UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 16 | Number 1 Article 7

12-1-1937

Notes and Comments

North Carolina Law Review

versity of Minnesota, has for the past thirteen years been engaged in the practice of law in Minneapolis and in the part-time teaching of Business Law at the University of Minnesota.

Miss Margaret E. Hall, Assistant Law Librarian, has resigned to become a member of the library staff at the Columbia University Law School. She has been succeeded for this year by Mrs. Ben Gray Lumpkin, Law Librarian of the University of Mississippi.

Associate Professor Frank W. Hanft has been promoted to a full professorship.

Visiting professors during the summer session of 1937 included: Professors Charles T. McCormick, of Northwestern University; Walter Wheeler Cook, of Northwestern University; James H. Chadbourn, of the University of Pennsylvania; and Wesley A. Sturges, of Yale University.

NOTES AND COMMENTS

Charities—Gifts to Enforce Prohibition Laws.

Testator in 1933 left a will providing: "$1,000 to any organization which may be organized for the purpose of enforcing the prohibition laws in Gaston County." After testator's death plaintiff corporation was organized for the above specified purpose with the express power to receive bequests. In an action against the executors the bequest was held void whether considered as a gift or as a charitable trust.[1]

Gifts to aid in prohibiting or minimizing the manufacture, sale, or use of intoxicating liquors, or to teach the evils of liquor, have been held to constitute charitable trusts.[2] It is no objection to their validity that the state may have the responsibility for doing what the trustee is directed to do.[3] They further either an educational purpose or one beneficial to the welfare of the community.[4]

[1] Dry Forces, Inc. v. Wilkins, 211 N. C. 560, 191 S. E. 8 (1937).

[2] Haines v. Allen, 78 Ind. 100, 41 Am. Rep. 555 (1881); Bowditch v. Att'y Gen., 241 Mass. 168, 134 N. E. 796 (1922). For collections of similar cases see: Notes (1922) 21 A. L. R. 951, 952; (1931) 73 A. L. R. 1361; ZOLLMAN, AMERICAN LAW OF CHARITIES (1924) §272.

[3] Humphrey v. Board of Trustees, 203 N. C. 201, 165 S. E. 547 (1932), (1933) 11 N. C. L. REV. 179.

[4] "A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or restraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature." Jackson v. Phillips, 14 Allen 539, 556 (Mass. 1867). Quoted with approval in Barden v. Atlantic Coast Line Ry., 152 N. C. 318, 327, 67 S. E. 971, 975 (1910).

A charitable trust is not defective because the gift is made to a corporation not in existence at the time of the testator's death, if such corporation is actually created within a reasonable time thereafter.[5] There are two classes of gifts falling into this category. One is a gift to an organization not even informally in existence at the date of the will. Thus, where there was a bequest to the German Red Cross Society for the relief, use, and benefit of widows, orphans, and invalids, and no such organization was functioning at the testator's death, the bequest was held to create a valid charitable gift to such an organization when it was created two years later.[6] The other is a gift to an unincorporated association which is later incorporated,[7] *e.g.*, to the Denver Foundation for the benefit of the needy people of Denver,[8] or to the Council at Narragansett Pier, Rhode Island, of the Boy Scouts of America to aid in carrying on its work.[9] In both types of instances the courts have endeavored to carry out the intent of the testator.

A trust will not be allowed to fail for lack of a trustee,[10] or for failure to use technical language expressing a trust purpose,[11] if it is otherwise clear that a trust was intended.[12] This intent will be found where the object as expressed is not opposed to the provisions or the policy of the law,[13] would be valuable educationally, would reasonably tend to promote the general welfare of the community, and could be best administered through the trust device. In such instances a charitable

[5] Keith v. Scales, 124 N. C. 497, 32 S. E. 809 (1899) (to the Moravian church of Salem for a church and school); *In re* Durham's Estate, 203 Iowa 497, 211 N. W. 358 (1926) (to the Original Chapter of the Salvation Army located in Council Bluffs, Iowa); *In re* Rahn's Estate, 316 Mo. 492, 291 S. W. 120, 51 A. L. R. 877 (1927) (German Red Cross case discussed in text); RESTATEMENT, TRUSTS (1935) §401, comment *k*; ZOLLMAN, AMERICAN LAW OF CHARITIES (1924) §§345, 346.

[6] *In re* Rahn's Estate, 316 Mo. 492, 291 S. W. 120 (1927).

[7] ZOLLMAN, AMERICAN LAW OF CHARITIES (1924) §347.

[8] Jeffreys v. Trust Co., 97 Colo. 188, 48 P. (2d) 1019 (1935), (1935) 8 ROCKY MT. L. REV. 159 (1935).

[9] Tillinghast v. Council at Narrangansett Pier, 47 R. I. 406, 133 Atl. 662 (1926), 46 A. L. R. 827 (1927).

[10] N. C. CODE ANN. (Michie, 1935) §§4023, 4035(a); State v. Gerard, 37 N. C. 210 (1842); Goodrum v. Goodrum, 43 N. C. 313 (1852); Keith v. Scales, 124 N. C. 497, 32 S. E. 809 (1899); Church v. Trustees, 158 N. C. 119, 73 S. E. 810 (1912); Benevolent Society v. Orrell, 195 N. C. 405, 142 S. E. 493 (1928) (a trustee may be appointed either by virtue of the statute or by the superior court in the exercise of its equitable jurisdiction); RESTATEMENT, TRUSTS (1935) §397 (will not fail for want of trustee unless settlor manifests an intention that trust shall not arise unless person named acts as trustee); 2 BOGERT, TRUSTS AND TRUSTEES (1935) §328, n. 21; ZOLLMAN, AMERICAN LAW OF CHARITIES (1924) §459, n. 17; Note (1920) 5 A. L. R. 315.

[11] Benevolent Society v. Orrell, 195 N. C. 405, 142 S. E. 493 (1928); RESTATEMENT, TRUSTS (1935) §351, comment *b*; ZOLLMAN, AMERICAN LAW OF CHARITIES (1924) §462.

[12] RESTATEMENT, TRUSTS (1935) §351; 2 BOGERT, TRUSTS AND TRUSTEES (1935) §324.

[13] Trust Co. v. Ogburn, 181 N. C. 324, 107 S. E. 238 (1921), (1922) 1 N. C. L. REV. 41.

trust would seem more nearly to comply with the testator's intention than an absolute gift.[14]

It is axiomatic that the beneficiaries of a charitable trust must be incapable of definite ascertainment.[15] The objects and purposes, however, must be sufficiently concrete to enable the court to frame a decree and to supervise the trust.[16] That is not to say, however, that the trustee may not be given discretion to choose the methods and persons through which the charitable purpose or object is to be effectuated.[17] Decisions to the contrary[18] in North Carolina have been in effect overruled by the statute[19] enacted in 1925. This statute also extends the area within which the trustee may be given the choice, from one marked by the word "charitable" used as a technical word of art, to one which shall include "benevolent uses."[20] And it establishes a public policy in favor of the liberal construction of "religious, educational, charitable or benevolent uses," by providing that "no gift, grant, bequest or devise, whether in trust or otherwise," to such uses, "shall be invalid by reason of any indefiniteness or uncertainty of the object or beneficiaries of such trust, or because said instrument confers upon the trustee . . . discretionary powers in the selection and designation of the objects or beneficiaries . . . or in carrying out the purpose thereof."[21]

[14] *Cf.* St. James Parish v. Bagley, 138 N. C. 384, 50 S. E. 841 (1905) (to church corporation for home for widows and orphans or other religious and charitable purposes).

[15] RESTATEMENT, TRUSTS (1935) §§364, 375 (a trust is not a charitable trust if the persons who are to benefit are not of a sufficiently large or indefinite class so that the community as a whole is interested in the enforcement of the trust); ZOLLMAN, AMERICAN LAW OF CHARITIES (1924) §353, n. 7 (the greatest of all solecisms in law, morals, or religion is the supposition of a charity to individuals personally known and selected by the giver); see 2 BOGERT, TRUSTS AND TRUSTEES (1935) §362.

[16] Haywood v. Craven's Ex'rs, 4 N. C. 360 (1816); White v. University, 39 N. C. 19 (1845); Miller v. Atkinson, 63 N. C. 537 (1869); Trust Co. v. Ogburn, 181 N. C. 324, 107 S. E. 238 (1921); ZOLLMAN, AMERICAN LAW OF CHARITIES (1924) §356.

[17] ZOLLMAN, AMERICAN LAW OF CHARITIES (1924) §§434, 435.

[18] Holland v. Peck, 37 N. C. 255 (1842) (to the Methodist Episcopal Church to be disposed of by members of the conference as they shall in their Godly wisdom judge will be most beneficial for the increase or prosperity of the gospel); Hester v. Hester, 37 N. C. 330 (1842) (to some promising young man of good talents and of the Baptist Order, at the discretion of my executors); Thomas v. Clay, 187 N. C. 778, 122 S. E. 852 (1924) (to my trustee to be invested by him in such worthy objects of charity as he determine upon as being in accord with what "my wishes and tastes in that direction were when living").

[19] N. C. CODE ANN. (Michie, 1935) §4035(a); Legis. (1926) 4 N. C. L. REV. 15.

[20] Morice v. Bishop of Durham, 10 Ves. 521 (1805); *In re* Cunningham's Will, 206 N. Y. 601, 100 N. E. 437 (1912) (effect of similar statute in New York); ZOLLMAN, AMERICAN LAW OF CHARITIES (1924) §§54, 55, 56, 401.

[21] Although four cases prior to the principal case, have referred to the statute since its enactment, none of them has indicated its effect upon the law of charities. Benevolent Society v. Orrell, 195 N. C. 405, 142 S. E. 493 (1928); Hass v. Hass, 195 N. C. 734, 143 S. E. 541 (1928); Whitsett v. Clapp, 200 N. C. 647, 158 S. E. 183 (1931); Humphrey v. Board of Trustees, 203 N. C. 201, 165 S. E. 547 (1932), (1933) 11 N. C. L. REV. 179. It is believed that the statement in (1926) 4 N. C. L. REV. 15, to the effect that the statute was intended to establish *Cy Pres* in North Carolina, is erroneous.

In the principal case the view that a gift and not a trust was intended is perhaps justified by the fact that if a trust were intended only the income on the $1,000 would be available for the use specified, and such income would be a negligible amount; whereas if a gift were intended, the full $1,000 would be available. However, the court discusses at length the validity of the bequest as a trust, and indicates that it is void as such. In so doing in the light of the considerations mentioned in the foregoing discussion, the court unnecessarily confuses the law of charitable trusts in North Carolina. The statute of 1925 and its effects upon the earlier decisions relied on are not mentioned. The opinion gives the impression that it is still legally impossible for the trustee of an otherwise valid charitable trust in this state to be given discretionary powers to select the particular objects and individuals to be benefitted. And it betrays unawareness of the extent to which the courts may, upon contests such as that in the principal case, or upon a petition for instructions, or at the suit of the Attorney General, supervise the administration by the charitable trustee.[22]

WM. R. DAWES.

Criminal Law—Evidence—Admissibility of Evidence of a Collateral Offense of Defendant to Prove the Offense Charged.

D was indicted with state's witness for conspiracy to rob by means of assault with firearms or other dangerous weapons, and for robbery in pursuance of the conspiracy. As proof of the conspiracy the lower court admitted in evidence testimony that a week after the alleged robbery state's witness and *D* conspired to burn, and did burn, an automobile to defraud an insurance company. This evidence was admitted to show identity and guilty knowledge,[1] and the Supreme Court affirmed the lower court ruling.[2]

It is the general rule that a particular crime cannot be proved by evidence of a distinct, substantive, unconnected collateral offense.[3] The strict application of this rule is obviously desirable. Not only does evidence of other crimes committed by *D* tend to prejudice and mislead the jury, but also *D* might be taken by surprise and be unprepared to answer the accusation, if innocent, or, if guilty, be unable to mitigate its effect upon the outcome of the trial for the offense charged in the

[22] N. C. CODE ANN. (Michie, 1935) §§4033, 4034; Tillinghast v. Council at Narragansett Pier, 47 R. I. 406, 133 Atl. 662, 46 A. L. R. 827 (1927) (court set up a trust until council incorporated).

[1] Record on Appeal, pp. 57, 351, State v. Flowers, 211 N. C. 721, 192 S. E. 110 (1937).

[2] State v. Flowers, 211 N. C. 721, 192 S. E. 110 (1937).

[3] People v. Molyneaux, 168 N. Y. 264, 61 N. E. 286 (1901), 62 L. R. A. 193 (1904).

indictment.[4] There are, however, certain well recognized exceptions to this general rule. If a collateral offense of *D* will tend to show guilty knowledge, intent, identity, malice or motive, plan or design, or if the collateral offense is part of the *res gestae* of the crime charged, evidence of the collateral crime is admissible.[5] In all cases, however, there must be a sufficient connection between the two crimes so that evidence of the collateral crime will tend to establish *D*'s guilt of the one charged.[6] The North Carolina Court follows the general rule and its exceptions.[7]

[4] State v. Beam, 184 N. C. 730, 115 S. E. 176 (1922).

[5] See note 3, *supra;* 1 WIGMORE, EVIDENCE (2d ed. 1923) §§300-306.

[6] See cases cited *infra* note 7. Each of these cases supports this statement either expressly or impliedly.

[7] A—Evidence of a collateral offense by *D* has been held inadmissible:

State v. Shuford, 69 N. C. 486 (1873) (where in a trial of *D* for murder of her newly born baby evidence of a similar previous offense was offered); State v. Norton, 82 N. C. 629 (1880) (where in a trial of *D* for assault and battery, supposedly with a pistol, evidence that two weeks prior *D* had exhibited a pistol, and made threatening remarks about prosecuting witness, was offered); State v. Jeffries, 117 N. C. 727, 23 S. E. 163 (1895) (where *D* was tried for pledging a bicycle already covered by a mortgage, and evidence was offered that he attempted to pledge a wagon, five months later, also covered by the same mortgage); State v. Frazier, 118 N. C. 1257, 24 S. E. 520 (1896) (where in a trial of *D* for larceny of money he had given prosecutrix, evidence was introduced that he had previously seduced prosecutrix, as it was not shown that the money had been given to her because of the seduction); State v. Graham, 121 N. C. 623, 28 S. E. 409 (1897) (where in a trial of *D* for burning his lessor's house, after taking out insurance on the furniture therein, evidence of a similar previous offense was offered); State v. Beam, 184 N. C. 730, 115 S. E. 176 (1922) (where in a trial of *D* for selling liquor evidence that *D* had sold liquor eleven years before was offered); State v. Smith, 204 N. C. 638, 169 S. E. 230 (1933) (where in a trial for breaking into a store and stealing therefrom evidence was offered that a store in another county, but belonging to the same people, was broken into, and goods found in *D*'s place seemed to be those taken from the stores); State v. Jordan, 207 N. C. 460, 177 S. E. 333 (1934) (where in a trial of *D* for knowingly receiving stolen goods evidence was offered that *D* sold liquor).

B—Evidence of a collateral offense has been held inadmissible because of lack of connection between *D* and the collateral offense:

State v. Freeman, 49 N. C. 5 (1856) (where in a trial of a servant for setting a house on fire evidence was offered of two previous fires with which *D* was not shown to be connected); State v. Alston, 94 N. C. 930 (1886) (where in a trial of *D* for burning a barn evidence merely intimating that *D* was connected with another barn fire was offered); State v. McCall, 131 N. C. 798, 42 S. E. 894 (1902) (where in a trial of *D* for burning a church evidence was offered concerning the burning of a mill by *D*'s father just previously); State v. Fowler, 172 N. C. 905, 90 S. E. 408 (1916) (where on a charge of breaking into a building and stealing therefrom evidence of other similar crimes in the same neighborhood was offered, but no connection was shown between *D* and the other crimes); State v. Deadmon, 195 N. C. 705, 143 S. E. 514 (1928) (where in a trial of *D* for burning a barn to collect insurance evidence was offered that another barn of *D*'s had burned).

C—Evidence of a collateral offense by *D* has been held admissible as part of the *res gestae:*

State v. Murphy, 84 N. C. 742 (1881) (where in a trial of *D* for stealing prosecutor's pig evidence was offered that someone else found his stolen pig in *D*'s pen at the time prosecuting witness found his there); State v. Mace, 118 N. C. 1244, 24 S. E. 798 (1896) (where in a trial of *D*

for murder evidence was offered that *D* prevented witness from notifying deceased's family by means of an assault with a gun); State v. Adams, 138 N. C. 688, 50 S. E. 765 (1905) (where *D* was tried for murder and evidence was offered of serious injury inflicted on deceased's children at the same time).

D—Evidence of a collateral offense by *D* has been held admissible to show intent:

State v. Parrish, 104 N. C. 679, 10 S. E. 457 (1889) (where *D* was indicted for rape of his daughter and evidence of previous forcible intercourse was introduced); State v. Register, 133 N. C. 747, 46 S. E. 21 (1903) (where in a trial for murder committed in an alleged attempt to rob evidence of the conspiracy to rob was offered); State v. Hight, 150 N. C. 817, 63 S. E. 1043 (1909) (where *D* was tried for embezzlement of watches and evidence of similar offenses over a period of the preceding two years was offered); State v. Plyler, 153 N. C. 630, 69 S. E. 269 (1910) (where in a trial of *D* for murder evidence that he had shortly before shot at deceased was offered. The court held this was admissible to show *motive.*); State v. Boynton, 155 N. C. 456, 71 S. E. 341 (1911) (where in a trial of *D* for selling liquor evidence that he habitually kept liquor on hand for purpose of sale was offered); State v. Leak, 156 N. C. 643, 72 S. E. 567 (1911) (where *D* was tried for assault with intent to rape and evidence of another assault on prosecuting witness, on the same day, was offered); Gray v. Cartwright, 174 N. C. 49, 93 S. E. 432 (1917) (where in a trial of *D* for malicious prosecution of *P* for stealing a cow evidence of other thefts of cattle by *P* was offered); State v. Simons, 178 N. C. 679, 100 S. E. 239 (1919) (discussed in body of comment); State v. Stancill, 178 N. C. 683, 100 S. E. 241 (1919) (discussed in body of comment); State v. Haywood, 182 N. C. 815, 108 S. E. 726 (1921) (where on indictment for keeping liquor for purpose of sale evidence of previous sales of liquor was offered); State v. Crouse, 182 N. C. 835, 108 S. E. 911 (1921) (where in a trial of *D* for possession of liquor for purpose of sale evidence that a still, which had been worked the preceding night, was found ninety days prior on *D*'s land was offered); State v. Pannil, 182 N. C. 838, 109 S. E. 1 (1921) (where in a trial of *D* for stealing oats, and receiving same, evidence that other stolen goods from prosecutor's place were found in *D*'s place was offered); State v. Dail, 191 N. C. 231, 131 S. E. 573 (1926) (where in a trial of *D* for stealing an auto, and receiving same with felonious intent, evidence that the car was used by *D* and his friends, who were staying at his home, in preconceived burglaries was offered); State v. Hardy, 209 N. C. 83, 182 S. E. 831 (1935) (where *D* was tried for receiving, possessing, and transporting liquor for the purpose of sale, and evidence that liquor was found in a previous search of *D*'s premises was offered); State v. Batts, 210 N. C. 659, 188 S. E. 99 (1936) (discussed in body of comment).

E—Evidence of a collateral offense by *D* has been held admissible to show system or design:

State v. Wilkerson, 98 N. C. 696, 3 S. E. 683 (1897) (where *D*, a county official, was tried for wrongfully obtaining money from the county for a pauper, and evidence that *D* continued to get the money after the pauper had moved out of the county and had died was offered); State v. Hight, 150 N. C. 817, 63 S. E. 1043 (1909) (facts given *supra* D); State v. Winner, 153 N. C. 602, 69 S. E. 9 (1910) (where in a trial of *D* for selling liquor evidence of other sales in the same place in a similar manner was offered); State v. Stancill, 178 N. C. 683, 100 S. E. 241 (1919) (discussed in body of comment).

F—Evidence of a collateral offense has been held admissible to show identity:

These cases are discussed in the body of the comment.

G—Evidence of a collateral offense has been held admissible to show guilty knowledge:

State v. Twitty, 9 N. C. 248 (1822) (where in trial of *D* for passing counterfeit money evidence of previous possession of counterfeit bills on many occasions was offered); State v. Murphy, 84 N. C. 742 (1881) (facts given *supra* C); State v. Wilkerson, 98 N. C. 696, 3 S. E. 683 (1887) (facts given *supra* E); State v. Walton, 114 N. C. 783, 18 S. E. 945 (1894) (where in a trial of *D* for obtaining money under false pre-

In the opinion in the principal case the general rule with its exceptions is set forth, and then the Court merely holds[8] that the evidence of the state "comes well within the exceptions to the general rule, as recognized and applied in *State v. Batts* . . .,[9] *State v. Ray* . . .,[10] *State v. Stancill* . . .,[11] *State v. Simons*. . . ."[12] The Court does not indicate under which exception(s) the evidence is admitted, but a reference to the lower court record shows that the evidence was admitted to show identity and guilty knowledge in the conspiracy charge.[13] It is difficult to see just how the question of guilty knowledge is involved, because if *D* were shown to have conspired to rob it would be unnecessary to prove that he knew of the wrongful nature of the act. Use of the term "guilty knowledge" seems to have been a terminological slip on the part of the Court, and in all probability the testimony was allowed only to show the identity of the *D* as one of the conspirators.

However, the above-mentioned cases on which the Court relied for its holding do not seem to support the Court's decision. In *State v. Batts*[14] *D* was tried for criminal conspiracy to wreck and damage his automobile with intent to defraud an insurance company. Evidence that a witness had seen *D* deliberately damage another of his automobiles and put in a claim therefor was held admissible on the question of intent. In *State v. Ray*,[15] wherein *D* was charged with knowingly receiving stolen cigarettes, evidence was admitted to show that shortly before and after the transaction charged in the indictment *D* received other stolen cigarettes. This evidence was held competent to show

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tenses evidence of other similar offenses was offered); State v. Winner, 153 N. C. 602, 69 S. E. 9 (1910) (facts given *supra* E); State v. Boynton, 155 N. C. 456, 71 S. E. 341 (1911) (facts given *supra* D); Greensboro Life Ins. Co. v. Knight, 160 N. C. 592, 76 S. E. 623 (1912) (where in a trial of *D*, an insurance agent, for fraudulent misrepresentation, evidence that he had made the same representations to others was offered. Apparently there was no prior indictable offense, yet in admitting the evidence the court treated the problem as if there were.); State v. Mincher, 178 N. C. 698, 100 S. E. 339 (1919) (where in a trial of a prison guard for receiving stolen goods from a "trusty" under his supervision evidence was offered that *D* allowed the "trusty" to overstay his leave, that the "trusty" stole the goods, and that *D* subscribed to a newspaper which carried the story and description of the stolen articles. Again apparently there was no prior indictable offense, yet in admitting the evidence the court treated the problem as if there were.); State v. Dail, 191 N. C. 231, 131 S. E. 573 (1926) (facts given *supra* D); State v. Hildebran, 201 N. C. 780, 161 S. E. 488 (1931) (where in a trial of *D* for conducting a bawdy house evidence that the inmates had previously been lewd and boisterous in their actions was offered); State v. Ray, 209 N. C. 772, 184 S. E. 836 (1936) (discussed in body of comment).

[8] State v. Flowers, 211 N. C. 721, 724, 192 S. E. 110, 112 (1937).

[9] 210 N. C. 659, 188 S. E. 99 (1936).

[10] 209 N. C. 772, 184 S. E. 836 (1936).

[11] 178 N. C. 683, 100 S. E. 241 (1919).

[12] 178 N. C. 679, 100 S. E. 239 (1919).

[13] Record on Appeal, pp. 57, 351, State v. Flowers, 211 N. C. 721, 192 S. E. 110 (1937).

[14] See note 9, *supra*.

[15] See note 10, *supra*.

guilty knowledge. In *State v. Stancill*[16] *D* was tried for stealing tobacco, and evidence that he had previously stolen tobacco in the same neighborhood was admitted to prove intent and design or plan. In *State v. Simons*[17] *D* was indicted for having whiskey for sale in violation of law. Evidence that about a month later *D* was caught working on a new still was held admissible to show intent. In not one of the above cases is the question of identity involved. In each of these cases there was no question about *D*'s having done the acts involved in both the collateral offense and the offense charged, and the only question was the intention or state of mind of the accused at the time of the crime charged. This differs from the principal case in which the evidence of the collateral crime was for the purpose of proving that *D* was connected or identified with the crime charged, and because of this difference, cases under the exceptions for intent and guilty knowledge do not logically support cases involving the exception for identity.

In those North Carolina cases which have dealt with the admissibility of evidence of another distinct offense to prove identity there has been a fairly obvious connection between the collateral crime and the one charged which indicated strongly that if *D* were engaged in the commission of the collateral crime he was also involved in the one charged. This connection is illustrated in the following situations: (1) In the trial of *D* for setting fire to an outhouse evidence that a dwelling house fifteen feet away was fired at the same time, in the same manner, and by faggots bound with *D*'s rope, was held admissible.[18] (2) In a trial of *D* for breaking and entering a house and stealing therefrom, evidence of the possession of the stolen goods soon after the robbery was held admissible.[19] (3) Evidence was admitted, in a trial of *D*'s for burning a barn, that their footprints led from the barn to the site of a mill fire which occurred the same night, and with which the *D*'s were connected by other evidence.[20] (4) In a trial of *D* for secret assault evidence was admitted that a short time prior to the offense charged *D* had shot at the prosecuting witness' home, and had threatened to shoot the prosecuting witness.[21] (5) In a trial of *D* for murder, committed in the course of a robbery, evidence that *D* had previously ridden around often with those known to have been involved, and had committed several robberies with them, was held competent.[22]

In the principal case the connection between the collateral offense and the one charged is not as strong, and the relevancy is questionable. The two conspiracies are so fundamentally different that evidence of

[16] See note 11, *supra*. [17] See note 12, *supra*.
[18] State v. Thompson, 97 N. C. 496, 1 S. E. 921 (1887).
[19] State v. Weaver, 104 N. C. 758, 10 S. E. 486 (1889); State v. Hullen, 133 N. C. 656, 45 S. E. 513 (1903).
[20] State v. Griffith, 185 N. C. 756, 117 S. E. 586 (1923).
[21] State v. Miller, 189 N. C. 695, 128 S. E. 1 (1925).
[22] State v. Ferrell, 205 N. C. 640, 172 S. E. 186 (1933).

complicity in one is extremely weak evidence of identity with the other. The principal case, then, is apparently unsupported by the cases cited by the court, and seems definitely out of line with prior decisions involving the use of testimony as to other offenses to prove identity.

JOSEPH M. KITTNER.

Declaratory Judgments—Insurance.

Plaintiff, insurer, issued life policies to defendant, the insured, providing for waiver of premiums and payment of benefits in the event of the insured's becoming disabled. Having refused to allow repeated claims for disability benefits, the insurer sought declaratory relief in a federal court to the effect that the insured was not disabled and that the policies were void for non-payment of premiums. *Held,* by the Supreme Court, the Federal Declaratory Judgment Act[1] is constitutional, and a controversy was presented in which the insurer was entitled to declaratory relief.[2]

In spite of three adverse Supreme Court dicta,[3] it has been assumed generally that the Federal Declaratory Judgment Act, if invoked in an actual controversy,[4] is valid. This assumption has found support in numerous decisions of state courts sustaining similar legislation,[5] in the Supreme Court's apparent change of attitude in *Nashville, Chattanooga, and St. Louis Ry. v. Wallace,*[6] and in favorable decisions in the lower federal courts.[7] The principal case is, however, the first square holding by the Supreme Court that the Federal Act is constitutional. The decision is equally significant as an indication of the increasing utility of the declaratory judgment in insurance cases.[8]

[1] 48 STAT. 955 (1934) as amended 49 STAT. 1027 (1935), 28 U. S. C. A. §400 (Supp. 1936). Compare with North Carolina Declaratory Judgment Act, N. C. CODE ANN. (Michie, 1935) §628.

[2] Aetna Life Ins. Co. v. Haworth, 300 U. S. 227, 57 Sup. Ct. 461, 81 L. ed. Adv. Ops. 394 (1937).

[3] Liberty Warehouse Co. v. Grannis, 273 U. S. 70, 47 Sup. Ct. 282, 71 L. ed. 541 (1927); Liberty Warehouse Co. v. Burley Tobacco Growers' Coöperative Marketing Ass'n, 276 U. S. 71, 88, 48 Sup. Ct. 291, 294, 72 L. ed. 473, 479 (1928); Willing v. Chicago Auditorium Ass'n, 277 U. S. 274, 289, 48 Sup. Ct. 507, 509, 72 L. ed. 880, 884 (1928). Cases criticized, Borchard, *The Supreme Court and the Declaratory Judgment* (1928) 14 A. B. A. J. 633, 635.

[4] U. S. CONST. Art. III, §2; Muskrat v. United States, 219 U. S. 346, 31 Sup. Ct. 250, 55 L. ed. 246 (1911). The Federal Act, cited *supra* note 1, limits the power to grant declaratory judgments to "cases of actual controversy."

[5] State v. Grove, 109 Kan. 619, 201 Pac. 82 (1921); Board of Education v. Van Zandt, 119 Misc. 124, 195 N. Y. Supp. 297 (1922); Carolina Power and Light Co. v. Iseley, 203 N. C. 811, 167 S. E. 56 (1933); Petition of Kariher, 284 Pa. 455, 131 Atl. 265 (1925).

[6] 288 U. S. 249, 264, 53 Sup. Ct. 345, 348, 77 L. ed. 730, 736 (1933) (declaratory judgment under Tennessee Statute held to be entitled to review in the Supreme Court).

[7] Commercial Casualty Co. v. Plummer, 13 F. Supp. 169 (S. D. Tex. 1935); Gully v. Interstate Natural Gas Co., 82 F. (2d) 145 (C. C. A. 5th, 1936).

[8] For a more extended treatment of the declaratory judgment and the insurance contract see: Morrison, *Availability of the Federal Declaratory Judgment Act for Life Insurance Cases* (1937) 23 A. B. A. J. 788; comment (1936) 46 YALE L. J. 286.

An insurance policy may be invalid because of fraud or misrepresentation in its procurement, or it may lapse for breach of conditions or non-payment of premiums. Whatever the cause of the policy's becoming inoperative, where there is a dispute between insurer and insured as to its validity, it is to the advantage of the insurer to secure a final adjudication of the dispute as soon as possible. The insurer may notify the insured of the rescission of the policy, but if the insured denies the insurer's right to rescind and there is any doubt about the matter, the insurer is forced to maintain reserves to cover the policy until its action has been upheld by the courts. In the principal case the policies would continue in force under the waiver clause, in spite of failure to pay the premiums, if the insured were actually disabled. But the insured delayed bringing suit for disability benefits, and the question of his disability remained undetermined. Although the Statute of Limitations would begin to run against the insured as to the disability benefits, it would not operate against the beneficiary until the latter's cause of action should accrue upon the death of the insured. The insured might not die until twenty or thirty years later, and at his death the beneficiary might bring an action on the policy, prove that the insured was disabled, that payment of premiums was unnecessary, and thus recover from the insurer. Throughout those years the insurer would have to set aside reserves to cover the policy and, unless permitted to take the initiative in bringing the controversy before the courts, would have to await passively an action by the other parties. Meanwhile many of its important witnesses might die or disappear and the memory of those remaining would be dimmed by the passage of time,[9] with the result that its defenses would become materially weakened.[10]

Before the enactment of declaratory judgment statutes the remedy of the insurer was the bill in equity for cancellation. But equitable relief was available only when the remedy at law was inadequate.[11] In order to show this inadequacy it was not sufficient to prove fraud or misrepresentation in procurement of the policy[12] or that the insured

[9] The insurer might be protected to some extent by a bill to perpetuate testimony or its equivalent under the codes. N. C. CODE ANN. (Michie, 1938) §1822(1)-(4); MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE (1929) §985; WALSH, EQUITY (1930) §116.

[10] An even more serious dilemma is presented by the disputed policy when it has been issued by a mutual company, in which the policy-holder is entitled to a voice in the management and a share in the profits. Until disputes of this kind are adjudicated there is a problem as to which policy-holders are entitled to vote in elections and share in the surplus of the company.

[11] Note (1935) 97 A. L. R. 572.

[12] Phoenix Mutual Life Ins. Co. v. Bailey, 13 Wallace 616, 20 L. ed. 501 (1871); Cable v. United States Life Ins. Co., 191 U. S. 288, 24 Sup. Ct. 74, 48 L. ed. 188 (1903); Aetna Life Ins. Co. v. Smith, 73 Fed. 318 (C. C. E. D. N. C. 1896); N. Y. Life Ins. Co. v. Miller, 73 F. (2d) 350 (C. C. A. 8th, 1934); Globe Mutual Life Ins. Co. v. Reals, 79 N. Y. 202 (1879). *Contra:* John Hancock Mutual Life Ins. Co. v. Dick, 114 Mich. 337, 72 N. W. 179 (1897). Cancellation has also been

had defaulted in payment of premiums.[13] It was necessary, in addition, to prove special circumstances under which the insurer would suffer not merely inconvenience but irreparable injury if left to its defenses.[14] Such circumstances could be proved by showing that the policy contained an incontestable clause,[15] for unless the insurer were allowed to sue in equity before the expiration of the contestable period he would be in danger of losing forever his right to contest upon grounds covered by the clause. The incontestable clause does not apply where the policy is contested for non-payment of premiums or breach of condition subsequent, and in such cases the presence of the clause in the policy does not make the remedy at law inadequate.

Insurance companies have sought to obtain through the declaratory judgment a more complete remedy than that afforded by the bill to cancel. The declaratory judgment provides a speedy and effective method of determining whether insurance policies are valid and operative by allowing the insurer to take the initiative in obtaining an adjudication of the issues. Policy-holders and beneficiaries have no legitimate complaint against its use since the right of jury trial upon questions of fact is specifically provided.[16] The public, as well as the insurer, has a vital interest in the efficient management of insurance companies, and both should benefit by the elimination of uncertainty and delay. In deciding upon the applicability of the declaratory judgment to suits by the insurer to determine its liability upon a policy, courts have been faced with three problems: (1) whether such a suit presents an actual controversy, (2) whether a declaration of immunity from liability is a declaration of "rights and other legal relations,"[17] and (3) whether the availability of another remedy precludes declaratory relief.

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refused on the grounds of an adequate remedy at law in Griesa v. Mutual Life Ins. Co., 169 Fed. 509 (C. C. A. 8th, 1909) (where insured committed suicide) and in Imperial Fire Ins. Co. v. Gunning, 81 Ill. 236 (1876) (where policy-holder set fire to insured property).

[13] Bank Savings Life Ins. Co. v. Wood, 122 Kan. 831, 253 Pac. 431 (1927); Globe Mutual Life Ins. Co. v. Reals, 79 N. Y. 202 (1879).

[14] The danger of loss of testimony is not sufficient to make the remedy at law inadequate. Aetna Life Ins. Co. v. Smith, 73 Fed. 318 (C. C. E. D. N. C. 1896); Nat. Life and Accident Ins. Co. v. Propst, 219 Ala. 437, 122 So. 656 (1929); Town of Venice v. Woodruff, 62 N. Y. 462 (1875) (action by municipality to cancel bonds); Globe Mutual Life Ins. Co. v. Reals, 79 N. Y. 202 (1879). *Contra:* Conn. Mutual Life Ins. Co. v. Home Ins. Co., 6 Fed. Cas. No. 3,107 (C. C. D. Conn. 1879).

[15] N. Y. Life Ins. Co. v. Seymour, 45 F. (2d) 47 (C. C. A. 6th, 1930); N. Y. Life Ins. Co. v. Rigas, 117 Conn. 437, 168 Atl. 22 (1933); Travelers' Ins. Co. v. Snydecker, 127 Misc. 66, 215 N. Y. Supp. 277 (1926); see Am. Trust Co. v. Life Ins. Co. of Va., 173 N. C. 558, 567, 92 S. E. 706, 711; note (1931) 73 A. L. R. 1529.

[16] 48 STAT. 955 (1934) as amended 49 STAT. 1027 (1935), 28 U. S. C. A. §400 (3) (Supp. 1936).

[17] 48 STAT. 955 (1934) as amended 49 STAT. 1027 (1935), 28 U. S. C. A. §400 (1) (Supp. 1936).

The principal case decides that in such suits an actual controversy exists and that a declaration of non-liability is a declaration of "rights and other legal relations." The third problem has caused the greatest confusion among the state and lower federal courts. A number of courts have applied equity rules to petitions for declaratory judgments, refusing relief where there is a so-called adequate remedy at law,[18] and requiring the insurer to wait and defend a future suit. Other courts, taking a more practical view of the situation, have refused to apply such a restriction.[19] The provision in the statute for declarations "whether or not further relief is or could be prayed"[20] and the result in the principal case, although the issue was not raised, would seem to indicate that the existence of another remedy is no absolute bar. Although the availability of another remedy should not, as a matter of law, automatically bar a declaratory judgment, the fact of its existence may be properly considered by the court in determining whether, in the exercise of its sound discretion, it should refuse declaratory relief. In *Aetna Casualty and Surety Co. v. Quarles*,[21] the insurer asked for a declaration that it was not liable to a judgment creditor of the insured, holder of an automobile liability policy. A suit by the judgment creditor against the insurer, as provided in the policy, was already pending. The Fourth Circuit Court of Appeals held a refusal to grant a declaratory judgment under the circumstances to be a proper exercise of judicial discretion.

The extent of the courts' discretion to refuse relief under the Fed-

[18] Western Casualty and Surety Co. v. Beverforden, 17 F. Supp. 928 (W. D. Mo. 1936); Columbia Nat. Life Ins. Co. v. Foulke, 13 F. Supp. 350 (W. D. Mo. 1936), *rev'd*, 89 F. (2d) 261 (C. C. A. 8th, 1937); Associated Indemnity Corp. v. Manning, 16 F. Supp. 430 (W. D. Wash. 1936) *semble;* Brindley v. Meara, 198 N. E. 301 (Ind. 1935) (dispute between advisory board and trustee of township); Merchants' Mutual Casualty Co. v. Leone, 9 N. E. (2d) 553 (Mass. 1937); Wolverine Mutual Motor Ins. Co. v. Clark, 277 Mich. 633, 270 N. W. 167 (1936); Stewart v. Herten, 125 Neb. 210, 249 N. W. 552 (1933) (involving appointment of guardian); Reynolds v. Chase, 177 Atl. 291 (N. H. 1935) (involving construction and validity of contract); see Babcock v. Babcock, 147 Misc. 900, 903, 265 N. Y. Supp. 470, 474 (1933) (alimony suit).

[19] Equitable Life Assurance Soc. v. Templeton, 19. F. Supp. 485 (E. D. S. C. 1936); Aetna Life Ins. Co. v. Williams, 88 F. (2d) 929 (C. C. A. 8th, 1937); Columbia Nat. Life Ins. Co. v. Foulke, 89 F. (2d) 261 (C. C. A. 8th, 1937); Anderson v. Aetna Life Ins. Co., 89 F. (2d) 345 (C. C. A. 4th, 1937); Stephenson v. Equitable Life Assurance Soc. (C. C. A. 4th, Sept. 29, 1937) (suit by insured against insurer). Declaratory judgments have been held proper, without discussion of the effect of the availability of other remedies, in the following suits by the insurer where the remedy at law would be considered adequate: Ohio Casualty Co. v. Plummer, 13 F. Supp. 169 (S. D. Tex. 1935); Commercial Casualty Co. v. Humphrey, 13 F. Supp. 174 (S. D. Tex. 1935); Travelers' Ins. Co. v. Helmer, 15 F. Supp. 355 (N. D. Ga. 1936); Travelers' Ins. Co. v. Young, 18 F. Supp. 450 (D. N. J. 1937); American Motorists' Ins. Co. v. Central Garage, 86 N. H. 362, 169 Atl. 121 (1933); Glens Falls Indemnity Co. v. Keliher, 187 Atl. 473 (N. H. 1936). See BORCHARD, DECLARATORY JUDGMENTS (1934) 149.

[20] 48 STAT. 955 (1934) as amended 49 STAT. 1027 (1935), 28 U. S. C. A. §400 (1) (Supp. 1936).

[21] C. C. A. 4th, Sept. 29, 1937.

eral Declaratory Judgment Act is not clear. Whatever discretion exists is a judicial discretion subject to appellate review.[22] The Uniform Declaratory Judgment Act, which has been adopted in North Carolina, makes refusal of declaratory relief discretionary where the uncertainty or the controversy giving rise to the proceeding would not be terminated.[23] There is no such provision in the Federal Act, and it has been strongly contended that the federal courts have no power to refuse to entertain jurisdiction in the exercise of a discretion not based upon an established rule of law.[24] In the *Quarles* case the court takes the position that it is implied that the granting of declaratory judgments shall rest in the court's discretion, since the statute merely gives the court power to grant the remedy without prescribing conditions under which it is to be granted. The possibility that the useful purpose of declaratory judgment statutes may be defeated by an abuse of judicial discretion is a danger that should be carefully guarded against. In the *Quarles* case, however, the granting of a declaratory judgment after an action had been brought against the insurer was unnecessary, and the decision is to be commended as an intelligent exercise of the court's discretion under the Federal Declaratory Judgment Act.

MOSES BRAXTON GILLAM, JR.

Equity—Extent of Injunction Against Nuisances.

Plaintiffs petitioned to enjoin as a nuisance a roadhouse situated in plaintiffs' neighborhood. A dancing pavillion was operated in connection with the roadhouse where music was continuously played, and where patrons remained throughout the night cursing, gambling, drinking, and fighting. Notwithstanding the fact that some of the acts connected with the operation of the business were legitimate, the decree granted by the court enjoined the operation of the business in its entirety.[1]

As shown by the principal case, a lawful business may become a nuisance by reason of the manner of its operation.[2] In framing a decree to enjoin such nuisances most courts in the absence of a statute hold that there cannot be abatement to the extent of closing out the whole busi-

[22] BORCHARD, DECLARATORY JUDGMENTS (1934) 100.
[23] UNIFORM DECLARATORY JUDGMENT ACT §6, 9 UNIFORM LAWS ANN. 127; N. C. CODE ANN. (Michie, 1935) §628(e).
[24] Morrison, *Availability of the Federal Declaratory Judgment Act for Life Insurance Cases* (1937) 23 A. B. A. J. 788, 791.

[1] Hunnicutt v. Eaton, 191 S. E. 919 (Ga. 1937).
[2] Nevins v. McGavock, 214 Ala. 93, 106 So. 597 (1925); Junction City Lumber Co. v. Sharp, 92 Ark. 538, 123 S. W. 370 (1909); Sullivan v. Royster, 72 Cal. 248, 13 Pac. 655 (1887); Gilbert v. Davidson Constr. Co., 110 Kan. 298, 203 Pac. 1113 (1922); Block v. Fertitta, 165 S. W. 504 (Tex. 1914); LEWIS AND SPELLING, INJUNCTIONS (1926) §288.

ness if a change in the character of its conduct will remove the evils.[3] Only that part of the activity complained of which is offensive is enjoined, and the defendant may continue his business if it can be separately conducted in a harmless way. Thus the following businesses were held to be nuisances, but the decree in each case was framed so as to enjoin only the illegal uses of the premises: a dance hall where the patrons used loud, profane, and vulgar language;[4] a shoe shine parlor where the negro boys employed were noisy and boisterous;[5] a dairy which caused noise, odors, and pests;[6] an iron works which caused noise;[7] a woodwork company where there was loud shouting of workmen and much smoke and noise;[8] a filling station where there was noise and confusion;[9] a poolroom where a large number of criminals, gamblers, and other low and dissolute characters congregated;[10] and a barbecue stand where the employees scuffled in a loud and boisterous manner.[11]

In declaring certain courses of action to be nuisances the legislatures of many states have provided for injunctions of a more rigorous form than those employed to suppress the above mentioned common law nuisances. Many states have passed statutes declaring houses of ill fame, illicit liquor establishments, gambling houses, and other places which foster conduct offensive to public morals to be nuisances.[12] The statutes may be roughly classified into the following two groups: 1. Where the injunction is to be limited to the forbidden activity.[13] 2. Where the entire business or place is to be closed for all purposes.[14] The statutes of the vast majority of states including North Carolina are of the latter class. Thus under these statutes courts have closed a cafe operated in the same building with a house of prostitution,[15] and an entire race track

[3] People v. High Ground Dairy Co., 166 N. Y. App. 81, 151 N. Y. Supp. 710 (1915).
[4] Kleising v. Miller, 83 S. W. (2d) 732 (Tex. 1935).
[5] Block v. Fertitta, 165 S. W. 504 (Tex. 1914).
[6] People v. High Ground Dairy Co., 166 N. Y. App. 81, 151 N. Y. Supp. 710 (1915).
[7] Collins v. Wayne Iron Works, 227 Pa. 326, 76 Atl. 24 (1910).
[8] Mackenzie v. Frank M. Pauli Co., 207 Mich. 456, 174 N. W. 161 (1919).
[9] National Refining Co. v. Batte, 135 Miss. 819, 100 So. 388 (1924).
[10] Respass v. Commonwealth, 131 Ky. 807, 115 S. W. 1131 (1909).
[11] Pig'n Whistle Sandwich Shops v. Keith, 167 Ga. 622, 146 S. E. 455 (1929).
[12] ALA. CODE ANN. (Michie, 1928) §§9280-98; ARIZ. REV. CODE ANN. (Struckmeyer, 1928) §§2486-92; COLO. STAT. ANN. (Michie, 1935) Vol. 2, c. 1, §§1-11; DEL. REV. CODE (1935) §§5272-80; D. C. CODE (1930) tit. 6, §§184-93; FLA. COMP. GEN. LAWS ANN. (1927) §7832; IOWA CODE (1935) §§1587-1618; PA. STAT. (Purden, 1936) tit. 68, §§467-73; S. C. CODE ANN. (Michie, 1932) §§575-83.
[13] 37 OKLA. STAT. ANN. (1937) §73. The statute is discussed in Gragg v. State, 73 Okla. 132, 175 Pac. 201 (1918); Ford v. State, 109 Okla. 79, 234 Pac. 635 (1925); PA. STAT. (Purden, 1936) tit. 68, §§467-73.
[14] ALA. CODE ANN. (Michie, 1928) §§9280-98; DEL. REV. CODE (1935) §§5272-80; FLA. COMP. GEN. LAWS ANN. (1927) §7832; N. C. CODE ANN. (Michie, 1935) §§3180-87; S. C. CODE ANN. (Michie, 1932) §§575-83.
[15] People v. Smith, 48 Cal. 251, 191 Pac. 996 (1920).

where only the betting on the horses was illegal.[16] Some of the statutes under this class provide that so much of any building or structure as may be entered through the same outside entrance shall be closed.[17] The North Carolina statute and several others provide that the place enjoined shall include any building, erection, or place or any separate part or portion thereof, or the ground itself.[18] In none of these statutes of the second class is the deprivation of the use of the property absolute. For the owner may apply to the court for permission to reopen, and if it is satisfied with his good faith he may reopen his business by posting a bond conditioned that he will immediately abate the nuisance and prevent its repetition for a period of one year.

Most of the acts specified in the above statutes were nuisances at common law. But equity has been hesitant to enjoin nuisances where the conduct was also a crime. Hence the legislatures have acted to reassure equity courts of their jurisdiction and to encourage them with a more extensive weapon.

The court in the principal case reached its decision under its general equity powers, and not by statutory provision. It is probable that the extensive scope of statutory injunctions influenced the court in going that far.

HARRY LEE RIDDLE, JR.

Fraudulent Conveyances—Dower Where the Conveyance Is Set Aside—Interests of the Parties.

Plaintiff's husband, eleven months before their marriage, conveyed real estate to his mother in fraud of his creditors. Whereupon a creditor brought an action to set aside the conveyance, and caused notice of *lis pendens* to be filed. Plaintiff thereafter married the debtor, and subsequently a judgment was rendered setting aside the conveyance as to the creditor. After her husband's death the plaintiff claims dower in this land against the defendants, the purchasers (and their vendees), under a sale pursuant to the judgment in the action to which the wife was not a party. Held, fraudulent conveyances are valid as between the parties, and the plaintiff's husband was never beneficially seized during coverture so that dower would attach.[1]

It is a generally accepted rule that an absolute conveyance of property in fraud of creditors is good as against all the world, except the

[16] Pompono Horse Club v. State, 93 Fla. 415, 111 So. 801 (1927).
[17] CAL. GEN. LAWS ANN. (Deering, 1931) Act 6161, §1; COLO. STAT. ANN. (Michie, 1935) Vol. 2 c. 1 §1.
[18] ALA. CODE ANN. (Michie, 1928) §9280; DEL. REV. CODE. (1935) §5272; D. C. CODE (1930) tit. 6, §184; N. C. CODE ANN. (Michie, 1935) §3180.

[1] McLawhorn v. Smith, 211 N. C. 513, 191 S. E. 35 (1937).

defrauded creditors.[2] The fraudulent grantee has a superior equity as against the grantor, and, where the conveyance has been impeached by the creditors, is entitled to any surplus remaining after satisfaction of the creditors' claims.[3] Where the wife has joined in the conveyance so impeached her right of dower is usually held to revive, irrespective of her knowledge of her husband's intent.[4] Other jurisdictions distinguish between the wife's knowledge and lack of knowledge of the husband's intent, and allow her dower to revive only in the latter instance.[5] The revival is based on the theory that since the inchoate dower right cannot be sold or released except to one having an interest in the land,[6] and since the grantee has been deprived of his interest for the benefit of the grantor's creditors, the release must fail.[7] Nor can the creditors set up the release to bar the wife's dower, because the release operates by way of estoppel and binds the wife only so far as the parties to the release and their privies are concerned.[8] Dower in the entire quantity of land is restored to the wife or widow "just as if no such deed had been

[2] Dent v. Ferguson, 132 U. S. 50, 10 Sup. Ct. 13, 33 L. ed. 242 (1889); Backhouse v. Jett, 2 Fed. Cas. No. 710 (C. C. D. Va. 1821); Atwater v. Seeley, 2 Fed. 133 (C. C. D. Minn. 1880); The Inhabitants of Canton v. The Inhabitants of Dorchester, 8 Cush. 525 (Mass. 1851); Coltraine v. Causey, 38 N. C. 246 (1844); Ellington v. Currie, 40 N. C. 21 (1847); York v. Merritt, 80 N. C. 285 (1879); Saunders v. Lee, 101 N. C. 3, 7 S. E. 590 (1888); Pierce v. Stallings, 163 N. C. 107, 79 S. E. 302 (1913); Marshall v. Dicks, 175 N. C. 38, 94 S. E. 514 (1918); Mosely v. Mosely, 15 N. Y. 334 (1857).

[3] Abbey v. Zimmerman, 12 Cal. App. (2d) 311, 55 P. (2d) 903 (1936); Crowinshield v. Kittridge, 7 Metc. 520 (Mass. 1944); Wheeler v. Wallace, 53 Mich. 364, 19 N. W. 37 (1884); Maze v. Griffin, 6 Mo. App. 377 (1896); Tetrault v. Ingraham, 54 Mont. 524, 171 Pac. 1148 (1918). Accord: Sturges v. Portis Mining Co., 206 Fed. 534 (E. D. N. C. 1913); see Charles v. White, 214 Mo. 187, 190, 112 S. W. 545, 548, 21 L. R. A. (N. S.) 481 (1908). But see Ballard v. Jones, 6 Humph. 455, 458 (Tenn. 1846).

[4] Robinson v. Bates, 3 Metc. 40 (Mass. 1841); Summers v. Babb, 13 Ill. 483 (1851); Lowry v. Fisher, 2 Bush 70 (Ky. 1867); Malloney v. Horan, 49 N. Y. 111 (1872); *In re* Lingafelter, 181 Fed. 24 (C. C. A. 6th, 1910); Wilson v. Robinson, 83 F. (2d) 397 (C. C. A. 2d, 1936); Cox v. Wilder, 6 Fed. Cas. No. 3308 (C. C. E. D. Mo. 1872); Wyman v. Fox, 59 Me. 100 (1871); Ridgway v. Mastings, 23 Ohio St. 294 (1872); Munger v. Perkins, 62 Wis. 499, 22 N. W. 511 (1885); Jenkins v. Mollenhauer, 105 Misc. 15, 173 N. Y. Supp. 870 (1918); *Ex parte* Clark, 125 S. C. 34, 118 S. E. 27 (1923); Elliott v. Locklear, 185 Ark. 269, 46 S. W. (2d) 1105 (1932). *Contra: Den, Ex Dem.* Stewart v. Johnson, 18 N. J. L. 87 (1840); Dey v. Allen, 77 N. J. Eq. 522, 78 Atl. 674 (1910); Barhan v. Bogard, 128 Ore. 218, 270 Pac. 762 (1928).

[5] Kitts v. Wilson, 130 Ind. 492, 29 N. E. 401 (1891); Wells v. Estes, 154 Mo. 291, 55 S. W. 255 (1900); Bradshaw v. Halpin, 180 Mo. 666, 79 S. W. 685 (1904).

[6] Lampet's Case, 10 Co. 46 (1613); Saltmarsh v. Smith, 32 Ala. 404 (1858); Chicago Dock Co. v. Kinzie, 49 Ill. 289 (1868); McCormick v. Hunter, 50 Ind. 186 (1875); Harriman v. Gray, 49 Me. 537 (1860); Reiff v. Horst, 55 Md. 47 (1880); Mason v. Mason, 140 Mass. 63, 3 N. E. 19 (1885); TIFFANY, OUTLINES OF REAL PROPERTY (1929) §163.

[7] Lockett's adm'x v. James, adm'r, 8 Bush 28 (Ky. 1871); Wyman v. Fox, 59 Me. 100 (1871); Bohannon v. Combs, 97 Mo. 446, 11 S. W. 232 (1889); Munger v. Perkins, 62 Wis. 499, 22 N. W. 511 (1885).

[8] Robinson v. Bates, 3 Metc. 40 (Mass. 1841); Lowry v. Fisher, 2 Bush 70 (Ky. 1867); Essey v. Bushakra, 299 Mo. 147, 252 S. W. 459 (1923) (creditor with quitclaim deed from grantee not allowed to prevail over dower).

executed"[9] or "as if the property had been deeded back to her husband."[10]

But the above stated general rule declared the grantee to be entitled against all but creditors. Where there is a surplus after satisfaction of creditors' claims, the deed is effective to convey that much to him. As to that portion, would he not have an estate to support the release of inchoate dower by the wife? But an allotment of dower *in the whole of the premises* substantially reduces the amount of the grantee's surplus, or precludes the possibility of there being any surplus. Thus, under the rules as stated: (1) that the fraudulent grantee is entitled against all but creditors, and (2) that the wife's dower revives in the whole property when the transer is set aside, the rights given the widow and the grantee are conflicting and overlapping. Where his right and the widow's overlap, she is given preference. It cannot validly be said, then, that the fraudulent grantee is entitled against all but creditors. The conveyance is set aside not only as to creditors' claims but also to allow the widow her dower. In effect, the revesting of the estate in the grantor so that dower may re-attach is made the basis of predication of dower, rather than the inefficacy of the release of the inchoate dower. Indeed, such a basis is the only one that is legally tenable.

Under the facts of the principal case, where the conveyance was made before the marriage, would it not follow that the revesting of the estate in the grantor to meet creditors' claims would be sufficient to allow his wife's dower to attach, especially since she personally did not participate in the fraud? Only two courts have previously passed directly on the point, and they held to the contrary.[11] They reasoned as does the court in the principal case—that the grantor is not seized to his own use during coverture. Nor was he seized to his own use when the estate was revested in him at the instance of creditors where the conveyance was made after marriage. Yet, as was pointed out, that revesting was the only justification for the restoration of dower in all of the property. Why should it not serve the same purpose here where the wife was not a party to the fraud?

Still, despite the fact that its reasoning (based on the fallacy in the stated rules in cases where the conveyance was made after marriage) is unsound, the principal case reaches the correct result. Here, as is usually the case, the creditor's claim absorbed all of the proceeds of the sale of the property, and the creditor has an equity prior to that of the widow. His priority is by reason of his equitable lien attaching

[9] See *Ex parte* Clark, 125 S. C. 34, 37, 118 S. E. 27, 28 (1923).
[10] Jenkins v. Mollenhauer, 105 Misc. 15, 16, 173 N. Y. Supp. 870, 871 (1918).
[11] Whited v. Mallory, 4 Cush. 138 (Mass. 1849); Gross v. Lange, 70 Mo. 45 (1879). But see Adkins v. Adkins, 52 S. W. 728, 731 (Tenn. Ch. App. 1899).

as of the date of the institution of the action[12] (which was before the marriage) to set aside the transfer.[13] Thus the creditor's lien attached before the dower could attach, and a sale to satisfy the prior lien would effectually bar any dower claim against the defendant purchasers under such sale. Because of his priority the creditor is entitled to full satisfaction of his claim out of the proceeds of the sale before other subsequent rights therein are considered. Where, however, the creditors' claims do not require all of the proceeds, it would seem that the widow should be entitled to her dower as against the grantee's claim. We have seen that logically the revesting of the estate in the grantor should be sufficient to support dower (whether the wife has ever before had dower in the property or not), and the fraudulent grantee's deed should be ineffective against rights of the widow and the creditor arising out of the revesting of title in the grantor. The equity of the widow as against the grantee is further strengthened by the fact that though her claim is through her husband's title which is tainted with fraud, she did not actually participate in the fraud and is not *in pari delicto* with the grantee.

C. A. GRIFFIN, JR.

Labor Law—State Anti-Injunction Statutes.

Since the advent of the New Deal there has been a rapidly growing tendency to look upon labor with an increasingly liberal attitude, evidenced, in state labor anti-injunction legislation,[1] by the correction of the abuses caused by the injunction in labor disputes during the past fifty years.[2] Twenty-three states have enacted such legislation,[3] each

[12] Hancock v. Wooten, 107 N. C. 9, 12 S. E. 199 (1890); Frank v. Kessler, 30 Ind. 8 (1868); Lindley v. Cross, 31 Ind. 106 (1869); Wooten v. Steele, 109 Ala. 563 19 So. 972 (1895). Accord: The Dawson Bank v. Harris, 84 N. C. 206 (1881); Armstrong Grocery Co. v. Banks, 185 N. C. 149, 116 S. E. 173 (1923); *cf.* Cassady v. Anderson, 53 Tex. 535 (1880); Arbuckle Bros. Coffee Co. v. Werner and Cohen, 77 Tex. 43, 13 S. W. 963 (1890).

[13] Most jurisdictions require that a judgment be obtained against the grantor as a condition precedent to the suit to set aside the fraudulent conveyance. Allyn v. Thurston, 53 N. Y. 622 (1873); Estes v. Wilcox, 67 N. Y. 264 (1876); Whitney v. Davis, 148 N. Y. 256, 42 N. E. 661 (1896); WAITE, FRAUDULENT CONVEYANCES AND CREDITORS' BILLS (3d ed. 1897) 149.

[1] No attempt will be made to consider federal anti-injunction legislation.

[2] FRANKFURTER AND GREENE, THE LABOR INJUNCTION (1930); Fraenkel, *Recent Statutes Affecting Labor Injunctions and Yellow Dog Contracts* (1936) 30 ILL. L. REV. 854.

[3] ARIZ. REV. CODE ANN. (Struckmeyer, 1928) §4286; CAL. GEN. LAWS (Deering, 1931) act 1605; COLO. STAT. ANN. (Michie, 1935) c. 97, §78; Idaho Sess. Laws 1933, c. 215; ILL. REV. STAT. ANN. (Cahill, 1933) c. 22, §58; ILL. STAT. ANN. (Callaghan, Supp. 1925-31) c. 22, §58; IND. STAT. ANN. (Burns, 1933) §40-504; KAN. GEN. STAT. ANN. (Corrick, 1935) c. 60, §1107; LA. GEN. STAT. (Dart, Supp. 1936) §4379.7; ME. LAWS 1933, c. 261, §1; MD. CODE ANN. (Bagby, Supp. 1935) c. 574, §67; Mass. Acts 1935, c. 407, §4; MINN. STAT. (Mason, Supp. 1936) §§4260-4264; MONT. REV. CODE ANN. (Anderson & McFarland, 1935) §9242; N. J. COMP. STAT. (Supp. 1925-30) §107-131a; N. Y. CIVIL PRACTICE (Cahill, Supp. 1936) §876a; N. D. Laws 1935, c. 247; OKLA. STAT. 1931, §10878; ORE. CODE ANN.

of the statutes having substantially the same provisions.[4] Generally,[5] they prohibit the courts from enjoining the peaceful activities of labor in disputes with employers, *i.e.*, striking, holding meetings, publishing grievances, peaceful picketing, and using strike funds without restriction.[6]

The first case involving the validity of an anti-injunction statute to come before the Supreme Court of the United States[7] was that of *Truax v. Corrigan*,[8] in 1921. The court, in a five to four decision, ruled the Arizona statute unconstitutional because it violated the due process and equal protection clauses of the Fourteenth Amendment.[9] The state courts, relying on this decision, have, until recent years, consistently declared similar statutes invalid.[10]

A change of attitude, however, became apparent during the depression years with their attendant labor troubles. The Oregon Supreme Court led the way in 1932 when it pronounced such a statute to be valid[11] if properly construed.[12] All of the reported cases since 1933, with the exception of one,[13] have upheld the validity of anti-injunction

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(1930) §§49-902, 49-903; PA. STAT. (Purden, 1936) §43-203; UTAH REV. STAT. ANN. (1933) §§4-2-6, 4-2-7; WASH. REV. STAT. ANN. (Remington, 1932) §§1712-1714; WIS. STAT. 1935, §§103:53, 103:63; Wyo. Sess. Laws 1937, c. 15, §1.

[4] For a classification and comparison of these statutes, see Riddlesbarger, *State Anti-Injunction Legislation* (1935) 14 ORE. L. REV. 501.

[5] Most of the statutes have additional provisions prohibiting "yellow dog" contracts, *ex parte* injunctions and the restraint of acts other than those specifically complained of, and guaranteeing the right to a jury trial to all persons charged with violating labor injunctions.

[6] Fraenkel, *supra* note 2, at 871.

[7] California and Massachusetts anti-injunction statutes had been previously declared unconstitutional by state tribunals, the courts employing substantially the same reasoning as that applied in Truax v. Corrigan, 257 U. S. 312, 42 Sup. Ct. 124, 66 L. ed. 254, 27 A. L. R. 375 (1921); Goldberg, Bowen and Co. v. Stablemen's Union, 149 Cal. 429, 86 Pac. 806, 8 L. R. A. (N. S.) 460 (1906); Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324 (1909); Bogni v. Perotti, 224 Mass. 252, 112 N. E. 853, L. R. A. 1916F 831 (1916).

[8] 257 U. S. 312, 42 Sup. Ct. 124, 66 L. ed. 254, 27 A. L. R. 375 (1921).

[9] Pitney (with whom Clarke, J., concurred), Brandeis, and Holmes, JJ., each wrote a dissenting opinion maintaining that the statute was a valid exercise of the police powers of the legislature and that the classification was not so unreasonable as to violate the equal protection clause of the Fourteenth Amendment.

[10] *In re* Opinion of the Justices, 275 Mass. 580, 176 N. E. 649 (1931), Note (1932) 17 CORN. L. Q. 666; *In re* Opinion of the Justices, 86 N. H. 597, 166 Atl. 640 (1933), Note (1934) 18 MINN. L. REV. 184; Greenfield v. Central Labor Council, 104 Ore. 236, 192 Pac. 783 (1922); see Bull v. International Alliance, 119 Kan. 713, 718, 241 Pac. 459, 461 (1925); Elkind and Sons, *et al.* v. Retail Clerks' Protective Ass'n, 114 N. J. Eq. 586, 595, 169 Atl. 494, 497 (1933); Pacific Coast Coal Co. v. Dist. No. 10, U. M. W. A., 122 Wash. 423, 436, 210 Pac. 953, 957 (1922).

[11] Moreland Theaters Corp. v. Portland M. P. M. O. P. Union, 140 Ore. 35, 12 P. (2d) 333 (1932).

[12] The validity of these statutes has, from the outset, depended largely upon whether the courts construed them as legalizing unlawful acts. Many courts look upon picketing as being unlawful in itself and therefore ruled that the statute attempted to make an unlawful act legal.

[13] Blanchard v. Golden Age Brewing Co., 188 Wash. 396, 63 P. (2d) 397 (1936).

legislation. These recent decisions have, for the most part, followed the same line of reasoning: that due process is not violated, for the legislature may, in the exercise of its police powers, make such regulations as the welfare of the public requires, even to the extent of interfering with the liberty and property of an individual; that equal protection is not taken away, for the classification is a reasonable one,[14] since labor injunction cases are fundamentally different from ordinary equitable actions;[15] and that the inherent equity powers of the courts are not abridged, for the statute, while it limits the jurisdiction of the courts in prohibiting the issuance of injunctions in certain cases, does not deprive the courts of the power to restrain *unlawful* acts.[16] The climax in this change in the attitude of the courts came recently when the United States Supreme Court declared a Wisconsin anti-injunction statute to be constitutional, in the first case to reach it since *Truax v. Corrigan,* involving the validity of this type of legislation.[17] The court distinguishes this case from *Truax v. Corrigan* on the grounds that in the latter the Arizona court construed the statute as legalizing picketing, which at that time was considered to be unlawful in any form,[18] while in the instant case the Wisconsin court construed the statute as prohibiting the issuance of injunctions only against peaceful picketing, which is now regarded as being lawful.[19] From recent decisions, then, it appears that: "More and more the tendency is to permit the parties to

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The case was decided, in the face of a strong dissent, on the grounds that the statute violated that section of the state constitution which specifically granted to the courts the power to issue injunctions. For comments on this case see (1937) 23 VA. L. REV. 606 and (1937) 4 U. OF CHI. L. REV. 500.

[14] The courts have uniformly held that the constitutional guarantee of equal protection of the laws to all citizens is not violated by legislation affecting only a certain group of citizens, as long as the classification is reasonable and there is no discrimination against members of the group. Labor anti-injunction statutes apply only to the employee-employer group.

[15] When an injunction is issued, the striker is immediately branded as a lawbreaker in the eyes of the public. And since strikes are usually short, the issuance of even a temporary injunction nearly always decides the case immediately. Note (1934) 18 MINN. L. REV. 184 at 191.

[16] Aberdeen Restaurant Corp. v. Gottfried, 158 Misc. 758, 285 N. Y. Supp. 832 (1935); Dehan v. Hotel and Restaurant Employees and Beverage Dispensers, 159 So. 637 (La. 1935); American Furniture Co. v. T. B. of T. C. and H. of A., 222 Wis. 338, 268 N. W. 250, 106 A. L. R. 335 (1936); Starr v. Laundry and Dry Cleaning Workers' Local Union No. 101, 63 P. (2d) 1104 (Ore. 1936), (1937) 16 ORE. L. REV. 192; Fenske Bros. Inc. v. Upholsterers' International Union, 358 Ill. 239, 193 N. E. 112, 97 A. L. R. 1318 (1934), Notes (1935) 30 ILL. L. REV. 237, (1935) 13 CHI-KENT REV. 170, (1935) 35 COL. L. REV. 616; Geo. B. Wallace Co. v. International Ass'n of Mechanics, 63 P. (2d) 1090 (Ore. 1936); see Bayonne Textile Corp. v. American Fed. of Silk Workers, 116 N. J. Eq. 146, 164, 172 Atl. 551, 559, 92 A. L. R. 1450, 1463 (1934).

[17] Senn v. Tile Layers Protection Union, 57 Sup. Ct. 857, 81 L. ed. Adv. Ops. 829 (1937).

[18] FRANKFURTER AND GREENE, *op. cit. supra* note 2, at 171.

[19] It is interesting to note that Mr. Justice Brandeis, who dissented strongly in *Truax v. Corrigan,* wrote the majority opinion in the instant case.

settle their differences without resort to injunction. The old order was injunction first, the new is injunction last."[20]

North Carolina has been extremely fortunate in escaping the labor injunction abuses which have been so prevalent in other jurisdictions.[21] The state was untroubled by labor injunction cases until as late as 1921, when, in the case of *McGinnis v. Raleigh Typographical Union*,[22] an injunction was granted which specifically listed the acts[23] and the parties restrained. Three years later, in *Citizen v. Asheville Typographical Union*,[24] the court became more conservative and affirmed a restraining order which not only enjoined all picketing, but also contained an all-inclusive and ambiguous clause restraining the defendants and all other persons from "doing any acts or things whatsoever in furtherance of any conspiracy of combination among themselves or any of them to obstruct and interfere with the plaintiff or its business. . . ."[25] In the third and last North Carolina decision, the unreported case of *Marion Manufacturing Co. v. United Textile Workers*,[26] the injunction was ambiguous in its terms, and hence, although the court did require that notice be personally served on each defendant, there was much confusion as to exactly what acts were enjoined. Thus, while the North Carolina court in the first case was extremely liberal towards labor, the injunctions granted in the last two cases are characterized by the vague sweeping terms which have been the despair of organized labor in other states ever since "government by injunction" began.[28] Both liberalism and conservatism have been exhibited in these three cases, and it is impossible to foretell which attitude the North Carolina court will adopt in the future.

While it is true that the number of labor injunction cases in North Carolina has been strikingly small in the past, it is inevitable, in view of the fact that the state is in a process of rapid industrial growth, that labor disputes will increase and the injunction tend to become common. And, since the trend of the courts throughout the nation is to uphold

[20] Collins, J., in Goldfinger v. Feintuch, 159 Misc. 806, 288 N. Y. Supp. 855, 863 (1936).

[21] McCRACKEN, STRIKE INJUNCTIONS IN THE NEW SOUTH (1931).

[22] 182 N. C. 770, 108 S. E. 728 (1921).

[23] Mass picketing, intimidation of employees, following employees, abusive epithets, and attempting to persuade employees to break employment contracts.

[24] 187 N. C. 42, 121 S. E. 31 (1924). [25] *Id.* at 44, 121 S. E. at 32.

[26] McCRACKEN, *op. cit. supra* note 21, at 79. (Superior Court, McDowell County, July 24, 1929).

[27] *Id.* at 84.

[28] The labor injunction has become an object of hatred for many reasons, but probably the chief among these is that the courts have, in most cases, issued restraining orders enjoining almost everybody from doing anything whatsoever in furtherance of labor's attempts to improve its situation. Due to vagueness and uncertainty of terms, and the failure to require personal notice to be served on the defendants, it is often impossible to determine just which acts and parties are restrained.

anti-injunction legislation, North Carolina might probably avoid the abuses which the use of the injunction has thrust upon labor in other jurisdictions by passing the Model Anti-injunction Act.[29]

JAMES D. CARR.

Municipal Corporations—Remedies Allowed Holders of Invalid Bonds—Constructive Trusts.

Municipal bonds, issued for the erection of a school building, were invalid because the city had no constitutional power to devote funds to such purposes. The United States Circuit Court of Appeals for the Fifth Circuit held that the plaintiff, holder of the entire bond issue, was entitled to have the municipality made a constructive trustee of the school building. This had been built on a city lot with funds supplied from the bond issue and by the county board of public instruction. The court decreed that the way was to be left open to the interested parties (the city, county board, and bondholder) "for such adjustments, whether by sale or rental, as may be within their several powers."[1] In a previous action for money had and received the plaintiff had failed because of the Statute of Limitations.[2] In the instant case there is a clear dictum that such an action would not lie on the merits, for the city no longer had the money, nor had it been used for a proper municipal purpose.[3]

It is settled that no action may be maintained on an invalid municipal bond.[4] However, where the city had the power both to borrow money and to devote it to the purposes for which the bonds were issued, the invalidity being due to mere irregularities in form or manner of issuance,[5] the bondholder may recover for money had and received.[6] The

[29] Prepared by Nathaniel Greene and Felix Frankfurter, and published by the National Committee on Labor Injunctions of the American Civil Liberties League, 100 Fifth Ave., New York City.

[1] Nuveen v. Board of Public Instruction, 88 F. (2d) 175 (C. C. A. 5th, 1937), *cert. denied* 57 Sup. Ct. 794. The adjustment would probably be a *pro rata* share. But see Nuveen v. Quincy, 115 Fla. 510, 524, 156 So. 153, 159 (1934) (in a dictum the state court on the same facts said that a constructive trust should be refused).

[2] State *ex rel.* Nuveen v. Greer, 88 Fla. 249, 102 So. 739 (1924).

[3] See Nuveen v. Board of Public Instruction, 88 F. (2d) 175, 178 (1937).

[4] Dodge v. Memphis, 51 Fed. 165 (C. C. E. D. Mo. 1892); German Ins. Co. v. Manning, 95 Fed. 597 (C. C. S. D. Iowa 1899); Swanson v. Ottumwa, 131 Iowa 540, 106 N. W. 9 (1906); People's Bank of St. Paul v. School Dist. 3 N. D. 496, 57 N. W. 787 (1893).

[5] Louisiana v. Wood, 102 U. S. 294, 26 L. ed. 153 (1880) (not registering bonds with proper authorities); Gause v. Clarksville, 1 Fed. 353 (C. C. E. D. Mo. 1880) (voters in bond election were not sworn properly); Geer v. School Dist. No. 11 in Ouray County, 111 Fed. 682 (C. C. A. 8th, 1901) and Fernald v. Gilman, 123 Fed. 797 (C. C. S. D. Iowa 1903) (municipality, although authorized to become indebted, was not entitled to secure the money by bonds); State *ex rel.* Northwestern Nat. Bank v. Dickerman, 16 Mont. 278, 40 Pac. 698 (1895) (non-compliance with notice requirement); Hoag v. Greenwich, 133 N. Y. 152, 30 N. E. 842 (1892) (bonds came due at different dates than allowed by law); Rainsburg v. Fyan, 127 Pa. 74, 17 Atl. 678 (1889) (not filing statement as required).

[6] Hitchcock v. Galveston, 96 U. S. 341, 24 L. ed. 659 (1877); Louisiana v. Wood, 102 U. S. 294, 26 L. ed. 153 (1880); Read v. Plattsmouth, 107 U. S. 568,

recovery is quasi-contractual on the theory that the municipality has received a benefit from the bond money which it would be inequitable to retain without compensation.[7] Where the funds have not been used for the benefit of the city, recovery is denied.[8]

On the other hand, where the city was totally without power to incur indebtedness at the time,[9] or for the purpose[10] for which the bonds were issued, recovery for money had and received is denied.[11] The reasons advanced for refusal to grant this relief are either based on the administrative policy that all persons dealing with a municipality must be presumed to know the limits of its power, and therefore act at their peril,[12] or on the theory that a refusal to find an implied promise to pay makes more effective a direct constitutional prohibition of such indebtedness.[13] Regardless of the varying language of the courts, the motive for refusing relief is the protection of the taxpayer.[14] Other-

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2 Sup. Ct. 208, 27 L. ed. 414 (1882) (although generally cited for this proposition, the case allows recovery where the debt incurred was in excess of limitation); Gause v. Clarksville, 1 Fed. 353 (C. C. E. D. Mo. 1880); Bangor Savings Bank v. Stillwater, 45 Fed. 544 (C. C. D. Minn. 1891); Geer v. School Dist. No. 11 in Ouray County, 111 Fed. 682 (C. C. A. 8th, 1901); Fernald v. Gilman, 123 Fed. 797 (C. C. S. D. Iowa 1903); Chelsea Savings Bank v. Ironwood, 130 Fed. 410 (C. C. A. 6th, 1904); Gilman v. Fernald, 141 Fed. 941 (C. C. A. 8th, 1905); Board of Commissioners of Bayou Terre Aux Boeufs Drainage Dist. v. McClellan *et al.*, 164 La. 808, 114 So. 694 (1927); State *ex rel.* Northwestern Nat. Bank v. Dickerman, 16 Mont. 278, 40 Pac. 698 (1895); Hoag v. Greenwich, 133 N. Y. 152, 30 N. E. 842 (1892); Rainsburg v. Fyan, 127 Pa. 24, 17 Atl. 678 (1889); Paul v. Kenosha, 22 Wis. 266 (1867); *cf.* Thompson v. Elton, 109 Wis. 589, 85 N. W. 425 (1901). There is authority that unless there is privity between bondholder and municipality there can be no recovery. Lumbermen's Trust Co. v. Ryegate, 61 F. (2d) 14 (C. C. A. 9th, 1932); Henderson v. Nat. Bank of Evansville, Ind., 185 Ky. 693, 215 S. W. 527 (1919); see Coquard v. Oquawka, 192 Ill. 355, 368, 61 N. E. 660, 664 (1901). *Contra:* Geer v. School Dist. No. 11 in Ouray County, 111 Fed. 682 (C. C. A. 8th, 1901); Fernald v. Gilman, 123 Fed. 797 (C. C. S. D. Iowa 1903); Chelsea Sav. Bank v. Ironwood, 130 Fed. 410 (C. C. A. 6th, 1904).

[7] WOODWARD, THE LAW OF QUASI-CONTRACTS (1913) §9.

[8] Aetna Life Ins. Co. v. Middleport, 124 U. S. 534, 8 Sup. Ct. 625, 31 L. ed. 537 (1887); Hedges v. Dixon County, 150 U. S. 182, 14 Sup. Ct. 71, 37 L. ed. 1044 (1893); Travelers' Ins. Co. v. Mayor, etc. of Johnson City, 99 Fed. 663 (C. C. A. 6th, 1900); Swanson v. Ottumwa, 131 Iowa 540, 106 N. W. 9 (1906); Waitz v. Ormsby County, 1 Nev. 370 (1865); Bolton v. Wharton, 163 S. C. 242, 161 S. E. 454 (1931).

[9] Litchfield v. Ballou, 114 U. S. 190, 5 Sup. Ct. 820, 29 L. ed. 132 (1885); Heyburn v. Security Sav. & Trust Co., 55 Idaho 732, 49 P. (2d) 258 (1935); McPherson v. Foster Bros., 43 Iowa 48 (1876); Balch v. Beach, 118 Wis. 267, 95 N. W. 132 (1903).

[10] Davis v. Stokes County, 74 N. C. 374 (1876). *Contra:* Henderson v. Redman, 185 Ky. 146, 214 S. W. 809 (1919); Henderson v. Winstead, 185 Ky. 693, 215 S. W. 527 (1919); see Field, *Government Bonds and Private Promises Under Unconstitutional Statutes* (1931) 17 IOWA L. REV. 1, 11.

[11] Morton v. Nevada, 41 Fed. 582 (C. C. W. D. Mo. 1890); McGurdy v. Shiawasse County, 154 Mich. 550, 118 N. W. 625 (1908); 2 DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911) §961; 6 MCQUILLIN, MUNICIPAL CORPORATIONS (2d ed. 1928) §2509; WOODWARD, THE LAW OF QUASI-CONTRACTS (1913) §161.

[12] Balch v. Beach, 118 Wis. 267, 95 N. W. 132 (1903).

[13] Morton v. Nevada, 41 Fed. 582 (C. C. W. D. Mo. 1890).

[14] McAlvay, J., in McGurdy v. Shiawasse County, 154 Mich. 550, 561, 118 N. W. 625, 629 (1908) says: "he (the taxpayer) is the public for whose benefit the

wise, innocent taxpayers would suffer for the corrupt or unwise acts of their officials in incurring unauthorized debts.[15]

The principal case is one of a very few in which a constructive trust has been decreed as a remedy for the holder of invalid municipal bonds.[16] The idea was suggested as long ago as 1885 in *Litchfield v. Ballou*.[17] There, however, the action was brought on the theory of money had and received, and in a dictum the court denied plaintiff's right to a constructive trust because of the difficulty of tracing the funds,[18] and because "equity will no more raise a trust in favor of the bondholder than the law will raise an implied assumpsit against a public policy so strongly declared." In a Kentucky case[19] this relief was granted, but under the law of Kentucky[20] it would seem that the bondholder could have recovered for money had and received. A recent New Mexico decision[21] allowed the holders of invalid certificates of indebtedness to have school buildings, erected largely with funds from the certificates, held in trust for them to the extent of their proportionate shares. These certificates were invalid because the statute authorizing the board to borrow money was unconstitutional. The court stressed the fact that the certificates were merely irregular. This is doubtful. As the statute was unconstitutional, was not the board totally without power to borrow money for building a school? If the reasoning of the court is accepted, however, there could have been a recovery for money had and received.[22] Thus, the principal case is the first square holding in which a constructive trust was used to give a bondholder succor otherwise denied him.

Is it desirable to decree a constructive trust as a remedy for the

municipality exists, and which bears all the burdens put upon it, but which is not consulted when such burdens, as in this case (borrowing money without authority), are assumed."

[15] However, see the argument advanced in 21 NAT. MUNIC. REV. 246 that every time recovery is denied because of the invalidity of a municipal bond the credit of the city is seriously embarrassed which works to the detriment of the taxpayer.

[16] Others are: Fordsville v. Postel, 121 Ky. 67, 88 S. W. 1065 (1907); Shaw v. Board of Education, 38 N. M. 298, 31 P. (2d) 993 (1934).

[17] 114 U. S. 190, 194, 5 Sup. Ct. 820, 822, 29 L. ed. 132, 134 (1885).

[18] Ths objection does not seem sound. The tracing problem in these cases is relatively simple, since even under the strict rule applied in a majority of jurisdictions, if the property can be traced step by step it does not matter if changes in form have occurred. The question is merely mathematical—the percentage of the bond money to the original value of the property involved. 4 BOGERT, TRUSTS AND TRUSTEES (1935) §921; Scott, *The Right to Follow Money Wrongfully Mingled With Other Money* (1913) 27 HARV. L. REV. 125.

[19] Fordsville v. Postel, 121 Ky. 67, 88 S. W. 1065 (1907).

[20] Henderson v. Redman, 185 Ky. 146, 214 S. W. 809 (1919); Henderson v. Winstead, 185 Ky. 693, 215 S. W. 527 (1919); see Field, *supra* note 11 at p. 13, where it is maintained that the holder of invalid bonds may recover against the city for money had and received even when the city had no power to borrow or to use money for the purposes to which the bond funds were devoted, so long as the city receives a benefit and there is privity between municipality and bondholder.

[21] Shaw v. Board of Education, 38 N. M. 298, 31 P. (2d) 993 (1934).

[22] See cases cited *supra* note 6.

holder of invalid municipal bonds? To do so might deprive the citizens of the use of the school, utility, or other service made possible by bond funds. Similar fears underlie the statutory refusals to allow mechanics' liens on public buildings.[23] Frequently, the *res* is constructed partially from bond proceeds and partially from tax money. In this situation, the contributing taxpayers' interests are jeopardized,[24] as full value would seldom be obtained under the forced sale or lease necessary to adjust the rights of the interested parties. If the value of the *res* has increased, the bondholder-beneficiary of the constructive trust might actually receive a return greater than the amount of the debt.[25] If bond funds had been mingled with other monies all parties might share *pro rata*.[26] A constructive trust is thought of as a remedy where there has been fraud, misrepresentation, duress, or something more than mere breach of contract. None of these is present in the case under consideration. The bondholder was not obligated to buy the securities and may be said to have walked in with his eyes wide open to the usual risks. If the denial of money had and received is necessary to effectuate the constitutional prohibition, is not the refusal of a constructive trust equally required?

On the other hand, to deny a constructive trust where money had and received will not lie is to give the community a benefit for which it has not paid and legally cannot pay. Thus, the city is unjustly enriched at the expense of the bondholder.

If the money derived from the bonds is still intact in the city treasury there should be no objection to a constructive trust. The bondholder is only regaining that which he supplied and no inconvenience or loss is suffered by citizens or taxpayers of the municipality. In any other situation, however, the courts, for the reasons suggested, should be very hesitant to decree this relief. The principal case appears to have been unwisely decided.

ROBERT C. HOWISON, JR.

[23] N. C. CODE ANN. (Michie, 1935) §2445 requires contractors of public buildings to give bond to help cover materialmen's and laborers' claims. This is because North Carolina has no statute providing for mechanics' liens on public buildings. Snow and Ellington, Royster & Co. v. Board of Commissioners of Durham County, 112 N. C. 336, 17 S. E. 176 (1893); Morganton Hardware Co. v. Morganton Graded Schools, 151 N. C. 507, 66 S. E. 583 (1909).

[24] When possible the bondholder would seek relief in an action for money had and received if the property had decreased in value, for that remedy would enable him to regain all that he had expended. But in the numerous cases where money had and received would not lie the constructive trust would certainly cause taxpayer loss.

[25] See Scott, *supra* note 18 at 128; 4 BOGERT, TRUSTS AND TRUSTEES (1935) §921 at p. 2653.

[26] By analogy to cases in which a trustee has wrongfully mingled trust money with his own for purchasing life insurance, where the cestui, by the weight of authority, is entitled to a pro rata share of the money derived from the policy. See Scott, *supra* note 18 at 128. There are cases, however, allowing the *cestui* to receive only insurance proceeds equivalent to the trust money with interest. 4 BOGERT, TRUSTS AND TRUSTEES (1935) §924.

Public Utilities—Rural Electrification Co-operatives—Certificate of Convenience and Necessity.

The Johnston County Electric Membership Corporation was formed under the 1935 statute[1] providing for the organization of co-operative electric utilities. The Carolina Power & Light Co. sought to enjoin the co-operative from constructing power lines in Johnston County paralleling its own lines, on the ground that defendant had not secured a certificate of convenience and necessity from the utilities commissioner, as required[2] of public utilities. *Held:* The 1935 statute expressly provides that corporations formed thereunder are not subject to the provisions of any other act; hence defendant needs no certificate.[3]

In furtherance of the national power policy, federal agencies in the past three years have successfully encouraged a number of state legislatures to pass more or less uniform laws designed to promote rural electrification. The North Carolina statutes are fairly typical. They provide (1) for the establishment of a state Rural Electrification Authority, and (2) for the organization of co-operative electric membership corporations.[4] On the application of five persons who wish to form a co-operative, the Authority has a survey made, and if it thinks the proposal feasible, grants the requested privilege. The Authority also has the power of eminent domain; and co-operatives desiring loans or grants from the federal Rural Electrification Administration must apply through the state Authority.

Nineteen other states[5] have statutes dealing with rural electrification.

[1] N. C. CODE ANN. (Michie, 1935) §1694(7)-(28).

[2] N. C. CODE ANN. (Michie, 1935) §1037(d).

[3] Carolina Power & Light Co. v. Johnston County Electric Membership Corp., 211 N. C. 717, 192 S. E. 105 (1937). After this decision, an agreement was reached between the plaintiff and the board of directors of defendant, whereby plaintiff promised to build 325 miles of power lines in Johnston County and to pay all expenditures "made for administrative and other expenses" of the co-operative, not to exceed $15,000, and defendant was to give up its right to construct lines in Johnston County. However, three residents of Johnston County brought suit to enjoin the Carolina Power & Light Co. and the board of directors of the co-operative from carrying out this agreement, alleging that the act of the board of directors was *ultra vires*. This injunction was denied in the Johnston Superior Court, Grady, J., holding that although the action of the board of directors "in selling out, lock, stock and barrel" to the Carolina Power & Light Co. was a plain breach of faith, nevertheless plaintiffs have not been injured because they are getting what they want—electric energy in the rural districts. Plaintiffs have appealed to the Supreme Court. Bailey v. Carolina Power & Light Co., argued before N. C. Sup. Ct., Nov. 2, 1937.

[4] N. C. CODE ANN. (Michie, 1935) §1694(1)-(28). The statute establishing the state Authority is N. C. Pub. Laws 1935, c. 288 (N. C. CODE ANN. (Michie, 1935) §1694(1)-(6)), and that referring to co-operatives is N. C. Pub. Laws 1935, c. 291 (N. C. CODE ANN. (Michie, 1935) §1694(7)-(28)).

[5] Ala. Laws 1935, nos. 45, 47 (as amended by no. 303); Ga. Laws 1937, no. 503; Ind. Acts 1935, c. 175; Iowa Laws 1935, c. 390-G1; KY. STAT. ANN. (Baldwin, 1937) c. 32, art. XVII; Me. Laws 1931, c. 230; Miss. Laws 1936, c. 183, 184; Mont. Laws 1935, c. 98; Nev. Stat. 1935, c. 72; N. H. Laws 1935, c. 135; N. M. Laws 1937, c. 100; N. D. Laws 1937, c. 115; ORE. CODE ANN. (Bobbs-Merrill, 1935) §56(3401)-(3460); S. C. Acts 1935, no. 65, Acts 1933, no. 275, Acts 1934, no.

Most of these acts were passed since 1934 and show marked similarities to the North Carolina statutes.[6] In six of these states[7] the Authorities, rather than the state public service or utilities commissions, have complete control and supervision of the co-operatives, including the power to set rates.[8] In North Carolina the statute establishing the state Authority provides that the "function of making rates and service charges and orders for the extension of lines shall remain in the utilities commission."[9]

However, the North Carolina utilities commission cannot require the co-operative to get a certificate of convenience and necessity. So ruled the court in the principal case,[10] basing its decision on Section 1694(28) which reads: "This article is complete in itself and shall be controlling. The provisions of any other law, general, special, or local, except as provided in this article, shall not apply to a corporation formed under this article."[11] This identical provision appears in the statutes adopted in ten other states.[12] But in the remaining nine states[13] having rural electrification statutes, this clause is conspicuously absent.[14]

887; S. D. Laws 1935, c. 162; Tenn. Acts 1935, c. 3, 4; Tex. Laws 1937 (Vernon's Tex. Sess. Law Service, p. 123); Vt. Acts 1935, no. 157; VA. CODE ANN. (Michie, 1936) c. 159A.

[6] Ala., Miss., Tenn. and Vt., like N. C., provide for the establishment of both Authorities and co-operatives. In Mont., N. H. and S. C., Authorities only are established, with no provision for co-operatives; exactly the reverse is true in Ga., Ind., Ky., Me., N. M., N. D., Tex., and Va. Rural electrification statutes of a somewhat different nature are found in Iowa, Nev., Ore., and S. D.

[7] Ala., Miss., Mont., N. M., S. C. and Tenn.

[8] It is worthy of note that none of the five states adopting rural electrification statutes in 1937 provides for state Authorities, indicating the growing tendency of the federal Authority to assume control of the co-operatives.

[9] N. C. CODE ANN. (Michie, 1935) §1694(3). But *quaere* as to whether this provision is not nullified by Section 1694(19)(k), which gives the co-operatives power "to fix, maintain and collect fees, rents, tolls and other charges for service rendered." Section 1694(28), providing that the article is complete in itself, seems technically to refer only to Sections 1694(7)-(27), relating to co-operatives, and not to Sections 1694(1)-(6), relating to the state Authority. See *supra* note 4.

[10] Accord: Lexington Mill & Elevator Co. v. Browne, 116 Neb. 753, 219 N. W. 12 (1928).

[11] N. C. CODE ANN. (Michie, 1935) §1694(28).

[12] Ga., Miss., Mont., Nev., N. M., N. D., S. C., S. D., Tenn. and Tex.

[13] Ala., Ind., Iowa, Ky., Me., N. H., Ore., Vt. and Va. However, Iowa provides that "Any law conflicting with any part of this chapter shall be construed as not applicable to associations formed hereunder" (Iowa Laws 1935, §8512-g56); and Vermont provides that the Board of Rural Electrification "shall have exclusive jurisdiction of all corporations organized under the provisions of this act" (Vt. Acts 1935, no. 157(4)).

[14] Kentucky, *e.g.*, stipulates that the provisions of general corporation laws are applicable to electric co-operatives and that they are subject to the general supervision of the public service commission. KY. STAT. ANN. (Baldwin, 1937) c. 32, art. XVII, §883j-25, §883j-27(b). Indiana specifically provides that a certificate must be secured from the public service commission by the co-operative. Ind. Acts 1935, c. 175, §5. Nevada and South Dakota have the same "complete in itself" clause as North Carolina, but add the provision that before the creation of a "power district," the public service commission must investigate and find (a) that the public convenience and necessity require the creation of a power district,

The plaintiff attacked this clause as unconstitutional in that it discriminated unfairly between two public utilities. To determine its constitutionality, it is necessary first to inquire whether this co-operative is a public utility. Until recent years, the vast majority of courts[15] held that the offering of service by a co-operative to its members did not constitute public service within the meaning of commission legislation, since it purported to serve its members only and not the public at large.[16] But the courts in some late cases,[17] looking to substance rather than form, have reasoned that the co-operative is in reality serving the public since any member of the public can join.[18] A contrary holding would provide opportunity for a public utility to avoid commission regulation: it could set up a co-operative, get each customer to take out a membership for a nominal fee, and escape regulation on the theory that it was not holding itself out to the public but was serving only its own members.

But even if the better view is that co-operatives are public utilities, it does not necessarily follow that the statutes under consideration result in unfair discrimination.[19] The inequality forbidden by the Con-

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and (b) that the creation of a power district is economically sound and desirable. Nev. Stat. 1935, c. 72, §4; S. D. Laws 1935, c. 162, §4.

[15] Southern Cal. Edison Co. v. Railroad Comm., 194 Cal. 757, 230 Pac. 661 (1925); People v. Orange County Farmers' & Merchants' Ass'n, 56 Cal. App. 205, 204 Pac. 873 (1922); State Public Utilities Comm. v. Okaw Valley Mut. Tel. Ass'n, 282 Ill. 336, 118 N. E. 760 (1918); State Public Utilities Comm. v. Bethany Mut. Tel. Ass'n, 270 Ill. 183, 110 N. E. 334 (1915); Hinds County Water Co. v. Scanlon, 159 Miss. 757, 132 So. 567 (1931); State *ex rel.* L. & F. Mut. Tel. Co. v. Brown, 323 Mo. 818, 19 S. W. (2d) 1048 (1929); State v. Southern Elkhorn Tel. Co., 106 Neb. 342, 183 N. W. 562 (1921); Schumacher v. Railroad Comm., 185 Wis. 303, 201 N. W. 241 (1924).

[16] The distinction was brought out definitely in a Kansas case, State *ex rel.* Helm v. Trego County Co-operative Tel. Co., 112 Kan. 701, 212 Pac. 902 (1923), where the co-operative originally served only members, but later also served the public. The court said that originally the co-operative was not subject to commission jurisdiction, but held that when it began to offer service to the public it became subject to commission jurisdiction. Accord: State Public Utilities Comm. v. Noble, 275 Ill. 121, 113 N. E. 910 (1916); Gilman v. Somerset Farmers' Co-operative Tel. Co., 129 Me. 243, 151 Atl. 440 (1930); Commonwealth Tel. Co. v. Carley, 192 Wis. 464, 213 N. W. 469 (1927). For an interesting discussion of the question of co-operatives as public utilities, see Packel, *Commission Jurisdiction over Utility Co-operatives* (1937) 35 MICH. L. REV. 411.

[17] Davis v. People *ex rel.* Public Utilities Comm., 79 Colo. 642, 247 Pac. 801 (1926); Parlett Co-operative v. Tidewater Lines, 164 Md. 405, 165 Atl. 313 (1933); North Shore F. & F. Co. v. North Shore Business Men's Trucking Ass'n, 195 Minn. 336, 263 N. W. 98 (1935); *cf.* State *ex rel.* Bd. of R. R. Comm'rs v. Rosenstein, 217 Iowa 985, 252 N. W. 251 (1934).

[18] "If it sees fit, it can and will serve the whole public willing to buy a share of stock. . . . Its incidents, its powers, and its operations are not to be distinguished from those of a public carrier, and in truth and in fact it is a public carrier." Parlett Co-operative v. Tidewater Lines, 164 Md. 405, 418, 165 Atl. 313, 318 (1933).

[19] In Parlett Co-operative v. Tidewater Lines, 164 Md. 405, 421, 165 Atl. 313, 319 (1933), it was said that the exemption of co-operative associations, transporting their members' freight for hire, from statutory provisions applicable to all public highway carriers for gain, would be unconstitutional as an arbitrary and unreasonable classification; but this was mere dictum.

stitution is only such as is actually and palpably unreasonable and arbitrary.[20] In *Frost v. Corporation Commission*,[21] an amendment to a statute exempting co-operative ginning associations from the necessity of obtaining certificates was held void on the ground that the classification was based on no real difference having a reasonable relation to the object of the legislation. But Justice Sutherland, speaking for the majority, emphasized that this co-operative was "in no sense a mutual association" but was engaged in serving "the general public for the sole purpose of making money," and stated that if this had been a non-profit co-operative restricted to the business of its own members there would be no reason to doubt that the classification was valid.[22] In view of the wide discretion which the legislature is allowed in the exercise of its power to make classifications,[23] it is likely that the United States Supreme Court would hold that there was sufficient difference between a co-operative and a private utility to justify the distinction created by the North Carolina statutes.[24]

But whether constitutional or not, the inclusion in the statutes of the "complete in itself" provision was ill-advised. Just how much of the vast field of legislation is covered within the bounds of this indefinite statement? If it were literally construed, for example, no action could be brought against a co-operative under any statute providing a remedy against a corporation in a tort action. Certainly for clarity's sake, if for no other, this statute needs re-wording. Even more serious consequences result from the dual control set-up—Rural Electrification Authority over co-operatives, and utilities commissioner over other public utilities.[25] One specific danger encouraged by this

[20] See Arkansas Gas Co. v. Railroad Comm., 261 U. S. 379, 384, 43 Sup. Ct. 387, 389, 67 L. ed. 705, 710 (1923), and cases cited.

[21] 278 U. S. 515, 49 Sup. Ct. 235, 73 L. ed. 483 (1928).

[22] 278 U. S. 515, 523, 49 Sup. Ct. 235, 238, 73 L. ed. 483, 489 (1928).

[23] Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 31 Sup. Ct. 337, 55 L. ed. 369, ANN. CAS. 1912C 165 (1911).

[24] See German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 418, 34 Sup. Ct. 612, 621, 58 L. ed. 1011, 1024 (1914), where the court states that there are differences between a mutual and a private insurance company and that "a recognition of the differences we cannot say is outside of the constitutional power of the legislature." Also *cf.* Lexington Mill & Elevator Co. v. Browne, 116 Neb. 753, 219 N. W. 12 (1928), where it was held that the requirements of a general warehousing act did not apply to a co-operative which was formed under an act authorizing co-operatives to engage in warehousing The question of unfair discrimination was not raised in this case, however. Also note that in a case decided after the *Frost* case the Supreme Court stated that a classification for purposes of taxation could undoubtedly be based on the non-profit character of an organization engaged in a business affected with a public interest. Puget Sound Power & Light Co. v. Seattle, 291 U. S. 619, 625, 54 Sup. Ct. 542, 545, 78 L. ed. 1025, 1030 (1934).

[25] Some interesting facts in this connection were brought out at the hearing before the North Carolina Utilities Commission, Oct. 7, 1936, Docket No. 839, *in re* the application of the Caldwell County Electric Membership Corporation for a certificate of convenience and necessity. Here it was shown that all the investigation as to the feasibility of the project was done by the federal Rural Electri-

system is strikingly illustrated in the principal case. According to the complaint, there are at present thirty-five miles of power lines in Johnston County belonging to plaintiff which run parallel to lines defendant proposed to construct. That this would cause a great waste, for which the public ultimately would have to pay, is obvious.

The muddled situation has been somewhat remedied in North Carolina by a resolution of the state Authority (passed after the Johnston County project had been approved) requiring co-operatives to obtain certificates from the utilities commissioner before the Authority will approve as feasible the proposed projects. However, in view of the possibility that the federal Rural Electrification Administration might exert its influence to persuade the state Authority to repeal this resolution, it would be wise for our legislature to strike out the "complete in itself" clause and add a provision requiring the co-operatives to obtain certificates of convenience and necessity from the utilities commissioner. A state's electrical policy can be administered more efficiently if control is centered in one body. There is no good reason why the co-operatives should protest against such regulation. If there is a real need for the proposed power line, the utilities commissioner will grant the certificate. Nor should the privately owned utilities fear regulated co-operatives, whose aim it is to construct only in rural areas which are inadequately supplied with electricity at present and into which the existing utilities do not wish to extend.[26]

CHAS. AYCOCK POE.

Torts—Last Clear Chance Doctrine.

The plaintiff's intestate, while sitting on a cross tie in a stooped position with his elbows on his knees and his head between his hands, was killed by the defendant's train. Deceased was shown to have been in full possession of his faculties a short time before the accident. The victim made no attempt to get off the track, and the engineer, who was violating a city speed ordinance, made no effort to stop until it was too

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fication Administration, none by the state Authority. The personal opinion of the chairman of the state Authority was that only 100 miles of the proposed 390 mile project were feasible; nevertheless the whole project was approved by the federal body. Impartial testimony tended to show that estimates, on which federal approval was based, of the number of farmers who would wire their homes and of the number of ranges, refrigerators, etc., they would purchase, were considerably exaggerated.

[26] One of the important achievements of the Rural Electrification Authority has been the spurring on of private utilities. *E.g.*, the Carolina Power & Light Co., since the 1935 statutes were adopted, has constructed or has under construction or has approved for immediate construction, 1,190 miles of rural lines. As a result of the co-operation of municipalities and private companies with the Authority, there have been projected more miles of rural lines in North Carolina than in any other state. See affidavit of Dudley Bagley, chairman of the North Carolina Authority, appearing in the record of the principal case, p. 49.

late to avoid the accident, although the deceased was seen for a distance of several hundred yards. In an action for wrongful death judgment was given for the plaintiff, but the supreme court reversed the decision, stating that the last clear chance doctrine did not apply and that the action should have been dismissed on the defendant's motion for judgment as of nonsuit.[1]

The doctrine of the last clear chance has long been recognized in North Carolina,[2] and has been applied especially to cases involving railroads. The North Carolina court has uniformly held that a duty rests on the engineer of a train to keep a vigilant lookout for persons or animals on the track,[3] and that he is presumed to have seen them at the earliest moment they could have been discovered by a proper performance of his duty. As a result of this rule the last clear chance doctrine may be applied not only in cases where a person in peril is in fact perceived on the track, but also in cases where, though in fact not seen, he would have been perceived had the engineer kept a proper lookout.[4]

The fact that the engineer sees a person upon the track does not necessarily mean that he must stop or even slacken his speed. When the victim is seen walking or standing upon the track, apparently in full possession of his faculties, the cases are uniform in denying recovery for his injury or death since the engineer, until the last moment, has a right to rely upon his getting off the track. Such an action is usually dismissed upon the defendant's motion for nonsuit.[5]

[1] Lemings v. Southern Ry., 211 N. C. 499, 191 S. E. 39 (1937).

[2] Note (1926) 5 N. C. L. REV. 58. According to this note the last clear chance doctrine was first applied in North Carolina in the case of Gunter v. Wicker, 85 N. C. 310 (1880).

[3] Carter v. Southern Ry., 135 N. C. 498, 47 S. E. 614 (1904); Ray v. Aberdeen & Rockfish R. R., 141 N. C. 84, 53 S. E. 622 (1906); Caudle v. Seaboard Air Line Ry., 202 N. C. 404, 163 S. E. 122 (1932); Johnson v. Atlantic Coast Line R. R., 205 N. C. 127, 170 S. E. 120 (1933).

[4] Deans v. Wilmington & W. R. R., 107 N. C. 686, 692, 12 S. E. 77, 79 (1890). In this case the court said, "If the engineer discover, or by reasonable watchfulness may discover, a person lying upon the track asleep or drunk, or see a human being who is known by him to be insane or otherwise insensible to danger, or unable to avoid it, upon the track in his front, it is his duty to resolve all doubts in favor of the preservation of life, and immediately use every available means, short of imperiling the lives of passengers on his train, to stop it."; Pickett v. Wilmington & W. R. R., 117 N. C. 616, 23 S. E. 264 (1895); Lassiter v. Raleigh & G. R. R., 133 N. C. 244, 45 S. E. 570 (1903); Edge v. Atlantic Coast Line Ry., 153 N. C. 212, 69 S. E. 74 (1910).

[5] High v. Carolina Cent. R. R., 112 N. C. 385, 17 S. E. 79 (1892); Abernathy v. Southern Ry., 164 N. C. 91, 80 S. E. 421 (1913); Davis v. Piedmont & N. Ry., 187 N. C. 147, 120 S. E. 827 (1924); Redmond v. Norfolk-Southern R. R., 196 N. C. 768, 147 S. E. 287 (1929); Thompson v. Atlantic Coast Line R. R., 199 N. C. 409, 154 S. E. 630 (1930); Dix v. High Point T. & D. R. R., 199 N. C. 651, 155 S. E. 448 (1930); Rives v. Atlantic Coast Line R. R., 203 N. C. 227, 165 S. E. 709 (1932); Way v. High Point T. & D. R. R., 207 N. C. 799, 178 S. E. 571 (1935); Rimmer v. Southern Ry., 208 N. C. 198, 179 S. E. 753 (1935); Kuykendall v. Southern Ry., 208 N. C. 840, 181 S. E. 625 (1935); Stover v. Southern Ry., 208 N. C. 495, 181 S. E. 336 (1935).

In the cases where a person is lying upon the track, the court says that his prostrate appearance should suggest to the engineer that he is helpless, and recovery is allowed by applying the last clear chance doctrine.[6] The doctrine has also been applied where one is found dead upon the track with no evidence other than a showing of sickness or intoxication a short while before the injury,[7] but where there is no evidence of sickness, intoxication, or helplessness, the court has dismissed the action as of nonsuit.[8] If one is upon the track in full possession of his faculties, but with no means of escape,[9] as when one is upon a trestle; or if he is apparently absorbed in some other activity,[10] then the doctrine is applied and recovery allowed.

There have been a number of cases in which the victim was sitting upon a cross tie in a stooped position because of sickness or intoxication, and the court has allowed a recovery by applying the last clear chance doctrine.[11] In all these cases the court stated that the *apparent* con-

[6] Deans v. Wilmington & W. R. R., 107 N. C. 686, 12 S. E. 77 (1890); Pickett v. Wilmington & W. R. R., 117 N. C. 616, 23 S. E. 264 (1895); Arrowood v. South Carolina & G. Extension Ry., 126 N. C. 629, 36 S. E. 151 (1900); Carter v. Southern Ry., 135 N. C. 498, 47 S. E. 614 (1904); Sawyer v. Roanoke R. R. & Lumber Co., 145 N. C. 24, 58 S. E. 598 (1907); Holman v. Norfolk & W. R. R., 159 N. C. 44, 74 S. E. 577 (1912); McManus v. Seaboard A. L. Ry., 174 N. C. 735, 737, 94 S. E. 455, 456 (1917). In this case the court said, "We consider it not amiss to note that it is not always required for the application of this doctrine that the person injured or killed should have been unconscious, but the same may at times be presented when a claimant was in a position of such peril that it is evident that ordinary effort on his part will not avail to extricate him."

[7] Powell v. Southern Ry., 125 N. C. 370, 34 S. E. 530 (1899).

[8] Holder v. North Carolina R. R., 160 N. C. 3, 75 S. E. 1094 (1912); Henry v. Norfolk S. R. R., 203 N. C. 277, 165 S. E. 698 (1932); Allman v. Southern Ry., 203 N. C. 660, 166 S. E. 891 (1932); Hester v. North Carolina R. R., 209 N. C. 843, 183 S. E. 377 (1936).

[9] McLamb v. Wilmington & W. R. R., 122 N. C. 862, 29 S. E. 894 (1898); McCall v. Southern Ry., 129 N. C. 298, 40 S. E. 67 (1901); Snipes v. Manufacturing Co., 152 N. C. 42, 46, 67 S. E. 27, 29 (1909). In this opinion the court said, "Ordinarily, cases calling for application of the doctrine indicated arise when the injured person was down on the track, apparently unconscious or helpless, . . . but such extreme conditions are not at all essential, and the ruling should prevail whenever an engineer operating a railroad train does or, in proper performance of his duty, should observe that a collision is not improbable, and that a person is in such a position of peril that ordinary effort on his part will not likely avail to save him from injury; and the authorities are also to the effect that an engineer in such circumstances should resolve doubts in favor of the safer course." Hopkins v. Southern Ry., 170 N. C. 485, 87 S. E. 320 (1915).

[10] Lassiter v. Raleigh & G. R. R., 133 N. C. 244, 45 S. E. 570 (1903); Caudle v. Seaboard A. L. Ry., 202 N. C. 404, 163 S. E. 122 (1932); Triplitt v. Southern Ry., 205 N. C. 113, 170 S. E. 146 (1933).

[11] Marks v. Atlantic Coast Line R. R., 133 N. C. 89, 45 S. E. 468 (1903); Guilford v. Norfolk & S. Ry., 154 N. C. 607, 70 S. E. 393 (1911); Tyson v. East Carolina R. R., 167 N. C. 215, 217, 83 S. E. 318, 319 (1914). This case quoted with approval the following passage, "A man seated on a cross tie of a railroad track, *apparently* asleep or unconscious, presents an unusual, not to say an extraordinary, spectacle, and we think it was the province of the jury to determine whether or not an engineer of ordinary prudence, seeing a man so situated, ought not commence checking the train in time to prevent injuring him, if it should transpire that he was unconscious or asleep." (italics ours); Jenkins v. Southern Ry., 196 N. C. 466, 146 S. E. 83 (1929).

dition of the victim should have put the engineer upon notice that the deceased was not sensitive of his peril.

The holding in the principal case should be contrasted with that in *Smith v. Salisbury and Spencer Railway Co.*[12] where the deceased was sitting upon the tracks with his elbows upon his knees and his head between his hands when struck. There was no evidence of sickness or intoxication. The court ruled that the case should go to the jury to determine if the motorman could have avoided the accident by exercising due care even though the plaintiff was negligent.

In the principal case the deceased was in the same position as in the *Smith* case. The victim was not sick or intoxicated in either case and in both was perceived by the engineer; yet the principal case held that a nonsuit should have been granted; the *Smith* case, that it was proper for the case to go to the jury.

In a majority of the North Carolina cases where the victim is actually perceived on the tracks, it seems that the court views the facts not from the standpoint of the engineer in the cabin of his locomotive, but bases the decision on whether or not the deceased was actually ill or intoxicated at the time of the accident. Since these facts are not revealed until after the accident these decisions defeat the purpose of the last clear chance doctrine except in cases where the deceased was actually ill or helpless. In spite of their holdings the court emphasizes the *apparent* condition of the injured party. If this *apparent* condition of the victim is to be the test rather than his *actual* condition, the court should have affirmed an application of the last clear chance doctrine in the principal case.

CLARENCE W. GRIFFIN.

Witnesses—Privileged Communications between Physician and Patient—Waiver Clauses in Insurance Applications.

Plaintiff, as beneficiary, sued defendant insurer on a life insurance policy issued to her deceased husband. The application for the policy contained a clause[1] waiving the statutory privilege against disclosure of communications between physician and patient.[2] In view of the

[12] 162 N. C. 30, 36, 77 S. E. 966, 968 (1913). In this opinion the court said, "If a person be seen upon the track, who is *apparently* capable of taking care of himself, the motorman may assume that he will leave the track before the car overtakes him, but he cannot act upon that presumption with respect to a person who is *apparently* insensible of his danger from sleepiness, drunkenness, or any other like cause." (italics ours).

[1] ". . . And further waive for myself and beneficiaries the privileges and benefits of any and all laws which are now in force or may hereafter be enacted in regard to disqualifying any physician or nurse from testifying concerning any information obtained by him or her in a professional capacity; and I expressly authorize such physician or nurse to make such disclosures."

[2] N. C. CODE ANN. (Michie, 1935) §1798.

fact that defendant did not rely upon the clause, the court disregarded it in determining the admissibility of a physician's testimony.[3]

While the decision in the instant case is beyond criticism, it nevertheless suggests the general problem as to how, when, and by whom this privilege may be waived, and, more particularly, the increasingly important question as to the legal effect of the waiver clauses contained in many applications for insurance.

That this purely statutory privilege[4] may be waived is undisputed.[5] But, well-settled as this general principle is, the various ways in which waiver may be accomplished deserve mention[6] in passing.

Although the privilege is plainly that of the patient during his life, it passes to his personal representative at his death; and the latter may waive it.[7] The Wisconsin Court, however, holds that the privilege becomes even more sacred after the death of the patient and that the deceased's representative is incapable of waiving it.[8]

Unless a statute requires express waiver,[9] the privilege may be waived by implication. The bringing of an action by the patient or his representative, in itself, will not constitute a waiver even when an essential issue is the existence of a physical ailment,[10] *e.g.*, in actions

[3] Creech v. Woodmen of the World, 211 N. C. 658, 191 S. E. 840 (1937).

[4] This privilege did not exist at common law. Sherman v. Sherman, 1 Root 486 (Conn. 1793); Remington v. Rhode Island Co., 37 R. I. 393, 93 Atl. 33 (1915); Banigan v. Banigan, 26 R. I. 454, 59 Atl. 313 (1904); Crow v. State, 89 Tex. Cr. 149, 230 S. W. 148 (1921); Trial of Duchess of Kingston, 20 How. St. Tr. 573 (House of Lords, 1776); 5 WIGMORE, EVIDENCE (2d ed. 1923) §2380.

Twenty-seven jurisdictions in the United States have created this privilege by statute. 5 WIGMORE, EVIDENCE (2d ed. 1923) §2380, note 5.

Since this privilege is strictly statutory, the decisions are controlled by the wording and construction of the statute of the particular jurisdiction. However, general propositions in regard to waiver may be derived from analogy to other privileges for confidential communications which did exist at common law, *e.g.*, between attorney and client, husband and wife.

[5] 5 WIGMORE, EVIDENCE (2d ed. 1923) §2388.

[6] The following is not intended to be an exhaustive analysis of all the cases dealing with the various types of waiver, but merely an illustrative foundation for the discussion of the particular problem of waiver clauses in applications for insurance.

[7] Schirmer v. Baldwin, 182 Ark. 581, 32 S. W. (2d) 162 (1930); Marker v. McCue, 50 Idaho 462, 297 Pac. 401 (1931); Penna. Mutual Life Ins. Co. v. Wiler, 100 Ind. 92 (1884); Miser v. Iowa State Traveling Men's Ass'n, 273 N. W. 155 (Iowa 1937); Goram v. Hickey, 145 Kan. 54, 64 P. (2d) 587 (1937) (heirs entitled to waive the privilege although executor of the will opposed waiver); Fraser v. Jennison, 42 Mich. 206, 3 N. W. 882 (1897); Parker v. Parker, 78 Neb. 535, 111 N. W. 119 (1907); National Life and Casualty Co. v. Heard, 148 Okla. 274, 298 Pac. 619 (1931); Indus. Comm. of Ohio v. Warnke, 131 Ohio St. 140, 2 N. E. (2d) 248 (1936).

[8] Borosich v. Metropolitan Life Ins. Co., 191 Wis. 239, 210 N. W. 829 (1926); Maine v. Maryland Casualty Co., 172 Wis. 350, 178 N. W. 749 (1920); *In re* Hunt's Will, 122 Wis. 460, 100 N. W. 874 (1904).

[9] For an example of a statute requiring express waiver see N. Y. CIV. PRAC. (Cahill, 1931 §§352, 354. In the absence of statute, express waiver is not necessary on any principle. *Cf.* Blackburn v. Crawford's Lessee, 3 Wall. 175, 18 L. ed. 186 (1866).

[10] But see 5 WIGMORE, *op. cit. supra* note 5, §2389, in which the author severely criticizes this rule.

for personal injury,[11] actions to recover on insurance policies,[12] and testamentary contests.[13] The privilege may be waived by the patient by referring specifically in his own testimony to communications made to his physician.[14] But where the patient testifies only as to his symptoms it is held not a waiver of the privilege, since there is given in evidence no communication by word or act.[15] Waiver may be accomplished by the patient or his representative in calling the physician as a witness and examining him as to the physical condition of the patient;[16] but the offer of the testimony of one physician is not a waiver of the privilege as to the testimony of other physicians present in consultation with him.[17] However, a waiver of the privilege as to one physician called by the opponent (by failure to object) is a waiver of the privilege as to other physicians.[18] A waiver of the privilege at a former trial, however accomplished, will bar a claim of the privilege at a subsequent trial.[19]

By far the most common form of waiver is an express stipulation to that effect in applications for insurance. In giving legal effect to this type of clause the courts are confronted with the oft' presented choice between allowing a party to contract as he pleases, so long as he acts voluntarily, and protecting him from his own lack of vision and im-

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Where so specifically provided by statute, CODES, LAWS, AND CONST. AMEND. OF CALIF. (Deering, 1935) §1881, par. 4, the bringing of an action will of itself constitute waiver. See Webb v. Francis J. Lewald Coal Co., 214 Cal. 182, 186, 4 P. (2d) 532, 533 (1931), (1932) 20 CALIF. L. REV. 302.

[11] Federal Mining Co. v. Dalo, 252 Fed. 356 (C. C. A. 9th, 1918).

[12] Foman v. Liberty Life Ins. Co., 227 Mo. App. 70, 51 S. W. (2d) 212 (1932).

[13] 5 WIGMORE, *op. cit. supra* note 10, §2389.

[14] Rauh v. Deutscher Verein, 51 N. Y. Supp. 985 (1898); Mutual Life Ins. Co. v. McKim, 54 Ohio App. 66, 6 N. E. (2d) 9 (1935).

[15] Inspiration Consol. Copper Co. v. Mendez, 250 U. S. 400, 34 Sup. Ct. 553, 63 L. ed. 1058 (1919), *aff'g* 19 Ariz 151, 166 Pac. 278 (1917); Williams v. Johnson, 117 Ind. 273, 13 N. E. 872 (1887); May v. Northern Pacific Ry., 37 Mont. 522, 81 Pac. 328 (1905); Green v. Town of Nebagamain, 113 Wis. 508, 89 N. W. 520, 1902). *Contra:* Forrest v. Portland Ry. L. & P. Co., 64 Ore. 240, 129 Pac. 1048 (1913).

[16] Metropolitan St. Ry. v. Jacobi, 112 Fed. 924 (C. C. A. 2d, 1901); Traveler's Bldg. & Loan Ass'n v. Hawkins, 182 Ark. 1148, 34 S. W. (2d) 474 (1931); Wheelock v. Godfrey, 100 Cal. 587, 35 Pac. 317 (1893); Pittsburg C. C. & St. L. Ry. v. O'Connor, 171 Ind. 686, 85 N. E. 969 (1908); Hier v. Farmers Mut. Life Ins Co., 67 P. (2d) 831 (Mont. 1937); McDonnell v. Monteith, 59 N. D. 750, 231 N. W. 854 (1930).

[17] Metropolitan St. Ry. v. Jacobi, 112 Fed. 924 (C. C. A. 2d, 1901); Penna. Mutual Life Ins. Co. v. Wiler, 100 Ind. 92 (1884); Barker v. Cunard S. S. Co., 36 N. Y. Supp. 256 (1895). *Contra:* State v. Long, 257 Mo. 199, 165 S. W. 748 (1914); (1914) 28 HARV. L. REV. 116; Schlard v. Henderson, 4 N. E. (2d) 205 (Ind. 1936).

[18] Capron v. Douglass, 193 N. Y. 11, 85 N. E. 827 (1908).

[19] Pittsburgh C. C. & St. L. Ry. v. O'Connor, 171 Ind. 686, 85 N. E. 969 (1908); Elliot v. Kansas City, 198 Mo. 593, 96 S. W. 1023 (1906); McKinney v. Grand St. P. P. & F. Ry., 104 N. Y. 352, 10 N. E. 544 (1887).

". . . After its publication no further injury can be inflicted upon the rights and interests which the statute was intended to protect, . . . the consent having been once given and acted upon, cannot be recalled" McKinney v. Grand St. P. P. & F. Ry., 104 N. Y. 352, 355, 10 N. E. 544 (1887).

providence. On the one hand we have the reasoning of Dean Wigmore. "Since experience has shown that the testimony of physicians who might assist in the discovery of the truth is likely to be suppressed by the insured's claim of privilege, and since the contract of insurance is a voluntary transaction for both parties, the insurer's insistence on a provision of this sort in his contract is no more than a reasonable measure of self-protection."[20] On the other hand we have the theory of the Michigan Court. ". . . We remain of our opinion that . . . our statute clearly expresses the legislative intent to prohibit, as a matter of public policy, anticipatory waivers of this nature which are to become operative after the mouth of the patient is closed by death."[21]

The overwhelming weight of authority holds such clauses to be valid waivers which preclude an assertion of the privilege in an action on the policy,[22] while New York and Michigan hold these waivers invalid for reasons to be discussed presently.

Under the majority view such a clause is not only binding on the insured but enforceable against beneficiaries, or any person claiming any interest under the policy.[23] Under this line of authority the wording of the particular clause is strictly construed in order to limit the scope of the waiver. Therefore, where the stipulation is construed to limit the waiver to communications made to physicians who examined the insured prior to the signing of the application, the clause is not a waiver as to future communications.[24] But evidence of communica-

[20] 5 WIGMORE, *op. cit. supra* note 13, §2388(b).

[21] Gilchrist v. Mystic Workers of the World, 196 Mich. 247, 248, 163 N. W. 10, 11 (1917).

[22] Wirthlin v. Mut. Life Ins. Co., 56 F. (2d) 137 (C. C. A. 10th, 1932); Lincoln Nat. Life Ins. Co. of Ft. Wayne, Ind. v. Hammer, 41 F. (2d) 12 (C. C. A. 8th, 1930); New York Life Ins. Co. v. Renault, 11 F. (2d) 281 (D. C. D. N. J., (1926); Andreveno v. Mutual Reserve Fund Life Ass'n, 34 Fed. 870 (E. D. Mo., 1888); Trull v. Modern Woodmen of America, 12 Idaho 318, 85 Pac. 1081 (1906); Mutual Life Ins. Co. v. Willis, 37 Ind. App. 48, 76 N. E. 560 (1906); Sovereign Camp W. O. W. v. Farmer, 116 Miss. 626, 77 So. 655 (1918); Keller v. Home Life Ins. Co., 95 Mo. App. 627, 69 S. W. 612 (1902); Fuller v. Knights of Pythias, 129 N. C. 318, 40 S. E. 65 (1901); Templeton v. Mutual Life Ins. Co. of N. Y., 177 Okla. 94, 57 P. (2d) 841 (1936).

[23] Trull v. Modern Woodmen of America, 12 Idaho 318, 85 Pac. 1081 (1906); Mutual Life Ins. Co. v. Willis, 37 Ind. App. 48, 76 N. E. 560 (1906); Keller v. Home Life Ins. Co., 95 Mo. App. 627, 69 S. W. 612 (1902); Modern Woodmen of America v. Angle, 127 Mo. App. 94, 104 S. W. 297 (1907); Falkinburg v. Prudential Life Ins. Co. of America, 273 N. W. 478 (Neb. 1937); New York Life Ins. Co. v. Snyder, 116 Ohio St. 693, 158 N. E. 176 (1927).

At least one court following the majority rule has held that such a clause should be construed strongly against the insurer since insurer drew the contract and since such a stipulation is provided as a means of aiding the insurer to avoid the policy on the ground of fraudulent misrepresentations as to the health of the insured Turner v. Redwood Mutual Life Ass'n of Fresno, 13 Cal. App. (2d) 573, 57 P. (2d) 222 (1936).

[24] Pride v. Interstate Business Men's Ass'n of Des Moines, 207 Iowa 167, 216 N. W. 62 (1927).

Of course, the waiver in such a case is not anticipatory, in the sense of applying to future *communications;* but is anticipatory in the sense of applying to a future *claim of the privilege* at a later trial. Accordingly, this may or may not

tions made subsequent to the signing of the application is admissible where the clause provides for disclosures by any physician who ". . . heretofore attended or may hereafter attend . . ." the insured.[25] In those applications where the clause does not by its own terms define the extent of waiver, but merely provides for waiver of the statute, the scope will of course depend upon the construction of the statute itself.[26]

The New York statute[27] requires an express waiver at the time of the trial or at the time of the examination of the physician, and therefore such a stipulation is held not to be a waiver.[28] But the statute does not affect the validity of a stipulation made prior to its enactment.[29]

The Michigan Court holds these stipulations invalid[30] and attempts to justify its position on two grounds. The first is that public policy forbids such a waiver because it operates after death has sealed the lips of the insured and he cannot then raise his voice in contradiction. This argument takes no account of the possibility of a case arising in which the patient *himself* sues on an accident policy, the application for which contains such a clause. Should such a case arise[31] it would be impossible for the court logically to apply this argument, and if it intends to continue its policy of holding these waivers invalid it would necessarily have to resort to another line of reasoning. The second ground on which the Michigan Court bases its decision is that the Michigan statute creating the privilege[32] provides, by amendment,[33] only one situation in which the privilege may be waived, *viz.*, by the heirs at law of the patient in a contest of the patient's will. It is argued by the Michigan Court that the statute creates an "absolute privilege"[34] and that this

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fall within the ban of the Michigan Court's rule, depending upon which connotation it attaches to the term "anticipatory waiver."

[25] Metropolitan Life Ins. Co. v. Brubaker, 78 Kan. 146, 96 Pac. 62 (1908); Fuller v. Knights of Pythias, 129 N. C. 318, 40 S. E. 65 (1901).

[26] Sovereign Camp v. Farmer, 116 Miss. 626, 77 So. 655 (1917).

[27] "The last three sections (creating the privileged communications) apply to any examination of a person as a witness unless the provisions thereof are expressly waived upon the trial or examination by the person confessing, the patient or client" N. Y. CIV. PRAC. (Cahill, 1931) §354.

[28] Meyer v. Knights of Pythias, 198 U. S. 508, 25 Sup. Ct. 754, 49 L. ed. 1146 (1905), *aff'g* 178 N. Y. 63, 70 N. E. 111 (1904); Holden v. Metropolitan Life Ins. Co., 165 N. Y. 13, 58 N. E. 771 (1900); Davis v. Supreme Lodge, K. H., 165 N. Y. 159, 58 N. E. 891 (1900).

[29] Foley v. Royal Arcanum, 151 N. Y. 196, 45 N. E. 456 (1896); Dougherty v. Metropolitan Life Ins. Co., 33 N. Y. Supp. 873 (1895).

[30] Gilchrist v. Mystic Workers of the World, 188 Mich. 466, 154 N. W. 575 (1915); Gilchrist v. Mystic Workers of the World, 196 Mich. 247, 163 N. W. 10 (1917).

[31] A search of the Michigan decisions reveals no case involving these facts.

[32] COMP. LAWS MICH. (1929) §14216.

[33] *Ibid.* (Amended 1909.)

[34] It is difficult to understand what the Court means by the term "absolute privilege." An "absolute privilege" might refer (1) to a rule of outright *incompetency*—which is no privilege at all; or it might refer (2) to a gen-

amendment creates the sole exception to it.[35] This conclusion is not only inconsistent with the law applied to waiver of other statutory privileges but is also inconsistent with previous Michigan decisions which have held that the patient or those who represent him after his death may waive the privilege expressly,[36] or by failure to claim the privilege before the physician's testimony is admitted in evidence.[37]

The strictness of the Michigan rule and the weakness of its foundation leave no doubt that the majority rule represents the better view. The latter is consistent with the law pertaining to waiver of the other privileges for confidential communications[38] and is supported by the strong argument that the enforcement of these clauses greatly diminishes the possibility of recovery on fraudulent insurance claims.

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uind privilege which must be claimed, but which is "absolute" in the sense that it cannot be waived except by failure to claim it.

[35] Gilchrist v. Mystic Workers of the World, 188 Mich. 466, 475, 154 N. W. 575, 578 (1915).

[36] Fraser v. Jennison, 42 Mich. 206, 3 N. W. 882 (1897); Grand Rapids & Ind. R. R. v. Martin, 41 Mich. 667, 3 N. W. 173 (1897).

[37] Breisenmeister v. Knights of Pythias, 81 Mich. 525, 45 N. W. 977 (1890).

[38] 5 WIGMORE, EVIDENCE (2d ed. 1923) §§2327-2329, 2340.