Notes and Comments

North Carolina Law Review

fessor Coates is on leave this fall in connection with his Institute of Government. Mr. J. H. Chadbourn has completed his study of Lynching and the Law and is now devoting his full time to the School as an assistant professor in charge of the courses in Legal Ethics, Civil Procedure One, Evidence and Federal Procedure, and as faculty editor of the NORTH CAROLINA LAW REVIEW. He is the first graduate of the School to hold the latter position.

Visiting professors in the summer session of 1932 included James M. Landis of Harvard, Henry Rottschaefer of Minnesota, Bryant Smith of Texas and Dean Julian S. Waterman of Arkansas. The attendance the first term was normal but there was a decrease in the registration for the second term. All of the students certified by the School successfully passed the State Bar examination held in August.

Professor Breckenridge spent the summer in Washington, engaged in research for the Interstate Commerce Committee of the House of Representatives. Dean Van Hecke taught the subject of Contracts in the summer session of the Law School of Northwestern University.

During the last school year the Law School prepared nine research reports at the request and for the use of the Constitutional Revision Commission.

NOTES AND COMMENTS

Corporations—Agreement to Repurchase Own Stock.

A Virginia corporation, through its chief executive officer, sold shares of its stock to plaintiff with a written agreement to repurchase the stock at the same price at any time the owner desired to sell. In an action for breach of the contract to repurchase, it was held that, since the corporation had power to purchase its own stock, it was liable to the extent of the full purchase price.[1]

Authorities are divided as to the inherent power of a corporation to purchase its own shares. The English and minority American view is that, in the absence of statutory authority, a corporation has no power to purchase its own shares.[2] The theory is that such pur-

[1] Grace Securities Corporation v. Roberts, 164 S. E. 700 (Va. 1932).

[2] Trevor v. Whitworth, 12 App. Cas. 409 (1887); *In re* London, H. & C. Exch. Bank, 5 Ch. App. 444 (1870); Cartwright v. Dickenson, 88 Tenn. 479, 12 S. W. 1030 (1890); Hall & Farley v. Ala. Terminal & Improvement Co., 143 Ala. 464, 39 So. 285 (1905); Wilson v. Torchon Lace & Mercantile Co., 167 Mo. App. 305, 149 S. W. 1156 (1912); Bear Creek Lumber Co. v. Second Nat.

chase is *ultra vires,* because it is an unauthorized trafficking in the shares, or an illegal reduction of the capital stock.[3] A substantial American majority, including North Carolina,[4] holds that such a power, in the absence of statutory or charter restrictions, is not *ultra vires,* and that it may be exercised where there is no fraud or prejudice to the rights of creditors.[5] These courts generally hold that the purchase must be made from surplus funds and not from capital stock funds.[6] Some states have statutes prohibiting the purchase by a corporation of its own stock.[7] Other states expressly

Bank of Cumberland, 120 Md. 566, 87 Atl. 1084 (1913); 2 FLETCHER, CYC. CORP. (1917) §§1134-5. Several exceptions are recognized. Thus, a corporation may take its own stock as security for an antecedent debt. Draper v. Blackwell, 138 Ala. 182, 35 So. 110 (1903). Or in compromise of a disputed claim or a hopeless debt. State v. Oberlin Bldg. Ass'n., 35 Ohio St. 258 (1879). Or in case of the involvency of its debtor. Morgan v. Lewis, 46 Ohio St. 1, 17 N. E. 558 (1888). Or by way of gift or devise. 3 Gratt. (Va.) 19, 46 Am. Dec. 183 (1846).

[3] The leading case of Trevor v. Whitworth, *supra* note 2, lays down these reasons which have been generally followed. If the corporation plans to reissue the shares, it is an unauthorized trafficking in its shares; if it does not plan to reissue them, it is an illegal reduction of its capital stock.

[4] Blalock v. Kernersville Mfg. Co., 110 N. C. 99, 14 S. E. 501 (1891); Thompson v. Shepherd, 203 N. C. 310, 165 S. E. 796 (1932); see Heggie v. Peoples' Bldg. & Loan Ass'n., 107 N. C. 582, 596, 12 S. E. 275, 279 (1890).

[5] Johnson County v. Thayer, 94 U. S. 631, 24 L. ed. 133 (1876); Republic Life Ins. Co. v. Swigert, 135 Ill. 150, 25 N. E. 680, 12 L. R. A. 328 (1890); New England Trust Co. v. Abbott, 162 Mass. 148, 38 N. E. 432, 27 L. R. A. 271 (1894); Dock v. Schlicter Jute Co., 167 Pa. 370, 31 Atl. 656 (1895); U. S. Mineral Co. v. Camden & Driscoll, 106 Va. 663, 56 S. E. 561 (1907); Tierney v. Butler, 144 Iowa 553, 123 N. W. 213 (1909); Gilchrist v. Highfield, 140 Wis. 476, 123 N. W. 102 (1909); Dalton Grocery Co. v. Blanton, 8 Ga. App. 809, 70 S. E. 183 (1911); *In re* International Radiator Co., 10 Del. Ch. 358, 92 Atl. 255 (1914); 5 THOMPSON, CORPORATIONS (3d ed. 1927) §4081.

[6] The theory that the capital stock of a corporation becomes a trust fund for the benefit of creditors upon the insolvency of the corporation has been generally recognized. 91 U. S. 45, 23 L. ed. 203 (1875); Sanger v. Upton, 91 U. S. 56, 23 L. ed. 220 (1875); Hamor v. Taylor-Rice Eng. Co., 84 Fed. 392 (C. C. Del. 1897). Thus, under either rule, the purchase is invalid where the capital stock is impaired, or where the corporation is insolvent, or the effect of the purchase is to render the corporation insolvent. *In re* Tichenor Grand Co., 203 Fed. 720 (S. D. N. Y. 1913); Coleman v. Tepel, 230 Fed. 63 (C. C. A. 4th, 1916); Crandal v. Lincoln, 52 Conn. 73, 52 Am. Rep. 560 (1884); *In re* Columbian Bank, 147 Pa. 422, 23 Atl. 625 (1892); Olmstead v. Vance & Jones Co., 196 Ill. 236, 63 N. E. 634 (1902). Generally, a purchase will be sustained where the corporation has sufficient surplus at the time of the purchase. *Contra: In re* Fechheimer-Fischel Co., 212 Fed. 357 (C. C. A. 2d, 1914), which holds that although there is a surplus at the time of the purchase, if when the purchase price becomes due there is not sufficient surplus, the purchase will not be sustained. This holding has received little support, and has been adversely criticized. Note (1914) 14 COL. L. REV. 451; Note (1914) 27 HARV. L. REV. 747.

[7] WYO. COMP. STAT. ANN. (1920) §5056; KY. STAT. (Carroll, 1930) §544. Other states have statutes which, though they contain no express prohibition, have been construed as having such. Steele v. Farmers' & Merchants' Mutual

authorize such purchase under certain restrictions.[8] Sound arguments can be made to sustain both views.[9] Commentators, as well as the courts, are in direct conflict.[10] The modern trend seems to be toward the majority American view, and there is some evidence that modern business approves of the practice.[11]

The courts are likewise divided upon the validity of an agreement by a corporation to repurchase stock from a stockholder who has bought with such an understanding.[12] Courts following the

Tel. Ass'n., 95 Kan. 580, 148 Pac. 661 (1915); Williams v. Md. Glass Corp., 134 Md. 320, 106 Atl. 755 (1919); Simonds v. Noland, 142 Wash. 423, 253 Pac. 638 (1927). By U. S. REV. STAT. §5201, 12 U. S. C. A. §83 (1927) national banks are expressly prohibited from purchasing their own stock.

[8] "If the capital is not impaired thereby," DEL. REV. CODE (1915) §1923; COLO. ANN. STAT. (Mills, 1927) §996. "Out of surplus," FLA. COMP. LAWS (1927) §6534; LA. LAWS (1928) Act 250, §23. "Out of surplus profits," N. D. COMP. LAWS ANN. (1913) §4531. The Ohio corporation act as amended in 1929 contains elaborate provisions on the subject. OHIO GEN. CODE (Throckmorton, 1929) §§8623-8641. The New York penal law makes it a misdemeanor for directors to apply any but surplus funds to the purchase. N. Y. PENAL LAW (1930) §664(5).

[9] Arguments for giving corporations such power: (1) gives the corporation greater flexibility; (2) enables corporations to remove undesirable stockholders; (3) allows for employee stock-holding schemes. See as an excellent article sustaining such power, Wormser, *The Power of a Corporation to Acquire Its Own Stock* (1915) 24 YALE L. REV. 177. Arguments against giving corporation such power: (1) enables corporation to speculate in its own stock; (2) permits preferences to favored stockholders; (3) provides illegal method for reducing capital stock; (4) gives opportunity for abuse in corporate management. See Levy, *Purchase By a Corporation of Its Own Stock* (1930) 15 MINN. L. REV. 1.

[10] *Pro:* 2 COOK, CORPORATIONS (8th ed. 1923) §§311-13; 2 FLETCHER, CYC. CORP. (1917) §1136. *Con:* 1 MACHEN, MODERN LAW OF CORPORATIONS (1908) §§626-30; GREEN'S BRICE, ULTRA VIRES (2d ed. 1880) §95. Thompson and Ballantine seem impartial. See 5 THOMPSON, *op. cit. supra* note 5, §§4081-99; BALLANTINE, CORPORATIONS (1927) §66.

[11] An examination of recent corporate balance sheets shows that a large number of corporations carry treasury stock either at cost or at market. See report of an address before the New York State Bankers' Association by Mr. J. Stewart Baker, president of the association, in The Washington Star of June 14, 1932, urging corporations to utilize surplus cash for the purchase of their securities at this time to check further declines. But see an article in The Chicago Tribune of Feb. 22, 1932, commenting on Wall Street brokers' statements that such practice leads to many abuses. See full page advertisement in U. S. Daily, Nov. 14, 1932, at 1657, and an article in Baltimore Sun, Nov. 16, 1932, indicating possible abuses.

[12] Agreements to repurchase stock sold by a corporation must be distinguished from subscriptions to stock made with a secret agreement whereby the subscriber is given the privilege of returning the stock and recovering the money paid thereon. The former pertains to property belonging entirely to the corporation and may be dealt with as the company sees fit, just as any other chattel which it might own. The latter type of agreement is definitely tied up with the rights of subscribers as a whole, and any such secret agreement is a fraud on them, and is uniformly held to be unenforceable. Burke v. Smith, 16 Wall. 390, 21 L. ed. 361 (1872); Scovill v. Thayer, 105 U. S. 143, 26 L. ed.

American view uniformly hold that such a repurchase agreement is valid and enforceable where the purchase does not impair the capital stock.[13] On the other hand, possibly a majority of the courts which follow the English view that a corporation has no power to purchase its own stock, nevertheless uphold the validity of repurchase agreements.[14] Such a holding is explained by a variety of reasons. Some courts hold that a sale with a repurchase agreement is conditional.[15] Since the purchaser does not get an absolute title, there is no sale, and hence, no illegal purchase by the corporation. Other courts hold that the contract of sale and repurchase is one entire contract; therefore, the corporation cannot repudiate the repurchase agreement and ratify the sale, but is liable for the purchase price as for money had and received.[16] Other jurisdictions, even where there are statutes prohibiting corporations from purchasing their own stocks, construe the prohibition as not applying to treasury stock as distinguished from stock of the original issue.[17]

968 (1881); Marles Carved Moulding Co. v. Stulb, 215 Pa. 91, 64 Atl. 431 (1906); Sarbach v. Kansas Fiscal Agency Co., 86 Kan. 734, 122 Pac. 113 (1912); Boushall v. Stronach, 172 N. C. 273, 90 S. E. 198 (1916); 2 FLETCHER, CYC. CORP. (1917) §§606, 607.

[13] Vent v. Duluth Coffee & Spice Co., 64 Minn. 307, 67 N. W. 70 (1896); Fremont Carriage Co. v. Thomsen, 65 Neb. 370, 91 N. W. 376 (1902); Wisconsin Lumber Co. v. Greene & Western Tel. Co., 127 Iowa 350, 101 N. W. 742, 69 L. R. A. 968 (1904); Watson v. Virginia-Carolina Lumber Co., 93 S. C. 1, 75 S. E. 1020 (1912); Paulsen v. Weeks, 80 Ore. 468, 157 Pac. 590 (1916); 5 THOMPSON, *op. cit. supra* note 5, §4086. Of course, in order to hold a corporation on an agreement to repurchase, it must be established that the agent was authorized to make such an agreement, or that the corporation ratified the act. Ordinarily, the managing officers of a corporation may bind it on a contract of repurchase. Phillips v. Riser, 8 Ga. App. 634, 70 S. E. 79 (1911); Trenholm v. Kloepper, 88 Neb. 236, 129 N. W. 436 (1911); Murray v. Standard Pecan Co., 309 Ill. 226, 140 N. E. 834 (1923); 5 THOMPSON, *loc. cit. supra*. If the length of the option is specified in the agreement, it must be exercised within a reasonable time after the expiration of the agreed period. New Haven Trust Co. v. Gaffney, 73 Conn. 480, 47 Atl. 760 (1901). If no time is fixed (as in the principal case) the purchaser must exercise his right within a reasonable time. Roush v. Ill. Oil Co., 180 Ill. App. 346 (1913).

[14] Ophir Consol. Mines Co. v. Brynteson, 143 Fed. 829 (C. C. A. 7th, 1906); Schulte v. Blvd. Gardens Land Co., 164 Cal. 464, 129 Pac. 582, 44 L. R. A. (N. S.) 156 (1913); Mulford v. Torrey Exploration Co., 45 Colo. 81, 100 Pac. 596 (1909); Latulippe v. New England Inv. Co., 77 N. H. 31, 86 Atl. 361 (1913); Simonds v. Noland, Williams v. Md. Glass Corp., both *supra* note 7.

[15] Ophir Consol. Mines Co. v. Brynteson, Mulford v. Torrey Co., both *supra* note 14; Williams v. Md. Glass Corp., *supra* note 7; Lyons v. Snider, 136 Minn. 252, 161 N. W. 532 (1917).

[16] Porter v. Plymouth Gold Min. Co., 29 Mont. 347, 74 Pac. 938 (1904); Latulippe v. New England Inv. Co., *supra* note 14; Griffin v. Bankers' Realty Inv. Co., 105 Neb. 419, 181 N. W. 169 (1920).

[17] Kom v. Cody Detective Agency, 76 Wash. 540, 136 Pac. 1155, 50 L. R. A. (N. S.) 1073 (1913); Wilson v. Torchon Lace & Mercantile Co., *supra* note

Only a very few jurisdictions hold that such repurchase agreements are unenforceable.[18] No case has been found in North Carolina involving a repurchase agreement, but since this jurisdiction permits a corporation to purchase its stock,[19] there seems little doubt that the Supreme Court will hold such an agreement valid.

This apparent effort of the courts to give effect to repurchase agreements can perhaps be explained by the general desirability and usefulness of such agreements. They form a necessary adjunct to most employee stock-holding schemes, enabling employees to share in the profits of the business.[20] Further, this type of agreement aids in inducing otherwise reluctant investors to purchase corporate stock.[21] Undoubtedly, however, opportunity is given for the creation of a favored class of stockholders to the possible detriment of non-assenting stockholders.[22] Such a possibility is well illustrated in the principal case, where the favored stockholder is allowed to dispose of his stock to the corporation at a price five times greater than the market value. If the stockholders consider such discrimination unfair, they should be allowed to prevent it by a specific corporate by-law or charter restriction; for a general legislative prohibition, in attempting to stamp out possible abuses, would make unavailable the beneficial effects of repurchase agreements.

ROBERT A. HOVIS.

Husband and Wife—Presumptions—Transfer of Property From Wife to Husband.

Husband and wife owned land; the profits therefrom and the proceeds of a sale of it were invested by the husband in his business. After judgment against him by a creditor, the husband executed a

2; Mulford v. Torrey Exploration Co., *supra* note 14. See Note (1927) 36 MICH. L. REV. 790 at 794 to the effect that such a distinction is not generally recognized.

[18] Civil Service Inv. Ass'n. v. Thomas, 138 Tenn. 77, 195 S. W. 775 (1917); Morril v. Mastin, 23 N. M. 563, 170 Pac. 45 (1918); Pothier v. Reid Air Spring Co., 103 Conn. 380, 130 Atl. 383 (1925). But *cf.* Topken, Loring & Schwartz, Inc. v. Schwartz, 249 N. Y. 206, 163 N. E. 735 (1928).

[19] Cases cited *supra* note 4.

[20] Levy, *supra* note 9, at 2 and 32; Fordham, *Some Legal Aspects of Employee Stock Purchase Plans* (1930) 8 N. C. L. REV. 161.

[21] It is obvious, of course, that a purchase with such an agreement presents an attractive investment, for it gives the purchaser an opportunity to escape what might be a bad investment. Vent v. Duluth Coffee & Spice Co., *supra* note 13; Schulte v. Blvd. Gardens Land Co., *supra* note 14.

[22] Levy, *supra* note 9, at 7 and 34. The author severely criticizes such stock-selling schemes, pointing out the abuses which are often attendant upon such practices.

deed of trust to secure the alleged debt due the wife. In a creditor's suit to set aside the trust deed, *held,* the decree of the lower court adjudging the trust deed valid and dismissing the bill was error, for a presumption of a gift to the husband arises and the burden is upon the wife to show a loan and a contemporaneous promise on his part to pay the debt.[1]

At common law, the attempted contracts of a married woman were absolutely void, with few exceptions.[2] Likewise, gifts[3] between husband and wife were generally void.[4] But modern statutes[5] have greatly modified common law rules, so that now spouses may make gifts to each other as though the marriage relation were non-existent,[6] if not made to defraud creditors.[7] Such transactions are,

[1] Brunswick Bank & Trust Co. v. Valentine, 164 S. E. 569 (Va. 1932).

[2] TIFFANY, DOMESTIC RELATIONS (3d ed. 1921) 156; BINGHAM, THE LAW OF INFANCY AND COVERTURE (1849) 181: "Married women are by the law of England, subject, in matters of contract, to a greater disability even than infants; (a) for the contracts of an infant are, as hath been shewn, for the most part only voidable, while those of married women are, with few exceptions, absolutely void."

[3] To constitute a valid gift there must be an intention of the donor to give, acceptance by the donee and delivery of the article given. Helmer v. Helmer, 159 Ga. 376, 125 S. E. 849 (1924), 37 A. L. R. 1137 (1925); Atchley v. Rimmer, 148 Tenn. 303, 255 S. W. 366 (1923), 30 A. L. R. 1481 (1924). Generally, transfer of money or other property by a debtor to one to whom he is indebted is presumed a satisfaction of the debt, not a gratuity; but an exception seems to have been made in case of a transfer by husband to wife. 71 A. L. R. 1024 (1931).

[4] LONG, DOMESTIC RELATIONS (3d ed. 1923) 245: "Thus, a gift of money by a husband to his wife is void at law, and as inoperative as a gift to himself"; 1 BRIGHT, LAW OF HUSBAND AND WIFE AS RESPECTS PROPERTY (1850) 29: "Upon the principle of union of husband and wife so as to be but one person, the husband could not by any common law conveyance give or grant any estate to the wife, either in possession, reversion, or remainder: and the same disability prevailed in regard to the wife."

[5] N. C. CODE ANN. (Michie, 1931) §§2506-2530 (married women's act of North Carolina); Murphy v. Wolfe, 45 S. W. (2d) 1079 (Mo. 1932); Taft v. Covington, 199 N. C. 51, 153 S. E. 597 (1930); LONG, *op. cit. supra* note 4, at 243; 1 SCHOULER, DOMESTIC RELATIONS (6th ed. 1921) 307: "Elevated to the pedestal of honor, and made the object of reverent esteem, if not idolatry, the wife stands perhaps as securely as she ever can upon the prosaic ground of legal equality"; TIFFANY, *op. cit. supra* note 2 at 159.

[6] Murphy v. Wolfe, *supra* note 5; Hillwood v. Hillwood, 159 Md. 167, 150 Atl. 286 (1930); Birkhauser v. Ross, 102 Cal. App. 582, 283 Pac. 866 (1929); Hendrix v. Bank of Portal, 169 Ga. 264, 149 S. E. 879 (1929); Barbee v. Harvey, 214 Ky. 461, 283 S. W. 442 (1926) ("The only difference between a gift by a wife to a stranger and one made to her husband consist *(sic)* not in her right to make one to her husband, but in the probative force of the evidence establishing such gift"); Moore v. Moore, 237 Ill. App. 190 (1925). In New Jersey a wife may not contract with her husband, but may make a gift to him. Young v. Gnichtel, 28 F. (2d) 789 (D. C. N. J. 1928).

[7] Birkhauser v. Ross; Moore v. Moore, both *supra* note 6.

however, viewed with suspicion.[8] As between husband and wife, a transfer by the wife to her husband of personalty[9] or realty,[10] will not usually be presumed to be a gift;[11] whereas in the case of a transfer by the husband to his wife, there is a presumption of a gift.[12]

[8] Hillwood v. Hillwood, *supra* note 6: "The law on this subject is familiar. It is that a wife may dispose of her property by gift to her husband as fully and effectually as if the transaction were between persons not occupying that relation, but, because of the natural dominance of the husband and the trust and confidence commonly incident to their union, the gift will be closely, carefully and vigorously investigated in a court of equity, and be annulled if obtained by fraud, coercion, misrepresentation or undue influence"; Hill v. Hill, 217 Ala. 235, 115 So. 258 (1928).

[9] Parker v. Staley, 21 S. W. (2d) 200 (Mo. App. 1929) (gift of note); Holohan v. McCarthy, 130 Ore. 577, 281 Pac. 178 (1929) (gift of furniture); Jent's Ex'rs v. Dodson, 220 Ky. 181, 294 S. W. 1052 (1927). Indorsement and delivery of stock by wife to husband, together with husband's testimony that it was a gift, is sufficient to authorize inference of gift. Mack v. Pardee, 39 Ga. App. 310, 147 S. E. 147 (1929). Advancement of money by wife to husband to permit him to purchase stock in his name is not presumed a gift. Gilbert v. Gilbert, 180 Ark. 596, 22 S. W. (2d) 32 (1929). Finding that prior to death wife transferred stock to her husband by signature shows a valid gift. Greer v. Stilwell, 184 Ark. 1102, 44 S. W. (2d) 1082 (1932).

[10] Hendrix v. Bank of Portal, *supra* note 6.

[11] Hendrix v. Bank of Portal, *supra* note 6, "The evidence to support it must be clear and unequivocal and the intention of the parties must be free from doubt"; Jent's Ex'rs v. Dodson; Gilbert v. Gilbert, both *supra* note 9.

[12] Where husband purchases property and takes title in his wife's name, there is a presumption of gift, not of trust. Nordquist v. Malmberg, 213 Cal. 394, 2 Pac. (2d) 334 (1931) (presumption not overcome by mere fact husband paid taxes and repairs alone); Hines v. Baker, 299 Pac. 5 (Colo. 1931); Swendick v. Swendick, 221 Ala. 337, 128 So. 593 (1930) ("The presumption that an advancement or gift was intended is not however a presumption of law, but one of fact, and may be overcome by proof of the real intent of the parties as reflected in the conditions and circumstances attending the transaction"); Holohan v. McCarthy, *supra* note 9; Wies v. O'Horow, 337 Ill. 267, 169 N. E. 168 (1929); Rosecrans v. Rosecrans, 99 N. J. Eq. 176, 132 Atl. 100 (1926). Presumption of gift of money by husband to wife, which she deposited in her name, may be overcome by parol. Monohan v. Monohan, 77 Vt. 133, 59 Atl. 169 (1904), 70 L. R. A. 935 (1905). Presumption may be overcome where facts show contrary intent. Fulbright v. Phoenix Ins. Co., 30 S. W. (2d) 870 (Mo. App. 1930). By statute in Georgia payment of purchase money by husband or wife with title in the other is presumed a gift. GA. CODE ANN. (Michie, 1926) §3740. But parol evidence is admissible to rebut the presumption. Romano v. Finley, 172 Ga. 366, 157 S. E. 669 (1931). Evidence that stock was transferred by husband to wife in order to secure a loan precludes presumption of gift, requiring wife to prove gift by convincing evidence. Platt v. Huegel, 326 Mo. 776, 32 S. W. (2d) 605 (1930). Where husband has deed made to himself and wife, spouses become tenants by entirety, and presumption is that husband took the deed as he did as gift to wife. Alexander v. Alexander, 44 S. W. (2d) 872 (Mo. App. 1932). Extent that the share of purchase money contributed by the husband exceeded the part contributed by the wife for land jointly, is presumed a gift. Coffman v. Coffman, 108 W. Va. 285, 150 S. E. 744 (1929). As to effect upon character of estate in entirety of the fact that one spouse already had an estate in the land, see Sprinkle v. Spainhour, 149 N. C. 223, 62 S. E. 910, 25 L. R. A. (N. S.) 167 (1908); Garris v.

A wife may make a valid loan to her husband[13] and, where there is an express promise by him to repay, the transaction is clearly a loan.[14] There is some conflict of authority, however, where the husband receives and uses his wife's money or other property without an express promise of repayment. One rule is that there arises a presumption of a loan.[15] Under this rule, one jurisdiction holds that a wife's laches in enforcing her equitable right to her property in her husband's hands will bar recovery as against a purchaser without notice of her rights.[16] The other rule is that there arises a presumption of a gift.[17] Under this rule, one jurisdiction holds that, where the wife voluntarily transfers property to her husband, which had been under her absolute control, a presumption of gift arises, but that, where property is in her husband's possession, which had

Tripp, 192 N. C. 211, 134 S. E. 461 (1926). As to whether husband may make parol gift of interest in land to wife, see 20 GEO. L. J. 533 (1931). Van Hecke and Lord, *Parol Trusts in North Carolina* (1929) 8 N. C. L. REV. 152. Savings of husband and wife invested in land in name of wife, presumed gift to wife. Beck v. Beck, 78 N. J. Eq. 544, 80 Atl. 550, 35 L. R. A. (N. S.) 712 (1911).

There is a presumption of gift in case of transfer by husband to wife because of his natural obligation to support her. Swendick v. Swendick, *supra* at 594.

[13] A wife, as creditor of her husband, is, in general, entitled to the same remedies and has the same standing to enforce any security for the payment of her husband's debt to her as any other creditor. Littler v. Jeffries, 36 Idaho 608, 212 Pac. 866 (1923); LONG, *op. cit. supra* note 4, at 248.

[14] Bast v. Bast, 68 Mont. 69, 217 Pac. 345 (1923); LONG, *op. cit. supra* note 4, at 248.

[15] Etheredge v. Cochran, 196 N. C. 681, 146 S. E. 711 (1929); Colangelo v. Colangelo, 46 R. I. 138, 125 Atl. 285 (1924) noted in (1924) 23 MICH. L. REV. 301; Gilmore v. Gilmore, 270 Fed. 260 (D. C. Mont. 1921); Stickney v. Stickney, 131 U. S. 227, 9 Sup. Ct. 677, 33 L. ed. 136 (1889); Parrett v. Palmer, 8 Ind. App. 356, 52 Am. St. Rep. 479 (1893). No presumption of gift where the wife furnishes purchase money for real estate with title taken in husband's name. Wright v. Wright, 242 Ill. 71, 89 N. E. 789 (1909), 26 L. R. A. (N. S.) 161 (1910). An agreement by the husband to invest separate property of the wife in land makes him trustee for her benefit. Sparks v. Taylor, 99 Tex. 411, 90 S. W. 485, 6 L. R. A. (N. S.) 381 (1906); Adoue v. Spencer, 62 N. J. Eq. 782, 49 Atl. 10, 90 Am. St. Rep. 484, 56 L. R. A. 817 (1902); Brown v. Wright, 58 Ark. 20, 22 S. W. 1022, 21 L. R. A. 467 (1893).

[16] Riley v. Martinelli, 97 Cal. 575, 32 Pac. 579, 33 Am. St. Rep. 209, 21 L. R. A. 33 (1893).

[17] Nelson v. Wilson, 81 Mont. 560, 264 Pac. 679 (1928) (and no contract or presumption to pay is implied). Conveyance by wife to husband presumed a gift. White v. Amenta, 110 Conn. 314, 148 Atl. 345 (1930); Hallahan v. Hamilton, 104 N. J. L. 632, 142 Atl. 27 (1928). Money of wife invested in land in husband's name, presumed a gift. Whitten v. Whitten, 70 W. Va. 422, 74 S. E. 237, 39 L. R. A. (N. S.) 1026 (1912). As against the husband's creditors, clear proof of the husband's prior or contemporaneous promise to repay money advanced him by the wife or to convey property to her is necessary to repel a presumption of gift. Am. Finance Co. v. Leedy, 163 S. E. 626 (W. Va. 1932).

never been under her control, a presumption of gift does not arise.[18] The use by the husband of income from the wife's separate estate is sometimes presumed a gift,[19] even in those jurisdictions where a transfer of other property of the wife is presumed to be a loan;[20] likewise, where either spouse improves realty of the other.[21]

The rule that a loan is presumed is based upon the realization that a wife commonly intrusts the management of her business to her husband,[22] and the rule that a gift is presumed, upon the contention that "emancipated" woman is afforded the same opportunity to protect her property rights as is her husband.[23]

It is submitted that the instant case is not in harmony with the true intent and purposes of the married women's acts, for it gives woman a legal equality which strips her of actual equality. If her husband gains control of her property, she has the burden of showing it was not given to him. The cases holding that a presumption of a loan arises recognize that husbands do use their position to gain control of property of their wives; and those cases protect the actual independence of the wife and her property by placing on the husband or his creditors the burden of showing it was given to him.

A. E. GARRETT, JR.

Injunctions—Prerequisites for Preliminary Mandatory Injunctions.

Petitioner, executor under a will, was removed for his refusal to comply with a court order to account for $80,000 worth of the estate's government bonds which he claimed to be his own. Upon

[18] Morris v. Westerman, 79 W. Va. 502, 92 S. E. 567 (1917), 3 A. L. R. 1237 (1919); 12 R. C. L. 928.

[19] Adoue v. Spencer, *supra* note 15.

[20] Colangelo v. Colangelo, *supra* note 15; Haymond v. Bledsoe, 11 Ind. App. 202, 38 N. E. 530, 54 Am. St. Rep. 502 (1894); Estate of Hauer, 140 Pa. 420, 21 Atl. 445, 23 Am. St. Rep. 245 (1891); 13 R. C. L. 1387; see Etheredge v. Cochran, *supra* note 15, at 685.

[21] Am. Finance Co. v. Leedy, *supra* note 17. Improvements made during marriage on separate property of either spouse, although with community funds, belong to spouse owning the separate property. Dunn v. Mullan, 211 Cal. 583, 296 Pac. 604 (1931), 77 A. L. R. 1015 (1932). Expenditures by either spouse on the other's property presumed gifts, therefore not basis for equitable lien. Nixon v. Nixon, 100 N. J. Eq. 437, 135 Atl. 516 (1927); Anderson v. Anderson, 177 N. C. 401, 99 S. E. 106 (1919). Husband's payment of mortgage indebtedness on property taken by entireties presumed gift so far as wife was relieved of contribution. Cunningham v. Cunningham, 158 Md. 372, 148 Atl. 444 (1930).

[22] Etheredge v. Cochran, *supra* note 15.

[23] Brunswick Bank & Trust Co. v. Valentine, *supra* note 17, at 571.

affidavits of petitioner's insolvency and fraudulent conduct, the court granted a preliminary mandatory injunction requiring petitioner to surrender the bonds to a receiver appointed by the court. The West Virginia Supreme Court of Appeals denied petitioner's application for a writ of prohibition to restrain the enforcement of the decree.[1]

Preliminary injunctions are issued for the purpose of preserving and protecting the *status quo* until final determination of the rights of the parties.[2] While a few cases hold that an interlocutory injunction can only be preventive or prohibitive,[3] it is generally held that equity may in a proper case thus compel the performance of an affirmative act.[4] But such power is never exercised, except in a case of urgent necessity where there is injury or prospective injury to a clear right and where there is no other adequate remedy for complainant, who has acted promptly and in good faith.[5] Conversely, where the propriety of the relief is doubtful it will be denied.[6]

Preliminary mandatory injunctions have been most frequently issued where an easement or right of way, or water course, public or private, has been unlawfully obstructed to complainant's irrep-

[1] State *ex rel.* Donley v. Baker, Judge, 164 S. E. 154 (W. Va. 1932).

[2] Toledo, etc., R. Co. v. Pennsylvania Co., 54 Fed. 730 (N. D. Ohio 1893), appeal dismissed, 150 U. S. 393, 14 Sup. Ct. 123, 37 L. ed. 1120 (1893); Powhatan Coal & Coke Co. v. Ritz, 60 W. Va. 395, 56 S. E. 257, 9 L. R. A. (N. S.) 1225 (1906); BISPHAM, PRINCIPLES OF EQUITY (10th ed. 1923) §400.

[3] In Audenreid v. Philadelphia etc., R. Co., 68 Pa. St. 370, 375, 8 Am. Rep. 195, 196 (1871), Judge Sharswood declared ". . . the authorities, both in England and this country, are very clear that an interlocutory or preliminary injunction cannot be mandatory." But see Klein, *Mandatory Injunctions* (1898) 12 HARV. L. REV. 95, where the author pictorially presents the case for preliminary mandatory injunctions, with especial emphasis on English cases.

World's Columbian Exposition Co. v. Brennan, 51 Ill. App. 128 (1893) (obstruction of public way); Rogers Locomotive Works v. Erie Ry. Co., 20 N. J. Eq. 379 (1869) (possible exception in case of obstruction to easement); to the effect that a court cannot compel the undoing of an act, see Washington Univ. v. Green, 1 Md. Ch. 97 (1847); Note (1890) 6 L. R. A. 855, 857.

As to statutory prohibition of mandatory injunctions, see GA. CODE ANN. (Michie, 1926) §5499. But see (1931) 17 VA. L. REV. 810, 813-814.

[4] Toledo, etc., R. Co. v. Pennsylvania Co., *supra* note 2; Pokegama Sugar-Pine Lumber Co. v. Klamath River Lumber Co., 86 Fed. 528 (C. C. N. D. Cal. 1898); Leakesville Mills v. Spray Water Power and Land Co., 183 N. C. 511, 112 S. E. 24 (1922); cases cited in 32 C. J. 24, §7, note 45; Klein, *supra* note 3. Note (1886) 20 Am. Dec. 389, 398.

[5] POMEROY, EQUITY JURISPRUDENCE (4th ed. 1919) §1359; see cases cited *infra* notes 8-16; especially is this so where the act complained of is willful and fraudulent; Popham v. Wright, 229 S. W. 335 (Tex. Civ. App. 1921).

[6] National Docks, etc., R. Co. v. Pennsylvania R. Co., 54 N. J. Eq. 10, 33 Atl. 219 (1895) (crossing over another railroad, injunction granted in part); Florida E. C. Ry. Co. v. Taylor, 56 Fla. 788, 47 So. 345 (1908) (operation of spur track off regular line).

arable injury. In such instance equity will order the removal of the obstruction.[7] Especially is this so where the obstruction was in violation of a court order.[8] Ordinary encroachments will not usually be disturbed before final hearing,[9] but where one has unlawfully torn down a structure he may be compelled to restore it.[10] Pending final hearing, real or personal property will not be transferred from one party to another except where the defendant wrongfully obtained possession and the complainant acted promptly.[11] However, the de-

[7] Cole Silver Min. Co. v. Va. & Gold Hill Water Co., 1 Sawy. 685, Fed. Cas. No. 2990 (C. C. D. Nev. 1871) (diversion of subterranean stream used by complainant); Johnson v. Superior Court of Tulare County, 65 Cal. 567, 4 Pac. 575 (1884) (diversion of water by dam); Ryan v. Weiser Valley Land & Water Co., 20 Idaho 288, 118 Pac. 769 (1911) (alternative of restoring dam or paying $2,500 and continuing the injury); Schneitzius v. Bailey, 45 N. J. Eq. 178, 13 Atl. 247 (1888) (obstruction to ravine as water course); Carpenter v. Gold, 88 Va. 551, 14 S. E. 329 (1892) (boundary stream watering complainant's stock).
Williamson v. McMonagle, 9 Del. Ch. 380, 83 Atl. 139 (1912) (windbreak across alley used thirty years); Zetrouer v. Zetrouer, 89 Fla. 253, 103 So. 625 (1925) (fence across road connecting farm and home); Salisbury v. Andrews, 128 Mass. 336 (1880) (courtyard providing entrance and light); Hodge v. Giese, 43 N. J. Eq. 342, 11 Atl. 484 (1887) (access to basement heater through defendant's shop); Leakesville Mills Co. v. Spray Water Power and Land Co., *supra* note 4 (right of way from factory to highway); Kennedy v. Klammer, 104 W. Va. 198, 139 S. E. 713 (1927) (fence across street leading to complainant's property).
Injunction denied: Gardner v. Stroever, 81 Cal. 148, 22 Pac. 483 (1889) (obstruction to ingress and egress of place of business); World's Columbian Exposition Co. v. Brennan, *supra* note 3; Dobrinsky v. Boyland, 222 Ill. App. 494 (1921) (public road); Ladd v. Flynn, 90 Mich. 181, 51 N. W. 203 (1892) (line fence obstructing window).

[8] In Keys v. Alligood, 178 N. C. 16, 100 S. E. 113 (1919) the defendant obstructed a road in violation of a court order not to interfere with or use the road except for ingress and egress. A preliminary mandatory injunction ordered the ditches restored to their former locus.

[9] Dallas Hunting & Fishing Club v. Dallas County Levee District, 235 S. W. 607 (Tex. Civ. App. 1921) (levee erected at cost of $400,000, causing only negligible damage to complainant; Williams v. Silverman Constr. Co., 111 App. Div. 679, 97 N. Y. Supp. 945 (1906) (bay windows projecting over setback line); Novi v. Del Prete, 121 Misc. Rep. 637, 202 N. Y. Supp. 86 (1923) (wall encroachment).

[10] In Pierce v. City of New Orleans, 18 La. Ann. 242 (1865) defendant was required to restore a boundary wall in which he had unlawfully made apertures.

[11] Denial of relief as to real property: Minneapolis & St. L. R. Co. v. Chicago, M. & St. P. R. Co., 116 Iowa 681, 88 N. W. 1082 (1902) (claim by purchaser against condemnation claimant); Arnold v. Bright, 41 Mich. 207, 2 N. W. 16 (1879) (lessee for term of years not ousted on *ex parte* application); Stephens v. Stephens, 87 Fla. 466, 100 So. 746 (1924) (wife versus husband owner); State *ex rel.* Reynolds v. Graves, 66 Neb. 17, 92 N. W. 144 (1902) (administrator of deceased owner versus lessee in possession); Proctor v. Stuart, 4 Okla. 679, 46 Pac. 501 (1896) (disputing homesteaders). As to disputes over church property see: Whitecar v. Michenor, 37 N. J. Eq. 6 (1883); Fredericks v. Huber, 180 Pa. 572, 37 Atl. 90 (1897); Tebo v.

fendant may be preliminarily dispossessed of personalty if it is being or is about to be dissipated in violation of the rights of others.[12] In case of a clear *prima facie* breach of duty by a public servant or public corporation the court will by interlocutory decree order service to an individual or the general public where other relief is inadequate.[13]

Hazel, 74 Atl. 841 (Del. Ch. 1909) (relief denied though defendants were in possession through wrongful conveyances).
But property was ordered transferred in Pokegama Sugar-Pine Lumber Co. v. Klamath River Lumber & Improvement Co., *supra* note 4 (lessors wrongfully ousted lessee); in Sproat v. Durland, 2 Okla. 24, 35 Pac. 682, dissent at page 886 (1894) (between homesteaders where one is a trespasser); and in Hodges v. Christmas, 212 S. W. 825 (Tex. Civ. App. 1919), where the complainant had been forceably and fraudulently ejected from oil land.
Where transfer of personal property was refused: Hutton v. Hammond, 194 Ind. 212, 142 N. E. 427, 32 A. L. R. 888 (1924) (architect's data in his possession after performance of building contract); Crossland v. Crossland, 53 W. Va. 108, 44 S. E. 424 (1903) (attempt to get the property to sell); Spoor-Thompson Machine Co. v. Bennett Film Laboratories, 105 N. J. Eq. 108, 147 Atl. 202 (1929) (film-developing machines made under contract, there being bond to prevent irreparable injury); Moller v. Lincoln Safe Deposit Co., 174 App. Div. 458, 161 N. Y. Supp. 171 (1916) (access to safe deposit box in dispute). But wrongfully possessed personalty was transferred in McCullom v. Morrison, 14 Fla. 414 (1874), where the litigation was over the location of a Confederate monument unlawfully removed. A mortgagee was given possession of rolling stock levied upon and about to be dispersed in impairment of his security. Central Trust Co. v. Moran, 56 Minn. 188, 57 N. W. 471 (1894).
See also Note (1924) 32 A. L. R. 894-918, on transfer of property by preliminary order.

[12] Ordinarily the defendant must be insolvent or otherwise irresponsible. The best view requires that the court take custody of the property. Fargo v. Rider, 36 S. W. 340 (Tex. Civ. App. 1896) (irresponsible assignee of fraudulent vendee required to pay into court money realized from sale of goods); Murrah v. Shirley, 237 S. W. 307 (Tex. Civ. App. 1922) (money from check cashed by stakeholder in violation of conditional delivery, the condition having failed); McCarty v. McCarty, 40 S. W. (2d) 165 (Tex. Civ. App. 1931) (preservation of community property during divorce proceedings). Relief was denied in State *ex rel.* Brookfield Co. v. Mart, 135 Ore. 603, 295 Pac. 459 (1931) (contempt proceedings for failure to turn over warrants and money to court); in Trust Co. of Florida v. Crider, 136 So. 434 (Fla. 1931) (money from trustee's sale of building and stock); and in Sims v. Stuart, 291 Fed. 707 (S. D. N. Y. 1922) (where customs officer seized money, Hand, J., seeing no necessity for equity to hurry the legal cause).

[13] Toledo, etc., R. Co. v. Pennsylvania Co., *supra* note 4 (railroad traffic facilities); Mason v. Byrley, 26 Ky. L. Rep. 487, 84 S. W. 767 (1904) (Canvassing votes by district committee); Broome v. N. Y. & N. J. Tel. Co., 42 N. J. Eq. 141, 7 Atl. 851 (1887) (erecting telephone poles unlawfully); McCran v. Public Service Ry. Co., 95 N. J. Eq. 22, 122 Atl. 205 (1923) (for street railway service pending mandamus proceedings during strike), discussed in (1923) 37 HARV. L. REV. 368, at 371; Clinton-Dunn Tel. Co. v. Carolina Tel. Co., 159 N. C. 9, 74 S. E. 636 (1912) (Hoke, J., discussing the use of mandamus and preliminary mandatory injunctions); City of Houston v. Little, 244 S. W. 247 (Tex. Civ. App. 1922) (city school board). See Farrall v. Hood, 32 S. W. (2d) 480, 482 (Tex. Civ. App. 1930) (attorney not allowed to see jailed client). Injunction denied in City Council v. Fort

Preliminary mandatory injunctions in the nature of specific performance, however, issue very rarely.[14] Courts occasionally adopt this form of relief for abating nuisances.[15]

The case under discussion has all the prerequisites necessary for a preliminary mandatory injunction. In view of petitioner's conduct, his insolvency, and the possible dissipation of part of the decedent's estate, the court quite properly invoked the provisional remedy to place the bonds in the custody of the court until final hearing. At that time the petitioner may set up his claim and have his rights adjudicated. The court wisely took that course in preference to transferring the property to the other claimants. While the case turns in part on a West Virginia statute[16] providing for the equitable protection of property in a case pending, that statute only strengthens the court's hand.

WM. CAREY PARKER.

Insurance—Incontestable Clause as Defense in Action on Life Policy.

The plaintiff issued a life insurance policy containing a liability exemption clause in case insured met his death while engaged in railroad employment. A statute provided that life insurance policies

Worth, etc., Contractors, Inc., 8 S. W. (2d) 730 (Tex. Civ. App. 1928) (revocation of plumber's license).

[14] In Boskowitz v. Cohn, 197 App. Div. 776, 189 N. Y. Supp. 419 (1921) an injunction ousted sub-lessees where lessees sub-leased in violation of a condition in their lease giving lessors right to possession without notice in case of breach, and in Kellerman v. Chase & Co., 101 Fla. 785, 135 So. 127 (1931), the court ordered performance of contract to deliver tomato crop, it being highly perishable. See also American Lead Pencil Co. v. Schneegass, 178 Fed. 735 (C. C. N. D. Ga. 1910) where mandatory relief was properly refused. Where complainant acted in bad faith relief was denied in Winton Motor Carriage Co. v. Curtis Pub. Co., 196 Fed. 906 (E. D. Pa. 1912))contract for commercial advertising in periodical). Accord: Amalgamated Furniture Factories, Inc. v. Rochester Times-Union, Inc., 128 Misc. Rep. 673, 219 N. Y. Supp. 705 (1927).

[15] Pennsylvania R. Co. v. Kelley, 77 N. J. Eq. 129, 75 Atl. 758 (1910) (defective building a public and private nuisance which must be removed or repaired); Salisbury v. Andrews, 128 Mass. 336 (1880) (light and sunshine shut out by alley obstruction); Pierce v. City of New Orleans, *supra* note 11; relief refused in Ort v. Bowden, 148 S. W. 1145 (Tex. Civ. App. 1912) (baseball park blocking street).

[16] W. VA. CODE (1931) c. 53, art. 6, §1: "A court of equity may, in a proper case pending therein, in which funds or property of a corporation, firm or person is involved, and there is danger of the loss or misappropriation of the same or a material part thereof, appoint a special receiver of such funds or property, or of the rents, issues and profits thereof, or both, who shall give bond with good security to be approved by the court. . . ."

should be incontestable, for any reason save nonpayment of premiums and military service, one year from date of issue.[1] The insured was killed in railroad employment more than one year after issuance, and this suit was instituted to cancel the policy.[2] *Held:* The defense of incontestability was not good since the action was not a contest of the policy (*i.e.*, a denial of it), but an insistence upon its terms.[3] On the theory that an insurance company may assume only such risks as it sees fit,[4] the decision appears both clear and reasonable and represents the majority view in the United States.[5]

Incontestable clauses in life insurance policies are required in twenty-five states.[6] By way of inducement to purchasers of insurance, companies voluntarily insert similar provisions in policies sold elsewhere.[7] With few exceptions statute-prescribed clauses are uniform.[8] They allow a two year contestable period and permit after

[1] VA. CODE ANN. (Michie, 1930) §4228.

[2] United Security Life Ins. & Trust Co. v. Massey, 164 S. E. 529 (Va. 1932). The policy was a fifteen year endowment life insurance contract which provided that the insurer advance the sum of the policy, $5,000, to the insured immediately. The latter agreed to pay $51.75 per month for fifteen years should he live that long; but in case of death the obligation was to be discharged. By way of security the insured gave a bond in the penalty of $10,000 and a deed of trust on certain real estate.

[3] "The incontestable clause should be construed merely as an agreement on the part of the insurer not to contest the validity of the policy as written." VANCE, INSURANCE (2d ed. 1930) 281, citing Sipp v. Philadelphia Life Ins. Co., 293 Pa. 292, 142 Atl. 221 (1928).

[4] ". . . a policy of insurance is a voluntary contract. Nearly any kind of agreement that is not contrary to law or public policy may be included therein. An insurer may impose such conditions as it desires and the insured may take them or go without the policy, as it may choose." Whitney v. Union Central Life Ins. Co., 47 F. (2d) 861, 864 (C. C. A. 8th, 1931).

[5] American Trust Co. v. Life Ins. Co. of Va., 173 N. C. 558, 92 S. E. 706 (1917); Dibble v. Reliable Life Ins. Co., 170 Cal. 199, 149 Pac. 171 (1915).

[6] Ala., Ariz., Colo., Idaho, Ill., Ind., Kan., Me., Mass., Mich., Minn., Neb., N. H., N. J., N. M., N. Y., N. D., Okla., Ore., Pa., Tenn., Utah, Vt., Va., and Wyo. North Carolina has no such statute. An excellent interpretation of a voluntarily inserted clause is to be found in American Trust Co. v. Life Ins. Co. of Va., *supra* note 5.

[7] "Premiums upon life policies are often paid at a great sacrifice, and one of the most disturbing and unsatisfactory features of the insurance contract is the fact that after the sacrifices and payments have been made for a number of years, and the insured has died, so that his testimony and perhaps that of others has been rendered unavailable by the lapse of time and the occurrence of death, instead of receiving the promised reward, the beneficiary will be met with a contest and a lawsuit to determine whether the insurance ever had any validity or force. Hence it has become an almost universal practice with insurance companies to provide against any contest or forfeiture of their policies after a certain length of time, greater in some cases and less in others." Clement v. New York Life Ins. Co., 101 Tenn. 22, 46 S. W. 561, 562 (1898).

that time the specific defenses of nonpayment of premiums and military service.[9] Self-imposed incontestability clauses contain provisions similar to those prescribed by statute.[10] They do, however, often provide broader defenses, and sometimes waive the period of contestability altogether.[11]

Interpretation of incontestability clauses, both mandatory and voluntary, has not been uniform.[12] Courts differ as to what constitutes a sufficient contest of the policy, a substantial majority holding that court action is necessary, such as instituting a suit for cancellation or filing an answer to a suit brought on the policy.[13] A few courts have held that a definite and positive repudiation of the policy plus a tender of the premiums paid is sufficient.[14] Most courts hold that the contestable period runs its course irrespective of the insured's death beforehand;[15] but they allow a suspension of the running of the period from the time of the insured's death to the appointment of his administrator, for in the interim there is no one

[8] A typical example of incontestability statutes is found in Indiana: ". . . the policy shall be incontestable after it shall have been in force during the lifetime of the insured for two years from its date, except for nonpayment of premiums and except for violation of the conditions of the policy relating to naval and military service in time of war." IND. ANN. STAT. (Burns, 1926) §9036 (3). The Virginia statute provides a one year period only. VA. CODE ANN. (Michie, 1930) §4228. Alabama sets the final date of contestability "after two annual premium payments have been made." ALA. CODE (Michie, 1928) §8365.

[9] *Supra* note 8.

[10] Hardy v. Phoenix Mutual Life Ins. Co., 180 N. C. 180, 104 S. E. 166 (1920).

[11] Union Central Life Ins. Co. v. Fox, 106 Tenn. 347, 61 S. W. 62 (1901) was a contest of a policy which provided for incontestability for any reason other than misstatement of age, and was to take effect upon issuance. (This case arose before the adoption of the Tennessee incontestable statute.)

[12] This is to be expected since all clauses do not embody the same provisions and all courts do not maintain the same attitude toward insurance companies.

[13] In Northwestern Mutual Life Ins. Co. v. Pickering, 293 Fed. 496, 499 (C. C. A. 5th, 1923), it was said that "a contest so provided for imports litigation, the invoking of judicial action to cancel or prevent the enforcement of the policy, either by a suit to that end, or by a defense to an action on the policy. A mere denial or repudiation by the insurer of its liability under the policy, accompanied by a tender of the premiums paid, is not a contest, within the meaning of the provision." Missouri State Life Ins. Co. v. Cranford, 161 Ark. 602, 257 S. W. 66 (1923).

[14] Mutual Life Ins. Co. v. Rose, 294 Fed. 122 (E. D. Ky. 1923).

[15] Plotner v. Northwestern Nat. Life Ins. Co., 48 N. D. 295, 183 N. W. 1000 (1921). This case is discussed with approval in (1921) 20 MICH. L. REV. 111. Monahan v. Metropolitan Life Ins. Co., 283 Ill. 136, 119 N. E. 68 (1918). This line of cases is based on the reasoning that such interpretation is in accord with the intent of the parties as expressed in the plain language of the policies.

against whom the insurer can bring suit.[16] Some, however, take the position that death under these circumstances stops the running of the period.[17]

It is not necessarily true that an incontestability clause denies the insurer, after the expiration of the period of contestability, all defenses not specifically excepted.[18] Courts allow the defense of lack of insurable interest[19] even after the period of contestability[20] on the ground that wager policies are contrary to public policy.[21] After the contestable period has expired fraud is universally denied as a defense.[22] When policies are made incontestable from date of issue, some courts allow a reasonable time in which to interpose this defense.[23] Others, however, construe these policies in their strictest terms and deny relief.[24]

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[16] Jensen v. Metropolitan Life Ins. Co., 251 N. Y. 336, 167 N. E. 462 (1929); Ramsay v. Old Colony Life Ins. Co., 297 Ill. 592, 131 N. E. 108 (1921).

[17] Mutual Life Ins. Co. v. Stevens, 157 Minn. 253, 195 N. W. 913 (1923).

[18] This would appear so from the face of the policy. Implications of law are not, of course, printed in the policy. *Infra* note 19. In Elwood v. New England Mutual Life Ins. Co., 158 Atl. 257 (Pa. 1931), an exceptional defense was allowed an insurer in an action on a policy containing an incontestable clause. The plaintiff made an unsuccessful attempt to take his life, but only maimed himself. His suit to collect damages was denied on the grounds of being opposed to public policy.

[19] What amounts to an insurable interest is a problem of considerable difficulty. See VANCE, INSURANCE (2d ed. 1930) 147-164.

[20] Clearly the defense would be a good one before the expiration of the period.

[21] Dakota Life Ins. Co. v. Midland Nat. Bank of Minneapolis, 18 F. (2d) 903 (C. C. A. 8th, 1927); Bromley's Adm. v. Washington Life Ins. Co., 122 Ky. 402, 92 S. W. 17 (1906). A case *contra* is cited and discussed in (1931) 19 GEO. L. J. 501, that of Bogacki v. Great West Life Assurance Co., 253 Mich. 253, 234 N. W. 865 (1931). This case cites as its authority Wright v. Mutual Benefit Asso., 188 N. Y. 237, 23 N. E. 186, 16 Am. St. Rep. 794 (1890), but this is a doubtful precedent since the defense of lack of an insurable interest was not pressed, and the opinion of the court proceeded on other grounds.

[22] Wright v. Mutual Benefit Asso., *supra* note 21. Incontestability clauses are said to be in the nature of short statutes of limitation, and are not contrary to public policy as condoning fraud. Drews v. Metropolitan Life Ins. Co., 79 N. J. L. 398, 75 Atl. 167 (1910); Hardy v. Phoenix Mutual Life Ins. Co., *supra* note 10. Note (1920) 6 A. L. R. 448.

[23] Reagan v. Mutual Life Ins. Co., 189 Mass. 555, 76 N. E. 217 (1905).

[24] MacKendree v. Southern States Life Ins. Co., 112 S. C. 335, 99 S. E. 806 (1919); Duvall v. Nat. Ins. Co., 28 Idaho 356, 154 Pac. 632 (1916). Note (1920) 6 A. L. R. 448.

Mortgages—Suretyship Where Grantee of Mortgagor Assumes Mortgage Debt.

Defendant's testator purchased certain land and gave his note for a portion of the purchase price, executing at the same time a deed of trust to secure the note. Subsequently he sold the land and the grantee "assumed" the mortgage debt. After this the mortgagee without the consent of the mortgagor-defendant released a portion of the land from the mortgage lien. Plaintiff as assignee of the mortgagee brought an action to recover on the note. Defendant contended that when the grantee assumed the obligation, the grantee became the principal debtor, he (the mortgagor) his surety, and that therefore the release of the land by the mortgagee released him from liability. *Held:* The relation of principal and surety existed only between the mortgagor and grantee, and the mortgagee's rights were not affected by the release of the property.[1]

It is generally held that where the purchaser of an equity of redemption promises the mortgagor to assume the mortgage debt, he becomes personally liable to the mortgagor or his assignee for the payment of the debt itself or for the deficiency after foreclosure.[2] But a purchase of the equity "subject to" the mortgage does not amount to an assumption and the mortgagee has no personal action against the grantee on the debt.[3] In both cases, however, the mortgagor remains personally liable to the mortgagee.

Where the grantee "assumes" the obligation, all of the cases found, except the principal case, hold that the grantee becomes the principal debtor and the mortgagor his surety, not only as between these two parties but as to the mortgagee as well.[4] If the mortgagee

[1] Brown v. Turner, 202 N. C. 227, 162 S. E. 608 (1932).

[2] In North Carolina, at one time, the result could be obtained only upon the equitable theory of subrogation. Woodcock v. Bostic, 118 N. C. 822, 24 S. E. 362 (1896) (third-party beneficiary theory rejected, mortgagee's rights not assignable); Baber v. Hanie, 163 N. C. 588, 80 S. E. 57 (1913) (assignee protected, third-party beneficiary theory rejected). Since 1920, however, the mortgagee may sue on a third-party beneficiary contract basis. Rector v. Lyda, 180 N. C. 577, 105 S. E. 170 (1920); Parlier v. Miller, 186 N. C. 501, 119 S. E. 898 (1923); Coxe v. Dillard, 197 N. C. 344, 148 S. E. 545 (1929); Sanders v. Griffin, 191 N. C. 447, 452, 132 S. E. 157 (1926); Keller v. Parrish, 196 N. C. 733, 147 S. E. 9 (1929); (1929) 8 N. C. L. REV. 85.

[3] Harvey v. Kinston Knitting Co., 197 N. C. 177, 148 S. E. 45 (1929); (1929) 8 N. C. L. REV. 85.

[4] The court in White v. Augello, 142 Misc. Rep. 233, 254 N. Y. Supp. 228 (1931), lays down the rule as follows: "When in a deed a grantee assumes and agrees to pay, as a part of the consideration of the grant, a mortgage upon the premises conveyed, the relationship of the mortgagor to the mortgagee is, as between himself and the grantee, altered; the mortgagor ceases to be the

learns of the transaction, a complete suretyship contract is then in existence; and if the mortgagee and grantee deal with the property so as to injure the mortgagor, without his consent, he is released to the extent of his injury.[5] Accordingly, it is held that where the mortgagee releases all the property securing the debt the mortgagor is entirely released.[6] In case he releases only a portion of the property, the mortgagor is entitled to have the mortgage credited in an amount equal to the value of the property released.[7] Also, a binding extension of time by the mortgagee, since it prevents the mortgagor from paying the debt and becoming immediately subrogated to the rights of the mortgagee, releases the mortgagor.[8] And where the mortgagee releases the grantee from personal liability, agreeing to look only to the security for payment, the mortgagor is released because he could not go against the grantee for any deficiency.[9]

The court in the principal case places considerable weight upon the fact that the mortgagee could proceed against the mortgagor on

principal obligor, and takes on the relationship of a surety, while a grantee who has assumed and agreed to pay the mortgage becomes the principal debtor." Meldola v. Furlong, 142 Misc. Rep. 562, 255 N. Y. Supp. 48 (1932); Harden v. First Nat. Bank, 6 Pac. (2d) 1060 (Okla. 1932); Miss. Valley Trust Co. v. Bussey, 49 F. (2d) 881 (C. C. A. 5th, 1931); Farmers & Merchants Bank v. Narvid, 259 Ill. App. 554 (1931); Reeves v. Cordes, 108 N. J. Eq. 469, 155 Atl. 547 (1931); Harris v. DePaulina, 40 Ohio App. 57, 178 N. E. 225 (1931).

[5] Meldola v. Furlong, Reeves v. Cordes, both *supra* note 4; Blumenthal v. Serota 155 Atl. 40 (Me. 1931); Bingna v. Bell, 259 Ill. App. 361 (1930); Harris v. Atchison, 183 Minn. 292, 236 N. W. 458 (1931); Grace v. Wilson, 139 Misc. Rep. 757, 250 N. Y. Supp. 212 (1931); *In re* Roth, 272 Fed. 516 (N. D. Ohio 1920); Insley v. Webb, 122 Wash. 98, 209 Pac. 1093 (1922); Gilliam v. McLemore, 141 Miss. 253, 106 So. 99 (1925).
It is usually held, however, that mere negligence on the part of the creditor resulting in the loss of the security will not release the surety. Fuller v. Tomlinson Bros., 58 Iowa 111, 12 N. W. 127 (1882); Schroeppell v. Shaw, 3 N. Y. 446 (1849); Newcomb v. Hale, 90 N. Y. 326, 43 Am. Rep. 173 (1882); Taylor v. Bridger, 185 N. C. 85, 116 S. E. 94 (1923).

[6] Crisman v. Lanterman, 149 Cal. 647, 87 Pac. 89, 117 Am. St. Rep. 167 (1906); Jordon v. Bullard, 145 Ga. 890, 90 S. E. 41 (1916); Heidahl v. Geiser Mfg. Co., 112 Minn. 319, 127 N. W. 1050, 140 Am. St. Rep. 493 (1910).

[7] In *In re* Hunter, 257 Pa. 32, 101 Atl. 79, 80 (1917), the court said: "Where the mortgagor has parted with his title to the mortgaged premises, a release of a part thereof by the mortgagee, without the knowledge or consent of the mortgagor, will discharge the latter from personal liability for any loss to the mortgagee resulting from a deficiency in the proceeds of a subsequent sale in foreclosure proceedings." Meigs v. Tunnicliffe, 214 Pa. 495, 63 Atl. 1019, 112 Am. St. Rep. 769 (1906); Norton v. Henry, 67 Vt. 308, 31 Atl. 787 (1895).

[8] Meldola v. Furlong, Miss. Valley Trust Co. v. Bussey, both *supra* note 4; Bingna v. Bell, Blumenthal v. Serota, Harris v. Atchison, Grace v. Wilson, all *supra* note 5.

[9] *In re* Roth, Insley v. Webb, Gilliam v. McLemore, all *supra* note 5.

the debt without first resorting to the security or the grantee. But that is true in any surety contract. It in no way affects the creditor's duty to retain the security for the mortgagor. If the surety pays he has a right under the doctrine of subrogation to have the debt and the security assigned to him.[10] If the security has been released the assignment can only operate as an assignment of an unsecured debt leaving the mortgagor dependent upon the general assets of the grantee on an equal basis with other creditors. Such a result is inconsistent with the mortgagor's contract and would, in a great many cases, result in a total loss of the debt.

The result of the decision might be justified in fairness on the ground that the mortgagor was not prejudiced. For the unreleased portion of the land was sufficient to satisfy the obligation. It would seem, however, that the rule announced would render the sale of an equity of redemption extremely hazardous to the mortgagor and thus menace this type of security transaction.

Winston-Salem, N. C. DALLACE MCLENNAN.

Negligence—Statutory Measure of Damages For Wrongful Death.

A twelve-year-old boy who contributed to his mother's support by carrying papers was killed by what was at most ordinary negligence on the part of the defendant. In an action by the mother, *held,* under the wrongful death statute of Georgia, the plaintiff may recover the *full value* of the life of the child upon whom she was dependent, or who contributed to her support.[1]

The Georgia statute provides for a recovery for the death of a husband, wife, or parent in any event, and for the death of a child if at least partial dependency is shown,[2] where the death is caused

[10] In *In re* Roth, *supra* note 5, at 520, the court says: "The mortgagor, like any other surety called upon to make payment, is entitled to have surrendered unimpaired all securities and remedies which the creditor holds, including in this case both the mortgage and the personal obligation of the Lumber Company to pay the mortgagor's debt to the Supply Company." Schenectady Sav. Bank v. Ashton, 205 App. Div. 781, 200 N. Y. Supp. 245 (1923); Cooper v. Jewett, 233 Fed. 618, (C. C. A. 8th, 1916); O'Neill v. Russell, 192 Wis. 141, 212 N. W. 278 (1927); Stevens v. First Nat. Bank, 117 Okla. 148, 245 Pac. 567 (1925).
In North Carolina it is held that where the surety pays the creditor, the security must be assigned to a trustee or else the payment operates as a satisfaction and in no other way can it be kept alive. Tiddy v. Harris, 101 N. C. 589, 8 S. E. 227 (1888); Peebles v. Gay, 115 N. C. 38, 20 S. E. 173 (1894).

[1] Michael v. Western & Atlantic R. Co., 165 S. E. 37 (Ga. 1932).

[2] See Central of Georgia R. Co. v. Henson, 121 Ga. 462, 463, 49 S. E. 278 (1904) ("partial dependence upon the child's labor, accompanied by substantial

by a crime or by criminal or other negligence.[3] It further provides that the measure of damages shall be the full value of the life of the deceased without deduction for the necessary or other personal expenses of the deceased had he lived.[4]

A recovery of the full value of the life of the deceased, irrespective of the pecuniary loss to the person entitled to recover, is a recovery of exemplary damages, and the Georgia court has specifically recognized this fact.[5] Nevertheless, such recovery has been permitted in many cases where the defendant was guilty of only ordinary negligence.[6]

The general (and common law) rule of the measure of damages is strict compensation for the pecuniary loss suffered by the plaintiff,[7] with exemplary damages permitted only where the defendant was guilty of at least gross negligence in the sense of culpable indifference to consequences.[8] It is a well established rule of the common law that ordinary negligence is not enough to justify the infliction of exemplary damages.[9] The Georgia provision is clearly contrary to this established common law rule and no similar provision has been found in the wrongful death statutes of any other state.

At common law no right of action survived to any person for a wrongful death.[10] The right originated with Lord Campbell's Act,[11]

contribution therefrom to the maintenance of the plaintiff, is sufficient"); Fuller v. Inman, 10 Ga. App. 680, 684, 74 S. E. 287, 291 (1912) ("If he performs substantial services of which she receives the benefit in and about the household, this is a contribution to her support, and she is dependent upon that child, within meaning of the law, without reference to whether he contributes one penny to her support").

[3] GA. CODE ANN. (Michie, 1930) §4424.

[4] GA. CODE ANN. (Michie, 1930) §4425.

[5] See Georgia Railroad and Banking Co. v. Spinks, 111 Ga. 571, 36 S. E. 855 (1900); Central of Georgia R. Co. v. Swann, 19 Ga. App. 691, 91 S. E. 1068, 1069 (1917). ("The statute with which we are dealing, being in derogation of the common law, must be strictly construed. The act is partly punitive and partly compensatory"); Michael v. Western and Atlantic R. Co., *supra* note 1.

[6] Atlantic Coast Line R. Co. v. McDonald, 135 Ga. 635, 70 S. E. 249 (1910); Seaboard Air Line R. Co. v. Young, 40 Ga. App. 4, 148 S. E. 757 (1929); Western & Atlantic R. Co. v. Gray, 172 Ga. 286, 157 S. E. 482 (1931).

[7] 1 SEDGWICK, DAMAGES (9th ed. 1920) §30.

[8] Reed v. Keith, 99 Wis. 672, 75 N. W. 392 (1898); Cotton v. Fisheries Products Co., 181 N. C. 151, 106 S. E. 487 (1921); 1 SEDGWICK, *op. cit. supra* note 7, §363.

[9] Denver and R. G. R. Co. v. Roller, 100 Fed. 738, 49 L. R. A. 77 (C. C. A. 9th, 1900); Coley v. North Carolina R. Co., 129 N. C. 407, 40 S. E. 195, 57 L. R. A. 817 (1901); 1 SEDGWICK, *loc cit. supra* note 8.

[10] The Mobile Life Insurance Co. v. Brame, 95 U. S. 754, 24 L. ed. 580 (1878); 2 SEDGWICK, *op. cit. supra* note 7, §570.

[11] 9 & 10 VICT., c. 93 (1842).

and similar statutes have been enacted in almost every jurisdiction of the United States.[12] Several of the states have provided for this right in their constitutions.[13] These statutes are all similar in substance with some differences as respects: (1) the party in whose name the action is to be brought;[14] (2) the distribution of the sum recovered;[15] and (3) the limit of the sum recoverable.[16]

As to provisions for the measure of damages, these statutes may be divided into four classes:

(1) Those in which the recovery is based strictly on compensation.[17] No exemplary damages are permitted however culpable the act.[18] This type of provision is found in more than half of the states. It seems to be the better rule in that the plaintiff is fully recompensed, in so far as money can compensate for the loss, and the defendant is not subject to double punishment by way of exemplary damages and a possible criminal action.

(2) Those in which the recovery is based on compensation plus such exemplary damages as the degree of culpability merits. In some statutes, such exemplary damages are specifically provided

[12] A careful search of the statute books showed that such a provision has been enacted in every state except Louisiana. However, Louisiana permits an action for a wrongful death. Aymond v. Western Union Tel. Co., 151 La. 184, 91 So. 671 (1922).

[13] For example, N. Y. Const., Art. 1, §18: "The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation".

[14] Most of the statutes require the action to be brought by the personal representative for the benefit of the designated beneficiaries. For example, VA. CODE ANN. (Michie, 1930) §5787. A few require the action to be brought by the real party in interest. For example, GA. CODE ANN (Michie, 1926) §4424.

[15] In every jurisdiction except Oregon it is provided that the damages recovered are free from the debts and liabilities of the deceased, and certain persons are designated as the beneficiaries. For example, N. C. CODE ANN. (Michie, 1931) §160. The Oregon statute, however, provides that "the amount recovered, if any, shall be administered as other personal property of the deceased person." ORE. CODE ANN. (1930) §5-703.

[16] The great majority of the statutes have not provided a limit to the sum recoverable, and some states have provided in their constitutions that no such limit may be established. For example, N. Y. Const., *supra* note 13. Other statutes limit the amount that may be recovered to a specified sum, in most cases $10,000. For example, KAN. REV. STAT. ANN. (1923) c. 60, §3203.

[17] For example, MICH. COMP. LAWS (1929) §14062, ". . . and in every action the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death, to those persons who may be entitled to such damages when recovered." N. C. CODE ANN. (Michie, 1931) §161.

[18] Western Union Tel Co. v. Catlett, 177 Fed. 71 (C. C. A. 4th, 1910); see Bradley v. Ohio River & C. R. Co., 122 N. C. 972, 975, 30 S. E. 8 (1898).

for,[19] while in others the result is attained by judicial decision under a clause in the wrongful death statute which provides for *just* damages without limiting to pecuniary loss.[20] This type of provision is found in about twenty states. It is most analogous to the aforementioned common law rule of damages, but is open to the objection that it gives the plaintiff more than he has lost, and subjects the defendant to the possibility of double punishment.

(3) Those statutes in which the recovery is based solely on the degree of culpability. This provision is found only in Massachusetts,[21] by a specific clause, and in Alabama by judicial decision.[22] This rule is most fair to the defendant, as he pays according to the degree of his wrong. It is, however, furthest from the original object of damages, *i. e.*, compensation.

(4) Those in which the recovery is given for the full value of the life. The Georgia statute stands alone in this class.[23] This provision is similar to those of the first class in that the measure of damages is the same regardless of the degree of culpability. The first class denies exemplary damages even where death was the result of a wilful assault;[24] the fourth class gives exemplary damages even where the death resulted from ordinary negligence alone.[25]

Despite the great differences in the statutory provisions and the variations from the common law rule of damages, these statutes have been uniformly held valid.[26] Apparently there is nothing to prevent the legislature from providing for any measure of damages it may deem desirable, and the court, in the instant case, is correct in its conclusion that it is clearly within the power of the legislature to permit recovery of exemplary damages for homicide resulting from ordinary

[19] For example, TEX. REV. CIV. CODE (Vernon, 1925) art. 4673: "When the death is caused by the wilful act or omission, or gross negligence of the defendant, exemplary as well as actual damages may be recovered."

[20] Matthews v. Warner's Adm'r., 29 Gratt. 570, 26 Am. Rep. 396 (Va. 1877).

[21] MASS. GEN. LAWS (1921) c. 229, §5: ". . . damages to be assessed with reference to the degree of his culpability."

[22] Dowling v. Garner, 195 Ala. 493, 10 So. 150 (1915); Alabama Power Co. v. Talmadge, 207 Ala. 86, 93 So. 548 (1921).

[23] *Supra* notes 3 & 4.

[24] *Supra* note 17.

[25] *Supra* note 6.

[26] U. S. Cast Iron Pipe and Foundry Co. v. Sullivan, 3 F. (2d) 794 (C. C. A. 5th, 1925); Alabama Power Co. v. Talmadge, 207 Ala. 86, 93 So. 548 (1921); Shaffer v. Chicago, R. I. & P. R. Co., 300 Mo. 477, 254 S. W. 257 (1923); aff'd 263 U. S. 687, 44 S. Ct. 228, 68 L. ed. 507 (1924); Hull v. Seaboard Air Line R. Co., 76 S. C. 278, 57 S. E. 28, 10 L. R. A. (N. S.) 1213 (1907); Michael v. Western & Atl. R. Co., 165 S. E. 37 (Ga. 1932).

negligence, as well as for homicide resulting from wanton, wilful or criminal negligence.[27]

IRVIN E. ERB.

Public Utilities—When a Utility May Withhold or Withdraw Service For Reasons of Credit.

Where, upon the payment of the usual fee, a telephone company refused to furnish its service without an additional deposit, on the ground that plaintiff was admittedly a bad credit risk, *held,* the company must serve the plaintiff without the additional security on the same terms as it serves other subscribers.[1]

It is almost universally conceded that a public utility may withdraw and withhold its service for nonpayment of a recent and just bill, since collection by legal process is practically prohibitive. And this is so even though the consumer has some counterclaim against the company.[2] But although the bill be legitimate, where the sum is owed by a public agency, the corporation may not use the summary method employed in collecting its debts from delinquent individuals, since here mandamus will lie to compel the proper official to pay the bill.[3] Another instance where the courts will enjoin a public utility from withholding service for nonpayment of a recent bill is where the refusal to pay is on the ground that its service has been inadequate.[4] And where the bill is *bona fide* in dispute, the company may not refuse to serve the consumer until such bill is paid.[5] The courts are very reluctant to permit the corporation to be its own judge and jury

[27] Michael v. Western & Atlantic R. Co., 165 S. E. 37, 43 (Ga. 1932).

[1] Horton v. Interstate Tel. & Tel. Co., 202 N. C. 610, 163 S. E. 694 (1932). The court explains its decision on the ground that the rule requiring an additional deposit by bad risks had never been approved by the Corporation Commission. It takes no definite stand, but intimates in a nebulous manner, that in the absence of such fact, it might have reached a contrary result.

[2] Barrett v. Broad River Power Co., 146 S. C. 85, 143 S. E. 650 (1928); Central La. Power Co. v. Thomas, 145 Miss. 352, 110 So. 673 (1927); Buffalo County Tel. Co. v. Turner, 82 Neb. 841, 118 N. W. 1064 (1908); Irvin v. Rushville Co-operative Tel. Co., 161 Ind. 524, 69 N. E. 258 (1903).

[3] Board of Education v. Richmond, 137 N. Y. Supp. 62 (1912) (water supply in a school); People *ex rel.* Johnson v. Barrows, 124 N. Y. Supp. 270 (1910) (water supply of public park).

[4] Mays v. Hutchinson, P. U. R. 1931B 104 (Pa. 1930); Case v. Meadow Lawn Tel. Co., P. U. R. 1929A 421 (Minn. 1928); State *ex rel.* Payne v. Kuloch Tel. Co., 93 Mo. App. 349, 67 S. W. 684 (1902); McEntee v. Kingston Water Co., 165 N. Y. 27, 58 N. E. 785 (1900).

[5] O'Neal v. Citizen's Pub. Service Co., 157 S. C. 320, 154 S. E. 217 (1930); Ala. Water Service Co. v. Harris, 221 Ala. 516, 129 So. 5 (1930); Dodd v. City of Atlanta, 154 Ga. 33, 113 S. E. 166 (1922); Poole v. Paris Mt. Water Co., 81 S. C. 438, 62 S. E. 874 (1908).

and coerce the recalcitrant one into submission by denying him service. But if the consumer, refusing to pay the bill because of his *bona fide* belief that it is unjust, has his service discontinued, he is not entitled to damages merely because of his belief, if it is proved that the bill is in fact correct.[6] Nor may a utility withdraw its service for nonpayment of an unreasonable,[7] discriminatory,[8] or obviously excessive charge.[9]

Some courts hold that the payment of arrearages for service at the same place is not required and the only condition precedent to a right to have the service is a tender for it.[10] Others say that the payment of arrearages may be demanded before service is extended.[11] But where an old bill has been passed over and later ones accepted, the company is said to have waived its right to discontinue service for nonpayment.[12]

It is generally held that service cannot be refused at one place because the consumer is in arrears at another place at the same time[13] or because he was in arrears at a different place.[14] Nor can the company urge another's default as an excuse for withholding

[6] Kentucky Utilities Co. v. Warren Ellison Cafe, 231 Ky. 538, 21 S. W. (2d) 976 (1929).

[7] Barrell v. Lake Forest Water Co., 191 Ill. App. 269 (1915); Ball v. Texarkana Water Corp., 127 S. W. 1068 (Tex. Civ. App. 1910); Borough of Washington v. Washington Water Co., 70 N. J. Eq. 254, 62 Atl. 390 (1905).

[8] Gordon & Ferguson v. Doran, 100 Minn. 343, 111 N. W. 272 (1907).

[9] Pond v. New Rochelle Water Co., 183 N. Y. 330, 76 N. E. 211 (1906); Horsky v. Helena Consolidated Water Co., 13 Mont. 229, 33 Pac. 689 (1893).

[10] Johnson v. Carolina Gas & Electric Co., 106 S. C. 447, 91 S. E. 734 (1917); Taylor v. N. Y. Tel. Co., 160 N. Y. Supp. 865 (1916); Danaher v. S. W. Tel. & Tel. Co., 94 Ark. 533, 127 S. W. 963 (1910); S. W. Tel. & Tel. Co. v. Luckett, 127 S. W. 856 (Tex. Civ. App. 1910); Crumley v. Watauga Water Co., 99 Tenn. 420, 41 S. W. 1058 (1897).

[11] Bailey v. Interstate Power Co., 209 Iowa 631, 228 N. W. 644 (1930). State *ex rel.* Latshaw v. Board of Water & Light Commissioners, 105 Minn. 472, 117 N. W. 827 (1908).

[12] Crumley v. Watauga Water Co., *supra* note 10; Wood v. City of Auburn, 87 Me. 287, 32 Atl. 906 (1895). *Contra:* Mackin v. Portland Gas Co., 38 Ore. 120, 61 Pac. 134 (1900); People *ex rel.* Kennedy v. Manhattan Gaslight Co., 45 Barb. 136 (N. Y. 1865).

[13] Texas Central Power Co. v. Perez, 291 S. W. 622 (Tex. Civ. App. 1927) (a store owner in debt for outside lights); Merill v. Livermore Falls Light & Power Co., 117 Me. 523, 105 Atl. 120 (1918) (a business man in default at his residence); Gaslight Co. of Baltimore v. Colliday, 25 Md. 1 (1866) (owner of several pieces of property in default on one).

[14] Miller v. Roswell Gas & Elect. Co., 22 N. M. 594, 166 Pac. 1177 (1917); Benson v. Paris Mt. Water Co., 88 S. C. 351, 70 S. E. 897 (1911); Hatch v. Consumers' Co., 17 Idaho 204, 104 Pac. 670 (1909); Mackin v. Portland Gas Co., *supra* note 12; Lloyd v. Washington Gaslight Co., 1 Mackey 331 (D. C. 1881). *Contra:* Clark v. Utica Gas & Electric Co., 231 N. Y. Supp. 308 (1928); Jones v. Mayor of Nashville, 109 Tenn. 550, 72 S. W. 985 (1903).

service even though such other person is the consumer's husband[15] or wife.[16] And in the absence of express statutory provision making a service charge a lien on the premises, a new customer cannot be denied service because of the default of the landlord[17] or previous tenant.[18]

Where it is impossible to serve a prospective customer without at the same time supplying one not entitled to service because of nonpayment, the utility is released from its duty.[19] The opposite view, however, has been recognized; and one court has held that the lessee of part of a room, where he applies for it in good faith, is entitled to service, although the lessor, occupying the remainder of the room, is in default.[20]

When the question of the general credit of the person is involved and payment in advance is not required by the company, some courts have said that a bad financial risk would justify the company in asking for security before extending service.[21] And demanding payment in advance from one financially irresponsible is permissible even when such payment is not demanded of others.[22] But it has been held, in accord with the principal case, that where a person offered to pay in advance, a company could not withhold service because of that person's credit rating.[23]

[15] Vanderburg v. Kansas City Gas Co., 126 Mo. App. 600, 105 S. W. 17 (1907).

[16] Cumberland Tel. & Tel. Co. v. Hobart, 89 Miss. 252, 42 So. 349 (1906).

[17] Ala. Water Co. v. Knowles, 220 Ala. 61, 124 So. 96 (1929).

[18] Carnaggio Bros. v. City of Greenwood, 142 Miss. 885, 108 So. 141 (1926); Farmer v. Nashville, 127 Tenn. 509, 156 S. W. 189 (1912); City of Houston v. Lockwood Inv. Co., 144 S. W. 685 (Tex. Civ. App. 1912); Nourse v. City of Los Angeles, 25 Cal. App. 384, 143 Pac. 801 (1914); Covington v. Ratterman, 128 Ky. 336, 108 S. W. 297 (1908) (vendor's debt). Where, however, there is a statutory provision, it does create a lien on the land. Howe v. Orange, 70 N. J. Eq. 648, 62 Atl. 777 (1906) (grantor's default); Gerard L. Ins. Co. v. Philadelphia, 88 Pa. 393 (1879) (purchaser of land at sheriff's sale).

[19] Birmingham Waterworks Co. v. Brooks, 16 Ala. App. 209, 76 So. 515 (1917); Frothingham v. Benson, 44 N. Y. Supp. 879 (1897). The company must serve a person so situated, upon the installation of a separate connection.

[20] Gaines v. Charleston Light & Water Co., 104 S. C. 136, 88 S. E. 378 (1916); Ginnings v. Meridian Waterworks Co., 100 Miss. 507, 56 So. 450 (1911).

[21] Phelan v. Boone Gas Co., 147 Iowa 626, 125 N. W. 208 (1910). Requiring a deposit or guarantee of a bad financial risk is a reasonable regulation. *Contra:* Barriger v. Louisville Gas & Electric Co., 196 Ky. 268, 244 S. W. 690 (1922).

[22] Southwestern Tel. & Tel. Co. v. Danaher, 238 U. S. 482, 35 Sup. Ct. 886, 59 L. ed. 1419 (1915); Allen v. Cape Fear & Yadkin Valley Ry. Co., 100 N. C. 397, 6 S. E. 105 (1887). Although it implies a charge of impaired credit, a common carrier has the right to demand the prepayment of charges from one, even where it extends credit to others.

[23] O'Neal v. Citizen's Pub. Service Co., *supra* note 5.

In North Carolina, while previously no situation has arisen comparable to the principal case, the court has strongly inclined towards upholding and enforcing the public duty of the utility to serve all similarly situated on equal terms.[24] Was the plaintiff in the principal case "similarly situated?" It has further been held that the company may refuse to serve those who will not comply with its reasonable rules and regulations.[25] Was not the requirement for an additional deposit "reasonable" under the circumstances?

It would seem that the court has displayed extraordinary solicitude for the subscriber. The decision is partly justified by the requirement of payment in advance, but how is the company to protect itself against nonpayment of additional charges, such as long distance calls?

CECILE L. PILTZ.

Real Property—Adverse Possession of Separate Interests in Land.

The plaintiff occupied land by adverse possession under color of title for the statutory period. The defendant claimed the timber growing on the land, basing his claim on a recorded timber deed given prior to the time the plaintiff took possession of the land. *Held:* The adverse possession of the land did not conclude the prior lessee of the timber upon the land.[1]

Under both the common law and the Georgia Code "the right of the owner of lands extends downward and upward indefinitely."[2] Yet, there may be ownership in fee of several distinct interests in connection with a single tract of land. One person may own the surface of the land, another the buildings, another the timber growing on the land, and still another the minerals beneath the surface.[3] Therefore, one having title to the surface may have valid claims as-

[24] Griffin v. Goldsboro Water Co., 122 N. C. 206, 30 S. E. 319 (1898); Clinton-Dunn Telephone Co. v. Carolina Tel. & Tel. Co., 159 N. C. 8, 74 S. E. 636 (1912); S. & S. Ry. Co. & N. C. Pub. Service Co. v. So. Pr. Co., 180 N. C. 422, 105 S. E. 28 (1920).

[25] Woodley v. Carolina Tel. & Tel. Co., 163 N. C. 284, 79 S. E. 598 (1913).

[1] McNeill v. Daniel, 164 S. E. 187 (Ga. 1932).

[2] 2 BL. COMM. 18; GA. CODE ANN. (Michie, 1926) §3617.

[3] Fox v. Pearl River Lumber Co., 80 Miss. 1, 31 So. 583 (1902); Walters v. Sheffield, 78 Fla. 505, 78 So. 539 (1918).

serted against him for the timber growing on the surface,[4] and for minerals beneath the surface.[5]

Timber may be severed from the surface by deed, and an estate in fee, a corporeal hereditament, created therein.[6] In that event, possession of the surface by an adverse claimant is not necessarily adverse to the owner of the timber.[7] For the limitation to run against the timber owner, there must be such possession of the timber evidenced by acts of ownership and control as would amount to a separate adverse claim to the timber.[8]

Analogous cases are found where the title to mineral rights has been severed from the title to the surface, and the adverse possessor of the surface claims title to the minerals. In such cases the courts hold that the adverse possessor must take actual possession of the minerals by operating mines, before the limitation will run against the mineral owner.[9] A recent case in Kentucky holds that where minerals are severed from the surface by conveyance, the surface owner holds possession of the minerals in trust for the mineral owner, and no limitation can run against the latter.[10] But Louisiana takes the view that deeds conveying mineral rights convey only "real rights" in the nature of servitude, which may be lost by non-use for ten years to the possessor of the surface who gets title to the minerals by prescription.[11]

[4] Southwestern Lumber Co. of N. J. v. Evans, 275 S. W. 1078 (Tex. Civ. App. 1925); Prince v. Frost-Johnson Lumber Co., 250 S. W. 785 (Tex. Civ. App. 1923).

[5] Claybrooke v. Barns, 180 Ark. 678, 22 S. W. (2d) 390, 67 A. L. R. 1436 (1929); Kentucky Block Cannel Coal Co. v. Seawell, 249 F. 840, 1 A. L. R. 556 (C. C. A. 6th, 1918); Green v. West Texas Coal Mining and Developing Co., 225 S. W. 548 (Tex. Civ. App. 1920).

[6] Florence, Phillips and Co. v. Newsome, 26 Ga. App. 501, 106 S. E. 619 (1921); Lodwick Lumber Co. v. Taylor, 100 Tex. 270, 98 S. W. 238 (1906); Magnetic Ore Co. v. Marbury Lumber Co., 104 Ala. 465, 16 So. 632, 27 L. R. A. 434 (1894); Walters v. Sheffield, *supra* note 3.

[7] Southwestern Lumber Co. of N. J. v. Evans, *supra* note 4. *Cf.* Prewitt v. Bull, 234 Ky. 18, 27 S. W. (2d) 399 (1930); and Prince v. Frost-Johnson Lumber Co., *supra* note 4, where possession of land by *owners* thereof was held not adverse possession of timber belonging to others.

[8] Southwestern Lumber Co. of N. J. v. Evans, *supra* note 4. The dissenting judge in the principal case, while not raising the question of the severability of the land and timber interests, felt that there had been sufficient adverse possession both of the land and the timber to warrant a different result.

[9] Claybrooke v. Barns; Kentucky Block Cannel Coal Co. v. Seawell, both *supra* note 5.

[10] Franklin Fluorspar Co. v. Hosick, 239 Ky. 453, 39 S. W. (2d) 665 (1931).

[11] Louisiana Petroleum Co. v. Broussard, 172 La. 613, 135 So. 1 (1931); La Del Oil Properties Inc. v. Magnolia Petroleum Co., 169 La. 1137, 126 So. 684 (1930). See LA. REV. CIV. CODE (Merrick, 1925) arts. 3529, 3546.

The result in the instant case is apparently correct, but the rationale of the decision is not clear. The court gives no reason for its decision other than to say dogmatically that "such occupancy (by the possessor of the land) is consistent with, and not as a matter of law adverse to, the possession of the prior lessee." It is believed that the same result could have been reached on the basis of other decisions: First, the timber case, mentioned above,[12] in which the lease was held to create a separate interest in fee in the timber against which adverse possession of the land alone would not be effective; and, second, by reasoning from analogy to the mineral cases.[13]

W. E. ANGLIN.

Res Judicata—Judgment in Ejectment Suit as Res Judicata Preventing Restitution of Land.

A judgment of interpleader, construing a will, gave *B* a right to rents and profits accruing from a certain tract of land. While an appeal was pending *B* brought an action in ejectment against *A,* who was in possession of the tract, and recovered. *A* did not appeal. The original judgment of interpleader was reversed on appeal, the court construing the will in favor of *A*. *A* now brings an action in ejectment to regain possession of the land. *Held:* The first judgment in ejectment not having been appealed from is *res judicata* as to the question of the title to the land (Cardozo, Brandeis, and Stone, JJ., dissenting).[1]

The majority of the court explains its decision upon the ground that the original suit in equity for rents and profits and the first suit in ejectment were separate and unrelated suits. Therefore, the reversal of the original judgment did not give grounds for restitution as to the lands in the ejectment suit. The minority contends that the first action in ejectment was dependent upon the interpleader judgment, and that this second suit in ejectment is in effect a suit for restitution to which the plaintiff is entitled.

If the construction placed upon the will by the interpleader judgment—that the title to the land in question was in *B*—is conclusive until reversed, then the first ejectment judgment was dependent upon the interpleader judgment. The general rule is that where a judg-

[12] Southwestern Lumber Co. of N. J. v. Evans, *supra* note 4.

[13] Claybrooke v. Barns; Kentucky Block Cannel Coal Co. v. Seawell, both *supra* note 5.

[1] Reed v. Allen, 286 U. S. 191, 52 Sup. Ct. 532, 76 L. ed. 749 (1932). This case has been commented upon in (1932) 88 U. OF PA. L. REV. 77.

ment determines the title under which a party claims, it is *res judicata* as to any other property or right claimed under the same title in a subsequent action between the same parties.[2] Applying the rule to the instant case it seems clear that the trial court in the first action in ejectment was bound by the previous construction of the will. In fact, the only defense pleaded by *A* in the first ejectment action was in the nature of a plea in abatement on the grounds that the question of title was pending on appeal. Therefore, a reversal of the interpleader judgment ought to give grounds for restoring the parties to their original position.

The doctrine of restitution operates to restore to a litigant that which is lost by reason of the subsequent reversal of a judgment.[3] But apparently the courts have limited this rule to prop-

[2] "But where a judgment determines the title or right under which a party claims, it is decisive as to any other property or right claimed under that same title." 34 C. J. 906. Brock v. Boyd, 211 Ill. 290, 71 N. E. 995, 103 Am. St. Rep. 200 (1904) (a decree in adoption proceedings on which title depends is *res judicata* as to another suit for partition of land); Mass. v. Brant, 216 Mo. 641, 116 S. W. 503 (1909) (judgment declaring void a judgment under which land was sold is *res judicata* as to purchaser of land); Angelo v. Aldridge, 164 Ill. 388, 45 N. E. 722 (1896) (a decree for rents and profits is *res judicata* as to subsequent suit for partition); Sou. Pac. Ry. v. United States, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. ed. 355 (1897); Johnson v. Victoria Chief Copper M. & S. Co., 150 App. Div. 653, 135 N. Y. Supp. 1070 (1912); *Re* Lart, [1896] 2 Ch. 788, 65 L. J. Ch. N. S. 846, 72 L. T. N. S. 175; Carson v. McCormick Harvesting Machine Co., 18 Tex. Civ. App. 225, 44 S. W. 406 (1898).
Contra: Malona v. Schwing, 101 Ky. 56, 39 S. W. 523 (1897).

[3] "Where a judgment or decree of an inferior court is reversed by a final judgment in a court of review, a party is in general entitled to restitution of all things lost by reason of the judgment in the lower court." 18 Enc. Pl. & Pr. 871.
This doctrine of restitution originated in the common law as a part of the inherent power of the courts. Ranson v. City of Pierre, 101 Fed. 665 (C. C. A. 8th, 1900); Skinner v. Hannon, 30 N. Y. Supp. 987 (1884). However, today it is controlled by statutes in a great many states. N. C. CODE ANN. (Michie, 1931) §1534; ALA. CODE (Michie, 1928) §§8023, 8030; VA. CODE ANN. (Michie, 1931) §6412.
In spite of the general application of the doctrine to "all things lost by reason of a judgment" it has been held not to apply where the judgment was voluntarily paid. Teasdale v. Stroller, 133 Mo. 645, 34 S. W. 873 (1896); Travelers Ins. Co. v. Heath, 95 Pa. St. 333 (1880). *Contra:* Schooley v. Hashley, 72 N. Y. 578 (1878); Hiller v. Hiller, 35 Ohio St. 645 (1880). Neither does it apply where the specific property cannot be returned. Farmer v. Rogers, 10 Cal. 335 (1858). Nor after the property is in the hands of an innocent purchaser for value. Vogler v. Montgomery, 54 Mo. 577 (1874); Dodson v. Butler, 101 Ark. 416, 142 S. W. 503, 39 L. R. A. (N. S.) 1100, Ann. Cas. 1913E 1001 (1912). Nor against one who did not enter on land under the one whose title was declared void by the reversal. Mayo v. Sprout, 45 Cal. 99 (1872).
But restitution can be had for crops grown on land between trial judgment and reversal by Supreme Court. Stanborough v. Cook, 86 Iowa 741, 53 N. W.

erty taken directly under the judgment which is reversed.[4] However, this limitation was placed upon the doctrine when the technical rules of procedure were emphasized more than they are now.[5] Then, too, those cases in which restitution was refused, because the property was not taken directly under the judgment that was reversed, did not involve the doctrine of *res judicata* between the two judgments. In the instant case there is a loss of property by virtue of a judgment (interpleader) which has been subsequently reversed. It would be consistent to extend the doctrine to this case.

The majority of the court recognizes the equities in favor of *A* by admitting that if the first judgment in ejectment had been appealed from, it probably would have been reversed; or the appeal would have been consolidated with the appeal in the interpleader suit.[6] They insist, however, that an appeal in the first ejectment action is the only remedy available to *A*.[7] But this is putting rules of procedure above the justice of the cause. The second judgment in ejectment, as Cardozo, J. suggests, should be treated as a suit for restitution.[8]

WILLIAM MEDFORD.

131 (1892). It also applies when more land is taken in ejectment than is called for by the judgment. Russel v. Webb, 96 Ark. 190, 131 S. W. 456 (1910). Or when land other than that included in a judgment is taken. *Ex parte* Reynolds, 1 Cai. 500 (N. Y. 1804); Shaw v. Bayard, 4 Pa. 257 (1846).

[4] Durham & N. W. Ry. Co. v. N. C. Ry. Co., 108 N. C. 304, 12 S. E. 983 (1890); Eilers v. Wood, 64 Wis. 422, 25 N. W. 440 (1885); Murry v. Berdell, 98 N. Y. 480 (1885); Reynolds v. Reynolds, 67 Cal. 20, 8 Pac. 184 (1885).

[5] Dicta in more recent cases indicate a possible change of attitude. Elis v. McGovern, 153 App. Div. 26, 137 N. Y. Supp. 1029 (1912); Walz v. Agricultural Ins. Co., 282 Fed. 646 (E. D. Mich. 1922); Ure v. Ure, 223 Ill. 454, 79 N. E. 153, 114 Am. St. Rep. 336 (1906).

[6] It is clear that it would have been reversed. Butler v. Eaton, 141 U. S. 240, 11 Sup. Ct. 985, 35 L. ed. 713 (1891); Arkadelphia Milling Co. v. St. Louis S. & W. Ry., 249 U. S. 134, 39 Sup. Ct. 237, 63 L. ed. 517 (1919); Poole v. Seney, 70 Iowa 275, 30 N. W. 634 (1868); Ranson v. City of Pierre, *supra* note 3; Hennessy v. Tacoma Smelting & Ref. Co., 129 Fed. 40 (C. C. A. 9th, 1904).

[7] The court cites Butler v. Eaton, *supra* note 6, as clearly pointing out that this was the only remedy available in this situation. But the case does not point this out. It merely decides that when a previous judgment, upon which the case before it depended, has been reversed, it can reverse the judgment itself instead of sending it back to the court below.

[8] The proper way to obtain a writ of restitution at common law was by a motion. Sometimes, however, the appellate court would, when it reversed the judgment, direct the return of all property taken under authority of the judgment. There is some authority for allowing an action for money had and received in this situation. Haebler v. Meyers, 132 N. Y. 363, 30 N. E. 963, 15 A. L. R. 588, 28 Am. St. Rep. 589 (1892) is an illustration of such an action being allowed It would not be radically out of line either with the modern attitude toward procedure or with the idea of restitution to allow this second action in ejectment to be treated as a suit for restitution.

Taxation—Copyright Royalties as Immune From State Taxation.

In *Maxwell v. Chemical Construction Co.*,[1] decided in March 1931, the North Carolina Supreme Court held unconstitutional a tax on income derived from royalties on patents issued by the United States. Identically the same form of tax had been declared invalid by the United States Supreme Court three years earlier in *Long v. Rockwood*,[2] and the North Carolina court considered that decision controlling. On May 16, 1932, the United States Supreme Court decided *Fox Film Corporation v. Doyal*,[3] upholding a Georgia privilege tax measured by gross receipts, which in the contested case were royalties from copyrights. Their decision in *Long v. Rockwood* having been urged upon the court, Mr. Chief Justice Hughes agreed that in this question copyrights and patents stood in the same position and remarked that, "the affirmance of the judgment in the instant case cannot be reconciled with the decision in *Long v. Rockwood*—and in view of the conclusions now reached upon a re-examination of the question, that case is definitely overruled."[4] Thus comes to an early end a generally criticized[5] extension of the doctrine, long established, that state and federal governmental instrumentalities are free from taxation by the other government. Mr. Justice Holmes' dissent in *Long v. Rockwood* contained the theory

[1] 200 N. C. 500, 157 S. E. 606 (1931). (1931) 9 N. C. L. REV. 475. The income of the company for 1929 was assessed at $134,341.96, and upon this sum, received from royalties, was levied a tax amounting to $6,907.76. The tax was paid under protest and appeal taken from the ruling of the Commissioner of Revenue.

[2] 277 U. S. 148, 48 Sup. Ct. 463, 72 L. ed. 824 (1928).

[3] 52 Sup. Ct. 546 (1932). (1932) 41 YALE L. J. 1237. The Fox case is followed in Com. v. Hannaford, 165 S. E. 512 (Va. 1932).

[4] 52 Sup. Ct. 546, 548 (1932). The court might have distinguished this tax from Long v. Rockwood in the manner of the North Carolina court's distinction between the Chemical Construction case and Educational Films Corp. v. Ward, 282 U. S. 379, 51 Sup. Ct. 170, 75 L. ed. 400 (1931), *i.e.*, the distinction between an income tax and a privilege tax measured by income. However, the distinction between franchise and income taxation might be offset in statute-healing properties by the difference between gross receipts and income as measures of the tax.

[5] (1928) 77 U. OF PA. L. REV. 115; (1928) 28 COL. L. REV. 1100; (1929) 13 MARQUETTE L. REV. 117; (1931) 9 N. C. L. REV. 475. In the latter note the opinion was expressed that inasmuch as Long v. Rockwood was a five to four decision, the changed personnel of the judiciary might result in a court which disapproved the authority the North Carolina court felt compelled to follow. Strangely enough, there was no dissent in the Fox Film case. Van Devanter, McReynolds, and Butler, JJ., who with Mr. Chief Justice Taft and Mr. Justice Sanford formed the Long v. Rockwood majority, acquiesced in the overturning of that case.

of decision in the *Fox Film* case, that a nondiscriminatory tax on the income from copyrights is not a tax upon any governmental function. More important is the ascendency, though in a restricted measure, of the philosophy that powers and immunities, once thought to be absolute, must be considered with regard to their effect.

Of incidental interest here, is the provision in the North Carolina Revenue Act which imposes a flat rate license tax on persons engaged in the business of selling patent rights.[6] Assuming this to mean patent rights granted by the United States, what is the constitutional status of the tax?[7] Both this tax and that involved in the *Fox Film* case are privilege taxes, but with the difference that the flat rate may be more burdensome than a gross receipts levy. Under the absolute immunity theory of *Long v. Rockwood* this tax should have been invalid. Though flat rate taxation often is iniquitous, this license, since small in amount, would likely be countenanced under the Court's present view.

E. M. PERKINS.

Trusts—Distinction Between Dividend and Coupon Funds.

The increasing burden imposed on the courts of adjudicating the various conflicting claims of creditors of insolvent corporations provokes serious inquiry as to the universally recognized distinction between a fund created to meet bond interest and a similar fund created to meet declared dividends.[1] The repeated efforts of the

[6] N. C. CODE ANN. (Michie, 1931) §7880 (94). "Every person, firm or corporation engaged in the business of selling or offering for sale any patent right or formula shall apply in advance and obtain from the Commissioner of Revenue a separate State license for each and every county in this State where such patent right or formula is to be sold or offered for sale, and shall pay for each separate license a tax of ten dollars ($10.00). Counties, cities, or towns may levy a license tax on the business taxed under this section not in excess of the taxes levied by the State."

[7] A similar tax has been found in every Revenue Act since 1913, but so far as can be determined it has not been judicially construed in North Carolina. See, holding like statutes unconstitutional, Commonwealth v. Petty, 96 Ky. 452, 29 S. W. 291 (1895); *In re* Sheffield, 64 Fed. 833 (C. C. Ky. 1894).

[1] In *Re* Interborough Consolidated Corporation, 288 Fed. 334 (C. C. A. 2d, 1923) the court said: "There seems to be a fundamental distinction between a fund set apart for the payment of a dividend and a fund set apart for the payment of ordinary indebtedness". In Guidise v. Island Refining Corporation, 291 Fed. 922 (S. D. N. Y. 1923) Judge Learned Hand declared, "I cannot conceive any legal distinction between a fund deposited in a bank to meet a declared dividend and called a 'Dividend Account,' and a similar fund deposited to meet coupons and called a 'Coupon Account'. A declared dividend is universally regarded as a debt, and a coupon is of course no more than a secured debt. How it can be thought, *ceteris paribus*, that one account should

coupon holders to impress a trust character on the former have been of no avail;[2] whereas similar efforts on the part of the stockholders as to the latter have invariably been successful.[3] It is well to state at the outset that deposits for a specific purpose are not within the scope of the present inquiry,[4] for, obviously, the court will declare even a coupon fund a trust when the circumstances surrounding the creation of the fund clearly indicate an intention to create a trust.[5] The matter which arouses interest is the fact that the courts hold that a dividend fund is a trust regardless of the circumstances attending its creation.[6] As was said in the first of the *Interborough*

be a trust fund and the other not passes the limit of my discrimination". But authority bound Judge Hand to hold to the contrary. In an article on *Status of Funds Deposited for the Payment of Interest on Bonds,* (1925) 19 ILL. L. REV. 429, Robert L. Grinell says that "why the creation of a debt plus the setting apart of the money to pay it should create a trust, while the setting apart of money to pay a debt already in existence does not, is nowhere made clear", and adds that both lines of cases are "of too long standing to be easily upset".

[2] Williamsport Gas Co. v. Pinkerton, 95 Pa. St. 62 (1880); Adams v. Hackensack Commission, 44 N. J. L. 638, 43 Am. Rep. 406 (1882); Van Horn v. Kittitas County, 28 Misc. Rep. 333, 59 N. Y. Supp. 883 (1889); Staten Island Club v. Trust Co., 41 App. Div. 321, 58 N. Y. Supp. 460 (1899); Noyes v. First National Bank, 180 App. Div. 162, 167 N. Y. Supp. 288 (1917); Guidise v. Island Refining Corp. *supra* note 1; *Re* Interborough Consolidated Corporation, *supra* note 1; Erb v. Banco di Napoli, 243 N. Y. 45, 152 N. E. 460 (1926); Pike v. Anglo South American Trust Co., 267 Mass. 130, 166 N. E. 553 (1929).

[3] Le Roy v. Globe Insurance Co., 2 Edw. Ch. 657 (N. Y. 1836); *Re* Le Blanc, 14 Hun 8 (N. Y. 1878); *Re* Interborough Consolidated Corporation, 267 Fed. 914 (S. D. N. Y. 1920); see Jermain v. Lake Shore Ry. Co., 91 N. Y. 483, 492 (1883); Albany Fertilizer Co. v. Arnold, 103 Ga. 145, 148, 29 S. E. 695, 696 (1897); *Re* Sutherland, 23 F. (2d) 595, 599 (C. C. A. 2d, 1928); Van Dyck v. McQuade, 86 N. Y. 38, 52 (1881).

[4] For a discussion of deposits for a specific purpose, see (1931) 10 N. C. L. REV. 381.

[5] In Rogers Locomotive Works v. Kelly, 88 N. Y. 234 (1882), the corporation deposited money to meet interest coupons under the following written agreement: "Received of corporation $25,000 *in trust,* to apply the same to an equal amount of corporation's coupons in order of presentment, said money not to be subject to the control of corporation otherwise than for payment of the said coupons." In Steel Cities Chemical Co. v. Virginia Carolina Chemical Co., 7 F. (2d) 280 (C. C. A. 2d, 1925), the company, under a trust indenture, transferred to a trust company, *as trustee,* all its property, to pay *as per trust agreement* the interest coupons as they fell due. Judge Hand dissented with "whatever may be said for the original ground of the doctrine and for any theoretical distinction between dividends and coupons, it seems to be unfortunate to introduce nice distinctions into such a subject, where certainty and simplicity is the first requirement." In Holland Trust Co. v. Sutherland, 177 N. Y. 327, 69 N. E. 647 (1904), a foreign corporation to secure its bonds assigned all its property to plaintiff *as trustee* and by the same trust instrument agreed to set apart certain revenues "to be used exclusively to pay the interest on bonds and for no other purposes." (Italics ours).

[6] 2 COOK, CORPORATIONS (8th ed. 1923) §541; 7 THOMPSON, CORPORATIONS (3d ed. 1927) §5308; cases cited, *supra* note 3.

cases,[7] "the fact that the dividends were declared and set aside distinguishes it in principle from that class of cases where the trust fund question depends on the circumstances and sometimes on the language used when the fund was created or deposited." It is believed that the failure to see this distinction has been the source of all the misunderstanding.[8]

Apparently the first case of any importance declaring that a dividend fund was a trust for the benefit of the stockholders was *Le Roy v. Globe Insurance Company,*[9] decided in 1836. There the corporation declared a dividend, debited the amount on the corporation books, and made out all the dividend checks. The corporation was declared insolvent before the plaintiff had received his share of the dividends. The court held that a trust fund had been created in favor of the stockholders and that the plaintiff could recover in preference to the general creditors of the corporation. There may be some doubt as to whether there was a sufficient segregation of the funds to establish a trust *res,* since the checks were drawn on the corporation's general account at the bank,[10] but the doctrine of the case has since been consistently followed and approved.[11]

Neither the language of the *Le Roy* case nor that of subsequent cases has been very helpful. But it is clear that in the coupon cases the courts will not declare a trust unless two elements are present: (1) a trust *res,*[12] in the nature of a fund, and (2) an unequivocal

[7] 267 Fed. 914 (S. D. N. Y. 1920) Although declaring the fund a trust as to the amount necessary to pay the dividends, the court reserved the point as to the status of money remaining after the dividend claims had been satisfied.

[8] In Guidise v. Island Refining Corp., *supra* note 1, Judge Hand says, "what seems to me of consequence is that each remittance was sent on with the understanding that the obligor should not have anything more to do with it, and that the bank should distribute it to those who were entitled. That, I should think, might have been treated as an irrevocable release of control, and so, a valid declaration of trust". In *Re* Interborough Consolidated Corporation, *supra* note 2, the court said "we find it impossible to spell out a trust in favor of the coupon holder, although we admit that we entered upon consideration of this case inclined to think that a trust relationship existed".

[9] 2 Edw. Ch. 657 (N. Y. 1836).

[10] In the course of the opinion the court said, "it makes no difference in my judgment that the money was not told out and specifically set apart in the bank to meet these checks, or that a separate fund was not created for the purpose, or that the money intended to meet them still formed a part of the general mass standing to the credit of the company on the books of the bank". This language clearly explodes any attempted analogy between coupon funds and dividend funds on the ground of the particular terms of the contract with the bank when the deposit is made.

[11] Cases cited, *supra* note 3.

[12] The trust *res* is never a prominent question in the coupon cases, for the suits always involve an attempt to impress a trust on a specific and designated

expression of intent to create a trust.[13] On the other hand, in the dividend cases the court's inquiry is restricted to the trust *res*, and if a sufficient segregation from the general assets of the corporation is shown, that, *ipso facto*, gives rise to a trust regardless of what the intent of the corporation may have been.[14] Furthermore, when the fund is not deposited in the bank, the corporation is declared the trustee.[15] The inevitable conclusion is that the distinction is predicated upon a relation between the corporation and its stockholders which does not exist between the ordinary debtor and creditor.[16]

It has long been established that the proper and authorized declaration of a dividend creates an irrevocable debt due from the corporation to the stockholder, placing the latter in the position of a general creditor.[17] But the important thing to notice is the fact that

bank deposit. It becomes important in the dividend cases due to the fact that quite often the dividend is payable out of a general account at the bank or is payable at the office of the corporation.

[13] In *Re* Interborough Consolidated Corporation, *supra* note 2, the court held that "nothing that was said or done amounted to a declaration of trust, and the relation between the bank and the depositor continued to be that of debtor and creditor", and that "the bank here was simply the agent of the bankrupt, agreeing merely to pay the latter's checks when presented. This agreement created a mere agency, and like all other agencies not coupled with an interest, was revocable at will and conferred no title or equitable lien on any third party or coupon holder". Attempts to apply the *Lawrence v. Fox* doctrine have generally failed for lack of an express promise, supported by consideration, by the bank to pay the coupon holders. Staten Island Club v. Trust Co.; Erb v. Banco di Napoli, both *supra* note 2.

[14] Le Roy v. Globe Insurance Co.; Van Dyck v. McQuade; Jermain v. Ry. Co.; *Re* Sutherland, all *supra* note 3. However, when a dividend is declared and a fund deposited in the bank, the insolvency of the bank does not cut off the stockholder's right against the corporation until a reasonable notice of the deposit has been given. King v. Paterson & Hudson R. Co., 29 N. J. L. 82 (1860). This is clearly true in the case of coupon funds. Williamsport Gas Co. v. Pinkerton, *supra* note 2.

[15] Van Dyck v. McQuade; Jermain v. Ry. Co., both *supra* note 3.

[16] Note (1928) 28 COL. L. REV. 477.

[17] The cases agree that a cash dividend which has been declared is not revocable. Beers v. Bridgeport, Spring Co., 42 Conn. 17 (1875); McLaren v. Crescent Co., *infra*. One court allowed the directors of a corporation to "rescind the vote" to pay a dividend where it had been given absolutely no publicity or publication. Ford v. East Hampton Rubber Thread Co., 158 Mass. 84, 32 N. E. 1036 (1893). But even this decision was criticized in the McLaren case, *infra*. The stockholder whose dividend is declared does not stand as a preferred creditor until there has been a segregation of the funds so as to give rise to a trust. Lowne v. American Fire Insurance Co., 6 Paige 482 (N. Y. 1837); Hunt v. O'Shea, 69 N. H. 600, 45 Atl. 480 (1899); McLaren v. Crescent Co., 117 Mo. App. 40, 93 S. W. 819 (1906); Staats v. Biograph Co., 236 Fed. 454 (C. C. A. 2d, 1916); see Elkins v. First National Bank, 43 F. (2d) 777, 779 (C. C. A. 4th, 1930). But the language in some of the cases is to the effect that mere declaration divides the property which belongs to the corporation into that which the corporation retains and that which the corporation agrees to pay to the stockholders, or that mere declara-

the debt is not supported by the usual common law consideration, but by the peculiar relationship which the corporation bears to the stockholder.[18] It has been said that this relationship is, to all practical purposes, that of trustee and *cestui*.[19] Although this may not be technically true, the fact cannot be escaped that the stockholders are, in a sense, the beneficial owners of the corporate property. That proposition has been adequately recognized by those cases in which the court has deemed it desirable to disregard the separate legal entity of the corporation.[20] It would logically follow that the earned increment from which a dividend is declared is also, in a sense, beneficially owned by the stockholders.[21] The formality of declaring a dividend is, in effect, no more than a dissolution of a portion of the corporate property in favor of the stockholders. And once that portion is segregated from the mass, it is not a matter of great difficulty to realize it as a trust fund in their favor.[22]

In this way there can be found at least a technical distinction be-

tion is, in legal contemplation, a separation of the amount from the assets of the corporation, which holds such amount thereafter as trustee of the stockholder. Staats v. Biograph Co., *supra;* Hopper v. Sage, 112 N. Y. 530, 20 N. E. 350, 8 Am. Rep. 771 (1889). But ordinarily, mere declaration does not entitle the stockholder to sue in equity. Searles v. Gebbie, 115 App. Div. 778, 101 N. Y. Supp. 199 (1906). But see Beers v. Bridgeport, *supra* at 24. The person owning the stock when the dividend is declared is the one entitled to it and not the one owning the stock when the dividend is paid. Hopper v. Sage, *supra;* Hill v. Newwanawich, 8 Hun 459 (N. Y. 1876).

[18] As was said in Ford v. East Hampton Rubber Thread Co., *supra* note 17, "the doctrine as applicable to simple contracts between persons having no fiduciary relation to each other is not applicable to the promise of a corporation to pay a dividend. The corporation's purpose is to make money for its stockholders, and it is the duty of the directors from time to time to declare dividends out of the net earnings, if there are any. The whole property of the corporation is held on a sort of trust for the stockholders, and the directors are, in a sense, managers. The stockholder's cause of action does not arise from any actual contract between the corporation and the stockholder, but from the nature of the organization and the relation of the stockholders to the corporation and its property. The amount after declaration is considered as property held by the corporation for the use of the stockholders individually".

[19] See Moore v. Schoppert, 22 W. Va. 282, 290 (1883).

[20] First Nat. Bank v. Trebein, 59 Ohio St. 316, 52 N. E. 834 (1898); Rice v. Sanger Bros., 27 Ariz. 15, 229 Pac. 397 (1924).

[21] See *Re* Sutherland, *supra* note 3, to the effect that a stockholder has a vested interest in the corporate profits.

[22] In *Re* Le Blanc, *supra* note 3, and *Re* Interborough Consolidated Corporation the language is that the stockholders acquired a "lien in equity" on the fund. But in conformance with the trust idea it has been held that the corporation cannot be taxed on such fund. Pollard v. First National Bank, 47 Kan. 406, 28 Pac. 202 (1891). It would therefore seem to follow that the fund could not be garnished by a creditor of the corporation, or be subjected to tort or wage claims against the corporation.

tween the two funds. But the question remains whether the conclusion reached by the courts is justified. As a practical matter the present-day stockholder is far removed from either ownership or control of the corporate property. To hold that a dividend fund is a trust necessitates indulgence in a process of abstract theorizing which should never be resorted to in the absence of cogent reasons of public policy. And if public policy is at all involved, it would seem to favor the creditor of the corporation rather than the stockholder.

FRANK P. SPRUILL, JR.

Workmen's Compensation—Conflict of Laws—Injury to Employee Outside State of Employment.

The deceased, a resident of Vermont, was employed in that state by a Vermont corporation, and was killed while doing temporary work in New Hampshire. The administratrix of deceased, a resident of New Hampshire, brought suit in that state for the death of her intestate. The Vermont Compensation Act provides that the employee's acceptance of the Act bars a recovery in a suit at law; whereas the New Hampshire Act permits the employee to elect, subsequent to the injury, either to take compensation under the Act or to sue at law. The Vermont Act also provides that workmen employed within the state shall be entitled to compensation though injured outside the state. The case was removed to the federal court on the ground of diversity of citizenship; and defendant interposed as a defense that the Vermont Act would not permit the action. The Supreme Court of the United States held the Vermont Act a bar to the action brought in New Hampshire.[1]

Where the injury occurs outside the state of employment the confusion among the courts as to what law governs is occasioned by the conflicting tort and contract theories of workmen's compensation and the differences among the statutes themselves.[2] The earlier tendency

[1] Bradford Electric Light Co. v. Clapper —— U. S. ——, 52 Sup. Ct. 571, 76 L. ed. 757 (1932).

[2] See an excellent article by Dwan, *Workmen's Compensation and the Conflict of Laws* (1927) 11 MINN. L. REV. 329.

In connection with the general problem, see GOODRICH, CONFLICT OF LAWS (1927) §§202-206; CONFLICT OF LAWS RESTATEMENT (Am. L. Inst. 1926) §§434-443; Angell, *Recovery Under Workmen's Compensation Act for Injury Abroad* (1918) 31 HARV. L. REV. 619; (1918) 27 YALE L. J. 113; (1927) 5 TEX. L. REV. 416; (1931) 79 U. OF PA. L. REV. 86; (1930) 16 VA. L. REV. 701; (1925) 10 CORN. L. Q. 364. On extraterritorial operation of workmen's compensation acts, see Note (1919) 3 A. L. R. 1351; Note (1929) 59 A. L. R. 735.

was to hold the act strictly territorial, and allow compensation only for injuries occurring within the state.[3] But the modern trend is to allow a recovery under the act of the state of employment for injuries received elsewhere.[4] Where the injury occurs outside the state but arises from employment merely incidental to the main employment within the state, most courts give their acts extraterritorial effect and allow compensation.[5] But where the parties are in one state and the contract contemplates permanent employment in another state, it has been held that the act of the state of injury applies.[6] The majority of cases, however, allow compensation in the state of hiring although the duties of the employee are to be performed outside that state.[7] Conversely, where recovery was sought under the

[3] Gould's Case, 215 Mass. 480, 102 N. E. 693 (1913) (changed by MASS. STAT. (1927) c. 309, §93); North Alaska Salmon Co. v. Pillsbury, 174 Cal. 1, 162 Pac. 93 (1916) (changed by CAL. GEN. LAWS (Deering, 1931) act 4749, §58).

In some states the application of the act is limited to injuries received in the state. PA. STAT. (West, 1920) §21916.

[4] Rounsaville v. Cent. R. Co., 87 N. J. L. 371, 94 Atl. 392 (1915); Smith v. Van Noy Interstate Co., 150 Tenn. 25, 262 S. W. 1048 (1924); Metropolitan Casualty Ins. Co. of N. Y. v. Hahn, 165 Ga. 667, 142 S. E. 121 (1928); Miller Bros. Const. Co. v. Maryland Casualty Co., 155 Atl. 709 (Conn. 1931).

In some states it is expressly provided that recovery may be had under the act when injury occurs outside the state. But even where it is not so provided, such construction has been read into the contract of employment and compensation allowed according to the law of the place where the contract was made. Crane v. Leonard, Crossette & Riley, 214 Mich. 218, 183 N. W. 204 (1921). See Note (1925) 34 YALE L. J. 453.

Jurisdiction of a state to enact such a statute upheld: Quong Ham Wah Co. v. Industrial Commission, 184 Cal. 26, 192 Pac. 1021 (1920); writ of error dismissed, 255 U. S. 445, 41 Sup. Ct. 373, 65 L. ed. 723 (1921). See Note (1921) 9 CALIF. L. REV. 230.

[5] Industrial Commission v. Aetna Life Ins. Co., 64 Col. 480, 174 Pac. 589 (1918); State *ex rel.* Maryland Casualty Co. v. District Court, 140 Minn. 427, 168 N. W. 177 (1918); Texas Employer's Ins. Ass'n. v. Volek, 44 S. W. (2d) 795 (Tex. Civ. App. 1931); Norwich Union Indemnity Co. v. Wilson, 43 S. W. (2d) 473 (Tex. Civ. App. 1931).

[6] Durrett v. Eicher-Woodland Lumber Co., 140 So. 867 (La. 1932) (recovery of employee hired in Louisiana to do work in Mississippi held to depend upon the law of the state of injury regardless of where the contract of hiring was made); Ginsburg v. Byers, 171 Minn. 366, 214 N. W. 55 (1927); N. C. CODE ANN. (Michie, 1931) §8081 (rr).

In Interstate Power Co. v. Industrial Commission, 203 Wis. 554, 234 N. W. 889 (1931), the defendant, a Wisconsin corporation, made the contract in Iowa with the deceased, a resident of that state, to work in Iowa, and he was killed while working temporarily in Wisconsin. It was held the Wisconsin Act applied to all injuries within the state without regard to the place where the employment contract was made. See Note (1931) 6 WIS. L. REV. 243.

[7] Hulswit v. Escanaba Mfg. Co., 218 Mich. 500, 188 N. W. 411 (1922); McGuire v. Phelan-Shirley Co., 111 Neb. 609, 197 N. W. 615 (1924); Beal Bros. Supply Co. v. Industrial Comm., 341 Ill. 193, 173 N. E. 64 (1930); Skelly Oil Co. v. Gaugenbaugh, 119 Neb. 698, 230 N. W. 688 (1930); Pettiti v. T. J. Pardy Construction Co., 103 Conn. 101, 130 Atl. 70 (1925), noted in

act of the state of injury it was denied because the contract of employment was made in another state.[8] But a number of jurisdictions allow compensation in the state of injury regardless of where the contract of employment was made.[9]

A workmen's compensation act creates a statutory relationship between employer and employee. Although this relationship is not purely contractual, it arises out of the contract of hire; and it is therefore submitted that the act of the state of employment, rather than that of the state of injury, should govern the rights of the parties.[10] It may be hoped that the principal case, a decision of the United States Supreme Court, will aid in securing more uniform decisions, and lessen the existing confusion in workmen's compensation cases where the injury occurs outside the state of employment.[11]

The instant case is entirely in harmony with a practically uniform line of decisions holding that any other form of relief will be denied if the plaintiff has a remedy under the compensation act of another jurisdiction.[12] But apparently the North Carolina cases decided prior to the enactment of the Workmen's Compensation Act in this state are to the contrary.[13] In *Johnson v. Carolina C. & O. Ry. Co.*,[14] the

(1925) 35 YALE L. J. 118. *Contra:* Tripp v. Industrial Commission, 89 Col. 512, 4 Pac. (2d) 917 (1931) (Colorado Act held inapplicable where salesman hired in Colorado by foreign corporation was killed while performing services outside the state).

[8] Hopkins v. Matchless Metal Polish Co., 99 Conn. 457, 121 Atl. 828 (1923). *Contra:* Ginsburg v. Byers, *supra* note 6.

[9] American Radiator Co. v. Rogge, 86 N. J. L. 463, 92 Atl. 85 (1914); Ginsburg v. Byers, *supra* note 6; Ocean Accident & Guarantee Corp. v. Industrial Comm., 32 Ariz. 275, 257 Pac. 644 (1927) (Arizona Act held to control rights of employee injured there though hired in California), noted in (1928) 1 So. CALIF. REV. 274.

New York appears to be one of the few states that have adopted a definite test for all situations. In Cameron v. Ellis Const. Co., 252 N. Y. 394, 169 N. E. 622 (1930), it was held that the place specified in the contract as that of employment was the sole and conclusive test of what law governs. Neither the place of the contract, site of injury, or residence of the parties is controlling.

[10] In Scott v. White Eagle Oil & Refining Co., 47 Fed. (2d) 615 (D. Kan. 1930), it was held that the Workmen's Compensation Act of Missouri, where the employment contract was made, governs the parties' rights in an action brought in Kansas by the employee injured there. Also see cases *supra* note 7.

[11] *Cf.* Swift v. Tyson, 16 Pet. 1, 10 L. ed. 865 (1842). See Fordham, *The Federal Courts and the Construction of Uniform State Laws* (1929) 7 N. C. L. REV. 423.

[12] Shurtliff v. Oregon Short Line R. Co., 66 Utah 161, 241 Pac. 1058 (1925) (recovery denied in suit at law where compensation act of the state of injury was pleaded); Albanese v. Stewart, 78 Misc. Rep. 581, 138 N. Y. Supp. 942 (1912); Wasilewski v. Warner Sugar Refining Co., 87 Misc. Rep. 156, 149 N. Y. Supp. 1035 (1914).

[13] Farr v. Babcock Lumber & Land Co., 182 N. C. 725, 109 S. E. 833 (1921) (Tennessee employee injured in North Carolina allowed recovery at

plaintiff, a citizen of North Carolina, made a contract in Tennessee with the railroad to perform work in that state, and the injury occurred there. It was held that the plaintiff could maintain a suit at law in North Carolina regardless of the Tennessee Act. The North Carolina Workmen's Compensation Act[15] provides that a workman hired in the state shall be entitled to compensation for injury received outside the state.[16] Following the reasoning of the principal case, the North Carolina Act would be a defense to a suit at law instituted in another state by an injured employee hired in North Carolina. Therefore, it is submitted that if the question presented in *Johnson v. Carolina C. & O. Ry. Co.* were to arise again, the North Carolina court should reverse its position and fall in line with the principal case.

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law in North Carolina regardless of the Tennessee Compensation Act); Johnson v. Carolina C. & O. Ry. Co., 191 N. C. 75, 131 S. E. 390 (1926), noted in (1926) 24 MICH. L. REV. 852, (1926) 40 HARV. L. REV. 130, and (1926) 21 ILL. L. REV. 184.

[14] *Supra* note 13.

[15] N. C. CODE ANN. (Michie, 1931) c. 133a.

[16] N. C. CODE ANN. (Michie, 1931) §8081 (rr). "Where an accident happens while the employee is employed elsewhere than in this State . . . the employee or his dependents shall be entitled to compensation, if the contract of employment was made in this State, if the employer's place of business is in this State, and if the residence of the employee is in this State; provided his contract of employment was not expressly for service exclusively outside of the State; . . ."

In Kleinfeld v. Radiator Specialty Co., 3 N. C. I. C. 255 (1932), deceased, a resident of New York, was employed by a North Carolina company, and the accident resulting in death occurred in Michigan. It did not appear from the record whether the contract of employment was made in North Carolina or not, or whether it was for services exclusively outside the state. Compensation was denied because deceased was not a resident or citizen of North Carolina.