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## Editorial Board/Notes and Comments

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## NOTES AND COMMENTS

### Conflict of Laws—Power of State to Deprive Courts of Jurisdiction to Hear Out-of-State Judgments.

A North Carolina statute provides that the courts of this state shall have no jurisdiction to entertain any suit or action brought on a judgment based upon a "futures" contract.<sup>1</sup> This statute was pleaded in defense to an action on a New York judgment in the North Carolina courts.<sup>2</sup> The allegations of the defendant were held insufficient to show that the New York judgment was based on such a "futures" contract as to come within the protection of the statute. The question, although expressly not decided by this case, is indirectly presented as to the validity of such a statute under the full faith and credit clause of the Federal Constitution.<sup>3</sup>

<sup>1</sup> N. C. CODE ANN. (Michie, 1939) §2144.

<sup>2</sup> *Cody v. Hovey*, 216 N. C. 391, 5 S. E. (2d) 165 (1939).

<sup>3</sup> U. S. CONST. Art. IV, §1.

A state may, even in the absence of such a statute, refuse to give credit to a judgment of a foreign country which is contrary to the public policy of the forum.<sup>4</sup> But as between the states a contrary rule applies, due to the obligations imposed by the full faith and credit clause.<sup>5</sup> Thus, where a judgment was obtained in a Maryland court against a married woman on a note made in Illinois guaranteeing her husband's indebtedness, it was recognized in a suit thereon in the courts of the District of Columbia, although such a judgment could not have been obtained in the District of Columbia because contrary to its public policy and express statutory law.<sup>6</sup> This rule was also applied where a wife became surety on her husband's note in the forum in contravention to its policy and laws, when the judgment being sued on had been recovered in another state.<sup>7</sup> A state income tax judgment is entitled to recognition when sued upon in another state although the original action could not have been maintained in the latter state.<sup>8</sup> Other illustrations of the obligation of a state to give credit to sister state judgments, based on actions which could not have been maintained under the law of the forum, are found in suits on judgments acquired by the power of confession in a judgment note.<sup>9</sup> These decisions are consistent with the rule that a judgment of one state court shall have the same credit, validity, and effect in every other court in the United States which it had in the state where it was rendered.<sup>10</sup>

The obligation required by the full faith and credit clause is that the courts of the state in which the judgment is being sued upon shall accept as conclusive evidence of the matter adjudged the valid judgment of another state when so regarded in the state where rendered.<sup>11</sup> It is

<sup>4</sup> 2 BEALE, *CONFLICT OF LAWS* (1935) §445.1.

<sup>5</sup> *Id.* §446.1.

<sup>6</sup> *Hieston v. National City Bank of Chicago*, 280 Fed. 525 (App. D. C. 1922).

<sup>7</sup> *Engineers Nat. Bank v. Drew*, 311 Pa. 59, 166 Atl. 376 (1933); *Bray v. Union Nat. Bank*, 194 S. W. 1165 (Tex. Civ. App. 1917).

<sup>8</sup> *Milwaukee County v. M. E. White Co.*, 296 U. S. 268, 56 Sup. Ct. 229, 80 L. ed. 220 (1935).

<sup>9</sup> *Westwater v. Murray*, 245 Fed. 427 (C. C. A. 6th, 1917); *Egley v. Bennett*, 196 Ind. 50, 145 N. E. 830 (1924); *Cuykendall v. Doe*, 129 Iowa 453, 105 N. W. 698 (1906); *Ritter v. Hoffman*, 35 Kan. 215, 10 Pac. 576 (1886); *Headlee v. Cain*, 250 S. W. 611 (Mo. App. 1923); *Hendrickson v. Fries*, 45 N. J. L. 555 (1883); *Bonnett-Brown Corp. v. Coble*, 195 N. C. 491, 142 S. E. 772 (1928); *Miller v. Miller*, 90 Wash. 333, 156 Pac. 8 (1916); *cf. Baldwin Building & Loan Ass'n v. Klein*, 136 Misc. 752, 240 N. Y. Supp. 804 (Sup. Ct. 1930) (Pennsylvania judgment by confession against resident of New York).

<sup>10</sup> *Hampton v. M'Connel*, 3 Wheat. 234, 4 L. ed. 378 (U. S. 1818); *Roller v. Murray*, 234 U. S. 738, 34 Sup. Ct. 902, 58 L. ed. 1570 (1914); *Beal v. Carpenter*, 235 Fed. 273 (C. C. A. 8th, 1916) (judgment on "futures" contract in New York given full faith and credit in Arkansas); *International Harvester Co. v. Solazo*, 116 W. Va. 34, 178 S. E. 429 (1935).

<sup>11</sup> *In re Roeben's Will*, 171 Misc. 548, 13 N. Y. Supp. (2d) 53 (Surr. Ct. 1939); see *M'Elmoyle v. Cohen*, 13 Pet. 312, 324, 10 L. ed. 177, 183 (U. S. 1839); *Hanley v. Donoghue*, 116 U. S. 1, 5, 6 Sup. Ct. 242, 244, 29 L. ed. 535, 537 (1885); *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 291, 8 Sup. Ct. 1370, 1375,

a rule of evidence and not of jurisdiction.<sup>12</sup> The constitutional provision does not preclude inquiry into the jurisdiction of the court which rendered the judgment as to the subject matter, the parties affected by it, or into the facts necessary to give the court jurisdiction.<sup>13</sup> A court may also look behind a judgment to determine if it is based upon the penal laws of another state, and, while it cannot go behind the judgment for the purpose of examining the validity of the claim, the full faith and credit clause does not prevent a court, to which a judgment is presented for affirmative action, from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it.<sup>14</sup> It has been indicated that it may be shown that the original cause of action arose out of a transaction illegal in the state where the cause of action arose, and which was also the state of the forum, when the judgment is based on a contract.<sup>15</sup> There has also been dictum indicating that a court may look behind a money judgment of another state to determine if it is based on a cause of action which is contrary to the public policy of the forum.<sup>16</sup> But it is not apparent what purpose this would serve since the general rule requires the giving of validity to a judgment of a sister state even though contrary to the public policy of the state in which it is sued upon. It has been held, in a federal court opinion, that the original cause of action could not be inquired into to determine if the state should give the judgment full faith and credit;<sup>17</sup> and a New York court held that it could not inquire whether the interpretation of the court of another state was in accordance with the declared policy of the New York courts.<sup>18</sup> These cases did not involve a statute similar to the one presented by the principal case. There would seem to be considerable doubt whether such an inquiry or looking behind the judgment as this statute necessitates would render it unconstitutional. If the end

32 L. ed. 239, 244 (1888); *Andrews v. Andrews*, 188 U. S. 14, 36, 23 Sup. Ct. 237, 242, 47 L. ed. 366, 371 (1903).

<sup>12</sup> *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. ed. 239 (1887); 3 FREEMAN, JUDGMENTS (5th ed. 1925) §1359.

<sup>13</sup> *Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 897 (U. S. 1873); *Cole v. Cunningham*, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. ed. 538 (1890); *Simmons v. Saul*, 138 U. S. 439, 11 Sup. Ct. 369, 34 L. ed. 1054 (1891); *Reynolds v. Stockton*, 140 U. S. 254, 11 Sup. Ct. 773, 35 L. ed. 464 (1891); *Cooper v. Newell*, 173 U. S. 555, 19 Sup. Ct. 506, 43 L. ed. 808 (1899); *Thormann v. Frame*, 176 U. S. 350, 20 Sup. Ct. 446, 44 L. ed. 500 (1900).

<sup>14</sup> *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. ed. 239 (1887) (state not required to give credit to judgments based on penal laws of another state and may examine judgment to discover if it is such).

<sup>15</sup> See *St. Louis Expanded Metal Fireproofing Co. v. Beilharz*, 88 S. W. 512, 514 (Tex. Civ. App. 1905).

<sup>16</sup> See *Interstate Savings & Trust Co. v. Wyatt*, 27 Colo. App. 217, 219, 147 Pac. 444, 445 (1915). But see *Irose v. Balla*, 181 Ind. 491, 495, 104 N. E. 851, 853 (1914) (limiting this right to cases involving peculiar public policy of the state of a purely domestic character, such as marriage and divorce).

<sup>17</sup> *Hieston v. National City Bank of Chicago*, 280 Fed. 525 (App. D. C. 1922).

<sup>18</sup> *Adams v. Dick*, 103 Misc. 259, 170 N. Y. Supp. 17 (Sup. Ct. 1918).

to be achieved is constitutional, this means should likewise be upheld, for it is the only manner in which the end could be accomplished.

There have been no decisions dealing directly with the power of a state to deprive its courts of jurisdiction to give credit to the judgment of another state based on a contract. However, it has been held that an action on the judgment of a sister state, against a resident of the forum, cannot be barred because the original action could not have been maintained in the forum because extinguished by the passage of time;<sup>19</sup> but the incapacity of a husband and wife to sue each other may prevent an action on a foreign judgment which has been rendered in favor of one of them.<sup>20</sup> This, however, does not go to the nature of the original cause of action, as does the North Carolina statute.

In *Anglo-American Provision Co. v. Davis Provision Co.*<sup>21</sup> a New York statute, denying jurisdiction to its courts to hear suits on judgments of another state by one foreign corporation against another, when the original cause of action did not arise in New York, was upheld. It was decided that the Constitution does not require a state to give jurisdiction to its courts against its will, nor to provide a court into which a plaintiff can go with his judgment. There was dictum to the effect that if the state let its own citizens use the courts for the general class of cases on which the out-of-state judgment was based, then the privileges and immunities clause of the Fourteenth Amendment might require its extension to citizens of other states.<sup>22</sup> The North Carolina statute would not be open to this objection because it applies to citizens of North Carolina and of other jurisdictions alike.

However, five years after this decision a Mississippi statute which made dealings in "futures" a misdemeanor and provided that such contracts "shall not be enforced by any court" was decided not to relieve the Mississippi court of the duty to give full faith and credit to a Missouri judgment based on such a contract made in Mississippi.<sup>23</sup> The Court, in construing the statute, distinguished between statutes directed toward the jurisdiction of the court and those directed to the merits of the case. The first type goes to the power of the court, whereas the second type only goes to the duty of the court. The Mississippi statute was held to be of the second type. The Court, in its opinion, said: "Whether a given statute is intended simply to establish a rule of substantive law, and thus to define the duty of the court, or is meant to

<sup>19</sup> *Roche v. McDonald*, 275 U. S. 449, 48 Sup. Ct. 142, 72 L. ed. 365 (1928); *Keyser v. Lowell*, 117 Fed. 400 (C. A. A. 8th, 1902); *Dodge v. Coffin*, 15 Kan. 277 (1875); note (1928) 6 N. C. L. Rev. 479.

<sup>20</sup> *Weidman v. Weidman*, 274 Mass. 118, 174 N. E. 206 (1931).

<sup>21</sup> 191 U. S. 373, 24 Sup. Ct. 92, 48 L. ed. 225 (1903).

<sup>22</sup> See *Anglo-American Provision Co. v. Davis Provision Co.*, 191 U. S. 373, 374, 24 Sup. Ct. 92, 93, 48 L. ed. 225, 227 (1903).

<sup>23</sup> *Fauntleroy v. Lum*, 210 U. S. 230, 28 Sup. Ct. 641, 52 L. ed. 1039 (1908).

limit its power, is a question of construction and common sense."<sup>24</sup> Thus, if the statute simply lays down a rule of decision for the courts to follow, it cannot be interpreted as depriving the court of jurisdiction. When the statute applies to a court of general jurisdiction, and deals with a matter upon which that court must pass, the Supreme Court of the United States has announced its reluctance to interpret ambiguous words so as to leave the judgment open to dispute. The North Carolina statute in the present case reads: ". . . nor shall the courts of this state have any jurisdiction to entertain any suit or action brought upon a judgment based on any such ['futures'] contract."<sup>25</sup> This language would appear to indicate clearly that the statute is directed at the jurisdiction of the court, and is not merely laying down a rule of decision. Therefore, it does not seem that the North Carolina statute would come under the rule of this case.

The North Carolina court was called upon to adjudicate the validity of this statute in *Mottu v. Davis*,<sup>26</sup> but it found that the Virginia court, on whose judgment the action was based, had decided that the contract was not a gaming contract, so the statute was not applicable. However, the court took the occasion to remark that they saw no reason why the rule of the *Anglo-American Provision Co.* case should not be extended to judgments in favor of private citizens. In other words, the North Carolina court, at that time, thought the statute was constitutional.

The legislature of Illinois passed a statute which provided that no action for damages as a result of a death occurring in another state in consequence of wrongful conduct should be prosecuted in that state. The Illinois Supreme Court applied the statute to a judgment of another state for damages of this nature.<sup>27</sup> The United States Supreme Court decided that the application of the statute to an action on a sister state judgment contravened the full faith and credit clause.<sup>28</sup> After limiting the *Anglo-American Provision Co.* case to its facts, Mr. Justice Holmes remarked: "Moreover no doubt there is truth in the proposition that the Constitution does not require the state to furnish a court. But it is also true that there are limits to the power of exclusion and to the power to consider the nature of the cause of action before the foreign judgment based on it is given effect."<sup>29</sup> Some light was thrown upon these limitations by the statement that the constitutional obligations could not be escaped by the simple device of denying jurisdiction in such cases to courts otherwise competent. The full implications of these

<sup>24</sup> *Id.* at 235, 28 Sup. Ct. at 642, 52 L. ed. at 1041.

<sup>25</sup> N. C. CODE ANN. (Michie, 1939) §2144.

<sup>26</sup> 151 N. C. 237, 65 S. E. 969 (1909).

<sup>27</sup> *Kenny v. Supreme Lodge*, 285 Ill. 188, 120 N. E. 631 (1918).

<sup>28</sup> *Kenny v. Supreme Lodge*, 252 U. S. 411, 40 Sup. Ct. 371, 64 L. ed. 638 (1920).

<sup>29</sup> *Id.* at 414, 40 Sup. Ct. at 372, 64 L. ed. at 640.

statements are somewhat questionable. This statute seems as if it were intended to relieve Illinois of the burden of trying such cases, while not really involving a strong element of public policy. But the North Carolina statute involves a strong element of public policy, as the making of such contracts in North Carolina is a misdemeanor. Another distinction might be found in the fact that the Illinois law applied only to accidents outside of the state, whereas, the North Carolina rule applies to judgments on "futures" contracts made within or without the state.

Nevertheless, if a state cannot refuse to give full faith and credit to an out-of-state judgment based on a cause of action contrary to the public policy of the forum, the method of depriving their courts of jurisdiction to entertain any suit on such a judgment is an attempt to do indirectly what cannot be done directly. Therefore, it appears doubtful that this statute could be upheld when scrutinized in the light of the full faith and credit clause.

W. O. COOKE.

#### **Constitutional Law—Wire Tapping Provision of Federal Communications Act—Effect in State Courts.**

The Federal Communications Act,<sup>1</sup> by the second clause of Section 605, provides: ". . . and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. . . ." The Supreme Court of the United States has construed this section as forbidding not only the recitation of the contents of the message itself in testimony in the federal courts,<sup>2</sup> but also the introduction of any evidence obtained as a result of the interception,<sup>3</sup> even where only intrastate communications are involved.<sup>4</sup>

An interesting problem is raised concerning the possible effect of the federal statute upon testimony in the state courts. Will the statutory prohibition be applied by these courts? If not, much evidence which would be inadmissible in federal prosecutions could be turned over to state law enforcing officers for such use as they might make of it in state courts. If this happens the effectiveness of the statute may be seriously impaired. The intent of Congress and the limits of its powers are (usually) important in deciding the application of such statutes.

These factors were controlling in the decisions of state courts upon

<sup>1</sup> 48 STAT. 1064 (1934), 47 U. S. C. A. §605 (Supp. 1939).

<sup>2</sup> *Nardone v. United States*, 302 U. S. 379, 58 Sup. Ct. 275, 82 L. ed. 314 (1937).

<sup>3</sup> *Nardone v. United States*, —U. S.— 60 Sup. Ct. 266, 84 L. ed. Adv. Ops. 227 (1939).

<sup>4</sup> *Weiss v. United States*, —U. S.— 60 Sup. Ct. 269, 84 L. ed. Adv. Ops. 233 (1939).

the effect of certain federal revenue laws passed at various times.<sup>5</sup> These laws required stamps to be used on certain legal instruments, and provided for the exclusion from evidence "in any court" of documents not duly stamped. A majority of the state courts held that these provisions relating to the use of the instruments in evidence applied only to the federal courts.<sup>6</sup> The decisions were generally based on the ground that it is beyond the constitutional authority of Congress to enact rules regulating the competency of evidence in state courts, and since the statutes were susceptible of an interpretation that would give them full operation and effect within the recognized scope of the constitutional authority of Congress, that construction must be given.<sup>7</sup> Other cases, however, reached the same result by holding merely that the power of Congress was doubtful.<sup>8</sup> A third view was that there was no intention on the part of Congress to have the statute apply to the state courts, and that the question of power was immaterial.<sup>9</sup>

The leading case applying such a procedural provision of a revenue law to a state court is *Chartiers & Robinson Turnpike Co. v. McNamara*.<sup>10</sup> This case, while recognizing the principle that "... Congress cannot pass laws regulating the competency of evidence in the trial of causes in the several states . . .",<sup>11</sup> held that "The purpose of Congress was not to make rules of evidence, but to stamp the instrument of evidence, with a disqualification, which will prevent its use as evidence until the delinquent has paid his tax",<sup>12</sup> and, that in the exercise of its clearly granted powers Congress can affix qualifications which must be recognized by the state courts.

If the problem were to arise as to the applicability of the statute in

<sup>5</sup> The Revenue Act of 1898 is typical of these statutes. 30 STAT. 452 (1898).

<sup>6</sup> *Bumpass v. Taggart*, 26 Ark. 398 (1870); *Duffy v. Hobson*, 40 Cal. 240 (1870); *Trowbridge v. Addoms*, 23 Colo. 518, 48 Pac. 535 (1897); *Garland v. Gaines*, 73 Conn. 662, 49 Atl. 19 (1901); *Small v. Slocumb*, 112 Ga. 279, 37 S. E. 481 (1900); *Craig v. Dimock*, 47 Ill. 308 (1868); *Wallace v. Cravens*, 34 Ind. 534 (1870); *Pargoud v. Richardson*, 30 La. Ann. 1286 (1878); *Wade v. Foss*, 96 Me. 230, 52 Atl. 640 (1902); *Carpenter v. Snelling*, 97 Mass. 452 (1867); *Clemens v. Conrad*, 19 Mich. 169 (1869); *Griffin Lumber Co. v. Myer*, 80 Miss. 435, 31 So. 787 (1902); *Knox v. Rossi*, 25 Nev. 96, 57 Pac. 179 (1899); *Woodward v. Roberts*, 58 N. H. 503 (1878); *People v. Gates*, 43 N. Y. 40 (1870); *Haight v. Grist*, 64 N. C. 739 (1870); *Davis v. Evans*, 133 N. C. 320, 45 S. E. 643 (1903); *Cassidy v. St. Germain*, 22 R. I. 53, 46 Atl. 35 (1900); *Kennedy v. Rountree*, 59 S. C. 324, 37 S. E. 942 (1901); *Southern Ins. Co. v. Estes*, 106 Tenn. 472, 62 S. W. 149 (1901); *Hale v. Wilkinson*, 21 Gratt. 75 (Va. 1871); *Dawson v. McCarty*, 21 Wash. 314, 57 Pac. 816 (1899); *Weltner v. Riggs*, 3 W. Va. 445 (1869). *Contra*: *Muscantine v. Sterneman*, 30 Iowa 526 (1870); *Chartiers & Robinson Turnpike Co. v. McNamara*, 72 Pa. 278 (1872).

<sup>7</sup> The great majority of the cases cited *supra* note 6 use such language.

<sup>8</sup> *Carpenter v. Snelling*, 97 Mass. 452 (1867), is the leading case expounding this view.

<sup>9</sup> *Haight v. Grist*, 64 N. C. 739 (1870); *Weltner v. Riggs*, 3 W. Va. 445 (1869).

<sup>10</sup> 72 Pa. 278 (1872).

<sup>11</sup> *Chartiers & Robinson Turnpike Co. v. McNamara*, 72 Pa. 278, 281 (1872).

<sup>12</sup> *Ibid.*



question in the state courts there would be even less difficulty than in the revenue act cases in restricting its operation to the federal courts, for the reason that there is no express statement that the evidence shall be inadmissible "in any court".<sup>13</sup> Even assuming the intention of the lawmakers to place this restriction upon the state courts, yet, since a majority of the decisions construing the revenue acts found that there was no power in Congress to prescribe rules of evidence except for the federal courts, it would be consistent to find a lack of power here. As construed by the Supreme Court, the provision under consideration is certainly a rule of evidence.

In *United States v. Fisher*,<sup>14</sup> Mr. Chief Justice Marshall, in construing the necessary and proper clause of the Constitution said: "Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution."<sup>15</sup> It was upon this principle that the Pennsylvania court relied in the *Chartiers* case when it took the minority position in interpreting the words "in any court" to include the state courts, and in holding that Congress had the power to enact the law.

If the present prohibition is, in fact, an exercise of the power to regulate commerce, then it is valid although it may affect a subject over which the states would ordinarily have jurisdiction. As pointed out by Mr. Robert Cushman in an article in the *Minnesota Law Review*,<sup>16</sup> Congress in the exercise of the police power, is subject to three limitations, namely: it must use an enumerated power; there must be a reasonable enough relation between the law passed and the constitutional grant of power upon which Congress has relied to warrant its being regarded as an exercise of that power; and the power must be exercised with regard to the specific prohibitions upon congressional authority contained in the Constitution.<sup>17</sup>

The peg on which the courts might hang this statute in applying it to state courts is the power to regulate commerce. There seems to be a reasonable enough connection between the law passed and the constitutional grant of power. Congress has on many occasions passed leg-

<sup>13</sup> Viewed in the light of the language of the North Carolina Court in *Haight v. Grist*, 64 N. C. 739, 741 (1870), the omission of the words "in any court" might make it easier to hold that the statute in question was intended to apply to the state courts. There the court said: "It is therefore in accordance with long settled and widely extended rules of constitutional construction that the general expression, 'any Court', which is found in this statute of the United States, means only 'any Court of the United States', and does not include Courts of the respective states. . . . We are therefore under no necessity of discussing the power of Congress. . . ."

<sup>14</sup> 2 Cranch 358, 2 L. ed. 304 (U. S. 1804).

<sup>15</sup> *Id.* at 396, 2 L. ed. at 317.

<sup>16</sup> Cushman, *The National Police Power Under the Commerce Clause of the Constitution* (1919) 3 MINN. L. REV. 289 and 381.

<sup>17</sup> *Id.* at 297.

islation designed to promote the safety and efficiency of interstate commerce.<sup>18</sup> It is submitted that there is no satisfactory reason why it cannot provide for the protection of the privacy of interstate communications as a means of promoting their efficiency. The Supreme Court having held that the section of the Communications Act in question is a valid exercise of the commerce power, the question remains as to its applicability to state courts.

In the statute the act of wire tapping itself is not prohibited; in addition to interception there must be disclosure to constitute a violation of the act.<sup>19</sup> Could Congress have effectuated its policy of protection without encroaching upon the power of the states to regulate the admissibility of evidence in their courts, by specifically making the disclosure, even in a state court, a violation of federal law?

Following the precedent established by the majority of the state courts in the revenue act cases, the present statute would be construed as being applicable only to the federal courts. Such a construction might be based upon the intent of Congress that the statute does not apply, or upon a lack of power to enact it. The principle that Congress may, in the exercise of a granted power, enact legislation which incidentally affects subjects over which the states have control, would seem to be inapplicable where the subject of regulation is the admissibility of evidence in a state court.

MARSHALL V. YOUNT.

**Corporations—Federal Venue—Designation of Process Agent  
in Accordance with State Statute as Consent to Be Sued  
in Federal Court.**

Plaintiffs, residents of New Jersey, brought suit in the Federal District Court for the Southern District of New York against defendant, a Delaware corporation which was doing business within that district. Federal jurisdiction was invoked upon the ground of diversity of citizenship. The defendant appeared specially and moved to quash the service and dismiss the bill since suit was brought in a district in which neither it nor the plaintiff had residence.<sup>1</sup> Defendant's motion was granted in the district court, and there was subsequent affirmance in the circuit court of appeals.<sup>2</sup> After grant of certiorari, *held*, suit was properly brought in the district court since defendant had effectively

<sup>18</sup> *Id.* at 304.

<sup>19</sup> The title of the section under discussion is: "Unauthorized publication or use of communications", and the language of the second clause is: "... and no person . . . shall intercept any communication and divulge or publish. . . ." Moreover, the act provides no penalty for the prohibited disclosure.

<sup>1</sup> This may now be accomplished by a simple motion to dismiss under Rule 12(b) Federal Rules of Civil Procedure.

<sup>2</sup> 103 F. (2d) 765 (C. C. A. 2d, 1939).

waived its immunity as to venue and had consented to suit in the federal court, by designating a New York agent for service of process in conformity with a state statute.<sup>3</sup>

Venue in the federal courts is a personal privilege which a defendant may elect to waive or to insist upon,<sup>4</sup> as contrasted with jurisdiction of the subject matter which may not be conferred through waiver or consent.<sup>5</sup> Under the Act of 1875,<sup>6</sup> which required civil suits in federal courts to be brought in the district "whereof he [defendant] is an inhabitant or in which he shall be found" (italics supplied), *Ex Parte Schollenberger*<sup>7</sup> decreed that a non-resident corporation which had designated an agent for service of process as a condition of doing business within a state was properly suable in the federal courts within that state. In 1887 the statute was amended<sup>8</sup> to provide that, in cases where jurisdiction is based entirely on diversity of citizenship, suit should be in the district of plaintiff's or defendant's residence; and the clause "or in which he shall be found" was omitted. Soon thereafter two decisions of the Supreme Court adopted views which severely curtailed corporate suability in the federal courts. *Shaw v. Quincy Mining Co.*<sup>9</sup> held that, for purposes of the venue provision, a corporation is a resident or inhabitant only of the state of its incorporation. *Southern Pacific Co. v. Denton*<sup>10</sup> declared that a corporation, by appointing a process agent as required by state statute, did not thereby waive its venue immunity or consent to be sued in the federal courts within the state, and distinguished *Ex Parte Schollenberger* as being based upon the above-quoted "found" clause, which was deleted after that decision. It is true that the particular state statute involved in the *Denton* case was void,<sup>11</sup> so

<sup>3</sup> *Neirbo Co. v. Bethlehem Shipbuilding Corp., Ltd.*, — U. S. —, 60 Sup. Ct. 153, 84 L. ed. Adv. Ops. 123 (1939). Accord: *Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co.*, — U. S. —, 60 Sup. Ct. 215, 84 L. ed. Adv. Ops. 329 (1940).

<sup>4</sup> *Commercial Casualty Ins. Co. v. Consolidated Stone Co.*, 278 U. S. 177, 49 Sup. Ct. 98, 73 L. ed. 252 (1929) (a negative waiver by failure to assert the venue privilege within time allowed for a general appearance). Venue may also be affirmatively waived by a general appearance. See DOBIE, *HANDBOOK ON FEDERAL JURISDICTION AND PROCEDURE* (1928) §116.

<sup>5</sup> *Interior Construction & Improvement Co. v. Gibney*, 160 U. S. 217, 16 Sup. Ct. 272, 40 L. ed. 401 (1895).

<sup>6</sup> REV. STAT. §739 (1875), 28 U. S. C. §112 (1934).

<sup>7</sup> 96 U. S. 369, 24 L. ed. 853 (1877). (Court expressly declined to determine whether the defendant foreign corporation was an "inhabitant" of its business district.)

<sup>8</sup> 24 STAT. 552 (1887) as corrected by 25 STAT. 433 (1888), 28 U. S. C. §112 (1934).

<sup>9</sup> 145 U. S. 444, 12 Sup. Ct. 935, 36 L. ed. 768 (1892) (plaintiff, a citizen of Massachusetts, sued defendant, a Michigan corporation, in federal court of New York).

<sup>10</sup> 146 U. S. 202, 13 Sup. Ct. 44, 36 L. ed. 942 (1892) (plaintiff, a resident of eastern district of Texas, sued defendant, a Kentucky corporation, in western district of Texas where defendant did business).

<sup>11</sup> This statute was held invalid because it required that a corporation forfeit

that no valid designation could be made under it; yet the Court said that, even assuming the statute to be valid for purposes of suits in state courts, a designation under it would not amount to consent to be sued in the federal courts. Uniform adherence to these doctrines occurred in subsequent Supreme Court decisions.<sup>12</sup> Contrary views were infrequently advanced by a few of the lower federal courts,<sup>13</sup> but a predominant majority followed the Supreme Court holdings.<sup>14</sup>

Thus, the instant decision represents an abrupt reversal of doctrine long acquiesced in by the Court. The basic point of legalistic departure is upon an interpretation of the holding in *Ex Parte Schollenberger*. Mr. Justice Frankfurter insists that the intervening Supreme Court opinions stemmed from a misconception of *Ex Parte Schollenberger*, since that decision did not hinge upon the "found" clause but rather upon a consent to be sued in the courts of the state, which included the federal courts sitting within the state. The corporation, he asserts, could not have been geographically "found" within the state since legal fiction has restricted the existence of a corporate entity to the state of its incorporation, and thus it could have been treated as "found" only be-

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its privilege of removing suits to the federal court, as a condition of being permitted to do business within the state.

<sup>12</sup> That designation of a process agent in conformity with state statute is not a waiver of venue: *In re Keasby & Mattison Co.*, 160 U. S. 221, 16 Sup. Ct. 273, 40 L. ed. 402 (1895); *McLean v. Mississippi*, 96 F. (2d) 741 (C. C. A. 5th, 1938), *Cert. denied*, 305 U. S. 623, 59 Sup. Ct. 84, 83 L. ed. 20 (1938).

That a corporation cannot be an "inhabitant" or "resident" of any state except that of its incorporation: *Empire Coal & Transp. Co. v. Empire Coal & Mining Co.*, 150 U. S. 159, 14 Sup. Ct. 66, 37 L. ed. 1037 (1893); *Galveston, H. & S. A. Ry. v. Gonzales*, 151 U. S. 496, 14 Sup. Ct. 401, 38 L. ed. 248 (1894); *Macon Grocery Co. v. Atlantic Coast Line R. R.*, 215 U. S. 501, 30 Sup. Ct. 184, 54 L. ed. 300 (1910); *Ladew v. Tennessee Copper Co.*, 218 U. S. 357, 31 Sup. Ct. 81, 54 L. ed. 1069 (1910); *Seaboard Rice Milling Co. v. Chicago, R. I. & Pac. Ry.*, 270 U. S. 363, 46 Sup. Ct. 247, 70 L. ed. 633 (1926).

<sup>13</sup> Designation of a process agent constitutes consent to be sued: *Shainwald v. Davids*, 69 Fed. 704 (N. D. Cal. 1895); *Patten v. Dodge Mfg. Corp.*, 23 F. (2d) 852 (D. Ind. 1928), *aff'd*, 60 F. (2d) 676 (C. C. A. 7th, 1932); *Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co.*, 100 F. (2d) 770 (C. C. A. 10th, 1938).

<sup>14</sup> Designation of a process agent is not a consent to be sued in the federal court: *Halstead v. Manning, Bowman Co.*, 34 Fed. 565 (C. C. S. D. N. Y. 1888); *Bendinger Self-Adding Cash Register Co. v. National Cash Register Co.*, 42 Fed. 81 (C. C. E. D. Mo. 1890); *Rawbotham v. Steele Iron Co.*, 71 Fed. 758 (C. C. E. D. Pa. 1896); *Hagstoz v. Mutual Life Ins. Co. of N. Y.*, 179 Fed. 569 (C. C. E. D. Pa. 1910); *Beech-Nut Packing Co. v. P. Lorillard Co.*, 287 Fed. 271 (S. D. N. Y. 1921); *Kerfoot & Co., Ltd. v. United Drug Co.*, 38 F. (2d) 671 (D. Del. 1930); *Fruit Industries, Ltd. v. Metro Glass Bottle Co.*, 18 F. Supp. 489 (D. N. J. 1937); *McLean v. Mississippi*, 96 F. (2d) 741 (C. C. A. 5th, 1938); *Toulmain v. James Mfg. Co.*, 27 F. Supp. 512 (W. D. N. Y. 1939).

A corporation is an "inhabitant" or "resident" only of its charter state: (so held in at least forty lower federal court decisions) *Booth v. St. Louis Fire-Engine Mfg. Co.*, 40 Fed. 1 (C. C. E. D. Mo. 1889); *United States v. Shotter Co.*, 110 Fed. 1 (C. C. S. D. Ala. 1901); *Wolff & Co. v. Choctaw, O. & G. R. R.*, 133 Fed. 601 (C. C. E. D. Ark. 1904); *Heine Chimney Co. v. Rust Engineering Co.*, 12 F. (2d) 596 (C. C. A. 7th, 1926); *Standard Stoker Co., Inc. v. Lower*, 46 F. (2d) 678 (D. Md. 1931); *McLean v. Mississippi*, 96 F. (2d) 741 (C. C. A. 5th, 1938).

cause of previously given consent. This being true, such consent waives the present venue requirement of "residence" as effectively as it formerly waived the "found" clause. However, this disclosure, as far as the Supreme Court is concerned, awaited the hand of Mr. Justice Frankfurter. It is open to question that such reasoning underlay the opinion in *Ex Parte Schollenberger*. Although it did place reliance upon *Railroad Co. v. Harris*,<sup>15</sup> in which the Court had expressly deduced a consent to be sued from the act of designating an agent for service of process, yet the *Schollenberger* opinion made no less than seven distinct references to "finding" and declared that ". . . the essential fact is the finding. . . ."

The *Denton* case is construed by Mr. Justice Frankfurter as not inconsistent with *Ex Parte Schollenberger* inasmuch as no valid consent to be sued was given under the invalid state statute there involved. The fact that the Court in the *Denton* case went on to deal with the effect the state statute would have had if valid is dismissed as a suggestion based on a misapprehension of the doctrine of *Ex Parte Schollenberger*. Conversely, intervening decisions of the Supreme Court and the lower federal courts treated this portion of the *Denton* opinion as an alternative ground of decision rather than mere dictum, and illustrate that the "misapprehension" had become firmly entrenched.<sup>16</sup>

Next, Mr. Justice Frankfurter asserts that Congress deleted the "found" clause solely to relieve natural litigants, and that it entertained no intent to alter corporate suability. He points out that the House Bill which struck out the "found" clause, had it passed the Senate in the form it passed the House, would also have denied the federal courts both original and removal jurisdiction over suits between citizens of a state and a corporation doing business within that state; and he argues from this that there could be no rational motive on the part of the House in altering the venue of corporate litigants by deleting the "found" clause, if they would be completely barred by the prohibition clause.<sup>17</sup> Yet it can be argued with at least equal force that the House

<sup>15</sup> 12 Wall. 65, 20 L. ed. 354 (U. S. 1870).

<sup>16</sup> See cases cited *supra* notes 12 and 14.

<sup>17</sup> The House Bill (H. R. 2441, 49th Cong., 1st Sess. (1887)) omitted the "found" clause from the venue section and provided that no suit between a citizen of a state and a corporation doing business there should be heard in the federal court, either originally or upon removal. This bill was reported by the Senate Judiciary Committee (18 Cong. Rec. 613-614 (1887)). The Senate struck out the jurisdictional prohibition against corporate litigation, but sanctioned the deletion of the "found" clause. Subsequently, the House accepted the Senate modification (*id.* at 2651, 2727), and it became the Act of March 3, 1887.

The dissent of the principal case urges that Congress has acquiesced in the judicial application of the above revised venue section to corporate litigants, insofar as there has been no attempt at amendment. The majority opinion made no mention of this contention, but in a more recent case the Court has expressly rejected a similar argument, saying: "It would require very persuasive circumstances enveloping congressional silence to debar this court from re-examining its

assumed that the "found" clause did affect venue in suits against corporations, and thus: (1) its retention would have been in direct conflict with the jurisdictional prohibition as to suits brought by plaintiffs resident in the state where the corporation was doing business; (2) the prohibition would not have applied to non-resident plaintiffs (the very situation involved in the principal case), and deletion of the "found" clause was simply a further move by the House, pursuant to the same policy prompting the prohibition clause, to restrict the use of federal courts in corporate litigation.<sup>18</sup> Therefore, the rectitude of this part of Mr. Justice Frankfurter's reasoning is not too obvious. However, when it is noted that congressional utterances concerning deletion of the "found" clause were exclusively directed to the situation of natural, as distinguished from corporate litigants,<sup>19</sup> his position is greatly strengthened.

Further, he insists that a hostile House would not have excluded the "found" clause if such action would nullify corporate suability in the federal court of a district in which it does business while leaving the corporation free, when the suit is brought in a state court, to remove to the federal court. This reference to the former lack of mutuality existing between corporate and natural litigants, in their ability to gain the federal courts against one another, opens the result of the instant decision to attack upon the same score. The principal case eliminates the advantage formerly enjoyed by corporations through their power to remove to a federal court not originally available to the plaintiff. However, it does not create an equilibrium, but creates a new discrimination. A natural litigant now has a greater choice of federal courts than his corporate adversary. The extent of this new inequality must depend upon a query left unanswered by the instant opinion: How broad is the corporate consent to be sued? Does it extend to every federal district within the state where the corporation does business or is it limited by state restrictions as to proper venue, that is, can an action be brought only in a district embracing a county which would be a proper venue had the action been brought in the state court? Since the corporate consent to be sued is exacted in return for authority to do statewide business, it might be plausibly argued that the corporation consents to suit in any federal district of the state. Further, allowing the availability of the particular federal district to be determined by state venue statutes might well be held to violate the doctrine that state statutes cannot govern federal venue, though this is somewhat uncertain

own doctrines. To explain the cause of nonaction by Congress when Congress itself sheds no light is to venture into speculative unrealities." *Helvering v. Hallock*, — U. S. —, 60 Sup. Ct. 444, 84 L. ed. Adv. Ops. 382 (1940).

<sup>18</sup> See *Toulmain v. James Mfg. Co.*, 27 F. Supp. 512, 514 (W.D. N. Y. 1939).

<sup>19</sup> See 18 Cong. Rec. 2545 (1887).

| PARTIES   | SUIT BROUGHT IN<br>N. C. IN                              | UNDER FORMER SUPREME<br>COURT VIEW   | UNDER RULE OF<br>PRINCIPAL CASE  |
|---|--|--|--|
| N. C. citizen and a Delaware corporation doing business in N. C.    | Federal district court of citizen's residence.           | (1) If citizen is plaintiff, then venue is <i>proper</i> because plaintiff's residence.<br>(2) If corp. is plaintiff, then venue is <i>proper</i> because defendant's residence.   | (1) Same (corporation's consent to be sued is immaterial).<br>(2) Same (corporation's consent to be sued is inapplicable).   |
| N. C. citizen and a Delaware corporation doing business in N. C.    | Federal district court other than plaintiff's residence. | (1) If citizen is plaintiff, then venue is <i>improper</i> because not the residence of either plaintiff or defendant.<br>(2) If corp. is plaintiff then venue is <i>improper</i> because not the residence of either plaintiff or defendant.  | (1) If citizen is plaintiff, venue is <i>proper</i> because of defendant's consent to be sued (Query: is proper district restricted in terms of state venue?).<br>(2) If corp. is plaintiff, venue is <i>improper</i> because not the residence of either plaintiff or defendant (corporation's consent to be sued is inapplicable). |
| N. C. citizen and a Delaware corporation doing business in N. C.    | State court of proper venue.                             | (1) If citizen is plaintiff, then <i>removable</i> to federal court because of diversity of citizenship and defendant being a non-resident.<br>(2) If corp. is plaintiff, then <i>not removable</i> because defendant is a resident.   | (1) Same.<br><br>(2) Same.   |
| Virginia citizen and a Delaware corporation doing business in N. C. | Federal district court.                                  | (1) If Va. citizen is plaintiff, venue is <i>improper</i> because not the residence of either plaintiff or defendant.<br>(2) If corp. is plaintiff, venue is <i>improper</i> because not the residence of either plaintiff or defendant.   | (1) If Va. citizen is plaintiff, venue is <i>proper</i> because of corporation's consent to be sued. (Query: is proper district restricted in terms of state venue?).<br>(2) If corp. is plaintiff, venue is <i>improper</i> because not the residence of either the plaintiff or defendant.   |
| Virginia citizen and a Delaware corporation doing business in N. C. | State court of proper venue.                             | (1) If Va. citizen is plaintiff, case is <i>removable</i> to federal court because of diversity of citizenship and defendant being a non-resident.<br>(2) If corp. is plaintiff, case is <i>removable</i> to federal court because of diversity of citizenship and defendant being a non-resident. | (1) Same.<br><br>(2) Same.   |

in view of the technique (mentioned below) employed in the instant case to avoid the same argument as applied to the state statute there involved.

Concrete illustration of the degree of mutuality in diversity cases, both past and present, is given by the accompanying chart. The principal change wrought by the instant case occurs where a corporation is

being sued in a federal court in a state where it does business by: (a) a non-resident plaintiff, (b) a resident plaintiff in a district other than his residence. In both these instances the corporation loses its former immunity, the exact extent of the loss depending upon the question mentioned above as to whether the corporate consent is extensive enough to open every federal district of the state to the plaintiff or merely that district which is proper according to state venue. If designation of a process agent makes a corporation vulnerable to suit in any federal district of the state,<sup>20</sup> then obviously a litigant (whether resident or non-resident) suing the corporation has a greater choice of federal courts than the corporation could have as plaintiff against that litigant. Yet, even if the corporate consent to be sued is restricted in terms of state venue provisions, the corporation will still suffer a lack of mutuality, since: (1) a non-resident litigant (whether individual or another corporation not doing local business) may sue the corporation in the federal court of its business state, whereas the corporation has no concomitant right to sue that litigant in the federal court of the same state; (2) a resident litigant (whether individual or another corporation) has a choice, as plaintiff, of suing the corporation either in the federal district of its own residence or in another district embracing a county which would be a proper venue under state laws, whereas the corporation may only sue in the district of defendant's residence. Rights of removal remain unchanged by the principal case.

Although state legislation may not enlarge or diminish federal jurisdiction or venue, the majority opinion of the principal case adroitly evades this obstacle by emphasizing that it is the corporation's voluntary consent to be sued, as manifested by its designation of a process agent in accord with a state statute, which gives jurisdiction to this particular federal court. Thus to isolate the act of designation as something separable from the effect given it by *operation* of the state statute seems a sophisticated distinction, reflecting more of judicial desire than impelling logic. The question of whether the mere doing of business in a state would constitute consent to be sued in a federal court there, under the doctrine of implied consent, must await future decision. An affirmative answer would be a further invasion of the doctrine that state legislation may not alter federal venue, for the operation of the state statute would thus override even a refusal to manifest consent by designating a process agent. (A similar problem would arise if an attempt were made to sue originally in the federal court under a non-resident motorist statute.)

<sup>20</sup> If this view prevails, then it should also apply to the state of incorporation, or else there will be the anomalous situation of a corporation being suable in more federal districts of a state in which it merely does business than in the state of its incorporation.



An alternative ground for arriving at the result of the principal case was advanced in the petitioner's brief. It was urged that the early dictum of Chief Justice Taney,<sup>21</sup> that a corporation can have no existence as a legal entity outside the state of its incorporation, be discarded for the illogical fiction that it is, and that a corporation doing permanent or substantial business within a state should be realistically regarded as a resident or inhabitant of that state. This would effectively destroy corporate immunity as to venue, yet leave undisturbed the fiction that a corporation is a citizen only of its charter state, which usually affords the requisite diversity of citizenship to invoke federal jurisdiction. Such treatment would have the merit of intellectual clarity, particularly as applied to "Delaware corporations," but a rule requiring determination of what constitutes "permanent" or "substantial" business might prove more elusive of application than the approach adopted by the instant case. Perhaps, however, the instant case does presage some further judicial inquiry into the legalistic fictions enshrouding corporations.

The principal case should not be interpreted as one which will immediately result in a greatly increased total volume of litigation in all federal courts. An overwhelming majority of the suits which may, solely by virtue of the principal decision, be brought originally in a particular federal court could have been removed to the federal court under the former rule or could have been brought in some other federal district. The actual increase in total volume of federal litigation will, therefore, be confined to cases in which the removal privilege would not have been invoked under the former rule. The significance of the decision lies mainly in the choice given plaintiffs, both as between state courts and federal courts and as between different federal courts.

JAMES K. DORSETT, JR.

**Damages—Admissibility of Evidence of Prior Earnings in  
Determining Probable Future Earning Capacity—"Remoteness".**

Plaintiff had been a public school teacher throughout her adult life, but in 1932 she temporarily discontinued teaching and began to take correspondence courses to raise the grade of her certificate, as the state intended to require a higher grade in 1940. In 1934 she stopped the courses, intending, however, to complete them in 1938 and 1939. On March 5, 1938, plaintiff received an injury to her left eye due to alleged negligence of defendant. She complains that her remaining eye, which had been injured in a previous accident, has been impaired by the resulting strain and that consequently her earning capacity has been seriously and permanently impaired. The Supreme Court of North Carolina,

<sup>21</sup> *Bank of Augusta v. Earle*, 13 Pet. 518, 588, 10 L. ed. 274, 306 (U. S. 1839).

with three justices dissenting, *held*, that evidence of plaintiff's earnings as a teacher six years before her injury was not competent on the question of her probable future earnings.<sup>1</sup> The majority decided that it was uncertain whether plaintiff would ever receive her certificate and, therefore, her earnings as a teacher were no indication of what her future earnings as a teacher would be. The dissenting opinion advanced the view that plaintiff's allegations were sufficient to support a recovery for damages to her general earning capacity, and, since the test of earning capacity lies in the actual earnings, evidence of her prior earnings was relevant.

It is a general rule that a person injured by the negligence of another may recover for the impairment of his future earning capacity.<sup>2</sup> Frequently this award, a major part of the recovery in such cases, is very difficult for the jury to evaluate.<sup>3</sup> Usually the measure of damages for a diminution of earning power is a sum equal to the present worth of such diminution, and not its aggregate for plaintiff's life expectancy.<sup>4</sup> If the plaintiff worked regularly for a salary, the problem would not be too difficult, but if he were not working at the time of the injury, his damage would rest on a problematical future loss. However, since everyone is a potential earner, it is possible to work out the probable future income.<sup>5</sup>

On these fundamental points the majority and dissenting opinions agree. And, although both groups accept the rule that there must be a reasonable relationship between the prior earnings and the probable future earnings,<sup>6</sup> the divergence comes in the application of the rule. The majority opinion takes the view that this reasonable relationship must exist between prior earnings and probable future earnings as a public school teacher, while the dissent maintains that it need only exist between prior earnings and general earning capacity.

In attempting to solve this problem, the courts have reached differ-

<sup>1</sup> *Fox v. Asheville Army Store, Inc.*, 216 N. C. 468, 5 S. E. (2d) 436 (1939).

<sup>2</sup> *Pierce v. Tennessee C., I. & R. R.*, 173 U. S. 1, 19 Sup. Ct. 335, 43 L. ed. 591 (1899); *Louisville & N. R. R. v. Carter*, 195 Ala. 382, 70 So. 655 (1915); *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266 (1889); *Western & A. R. R. v. Young*, 81 Ga. 397, 7 S. E. 912 (1888); *Graham v. Mattoon City Ry.*, 234 Ill. 483, 84 N. E. 1070 (1908); *Louisville & N. R. R. v. Ashley*, 169 Ky. 330, 183 S. W. 921 (1916); *Hendler v. Coffey*, 278 Mass. 339, 179 N. E. 801 (1932); *Beaudin v. Bay City*, 136 Mich. 333, 99 N. W. 285 (1904); *Clark v. Traction Co.*, 138 N. C. 77, 50 S. E. 518 (1905); *Kirk v. Seattle Electric Co.*, 58 Wash. 283, 108 Pac. 604 (1910); *McCORMICK, DAMAGES* (1935) §86.

<sup>3</sup> *McCORMICK, DAMAGES* (1935) §86.

<sup>4</sup> *Baltimore & O. R. R. v. Henthorne*, 73 Fed. 634 (C. C. A. 6th, 1896); *Bourke v. Butte Electric & Power Co.*, 33 Mont. 267, 83 Pac. 470 (1905); *Fry v. North Carolina R. R.*, 159 N. C. 357, 74 S. E. 971 (1912); 4 *SUTHERLAND, DAMAGES* (4th ed. 1916) §1249.

<sup>5</sup> *Miller, Assessment of Damages in Personal Injury Actions* (1930) 14 MINN. L. REV. 216, 224.

<sup>6</sup> *Bourke v. Butte Electric & Power Co.*, 33 Mont. 267, 83 Pac. 470 (1905); *Wells Fargo & Co. v. Benjamin*, 165 S. W. 120 (Tex. Civ. App. 1914).

ent results. In a Michigan case,<sup>7</sup> the plaintiff, who was sixty-five years old when he was injured, had moved to Detroit six months before the accident, and, although he had not worked since moving to Detroit, he planned to open a shoe store. He was allowed to testify that he had worked in a shoe factory in Connecticut and earned twelve dollars a week. The court held that such evidence was relevant as to impairment of plaintiff's ability to earn money and that under these circumstances the period was not too remote.

The Texas Court of Civil Appeals, in *Galveston, H. & S. A. Ry. v. Contois*,<sup>8</sup> allowed an injured employee to show the pay that he had received while he was in the army, although his service in the army ceased about five years before the date of the injury. The court overruled objections that such evidence was irrelevant, immaterial, and too remote in time, on the ground that it went to the weight of the testimony and had a bearing on the plaintiff's ability to earn money before the accident.

Remoteness, however, may be viewed prospectively as well as retrospectively, as some courts have taken into consideration the plaintiff's earning capacity in occupations for which he was fitted but in which he had never actually worked. For example, in a Pennsylvania case,<sup>9</sup> the injured plaintiff had completed a four-year course in forestry the year before the accident, but he had not started to work as a forester at the time of his injury. He was allowed to show the minimum salary of a graduate forester, as bearing upon loss of earning power, since he had been disabled by the accident and would not be able to pursue that occupation. The court developed its argument in this way: "Should a graduate nurse be disabled before entering upon her profession we believe it would be competent to show the income of that occupation as bearing on the question of loss of earning power, and, if so, why not in this case?"<sup>10</sup> The analogy is good, but what about the problem of remoteness? The plaintiff's earnings in his chosen field are purely a matter of conjecture; they have never existed and are, therefore, remote not only in point of time but in reality as well. In other words, it would seem that an event which occurred in the past, no matter how far distant, would be less remote than an event dependent upon some future contingency. However, when a person has studied to enter a particular profession, the certainty that the person will in fact engage in that profession might be greater than in the case of a person who has left the profession for another. Therefore, under this reasoning the degree of remoteness would be greater in the case of the employee who had left the service of the army than in the case of the plaintiff who had studied

<sup>7</sup> *Pawlicki v. Detroit United Ry.*, 191 Mich. 536, 158 N. W. 162 (1916).

<sup>8</sup> 279 S. W. 929 (Tex. Civ. App. 1925).

<sup>9</sup> *De Hass v. Pennsylvania R. R.*, 261 Pa. 499, 104 Atl. 733 (1918).

<sup>10</sup> *Id.* at 503, 104 Atl. at 735.

to be a forester. This, of course, assumes that the relationship of earnings must be to probable future earnings in a certain profession. If it is assumed that this relation need be only to general earning capacity, there would seem to be no difference in degree of remoteness, whether viewed prospectively or retrospectively.

In the case of injuries to children the courts have allowed them to recover for loss of future income,<sup>11</sup> and although it would seem appropriate to do so, the courts do not discuss the question of remoteness. On the other hand, many courts have not been so liberal in interpreting remoteness in cases of injuries to adults.<sup>12</sup>

Although one court, in directing the approximate damages to be awarded the injured employee, confined consideration solely to wages earned by the employee at the time of the accident,<sup>13</sup> there is ample authority to sustain the view that the plaintiff's recovery should not be confined to an award based on her probable future earnings in any one type of employment.<sup>14</sup> This rule may be carried even one step further. The plaintiff is entitled to have the jury consider evidence as to what she *might* have been able to earn in any occupation for which she was fitted, if she had not been injured.<sup>15</sup> This is illustrated in a wrongful death action against a railroad in which the appellee was permitted to show that the deceased had been a plasterer's apprentice for several years before he went to work for the appellant, and that, although he had not completely mastered the trade, he was able to do creditable work. The court allowed him to show the wages that plasterers received at the time of the injury.<sup>16</sup> When this case is considered on the question

<sup>11</sup> *Jeffries v. Seaboard Air Line R. R.*, 129 N. C. 236, 39 S. E. 836 (1901) (plaintiff, a three year old child, was allowed to show the average wages of cooks and women field hands in that vicinity); *Gulf C. & S. F. Ry. v. Sauter*, 46 Tex. Civ. App. 309, 103 S. W. 201 (1907) (a four year old child, whose fingers had been injured, was permitted to introduce evidence to show her prospective musical talent and that, as a result of her injury, her earning capacity had been reduced).

<sup>12</sup> *Payne v. Lyon*, 154 Ga. 501, 114 S. E. 892 (1922) (evidence of probability of promotion inadmissible); *Buck v. McKeesport*, 223 Pa. 211, 72 Atl. 514 (1909) (married woman could not show her earnings prior to her marriage twenty-three years before); *Helmstetter v. Pittsburgh Ry.*, 243 Pa. 422, 90 Atl. 203 (1914) (plaintiff, a city foreman, could not show his salary as a stationary engineer thirteen years before his injury); *Fort Worth & D. C. Ry. v. Smithers*, 249 S. W. 286 (Tex. Civ. App. 1922) (evidence of chances of promotion inadmissible in the absence of a definite rule for promotions).

<sup>13</sup> *Brown v. Chicago, R. I. & P. Ry.*, 64 Iowa 652, 21 N. W. 193 (1884). But see 4 SUTHERLAND, DAMAGES (4th ed. 1916) §1246.

<sup>14</sup> *Laird v. Chicago, R. I. & P. Ry.*, 100 Iowa 336, 69 N. W. 414 (1896); *Trott v. Chicago, R. I. & P. Ry.*, 115 Iowa 80, 86 N. W. 33 (1901); *Houston & T. C. R. R. v. McCullough*, 22 Tex. Civ. App. 208, 55 S. W. 392 (1899); 4 SUTHERLAND, DAMAGES (4th ed. 1916) §1249.

<sup>15</sup> *Seaboard Mfg. Co. v. Woodson*, 98 Ala. 378, 11 So. 733 (1892); *Zibbell v. Southern Pac. Ry.*, 160 Cal. 237, 116 Pac. 513 (1911); *Grimmelman v. Union Pac. Ry.*, 101 Iowa 74, 70 N. W. 90 (1897); *Millette v. Detroit United Ry.*, 186 Mich. 634, 153 N. W. 10 (1915).

<sup>16</sup> *Grimmelman v. Union Pac. Ry.*, 101 Iowa 74, 70 N. W. 90 (1897).

of remoteness, it has a marked similarity to the principal case. In the case of the plasterer's apprentice the plaintiff was allowed to show the wages of master plasterers at the time of the injury although the deceased had been only an apprentice; in the principal case the plaintiff had been a teacher and was working on the requirements necessary to continue teaching, yet she was not allowed to show her own earnings as a teacher, much less the present earnings of public school teachers.

It is obvious from the foregoing discussion that there is no hard and fast rule as to remoteness. The best that the courts can do is to reiterate the necessity for a "reasonable relationship between prior earnings and probable future earnings". What this reasonable relationship is, the courts must determine in each particular case. The dissenting justice offers his solution: "Courts speak of the market value of services. The test of earning capacity lies in the actual earnings. There is an evidential connection between this plaintiff's earnings in her former work and her general earning capacity which cannot be denied."<sup>17</sup> In view of the holdings of the courts in similar fact situations, it is submitted that the evidence in the principal case should not have been excluded on the ground of remoteness, and that a more equitable result would have been reached if the view taken by the dissenting justice had been followed.

VIRGINIA EMERSON LEWIS.

#### **Dower Consummate Unassigned—Right of Widow to Alienate— Right of Quarantine.**

After a voluntary partition among the heirs of an intestate of all his property except the mansion house and lot 14, the intestate's widow, for a valuable consideration, disposed of her unassigned dower rights to these heirs. She also conveyed by deed to one of these heirs, *L*, all her right and interest in the mansion house and lot 14. In a suit to partition or sell these two properties, the question arose as to what interest *L* took from the widow. The court recognized the right of the widow to sell her unassigned dower, and held that by the wording of the instruments of conveyance she had disposed of all her dower rights in the intestate's entire property. However, as her statutory quarantine right to hold the mansion house until dower was assigned her was a non-salable, personal right that terminated when the dower was disposed of, *L* did not succeed to it by virtue of his deed.<sup>1</sup>

It is generally held that the widow's right to have dower assigned her after her husband's death does not constitute an interest in land,

<sup>17</sup> *Fox v. Asheville Army Store, Inc.*, 216 N. C. 468, 474, 5 S. E. (2d) 436, 440 (1939).

<sup>1</sup> *Love v. Ward*, 5 S. E. (2d) 411 (W. Va. 1939).

such as a life estate,<sup>2</sup> but rather, a personal right, comparable to a chose in action.<sup>3</sup> As such it cannot be alienated so as to vest in the recipient a right enforceable at law.<sup>4</sup> Thus, her grantee, through such attempted transfer, acquires no right of entry, and cannot set up such conveyance as a defense in an action of ejectment by the heirs.<sup>5</sup>

The rule against such a conveyance is generally limited to a stranger to the title.<sup>6</sup> The widow can transfer her unassigned dower right to the owner of the fee or to persons in privity with him,<sup>7</sup> since such a release would not necessitate laying off the dower in that particular property. Similarly, where the widow joins with the owner of the fee in conveying the land, she releases her dower in it, even though there is no recital to that effect in the deed.<sup>8</sup> This is true also where she conveys her unassigned dower to a purchaser of the fee from the heirs,<sup>9</sup> although all the heirs do not transfer their interests.<sup>10</sup> Where the heirs with whom the widow joined in the conveyance are minors, their subsequent disaffirmance does not affect the validity of the transfer of her consummate interest.<sup>11</sup>

The grantee of the widow's right to dower receives more lenient treatment in equity than at law. Courts of chancery will recognize the conveyance as an equitable transfer and will enforce it as a contract,

<sup>2</sup> Grubbs v. Lydecker, 153 Ind. 348, 53 N. E. 940 (1899).

<sup>3</sup> Mullan v. Bank of Pasco County, 101 Fla. 1097, 133 So. 323 (1931); Burk v. Moore, 209 Ky. 24, 272 S. W. 38 (1925); see Harrison v. Wood, 21 N. C. 437, 440 (1836); Dailey v. Benn, 81 Okla. 285, 286, 198 Pac. 323, 324 (1921); Astle v. Card, 52 R. I. 357, 360, 161 Atl. 126, 128 (1932).

<sup>4</sup> Pacific Bank v. Hannah, 90 Fed. 72 (C. C. A. 9th, 1898); Lewis v. King, 180 Ill. 259, 54 N. E. 330 (1899); Hunt's Guardian v. Crawford Coal Co., 222 Ky. 504, 1 S. W. (2d) 955 (1928); Ritt v. Dodge, 20 R. I. 133, 37 Atl. 810 (1897). There are some cases *contra*, but they are usually based on statutory construction. Cf. Dobberstein v. Murphy, 64 Minn. 129, 66 N. W. 204 (1896); Serry v. Curry, 26 Neb. 353, 42 N. W. 97 (1889); Tucker v. Tucker, 100 Tenn. 310, 45 S. W. 344 (1898).

Missouri has a statute expressly allowing alienation of consummate dower unassigned. Mo. Rev. Stat. (1929) §320. Phillips v. Presson, 172 Mo. 24, 72 S. W. 501 (1903).

<sup>5</sup> Landers v. Hayes, 196 Ala. 533, 72 So. 106 (1916); Bowen v. Black, 170 Ark. 237, 279 S. W. 782 (1926); Fuchs v. Christie, 79 N. J. L. 14, 74 Atl. 129 (Sup. Ct. 1909); Byrne v. Kernals, 55 Okla. 573, 155 Pac. 587 (1916).

<sup>6</sup> Chicago B. & D. Ry. v. Kelly, 221 Ill. 498, 77 N. E. 916 (1906); Burk v. Moore, 209 Ky. 24, 272 S. W. 38 (1925); Fuchs v. Christie, 79 N. J. L. 14, 74 Atl. 129 (Sup. Ct. 1909); Byrne v. Kernals, 55 Okla. 573, 155 Pac. 587 (1916); cf. Landers v. Hayes, 196 Ala. 533, 72 So. 106 (1916); see Astle v. Card, 52 R. I. 357, 361, 161 Atl. 126, 128 (1932).

<sup>7</sup> Preston v. Second Nat. Bank of Paintsville, 250 Ky. 573, 63 S. W. (2d) 774 (1933); see Campbell v. Wilson, 195 Ill. 284, 285, 63 N. E. 103, 104 (1902); Burk v. Moore, 209 Ky. 24, 28, 272 S. W. 38, 40 (1925); Byrne v. Kernals, 55 Okla. 573, 579, 155 Pac. 587, 589 (1916); Astle v. Card, 52 R. I. 357, 361, 161 Atl. 126, 128 (1932).

<sup>8</sup> Campbell v. Wilson, 195 Ill. 284, 63 N. E. 103 (1902); cf. Callan v. Western Investment & Holding Co., 157 Ore. 412, 72 P. (2d) 48 (1937).

<sup>9</sup> Consolidated Coal Co. v. Grayson, 186 Ky. 314, 216 S. W. 848 (1919).

<sup>10</sup> Dailey v. Benn, 81 Okla. 285, 198 Pac. 323 (1921); Callan v. Western Investment & Holding Co., 157 Ore. 412, 72 P. (2d) 48 (1937).

<sup>11</sup> Beauchamp v. Bertig, 90 Ark. 351, 119 S. W. 75 (1909).

provided that such enforcement would not prove unjust.<sup>12</sup> A valuable consideration should be paid,<sup>13</sup> although mere inadequacy of price will not of itself vitiate the contract.<sup>14</sup> The presence of fraud, imposition, or undue influence, however, will prevent the enforcement of the agreement.<sup>15</sup> The grantee acquires an equitable right to have the dower assigned to him.<sup>16</sup> Usually the exercise of this right takes the form of procuring a decree for the assignment of the dower to the widow, with the further requirement that she then convey the legal title to her equitable grantee.<sup>17</sup> It has been held that in such a proceeding, the widow is a necessary party.<sup>18</sup> Similarly, in equity, a widow may mortgage her right to unassigned dower, and in so doing she is estopped to deny the validity of the mortgage. If she then, for some reason, does not have the dower assigned her, the mortgagee may, on her default, have it done for his own benefit.<sup>19</sup>

At common law the widow's right to quarantine was limited by the meaning of the word itself, in that the widow was allowed to remain in her husband's principal "mansion house" only for forty days after his death.<sup>20</sup> This was for the purpose of providing her with a place in which to live until her dower was allotted. The modern American equivalent, which, too, is generally referred to as quarantine, extends by statute the widow's right to occupy the house until dower is actually assigned her;<sup>21</sup> this right usually includes also the property immediately adjoining the mansion house.<sup>22</sup> The widow is entitled to this property free from molestation, and without the burden of paying taxes

<sup>12</sup> *Wilson v. Roebuck*, 180 Ala. 288, 60 So. 870 (1913); *Flowers v. Flowers*, 84 Ark. 557, 106 S. W. 949 (1907); *Tandy v. Smith*, 173 Ark. 828, 293 S. W. 735 (1927); *Morris v. Glaser*, 106 N. J. Eq. 585, 151 Atl. 766 (Ch. 1930), *aff'd*, 110 N. J. Eq. 661, 160 Atl. 578 (1932); *Potter v. Everitt*, 42 N. C. 152 (1850).

<sup>13</sup> *Wilson v. Roebuck*, 180 Ala. 288, 60 So. 870 (1913); *Flowers v. Flowers*, 84 Ark. 557, 106 S. W. 949 (1907).

<sup>14</sup> *Potter v. Everitt*, 42 N. C. 152 (1850).

<sup>15</sup> *Wilson v. Roebuck*, 180 Ala. 288, 60 So. 870 (1913).

<sup>16</sup> *Randerson v. Peeples*, 79 Fla. 367, 84 So. 370 (1920); *Johnston v. Loose*, 201 Mich. 259, 167 N. W. 1021 (1918); *cf. Parton v. Allison*, 109 N. C. 674, 14 S. E. 107 (1891).

<sup>17</sup> *Johnston v. Loose*, 201 Mich. 259, 167 N. W. 1021 (1918); see *Harrison v. Wood*, 21 N. C. 437, 440 (1836).

<sup>18</sup> *Parton v. Allison*, 111 N. C. 429, 16 S. E. 415 (1892).

<sup>19</sup> *Mullan v. Bank of Pasco County*, 101 Fla. 1097, 133 So. 323 (1931); *Morris v. Glaser*, 106 N. J. Eq. 585, 151 Atl. 766 (Ch. 1930), *aff'd*, 110 N. J. Eq. 661, 160 Atl. 578 (1932). As to the liability of the unassigned dower right to satisfaction of a widow's debts, see note (1932) 81 A. L. R. 1110.

<sup>20</sup> TIFFANY, *REAL PROPERTY* (3d ed. 1939) §535.

<sup>21</sup> STAT. ARK. (1937), §82.

<sup>22</sup> *Boyte v. Pekins*, 211 Ala. 130, 99 So. 652 (1924); *Mullan v. Bank of Pasco County*, 101 Fla. 1097, 133 So. 323 (1931); *Wyly v. Kallenbach*, 256 Ky. 391, 76 S. W. (2d) 34 (1934); *Moore v. Hoffman*, 327 Mo. 852, 39 S. W. (2d) 339 (1931). ALA. CODE ANN. (Michie, 1928) §7437; FLA. COMP. GEN. LAWS ANN. (Skillman, 1927) §5497; KY. STAT. ANN. (Carroll, 1936) §2138; MO. REV. STAT. (1929) §338; W. VA. CODE ANN. (Michie, 1937) §4105.

or rent thereon.<sup>23</sup> Nor is she required to keep up the interest on any encumbrance that may burden the land.<sup>24</sup> One who deprives her of this right is liable to her for the reasonable rental value of the land during the period of deprivation, as long as her right of quarantine is in force.<sup>25</sup>

At common law the re-marriage of the widow terminated her quarantine, but at least one American court has repudiated this rule. It considered the quarantine as a statutory substitute for dower until the dower is assigned. Since the re-marriage does not terminate the right of dower, neither does it end the right to quarantine.<sup>26</sup>

The right to quarantine exists only until dower is assigned, and consequently the running of a statute of limitations on the right to have dower assigned will necessarily terminate the quarantine.<sup>27</sup> It will be seen that, in the absence of such a statutory limitation, it is possible for the widow to retain possession for the duration of her life, if the heirs neglect to have the dower assigned her.<sup>28</sup>

The overwhelming majority of the cases hold that the widow cannot convey her statutory right of quarantine,<sup>29</sup> either at law<sup>30</sup> or in equity.<sup>31</sup> It is considered a personal right for the protection of the widow, and, therefore, not capable of alienation. If she does attempt to transfer this right by conveyance, she thereby abandons it, and thus the heirs' right of entry into such premises becomes complete, subject, of course, to the assignment of her dower.<sup>32</sup> However, the widow may release her quarantine to the heirs; this is not considered a conveyance of the right, but an extinguishment of it.<sup>33</sup>

In Missouri, however, it is held that quarantine is a possessory right which the widow may convey, such conveyance carrying with it all of her rights previous to the transfer. This holding may be explained, however, by virtue of the fact that a Missouri statute expressly

<sup>23</sup> *Mullan v. Bank of Pasco County*, 101 Fla. 1097, 133 So. 323 (1931); *Wyly v. Kallenbach*, 256 Ky. 391, 76 S. W. (2d) 34 (1934).

<sup>24</sup> *Rains v. Moulder*, 338 Mo. 275, 90 S. W. (2d) 81 (1936); *Krug v. Bremer*, 11 S. W. (2d) 1096 (Mo. App. 1928).

<sup>25</sup> *Krug v. Bremer*, 11 S. W. (2d) 1096 (Mo. App. 1928).

<sup>26</sup> *Doe ex dem. Shelton v. Carrol*, 16 Ala. 148 (1849).

<sup>27</sup> *Smith Bros. Land & Investment Co. v. Phillips*, 289 Mo. 579, 233 S. W. 413 (1921); *Moore v. Hoffman*, 327 Mo. 852, 39 S. W. (2d) 339 (1931).

<sup>28</sup> If the widow is also administratrix, it is her duty to see that dower is assigned within a reasonable time. *Boyte v. Pekins*, 211 Ala. 130, 99 So. 652 (1924).

<sup>29</sup> *Griffin v. Dunn*, 79 Ark. 408, 96 S. W. 190 (1906); *Phillips v. Williams*, 130 Ky. 773, 113 S. W. 908 (1908). But see Missouri rule, *infra*, note 34.

<sup>30</sup> *Barber v. Williams*, 74 Ala. 331 (1883).

<sup>31</sup> *Flowers v. Flowers*, 84 Ark. 557, 106 S. W. 949 (1907).

<sup>32</sup> *Barber v. Williams*, 74 Ala. 331 (1883); *Griffin v. Dunn*, 79 Ark. 408, 96 S. W. 190 (1906).

<sup>33</sup> *Barber v. Williams*, 74 Ala. 331 (1883); see *Penny v. Weems*, 39 So. 574 (Ala. 1905).



permits the alienation of unassigned dower, and quarantine is considered but a mere incident thereof.<sup>34</sup>

A New Jersey case which permits an equitable conveyance of quarantine<sup>35</sup> presents an interesting discussion of the possible reasoning behind these two views. Those decisions holding that the right of quarantine is not alienable compare it with a tenancy at will, and consider it a tenancy terminable at the will of the heir who may have dower assigned. As the common law tenancy at will is not assignable,<sup>36</sup> neither is the right of quarantine. The New Jersey court, however, held that quarantine is something more than a mere tenancy at the will of the heirs, as they must render the widow a *quid pro quo* by having her dower assigned to her before they can take away her quarantine. Consequently, under this view, as an incident of dower capable of being successfully transferred in equity, the right of quarantine is likewise alienable.

In spite of the unqualified rule laid down by the court in the principal case that a "widow may sell unassigned dower", it seems that it reached the correct result according to the weight of authority, both because the grantees of the widow were, in fact, heirs of the intestate, and because there was no unfairness shown to prevent equity from enforcing her transfers. The court also was in line with the majority of cases in holding that the quarantine right was not salable. From a purely practical standpoint, in the interest of simplicity of the records of titles to lands, it seems desirable not to allow a widow to pass any legal title to either her dower unassigned or her right of quarantine.

J. B. CHESHIRE, IV.

### Husband and Wife—Divorce—"Living Apart"—Effect of Living in Same House.

Plaintiff wife sued for limited divorce. The Court of Appeals for the District of Columbia reversed the lower court holding that plaintiff was not entitled to maintenance pendente lite, and remanded the cause to the trial court for determination of the amount.<sup>1</sup> One point on which the holding of the appellate court hinged was that concerning the effect of the parties' dwelling under the same roof during the pendency of proceedings. Husband and wife occupied separate bedrooms, ate sepa-

<sup>34</sup> *Graham v. Stafford*, 171 Mo. 692, 72 S. W. 507 (1903); *Phillips v. Presson*, 172 Mo. 24, 72 S. W. 501 (1903); see *Wetzel v. Hecht*, 281 Mo. 610, 615, 220 S. W. 888, 889 (1920). See note 4, *supra*.

<sup>35</sup> *Moffett v. Trent*, 66 N. J. Eq. 143, 56 Atl. 1035 (Ch. 1904). *Contra*: *Flowers v. Flowers*, 84 Ark. 557, 106 S. W. 949 (1907) (where equity would not enforce the transfer of quarantine).

<sup>36</sup> TIFFANY, REAL PROPERTY (3d ed. 1939) §164.

<sup>1</sup> *Pedersen v. Pedersen*, 107 F. (2d) 227 (App. D. C. 1939).

rately, each preparing his or her own food, and such communications as were had between them were distinctly hostile. Husband supplied the food for the household, and gave his wife a meager allowance supposed to supply all her necessities. Title to the house was in both parties, in tenancy by the entirety. The court held that the parties were "living separate and apart" so as to avoid the defense to the divorce suit of condonation by the wife.

The question of whether husband and wife are "living apart" while occupying the same dwelling house may be of importance to the courts in several different situations: (1) as a test of condonation by the offended spouse of the acts alleged as ground for divorce; (2) when "separation" or "living separate and apart" is alleged as ground for divorce; (3) where the cause alleged is desertion; (4) in a suit for separate maintenance or alimony without divorce; and (5) in a suit for support and maintenance pendente lite.

(1) Condonation is a legal inference, drawn from the facts shown, of a restoration of the offending party "to the same position he or she occupied before the offence was committed".<sup>2</sup> In the absence of other evidence showing such restoration, voluntary cohabitation, that is, living under the same roof, will generally be held to be proof of condonation.<sup>3</sup> The inference may be rebutted, however, by a showing that there was no sexual intercourse,<sup>4</sup> that the offended party had no knowledge of the other party's misconduct,<sup>5</sup> or that the cohabitation was not voluntary, the wronged spouse having no other place to go,<sup>6</sup> being unable to move because of sickness,<sup>7</sup> staying or returning temporarily because of children,<sup>8</sup> or being impelled through fear to continue the marital relation for a short time longer.<sup>9</sup> Due to the wife's dependence on the husband for support and shelter, condonation by remaining in the same house with her husband will not be so readily inferred against her,<sup>10</sup> even, it seems, if she does not leave his bed.<sup>11</sup>

(2). Eleven states, including North Carolina and the District of

<sup>2</sup> 2 BISHOP, MARRIAGE AND DIVORCE (6th ed. 1881) §§33, 34.

<sup>3</sup> Parks v. Parks, 55 S. W. (2d) 242 (Tex. Civ. App. 1932); MADDEN, PERSONS AND DOMESTIC RELATIONS (1931) 303.

<sup>4</sup> Stoneburg v. Stoneburg, 120 Fla. 188, 162 So. 334 (1935); Coulter v. Coulter, 204 Iowa 575, 215 N. W. 619 (1927); Pichon v. Pichon, 164 La. 272, 113 So. 845 (1927); Christensen v. Christensen, 125 Me. 397, 134 Atl. 373 (1926); Barta v. Barta, 283 S. W. 201 (Tex. Civ. App. 1926).

<sup>5</sup> MADDEN, PERSONS AND DOMESTIC RELATIONS (1931) 305.

<sup>6</sup> Pichon v. Pichon, 164 La. 272, 113 So. 845 (1927); Barta v. Barta, 283 S. W. 201 (Tex. Civ. App. 1926).

<sup>7</sup> Norman v. Norman, 88 W. Va. 640, 107 S. E. 407 (1921).

<sup>8</sup> Greer v. Greer, 193 Ark. 301, 99 S. W. (2d) 248 (1936); Sayles v. Sayles, 41 R. I. 170, 103 Atl. 225 (1918).

<sup>9</sup> See discussion in 2 BISHOP, MARRIAGE AND DIVORCE (6th ed. 1881) §§49-52.

<sup>10</sup> MADDEN, PERSONS AND DOMESTIC RELATIONS (1931) 304.

<sup>11</sup> Sayles v. Sayles, 41 R. I. 170, 103 Atl. 225 (1918).

Columbia, have statutes which enumerate separate living as a ground for absolute divorce.<sup>12</sup> Two of these states and the District of Columbia<sup>13</sup> also grant a limited divorce on the same ground. The question whether parties living in the same house are necessarily not living separately under the terms of the statute has very seldom been raised in these jurisdictions. Cases in only three states, Kentucky,<sup>14</sup> Louisiana,<sup>15</sup> and Rhode Island,<sup>16</sup> have been found directly on the point. In all but the Rhode Island case the statute was held not to have been satisfied, Kentucky flatly refusing to find separate living where the parties have lived in the same house, and Louisiana declining to go "behind the closed doors of the matrimonial domicile" where outside appearances indicate marital unity. In the Rhode Island case the parties lived in separate apartments of the same apartment building, the building being owned by the husband, so the point was not squarely presented. The North Carolina statute has apparently not yet been construed on the question, but there is dicta in *Parker v. Parker*<sup>17</sup> which would seem to indicate a decision in harmony with those above. Further indication of such a holding might be found in the North Carolina rule that cohabitation subsequent to a separation agreement invalidates the agreement,<sup>18</sup> although this is not a strictly analogous situation.

(3) The desertion cases show a more liberal trend than that found in the separation cases. Where the parties have shared the same roof during part or all of the period of desertion required by the statute, the key to the decisions seems to rest in the existence or unjustified denial of sexual intercourse. No case has been found where a divorce has been granted for desertion without a cessation of intercourse, but the importance attached by the courts to this one of the many duties of married life differs greatly.

One line of authority holds simply that a refusal of sexual intercourse for the statutory period amounts to desertion.<sup>19</sup> These courts have evidently been influenced by Bishop in his work on *Marriage*.

<sup>12</sup> ARIZ. REV. CODE ANN. (Courtright, Supp. 1936) §2179; ARK. DIG. STAT. (Pope, 1937) §4381; D. C. CODE (Supp. V. 1939) tit. 14, §63; KY. STAT. ANN. (Carroll, 1936) §2117; LA. GEN. STAT. ANN. (Dart, Supp. 1938) §2202; MD. ANN. CODE (Bagby, 1924) art. 16, §38 as amended by Md. Laws 1937, c. 396; NEV. COMP. LAWS (Hillyer, Supp. 1938) §9467.06; N. C. CODE ANN. (Michie, 1939) §§1659, 1659(a); R. I. GEN. LAWS (1923) §4214; TEX. ANN. REV. CIV. STAT. (Vernon, 1925) art. 4629; WASH. REV. STAT. ANN. (Remington, 1932) §982; WIS. STAT. (1937) §247.07.

<sup>13</sup> D. C. CODE (Supp. V. 1939) tit. 14, §63; KY. STAT. ANN. (Carroll, 1936) §2121; R. I. GEN. LAWS (1923) §4219.

<sup>14</sup> *Gates v. Gates*, 192 Ky. 253, 232 S. W. 378 (1921).

<sup>15</sup> *Hava v. Chavigny*, 147 La. 330, 84 So. 892 (1920); *Singleton v. Rogers*, 160 La. 196, 106 So. 781 (1926).

<sup>16</sup> *Stewart v. Stewart*, 45 R. I. 375, 122 Atl. 778 (1923).

<sup>17</sup> 210 N. C. 264, 266, 186 S. E. 346, 347 (1936).

<sup>18</sup> *Smith v. King*, 107 N. C. 273, 12 S. E. 57 (1890); *Archbell v. Archbell*, 158 N. C. 408, 74 S. E. 327 (1912).

<sup>19</sup> See notes 24 through 31. *infra*.

*Divorce, and Separation*, in which he says: "If from no consideration of health and from no other good reason, either the husband or the wife, permanently, totally, and irrevocably puts an end to what is lawful in marriage and unlawful in every other relation, to what distinguishes marriage from every other relation, this by the better opinion constitutes matrimonial desertion, though the deserting party consents to live in the same house with the other in the capacity of servant, of master, of brother, of sister, of child, or of friend, either for pay or as a gratuity."<sup>20</sup> He supports his argument by showing<sup>21</sup> (a) that a complete abnegation of marital duties is not necessary to show desertion, e.g., absence of husband from matrimonial domicile, even though he supports wife, is held by all jurisdictions to amount to desertion;<sup>22</sup> and (b) that sexual relations are so important in marriage that without the capacity therefor the marriage will be voidable.<sup>23</sup> California,<sup>24</sup> North Dakota,<sup>25</sup> and South Dakota<sup>26</sup> expressly by statute, and Colorado,<sup>27</sup> Georgia,<sup>28</sup> Kentucky,<sup>29</sup> Maryland,<sup>30</sup> and Mississippi<sup>31</sup> follow this liberal doctrine concerning sexual intercourse, which is a minority view.

The opposite and majority view is that a refusal by itself of the rights of the marital bed will not warrant a decree for desertion. Courts which adhere to this view may be divided into two classes: (a) those requiring a complete abnegation of all marital duties;<sup>32</sup> and (b) those which find a desertion where the denial of intercourse is accompanied by a denial of other rights of the marriage relation to the extent that the parties are living under the same roof only in the relation which would exist between "a man and his housekeeper—or a woman and her boarder".<sup>33</sup>

The view of the courts in the first class of cases may be explained

<sup>20</sup> 1 BISHOP, MARRIAGE, DIVORCE AND SEPARATION (1891) §1676.

<sup>21</sup> 1 BISHOP, MARRIAGE AND DIVORCE (6th ed. 1881) §779.

<sup>22</sup> Magrath v. Magrath, 103 Mass. 577 (1870).

<sup>23</sup> Although this illustrates the importance of sexual relations in marriage, divorce for impotence is more of a nullification of the marriage than a divorce, the marriage never having been consummated, whereas a refusal to continue to indulge in intercourse is a cause for divorce which arises after marriage. It would seem, therefore, that the analogy is not particularly close. But see *Stewart v. Stewart*, 78 Me. 548, 553, 7 Atl. 473, 475 (1887).

<sup>24</sup> CAL. CIV. CODE (Deering, 1937) §§92, 95-104, 107, *Goucher v. Goucher*, 82 Cal. App. 449, 255 Pac. 892 (1927).

<sup>25</sup> N. D. COMP. LAWS ANN. (1913) §§4380, 4383.

<sup>26</sup> S. D. COMP. LAWS (1929) §§137, 140, 143.

<sup>27</sup> *Stein v. Stein*, 5 Colo. 55 (1879).

<sup>28</sup> *Whitfield v. Whitfield*, 89 Ga. 471, 15 S. E. 543 (1892).

<sup>29</sup> *Evans v. Evans*, 93 Ky. 510, 20 S. W. 605 (1892); *Axton v. Axton*, 182 Ky. 286, 206 S. W. 480 (1918).

<sup>30</sup> *Fleegle v. Fleegle*, 136 Md. 630, 110 Atl. 889 (1920); *Beach v. Beach*, 159 Md. 647, 152 Atl. 365 (1930); *Fries v. Fries*, 166 Md. 604, 171 Atl. 703 (1934).

<sup>31</sup> *Graves v. Graves*, 88 Miss. 677, 41 So. 384 (1906).

<sup>32</sup> *Fritz v. Fritz*, 138 Ill. 436, 28 N. E. 1058 (1891); *Southwick v. Southwick*, 97 Mass. 327 (1867).

<sup>33</sup> *Rector v. Rector*, 78 N. J. Eq. 386, 79 Atl. 295 (Ch. 1911).

partly by looking at the statutes of the states, and partly by the fact that these courts hold their statutes to be a substitution for the English suit for restitution of conjugal rights. Eight states require by statute that the deserter must absent himself from the other party.<sup>34</sup> A decision in these states that there must be a complete cessation of the marital relation in all its aspects is to be expected. When there is added to this an analogy to the English suit for restitution of conjugal rights, which went only so far as to compel the parties to live together apparently as man and wife, expressly avoiding the compelling of intercourse,<sup>35</sup> the attitude of these ultra-conservative states is made clear. In the other states following the same view of desertion, although the statutes do not expressly require such a holding,<sup>36</sup> it is a reasonable construction of them.

New Jersey, Virginia, and West Virginia fall in the second class above, and follow a middle ground. Although their statutes are practically identical to those of Minnesota, Wisconsin, and Florida,<sup>37</sup> which take the conservative view, by ignoring the analogy to the English suit for restitution, and construing their statutes liberally, they have arrived at the conclusion that where there is a cessation of sexual intercourse, and the parties no longer treat each other as man and wife should, desertion is established, even though the parties are still living in their common residence.<sup>38</sup> Exactly how man and wife should treat each other has not yet been determined.

<sup>34</sup> ARK. DIG. STAT. (Pope, 1937) §4381, *Rie v. Rie*, 34 Ark. 37 (1879); ILL. REV. STAT. (1937) c.40, §1, *Fritts v. Fritts*, 138 Ill. 436, 28 N. E. 1058 (1891); IOWA CODE (1935) §§10475, 10476, *Pfannebecker v. Pfannebecker*, 133 Iowa 425, 110 N. W. 618 (1907); *Lambert v. Lambert*, 165 Iowa 367, 145 N. W. 920 (1914); MO. STAT. ANN. (1935) §1350; N. H. PUB. LAWS (1926) c.287, §6; OHIO GEN. CODE ANN. (1926) §11979; PA. STAT. ANN. (Purdon, 1930) tit. 23, §10, *Wacker v. Wacker*, 55 Pa. Super. Ct. 380 (1913); *Eshbach v. Eshbach*, 23 Pa. St. 343 (1854) (question of whether denial of sexual intercourse would justify desertion); TENN. CODE ANN. (Williams, 1934) §8426.

<sup>35</sup> *Fritz v. Fritz*, 138 Ill. 436, 442, 28 N. E. 1058, 1059 (1891); *Pfannebecker v. Pfannebecker*, 133 Iowa 425, 426, 110 N. W. 618, 619 (1907); *Southwick v. Southwick*, 97 Mass. 327, 329 (1867); *Segelbaum v. Segelbaum*, 39 Minn. 258, 259, 39 N. W. 492, 493 (1888).

<sup>36</sup> "Utter" desertion: ME. REV. STAT. (1930) c.73, §2, *Stewart v. Stewart*, 78 Me. 548, 7 Atl. 473 (1887); MASS. ANN. LAWS (1933) c.208, §§1, 22, *Southwick v. Southwick*, 97 Mass. 327 (1867); *Magrath v. Magrath*, 103 Mass. 577 (1870); "wilful" desertion: MINN. STAT. (Mason, 1927) §8585, *Segelbaum v. Segelbaum*, 39 Minn. 258, 39 N. W. 492 (1888); WIS. STAT. (1937) §247.07, *Schoessow v. Schoessow*, 83 Wis. 553, 53 N. W. 856 (1892); "wilful, obstinate, and continued" desertion: FLA. COMP. GEN. LAWS ANN. (Skillman, 1927) §4983, *Prall v. Prall*, 58 Fla. 496, 50 So. 867 (1909).

<sup>37</sup> See note 36, *supra*. N. J. REV. STAT. (1937) §§2:50-2, 2:50-6 ("wilful, obstinate, and continued" desertion); VA. CODE ANN. (Michie, 1936) §5103 ("wilful" desertion); W. VA. CODE ANN. (Michie, 1937) §4704 ("wilful" desertion).

<sup>38</sup> *Watson v. Watson*, 52 N. J. Eq. 349, 28 Atl. 467 (Ch. 1894); *Rector v. Rector*, 78 N. J. Eq. 386, 79 Atl. 295 (Ch. 1911); *Parmly v. Parmly*, 90 N. J. Eq. 490, 106 Atl. 456 (Ch. 1919); *Ringgold v. Ringgold*, 128 Va. 485, 104 S. E. 836 (1920); *Chandler v. Chandler*, 132 Va. 418, 112 S. E. 856 (1922); *Reynolds*

(4) Prior to statutes on the subject the suit for separate maintenance could not be brought by the wife, it being held that equity had no jurisdiction to compel a husband to support his wife.<sup>39</sup> Today all but eleven states<sup>40</sup> have statutes providing for enforcement of the husband's duty to provide his wife with support. Of these eleven, seven have authorized relief by judicial decisions.<sup>41</sup> In the statutory jurisdictions, whether the parties must live entirely separate from each other as a condition precedent to the granting of relief, depends on the statute. Where, as in most states, and as in North Carolina, the statute calls for abandonment or desertion, or the existence of a ground for divorce,<sup>42</sup> the outcome of the question of whether living separate is necessary, and the definition of the term, will depend on the stand taken by the court in cases involving abandonment, desertion, or ground for divorce where living apart is prerequisite to a cause of action.<sup>43</sup> When, however, the statute requires only that the husband has ceased to support his wife,<sup>44</sup> or, in the more extreme case, does not limit the situations where separate maintenance will be allowed,<sup>45</sup> there is room for judicial legislation or

v. Reynolds, 68 W. Va. 15, 69 S. E. 381 (1910); *Perine v. Perine*, 92 W. Va. 530, 114 S. E. 871 (1922); see *Anshutz v. Anshutz*, 16 N. J. Eq. 162, 163 (Ch. 1863); *Reid v. Reid*, 21 N. J. Eq. 331, 332 (Ch. 1871). But see *Raymond v. Raymond*, 79 Atl. 430, 432 (N. J. Ch. 1909), where marriage had not been consummated, and although facts would have warranted applying the rule of the above cases, court held mere refusal of intercourse was enough. The same rule was applied in *Wood v. Wood*, 97 N. J. Eq. 1, 128 Atl. 418 (Ch. 1925) (wife denied intercourse because of philosophical reasons) and in *Anderson v. Anderson*, 12 N. J. Misc. 625, 173 Atl. 393 (Ch. 1934) (marriage had never been consummated, wife having "nameless fear" of completed marital act).

<sup>39</sup> 2 VERNIER, AMERICAN FAMILY LAWS (1932) §139.

<sup>40</sup> Alabama, Arkansas, Delaware, Idaho, Kentucky, Louisiana, Mississippi, South Carolina, Texas, Virginia, and Washington.

<sup>41</sup> Those not authorizing relief are Arkansas, Delaware, Louisiana, and Texas. 2 VERNIER, AMERICAN FAMILY LAWS (1932) §139.

<sup>42</sup> The North Carolina statute, N. C. CODE ANN. (Michie, 1939) §1667, provides for a decree if the husband deserts and fails to provide, or is a drunkard or spendthrift (which would not seem to call necessarily for separate living), or gives cause for divorce, absolute or limited.

<sup>43</sup> See *Klemme v. Klemme*, 37 Ill. App. 54, 57 (1890), and *Smith v. Smith*, 156 Ill. App. 176, 178 (1910), for apparent Illinois view that its statute requires separate homes. New Jersey has followed its views concerning desertion. *Pinkinson v. Pinkinson*, 92 N. J. Eq. 669, 113 Atl. 143 (1921); see *Anshutz v. Anshutz*, 16 N. J. Eq. 162, 163 (Ch. 1863).

<sup>44</sup> This requirement alone is to be found in the following statutes: CONN. GEN. STAT. (1930) §1717; D. C. CODE (1929) tit. 14, §75; ME. REV. STAT. (1930) c. 74, §9; ORE. CODE ANN. (1930) §§14(843), 14(844), 33(207)-33(210). It may be found in combination with the other statutory grounds in those states having statutes similar to that of North Carolina. See note 42, *supra*. The present consideration is directed only toward this isolated cause for separate maintenance.

<sup>45</sup> Such loosely worded provisions are found in: IOWA CODE (1935) §§10655, 10704; MD. ANN. CODE (Bagby, 1924) art. 16, §14; MINN. STAT. (Mason, 1927) §8614; NEB. COMP. STAT. (1929) §§42(337), 42(339); N. Y. CIV. PRAC. ACT §§1164, 1171; N. D. COMP. LAWS ANN. (1913) §4401; R. I. GEN. LAWS (1923) §§4225, 4226; VA. CODE ANN. (Michie, 1936) §5111; WIS. STAT. (1937) §§247-28-247.32.

interpretation.<sup>46</sup> No case directly in point from the states having the latter type of statutes has been found, but the trend seems to be toward requiring an abandonment by the husband.<sup>47</sup> Whether this can be done while the parties are living in the same house is not clear, but this point would doubtless be settled by the courts according to their views of divorce cases which involve abandonment, desertion, or living separate and apart. In those states having no statute, but which allow separate maintenance by judicial decision,<sup>48</sup> the cases indicate that grounds for divorce are not necessary to justify a decree.<sup>49</sup> One state holds that there must be an abandonment, however, and finds abandonment where the parties dwelt under the same roof.<sup>50</sup> Another state grants separate support on a showing merely of refusal to maintain the wife;<sup>51</sup> and still another gives relief where the parties find it impossible to reside together.<sup>52</sup> Here, too, there is no definite indication of the stand which will be taken by the courts where the parties occupy the same residence.

(5) In a motion for counsel fees or maintenance pendente lite, several courts have enunciated a rule that the parties must be living "separate and apart" in order for the motion to be granted.<sup>53</sup> There seems to be no statutory authority whatever for such a rule, and the case authority cited by the early cases following the rule does not support it, being either dicta<sup>54</sup> or cases where the suit was for divorce, and a showing of separate living as a part of the cause of action was necessary for success.<sup>55</sup> It would seem that the only reasons which could be advanced to support such a rule would be (a) that the statute

<sup>46</sup> The Florida statute seems to solve the question nicely, providing for separate maintenance when wife lives apart and has cause for divorce, or when husband being able, fails to support wife or minor children, *irrespective of where wife lives*. FLA. COMP. GEN. LAWS ANN. (Skillman, 1937) §§4988, 4989.

<sup>47</sup> *Marschalk v. Marschalk*, 45 App. D. C. 455 (1916); *Waller v. Waller*, 160 Minn. 431, 200 N. W. 480 (1924); *Jones v. Jones*, 161 Misc. 660, 292 N. Y. Supp. 221 (N. Y. City Cts. 1937); *Matlock v. Matlock*, 86 Ore. 78, 167 Pac. 311 (1917).

<sup>48</sup> See notes 40 and 41, *supra*.

<sup>49</sup> *Spafford v. Spafford*, 199 Ala. 300, 74 So. 354 (1917); *Rearden v. Rearden*, 210 Ala. 129, 97 So. 138 (1923); *Stephens v. Stephens*, 53 Idaho 427, 24 P.(2d) 52 (1933); *George v. George*, 190 Ky. 706, 228 S. W. 408 (1921); *Purcell v. Purcell*, 197 Ky. 627, 247 S. W. 760 (1923). But see *Hood v. Hood*, 138 Md. 355, 361, 113 Atl. 895, 897 (1921).

<sup>50</sup> *Herrett v. Herrett*, 60 Wash. 607, 111 Pac. 867 (1910).

<sup>51</sup> *George v. George*, 190 Ky. 706, 228 S. W. 408 (1921).

<sup>52</sup> *Stephens v. Stephens*, 53 Idaho 427, 24 P.(2d) 52 (1933).

<sup>53</sup> *Cowan v. Cowan*, 10 Colo. 540, 16 Pac. 215 (1887); *Tayman v. Tayman*, 2 Md. Ch. 393 (1851); *Lipp v. Lipp*, 117 S. W. (2d) 364 (Mo. App. 1938); see *Collins v. Collins*, 80 N. Y. 1, 12 (1880).

<sup>54</sup> See *Adams v. Adams*, 49 Mo. App. 592, 599 (1892); *Anshutz v. Anshutz*, 16 N. J. Eq. 162, 163 (Ch. 1863) (suit for alimony without divorce); *Chapman v. Chapman*, 25 N. J. Eq. 493, 395 (Ch. 1874) (petition for injunction to make husband, during divorce proceedings, move out of common abode allegedly owned by wife).

<sup>55</sup> *Raymond v. Raymond*, 79 Atl. 430 (N. J. Ch. 1909).

giving a right to such an order required a prima facie showing of grounds for divorce, as in the North Carolina statute, and the grounds alleged for divorce called for living separate; or (b) in order to avoid condonation of the conduct of the offending spouse<sup>56</sup> (which would seem to be the only sound reason for such a rule in the absence of a statute such as that in (a)); or (c) unless the wife was living separate from her husband she would not need separate maintenance.<sup>57</sup> A better reason than (c) for the granting of separate maintenance would seem to be that the wife would need the help of the court to assure her of adequate support from a hostile mate.<sup>58</sup>

Whether there is such a rule or not, the cases which have depended on this point for decision seem to hold that mere residence in the same house makes no difference so long as the marital relation (in the broad sense) has been suspended.<sup>59</sup> This would seem to be analogous to the "middle ground" desertion cases. There is dictum to the contrary in *Collins v. Collins*,<sup>60</sup> but it is not supported by the authority cited.<sup>61</sup> In the absence of a showing of condonation<sup>62</sup> or of a statute similar to that of North Carolina, the courts which have decided the question of maintenance or suit fees pendente lite on other grounds than that of "living apart" seem not to be disturbed at all by the fact that the parties are living in the same house.<sup>63</sup> The North Carolina court has not yet decided the point.

The principal case merely adds another piece to the mosaic of when husband and wife are "living apart". All that can be said in summary is that for some purposes the same roof will necessarily preclude a finding of "living apart", and for other purposes it will not. What stand the North Carolina court will take on the problems above presented is open to conjecture.

SAMUEL R. LEAGER.

<sup>56</sup> This view was taken in the principal case. *Pedersen v. Pedersen*, 107 F. (2d) 227 (App. D. C. 1939).

<sup>57</sup> *Tayman v. Tayman*, 2 Md. Ch. 393, 397 (1851) (if the wife "be living with her husband a suit for alimony pendente lite would be unnecessary and improper"), cited in *Cowan v. Cowan*, 10 Colo. 540, 552, 16 Pac. 215, 221 (1887).

<sup>58</sup> See *Pedersen v. Pedersen*, 107 F. (2d) 227, 234 (App. D. C. 1939), and cases cited therein.

<sup>59</sup> *Cowan v. Cowan*, 10 Colo. 540, 16 Pac. 215 (1887); *Lipp v. Lipp*, 117 S. W. (2d) 364 (Mo. App. 1938). *Contra*: *Tayman v. Tayman*, 2 Md. Ch. 393 (1851).

<sup>60</sup> 80 N. Y. 1, 12 (1880).

<sup>61</sup> *Sykes v. Halstead*, 1 Sandf. 483 (N. Y. Super. Ct. 1848) (husband's defense to tradesman's suit for coal furnished wife who was living separately was that he had offered to keep her in his own home; *held*, no defense).

<sup>62</sup> *Fullhart v. Fullhart*, 109 Mo. App. 705, 83 S. W. 541 (1904).

<sup>63</sup> *Anderson v. Anderson*, 137 Cal. 225, 69 Pac. 1061 (1902); *Roth v. Roth*, 143 Md. 142, 122 Atl. 34 (1923); *McCloskey v. McCloskey*, 68 Mo. App. 199 (1896) (apparently overruling dicta in *Adams v. Adams*, 49 Mo. App. 592, 599 (1892), cited *supra* note 54); *Homler v. Homler*, 120 Pa. Super. 66, 181 Atl. 840 (1935).



**Injunction—Restraint Against Violation of the Criminal Law.**

A municipality sued to enjoin a gasoline distributor from constructing a gasoline storage tank with a capacity of 15,000 gallons, in violation of a city ordinance limiting the size of such tanks in a congested district to 4,500 gallons and prescribing criminal penalties as sanctions. Defendant claimed that a municipal corporation may not invoke the remedy of injunction to prevent the threatened violation of such an ordinance, and that the court may not enjoin such misconduct when the injury is at most contingent and the act complained of does not amount to a nuisance *per se*. *Held*, under a North Carolina statute<sup>1</sup> granting municipalities authority to resort to injunction in the enforcement of their zoning ordinances, the plaintiff has made a sufficient showing to justify the court in continuing the restraining order until a hearing on the merits.<sup>2</sup>

It is well settled that, as a general rule, a court of equity will not grant an injunction to prevent the perpetration of a crime.<sup>3</sup> The criminal laws themselves, even though they come into action only after the crime has been committed, are considered sufficient to prevent the misconduct and to provide an adequate remedy at law.<sup>4</sup> Following this rule, a few courts hold that under no circumstances may a court of equity enjoin any criminal act.<sup>5</sup>

However, most courts now give the government access to the remedy of injunction where the conduct sought to be enjoined constitutes a public nuisance,<sup>6</sup> or threatens the public health, safety, or welfare,<sup>7</sup> or is of such nature that the criminal laws are inadequate to prevent its commission.<sup>8</sup> This exception to the general rule is limited by some courts to apply only to those acts which amount to nuisances *per se*,<sup>9</sup> or

<sup>1</sup> N. C. CODE ANN. (Michie, 1939) §2776(y).

<sup>2</sup> *Fayetteville v. Spur Distributing Co.*, 216 N. C. 596, 5 S. E. (2d) 838 (1939).

<sup>3</sup> *Higgins v. Lacroix*, 119 Minn. 145, 137 N. W. 417 (1912); *San Antonio v. Schutte*, 246 S. W. 413 (Tex. Civ. App. 1922).

<sup>4</sup> *DeQueen v. Fenton*, 98 Ark. 521, 136 S. W. 945 (1911); *Robinson v. Paintsville*, 199 Ky. 247, 250 S. W. 972 (1923); *Elizabeth City v. Aydlett*, 198 N. C. 585, 152 S. E. 681 (1930); *San Antonio v. Schutte*, 246 S. W. 413 (Tex. Civ. App. 1922).

<sup>5</sup> *DeQueen v. Fenton*, 98 Ark. 521, 136 S. W. 945 (1911); *Higgins v. Lacroix*, 119 Minn. 145, 137 N. W. 417 (1912).

<sup>6</sup> *Augusta v. Reynolds*, 122 Ga. 754, 50 S. E. 998 (1905) (use of public streets in unlawful manner); *State v. Fortner*, 255 Ill. 468, 99 N. E. 680 (1912) (liquor nuisance); *New Orleans v. Liberty Shop*, 157 La. 26, 101 So. 798 (1924) (violation of a zoning ordinance); *State v. Marshall*, 100 Miss. 626, 56 So. 792 (1911) (liquor nuisance).

<sup>7</sup> *People ex rel. Dyer v. Clark*, 268 Ill. 156, 108 N. E. 994 (1915); *People ex rel. Kerns v. Huls*, 355 Ill. 412, 189 N. E. 346 (1934); *Jansen Farms v. Indianapolis*, 202 Ind. 138, 171 N. E. 199 (1930).

<sup>8</sup> *People ex rel. Dyer v. Clark*, 268 Ill. 156, 108 N. E. 994 (1915); *Monticello v. Bates*, 163 Ky. 38, 173 S. W. 159 (1915).

<sup>9</sup> *Manchester v. Smyth*, 64 N. H. 380, 10 Atl. 700 (1887); *Ventnor City v. Fulmer*, 92 N. J. Eq. 478, 113 Atl. 488 (Ch. 1921); *Baren v. Magnolia Petroleum Co.*, 266 S. W. 623 (Tex. Civ. App. 1924).

to those acts declared to be nuisances by legislative fiat.<sup>10</sup> Two North Carolina cases illustrate this limitation. In the case of *Elizabeth City v. Aydlett*,<sup>11</sup> plaintiff sued to enjoin defendant from constructing a gasoline station in violation of a municipal ordinance. The court held that since the act complained of was not a nuisance *per se*, and the remedy asked for was not expressly authorized by the ordinance itself or by statute, a court of equity had no jurisdiction to grant an injunction. However, in a second suit by the city,<sup>12</sup> the statute relied upon in the principal case was invoked,<sup>13</sup> and the court held that equity was thereby given jurisdiction to issue the injunction.

This exception has resulted in a broadening of the concept of nuisance to include many acts that were not considered such at the common law. That is to say, the general tendency of the courts is toward the increased use of the injunction as an aid to the enforcement of the criminal statutes. This is accomplished through the extension of the concept of nuisance so as to include, for example, bawdy-houses,<sup>14</sup> places used for the illegal sale of liquor,<sup>15</sup> and violations of zoning ordinances.<sup>16</sup> These extensions have been brought about partly by judicial decision, but mainly by statute.<sup>17</sup> A North Carolina statute falling in this group, aside from the statute used in the principal case, is that covering nuisances against public morals.<sup>18</sup> Acts declared to be enjoinable nuisances by this statute are the erection, establishment, maintenance, ownership, use or leasing of any building or place to be used for lewdness, assignation, prostitution, gambling, or illegal sale of liquor. This statute has been held constitutional in the case of *Carpenter v. Boyles*.<sup>19</sup>

Other statutes in this state authorize action by administrative boards or officers that is substantially the equivalent of injunction. Thus, the county health officer has the power to abate any situation which he considers a nuisance and a menace to public health.<sup>20</sup> Under this statute a stable was declared a nuisance and abated when it was considered to

<sup>10</sup> *State v. Marshall*, 100 Miss. 626, 56 So. 792 (1911); *Elizabeth City v. Aydlett*, 200 N. C. 58, 156 S. E. 163 (1930).

<sup>11</sup> 198 N. C. 585, 152 S. E. 681 (1930).

<sup>12</sup> *Elizabeth City v. Aydlett*, 200 N. C. 58, 156 S. E. 163 (1930).

<sup>13</sup> N. C. CODE ANN. (Michie, 1939) §2776(y).

<sup>14</sup> *State v. Ellis*, 201 Ala. 295, 78 So. 71 (1918); *People ex rel. Dyer v. Clark*, 268 Ill. 156, 108 N. E. 994 (1915); *State ex rel. Ford v. Young*, 54 Mont. 401, 170 Pac. 947 (1918).

<sup>15</sup> *State v. Crawford*, 28 Kan. 726 (1882).

<sup>16</sup> *Utica v. Ortner*, 10 N. Y. Supp. (2d) 729 (App. Div., 4th Dep't 1939).

<sup>17</sup> *E.g.*, CONN. GEN. STAT. (1930) §2694; ILL. REV. STAT. (Smith-Hurd, 1937) c. 24, §69(a); KY. STAT. ANN. (Carroll, 1936) §3941 m.

<sup>18</sup> N. C. CODE ANN. (Michie, 1939) §§3180, 3181.

<sup>19</sup> 213 N. C. 432, 196 S. E. 850 (1938).

<sup>20</sup> N. C. CODE ANN. (Michie, 1939) §7071.

be too close to a dwelling house.<sup>21</sup> So, boards of town commissioners have the power to prevent nuisances and to preserve the health of the citizens.<sup>22</sup>

The statutes so far cited have been limited to acts involving offensive uses of land. However, the legislatures have gone beyond this category and have given the state and local governments even broader authority to invoke the injunctive remedy in aid of the enforcement of the criminal law.<sup>23</sup> There are several North Carolina statutes typifying this extension. One enables injunction to prevent dealing with adulterated or misbranded foods, drugs, or cosmetics.<sup>24</sup> Another authorizes the solicitor or the state bar to obtain an injunction to prevent the unauthorized practice of the law.<sup>25</sup>

These statutory developments go far to establish a public policy in favor of a wider use of injunction in aid of the enforcement of the criminal law, even in cases where specific legislation is lacking. The objection that the accused might thereby be deprived of a constitutional right of trial by jury<sup>26</sup> is minimized in North Carolina by the availability<sup>27</sup> of such a trial at final hearing on the issue of fact framed by the pleadings in the injunction suit.

FRANK N. PATTERSON, JR.

### Mortgages—Partition of Realty When Liens Exist.

Co-tenant sought the partition of land held by the purchaser thereof under a void foreclosure sale. *Held*, partition denied, on the ground that possession or the right to possession of the land is necessary to an action for partition. The purchaser at the invalid foreclosure sale, who was himself the owner of some of the bonds secured by the deed of trust, acquired the rights of a mortgagee in possession, and had the legal right to stay in possession until the mortgage indebtedness was paid or tendered. Therefore, the co-tenant claiming under the mortgagor had no possession or right to possession.<sup>1</sup>

The right of any one or more of several persons, holding an undi-

<sup>21</sup> *State v. Wilkes*, 170 N. C. 735, 87 S. E. 48 (1915).

<sup>22</sup> N. C. CODE ANN. (Michie, 1939) §2676.

<sup>23</sup> *E.g.*, N. Y. AGRICULTURE AND MARKETING LAW (1922) §38 (food production); MASS. ANN. LAWS (1933) c. 111, §130 (preventive health regulations); for other statutes used by states to aid in the enforcement of the criminal law, see note (1931) 45 HARV. L. REV. 1096. And see Berge, *Remedies Available to the Government Under the Sherman Act* (1940) 7 LAW & CONTEMP. PROB. 104.

<sup>24</sup> N. C. CODE ANN. (Michie, 1939) §4768(4).

<sup>25</sup> *Id.* §199(d); §215 (20); *Seawell v. Carolina Motor Club*, 209 N. C. 624, 184 S. E. 540 (1936).

<sup>26</sup> See note (1930) 43 HARV. L. REV. 1159.

<sup>27</sup> N. C. CONST. art. IV §§1, 13; N. C. CODE ANN. (Michie, 1939) §556; *Worthy v. Shields*, 90 N. C. 192 (1883); *Ely v. Earley*, 94 N. C. 1 (1886); *Bales v. Caudle*, 133 N. C. 528, 45 S. E. 838 (1903).

<sup>1</sup> *Wirtz v. Gordon*, 184 So. 798 (Miss. 1938) and 192 So. 29 (Miss. 1939).

vided interest in land as tenants in common, to obtain a partition of that land and to enter into the enjoyment of their interests in severalty is well established.<sup>2</sup> The right to partition in the United States is now defined entirely by statutes embodying for the most part the equitable procedure for partition in specie which originated in England, and also universally extending the doctrine to incorporate the provision, unknown at common law, that when partition in kind is impractical or undesirable, the court in its discretion may decree a sale of the aggregate interests and a division of the proceeds of the sale.<sup>3</sup> Therefore, the fundamental rule, as now recognized, is that partition of property held in common is an absolute right whether the action is for the actual partition of the land,<sup>4</sup> or for a sale of the land and a division of the proceeds, which, however, will be permitted as an alternative method of partition only when satisfactory proof is presented to convince the court that actual partition could not be made without injury to the interest of some one or more of the tenants.<sup>5</sup> The ultimate question is, therefore, whether it is possible to make a division in kind which is practical under the circumstances presented, in that it preserves the proportional rights and interest of the co-tenants. In case a sale is ordered, such sale may be made subject to a lien where the lien is upon the united interest of all the co-tenants.<sup>6</sup> In the great majority of the states, when a lien exists on the undivided interest of one co-tenant, the land passes free from the encumbrance, and such lien is transferred to the share of the proceeds of the tenant who incurred the debt.<sup>7</sup> In North Carolina the sale trans-

<sup>2</sup> Willard v. Willard, 145 U. S. 116, 12 Sup. Ct. 818, 36 L. ed. 644 (1892); Wood v. Barnett, 208 Ala. 295, 94 So. 338 (1922); Leddon v. Strickland, 218 Ala. 436, 118 So. 651 (1928); Shoup v. Cummins, 334 Ill. 539, 166 N. E. 118 (1929); Tolson v. Bryan, 130 Md. 338, 100 Atl. 366 (1917); Arthur v. Arthur, 115 Neb. 781, 215 N. W. 117 (1927); Barber v. Barber, 195 N. C. 711, 143 S. E. 469 (1928); Talley v. Murchison, 212 N. C. 205, 193 S. E. 148 (1937); *Ex parte* Johnson, 147 S. C. 259, 145 S. E. 113 (1928); *cf.* Plsek v. Kostrum, 6 S. W. (2d) 813 (Tex. Civ. App. 1928). 2 TIFFANY, REAL PROPERTY (3d ed. 1939) §474. See Chadwick v. Blades, 210 N. C. 609, 612, 188 S. E. 198, 200 (1936).

<sup>3</sup> N. C. CODE ANN. (Michie, 1939) §§3213-3245; FREEMAN, COTENANCY (1882) c. 28; 2 TIFFANY, REAL PROPERTY (3d ed. 1939) §479.

<sup>4</sup> Compton v. Simmons, 223 Ala. 352, 135 So. 570 (1931); McClure v. Raber, 19 N. E. (2d) 891 (Ind. App. 1939); Barnes v. Barnes, 140 Kan. 612, 38 P. (2d) 93 (1934); Rostan v. Huggins, 216 N. C. 386, 5 S. E. (2d) 162 (1939).

<sup>5</sup> Willard v. Willard, 145 U. S. 116, 12 Sup. Ct. 818, 36 L. ed. 644 (1892); East Coast Cedar Co. v. People's Bank, 111 Fed. 446 (C. C. A. 4th, 1901); Barbee v. Price, 263 Ky. 8, 91 S. W. (2d) 561 (1936); Raceland Bank & Trust Co. v. Touns, 173 La. 742, 138 So. 652 (1931); Barber v. Barber, 195 N. C. 711, 143 S. E. 469 (1928); Talley v. Murchison, 212 N. C. 205, 193 S. E. 148 (1937); Citizens Bank & Trust Co. v. Watkins, 215 N. C. 292, 1 S. E. (2d) 853 (1939); N. C. CODE ANN. (Michie, 1939) §3233. See Bridge v. Snead, 151 Va. 383, 390, 145 S. E. 338, 340 (1928).

<sup>6</sup> See Wernse v. Dorsey, 2 Cal. (2d) 513, 515, 41 P. (2d) 935, 936 (1935).

<sup>7</sup> Wood v. Barnett, 208 Ala. 295, 94 So. 338 (1922); Wernse v. Dorsey, 2 Cal. (2d) 513, 41 P. (2d) 935 (1935); Stevens v. Plummer, 195 Ill. App. 278 (1915); Cull v. Federal Land Bank of St. Louis, 281 Ill. App. 432 (1935); Moseley v. Moseley, 240 Mass. 1, 132 N. E. 418 (1921); Wright v. Vickers, 81 Pa. 122

fers only the interest of the tenants, and the lienholder has no interest in the proceeds.<sup>8</sup> But it is intimated that the result would be otherwise if the lienholders were made parties to the partition.<sup>9</sup> By passing the land free from encumbrances the possibility of sale at a sacrifice price, owing to the existence of a lien, is avoided, as is also the alternative of leaving the proportional share of the single mortgagor untouched by the sale, which is likely to be difficult since if the land had been readily divisible there need have been no sale. Whether the land is sold or whether it is partitioned in specie, statutes<sup>10</sup> in many states have provided means of ascertaining all chargeable liens and thus making possible such a distribution of the proceeds, when necessary, as will protect the mortgagee. In the absence of statutory provisions, the lienholder is not a necessary party to the partition action,<sup>11</sup> since if the property is divided, the lien continues on the share of the mortgagor, and if a sale is decreed either it is made subject to his mortgage or, in most jurisdictions, he may enforce his lien against a share of the proceeds of the sale, so that in any event the lien is not lost to him.

In cases where the partition is in specie, the existence of prior mortgages on the undivided interest of one tenant in the land sought to be partitioned does not impair the right of partition,<sup>12</sup> and this right is available to the mortgaging co-tenant in possession of the land as well as to the other co-tenants.<sup>13</sup> Generally, when partition is made,

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(1876); *Ex parte Johnson*, 147 S. C. 259, 145 S. E. 113 (1928). See *East Coast Cedar Co. v. People's Bank*, 111 Fed. 446, 450 (C. C. A. 4th, 1901).

<sup>8</sup> N. C. CODE ANN. (Michie, 1939) §3241; *Jordan v. Faulkner*, 168 N. C. 466, 84 S. E. 764 (1915).

<sup>9</sup> *Holley v. White*, 172 N. C. 77, 89 S. E. 1061 (1915); cf. *Barber v. Barber*, 195 N. C. 711, 143 S. E. 469 (1928).

<sup>10</sup> The following statutes embody typical provisions that provide some means for the protection of the lienholder. ILL. REV. STAT. (Smith-Hurd, 1937) c. 106 §14 (providing that any person claiming an interest in the premises may appear by way of interpleader); N. Y. CIV. PRAC. ACT (Cahill, 1937) §1059 (providing, "... but a person having any such specific lien, appearing of record at the time of the filing of the notice of the pendency of the action, who is not made a party, is not affected by such judgment."); N. C. CODE ANN. (Michie, 1939) §3241 (providing, "... And the deed of the officer or person designated to make such sales shall convey to the purchaser such title and estate in the property as tenants in common, or joint tenants, had."); VA. CODE ANN. (Michie, 1936) §5281 (providing that the court shall, on request, ascertain the liens and apply them to the dividends of the correct party).

<sup>11</sup> *East Coast Cedar Co. v. People's Bank*, 111 Fed. 446 (C. C. A. 4th, 1901); *Barry v. Baker*, 29 Ky. L. 537, 93 S. W. 1061 (1906); *Rostan v. Huggins*, 216 N. C. 386, 5 S. E. (2d) 162 (1939); *Helmick v. Kraft*, 84 W. Va. 159, 99 S. E. 325 (1919). In *Holley v. White*, 172 N. C. 77, 89 S. E. 1061 (1915), it was held, however, that mortgagees were "proper" parties.

<sup>12</sup> *Gore v. Dickinson*, 98 Ala. 363, 11 So. 743 (1892); *Gardner v. Cord*, 145 Cal. 157, 78 Pac. 544 (1904); *McClure v. Raber*, 19 N. E. (2d) 891 (Ind. App. 1939); *Hunt v. Meeker County Abstract & Loan Co.*, 135 Minn. 134, 160 N. W. 496 (1916); *Rostan v. Huggins*, 216 N. C. 386, 5 S. E. (2d) 162 (1939); *Marion County Lumber Co. v. Tilghman Lumber Co.*, 84 S. C. 505, 66 S. E. 124 (1909).

<sup>13</sup> *Call v. Barker*, 12 Me. 327 (1835); *Upham v. Bradley*, 17 Me. 423 (1840);

such pre-existing lien on an undivided interest in the whole attaches to the land which is allotted in severalty to the co-tenant against whose interest the lien was made.<sup>14</sup> The reasons advanced for such a holding hinge on the importance of the incident of partition to the co-tenancy. This incident is so firmly established that anyone taking a mortgage on such an undivided interest must take it subject to the right of partition, as any contrary holding would be an effective means of defeating the power of other co-tenants to exercise their fundamental right of partition.

Where a mortgage covers the entire property it has been held that the land may be partitioned, subject to the encumbrance.<sup>15</sup> This doubtless means that the whole encumbrance still adheres to the whole property. But if after the partition one of the tenants pays his half of the mortgage, the other half of the land is to be resorted to first on the foreclosure of the mortgage for the balance.<sup>16</sup> This is in accord with the principle that a mortgagee is entitled to his full lien until fully paid, but that one portion of the security must, in the proper case, be resorted to in exoneration of the other.<sup>17</sup>

Some courts, in accord with the principal case, hold that a mortgagee who acquires possession under a void foreclosure becomes technically a "mortgagee in possession".<sup>18</sup> A "mortgagee in possession" may stay in possession until paid.<sup>19</sup> It is likewise commonly held that possession or right thereto is necessary in order to obtain a partition.<sup>20</sup> The reason given is that a proceeding for partition cannot be utilized as a means by which to try title to land, and therefore, until the petitioner has at law established his title and right to possession, equity will not take jurisdiction to decree partition.<sup>21</sup> These rules support the conclusion of the court in the principal case that the co-tenant was not entitled to a partition. Furthermore, since, as above indicated, a partition of the land does not result in a partition of the mortgage so as to enable a

Reid v. Gardner, 65 N. Y. 578 (1875); 2 JONES, MORTGAGES (7th ed. 1915) §706.<sup>14</sup> See note 12, *supra*.

<sup>15</sup> Schrei v. Van Alyea, 247 Ill. App. 440 (1928).

<sup>16</sup> McLamb v. McLamb, 208 N. C. 72, 178 S. E. 847 (1935); see 2 WILTSIE, MORTGAGE FORECLOSURE (5th ed. 1939) §689.

<sup>17</sup> Notes (1929) 27 MICH. L. REV. 709, 710.

<sup>18</sup> Notes (1928) 7 TEXAS L. REV. 170; (1932) 32 YALE L. J. 739.

<sup>19</sup> Bryan v. Kales, 162 U. S. 411, 16 Sup. Ct. 802, 40 L. ed. 1020 (1895); Burns v. Hiatt, 149 Cal. 617, 87 Pac. 196 (1906); Stouffer v. Harlan, 68 Kan. 135, 74 Pac. 610 (1903).

<sup>20</sup> See Etheridge v. Etheridge, 219 Ala. 660, 661, 123 So. 48, 49 (1929); Church v. Thornton, 158 N. C. 119, 122, 73 S. E. 810, 812 (1912); Schmid v. Schmid, 35 Ohio App. 526, 172 N. E. 629, 631 (1930); 2 TIFFANY, REAL PROPERTY (3d ed. 1939) §475. For a classification of statutes describing the estate in the land which is necessary to maintain the action, see 2 RESTATEMENT, PROPERTY (1936) 654-661.

<sup>21</sup> Chapin v. Sears, 18 Fed. 814 (C. C. D. N. J. 1883); FREEMAN, COTENANCY (1882) §447.

co-tenant to redeem his portion by paying a portion of the mortgage, it is obvious that if a partition had been granted redemption by the co-tenant could still not be had except by paying the entire amount of the mortgage. And even without a partition the co-tenant could redeem by paying the whole, since a holder of an interest in the equity of redemption can redeem.<sup>22</sup>

MARGARET C. JOHNSON.

### Torts—Exercise of Right of Discharge in Wrongful Manner— Employee's Unprotected Interests.

*P*, suing *D* employer for damages for wrongful discharge, alleged that for nearly seven years he had been an employee of *D*, during which time his service was capable and efficient; that one day *D* called him out from his work in the office building to the sidewalk of a crowded thoroughfare, and there discharged him publicly; that *D* refused *P*'s request for an audit and accounting and a chance to wind up his affairs in an orderly manner, as well as utterly refusing to state any cause or reason for *P*'s dismissal; that news of such dismissal rapidly permeated the neighborhood, speculation running rife as to the reasons therefor; and that as a result *P* lost face in the community, and hence alleges damages. *Held*, *D*'s demurrer to the complaint on the ground that it stated no cause of action should have been sustained.<sup>1</sup>

No distinction is made in *P*'s allegation as to whether he sues in contract or in tort, "illegally" and "wrongfully" discharging being equally applicable to both, nor is such distinction necessary under our system of code pleading.<sup>2</sup> However, the fact that *P* has made out no case for recovery in contract, since he failed to introduce evidence to show that the employment contract was anything more than one terminable at will, would conclusively require that *P*'s recovery, if any, be founded on some principle of tort law. It is too well settled to merit discussion that no cause of action arises out of a discharge from an employment at will.<sup>3</sup> It then seems clear that *P*'s discharge is not actionable, since it is but the exercise of a legal right, unless the manner in which the right has been exercised be shown to be tortious in itself. In cases

<sup>22</sup> *McQueen v. Whetstone*, 127 Ala. 417, 30 So. 548 (1900); *Owens v. Commonwealth Trust Co.*, 183 Ill. App. 605 (1913); *McSorley v. Lindsay*, 62 Wash. 203, 113 Pac. 267 (1911); *WALSH, MORTGAGES* (1934) 190, 191; see *WILTSIE, MORTGAGE FORECLOSURE* (5th ed. 1939) §§1060, 1192.

<sup>1</sup> *May v. Tidewater Power Co.*, 216 N. C. 439, 5 S. E. (2d) 308 (1939).

<sup>2</sup> *Richardson v. Wilmington & Weldon R. R.*, 126 N. C. 100, 35 S. E. 235 (1900).

<sup>3</sup> *Richardson v. Wilmington & Weldon R. R.*, 126 N. C. 100, 35 S. E. 235 (1900); *Biggers v. Matthews*, 147 N. C. 299, 61 S. E. 55 (1908); *Bell v. Danzer*, 187 N. C. 224, 121 S. E. 448 (1924); *Elmore v. Atlantic Coast Line R. R.*, 191 N. C. 182, 131 S. E. 633, 43 A. L. R. 1072 (1926).

analogous to this one there are three possible categories in the law of torts, under which a plaintiff might seek to recover, none of which the North Carolina Supreme Court was here willing to allow.

### I. SLANDER

In the principal case, *P* clearly does not allege facts sufficient to support a recovery for slander. No quotations of what was actually said appear in the case; it would seem, by inference, that only words effecting the actual discharge were voiced. *P*'s own allegation would seem to preclude any chance of recovery for slander, since he states that *D* would give no reason for the discharge, even though *P* requested him to do so. Nor is there present any allegation of the special damage which the law of slander requires when the words are not actionable *per se*. It being said in *Elmore v. Atlantic Coast Line R. R.*<sup>4</sup> that the employer cannot be liable for the "remote or collateral consequences resulting from the inferences or deductions" which the public may draw from the discharge of an employee,<sup>5</sup> it would seem that although the result of *D*'s act here was that *P* suffered humiliation, and, quite likely, damage to his business reputation, still *P* is remediless in so far as recovery for slander is concerned. The possibility that that case and the principal one are distinguishable will be discussed later. However, it would seem that the presence of the malice which must have motivated *D* here might yet create the possibility of a cause of action in slander. It is unthinkable to suppose that *D* acted as he did save out of anger or ill will; the very nature of his act proclaims it. Since he must have intended public humiliation and, probably, damage to reputation, and since some words must have been spoken, is it too strained to suggest slander? If *D*'s silence as to the cause of the discharge in view of the surrounding circumstances would give rise to an inference of improper conduct on *P*'s part, *D* expressly keeping silent for this reason, and, in fact, thus succeeding in injuring *P*'s reputation, could not this be enough to state a case in malicious damage to business name, or defamation—one which would at least get to the jury?<sup>6</sup> It is true, of course, that any charge of slander in the present case would be barred by our six-months statute of limitations on actions of that nature.<sup>7</sup>

### II. PHYSICAL OR MENTAL INJURIES RESULTANT FROM ACTS NOT AMOUNTING TO A TOUCHING

Patently such a conception is inapplicable to the alleged facts of this case, nor is there any suggestion that this was one theory of the case.

<sup>4</sup> 191 N. C. 182, 131 S. E. 633, 43 A. L. R. 1072 (1926).

<sup>5</sup> *Id.* at 189, 61 S. E. at 637.

<sup>6</sup> Note (1937) 5 U. OF CHI. L. REV. 692 (showing the broadening of the protection which the law affords against this kind of harm).

<sup>7</sup> N. C. CODE ANN. (Michie, 1939) §444.



However, the possibility is one closely allied with the problem here in that many cases allow recovery today for suffering or anguish which follows acts done with an intent to cause just such consequences, or even acts which are merely grossly negligent. The precedent is much more nearly set out in cases where some actual physical disability ensues, but, judging from many of the recent decisions, physical contact, which was once the *sine qua non* of recovery in such situations, is no longer essential.<sup>8</sup> This trend finds expression perhaps most strikingly in the telegraph cases, where recovery is allowed usually in situations in which the company loses or fails to deliver messages anent deaths in the family of the recipient of the telegram.<sup>9</sup> Such recovery purports to compensate for the element of emotional distress ensuing from the failure to communicate news of so delicate a nature. Much the same kind of situation arises in cases where the collection of claims is sought in a wrongful manner,<sup>10</sup> although the weight of authority as to these cases seems to be that recovery is not allowed unless there is actually some physical harm resultant to the plaintiff from the actions or threats of the creditor.<sup>11</sup> In an allied phase of the same general problem, relief of this nature was sought in a Louisiana case in which the plaintiff was the victim of a practical joke in the nature of a treasure hunt. By following special "clues" put out by the pranksters, and opening the fake "treasure" in accordance with formal public preliminaries prescribed in the instructions, she was wantonly exposed to public derision and contempt. The court said she had an actionable cause and gave recovery.<sup>12</sup> This salutary advance in the law has been lessened, and, in fact, somewhat impeded, by the fear of increased litigation and fictitious claims.<sup>13</sup> This drawback is admittedly one worthy of attention, but the

<sup>8</sup> *Kenny v. Wong Len*, 81 N. H. 427, 128 Atl. 343 (1925); *May v. Western Union Telegraph Co.*, 157 N. C. 416, 72 S. E. 1059 (1911); *Wilkinson v. Downton*, [1897] 2 Q. B. 57; HARPER, *THE LAW OF TORTS* (1933) §67; Magruder, *Mental and Emotional Disturbance in the Law of Torts* (1936) 49 HARV. L. REV. 1033; note (1926) 11 CORN. L. Q. 262.

<sup>9</sup> *Young v. Western Union Telegraph Co.*, 107 N. C. 370, 11 S. E. 1044 (1890); *Thompson v. Western Union Telegraph Co.*, 107 N. C. 449, 12 S. E. 427 (1890). *Green v. Western Union Telegraph Co.*, 136 N. C. 489, 49 S. E. 165 (1904), is indicative of the widened scope of recovery in this phase of tort law. In that case the defendant company was late in delivering a wire telling the addressee to meet the sender's young daughter upon the arrival of her train in that city. As a consequence, no one met her when she came in after midnight, and recovery was allowed for her mental suffering and fright upon finding herself alone and unprotected at such a late hour in a strange city. This was true despite the fact that no actual harm befell her.

<sup>10</sup> *Barnett v. Collection Service Co.*, 214 Iowa 1303, 242 N. W. 25 (1932); *La Salle Extension University v. Fogarty*, 126 Neb. 457, 253 N. W. 424 (1934); *Kirby v. Jules Chain Store Corp.*, 210 N. C. 808, 188 S. E. 625 (1936).

<sup>11</sup> Note (1939) 18 N. C. L. REV. 71.

<sup>12</sup> *Nickerson v. Hodges*, 146 La. 735, 84 So. 37 (1920).

<sup>13</sup> Prosser, *The Intentional Infliction of Mental Suffering: A New Tort* (1939) 37 MICH. L. REV. 874.

advance of science and methods of detection are decreasing the risk of fraud in such situations, and there seems no valid ground for denying recovery in *bona fide* cases of injury resulting from the defendant's malevolent or reckless acts directed toward the plaintiff, despite the absence of any corporal contact. The law has taken cognizance of this need, and the trend is clearly in that direction.<sup>14</sup> There is, however, no such problem in the instant set of facts.

### III. EFFECT OF MALICE AS MAKING AN OTHERWISE LEGAL ACT WRONGFUL

The statement that malice cannot make the exercise of a legal right actionable is quite prevalent in judicial decisions<sup>15</sup> in our law, but it is equally true that many rights are held not to be absolute, but to be conditioned upon a proper usage.<sup>16</sup> An analogy to the "spite well" or to the "spite fence" might here be appropriate. In these instances one has a legal right to dig his well or erect his fence on his own property, but if he does so purely out of ill will toward his neighbor, and thus attempts to interfere with the latter's water supply,<sup>17</sup> or his access to light and air,<sup>18</sup> he loses his privilege, and the other has a right of action.<sup>19</sup> In *Barger v. Barringer*,<sup>20</sup> one of the country's leading cases on the subject, the North Carolina court remarks: "The law would be untrue to its soundest principles if it declared that the needless and wanton infliction of injury can ever be a legal right."<sup>21</sup> This is typical of the reasoning used to overthrow the precedent that the ownership of realty signified utter and complete control thereof. It is still widely held, however, that if the user is in some way beneficial to the actor, then it is privileged, no matter what his fundamental motive be.<sup>22</sup> An unusual case along this line is one in New York,<sup>23</sup> in which the defend-

<sup>14</sup> *Ibid.*

<sup>15</sup> *Richardson v. Wilmington & Weldon R. R.*, 126 N. C. 100, 35 S. E. 235 (1900); *Elmore v. Atlantic Coast Line R. R.*, 191 N. C. 182, 131 S. E. 633 (1926); *Allen v. Flood*, [1898] A. C. 1; see *Stevenson v. Newnham*, 13 C. B. 285, 297 (1853).

<sup>16</sup> Ames, *How Far an Act May be a Tort Because of the Wrongful Motive of the Actor* (1905) 18 HARV. L. REV. 411; Walton, *Motive as an Element in Torts* (1909) 22 HARV. L. REV. 501.

<sup>17</sup> *Katz v. Wilkinshaw*, 141 Cal. 116, 70 Pac. 663 (1902); *Stillwater Water Co. v. Farmer*, 89 Minn. 58, 93 N. W. 907 (1903); *Miller v. Black Rock Co.*, 99 Va. 747, 40 S. E. 27 (1901). For possible analogy of a "spite oil well", refer to *Hague v. Wheeler*, 157 Pa. 324, 27 Atl. 714 (1893).

<sup>18</sup> *Norton v. Randolph*, 176 Ala. 381, 58 So. 283 (1912); *Burke v. Smith*, 69 Mich. 380, 37 N. W. 838 (1888).

<sup>19</sup> For a good summary of the history of, and of the law today on, "spite wells" and "spite fences", refer to Freeland, *Statutory Regulation of Spite Fences in American Jurisdictions* (1937) 25 KY. L. J. 356; note (1938) 26 CALIF. L. REV. 691.

<sup>20</sup> 151 N. C. 433, 66 S. E. 439 (1909).

<sup>21</sup> *Id.* at 437, 66 S. E. at 441.

<sup>22</sup> Note (1936) 10 TULANE L. REV. 646.

<sup>23</sup> *Panton v. Holland*, 17 Johns. 92 (N. Y. 1819).

ant very carefully dug up some soil on his own lot, knowing that later the natural subsidence resulting would cause harm to the land of the adjoining plaintiff. The court said that if this were maliciously done, and not for the defendant's benefit, a cause of action was made out. The same result was reached in a case where a man malevolently piled a lot of old lumber on his property, not for any benefit to himself, but with the sole aim of shutting off the light and air from the plaintiff's windows, and annoying him.<sup>24</sup> A holding which goes somewhat farther appears in Louisiana,<sup>25</sup> where the defendant erected on his land a signboard which obstructed the view of plaintiff's service station. Plaintiff succeeded in getting it moved and relocated. The decision seems rather bold in that, although the signboard was maliciously erected, it was of financial benefit to the defendant. Other analogous situations may be mentioned. A man unquestionably has a legal right to attempt to collect his debts, but, as already shown,<sup>26</sup> this right must be exercised within certain limits. The humiliation caused a debtor by his creditor's placing of an account of the debt in his show window, together with statements that the debtor broke his promises to pay, has been held actionable, although the statements were true.<sup>27</sup> The malice underlying the creditor's conduct has undoubtedly made wrongful his otherwise clear right to make public the plaintiff's indebtedness. It is not doubted that citizens are privileged to petition for desired ends, yet, a Pennsylvania case,<sup>28</sup> involving a situation where some citizens maliciously sought to prevent the appointment of a certain teacher, held that the exercise of the privilege was not the absolute right of every citizen when actuated solely by malevolence. And the same reasoning was employed in an Illinois case<sup>29</sup> where the defendant chairman of the school board was held restricted in the exercise of his power to revoke licenses of teachers, where he did so purely through malice.

The present analogy can be carried on into what are regarded in certain businesses as unfair practices. Agreements or plans made solely for the purpose of hurting the plaintiff's business or trade, and not for the actor's own advancement, have been held wrongful.<sup>30</sup> The same is true in situations where the end sought is malicious discharge.<sup>31</sup>

<sup>24</sup> *Dunbar v. O'Brien*, 117 Neb. 245, 220 N. W. 278 (1928).

<sup>25</sup> *Parker v. Harvey*, 164 So. 507 (La. App. 1935), (1936) 10 *TULANE L. REV.* 646.

<sup>26</sup> See note 10, *supra*.

<sup>27</sup> *Brents v. Morgan*, 221 Ky. 765, 299 S. W. 967 (1927), 55 A. L. R. 964 (1928).

<sup>28</sup> *Vanarsdale v. Laverty*, 69 Pa. 103 (1871).

<sup>29</sup> *Love v. Moore*, 45 Ill. 12 (1867).

<sup>30</sup> *Purington v. Hinchliff*, 219 Ill. 159, 76 N. E. 47 (1905); *Delz v. Winfree*, 80 Tex. 400, 16 S. W. 111 (1891). *Contra*: *Passaic Print Works v. Ely & Walker Dry Goods Co.*, 105 Fed. 163 (C. C. A. 8th, 1900).

<sup>31</sup> *Lucke v. Clothing Cutters and Trimmers Assembly*, 77 Md. 396, 26 Atl.

In all these situations, a strict legal right becomes actionable when exercised only to harm another, and not for the actor's own gain. Here there is no doubt but that *D* had the strict legal right to discharge *P*, since the latter proved nothing better than a contract terminable at will, but the whole matter hinges upon whether *D* properly exercised that right. On the strength of the analogies already presented, it would seem that if *D* exercised that right maliciously and to the intended detriment of *P*, without any benefit to *D*, then possibly *P* has made out a cause of action after all. And there would seem to be no difficulty in inferring and reading malice into *D*'s conduct here; his actions in any other light would seem utterly irrational.

The *Elmore*<sup>32</sup> case is one strongly relied on by the defense, and seems to be the leading one on the subject in the entire country. There, a man employed as a conductor was called into an official's office, and discharged under an imputation of dishonesty. Later, he had to ride home on the train, still in his uniform. He sued on the basis of wrongful discharge and slander, as well as for the humiliation arising out of having to ride on his train as a passenger while yet clothed as a conductor. It was held that he had no cause of action. That case would seem distinguishable from the principal one in that the element of publication was lacking, and that there was no showing of malice comparable to that in the instant case.

Upon the demurrer, construing all of *P*'s allegations in the light most favorable to him, one's first reaction is that this employee has been treated rather shabbily by his employer, who, indeed, even presumed upon the master-servant relationship to induce *P* out into the street to disgrace and humiliate him. It seems most unjust that one cannot be sued for thus maliciously and wilfully subjecting another to public ridicule, and, even worse, to loss of reputation and business name. The case is a unique one, and is admittedly difficult of solution along any historic line of tort law. It may be that it is one of the law's blind-spots, or one of the chinks in the armor against the onslaughts of wrongdoers. If this be true, the judiciary's hesitancy in refusing to take cognizance of the matter may be founded on its wish to leave it to the consideration of the legislature. At any rate, if our modern justice is to equal the boast of the old common law—"No wrong without its remedy"—it would seem that some provision, either legislative or judicial, is imperative to safeguard the interests of those who find themselves in such straits as does the plaintiff in the instant case.

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505 (1893); *Connell v. Stalker*, 20 Misc. 423, 45 N. Y. Supp. 1048 (N. Y. City Ct. 1897).

<sup>32</sup> *Elmore v. Atlantic Coast Line R. R.*, 191 N. C. 182, 131 S. E. 633 (1926).