Conflict of Laws -- Validity of Foreign Contracts -- Effect of Domestic Usury Laws

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The purpose of the present bankruptcy act is to discharge the bankrupt from existing obligations and distribute his assets ratably among his creditors.[18] By construing subdivision (4) as independent of subdivision (1) the logic of the principal case would allow proof of practically all contingent claims founded upon contract. This construction seems to be in furtherance of the purpose of the act, in that it allows these contingent claims to be proved and discharged. A meritorious limitation upon this broad rule is found in the English bankruptcy act to the effect that the amount of the damages be ascertainable with reasonable certainty.[19]

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Conflict of Laws—Validity of Foreign Contracts—Effect of Domestic Usury Laws.

The receiver for a bankrupt North Carolina corporation sued the defendant, a credit company, incorporated in Delaware with principal office in Baltimore, for twice the amount of usurious interest allegedly paid by the lumber company.[1] By a "covering agreement" the lumber company "sold" and the credit company "bought" acceptable accounts, notes, drafts, and other paper taken from the former's customers and mailed to defendant in Baltimore. Defendant advanced 77 per cent on acceptance and the balance when the customer paid the lumber company as defendant's agent and the latter remitted. If the customer did not pay, defendant served notice and charged the amount back. For this and other services not deemed material by the court, the credit company collected 1/30 of 1 per cent of the net face value of accounts for each day, and other charges amounting to 15 per cent. The contract stipulated that the law of Delaware should govern, also that it was not to be effective until accepted by defendant in Baltimore. (Corporations cannot take ad-

[18] Central Trust Co. v. Chicago Auditorium Ass'n., *supra* note 15 at 591; Williams v. U. S. Fidelity Co., 236 U. S. 549, 554, 35 Sup. Ct. 289, 59 L. ed. 713 (1915).

[19] (1883) 46 & 47 VICT. c. 52, para. 37 (1) (3), 1 CHIT. STAT. 702; *cf.* Dunbar v. Dunbar, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. ed. 1084 (1903) (the contract of a husband to pay his wife an annuity so long as she should remain a widow held not a provable claim in bankruptcy because the value of the annuity was so uncertain as to be incapable of estimation).

[1] N. C. ANN. CODE (Michie, 1927) §2306, provides that all interest is forfeited for charging usury, and twice the interest may be recovered for usurious interest paid.

vantage of the usury statute in Delaware or Maryland.[2]) *Held:* This was a loan. The contract was made in Maryland. If made in good faith without intent to evade the North Carolina usury law, Maryland law applies, otherwise North Carolina law. The issue of good faith should have been submitted to the jury, hence reversed and remanded.[3]

The first question is was this a loan or a sale? The court looks through form to substance.[4] This is always the rule. Thus in one case the language is found: "Where a transaction is in reality a loan of money (it will be so treated), whatever may be its form," and "by whatever name the charge may be called." The identical contract involved in the instant case has been construed by one District Court to be a loan,[5] and by another District Court to be a sale.[6] Our court is "of the opinion that the agreement contemplates a loan." This seems the sound, analytical view, for the credit company took no risk, charging all unpaid accounts back to the lumber company.

The authorities are in great confusion as to what law governs the validity of a contract, and the same court will often enunciate inconsistent theories. The courts have laid down three general rules: (1) the law of the place of making; (2) the law of the place of performance; (3) the law intended by the parties. The latter is the English rule, probably the majority rule in this country, and is modified by presumptions and limitations.[7]

Early North Carolina cases went on the intention rule. If there was no place of payment or performance different from the place of making, the court presumed the parties intended the law of the latter place to govern, or they would have stipulated otherwise.[8] Where

[2] MD. ANN. CODE (Bagby, 1924), art. 49, §5. No corporation can plead usury as a defense, nor maintain an action based upon usury.

DELAWARE, GENERAL CORPORATION ACT, §4, provides that corporations created to deal in notes, accounts, etc., shall not be construed as engaging in the business of banking, and may charge such amounts as the respective parties agree upon.

[3] Bundy v. Commercial Credit Co., 200 N. C. 511, 157 S. E. 860 (1931).

[4] Burwell v. Burgwyn, 100 N. C. 639, 6 S. E. 409 (1888); Bank v. Wysong, 177 N. C. 380, 99 S. E. 199 (1918); Lumber Co. v. Trust Co., 179 N. C. 211, 102 S. E. 205 (1919); Ripple v. Mortgage Co., 193 N. C. 422, 137 S. E. 156 (1927).

[5] Brierly v. Commercial Credit Co., 43 F. (2d) 724-30 (E. D. Pa. 1929).

[6] *In re* Eby, 39 F. (2d) 76 (E. D. N. C. 1929).

[7] GOODRICH, CONFLICT OF LAWS 228.

[8] Arrington v. Gee, 27 N. C. 590 (1845); Houston v. Potts, 64 N. C. 33 (1870); Williams v. Carr, 80 N. C. 294 (1879); Hilliard & Co. v. Outlaw, 92 N. C. 266 (1885); Morris v. Hockaday, 94 N. C. 286 (1886); Wood v. Wheeler, 111 N. C. 231, 16 S. E. 418 (1892); Copeland v. Collins, 122 N. C.

the places differed, some cases presumed that the parties intended the law of the place of performance to govern,[9] others the law of the place of making.[10] But not if money was loaned at usury in another state secured by a mortgage on land in North Carolina,[11] or if there was evidence of intent to evade the North Carolina usury law,[12] or if the capacity of the contracting party, as a married woman, were in question, the law of the forum—likewise the domicile—being applied.[13] Unusually strong authority for the intention theory is found in a decision of the elder Judge Connor written in 1907: "That, in the absence of such a statute, the parties may agree upon the place of the contract, is well settled."[14]

The latter cases practically all apply the law of the place of making.[15] This is the rule urged by the *Restatement of Conflict of Laws*.[16] But the instant case talks about the presumption that the parties intended, or must have intended, this law to govern.[17]

619, 30 S. E. 315 (1898); Exchange Bank v. Appalachian Land and Lumber Co., 128 N. C. 193, 38 S. E. 813 (1901); Cannady v. Railroad, 143 N. C. 439, 55 S. E. 836 (1906).

[9] Roberts v. McNeely, 52 N. C. 506 (1860).

[10] Bryan v. Western Union Telegraph Co., 133 N. C. 604, 45 S. E. 938 (1903); Hancock v. Telegraph Co., 137 N. C. 498, 49 S. E. 952 (1905); Hall v. Telegraph Co., 139 N. C. 369, 52 S. E. 50 (1905); Johnson v. Western Union Telegraph Co., 144 N. C. 410, 57 S. E. 122 (1907). (All four of the preceding cases were suits on the contract against telegraph companies for negligent transmission or delivery of messages.) Bank of Charlotte v. Simpson, 90 N. C. 467 (1884); Taylor v. Sharp, 108 N. C. 377, 13 S. E. 138 (1891).

[11] Commissioners of Craven v. Atlantic & N. C. Railroad Co., 77 N. C. 289 (1877); Rowland v. Old Dominion Building and Loan Association, 115 N. C. 825, 18 S. E. 965 (1894); Meroney v. Atlanta Building and Loan Association, 116 N. C. 882, 21 S. E. 924 (1895); Faison v. Grandy, 128 N. C. 438, 38 S. E. 897 (1901).

[12] Meroney v. Atlanta Building and Loan Association, 112 N. C. 842, 17 S. E. 537 (1893); see Roberts v. McNeely, 52 N. C. 506 at 508 (1860).

[13] Armstrong, Cator & Co. v. Best, 112 N. C. 59, 17 S. E. 14 (1893); Hanover National Bank v. Howell, 118 N. C. 271, 23 S. E. 1005 (1896).

[14] Williams v. Mutual Reserve Fund Life Association, 145 N. C. 128, 58 S. E. 802 (1907).

[15] National Exchange Bank of Baltimore v. Rook Granite Co., 155 N. C. 43, 70 S. E. 1002 (1911); Pfeifer & Co. v. Israel, 161 N. C. 409, 77 S. E. 421 (1913); Carpenter, Baggott & Co. v. Hanes, 167 N. C. 551, 83 S. E. 577 (1914); Wilson v. Order of Heptasophs, 174 N. C. 628, 94 S. E. 443 (1917); Kesler v. Mutual Benefit Life Insurance Co., 177 N. C. 394, 99 S. E. 207 (1919).

Draft No. 2, §§333, 353.

[16] CONFLICT OF LAWS RESTATEMENT (Am. L. Inst. 1931), Proposed Final

[17] Bundy v. Commercial Credit Co., *supra* note 3. "It is a generally accepted principle that 'the test of the place of a contract is as to the place at which the last act was done by either of the parties essential to a meeting of the minds.' It is clear the contract was executed in Baltimore, because the last act essential to completion of the agreement was performed there. Nothing else appearing, it follows that the parties intended the laws of Maryland to govern its validity and performance."

And there are exceptions: where the contract is contrary to a state statute;[18] contrary to good morals;[19] injurious to the forum or its citizens;[20] violative of the fixed public policy of the state;[21] where the loan or place of payment is in another state, but is secured by a loan upon real estate here, even though the contract stipulated the law of another state should govern;[22] and others.[23]

In the usury cases there is still a strong tendency to adopt the intention test, presuming the intention of the parties to be to adopt the law which will make their contract valid.[24] It is required, however, that there be no bad faith and no intent to evade the usury law.[25] This issue of good faith, which the court says should have gone to the jury in the instant case, often becomes very difficult to decide. It is especially so when the court reverses a former position[26] and says that the charging of more than 6 per cent interest under a contract made in another state is not necessarily contrary to public policy. One commentator observes that this is attaching a penalty to knowledge of the law.[27]

The issue of the principal case becomes impressively important in this era of industrialization of North Carolina. Briefly, do we need and do we want 15 per cent loans, and can our industry prosper on 15 per cent loans? Or is this better than no capital available at a theoretical rate of 6 per cent? The court seems to have been very cognizant of the issues at times.[28]

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[18] Burrus v. Witcover, 158 N. C. 384, 74 S. E. 11 (1912); Bluthenthal & Beckhart, Inc. v. Kennedy, 165 N. C. 372, 81 S. E. 337 (1914); Standard Fashion Co. v. Grant, 165 N. C. 453, 81 S. E. 606 (1914).

[19] See Burrus v. Witcover, *supra* note 18, at 385.

[20] See Burrus v. Witcover, *supra* note 18, at 385.

[21] Bluthenthal & Beckhart, Inc. v. Kennedy, *supra* note 18; Williamson v. Postal Telegraph-Cable Co., 151 N. C. 223, 65 S. E. 974 (1909) [Stipulation on telegraph message limiting liability of telegraph company for transmitting unrepeated message. The federal rule applies now and this is changed. Hardie v. Western Union Telegraph Co., 190 N. C. 45, 128 S. E. 500 (1925)]. See Burrus v. Witcover, *supra* note 18, at 385.

[22] Meroney v. Atlanta Building and Loan Association, *supra* note 11.

[23] See special exception in usury cases, *infra* note 25, *supra* note 4.

[24] Bundy v. Commercial Credit Co., *supra* note 3.

[25] Arrington v. Gee, *supra* note 8; Roberts v. McNeely, *supra* note 9; Houston v. Potts, *supra* note 8; Morris v. Hockaday, *supra* note 8; Ripple v. Mortgage Corporation, *supra* note 4; Bundy v. Commercial Credit Co., *supra* note 3.

[26] Ripple v. Mortgage Corporation, *supra* note 4.

[27] Note (1921) 21 COL. L. REV. 585.

[28] Burwell, J., in Meroney v. Atlanta Building and Loan Association, *supra* note 11, at 889: "Comity does not require that we allow foreign corporations