UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 7 | Number 3 Article 7

4-1-1929

Recent Case Comments

North Carolina Law Review

Where a payment is made upon a running account after it has become an account stated the whole claim stated is brought in date.[21] The law could not apply a payment to items already barred,[22] where the parties had failed to make the application. If the statute had run upon all the items of the account at the time of the payment the effect thereof would be to bring the whole account in date because the payment would be one upon the account and the fact that all the items of the account were of the same standing would remove the reason for the rule as to application of payments.[23]

J. B. FORDHAM.

RECENT CASE COMMENTS

CONSTITUTIONAL LAW—ZONING—DELEGATION OF POWER—FRONTAGE CONSENT TO ERECTION OF PHILANTHROPIC INSTITUTION IN RESIDENCE DISTRICT—In *State of Washington ex rel. v. Roberge*,[1] the Supreme Court of the United States held unconstitutional that part of a Seattle zoning ordinance which provided that in a residential use-district a philanthropic home for children or old people could be erected only upon the written consent of the owners of two-thirds of the property within 400 feet of the proposed building. Such an institution, which had stood for many years in what is now a residential district, sought, through its trustee, a permit to replace the old building with a new one of twice the original capacity, on the same site. From a decision of the Washington Supreme Court dismissing an action of mandamus to compel the city building department to issue the permit, without any attempt to obtain the required frontage consent, the trustee for the home obtained a write of *certiorari*. Held, reversed, the ordinance being in violation of the Fourteenth Amendment as an arbitrary delegation of power to the neighboring property owners.

The validity of general zoning is now firmly established.[2] The

[21] See Nunn v. W. T. McKnight & Bros., 79 Ark. 393, 96 S. W. 193 (1906).

[22] Livermore v. Rand, 26 N. H. 85 (1852). But see Fletcher v. Gillan, 62 Miss. 8 (1884), where, in a case where no proof was made as to the date of a payment, it was held that the law would apply the payment to the oldest items though they were barred and there were younger items not barred by the statute.

[23] For a discussion of California cases, see Schapiro, *Accounts and Statute of Limitations* (1922), 11 CAL. L. REV. 121.

[1] State of Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 49 Sup. Ct. 50 (U. S., 1928).

[2] Village of Euclid v. Ambler Realty Co., 272 U. S. 365, 71 L. Ed. 303, 47 Sup. Ct. 114, 54 A. L. R. 1016 (1926), discussed in NOTE (1927) 5 N. C. L. REV. 237; Nectow v. City of Cambridge, 277 U. S. 183, 48 Sup. Ct. 447 (1928);

present problem is that of application to specific situations. One aspect of that problem is the question of the restrictions necessary upon the exercise of power to permit variations from the general zoning scheme. Where city councils,[3] building commissioners[4] or neighboring property owners[5] have been given uncontrolled discretion to permit the erection of stables, gasoline filling stations, garages or other commercial establishments, or to fix building lines, the courts have uniformly reached the result of the principal case; *contra,* where that to which the property owners' consent has been requisite was regarded as inherently dangerous.[6] On the other hand, where individual whim, caprice or arbitrariness has been excluded, and the exercise of the power subjected to various objective tests of reasonableness, the reverse has been true.[7] Chief among such instances have been the grants of power to a board of zoning appeals to make such reasonable adjustments of the plan of the ordinance to existing situations as would prevent unnecessary and inequitable consequences of literal enforcement. In general, the courts have not interfered with the decisions of such boards allowing apparently reasonable variations from the strict letter of the ordinance,[8] except where the discretion appears to have been abused.[9] Thus a garage was per-

Zahn v. Board of Public Works of Los Angeles, 274 U. S. 325, 71 L. Ed. 1074 (1927); Gorieb v. Fox, 274 U. S. 603, 47 Sup. Ct. 675 (1927); BAKER, THE LEGAL ASPECTS OF ZONING (1927).

[3] Bizzell v. Goldsboro, 192 N. C. 348, 135 S. E. 50 (1926); State *ex rel.* Dickinson v. Harrison, 161 La. 218, 108 So. 421 (1926); State *ex rel.* Manheim v. Harrison, 164 La. 564, 114 So. 159 (1927); Slaughter v. Post, 214 Ky. 175, 282 S. W. 1091 (1926); 12 A. L. R. 1436, with note.

[4] Gulf Refining Co. v. City of Dallas, 10 S. W. (2d) 151 (Tex. Civ. App., 1928).

[5] Coley v. Campbell, 126 Misc. 869, 215 N. Y. Supp. 679 (1926); Glenn Falls v. Standard Oil Co., 127 Misc. 104, 215 N. Y. Supp. 354 (1926); Longley v. Rumsey, 130 Misc. 492, 224 N. Y. Supp. 165 (1927); Authorities collected in 43 A. L. R. 834, 46 A. L. R. 88; Eubank v. City of Richmond, 226 U. S. 137, 47 Sup. Ct. 675, 42 L. R. A. (n. s.) 1123 (1912); State *ex rel.* Nehrbass v. Harper, 162 Wis. 589, 156 N. W. 941 (1916). Followed in Wasilewski v. Biedrgycki, 180 Wis. 633, 192 N. W. 989 (1923).

[6] Cusack v. Chicago, 267 Ill. 344, 242 U. S. 526 (1916).

[7] Hyma v. Seegar, 233 Mich. 659, 207 N. W. 834 (1926); Lovell v. Mt. Vernon, 215 Ky. 143, 284 S. W. 1025 (1926).

[8] People *ex rel.* Werner v. Walsh, 209 N. Y. Supp. 454 (1925); People *ex rel.* St. Basil's Church v. Kerner, 211 N. Y. Supp. 470, 125 Misc. 526 (1925); People *ex rel.* Ruth v. Leo, 188 N. Y. Supp. 945, 197 N. Y. App. Div. 942 (1921); People *ex rel.* Helvetia Realty Co. v. Leo, 183 N. Y. Supp. 37, 195 N. Y. App. Div. 887, 231 N. Y. 619 (1921); Harris v. State, 23 Ohio App. Rep. 33, 155 N. E. 166 (1926); Gorieb v. Fox, *supra* note 2.

[9] People *ex rel.* Small v. Leo, 178 N. Y. Supp. 239, 192 N. Y. App. Div. 918 (1919); People *ex rel.* Wohl v. Leo, 178 N. Y. Supp. 851, 109 Misc. 448 (1919); People *ex rel.* Stephens v. Clarke, 215 N. Y. Supp. 190, 216 N. Y. App. Div. 351 (1926).

mitted, this being the only practical use for the building;[10] a building height has been allowed to be raised upon precautions being taken against cutting off the light for adjoining buildings;[11] and violation of a set-back line has been permitted where the character of the lot necessitated this result.[12]

It is interesting to note that in the principal case, the trial and appellate courts in the State of Washington, supposedly more conversant with the local situation than could be the Supreme Court of the United States from the record, both upheld the ordinance. Three factors, however, contributed to the Supreme Court's view. The consent of the property-owners in the vicinity was unconditional and not reviewable by any public body. The ordinance permitted various other institutions in the district, such as schools, fraternity and sorority houses, railroad stations and temporary circuses and fairs. And the original home for the aged was located in what was formerly a private dwelling, suitable for fourteen inmates, near the centre of a five-acre tract, 280 feet back from an avenue and 400 feet from a lake, and mostly hidden by trees and shrubs. The new building was to be on the same site, and was to be a two and one-half story house, fireproof, and capable of handling only thirty persons. In a word, the proposed structure bore such a relation to the desired character of the district and was of such a type that, had a board of zoning appeals permitted its erection in spite of an ordinance excluding such institutions altogether, most courts would have sustained the action as reasonable and necessary. To make such a variation dependent upon the ungovernable consent of the neighbors appeared to the court to be highly inequitable. Perhaps the decision of the court was not wholly unaffected by the fact that this particular provision of the ordinance was inserted two years after the enactment of the ordinance as a whole, by an amendment apparently directed at this one institution.

WALTER HOYLE.

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[10] People *ex rel.* Smith v. Walsh, 207 N. Y. Supp. 900, 211 N. Y. App. Div. 205 (1924).

[11] People *ex rel.* Helvetia Realty Co. v. Leo, 185 N. Y. Supp. 37 (1920), affd. 195 N. Y. App. Div. 887, 231 N. Y. 619, 132 N. E. 912 (1921).

[12] Allen v. City of Patterson, 98 N. J. L. 661, 121 Atl. Rep. 610 (1923), affd. 99 N. J. L. 489, 123 Atl. Rep. 884 (1924).

EQUITY—INJUNCTIONS—PIRACY OF SALES PLAN—In *Moore v. Ford Motor Co.*,[1] the plaintiff disclosed his sales plan to the defendant for the purpose of interesting defendant in its purchase, with the understanding that such a disclosure placed the defendant under no obligation to the plaintiff. Six months later the defendant, having refused to purchase the plaintiff's plan, produced what it claimed to be its own sales plan. Both plans were similar in objective, namely, to increase the sales of Fords among the laboring classes, but they differed in the method or system of saving, in the rate of interest to be paid, in the handling of these savings accounts, and in that defendant's plan was more detailed. Defendant, in bill for injunction and accounting, was charged with pirating plaintiff's plan through an unauthorized use of plaintiff's sales idea. The court refused relief. It found that the defendant had formulated its plan by its own "skill and labor from the common source," and that plaintiff's idea was not original. The court said, however, that had it been original, plaintiff could not have prevented defendant from using the plan because there existed no "fiduciary relationship or agreement."

The courts have so far been in accord in holding that disclosed business schemes must go unprotected at law in the absence of a contract or fiduciary relationship.[2] Thus, where alleged originators divulged plans to combine the white lead industries,[3] a system of soliciting the purchase of life insurance,[4] a plan of savings for banks,[5] and a symbolic system of indicating the rating of business men,[6] relief was refused.

The lack of "a property right" is given by some of these courts as their reason for refusing protection.[7] This seems unsound because property is the sum total of the rights in things of value which the law protects, and is the result of legal protection rather than the

[1] Moore v. Ford Motor Co., 28 F. (2d) 529 (S. D. N. Y., 1928).

[2] Haskins v. Ryan, 71 N. J. Eq. 575, 64 Atl. 436 (1906); Bristol v. Equitable Life Assurance Co. of N. Y., 132 N. Y. 264, 30 N. E. 506, 28 Am. S. Rep. 568 (1892); Stein v. Morris, 234 F. 382 (S. D. N. Y., 1916); Stein v. Morris, 120 Va. 390, 91 S. E. 177 (1917); Burnell v. Chown, 69 F. 993 (1895); Soule v. Bon Ami Co., 201 App. Div. 794, 195 N. Y. S. 574, affirmed 235 N. Y. 609, 139 N. E. 754 (1923).

[3] Haskins v. Ryan, *supra* note 2.

[4] Bristol v. Equitable Assurance Co., *supra* note 2.

[5] Stein v. Morris, both in N. Y. and Va., *supra* note 2.

[6] Burnell v. Chown, *supra* note 2.

[7] Haskins v. Ryan, *supra* note 2; Bristol v. Equitable Assurance Co., *supra* note 2; Stein v. Morris (both cases), *supra* note 2; Burnell v. Chown, *supra* note 2.

basis for it. Since the law does recognize rights in incorporeal things in many respects similar to ideas,[8] the reason for refusing protection to business schemes would be based upon some supposed policy. The injustice of allowing one to realize upon another's ideas without compensation, the probability that the protection of ideas during the course of negotiations for sale would encourage freer disclosure; and the fact that protection has been lent in somewhat analagous situations, would be reasons for extending protection.

The presumed policy underlying the cases may be based upon sheer inertia. There is no precedent for such a change. There is also the usual conservative disinclination to make new rules of law and the probability of increasing needless litigation. Then too, the policy may be based upon the practical inability to cope with the situation.[9] The very vagueness of ideas would render legal proof of piracy difficult, and under the modern system of corporate industry, the ability to determine responsibility for the unauthorized use or the actual source of ideas would be easily thwarted. However, the courts do not doubt their competency to trace the origin of ideas in the copyright cases,[10] and the court, in the principal case,[11] had very little trouble in finding that the defendant originated the scheme itself.

The precise question of the nature and extent of the contract or fiduciary relationship necessary for legal protection has never squarely confronted the courts. The agreement, in the principal case,[12] that a disclosure would impose no obligation upon the defendant apparently meant, by a fair interpretation of the facts, not that the plaintiff had waived all his rights in the disclosed scheme but that the mere disclosure should not create any obligation upon the defendant to purchase it. It is submitted that when a case does arise in which there exists no fiduciary relationship or contract, and in which it is

[8] Secret formulas and processes are property rights which will be protected by injunction, Herold v. Herold China & Pottery Co., 169 C. C. A. 61, 257 F. 911 (C. C. A. 6th, 1911); employee may be enjoined from using confidential business information obtained from his employer; Merchants' Syndicate Catalog Co. v. Retailers Factory Catalog Co., 206 F. 545 (N. D. Ill., 1911); defendant newspaper enjoined from using news gathered by plaintiff newspaper agency for the purpose of sale, International News Service v. Associated Press, 248 U. S. 215, 39 Sup. Ct. 78, 2 A. L. R. 93 (1918).

[9] "Obviously, a contrary rule would place a serious limitation upon industry, and would be impractical," says the court in Moore v. Ford Motor Co., *supra* note 1 at page 535.

[10] Edwards & Deutsch Lithographing Co. v. Boorman, 15 F. (2d) 35 (C. C. A. 7th, 1926); Simonton v. Gordon, 12 F. (2d) 116 (S. D. N. Y., 1925).

[11] Moore v. Ford Motor Co., *supra* note 1.

[12] *Ibid.*

found that the defendant did use the plaintiff's idea, the modern trend in business ethics and the prevention of unfair competition should enable the courts to find a means of protection.

J. FRAZIER GLENN, JR.

EVIDENCE—OPINION EVIDENCE ON THE VERY ISSUE BEFORE THE JURY—In an indictment for murder, in which the defense was suicide, the state called Dr. Quinn as a witness, and the doctor was allowed, over the defendant's objection, to testify, "I don't think it was possible for the deceased to have fired the gun and made the wound that I saw." On appeal to the Supreme Court of North Carolina, the defendant was granted a new trial, the court deciding, among other things, that the admission of this evidence was error. An expert witness may not give his opinion on the very issue before the jury, for this is an "invasion of the province of the jury."[1] Clearly, the court did not mean the phrase literally, but it did mean that if the witness gives his opinion on the issue before the jury, there is the danger that the jury will give too much weight to the witness's opinion and possibly substitute his opinion for their own. The weight of authority supports the instant holding, as pointed out by Mr. Justice Adams, in writing the court's opinion.

One wonders if, after all, this really is a danger? The writers on evidence lean the other way. Wigmore considers the phrase "usurping the province of the jury" simply rhetorical.[2] It is interesting to recall that such a doctrine as that employed in the title case is never used in a case in which insanity is a defense or a vital issue. It is common knowledge that sanity experts, or non-expert witnesses, give their opinions freely as to whether or not the defendant is sane, when the defendant is charged with murder, or some other crime.[3] Likewise, in contesting a will on the grounds of insanity of the testator, doctors and acquaintances are allowed to give their opinions as to his sanity.[4] Also, in a tort action for libel, a handwriting expert may give his opinion as to whether or not the writing in question,

[1] State v. Carr, 196 N. C. 129, 144 S. E. 698 (1928).
[2] WIGMORE, EVIDENCE, §1921.
[3] State v. Banner, 149 N. C. 519, 63 S. E. 84 (1908); State v. Alexander, 179, N. C. 759, 103 S. E. 383 (1920).
[4] *In re* Will of Staub, 172 N. C. 138, 90 S. E. 119 (1916); *In re* Will of Stocks, 175 N. C. 224, 95 S. E. 360 (1918). It is interesting to note that in the Staub case, the dissenting opinion by Brown, J., is in accord with State v. Carr, *supra*. The question of "invading the province of the jury" was undoubtedly raised, but considered subordinate by the majority of the court.

though libelous *per se,* was written by the same person as another writing admitted to be that of the defendant.[5] The matter simply comes down to this—is there a real danger attached to admitting these opinions, or isn't this overshadowed by the extremely high value and importance of this type of evidence? A few of the courts have adopted this latter reasoning,[6] but it is undoubtedly the minority view. The expert's opinion will carry great weight, and it is only right that it should so do. He is an expert because he is especially capable of judging these particular facts. The jury is not bound by his opinion, but merely considers it along with the other evidence. If you exclude his opinion aren't you taking from the jury evidence which might prove unusually helpful in correctly deciding the case?[7]

T. S. ROLLINS, JR.

HOMESTEAD EXEMPTION—PROTECTION OF JUDGMENT CREDITORS AFTER MORTGAGE FORECLOSURE—The plaintiff, aged forty, owned a house and lot worth $1290, against which one of the defendants had a recorded judgment for $208. Thereafter plaintiff and wife made a mortgage on the house and lot, which was later foreclosed. There was an excess of $509 above the mortgage debt. This fund was paid to the clerk of court. It was claimed by the plaintiff that he is entitled to the present worth of this surplus, measured by the expectancy of his homestead exemption.[1] The defendant contended that the plaintiff is only entitled to the income derived therefrom. Judgment for defendant affirmed. *Farris v. Hendricks,* 196 N. C. 439, 146 S. E. 77 (1929).

Does the plaintiff have by virtue of his homestead exemption such an interest as to entitle him to its present worth? Can this interest ever be turned into a money equivalent? The policy and purpose of the homestead law is to provide a home for the debtor

[5] Hedgepeth v. Coleman, 183 N. C. 309, 111 S. E. 517 (1922).

[6] Cited in footnote 2, WIGMORE, EVIDENCE, §1921.

[7] Danforth, J., in Snow v. R. R. Co., 65 Me. 231 (1875): "The reason for its exclusion given by counsel, that it would instruct the jury as to the amount of the verdict to be rendered, would seem to be a very good reason for its admission. Instruction is what the jury wants. They would not be bound by it any more than by other testimony, but it would be more or less valuable in enabling them to come to the correct conclusion."

[1] Joyner v. Suggs, 132 N. C. 580, 44 S. E. 122 (1903). The homestead is exempt, "so long as he might live, and to extend the benefit of the exemption to the wife during her life, if there should be no children of the marriage, and if there were children during the minority of the children, or any of them"; note (1902) 56 L. R. A. 33.

and his family[2] and to protect the wife and children against the neglect and improvidence of the husband and father.[3] There are two theories as to the nature of this right, one line of cases holding that it is an estate in land vested in the person designated by law,[4] the other that the homestead is merely an exemption and that a docketed judgment is a lien upon the land.[5] Under the latter view, the plaintiff is entitled to the enjoyment of the land, relieved of liability to, or annoyance of, his creditors, until by operation of law the exemption terminates.[6] In addition, if he were discharged of his debts, he would be vested with a fee or whatever estate he might have.

The result in the instant case, while fully protecting judgment creditors, does not seem to give similar protection to the debtor and his family. The purpose of exemption laws is to provide a minimum of subsistence for improvident and unfortunate persons. There is a social interest in preventing people from becoming public charges, as well as in enabling people to be economically independent. Is this laudable purpose advanced by giving the debtor, for his homestead exemption, the small amount of money which would accrue as interest on the fund in the hands of the clerk of court?

N. S. SOWERS.

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[2] Murchison v. Plyler, 87 N. C. 79 (1882).

[3] Hughes v. Hodge, 102 N. C. 239, 9 S. E. 437 (1889).

[4] Abbott v. Abbott, 97 Mass. 136 (1866), by statute the homestead is a freehold estate, defeasible, during life only by deed in which the wife joins, or by occupying a new homestead; Tomlinson v. Kandiyohi County Bank, 162 Minn. 230, 202 N. W. 494 (1925), the homestead exemption, by statute, is not alone for the husband and his protection, but for the benefit of his wife and children, and is not only a privilege but an absolute right; Beaty v. Callis, 294 Ill. 424, 128 N. E. 547 (1920), formerly in this state homestead right held to be a mere exemption, but it is now held to be an absolute right; Fritts v. Fritts, 298 Ill. 314, 131 N. E. 584 (1921), a homestead is more than a mere right of occupancy exempt from levy and sale for debts.

[5] Adrian v. Shaw, 82 N. C. 474 (1880), a homestead is a right annexed to the land, whereby the estate is exempt from sale under execution; Vanstory v Thorton, 112 N. C. 196, 17 S. E. 566, 34 Am. St. Rep. 483 (1893), the homestead is merely an exemption and not an estate, and a docketed judgment is a lien upon the land; Kirkwood v. Penden, 173 N. C. 460, 92 S. E. 264 (1917), it is now well settled that, whatever else it may be, a homestead is not an interest or an estate in land.

[6] Finley v. Saunders, 98 N. C. 462, 4 S. E. 516 (1887), by abandonment with the intent to make his home elsewhere, even though he had deserted his wife and children; Fulton v. Roberts, 113 N. C. 421, 18 S. E. 510 (1893), on leaving the state the exemption does not cease until it is acquired in another state; Dalrymple v. Cole, 170 N. C. 102, 82 S. E. 989 (1915), by executing a mortgage with the consent of the wife; Rose v. Bryan, 157 N. C. 173, 72 S. E. 960 (1911), on conveyance with the consent of the wife as provided in Const. Art. X, §2.

INSURANCE—PRESUMPTION OF DEATH—BOND BY PLAINTIFF TO INDEMNIFY DEFENDANT IN CASE INSURED IS LIVING—Plaintiff was assignee for value, with consent of the insurer, of a life insurance term policy in the sum of $2,500, issued by the defendant company on the life of *H*. Plaintiff alleged and offered evidence to the effect that *H* had not been seen or heard from for over seven years, and that diligent search and inquiry had been made for him. Defendant denied that *H* was dead and demanded strict proof. The jury found that *H* was dead, and there was judgment for the plaintiff with the following qualification: "No execution to issue until plaintiff files bond in the sum of $3,000 with sufficient surety to indemnify the defendant in event John M. Harrell is in fact living." On appeal the judgment was reversed on the ground that the court did not have the power to require the plaintiff to give bond for the return of money awarded by verdict of a jury.[1]

As applied to life insurance, the presumption arising from continued absence, unheard of, for seven years, is without reason and is based neither on fact nor on experience. The presumption had its origin in the efforts to administer the estates of absentees. The effects of the presumption are, nevertheless, of a limited nature. It does not specify the time of death,[2] or the celibate or childless or intestate condition of the supposed deceased.[3] The presumption merely extends to the fact of death, and from an evidential viewpoint was designed merely to aid in the proof of death. Some judges have fallaciously attributed to the presumption a "probative force," even when the opponent has come forward with contrary evidence.[4] Moreover, there is no uniform practice in establishing the precise point at which the burden of bringing forward the evidence shifts to the opponent. In fact very few courts, if any, seem to observe the difference between the presumption of death and the burden of proof as to the issue of death. They do recognize that the presumption makes it incumbent upon the adverse party to introduce some evidence in rebuttal.

[1] Steele v. Metropolitan Life Ins. Co. of N. Y., 196 N. C. 412, 145 S. E. 787 (1928).

[2] State v. Moore, 33 N. C. 160, 53 Am. Dec. 401 (1850); Beard v. Sovereign Lodge W. O. W., 184 N. C. 154, 113 S. E. 661 (1922); Lewis v. Lewis, 185 N. C. 5, 115 S. E. 885 (1925); Davie v. Briggs, 97 U. S. 628, 24 L. Ed. 1086 (1878); Neapan v. Doe, 2 Mees. & W. 894, 8 Eng. Rul. Cas. 512 (1837). Additional circumstances of probability may justify the determination of the date of death, but where they operate a distinct and dissimilar principle is introduced.

[3] 5 WIGMORE, EVIDENCE (1923), §2531 (b), n. 4.

[4] *Ibid.* §2491.

There can be no doubt that this arbitrary presumption, designed to settle the confusion which arises from the existence of estates over which there is no controlling hand, has often in its actual application resulted in greater confusion. Some states have realized this situation and have enacted statutes requiring: (1) that notice of application for letters of administration shall be made by a series of publications, and (2), that before distribution each distributee, or some one in his behalf, shall enter into a bond, acceptable to the court and conditioned to refund and pay to the presumed deceased, or any other person lawfully entitled, all money and other property received as distributee.[5] These sections have been held to be in conflict neither with the state constitution which gives jurisdiction to the courts only for the settlement of estates of deceased persons,[6] nor with the Fourteenth Amendment to the Federal Constitution.[7]

Experience has shown that the presumption of death from seven years' absence has occasionally been fraudulently taken advantage of by an insured who has concealed himself at a distant point and thereby allowed his beneficiary to collect. Some companies, especially the mutual-fraternal companies, have attempted to avert this situation by means of contract clauses, or through by-laws, either dispensing with the presumption or substituting a longer term than seven years. While the numerical majority of the few courts who have ruled directly on this question of the validity of such agree-

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[5] Callaghan's Ill. Statutes Anno. (1924), §§21, 79; Pa. Stat. (West, 1920), §§8409, 8416. §8416 of the Pa. Statute is as follows: "Before any distribution of the proceeds of the estate of such presumed decedent, the persons, other than creditors, entitled to receive the same shall, respectively, give sufficient real or personal security, to be approved by the orphan's court having jurisdiction, in such sum and form as the court shall direct, with condition that, if the said presumed decedent shall in fact be at the time alive, they will respectively refund the amounts received by each, on demand, with interest thereon."

[6] Stevenson v. Montgomery, 263 Ill. 93, 104 N. E. 1075 (1914).

[7] Cunnius v. Reading School District, 198 U. S. 458, 49 L. Ed. 1125 (1904), where it was adjudged that the provision of a state statute for administration on the assets of an absentee when they are reasonable as the period of absence necessary to raise the presumption of death and create the proper safeguards for the protection of the interests of the absentee in case he should be alive and return, do not violate the due process clause of the Fourteenth Amndment. "That the Amendment does not deprive the States of their police power over subjects within their jurisdiction is elementary. . . . We do pause to demonstrate, by original reasoning, that the right to regulate concerning the estates or property of absentees is an attribute, which, in its very essence, must belong to all governments to the end that they may be able to perform the purposes for which governments exist."

ments have upheld their validity,[8] the minority view is militant,[9] and is given favorable support by a wealth of dicta.[10] The argument favoring the validity of such contracts seems irrefutable.[11] But arguments do not save the insurance companies from the unfavorable attitude of the courts. The most obvious method to be used in protecting the insurance companies from unjust and fraudulent claims is to condition the recovery under the presumption of death on the posting of an indemnity bond. So far as the power to introduce such a reform is concerned, it would seem clear that the legislatures could do so.[12] On the analogy of the practice in equity courts of conditioning the recovery on lost bonds and other instruments upon

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[8] Steen v. Modern Woodmen, 296 Ill. 104, 129 N. E. 546 (1921), holding valid a clause removing the presumption of death from absence and declaring that there is no vested right in a rule of evidence; Porter v. Home Friendly Society, 114 Ga. 937, 41 S. E. 45 (1902), holding valid a contract clause substituting the period of life expectancy; Cobble v. Royal Neighbors, 219 S. W. 118 (Mo. App., 1920), holding valid a by-law substituting the period of life expectancy; McGovern v. Brotherhood, 85 Oh. St. 460, 98 N. E. 1128 (1911), holding valid a by-law eliminating the presumption arising from disappearance.

[9] Gaffney v. Royal Neighbors, 31 Idaho 549, 174 Pac. 1014 (1918), holding invalid a by-law substituting the period of life expectancy as prescribing a rule of evidence which would be binding upon the courts; Fleming v. Merchant's Life Ins. Co., 180 N. W. 202 (Iowa, 1920), holding void, as ousting the courts of jurisdiction and as contrary to public policy, a by-law abolishing the presumption of death; National Union v. Sawyer, 42 D. C. App. 475 (1914), under the supposed compulsion of a statute; Supreme Ruling v. Hoskins, 171 S. W. 812 (Tex. Civ. App., 1914), holding ineffective a by-law repudiating the presumption of death, on the basis of a statute declaring the usual presumption from seven years' absence.

[10] Modern Woodmen v. White, 70 Col. 207, 199 Pac. 965 (1921), declining to adopt the reasoning or the conclusion in Steen v. Modern Woodmen, *supra* note 8; Haines v. Modern Woodmen, 189 Ia. 651, 178 N. W. 1010 (1920); Hannon v. United Workmen, 99 Kan. 736, 163 Pac. 169 (1917); Samberg v. Modern Macabees, 158 Mich. 568, 123 N. W. 25 (1909); Sweet v. Modern Woodmen, 169 Wis. 462, 172 N. W. 143 (1919); Roblin v. Supreme Tent, 269 Pa. 139, 112 Atl. 70 (1920); McLaughlin v. Sovereign Camp, 97 Nebr. 71, 149 N. W. 112 (1914). While these cases deal with the validity of by-laws adopted subsequent to the insured's contract, the viewpoint seems antagonistic to a recognition of a contract clause which forms a part of the original agreement.

[11] There is a general principle that parties are at liberty to specify their own terms on all matters of a contract, except when fraud or oppression has been practiced. Moreover, since the limitation of liability to specified events is permissible, why should not a clause conditioning liability to an event to be proved in a certain manner be allowed? A prior waiver of rules of procedure would seem to be no more harmful than a waiver after litigation is begun, and such subsequent waivers are commonly allowed.

[12] *Supra* note 5. By N. C. Con. Stat. Ann. (1919), §1163, the order to issue and deliver a new certificate of stock to replace the one which the plaintiff alleged was lost, or destroyed, must also direct the plaintiff to deposit such security as to the court seems sufficient "to indemnify any person other than the plaintiff, who shall thereafter appear to be the lawful owner of such certificate stated to be lost or destroyed."

the defendant being indemnified,[13] it appears that the courts in Code states, where the procedural distinctions between law and equity are abolished, might similarly regulate the recovery on a life insurance policy.[14]

A. K. SMITH.

PROCEDURE—INJURY TO PERSON AND PROPERTY BY ONE ACT AS SINGLE CAUSE OF ACTION—In a recent Georgia case[1] the plaintiff's person and her property were injured by a single negligent act on the part of the defendant. The plaintiff brought one action to recover for the property damage only, and thereafter filed another suit in which damages were sought solely for the personal injuries, and the defendant filed merely a general denial of liability to each, not objecting to either on the ground of another action pending until after judgment was rendered in favor of the plaintiff in the property damage suit. The question arises whether injury to a person and her property by a single negligent act on the part of the defendant gives rise to one cause of action or more than one.

There is a conflict of authorities in this country on this question. One line of decisions holds that there are two causes of action as a result of the negligent act,[2] following the English rule[3] on the subject. The reasoning of these decisions is that the injury is the grava-

[13] II POMEROY, EQUITY JURISPRUDENCE (4th ed.), §832, stating that equity has jurisdiction to recover amounts due on lost bonds and negotiable instruments, that the weight of authority sustains the jurisdiction upon lost non-negotiable instruments and simple contracts, and that the defendant can always be protected by the provisions of a decree making a recovery conditional upon his being indemnified by the plaintiff, or some one on behalf of the plaintiff. In a recent North Carolina case, Wooten v. Bell, 196 N. C. 654, p. 656 (1929), Clarkson, J., makes the following statement: "This Court has held that recovery can be had upon a lost or destroyed note, and upon satisfactory evidence of the fact that witness can testify as to the note itself. Many cases in this connection suggests (*sic*) the propriety of requiring a bond of the plaintiff to protect the maker of the lost or destroyed instrument."

[14] It is submitted that the decision in Steele v. Metropolitan Life Ins. Co. of N. Y., *supra* note 1, is but an echo of the common law courts' self-imposed limitation to a rendering of unconditional judgments.

[1] Georgia Ry. & Power Co. v. Endsley, 145 S. E. 851 (1928), holding the Court of Appeal erred in its ruling of two causes of action in a former opinion in this case, 37 Ga. App. 439, 140 S. E. 386 (1927). See 6 N. C. L. REV. 345.

[2] Schermerhorn v. Los Angeles Pac. R. Co., 18 Cal. App. 454, 123 Pac. 351 (1912); Borden Condensed Milk Co. v. Mosley, 250 Fed. 839 (C. C. A. 2nd Cir., 1918); Reilly v. Sicillian Asphalt Pav. Co., 170 N. Y. 40, 62 N. E. 772, 57 L. R. A. 176, 88 Am. St. Rep. 636 (1902), reversing 31 App. Div. 302, 52 N. Y. S. 817 (1898); Ochs v. Public Service R. Co., 81 N. J. Law 661, 80 Atl. 495, 36 L. R. A. (N. S.) 240, Ann. Cas. 1912 D, 225 (1911); Watson v. Texas & P. R. Co., 8 Tex. Civ. App. 144, 27 S. W. 924 (1894).

[3] Brundsen v. Humphrey, L. R. 14 Q. B. Div. 141.

men of the action, and not the negligent act producing it, and that differences exist between the periods of limitation for the actions, as well as the differences between the ability to assign, and the survival of the actions.

The other line of decisions holds that there is but one cause of action,[4] maintaining that the cause of action consists of the negligent act which produces the effect, rather than the effect of the act in its application to different primary rights, and that the injury to the person and property as a result of the original cause gives rise to different items of damages. The effect is to prevent a multiplicity of suits. This line of decisions seems to be the weight of American authority on the proposition, and supports the instant case in its holding of one cause of action. It seems that the North Carolina court follows this latter view.[5]

Holding that there is one cause of action the further question arising is whether or not this action can be split up by the plaintiff, and what would be the effect if this should be done. The rule is fully established that an entire claim cannot be divided and made the subject of several suits; and if several suits be brought for different parts of such a claim, the pendency of the first may be pleaded in abatement of the others, and a judgment upon the merits in either will be available as a bar in other suits.[6] But since the rule against the splitting up of a single cause of action is largely for the protection of the defendant, under the American rule it may be waived by him,

[4] Birmingham S. R. Co. v. Lintner, 141 Ala. 420, 38 So. 363, 109 Am. St. Rep. 40, 3 Ann. Cas. 461 (1904); Jenkins v. Skelton, 21 Ariz. 663, 192 Pac. 249 (1920); Seger v. Barkhamsted, 22 Conn. 290 (1853); Doran v. Cohen, 147 Mass. 342, 17 N. E. 647 (1888); Kimball v. Louisville & N. R. Co., 94 Miss. 396, 48 So. 230 (1909); King v. Chicago & St. P. Ry. Co., 80 Minn. 83, 82 N. W. 1113, 50 L. R. A. 161, 81 Am. St. Rep. 238 (1900); Coy v. St. Louis & S. F. R. Co., 186 Mo. App. 408, 172 S. W. 446 (1915); Anderson v. Jacobsen, 42 N. D. 87, 172 N. W. 64 (1919); Fields v. Philadelphia Rapid Transit Co., 273 Pa. 282, 117 Atl. 59 (1922); Smith v. Cincinatti N. O. & T. Ry. Co., 136 Tenn. 282, 189 S. W. 367, L. R. A. 1917 C, 543 (1916); Hanson v. Anderson, 90 Wis. 195, 62 N. W. 1055 (1895); Hazard Powder Co. v. Volger, 3 Wyo. 189, 18 Pac. 636 (1888).

[5] Eller v. Carolina & Western R. R. Co., 140 N. C. 140, 52 S. E. 305 (1905); Watkins v. Kaolin Mfg. Co., 131 N. C. 536, 42 S. E. 305 (1905), in which the plaintiff, a woman, was allowed to recover for injury to her real property and for nervous shock, caused by one negligent act on the part of the defendant, as one cause of action, but the court did not discuss the proposition.

[6] Secor v. Sturgis, 16 N. Y. 548 (1858); Van Horne v. Treadwell, 164 Cal. 620, 130 Pac. 5 (1913); White v. Harvey, 175 Iowa 213, 157 N. W. 152 (1916); See v. See, 294 Mo. 495, 242 S. W. 949, 24 A. L. R. 880 (1922); Dils v. Justice, 137 Ky. 822, 127 S. W. 472 (1910); Bliss v. N. Y. Cent. & H. R. R. Co., 160 Mass. 447, 36 N. E. 65, 39 Am. St. Rep. 504 (1894); Sloan v. Hart, 150 N. C. 269, 63 S. E. 1037, 134 Am. St. Rep. 911, 21 L. R. A. (N. S.) 239 (1909).

and is waived if he fails to raise the objection in the later action.[7] The codes provide that if objection that there is another action pending between the parties for the same cause is not taken either by demurrer or answer the defendant is deemed to have waived it.[8] Under this rule the decision of the instant case[9] that by pleading a general denial to both suits the defendant waived the objection to the splitting of the action is correct. North Carolina seems to be in line with these decisions.[10]

A. W. GHOLSON, JR.

SALES—CONDITIONAL SALES—PURCHASE UNDER ASSUMED NAME—PRIORITY BETWEEN VENDOR AND ATTACHMENT CREDITOR—In a recent North Carolina case,[1] a merchant selling furniture under a properly registered conditional sale contract which had been executed by one Adams, as purchaser, under the assumed name of Calhoun was *held* to have priority[2] over the buyer's attachment creditor, regardless of any question of fraud.

Apart from the vendor's priority, a question not settled in North Carolina nor discussed in the principal case, is whether the buyer before default in payment has an attachable interest. The cases elsewhere are in conflict,[3] with those upholding the negative declaring the buyer's right is not a property interest but a mere contract right.[4]

[7] Carrington v. Crocker, 37 N. Y. 336 (1867); Vineseck v. Great Northern R. Co., 136 Minn. 96, 161 N. W. 494, 2 A. L. R. 530 (1917); Hardwick-Etter Co. v. City of Durant, 77 Okl. 202, 187 Pac. 484 (1920); Johnson v. Prineville, 100 Or. 119, 196 Pac. 821 (1921); Matheny v. Preston Hotel Co., 140 Tenn. 41, 203 S. W. 327 (1918); Brice v. Starr, 93 Wash. 501, 161 Pac. 347 (1916).

[8] Clark on Code Pleading (1928), p. 412.

[9] *Supra* note 1.

[10] So. Stock Fire Ins. Co. v. So. Ry. Co., 179 N. C. 290, 102 S. E. 504 (1920), the court saying it is true that the rule against splitting of causes of action is for the benefit of the defendant, for the purpose of protecting him against a multiplicity of suits and unnecessary expense and costs, and may be waived by him. If the two demands are one and the same transaction, and therefore indivisable the defendant must file plea in abatement, and upon failure to do so the objection is waived. Honig v. Hockenberg & N. Hawa, 194 N. C. 208, 139 S. E. 222 (1927).

[1] Weeks v. Adams, 196 N. C. 512, 146 S. E. 130 (1929).

[2] Under C. S., §3312, requiring conditional sales to be registered in the same manner as chattel mortgages to be valid against creditors and purchasers for value.

[3] For general discussion see (1929) 13 MINN. L. REV. 247; Liver v. Mills, 155 Cal. 463, 101 Pac. 299 (1909); Kech v. State, 12 Ind. App. 119, 39 N. E. 899 (1895).

[4] 2A BOGERT, UNIFORM LAWS ANNOTATED, §26, p. 35, terms this reason as not a "very satisfactory" one. Whitney v. Biggs, 92 Misc. 424, 156 N. Y. S. 1107 (1915); Friedman v. Phillips, 84 App. Div. 179, 82 N. Y. S. 196 (1903); Picone v. Freeman, 115 N. Y. S. 128 (1909); French v. Osmer, 67 Vt. 427, 32

But the weight of authority favors making this interest one in property and available to creditors.[5] And this seems the better view as the creditor is seeking, not the vendor's interest, but the rights acquired by the buyer's previous payments.[6] However, as North Carolina gives attaching creditors only the interest of the defendant in the attachment,[7] regardless of which of these views the court would adopt, the decision is sound on the issue presented.

The question naturally follows, would the result have been the same if the creditor has been misled into extending credit or making advances in reliance on the buyer's apparent ownership? The rule supported by the best authority holds the record to be constructive notice only of such facts as could have been learned if the record had been examined.[8] The present fact situation shows the desirability of that position, for had the plaintiff diligently searched the records under the name of Adams, nothing would have been disclosed to put him on his guard. It did not appear here that the creditor relied either on the appearance of ownership in the furniture or on the record. It would seem, however, only fair to protect one who does make such a reliance.[9] This view would give effect to the main purpose of the Recording Act, *i.e.*, to require notice of the conditional sale to creditors and purchasers.[10]

As the court intimated, the assumption of another name is immaterial where the creditor places no reliance on the records, but it is of

Atl. 254 (1895). Even while asserting that the vendee has no attachable interest, these cases hold that he has a mortgagable and vendable interest.

[5] WILLISTON, SALES (2d ed., 1909), §326; TIFFANY, SALES (2d ed., 1908), p. 137; Duplex Printing Press Co. v. Clipper Pub. Co., 213 Pa. 207, 62 Atl. 841 (1906).

[6] Ivey v. Coston, 134 Ala. 259, 32 So. 664 (1902); Hervey v. Dimond, 67 N. H. 342, 39 Atl. 331 (1893).

[7] Bristol v. Hallyburton, 93 N. C. 384 (1885); Spence v. Foster Pottery Co., 185 N. C. 218, 117 S. E. 32 (1923).

[8] Neas v. Whitner-London Realty Co., 119 Ark. 301, 178 S. W. 390 (1915); Curtis v. Moore, 152 N. Y. 159, 46 N. E. 168 (1897).

[9] But 2A BOGERT, UNIFORM LAWS ANNOTATED (1924), §59, p. 84, asserts that all creditors extending credit while the conditional buyer is in possession of the goods should be protected. "To draw the line between creditors who actually relied on the goods and those who relied on the buyer's general appearance of prosperity and those who would have extended credit even if there had been no conditional sale is to attempt too fine a distinction."

[10] North Carolina holds that constructive notice and priority by registration can only arise from a duly recorded mortgage, and that for purposes of registration a chattel mortgage and conditional sale are the same. True, the cases show only defects in the manner of complying with the Recording Act, but it is clear that the result of fraud in situations similar to the one in the case under comment is more serious to legitimate business than mere failure to conform to the technical requirements of the statutes. Todd, Schench & Co. v. Outlaw, 79 N. C. 235 (1878); Norman v. Ausbon, 193 N. C. 791, 138 S. E. 162 (1927).

first importance when credit is extended only after such reliance. Whether the vendor or the creditor of the vendee should then bear the loss would be a question of policy. And it is believed, that by placing it on the seller who allowed the situation to arise, by entering the contract without sufficient investigation of his customer, it will encourage carefulness in credit transactions.[11]

LAWRENCE WALLACE.

TORTS—PHYSICIANS AND SURGEONS—STATUTORY DUTY—MALPRACTICE—In *Covington v. Wyatt*,[1] an infant, by his next friend, sued the attending physician at his birth for permanent injuries to his eyes resulting from alleged violation of statute and malpractice. By the statute the defendant was required to instill or to have instilled into the eyes of the plaintiff, immediately upon his birth, two drops of a solution prescribed by the state board of health. Failure to comply is made a misdemeanor, and an action for damages resulting to the child is given.[2] The nurse in the hospital was requested by the defendant to procure the solution to be instilled into the plaintiff's eyes, and she brought from a cabinet in which there was usually kept a solution of one per cent. of silver nitrate a bottle which she supposed to contain the proper solution. While the defendant held open the plaintiff's eyes, the nurse placed in them two drops of this solution, which was found to contain thirty per cent. of silver nitrate. The solution prescribed by the state board of health contains one per cent. of silver nitrate. *Held:* Judgment of nonsuit affirmed.

[11] This is in line with the rule in the majority of the states that the burden is on the person whose duty it is to have an instrument recorded, to see that recordation is complete and valid, if he desires the protection of the Recording Act. White v. Lumber Co., 240 Mo. 13, 139 S. W. 553 (1911); Prouty v. Marshall, 225 Pa. St. 570, 74 Atl. 55 (1909); Bamberg v. Harrison, 89 S. C. 454, 71 S. E. 1086 (1911). See also Standard Furniture Co. v. Van Alstine, 22 Wash. 670, 62 Pac. 145 (1900), (conditional vendor of furniture to prostitute not protected as against latter's judgment creditor).

[1] 196 N. C. 367, 145 S. E. 673 (1928).

[2] N. C. CONS. STAT. ANN. (1919), or N. C. ANN. CODE (Michie, 1927), chapter 118, art. 14, is entitled "Inflammation of Eyes of Newborn." §7182 provides: "It shall be unlawful for any physician or midwife practicing midwifery in the state of North Carolina to neglect or otherwise fail to instill or have instilled, immediately upon its birth, in the eyes of the newborn babe, two drops of a solution prescribed or furnished by the state board of health." §7185 makes a similar stipulation in respect to the treatment in hospitals and other institutions. §7186 provides: "Whoever being a physician, surgeon, midwife, obstetrician, nurse, manager, or person in charge of a maternity home or hospital, parent, relative, or person attendant upon or assisting at the birth of an infant, violates any of the provisions of this article shall be deemed guilty of a misdemeanor, . . . and . . . subject to suit by the parent or guardian of the child for damages resulting to the child. . . ."

The facts of the plaintiff's case being admitted by the defendant's motion for nonsuit, the first question to be determined is whether the defendant has violated the statute at all. If there has been a violation, the statute itself gives a civil action for damages. Similar legislation is found in many of the states, the express stipulations of the statutes varying widely in definiteness,[3] but this is apparently the first case of its type to be presented to an appellate court. Was the statute designed to give protection against the hazard of instilling a wrong solution under the circumstances of this case?[4] The statute obviously protects the newborn babe against the failure of the physician to give any prophylactic treatment. Where, however, the injury results from instilling the wrong solution, the physician acting in good faith, then whether there has been a violation becomes doubtful. The result of the case, however, would seem to defeat the apparent legislative intent.[5] If, as the court says, the statute be not absolute, it gives no additional protection to an infant against injuries resulting from a violation of its terms; recovery would exist under the broad principles of malpractice, since a failure to take these precautionary measures would no doubt constitute culpable negligence on the part of the physician.

The second cause of action is based on malpractice, or negligence. By granting a nonsuit, the trial judge held that there was only one reasonable inference to be drawn from the facts, *i.e.*, that the defendant was not negligent.[6] In the absence of proof to the contrary, the defendant is presumed to have used reasonable care.[7] In malpractice cases the plaintiff usually must seek to prove his case by his opponent's evidence,[8] which consists in the main of customary con-

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[3] The following are illustrative: IND. ANN. STAT. (Burns, 1926), §§8164-8167 (duty of attendant to employ prophylactic treatment recognized as efficient in medical science, but only in case infection is discovered in the eyes); MASS. GEN. LAWS (1921), Chapter 111, §§14, 110, 111 (board of health required to furnish physicians with such prophylactic remedies as it may deem best); OHIO ANN. CODE (Throckmorton, 1929), §1248 (1-6), (attendant to use some prophylactic); VA. CODE ANN. (1924), §1554 (n-u), (solution prescribed by the state board of health); WIS. STAT. (1927), §146.01 (one per cent. solution of silver nitrate, to be prepared by and obtained from the state board of health).

[4] GREEN, RATIONALE OF PROXIMATE CAUSE (1927), pp. 12, 13.

[5] Norman v. Ausbon, 193 N. C. 791, 138 S. E. 162 (1927), prescribes the limits of statutory construction by the courts.

[6] GREEN, *op. cit. supra* note 4, at p. 67; 5 WIGMORE, EVIDENCE (2nd. ed., 1923), §2552; Carolina Bagging Co. v. Byrd, 185 N. C. 136, 116 S. E. 90 (1923).

[7] 5 WIGMORE, *op. cit. supra* note 6, §§2489, 2490.

[8] (1927) 2 Ind. L. J. 484.

duct in the profession under similar circumstances. This conduct of others, however, merely evidences the tendency and should be received merely as evidential, and not as legal standard.[9] In the instant case it seems that reasonable men could have differed in regard to whether the defendant fulfilled the agreement, which his engagement by the plaintiff implied, *i.e.*, whether he lived up to the duty of reasonable care under the circumstances.[10] A variety of circumstances not fully developed on the trial clouds the issue and apparently justifies the decision: (1) alternative authority to administer the solution was given to the defendant and to the nurse;[11] (2) by her own choice the mother of the plaintiff went to the hospital; and (3) the medicine was furnished by and was under the control of the hospital.

That there must have entered into this decision a strong element of policy[12] can not be doubted, in the light of the settled rule that on a motion to nonsuit the evidence in support of the plaintiff's claim will be considered in its most favorable light for the plaintiff, who is "entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom."[13]

CHARLES F. ROUSE.

USURY—AGREEMENT BY BORROWER'S AGENT TO DIVIDE COMMISSION WITH THE LENDER—Where plaintiff had contracted to secure a loan for the defendant for a commission of five per cent. of the amount of the loan and, having procured such loan, brought this action for his commission, defendant-borrower set up, as one defense, that the transaction was usurious because the plaintiff had agreed to divide his commission with the lender. The North Carolina court

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[9] 1 WIGMORE, *op. cit. supra* note 7, §461; Ault v. Hall, 119 Ohio St. ——, 164 N. E. 518 (1928), an interesting malpractice case.

[10] The implied agreement in full is: "(1) that he possesses the requisite degree of learning, skill and ability necessary to the practice of his profession, and which others similarly stituated ordinarily possess; (2) that he will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to the patient's case; and (3) that he will exert his best judgment in the treatment and care of the case entrusted to him." Nash v. Royster, 189 N. C. 408, 127 S. E. 356 (1925).

[11] N. C. CONS. STAT. ANN. (1919), or N. C. ANN. CODE (Michie, 1927), §7185.

[12] It is submitted, however, that as a matter of policy a contrary holding would have worked for the exercise of greater care by attendants at birth, and that such would be a desirable result.

[13] Smith v. Ritch, 196 N. C. 72, 74, 144 S. E. 537, 538 (1928); see Nash v. Royster, *supra* note 11.

held that this was not usury, because the lender did not reserve interest at more than six per cent. and the borrower, had the loan been actually made, would not have had to pay more than six per cent.[1]

If the North Carolina usury statute has for its primary purpose the protection of borrowers, the instant transaction would not be usurious, for the borrower, having agreed to pay his agent a commission (which agreement, standing alone, is generally conceded not to constitute usury), would be placed in no worse position by the division of the commission with the lender. If, on the other hand, the purpose of the statute is to discourage and punish lender's taking more than six per cent., the transaction is usurious, even though the lender reserves no more than six per cent. by way of actual interest.[2] It would seem, from the double penalty imposed, that at least one purpose is discouragement and punishment of lenders.[3]

Our court, heretofore, has been very willing to impose the penalty in the case of agreements, made at the time of the contracting for the loan, by which the lender will, in some way, receive more than six per cent.[4] Further, the court has looked more to what the lender received than to what the borrower actually parted with. Judge Gaston, in an early case,[5] laid down the following test: "Whatever may be the motives which induced the legislature to regulate the value of the use of money, and by severe penalties to prohibit

[1] Patterson v. Bloomberg, 196 N. C. 433 (1929).

[2] Historically speaking, usury statutes probably grew out of the desire to protect the borrower from oppression by the lender. But the method of giving such protection could still be the penalizing of lenders securing to themselves a profit larger than that allowed by the statute. And if such be the case the test of usury would be the lender's receipts.

[3] N. C. Code Ann. (1927), §2306: "The taking, receiving, reserving or charging a greater rate of interest than 6 per centum per annum, either before or after the interest may accrue, where knowingly done, shall be a forfeiture of the entire interest which the note or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person or his legal representatives or corporation by whom it has been paid may recover back twice the amount of interest paid. . . ."

[4] Where the borrower was forced to leave a part of the loan on deposit with the lender bank, held usury. Planters Nat'l. Bk. of Va. v. Wysong & Miles Co., 177 N. C. 380, 99 S. E. 199 (1919); English Lumber Co. v. Wachovia Bk. & Tr. Co., 179 N. C. 211, 102 S. E. 205 (1920). Where the borrower was forced to take out an insurance policy with the lender, held usury. Miller v. Life Ins. Co. of Va., 118 N. C. 612, 24 S. E. 484, 54 Am. St. Rep. 741 (1896); Carter v. Life Ins. Co. of Va., 122 N. C. 338, 30 S. E. 341 (1898). It will be noted that in these, as in all the North Carolina cases to be cited, the fact situations are not in point, since the transactions all took place directly between the borrower and lender. They are cited merely as an indication of the attitude and guiding principles heretofore adopted by our court in usury cases.

[5] Ehringhaus v. Ford, 25 N. C. 522, 529 (1843).

all bargains for its use at a higher price, the standard of this value is the gain taken or reserved to the lender, not the price paid or to be paid by the borrower. Accordingly, we cannot doubt, if it was a part of the consideration for a loan, that in addition to the principal and lawful interest to be paid by the borrower, a stranger should allow a gratuity to the lender, such loan would be usurious under the statute."[6] That the instant case would be usury under the dictum in the last sentence can hardly be doubted.

In Georgia, construing a statute[7] very similar to our own, the court has likewise looked at the lender's receipts. Where the facts were identical with those of the instant case, the agent was refused recovery.[8] And where the general manager of the lending company received a commission which he divided with the lending company it was held to be usury.[9] And California, on facts very similar to those of the instant case, held the transaction usurious.[10]

A possible test, other than the one of statutory purpose and lender's receipts, may be applied by looking to the purpose of the division of the commission. Thus it is suggested that if the division be part of the consideration or inducement for making the loan, it is usury; but if the agent share his commission as a gratuity or as consideration for something other than the making of the loan there is no usury.[11] And North Carolina, in one case,[12] has demanded that there be an intent on the part of the lender to secure more than the lawful rate of interest.

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[6] At the time this decision was rendered a statute different from the present one was in force. But for our purpose the change makes no difference. Since the statute was cast in its present mold Judge Gaston's language has been favorably cited. In Planters Nat'l. Bk. v. Wysong & Miles Co., *supra* note 3, the court remarks: "Usury consists in the unlawful gain, beyond the rate of 6%, taken or reserved by the lender, and not in the actual or contingent loss sustained by the borrower."

[7] Ga. Code Ann. (1926), §3436.

[8] Harrison v. Stiles, 95 Ga. 264, 22 S. E. 536 (1895).

[9] Pottle v. Lowe, 99 Ga. 576, 27 S. E. 145, 59 Am. St. Rep. 246 (1896).

[10] A salesman was to receive a commission out of the buyer's down payment and, having undertaken to negotiate the buyer's notes, he agreed to divide his commission with the lender. Rice v. Dunlap, 76 Cal. Dec. 316 (1928). This decision has been attacked in 17 CAL. LAW REV. 73 on the grounds that "jurisdictions which have had usury laws for a longer time than California seem to hold uniformly that usury laws are enacted primarily for the benefit and protection of the borrower against oppression by the lender," citing 39 Cyc. 981 and 27 R. C. L. 203. If such a construction be adopted it is admitted that this California case would not be usury, for the commission was not paid by the borrower but by the agent's permanent employer, the seller.

[11] 21 A. L. R. 834-7 (1922).

[12] Miller v. Life Ins. Co. of Va., *supra* note 3.

The two tests are not essentially different, for it will be noted that Judge Gaston contemplated the gratuity as being a part of the consideration for the loan. The only difference is in the meanings given to the word "gratuity." Thus, under either test, where the borrower gave the agent a commission in order that he might use a part of it in securing the loan, that would be usury.[13] Where the borrower gave the commission merely as adequate recompense for the agent's services, and the agent divided as consideration for services performed by the lender, that would not constitute usury.[14] In the instant case it appears from the record that the division was made as a bonus for the loan. Hence, apparently, the borrower considered the commission solely as payment for the agent, but the agent divided it as partial consideration for the loan. It is difficult to see how, under either test, this would not be usury. Apparently the only justification for the decision would be not only to construe the statute as being solely for the protection of the borrower, but also to hold that the test is what the borrower actually pays to the lender, and such a holding would involve a departure from North Carolina authority.[15]

HENRY BRANDIS, JR.

VENDOR AND PURCHASER—RELIEF AGAINST TRESPASS COMMITTED DURING PENDENCY OF OPTION—In a recent Georgia case,[1] a demurrer was sustained to a complaint embracing the following allegations: At a time when the plaintiff held an option to buy timber land, and before that option had been exercised, the defendant optionors cut and removed from the land a quantity of timber, without the optionee's consent or knowledge. The plaintiff exercised the option, paid the price, and received a deed to the property, still unaware of

[13] See Collamer v. Goodrich, 30 Vt. 628 (1858).
[14] See Wilhoit v. Flack, 123 Ark. 619, 185 S. W. 460 (1916).
[15] It has not been possible in the scope of this comment to discuss the distinction drawn by some courts between cases where the agent was the agent of the borrower and cases where he was the agent of the lender. For cases on this point, and on the effect of knowledge on the part of the lender that a commission is being charged, see: Harvard v. Davis, 145 Ga. 580, 89 S. E. 740 (1916); Clark v. Havard, 111 Ga. 242, 36 S. E. 837, 51 L. R. A. 499 (1900); McCall v. Herring, 118 Ga. 522, 45 S. E. 442 (1903); Mayfield v. British & American Mortgage Co., 104 S. C. 152, 88 S. E. 370 (1916); Brown v. Brown, 38 S. C. 173, 17 S. E. 452 (1893); McBroom v. Scottish Mortgage & Land Inv. Co., 153 U. S. 318, 14 S. Ct. 852, 38 L. Ed. 729 (1894).
[1] Varn Turpentine and Cattle Co. v. Allen and Newton, 144 S. E. 47 (Ga., 1928).

the alleged trespass. It now sues in tort for the value of the timber cut and removed. *Held:* Judgment affirmed.

Although it has several times been asserted in dicta that an optionee, prior to the exercise of the option, has an equitable interest in the land,[2] the almost universal trend of the decisions is to the contrary.[3] Similarly, once the option has been exercised, no doctrine of relation back may enable the present owner to claim an interest at an earlier time,[4] although some courts have held otherwise.[5] Thus, except where the option is contained in a lease,[6] options are governed by the rule against remoteness of vesting.[7] To this extent, therefore, the principle case is sound in holding that the alleged trespass, at the time it took place, did not violate any property interest of the plaintiff. The Georgia court was aided in reaching this result by the provisions of the code[8] defining a tort as a wrong done to person or property, independent of contract. This was probably a mere makeweight. Doubtless the same result would have been reached without such a statute.

[2] Brodhead v. Reinbold, 200 Pa. 618, 50 Atl. 229 (1901); House v. Jackson, 24 Or. 89, 32 Pac. 1027 (1893); Keep v. Miller, 42 N. J. Eq. 100, 6 Atl. 495 (1886); Kerr v. Day, 14 Pa. 112 (1850).

[3] Strong v. Moore, 105 Or. 12, 207 Pac. 179, 23 A. L. R. 1217 (1922); Gamble v. Garlock, 116 Minn. 59, 133 N. W. 175, Ann. Cas. 1913A 1294 (1911); Kingsley v. Kressley, 60 Or. 167, 118 Pac. 678 (1911); Sprague v. Schotte, 48 Or. 609, 87 Pac. 1046 (1906); Caldwell v. Frazier, 65 Kan. 24, 168 Pac. 1076 (1902); 33 HARV. L. REV. at 825, n. 59; Clark v. Burr, 85 Wis. 649, 55 N. W. 401 (1893); Gustin v. Union School Dist. 94 Mich. 502, 54 N. W. 156 (1893), holding that no interest passes to an optionee's heir by descent. Vigars v. Hewings, 184 Ia. 683, 169 N. W. 119 (1918) holds that no equitable interest is raised by option upon which the lien of a judgment will attach.

[4] Strong v. Moore, *supra* note 3; Sprague v. Schotte, *supra* note 3; *In re* Marlay, 2 Ch. D. 264 (1915); Caldwell v. Frazier, *supra* note 3.

[5] Horgan v. Russell, 24 N. D. 490, 140 N. W. 99 (1913); Williams v. Lilley, 67 Conn. 50, 34 Atl. 765, 37 L. R. A. 150 (1895) was admittedly an exceptional case; Peoples Street R. Co. v. Spencer, 22 Pa. 85, 27 Atl. 113, 36 Am. St. Rep. 22 (1893) held that a sale with a lease and an option given the vendor was a conveyance to secure money loaned the vendor.

[6] Blakeman v. Miller, 136 Cal. 138, 68 Pac. 587, 89 A. S. R. 120 (1902); 21 R. C. L., p. 303, §28.

[7] Skeen v. Clinchfield Coal Corporation, 137 Va. 392, 119 S. E. 89 (1923) (an option to sell); Turner v. Peacock, 153 Ga. 870, 113 S. E. 585 (1922) (an option with no time limit); Woodall v. Bruen, 76 W. Va. 193, 85 S. E. 170 (1915) (option reserved in a deed to repurchase within 99 years); Barton v. Thaw, 246 Pa. 348, 92 Atl. 312, Ann. Cas. 1916D 570 (1914); Starcher v. Duty, 61 W. Va. 371, 56 S. E. 524, 9 L. R. A. (N. S.) 913, 123 Am. St. Rep. 990 (1907) (privilege of renewing option from year to year with payment of a certain sum); London and Southwestern R. Co. v. Gomm, 20 Ch. D. 562 (1880); 21 R. C. L., p. 303, §28.

[8] Ga. Code (1926), §4403. "A tort is a legal wrong committed upon the person or property, independent of contract" which may arise from "the violation of some private obligation, by which . . . damage accrues to the individual."

The court seems also to have been correct in suggesting that the plaintiff could recover for breach of an implied contract by the optionors to hold the property in the same condition in which it existed at time the option was made.[9] The plaintiff conceded that its complaint could not be construed as having been framed on this theory.

Had the plaintiff known, before the expiration and exercise of the option, of the optionor's depredations, could it have had an injunction and an accounting? This is clearly so in the case where the plaintiff has acquired an interest under a contract[10] or a settlement[11] which is subject to be divested either by his exercise of a withdrawal privilege or by the happening of some contingency beyond his control. The cases of options to purchase are, however, cases where the optionor was attempting to sell in violation of the option,[12] and relief was granted on the theory of specific performance of the implied contract to hold the property available. The Georgia cases[13] apparently opposed can be distinguished, because of the absence of both consideration and seal.

If it had been necessary, the optionee (then vendee), after the exercise of the option, could have had specific performance with an abatement from the purchase price equal to the value of the timber

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[9] Samonds v. Cloninger, 189 N. C. 610, 127 S. E. 706 (1925); Millan v. Bartlett, 69 W. Va. 155, 71 S. E. 13 (1911).

[10] Town of Boonton v. United Water Supply Co., 83 N. J. Eq. 539, 91 Atl. 814; affirmed in 84 N. J. Eq. 197, 93 Atl. 1086 (1914); Alabama Water Co. v. Anniston, 215 Ala. 120, 110 So. 36 (1926); Van Hecke, *Specific Performance of Right of Inspection* (1927), 12 MINN. L. REV. 1. *Contra:* Electric Management and Engineering Corporation v. United Power and Light Corporation (of Kansas), 19 Fed. (2d) 311 (C. C. A. 8th, 1927).

[11] Ivey v. Lewis, 133 Va. 122, 112 S. E. 712 (1922); Canada v. Daniel, 75 Mo. 55, 157 S. W. 1032 (1913) ordered trust fund restored and gave an injunction against further depredations; Watson v. Wolf-Goldman Realty Co., 95 Ark. 18, 128 S. W. 581, Ann. Cas. 1912A 540 (1910); Coward v. Myers, 99 N. C. 198, 6 S. E. 82 (1888) gave an injunction protecting contingent remainderman although little possibility of estate becoming vested; University v. Tucker, 31 W. Va. 621, 8 S. E. 410 (1888). See also: Bender v. Bender, 292 Ill. 358, 127 N. E. 22 (1920); Ohio Oil Co. v. Daughtee, 240 Ill. 361, 88 N. E. 818, 36 L. R. A. (N. S.) 1108 (1909); Kellock v. Webb, 113 Ga. 762, 39 S. E. 339 (1901). *Contra:* Brown v. Brown, 89 W. Va. 339, 109 S. E. 815 (1921). In this case the vesting of the remainder was practically impossible.

[12] Crawford v. Smith, 151 Ga. 18, 105 S. E. 447 (1921). Eviction proceedings enjoined by lessee-optionee in a suit against purchaser. Blalock v. Hodges, 171 N. C. 134, 87 S. E. 983 (1916); Ward v. Albertson, 165 N. C. 218, 81 S. E. 168 (1914) (an option to purchase timber); Manchester Ship Canal Co. v. Manchester Racecourse Co., Ch. D. 37, 42 (1901); Horgan v. Russell, *supra* note 5; Hayes v. O'Brien, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555 (1894).

[13] Grizzle v. Gaddis, 75 Ga. 350 (1885); Peacock v. Deweese, 73 Ga. 570 (1884).