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recordation acts forbids its making an exception in case of stock in trade, such an exception should be immediately incorporated by the legislature in the recordation acts of North Carolina. The following provision of the Uniform Chattel Mortgage Act[15] is offered as a suggestion:

"If the mortgagee allows the goods to be placed in the mortgagor's stock in trade or sales or exhibition room, this shall have like effect as written consent to sell, in favor of any purchaser in the ordinary course of the mortgagor's business, not, however, including a purchaser by way of mortgage, pledge or sale in bulk or in payment of antecedent debts."

J. W. CREW, JR.

EFFECT OF PAYMENT UPON OPERATION OF STATUTE OF LIMITATIONS AGAINST A RUNNING ACCOUNT FOR SERVICES

In solving a problem involving a given account it is important as a conceptual matter first to ascertain the general rules governing accounts in order to understand the nature, and make the proper classification, of the account in question.

1—*Distinction between mutual and running accounts.*

As usually defined a mutual account is one based upon a course of dealing wherein each party has given credit to the other upon the faith of his indebtedness to the other.[1] It is essential to a mutual

[15] §18, par. 2 (a). Texas Revised Civil Statutes, Article 3970, is somewhat similar to the provision of the Uniform Chattel Mortgage Act:

"Every mortgage, deed of trust, or other form of lien attempted to be given by the owner of any stock of goods, wares, or merchandise, daily exposed to sale, in parcels, in the regular course of the business of such merchandise, and contemplating a continuance of the possession of said goods and control of said business, by sale of said goods by said owner, shall be deemed fraudulent and void." Wagons, buggies, automobiles, and the like have been treated as stock of goods, wares, or merchandise under this statute. *Supra* note 12.

The Uniform Chattel Mortgage Act has not been adopted in any of the states.

[1] Bank of Blakely v. Buchannan, 83 Ga. App. 793, 80 S. E. 42 (1913). The following definitions of running accounts appear in the later North Carolina reports: "A running and mutual account within the meaning of these issues (as to whether an action upon account was barred by the statute) is one growing out of reciprocal dealings between the parties in which each extends credit to the other and with the understanding, express or implied, that, on adjustment had, the items supplied and charged shall be allowed as proper credits." Hollingsworth v. Allen, 176 N. C. 629, 97 S. E. 625 (1918). "The account must be mutual—that is, involving reciprocal rights and liabilities; open—that is, contemplate further dealings between the parties; and current—that is, running with no time limitation fixed by agreement, express or implied, with the balance to be determined by an adjustment of credit and debit items." McKinnie Bros. Co. v. Wester, 188 N. C. 514, 516, 125 S. E. 1 (1924).

account that each party has extended credit.[2] On the other hand an ordinary running account involves a situation where the extensions of credit have all been from one side.[3] And payments by the debtor do not operate to make a running account mutual[4] In a mutual account there is an understanding, express or implied, that, upon adjustment had, the items of indebtedness on each side shall be balanced against each other.[5] The cause of action upon a mutual account accrues at the time of the last item on either side.[6] On the other hand the statute of limitations begins to run against each item of a running account when created, unless by contract or usage payment is due at some fixed time, such as the first of each month, in which case the statute would begin to run against all items within such period at the end thereof.[7]

It seems proper to classify a claim for services rendered over a period of years without agreement as to the period of service or for fixed compensation as a running account. Items of service are com-

[2] As embodied in the North Carolina Statute, N. C. Code (1927), §421, there must have been "reciprocal demands between the parties." The section reads: "In an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action accrues from the time of the latest item proved in the account on either side." See also Robertson v. Pickerell, 77 N. C. 302 (1877).

[3] Spencer v. Sowers, 118 Kan. 259, 234 Pac. 972, 39 A. L. R. 365 (1925). See note 39 A. L. R. 369, 371.

[4] Brock v. Franck, 194 N. C. 346, 139 S. E. 696 (1927); Hussey v. Burgwyn, 51 N. C. 385 (1859). And see notes (1918), 1 A. L. R. 1060, 1068 and (1925) 39 A. L. R. 369, 372 for lists of authorities. If the payment is made in labor or services, if intended as a payment, it will not make the account mutual. Smith v. Hembree, 3 Ga. App. 510, 60 S. E. 126 (1908). And a payment may be made in kind without having the effect of making the account mutual. Norton v. Larco, 30 Cal. 127 (1866). But, in the absence of evidence *aliunde* the *account,* that the delivery of goods was to be a payment, the legal presumption would be that there was a sale and not a payment in kind, the effect of which sale would be to make the account mutual. *Ibid.* And in Green v. Disbrow, 79 N. Y. 1 (1879), it was emphatically declared that the delivery of eggs to be credited upon a store account was not a payment in kind but an item operating to make the account mutual. There was evidence *aliunde* the account of an intention to make a payment in kind in Weatherwax v. Consumnes Mill Co., 17 Cal. 344 (1861) and that payment was held not to make the account mutual. It has been suggested that a cash payment in excess of the amount due on a running account will not make it mutual. Goffe & Clarkener v. Lyons Milling Co., 28 F. (2d) 801 (D. C. D. Kan., 1928).

[5] Hollingsworth v. Allen, *supra* note 1; Stokes v. Taylor, 104 N. C. 395, 10 S. E. 566 (1889). Such an understanding might be inferred from the fact that one party, with the knowledge of the other, kept an account of the debits and credits. Green v. Caldcleugh, 18 N. C. 320 (1835).

[6] *Supra* note 2.

[7] Hollingsworth v. Allen, *supra* note 1; Brock v. Franck, *supra* note 4. Missouri, among other jurisdictions, has taken the contrary view. Smith v. Collins, 247 S. W. 457 (Mo. App., 1923); Soderland v. Graeber, 19 Ia. 765, 180 N. W. 745 (1921).

parable to items of goods sold under an ordinary running store account. The extension of credit all runs from one side. With respect to such accounts the question arises whether a court will deem the right to compensation to accrue at definite intervals or at the time each item of service is performed. The former possibility has been approved in New York.[8] The result of the North Carolina decisions is to sustain the latter view, in the absence of a showing of some controlling usage in favor of compensation at some fixed period, as yearly.[9] The New York rule would seem more to facilitate the work of a court in a given case because it is easier to apply. A third view, that compensation would be postponed in the entirety until services ceased as by reason of the master's death, leads to manifestly unjust results and was long ago rejected in North Carolina.[10]

2—The rules governing the application of payments.

On this matter the law is well settled in North Carolina. "1. A debtor owing two or more debts to the same creditor and making a payment may at the time direct the application of it. 2. If the debtor does not direct the application at the time, the creditor may make it. 3. If neither debtor nor creditor makes it, then the law will apply the payment to that debt for which the creditor's security is most precarious."[11] And it is widely held elsewhere that where the parties fail to direct the application the law will apply a payment to the most

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[8] Davis v. Gorton, 16 N. Y. 255 (1857).

[9] Miller v. Lash, 85 N. C. 52 (1881). There is a dictum in Grady v. Wilson, 115 N. C. 344, 20 S. E. 518 (1894), which announces the New York view. But still more recent decisions support the Lash case. Wood v. Wood, 186 N. C. 559, 120 S. E. 194 (1923).

[10] A dictum in Hauser v. Sain, 74 N. C. 552 (1876) to the effect that compensation was to be postponed until the death of the master terminated the service was definitely rejected in the Lash case, *supra* note 9.

[11] Sprinkle v. Martin, 72 N. C. 92 (1875). If the debtor does not direct the application before or at the time of payment his right to do so is waived but the option to make the application thereby afforded the creditor may be exercised at any time before suit brought. Moss v. Adams, 39 N. C. 42 (1845). And where the creditor has the option he may apply the payment to a claim already barred but such would not remove the bar as to the balance of that claim or other claims because it involves no implied promise to pay. I WILLISTON, CONTRACTS (1920), §178; Anderson v. Nystrom, 103 Minn. 168, 114 N. W. 742, 13 L. R. A. (N. S.) 1141 and note (1908). *Contra:* Hopper v. Hopper, 61 S. C. 124, 39 S. E. 366 (1901). In the absence of an application by the parties the law will, as between secured and unsecured claims, apply the payment to the unsecured claim. Stone v. Rich, 160 N. C. 162, 75 S. E. 1077 (1912). The law will apply a payment to the interest upon a claim in preference to the principal. Riddle v. Bridgewater Milling Co., 150 N. C. 689, 64 S. E. 782 (1909).

precarious claim.[12] In some jurisdictions, however, the courts will apply the payment in the manner most favorable to the debtor.[13]

The rule of application favoring the creditor, as followed in North Carolina would not be applicable to a mutual account.[14] Obviously a payment made upon a mutual account is only a credit item to be reckoned in the final adjustment. A payment made after a mutual account was closed would set the statute of limitations off anew as to the whole balance, to whichever party it was due. But the rule does not apply to a running account.[15] Payments made upon an open, running account, which are not particularly applied by the parties, will, under the decided cases, be balanced against unbarred debit items in the order of their priority.[16]

3—*Effect of a payment upon the operation of the statute of limitations against a running account for services rendered under indefinite agreement.*

We come now to the problem which arose in a recent case before the Supreme Court of North Carolina. In *Phillips v. Penland*[17] there was a running account for services (as to which there was no agreed rate of compensation or fixed period of service) from sometime in 1916 till the master's death in 1926. There was a payment of $3.00 in 1921 and another of $40.00 in 1925. The action was brought in 1928 against the executor of the master. The court deemed the 1925 payment as a recognition of all items not barred at that time and held that it started the statute running anew from the date of payment as to all such items (*i.e.*, all items accruing within the statutory period prior to the date of payment). Plaintiff's recovery, of course, would be subject to a $40.00 credit.

On a similar state of facts the New York court has reached the same conclusion.[18] Another suggested view of the case is to regard

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[12] Watson v. Appleton, 183 Ala. 514, 62 So. 765 (1913); Robinson's Adm'rs. v. Allison, 36 Ala. 525, 531 (1860).

[13] See collection of authorities in note (1902) 96 Am. St. Rep. 44, 59.

[14] See Jenkins v. Smith, 72 N. C. 296, 306 (1875).

[15] I WOOD on LIMITATIONS (4th ed., 1916), 553, 554 and cases cited.

[16] Jenkins v. Smith, *supra* note 14. See collection of authorities in note (1902) 96 Am. St. Rep. 44, 63. The rule does not apply in the face of an understanding of the parties to the contrary. Miller v. Womble, 122 N. C. 135, 29 S. E. 102 (1898). Compare the rule in Clayton's case, 1 Mer. 572, 608 (1816).

[17] 196 N. C. 425, 146 S. E. 72 (1929).

[18] *In re* Gardner, 103 N. Y. 533, 9 N. E. 306 (1886).

the payment as simply a credit item in the account, which would have no effect upon the operation of the statute of limitations.[19]

Looking squarely at the practical situation involved the fair assumption in the absence of express declaration to the contrary is that one paying money upon an open, running account recognizes by reason of that act all the live part of the account. It is true that the law regards the several items of the account as so many debts[20] but one making a payment upon an open, running account normally looks at it *in solido* and may thus be deemed to have intended to apply the payment to all the live portion of the account. It is true that the effect of the payment upon the operation of the statute depends upon its application. But it is fair to assume that the debtor intended to apply the payment to all the live part of the account and it is believed that this is the best theory upon which to explain the just decision rendered in the Penland case.

If it were to be assumed that the debtor had completely waived his right to make the application when he did not expressly direct it, it would be rather difficult to escape the logic of a third view of the case. That view is that since the items of the account constitute separate debts and the law applies payments to the most precarious claims, in the absence of application by the parties, the oldest live items at the time of a payment would get the benefit of the payment and the only effect upon the operation of the statute would be to bring in date the balance due on any items to which the payment was applied and as to which it amounted to only part payment. The running of the statute as to later items would not be affected according to this view of the case. But manifestly the parties would have intended no such result and there is no reason to say here that the legal consequences of acts are not necessarily what the actors expected them to be for the reason that the legal consequences of a payment intended by the debtor to be applied generally to an account is to renew the whole account that remains as a subsisting obligation, that is, the part not barred.

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[19] It has been held in Georgia that payments made upon an open, running account do not affect the operation of the statute of limitations. Ford v. Clark, 72 Ga. 760 (1884); Liseur v. Hitson, 95 Ga. 527, 20 S. E. 498 (1894).

[20] Thus it is the rule in North Carolina that, before there has been an account stated, the creditor may so split up the account, by separating items accordingly as they composed separate transactions in their origin, so as to bring the whole account within the jurisdiction of a justice of the peace. Mayo v. Martin, 186 N. C. 1, 118 S. E. 830 (1923).

Where a payment is made upon a running account after it has become an account stated the whole claim stated is brought in date.[21] The law could not apply a payment to items already barred,[22] where the parties had failed to make the application. If the statute had run upon all the items of the account at the time of the payment the effect thereof would be to bring the whole account in date because the payment would be one upon the account and the fact that all the items of the account were of the same standing would remove the reason for the rule as to application of payments.[23]

J. B. FORDHAM.

RECENT CASE COMMENTS

CONSTITUTIONAL LAW—ZONING—DELEGATION OF POWER—FRONTAGE CONSENT TO ERECTION OF PHILANTHROPIC INSTITUTION IN RESIDENCE DISTRICT—In *State of Washington ex rel. v. Roberge*,[1] the Supreme Court of the United States held unconstitutional that part of a Seattle zoning ordinance which provided that in a residential use-district a philanthropic home for children or old people could be erected only upon the written consent of the owners of two-thirds of the property within 400 feet of the proposed building. Such an institution, which had stood for many years in what is now a residential district, sought, through its trustee, a permit to replace the old building with a new one of twice the original capacity, on the same site. From a decision of the Washington Supreme Court dismissing an action of mandamus to compel the city building department to issue the permit, without any attempt to obtain the required frontage consent, the trustee for the home obtained a write of *certiorari*. Held, reversed, the ordinance being in violation of the Fourteenth Amendment as an arbitrary delegation of power to the neighboring property owners.

The validity of general zoning is now firmly established.[2] The

[21] See Nunn v. W. T. McKnight & Bros., 79 Ark. 393, 96 S. W. 193 (1906).

[22] Livermore v. Rand, 26 N. H. 85 (1852). But see Fletcher v. Gillan, 62 Miss. 8 (1884), where, in a case where no proof was made as to the date of a payment, it was held that the law would apply the payment to the oldest items though they were barred and there were younger items not barred by the statute.

[23] For a discussion of California cases, see Schapiro, *Accounts and Statute of Limitations* (1922), 11 CAL. L. REV. 121.

[1] State of Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 49 Sup. Ct. 50 (U. S., 1928).

[2] Village of Euclid v. Ambler Realty Co., 272 U. S. 365, 71 L. Ed. 303, 47 Sup. Ct. 114, 54 A. L. R. 1016 (1926), discussed in NOTE (1927) 5 N. C. L. REV. 237; Nectow v. City of Cambridge, 277 U. S. 183, 48 Sup. Ct. 447 (1928);