Criminal Procedure -- Use of Suspended Sentence to Secure Civil Redress

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the chattel mortgagee would seem to have become a creditor prior to the time that the vendee acquired possession.[7] This removes the case from the reason of the statute and suggests the desirability of a result contrary to that reached.[8] Three analogous types of cases, in which the statute has been held inapplicable, point to the same conclusion: first, cases in which a mortgagee is in possession;[9] second, cases in which a judgment creditor obtains a judgment before the execution of a conditional sale contract and the transfer of possession of property thereunder;[10] and third, cases in which there was a mortgage on after acquired property. In the last situation liens already on the property when it came into the hands of the mortgagor were held not to be displaced.[11]

The provision of the Uniform Conditional Sales Act, protecting purchasers from or creditors of the buyer, is drafted to protect both prior and subsequent creditors who have acquired a lien on the goods by levy or attachment and would take care of several of the problems raised in the instant case.[12]

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In a criminal prosecution[1] for assault with a deadly weapon the defendant was convicted, fined $250, and sentenced to two years imprisonment. Capias was not to issue, however, if payment of $2500 was made to prosecutrix in $50 monthly installments, the same to be

[7] North Carolina recording statute protects lien creditors only and not general creditors. See Francis v. Herren, *supra* note 6, at 507, 8 S. E. at 358; National Bank of Goldsboro v. Hill, 226 Fed. 102, 115 (E. D. N. C. 1915).

[8] ALA. CODE (Michie, 1928) §6898 (recording statute protects "judgment creditors" generally); GA. CODE ANN. (Michie, 1926) §3318 (recording statute protects "third parties"); both of these statutes have been construed to protect a subsequent and not a prior creditor, in the following respective cases: Elliott v. Palmer, 9 Ala. App. 483, 64 So. 182 (1913); Conder v. Holleman, 71 Ga. 93 (1883).

[9] Cowan v. Whitener, 189 N. C. 684, 128 S. E. 155 (1925); JONES, *op. cit. supra* note 3, §§178, 236; Note (1910) 25 L. R. A. (N. S.) 110, 115.

[10] Note (1928) 55 A. L. R. 1137; Second National Bank v. Ohio Contract Purchase Co., 28 Ohio App. 93, 162 N. E. 460 (1927).

[11] Standard Dry Kiln Co. v. Ellington, 172 N. C. 481, 90 S. E. 564 (1916).

[12] UNIFORM CONDITIONAL SALES ACT §5: "Every provision in a conditional sale reserving property in the seller, shall be void as to any purchaser from or creditor of the buyer, who, without notice of such provision, purchases the goods or acquires by attachment or levy a lien upon them, before the contract or a copy thereof shall be filed as hereinafter provided, unless such contract or copy is so filed within ten days after the making of the conditional sale."

[1] State v. Barnhardt, June term, 1927, Forsyth Superior Court.

secured by sufficient bond. The prosecutrix agreed, in consideration of the undertaking, to take a nonsuit in the civil action then pending against the defendant. The latter defaulted after payment of $1350, and plaintiff brought action on bond to collect remainder. From a judgment of nonsuit, plaintiff appealed and was awarded a new trial.[2]

Suspended judgments are now accepted in both theory and practice by North Carolina courts.[3] Conditions of suspension vary widely in nature and number.[4] In the principal case, payment of costs and fine, filing of bond to indemnify the injured party, and the non-operation of an automobile for two years were conditions imposed.[5] The breach or non-performance of one of the several conditions of a suspended sentence is sufficient to invoke enforcement of the entire judgment.[6] Full performance by the defendant was seemingly required in the instant case. If it may be considered that the settlement of the pending civil action became a condition of suspension, it would appear that the case illustrates a material extension in the scope of the

[2] Myers v. Barnhardt, 202 N. C. 49, 161 S. E. 715 (1932).

[3] Chief Justice Stacy, writing the opinion in the instant case, says that "the practice of suspending judgments in criminal prosecutions, upon terms that are reasonable and just, or staying executions therein for a time, with the consent of the defendant, has so long prevailed in our courts of general jurisdiction that it may now be considered established by both custom and judicial decision, as a part of the permissible procedure in such cases." This language is supported by State v. Edwards, 192 N. C. 321, 135 S. E. 37 (1926); State v. Everitt, 164 N. C. 399, 79 S. E. 274, 47 L. R. A. (N. S.) 848 (1913).

[4] Sentences have been suspended in North Carolina upon these conditions: good behavior, State v. Everitt, *supra* note 3; that the defendant leave the state, State v. McAfee, 198 N. C. 507, 152 S. E. 391 (1930); that he leave the county permanently, *Ex parte* Hinson, 156 N. C. 250, 72 S. E. 310, 36 L. R. A. (N. S.) 352 (1911); that he pay the costs, State v. Griffis, 117 N. C. 709, 23 S. E. 164 (1895); that he keep the peace and not libel certain persons, State v. Sanders, 153 N. C. 624, 69 S. E. 272 (1910); that he observe the prohibition laws and show good behavior, State v. Tripp, 168 N. C. 150, 83 S. E. 630 (1914). Comments upon North Carolina cases are to be found in (1922) 1 N. C. L. REV. 116; (1928) 6 N. C. L. REV. 327; (1930) 8 N. C. L. REV. 465. Valuable notes on the topic in its wider application are found in (1912) 12 COL. L. REV. 543; (1917) 30 HARV. L. REV. 369.

[5] Counsel for the defense raised the objection on appeal that the judgment rendered in the trial court was void for alternativeness, but the court rejected the plea. But few criminal judgments have been declared void for this reason in North Carolina. The writer has been able to discover but three such cases: State v. Bennett, 20 N. C. 170 (1838); State v. Perkins, 82 N. C. 682 (1880); *In re* Deaton, 105 N. C. 59, 11 S. E. 244 (1890).

[6] In State v. Strange, 183 N. C. 775, 111 S. E. 350 (1922), judgment was suspended on payment of costs and continued good behavior for two years. The costs were paid and the defendant released. But on proof of subsequent violation of the liquor laws his sentence was put into effect. In State v. Hardin, 183 N. C. 815, 112 S. E. 593 (1922), the terms of the suspension were payment of costs, payment of private prosecutor's fees, and good behavior. An attempt was made to enforce the sentence because of alleged breach of the last-named conditions, but on appeal the case was reversed because of insufficient evidence on this one point.

suspended judgment as most commonly employed in North Carolina.[7]

Where a criminal action follows the civil action, clearly no enforceable settlement based on a promise to forego criminal prosecution may be reached since it would run counter to the inhibition of stifling criminal prosecutions.[8] But this so-called "public policy" objection does not apply to stifling purely civil actions, *i.e.* to their settlement out of court. This raises the question of the advisability of "double adjudication," or the settlement of civil disputes in connection with criminal prosecutions.[9] Our past judicial theory and practice have been in favor of separate settlements. Most decidedly have the courts been opposed to the *substitution* of one for the other.[10] The practice, nevertheless, seems to have seeped into the judicial structure, notably in "bad check" cases appearing in justice of the peace courts. It is submitted that the *merger* of civil into criminal actions in proper circumstances is a practice worthy of commendation for the reasons that: (1) litigation is minimized; (2) an injured party has a better chance of restitution when the wrong-doer is financially irresponsible;[11] (3) criminal prosecution is not stifled.

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[7] A slight variation from this type of case is to be found in State v. Schlichter, 194 N. C. 277, 139 S. E. 448 (1927), in which the judgment rendered was held to be neither an alternative nor a suspended judgment, but a suspended execution. The defendants, officers of a defunct bank, had been convicted and sentenced for violation of the state banking laws. Capias was to issue at the next term of court in the event that the presiding judge found as a matter of fact that the defendants had failed to make proper restitution to the receiver. The analogy with the principal case is clear: in each instance the defendants could avoid imprisonment by making restitution to the injured individuals.

[8] Corbett v. Clute, 137 N. C. 546, 50 S. E. 216 (1905), was an action to foreclose a mortgage, the sole consideration and inducement of which was that the plaintiff would refrain from prosecuting the defendant's son for obtaining goods and money under false pretenses. The court quoted with approval from Garner v. Qualls, 49 N. C. 223, 224 (1856). "It is manifest that contracts founded upon agreements to compound felonies or to stifle public prosecution of any kind" cannot be enforced in a court of justice. Strong language was employed by the court, speaking through Chief Justice Smith, in Commissioners of Guilford County v. March, 89 N. C. 268, 271 (1883): "The principle is too well settled to require more than its mere enunciation, that any instrument taken which tends to obstruct the *firm* and *impartial* administration of public justice, will not be recognized and enforced."

[9] It is obvious that the two actions—civil and criminal—would have to arise from the same transaction.

[10] To agree to refrain from a threatened criminal prosecution in consideration of a private settlement would be in notorious violation of the principles so zealously protected in the cases cited *supra* note 8, and also laid down in Johnson v. Pittman, 194 N. C. 298, 139 S. E. 440 (1927).

[11] The brief for the defendant affirms a suspicion raised by the report of the case to the effect that although the plaintiff could have secured a judgment against the defendant in the civil action begun, but subsequently abandoned, it would have been in fact worthless because of the defendant's financial status. Unless the type of settlement here secured be more widely adopted, many a hapless victim of one's wrong-doing will go unrecompensed because the defendant is without estate.