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NOTES AND COMMENTS

Contracts—Priority of Successive Assignments by a Common Assignor.

X Co. entered into a contract with a town for the construction of a water and sewerage system. It assigned to its surety all payments due and to become due from the town to secure the surety from loss on performance bonds given by *X* Co. for this and other construction projects. Later *X* Co. assigned the same monies to *P* to secure a loan. Before making the loan and accepting the assignment *P* inquired of the town and was told that there were no previous assignments. *P* gave notice to the town of its assignment before any notice was given by the surety. Later, *P* brings an action against the town for the money

in its possession due *X* Co. The surety claims the money under the terms of its assignment because of loss on a performance bond of *X* Co. covering another construction job. *Held, P* is entitled to the money.[1]

This case presents the question of which of successive assignees from a common assignor is entitled to the proceeds of a claim embraced by both assignments. Title to a chose in action derived through assignment was at first recognized only by courts of chancery.[2] And even when such a title is enforced in a court of law, it retains the incidents resulting from its equitable origin.[3] But either assignee, at least when he takes without notice of rights in other persons and gives value, will prevail over the other if he: (1) collects the money assigned,[4] (2) recovers judgment against the debtor on the assigned claim,[5] (3) secures a contract whereby the debtor promises to pay him the money covered by the assignment,[6] or (4) obtains possession of the writing evidencing the obligation assigned if this writing be of a required type.[7]

[1] Bank of Northampton v. Jackson, 214 N. C. 582, 200 S. E. 444 (1939). The decision seems to have been partly based upon the following grounds: (1) The town became independently bound to pay the plaintiff without notice of prior assignments. (2) Since the construction contract stipulated against assignments without the consent of the town the assignment to the surety, being without this consent, is invalid. But *cf.* Fortunato v. Patten, 147 N. Y. 277, 41 N. E. 572 (1895). (3) The court also seemed to suggest that the plaintiff was subrogated to the rights of the town because the money loaned was used to aid the completion of the construction project. *Contra:* Standard Oil Co. v. Powell Paving & Contracting Co., 139 S. C. 411, 138 S. E. 184 (1927); see note (1934) 43 YALE L. J. 1135, 1143. But, as a whole, the opinion seemed to treat the case as involving primarily the question of priority of successive assignments of a chose in action.

[2] See Wallston v. Braswell, 54 N. C. 138, 139 (1853); Holdsworth, *Choses in Action by the Common Law* (1920) 33 HARV. L. REV. 997, 1021.

[3] See 2 WILLISTON, CONTRACTS (rev. ed. 1936) 1297, 1298.

[4] Rabinowitz v. People's Nat. Bank, 235 Mass. 102, 126 N. E. 289 (1920). But *cf.* Thigpen v. Horne, 36 N. C. 20 (1840). *Contra:* Superior Brassiere Co. v. Zimetbaum, 214 App. Div. 525, 212 N. Y. Supp. 473 (1st Dep't 1925).

[5] Judson v. Corcoran, 17 How. 612, 15 L. ed. 231 (U. S. 1855); Mack Mfg. Co. v. Mass. Bonding & Ins. Co., 114 S. C. 207, 103 S. E. 499 (1919).

[6] Burck v. Taylor, 152 U. S. 634, 14 Sup. Ct. 696, 38 L. ed. 578 (1894); *cf.* Bank of Dallas v. McCanless, 199 N. C. 360, 154 S. E. 621 (1930).

[7] Graham Paper Co. v. Pembroke, 124 Cal. 117, 56 Pac. 627 (1899) (book accounts); Coffman v. Liggett's Adm'r, 107 Va. 418, 59 S. E. 392 (1907) (insurance policy). It would seem, on principle, that the writings which confer "legal title" upon transfer, thereby allowing *either* assignee who is the transferee to prevail, should be limited to negotiable instruments where the promise of the debtor runs to the assignee; to specialties where the writing *is*, as well as represents, the contract, AMES, CASES ON TRUSTS (2d ed. 1893) 328; or, at the most, to other indispensable documents surrender of which is a condition precedent to the debtor's obligation to pay, Glenn, *Assignments of Choses in Action* (1934) 20 VA. L. REV. 621, 627. Numerous other types of writings have been held to confer a superior title on a *subsequent* assignee when he gains possession of them. Security Mortgage Co. v. Delfs, 47 Cal. App. 599, 191 Pac. 53 (1920) (note and mortgage); Bridge v. Wheeler, 152 Mass. 343, 25 N. E. 612 (1890) (life insurance policy); Washington Township v. First Nat. Bank of Huntington, 147 Mich. 571, 111 N. W. 349 (1907) (construction contract and municipal order); Greeley County v. First Nat. Bank of Cozad, 126 Neb. 872, 254 N. W. 502 (1934) (county's acknowledgment of claim against it); see Maybin v. Kirby, 4 Rich.

In these situations the assignee, having acquired a *legal* right in good faith and for value, takes free from the equities of other persons.[8]

But in the principal case, neither assignee having become a bona fide purchaser of a legal right, it is necessary to determine whose equities will prevail. The great bulk of the cases can be grouped into two classes for purposes of this problem. First, there are cases which give priority to the assignee who first procures his assignment.[9] The rationale for such a rule is that the first assignment conveys to the first assignee all the rights of the assignor against the debtor to the funds, leaving nothing a subsequent assignee can acquire except rights *in personam* against his assignor.[10] Secondly, there are cases which prefer the assignee who first notifies the debtor or obligor of his assignment.[11] The rationale for this rule is that the assignment is incomplete and imperfect, conveys no property interest at all, and is of no force against the debtor or subsequent assignees until notice is given to the debtor.[12] But under either view, an assignee who would otherwise prevail may lose his priority because of conduct which gives rise to an estoppel.[13] In a comparatively recent decision[14] of the Supreme Court of the United States the possibility of a third and compromise rule was suggested. This view,[15] although taking the

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Eq. Cas. 105, 114 (S. C. 1851) (stock script). But since the basis for so holding is that the prior assignee is negligent in leaving such writings in the possession of the assignor thereby inducing subsequent assignees to rely on the assignor's apparent ownership, the possession of such writing by a prior assignee should not, in itself, make his title superior to that of a subsequent assignee.

[8] AMES, CASES ON TRUSTS (2d ed. 1893) 328; 2 WILLISTON, CONTRACTS 1261.

[9] White v. Wiley, 14 Ind. 495 (1860); Talbot v. Cook, 23 Ky. 438 (1828); Putnam v. Story, 132 Mass. 205 (1882); Fortunato v. Patten, 147 N. Y. 277, 41 N. E. 572 (1895); Forsythe v. Fisher, 20 W. Va. 497 (1882); 2 WILLISTON, CONTRACTS §435.

[10] See Salem Trust Co. v. Manufacturer's Finance Co., 264 U. S. 182, 192, 44 Sup. Ct. 266, 268, 68 L. ed. 628, 632 (1923); Columbia Finance Co. v. First Nat. Bank, 116 Ky. 364, 375, 76 S. W. 156, 158 (1903).

[11] Graham Paper Co. v. Pembroke, 124 Cal. 117, 56 Pac. 627 (1899); Lambert v. Morgan, 110 Md. 1, 72 Atl. 407 (1909); Murdock v. Finney, 21 Mo. 138 (1855); Philip's Estate, 205 Pa. 515, 55 Atl. 213 (1903); Clodfelter v. Cox, 1 Sneed 330 (Tenn. 1853); 2 WILLISTON, CONTRACTS §435.

[12] See cases cited *supra* note 11. Because this rationale seems to beg the question, the following cases suggest additional reasons that are often given. Philip's Estate, 205 Pa. 515, 55 Atl. 213 (1903) (notice prevents fraud on subsequent assignees by the creditor); Dearle v. Hall, 3 Russ. 1 (Ch. 1823) (failure to give notice clothes the assignor with "apparent possession"). It would seem that these reasons serve to support the third rule.

[13] Commercial Investment Trust Co. v. Bay City Bank, 62 F. (2d) 735 (C. C. A. 6th, 1933); Herman v. Connecticut Mutual Life Ins. Co., 218 Mass. 181, 105 N. E. 450 (1914); see cases cited *supra* note 7.

[14] Salem Trust Co. v. Manufacturer's Finance Co., 264 U. S. 182, 44 Sup. Ct. 266, 68 L. ed. 628 (1923), following the dissenting opinion in 280 Fed. 803, 806 (C. C. A. 1st, 1922). The Supreme Court in this case definitely rejected the second rule. Whether it adopted the first or the third rule is a matter of speculation.

[15] *Cf.* Houser v. Richardson, 90 Mo. App. 134 (1901); Moorestown Trust Co. v. Buzby, 109 N. J. Eq. 409, 157 Atl. 663 (1931); see *In re* Gillespie, 15 Fed.

position that the rights against the debtor are vested in the assignee at the time of the assignment contract rather than at the time of notice to the debtor, makes failure[16] to notify the debtor negligence on the part of the assignee, and, when the subsequent assignee takes only after inquiry of the debtor as to previous assignments, estops the prior assignee to contest the validity of the later assignment. Although the cases applying the first rule recognize the possibility of an estoppel,[17] it is implicit in these cases that failure to give notice is not such conduct as will give rise to one;[18] and the cases adopting the second rule go too far to allow their results to be explained on estoppel alone.[19]

Of the three tests for deciding priority, the first seems to be preferable. It has the advantage of being simple to understand and to apply. However, it is undesirable in that an assignee is always subject to losing his rights to prior assignees, there being no way he can assuredly discover the existence of such persons. Because of this risk the assignee is apt to be unwilling to pay much for the claim, the creditor is therefore less willing to sell, and commerce suffers because contract rights are less marketable. But this objection can be alleviated in part if the parties to the contract giving rise to the claim create that type[20] of written evidence of the obligation which, upon transfer, will enable the assignee to acquire a "legal right" and consequently be free from undisclosed equities in third persons.

The second rule has the advantage of instilling a greater feeling of security in the assignee. Its requirement of notice is one that a prudent man would ordinarily observe in order to prevent the debtor from settling with the creditor-assignor.[21] But it has the disadvantage of unduly penalizing the assignee for failing to give notice to the debtor. Even assuming that failure on the part of the prior assignee to give notice to the debtor is negligence toward the interests of subsequent assignees, it seems unduly harsh to allow them to take advantage of this negli-

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734, 736 (S. D. N. Y. 1883); Wilson v. Duncan, 61 F. (2d) 515 (C. C. A. 5th, 1932); Bishop v. Holcomb, 10 Conn. 444, 446 (1835); Board of Education v. Zinc, 101 N. J. Eq. 78, 83, 137 Atl. 713, 715 (1927); note (1924) 24 COL. L. REV. 501, 507.

[16] Being based on negligence, the application of this rule would probably allow a prior assignee to prevail even when a subsequent assignee both made inquiry and gave prior notice, provided the prior assignee did not, under the circumstances, delay an unreasonable time in giving his notice. *Cf.* Feltham v. Clarke, 1 De G. & S. 307 (Ch. 1847); see Bishop v. Holcomb, 10 Conn. 444, 446 (1835) (prior assignee must give notice within a *reasonable* time); note (1924) 24 COL. L. REV. 501, 508.

[17] See cases cited *supra* note 13.

[18] See BOGERT, TRUSTS AND TRUSTEES (1935) 557.

[19] That is, the rule does not take into account the element of inquiry by subsequent assignees. Meux v. Bell, 1 Hare 73 (Ch. 1841).

[20] See note 7, *supra.*

[21] See King v. Lindsay, 38 N. C. 77, 80 (1843).

gence when they are not injured by it—*i.e.*, when they fail to inquire of the debtor before securing their assignments. Conversely, when no notice has been given by the prior assignee at the time the subsequent assignee gives value on the strength of this appearance, it seems unjust to subordinate his claim to that of the prior assignee merely because, subsequently, the latter was the first to give notice of his assignment. Prior assignees could not possibly be injured by the failure of a subsequent assignee to notify the debtor. That these arguments are given some force by the court is seen in the decisions holding that a prior assignee will prevail over a subsequent garnishing creditor even though the former did not give notice until after the garnishment,[22] and that a prior assignee who failed to give notice will prevail over a subsequent assignee who did, if the former gave value and the latter did not.[23]

The third rule, although inferior to the second in that it introduces the additional factor of inquiry,[24] seems, as a whole, preferable to the second rule in that it avoids the defect of conferring an undeserved windfall. But both have serious objections arising from the necessity for giving notice which make them less desirable than the first. What is notice and how must it be given? Can it be constructive, or must it be actual? Does the debtor have to acquire knowledge, or will an attempt on the part of the assignee to confer knowledge be sufficient?[25] If so, what kind of an attempt?[26] If the debtor has to acquire knowledge does the assignee have to be the cause of such receipt, or can it be acquired casually or accidentally?[27] When must such notice be given? Can it be given to the debtor before he becomes obligated on the assigned claim, or must it be given afterwards?[28] Does it have to be given after the assignment is completed, or can the notice be given prospective to the assignment? Difficulties such as these in the application of a rule

[22] Blue Pearl Granite Co. v. Merchant's Bank, 172 N. C. 354, 90 S. E. 312 (1916).

[23] The Elmbank, 72 Fed. 610 (N. D. Cal. 1896).

[24] It is a legitimate, if not a necessary, inference that a duty to give notice presupposes a duty on subsequent purchasers to make inquiry. See Salem Trust Co. v. Manufacturer's Finance Co., 280 Fed. 803, 814 (C. C. A. 1st, 1922) (dissenting opinion); King v. Lindsay, 38 N. C. 77, 80 (1843). If this duty to inquire exist, then the rule that a subsequent assignee who acquires a "legal right" will prevail must be conditioned upon the later purchaser making inquiry, provided notice was given by the earlier assignee. The duty to inquire charging him with knowledge of all that such inquiry would have revealed, the subsequent assignee would not be a purchaser without notice.

[25] *In re* Leterman, Becher & Co., 260 Fed. 543 (C. C. A. 2d, 1919) (debtor must receive knowledge); Feltham v. Clarke, 1 De G. & S. 307 (Ch. 1847) debtor need not receive knowledge in all cases).

[26] Feltham v. Clarke, 1 De G. & S. 307 (Ch. 1847) assignee must do all in his power toward giving notice).

[27] Barron v. Porter, 44 Vt. 587 (1872) (debtor must receive knowledge through the procurement of the assignee).

[28] Somerset v. Cox, 33 Beav. 634 (Rolls Ct. 1865) (must be given after the obligation is incurred).

requiring notice can be multiplied.[29] This requirement of notice practically destroys the concept of assignability. Even without this concept a third party can succeed to the rights of an obligee by novation. If assignability is conditioned upon notice its recognition in the law is of scant utility. For it is but little more trouble, and much safer,[30] to effect a novation than it is to give notice.

The North Carolina cases before the principal case did little to clarify the rule governing assignments in this state. Probably the most direct authority on the point is *Thigpen v. Horne*,[31] which applies the first rule. In that case a prior assignee was preferred over a subsequent assignee even though the latter had collected[32] the proceeds of the assigned claim. Although the court said nothing about notice to the debtor being given by either assignee, it must have been thought irrelevant, for the opinion was written as a guide for the court below at a new trial. The problem involved in the case of *Lindsay v. Wilson*[33] which, because of its language, is also cited as authority for the first rule is distinguishable from the problem before us in that the second assignment, by its terms, was made subject to the prior one, and the subsequent assignee had notice of the prior assignment. *Richmond County v. Page Trust Co.*,[34] where the court preferred a prior assignee without discussion of notice to the debtor, is distinguishable in that the decision was on a ruling to a demurrer and the prior assignee alleged the second assignment was fraudulent. The case of *Wallston v. Braswell*,[35] which seems to adopt the second rule, is distinguishable in that the assignment was of a legacy and the second assignee, who prevailed over an earlier one who failed to give notice, was the executor. The so-called assignment being to the executor in his official capacity, this case comes within the

[29] See WHITE & TUDOR, LEADING CASES IN EQUITY (4th Amer. ed. 1877) 1584 *et seq.*; Firth, *The Rule in Dearle v. Hall* (1895) 11 L. Q. REV. 337; note 66 L. R. A. 760, 770 (1905).

[30] There is the risk that the notice given may not be sufficient in the case of an assignment.

[31] 36 N. C. 20 (1840). As far as the bare holding is concerned the case might be reconciled with all three rules. It may be said that under all three rules notice is irrelevant when neither assignee gives "value". Under the first rule notice is never relevant. Under the second rule it has been held that the prior assignee prevails even when he gives notice last if neither assignee gave value. Sloper v. Cottrell, 6 E. & B. 497 (Q. B. 1856). Under the third rule the negligent failure of a prior assignee to give notice can no more injure a subsequent assignee who fails to give value than one who fails to make inquiry. In this North Carolina case the consideration for each assignment was a pre-existing debt.

[32] It is stated that the fact that neither assignee gave value does not prevent the assignee who acquires "legal title" from prvailing. 2 WILLISTON, CONTRACTS, §435. Even though one disagree with the decision because of the fact that the subsequent assignee collected the proceeds, in reaching the result that it did the major premise of the court was that the prior assignee would be entitled to the proceeds if they were in the hands of the debtor, and that is the point in which we are interested.

[33] 22 N. C. 85 (1838).

[34] 195 N. C. 545, 142 S. E. 786 (1928).

[35] 54 N. C. 137 (1853).

rule[36] which protects an obligor, here the executor, who without notice of an assignment enters into a contract with his obligee, the assignor here, whereby the terms of the original agreement are altered. Treating the agreement with the executor as an assignment to him, as the court did, the case is also authority for the third rule. The assignee being the obligor, the equivalent of inquiry was naturally present. Language can be found in other cases tending to support both the first and second rules.[37]

The principal case, also, so far as it attempts to determine the priority of successive assignments alone, does little to state which rule is law in North Carolina. Although the opinion would reject the first rule, it is still authority for either the second or the third rules. While the prior assignee lost because he was last to give notice, the subsequent assignee, before taking the assignment, had made inquiry, and it can be said that the former lost because he negligently injured the later assignee. Another factor in the case which, although not discussed by the court, seems important is that both of the assignments were for the purposes of security. Such being the case, they should have been governed by the recordation statute[38] applicable to mortgages of personal property.

WILLIAM R. DALTON, JR.

Federal Courts—Jurisdictional Amount in Cases of Injunction against Enforcement of Licensing Acts.

Plaintiff, a photographer, sued in the United States District Court for the Northern District of Georgia to enjoin the enforcement of a Georgia statute requiring the licensing of photographers. The amount of the license fee then due was less than $3,000, but the plaintiff sought to establish jurisdictional amount by a showing that the total volume of his business in the state was in excess of $5,000. It was held that the court was without jurisdiction, the business not being impaired to the extent of $3,000. The amount of the fee and the nature of the penalty for noncompliance were not specified.[1]

The district courts have original jurisdiction of suits at law or in equity when such suits arise under the United States Constitution, laws

[36] Assignees take subject to defenses between the original parties, obligor and obligee, arising before notice of the assignment to the obligor. North Carolina Bank & Trust Co. v. Williams, 201 N. C. 464, 160 S.E. 484 (1931).

[37] See Perry v. Merchants Bank of New Bern, 70 N. C. 309, 315 (1874) (first rule); Motz v. Stowe, 83 N. C. 434, 439 (1880) (second rule); Blue Pearl Granite Co. v. Merchants Bank, 172 N. C. 354, 359, 90 S. E. 312, 314 (1916).

[38] N.C.CODE ANN. (Michie, 1935) §3311; Sneeden v. Nurnburger's Market, 192 N. C. 439, 135 S. E. 328 (1926); Bundy v. Commercial Credit Co., 202 N. C. 604, 163 S. E. 676 (1932).

[1] Connor v. Rivers, 25 F. Supp. 937 (N. D. Ga. 1938).

or treaties, or when there is diversity of citizenship, only if the amount in controversy, that is, the value of the matter in controversy, is in excess of $3,000.[2] This value is measured by the "plaintiff viewpoint" rule, or the value to the plaintiff of the object of the suit.[3] In actions for damages there is usually little difficulty in determining jurisdictional amount, for it is the amount of damages claimed in good faith by the plaintiff.[4] But when an injunction is sought, the problem is less definite. Particularly is this so in cases of injunction against the enforcement of licensing and regulatory legislation.

When a property tax is sought to be enjoined, most courts hold that the amount in controversy is the amount of the tax accrued at the time the action was commenced.[5] When, however, the tax is a license or privilege tax, the rules governing the determination of the amount in controversy are not nearly so well settled. The courts are unable to agree in these cases upon a single concept of what constitutes the object of suit or the matter in controversy. It has been suggested that in this situation there are really two matters in controversy: a primary matter being the right to be free of the particular burden imposed by the regulatory or taxing statute, and a secondary matter being the right to conduct business without any unlawful interference. Some courts designate the value of the primary matter as the amount in controversy; others designate the value of the secondary matter.[6]

Those cases which adopt the value of the secondary matter in con-

[2] REV. STAT. §§563, 639 (1875) as amended, 18 STAT. 470 (1875), 24 STAT. 552 (1887), 25 STAT. 433 (1888), 36 STAT. 1091 (1911), 48 STAT. 775 (1934), 50 STAT. 738 (1937), 28 U. S. C. A. §41(1) (Supp. 1938).

[3] Glenwood Light Co. v. Mutual Light Co., 239 U. S. 121, 36 Sup. Ct. 30, 60 L. ed. 174 (1915); First Nat. Bank of Columbia v. Louisiana Highway Comm. 264 U. S. 308, 44 Sup. Ct. 340, 68 L. ed. 701 (1924); Chicago Board of Trade v. Cella Commission Co., 145 Fed. 28 (C. C. A. 8th, 1906); Bricklayers', Masons', and Plasterers' International Union v. Bowen, 278 Fed. 271 (S. D. Tex. 1922); Adam v. New York Trust Co., 37 F. (2d) 826 (C. C. A. 5th, 1930); Swan Island Club v. Ansell, 51 F. (2d) 337 (C. C. A. 4th, 1931); DOBIE, FEDERAL PROCEDURE (1928) §56.

[4] Smithers v. Smith, 204 U. S. 632, 27 Sup. Ct. 297, 51 L. ed. 656 (1906); Hampton Stove Co. v. Gardner, 154 Fed. 805 (C. C. A. 8th, 1907); O. J. Lewis Mercantile Co. v. Klepner, 176 Fed. 343 (C. C. A. 2d, 1910); Mullins Lumber Co. v. Williamson & Brown Land & Lumber Co., 246 Fed. 232 (C. C. A. 4th, 1917); Ragsdale v. Rudich, 293 Fed. 182 (C. C. A. 5th, 1923); note (1934) 34 COL. L. REV. 311.

[5] Holt v. Indiana Mfg. Co., 176 U. S. 68, 20 Sup. Ct. 272, 44 L. ed. 272 (1900); Eachus v. Hartwell, 112 Fed. 564 (C. C. S. D. Cal. 1901); Purnell v. Page, 128 Fed. 496 (C. C. E. D. N. C. 1903); Turner v. Jackson Lumber Co., 159 Fed. 926 (C. C. A. 5th, 1908); Bank of Arizona v. Howe, 293 Fed. 600 (D. Ariz. 1923). This situation should not be confused with that in which permanent contractual immunity from taxation is claimed, the amount in controversy in the latter situation being the value of the exemption during the life of the corporation, and not merely accrued taxes. Berryman v. Whitman College, 222 U. S. 334, 32 Sup. Ct. 149, 56 L. ed. 225 (1912).

[6] Note (1936) 25 CALIF. L. REV. 336.

troversy as the test of jurisdictional amount[7] are in conflict as to whether to take the value of (a) the right to do business at all or (b) the extent of the injury to the business resulting from the application of the statute. One group of cases, reasoning that a regulation or license tax is imposed on the right to do business, hold that that right itself is disputed and therefore the amount in controversy is the value of the business.[8] This view seems sound as applied to cases in which the tax imposed is prohibitive,[9] for in such a case the right to do business is directly controverted by the tax itself. But the courts have applied the same test in cases where the penalty, and not the tax, would force the plaintiff out of business.[10] In such a situation, this test seems inappropriate, because if payment of the tax were made, no penalty would be inflicted and the plaintiff could continue to operate his business. Unless the tax itself is so exorbitant as to destroy the business, the fact that the penalties for non-payment would have this effect does not seem to justify considering the value of the business as the amount in controversy. In other words, the courts should look to the effect of payment of the tax rather than of non-payment. For, unless payment will destroy the business, the right to do business is not actually disputed, and its value should not be considered the amount in controversy.

Another group of cases, while still employing the "secondary matter" test, take the view that the matter in controversy is the right to be free of the impairment resulting from the application of the statute, and that the amount in controversy is the amount of the injury occasioned

[7] Packard v. Banton, 264 U. S. 140, 44 Sup. Ct. 257, 68 L. ed. 596 (1924); McNutt v. General Motors Acceptance Corp., 298 U. S. 178, 56 Sup. Ct. 780, 80 L. ed. 1135 (1936); American Fertilizing Co. v. Board of Agriculture, 43 Fed. 609 (C. C. E. D. N. C. 1890); Humes v. Little Rock, 138 Fed. 929 (C. C. W. D. Ark. 1898); Southern Express Co. v. Mayor of Ensley, 116 Fed. 756 (C. C. N. D. Ala. 1902); Nutt v. Ellerbe, 56 F. (2d) 1058 (E. D. S. C. 1932); Grandin Farmers' Co-op. Elevator Co. v. Langer, 5 F. Supp. 425 (D. N. D. 1934), *aff'd*, 292 U. S. 605, 54 Sup. Ct. 772, 78 L. ed. 1461 (1934); White Cleaners & Dyers v. Hughes, 7 F. Supp. 1017 (W. D. La. 1934).

[8] Humes v. Little Rock, 138 Fed. 929 (C. C. W. D. Ark. 1898); Southern Express Co. v. Mayor of Ensley, 116 Fed. 756 (C. C. N. D. Ala. 1902); Hutchinson v. Beckham, 118 Fed. 399 (C. C. A. 8th, 1902); Campbell Baking Co. v. Maryville, 31 F. (2d) 466 (W. D. Mo. 1929); McCormick & Co. v. Brown, 58 F. (2d) 994 (S. D. W. Va. 1931); Nutt v. Ellerbe, 56 F. (2d) 1058 (E. D. S. C. 1932); Grandin Farmers' Co-op. Elevator Co. v. Langer, 5 F. Supp. 425 (D. N. D. 1934), *aff'd*, 292 U. S. 605, 54 Sup. Ct. 772, 78 L. ed. 1461 (1934); White Cleaners & Dyers v. Hughes, 7 F. Supp. 1017 (W. D. La. 1934).

[9] Humes v. Little Rock, 138 Fed. 929 (C. C. W. D. Ark. 1898); Campbell Baking Co. v. Maryville, 31 F. (2d) 466 (W. D. Mo. 1929); Grandin Farmers' Co-op. Elevator Co. v. Langer, 5 F. Supp. 425 (D. N. D. 1934), *aff'd*, 292 U. S. 605, 54 Sup. Ct. 772, 78 L. ed. 1461 (1934).

[10] Southern Express Co. v. Mayor of Ensley, 116 Fed. 756 (C. C. N. D. Ala. 1902); Hutchinson v. Beckham, 118 Fed. 399 (C. C. A. 8th, 1902); St. Louis Southwestern Ry. v. Emmerson, 30 F. (2d) 322 (C. C. A. 7th, 1929), *rev'd on other grounds*, 282 U. S. 10, 51 Sup. Ct. 8, 75 L. ed. 135 (1930); Nutt v. Ellerbe, 56 F. (2d) 1058 (E. D. S. C. 1932).

by enforcement of the statute.[11] Under this rule the value of the business is not the test in all cases, but only in those in which the extent of the impairment is equal to the whole value of the business. In this respect it is sounder than the rule making the value of the business the absolute test, for in many cases, only impairment, and not complete destruction will result from enforcement of the statute. However, the same inappropriateness found in that test is also apparent here. Looking to the effect of non-payment rather than of payment, some courts have held that the injury caused by penalties should also be counted in determining the amount in controversy, although payment of the tax would preclude the possibility of impairment due to penalties.[12] Other cases, however, have held that only impairment resulting from payment of the tax is to be considered.[13] If the injury due to penalties is considered, the test in most cases would become the value of the business, as the penalty for non-payment usually includes suppression of the business, so that the right to do business would be controverted, and its value would become the amount in controversy. Consequently, the extent of the injury test would have no application were the effect of non-payment rather than of payment deemed controlling. Under almost all of these cases, capitalization[14] of the amount of the tax for the period within which the injury is threatened is allowed as a part of the extent of the injury, on the theory that the taxing statute will remain on the books and that the plaintiff will continue to be liable therefor.[15]

The confusion experienced by the courts in the application of the "secondary matter" test has been partly responsible for the adoption, especially in more recent cases, of the "primary matter" test, which

[11] Packard v. Banton, 264 U. S. 140, 44 Sup. Ct. 257, 68 L. ed. 596 (1924); McNutt v. General Motors Acceptance Corp., 298 U. S. 178, 54 Sup. Ct. 780, 80 L. ed. 1135 (1936); American Fertilizing Co. v. Board of Agriculture, 43 Fed. 609 (C. C. E. D. N. C. 1890); Jewel Tea Co. v. Lee's Summit, 198 Fed. 532 (W. D. Mo. 1912); Station WBT v. Poulnot, 46 F. (2d) 671 (E. D. S. C. 1931) (This case is peculiar in that the tax was not levied on the plaintiff, but on the owners of radio receiving sets.)

[12] American Fertilizer Co. v. Board of Agriculture, 43 Fed. 609 (C. C. E. D. N. C. 1890); Jewel Tea Co. v. Lee's Summit, 198 Fed. 532 (W. D. Mo. 1912).

[13] Packard v. Banton, 264 U. S. 140, 44 Sup. Ct. 257, 68 L. ed. 596 (1924); McNutt v. General Motors Acceptance Corp., 298 U. S. 178, 56 Sup. Ct. 780, 80 L. ed. 1135 (1936); Station WBT v. Poulnot, 46 F. (2d) 671 (E. D. S. C. 1931).

[14] By "capitalization" is meant the reduction of a series of periodic payments to a single lump sum. Brown v. Erie R.R., 87 N. J. L. 487, 91 Atl. 1023 (1914).

[15] American Fertilizer Co. v. Board of Agriculture, 43 Fed. 609 (C. C. E. D. N. C. 1890); Station WBT v. Poulnot, 46 F. (2d) 671 (E. D. S. C. 1931) (capitalization of the amount of the impairment and not of the tax, as the tax was not levied on the plaintiff). When the tax is to be paid only once, and not annually, the amount of the tax is the amount in controversy. Woodman v. Ely, 2 Fed. 839 (C. C. W. D. Mich. 1880); Douglas Co. v. Stone, 110 Fed. 810 (C. C. W. D. Va. 1901), *aff'd*, 191 U. S. 557, 24 Sup. Ct. 843, 48 L. ed. 301 (1903); Eachus v. Hartwell, 112 Fed. 564 (C. C. S. D. Cal. 1901).

brings the license tax cases more in line with the property tax cases. As the primary matter is the right to be free of the particular burden of tax imposed by the statute, the amount in controversy is the amount of the tax only,[16] and not its capitalized value,[17] or the amount of possible penalties which payment would avoid.[18] As this rule might work hardship in some cases, two opportunities for adjustment were left open in the leading case of *Healy v. Ratta*.[19] It was suggested that in cases where the tax itself was prohibitive, the right to do business should be considered the matter in controversy.[20] This exception seems wise, for in such a case, the "primary matter" test appears too narrow to meet the situation adequately. But it may serve to pave the way for attempts to apply a test similar to the "secondary matter" test in doubtful cases.[21] And this may create more confusion in the decisions. It was also suggested that penalties might be considered as part of the matter in controversy when they had already accrued so that the plaintiff was liable therefor when the action was brought.[22] As a practical matter, this exception seems inadvisable, as it may encourage plaintiffs deliberately to refrain from compliance with the statute until the penalties amounted to $3,000 in order to test the validity of the statute in the federal rather than the state court. However, it is true that when the penalties have accrued, the object of one suit is as much to restrain their enforcement as to restrain collection of the tax.

In license tax cases, the courts will not allow several plaintiffs, all of whom are affected by the tax, to pool the amounts owed by each in order to total the jurisdictional minimum. Pooling of the claims of separate plaintiffs is permissible only when they join to enforce a single right in which they have a common or undivided interest.[23] In license tax cases, the plaintiffs are in no way jointly liable for the amount of

[16] Washington & Georgetown R.R. v. District of Columbia, 146 U. S. 227, 13 Sup. Ct. 64, 36 L. ed. 951 (1892); Healy v. Ratta, 292 U. S. 263, 54 Sup. Ct. 700, 78 L. ed. 1246 (1934); Grosjean v. Musser, 74 F. (2d) 741 (C. C. A. 5th, 1935); Lucas v. Charlotte, 86 F. (2d) 394 (C. C. A. 4th, 1936); Royalty Service Corp. v. Los Angeles, 98 F. (2d) 551 (C. C. A. 9th, 1938).; Crater Lake Nat. Park Co. v. Oregon Liquor Control Comm., 23 F. Supp. 316 (D. Ore. 1938).

[17] Healy v. Ratta, 292 U. S. 263, 54 Sup. Ct. 700, 78 L. ed. 1246 (1934); Grosjean v. Musser, 74 F. (2d) 741 (C. C. A. 5th, 1935).

[18] Healy v. Ratta, 292 U. S. 263, 54 Sup. Ct. 700, 78 L. ed. 1246 (1934); Royalty Service Corp. v. Los Angeles, 98 F. (2d) 551 (C. C. A. 9th, 1938).

[19] 292 U. S. 263, 54 Sup. Ct. 700, 78 L. ed. 1246 (1934).

[20] See Healy v. Ratta, 292 U. S. 263, 269, 54 Sup. Ct. 700, 703, 78 L. ed. 1246, 1253 (1934).

[21] Dugan v. Bridges, 16 F. Supp. 994 (D. N. H. 1936).

[22] See Healy v. Ratta, 292 U. S. 263, 267, 54 Sup. Ct. 700, 702, 78 L. ed. 1246, 1250 (1934).

[23] Troy Bank v. Whitehead Co., 222 U. S. 39, 39 Sup. Ct. 9, 56 L. ed. 81 (1911); see Lion Bonding & Surety Co. v. Karatz, 262 U. S. 77, 86, 43 Sup. Ct. 480, 483, 67 L. ed. 871, 874 (1923); Blume, *Jurisdictional Amount in Representative Suits* (1931) 15 MINN. L. REV. 501.

the tax; therefore, when the claim of none amounts to $3,000, the federal court has no jurisdiction.[24]

When the effect of payment rather than non-payment is considered, the "secondary matter" test may become almost the same as the "primary matter" test. If the tax is prohibitive, the case will fall into the first exception of *Healy v. Ratta,* so that under both tests the value of the business is the amount in controversy.[25] If the tax is not prohibitive, the value of the business should not be deemed the amount in controversy,[26] and the extent of the injury in most cases will be only the amount of the tax. However, there may be incidental results of payment which would be considered as part of the extent of the injury under the "secondary matter" test,[27] but which are not considered under the "primary matter" test; and future taxes are allowed under the former test but not under the latter.[28] On the whole, the adoption of the "primary matter" test would seem advisable, as its application is not attended by so much confusion as is that of the "secondary matter" test. Also, it represents an effort on the part of the federal court to cut down the increasing volume of litigation with which they are burdened and to avoid encroaching upon the jurisdiction of the state courts, especially when the validity of state statutes, municipal ordinances, or orders of state administrative boards is involved.[29]

The court in the principal case did not discuss the reasons for its holding, merely remarking that the business was not impaired to the extent of $3,000. This seems to indicate that the extent of the injury was used as the test of jurisdictional amount. It is suggested that unless there was a showing of impairment incident to payment of the fee other than the amount thereof, the amount of the tax alone would have been a sounder basis for determining jurisdiction.

ELIZABETH SHEWMAKE.

[24] Dewar v. Brooks, 16 F. Supp. 636 (D. Nev. 1936); Dugan v. Bridges, 16 F. Supp. 694 (D. N. H. 1936); Buck v. Case, 24 F. Supp. 541 (W. D. Wash. 1938).

[25] Humes v. Little Rock, 138 Fed. 929 (C. C. W. D. Ark. 1898); Campbell Baking Co. v. Maryville, 31 F. (2d) 466 (W. D. Mo. 1929); see Healy v. Ratta, 292 U. S. 263, 269, 54 Sup. Ct. 700, 703, 78 L. ed. 1246, 1250 (1934).

[26] See note 13, *supra.*

[27] Packard v. Banton, 264 U. S. 140, 44 Sup. Ct. 257, 68 L. ed. 596 (1924) (where the court considered the alleged decreased earning power of trucks due to payment); Station WBT v. Poulnot, 46 F. (2d) 671 (E. D. S. C. 1931) (where the result of the tax would be to decrease the plaintiff's income from advertisers).

[28] Healy v. Ratta, 292 U. S. 263, 54 Sup. Ct. 700, 78 L. ed. 1246 (1934); American Fertilizing Co. v. Board of Agriculture, 43 Fed. 609 (C. C. E. D. N. C. 1890).

[29] See Healy v. Ratta, 292 U. S. 263, 270, 54 Sup. Ct. 700, 703, 78 L. ed. 1246, 1254 (1934); Lucas v. Charlotte, 86 F. (2d) 394, 396 (C. C. A. 4th, 1936).

Insurance—Master and Servant—Construction of Term "Employee" As Used in Robbery and Burglary Policies.

The operator of a window cleaning company contracted with *P* to furnish janitor service to *P's* jewelery store. His workman was instructed to do any other general work which *P* might request of him, but *P* had no right to direct or control him. The *D* company insured *P's* store against robbery, and the policy required the presence of a custodian and at least one other employee at the time of the robbery. When the robbery occurred a regular clerk in *P's* employ and the janitor were in the store. In *P's* action to recover from *D* on the policy the court *held* that the janitor was an "employee" of *P* within the meaning of the insurance policy.[1]

Situations frequently arise where the owner of premises or a business secures another to perform services for him and this contractee has the labor done by one of its workmen. Whether the laborer then becomes an employee of the owner is a question which arises not only in construing the term as used in insurance contracts, but also in determining liability at common law, under the Federal Employer's Liability Act, and state workmen's compensation acts.

The relationship of employer and employee arises out of a contract, express or implied, made by the parties or their agents.[2] If the employer undertakes by the contract to furnish the premises upon which the work is to be done, tools and appliances, or fellow workers he is under a duty to see that the premises and appliances are safe and that the fellow servants are competent.[3] Consequently, in order to impose liability upon the owner it is commonly necessary for an injured worker to show an employer-employee relationship and thereby establish a duty to himself which the owner does not owe the general public. If the party with whom the owner bargained is considered an independent contractor the worker is deemed his employee and not that of the owner.[4] But to ascertain whether this second party is an independent

[1] Fidelity & Deposit Co. of Maryland v. S. Friedlander, 101 F.(2d) 106 (C. C. A. 6th, 1938).

[2] See Benway v. Missouri-Kansas-Texas Ry., 26 F.(2d) 383, 385 (N. D. Okla. 1928); Copp v. Paradis, 130 Me. 464, 467, 157 Atl. 228, 229 (1931); Hodge v. Feiner, 338 Mo. 268, 271, 78 S. W. (2d) 478, 479 (1935); Meo v. Bloomgarden, 237 App. Div. 325, 327, 261 N. Y. Supp. 279, 280. (2d Dep't 1933); Holleman v. Taylor, 200 N. C. 618, 620, 158 S. E. 88, 89 (1931); Corbin v. George, 308 Pa. 201, 203, 162 Atl. 459, 462 (1932).

[3] Decatur v. Charles H. Tomkins Co., 25 F.(2d) 526 (App. D. C. 1928); McGee v. C. E. De Brauwere & Co., 117 Fla. 859, 162 So. 510 (1925); Bell v. Brown, 214 Iowa 370, 239 N. W. 785 (1932); Kelso v. Ross Const. Co., 337 Mo. 202, 85 S. W. (2d) 527 (1935); Fort Worth Elevators Co. v. Russell, 123 Tex. 128, 70 S. W. (2d) 397 (1934); 3 LABATT, MASTER & SERVANT (2d ed. 1913) §898.

[4] Cory Bros. & Co. v. United States, 51 F.(2d) 1010 (C. C. A. 2d, 1931); Presto-O-Lite Co. v. Skeel, 182 Ind. 593, 106 N. E. 365 (1914); Gayle v. Missouri Car & Foundry Co., 177 Mo. 427, 76 S. W. 987 (1903); Reisman v. Public

contractor or merely an agent it is necessary to consider the relationship between the owner and the workman. The most conclusive factor is control over the worker. If the owner reserves only limited control over the job he is ordinarily not considered the employer.[5] Conversely, a great deal of regulation so that the workman seems to be doing the owner's business indicates that he is the latter's employee.[6] The courts have also given varying degrees of weight to considerations of whether the owner pays for the work in a lump sum,[7] whether he provided the instruments used,[8] and whether the type of work done ordinarily would not require independence of performance.[9] Affirmative answers to these tests generally cause the courts to treat the worker as the employee of the owner and the second party to the contract as merely the latter's agent.

The term "employee" as used in the Federal Employers' Liability Act has been construed by the United States Supreme Court to have the same meaning as when used at common law.[10] Pursuant to this interpretation no liability as an employer attaches to a railroad in favor of workers on Pullman[11] and express[12] cars where those cars are operated by special contract with the railroad and the workers are not under its control. But where the contract is one of co-proprietorship

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Serv. Corp., 82 N. J. L. 464, 81 Atl. 838 (1911). MECHEM, OUTLINES OF AGENCY (1923) §506.

[5] Casement v. Brown, 148 U. S. 615, 13 Sup. Ct. 672, 37 L. ed. 582 (1892); Bellatty v. Barrett Mfg. Co., 196 Fed. 493 (C. C. A. 1st, 1912); Harrell v. Atlas Portland Cement Co., 250 Fed. 83 (C. C. A. 8th, 1918); Scoggins v. Atlantic & Gulf Portland Cement Co., 179 Ala. 213, 60 So. 175 (1912); Lafferty v. United States Gypsum Co., 83 Kan. 349, 111 Pac. 498 (1910); Mason & Hoge Co. v. Highland, 116 S. W. 320 (Ky. 1909).

[6] Ocean Accident & Guarantee Corp. v. Kennison, 42 Ariz. 349, 26 P.(2d) 113 (1933); McCormick Lumber Co. v. O'Brien, 90 Cal. App. 776, 266 Pac. 594 (1928); Burns v. Fitz, 33 Ohio App. 306, 169 N. E. 309 (1930); Gulf Refining Co. v. Rogers, 57 S. W. (2d) 183 (Tex. Civ. App. 1933); see North Carolina Lumber Co. v. Spear Motor Co., 192 N. C. 377, 380, 135 S. E. 115, 117 (1926).

[7] Kisner v. Jackson, 159 Miss. 424, 132 So. 90 (1931); Merron v. Fessenden & Lowell, 77 N. H. 77, 87 Atl. 248 (1913); see North Carolina Lumber Co. v. Spear Motor Co., 192 N. C. 377, 381, 135 S. E. 115, 117 (1926).

[8] Singer Mfg. Co. v. Rahn, 132 U. S. 518, 10 Sup. Ct. 175, 31 L. ed. 440 (1889); Sloss-Sheffield Steel & Iron Co. v. Bibb, 164 Ala. 62, 51 So. 345 (1909); see North Carolina Lumber Co. v. Spear Motor Co., 192 N. C. 377, 381, 135 S. E. 115, 117 (1926).

[9] Pearson v. Potter Co., 10 Cal. App. 245, 101 Pac. 681 (1909); Ruehl v. Lidgerwood Rural Tel. Co., 23 N. D. 6, 135 N. W. 793 (1913).

[10] Robinson v. Baltimore & O. R. R., 237 U. S. 84, 35 Sup. Ct. 491, 59 L. ed. 849 (1915); Hull v. Philadelphia & R. R. R., 252 U. S. 475, 40 Sup. Ct. 358, 64 L. ed. 670 (1919); Stiedler v. Pennsylvania R. R., 94 N. J. L. 197, 109 Atl. 512 (1920).

[11] Robinson v. Baltimore & O. R. R., 237 U. S. 84, 35 Sup. Ct. 491, 59 L. ed. 849 (1915); Lindsay v. Chicago, B. & Q. Ry., 226 Fed. 23 (C. C. A. 7th, 1915); Denver & R. G. Ry. v. Whan, 39 Colo. 230, 89 Pac. 39 (1907).

[12] Wells Fargo & Co. v. Taylor, 254 U. S. 175, 41 Sup. Ct. 93, 65 L. ed. 205 (1920); Missouri, K. & T. Ry. v. West, 39 Okla. 581, 134 Pac. 655 (1913); Missouri, K. & T. Ry. v. Blalock, 105 Tex. 296, 147 S. W. 559 (1912).

between the Pullman company and the railroad with a profit-sharing arrangement the workers are held to be employees of both the Pullman company and of the railroad.[13] Servants of stevedore companies,[14] construction companies,[15] and ice companies[16] hired to do specific work are held not to be employees of the owner.

Consistent with the legislative policy of making an industry or business bear the expense of occupational injuries to its workmen, there has been a more liberal construction of the term "employee" under workmen's compensation than at common law.[17] This development may be observed in cases dealing with the tri-partite relation under consideration. For example, at common law a person in the general employment of one person could become the "special employee" of another while doing work for the latter's benefit and under his control,[18] but, if there were such a transfer of services, the employee became *exclusively* the employee of the "special employer" for purposes of this particular work.[19] When a workman engaged by an independent contractor does work which the contractor has agreed to perform for the owner of a business and the work is under the direction and control of the latter, some compensation cases, among them the leading case of *Famous Players Lasky Corporation v. Industrial Commission of California,*[20] have treated the workman as the employee not of one but of *both* so that he may recover compensation from either.[21] In the same situation where, however, the owner does not control the workman, statutes frequently, *without* declaring the workman to be an *employee* of the owner of the business, authorize recovery of compensation from either the owner or the independent contractor provided the work was

[13] Oliver v. Northern Pac. Ry., 196 Fed. 432 (E. D. Wash. 1912).

[14] Chicago, R. I. & P. Ry. v. Bond, 240 U. S. 449, 36 Sup. Ct. 403, 60 L. ed. 735 (1916); Drago v. Central Ry. of N. J., 93 N. J. L. 176, 106 Atl. 803 (1919).

[15] Pittsburgh, C. C. & St. L. Ry. v. Parker, 191 Ind. 686, 132 N. E. 372 (1921); see State v. Bates & Rogers Const. Co., 91 Wash. 181, 184, 157 Pac. 482, 484 (1916).

[16] Reynolds v. Addison Miller Co., 143 Wash. 271, 255 Pac. 110 (1927).

[17] See Fire & Life Assurance Corp. v. Crowell, 76 F.(2d) 341, 342 (C. C. A. 5th, 1935); Continental Casualty Co. v. Haynie, 51 Ga. App. 650, 653, 181 S. E. 126, 128 (1935); Allen-Garcia v. Industrial Comm., 334 Ill. 390, 394, 166 N. E. 78, 80 (1929); McDowell v. Duer, 78 Ind. App. 440, 445, 133 N. E. 839, 842 (1933); Badger Furniture Co. v. Chapeau, 195 Wis. 134, 138, 217 N. W. 734, 736 (1928); 1 SCHNEIDER, WORKMEN'S COMPENSATION LAW (2d ed. 1932) §20.

[18] Johnson v. Boston, 118 Mass. 114 (1875); Donovan v. Laing, W. & D. Constr. Syndicate, [1893] 1 Q. B. 629 (C. A.); 1 LABATT, *op. cit. supra* note 3, §52 *et seq.*

[19] Donovan v. Laing, W. & D. Constr. Syndicate, [1893] 1 Q. B. 629 (C. A.); 1 LABATT, *op. cit. supra* note 3 at 171, 172.

[20] 194 Cal. 134, 228 Pac. 5 (1924).

[21] Diamond Drill Contracting Co. v. Industrial Accident Comm. of California, 199 Cal. 164, 250 Pac. 862 (1926); Wright v. Cane Run Petroleum Co., 262 Ky. 251, 90 S. W. (2d) 36 (1936); De Noyer v. Cavanaugh, 221 N. Y. 273, 116 N. E. 992 (1917).

part or process of the owner's business.[22] The principal case, which in no way involved workmen's compensation, relied heavily upon a case arising under one of these statutes. That case, *Fox v. Fafnir Bearing Co.*,[23] held that a window washer engaged by an independent contractor to wash windows for a manufacturer of bearings was entitled to compensation from the manufacturer because washing windows was part and process of the business.

Insurance policies, like all contracts, should be construed in accordance with the intent of the parties. While the courts tend to attribute to the word "employee" as used in these policies its ordinary meaning,[24] the intent with which the parties used the term will govern without any "niceties of legal reasoning."[25] Thus it has been held that the vice-president of a subsidiary company is an employee of the insured parent company for purposes of a fidelity bond,[26] although the relationship between the officer and the parent company is not that of employee-employer at common law.

In both robbery and burglary insurance policies the general purpose underlying the stipulation that several employees remain on the premises is that their presence would tend to thwart any taking of insured goods either by independent third parties or parties acting in collusion with the insured.[27] However, there may be a slight difference in the type of the persons considered "employees" within the purposes of burglary and of robbery policies. Inasmuch as burglary at common law is the breaking into and entering a dwelling at night with intent to commit a felony[28] it is a reasonable assumption that persons in widely separated parts of the building would be of the greatest utility in preventing a breaking into the premises. On the other hand, robbery is a taking by force or violence[29] and it is likely that "employees" as used in robbery policies contemplates persons who would be sufficiently near

[22] *E.g.*, CONN. GEN. STAT. (1930) §5230; ILL. REV. STAT. (State Bar Ass'n ed., 1937) c. 48, §168; MASS. ANN. LAWS (1933) c. 152, §18; VA. CODE ANN. (Michie, 1936) §1887(20); *cf.* N. C. CODE ANN. (Michie, 1935) §8081(aa) (imposing a similar liability upon "principal contractors").

[23] 107 Conn. 189, 139 Atl. 778 (1928), note (1928) 26 MICH. L. REV. 938.

[24] Imperial Fire Ins. Co. v. Coos County, 151 U. S. 452, 14 Sup. Ct. 379, 38 L. ed. 231 (1893); Aschenbrenner v. United States Fidelity & Guaranty Co., 292 U. S. 80, 54 Sup. Ct. 590, 78 L. ed. 1137 (1934); Neighbors v. Life & Casualty Co. of Tennessee, 182 Ark. 356, 31 S. W. (2d) 418 (1930); Ledvinska v. Home Ins. Co. of New Mexico, 139 Md. 434, 115 Atl. 596 (1921); Farber v. Mutual Life Ins. Co. of New York, 250 Mass. 250, 145 N. E. 535 (1924); Auchincloss v. United States Fidelity & Guaranty Co., 190 App. Div. 6, 179 N. Y. Supp. 454 (1st Dep't 1919).

[25] Aschenbrenner v. United States Fidelity & Guaranty Co., 292 U. S. 80, 54 Sup. Ct. 590, 78 L. ed. 1137 (1934).

[26] Pennsylvania Car Co. v. Hartford Accident & Indemnity Co., 4 Harr. 225, 151 Atl. 665 (Del. 1930).

[27] VANCE, INSURANCE (2d ed. 1930) §279.

[28] CLARK AND MARSHALL, CRIMES (3d ed. 1927) §400.

[29] *Id.* at 370.

each other to join forces in repelling an intrusion. Of course, both robbery and burglary policies usually state in detail what offense is covered by the policy as a result of which common law definitions of these crimes are not controlling.[30] In either case an "employee" in order to secure the contemplated protection should be one who is thoroughly familiar with the premises and who has a feeling of responsibility to the insured.

In the principal case in considering a janitor paid by a third party, using his implements, and largely under his control, as an employee of the insured for purposes of a robbery policy the court ignored the reasons for the "employee" requirement in the policy. In addition, the insured's policy called for a custodian and one *other* employee, indicating perhaps that the terms "employee" and "custodian" were used interchangeably. Yet a custodian as defined in a typical policy[31] is "any person . . . in the *regular*[32] employ of the insured and duly authorized by him to act as his . . . cashier, clerk, or sales person, and while so acting to have the care and custody of the property covered hereby, but who is not a watchman or porter." Finally, the court relied on doubtful precedents from the workmen's compensation field. In some of these decisions, such as the *Fafnir* case, it was merely decided that the activity of the worker was part or process of the owner's business and that the owner must compensate him under the act, it being unnecessary to find that he was an employee of the owner. Even those cases which have held in these tri-partite situations that the worker is an employee of the owner for compensation purposes should not be controlling in the construction of an insurance policy because of the entirely different purposes of the compensation acts. Correspondingly, it would be ill-advised to rely on the principal case or other insurance decisions in determining a controversy under a workmen's compensation act. For to hold that the worker is an employee of the owner would result in a denial of compensation to him when the owner is a small employer not within the act even though the independent contractor by whom the worker thought that he was employed was covered by the act unless the theory of the *Famous Players Lasky* case were followed and both were deemed employers. If this theory were not adopted, a result plainly undesirable in view of the purposes of the workmen's compensation acts would be reached because of this reliance.

MARGARET CLOYD JOHNSON.

[30] 5 COUCH, CYCLOPEDIA OF INSURANCE LAW (1929) §1199c.
[31] Sample robbery policy of Lumbermen's Mutual Casualty Company.
[32] *Ibid.*

Labor Law—Sit-Down Strikes—Reinstatement of Employees Under the Wagner Act.

Respondent employer having engaged in labor practices which its union employees thought to be violative of the National Labor Relations Act,[1] the union employees embarked on a sit-down strike. The strikers were discharged for their refusal to vacate the buildings. After a hearing before the National Labor Relations Board,[2] respondent was ordered to cease and desist from engaging in certain unfair labor practices and to offer the discharged employees reinstatement to their former positions with back pay. The board contended that, as the employer's unfair practices provoked the strike, the employer-employee relationship continued despite the illegal seizure of the employer's property, and the board in its discretion might order reinstatement of discharged employees.[3] The circuit court of appeals[4] set aside the board's order of reinstatement. On *certiorari* the United States Supreme Court affirmed this judgment,[5] saying that although the employees had the right to strike, they did not have the right to commit acts of violence or to seize the property of their employer. The acts of lawlessness, though provoked by the unfair labor practices of respondent, furnished ground for discharge outside the protection of the Act, because the Act does not interfere with the employer's normal exercise of the right to select and discharge its employees for other reasons than intimidation or coercion of employees with respect to their self-organization and representation for collective bargaining. And the reinstatement of the guilty employees would ". . . not only not effectuate any policy of the Act but would directly tend to make abortive its plan for peaceable procedure."[6]

[1] 49 STAT. 449 *et seq.* (1935), 29 U. S. C. A. §151 *et seq.* (Supp. 1938).
The Act was sustained by the United States Supreme Court in National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 Sup. Ct. 615, 81 L. ed. 893 (1937); see Geffs and Hepburn, *The Wagner Labor Act Cases* (1937) 22 MINN. L. REV. 1; Mueller, *Businesses Subject to the National Labor Relations Act* (1937) 35 MICH. L. REV. 1286; C. C. H. Labor Law Serv. ¶2015 *et seq.* (new ed. 1937).

[2] *In re* Fansteel Metallurgical Corp., 5 NLRB 930 (1938).

[3] The Act empowers the board, when it shall be of the opinion that any person named in the complaint has engaged in, or is engaging in, any unfair labor practice ". . . to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this chapter." 49 STAT. 453 (1935), 29 U. S. C. A. §160(c) (Supp. 1938). The term employee is defined as including ". . . any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice. . . ." 49 STAT. 450 (1935), 29 U. S. C. A. §152(3) (Supp. 1938). It is further expressly stated that "Nothing in this chapter shall be construed so as to interfere with or impede or diminish in any way the right to strike." 49 STAT. 457 (1935), 29 U. S. C. A. §163 (Supp. 1938).

[4] Fansteel Metallurgical Corp. v. National Labor Relations Board, 98 F. (2d) 375 (C. C. A. 7th, 1938).

[5] National Labor Relations Board v. Fansteel Metallurgical Corp., 305 U. S. —, 59 Sup. Ct. 490, 83 L. ed. Adv. Ops. 469 (1939).

[6] *Id.* at —, 59 Sup. Ct. at 497, 83 L. ed. Adv. Ops. at 476.

Although the interpretation given the terms of the Act by the board, the dissenting judge in the circuit court of appeals, and the dissenting justices in the Supreme Court seems tenable, the courts have intimated that the adoption of such an interpretation would result in the Act being declared unconstitutional. The implications left by the courts have been that an invasion of the employer's fundamental right of discharge for proper cause would contravene the "due process" provisions of the Fifth Amendment to the Constitution[7] which protect that right of the employer.[8] And although it has been held that due process is not denied by a statute forbidding discrimination against employees because of union activities,[9] this constitutional protection can be required to give way only to the extent that it invades the employees' right to self-organization and collective bargaining.[10]

The status of the sit-down strike has been prominent in labor discussions. In support of the argument for the legality of this form of labor weapon, it is contended that the employees have a property right in their jobs and may assert that right by maintaining possession of the employer's premises while they negotiate about their conditions. Their presence in the industrial plant does not violate their obligations as employees so long as they refrain from fraud and violence. They are not trespassers; they are still employees with all of their relations in-

[7] In National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 46, 57 Sup. Ct. 615, 628, 81 L. ed. 893, 916 (1937), the Supreme Court indicates that ". . . the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than . . . intimidation or coercion." And in the opinion of the circuit court of appeals in the principal case, 98 F. (2d) 375, 381 (C. C. A. 7th, 1938), it was said: "Certainly it cannot be denied that an employer is warranted in discharging his employees, and severing that relationship, when they take and retain exclusive possession of his property against his will." In the prevailing opinion of the Supreme Court in the principal case, 305 U. S. —, —, 59 Sup. Ct. 490, 496, 83 L. ed. Adv. Ops. 469, 474 (1939), it was said: "We are unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct,—to invest those who go on strike with an immunity from discharge for acts of trespass or violence against the employer's property, which they would not have enjoyed had they remained at work. Apart from the question of the constitutional validity of an enactment of that sort, it is enough to say that such a legislative intention should be found in some definite and unmistakable expression." This view is further expounded in the concurring opinion, *id.* at —, 59 Sup. Ct. at 500, 83 L. ed. Adv. Ops. at 479, by this language: "If a plainer indication of such a purpose had been given . . . I should have thought it of sufficiently dubious constitutionality to require us to construe its language otherwise, if that could be reasonably done, leaving it to Congress to say so, in unmistakable language, if it really meant to impose that duty on the employer."

[8] Adair v. United States, 208 U. S. 161, 28 Sup. Ct. 277, 52 L. ed. 436 (1908).

[9] National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 Sup. Ct. 615, 81 L. ed. 893 (1937).

[10] Texas & N. O. R.R. v. Brotherhood of Railway and Steamship Clerks, 281 U. S. 548, 50 Sup. Ct. 427, 74 L. ed. 1034 (1930); Virginian Ry. v. System Federation, 300 U. S. 515, 57 Sup. Ct. 592, 81 L. ed. 789 (1937); National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 Sup. Ct. 615, 81 L. ed. 893 (1937).

tact.[11] The argument contemplates a peaceful settlement of the dispute; but the courts that have passed on the question have negatived this conception by denying the existence of peacefulness where employees seize the property of their employer and refuse to surrender possession of the premises. The courts reason that the right of employees to be upon their employer's premises is by reason of their employment;[12] and that when this employment is terminated, whether by their voluntary act[13] or by their discharge, and whether they cease their labors individually or in a body, their right upon the employer's premises ceases forthwith.[14] It is further argued that the conduct of the sit-down strikers operates to cancel their rights to be on the premises, because they thereby cease to discharge their duties as employees and assume a position never contemplated within the purpose for which they were employed. Though they entered the premises under a legal right, their subsequent conduct makes them trespassers.[15] One court even went so far as to declare that a sit-down strike amounted to a conspiracy in restraint of interstate commerce and a violation of the Sherman Anti-Trust Act.[16] In all of these cases there is no doubt that the strike itself is called for a proper purpose.[17] The trouble grows out of the means used to attain the objective.[18] Decisions on the

[11] Green, *The Case for the Sit-Down Strike* (March 24, 1937), 90 NEW REPUBLIC 199.

[12] The mere fact that they worked in the plant does not give them, for the purpose of protecting their jobs, a property right in the plant and the equipment as against the employer who is admittedly the owner. To hold otherwise would lead to the "abolition of the right to property". Ohio Leather Co. v. De Chant, Common Pleas, Trumbull County, Ohio, (1937) 4 U. S. L. WEEK 951.

[13] In some workmen's compensation cases it has been held that the worker who strikes has voluntarily given up his job and his rights in it. Brown v. Central West Coal Co., 200 Mich. 174, 166 N. W. 850 (1918); Mendoza v. Gallup Southwestern Coal Co., 41 N. M. 161, 66 P. (2d) 426 (1937).

[14] Plecity v. Local No. 37, International Union of Bakery and Confectionery Workers of America, Superior Ct., Los Angeles County, Cal., (1937) 4 U. S. L. WEEK 898.

Earlier decisions have established the proposition that it is a trespass to retain the employer's property after the employment, of which the right to possession and use is an incident, has voluntarily ceased. Lane v. Au Sable Electric Co., 181 Mich. 26, 147 N. W. 546 (1914); Bowman v. Bradley, 151 Pa. 351, 24 Atl. 1062 (1892); Case v. Knight, 129 Wash. 570, 225 Pac. 645 (1924); note (1937) 35 MICH. L. REV. 1330, 1339.

[15] From an argument presented upon the floor of Congress by Mr. Anderson of Missouri, 81 CONG. REC. 3168, 3169 (1937).

[16] Apex Hosiery Co. v. Leader, 90 F. (2d) 155 (C. C. A. 3rd, 1937), *dismissed on appeal as a moot question,* 302 U. S. 656, 58 Sup. Ct. 140, 82 L. ed. 508 (1937).

[17] Strikes for higher wages, shorter hours, and for the right to organize and bargain collectively have been held legal. See WITTE, THE GOVERNMENT IN LABOR DISPUTES (1932) 20; note (1937) 23 VA. L. REV. 799, 802.

[18] The existence of a legal purpose of the strikers' action has never been deemed sufficient to justify tortious conduct on the part of the strikers. See Interborough Rapid Transit Co. v. Lavin, 247 N. Y. 65, 81, 159 N. E. 863, 869 (1928); FRANKFURTER AND GREENE, THE LABOR INJUNCTION (1930) 24; (1937) 85 U. OF PA. L. REV. 643, 644.

subject are few, but the courts are all inclined to the view that the sit-down strike is illegal;[19] and some states have recently passed statutes specifically outlawing this weapon of labor.[20]

In the principal case the United States Supreme Court assumed the sit-down strike to be illegal, even in a situation where none of the employer's property is destroyed.[21] But it would seem that the decision of the Supreme Court as to the legality of the sit-down strike is not binding upon, but is merely persuasive authority for, the state courts in their applications of the local civil and criminal laws to the acts of the strikers when no statute raising a constitutional issue is involved.[22] There is reason to believe, however, that a statute seeking to validate the sit-down strike would so invade the owner's right to the free use and possession of his property as to offend the "due process" clause of the Fourteenth Amendment.[23] But, though it appears that whether the strikers' acts are illegal must be determined by state law, it is not felt that the language of the instant case means that any minor infraction of state law will preclude the board from reinstating a discharged

[19] Prior to the decision in the principal case the illegality of the sit-down strike had been announced in the following cases: Apex Hosiery Co. v. Leader, 90 F. (2d) 155 (C. C. A. 3rd, 1937), *dismissed on appeal as a moot question*, 302 U. S. 656, 58 Sup. Ct. 140, 82 L. ed. 508 (1937); The Oakmar, 20 F. Supp. 650 (D. Md. 1937); The Losmar, 20 F. Supp. 887 (D. Md. 1937); Plecity v. Local No. 37, International Union of Bakery and Confectionery Workers of America, Superior Ct., Los Angeles County, Cal., (1937) 4 U. S. L. WEEK 898; General Motors Corp. v. International Union, United Automobile Workers of America, Cir. Ct., Genesee County, Mich., (1937) 4 U. S. L. WEEK 678; Chrysler Corp. v. International Union, United Automobile Workers of America, Cir. Ct., Wayne County, Mich., (1937) 4 U. S. L. WEEK 858.

[20] The following statutes have the effect of outlawing the sit-down strike: ILL. REV. STAT. (State Bar Ass'n ed., 1937) c. 38, §§376, 377, 378; Mass. Acts 1938, c. 345; Tenn. Acts 1937, c. 160; Vt. Laws 1937, n. 210, p. 251.

[21] "The seizure and holding of the buildings was itself a wrong apart from any acts of sabotage." National Labor Relations Board v. Fansteel Metallurgical Corp., 305 U. S. —, —, 59 Sup. Ct. 490, 495, 83 L. ed. Adv. Ops. 469, 473 (1939). "Here the strike was illegal in its inception and prosecution." *Id.* at —, 59 Sup. Ct. at 496, 83 L. ed. Adv. Ops. at 475.

[22] Bethell v. Demaret, 10 Wall. 537, 19 L. ed. 1007 (U. S. 1871); United States v. Thompson, 93 U. S. 586, 23 L. ed. 982 (1877).

[23] Section 1 of the Fourteenth Amendment to the Constitution of the United States declares that no state shall ". . . deprive any person of life, liberty, or property, without due process of law. . . ." The sit-down strike begins with an unauthorized physical seizure of another's property, and a violation of his right to possess and enjoy the use of that property. Though the employer's right to the use of his property has been limited to the extent that a statute forbidding discrimination against employees because of union activities has been upheld, in the absence of such discrimination his rights of ownership and the exercise of dominion over his property cannot be invaded. National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 Sup. Ct. 615, 81 L. ed. 893 (1937). It has been held that the legislature cannot prevent the granting of an injunction against the intimidation and coercion of a merchant's employees by a labor union for the purpose of compelling him to pay the union's scale of prices to his employees, since it interferes with his constitutional right to acquire, possess, enjoy, and protect property. Goldberg, B. & Co. v. Stablemen's Union, 149 Cal. 429, 86 Pac. 806 (1906).

employee.[24] Justifiable discharge under the Wagner Act is not to be thus dependent upon the vagaries of state statutes and decisions. Rather the Court apparently feels that the striker's illegal act must be of a sufficiently serious degree as to fall within that "selected illegality" which the Court deems heinous enough to warrant a discharge which the board has no power to countermand. The principal case indicates that without other violence a seizure of the employer's plant falls within that "selected illegality". What other acts come within the category can only be a matter of conjecture until the specific case is presented for decision.[25] The Court, in a case decided on the same day as the principal case, characterized the principal case as saving to the employer the right to discharge employees guilty of a tort against him;[26] but such a general statement is of little help in defining what particular acts will be "selected" by the Court as being good cause for discharge. Moreover, there still remains the question as to whether the Court will continue its present stand in determining whether the board's action would "effectuate the policies of the Act". Unless the board's action is absolutely beyond the ken of reasonableness or is arbitrary or capricious, a judicial review and determination of what will "effectuate the policies of the Act" seems to be an unwarranted assumption of authority by the Court, and an invasion of the exercise of the discretion granted by Congress to the board.

FRANK THOMAS MILLER, JR.

Mortgages—Conditional Sales—After Acquired Property Clauses—Status of Conditionally Sold Property When Affixed to Previously Encumbered Realty or Personalty.

X purchased an automobile from *D*, executing a conditional sale contract, which was recorded, for the balance of the purchase price. This contract contained an after acquired property clause providing that the lien should cover "any equipment, repairs, replacements or

[24] Where a discharged employee has been engaging in union activities and is also guilty of unlawful conduct, the board, on hearing before it, makes findings of fact to determine which of these elements was the dominating force in causing the discharge; for when it is found that the discharge is motivated by the employer's prejudice against union activities and not by the employee's misconduct, the discharge is discriminatory and a violation of Section 8(3) of the Act, 49 STAT. 452 (1935), 29 U. S. C. A. §158(3) (Supp. 1938), leaving the board with power to order reinstatement.

[25] The board has been denied the power to reinstate discharged employees who were found guilty and sentenced to jail for conspiring to destroy property. Standard Lime & Stone Co. v. National Labor Relations Board, 97 F. (2d) 531 (C. C. A. 4th, 1938).

[26] "The Act does not prohibit an effective discharge for repudiation by the employee of his agreement, any more than it prohibits such discharge for a tort committed against the employer." National Labor Relations Board v. Sands Mfg. Co., 305 U. S. —, —, 59 Sup. Ct. 508, 514, 83 L. ed. Adv. Ops. 488, 494 (1939).

accessories thereafter placed on the car". Later *X* purchased tires and tubes from *P*, executing a chattel mortgage on both the tires and automobile to secure the purchase price. This was also recorded. Upon default, *D* repossessed the car, and *P* instituted claim and delivery proceedings for the tires. *Held*, judgment for *P*, his lien being superior to that of *D* and not being defeated by accession or the after acquired property clause.[1]

Today after acquired property clauses contained in mortgages are generally considered valid,[2] the majority of jurisdictions holding that a lien attaches to the newly acquired property as soon as it comes into the mortgagor's possession.[3] North Carolina decisions are in accord with this view, regarding such a provision as valid between the parties[4] and as giving rise to a lien superior to that of a vendee[5] or attaching creditor[6] of the mortgagor. It is almost universally held, however, that if the after acquired property is encumbered with a lien at the time it comes into the mortgagor's possession, such lien is superior to that of the after acquired property clause, though junior to it in point of time.[7] Thus when the vendor of after acquired property takes a purchase money mortgage or a conditional sale lien thereon,[8] as in the principal case, the law treats the sale and execution of the mortgage as one instantaneous transaction so that the lien of the prior mortgage does not have time to attach and displace the lien thereby created.[9] North Carolina follows this view,[10] and holds further that the failure by the vendor to register the conditional sale contract does not defeat the lien in favor of that of the prior mortgagee,[11] as our registration

[1] Goodrich Silvertown Stores v. Caesar, 214 N. C. 85, 197 S. E. 698 (1938).

[2] Central Trust Co. v. Kneeland, 138 U. S. 414, 11 Sup. Ct. 357, 34 L. ed. 1014 (1891); Gerard Trust Co. v. Standard Gas Co., 93 N. J. Eq. 307, 115 Atl. 910 (Ch. 1922).

[3] Bear Lake Irrigation Co. v. Garland, 164 U. S. 1, 17 Sup. Ct. 7, 41 L. ed. 327 (1896); Kribbs v. Alford, 120 N. Y. 519, 24 N. E. 811 (1890); Hirshkind v. Israel, 18 S. C. 157 (1882); Holroyd v. Marshall, 10 H. L. Cas. 191 (1862); 1 JONES, CHATTEL MORTGAGES (6th ed. 1933) §173; (1924) 37 HARV. L. REV. 765.

[4] Perry v. White, 111 N. C. 197, 16 S. E. 172 (1892).

[5] Brown v. Dail, 117 N. C. 41, 23 S. E. 45 (1895).

[6] Merchants & Farmers Bank v. Pearson, 186 N. C. 609, 120 S. E. 210 (1923).

[7] United States v. New Orleans R. R., 12 Wall. 362, 20 L. ed. 434 (U. S. 1870); Tippett & Wood v. Barham, 180 Fed. 76 (C. C. A. 4th, 1910), 37 L. R. A. (N.S.) 119 (1912); 1 JONES, CHATTEL MORTGAGES (6th ed. 1933) §247.

[8] Fosdick v. Southwestern Car Co., 99 U. S. 256, 25 L. ed. 344 (1878); Hammell v. First Nat. Bank of Hancock, 129 Mich. 176, 88 N. W. 397 (1901).

[9] Myer v. Western Car Co., 102 U. S. 1, 26 L. ed. 59 (1880); Tippett & Wood v. Barham, 180 Fed. 76 (C. C. A. 4th, 1910); Lumbert v. Woodard, 144 Ind. 335, 43 N. E. 302 (1896).

[10] Cox v. Newbern Lighting & Fuel Co., 151 N. C. 62, 65 S. E. 648 (1909).

[11] Standard Dry Kiln Co. v. Ellington, 172 N. C. 481, 90 S. E. 564 (1916); note (1930) 9 N. C. L. REV. 205. But *cf.* Clark v. Hill, 117 N. C. 11, 23 S. E. 91 (1895) (The holding of this case that as the conditional sale contract was unrecorded title to the fixture went to the prior mortgagee is not mentioned in later cases.)

laws are intended to protect the subsequent, not the prior purchasers and creditors.

Although a purchase money lien on a chattel is not defeated by the fact that previous to sale the vendee has given an after acquired property mortgage, will it be defeated when the chattel subject to such lien is attached by the vendee to the property already encumbered? If the chattel is attached to encumbered real property the answer to this question depends upon whether, in legal contemplation, the chattel has been affixed to the soil or realty in such a manner as to lose its identity as personal property and become itself a part of the realty. If it has, it passes with the prior real property mortgage and the purchase money lien is defeated.[12]

The exact nature of the *physical* connection that must be made before a chattel in *any* case becomes a part of realty presents a problem in property law beyond the scope of this note. It is possible, however, that even though the requirement of physical attachment be satisfied, a chattel will not lose its identity as personalty because the interested parties have contracted against this result.[13] When a mortgagor buys a chattel free of encumbrances and there is a sufficient physical attachment, his intent that it become realty is evidenced by the fact of annexation, and the chattel passes with the mortgage.[14] But when a mortgagor buys subject to a purchase money lien, most courts are disposed to give the purchase money mortgage or conditional sale contract the effect of a stipulation between vendor and vendee that the chattel remain personalty.[15] Since the interests of the prior mortgagee, who was not a party to this stipulation, may be adversely affected by a removal of the chattel from the realty, this implied stipulation is not always enforced. Various tests are applied to determine whether it will or will not be enforced.[16]

There are certain types of chattels such as bricks, mortar, and lumber united to form a building,[17] railroad irons laid on a track,[18] or

[12] 1 TIFFANY, REAL PROPERTY (2d ed. 1920) §266.

[13] Title & Bond Guaranty Co. v. Pointer, 243 Mich. 415, 220 N. W. 786 (1928); BROWN, PERSONAL PROPERTY (1936) §153.

[14] Whitaker-Glessmer Co. v. Ohio Savings Bank & Trust Co., 22 F. (2d) 773 (C. C. A. 6th, 1927); Southern Cotton Oil Co. v. Lowery, 231 Ala. 119, 163 So. 629 (1935); Morgan Utilities Inc. v. Kansas City Life Ins. Co., 183 Ark. 492, 37 S. W. (2d) 90 (1931); First Mortgage Bond Co. v. London, 259 Mich. 688, 244 N. W. 203 (1932); Love v. Union Central Life Ins. Co., 168 Miss. 408, 150 So. 794 (1933).

[15] Whitney-Central Trust & Savings Bank v. Luck, 231 Fed. 431 (C. C. A. 5th, 1916); Bromich v. Burkholder, 98 Kan. 261, 158 Pac. 63 (1916); Perfect Lighting Fixtures Co. v. Grubar Realty Corp., 228 App. Div. 141, 239 N. Y. Supp. 286 (1st Dep't 1930); Miller v. McCarthy, 148 Ore. 310, 36 P. (2d) 346 (1934); King v. Blickfeldt, 111 Wash. 508, 191 Pac. 748 (1920).

[16] Note (1934) 88 A. L. R. 1318.

[17] See Campbell v. Roddy, 44 N. J. Eq. 244, 252, 14 Atl. 279, 283 (1888).

[18] See United States v. New Orleans R. R. 12 Wall. 362, 365, 20 L. ed. 434, 436 (U. S. 1870).

a building built upon the land,[19] which, when there has been a physical attachment, are universally considered realty in the absence of any contract to the contrary by *all* interested parties. With the exception of this type of annexation, the rule adopted by the great majority of courts is that the implied stipulation of the vendor and vendee that the chattel remain personalty will be given effect and the seller's lien will be superior if the chattel can be detached without *material injury to the premises.*[20]

However, a conflict arises in determining what constitutes material injury to the premises. The test applied by the majority of courts which follow this general rule is whether the removal of the *fixture*[21] will cause actual *physical injury to the freehold,*[22] such as injury to a wall by tearing out pipes.[23] Another line of cases imposing a slightly different standard speak of injury to the *original security.*[24] These cases suggest that if the fixture replaces a chattel of substantial value the mortgagee of the realty is entitled to collect for the old one on surrendering or paying for the new.[25] Still another criterion is the *institutional test.* The courts applying this test maintain that the vendor's lien is lost and the added equipment passes with the realty if it has become an essential and permanent part of a going plant,[26] even

[19] See Burbridge v. Therrell, 110 Fla. 6, 10, 148 So. 204, 205 (1933); 1 JONES, CHATTEL MORTGAGES (5th ed. 1908) §130; 1 TIFFANY, REAL PROPERTY (2d ed. 1920) §271.

[20] Holt v. Henly, 232 U. S. 637, 34 Sup. Ct. 459, 58 L. ed. 767 (1914); First Nat. Bank of Evanston v. Bank of Waynesboro, 262 Fed. 754 (C. C. A. 8th, 1919); International Machinery Co. v. Moultrie Banking Co., 34 Ga. App. 396, 129 S. E. 877 (1925); Bromich v. Burkholder, 98 Kan. 261, 158 Pac. 63 (1916); Ratchford v. Cayuga County Cold Storage Co., 217 N. Y. 565, 112 N. E. 447 (1916); Standard Motors Finance Co. v. Weaver, 199 N. C. 178, 153 S. E. 861 (1930). In Holt v. Henly, *supra,* Holmes, J., says at p. 641 of the official report: "To hold that the mere fact of annexing the system to the freehold over-rode the agreement that it should remain personalty and still belong to Holt would be to give a mystic importance to attachment by bolts and screws."

[21] The word fixture is used in this note in its popular sense, meaning any annexation to the realty, and not in its legal sense.

[22] Hachmeister v. Power Mfg. Co., 165 Ark. 469, 264 S. W. 976 (1924); Sears Roebuck & Co. v. Piasa Bldg. & Loan Ass'n, 276 Ill. App. 389 (1934); Ratchford v. Cayuga County Cold Storage Co., 217 N. Y. 565, 112 N. E. 447 (1916); Standard Motors Finance Co. v. Weaver, 199 N. C. 178, 153 S. E. 861 (1930); Lenoir Land Co. v. Haynes Heating Co., 166 Tenn. 494, 63 S. W. (2d) 659 (1933); People's Savings & Trust Co. v. Munsert, 212 Wis. 449, 249 N. W. 527 (1933); note (1934) 88 A. L. R. 1318.

[23] Evans v. Argenta Bldg. & Loan Ass'n, 180 Ark. 654, 22 S. W. (2d) 377 (1930).

[24] Binkley v. Forkner, 117 Ind. 176, 19 N. E. 753 (1889); Bromich v. Burkholder, 98 Kan. 261, 158 Pac. 63 (1916); Kramer v. Yocum, 104 N. J. Eq. 79, 144 Atl. 188 (Ch. 1929); Holland Furnace Co. v. Byrd, 45 Wyo. 471, 21 P. (2d) 825 (1933).

[25] *In re* Dana Bros., 250 Fed. 268 (S. D. Fla. 1918); Franklin Service Stores v. Sterling Motor Co., 50 R. I. 336, 147 Atl. 754 (1929); see Cox v. Newbern Lighting & Fuel Co., 151 N. C. 62, 68, 65 S. E. 648, 651 (1909).

[26] *In re* Moultrie Creamery & Produce Co., 2 F. (2d) 129 (C. C. A. 5th, 1924); Holland v. Bartholomew, 93 F. (2d) 533 (C. C. A. 3d, 1937); Dauch v. Ginsberg, 214 Cal. 540, 6 P. (2d) 952 (1931); MacLeod v. Satterthwait, 109 N. J. Eq. 414,

though it could be detached without physical injury to the real property. Although the Uniform Conditional Sales Act, which has been adopted in a few states,[27] incorporates the majority test of *physical injury to the freehold,*[28] two of the states which had used the *institutional test* prior to its passage still use it in interpreting this phrase.[29]

A very small minority of courts, following what is known as the *Massachusetts rule,* absolutely refuse to consider any application of the material injury test. They hold that an express or implied contract that the fixture remain personalty is not binding on the prior mortgagee of realty unless he expressly assents thereto.[30]

When a conditionally sold article is attached to encumbered personal property, as in the principal case, the same question presents itself: When does the chattel become an integral part of the personalty so as to defeat the lien of the conditional vendor? Analogous to the real property situation, the requirement of the doctrine of *accession*[31] that there be a physical attachment of the chattel to the principal personalty may be met, yet, by the great weight of authority, the implied stipulation of the conditional vendor or mortgagor that this chattel is to remain a distinct one will be effectuated and the chattel will not pass by accession if it can be removed without material injury to the principal personalty.[32]

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157 Atl. 670 (Ch. 1932); see Commonwealth Trust Co. v. Harkins, 312 Pa. 402, 406, 167 Atl. 278, 280 (1933).

[27] Alaska, Arizona, Delaware, Indiana, New Jersey, New York, Pennsylvania, South Dakota, West Virginia, and Wisconsin.

[28] UNIFORM CONDITIONAL SALES ACT §7.

[29] MacLeod v. Satterthwait, 109 N. J. Eq. 414, 157 Atl. 670 (Ch. 1932); see Commonwealth Trust Co. v. Harkins, 312 Pa. 402, 406, 167 Atl. 278, 280 (1933); notes (1934) 88 A. L. R. 1318, (1935) 83 U. OF PA. L. REV. 916.

[30] Murphy Door Bed Co. v. New England Bond Co., 276 Mass. 79, 176 N. E. 802 (1931); Hamilton v. Huntly, 78 Ind. 521 (1881); Gaunt v. Allen-Lane Co., 128 Me. 41, 145 Atl. 255 (1929), 73 A. L. R. 748 (1931); Banker's & Merchant's Credit Co. v. Harlem Park Bldg. & Loan Ass'n, 160 Md. 230, 153 Atl. 64 (1931).

[31] "As a term of legal classification, accession is generally employed to signify the acquisition of title to personal property by its incorporation into, or union with other property." 2 BERRY, AUTOMOBILES (6th ed. 1929) §1806.

[32] Alley v. Adams, 44 Ala. 609 (1870); Motor Credit Co. v. Smith, 181 Ark. 127, 24 S. W. (2d) 974, 68 A. L. R. 1242 (1930); Snyder v. Aker, 134 Misc. 721, 236 N. Y. Supp. 28 (Sup. Ct. 1929); Goodrich Silvertown Stores v. Caesar, 214 N. C. 85, 197 S. E. 698 (1938); K. C. Tire Co. v. Way Motor Co., 143 Okla. 87, 287 Pac. 993 (1930).

In the automobile cases, where most present day litigation of this type arises, the same rule prevails. 3 BLASHFIELD, ENCYCLOPEDIA OF AUTOMOBILE LAW (1927) 2370; note (1934) 92 A. L. R. 425. Following this rule the courts have declared that title did not pass by accession under a mortgage on the automobile, where the vendor had reserved title for the purchase price, in the following instances: tires and tubes, Tire Shop v. Peat, 115 Conn. 187, 161 Atl. 96 (1932); batteries, Goodrich Silvertown Stores v. Pratt Motor Co., 198 Minn. 259, 269 N. W. 464 (1936); a "Form-a-truck" body, Hallman v. Dothan Foundry Machine Co., 17 Ala. App. 152, 82 So. 642 (1919); and a gasoline power unit, Lincoln Road Equipment Co. v. Bolton, 127 Neb. 224, 254 N. W. 884 (1934). Simple accessories, such as nuts, bolts, and flooring are always held to have lost their identity and

The North Carolina cases involving annexations to real and personal property would appear to be consistent with the majority views[33] were it not for one case.[34] There the accessory installed was a motor, the vendor taking a mortgage on the whole automobile to secure indebtedness for repairs and the balance of the purchase price of the motor. The court held that the motor had become an integral part of the car by accession and also that the vendor's mortgage on the whole car was second to the prior recorded mortgage of the vendor of the automobile. It is arguable that a mortgage for the purchase price of the motor, taken on the whole automobile, should include a purchase money mortgage on the motor itself, giving the purchaser only an instantaneous title so that the lien of the prior mortgage should not attach.[35] Yet the court in the principal case distinguishes that case on the ground that there the mortgage of the vendor of the motor was second to the recorded lien of the conditional vendor of the automobile because both were mortgages of the whole. This leaves undisturbed the other basis for the decision that the motor had become an integral and inseparable part of the car.[36] However, the motor of a modern automobile is interchangeable, may be detached without harm to the automobile, and is easily identifiable by serial number. Therefore, it should not be subject to the claims of the prior mortgagee under the majority test.

The majority rule would seem to be the most equitable to all parties concerned. It is fair to the conditional vendor of equipment in that it gives him an enforceable security where the chattel may be removed without material injury to the mortgaged property. It works no injustice to the prior mortgagee of realty or personality, because the new parts and equipment probably enhance the value of the security and he takes them subject only to the possibility that the lien of the conditional seller may be enforced. Such a rule also benefits the mortgagor, in that it encourages dealers to sell him equipment essential to his business operations without having to seek out the mortgagee and ask for a release.

WILLIAM W. SPEIGHT.

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are considered an integral and inseparable part of the whole. 2 BERRY, AUTOMOBILES (6th ed. 1929) §1806.

[33] Cox v. Newbern Lighting & Fuel Co., 151 N. C. 62, 65 S. E. 648 (1909); Standard Dry Kiln Co. v. Ellington, 172 N. C. 481, 90 S. E. 564 (1916); Standard Motors Finance Co. v. Weaver, 199 N. C. 178, 153 S. E. 861 (1930); Goodrich Silvertown Stores v. Caesar, 214 N. C. 85, 197 S. E. 698 (1938).

[34] Twin City Motor Co. v. Rouzer Motor Co., 197 N. C. 371, 148 S. E. 461 (1929).

[35] K. C. Tire Co. v. Way Motor Co., 143 Okla. 87, 287 Pac. 993 (1930); note (1934) 92 A. L. R. 425.

[36] Notes (1932) 7 IND. L. J. 507, (1936) 70 U. S. L. REV. 363.

Mortgages—Deeds of Trust—Limitation on Period in Which Power of Sale May Be Exercised.

By statute in North Carolina, where the mortgagor is in possession of the encumbered premises, an "action for foreclosure" is limited to ten years after default or date of last payment on the obligation.[1] By another provision, a power of sale "shall become inoperative" when an action to foreclose would be barred by the Statute of Limitations.[2] In a recent North Carolina case, a deed of trust had been executed to secure a note maturing on November 16, 1921. No payments were made on the obligation of the mortgagor. In foreclosure under the power of sale in the deed of trust, a sale was held at public auction September 2, 1930, but the trustee's deed was not executed to the purchaser until April 3, 1936. In an action of ejectment by a plaintiff claiming through the purchaser at the foreclosure sale, *held* for defendant, as the power of sale was not exercised within the period required by statute.[3]

It was early held that the section relating to the limitation on an action for foreclosure did not apply to a foreclosure under a power of sale. That section applies only to "actions" and foreclosure by power of sale is not an "action" within the terms of that statute.[4] As a result, before the subsequent enactment, the only limitation on a power of sale was that of an equitable nature growing out of unreasonable delay,[5] or possibly out of a presumption of payment.[6] Apparently the subsequent provision was enacted to remedy this situation.

No other case seems to have arisen involving the validity of a purchaser's title where, though all the other acts in the exercise of the power of sale were performed within the limitation period prescribed by statute, the deed to the purchaser was executed after expiration of that period. A few cases have arisen where publication of notice was begun within the period but the sale was held after the running of the statute, and they are in conflict as to the validity of the foreclosure. However, the conflict is explainable, since the statutes in the cases sustaining the foreclosure apparently required only that proceedings to foreclose be *begun* within that period.[7] The cases holding the foreclosure barred reasoned that to hold otherwise would be legislation and

[1] N. C. CODE ANN. (Michie, 1935) §437(3).
[2] *Id.* §2589.
[3] Spain v. Hines, 214 N. C. 432, 200 S. E. 25 (1938).
[4] Menzel v. Hinton, 132 N. C. 660, 44 S. E. 385 (1903); Cone v. Hyatt, 132 N. C. 810, 44 S. E. 678 (1903).
[5] See Stevens v. Osgood, 18 S. D. 247, 249, 100 N. W. 161 (1904); WALSH, MORTGAGES (1934) §73,
[6] 2 JONES, MORTGAGES (8th ed. 1928) §1533. But see Menzel v. Hinton, 132 N. C. 660, 666, 44 S. E. 385, 388 (1903).
[7] Gates v. Chandler, 174 Miss. 815, 165 So. 442 (1936); Friel v. Alewell, 318 Mo. 1, 298 S. W. 762 (1927).

not adjudication, since the statutes required that foreclosure be had within the period, and publication of notice is not foreclosure;[8] but the indication was that the requirements of the statutes would be satisfied if the sale were had within the period.

The court in the principal case contents itself with a conclusion predicated upon this syllogism: the statute requires that the power of sale must be completely exercised within the prescribed period; the passing of a complete title is necessary to the complete exercise of the power; a deed is necessary to the vesting of a complete title; therefore, a deed must be executed to the purchaser within the prescribed period.[9] Thus by "juggling with legal concepts", the conclusion becomes inevitable.[10]

Title, like most legal concepts, is a useful device of legal thought. It is a handy term for labeling as a whole that group of rights which the law recognizes as incident to the ownership of property. However, where one is concerned with apportioning rights of ownership between several parties, the concept serves to cloud rather than clarify the issues involved[11] by causing the courts to lose sight of the concept as simply an aid to their thinking and so to vitalize the logical consequence of the premise as to exclude important factors in the determination of a particular case. In the principal case, the question was whether there had been foreclosure within the prescribed period. The solution would seem to turn upon whether the purchaser had divested the mortgagor of the substantive rights of property within that time. It would therefore seem proper to inquire as to the status of a purchaser at foreclosure who gets no deed, *i.e.*, the rights he had acquired even though he had no deed at the time the statutory period elapsed.

A few early cases held that a purchaser at a foreclosure sale without a deed could not maintain ejectment,[12] but rather than indicating that any substantial property interest remained in the mortgagor, the cases are explainable by the formalism of the common law in requiring "legal title" as a prerequisite to the action of ejectment.[13] It has been held that a purchaser without a deed may maintain an action to quiet title.[14] The basis of the courts' conclusion was the fact that the pur-

[8] Duncan v. Menard, 32 Minn. 460, 21 N. W. 714 (1884); Blackwell v. Barnett, 52 Tex. 326 (1879).

[9] See Spain v. Hines, 214 N. C. 432, 436, 200 S. E. 25, 28 (1938).

[10] See DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW (1927) 135.

[11] See Fuller, *Legal Fictions* (1931) 25 ILL. L. REV. 363, at 899.

[12] Sanders v. McDonald, 63 Md. 503 (1885); Leyman v. Whiting, 20 Barb. 559 (N. Y. 1855); Tripp v. Ide, 3 R. I. 51 (1854). An equitable title apparently will support an action of ejectment in North Carolina. Note (1938) 16 N. C. L. REV. 306.

[13] SHIPMAN, COMMON LAW PLEADING (3d ed. 1923) 178.

[14] Morgan v. Kendrick, 91 Ark. 394, 121 S. W. 278 (1909); Bennett v. Morrison, 78 Colo. 464, 242 Pac. 636 (1925); Bell v. Diesem, 86 Kan. 364, 121 Pac. 335 (1912).

chase price had been paid—a fact which appears expressly or by strong inference in all the cases discussed hereinafter except where it is specifically designated otherwise. Putting the purchaser into possession of the premises does not violate the provisions of the Bankruptcy Act against "seizure" of a debtor's property.[15] The mortgagor has no equitable right to redeem though the purchaser has no deed.[16] And it has been held that during the interim between the foreclosure sale and the delivery of a deed, the mortgagor's interest is a mere right in the excess of the proceeds of the sale over the amount of the debt; thus a judgment debtor of the mortgagor whose lien was acquired during the interim gets no priority since the mortgagor's right is a *chose* and not an estate.[17] Moreover, a purchaser at foreclosure without a deed may recover rents and profits for the period the mortgagor continues in possession.[18] However, in a Massachusetts case,[19] cited with approval in the principal case,[20] a purchaser was refused the rents and profits between the time of sale and the execution of a deed where the foreclosure was by power of sale. The court reasoned that the auction sale was a mere contract of sale. But the cases cited as sustaining the holding of the court were all cases involving the right to rents and profits between the time decreed for a sale and the time decreed for the execution of a deed to the purchaser.[21] The result of those authorities was not attributable to the fact the purchaser did not have a paper title. The conclusion of the court in each of those cases was based solely on the fact that the rights during the interim depended

[15] Glenn v. Hallum, 80 F. (2d) 555 (C. C. A. 5th, 1935).

[16] Mewburn v. Bass, 82 Ala. 622, 2 So. 520 (1887); Union Bldg. & Loan Ass'n v. Childrey, 97 N. J. Eq. 20, 127 Atl. 253 (Ch. 1924); *cf.* Demarest v. Wynkoop, 3 Johns. Ch. 129 (N. Y. 1817). But see Arnot v. McClure, 4 Denio 41, 45 (N. Y. 1847). A peculiar Illinois statute limits the right of a purchaser to convert his certificate of sale into a deed to five years after the expiration of the mortgagor's equity of redemption, making the certificate of sale void thereafter. Where a purchaser had failed to get his deed within the prescribed period, the statute was interpreted to bar his right to a deed and to vest complete title back in the mortgagor discharged of the encumbrance. Bradley v. Lightcap, 201 Ill. 511, 66 N. E. 546 (1903) (vigorous dissent by two justices, one justice specially concurring). The feeling of the United States Supreme Court toward this interpretation is reflected in its holding overruling the Illinois court on the rather doubtful constitutional grounds that the statute impairs the obligation of contract, since it was passed subsequent to the execution of the mortgage. Bradley v. Lightcap, 195 U. S. 1, 24 Sup. Ct. 748, 49 L. ed. 65 (1904).

[17] Union Trust Co. v. Biggs, 153 Md. 50, 137 Atl. 509 (1927). It does not appear whether the purchase price was paid here, the court saying the complete equitable title vested at the time of the bid at the auction sale.

[18] Bates v. Bank of Moulton, 226 Ala. 679, 148 So. 150 (1933). The court speaks here, however, as though no deed were necessary to vest title in the purchaser since the mortgagee purchased. See note 38, *infra*.

[19] Beal v. Attleboro Sav. Bank, 248 Mass. 342, 142 N. E. 789 (1924). See also Eirich v. Leitschuh, 81 Ill. App. 573, 575 (1898).

[20] Spain v. Hines, 214 N. C. 432, 436, 200 S. E. 25, 28 (1938).

[21] Astor v. Turner, 11 Paige 436 (N. Y. 1845); Clason v. Corley, 7 N. Y. Sup. Ct. 447 (1852); Cheney v. Woodruff, 45 N. Y. 98 (1871); Garrett v. Dewart, 43 Pa. 342 (1862).

upon the terms of the decree, by which the purchaser was not entitled to a deed until the date decreed for the conveyance. Where foreclosure is by power of sale, however, and the purchaser is immediately entitled to a deed, it does not follow from those authorities that the purchaser's rights do not accrue until the conveyance is actually made.[22] But the result of the Massachusetts case would appear to be sustainable, since the purchase price had not been paid.[23]

These cases would seem to indicate that, despite his lack of a deed, where the purchase price has been paid, the purchaser at foreclosure has the important, substantial property rights in the land. However, there are judicial pronouncements which would seem to lead to the opposite conclusion. Where property burned after the foreclosure sale but before the delivery of a deed to the purchaser, it was held that there had been no "change of title" in the grantor of a deed of trust within the terms of an insurance policy so as to preclude him from recovering the insurance on the property.[24] This conclusion was based on the fact that no deed was executed to the purchaser, and whether the purchase price had been paid was ignored. But the fact that as between the grantor and the insurance company there had been no change of title in the grantor does not necessarily mean that as between the grantor and the purchaser "title" had not changed,[25] especially in view of the leniency of courts in interpreting "change of title" clauses in insurance contracts. Other courts ostensibly require the purchaser at foreclosure to have a deed in order to enforce his rights. Yet they obviate the "inconvenience"[26] of this rule by adopting the fiction that the deed when executed relates back to the time of the foreclosure sale in order to preclude the intervention of other rights.[27] By this construction. it would seem that the deed in the principal case might have

[22] But in Clason v. Corley, 7 N. Y. Sup. Ct. 447 (1852), the purchaser was refused the rents and profits during the time intervening between the date decreed for the execution of a deed and the date when the deed was actually executed, although he made a tender on the date decreed. The court said: "He should have followed up his tender by a motion . . . to pay his money into court. . . ." *Cf.* Mitchell v. Bartlett, 52 Barb. 319 (N. Y. 1868). See Whipple v. Farrar, 3 Mich. 436, 447 (1855).

[23] But see note 17, *supra.*

[24] Patten v. Springfield Fire & Marine Ins. Co., 223 Mo. App. 1070, 25 S. W. (2d) 1075 (1930).

[25] CARDOZO, THE PARADOXES OF LEGAL SCIENCE (1930) 64; DICKINSON, *op. cit. supra* note 10, at 137. See also Fuller, *supra* note 11, at 900.

[26] Fiction is a familiar means for obviating the "inconvenience" of a particular rule of law. 3 BL. COMM. * 43; Mitchell, *The Fictions of the Law: Have They Proved Useful or Detrimental to Its Growth?* (1893) 7 HARV. L. REV. 249, 253; Fuller, *supra* note 11, at 514.

[27] See cases cited *infra* note 28. This fiction is more often applied to cut out intervening rights between the time of sale and the execution of a deed to the purchaser where foreclosure is by decree. 3 JONES, MORTGAGES (8th ed. 1928) §2122. See also ARNOLD & JAMES, CASES ON TRIALS, JUDGMENTS AND APPEALS (1936) 546, n. 9; FREEMAN, EXECUTIONS (1880) §333.

satisfied the requirements of the statute, though executed five years after the sale.[28]

From the review of the cases, it would seem that a deed to the purchaser is not an inexorable requirement for the enforcement of substantive rights. Why, then, is the delivery of a deed to the purchaser made the determining factor in the principal case? It would seem that the deciding factor should be whether the purchase price had been paid within the statutory period. When the purchase price was paid does not clearly appear in the instant case, as it is dismissed as being irrelevant.[29] If the purchase price were paid within the prescribed period, all substantial equities would appear to be in the purchaser, and only a bare legal title—withheld from the purchaser by the mere formality of a conveyance—in the grantor.[30] It clearly appears in the instant case, moreover, that the controversy is between the immediate parties to the foreclosure proceedings, since the plantiff is in privity with the purchaser, and no repugnant rights could have intervened.[31] For this reason, retroactive operation was given to a deed executed over eighteen years after the sale in order to cut off the equity of redemption of a mortgagor[32] and, in another case, to allow the purchaser to eject an heir of the mortgagor still in possession many years after the sale.[33] Likewise, for this reason, a purchaser was allowed to maintain a suit to quiet title, though apparently no deed was executed to him.[34] It is submitted, therefore, that where the controversy is between the immediate parties or their privies and the purchase price has been paid, foreclosure should be considered complete within the terms of the statute limiting the time for the exercise of a power of sale.[35]

The reasoning of the court in the principal case in requiring that

[28] *Cf.* Bellenger v. Whitt, 208 Ala. 655, 95 So. 10 (1923); Demarest v. Wynkoop, 3 Johns. Ch. 129 (N. Y. 1817).

[29] See Spain v. Hines, 214 N. C. 432, 433, 200 S. E. 25, 27 (1938). A fair inference would appear to be that the purchase price was credited to the debt at foreclosure, since the *cestui* was the purchaser, and that the plaintiff here, claiming through the purchaser, paid fifty dollars down and executed his note for the balance. Record p. 7, Spain v. Hines, 214 N. C. 432, 200 S. E. 25 (1938).

[30] See Jennings v. Shannon, 200 N. C. 1, 3, 156 S. E. 89, 90 (1930). *Quaere*, as to the equities of the situation where the purchase price has only been *credited* to the debt? Where the purchaser has executed a note for the purchase price? Where the purchaser has paid only part of the purchase price?

[31] See Bennett v. Morrison, 78 Colo. 464, 467, 242 Pac. 636, 637 (1925).

[32] Demarest v. Wynkoop, 3 Johns. Ch. 129 (N. Y. 1817).

[33] Bellenger v. Whitt, 208 Ala. 655, 95 So. 10 (1923).

[34] Bennett v. Morrison, 78 Colo. 464, 242 Pac. 636 (1925).

[35] A problem somewhat analogous to that in the principal case arises in connection with the determination of when the Statute of Limitations begins to run on the right to redeem after foreclosure where such is allowed by statute. The courts are divided as to whether it begins running at the time of the auction sale, at the time of the payment of the purchase price, or at the time of the delivery of a deed to the purchaser. For collection of cases, see note (1936) 101 A. L. R. 1348.

the grantor be divested of complete title, both legal and equitable, and that all interest be vested in the purchaser, might be further tested by its application to the case where a mortgagee purchases at his own sale. In North Carolina, the mortgagor has a right to avoid the sale.[36] This right is an equitable interest[37] remaining in the mortgagor. Thus the foreclosure would never be complete and would eventually become barred.[38]

OSCAR LEAK TYREE.

Torts—Negligence—Common Carriers—Degree of Care Owed Passengers.

Plaintiff was injured when the taxicab in which she was riding collided with an automobile. She sued the cab company, and the judge in the county court charged the jury as follows: "The court further instructs you that a common carrier is held to exercise the greatest practicable care, the highest degree of prudence, and the utmost human skill and foresight which has been demonstrated by experience to be practicable. . . ." On appeal from a judgment for the plaintiff the superior court granted a new trial. This was affirmed by the North Carolina Supreme Court because the above charge required too high a degree of care.[1] In the course of the opinion the court approved the following test ". . . as far as human care and foresight can go he (the carrier) must provide for their safe conveyance . . ." qualifying it only by saying that the carrier was not bound to employ every devise which the ingenuity of man could provide.[2] It seems that the language approved would require, if anything, an even higher degree of care than would the phrases employed by the county court.

A large majority of jurisdictions regard taxi companies as common carriers of passengers and, consequently, require them to exercise the high degree of care usually exacted from such carriers.[3] Regardless

[36] Whitehead v. Hellen, 76 N. C. 99 (1877); Joyner v. Farmer, 78 N. C. 196 (1878); Whitehead v. Whitehurst, 108 N. C. 458, 13 S. E. 166 (1891); Austin v. Stewart, 126 N. C. 525, 36 S. E. 37 (1900).

[37] See Joyner v. Farmer, 78 N. C. 196, 198 (1878).

[38] It has been held in other jurisdictions that no deed is necessary to the vesting of title in the mortgagee where he purchases at his own sale, since the effect of the deed is to give him nothing more than he already had, and the power is deemed to be fully executed. Monroe v. Stevens, 80 Ky. 155 (1882); Jackson v. Colden, 4 Cow. 266 (N. Y. 1822); see Jackson v. Tribble, 156 Ala. 480, 489, 47 So. 310, 313 (1908); Ritter v. Mosely, 226 Ala. 648, 652, 148 So. 143, 147 (1933); 3 JONES, MORTGAGES (8th ed. 1928) §2435. *Contra:* Pilok v. Bernarski, 230 Mass. 56, 119 N. E. 360 (1918).

[1] Perry v. Sykes, 215 N. C. 39, 200 S. E. 923 (1939).

[2] *Id.* at 42, 200 S. E. at 925.

[3] Terminal Taxicab Co. v. Public Utilities Comm., 241 U. S. 252, 36 Sup. Ct. 583, 60 L. ed. 984 (1916); Lindsay v. Anniston, 104 Ala. 257, 16 So. 545 (1894); Bezera v. Associated Oil Co., 117 Cal. App. 139, 3 P. (2d) 622 (1931);

of whether taxis are so classified, the fact that they transport large numbers of people over public highways which grow more dangerous daily might well dictate a requirement that they exercise as high a degree of care as that exacted from other common carriers, which are often engaged in less hazardous means of transportation.

Although courts have used different words to set forth the degree of care which common carriers owe to their passengers,[4] in most instances these various phrases describe degrees of care which are substantially the same.[5] A large majority of the cases demand of the common carrier a very high degree of care.[6] Some of the courts which adhere to the majority view say the carrier is responsible for the slightest negligence,[7] while other opinions require the exercise of the highest degree of care practicable under the circumstances.[8] Some of the opinions which require the exercise of a high degree of care say that they do so because the slightest negligence is likely to cause serious damage.[9] Other courts which adhere to the majority view seem to be actuated by a desire to protect the passenger, who has almost no means of guarding against the carrier's negligence.[10] A few courts, apparently unmoved by the above considerations, hold that common carriers fulfill their

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Reity v. Yellow Cab Co., 248 Ill. App. 287 (1928); Shelton Taxi Co. v. Bowling, 244 Ky. 817, 51 S. W. (2d) 468 (1932); Guininan v. Checker Taxi Co., 289 Mass. 295, 194 N. E. 100 (1935); Durfey v. Milligan, 265 Mich. 97, 251 N. W. 356 (1934); Van Hoefen v. Columbia Taxicab Co., 179 Mo. App. 591, 162 S. W. 694 (1913); Ramsdell v. Frederick, 132 Ore. 161, 285 Pac. 219 (1930); Hughes v. Pittsburgh Transportation Co., 300 Pa. 474, 150 Atl. 152 (1930); Hogan v. Miller, 156 Va. 166, 157 S. E. 540 (1931); Scales v. Boynton Cab Co., 198 Wis. 293, 223 N. W. 836 (1929).

[4] HUTCHINSON, LAW OF CARRIERS (1st ed. 1882) §501.

[5] *Ibid.*

[6] Henson v. Fidelity & Columbia Trust Co., 68 F. (2d) 144 (C. C. A. 6th, 1933); Alabama Power Co. v. Maddox, 227 Ala. 628, 151 So. 575 (1934); Bezera v. Associated Oil Co., 117 Cal. App. 139, 3 P. (2d) 622 (1931); Briganti v. Connecticut Co., 119 Conn. 316, 175 Atl. 679 (1935); Hauser v. Chicago, R. I. & P. Ry., 205 Iowa 940, 219 N. W. 60 (1928); Peak v. Louisville & N. R.R., 221 Ky. 97, 297 S. W. 1107 (1927); Shelton Taxi Co. v. Bowling, 244 Ky. 817, 51 S. W. (2d) 468 (1931); Guininan v. Checker Taxi Co., 289 Mass. 295, 194 N. E. 100 (1935); Durfey v. Milligan, 265 Mich. 97, 251 N. W. 356 (1934); Ramsdell v. Frederick, 132 Ore. 161, 285 Pac. 219 (1930); Hughes v. Pittsburgh Trans. Co., 300 Pa. 474, 150 Atl. 153 (1930); Hogan v. Miller, 156 Va. 166, 157 S. E. 540 (1931); Scales v. Boynton Cab Co., 198 Wis. 293, 223 N. W. 836 (1929).

[7] Farish & Co. v. Reigle, 11 Grat. 697 (Va. 1854); McKeon v. Chicago, M. & St. P. Ry., 94 Wis. 477, 69 N. W. 175 (1896).

[8] Shelton Taxi Co. v. Bowling, 244 Ky. 817, 51 S. W. (2d) 468 (1932); Ingalls v. Bills, 9 Metc. 1 (Mass. 1845); Hadley v. Cross, 34 Vt. 586 (1861); Scales v. Boynton Cab Co., 198 Wis. 293, 223 N. W. 836 (1929).

[9] See Philadelphia & R. R. R. v. Derby, 14 How. 468, 486, 14 L. ed. 502, 509 (U. S. 1852); Bruswitz v. Netherlands Am. Steam Nav. Co., 64 Hun 262, 19 N. Y. Supp. 75 (Sup. Ct. 1892); HUTCHINSON, LAW OF CARRIERS (1st ed. 1882) 406.

[10] See Colorado & S. Ry. v. McGeorge, 46 Colo. 15, 23, 102 Pac. 747, 748 (1909); Ingalls v. Bills, 9 Metc. 1, 9 (Mass. 1845); Jacobus v. Railroad, 20 Minn. 110, 113 (1873).

duty to passengers by exercising due care under the circumstances.[11] In view of the fact that the circumstances would have to be considered in both cases the minority rule would seem to be more favorable to carriers than that adhered to by the majority. Since there seems to be no implied warranty to transport safely,[12] the only remedy available to an injured passenger is a suit in tort, which is always available to him regardless of the contract with the carrier, since no one is allowed to contract against his own negligence.[13]

The liability of common carriers of passengers must not be confused with that of common carriers of goods.[14] The latter, at common law in a large majority of the states, including North Carolina, are liable as insurers, that is, liable regardless of care exercised.[15] There are some well recognized exceptions to the above liability. The exceptions include injury, loss, or destruction resulting from acts of God, actions of public enemies,[16] inherent defect in the goods, or negligence of the shipper.[17] However, most of the jurisdictions, including North Carolina, now permit the carrier to get around this common law rule by providing in the contract of shipment that it shall not be liable as in-

[11] Pomroy v. Bangor & A. R. R., 102 Me. 497, 67 Atl. 561 (1907); Thayer v. Old Colony St. Ry. 214 Mass. 234, 101 N. E. 368 (1913).

[12] ANGELL, LAW OF CARRIERS (5th ed. 1877) 533; HUTCHINSON, LAW OF CARRIERS (1st ed. 1882) §504.

[13] New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 12 L. ed. 465 (U. S. 1848); GODDARD, LAW OF BAILMENTS AND CARRIERS (2d ed. 1928) 229.

[14] In Hollingsworth v. Skelding, 142 N. C. 246, 247, 55 S. E. 212 (1906) the charge of the lower court read as follows: "Carriers of passengers are insurers as to their passengers, subject to a few reasonable exceptions. They are held to exercise the greatest practicable care, the highest degree of prudence, and the utmost human skill and foresight which has been demonstrated by experience to be practicable. . . . The exceptions are the act of God and the public enemy. If these, that is, the act of God or of the public enemy, be the proximate cause of the injury and without any neglect on the part of the carrier the carrier is not liable." The court, on page 248 of the official report, in referring to the above charge said, "The rule laid down by the late *Chief Justice* applies to the transportation of freight and all classes of inanimate objects only." This charge obviously confused and fused the rules governing carriers of passengers and those applicable to carriers of freight and did not set out either rule correctly.

[15] See note 17, *infra*.

[16] This term is used to include those waging war against the sovereign and not criminals.

[17] See American Ry. Express Co. v. Fegenbush, 107 Fla. 145, 148, 144 So. 320, 321 (1932); S. Valentine & Co. v. Atchison, T. & S. F. Ry., 220 Ill. App. 188, 193 (1920); Hall v. Cumberland Pipe Line Co., 193 Ky. 728, 732, 237 S. W. 405, 408 (1918); Anderson, Clayton & Co. v. Yazoo & M. V. R.R., 174 La. 762, 767, 141 So. 453, 455 (1932); Warren v. Portland Terminal Co., 121 Me. 157, 116 Atl. 411, 412 (1922); Cudahy Packing Co. v. Atchison, T. & S. F. Ry., 193 Mo. App. 572, 187 S. W. 149, 151 (1916); Perry v. Seaboard A. L. R.R., 171 N. C. 158, 161, 88 S. E. 156, 158 (1916); Morris v. American Ry. Express Co., 183 N. C. 144, 148, 110 S. E. 855, 857 (1922); Haglin-Stahr So. v. Montpelier & W. R. R.R., 92 Vt. 258, 261, 102 Atl. 940, 941 (1918); Chesapeake & O. Ry. v. Temberlake, Currie & Co., 147 Va. 304, 309, 137 S. E. 507, 508 (1925).

surer.[18] The carrier is still under a duty to use due care, no one being allowed to contract against his own negligence.[19]

As regards common carriers of passengers the North Carolina Supreme Court has used various phrases to describe the degree of care which must be exercised. In *Wallace v. Western North Carolina R. R.*[20] the court said by way of dictum, ". . . it is the duty of a company carrying passengers on such a train [a mixed freight and passenger train] to exercise *every reasonable care* and take *every reasonable precaution* [these and all following italics are ours] . . . which appliances for that mode of travel will admit of. . . ." Again in *Riggs v. Norfolk & Southern R. R.*[21] we find the court using the identical language set out above. Also in *Usury v. Watkins*[22] there is this similar language, "In taking passage on a freight train a passenger assumes the usual risks incident to traveling on such trains, when managed by *prudent and competent men* in a *careful manner*." It seems that the above language would lead a jury to believe that a common carrier owes its passengers a duty to use only reasonable care. However, note the language used in the following cases: The court held in *Suttle v. Southern Ry.*[23] that ". . . where a person has been received as a passenger on one of these mixed trains . . . he is entitled to *the highest degree of care and diligence of which such trains are susceptible*." Again, in *Kearney v. Seaboard Air Line R. R.*[24] the court held that it was the duty of a common carrier of passengers to exercise ". . . *the highest degree of care practicable*." In another case, *Briggs v. Durham Traction Co.*,[25] the court described the care owed by a common carrier to its passengers as, ". . . *a high degree of care, skill and diligence in operating its cars as far as is consistent with the practicable operation of its business* . . . but *it* is liable only for negligence and is not an insurer." These cases require the carrier to exercise a much higher

[18] Barron v. Mobile & O. R.R., 2 Ala. App. 555, 56 So. 862 (1911); St. Louis-San Franscisco Ry. v. Watts, 168 Ark. 804, 271 S. W. 464 (1925); McIntosh v. Oregon R.R. & Nav. Co., 17 Idaho 100, 105 Pac. 66 (1909); Donchian v. Brink's Chicago City Express Co., 217 Ill. App. 124 (1920); Young v. Maine Cent. R.R., 113 Me. 113, 93 Atl. 48 (1915); Murphy v. Wells Fargo & Co., 99 Minn. 230, 108 N. W. 1070 (1906); Lee v. Raleigh & Gaston R.R., 72 N. C. 236 (1875); Hornthal v. Roanoke, N. & B. Steamboat Co., 107 N. C. 76, 11 S. E. 1049 (1890); St. Louis & S. F. R.R. v. Akard, 60 Okl. 4, 159 Pac. 344 (1916); Carrol v. Royal Mail Steam Packet Co., 130 Ore. 294, 279 Pac. 961 (1929); Louisville & N. R.R. v. Manchester Mills, 88 Tenn. 655, 14 S. W. 314 (1890).

[19] New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 12 L. ed. 465 (U. S. 1848); Mears v. New York, N. H. & H. R.R., 75 Conn. 171, 52 Atl. 610 (1902); Everett v. Norfolk & S. R.R., 138 N. C. 68, 50 S. E. 557 (1905).

[20] 98 N. C. 494, 498, 4 S. E. 503, 505 (1887).

[21] 188 N. C. 366, 368, 124 S. E. 749, 750 (1924).

[22] 152 N. C. 760, 761, 67 S. E. 926, 927 (1910).

[23] 150 N. C. 668, 671, 67 S. E. 778, 779 (1909).

[24] 158 N. C. 521, 527, 74 S. E. 593, 595 (1912).

[25] 147 N. C. 389, 392, 61 S. E. 373, 375 (1908).

degree of care than did those first mentioned, and even these might be regarded as not entirely consistent since one of them says it must exercise the highest degree of care to which certain trains are susceptible, a second case limits the highest degree of care by the bounds of practicability, and a third requires only a high degree of care.

In another case, *Cates v. Hall*,[26] the language used does not seem to be entirely harmonious with any of the above cases. The court in this case says, ". . . . a carrier is required to use that high degree of care . . . which a prudent person would use in view of the nature and risks of the business. . . . They (the employees of the company) were, therefore, *charged with a high degree of care in this respect. This statement imports no infringement on the doctrine which obtains with us that there are no degrees of care* so far as fixing responsibility for negligence is concerned. This is true on a given state of facts, and in the same case, *the standard is always that care which a prudent man should use under like circumstances.* What such *reasonable care* is, however, does vary in different cases and under different conditions, and the degree of care required of one whose breach of duty is likely to result in serious harm is greater than when the effect of such a breach is not near so threatening." This language indicates that the court thinks that there is no difference between "reasonable care under the circumstances" and "a high degree of care". This seems to be fallacious as the circumstances would have to be considered whether the carrier is required to exercise "a high degree of care" or only "reasonable care". The court in another case, *Marable v. Southern Ry.*,[27] uses the following quotation which recognizes the fact that the circumstances would have to be considered is applying the "high degree of care" rule, " '. . . the carrier is required to exercise *that high degree of care* for the safety of the passenger which a prudent person would use in view of the nature and risks of the business, *or, in general, the highest degree of care, prudence and foresight which the situation and circumstances demand.*' " Here the requirement of a high degree of care and the highest degree of care are blended.

In *Pruett v. Southern Ry.*[28] the court seems to apply both the "high degree of care" rule and the "reasonable care" rule. It uses this language, "A common carrier . . . is required only to exercise *proper care* to guard them [its passengers] against injuries which *may reasonably be anticipated.*" On page five of the official report the court quotes with approval as follows, " 'The rule that it is *the duty of a carrier to use the highest degree of care* to protect the passenger from wrong or

[26] 171 N. C. 360, 363, 88 S. E. 524, 525 (1916).
[27] 142 N. C. 557, 562, 55 S. E. 355, 357 (1906).
[28] 164 N. C. 3, 4, 80 S. E. 65, 66 (1913).

injury by a fellow-passenger applies only when the carrier has knowledge of the existence of the danger, or of facts and circumstances from which the danger may be *responsibly anticipated.'"* This language indicates that a carrier must use the highest degree of care to guard against known dangers and those of which he reasonably should know but is only required to use reasonable care to foresee danger. In a later case, *Mills v. Atlantic Coast Line Ry.*,[29] the court holds that the following language, which seems to be squarely *contra* to that set out above, correctly describes the duty owed by a common carrier to its passengers, "Railroad companies . . . are held to a high degree of care in looking after the safety of passengers on their trains . . . and the company is responsible for actionable wrongs committed upon them by other passengers or third persons *which could have been provided against or prevented by the utmost vigilance and foresight* . . . these companies are not insurers of the safety of passengers and are not liable for injuries which in the exercise of *such care* [this must refer to the italicized language set out above] their . . . employees . . . could not *reasonably have prevented.*"

In view of the fact that jury verdicts may go one way or the other depending on the language used to describe the degree of care owed by common carriers to their passengers and the fact that the North Carolina court has used so many different phrases to designate this degree of care it seems that we would secure more uniform verdicts, and have fewer appeals, if the supreme court would definitely and finally put its stamp of approval on one consistent group of words which could be confidently used by trial courts in cases involving this question.

J. NATHANIEL HAMRICK.

Workmen's Compensation—Do Mealtime Injuries Arise Out of and in the Course of Employment?

D operated a cold drink and sandwich stand in his factory for his employees. *P,* an employee, was injured by eating a spoiled sandwich bought from the refreshment stand. *D's* motion to dismiss a suit at common law was denied. On appeal,[1] it was *held* that *D* was subject to and operating under the North Carolina Workmen's Compensation Act; that the injury arose out of and in the course of the employment of *P*; and, therefore, that the motion to dismiss should have been sustained, as *P's* remedies against *D* are limited to those given by the Act.

Injuries suffered by employees during the period allotted to them for eating—either before, during, or after the actual eating—or while

[29] 172 N. C. 266, 267, 90 S. E. 221 (1916).

[1] Tscheiller v. National Weaving Co., 214 N. C. 449, 199 S. E. 623 (1938).

refreshing themselves with food or drink during working hours have been the subject of considerable litigation under workmen's compensation acts. Whether such an injury is compensable depends, under the usual statute, upon whether the injury was one "arising out of and in the course of"[2] the employment. It is not alone sufficient in order to award compensation to determine that the injury arose in the course of the employment, but once this is found it must also be decided that the injury was caused by the employment.[3]

The employee usually is allowed compensation for injuries sustained on the employer's premises while eating a lunch which he has brought from home.[4] The courts rely on "employer control"[5]— probably referring to control over the premises by the employer and the right to regulate their use, though perhaps control over the employee in that he is subject to immediate recall to work or that he is denied the right to leave the premises is meant. On the other hand, where

[2] This phrase is common to the great majority of workmen's compensation acts. Examples are: KY. STAT. ANN. (Carroll, 1936) §4880; N. Y. WORKMEN'S COMPENSATION LAW §2(7); N. C. CODE ANN. (Michie, 1935) §8081(i)(f); VA. CODE ANN. (Michie, 1936) §1887(2)(c). In some jurisdictions the phrase is either stated in the alternative or one clause is eliminated. PA. STAT. (Purdon, 1936) tit. 77, §361 ("in the course of"); UTAH REV. STAT. ANN. (1933) §42-1-43 ("arising out of or in the course of").

[3] See Mann v. Knitting Co., 90 Conn. 116, 117, 96 Atl. 368 (1916); Dietzen Co. v. Industrial Board, 279 Ill. 11, 15, 116 N. E. 684, 686 (1917); State v. District Court, 138 Minn. 326, 328, 164 N. W. 1012, 1013 (1918); Badger Furniture Co. v. Industrial Comm., 195 Wis. 134, 217 N. W. 734 (1928).

[4] Humphrey v. Industrial Comm., 285 Ill. 372, 120 N. E. 816 (1918); Haller v. Lansing, 195 Mich. 753, 162 N. W. 335 (1917); Racine Rubber Co. v. Industrial Comm., 165 Wis. 600, 162 N. W. 664 (1917). However, it would seem absurd to hold the employer liable for an industrial accident where the employee was poisoned by, or choked upon, his own food while eating. This would be because the injury would not arise out of the employment, not because the workman was not in the course thereof.

[5] The "employer control" theory, however, is not a reliable basis on which to allow recovery. Its application is subject to as many objections as the other general rules laid down by the courts. Some do not refer to any underlying theory at all, while a great many others merely state in general terms that the injury was not so far removed from the actual work as to take the employee out of the course of his employment. Examples of the phraseology of a few courts attempting to define the degree of relationship between the injury and the employment necessary to bring the employee within the remedial scope of the act are: Mann v. Knitting Co., 90 Conn. 116, 96 Atl. 368 (1916) (there must be a causal connection); Larke v. John Hancock Mut. Life Ins. Co., 90 Conn. 303, 97 Atl. 320 (1916) (the injury must occur within the period of employment, at a place where the workman may reasonably be, reasonably fulfilling duties of the employment, or doing something incidental to it); Wasmuth-Endicott Co. v. Karst, 77 Ind. App. 279, 133 N. E. 609 (1922) (the injury must be incidental to the service); Haller v. Lansing, 195 Mich. 753, 162 N. W. 335 (1917) (workman must be doing a reasonable and natural thing under existing conditions); Ames v. Lake Independence Lumber Co., 226 Mich. 83, 197 N. W. 499 (1924) (injury must result from some special hazard incidental to or arising out of workman's employment); State v. District Court, 138 Minn. 326, 164 N. W. 1012 (1918) (injury must result from a hazard of the employment or be attributable to a peculiar liability inherent in the employment); Stratton v. Interstate Fruit Co., 47 S. D. 452, 199 N. W. 117 (1924) (injury must be incident to the employment).

the employee goes to forbidden parts of the premises or leaves them entirely to dine at home or elsewhere he is denied compensation,[6] the courts saying that this activity takes him out of the course of his employment. Whatever the nature of the control that influences the courts when the employee has eaten upon the employer's premises, that element is lacking when the employee goes home to eat.

Where the employer himself furnishes meals on the premises to the employees free of charge to them it would seem that he is responsible for injuries that occur either going to or from, or suffered at the meal, or those occasioned by the food itself.[7] Here, as in the case where the employee brings his own lunch, there is the element of "employer control". If the meals are furnished on a permanent basis there is the additional reason that they are but a means of compensation to the employee in that his actual salary is probably lower than it otherwise would have been.[8] Thus, going to meals is collecting wages, which is a part of the employment.[9] Even where the employee purchases his meal from the employer on the latter's premises there remains the element of "employer control" which seems sufficient to justify an award of compensation. Injuries caused by impurities in drinking water furnished employees upon the premises are generally held to be compensable.[10] Here too there is the element of "employer control"—not only over the premises but also over the employee who ceases work only momentarily. Further, because of the normal bodily requirement of drinking water the employee by reason of his employment is exposed to the risk involved in satisfying this need.

When it is necessary for an employee to leave the premises where he is working in order to avail himself of food and drink furnished by the employer, complicating factors are present. The further removed the employee from the scene of his actual labor, the more difficult it is to conceive the risk of injury to be incident to his employ-

[6] Moore & Scott Iron Works v. Industrial Acc. Comm., 36 Cal. App. 582, 172 Pac. 1114 (1918); Haggard's Case, 234 Mass. 330, 125 N. E. 565 (1920). *Contra:* Stratton v. Interstate Fruit Co., 47 S. D. 452, 199 N. W. 117 (1924).

[7] Martin v. Metropolitan Life Ins. Co., 197 App. Div. 382, 189 N. Y. Supp. 467 (1st Dep't 1921). An employee was injured in the elevator while going downstairs after eating a free lunch furnished by the employer on the twelfth floor. The court awarded compensation on the ground that the employer was obligated to furnish a safe exist from the employment, thereby implying that the employee was in the course of his employment while eating the free lunch.

[8] *Cf.* State Compensation Ins. Fund v. Industrial Acc. Comm., 194 Cal. 28, 227 Pac. 168 (1924).

[9] The implication contained in State Compensation Ins. Fund v. Industrial Acc. Comm., 194 Cal. 28, 227 Pac. 168 (1924), that the employee who is furnished with room and board in lieu of wages is simply collecting that compensation whenever and wherever using such accommodations is far reaching, but is illustrative of the liberal attitude of the courts in the interpretation of the compensation acts.

[10] Wasmuth-Endicott Co. v. Karst, 77 Ind. App. 279, 133 N. E. 609 (1922); Frankamp v. Fordney Hotel, 222 Mich. 525, 193 N. W. 204 (1923); Ames v. Lake Independence Lumber Co., 226 Mich. 83, 197 N. W. 499 (1924).

ment. However, the mere fact that he leaves the premises should not control, as the case of *Redford v. Armstrong*[11] illustrates. There an employee had been injured while leaving a canteen operated by the employer for the exclusive purpose of selling meals and refreshments to employees, who were permitted but not required to use it. Compensation was allowed in spite of the fact that in order to reach the canteen, which was in another part of the building from that where he worked, the employee had to go out upon the street and enter through an outside door. The court considered the fact that the canteen was controlled by the employer and that it was contemplated that the employee should use it as an incident to his employment as determinative. Again, for reasons already discussed, it should be immaterial in this type of situation whether the employee pays for food or drink as long as the facilities are open only to employees. But when the employee patronizes an eating establishment operated by his employer off the premises where he works, when he must pay for his food, and when the place is open to the general public, the employee is exposed to no risk different from that to which the general public is exposed; if he is perfectly free to go there or not, it is difficult to see how an injury suffered there is one arising out of and in the course of his employment.[12] Yet if meals are furnished free to an employee at such an establishment, compensation may be awarded on the theory that the free meals are but a method of remuneration for his employment, which occasions the employee's presence.[13] Correspondingly, if as a result of pressure exerted by the employer the employee patronizes such an establishment through fear of dismissal, although paying for his meals as would the public, it may be argued that the employee has assumed risks by reason of his employment and that such an injury should be compensable.

An injury suffered off the premises at an eating establishment operated by a third party would not ordinarily be compensable.[14] The situation could be changed, however, if the employer should pay for

[11] 121 L. T. R. (N. S.) 293 (C. A. 1919).

[12] Brown, *"Arising Out of and in the Course of the Employment" in Workmen's Compensation Laws* (1932) 8 WIS. L. REV. 134, 252. It seems that unless there is some relation between the employer's order and the injury, which would make it immaterial whether or not others were exposed to the same hazard, the employee must by reason of his employment be subjected to some greater degree of hazard than the general public, when he is in the same place with the public, before a resulting injury is compensable.

[13] See note 9, *supra*.

[14] Mitchell v. Ball Bros., 97 Ind. App. 642, 186 N. E. 900 (1933) (employer operated cafeteria on premises, but employee ate at restaurant across the street); Hills v. Blair, 182 Mich. 20, 148 N. W. 243 (1914); McInerney v. Buffalo & S. R. Corp., 225 N. Y. 130, 121 N. E. 806 (1919). When the employee starts from the premises on business of his own, the nexus between employer and employee is, as a general rule, broken. But *cf.* Manchester St. Ry. v. Barrett, 265 Fed. 557 (C. C. A. 1st, 1920).

the meal and require the employee to eat at a particular place. Thus, in *Krause v. Swartwood*[15] a secretary was allowed compensation when injured by the food at a restaurant adjacent to her employer's office, the employer having paid for her meal and asked that she eat there in order to be within hearing of his telephone. But in *Johnson v. Smith*[16] compensation was refused where an employee was injured by the food in a restaurant in a town to which he had been sent on business. The employer had paid for the meal but had not chosen the restaurant, the latter fact affording a possible distinction between the two cases.

It is extremely difficult to solve any of these cases by applying the "arising out of and in the course of employment" phrase because it is subject to varied interpretations, and, while it would be judicially desirable to work out one general governing principle, it has seemed impossible. The rules governing recovery in mealtime cases do not appear to be any different from those applied in lightning cases,[17] horseplay cases,[18] going to and from work cases,[19] cases involving injuries from company-sponsored athletics,[20] and cases occasioned by injuries resulting from acts for the personal comfort or convenience of the employee,[21] if those tests can be satisfactorily determined. The majority of the courts seldom attempt to lay down any inflexible rule for the determination of why an accident arises out of and in the course of the employment, but content themselves with letting their intuition be their guide. And justly so; many cases deserving relief cannot be fitted into any very specific rule. But it is evident that a constantly more liberal interpretation is being given to the compensation acts, both to give the employee relief and to protect the employer from suits at common law with their usual large verdicts.

HARRY MCMULLAN, JR.

[15] 174 Minn. 147, 218 N. W. 555 (1928).

[16] 263 N. Y. 10, 188 N. E. 140 (1933).

[17] Aetna Life Ins. Co. v. Industrial Comm., 81 Colo. 233, 254 Pac. 995 (1927); Alzina Construction Co. v. Industrial Comm., 309 Ill. 395, 141 N. E. 191 (1923); notes (1928) 26 MICH. L. REV. 307, (1930) 28 MICH. L. REV. 944.

[18] Leonbruno v. Champlain Silk Mills, 229 N. Y. 470, 128 N. E. 711 (1920); Industrial Comm. v. Weigandt, 102 Ohio St. 1, 130 N. E. 38 (1921); note (1930) 9 N. C. L. REV. 105.

[19] Flanagan v. Webster & Webster, 107 Conn. 502, 142 Atl. 201 (1928); Brown, *"Arising Out of and in the Course of the Employment" in Workmen's Compensation Laws* (1931) 7 WIS. L. REV. 15, 29; (1928) 38 YALE L. J. 125.

[20] Industrial Comm. of Colo. v. Murphey, 102 Colo. 59, 76 P. (2d) 741 (1938); Clark v. Chrysler Corp., 276 Mich. 24, 267 N. W. 589 (1936); Ryan v. State Industrial Comm., 128 Okla. 25, 261 Pac. 181 (1927).

[21] Compensation was allowed employees injured while engaged in the following activities: Richards v. Indianapolis Abattoir Co., 92 Conn. 274, 102 Atl. 604 (1917) (seeking warmth or shelter); Steel Sales Corp. v. Industrial Comm., 293 Ill. 435, 127 N. E. 698 (1920) (attending calls of nature); Hollenbach Co. v. Hollenbach, 181 Ky. 262, 204 S. W. 152 (1918) (washing up); *In re* Von Ette, 223 Mass. 56, 111 N. E. 696 (1916) (resting); Dzikowska v. Superior Steel Co., 259 Pa. 578, 103 Atl. 351 (1918) (smoking); Vennen v. New Dells Lumber Co., 161 Wis. 370, 154 N. W. 640 (1915) (drinking water).