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deposit was expressly held to be a pledge.⁴ In another, the lessee was allowed damages for conversion of the sum by the lessor.⁵ Accordingly, it is the usual view that these deposits are subject to set-offs and counterclaims only in connection with the express purposes for which the deposits were made.⁶ For instance, in a New York case,⁷ a deposit was made to secure payment of rent and taxes. Lessee, evicted for non-payment of rent, was held entitled to the deposit minus only the rent due and not the depreciation in rental value or costs of the dispossess action. The reasoning advanced in these cases is that the deposit is still the property of the lessee and the lessor has merely a right to hold it until the conditions for which it was given are fulfilled or made impossible of fulfillment. In every case, the deposit receipt or the deposit clause in the lease or contract determined the extent of these conditions.

In view of these decisions, it seems that the holding of the principal case was erroneous. *B*'s interest in the \$3,000 consisted of a right to retain it if *A* did not go into possession. But *A* went into possession, thereby cutting off this claim. To allow *B* to set-off an unsecured claim for extra construction costs is not only to go outside of the express conditions limiting *B*'s interest in the deposit, but to allow an unjustified preference to a creditor of a bankrupt as well.

PETER HAIRSTON, JR.

Real Property—Registration—Mortgage of Wife Without Privy Examination.

A man and his wife borrowed money to purchase realty, giving a note secured by a deed of trust on the property purchased. No acknowledgment or privy examination of the wife was actually had, though the notary's certificate stated the contrary and the registration was apparently regular. Subsequently a valid deed of trust was executed and recorded. In an action by the wife to restrain a fore-

⁴ Kaufman v. Williams, 92 N. J. L. 182, 104 Atl. 202 (1918).

⁵ Atlas v. Moritz, 217 App. Div. 38, 216 N. Y. S. 490 (1926). But note that in Goodman v. Scharched, 144 Misc. Rep. 905, 260 N. Y. S. 883 (1932), the holding was limited to cases where the deposit was expressly given as security.

⁶ Set-off allowed: Burke v. Norton, 42 Cal. App. 705, 184 Pac. 45 (1919); Lieberman v. Lavene, 253 Mass. 579, 149 N. E. 625 (1925); Sockloff v. Burnstein, 177 App. Div. 471, 164 N. Y. S. 262 (1917). Set-off denied: Rez v. Summers, 34 Cal. App. 527, 168 Pac. 156 (1917); Shanklin v. Kamin, 197 Ill. App. 630 (1916); see Knight v. Marks, 183 Cal. 354, 191 Pac. 531, 532 (1920).

⁷ Crausman v. Graham Const. Co., 95 Misc. Rep. 608, 159 N. Y. S. 709 (1916).

closure and sale under the first deed of trust it was *held*, that though the first deed of trust was admittedly invalid and equity would not enforce a specific performance, the amount so loaned would constitute an equitable lien on the land. The Supreme Court in affirming the dissolution of the injunction and decision of the lower court allowed priority to the first deed of trust.¹

As between the alleged grantor and grantee the attempted conveyance by a married woman of her realty is a nullity in absence of her privy examination.² Though specific performance quite generally has been denied, the property in some cases has been charged with an equitable lien where the married woman has received the benefits of the transaction.³ In all such cases in North Carolina no subsequent incumbrancer was involved.⁴ Other cases have held the married woman liable in damages for breach of her contract to convey.⁵

Conceding the justice of the principal case as between the parties, what effect should the equitable lien have upon the priority of a subsequent incumbrancer: (1) where the first deed is unregistered, and (2) where registered?

(1) If the first deed of trust is unregistered it will be ineffective

¹ *Boyett v. First National Bank of Durham*, 204 N. C. 639, 169 S. E. 231 (1933). Under the decision of the lower court, affirmed, the payees of the notes secured by the first deed of trust were held entitled to a sale of such land to satisfy the balance due, the proceeds of such sale to be applied as follows: (1) To the costs of the sale, (2) the payees of the notes secured by the first deed of trust, (3) to clerk of court to hold for subsequent incumbrancers or claimants.

² *Smith v. Ingram*, 130 N. C. 100, 40 S. E. 984 (1902); *Warren v. Dail*, 170 N. C. 406, 87 S. E. 126 (1915); *Hardy v. Abdallah*, 192 N. C. 45, 133 S. E. 195 (1926); N. C. CODE ANN. (Michie, 1931) §997; TIFFANY, REAL PROPERTY (1912) §477.

³ *Burns v. McGregor*, 90 N. C. 222 (1884); *North v. Bunn*, 122 N. C. 766, 29 S. E. 776 (1898); *Gann v. Spencer*, 167 N. C. 429, 83 S. E. 620 (1914) (as to betterments); TIFFANY, REAL PROPERTY (1912) §564.

⁴ In *Burns v. McGregor*, *supra* note 3, a married woman contracted to convey a smaller for a larger tract of land and to give a mortgage back to secure the difference in price. After execution of the deed she refused to acknowledge the mortgage back as of her own free will. *Held*, the land conveyed to her is subject to the price by reason of an equitable lien—if she keeps the property she must pay the debt. (But no subsequent incumbrancer was involved.)

⁵ *Warren v. Dail*, *supra* note 2 (though a married woman cannot convey realty without a privy examination she may be held for damages for breach of a contract to convey land, but equity will not decree specific performance); *Foster v. Williams*, 182 N. C. 632, 109 S. E. 834 (1921) (no lien was allowed where the deed of trust was invalid for want of privy examination of the wife).

as notice as against a subsequent creditor or purchaser for value holding under a registered instrument.⁶ No notice, however full or formal, will supply the want of registration.⁷

In (2), where the first deed is registered, two problems arise: what effect has it as notice (a) where such deed is defective on its face as to acknowledgment or proof of probate, and (b) where such defect is latent?

As to (a), North Carolina has consistently held that a deed, though registered, when defective on its face, is no notice to subsequent incumbrancers.⁸ The result is not so clear where the defective probate is latent, i.e. does not appear upon the face of the instrument.

North Carolina has held that where the defect in the registered instrument is due to the disqualification of the probating officer, and such defect is latent, one taking under the grantee in such instrument gets a good title unless the one claiming the benefit of the defective registration is "cognizant of the facts."⁹ But in such a situation the conveyance itself was valid as between the parties without registration.¹⁰ In the principal case the probate of the first deed of trust was latently defective in that there was a complete absence of the wife's privy examination. The registration should not be effective as notice to the subsequent incumbrancer, for, as between the parties, such a deed is a nullity.¹¹ The wife could set up the absence of the privy examination to avoid the deed apparently regular on the probate,¹² Consolidated Statutes Section 1001 not applying to such a

⁶ N. C. CODE ANN. (Michie, 1931) §3309 provides that no conveyance of realty will be valid as against creditors or bona fide purchasers unless registered.

⁷ *Collins v. Davis*, 132 N. C. 106, 43 S. E. 579 (1903); *Buchanan v. Clark*, 164 N. C. 56, 71, 80 S. E. 424 (1913); *Duncan v. Gully*, 199 N. C. 552, 155 S. E. 167 (1930); TIFFANY, REAL PROPERTY (1912) §478 and notes.

⁸ *Wood v. Lewey*, 153 N. C. 401, 69 S. E. 268 (1910); *Fibre Co. v. Cozad*, 183 N. C. 600, 112 S. E. 810 (1922); *Bank v. Tolbert*, 192 N. C. 126, 133 S. E. 558 (1926).

⁹ *Blanton v. Bostic*, 126 N. C. 418, 35 S. E. 1035 (1900); *Bank v. Tolbert*, *supra* note 8.

¹⁰ *Blanton v. Bostic*, *supra* note 9; *Warren v. Williford*, 62 S. E. 697, 148 N. C. 474 (1908); *Weston v. Roper Lumber Co.*, 160 N. C. 263, 266, 75 S. E. 800 (1912).

¹¹ *Supra* note 2.

¹² *Benedict v. Jones*, 129 N. C. 470, 40 S. E. 221 (1901); *Davis v. Davis*, 146 N. C. 163, 59 S. E. 654 (1907); *Lumber Co. v. Leonard*, 145 N. C. 339, 59 S. E. 134 (1907).

situation.¹³ It has been held that a deed void for want of mental capacity of the grantor will not be validated by proper registration even as against subsequent incumbrancers.¹⁴ A married woman's conveyance without her privity examination is equally void, and it is difficult to see how a void deed acquires any additional validity for registration and notice purposes because it seems to be regular. To hold otherwise would be to give the registration acts an unintended effect by allowing them to abrogate the requirements as to a married woman's conveyance of her realty.¹⁵

The privity examination of the wife being prerequisite to a valid conveyance of her realty, it is submitted the Court is allowing indirectly that which is prohibited directly by permitting an apparently regular registration to validate a void instrument and to charge a subsequent incumbrancer with notice so as to defeat his priority. Though it is doubtful that the Court intended to go so far, it has apparently done so in affirming the decision of the lower court.

HENRY L. ANDERSON.

Sales—Conditional Sales—Registration.

Dealer sold automobiles to customers on conditional sale and assigned the contracts to finance company, with an unrecorded agreement that repossessed cars should be purchased by dealer from finance company for the unpaid balance due from customers. Finance company was to hold title, dealer to be bailee for storage only, with duty to deliver to finance company on demand. Finance company claimed several cars so held from the dealer's receiver. *Held*, for claimant; the agreement was not a conditional sale and need not be recorded.¹

Either by express statutory provision or by judicial construction the requisite of recordation has been imposed upon chattel mort-

¹³ N. C. CODE ANN. (Michie, 1931) §1001 providing that an innocent purchaser is not affected by fraud in the treaty if the privity examination is regular, does not apply to situations where there is a complete absence of privity examination. See *Davis v. Davis*, *supra* note 13.

¹⁴ *Thompson v. Thomas*, 163 N. C. 500, 79 S. E. 896 (1913).

¹⁵ The requirements prerequisite to a married woman's valid conveyance of her realty are specifically set forth. N. C. CODE ANN. (Michie, 1931) §997. The registration acts (N. C. CODE ANN. (Michie, 1931) §3309) are for the protection of subsequent creditors and purchaser for value, and not for the purpose of correcting defects in the execution of an instrument of conveyance.

¹ *Cutter Realty Co. v. Moneyhun Co., Inc.*, 204 N. C. 651, 169 S. E. 274 (1933).