Notes and Comments

North Carolina Law Review

the total of 57 in the class, 18 have college degrees, 3 have had 4 years of college work, 28 have had three years, 5 have had two years under the temporary exception in the trustees' regulation setting up a three-year entrance requirement, and 3 are special students.

The visiting professors in the summer session of 1933 included: Ralph Fuchs, Washington University, St. Louis; Albert C. Jacobs, Columbia University; Roscoe Turner Steffen, Yale University; and William E. McCurdy, Harvard University. Professor R. H. Wettach spent the summer teaching Constitutional Law and Conflict of Laws at the Northwestern University Law School. Professor M. S. Breckenridge was again engaged in research for the Interstate Commerce Committee of the House of Representatives. Professor Albert Coates is absent on leave during the fall semester in order that he may devote his time to the Institute of Government.

The University of North Carolina Press has just published *Lynching and the Law* by Assistant Professor J. H. Chadbourn. It is a study of the operation and effectiveness of the judicial process and the special legislation in relation to lynching, and concludes with a suggested model anti-lynching law for adoption by the several states. The study is the fruit of three years of coöperation between the Law School and the Southern Commission on Lynching.

NOTES AND COMMENTS

Administrative Law—Delegation of Legislative Power to President Under National Industrial Recovery Act.

The provisions of the National Industrial Recovery Act which tend to effectuate its policy are to be found in those sections which provide for the promulgation of compulsory codes and the issuance of licenses upon the discovery of specified abuses.[1] Congress has put both these weapons into the hands of the President, and this inquiry concerns the validity of such delegation as tested by precedent.[2]

[1] 48 STAT. 196 (d) (1933), 15 U. S. C. A. §703 (d) and 48 STAT. 197 (b) (1933), 15 U. S. C. A. §704 b). The scope of this note is confined to the question of delegation. For the purposes of discussion, it is assumed that Congress had the power to pass the act as to its other aspects.

[2] The cases examined yield no clear cut definition of what is or is not legislative. In the last analysis, it would seem that the outcome of each case depends on the attitude of the court upon the question involved in the particular legislation. See Parke v. Bradley, 204 Ala. 455, 86 S. 28 (1920) ("The limits beyond which a legislative may go have never been clearly defined").

It is asserted as a truism that there can be no delegation of legislative power.[3] But such prohibition is said to include only the legislative prerogative of policy forming.[4] Any power not legislative in character which the legislature may exercise, it may delegate.[5] Such delegations of power as the following have been upheld: fact finding,[6] the making of rules and regulations, even where the legislature has provided that these violations shall be punishable,[7] the working out of administrative details[8] and a determination of whether the occasion exists for executing the law.[9]

One of the tests of the validity of such delegation is the "completeness of the statute."[10] Some say, if the subject matter has been acted upon as far as is practical, the statute will be upheld.[11] It has

[3] Field v. Clark, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. ed. 294 (1892); Commonwealth v. Beaver Dam Coal Co., 194 Ky. 34, 237 S. W. 1086; Durham Provision Co. v. Daves, 190 N. C. 7, 128 S. E. 593 (1925).

[4] Parker v. Bradley, 204 Ala. 455, 86 So. 28 (1920); State v. Atlantic Coast Line R. R. Co., 56 Fla. 617, 47 So. 969 (1908); State v. Moorer, 152 S. C. 455, 150 S. E. 269 (1929).

[5] U. S. v. Grimand, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. ed. 563 (1910); Merchants' Exchange v. Knott, 212 Mo. 616, 111 S. W. 565 (1908); Monroe v. Withycombe, 84 Ore. 328, 165 P. 227 (1917).

[6] Union Bridge Co. v. U. S., 204 U. S. 364, 27 Sup. Ct. 361, 51 L. ed. 523 (1907); Monongahella Bridge Co. v. U. S. 216 U. S. 177, 30 Sup. Ct. 356, 54 L. ed. 435 (1910); J. W. Hampton & Co. v. U. S., 276 U. S. 394, 48 Sup. Ct. 348, 72 L. ed. 624 (1928); Sears Roebuck & Co. v. Federal Trade Com., 258 Fed. 307, 169 C. C. A. 323 (1919); Amchanitsky v. Carrougher, 3 Fed. Supp. 999 (E. D. N. Y. (1933) (In this case the Economy Act of Congress, 5 U. S. C. A. §673, providing for the reduction of Federal employers' salaries, is held constitutional).

[7] U. S. v. Grimand, *supra* note 5; I. C. C. v. Goodrich Transit Co., 224 U. S. 194, 32 Sup. Ct. 436, 56 L. ed. 729 (1912); United States v. Calisbad Packers, 4 Fed. Supp. 660 (N. D. Col. 1933) (The Agricultural Adjustment Act [7 U. S. C. A. §§601-619] is not unconstitutional because of an invalid delegation of legislative power); State v. Atlantic C. L. R. Co., 56 Fla. 617, 47 So. 969 (1908) (The Commission itself may not prescribe a penalty); Durham Provision Co. v. Daves, *supra* note 3.

[8] *In re* Kollock, 165 U. S. 526, 17 Sup. Ct. 444, 41 L. ed. 813 (1897) (design of stamp used for oleomargarine); Arms v. Ayer, 192 Ill. 601, 61 N. E. 851 (1901) (number and location of fire escapes); Steele v. Louisville & M. R. Co., 54 Tenn. 208, 285 S. W. 582 (1926) (designate form of railroad crossing sign).

[9] U. S. v. Chemical Foundation, 272 U. S. 1, 47 Sup. Ct. 1, 71 L. ed. 131 (1926).

[10] People v. Barnett, 344 Ill. 62, 176 N. E. 1108 (1931); Welton v. Hamilton, 344 Ill. 82, 176 N. E. 333 (1931) (The term "complete" is used to mean almost anything. It may mean merely a declaration of policy exists in the statute or, as in this case, it may include the existence of a policy and a sufficient standard to carry it into effect); Steele v. Louisville & M. R. Co., *supra* note 8. (The maxim that the law must be complete when coming from the legislature means that the duties or privileges must be definitely fixed or determined or rules for fixing and determining them clearly established).

[11] Buttfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. ed. 525 (1904).

also been said that the permissibility of delegation may vary with the scope and authority of the delegating body.[12] But the most frequent inquiry is the existence of a standard definite enough to effectuate the legislative will. It is generally said that the statute should prescribe a definite rule of action for the guidance of any discretionary power conferred.[13] But even in such cases the precision of a criminal statute is not required.[14] An exception to the above rule is recognized where the problem involved is technical[15] or where it is difficult or impractical to lay down some definite rule.[16] Even where such special conditions do not exist, some courts accept the most flimsy of standards.[17] Still other courts have held that a general standard can be dispensed with entirely since exercise of a reasonable discretion will be implied.[18]

In the past, the tendency in administrative licensing, has been towards a greater observation of the requirement of a fixed standard, than in other administrative functions. The doctrine is frequently re-iterated that a statute which purports to vest an absolute discretion in an official to license a lawful enterprise is invalid.[19] There must be a uniform rule of action except where it is difficult or impractical to establish one.[20] A liberal delegation of discretion is also considered appropriate where the regulation of the government's

[12] Ruggles v. Collier, 43 Mo. 353 (1869).

[13] Welton v. Hamilton, *supra* note 10; Merchants' Exchange v. Knott, 212 Mo. 616, 111 S. W. 565 (1908).

[14] Tarpey v. McClure, 190 Cal. 521, 213 P. 983 (1923); State v. Public Service Com. 94 Wash. 274, 162 P. 523 (1917).

[15] Mahler v. Eby, 264 U. S. 32, 44 Sup. Ct. 283, 68 L. ed. 549 (1924); U. S. v. Cohen Grocery Co. 255 U. S. 81, 41 Sup. Ct. 298, 65 L. ed. 516 (1921).

[16] Avent v. U. S. 266 U. S. 127, 45 Sup. Ct. 34, 69 L. ed. 202 (1924); Merchants' Exchange v. Knott, *supra* note 13.

[17] Red C. Oil Co. v. North Carolina, 222 U. S. 380, 32 Sup. Ct. 152, 56 L. ed. 240 (1912) (oil to be safe, pure and to afford satisfactory light); Mahler v. Eby, *supra* note 14 (undesirable residents); New York Central Securities Co. v. U. S., 287 U. S. 12, 53 Sup. Ct. 45 (1932) (Public interest); Sears Roebuck & Co. v. Federal Trade Comm., *supra* note 6 (authority to stop unfair methods of competition); Spencer-Sturta Co. v. City of Memphis, 155 Tenn. 70, 290 S. W. 608 (1927) (the ordinance by requiring the board to follow "fundamental purpose and intent of the ordinance," provided sufficient guide); State *ex rel* Central Steam Heat & Pr. Co. v. Gettle, 196 Wisc. 1, 220 N. W. 201 (1898.)

[18] State v. Whitman, 196 Wisc. 472, 220 N. W. 929 (1928).

[19] Yick Wo. v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. ed. 220 (1886); Bizzell v. Board of Aldermen of City of Goldsboro, 192 N. C. 348, 135 S. E. 50 (1926); Village of St. Johnsbury v. Aron, 103 Vt. 22, 151 Atl. 650 (1930); Thompson v. Smith 155 Va. 367, 154 S. E. 579 (1930).

[20] Mutual Film Corp. v. Kansas, 236 U. S. 230, 35 Sup. Ct. 387, 59 L. ed. 552 (1915) (due to numerous types of pictures, it would be impossible to devise language which would be comprehensive and automatic); *Ex parte* Whitley, 144 Cal. 167, 77 Pac. 879 (1904); State v. Briggs, 45 Ore. 366, 77 Pac. 750 (1904).

own resources are concerned.[21] On the other hand, in businesses which are a matter of privilege rather than of right, a larger discretion is granted in order to protect the public health, morals, safety or welfare.[22] Statutes are upheld which confer authority to make rules and regulations and to license in pursuance to them.[23] And in the licensing of both lawful pursuits and those within the police power, where there is no uniform rule or even the existence of a general one, the discretion conferred is often upheld on the ground that a public official will be presumed to exercise his power impartially and according to law.[24] As a result of such attitude, the courts will not pass on the validity of a licensing act, on the ground that too much discretion has been given, unless there has been a dereliction by officials in refusing a license.[25]

There has been a growing trend to hold those cases of delegated powers which have heretofore been in the twilight zone of uncertainty, valid. It is pointed out that such shift of view is necessitated by the complex situations created by modern society and business.[26] The question is no longer whether there has been an invalid delegation of power, but whether such delegation is necessary and expedient due to the limited time and necessarily restricted knowledge of the legislature and whether it is in the interest of greater speed, efficiency, elasticity, and justice.[27]

[21] Dastervigres v. U. S., 122 Fed. 30 (C. C. A. 9th, 1903); Port Royal Mining Co. v. Hagood, 30 S. C. 519, 9 S. E. 686 (1889); Vail v. Seaborg, 120 Wash. 126, 207 Pac. 15 (1922).

[22] Davis v. Mass., 167 U. S. 43, 17 Sup. Ct. 731, 42 L. ed. 71 (1897); State v. Sherow, 87 Kans. 235, 123 Pac. 866 (1912); State v. Hyde, 315 Mo. 681, 286 S. W. 363 (1926); State v. Fleming, 129 Wash. 64, 225, Pac. 647 (1924).

[23] First Natl. Bk. v. Union Trust Co., 244 U. S. 416, 37 Sup. Ct. 734, 61 L. ed. 1233 (1917); State Racing Com. v. Latoma Agri. Assoc., 136 Ky. 173, 123 S. W. 681 (1909).

[24] Lieberman v. Van deCarr, 199 U. S. 552, 26 Sup. Ct. 144, 50 L. ed. 305 (1905); Engel v. O'Malley, 219 U. S. 128, 31 Sup. Ct. 190, 55 L. ed. 128 (1911); Hall v. Gieger-Jones Co., 242 U. S. 539, 37 Sup. Ct. 217, 61 L. ed. 480 (1917); Schaake v. Dolley, 85 Kan. 598, 118 Pac. 80 (1911). (The courts are bound to take for granted the honesty and right mindedness of public officials chosen directly or indirectly by the people to administer the law).

[25] Interstate Buses Corp. v. Holyoke St. Ry. Co., 273 U. S. 45, 47 Sup. Ct. 298, 71 L. ed. 530 (1927); Alaska Gold Mining Co. v. Territory of Alaska, 236 Fed. 64 (C. C. A. 9th, 1916); People v. Globe Grain & Milling Co.; 80 Cal. 625, 294 Pac. 3 (1930).

[26] Cook v. Burnquist, 242 Fed. 321 (1917); Sears Roebuck & Co. v. Federal Trade Com., *supra* note 6; State *ex rel* Jonason v. Crosby, 92 Minn. 176, 99 N. W. 636 (1904); Dillon Catfish Drainage District v. Bk. of Dillon, 143 S. C. 178, 141 S. E. 274 (1928); State v. Moorer, *supra* note 4; State v. Public Service Com., *supra* note 15.

[27] Monongahela Bridge Co. v. U. S., *supra* note 6; Mutual Film Corp. v. Kansas, *supra* note 20; Avent v. U. S., *supra* note 16; J. W. Hampton, Jr. and

From all the foregoing one can only conclude that the provisions in question are valid. The act starts with an extensive declaration of policy, so that nothing essentially legislative has been left undone.[28] The power to impose a compulsory code is to be exercised only where it can be shown that there are abuses inimical to the public interest and contrary to the policy of the act.[29] And the President is to license a business, only when it appears that it is engaged in destructive price or wage cutting.[30] The exercise of both these powers is further limited by the requirement that any license or code shall contain certain specified conditions.[31] And in addition the procedure to be used in arriving at these conditions is delineated.[32] The licensing power is further curtailed by the provision that it shall expire within a year. Moreover, should anyone doubt that the standard fixed is more than sufficient, would it not seem reasonable to indulge in the presumption that the President will act with fairness commensurate with the dignity of his office? There are also cases available which sustain the delegation of unusually large powers during periods of emergency.[33] However, could the provisions not be upheld under the most orthodox tenets, ample justifications for them could still be found in the existing crisis and sufficient precedent in the legislation enacted during the World War.[34] And finally, since the nondelegibility of legislative power is largely a myth, why should it not be openly discarded by the courts?[35]

CECILE L. PILTZ.

Co. v. U. S., *supra* note 6; State of Wisc. v. State of Ill. & Sanitary District of Chicago, 278 U. S. 367, 49 Sup. Ct. 163, 73 L. ed. 426 (1929).

[28] 48 STAT. 195 (1933), 15 U. S. C. A. §701.

[29] 48 STAT. 196 (a) (1933), 15 U. S. C. A. §703 (a).

[30] 48 STAT. 197 (b) (1933), 15 U. S. C. A. §704 (b).

[31] 48 STAT. 198 (a) (1933), 15 U. S. C. A. §707 (a).

[32] N. I. R. A. §7 (b), 7 (c). *Id.* (b) & (c).

[33] Avent v. U. S. *supra* note 16; Contract Cartage Co. v. Morris, 59 F. (2d) 437 (D. C. Ill. 1932); City of Chicago v. Mariotto, 332 Ill. 44, 163 N. E. 369 (1928); Blue v. Beach, 195 Ind. 121, 56 N. E. 89 (1900).

[34] New State Ice Co. v. Lieberman, 285 U. S. 262, 282, 52 Sup. Ct. 371, 76 L. ed. 747 (1932) (dissent of Brandeis, J., "the people of the United States are now confronted with an emergency more serious than war.") Selective Draft Law Cases 245 U. S. 366, 38 Sup. Ct. 159, 62 L. ed. 349; (1918); U. S. v. Ford, 265 Fed. 424 (S. D. Ohio 1920); 40 U. S. Stat. L. 277, Chapter 53 §5 (Wilson given the authority to regulate by licensing the importation, manufacture, storage, mining or distribution of any necessaries); HART, THE ORDINANCE MAKING POWERS OF THE PRESIDENT OF U. S.

[35] Trustees of Saratoga Springs v. Saratoga Gas E. L. & Pr. Co.; 19 N. Y. 123, 83 N. E. 693 (1908) ("The true meaning of constitutional division of governmental powers being that the whole power of one of the three shall not be exercised by the same hands which possess the power of either of other two, there being no objection to the imposition on an administrative body of some powers legislative in character.")

Agency—Automobiles—Liability of a Cab-Calling Company For the Torts of the Driver.

The defendant cab company owns no cars and hires no drivers, but merely operates a calling service and sells the right to use its name to private owners. The plaintiff is injured through the negligence of the driver of a cab which bears the company's insignia, and which she has ordered in response to one of its advertisements. The defendant Jackson admits the ownership of the cab, and that it is registered in his name, but denies liability on the grounds that the car was being operated by an independent contractor to whom he has leased it. *Held,* both defendants liable on the theory of agency by estoppel.[1]

Corporations similar to the one in the above case are becoming increasingly common in our larger cities, especially the city of Washington, where a recent price war has had the effect of temporarily eliminating some of the more responsible cab-owning companies. Persons sustaining injuries through the negligent operation of these cabs find it difficult to obtain redress, since the drivers are usually execution proof, and the company defends upon the grounds that the drivers are not its agents, but independent contractors.[2]

When an actual agency can be shown, the plaintiff may recover against the company, provided the tort was committed within the scope of the agent's employment, under the familiar doctrine of *respondeat superior.*[3] Or, when the fact of agency is left in some doubt, the plaintiff is aided by a presumption of agency which arises, in most jurisdictions, upon proof that the defendant was the owner of

[1] Rhone v. Try Me Cab Co., 65 F. (2d) 834 (D. C. C. A., 1933).

[2] It is often very difficult to determine whether the relationship is that of agent or independent contractor. In the latter case, as a general rule, there can be no liability except in cases where an estoppel exists. However, the mere fact that the driver operates on a commission basis, and has a great deal of latitude in the conduct of the cab, will not constitute him an independent contractor. Natchez Coca Cola Bottling Co. v. Watson, 160 Miss. 173, 133 So. 677 (1931); Dunbaden v. Castles Ice Cream Co., 103 N. J. L. 427, 135 A. 886 (1927). Nor does it seem to alter the situation when the driver owns the car. Montgomery v. Globe Grain & Milling Co., 293 P. 856 (Cal. App. 1930); Lassen v. Stamford Transit Co., 102 Conn. 76, 128 A. 117. A few states have passed statutes which make the owner of the car liable when it is being used with his consent, regardless of agency. For a discussion of these statutes (1926) 20 ILL. LAW REV. 405.

[3] Standard Oil Co. v. Anderson, 212 U. S. 215, 29 Sup. Ct. 252, 53 L. ed. 480 (1908).

the cab,[4] that it bears his name or insignia,[5] that the driver wears his uniform,[6] or that the cab is registered in his name.[7] When this presumption is rebutted, as in the principal case, there are several other possibilities. There may be such a concert of interest between the driver and the company that the plaintiff can hold the latter upon the theory of joint adventure.[8] This is doubtful, however, due to the fact that the company merely operates a calling service and sells the right to use its name, while the conduct of the cab is left entirely with the driver.

The theory of estoppel would seem the most likely one under the facts presented in the principal case. There is clearly a holding out by the defendant and a reliance upon this by the plaintiff to her detriment.[9] There is even the presence of a contractual element, which is deemed necessary by some authorities.[10] But in holding the defendant Jackson, the court seems to go a step further, perhaps,

[4] Judson v. Bee Hive Auto Service Co., 136 Ore. 1, 294 P. 588, 297 P. 1050 (1930); Burger v. Taxicab Motor Co., 66 Wash. 676, 120 P. 519 (1912). *Contra:* Welch v. Checker Taxi Co., 262 Mass. 310, 159 N. E. 622 (1928). For a general discussion, HUDDY, AUTOMOBILES (8th ed. 1927) §794; (1930) 8 N. C. L. REV. 309.

[5] Voegeli v. Waterbury Yellow Cab Co., 111 Conn. 407, 150 A. 303 (1930); Robeson v. Greyhound Lines, Inc., 257 Ill. App. 278 (1930); Weidnam v. St. Louis Taxicab Co., 182 Mo. App. 523, 165 S. W. 1105 (1914); Misenheimer v. Hayman, 195 N. C. 613, 143 S. E. 1 (1928); BERRY, AUTOMOBILES (6th ed. 1929) §§1360-1361.

[6] Teiman v. Red Top Cab Co., 3 P. (2d) 381 (Cal. App. 1931). *Contra:* Welch v. Checker Taxi Co., *supra* note 4.

[7] Irwin v. Pickwick Stage System, Inc., 21 P. (2d) 981 (Cal. 1933); Jones v. Detroit Taxicab & Trans. Co., 218 Mich. 673, 188 N. W. 394 (1922).

[8] Andrews v. Boedecker, 126 Ill. 605, 18 N. E. 651 (1888); Koplitz v. City of St. Paul, 86 Minn. 373, 90 N. W. 794 (1902); Stroher v. Elting, 97 N. Y. 102, 49 Am. Rep. 515 (1884); see Gallas v. Independent Taxi Owners Ass'n *et. al.*, 66 F. (2d) 192 (D. C. C. A. 1933).

[9] Maloney Tank Mfg. Co. v. Midcontinental Petroleum Corp., 49 F. (2d) 146 (C. C. A. 10th, 1931); Pennsylvania R. Co. v. Hoover, 142 Md. 251, 120 A. 526 (1923); *cf:* Burgenthall v. State Garage & Trucking Co., 179 Wis. 42, 190 N. W. 901 (1922). Perhaps, the rule is best illustrated by a line of cases in which department stores have advertised independently operated dentists's offices or beauty shops as a part of the store. The few courts which have passed on this question have uniformly held that an estoppel does arise in favor of a person who has relied upon these representations and have been injured through the negligence of the employes of the beauty shop or dentist's office. Agusta Friedman's Shop v. Yeats, 216 Ala. 434, 113 So. 299 (1927); Hannon v. Seigel-Cooper Co., 167 N. Y. 244, 60 N. E. 597 (1901) (A leading case); Fields, Inc. v. Evans, 36 Ohio App. 153, 172 N. E. 702 (1929) commented upon (1931) 11 B. U. L. REV. 85, (1931) 29 MICH. L. REV. 640; Christiansen v. Fantle Bros., Inc. *et. al.*, 56 S. D. 350, 228 N. W. 407 (1929). AGENCY RESTATEMENT (Am. L. Inst., 1930) §490.

than the facts would warrant. It does not appear that the plaintiff relied on any representations which might have been made by him,[11] nor does it appear that he made any representations, other than the registration of the cab in his name.

If a corporation is chartered for the purpose of owning and operating taxicabs, it would seem only just to say that, since this is a business affected with a public interest, this responsibility could not be avoided by renting their name to independent contractors;[12] but, where no such authority is contained in the charter, it would not be unreasonable to force the actual owners and operators of the cabs to give bond or take out liability insurance as a condition precedent to obtaining their licenses. This policy has been adopted by statute,[13] with regard to taxicab and bus operators, in many states, and these laws have been uniformly held to be constitutional, and not in violation of the "Due Process" clause.[14] This whole situation presents a rather elusive problem, and such requirements are, undoubtedly, the most satisfactory solution.

J. B. ADAMS.

[10] Agusta Freidman's Shop v. Yeats, *supra* note 9; *cf.* Denver & R. G. R. Co. v. Gustafson, 21 Colo. 393, 41 P. 505 (1895) (Where the apparent agent was the watchman at a grade crossing.).

[11] Jung v. New Orleans Ry. & Light Co., 145 La. 727, 82 So. 870 (1919); Dressler v. McArdle, 85 Misc. Rep. 444, 147 N. Y. S. 821 (1914); MECHEM, AGENCY (2d ed. 1914) §724.

[12] Dixie Stage Lines v. Anderson, 134 So. 23 (Ala., 1931); Robeson v. Greyhound Lines, Inc., *supra* note 5; King v. Brenham Automobile Co., 145 S. W. 278, 279 (Tex. Civ. App. 1912) ("Taking for granted the truth of the statements of the officers of the company, we are of the opinion that a corporation, chartered for certain purposes, cannot evade its responsibilities to the general public by delegating its authority to others, whether responsible or irresponsible. . . . No responsible person or corporation could be held liable for the most outrageous acts of negligence if they should be allowed to place a 'middleman' between them and the public, and escape liability by the manner in which they recompense their servants.").

[13] IDAHO CODE ANN. (1932) §59-806; NEB. COMP. STAT. (1929) §60-202; N. Y. CONSOL. LAWS (Cahill, 1930), c. 64-a, §17; WASH. COMP. STAT. (Remington, 1931) §6382 *et seq.* The North Carolina statute, N. C. CODE ANN. (Michie, 1931) §2621 (112) *et seq.* applies to all automobile owners against whom a judgment of $100 has been docketed and remains unsatisfied. Nichols *et al* v. Maxwell, 202 N. C. 38, 161 S. E. 712 (1932).

[14] Packard v. Banton, 264 U. S. 140, 44 Sup. Ct. 257, 68 L. ed. 596 (1923). In some jurisdictions it has been held that a municipal corporation has the power to demand such bond or insurance under its general authority to regulate motor vehicles within its borders: Lutz v. City of New Orleans, 237 Fed. 1018 (C. C. A. 5th, 1917); Kruger v. California Indemnity Exch., 201 Cal. 672, 258 P. 602 (1927); Commonwealth v. Kelley, 229 Ky. 722, 17 S. W. (2d) 1017 (1929); Commonwealth v. Slocum, 230 Mass. 180, 119 N. E. 687 (1919); Jitney Bus Ass'n of Wilkes-Barre *et al* v. City of Wilkes-Barre, 256 Pa. 462, 100 A. 954 (1917); *cf.* Sprout v. City of South Bend, 277 U. S. 163, 48 Sup. Ct. 502, 72 L. ed. 833 (1928); West *et al* v. Sun Cab Co., Inc., 154 A. 100 (Md., 1931).

Banks and Banking—Collection Items as Preferences.

Plaintiff drew a sight draft on *C*. The collecting bank accepted as payment a check from *C*, a depositor, on itself, and then forwarded to plaintiff its own draft on a St. Louis bank. Payment of the draft was refused because of the collecting bank's subsequent insolvency. *Held,* plaintiff had no preferred claim against the collecting bank,[1] although plaintiff had stipulated that the proceeds of the draft were to be treated as a trust[2] fund.[3] The court declared that such stipulation did not contemplate that the collecting bank should hold the proceeds as a bailment and remit the specific funds collected; hence, on collection, a debtor-creditor relationship superseded the agency relationship of plaintiff and the collecting bank.[4] Further, since the assets of the bank were not augmented, there were no funds to which a trust aspect could attach.

The possible efficacy of any stipulation attempting to impress a trust on the proceeds of a collection item seems to depend on the individual court's reasons for denying trusts in such proceeds generally. Trusts[5] have been held to exist on the grounds of an intended agency relationship if the owner of the item is not a general

[1] Allied Mills v. Horton, 65 F. (2d) 708 (C. C. A. 7th, 1933).

[2] In this comment, and for that matter, in most cases in which it is sought to establish a preferred claim *in re* proceeds of a collection item, the word "trust" is used, although a "trust" in the usual sense of the word almost never exists. "Trust" under these circumstances is a label attached *after* the court has decided a preferred claim should exist rather than a means of determining whether a preference should be allowed. Thus "trust" as used in this comment merely means "grounds for a preferred claim." TOWNSEND, *Insolvent Banks and Collection Preferences: The Heaven of Psychophoros Revisited* (1932) 6 TULANE L. R. 643.

[3] The specific statement is: "This draft a cash item and not to be treated as a deposit. The funds obtained through its collection are to be accounted for to us and are not to be commingled with the other funds of the collecting bank."

[4] When the collecting bank remits by a draft on a third bank and such draft is refused payment because of the collecting bank's insolvency, some courts have held that the draft constitutes an equitable assignment of funds received in trust. Hence collection may be enforced against the third bank on the theory of a constructive trust. Carson Nat. Bank v. American Nat. Bank, 225 Mo. App. 64, 34 S. W. (2d) 143 (1930); Central Trust Co. v. Bank of Mullens, 108 W. Va. 12, 150 S. E. 137 (1929).

[5] Only illustrative cases are cited below. For a collection and discussion of cases upholding and cases denying the existence of a trust in the proceeds of a collection item Townsend, *Constructive Trusts and Bank Collections* (1930) 39 YALE L. J. 980; (1896) 32 L. R. A. 715; (1912) 38 L. R. A. (N. S.) 146; (1917) L. R. A. (1917F) 603; (1923) 24 A. L. R. 1152; (1926) 42 A. L. R. 754; (1927) 47 A. L. R. 761; (1931) 73 A. L. R. 71; (1932) 77 A. L. R. 473.

depositor,[6] if the owner instructs the bank "to collect only,"[7] "to collect and notify,"[8] "to collect and remit,"[9] to treat as a trust;[10] statutory regulations impose a trust in some jurisdictions.[11] The existence of a trust has been denied on the grounds that a debtor-creditor relationship arises after collection by virtue of an express agreement,[12] or because customary,[13] or because the stipulation of the owner fails *in fact* to change the collecting bank's method of handling the proceeds,[14] and on the grounds that the bank's assets

[6] Piano M'f'g. Co. v. Auld, 14 S. D. 512, 86 N. W. 21 (1901); Skinner v. Porter. 45 Idaho 530, 263 Pac. 993, (1928) (In the absence of reciprocal accounts, the only duty of the collecting bank is to remit; hence a trust in the proceeds of the collection item).

[7] State v. Bank of Commerce, 61 Neb. 181, 85 N. W. 43 (1901).

[8] Guignon v. First Nat. Bank, 22 Mont. 140, 55 Pac. 1051 (1899).

[9] Hall v. Beymer, 22 Colo. App. 271, 125 Pac. 561 (1912); Federal Reserve Bank v. Millspaugh, 275 S. W. 583 (Mo. App. 1926) (no reciprocal accounts); Vermont Loan and Trust Co. v. First Nat. Bank, 37 Wyo. 216, 260 Pac. 534 (1927).

[10] That is, a more detailed and explicit stipulation than a mere "for collection and remittance" is attached to the draft. First Nat. Bank of Raton v. Dennis, 20 N. M. 96, 146, Pac. 948 (1915); Kansas Flour Mills Co. v. New State Bank, 124 Okla. 185, 256 Pac. 43 (1926) (same stipulation as in principal case, *supra* note 3); *cf.* Peters Shoe Co. v. Murray, *infra* note 20.

[11] OHIO CODE (Throckmorton, 1929) §713 applied in Fulton v. R. Baker-Toledo Co., 125 Ohio St. 518, 182 N. E. 513 (1932); S. C. CODE ANN. (Michie, 1932) §6960 held to be constitutional in Witt v. People's State Bank of S. C., 166 S. C. 1, 164 S. E. 309 (1932). Preferred claims would probably be allowed in the following states by virtue of statutes: IND. ACTS (1929) c. 164 §13; MD. CODE ANN. (Bagby, Supp. 1929) art. 11 §95; N. Y. CONSOL. LAWS (Cahill, 1930) c. 39 §350-1; WASH. REV. STAT. (Remington, 1932) §§3292-13; WIS. STAT. (1931) §§220-15.

[12] Commonwealth v. State Bank of Pittsburg, 216 Pa. 124, 64 Atl. 923 (1906).

[13] This view is that while the collecting bank is the agent of the owner of the collection item until proceeds are collected, yet—inasmuch as the bank mingles the proceeds with its own funds as soon as collection is made and sends the owner a cashier's check or its own draft—the agency relationship ceases on collection and that of debtor and creditor arises. Hecker-Jones-Jewel Mill. Co. v. Cosmopolitan Trust Co., 242 Mass. 181, 136 N. E. 333, (1922); Gordon v. Rasines, 5 Misc. 192, 25 N. Y. S. 767 (1893). This is held to be true even when the owner is not a depositor in, or has no reciprocal accounts with, the collecting bank for the reason that, as a matter of banking practice, the collecting bank does substitute an obligation of its own for the amount of the proceeds of the collection item rather than remit the specific funds collected, *infra* note 14.

[14] The stipulation is made not in contemplation of any actual change in banking practices or methods, but solely with a view to obtaining a preference in the event of the collecting bank's insolvency. Lippitt v. Thames Loan and Trust Co., 38 Conn. 185, 90 Atl. 369 (1914); Union Nat. Bank v. Citizens Bank, 153 Ind. 44, 54 N. E. 970 (1899) ("There was nothing in the transaction . . . which indicated that other than the usual course of dealing was expected by the forwarding bank.") Leach v. Farmers and Merchants Savings Bank, 207 Iowa 471, 220 N. W. 10 (1928).

are not augmented,[15] or that, because of mingling, it is impossible to trace the funds.[16]

Therefore, if a forwarding bank wishes to have a preferred claim in the event of the collecting bank's insolvency, clearly a statement that only cash was to be collected, and remitted in specie, would certainly be effective,[17] but such a method of remittance is obviously impractical. A use of such stipulation with the tacit understanding that it was only a safeguard, to be disregarded in practice, would probably be held to have no effect.[18] Some state courts which regard the intention of the parties as controlling, and which ordinarily deny a preference, would probably permit even such a stipulation[19] as in the principal case to constitute grounds for allowing a preference.[20] A statement accompanying the draft requiring segregation of the general funds of the bank, to the amount of the item, might by some state courts be held to be sufficient to entitle the forwarding bank to a preferred claim.[21] But it is doubtful if such language

[15] Midland Nat. Bank v. Brightwell, 148 Mo. 358, 49 S. W. 994 (1898); Com. v. State Bank, 216 Pa. 124, 64 Atl. 923 (1906); Harnish, Moore and Porterfield v. Farmers and Merchants Bank, 56 S. D. 18, 227 N. W. 375 (1929). This has been the principal reason assigned in a long line of federal decisions for refusing to concede a trust. Amer. Can Co. v. Williams, 178 Fed. 420 (C. C. A. 2d, 1910). Larabee Flour Mills Co. v. First Nat. Bank, 13 F. (2d) 30 (C. C. A. 8th, 1926) (Federal cases supporting this view cited therein by circuits); (1927) 36 YALE L. J. 682. Cases holding the opposite view meet the argument that there has been no augmentation of assets by declaring that it would be a useless procedure to cash the check and then return the cash, and that therefore payment by check is the same in its legal effect as payment in cash, Kansas Flour Mills Co. v. New State Bank, *supra* note 10; or by holding that in as much as a successful remittance of the proceeds would have decreased the assets of the bank, a retention of these proceeds, therefore, augmented its assets. Hawaiian Pineapple Co. v. Browne, 69 Mont. 140, 220 Pac. 1114 (1923).

[16] State ex rel. N. C. Corp. Com. v. Merchants and Farmers Bank, 137 N. C. 697, 50 S. E. 308 (1905).

[17] Union Nat. Bank v. Citizens Bank, *supra* note 14; Hallam v. Tillinghast, 19 Wash. 20, 52 Pac. 329 (1898).

[18] Stipulations are ineffective if the parties do not *in fact* contemplate a change in the bank's method of handling such items, *supra* note 14. Clearly, however, the party stipulating collection in cash does intend just that, in as much as the legal effect of collection in cash would be to impress a trust on such funds since the bank's assets are augmented. But the federal courts ignore this.

[19] *Supra* note 3.

[20] Peters Shoe Co. v. Murray, 31 Tex. Civ. App. 259, at 260, 71 S. W. 977, at 978 (1903).

[21] Hallam v. Tillinghast, *supra* note 17 (suggests such would be effective).

would be regarded by the Federal Courts as having any effect, in as much as such procedure would hamper banking relations.[22]

HARRY W. MCGALLIARD.

Damages—Unauthorized Disclosure of Telegram as Basis of Punitive Damages.

The plaintiff sued for the wrongful disclosure of the contents of a telegram from his divorced wife. The disclosure was made to the plaintiff's fiancée by one of the defendant's employees who had erroneously concluded from the message that the plaintiff was still married. Although the fiancée then knew of the previous marriage and divorce, she immediately broke off the engagement. The plaintiff's recovery was limited to nominal damages. *Held,* a corporate employer is not liable for punitive damages without having participated in or ratified his servant's act.[1]

In actions *ex delicto* where the tortious conduct was characterized by malice or wantonness, exemplary damages are discretionary with the jury.[2] As in the principal case, the wantonness may take the form of a reckless disregard for another's rights.[3] Verdicts in excess of the plaintiff's actual loss are the exception rather than the rule.[4]

Concerning the liability of employers for exemplary damages, in most jurisdictions the practice prevails of limiting an individual employer's liability to those acts of his servant in which he has himself participated.[5] Judicial opinion is rather evenly divided on the question of the liability of corporate employers.[6] The federal courts and

[22] Allied Mill v. Horton, *supra* note 1, at 710. The court states with reference to the stipulation accompanying the draft, *supra* note 3: "If each time such a draft is collected the collecting bank under such notice is required to place the specific funds received in a safe deposit box or in a package for the drawer, the transaction of business through drafts . . . would be quite revolutionized."

[1] Western Union Telegraph Co. v. Aldridge, 66 F. (2d) 842 (C. C. A. 9th, 1933).

[2] Lake Shore & Michigan Southern R. Co. v. Prentice, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. ed. 97 (1893). *Contra:* Boott Mills Co. v. Boston & Maine R. Co., 218 Mass. 582, 106 N. E. 680 (1914) (Louisiana, Nevada, and Washington follow Massachusetts in rejecting the doctrine of exemplary damages completely).

[3] Lake Shore & Michigan Southern R. Co. v. Rosenzweig, 113 Pa. 519, 6 Atl. 545 (1886).

[4] Cock v. Western Union Telegraph Co., 84 Miss. 380, 36 So. 392 (1904).

[5] Haines v. Schultz, 50 N. J. L. 481, 14 Atl. 488 (1888).

[6] McCormick, *The Doctrine of Exemplary Damages* (1930) 8 N. C. L. REV. 129, 132.

many states have extended to corporations the treatment accorded individual employers.[7] A great number of jurisdictions, however, adhere to the contrary rule of unrestricted liability by which, if an employee's wrongful act is such as to render him liable for exemplary damages and his corporate employer for compensatory damages, the latter may be held for the exemplary damages as well.[8] The adherents of this rule hold that, because of the pecuniary irresponsibility of employees who are placed in positions of trust for the benefit of the corporations, unrestricted liability is a social necessity which justifies the lenient interpretation of the requirement of malice as a basis for the recovery of punitive damages.[9]

In the federal courts, where the question of exemplary damages is considered a matter of general jurisprudence and decided in accordance with the federal rule,[10] to recover such damages the plaintiff must show that the corporate employer was privy to the misconduct.[11] This connection may be established by proof of specific or general authorization,[12] actual participation through a company executive,[13] employment or retention of an employee of known incompetence or recklessness,[14] or subsequent ratification of the wrong.[15]

An addressee may sue a telegraph company in tort for a breach of its public duty, such as an unauthorized disclosure.[16] Thus, the nominal award of $1 compensatory damages in the principal case does not appear to represent fully the plaintiff's actual injury. It is true that he cannot recover for the loss of the engagement. The interest of the parties to a marriage engagement is not protected against its rupture by third persons,[17] regardless of the aggravated nature of the circumstances.[18] In addition, the fiancée's admission of prior

[7] Lake Shore & Michigan Southern R. Co. v. Prentice, *supra* note 2; Lightner Mining Co. v. Lane, 161 Cal. 689, 120 Pac. 771 (1911); Marlatt v. Western Union Telegraph Co., 167 Wis. 176, 167 N. W. 263 (1918).

[8] Goddard v. Grand Trunk R. Co., 57 Me. 202 (1869); Peterson v. Western Union Telegraph Co., 75 Minn. 368, 77 N. W. 985 (1899).

[9] Peterson v. Western Union Telegraph Co., *supra* note 8.

[10] Lake Shore & Michigan Southern R. Co. v. Prentice, *supra* note 2.

[11] *Ibid.*

[12] Denver & Rio Grande R. Co. v. Harris, 122 U. S. 597, 7 Sup. Ct. 1286, 30 L. ed. 1146 (1887).

[13] *Ibid.*

[14] Cleghorn v. N. Y. Central & Hudson River R. Co., 56 N. Y. 44, 15 Am. Rep. 375 (1874).

[15] Forrester v. Southern Pacific Co., 36 Nev. 247, 134 Pac. 753 (1913).

[16] Western Union Telegraph Co. v. Cowin & Co., 20 F. (2d) 103 (C. C. A. 8th, 1927).

[17] Homan v. Hall, 102 Neb. 70, 165 N. W. 881 (1917).

[18] Davis v. Condit, 124 Minn. 365, 144 N. W. 1089 (1915) (plaintiff's fiancée seduced).

knowledge of the plaintiff's first marriage tends to show that the breach did not result proximately from the disclosure. But the disclosure itself was a clear invasion of the plaintiff's right of privacy in his communications with others.[19] In an analogous class of cases dealing with the tapping of telephone wires, substantial compensatory damages are recoverable, even where there is no injurious use of the information obtained.[20] If the right of privacy in communications is to receive the protection which its importance to the individual merits, it would seem that the courts should assess substantial damages upon those who violate it.

ERVID ERIC ERICSON.

Declaratory Judgments—Recent Trends.

Plaintiff sued in the New York state courts for an injunction to restrain the sale of reclassified stock of defendant corporation and for a declaratory judgment as to the rights of preferred stockholders under the Delaware reclassification statute. The cause was removed to the Federal District Court in New York, the injunction denied, and the complaint dismissed without prejudice to any rights plaintiff might have in the matter. On appeal the Circuit Court of Appeals affirmed the denial of an injunction, but held it was error to dismiss the application for a declaratory judgment.[1]

In three leading cases,[2] the Supreme Court of the United States uttered dicta, criticized as unwarranted and inappropriate,[3] to the effect that the requirements of a case or controversy under Article III of the Constitution prevented declaratory judgments in the Federal Courts, originally or by removal. These dicta were followed in subsequent cases.[4] Recently, by a unanimous opinion in *Nashville,*

[19] Green, *The Right of Privacy* (1932) 27 ILL. L. REV. 237, 252.

[20] Rhodes v. Graham, 238 Ky. 225, 37 S. W. (2d) 46 (1931) commented on (1932) 11 ORE. L. REV. 217.

[1] Harr *et. al.* v. Pioneer Mechanical Corp., 65 F. (2d) 332 (C. C. A. 2d, 1933).

[2] Liberty Warehouse Co. v. Grannis, 273 U. S. 70, 47 Sup. Ct. 282, 71 L. ed. 541 (1927); Liberty Warehouse Co. v. Burley Tobacco Growers Co-op. Ass'n., 276 U. S. 71, 48 Sup. Ct. 291, 72 L. ed. 473 (1928); Willing v. Chicago Auditorium Ass'n., 277 U. S. 274, 48 Sup. Ct. 507, 72 L. ed. 880 (1928).

[3] Borchard, *The Supreme Court and the Declaratory Judgment* (1928) 14 A. B. A. J. 633, 635.

[4] State of Arizona v. State of California, 283 U. S. 423, 51 Sup. Ct. 522, 75 L. ed. 1154 (1931); Lamoreaux v. Kinney, 41 F. (2d) 30 (C. C. A. 9th, 1930); Marty v. Nagle, 44 F. (2d) 695 (C. C. A. 9th, 1930); City of Osceola, Iowa v. Utilities Holding Corp., 55 F. (2d) 155 (C. C. A. 8th, 1932); Chicago Bank of Commerce v. McPherson, 62 F. (2d) 393 (C. C. A. 6th, 1932.)

C. & St. L. R. Co. v. Wallace,[5] the Court seemingly reversed itself and to some extent opened the Federal Courts for declaratory judgments. In that case, on appeal from the Supreme Court of Tennessee, a declaratory judgment under the Tennessee Declaratory Judgment Act was held entitled to review in the Supreme Court as of right under Section 237a of the Judicial Code.

The principal case is the first reported application for a declaratory judgment in the Federal Courts since the Nashville case. In the latter, a declaratory judgment was used for a situation traditionally handled by injunction. This may imply a limitation upon the scope of declaratory judgments in the Federal Courts. The case under discussion, however, seems free from this limitation, for here the Circuit Court of Appeals held a declaratory judgment available notwithstanding its approval of the order denying an injunction.

On the question of removal the Court said in *Willing v. Chicago Auditorium Ass'n*[6] that an application for a declaratory judgment should have been remanded to the state courts for failure to present a case or controversy under Article III. In the principal case, also a removal case, the Court apparently takes a different view,[7] unless the last sentence quoted in the note from the opinion qualifies its position. If that qualification is effective, must some more traditional type of procedure be invoked to gain standing in the Federal Courts in order to secure, as an adjunct thereto, a declaratory judgment?

Five cases have come before the Supreme Court of North Carolina since the Uniform Declaratory Judgment Act[8] was enacted in 1931. In three of these cases the declaratory judgment was denied.

[5] Nashville, Chattanooga, and St. Louis Ry. v. Wallace, 288 U. S. 249, 53 Sup. Ct. 345, 77 L. ed. 444 (1933). (Plaintiff sued in courts of Tennessee for a declaratory judgment to the effect that a state excise tax was, as applied to him, unconstitutional. The Supreme Court of Tennessee held the tax valid, and plaintiff appealed to the Supreme Court of the United States) commented upon (1932) 42 YALE L. J. 974, (1932) 46 HARV. L. R. 850.

[6] *Supra* note 2.

[7] Harr *et al.* v. Pioneer Mechanical Corp., *supra* note 1, at 335 ("The name given the relief sought is of no particular moment. The controversy is clearly adverse and over matters which are justiceable in a District court when there is a diversity of citizenship and the requisite amount is involved. We think *Nashville, Chattanooga, and St. Louis Ry. v. Wallace* is authority for deciding the case fully on the merits. An added reason is found in that, where equitable jurisdiction has been properly invoked in an adversary suit for the purpose of seeking an injunction, the court may dispose of the entire controversy between the parties to the action").

[8] N. C. CODE ANN. (Michie, 1931) §628. See Van Hecke, *The North Carolina Declaratory Judgment Act* (1931) 10 N. C. L. R. 1, for valuable discussion of the procedure, uses and advantages of declaratory judgments.

In the other two it was granted. This does not mean that the Act has not been given liberal interpretation or that the potentialities of the procedure as an alternative remedy[9] have been overlooked. The denials were based on plaintiff's failure to present an adversary dispute on a question of legal import in connection with his application for a declaratory judgment to settle his racial status;[10] on the belief that probate under provisions of Section 4163 of the consolidated statutes ought still to be the exclusive procedure to determine the validity of a will;[11] and on the fact that plaintiff's complaint stated a cause of action which had already accrued under an insurance policy, and not a prayer for anticipatory relief.[12] The two instances in which the Court upheld declaratory judgments illustrate the value of the new remedy. In one a deed was construed in advance of any breach of covenants and the rights of the parties set forth.[13] In the other, a recent and most important case, the Court determined the rights of the city, the traction company, and the public under a street-car franchise from the city of Raleigh.[14]

JOE EAGLES.

Evidence—Trial Judge's Power of Comment.

In *Quercia v. United States*[1] the court charged the jury that defendant had wiped his hands during his testimony and that such a mannerism was almost always an indication of lying, and further, that he thought everything the defendant said was a lie. *Held:* Prejudical error.

Under the common law, trial judges had the power of commenting and expressing their opinion upon the evidence.[2] This rule is still followed in English courts[3] and in the federal courts of the

[9] N. C. CODE ANN. (Michie, 1931) §628 ("Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed").

[10] *In Re* George C. Eubanks, 202 N. C. 357, 162 S. E. 769 (1932). See Miller v. Currie, 242 N. W. 570 (Wis. 1932) (a declaratory judgment as to plaintiff's legitimacy is possible under the Uniform Declaratory Judgment Act.) Commented upon (1932) 46 HAR. L. REV. 336.

[11] Poore v. Poore, 201 N. C. 791, 161 S. E. 532 (1931).

[12] Green v. Inter-Ocean Casualty Co. of Cincinnati, 203 N. C. 767, 167 S. E. 38 (1932).

[13] Walker v. Phelps, 202 N. C. 344, 162 S. E. 727 (1932).

[14] Carolina Power and Light Co. v. Isley, 203 N. C. 811, 167 S. E. 56 (1933).

[1] 77 L. ed. 996 (1933).

[2] Capitol Traction Co. v. Hoff, 174 U. S. 1, 19 Sup. Ct. 580, 43 L. ed. 873 (1899); HALE, HISTORY OF THE COMMON LAW (1792) 291; 16 C. J. 939 §2308b.

[3] Jefferson v. Paskell, 1 K. B. 57 (1916).

United States, in both civil and criminal cases.[4] This, however, is not an unrestricted power of comment. It is subject to the general, flexible limitation typically defined as follows: "the line of demarcation between what a court may say to the jury * * * * in expressing his opinion on the facts, and what he may not say, is to be drawn between mere expression of opinion not partaking of such argumentative nature as to amount to advocacy, leaving to the jury absolute freedom to determine the facts; and such discussion as amounts to an argument and makes the court in fact an advocate against the defendant."[5] This vague rule permits of widely divergent results.[6] For example, in a criminal case the court's charge that "in my opinion the defendant is a liar" was held to be prejudical.[7] On the other hand a charge that the government's witnesses, who had directly contradicted the defendant, "were telling the truth" was held not to exceed the power of comment.[8] In practically all cases, the trial judge's comment is held not to be prejudicial if the judge qualifies his remarks by making it clear to the jury that what he says is not binding upon them and that the facts are subject to their consideration and decision,[9] unless his comment is obviously unfair and argumentative,[10] such as "you are not to be hoodwinked or bamboozled by anybody * * * if a witness testifies that down the street he saw an elephant climb a telephone pole, you are not bound to believe it is a fact, even though he shows you the pole."[11] Under the above rule,

[4] Simmons v. United States, 142 U. S. 148, 12 Sup. Ct. 171, 35 L. ed. 968 (1891); United States v. Phila., Reading R. Co., 123 U. S. 113, 8 Sup. Ct. 77, 31 L. ed. 138 (1887); COOLEY, PRINCIPLES OF CONSTITUTIONAL LAW (3d ed. 1898) 265.

[5] Cook v. United States, 18 F. (2d) 50 (C. C. A. 8th, 1927); Kolkman v. People, 89 Colo. 8, 300 Pac. 575, 579 (1931).

[6] Hicks v. United States, 150 U. S. 442, 14 Sup. Ct. 144, 37 L. ed. 1137 (1893); Allison v. United States, 160 U. S. 203, 16 Sup. Ct. 252, 40 L. ed. 395 (1895); *cf.* Horning v. District of Columbia, 254 U. S. 135, 41 Sup. Ct. 36, 65 L. ed. 185 (1920); Shea v. United States, 251 Fed. 440 (C. C. A. 6th, 1918).

[7] Malaga v. United States, 57 F. (2d) 822 (C. C. A. 1st, 1932).

[8] Tuckermann v. United States, 291 Fed. 958 (C. C. A. 6th, 1923).

[9] Buchanan v. United States, 15 F. (2d) 496 (C. C. A. 8th, 1926); Weiderman v. United States, 10 F. (2d) 745 (C. C. A. 8th, 1926); Tuckermann v. United States, *supra* note 8, at 965.

[10] Starr v. United States, 153 U. S. 614, 626, 14 Sup. Ct. 919, 38 L. ed. 841 (1894) (trial judge voiced his indignation in a sarcastic charge ridiculing the defense); Mullen v. United States, 106 Fed. 892 (C. C. A. 6th, 1901) (the court charged "that if these defendants desired or anybody desired to have colored men deprived of the right to vote, it would be in such a precinct as this and it is not improbable that just such men as these defendants would be chosen to carry that object into execution"); Parker v. United States, 2 F. (2d) 710 (C. C. A. 6th, 1924).

[11] Carney v. United States, 295 Fed. 606 (C. C. A. 9th, 1924).

comment is allowed only upon the evidence in the case[12] and it should be given so as not to mislead the jury in ultimately deciding controverted questions of fact.[13]

The trends, if any, in respect to the use of the above rule seem to be: (1) that greater emphasis is allowed in the federal courts in commenting on the evidence;[14] and (2) that some distinction is drawn in a few jurisdictions between the application of the rule in criminal and in civil cases, some states limiting the extent of comment in criminal cases.[15] Federal courts, however, as regards the comment rule, are not bound by the practice in the jurisdictions in which they are sitting.[16]

Although only twelve states follow the practice of the English and federal courts,[17] it would seem that such is the better policy since it does not deprive the jury of the experience and knowledge of the trial judge. Those who oppose this policy on the ground that he will usurp the jury's function have little to fear in view of the

[12] Mullen v. United States, *supra* note 10, at 895; O'Shaughnessy *et al.* v. United States, 17 F. (2d) 225 (C. C. A. 5th, 1927); City of Minneapolis v. Canterbury, 122 Minn. 301, 142 N. W. 812 (1913).

[13] Rudd v. United States, 173 Fed. 912, 97 C. C. A. 462 (1909); State v. Greene, 33 Utah 497, 94 Pac. 987 (1908); Seviour v. Rutland R. Co., 88 Vt. 107, 91 Atl. 1039 (1914).

[14] United States v. Phila., Reading R. Co., *supra* note 4, at 139; Weiderman v. United States, *supra* note 9, at 746; *cf.* State v. Greene, *supra* note 13, at 989; Bradley v. Gorham, 77 Conn. 211, 58 Atl. 698 (1904).

[15] People v. Lee, 2 Utah 441 (1878); State v. Dolliver, 150 Minn. 155, 184 N. W. 848 (1921); Ames v. Cannon River Co., 27 Minn. 245, 6 N. W. 787 (1880).

[16] Nudd v. Burrows, 91 U. S. 426, 23 L. ed. 286 (1875) (The supreme court in commenting upon the act of Congress, June 1, 1872 (17 Stat. 197 (1872), 28 U. S. C. A. 724 (1928)) which states that the practice of the circuit and district courts shall conform to that of the state courts in which such circuit or district court is held, says—"The identity required is to be in practice, pleadings and forms and modes of proceeding. The personal conduct and administration of the judge in the discharge of his separate functions is in our judgment, neither practice, pleading, nor a form nor mode of proceeding within the meaning of those terms as found in the context.")

[17] Colorado—Kolkman v. People, *supra* note 5.
Connecticut—State v. Cianeflone, 98 Conn. 454, 120 Atl. 349 (1923).
Michigan—People v. Burlingame, 257 Mich. 252, 241 N. W. 253 (1932); MICH. COMP. LAWS (1929) §17322.
Minnesota—Ames v. Cannon River Co., *supra* note 15.
New Hampshire—Flanders v. Colby, 28 N. H. 34 (1853).
New Jersey—Merklinger v. Lambert, 76 N. J. L. 806, 72 Atl. 119 (1909).
New York—Hurlbutt v. Hurlbutt, 128 N. Y. 420, 28 N. E. 651 (1891).
Ohio—Sandoffsky v. State, 29 Ohio App. 419, 163 N. E. 634 (1928).
Pennsylvania—Johnston v. Commonwealth, 85 Pa. St. 54 (1877).
Rhode Island—Smith v. Rhode Island Co., 39 R. I. 146, 98 Atl. 1 (1916).
Utah—People v. Lee, *supra* note 15.
Vermont—Sawyer v. Phaley, 33 Vt. 69 (1860).

tendency on the part of appellate courts to rigidly supervise his exercise of discretion.[18]

E. D. KUYKENDALL, JR.

Insurance—Construction of "Violation of Law" Exception in Policy.

An action was brought on a life insurance policy which provided that double indemnity should not be payable if death resulted from violation of law. Insured was killed when he ran his car into a culvert on the left side of the highway. The court below instructed the jury that if insured "inadvertently and involuntarily drove his car upon the left hand side of the road, he may have been guilty of negligence, but he was not guilty of violation of law in so doing." *Held,* that this instruction was erroneous.[1]

Some courts in construing such conditions have held that there must be a violation of the criminal law.[2] Generally, this clause includes the commission of a misdemeanor,[3] but where the associated exceptions impute the commission of a felony, the courts hold, in accordance with the maxim *noscitur a sociis,* that the exception extends only to a violation of law which amounts to a felony.[4] The resulting death may be accidental[5] or caused by the intentional act of another.[6] However, in order that the insurer may be discharged the

[18] Hickory v. United States, 160 U. S. 408, 16 Sup. Ct. 327, 40 L. ed. 474, 480 (1896) and cases cited.

[1] Mutual Life Ins. Co. of New York v. Grimsley, 168 S. E. 329 (Va. 1933).

[2] Ragan v. Provident Life & Acc. Ins. Co., 209 Iowa 1075, 229 N. W. 702 (1930) (riding in box car held no crime such as to avoid accident policy); see Cluff v. Mutual Ben. Life Ins. Co., 13 Allen (Mass.) 308, 317 (1866) (attempting to forcefully take personal property from debtor).

Some courts say it need not necessarily be a violation of the criminal law. Bloom v. Franklin Life Ins. Co., 97 Ind. 478, 49 Am. Rep. 469 (1884). In Travelers' Ins. Co. v. Seaver, 19 Wall. 531, 22 L. ed. 155 (1873) where insured was killed in horse race, the court said, "It was against the general species of danger attending nearly all infractions of law that the exception was directed."

[3] Travelers' Ins. Co. v. Seaver, *supra* note 2 (horse-racing made a misdemeanor); Wolff v. Conn. Mut. Life Ins. Co., 5 Mo. App. 236 (1878). *Contra:* Supreme Council of Royal Arcanum v. Quarles, 23 Ga. App. 104, 97 S. E. 557 (1918).

[4] Harper's Adm'r v. Phoenix Ins. Co., 19 Mo. 506 (1854) ("if insured should die in consequence of a duel, or by the hands of justice, or in the known violation of any law of this state"); *cf.* Brown v. Supreme Lodge K. P., 83 Mo. App. 633 (1900) (all the associated exceptions were not felonies).

[5] Murray v. New York Life Ins. Co., 96 N. Y. 614, 48 Am. Rep. 658 (1884).

[6] Osborne v. People's Benev. Industrial Life Ins. Co. of La., 19 La. App. 667, 139 So. 733 (1932).

In some cases the test has been whether the insured was the aggressor. Woodmen of the World v. Walters, 124 Ky. 663, 99 S. W. 930 (1907); Payne

violation of law by the insured must be the proximate,[7] though not the sole,[8] cause of the death or injury. The violation of law must be voluntary, and therefore, where the insured is insane the insurer is not discharged,[9] but the exemption from liability is not affected by the fact that insured was intoxicated at the time of the violation of law.[10]

The conduct of the insured has been held to be a violation of law within such exceptions where the insured: assaulted one who shot him;[11] unlawfully pointed a gun at another;[12] committed an assault and battery on wife of man who shot him;[13] was violating Sunday laws;[14] was placing trot-line to prevent free passage of fish;[15] was trying to get on moving car in violation of statute;[16] was alighting from moving train likewise prohibited;[17] submitted to an abortion

v. Union Life Guards, 136 Mich. 416, 99 N. W. 376 (1904). Others declare that if the killing was justifiable, the insurer is not responsible. Railway Mail Assoc. v. Moseley, 211 Fed. 1 (C. C. A. 6th, 1914); Am. Nat. Life Ins. Co. v. White, 126 Ark. 483, 191 S. W. 25 (1916). Others say the killing need not be justifiable. Hobbs v. Sovereign Camp, W. O. W., 212 Ala. 467, 102 So. 625 (1925). Where the action on the policy is defended on the theory that the member was killed by another in self-defense, evidence of the third person's indictment, trial, and acquittal is inadmissible. Sovereign Camp, W. O. W. v. McDonald, 109 Miss. 167, 68 So. 74 (1915).

[7] Supreme Lodge v. Beck, 181 U. S. 49, 21 Sup. Ct. 532, 45 L. ed. 741 (1901); Rowe v. United Commercial Travelers' Assoc. 186 Iowa 454, 172 N. W. 454 (1919).

[8] Whyte v. Union Mut. Casualty Co., 209 Iowa 917, 227 N. W. 518 (1929).

[9] Howle v. Eminent Household of Columbian Woodmen, 118 Ark. 226, 176 S. W. 313 (1915); Woodmen of the World v. Dodd, 134 S. W. 254 (Tex. Civ. App. 1911).

However, a provision that the policy shall be void if death occurs in consequence of a violation of law, whether the insured is sane or insane, is valid. Sovereign Camp, W. O. W. v. Hunt, 136 Miss. 156, 98 So. 62 (1923).

[10] Eminent Household of Columbian Woodmen v. Howle, 124 Ark. 224, 187 S. W. 176 (1916); Bloom v. Franklin Life Ins. Co., 97 Ind. 478, 49 Am. Rep. 469 (1884).

[11] Osborne v. People's Benev. Industrial Life Ins. Co. of La., 19 La. App. 667, 139 So. 733 (1932); Hobbs v. Sovereign Camp, W. O. W. 212 Ala. 467, 102 So. 625 (1925).

[12] North Carolina Mut. Life Ins. Co. v. Evans, 38 Ga. App. 178, 143 S. E. 449 (1928).

[13] Bloom v. Franklin Life Ins. Co. 97 Ind. 478, 49 Am. Rep. 469 (1884).

[14] Duran v. Standard Life & Acc. Ins. Co. 63 Vt. 437, 22 Atl. 530 (1891); *cf.* Eaton v. Atlas Acc. Ins. Co., 89 Me. 570, 36 Atl. 1048 (1897) (insurer liable where insured was injured while riding bicycle from funeral on Sunday).

[15] See Collins v. Bankers' Acc. Ins. Co., 96 Iowa 216, 64 N. W. 778, 779 (1895).

[16] Flower v. Continental Casualty Co., 140 Iowa 510, 118 N. W. 761 (1908).

[17] Poole v. Imperial Mut. Life & Health Ins. Co., 188 N. C. 468, 125 S. E. 8 (1924) (question for jury whether there was a known violation of law).

which was not a medical necessity;[18] was gambling;[19] was participating in horse race;[20] was driving car at an unlawful rate of speed;[21] was transporting liquor;[22] was driving while intoxicated;[23] was attempting to escape with money after committing robbery.[24]

On the other hand, the liability of insurer was not discharged where the insured: ran his car on sidewalk and into pillar on left-hand side of the street;[25] cursed and abused another but was shot before he committed any act;[26] shot himself while carrying pistol on highway;[27] drove a motorcycle which was not licensed and registered according to law;[28] committed suicide;[29] rode on running board of a truck in violation of an ordinance;[30] committed abortion upon herself;[31] swung from moving car;[32] rode in box car;[33] drank "bootleg" whiskey served by his host;[34] attempted sexual intercourse with an-

[18] Wells v. New England Mut. Life Ins. Co. of Boston, 191 Pa. St. 207, 43 Atl. 126 (1899).

[19] Landry v. Independent Nat. Life Ins. Co., 17 La. App. 10, 135 So. 110 (1931).

[20] Travelers' Ins. Co. v. Seaver, 19 Wall. 531, 22 L. ed. 155 (1873).

[21] Rowe v. United Commercial Travelers' Ass'n, 186 Iowa 454, 172 N. W. 454 (1919); Witt v. Spot Cash Ins. Co., 128 Kan. 155, 276 Pac. 804 (1929); see Davilla v. Liberty Life Ins. Co., 114 Cal. App. 308, 299 Pac. 831, 835 (1931).

[22] Flath v. Bankers' Casualty Co., 49 N. D. 1053, 194 N. W. 739 (1923).

[23] Flanagan v. Provident Life & Acc. Ins. Co., 22 F. (2d) 136 (C. C. A. 4th, 1927).

[24] Haley v. Prudential Ins. Co., 189 Ill. 317, 59 N. E. 545 (1901). *Contra:* Jordan v. Logie Suprema De La Alianza Hispano-Americana, 23 Ariz. 584, 206 Pac. 162 (1922); Ben Hur Life Assoc. v. Cox, 181 N. E. 528 (Ind. App. 1932) commented upon (1932-33) 31 MICH. L. REV. 856; Griffin v. Western Ass'n, 20 Neb. 620, 31 N. W. 122 (1886).

[25] Zohner v. Sierra Nevada Life & Casualty Co., 114 Cal. App. 85, 299 Pac. 749 (1931).

[26] Eminent Household of Columbian Woodmen v. Gallant, 194 Ala. 680, 69 So. 884 (1915); Empire Life Ins. Co. v. Einstein, 12 Ga. App. 380, 77 S. E. 209 (1913).

[27] Woodmen of the World v. Wright, 7 Ala. App. 255, 60 So. 1006 (1913).

[28] Fischer v. Midland Casualty Co., 189 Ill. App. 486 (1915).

[29] Kerr v. Minn. Mut. Ben. Ass'n, 39 Minn. 174, 39 N. W. 312 (1888) (suicide to avoid arrest); Darrow v. Family Fund Soc., 116 N. Y. 537, 22 N. E. 1093 (1889); *cf.* Shipman v. Protected Home Circle, 174 N. Y. 398, 67 N. E. 83 (1903).

[30] Reynolds v. Life & Casualty Ins. Co. of Tenn., 166 S. C. 214, 164 S. E. 602 (1932).

[31] Simmons v. Victory Industrial Life Ins. Co. of La., 18 La. App. 660, 139 So. 68 (1932).

[32] Nat. Life & Acc. Ins. Co. v. Lokey, 166 Ala. 174, 52 So. 45 (1910). (The ordinance invoked, however, prohibited merely getting on while car moving.)

[33] Ragan v. Provident Life & Acc. Ins. Co., 209 Iowa 1075, 229 N. W. 702 (1930).

[34] Zurich Gen'l Acc. & Liability Ins. Co. v. Flickinger, 33 F. (2d) 853 (C. C. A. 4th, 1929).

other's wife;[35] was living in a state of fornication with his mistress;[36] was assaulted without provocation after first combat had ceased.[37]

In *Zohner v. Sierra Nevada Life & Casualty Co.*,[38] where insured was killed when he drove his car against a pillar on the sidewalk on the left side of the street, recovery was allowed though the policy excluded injuries sustained while violating law. The California court said that the mere fact that a car is driven upon the left side of the highway or across a sidewalk does not, under all circumstances, constitute a violation of law. This seems to be a better result than that reached by the court in the principal case. The rule requiring one to drive on the right side of the road applies ordinarily only when one vehicle meets another.[39] What difference should it make in the liability of the insurer whether the insured while driving along a straight unobstructed highway happened to run off the left instead of the right-hand side of the road?

JULE MCMICHAEL.

Judgments—Effect of Personal Property Exemption.

By virtue of the North Carolina Constitution[1] a resident debtor is entitled to $500 personal property free from execution for the collection of a debt, this exemption being subject to allotment upon demand at any time before the process is executed by a sale.[2]

In a recent North Carolina case[3] the plaintiff held a valid judgment against the defendant for $3,650. Execution had been returned unsatisfied. Defendant was the owner of four life insurance policies under whose health benefit clauses he was receiving $300 monthly. Plaintiff, by supplemental proceedings, sought to reach this $300 monthly benefit and apply it on his judgment. The court held that the defendant should be allowed to select the $300 each month as a part of his $500 personal property exemption, so that at all times he

[35] Supreme Lodge K. P. v. Crenshaw, 129 Ga. 195, 58 S. E. 628 (1907).
[36] Acc. Ins. Co. v. Bennett, 90 Tenn. 256, 16 S. W. 723 (1891).
[37] Grose v. Liberty Industrial Ins. Co., 6 La. App. 390 (1927).
[38] *Supra* note 25.
[39] Mike v. Levy, 210 App. Div. 813, 206 N. Y. Supp. 4 (1924); Weinstein v. Wheeler, 135 Ore. 518, 295 Pac. 196 (1931); Segerstrom v. Lawrence, 64 Wash. 245, 116 Pac. 876 (1911); see Dole v. Lublin, 112 Conn. 603, 153 Atl. 856, 858 (1931); Reid v. McDevitt, 140 So. 722, 723 (Miss. 1932).
[1] Article X §1.
[2] N. C. CODE ANN. (Michie, 1931) §737.
[3] Commissioner of Banks v. Yelverton, 204 N. C. 441, 168 S. E. 505 (1933).

should have the amount of $500 which could not be reached by the creditor. No matter how frequently creditors may bring execution against the debtor he is entitled to ask for a reassignment of his personal property exemption at each different levy.[4] Accordingly, if between the first and second levies the debtor has consumed half of his previous exemption he is entitled, upon the second levy, to replenish the remainder by $250, bringing the total exemption back to the $500 allowed. The creditor cannot avoid the exemption by having the payments not yet due declared subject to the payment of his debt.[5]

If the plaintiff, in a proper case, had attempted to reach the property of the defendant by attachment and garnishment instead of by judgment and execution the result would have been the same. An attachment is in the nature of a preliminary execution against the property of the defendant which is subject to levy; and garnishment is used to reach the debtor's property which is in the hands of a third person and not subject to actual levy. A resident debtor can claim his exemptions as against such proceeding.[6]

If the plaintiff, a resident creditor seeking to avoid the exemption laws of this state, should proceed in the courts of another state by attachment and garnishment against a non-resident debtor of a resident defendant, he may thus succeed in reaching property to be applied to his debt;[7] but since both plaintiff and defendant are in such case residents of the state, the defendant may ask the court to grant an injunction to restrain the creditor from proceeding in the other state.[8] If the plaintiff is a non-resident and should proceed by garnishment against a debtor of the defendant in another state, the

[4] Frost v. Naylor, 68 N. C. 325 (1873); Shepherd v. Murrill, 90 N. C. 208 (1884); Pate v. Harper, 94 N. C. 23 (1886); Jones v. Alsbrook, 115 N. C. 46, 20 S. E. 170 (1894); Gardner v. McConnaughey, 157 N. C. 481, 73 S. E. 125 (1911); Befarrah v. Spell, 178 N. C. 231, 100 S. E. 321 (1919).

[5] 12 R. C. L. 800 ("By reason of the rule that the garnishing creditor can reach no more than the garnishee owes the principal debtor.")

[6] Gamble v. Rhyne, 80 N. C. 183 (1879); McINTOSH, N. C. PRACTICE AND PROCEDURE (1929) §§809 (3), 819.

[7] Chicago, Rock Island & P. R. Co. v. Strum, 174 U. S. 710, 19 Sup. Ct. 797, 43 L. ed. 1144 (1899). ("It is held generally that exemption laws are a part of the remedy of the forum and have no force beyond the bounds of the state enacting them." Armour Fertilizer Works v. Sanders, 63 F. (2d) 902 (1933); Goodwin v. Claytor, 137 N. C. 224, 49 S. E. 173 (1904); Penn. R. Co. v. Rogers, 52 W. Va. 450, 44 S. E. 300 (1903); McIntosh, *op. cit. supra* note 6 §758.

[8] Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. ed. 538 (1889); Morton v. Hull, 77 Tex. 80, 13 S. W. 849 (1890); Wierse v. Thomas, 145 N. C. 261, 59 S. E. 58 (1907).

defendant would not be allowed to set up his personal property exemption since it applies only within the state.[9] Where a resident debtor has brought action against his debtor and reduced his claim to a judgment in this state, a non-resident creditor cannot reach the amount due on such judgment by attachment and garnishment in another state.[10] While this will protect the exemption of the debtor in this state, the reason for such ruling is to preserve the control of the court over the judgment rendered, since this would be interfered with by the garnishment of the judgment debtor.

From this discussion the following conclusions may be drawn: (1) The resident debtor's personal property exemption is afforded complete protection from execution (a) where the creditor is a resident of this state, and (b) where the creditor, although a non-resident, brings action within this state; (2) the debtor cannot protect his exemption where the creditor, a non-resident, brings his action in a state foreign to the debtor.

J. CARLYLE RUTLEDGE.

Landlord and Tenant—Set-Offs Against Lease Deposits.

A deposited $3,000 with *B* as a binder to insure *A's* taking possession of a store under a build and lease contract.[1] *A* later became indebted to *B* on a collateral agreement for construction extras. *A* then assigned the deposit to *C* and later went bankrupt. *Held, B* is entitled to a set-off for the extras against *C*.[2] As the assignee can take no more than the assignor had,[3] the real question at issue is what were *B's* rights against *A*, the assignor.

Such deposits are generally held not to create a debtor-creditor relationship. Two cases especially may be pointed out. In one, the

[9] Harris v. Balk, 198 U. S. 215, 25 Sup. Ct. 625, 49 L. ed. 1023 (1904); Sexton v. Phoenix Insurance Co., 132 N. C. 1, 43 S. E. 479 (1903); Balk v. Harris, 132 N. C. 10, 43 S. E. 477 (1903); Watson v. Seaboard R. Co., 198 N. C. 471, 152 S. E. 408 (1930); Penn. R. Co. v. Rogers, *supra* note 7.

[10] Manufacturing Co. v. Freeman, 175 N. C. 212, 95 S. E. 367 (1918); Wabash R. Co. v. Tourville, 179 U. S. 322, 21 Sup. Ct. 113, 45 L. ed. 210 (1900); Shinn v. Zimmerman, 3 Zabriskie (N. J.) 150 (1851); McIntosh, *op. cit. supra* note 6 §819.

[1] Receipt for the deposit read: "Received of *A*, check for Three Thousand Dollars ($3,000.00) to be held by us as a binder to guarantee your carrying out lease made between yourselves and *B*, said lease being on store located at . . . , same to be returned when satisfactory bond is furnished or when you begin occupying store. Signed, *B*."

[2] Commercial National Bank v. Cutter Realty Co., 205 N. C. 99, 170 S. E. 139 (1933).

[3] Bank v. Bynum, 84 N. C. 24 (1881); N. C. CODE ANN. (Michie, 1931) §446.

deposit was expressly held to be a pledge.[4] In another, the lessee was allowed damages for conversion of the sum by the lessor.[5] Accordingly, it is the usual view that these deposits are subject to set-offs and counterclaims only in connection with the express purposes for which the deposits were made.[6] For instance, in a New York case,[7] a deposit was made to secure payment of rent and taxes. Lessee, evicted for non-payment of rent, was held entitled to the deposit minus only the rent due and not the depreciation in rental value or costs of the dispossess action. The reasoning advanced in these cases is that the deposit is still the property of the lessee and the lessor has merely a right to hold it until the conditions for which it was given are fulfilled or made impossible of fulfillment. In every case, the deposit receipt or the deposit clause in the lease or contract determined the extent of these conditions.

In view of these decisions, it seems that the holding of the principal case was erroneous. *B's* interest in the $3,000 consisted of a right to retain it if *A* did not go into possession. But *A* went into possession, thereby cutting off this claim. To allow *B* to set-off an unsecured claim for extra construction costs is not only to go outside of the express conditions limiting *B's* interest in the deposit, but to allow an unjustified preference to a creditor of a bankrupt as well.

PETER HAIRSTON, JR.

Real Property—Registration—Mortgage of Wife Without Privy Examination.

A man and his wife borrowed money to purchase realty, giving a note secured by a deed of trust on the property purchased. No acknowledgment or privy examination of the wife was actually had, though the notary's certificate stated the contrary and the registration was apparently regular. Subsequently a valid deed of trust was executed and recorded. In an action by the wife to restrain a fore-

[4] Kaufman v. Williams, 92 N. J. L. 182, 104 Atl. 202 (1918).

[5] Atlas v. Moritz, 217 App. Div. 38, 216 N. Y. S. 490 (1926). But note that in Goodman v. Scharched, 144 Misc. Rep. 905, 260 N. Y. S. 883 (1932), the holding was limited to cases where the deposit was expressly given as security.

[6] Set-off allowed: Burke v. Norton, 42 Cal. App. 705, 184 Pac. 45 (1919); Lieberman v. Lavene, 253 Mass. 579, 149 N. E. 625 (1925); Sockloff v. Burnstein, 177 App. Div. 471, 164 N. Y. S. 262 (1917). Set-off denied: Rez v. Summers, 34 Cal. App. 527, 168 Pac. 156 (1917); Shanklin v. Kamin, 197 Ill. App. 630 (1916); see Knight v. Marks, 183 Cal. 354, 191 Pac. 531, 532 (1920).

[7] Crausman v. Graham Const. Co., 95 Misc. Rep. 608, 159 N. Y. S. 709 (1916).

closure and sale under the first deed of trust it was *held,* that though the first deed of trust was admittedly invalid and equity would not enforce a specific performance, the amount so loaned would constitute an equitable lien on the land. The Supreme Court in affirming the dissolution of the injunction and decision of the lower court allowed priority to the first deed of trust.[1]

As between the alleged grantor and grantee the attempted conveyance by a married woman of her realty is a nullity in absence of her privy examination.[2] Though specific performance quite generally has been denied, the property in some cases has been charged with an equitable lien where the married woman has received the benefits of the transaction.[3] In all such cases in North Carolina no subsequent incumbrancer was involved.[4] Other cases have held the married woman liable in damages for breach of her contract to convey.[5]

Conceding the justice of the principal case as between the parties, what effect should the equitable lien have upon the priority of a subsequent incumbrancer: (1) where the first deed is unregistered, and (2) where registered?

(1) If the first deed of trust is unregistered it will be ineffective

[1] Boyett v. First National Bank of Durham, 204 N. C. 639, 169 S. E. 231 (1933). Under the decision of the lower court, affirmed, the payees of the notes secured by the first deed of trust were held entitled to a sale of such land to satisfy the balance due, the proceeds of such sale to be applied as follows: (1) To the costs of the sale, (2) the payees of the notes secured by the first deed of trust, (3) to clerk of court to hold for subsequent incumbrancers or claimants.

[2] Smith v. Ingram, 130 N. C. 100, 40 S. E. 984 (1902); Warren v. Dail, 170 N. C. 406, 87 S. E. 126 (1915); Hardy v. Abdallah, 192 N. C. 45, 133 S. E. 195 (1926); N. C. CODE ANN. (Michie, 1931) §997; TIFFANY, REAL PROPERTY (1912) §477.

[3] Burns v. McGregor, 90 N. C. 222 (1884); North v. Bunn, 122 N. C. 766, 29 S. E. 776 (1898); Gann v. Spencer, 167 N. C. 429, 83 S. E. 620 (1914) (as to betterments); TIFFANY, REAL PROPERTY (1912) §564.

[4] In Burns v. McGregor, *supra* note 3, a married woman contracted to convey a smaller for a larger tract of land and to give a mortgage back to secure the difference in price. After execution of the deed she refused to acknowledge the mortgage back as of her own free will. *Held,* the land conveyed to her is subject to the price by reason of an equitable lien—if she keeps the property she must pay the debt. (But no subsequent incumbrancer was involved.)

[5] Warren v. Dail, *supra* note 2 (though a married woman cannot convey realty without a privy examination she may be held for damages for breach of a contract to convey land, but equity will not decree specific performance); Foster v. Williams, 182 N. C. 632, 109 S. E. 834 (1921) (no lien was allowed where the deed of trust was invalid for want of privy examination of the wife).

as notice as against a subsequent creditor or purchaser for value holding under a registered instrument.[6] No notice, however full or formal, will supply the want of registration.[7]

In (2), where the first deed is registered, two problems arise: what effect has it as notice (a) where such deed is defective on its face as to acknowledgment or proof of probate, and (b) where such defect is latent?

As to (a), North Carolina has consistently held that a deed, though registered, when defective on its face, is no notice to subsequent incumbrancers.[8] The result is not so clear where the defective probate is latent, i.e. does not appear upon the face of the instrument.

North Carolina has held that where the defect in the registered instrument is due to the disqualification of the probating officer, and such defect is latent, one taking under the grantee in such instrument gets a good title unless the one claiming the benefit of the defective registration is "cognizant of the facts."[9] But in such a situation the conveyance itself was valid as between the parties without registration.[10] In the principal case the probate of the first deed of trust was latently defective in that there was a complete absence of the wife's privy examination. The registration should not be effective as notice to the subsequent incumbrancer, for, as between the parties, such a deed is a nullity.[11] The wife could set up the absence of the privy examination to avoid the deed apparently regular on the probate,[12] Consolidated Statutes Section 1001 not applying to such a

[6] N. C. CODE ANN. (Michie, 1931) §3309 provides that no conveyance of realty will be valid as against creditors or bona fide purchasers unless registered.

[7] Collins v. Davis, 132 N. C. 106, 43 S. E. 579 (1903); Buchanan v. Clark, 164 N. C. 56, 71, 80 S. E. 424 (1913); Duncan v. Gully, 199 N. C. 552, 155 S. E. 167 (1930); TIFFANY, REAL PROPERTY (1912) §478 and notes.

[8] Wood v. Lewey, 153 N. C. 401, 69 S. E. 268 (1910); Fibre Co. v. Cozad, 183 N. C. 600, 112 S. E. 810 (1922); Bank v. Tolbert, 192 N. C. 126, 133 S. E. 558 (1926).

[9] Blanton v. Bostic, 126 N. C. 418, 35 S. E. 1035 (1900); Bank v. Tolbert, *supra* note 8.

[10] Blanton v. Bostic, *supra* note 9; Warren v. Williford, 62 S. E. 697, 148 N. C. 474 (1908); Weston v. Roper Lumber Co., 160 N. C. 263, 266, 75 S. E. 800 (1912).

[11] *Supra* note 2.

[12] Benedict v. Jones, 129 N. C. 470, 40 S. E. 221 (1901); Davis v. Davis, 146 N. C. 163, 59 S. E. 654 (1907); Lumber Co. v. Leonard, 145 N. C. 339, 59 S. E. 134 (1907).

situation.[13] It has been held that a deed void for want of mental capacity of the grantor will not be validated by proper registration even as against subsequent incumbrancers.[14] A married woman's conveyance without her privy examination is equally void, and it is difficult to see how a void deed acquires any additional validity for registration and notice purposes because it seems to be regular. To hold otherwise would be to give the registration acts an unintended effect by allowing them to abrogate the requirements as to a married woman's conveyance of her realty.[15]

The privy examination of the wife being prerequisite to a valid conveyance of her realty, it is submitted the Court is allowing indirectly that which is prohibited directly by permitting an apparently regular registration to validate a void instrument and to charge a subsequent incumbrancer with notice so as to defeat his priority. Though it is doubtful that the Court intended to go so far, it has apparently done so in affirming the decision of the lower court.

HENRY L. ANDERSON.

Sales—Conditional Sales—Registration.

Dealer sold automobiles to customers on conditional sale and assigned the contracts to finance company, with an unrecorded agreement that repossessed cars should be purchased by dealer from finance company for the unpaid balance due from customers. Finance company was to hold title, dealer to be bailee for storage only, with duty to deliver to finance company on demand. Finance company claimed several cars so held from the dealer's receiver. *Held,* for claimant; the agreement was not a conditional sale and need not be recorded.[1]

Either by express statutory provision or by judicial construction the requisite of recordation has been imposed upon chattel mort-

[13] N. C. CODE ANN. (Michie, 1931) §1001 providing that an innocent purchaser is not affected by fraud in the treaty if the privy examination is regular, does not apply to situations where there is a complete absence of privy examination. See Davis v. Davis, *supra* note 13.

[14] Thompson v. Thomas, 163 N. C. 500, 79 S. E. 896 (1913).

[15] The requirements prerequisite to a married woman's valid conveyance of her realty are specifically set forth. N. C. CODE ANN. (Michie, 1931) §997. The registration acts (N. C. CODE ANN. (Michie, 1931) §3309) are for the protection of subsequent creditors and purchaser for value, and not for the purpose of correcting defects in the execution of an instrument of conveyance.

[1] Cutter Realty Co. v. Moneyhun Co., Inc., 204 N. C. 651, 169 S. E. 274 (1933).

gages,[2] conditional sales,[3] and in some cases, trust receipts;[4] all of which, according to the weight of authority, have the common feature of some form of divided ownership.[5] Although by the conditional sales agreement title is retained in the vendor, it is generally recognized that such title is for security purposes only, the vendee having the beneficial ownership, as well as the possession of the property.[6]

The view that mere possession is not sufficient indicia of ownership to mislead third parties, however, has kept leases,[7] bailments,[8] and consignments[9] from inclusion in the above group. Consequently, evasion of the recordation statutes has often been attempted by drafting a sales agreement to simulate one of these transactions. In such cases the court will construe the contract according to its essential character.[10]

It is often difficult to distinguish a conditional sale camouflaged

[2] N. C. CODE ANN. (Michie, 1931) §3311.

[3] Kornegay v. Kornegay, 109 N. C. 188, 13 S. E. 770 (1891); N. C. CODE ANN. (Michie, 1931) §3312; HARING, CONDITIONAL SALES LAWS (3rd ed. 1927) 18 (list of states requiring recordation of conditional sales).

[4] General Motors Acceptance Corp. v. Boddeker, 274 S. W. 1016 (Tex. Civ. App. 1925); *In re* Richheimer, 221 Fed. 16 (C. C. A. 7th, 1915); *In re* Bettman-Johnson Co., 250 Fed. 657 (C. C. A. 6th, 1918).

[5] VOLD, SALES (1931) 265 (chattel mortgages), 270 (conditional sales), 346 (trust receipts).

[6] Universal Credit Co. v. Mamminga, 214 Iowa 1135, 243 N. W. 513 (1932); Observer Co. v. Little, 175 N. C. 42, 94 S. E. 526 (1907) (conditional sales regarded in effect as chattel mortgages); *cf.* Citizen's Bank v. Mullis, 161 Ga. 371, 131 S. E. 44 (1925) (conditional seller is not a mere lienor, but stands in the position of absolute owner).

[7] Foreman v. Drake, 98 N. C. 311, 3 S. E. 842 (1887).

[8] Shaffer v. Lacy, 121 Cal. 574, 54 Pac. 72 (1898). *Contra: In re* Tansil, 17 F. (2d) 413 (D. C. S. C. 1922) (South Carolina statute requires recordation of bailment contracts).

[9] Empire Drill Co. v. Allison, 94 N. C. 548 (1886).

[10] Contracts in the form of leases held conditional sales. Puffer and Sons Mfg. Co. v. Lucas, 112 N. C. 378, 17 S. E. 174 (1893); Wilcox Bros. v. Cherry, 123 N. C. 79, 31 S. E. 369 (1898). Contracts in the form of bailments held conditional sales. Boon v. Moss, 70 N. Y. 465 (1877); Hamilton v. Highlands, 144 N. C. 279, 56 S. E. 929 (1907). Contracts in the form of consignments for sale held conditional sales. Kellam v. Brown, 112 N. C. 451, 17 S. E. 416 (1893); Arbuckle Bros. v. Gates, 95 Va. 802, 30 S. E. 496 (1898).

Much of the difficulty is eliminated by the Uniform Conditional Sales Act §1, which defines a conditional sale as "(1) any contract for the sale of goods under which the possession is delivered to the buyer and the property in the goods is to vest in the buyer at a subsequent time upon the payment of part or all of the price, or upon the performance of any other condition or the happening of any contingency; or (2) any contract for the bailment or leasing of goods by which the bailee or lessee contracts to pay as compensation a sum substantially equivalent to the value of the goods, and by which it is agreed that the bailee or lessee is bound to become, or has the option of becoming the owner of such goods upon the full compliance with the terms of the contract."

as a bailment. The most approved distinction is that a conditional sale contemplates passage of title to the vendee and payment of the price by him, while a bailment contemplates that title shall remain in the bailor and that the property shall be returned to him.[11] Seemingly the contract in the present case falls under the concept of a conditional sale. The provision that the finance company may demand possession before default does not prevent a conditional sale from resulting.[12] However, in practically all cases where an ostensible bailment was held a conditional sale the possessor had the right of use or disposal of the property to some extent, while in the principal case the possession of the dealer was limited to storage. Nevertheless, many courts have held certain trust receipt agreements in which the vendor retains title and the vendee holds the property in trust for storage only to be in effect conditional sales.[13]

The bailment in the principal case seems colorable. The clear intent of the parties appears to be that the claimant should not demand possession unless the dealer defaulted in payment. The facts present an especially deceptive situation, since the cars are the very ones over which the dealer has formerly exercised control by selling to customers. Good policy demands recordation of such agreements.

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Workmen's Compensation—Subrogation—Defenses Available to Negligent Third Parties.

While driving a truck of *X* Company across the defendant's railroad track, an employee of the company was killed by a train. While

[11] Morris v. Boston Music Co., 129 Minn. 198, 151 N. W. 971 (1917); Vermont Acceptance Corp. v. Wiltshire, 103 Vt. 219, 153 Atl. 199 (1931).

[12] Emerson-Brantingham Implement Co. v. Lawson, 237 Fed. 877 (S. D. Iowa 1916); *In re* Shiffert, 281 Fed. 284 (E. D. Pa. 1922). Certainly a right in the finance company to demand possession before default would not prevent a conditional sale under a dictum of the North Carolina court giving any conditional vendor such a right. See State v. Stinett, 203 N. C. 829, 167 S. E. 63 (1933) criticised in (1933) 11 N. C. L. REV. 321.

[13] *In re* Cullen, 282 Fed. 902 (D.Md. 1922); Commonwealth Finance Co. v. Schutt, 97 N. J. L. 225, 116 Atl. 722 (1922).

However, a tripartite trust receipt agreement, in which the vendee was to hold for storage, was not to use or dispose of cars, and was to deliver to finance company on demand was held merely a bailment. General Motors Acceptance Corp. v. Hupfer, 113 Neb. 228, 202 N. W. 627 (1925). In *In re* Otto-Johnson Mercantile Co., 52 F. (2d) 678 (D. N. M. 1928) the court held a similar agreement to be a bailment intimating it could not be a conditional sale because the manufacturer was the real dealer. In Hanna, *Trust Receipts* (1929) 29 COL. L. REV. 545 it is noted that some courts regard the trust receipt as *sui generis*. See (1931) 9 N. C. L. REV. 468.

an action by the deceased's administrator was pending, an award was made under the Workmen's Compensation Act. The complaint was then amended so as to make the *X* Company a real party in interest. The defendant set up the contributory negligence of *X* Company in allowing its employee to use a truck with defective brakes. *Held:* Valid defense.[1]

As the Workmen's Compensation Acts are never exactly alike in any two states, the jurisdictions differ materially on the question of who has the right to bring an action against a third party whose negligence has caused the injury or death of an employee operating under the Act. Most of them, however, may be placed within one of the following categories: (1) Those in which there is a statutory provision to the effect that, if the negligent third party is operating under the Workmen's Compensation Act, his liability is limited to the amount of the award specified in the Act, and the employer or his insurance carrier has the exclusive right to maintain an action against the third party for injury to or death of an employee.[2] (2) Those in which the action may be maintained either by the employer or the employee.[3] (3) Those in which the employee has the option of maintaining an action against the third party or against the employer; but if he elects to do the latter and an award is made, he is considered to have given up his right to sue the third party.[4] North Carolina adopts the latter view, and the employee, or his representative, is privileged to begin both actions at once, with the employer being subrogated to the rights of the employee, or his representative, after an award has been made.[5] It has been held that if the employer fails to take advantage of his right of subrogation, the employee, or his representative, may sue the third person.[6]

When the employer does exercise his right, it is held, with the exception of a few cases,[7] that his concurring negligence is not a

[1] Brown v. Southern Ry. Co., 204 N. C. 668, 169 S. E. 419 (1933).
[2] Wendt & Crane Co. v. Traff, 262 Ill. App. 58 (1931).
[3] McKenzie v. Mo. Stables, 327 Mo. 88, 34 S. W. (2d) 136 (1930).
[4] Holmes v. Henry Jennings & Sons, 7 Fed. (2d) 231 (D. C. 1921); State v. Francis, 150 Md. 285, 134 Atl. 26 (1926).
[5] Phifer v. Berry, 202 N. C. 388, 163 S. E. 119 (1932); Prigden & U. S. Fidelity & Guarantee Co. v. Ry. & Carolina Delivery Service, 203 N. C. 62, 164 S. E. 325 (1932); McCarley v. Council and Sutton 205 N. C. 370, 171 S. E. 323 (1933).
[6] Chesapeake & O. Ry. Co. v. Palmer, 149 Va. 560, 140 S. E. 831 (1927).
[7] Thornton v. Reese, 246 N. W. 527 (Minn. 1933); Corey & Son, Lt'd. v. France, Fenwick & Co., Lt'd. (1911) 1 K. B. 114; Canadian P. R. Co. v. Alberta Clay Products, Lt'd., 8 B. W. C. C. 675 (Can. 1914) (cited and distinguished in

valid defense.[8] This result is reached through the following process of reasoning: (1) No exceptions are made in the statutes to the rule that for the purpose of this suit the employer is subrogated to every right of the employee, or his representative.[9] (2) As the right of the employee, or his representative, to compensation exists solely because of the Workmen's Compensation Act and not because of the negligence of the employer, the latter should not be precluded from a recovery against a negligent third person by his own contributory negligence.[10] (3) As evidence of the amount of compensation paid is not admissible in the third party action, it is impossible to measure the effect of the employer's contributory negligence.[11] The cases in the United States holding that the defense is available to the third party maintain that the statutes providing for subrogation do not contemplate a situation in which the employer's negligence contributed to the injury. The actual rights of the employee, or his representative, are transferred to the employer only when his hands are clean.[12] In view of the fact that not one of the statutes makes exception to the rule that the employer is subrogated to the rights of an employee, or his representative, it would seem that the holding of the principal case is fallacious.

Following the reasoning of the majority holding, it has been held that the statute of limitations begins running on the employer's right of action from the time of the injury.[13] As the North Carolina statute provides that the employer may institute action before payment of an award in order to protect the loss of his rights by the

Milosevich *et. al.* v. Pacific Electric Ry. Co., 68 Cal. App. 662, 230 Pac. 15 (1924).

[8] Otis Elevator Co. v. Miller & Paine, 240 Fed. 376 (C. C. A. 8th, 1917); Milosevich *et. al.* v. Pacific Electric Ry. Co., *supra* note 7; Fidelity & Casualty Co. v. Cedar Valley Electric Co., 187 Ia. 1014, 174 N. W. 709 (1919); City of Shreveport v. Southwestern Gas & Electric Co., 145 La. 679, 82 So. 785 (1919); General Box Co. v. Mo. Utilities Co., 55 S. W. (2d) 442 (Mo. 1932); Graham v. City of Lincoln *et al.*, 106 Neb. 305, 183 N. W. 569 (1921).

[9] General Box Co. v. Mo. Utilities Co., *supra* note 8.

[10] See Fidelity & Casualty Co. v. Cedar Valley Electric Co., *supra* note 8, at 1019 ("A discussion of the right of one joint tort-feasor to contribution from another, or of the right of one injured person, who has recovered judgment against, made settlement with, one joint tort-feasor to recover against another, is not germane to the question.").

[11] Milosevich *et al.* v. Pacific Electric Ry. Co., *supra* note 7.

[12] Thornton Bros. v. Reese, *supra* note 7; Brown v. So. Ry., *supra* note 1.

[13] Employer's Liability Assur. Corp. v. Indianapolis & Cinc. Traction Co., 195 Ind. 91, 142 N. E. 856 (1924); Maryland Casualty Co. v. Ladd, 121 Kan. 659, 249 Pac. 687 (1926); U. S. Fidelity & Guaranty Co. v. Blue Diamond Coal Co., 170 S. E. 728 (Va. 1933); *Contra:* Star Brewing Co. v. Cleveland, C. C. & St. L. Ry. Co., 275 Fed. 330 (C. C. A. 7th, 1921).

passage of time,[14] it is reasonable to infer that we would adopt this view. It is generally conceded that as against the employer the third party can not avail himself of the defense that a settlement has been made with the employee, unless the employer has consented thereto.[15] Since he is considered to stand in the position of the employee as against a third party,[16] any defense which would be available to the third party in an action by the employee, or his representative, is valid when the employer brings the action.[17]

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[14] N. C. CODE ANN. (Michie, 1931) §1081(r).
[15] Pizcz v. Schultz *et. al.*, 236 App. Div. 552, 261 N. Y. S. 198 (1932); Smith v. Yellow Cab Co., 288 Pa. 85, 135 Atl. 558 (1927). *Contra:* Gones v. Fisher, 286 Ill. 606, 122 N. E. 94 (1919) (on the grounds that there being only one cause of action, any settlement will destroy it).
[16] General Box Co. v. Mo. Utilities Co., *supra* note 8.
[17] Maryland Casualty Co. v. Ladd, *supra* note 13; (1933) 33 COL. L. REV. 550.