

6-1-1927

Recent Case Comments

North Carolina Law Review

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Recommended Citation

North Carolina Law Review, *Recent Case Comments*, 5 N.C. L. REV. 349 (1927).Available at: <http://scholarship.law.unc.edu/nclr/vol5/iss4/5>

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RECENT CASE COMMENTS

BANKS AND BANKING — DUTY TO DEPOSITOR — LIABILITY FOR ACTS OF VICE PRESIDENT OUTSIDE OF SCOPE OF AUTHORITY—The plaintiff, aged, left his home for greener pastures in which to invest his money. He fell victim to the wiles of a confidence man, who in order to make the plaintiff's funds available, induced him to transfer his account from his home bank to the defendant bank. Meanwhile the confidence man had approached the vice-president of the defendant bank, intimated to him his scheme to defraud the plaintiff and agreed to give him 10 per cent of the "profits" if, when the money was transferred to the defendant bank, he would not warn or advise the plaintiff when he wished to withdraw his account. The vice-president, who was the active manager of the bank, personally cashed the plaintiff's check, which money he knew was soon to be turned over to the thieves and later, after the plaintiff became worried at the disappearance of his "friends," he returned to the bank where the vice-president reassured him as to the safety of his venture, thus allowing the swindlers more time to get away.

The plaintiff brought his action on the theory that the defendant bank, through its agent the vice-president, while acting in the scope of his authority, participated in the swindle. He recovered a tort judgment. The Circuit Court of Appeals affirmed the lower court, holding that the plaintiff had a cause of action, that the bank had failed in its duty "to receive and keep the depositor's money, faithfully, for his benefit," but reversed on other grounds. *National City Bank v. Carter*, 14 Fed. (2d) 940, 6 C. C. A.

The decision appears to extend the bank's obligations considerably beyond those ordinarily incident to the relation between bank and depositor.¹ If the bank, acting through its agent, the vice-president, fully performed its legal obligation, to pay the depositor on demand, there seems to be no justification for holding the bank liable. For its agent's participation in the conspiracy and the acts done in furtherance of the plan cannot be imputed to the bank on any theory of

¹ 7 C. J. 630 n. 96; *Bank v. Dawson* (1885) 33 Minn. 399, 23 N. W. 552.

agency as they were both unauthorized and outside the scope of his employment.²

Does not the case recognise the doctrine that the relation between bank and depositor is no longer that of mere depositor and creditor but more extensive and inclusive of some of the features of the fiduciary relation? Was there not an affirmative duty to warn the plaintiff of the fraudulent plans laid against him, after the defendant's agent learned of the plan and that it was directed against the defendant's depositor? The act of paying the plaintiff on demand was an official one that could have been performed by other bank officials. Certainly the fact that the vice-president performed the official act of handing over the money was not the basis of the bank's liability. Nor could the statements of reassurance by the vice-president be imputed to the bank for they were not within the scope of his authority.³

But the fact that the vice-president's silence was bought; does not that establish the bank's liability? Not unless there was a duty on the bank to warn the plaintiff. At once we recognise a moral duty and this might have received sanction, for J. Vaughan said, "the law is never better employed than in enforcing the observance of moral duties."⁴ The basis for this duty to warn must be founded on firmer ground than moral sensibility before courts feel disposed to enforce it. It lies in the relation between bank and depositor for as Dean Pound states, "In the absence of a relation that calls for action the duty to be the good Samaritan is moral only. The common law judge tends to seek for some relation between the parties or as he is likely to put it, some duty of the one to the other."⁵ But does such relation that calls for action exist today between bank and depositor?

²"Where an officer is guilty of fraud, the bank is not, as a general rule, chargeable with notice of the facts connected with the fraudulent transaction and which for that reason would probably have been concealed by the officer." 7 C. J. 533; *Knobloch v. Germania Sav. Bank* (1897) 50 S. C. 259, 27 S. E. 962; *Real Estate Trust Co. of Phila. v. Washington* (1911) 191 Fed. 566, 113 C. C. A. 124, certiorari denied 223 U. S. 724. *Findley v. Cowles et al.* (1895) 93 Iowa 389, 61 N. W. 998.

³"A cashier does not act as agent of the bank in answering an inquiry addressed to him by a person as to the business standing of a third person, his act being a mere voluntary statement, and not relating to the business of the bank." Tiffany, *Banks and Banking* (1912) p. 330; *Mores v. 2nd, Nat. Bank of Titusville* (1875) 80 Pa. 163; *First National Bank v. Marshall and Ilsley Bank* (1897) 83 Fed. 725; *Taylor v. Commercial Bank* (1903) 174 N. Y. 181, 66 N. E. 726.

⁴*Taylor v. Blacklow* (1836) 3 Bing. N. C. 235, 249.

⁵Pound, *Spirit of the Common Law*, p. 24.

"Banks invite business and seek accounts, and those who do business with them have the right to expect the exercise of good faith on their part."⁶ Every day there is a growing practice in modern banking to advise, not only on application by the depositor, but voluntarily by circular and agent, of the investment opportunities open to the depositor. This custom is indicative of a relation between banker and depositor which has a greater obligation than the repayment of the debt. It would seem that good faith is inherent in the relation. In this sense the decision of the principal case recognises the duty of the bank to depositor "to keep the depositor's money, faithfully, and for his benefit."

By a recent decision⁷ in England the duty of secrecy on the banker not to disclose the depositor's account or transactions with the bank was given legal sanction. This decision is but another in which English courts have recognised that debtor-creditor no longer explains the relation between bank and depositor, that duties arise from the relation other than the repayment of the deposit.⁸

In the instant case the decision might have been of a happier tenor if the general duty of good faith inherent in the relation between bank and depositor had been recognised in the lesser though more particular and specific duty on the bank to warn the depositor in a situation where a bank official knows a swindle is being directed against the bank's depositor.

F. B. GUMMEY

CONFLICT OF LAWS—FEDERAL COURTS—RULE OF LAW WHEN STATE COURTS DIFFER—The inevitable difficulty of the courts in arriving at uniform decisions under our dual system of jurisdiction—federal and state—has again risen in the case of *Pacheco v. N. Y., N. H., & H. R. C.*¹ There an employee of the defendant railroad company brought an action for personal injuries under the federal Employer's Liability Act.² The plaintiff, a section hand employed by the defendant company in Massachusetts, was ordered by his

⁶ *Heinz et al v. Fourth Nat. Bank of Chattanooga, Tenn.* (1897) 48 S. W. 132.

⁷ *Tournier v. Nat. Provincial and Union Bank of Eng.* (1924) 1 K. B. 461, 12 B. R. C. 1021; Paton's Digest Vol. 2 (1926) 568 a, 565 a; 10 H. L. R. 108.

⁸ *Foster v. Bank of London*, 3 F. and F. 214; *N. Joachimson v. Swiss Bank Corp.* (1921) 3 K. B. 110; *London Joint Stock Bk. Ltd. v. MacMillan & Arthur* (1918) A. C. 777, 9 B. R. C. 720.

¹ 15 F. (2 nd.) 467 (1926).

² Comp. St. 8657-8685.

foreman to spread some top dirt on the road bed, and while so engaged near a switch, was struck by a shift of freight cars backing down a siding toward the main track. There was no one on the rear of the cars to warn employees at work on the tracks, nor did the switching engine ring its bell before starting or crossing the highway, which was nearby, as the defendant's rules required. The court *nisi* dismissed the complaint at the close of all the evidence on the ground that the plaintiff had assumed the risk of such an injury. On writ of error to the Circuit Court of Appeals this ruling was reversed, and a new trial ordered, the appellate court applying its own notion of the meaning of assumption of risk under the statute, holding that the case came under an exception to the rule that "assumption of risk" bars the action,³ to wit: "when the plaintiff's fellow servants have failed to observe a rule or practice established by it (defendant employer) for the protection of its employees," assumption of risk is no bar.⁴ This ruling of the Circuit Court was distinctly contrary to the settled law enunciated by the Massachusetts courts which hold that such rules are not for the protection of employees but for the benefit of the train, and the risk of such inattention amounting to a breach of these rules is assumed by an employee.⁵ The defendant contended that the statute should be interpreted in the light of decisions of the courts of Massachusetts, the locality where injury occurred, and that the common law of Massachusetts as laid down by the state courts should govern in the case at bar in interpreting the meaning of "assumption of risk" in the federal statute.

In suits based upon state statutes, the federal courts follow the interpretation given such statutes by the highest court of that state.⁶ And in *vice versa* cases, where the action is brought on a federal statute in a state court, the federal decisions are controlling.⁷ Again

³ *Aerkfetz v. Humphrey* (1892) 145 U. S. 418; *Goidt v. Penna. R. R. Co.* (1918) 245 U. S. 441; *Pryor v. Williams* (1920) 254 U. S. 43.

⁴ *Lehigh Valley R. R. v. Mangan*, 278 F. 85; *B. & O. R. R. v. Robertson* (1924) 300 F. 319; *St. Louis etc. Ry. v. Jeffries* (1921) 276 F. 73.

⁵ *Sullivan v. Fitchburg R. R.* (Mass.-1894) 36 N. E. 751; *Porter v. N. Y. N. H., & H. R. R. C.* (Mass. 1911) 96 N. E. 691.

⁶ *Morgan v. Curtenis* (1857) 20 How. 1; *Bauserman v. Blunt* (1893) 147 U. S. 647; *Sioux City R. R. Co. v. N. A. Trust Co.* (1898) 173 U. S. 99; Taney, C. J., in *Rowan v. Runnels* (1846) 5 How. 138, 139 says: "Undoubtedly this court will always feel itself bound to respect decisions of the state courts, and from the time they are made will regard them as conclusive in all cases upon the construction of their own constitutions and laws;" Black, *Interpretation of Laws*, 185.

⁷ *Inge v. R. R.* (1926) 192 N. C. 522, 135 S. E. 522.

in questions involving local law the federal courts feel themselves bound by the decisions of the state courts⁸ just as in practice and procedure.⁹ But in cases involving the general principles and doctrines of commercial jurisprudence, such as negotiable instruments, insurance contracts, common carriers, the federal courts are independent of state decisions.¹⁰ And especially in construction of federal statutes do the federal courts feel themselves unfettered by state decisions.¹¹

In the instant case, Circuit Judge Hand, for the court, said in answering the argument of the defendant: "On that point we think that the state decisions are not authoritative, because the question is not one of Massachusetts common law, but of the meaning of a federal statute.¹² While agreeing with Judge Hand's conclusion that state decisions should not bind the federal courts on such a point, it is submitted that he could have reached his conclusion by treating the matter as a question of Massachusetts law.¹³ Moreover, it is a well established rule of statutory interpretation that where the statute uses an unexplained term, the common law of the locality should be used to determine its meaning.¹⁴ The court might easily have rested its decision upon the established principle that, as

⁸ *Ins. Co. v. Chi., Mil., etc. Ry. Co.* (1899) 175 U. S. 91; *East Central E. M. Co. v. Cent. Eureka Co.* (1906) 204 U. S. 266; "It may be said generally that whenever the decisions of the state courts relate to some law of a local character which may have become established by those courts or have always been a part of the law of the state that the decisions upon the subject are usually conclusive and always entitled to the highest respect of the federal courts . . . when such a local law or custom has been established by repeated decisions of the highest courts of the state it becomes also the law of the United States courts sitting in that state," per Miller, J. in *Bucher v. Chesire R. R. Co.* (1887) 125 U. S. 555.

⁹ *Cent. Vermont Ry. v. White* (1915) 238 U. S. 507; *Minn. etc. R. R. v. Bombolis* (1916) 241 U. S. 211.

¹⁰ Rose: *Federal Jurisdiction and Procedure*, paragraph 603 and cases there cited; *Swift v. Tyson* (1842) 16 Peters (U. S.) 1.

¹¹ *Seaboard Air Line Ry. v. Horton* (1913) 233 U. S. 492, reversing *Horton v. Ry. Co.*, 162 N. C. 424, 78 S. E. 494; *New Orleans etc. Ry. v. Scarlet* (1918) 249 U. S. 528 overruling s. c. (1918) 115 Miss. 285; *Pryor v. Williams* (1920) 254 U. S. 43, reversing 272 Mo. 613.

¹² 15 Fed. (2 nd.) 467, 468.

¹³ ". . . But I suppose it will be admitted on the other side that even the independent jurisdiction of the Circuit Court of the United States is a jurisdiction only to declare the law . . . and only to declare the law of the state. It is not an authority to make it." Holmes, J., dissenting in *Kuhn v. Fairmont Coal Co.*, 215 U. S. 349, 370; Beale, *A Treatise on the Conflict of Laws*, sec. 112 a.

¹⁴ Black, *Interpretation of Laws*, page 361: "If a statute makes use of a word, the meaning of which is well understood at common law, the word should be understood in the statute in the same sense in which it was understood at common law." *Seaboard Air Line v. Horton* (1913) 233 U. S. 482.

to the common law of a state, the federal courts are not bound by the state courts but may find the common law to be as the federal courts see it in interpreting federal statutes.¹⁵

Circuit Judge Hough, dissenting, based his opinion upon the social policy of lessening the gap between the state law and the federal law in the same locality, saying: "We must decide whether it is better for the community to make negligence mean one thing in the state courts of Massachusetts and another thing in the U. S. Courts sitting in the same state, or to let the unfortunate difference in meaning affect both state and federal courts geographically. To my mind the latter course is better for the common weal, and we preferred it in *B. & M. R. R. v. Daniel*, 290 Fed. 816 . . . now in substance overruled."¹⁶

But the *Daniel* case, *supra*, is not overruled by the instant case; indeed it is not even on all fours with it. That case was an action on a state statute of Vermont, and there, of course, the common law of Vermont, as laid down by the state courts, was applied in interpretation.¹⁷ The learned dissenting judge believed that there was a public policy to be served in minimizing the difference between the rules of law applied in state and federal courts sitting in the same state. But why is there not a paramount public policy in striving—as the court here does—for uniformity of decisions throughout the

¹⁵ *Supra*, n. 10; "There is no common law of the United States in the sense of a national customary law distinct from the common law of England as adopted by the several states, each for itself applied as its local law, and subject to such alterations as may be provided by its own statutes. *Wheaton v. Peters*, 8 Pet. 591. A determination in a given case of what that law is may be different in a court of the United States from that which prevails in the judicial tribunals of a particular state. This arises from the circumstances that courts of the United States, in cases within their jurisdiction where they are called upon to administer the law of the state in which they sit or by which the transaction is governed exercise an independent, though concurrent, jurisdiction and are required to ascertain and declare the law according to their own judgment. This is illustrated by the case of *R. R. Co. v. Lockwood*, 17 Wall. 357 where the common law prevailing in the state of New York in reference to the liability of common carriers for negligence received a different interpretation from that placed upon it by the judicial tribunals of the state; *but the law as applied is none the less the law of that state.*" (Italics ours) *Matthews, J., in Smith v. Alabama* (1887) 124 U. S. 465, 478.

¹⁶ 15 F. (2nd.) 467, 469.

¹⁷ *Supra*, n. 6 and *Marshall, C. J., in Elmendorf v. Taylor*, 10 Wheat. 152: "The court has uniformly professed its disposition in cases depending on laws of a particular state to adopt the construction which the courts of the state have given to the laws. This course is founded upon the principle, supposed to be universally recognized, that the judicial department of every government where such a department exists is the appropriate organ for construing the legislative acts of that government." Also see *Knights of Pythias v. Meyer* (1923) 265 U. S. 30.

federal courts, whose purpose is the protection of non residents wherever they may be, rather than trying to reconcile the federal courts with all the many and conflicting state courts—a bootless endeavor?

Finally, it seems apparent that the court in reaching its decision contrary to the state courts of Massachusetts was influenced as other courts have been,¹⁸ by an unpleasant visceral sensation of revolt against the unjust state decisions holding that rules requiring a lookout to be kept in the rear of a backing train and the engine bell to be rung before starting or before crossing a highway were made not for the benefit of employees at work in the vicinity but for protection and warning to three empty box cars—an absurdity.

GEO. ROUNTREE, JR.

CONSTITUTIONAL LAW — COMMERCE — RESHIPMENT OF FERTILIZER BY IMPORTER—In the case of the *Seaboard Air Line Ry. Co. v. Lee et al.* (E. D. N. C., 1926) 14 F. (2d.) 439, the court held, in a strong opinion summarizing the conflicting decisions, that the reshipment of fertilizer from the port of receipt by the importer to points in the same state was intrastate commerce and therefore subject to local freight rates. The fertilizer in question was received in bags or bulk from Chile at Wilmington, the business residence of the importer, and was either stored or delivered from the dock to the purchaser after being tagged and branded. All contracts of the importer for resale called for delivery f. o. b. Wilmington. The purchasers then shipped on new billing to points within the state. Eighty per cent of the fertilizer was reshipped direct from shipside and the remainder stored. In some cases, ownership changed several times before the fertilizer was removed from the dock. The port of destination of the ship was not known until it reached the Panama Canal, where orders were received, as in this case to proceed to Wilmington.

¹⁸ *Lane v. Vick* (1844) 3 How. 464, 477. McLean, J.: "... This construction of the will is strengthened by its justice to all the parties concerned. That the testator intended to give to his sons a much larger part of his property than to his daughters, is evident. He gave to his sons an equal share with his daughters of his personal property. But did he intend to cut off his daughters from all interest in his real estate? He could not have had the heart of a dying father to have done so. He did not act unjustly to his daughters. They, equally with his sons, were devisees of the proceeds of the town lots, after payment of all just debts and other engagements." *Fozcroft v. Mallet* (1845) 4 How. 353; See Pound, *Spirit of the Common Law*, pp. 2 and 216.

The court found that at the time of shipment from South America the importer did not intend the ultimate destination of the fertilizer to be any specific interior points in North Carolina. The knowledge that the very nature of the fertilizer would cause it to be spread all over the state is not the same as a definite intent on the part of the importer that the fertilizer should ultimately reach definite points in the interior of the state. His intention was fully carried out when the cargo was delivered to him at Wilmington, the importer's point of distribution. The fertilizer is now in his possession and has come definitely to rest according to his original and continuing intention. He is now ready to make delivery at Wilmington to various purchasers throughout the state.

Are the reshipments from Wilmington to interior points in North Carolina subject to intrastate rates? The answer to this is difficult because of the conflicting decisions attempting to draw the line between intrastate and interstate commerce. Various tests have been proposed, each of which was at one time considered the essential test. (1) Have the imported articles become incorporated with the general mass of property in the state? This test was stated by Chief Justice Marshall in the famous case of *Brown v. Maryland*¹ and known as the "original package doctrine." (2) Was the bill of lading under which the goods were shipped local or foreign?² But it has been held that a shipment of freight under local bills of lading to New Orleans, and intended for export is foreign commerce.³ (3) What is the essential character of the movement of the goods?⁴ Under this test, the contract of sale, the bill of lading, the intention of the parties are all elements to be considered. (4) What is the purpose of a lay over? Is the lay over for redistribution or for remanufacture? Clearly if it is only for redistribution, the lay over does not take the goods out of interstate commerce.⁵ On the other hand, if the goods are changed by manufacture, the finished products are clearly subject to local regulation.⁶ The length of time of the lay over and what is done to the goods during the lay over are important consider-

¹ *Brown v. Maryland* (1827) 12 Wheat. 419, 114 U. S. 598.

² *Louisville & N. R. Co. v. Ohio Valley Tie Co.* (1912) 148 Ky. 718, 147 S. W. 421.

³ *Railroad Commission of Louisiana v. Texas Pac. R. R. Co.* (1913) 229 U. S. 336, affirming 183 Fed. 1005.

⁴ *Baltimore & O. S. N. R. Co. v. Seattle* (1922) 43 S. Ct. 28, 200 U. S. 166, affirming 272 Fed. 675.

⁵ *Kelly v Rhoads* (1903) 188 U. S. 1, 23 S. Ct. 259.

⁶ *Lumber Co. v. R. Co.* (1911) 97 Ark. 300, 133 S. W. 1119.

ations. Thus the lay over of grain in Chicago for purposes of storing, weighing, grading and inspecting was held not to take the shipment out of interstate commerce.⁷ The court distinguished this case from the lay over of oil in Tennessee for purposes of storage, separation and redistribution, which was held to make the reshipments subject to local rates.⁸

Obviously, there is no well defined test for determining the character of a shipment as interstate or intrastate commerce. Perhaps the controlling consideration is one of public policy. The court, in the instant case, looking at the facts in the light of all of the above tests, concluded that local rates applied to the reshipments of the fertilizer since it had come definitely to rest and was part of the general mass of property in North Carolina, was being reshipped under local bills of lading and the essential character of such reshipments was local.

T. B. LIVINGSTON, JR.

CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—DISQUALIFICATION OF JUDGE—INTEREST IN COSTS—The case of *Tumey v. State of Ohio*,¹ decided by the Supreme Court of the United States in March, is of peculiar interest in its possible application to the inferior courts of North Carolina and of other states. Tumey, the defendant, was arrested and brought before the mayor of a village and charged with unlawfully possessing intoxicating liquors. Under the Ohio Code the mayor had jurisdiction within the county of violations of the Prohibition law. The statutes further provided a minimum fine of \$100 for a violation of the same. 50 per cent of this fine was received by the village if the conviction was before the mayor. In such cases no fees or costs are paid the mayor except by the defendant, and then the mayor receives no costs unless the defendant is convicted.

The defendant, having been brought up for trial, moved for a dismissal because of the disqualification of the mayor to try him under the Fourteenth Amendment. The mayor denied the motion. The defendant was convicted, fined \$100 and costs, which in this case amounted to \$12. It was further ordered that defendant be imprisoned until the same were paid, and a credit of \$1.50 was given to

¹ *Board of Trade of Chicago v. Olsen* (1923) 43 S. Ct. 470, 262 U. S. 1.

² *General Oil Co. v. Crain* (1908) 209 U. S. 211.

³ *Tumey v. Ohio* (1927) 47 St. Ct. 437.

him for every day which he remained in prison. The case was appealed to the appellate courts of the State and then to the Supreme Court of the United States. That Court rendered a decision in favor of the defendant that he was deprived of due process of law because "of the disqualification of the judge, which existed both because of his direct pecuniary interest in the outcome, and because of his official motive to convict and to graduate the fine to help the financial needs of the village."

The Court states as the general rule that officers acting in a judicial or quasi judicial capacity are disqualified by an interest in the controversy to be decided.² Exceptions, however, are recognized, depending upon the nature and degree of the interest, and also upon the fact that there is no other court to try the case. *Evans v. Gore*³ is an example of the second exception. In that case it became necessary for the Supreme Court of the United States to pass on the question of the constitutionality of an income tax on the salary of federal judges because, "there is no other appellate tribunal to which, under the law, the plaintiff could go."

In the present case, counsel for the State asserts the validity of the practice as an exception to the general rule. The Court, to determine if such a practice would allow the defendant due process of law, looks to the common law of England before the emigration of our ancestors to America and finds that inferior judicial officers and justices of the peace were disqualified because of the slightest pecuniary interest in the cause to be tried.⁴ However, in this country, some states followed the strict common law rule⁵ while others did not, the latter states taking the view that the rule was impracticable, and that such a minute or remote interest in the litigation as that of citizens or taxpayers in suits against the municipal corporations where they reside might be declared by the Legislature to be insufficient reason for the disqualification of a judge or juror.⁶

² *Gregory v. Railroad* (1849) 4 Ohio State 675; *Pearce v. Atwood* (1815) 13 Mass. 324; *Moses v. Julian* (1863) 45 N. H. 52, 84 Amer. Dec. 114; *Railroad Co. v. Howard* (1868) 20 Mich. 18.

³ (1920) 253 U. S. 245, 40 S. Ct. 450, 64 L. Ed. 887, 11 A. L. R. 519.

⁴ *Bonham's Case*, 8 Coke 118 a; *Day v. Savage*, Hobart 85, 87; *The Queen v. Rand* (1866) 1 Q. B. 230.

⁵ *Diveny v. Elmira* (1873) 51 N. Y. 506; *Clark v. Lamb* (1861) 2 Allen (Mass) 396; *Dively v. Cedar Falls* (1866) 21 Iowa 565.

⁶ *City Council v. Pepper* (S. C., 1845) 1 Rich. 364; *Foreman v. Mariana*, 43 Ark. 324; *Board of Justices v. Fennimore* (1793) 1 N. J. Law 190; *Bennett v. State* (1878) 4 Tex. App. 72; *Wellmaker v. Terrell* (1908) 3 Ga. App. 791, 60 S. E. 464.

The Court then said, "From this review (of the authorities) we conclude that a system by which an inferior judge is paid for his service only when he convicts the defendant has not become so embedded by custom in the general practice, either at common law or in this country, that it can be regarded as due process of law, *UNLESS* the costs *USUALLY* imposed are so small that they may be properly ignored as within the maxim 'de minimis non curat lex.'" Further, it stated that the prospect of receiving or losing \$12 in each case could not be regarded as a minute or remote interest.

The North Carolina Laws in regard to the fees for a justice of the peace are, in some respects, similar to the laws of Ohio which were considered in the principal case. In criminal cases of which the justice has final jurisdiction, he is entitled to fees only in case the defendant is convicted, the defendant being liable for the same,⁷ but "if the party charged be acquitted, the *COMPLAINANT* shall be adjudged to pay the costs, and may be imprisoned for the non-payment thereof, *IF* the justice shall adjudge that the prosecution was frivolous or malicious."⁸ This exception would seem to cover but few cases, the majority of acquittals would leave the justice with no compensation for his services. Furthermore, if the interest of the justice in the costs is such as to deprive the defendant of due process, in case of an acquittal where the complainant was adjudged to pay them, he too would be deprived of due process, for the justice would have the same interest in holding him guilty of malicious prosecution as he would have in convicting the defendant. But that is another question.

So, under the principal case, it seems that the fee system in North Carolina can be justified, if at all, only on the ground that the costs imposed are so small as to come within the maxim "de minimis non curat lex." As to the amounts which would come within that maxim, there seems to be no way to ascertain except by trial before the Supreme Court.⁹ However, it is certain that \$12 is not such an amount.

A search through the records of a number of justices of the peace indicates that the costs which go to the justice himself are usually from \$1.60 to \$2.95, the average costs being about \$2.00.

⁷C. S. 1267.

⁸C. S. 1288.

⁹In only four cases, cited in the principal case, has this exact question arisen, and in those cases, none of which were carried to the Supreme Court of the United States, was the question of due process of law properly raised.

It is entirely possible, depending upon the number of witnesses and other circumstances, for the costs to amount to \$5.00 or more, but that would be an exceptional case. Suppose that a case involving \$5.00 for costs was taken before the Supreme Court, would the Court allow evidence to show that it was an exceptional case, and that the average costs are lower than that amount. Even if it were decided that the average amount charged as costs is so small as not to disqualify the judge because of interest, in the cases where the costs are exceptionally large the defendant would probably have reason to appeal, if he so desired, because he was deprived of due process. And, as stated before, there is no standard by which to gauge the amounts which would come within the maxim "*De minimis*." It is merely a matter for the opinion of the Court, and that opinion would probably be based on the fundamental proposition quoted in the principal case, which is as follows, "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, 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."

W. H. ABERNATHY

CONSTITUTIONAL LAW—VALIDITY OF LAW PRESCRIBING FLOGGING FOR INCORRIGIBLE PRISONERS—Defendant, a prison superintendent, was indicted for assault on a prisoner to whom he administered punishment by six licks across the back and hips with a strap two feet long, two inches wide and one-eighth of an inch thick. This whipping was done in accordance with a law authorizing it and applying to the county where the whipping took place, the law allowing only the superintendent to apply the lash, and then only to those who are incorrigible, and specifying that the whipping shall be administered by two persons of good moral character, and that the superintendent shall make a memorandum of the transaction and file it with the county commissioners for a permanent record. The question, therefore, in this case was as to the validity of this law.

Held, that defendant was not guilty; and that the judgment in the court below, rendered upon a special verdict, on ground that the statute is unconstitutional, is reversed.¹

Despite the possible objections that may be raised against this decision by extremists in the matter of prison discipline, it seems

¹ *State v. Revis* (1926) 193 N. C. 192, 136 S. E. 346.

unassailable from the standpoint of both law and common sense. The Constitution of North Carolina provides that only the following punishments shall be known to the law of this state: Death, imprisonment with or without hard labor, fines, removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under this state.² The argument was made that this provision of the organic law excluded whipping. It is no doubt true that a court could not, on conviction of a crime, pronounce that the sentence should be executed with the lash. But to apply this analogy to the present case would be carrying logic too far. That the framers of the Constitution of 1868 recognized this distinction is shown by the latter part of the section prescribing what punishments shall be known to the law of this state, which states, in substance, that no convict whose labor shall be farmed out shall be punished for any failure of duty as a laborer except by a responsible officer of the state.³

The tenor of the North Carolina decisions is to the effect that the whipping of prisoners is legal if done in a reasonable manner and by the proper authority and under legislative sanction.⁴ No doubt the same result would be reached should the flogging be done under proper rules and regulations promulgated by the county commissioners, and such has been strongly intimated.⁵ But, by the law of this state, flogging of prisoners under any conditions is invalid if done without the legislative power or without authority of some prescribed rules.⁶

S. E. VEST

CORPORATIONS—FOREIGN CORPORATION DOING BUSINESS IN A STATE—If a foreign corporation is doing acts of business in a state sufficient to show an intent to make it an effective part of its field of operations in the business for which it was created, the courts

² N. C. Const. art. XI, sec. 1.

³ N. C. Const. art. XI, sec. 1.

⁴ *State v. Revis* (1926) 193 N. C. 192, 136 S. E. 346; *State v. Nipper* (1914) 166 N. C. 272, 81 S. E. 164; *State v. Mincher* (1916) 172 N. C. 895, 90 S. E. 429.

⁵ *State v. Nipper* (1914) 166 N. C. 272; *State v. Morris* (1914) 166 N. C. 441, 81 S. E. 462. Brown, J., says that such an important matter would have to be regulated and prescribed by the commissioners themselves and could not be delegated; hence, "the order of the board that the road superintendent be authorized to use such means as he may deem necessary to enforce obedience by the convict force does not authorize the infliction of corporal punishment."

⁶ *State v. Mincher* (1916) 172 N. C. 895, 90 S. E. 429.

hold that this corporation has subjected itself to the jurisdiction of that state. See *Jurisdiction Over Non-Resident Corporations*, 5 N. C. L. Rev. 159.

Three recent decisions—from North Carolina, Virginia, and Maine—confirm this view. In the North Carolina case, *Commercial Trust v. Gaines* (1927) 193 N. C. 233, 136 S. E. 609, the plaintiff was a New York corporation engaged in the purchase of notes from automobile dealers in other states, the notes being sent on to the plaintiff in New York and there purchased or rejected. There was no evidence of any purchase in North Carolina or of any officer or agent of the corporation coming here. The plaintiff had brought several suits in North Carolina to recover payments on other notes. Held, there was no evidence of doing business in North Carolina so as to require compliance with statutes relative to foreign corporations doing business in the state. Since there was no act of business in the state, and no agent for the company sent into the state, and only sporadic suits on unpaid notes here, there was no basis for jurisdiction. *Timber Co. v. Ins. Co.* (1926) 192 N. C. 57, 133 S. E. 424; *Ins. Co. v. Meyer* (1905) 197 U. S. 407; 14a C. J. 1776, sec. 2983.

In the Virginia case, *Western Gas Const. Co. v. Commonwealth* (1927) 136 S. E. 646, the defendant, an Indiana corporation, contracted with the City of Richmond to supply all labor and materials for the construction of a gas works. The construction company shipped its ready-to-be-assembled materials from Indiana to Richmond. The Commission also found as a fact that the parties expected the defendant to make a substantial addition to the city's gas works—as was done—not a mere delivery of property in the form of assemblable construction stuff. The defendant contended that it was engaged in interstate commerce only and was not doing business in Virginia. Held, that the defendant was doing business in Virginia without a license as provided by the Virginia Code. This decision seems to be in accord with the North Carolina court's theory of jurisdiction over non-resident corporations as stated by Mr. Justice Connor in delivering the opinion of the court in the *Gaines Case*, *supra*: The "presence within the state of such officers, agents, or other persons engaged in the transactions of the corporation's business with citizens of the state is generally held as determinative of the question as to whether a corporation is doing business in the state."

In the federal case from the district of Maine, *Edward Sales Co. v. Harris Structural Steel Co.* (1927) 14 F. (2d) 155, the plaintiff, a Maine Corporation, brought a contract action against the defendant, a New York corporation. The evidence showed that the defendant company had shipped three lots of construction materials into Maine; no contracts had been made in that state, however; and there was no office or place of business of the defendant in Maine, although an agent had been appointed to solicit future business there, and the defendant had engaged in one suit in that state. A statute gave the court jurisdiction over a foreign corporation having a "usual place of business" in that state or "doing business" there. Held that the action should be dismissed for want of jurisdiction. The defendant's shipment of three lots of stuff into Maine were acts of interstate commerce and did not constitute carrying on intra-state business, as there was a mere transportation of materials from one state to the other, and no further acts of business by the defendant in the state of Maine. *Const. Co. v. Commonwealth*, *supra*. And engaging in litigation in a state does not come within the term "doing business" in that state. *Commercial Trust v. Gaines*, *supra*. Finally, the appointment of an agent by the defendant to do business in the state at some future time by the very terms of the appointment does not constitute doing business as yet. As was said by the court in *Commonwealth v. Chattanooga Impl. Co.* (1907) 126 Ky. 636, 104 S. W. 389, "The appointment of an agent is a step toward carrying on business, but unless the agent acts under his employment the business is not carried on in this state."

To conclude, then, it seems that these cases are reconcilable upon the theory that a court of a state may not entertain jurisdiction over a foreign corporation on "doing business" statutes unless that corporation by its acts in the state shows an intent to carry on an effective, material part of its business there.

GEO. ROUNTREE, JR.

CRIMINAL LAW — FIRST DEGREE MURDER — DRUNKENNESS AS A DEFENSE—In the case of *State v. Ross*,¹ the defendant was indicted for murder in the first degree. On trial the defendant offered evidence as to his mental condition which was caused by intoxication. The evidence was excluded, and upon conviction, the defendant appealed, assigning as error the exclusion of evidence tending to show intoxication. Held: Error.

¹ *State v. Ross* (1927) 193 N. C. 25, 136 S. E. 193.

The crime of murder has been divided into degrees in this and many other states. The North Carolina statute² provides: "A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture or by any other kind of wilful, deliberate and premeditated killing . . . shall be deemed to be murder in the first degree." It is plain from the wording of the statute that there must be deliberate and premeditated design to kill in order for the defendant to be guilty of the offense. For the state to secure a conviction for murder in the first degree it must show, beyond a reasonable doubt, that such a murder was committed by the defendant. Can such a conviction be reached where evidence offered by defendant to show that his reason was dethroned by intoxication is excluded? The evidence of intoxication is not introduced for the purpose of mitigating or excusing the crime, but for the purpose of determining whether the accused was capable of forming or retaining the intent or design necessary to constitute the crime.³ Where such a defense is offered by the defendant the burden is upon him to prove to the satisfaction of the jury that he was incapable of having the necessary intent.⁴ Our court has held that drunkenness is not an excuse for crime, but that where the prisoner is charged with the commission of a crime of which the specific intent is an essential element, evidence of drunkenness should be admitted to show the mental condition of the accused at the time the crime was committed.⁵ "Where murder is divided into degrees, the decided weight of authority is that drunkenness may be shown to negative the existence of the state of mind, the intent necessary to constitute murder in the first degree."⁶ To show the lack of deliberation and premeditation the defendant should be allowed to introduce such evidence as would show that his mental condition was such that he was incapable of forming or entertaining such a design or intent, for where the killing is voluntary and unlawful, but without premeditation, the offense is murder in second degree, unless the provocation was sufficient to reduce the degree. To reduce the degree the evidence must be such as to show that intoxication was so complete as to dethrone the reason and render the accused incapable of having the specific intent to take life.⁷ As to the execution, while

² C. S. 4200.

³ 13 R. C. L. p. 717.

⁴ *State v. Shelton* (1913) 164 N. C. 513, 79 S. E. 883.

⁵ *State v. Wilson* (1889) 104 N. C. 868, 10 S. E. 315.

⁶ Clark and Marshall, *Crimes*, p. 164.

⁷ *State v. Shelton* (1913) 164 N. C. 513, 79 S. E. 883.

intoxicated, of a previously formed intent or design, the North Carolina court said: "The killing and its manner, the intent, intoxication, how it comes about, and for what purpose drunkenness takes place, and the like, are questions for the jury."⁸ Where the killing is the result of a deliberate and premeditated design to take life the murderer is guilty of murder in the first degree, but where there is no such design, either from lack of capacity or from actual choice, the crime is of a less degree.

J. C. KESLER

GIFTS—DEEDS OF GIFT VOID WHEN NOT REGISTERED WITHIN STATUTORY PERIOD—CURATIVE STATUTES—In the recent case of *Booth v. Hairston* (1927) 193 N. C. 278, 136 S. E. 879, Mrs. George, on February 21, 1921, deeded a tract of land to her son, the defendant, but remained in possession herself. The defendant failed to have his deed registered during the statutory period of two years, C. S. 3315, and on April 1, 1923, Mrs. George willed the same property to her daughter, the plaintiff. A statute was passed in 1924 (ch. 20) extending the time in which all such instruments might be registered until September 1, 1926, and the defendant registered his deed in 1924 subsequent to the making of the will. Mrs. George died in 1925, and her daughter brought this action to set aside the defendant's deed. The question in the case is whether or not the defendant's unregistered deed which the statute declared to be void was validated by the Act of 1924. The court held for the plaintiff on the ground that the statute could not validate a void deed. To give validity to such a deed would divest one person's rights and invest them in another contrary to the constitution. Two judges dissented on the ground that there was no vested right in a third party and that as between Mrs. George and the son the statute was valid. The cases uniformly hold that where third persons get rights during the intervening period no curative statute will be valid which divests these rights. But in the present case the daughter got no interest in the land for the will didn't take effect until the testatrix's death, C. S. 4165, and the testatrix was alive at the time the statute was passed, and thus it seems the title to the land passed to the son before the will became effective. The cases cited by the majority opinion were

⁸ *State v. Kale* (1899) 124 N. C. 816.

cases in which third persons had secured an interest during the intervening period, but the weight of authority seems to be that where no rights have vested in third persons such statutes are valid.

M. P. MYERS

HUSBAND AND WIFE—ESTATE BY ENTIRETY—PURCHASE MONEY MORTGAGE SIGNED BY HUSBAND ALONE—In *Eastern Bank & Trust Co. v. Broughton* (1927) 193 N. C. 320, 136 S. E. 876, the plaintiff sued to foreclose a mortgage executed by the defendant and his wife on certain lands, thirty acres of which they held as tenants by the entirety. There was a prior mortgage on this thirty acres which was executed by the defendant alone without the joinder of the wife. The plaintiff claims that under the case of *Gray v. Bailey* (1895) 117 N. C. 439, 23 S. E. 318, the husband alone cannot give a valid mortgage on an estate by the entirety. That case holds that a conveyance by the husband of his interest in an estate by the entirety is void.

The Court below held that the mortgage executed by the husband, which was a purchase money mortgage, was a valid prior incumbrance to the mortgage held by the plaintiff, and allowed foreclosure of the land described in the plaintiff's mortgage, with the exception of the thirty acres mentioned above.

On appeal the Court held that the first mortgage was a valid prior encumbrance, but since both husband and wife joined in the execution of the second mortgage, the judgment below must be modified to allow a sale of the thirty acres subject only to the rights of the holder of the first mortgage.

The Court based its decision on cases which show that where there is an estate by the entirety, the right of survivorship has not been destroyed by statute, *Motley v. Whitmore* (1837) 19 N. C. 357; that the husband cannot alienate any part of the estate as that would defeat the unity of possession of the husband and wife, convert the estate into a tenancy in common, and thus destroy the right of survivorship, *Davis v. Bass* (1924) 188 N. C. 200, 124 S. E. 566; nor can the estate be subjected to a judgment against the husband alone, *Hood v. Mercer* (1909) 150 N. C. 699, 64 S. E. 897; *Johnson v. Leavitt* (1924) 188 N. C. 682, 125 S. E. 490; however, he is entitled to the use and possession of the property during the joint lives of himself and his wife, and during this period the wife has no control

over the property, but has the right of survivorship only. Thus the husband alone may create a valid lease, *Greenville v. Gornto* (1913) 161 N. C. 341, 77 S. E. 222, or mortgage, *Bynum v. Wicker* (1906) 141 N. C. 95, 53 S. E. 478, or may convey the land during their joint lives, *Dorsey v. Kirkland* (1919) 177 N. C. 520, 99 S. E. 407, but if the estate be one of free hold, he cannot alienate or incumber it so as to prevent his wife or her heirs from enjoying it discharged from his debts and engagements, *Bruce v. Nicholson* (1891) 109 N. C. 204, 13 S. E. 790.

W. H. ABERNATHY

INSURANCE—AVOIDANCE OF POLICY BECAUSE OF FALSE REPRESENTATIONS—A made representations in an insurance application that he had not consulted a physician within five years, which statement was false; and on suit being brought by A's administratrix within two years from date of issuing of the policy, held, that the policy was void, as the representations were both false and material and that it was not necessary to consider whether the statements were made with intent to deceive.¹ The case seems to be in line with the authorities and correct.²

In this sort of suit either of four fact-situations may exist:

1. The misrepresentation was actuated by fraud and was material.
2. The misrepresentation was not actuated by fraud, but was material.
3. The misrepresentation was not actuated by fraud and was not material.
4. The misrepresentation was actuated by fraud, but was not material.

The first and second situations may be considered together, for as a practical matter the existence of fraud is unimportant where there is a misrepresentation which is material.³ The reasoning of the courts is that the fact that the representation is material means

¹*Life Ins. Co. v. Price* (1927) 16 F. (2nd) 660. The courts use rather loose language in stating the rule. In this case the court said: "A false representation, though made in good faith, as to a matter that is material, is sufficient to avoid the policy." False representation, as ordinarily known to the law, is one that is untrue, wilfully made to deceive another to his injury. Bouvier's Law Dictionary. Under this definition, a false representation could hardly be made in good faith.

²*Ins. Co. v. Cummings* (1910) 113 Md. 356, 76 Atl. 571; *Fidelity and Guaranty Co. v. Bank*, 137 Ill. App. 382, affirmed in (1908) 233 Ill. 475, 84 N. E. 670.

³Cases in Note 2, supra.

that it was an inducement for the insurer to enter into the contract, which they would not have done had they known the true facts; hence the contract sought to be avoided is not the contract the insurer made.⁴

Third, where there is an immaterial misrepresentation, not actuated by fraud, the contract cannot be avoided.⁵ This is clearly correct, for the fact that the representation was not material indicates that the insurer would not have been influenced not to enter into the contract had the truth been disclosed. Hence he cannot set up, as in situation (1) and (2) above, that he did not make that particular contract.

Fourth, a few courts in laying down a rule for situation No. 3, stated that an immaterial misrepresentation would not avoid a policy unless fraudulent, thus leaving the inference that fraud would avoid the policy even if the misrepresentation were immaterial.⁶ However, this seems to be an illogical rule.⁷ Suppose the ground of avoiding the policy were fraud. The insurer could not show that it had been damaged by relying upon the fraudulent misrepresentation, for, the misrepresentation being immaterial, the insurer would have made the same contract had the true facts been disclosed. Nor can the insurer say this is not the contract he made, for he cannot set up that he would have made a different contract, or none at all, if he had known the true facts, and at the same time acknowledge that the misrepresentations were immaterial. However, the rule as here stated is not approved by the numerical weight of authority nor by the better adjudged cases,⁸ and Vance says that he had found no cases where the policy was avoided where the false misrepresentation was immaterial.⁹

Statutes in many states, passed to abolish the distinction between warranties and representations in insurance contracts, declare that a misrepresentation, unless material or fraudulent, will not prevent a recovery on the policy.¹⁰ Under such statute it seems that the rule as disapproved of above is codified, and that the policy will be avoided by a false misrepresentation whether material or not,¹¹

⁴ Vance, *Insurance*, p. 267.

⁵ *Dennison v. Ins. Co.* (1841) 20 Me. 125, 37 Am. Dec. 42; *Armour v. Ins. Co.* (1882) 90 N. Y. 450.

⁶ *Barreau v. Ins. Co.* (1876) 67 N. Y., 595; see rule stated in note to *Life Ins. Co. v. Miazza*, 93 Miss 18, 46 So. 817, in 136 Am. S. R. at page 540.

⁷ *Johnson v. Life Ins. Co.* (1913) 123 Minn. 453, 144 N. W. 218.

⁸ *Life Ins. Co. v. Mullen* (1908) 107 Md. 457, 69 Atl. 385.

⁹ Vance, *Insurance*, p. 269.

¹⁰ For example of such statute see N. C. Cons. Stat., sec 6289.

¹¹ *Life Ins. Co. v. Bank and Trust Co.* (1896) 72 Fed. 413, 38 L. R. A. 33.

although there is a view that such statute was made for the purpose of changing the rule as to warranties only and that the rule as to representations is not changed.¹²

A statute providing that no misrepresentation made in obtaining life insurance shall be deemed material or render the policy void unless the matters misrepresented shall have actually contributed to the contingency whereby the policy becomes payable, has no application to a suit to avoid the policy during the life of the insured.¹³

If the matter misrepresented is an opinion merely the contract will not be avoided if the opinion is incorrect, the good faith alone of the insured furnishing the test.¹⁴

S. E. VEST

NEGOTIABLE INSTRUMENTS—REAL PARTY IN INTEREST—COLLECTION AGENTS—HOLDER IN DUE COURSE—GENERAL AND SPECIAL STATUTES—Action by the Bank against the defendants as makers of a bill of exchange given to K Bros., the Bank alleging that after acceptance and indorsement, before maturity, they had purchased the bill and then sent the same to the defendants for collection and payment of maturity, and the payment was refused. Defendants denied that they were indebted to the plaintiff in any sum whatsoever. The issues submitted to the jury were whether the plaintiffs were the holders in due course of the bill, and if the Bank took the bill as a collection agent. Held, the plaintiff was not the holder of the bill of exchange in due course. The statute which requires that every action be prosecuted by the real party in interest is mandatory; it follows that a bank cannot sue in its own name on a bill of exchange taken by it as an agent for collection.¹

The case gives rise to several questions. Who is the "real party in interest?" Must the party bringing the action on a bill be a holder in due course? What are the rights of a holder of a bill of exchange? And where there are two statutes, a general and a special one, which are apparently in conflict, which prevails? Under the Code of Civil Procedure, "every action must be prosecuted in the name of the real

¹² *Ins. Co. v. Gee* (1911) 171 Ala. 441, 55 So. 166.

¹³ *Life Ins. Co. v. Glaser* (1912) 245 Mo. 377, 150 S. W. 549, 45 L. R. A. (N. S.) 222

¹⁴ *Dennison v. Ins. Co.* (1841) 20 Me. 125, 37 Am. Dec. 42; *Life Ins. Co. v. France* (1876) 94 U. S. 561, 24 L. Ed. 287.

¹ *First Nat. Bank of Columbus, Ga., v. Rochamora* (1926) 193 N. C. 1, 136 S. E. 259.

party in interest," etc. (C. S. 446). In the instant case the bank has taken the bill for collection and has credited the indorsers account with the face value. Their sole interest is to collect the amount so credited, and at the same time to accommodate a customer. Under such circumstances it would seem that the bank, being entitled to receive the avails of the suit and having the right to control such suit, would be the real party in interest. Although the Code requires an action to be brought in the name of the real party in interest, yet under sec. 51 of the Negotiable Instruments Law (C. S. 3032), a holder even though he be a holder only for collection, may sue in his own name.²

"The holder of a negotiable instrument may sue thereon in his own name; and payment to him in due course discharges the instrument." (C. S. 3032) In the present case, the bank introduced the bill of exchange, proved its execution by the defendants and indorsement by K Bros. This made out a prima facie case that the plaintiff was the holder, and in addition a holder in due course. But the N. I. L. does not say the holder must be in due course, but merely authorizes *any* holder to sue in his own name. Decisions in other jurisdictions having similar statutes have held that "the holder of the legal title to a note may sue thereon in his own name, although others may be beneficially interested therein."³ The defendants introduced evidence, more than a scintilla, to show that the bank was not making an outright purchase of the bill of exchange, but was handling it as an agent for collection for the convenience of K Bros. The jury found under proper instructions that the plaintiff was not a holder in due course. But does the N. I. L. require that the bank be a holder in *due course*? The Court, in deciding that it does, relies on its own past decisions in which they have said that C. S. 446 is

² *Alabama City, G. & A. Ry. Co. v. Kyle* (1918) 202 Ala. 552, 81 So. 54; *Craig v. Palo Alto Stock Farm* (1909) 16 Ida. 701, 102 Pac. 393; *Utah Implement Co. v. Kenyon* (1917) 30 Ida. 407, 164 Pac. 1176; *Trude v. Fulton*, 207 Ill. App. 216; *Harrison v. Percy* (1917) 174 Ky. 485, 192 S. W. 513; *Harrison v. Union Store Co.* (1918) 179 Ky. 672, 201 S. W. 31; *Lower v. Shorthill* (1918) 103 Kan. 534, 176 Pac. 107; *Curtis v. Douglas*, 130 N. Y. Supp. 1054, not citing the N. I. L.; *Mechanics and Metals Nat. Bank v. Termini*, 117 Misc. Rep. 309, 191 N. Y. Supp. 334; *Donlin v. Carlow*, 120 Misc. Rep. 698, 200 N. Y. Supp. 339; *Murchelwis v. Tidrick* (1918) 40 S. D. 435, 167 N. W. 499; *McDonald v. Mulkey* (Wyo., 1924) 231 Pac. 672; (contra) *Clark v. Dada*, 183 App. Div. 253, 171 N. Y. Supp. 205.

³ *Stocker v. Dobyns-Lantz Hdwe. Co.* (1924) 101 Okla. 133, 224 Pac. 302; *Chaffee v. Shartel* (1915) 46 Okla. 199, 148 Pac. 686; *Retallic v. Dickson* (1923) 75 Colo. 123, 224 Pac. 1054; And even tho he has no interest at all—*Fay v. Hunt* (1906) 190 Mass. 378, 77 N. E. 502, citing old cases but not the N. I. L.

mandatory and compelling and that to do otherwise would be to show favoritism and allow the owner of a negotiable instrument to defeat all equities of the maker by simply turning it over to an agent for collection. Sec. 58 of the N. I. L. (C. S. 3039) provides that "in the hands of any holder other than a holder in due course a negotiable instrument is subject to the defenses as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect to all parties prior to the latter." If the plaintiff is not a holder in due course, as found by the jury, yet it is a holder and entitled to sue though it is subject to any equities or defenses that the defendant may have against the plaintiff's indorser. This statute expressly provides that a holder not in due course is subject to the same defenses as if the instrument were nonnegotiable. Hence the maker is protected from any undue prejudice in a suit by an agent for collection. Favoritism cannot be shown to any holder or owner of a negotiable instrument where there are explicit statutes stating the rights of all parties concerned. A holder is in due course or not in due course. If the former he is entitled to collection free from all defenses, if the latter he is subject to them. And it is always in the power of the maker to introduce evidence to overcome or defeat the presumption that the holder is in due course, and then to set up any defenses he may have against the payee.

An old North Carolina case⁴ refused to allow a holder "for collection" to recover because he was not the "real party in interest." A more recent case,⁵ decided after the adoption of the N. I. L. and citing the above case, held that an indorsee for collection could not maintain an action, evidently overlooking sections 51, 36, and 37 of the N. I. L. (C. S. 3032, 3017, 3018). A restrictive indorsement confers upon the indorsee the right to bring any action thereon that the indorser could bring. (C. S. 3018). Such restrictive indorsements carry on their face notice that the indorsee is holding in trust for the indorser although he has the legal title.⁶ While the other sections of the N. I. L. clearly allow the holder for collection under an ordinary indorsement to sue in his own name, if there were doubt in regard to the intent of the statute it would be completely

⁴ *Abrams v. Caveton* (1876) 74 N. C. 523.

⁵ *Nat. Bank v. Exum* (1903) 163 N. C. 199, 79 S. E. 498.

⁶ 22 Harvard Law Rev. 150.

removed by the fact that, even if the indorsement were restrictive in form and merely constituted the bank the agent of the indorser, the bank would still under Sec. 37 (C. S. 3018) have the right to bring suit.⁷

Where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them, the *special* will prevail over the general statute.⁸ This is especially so where as here the particular statute was passed subsequent to the more general one. The fact that a legislature adopts a set of laws similar to those of other States would surely infer that the courts of that State would interpret them similarly, presuming that other statutes, Constitution, etc. were on the same basis.⁹ It seems questionable, in the light of the foregoing considerations, whether the instant decision (though consonant with previous North Carolina holdings) gives due regard to the generally accepted views as to the effect of the above mentioned provisions of the Uniform Negotiable Instruments Law.

J. WIG

STATUTES—SUNDAY LAWS—ENGAGING IN PROFESSIONAL BASEBALL GAME—In the recent case of *Crook et al v. Commonwealth* (Va-1927) 136 S. E. 565, defendants were indicted for playing baseball on Sunday. Defendants were professional baseball players, and were under a contract with the Virginia League for the playing season from April 16, 1925 to Sept. 12, 1925, each receiving an agreed monthly salary. Defendants played a Sunday game making no admission charges. *Held*, that defendants were guilty of violating a statute which declared it a misdemeanor for any person to be found laboring at a trade or calling on Sunday. Va. Code (1919) sec. 4750. The court was of the opinion that professional baseball is a "trade" or "calling" within the purview of the statute, and though the game was free, defendants were laboring at their trade or calling just as they were on other days when admission was charged. Burke

⁷ *Mechanics and Metals Nat. Bank v. Termini*, *supra* n. 2.

⁸ 36 Cyc. 1151.

⁹ Cases in note 3, *supra*.

and Chichester, JJ., dissented on the ground that baseball is a "trade" or "calling" only when played for a consideration and defendants though professional players had a right to play ball on Sunday *as a sport* as well as amateurs or any other persons.

C. W. HALL

TRUSTS—CONSTRUCTIVE TRUSTS WHERE ONE PERSON HAVING AN INTEREST IN THE PROPERTY OF ANOTHER KILLS HIM IN ORDER TO GAIN THE BENEFITS OF THAT INTEREST—A question which has caused much discussion and diversity of opinion among the courts was recently raised in the North Carolina case of *Bryant v. Bryant*.¹ X conveyed land to A and B, his wife, as tenants by the entirety. A murdered B, was convicted and imprisoned. Suit was brought by the heirs of B, claiming under her. In the lower court it was held that A should take legal title to the whole tract, and hold as constructive trustee for the heirs of B. The Supreme Court modified the decision; the result being that A should hold one-half as trustee for the heirs at law of B, and that the heirs at law of B should be the sole owners of the whole at A's death. The reason given by the court was that although A by operation of the deed from X became entitled to the whole in fee upon surviving B, equity will deprive him of the beneficial use, because of the wrongful and unconscionable method of acquisition. By this peculiar modification, the court also sought to protect an interest which it recognized as existing in A.

The problem presented in the above case, and like cases arising under devises, statutes of descent and insurance policies has been dealt with in three ways:

- (1) Cases which say legal title passes, and the wrongdoer retains title in spite of the crime;²
- (2) Cases which say title does not pass to the killer, reaching such a result by reading exceptions into the statute covering the case;³

¹ *Bryant v. Bryant* (1927) 193 N. C. 372, 137 S. E. 188.

² *Wall et. al. v. Phanschmidt* (Ill-1914) 106 N. E. 785; *Shellenberger v. Ransom, rehearing* (1894) 41 Nebr. 631, 59 N. W. 935, 25 L. R. A. 564; *Owens v. Owens* (1888) 100 N. C. 240, 6 S. E. 794; *Deem v. Milliken* (1895) 6 Ohio C. C. 351, affirmed 53 Ohio St. 668, 44 N. E. 1134; *In re. Carpenter's Estate* (1895) 170 Pa. 203, 32 Atl. 637; *Wellner v. Eckstein* (Minn-1908) 117 N. W. 830; *McAllister v. Fair* (Kan-1906) 84 Pac. 112.

³ *Riggs v. Palmer* (1889) 115 N. Y. 506, 22 N. E. 188, 5 L. R. A. 340; *Perry v. Strawbridge* (1908) 209 Mo. 621, 108 S. W. 641, 16 L. R. A. (N. S.) 244; *Box v. Lanier* (1904) 112 Tenn. 393, 79 S. W. 1042, 64 L. R. A. 458.

(3) Cases which say legal title passes, but equity will impose a constructive trust in favor of the heirs of the deceased, exclusive of the murderer.⁴

Many states which adopted the first view given above have by legislation prevented the criminal from reaping the benefits of his crime.⁵ Such statutes are upheld under constitutions which prevent forfeiture for crime,⁶ but do not in all cases cover the evil at which they are aimed.⁷

North Carolina seems to be recognized as the first state to adopt the first view stated above. A wife who murdered her husband was held to be entitled to her right of dower irrespective of her crime.⁸ The Legislature the following year adopted a statute⁹ providing that where either of the spouses is convicted of feloniously slaying the other, such person loses right to curtesy, dower, year's provision, distributive share, right to administer, and every right and estate in the real or personal property of the other settled in consideration of the marriage.

It is questionable whether an estate by the entirety is included in this statute. Conceding that it is not, a just result can be reached by the application of the recognized principle of equity that where one acquires title to property under circumstances which render it unconscionable that he retain the beneficial interest, a constructive trust will be declared in favor of those entitled to the benefit and enjoyment.

What should be the result of the application of such a principle to this case? If the husband had not killed the wife, and then had survived her, he would have taken the entire property in fee simple under the deed. If he had not killed the wife, and she had survived him, she would likewise have had the whole. Now, he killed the wife. He has outlived her, and according to law gets legal title to the entire tract. When this is done, the intentment of the law has been fulfilled. Equity then comes in to prevent one who has accomplished

⁴*Van Alstyne v. Tuffy* (1918) 16 N. Y. Supp. 173, 27 Yale L. J. 964, 16 Mich. L. Rev. 561; *Ellerson v. Westcott* (1896) 148 N. Y. 149, 42 N. E. 540; *Bryant v. Bryant*, *supra*, n. 1.

⁵*Hamblin v. Marchant* (Kan.-1918) 175 Pac. 678; *Fisher v. Groff* (Ind.-1914) 105 N. E. 470; *In re. Kirby's Estate* (Cal.-1912) 121 Pac. 370, 39 L. R. A. (N. S.) 1088.

⁶*Box v. Lanier*, *supra*, n. 3.

⁷*In re. Kirby's Estate*, *supra*, n. 5; *Fisher v. Graff*, *supra*, n. 5.

⁸*Owens v. Owens*, *supra*, n. 2.

⁹C. S. 2522.

this result by crime from profiting by his unconscionable conduct. He has by his crime made absolute that which was contingent. The fact of the wife's death is unquestionable, and the title must now be dealt with, having that fact in view. Since one tenant by the entirety is dead, there remains only one interest in the property, which is that of survivorship. That interest is what he has acquired by his crime. His life interest as tenant by the entirety has now ceased, and he must either hold all or nothing. There is no need of quibbling over the vested interest existing in each during their joint lives. The death of one has absolutely ended that, and no fiction can revive it. Death cannot be undone by a legal fiction.

Nor is the effect of such a conclusion to cause a forfeiture for crime. The wife's death, by virtue of the deed itself and the significance given it by law, puts an end to the life estate in the husband. He cannot forfeit that which he has not. His life interest depends upon the wife's survival. The court by use of the mortality tables found as a fact that she would have survived him. Mortality tables are for dealing with a class, not with an individual. What if she would have survived him but for the murder? It is strange that this should lead to the conclusion that equity must protect to the husband an estate which depends for its existence upon the actual survival of the wife. The finding that she would have survived him cannot alter the fact that she did not survive.

Aside from this odd feature the court is to be commended upon the doctrine which it has adopted. A just result has been reached which is not open to the criticism that violence has been done to some express principle or enactment of law. This is one of the few American cases dealing with similar facts¹⁰ in which the result has been based squarely upon a constructive trust, though it has been advocated by writers,¹¹ and contended for by jurists.¹² It is supported by the weight of reason, though not the weight of authority.

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¹⁰ See *Beddingfield v. Estill & Newman* (Tenn.-1907) 100 S. W. 108. Here the court held that the common law rule in case of homicide preventing taking by one spouse by inheritance, descent, distribution or marital rights, does not apply to an estate by the entirety; because the title which he claimed vested in him by the conveyance to him and wife, and not by any claim through her.

¹¹ 30 A. L. Rev. 130; 4 H. L. Rev. 294; 8 id. 170; 27 id. 280; 30 id. 622; Ames, *Lectures on Legal History*, 310.

¹² See dissenting opinion of Elliott, J., concurred in by Jaggard, J., in *Wellner v. Eckstein*, *supra*, n. 2.

TRUSTS—RESULTING TRUST—DEED FROM WIFE TO HUSBAND RECITING A NOMINAL CONSIDERATION—A very interesting set of facts gave rise to a recent case involving land held by the husband in resulting trust for his wife. *Kelly Springfield Tire Co. v. Lester* (1926) 192 N. C. 642, 135 S. E. 778.

The action was in the nature of a creditor's bill to set aside a deed executed by the defendant to his wife. In 1889, Lester borrowed money with which to pay for certain interests he bought in his father's land. For securing this loan, he executed a deed to McLaurin, the deed reciting consideration. McLaurin then deeded the same tract of land to Mrs. Lester, wife of the defendant, reciting the same consideration; and as part of the same transaction, Mrs. Lester executed and delivered to McLaurin a mortgage on the land to secure the loan.

Subsequently, Mrs. Lester executed another mortgage on the land to secure a loan from two sisters of Lester; with the proceeds of this loan the McLaurin mortgage was satisfied. The mortgage to the two sisters was paid with money of both Mr. and Mrs. Lester.

In 1910, Mrs. Lester conveyed to the defendant, her husband, with full covenants of warranty, the said tract of land in consideration of "one dollar and affection."

In 1917, Lester purchased in his own name a second tract of land, paying for it with the proceeds of the sale of the first tract, which was conveyed by the defendants jointly on January 1, 1918.

In 1922, Lester conveyed this second tract of land to his wife, who at that time paid neither money nor any other consideration. It is this last named conveyance that is sought to be set aside by the creditor's bill.

The plaintiffs base their claim on the theory that the conveyance by Lester to his wife was made with intent to hinder, delay and defraud his creditors; that he was insolvent, and did not retain property sufficient for the satisfaction of his creditors. (CS 1005, 1007).

The defense is that the deed from Mrs. Lester to her husband, made in 1910, of the first tract of land, reciting a consideration of only "one dollar and affection," raised a resulting trust in favor of the grantor, the wife, as no consideration was actually paid by the husband; that by the sale of the first tract, and the purchase of the second tract, the wife's money went into the second tract, raising a resulting trust in her favor in that second tract; that the deed from Lester to Mrs. Lester, executed in 1922, was made for the purpose

of conveying to the wife her interest in the second tract of land. In this action, Mrs. Lester claims only half of this second tract of land.

The question raised is whether the trial judge should have excluded the evidence offered by defendants to establish a resulting trust in favor of the wife at the time (1910) she conveyed the first tract of land to her husband.

Justice Adams, writing for the court, said that in conveyances of the character of deeds of bargain and sale (now almost universally used), parol evidence is not admissible to establish a resulting trust in favor of the grantor. Quoting from 3 Pomeroy's *Equity Jurisprudence* (4th ed.), sec. 1036, he said: "If there is in fact no consideration, but the deed recites a pecuniary consideration, even merely nominal, as paid by the grantee, this statement raises a conclusive presumption of an intention that the grantee is to take the beneficial estate, and destroys the possibility of a trust resulting to the grantor, and no extrinsic evidence would be admitted to contradict the recital, and to show that there is in fact no consideration, except in a case of fraud or mistake." In the deed of 1910 from the wife to the husband, the recital of a consideration of "one dollar" raised a conclusive presumption of an intention that the husband was to take the beneficial estate, and destroy the possibility of a trust resulting to the wife.

That the rule laid down by the North Carolina Court is in accord with the weight of authority is not to be doubted. A clear distinction is made between a voluntary conveyance and one reciting consideration. In the former case, of course, a resulting trust would arise in favor of the grantor. In the present decision, had the jury found that there was fraud or mistake in the conveyance by the wife to the husband, a trust would have been raised in favor of the wife, the grantor. And then the trust would have been, not a resulting trust, but a constructive trust, raised by the law on account of the fraud or mistake.

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