4 L. T. 102 (Eng. 1844) (to effect that courts disciplined practitioners without aid of statute).

<sup>6</sup> See *Ex parte* David Schenck, 65 N. C. 353, 368 (1871); *In re* Ebbs, 150 N. C. 44, 54, 63 S. E. 190, 195 (1908); *State ex rel. Solicitor v. Johnson*, 171 N. C. 799, 802, 88 S. E. 437, 438 (1916); *State ex rel. Solicitor v. Johnson*, 174 N. C. 345, 348, 93 S. E. 847, 849 (1917).

<sup>7</sup> *State ex rel. Brummit, Attorney-General, v. Winburn*, 206 N. C. 923, 175 S. E. 498 (1934); *State ex rel. Attorney-General v. Gorson*, 209 N. C. 320, 183 S. E. 392 (1936), *cert. denied*, 298 U. S. 662 (1936).

<sup>8</sup> *Dignan v. State Bar of Nevada*, 70 P. (2d) 774, 776 (Nev. 1937).

<sup>9</sup> *In re* Shattuck, 208 Cal. 6, 279 Pac. 998 (1929) (a disciplinary order by the Board of Governors of the State Bar was treated by the supreme court as merely recommendatory); *In re* Sparks, 267 Ky. 93, 101 S. W. (2d) 194 (1936) (in setting up the Board of Bar Comm'rs in deference to the Bar Act, the court of appeals was but exerting its inherent power); *Louisville Bar Ass'n v. Yonts*, 270 Ky. 503, 109 S. W. (2d) 1186 (1937); *In re* Mundy, 182 La. 148, 161 So. 184 (1935) (State Bar Act did not interfere with supreme court's original jurisdiction in disbarment proceedings); *State v. Greathouse*, 55 Nev. 409, 36 P. (2d) 357 (1934) (Board of Governors of Bar suspended D and such action was construed to be recommendatory to supreme court which had the final authority); *In re* Royal, 34 N. M. 554, 286 Pac. 156 (1930) *semble*; *In re* Shoemaker, 168 Okla. 77, 31 P. (2d) 928 (1934); *In re* Barclay, 82 Utah 288, 24 P. (2d) 302 (1933) *semble*.

discipline attorneys by suspension or disbarment, independently of statutes;<sup>10</sup> that it exists as a corollary of the power to admit attorneys to practice when the latter right is given by statute;<sup>11</sup> and that statutes<sup>12</sup> or constitutions<sup>13</sup> giving them power to disbar are only declaratory of a right already existing. It is recognized that the legislature may legislate to aid in the exercise of such power by the court but may not frustrate or abolish it.<sup>14</sup> In England and Canada, however, the exclusive power of final disbarment of barristers has for many generations been exercised by the Inns of Court<sup>15</sup> and the Law Society,<sup>16</sup> respectively, with but a limited judicial review permitted as to the reasonableness of the proceeding.

Granting that state supreme courts may disbar on their own initiative, the query now becomes whether the power may be extended to an inferior court of general jurisdiction.<sup>17</sup> The disbarment of an attorney by

<sup>10</sup> *In re Bailey*, 30 Ariz. 407, 248 Pac. 29 (1926); *In re Spriggs*, 36 Ariz. 262, 284 Pac. 521 (1930); *People v. Harris*, 273 Ill. 413, 112 N. E. 978 (1916); *In re Information to Discipline Certain Attorneys for Sanitary District of Chicago*, 351 Ill. 206, 184 N. E. 332 (1932); *In re Richards*, 333 Mo. 907, 63 S. W. (2d) 672 (1933); *In re Fate*, 107 S. W. (2d) 157 (Mo. 1937); *State v. Crocker*, 132 Neb. 214, 271 N. W. 444 (1937); *State Bar Comm. v. Sullivan*, 35 Okla. 745, 131 Pac. 703 (1912); *State v. Ledbetter*, 127 Okla. 85, 260 Pac. 454 (1927) (both inherent and statutory power); *In re Egan*, 22 S. D. 355, 117 N. W. 874 (1908); *In re Evans*, 42 Utah 282, 130 Pac. 217 (1913); *In re Burton*, 67 Utah 118, 246 Pac. 188 (1926) (both inherent and statutory power); *In re Bruen*, 102 Wash. 472, 172 Pac. 1152 (1918); see *In re Gorsuch*, 113 Kan. 380, 214 Pac. 794, 796 (1923).

<sup>11</sup> *In re De Caro*, 220 Iowa 176, 262 N. W. 132 (1935); *Commonwealth ex rel. Ward v. Harrington*, 266 Ky. 41, 98 S. W. (2d) 53 (1936); *State Bar Comm. v. Sullivan*, 35 Okla. 745, 131 Pac. 703 (1912); *In re Brown*, 64 S. D. 87, 264 N. W. 521 (1936); *In re Haddad*, 106 Vt. 322, 173 Atl. 103 (1934); *In re Robinson*, 48 Wash. 153, 92 Pac. 929 (1907); see *Bradley v. Fisher*, 13 Wall. 335, 354, 20 L. ed. 646, 651 (U. S. 1871) (power of removal from the bar is possessed by all courts that have power to admit attorneys to practice); *Ex parte Robinson*, 19 Wall. 505, 512, 22 L. ed. 205, 208 (U. S. 1873); *In re Westcott*, 66 Conn. 585, 587, 34 Atl. 505 (1895); *State v. Harber*, 129 Mo. 271, 31 S. W. 889, 892 (1895).

<sup>12</sup> *State v. Mosher*, 128 Iowa 82, 103 N. W. 105 (1905); *In re Sparks*, 267 Ky. 93, 101 S. W. (2d) 194 (1936); *State v. Harber*, 129 Mo. 271, 31 S. W. 889 (1895); *In re Simpson*, 9 N. D. 379, 83 N. W. 541 (1900).

<sup>13</sup> *State v. Flynn*, 160 La. 483, 107 So. 314 (1926).

<sup>14</sup> *In re Bailey*, 30 Ariz. 407, 248 Pac. 29 (1926); *In re Myrland*, 45 Ariz. 484, 45 P. (2d) 953 (1935); *Brydonjack v. State Bar of Calif.*, 208 Cal. 439, 281 Pac. 1018 (1929); *In re Richards*, 333 Mo. 907, 63 S. W. (2d) 672 (1933); *In re Shoemaker*, 168 Okla. 77, 31 P. (2d) 928 (1934); *In re Bruen*, 102 Wash. 472, 172 Pac. 1152 (1918); *State v. Cannon*, 206 Wis. 374, 240 N. W. 441 (1932) *semble*.

<sup>15</sup> DILLON, THE LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA (1894) 90; 2 HALSBURY, LAWS OF ENGLAND (1908) §608 (decisions of Inns of Court subject to review by the Lord Chancellor and the judges of the High Court of Justice, sitting as a domestic tribunal).

<sup>16</sup> REV. STAT. ONT. (1914) c. 157, §§45-46; 2 THORNTON, ATTORNEYS AT LAW (1914) 1182.

<sup>17</sup> Inferior courts of limited jurisdiction are not vested with power to disbar: *Baird v. Justice's Court of Riverside*, 11 Cal. App. 439, 105 Pac. 259 (1909) (Justice's court may not remove or suspend); *Mattler v. Schaffner et ux.*, 53 Ind. 245 (1876) (inferior court of criminal jurisdiction unable to disbar); *State*

a trial court upon its own initiative marks a new step in the discipline of attorneys in this state. However, in a recent Massachusetts case an attorney, guilty of larceny, was disbarred by a trial court upon its own motion from all courts of the state. This was upheld by the state supreme court independently of a statute which gave the trial court power to disbar.<sup>18</sup> Earlier Massachusetts cases relied upon by the court were to the same effect.<sup>19</sup> In several other instances inferior courts have been held to be vested with power to disbar from all courts independently of and notwithstanding statutes. A superior court, having knowledge of an attorney's conviction of a crime involving moral turpitude, was held authorized to suspend from all courts of the state until final disbarment proceedings.<sup>20</sup> In another instance, where an attorney had been convicted of receiving stolen goods, a county court of common pleas was held inherently empowered to disbar.<sup>21</sup> A county circuit court was allowed to disbar without statutory authority where an attorney was guilty of an attempt to stifle evidence relating to a crime.<sup>22</sup> Likewise another circuit court was held empowered to disbar from all courts of the commonwealth where an attorney made false representations to a minor in proceedings to appoint a guardian.<sup>23</sup> An intermediate appellate court has been held to have power to disbar in an original proceeding before it.<sup>24</sup> Some decisions are to the effect that any court of record possesses the power to suspend attorneys *from practicing before it*, but that a statute is necessary to make such disbarment effective in *all* courts of the state.<sup>25</sup> The power of expelling from the one court alone has been exercised by county courts,<sup>26</sup> federal district courts,<sup>27</sup> a state district court,<sup>28</sup> and a state circuit court.<sup>29</sup> In one

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v. Laughlin, 73 Mo. 443 (1881) (St. Louis Criminal Court could not disbar); State *ex rel.* Storts v. Peabody, 63 Mo. App. 378 (1895) (City of St. Louis could not authorize police justices to disbar or suspend from appearing before them); Bloomingdale v. Hudson, 147 Misc. 759, 264 N. Y. Supp. 639 (Sup. Ct. 1933) (Municipal court could not discipline attorneys for misconduct).

<sup>18</sup> *In re Stern*, 12 N. E. (2d) 100 (Mass. 1937).

<sup>19</sup> See Randall, Petitioner for *certiorari*, 93 Mass. 472 (1865); Bar Ass'n of City of Boston v. Casey, 211 Mass. 187, 192, 97 N. E. 751, 754 (1912); *In re Carver*, 224 Mass. 169, 112 N. E. 877, 879 (1916); *In re Ulmer*, 268 Mass. 373, 397, 167 N. E. 749, 755 (1929); *In re Opinion of the Justices*, 279 Mass. 607, 610, 180 N. E. 725, 727, 81 A. L. R. 1064 (1932); *In re Mayberry*, 3 N. E. (2d) 248, 250 (Mass. 1936).

<sup>20</sup> *De Krasner v. Boykin*, 54 Ga. App. 29, 186 S. E. 701 (1936).

<sup>21</sup> *In re Wolfe's Disbarment*, 288 Pa. St. 331, 135 Atl. 732 (1927).

<sup>22</sup> *In re Shepard*, 109 Mich. 631, 67 N. W. 971 (1896).

<sup>23</sup> *Lenihan v. Commonwealth*, 165 Ky. 93, 176 S. W. 948 (1915).

<sup>24</sup> *In re Sparrow*, 338 Mo. 203, 90 S. W. (2d) 401 (1935). *Contra: In re Meck*, 51 Ohio App. 237, 200 N. E. 478 (1935).

<sup>25</sup> *Legal Club of Lynchburg v. Light*, 137 Va. 249, 119 S. E. 55 (1923); *State v. McClagherty*, 33 W. Va. 250, 10 S. E. 407 (1889).

<sup>26</sup> *State v. Kirke*, 12 Fla. 278 (1869).

<sup>27</sup> *Ex parte Robinson*, 19 Wall. 505, 22 L. ed. 205 (U. S. 1873); *Barnes v. Lyons*, 187 Fed. 881 (C. C. A. 9th, 1911); *Hertz v. United States*, 18 F. (2d) 52

state the superior court is given original power by statute to disbar from all courts;<sup>30</sup> in others the superior and supreme court are given concurrent jurisdiction.<sup>31</sup>

Thus, the principal case is supported by authority. In cases where the attorney is clearly shown to be an unworthy practitioner, there should be no objection to the extension of judicial disbarment to an inferior court which has peculiar knowledge of the situation and may preserve the dignity of all the courts by immediate action. The rights of the attorney are protected by an appeal to the state appellate court.

WILLIS C. SMITH.

### Bankruptcy—Lien of Trustee Under Section 47a (2).

A recent case in the Fourth Circuit Court of Appeals decided for the first time the rights of a trustee in bankruptcy to North Carolina real property "not within the custody of the bankruptcy court." The bankrupt, thirteen years prior to the bankruptcy, had conveyed the property for valuable consideration to defendant's predecessor in title, who had entered into possession, paid taxes, and made improvements. The conveyance was not properly recorded as to the bankrupt until after the certificate of adjudication of bankruptcy had been filed in the county where the land is located. The trustee sought to enforce a lien which he claimed was given him under the Bankruptcy Act. The circuit court of appeals, reversing the district court, held that the trustee, having the rights of "a judgment creditor with execution duly returned unsatisfied," has no lien in North Carolina.<sup>1</sup>

Prior to the 1910 amendment to section 47a (2) of the Bankruptcy Act,<sup>2</sup> the trustee "stood in the shoes of the bankrupt."<sup>3</sup> Since in most jurisdictions, as in North Carolina, an unrecorded conveyance is good as

(C. C. A. 8th, 1927); *Conley v. United States*, 59 F. (2d) 929 (C. C. A. 8th, 1932).

<sup>28</sup> *State v. Reynolds*, 22 N. M. 1, 158 Pac. 413 (1916) (subject to supreme court's completely disbarring).

<sup>29</sup> *Clark v. Reardon*, 104 S. W. (2d) 407 (Mo. 1937).

<sup>30</sup> CONN. GEN. STAT. (1930) §§5343-5346.

<sup>31</sup> CAL. CODE CIV. PROC. (Deering, 1937) §287; MASS. ANN. LAWS (1933) c. 221, §40.

<sup>1</sup> *Southern Dairies v. Banks*, 92 F. (2d) 282 (C. C. A. 4th, 1937), *cert. denied*, 58 Sup. Ct. 368, 82 L. ed. 261 (U. S. 1937).

<sup>2</sup> ". . . and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied." 36 STAT. 840 (1910), 11 U. S. C. A. §75(a) (2) (1926), 3 F. C. A. tit. 11, §75(a) (2) (1937).

<sup>3</sup> *York Mfg. Co. v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. ed. 782 (1906).

between the parties,<sup>4</sup> it was impossible for the trustee to attack successfully such conveyances of the bankrupt in the absence of bad faith.<sup>5</sup> The amendment was passed to remedy this situation. Whatever rights the trustee has superior to those of the bankrupt, then, are given by this amendment.

It is now well established that as to property "in the custody of the bankruptcy court" the lien given to the trustee by the amendment is superior to secret or unrecorded liens or conveyances.<sup>6</sup> There have been few cases, however, on the rights of a trustee as to property *not* in the custody of the bankruptcy court. Indeed, few courts have had occasion to recognize the distinction, or have bothered to do so.

Property is not "in the custody of the bankruptcy court" when it is at the time the bankruptcy is begun "in the exclusive possession, . . . under claim of right," of someone other than the bankrupt,<sup>7</sup> or "not in the possession of the bankrupt, trustee, or any officer of the court."<sup>8</sup> But some courts have said that it may be in the "constructive possession" of the court, "though in the actual possession of the bankrupt or a third person under a merely colorable [claim of] right."<sup>9</sup> Thus, where real property had been in the possession of the vendee under a parol contract of purchase for ten years prior to the bankruptcy, it was held "not in the custody."<sup>10</sup> The same result was reached where real property was in the possession of the holder of an unrecorded deed as in the principal case;<sup>11</sup> where property of the bankrupt, held under an unrecorded lease having the effect of a mortgage, was taken on execution by a third person before the bankruptcy;<sup>12</sup> where a bankrupt husband who had held it in trust for his wife conveyed to her shortly before the bankruptcy.<sup>13</sup> The same result apparently was reached in a more extreme case where

<sup>4</sup> *In re Cunningham*, 64 F. (2d) 296 (C. C. A. 4th, 1933); *Leggett v. Bullock*, 44 N. C. 283 (1853); *McBrayer v. Harrill*, 152 N. C. 712, 68 S. E. 204 (1910); see *South Ga. Motor Co. v. Jackson*, 184 N. C. 328, 331, 114 S. E. 478, 479 (1922).

<sup>5</sup> *York Mfg. Co. v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. ed. 782 (1906); *Hewitt v. Berlin Machine Works*, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. ed. 986 (1904).

<sup>6</sup> *Fairbanks v. Wills*, 240 U. S. 642, 36 Sup. Ct. 466, 60 L. ed. 841 (1916); *Cooper Grocery Co. v. Park*, 218 Fed. 42 (C. C. A. 5th, 1914); *Potter Mfg. Co. v. Arthur*, 220 Fed. 843 (C. C. A. 6th, 1915); *In re Duker Ave. Meat Market*, 2 F. (2d) 699 (C. C. A. 6th, 1924); *Farmers' State Bank v. Benston*, 29 F. (2d) 902 (C. C. A. 8th, 1928); *Midwest Production Co. v. Doerner*, 70 F. (2d) 194 (C. C. A. 10th, 1934). *Contra: In re Gamble*, 14 F. (2d) 847 (W. D. Pa. 1926) *semble*.

<sup>7</sup> *In re Snelling*, 202 Fed. 259, 261 (D. Mass. 1912).

<sup>8</sup> *Lewin v. Telluride Iron Works*, 272 Fed. 590, 594 (C. C. A. 8th, 1921).

<sup>9</sup> *Vincent v. Tafien*, 40 F. (2d) 823, 824 (C. C. A. 1st, 1930).

<sup>10</sup> *Clark v. Snelling*, 205 Fed. 240 (C. C. A. 1st, 1913).

<sup>11</sup> *United States Plywood Co. v. Verrill*, 131 Maine 469, 164 Atl. 200 (1933).

<sup>12</sup> *Lewin v. Telluride Iron Works*, 272 Fed. 590 (C. C. A. 8th, 1921).

<sup>13</sup> *Conron v. Cauchois*, 242 Fed. 909 (C. C. A. 2d, 1917).

the title was in a third person, but the bankrupt himself was in possession under a contract to purchase.<sup>14</sup>

As to property "not in the custody" the trustee is given by the statute the rights of "a judgment creditor holding an execution duly returned unsatisfied."<sup>15</sup> The law of the state where the property is located determines the rights and powers of a trustee who is so armed.<sup>16</sup> Under North Carolina law, a judgment creditor with execution returned unsatisfied has no lien unless the judgment is properly docketed in the county where the land is located.<sup>17</sup> The clerks of the superior courts are required by statute<sup>18</sup> to enter all judgments on the docket before execution, *but if they neglect this duty there is no lien*<sup>19</sup>—though they may become liable on their bonds.<sup>20</sup> In addition, the federal courts,<sup>21</sup> the Supreme Court of North Carolina,<sup>22</sup> and numerous inferior county,<sup>23</sup> recorder,<sup>24</sup> and justice of the peace<sup>25</sup> courts in the state can issue executions without any entry on the judgment docket of the county.

The trustee has no *actual* judgment which can be docketed to create a lien in his favor; he has only the *status* of a judgment creditor. Furthermore, the requirement that a certificate of the adjudication be filed in the county where the property is located<sup>26</sup> is generally held to be directory only,<sup>27</sup> and such filing is not essential to his lien—which he takes, if he takes at all, as of the date the petition in bankruptcy was

<sup>14</sup> See *Wilson v. Holub*, 202 Iowa 549, 552, 210 N. W. 593, 594 (1926).

<sup>15</sup> See note 2, *supra*.

<sup>16</sup> *Matter of Floyd-Scott Co.*, 224 Fed. 987 (D. Mass. 1915); *Hoyt v. Gibell*, 259 Fed. 186 (C. C. A. 7th, 1919); *Lewin v. Telluride Iron Works*, 272 Fed. 590 (C. C. A. 8th, 1921); *Albert Pick & Co. v. Wilson*, 19 F. (2d) 18 (C. C. A. 8th, 1927); *In re Bowling Constr. Corp.*, 19 F. (2d) 604 (D. Md. 1927); see *Potter Mfg. Co. v. Arthur*, 220 Fed. 843, 846 (C. C. A. 6th, 1915).

<sup>17</sup> *Holman v. Miller*, 103 N. C. 118, 9 S. E. 428 (1889); *Young v. Connelly*, 112 N. C. 646, 17 S. E. 424 (1892); *Jones v. Currie*, 190 N. C. 260, 129 S. E. 605 (1925); *McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE* (1929) §§664, 665.

<sup>18</sup> N. C. CODE ANN. (Michie, 1935) §670.

<sup>19</sup> *Jones v. Currie*, 190 N. C. 260, 129 S. E. 605 (1925); *Bernhardt v. Brown*, 122 N. C. 587, 29 S. E. 884 (1898); *McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE* (1929) §717.

<sup>20</sup> *Holman v. Miller*, 103 N. C. 118, 9 S. E. 429 (1889); *Bernhardt v. Brown*, 122 N. C. 587, 29 S. E. 884 (1898). *McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE* (1929) §665.

<sup>21</sup> REV. STAT. §916 (1875), 28 U. S. C. A. §727 (1928), 8 F. C. A. tit. 28, §727 (1937); see *Naumburg v. Hyatt*, 24 Fed. 898, 902 (C. C. W. D. N. C. 1885).

<sup>22</sup> *Johnson v. Richmond & D. Ry.*, 109 N. C. 505, 13 S. E. 881 (1891); *Midgett v. Vann*, 158 N. C. 128, 73 S. E. 801 (1912); *McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE* (1929) §25.

<sup>23</sup> N. C. CODE ANN. (Michie, 1935) §1608(dd).

<sup>24</sup> *Id.* §1598.

<sup>25</sup> *Id.* §1521; see *Bailey v. Hester*, 101 N. C. 538, 540, 8 S. E. 164, 165 (1888).

<sup>26</sup> 32 STAT. 799 (1903), 11 U. S. C. A. §75(c) (1927), 3 F. C. A. tit. 11, §75(c) (1937).

<sup>27</sup> *Hull v. Burr*, 61 Fla. 625, 55 So. 852 (1911); see *Ward v. Hargett*, 151 N. C. 365, 369, 66 S. E. 340, 342 (1909).



filed.<sup>28</sup> A few decisions look in the opposite direction, holding that the trustee may lose certain rights by failing to file this notice.<sup>29</sup> The reasoning of these latter cases has the approval of some leading text writers,<sup>30</sup> but no cases have been found in which it was held that the trustee added anything to his title by filing this certificate.

The courts, in previous decisions on the rights of trustees as to property not in the custody of the court, have almost uniformly held, as in the instant case, that the trustee had no lien since the mere obtaining of a judgment and having execution returned unsatisfied does not give one.<sup>31</sup> In *Lewin v. Telluride Iron Works*,<sup>32</sup> a frequently cited decision, a trustee was held to have no lien on real and personal property, not in the custody of the bankruptcy court, superior to an unrecorded mortgage "in the absence of filing of docket entry with the clerk of the county." To the same effect is *United States Plywood Co. v. Verrill*,<sup>33</sup> where the fact situation was very similar to the principal case. Of course, it must be borne in mind that the recording laws of the states where these cases arose differ in some respects from our own. In the only North Carolina case which deals with the situation, the question was not presented from this angle, and the decision, though consistent with the result in this case, went on another point.<sup>34</sup>

The framers of the amendment must have intended, by placing property in the custody of the court and property not in such custody in different categories, to make *some* distinction between them. If they intended to give the trustee a lien as to both, it was inconsistent expressly to give a lien in the first class of property and to fail to mention it in the second; further, the distinction that they were at such pains to make would be a useless one. Possibly the purpose of the second clause of the amendment was, as a number of courts have said, to give the trustee as to property "not in the custody," the status necessary to go into equity to recover any equitable interest in the property which a

<sup>28</sup> *Bailey v. Baker Ice Machine Co.*, 239 U. S. 268, 36 Sup. Ct. 50, 60 L. ed. 275 (1915); *Fairbanks v. Wills*, 240 U. S. 642, 36 Sup. Ct. 466, 60 L. ed. 814 (1916); *Martin v. Commercial Nat. Bank*, 245 U. S. 513, 38 Sup. Ct. 176, 62 L. ed. 441 (1918).

<sup>29</sup> *Beach v. Faust*, 2 Cal. (2d) 290, 40 P. (2d) 822 (1935); *Vombrack v. Wavra*, 331 Ill. 508, 163 N. E. 340 (1928).

<sup>30</sup> REMINGTON, BANKRUPTCY (3d ed. Supp. 1937) §1141.

<sup>31</sup> *In re Snelling*, 202 Fed. 259 (D. Mass. 1912), *aff'd*, *Clark v. Snelling*, 205 Fed. 240 (C. C. A. 1st, 1913); *Lewin v. Telluride Iron Works*, 212 Fed. 590 (C. C. A. 8th, 1921); *Vincent v. Tafien*, 40 F. (2d) 823 (C. C. A. 1st, 1930); *United States Plywood Co. v. Verrill*, 131 Maine 469, 164 Atl. 200 (1933). Accord: *Sparks v. Weatherly*, 176 Ala. 324, 58 So. 280 (1912); *Harper v. Dothan Nat. Bank*, 223 Ala. 26, 134 So. 623 (1931); *Brooks v. American Lumber Co.*, 162 Minn. 220, 202 N. W. 818 (1925). Cf. *In re Sachs*, 30 F. (2d) 510 (C. C. A. 4th, 1929).

<sup>32</sup> 212 Fed. 590 (C. C. A. 8th, 1921).

<sup>33</sup> 131 Maine 469, 164 Atl. 200 (1933).

<sup>34</sup> *Gosney v. McCullers*, 202 N. C. 326, 162 S. E. 746 (1932).

creditor so armed could get.<sup>35</sup> It has been held that the status of a judgment creditor with execution returned unsatisfied gives the trustee the right to get at surpluses of spendthrift trusts of the bankrupt "in the same way and by the same processes as are available to a creditor with unsatisfied execution."<sup>36</sup> A trustee with this status may maintain an action of trespass on the case to recover damages caused by a conspiracy to transfer and conceal the property of the bankrupt.<sup>37</sup> The right of a trustee to attack the fraudulent foreclosure of a mortgage<sup>38</sup> is ascribed to the status given him by the amendment. Dicta in a number of other cases lend recognition to this interpretation of the purpose of the act.<sup>39</sup> This view also seems to have found support among some leading text writers including Remington,<sup>40</sup> who aided in the drafting of the amendment.

However, in a passage often quoted by the courts from the report of the congressional committee which drew up the amendment, it was said of this provision: "... [The amendment] will give to creditors *all* the rights that creditors under the state law might have had had there been no bankruptcy, and from which they are debarred by the bankruptcy"<sup>41</sup> (italics ours). In North Carolina under *Eaton v. Doub*<sup>42</sup> any of the creditors could have reached this property by reducing his claim to a judgment and levying on it. Of course, the result reached in *Eaton v. Doub*, a strict insistence on record notice as opposed to actual notice, seems rather harsh when it, as in the present case, disregards strong equities existing in favor of the grantee of an unrecorded conveyance, who has paid full consideration. This is especially so when the property has not been in the bankrupt's possession for years so that no one should have been misled. But this decision has never been overruled, and the result of the principal case denies the creditors the right to take advantage of it in cases of a bankruptcy. Under this decision,

<sup>35</sup> *Sattler v. Slonimsky*, 199 Fed. 592 (E. D. Pa. 1912); *In re Reynolds*, 243 Fed. 268 (N. D. N. Y. 1917); *Union Guardian Trust Co. v. Detroit Creamery*, 265 Mich. 636, 251 N. W. 797 (1933); *Forbes v. Snow*, 239 Mass. 138, 131 N. E. 299 (1921) *semble*. Contrast *Jenks v. Title Guarantee & Trust Co.*, 170 App. Div. 830, 156 N. Y. Supp. 478 (1st Dep't 1915) (after 1910 Amendment) with *Butler v. Baudoine*, 84 App. Div. 215, 82 N. Y. Supp. 773 (1st Dep't 1903) (before 1910 Amendment).

<sup>36</sup> *In re Reynolds*, 243 Fed. 268 (N. D. N. Y. 1917).

<sup>37</sup> *Sattler v. Slonimsky*, 199 Fed. 592 (E. D. Pa. 1912).

<sup>38</sup> *Union Guardian Trust Co. v. Detroit Creamery*, 265 Mich. 636, 251 N. W. 797 (1933).

<sup>39</sup> See *Scoron v. Cauchois*, 242 Fed. 909, 911 (C. C. A. 2d, 1917); *Wilson v. Holub*, 202 Iowa 549, 552, 210 N. W. 593, 594 (1926); *Jones v. Bank of Excelsior*, 201 Mo. App. 545, 548, 213 S. W. 892, 893 (1919).

<sup>40</sup> "The trustee may now institute suits to subject interests of the bankrupt in equitable estates, where the return of execution unsatisfied is a prerequisite to equity jurisdiction." REMINGTON, BANKRUPTCY (4th ed. 1935) §1557.

<sup>41</sup> SEN. REP. NO. 691, 61st Cong., 2d Sess. (1910) 7; 4 REMINGTON, BANKRUPTCY (4th ed. 1935) 392.

<sup>42</sup> 190 N. C. 14, 128 S. E. 494 (1925).

the Bankruptcy Act takes away from the creditors the right to protect their claims by reducing them to judgment and does *not* give to the trustee "all the rights that the creditors . . . might have had had there been no bankruptcy." At the same time, it opens the door to the possibility of fraud on the creditors by permitting grantees and mortgagees to perfect their titles, after the petition in bankruptcy, by filing for registration unrecorded conveyances of property not in the custody of the court.<sup>43</sup>

Our conclusion must be, however, that the principal case is well supported by the authority of the previous decisions in the field. If congress intended that the trustee should get more than a mere "right to go into equity" relative to this class of property, the decisions construing the provision have defeated that intention, and further legislation will be necessary to make it effective.

JAMES B. CRAIGHILL.

#### Bills and Notes—Checks—Acceptance by Retention of Check by Drawee.

Defendant drawee bank held for three days after presentment for payment a check drawn on it, then returned the item to the cashing bank unpaid because the drawer's signature was discovered to be a forgery. In an action by the holder, an accommodation indorser who had repaid the amount of the check to the cashing bank after its return, it was held<sup>1</sup> that the drawee bank was not bound as acceptor under Section 137 of The Negotiable Instruments Law.<sup>2</sup>

In the absence of a statute to the contrary it is an acknowledged principle of commercial law that the mere retention of a bill of exchange or a check for even an unreasonable time or a mere failure to return after a demand to do so, unaccompanied by circumstances from which an acceptance may be implied, is not sufficient to render the drawee liable as acceptor of the instrument.<sup>3</sup> The English law to like effect is well settled.<sup>4</sup> There are cases, however, in which a drawee, who has refused to surrender to the rightful owner a bill or a check after a request for

<sup>43</sup> This type of fraud would be quite possible in North Carolina where the creditors, in extending credit to the bankrupt, have relied on the record, which shows the title apparently in him.

<sup>1</sup> *Seymour v. The Peoples Bank*, 212 N. C. 707, 194 S. E. 464 (1938).

<sup>2</sup> N. C. CODE ANN. (Michie 1935) §3119, "Where a drawee to whom a bill is delivered for acceptance destroys the same or refuses within twenty-four hours after such delivery, or within such other time as the holder may allow, to return the bill accepted or nonaccepted to the holder, he will be deemed to have accepted the same".

<sup>3</sup> *Colorado Nat. Bank of Denver v. Boettcher*, 5 Colo. 185 (1879); *Overman v. Hoboken City Bank*, 31 N. J. Law 563 (1864).

<sup>4</sup> *Jeune v. Ward*, 2 Stark. 326, 1 B. & Ald. 653 (Eng. 1818).

its return, has been held liable in damages to the latter to the extent of the actual value of the instrument for the conversion thereof.<sup>5</sup>

At an early date before the enactment into law in that state of The Negotiable Instruments Law it was provided in New York by statute<sup>6</sup> that a drawee, to whom a bill was delivered for acceptance, should be deemed to have accepted the same upon refusal to return it accepted or nonaccepted within twenty-four hours. Acceptance thereunder was held, however, to be predicated upon the tortious act of the drawee in holding the bill after a demand had been made for its return.<sup>7</sup> A similar judicial construction was given like acts in other jurisdictions.<sup>8</sup> This New York statute was incorporated bodily into The Negotiable Instruments Law as Section 137.<sup>9</sup> As would be expected, early decisions construing this section accorded with constructions of the parent statute, mere failure to return the bill, in the absence of a demand, being held not to constitute acceptance.<sup>10</sup> Many courts, moreover, have refused to extend the section to checks presented for payment on the ground that there is no presentment for acceptance within its meaning.<sup>11</sup>

The case of *Wisner v. First Nat. Bank of Gallitzin*<sup>12</sup> first adjudged that by Section 137 nonreturn of a check<sup>13</sup> within twenty-four hours of its presentment for payment, even in the absence of any additional demand by the holder for its return, constitutes acceptance by the drawee. The court reasoned that presentment itself is a demand for acceptance or return and a failure to comply with this demand constitutes acceptance under the statute without more. This decision has found a large following<sup>14</sup> and represents the present overwhelming

<sup>5</sup> *Louisville & N. R. R. v. Citizens & Peoples Nat. Bank*, 74 Fla. 385, 77 So. 104 (1917); *Burstein v. People's Trust Co.*, 13 App. Div. 165, 127 N. Y. Supp. 1092 (2d Dep't 1911); *Knoxville Water Co. v. East Tenn. Nat. Bank*, 123 Tenn. 364, 131 S. W. 447 (1910).

<sup>6</sup> 1 N. Y. STATS. (1869) 722.

<sup>7</sup> *Matteson v. Moulton*, 11 Hun. 268 (N. Y. 1877), *aff'd* 79 N. Y. 627 (1880).

<sup>8</sup> *St. Louis & S. W. R. R. v. James*, 78 Ark. 490, 95 S. W. 804 (1906); *Lockhart v. Moss*, 53 Mo. App. 633 (1893); *Dickinson v. Marsh*, 57 Mo. App. 566 (1894).

<sup>9</sup> An early criticism of this section appeared in Ames, *The Negotiable Instruments Law* (1900) 14 HARV. L. REV. 241, 245, "A refusal to accept is an acceptance! Such a perversion of language would be strange enough anywhere, but in a deliberately framed code is well-nigh inexplicable".

<sup>10</sup> *Westberg v. Chicago Lumber Co.*, 117 Wis. 589, 94 N. W. 572 (1903).

<sup>11</sup> *First Nat. Bank of Omaha v. Whitmore*, 177 Fed. 397 (C. C. A. 8th, 1910); *Kentucky Title Savings Bank & Trust Co. v. Dunavan*, 205 Ky. 801, 266 S. W. 667 (1924); *First Nat. Bank of Goree v. Talley*, 115 Tex. 591, 285 S. W. 612 (1926).

<sup>12</sup> 220 Pa. 21, 68 Atl. 955 (1908).

<sup>13</sup> NEGOTIABLE INSTRUMENTS LAWS §185, "A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check."

<sup>14</sup> *First Nat. Bank of Winnfield v. Citizens' Bank of Campti*, 163 La. 919, 113 So. 147 (1927); *Miller v. Farmers' State Bank of Arco*, 165 Minn. 339, 206 N. W. 930 (1925); *Clarke v. Nat. Bank of Mont.*, 78 Mont. 48, 252 Pac. 373

weight of authority.<sup>15</sup> It has been urged that in the interest of uniformity this construction of the statute be generally adopted.<sup>16</sup> A strong expression of approval by the North Carolina court<sup>17</sup> of the holding in the *Wisner* case leads to the conclusion that it will follow the majority rule in the case of retention beyond the twenty-four hour period after presentment for payment of a check on which the drawer's signature is genuine.

In the principal case the court, tacitly assuming the majority rule above set forth to be the law,<sup>18</sup> concluded that Section 137 has no application to a check on which the drawer's signature has been forged, since "a forged paper is neither a bill nor a check".<sup>19</sup> This holding overlooks the fact that the right which the plaintiff seeks to enforce has accrued to him, not through the drawer's forged signature, but, rather, by virtue of the drawee's statutory acceptance by its conduct in retaining the instrument more than twenty-four hours after delivery to it. Though admittedly rights do not arise through a counterfeit signature, unless there be circumstances justifying the preclusion of the defense of forgery, there are instances in which rights do accrue upon and incident to a commercial paper on which there is a forgery. For instance, the transferor of a negotiable note must answer to his trans-

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(1926); *State Bank v. Weiss*, 46 Misc. 93, 91 N. Y. Supp. 276 (Sup. Ct. 1904); *Clark v. Northern Pac. Ry.*, 55 N. D. 454, 214 N. W. 33 (1927); *American Nat. Bank of Ardmore v. Nat. Bank of Claremore*, 119 Okla. 149, 249 Pac. 424 (1926); *Mt. Vernon Bank v. Canby State Bank*, 129 Ore. 36, 276 Pac. 262 (1929). (In each of these cases, as in *Wisner v. Bank*, 220 Pa. 21, 68 Atl. 955 (1908), cited, *supra* note 12, the drawer's signature was genuine.)

<sup>15</sup> BRANNAN, *NEGOTIABLE INSTRUMENTS LAW* (5th ed. 1932) 1005; 2 DANIEL, *NEGOTIABLE INSTRUMENTS* (7th ed. 1933) 622.

<sup>16</sup> BRANNAN, *op. cit. supra* note 15, at 1006.

<sup>17</sup> *Standard Trust Co. v. Commercial Nat. Bank*, 166 N. C. 112, 120, 81 S. E. 1074, 1077 (1914). In this case it was held to be error for the trial court to fail to leave to the jury the question of the liability of the drawee bank to which a check was sent for collection for failure to use due diligence in collection. The Negotiable Instruments Law was not applied.

<sup>18</sup> Further evidence that the North Carolina court is committed to the doctrine of acceptance by retention appears in *Dawson v. Nat. Bank of Greenville*, 196 N. C. 134, 144 S. E. 833 (1928), subsequent appeal 197 N. C. 499, 150 S. E. 38 (1929), in which the drawee bank, having paid the check to a party not entitled, was held to have accepted the instrument and was required to answer to the rightful owner for its face amount. The Negotiable Instruments Law was not cited. In a note to this case, (1928) 7 N. C. L. REV. 191, it was contended that the drawee should have been charged, not with acceptance, but with conversion of the check, in which event recovery would have been limited to its actual value.

<sup>19</sup> To reach this conclusion the court applied *NEGOTIABLE INSTRUMENTS LAW* §23, N. C. CODE ANN. (Michie 1935) §3003, "Where a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up such forgery or want of authority."

feree when it develops that the maker's signature is false;<sup>20</sup> the indorser of a check on which the name of a prior indorser has been forged, warrants his title and that the instrument is genuine and, therefore, becomes bound to all parties subsequent to him;<sup>21</sup> a drawee becomes bound in favor of an innocent holder by his written acceptance of a forged bill;<sup>22</sup> and a drawee may not recover money paid to an innocent holder upon a forged bill.<sup>23</sup> There is no statutory distinction, and there appears to be no valid reason for a judicial differentiation, between an instrument which may be the subject of acceptance in writing or by payment and that which may be accepted by retention.

If Section 137 is to be extended to checks presented for payment it is felt that it should be held, contrary to the instant case, that it is equally applicable to a check on which, unknown to the holder, the drawer's signature is a forgery.<sup>24</sup>

JULIAN C. FRANKLIN.

#### Contempt of Court, Civil and Criminal—Review of Contempt Orders in the Federal Courts.

Adjudged in contempt by a federal district court for violating a temporary injunction in a patent infringement suit, the defendant was fined \$125 as punishment for disrespect to the court and \$1,044 as reimbursement to plaintiff for his expenses in the contempt proceedings. In considering its jurisdiction to hear the defendant's appeal, the Ninth Circuit Court of Appeals recognized that the contempt order would have been interlocutory and not appealable had it been purely remedial or compensatory but decided that, inasmuch as the fine was punitive to the extent of \$125, the character of the order for purposes of review was fixed as a punishment for criminal contempt, final and subject to appeal. Nevertheless, the court held that Rule 3 of the new rules promulgated by the Supreme Court for appeals in criminal cases<sup>1</sup> is applicable to appeals from criminal contempt judgments and, since the defendant failed to file his appeal within five days from the

<sup>20</sup> *Cluseau v. Wagner*, 126 La. 375, 52 So. 547 (1910); *Hunt v. Sanders*, 228 Mo. 337, 232 S. W. 456 (1921).

<sup>21</sup> *Main Street Bank v. Planters' Nat. Bank of Richmond*, 116 Va. 137, 81 S. E. 24 (1914).

<sup>22</sup> *Price v. Neal*, 3 Burr. 1355 (K. B. 1762).

<sup>23</sup> *State Bank v. Cumberland Savings & Trust Co.*, 168 N. C. 605, 85 S. E. 5 (1915).

<sup>24</sup> It was so held in *United States Fidelity & Guaranty Co. v. Jacobs*, 287 S. W. 504 (Tex. Civ. App. 1926). (This decision loses much of its force because of the decision of *First Nat. Bank of Goree v. Talley*, 115 Tex. 591, 285 S. W. 612 (1926) to the effect that no check presented for payment falls within the provisions of Section 137.)

<sup>1</sup> Rules of Practice and Procedure, after Plea of Guilty, Verdict or Finding of Guilt, in Criminal Cases, 292 U. S. 661, 54 Sup. Ct. xxxvii, 78 L. ed. 1512 (1934).

entry of the order below, as required by the rule, the court dismissed his appeal for want of jurisdiction.<sup>2</sup>

The federal courts follow the traditional distinction between criminal and civil contempts<sup>3</sup>—the former being acts or omissions which are affronts to the dignity and authority of the court, the latter, disobediences to orders of the court whereby the rights and remedies of private parties in the course of litigation are impaired.<sup>4</sup> Criminal contempts are punishable by a fine payable to the government or imprisonment for a definite term. To the extent that a contempt is civil only, the object of punishment, if it may be called punishment, is not vindicative but remedial. The defendant is coerced into complying with the court's order by imprisonment until he does comply, or he may be required to make amends to the injured party by paying a fine for that party's benefit. A single act often constitutes both civil and criminal contempt and may be proceeded against as both in one proceeding.<sup>5</sup> However, the character of the proceeding must be such as to indicate to the defendant the type of contempt for which he is being prosecuted and the character of the order which he may anticipate. A purely civil proceeding will not support a punishment for criminal contempt.<sup>6</sup> The character of the order determines the method by which a contempt proceeding is reviewed. If punitive, it is reviewed as a criminal contempt judgment; if remedial, as civil contempt.

Although contempt of court is not, in itself, considered a crime,<sup>7</sup> it is an offense of a criminal nature, and a judgment imposing a punishment for criminal contempt is a criminal judgment for purposes of review.<sup>8</sup> Originally criminal judgments of inferior federal courts, including punishments for criminal contempt, could not be reviewed as a matter of right by appeal or writ of error in any appellate court.<sup>9</sup> The

<sup>2</sup> *Wilson v. Byron Jackson Co.*, 93 F. (2d) 577 (C. C. A. 9th, 1937).

<sup>3</sup> In North Carolina all contempt proceedings are regulated by statute, no distinction being made between civil and criminal contempt. N. C. CODE ANN. (Michie, 1935) §§978-986. But in most jurisdictions the distinction is preserved.

<sup>4</sup> See *In re Nevitt*, 117 Fed. 448, 458 (C. C. A. 8th, 1902); Beale, *Contempt of Court, Criminal and Civil* (1908) 21 HARV. L. REV. 161; note (1936) 46 YALE L. J. 326.

<sup>5</sup> *Kreplik v. Couch Patents Co.*, 190 Fed. 565 (C. C. A. 1st, 1911); see *Bessette v. Conkey Co.*, 194 U. S. 324, 329, 24 Sup. Ct. 665, 667, 48 L. ed. 997, 1002 (1904); *Phillips Sheet and Tin Plate Co. v. Amalgamated Ass'n of Iron, Steel, and Tin Workers*, 208 Fed. 335, 340 (S. D. Ohio, 1913).

<sup>6</sup> *Gompers v. Buck's Stove and Range Co.*, 221 U. S. 418, 31 Sup. Ct. 492, 55 L. ed. 797 (1911); *McCann v. New York Stock Exchange*, 80 F. (2d) 211 (C. C. A. 2d, 1935).

<sup>7</sup> *Myers v. United States*, 264 U. S. 95, 44 Sup. Ct. 272, 68 L. ed. 577 (1924).

<sup>8</sup> *O'Neal v. United States*, 190 U. S. 36, 23 Sup. Ct. 776, 47 L. ed. 945 (1903); *Bessette v. Conkey Co.*, 194 U. S. 324, 24 Sup. Ct. 665, 48 L. ed. 997 (1904).

<sup>9</sup> *Ex parte Kearney*, 7 Wheat. 38, 5 L. ed. 391 (U. S. 1822); *New Orleans v. N. Y. Mail S. S. Co.*, 20 Wall. 387, 22 L. ed. 354 (U. S. 1874); *Hayes v. Fischer*, 102 U. S. 121, 26 L. ed. 95 (1880).

only methods of review were by *habeas corpus* proceedings<sup>10</sup> and by *certiorari*.<sup>11</sup> A writ of *habeas corpus* could be used, not as a substitute for a writ of error, but only to challenge the jurisdiction of the trial court;<sup>12</sup> and the grant of a writ of *certiorari* by the Supreme Court was, of course, discretionary. The circuit courts of appeal, when created, were given jurisdiction to review judgments in criminal cases and may, therefore, review a criminal contempt judgment.<sup>13</sup> Originally the proper method of reviewing such judgments in those courts was by writ of error.<sup>14</sup> If the defendant sought to *appeal*, his appeal was dismissed.<sup>15</sup> A statute enacted in 1916, however, required appellate courts to disregard the mistake when an appeal was resorted to instead of a writ of error and to make such disposition of the case as would be appropriate under the correct appellate procedure.<sup>16</sup> More recently the writ of error has been abolished,<sup>17</sup> and the method of seeking review is now by appeal,<sup>18</sup> but procedure in criminal appeals is substantially the same as it was under the old writ of error. The appellate court reviews questions of law presented by the bill of exceptions and assignment of errors.<sup>19</sup> There is no review of the trial court's finding of facts,<sup>20</sup> and the sufficiency of the evidence can only be considered when there has been a motion for directed verdict, denied, and exception taken.<sup>21</sup>

The new Supreme Court rules governing criminal appeals are the latest development in appellate procedure with reference to criminal

<sup>10</sup> *Ex parte Kearney*, 7 Wheat. 38, 5 L. ed. 391 (U. S. 1822); *Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872 (U. S. 1874); *Ex parte Hudgings*, 249 U. S. 378, 39 Sup. Ct. 337, 63 L. ed. 656 (1919) (Supreme Court may still consider legality of imprisonment for contempt by *habeas corpus* proceedings).

<sup>11</sup> *Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872 (U. S. 1874) (*certiorari* used in connection with writ of *habeas corpus* to determine legality of imprisonment for criminal offense); *Ex parte Chetwood*, 165 U. S. 443, 17 Sup. Ct. 385, 41 L. ed. 782 (1897) (*certiorari* allowed, after creation of circuit courts of appeal, to enable Supreme Court to review criminal contempt proceeding); *Re Watts*, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. ed. 933 (1903).

<sup>12</sup> *Ex parte Kearney*, 7 Wheat. 38, 5 L. ed. 391 (U. S. 1822); *In re Lennon*, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. ed. 1110 (1897); *In re Nevitt*, 117 Fed. 448 (C. C. A. 8th, 1902).

<sup>13</sup> *Bessette v. Conkey Co.*, 194 U. S. 324, 24 Sup. Ct. 665, 48 L. ed. 997 (1904).

<sup>14</sup> *Grant v. United States*, 227 U. S. 74, 33 Sup. Ct. 190, 57 L. ed. 426 (1913); *Brown v. Detroit Trust Co.*, 193 Fed. 622 (C. C. A. 6th, 1912); *Gill v. United States*, 262 Fed. 503 (C. C. A. 2d, 1919).

<sup>15</sup> *Grant v. United States*, 227 U. S. 74, 33 Sup. Ct. 190, 57 L. ed. 423 (1913).

<sup>16</sup> 39 STAT. 727 (1916) (inoperative since abolition of writ of error).

<sup>17</sup> 45 STAT. 54 (1928) as amended 45 STAT. 466 (1928), 28 U. S. C. A. §§861a, 861b (Supp. 1937).

<sup>18</sup> *Ibid.*

<sup>19</sup> *Binkley v. United States*, 282 Fed. 244 (C. C. A. 8th, 1922); *Reeder v. Morton-Gregson Co.*, 296 Fed. 785 (C. C. A. 8th, 1924).

<sup>20</sup> *Keeney v. United States*, 17 F. (2d) 976 (C. C. A. 7th, 1927); *Burneson v. United States*, 19 F. (2d) 780 (C. C. A. 6th, 1927); *Woodside v. United States*, 60 F. (2d) 823 (C. C. A. 4th, 1932).

<sup>21</sup> *Kubik v. United States*, 57 F. (2d) 477 (C. C. A. 8th, 1932); *Woodside v. United States*, 60 F. (2d) 823 (C. C. A. 4th, 1932).



contempts. These rules were promulgated pursuant to an act of congress<sup>22</sup> authorizing the Supreme Court to prescribe rules of practice and procedure in criminal cases in district courts "with respect to any and all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty". The rules, themselves, state that they are applicable to the proceedings enumerated in the statute.<sup>23</sup> Proceedings for criminal contempt in which a jury trial is provided by statute<sup>24</sup> clearly come within the scope of the rules. But in ordinary criminal contempt cases there is no right to trial by jury which can be waived, and there is no verdict. If the defendant does not plead guilty, it is difficult to see how the proceeding comes within the scope of the rules or the statute authorizing them. On the other hand, criminal contempt proceedings, for purposes of review, have always been treated exactly as other criminal proceedings in the federal courts. There seems to be no reason why a set of rules should apply to criminal cases generally and to contempt proceedings in which there is a right to trial by jury or where there is a plea of guilty, leaving other criminal contempt proceedings in a class by themselves; and the failure of congress to mention ordinary criminal contempt proceedings specifically in the statute authorizing the new rules appears to have been an oversight. The principal case holds that, by reason of the statement in the second paragraph of the statute that "the rules made as herein authorized may provide the time for and the manner of taking appeals", the rules are applicable to a criminal contempt proceeding in which there is neither right to jury trial nor plea of guilty. The result is highly desirable, but the reasoning is not persuasive. A clarifying amendment to the statute and to the rules would be helpful.

A proceeding for civil contempt alone is considered a proceeding in the main suit as an incident to which the contempt occurred.<sup>25</sup> In the federal courts it has always been subject to review in connection with the main suit, formerly by writ of error or appeal to the Supreme Court,<sup>26</sup> and now by appeal to the circuit court of appeals<sup>27</sup> with no right to review in the Supreme Court in most cases except by *certiorari*.<sup>28</sup> A civil contempt may occur either in connection with an action

<sup>22</sup> 47 STAT. 904 (1933) as amended 48 STAT. 399, 926 (1934), 28 U. S. C. A. §723a (Supp. 1937).

<sup>23</sup> See note 1, *supra*.

<sup>24</sup> 38 STAT. 738 (1914), 28 U. S. C. A. §§386, 387 (1928) (giving right to trial by jury in contempt cases when alleged act of contempt also constitutes a crime); 47 STAT. 72 (1932), 29 U. S. C. A. §111 (Supp. 1937) (providing trial by jury in contempt proceedings for violating labor injunctions).

<sup>25</sup> *Worden v. Searls*, 121 U. S. 14, 7 Sup. Ct. 814, 30 L. ed. 853 (1887); *Norstrom v. Wahl*, 41 F. (2d) 910 (C. C. A. 7th, 1930).

<sup>26</sup> *Worden v. Searls*, 121 U. S. 14, 7 Sup. Ct. 814, 30 L. ed. 853 (1887).

<sup>27</sup> *Clements v. Coppin*, 72 F. (2d) 796 (C. C. A. 9th, 1934).

<sup>28</sup> *Fox v. Capital Co.*, 299 U. S. 105, 57 Sup. Ct. 57, 81 L. ed. 67 (1936).

at law or a suit in equity, an example of the former being disobedience to a writ of mandamus,<sup>29</sup> of the latter, the violation of an injunction.<sup>30</sup> Before the abolition of the writ of error, that method of review was resorted to if the contempt occurred in an action at law,<sup>31</sup> an appeal being taken if in equity.<sup>32</sup> Although the writ of error has been abolished,<sup>33</sup> the appellate court must still restrict itself to questions of law if the proceedings below were at law, whereas it may review findings of fact if the proceedings were in equity.<sup>34</sup> A proceeding for civil contempt resulting from disobedience to an order of a bankruptcy court, such as an order to turn over property, is now reviewable by appeal,<sup>35</sup> although formerly only by petition to revise.<sup>36</sup> It is a "proceeding" in bankruptcy within the meaning of Section 24(b) of the Bankruptcy Act,<sup>37</sup> and the appeal is to be allowed only in the discretion of the circuit court of appeals.<sup>38</sup>

In general, an appellate court has no jurisdiction to review a contempt order unless it is final.<sup>39</sup> One exception to the rule, however, is found in the discretion of the circuit courts of appeals under Section 24(b) of the Bankruptcy Act to review certain types of interlocutory proceedings, including contempt proceedings for violating an interlocutory order of the bankruptcy court.<sup>40</sup> In a receivership, on the other hand, a commitment for civil contempt in disobeying a "turnover" order is interlocutory and may not be appealed,<sup>41</sup> although the same type of proceeding in a bankruptcy court might be subject to appeal. A judgment of criminal contempt is always final<sup>42</sup> and presents no jurisdictional problem on that score. Likewise, when the party being proceeded against for civil contempt in violating an injunction, whether permanent or temporary, is not a party to the original suit in equity, the decree is

<sup>29</sup> *In re Nevitt*, 117 Fed. 448 (C. C. A. 8th, 1902).

<sup>30</sup> *Kreplik v. Couch Patents Co.*, 190 Fed. 565 (C. C. A. 1st, 1911).

<sup>31</sup> *International Paper Co. v. Chaloux*, 165 Fed. 436 (C. C. A. 1st, 1908) (appeal improper when contempt occurred and was punished in action at law).

<sup>32</sup> *Heller v. Nat. Waistband Co.*, 168 Fed. 249 (C. C. A. 2d, 1909) (writ of error dismissed, appeal being proper method of review when civil contempt proceedings were in equity).

<sup>33</sup> See note 17, *supra*.

<sup>34</sup> *Robie v. Hart, Schaffner, and Marx*, 40 F. (2d) 871 (C. C. A. 8th, 1930) (effect of abolition of writ of error was change in name only); *Burns Bros. v. Cook Coal Co.*, 42 F. (2d) 109 (C. C. A. 3d, 1930) (to same effect).

<sup>35</sup> *Ahlstrom v. Ferguson*, 29 F. (2d) 515 (C. C. A. 1st, 1928).

<sup>36</sup> 30 STAT. 553 (1898), 11 U. S. C. A. §47(b) (1927) (before amendments of 1926), *Kirsner v. Taliaferro*, 202 Fed. 51 (C. C. A. 4th, 1912), *Freed v. Central Trust Co.*, 215 Fed. 873 (C. C. A. 7th, 1914).

<sup>37</sup> 30 STAT. 553 (1898) as amended 44 STAT. 664 (1926) as amended 48 STAT. 926 (1934), 11 U. S. C. A. §47(b) (Supp. 1937), *Ahlstrom v. Ferguson*, 29 F. (2d) 515 (C. C. A. 1st, 1928).

<sup>38</sup> *Ibid.*

<sup>39</sup> *Doyle v. London Guarantee and Accident Co., Ltd.*, 204 U. S. 599, 27 Sup. Ct. 313, 51 L. ed. 641 (1907).

<sup>40</sup> See note 37, *supra*.

<sup>41</sup> *Mearns v. Sullivan*, 262 Fed. 633 (App. D. C. 1920).

<sup>42</sup> *Union Tool Co. v. Wilson*, 259 U. S. 107, 42 Sup. Ct. 427, 66 L. ed. 848 (1922); *Brown v. Detroit Trust Co.*, 193 Fed. 622 (C. C. A. 6th, 1912); *Gill v. United States*, 262 Fed. 503 (C. C. A. 2d, 1919).

final as to him and may be appealed at once for the reason that, not being a party to the main suit, the defendant is not in a position to appeal from the final decree in that action.<sup>43</sup> When a defendant in a suit in equity violates a temporary injunction or restraining order and a fine is imposed for the plaintiff's benefit or he is committed to prison until he shall comply with the court's order, the decree is interlocutory and not subject to appeal.<sup>44</sup> The defendant may, however, wait and appeal from the final decree in the main suit, and in that appeal the final decree and all interlocutory decrees, including those of contempt, will be subject to review.<sup>45</sup>

What happens when a defendant violates a temporary injunction, is found guilty of contempt, and the contempt order punishes him for criminal contempt and also requires him to pay a fine for the injured party's benefit? If the order were wholly criminal it would be final and subject to appeal at once; if wholly remedial, it would be interlocutory and not appealable. The principal case holds that the criminal element dominates, and the order is at once subject to appeal. This rule seems to be too well established to be open to serious attack. On two occasions when exactly the same problem arose the Supreme Court granted writs of mandamus to compel the circuit court of appeals to review by writ of error, as in criminal cases, contempt orders of the district court which were both punitive and remedial.<sup>46</sup> In a third case both punitive and remedial fines were imposed upon the defendant for contempt in violating a temporary injunction. The circuit court of appeals reviewed the order of the lower court by writ of error and cross writ of error, reversed the order so far as it was punitive, but increased the amount of the fine payable to the plaintiff. In sustaining the circuit court of appeals, the Supreme Court held that the criminal features of the order fixed the character of the proceeding for purposes of review, every part of the order, criminal and civil, being properly before the appellate court.<sup>47</sup>

It may seem somewhat strange and objectionable that a punitive fine of \$125 which is almost trivial as compared with the remedial fine of \$1,044 in the principal case should determine the character of the

<sup>43</sup> *Shuler v. Raton Waterworks Co.*, 247 Fed. 634 (C. C. A. 8th, 1917); *cf.* *Flower v. McGinnis*, 112 Fed. 377 (C. C. A. 2d, 1901).

<sup>44</sup> *Hayes v. Fischer*, 102 U. S. 121, 26 L. ed. 95 (1880); see *In re Christensen Engineering Co.*, 194 U. S. 458, 460, 24 Sup. Ct. 729, 731, 48 L. ed. 1072, 1075 (1904); *Re Merchants' Stock and Grain Co.*, 223 U. S. 639, 641, 32 Sup. Ct. 339, 340, 56 L. ed. 584, 585 (1912).

<sup>45</sup> *Worden v. Searls*, 121 U. S. 14, 7 Sup. Ct. 814, 30 L. ed. 853 (1887).

<sup>46</sup> *In re Christensen Engineering Co.*, 194 U. S. 458, 24 Sup. Ct. 729, 48 L. ed. 1072 (1904); *Re Merchants' Stock and Grain Co.*, 223 U. S. 639, 32 Sup. Ct. 339, 56 L. ed. 584 (1912).

<sup>47</sup> *Union Tool Co. v. Wilson*, 259 U. S. 107, 42 Sup. Ct. 427, 66 L. ed. 848 (1922).

order and the method of appeal. There are three possible rules which might be substituted for the rule established by the Supreme Court and followed in the principal case: (1) the civil and criminal issues might be split and reviewed by separate appeals, (2) the civil element might be considered dominant so that there could be no appeal except from a final decree in the equity suit, and (3) the dominant element in each order might be determined by a consideration of the primary purpose of the proceeding below and of the relative severity of the punitive element as contrasted with the remedial or civil elements. The first substitute has little to commend it. Separate appeals might often lead to inconsistent results, and in the interest of economy and administrative efficiency, it would be better to settle the whole matter in one appeal, regardless of how taken. The disposition of the problem under the second is subject to all the criticism that might be directed at the rule that has been adopted. Were the remedial element of the contempt order insignificant as compared with the punitive element, it would be at least as objectionable to require the defendant to wait for a final decree in the suit in equity before appealing as it is, in a situation like that in the principal case where the punitive element is relatively insignificant, to permit an appeal from the whole order at once. Furthermore, to delay the appeal from a contempt order which is criminal in whole or in part runs counter to the established policy in the federal courts of surrounding persons accused of criminal contempt with most of the protections afforded those accused of crime,<sup>48</sup> with the exception of trial by jury in ordinary contempt cases. The third substitute is likewise subject to the last mentioned criticism of the second. If adopted it would be productive of uncertainty and inefficiency. The only method by which defendants could determine with certainty the dominant element in their cases would be by appealing all cases at once, as if the criminal element were dominant. If the appellate court should find the criminal element dominant no harm would be done, but if it should find otherwise the appeal would necessarily be dis-

<sup>48</sup> Defendant in criminal contempt proceedings is presumed innocent until proved guilty beyond reasonable doubt. *Jones v. United States*, 209 Fed. 585 (C. C. A. 7th, 1913); *Blim v. United States*, 68 F. (2d) 484 (C. C. A. 7th, 1934); see note L. R. A. 1917B 118, 122. Defendant cannot be compelled to give testimony against himself. See *Gompers v. Buck's Stove and Range Co.*, 221 U. S. 418, 443, 31 Sup. Ct. 492, 499, 55 L. ed. 797, 807 (1911); 4 WIGMORE, EVIDENCE (1923) §2257(3); note L. R. A. 1917B 118 (indicating split of authority in state courts). There is no appeal from a judgment for the defendant in criminal contempt cases. *United States ex rel. West Va.-Pittsburg Coal Co. v. Bittner*, 11 F. (2d) 93 (C. C. A. 4th, 1926); *Wingert v. Kieffer*, 29 F. (2d) 59 (C. C. A. 4th, 1928). Defendant may have adverse judgment reviewed. See notes 13, 14, and 18, *supra*. Criminal contempts may be pardoned by the president. *Ex parte Grossman*, 267 U. S. 87, 45 Sup. Ct. 332, 69 L. ed. 527 (1925). Statute of Limitations for criminal prosecutions applies to criminal contempt proceedings. *Gompers v. United States*, 233 U. S. 604, 34 Sup. Ct. 693, 58 L. ed. 1115 (1914).

missed, the time of the court and the time and money of the litigants having been wasted. The courts do well to adhere to the rule followed in the principal case.

M. B. GILLAM, JR.

### Dower—Jointure.

Husband, during coverture, bought a tract of land and had it conveyed for life to his wife, who accepted the deed and still owned the property at his death. The heirs contested her petition to have dower allotted out of her husband's other real estate on the ground that the property given her during coverture amounted to a jointure and barred her claim for dower. *Held*: The conveyance operated as a bar to her right to claim dower since it was a jointure under a Virginia statute<sup>1</sup> which provides, "if any estate, real or personal, intended to be in lieu of dower, shall be conveyed or devised for the jointure of the wife, such conveyance or devise shall bar her dower of the real estate, or residue thereof, and every such provision by deed or will, shall be taken to be intended in lieu of dower, unless the contrary intention plainly appear in such deed or will, or in some other writing signed by the party making the provision."<sup>2</sup>

Jointure, under the common law, is a conveyance to a wife having the following characteristics: It must (1) commence immediately upon the death of the husband; (2) be an estate no smaller than for the wife's life; (3) be made to herself and not in trust for her; (4) be expressed to be in satisfaction of her whole dower and not a part; and (5) be made before marriage.<sup>3</sup> Jointure first arose in England when the practice of conveying land to uses became prevalent.<sup>4</sup> Under the common law a wife could not have dower in the lands of her husband unless he was seized of those lands,<sup>5</sup> and he was not so seized when the lands

<sup>1</sup> VA. CODE ANN. (Michie, 1936) §5120.

<sup>2</sup> McDonald v. McDonald, 194 S. E. 709 (Va. 1938).

<sup>3</sup> 1 CRUISE, A DIGEST OF THE LAW OF REAL PROPERTY (Rev. ed. 1849) 213; GILBERT, USES AND TRUSTS (3d ed. 1811) 326 *et seq.*; 1 TIFFANY, THE LAW OF REAL PROPERTY (Enlarged ed. 1920) 790.

<sup>4</sup> 1 CRUISE, *op. cit. supra* note 3, at 212; 1 THOMPSON, COMMENTARIES ON THE LAW OF REAL PROPERTY (1st ed. 1924) 961. This practice arose as a means of evading the strict rules of the common law regarding real property. GILBERT, *op. cit. supra* note 3, at XLII. Under this practice "the estate was regularly transferred by a common law conveyance to some person as trustee, and he at law was the absolute owner of the property, so much so that the real owner would have been deemed a trespasser had he entered without the authority express or implied of the legal tenant. But in equity the legal tenant and his heirs were by degrees considered the mere nominees of the person by whom the estate was conveyed, and were deemed bound to execute all his directions in regard to the estate." *ibid.*

<sup>5</sup> Maybury v. Brien, 15 Pet. 21, 10 L. ed. 646 (U. S. 1841); CHALLIS, THE LAW OF REAL PROPERTY (3d ed. 1911) 346; 1 CRUISE, *op. cit. supra* note 3, at 165; 1 THOMPSON, *op. cit. supra* note 4, §805; 1 TIFFANY, *op. cit. supra* note 3, §208.

were merely conveyed to his use.<sup>6</sup> Consequently the parents of the bride usually required the prospective bridegroom to have lands conveyed to the use of himself and his wife as joint tenants so that after his death she would have, as a means of support, a life estate in this property.<sup>7</sup> Then the Statute of Uses<sup>8</sup> vested the legal title in the holder of the equitable title and the husband acquired seisin of lands in which he had formerly held only an equitable interest.<sup>9</sup> Then, of course, the wife by virtue of seisin in her husband, was entitled to dower in these lands.<sup>10</sup> However, in order to keep wives from enjoying both jointure and dower, the statute provided that no woman who had jointure should also have dower.<sup>11</sup> The courts, for the purpose of safeguarding and protecting the wife's historical right to dower,<sup>12</sup> were very strict in their application of this last provision and would allow no conveyance to operate as a jointure unless it had the five requisites set forth above.<sup>13</sup>

The courts of this country usually hold that a contract to accept some settlement in lieu of dower is binding if based on sufficient consideration and validly assented to by the wife.<sup>14</sup> A post-nuptial settlement which is expressly, or by necessary implication, intended as a jointure will force the wife to elect whether she will take the settlement or her dower.<sup>15</sup> However, in the absence of any express or implied intention that the post-nuptial conveyance shall be in lieu of dower it is held by a majority of the courts to be a mere gift and does not put the wife to her election.<sup>16</sup>

<sup>6</sup> 1 CRUISE, *op. cit. supra* note 3, at 287; 1 TIFFANY, *op. cit. supra* note 3, §226.

<sup>7</sup> 2 BL. COMM. \*137; 1 CRUISE, *op. cit. supra* note 3, at 212; GILBERT, *op. cit. supra* note 3, at 322; 1 TIFFANY, *op. cit. supra* note 3, at 789.

<sup>8</sup> Statute of Uses, 1536, 27 HEN. VIII, c. 10.

<sup>9</sup> 1 CRUISE, *op. cit. supra* note 3, at 212; GILBERT, *op. cit. supra* note 3, at 149;

1 TIFFANY, *op. cit. supra* note 3, at 798.

<sup>10</sup> See note 8, *supra*; 1 CRUISE, *op. cit. supra* note 3, at 212; 1 TIFFANY, *op. cit. supra* note 3, §226.

<sup>11</sup> See note 8, *supra*; GILBERT, *op. cit. supra* note 3, at 325; 1 TIFFANY, *op. cit. supra* note 3, at 790.

<sup>12</sup> 1 CRUISE, *op. cit. supra* note 3, at 213, 214.

<sup>13</sup> 1 CRUISE, *op. cit. supra* note 3, at 213; GILBERT, *op. cit. supra* note 3, at 326 *et seq.*; 1 TIFFANY, *op. cit. supra* note 3, at 790.

<sup>14</sup> Andrews v. Andrews, 8 Conn. 79 (1830); Lively v. Paschal, 35 Ga. 218 (1866); Merki v. Merki, 212 Ill. 121, 72 N. E. 9 (1904); Edwards v. Edwards, 267 Ill. 111, 107 N. E. 874 (1915); Randles v. Randles, 63 Ind. 93 (1878); Redwine's Ex'r *et al.* v. Redwine, 160 Ky. 282, 169 S. W. 864 (1914); Hill v. Boland, 125 Md. 113, 93 Atl. 395 (1907); Rhoades v. Davis, 51 Mich. 306 (1883); Wright v. Wright, 79 Mich. 527, 44 N. W. 944 (1890); Dakin v. Dakin, 97 Mich. 284, 56 N. W. 562 (1893); Fennell's Estate, 207 Pa. 309, 56 Atl. 875 (1904); Taylor v. Moore, 2 Rand. 563 (Va. 1824).

<sup>15</sup> Edwards v. Edwards, 267 Ill. 111, 107 N. E. 874 (1915); Mannan v. Mannan *et al.*, 154 Ind. 9, 55 N. E. 855 (1899); Yancy v. Smith, 59 Ky. 408 (1859); Tevis' Ex'r v. McCreary, 60 Ky. 151 (1860); Roberts v. Walker, 82 Mo. 200 (1884); Spangler v. Dukes, 34 Ohio St. 642 (1884); Jacobs v. Jacobs, 100 W. Va. 585, 131 S. E. 449 (1926).

<sup>16</sup> Mitchell v. Ward, 60 Ga. 525 (1878); Yancy v. Smith, 59 Ky. 408 (1859); Pepper v. Thomas, 85 Ky. 539 (1887); Bubier v. Roberts, 49 Me. 460 (1862); Grossnickle v. Grossnickle, 139 Md. 1, 114 Atl. 725 (1921); Perry v. Perryman,

The principal case involved the construction of a Virginia statute regulating jointure. The majority of the court seemed to hold, that because the legislature omitted from the revival of 1849<sup>17</sup> the words "to take effect in her own possession immediately upon the death of her husband" (which words were present in the statute before that time) it intended to redefine the word "jointure" and to provide that any gift made to the wife during coverture, whether to take effect presently or on the death of the husband, should operate as a jointure and force the wife to elect whether she would take the gift or her dower. However, a more logical explanation of the omission seems to be that the legislators regarded these words as mere surplusage since the statute contains the words "for the jointure of the wife" and jointure has, ever since the Statute of Uses, been said to "*take effect in profit and possession presently after the death of the husband.*"<sup>18</sup>

Since the word "jointure" has usually been given a strict and technical meaning in order to protect the wife's right to share in her husband's property at his death, and dower has always been a favorite of the law,<sup>19</sup> it seems that the Virginia court should have followed the dissent, which construed the word according to its accepted meaning and held that a gift from husband to wife could not operate as a jointure, unless the conveyance were to take effect in profit and possession upon the death of the husband.

J. NATHANIEL HAMRICK.

### Gaming—Illegal Slot Machines—"Silent Salesman."

*P*, manufacturer of vending machines bearing the copyright name "Silent Salesman", sought to enjoin interference by the police in the use of these devices. *P*'s complaint described an instrument which

19 Mo. 469 (1854); *Swaine v. Perine*, 5 Johns. Ch. 482 (N. Y. 1821). See *Cowdrey v. Cowdrey*, 72 N. J. Eq. 951, 952, 67 Atl. 111 (1907) "The gift of a husband to his wife of land does not ipso facto, bar her dower in the husband's remaining real estate. So any provision for an equitable jointure, which operates to put the widow upon her election, must be either expressly in lieu of dower or the same instrument must make a disposition of some part of the estate which is clearly inconsistent with the existence of dower therein, so that, in claiming dower the widow would defeat, interrupt or disappoint some provision of the instrument."

<sup>17</sup> VA. CODE ANN. (Michie, 1936) §5120.

<sup>18</sup> SHUMAKER AND LONGSDORF, CYCLOPEDIA LAW DICTIONARY (Cahill's ed. 1922) 599. Also the Virginia court stated by way of dictum in a previous case, *Land v. Shipp*, 98 Va. 284, 291, 36 S. E. 391, 394 (1900), in construing the present statute, that "sections 2270 and 2271 of the code as to jointure differ from jointure at common law only in that, under the statute it may be of personal as well as real estate."

<sup>19</sup> See *Frazer v. Stokes*, 112 Va. 335, 340, 71 S. E. 545, 547 (1911) "It is a general maxim that the law favors dower, and as we have held in *Lewis v. Apperson*, 103 Va. 624, 49 S. E. 987, 106 Am. St. Rep. 903, 68 L. R. A. 867, a widow will not be deprived of her dower as a rule, unless it is barred by the statutory requirements for that purpose."

vended a package of mints when the operator deposited a nickel in a slot and pulled a lever on the machine. In addition, the user received from time to time a varying number of tokens, each worth five cents in trade. The number of these tokens returned on each operation was designated in advance of the play by an indicator on the face of the machine. A metal plate on the mechanism forbade successive "purchases" by the same user, and the owner of the instruments contracted with the lessees thereof that tokens received in violation of this stipulation were not to be redeemed in trade. When tokens were replayed into the machine no mints were vended. *D.*, police, did not defend the action. On the strength of *P.*'s complaint, the Federal District Court for the Eastern District of North Carolina granted an injunction.<sup>1</sup> Subsequently the case was reopened and evidence was introduced to the effect that the mints vended were comparatively valueless, that the users of the machine did not observe the restrictions of the metal plate, and that all tokens were redeemed regardless of how acquired. Whereupon, the court, setting aside the injunction, held<sup>2</sup> that the instruments were inherently mischievous notwithstanding the no successive purchase plates which were "ineffectual for all practical purposes", and that the devices contravened chapter 196 of the North Carolina Public Laws of 1937.<sup>3</sup>

The simplest type of slot machine which has attracted marked attention is one which vends mints, gum, or similar merchandise, and at unpredictable intervals coin or trade tokens. The user supposedly gets value received in the form of merchandise regardless of whether tokens are issued. General statutes prohibiting gaming devices have sufficed to ban this type of instrument.<sup>4</sup> It is not essential that there be chance of loss to the user as well as chance of gain; that either party, user or owner, risks loss is enough.<sup>5</sup> That the trade checks were used only to stimulate business is no defense.<sup>6</sup> Likewise, the courts have cast

<sup>1</sup> *Morris v. Madrin*, D. C. E. D. N. C., Dec. 2, 1937.

<sup>2</sup> *Morris v. Madrin*, D. C. E. D. N. C., Feb. 15, 1938.

<sup>3</sup> N. C. CODE ANN. (Michie, Supp. 1937) §4437(t).

<sup>4</sup> *State v. Vasquez*, 49 Fla. 126, 38 So. 830 (1905); *Connors v. Springfield*, 130 Ill. App. 240 (1906); *State v. Doe*, 221 Iowa 1, 263 N. W. 529 (1935); *Allen v. Commonwealth*, 178 Ky. 250, 198 S. W. 897 (1917); *Commonwealth v. Gritten*, 180 Ky. 446, 202 S. W. 884 (1918); *Enloe v. Lawson*, 146 Ore. 621, 31 P. (2d) 171 (1934); *Meeks v. State*, 74 S. W. 910 (Tex. Civ. App. 1903); *Salt Lake City v. Doran*, 42 Utah 401, 131 Pac. 636 (1913); *State v. Gaughan*, 55 W. Va. 692, 48 S. E. 210 (1904). Accord: *Meyer v. State*, 112 Ga. 20, 37 S. E. 96 (1900); *Lang v. Merwin*, 99 Me. 486, 59 Atl. 1021 (1905); *Territory v. Jones*, 14 N. M. 579, 99 Pac. 338 (1908); *Moore v. Adams*, 91 S. W. (2d) 447 (Tex. Civ. App. 1935).

<sup>5</sup> *Meyer v. State*, 112 Ga. 20, 37 S. E. 96 (1900); *Lang v. Merwin*, 99 Me. 486, 59 Atl. 1021 (1905); *State v. Apodoca*, 32 N. M. 80, 251 Pac. 389 (1926); *State v. McTeer*, 129 Tenn. 535, 167 S. W. 121 (1914) (the machines involved in last two cases were slightly different, but cases are directly in point on this question).

<sup>6</sup> *State v. Apodoca*, 32 N. M. 80, 251 Pac. 389 (1926).



aside arguments that the devices are merely a method of distribution to players of profits earned by the owners in avoiding clerk hire by use of the selling machine.<sup>7</sup> The answer to this is that the so-called distribution is no normal trade rebate based on the amount of purchases or plays, but is founded purely on chance.

Manufacturers resorted to a stratagem by introducing an indicator on the machines which informed the operator before each play whether any tokens would be returned, and if so how many. Ostensibly, the element of chance had been removed. Only one decision,<sup>8</sup> reversed on appeal,<sup>9</sup> sustained that ruse. With the exception of this case, the courts unanimously see through the artifice, realizing that the element of chance is only once postponed—the user hazarding his money in the hope that the indicator will favor him on the next play. Here, too, catch-all statutes prohibiting gaming devices,<sup>10</sup> as well as more particularized enactments,<sup>11</sup> serve to stamp these instruments as illegal.

The mechanism described in the principal case represents the logical development of these simple "predictable" machines whose illegality was due to their allowance of successive operations by the same player. Forbidding such manipulation by plates on the machines was designed to remedy this difficulty. The principal case and one other opinion<sup>12</sup> consider this move but a sham to hide the essentially gaming nature of the instruments. These decisions frankly scoff at the efficacy of such language to prevent consecutive plays even if the owner of the machine

<sup>7</sup> *Sheetz v. State*, 156 Ark. 255, 245 S. W. 815 (1922) (machine involved was slightly different, but case directly in point on this question).

<sup>8</sup> *Byk v. Enright*, 203 N. Y. Supp. 296 (Sup. Ct. 1924).

<sup>9</sup> *Byk v. Enright*, 208 App. Div. 850, 204 N. Y. Supp. 897 (2d Dep't 1924), *aff'd*, 240 N. Y. 699, 148 N. E. 764 (1925).

<sup>10</sup> Cases arising under such statutes are: *Gardner v. Daugherty*, 10 F. (2d) 373 (E. D. Mich. 1925); *Cagle v. State*, 18 Ala. App. 553, 93 So. 206 (1922); *Sheetz v. State*, 156 Ark. 255, 245 S. W. 815 (1922); *Alexander v. Atlanta*, 13 Ga. App. 354, 79 S. E. 177 (1913); *Brockett v. State*, 33 Ga. App. 57, 125 S. E. 513 (1924); *Ferguson v. State*, 178 Ind. 568, 99 N. E. 806 (1912); *Welch v. Commonwealth*, 179 Ky. 125, 200 S. W. 371 (1918); *Tonahill v. Molony*, 156 La. 753, 101 So. 130 (1924); *State v. Googin*, 117 Me. 102, 102 Atl. 970 (1918); *Commonwealth v. McClintock*, 257 Mass. 431, 154 N. E. 264 (1926); *Moberly v. Deskin*, 169 Mo. App. 672, 155 S. W. 842 (1913); *Marvin v. Sloan*, 77 Mont. 174, 250 Pac. 443 (1926); *Zaft v. Milton*, 96 N. J. Eq. 576, 126 Atl. 29 (Ch. 1924); *State v. Apodoca*, 32 N. M. 80, 251 Pac. 389 (1926); *State v. McTeer*, 129 Tenn. 535, 167 S. W. 121 (1914); *Queen v. State*, 93 Tex. Crim. Rep. 173, 246 S. W. 384 (1922); *Milwaukee v. Johnson*, 192 Wis. 585, 213 N. W. 335 (1927); *People ex rel. Verchereau v. Jenkins*, 153 App. Div. 512, 138 N. Y. Supp. 449 (3d Dep't 1912) *semble*.

<sup>11</sup> Cases arising under such statutes are: *Pure Mint Co. v. LaBarre*, 96 N. J. Eq. 186, 125 Atl. 105 (Ch. 1924); *Crippen, Sheriff, v. Mint Sales Co.*, 139 Miss. 87, 103 So. 503 (1925); *People v. Spitzig*, 133 Misc. 508, 233 N. Y. Supp. 228 (Co. Ct. 1929); *State v. Johnson*, 15 Okl. Cr. 460, 17 Pac. 926 (1919); *Nelson v. State*, 37 Okl. Cr. 90, 256 Pac. 939 (1927); *Griste v. Burch*, 112 S. C. 369, 99 S. E. 703 (1919).

<sup>12</sup> *State v. Certain Gambling Instruments and Apparatus*, 46 R. I. 347, 128 Atl. 12 (1925).

desired this, which is plainly doubted. It is further pointed out that there is nothing to prevent two persons collaborating to operate the instrument indefinitely.<sup>13</sup> In the only other case found which involved these devices they were accepted at their face value and declared to be legal.<sup>14</sup>

All of the above discussed machines involve the possibility of additional returns to the operator either in money or trade. Other machines yield amusement as the sole return in addition to the usual gum or mints. The tokens to be won are stamped "no value", and may be replayed into the machine thereby causing vari-colored reels to revolve, or a baseball game to progress, or some other display for the amusement of the player to occur. Some of the machines have the familiar indicator denoting the number of tokens to be received on the next play. Clearly the chance for additional amusement makes the instruments illegal under statutes prohibiting playing for money or any other thing.<sup>15</sup> Under general gaming enactments, and statutes which prohibit playing for money or property, or prohibit playing for any valuable thing, some courts consider the mechanism a subterfuge, and treat the tokens as redeemable in practice in coin or merchandise, notwithstanding their markings to the contrary.<sup>16</sup> Other tribunals assume that the tokens may be used only for amusement, and are divided on the question of whether or not this amusement is "property" or a "thing of value" within the ban of the statutes. Those holding in the negative maintain that the amusement is of infinitesimal importance,<sup>17</sup> and further contend that even if amusement is technically a thing of value, the attention of courts and law officers should not be absorbed with such minor infractions.<sup>18</sup> On the other hand, it is reasoned, seemingly with more

<sup>13</sup> *Ibid.*

<sup>14</sup> *State v. Krauss*, 114 Ohio St. 342, 151 N. E. 183 (1926). The case was a criminal prosecution. The court intimated that had the action been by the owner to enjoin police interference an injunction would not have been granted.

<sup>15</sup> *Ross v. Goodwin*, 40 F. (2d) 535 (D. N. H. 1930); *State ex rel. Manchester v. Marvin*, 211 Iowa 462, 233 N. W. 486 (1930); *State v. Mint Vending Machine No. 195084*, 85 N. H. 22, 154 Atl. 224 (1931).

<sup>16</sup> *Chambers, Mayor, v. Bachtel*, 55 F. (2d) 851 (C. C. A. 5th, 1932); *Gaither v. Cate*, 156 Md. 254, 144 Atl. 239 (1928); *Petition of Sup't of Police of Phila. for Order to Destroy Gambling Implements*, 113 Pa. Super. 520, 173 Atl. 753 (1934); *Commonwealth v. Heiland*, 113 Pa. Super. 534, 173 Atl. 759 (1934); *Harvie v. Heise*, 150 S. C. 277, 148 S. E. 66 (1928); *Mills v. Browning*, 59 S. W. (2d) 219 (Tex. Civ. App. 1933).

<sup>17</sup> *Mills Novelty Co. v. Farrell*, 3 F. Supp. 555 (D. Conn. 1933), *aff'd*, 64 F. (2d) 476 (C. C. A. 2d, 1933); *Mills Novelty Co. v. Bolan*, 3 F. Supp. 968 (E. D. N. Y. 1933), *aff'd*, *Mills Novelty Co. v. O'Ryan*, 68 F. (2d) 1009 (C. C. A. 2d, 1934), *rev'd on other grounds*, *O'Ryan v. Mills Novelty Co.*, 292 U. S. 609, 54 Sup. Ct. 779, 78 L. ed. 1469 (1934); *Davies v. Mills Novelty Co.*, 70 F. (2d) 424 (C. C. A. 8th, 1934); *Kirk v. Morrison*, 108 Fla. 144, 146 So. 215 (1933); *Ex parte Overby*, 43 Okl. Cr. 400, 279 Pac. 523 (1929); *Overby v. Oklahoma City*, 46 Okl. Cr. 42, 287 Pac. 796 (1930).

<sup>18</sup> For a clear statement of this position see the dissenting opinion in *Painter v. State*, 163 Tenn. 627, 45 S. W. (2d) 46 (1932).

cogency, that the amusement must be valuable to the user to induce him to patronize the machine rather than buy at the counter.<sup>19</sup> The device is a lure to gaming impulses, and arguments concerning its comparative harmlessness should be addressed to legislatures, not courts.<sup>20</sup>

Pin ball or marble games present a new element: skill on the part of the user. These machines are operated by using a spring plunger to propel balls onto a slightly inclined plane where they have a chance to fall into numbered holes. A prize is awarded for scores above a certain point. Experience enables the operator to gain higher scores if the plane remains at the same angle and the plunger retains the same tension. It is sometimes held that the element of chance must predominate over that of skill to constitute a machine a game of chance.<sup>21</sup> This is found in pin ball games,<sup>22</sup> largely because the owners of the devices alter the inclination of the board and change the plunger tension sufficiently often to negate any acquired skill of the operator, and because guards around the scoring holes suffice to protect them from most carefully executed shots. Of course, these instruments are often held illegal under statutes specifically covering such machines without the necessity of showing that the element of chance predominates.<sup>23</sup>

<sup>19</sup> *Green v. Hart*, 41 F. (2d) 855 (D. Conn. 1930); *Boynton, Att'y Gen. of Kan., v. Ellis*, 57 F. (2d) 665 (C. C. A. 10th, 1932); *Boynton, Att'y Gen. of Kan., v. Mills Novelty Co.*, 60 F. (2d) 125 (C. C. A. 10th, 1932); *Rankin v. Mills Novelty Co.*, 182 Ark. 561, 32 S. W. (2d) 161 (1930); *Howell v. State*, 184 Ark. 109, 40 S. W. (2d) 782 (1931); *Sweat v. Daley*, 116 Fla. 755, 156 So. 720 (1934); *Jenner v. State*, 173 Ga. 86, 159 S. E. 564 (1931); *State v. Baitler*, 131 Me. 285, 161 Atl. 671 (1932); *Snyder v. Alliance*, 41 Ohio App. 48, 179 N. E. 426 (1931); *Painter v. State*, 163 Tenn. 627, 45 S. W. (2d) 46 (1932); see *Colbert v. Superior Confection Co.*, 154 Okla. 28, 30, 6 P. (2d) 791, 792 (1931). A comparison of the cases in n. 17 with those in n. 19 shows that cases from the same jurisdictions reach opposite results. *Green v. Hart*, *supra*, considers that a Conn. statute bars these machines, but subsequently *Mills Novelty Co. v. Farrell*, 3 F. Supp. 555 (D. Conn. 1933) held them to be legal. A dictum by the Okla. Sup. Ct. in *Colbert v. Superior Confection Co.*, *supra*, declaring the mechanisms to be illegal would seem to overrule *Ex parte Overby*, and *Overby v. Oklahoma City*, both *supra* note 17. Likewise, *Sweat v. Daley*, *supra*, indicates that the Fla. court no longer considers the tokens to be without value, as was held in *Kirk v. Morrison*, *supra* note 17.

<sup>20</sup> See note (1931) 22 J. CRIM. L. 282, 284.

<sup>21</sup> *United States v. McKenna*, 149 Fed. 252 (W. D. N. Y. 1906); *People ex rel. Ellison v. Lavin*, 179 N. Y. 164, 71 N. E. 753 (1904).

<sup>22</sup> *Howle v. Birmingham*, 229 Ala. 666, 159 So. 206 (1935); *Shapiro v. Moss*, 245 App. Div. 835, 281 N. Y. Supp. 72 (2d Dep't 1935); *Milwaukee v. Burns*, 274 N. W. 273 (Wis. 1937); see *Times Amusement Corp. v. Moss*, 160 Misc. 930, 934, 290 N. Y. Supp. 794, 799 (Sup. Ct. 1936); *Adams v. Antonio*, 88 S. W. (2d) 503, 505 (Tex. Civ. App. 1935).

<sup>23</sup> Cases arising under such statutes are: *Steed v. State*, 189 Ark. 389, 72 S. W. (2d) 542 (1934); *Stanley v. State*, 107 S. W. (2d) 532 (Ark. 1937); *Smith v. Harris*, 267 Ky. 439, 102 S. W. (2d) 385 (1936); *Commonwealth v. Bowman*, 267 Ky. 602, 102 S. W. (2d) 382 (1936); *Henry v. Kunej*, 280 Mich. 188, 273 N. W. 442 (1937); *Redd v. Simmons*, 175 Miss. 402, 167 So. 65 (1936); *State v. Humphries*, 210 N. C. 406, 186 S. E. 473 (1936); *Times Amusement Corp. v. Moss*, 160 Misc. 930, 290 N. Y. Supp. 794 (Sup. Ct. 1936); *Adams v. Antonio*, 88 S. W. (2d) 503 (Tex. Civ. App. 1935); *Roberts v. Gossett*, 88 S. W. (2d) 507 (Tex. Civ. App. 1935); *Houghton v. Fox*, 93 S. W. (2d) 781 (Tex. Civ. App. 1936); *Barkley v. Conklin*, 101 S. W. (2d) 405 (Tex. Civ. App. 1937).

In the earlier cases questioning the legality of slot machines controlling statutes were very general in terminology. These, often passed before the development of the "one armed bandit", listed several prohibited games and ended with the inclusive phrase: "and other devices of chance." The doctrine of *ejusdem generis* was urged to be applicable, and thereby to exclude slot machines from the prohibition. Under this doctrine general words following an enumeration of specific things are restricted to things of the same kind as those specifically mentioned. The courts have taken two divergent views, but have reached the same result: that the instruments are included within the statute. Some say *ejusdem generis* is inapplicable because the very games enumerated are not of the same type.<sup>24</sup> Others, applying the doctrine, reason that games of chance are of two types: those wherein the player has an even chance, and those wherein he does not; that the games listed are of the latter type;<sup>25</sup> that slot machines are also; therefore that these devices are illegal.<sup>26</sup>

Are slot machines which may be used for gambling, gaming devices *per se*? If so, the machines may be destroyed,<sup>27</sup> and, according to some cases, seized without warrants.<sup>28</sup> The decisions are split. Some maintain that the instruments lack inherent viciousness, and are not *per se* gaming apparatus.<sup>29</sup> Others argue more realistically that they are *per se* gaming devices as the only reasonable and profitable use to which they may be put is in a game of chance.<sup>30</sup>

The form of the action may well be of importance. Frequently the owners of slot machines seek to enjoin interference by the police in the operation of such devices. Several decisions have held that an injunction will not lie until a criminal court has held that the instruments

<sup>24</sup> *Connors v. Springfield*, 130 Ill. App. 240 (1906); *Salt Lake City v. Doran*, 42 Utah 401, 131 Pac. 636 (1913).

<sup>25</sup> Games typically enumerated are: faro, pass-faro, pass-monte, twenty-one, roulette, chuck a luck, and hazard.

<sup>26</sup> *Territory v. Jones*, 14 N. M. 579, 99 Pac. 338 (1908); *Zaft v. Milton*, 96 N. J. Eq. 576, 126 Atl. 29 (Ch. 1924); *State v. Gaughan*, 55 W. Va. 692, 48 S. E. 210 (1904).

<sup>27</sup> *Howell v. State*, 184 Ark. 109, 40 S. W. (2d) 782 (1931); *Steed v. State*, 189 Ark. 389, 72 S. W. (2d) 542 (1934); *Stanley v. State*, 107 S. W. (2d) 532 (Ark. 1937); *Zaft v. Milton*, 96 N. J. Eq. 576, 126 Atl. 29 (Ch. 1924).

<sup>28</sup> *Zaft v. Milton*, 96 N. J. Eq. 576, 126 Atl. 29 (Ch. 1924); *Moore v. Adams*, 91 S. W. (2d) 447 (Tex. Civ. App. 1935). But *cf.* *Adams v. Antonio*, 88 S. W. (2d) 503 (Tex. Civ. App. 1935) (injunction will lie to compel police to get court order, as they may not be judge, jury, and executioner).

<sup>29</sup> *Ashcraft v. Healey*, 23 F. (2d) 189 (C. C. A. 5th, 1927); *State v. Derry*, 171 Ind. 18, 85 N. E. 765 (1908) (machine is capable of use as harmless article of furniture); *Soper v. Michal*, 123 Md. 542, 91 Atl. 684 (1914); *State v. Stigler*, 175 So. 194 (Miss. 1937); *Kearney v. Elmira*, 266 N. Y. Supp. 81 (3d Dep't 1933) *semble*.

<sup>30</sup> *Howell v. State*, 184 Ark. 109, 40 S. W. (2d) 782 (1931); *Steed v. State*, 189 Ark. 389, 72 S. W. (2d) 542 (1934); *Stanley v. State*, 107 S. W. (2d) 532 (Ark. 1937); *Zaft v. Milton*, 96 N. J. Eq. 576, 126 Atl. 29 (Ch. 1924); *Moore v. Adams*, 91 S. W. (2d) 447 (Tex. Civ. App. 1935).

are legal.<sup>31</sup> Even though no criminal action would lie, equity in its good conscience may refuse injunctive relief because the machines are readily adaptable to gaming,<sup>32</sup> or because equity upon receiving evidence that most slot machines are owned by racketeers, inadmissible in a criminal action, does not feel disposed to act.<sup>33</sup> Where the action is *in rem* to condemn the instruments it is unnecessary to show that the owners knew of the violation or had any intention that the machines be used illegally.<sup>34</sup>

Only two cases seem to have considered who is entitled to the money found in a lawfully seized illegal instrument.<sup>35</sup> *State v. Falgren*<sup>36</sup> held that the owner of the machine was entitled as against the state; the purpose of statutes allowing seizure being the destruction of the machine, not governmental enrichment. *Dorrell v. Clark*,<sup>37</sup> however, refused to secure to the transgressor of the law the fruits of his outlawry. There the money was put aside for those who had lost it in the condemned device, but the court intimated that in as much as the money constituted a retrieved portion of a destroyed machine it might perhaps be considered as treasure trove, and be claimed by the state, which found it.<sup>38</sup>

North Carolina first legislated specifically against slot machines in 1923,<sup>39</sup> defining as illegal all of these instruments which did not give the same return in market value each and every time operated. In 1931 the legislature adopted<sup>40</sup> this definition, and inserted the phrase "illegal slot machines" into the general gaming statutes.<sup>41</sup> The 1935 assembly twice defined these devices in vague and seemingly conflicting enactments.<sup>42</sup> The North Carolina Supreme Court construed the two statutes together in *State v. Humphries*<sup>43</sup> to mean that a machine was illegal

<sup>31</sup> *Sweat v. Daley*, 116 Fla. 755, 156 So. 720 (1924); *Roberts v. Gossett*, 88 S. W. (2d) 507 (Tex. Civ. App. 1935); *Barkley v. Conklin*, 101 S. W. (2d) 405 (Tex. Civ. App. 1937).

<sup>32</sup> *People v. Jennings*, 257 N. Y. 196, 177 N. E. 419 (1931).

<sup>33</sup> *Times Amusement Corp. v. Moss*, 160 Misc. 930, 290 N. Y. Supp. 794 (Sup. Ct. 1936).

<sup>34</sup> *State v. Doe*, 221 Iowa 1, 263 N. W. 529 (1935); *Enloe v. Lawson*, 146 Ore. 621, 31 P. (2d) 171 (1934); *State v. Certain Gambling Instruments and Apparatus*, 46 R. I. 347, 128 Atl. 12 (1925); *cf. Petition of Sup't of Police of Phila. for Order to Destroy Gambling Implements*, 113 Pa. Super. 520, 173 Atl. 753 (1934) (evidence does not have to be as great as in a criminal action).

<sup>35</sup> Statutes provide for this in some jurisdictions.

<sup>36</sup> 176 Minn. 346, 223 N. W. 455 (1929).

<sup>37</sup> 90 Mont. 585, 4 P. (2d) 712 (1931). <sup>38</sup> *Id.* at 592, 4 P. (2d) at 714.

<sup>39</sup> N. C. Pub. Laws 1923, c. 138. <sup>40</sup> N. C. Pub. Laws 1931, c. 14, §1.

<sup>41</sup> N. C. CODE ANN. (Michie, 1935) §§4433, 4434, 4435. This makes the meaning of these statutes ambiguous. They were designed to prohibit games of chance, and allow those of skill, yet under its definition an illegal slot machine might be a game of skill.

<sup>42</sup> N. C. Pub. Laws 1935, cc. 37, 282.

<sup>43</sup> 210 N. C. 406, 186 S. E. 473 (1936). This was a three to two decision. The dissent considered that the second enactment was designed to alleviate the harshness of the former one by legalizing machines where the outcome of oper-

when the result of its operations involved an element of chance even though it was achieved partly by skill. The legislature in 1937 remedied the uncertainty of earlier acts. This latest enactment<sup>44</sup> is clear and very inclusive. Protected by the statute are simple vending machines making the same return or returns of equal value on each and every play, and only those devices, for if the user has a chance to receive anything of value in addition to the customary merchandise vended, or to make varying scores, or to replay the machine without charge, the instrument is illegal. This act has recently been declared constitutional as within the police power of the state.<sup>45</sup> Because of the carefully inclusive terminology of the present statute, and because courts generally interpret such acts liberally in favor of the state, clever slot machine manufacturers will be hard pressed to create an instrument appealing to the gaming instinct which may be legally operated in North Carolina.

In view of this statute the principal case is undoubtedly correctly decided. Indeed, the injunction might well have been refused in the first instance. It should have been entirely unnecessary to show that the restrictions imposed by the device itself were not followed, because, assuming complete obedience to instructions, the machines would give varying returns on different plays which is prohibited by the 1937 act.

ROBERT C. HOWISON, JR.

### **Injunction—State Injunctions Against Federal Judicial Proceedings.**

The plaintiff employee of the defendant railroad, which was engaged in interstate commerce, was injured in the course of his employment. The accident happened in Virginia where the plaintiff lived and the witnesses were available. The plaintiff brought suit against the defendant under the Federal Employers' Liability Act<sup>1</sup> in the United States District Court for the Southern District of New York. Thereafter the defendant obtained an injunction in a state court of Virginia enjoining the employee from prosecuting the action in New York, on the ground that to bring suit there was inconvenient and oppressive, and intended to harass and vex the defendant employer, and that the proper forum was in Virginia. Thereupon the plaintiff employee moved in this action for an order enjoining the defendant from enforcing its injunction, or from prosecuting that suit. *Held*, the decree sought does

ations was dependent in part on the skill of the player. However, a very recent case, *Tomberlin v. Bachtel*, 213 N. C. 250 (1938), reasserts the view of the majority.

<sup>44</sup> N. C. CODE ANN. (Michie, Supp. 1937) §4437(r)-(w).

<sup>45</sup> *Calcutt v. McGeachy*, 213 N. C. 1, 195 S. E. 49 (1938).

<sup>1</sup> 35 STAT. 65 (1908), 45 U. S. C. A. §51 (1934).

not fall within the exceptions to the federal statutory prohibition against the issuance of injunctions by federal courts against proceedings in state courts. Both the federal suit and the state injunction litigation may go along side by side. Order denied.<sup>2</sup>

The general rule appears well settled that one within the jurisdiction of a court may be enjoined, on a proper showing,<sup>3</sup> from prosecuting an action in another jurisdiction.<sup>4</sup> But the Federal Employers' Liability Act, under which the plaintiff's original action was brought, confers on the injured employee the privilege to sue the defendant employer in the state or federal courts in any district in which the employer does business.<sup>5</sup> Against the contention that this privilege is an absolute one, most courts have held that, where the foreign action is in a *state* court, the statutory privilege to sue is limited by the potential jurisdiction of a state court of equity to enjoin a foreign action which would harass, oppress, or defraud the defendant.<sup>6</sup> The reasoning of such cases is that since it was allowable before the act to enjoin the plaintiff from bringing his suit in a court and at a place where under the law he had a right to bring it, it must be equally allowable to do so since the act, because the act merely limits instead of enlarging the places where the suit must be brought.

However, where the foreign action under the act is brought in a *federal* court, the power of the state courts to enjoin the employee's suit is disputed,<sup>7</sup> on the ground that to allow the injunction would be to permit state interference with the jurisdiction of the federal courts and with a federal right conferred upon the claimant by Congress. This involves the exception to the general rule that equity may enjoin the prosecution of foreign actions, namely, that, as between state and federal courts, neither may enjoin a person from bringing an action in the other.<sup>8</sup> A statute in 1793<sup>9</sup> forbade the issuance of injunctions by a

<sup>2</sup> Brant v. Atlantic Coast Line R. R., 92 F. (2d) 569 (C. C. A. 2d, 1937).

<sup>3</sup> What grounds constitute a proper showing is a question beyond the scope of this note. Note (1934) 13 N. C. L. Rev. 235.

<sup>4</sup> Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. ed. 538 (1890); Allen v. Buchanan, 97 Ala. 399, 11 So. 777 (1892); 5 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1919) §2091.

<sup>5</sup> 35 STAT. 66 (1908), 45 U. S. C. A. §56 (1934).

<sup>6</sup> *Ex parte* Crandall, 53 F. (2d) 969 (C. C. A. 7th, 1931), *cert. denied*, 285 U. S. 540, 52 Sup. Ct. 312, 76 L. ed. 933 (1931); Reed v. Illinois C. R. R., 182 Ky. 455, 206 S. W. 794 (1918); Kern v. Cleveland, C. C. & St. L. R. R., 204 Ind. 595, 185 N. E. 446 (1933). Accord: *Re* Spoo, 191 Iowa 1134, 183 N. W. 580 (1921); *cf.* Payne v. Knapp, 197 Iowa 737, 198 N. W. 62 (1923); Peterson v. Chicago, B. & Q. R. R., 187 Minn. 228, 244 N. W. 823 (1932).

<sup>7</sup> Chicago, M. & St. P. R. R. v. Schendel, 292 Fed. 326 (C. C. A. 8th, 1923); McConnell v. Thomson, 8 N. E. (2d) 986 (Ind. 1937).

<sup>8</sup> 5 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1919) §§2061, 2062.

<sup>9</sup> 1 STAT. 334 (1793), 28 U. S. C. A. §379 (1934), as amended by 36 STAT. 1162 (1911), 28 U. S. C. A. §379 (1934) (to permit injunctions in bankruptcy cases).

federal court against proceedings<sup>10</sup> in state courts. In the first case before it involving the converse of the situation, *i.e.*, where the state court had enjoined proceedings in a federal court, the Supreme Court invoked broad principles of comity similarly to circumscribe the jurisdiction of state courts.<sup>11</sup>

Subsequently, however, the Court found it expedient to evolve certain exceptions (discussed hereinafter) to the federal statute in order to permit federal injunctions against state court proceedings under particular conditions. The statute has accordingly been declared to be not a limitation on the powers of the federal court but merely on the exercise of its equitable powers.<sup>12</sup> Whether the lack of "jurisdiction" in the state courts to enjoin federal proceedings means a lack of power, or merely that such a power should not be exercised, has never been expressly adjudicated by the Supreme Court. Most of the language of the Court's opinions would support the lack of power theory.<sup>13</sup> Yet some of the language would permit a contrary inference,<sup>14</sup> and once the Court cited with approval a state decision granting such an injunction.<sup>15</sup>

<sup>10</sup> The theory behind the general rule that equity may enjoin the prosecution of foreign actions is that the decree is directed against the defendant, and not the foreign court. Therefore it is legally reasoned that there is no interference with or supervision over the acts of a foreign tribunal. See note 4, *supra*. In an early case, however, the Supreme Court declared that in the state and federal court relationship, the fact that the decree was directed against the individual defendant was merely a matter of form, and that in effect such a decree enjoined the proceedings in the other court. *Peck v. Jenness*, 7 How. 612, 625, 12 L. ed. 841, 846 (U. S. 1849). For convenience's sake reference is made in the text to "injunctions against proceedings", though technically the decree enjoins the defendant from instituting or prosecuting proceedings in the foreign court.

<sup>11</sup> *McKim v. Voorhies*, 7 Cranch 279, 3 L. ed. 342 (U. S. 1812).

<sup>12</sup> *Smith v. Apple*, 264 U. S. 274, 278, 44 Sup. Ct. 311, 313, 68 L. ed. 678, 681 (1924).

<sup>13</sup> *McKim v. Voorhies*, 7 Cranch 279, 3 L. ed. 342, 343 (U. S. 1812) ("... State court had no jurisdiction to enjoin a judgment of the circuit court of the United States. . . ."); *Riggs v. Johnson County*, 11 Wall. 166, 195, 18 L. ed. 768, 771 (U. S. 1867) ("State Courts . . . are destitute of all power to restrain either the process or proceedings in the National Courts"); *Amy v. The Supervisors*, 11 Wall. 136, 137, 20 L. ed. 101, 102 (U. S. 1870) ("... the [state court] injunction was a nullity"); *Moran v. Sturges*, 154 U. S. 256, 268, 14 Sup. Ct. 1019, 1022, 38 L. ed. 981, 985 (1894) ("... the injunction of a state court is inoperative to control, or in any manner to affect the process or proceedings of a Circuit Court. . . ."); *Central Nat. Bank v. Stevens*, 169 U. S. 432, 460, 18 Sup. Ct. 403, 413, 42 L. ed. 807, 817 (1898) ("The exemption of the authority of the courts of the United States from interference by . . . judicial action of the States is essential to their independence and efficiency.").

<sup>14</sup> *Central Nat. Bank v. Stevens*, 169 U. S. 432, 465, 18 Sup. Ct. 403, 415, 42 L. ed. 807, 819 (1898) ("The judgments [granting a state injunction] are erroneous"); *Farmers' L. & T. Co. v. Lake St. Elev. R. R.*, 177 U. S. 51, 61, 20 Sup. Ct. 564, 568, 44 L. ed. 667, 671 (1900) ("As . . . the jurisdiction of that [federal] court had thus attached before the commencement of the suit in the state court, it follows . . . that it was not competent for the state court to interfere by injunction or otherwise with the proceedings in the Federal court.").

<sup>15</sup> *Home Ins. Co. v. Howell*, 24 N. J. Eq. 238 (Ch. 1873), cited with approval in *Moran v. Sturges*, 154 U. S. 256, 271, 14 Sup. Ct. 1019, 1023, 38 L. ed. 981, 986 (1894).



However, with this exception, prior to the principal case, no decision has been found in which a federal court even tacitly approved the issuance of such an injunction by a state court. The state courts have exercised that power occasionally.<sup>16</sup> Logically, it would seem that if the federal statute is a limitation merely on the exercise of power by the federal courts, the judicial limitation on state courts would be on the exercise of power, and not on the existence of power. However, though the relationship between state and federal courts is theoretically reciprocal,<sup>17</sup> that is not always the case.<sup>18</sup> One cannot but feel that in this particular relationship the independence of the federal courts' sphere of action has been much more zealously guarded than has the supposedly corresponding independence of the state courts. A decision of the Supreme Court denying the existence of power in the state court to enjoin federal proceedings would not come, then, as a complete surprise.<sup>19</sup> The assumption to the contrary in the principal case is out of line with the trend of previous federal decisions.

Assuming, however, that the Virginia court had jurisdiction (in a strict sense) of the suit for injunction, was its discretion properly exercised? The decree granted was an "original"<sup>20</sup> one to restrain an action then pending in a federal court. Only one previous state decision is authority for such a position.<sup>21</sup> The federal courts, in spite of the broad exceptions to the prohibitory statute, are prevented by it from "origi-

<sup>16</sup> *Akerly v. Vilas*, 15 Wis. 440 (1862); *Home Ins. Co. v. Howell*, 24 N. J. Eq. 238 (Ch. 1873); *Keith v. Alger*, 114 Tenn. 1, 85 S. W. 71 (1905); *Reagan v. Dick*, 76 Colo. 544, 233 Pac. 159 (1925); *In re Dawley*, 99 Vt. 306, 131 Atl. 847 (1926); *Marchant v. Wannamaker*, 176 S. C. 369, 180 S. E. 350 (1935); cf. *Hines & Hobbs v. Rawson*, 40 Ga. 356 (1869).

<sup>17</sup> "Circuit courts and State courts act separately and independently of each other, and in their respective spheres of action the process issued by one is as far beyond the reach of the other, as if the line of division between them 'was traced by landmarks and monuments visible to the eye.'" *Riggs v. Johnson County*, 11 Wall. 166, 195, 18 L. ed. 768, 776 (U. S. 1867).

<sup>18</sup> The enforcement of the judgment of a state court may be enjoined by a federal court, *Marshall v. Holmes*, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. ed. 870 (1891), but a state court may not enjoin the enforcement of a federal judgment, *M'Kim v. Voorhies*, 7 Cranch 279, 3 L. ed. 342 (1812). Other examples of the influence of the "federalist" philosophy on the allocation of judicial powers are: a state court may not issue mandamus to a federal official, *McClung v. Silliman*, 6 Wheat. 598, 5 L. ed. 340 (U. S. 1821), but a federal court may issue mandamus to a county official, *Gelpke v. Dubuque*, 1 Wall. 175, 17 L. ed. 520 (U. S. 1864); a state court possesses no power to remove any person from the jurisdiction of federal officials or courts through the writ of *habeas corpus*, *Tarble's Case*, 13 Wall. 397, 20 L. ed. 597 (U. S. 1872), but a federal court has the power to issue writs of *habeas corpus* wherever a person is in custody, whether under state or federal authority, in violation of the Constitution or laws of the United States, 14 STAT. 385 (1867), 28 U. S. C. A. §463 (1934).

<sup>19</sup> It is readily observed that this would be the most practicable means of achieving the desired results—non-interference by state courts.

<sup>20</sup> The term "original", as distinguished from "ancillary", denotes a lack of prior action in the same court to which the injunction might be considered supplemental.

<sup>21</sup> *Farmers' L. & T. Co. v. Hughes*, 11 Hun 130 (N. Y. 1877).

nally" enjoining an action in a state court before rendition of judgment (unless the action is to enforce an unconstitutional statute).<sup>22</sup> It is hardly conceivable that state courts will be permitted to exercise greater powers of interference than are granted to the federal courts. Therefore, it seems fairly clear that, even assuming jurisdiction in the Virginia court, its action was erroneous.

As its decree was erroneous, whether the Virginia court had jurisdiction seems, perhaps, just an academic question, but it is important in determining the effect to be given that decree. The court in the principal case refused to give it extraterritorial effect, and permitted the plaintiff to continue his suit in defiance of the Virginia court. While this seems to be the majority rule, even where the injunction is jurisdictionally valid,<sup>23</sup> the more commendable minority view declines to entertain the plaintiff's suit after the foreign court has been officially informed of the injunction.<sup>24</sup> If the Virginia decree was merely erroneous, in view of the "full faith and credit" clause and on principles of comity it would be more desirable to accord it recognition.<sup>25</sup> If, however, the Virginia court had no power, recognition was correctly refused a decree that was a nullity. On the other hand, perhaps the plaintiff's remedy was by appeal to the Supreme Court of Virginia and thence by *certiorari* to the Supreme Court of the United States. Failure thus to question the jurisdiction directly might foreclose any subsequent raising of that issue.<sup>26</sup>

After a refusal to recognize the state injunction, has the New York federal court power to block affirmatively that injunction by means of a counter-injunction? Unless the counter-injunction falls within the recognized exceptions, the federal statute would prohibit it. As the cases by means of which the exceptions have become engrafted on the

<sup>22</sup> *Essanay Film Co. v. Kane*, 258 U. S. 358, 42 Sup. Ct. 318, 66 L. ed. 658 (1922).

<sup>23</sup> *State ex rel. Bossung v. District Court*, 140 Minn. 494, 168 N. W. 589 (1918); *Nichols & S. Co. v. Wheeler*, 150 Ky. 169, 150 S. W. 33 (1912); *Kepner v. Cleveland, C. C. & St. L. R. R.*, 322 Mo. 299, 15 S. W. (2d) 825 (1929). These decisions are based on the ground that, as the foreign tribunal would not be allowed to control a citizen of the local state, as to bringing a transitory action therein, the "privileges and immunities" clause of the Fourth Amendment requires a similar rule as to non-residents. The basis for this reasoning was removed by the Supreme Court's sanction of discretionary refusal of jurisdiction to non-residents. *Douglas v. New York, N. H. & H. R. R.*, 279 U. S. 377, 49 Sup. Ct. 355, 93 L. ed. 747 (1929). Though this rule is numerically the majority view, it has been subjected to much criticism. See Note (1930) 39 YALE L. J. 719.

<sup>24</sup> *Gilman v. Ketcham*, 84 Wis. 60, 54 N. W. 395 (1893); *Fisher v. Pacific Mut. L. Ins. Co.*, 112 Miss. 30, 72 So. 846 (1916); *Allen v. Chicago Great Western R. R.*, 239 Ill. App. 38 (1925).

<sup>25</sup> Note (1924) 22 MICH. L. REV. 469.

<sup>26</sup> *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U. S. 522, 51 Sup. Ct. 517, 75 L. ed. 1244 (1931); *American Surety Co. v. Baldwin*, 287 U. S. 156, 53 Sup. Ct. 98, 77 L. ed. 1244 (1932); Note (1932) 42 YALE L. J. 427.

statute apparently can not be reconciled,<sup>27</sup> it is probably best to accept the Supreme Court's version of the result of those cases. In *Wells Fargo & Co. v. Taylor*,<sup>28</sup> Mr. Justice VanDevanter stated the situation thus: "[the statute] . . . does not prevent the federal courts from enjoining the institution in the state courts of proceedings to enforce local statutes which are repugnant to the Constitution of the United States,<sup>29</sup> . . . or prevent them from maintaining and protecting their own jurisdiction properly acquired and still subsisting,<sup>30</sup> . . . or prevent them of depriving a party . . . of the benefit of a judgment obtained in a state court where its enforcement will be contrary to recognized principles of equity and the standards of good conscience."<sup>31</sup> The counter-injunction sought by the plaintiff here seems to come squarely within the second exception. The principal case, however, citing *Kline v. Burke Construction Co.*,<sup>32</sup> declares that where the action in the state and in the federal court are both *in personam*, there is no such conflict between jurisdictions as would exist if a *res* were involved. Therefore the federal court, though its jurisdiction attached first, on authority of the *Kline* case declares the statute prevents it from issuing an injunction to protect that jurisdiction. The *Kline* case denied an injunction against the state court proceedings where an *in personam* action was pending in the federal court, and subsequently an *in personam* action was brought in a state court on the same cause of action. The lack of a *res* was said to permit both actions to go along side by side without conflict. Yet it would seem that where the state court directly enjoined the federal proceedings, rather than merely entertained the same cause of action, there would be a distinct conflict between the different jurisdictions, even though both actions were *in personam*. Therefore, it follows that the second exception stated by the Supreme Court would be applicable to the situation at hand. As the federal court had prior jurisdiction over the case, it would have the power to protect that jurisdiction by the counter-injunction.<sup>33</sup>

<sup>27</sup> For excellent surveys of these cases see Durfee and Sloss, *Federal Injunctions Against Proceedings in State Courts: The Life History of a Statute* (1932) 30 MICH. L. REV. 1145; Taylor and Willis, *The Power of Federal Courts to Enjoin Proceedings in State Courts* (1933) 42 YALE L. J. 1169.

<sup>28</sup> 254 U. S. 175, 183, 41 Sup. Ct. 93, 96, 65 L. ed. 205, 211 (1920).

<sup>29</sup> *Gunter v. Atlantic C. L. R. R.*, 200 U. S. 273, 26 Sup. Ct. 252, 50 L. ed. 477 (1906); *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. ed. 714 (1908); *Truax v. Raich*, 239 U. S. 33, 36 Sup. Ct. 7, 60 L. ed. 131 (1915).

<sup>30</sup> *French v. Hay*, 22 Wall. 250, 22 L. ed. 854 (U. S. 1875); *Julian v. Central Trust Co.*, 193 U. S. 93, 24 Sup. Ct. 339, 48 L. ed. 629 (1904); *Looney v. Eastern Tex. R. R.*, 247 U. S. 214, 38 Sup. Ct. 460, 62 L. ed. 1084 (1918).

<sup>31</sup> *Marshall v. Holmes*, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. ed. 870 (1891); *Ex parte Simon*, 208 U. S. 144, 28 Sup. Ct. 238, 52 L. ed. 429 (1908); *Simon v. Southern Ry.*, 236 U. S. 115, 35 Sup. Ct. 255, 59 L. ed. 492 (1915).

<sup>32</sup> 260 U. S. 226, 43 Sup. Ct. 49, 67 L. ed. 226 (1922).

<sup>33</sup> *Libby Glass Co. v. McKee Glass Co.*, 216 Fed. 172 (W. D. Pa. 1914); *Chicago, M. & St. P. Ry. v. Schendel*, 292 Fed. 326 (C. C. A. 8th, 1923).

Had the court in the principal case issued the retaliatory injunction, however, the results would have been quite undesirable. Besides a situation that would smack of petty judicial squabbling, a jurisdictional stalemate would have been effected. If the plaintiff continued his federal action, he would be in contempt of the Virginia court; if the defendant cited the plaintiff for contempt in Virginia, the defendant in turn would be in contempt of the federal court. The court here wisely exercised its discretion to prevent such unseemly results.

C. A. GRIFFIN, JR.

### Labor Law—Anti-Injunction Statute—Definition of a Labor Dispute.

Plaintiff maintained five meat markets in the city of Milwaukee, employing about thirty-five persons. The defendants, officers and agents of a labor union, demanded that the plaintiff require his employees, as a condition of employment, to become members of the union. The plaintiff willingly notified the employees that they were free to join if they wished, but they refused to do so. The defendants thereupon picketed the plaintiff's markets in an attempt to coerce him into *compelling* his employees, upon pain of dismissal, to join the union. In an action seeking a decree enjoining such picketing, *held*, this is a "labor dispute" within the terms of both the Norris-LaGuardia Anti-Injunction Act<sup>1</sup> and the Wisconsin Labor Code,<sup>2</sup> which limit the issuance of injunctions in labor controversies, and hence an injunction may not issue.<sup>3</sup>

This case represents the culmination of a lengthy fight by organized labor against the use of the injunction in labor disputes. In 1914, after a persistent battle on the part of the proponents of labor,<sup>4</sup> Congress passed the Clayton Act,<sup>5</sup> the famous Section 20 of which provided that:

"No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury. . . ."

<sup>1</sup> 47 STAT. 70 (1932), 29 U. S. C. A. §§101-115 (Supp. 1937).

<sup>2</sup> WIS. STAT. (1935) §103.51.

<sup>3</sup> *Lauf v. E. G. Shinner & Co.*, 58 Sup. Ct. 578 (U. S. 1938).

<sup>4</sup> A number of bills intended to relieve labor of "government by injunction" were introduced into Congress during the first decade of the present century, the most notable of these being the Pearre Bill and the nearly identical Wilson Bill, for which the Clayton Act was a substitute. See FRANKFURTER AND GREENE, *THE LABOR INJUNCTION* (1930) c. IV; WITTE, *THE GOVERNMENT IN LABOR DISPUTES* (1932); Witte, *The Federal Anti-Injunction Act* (1933) 16 MINN. L. REV. 638; note (1936) 11 WIS. L. REV. 552.

<sup>5</sup> 38 STAT. 730 (1914), 29 U. S. C. A. §52 (1927).

The history of the process of judicial emasculation whereby labor's "Magna Charta"<sup>6</sup> was rendered nugatory is well known to the student of labor law. One of the many loopholes which soon appeared in the statute was afforded by the construction placed upon Section 20 by the lower federal courts, *i.e.*, that the act was applicable only to those disputes in which there existed between the disputants the relationship of employee and employer.<sup>7</sup> This construction received the sanction of the Supreme Court in 1921<sup>8</sup> and has been consistently followed ever since.<sup>9</sup>

The nullification of the Clayton Act by judicial decision led to the passage of the Norris-LaGuardia Anti-Injunction Act<sup>10</sup> in 1932. Congress, in an attempt to avoid the difficulties which the Clayton Act met at the hands of the courts, has specified in this more recent legislation the situations to which it shall be applicable as follows:

"... when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; ... whether such dispute is (1) between one or

<sup>6</sup> Note (1936) 84 U. OF PA. L. REV. 771.

<sup>7</sup> *Dail-Overland Co. v. Willys-Overland, Inc.*, 263 Fed. 171 (N. D. Ohio 1920); *Vonnegut Machinery Co. v. Toledo Machine & Tool Co.*, 263 Fed. 192 (N. D. Ohio 1920). These two cases went to the extent of holding that the Clayton Act was inapplicable to strikers whose places had been filled by strike-breakers, for the "employer-employee" relationship was thereby terminated. See dissent of Pitney, J., in *Paine Lumber Co. v. Neal*, 244 U. S. 459, 484, 37 Sup. Ct. 718, 720, 61 L. ed. 1256, 1265 (1917).

<sup>8</sup> *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 41 Sup. Ct. 172, 65 L. ed. 349, 16 A. L. R. 196 (1921).

<sup>9</sup> *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184, 42 Sup. Ct. 72, 66 L. ed. 189, 27 A. L. R. 360 (1921); *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n*, 274 U. S. 37, 47 Sup. Ct. 522, 71 L. ed. 916, 54 A. L. R. 791 (1927); *Buyer v. Guillan*, 271 Fed. 65 (C. C. A. 2d, 1921); *Quinlivan v. Dail-Overland Co.*, 274 Fed. 56 (C. C. A. 6th, 1921); *Kinloch Tel. Co. v. Local Union No. 2*, 275 Fed. 241 (C. C. A. 8th, 1921); *Central Metal Products Corp. v. O'Brien*, 278 Fed. 827 (N. D. Ohio 1922); *Canoe Creek Coal Co. v. Christinon*, 281 Fed. 559 (W. D. Ky. 1922); *United States v. Railway Employees' Dep't of A. F. of L.*, 283 Fed. 479 (N. D. Ill. 1922); *Montgomery v. Pacific E. Ry.*, 293 Fed. 680 (C. C. A. 9th, 1923); *Waitresses' Union, Local No. 249 v. Benish Restaurant Co., Inc.*, 6 F. (2d) 568 (C. C. A. 8th, 1925); *Bittner v. West Virginia-Pittsburgh Coal Co.*, 15 F. (2d) 652 (C. C. A. 4th, 1926); *Columbus Heating & Ventilating Co. v. Pittsburgh Bldg. Trades Council*, 17 F. (2d) 806 (W. D. Pa. 1927); *Ferguson v. Peake*, 18 F. (2d) 166 (App. D. C. 1927); *Armstrong v. United States*, 18 F. (2d) 371 (C. C. A. 7th, 1927), *cert. denied*, 275 U. S. 534 (1928); *International Organization, United Mine Workers of America v. Red Jacket Consol. Coal & Coke Co.*, 18 F. (2d) 839 (C. C. A. 4th, 1927); *Alco-Zander Co. v. Amalgamated Clothing Workers of America*, 35 F. (2d) 203 (E. D. Pa. 1929); *United States Gypsum Co. v. Heslop*, 39 F. (2d) 228 (N. D. Iowa 1930); see dissent of Manton, J., in *Aeolian Co. v. Fischer*, 29 F. (2d) 679, 682 (C. C. A. 2d, 1928).

<sup>10</sup> 47 STAT. 70 (1932), 29 U. S. C. A. §§101-115 (Supp. 1937). For an analysis of the provisions of the act, see Fraenkel, *Recent Statutes Affecting Labor Injunctions and Yellow Dog Contracts* (1936) 30 ILL. L. REV. 854; Monkemeyer, *Five Years of the Norris-LaGuardia Act* (1937) 2 MO. L. REV. 1; Riddlesbarger, *The Federal Anti-Injunction Act* (1935) 14 ORE. L. REV. 242; Witte, *The Federal Anti-Injunction Act* (1932) 16 MINN. L. REV. 638; Notes (1935) 5 FORDHAM L. REV. 125; (1932) 30 MICH. L. REV. 1257; (1934) 12 N. Y. U. L. Q. REV. 101.

more employers or associations of employers and one or more employees or associations of employees; (2) between . . . employers . . . and . . . employers; or (3) between . . . employees . . . and employees; . . ."<sup>11</sup>

"A person or association shall be held to be a person participating . . . in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same . . . occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, . . . of any association composed in whole or in part of employers or employees engaged in such . . . occupation."<sup>12</sup>

"The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in . . . seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."<sup>13</sup>

In spite of this broad and apparently unambiguous language the lower federal courts have shown considerable confusion as to just what controversies come within the terms of the act. The Seventh Circuit Court of Appeals, in which the instant case arose,<sup>14</sup> is noted for its restrictive construction of the applicability of the statute. In *United Electric Coal Cos. v. Rice*,<sup>15</sup> where one union picketed the plaintiffs' mines in an effort to coerce them into breaking a contract with another union, this court held the Norris Act to be inapplicable on the grounds that the term "labor dispute" implies the existence of an employer-employee relationship. This holding was confirmed in *Newton v. Laclede Steel Co.*,<sup>16</sup> where an injunction was issued against picketing for unionization. The following year the court enjoined a union from picketing, in order to prevent a general drop in union wages, a "price-cutter," none of whose employees were union men.<sup>17</sup> A number of

<sup>11</sup> 47 STAT. 70 (1932), 29 U. S. C. A. §113(a) (Supp. 1937).

<sup>12</sup> *Id.* §113(b).

<sup>13</sup> *Id.* §113(c).

<sup>14</sup> The decision of the circuit court, holding that no labor dispute was involved and affirming the injunction issued by the district court, was based on §102, which declares regarding the employee, "though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor. . . ." *Lauf v. E. G. Shinner & Co.*, 82 F. (2d) 68 (C. C. A. 7th, 1936), discussed in *Legis.* (1937) 50 HARV. L. REV. 1295, (1937) 31 ILL. L. REV. 688.

<sup>15</sup> 80 F. (2d) 1 (C. C. A. 7th, 1935), (1936) 36 COL. L. REV. 157, (1936) 45 YALE L. J. 1320, (1937) 35 MICH. L. REV. 1320, *cert. denied*, 297 U. S. 714 (1936).

<sup>16</sup> 80 F. (2d) 636 (C. C. A. 7th, 1935). The court in this case states that it is following the decision in the *United Electric Companies* case; but here some of the employees were involved in the picketing union's activities, so the case may have actually turned on other grounds.

<sup>17</sup> *Scavenger Service Corp. v. Courtney*, 85 F. (2d) 825 (C. C. A. 7th, 1936).

district courts have likewise applied the "employer-employee" test in determining the presence or absence of a "labor dispute."<sup>18</sup>

Most of the lower federal courts, however, have shown little inclination to follow the reversion of the seventh circuit to the reasoning that was prevalent under the Clayton Act. In *Cinderella Theater Co., Inc. v. Sign Writers' Local Union*<sup>19</sup> the District Court for the Eastern District of Michigan held that union picketing of an employer in an attempt to force it to replace its single employee with a union man constituted a labor dispute and therefore refused to enjoin such activity. Subsequent decisions have followed this holding in cases in which the fact situations were almost identical to that in the principal case.<sup>20</sup> Labor disputes have been found to exist in cases of agitation against employers in order to secure unionization elsewhere,<sup>21</sup> as in *Levering & Garrigues v. Morrin*,<sup>22</sup> where a union, in an effort to secure a closed shop in the field of steel construction, threatened architects, owners, and builders with strikes if all subcontracts for the erection of steel did not provide for a closed shop. The act has also been held applicable to controversies between rival unions.<sup>23</sup>

The principal case serves to set a definite standard for the complete rejection of the "employer-employee" yardstick in determining what con-

<sup>18</sup> *Hedges-Walsh-Weidner Co. v. Duffy*, C. C. H. Labor Serv. ¶16,066 (1935) (D. Tenn. 1934) (picketing for a closed shop held to violate public policy declared in §102); *Colonial Baking Co. v. Hatenbach*, C. C. H. Labor Serv. ¶16,051 (1935) (D. Tenn. 1934) (picketing for closed shop); *In re Cleveland & Sandusky Brewing Co.*, 11 F. Supp. 198 (N. D. Ohio 1935), (1935) 49 HARV. L. REV. 341, (1935) 35 COL. L. REV. 1140, (1935) 45 YALE L. J. 372, (1935) 21 CORN. L. Q. 137 (dispute between two unions); *Donnelly Garment Co. v. International Ladies Garment Workers' Union*, C. C. H. Labor Serv. ¶18,071 (1937) (W. D. Mo. 1937) (picketing to unionize employees); *State Brewers Institute v. International Brotherhood of Teamsters*, C. C. H. Labor Serv. ¶18,030 (1937) (W. D. Wash. 1937) (refusal of teamsters to handle beer transported by non-union truckmen in effort to secure closed-shop contracts with brewers); *New Negro Alliance v. Sanitary Grocery Co.*, 92 F. (2d) 510 (App. D. C. 1937) (picketing by negro association to secure employment of negro labor).

<sup>19</sup> 6 F. Supp. 164 (E. D. Mich. 1934).

<sup>20</sup> *Dean v. Mayo*, 8 F. Supp. 73 (W. D. La. 1934), *aff'd*, 82 F. (2d) 554 (C. C. A. 5th, 1935); *Miller Parlor Furniture Co. v. Furniture Workers' Industrial Union*, 8 F. Supp. 209 (D. N. J. 1934), (1934) 3 GEO. WASH. L. REV. 126; *Coryell & Son v. Petroleum Workers Union*, C. C. H. Labor Serv. ¶16,318 (1936) (D. Minn. 1936); *S. S. Kresge Co. v. Amsler*, C. C. H. Labor Serv. ¶18,004 (1937) (E. D. Mo. 1937).

<sup>21</sup> *Lake Charles Stevedores v. Mayo*, C. C. H. Labor Serv. ¶16,177 (1935) (W. D. La. 1935) (strike to secure unionization at other ports).

<sup>22</sup> 71 F. (2d) 284 (C. C. A. 2d, 1934), *cert. denied*, 293 U. S. 595 (1934).

<sup>23</sup> *United States v. Weirton Steel Co.*, 7 F. Supp. 255 (D. Del. 1934); *Virginian Ry. v. System Fed. No. 40, Ry. Employees of A. F. of L.*, 84 F. (2d) 641 (C. C. A. 4th, 1936). In both of these cases, however, one of the unions was a company union, and hence the situation might be said to be practically the same as where the dispute is between an employer and a union. See (1937) 50 HARV. L. REV. 1295, 1299. The act has been held to apply to employee plaintiffs as well as employer plaintiffs. *Stanley v. Peabody Coal Co.*, 5 F. Supp. 612 (S. D. Ill. 1933) (union seeking to enjoin employer from violating N.I.R.A.); *Cole v. Atlanta Terminal Co.*, 15 F. Supp. 131 (N. D. Ga. 1936) (one group of employees seeking to enjoin another).

stitutes a labor dispute under the anti-injunction statutes.<sup>24</sup> Clearly the decision is in line with both the wording of the Norris-LaGuardia Act and the intent of Congress in enacting it.<sup>25</sup> The results, however, are questionable. It is conceded that the arguments in favor of such a statute and an unrestricted construction of it are powerful. The individual employee has little bargaining power in our modern civilization and, in order to bargain effectively, labor must organize. The complexity of the economic society of today and the integration of industrial units make organization of entire industries necessary in order to be effective.<sup>26</sup> Labor must, to bring about that organization, have freedom to agitate for unionization, to strike and picket for the absorption of the weaker unions by the stronger, and to coerce the individual employee into giving up his "freedom of contract." While such freedom may work hardship on a few employees and employers, the ultimate object of unionization and the consequent equalization of the respective bargaining powers of capital and labor might possibly render the means worthwhile in the light of the end.<sup>27</sup>

The fact remains, however, that the decision in the principal case leaves the door open for great injustice in individual cases. It gives the unions power to monopolize labor and deprive the individual employee of the privilege of contracting for himself.<sup>28</sup> An employer may be forced to stand by and watch his business ruined by a quarrel between two unions in which he takes no part.<sup>29</sup> The scales of bargaining power are so far tilted that the small employer may have all means of livelihood taken from him simply because he is unable to comply with unreasonable union demands.<sup>30</sup> Satisfied employees may be *compelled* to join

<sup>24</sup> Thirteen states have enacted statutes similar in terms to the Norris-LaGuardia Act. COLO. STAT. ANN. (Michie, 1935) c. 97, §78; Idaho Sess. Laws 1933, c. 215; IND. STAT. ANN. (Burns, 1933) §40-501 *et seq.*; LA. GEN. STAT. (Dart, Supp. (1936) §4379.5 *et seq.*; MD. CODE ANN. (Bagby, Supp. 1935) c. 574, §67; Mass. Acts 1935, c. 407; MINN. STAT. (Mason, Supp. 1936) §4260-1 *et seq.*; N. Y. CIVIL PRACTICE (Cahill, Supp. 1936) §876a; N. D. Laws 1935, c. 247; ORE. CODE ANN. (Supp. 1935) §49-1901 *et seq.*; UTAH REV. STAT. ANN. (1933) §49-2-1 *et seq.*; WASH. REV. STAT. ANN. (Remington, 1932) §7612; WIS. STAT. (1935) §103.51 *et seq.* Twelve other states have some form of anti-injunction legislation. ARIZ. REV. CODE ANN. (Struckmeyer, 1928) §4286 *et seq.*; CAL. GEN. LAWS (Deering, 1931) act 1605; ILL. REV. STAT. ANN. (Cahill, 1933) c. 22, §58; KAN. GEN. STAT. ANN. (Corrick, 1935) c. 60, §1104 *et seq.*; Maine Laws 1933, c. 261; MONT. REV. CODE ANN. (Anderson & McFarland, 1935) §9242; N. H. Pub. Laws 1926, c. 380, §27, as amended by N. H. Pub. Laws 1935, c. 46; N. J. REV. STAT. (1937) §2:29-77; OKLA. STAT. (Harlow, 1931) §10878; PA. STAT. (Purdon, 1936) §43-203; R. I. Acts and Resolves 1936, c. 2359; Wyo. Sess. Laws 1937, c. 15, §1.

<sup>25</sup> 75 CONG. REC. 4916, 5483, 5489 (1932).

<sup>26</sup> Note (1927) 40 HARV. L. REV. 896.

<sup>27</sup> FRANKFURTER AND GREENE, *op. cit. supra* note 4, 24-46; Sayre, *Inducing Breach of Contract* (1923) 36 HARV. L. REV. 663, 695; Note (1936) 21 CORN. L. Q. 640; (1936) 35 MICH. L. REV. 340; (1933) 10 N. Y. U. L. Q. REV. 404.

<sup>28</sup> (1937) 6 FORDHAM L. REV. 140.

<sup>29</sup> (1936) 11 WASH. L. REV. 53.

<sup>30</sup> See *Senn v. Tile Layers Protection Union*, 301 U. S. 468, 57 Sup. Ct. 857, 81 L. ed. 1229 (1937), (1937) 16 N. C. L. REV. 38.



an organization in which they are uninterested and to contribute to a cause which they have no desire to further. And, finally, labor disputes may be utilized for objectives other than the furtherance of unionization and collective bargaining.<sup>31</sup>

JAMES D. CARR.

### Mortgages—Absolute Deeds Construed As.

The plaintiffs, needing funds to redeem a mortgage, applied to the defendant, who refused to make the loan on the security of the mortgaged property, but offered to buy it for the amount of the proposed loan (\$7,000) and to give the plaintiffs an option to repurchase within one year. Thereupon the plaintiffs conveyed the property to defendant by an absolute deed; and contemporaneously the defendant executed a contract to reconvey upon the payment of the \$7,000 with interest, the contract to be null and void if not fully complied with. One of the plaintiffs remained in possession, but under the contract they were obligated to pay in addition to interest \$100.00 per month rent for twelve months, and also any sums advanced for insurance, taxes, and repairs. Plaintiffs seek to have the deed and contract declared a mortgage, alleging that they and the defendant both intended the transaction to constitute a loan of money secured by the deed with separate contract to reconvey. Denying that there was any loan or that the purpose and intention of the parties was to create the relationship of creditor and debtor or mortgagor and mortgagee, the defendant claims that since plaintiffs failed to exercise their option, the contract is now null and void. Plaintiffs' motion for judgment on the pleadings was denied; and at the trial it was shown, among other things, that the property was worth between \$17,000 and \$25,000. On the only issue submitted to the jury, whether the two instruments were intended as a security for the loan of money, the judge charged that the evidence must be clear, strong, and convincing to sustain a verdict for plaintiffs. *Held*, (1) the agreement to reconvey being a mere option and plaintiffs, grantors, not being absolutely bound to pay the amount stipulated, there was no relation of creditor and debtor on the face of the written document; hence, they were not entitled to judgment on the pleadings; (2) since it was not an action for reformation but only to show that the two instruments were intended as security, a mere preponderance of evidence was sufficient to support the issue; hence, there was error in the judge's charge.<sup>1</sup>

That an absolute deed given as security will be construed as a mortgage in equity is well settled, although the grounds upon which this relief will be granted vary.<sup>2</sup> Since North Carolina has no public policy

<sup>31</sup> (1932) 18 A. B. A. J. 248.

<sup>1</sup> O'Briant v. Lee, 212 N. C. 793, 195 S. E. 15 (1938).

<sup>2</sup> Sprague v. Bond, 115 N. C. 530, 531, 20 S. E. 709 (1894).

favoring the protection of the grantor in an absolute deed intended as security, in an action to convert such a deed into a mortgage two principles are controlling: "1. It must be alleged and proven that the clause of redemption was omitted by reason of ignorance, mistake, fraud, or undue advantage; 2. the intention (to create a security) must be established, not merely by proof of declarations, but by proof of facts and circumstances, *dehors* the deed, inconsistent with the idea of an absolute purchase."<sup>3</sup>

Where there is an absolute deed with an oral defeasance agreement, the two principles are treated as concurrent prerequisites to relief.<sup>4</sup> Furthermore, in applying these principles the court has laid down the rule that fraud, *etc.*, must be established by clear, strong, cogent, and convincing evidence.<sup>5</sup> However, evidence as to this intention is not admissible until the allegation of fraud, *etc.*, has been sustained.<sup>6</sup> There is one discordant case among those supporting the above propositions, namely, *Fuller v. Jenkins*,<sup>7</sup> where the court held that if the instrument was intended as security it would be held a mortgage, even though it was not shown that the clause of redemption was omitted by reason of fraud, *etc.* However, in the subsequent case of *Williamson v. Rabon*,<sup>8</sup> Hoke, J., in reaffirming the prior holdings of the court, expressly overruled this decision and classified it as an inadvertence, stating: "The principle appearing in *Fuller v. Jenkins* is in direct antagonism to the law of the State, as established by a current of decisions, well nigh from the beginning of the court, certainly as far back as *Streator v. Jones*."<sup>9</sup>

<sup>3</sup> *McLaurin v. Wright*, 37 N. C. 94 (1841); *Allen v. McRae*, 39 N. C. 325 (1846); *Kelly v. Bryan*, 41 N. C. 283 (1849); *Sellers v. Stalcup*, 42 N. C. 13 (1850); *Sowell v. Barrett*, 45 N. C. 50 (1852); *Brown v. Carson*, 45 N. C. 272 (1853); *Cook v. Gudger*, 55 N. C. 172 (1855); *Brothers v. Harrill*, 55 N. C. 209 (1855); *Glisson v. Hill*, 55 N. C. 256 (1855); *Steel v. Black*, 56 N. C. 427 (1857); *Sprague v. Bond*, 115 N. C. 530, 20 S. E. 709 (1894); *Frazier v. Frazier*, 129 N. C. 30, 39 S. E. 634 (1901); *Newton v. Clark*, 174 N. C. 393, 93 S. E. 951 (1917); *Williamson v. Rabon*, 177 N. C. 302, 98 S. E. 830 (1919); *Newbern v. Newbern*, 178 N. C. 3, 100 S. E. 77 (1919). It is interesting to note that many of the cases cite *Streator v. Jones*, 10 N. C. 423 (1824), as being the origin of the two principles. It was, but they were originated by Taylor, C. J., in the dissenting opinion.

<sup>4</sup> See note 3, *supra*; *Streator v. Jones*, 5 N. C. 449 (1810); *McDonald v. McLeod*, 36 N. C. 221 (1840); *Briant v. Corpening*, 62 N. C. 325 (1868); *Egerton v. Jones*, 102 N. C. 278, 9 S. E. 2 (1889); *Norris v. McLam*, 104 N. C. 159, 10 S. E. 140 (1889); *Green v. Sherrod*, 105 N. C. 197, 10 S. E. 986 (1890); *Egerton v. Jones*, 107 N. C. 284, 12 S. E. 434 (1890); *Chilton v. Smith*, 180 N. C. 472, 105 S. E. 1 (1920); *Waddell v. Aycock*, 195 N. C. 268, 142 S. E. 10 (1928).

<sup>5</sup> *Lewis v. Owen*, 36 N. C. 290 (1840); *Franklin v. Roberts*, 37 N. C. 560 (1843); *Blackwell v. Overby*, 41 N. C. 38 (1849); *Elliot v. Maxwell*, 42 N. C. 246 (1851); *Moore v. Ivey*, 43 N. C. 192 (1851); *Culbreth v. Hall*, 159 N. C. 588, 75 S. E. 1096 (1912); *Ray v. Patterson*, 170 N. C. 226, 87 S. E. 212 (1915).

<sup>6</sup> *Streator v. Jones*, 5 N. C. 449 (1810); *Kimborough v. Smith*, 17 N. C. 558 (1834); *McLaurin v. Wright*, 37 N. C. 94 (1841); *Chilton v. Smith*, 180 N. C. 472, 105 S. E. 1 (1920).

<sup>7</sup> 130 N. C. 554, 41 S. E. 706 (1902).

<sup>8</sup> 177 N. C. 302, 98 S. E. 830 (1919).

<sup>9</sup> *Id.* at 306, 98 S. E. at 831.

Where, however, there is an absolute deed accompanied by a written contract or bond to reconvey, or option to repurchase, in contrast to the above situation the question as to the omission of the clause of redemption is not involved. The court in these cases has either passed over the first principle without even noting it,<sup>10</sup> or when mentioning it has stated that it is not applicable.<sup>11</sup> Thus, it is sufficient merely to show that the instruments were intended as security,<sup>12</sup> this constituting the only point in issue, but the evidence must be clear, strong, cogent, and convincing,<sup>13</sup> a mere preponderance not being sufficient.

Regardless of which category a particular case may fall into, the question of how to determine the intent of the parties to create a security is always present. Mere proof of declarations is not sufficient. Factors which the court has considered very persuasive are: the distresses of the maker of the deed,<sup>14</sup> the prior negotiation of the parties,<sup>15</sup> the continued existence of the debt,<sup>16</sup> possession by the grantor without the payment of rent,<sup>17</sup> the payment of interest,<sup>18</sup> the fact that the amount advanced was the exact amount that the grantor needed to pay an existing indebtedness,<sup>19</sup> and the gross inadequacy of the price.<sup>20</sup> While none of these alone is conclusive of the issue, nevertheless, a combination of several will go a long way in showing that the deed was in fact intended as a mortgage, and the relative weight to be given each may vary with the case depending on the attendant circumstances. In this connection

<sup>10</sup> *Wilcox's Heirs v. Morris*, 5 N. C. 116 (1806); *Gillis v. Martin*, 17 N. C. 470 (1833); *Mason v. Hearne*, 45 N. C. 88 (1852); *Robinson v. Willoughby*, 65 N. C. 520 (1871).

<sup>11</sup> *Hall v. Lewis*, 118 N. C. 509, 24 S. E. 209 (1896); *Watkins v. Williams*, 123 N. C. 170, 31 S. E. 388 (1898); *Porter v. White*, 128 N. C. 42, 38 S. E. 24 (1901); *Perry v. Southern Surety Co.*, 190 N. C. 284, 129 S. E. 721 (1925).

<sup>12</sup> See notes 10 and 11, *supra*.

<sup>13</sup> *Waters v. Crabtree*, 105 N. C. 394, 11 S. E. 240 (1890); *Porter v. White*, 128 N. C. 42, 38 S. E. 24 (1901). Accord: *Ray v. Patterson*, 170 N. C. 226, 87 S. E. 212 (1915).

<sup>14</sup> *Blackwell v. Overby*, 41 N. C. 38 (1849).

<sup>15</sup> *Kimborough v. Smith*, 17 N. C. 558 (1834); *Blackwell v. Overby*, 41 N. C. 38 (1849).

<sup>16</sup> *Robinson v. Willoughby*, 65 N. C. 520 (1871); see *Sprague v. Bond*, 115 N. C. 530, 533, 20 S. E. 709, 710 (1894).

<sup>17</sup> *Blackwell v. Overby*, 41 N. C. 38 (1849); *Sellers v. Stalcup*, 42 N. C. 13 (1850); *Kemp v. Earp*, 42 N. C. 167 (1850); *Steel v. Black*, 56 N. C. 428 (1857); *Culbreth v. Hall*, 159 N. C. 588, 75 S. E. 1096 (1912).

<sup>18</sup> See *Lewis v. Owen*, 36 N. C. 290, 297 (1840).

<sup>19</sup> *Kimborough v. Smith*, 17 N. C. 558 (1834); *Kemp v. Earp*, 42 N. C. 167 (1850).

<sup>20</sup> *Wilcox's Heirs v. Morris*, 5 N. C. 116 (1806); *Streator v. Jones*, 10 N. C. 423 (1824); *Kimborough v. Smith*, 17 N. C. 558 (1834); *McDonald v. McLeod*, 36 N. C. 221 (1840); *McLaurin v. Wright*, 37 N. C. 94 (1841); *Blackwell v. Overby*, 41 N. C. 38 (1849); *Sellers v. Stalcup*, 42 N. C. 13 (1850); *Kemp v. Earp*, 42 N. C. 167 (1850); *Elliot v. Maxwell*, 42 N. C. 246 (1851); *Moore v. Ivey*, 43 N. C. 192 (1851); *Steel v. Black*, 56 N. C. 428 (1857); *Sprague v. Bond*, 115 N. C. 530, 20 S. E. 709 (1894); Note (1934) 90 A. L. R. 953 (value of property as factor in determining whether deed intended as mortgage).

it is worth while to note that in doubtful cases the court likely will lean toward the conclusion that a security was meant rather than a sale, because this subserves the ends of abstract justice and averts injurious consequences.<sup>21</sup>

The principal case clearly falls into the second category above. Thus, the holding of the court that a mere preponderance of evidence is sufficient to establish the intention of the parties is clearly contrary to the established rule. Even under the true rule as to the quantum of proof, the prior negotiations of the parties, the fact that the sum advanced was the approximate sum that the plaintiffs needed to prevent the consummation of the foreclosure, the necessitous circumstances of the plaintiffs, their unwillingness to allow the then pending foreclosure sale to become complete, and the gross inadequacy of the price, together with the fact that one of the plaintiffs remained in possession, even though under the option to repurchase, are sufficient to justify a finding that the transaction was intended as security.

Conceding that an absolute deed with a separate option to repurchase<sup>22</sup> should not as a matter of law or equity be construed as a mortgage, still such transactions should be closely scrutinized in order to avoid the obvious danger of imposition on a distressed borrower. If the debtors in the instant case pay, the creditor not only gets the principal but also usury in the guise of rent. Whereas, if the debtors do not redeem, the creditor gets property the value of which is greatly in excess of the amount of the loan. In all cases where the transaction is determined to be a mortgage, the rent payments should be allowed in reduction of the principal, otherwise the usury statute is evaded.

WM. R. DAWES.

### Workmen's Compensation—The Status of the Deputy Sheriff in North Carolina.

In speaking of the deputy sheriff the North Carolina court has said, "the deputy is an officer coeval in point of antiquity with the sheriff."<sup>1</sup> However, despite the antiquity of his office, two recent cases illustrate the uncertainty still existent as to his exact legal status.<sup>2</sup> Both cases grew out of proceedings to determine whether or not a fee deputy comes

<sup>21</sup> *Watkins v. Williams*, 123 N. C. 170, 175, 31 S. E. 388, 390 (1898); *Perry v. Southern Surety Co.*, 190 N. C. 284, 291, 129 S. E. 721, 724 (1925).

<sup>22</sup> Note (1932) 79 A. L. R. 937 (deed absolute on its face, with contemporaneous agreement of option for repurchase by grantor, as a mortgage *vel non*).

<sup>1</sup> *Lanier v. Greenville*, 174 N. C. 311, 316, 93 S. E. 850, 853 (1917).

<sup>2</sup> *Borders v. Cline*, 212 N. C. 472, 193 S. E. 826 (1937); *Styers v. Forsyth County*, 212 N. C. 558, 194 S. E. 305 (1937).

within the purview of the North Carolina Workmen's Compensation Act.<sup>3</sup> Both decisions were reached by a four to three majority.<sup>4</sup>

While the two cases were decided at the same term and reach the same result, they proceed upon somewhat different theories.

Justice Winborne, writing the opinion in *Borders v. Cline*,<sup>5</sup> first discusses whether or not a deputy comes within the meaning of the term "employment" as defined in the Workmen's Compensation Act. He concludes that a deputy is not so included because his employment does not fall into one of the enumerated categories of the act, *i.e.*, "employment by the State, and all its political subdivisions thereof and all public and quasi-public corporations therein and all private employments."<sup>6</sup> Reaching such a conclusion would seem to obviate the determination of any further questions; however, the opinion continues with a discussion of the historic status of a fee deputy reaching the result that he is *not* an employee of the sheriff. While no definite stand is taken on the specific

<sup>3</sup>For an excellent discussion of the sheriff and deputy in North Carolina see Gardner, *The Structure and Organization of the Sheriff's Office in North Carolina* (1936) Pop. Gov't, Guidebook Series no. 8.

While cases involving the question as to whether a deputy sheriff is entitled to workmen's compensation are rare the following show a diversity of authority: *Monterey County v. Rader*, 199 Cal. 221, 248 Pac. 912 (1926) (A deputy sheriff, who is not appointed for his own convenience [*i.e.*, to serve a personal interest] is entitled to the benefits of the compensatory provisions of the act.); *Bowden v. Cumberland County*, 123 Me. 359, 123 Atl. 166 (1924) (A deputy sheriff acting as a court officer does not exercise an executive function under the executive department of the state, nor is he an "employee" of any department relative to workmen's compensation.); *Curran v. Delta County*, 230 Mich. 646, 203 N. W. 470 (1925) (Special deputy was awarded compensation against the county when killed while attempting to capture an escaped convict.); *Milliard County v. Industrial Commission*, 62 Utah 46, 217 Pac. 974 (1923) (Sheriff's assistant employed to capture escaped prisoner held an employee of the county within workmen's compensation provisions.); *Board of Sup'rs v. Lucas*, 142 Va. 84, 128 S. E. 574 (1925) (A deputy sheriff, enforcing prohibition act for fees connected therewith held not an employee of the county within the meaning of the workmen's compensation act.); *Nix v. Dep't of Labor and Industries*, 186 Wash. 651, 59 P. (2d) 740 (1936) (Discharged deputy who retained commission and acted as special deputy on special assignments and who was paid by parties requesting services, held not "salaried" peace officer of county and not entitled to workmen's compensation.).

<sup>4</sup>Justice Devin, writing the dissenting opinion in the *Cline* case, uses the following arguments: (1) That the comprehensive language of the workmen's compensation act and the statutory definitions of the terms "employment," "employer" and "employee" are sufficiently broad to embrace the service or employment of the sheriff's deputies. (2) The amendment to the act allowing sheriffs to exempt themselves from its terms shows the legislative intent that deputies be included. (3) The Industrial Commission has always ruled that the sheriff's deputies are within the act and the sheriff in this case had taken out insurance under the act on the assumption that the deputy was an employee. (4) The fact that the fees received by the deputy are not usually paid to him by the sheriff should not be held controlling, for the reason that compensation for his service is received by him by virtue of his appointment and employment by the sheriff in whose name alone he is empowered to act. (5) The deputy renders valuable service to the public and his services involve great danger to himself.

<sup>5</sup>212 N. C. 472, 193 S. E. 826 (1937).

<sup>6</sup>N. C. CODE ANN. (Michie, 1935) §8081(i).

point, the court quotes with approval an authority to the effect that a deputy is a public officer.<sup>7</sup>

The court in *Styers v. Forsyth County*, speaking through Chief Justice Stacy, decides that a fee deputy is not an employee of the county because, "The commissioners exercise no control or supervision over fee deputies."<sup>8</sup> The holding of the *Cline* case is affirmed to the effect that the deputy is not an employee of the sheriff, and it is added that he "acts as vice principal or *alter ego* of the sheriff."<sup>9</sup> Past decisions in which the North Carolina court has given to the deputy such appellations as "employee,"<sup>10</sup> "agent,"<sup>11</sup> and "servant"<sup>12</sup> are distinguished on the ground that those cases involved merely the liability of the sheriff to third parties for tortious acts of the deputy and not the relationship of the deputy to the sheriff. The court leaves open the question whether a salaried deputy, under the control and supervision of the county, would be considered one of its employees for purposes of workmen's compensation.

From the two instant cases it is apparent that the status of a fee deputy is a peculiar, if not unfortunate one. Although appointed by the sheriff, drawing his authority from him, and acting under his orders, he is neither employee nor agent of the sheriff. While on the other hand, although he acts with county wide authority and is often paid by fees from the county treasury, he is not, for purposes of workmen's compensation, an employee or agent of the county. His sorrowful plight is aptly characterized by Justice Devin in his dissent in the *Styers* case, "The holding of this court that the deputy sheriff is an employee neither of the county nor the sheriff leaves his employment status as a species of *nullius in law*—he is employed by nobody—yet he serves."<sup>13</sup>

For over a hundred years the North Carolina court has had occasion to examine and determine the status of the deputy sheriff. And in cases involving the liability of the sheriff for wrongful acts of the deputy the court has consistently referred to their relationship as one of principal and agent. Accordingly it has been held that an action for false imprisonment will lie against the sheriff for an illegal arrest by his deputy,<sup>14</sup> the sheriff is liable for the failure of his deputy to col-

<sup>7</sup> 212 N. C. 472, 476, 193 S. E. 826, 829, "It is said in 57 C. J., 731, sec 4, 'A deputy is the deputy, of the sheriff, one appointed to act ordinarily for the sheriff and not in his own name, person or right, and although ordinarily appointed by the sheriff, is considered a public officer.'"

<sup>8</sup> 212 N. C. 558, 561, 194 S. E. 305, 306 (1937).

<sup>9</sup> *Id.* at 564, 194 S. E. at 308.

<sup>10</sup> *Cansler v. Penland*, 125 N. C. 578, 34 S. E. 683 (1899).

<sup>11</sup> *Horne v. Allen*, 27 N. C. 36 (1844).

<sup>12</sup> *Hampton v. Brown*, 35 N. C. 18 (1851).

<sup>13</sup> *Styers v. Forsyth County*, 212 N. C. 558, 565, 194 S. E. 305, 309 (1937).

<sup>14</sup> *Spencer v. Moore*, 19 N. C. 264 (1837).

lect a debt,<sup>15</sup> trespass by the deputy gives rise to an action against the sheriff,<sup>16</sup> where money has been collected by the deputy a demand upon him is equivalent to a demand upon the sheriff,<sup>17</sup> admissions or declarations of the deputy may be used in evidence against the sheriff,<sup>18</sup> and the sheriff is held liable for a false return by his deputy.<sup>19</sup>

Cases not involving the tortious acts of the deputy also proceed upon the agency doctrine. For example it was held that a deputy could not maintain trover or trespass for goods seized on execution and taken from him by another, because, said the court, "he is merely the servant of his superior and holds for him."<sup>20</sup> And where the sheriff was removed from office upon official ascertainment of his insanity the agency of his deputies was held to be terminated.<sup>21</sup>

In *Jamesville and Wash. R. R. v. Fisher*,<sup>22</sup> the court in holding that a sheriff could appoint a minor as his deputy, used language which seems strongly to indicate that the law of agency should apply to *all* sheriff-deputy relations. The court stated, "Thus in every way, the courts of this country have, in the absence of specific statutory provisions, adjusted the powers of sheriffs and their deputies, *and their liability to the public and to each other* according to the rules which determine the duties and responsibility of principal and agent."<sup>23</sup> Further language in the case indicates the feeling of the court that the employment of the deputy is of a private status. The court added, "the courts . . . have recognized the right of the sheriff to select such agents for the discharge of mere ministerial duties as an individual could appoint and constitute for the transaction of private business."<sup>24</sup>

From a review of the above cases it can be readily seen that the court in the *Borders* and *Styers* cases would have had little trouble in holding the deputy to be an employee of the sheriff. However, such a decision would have done nothing toward allowing him compensation in view of the court's finding that his employment was not within the purview of the act. This decision would also seem to exclude clerical assistants of the sheriff from enjoying the benefits of compensation.

The inclusion of the fee deputy within the scope of workmen's compensation would accomplish a socially desirable result. The legislature should enact an amendment including *all* deputies and clerical assistants of the sheriff.

HARRY LEE RIDDLE, JR.

<sup>15</sup> *State v. Roane*, 24 N. C. 144 (1841); *McClellan v. Buchanan*, 53 N. C. 444 (1862).

<sup>16</sup> *Satterwhite v. Carson*, 25 N. C. 549 (1843).

<sup>17</sup> *Lyle v. Wilson*, 26 N. C. 227 (1844).

<sup>18</sup> *Horne v. Allen*, 27 N. C. 36 (1844).

<sup>19</sup> *Martin v. Martin*, 47 N. C. 285 (1855).

<sup>20</sup> *Hampton v. Brown*, 35 N. C. 18, 20 (1851).

<sup>21</sup> *Somers v. Comm'rs*, 123 N. C. 582, 31 S. E. 873 (1898).

<sup>22</sup> 109 N. C. 1, 13 S. E. 698 (1891).

<sup>23</sup> *Id.* at 5, 13 S. E. at 700.

<sup>24</sup> *Id.* at 6, 13 S. E. at 700.