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RECENT CASE COMMENTS

BANKS AND BANKING—CHECKS—DISCHARGE OF DRAWER—DEPOSIT IN DRAWEE BANK—Defendant drew a check to order of the plaintiff who deposited it to his account in the same bank. The deposit was entered in plaintiff's passbook, and accounts were accordingly debited and credited. The drawee was then known to its officers to be hopelessly insolvent and was closed by the bank examiner a few hours later. *Held*: the check was paid and the drawer discharged.¹

The particular set of facts involved, appears never to have been passed upon before,² due probably to an inherent feeling of payee depositors that since they have requested and received the credit of their own bank, they have no equitable recourse upon another unfortunate depositor. Generally the action brought, is one against the insolvent's receivers to declare a preference.³

The inquiry here is, has the check been paid. As the court points out, the question must be distinguished from that arising where a holder deposits checks drawn upon another bank for collection; and the problem cannot be decided under the principle there governing, that where a bank, known to its officers to be hopelessly insolvent, accepts checks from its depositor for collection, the depositor may rescind the transaction and recover his paper.⁴ Even in those cases if the check has been paid by the drawee, the drawer is held to be discharged.

¹ *Boatwright v. Rankin* 148 S. E. 214 (S. C. 1929).

² But *cf.* *Hare v. Bailey*, 73 Minn. 409, 76 N. W. 213 (1898); *Board of Education v. Robinson*, 81 Minn. 305, 84 N. W. 105, 83 Am. St. Rep. 374 (1900); *Parks v. Bryant*, 142 Ala. 627, 38 So. 180 (1905); *Montgomery County v. Cochran*, 121 Fed. 17 (C. C. A. 5th, 1903), cases of counter presentment for credit in which the drawer was held discharged, but distinguishable on their facts as e.g., (1) suit against surety on the bonds of county officials, (2) no finding of hopeless and irretrievable insolvency, (3) payee had at the time of bank's failure, withdrawn part of the deposit. And see *Herman v. Cohen*, 218 Ala. 491, 119 So. 1 (1928) intimating that had the bank been hopelessly insolvent, the result might have been different.

³ *Raynor v. Scandinavian-American Bank*, 122 Wash. 150, 210 Pac. 499, 25 A. L. R. 716 (1922) and note; *Steele v. Allen*, 240 Mass. 394, 134 N. E. 401, 20 A. L. R. 1203 (1922); *Pennington v. Third Nat. Bank*, 114 Va. 674, 77 S. E. 455, 45 L. R. A. (N. S.) 781 (1913), on the grounds that the fraud entitled depositor to rescind, or that a trust maleficio is created entitling depositor to a preference.

⁴ *Old Nat. Bank v. Gibson*, 105 Wash. 578, 179 Pac. 117, 6 A. L. R. 247 (1919); *Raynor v. Scandinavian-American Bank*, *supra* note 3; *Knafl v. Knoxville Banking Co.*, 130 Tenn. 336, 170 S. W. 476, L. R. A. 1915D 402, that a bank receiving checks for collection knowing of its insolvency can acquire no title to them. This fact is immaterial in determining whether the check has been paid so as to discharge the drawer.

Where the payee could have demanded cash but instead agreed to accept payment in some other medium, the drawer is discharged.⁵ But the important question is, could he have gotten cash? It has been decided in North Carolina that where a drawee receiving checks by mail for collection remits an exchange draft and charges accounts accordingly, the check is not paid if the drawee did not have sufficient funds in its own vaults or with its correspondents to pay the check.⁶ An insolvent drawee may not deal with the rights of the parties to a check so as to substitute its own liability for that of the drawer when it knows that a credit by it is worthless.⁷ In the instant case the examiner closed the bank a few hours after the deposit but whether at the bank's request or the examiner's own initiative, does not appear.

The trend of the law governing checks and bank collections is in the direction of giving adequate protection to payees in most cases, either by continuing the drawer's liability or allowing a preference in the insolvent's assets.⁸ It is submitted that the fact that the payee here was also a depositor of the drawee should not alter the policy.⁹

HARRY ROCKWELL.

⁵ *Smith Roofing Co. v. Mitchell*, 121 Ga. 772, 45 S. E. 47 (1903); *Morris v. Cleve*, 197 N. C. 253, 148 S. E. 256 (1929) noted in 8 N. C. L. Rev. 55; 2 MORSE, BANKS AND BANKING (6th ed.) §451.

⁶ *Moore & Dawson v. Highway Eng. & Const. Co.*, 196 N. C. 142, 144 S. E. 692 (1928) commented on in 7 N. C. L. Rev. 187; and see *Waggoner Bank & Trust Co. v. Gamer Co.* 213 S. W. 927, 6 A. L. R. 613 (Tex. 1919); *Taylor v. Wilson*, 11 Met. (Mass.) 44, 45 Am. Dec. 180 (1846), holding that a bank must be solvent for a check to operate as payment. See also, *Exch. Bank of Wheeling v. Sutton*, 78 Md. 577, 28 Atl. 563 (1894), where a check sent by mail to drawee was debited to drawer a short time before suspension, and the receiver later credited it to the payee. And it has been held, where it was negligence to accept a draft in payment of a check sent for collection and the drawee did not have sufficient funds to pay, if cash had been demanded, that the forwarding bank was not liable for accepting the draft which was dishonored. *Louisville & N. Ry. Co. v. Fed. Res. Bank*, 157 Tenn. 497, 10 S. W. (2d) 683 (1928).

⁷ *Supra*, note 6.

⁸ See comment on *Central Trust Co. v. Mullens*, 150 S. E. 137 (W. Va. 1929) in this issue, *infra* p. 201.

⁹ The American Bankers Association "Bank Collection Code" §3 provides in effect that a credit given by a bank for items drawn on the same bank shall be provisional, subject to revocation at or before the end of the day in the event that it is found not payable. See (1929) 46 Banking Law Journal 755, (New York Act, §350-b). It has previously been so held in some states, *Cohen v. First Nat. Bank*, 22 Ariz. 394, 198 Pac. 122, 15 A. L. R. 701 (1921); *Stankey v. Citizen's Nat. Bank*, 64 Mont. 309, 209 Pac. 1054 (1922); *Ocean Park Bank v. Rogers*, 6 Cal. App. 673, 92 Pac. 879 (1907). And the majority of banks in this country carry stipulations to that effect on their deposit slips. The effect of such practice is to make counter presentment for credit, actually equivalent to presentment for collection from and by the drawee itself. The drawee in such case has a double identity; both as a depository receiving checks for collection, and as a drawee holding checks as agent of the payee to present to itself and collect, and the situation becomes much the same as that where the depository and the drawee are separate banks. The general rule, therefore, that a credit given for a check drawn on the same bank is tantamount to a cash payment and redeposit, is not entirely applicable.

BANKS AND BANKING—ILLEGAL DEPOSIT OF PUBLIC FUNDS—RIGHTS OF DEPOSITORS UPON INSOLVENCY OF BANK—In a recent Georgia case,¹ a town treasurer deposited in a bank, of which he was also cashier, certain sinking funds of the town. The deposit was in violation of a statute requiring investments in bonds. Shortly thereafter the bank became insolvent, and the receiver paid out three 10% dividends, a part of which was raised by assessing the stockholders on their statutory liability, to the plaintiff town along with the general depositors. The town then brought a bill in equity to enjoin further payments to the general creditors until its claim should be paid in full. *Held*: that while the bank was affected with notice of the illegal nature of the deposit so that a trust relationship might arise, entitling the town to restitution from any assets of the bank into which the funds could be traced, the injunction was denied, because the town had not returned the dividends received as a general creditor.

In the absence of express statutory regulation, a deposit of public funds in a bank gives rise to a debtor-creditor relationship.² The same result obtains where the deposit is expressly authorized.³ But it has been widely held that an illegal or wrongful deposit of public funds creates a trust relationship.⁴ Most jurisdictions therefore require that the funds deposited be clearly traced into the assets of the bank taken over by the receiver.⁵ Some courts, however, dispense

¹ *Town of Douglasville v. Mobley*, 149 S. E. 575 (Ga., 1929).

² *City of Sturgis v. Meade County Bank*, 38 S. D. 317, 161 N. W. 327 (1917); *Kies v. Wilkinson*, 101 Wash. 340, 172 Pac. 351 (1918); *cf. Zizelman v. Union Trust Co.*, 25 Ohio App. 165, 157 N. E. 903 (1927) and Note (1927) 1 Univ. of Cincinnati L. Rev. 495.

³ *Town of Conway v. Conway*, 190 Iowa 563, 180 N. W. 677 (1920).

⁴ *First Nat. Bank v. C. Bunting & Co.*, 7 Idaho 27, 59 Pac. 929 (1900); *Page County v. Rose*, 130 Iowa 296, 106 N. W. 744 (1906) and Note (1907) 5 L. R. A. (N.S.) 886; *Poweshiek County v. Merchants Nat. Bank of Grinnell*, 220 N. W. 63 (Iowa 1928); *Leach v. Grinnell Sav. Bank*, 219 N. W. 483 (Iowa 1928); *Special Road Dist. v. Cantley*, 8 S. W. (2d) 944 (Mo. App. 1928); *Jarvis v. Hammons*, 259 Pac. 886 (Ariz. 1927); *City of New Hampton v. Leach*, 201 Iowa 316, 207 N. W. 348 (1926); *Grand Forks County v. Baird*, 54 N. D. 315, 209 N. W. 782 (1926); *Leach v. Farmers Sav. Bank of Hamburg*, 204 Iowa 1083, 216 N. W. 748 (1927) and Note (1928) 76 U. Pa. L. Rev. 864; *Phillips v. Yates Center Nat. Bank*, 98 Kan. 383, 158 Pac. 23 (1916) and Note L. R. A. 1917A, 683.

⁵ *Board of Fire and Water Com'rs of City of Marquette v. Wilkinson*, 119 Mich. 655, 78 N. W. 893, 44 L. R. A. 493 (1899); *In re Linn County Bank*, 1 S. W. (2d) 206 (Mo. App. 1928); *Special Road Dist. v. Cathey*, *supra* note 4; *Jarvis v. Hammons*, *supra* note 4; *City of New Hampton v. Leach*, *supra* note 4; *Honer v. Hanover State Bank*, 114 Kan. 123, 216 Pac. 822 (1923); *Chetopah State Bank v. Farmers' & Merchants' State Bank*, 114 Kan. 463, 218 Pac. 1000 (1923); *U. S. Nat. Bank of Centralia v. Centralia*, 243 U. S. 656, 61 L. ed. 949 (Wash. 1917); *City of Spring Hill v. Paxton*, 115 Kan. 412, 223 Pac. 283

with the necessity of tracing by holding that the state has a common-law prerogative of preference in the assets of insolvent debtors.⁶ On the other hand, an agreement whereby the state was to receive interest on the deposit has been held to amount to a waiver, upon the part of the state, of this right.⁷ But the courts are divided as to whether this prerogative preference extends to political subdivisions of the state, such as counties.⁸ A Mississippi statute gives the right to municipalities.⁹ The North Carolina court has denied the existence of any such governmental prerogative, however, as being opposed to the principles of democratic institutions.¹⁰

The dicta in the principal case are supported by the weight of authority. The result of the decision, however, is opposed by a North Dakota case¹¹ holding that a county could impress a trust upon the assets of the insolvent bank although it had already received dividends

(1924); *Board of Com'rs of Dona Ana County v. Clapp*, 24 N. M. 522, 174 Pac. 998 (1918). *Contra*: *State v. McKee*, 168 Ark. 441, 270 S. W. 513 (1925). See Note L. R. A. 1916C, 21.

⁶*Fidelity and D. Co. v. State Bank*, 117 Ore. 1, 242 Pac. 823 (1926); *Re Carnegie Trust Co.*, 206 N. Y. 390, 99 N. E. 1096 (1912); *State v. Banking Corp. of Montana*, 77 Mont. 134, 251 Pac. 151 (1926); *Fidelity and Guaranty Co. v. Bramwell*, 108 Ore. 261, 217 Pac. 332 (1923) and Note (1924) 32 A. L. R. 829; *Aetna Accident and Liability Co. v. Miller*, 54 Mont. 377, 170 Pac. 760, L. R. A. 1918C, 954 (1918); *American Surety Co. of New York v. Pearson*, 146 Minn. 341, 178 N. W. 817 (1920); Note (1913) 46 L. R. A. (N.S.) 260. *Contra*: *Fidelity and Casualty Co. of N. Y. v. Union Sav. Bank Co.*, 29 Ohio App. 154, 163 N. E. 221 (1928); *Maryland Casualty Co. v. Rainwater*, 291 S. W. 1003 (Ark. 1927); *Hammons v. U. S. Fidelity and Guaranty Co.*, 30 Ariz. 480, 248 Pac. 1086 (1926); *Phillips v. Yates Center Nat. Bank*, *supra* note 4. See Note (1908) 8 Ann. Cas. 116, and (1907) 5 L. R. A. (N. S.) 886.

As pointed out by the Iowa court in *Poweshiek County v. Merchants Nat. Bank of Grinnell*, *supra* note 4, "A preference can only arise by reason of some statutory provision or some fixed principle of common law which creates a special, superior right in certain creditors over others." The distinction between a preferred claim and a priority by reason of a trust is important because in the latter case the trust res must be traced into the assets of the insolvent debtor-trustee.

⁷*National Surety Co. v. Morris*, 34 Wyo. 134, 241 Pac. 1063, 42 A. L. R. 1290 (1925); see also *Board of Education v. Union Trust Co.*, 136 Mich. 454, 99 N. W. 373 (1904). *Contra*: *Maryland Casualty Co. v. McConnell*, 148 Tenn. 656, 257 S. W. 410 (1924); *Central Bank and Trust Corp. v. State*, 139 Ga. 54, 76 S. E. 587 (1912); *Fidelity and D. Co. v. State Bank*, *supra* note 6.

⁸Affirmative: *Leach v. U. S. Bank of Des Moines*, 205 Iowa 987, 213 N. W. 528 (1927). See also *Pinal County v. Hammons*, 30 Ariz. 36, 243 Pac. 919 (1926). *Contra*: *Aetna Casualty and Surety Co. v. Bramwell*, 12 F. (2d) 307 (D. C. Ore. 1926).

⁹Miss. Code 1906, §3485 (*Hemingway's Code* 1927, §3019).

¹⁰*Corp. Comm. v. Citizen's Bank and Trust Co.*, 193 N. C. 513, 137 S. E. 587 (1927). Accord: *In re Northern Bank of New York*, 212 N. Y. 608, 106 N. E. 749 (1914); *In re Central Bank of Willcox*, 23 Ariz. 574, 205 Pac. 915 (1922).

¹¹*Grand Forks County v. Baird*, *supra* note 4.

as a general creditor, the relief being measured by the amount of cash on hand at the time of closing, which, added to the dividend, was still less than the total amount of the county's deposit. It is submitted that the outcome of the principal case would have been fairer if a similar result had been reached, or if a conditional decree had been entered, requiring a tender into court of the dividend received as a condition precedent to relief.

PEYTON B. ABBOTT.

BILLS AND NOTES—BANKS AND BANKING—CHECK AS AN ASSIGNMENT—Where a check drawn by *A* upon *X* Bank payable to *B* is dishonored because of *A*'s intervening insolvency, and *X* subsequently applies the amount standing to *A*'s credit in discharge of a debt owing to it, does *B* have a preference to the amount of the check in *A*'s general assets? The West Virginia court answered in the affirmative on the ground that the check constituted an equitable assignment of the fund *pro tanto*.¹

While many courts, prior to the enactment of the N. I. L. held a check to be a *pro tanto* assignment of the fund drawn against, the majority did not.² The hardship thrown upon a drawee bank by such holdings, arising from its liability to payees after payment to executors, administrators, attaching creditors, other check holders, or its refusal to pay after countermand by the drawer, was removed by N. I. L. §189.³ Many of the minority states still continue to hold that

¹ Central Trust Co. v. Bank of Mullens, 150 S. E. 137 (W. Va. 1929).

² A check operates as an equitable assignment *pro tanto*: Hulings v. Hulings Lumber Co., 38 W. Va. 351, 18 S. E. 620 (1893); Kuhnes v. Cahill, 128 Iowa 594, 104 N. W. 1025 (1905); Wasgatt v. First Nat. Bank, 117 Minn. 9, 134 N. W. 224, 43 L. R. A. (N. S.) 109 (1912); Boswell v. Citizens' Saving Bank, 123 Ky. 485, 96 S. W. 797 (1906); Peoples Nat. Bank v. Swift, 134 Tenn. 175, 183 S. W. 125 (1916); Southern Cabinet Co v. First Nat. Bank, 87 S. C. 79, 68 S. E. 962, 29 L. R. A. 623 (1910). *Contra*: N. C. Corp Comm. v. Merchants' & Farmers' Bank, 137 N. C. 697, 50 S. E. 308, 2 Ann. Cas. 537 (1905); Peter's Shoe Co. v. Murray, 31 Tex. Civ. App. 259, 71 S. W. 977 (1903); Grammill v. Carmer, 55 Mich. 201, 21 N. W. 418, 54 Am. Rep. 363 (1884). Mr. Morse strongly favors the assignment theory and seems to suggest that N. I. L. §§127 and 189 are undesirable, 2 MORSE, BANKS AND BANKING (6th ed.), §§494-510; while Mr. Brannan takes the contrary view, BRANNAN, NEGOTIABLE INSTRUMENTS LAW (4th ed.), 902 *et seq.*

³ "A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable unless and until it accepts or certifies the check." However it is still possible for a drawer to make an assignment of all or part of his account, but it must be so shown by evidence of intention to assign, other than the check itself. Fourth St. Nat. Bank v. Yardley, 165 U. S. 634, 17 S. Ct. 439, 41 L. ed. 855 (1897); Peoples Nat. Bank v. Swift, 134 Tenn. 175, 183 S. W. 725 (1916); see Aigler,

as between the drawer, or those standing in his place, and the payee or holder, a check operates as an equitable assignment *pro tanto* of the fund drawn upon from the time of delivery.⁴ The results reached in various situations, from logical deductions based upon the law of assignment in general have however not been uniform.⁵

In the instant case admitting that the check operates as an assignment, it is difficult to see how it can be made the basis of a preference in the insolvent's general assets. Being an assignment, any rights in the payee would attach to the thing assigned and if the deposit in the drawee had been paid to the drawer's receivers, the payee's rights would not be extinguished.⁶ But here the receivers did nothing in regard to the chose in action owing to them. The drawee merely appropriated the amount of the deposit to the drawer's credit to the satisfaction of a debt owing to it. Under N. I. L. §189 the drawee is apparently not liable since it refused to accept the check.⁷ True, the

Rights of Holder of Bill of Exchange Against the Drawee (1925), 38 HARV. L. REV. 860; *Feezer, Death of a Drawer of a Check* (1930), 14 MINN. L. REV. 124.

⁴ *Fed. Res. Bank v. Peters*, 139 Va. 45, 123 S. E. 379, 42 A. L. R. 742 (1924); *McClain & Norvet v. Torkelson*, 187 Iowa 202, 174 N. W. 42, 5 A. L. R. 1665 (1919), but overruled in *Leach v. Mechanic's Savings Bank*, 202 Iowa 899, 211 N. W. 506, 50 A. L. R. 388 (1926) and note. *Contra*; *Anderson v. Elem*, 111 Kan. 713, 208 Pac. 573, 23 A. L. R. 1202 (1922); *Kaesemeyer v. Smith*, 22 Ida. 1, 123 Pac. 943, 43 L. R. A. 100 (1912), even though deposit was made for the purpose of paying the check. See cases collected in BRANNAN, *NEGOTIABLE INSTRUMENTS LAW* (4th ed.), 902 *et seq.*; *Perry v. Bank of Smithfield*, 131 N. C. 117, 42 S. E. 551 (1902); *semble*, *Standard Trust Co. v. Comm. Nat. Bank*, 166 N. C. 112, 81 S. E. 1074 (1914).

⁵ *Supra* note 4.

⁶ The atmosphere might possibly be clarified if the term "assignment of the debt owing to the drawer" were used rather than "assignment of the fund drawn upon." Certainly there is no actual fund to which the assignment might attach, nor even a transfer of a chose in action, since it is unenforceable against the debtor. Since delivery of the check gives rise to none of the ordinary legal consequences and relations flowing from an actual assignment, it might be well to adopt another name for the method by which the desired results are reached. See BIGELOW, *BILLS AND NOTES* (3rd ed.), §§208-214.

⁷ But upon the premise that the check here is an equitable assignment, should not the drawee bank be liable? It is submitted that the drawee is not protected by N. I. L. §189 in this case. Suit might have been brought against it, not for failure to honor the check—since a bank is justified and even required to refuse to honor the drawer's checks upon notice of his insolvency, especially when the drawer is a bank, *First Nat. Bank v. Selden*, 120 Fed. 212 (C. C. A. 7th, 1903)—but for the appropriation to its own use of the debt with knowledge of the assignment. The position of the drawee here is that of attaching creditor, or purchaser with notice and not of dishonoring drawee. Possibly the right of set-off attaching upon the drawer's insolvency might prove a greater equity than that of the payee's, but apart from this there seems to be a good cause of action against the drawee.

receiver gets the benefit of the set-off, but that fact may be taken advantage of only under some other theory of preference.⁸

The effect of the present holding is to make a check a preferred claim against the drawer's general assets without regard to the fund drawn against. It would logically follow that if *A* having \$500 on deposit gives a check to *B* and later one to *C* for that amount, and *C* cashes his check first, *B* would be entitled to a preference over *A*'s creditors.⁹

HARRY ROCKWELL.

CONFLICT OF LAWS—MARRIAGE AND DIVORCE—In a recent case¹ it was found that the plaintiff, who claimed the proceeds of a War-Risk Insurance Policy, had married the now deceased ex-soldier in Minnesota within one year after receiving her divorce from a former husband in Wisconsin. This act was an intentional evasion of the Wisconsin statutes,² which provided that a marriage contracted within one year after the divorce decree would be void, whether within or without the state. It was *held* that the marriage was invalid and that the proceeds of the policy should go to the next of kin.

It is well established that a *bona fide* marriage which is valid in the place of celebration is valid everywhere,³ unless entered into for the purpose of evading the laws of the jurisdiction in which the parties reside,⁴ or unless it is an incestuous or polygamous marriage.⁵

¹ In the instant case the decision was also based upon the theory that the drawer, who was by this check transmitting the proceeds of a collection held the debt "collected" by it in trust for the plaintiff. For a discussion of the trust fund theory see, *Goodyear Co. v. Hanover State Bank*, 109 Kan. 772, 204 Pac. 992. 21 A. L. R. 677 and note (1921); *Fed. Res. Bank v. Peters*, *supra* note 4. The same result is reached in this state by a statute giving a preference, N. C. CODE (Michie 1927), §218(c), subs. 14.

² Such a situation is unusual, the normal one being a contest between two or more parties for title to a single specific sum of money, and it seems unlikely that the West Virginia court would grant *B* a preference.

³ *Cummings v. United States*, 34 F. (2d) 284 (D. C. Minn. 1929).

⁴ Wis. Stat. (Edition 1925) §245.03 ss.2 and §245.04.

⁵ *State v. Ross*, 76 N. C. 242 (1877); *Pierce v. Pierce*, 58 Wash. 622, 109 Pac. 45 (1910); *In re Wood*, 137 Cal. 129, 69 Pac. 900 (1902); *Lanham v. Lanham*, 136 Wis. 360, 117 N. W. 787 (1908); *cf. Fowler v. Fowler*, 131 N. C. 169, 42 S. E. 563 (2) (1902); *Fisher v. Fisher*, 250 N. Y. 313, 165 N. E. 460 (1929), where marriage on the sea was held valid, since a ship on the high seas is considered domiciled where its owner resides rather than at the port from which it sailed. See *State v. Ta-Cha-Na-Tah*, 64 N. C. 614 (1870) which held a common law marriage between Indians was invalid in this state though in accord with their custom. Note (1909) 17 L. R. A. (N. S.) 800.

⁶ *State v. Kennedy*, 76 N. C. 251 (1877); *Lanham v. Lanham*, *supra* note 3; *Johnson v. Johnson*, 57 Wash. 89, 106 Pac. 500 (1910); *White v. White*, 167 Wis. 615, 168 N. W. 704 (1918); *In re Kienstra*, 276 Pac. 294 (Wash. 1929);

A state has the power to legislate as to marriages contracted by its citizens in other jurisdictions, so as to invalidate a marriage which might be valid under the foreign law.⁶ However, if the marriage is technically void but one of the parties acted in good faith, it has been held not to be illegal.⁷

Generally a state adopts its marriage and divorce policy irrespective of the laws of another state, but it has been held, under what seems to be the better reasoning, that a state will give effect to the policy of marriage and divorce laws of other jurisdictions which is similar to its own.⁸ However, this rule has no application when the parties do not return to their former domicile, for such statutes have no extraterritorial effect.⁹ For instance, suppose statutes similar to the one in the instant case to be in force in States X and Y but not in State Z. A person having been divorced in X marries in Z. If the parties return to X, the marriage is invalid in that state and in Y, their policies being mutual, but if the parties remove directly to Y, their status when questioned there is determined by the laws of Z. Suppose, however, the marriage is contracted in Y. By the better view such marriage is invalid in Y.¹⁰ And if the parties then removed to Z from Y, it should follow that the marriage would be held invalid there, but such marriage might conceivably be held valid in Z unless the status of the particular parties had been determined in Y.

State v. Fenn, 47 Wash. 561, 92 Pac. 417 (1907). *Contra*: *Van Voorhis v. Brintnall*, 86 N. Y. 18, 40 Am. Rep. 505 (1881); *Dudley v. Dudley*, 161 Iowa 142, 130 N. W. 785 (1911); *Palmer v. Palmer*, 163 N. E. 879 (Mass. 1928); (1929) 42 HARV. L. REV. 701; *Moore v. Hegeman*, 92 N. Y. 521 (1883); *cf.* *State v. Hand*, 87 Neb. 189, 126 N. W. 1002 (1910). Note (1912) 43 L. R. A. (N. S.) 355.

In some states there is a similar statute prohibiting remarriage by the guilty party in divorce proceedings for adultery. *Williams v. Oates*, 27 N. C. 535 (1845); *In re Stull's Estate*, 183 Pa. 625, 39 Atl. 16 (1898); *Gabisso's Succession*, 119 La. 704, 44 So. 438 (1907); *Pennegar v. State*, 87 Tenn. 244, 10 S. W. 305 (1889). *Contra*: *State v. Shattuck*, 69 Vt. 403, 38 Atl. 81 (1897); (1924) 37 HARV. L. REV. 913.

⁶ Dictum: *Lanham v. Lanham*, *supra* note 3. Note (1923) 8 IOWA L. REV. 245. And see *Soviet Marriages*, (1929) 68 Law Journal 328.

⁷ *Wilson v. Cook*, 256 Ill. 460, 100 N. E. 222 (1912); *Heflinger v. Heflinger*, 136 Va. 289, 118 S. E. 316 (1923). Note (1928) 41 HARV. L. REV. 1059.

⁸ *Whippen v. Whippen*, 171 Mass. 560, 51 N. E. 174 (1898).

⁹ *Mosholder v. Industrial Commission*, 329 Ill. 497, 160 N. E. 835 (1928); *Hall v. Industrial Commission*, 165 Wis. 364, 162 N. W. 312 (1917); (1917) 27 YALE L. J. 131.

¹⁰ *Owen v. Owen*, 178 Wis. 609, 190 N. W. 363 (1922).

¹¹ *Mosholder v. Industrial Commission*, *supra* note 8; Uniform Marriage Evasion Act §2. *Contra*: *People v. Goddard*, 258 Pac. 447 (Cal. App. 1927), criticised in (1928) 41 HARV. L. REV. 397.

Under statutes of the type¹¹ in the instant case a marriage anywhere is specifically declared void, but if the parties conform to the laws of the foreign jurisdiction the marriage is valid unless they return to the original state. Even though the Wisconsin court could not give any extraterritorial effect to the statute, the decision is undoubtedly sound, since it is based on public policy and is supported by the weight of authority.

CHARLES MANGUM,
JOHN B. LEWIS.

CONSTITUTIONAL LAW—UNCONSTITUTIONAL STATUTE—POWER OF COURT TO MAKE STATUTE CONSTITUTIONAL BY CHANGED CONSTRUCTION—A Georgia statute creating a presumption of negligence upon proof of injury resulting from the operation of cars of a railway company was held unconstitutional by the Supreme Court of the United States because, according to its construction by the Georgia courts, it imposed not merely the duty of *going forward* with the evidence but the greater burden of the *risk of non-persuasion*.¹ After the above decision had been rendered, the Court of Appeals of Georgia construed the same statute as imposing only the duty of *going forward* with the evidence.² Thus, the decision of the Georgia court, in putting a new construction on the statute after it had been declared unconstitutional, raises the question whether a state court can so change the construction of a statute held unconstitutional by the Supreme Court of the United States as to cure the objections to it.

The general rule that an unconstitutional statute is void *ab initio*—that it never had the force and effect of law³—has been subjected to

¹¹ A different type of statute—to the effect that the divorce decree will not take effect for six months—is found in Oklahoma. Such a statute simplifies the whole situation, for a subsequent marriage within the time limit would be bigamous and thus void everywhere. *Atkeson v. Sovereign Camp*, 90 Okla. 154, 216 Pac. 467, 32 A. L. R. 1108 (1923). It seems that a similar result would be reached for a marriage that takes place pending a rule *nisi* in a divorce suit. *Commonwealth v. Stevens*, 196 Mass. 280, 82 N. E. 33 (2) (1907).

¹ *Western and Atl. Ry. Co. v. Henderson*, 279 U. S. 639, 49 Sup. Ct. 445 (1929). See also note (1929) 8 N. C. L. REV. 50; note (1929) 43 HARV. L. REV. 100.

² *Ga. Ry. & Power Co. v. Shaw*, 149 S. E. 637, (Ga. 1929). Plaintiff was standing near street car tracks on a public street in Atlanta placing things in an automobile when he was injured by the defendant company's street car. The opinion of the court contains an excellent discussion of presumptions.

³ *Norton v. Shelby County*, 118 U. S. 425, 30 L. ed. 128, 6 Sup. Ct. 1121 (1886); *Louisiana v. Pillsbury*, 105 U. S. 278, 26 L. ed. 1090 (1881); *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717 (1879); *Gunn v. Barry*, 15 Wall. 610, 21 L. ed. 212 (1872); *State v. Williams*, 146 N. C. 618, 61 S. E. 61 (1908).

an increasing number of limitations.⁴ In every jurisdiction, there are cases which treat unconstitutional statutes as voidable rather than void. For example, unconstitutional statutes creating moral obligations on the state or individuals thereof,⁵ creating public offices,⁶ subjecting officers to criminal liability for acting thereunder⁷ have been held void only from the date of their declared unconstitutionality. Furthermore, there are some decisions which hold that an unconstitutional statute is not void at all, but that the statute is merely inapplicable to the particular situation presented to the court.⁸

The precise question whether an inferior court, by changing the construction of an unconstitutional statute, can render it constitutional has apparently never been raised. Under the void *ab initio* theory it would logically follow that since a statute ceases to exist when it is declared unconstitutional, there is nothing left for any court to consider. However, it has been held that a court can reverse its own prior decision of unconstitutionality and that the unconstitutional statute is thereby rendered effective as of the date of its enactment.⁹ Therefore, in view of the trend away from the *ab initio* theory, and since the construction of state statutes is primarily the function of the state courts,¹⁰ a state court should be allowed to change its construction so as to remove the objections raised by the United States Supreme Court, provided (1) that such a change would not be contrary to any manifest legislative intent, and consequently (2) that the court would be justified in concluding,

⁴ Field, *Effect of Unconstitutional Statutes* (1926), 1 IND. L. JOUR. 1-4.

⁵ Road Improvement Dist. No. B. v. Burkett, 163 Ark. 578, 260 S. W. 718 (1924).

⁶ Nagel v. Bosworth, 198 Ky. 897, 147 S. W. 940 (1912); State v. Poulin, 104 Me. 224, 74 Atl. 119 (1909); Lang v. Mayor of Bayonne, 74 N. J. L. 455, 68 Atl. 90, 15 L. R. A. (N. S.) 94 (1907).

⁷ State v. Godwin, 123 N. C. 697, 31 S. E. 221 (1898).

⁸ Shephard v. Wheeling, 30 W. Va. 479, 4 S. E. 634 (1887); Allison v. Corker, 67 N. J. L. 596, 52 Atl. 362 (1902); Bentley v. State Board Medical Examiners, 152 Ga. 836, 111 S. E. 379 (1922).

⁹ Christopher v. Mungen, 61 Fla. 513, 55 So. 273 (1911); State v. O'Neil, 147 Iowa 513, 126 N. W. 404 (1910); Pierce v. Pierce, 46 Ind. 86 (1874), BLACK, CONSTITUTIONAL LAW (3 ed. 1910) 75.

¹⁰ It is assumed that the Supreme Court of Georgia would affirm the construction of the statute given to it by the Georgia Court of Appeals. It has been held that it is the duty of the federal courts to follow the construction of a state constitution, in accordance with the decisions of the highest state court on the subject, although, before such state decisions were rendered, the federal courts had rendered an opinion to the contrary. Sandford v. Poe, 69 Fed. 546 (C. C., S. D., Ohio), 60 L. R. A. 641 (1895); Indianapolis v. Navin, 151 Ind. 139, 47 N. E. 525, (1898); Fairfield v. Gallatin Co., 100 U. S. 47, 25 L. ed. 544 (1879).

in view of the effect of its former decision—rendering the statute unconstitutional—, that the new construction—rendering the statute constitutional—must have been the one actually intended by the legislature.¹¹ Such a view, as expressed in the present decision, would make unnecessary any new legislation.¹²

J. FRAZIER GLENN, JR.

EMPLOYER'S LIABILITY—FEDERAL EMPLOYER'S LIABILITY ACT—ADULTEROUS WIDOW AS BENEFICIARY—In *Lytle v. Southern Ry.—Carolina Division*,¹ deceased was killed in North Carolina while engaged in interstate commerce. Suit was brought under the Federal Employer's Liability Act for the benefit of deceased's mother. There were no children of deceased. Complaint alleged that deceased's wife had deserted him and eloped with an adulterer. A demurrer to the complaint was overruled. Judgment affirmed.²

The Federal Employer's Liability Act specifies that the sum recovered thereunder shall be "for the benefit of the surviving widow or husband and children of such employee; and if none, then to such employee's parents; and, if none, then to the next of kin dependent upon such employee. . . ."³ The laws of the several state, in so far as they cover the same field are superseded by this act.⁴ Therefore,

¹¹ A statute which is susceptible of two constructions, one of which would render it unconstitutional and the other which would render it constitutional, should be given the construction in favor of constitutionality. "It is the duty of courts to adopt a construction that will bring (it) into harmony with the constitution, if (its) language will permit, and they are not justified in declaring an act of legislature invalid, if by any legitimate rules of construction its meaning can be ascertained and its provisions carried out, even though the construction which is adopted does not appear to be as natural as the other." *Stewart v. Great Northern Ry. Co.*, 65 Minn. 515, 68 N. W. 208, 33 L. R. A. 427 (1896); *Samuelson v. State*, 116 Tenn. 470, 95 S. W. 1012 (1906); *Hooper v. State of California*, 155 U. S. 648, 39 L. ed. 297, 15 Sup. Ct. 207, (1894).

¹² After the statute had been held unconstitutional by the Supreme Court of the U. S. and before the decision in this case had been rendered, the legislature passed a new statute imposing the duty of merely *proceeding with the evidence*, Ga. Pub. Laws (1929), ch. —; referred to in the principal case, 149 S. E. at p. 663.

¹ 149 S. E. 692 (S. C. 1929).

² Cothran, J., dissented. Leave was granted by the appellate court to allow the defendant to make a motion to have the widow a party, and thereby prevent a possibility of two judgments for the same tort.

³ April 22, 1908, c. 149, §1, 35 Stat. 65, 45 U. S. C. A. §51.

⁴ *Mondou v. New York, N. H. & H. R. Co.*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. ed. 327, 38 L. R. A. (N. S.) 44 (1912), rev'g. 82 Conn. 373, 73 Atl. 762 (1909); *Seaboard A. L. Ry. v. Horton*, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. ed. 1062 (1914), rev'g. 162 N. C. 424, 78 S. E. 494 (1913); *Chesapeake & O. R. Co. v. Stapleton*, 279 U. S. 587, 49 Sup. Ct. 442, 73 L. ed. 540 (1929).

a recovery under the act can only be had by and for the persons or classes of persons in whose favor the law creates a cause of action.⁵ If a beneficiary of the first class survives the deceased, the latter mentioned classes are entirely excluded from benefit; and likewise, if one person of the second class, but none of the first class, survives the deceased, then the third class will be excluded.⁶ A state statute⁷ determining the distributees of an intestate estate cannot effect the beneficiaries under the Federal Act with respect to priority of claims.⁸ However, a state statute may be employed to secure the definition of such a term as "next of kin."⁹ But the right of the faithless wife to recover under the Federal Act does not depend upon the existence or non-existence under state laws of a right of dower or a right as an heir of her deceased husband.¹⁰

⁵In *re Stone*, 173 N. C. 208, 91 S. E. 852 (1917), writ of error dismissed 245 U. S. 638, 38 Sup. Ct. 192, 62 L. ed. 525 (1918).

⁶*Chicago, B. & Q. R. v. Wells-Dickey Trust Co.*, 275 U. S. 161, 48 Sup. Ct. 73, 72 L. ed. 216 (1927), holding that where deceased was survived by his mother, who died before suit, no recovery would be allowed to the dependent sister.

⁷N. C. Cons. Stat. Ann. (1919) §2523, cuts off a faithless wife from dower and prevents her from being an heir of her deceased husband.

⁸The state statutes are not applicable because they deal with the estate of the deceased. The right of action in the personal representative, under the Federal Act, for the benefit of designated beneficiaries, is not a part of the estate of the deceased. It is a cause independent of any which the decedent had; it includes no damages which he might have recovered; it is a liability for pecuniary damage sustained by relatives of decedent. *Mich. Cent. R. Co. v. Vreeland*, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. ed 417 (1913).

⁹It is held in *Seaboard A. L. R. Co. v. Kenney*, 240 U. S. 489, 36 Sup. Ct. 458, 60 L. ed. 762 (1916), aff'g. 167 N. C. 14, 82 S. E. 968 (1914), that the next of kin of an illegitimate are, according to the state law, the legitimate children of the same mother, she having predeceased her illegitimate offspring, and that in such a situation the asserted father may not claim as parent. It is intimated in the case that the term "surviving widow," "husband," "children," and "mother" are understood as defined by the state law. But even under this view it would seem that the marriage which created the husband-wife relationship is not dissolved by the unfaithful, criminal, or adulterous conduct of one of the parties, but only by a divorce a vinculo. State statutes, other than those regulating the distribution of an intestate's estate, establish the definition of what is a wife and what is a widow. That the definition of "next of kin" is found in the distribution statute is attributable to the fact that the term is necessary only in that connection.

It seems paradoxical that a court in South Carolina, which will not grant a divorce, should attempt to make a North Carolina statute of distributions operate as a virtual decree of divorce.

¹⁰In *Dunbar v. Charleston & W. C. R. Co.*, 186 Fed. 175, 176 (C. C. S. D. Ga. 1911), the sustaining of an objection to an offer to prove that at the time of death the wife was separated from her husband was affirmed, *Speer, J.*, using the following words, but citing no authority: "The unhappy pair will be presumed to live in the relationship of husband and wife until they have been separated in a manner pointed out by law." A dictum which might possibly point to a contrary result is to be found in *New Orleans & Northeastern R.*

Moreover, her recovery is not based upon dependency.¹¹ It rests rather upon a reasonable expectation of pecuniary benefit from a continuance of his life.¹² Exactly what "reasonable expectation" a faithless and adulterous wife, who has irrevocably lost all legal rights to demand support, might prove is vague.¹³ Nevertheless, her mere existence, regardless of what she may or may not prove in the way of pecuniary loss, operates to exclude the other classes.¹⁴

The instant case seems to have been incorrectly decided. The allegation that deceased left a surviving widow should have sufficed to allow the demurrer. But the case does very clearly evidence the fact that there is a palpable defect in the Federal Act which allows an unmeritorious person of a preferred class to recover the benefits, or at least to exclude from benefits a deserving, though less preferred, class.¹⁵

A. K. SMITH.

Co. v. Harris, 247 U. S. 367, 372, 38 Sup. Ct. 535, 536, 62 L. ed. 1167, 1171 (1918), and is as follows: "The deceased left a widow and although they had lived apart no claim is made that the rights and liabilities consequent upon marriage had disappeared under local law. . . . In the circumstances, proof of the mother's pecuniary loss could not support a recovery." It is submitted that the dictum found in *Fogarty v. Northern Pac. R. Co.*, 85 Wash. 90, 147 Pac. 652, 655 (1915), does not go to the question of whether this would eliminate the wife in favor of the second class of beneficiaries: "It may be conceded that had the undisputed evidence shown that the widow since being abandoned by the deceased had led a dissolute life such as to absolve the husband of all legal duty to support her, this would bar her recovery."

¹¹ The element of dependency is limited to the third class, the next of kin. *Moffett v. Baltimore & O. R. Co.*, 220 Fed. 39 (C. C. A. 4th. W. Va. 1914); *Carolina C. & O. Ry. v. Shewalter*, 128 Tenn. 363, 161 S. W. 1136 (1913), *aff'd* 239 U. S. 630, 36 Sup. Ct. 166, 60 L. ed. 476 (1915); *Dooley v. Seaboard A. L. R. Co.*, 163 N. C. 454, 79 S. E. 970 (1913).

¹² *Mich. Cent. R. Co. v. Vreeland*, *supra* note 7, which also clearly lays down the rule that the widow may not recover for loss of consolation, companionship or society.

¹³ A discreditable argument in favor of the faithless wife might be made in case the deceased lingered long enough for a cause of action on account of loss and suffering to survive to his personal representative. April 5, 1910, c. 143, §2, 36 Stat. 391, 45 U. S. C. A. §59. A recovery in her behalf for the personal loss and suffering of the deceased does not have to be based upon an expectation of pecuniary benefit. A claim for such a recovery is usually joined with a claim arising from the death. But since the claims are quite separate and distinct (*St. Louis etc. R. Co. v. Craft*, 237 U. S. 648, 35 Sup. Ct. 704, 59 L. ed. 1160 (1915)), it would seem that there might be a recovery on the former, although a recovery on the latter was disallowed. The discreditable part of the argument is based on the theory that a widow who could not otherwise recover may do so if her husband lived for a short while after the injury and suffered. Yet the same situation would result if a mother or father could show no "expectation" or if the next of kin could show no dependency.

¹⁴ *Supra* note 6. Of course, it might be argued that the phrase "if none" should be judicially interpreted to mean "if none survived capable of showing a pecuniary interest."

¹⁵ This exclusion of a deserving class is quite as undesired as the wind-falls to non-dependent next of kin under certain Workmen's Compensation Acts. See (1929) 7 N. C. L. REV. 410.

INSURANCE—ACCIDENT INSURANCE—DEATH FROM WOOD ALCOHOL IN "BOOT-LEG" LIQUOR—The deceased, who was insured against loss of life "resulting from bodily injuries . . . directly and independently of all other causes, through accidental means," died as a result of drinking wood alcohol which, unknown to him, was an ingredient of synthetic gin cocktails served him by a friend. *Held*: death resulted through accidental means.¹

In accident insurance cases the distinction should be made between accidental injury or death and injury or death through accidental means,² for it is not the result but the means producing the result that are insured against. Accidental means have been defined as those which produce effects which are not their natural and probable consequences.³ Thus, where the insured, though fully aware of the deleterious nature of the fruit, voluntarily selected and ate infected oranges,⁴ and where the insured, with full knowledge of the high fusel oil content of certain boot-leg whiskey, voluntarily imbibed,⁵ the resultant deaths, though unquestionably accidental, were not caused by accidental means, for in each case the insured had consumed that which he intended to consume. But, on the other hand, where the insured drank polluted water which he thought pure,⁶ ate poisonous mush-rooms which he supposed edible,⁷ or consumed food which he thought wholesome but which contained ptomaines,⁸ the deaths were held to have been caused by accidental

¹ *Zurich Gen'l Acc. & Liability Co. v. Flickinger*, 33 F. (2d) 853 (C. C. A. 4th, 1929), Note (1929) 16 VA. L. REV. 64.

² *Rock v. Travelers' Ins. Co.*, 172 Cal. 462, 156 Pac. 1029, L. R. A. 1916 E, 1196, 1199 (1916); see Christian, *The Accident Policy* (1920) 7 VA. L. REV. 116; Bagby, *Recovery on Accident Policies Limiting Liability to Injuries or Death Effected "Through External, Violent and Accidental Means"* (1914) 2 *ibid.* 178.

³ *Western Com. Travelers' Ass'n v. Smith*, 85 Fed. 401, 405, 40 L. R. A. 653 (C. C. A. 8th, 1898). If in the act which precedes the injury, something unforeseen, unexpected, unusual occurs, which produces the injury, then the injury has resulted through accidental means, *U. S. Mutual Acc. Ass'n v. Barry*, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. ed. 60 (1888). For a discussion of "accident" and "accidental" see, (1910) 24 HARV. L. REV. 221; (1914) 28 *ibid.* 209.

⁴ *Martin v. Interstate etc. Acc. Ass'n*, 187 Iowa 869, 174 N. W. 577 (1919); (1920) 18 MICH. L. REV. 429.

⁵ *Calkins v. Nat. Travelers' Ass'n*, 200 Iowa 60, 204 N. W. 406 (1925), 41 A. L. R. 363 (1926).

⁶ *Christ v. Pac. Mut. Life Ins. Co.*, 312 Ill. 525, 144 N. E. 161, 35 A. L. R. 730 (1924).

⁷ *U. S. Casualty Co. v. Griffis*, 186 Ind. 126, 114 N. E. 83 (1916), L. R. A. 1917F, 481.

⁸ *Johnson v. Fidelity & Casualty Co.*, 184 Mich. 406, 151 N. W. 593 (1915) (tainted food); *Newsoms v. Commercial Casualty Ins. Co.*, 147 Va. 471, 137 S. E. 456 52 A. L. R. 363 (1927). commented on (1928) 31 LAW NOTES 212

means. Likewise, where the deceased, intending to take a small dose of a dangerous medicine, by mistake took a lethal dose,⁹ inadvertently took the wrong draft,¹⁰ or swallowed what ordinarily is a harmless substance in such a manner as to produce death,¹¹ the courts have generally found that death resulted through accidental means.

The situation presented by the principal case meets all the requirements for death by accidental means; whatever may be the "natural and probable" consequences of drinking gin cocktails, death is not generally considered as such. The unforeseen, unexpected and unusual thing¹² which produced the death was the presence, unknown to the insured, of wood alcohol in the beverage.

THOMAS W. SPRINKLE.

QUASI CONTRACTS—LIABILITY OF MUNICIPALITY FOR BENEFITS CONFERRED UNDER ILLEGAL CONTRACT—Plaintiff municipality contracted with defendant property owners to exempt them from taxes for a period of ten years in consideration of their subdividing and developing their property. The contract was repugnant to a constitutional provision making void contracts for tax exemption, and to a statute making void contracts in which councilmen were interested. Plaintiff sued for taxes; defendants counterclaimed in quantum meruit for sums expended in the development. *Held*: plaintiff

(pork and beans); *O'Connor v. Columbian Nat. Life Ins. Co.*, 208 Mo. App. 46, 232 S. W. 218 (1921) (decomposed ice cream); *Buel v. Kansas City Life Ins. Co.*, 250 Pac. 635 (N. M. 1926), 52 A. L. R. 366 (milk from cow which had eaten golden-rod—alkali poisoning resulted); *Md. Casualty Co. v. Hudgen*, 97 Tex. 124, 76 S. W. 745, 104 Am. St. Rep. 857 (1903) (spoiled oysters—recovery in this case was barred by an exception in the policy); *Sutter v. Mass. Bonding & Ins. Co.*, 215 Ill. App. 341 (1919).

* *Pixley v. Ill. Com. Men's Ass'n*, 195 Ill. App. 135 (1915) (overdose of morphine); *Dezell v. Fidelity & Casualty Co.*, 126 Mo. 253, 75 S. W. 1102 (1903) (morphine); *Hodgson v. Preferred Acc. Ins. Co.*, 165 N. Y. Supp. 293, 100 Misc. Rep. 155 (1917) (morphine); *Mutual Acc. Ass'n v. Tuggle*, 39 Ill. App. 509 (1891) (overdose of laudanum). But see *Carnes v. Iowa etc. Ass'n*, 106 Iowa 281, 76 N. W. 683, 68 Am. St. Rep. 306 (1898).

¹⁰ *Healey v. Mut. Acc. Ass'n*, 133 Ill. 556, 25 N. E. 52, 23 Am. St. Rep. 637, 9 L. R. A. 371 (1890); *Metropolitan Acc. Ins. Ass'n v. Froiland*, 161 Ill. 30, 43 N. E. 766 (1896) (chloral instead of distilled water); *Travelers' Ins. Co. v. Dunlap*, 59 Ill. App. 515, 160, Ill. 642, 43 N. E. 765 (1896) (accidental taking of carbolic acid). But see *Miller v. Ft. Wayne Mercantile Acc. Ass'n*, 153 N. E. 427 (Ind. App. 1926), commented on (1926) 12 St. L. L. Rev. 146; (1926) 13 VA. L. REV. 238; (1926) 25 MICH. L. REV. 309.

¹² *American Acc. Co. v. Reigert*, 94 Ky. 547, 23 S. W. 191, 42 Am. St. Rep. 374, 21 L. R. A. 651 (1893) (suffocation caused by piece of beefsteak lodging in windpipe); *Gohlke v. Hawkeye Com. Men's Ass'n*, 198 Iowa 144, 197 N. W. 1004, 35 A. L. R. 1177 (1924) (strangulation produced by effervescence of sal hepatica swallowed dry).

¹³ *U. S. Mut. Acc. Ass'n v. Barry*, *supra* note 3.

recovers taxes, and defendants take nothing by their counterclaim.¹

Generally the value of benefits conferred by one who is party to an illegal contract may not be recovered in quasi contract.² An exception exists in the case of a private corporation, where the illegality consists solely in the fact that the contract is *ultra vires*.³ But this exception does not apply to municipal corporations, because of a supposed policy that taxpayers should be relieved from the consequences of official misconduct.⁴ This view, while well established, is open to the counter suggestion that to permit recovery might awaken the voters to their duty to select responsible officers.⁵ And recovery has been allowed where it would not burden the taxpayers,⁶ or where the statute contravened by the contract is so formal that its violation is without substantial effect.⁷ The instant case is clearly correct, in that the prohibitions against the contract were not of the latter class.⁸ It would seem, however, to be of no moment whether the contract is *ultra vires* or irregular.⁹ That distinction is unnecessarily emphasized in the opinion.

However, the instant case seems to present a more fundamental reason for denying recovery on the count in quantum meruit. Private owners develop their property patently for their own gain. No benefit is conferred on the municipality, distinguishable from that incidentally and inevitably accruing from the normal carrying out of any constructive private enterprise. It is not, therefore, inequitable for the city to retain such a benefit.¹⁰

J. H. CHADBOURN.

¹ *City of Bristol v. Dominion National Bank*, 149 S. E. 632 (Va. 1929).

² *Edwards v. City of Goldsboro*, 141 N. C. 60, 53 S. E. 652, 4 L. R. A. (N. S.) 589 (1906). As to recovery where the contract is within the Statute of Frauds, see *Carter v. Carter*, 182 N. C. 186, 108 S. E. 765, 17 A. L. R. 945 (1921).

³ *Howard & Foster Co. v. Citizens National Bank of Union*, 133 S. C. 202, 130 S. E. 758 (1925); *WOODWARD, QUASI CONTRACTS* (1913) §160.

⁴ *Thomas v. City of Richmond*, 79 U. S. 349, 20 L. ed. 453 (1870); *Litchfield v. Ballou*, 114 U. S. 190, 5 S. Ct. 820, 29 L. ed. 132 (1884); *Burgin v. Smith*, 151 N. C. 561, 66 S. E. 607 (1909); Note (1904) 4 *Col. L. Rev.* 67.

⁵ Knowlton, *Quasi Contracts of Municipalities*, (1911) 9 *MICH. L. REV.* 671-681.

⁶ *Butts County v. Jackson Banking Co.*, 129 Ga. 801, 60 S. E. 149 (1908).

⁷ *Webb v. Wakefield Township*, 239 Mich. 521, 215 N. W. 43 (1927), commented on in (1928) 26 *MICH. L. REV.* 335; *Laird Norton Yards v. Rochester*, 117 Minn. 114, 134 N. W. 644, 4 L. R. A. (N. S.) 473 (1912).

⁸ *Cawker v. Central Bitulithic Paving Co.*, 140 Wis. 25, 121 N. W. 888 (1909), (competitive bidding). *Beebe v. Sullivan County*, 64 Hun. 377, 19 N. Y. Supp. 629 (1892), (interest of councilman).

⁹ 3 *McQUILLAN, MUNICIPAL CORPORATIONS* (2nd ed. 1928) §1274; (1922) 31 *YALE L. J.* 779.

¹⁰ *WOODWARD, op. cit. supra* note 3, §7.

REAL PROPERTY—PARTITION SALE AS JUDICIAL SALE NOT EXECUTION SALE—TITLE ACQUIRED BY PURCHASER—In *Perry V. Wiggins*¹ a purchaser at a duly decreed partition sale discovered that the title was defective after the sale and before the court confirmed it. The deed purported to convey a fee-simple. The commissioners retained the purchase money, awaiting the confirmation. Summons had not been served on four parties who owned an interest in the land, one of whom filed a petition that her interest be not sold. The court affirmed a decision that the parties be restored to their original status quo.

A judicial sale is one made, under the process of a court having jurisdiction to order it, by an officer appointed and commissioned to sell. In an execution sale the contract is between the parties. In common law jurisdictions the purchaser acquires only such interest as the judgment debtor possessed,² taking merely a quit-claim of the execution debtor's title,³ without warranty,⁴ so that if the judgment debtor had nothing, the purchaser acquires nothing.⁵ North Carolina provides that the purchaser may sue the defendant who has no title for the amount paid, but not the sheriff or plaintiff in execution.⁶ On the other hand, in judicial sales, the court has entire control over the contract. It considers the contract as made with itself, or by the parties under the direction of the court, and will interfere, under equitable circumstances, to relieve the purchaser where it would not in a private contract.⁷

It has been broadly stated that the purchaser at a partition sale buys at his own peril,⁸ and certainly acquires only such title as was in the parties to the partition proceeding.⁹ However, the doctrine of caveat emptor has been somewhat relaxed with regard to judicial sales.¹⁰ The purchaser has only the duty to examine the record of the proceedings and to ascertain that the officer has authority to

¹ 197 N. C. 502, 149 S. E. 729 (1929).

² *Frost v. Yonkers Bank*, 70 N. Y. 553, 26 Am. Rep. 627 (1877); *Boggs v. Fowler*, 16 Cal. 559, 76 Am. Dec. 561 (1860).

³ *Gonce v. McCoy*, 101 Tenn. 587, 49 S. W. 754 (1898).

⁴ *Davis v. Murray*, 2 Mill Const. (S. C.) 143, 12 Am. Dec. 661 (1818).

⁵ *Sanborn v. Kittredge*, 20 Vt. 632, 50 Am. Dec. 58 (1847).

⁶ N. C. Cons. Stat. Ann. (1919) §685.

⁷ *The Monte Allegre*, 9 Wheat. 616, 6 Sup. Ct. 213, 6 L. ed. 174 (1824); *Smith v. Brittain*, 38 N. C. 347, 42 Am. Dec. 175 (1844).

⁸ *Holt v. Love*, 63 Tex. Civ. App. 65, 131 S. W. 857 (1910), 33 L. R. A. (N. S.) 409.

⁹ *Ruf. v. Mueller*, 49 Ind. 7, 96 N. E. 612 (1911).

¹⁰ *Eccles v. Timmons*, 95 N. C. 540 (1886).

sell.¹¹ The purchaser is bound to take such title as an examination of the proceedings show that he will get.¹² But where the pleadings and the proceedings purport to sell a perfect title, he will not be required to take the land, if the title is imperfect.¹³ The purchaser is entitled to be relieved from his purchase if he was not fairly apprised of defects in the title.¹⁴

The interests of parties not represented in the partition proceedings are not affected by a judicial sale and they become tenants in common with the purchaser in the land.¹⁵ Such a defect of parties will entitle the purchaser to recover the sum he has paid.¹⁶ If the proceedings purport to offer a fee-simple, the buyer will not be compelled to complete the purchase, unless a title which is good both in law and equity can be given.¹⁷ Nor is he bound if the title be doubtful, exposing him to the hazard of litigation with parties not before the court.¹⁸ It has been held that the purchaser is entitled to a marketable title and should not be forced to take any other.¹⁹

In England and Canada the courts undertake to sell a good title. The custom is to allow the purchaser a reasonable time within which to examine the title and if it is defective, he may be released from his bid.²⁰

The instant case is well substantiated in this jurisdiction.²¹

C. E. REITZEL.

TAXATION—INCOME TAX—PAYMENT OF TAX ON SALARY BY EMPLOYER AS INCOME TO EMPLOYEE—In *Old Colony Trust Co. v. Commissioner of Internal Revenue*¹ the American Woolen Co. paid in 1919 and 1920 the income taxes of its officers, pursuant to a resolution passed in 1916 "to the end that said persons and officers shall

¹¹ *Buell v. Kanamba Lumber Corp.*, 185 Fed. 109 (C. C. A. 4th 1911).

¹² *Podesta v. Binns*, 69 N. J. Eq. 387, 60 Atl. 815 (1905).

¹³ *Eccles v. Timmons*, *supra* note 10.

¹⁴ *Remsen v. Storm*, 157 N. Y. 705, 52 N. E. 1124 (1898).

¹⁵ *Bowler v. Ennis*, 46 App. Div. 309, 61 N. Y. S. 686 (1899).

¹⁶ *Handy v. Waxter*, 75 Md. 517, 23 Atl. 1035 (1892); *In re Callahan*, 176 App. Div. 906, 162 N. Y. S. 1113 (1917).

¹⁷ *Morris v. Mowatt*, 2 Paige 586, 22 Am. Dec. 661 (N. Y. 1831).

¹⁸ *McCaffrey v. Little*, 20 Ct. of App. D. C. 116 (1902).

¹⁹ *Wonser v. De Nyse*, 188 N. Y. 378, 80 N. E. 1088 (1907); *Crowley v. O'Neil*, 271 Fed. 379 (Ct. of App. D. C. 1921).

²⁰ *Freeland v. Pearson*, L. R. 7 Eq. 246 (1867); *Else v. Else*, L. R. 13 Eq. 196 (1868); *Street v. Hallet*, 6 Ont. Pr. 312 (1871).

²¹ *Eccles v. Timmons*, *supra* note 10; *Carraway v. Stancill*, 137 N. C. 472, 49 S. E. 957 (1905); *Edney v. Edney*, 80 N. C. 81 (1879); *Shields v. Allen*, 77 N. C. 375 (1877).

¹ 279 U. S. 716, 49 Sup. Ct. 499, 73 L. ed. 918 (1929).

receive their salaries or other compensation in full without deduction on account of income taxes." It was contended by the Commissioner that such payment was to the officers additional income on which additional taxes were due under the Revenue Act of 1918.² The Board of Tax Appeals sustained this contention, and the Supreme Court, on certificate from the Circuit Court of Appeals,³ affirmed the decision.

"Income" has been defined in all of the Revenue Acts to include "gains or profits and income derived from any source whatever,"⁴ and by the courts it has uniformly been given its common, ordinary meaning, and not a technical one.⁵ The Revenue Acts contemplate receipt of income by the taxpayer within the taxable period,⁶ with the qualification that it may be constructively as well as actually received.⁷ The payment, for a consideration, by one person to a third party of the obligation of the person taxed is generally considered as income to the latter, the typical situation being the payment by a lessee of interest to the bondholders or of dividends to the stockholders of a lessor.⁸ In the case of bonds containing tax-free covenants⁹ the tax levied at the source and paid by the covenantor is held not to constitute additional income to the obligee;¹⁰ however,

² 40 Stat. 1058 (1918). At the present time incomes are taxed under the Revenue Act of 1928 (45 Stat. 795).

³ 33 F. (2d) 889 (C. C. A. 1st, 1928).

⁴ Revenue Act of 1918, *supra* note 2, §213 (a); Revenue Act of 1928, *supra* note 2, §22 (a); see BARTON AND BROWNING, FEDERAL INCOME AND ESTATE TAX LAWS (4th ed. 1929) 28, 30, 31.

⁵ Merchant's Loan and Trust Co. v. Smietanka, 255 U. S. 509, 41 Sup. Ct. 386, 65 L. ed. 751 (1921); Gavit v. Irwin, 275 Fed. 643, 645 (N. D. N. Y. 1921).

⁶ Revenue Act of 1918, *supra* note 2, §213 (a) (2); Revenue Act of 1928, *supra* note 2, §42; Regulations 74, Art. 331.

⁷ HOLMES, FEDERAL TAXES (6th ed. 1925) §263.

⁸ U. S. v. Western Union Telegraph Co., 19 F. (2d) 157 (S. D. N. Y. 1926); Rensselaer & S. R. Co. v. Irwin, 249 Fed. 726 (C. C. A. 2d, 1918); West End St. Ry. Co. v. Malley, 246 Fed. 625 (C. C. A. 1st, 1917); Blalock v. Georgia Ry. & Electric Co., 246 Fed. 387 (C. C. A. 5th, 1917).

⁹ "In any case where bonds, mortgages, or deeds of trust, or other similar obligations of a corporation contain a contract or provision by which the obligor agrees to pay any portion of the tax imposed by this title upon the obligee, or to pay the interest without deduction for any tax which the obligor may be required or permitted to pay thereon or to retain therefrom under any law of the United States, the obligor shall deduct and withhold a tax equal to two per cent of the interest upon such . . . obligations." Revenue Act of 1918, *supra* note 2, §221 (b).

¹⁰ Duffy v. Pitney, 2 F. (2d) 230 (C. C. A. 3d, 1924); Heller v. Commissioner of Internal Revenue, 10 B. T. A. 53 (1928). *Contra*: Massey v. Lederer, 277 Fed. 123 (E. D. Penn. 1921). The view of Duffy v. Pitney, *supra*, was adopted in the Revenue Act of 1921 (42 Stat. 227), §234 (a) (3), and it has remained unchanged in the subsequent Acts; see BARTON AND BROWNING, *op. cit. supra* note 4, at 56 and 57.

this holding does not conflict with the general rule above. The tax upon this type of bond is imposed by law upon the covenantor, while in the normal case it results from the contract of the parties and its payment is in the nature of compensation for the use of property. The Supreme Court in the companion-case to the one under discussion held payment by a lessee, under the terms of a lease, of income taxes assessed against the lessor to be additional taxable income to the lessor.¹¹ Payment of taxes cannot be distinguished from the discharge by the lessee of other of the lessor's obligations.¹² Similarly, with the payment, pursuant to an agreement, by the employer of income taxes assessed against its employees.

The value of property acquired by gift is exempt from income tax,¹³ but the payment of money to or for another, when made for services rendered or other valuable consideration, is not a gift.¹⁴ The rendition of services constituted the consideration in the present case.

The effect of the possibility that the payment by the employer of the additional tax would create more income on which more tax would be due, and so on *ad infinitum*, has never been decided by

¹¹ U. S. v. Boston & M. R. R. 279 U. S. 732, 49 Sup. Ct. 505, 73 L. ed. 929 (1929). *Accord*: Old Colony R. R. Co. v. Commissioner, B. T. A. Docket No. 18813, Nov. 19, 1929.

¹² In all such cases the payment is made as a part of the compensation for the use of property and, although it does not pass through the lessor's hands, is made for his benefit. This is as truly a part of the income from the property as would be a payment of an equal amount made directly to the lessor. Appeal of Providence & Worcester R. R. Co., 5 B. T. A. 1186 (1927). *Contra*: Boston & M. R. R. v. U. S., 23 F. (2d) 343 (D. C. Mass. 1927), (1928) 41 HARV. L. REV. 801 (overruled by U. S. v. Boston & M. R. R., *supra* note 11), where the court, while admitting that such payment was income to the lessor, denied that this was taxable to him on the ground that he derived no gain therefrom.

¹³ Revenue Act of 1918, *supra* note 2, §213 (b) (3); Revenue Act of 1928, *supra* note 2, §22 (b) (3); U. S. v. Merriam, 263 U. S. 179, 44 Sup. Ct. 69, 68 L. ed. 240, 29 A. L. R. 1547 (1923); see John M. Maguire, *Capitalization of Periodical Payments by Gift* (1920) 34 HARV. L. REV. 20; Roswell Magill, *Income Tax Liability of Annuities* (1924) 33 YALE L. J. 229.

¹⁴ Noel v. Parrott, 15 F. (2d) 669 (C. C. A. 4th, 1926), holding as taxable income an amount paid to a general superintendent and director of a corporation under a resolution of the directors. Jones v. Commissioner of Internal Revenue, 31 F. (2d) 755 (C. C. A. 3d, 1929), is a similar case, in which the decision that the payment by the corporation to certain members of its administrative staff constituted a gift was distinguished from the Noel case, *supra*, on the ground that payment was not out of the assets of the corporation but was a result of the sale of stock, and consequently was out of the assets of the stockholders.

the courts.¹⁵ The difficulty of computation would not make such a result fatal to the tax,¹⁶ however, and, since it would seem to be a natural consequence of the contract of the parties, the latter should not be heard to complain.¹⁷

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¹⁵ It has been suggested that this point will not arise for determination, because of the Commissioner's practice of considering as income only the tax assessed on the employee's original return. *U. S. v. Norwich & W. R. Co.*, 16 F. (2d) 944 (D. C. Mass. 1926).

¹⁶ *Boston & M. R. R. v. U. S.*, *supra* note 12.

¹⁷ *Appeal of Providence & Worcester R. R. Co.*, *supra* note 12.