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the several states, and a ranking of the various states in this respect. California ranked thirty-fourth. North Carolina and Texas tied for thirty-ninth place. California, by the recent rules referred to above, will step up among the first nine states.

The same report also ranks the different callings, admission to which is regulated by law. It finds that, in North Carolina where only two years of law study is required for admission to the Bar, the various professions, with respect to the period of time required to be spent in general education and professional training, take rank in the following order: medicine, engineering, dentistry, public accountancy, osteopathy, chiropractic, trained nurses, optometry, chiropody, pharmacy, elementary school teaching, and the legal profession.

NOTES

Admissibility of Evidence of Attempted Suicide of Accused

In the case of *State v. Lawrence*[1] the defendant on trial for murder, while confined during the course of the trial, attempted suicide. He had written this note: "To all my friends: since they have started lying so much, it is impossible for me to stand it any longer. So please pardon me for this act I am about to commit. You all know I am not guilty, and I am being lied on by some, and the worst ones for that are yet to come, so this is the shortest way out. Good-bye to you all." The Supreme Court held that evidence of the attempted suicide was properly admitted upon behalf of the state on the analogy to flight as tending to show consciousness of guilt. Justice Brogden dissented.

In the course of the opinion reference was made to the four reported cases in which the question has arisen to date. In New Mexico,[2] Illinois,[3] and New Jersey,[4] evidence of an attempt by the accused to destroy himself has been held to be admissible. Defendant laid stress upon the fourth case, a North Dakota decision.[5] There the state relied upon the evidence of two confessed accomplices. By statute such evidence would not support a conviction without corroborating evidence tending to connect defendant with the commission of the offense. The court held that evidence of the attempted suicide did not raise a presumption of guilt or constitute sufficient

[1] 196 N. C. 562, 146 S. E. 395 (1929).
[2] State v. Blancett, 24 N. M. 433, 174 Pac. 207 (1918).
[3] People v. Duncan, 261 Ill. 339, 103 N. E. 1043 (1914).
[4] State v. Jaggers, 71 N. J. L. 281, 58 Atl. 1014, 108 Am. St. Rep. 746 (1904).
[5] State v. Coudotte, 7 N. D. 109, 72 N. W. 913 (1897).

corroborating evidence to sustain a conviction. But the court did not hold that evidence of the attempted suicide was inadmissible.[6] Thus the Coudotte case does not decide the question of admissibility and all existing authority upon that question is affirmative.

The question here is purely one of relevancy. No exclusionary rule of evidence is involved. What conduct of an accused after the commission of a crime is to be deemed relevant against him? Under the decisions common types of such conduct are flight,[7] resisting arrest,[8] attempting to bribe the officer making the arrest,[9] concealing one's identity,[10] subornation of witnesses[11] or bribing jurors,[12] suppressing evidence[13] or intimidating witnesses,[14] and escape or attempt to escape after arrest.[15] There is some indication that persons apprehending conviction have a distinctly higher suicide rate than the normal population.[16] But that does not *per se* give the evidence probative value on the fact of guilt because an innocent man is likely to apprehend conviction.

Four views of the question of admissibility may be suggested: 1—That the evidence should be admitted generally.[17] The defendant would be entitled to introduce evidence in explanation of his conduct. The fact of the attempt would not raise a presumption of guilt[18] but would be an item of circumstantial evidence tending to increase the probability of guilt. The weight of the evidence, under the usual practice, would be for the jury. 2—That the evidence should be admitted unless it appear that the accused is mentally disordered. In this latter contingency it would be for the court to decide whether

[6] In the Coudotte case there was the added circumstance that the accused was a Sioux Indian and there was uncontroverted evidence that the Sioux could not endure confinement.

[7] State v. Mull, 196 N. C. 351, 145 S. E. 677 (1928). But the accused is entitled to explain his conduct and the exclusion of his evidence that he fled because the brothers of the murdered man had threatened his life was erroneous. *Ibid.* See also State v. Hairston, 182 N. C. 851, 109 S. E. 45 (1921).

[8] McKevitt v. People, 208 Ill. 460, 70 N. E. 693 (1904).

[9] Taylor v. State, 110 Ga. 150, 35 S. E. 161, 164 (1900).

[10] Almerigi v. State, 18 Okla. Cr. App. 458, 188 Pac. 1094 (1920); State v. Whitson, 111 N. C. 695, 16 S. E. 332 (1892).

[11] State v. Weissengoff, 89 W. Va. 279, 109 S. E. 707 (1921).

[12] State v. Case, 93 N. C. 545, 53 Am. Rep. 471 (1885).

[13] State v. Constantine, 48 Wash. 218, 93 Pac. 317 (1908).

[14] State v. Little, 174 N. C. 793, 94 S. E. 97 (1917).

[15] Flannigan v. State, 136 Ga. 132, 70 S. E. 1107 (1911).

[16] See HOFFMAN, SUICIDE PROBLEMS (1927), 215. The author makes an indefinite reference to an investigation tending to sustain the proposition stated.

[17] This is the view followed in the Lawrence case.

[18] The Coudotte case sufficiently indicates that evidence of an attempted suicide by the accused should not be deemed to raise a presumption of guilt.

the abnormality of the accused was the real explanation of his conduct and thus made evidence thereof unreliable. 3—That the evidence should generally be excluded as irrelevant. 4—That, conceding the bare relevancy of the evidence, it should be excluded because not sufficiently material to counterbalance the consideration that a jury is not qualified to estimate its value and would be inclined to accord it undue weight because of its dramatic character.

Literature in the English language upon the sociological and psychological aspects of the suicide problem is scant.[19] It does appear, however, that social and psychological factors are so important in the explanation of a given suicide and are so variable that it would be dangerous to adopt a broadside rule admitting the evidence. Suicide may be described as an abnormal solution to a problem of an individual personality, which that individual has been unable to solve by normal adjustments. The difficulty of piercing the veil of motives and introspection leading up to the act makes a suicide the more difficult (especially for a *behaviorist*) to explain.

The fourth view may be rejected at once because, though expert evidence is expensive, the important interests at stake would justify resort to expert testimony as an aid to the jury in assessing the value of the evidence.

The second view is preferable to the first. It would tend to keep the attempt from the jury if the explanation of the conduct of the accused lay in his abnormality. But the rule of exclusion is probably the fairest of all. Admissibility here depends upon the likelihood that an accused person who attempts suicide is guilty. Does a showing of such conduct increase the probability of guilt? Ordinary human experience as to such situations is too limited to teach us much. There is not, and hardly could be, statistical data to show that a larger ratio of accused persons who attempt suicide are guilty than of those who do not attempt it.[20] Motivation is important here but is difficult to arrive at because the accused might have responded to any one of several motives only one of which, con-

[19] For a recent statistical treatment of the subject see A. D. FRENAY, THE SUICIDE PROBLEM IN THE UNITED STATES (1927). A more analytical study is that of RUTH SHONLE CAVAN, SUICIDE (1927). For periodical and current literature on the general subject see the *Psychological Index*.

[20] In all of the four cases in which the question has arisen the accused was convicted and in each case the evidence of the attempt was doubtless relied upon by the jury in reaching its verdict. Since the state seldom may, and does, appeal the reports do not contain cases in which attempted suicide by the accused was in evidence and a verdict of acquittal was rendered.

sciousness of guilt, bears upon the question of guilt. Moreover, motivation may be unconscious.[21] It may fairly be concluded, therefore, that the evidence is too unreliable to be brought into the case. Of course, the state might in an exceptional case negative other motives than consciousness of guilt and thereby qualify the evidence.

Assuming that the attempted suicide might be shown in evidence it would seem fair at first blush to admit the explanatory note. Let us examine the problem. In the Lawrence case the note was read in evidence by a witness for the state. Where its content is favorable to the accused as in that case he would hardly object to its introduction by the state. If the note were unfavorable to the accused the state could bring it into the case as an admission or a confession, since it would necessarily be one or the other.

If the note were not placed in evidence by the state in showing the attempt could the accused introduce it? This is doubtful. His best recourse would be to offer it as a declaration concerning present state of mind in order to show a state of mind other than consciousness of guilt at the time of the attempt. The objections open to such an offer would be the availability of the accused as a witness, the fact that the attempt was so recent that the present recollection of the accused of his state of mind at the time of the attempt is substantially as accurate as the note, and the fact of the probable deliberate character of the note.[22] If the trial judge was satisfied that the test of spontaneity were satisfied he might, under the authorities, admit the note even though the declarant was available.[23] The accused would clearly be entitled to explain the attempt and evidence to show a state of mind other than consciousness of guilt at the time of the attempt would be explanatory. Since the *onus* is upon the state all that the accused need do to win is to neutralize the effect of the evidence for the state and to that end he might offer the note simply to show the fact of his state of mind alone without reference to positively showing that he was not guilty. We have the dictum of the Hillmon case that, to show state of mind, declarations as to presently existing state of mind may be admitted even though the

[21] Hutchins and Slesinger, *Some Observations on the Law of Evidence—State of Mind to Prove an Act* (1929), 38 YALE L. J. 283, 295.

[22] The declaration, to be competent, must have been made naturally and without circumstances of suspicion. E. M. Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae* (1922), 31 YALE L. J. 229.

[23] Mutual Life Ins. Co. v. Hillmon, 145 U. S. 285, 295, 12 Sup. Ct. 909 (1892). The declarant was not available in this case.

declarant is available as a witness.[24] The suggestion that that dictum went so far as to lay it down that the declaration as to state of mind would be admissible to show a future act though the declarant is available is subject to question.[25] It is quite likely that Mr. Justice Gray in writing the opinion in that case did not observe the distinction but the words of the dictum may fairly be taken to have reference to admitting declarations to show state of mind just for the purpose of showing state of mind.[26]

If accused offers the note to show his innocence it should be excluded. Though the contrary view has support,[27] it is believed that the dictum of the Hillmon case does not logically require the admission of declarations as to presently existing state of mind to show past conduct.[28] Furthermore, as recently suggested in an acute article in the *Yale Law Journal*,[29] where the accused is available to testify directly concerning the fact of guilt, it is undesirable and unnecessary to tread the tortuous maze of the hearsay exception in question. The recollection of the accused as to the fact of his guilt or innocence would hardly have dimmed since the note was written. Finally, it would give the accused an unwarranted advantage to allow him to introduce the note as positive evidence on the question of guilt because he could still exercise his privilege against self-crimination and thereby escape cross examination by the state.

J. B. FORDHAM.

JURISDICTION OF PERSON AND PROPERTY FOR PURPOSE OF ATTACHMENT

The extraordinary remedy of foreign attachment is governed by local statutes in the several states.[1] These statutes are based on the fact of the debtor's non-residence and the presence of his property within the state. Consequently it becomes important for courts to

[24] *Ibid.*
[25] Art. cit. *supra* note 21, 285.
[26] *Supra* note 23. The dictum is premised with this sentence: "The existence of a particular intention in a certain person at a certain time *being a material fact to be proved*, evidence that he expressed that intention at that time is as direct evidence of the fact, as his own testimony that he then had that intention would be."
[27] Eustace Seligman, *An Exception to the Hearsay Rule* (1912), 26 HARV. L. REV. 146.
[28] John MacArthur Maguire, *The Hillmon Case—Thirty-three Years After* (1925), 38 HARV. L. REV. 709.
[29] Art. cit. *supra* note 21, 287.
[1] The N. C. Statute, C. S. §§798, 799.

decide upon the meaning of the term "non-resident." Likewise, difficulties occur when jurisdiction of the debtor's property is acquired by trick or stratagem.

In a recent North Carolina case[2] the defendant became ill and left the state for the purpose of regaining his health. His condition became worse, making his return impossible until he improved considerably. Suit by attachment was brought about a year after he had left. The court held him to be a non-resident within the meaning of the statute. In a West Virginia case[3] the defendant left the state for the purpose of taking care of her husband who was seriously ill. When she had been gone about ten months this suit was brought. The court ruled that she was a resident of the state. In both cases the defendants always intended to return as soon as was practicable.

The purpose and most natural result of attachment is to compel the presence of the defendant in court.[4] But there is no intention to subject residents, who leave the state temporarily, to summary proceedings.[5] When one leaves the state with no intention of returning it is generally held that he is a non-resident as soon as he crosses the state line.[6] But the intention alone without a removal or a definite act in furtherance of that intention is not sufficient. Likewise, absence from the state, but with intention to return, does not constitute non-residence unless the absence is so protracted as to make personal service impossible for a great length of time.[7] In *Knapp v. Gerson*,[8] it is said that three elements must be considered; the length of the stay, the purpose thereof and the debtor's intentions as to returning. Thus although the reason for this type of relief is the impossibility of service of summons upon the defendant, that alone is not a test of the defendant's non-residence. Otherwise the length of the absence from the state necessary to constitute one a non-resident might easily be fixed by statute.

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[2] Brann v. Hanes, 194 N. C. 571, 140 S. E. 292 (1927).

[3] Kanawha Bank & Trust Co. v. Swisher, 144 S. E. 294 (W. Va., 1928).

[4] Blair v. Winston, 84 Md. 356, 35 Atl. 1101; Raymond v. Leishman, 243 Pa. 64; 89 Atl. 791, L. R. A. 1915A 400 (1914); cf. Keller v. Carr, 40 Minn. 428, 42 N. W. 292, where the primary object is said to be to furnish a remedy against the debtor's property when he is beyond the reach of ordinary process.

[5] Wheeler v. Cobb, 75 N. C. 21 (1876); Risewick v. Davis, 19 Md. 82 (1862).

[6] Whitehill v. Eicherly, 15 Pa. Co. Ct. 593 (1894); Balinger v. Lantier, 15 Kan. 608 (1875); Mann v. Taylor, 78 Iowa 355, 43 N. W. 221 (1889); Lyle v. Foreman, 1 Dall. (U. S.), 480, 1 L. Ed. 232 (1792). In Burt v. Allen, 48 W. Va. 154, 35 S. E. 990, 50 L. R. A. 284, 86 Am. St. Rep. 29 (1900), held non-residence before crossing state line.

[7] Winakur v. Hazard, 140 Md. 102, 116 Atl. 850, 26 A. L. R. 177.

[8] 25 F. 197 (C. C. S. D. N. Y., 1885).

By far the greatest difficulty arising in this consideration is the case of an indefinite absence whose length is dependent upon a contingency.[9] And when the impossibility or impracticability of the debtor's return is superadded, the question can hardly be decided under a definite rule of law. Here, consideration of the policy of attachment statutes and the facts peculiar to each situation must enter in. Whatever the position of the defendant may be, the creditor is nevertheless without remedy unless attachment lies. Still it would be highly undesirable to allow attachment against the property in every case, where the creditor must otherwise suffer, without due consideration of the absent debtor's position.[10]

Although on its face it may seem that the results reached in the two cases under discussion are in conflict they are nevertheless justified by all the attendant facts. In each the length of the absence was the same, the intention to return and the indefiniteness of the time of return existed. However in the North Carolina case it was improbable that the defendant would return at all while in the other it was rather certain. It is altogether desirable that the language of the statutes and the state of decided cases are such as to allow great latitude to the courts in passing upon this question.

The other problem here under discussion arises in a recent Virginia case.[11] The plaintiff, a resident of Virgina, knowing that the defendant's note, to which was attached another note as collateral security, was owned by *S* in District of Columbia, had *H* buy it and bring it into Virginia where it was attached for a debt owing to the plaintiff from the defendant. The defendant entered plea in abatement to the jurisdiction on the ground that it had been procured by fraud. Held, that the court will not exercise its jurisdiction and that the attachment be vacated.

The general rule governing this question is that the court will not exercise its jurisdiction over the property of a non-resident when it

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[9] Hickson v. Brown, 92 Ga. 225, 17 S. E. 1035 (1893); Weitkamp v. Loehr, 21 Jones & S., 79 (N. Y., 1886); Keelin v. Graves, 129 Tenn. 103, 165 S. W. 232 L. R. A. 1915A 421 (1914); Garlinghouse v. Mulvane, 40 Kan. 428, 19 Pac. 798 (1888); Mahoney v. Tyler, 136 N. C. 40, 48 S. E. 549 (1904); Tyler v. Mahoney, 166 N. C. 509, 82 S. E. 870 (1914).

[10] A continuance may be secured by a defendant served with summons if the circumstances are such as to warrant it. 92 N. C. 297 (1884). He is deprived of this right if foreign attachment is brought even though the reason of his absence would otherwise sustain a request for a continuance. *Supra* note 2.

[11] Abel v. Smith, 144 S. E. 616 (Va., 1928).

has been obtained by any deceitful contrivance, trick, or stratagem.[12]

It is within the discretion of the court whether to exercise jurisdiction in such a case and since "it is a thing affecting the court itself and the integrity of its process,"[13] the court will vacate the attachment if requested to do so by the deceived defendant unless he has waived his right by pleading to the merits of the case.[14]

But when the defendant's property has been brought into a state by trick or stratagem involving no fraud the above reasoning does not apply. There are only a few decided cases where the court permitted the exercise of its jurisdiction procured by a trick without actual fraud. The outstanding case is *Siro v. American Express Company*.[15] Defendant, a foreign corporation against whom the plaintiff held a claim, had placed American Express travelers check in the hands of its local agent. Plaintiff's attorney bought checks to the amount of the claim and had the proceeds in the hands of the agent attached. The checks were bought solely for the purpose of attachment. The court refused to vacate the attachment saying that no deceit had been practiced. In *Condon Wrapping Machine Co., Inc. v. Dearborn*[16] the plaintiff through correspondence induced defendant, a non-resident, to send certain property to an attorney at plaintiff's residence through whom a sale was to be consummated, with the object of attaching the purchase price in the attorney's hands. Held: the attachment must stand. There were no false representations and no deceit.

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[12] Siro v. Amer. Exp. Co., 99 Conn. 95, 121 Atl. 280, 37 A. L. R. 1250 (1923); Sessoms Groc. Co. v. Inter. Sugar Feed Co., 188 Ala. 232, 66 So. 479 (1914). The rule is the same where service of summons on the person is obtained by fraudulent trick. The inclination here to hold service invalid is even greater than in the attachment cases, apparently since the person has always been considered more inviolable than property. Union Sugar Refinery v. Mathieson, 2 Cliff. (U. S.), 304, Fed. Cas. 14, 397 (1864); Chubuck v. Cleveland, 37 Minn. 466, 35 N. W. 362, 5 Am. St. Rep. 864 (1887); cf. Jaster v. Currie, 198 U. S. 144, 25 S. Ct. 614, 49 L. Ed. 988 (1904); Case v. Smith Lineweaver Co., 152 F. 730, 732 (C. C. E. D. N. Y., 1907).

[13] It would seem that it affects the parties to the suit rather than the court itself, *post* note 14. In Colonial Lumber Co. v. Andelusia Nat. Bank, 138 Miss. 566, 103 So. 343 (1925), the court specifically points out that the defendant conceived a plan of ordering goods in order to attach proceeds of draft. Whether or not the plea to the jurisdiction was waived does not appear but the court gives no further mention to this point; Acme Hay Co. v. Metropolitan Nat. Bank, 198 Iowa 1337, 201 N. W. 129 (1924).

[14] Dailey Motor Co. v. Reaves, 184 N. C. 260, 114 S. E. 175 (1922); Scott v. Mutual Reserve Life Ass'n., 137 N. C. 515, 50 S. E. 221 (1905).

[15] *Supra* note 12.

[16] 168 N. Y. Supp. 718 (1918).

In a North Carolina case[17] plaintiff ordered five electric lighting plants requesting that one be shipped immediately for exhibition purposes and paying part price of the entire lot. The article proved worthless and the plaintiff sought a recission of the contract and the return of the money. Defendant refused and shipped the rest of the machinery "order notify" though apparently not at plaintiff's request. Upon arrival plaintiff paid draft and attached the proceeds. Although the plea to the jurisdiction was held to be waived by a plea to the merits, the court evidently considered the case as one where attachment should not be allowed.[18]

In *Abel v. Smith*[19] it seems that the court fails to distinguish the case of *fraudulently* procuring property to be brought into a state, from the case of procuring property to be brought into a state *solely for the purpose of attachment.*[20] There is no authority for the statement that the non-resident's property must find its way into a state casually and in the regular course of business, nor that the attachment cannot stand if the plaintiff has done any acts whatsoever in enabling the court to secure jurisdiction over the *res*. The gist of the rule is actual fraud or deceit. Courts are averse to allowing one to prosecute a legal advantage obtained by unlawful means. But where nothing illegal has been done, neither policy nor authority require that the advantage be relinquished. The fraud may be accomplished in many ways, either by acts, or words, or concealment of material facts, but it must exist.[21] If the defendant has placed himself in an unfavorable position and the plaintiff takes an advantage thus afforded, the defendant should suffer the consequences. When Smith issued the note in question, there was no assurance given him that it would remain always in Virginia. In fact he might reason-

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[17] Economy Elect. Co. v. Auto Elect. Power & Light Co., 185 N. C. 534, 118 S. E. 3 (1923).

[18] The opinion seems to infer that the fraud was in inducing defendant to ship "order notify." It is difficult to see how else the goods might have been shipped. Under straight bill of lading the defendant would have been in a worse position while C. O. D. express would have been as bad.

[19] *Supra* note 11.

[20] In Abel v. Smith, *supra* note 11, the court attempts to distinguish the case of Siro v. Amer. Ex. Co., *supra* note 12, on the ground that no property belonging to the defendant had been brought into the state. Nevertheless it was the plaintiff's act which made it possible that the defendant should have property there subject to attachment when there had been none before. To make a distinction upon such grounds seems to border on equivocation.

[21] Stewart v. Wyoming Ranch Co., 128 U. S. 383, 9 S. Ct. 101, 32 L. Ed. 439 (1888); Jaster v. Currie, *supra* note 12. But cf. Case v. Smith Line Weaver Co., *supra* note 12; Wood v. Wood, 78 Ky. 624 at 629 (1880).

ably have contemplated, due to the currency of negotiable instruments that it would find its way into another state. If the court holds that fraud was practiced by bringing the note into Virginia for the sole purpose of attaching the collateral, the fraud would be against the holder rather than Smith.

Burpee, J., in *Siro v. American Express Co.*,[22] advances an argument which apparently has been given little consideration by other courts. He says, "The defendant has not been oppressed or seriously harmed by the retention of the money in the hands of its agent. It has not lost it. . . . If the defendant has a good defense to plaintiff's suit it should rather welcome its determination. . . . Its plea to the jurisdiction is not adopted to appeal persuasively to the equitable powers of the court."

There is a reluctance upon the part of the courts to grant relief in cases which fall in the penumbra of the rule. They are afraid of giving the appearance of fighting for jurisdiction of causes, a practice for which the old common law courts are condemned. Foreign attachment is today an important and needful remedy and should be allowed, in the absence of actual fraud, in the type of case herein discussed.

HARRY ROCKWELL.

JURISDICTION OVER FEDERAL LANDS WITHIN THE STATE

In view of the present ownership by the United States of large tracts of land in North Carolina (including post-office sites, military reservations, custom houses, national forests, etc.), and the prospective ownership of the proposed Great Smoky Mountain National Park,[1] our courts will probably have to decide a number of controversies involving a balance of state and federal power.

The necessity for absolute independence of the National Government and exclusive sovereignty over the seat of government and certain other places was impressed upon the framers of the Constitution by the insults of rioting soldiers to the Continental Congress at Philadelphia in 1778, forcing it to seek the protection of the state of New Jersey. When the original resolution on the subject was introduced in the convention, it only provided for exclusive jursidiction over lands to be acquired for the seat of government. The committee

[22] *Supra* note 12.

[1] N. C. Public Laws, 1927, ch. 48, authorizing acquisition by United States of 700,000 acres in North Carolina for public park purposes.

to whom the proposition was referred added the words "and to exercise like authority over all places purchased * * * for the erection of forts, magazines, arsenals, dock yards, and other needful buildings." When the report of the committee, with this amended provision, came before the convention, Mr. Gerry contended that the "power might be made use of to enslave any particular state by buying up its property, and that the strongholds proposed would be a means of awing the state into undue obedience to the general government." Thereupon Mr. King moved to insert after the word "purchase" the words "by consent of the legislature of the state," and with this amendment the resolution was adopted, and became part of the Constitution.[2]

In the leading case on this subject,[3] Mr. Justice Field sets out that there are three ways in which the United States can acquire or hold land within the limits of a state: (1) by purchase or condemnation of land belonging to a private party; (2) purchase with consent for governmental purposes defined in the constitution; (3) public land at the time of the admission of the state into the union.

The manner of acquiring the land has controlling effect upon the jurisdiction of the federal government. The United States may acquire needed lands by purchase, without consent of the state, or by eminent domain, where needed to execute powers conferred by the Constitution.[4] It is fundamental, however, that no state can be de-

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[2] U. S. Const., Art. 1, §8, cl. 17. For history of this clause, see 5 ELLIOTT'S DEBATES, 57 *et seq.;* 3 Story's Comm. on Const. 1219. In the Federalist No. 43, Madison writing of this clause, says:

"The necessity of a like authority over forts, magazines, etc., established by the general government, is not less evident. The public money expended over such places, and the public property deposited in them, require that they should be exempt from the authority of the particular state. Nor would it be proper, for the places on which the security of the entire Union depends, to be in any degree dependent on a particular member of it. All objections and scruples are here also obviated, by requiring the concurrence of the states concerned, in every such establishment."

[3] Fort Leavenworth R. R. Co. v. Lowe, 114 U. S. 525, 5 S. Ct. 995, 29 L. Ed. 264 (1884).

[4] Kohl v. U. S., 91 U. S. 367, 23 L. Ed. 449 (1875); Chappell v. U. S., 160 U. S. 510, 49 L. Ed. 514, 16 S. Ct. 400 (1895); U. S. v. O'Neill, 198 F. 677, 682 (D. Ct. Col., 1912), power conferred on Secretary of Interior to condemn lands for irrigation works not limited by state laws on eminent domain. It is generally assumed that the United States may condemn state property for federal purposes. See St. Louis v. Western Union Tel. Co., 148 U. S. 92, 101, 13 S. Ct. 427, 40 L. Ed. 389 (1893). In U. S. v. Gettysburg Elec. Ry. Co., 160 U. S. 668, 16 S. Ct. 427, 40 L. Ed. 576 (1896), the U. S. took for a park the route of a state electric road; and in Nahant v. U. S., 136 F. 273, 69 L. R. A. 723 (C. C. A. 1st., 1905), it took for fortification purposes the public streets, and water works appurtenant, of a Massachusetts city.

prived of sovereignty over any territory without its consent. Therefore, where the land is acquired otherwise than by purchase with consent, the United States acquires only the powers and rights of a proprietor in such land. As an instrumentality of the General Government, these lands are free from such state control as would impair their effective use for the designated purposes.[5] Insofar as the state laws do not contravene the "needful" federal legislation,[6] the state has "concurrent" jurisdiction within such territory.

Upon these lands, a single act may constitute an offense against the United States, and against the state. But the United States cannot without encroachment upon the police power of the state, deal with acts of personal violence upon the lands, as such; these are within the exclusive jurisdiction of the state tribunals. Only when the acts are made the means of effecting a prohibited interference with the proper use of government property, can the general government take any account of them.[7]

The most recent application of this principle is found in the case of *United States v. Hunt*,[8] where the issuance of licenses for killing deer on a national forest reservation in violation of state game laws,

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In Pacific R. R. Removal Cases, 115 U. S. 1, 5 S. Ct. 113, 29 L. Ed. 319 (1885), it was apparently assumed that a state might condemn part of the depot grounds of a federal railroad corporation in order to widen a street. U .S. v. R. R. Bridge Co., 27 Fed. Cas. 686, 692 (N. D. Ill., 1855), held that a state has the right of eminent domain over federal owned lands not in use.

[5] Such is the law with reference to all instrumentalities created by the Federal Government: Panhandle Oil Co. v. Mississippi, 48 S. Ct. 451 (U. S., 1928); Van Brocklin v. Tenn., 117 U. S. 151, 6 S. Ct. 679, 29 L. Ed. 845 (1886); Pundt v. Pendleton, 167 F. 997 (D. C. N. D. Ga., 1909), teamster in quartermaster's department at military post cannot be required to work out road tax.

[6] U. S. Const., Art. 4, §3, cl. 2, Congress has power to make all needful rules and regulations for disposition and control of federal territory.

[7] McKelvey v. U. S., 260 U. S. 353, 67 L. Ed. 301, 43 S. Ct. 132 (1922), where an assault committed in obstructing passage over federal land in violation of federal statute held punishable in federal court; Utah Power and Light Co. v. U. S. 243 U. S. 389, 403, 37 S. Ct. 387, 389, 61 L. Ed. 791 (1917), Congress has power to control lands although this may involve exercise of police power. In U. S. v. Penn, 48 F. 669 (C. C. E. D., Va. 1880), larceny of private property on Arlington Cemetery (concurrent jurisdiction type) was held not cognizable by federal court.

[8] 49 S. Ct. 38 (U. S., 1929). The order of the Secretary of Agriculture in this case, authorizing hunting licenses to be issued for killing deer, is an administrative ruling of statutory rank. The court considered the National Forest as being within the concurrent jurisdiction of the State and Federal government, but it seems that the United States had exclusive jurisdiction over the land by virtue of the cession act of Kansas. Therefore the order of the Secretary of Agriculture would be supreme on the reservation regardless of its necessity for protection of the property, as will appear in subsequent discussion.

The court in this case did not find it necessary to discuss the ownership of the wild game on the reservation.

in order to protect the trees and shrubs thereon from destruction, was held within the authority of Congress and paramount to state law.

The inhabitants of federal-owned land not under exclusive jurisdiction of Congress would for all purposes be residents of the state, subject to its laws, taxes,[9] and entitled to suffrage and benefits within the state.[10]

When a purchase of land for any of the purposes enumerated in the Constitution[11] is made by the National Government and the state state legislature has given its consent to the purchase, the land so purchased, by the very terms of the Constitution, *ipso facto,* falls within the exclusive legislation of Congress, and the state jurisdiction is completely ousted. "This is the necessary result, for exclusive jurisdiction is the attendant upon exclusive legislation."[12]

A reservation by the state providing for the execution of its criminal and civil process upon the land, which usually accompanies consent to the purchase, is not considered incompatible with the ex-

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[9] Territory v. Delinquent Tax List, 3 Ariz. 308, 309, *26* Pac. 310, 312 (1891). See collected cases in 14 Anno. Cases. *963.*

[10] Renner v. Bennett, *21* Ohio St. 431 (1871).

[11] Must have been purchased for some of the purposes specified in the constitution, i.e., ". . . for forts, arsenals, magazines, customhouses, *and other needful buildings," supra* note 2; U. S. v. Tierney, 28 Fed. Cas. 158 (S. D. Ohio, 1864.) A broad construction has been put upon the language of this clause, which makes it cover all structures and places necessary for carrying on the business of government; U. S. v. Tucker, 122 F. 518, 521 (D. Ct. Ky., 1903), dam-locks; Sharon v. Hill, *24* F. *727* (C. Ct. Calif., 1885), appraiser's building; Steele v. Halligan, *229* F. 1011 (D. Ct. W. D. Wash., 1916), penitentiary; Brooks Hardware Co. v. Greer, 111 Me. 78, 87 Atl. 889 (1911), soldiers' home. But see *In re* Kelly, 71 F. 545 (C. Ct. E. D. Wis., 1895), holding U. S. does not have exclusive jurisdiction over land purchased with consent for soldiers' home, no necessity for such jurisdiction having been expressed by congress.

[12] Associate Justice Field in Ft. Leavenworth v. Lowe, *supra* note 3; U. S. v. Cornell, Fed. Cas. No. 14,867 (R. I., 1819), murder in Fort Adams; Battle v. U. S. 209 U. S. 37, 28 S. Ct. 422, 52 L. Ed. *672* (1907), murder in post-office; State v. Morris, *76* N. J. L. *224, 68* Atl. 1103 (1908), no jurisdiction in state of crime on post-office property; U. S. v. Andem, 158 F. 996, 1000 (D. Ct. N. J., 1908), exclusive jurisdiction in U. S., state criminal law adopted; Mitchell v. Tibbetts, 17 Pick. (Mass.), 298 (1838), vessel hauling stone from another state to navy yard in Massachusetts not subject to state regulation; Western Union Tel. Co. v. Chiles, 214 U. S. *278,* 29 S. Ct. *613,* 53 L. Ed. *997* (1908), penalty under Virginia statute for non-delivery of telegram unenforcible when addressee within navy yard. See also U. S. v. Carter, 84 F. *622* (C. Ct. S. D. N. Y., 1897), U. S. jurisdiction exclusive over murder on battleship in Cob Dock. Cf. Exum v. State, 90 Tenn. 501, 17 S. W. 107, 15 L. R. A. 381 (1891), state court retains jurisdiction over perjury committed in a state court trial held in a building within the exclusive jurisdiction of U. S.; U. S. v. World's Col. Exposition, 56 F. 630 (D. Ct. N. D. Ill., 1893), no exclusive jurisdiction over land taken for a temporary purpose.

clusive sovereignty or jurisdiction of the United States.[13] It has been said to operate "as an agreement of the new sovereign to permit its free exercise, as, *quoad hoc,* its own process."[14] The object of reservations of this type is merely to prevent these lands from becoming a sanctuary for fugitives from justice. The courts have construed such reservations as collateral agreements rather than as qualifications to the consent. Indeed, it has been doubted whether Congress is, by the terms of the Constitution, at liberty to purchase lands for the enumerated purposes when the consent of the state is so qualified that it will not permit the exclusive legislation of Congress there.[15] If the land is not acquired under the constitutional provision, the state may cede such jurisdiction as it sees fit to the federal government, with any conditions not inconsistent with the free and effective use of it for the public purposes for which acquired.[16] The jurisdiction depends on the terms of the cession.

It is competent for the legislature to cede exclusive jurisdiction over places needed by the general government in the execution of its powers, such use being for the people of the state as well as of the United States.[17] In *Fort Leavenworth v. Lowe,*[18] Mr. Justice Field stated *obiter* that such jurisdiction would necessarily end when the places ceased to be used for those purposes. If cession of jurisdiction to the United States is free from any condition or limitation as to duration, the land should be considered as within the sole jurisdiction of the United States as long as it remains in federal government ownership, regardless of the use to which it is temporarily put. In accord with this principle, the Supreme Court held in *Arlington Hotel Co. v. Fant*[19] that a lease of an acre of land on the United

[13] *In Re* Ladd, 74 F. 31, 36 (C. Ct. N. D. Neb., 1896); U. S. v. Cornell, *supra* note 12. Right of serving state process exists whether specifically reserved or not; 9 Op. Att. Gen. 197 (1858); U. S. Rev. St. 4662, Title 33 U. S. C. A. 728.

[14] Field, J., in Ft. Leavenworth R. R. v. Lowe, *supra* note 2.

[15] Therefore, consent of the state legislature to purchase of land for public buildings is required by act of Congress: 5 Stat. 468, 8 Fed. St. Anno. 1105, §355. Where act of legislature contains provision for punishment of violations of state's criminal law within federal land, it does not satisfy this federal statute; 20 Opin. Att. Gen. 611 (1863). If legislative act of state amounts to a consent to purchase, any exceptions or qualifications contained in the act are void: 10 Opin. Att.-Gen. 34 (1861).

[16] Ft. Leavenworth R. R. v. Lowe, *supra* note 2, reservation of right to tax private property on federal territory.

[17] Steele v. Halligan, 229 F. 1016 (D. Ct. W. D. Wash., 1916).

[18] *Supra* note 2.

[19] Williams v. Arlington Hotel Co., 15 F. (2d) 412 (D. C. E. D. Ark); reversed on appeal in 22 F. (2d) 669 (C. C. A. 8th, 1927); Williams v. Arlington

States Hot Springs reservation, to a private corporation for hotel purposes did not divest the federal government of exclusive jurisdiction over that acre. In *Benson v. United States*,[20] it was said that the court will not inquire into the actual use that is made of the land ceded, but that it will consider it appropriated to the use for which the political department has designated the entire tract of land. Where the land has clearly been abandoned for use by the United States, the state should be revested with complete jurisdiction, immediately and without the necessity of a recession by Congress. The probability of a constitutional controversy arising over this question is alluded to by Chief Justice Taft in the Arlington Hotel case.[21]

The inhabitants of these lands (exclusive jurisdiction type) are non-residents of the state,[22] and are not entitled to the benefits of its

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Hotel Co., 170 Ark. 440, 280 S. W. 20 (1926), in accord with U. S. Supreme Court.

In this case, exclusive jurisdiction was ceded by Arkansas by act of 1903, to the Hot Springs National Park "so long as the same shall remain the property of the United States, with a further reservation of the right to tax private property thereon. The federal government leased to the defendants a tract of land, within the reservation, for hotel purposes. The plaintiff brings suit for loss of personal property when the hotel is burned without fault of the defendant. The law of the state in relation to liability of innkeepers at the time of cession of jurisdiction was the common law liability of insurer of a guest's goods. By state statute of 1913 an innkeeper's liability was for negligence only. The Supreme Court *held* the statute of 1913 inoperative within the reservation because exclusive jurisdiction had been ceded by the state and the lease to the defendants did not divest the U. S. of exclusive jurisdiction. Therefore, the defendants were liable under the common law of the state at the time of transfer of jurisdiction, which became the law of the federal territory in absence of federal statutes to the contrary.

[20] 146 U. S. 325, 13 S. Ct. 60, 36 L. Ed. 991 (1892), murder on part of Fort Leavenworth reservation which was used solely for farming purposes was held to be within exclusive jurisdiction of federal court. Accord: U. S. v. Holt, 168 F. 141 (C. Ct. W. D. Wash. 1909), boundary of military reservation not subject to scrutiny by court; Baker v. State, 47 Tex. Cr. App. 484, 83 S. W. 112 (1904), part of land used for street outside garrison walls.

Cf. Palmer v. Barrett, 162 U. S. 399, 16 S. Ct. 837 (1896); Crook, Horner and Co. v. Old Pt. Comfort Hotel Co., 54 F. 604, 610 (C. Ct. E. D. Va., 1893). The cession act governing these cases limited the use of the land ceded.

[21] In reference to counsels' argument that "the United States may, where land is ceded by a state to the exclusive jurisdiction of the national government, treat land thus ceded by the state for such purpose as it would treat national public land which had never come within the jurisdiction of the state," Chief Justice Taft said: "This issue may in the future become a subject of constitutional controversy, because some 20 or more parks have been created by Congress, in a number of which exclusive jurisdiction over the land has been conferred by the act of cession of the state."

[22] Bank of Phoebus v. Byrum, 110 Va. 708, 67 S. E. 345, 27 L. R. A. (N. S.) 437 (1910), defendant at Ft. Monroe held subject to attachment as non-resident of the state although process could be served on him there.

laws,[23] nor subject to its penalties or taxes.[24] The state court has no jurisdiction over crimes committed therein.[25] With the change of government, the laws of the state at the time of the purchase, or cession of exclusive jurisdiction, not being inconsistent with any law of the United States, remain in force as the law of the federal territory until changed by act of Congress.[26]

In *Arlington Hotel Co. v. Fant*,[27] the defendant hotel keeper was held liable as an insurer under the common law of Arkansas at the time of the cession act in 1901, since the Arkansas statute of 1913, making the innkeeper liable for loss by negligence only, was inoperative within the Hot Springs reservation. If we apply this principle to North Carolina, contracts made or wrongs occurring on federal property, as post offices, Fort Bragg, and other places of the exclusive jurisdiction type, would be governed by the law of North Carolina at the time the property was acquired by the federal government, and not by the present law of the state.[28]

As to the third class of land mentioned above by Associate Justice

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[23] Sinks v. Reese, 19 Oh. St. 306 (1865), inmates of soldiers' home not entitled to vote in state; St. v. Willett, 117 Tenn. 343, 97 S. W. 299 (1906), same. Opinion of Justices, 1 Met. 580 (1841), not entitled to school law; Farley v. Scherno, 208 N. Y. 269, 101 N. E. 891, 47 L. R. A. (N. S.) 1031 (1913), state liquor license a nullity within federal military reservation.

[24] U. S. v. Naylan, 3 Alaska 94, civil employee resident on military reservation not subject to state road tax; Harper's Ferry Armory case, 6 Ops. Att.-Gen. 577, private property not taxable by state; Brooks Hardware Co. v. Greer, *supra* note 11, inmate of soldiers' home not subject to garnishee process of state.

[25] *Supra* note 12, cases cited.

[26] Chicago Rock Is. etc. R. R. Co. v. McGlinn, 114 U. S. 542, 545, 5 S. Ct. 1005, 29 L. Ed. 270 (1884); *In re* Chavez, 149 F. 73 (C. C. A. 8th, 1906); Hoffman v. Leavenworth Light Co., 91 Kan. 452, 138 Pac. 633, 50 L. R. A. (N. S.) 574 (1914).

Criminal laws of the state in force at the time of passage or reënactment of federal statute adopting such laws, apply to federal lands: 35 Stat. 1145, 7 Fed. St. Anno. p. 938, §289.

But in U. S. v. Press Pub. Co., 219 U. S. 1, 31 S. Ct. 212, 55 L. Ed. 65 (1911), circulation of libel in government reservation at West Point was held not punishable in Federal court, since the state law afforded adequate punishment for the offense, because the plain purpose of federal statute adopting state criminal laws was that there should be but a single prosecution and conviction for criminal libel.

[27] *Supra* note 19.

[28] In Williams v. Arlington Hotel Co., 170 Ark. 440, 280 S. W. 20 (1926), the Arkansas court took cognizance of the cause as a transitory action, but held that the law of the Hot Springs Reservation where the loss occurred would govern the case. The court then held that the defendant would be liable according to the law of Arkansas twenty-five years previous.

See also Divine v. Unaka Nat. Bk., 125 Tenn. 107, 140 S. W. 749 (1911), holding the state court had probate jurisdiction over estate of inmate of soldiers' home.

Field, *i.e.*, public lands at the time of admission of a state into the Union, it seems that the jurisdiction of the state is complete unless Congress makes reservation of jurisdiction as a condition of admission.[29] A state, once admitted, is on the same basis as the other states.

It may be noted that North Carolina has given in advance consent to the acquisition by the federal government of land within the state in accordance with the constitutional method.[30] Hence, federal jurisdiction over land purchased for purposes specified in the Constitution will be exclusive. It seems that places rented for these same purposes, however, are of the concurrent jurisdiction type. As to federal forest reserves, the North Carolina legislature authorizes the federal government to acquire such lands but does not cede jurisdiction over the lands.[31] Likewise the proposed Smoky Mountain National Park will be subject to the concurrent jurisdiction of the United States and the State of North Carolina.[32]

J. H. ANDERSON, JR.

RECORDATION OF CHATTEL MORTGAGE AS NOTICE TO PURCHASER OF AUTOMOBILE FROM STOCK IN TRADE

By statute in North Carolina[1] and other states, registration of chattel mortgages is notice to all the world of the mortgagee's interest in the chattel. No notice, however full and formal, is a sufficient substitute for registration.[2] The North Carolina statute does not make any exception in regard to the recordation of chattel mortgages on stock in trade exposed for sale. As a result of this omission, is recordation of chattel mortgages on stock in trade notice to otherwise bona fide purchasers for value of the mortgagee's interest in the article purchased? Very few courts have passed on this question.[3]

[29] Ft. Leavenworth v. Lowe, *supra* note 2; U. S. v. Tully, 140 F. 899 (C. Ct. Mont., 1905), unless legally set aside for military purposes, no exclusive jurisdiction vests; mere occupancy by army not sufficient.

[30] C. S., §§8058, 8059.

[31] "This consent is given upon condition that the state shall retain concurrent jurisdiction with the United States . . . so far as civil process in all cases, and such criminal process as may issue under the authority of the state . . . may be executed . . ." C. S., §8057. These reservations seem to be placed in the statute out of abundance of caution.

[32] Pub. Laws, 1927, ch. 48.

[1] N. C. Cons. Stat. 3311, 3312.

[2] Blalock v. Strain, 122 N. C. 283, 29 S. E. 408 (1895).

[3] If the mortgagor is left in possession, the mortgagee generally makes some provision as to the mortgagor selling the stock in trade and applying part of the proceeds on the mortgage debt. Hence the paucity of cases as to the particular point in question.

In *Rogers v. Booker*,[4] the court held that in the situation there involved the purchaser for value took subject to the recorded mortgage. In its opinion the court said: "This was not the case of a mortgage upon a stock of goods left in the hands of the mortgagor for sale," thus intimating that a different result would have been reached if it were a mortgage upon stock in trade.[5]

The recent North Carolina case of *Whitehurst v. Garrett*[6] squarely involves this situation. The plaintiff, the holder of a mortgage of five automobiles specifically described and properly recorded, was allowed to recover from the defendant in a civil action of claim and delivery one new Pontiac automobile bought by the defendant from the dealer mortgagor. At the time of the purchase by the defendant this car was kept with others in a display window for sale to anyone who cared to purchase. The justice writing the opinion said:

"There is no sufficient evidence to show an implied agency giving the mortgagor a right to sell free from the mortgage lien." Assuming there was no agency,[7] it is submitted there was sufficient evidence to warrant an estoppel by conduct as to a bona fide purchaser for value. Where a mortgagee leaves goods with the mortgagor whose business it is to sell such goods, and permits the goods to be exposed for sale by the mortgagor, he is estopped to deny the right of a bona fide purchaser for value.[8] There was no intention in the instant

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[4] 184 N. C. 183, 186, 113 S. E. 672 (1922). The mortgagor here was not a dealer in automobiles. He operated a storage room for cars. There was evidence that he had never sold a car.

[5] There are three distinct theories as to mortgages on shifting stock in trade where the mortgagor is allowed to remain in possession and sell as if there were no mortgage. First: Such mortgages are void and fraudulent as to creditors and purchasers for value without notice. Gray v. Atlantic Trust and Deposit Co., 113 Va. 580, 75 S. E. 226 (1912); Reynolds v. Ellis, 103 N. Y. 115, 8 N. E. 392, 57 Am. Rep. 701 (1886); Standard Brewery Co. v. Nudelman, 70 Ill. App. 356, affirmed in 172 Ill. 337, 50 N. E. 190 (1898), held such a mortgage to be void even as to a purchaser of the entire stock. Second: Such mortgages are presumptively fraudulent and void. New v. Sailors, 114 Ind. 407, 16 N. E. 609, 5 Am. St. Rep. 632 (1888). Cf. Blanton Grocery Co. v. Taylor, 162 N. C. 307, 78 S. E. 276 (1913). Third: Such mortgages are valid in the absence of actual fraud, fraud being a question for the jury under the facts of each particular case. Williams v. Wilson, 12 R. I. 9, 12 (1877).

[6] 196 N. C. 154, 144 S. E. 835 (1928).

[7] This seems technically correct. There was no showing of a prior course of dealing between the mortgagor and mortagee that would warrant the court in holding that the mortgagor had implied power to sell. Nor is there any express or apparent authority to sell. The mortgagor is held out as owner, not as agent. If there was an agency relation the result would be obvious.

[8] Dissenting opinion in Hardin v. State Bank of Seattle, 119 Wash. 169, 205 Pac. 382 (1922): "Where one of two equally innocent persons must suffer, he should bear the burden whose conduct has induced the loss." Pickering v. Bust, 15 East, 45, 104 English Reports, 761 (1812). More specifically see notes 10, 11, and 12, *infra*.

case that the mortgagor should cease business. The loan was made in order that the mortgagor might continue the purchase and sale of automobiles. Even the mortgagee's testimony showed that he permited the mortgaged automobiles to be exposed for sale:

"I knew that he (mortgagor) was an automobile dealer and had a show and display room on the corner of Main and Road Street. . . . I knew that the cars that were kept in that show room were kept there for the purpose of indiscriminate sale to anyone who wanted to buy. . . . I never made any effort to take them from his (mortgagor's) show room. . . . I live within one block of the show room and pass it several times a day when I am in town."

The plaintiff vested the mortgagor with all the indicia of ownership and permitted him to hold himself out to the world as owner. Such conduct should estop the mortgagee from asserting his claim as against the defendant purchaser. The Virginia[9] and Arizona[10] courts on an almost similar set of facts, and the Texas[11] court by interpretation of statute, have held that the mortgagee was estopped by his conduct from asserting his ownership against a purchaser for value and without actual notice.

By the decision in *Whitehurst v. Garrett* the North Carolina court has preserved the integrity of the recording acts, as it evidently set out to do,[12] and as a literal interpretation of the statute warrants, but it has failed to take into consideration actual business experience, expediency and practice. No purchaser of a new automobile from a dealer goes to the county seat to determine if that particular car is mortgaged. To follow the decision of this case to its logical result would indeed be unfortunate for free business intercourse. Every purchaser of a horse from a livery stable; every purchaser of farming implements, of household furniture, of a piano, or a typewriter, or of any article of a stock of drugs or groceries that could be specifically described would be required to search the registry for any incum-

[9] Rudolph v. Farmers Supply Co., 131 Va. 305, 313, 108 S. E. 638, 640 (1921), citing with approval Boice v. Finance and Guaranty Corp., 127 Va. 563, 102 S. E. 591, 10 A. L. R. 654 (1920). This case and the ones in the two note *infra* present situations almost identical with that in Whitehurst v. Garrett, *supra* note 6.

[10] Kearby v. Western States Securities Co., 250 Pac. 760 (Ariz., 1926). Recordation of conditional sales.

[11] First Nat. Bank of Stephenville v. Thompson, 265 S. W. 884 (Texas, 1924), construing Revised Civil Statutes, Article 3970. For the text of the statute see *infra* note 16.

[12] "Whatever may be the holding elsewhere, the registration of mortgages is favored in this jurisdiction." *Supra* note 6.

brance in order to protect himself from the mortgagee's claim. It may be argued that this is a matter of degree and that the holding would not apply to small and inexpensive articles. This argument is unsound, for the recordation act is silent as to any degree of size or value of the article mortgaged just as it is silent as to any exception in case of stock in trade. If a person lending money on an automobile in stock is to be protected by his recorded mortgage, why should not the mortgagee of a piano, chair, or typewriter in the hands of a dealer and exposed for sale be protected, provided the mortgaged article is specifically described so that it may be identified? In his transactions with an automobile dealer how will the purchaser determine at what point along the scale the registry act applies as to the sale of articles ranging from a small wrench to a Rolls-Royce? The distinction as to degree is not a valid one. It is true that the mortgage in the instant case is on particular articles in a stock in trade rather than on the entire stock as such. A California case[13] makes a distinction between the two, but the distinction seems unwarranted provided the goods in each instance are adequately described and properly recorded. The result as to the purchaser is the same regardless of whether the mortgage is on the entire stock in which his car is included, or only on his particular car. If he searched the registry in either case he would be put on notice as to the mortgagee's claim. However necessary the result in *Whitehurst v. Garrett* may be as a matter of statutory interpretation, from an economical point of view an escape from the holding seems not only desirable,[14] but absolutely imperative. Practically every purchaser of an automobile in North Carolina today is subjecting himself to double payment, or at least to payment and then the risk of having the car sold to pay the remaining mortgage indebtedness; for most concerns financing automobile dealers take some security similar to a chattel mortgage on the cars. If the court (since its duty, broadly speaking, is to interpret, not to make the laws) feels that the integrity of the

[13] Hardin v. State Bank of Seattle, 119 Wash. 169, 205 Pac. 382 (1922).

[14] How could the corporation financing the automobile dealer protect itself under a decision *contra* to Whitehurst v. Garrett? It could not resort to the conditional sale, for North Carolina has repeatedly held that when used as a method of security it was no more than a chattel mortgage. The Texas court has held the same way as regards a trust receipt. General Motors Acceptance Corp. v. Baddeker, 274 S. W. 1016 (Tex., 1925). What the finance corporation really does is to charge a slightly higher rate, anticipating these occasional losses, and thus protect itself in advance. Possibly some guaranty or indemnity company would insure the banker or the one furnishing the credit against possible default of the dealer.

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

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

J. W. CREW, JR.

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

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

1—*Distinction between mutual and running accounts.*

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

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

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

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

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

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

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

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

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

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

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

[6] *Supra* note 2.

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

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

2—The rules governing the application of payments.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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