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NOTES AND COMMENTS

Conflict of Laws—Full Faith and Credit—Recognition of Foreign Divorce Decrees

A deserted her husband, *B* deserted his wife, and, proceeding together to Nevada, they established the required six-weeks residence and obtained divorces, *A*'s husband being served by publication only and *B*'s wife by publication and also by personal service in North Carolina. As soon as these decrees became final, *A* and *B* were married and returned to North Carolina where they were prosecuted for bigamous cohabitation. The Supreme Court upheld their conviction,¹ refusing to

¹ *State v. Williams*, 220 N. C. 445, 17 S. E. (2d) 769 (1942). The man's sentence was for not less than three nor more than ten years at hard labor. The

recognize the validity of the Nevada divorces. The basis of the opinion was that since the *Haddock* case left the states free to decide as a matter of comity whether or not to recognize foreign divorce decrees when only constructive service on defendant was had, North Carolina has chosen to ignore them.²

Simply because this decision is consistent with the view expressed in North Carolina cases whenever a question of the recognition of the divorce decrees of sister states has arisen, it is of vital significance to numerous families in the state whose existence is predicated upon such anemic divorces as the one in the principal case. If a discussion of the law relating to the extraterritorial validity of divorces can contain little material which has not been more or less exhaustively treated both in this and other publications, nevertheless it may serve to warn the bar and public and to stress a point on which it would be difficult to place too much emphasis.

The generally accepted theory of jurisdiction for divorce³ is that the marital status is a res located where the parties to the status are domiciled, since the state of domicile is deemed to have most interest therein. The divorce proceeding is an action in rem directed against that res. Domicile of at least one of the parties is therefore essential for jurisdiction, and where a divorce is granted by a state in which neither party is domiciled, the decree is invalid both in that state and elsewhere, although both parties may have appeared in the action. A state in which both parties are domiciled has jurisdiction to grant a divorce valid locally and also in other states under the Full Faith and Credit Clause.

As long as a wife was unable to establish a domicile separate from that of her husband the possibilities were limited to these two situations, but when she was allowed to have a domicile of her own, the courts were confronted with the problem of the validity and recognition by other states of divorces granted at the domicile of one spouse against a spouse domiciled elsewhere. The great majority of states have considered the marital res as divisible, enough of it remaining with each spouse to allow that spouse to obtain a divorce at his or her domicile, on actual or constructive notice, which would be valid where granted and entitled to recognition elsewhere. A minority composed of New York, North Carolina, South Carolina and Pennsylvania have felt that

woman received a sentence of not less than three nor more than five years at such labor as is provided for women prisoners by law.

² *State v. Williams*, 220 N. C. 445, 460, 17 S. E. (2d) 769, 778 (1942).

³ Note (1937) 2 Mo. L. Rev. 193; Note (1940) 18 CHI-KENT L. REV. 178; STUMBERG, *PRINCIPLES OF CONFLICT OF LAWS* (1937) 267-284; GOODRICH, *HANDBOOK OF THE CONFLICT OF LAWS* (1938) §§123-128; Leflar, *More Faith and Credit for Divorce Decrees* (1939) 4 Mo. L. Rev. 268.

the action partook enough of the character of an in personam action to require personal service in the decree-granting state or appearance by the defendant in the action as a requisite to recognition. Another group of states holds that the domicile of plaintiff plus actual notice to defendant is all that is necessary.

In 1906, the United States Supreme Court decided⁴ that a divorce granted at the domicile of only one spouse must be given Full Faith and Credit by other states (1) when the decree-granting state is also the last matrimonial domicile although service is given by publication only and (2) when the decree-granting state is not the last matrimonial domicile but (a) the defendant was personally served or (b) appeared in the action. The court also decided that although the states were not compelled to recognize decrees rendered on constructive service alone except at the last matrimonial domicile, nevertheless if they complied with the law of the state granting them, such decrees were valid locally and might be given recognition by another state as a matter of comity. Thus North Carolina was left at liberty to refuse validity to such decrees and, as in the principal case, has consistently held them void.⁵

The proposition that divorces in other states on constructive service are good where rendered but invalid in North Carolina is settled law. There necessarily arises from it, however, the absurd spectacle of the wife without a husband and the husband without a wife: a man divorced in Nevada, with perhaps a second wife there, never having been divorced in North Carolina from his first wife who has been discarded but who is, nonetheless, bound to him by undisturbed marriage ties. The majority view, which goes on the assumption that divorcing a man from his wife necessarily divorces her from him, has, at least, the virtue of simplicity.

New York shares with North Carolina the doctrine that, so far as her own citizens are concerned, divorces granted against them on constructive service by other states are invalid in New York.⁶ It was the decision of a case in New York involving a Connecticut decree against a New York resident upon service by publication which gave rise to the pronouncement of the United States Supreme Court in *Haddock v. Haddock*.⁷ That New York in holding such divorces void is primarily interested in the protection of the interests of her own citizens is indicated by decisions upholding *ex parte* divorces where the parties were citizens of other states.⁸

⁴ *Haddock v. Haddock*, 201 U. S. 562, 26 S. Ct. 525, 50 L. ed. 867 (1906).

⁵ Wettach, *North Carolina and Jurisdiction for Divorce* (1922) 1 N. C. L. REV. 95; Note (1930) 16 VA. L. REV. 706; Note (1929) 17 GEO. L. J. 264.

⁶ Howe, *The Recognition of Foreign Divorce Decrees in New York State* (1940) 40 COL. L. REV. 373.

⁷ See note 4 *supra*.

⁸ Note (1925) 35 YALE L. J. 372.

Two New York cases tend to throw doubt upon the orthodox theory that domicile of at least one of the parties is essential for jurisdiction.⁹ *Gould v. Gould*¹⁰ was an action for divorce in which the husband set up as an affirmative defense a French divorce granted him some ten years before. The husband was domiciled in New York at the time but resident in France. The wife, also domiciled in New York, had appeared in the action and had contested it. The New York court held that although the French decree was not entered at the domicile of either party it was entitled to recognition.

In *Glaser v. Glaser*¹¹ a Nevada divorce was held valid as a defense to a wife's action for separation. Although she showed clearly that the husband had not acquired a *bona fide* domicile in Nevada, nevertheless her general appearance in the action was held to preclude a reexamination of the question of domicile by the New York court.

The *Glaser* case goes even further than the Supreme Court of the United States in *Davis v. Davis*.¹² In that case it was held that a Virginia divorce decree granted on the petition of the husband must be given Full Faith and Credit in the District of Columbia when the wife, a resident of the District, had appeared in the Virginia court and there litigated the jurisdictional question of whether her husband was domiciled in Virginia. The decision of that issue in the husband's favor was *res judicata* everywhere, and the District Court could not constitutionally reexamine the question of whether the husband was domiciled in Virginia. It has formerly been thought that a general appearance was necessary for Full Faith and Credit, but it has been suggested that a special appearance supplemented by certain other conduct by the defendant is now enough.¹³

Professor Beale is at least one commentator who urges that the holding in *Haddock v. Haddock* was a statement of jurisdiction as well as of the limits of Full Faith and Credit.¹⁴ Although this view has not been accepted, Beale's influence was enough to cause its incorporation into the RESTATEMENT OF CONFLICT OF LAWS which also suggested that the Supreme Court add two further circumstances under which Full Faith and Credit should be compelled for foreign divorces.¹⁵ These

⁹ Howe, *The Recognition of Foreign Divorce Decrees in New York State* (1940) 40 COL. L. REV. 373.

¹⁰ 235 N. Y. 14, 138 N. E. 490 (1923).

¹¹ 276 N. Y. 296, 12 N. E. (2d) 305 (1938); Note (1938) 7 FORDHAM L. REV. 258.

¹² 305 U. S. 32, 59 S. Ct. 3, 83 L. ed. 26 (1938); Leflar, *More Faith and Credit for Divorce Decrees* (1939) 4 MO. L. REV. 268.

¹³ Note (1939) 8 FORDHAM L. REV. 80.

¹⁴ Beale, *Constitutional Protection of Decrees for Divorce* (1906) 19 HARV. L. REV. 586; Beale, *Haddock Revisited* (1926) 39 HARV. L. REV. 417.

¹⁵ RESTATEMENT, CONFLICT OF LAWS (1934) §113; Strahorn, *A Rationale of the Haddock Case* (1938) 32 ILL. L. REV. 796; Strahorn, *The Supreme Court*

are (1) where one spouse has consented to the other's separate domicile and (2) where one party has by his misconduct forfeited the right to object to such separate domicile. Although the purpose of these requirements is greater uniformity of recognition, they have been severely criticized¹⁶ on the ground that by injecting into the cases a further jurisdictional fact, *i.e.*, fault, they will tend to have the opposite result. The Supreme Court has remained uninfluenced by them.¹⁷

The courts have been constrained to mitigate to some extent the harshness resulting from the invalidity of foreign divorces by limiting the class of those who are able to attack them. On principles of estoppel or quasi-estoppel it has been declared (1) that one who has obtained an invalid decree cannot subsequently question its validity and (2) that one who relies upon an invalid decree by remarrying will not be allowed to claim later that it is not good.¹⁸ This does not mean that the decrees are valid, for the person who remarries is subject to a prosecution for bigamy and the children of the second marriage are in danger of being declared illegitimate. As against the state or the children and the other spouse by the first marriage there is no estoppel. Virginia sometimes applies the doctrine of laches to prevent attack upon void decrees.¹⁹ In *Dry v. Rice*,²⁰ a "Reno divorce" obtained by the wife where a finding of no *bona fide* domicile was warranted, was protected from attack by the husband who, with knowledge of the divorce, delayed questioning it for two and a half years until the wife had remarried.

The court in the principal case²¹ suggests by way of dictum that the divorces in question are vulnerable because they are typical "Reno divorces." In the typical "Reno divorce" the *bona fide* domicile of the plaintiff is doubtful even though a residence requirement may have been complied with. The finding of domicile, a jurisdictional fact, by the court of the forum is not conclusive upon other courts, and if another court finds lack of domicile the divorce is void under the rule that a state in which neither party to a marriage is domiciled has no jurisdiction to grant a divorce.²² Domicile has been defined as presence with intent to remain.²³ The defendants in the instant case clearly did not

Revisits Haddock (1939) 33 ILL. L. REV. 412; Bingham, *The American Law Institute vs. the Supreme Court* (1936) 21 CORN. L. Q. 393.

¹⁶ Leflar, *More Faith and Credit for Divorce Decrees* (1939) 4 MO. L. REV. 268.

¹⁷ Note (1935) 44 YALE L. J. 488.

¹⁸ RESTATEMENT, CONFLICT OF LAWS (1934) §112; STUMBERG, PRINCIPLES OF CONFLICT OF LAWS (1937) 280-284; GOODRICH, HANDBOOK OF THE CONFLICT OF LAWS (1938) 350; Notes (1940) 18 N. Y. U. L. Q. 94, (1940) 9 FORDHAM L. REV. 242.

¹⁹ Note (1935) 22 VA. L. REV. 233. ²⁰ 147 Va. 331, 137 S. E. 473 (1927).

²¹ *State v. Williams*, 220 N. C. 445, 460, 462, 17 S. E. (2d) 769, 778, 780 (1942).

²² RESTATEMENT, CONFLICT OF LAWS (1934) §111.

²³ Note (1935) 22 VA. L. REV. 233.

establish domicile in Nevada under this definition. They were physically present in Nevada for six weeks, it is true, but their going to Nevada together, their prompt filing of suit, and their marriage and immediate return to North Carolina after the decree are persuasive that they lack *animus manendi*, and that they left North Carolina for the purpose of evading its laws and practiced a fraud upon the courts of another state in order to do so. Generally, however, the Nevada courts are not deceived. Thus, they might be regarded as participating in the "fraud."

In a dispute over the estate of a North Carolina professor, the Virginia court recently denied validity to a divorce which had been obtained in Arkansas, on the ground that the professor had not established a *bona fide* domicile there.²⁴ He had gone to Arkansas, ostensibly for a vacation, and had resumed his professorial duties in North Carolina before the final decree was entered. Incidentally, the attitude of the Virginia court toward "Reno divorces" is interesting both as illustrative of a possible trend in the direction of more frequent recognition in proper cases and also as showing the technique of evasion which courts are forced to use to prevent undeserved hardship which would sometimes follow a strict adherence to accepted notions of the validity of foreign divorces.²⁵ The burden of proving lack of domicile is with the attacker, and, in determining whether this burden has been sustained, the court exercises a wide discretion, manipulating presumptions and evidential requirements almost at will. Consequently, in cases where the equities so dictate, the burden becomes well-nigh impossible to overcome. But where the situation of the parties justifies denying recognition to the decree almost any evidence of lack of domicile will be used to sustain the burden of the attacker.²⁶

The possible consequences of these divorce decrees obtained without *bona fide* domicile, and, in North Carolina, of those obtained on constructive service, are so far-reaching that they will no doubt startle the average individual. Their validity "is open to question in suits for divorce, annulment, alimony or separate maintenance, custody of children, criminal proceedings for fornication, adultery, bigamy, or non-support, proceedings in probate for letters of administration, actions to participate in an estate as a lawful heir, petitions for dower or the equivalent thereof, actions for alienation of affection, suits for breach of promise to marry, and actions for ejectment, or specific performance."²⁷

The natural question for one who has obtained such a divorce to

²⁴ *Howe v. Howe*, 18 S. E. (2d) 294 (1942).

²⁵ Note (1935) 22 VA. L. REV. 233.

²⁶ Note (1935) 21 VA. L. REV. 797.

²⁷ Note (1933) 17 MINN. L. REV. 567.

ask, especially if he has married again on the strength of it, is, "What measures can I take to remedy the situation?" The sad truth probably is that he can do nothing to help himself. He cannot get another divorce in the original decree-granting state, for the matter would be *res judicata* there. The doctrine of estoppel would prevent a second divorce in any other state. For an essential allegation of the complaint in a divorce action is the existence of a marriage, and this necessarily involves a denial of the validity of the original divorce. But the one who procures a divorce is estopped to deny its validity.²⁸

ARTHUR C. JONES, JR.

Criminal Law—Barratry

In *State v. Batson*¹ the Supreme Court of North Carolina upheld conviction of defendant, a layman, for an attempt to commit the crime of common barratry. The court found that he, unsolicited, had approached others and urged each of them to institute suits, upon apparently reasonable grounds, offering to assist such persons in the conduct of this litigation, and agreeing to receive his compensation from their recoveries. The decision was based upon the fact that as common barratry was an offense at common law, under C.S. §970² the crime is now recognized in this state.

Common barratry is "the offense of frequently exciting and stirring up suits and quarrels either at law or otherwise."³ This was a mis-

²⁸ Other treatments in North Carolina publications of aspects of the general subject of foreign divorces are: *Migratory Divorce* (1935) 2 LAW AND CONTEMP. PROB. 289; Wettach, *North Carolina and Jurisdiction for Divorce* (1922) 1 N. C. L. REV. 95; Frierson, *Divorce in South Carolina* (1931) 9 N. C. L. REV. 265; Jacobs, *Attack on Decrees of Divorce by Second Spouses* (1936) 15 N. C. L. REV. 136; Note (1933) 1 DUKE B. A. J. 77.

¹ 220 N. C. 411, 17 S. E. (2d) 511 (1941).

² N. C. CODE ANN. (Michie, 1939) §970. "All such parts of the common law as were heretofore in force and use within this state, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this state and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this state."

³ 4 BL. COMM. *134; See *Scott v. State*, 53 Ga. App. 61, 185 S. E. 131 (1936); *The Case of Barretery*, 8 Co. 36b, 77 Eng. Rep. 528; CO. LIT. 368; HAWK., P. C. (1788) c. 81, §1; 1 RUSSELL, CRIMES (9th ed. 1877) *266; 1 BOUVIER, LAW DICTIONARY (3rd rev. ed. 1914) 327; BLACK, LAW DICTIONARY (3rd ed. 1933) 196; Brooks, *Champerty and Maintenance in The United States* (1916) 3 VA. L. REV. 421.

Barratry is also an offense of an entirely different sort in the field of maritime law, but this phase is not to be discussed here. See *Waters v. The Merchants' Louisville Insurance Co.*, 11 Pet. 213, 9 L. ed. 691 (1837) and note, 9 L. ed. at 692; *New Orleans Insurance Co. v. Albro Co.*, 112 U. S. 506, 5 S. Ct. 289, 28 L. ed. 809 (1884) and note 28 L. ed. at 809; 1 BOUVIER, LAW DICTIONARY (3rd rev. ed. 1914) 327; BLACK, LAW DICTIONARY (3rd ed. 1933) 196.

At the outset, "barratry," "champerty" and "maintenance" should be distinguished. These three offenses are closely intermingled and akin one to the other.

demeanor at common law,⁴ punishable by fine and imprisonment⁵ plus disbarment for attorneys.⁶ Numerous states have adopted statutes modifying the common law,⁷ and at least one of these has been upheld

"Maintenance" is an officious intermeddling in suits in which the offender has no interest by assisting either party with money or otherwise to prosecute or defend the action against the other. BLACK, LAW DICTIONARY (3rd ed. 1933) 1144; 2 THORNTON, ATTORNEYS AT LAW (1914) 655; Note (1919) 3 MINN. L. REV. 520, 522; Winfield, *History of Maintenance and Champerty* (1935) 35 L. Q. REV. 50. "Champerty" is a bargain made by a stranger to the litigation with one of the parties, whereby the stranger undertakes to carry on the suit at his own risk and cost, and by which he receives part of the subject matter of the litigation as compensation. "Champerty differs from maintenance chiefly in this, that in champerty the compensation to be given for the service rendered is a part of the matter in suit, or some profit growing out of it . . . while in simple maintenance the question of compensation does not enter into the account. . . . In maintenance the interfering party is in no way benefited by the success of the party aided, but simply intermeddles officiously. Thus, every champerty includes maintenance, but not every maintenance is champerty." BLACK, LAW DICTIONARY (3rd ed. 1933) 306. See Smith v. Hartsell, 150 N. C. 71, 63 S. E. 172 (1908); 2 THORNTON, *op. cit. supra* at 653; Brooks, *loc. cit. supra*; Notes (1897) 11 HARV. L. REV. 192, (1904) 18 HARV. L. REV. 222, (1919) 3 MINN. L. REV. 520. "Barratry is the frequent stirring up of suits and quarrels, while only one such act would be maintenance." Winfield, *loc. cit. supra*; Note (1919) 3 MINN. L. REV. 520.

It is doubtful whether champerty and maintenance were offenses at common law or whether they were created by early statutes. Many states, including North Carolina, hold to the former view and conclude that being part of the common law they are still misdemeanors in the absence of statute. *Munday v. Whissenhunt*, 90 N. C. 458 (1884); *Barnes v. Strong*, 54 N. C. 100 (1853); *Martin v. Clarke*, 8 R. I. 389 (1866); 4 BL. COMM. *134; Brooks, *loc. cit. supra*. See *Thompson v. Reynolds*, 73 Ill. 11 (1874). Other states reason either that these offenses were created by early statutes and were not adopted as part of the common law of the state, or that the offenses are inconsistent with the present form of government, and thus deny any criminal liability of the champetor or maintenor. *Mathewson v. Fitch*, 22 Cal. 86 (1863); *Duke v. Harper*, 2 Mo. App. 1 (1876); *Sedgwick v. Stanton*, 14 N. Y. 289 (1856); *Fowler v. Callon*, 102 N. Y. 395 (1886); *Schomp v. Schenck*, 40 N. J. L. 195 (1876).

Courts refuse to enforce barratrous and champertous contracts, without regard to the number of acts. *Brush v. Carbondale*, 229 Ill. 144, 82 N. E. 252 (1907). See *Munday v. Whissenhunt*, 90 N. C. 458 (1884); Notes (1933) 85 A. L. R. 1365, 86 A. L. R. 517; Note 13 *infra*.

⁴ *Lucas v. Pico*, 55 Cal. 126 (1880); *Burton's Case*, Cro. Eliz. 148, 78 Eng. Rep. 405; *Chapman's Case*, Cro. Car. 340, 79 Eng. Rep. 898; WINFIELD, HISTORY OF CONSPIRACY AND ABUSE OF LEGAL PROCEDURE (1921) 200, 205; 9 HALSBURY, LAWS OF ENGLAND (1909) 499; ARCHBOLD, CRIMINAL PLEADING, EVIDENCE AND PRACTICE (30th ed. 1938) 1231; CLARK AND MARSHALL, CRIMES (4th ed. 1940) 607; HAWK, P. C. (1788) c. 81, §10; Note (1909) 69 CENT. L. J. 117. But see *Bentinck v. Franklin*, 38 Tex. 458, 472 (1873).

⁵ 4 BL. COMM. *134; 2 ARCHBOLD, CRIMINAL PROCEDURE (8th ed. 1877) 1857; 1 RUSSELL, CRIMES (9th ed. 1877) *266; HAWK, P. C. (1788) c. 81, §14.

⁶ *Alwin's Case*, Style, 483, 82 Eng. Rep. 881; 4 BL. COMM. *134; 2 ARCHBOLD, CRIMINAL PROCEDURE (8th ed. 1877) 1857; 1 RUSSELL, CRIMES (9th ed. 1877) *266; HAWK, P. C. (1788) c. 81, §14. Formerly, in England, an attorney who practiced before the court after having been convicted of barratry, could be summarily sentenced to seven years penal servitude. 9 HALSBURY, LAWS OF ENGLAND (1909) 499; ARCHBOLD, CRIMINAL PLEADING, EVIDENCE AND PRACTICE (30th ed. 1938) 1231; 1 RUSSELL, *loc. cit. supra*.

⁷ ARIZ. CODE ANN. (1939) §43-3301; CAL. PENAL CODE (Deering, 1937) §158; COLO. STAT. ANN. (1935) §181; GA. CODE (1933) §9-9901 *et seq.*, §26-4701; IDAHO CODE (1932) §17-1012 *et seq.*; ILL. STAT. (Smith-Hurd) ch. 38, §65; BURNS' IND. STAT. (1933) §10-3108; KAN., GEN. STAT. (1935) §21-745; FLACK'S ANN. CODE MD. (1939) Art. 27, §14 *et seq.*; MASON'S MINN. STAT. (1927) §§9979, 10040;

as constitutional by the United States Supreme Court.⁸ Under the common law rule, now recognized as in force in this state, the offense consists of the practice, by lawyer or layman,⁹ of stirring up civil or criminal¹⁰ litigation between others, whether on just (which seems to be the situation in the principal case) or unjust grounds,¹¹ when the object of promoting such suits is for oppressive or selfish purposes, or for pecuniary gain to the barrator.¹² Of course, if the sole object of promoting such litigations is the attainment of public justice or private right, it is not barratry¹³—the motive of the alleged barrator in bringing the suits being the controlling factor. There is some authority for the position that it is barratrous for one to institute a number of groundless suits of his own with the intent to harass and oppress the defendant,¹⁴ but this is controverted.¹⁵ However, an attorney cannot be guilty for conducting false suits at the behest of clients when the attorney had no part in instigating their commencement.¹⁶ Since the crime consists of

MO. STAT. ANN. (1932) §3926; REV. CODE MONT. (1935) §10936 *et seq.*; COMP. STAT. NEBR. (1929) §§28-739, 28-716; NEV. COMP. LAWS (1929) §10051; 39 MCKINNEY'S CONSOL. LAWS OF N. Y. (1938) §320 *et seq.*; COMP. LAWS OF N. D. (1913) §9408 *et seq.*; PAGE'S OHIO GEN. CODE (1939) §12847; 21 OKLA. STAT. ANN. (1937) §550 *et seq.*; PURDON'S PENNA. STAT. (1930) §171; S. D. CODE (1939) §13.1252; WILLIAM'S TENN. CODE (1934) §11108 *et seq.*; TEX. CONST. ART. XVI, §28; VERNON'S PENAL CODE OF TEXAS (1925 Rev.) Art. 430; REV. STAT. UTAH (1933) §103-26-43 *et seq.*; PUB. LAWS VT. (1933) §8665; REM. REV. STAT. WASH. (1932) §2370; WIS. STAT. (1941) §348.325. *See* 2 THORNTON, ATTORNEYS AT LAW (1914) 654; Brooks, *Champerty and Maintenance in The United States* (1916) 3 VA. L. REV. 421. Under the Texas statute, *supra*, the common law has been so modified that in *Ackerman v. State*, 124 Tex. Cr. App. 260, 61 S. W. (2d) 116 (1933) an attorney was fined only five dollars upon a conviction for barratry. *See also* cases cited note 6 *supra*.

⁸ *McCloskey v. Tobin*, 252 U. S. 107, 40 S. Ct. 306, 64 L. ed. 481 (1919) upholding the Texas statute (see note 7 *supra*).

⁹ *State v. Chitty*, 1 Bailey Law (S. C.) 379 (1830); *Rex v. —*, 3 Mod. 97, 87 Eng. Rep. 62; Brooks, *Champerty and Maintenance in The United States* (1916) 3 VA. L. REV. 421.

¹⁰ *State v. Chitty*, 1 Bailey Law (S. C.) 379 (1830).

¹¹ *State v. Chitty*, 1 Bailey Law (S. C.) 379 (1830); *Scott v. State*, 53 Ga. App. 61, 185 S. E. 131 (1936).

¹² *State v. Chitty*, 1 Bailey Law (S. C.) 379 (1830); CLARK AND MARSHALL, CRIMES (4th ed. 1940) 607.

¹³ *State v. Chitty*, 1 Bailey Law (S. C.) 379 (1830); CLARK AND MARSHALL, CRIMES (4th ed. 1940) 607. In *Gunnels v. Atlanta Bar Association*, 191 Ga. 366, 12 S. E. (2d) 602 (1940) it was held not barratry under statute for bar association to offer its services gratuitously to those caught in the toils of usurious money-lenders. In *Brush v. Carbondale*, 229 Ill. 144, 82 N. E. 252 (1907) where attorney paid costs and expenses of a test case and after recovery sued client on the contract of employment, who defended that the contract was barratrous and unenforceable, the court said that the attorney was not engaged in stirring up strife and litigation, but that what he was doing was of interest to all the citizens of the community, and allowed recovery on the contract.

¹⁴ *State v. Chitty*, 1 Bailey Law (S. C.) 379 (1830); HAWK., P. C. (1788) c. 81, §3.

¹⁵ WINFIELD, HISTORY OF CONSPIRACY AND ABUSE OF LEGAL PROCEDURE (1921) 200, 207; 2 WORDS AND PHRASES, FIRST SERIES (1904) 1312, citing 4 VIN. ABR. 208. *See* 1 RUSSELL, CRIMES (9th ed. 1877) *266.

¹⁶ WINFIELD, *op. cit. supra* note 15, at 208; HAWK., P. C. (1788) c. 81, §4;

the *practice* of stirring up litigation, one act is insufficient;¹⁷ it seems to be firmly established that three such acts must be shown.¹⁸ An indictment charging defendant as a "common barrator" is sufficient,¹⁹ and need not set out the specific acts to be proved. However, defendant is entitled to a bill of particulars to enable him to formulate his defense, and the prosecution may prove only those acts set out in this bill.²⁰

The decision in the instant case has far-reaching possibilities in strengthening the capacity of the courts and of the bar to deal with modern barrators, better known as "ambulance chasers." Canon 28 of the American Bar Association Canons of Professional Ethics,²¹ provides that ". . . Stirring up strife and litigation is not only unprofessional, but is indictable at common law. . . ." It is well settled that an attorney may be suspended or disbarred for such practices, either under specific statutes or under the power of the court to discipline attorneys practicing before it.²² Even under the North Carolina State Bar Act,²³ it is recognized that the Supreme and Superior Courts retain their power to disbar attorneys,²⁴ and this has been done in open court upon a conviction for a sexual crime.²⁵ Under the common law an attorney could be disbarred on conviction of barratry.²⁶ North Carolina has adopted the common law offense, and under C. S. §4173²⁷ the common law pun-

RUSSELL, *loc. cit. supra* note 15; 1 BOUVIER, LAW DICTIONARY (3rd rev. ed. 1914) 327.

¹⁷ Comm. v. Davis, 11 Pick. (Mass.) 432 (1831); Voorhees v. Dorr, 51 Barb. (N. Y.) 580 (1868); 4 BL. COMM. *135; RUSSELL, *loc. cit. supra* note 15; BOUVIER, *loc. cit. supra* note 16; HAWK., P. C. (1788) c. 81, §5.

¹⁸ Comm. v. McCulloch, 15 Tyng (Mass.) 227 (1818); State v. Noell, 220 Mo. App. 883, 295 S. W. 529 (1927); RUSSELL, *loc. cit. supra* note 15; BOUVIER, *loc. cit. supra* note 16.

¹⁹ Comm. v. Davis, 11 Pick. (Mass.) 432 (1831); State v. Chitty, 1 Bailey Law (S. C.) 379 (1830); The Case of Barrettry, 8 Co. 36b, 77 Eng. Rep. 528; 4 BL. COMM. *135; 9 HALSBURY, LAWS OF ENGLAND (1909) 499; 1 RUSSELL, *loc. cit. supra* note 15; HAWK., P. C. (1788) c. 81, §§5, 11; WINFIELD, *loc. cit. supra* note 15. See Stratton v. Comm., 10 Metc. (Mass.) 217 (1845); Comm. v. Tubbs, 1 Cush. (Mass.) 2 (1848); State v. Noell, 220 Mo. App. 883, 295 S. W. 529 (1927).

²⁰ State v. Chitty, 1 Bailey Law (S. C.) 379 (1830); Comm. v. Davis, 11 Pick. (Mass.) 432 (1831); HALSBURY, *loc. cit. supra* note 19; RUSSELL, *loc. cit. supra* note 15; HAWK., P. C. (1788) c. 81, §13.

²¹ Adopted by The North Carolina State Bar, 205 N. C. 853, 873 (1933). See (1937) 15 N. C. L. REV. 330, 332; Note 29 *infra*.

²² See collection of cases in Note (1931) 73 A. L. R. 401.

²³ N. C. PUB. LAWS (1933) c. 210; N. C. CODE ANN. (Michie, 1939) §215(1) *et seq.*

²⁴ N. C. CODE ANN. (Michie, 1939) §215(19); *In re Brittain*, 214 N. C. 95, 197 S. E. 705 (1938); Attorney-General v. Gorson, 209 N. C. 320, 183 S. E. 392 (1935) *cert. denied* 298 U. S. 662, 56 S. Ct. 752, 80 L. ed. 1387 (1935); Attorney-General v. Winburn, 206 N. C. 923, 175 S. E. 498 (1934); State v. Spivey, 213 N. C. 45, 195 S. E. 1 (1937); Note (1938) 16 N. C. L. REV. 377.

²⁵ State v. Spivey, 213 N. C. 45, 195 S. E. 1 (1937).

²⁶ See note 6 *supra*.

²⁷ N. C. CODE ANN. (Michie, 1939) §4173. "All misdemeanors, where a specific punishment is not prescribed shall be punished as misdemeanors at common law. . . ."

ishment governs. Therefore, upon the conviction of an attorney for barratry, the Superior Court could, as part of the sentence, order the convicted attorney's license revoked. Should the Superior Court fail to do so, the Council of the State Bar could disbar the guilty lawyer for "commission of a criminal offense showing professional unfitness"²⁸ as well as for "violation of any of the canons of ethics . . . adopted . . . by the council of the North Carolina state bar."²⁹

P. DALTON KENNEDY, JR.

Justices of the Peace—Effect of Interest in Fees on Jail Sentence

In *In Re Steele*¹ the North Carolina Supreme Court decided that habeas corpus was not available to test the constitutionality of our justice of the peace system, whereby in a criminal case, the justice receives his fee only in the event of conviction.

In this case, *S* appeared before a justice of the peace in Rockingham, North Carolina, in answer to a warrant charging him with public drunkenness. *S* pleaded guilty, and the justice ordered that he be imprisoned for thirty days. Fourteen days later *S* filed a petition for a writ of habeas corpus before the judge of the Superior Court in the county in which *S* was imprisoned. The judge of the Superior Court held that "the proceedings and trial before John H. Yates, justice of the peace, of Eldon Steele were unconstitutional and void." The judgment of the Superior Court was based on the conclusion that there was a denial of due process of law since the justice of the peace had a direct pecuniary interest in the conviction, one dollar of his compensation being dependent on costs collected from this defendant upon conviction. For the justice would have received no fee at all if the defendant had been acquitted. The Supreme Court, in a review of the decision by certiorari, held that the judgment of the justice of the peace was not a denial of due process for if *S* had not pleaded guilty he could have appealed and had a trial *de novo* in the Superior Court. Thus the court distinguished the case from *Tumey v. Ohio*.² The court said, moreover, that "even if the disqualification of the judge be conceded, by the clear weight of authority the effect would be to render his decision voidable and not void."³ Finally, the court said that there was authority for the position that *S* had waived the disqualification by not making seasonable objection at the outset of the trial.

The United States Supreme Court, in 1927, dealt with a problem

²⁸ N. C. CODE ANN. (Michie, 1939) §215(11), clause 1.

²⁹ N. C. CODE ANN. (Michie, 1939) §215(11), clause 6.

¹ *In Re Steele*, 220 N. C. 685, 18 S. E. (2d) 132 (1942).

² *Tumey v. Ohio*, 273 U. S. 510, 47 S. Ct. 437, 71 L. ed. 479 (1927).

³ *In Re Steele*, 220 N. C. 685, 689, 18 S. E. (2d) 132, 135 (1942).

similar to this in *Tumey v. Ohio*.⁴ There, after a trial on the merits, the judge (a mayor) fined the defendant one hundred dollars. Out of the costs imposed on the defendant the judge received a twelve dollar fee, and the village, of which he was executive head, received half the fine. The judge would have received no fee had the defendant been acquitted. It was shown that the defendant had objected to the judge on grounds of interest at the outset of the trial, that there was no provision in the Ohio law for jury trial in such a case, and that appellate review was confined to questions of law. The Supreme Court said: "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law."⁵

In the course of the *Tumey* decision, Chief Justice Taft mentioned a number of states in which prevailed the system of compensating the judges of inferior courts by fees derived from costs paid by convicted defendants.⁶ In all but one of these states the problem of the validity of a conviction by such courts has been reviewed since the *Tumey* case. The decisions have differed in result. Almost all of the courts have agreed that such pecuniary interest is sufficient to disqualify the judge. But some have held, as does the North Carolina Court in the instant case, that the right to have a trial *de novo* on appeal removes the taint of unconstitutionality; some have held that the conviction is voidable and that failure to raise seasonable objection will constitute a waiver; and others have held that the conviction is absolutely void.

In the first group, *i.e.* those which have held that the right to a trial *de novo* immunized the irregularity of the conviction before the disqualified judge, are Arkansas,⁷ Indiana,⁸ Mississippi,⁹ and Virginia.¹⁰ A U. S. District Court in Kentucky¹¹ has also reached this result; and the Supreme Court of New Mexico has approved it by way of dictum.¹² North Carolina, in the instant case, adopts this view of the law.¹³

⁴ *Tumey v. Ohio*, 273 U. S. 510, 47 S. Ct. 437, 71 L. ed. 749 (1927).

⁵ *Tumey v. Ohio*, 273 U. S. 510, 532, 47 S. Ct. 437, 444, 71 L. ed. 749, 758 (1927).

⁶ *Tumey v. Ohio*, 273 U. S. 510, 526, 47 S. Ct. 437, 442, 71 L. ed. 749, 756 (1927).

⁷ *Hill v. State*, 174 Ark. 889, 298 S. W. 321 (1927).

⁸ *Cole v. Wheely*, 206 Ind. 461, 190 N. E. 56 (1934); *Harding v. Minas*, 206 Ind. 661, 190 N. E. 862 (1934); *State v. Schelton*, 205 Ind. 416, 186 N. E. 772 (1933).

⁹ *Hitt v. State*, 149 Miss. 724, 115 So. 880 (1928); *Foot v. State*, 115 So. 886 (Miss. 1928); *Jones v. State*, 115 So. 886 (Miss. 1928).

¹⁰ *Brooks v. Potomac*, 149 Va. 427, 141 S. E. 249 (1928).

¹¹ *Ex Parte Meeks*, 20 F. (2d) 543 (W. D. Ky. 1927).

¹² *State v. Gonzales*, 43 N. M. 498, 95 P. (2d) 673 (1940).

¹³ *In Re Steele*, 220 N. C. 685, 686, 18 S. E. (2d) 132, 134 (1942).

The theory employed by these states was thus stated by the Mississippi court: "Whatever error was committed by the justice of the peace in his view of the law, or his determination of the facts was cured by a full, free, fair, impartial *de novo* trial."¹⁴ The Federal District Court¹⁵ took the view that an act of the state was being looked at, and when such was the case the question involved was whether there was a denial of due process by the state. That, said the court, is determined not merely by the result in one judicial tribunal of the state, but the whole procedure open to the accused under state law must be examined for the purpose of determining whether the state law has furnished the means by which the wrong done in one tribunal may be corrected in another. Both the Mississippi and the Federal courts were discussing the right of an accused to habeas corpus when convicted by a judge who had a pecuniary interest in the conviction.

It is submitted that these courts have taken an unrealistic approach to the problem. Two unfortunate results follow such a holding. The first is that the mere availability of a trial *de novo* on appeal cures all irregularity in the inferior court by effectively immunizing the inferior court against correction except on appeal. The second unfortunate result is that in most cases the type of persons usually convicted before a justice of the peace cannot afford an appeal and are thus forced to accept the judgment of the prejudiced judge. But this does not justify the decision of the case by an interested judge. As was said in a West Virginia case: "It is ordinarily cheaper to pay a moderate fine than to pay the expenses attendant upon appeal, for which reason many an innocent man has submitted to an unjust decision in an inferior court. Right of appeal does not meet the situation. The constitution requires that the accused shall be tried before a fair and impartial tribunal in the first instance where he will not face the alternative of paying an unjust fine or of resorting to the delay, annoyance, and expense of appeal."¹⁶

The second group of cases reviewing the effect of *Tumey v. Ohio* adopts the theory that a judgment by an interested judge is merely voidable and not void; and that failure seasonably to object waives the irregularity. The states in this group are Arkansas,¹⁷ Kentucky,¹⁸ Mississippi,¹⁹ Ohio,²⁰ and West Virginia.²¹ This result has also been

¹⁴ *Hitt v. State*, 149 Miss. 724, 728, 115 So. 880, 884 (1928).

¹⁵ *Ex Parte Meeks*, 20 F. (2d) 543 (W. D. Ky. 1927).

¹⁶ *Williams v. Brannen*, 116 W. Va. 1, 3, 178 S. E. 67, 69 (1935).

¹⁷ *Washington Fire Ins. Co. v. Hogan*, 213 S. W. 7 (Ark. 1919).

¹⁸ *Pinkleton v. Lueke*, 265 Ky. 84, 90 S. W. (2d) 1103 (1936); *Martin v. Wyatt*, 225 Ky. 212, 7 S. W. (2d) 1048 (1928); *Wager v. Sizemore*, 222 Ky. 306, 300 S. W. 918 (1928); *Adams v. Slavin*, 225 Ky. 136, 7 S. W. (2d) 836 (1928).

¹⁹ *Bryant v. State*, 146 Miss. 539, 112 So. 676 (1927).

²⁰ *State ex rel. Bowman v. Board of Commissioners*, 124 Ohio 174, 177 N. E.

reached by the Tenth United States Circuit Court of Appeals,²² and has been approved by dictum in New Mexico.²³ It became necessary for the North Carolina Court in the instant case to follow the majority rule and hold that the judgment of the justice of the peace was merely voidable. For the jurisdiction of the Superior Court in appeals from a justice of the peace is derivative;²⁴ and hence, if the judgment of the justice of the peace were void the Superior Court could gain no greater jurisdiction. Although not necessary to the decision, the court in the instant case expressed the view that the accused had waived the disqualification of the justice.²⁵

It will be noticed that there is some overlapping between the two groups. Some of the states which appear in the first group also appear in the second group. This can perhaps be explained by the fact that in not all of the cases even in the same state is a judgment by the same inferior court being dealt with, and that possibly appeal with a trial *de novo* lay from one court and not from another. This would explain the absence of reference to the right of appeal in some cases.²⁶

Undoubtedly the great weight of authority establishes the proposition that, at common law, the acts of a disqualified judge are not mere nullities; they are simply erroneous and subject to be reversed or avoided on proper application, but cannot be impeached collaterally.²⁷ A distinction is drawn between jurisdiction and disqualification.²⁸ By the majority rule a judgment rendered without jurisdiction is void and subject to collateral attack. The right to have a disinterested judge hear the case, however, is a personal privilege (according to the majority theory), and a judgment rendered by an interested judge is merely erroneous and not subject to collateral attack. In the West Virginia case of *State v. Simmons* it was said: "In considering the problem

271 (1931); *State ex rel. Atcherson v. Thatcher*, 124 Ohio St. 64, 176 N. E. 883 (1931); *Stephenson v. State*, 119 Ohio St. 352, 164 N. E. 359 (1928); *Tari v. State*, 117 Ohio St. 481, 159 N. E. 594 (1927).

²¹ *State v. Simmons*, 185 S. E. 417 (W. Va. 1936).

²² *Willis v. Scott*, 40 F. (2d) 328 (C. C. A. 10th, 1929); *Owens v. Daney*, 36 F. (2d) 882 (C. C. A. 10th, 1929).

²³ *State v. Gonzales*, 43 N. M. 498, 95 P. (2d) 673 (1940).

²⁴ *McLarnin v. McIntyre*, 167 N. C. 350, 88 S. E. 627 (1914); *Stacey Cheese Co. v. Pipkin*, 155 N. C. 394, 71 S. E. 442 (1911).

²⁵ *In Re Steele*, 220 N. C. 685, 689, 18 S. E. (2d) 132, 135 (1942).

²⁶ For instance, in *Hitt v. State*, 174 Ark. 889, 298 S. W. 321 (1927), which relied on the immunizing effect of a trial *de novo*, the appeal was from a mayor's court, while in *Washington Fire Ins. Co. v. Hogan*, 213 S. W. 7 (Ark. 1919), which contained no reference to a right of a trial *de novo*, the appeal was from a county court.

²⁷ *Willis v. Scott*, 40 F. (2d) 328 (C. C. A. 10th, 1930); *Owens v. Daney*, 36 F. (2d) 882 (C. C. A. 10th, 1929); *Tari v. State*, 117 Ohio St. 471, 159 N. E. 594 (1927); *State v. Simmons*, 185 S. E. 417 (W. Va. 1936); Note (1919) 5 A. L. R. 1585.

²⁸ *Carr v. Duhme*, 167 Ind. 76, 78 N. E. 322 (1906); *Pinkleton v. Lueke*, 265 Ky. 84, 95 S. W. (2d) 1103 (1936).

herein presented, there must be borne in mind the distinction between a situation wherein there is presented a question of the court's jurisdiction of the subject matter, and a situation involving merely the personal disqualification of a judge or a justice. When a court presumes to act in a given case without jurisdiction of the subject matter thereof, the attempted judicial action is void. . . . But jurisdiction . . . is not the question in the instant case, for, clearly, justices have jurisdiction of offenses such as (are) presented here. The pertinent question here is in respect of the qualification of the justice."²⁹

There is authority, however, for the proposition that a judgment rendered by an interested judge is void. In an early Michigan case it was said: "No judge can sit in his own cause. Should he do so the decree rendered by him in his own favor would be utterly void. If he cannot sit, his seat in a judicial sense is vacant, and his acts are without judicial sanction."³⁰ Cooley maintains that even the legislature is unable to empower a party to sit in his own cause. He says: "The judge acting in such a case is not simply proceeding irregularly, but he is acting without jurisdiction."³¹

Where there is a constitutional prohibition against an interested judge sitting in a case, or where there is a statute which provides that a certain interest disqualifies a judge, it has been almost uniformly held that actions by such judge are void.³² It is difficult to see why actions in violation of such a constitutional limitation, or in violation of such a statute, should be void, while actions in violation of the general constitutional requirement for due process of law ("law of the land" in North Carolina)³³ should be merely voidable.³⁴ In most of those states which hold the acts of an interested judge to be merely voidable the disqualification of the judge is conceded—a disqualification based on the inability of the judge to give a fair trial. Yet it has been held that one of the indispensable elements of due process is a fair and impartial trial. Thus it appears that a concession of the disqualification of the judge is a concession of denial of due process.

Further, it has been almost unanimously held by those courts which have said that the judgment of an interested judge is voidable that the

²⁹ State v. Simmons, 185 S. E. 417, 418 (W. Va. 1936).

³⁰ Horton v. Howard, 79 Mich. 642, 644, 44 N. W. 1112, 1114 (1890).

³¹ COOLEY, CONSTITUTIONAL LIMITATIONS (4th ed. 1878) 517.

³² Horton v. Howard, 79 Mich. 642, 44 N. W. 1112 (1890); *Ex Parte Kelly*, 111 Tex. Crim. 57, 10 S. W. (2d) 728 (1928); *Ex Parte Binney*, 14 S. W. (2d) 63 (Texas 1928). *Contra*: Bryant v. State, 146 Miss. 539, 112 So. 676 (1927).

³³ NORTH CAROLINA CONSTITUTION, Art. I, §17.

³⁴ Tumey v. Ohio, 273 U. S. 510, 523, 47 S. Ct. 437, 441, 71 L. ed. 749, 754 (1927) ("But it certainly violates the fourteenth amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, pecuniary interest in reaching a conclusion against him in his case.").

disqualification of the judge could be waived.³⁵ This seems to be the general rule; and, although there are statements that due process cannot be waived,³⁶ many constitutional provisions have been held to be subject to waiver.³⁷

The question arises, however, as to whether the court was correct in saying that the defendant in the instant case had waived the disqualification of the trial judge. It is true that he pleaded guilty. That fact alone, however, should not constitute a waiver³⁸ of, nor should it detract from, the importance of a fair and impartial judge.³⁹ A citizen ought not to be deprived of due process of law, though ever so guilty—if he could be so deprived mob violence would be excused.⁴⁰

The court in the instant case bases the waiver on the failure of the accused to interpose seasonable objection. The Court says: "There is also authority for the position that . . . a failure to raise objection at the trial, when the party complaining had *full knowledge* of the disqualification constitutes a waiver."⁴¹

One of the essential elements of waiver is knowledge.⁴² No one can waive a right of which he is ignorant, for waiver is an intentional relinquishment of a known right. In a recent case⁴³ the Supreme Court of

³⁵ *Willis v. Scott*, 40 F. (2d) 328 (C. C. A. 10th, 1930); *Owens v. Daney*, 36 F. (2d) 882 (C. C. A. 10th, 1929); *Washington Fire Ins. Co. v. Hogan*, 213 S. W. 7 (Ark. 1919); *Pinkelton v. Lueke*, 265 Ky. 84, 95 S. W. (2d) 1103 (1936); *Martin v. Wyatt*, 225 Ky. 212, 7 S. W. (2d) 1048 (1928); *Wager v. Sizemore*, 222 Ky. 306, 300 S. W. 918 (1928); *Adams v. Slavin*, 225 Ky. 136, 7 S. W. (2d) 836 (1928); *Bryant v. State*, 146 Miss. 539, 113 So. 676 (1927); *Tari v. State*, 117 Ohio St. 481, 159 N. E. 594 (1927); *State v. Simmons*, 117 W. Va. 326, 185 S. E. 417 (1936).

³⁶ *Simons v. U. S.*, 119 F. (2d) 539 (C. C. A. 9th, 1941); Note (1928) 23 *ILL. L. REV.* 394, 396.

³⁷ *In Re Steele*, 220 N. C. 685, 689, 18 S. E. (2d) 132, 135 (1942); *Bates v. Commonwealth*, 205 Ky. 832, 266 S. W. 651 (1924) (the right to be present in court in a misdemeanor case may be waived); *Phipps v. Commonwealth*, 205 Ky. 832, 266 S. W. 654 (1924) (the right to a trial by a jury of twelve men in a misdemeanor case may be waived); *Bonnor v. Commonwealth*, 180 Ky. 338, 202 S. W. 676 (1918) (the right of the accused to meet the witness against him face to face may be waived); *SEDGWICK, CONSTRUCTION OF CONSTITUTIONAL AND STATUTORY LAW* (2d ed. 1874) 88.

³⁸ Although in North Carolina the effect of a plea of guilty is to waive jury trial, it may be argued that it does not waive the right to have a fair and impartial judge. When there is a plea of guilty the jury's function is already substantially performed; hence there is no great harm done to the accused by holding that the jury has been waived. The judge, however, has important functions to perform regardless of the plea, and, for that reason, the waiver of the judge should be expressed more specifically than by a mere plea of guilty.

³⁹ *Tumey v. Ohio*, 273 U. S. 510, 535, 47 S. Ct. 437, 445, 71 L. ed. 749, 759 (1927) ("No matter what the evidence was against him [the accused], he had a right to have an impartial judge").

⁴⁰ *Commonwealth v. O'Keefe*, 298 Pa. 169, 148 Atl. 73 (1929).

⁴¹ *In Re Steele*, 220 N. C. 685, 689, 18 S. E. (2d) 132, 135 (1942).

⁴² *Bernhamer v. State*, 123 Ind. 577, 24 N. E. 509 (1899); *Yazoo & Mississippi Valley Ry. Co. v. Kirk*, 102 Miss. 41, 58 So. 710 (1912); *Jeffers v. Jeffers*, 89 S. C. 244, 71 S. E. 810 (1911); Note (1928) 23 *ILL. L. REV.* 394.

⁴³ *Johnson v. Zerbst*, 304 U. S. 458, 58 S. Ct. 1019, 82 L. ed. 1461 (1938).

the United States remanded to a federal district court a petition for a writ of habeas corpus in order for the district court to determine whether or not there had been an intelligent waiver of a constitutional right. In that case a layman had proceeded with his own defense "about as well as the average layman." The record was conflicting as to whether he had requested counsel, but there was no doubt that he had been without counsel. It was held that a failure to protest this deprivation of a constitutional right did not constitute a waiver per se. The Court said: "It has been pointed out that the courts indulge in 'every reasonable presumption against waiver of fundamental rights' and that we 'do not presume acquiescence in the loss of fundamental rights.' The determination of whether there has been an intelligent waiver . . . must depend in every case upon the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused."⁴⁴

It is submitted that the waiver idea of the North Carolina Court in the *Steele* case represents a closer adherence to administrative convenience than to the more humane view of the merits entertained by the United States Supreme Court. It is difficult to see how it could be said that the accused, a seventeen-year-old youth,⁴⁵ without the benefit of counsel, knowingly waived his right to a fair and unprejudiced judge.

In the third group of cases, reviewing the effect of *Turney v. Ohio*, it has been held that decisions by judges having a direct interest in the result are void and subject to collateral attack. Texas⁴⁶ and Michigan⁴⁷ have reached this result along with at least three Federal courts⁴⁸ in Kentucky and Oklahoma. One West Virginia case seems to indicate that that state at one time considered such a judgment void;⁴⁹ but this case seems to have been directly overruled, and evidently that state now regards such judgments as merely voidable.⁵⁰ There is either a constitutional or a statutory provision disqualifying a judge for interest in each of the states (except West Virginia) which hold that the judgment is void. As pointed out above, it is difficult to see why, if this result should follow violation of such a constitutional or statutory provision, a

⁴⁴ *Johnson v. Zerbst*, 304 U. S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. ed. 1461, 1466 (1938).

⁴⁵ See *Rudd v. Woolfolk*, 67 Ky. 555, 561 (1868) ("Consent cannot be presumed against one only constructively before the court, nor against minors. . . ." There the court was speaking of consent to the trial of a case by a special judge.).

⁴⁶ *Ex Parte Binney*, 112 Tex. Cr. 38, 14 S. W. (2d) 63 (1928); *Ex Parte Kelly*, 111 Tex. Cr. 57, 10 S. W. (2d) 728 (1928).

⁴⁷ *Bliss v. Tyler*, 149 Mich. 601, 113 N. W. 317 (1907); *Horton v. Howard*, 79 Mich. 642, 44 N. W. 1112 (1890).

⁴⁸ *Ex Parte Hatem*, 38 F. (2d) 226 (C. C. A. 6th, 1930); *Champlin Refining Co. v. Corporation Commission*, 51 F. (2d) 823 (W. D. Okla., 1931); *Ex Parte Baer*, 20 F. (2d) 912 (E. D. Ky., 1912).

⁴⁹ *Williams v. Brannen*, 116 W. Va. 1, 178 S. E. 67 (1935).

⁵⁰ *State v. Simmons*, 185 S. E. 417 (W. Va., 1936).

like result should not also follow violation of a constitutional provision against an unfair or a partial trial such as is encompassed in the due process clause.

Since the *Tumey* decision at least two states have taken legislative action on the problem. In 1928 Kentucky provided that "The fiscal courts of the several counties shall fix a reasonable compensation for county judges for their services in criminal misdemeanor case."⁵¹ West Virginia in 1935 provided that the county should pay all claims of the justice of the peace out of the general fund, and that the costs collected by the justices should go to the county fund.⁵² Nebraska, mentioned by Chief Justice Taft in the *Tumey* case as being one of the states which had the fee system, does not fall into the category of those states which make the compensation of the inferior courts dependent on conviction. The justice of the peace in Nebraska is entitled to his fees from the county if the defendant is either acquitted or fails to pay the costs.⁵³

It is regrettable that the North Carolina Court in the *Steele* case chose to ignore the spirit of the *Tumey* decision. *In Re Steele* presented an opportunity to correct one of the causes for the evils of the justice of the peace system. The administration of the public business in the courts of the justice of the peace has become a scandal.⁵⁴ This is to be expected as long as the present system of compensation remains.⁵⁵ The contingent fee basis of compensation presents the justice with the dilemma that he must convict so many head a month or go bankrupt.

It is to be hoped that the legislature will take cognizance of the abuses which exist, and move in the near future to assure a more impartial tribunal in North Carolina's criminal courts of the first instance by abolishing the system of basing the judge's fees on the number of convictions in his court.

FRED R. EDNEY, JR.

Lis Pendens—Filing and Cross Indexing—Statutory Requirements in North Carolina

In an action to foreclose a recorded deed of trust the plaintiff neglected to file statutory notice of *lis pendens*. While the litigation was

⁵¹ Session Acts, 1928 Session of the Ky. General Assembly, c. 22.

⁵² Acts of Legislature, 1935 (W. Va.) cc. 30, 31, 32.

⁵³ NEBRASKA COMPILED STATUTES (Brown, 1922) §§2400, 10274. And see Note (1940) 15 IND. L. J. 445.

⁵⁴ Battle, *Open Court* (1928) 6 N. C. L. REV. 349. And see McClamroch, *A Discussion of the Justice of the Peace Courts in North Carolina* (1930) 32 N. C. BAR ASSOC. REPORTS 194.

⁵⁵ *Report of the Committee on Justices of the Peace of the North Carolina Bar Association*, (1939) 41 N. C. BAR ASSOC. REPORTS 152; *Report of the Committee on Justices of the Peace of North Carolina*, (1938) 40 N. C. BAR ASSOC. REPORTS 115.

pending the defendant sold the land involved to third parties who had no actual knowledge of either the recorded mortgage or the pending action to foreclose. The North Carolina statute requires all mortgage foreclosure suits to be brought within ten years from the date of the last payment on the mortgage.¹ Though the original action was instituted in apt time the purchasers *pendente lite* were not joined as party defendants until after the lapse of the statutory period. These defendants pleaded the statute of limitations, and maintained that since no formal notice of the institution of the suit had been filed the doctrine of *lis pendens* should not apply to them. But the court found that no formal notice of *lis pendens* was necessary to protect subsequent purchasers, because the recordation of the mortgage itself gave constructive notice of the suit to foreclose. Therefore the purchasers were bound by the foreclosure suit and could not avail themselves of the defense of the statute of limitations.²

The doctrine of *lis pendens* is ancient. The principle was originally found in the Roman civil law and was first clearly formulated in English law by Lord Bacon, but was applied in practice in the courts long before his time.³ The essence of the rule is that whoever purchases property involved directly in a pending litigation from one of the parties thereto is bound by the outcome of that suit just as if he had been joined as an original party.⁴ It is equally applicable at common law and equity.⁵ The rule was first applied to real property. Because of hesitancy of the courts to restrict unduly the flow of commercial transactions there is now a difference of opinion as to whether its operation should be extended. Negotiable instruments are universally recognized as being beyond the scope of the rule⁶ and England has refused to apply it to personal property.⁷ In the majority of American jurisdictions *lis pendens* applies to personal property;⁸ but there has been no North Carolina decision on this point.⁹

¹ N. C. CODE ANN. (Michie, 1939) §437.

² Massachusetts Bonding & Ins. Co. v. Knox, 220 N. C. 725, 18 S. E. (2d) 436 (1942).

³ See Fox v. Reeder, 28 Ohio St. 181, 187 (1875); BENNETT, LIS PENDENS (1887) §§1-11; Note (1932) 12 ORE. L. REV. 68.

⁴ Jarrett v. Holland, 213 N. C. 428, 196 S. E. 314 (1938); Jones v. Williams, 155 N. C. 179, 71 S. E. 222 (1911); Williams v. Kerr, 113 N. C. 306, 18 S. E. 501 (1893); Collingwood v. Brown, 106 N. C. 362, 10 S. E. 868 (1890); Rollins v. Henry, 78 N. C. 342 (1878); Isler v. Brown, 66 N. C. 557 (1872); Baird v. Baird, 62 N. C. 317 (1868).

⁵ Rollins v. Henry, 78 N. C. 342 (1878); Note (1886) 14 Am. Dec. 775.

⁶ County of Warren v. Marcy, 97 U. S. 96, 24 L. ed. 977 (1878); BENNETT, LIS PENDENS (1887) §86; Note (1909) 22 HARV. L. REV. 455.

⁷ Wigram v. Buckley, 3 Ch. 483 (1894); BENNETT, LIS PENDENS (1887) §80; Graubart, *Should Lis Pendens Prevent the Performance of an Executory Contract?* (1940) 44 DICK. L. REV. 59, 61; Note (1932) 12 ORE. L. REV. 68.

⁸ BENNETT, LIS PENDENS (1887) §§81, 82; Notes (1886) 14 Am. Dec. 775, (1934) 8 U. OF CIN. L. REV. 80, 84, *The Application of Lis Pendens to Personality* (1934) 47 HARV. L. REV. 1023, (1932) 12 ORE. L. REV. 68.

⁹ McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE (1929) §345.

The purpose of *lis pendens* is to render court decisions effective. It has its basis in public necessity.¹⁰ Without it any judgment involving the recovery of specific property could be negated by an alienation of the property during the period of litigation.¹¹ The plaintiff might have to bring suit interminably against an endless succession of purchasers *pendente lite*.¹² But the application of the doctrine was severe; bona fide purchasers were subjected to considerable hardship. Purchasers *pendente lite* suffered financial loss through failure to discover suits hidden in the impenetrable mazes of the civil dockets. In an effort to justify the harshness of the rule the courts evolved the theory of constructive notice.¹³ The purchaser was presumed to be acquainted with all litigation in the courts. By searching the dockets he might have found the action affecting the land he proposed to buy. Therefore, being on notice, he bought at his peril and thus brought his losses upon himself.

But the theory of notice as applied to *lis pendens* in the absence of statutes is rather fallacious.¹⁴ *Lis pendens* applied even when it was physically impossible for the purchaser to obtain actual knowledge of the suit.¹⁵ There was no constructive notice of collateral claims which were not litigated, even though they were set forth in the pleadings as clearly as the main issue.¹⁶ The court in the instant case recognizes that the statutory notice of *lis pendens* can be no substitute for recordation. A *lis pendens* notice of a suit to foreclose a mortgage is no notice of the mortgage itself. If the mortgage is unrecorded the purchaser *pendente lite* is considered a purchaser without notice in spite of the so-called "notice" of the *lis pendens*.¹⁷ The principle of *lis pendens*

¹⁰ Jarrett v. Holland, 213 N. C. 428, 196 S. E. 314 (1938); Collingwood v. Brown, 106 N. C. 362, 10 S. E. 868 (1890); Rollins v. Henry, 78 N. C. 342 (1878); Taylor v. Kelly, 56 N. C. 240 (1857) (rule based on policy to prevent alienation of the property by the defendant, hence does not apply to alienation by the plaintiff); Murray v. Ballou, 1 Johns. Ch. 566 (N. Y., 1815); Vickers v. Salyer, 111 Va. 307, 68 S. E. 988 (1910); Newman v. Chapman, 2 Rand. (Va.) 93, 14 Am. Dec. 766 (1823); BENNETT, *LIS PENDENS* (1887) §14; Notes (1935) 20 IOWA L. REV. 476, (1933) 6 SO. CALIF. L. REV. 346.

¹¹ Prior to 1919 the "period of litigation" for the purpose of *lis pendens* in North Carolina extended from the time of filing the complaint until the end of any final rehearing in the Supreme Court. Morgan v. Bostic, 132 N. C. 743, 44 S. E. 639 (1903); Bird v. Gilliam, 125 N. C. 76, 34 S. E. 196 (1899). For collected cases see Notes (1941) 130 A. L. R. 943, (1910) 27 L. R. A. (N.S.) 735, (1907) 10 L. R. A. (N.S.) 443, (1926) 39 HARV. L. REV. 511. Since 1919 the statute requiring cross-indexing of *lis pendens* has provided: "For the purposes of this section an action is pending from the time of cross-indexing the notice." N. C. CODE ANN. (Michie, 1939) §502.

¹² Jarrett v. Holland, 213 N. C. 428, 196 S. E. 314 (1938); Jones v. Williams, 155 N. C. 179, 71 S. E. 222 (1911); Rollins v. Henry, 78 N. C. 342 (1878).

¹³ BENNETT, *LIS PENDENS* (1887) §§17-21.

¹⁴ *Ibid.* But cf. Arrington v. Arrington, 114 N. C. 151, 19 S. E. 351 (1894).

¹⁵ BENNETT, *LIS PENDENS* (1887) §31.

¹⁶ Geishaker v. Pancoast, 57 N. J. Eq. 60, 40 Atl. 200 (1898); Bellamy v. Sabine, 1 De G. & J. 566, 44 Eng. Rep. 842 (1877). *Contra*: Daniel v. Hodges, 87 N. C. 95 (1882). Note (1935) 7 ROCKY MOUNTAIN L. REV. 219.

¹⁷ Simmons v. Fleming, 157 N. C. 389, 72 S. E. 1082 (1911) (unrecorded

should be regarded not as a rule of notice but as a device for maintaining the court's control over property in litigation.

In an attempt to mitigate the harshness of *lis pendens* the great majority of American jurisdictions have adopted the constructive notice theory and have provided by statute for the recordation or registration of notice of the institution of suits. These statutes were intended to provide the purchaser with a record notice of the litigation so that he could more easily guard against buying property which he might lose. Unfortunately the best results have not been achieved. The common law doctrine has not been abolished, and wherever the statutes do not apply the old rules continue in effect.¹⁸ Most of the statutes relate only to land. Some refer to actions "affecting any interest in land," but many apply only to actions "affecting the title to land." The North Carolina statute is of the latter type.¹⁹ Many courts further restrict the scope of the statutes by refusing to apply them in any instance where the purchaser was put on such inquiry that in the exercise of reasonable diligence he might have discovered the pending suit.²⁰ The instant case is the result of such an attitude.

The North Carolina statutes²¹ provide: "In actions affecting the title to real property, the plaintiff . . . or a defendant when he sets up an affirmative cause of action in his answer . . . if it is intended to affect real estate, may file with the clerk of each county in which the property is situated a notice of the pendency of the action . . ." (C.S. 500). "Any party to an action desiring to claim the benefit of a notice of *lis pendens*, whether given formally under this article or in the pleadings filed in the case, shall cause such notice to be cross-indexed by the clerk of the

deed); *Williams v. Kerr*, 113 N. C. 306, 18 S. E. 501 (1893); *Collingwood v. Brown*, 106 N. C. 362, 10 S. E. 868 (1890) (unrecorded deed); *Newman v. Chapman*, 2 Rand. (Va.) 93, 14 Am. Dec. 766 (1823). *Contra*: *Blackwood v. Davidson*, 198 Ark. 1055, 132 S. W. (2d) 799 (1939); *Stone v. Keith*, 218 Ky. 11, 290 S. W. 1042 (1927). Notes (1927) 16 Ky. L. J. 75, (1934) 8 WASH. L. REV. 197.

¹⁸ *Rardin v. Rardin*, 85 W. Va. 145, 102 S. E. 295 (1920); *But cf.* *Collingwood v. Brown*, 106 N. C. 362, 10 S. E. 868 (1890); Note (1921) 10 A. L. R. 306.

¹⁹ For a good summary of the statutes see Note (1935) 20 IOWA L. REV. 476.

²⁰ *Conner v. Caldwell*, 208 Minn. 502, 294 N. W. 650 (1940) (suit to foreclose motor lien); *Palmer v. First National Bank in Rhome*, 77 S. W. (2d) 902 (Tex. 1934) (foreclosure of recorded mortgage); *Holford v. Patterson*, 112 Tex. 410, 257 S. W. 213 (1923) (attachment); *Dick v. Jasper*, 195 Ky. 539, 242 S. W. 834 (1922); *Shumate's Executors v. Crockett*, 43 W. Va. 491, 27 S. E. 240 (1897) (docketed judgments and recorded deed of trust); *Empire Land & Canal Co. v. Engley*, 18 Colo. 388, 33 Pac. 153 (1893) (mechanics lien).

²¹ N. C. CODE ANN. (Michie, 1939) §§500, 501, 502. §503 requires service of summons within sixty days after cross-indexing. §504 provides for cancellation of *lis pendens* notice. The cross-indexing sections, §§501, 502, were at first enacted for Buncombe County only. N. C. PUB. LAWS 1903, c. 472. They were made applicable to the entire state in 1919. N. C. PUB. LAWS 1919, c. 31. The cross-indexing statute is still often referred to as the "Buncombe County law." Note that under §500 the defendant may file a *lis pendens* notice whenever his affirmative defense affects "real estate" and that the word "title" is not used.

superior court in a docket . . . to be called Record of *Lis Pendens* . . .” (C.S. 501). “From the cross-indexing of the notice of *lis pendens* only is the pendency of the action constructive notice to a purchaser or incumbrancer of the property affected thereby. . . . For the purposes of this section an action is pending from the time of cross-indexing the notice.” (C.S. 502).

This language is indeed so plain “that he may run that readeth it.” Nevertheless the North Carolina court has refused to apply the statutory requirements wherever there has been any possibility that the purchaser might have been put on constructive notice or inquiry in some other way.²² Thus under C.S. 500, before the passage of the cross-indexing sections, formal *lis pendens* notice was deemed unnecessary when the action was pending in the same county in which the land was situated. The filing of the complaint in that county was considered sufficient notice.²³ Hence the common law was allowed to continue in force in these cases. It would be better to have the notice filed in every county where the land lies, regardless of where the action is pending,²⁴ and it was felt that the cross-indexing statute would bring this about.²⁵ In *Jarret v. Holland*²⁶ there is dictum that “where the action is instituted in the county in which the land is situated, the action itself is notice to those who seek to deal with the property described in the complaint and no notice of *lis pendens*, under C.S. 500, is required, *except the procedure now provided by C.S. 501.*” But Stacy, C. J., in his concurring opinion in the instant case, reiterates the notion that no notice of *lis pendens* is necessary where the action and the land are in the same county, and applies that idea to the cross-indexing statute. He says that the cross-indexing statute applies only where notice of *lis pendens* is required, and since it is not required where the land and the action are in the same county, it should follow that the cross-indexing statute is equally inapplicable in such a case. C.S. 501 requires cross-indexing wherever any party to an action desires to claim the benefit of a notice of *lis pendens*, “whether given formally under this article *or in the pleadings filed in the case.* . . .” When the action and the land were in the same county the notice of *lis pendens* was previously given in the

²² No formal *lis pendens* notice is necessary where the purchaser has actual notice. *Morris v. Basnight*, 179 N. C. 298, 102 S. E. 389 (1920). Though this is inconsistent with the general spirit of the North Carolina recording act it is not contrary to the terms of the *lis pendens* statute.

²³ *Brinson v. Lacy*, 195 N. C. 394, 142 S. E. 317 (1928) (torrens suit); *Powell v. Dail*, 172 N. C. 261, 90 S. E. 194 (1916); *Lamm v. Lamm*, 163 N. C. 71, 79 S. E. 290 (1913); *Jones v. Williams*, 155 N. C. 179, 71 S. E. 222 (1911); *Arrington v. Arrington*, 114 N. C. 151, 19 S. E. 351 (1894); *Todd v. Outlaw*, 79 N. C. 234 (1878); Note (1931) 71 A. L. R. 1085.

²⁴ See *Collingwood v. Brown*, 106 N. C. 362, 368, 10 S. E. 868, 870 (1890); *Todd v. Outlaw*, 79 N. C. 234, 241 (1878).

²⁵ *McIntosh, North Carolina Practice and Procedure* (1929) §342.

²⁶ 213 N. C. 428, 430, 196 S. E. 314, 316 (1938).

pleadings.²⁷ It would seem that the statute now directly requires cross-indexing in every county. In his quotation of the statute the Chief Justice conveniently omitted the statement as to notice given by the pleadings.²⁸ His concurring opinion may possibly be adopted as the law on this point and as a result every title searcher will be forced to return to examination of the voluminous civil dockets to satisfy himself that the land is not involved in some litigation pending in the same county.

The majority based its decision on the theory that the notice of *lis pendens* was unnecessary in an action to foreclose a recorded mortgage because the recordation of the mortgage was enough to put the purchaser on inquiry, so that through the exercise of reasonable diligence he might have discovered the pending suit. Recordation is absolutely necessary in North Carolina to prevent subsequent purchasers from taking priority. Even actual notice is no substitute.²⁹ Neither is a notice of *lis pendens* of a suit to foreclose a mortgage a sufficient notice to subsequent purchasers of the existence of the unrecorded mortgage itself. Also, if a mortgage is given or a deed executed prior to the commencement of a suit affecting the land, but not recorded until the litigation has begun (with proper *lis pendens* notice filed), the holder thereof is considered a purchaser *pendente lite*.³⁰ This stress on recordation is necessary to carry out the purpose of the recording acts, i.e., to provide one place—the record—to which the public may look to determine the validity of titles.³¹ The Record of Lis Pendens might certainly be called a part of the “record.” The mortgage itself and the suit to foreclose it are two different things. The fact that knowledge of the mortgage might lead to knowledge of the suit does not make for inconsistency between the *lis pendens* statute and the recordation act. One does not destroy the other. Certainly the court should have allowed the legislature to require the recordation of two different things at two different places in the record.³² The result of the instant case is to diminish rather than increase the emphasis usually placed on record notice in this state. The title searcher will now have to go outside the record, i.e., either to the mortgagee or the “multitudinous files of civil actions,” to determine whether a foreclosure suit has been instituted.

All of the North Carolina cases are distinguishable from the prob-

²⁷ In order to give effective notice the pleadings had to contain an adequate description of the land. *Badger v. Daniel*, 77 N. C. 251 (1877).

²⁸ See *Massachusetts Bonding & Ins. Co. v. Knox*, 220 N. C. 725, 731, 18 S. E. (2d) 436, 441 (1942) (concurring opinion).

²⁹ N. C. CODE ANN. (Michie, 1939) §3309; *Dorman v. Goodman*, 213 N. C. 406, 196 S. E. 352 (1938); *Davis v. Robinson*, 189 N. C. 589, 127 S. E. 697 (1925); *Collins v. Davis*, 132 N. C. 106, 43 S. E. 579 (1903).

³⁰ See note 17 *supra*.

³¹ See note 29 *supra*.

³² *Jones v. McNarrin*, 68 Me. 334 (1878).

lem in hand—either because of differences in the fact situations or because they antedate the cross-indexing statute.³³ In other jurisdictions there is authority to support the instant decision by reasoning from analogous fact situations,³⁴ but also almost direct authority to the contrary has been discovered.³⁵ The Arkansas case of *Shouse v. Scovill*³⁶ is almost precisely in point with the instant case—the differences serving only to delineate more clearly the problem involved. In the instant case the title was never actually searched. In the *Shouse* case the title was searched and the purchaser obtained actual knowledge of a recorded mortgage. In Arkansas the mortgagee is required to record part payments on the margin of the record of the mortgage. In Arkansas, as in North Carolina, the statute of limitations on foreclosure suits runs from the time of the last payment after the mortgage was due.³⁷ As no part payment had been registered within the statutory period the Arkansas purchaser considered it safe to buy the land. He did not know that a timely foreclosure action had been instituted and was in the process of litigation, because no notice of *lis pendens* had been filed. Under a *lis pendens* statute of sufficient similarity to the North Carolina act for the two to be interpreted alike,³⁸ the Arkansas court protected the purchaser *pendente lite* and upheld his defense of the statute of limitations. It would seem that this case reaches the more logical result. Though the institution of suit to foreclose a mortgage will keep the lien alive for the purpose of tolling the statute of limitations³⁹ this should only apply as to the parties to the suit, and where no *lis pendens* notice has been filed innocent third-party purchasers should be protected. The suit in such case is not instituted against the purchaser until he is joined as a defendant.⁴⁰ If by that time the statutory period has expired the action should be barred as against the pur-

³³ *Pierce v. Mallard*, 197 N. C. 679, 150 S. E. 342 (1929) (attachment recorded and cross-indexed—property thereby taken in *custodia legis* and no necessity for *lis pendens*); *Threlkeld v. Malcragson*, 198 N. C. 186, 151 S. E. 99 (1929) (suit to collect note secured by mortgage but not to foreclose mortgage itself); *Jones v. Williams*, 155 N. C. 179, 71 S. E. 222 (1911) (suit to foreclose recorded mortgage prior to cross indexing statute and brought in the county where the land lay); see *Massachusetts Bonding & Ins. Co. v. Knox*, 220 N. C. 725, 736, 18 S. E. (2d) 436, 444 (1942) (Mr. Justice Seawell dissenting) and cases cited.

³⁴ See note 20 *supra*.

³⁵ *Blackwood v. Davidson*, 198 Ark. 1055, 132 S. W. (2d) 799 (1939) (foreclosure of vendor's lien); *Jordan v. Hargis*, 156 Ark. 408, 246 S. W. 476 (1923) (mortgage foreclosure); *Perkins v. Oglivie*, 140 Ky. 412, 131 S. W. 200 (1910); *Foster v. Warren*, 39 Cal. (2d) 506, 103 P. (2d) 591, 594 (1940).

³⁶ 200 Ark. 441, 139 S. W. (2d) 240 (1940).

³⁷ Compare N. C. CODE ANN. (Michie, 1939) §2594 with ARK. DIGEST ANN. (Pope, 1937) §9465.

³⁸ ARK. DIGEST ANN. (Pope, 1937) §8959.

³⁹ *Harris v. Davenport*, 132 N. C. 697, 44 S. E. 406 (1903); *Wasson v. Beekman*, 188 Ark. 895, 68 S. W. (2d) 93 (1934).

⁴⁰ *Jones v. Vanstory*, 200 N. C. 582, 157 S. E. 867 (1931); *Hatch v. Alamance R.R. Co.*, 183 N. C. 617, 112 S. E. 529 (1922).

chaser.⁴¹ The plaintiff should lose through his own neglect in not filing proper notice to protect third persons.

The argument advanced by the majority in the instant case that a foreclosure suit is not an action "affecting the title" to land and hence not within the scope of the statute seems illogical. True, North Carolina being a "title theory" jurisdiction, in this state the legal title is recognized as being transferred to the mortgagee, or to the trustee under the deed of trust. The mortgagor retains only an equity of redemption. However, the legal title given to the mortgagee is subject to defeasance by payment of the mortgage and technically the foreclosure suit does more than merely wipe out the equity of redemption, for the relief requested is that the land be sold and the title conveyed to the purchaser. The foreclosure suit, and sale pursuant thereto, renders the title indefeasible and actually transfers it to the purchaser at the sale. To say that the suit does not affect the title⁴² is to place too great, and too inconsistent, an emphasis on technicalities with consequent disregard for the realistic features of the situation.⁴³

When a careful title searcher finds a recorded mortgage he makes a diligent inquiry as to its actual status. He does not rely on the absence of *lis pendens* notice. If the title had been searched in the instant case there is little doubt that the foreclosure suit would have been discovered. On this point the instant case presents only an academic problem and is of little practical significance. As a general rule it is true that whatever puts a person on inquiry is constructive notice to him of all facts which he could have discovered by reasonable investigation pursuant to such inquiry,⁴⁴ but this rule should not have been adhered to in the face of a specific legislative pronouncement of policy.

As a result of the instant case the notice of *lis pendens* is abolished in mortgage foreclosure suits. If the mortgage is unrecorded a *lis pendens* notice of the foreclosure action is immaterial; if the mortgage is recorded the *lis pendens* notice is now unnecessary. But only a relative few of the mortgage foreclosures in this state are obtained by court order. Most of them are consummated under the power of sale contained in the mortgage or deed of trust, and *lis pendens* does not apply to

⁴¹ *Stancil v. Spain*, 133 N. C. 76, 45 S. E. 466 (1903). A purchaser *pendente lite* may get the land by adverse possession. *Fox v. Reeder*, 28 Ohio St. 181 (1875); *Blake v. Heyward*, Bail. Eq. 208 (S. C. 1831). *But cf.* *Parker's Adm'r. v. Clarkson*, 39 W. Va. 184, 19 S. E. 431 (1894) (delay in litigation due to fault of defendant).

⁴² "Title is the means whereby the owner of lands has the just possession of his property." *Horney v. Price*, 189 N. C. 820, 825, 128 S. E. 321, 323 (1925).

⁴³ See *Massachusetts Bonding & Ins. Co. v. Knox*, 220 N. C. 725, 732, 736, 18 S. E. (2d) 436, 442, 444 (1942) (dissenting opinions) and cases cited.

⁴⁴ *Hargett v. Lee*, 206 N. C. 536, 174 S. E. 498 (1934); *Wynn v. Grant*, 166 N. C. 39, 81 S. E. 949 (1914); *Collins v. Davis*, 132 N. C. 106, 43 S. E. 579 (1903); *Bolles v. Chauncey*, 8 Conn. 389 (1831).

such procedures. This, coupled with the established practice of title examiners, diminishes the actual importance of the majority opinion in the instant case. But the concurring opinion of Mr. Chief Justice Stacy to the effect that no cross-indexing is necessary where the land and the action are in the same county will, if adopted, impose a very real burden on title searchers.

The North Carolina court has often said that the doctrine of *lis pendens* is founded on public policy; that it is harsh in its operation whether founded on policy or notice; and that in order to acquire its protection the plaintiff should strictly conform to all its requirements.⁴⁵ New Jersey has gone so far as to say that the statutory requirements for giving notice, being for the protection of the public, cannot be waived; and that failure to file the notice will constitute a valid affirmative defense to the action even though no third parties have been affected.⁴⁶ It is felt that the *Shouse* case, in protecting the innocent purchaser where no *lis pendens* notice was filed, adopted the proper progressive attitude, and that it would have been better if the North Carolina court had given effect to the manifest intention of the legislature. Because of the wide split in the court there is some hope that the instant case will be overruled. It is also believed that the North Carolina statute is too limited by its terms, and should be amended to cover actions affecting any interest in land.

JOHN T. KILPATRICK, JR.

Partition—Tenants in Common—Estoppel

Tenants in common owning a mineral interest in land contracted to lease same for twenty-six years in consideration of lessee's covenant to pay certain royalties during this period. Thereafter the lessee purchased the interest of one of the cotenants. Three years before the lease expired, lessee-tenant instituted suit to have the mineral interest sold for partition. *Held*: Lessee-tenant estopped to demand sale for partition prior to expiration of lease since such sale would destroy lessor-tenant's rights guaranteed under the lease (i.e., payment of royalties).¹

⁴⁵ *Powell v. Dail*, 172 N. C. 261, 90 S. E. 194 (1916); "The rule *lis pendens*, while founded on principles of public policy and absolutely necessary to give effect to the decrees of the Courts, is nevertheless, in many instances, very harsh in its operation; and one who relies upon it to defeat a *bona fide* purchaser must understand that his case is *strictissimi juris*." *Arrington v. Arrington*, 114 N. C. 151, 159, 19 S. E. 351, 354 (1894); *Badger v. Daniel*, 77 N. C. 251 (1877); *Isler v. Brown*, 66 N. C. 557 (1872); see note 10 *supra*; *Notes* (1930) 3 DAK. L. REV. 60, (1929) 7 TEX. L. REV. 481.

⁴⁶ *Workmen's Building & Loan Association of City of Newark v. Hunger*, 12 N. J. Misc. 810, 175 A. 810 (Sup. Ct. 1934).

¹ *Carolina Mineral Co. v. Young*, 220 N. C. 287, 17 S. E. (2d) 119 (1941).

The object of partition proceedings is to enable those who own property as joint tenants or coparceners or tenants in common to sever the common holding and vest in each a sole estate in the land.² Generally, every tenant in common is entitled, as a matter of right, to partition.³ But this right is subject to some qualification. By statute in most, if not all, of the states the court may decree a sale of the land and a division of proceeds instead of partition in kind.⁴ In North Carolina, ordinarily, a tenant in common is entitled to actual partition.⁵ But where actual partition cannot be had without injury to some or all of the parties,⁶ or if property cannot be fairly divided,⁷ the land may be sold for a division of proceeds. Whether the situation demands an actual partition or a sale for partition involves a question of fact for the trial judge, and not an issue of fact for the jury.⁸

In North Carolina, partition has been granted where: one tenant had given a mortgage on his one-half undivided interest;⁹ one tenant had purchased the undivided interest of one of several other tenants;¹⁰ a will devised land to nine tenants in common;¹¹ a trust had been created in the land by one of the tenants (partition sale allowed, and rights of trustee and beneficiaries preserved in that share of proceeds of sale);¹² tenants owned mill (sale for partition ordered because from nature of property it could not be divided without prejudice to interest of all parties);¹³ a tenant was entitled to a homestead against a judgment lien (partition sale allowed, his share of the proceeds reserved and his homestead right therein protected);¹⁴ holder of a life estate

² 4 THOMPSON, REAL PROPERTY (Perm. ed., 1940) §1979.

³ Willard v. Willard, 145 U. S. 116, 12 Sup. Ct. 818, 36 L. Ed. 644 (1892); Roberts v. Jones, 307 Mass. 504, 30 N. E. (2d) 392 (1940) (and cases cited); Hyman v. Edwards, 217 N. C. 342, 7 S. E. (2d) 700 (1940); Talley v. Murchison, 212 N. C. 205, 193 S. E. 148 (1937); Barber v. Barber, 195 N. C. 711, 143 S. E. 469 (1928); Wisely v. Findley, 3 Rand. (Va.) 361, 15 Am. Dec. 712 (1825); 2 TIFFANY, REAL PROPERTY (3rd ed. 1939) §474, n. 78.

⁴ 2 TIFFANY, REAL PROPERTY (3rd ed. 1939) §479, n. 43.

⁵ Hyman v. Edwards, 217 N. C. 342, 7 S. E. (2d) 700 (1940); Talley v. Murchison, 212 N. C. 205, 193 S. E. 148 (1937); Barber v. Barber, 195 N. C. 711, 143 S. E. 469 (1928); Foster v. Williams, 182 N. C. 632, 109 S. E. 834 (1921); Haddock v. Stocks, 167 N. C. 70, 83 S. E. 9 (1914); Tayloe v. Carrow, 156 N. C. 6, 72 S. E. 76 (1911); Gillespie v. Allison, 115 N. C. 542, 20 S. E. 627 (1893); Holmes v. Holmes, 55 N. C. 334 (1856).

⁶ N. C. CODE ANN. (Michie, 1939) §3233.

⁷ Tayloe v. Carrow, 156 N. C. 6, 72 S. E. 76 (1911). As to when sale will be allowed in other jurisdictions, see FREEMAN, COTENANCY (1882) §537.

⁸ Tally v. Murchison, 212 N. C. 205, 193 S. E. 148 (1937); Barber v. Barber, 195 N. C. 711, 143 S. E. 469 (1928); Vanderbilt v. Roberts, 162 N. C. 273, 78 S. E. 156 (1913); Ledbetter v. Pinner, 120 N. C. 455, 27 S. E. 123 (1897).

⁹ Rosten v. Huggins, 216 N. C. 386, 5 S. E. (2d) 162 (1939).

¹⁰ Crawford v. Crawford, 214 N. C. 614, 200 S. E. 421 (1939).

¹¹ Haddock v. Stocks, 167 N. C. 70, 80 S. E. 9 (1914).

¹² Barber v. Barber, 195 N. C. 711, 143 S. E. 469 (1928).

¹³ Holmes v. Holmes, 55 N. C. 334 (1856).

¹⁴ Smith v. Eakes, 212 N. C. 382, 193 S. E. 393 (1937); Holley v. White, 172 N. C. 79, 189 S. E. 1061 (1916); Kelly v. McLeod, 165 N. C. 382, 81 S. E. 455 (1914).

and an owner in fee were cotenants in possession;¹⁵ grantee of husband became a tenant in common with divorced wife;¹⁶ tenant who had made improvements was entitled to have allotted to her the part of property improved;¹⁷ widow's dower had already been allotted in land out of husband's interest as tenant in common (sale for partition allowed);¹⁸ actual partition could not be made because of small number of acres to which each tenant was entitled in the division, thus partition sale allowed.¹⁹

On the other hand, partition in North Carolina has been denied in the following situations: where land was devised to a daughter for life, with remainder to her surviving children (partition denied until after death of life tenant);²⁰ *similiter*, where there was a devise of a life estate to *W*, with a reversionary expectancy in the heirs of the deviser;²¹ during minority of devisees under a will providing that grandchildren hold as tenants in common until the youngest cotenant attain the age of twenty-one.²² Moreover, partition is denied where the tenants in common are not in possession,²³ and a parol partition is not enforced when not followed by possession sufficient to satisfy the requirements of adverse possession.²⁴

No general rule as to when partition will be granted or denied seems deducible from the foregoing holdings. Rather, the results appear to vary with the particular facts of each case. Nevertheless, even though facts exist which ordinarily would result in partition being granted, that right is not so absolute that a cotenant may not, either by his acts or agreements, preclude himself from asserting it.²⁵ It is established that

¹⁵ McEachern v. Gilchrist, 75 N. C. 196 (1876).

¹⁶ McKinnon, Currie & Co. v. Caulk, 167 N. C. 411, 83 S. E. 559 (1914).

¹⁷ Jenkins v. Strickland, 214 N. C. 441, 199 S. E. 612 (1938) (value of land assessed as if no improvements had been made).

¹⁸ Citizens Bank & Trust Co. v. Watkins, 215 N. C. 292, 1 S. E. (2d) 853 (1939) (other tenant in common entitled to sale for partition—for this right could have been enforced against the husband prior to his death, and the same right exists against the widow's dower, since her dower in land is but a continuation of her husband's estate).

¹⁹ Tally v. Murchison, 212 N. C. 206, 193 S. E. 148 (1937).

²⁰ Ex parte Miller, 90 N. C. 625 (1884); Williams v. Hassell, 74 N. C. 434 (1876) (until daughter's death it cannot be known who are the remaindermen).

²¹ Wood v. Sugg, 91 N. C. 93 (1884).

²² Greene v. Stadiem, 198 N. C. 445, 152 S. E. 398 (1935); Blake v. Blake, 118 N. C. 575, 24 S. E. 424 (1896). See note (1921) 14 A. L. R. 1238, 1245.

²³ Spring Green Church v. Thornton, 158 N. C. 119, 73 S. E. 810 (1912); Wood v. Sugg, 91 N. C. 93 (1884); Clemmons v. Drew, 55 N. C. 314 (1856).

²⁴ Tuttle v. Warren, 153 N. C. 459, 69 S. E. 426 (1910).

²⁵ Martin v. Martin, 170 Ill. 639, 48 N. E. 694, 62 Am. St. Rep. 411 (1897); Roberts v. Jones, 307 Mass. 504, 30 N. E. (2d) 392 (1940) (and cases cited); Eberts v. Fisher, 54 Mich. 294, 20 N. W. 80 (1884); Coleman v. Coleman, 19 Pa. St. 100, 57 Am. Dec. 641 (1852); 2 TIFFANY, REAL PROPERTY (3rd ed. 1939) §474, n. 82; FREEMAN, COTENANCY (1882) §442.

such agreements may be either express²⁶ or implied,²⁷ or even oral where acted upon.²⁸ To be enforceable this waiver or postponement agreement must extend only for a reasonable time.²⁹ In this connection, both express and implied agreements not to partition property for five years,³⁰ eight years,³¹ eighteen years,³² and twenty-five years³³ have been held reasonable. Where no definite time is stipulated, the reasonableness of the time for which an agreement may preclude the right to partition depends upon a consideration of the lawful purposes for which the promise is made, and the time to be consumed in its performance.³⁴ However, if the agreement is for perpetual forbearance from seeking partition,³⁵ or operates as an unreasonable restriction on the use and enjoyment of the property,³⁶ it is void as unduly restricting the free alienation of the property. And from general property rules it has been determined that persons deriving title through an instrument containing a provision against partition are bound thereby.³⁷ This rule is also subject to the requirement of reasonableness.

The statement that partition is a matter of right is also subject to the operation of estoppel. For example, partition has been denied under the estoppel theory: where heirs agreed to "draw lots" for shares in the land;³⁸ where property was purchased for speculative purposes

²⁶ *Hunt v. Wright*, 47 N. H. 396, 93 Am. Dec. 451 (1867); *Marchland v. Marsh*, 280 Pa. 292, 124 Atl. 427 (1924).

²⁷ *Henderson v. Henderson*, 136 Iowa 564, 114 N. W. 178 (1907); *Eberts v. Fisher*, 54 Mich. 294, 20 N. W. 80 (1884); *Avery v. Payne*, 12 Mich. 540 (1864); *Roberts v. Wallace*, 100 Minn. 359, 111 N. W. 289, 117 Am. St. Rep. 701 (1907); *McInteer v. Gillespie*, 31 Okla. 644, 122 Pac. 184 (1912). *Contra*: *Hayne v. Gould* (C. C. S. D., 1893), 54 F. 951 (partition allowed).

²⁸ *Hensler v. Alberding*, 86 Ind. App. 372, 158 N. E. 243 (1927); *Arnold v. Arnold*, 308 Ill. 365, 139 N. E. 592 (1925); *Martin v. Martin*, 170 Ill. 639, 48 N. E. 924, 62 Am. St. Rep. 441 (1897); *Faulk v. Faulk*, 180 So. 887 (La. App., 1938). *Contra*: *Milburn v. Wemple*, 156 La. 759, 101 So. 132 (1924); *Brands v. Cassedy*, 124 N. J. Eq. 417, 1 A. (2d) 639 (1938) *aff'd*, 125 N. J. Eq. 346, 5 A. (2d) 685 (1939) (oral agreements of this character may not be enforced because they violate the statute of frauds).

²⁹ *Rayhol Co. v. Holland*, 110 Conn. 516, 148 Atl. 358 (1930); *Roberts v. Jones*, 307 Mass. 504, 30 N. E. (2d) 392 (1940); *Chadwick v. Blades*, 210 N. C. 609, 188 S. E. 198 (1936).

³⁰ *Roberts v. Wallace*, 100 Minn. 359, 111 N. W. 289, 117 Am. St. Rep. 701 (1907); *Yglesias v. Dewey*, 60 N. J. Eq. 62, 47 Atl. 59 (1900).

³¹ *Brown v. Coddington*, 72 Hun. 147, 25 N. Y. Supp. 649 (1893).

³² *Friesner v. Friesner*, 193 Iowa 576, 187 N. W. 437 (1922).

³³ *Arnold v. Arnold*, 308 Ill. 365, 139 N. E. 592 (1923).

³⁴ *Smith v. Brasseale*, 213 Ala. 387, 105 So. 199 (1925).

³⁵ *Smith v. Brasseale*, 213 Ala. 387, 105 So. 199 (1925); *Vollmer v. Wheeler*, 42 Cal. App. 1, 183 Pac. 264 (1919). *Etnier v. Pascoe*, 275 Pa. 308, 119 Atl. 406 (1923).

³⁶ *Roberts v. Jones*, 307 Mass. 504, 30 N. E. (2d) 392 (1940); *Haeussler v. Missouri Iron Co.*, 110 Mo. 188, 19 S. W. 75 (1892).

³⁷ *Winemiller v. Mossberger*, 355 Ill. 145, 188 N. E. 903 (1933); *Voellinger v. Kirchner*, 314 Ill. 398, 145 N. E. 638 (1924); *Hill v. Reno*, 112 Ill. 154, 54 Am. St. Rep. 222 (1883).

³⁸ *Hensler v. Alberding*, 86 Ind. App. 372, 158 N. E. 243 (1927).

such as real estate development;³⁹ where a contract between cotenants gave each cotenant the right to sell, but not to partition, his interest in the land;⁴⁰ where lessee, so long as he performed terms of lease, was privileged upon termination of lease to remain in possession for another ten years;⁴¹ where, by terms of a deed, grantees were to hold premises in common with other tenants without partition or division;⁴² where heirs leased property to a widow for her lifetime;⁴³ and where a declared trust was to continue until a certain mortgage indebtedness was discharged.⁴⁴ The principle which seems to underly these cases is that the court will not award a partition to one in violation of his own agreement, or in violation of a condition or restriction imposed upon the estate by one through whom he claims.

By the weight of authority, as between cotenants, partition by sale is the only proper method of partition of property in minerals, oil, and gas, considered separately from the soil.⁴⁵ An existing lease on such property should be no obstacle to partition,⁴⁶ for partition would be made subject to the lease.⁴⁷ But, as in the principal case, where the lessee buys in as cotenant and later seeks a sale of the land for the purpose of dividing proceeds, or to evade his contractual obligations, the rights of the parties are subject to radical change. This case, one of first impression in North Carolina, placed before our court a practically equal division of authority in other jurisdictions. In *Hill v. Reno*,⁴⁸ land was leased for twenty years and the lessor of the premises died leaving several heirs at law to whom the property descended as

³⁹ *McInteer v. Gillespie*, 31 Okla. 644, 122 Pac. 184 (1912).

⁴⁰ *Chadwick v. Blades*, 210 N. C. 609, 188 S. E. 198 (1936).

⁴¹ *Eberts v. Fisher*, 54 Mich. 294, 20 N. W. 80 (1913).

⁴² *Hunt v. Wright*, 47 N. H. 396, 93 Am. Dec. 451 (1867) (such a condition held not invalid as a restraint of alienation, but only a partial and temporary restriction as to mode of occupation).

⁴³ *Martin v. Ireland*, 320 Mo. 617, 85 S. W. (2d) 900 (1928); cf. *Henderson v. Henderson*, 136 Iowa 564, 114 N. W. 178 (1907) (widow to hold land during her widowhood).

⁴⁴ *Springer v. Bradley*, 188 S. W. 175 (Mo. Super., 1916).

⁴⁵ *Osborn v. Osborn*, 267 Ky. 757, 103 S. W. (2d) 262 (1937); *Warfield Natural Gas Co. v. Cassady*, 266 Ky. 217, 98 S. W. (2d) 495 (1936); *Coker v. Vierson*, 170 Okla. 528, 41 Pac. (2d) 95 (1935); *Hall v. Douglas*, 102 W. Va. 400, 135 S. E. 282 (1926). See also 20 R. C. L. (1st ed., 1918) 775, n. 18 and cases cited.

⁴⁶ *Willard v. Willard*, 145 U. S. 116, 12 Sup. Ct. 818, 36 L. ed. 644 (1892); *Arnold v. Arnold*, 308 Ill. 365, 139 N. E. 592 (1923); *Blakeslee v. Blakeslee*, 265 Ill. 48, 106 N. E. 470 (1914); *Lucy v. Kelly*, 117 Va. 318, 84 S. E. 661 (1915); 2 *TIFFANY, REAL PROPERTY* (3rd ed. 1939) §476, n. 14; 20 R. C. L. (1st ed., 1918) 741, n. 14. *Contra*: *Cannon v. Lomax*, 29 S. C. 369, 7 S. E. 529 (1888); *McMullen v. Blecker*, 64 W. Va. 88, 60 S. E. 1093 (1908) (partition not allowed until lease expires).

⁴⁷ *Blakeslee v. Blakeslee*, 265 Ill. 48, 106 N. E. 470 (1914); *Henderson v. Henderson*, 114 N. W. 178, 136 Iowa 564 (1907); *Peterman v. Kingsley*, 140 Wis. 666, 123 N. W. 137 (1909).

⁴⁸ 112 Ill. 154, 54 Am. Rep. 222 (1883).

tenants in common. When lessee purchased from one of the heirs his interest in the reversion in fee, and later initiated partition proceedings, the court held that the right to partition was imperative and absolute even though such a ruling necessitated sale of the premises. The court based its decision on the ground that if one of the tenants may demand partition without violating the rights of the other tenants, then the lessee, purchaser of the interest of one of the tenants, is entitled to this same right. Also in *Peterman v. Kingsley*,⁴⁹ where the lease on certain real estate of a business block was for five years, and after two years the lessee purchased the interest of one of the cotenants and subsequently instituted partition proceedings, the court found that the property could not be partitioned in kind, and ordered a sale. This ruling was based on a Wisconsin statute which provided that tenants in common holding an estate in possession of lands are entitled to partition. Thus, when the lessee purchased the interest of one of the cotenants, he acquired all the property rights, including the right to partition, that were formerly vested in that cotenant.

On the other hand, in *McIntire v. Midwest Theatres Co.*,⁵⁰ where the cotenants executed a ten-year lease, and the lessee after two years purchased the interest of one of the cotenants and by contract with the other cotenant agreed to pay certain rents secured by a mortgage on the property, in a subsequent partition suit the court held that the lessee-tenant had contracted away his right of partition. Likewise in *Arnold v. Arnold*,⁵¹ it was held that where one cotenant leased his interest in the property to the other cotenant for twenty-five years, and the lessee-cotenant thereafter made leases on portions of the lots with numerous party wall agreements respecting the property, the lessee-tenant was later estopped from seeking partition. The court based its ruling on the ground that there was no way to preserve the respective rights of the parties under the leases and agreements to which partition would be subject.

Considering the circumstances of the principal case, it seems that the North Carolina court reached the better conclusion by applying the reasoning of the latter two cases. The lessee had contracted to mine the property for twenty-six years and had guaranteed the cotenants certain royalties during this period. The fact that the lessee subsequently purchased the interest of one of the cotenants should not permit him to escape his contractual obligations to the other. For to enforce a sale against the lessor-tenant would deny him royalties guaranteed under the contract, unless he should wish to protect his rights by pur-

⁴⁹ 140 Wis. 666, 123 N. W. 137 (1909).

⁵⁰ 88 Colo. 559, 298 Pac. 959 (1931).

⁵¹ 308 Ill. 365, 139 N. E. 592 (1923).

chasing the property at the partition sale. Obviously, the lessor-tenant should not be burdened with this additional expense. Thus, the court properly concluded that partition, either actual or by sale, could in no way preserve the respective rights of the parties under the lease. Therefore, according to the better and more equitable view, the lessee-tenant was correctly held to be estopped to demand sale for partition prior to the expiration of his existing lease.

WILLIAM J. RENDLEMAN.

Pleadings—Libelous Pleadings—Estoppel—Res Judicata

Plaintiff in a former action had sought to recover a death benefit fund and a year's allowance, claiming to be the wife of one J. M. Harshaw, deceased. Defendants were the heirs of said Harshaw, in possession of his assets and estate. Defendants pleaded in that action that plaintiff was not the wife of Harshaw, but had lived with him illegally (thus implying that the children of that union were illegitimate). The judgment therein was for plaintiff. In a second action plaintiff sought to obtain allotment of dower, and defendants repeated the same answer—that plaintiff was not legally the wife of Harshaw. On the basis of this second answer by the defendants the plaintiff brings this present action for libel, claiming that it was actionable defamation for the defendants to assail her virtue in the second suit when it had already been determined in the first suit that her cohabitation with Harshaw was lawful. *Held*: since the matter had already been settled in the prior action, the second pleading of illegal cohabitation was barred by estoppel, and so was irrelevant. Plaintiff should therefore be allowed damages for defamation.¹

As Justice Devin states in the present case, "Undoubtedly the general rule is that pleadings are privileged when pertinent and relevant to the subject under judicial inquiry, however false and malicious the defamatory statements may be." This particular infringement of personal rights is permitted because public policy favors protecting one having what he believes is a good cause of action from being forced to plead at his own risk.²

It is readily seen why the court would desire to award damages to the defamed woman in this case even in the event that the law was not entirely favorable. "Fireside equity" and a sense of natural justice work strongly in her favor. Defendants must have known from the first action that their statement as to plaintiff's incontinence would not prevail. Also the court may have been influenced by the fact that North

¹ Harshaw v. Harshaw, 220 N. C. 145, 16 S. E. (2d) 666 (1941).

² Alexander v. Vann, 180 N. C. 187, 104 S. E. 360 (1920); HARPER, TORTS (1933) §§247-248, n. 34.

Carolina law has traditionally demanded a high degree of respect for a virtuous woman's reputation. Defamation of chastity is one of the three types of defamation made subject to criminal punishment by legislative enactment.³

The rationale which the court offered was that since the defendants were estopped to plead that the plaintiff was not the legal wife of Harshaw, that fact was *irrelevant*, and so comes within the exception that libelous matter in pleadings is actionable when irrelevant. It seems obvious that this rationale was used to a large extent only to back up the court's preconceived notion as to how the case should be decided. For by no stretch of the imagination does it seem in actuality to be irrelevant to plead that a woman seeking dower was not the wife of the deceased man. This is not only relevant, but it is very material, and, in fact, is one of the most generally recognized defenses to an action for allotment of dower.⁴ It would seem that when a statement is in truth relevant it should be looked upon by the court as such, irrespective of any consideration that the statement cannot, for other reasons, have any effect upon the decision of the case.⁵ It is submitted that the

³ N. C. CODE ANN. (Michie, 1939) §§4230, 2432.

⁴ *Bannister v. Bannister*, 150 S. C. 411, 148 S. E. 228 (1929); 2 TIFFANY, REAL PROPERTY (3rd ed. 1939) §488.

⁵ "IRRELEVANCY AND PRACTICAL POLICY DISTINGUISHED. A fact may be logically relevant, and thus far admissible, and yet be excluded by reason of one of the auxiliary principles of policy. . . ." 1 WIGMORE, EVIDENCE (3rd ed. 1940) §29(a).

In none of the various instances in which evidence is usually ruled unusable for reasons of public policy does it seem that such evidence has on that account been held irrelevant. "That most of the characteristic rules of admissibility are rules which do not prescribe anything about the relevancy or probative value of the facts they exclude is undoubted. All the rules of privilege, for example, are of that sort. The rules for the order of evidence assume the evidence to be relevant. The rules for producing documentary originals concede that a copy is relevant, even though excluding the copy." 1 WIGMORE, EVIDENCE (3rd ed. 1940) §12.

The federal courts consider that a violation of the fifth amendment may automatically occur if the fourth has been violated, so that evidence obtained by unlawful searches and seizures is barred as being tantamount to self-incrimination. However such evidence is not said to be irrelevant. In fact there is some agitation to change this rule of the federal courts for the very reason that the evidence barred by it may often manifestly be the most relevant and material evidence in an entire case. ROTTSCHAEFER, CONSTITUTIONAL LAW (1939) 748.

Evidence of a private and secretive nature may be barred because the court feels that its utility to a court proceeding may not be commensurate to the detriment that would be caused the witness. *Goss Printing Company v. Scott*, 89 Fed. 818 (C. C. D. N. J. 1896). Some of the various types of private and secretive evidence are illustrated in the trial of Aaron Burr, II Robertson's Rep. 517 (1807), and *Totten v. United States*, 92 U. S. 105, 23 L. ed. 605 (1875) (state and military secrets); *State v. Beal*, 199 N. C. 278, 154 S. E. 604 (1930) (religious and theological beliefs); *Boyer v. Teague*, 106 N. C. 576, 625, 11 S. E. 665 (1890) (a qualified voter does not have to reveal how he voted); *Worrell v. Kinnear*, 103 Va. 719, 49 S. E. 988 (1905) (trade, business, and manufacturing secrets); *R. v. Hunter*, 3 C. & P. 591, 592 (1829) (land title-deeds in England).

Another common situation in which evidence may admittedly or manifestly be relevant, yet still not be usable in a particular case is where such evidence would be self-incriminatory. If the notion of the *Harshaw* case were applied to these

present case represents an injustice to the defendants in that they were not judged according to the accepted and proven law, and that the case seems to confuse a law which previously had been well and wisely determined.⁶ Heretofore the question of relevancy has been handled in a logical, commonsense manner, without reference to the foreign and unrelated topic of whether the statements were barred by estoppel.⁷

The court quotes FREEMAN ON JUDGMENTS⁸ to the effect that a final judgment or decree affirming the existence of any fact is conclusive upon the parties whenever that fact is again in issue between them. Granted that an adjudicated fact is conclusive upon the parties, does it logically follow that it is also *irrelevant* for them to bring such fact up for the scrutiny of the court? It should be remembered that a matter which is *res judicata* will be just as admissible in a trial as any other evidence, unless the party against whom that fact is being used cares to call attention to and prove the fact that it is *res judicata*.⁹ It does not seem that this quotation from Freeman's treatise justifies the court in imposing upon litigants the burden of acting at their own risk when presenting matter in their pleadings which may be defamatory.¹⁰ The effect of this decision is to force a litigant to decide, even before he submits his pleadings, the complicated question of law as to just what he is estopped to plead,¹¹ and the equally complicated question of what constitutes defamation, so that he can eliminate from his plea any defamation which he is estopped to plead.

This same criticism might be made of the court's citing of *Armfield v. Moore*,¹² *Crawford v. Crawford*,¹³ and *Gibbs v. Higgins*.¹⁴

In the *Gibbs* case, *A et al.* previously had sought partition of certain lands, claiming to be the heirs of J. N. Higgins, the original owner, deceased. *B et al.* were in possession of the land claiming under a deed

situations, the result would be holdings that whoever pleads libelous matter, which can be proved only by self-incriminatory evidence or by evidence protected by any other privilege, may be sued for libel. The same result would follow also in a case where libelous pleadings could be proved only by testimony of the wife of the one libeled, in view of the statutory provisions against such evidence. N. C. CODE ANN. (Michie, 1939) §§1801-02.

⁶ See note 5 *supra*.

⁷ See note 5 *supra*; *Shepard v. U. S.*, 290 U. S. 96, 54 S. Ct. 22, 78 L. ed. 196 (1934); *Riss and Company v. Galloway*, 108 Colo. —, 114 P. (2d) 550 (1941).

"2. GENERAL CONSIDERATIONS AFFECTING RELEVANCY. . . . Lastly, the logical powers employed must be those of everyday life, not those of the trained logician or scientist. The conclusions and tests of everyday experience must constantly control the standards of legal logic." 1 WIGMORE, EVIDENCE (3rd ed. 1940) §27.

⁸ 2 FREEMAN, JUDGMENTS (5th ed. 1925) §670.

⁹ *Sanderson v. Aetna Life Ins. Co.*, 218 N. C. 270, 10 S. E. (2d) 802 (1940); *Williams v. Hutton*, 164 N. C. 216, 80 S. E. 257 (1913).

¹⁰ See note 5 *supra*.

¹¹ See notes 20, 21, 22 *infra*.

¹² 44 N. C. 157 (1852).

¹³ 214 N. C. 614, 200 S. E. 421 (1939).

¹⁴ 215 N. C. 201, 1 S. E. (2d) 554 (1939).

from said J. N. Higgins. *A* attacked this deed on grounds of lack of mental capacity of the grantor. Decision was for *B*. In a later action, *A* attacked the deed on grounds of undue influence. *Held*: *A* is estopped to plead undue influence because the matter is *res judicata*. If this case is given the interpretation which the present decision seeks to give it, the effect is to say that anything which is *res judicata* may not be pleaded at all, because it is irrelevant, such irrelevancy being a potential basis of a subsequent libel suit. Such a notion obviously imposes a phenomenal penalty upon litigants who may make an entirely innocent mistake in pleading. In *Current v. Webb*,¹⁵ a suit for damages incurred in an automobile accident, question arose as to whether summons was properly served on defendant, he being a nonresident. In the coroner's inquest held previously it had been decided that defendant was exempt from service. The matter was therefore held *res judicata* as to the present action. Under the rule of the *Harshaw* case plaintiff would have been subject to a libel action if he had inserted any libel in his pleadings, even though he was not a privy of the parties of the first action, and presumably did not know that the matter of defendant's exemption had already been litigated.

In *Ludwick v. Penny*¹⁶ question was raised as to whether *res judicata* barred plaintiff from recovering damages for defendant's previous maliciously brought claim-and-delivery suit against plaintiff, where plaintiff had failed to raise this issue in a counterclaim in the original suit. Since charging the defendant with malicious prosecution (and also with destroying plaintiff's property) would be libelous, plaintiff would have stood in great danger of a libel suit if the rule of the *Harshaw* case had been in existence at that time.

In *Bear v. Board of County Commissioners*¹⁷ plaintiff was barred by *res judicata* even though he had not been a party to the original action. Yet, if he had included something libelous in his pleadings he would have been subject to a libel action, under the rule of the present case. Clearly this would be an injustice to the pleader, since the prior suit might not have come to his knowledge.

In *Farrar v. Staton*¹⁸ appellant was barred because he had waited beyond the statutory limit to appeal. From the holding of the *Harshaw* case, it would be logical to assume that appellant would be subject to a libel action if he had included something libelous in his appeal.

It should be remembered that court proceedings are in the nature of private warfare between the litigants; our system of trials is spoken of

¹⁵ 220 N. C. 423, 17 S. E. (2d) 641 (1941).

¹⁶ 158 N. C. 104, 73 S. E. (2d) 228 (1911).

¹⁷ 122 N. C. 434, 29 S. E. 719 (1898).

¹⁸ 101 N. C. 78, 7 S. E. 743 (1888).

as the adversary system.¹⁹ So it is obvious that many complaints and answers will contain some libelous matter.

To see the effect of saying that anything in the pleadings which is *res judicata* may afford a basis for a subsequent libel suit, it is necessary to examine the central ideas of the doctrine of *res judicata*: 1) An entire cause of action is *res judicata* when a final judgment on its merits has occurred. The losing plaintiff cannot win in a subsequent suit on that cause of action even though he bases this later suit on allegations not pleaded at all in the first action, if they could have been pleaded. Plaintiff will lose in the second suit even though favored by all law and equity if the defendant proves that the matter is *res judicata*.²⁰ 2) Also, each individual allegation tried in any action will be deemed *res judicata* upon any future occasion when the same parties or their privies again oppose each other in court even though the cause of action is entirely different from that of the suit in which the fact was originally adjudicated.²¹ These rules appear simple, but in truth the law of *res judicata*

¹⁹ *Muskraat v. United States*, 219 U. S. 346, 55 L. ed. 246, 31 S. Ct. 250 (1911); *Marbury v. Madison*, 1 Cranch 137, 2 L. ed. 60 (1803); see *In Re Pacific R. Commission*, 32 Fed. 241, 255 (C. C. D. Cal. 1887).

²⁰ *Crowley v. Mellon*, 52 Ark. 1, 11 S. W. 876 (1889) (a judgment which even erroneously awards dower to a widow nonetheless renders *res judicata* the fact of her right to it); *Buttnick v. Buttnick*, 121 Wash. 211, 209 Pac. 6 (1922) (and cases cited); *Moore v. Harkins*, 179 N. C. 167, 101 S. E. 564 (1919); *Northcott v. Northcott*, 175 N. C. 148, 95 S. E. 104 (1918); *Cropsey v. Markham*, 171 N. C. 43, 87 S. E. 950 (1916).

²¹ In *Hilton v. Stewart*, 15 Idaho 150, 96 Pac. 579 (1908), facts were that plaintiff and deceased had previously received a Mormon Church divorce, but in litigation on the matter the divorce was held null and void, and judgment was that plaintiff and deceased remained man and wife. Plaintiff is now seeking her statutory allowance of half her husband's property. Defendants plead that she was not his wife. In holding that this defense was barred the court said, "To make the matter *res adjudicata* it is immaterial that the question alleged to have been settled by a former adjudication was determined in a different kind of proceeding or a different form of action from that in which the estoppel is claimed. The test is: Was the question actually and directly in issue and judicially determined in the former suit between the same parties or their privies in a court of competent jurisdiction?" (In a later case, *Hilton v. Snyder*, 37 Utah 384, 108 Pac. 698 (1910), the fact of Mrs. Hilton's marriage was not held *res judicata*, the parties to that suit not being privies of the parties in the original action).

Lorillard v. Clyde, 122 N. Y. 41, 25 N. E. 292 (1890); *Current v. Webb*, 220 N. C. 423, 17 S. E. (2d) 614 (1941).

A case *contra* the above and the *Harshaw* case is *Bordwell v. Snow*, 119 Mich. 421, 78 N. W. 468 (1899), which is the only case in the United States with substantially the same fact situation as the *Harshaw* case. A had sought the weekly allowance awarded by statute to widows, and had been adjudged to be the widow of the deceased, though the heirs had pleaded otherwise. In holding that this adjudication was not conclusive (*a fortiori*, not irrelevant) in a subsequent action by A for a distributive share of the estate, the court said, "His [the trial judge's] determination that relator is the widow of Mr. Bordwell is conclusive only so far as it relates to the allowances made . . . and is not *res judicata* as to her right as widow to the distributive share of the estate to which the widow is entitled."

Despite the *Bordwell* case, it is no doubt in accord with the well-settled law that the fact of Mrs. Harshaw's marriage was *res judicata* (though not irrele-

is in a state of confusion and flux, as a glance at any recent digest will indicate. Essentially the question of *res judicata* is a problem in deciding whether to let the public policies of protecting rights already established by court decree and of preventing redundant litigation bar the court from looking into the real equities of the case.²² Thus the application of the *res judicata* rules is one of the most uncertain things in all law. To suppose that the parties themselves can properly decide the question before submitting their pleadings is to indulge in the fantasy that the average practicing lawyer is a perfect jurist.

If the clear inference of the present case—that a cause of action for libel accrues where a libelous pleading is *res judicata*—is carried to its logical conclusion, it would seem that the defendants in the present case could not have pleaded truth as a defense to the charge of libel. For to plead still a third time that the plaintiff was not married would give the plaintiff still another cause of action for libel.²³ It would seem that we are to believe that pleading truth as a defense to libel involves the risk of such plea itself being actionable libel. Such a theory is especially harsh when it is remembered that the defendants in the present case may still in good faith believe that the plaintiff was not married, and that she has committed perjury²⁴ so that the prior adjudications were miscarriages of justice.

It is submitted that the plaintiff in the present case would not have

vant) in the second (dower) action. But considering the purposes and social needs from which the doctrine of *res judicata* sprang, is it entirely logical to consider this fact *res judicata*? "The doctrine is an outgrowth of the familiar maxim that a man shall not be twice vexed for the same cause, and the other wholesome rule of the law that it is in the interest of the State that there be an end of litigation, and consequently a matter of public concern that solemn adjudications of the courts should not be disturbed." *White v. Tayloe*, 153 N. C. 29, 68 S. E. 907 (1910). Obviously, the first purpose mentioned, that of making litigants secure in their adjudicated rights, is not served by holding the fact of Mrs. Harshaw's marriage *res judicata*, as the defendants were merely using that plea as a defense, not as a means of rendering insecure her previously obtained rights. Nor is the second purpose, that of preventing multiplicity of suits, served by holding that fact *res judicata*. For the suits had already multiplied, as it were, before the defendants made this plea.

Compare *American Woollen Company v. Leshner*, 267 Ill. 11, 107 N. E. 882 (1915), with *Buttnick v. Buttnick*, 121 Wash. 211, 209 Pac. 6 (1922).

²² Note (1941) 55 HARV. L. REV. 120.

²³ The doctrine of *res judicata* applies to defenses, either litigated or which might have been litigated, just as forcefully as it does to claims and counterclaims. *Lee v. McKoy*, 118 N. C. 518, 24 S. E. 210 (1895); *Bond v. Billups*, 53 N. C. 423 (1861). Clearly then, each subsequent defense that Mrs. Harshaw was not legally married would be *res judicata*, and actionable libel under the rule of the *Harshaw* case. For each repetition of a libelous statement gives a separate cause of action. *Cook v. Connors*, 215 N. Y. 175, 109 N. E. 78 (1915); *Underwood v. Smith*, 93 Tenn. 687, 27 S. W. 1008 (1894).

²⁴ A cause of action is *res judicata* despite the fact that fraud or false testimony was involved in the litigation. *Peninsula Iron Company v. Eels*, 68 Fed. 24 (C. C. A. 8th, 1895); *Guling v. Washoe County Bank*, 24 Nev. 477, 56 Pac. 580 (1899).

been left in any great difficulty if the decision had gone against her. Her virtue had already been established once by court decree. In any event, it would seem to be more in accord with public policy to permit complete freedom and complete latitude of choice of allegations in pleadings than to protect individuals against this one possible source of defamation,²⁵ even though the defamation may be malicious.²⁶

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²⁵ For a general discussion of the social policies and purposes behind the doctrine of privilege, see HARPER, TORTS (1933) §9.

²⁶ Certain communications are absolutely privileged, while others are only qualifiedly privileged. The presence of malice is immaterial in those cases where the communication is absolutely privileged. Communications in court pleadings are absolutely privileged. *Nicholson v. Dillard*, 137 Ga. 225, 73 S. E. 382 (1911); *Wilson v. Sullivan*, 81 Ga. 238, 7 S. E. 274 (1888); *Alexander v. Vann*, 180 N. C. 187, 104 S. E. 360 (1920); *Pennick v. Ratcliffe*, 149 Va. 618, 140 S. E. 664 (1927); HARPER, TORTS (1933) §247, at page 528; Note (1935) 13 N. C. L. REV. 242.