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A note by John Henry Blalock, a law student not a member of the Student Board of Editors, appears in this issue.

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NOTES AND COMMENTS

Conflict of Laws—Capacity of Married Woman to Sue

For personal injuries occasioned by an automobile accident in North Carolina, plaintiff, a resident of Ohio, brought suit in North Carolina against her husband, also a resident of Ohio, for his alleged negligence. Defendant's motion for dismissal was denied. On appeal defendant argued (1) that the provisions of the North Carolina Constitution and statutes relating to emancipation of married women do not apply to this plaintiff for the reason that these provisions are either expressly or impliedly limited, in their application, to a female in this state;¹ and (2) that since a married woman cannot sue her husband in Ohio, this suit is clearly an attempt to evade the laws of the domicile

¹ Brief of Defendant-Appellant, p. 5.

of the parties, and should not be permitted.² The court, by Clarkson, J., held that the Martin Act,³ which has been interpreted as giving a wife the right to sue her husband,⁴ is not limited to residents of North Carolina, but applies to any female who while in this state becomes the owner of a cause of action. Stacy, C. J., looking at the conflict of laws aspect of the problem, pointed out in a concurring opinion that the cause of action arose in North Carolina and is being sued on here, therefore, the law of North Carolina governs, both as to substance and procedure; that the law of the forum is alone applicable to the question of the wife's capacity to sue, citing *Howard v. Howard*,⁵ and that the Martin Act gives substantive rights as well as remedial ones, inasmuch as it makes the recovery by a wife for personal injuries her "sole and separate property", and thus gives substance to an otherwise meaningless right to sue.

The three-justice dissent in effect held that the capacity of a wife to sue is determined by her domicile. The reasons given for such a rule were: (1) the marital status is "determined" by the law of the domicile, (2) a cause of action is a species of personal property, and "the situs of the ownership of personal property is the residence of the owner" (it was admitted, however, that the situs of ownership follows the owner, and that as long as plaintiff remained in North Carolina, its law would govern such ownership), and (3) from a practical standpoint, even though plaintiff should recover in North Carolina, she would have to sue on the judgment in Ohio, and there would be "met at the threshold of that suit by her disability".

The first problem the court had before it was to distinguish between status and the incidents of status. This is elementary. In brief, it may be stated that under any theory of conflict of laws, the state which sets up a status or relationship, does not necessarily control the incidents of that status when it is moved to another state.⁶ Keep-

² *Id.* at 6 and 7.

³ N. C. CODE ANN. (Michie, 1939) §2513.

⁴ *Crowell v. Crowell*, 180 N. C. 516, 105 S. E. 206 (1920); *Roberts v. Roberts*, 185 N. C. 566, 118 S. E. 9 (1923); *Shirley v. Ayers*, 201 N. C. 51, 158 S. E. 840 (1931); *York v. York*, 212 N. C. 695, 194 S. E. 486 (1937).

⁵ 200 N. C. 574, 158 S. E. 101 (1931).

⁶ *Polydore v. Prince*, 19 Fed. Cas. No. 11,257 (D. C. Me. 1837); *New York Foundling Hospital v. Gatti*, 9 Ariz. 105, 79 Pac. 231 (1905); *Deacon v. Jones*, 7 Cal. App. (2d) 482, 45 P. (2d) 1025 (1935); *Woodworth v. Spring*, 86 Mass. 321 (1862); *Ross v. Ross*, 129 Mass. 243 (1880); *Gray v. Gray*, 87 N. H. 82, 174 Atl. 508 (1934). An excellent example of this is the treatment which has been given to capacity to contract as an incident of the marital status. It may be controlled by the law of the domicile, *Marks v. Germania Sav. Bank*, 110 La. 659, 34 So. 725 (1903); *Freret v. Taylor*, 119 La. 307, 44 So. 26 (1907); *Lorio v. Gladney*, 147 La. 930, 86 So. 365 (1920); *Armstrong v. Best*, 112 N. C. 59, 17 S. E. 14 (1893); *Hanover Nat'l Bank v. Howell*, 118 N. C. 271, 23 S. E. 1005 (1896); *Young v. Hart*, 101 Va. 480, 44 S. E. 703 (1903); *Dulin v. McCaw*, 39 W. Va. 721, 20 S. E. 681 (1894), or by the law of the place where the contract was executed, *Meier & Frank Co. v. Bruce*, 30 Idaho 732, 168 Pac. 5

ing this distinction in mind, and assuming that the forum recognized as valid the marital status or relationship of the parties before it, the remaining question before the court was what law governs an incident of that relationship, namely, capacity to sue or be sued. In answering this or any other conflict of laws question the court may choose as its basic theory either the traditional territorial or vested rights doctrine, or the more modern "realistic" approach.

According to the traditional view, the laws of a state have no force outside the borders of that state;⁷ but in the interests of comity a state having a legal situation foreign to it dumped in its lap, will enforce rights or liabilities acquired or imposed under the laws of the foreign state where the situation arose,⁸ unless this would be contrary to its public policy.⁹ The conception is that a person who has come under the jurisdiction of a state by reason of being physically or constructively present therein may there acquire by his acts certain rights or obligations which, in so far as they are presently actionable in the courts of that state, follow him wherever he goes, and may be enforced by the courts of other states if they so desire, but only as granted or imposed.¹⁰ As a matter of practicality the forum, in enforcing this vested or foreign-acquired right or obligation, uses its own procedural rules,¹¹

(1917); *Palmer Nat. Bank v. Van Doren*, 260 Mich. 310, 244 N. W. 485 (1932); *Ohio v. Purse*, 263 N. W. 872 (Mich. 1935); *Taylor v. Sharp*, 108 N. C. 377, 13 S. E. 138 (1891); *RESTATEMENT, CONFLICT OF LAWS* (1934) §333, or by the law of the place of performance when the parties intend that law to govern, *Kiess v. Baldwin*, 74 F. (2d) 470 (App. D. C. 1934); *Greenlee v. Hardin*, 157 Miss. 229, 127 So. 777 (1930); *Poole v. Perkins*, 126 Va. 331, 101 S. E. 240 (1919); *Jefferis v. Kanawha Fuel Co.*, 182 Wis. 203, 196 N. W. 238 (1923). It is quite obvious, then, that the capacity to contract, as an incident of the marital status, does not depend on the law of the place where the status or relationship was entered into.

⁷ *Loucks v. Standard Oil Co. of N. Y.*, 120 N. E. 198, 224 N. Y. 99 (1918); *Mertz v. Mertz*, 271 N. Y. 466, 3 N. E. (2d) 597 (1936); *STORY, COMMENTARIES ON THE CONFLICT OF LAWS* (8th ed. 1883) §7; *RESTATEMENT, CONFLICT OF LAWS* (1934) §1; see *Howard v. Howard*, 200 N. C. 574, 578, 158 S. E. 101, 103 (1931).

⁸ See *Hilton v. Guyot*, 159 U. S. 113, 163, 16 Sup. Ct. 139, 143, 40 L. ed. 95, 108 (1894); *In re Chase*, 195 N. C. 143, 148, 141 S. E. 471, 473 (1927); *Howard v. Howard*, 200 N. C. 574, 578, 158 S. E. 101, 103 (1931).

⁹ *Franklin Sugar Refining Co. v. Mullen Co.*, 7 F. (2d) 470 (D. Dela. 1925); *Howard v. Howard*, 200 N. C. 574, 578, 158 S. E. 101 (1931).

¹⁰ "But when such a liability is enforced in a jurisdiction foreign to the place of the wrongful act, obviously that does not mean that the act in any degree is subject to the *lex fori*, with regard to either its quality or its consequences. On the other hand, it equally little means that the law of the place of the act is operative outside its own territory. The theory of the foreign suit is that, although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio*, which, like other obligations, follows the person, and may be enforced wherever the person may be found." *Holmes, J.*, in *Slater v. Mexican Nat'l Ry.*, 194 U. S. 120, 126, 24 S. Ct. 581, 582, 48 L. ed. 900, 902 (1904). See also *GOODRICH, HANDBOOK OF THE CONFLICT OF LAWS* (1927) 10.

¹¹ *Ingle v. Cassady*, 208 N. C. 497, 181 S. E. 562 (1935); *Clodfelter v. Wells*, 212 N. C. 823, 195 S. E. 11 (1937); *RESTATEMENT, CONFLICT OF LAWS* (1934) §585.

and looks to the locus only for instructions as to the substance of the case.

The modern approach or analysis is to disregard the purported logic and simplicity of the vested rights theory and to treat the forum as a law unto itself. It formulates its conflict of laws rules as it would those in any other field of the law, unfettered by any preordained conceptions as to what law must govern the case, being free to pick any state among those involved in the case as the one whose law ought to govern.¹² Just as under the vested rights theory, considerations of convenience call for application of the procedural rules of the forum regardless of the locus whose substantive law is picked as controlling.

So, if the court follows the orthodox, traditional view, it must first determine whether the particular point before it involves substance or procedure. If the forum should hold that capacity to sue or be sued, as a conflict of laws problem, is a question of substance, it must, under the vested rights theory, apply the local law of that state where the substantive rights arose; if it deems it procedural, it applies its own local law to decision of the question. The general rule is that capacity of a married woman to sue is a procedural question to be resolved by the local law of the forum.¹³ The North Carolina view, according to *Howard v. Howard*,¹⁴ appears to be that capacity of a wife to sue or be sued is a question of substance, part of the cause of action, to be controlled by the local law of the state giving the cause of action. In that case a North Carolina wife suing her husband in North Carolina was denied recovery because the cause of action on which she was seeking to recover—an automobile accident—arose, if at all, in New Jersey, and since New Jersey would not allow a wife to sue her husband, this wife had no cause of action. The court having impliedly¹⁵ classified capacity of a wife to sue as substantive, this decision was in full accord with the strict territorial view—plaintiff's right to sue her husband, accorded by the statutes of her domicile as an incident of the marital status in that state,¹⁶ being denied by the court of her domicile¹⁷ because her substantive rights, of which capacity to sue is one, arose in another state.

¹² See, for an example of this approach, the articles of Cook, *The Logical and Legal Bases of the Conflict of Laws* (1924) 33 YALE L. J. 457; *The Jurisdiction of Sovereign States and the Conflict of Laws* (1931) 31 COL. L. REV. 368; *Tort Liability and the Conflict of Laws* (1935) 35 COL. L. REV. 202.

¹³ *New York Evening Post Co. v. Chaloner*, 265 F. 204 (C. C. A. 2nd, 1920); *Gott v. Dinsmore*, 111 Mass. 45 (1872); *Rogers v. Rogers*, 265 Mo. 200, 177 S. W. 382 (1915); *RESTATEMENT, CONFLICT OF LAWS* (1934) §588.

¹⁴ 200 N. C. 574, 158 S. E. 101 (1931).

¹⁵ There was no express determination of the question, the court apparently assuming that capacity to sue was a part of the cause of action.

¹⁶ See note 4, *supra*.

¹⁷ *Dawson v. Dawson*, 224 Ala. 13, 138 So. 414 (1931); *Buckeye v. Buckeye*, 203 Wis. 248, 234 N. W. 342 (1931). Compare with such a view the holdings

If, on the other hand, the court looks upon itself as its own master, in accord with the "liberal" analysis, it still has before it the primary hurdle of substance or procedure. If this hurdle is cleared in favor of procedure, the rule of the forum will govern.¹⁸ If, however, substance is found on the other side, then the court may settle on the law of any state in the picture which it thinks ought to govern—the *lex loci celebrationis*,¹⁹ the *lex domicilii*,²⁰ the *lex loci delicti* or *contractus*,²¹ or the *lex fori*.²² How it is to make this selection is beyond the scope of this note. *Howard v. Howard* will fit into this analysis by merely saying that it holds capacity of a married woman to sue to be governed by the law of the place which controls the substance of the case.

The principal case could have been disposed of simply by saying that capacity to sue is a question of substance, to be resolved by the law of the place of tort. North Carolina being that place, its law will govern, and plaintiff wife may bring this suit against her husband. The opinions in the case torture the problem, however, and never quite work their way out of confusion. Justice Clarkson simply evaded the problem in conflict of laws and rested his decision on the technical basis that the female plaintiff was "in this state" when her cause of action arose, and therefore the Martin Act applies. The effect of her domiciliary incapacity to sue was not discussed. Chief Justice Stacy's opinion more closely approaches a sound reason for allowing the plaintiff to recover. The fact that the forum and the *locus delicti* are the same makes his point as to substantive and procedural questions being controlled by the forum a neat one. But it leaves no guidepost to indicate in future cases, where the forum and *locus* might be different, whether capacity of a married woman to sue is a question of procedure or substance. His statement that the forum controls questions of capacity to sue could act as such a guidepost and completely dispose of the

in *Armstrong v. Best*, 112 N. C. 59, 17 S. E. 14 (1893) and *Hanover Nat. Bank v. Howell*, 118 N. C. 271, 23 S. E. 1005 (1896).

¹⁸ See note 13, *supra*.

¹⁹ There has been no case found which has actually held that the place which created the status, when different from the domicile, would control the incidents thereof, but it is entirely possible that a court might so hold in the absence of contrary precedent.

²⁰ *Williams v. Pope Mfg. Co.*, 52 La. Ann. 1417, 27 So. 851 (1900); *Freret v. Taylor*, 119 La. 307, 44 So. 26 (1907); *Little Players Film Co. v. Harcol Film Co.*, 1 La. App. 388 (1925).

²¹ *Dawson v. Dawson*, 224 Ala. 13, 138 So. 414 (1931); *Buckeye v. Buckeye*, 203 Wis. 248, 234 N. W. 342 (1931).

²² *Tex. & Pac. Ry. v. Humble*, 181 U. S. 57, 21 Sup. Ct. 526, 45 L. ed. 747 (1901); *Lee v. Puleston*, 102 Fla. 1079, 137 So. 709 (1931); *Beck & Gregg Hardware Co. v. Southern Surety Co.*, 44 Ga. App. 518, 162 S. E. 405 (1931); *Herzog v. Stern*, 264 N. Y. 379, 191 N. E. 23 (1934); *Dunn Co. v. Corwin*, 258 App. Div. 609, 17 N. Y. S. (2d) 577 (1st Dep't 1940). Accord: *Byrd v. Aetna Life Ins. Co.*, 25 Ala. App. 318, 146 So. 78 (1933); *Fowlkes v. Ray-O-Vac Co.*, 183 S. E. 210 (Ga. App. 1935).

case if the authority he cites, *Howard v. Howard*, bore him out. His argument that the Martin Act, by giving substance to an otherwise meaningless right to sue, thereby gives substantive rights to the plaintiff would seem to beg the question, for the whole problem before the court is by what law the plaintiff's procedural and substantive rights are to be determined.

From the practical side, the dissent points out entirely possible difficulties in enforcing the judgment, but this should not deter the court from going along with the plaintiff as far as possible. Its theoretical reasons show a confusion between status and the incidents of status, and a failure to distinguish between a cause of action and the proceeds of a cause of action. Certainly if the situs of ownership of a cause of action follows the person of the owner, as admitted by the dissent, that ownership in the principal case is to be determined by North Carolina law as long as the plaintiff is in North Carolina. Once she has recovered on that cause of action, it would seem to cease to be a cause of action and would become a judgment enforceable under the full faith and credit clause.²³ Furthermore, no doubt there was an insurance company in the background, which it seems would be obliged to pay the judgment once rendered.

SAMUEL R. LEAGER.

Constitutional Law—Escheats and Abandoned Property

In its origin, escheat was a comparatively simple element of the law of property. It denominated, in its most usual form, the right of the state or the sovereign to real property whose owner had died intestate and without lawful heirs, and it was this form of escheat which was originally incorporated into the North Carolina law.¹ Its scope was enlarged contemporaneously with its introduction, however, to include unclaimed distributive shares of a decedent's personal estate as well as his realty.² Strictly speaking, only when the owner of property dies intestate and without heirs can there be an escheat.

Of recent years there has been a tendency among the states to include in their statutes provision for the "escheat" to the state of unclaimed funds or personalty,³ and in certain cases realty,⁴ held by one person for another, or owed by one person to another—the most notable

²³ U. S. CONST., Art. IV, §1; RESTATEMENT, CONFLICT OF LAWS (1934) §434.

¹ N. C. CODE ANN. (Michie, 1939) §5784; *University v. High Point*, 203 N. C. 558, 166 S. E. 511 (1932).

² N. C. CODE ANN. (Michie, 1939) §5785.

³ ALASKA COMP. LAWS (1933) §2903; ARIZ. REV. CODE ANN. (Struckmeyer, 1928) §266; CAL. CODE CIV. PROC. (Deering, 1937) §1273; MICH. STAT. ANN. (1937) §26.1025; ORE. CODE ANN. (1930) §11-1215; PA. STAT. (Purdon, 1936) tit. 27, §§282-437.

⁴ PA. STAT. (Purdon, 1936) tit. 27, §§332, 333.

source of such "escheatable" property being unclaimed or dormant bank deposits. From the strictly historical viewpoint, this is not a true escheat since the customary basis, *i.e.*, death, intestacy, and lack of heirs of the owner, is not present. It partakes more of the nature of abandoned property, where the possibly living owner has parted with all interest in the property, leaving it to be claimed by the first taker or by the state if it sees fit to legislate concerning its potential control over such property.⁵

Whether the ordinary modern statute be called an escheat statute or an abandoned property statute, or a combination of both, its enlargement to include all kinds of property for which there is no apparent lawful owner has raised new questions of constitutionality and of practical administration which did not originally exist.

Foremost among the constitutional problems is that of compliance with the requirements of substantive and procedural due process of law.⁶ Substantive due process concerns the basis for the state's right to take over the escheated or abandoned property.⁷ As for escheats, the North Carolina constitution expressly provides for their acquisition by the state.⁸ There is no similar federal constitutional or statutory provision, so it would seem that the state's right in such case is unquestionable. Again, there is no federal constitutional or statutory provision for the recovery of abandoned property, but even if there were, the state would have admitted jurisdiction and control over tangible or intangible property within its borders.⁹ Where there is a true escheat or a true abandonment, the state clearly has a right to the property.

Obviously, from the nature of escheat and of abandonment, it would be practically impossible to find a pure case of either. In escheat, if it were possible to prove that a property owner had died intestate, it would still be necessary to show that there were no heirs to take the property. North Carolina has a presumption of law that every person dying leaves heirs, and it has been held, in an ejectment suit brought by the University to recover land by escheat, that the University must rebut this presumption by proof; yet this proof may be founded on enquiries made of those most likely to know whether there are heirs capable of succeeding to the inheritance.¹⁰ This is but a pre-

⁵ *Germantown Trust Co. v. Powell*, 265 Pa. 71, 108 Atl. 441 (1919); *Greenough v. Peoples' Savings Bank*, 38 R. I. 100, 94 Atl. 706 (1915).

⁶ U. S. CONST. Amendment XIV, §1.

⁷ *Brooklyn Borough Gas Co. v. Bennett*, 154 Misc. 106, 217 N. Y. Supp. 203 (Sup. Ct. 1935); *Pennsylvania v. Dollar Savings Bank*, 259 Pa. 138, 102 Atl. 569 (1917); *Germantown Trust Co. v. Powell*, 265 Pa. 71, 108 Atl. 441 (1919); *Greenough v. Peoples' Savings Bank*, 38 R. I. 100, 94 Atl. 706 (1915).

⁸ N. C. CONST. (1936) art. IX, §7.

⁹ *Security Savings Bank v. California*, 263 U. S. 282, 44 Sup. Ct. 108, 68 L. ed. 301 (1923).

¹⁰ *University v. Harrison*, 90 N. C. 385 (1884).

sumption to rebut a presumption, and appears the only practical means to prove a lack of heirs. It would seem that a complete escheat statute should stipulate certain facts which, if proved by the University, will reasonably raise a presumption that the decedent had no heirs.

It would be even more unusual to find a pure case of abandonment than one of escheat, since it involves proof that the owner has relinquished all his interest in the abandoned property¹¹—a matter of intent—and in practically every case the owner's intent must be presumed from his acts—disappearance, failure to deal with the property for a certain length of time, etc. What will constitute a reasonable factual basis for such presumption should be established by any complete abandonment statute. If what is more logically abandoned property be termed escheated property, the problem of presumptions grows more complicated, since it is then necessary to prove by presumptions all three of the elements of escheat: death, intestacy, and lack of heirs.

Thus if the state can prove the essential elements of escheat or abandonment, or if it sets up a reasonable basis for presuming such facts as are not certain but must be proved, it will have satisfied the requirements of substantive due process.

Some form of proceeding would seem necessary for the state to establish its right to property in the possession of another. This raises the question of procedural due process. However, in North Carolina and a majority of states, the title to escheated property vests in the state immediately upon the death of the owner,¹² hence, there is no constitutional necessity for a proceeding to determine escheat.¹³ Ejectment is usually resorted to in North Carolina to dispossess one in possession of escheated property, and it is in this proceeding that the facts of escheat are adjudicated.¹⁴ This may be a sufficient means of determining escheat, but a statutory form should be evolved which would provide for notice to the parties in possession of the property and to other interested parties. Notice by publication would probably be sufficient. Such provisions would clearly satisfy the requirements of procedural due process.

In abandonment the requirements of procedural due process have been clearly set forth by the Supreme Court in *Security Savings*

¹¹ *Bickham v. Bussa Oil & Gas Co.*, 152 So. 393 (La. App. 1934); *Hediger v. Zastrow*, 174 Minn. 11, 218 N. W. 172 (1928).

¹² N. C. CODE ANN. (Michie, 1939) §5784; *Crane v. Reeder*, 21 Mich. 24 (1870); *Farrar v. Dean*, 24 Mo. 16 (1856); *Roberts v. Reeder*, 5 Neb. 203 (1876); *Den, Colgan v. McKeon*, 24 N. J. L. 566 (1854).

¹³ *Hamilton v. Brown*, 161 U. S. 256, 16 Sup. Ct. 585, 40 L. ed. 691 (1896); *University v. High Point*, 203 N. C. 558, 166 S. E. 511 (1932).

¹⁴ *University v. Johnson*, 2 N. C. 373 (1796); *University v. Foy*, 5 N. C. 58 (1805); *University v. Harrison*, 90 N. C. 385 (1884); *University v. High Point*, 203 N. C. 558, 166 S. E. 511 (1932).

Bank v. California.¹⁵ There the Court upheld a California statute providing for the "escheat" to the state of bank deposits unclaimed after 20 years. The bank was to be served personally, and the depositors were to be served by publication, with a five-year period allowed for those not parties to the judgment to sue to recover the money.¹⁶ The Court held such a statutory proceeding (it was called an escheat proceeding, although it actually dealt with abandoned property) to be either *quasi in rem* or strictly *in rem*, in either of which the essentials of jurisdiction are seizure of the *res*—accomplished by personal service made upon the bank—and reasonable notice and opportunity to be heard—accomplished by service by publication on the depositors and a five-year period for them to reclaim the supposedly abandoned property. In the light of this decision any abandonment statute which hopes to be constitutional should contain some provision for a proceeding to determine the fact of abandonment, in which the holder of the property or the debtor is served personally and the owner of the property or the creditor is served at least by publication and given an opportunity to be heard.

If such proceeding and notice is provided for, it has been held that there is no impairment of the contract obligation which the holder of the property or the debtor owes the owner or creditor,¹⁷ especially if the holder or debtor is absolved by the statute from liability to the owner of the property.¹⁸ A subsidiary problem arises, however, when the abandoned property is held by a national bank. The Supreme Court held a California statute providing for the "escheat" of apparently abandoned deposits in a national bank to be an interference with the bank's function as a federal agency.¹⁹ However, a later federal case upheld an Alaska statute which applied to national banks.²⁰ This statute provided that seven years' absence in which the depositor has not been heard from raises a presumption of death, making his deposit subject to escheat if no heirs can be found.²¹ It was distinguished from

¹⁵ 263 U. S. 282, 44 Sup. Ct. 108, 68 L. ed. 301 (1923).

¹⁶ CAL. CODE CIV. PROC. (Deering, 1937) §1273.

¹⁷ *Security Savings Bank v. California*, 263 U. S. 282, 44 Sup. Ct. 108, 68 L. ed. 301 (1923); *Germantown Trust Co. v. Powell*, 265 Pa. 71, 108 Atl. 441 (1919); see *Provident Institute for Savings v. Malone*, 221 U. S. 660, 664, 31 Sup. Ct. 661, 663, 55 L. ed. 899, 903 (1910).

¹⁸ *Louisville & N. R. R. v. Deer*, 200 U. S. 176, 26 Sup. Ct. 207, 50 L. ed. 426 (1905); *Security Savings Bank v. California*, 263 U. S. 282, 44 Sup. Ct. 108, 68 L. ed. 301 (1923); see *Oregon v. First Nat. Bank of Portland*, 61 Ore. 551, 561, 123 Pac. 712, 716 (1912).

¹⁹ *First Nat. Bank of San Jose v. California*, 262 U. S. 366, 43 Sup. Ct. 602, 67 L. ed. 1030 (1923). See also *American Nat'l. Bank of Nashville v. Clarke*, 175 Tenn. 480, 135 S. W. (2d) 935 (1940). *Contra*: *Oregon v. First Nat'l Bank of Portland*, 61 Ore. 551, 123 Pac. 712 (1912).

²⁰ *Alaska v. First Nat'l Bank of Fairbanks*, 22 F. (2d) 377 (C. C. A. 9th, 1927).

²¹ ALASKA COMP. LAWS (1933) §2903.

the California statute which made the deposits escheatable, but made no reference to the death, intestacy, or lack of heirs of the depositor, so that it was possible to escheat the deposit of a living person—not a true case of escheat. The deduction from this is that if the state were to condition its right to escheated property on the facts, actual or presumed, of escheat, and to abandoned property on the facts, actual or presumed, of abandonment, and make a clear-cut distinction between the two, it would have a right to such property within its borders, whether in a national bank or not, since the property no longer has a lawful owner, and the state merely succeeds to the rights of the former owner. Some such clear-cut basic distinction should be included in an all-reaching statute.

Aside from the constitutional difficulties, certain practical problems should be met by any complete escheat or abandoned property statute. First of these is the sources of escheatable or abandoned property. Escheated property should cover all the realty or personalty of an intestate decedent who dies without heirs. As for abandoned property, some states²² specify in particular what shall be recoverable by the state, but it seems that all abandoned property of whatever kind should be obtainable by the state *if it sets up a reasonable basis for the determination of its abandoned character*. Certainly the holder of the property has no tontine right or contractual right to continue in possession of it as opposed to the state's right once the owner has ceased to regard it as his own.²³

Another important practical problem is that of obtaining information concerning the existence of escheated or abandoned property. A number of states require reports to be made by the person holding or owing abandoned property.²⁴ This, coupled with the power in the state to examine books, accounts, etc., of holders of abandoned property,²⁵ seems a popular and very practical means of obtaining such information.

Other practical problems include the office or officer to be responsible for administering the statute, the mode of proceeding best suited to the determination of the facts of escheat or abandonment, what courts shall have jurisdiction, how much notice shall be given to interested parties, what facts are necessary to prove as a basis for escheat or abandonment, and what facts if proven will raise a presumption of

²² See, for instance, PA. STAT. (Purdon, 1936) tit. 27, §§282-284, 333, 334, 381, 435, 436.

²³ *Security Savings Bank v. California*, 263 U. S. 282, 44 Sup. Ct. 108, 68 L. ed. 301 (1923).

²⁴ MICH. STAT. ANN. (1937) §§26.1026-26.1028; PA. STAT. (Purdon, 1936) tit. 27, §§43, 262, 361, 362, 436.

²⁵ MICH. STAT. ANN. (1937) §26.1026; PA. STAT. (Purdon, 1936) tit. 27, §§284, 437.

escheat or abandonment (the latter two problems overlapping into the constitutional field), the length of time to be allowed for non-parties to the determination to come in and claim the property, the procedure to be followed in entering such claim, and rights of appeal from any judgment of escheat or abandonment or other judgment provided for.

In sum, the required provisions of a completely constitutional and workable escheat or abandoned property statute are:

I. Constitutional Requirements

(1) Statement of the facts on which the state bases its right to escheated or abandoned property—definition. (2) Reasonable factual basis for presuming the basic facts of escheat or abandonment. (3) Proceeding to determine existence or presumed existence of basic facts. (4) Notice to interested parties. (5) Opportunity to non-parties to the proceeding to claim the escheated or abandoned property. (6) Absolution to holder of property from liability for compliance with the statute. (7) Clear-cut distinction in definition and treatment between escheat and abandonment.

II. Practical Requirements

(1) Statement of sources of escheatable or abandoned property. (2) Means of obtaining information concerning escheatable or abandoned property. (3) Detailed description of the type or mode of proceeding. (4) Detailed description of the effect of a judgment of escheat or abandonment. (5) An office or officer to have charge of administering the statute.

An analysis of the present North Carolina escheats statute²⁶ in the light of this summary reveals that in a test case it would probably be held unconstitutional, and that its practical aspects leave much to be desired. Its provisions may be classified into those dealing with real property, and those dealing with personalty, and it is on this line that the statute may be divided into escheats and abandoned property.

As to constitutional requirements: 1. There is no definition of escheat on which the state may base its substantive right to escheated property. Possibly a definition may be drawn by inference from C. S. 5784(a) which sets forth the facts constituting a prima facie case of escheat, but this falls short of a clear and unequivocal definition. Nor do the sections relating to personal property²⁷ give any definitive basis for the state's right to the property. These sections all provide that the personalty listed as recoverable "shall be deemed derelict property", indicating their reliance on the abandoned property theory, though there is no definite statement to that effect.

²⁶ N. C. CODE ANN. (Michie, 1939) §§218(c), 5784-5786(2).

²⁷ *Id.*, §§5785-5786(2).

2. However, assuming that the basis is sufficiently clear, the question of when to presume escheat or abandonment has been dealt with. In escheat, C. S. 5784(a) provides that if the University can show death and intestacy of the owner of the realty, lack of heirs will be presumed from the failure for fifty years of any person to appear and claim the land as devisee, grantee, or heir. This is obviously too long for the University to have to wait to rebut the usual presumption that everyone dying leaves heirs. Some provision for notice to possible heirs, coupled with failure to respond to the notice should be sufficient to prove absence of heirs. The present statutory basis for presuming abandonment is a five-year period of dormancy during which no claim to the property is made by the owner thereof, followed by a ten-year period during which the University possesses the property subject to claim by the owner.²⁸ Certain qualifications to this last statement must be made. In the case of unclaimed construction wages the initial dormancy period is one year, and two years in the case of rebates and returns of overcharges due by utility companies.²⁹ The section relating to bank deposits reads: "All bank deposits in connection with which no debits or credits have been entered within a period of five years. . . ." ³⁰ It would seem that the bank could defeat the purpose of this section by crediting interest to a savings account, and by making service charges on a checking account. The period of dormancy should depend clearly on the acts of the depositor and not those of the bank. In the case of claims in a bank liquidation, the dormancy period *after* settlement of the liquidation is three months, during which time the funds remain in the hands of the Clerk of the Superior Court.³¹ This section appears in the statute relating to regulation of state banks, and therefore could not apply to national banks. The provision should be broadened to include the latter.

3. & 4. There is no provision for a proceeding to determine the facts of escheat or abandonment, nor is there any provision for notice to interested parties. This defect as to abandonment is the most serious fault of the present statute. In C. S. 5785, dealing with unclaimed personalty or settlement of a decedent's estate, the University "is authorized to demand, sue for, recover and collect such moneys or other estate of whatever kind", but this is limited only to the one section, and is insufficient to set up a definite procedure to be followed.

5. In all the sections dealing with personal property,³² with the exception of that concerning claims in a bank liquidation,³³ it is provided that the University shall hold the property it recovers for ten years, subject to preferment of a claim by the parties entitled thereto,

²⁸ *Ibid.*

³⁰ *Id.*, §5786(1).

³² *Id.*, §§5785-5786(2).

²⁹ *Id.*, §5786(2).

³¹ *Id.*, §218(c).

³³ *Id.*, §218(c).

and if no such claim be preferred, then the University shall hold the property absolutely. If a proceeding were provided for at the beginning of this period, this ten-year provision would be sufficient as an opportunity to non-parties to come in and claim the property, but as it is, it amounts to merely an extension of the period of dormancy, and actually does not satisfy the fifth requirement.

6. In only one case, that of bank deposits,³⁴ is the holder of the property or debtor absolved from liability to the parties entitled thereto after delivering the property or paying the money to the University. This section provides: "The receipt of the University of North Carolina of any deposit hereunder shall be and constitutes a release of the bank delivering over any deposit coming within the provisions of this section from any liability therefor to the depositor or any other person." This is an excellent provision, but should be extended to cover every case of abandoned property.

7. The distinction between escheat and abandonment is not clear-cut, and rests more on the distinction between realty and personalty than the basis behind the state's right to the property. This is not a serious fault, but should be remedied if possible, since it may make a difference in the applicability of the statute to national banks.

As to practical requirements: Of those listed only one is met by the present statute—that concerning the sources of escheatable or abandoned property. The source of escheats is limited to realty, and of abandoned property to personalty—whose sources are listed specifically. It seems desirable to broaden the scope of the statute to include realty and personalty in escheat, and to include all kinds of property in abandonment. Several sources of abandoned property may thus be opened up to the University, such as unclaimed proceeds of insurance policies, unclaimed refundable insurance premiums, trust funds for which there is no lawful owner, funds in hands of municipal corporations, outstanding checks, funds of all kinds in the hands of the state, etc. There is no reason why the University should not recover all abandoned property of whatever kind, for no one else has a right to it superior to that of the state.

SAMUEL R. LEAGER.

Constitutional Law—Federal Power Commission— Navigability as Prerequisite to Federal Jurisdiction.

In 1925 respondent Power Company filed with the Federal Power Commission its declaration of intention to construct a dam across the New River in Virginia. The New, both above and below the proposed dam, had been navigated in places by shallow draft boats, but below

³⁴ *Id.*, §5786(1).

the dam there are shoals, rapids which descend eight feet to the mile, and even an almost vertical six-foot falls.¹ A large volume of water flows through the stream during all seasons. In 1933 the Commission found the river to be navigable, and accordingly required the respondent to take out a federal license providing for certain supervision by the Commission and empowering the government to acquire the project after expiration of fifty years by paying the licensee's net investment. However, in 1934, respondent began construction with only a Virginia state license. In 1935 the United States sought an injunction, alleging both that the New River was navigable and that the dam would affect the navigability of lower rivers. In 1938 the District Court² denied the injunction on either ground, reasoning that a river is navigable in law when it is navigable in fact in its *natural* and *ordinary* (*i.e.*, unimproved) condition and therefore the New River is not navigable. The Circuit Court of Appeals affirmed,³ but implied that the proper inquiry was whether the river is now navigable in fact, due either to natural or artificial means. On appeal the Supreme Court⁴ ruled that "natural and ordinary condition" referred to "volume of water, the gradients and regularity of flow",⁵ and a stream which has a sufficient volume and by the use of reasonable improvements may be made navigable, is a navigable stream of the United States. The Court further held that whether reasonable improvements would make the stream navigable depends upon a balance between the cost of the improvements and the need for the interstate navigation made possible by the improvements. Applying this newly formulated test to the New River, the Court concluded that "by reasonable improvements" it could be made navigable "for the typical, light commercial traffic of the area".⁶ Hence, it is a navigable river of the United States, subject to federal regulation under the commerce clause, which has been construed to empower the prohibition or licensing of any obstruction of a navigable river.⁷ Therefore, in order to maintain its dam, the respondent must procure a federal license and abide by restrictions therein.

¹The United States Government mile-by-mile survey of the New River, the 40th mile being at the dam and measuring toward its mouth, shows: 49th mile—"Rapids and shoals (mostly over boulders) 2,000 feet long; fall 4 feet to the mile." 67th mile—"River fall 5 feet in 500 feet." 79th mile—"Rapids over two ledges, 500 feet long; fall 7 feet to the mile." Nevertheless the New River is a navigable river of the United States.

²United States v. Appalachian Electric Power Co., 23 F. Supp. 83 (W. D. Va. 1938).

³United States v. Appalachian Electric Power Co., 107 F. (2d) 769 (C. C. A. 4th, 1939).

⁴United States v. Appalachian Electric Power Co., 61 Sup. Ct. 291, 85 L. ed. 201 (1940).

⁵*Id.* at 299, 85 L. ed. at 208.

⁶*Id.* at 304, 85 L. ed. at 213.

⁷United States v. Rio Grande Dam & Irrigation Co., 174 U. S. 690, 19 Sup. Ct. 770, 43 L. ed. 1136 (1898).

The courts below, having held that the New River was not navigable, had to pass on questions of federal power which the Supreme Court avoided by its decision that the river was navigable. These questions were: (1) Can the Federal Power Act be construed to include non-navigable streams?, (2) If so construed, is it a constitutional exercise of the power of Congress to regulate interstate and foreign commerce? These problems are still of vital importance, although the new test of navigability greatly extends the possibilities of federal control.

The core of the problem involved in the principal case lies deeper than a mere determination of navigability. It goes back to the question whether the state or the Federal Government is to control hydro-electric power. The Supreme Court, in order to find a basis for federal control, used as a stepping stone the commerce clause which gives to the Federal Government control over interstate and foreign commerce, which has been construed to include control over all rivers navigable in carrying such commerce.⁸ Since the Court based its decision on navigability and formulated a new test for its determination, it is important to inquire into the legal basis of navigability where federal jurisdiction is concerned and then into the justification for the new rule.

"Navigable" may be a word of different meanings, varying with the legal problem involved when the word is used.⁹ When "navigable" is a prerequisite to federal jurisdiction over rivers, it is construed in the sense of the commerce clause, and the question centers on the commerce bearing possibilities of the river. That is, if a river be actually navigated then it is capable of commerce and *ipso facto* warrants federal control. But a river, presently non-navigable in fact, may have potentialities of commercial use the obstruction of which would hinder future commerce.

The relatively short rivers in England gave rise to the old English rule that a river is navigable to the extent it is affected by the ebb and flow of the tide. Our rivers are of great length, extending far beyond the reach of the tides, thus necessitating a different rule. The classic test of what is a navigable river of the United States was set forth in

⁸ *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23 (U. S. 1824); *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. ed. 96 (U. S. 1865).

⁹ Courts have not always recognized that "navigable" may mean different things according to the purpose at hand. For instance in cases where navigability determines riparian and property rights, the question is determined as of the time the original states formed the Union or new states were admitted. Thus the District Judge apparently adopted the riparian test when he made federal control depend on whether waters were navigable in their unimproved condition. But it is inconceivable that the Federal Government has no power over our great canal systems simply because they are artificial and were not navigable in an unimproved state. Rather, they fall within the federal sphere because they are instrumentalities in commerce.

The Daniel Ball:¹⁰ "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used or are susceptible of being used in this ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade, and travel on water. And they constitute navigable waters of the United States within the meaning of the Acts of Congress in contra distinction from the navigable waters of the State, when they form in their ordinary condition by themselves, or by uniting with other waters a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water."

Prior to the principal case it was determined that to be navigable a river need not be capable of bearing steam or sail vessels;¹¹ it need only be capable of bearing some variety of useful commerce.¹² Navigability did not follow merely because a creek would float a skiff or canoe at high water;¹³ the commerce had to be of a substantial and permanent character.¹⁴ Legal navigability was not defeated because the watercourse was interrupted by occasional natural obstructions or portages,¹⁵ nor because navigation was not possible at all seasons nor at all stages of the water.¹⁶ The presence of artificial barriers had no bearing on navigability in law.¹⁷

The principal case departs from the earlier law in that a stream need neither be navigated nor capable of navigation in its present condition, so long as it can be made navigable by improvements not disproportionate in cost as compared with the navigation made possible.

By some it is feared that the new test renders the determination more uncertain. This fear can scarcely be justified. Rather, the new

¹⁰ *The Daniel Ball v. United States*, 10 Wall. 557, 563, 19 L. ed. 999, 1001 (U. S. 1871).

¹¹ *United States v. The Montello*, 20 Wall. 430, 22 L. ed. 391 (U. S. 1874); *United States v. Utah*, 283 U. S. 64, 51 Sup. Ct. 438, 75 L. ed. 844 (1930).

¹² *United States v. The Montello*, 20 Wall. 430, 22 L. ed. 391 (U. S. 1874); *United States v. Cress*, 243 U. S. 316, 37 Sup. Ct. 380, 61 L. ed. 746 (1916); *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U. S. 77, 43 Sup. Ct. 60, 67 L. ed. 140 (1922); *United States v. Utah*, 283 U. S. 64, 51 Sup. Ct. 438, 75 L. ed. 844 (1930).

¹³ *United States v. Rio Grande Dam & Irrigation Co.*, 174 U. S. 690, 19 Sup. Ct. 770, 43 L. ed. 1136 (1898).

¹⁴ *Leovy v. United States*, 177 U. S. 621, 20 Sup. Ct. 797, 44 L. ed. 914 (1894).

¹⁵ *United States v. The Montello*, 20 Wall. 430, 22 L. ed. 391 (U. S. 1874), *United States v. Rio Grande Dam & Irrigation Co.*, 174 U. S. 690, 19 Sup. Ct. 770, 43 L. ed. 1136 (1898), *Economy Light & Power Co. v. United States*, 256 U. S. 113, 41 Sup. Ct. 409, 65 L. ed. 847 (1920).

¹⁶ *St. Anthony Falls Water Power Co. v. Board of Water Comm'rs.*, 168 U. S. 349, 18 Sup. Ct. 157, 42 L. ed. 497 (1897), *Economy Light & Power Co. v. United States*, 256 U. S. 113, 41 Sup. Ct. 409, 65 L. ed. 847 (1920).

¹⁷ *Economy Light & Power Co. v. United States*, 256 U. S. 113, 41 Sup. Ct. 409, 65 L. ed. 847 (1920).

formula appears more definite. Under the old rule what was more uncertain than the determination of just what was "useful commerce" of a "substantial form"? Did not the courts apply the vague yardstick of reasonable amount in solving these questions? Was not the number of permissible obstructions to navigation decided by an indefinite test of reasonable number? Those old standards were at least as tenuous as the new inquiry of whether "streams with a sufficient volume of water" may be made navigable by "reasonable improvements" based on the cost and need of these improvements. Moreover, the tests are comparable in a particular application; under the old law the question arose whether the cost of portage around natural obstructions would be repaid by the potential use of the rest of the waterway, and today we ask whether the cost of removing the same obstruction will be offset by the ensuing free flow of commerce—in other words, a comparison of cost with need in either case.

It may be argued that until there is commercial need for a stream to be navigated, the application of the new test to bar present obstructions is a mere subterfuge for the purpose of gaining federal control over hydroelectric power.¹⁸ There is no need to bar obstructions when there is no commerce to be obstructed. A partial answer is that there is far less hardship in requiring the dams to be built under federal control than in imposing federal control after the dams are built and future commercial need for navigation has arisen.¹⁹ But it would be more candid to admit that under present circumstances the navigation involved, present or future, is not the real consideration; navigability is simply a legal doctrine invoked, and in this case remolded, for a purpose, namely to bring about federal control of hydroelectric power. The present Supreme Court for all its realism, here seems to have paralleled the ancient device of a legal fiction.

It is possible that if the new test is carried to drily logical extremes, certain absurd results may issue. Elevated roads through marshlands in the bayou country of Louisiana may require federal license, for they are obstructing a body of water with sufficient volume to make canalization possible. Similarly, fish nets may be licensed. And if the War Department desires to exert its power to license bridges over navigable

¹⁸ Such federal control over state resources is "hotly" contested by the states, as is evidenced by the fact that in the principal case 41 states joined with the state of Virginia in the brief to the Supreme Court.

¹⁹ At least one proposed dam has been abandoned because of the decision of the principal case. The Nantahala Power & Light Co., on March 5, 1941, abandoned its intention to construct a \$35,000,000 dam on the Little Tennessee River in North Carolina. The Power Company had maintained that the Little Tennessee was non-navigable, but in view of the decision of the principal case they abandoned this contention, and rather than build subject to federal control they abandoned the whole project.

rivers as newly conceived, no state highway commission or private individual may safely build any bridge without a federal license. Since by statute²⁰ it is criminal to obstruct a navigable stream without a license, the bridge builders must either assume the risk of determining for themselves the navigability of a river or have a court decide the question. The navigability of many streams hitherto deemed non-navigable may under the new test become doubtful, hence much new navigability litigation may be opened by the principal case.²¹

J. KENYON WILSON, JR.

Contracts—Rights of Enforcement in Third Party Beneficiary.

Plaintiffs, by guardian, sue their father to recover \$7,600 alleged due them under a separation agreement between their mother and defendant, under which defendant agreed to pay plaintiff's mother \$25 monthly for the support, maintenance, and education of each child until majority. Shortly thereafter, the mother had refused to accept further payments. Demurrer to the complaint was sustained. *Held*, affirmed, on the ground that the children were only incidental beneficiaries of the contract and as such, could not recover.¹

Quite commonly courts do not hesitate to label a contract one "for the benefit of a third party" even though no enforceable right is recognized in the supposed beneficiary.² Such third person beneficiaries, although not parties to the contract, are classified by Williston³ and the Restatement⁴ as (1) *donee*,⁵ if the benefit to the third party is in the nature of a gift from the promisee, rather than a performance claimable as of right from the promisee; (2) *creditor*,⁶ if the purpose of the promise is to discharge some duty owed by the promisee to the bene-

²⁰ 30 STAT. 1151 (1899); 33 U. S. C. A. §403 (1928); N. C. CODE ANN. (Michie, 1939) §§6981, 7377.

²¹ The North Carolina test of navigability holds to the concept of "navigable in fact" as laid down in *The Daniel Ball*. Previously it had held navigable those rivers which could be navigated by a sea going vessel. In the latest case, involving riparian rights, however, both *The Daniel Ball* and the sea vessel tests were applied. It is to be expected, however, that the state courts will look on this new formula with acute disfavor and will not adopt a test so detrimental to state control over the state's own resources.

¹ *Percival v. Luce*, 114 F. (2d) 774 (C. C. A. 9th, 1940).

² *Baurer v. Devenes*, 99 Conn. 203, 205, 121 Atl. 566, 567 (1923).

³ 2 WILLISTON, CONTRACTS (rev. ed. 1936) §356.

⁴ RESTATEMENT, CONTRACTS (1932) §133.

⁵ *Id.* §133, Illustration 2 (1a): *C* is a troublesome person who is annoying *A*. *A* dislikes him but believing the best way to obtain freedom from annoyance is to make a present, secures for sufficient consideration a promise from *B* to give *C* a box of cigars. *C* is a *donee* beneficiary.

⁶ *Id.* §133, Illustration 8 (1b): *B* promises *A* for sufficient consideration to furnish support for *A*'s minor child *C*, whom *A* is bound by law to support. *C* is a *creditor* beneficiary.

fiary; (3) *incidental*,⁷ if the benefits to him under the contract are merely incidental to the performance. There is no dispute as to the rule concerning incidental beneficiaries; they have no rights in the contract.⁸ Nearly all jurisdictions recognize a directly enforceable right, at law and equity, in beneficiaries of either the donee or creditor type; no distinction between them is made or called for in most situations.⁹ A minority group of courts refuse to recognize any rights in any type of third party beneficiaries.¹⁰

The early cases recognizing the rights of third party beneficiaries justified recovery on diverse theories as trust relationship,¹¹ equitable subrogation,¹² agency,¹³ effectuation of the intention of the parties by creating a duty and privity or implying a promise and obligation,¹⁴ equitable consideration apart from legal principles.¹⁵ Today, most jurisdictions simply state the rule that one for whose direct benefit a contract is made, although not a party to the agreement and not furnishing consideration, may maintain an action against the promisor.¹⁶ The difficulty lies in ascertaining when the beneficiary falls within the protected class. Solution is sought in the manifestation of the promisee's intent as to how or by whom his promise is to be enforced.¹⁷ Various formu-

⁷ *Id.* §133, Illustration 11 (1c): *B* contracts with *A* to erect an expensive building on *A's* land. *C's* adjoining land would be enhanced in value by performance of the contract. *C* is an *incidental* beneficiary.

⁸ *Swift Lumber & Fuel Co. v. Hock*, 124 Neb. 30, 245 N. W. 3 (1932) (in suit to recover for fuel oil furnished *D*, *D* not allowed to counterclaim on contract between *P* and *D's* lessor containing a guaranty on oil burners, on ground that *D* not of the class intended to be benefited); *Haines v. Pacific Bancorporation*, 146 Or. 407, 30 P. (2d) 763 (1934) (*P* could not enforce a contract wherein *D* promised *X* to purchase stock of *P's* as incidental to purchase of other stock); RESTATEMENT, CONTRACTS (1932) §147.

⁹ *Hendrix v. Lindsay*, 93 U. S. 143, 23 L. Ed. 855 (1876); *Smith v. Wilson*, 9 F. (2d) 51 (C. C. A. 8th, 1925); *Myerson v. New Idea Hosiery Co.*, 217 Ala. 153, 115 So. 94 (1927); *Calhoun v. Downs*, 211 Cal. 766, 297 Pac. 548 (1931) (statutory provision); *Weinberger v. Van Hassen*, 260 N. Y. 294, 183 N. E. 429 (1929) (*P*, minor, allowed to recover on contract between mother and *D*, stranger, for support and education); *Carrell v. Greensboro Water Supply*, 124 N. C. 328, 32 S. E. 720 (1899) (*P* allowed recovery on contract between city of Greensboro and *D* by which *D* was to furnish water supply of sufficient force to protect inhabitants against fire); *Boone & Jervey v. Boone*, 217 N. C. 722, 9 S. E. (2d) 283 (1940); *Re Thienhaus*, 175 Wis. 526, 185 N. W. 531 (1921).

¹⁰ See cases collected in Note (1932) 81 A. L. R. 1271.

¹¹ *Union Pacific Ry. v. Durante*, 95 U. S. 576, 246 L. Ed. 391 (1877); *Crawford v. Wilson*, 139 Ga. 654, 78 S. E. 30 (1913); *Sell v. Steller*, 53 N. J. Eq. 397, 32 Atl. 211 (1895); *Sweeney v. Houston*, 243 Pa. 542, 90 Atl. 347 (1914); *Urguhart v. Ury*, 27 Tex. 7 (1856); *Matheny v. Ferguson*, 55 W. Va. 656, 47 S. E. 886 (1904).

¹² *Palmer v. Bray*, 136 Mich. 85, 98 N. W. 849 (1904); *Green v. McDonald*, 75 Vt. 93, 53 Atl. 332 (1902).

¹³ *Lawrence v. Fox*, 20 N. Y. 268 (1859); *Cox v. Skeen*, 24 N. C. 220, 38 Am. Dec. 691 (1842) (promisee treated as agent for *P*).

¹⁴ *Brewer v. Dyer*, 7 Cush. 337 (Mass. 1851); *Tweeddale v. Tweeddale*, 116 Wis. 517, 93 N. W. 440 (1903).

¹⁵ *Peoples Bank v. Winter*, 161 Ga. 898, 132 S. E. 422 (1926).

¹⁶ See note 9 *supra*.

¹⁷ *Williston, op. cit. supra* note 3, §356A.

laic tests have been articulated, all partaking of the vague generality inherent in a concept of intent. It has been said that the contract must evidence the assumption of a "direct obligation" to the third party;¹⁸ that the contract must be "expressly" for the benefit of the third party but need not be "solely" or "exclusively" so;¹⁹ that the intent must be clearly manifested in the terms of the contract;²⁰ that a benefit incidentally accruing from performance is not sufficient, instead that a direct benefit must be shown to have been within the contemplation of the promisee or of both parties.²¹ These are at best shadowy guides. In essence they resolve into an effort to distinguish those contracts motivated by deliberate intent to confer a direct benefit on the third party beneficiary, from those which spring from some other intent but whose realization will benefit him collaterally. The instant case professed to follow the general rule that a third party might sue only if it appeared that the contract was intended for his direct benefit, not if he was merely an incidental beneficiary. As its test, the court asked "who was the direct recipient of the money?"²² Since the promise named the mother as sole payee, the benefit to the children was held indirect, constituting them merely incidental beneficiaries. Is such a mechanical test sufficiently infallible that it may be relied upon to the exclusion of other factors?

Heretofore a child has not been denied the right to sue on contract between his father and mother providing for his maintenance.²³ Ordinarily this right has been predicated on the third party beneficiary doctrine, with public policy admittedly a determining factor. In *Brill v. Brill*,²⁴ the contract called for payment to the mother in the capacity of guardian; in the North Carolina case of *Thayer v. Thayer*,²⁵ the putative father promised support and education of the child, without stipulation as to whether payment was to go directly to the child or the mother in his behalf. The technical distinction that the promise of payment in the principal case was to the mother scarcely warrants a difference in result.²⁶ The underlying circumstances closely correspond

¹⁸ *Byran Lumber & Supply Co. v. Page*, 109 Conn. 256, 146 Atl. 293 (1929).

¹⁹ *Le Ballester v. Redwood Theatres*, 1 Calif. App. 447, 36 P. (2d) 827 (1934); *Watson v. Amer. Creosote Works*, 84 P. (2d) 431 (Okla. 1938).

²⁰ See cases collected in Note (1932) 77 A. L. R. 21.

²¹ *Durnherr v. Rau*, 135 N. Y. 219, 32 N. E. 49 (1892).

²² *Percival v. Luce*, 114 F. (2d) 774, 775 (C. C. A. 9th, 1940).

²³ *Di Girolma v. Di Matteo*, 108 N. J. Eq. 592, 156 Atl. 24 (1931) (hospital placed child in care of *D* on agreement that child was to inherit part of his estate, and recovery allowed child when *D* left his property to wife). On 2 WILLISTON, *op. cit. supra* note 3, §356, it is said at page 1044: "Everywhere, the child is permitted to maintain the action, and usually as a third party beneficiary."

²⁴ 282 Pa. 276, 127 Atl. 840 (1925) ("public policy").

²⁵ 189 N. C. 502, 127 S. E. 553 (1925) (recovery allowed on the contract, with intimation that recovery could also be had on statutory grounds).

²⁶ As said in *Brill v. Brill*, 282 Pa. 276, 127 Atl. 840, 842 (1925), the proper inquiry is whether "... the fact that the money is to be paid to the third

to those cases which have allowed suit on the contract, and there appears scant justification for inferring a contrary intent here. The infancy of the instant beneficiaries affords an obvious reason for naming the mother recipient of the money. Although direct performance to the beneficiary may be a normal prerequisite to a right to sue, it should not stand as an inequitable *sine qua non* in the face of clear intent, such as appears here. No urgent reason appears for the harshly narrow construction adopted by the court. It appears almost slavish adherence to formalism.

The dissenting judge²⁷ advocated a recovery on the theory that plaintiffs were the beneficiaries of a trust obligation in the mother to collect the money for the sole use of plaintiffs. Such an approach appears sound since trusts have long been a flexible instrument for the working of justice.²⁸ No particular form of words or conduct is necessary to the creation of a trust; the essential inquiry is whether the settlor manifested an intention to impose equitable duties to deal with the property for the benefit of another.²⁹ There is analogous search for intent in the trust cases and in the third party beneficiary cases. In the principal case, treating the minors as the "cestui qui trust", they could bring suit in equity joining the trustee (mother) and the promisor (father) as codefendants and settle the matter in one action.³⁰ Such an application of the trust device might well have avoided the thwarting of intention and yielded protection to the minor children.

In the principal case, the problem of rescission was but mentioned in passing since the court treated the children as barred from suit. Had the result been otherwise, what effect would the refusal of the mother to accept further payments have had on the children's right to recover? The weight of authority allows parties entering a contract for the benefit of a third person to rescind or vary the contract as they see fit without the assent of the third person at any time before he acts in

person is merely a matter of arrangement of convenience for the other party to the contract, or whether the primary purpose and object of the promise are to benefit the third person; . . . while, therefore both the promisee and the third person no doubt receive some benefit in every such contract, the determining question is whose interest and benefit are primarily subserved and as a matter of paramount purpose."

²⁷ See *Percival v. Luce*, 114 F. (2d) 774, 776 (C. C. A. 9th, 1940).

²⁸ Corwin, *Contracts for the Benefit of Third Parties* (1918) 27 YALE L. J. 1008.

²⁹ 1 SCOTT, THE LAW OF TRUSTS (1939) §§23, 24; 1 RESTATEMENT, TRUSTS (1935) §§23, 24; see *Stephens v. Clark*, 211 N. C. 84, 88, 189 S. E. 191, 194 (1937).

³⁰ *Grant v. Phoenix Mutual Life Ins. Co.*, 121 U. S. 105, 7 Sup. Ct. 841, 30 L. ed. 905 (1887); *Mason v. Mason*, 33 Ga. 435, 83 Am. Dec. 172 (1863); *Noll v. Smith*, 250 App. Div. 453, 294 N. Y. S. 562 (1937); *Gandy v. Gandy*, 30 Ch. D. 57 (1885) (promise by husband to pay trustee money for support of promisor's wife and children, held, enforceable by wife when trustee refused to sue); SCOTT, *op. cit. supra* note 30, §282.1; WILLISTON, *op. cit. supra* note 3, §355.

reliance on the contract.³¹ A minority holds that once the contract is made, rights of the third person vest and may not be changed thereafter without his assent.³² Some courts draw a distinction where the beneficiary is an infant and require no formal or express acceptance on his part in order for his rights to vest.³³ After action in reliance on the contract by a third party beneficiary, the original parties may not, without his consent, rescind the contract in such a way as to deprive him of its benefits.³⁴ Had the minors been classified as direct beneficiaries in the principal case, their assent might have been presumed so that the mother's refusal to accept further payments would have been no bar to recovery; not being their legal guardian, the mother could not consent to a release for them.

JOHN HENRY BLALOCK.

Courts—Alimony—Power of Court to Modify Prior Award.

H and *W* were divorced *a vinculo* in 1929 and the decree awarded *W* \$50 monthly alimony. The court refused *H*'s motion that the power to modify be reserved, and on appeal this was sustained by the Supreme Court of Virginia.¹ In 1938 the Virginia Legislature amended the alimony statute to allow modification of any alimony award, whether past or future.² *H* sought to modify the 1929 decree, and *W* defended that the 1938 amendment was unconstitutional insofar as it applied retrospectively. *Held*, although the court lacked power to modify the decree

³¹ *Clark v. Nelson*, 211 Ala. 199, 112 So. 819 (1927); *Jordan v. Laventy*, 53 N. J. Eq. 15, 20 Atl. 832 (1890) (partnership agreement, making promisor liable for one half of debts, rescinded by promisor before acceptance by creditor, *held*, good defense); *Trinble v. Strother*, 25 Ohio St. 378 (1874) (*D* agreed with another to pay a debt to *P*, but they rescinded before *P* acted on the promise, *held*, good defense); *Blake v. Atlantic Nat. Bank*, 33 R. I. 464, 82 Atl. 225 (1912).

³² *Tweeddale v. Tweeddale*, 116 Wis. 517, 93 N. W. 440 (1903), cited *supra* note 14; see *Bay v. Williams*, 112 Ill. 91, 96, 1 N. E. 340, 342 (1884) (saying third party's rights came into being at time contract was made and could not be rescinded without his consent).

³³ *Waterman v. Morgan*, 114 Ind. 237, 16 N. E. 590 (1880) (in consideration of father conveying land to him, son agrees to pay certain money to father's minor grandchildren, *held*, enforceable by minors as acceptance was presumed); *Brill v. Brill*, 282 Pa. 276, 127 Atl. 840 (1925) (release by mother not binding on infant).

³⁴ *Richardson v. Short*, 201 Iowa 561, 202 N. W. 836 (1925); *Dodge v. Moss*, 82 Ky. 441 (1884) (where sale of land would satisfy debt to a third person vendor and vendee could not agree to annul their agreement after his acceptance); *Thomas v. Atkinson*, 94 S. C. 125, 77 S. E. 722 (1913) (holding that where a party to contract notified beneficiary of the transaction, the original parties may not thereafter rescind, since acceptance is implied and certain rights pass to the beneficiary); *Estscheid v. Baker*, 112 Wis. 129, 88 N. W. 52 (1901) (where third person had notice of and assented to contract whereby a gift of \$1,000 was to be made him on the happening of certain contingency, his rights were not divested by mutual rescission by immediate parties).

¹ *Eaton v. Davis*, 154 Va. xxi (1930) (Memorandum).

² VA. CODE ANN. (Michie, 1938 Supp.) §5111.

prior to the 1938 amendment, it now had that power, the amendment being constitutional.³

Forty of the fifty-one American jurisdictions have statutes allowing modification of alimony decrees in particular situations,⁴ but there is much conflict as to whether a court has power to modify in the absence of such a statute or of a reservation of such power in the decree. This question necessarily turns upon the history of divorce and alimony, the statutory provisions therefor, and the distinction between divorces *a mensa et thoro* and *a vinculo*.

Under the common law of England, the ecclesiastical courts granted only divorces *a mensa et thoro*, and maintained a continuing jurisdiction over any award of alimony without reserving such power in the decree.⁵ It was said that alimony in a divorce *a mensa* merely represented a continuation of the husband's duty to support his wife during coverture, and that there was no release from this duty by a divorce which did not finally sever the marital relation. This part of the common law has been adopted in the United States, and today it is practically the undisputed rule that alimony awarded with a divorce *a mensa* is subject to modification from time to time without any reservation of that power in the decree and without any statutory authorization.⁶

North Carolina statutes specifically allow modification of alimony decreed *pendente lite*⁷ and without divorce,⁸ and the common law power of modification in the case of a divorce *a mensa* is recognized by our courts.⁹

There is a sharp disagreement, in the absence of statute or reservation, as to whether a court may modify an alimony award granted with

³ *Eaton v. Davis*, 10 S.E. (2d) 893 (Va. 1940).

⁴ 2 VERNIER, AMERICAN FAMILY LAWS (1932) §106; VERNIER, AMERICAN FAMILY LAWS (1938 Supp.) §106.

Alimony is "the allowance made to a wife out of her husband's estate for support, either during a matrimonial suit, or at its termination, when she proves herself entitled to a separate maintenance . . ." BLACK, LAW DICT. (1933).

References to "alimony" throughout this note include an award made in favor of the wife only. An award for the support of children is beyond the scope of this note, as is an award based upon a contractual relation between husband and wife. Likewise, accrued alimony is not considered here.

⁵ MADDEN, DOMESTIC RELATIONS (1931) 328; Vernier and Harlbut, *The Historical Background of Alimony and Its Present Statutory Structure*, (1939) 6 LAW AND CONTEMP. PROB. 197, 198; See *Gloth v. Gloth*, 154 Va. 511, 534, 153 S.E. 879, 886 (1930).

⁶ *Rogers v. Vines*, 28 N. C. 293 (1846); *Taylor v. Taylor*, 93 N. C. 418 (1885); *Crews v. Crews*, 175 N. C. 168, 95 S. E. 149 (1918); *Gloth v. Gloth*, 154 Va. 511, 153 S. E. 879 (1930); *Ruge v. Ruge*, 97 Wash. 51, 165 Pac. 1063 (1917); MADDEN, DOMESTIC RELATIONS (1931) 328; 2 SCHOULER, MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS (6th ed. 1921) 1991; Note (1913) 26 HARV. L. R. 441. See collection of cases in Notes (1931) 71 A. L. R. 723, 724, (1940) 127 A. L. R. 741, 742.

⁷ N. C. CODE ANN. (Michie, 1939) §1666.

⁸ N. C. CODE ANN. (Michie, 1939) §1667.

⁹ See N. C. cases cited Note 6, *supra*.

an *a vinculo* divorce. The weight of authority seems to deny that power.¹⁰ These decisions reason that with an *a vinculo* divorce the marriage relation reaches complete termination, that an accompanying decree of alimony is likewise conclusive, and that *res adjudicata* controls.¹¹ Conversely, some courts contend that an award of periodical payments requires supervision by the court, and that jurisdiction is necessarily retained to permit consideration of changed conditions in order to insure justice as between the parties.¹² Some rationalize that as divorces *a vinculo* are entirely statutory, all the elements thereof must depend upon statute; accordingly if no statute provides for modification of alimony, there can be none.¹³ A few differentiate between alimony avowedly designed for support of the wife and alimony in the form of an ultimate property settlement, allowing modification in the former case but refusing it in the latter.¹⁴ In these cases it is said that the duty to support may vary with the circumstances of the parties, but that a property settlement, once made, is as absolute and final as the divorce itself. These distinctions are of no consequence in North Carolina, for alimony, as such, is not authorized and is never granted with a divorce *a vinculo*.¹⁵

Recognition of alimony as a continuation of the duty to support the wife, even after a divorce *a vinculo*, is found in those decisions which hold it not a debt within the constitutional ban against imprisonment for debt.¹⁶ The conflict of laws authorities are divided as to whether an alimony award must be given full faith and credit in other states.¹⁷ Those who say no are troubled by its adjustability.¹⁸ Simi-

¹⁰ *Livingston v. Livingston*, 173 N. Y. 377, 66 N. E. 123 (1903); KEEZER, *MARRIAGE AND DIVORCE* (2nd ed. 1923) §765; SCHOULER, *op. cit.*, *supra* note 6, at 1991. See collection of cases in Notes L. R. A. 1917 F, 729, (1940) 127 A. L. R. 741, 742.

¹¹ *Bates v. Bodie*, 245 U. S. 520, 62 L. ed. 444, 38 Sup. Ct. 182 (1917); *Graham v. Graham*, 135 Neb. 761, 284 N. W. 280 (1939); *Livingston v. Livingston*, 173 N. Y. 377, 66 N. E. 123 (1903); *Sampson v. Sampson*, 16 R. I. 456, 16 Atl. 711 (1899); *Golderos v. Golderos*, 169 Va. 496, 194 S. E. 706 (1938); *Ruge v. Ruge*, 97 Wash. 51, 165 Pac. 1063 (1917); SCHOULER, *op. cit.*, *supra* note 6, at 1991. Note (1913) 26 HARV. L. R. 441. See collection of cases in Note (1931) 71 A. L. R. 723, 734.

¹² *Epps v. Epps*, 218 Ala. 667, 120 So. 150 (1929); *Alexander v. Alexander*, 13 App. D. C. 334 (1898); *Emerson v. Emerson*, 120 Md. 584, 87 Atl. 1033 (1913); *Knabe v. Knabe*, 176 Md. 606, 6 Atl. (2d) 366 (1939). See collection of cases in Note (1931) 71 A. L. R. 723, 738.

¹³ *Herrick v. Herrick*, 319 Ill. 146, 149 N. E. 820 (1925); *Mayer v. Mayer*, 154 Mich. 386, 117 N. W. 890 (1908); *Livingston v. Livingston*, 173 N. Y. 377, 66 N. E. 123 (1903). See collection of cases in Note (1931) 71 A. L. R. 723, 728.

¹⁴ *Smith v. Smith*, 45 Ala. 264 (1871); *Fries v. Fries*, 1 MacArthur 291 (D. C. 1874); *Sammis v. Medbury*, 14 R. I. 214 (1883).

¹⁵ N. C. CODE ANN. (Michie, 1939) §1663; *Duffy v. Duffy*, 120 N. C. 346, 27 S. E. 28 (1897); *Hobbs v. Hobbs*, 218 N. C. 468, 11 S. E. (2d) 311 (1940); 1 MORDECAI, *LAW LECTURES* (2nd ed. 1916) 12.

¹⁶ See collection of cases in Note (1924) 30 A. L. R. 130, 131.

¹⁷ Compare BEALE, *THE CONFLICT OF LAWS* (1935) §435.2 with GOODRICH, *CONFLICT OF LAWS* (2nd ed. 1938) §135; *Sistare v. Sistare*, 218 U. S. 1, 54 L. ed. 905,

larly, the analogous permanent injunction against tort may be modified or vacated, without reservation or statutory authority; where changed circumstances equitably require it.¹⁹

In the principal case the statute authorizing modification was held constitutional both as to its prospective and retrospective application. The former is universally conceded, but there is a clear split of authority as to whether a statute may operate upon decrees rendered prior to its enactment. A majority insists that such application is unconstitutional, since an award of alimony is a vested right within the protection of the 14th Amendment.²⁰ Contrarily, the minority insists that alimony is inherently a continuing obligation of support, subject to the control and regulation of the court regardless of statute.²¹

The instant decision seems commendable in its constitutional aspects, but unduly restrictive in its denial of the court's power to modify alimony in an *a vinculo* divorce in the absence of statute. The desirability of finality in litigation should yield to the social need for adjustability in alimony cases.

P. DALTON KENNEDY, JR.

Criminal Law—Statutes Compelling Attendance of Out-of-State Witnesses.

In a recent case,¹ an attempt was made by the Attorney General of New York to have sent to that state certain residents of Pennsylvania who were certified to be material witnesses in a Grand Jury investigation. It was expressly stated that no criminal charge was contemplated against either of the witnesses—their testimony being desired simply because of their knowledge, as accountant and bookkeeper, of the books of a Philadelphia firm believed to have been involved in collusive bidding for public work in New York. This attempt raises a problem as current as today, and yet as old as our Constitution: When a criminal proceeding, either grand jury hearing or actual trial, is being conducted

30 Sup. Ct. 682 (1910); Notes (1910) 28 L. R. A. (N. S.) 1068, (1926) 41 A. L. R. 1419, (1928) 57 A. L. R. 1113.

¹⁹ BEALE, *loc. cit. supra* note 17. See *Sistare v. Sistare*, 218 U. S. 1, 17, 54 L. ed. 905, 911, 30 Sup. Ct. 682, 686 (1910).

²⁰ 4 RESTATEMENT, TORTS (1939) §943, comment (e); See collection of cases in Note (1930) 68 A. L. R. 1180.

²¹ *Craig v. Craig*, 163 Ill. 176, 45 N. E. 153 (1896); *Livingston v. Livingston*, 173 N. Y. 377, 66 N. E. 123 (1903); *Fuller v. Fuller*, 49 R. I. 45, 139 Atl. 662 (1927); *Blethen v. Blethen*, 177 Wash. 431, 32 P. (2d) 543 (1934); see *Walker v. Walker*, 155 N. Y. 77, 49 N. E. 663 (1898).

²² *Hartigan v. Hartigan*, 142 Minn. 274, 171 N. W. 925 (1919); *Plankers v. Plankers*, 178 Minn. 31, 225 N. W. 913 (1929); Note (1936) 20 MINN. L. R. 314.

¹ *In re People of New York, Court of Quarter Sessions, County of Philadelphia*. Opinion rendered December 6, 1940.

in State *A.*, how may the prosecution obtain material evidence solely within the knowledge of persons who are either citizens and residents of State *B.* or who have fled there to avoid testifying?

The Federal Constitution provides that "In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." ² True, this provision does not apply to the states; but similar clauses are to be found in most or all of the state constitutions. ³ The primary object of this provision is to secure to the accused the right of cross-examination of witnesses against him. ⁴ Thus depositions taken in the foreign domicile-state of the witness would be useless unless, by some means, the accused is given an opportunity to exercise his right. Since it is generally provided by statute that the accused may take depositions within or without the state for use in his defense, this constitutional provision secures for him an advantage over the prosecution. ⁵ Unless the accused is willing to waive his right, the prosecution must actually place its witnesses before him.

Lack of machinery for obtaining witnesses from a sister state has made the state line a most effective barrier to the administration of justice. Extradition procedure provided by the Federal Constitution and by statutes has succeeded admirably well in preventing the criminal himself from escaping the jurisdiction in which the crime was perpetrated; however, criminals were quick to learn that prosecution could be just as effectively prevented by spiriting away, through bribery or intimidation, the material witnesses in their cases. Furthermore, crime, like many present-day problems, often has left state boundaries behind

² U. S. CONST. 6TH AMENDMENT.

³ See 5 WIGMORE, EVIDENCE (3rd ed. 1940) §1397, n. 1, wherein the provisions are set forth.

⁴ *Mattox v. United States*, 156 U. S. 237, 15 Sup. Ct. 337, 39 L. ed. 409 (1894). The right to confrontation secures the right of cross-examination. That right, in turn, in the final analysis, guarantees enforcement of the hearsay rule, and is subject to the same exceptions as is that rule. 5 WIGMORE, EVIDENCE (3rd ed. 1940) §1397. Thus, dying declarations of witnesses for the prosecution could undoubtedly be used. Moreover, it now seems well settled that depositions may be used by the state in criminal trials if the witness himself is not available and it appears that, in the taking of the testimony, the accused was confronted with the witness and given a proper opportunity to cross-examine, provided it is shown to the satisfaction of the court that the witness is dead, insane, too ill ever to be expected to attend the trial, or a non-resident permanently beyond the jurisdiction of the court. *West v. Louisiana*, 194 U. S. 258, 24 Sup. Ct. 650, 48 L. ed. 965 (1904). It is arguable that the right of confrontation must be kept inviolate because of its secondary advantage of presenting to the judge and jury the deponent of the testifying witness. However, the rule is said to be that this secondary advantage is to be insisted upon only where it can be had—The right to be confronted is a personal privilege which the accused may waive. *Diaz v. United States*, 223 U. S. 442, 32 Sup. Ct. 250, 56 L. ed. 500 (1912); *State v. Mitchell*, 119 N. C. 784, 25 S. E. 783 (1896).

⁵ This situation was reported to the American Law Institute as a defect in criminal justice. See REPORT OF THE COMMITTEE ON A SURVEY AND STATEMENT OF THE DEFECTS IN CRIMINAL JUSTICE (1925) 23.

and become national in scope. Frequently material witnesses, who have never been in the forum state, simply refuse voluntarily to neglect their business and inconvenience themselves out of a mere sense of public justice. Desiring more stringent enforcement of their criminal laws, states have long sought methods for preventing a material witness for the prosecution in one state from placing himself beyond their process by simply remaining in or fleeing to another state.⁶ The methods of solution which have been attempted may be grouped as follows: (1) The early laws of certain New England states; (2) the New York law of 1902; (3) the Wisconsin law providing machinery for sending accused to domicile of the prosecuting witness; (4) the Federal Fugitive Felon law; (5) the Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings,⁷ as proposed by the Commissioners on Uniform State Laws.

As early as 1792, the state of New Hampshire provided by statute⁸ that upon certification by the clerk of "any court of any other of the United States," that a named resident of New Hampshire is a material witness in a criminal case therein pending, a justice of the peace may issue a summons requiring such person to attend trial in the requesting state; and that if the proposed witness, after having been tendered certain expense moneys, should "unreasonably neglect or refuse to attend and testify," a certain money penalty should be imposed. Similar statutes were subsequently passed in all of the New England states,⁹ varying in detail as to limitations upon where witness could be sent,¹⁰ and as to the extent of and to whom the penalty should be paid. However, these early statutes were alike in giving the witness no hearing before ordering him to proceed to the requesting state, in containing no provisions protecting the witness from process while traveling or in the requesting state, in providing only for sending and not for requesting witnesses, and in imposing only a fine as punishment for failure to obey the order. The constitutionality of these acts seems doubtful; however, it is said that their validity was never passed on by a court of last resort, and that in practice they were satisfactory.¹¹

Forerunner of the Uniform Act was the statute adopted in New York in 1902.¹² Limited in its application to border states, to crimes

⁶ Generally, on this problem, see Note (1937) 85 U. OF PA. L. R. 717.

⁷ Hereinafter called the "Uniform Act."

⁸ N. H. LAWS 1792, pp. 251-252.

⁹ CONN. ACTS 1903, c. 87; ME. LAWS 1855, c. 184; MASS. LAWS 1873, c. 319; R. I. LAWS 1907, c. 1462; VT. ACTS 1878, no. 43, p. 51.

¹⁰ Conn. and Vt., like N. H., placed no limitation thereon; but R. I. specified only the New England States, and Mass. limited the privilege to adjoining states and Maine.

¹¹ See Harker, *Compulsory Attendance of Non-Resident Witnesses in Criminal Cases* (1928) 33 ILL. L. REV. 195, 198; Note (1902) 6 LAW NOTES 159. All states in this group have, since 1936, adopted the Uniform Act.

¹² LAWS OF NEW YORK 1902, c. 94. The second draft of the Uniform Act,

of the grade of a felony, and to pending actions, the New York act was the first requiring reciprocal legislation. It also required laws in the requesting state for the protection of witnesses from service of papers and arrest. One of its great advantages over the earlier acts was that this act gave the proposed witness opportunity to appear and be heard in opposition to the request, thus being less susceptible to attack as a deprivation of liberty without due process of law. The New York court, after determining the materiality and necessity of the person as witness, ordered him to appear and testify in the requesting state. This statute gave the court much greater power to compel the witness to act, because disobedience of the order placed a proposed witness in contempt of court and empowered the official to imprison him, rather than simply to fine him as was provided in the earlier laws.¹³ In spite of its improvements, this act was but a step toward the solution of the problem, its practical defects being apparent because of its limitations.

Proceeding on the theory that it could not force a non-resident witness to come into the forum, and yet being unable to disregard the accused's right to cross-examine witnesses against him, Wisconsin has gone so far as to empower the prosecution to take the accused to the non-resident witness so that a deposition for the prosecution taken there could be used on trial.¹⁴ The Wisconsin statute provides that if the accused is in custody, he is to be taken to the residence of the witness by officers of the state—this right on behalf of the state is not to be granted unless all states through which the officer will travel with the accused have conferred upon the officers of Wisconsin the right to hold and convey prisoners in and through them. If the accused is not in custody, he is ordered to attend, and having been tendered witness fees, if he does not appear, he is deemed to have waived his right of confrontation as to the particular deposition taken. The machinery established in this earnest effort to combat crime has its advantages. It is far better than no procedure at all for obtaining such testimony. However, it seems cumbersome and inferior to the Uniform Act.¹⁵

approved by the Commissioners on Uniform State Laws in 1928, was essentially a restatement of this act of New York. See HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (1928) 430-433.

¹³ For an excellent discussion of all phases of this New York Act, see Medalie, *Inter-State Exchange of Witnesses in Criminal Cases* (1929) 33 LAW NOTES 166. This act was held unconstitutional in 1904; but in 1911 the New York court reversed its view and declared the act constitutional. See Notes 25 and 26, *infra*. New York adopted the Uniform Act, in complete form, in 1936.

¹⁴ WISC. STATS. 1939, §326.06. See *State v. Shaughnessy*, 212 Wis. 322, 249 N. W. 522 (1933) in which the provision was utilized.

¹⁵ Some questions which might arise from the use of this statute are: What right does the Wisconsin court have to order a man, presumed to be innocent

The Federal Fugitive Felon Law¹⁶ was passed in 1934 because of the absence of suitable legislation among the states providing for the rendition of fugitive witnesses. That Act made it a felony to travel in interstate or foreign commerce "with intent . . . to avoid giving testimony in any criminal proceedings in such place in which the commission of a felony is charged." The objects of this law have been said to "balance the equities between the accuser and accused . . . and . . . restrain the flight of witnesses from the performance of their most sacred duty as citizens. . . ."¹⁷ It is said to be only a "temporary expedient to be used until such time as the states, by compact or uniform law, shall provide for the return of witnesses who have left the trial jurisdiction."¹⁸ Although this statute, by making the specified act criminal under the federal laws, undoubtedly is beneficial,¹⁹ it falls far short of solving the problem. It is limited in application to witnesses to felonies who have fled across state lines. The threat of committing a federal crime is its only coercive force—no machinery is provided for turning the witness over to testify in the criminal proceeding from which he fled.

The Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings,²⁰ the culmination of twenty years consideration by the National Conference of Commissioners on Uniform State Laws, combines the better features of all former legislation on this subject. Reciprocal in nature, the machinery set up is actuated when a court of record in State *A*. certifies that there is a "criminal proceeding pending in such court, or that a grand jury investigation has commenced or is about to commence," wherein *X*., within the boundaries of State *B*., is needed as a material witness. Upon receipt of such certificate by a court of record in *X*'s county, an order is

until proved guilty, to go into another state in order to preserve his constitutional right? What power do the Wisconsin officers have over the accused after they leave the jurisdiction of their courts? What rights would they have if the accused escaped while they were in another state? Supposing that the accused had bribed the witness to avoid testifying, could the Wisconsin court force the witness to appear and testify so as to form a deposition? It seems that this statute provides a greater violation of the old rule that courts may not order performance of acts beyond their jurisdictional boundaries than does the Uniform Act; however, see note 31, *infra*, for new, liberal trend.

¹⁶ 48 STAT. 782 (1934), 18 U. S. C. A. §408e (Supp. 1940).

¹⁷ Toy and Shepherd, *The Problem of Fugitive Felons and Witnesses* (1934) 1 LAW & CONTEMP. PROB. 415, 422.

¹⁸ Address by Gordon Dean, Attache of Dep't. of Justice, PROCEEDINGS OF ATTORNEY GENERAL'S CONFERENCE ON CRIME (1934) 67-68.

¹⁹ The three cases which have passed upon this statute seem to have settled its constitutionality. ". . . the withdrawal by Congress of the facilities of interstate commerce from . . . criminals is an appropriate means to a proper end, and the most effective way to prevent the use of interstate commerce to defeat justice." *Simmons v. Zerbst*, 18 F. Supp. 929, 930 (D. C. Ga. 1937); *Barrow v. Owen*, 89 F. (2d) 476 (C. C. A. 5th, 1937); *United States v. Miller*, 17 F. Supp. 65 (D. C. Ky. 1936).

²⁰ 9 U. L. A. (Supp. 1940) 9.

issued commanding him to appear for a hearing. If, at the hearing, it is determined (1) that *X.* is a "material and necessary" witness, (2) that no "undue hardship" is involved in the trip,²¹ and (3) that State *A.* and all other states through which *X.* will be required to pass have granted him protection from arrest and service of process while traveling and attending, the court of State *B.* may issue a summons commanding *X.* to attend and testify in the requesting state. It is further provided that if the said certificate so recommends, the judge in State *B.* may order that the witness be bodily delivered over to officers of State *A.* However, before this latter procedure is used, the essential requisites must be found at the hearing, and it must be deemed necessary and expedient that the proposed witness be delivered to the officers instead of being allowed to attend voluntarily. If, under the first method, after being ordered and tendered a specified sum,²² *X.* fails to attend in State *A.*; "he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record" in State *B.*²³ Under the Uniform Act, in order to facilitate the above procedure, each state guarantees protection from arrest or service of process to any person attending court on its request or passing through the state in obedience to a like summons. Many drafts have been submitted by the Commissioners, each of which has been adopted by some states. The final draft was much more complete than its predecessors. Of the 33 states having legislation on this subject,²⁴ 23 have acts adopted during or after 1936, which is the date of submission of the final complete draft to the states.

²¹ The earlier drafts, adopted by many states, limited application of the Act to 1,000 miles by the ordinary traveled route, though such a limitation was considered arbitrary and unnecessary by many of the drafters of the Act. See *HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS* (1931) 44 *et seq.*, 421 *et seq.* The 1,000 mile limitation seems to have been the result of a compromise with the American Law Institute, whose original draft on this subject limited application of the process to border states. See *MODEL CODE OF CRIM. PROC.*, Final Draft, §§320, 321. The limit was omitted in the final draft as approved by the Commissioners in 1936. *HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS* (1936) 333-338. The matter of imposing a limitation being left to the discretion of the adopting state, the majority of states have omitted the limitation.

²² Ten cents for each mile by the ordinary traveled route to and from the court where the prosecution is pending and five dollars for each day that he is required to travel and attend is the usual amount, although some states have reduced the rate per mile slightly.

²³ It may be noted that if *X.*, in compliance with the subpoena, went into State *A.*, and then failed to attend the proceedings as ordered, the Commissioners who drafted the Uniform Act were of the opinion that the requesting court in State *A.* would have the power to punish him for contempt. See *HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS* (1936) 156, (1931) 64-69.

²⁴ See 9 U. L. A. 9 listing statutes of the following states wherein Act has been adopted: (The starred states have acts adopted during or after 1936): Arizona,* Arkansas, California,* Colorado,* Connecticut,* Delaware,* Idaho,

The New York statute of 1902 was first declared unconstitutional in a decision which was admittedly hurried and rendered without research.²⁵ This opinion was overruled by *Massachusetts v. Klaus*²⁶—a decision by a five-to-four divided court, containing an excellent discussion of the points involved in this problem. Therein, the majority held the act constitutional, saying that due process was amply provided, freedom of ingress and egress was not unduly hampered, and, since there was great need for this procedure, it should be presumed valid unless found to be in contravention of some constitutional provision. Justice Laughlin, dissenting, argued that the proposed witness was deprived of due process since the court was attempting to act where it had no power, freedom of ingress and egress was directly impaired, and that this act was an attempt to make inter-state agreements without the consent of Congress.²⁷

The case mentioned at the outset was presented to an inferior court of Pennsylvania, which state had adopted the Uniform Act. That court accepted almost without change the dissent of Justice Laughlin in *Massachusetts v. Klaus*, a decision under the New York Law of 1902. Requested subpoenas were refused on the ground that the Uniform Act was unconstitutional.²⁸

It was held that sending a proposed witness to another state under

Indiana,* Maine,* Maryland,* Massachusetts,* Minnesota,* Mississippi,* Montana,* Nebraska,* Nevada,* New Hampshire,* New Jersey,* New York,* North Carolina,* North Dakota,* Ohio,* Oregon,* Pennsylvania,* Rhode Island,* South Dakota,* Tennessee,* Utah,* Vermont,* Virginia,* West Virginia,* Wisconsin,* Wyoming.

²⁵ *In re Commonwealth of Pennsylvania*, 45 Misc. 46, 90 N. Y. Supp. 808 (Sup. Ct., 1904).

²⁶ 145 App. Div. 798, 130 N. Y. Supp. 713 (1st Dep't 1911).

²⁷ Justice Laughlin, in his dissent, urges that the act, being reciprocal in nature, is an attempt to make an unsigned treaty or compact with other states, and, as such, is violative of Article I, Sec. 10, Sub-sec. 1-2 of the Federal Constitution when done without the consent of Congress. This argument might have been of some validity in 1911, but it is now of no effect. In 1934, Congress gave its consent to any inter-state agreement leading toward "cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws." 48 STAT. 909 (1934), 18 U. S. C. A. §420 (Supp. 1940).

²⁸ *In re People of New York*, Court of Quarter Sessions, County of Philadelphia. Opinion rendered December 6, 1940. This was the first decision actually to pass on the merits of the Uniform Act. In *People of New York v. Parker*, 1 Atl. (2d) 54 (N. J. Circ. Ct., 1936), the act was declared invalid on the sole ground that its title, "Uniform Act to Secure the Attendance of Witnesses from Without the State . . ." did not reasonably import that citizens of New Jersey might be called on thereby to go to some other state. This reasoning was also used by the Pennsylvania court in the principal case as a minor ground for declaring the act invalid. It seems that the natural import of the term "Uniform Act" in the title should inform citizens of the reciprocal nature of the act. However, it might be well, in order to avoid difficulty on this point, to change the title of the Act, in states which like North Carolina have such a form, to read ". . . from within or without a state. . . ." A title of that style was adopted by the Interstate Commission on Crime when they placed their approval on the Uniform Act. See HANDBOOK ON INTERSTATE CRIME CONTROL (Executive Officers of the Commission, Newark, N. J., 1940) 39-49.

the Uniform Act would be a deprivation of liberty without due process of law. "The mere fact that the formality of appearing before a *judge* is required does not materially change the situation. . . . Due process requires not only notice and hearing . . . but that the adjudication should be by a court of competent jurisdiction, and that the process of a court can have no extraterritorial effect."²⁹ However, the better view seems to be that this Act provides due process in every real sense of the word. Under the Act, the proposed witness is afforded greater due process of law than is a citizen who is summoned as witness in his own state.³⁰ He "must be given notice and an opportunity to be heard before a subpoena can be issued, and in addition is assured of ample indemnity for expenses, and immunity from the service of process while in [or going to or from] the foreign state." It must be found, not only that he is necessary, but also that no undue hardship is involved. The growing view among the authorities is that a court may order performance of affirmative acts beyond its jurisdiction³¹—by so doing, the court aids

²⁹ *In re* People of New York, typed copy of opinion, p. 13. See also dissenting opinion in *Massachusetts v. Klaus*, 145 App. Div. 498, 130 N. Y. Supp. 713, 719 (1st Dep't 1911).

³⁰ In this connection, the principal case presented the view that this Act makes no provision for permitting entering a recognizance; that such a practice is allowed even in extradition proceedings. Such a view seems fallacious, in that the proposed witness is not taken into custody at all unless there are reasonable grounds for believing that he will disobey the court's order. Furthermore, the weight of authority seems to be that ordinarily one in custody under an extradition warrant is not entitled to bail: *Hames v. Sturdivant*, 181 Ga. 427, 182 S. E. 601 (1935); *In re Thompson*, 85 N. J. Eq. 221, 96 Atl. 102 (Ch., 1915); *State v. Ronald*, 107 Wash. 189, 179 Pac. 843 (1919). *Contra: Ex parte Thaw*, 209 Fed. 954 (D. C. N. H. 1923).

³¹ Perhaps the leading authority for the view that a court of equity may order affirmative acts to be done beyond the jurisdiction of the court is *The Salton Sea Cases*, 172 Fed. 792 (C. C. A. 9th, 1909), in which the court ordered defendant to abate a nuisance in California caused by the construction of water intakes in Mexico, the effect of the order being to force defendant to do affirmative acts (repair the intakes) in Mexico. In *Niagara Falls International Bridge Co. v. Grand Trunk Ry. of Canada*, 241 N. Y. 85, 148 N. E. 797 (1925), it was held that it was no objection to the decree that it required D. to do affirmative acts (reconstruct ry. tracks) in Canada. For comments thereon, see: *Notes* (1925) 35 YALE L. J. 229; (1928) 74 U. OF PA. L. R. 322. In *Madden v. Rosseter*, 114 Misc. 416, 187 N. Y. Supp. 462 (Sup. Ct., 1921), the New York court ordered defendant, who was before the court, to ship a horse from California to Kentucky. See for comments thereon: *Notes* (1921) 30 YALE L. J. 865; (1922) 35 HARV. L. REV. 610.

Further bearing out the above trend, and of especial value on the problem in question are the following provisions of the *RESTATEMENT, CONFLICT OF LAWS* (1934) §94: "A state can exercise jurisdiction through its courts to make a decree directing a party subject to the jurisdiction of the court to do an act in another state, provided such act is not contrary to the law of the state in which it is to be performed." §95: "A state can exercise through its courts jurisdiction to order a party subject to its jurisdiction to institute proceedings in a court or other governmental agency in another state, or to defend or appear in such proceedings."

But see *Beal, Equity in America*. (1923) 1 CAMB. L. J. 21, 27, wherein Professor Beal criticises the above cases as violating a "settled principle of law that a

indirectly the administration of justice within its own state as well as facilitates the administration of justice generally.

Another basis for the present decision was that the Uniform Act violates "privileges and immunities" under the Federal Constitution, in that the state impairs freedom of ingress and egress. The act has the effect of compelling peaceful citizens of a state, against whom no criminal charge has been made, to leave the state against their wills. Or, it would result in compelling one to leave the state whom the state could not legally prevent from entering.³² This view seems amply refuted by the majority holding in *Massachusetts v. Klaus*: "... the right of free ingress and egress was never intended to enable a citizen of the United States to interfere with the orderly administration of justice within ... the state ... the only protection which the privileges and immunities clause ... affords him there is that no state shall discriminate between him and the citizens of the state."³³ Giving testimony when one is capable is a long-recognized duty, whose performance society has a right to compel.³⁴ Admittedly, the right of free ingress and egress is subjected to the police power of a state.³⁵ What right should one have to insist on exercising that freedom for the sole purpose of escaping a duty placed on him for the good of society and the orderly administration of justice? There should be no objection to a temporary interference with this right until such duty is performed. Whenever a citizen is subpoenaed as a witness, his freedom of movement is restrained in much the same manner.

Several subterfuges may be attempted if the law in question fails. A state might pass a law making it a misdemeanor to flee from the state to avoid giving testimony in a criminal proceeding. A misdemeanor is an extraditable offense under the federal laws. Thereby, the proposed witness could be returned to the state, and, while being tried for that offense, be subpoenaed to appear in the other proceeding as witness. Also when a fleeing witness is returned to be tried under the Federal Fugitive Felon Law, he could easily be turned over to the state officers for use in the criminal proceeding in which he was

Court of Equity cannot order the doing of an act outside the territory of its Sovereign."

³² *In re* People of New York, typed copy of opinion, pp. 8-12. Dissenting opinion in *Massachusetts v. Klaus*, 145 App. Div. 798, 130 N. Y. Supp. 713, 721 (1st Dep't 1911).

³³ 145 App. Div. 798, 130 N. Y. Supp. 713, 717 (1st Dep't 1911).

³⁴ 8 WIGMORE, EVIDENCE (3rd ed. 1940) §2192: "For more than three centuries it has now been recognized as a fundamental maxim that the public ... has a right to every man's evidence ... there is a general duty to give what testimony one is capable of giving ... the whole life of the community; the regularity and continuity of its relations, depend upon the coming of the witness."

³⁵ See dissenting opinion in *Massachusetts v. Klaus*, 145 App. Div. 798, 130 N. Y. Supp. 713, 721 (1st Dep't 1911) and cases cited. BRANNON, ON THE FOURTEENTH AMENDMENT (1901) 176.

attempting to avoid giving testimony. The difficulty of this latter suggestion is that it applies only to witnesses to felonies. Both suggestions are defective in that they provide no machinery for obtaining witnesses who have not fled but who are permanent residents of the foreign state. Furthermore, these ideas are obviously subterfuges. Justice should not be forced to stoop to such when the practical, smooth-working system established by the Uniform Act could be so easily upheld.

The desirability of the type of law in question need be no further reiterated. Suffice it to say that this is one of six fundamental problems in the administration of the criminal law which have been studied by the Interstate Commission on Crime.³⁶ Unless this uniform law be upheld, we will be again thrown into that anomalous situation wherein a needed witness who has placed a state line between himself and the court may be "begged to return, or kidnaped and returned, but there is no legal procedure provided by the states which can compel him to return unless he, himself, has committed an extraditable offense."³⁷

HARVEY A. JONAS, JR.

Federal Jurisdiction—State *in rem* Action as Bar to Jurisdiction

The federal district court refused to look into the merits of a case brought by members and officers of the newly united Methodist Church against dissenters in South Carolina, who oppose the union of the three separate Methodist Episcopal Church bodies.¹ The petitioners seek a declaratory judgment as to the validity of the union and the rights thereunder, and an injunction against any other group using the title Methodist Episcopal Church, South.² After conceding that the action was proper as to jurisdictional amount, as to diversity of citizenship, as a class action, and for settlement under the Declaratory Judgment Act, the court dismissed the action on the grounds that it was an action *in rem*, and the *res* involved had been withdrawn by prior state court actions.³

³⁶ See HANDBOOK ON INTERSTATE CRIME CONTROL (Executive Offices of the Interstate Commission on Crime, Newark, N. J., 1940) 39-49. Approved forms for use under the Act are therein set out.

³⁷ Address by Gordon Dean, Attache of Dept. of Justice, PROCEEDINGS OF ATTORNEY GENERAL'S CONFERENCE ON CRIME (1934) 67.

¹ The unification being contested is the attempted ending of a schism between the northern and southern Methodists which dates back beyond Civil War days and started with the slavery issue.

² Ordinarily law courts will not disturb ecclesiastic disputes, but will leave their determination to the appropriate church authorities. Here, however, all the property is centrally and commonly owned, and the individual church properties are held by trustees for the greater church. Courts will go into ecclesiastic disputes where property rights are involved. *Barkley v. Hayes*, 208 Fed. 319 (W. D. Mo. 1913).

³ *Purcell v. Summers*, 34 F. Supp. 421 (E. D. S. C. 1940).

These prior state actions arose from attempts by several groups of dissidents to the unification to take possession of local church properties, by means of alleged wrongful conveyance to new trustees for the benefit of the individual churches as separate bodies.⁴ In these state actions local plaintiffs, on behalf of all those favoring the unification, seek to have those deeds declared null and void and the properties turned over to themselves as the rightful trustees for the unified church, and they also seek an injunction against the dissenters' use of the name Methodist Episcopal Church, South, such name now being the property or right of the union.⁵ The defense is that the unification is invalid and accordingly the plaintiffs have no right as against the dissidents. While the state actions were pending the district court based its conclusion as to the withdrawal of the *res* upon the assumption that these property actions in the state court are representative of all southern churches involved in the unification, and that all properties affected by the unification will be subject to the South Carolina decree as to the validity of the union, under the doctrine laid down in *Hartford Life Ins. Co. v. Ibs*,⁶ therefore the South Carolina court has withdrawn a *res* including at least all the properties affected within the state. Since the *real* controversy⁷ asserted to support the federal action is the one present in South Carolina, such a conclusion by the federal court leaves nothing for its determination.

In view of admissions by the court that this is an otherwise proper case for determination in a federal court, the jurisdictional issue of whether the court correctly dismissed this action centers upon the propriety of applying the following general rule to the facts of this case: where courts have concurrent jurisdiction, as state and federal courts may, the first court entertaining an *in rem* action which necessitates its control of the *res* will necessarily exclude the other.⁸

Earliest applications of this rule arose in cases where rival courts were disputing actual possession of properties under court process—as to which attached first and whether or not it was exclusive of the

⁴ Eight state actions, now pending, were started by local groups against dissenters who tried to alienate the local properties to an independent church styling itself as the Methodist Episcopal Church, South. Nine others are threatening and are pointed to by this federal petition. For convenience and because they are virtually alike they will be grouped together and mentioned as one.

⁵ The injunctions sought in both state and federal actions are requests for incidental and supplementary relief and will not herein be treated.

⁶ 237 U. S. 662, 35 Sup. Ct. 692, 59 L. ed. 1165 (1915).

⁷ There must be a real controversy as distinguished from a dispute of a hypothetical or abstract character for the court to render a declaratory judgment. *Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227, 57 Sup. Ct. 461, 81 L. ed. 617, 108 A. L. R. 1000 (1937).

⁸ *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355, 28 L. ed. 390 (1884); *Kline v. Burke Constr. Co.*, 260 U. S. 226, 43 Sup. Ct. 79, 67 L. ed. 226, 24 A. L. R. 1077 (1922).

other.⁹ Some early decisions recognized the difficulty where state and federal jurisdictions clashed, labeling the situation as lamentable, but at the same time pleaded ignorance of a method of circumventing the trouble.¹⁰ These seemed to say that pendency of another action in a court of concurrent jurisdiction, even though involving the same parties and subject matter, was not by any legal precedent excuse for refusing jurisdiction, despite the fact that final judgments in the two causes might clash in result. However, the Supreme Court in *Freeman v. Howe*¹¹ worked out a method for making federal process exclusive in cases requiring control of a *res*. Reasoning that a court first taking jurisdiction of a cause shall maintain it to the end and litigate all the questions involved and grant full relief, that exclusive control of the *res* is necessary for complete handling of *in rem* cases, and that no other court may interfere with a court's process or jurisdiction, the Supreme Court ruled that "proceedings *in rem*" must of necessity exclude other courts in favor of the forum first entered. *Buck v. Colbath*¹² sought to limit so sweeping a statement by urging that actual possession and control of the property was the necessity giving rise to the rule, and therefore when a second action in another court did not interfere with the control or possession of the *res* by the first court, the rule did not apply.¹³ The use of the term "constructive possession" in that decision¹⁴ makes the next step in the rule's development natural enough. The rule was applied to receivership cases, land disputes, bankruptcies, suits to marshal assets, *et cetera*.¹⁵ Practically all the cases where federal courts have refused jurisdiction because of a prior state action involving the same *res* have contained the common denominator of necessary control or possession of the *res* by the state court which would be disturbed by the federal court's assuming jurisdiction.

⁹ *Taylor v. Carryl*, 20 How. 583, 15 L. ed. 1028 (U. S. 1857); *Freeman v. Howe*, 24 How. 450, 16 L. ed. 749 (U. S. 1860); *Buck v. Colbath*, 3 Wall. 334, 18 L. ed. 257 (U. S. 1865). See also note, Ann. Cas. 1912A, 150.

¹⁰ *Wadleigh v. Veazie*, 28 Fed. Cas. No. 17,031 (Me. 1838); *Loring v. Marsh*, 15 Fed. Cas. No. 8,514 (Mass. 1864).

¹¹ 24 How. 450, 16 L. ed. 749 (U. S. 1860).

¹² 3 Wall. 334, 18 L. ed. 257 (U. S. 1865).

¹³ *Id.* at 342, 18 L. ed. at 260. "It is only while the property is in possession of the court, either actually or constructively, that the court is bound, or professes to protect that possession from the process of other courts. . . ."

¹⁴ The term "constructive possession" is here used as applied to land or any other *res* which can only be possessed constructively. The import of the term is not meant to detract from the force of the requirement of control or possession.

¹⁵ *Oakes v. Lake*, 290 U. S. 59, 54 Sup. Ct. 13, 78 L. ed. 168 (1933) (receivership); *United States v. Bank of New York & Trust Co.*, 296 U. S. 463, 56 Sup. Ct. 343, 80 L. ed. 331 (1936) (trust fund ownership); *Princess Lida of Thurn v. Thompson*, 305 U. S. 456, 59 Sup. Ct. 275, 83 L. ed. 285 (1939) (accounting by trustee sought); *Union Mutual Life Ins. Co. v. University of Chicago*, 8 Fed. 443 (C. C. N. D. Ill. 1881) (mortgage foreclosure); *Sharp v. Bonham*, 213 Fed. 660 (M. D. Tenn. 1913) (class action involving church property). See annotations, 5 ROSE'S NOTES ON UNITED STATES REPORTS (1917) 98, 463, 1035; 1 ROSE'S NOTES ON UNITED STATES REPORTS (1920) 775; 36 Ann. Cas. 1915B, 1118.

In other words, by the term "*in rem* action" is meant one looking toward an actual disposition of a particular *res*. Federal courts have not refused to entertain cases involving the litigation of personal liability¹⁶ or of rights concerning property embraced by actions previously started in state courts, but which were not classed as *in rem* actions.¹⁷ If an *in personam* judgment is rendered by one court it may then be pleaded as *res adjudicata* in another court of concurrent jurisdiction where an action involving the same parties still pends.¹⁸

In the instant case the conflicting state action is clearly *in rem*.¹⁹ Also there can be no doubt that the issue of the validity of the unification is raised in and *may* be the deciding point of the South Carolina action; however, the remedy sought in the federal action must be scrutinized to determine whether or not a full adjudication by the federal court can be made without interfering with the state court's control of the particular *res*, *i.e.* the local church property in Pine Grove, South Carolina.

The present petitioners sought a federal court adjudication as to the validity of the unification and a declaration as to property rights thereunder. This is distinguishable from *Sharp v. Bonham*²⁰ in which federal and state adjudications presented the issue of the validity of a merger between the Cumberland Presbyterian Church and the Presbyterian Church in the United States, in the same manner. For there

¹⁶ *Kline v. Burke Constr. Co.*, 260 U. S. 226, 43 Sup. Ct. 79, 67 L. ed. 226, 24 A. L. R. 1077 (1922) (action for damages for contractual breach relating to property).

¹⁷ In *Commonwealth Trust Co. v. Bradford*, 297 U. S. 613, 56 Sup. Ct. 600, 80 L. ed. 920 (1935), the federal court determined the participation rights of a bank receiver as *cestui que trust* of a trust which had been turned over with his consent to a successor trustee appointed by a state court, saying that the action was not *in rem* and did not interfere with the trustee's possession or the power of the state court to order distribution of assets. "Such proceedings are not *in rem*; they seek only to establish rights; judgments therein do not deal with the property or order distribution; they adjudicate questions which precede distribution." By *Oakes v. Lake*, 290 U. S. 59, 54 Sup. Ct. 13, 78 L. ed. 168 (1933), an action against a sheriff which does not request the property attached but rather asks damages, is not an action *in rem* under the exclusive jurisdiction rule because it does not go to the merits of the *in rem* case under which the sheriff holds the *res* or interfere with the state court's possession of the *res*. In *General Baking Co. v. Harr*, 300 U. S. 433, 57 Sup. Ct. 540, 81 L. ed. 730 (1937), the *in rem* label did not apply to litigating the ownership of monies under a trust among the assets of a bankrupt, and where the state had taken over control of the business and assets. See also *Compton v. Jesup*, 68 Fed. 263 (C. C. A. 6th, 1895); *Hurst v. Everett*, 21 Fed. 218 (C. C. W. D. N. C. 1884); *Coe v. Aiken*, 50 Fed. 64 (C. C. N. H. 1892).

¹⁸ *Kline v. Burke Constr. Co.*, 260 U. S. 226, 43 Sup. Ct. 79, 67 L. ed. 226, 24 A. L. R. 1077 (1922).

¹⁹ This state action raises the validity question exactly as it was raised in *Sharp v. Bonham*, 213 Fed. 660 (M. D. Tenn. 1913), and the court there called the action *in rem* and therefore within the requirement of exclusive jurisdiction. This statement excludes consideration of the incidental remedy of injunction which is sought. Injunction suits are generally considered *in personam*. WALSH, TREATISE ON EQUITY (1930) 45.

²⁰ 213 Fed. 660 (M. D. Tenn. 1913).

different plaintiffs asked in both courts that a certain Grace Church property be delivered to them as trustees for their respective interests. Asking that rights be declared as in the instant case and asking that property be delivered up as in *Sharp v. Bonham*²¹ seem materially different, in that the latter calls for acting on the property itself. Indeed the instant case lacks the sort of conflict which the *in rem* rule of exclusion was intended to obviate. The only possible conflict here is one of results concerning the validity question. No federal remedy is asked which might interfere with the complete exercising of jurisdiction by the South Carolina court. A possible conflict of results where *in personam* actions are pursued on the same or similar causes furnishes no excuse for a federal court denying jurisdiction.²²

Whether the nature of declaratory judgments be *in personam* or *sui generis*²³ seems unimportant. It is important that they lack the characteristic element of proceedings *in rem*, in that they contemplate no direct action on the *res*; nor do they require control or possession of a *res*, although their determinations may later form the basis for an *in rem* action.²⁴ The federal district court could have gone into the merits of and decided the instant case without disturbing the South Carolina court's constructive possession of the Pine Grove church properties. Therefore by refusing to examine the merits of the instant case, a justiciable matter properly presented for adjudication, the federal court apparently exercised a discretion which it did not possess.²⁵

Another factor in this case which does not ring quite true is the overly-generous evaluation of the effect of the South Carolina litigation. The fallacy in applying *Hartford Ins. Co. v. Ibs*²⁶ to this case, as the court did in its *dictum*, shows at two points: first, the effect of a final state judgment deciding issues in class actions which affect property and citizens of other states; second, the essential difference in extent of subject matter in the two actions involved here. All those cases consciously following *Hartford Ins. Co. v. Ibs*²⁷ have in common that

²¹ *Ibid.*

²² *Kline v. Burke Constr. Co.*, 260 U. S. 226, 43 Sup. Ct. 79, 67 L. ed. 226 (1922).

²³ BORCHARD, DECLARATORY JUDGMENTS (1934) 138.

²⁴ *Id.* at 8, 10, 14.

²⁵ *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. ed. 382 (1909); *McClellan v. Carland*, 217 U. S. 268, 30 Sup. Ct. 501, 54 L. ed. 762 (1910); *Johnson v. N. Y. D. & W. Ry.*, 3 F. Supp. 80 (E. D. N. Y. 1931).

²⁶ 237 U. S. 662, 35 Sup. Ct. 692, 59 L. ed. 1165 (1915).

²⁷ *Hartford Life Ins. Co. v. Barber*, 245 U. S. 146, 38 Sup. Ct. 54, 62 L. ed. 208 (1917); *Christopher v. Brusselback*, 302 U. S. 500, 58 Sup. Ct. 350, 82 L. ed. 388 (1938); *Waybright v. Columbian Mut. Life Ins. Co.*, 30 F. Supp. 887 (W. D. Penn. 1939). An earlier case, *Smith v. Swormstedt*, 16 How. 288, 14 L. ed. 942 (U. S. 1853) displayed this characteristic in common with the previously cited cases. However, some doubt may be cast upon this being the only deciding factor in view of the decision in *Hansberry v. Lee*, — U. S. —, 61 Sup. Ct. 115, 85 L. ed. 11 (1940).

the *res* (a fund held by the company in the leading case) was *completely* within the state whose court's decision in a class action was held binding throughout the nation. The leading case itself spotlights this feature.²⁸ Repeated litigation concerning the validity of the Presbyterian Church merger reveals the inconclusiveness of such judgments.²⁹ In several instances the adjudication of one state court was not recognized as *res adjudicata* in another state;³⁰ one federal decision stated that no single state decision could establish a rule of property binding on the federal courts or on other states.³¹

The second point can best be shown by viewing the difference in parties (despite the language in both actions "and all those similarly situated") as well as the difference in what is requested in the two actions. The state action consists wholly of members of the local congregation and is solely a controversy over local church property. The federal action is brought by bishops asking that the validity of the union be settled and that the rights of the newly united church be declared. The latter action is so much broader in its scope, that it is difficult to conceive how any court could view them as mutually exclusive actions.

Apparently the petitioners in the instant case were trying to prevent a multiplicity of suits and repeated re-litigation of the validity question such as occurred in the Presbyterian merger controversy. It must be recognized that this controversy involves thousands of people and property worth many millions of dollars. So important and urgent a question should be heard by the most able and impartial of our courts. A local court rooted in the storm center itself scarcely fills those requirements. Federal courts have long been considered preferable in diversity of citizenship cases because of their comparative freedom from prejudice and local pressure. Both legal propriety and practicality would have been better served had the federal District Court rendered final judgment on the merits in this case.

GILBERT C. HINE.

²⁸ "... it was proper that a class suit should be brought in a court of the state where the company was chartered and where the mortuary fund was kept." 237 U. S. 662, 672, 35 Sup. Ct. 692, 695, 59 L. ed. 1165, 1169 (1915).

²⁹ See *Shepherd v. Barkley*, 222 Fed. 669, 670 (C. C. A. 8th, 1915) which points out the number of courts passing on the validity question in the Presbyterian controversy. Three cases in the federal courts, at least sixteen cases in at least eleven state courts passed on it. In addition there were the duplicating Tennessee actions. *Sharp v. Bonham*, 213 Fed. 660 (M. D. Tenn. 1913); *Bonham v. Harris*, 125 Tenn. 452, 145 S. W. 169 (1911).

³⁰ *Bonham v. Harris*, 125 Tenn. 452, 145 S. W. 169 (1911).

³¹ See *Barkley v. Hayes*, 208 Fed. 319, 333 (W. D. Mo. 1913). This stand is of dubious value today because it was partially based upon *Swift v. Tyson*, 16 Pet. 1, 10 L. ed. 865 (U. S. 1842) and the general law doctrine which has since been overruled. *Erie R. R. v. Tompkins*, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. ed. 1188 (1938). 114 A. L. R. 1487.

Practice and Procedure—Declaratory Judgments Against Taxes—Suits Against State.

Plaintiff insurance company, alleging a controversy between it and the Unemployment Compensation Commission over contribution due the Commission on sums paid by plaintiff to its agents (whom plaintiff contends are independent contractors), brings this action against the Commission and its individual officers, under the declaratory judgment statute, to determine its liability. The trial court sustained the defendant Commission's demurrer *ore tenus*. On appeal, *held*, affirmed, on four grounds: (1) the action is a suit against the state; (2) it is not covered by the declaratory judgment act; (3) the effect of such a judgment would amount by indirection to an injunction against the collection of the contribution or tax, which is expressly prohibited by the statute setting up the Commission; and (4) the plaintiff has an adequate statutory, administrative remedy.¹

It is not the purpose of this note to take issue with the actual decision of the principal case, or with the fourth ground relied upon. The other grounds of the decision, however, may be questioned.

The wisdom of holding the action to be a suit against the state is doubtful, for the result is that declaratory judgments are thereby precluded in all controversies with state agencies over liability for taxes. From the state's point of view, the decision is desirable as it facilitates the speedy collection of taxes with a minimum of interference. However, until there has been an express extension to declaratory judgments of the statutory ban on injunctions,² the taxpayer may well contend that it is equally desirable to have an advance determination of the validity of governmental action, where such is necessary in order to prevent serious impairment of individual freedom of action. Hence, an inquiry into whether or not declaratory proceedings are forbidden as suits against the state may well be worth while.

The general rule that sovereignty renders a state immune to suit without its consent³ applies as well to such agencies of the state as commissions and boards.⁴ The test laid down is whether or not the state will be directly affected by the judgment, regardless of who are actually named as parties defendant.⁵ The reason for the existence of this constitutional rule is one of policy—to prevent constant and nu-

¹ Prudential Ins. Co. of America v. Powell, 217 N. C. 497, 8 S. E. (2d) 619 (1940).

² Cf. notes 22 and 23, *infra*.

³ U. S. CONST., 11th Amendment; *Rotan v. North Carolina*, 195 N. C. 291, 141 S. E. 733 (1928).

⁴ *Calkin Dredging Co. v. North Carolina*, 191 N. C. 243, 131 S. E. 665 (1926); *Moody v. State Prison*, 128 N. C. 12, 38 S. E. 131 (1901).

⁵ *North Carolina v. Temple*, 134 U. S. 22, 10 Sup. Ct. 509, 33 L. ed. 849 (1890); *Carpenter v. Atlanta & Charlotte Air Line Ry.*, 184 N. C. 400, 114 S. E. 693 (1922).

merous interferences with the administration of governmental functions. However, in practical effect, the rule is by no means iron-clad. The North Carolina court, in 1907,⁶ attempted a strict application by holding that a federal injunction against enforcement of an alleged unconstitutional state statute was a suit against the state and therefore that state enforcement officers were not prevented from proceeding under the statute. The United States Supreme Court, however, on the principle of *Ex parte Young*, reversed this decision⁷ by releasing on habeas corpus a person whom the state had jailed for disobeying the statute involved while following the federal injunction. Using the rationalization that since the statute is void, the officer's action under it is an illegal attempt in the name of the state to enforce the statute, *Ex parte Young*⁸ decided that any proceeding against him does not affect the state in its sovereign capacity. The rule, however, is not confined to unconstitutional statutes, federal courts having also enjoined the enforcement of state statutes wrongfully applied.⁹ This latter limitation on the rule preventing suits against the state is by no means peculiar to federal courts. Numerous state courts have established the same principle for the same reason.¹⁰ While these injunction cases generally contain the traditional elements for equitable relief, their presence does not change the practical effect of the decrees rendered. Whatever the legalistic explanation, the state in actuality is the real party affected, because its officers are thereby prevented from carrying out its laws in the manner attempted. This is true whether the action is to declare a state statute unconstitutional, or to determine whether or not it rightfully applies to the particular situation. If an injunction, which is coercive in addition to being a determination of the rights involved, does not violate the "suit against the state" prohibition, it follows that the

⁶ *State v. Southern Railway*, 145 N. C. 495, 59 S. E. 570 (1907).

⁷ *Hunter v. Wood*, 209 U. S. 205, 28 Sup. Ct. 472, 52 L. ed. 747 (1908).

⁸ *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. ed. 714 (1907); *Looney v. Crane Co.*, 245 U. S. 178, 38 Sup. Ct. 85, 62 L. ed. 230 (1917); cf. Judge John J. Parker in *Gramling v. Maxwell*, (W. D. N. C. 1931) 52 F. (2d) 256.

⁹ *Green v. Louisville & Interurban Ry.*, 244 U. S. 499, 37 Sup. Ct. 673, 61 L. ed. 1280 (1917); *Glenn v. Filled Packing Co.*, 290 U. S. 177, 54 Sup. Ct. 138, 78 L. ed. 252 (1933); *Lee v. Bickell*, 292 U. S. 415, 54 Sup. Ct. 727, 78 L. ed. 1336 (1934); *Beal v. Missouri-Pacific R. R.*, 108 F. (2d) 897 (C. C. A. 8th, 1940); *Modern Woodmen of America v. Casados*, 15 F. Supp. 483 (D. N. M. 1936); cf. *Bohler v. Callaway*, 267 U. S. 479, 45 Sup. Ct. 431, 69 L. ed. 745 (1925).

¹⁰ *Coen v. Lee*, 116 Fla. 215, 156 So. 747 (1934); *Patten v. Miller*, 8 S. E. (2d) 776 (Ga. 1940); *People v. Department of Public Welfare*, 368 Ill. 505, 14 N. E. (2d) 642 (1938); *Conway v. New Hampshire Water Resources Board*, 89 N. H. 346, 199 Atl. 83 (1938); cf. *Columbia Life Ins. Co. v. Hess*, 28 Ohio App. 107, 162 N. E. 466 (1926), *aff'd* 116 Ohio St. 416, 156 N. E. 504 (1927); *Purple Truck Garage Co. v. Campbell*, 119 Ore. 484, 250 Pac. 213, 51 A. L. R. 816 (1926).

lesser remedy—a mere declaration of rights by way of declaratory judgment—is not forbidden.¹¹

If the "suit against the state" hurdle can be successfully cleared, the action still must come within the scope of the declaratory judgment act. The North Carolina act,¹² which is substantially the uniform act, provides that "any person . . . whose rights, status or other relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status or other relations thereunder."¹³ Thus, it seems that the very words of the statute are broad enough to cover the principal case. However, the court concluded that this provision referred to declarations concerning questions of law only, and that the principal case involved purely a question of fact. It is respectfully submitted that the court is mistaken. The essence of a declaratory judgment action, like any other action, is the determination of a controversy. It is certainly more the rule than the exception that disputes as to facts arise in legal controversies, and the act itself recognizes this by providing that *issues of fact shall be decided in the same way as in other civil actions*.¹⁴ While it is not possible here to delve into the fine distinctions between law and fact, it seems in any event that whether or not an insurance company's representatives with certain specified duties are within an unemployment compensation statute is as much a question of law as of fact.

Three recent decisions, two from Washington¹⁵ and one from Connecticut,¹⁶ have allowed exactly what was denied in the principal case. In each of these cases, a declaratory judgment was rendered as to the status of certain employees under the particular state's unemployment compensation act. In each, the court apparently conceded the appropriateness of a declaratory judgment action, for no question as to suits against the state was referred to. It is interesting to note that one of these cases was denominated an action against "the state of Washington, as a sovereign state. . . ."¹⁷ The failure of these courts to discuss the problem that bothered the North Carolina court is, to say the least, significant.¹⁸

¹¹ It might be noted that the North Carolina court allowed a declaratory judgment to determine the constitutionality of a registration statute for voting, in *Allison v. Sharp*, 209 N. C. 477, 184 S. E. 27 (1936).

¹² N. C. CODE ANN. (Michie, 1939) §628 (a)-(o).

¹³ N. C. CODE ANN. (Michie, 1939) §628 (b).

¹⁴ N. C. CODE ANN. (Michie, 1939) §628 (i).

¹⁵ *McDermott v. State*, 196 Wash. 261, 82 P. (2d) 568 (1938); *Washington Recorder Pub. Co. v. Ernst*, 199 Wash. 176, 91 P. (2d) 718 (1939).

¹⁶ *Northwest Mutual Life Ins. Co. v. Tone*, 125 Conn. 183, 4 Atl. (2d) 640 (1939).

¹⁷ *McDermott v. State*, 196 Wash. 261, 82 P. (2d) 568 (1938).

¹⁸ *cf. Taylor v. McSwain*, 54 Ariz. 295, 95 P. (2d) 415 (1939).

The question may properly be asked, why worry about a declaratory judgment if you can get an injunction? The answer is twofold. 1. In addition to North Carolina's general statutory provision prohibiting injunctions against taxes,¹⁹ the unemployment compensation act specifically bars injunctions against the contributions in question.²⁰ 2. Congress' Johnson Act of 1937 greatly restricts the power of federal courts to enjoin state taxes.²¹ True, the principal case holds that the effect of a declaratory judgment is, by indirection, to enjoin. But it seems that the rule might well be the opposite. A declaratory judgment merely determines the actual rights and duties of the government officials. It exerts no coercive force. That a statutory ban on injunctions against taxes does not apply to declaratory judgments is shown by the fact that it took an amendment to the Federal Declaratory Judgment Act to prevent its application to federal taxes,²² notwithstanding the statutory prohibition against enjoining them. And, while there does not seem to be unanimity of opinion on the subject, there is at least recent authority that the Johnson Act does not restrict federal declaratory judgments as to state taxes.²³ A mere prohibition against injunctive relief is not enough, for, in the words of Professor Edwin Borchard, the father of the declaratory judgment in the United States, "Declaratory relief is neither legal nor equitable, but *sui generis*. It has the advantage of escaping the technicalities associated with equitable and extraordinary remedies, thus enabling the substantive goal to be reached in the speediest and most inexpensive form."²⁴

It is submitted that, since the decision of the principal case could have been reached on the fourth ground alone, the court unnecessarily confused the law on the other questions considered.²⁵

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¹⁹ N. C. PUB. LAWS 1939, c. 158, §936; N. C. CODE ANN. (Michie, 1939) §7880 (194). See Perkins, *Tax Injunctions and Suits to Recover Taxes Paid Under Protest in North Carolina* (1933) 12 N. C. L. REV. 20.

²⁰ N. C. PUB. LAWS 1939, c. 27, §10; N. C. CODE ANN. (Michie, 1939) §8052 (14) (e).

²¹ 28 U. S. C. A. §41 (1) (Supp. 1940).

²² 28 U. S. C. A. §400 (Supp. 1940); See *Morrison Knudsen Co. v. State Board of Equalization of Wyoming*, 35 F. Supp. 553 (D. Wyo. 1940).

²³ *Morrison Knudsen Co. v. State Board of Equalization of Wyoming*, 35 F. Supp. 553 (D. Wyo. 1940); But cf. *Collier Advertising Service v. City of New York*, 32 F. Supp. 870 (S. D. N. Y. 1940).

²⁴ Borchard, *The Federal Declaratory Judgments Act* (1934), 21 Va. L. Rev. 35, 38.

²⁵ See generally, Borchard, *Declaratory Judgments in Administrative Law* (1933) 11 N. Y. U. L. Q. Rev. 139.

Vendor and Purchaser—Conditional Sale—Vendee's Right to Vendor's Insurance in Case of Accidental Loss by Fire.

A contracted with *B* for the purchase of a tract of land for \$1,200, of which \$600 was paid in cash. *A* went into possession and, two months before title was to pass, was killed in an accidental fire which destroyed a building on the premises valued at \$900. Previously, *A* had refused to accept an assignment of the insurance on the building from his vendor and had also refused to contribute to the premiums on the policy, asserting that he would claim no interest in any insurance that *B* might take out. In the present action, *A*'s administrator sued *B* for specific performance of the contract of sale and petitioned for application of the proceeds of the insurance policy upon the unpaid balance of the purchase price. The Supreme Court, granting specific performance, held that the loss occasioned by the fire fell upon the vendee, but refused to apply the vendor's insurance money upon the purchase price. The basis of this ruling was that the vendee's disavowal of all interest in the insurance placed him in the same position as if no insurance had been maintained and barred any claim that he might make to its benefits.¹

EQUITABLE CONVERSION

As early as 1663 the English court of chancery, invoking the maxim that equity considers as done that which is agreed to be done, determined that for certain purposes a contract for the sale of land performs an equitable conversion, transmuting the vendor's proprietary interests in real estate into a chose in action, and the vendee's right on the contract into equitable ownership.² This equitable ownership was recognized to permit the vendee's heirs to succeed to his right of action on the contract,³ to give the vendee's wife a dower right in the equitable estate,⁴ and to allow the vendee to convey his equitable interest in the

¹ *Bruce v. Jennings*, 10 S. E. (2d) 56 (Ga. 1940).

² *Daire v. Beaversham*, 10 Ch. Cas. 39, 21 Eng. Rep. 793 (1663). The operation of equitable conversion is described by Jessel, M. R., in *Lysaght v. Edwards*, L. R. 2 Ch. D. 499, 507 (1876) as follows: "Being a valid contract it has this remarkable effect, that it converts the estate, so to say, in equity; it makes the purchase money a part of the personal estate of the vendor, and it makes the land a part of the real estate of the vendee; and therefore all these cases of constructive conversion are founded simply on this, that a valid contract actually changes the ownership of the estate in equity." See 1 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) §105; POMEROY, SPECIFIC PERFORMANCE OF CONTRACTS (3d ed. 1926) §314.

³ *Bubb's Case*, Freem. Ch. 38, 22 Eng. Rep. 1044 (Ch. 1678); *Parks v. Smoot's Adm'rs.*, 105 Ky. 63, 48 S. W. 146 (1898). Conversely upon the vendor's death, his personal representative secures a chose in action on the contract of sale, "and the legal title is held only as security for the payment of the debt", *Bender v. Luckenback*, 162 Pa. 18, 29 Atl. 1063 (1894); cf. *Rhodes v. Meredith*, 260 Ill. 138, 102 N. E. 1063 (1913).

⁴ *Spalding v. Haley*, 101 Ark. 296, 142 S. W. 172 (1911); cf. *Nortnass v. Pioneer Townsite Co.*, 82 Neb. 382, 117 N. W. 951 (1908).

land as realty.⁵ But not until *Paine v. Meller*,⁶ in 1801, was the contract of sale considered to make the vendee equitable owner "for all intents and purposes", and to subject him in equity to the risk of loss by accidental fire. There, in an action for specific performance, Lord Eldon held the vendee responsible for the full contract price of a tract of land although accidental burning of a building on the premises had reduced its value fifty per cent.

The rule of *Paine v. Meller* has been adopted in American jurisdictions with but few exceptions.⁷ It has provoked considerable criticism, however, even against the fundamental doctrine of equitable conversion by contract.⁸ And its ultimate logical extension has not yet been reached

⁵ See *Paine v. Meller*, 6 Ves. 349, 31 Eng. Rep. 1088 (Ch. 1801).

Other purposes for which vendee is considered "owner":

(a) Montana statute placed burden of extinguishing fires on him upon whose property the fire occurred; vendee held responsible. *First National Bank of Thomas Falls v. United States*, 92 F. (2d) 132 (C. C. A. 9th, 1937). See Note (1938) 36 MICH. L. REV. 680.

(b) Vendee is real party in interest in suit for mesne profits arising from trespass occurring after the date of contract. *Limberg v. Higginbotham*, 11 Colo. 156, 17 Pac. 481 (1888); cf. *Mathews v. James Lumber Co.*, 187 N. C. 651, 122 S. E. 480 (1924) (action for continuing trespass in nature of fire started before the date of contract); *Gartner v. Chicago, R. I. & P. R. R.*, 71 Neb. 444, 98 N. W. 1052 (1904). But see *Litchfield v. Norwood Mfg. Co.*, 22 App. Div. 569, 48 N. Y. Supp. 496 (3d Dep't 1897).

(c) Where husband and wife entered into contract to purchase land as tenants by entireties and building destroyed pending execution of the contract, wife took entire equitable estate by survivorship. *Roach v. Richardson*, 84 Ark. 37, 104 S. W. 538 (1907).

(d) "For the purposes of insurance, the holder of an equitable title . . . may be said to be vested with the entire, unconditional, and sole ownership." *O'Brien v. Paulsen*, 192 Iowa 1351, 186 N. W. 440 (1922).

⁶ *Paine v. Meller*, 6 Ves. 349, 31 Eng. Rep. 1088 (Ch. 1801).

⁷ The courts which take exception to the *Paine v. Meller* doctrine either:

(a) Adopt the rule of law that there is an implied condition in every contract of sale that it shall be void upon material failure of the subject matter; *Anderson v. Yaworski*, 181 Atl. 205 (Conn. 1935); *Libman v. Levenson*, 236 Mass. 221, 128 N. E. 13 (1920); *Powell v. Dayton, S. & G. R. R.*, 120 Ore. 488, 8 Pac. 544 (1885); *Appleton Elect. Co. v. Rogers*, 200 Wis. 331, 228 N. W. 505 (1930); or

(b) Declare that the risk of loss should fall on the party in possession. *La Chance v. Brown*, 41 Cal. App. 500, 183 Pac. 216 (1919); cf. *In re Boyle's Estate*, 154 Iowa 249, 134 N. W. 590 (1912); *Bank of Newport v. Reese*, 47 R. I. 60, 129 Atl. 803 (1925); *Northern Texas Realty Co. v. Lary*, 136 S. W. 843 (Tex. Civ. App. 1911); *Appleton Electric Co. v. Rogers*, 200 Wis. 331, 228 N. W. 505 (1930). See notes (1930) 14 MARQ. L. REV. 183, (1930) 5 Wis. L. REV. 503. See note 18, *infra*.

⁸ At least four views have been advanced by renowned commentators:

(a) That the risk of loss should be on the vendor until title is conveyed. *Stone, Equitable Conversion by Contract* (1913) 13 COL. L. REV. 368, 385-387; *Griffin, Risk of Loss in Executory Land Contracts* (1929) 4 NOTRE DAME LAWY. 506.

(b) That risk of loss should be on the vendor until the time agreed upon for conveyance of title. *LANGDELL, BRIEF OF EQUITY JURISDICTION* (2d ed. 1926) 58-65.

(c) That the risk of loss should be on the party in possession, whether vendor or vendee. See note 18, *infra*.

(d) That the risk of loss should fall upon the vendor unless there is some-

in any case: would the vendee be required to pay the full contract price if the land which is the subject of the contract were completely destroyed (*e.g.* by flood), thereby rendering specific performance by the vendor absolutely impossible.⁹

Although the vendee is considered, for purposes of dower, descent and alienation, to receive an equitable estate in land at the date of the making of the contract, none of the incidents of equitable ownership are enforceable until the date set for performance of the contract. And even then they receive no recognition if specific performance is impossible.¹⁰ For these reasons it has been suggested: (1) Whatever equitable interests the vendee has under the contract being dependent upon a right to specific performance, and substantial destruction of the subject matter of the contract being considered to render specific performance impossible, any accidental loss pending the fulfillment of the contract should fall on the vendor.¹¹ (2) The ancient maxim "whatever is agreed to be done is considered by equity to be done"¹² affords no support to this application of the doctrine of equitable conversion by contract, for the courts recognize that nothing is agreed to be done until the date set for performance.¹³

Perhaps the first of these criticisms is unwarranted, since equitable conversion was consolidated into contract law by adoption from the law applied to wills,¹⁴ has always been considered to be effected by and at the date of the contract,¹⁵ and is merely rendered *unenforceable* by

thing in the contract or the relations of the parties from which the court can infer a different intention. See notes (1920) 6 CORN. L. Q. 111, (1930) 5 WIS. L. REV. 239. See note 22, *infra*.

⁹ *Wilson v. Clark*, 60 N. H. 352 (1880) (buildings worth \$587.50 destroyed by fire; remaining land valued at \$62); *Reife v. Osmer*, 252 N. Y. 320, 169 N. E. 399 (1929) (tract taken by public domain; leaving only claim for money award); *Amundsen v. Severson*, 41 S. D. 377, 170 N. W. 633 (1919) (all but 30 acres of 120 acre tract washed away by Missouri River).

¹⁰ *Phinizy v. Guernsey*, 111 Ga. 346, 36 S. E. 796, 50 L. R. A. 680 (1900) (performance impossible because of outstanding security deed; vendor in possession; loss falls on vendor); *cf. Mehrens v. Knight*, 29 Ga. App. 390, 115 S. E. 506 (1922) (vendee in possession as tenant pending execution of contract and payment of purchase price; vendor sells property to third party; vendee allowed to recover previous partial payments plus the value of any improvements made, less a deduction of the rental value of the land and any injury to the property during the term of occupancy); *Rhomberg v. Zapf*, 201 Iowa 928, 208 N. W. 276 (1926); *Lombard v. Chicago Sinai Congregation*, 64 Ill. 477, (1872) (vendor having option to withdraw).

¹¹ *Stone, Equitable Conversion by Contract* (1913) 13 COL. L. REV. 369, 389. See note (1922) 6 MINN. L. REV. 513.

¹² Williston speaking of this maxim says: "Only the hoary age and frequent repetition of this maxim prevents a general recognition of its absurdity—and one who accepts the maxim denies himself the effort of further thought." 2 WILLISTON ON CONTRACTS (1920) 1767.

¹³ *Simpson, Legislative Changes in the Law of Equitable Conversion by Contract*: I (1934) 44 YALE L. J. 559, n. 3. See notes (1936) 25 KY. L. J. 58, 166.

¹⁴ See notes (1936) 25 KY. L. J. 58, 63, (1937) 25 KY. L. J. 166.

¹⁵ See *Bender v. Luckenback*, 162 Pa. 18, 29 Atl. 295 (1894).

impossibility of specific performance.¹⁶ Furthermore, the doctrine has proved beneficial in its every application except that of shifting risk of loss upon the vendee.

It has been suggested that equity, in its escape from the rule of *Paine v. Meller*, should revert to the old rule of *Stent v. Bailis*¹⁷ which, prior to 1801, imposed upon the vendor all risk of accidental loss by fire until the date set for performance of a contract of sale. However, Professor Williston's suggestion¹⁸ that the risk should fall on the party in possession has met with greater approval. The California courts,¹⁹ for example, have found possession a satisfactory test. The burden of loss then falls upon the party entitled to the rents and profits and in the best position to protect the property.²⁰ Insurance companies generally make possession the test of transfer of ownership.²¹ And the parties probably intend that all the risks and incidents of ownership shall pass with possession of the land.

Doubtless any stereotyped rule for determining transfer of equitable ownership will prove harsh in exceptional cases. However, the most promising rule is one that would make the intent of the parties the determining test,²² in the light of the following factors: (1) the extent of the property interests presently conveyed and reserved by the contract, (2) the general intent of the parties as expressed in the instrument, and (3) the prevailing conception of the market-place as to when the risk of loss passes.

To explain the nature of the vendor's title when the vendee has become equitable owner of the premises, the vendor is regarded as trustee of the legal title for the benefit of the vendee.²³ Such an idea

¹⁶ See note 10, *supra*.

¹⁷ 2 P. Wms. 213, 220, 24 Eng. Rep. 705, 706 (Ch., 1724) "If I should buy an house and before such time as by the articles I am to pay for the same, the house be burnt down by casualty of fire, I shall not in equity be bound to pay for the house." (dictum).

¹⁸ 4 WILLISTON, CONTRACTS (Rev. ed. 1936) §940; Williston, *The Risk of Loss after an Executory Contract of Sale in the Common Law* (1895) 9 HARV. L. REV. 106, 111-130; See notes (1922) 6 MINN. L. REV. 513 (1923) 2 WIS. L. REV. 174.

¹⁹ *La Chance v. Brown*, 41 Cal. App. 500, 183 Pac. 216 (1900); *Lubarsky v. Chavis*, 99 Cal. App. 610, 279 Pac. 205 (1929); See note 7, *supra*.

²⁰ *In re Boyles' Estate*, 154 Iowa 249, 134 N. W. 590, 38 L. R. A. (N.S.) 420 (1912); *Tucker v. McLaughlin-Farrar Co.*, 36 Okla. 321, 129 Pac. 5 (1912); *cf. Ashurst v. Pecker*, 101 Ala. 499, 14 So. 541 (1893). See 4 WILLISTON, CONTRACTS (1920) 2624, n. 4 *Contra: Williams v. Lilley*, 67 Conn. 50, 34 Atl. 765 (1895).

²¹ VANCE, INSURANCE (2d ed. 1930) 719; RICHARDS, INSURANCE (4th ed. 1932) §245.

²² This is the solution espoused by Dean Vanneman in Vanneman, *Risk of Loss in Equity Between the Date of Contract to Sell Real Estate and Transfer of Title* (1923) 8 MINN. L. REV. 127, 139 ff; *cf. POMEROY, SPECIFIC PERFORMANCE OF CONTRACTS* (3d ed. 1926) §434.

²³ *Lombard v. Chicago Sinai Congregation*, 64 Ill. 477 (1872) ("the vendee is to be considered as the trustee of the purchase money for the vendor, who is

results in considerable confusion, for the vendor retains certain rights and interests which are relatively incompatible with the legal concept of a trust.²⁴ He possesses a selfish security interest in the land comparable to a mortgagee's title;²⁵ the profits, use, and possession of the land belong to the vendor-trustee until title passes, unless the contract otherwise specifies;²⁶ the vendor is in no sense a fiduciary nor is he under any obligation to render an account;²⁷ and most courts regard the right of the cestui-vendee as unenforceable until the date set for performance.²⁸

Nevertheless this is the construction almost generally applied. The early jurists explained it only by considering the property as held in a sort of inchoate trust capable of maturing into an actual trust only at the time set for performance, when all the vendor's security interests in the land terminated. At that time, the situation of actual trust was considered for certain purposes to relate back to the date of making the contract.²⁹

Many jurists, rejecting or overlooking this fiction, have adopted the construction stated by Lord Hatterley that "the moment a contract for sale and purchase is entered into . . . the vendor becomes a constructive trustee to the vendee."³⁰ A constructive trust, however, is not generally considered to arise until the moment a duty to convey becomes absolute.³¹ Thus it is obvious that the entire fiction was an attempt to explain how a vendor could hold title to land considered by equity to be owned "for all intents and purposes" by the vendee. Had the courts been a little more anxious to retain consistency in their rules of trust than to explain the problem of equitable conversion, it is submitted that they could have attained the same results by considering the construc-

regarded as trustee of the land for the vendee"); *Moore v. Taylor*, 157 N. Y. Supp. 921 (Sup. Ct. 1916). *EATON, EQUITY* (2d ed. 1923) 445, n. 49.

²⁴ *VANNEMAN*, *supra* note 22, at 136; see note (1935) 24 Ky. L. J. 201.

²⁵ *Lowenthal v. Home Ins. Co.* 112 Ala. 108, 20 So. 419 (1896); *Guin v. H. & D. Lumber Co.*, 6 Ga. App. 486, 65 S. E. 330 (1909) (holding that where the vendor reserves legal title merely as security for the purchase price the legal effect of the situation is not different from that which would arise if the vendor had made a deed to the vendee and received a mortgage as security); see *James v. Boyd*, 80 N. C. 258, 261 (1878). See *EATON, EQUITY* (2d ed. 1923) §242.

²⁶ But see *Reid v. Davis*, 4 Ala. 83 (1842); *Bostwick v. Beach*, 105 N. Y. 661, 12 N. E. 32 (1887).

²⁷ See *VANNEMAN*, *supra* note 24, at 136; "the purchaser cannot require of him an accounting for the rents and profits". But see *Bostwick v. Beach*, 105 N. Y. 661, 12 N. E. 32 (1887).

²⁸ *Stone, Equitable Conversion by Contract* (1913) 13 Col. L. Rev. 369, 381-386 and cases cited. See note 36, *infra*.

²⁹ See *Shaw v. Foster*, L. R. 5 H. L. 321, 338 (1872); see *Wall v. Bright*, 1 Jacob & W. 494, 508 (Ch., 1820). *POMEROY, EQUITY JURISPRUDENCE* (4th ed. 1918) §§1260, 1261.

³⁰ *Shaw v. Foster*, L. R. 5 H. L. 321, 338 (1872).

³¹ 3 *BOGERT, TRUSTS AND TRUSTEES* (1935) 1456; 3 *SCOTT, TRUSTS* (1939) 2320.

tive trust to arise at the date set for performance of the contract rather than at the moment the contract is entered into.

RIGHT TO INSURANCE

In *Rayner v. Preston*,³² a vendee petitioned for specific performance of a contract for the sale of land and for application upon the purchase price of insurance moneys collected by his vendor pending performance of the contract of sale. In denying the application for insurance, the court held that the contract of sale acts only upon the property and its necessary appurtenances and does not affect collateral contracts, that the contract of insurance is a personal contract of indemnity and unless assigned affords no right of action to any party not privy thereto, and that the vendor occupies the position of trustee only in respect to the property to be sold, of which the insurance policy is not a part. Later, in *Castellain v. Preston*,³³ the same court granted the vendor's insurer the right to recover from the vendor what he had secured from his vendee as the value of the building destroyed, applying the rule of subrogation. On the issues presented by the instant case these two decisions determined the law of England until Parliament in 1922 yielded to the "vendee's rights of natural equity", and by statute made the vendor trustee for the vendee of any insurance moneys collected during the life of a contract for the sale of land, "subject to any stipulation to the contrary".³⁴

A decided majority of American courts have rejected the reasoning of *Rayner v. Preston* and have permitted the vendee to secure application of the vendor's insurance moneys upon the purchase price when the vendee is the only party to suffer injury.³⁵ They have, however,

³² L. R. 18 Ch. D. 1 (1881); cf. *King v. Preston*, 11 La. Ann. 95 (1856) (adopting same rule in Louisiana; but see *Automatic Sprinkler Corp. v. Robinson-Slagle Lumber Co.*, 147 So. 542, 544 (La. App. 1933)); See *Brownell v. Board of Education*, 239 N. Y. 369, 372, 146 N. E. 630, 631 (1925). See notes (1925) 25 COL. L. REV. 477, (1925) 10 CORN. L. Q. 379.

³³ L. R. 11 Q. B. D. 380 (1883).

³⁴ Law of Property Act, 1922, 12 & 13 Geo. V, c. 16, §105: "any money becoming payable after the date of any contract for sale of property under any policy of assurance in respect of any damage to or destruction of property included in such contract shall on the completion of such contract, but subject to any stipulation to the contrary, be held or receivable by the vendor on behalf of the purchaser and paid by the vendor to the purchaser on the completion of the sale. . . ." This act was amended by Law of Property Act, 1925, 15 Geo. V., c. 20, §47 (2) subjecting the operation of the previous act (a) to any stipulation to the contrary in the contract of sale, (b) to any requisite consents of the insurers, and (c) to the payment by the purchaser of the premiums from the date of the contract.

³⁵ *Kaufman v. All Persons*, 16 Cal. App. 388, 117 Pac. 586 (1911); *Brady v. Welsh*, 204 N. W. 235 (Iowa 1925); *Mattingly v. Springfield F. & M. Ins. Co.*, 120 Ky. 768, 83 S. W. 577 (1904); *Wm. Skinner Co. v. Houghton*, 92 Md. 68, 48 Atl. 85 (1900); *McGinley v. Forrest*, 107 Neb. 309, 186 N. W. 74 (1921); *Millville Aerie F. O. E. v. Weatherby*, 82 N. J. Eq. 455, 88 Atl. 847 (Ch., 1913); *Turner v. Bryant*, 152 App. Div. 601, 137 N. Y. Supp. 466 (3d Dep't 1912);

recognized a power in the insurer to protect itself from the additional responsibility by making its policies voidable upon a "change in interest", "change in title", or termination of the "sole ownership" of the insured.³⁶ In allowing the vendee to reach the insurance, they have variously ruled that the vendor who stands as trustee of the property to the benefit of the vendee holds any insurance policy in the same capacity;³⁷ that equity will consider the insurance money to be substituted for the property held in trust by the vendor;³⁸ or that the probable intent of the parties to have the insurance policy of one cover the interests of both will be given legal effect by equity's effectuating an assignment of the policy to this extent.³⁹

The idea of constructive assignment, apparently recognized in only one case,⁴⁰ probably lacks an essential basis of fact. For insurance

Peck v. Hale, 30 Ohio C. A. 473, 11 Ohio App. 418 (1919); Reed v. Lukens, 44 Pa. 200, 84 Am. Dec. 425 (1863); Brakhage v. Tracy, 13 S. D. 343, 83 N. W. 363 (1900). *Contra*: see note 7, *supra*.

Exceptions to the application of the American rule are recognized:

(a) When a condition precedent to the vendor's duty to convey has not been performed. Amundsen v. Severson, 170 N. W. 633 (S. D. 1919); but see Sewell v. Underhill, 197 N. Y. 168, 90 N. E. 430 (1910) (where conveyance was delayed to secure a map mentioned in the deed, as a matter of convenience and not for any matter essential to transfer of title).

(b) Where contract arises from sheriff's sale. Cropper v. Brown, 76 N. J. Eq. 406, 74 Atl. 987 (Ch., 1909) (applying rule and surveying cases in point); *Contra*: Plimpton v. Farmer's Mutual Fire Ins. Co., 43 Vt. 497 (1871).

(c) Where vendee has option contract to purchase. Williams v. Lilley, 67 Conn. 50, 34 Atl. 765 (1895) (lessee with option to purchase—applied general rule allowing recovery). *Contra*: Wheeler v. Gahan, 206 Ky. 366, 267 S. W. 227 (1924); Strong v. Moore, 105 Ore. 12, 207 Pac. 179 (1922). See note (1923) 23 A. L. R. 1225.

(d) Where vendor cannot convey good title. See note 10, *supra*.

³⁶ See COOKE, CASES ON EQUITY (2d ed. 1932) 808, n. 24; see I AMES, CASES IN EQUITY JURISDICTION (1904) 241, n. 4.

(a) A contract of sale breaches a "change in interest" condition. Skinner v. Houghton, 92 Md. 68, 48 Atl. 85 (1900).

(b) A contract to sell is not generally a breach of a "change of title" condition. Smith v. Phoenix Ins. Co., 91 Cal. 323, 27 Pac. 738 (1891); Phoenix Ins. Co. v. Caldwell, 187 Ill. 73, 58 N. E. 314 (1900). *Contra*: Davidson v. Hawkeye Ins. Co., 71 Iowa 532, 32 N. W. 514 (1887).

(c) A contract to sell is generally a breach of a "sole ownership" condition. Clay Co. v. Huron Co., 31 Mich. 346 (1875); Collins v. London Ins. Co., 165 Pa. 298, 30 Atl. 942 (1895).

³⁷ Phoenix Ins. Co. v. Mitchell, 67 Ill. 43 (1873); Skinner Co. v. Houghton, 92 Md. 68, 48 Atl. 85 (1900); People's Ry. v. Spencer, 156 Pa. 85, 27 Atl. 113 (1893); Russell v. Elliott, 45 S. D. 184, 186 N. W. 824 (1922); See Phinizz v. Guernsey, 111 Ga. 346, 349, 36 S. E. 796, 680 (1900); Rayner v. Preston, L. R. 18 Ch. D. 1, 13 (1881) (Lord James' dissent).

³⁸ Williams v. Lilley, 67 Conn. 50, 62, 34 Atl. 765, 770 (1895); Godfrey v. Alcorn, 215 Ky. 465, 284 S. W. 1094, 51 A. L. R. 925 (1926); *cf.* Skinner Co. v. Houghton, 92 Md. 68, 48 Atl. 85 (1900); see Reed v. Lukens, 44 Pa. St. 200 (1863).

³⁹ See note (1935) 23 Ky. L. J. 505, 507.

⁴⁰ Ins. Co. v. Updegraff, 21 Pa. St. 513 (1853); *cf.* Callahan v. Linthicum, 43 Md. 97 (1875).

companies insure the interests of vendor and vendee separately,⁴¹ a vendor could hardly be said to offer gratuitous protection to the vendee's interest, and contracts of sale frequently expressly provide that the vendor shall suffer any intervening loss by fire.

The substitution rule, as applied in Kentucky,⁴² probably conforms most with "the layman's ideas of equity".⁴³ Yet it obviously runs counter to the "personal contract of indemnity"⁴⁴ idea of insurance and makes the insurance policy indemnify the land and not the insured. But the fact that most fire insurance policies provide the insurer with an option to repair or rebuild,⁴⁵ rather than pay the value of the property destroyed, affords some practical basis for the rule. For the building if reconstructed must necessarily be conveyed to the vendee should specific performance be decreed.

In *Phinizy v. Guernsey*, the Georgia court adopted the first rule suggested, that whenever "the vendors would have held the legal title as trustees for the vendee, then they would likewise have held title to the insurance in the same capacity."⁴⁶ However, neither an express⁴⁷ nor a resulting trust⁴⁸ can be created by a simple contract for the sale of land. And before the vendor can be declared a constructive trustee of the insurance, the court must find that he would be unjustly enriched at the expense of the vendee.⁴⁹

In determining whether to impose a constructive trust upon the vendee, the following factors are considered important: (1) the quan-

⁴¹ "Vendor and vendee have separate insurable interests in the property, which they may protect by insurance, but the interest must be specifically disclosed." RICHARDS, LAW OF INSURANCE, (4th ed. 1932) 68.

⁴² *Mattingly v. Springfield F. & M. Ins. Co.*, 120 Ky. 768, 83 S. W. 577 (1904).

⁴³ See *Rayner v. Preston*, L. R. 18 Ch. D. 1, 15 (1881) (Lord James' dissent); cf. *Brownell v. Board of Education*, 239 N. Y. 369, 146 N. E. 630 (1925) (Justice Pound speaks of Lord James' discussion of an insurance policy as benefiting anyone beside the named beneficiary as savoring "of the layman's ideas of equity, but they are not the law.")

⁴⁴ "A contract of insurance is essentially personal, each party having in view the character, credit, and conduct of the other." VANCE, INSURANCE (2d ed. 1930) 69. And this applies particularly to fire insurance contracts. Vance, *op. cit.* at 73.

⁴⁵ See RICHARDS, LAW OF INSURANCE (4th ed. 1932) §301.

⁴⁶ *Phinizy v. Guernsey*, 111 Ga. 346, 36 S. E. 796 (1900).

⁴⁷ "A trust . . . is a fiduciary relationship with respect to property . . . which arises as a result of a manifestation of an intent to create it." RESTATEMENT, LAW OF TRUSTS (1935) v. I, §2. No intent to create a trust can possibly be inferred from a simple contract to convey land.

⁴⁸ "A resulting trust arises where a transfer of property is made under circumstances which raise an inference that the person making the transfer or causing it to be made did not intend the transferee to have the beneficial interest in the property transferred." RESTATEMENT, LAW OF RESTITUTION (1937) 642.

⁴⁹ "Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it, a constructive trust arises." RESTATEMENT, LAW OF RESTITUTION (1937) §160, p. 640.

tum of interest in the land presently conveyed by the contract and the notice afforded the vendee that he has an insurable interest;⁵⁰ (2) the apparent desire of American courts to protect all equitable interests arising under the contract of sale as evidenced by the widespread rejection of the rule of *Rayner v. Preston*; (3) the power of insurance companies to protect themselves by making their policies voidable upon a change in interest and ownership of the insured; (4) the general misconception of the market-place that the vendor is owner and sustains all risk of loss pending the performance of the contract;⁵¹ (5) the fact that the vendee is the only party to suffer loss where the equitable conversion theory is applied and specific performance decreed; and (6) the effect, upon the vendor's "unjust enrichment", of the fact that the vendor has paid the premiums upon the policy, and of the insurer's right to be subrogated to a part of the purchase price.⁵²

Actually, the mortgagor-mortgagee relation affords the most helpful analogy. The vendor's legal title is considered by most courts as a bare security title comparable to that of a mortgagee.⁵³ And it is often suggested that the rules of insurance there applied offer a ready solution to the instant problem.⁵⁴ Under the law of mortgages, though the insurer purports to insure the entire value of the building at prevailing premium rates, it actually indemnifies the insured mortgagee only for what loss he sustains, discounting the amount of money previously paid on the mortgage notes. Furthermore, it succeeds by subrogation to the mortgagee's right of action against the mortgagor upon the unpaid notes.⁵⁵ If these rules were adopted, the vendee would be denied any

⁵⁰ I.e., does the vendee secure possession, right to rents and profits, and a right to deal with the property as his own, or are these rights to pass only with title? See note 17, *supra*. *Quaere*, should bond for title afford the vendee notice that he has an insurable interest? *Bruce v. Jennings*, 10 S. E. (2d) 56 (Ga. 1940).

⁵¹ See *Rayner v. Preston*, L. R. 18 Ch. D. 1, 16 (1881) (Lord James' dissent).

⁵² This argument is important if the insurer is permitted to recover by subrogation whatever the vendor realizes on the contract as collateral indemnity for the building destroyed. *Davidson v. Hawkeye Ins. Co.*, 71 Iowa 532, 32 N. W. 514 (1887); *Sussex Ins. Co. v. Woodruff*, 26 N. J. Law 541 (1857); *Phoenix Assurance Co. v. Spooner*, (1905) 2 K. B. 753. See note 33, *supra*. Furthermore there is authority that the insurer will be estopped to assert its right to subrogation neither by continuing the policy with notice that the vendor holds a mere security title, nor by payment of the insurance money to the vendor when the vendee suffers the only loss. *Mahan v. Home Ins. Co.*, 205 Mo. App. 592, 226 S. W. 593 (1920); *Gottingham v. Fireman's Ins. Co.*, 90 Ky. 439, 14 S. W. 417 (1890).

⁵³ *White v. Gilman*, 138 Cal. 375, 71 Pac. 436 (1903); see *Candler v. Dodge Lumber Co.*, 34 Ga. App. 289, 129 S. E. 289 (1925); *Jones v. Boyd*, 80 N. C. 258, 261 (1878); *Crawford v. Allen*, 189 N. C. 434, 444, 127 S. E. 126, 127 (1925).

⁵⁴ 1 BOGERT, TRUSTS AND TRUSTEES (1935) 75.

⁵⁵ *Gould v. Maine Farmers' Mutual Ins. Co.*, 114 Me. 416, 96 Atl. 732 (1916); *International Trust Co. v. Beardman*, 149 Mass. 158, 21 N. E. 239 (1889); *Leyden v. Lawrence*, 79 N. J. Eq. 113, 81 Atl. 121 (Ch., 1911) (right of insurer to be subrogated to mortgagee's claim against mortgagor); *Stuyvesant Ins. Co. v. Reid*, 171 N. C. 513, 88 S. E. 779 (1916) (chattel mortgage); see *Suttles v.*

interest whatever in the vendor's insurance money. But such a result might prove inequitable where, unlike the mortgagor, the vendee is not afforded notice of his need to insure either by a long standing rule of law or by an actual transfer of legal title and an unmistakable change of interest.

DISAVOWAL

Apparently no previous case has arisen in which a vendee has disavowed, as he did in the instant case, all interest in the insurance of his vendor.⁵⁶ In *Skinner v. Houghton*,⁵⁷ the vendee represented to the vendor's agent, subsequent to the making of the contract and before the fire, that he intended to remove the buildings on the premises upon acquiring title and would not be interested in an assignment of the policy, yet thought it wise that the vendor insure the buildings for her own security. There the Maryland Supreme Court found no disavowal of interest in the insurance, but held the insurance money "justly due to the vendee who had sustained the only loss."⁵⁸

It is generally conceded, moreover, that such an intent is not conclusive on a court when unjust enrichment at another's expense justifies a finding of constructive trust;⁵⁹ and it is submitted that despite a finding of unequivocal disavowal of interest in the instant case, by the rules of constructive trust, petitioner's plea for application of the insurance should have been granted.

STATUTES

Perhaps the most adequate solution to the confusing problem is suggested by the statute enacted in England.⁶⁰ In 1934, because of the vast diversity of rules applied in the various states and to alleviate the diffi-

Vickery, 179 Ga. 752, 756, 177 S. E. 715, 717 (1934) (security deed). *Contra*: Callahan v. Linthicum, 43 Md. 97 (1875). But see Home Ins. Co. v. Marshall, 48 Kans. 235, 26 Pac. 161 (1892). See VANCE, INSURANCE (2d ed. 1930) 652-654; RICHARDS, LAW OF INSURANCE (4th ed. 1932) §276. Conversely, the mortgagee has no interest in the mortgagor's insurance in the absence of any agreement to the contrary. Suttles v. Vickery, 179 Ga. 152, 177 S. E. 714 (1934); Bryan v. Old Colony Ins. Co., 213 N. C. 319, 196 S. E. 345 (1937). See RICHARDS, LAW OF INSURANCE (4th ed. 1932) §65.

⁵⁶ But see Dumbrock v. Neal, 55 W. Va. 565, 49 S. E. 303 (1904) where the grantor of a deed of trust assigned insurance policy to the beneficiary, who had refused assignment and wanted nothing to do with the policy, making it payable to the trustee as his interest might appear. Fire occurred while first note was due and unpaid. Trustee gave notice of sale and cestui brings action to restrain sale and secure application of the insurance money upon the purchase price. Petition denied, cestui's equitable interest having terminated.

⁵⁷ 92 Md. 68, 48 Atl. 85 (1900).

⁵⁸ Skinner v. Houghton, 92 Md. 68, 91, 48 Atl. 85, 90 (1900).

⁵⁹ "It is created regardless of the intent of the parties and naturally directly against the intent of the defendant. As is well stated by a learned writer, it is a 'fraud-rectifying' and not an 'intent-enforcing' trust." 3 BOGERT, TRUSTS AND TRUSTEES (1935) 79.

⁶⁰ See note 34, *supra*.

culties encountered in particular states such as New York,⁶¹ wherein as many as four different and conflicting doctrines have been applied, the National Conference Commissioners on Uniform State Laws considered a draft of a Uniform Purchaser and Vendor Risk Act.⁶² This draft would have granted the greatest possible security to the vendee, permitting him, in the event of subsequent destruction of the subject matter by fire, either to revoke the contract and recover what portion of the purchase price he has previously paid if he be out of possession, or to secure specific performance and application of his vendor's insurance upon the purchase price whether he be in possession or not. And apparently the terms of this statute were to be enforceable regardless of any previous disavowal the vendee may have made concerning his interest in the vendor's policy. But in affording the vendee who is out of possession the option either to revoke the contract if it proves unfavorable or to enforce performance without risk of loss if it proves advantageous, the proposed act would have given the vendee an advantage disproportionate to the burden placed on the vendor. It is submitted, however, that this criticism could be avoided by a change in the provisions of the

⁶¹ *Bruce v. Allisoun*, 56 N. Y. 366 (1874) (denied vendee application of insurance); *Bostwick v. Beach*, 105 N. Y. 661, 12 N. E. 32 (1887) (granted vendor specific performance, allowing vendee set-off to extent of damage by deterioration); *Doty v. Rennselaer Ins. Co.*, 188 App. Div. 29, 176 N. Y. Supp. 55 (3d Dep't 1919) (applied substitution theory, ordering application of insurance upon the purchase price); See *Brownell v. Board of Education*, 239 N. Y. 369, 373, 146 N. E. 630, 631 (1925) (adopting reasoning of *Rayner v. Preston* that only named beneficiary can benefit from insurance policy). Compare *Conlin v. Osborne*, 161 Cal. 659, 120 Pac. 755 (1912) with *Lubarsky v. Chavis*, 99 Cal. App. 610, 279 Pac. 205 (1929).

⁶² The following proposed act was considered by the Conference while sitting in Committee of the Whole and is presented and discussed in Simpson, *Legislative Changes in the Law of Equitable Conversion by Contract: II*, (1934) 44 *YALE L. J.* 754, 769-773.

"Any contract hereafter made in this state for the purchase and sale of realty shall be interpreted as imposing upon the parties the following rights and duties, unless the contract expressly provides otherwise:

(a) If before transfer of the legal title, or the possession of the subject matter of the contract, all or a material part thereof is accidentally destroyed or taken by eminent domain, the vendor cannot enforce the contract, and the purchaser is entitled to recover any portion of the price that he has paid.

(b) If after the transfer of the legal title, or of the possession of the subject matter of the contract, all or any part thereof is accidentally destroyed or is taken by eminent domain, the purchaser is not thereby relieved of a duty to pay the price or entitled to recover any portion thereof that he has paid.

(c) Where a vendor receives compensation from insurance or otherwise for such destruction or taking, the purchaser shall be entitled to enforce the contract with an abatement of the price to the extent of such compensation.

(d) Where a purchaser receives compensation from insurance or otherwise for such destruction or taking, the vendor shall be entitled either to have such compensation applied to the payment of the price to the extent that is necessary or, at the option of the purchaser, applied to the restoration of the subject matter."

As adopted however the act omits any provision for application of insurance. *HANDBOOK OF NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS* (1935) 139.

act, so that the act would provide substantially as follows (changes are in italics) :

"Any contract hereafter made in this state for the purchase and sale of realty shall be interpreted as imposing upon the parties the following rights and duties, unless the contract provides otherwise:

(a) If, before transfer of the legal title, or of the possession of the subject matter of the contract, all or a material part thereof is accidentally destroyed or is taken by eminent domain, the vendor cannot enforce the contract *if the vendee elects to revoke it, in which case the vendee is entitled to recover any portion of the price he has paid; if the vendee elects to perform the contract he shall have no interest in the insurance of his vendor.*

(b) If, after transfer of the legal title, or of the possession of the subject matter of the contract, all or any part thereof is accidentally destroyed or is taken by eminent domain, the purchaser is not relieved of the duty to render specific performance, nor may he recover all or any part of the purchase price that he has paid, *but he is entitled to secure an abatement of the purchase price to the extent of any compensation the vendor receives as collateral security for the property destroyed: Provided that if said collateral security be insurance the vendee shall pay into court a sum equal to the premiums paid by the vendor from the date of the contract until the date of the accident, before any abatement in the purchase price shall be ordered.*

(c) Where a purchaser receives compensation from insurance or otherwise for such destruction or taking, the vendor shall be entitled either to have such compensation applied to the payment of the price to the extent that is necessary or, at the option of the purchaser, applied to the restoration of the subject matter."

V. LAMAR GÜDGER, JR.