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Notes and Comments

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The following students have been elected to the Order of the Coif: Hugh Lewis Lobdell, Irvin Elsworth Erb, and Joe Colin Eagles.

Shepard's Citations and the North Carolina Law Review.

The publishers of Shepard's Citations have announced that, beginning with the June 1934 Cumulative Supplement, Shepard's North Carolina Citations will carry citations to the Articles and Notes and Comments in THE NORTH CAROLINA LAW REVIEW which deal with North Carolina cases, constitution and statutes and with the United States constitution and statutes. At first this service will cover only Volume XII of the REVIEW, being the issues of December 1933, and February, April, and June 1934, and subsequent issues. Later on it is planned to extend the citations to cover all of the previous eleven volumes of the REVIEW. It will not include reference to comments on North Carolina cases or statutes in other LAW REVIEWS. It is earnestly hoped that at some later time the service may thus be extended.

This new feature of Shepard's North Carolina Citations will greatly enlarge its usefulness and that of THE NORTH CAROLINA LAW REVIEW to the bench and bar.

NOTES AND COMMENTS

Constitutional Law—Impairment of Contract—Mortgage Relief During the Depression.

In an action under the North Carolina statute authorizing courts of equity to enjoin the consummation of sales under powers of sale contained in deeds of trust and mortgages solely on the ground that the highest bid at the sale does not represent the reasonable value of the property, the trial court, after finding that the bid of $40,000 at the trustee's sale was only about half of the reasonable value of the land, issued a temporary restraining order, enjoining the trustee and purchaser from consummating the sale. On appeal, *held,* that the statute applies to sales under deeds of trust executed prior to its enactment, and being remedial only does not impair the obligation of contract nor deprive the parties of property without due process of law, nor confer upon mortgagors or trustors exclusive privileges.[1]

[1] Woltz v. Deposit Co., 206 N. C. 239 (1934).

In the recent case of *Home Building & Loan Ass'n v. Blaisdell*[2] the Supreme Court of the United States put its stamp of approval on legislative attempts to relieve mortgagors during the present economic depression. A Minnesota statute authorized the district courts to extend the period of redemption from mortgage foreclosure and execution sales for a just and equitable period, not beyond May 1, 1935, and during that time to withhold the right of deficiency judgments, contingent upon the mortgagor's paying a reasonable rental value to be applied to the interest, taxes, and mortgage indebtedness. The court by a five to four decision sustained the statute holding that it was not an unlawful impairment of the obligation of contract nor a violation of the due process or equal protection clauses of the Federal Constitution. In applying the principle of harmonizing the constitutional prohibition with the necessary residuum of state power the court said, "The economic interests of the state may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts."

Among the many legal problems raised by the depression, perhaps none has attained more widespread importance than that of the defaulting mortgagor. The decisions seem to be unanimous in holding that in the absence of statute the existence of a financial depression and the fact that the property cannot be sold for a fair price are not sufficient grounds for enjoining a sale under a mortgage or deed of trust.[3] Also it has been generally held that in the absence of fraud and unfairness mere inadequacy of price will not invalidate a foreclosure sale.[4] Such sales, however, have been set aside when the price is so grossly inadequate as to shock the court's conscience or imply fraud.[5]

The Wisconsin court has held that in the light of the present emergency the equity courts may, independently of moratory stat-

[2] 78 L. ed. 251, 54 Sup. Ct. 231 (1934) commented upon (1934) 1 U. CHI. L. REV. 639 and (1934) 47 HARV. L. REV. 660.

[3] Bolich v. Prudential Ins. Co., 202 N. C. 789, 164 S. E. 335 (1932) commented upon (1933) 11 N. C. L. REV. 172; note (1932) 82 A. L. R. 976; JONES, MORTGAGES (8th ed. 1928) §2354; WILTSIE, MORTGAGE FORECLOSURES (4th ed. 1927) §663.

[4] Federal Land Bank of St. Louis v. Ballentine, 186 Ark. 141, 52 S. W. (2d) 965 (1932); Baldwin v. Brown, 193 Cal. 345, 224 Pac. 462 (1924); Springer v. Law, 185 Ill. 542, 57 N. E. 435 (1900); Roberson v. Mathews, 200 N. C. 241, 156 S. E. 496 (1930); note (1920) 8 A. L. R. 1001; JONES, *op. cit. supra* note 3, §§2108, 2140, 2462; WILTSIE, *op. cit supra* note 3, §§752, 759.

[5] Ballentyne v. Smith, 205 U. S. 285, 51 L. ed. 803, 27 Sup. Ct. 527 (1907); Michigan Trust Co. v. Cody, 249 N. W. 844 (Mich. 1933); Hoffman v. McCracken, 168 Mo. 337, 67 S. W. 878 (1902) note (1920) 8 A. L. R. 1001.

utes, take any one, two, or all of three steps: "(1) The court may decline to confirm the sale where the bid is substantially inadequate. . . . (2) The court in ordering a sale or resale, may, in its discretion, fix a minimum or upset price at which the premises must be bid in if the sale is to be confirmed. . . . (3) The court may, upon application for the confirmation of a sale, if it has not theretofore fixed an upset price, conduct a hearing, establish the value of the property, and, as a condition to confirmation, require that the fair value of the property be credited upon the foreclosure judgment."[6]

In the last year, the legislatures of twenty-five states have passed various types of mortgage moratory statutes.[7] A majority of the courts which have considered such statutes have held them unconstitutional on the grounds that they impaired the obligation of contracts.[8] These courts in following the traditional[9] and logical view have taken the position that where the power of the legislature was specifically limited or denied, no power could be exercised, however great the emergency, and that the police power did not enable states

[6] Suring State Bank v. Giese, 210 Wis. 489, 246 N. W. 556 (1933) (in determining fair value potential or future value should be considered) commented upon (1933) 33 COL. L. REV. 744; (1933) 27 ILL. L. REV. 950; (1933) 81 U. PA. L. REV. 883; (1933) 8 WIS. L. REV. 286; note (1933) 85 A. L. R. 1480. Some courts have approved the requirement that fair value be credited on deficiency decrees. Federal Title & Mortgage Guaranty Co. v. Lowenstein, 113 N. J. Eq. 200, 166 Atl. 538 (1933). Others have refused to fix an upset price on the ground that competitive bidding might be further discouraged. United Building & Loan Ass'n. of the City of Newark v. Neuman, 113 N. J. Eq. 224, 166 Atl. 537 (1933); Michigan Trust Co. v. Cody, *supra* note 5.

[7] For a discussion of the statutes see notes: (1933) A. B. A. J. 474; (1934) 47 HARV. L. REV. 660; (1933) 42 YALE L. J. 1236.

[8] Alliance Trust Co., Limited v. Hall, 5 F. Supp. 285 (D. Idaho, 1933) (proclamation of governor of Idaho suspending foreclosure of real estate mortgages held not to apply to mortgages executed before legislative act authorizing the suspension because of unconstitutional impairment of contract); Adams v. Spillyards, 61 S. W. (2d) 686 (Ark. 1933) (statute in effect abolishing deficiency judgments) commented upon (1933) 20 VA. L. REV. 122; State *ex rel.* Cleveringa v. Klein, 249 N. W. 118 (N. D. 1933) (unconditional statutory extension in redemption period) noted in (1933) 86 A. L. R. 1539; Life Ins. Co. of Va. v. Sanders, 62 S. W. (2d) 348 (Tex. Civ. App. 1933) (provision for continuance of court until May 1, 1934, in foreclosure sales and for temporary injunction against foreclosure sales); *cf.* Milkint v. McNeeley, 169 S. E. 790 (W. Va. 1933) (statute extending time of redemption for tax sales held unconstitutional). Other state decisions have held such statutes valid. Blaisdell v. Home Building and Loan Ass'n., 249 N. W. 334 (Minn. 1933); Lingo Lumber Co. v. Hayes, 64 S. W. (2d) 835 (Tex. Civ. App. 1933); Beaumont Petroleum Syndicate v. Broussard, 64 S. W. (2d) 993 (Tex. Civ. App. 1933).

[9] Bronson v. Kinsie, 1 How. 311, 11 L. ed. 397 (U. S. 1843); Howard v. Bugbee, 24 How. 461, 16 L. ed. 753 (U. S. 1860); Barnitz v. Beverly, 163 U. S. 118, 41 L. ed. 93, 16 Sup. Ct. 1042 (1896).

to impair the obligation of contracts.[10] This course of the state decisions tending toward holding the moratory statutes invalid was halted by the *Blaisdell case* which seems to establish the doctrine that the contract clause is subject to the police power of the states, and that laws altering contracts constitute an impairment within the meaning of the clause only if they are unreasonable.

The North Carolina statute in sections not involved in the principal case provides that where the mortgagee, payee, or other holder of the obligation secured becomes the purchaser at a sale not made pursuant to an order or decree of court and thereafter sues for a deficiency judgment, the defendant may defeat the deficiency judgment in whole or in part by showing that the property sold was fairly worth the amount of the debt at the time and place of sale, or that the amount bid was substantially less than its true value.[11] An Arkansas statute which in effect deprived the mortgagee of his deficiency judgment was held unconstitutional.[12] However, applying the principle laid down in the *Blaisdell case* it seems that the deprivation of a deficiency judgment to the extent of the fair value of the property received by the mortgagee might be sustained as a reasonable impairment of the obligation of contract within the police power of the state.

It is submitted that the principle of permitting a reasonable impairment of the obligation of contract is sound. Interpreted this way, the limitation of the contract clause is similar to that of the due process clause of the Fourteenth Amendment. The ultimate test of the power of the state is whether its exercise is reasonable. This is not new, but is a doctrine consistent with prior decisions.[13]

JULE MCMICHAEL.

[10] State *ex rel.* Cleveringa v. Klein, *supra* note 8. N. C. Laws, 1933, c. 275, §3, N. C. CODE ANN. (Michie, Supp. 1933) §2593 (d).

[11] N. C. LAWS 1933, c. 275, §3. By another statute the North Carolina Legislature has provided that no deficiency judgments shall be had in foreclosures of purchase money mortgages or deeds of trust executed after the enactment of the statute. N. C. Laws, 1933, c. 36; N. C. CODE ANN. (Michie, Supp. 1933) §2593 (f).

[12] Adams v. Spillyards, *supra* note 8.

[13] Beer Co. v. Mass., 97 U. S. 25, 24 L. ed. 989 (1878) (prohibition laws of Mass. impairing charter of Boston Beer Co. held valid); Stone v. Miss., 101 U. S. 814, 25 L. ed. 1079 (1879) (Miss. lottery laws held valid though charter of lottery company was impaired); Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 558, 58 L. ed. 721, 726, 34 Sup. Ct. 364, 368 (1914) ("For it is settled that neither the 'contract clause' nor the 'due process' clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor

Courts—Constitutional Law—Power of Congress to Diminish the Retired Salaries of Federal Judges.

Plaintiffs, retired judges of a circuit and district federal court respectively, bring separate suits to recover a portion of their salaries, which had been withheld pursuant to an act of congress providing for a 15 per cent reduction in the retired pay of judges, "whose pay prior to retirement could not have been diminished under the Constitution." Plaintiffs contend that such act is in violation of Article III, Section 1 of the Constitution, which forbids diminution of the compensation of federal judges during their continuance in office.[1] *Held,* judgment for plaintiffs. A federal judge does not relinquish his office by retirement and the reduction of retired pay as provided for in that act is unconstitutional.[2]

The constitutional provision forbidding diminution of judicial salaries applies only to officers of constitutional courts created by congress by virtue of the power given it in Article III, Section 1.[3] It is not applicable to those of legislative courts created by virtue of the power delegated to congress in other constitutional provisions.[4] Concededly the courts involved in the instant case belong to the former class, and plaintiffs' salaries before retirement could not have been reduced.[5]

The underlying principle behind the provision and decisions upholding it is deduced from the Constitution itself which sets up three branches of government essentially separate and independent, with neither department possessing an overruling influence in the administration of their respective powers.[6] So careful have the courts

bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise."); Marcus Brown Holding Co. v. Feldman, 256 U. S. 170, 198, 65 L. ed. 877, 888, 41 Sup. Ct. 465, 466 (1921) (in sustaining the New York rent legislation as a valid exercise of police power the court said: ". . . contracts are made subject to this exercise of the power of the State when otherwise justified. . . .").

[1] The North Carolina constitution contains a similar provision. N. C. CONST. (1868) ART. IV §18.

[2] Booth v. United States, Amidon v. United States, 54 Sup. Ct. 379, 78 L. ed. 464 (1934).

[3] O'Donoghue v. United States, 289 U. S. 516, 53 Sup. Ct. 740, 77 L. ed. 1356 (1933); (1934) 9 IND. L. J. 318.

[4] American Ins. Co. v. Canter, 1 Pet. 511 (U. S. 1828); *ex parte* Bakelite Corp., 279 U. S. 438, 49 Sup. Ct. 411, 73 L. ed. 789 (1929); Williams v. United States, 289 U. S. 553, 53 Sup. Ct. 751, 77 L. ed. 1372 (1933).

[5] *Supra* note 3.

[6] State v. Porter, 57 Mont. 343, 188 Pac. 375 (1920); *In Re* Taxation of Judges' Salaries, 131 N. C. 692, 42 S. E. 970 (1902); Long v. Watts, 183 N. C. 99, 110 S. E. 765 (1922); *cf.* Springer v. Philippine Islands, 277 U. S. 189, 48 Sup. Ct. 480, 72 L. ed. 845 (1927).

been to preserve this protection that state as well as federal courts have repeatedly held judges' salaries exempt from taxation on the theory that the "power to tax is the power to destroy."[7] It is difficult to see how an income tax, a burden which is borne by all citizens alike, as distinguished from an occupational tax on the judiciary alone, is a menace to the independence or existence of the judiciary,[8] and one court proceeds on this theory in holding judges' salaries subject to income taxes.[9]

The most extreme holdings, however, deal with the situation that arises where no legislative appropriation is made for judges' salaries. Some courts have gone as far as to hold legislative appropriations authorizing payment of such salaries unnecessary where the constitution prohibits their increase or diminution, on the theory that such provision is self-executing and *ex proprio vigore* makes the necessary appropriation by law,[10] although the majority view is that such appropriation is required before the salaries can be drawn.[11]

It is submitted that the court in the principal case has enforced the rule where the reason no longer exists. While an independent judiciary is to be desired and jealously guarded, it would seem unnecessary to maintain an expensive safeguard where judicial independence is not threatened.[12] Under the federal retirement statute it is clear that a retired judge cannot be forced to undertake any duty unwillingly. Under no circumstances is his duty after retirement obligatory.[13] It would seem then that the court has taken a step,

[7] Evans v. Gore, 253 U. S. 245, 40 Sup. Ct. 550, 64 L. ed. 887 (1920); New Orleans v. Lee, 14 La. Ann. 197 (1859); Purnell v. Page, 133 N. C. 125. 45 S. E. 534 (1903); Long v. Watts, *supra* note 6.

[8] State v. Nygaard, 159 Wis. 396, 150 N. W. 512 (1915); see Evans v. Gore, *supra* note 7 (dissent of Holmes, J.). Art. IV §12 of the proposed constitution for North Carolina provides that "the general assembly shall regulate . . . salaries of all officers . . . but the salaries of justices of the Supreme Court and judges of the superior courts shall not be diminished except by tax levies common to others during the time for which they shall have been elected."

[9] Taylor v. Gehner, 329 Mo. 511, 45 S. W. (2d) 59 (1931) (As regards the constitutional provision prohibiting diminution of judges' salaries, the court said, "the section was never intended as a limitation on the taxing power.").

[10] State v. Hickman, 10 Mont. 497, 26 Pac. 386 (1891); Riley v. Carter, 25 Pac. (2d) 666 (Okla. 1933) commented upon (1934) 22 GEO. L. J. 376.

[11] Meyers v. English, 9 Cal. 341 (1858); *In Re* Groff, 21 Nebr. 647, 33 N. W. 426 (1887).

[12] State v. Porter, *supra* note 6 (the principles underlying the constitutional provision were given effect and although the constitution of Montana prohibited increase or diminution, the court allowed an increase in judges' salaries on the theory that as the reason for the rule ceases, so does the rule itself).

[13] 40 STAT. 1156, 1157 (1919) 28 U. S. C. A. §375 (1926) (". . . but instead of resigning, any judge other than a justice of the Supreme Court . . . may retire upon the salary of which he is then in receipt, from regular active serv-

the direction of which is decidedly questionable, when it holds that a retired judge is still in office to such an extent that a diminution after an increase is banned, notwithstanding the reduced salary remains in excess of the salary payable when the incumbent took office. Furthermore, the provision in that act for the appointment of a successor, who would be in fact in office, and whose "subsistence" could not be controlled by the legislature, would seem to be inconsistent with the theory that his predecessor was still "in office,"[14] and would seem to furnish adequate comfort to those who fear for the independence of our judiciary.

The wisdom of such a decision is rendered more doubtful in view of the emergency which prompted the legislation diminishing the retired pay of federal judges. "The interpretation of constitutional provisions is to be made in view of the history of the times, the evil to be remedied, and the purpose to be accomplished,"[15]—a timely rule of construction which the court in the instant case seems to have ignored.

E. D. KUYKENDALL, JR.

Criminal Law—Effect of a Plea of Nolo Contendere.

The defendant was convicted in New Jersey under a plea of nolo contendere to an indictment for false pretense. He was subsequently convicted in New York on a plea of guilty to an indictment for forgery, and, on information brought of the former conviction, was sentenced under the second offender statute. On appeal, *held,* that a conviction under a plea of nolo contendere is not such a conviction as to come within the contemplation of the second offender statute.[1]

The plea of nolo contendere is of common-law origin,[2] and may

ice on the bench, and the President shall . . . appoint a successor; . . . but a judge so retiring may nevertheless be called upon by the senior circuit judge of his circuit and be by him authorized to perform such judicial duties . . . as such retired judge may be willing to undertake. . . .").

[14] *Supra* note 13; *cf.* Board v. Lee, 76 N. J. L. 327, 70 Atl. 925 (1908) (The court said, "to assert that a term of office of a deceased or an impeached officer continues, is to assert that there may be two terms of office running together, although the office can be filled but by a single person." It would seem that the same could be said of a resigning or retiring judge.); N. C. CODE ANN. (Michie, 1931) §3884a (North Carolina retirement statute). Investigation discloses no North Carolina cases similar to the principal one where judges, retired pursuant to that statute, bring action to recover a portion of their salaries withheld by the state.

[15] Fargo v. Powers, 220 Fed. 217 (E. D. Mich. 1914).

[1] People v. Daiboch, 269 N. Y. S. 321 (1934). (Three-to-two decision.)

[2] Hudson v. U. S. 272 U. S. 451, 47 Sup. Ct. 127, 71 L. ed. 347 (1926); Tucker v. U. S., 196 Fed. 260 (C. C. A. 7th, 1912); Regina v. Templeman, 1

be invoked by the defendant in criminal cases: (a) where he is unwilling to confess his guilt, but does not wish to go to trial, and submits without more to the imposition of sentence by the court;[3] (b) where he wishes to avoid the use of the conviction in a subsequent civil action for damages growing out of the same act;[4] (c) in the hope of obtaining a lighter punishment by saving the time and expense of a regular trial; and, in the instant case, (d) to avoid a longer sentence for a second offense.

Textbooks,[5] supported by a few cases,[6] take the view that the plea is confined to cases involving light misdemeanors, punishable by fine alone. This seems to be based upon an ambiguous statement in Hawkins' *Pleas of the Crown,* to the effect that the defendant throws himself on the mercy of the court and desires to submit to a small fine.[7] It has been explicitly rejected by the Supreme Court of the United States[8] and by at least two other jurisdictions,[9] and in the majority of cases the courts have ordered imprisonment on the plea of nolo contendere without any discussion of the matter.[10] One court holds that it is not allowable in a capital case;[11] another by statute

Salk. 55, 91 Eng. Rep. 54 (1702). The common law rules govern in the federal courts, and in many of the states, in the absence of statutes or controlling decisions. In Illinois, Indiana, Minnesota, and New York the plea of nolo contendere is not allowed. People v. Miller, 264 Ill. 148, 154, 106 N. E. 191 (1914); Mahoney v. State, 197 Ind. 335, 149 N. E. 447 (1925); State v. Kiewel, 166 Minn. 302, 207 N. W. 646, 647 (1926); People v. Daiboch, *supra* note 1. In Massachusetts, by statute, a defendant cannot be adjudged guilty on a plea of nolo contendere unless it appears by the record that the plea was received with the consent of the prosecutor. Comm. v. Adams, 72 Mass. 359 (1856).

[3] Tucker v. U. S., *supra* note 2; Comm. v. Horton, 9 Pick. 206 (Mass. 1829).

[4] Tucker v. U. S., *supra* note 2; White v. Creamer, 175 Mass. 567, 56 N. E. 832 (1900); State v. Henson, 66 N. J. L. 601, 50 Atl. 468 (1901); State v. Conway, 20 R. I. 270, 38 Atl. 656 (1897). A plea of guilty may be used in a civil suit.

[5] 2 BISHOP, NEW CRIMINAL PROCEDURE (2d ed. 1913) 624; BYRNE, FEDERAL CRIMINAL PROCEDURE (1916) 125; *cf.* 1 CHITTY, CRIMINAL LAW (4th Am. ed. 1841) 430; CLARK, CRIMINAL PROCEDURE (2d ed. 1918) 430 (both limiting the plea of nolo contendere to "cases not capital").

[6] Tucker v. U. S., *supra* note 2 (a leading case).

[7] 2 HAWKINS' PLEAS OF THE CROWN (8th ed.) c. 31, §466.

[8] Hudson v. U. S., *supra* note 2.

[9] Comm. v. Ferguson, 44 Pa. Sup. Ct. 626 (1910); Brozosky v. State, 197 Wis. 446, 222 N. W. 311 (1928).

[10] Philpot v. State, 65 N. H. 250, 20 Atl. 955 (1890); Comm. v. Holstine, 132 Pa. 357, 19 Atl. 273 (1890); In re Lanni, 47 R. I. 158, 131 Atl. 52 (1925). State v. Burnett, 174 N. C. 796, 93 S. E. 473 (1917) recognizes the court's power to sentence the defendant to imprisonment, although that point was not necessary to the decision.

[11] Comm. v. Shrope, 264 Pa. 246, 107 Atl. 729 (1919).

does not allow it in cases of felony;[12] but at least one state holds that even in an indictment for murder its allowance is at the discretion of the trial court.[13]

In no case, either of misdemeanor or of felony, can it be entered as a matter of right, but is entirely within the sound discretion of the court.[14] Once accepted it cannot be withdrawn in favor of a plea of not guilty except by permission of the court,[15] and the plea becomes an implied confession, equivalent to a plea of guilty to every material element of the indictment well pleaded.[16] It is not necessary for the court to adjudge the defendant guilty, for that follows by necessary legal inference from the implied confession.[17] After the plea has been entered, evidence may be received for the purpose of mitigation or aggravation of punishment.[18] By pleading nolo contendere the defendant waives all formal defects in the proceeding of which he could have availed himself by a plea to the merits, a plea in abatement, a demurrer, or a motion to quash.[19] Nolo contendere does not, however, preclude the defendant from moving in arrest of judgment upon the ground that the indictment is defective.[20] In North Carolina, by a recent statutory provision, under the plea of nolo contendere, the court may hear the evidence of the state, and if, on its conclusion, the judge is not satisfied beyond a reasonable doubt that the defendant is guilty, he may cause the plea to be stricken out, and a verdict of not guilty entered.[21]

The conclusiveness of the plea is recognized in cases of the following type. A conviction founded upon a plea of nolo contendere is conclusive as against a subsequent criminal prosecution for the

[12] Roach v. Comm., 157 Va. 954, 162 S. E. 50 (1932).
[13] State v. Martin, 92 N. J. L. 436, 106 Atl. 385 (1919).
[14] Comm. v. Horton, *supra* note 3; State v. Henson, *supra* note 4; State v. Suick, 195 Wis. 175, 217 N. W. 743 (1928).
[15] Com. v. Ingersoll, 145 Mass. 381, 14 N. E. 449 (1888); State v. Sidall, 103 Me. 144, 68 Atl. 634 (1907); State v. Alderman, 81 N. J. L. 549, 79 Atl. 283 (1911). The ruling of the lower court will not be reversed except in the case of the abuse of that discretion. In re Lanni, *supra* note 10.
[16] U. S. v. Lair, 195 Fed. 47 (C. C. A. 8th, 1912) *certiorari* denied, 229 U. S. 609, 33 Sup. Ct. 464, 57 L. ed. 1350 (1912); State v. Sidall, *supra* note 15; State v. O'Brien, 18 R. I. 105, 25 Atl. 1910 (1892).
[17] U. S. v. Lair, *supra* note 16; Comm. v. Ingersoll, *supra* note 15; Brozosky v. State, *supra* note 9; State v. Burnett, *supra* note 10.
[18] Young v. People, 53 Colo. 251, 125 Pac. 117 (1912); Comm. v. Horton, *supra* note 3; Reg. v. Templeman, *supra* note 2.
[19] State v. Alderman, *supra* note 15.
[20] Comm. v. Northampton, 2 Mass. 116 (1806); Comm. v. Grey, 2 Gray 501, 61 Am. Dec. 476 (Mass. 1854).
[21] N. C. CODE ANN. (Michie Supp. 1933) §4636 (a).

same offense;[22] and such conviction is within the contemplation of a statute which provides that one convicted of larceny shall be liable to the owner of the property for twice the value thereof.[23] A record of the conviction of a defendant under a plea of nolo contendere is admissible as evidence of the guilt of that defendant in an action against a third party;[24] and such a record is also admissible for the purpose of impeaching the credibility of the defendant as a witness.[25]

Other cases involving the identical point of the principal case reach an opposite result, and hold that a conviction under a plea of nolo contendere is admissible as substantive evidence on which the conviction of defendant as a second offender can rest.[26]

If the defendant pleads guilty to a criminal charge, the conviction thereunder certainly comes within the second offender statute; if he pleads not guilty, and is convicted, it is likewise conclusive. There seems to be no logical reason why a judgment of conviction following a plea of nolo contendere should not constitute a prior conviction, or as conclusive evidence of a prior offense, as a judgment entered upon a plea of guilty, or upon a verdict of the jury. As stated by one court, "The decisive thing is not the former plea, but the former judgment. The judgment recovered by the state is not a compromise in the sense of being something less than a conviction. It could have been entered on no other ground than the defendant's guilt."[27] As the dissenting opinion in the instant case pointed out, to hold that the defendant was not a second offender because he pleaded nolo contendere would be giving effect to form rather than substance, and would defeat the very purpose and intent of the statute.

HERBERT H. TAYLOR, JR.

Evidence—Impeachment of Defendant's Reputation Witness by Record of Defendant's Prior Conviction.

Witnesses testified to their knowledge of the good reputation of a defendant charged with passing counterfeit bills. On cross-examina-

[22] State v. Lang, 63 Me. 215, 220 (1874). In North Carolina, evidence of such conviction is not admissible in a disbarment proceeding, as it is a civil suit. *In re* Stiers, 204 N. C. 48, 167 S. E. 382 (1933).

[23] Barker v. Almy, 20 R. I. 367, 39 Atl. 185 (1898).

[24] U. S. v. Hartwell, Fed. Cas. No. 15,318 (1869); Comm. v. Horton, *supra* note 3.

[25] State v. Herlihy, 102 Me. 310, 66 Atl. 643 (1906); Johnson v. Johnson, 78 N. J. Eq. 507, 80 Atl. 119 (1911). *Contra:* Olzewski v. Goldberg, 223 Mass. 27, 28, 111 N. E. 404 (1916); Collins v. Benson, 81 N. H. 10, 120 Atl. 724 (1923).

[26] State v. Fagin, 64 N. H. 431, 432, 14 Atl. 727 (1888); State v. Suick, *supra* note 14; Brozosky v. State, *supra* note 9.

[27] State v. Fagin, *supra* note 26, at 728.

tion they denied that they had heard that he had pleaded guilty of violating the prohibition law. "In rebuttal, the record of such case was allowed solely to affect the extent of such witnesses' knowledge of the general reputation of the defendant." *Held:* No error.[1]

Cross-examination of a witness to good reputation as to whether he has *heard* of particular acts of misconduct committed by the person whose reputation is in question is: (1) by nearly all courts allowed;[2] (2) by a few courts within the range of the trial judge's discretion;[3] and (3) by North Carolina decisions excluded.[4] In North Carolina, however, the witness may be cross-examined as to the general reputation as to particular traits.[5]

Some few courts allow the witness to be cross-examined as to his *knowledge* of particular acts of misconduct.[6] North Carolina does not.[7]

The fundamental distinction between reputation and character[8] is not generally recognized by the courts. In theory, remarks heard by the witness should go to discredit testimony as to good reputation, while knowledge as to particular acts should be allowed to discredit testimony as to good character.[9]

In the instant case admission of the record tends to discredit the witness in a twofold manner: (1) by showing that they probably did hear of the plea of guilty, and (2) by showing a limited knowledge of the defendant's reputation.

Contradicting the witnesses merely as to their hearing about the plea of guilty is a direct violation of the rule against contradiction on collateral issues. The courts do not permit such a violation.[10]

[1] Chiccarello v. United States, 68 F. (2d) 315 (C. C. A. 3rd, 1933).

[2] Baldwin v. State, 138 Ga. 349, 75 S. E. 324 (1912); Note (1931) 71 A. L. R. 1504; 2 WIGMORE, EVIDENCE (2d ed. 1923) §988.

[3] Roney v. State, 141 So. 907 (Ala., 1932).

[4] State v. Holly, 155 N. C. 485, 71 S. E. 450 (1911) (where witness was asked if he had not heard prisoner had been accused of killing his wife the state "cannot, by cross-examination or otherwise, offer evidence as to particular acts of misconduct"). But see State v. Burton, 172 N. C. 939, 90 S. E. 651 (1916).

[5] State v. Wilson, 158 N. C. 599, 73 S. E. 812 (1912).

[6] Chisum v. State, 60 S. W. (2d) 443 (Tex. Cr. App. 1933).

[7] State v. Canup, 180 N. C. 739, 105 S. E. 322 (1920).

[8] Reputation is what is reputed about a person; character is what the person actually is. State v. Poston, 199 Ia. 1073, 203 N. W. 257 (1925).

[9] State v. Dickerson, 77 Ohio 34, 82 N. E. 969 (1927); State v. Poston, *supra* note 8.

[10] Etherton v. Commonwealth, 246 Ky. 553, 55 S. W. (2d) 343 (1932); see Kelly v. State, 17 Ala. App. 577, 88 So. 180 (1920); State v. Johnson, 221 Ala. 632, 130 So. 175 (1930). *Aliter* in some jurisdictions if defendant had testified as the record of his conviction would be admissible on the question of his credibility. 2 WIGMORE, EVIDENCE (2d ed. 1923) §§1020, 980.

Discrediting witnesses as to their knowledge of the general reputation of the defendant gives rise to a close question.

Any circumstances detracting from a witness's credibility are competent for impeachment by cross-examination. But the range of such circumstances that may also be shown extrinsically is narrower. The distinction, sometimes difficult to draw, is said to be between discrediting the witness generally and discrediting him in the cause. Thus, while it may not be shown that the witness does not have the intelligence of an ordinary person,[11] it may be shown that he does not have full knowledge of the matter in controversy.[12] But though the evidence in the principal case would be admissible on this theory, it should be excluded on the ground of prejudice.

Where the primary purpose and the ultimate effect of discrediting the testimony is to put before the jury particular facts not otherwise competent the court should have the discretion to exclude such evidence. Instructing the jury to consider the evidence only as discrediting the witness has little practical effect.

W. E. ANGLIN.

Insurance—Status of Beneficiaries as Such as Altered by Changed Circumstances.

At the time that insured took out a benefit certificate, he was married to a woman who had several children by a former marriage. She was named as beneficiary with the insured's children, which term was specifically defined to include step-children, as secondary beneficiaries. She divorced the insured and later remarried. A recent Federal case awards his brother, named as third in line of beneficiaries, the proceeds against the claims of the ex-step-children.[1] The holding was based on the rule that in benefit society[2] insurance only certain classes of persons closely related to the insured can take.[3]

[11] Bell v. Rinner, 16 Oh. St. 45 (1864).

[12] Harrington v. Boston Elevated Ry. Co., 229 Mass. 421, 118 N. E. 880 (1918). (a witness in a tort action testified that he did not know of any place where a certain structure was used. *Held,* it is competent to show that such structure was used at a particular place).

[1] Brotherhood of Loc. Firemen v. Hogan, 5 F. Supp. 598 (D. C. Minn. 1934).

[2] "Benefit society" is used in preference to the more usual term "mutual" as being more indicative of the distinction between straight life and insurance provided by benevolent societies.

[3] The limitation is commonly made by the constitutions of these societies which are incorporated into the contracts of insurance. Some states have statutes imposing similar limitations. N. C. CODE ANN. (Michie, 1931) §6491. The restriction is one on who may take, hence it has been held that although

The ex-step-children lost their rights when they ceased to belong to any such class. The case raises the problem of when changed circumstances will alter the standing of beneficiaries as such. It is to be noted that where the particular change is contemplated and provided for in the policy itself, its terms will prevail and hence no problem arises.[4] Because of this, in all of these cases the intent of the insured is material.[5]

The rule generally announced is that when an ordinary life policy issues the beneficiary takes a vested interest,[6] but that in benefit society insurance no interest vests until the death of the insured.[7]

As a result of this rule, it is usually held that where the beneficiary is named, even though he predecease the insured, the former's estate will take.[8] The word "wife" used in apposition is generally held to be a mere description and therefore not material.[9] However, when the designation is merely "wife" or "Mrs. Insured" and a second wife is left, there is a division of authority, the argument being mainly over the insured's intention.[10] The case presents more difficulty when a class is named, as "my wife and children."[11] One group of courts, led by New York, holds that the interest vests in the class as joint tenants; hence the survivors at the insured's

a beneficiary was designated as being in one class and later, by way of divorce, fell out of that, but remained in another, she still took. Rose v. Brotherhood, 80 Colo. 344, 251 Pac. 537 (1926).

[4] Sherwood v. N. Y. Life Ins. Co., 166 La. 905, 118 So. 78 (1928) (Policy named children and provided that the survivors at the time of the insured's death should take); Fleming v. Grimes, 142 Miss. 522, 107 So. 420 (1926) (Policy provided that the interest of beneficiary revert to insured on the former's prior death).

[5] Pike County Mut. Life Ass'n. v. Berry, 214 Ill. App. 316 (1919); Pape v. Pape, 67 Ind. App. 153, 119 N. E. 11 (1918).

[6] Preston v. Conn. Mut. Life Ins. Co., 95 Md. 101, 51 Atl. 838 (1902); Hooker v. Sugg, 102 N. C. 115, 8 S. E. 919 (1889); NOTE (1927) 75 U. PA. L. REV. 155.

[7] Supreme Council v. Behrend, 247 U. S. 394, 38 Sup. Ct. 522, 62 L. ed. 1182 (1917); Wooten v. Odd Fellows, 176 N. C. 52, 96 S. E. 654 (1918).

[8] Preston v. Conn. Mut. Life Ins. Co., *supra* note 6.

[9] Doney v. Eq. Life Assur. Soc. of the U. S., 97 N. J. L. 393, 117 Atl. 618 (1922).

[10] That the former wife takes against the present wife. Day v. Case, 43 Hun. 179 (N. Y. 1887). That the present wife takes. Modern Woodmen v. Allin, 301 Ill. 119, 133 N. E. 677 (1921).

[11] McLin v. Calvert, 78 Ky. 472 (1880) was a bizarre holding showing the difficulty which courts experienced in disposing of the problem. In that case, insurance payable to the wife and children of the insured was divided in the proportions designated by the statute regulating the distribution of surplus personal property. The holding was subsequently overruled in Bell v. Kinneer, 101 Ky. 271, 40 S. W. 686 (1897).

death take all the proceeds.[12] Another group, among them North Carolina, states that the interest vests individually and that therefore the estates of the deceased take equally with the survivors.[13] It would be more consonant with the latter rule to hold that in such cases a child born after the policy issued would take,[14] but on an analogy to wills, such children are generally included.[15]

In England, under the Married Women's Property Act,[16] where the policy is payable to the "wife" or the "wife and children" a trust is set up for the beneficiary and when, because of her death, the trust cannot be performed, the fund results to the estate of the insured.[17]

When a spouse is beneficiary, what effect will a subsequent divorce have on his right to take? Except in Texas, where a continuing insurable interest is required of the beneficiary,[18] the holding has been, when he was named, that a divorce has no effect[19] and the words "husband" and "wife" in apposition were not conditions, but descriptions only.[20] But in a case involving benefit insurance, where only the word "wife" was used, an opposite result was reached by considering the insured's probable intention.[21] The question has not

[12] Bell v. Kinneer, *supra* note 11; Schneider v. N. W. Mut. Ben. Life Ins. Co., 33 Mo. App. 64 (1888); U. S. Trust Co. v. Mut. Ben. Life Ins. Co., 115 N. Y. 405, 21 N. E. 1025 (1889); Elgar v. Equitable Life Assur. Soc. of U. S., 113 Wis. 90, 88 N. W. 927 (1902).

[13] Cont. Life Ins. Co. v. Palmer, 42 Conn. 60 (1875); Germania Life Ins. Co. v. Wirtz, 196 Mich. 145, 162 N. W. 981 (1917); Hooker v. Sugg, *supra* note 6; Glenn v. Burns, 100 Tenn. 295, 45 S. W. 784 (1898).

[14] Conn. Mut. Life Ins. Co. v. Baldwin, 15 R. I. 106, 23 Atl. 105 (1885).

[15] Pape v. Pape, *supra* note 5; Schull v. Aetna Life Ins. Co., 132 N. C. 30, 43 S. E. 504 (1903); Thomas v. Leake, 67 Tex. 471, 3 S. W. 703 (1887). But see Evans v. Opperman, 76 Tex. 293, 13 S. W. 312 (1890) ("Their children" used as designation of beneficiary precluded later children by a second wife.).

[16] 45 & 46 Vic. c. 75, §11 (1882) ("A policy of assurance effected by any man on his own life, and expressed to be for the benefit . . . of his wife and children, or any of them . . . shall create a trust in favor of the objects therein named, and the moneys payable under such policy shall not so long as any object of the trust remains unperformed form part of the estate of the insured or be subject to . . . his debts. . . .").

[17] In re Browne's Policy, [1903] 1 Ch. 188.

[18] Whiteselle v. N. W. Mut. Life Ins. Co., 221 S. W. 575 (Tex. Comm. App. 1920).

[19] Conn. Mut. Life Ins. Co. v. Schaeffer, 94 U. S. 457, 24 L. ed. 251 (1877) (the leading case on the point. It is regularly cited for the proposition but it was expressly decided on the grounds that the insurance was joint and hence supportable marriage or no marriage.); In re Orear, 111 C. C. A. (8th) 150, 189 Fed. 883 (1911); Filley v. Ill. Life Ins. Co., 93 Kan. 193, 144 Pac. 259 (1914).

[20] Phoenix Life Ins. Co. v. Dunham, 46 Conn. 79 (1878); Doney v. Eq. Life Assur. Soc. of the U. S., *supra* note 9.

[21] Pike County Mut. Life Ass'n. v. Berry, *supra* note 5.

been passed on in North Carolina; so it is possible that our statute[22] which provides that a divorcee "shall thereby lose all his or her right and estate in the real or personal estate of the other party . . . which was settled upon such party in consideration of the marriage alone" might apply.[23] The principal case seems to be the first to consider the changed status of step-children.

In arriving at the disposition made of the divorce cases, the courts have not reached an entirely satisfactory solution of the problem. It is probable that insureds' minds are, in general, centered on the idea of protection and a holding which makes the policy a gift is a violation of their intention. A second objection is that in granting divorces courts make a disposition of the pecuniary relationships between the parties. A consideration of any life insurance involved seems necessary to such a settlement. If it is not taken into account at that time, it might well be considered property not awarded to the wife.

PETER HAIRSTON.

Libel and Slander—The Use of Extrinsic Facts to Identify the Plaintiff.

A newspaper publication referring to a white man as a negro was *held* not to constitute a libel on his white parents, where it neither named nor referred to them.[1]

It is well settled that a written description of a white person as a negro is libelous.[2] But the principal case raises the question as to when the libelous publication refers to a person sufficiently to enable

[22] N. C. CODE ANN. (Michie, 1911) §2522.

[23] A general order issued pursuant to KY. CIVIL PRACTICE CODE (Carroll, 1932) §425 which provides that "Every judgment for a divorce from the bond of matrimony shall contain an order restoring any property not disposed of at the commencement of the action, which either party may have obtained, directly or indirectly, from or through the other, during marriage, in consideration or by reason thereof . . ." was held to abrogate a divorced wife's status as beneficiary of a policy of insurance on her husband's life. Shauberger v. Morel's Adm'r., 168 Ky. 368, 182 S. W. 198 (1916).

[1] Atlanta Journal Co. v. Farmer, 172 S. E. 647 (Ga. App. 1934) (Plaintiff's son was a convict. After having fallen under extreme heat he was chained to a telephone pole, where he soon died of sunstroke. The defamatory article reported the indictment of highway employees to answer for the death of the "negro convict.").

[2] Stultz v. Cousins, 242 Fed. 794 (C. C. A. 6th, 1917); Upton v. Times-Democrat Publishing Co., 104 La. 141, 28 So. 970 (1900); Flood v. News & Courier Co., 71 S. C. 112, 50 S. E. 637 (1905). When such description is made by spoken words, it is not actionable without proof of special damages. Deese v. Collins, 191 N. C. 749, 133 S. E. 92 (1926) commented upon (1927) 5 N. C. L. REV. 183.

him to maintain an action thereon. Recovery is permitted when the reference is direct, indirect, or by imputation.

As a general rule defamatory words must refer to some ascertained or ascertainable person, and that person must be the plaintiff.[3] But it is not necessary that the plaintiff be named in the article,[4] because the writing must be read and construed in the sense in which the readers to whom it is addressed would ordinarily understand it.[5] All the world need not know who the libeled person is, since it is sufficient if the publication points out to his friends and acquaintances,[6] or to at least one third person,[7] that plaintiff was the person intended. Whether the alleged libel referred to the plaintiff,[8] or was so understood to refer by its readers,[9] is a question for the jury, and witnesses may be called to show that on reading the publication, they at once concluded that it was aimed at the plaintiff.[10]

A number of courts have held it unnecessary that the person libeled be named if he is identified by the surrounding circumstances.[11] Thus a reference to one's business,[12] occupation,[13] house,[14] or vessel[15] is sufficient. Here recovery is had for personal defamation upon an indirect reference.

In many cases there is neither direct nor indirect reference to the

[3] Hays v. American Defense Society, 252 N. Y. 266, 169 N. E. 380 (1929); Express Publishing Co. v. Southwell, 295 S. W. 180 (Tex. Civ. App. 1927); Argabright v. Jones, 46 W. Va. 144, 32 S. E. 995 (1899); Helmicks v. Stevlingson, 250 N. W. 402 (Wis. 1933); NEWELL, SLANDER AND LIBEL (4th ed.) §214.

[4] National Refining Co. v. Benzo Gas Motor Fuel Co., 20 F. (2d) 763 (C. C. A. 8th, 1927); Shaw Cleaners & Dyers v. Des Moines Dress Club, 215 Iowa 1130, 245 N. W. 231 (1932).

[5] Peck v. Tribune Co., 214 U. S. 185, 29 Sup. Ct. 554, 53 L. ed. 960 (1909); Washington Post Co. v. Chaloner, 205 U. S. 290, 39 Sup. Ct. 448, 63 L. ed. 987 (1919).

[6] Express Publishing Co. v. Herrera, 234 S. W. 554 (Tex. Civ. App. 1921).

[7] Vedovi v. Watson & Taylor, 104 Cal. App. 80, 285 Pac. 418 (1930).

[8] Powell v. Young, 151 Va. 985, 144 S. E. 624 (1928).

[9] Byrne v. News Corp., 195 Mo. App. 265, 190 S. W. 933 (1916).

[10] Houston Printing Co. v. Moulden, 15 Tex. Civ. App. 586, 41 S. W. 381 (1897). An extreme application of this rule is found in a recent English case tried in the King's Bench where recovery was had for the publication of a rape episode in the cinema "Rasputin, the Mad Monk." Plaintiff proved that the character Natasha had been understood as referring to her. Princess Youssoupoff v. Metro-Goldwyn-Mayer Pictures, Ltd. Time, March 12, 1934, at 22.

[11] Dewing v. Blodgett, 124 Cal. App. 100, 11 P. (2d) 1105 (1932); Bonham v. Dotson, 216 Ky. 660, 288 S. W. 297 (1926).

[12] Naihaus v. Louisiana Weekly Publishing Co., 176 La. 240, 145 So. 527 (1932); Powell v. Young, *supra* note 8.

[13] State v. Pardo, 190 S. W. 264 (Mo. 1916).

[14] Hollenbeck v. Post-Intelligencer Co., 162 Wash. 14, 297 Pac. 793 (1931).

[15] Ingram v. Lawson, 6 Bing. N. C. 212, 133 Eng. Rep. 84 (1840).

plaintiff, but because of a natural or legal relationship, to publish a calumnious statement of one person imputes a libel upon another. To call a woman a bawd charges her husband with keeping a bawdy-house;[16] to call a man a cuckold is tantamount to calling his wife a whore;[17] to say that one's marriage was invalid charges his child with illegitimacy;[18] to write that a woman inherited from her mother the quality of manliness and the desire to become master of her household constitutes a libel on her mother;[19] and, to state that a postmaster's sister has been arrested for larceny of letters from the postoffice may also be a libel on him.[20]

Where the libel is direct there is not present the problem of identification which arises where the reference is indirect or by imputation. A plaintiff in cases of the last two classes must identify himself as the person libeled by facts extraneous to the written statement. Such identification is precluded by those courts which say that since the statement was not written of and concerning the plaintiff, there can be no recovery, irrespective of the injuries sustained.[21] However, it is an established rule that extrinsic facts may be employed to render statements libelous which are apparently innocent.[22]

The principal case is plainly against the weight of authority and contra to previous decisions of the Georgia Supreme Court, in which the identity of the plaintiff was held to be a question for the jury in consideration of extraneous facts.[23] Here the Court of Appeals dismissed the case on demurrer, dogmatically deciding that persons

[16] Huckle v. Reynolds, 7 C. B. (N. S.) 114, 141 Eng. Rep. 758 (1850).

[17] Vicars v. Worth, 1 Strange 471, 93 Eng. Rep. 641 (1722).

[18] Chiniquy v. Begin, [1915] Rap. Jud. Quebec, 24 K. B. 294, 24 D. L. R. 687.

[19] McDavid v. Houston Chronicle Printing Co., 146 S. W. 252 (Tex. Civ. App. 1912).

[20] Merrill v. Post Publishing Co., 197 Mass. 185, 83 N. E. 419 (1908).

[21] Saucer v. Girous, 36 Cal. App. 538, 202 Pac. 887 (1921); Hanson v. Globe Newspaper Co., 159 Mass. 293, 34 N. E. 467 (1893); Maxwell v. Allison, 11 Serg. & R., 343 (Pa. 1824).

[22] Morrison v. Ritchie & Co., 39 Scottish Law Rep. 432 (1902) (The announcement of the birth of twins to a couple is libelous when it is shown that they have been married only one month.); Sydney v. McFadden Newspaper Publishing Corp., 242 N. Y. 208, 151 N. E. 209 (1926) (The publication that Doris Keane is to marry "Fatty" Arbuckle is rendered libelous by the fact that she is already married.); Cassidy v. Daily Mirror Newspapers, Ltd., [1929] 2 K. B. 331, 69 A. L. R. 720 (An apparently harmless engagement announcement becomes libelous upon proof that the man was already married, and that his wife was the plaintiff.). For a fuller treatment of the use of extrinsic facts to render words libelous see Wettach, *Recent Developments in Newspaper Libel* (1928) 7 N. C. L. REV. 3, at 5-9. See also (1929) 7 N. C. L. REV. 481.

[23] Hardy v. Williamson, 86 Ga. 551, 12 S. E. 874 (1891); Colvard v. Black, 110 Ga. 642, 36 S. E. 80 (1900).

reading the publication could not ascertain that either of the plaintiffs was referred to. Was the reason for this irreconcilable result couched in the court's statement that plaintiffs were not persons of prominence or in the public eye?

JOHN R. JENKINS, JR.

Mortgages—Adverse Possession by Mortgagor's Grantee Against the Mortgagee.

The mortgagor sold the mortgaged realty to his tenant, the claimant, who remained in possession under bond for title, paid substantial back taxes, and on payment of the purchase price took a duly recorded deed. The claimant occupied the land for more than seven years, making valuable improvements and had no notice of the mortgage, except that of registration, until execution under foreclosure, at which time he filed his claim. Although the mortgagee did not know of the improvements, and although the mortgagor had kept up payments of interest on the debt until foreclosure, verdict was directed for the claimant on the ground that improvements and payment of taxes constituted sufficient notice of adverse possession to start prescription running against the mortgagee.[1]

The court, in construing a Georgia statute, took the view that only the claimant's actual knowledge of the mortgage, or bad faith, could make his holding permissive; that record notice is effective only to prevent subsequent deeds from passing clear title, but not to preclude possession adverse in character; and that mere occupancy, plus improvements under bond for title, known or unknown to the mortgagee, is hostile.[2] A former case holding that the sale of mortgaged premises did not repudiate the mortgage is distinguished by the court on the ground that the grantee did not take possession, but the mortgagor stayed on as tenant.[3] Though distinctly representing the minority rule, the principal case does not stand entirely alone.[4]

[1] Chandler v. Douglas, 172 S. E. 54 (Ga. 1933).

[2] GA. CODE ANN. (Michie, 1926) §4164, providing that "Possession to be the foundation of a prescription must be in the right of the possessor, and not of another; must not have originated in fraud. . . . Permissive possession cannot be the foundation of a prescription until an adverse claim and actual notice to the other party." Although it cited the statute, the court said: "The absence of actual notice on the part of Mrs. Chandler cannot alter the result because Douglas was never in possession by permission of [the mortgagee]."

[3] Melson v. Leigh, 159 Ga. 683, 126 S. E. 718 (1925).

[4] Shreeve v. Harvey, 74 N. J. Eq. 336, 70 Atl. 671 (1910); Ely v. Wilson, 65 N. J. L. 544, 47 Atl. 806 (1900) (Except from this jurisdiction, there is almost no direct authority in support of the instant case); see Denbo v. Boyd, 194 Mo. App. 121, 185 S. W. 236, 238 (1916); Ma Haffy v. Farris, 144 Ia.

Ordinarily the possession of the mortgagor or his grantee is consistent with and not adverse to the rights of the mortgagee, this being true whether the mortgage passes to the mortgagee legal title or equitable lien.[5] However, it is not true unless the grantee of the mortgagor has constructive or actual notice of the mortgage,[6] but for this purpose record is usually sufficient.[7] Even if the claimant has notice, still his permissive occupancy may be changed to adverse possession through repudiation of the mortgage: (1) in most states by acts or words that bring to the mortgagee's actual notice[8] the fact that his rights are denied by the grantee claiming in his own right; (2) in other states by acts or words that would put a reasonable man on notice of such claim;[9] and (3) in a few states, possibly only by surrendering the possession entirely and returning as a stranger in his own right.[10]

In all cases, the repudiation must be absolutely clear. Generally, sale by the mortgagor, together with the recording of his deed, occupancy, payment of back taxes, and improvements by the grantee, will

220, 122 N. W. 934, 935 (1909); Jamison v. Perry, 38 Ia. 14, 17 (1873) (This case seems to be squarely in accord with the instant case, but it is declared dictum by the Iowa court in Dodgon v. Heidman, 66 Ia. 645, 24 N. W. 257 (1885), which follows the majority rule).

[5] Zeller v. Eckert, 4 How. 289, 11 L. ed. 979 (U. S. 1846); Bristol Lumber Co. v. Derby, 114 Conn. 88, 157 Atl. 640 (1931); Weathersby v. Goodwin, 175 N. C. 234, 95 S. E. 491 (1918); 2 CLARK, RECEIVERS, §935 (At common law the mortgagee had legal title to the mortgaged property; today almost all the states are numbered among the so called "lien" jurisdictions, legal title remaining in the mortgagor; North Carolina retains the common law rule).

[6] Lemker v. Unknown Claimant, 201 Ia. 902, 208 N. W. 290 (1926); Baker v. Evans, 4 N. C. 417 (1816).

[7] Christopher v. Shockley, 199 Ala. 681, 75 So. 158 (1917); Baker-Matthews Lumber Co. v. Bank of Lepanto, 170 Ark. 1146, 282 S. W. 995 (1926); Parker v. Banks, 79 N. C. 480 (1878).

[8] Dobbins v. Economic Gas Co., 182 Cal. 616, 189 Pac. 1073 (1920); Bristol Lumber Co. v. Derby, *supra* note 5; Alsup v. Stewart, 194 Ill. 959, 62 N. E. 795 (1902); see Johnson v. Bean, 119 Mass. 271, 272 (1876); 2 JONES, MORTGAGES (8th ed. 1928) §830. Practically all states require that the mortgagee have actual knowledge of the adverse claim.

[9] Ringo v. Ruff, 43 Ark. 469 (1884); Talbot v. Cook, 57 Ore. 535, 112 Pac. 709 (1911); 1 WILTSIE, MORTGAGES (4th ed. 1927) §80; JONES, MORTGAGES (8th ed. 1928) §830. Nowhere do judges or writers say just what acts will put a reasonable man on notice.

[10] See Parker v. Banks, 79 N. C. 480 (1878); Williams v. Kerr, 113 N. C. 306, 18 S. E. 501 (1891) (The North Carolina court takes the position that the grantee of the mortgagor cannot hold adversely to the mortgagee unless he occupies without notice, but that record is notice; that "nothing short of payment of the mortgage debt will end the mortgage relation"; that the grantee has only the right of redemption, and is the tenant of the mortgagee); N. C. CODE ANN. (Michie, 1931) §433 (provides that a tenant remaining in possession holds in subordination to his lord for twenty years after the end of the term.).

not suffice, even though such facts are known to the mortgagee, because they could easily be consistent with a continued recognition of the mortgage.[11] Any act done in deference to the mortgage, such as payments on the debt, conclusively rebuts any possibility of repudiation.[12]

Even in its own jurisdiction, the instant case is not unquestioned. It is weakened by the fact that the authority upon which the court expressly bases its decision is not only not squarely in point, but also rests ultimately upon the dictum of another case.[13] In two other Georgia cases a clear inference and a strong dictum seem flatly contra to the result reached in the principal case.[14] Furthermore, there is an early decision of the Supreme Court of the United States overruling a very similar holding by a circuit court sitting in Georgia.[15]

In those jurisdictions in which a mortgagee is held to get only a lien to secure his debt, the grantee of the mortgagor has legal title and the right to possession, and the mortgagee cannot bring ejectment.[16] It is difficult to see how possession by the grantee of the mortgagor can be adverse to the mortgagee who cannot sue to recover the land. It follows that the lien cannot be "repudiated," but lives until the debt is paid or barred by the statute of limitations. Hence it appears that the position of those states which allow hostile words or acts to constitute adverse possession against the mortgagee to defeat his lien, he having no title which prescription can take out

[11] New England Mortgage Co. v. Fry, 143 Ala. 637, 42 So. 57 (1904); Harding v. Durand, 36 Ill. App. 238 (1890) (The claimant cannot break the mortgage relation by allowing the land to be sold for taxes and buying it back); cases *supra* notes 7 and 8.

[12] Hughes v. Edwards, 9 Wheat 489, 6 L. ed. 142 (U. S. 1824); Wright v. Eaves, 10 Rich. Eq. 582 (S. C. 1858).

[13] Baxter v. Phillips, 50 Ga. 498, 104 S. E. 196 (1920) (Here the mortgagee had actual notice of the improvements and claims of the grantee, whereas he did not have in the instant case); Garrett v. Adrian, 44 Ga. 274 (1871) (This case was cited by the court in Baxter v. Phillips as grounds for its decision, yet it does not clearly appear from the facts of Garret v. Adrian that the prior incumbrance was ever recorded, as it was in the instant case).

[14] Parker v. Jones, 57 Ga. 204 (1876) (The court said that since the mortgage was not recorded, the grantee of the mortgagor held adversely to the mortgagee, the inference being that in case of registration the result would be contra); Dearing v. Hawkins, 93 Ga. 108, 19 S. E. 717 (1894) (Of a claimant in a situation exactly similar to that of the principal case, except for the time element, the court said that even if the grantee had stayed on the land seven years, the lien of the mortgagee would not thereby be destroyed.

[15] Higginson v. Mein, 4 Cranch 415, 2 L. ed. 664 (U. S. 1808).

[16] Green v. Coast Line Railroad, 97 Ga. 15, 24 S. E. 814 (1895); GA. CODE ANN. (Michie, 1926) §3256.

of him and put into the claimant, is anomalous,[17] and that the view of the instant case in its own jurisdiction is altogether untenable.

In jurisdictions in which it is held that the mortgagee gets legal title to the land the situation is reversed and, nothing to the contrary appearing in the mortgage, the mortgagee has the right to sue for the recovery of the land, whereas the grantee of the mortgagor has only the right of redemption.[18] Hence the Georgia view is at least arguable in such states on the ground that, given the usual elements of adverse possession, it would be possible for prescription to transfer title from the mortgagee to the claimant. In North Carolina, which belongs to the "title jurisdiction" category, any such argument is defeated by the fact that the record is held to be even better than actual notice.[19]

J. L. CARLTON.

Mortgages: Assumption of the Debt: Defenses.

A mortgaged land to *B*. *C* mortgaged other land to *D*. *A's* property was immediately conveyed to *X*. Co., which was controlled by *A*. Pursuant to an agreement between *A*, acting for *X*. Co., and *C*, each deeded his property to the other. Each assumed the debt secured by the property conveyed to him. In an action by *B* against *C* on his assumption of the debt, *C* set up the defense that *A* had made no attempt to pay *D* and, hence, had breached a condition of the contract which *C* agreed to pay *B*. *Held*, a valid defense.[1]

It is no longer open to serious doubt that when a purchaser of the equity of redemption assumes payment of the mortgage debt, the mortgagee may proceed against him directly; however, the decisions are in conflict as to the theory under which liability attaches. Some hold that the purchaser becomes the principal debtor and the grantor a surety.[2] Others allow the mortgagee to recover upon the broad principle that a promise made by one person to another for the benefit of a third may be enforced by that third person.[3] Formerly North Carolina did not recognize this latter ground for recovery by

[17] Templeman & Son v. Kemper, 223 S. W. 293 (Tex. Civ. App. 1920) (The court says that title is not in issue in a suit to foreclose the mortgage lien, and hence that title by prescription cannot be set up as a defense.).
[18] Stephenson v. Turlington, 186 N. C. 191, 119 S. E. 210 (1923); MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE §§161, 211.
[19] *Supra* note 10.

[1] Land Bank v. Page, 206 N. C. 18 (1934).
[2] (1932) 11 N. C. L. REV. 96.
[3] Marble Sav. Bank v. Mesarvey, 101 Iowa 285, 70 N. W. 198 (1897).

the mortgagee,[4] but it now sanctions the application of the third party beneficiary doctrine.[5]

In those states where the purchaser is treated as being a principal debtor and the vendor a surety, the tenor of the promise is to indemnify the latter in case he has to pay the debt;[6] thus it follows that if the purchaser can show that his grantor had not assumed personal liability, this constitutes a valid defense to an action on the debt.[7] The principal case raised this point without deciding it.[8] Where the mortgagee is permitted to sue as a third party beneficiary, it is generally held that the personal liability of the vendor is immaterial,[9] although the rule is otherwise in several states.[10] Under either theory any defense which the purchaser would have against the vendor is available to him in an action by the mortgagee,[11] who derives his rights solely by virtue of the contract between the purchaser and vendor.[12] It has been held that fraud practiced on the grantee in persuading him to assume the debt is a valid defense.[13] The same result has been reached where the assumption clause was inserted in the deed through a mistake of the scrivner;[14] where the deed failed to express the terms of the written contract between the purchaser and his vendor;[15] where the title to land which the grantor deeded to the purchaser as consideration for the latter's promise proved to be defective;[16] and where, as in the principal case, the vendor failed to pay a mortgage debt assumed by him.[17] It is generally considered

[4] Woodcock v. Bostic, 118 N. C. 822, 24 S. E. 362 (1896).
[5] Rector v. Lyda, 180 N. C. 577, 105 S. E. 170 (1920).
[6] Thacker v. Hubbard & Appleby, 122 Va. 379, 94 S. E. 929 (1918).
[7] Colorado Sav. Bank v. Bales, 101 Kan. 100, 165 Pac. 843 (1917); see Barber v. Hanie, 163 N. C. 588, 591, 80 S. E. 57 (1913).
[8] *Supra* note 1, at 24.
[9] Scott v. Wharton, 226 Ala. 601, 148 So. 308 (1933); Allen v. Traylor, 212 S. W. 945 (Tex. Civ. App. 1919); Citizens Sav. & Loan Soc. v. Chapman, 173 Wash. 515, 24 P. (2d) 63 (1933).
[10] Ross v. Davis, 138 Misc. Rep. 863, 248 N. Y. Supp. 441 (1931); Fry v. Auman, 29 S. D. 30, 135 N. W. 708 (1912).
[11] Kyner v. Clark, 29 F. (2d) 545 (C. C. A. 8th, 1928).
[12] Shult v. Doyle, 199 Iowa 304, 201 N. W. 787 (1925).
[13] Bradbury v. Carter, 291 Fed. 363 (C. C. A. 7th, 1923); Tuttle v. Jockmus, 111 Conn. 269, 149 Atl. 785 (1930).
[14] Lloyd v. Lowe, 63 Colo. 294, 165 Pac. 608 (1917); Cushing v. Newbern, 75 Okla. 258, 183 Pac. 409 (1919).
[15] Peters v. Goodrich, 192 Iowa 790, 185 N. W. 903, 904 (1921) ("Notwithstanding the recitals in the warranty deed, it was available to the appellee (purchaser) to show the true contract between him and his grantor as against appellant (mortgagee). He could not only show this where said contract was evidenced in writing but it was available to him to establish by parol the true contract between the parties. . . .").
[16] Ross v. Dexter, 92 Okla. 73, 219 Pac. 689 (1923).

that a release of the grantee from personal liability by his grantor without the mortgagee's consent is a valid defense unless the mortgagee has accepted the promise before the release.[18] At least two states have reached an opposite result upon the reasoning that, as the promise is beneficial to the mortgagee, his immediate acceptance is presumed.[19]

If the purchaser assumes payment of the mortgage debt, subject expressly to the defenses available to the vendor, he may attack the validity of that debt in an action by the mortgagee;[20] however he is ordinarily estopped from availing himself of this type of defense.[21] The theory is that as he has been credited with the value of the mortgage debt upon the purchase price, it would be unfair to permit him to deny the legality of either the debt or mortgage.[22] It is because of this reasoning that defenses such as usury,[23] defective execution of the mortgage,[24] lack of consideration for the debt,[25] and fraud in procuring the mortgage,[26] are unavailable to the purchaser.

EMMETT C. WILLIS, JR.

Negligence—Imputed Negligence—Joint Enterprise—Liability of Passenger in Automobile for Negligence of Driver.

Plaintiff's intestate offered, purely as an accommodation, to drive a car, which a dealer was repossessing, from a distant part of the city back to the dealer's garage. While he was being driven to the location by an employee of the dealer, he was killed when the car in which he was riding was wrecked in a collision with a bus, caused by the concurring negligence of the drivers of both vehicles. Suit against the bus driver who pleads contributory negligence by imputa-

[17] Hagman v. Williams, 228 N. W. 811 (S. D. 1930); *cf.* Holloway v. Hendrick, 98 N. J. Eq. 713, 129 Atl. 702 (1925) (distinguishable on the grounds that here the vendor performed his contract although he did so in such a manner as to warrant a counterclaim had the action been between him and the purchaser).

[18] Thacker v. Hubbard & Appleby, *supra* note 6.

[19] Bay v. Williams, 112 Ill. 91, 1 N. E. 340 (1884); Starbird v. Cranston, 24 Colo. 20, 48 Pac. 652 (1897).

[20] Erwin v. Morris, 137 N. C. 48, 49 S. E. 53 (1904).

[21] Caldwell v. Comm. Bank of Waynoka, 80 Okla. 115, 194 Pac. 898 (1921).

[22] Chenoweth v. Nat. Building Ass'n., 59 W. Va. 653, 53 S. E. 559 (1906); Midland Sav. & Loan Co. v. Neighbor, 54 Okla. 626, 154 Pac. 506 (1916).

[23] Caldwell v. Comm. Bank of Waynoka, *supra* note 21.

[24] Hill v. Longe, 95 Vt. 411, 115 Atl. 237 (1921).

[25] Peoples Trust Co. v. Doolittle, 178 App. Div. 802, 165 N. Y. Supp. 813 (1917).

[26] Curry v. Lafon, 133 Mo. App. 163, 113 S. W. 246 (1908).

tion from the intestate's driver to the intestate. *Held,* judgment for plaintiff affirmed; there was no master and servant or agency relationship, and while there was a joint enterprise the intestate had no such control over the car as to impute the driver's negligence to him.[1]

This case raises directly the problem of when will the negligence of a driver of an automobile be imputed to a passenger riding with him.[2] The question arises most often in cases in which the injured passenger, or his representative, sues the negligent third party who attempts to defeat recovery on the ground of contributory negligence by imputation as in the instant case. The problem may also arise where the passenger is the defendant and a third party seeks to hold him liable for the negligence of the driver.[3] A passenger, of course, may be guilty of negligence separate and distinct from any negligence on the part of his driver, and in such case there is no need to apply the doctrine of imputed negligence.[4]

The courts are in general accord that wherever the relationship of agency, master and servant,[5] or joint enterprise can be established

[1] Gilmore v. Grass, 68 F. (2d) 150 (C. C. A. 10th, 1933).

[2] The doctrine of imputed negligence may be considered to have originated in England with the case of Thorogood v. Bryan, 8 C. B. 115 (C. P. 1849). It was subsequently repudiated in Mills v. Armstrong (The "Bernina"), 13 A. C. 1, 58 L. T. 425 (1887). It was repudiated by the United States Supreme Court in Little v. Hackett, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. ed. 652 (1886), and is now generally discredited. Ga. Pac. R. Co. v. Hughes, 87 Ala. 610, 6 So. 413 (1889); Colo. & So. R. Co. v. Thomas, 33 Colo. 517, 81 Pac. 801 (1905); State v. Boston & M. R. Co., 80 Me. 430, 15 Atl. 36 (1888); (1921) 19 MICH. L. REV. 858.

[3] Reiter v. Grober, 173 Wis. 493, 181 N. W. 739 (1921) (pedestrian injured by negligence of son driving father, held son's negligence not imputable to father). It is sometimes attempted to invoke the doctrine of imputed negligence in a suit between passenger and driver, but it is held to have no application as there is a duty of care owed between joint enterprisers just as there is between principal and agent, master and servant, or host and guest. Yanco v. Thon, 108 N. J. L. 235, 157 Atl. 101 (1931); see (1929) 77 U. OF PA. L. REV. 676, at 682. See also TORTS RESTATEMENT (Am. L. Inst. 1933) §30.

[4] Most jurisdictions hold a passenger responsible for exercising reasonable care for his own safety. For definitions of what constitutes such negligence on the part of a passenger as will defeat his recovery from the negligent third party: Birmingham Ry. Light & Power Co. v. Barranco, 203 Ala. 639, 84 So. 839 (1920); Sharp v. Sproat, 111 Kans. 735, 208 Pac. 613 (1922); Graham's Adm'r. v. Ill. Cent. R. Co., 185 Ky. 370, 215 S. W. 60 (1919); Cotton v. Willmar & S. F. R. Co., 99 Minn. 366, 109 N. W. 835 (1906); Brubaker v. Iowa County, 174 Wis. 574, 183 N. W. 690 (1921); Schwartz v. Johnson, 152 Tenn. 586, 280 S. W. 32 (1926) (riding with drunken driver, held contributory negligence). *Contra:* Tyree v. Tudor, 183 N. C. 340, 111 S. E. 714 (1922) (young girl killed returning from dance with drunken escort, held not contributorily negligent either personally or by imputation, as there was no joint adventure although she had said "get me home in a hurry").

[5] The servant's negligence while driving the master's car will be imputed to

the doctrine will be applied. Master and servant relations are relatively easy to prove; agency may present a slightly more difficult problem; but it is in the determination of joint enterprise that true confusion exists.[6] There has been a total failure on the part of the courts to lay down any definite tests or definitions by which this last may be determined.

There are a few general types of relationships that the courts seem unanimously to hold do not constitute joint enterprise unless other factors exist. The driver's negligence will not be imputed; to a mere guest in an automobile who has no particular control over the driver;[7] to a passenger in a public conveyance;[8] between husband and wife from the mere fact of their marital relationship;[9] on ac-

the master riding with him. Markowitz v. Metropolitan St. Ry. Co., 186 Mo. 350, 85 S. W. 351 (1904); Schofield v. Director General of Railroads, 276 Pa. 508, 120 Atl. 449 (1923); Hepps v. Bessemer & L. E. R. Co., 284 Pa. 479, 131 Atl. 279 (1925). But if employer is riding in employee's car by choice of employee, then it will not be imputed. County Com'rs of Dorchester County v. Wright, 138 Md. 577, 114 Atl. 573 (1921). The master's negligence will generally be imputed to a servant riding with him. Robertson v. United Fuel & Supply Co., 218 Mich. 271, 187 N. W. 300 (1922). *Contra:* Compagna v. Lyles, 298 Pa. 352, 148 Atl. 527 (1929); (1930) 30 COL. L. REV. 581. Chauffeur's negligence will be imputed to employer but not necessarily to other members of the employer's family. Bullard v. Boston Elevated Ry. Co., 226 Mass. 262, 115 N. E. 294 (1917).

[6] The courts talk about agency, master and servant, and joint enterprise as three entirely separate and distinct relationships. The reason for this is unexplainable, other than by historical development, as all of these are a phase of agency and rest ultimately on the same fundamental principle, namely, action for another by representation.

[7] Crescent Motor Co. v. Stone, 211 Ala. 516, 101 So. 49 (1924); Meyers v. Southern Pac. Co., 63 Cal. App. 164, 218 Pac. 284 (1923); Withey v. Fowler Co., 164 Iowa 377, 145 N. W. 923 (1914); Pusey v. Atl. C. L. R. Co., 181 N. C. 137, 106 S. E. 452 (1921). This is not changed because guest may indicate or direct the way he wants to go. Cram v. City of Des Moines, 185 Iowa 1292, 172 N. W. 23 (1919). Michigan is the only state which reaches the opposite result still adhering to the original theory that by electing to ride with the driver the passenger adopts the driver's acts as his own. Gates v. Landon, 216 Mich. 417, 185 N. W. 723 (1921); Holsaple v. Superintendents of Poor of Menominee County, 232 Mich. 603, 206 N. W. 529 (1925). But it is not applied to passengers in private carriers for hire, nor to those paying for their ride. Lachow v. Kimmich, 263 Mich. 1, 248 N. W. 531 (1933); Johnson v. Mack, 263 Mich. 10, 248 N. W. 534 (1933). Wisconsin was the first American state to endorse the doctrine of imputed negligence, and one of the last to discard it. See Prideaux v. Mineral Point, 43 Wis. 513 (1878); Reiter v. Grober, *supra* note 3.

[8] Little v. Hackett, *supra* note 2.

[9] Withey v. Fowler, *supra* note 7; Kokesh v. Price, 136 Minn. 304, 161 N. W. 715 (1917); Brubaker v. Iowa County, *supra* note 4 (even though both are travelling together to take up a new residence in a new city, both to enter separate businesses there); *cf.* Langley v. Southern R. Co., 113 S. C. 45, 101 S. E. 286 (1919) (where wife influenced husband to drive at high speed, his negligence imputed to her). For collection of cases see Gilmore, *Imputed Negligence* (1921) 1 WIS. L. REV. 193, at 203.

count of family or blood relation in general.[10] Nor will a pleasure trip alone make a joint enterprise.[11]

It is more difficult to say when the doctrine will be applied. Community of interest in the common purpose,[12] anticipation of sharing in any profits, mutual ownership of the conveyance, and the right to direct and control its operation are all factors which must be weighed. The degree of control which the passenger has, though not necessarily exercises, is the test most favored by students and critics on the subject, and the one on which the case is most likely to turn.[13] Ownership in itself implies a certain element of control even though the actual control may be in the hands of another.[14] Sharing expenses will generally be held to create joint enterprise, though the jury may find otherwise;[15] and if the conveyance is

[10] Bryant v. Pac. Elec. R. Co., 174 Cal. 737, 164 Pac. 385 (1917) (father and son); Wessling v. Southern Pac. Co., 116 Cal. App. 455, 3 P. (2d) 25 (1931) (two brothers); Kokesh v. Price, *supra* note 9 (husband, wife, and children); Lomis v. Abelson, 101 Vt. 459, 144 Atl. 378 (1929) (brother and sister). *Contra:* Wiley v. Dobins, 204 Iowa 174, 214 N. W. 529 (1927). Where the relationship is that of parent and minor child there is a stronger tendency to hold that the negligence is imputed. Gallagher v. Johnson, 237 Mass. 455, 130 N. E. 174 (1921), but even in this situation the majority of courts refuse to impute the negligence. Mullinax v. Hord, 174 N. C. 607, 94 S. E. 426 (1917); note (1921) 15 A. L. R. 414.

[11] Parker v. Ullom, 84 Colo. 433, 271 Pac. 187 (1928) (going to a poker game is not a joint adventure); Withey v. Fowler, *supra* note 7; Tyre v. Tudor, *supra* note 4; St. L. & San F. R. Co. v. Bell, 58 Okla. 84, 159 Pac. 336 (1916); Swartz v. Johnson, *supra* note 4. *Contra:* Wiley v. Dobins, *supra* note 10.

[12] (1929) 78 U. OF PA. L. REV. 270 ("A 'common purpose' is but an element of a 'joint enterprise'").

[13] This is illustrated in the cases where sharing expenses is held to constitute joint enterprise. In law the splitting of expense on gas and oil may give one a joint right or control, but practically courtesy, politeness, or personal relations may readily prevent the passenger from telling host or owner how to operate his automobile. For review of tests employed, see Rollison, *The "Joint Enterprise" in the Law of Imputed Negligence* (1930) 6 NOTRE DAME LAW. 172; notes (1926) 12 VA. L. REV. 341; (1928) 62 AM. L. REV. 261, at 264 ("It is not so much actual control, nor actual possibility of control that is the deciding factor, but rather a possibility of control by implication of law.").

[14] Masterton v. Leonard, 116 Wash. 551, 200 Pac. 320 (1921); Tannehill v. Kans. City C. & S. R. Co., 279 Mo. 158, 213 S. W. 818 (1919) (joint ownership of automobile, held joint adventure).

[15] Beaucage v. Mercer, 206 Mass. 492, 92 N. E. 774 (1910); Derrick v. Salt Lake & O. R. Co., 50 Utah 573, 168 Pac. 335 (1917); *cf.* Coleman v. Bent, 100 Conn. 527, 124 Atl. 224 (1924) (sharing expenses does not show "joint adventure" as a matter of law for it is not inconsistent with the defendant's rights as owner). Joint enterprise is a question of fact to be found by the jury under proper instructions from the court. The court defines what facts will constitute joint enterprise, and if the jury find those facts to have existed the negligence of the driver is imputed as a matter of law according to the jurisdiction. Crescent Motor Car Co. v. Stone, *supra* note 7 (Holding valid a charge to the effect that if the jury found both drivers were acting in a

rented by several persons, whether it be for business or social use, each sharing in the expense of the rental, then all are deemed to have a mutual right of control and are joint enterprisers.[16]

"Joint enterprise," or "joint adventure," is a term that was unknown at common law. It is a recent American invention, still in the process of formation, by which the courts are attempting to distinguish a group of relationships that are too informal and loose to be accurately described as partnerships,[17] but which, nevertheless, bear most of the same incidents.[18] It is suggested that this association with business and economic profits is perhaps responsible for the reluctance of the courts to apply it to social relations.[19] For although a purely social purpose may constitute a joint enterprise,[20] the courts are much more inclined to apply the doctrine if some kind of business basis can be shown.[21] In general there must be community of interest and purpose in the undertaking, and a joint or equal right to govern and control the conduct of the other and the agencies employed.

In the principal case the court in refusing to impute the negligence reached the correct result under the most approved test since the

common purpose, each having right to drive or control, then the jury might find it was a joint enterprise and negligence would be imputable); Meyers v. So. Pac. Co., *supra* note 7.

[16] Christopherson v. Minneapolis, etc. R. Co., 28 N. D. 128, 147 N. W. 791 (1914); Coleman v. Bent, *supra* note 15; Grand Trunk R. Co. v. Dixon, 51 D. L. R. 576 (1920). The fact that the parties take turns driving will not make a joint adventure. Hollister v. Hines, 150 Minn. 185, 184 N. W. 856 (1921); *cf.* Washington & O. D. R. Co., v. Zell's Adm'x, 118 Va. 755, 88 S. E. 309 (1916) (Where two friends went together often, the driver's negligence held imputed.).

[17] Note (1927) 48 A. L. R. 1055.

[18] The term is less definite than partnership. Connellee v. Nees, 266 S. W. 502 (Tex. Civ. App. 1924). It generally relates to a single transaction though it may be for a business to extend over a period of years. Finney v. Terrell, 276 S. W. 340 (Tex. Civ. App. 1925). Where the parties agree to share in profits it will be a joint adventure. Houston v. Dexter & Carpenter, Inc., 300 Fed. 354 (E. D. Va. 1924). But participation in profits does not of itself prove joint adventure. Hill v. Curtis, 154 App. Div. 662, 139 N. Y. Supp. 428, 430 (1913). Where there is no agreement to share in profits there can be no joint adventure. Columbian Laundry v. Hencken, 203 App. Div. 140, 196 N. Y. Supp. 523 (1922).

[19] Coleman v. Bent, *supra* note 15.

[20] Beaucage v. Mercer, *supra* note 15.

[21] Even though a business relationship exists, the element of control may still be necessary. Wren v. Suburban Motor Transfer Co., 241 S. W. 464 (Mo. App. 1922) (Passenger in real estate agent's car going to inspect house had no such control over driver as to impute negligence.). It should be remembered that joint enterprise springs from a contractual relation, and must eventually rest on contract. The contract does not have to be express; it may be implied. In re Taub, 4 F. (2d) 993 (C. C. A. 2nd, 1924).

intestate had no control over the driver, even though it varied the conventional definition by saying, in absence of such control, that there was a joint enterprise.

FRANKLIN S. CLARK.

Procedure—Federal Procedure—Minimum Jurisdictional Amount.

A citizen of Kentucky, beneficiary under a $15,000 accident insurance policy, brought suit in the state courts against the insurer, a non-resident company. To avail itself of the fact that the Federal courts would enforce the provision of the policy requiring suit to be brought within two years from the expiration of the time within which proofs of loss were to be made whereas the Kentucky courts would not, defendant removed the case to the Federal District Court. Plaintiff took a non-suit without prejudice and brought a new suit in the state courts but limited his prayer for relief to $2,999.99. Defendant again removed the cause and plaintiff, after his motion to remand was overruled, allowed a judgment by default in favor of defendant. Plaintiff appealed, and the Circuit Court of Appeals held that the prayer for relief determined the amount involved for jurisdictional purposes, and since it was less than $3,000, the motion to remand should have been granted.[1]

For reasons similar to those motivating the plaintiff in the principal case there are frequent resorts to devices either to confer[2] jurisdiction on the Federal courts or to prevent its attaching.[3] It is generally deducible from the decisions that the device will be approved provided it is bona fide and some substantial right is in fact relinquished. Since the principal case involves a liquidated claim, it presents, it seems, merely a more obvious variation of the generally sanctioned limitation of unliquidated claims.[4] But since the amount

[1] Brady v. Indemnity Ins. Co. of North America, 68 F. (2d) 302 (C. C. A. 6th, 1933); see also Brown *et al* v. House, 20 F. (2d) 142 (S. D. Idaho, 1927); Woods v. Massachusetts Protective Ass'n., 34 F. (2d) 501 (E. D. Ky. 1929); Henderson *et al* v. Maryland Casualty Co., 62 F. (2d) 107 (C. C. A. 5th, 1932); *cf.* Smith v. Traveller's Protective Ass'n., 200 N. C. 740, 158 S. E. 402 (1931).

[2] Williamson v. Osenton, 232 U. S. 619, 34 Sup. Ct. 442, 58 L. ed. 758 (1914); Black and White Taxicab Co. v. Brown and White Taxicab Co., 276 U. S. 518, 48 Sup. Ct. 404, 72 L. ed. 681 (1929); note (1930) 43 HARV. L. REV. 320; note (1934) 34 COL. L. REV. 311.

[3] Richardson v. Southern Idaho Waterpower Co., 209 Fed. 949 (D. Idaho 1913); Kraus v. Chicago B. and Q. R. R., 16 F. (2d) 79 (C. C. A. 8th, 1926).

[4] Swann v. Mutual Res. Fund Life Ass'n., 116 Fed. 232 (W. D. Ky. 1902); Barber v. Boston and Maine R. Co., 145 Fed. 52 (D. Vt. 1906); Harley v. Firemen's Fund Ins. Co., 245 Fed. 471 (W. D. Wash. 1913).

of a liquidated claim clearly must show on the face of the pleadings, whereas in an unliquidated claim it must of necessity be conjectural, it seems that the court missed an excellent opportunity to take advantage of the patent nature of the device and pierce it.[5] The apparent desire to protect Federal jurisdiction by facilitating removal, evinced by the recent celebrated *Black and White Taxicab Co. case*,[6] would lead one to anticipate a different result in the principal case.

The present decision makes for uniformity in that any type of claim may be limited to defeat federal jurisdiction. But it also involves inconsistencies. In cases involving unliquidated claims the prayer controls jurisdiction so long as the pleadings by inspection do not show inability to recover the jurisdictional amount.[7] But in other cases the "court will look to the face of the complaint and upon the facts as there disclosed, decide what the actual demand for recovery is."[8] Here apparently in order to recover anything at all the plaintiff would have to plead the 15,000 policy upon which he based his claim. Then, applying the rule last noted, the court would find that $15,000 was the amount involved. But in the principal case it departed from the rule and accepted the prayer as conclusive. This is further inconsistent with the Federal practice which, once a suit is in the Federal courts, permits a recovery of any amount the facts, as proved, demand, whether more or less than prayed for[9] and whether less than the $3,000 minimum limitation on Federal jurisdiction.[10] Since, however, the Federal courts follow state court rules in assessing damages in default judgments,[11] in many cases of default judg-

[5] Texas and Vermont apparently make the nature of the claim the criterion of the right to remit for jurisdictional purposes. Fuller v. Sparks, 39 Tex. 137 (1873); Pecos and N. T. R. Co. v. Canyon Coal Co., 102 Tex. 478, 119 S. W. 294 (1909); Perkins v. Rich, 12 Vt. 595 (1840).

[6] *Supra* note 2.

[7] Wiley v. Sinkler, 179 U. S. 58, 21 Sup. Ct. 17, 45 L. ed. 84 (1900); Fernandina Shipbuilding and Dry Dock Co. v. Peters, 283 Fed. 621 (S. D. Fla. 1922); DOBIE, FEDERAL PROCEDURE (1928) §56, at 144.

[8] Vance v. W. A. Vandercook, 170 U. S. 468, 18 Sup. Ct. 645, 42 L. ed. 1111 (1898); Brown v. House, *supra* note 1; DOBIE, FEDERAL PROCEDURE (1928) §56, at 142.

[9] 17 STAT. 197 (1872), 28 U. S. C. A. §724 (1926); cases *infra* note 16.

[10] Barry v. Edmunds, 116 U. S. 550, 6 Sup. Ct. 501, 29 L. ed. 729 (1886); Roessler-Hasslacher Chem. Co. v. Doyle, 142 Fed. 118 (C. C. A. 3d, 1905); Armstrong v. Walters, 223 Fed. 451 (E. D. Pa. 1915).

[11] Raymond v. Danbury and N. R. Co., Fed. Cas. No. 11,593 (D. Conn. 1877); Cape Fear Towing and Transportation Co. v. Pearsall, 90 Fed. 435 (C. C. A. 4th, 1898); Orsinger v. Consolidated Flour Co., 284 Fed. 224 (C. C. A. 7th, 1922).

ment the prayer would probably be conclusive of the amount recovered.[12]

A more important and more striking inconsistency in Federal practice is made evident by the principal case. There the court approved a reduction of the claim to prevent Federal jurisdiction attaching when accomplished by means of a non-suit in the Federal court and a new suit in the state courts upon a limited demand. Yet the general rule is that, once in the Federal courts, the plaintiff will not be permitted to amend his complaint so as to reduce his claim to less than $3,000 and thus force the court to remand the case, unless the demand was excessive through a bona fide error.[13]

Should the plaintiff attempt to recover the full $15,000 in his suit in the state court by amending his prayer for relief the defendant could petition for removal.[14] The prayer would be evident on the pleadings, which with the record at the time of the motion, determine removability.[15]

But there seems a possibility that the plaintiff might recover $15,000 in the state courts by taking advantage of a common rule of state court practice: any relief demanded by the facts will be granted.[16] To recover anything at all plaintiff would have to prove the $15,000 policy. Thus at the close of the evidence the jury would be instructed to render a judgment consistent with the facts as they found them proved. If the defendant attempted to remove prior to judgment in such a case, it is likely that he would be denied because

[12] This would be true in North Carolina. McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE (1929) §632; see Orsinger v. Consolidated Flour Co., *supra* note 11.

[13] Johnson v. Computing Scale Co., 139 Fed. 339 (N. D. N. Y. 1905); Donovan v. Dixieland Amusement Co., 152 Fed. 661 (E. D. N. Y. 1907); Twin Hills Gasoline Co. v. Bradford Oil Corp., 264 Fed. 440 (E. D. Okla. 1919).

[14] 36 STAT. 1095 (1911), 28 U. S. C. A. §72 (1926) (the removal petition must be filed ". . . in such State court at the time, or any time before the defendant is required by the laws of the State or the rule of the State court in which suit is brought to answer or plead to the declaration or complaint of the plaintiff."). But where by amendment during the trial plaintiff for the first time sets out a case within Federal jurisdiction defendant can petition for removal. Northern Pac. R. Co. v. Austin, 135 U. S. 315, 10 Sup. Ct. 758, 34 L. ed. 218 (1890); Bagenas v. Southern Pac. Co., 180 Fed. 887 (N. D. Cal. 1910); Key v. West Kentucky Coal Co., 237 Fed. 258 (W. D. Ky. 1916).

[15] Herbert v. Roxana Petroleum Corp., 12 F. (2d) 81 (E. D. Ill. 1926); Kelly v. Alabama-Quenelda Graphite Co., 34 F. (2d) 790 (N. D. Ala. 1929).

[16] Dean v. Shingle, 198 Cal. 652, 246 Pac. 1049 (1926); Smith v. Smith, 67 Kans. 841, 73 Pac. 56 (1900); Caldwell v. Ewbanks, 326 Mo. 185, 39 S. W. (2d) 976 (1930); Syracuse v. Hogan, 234 N. Y. 457, 138 N. E. 406 (1923); Jones v. Atlantic and Western R. Co., 193 N. C. 590, 137 S. E. 706 (1927).

the pleadings would remain precisely as they were when the Federal court previously denied removal, and the record would be in accord with the pleadings.[17] A motion to remove after judgment would come too late because there would be no case pending on which the removal order could act.[18]

Whitcomb v. Smithson affords an interesting speculation on the possibilities of removal which would arise in the case last supposed when the judge instructed the jury to grant any relief the facts demanded.[19] There it was held that a suit hitherto outside Federal jurisdiction because of the joinder of a resident defendant was not made removable by the judge's instructing the jury to find in favor of the resident defendant thus leaving the petitioner, a non-resident, the only interested defendant. The rationale of the decision was that the judge, and not the plaintiff by his voluntary act,[20] brought the case within the scope of Federal jurisdiction. Would it be the act of the plaintiff in proving a $15,000 claim, or the act of the judge applying the law in his instructions which would bring the present supposed case within the limits of Federal jurisdiction?

Assuming that the plaintiff had recovered a judgment for $15,000 in the state courts could the defendant obtain an injunction from the Federal courts against enforcement of the judgment? By Section 265 of the Judicial Code[21] the Federal courts are prohibited from staying proceedings of a state court or its officers. By judicial decisions[22] the Federal courts today have apparently succeeded in circumventing the statute and will enjoin proceedings prior to judgment and subsequent thereto. The cases imply the limitation that the injunction must operate upon the parties and not the court, and that

[17] But see: City of Chicago v. Mills, 204 U. S. 321, 328, 27 Sup. Ct. 286, 51 L. ed. 504 (1907) citing Kirby v. Am. Soda Fountain Co., 194 U. S. 141, 24 Sup. Ct. 619, 48 L. ed. 911 (1904) as authority for the proposition: ("The question of jurisdiction must be decided having reference to the attitude of the case at the date the bill was filed."); Fielding v. Toledo and O. C. R. Co., 33 F. (2d) 994 (N. D. Ohio, 1928).

[18] 36 STAT. 1095 (1911), 28 U. S. C. A. §72 (1926); see State *ex rel* Hall v. Kelley, 220 Mo. App. 388, 286 S. W. 724 (1926).

[19] Whitcomb v. Smithson, 175 U. S. 635, 20 Sup. Ct. 248, 44 L. ed. 303 (1900).

[20] Great Northern Ry. Co. v. Alexander, 246 U. S. 276, 316, 38 Sup. Ct. 237, 62 L. ed. 713 (1918). "It must appear, to make the case a removable one as to a non-resident defendant, because of dismissal as to resident defendants, that the discontinuance as to such defendants was voluntary on the part of the plaintiff."); Moeller v. Southern Pacific Co., 211 F. 239 (N. D. Cal. 1913).

[21] 36 STAT. 1162 (1911), 28 U. S. C. A. §379 (1926).

[22] See Taylor and Willis, *The Power of Federal Courts to Enjoin Proceedings in State Courts* (1933) 42 YALE L. J. 1169.

a judgment which is unconscionable for fraud, accident, or mistake whereby defendant was prevented from setting up a meritorious defense will be enjoined. But the power does not extend to relieve from judgments on account of errors or irregularities on which the judgment was founded.[23] Although it would seem that the Federal court could hardly expect, by accepting the prayer for relief as conclusive of the amount involved, to limit the state courts to this interpretation, the language of the principal case suggests that a recovery for more than the amount prayed for at the time removal was denied would be deemed a fraud on the jurisdiction of the Federal courts.[24] For this reason the judgment might be enjoined.

JOE EAGLES.

Suretyship—Extent of Liability on Sheriff's Official Bond.

In *State of North Carolina ex rel. Wimmer v. Leonard*[1] the relator was wrongfully shot by a North Carolina sheriff. Action was brought in a Federal court on the sheriff's official "process bond," which contains a clause for the faithful execution of office. *Held,* a demurrer to the complaint was properly sustained. Such a general clause of faithfulness in all things in an official bond is limited to the specific duties mentioned therein, *i.e.* in the "process bond" the due execution and return of process, and the payment of money and fees collected.

Wrongful acts of a public official which render him personally liable to a person injured thereby have been placed in three categories: acts done by virtue of office, acts done under color of office, and those done by the official in his private capacity. All courts hold that the sureties on the officer's official bond are not liable for acts of the latter type.[2] Many courts hold that a bond conditioned for the faith-

[23] Wells Fargo & Co. v. Taylor, 254 U. S. 175, 41 Sup. Ct. 93, 65 L. ed. 205 (1920); National Surety Co. of N. Y. v. State Bank of Humboldt, 120 Fed. 593 (C. C. A. 8th, 1903); Horton v. Stegmyer, 175 Fed. 756 (C. C. A. 8th, 1910).

[24] Brady v. Indemnity Ins. Co. of North America, *supra* note 1, ("Having the right to determine the amount she would claim, the filing of a suit for such amount in the State court was not in our opinion a fraud on the jurisdiction of the Federal court.").

[1] 68 F. (2d) 228 (C. C. A. 4th, 1934).

[2] Feller v. Gates, 40 Ore. 543, 67 Pac. 416 (1902) (constable received money from execution debtor under contract not to serve execution, the constable to repay money on reversal of judgment on appeal. *Held,* a personal act, so sureties on his official bond not liable for conversion of the money.); Citizen's State Bank of Wheeler v. American Surety Co., 65 S. W. (2d) 778 (Tex. 1933) (sheriff filed list of fees, including several unlawful ones and received

ful performance of the duties of office include only those acts done by virtue of office,[3] but the tendency of most courts is to include acts done under color of office as well.[4] The first named view involves a distinction between acts done under color of office and those by virtue of office, and the second, a distinction between acts done under color of office and those done by the officer in his private capacity. The factual distinctions thus made, however, have led to much variance in authority as to the extent of the terms "by virtue of office"[5] and "under color of office."[6]

Unlike most jurisdictions North Carolina requires three bonds of a sheriff: two conditioned specifically for the proper collection of state and county taxes, respectively, and one conditioned specifically for the due execution and return of process, and the payment of fees and money collected, and generally "for the faithful execution of his office as sheriff."[7] The concluding clause of the "process bond" has been the subject of much controversy. The earlier cases held to the narrow view that a general clause of faithfulness in all things in an

a deficiency certificate, which he sold to bank. *Held,* such sale was neither by virtue nor under color of office, but merely a personal transaction of the sheriff in his private capacity).

[3] Bassinger v. United States Fidelity & Guaranty Co., 58 F. (2d) 573 (C. C. A. 8th, 1932) (no recovery where plaintiff injured during arrest without warrant, the sheriff believing he had committed a felony); State v. Fidelity & Deposit Co. of Md., 147 Md. 194, 127 Atl. 758 (1925) (sheriff's bond not liable for his unauthorized arrest and mistreatment of plaintiff on a charge of having aided another to escape).

[4] Kosowsky v. Fidelity & Deposit Co. of Md., 245 Mich. 266, 222 N. W. 153 (1928) (sheriff unlawfully assaulted plaintiff and imprisoned him. *Held,* bond is liable for nonfeasance, misfeasance, and malfeasance by sheriff, *virtute officii* or *colore officii.*); Wieters v. May, 71 S. C. 9, 50 S. E. 547 (1905).

[5] Brown v. Weaver, 76 Miss. 7, 23 So. 388 (1898). Sheriff's bond liable for deputy's act (of shooting misdemeanant fleeing to escape after arrest as having been done by virtue of office); *cf.* Richards v. American Surety Co. of N. Y., 171 S. E. 924 (Ga. 1933) (Deputy's shooting plaintiff to prevent escape from arrest held under color of office); MURFREE, OFFICIAL BONDS (1885) 471 (contending that where a man doing an act within the limit of his official authority exercises that authority improperly or abuses the discretion placed in him he is acting by virtue of office.).

[6] Lewis v. Treadway, 211 Ky. 140, 277 S. W. 309 (1925) (if arresting officer is armed with no writ, or an utterly void one, and there is no statute which gives him authority to do the act without process, then there is no color of office); *cf.* State v. Roth, 330 Mo. 105 49 S. W. (2d) 109 (1932) (if he assumed to act as an officer, whether under a valid process, or a void one, or no process whatsoever, the officer's bond is liable); see American Guaranty Co. v. McNiece, 111 Ohio St. 532, 146 N. E. 77 (1924) (a dictum to the effect that some courts hold the question of liability for wrongful acts done under color of office is *sui generis,* and dependent upon the particular circumstances of each case; State v. Freeman, 61 S. W. (2d) 459 (Tenn. 1933) (the term "under color of office" implies an evil or corrupt motive).

[7] N. C. CODE ANN. (Michie, 1931) §3930.

official bond was limited to the specific duties mentioned therein.[8] There is also early North Carolina authority to the effect that such a general clause merely requires the sheriff faithfully to execute the specific duties of his office, and does not cover any abuse or usurpation of power.[9]

That the official bond, so construed, was insufficient for public security, and that legislative action broadening the scope of the bond was needed was pointed out in several cases.[10] In 1883 Section 354 of the present Code was enacted, which provides in part, ". . . and every such officer and the sureties on his official bond shall be liable to the person injured for all acts done by said officer by virtue or under color of office." This section was construed as broadening the scope of the official bond so as to cover both acts done by virtue of office and those done under color of office,[11] with the latter term liberally interpreted.[12]

However, in *Sutton v. Williams*,[13] decided in 1930, the court reverted to the older authority in holding that the general clause of the "process bond" was limited to the specific duties which were provided for in the bond, and that even if not so limited the clause merely requires the affirmative performance of the duties of office. Although Section 354 and the cases based upon it were before the court in the briefs of counsel,[14] no mention was made of such authority in the court's opinion. The Federal court in the principal case was thus justified in recognizing this decision as the latest pronouncement of the local law. This case serves, however, to call

[8] Crumpler v. Governor, 12 N. C. 52 (1826); Eaton v. Kelly, 72 N. C. 110 (1875); Holt v. McLean, 75 N. C. 347 (1876); see South v. Maryland, 18 How. 396, 15 L. ed. 433 (U. S. 1856).

[9] State v. Long, 30 N. C. 415 (1848) (no recovery where a sheriff took a money deposit in lieu of a bail bond and refused to return on defendant's surrender and demand. Butts v. Brown, 33 N. C. 141 (1850) (sheriff's bond not liable for a simple trespass committed by him under color of office); *cf.* State v. Wade, 87 Md. 529, 40 Atl. 104 (1898).

[10] State v. Long, Butts v. Brown, both *supra* note 9; Holt v. McLean, *supra* note 8.

[11] State *ex rel.* Kivett v. Young, 106 N. C. 567, 10 S. E. 1019 (1890); Joyner v. Roberts, 112 N. C. 114, 16 S. E. 917 (1893); Warren v. Boyd, 120 N. C. 56, 26 S. E. 700 (1897); State *ex rel.* Board of Com'rs. v. Sutton, 120 N. C. 298, 26 S. E. 920 (1897).

[12] Warren v. Boyd, *supra* note 11 (a constable's bond held liable for false imprisonment of the plaintiff, even though done without legal process or color of process).

[13] 199 N. C. 546, 155 S. E. 160 (1930) (sheriff's bond held not liable for injury caused by negligence of a prisoner whom sheriff had wrongfully allowed freedom as a trusty).

[14] So found by the Federal court in the principal case.

attention to the conflicting lines of authority in North Carolina on the subject, and to the need for definitive legislative action. While a complete revision of the system of sheriff's bonds probably would be best, it is submitted that the adoption of the following statute would clarify the existing confusion and afford the public that degree of security which seems desirable:

> No clause for the faithful execution of his office, found in the official bond of any public officer, shall be construed as limited to the specific duties therein enumerated, but every such clause shall render such officer and the sureties on his official bond liable to any person injured by any wrongful or unauthorized act done by said officer by virtue or under color of office.

J. A. KLEEMEIER, JR.

Trial—Power of Court to Dismiss an Action or Defense Upon Opening Statement of Counsel.

Plaintiff, as administrator, brought an action to recover for the death of his infant son, who was drowned after falling through an unguarded hole in the defendant's wharf. It was contended that the wharf, together with sandpiles thereon, brought the case within the doctrine of attractive nuisance. After the opening statement of the plaintiff's counsel, a verdict was directed for the defendant on the ground that it was not stated in such opening that the alleged nuisance was visible from the highway. *Held,* error. It was inferable from counsel's statement that the wharf and sandpiles could be readily seen from a near-by street.[1]

The privilege of making an opening statement is afforded counsel in order that he may outline his proofs to the jury and aid them in their understanding of the case to be presented.[2] It should be no more than an informal summary of the intended evidence, and cannot take the place of pleadings in determining the issues to be tried,[3]

[1] Best v. District of Columbia, 54 Sup. Ct. 487, 78 L. ed. 635 (1934).

[2] Paige v. Illinois Steel Co., 233 Ill. 313, 84 N. E. 239 (1908); State v. Sheets, 89 N. C. 583 (1883); MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE (1929), §561. Nor should the counsel be permitted to argue the merits under the guise of sketching his own case, Posell v. Herscovitz, 237 Mass. 513, 130 N. E. 69 (1921).

[3] Hunter Milling Co. v. Allen, 65 Kan. 158, 69 Pac. 159 (1902); Douglas v. Marsh, 141 Mich. 209, 104 N. W. 624 (1905); Mocre v. Dawson, 220 Mo. App. 791, 277 S. W. 58 (1925). The party should not be confined in the introduction of evidence to the statements made in the opening. Winfield v. Feder, 169 Ill. App. 480 (1912); Marcy v. Shelburne Falls & C. St. Ry. Co., 210 Mass. 197, 96 N. E. 130 (1911); Petherick v. Order of the Amaranth, 114 Mich. 420, 72 N. W. 262 (1897).

though admissions therein, when deliberately made, are binding upon the litigant.[4] The doctrine that such opening may be the basis for judgment is largely an outgrowth of a famous United States Supreme Court decision, *Oscanyan v. Winchester Repeating Arms Co.*,[5] decided in 1880. There the plaintiff sought to recover commissions for his services in bringing about a sale of firearms to the Turkish government. The opening of plaintiff's attorney showed clearly that the plaintiff had procured the sale through his influence as a diplomatic official of the purchasing government. Thereupon the case was dismissed as being founded upon a corrupt and unconscionable cause of action, which the court refused to entertain. The principles of this case have been expanded until, at the present time, the practice of deciding cases upon the basis of the opening statement has become a relatively common one, and a dismissal may be had upon much slimmer grounds than those presented in the *Oscanyan case.*

The attitude of the courts on a specific case is not easily predictable, as each case must, to a great extent, stand upon its own bottom, and so much depends upon the discretion of the trial court, but the authorities seem to group themselves into three rather indistinctly defined groups:

(1) Some of the courts have refused to sanction the practice, either because it is considered an abortive method of deciding cases, which deprives the litigant of his day in court,[6] or because of statutory inhibitions.[7]

(2) A second group are willing to go the whole way, and will dismiss the case when the opening statement fails to show facts which, if proved, would make out a cause of action or defense.[8]

[4] WIGMORE, EVIDENCE (2d ed., 1923), Vol. 5, §2594; *cf.* Wasmer v. Missouri Pac. Ry. Co., 166 Mo. App. 215, 148 S. W. 155 (1912).

[5] 103 U. S. 261, 26 L. ed. 539 (1880).

[6] Pietsh v. Pietsh, 245 Ill. 454, 92 N. E. 325 (1910); Fischer v. Fischer, 5 Wis. 472 (1856); Fletcher v. London & North Western R. Co., [1892] 1 Q. B. 122, 65 L. T. Rep. 605. The reasons for such holding are more persuasive in England than in this country, due to the division of labor between advocate and solicitor. Bailey, *The Admission of Barristers and Solicitors in England,* (1928) 14 MASS. L. Q. 60, at 60. It has been intimated by at least one court which adheres to this rule that, should a similar situation be presented, the Oscanyan case would be followed. Martin Emerich Outfitting Co. v. Sigel, Cooper & Co., 108 Ill. App. 364 (1903); Sun Oil Co. v. Garren, 261 Ill. App. 513 (1931).

[7] Wheler v. Oregon R. & Navigation Co., 16 Idaho 375, 102 Pac. 347 (1909).

[8] Bias v. Reed, 169 Cal. 33, 145 Pac. 516 (1914); Energy Electrical Co. v. General Electric Co., 262 Mass. 534, 160 N. E. 278 (1928); Spicer v. Bonker,

However, it may be noted, in this connection, that counsel is given ample opportunity to amend and elaborate upon his opening,[9] and he is to have the advantage of every reasonable inference which may be drawn from the facts stated.[10] Moreover, the court should point out to him wherein his statement is defective in order that such defect may, if possible, be remedied.[11]

(3) The remaining decisions adopt a middle ground, and will dismiss the action after the opening statement only when something is affirmatively asserted therein which will absolutely preclude the cause of action or defense.[12]

45 Mich. 630, 8 N. W. 518 (1881); Berkman v. Cohn, 111 N. J. L. 229, 168 Atl. 290 (1933); Cornell v. Morrison, 87 Ohio St. 215, 100 N. E. 817 (1912) ("It is, in substance and effect, for the purposes of the motion, an agreed statements of facts."); Smith v. Groesbeck, 54 S. D. 350, 223 N. W. 308 (1929) commented upon (1929) 15 IA. L. REV. 227; *cf.* Neckel v. Fox, 110 Ohio St. 150, 143 N. E. 389 (1924); Coughlin v. State Bank of Portland, 117 Ore. 83, 243 Pac. 78 (1926) (In view of the complexity of the facts it was error to dismiss the complaint on the opening statement.).

[9] Barto v. Detroit Iron & Steel Co., 155 Mich. 94, 118 N. W. 738 (1908); Donnelly v. Paramount Organization, 109 N. J. L. 57, 160 Atl. 569 (1932); note (1933) 83 A. L. R. 221.

[10] Kelick v. Cleveland, 24 Ohio App. 82, 156 N. E. 248 (1927); HYATT, TRIALS (1924), Vol. 2, §1459.

[11] Haynes v. Maubury, 166 Mich. 498, 131 N. W. 110 (1911).

[12] Butler v. National Home for Soldiers, 144 U. S. 64, 12 Sup. Ct. 581, 36 L. ed. 346 (1891); United States v. Deitrich, 126 Fed. 676 (C. C. D. Neb., 1904) (Defendant was indicted for receiving bribes while a member of the Senate. The opening statement for the prosecution showed that he was not, in fact, a member of that body at the time of the alleged offense. The court said: [at 677] "Where by the opening statement for the prosecution in a criminal trial, and after full opportunity for correction of any ambiguity, error or omission in the statement, a fact is clearly and deliberately admitted which must necessarily prevent a conviction, the court may upon its own motion or that of counsel, close the case by directing a verdict for the accused. The court has the same power to act upon such an admission that it would have to act upon the evidence if produced. It would be a waste of time to listen to the evidence of other matters when at the outset a fact is clearly and deliberately admitted which must defeat the prosecution in the end."); Smith v. Standard Sanitary Mfg. Co., 254 Fed. 427 (C. C. A. 2d, 1918) (promoter seeking to recover commissions showed that he was not employed, and that the alleged deal was never consummated); Millsaps, Hatchett & Co. v. Nixon, 102 Ark. 435, 144 S. W. 915 (1912) (contract of surety shown to be within the statute of frauds); Brasher v. Rabenstein, 71 Kan. 455, 80 Pac. 950 (1905); State v. Hall, 55 Mont. 182, 175 Pac. 267 (1918) (action should not be dismissed merely because opening failed to state that crime was committed within the jurisdiction of the court); Miner v. Town of Hopkinton, 73 N. H. 232, 60 Atl. 433 (1905) (statement contained facts which would take case out of perview of statute under which it was instituted); Hoffman House v. Foote, 172 N. Y. 384, 65 N. E. 169 (1902); Denefeld v. Baumann, 40 App. Div. 502, 58 N. Y. Supp. 110 (1899) (The statement contained facts which showed affirmatively that it was solely the negligence of the tenant which caused the injury; held, that the action was properly dismissed as to the landlord.); Preusse v. Childwold Park Hotel, 134 App. Div. 383, 119 N. Y. Supp. 98

This practice of deciding cases on the basis of the opening statement is subject to criticism, in that it seems to place greater emphasis upon an informal, and often perfunctory, speech of counsel than upon the carefully-drawn answer or complaint. It is submitted, however, that the benefits to be derived from a careful use of this power greatly outweigh the possible evils which may result from its abuse. It is to be employed only in extreme cases, and then only after the party has been given the benefit of every doubt. Moreover, there is a further safeguard, which, psychologically at any rate, will prove a deterrence to any rash action on the part of the trial judge. If the action is dismissed, it is more than likely to meet with reversal at the hands of the appellate tribunal; whereas, if the motion is denied, and the party is able to go forward and prove his case, the defect, if any, is cured;[13] if he is unable to accomplish this, his opponent is already victorious without an appeal.

JOEL B. ADAMS.

Trusts—Constructive Trust to Protect Victims of Theft.

B, an officer of a building and loan association, embezzled some $8,000,000 from the association over a period of nine years. The embezzled funds were invested in, and deposited to the account of, a dummy oil corporation organized and controlled by *B*. In an action by the receiver of the building and loan association to declare a constructive trust upon all the assets of the oil corporation, *held*, a trust would be impressed upon the embezzled funds traced to a bank account of the oil company, and as far as they could be traced into other assets of the oil company.[1] Other parties, who were creditors of the oil company by reason of money advanced, and credit extended in sales transactions, were protected *pro tanto*.

There has been much reluctance in the application of the constructive trust device for the protection of victims of theft. It has been variously objected that there are adequate remedies at law,[2] that assumption of equity jurisdiction deprives the defendant of right

(1909) (claim shown to be barred by the statute of limitations); Abraham v. Gelwick, 123 Okla. 248, 253 Pac. 84 (1926); Redding v. Puget Sound Iron & Steel Works, 36 Wash. 642, 79 Pac. 308 (1905).

[13] Glass v. American Stores Co., 110 N. J. L. 152, 164 Atl. 305 (1933); *cf.* Meaney v. Doyle, 176 Mass. 218, 177 N. E. 6 (1931) ("Although a trial judge has power to direct a verdict at the close of the opening, he is not, as a matter of law, obliged to do so . . . whether so to rule rests in his discretion.").

[1] Elmer Co. L't'd. v. Kemp, 67 F. (2d) 948 (C. C. A. 9th, 1933).

[2] Robinson v. Mutual Life Insurance Co., 193 Fed. 399 (C. C. A. 2d, 1912) (Insurance company director embezzled funds and turned them over to culpable president. Accounting denied.).

to trial of certain issues by jury,[3] and that a thief has no title to stolen goods[4] and hence that neither a thief nor holders under him could be regarded as constructive trustees.[5] The objectors seem to have lost sight of the fact that a constructive trust is merely a remedial device for preventing unjust enrichment in a given case, and not a technical concept.[6] Thus it has been pointed out that it would be ridiculous "if the owner who has been deprived of his property by a larceny should be less favorably situated in a court of equity, in respect to his remedy to recover it, or the property into which it has been converted, than one who, by an abuse of trust, has been injured by the wrongful act of a trustee to whom the possession of trust property has been confided."[7]

Accordingly, it has been held that if a thief sells stolen goods, he may be regarded as holding the proceeds in the capacity of a constructive trustee for the benefit of the owner.[8] And where a bank officer, to secure his personal notes, pledged stock—purchased in his own name with funds embezzled from the bank—it was held that the pledgee got only the embezzler's title, subject to a constructive trust in favor of the bank.[9]

Are there adequate remedies at law? Those so glibly suggested

[3] United States v. Bitter Root Development Co., 200 U. S. 451, 475, 26 Sup. Ct. 318, 50 L. ed. 550 (1905) (Plaintiff sought relief in equity for the cutting, carrying away, and conversion of timber. Due to the fact that the defendants had organized themselves into a number of corporations, actions at law in trespass or trover would have been most ineffectual. Nevertheless, equity jurisdiction was denied.).

[4] Even a bona fide purchaser for value acquires no better title than that of the thief-vendor. Saltus & Saltus v. Everett, 20 Wend. 267, 32 Am. Dec. 541 (N. Y. 1838); Phelps v. McQuade, 158 App. Div. 528, 143 N. Y. Supp. 822 (1913).

[5] *Contra:* Anderson, Meyer & Co. v. Fur & Wool Trading Co., 14 F. (2d) 586 (C. C. A. 9th, 1926) (purchaser from a thief held a constructive trustee) adversely criticized (1927) 25 MICH. L. REV. 313.

[6] 3 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) §1045 ("The specific instances in which equity impresses a constructive trust are numberless,—as numberless as the modes by which property may be obtained through bad faith and unconscientious acts.").

[7] Newton v. Porter, 69 N. Y. 133, 25 Am. Rep. 152 (1877) quoted with approval in Preston v. Moore, 133 Tenn. 247, 180 S. W. 320 (1915).

[8] Pioneer Mining Company v. Tyberg, 215 Fed. 501 (C. C. A. 9th, 1914); Aetna Indemnity Co. v. Malone, 88 Neb. 260, 131 N. W. 200 (1911) ("In contriving means to cheat an owner out of his property a thief should not be permitted to outstrip the courts in discovering a remedy to restore it when found."); 3 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) §1051 ("Whenever one person has wrongfully taken the property of another, and converted it into a new form, or transferred it, the trust arises and follows the property or its proceeds."); see Anderson, Meyer & Co. v. Fur and Wool Trading Co., *supra* note 5.

[9] Millard v. Green, 94 Conn. 597, 110 Atl. 177 (1920).

by the courts denying equity jurisdiction on this ground generally boil down to an action for the value of the article stolen or its substitute. When the exact amounts stolen are unknown and when creditors of the defendant are seeking to enforce claims against property to which the defendant, himself, never in good conscience had any just claim, then this remedy at law collapses. In the principal case, for example, an accounting, which can only be had in equity,[10] is necessary. Therefore the summary use of the trust device here is to be commended.

HARRY W. MCGALLIARD.

Wills—Inheritance by Child Adopted After Execution of Adopting Parent's Will.

The testator attached a codicil in order to make provision for an infant adopted subsequent to the execution of the will. A technicality voided the codicil, but the South Carolina Supreme Court construed the statute governing adoption in connection with the statute providing for after-born children to reopen the will and to allow the child to take an intestate share of the estate.[1]

The right of an adopted child to inherit arises solely from statute,[2] as no such right existed at common law.[3] Subject to certain qualifications[4] the adoption statutes make the obligations of the parent to the adopted child the same as would be owed if the child had been born to the adopting parents in lawful wedlock.[5] The adopted child may inherit as a natural child where the foster parent dies intestate.[6] The North Carolina statute expressly prohibits the adopted child

[10] Fur & Wool Trading Co. v. Fox, 245 N. Y. 215, 156 N. E. 670 (1927); note (1928) 37 YALE L. J. 654 (discussion of general problem of thieves as constructive trustees).

[1] Fishburne v. Fishburne, 172 S. E. 426 (S. C. 1934).

[2] In re Rieman's Estate, 123 Kan. 718, 256 Pac. 1004 (1927); Elmer v. Wellbrook, 110 N. J. Eq. 15, 158 Atl. 760 (1932).

[3] Villier v. Watson, 168 Ky. 631, 182 S. W. 869 (1916); In re Powell's Estate, 112 Misc. Rep. 74, 183 N. Y. Supp. 939 (1920); Smith v. Bradford, 51 R. I. 289, 154 Atl. 272 (1931).

[4] For example there is a provision in Ill. and Ohio that the adopted child cannot take property limited to the heirs of the parent's body or from the collateral heirs of the parent [ILL. REV. STAT. (Cahill, 1929) c. 4 §5; OHIO GEN. CODE (Page, 1931) §10512(19)] while there is a provision in Va. that the relatives of the adopted child cannot take his share of the estate if he predeceases the foster parent [VA. CODE ANN. (Michie, 1930) §5333].

[5] Flannigan v. Howard, 200 Ill. 396, 65 N. E. 782 (1902); Bilderbach v. Clark, 106 Kan. 737, 189 Pac. 977 (1920); Kales, *Rights of Adopted Children* (1914) 9 ILL. L. REV. 149.

[6] Fosburg v. Rogers, 114 Mo. 122, 21 S. W. 82 (1893); In re Pepin's Estate, 53 Mont. 240, 163 Pac. 104 (1917).

from sharing in the estate unless the parent dies intestate[7] or unless the will provides for him. A statute in Alabama was construed to have the same effect.[8]

If the child is adopted after the execution of the parent's will, does his right to inherit as a natural child serve to include him within the statutes providing for children "born" after the making of their parent's will? These statutes seem to be of two types. The first provides that a child born after the execution of his parent's will shares as if the parent had died intestate.[9] Following the view that the adopted child has all the rights of a natural child, the majority of the decisions under such statutes have allowed the child adopted after the will was executed to take a child's "intestate" share.[10] The North Carolina statute is of this type, but it does not apply to adopted children because of the peculiar provision of the adoption statute set out above.[11] The second type of statute provides that the birth of a child after the execution of the parent's will voids or revokes it.[12] Some courts permit adoption to substitute for birth as an agency of revocation[13] and the will being thus eliminated the adopted child takes his share in the estate under the intestate succession laws. Other courts, however, deny that adoption has such an effect under these statutes, and hold that the child adopted after the will was made can take no share unless he can find some other means of disposing of the instrument.[14] The liberal or conservative

[7] N. C. CODE ANN. (Michie, 1931) §185.

[8] Russell v. Russell, 84 Ala. 48, 3 So. 900 (1888).

[9] Some thirty-four states have this type of statute. For example: N. Y. DEC. EST. LAW (1909) §26; N. C. CODE ANN. (Michie, 1931) §4169.

[10] Hopkins v. Gifford, 309 Ill. 363, 141 N. E. 178 (1923); Dreyer v. Schrick, 105 Kan. 495, 185 Pac. 30 (1919); In re Rendell's Estate, 244 Mich. 197, 221 N. W. 116 (1928); Bourne v. Dorney, 184 App. Div. 476, 171 N. Y. Supp. 264 (1918); In re Sandon's Will, 123 Wis. 603, 101 N. W. 1089 (1905). *Contra:* Shaver v. Nash, 181 Ark. 1112, 29 S. W. (2d) 298 (1930) (construing the Texas statute); Evans v. Evans, 186 S. W. 815 (Tex. Civ. App. 1916).

[11] *Supra* note 7; Sorrell v. Sorrell, 193 N. C. 439, 137 S. E. 306 (1927).

[12] This type of statute is found in four states. For example: GA. CODE ANN. (Michie, 1926) §3923; LA. CIV. CODE (Dart, 1932) §1705. There is a third type of statute which provides that if a child is living when the will is made and another is subsequently born, the latter shares as if the parent had died intestate, but if no child is living when the will is made the subsequent birth of the issue revokes the will. Some five states have this type of statute. For example: N. J. COMP. STAT. (1910) 5865; TEX. REV. CIV. CODE (Vernon, 1925) art. 8292 and art. 8293.

[13] Hilpire v. Claude, 109 Iowa 159, 80 N. W. 332 (1899); In re Alter's Will, 92 N. J. Eq. 415, 112 Atl. 483 (1921); Surman v. Surman, 22 Ohio 472, 153 N. E. 873 (1925).

[14] Davis v. Fogle, 124 Ind. 41, 23 N. E. 860 (1890); Succession of McRacken, 162 La. 443, 110 So. 645 (1926); In re Boyd's Estate, 270 Pa. 504, 113 Atl. 691 (1921).

nature of the court is the determining factor, since, basically, the statutes are similar. In several states this problem of construction has been removed by the enactment of statutes which expressly provide for the child who is adopted after the foster parent has made his will.[15]

The principal case seems to be directly in line with the majority of the decisions involving similar statutes (first type).[16] Since adoption is a statutory creation, it seems illogical that the adopted child should fit into any group in which the legislature has not placed him. However, the difficulty of the adopted child's qualification as an after-born child is removed when the statute designating the rights of adopted children is construed with the after-born child statute. The relationship of natural birth established by the former statute serves to confer upon the adopted child the privilege granted to natural children by the latter statute. Such a decision is eminently just. It protects the interests of the adopted child while working no injustice upon the other heirs.

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[15] CONN. GEN. STAT. (1930) §4880; OHIO GEN. CODE (Page, 1931) §10504-49; PA. STAT. ANN. (Purdon, 1930) tit. 20, §273.
[16] *Supra* note 10.