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Notes and Comments

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The executives for 1939-1940 of the editorial staff of the NORTH CAROLINA LAW REVIEW are: Frank Thomas Miller, Jr., editor-in-chief; Elizabeth Shewmake, associate editor; Nathaniel G. Sims, book review editor. They are likewise the recipients of the faculty research assistantships for the current academic year.

Because they stood among the highest ten per cent of their class in point of scholarship, the following students were elected last spring to the honorary law school society of the Order of the Coif: Robert C. Howison, Jr., Moses B. Gillam, Jr., and Clarence A. Griffin, Jr.

Visiting professors in the 1939 summer session of the Law School included: Breck P. McAllister, of the University of Washington, who gave the course in Administrative Law; Walter Wheeler Cook, of Northwestern University, who taught Conflict of Laws; Alexander H. Frey, of the University of Pennsylvania, who gave the course in Labor Law; and Richard R. B. Powell, of Columbia University, who taught the course in Trusts.

NOTES AND COMMENTS

Bankruptcy—Receiverships—Insolvency—Corporate Reorganization—Power of Indenture Trustee to Act on Behalf of Bondholders.

In a proceeding for corporate reorganization under Section 77B of the Bankruptcy Act,[1] the circuit court of appeals[2] reversed the district court's confirmation of a plan of reorganization which had been approved by a two-thirds majority of those bondholders who had filed and voted their claims individually. The circuit court *held* that under Section 77B in computing the amount of claims, two-thirds of which must be represented by the assenting bondholders, the amount of claims filed by the indenture trustee are included as well as those filed by the individual bondholders, and that for the purpose of filing written acceptances no distinction is made between those claims filed by the indenture trustee, and allowed, and those filed by the individual creditor or someone expressly authorized to file them. On this basis the plan did not have the requisite number of acceptances and could not be confirmed by the court.

The usefulness of the deed of trust in corporation finance lies largely in the concert of action which may be obtained by concentration of power in the trustee to act in preserving the interests of the bondholders as a whole, which at the same time avoids the danger of overwhelming the debtor with a multiplicity of suits.[3] In the usual indenture the

[1] 48 STAT. 912, 11 U. S. C. A. §207 (1934).
[2] *In re* Kenilworth Bldg. Corporation, 105 F. (2d) 673 (C. C. A. 7th, 1939).
[3] Note (1927) 27 COL. L. REV. 443.

bondholder is a secured creditor,[4] recognized as the obligee of the bond which he holds; while the trustee, deriving his powers from the deed of trust, is the party responsible for the protection of the bondholder's interests under the covenants of the indenture. The extent to which a trustee has a right to act in connection with trust property is a problem which presents itself to the courts in varying degrees of complexity, depending upon the particular case and the powers therein sought to be exercised by the trustee.[5] Among the problems most frequently arising are those concerned with the power of the trustee to: (1) file an aggregate claim in reorganization and liquidation proceedings on behalf of the bondholders secured by the indenture, (2) vote on a proposed plan of corporate reorganization, (3) bind the bondholders by his consent to the issuance of prior lien receivership certificates, (4) bid in the property for the benefit of the bondholders. The protection remaining to the bondholders when the trustee exceeds the scope of his authority is likewise closely related to these problems.

Whether or not an indenture trustee holds such title as will permit him to file a claim on behalf of all the creditors secured by the indenture is a question which has caused much confusion. It will be conceded that ordinarily the proper party to file the claim is the individual holder of the bond giving rise to the obligation of the maker. If the indenture expressly authorizes the trustee to file the claims, this provision will be given effect.[6] If the indenture contains no provision which can be interpreted to give the trustee such power, many courts hold that the power will not be implied[7] for the reason that since the debt is evidenced

[4] *In re* U. S. Leatheroid & Rubber Co., 285 Fed. 884 (D. Mass. 1923); *In re* Indiana Flooring Co., 53 F. (2d) 263 (S. D. N. Y. 1931); see note (1927) 27 COL. L. REV. 443, 444.

[5] See Moss Tie Co. v. Wabash Ry., 11 F. Supp. 277, 283 (S. D. N. Y. 1935).

[6] *In re* International Match Corp., 3 F. Supp. 445 (S. D. N. Y. 1932); Spitz v. Fox Metropolitan Playhouses, Inc., 3 F. Supp. 606 (S. D. N. Y. 1933).

[7] United States Trust Co. v. Gordon, 216 Fed. 929 (C. C. A. 6th, 1914) (bankruptcy case which decided only that the trustee was not entitled to file aggregate claims where bondholders had already acted); *In re* U. S. Leatheroid & Rubber Co., 285 Fed. 884 (D. Mass. 1923) (bankruptcy case where the trustee was not permitted to file claims even though bonds were made payable to trustee or holder, the court holding that the debt was represented only by the bond itself); Fitkin v. Century Oil Co., 16 F. (2d) 22 (C. C. A. 2d, 1926) (receivership action in which the mortgage deed giving the trustee power "to take all steps needful for the protection and enforcement of rights of the trustee and holders of the notes hereby secured", was deemed insufficient to allow trustee to file the aggregate of the claims); *In re* Indiana Flooring Co., 53 F. (2d) 263 (S. D. N. Y. 1931) (bankruptcy proceeding in which the court emphasized the clause in the indenture to the effect that nothing contained therein should affect the rights of the bondholders); *In re* Prudence Bonds Corp., 16 F. Supp. 324 (E. D. N. Y. 1936) (a proceeding in bankruptcy in which the court held that the trustee relationship was not sufficient to constitute the trustee a creditor and thus allow him to file the aggregate claim). See Mackey v. Randolph Macon Coal Co., 178 Fed. 881, 884 (C. C. A. 8th, 1910); *In re* A. J. Ellis, Inc., 242 Fed. 156, 158 (D. N. J. 1917); Seaboard Nat. Bank v. Rogers Milk Products Co., 21 F. (2d) 414, 418 (1927).

by the bond itself, an instrument entirely separate and distinct from the deed of trust, and that since the trustee is neither the holder of the bond nor its owner, he is, in the absence of express authority to the contrary, in no position to claim against the corporation as its creditor. For this reason, in the more usual situation there is included in the indenture a clause giving the trustee the express power to prove claims;[8] or a clause to the effect that the interest and principal of the secured indebtedness are payable to the trustee in case of default, thereby implying that power in a manner which the courts will recognize.[9] Where the trustee is allowed to file the claims, then, unless his power is specified in the indenture to be exclusive, the bondholders also have the right to file their own claims. Duplication of claims is avoided by reducing the trustee's claim *pro tanto* as the individual bondholders file their own claims.[10] The inclusion in the indenture of a specific clause allowing the trustee to file a claim on behalf of all the creditors secured by the indenture or a clause from which the courts will imply this power, would seem to be practical, as well as equitable, considering the fact that many individual holders cannot be located or notified in the relatively short time allowed for filing claims in bankruptcy proceedings, equity receiverships, and other forms of reorganizations.

However, where this power to file claims is vested in a trustee it does not imply a like power to vote on a plan of reorganization.[11] In filing claims he has acted as an authorized agent of the bondholders,

[8] See note 6, *supra.*

[9] Continental-Equitable Title & Trust Co. v. National Properties Co., 273 Fed. 967 (D. Del. 1921) (receivership action in which it was held that the title of the bondholders was defeasible and terminated on default, at which time title and right to make demand passed to the trustee); *In re* United Cigar Stores Co., 68 F. (2d) 895 (C. C. A. 2d, 1934) (bankruptcy proceeding in which the deed of trust stipulated that payment shall be made "only" to the trustee); *In re* Paramount Publix Corp., 72 F. (2d) 219 (C. C. A. 2d, 1934) (bankruptcy proceeding where the right of the trustee to file was based on the terms of the indenture which stated that payment should be made to the trustee); *In re* Allied Owners' Corp., 74 F. (2d) 201 (C. C. A. 2d, 1934) (77B proceeding where the trustee under the indenture was given the power, in case of default, to proceed to enforce the rights of the bondholders); National Milling & Chemical Co., Inc. v. Amalgamated Laundries, Inc., 7 F. Supp. 723 (S. D. N. Y. 1934) (receivership proceedings in which the trustee under the covenants of the indenture and in his representative capacity was conceded the right to file claims); *In re* James Butler Grocery Co., 21 F. Supp. 149 (E. D. N. Y. 1937) (bankruptcy proceeding where under the terms of the indenture the trustee was given the right to act upon default); Central Nat. Bank of Philadelphia v. Bateman & Co., Inc., 15 Del. Ch. 31, 131 Atl. 202 (1925).

[10] *In re* United Cigar Stores Co., 68 F. (2d) 895 (C. C. A. 2d, 1934); *In re* Associated Telephone Co., 12 F. Supp. 468 (S. D. N. Y. 1935); Gochenour v. Griever, 295 Ill. App. 366, 15 N. E. (2d) 26 (1938); 2 GERDES, CORPORATE REORGANIZATIONS (1936) §744.

[11] *In re* Allied Owners' Corp., 74 F. (2d) 201 (C. C. A. 2d, 1934); Blumgart v. St. Louis S. F. Ry., 94 F. (2d) 712 (C. C. A. 8th, 1938); *In re* Kenilworth Bldg. Corp., 105 F. (2d) 673 (C. C. A. 7th, 1939); note (1935) 2 U. OF CHI. L. REV. 644.

and at no time has he gained the status of an independent creditor of the company; his position was developed for duties of a fiduciary and administrative nature, and at no time was it within the intent of the parties to place the trustee in a policy-forming position.[12] The courts have refused to allow the contract between the corporation and the bondholders to be impaired or changed materially without their consent.[13] Therefore, this action by the trustee would not bind the bondholders since it exceeds the scope of his authority.[14] It has been suggested,[15] however, that at least a provision in the indenture should be made for allowing the trustee to vote for absent bondholders.

The problem of the respective powers of the trustee or the bondholders to vote on a plan of reorganization arises in reorganizations under the National Bankruptcy Act. Under Section 77B of the Bankruptcy Act[16] it was necessary to have the affirmative acceptance of two-thirds of the claims allowed. In such cases it has been said that it was customary to get the acceptance of two-thirds of the entire issue whether the claims were filed by the bondholders or the trustee.[17] The question would then be important whether the acceptance by the trustee could be counted in making up the two-thirds. The Chandler Act, which replaces Section 77B with Chapter X,[18] makes specific provision for such a situation. It provides that the trustee shall have the power to file claims for all holders who have not acted, but ". . . that in computing the majority necessary for the acceptance of the plan only the claims filed by the holders thereof, and allowed, shall be included." The language of the statute would, therefore, lead us to believe that in the future claims must be filed by the individual bondholder in order to allow his claim to be considered in computing the necessary majorities, or to allow him to vote on the plan of reorganization.[19] The claims filed by the trustee are kept alive by the filing, however, so these holders

[12] Note (1935) 2 U. OF CHI. L. REV. 644; see Bitker v. Hotel Duluth Co., 83 F. (2d) 721, 723 (C. C. A. 8th, 1936).

[13] *In re* Allied Owners' Corp., 74 F. (2d) 201 (C. C. A. 2d, 1934); note (1935) 33 MICH. L. REV. 1101; see Bitker v. Hotel Duluth Co., 83 F. (2d) 721, 723 (C. C. A. 8th, 1936).

[14] Palmer v. Bankers' Trust Co., 12 F. (2d) 747 (C. C. A. 8th, 1926); Hollister v. Stewart, 111 N. Y. 644, 19 N. E. 782 (1889); Sturges v. Knapp, 31 Vt. 1 (1858); see Werner, Harris & Buck v. Equitable Trust Co., 35 F. (2d) 513, 514 (C. C. A. 10th, 1929); Chicago Title & Trust Co. v. Robin, 361 Ill. 261, 267, 198 N. E. 4, 8 (1935). *Cf.* Allen v. Moline Plow Co., 14 F. (2d) 912 (C. C. A. 8th, 1926).

[15] Note (1935) 2 U. OF CHI. L. REV. 644.

[16] 48 STAT. 912, 11 U. S. C. A. §207 (1934).

[17] Brief for Appellants, p. 20, *In re* Kenilworth Bldg. Corp., 105 F. (2d) 673 (C. C. A. 7th, 1939). The phrase relied on in 77B(e) (1), "whose claims have been allowed", would seem to make no distinction in the persons who filed them.

[18] 52 STAT. 893, 11 U. S. C. A. §598 (Supp. 1938).

[19] *In re* Genesse Valley Gas Co., Inc. (S. D. N. Y. 1939), C. C. H. Bankr. Serv. ¶2808 (1939).

have some measure of protection since the court will look to the fairness of the proposed plan to the non-voting security holders before confirming it.[20]

The issuance of prior lien receivership certificates for a private company raises an analogous problem where such an issue requires the consent of the bondholders before the certificates are given priority over the secured bond issue.[21] The great majority of the cases hold that the ordinary deed of trust does not contemplate, under a reasonable construction of the general power to protect the bonds, that the authority to give consent shall vest in the trustee[22] either by direct action on his part,[23] or by his inaction in the face of notice of the receivership proceeding.[24]

Relatively few cases have come to the courts for a consideration of the right of the trustee, in the absence of a governing provision in the instrument, to bid for the property at the foreclosure sale on behalf of the bondholders. These cases show a well divided split of authority with excellent authority on both sides. Led by *Nay Aug Lumber Co. v. Scranton Trust Co.*,[25] some courts hold that the trustee has the implied power to bid for the property for the bondholders as part of his duty to protect the security, bidding for it an amount up to the amount of the bonds, and, if it is thereby bid in for the amount of the bonded indebtedness, giving each bondholder an undivided interest in the property.[26] The principal advantage which the courts recognize in this Pennsylvania rule of implied power of the trustee arises from the well known fact that property sold under a foreclosure seldom brings a price anywhere nearly commensurate with its true value. Therefore, it would seem more in the contemplation of the makers of the instru-

[20] See 3 GERDES, CORPORATE REORGANIZATIONS §1124.

[21] Rhode Island Hospital Trust Co. v. Greene & Sons Corp., 50 R. I. 305, 146 Atl. 765 (1929); Koester v. Citizens' Publishing Co., 154 S. C. 144, 151 S. E. 452 (1930); see Clifford v. West Hartford Creamery Co., 103 Vt. 229, 234, 153 Atl. 205, 211 (1931); note (1926) 40 A. L. R. 244.

[22] Farmers Loan & Trust Co. v. Centralia & C. Ry., 96 Fed. 636 (C. C. A. 7th, 1899); Bernard v. Union Trust Co., 159 Fed. 620 (C. C. A. 4th, 1908); Nowell v. International Trustee Co., 169 Fed. 497 (C. C. A. 9th, 1909); Rhode Island Hospital Trust Co. v. Greene & Sons Corp., 50 R. I. 305, 146 Atl. 765 (1929). *Contra: In re* Quemahoning Creek Coal Co., 15 F. (2d) 58 (W. D. Pa. 1926).

[23] See Koester v. Citizens' Publishing Co., 154 S. C. 154, 197, 151 S. E. 452, 467 (1930).

[24] Farmers Loan & Trust Co. v. Centralia Ry., 96 Fed. 636 (C. C. A. 7th, 1899); Rhode Island Hospital Trust Co. v. Greene & Sons Corp., 50 R. I. 305, 146 Atl. 765 (1929).

[25] 240 Pa. 500, 87 Atl. 843 (1913).

[26] Hoffman v. First Bond & Mortgage Co. of Hartford, 116 Conn. 320, 164 Atl. 656 (1933); First Nat. Bank in Wichita v. Neil, 137 Kan. 436, 20 P. (2d) 528 (1933); Krieger v. Title Ins. & Trust Co., 260 Ky. 1, 83 S. W. (2d) 850 (1935); Rogers v. Wheeler, 2 Lans. 486 (N. Y. 1870); Nay Aug Lumber Co. v. Scranton Trust Co., 240 Pa. 500, 87 Atl. 843 (1913); see Straus v. Chicago Title & Trust Co., 273 Ill. App. 63, 67 (1933); Silver v. Wichfield Farms, 209 Iowa 857, 861, 227 N. W. 97, 99 (1929).

ment that the trustee should continue his protection of the bondholders' interest to save them from severe losses. But other courts[27] are unwilling to impair the rights of the bondholders who, in case of default, are entitled to a foreclosure sale and their *pro rata* share of the proceeds in cash. These courts, following the federal rule, hold that it is impossible, in the absence of authorization in the indenture, to bind unwilling bondholders to the hazards of possible subsequent loss in case it turns out that later the property cannot be sold for as much as it would have brought if sold outright at the time of the foreclosure, instead of being bid in for the bondholders. For this reason, a Michigan statute giving the trustee power to bid in on the trust property was declared unconstitutional.[28] Fortunately, this difficulty is usually avoided by express provisions in the deed of trust giving the trustee the power to bid for the property, which provisions are held to be valid and binding on the bondholders.[29]

Bondholders, as individuals or as a class, are not entirely at the mercy of the trustee where he has authority to represent them. The rule of representation of bondholders by the trustee is a rule of convenience and continues only during the exercise of a fair and just representation.[30] Thus, if the trustee, at any time, refuses to act on behalf of the bondholders, conditions of the trust having been met, or if he proves himself hostile or his conduct proves prejudicial to the interests of the bondholders, the rule is put aside.[31] If such an adverse position of the trustee is proved, the bondholders may then represent themselves in proceedings such as these discussed, regardless of any clause in the deed of trust giving power to the trustee to act on their behalf.[32]

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[27] Werner, Harris & Buck v. Equitable Trust Co., 35 F. (2d) 513 (C. C. A. 10th, 1929); Cosmopolitan Hotel Co. v. Colorado Nat. Bank of Denver, 96 Colo. 62, 40 P. (2d) 245 (1934); Sanxey v. Iowa City Glass Co., 63 Iowa 707, 17 N. W. 429 (1883); Bradley v. Tyson, 33 Mich. 337 (1876); Detroit Trust Co. v. Stormfeltz-Loveley Co., 257 Mich. 655, 242 N. W. 227 (1932); see Chicago Title & Trust Co. v. Robin, 361 Ill. App. 261, 265, 198 N. E. 4, 8 (1935).

[28] Detroit Trust Co. v. Stormfeltz-Loveley Co., 257 Mich. 655, 242 N. W. 227 (1932) (a statute giving court power to authorize trustee to bid in on the trust property where not less than a majority of the bondholders requested it, was declared unconstitutional as impairing the contractual rights of the dissenters). But see Heighe v. Sale of Real Estate, 164 Md. 259, 268, 164 Atl. 671, 676 (1933).

[29] Sage v. Central R. R., 99 U. S. 334, 25 L. ed. 394 (1878); Smith v. Massachusetts Mutual Life Ins. Co., 116 Fla. 390, 156 So. 498 (1934); Kitchen Bros. Hotel Co. v. Omaha Safe Deposit Co., 126 Neb. 744, 254 N. W. 507 (1934).

[30] See Farmers Loan & Trust Co. v. Northern Pac. Ry., 66 Fed. 169, 174 (C. C. E. D. Wis. 1895).

[31] Farmers Loan & Trust Co. v. Northern Pac. Ry., 66 Fed. 169 (C. C. E. D. Wis. 1895); Cochran v. Pittsburg S. & N. Ry., 150 Fed. 682 (W. D. N. Y. 1907); Lowenthal v. Georgia Coast & P. Ry., 233 Fed. 1010 (S. D. Ga. 1916); Brown v. Denver Omnibus Co., 254 Fed. 560 (C. C. A. 8th, 1918).

[32] See note 31, *supra*.

Constitutional Law—Eminent Domain—Tucker Act—What Constitutes a "Taking" Under the Fifth Amendment.

The United States, acting under the authority of the Mississippi River Flood Control Act,[1] constructed dikes in the Mississippi River a short distance above and opposite the appellants' land, in order to improve the navigation of the stream. The dikes deflected the current of the river, washing away appellants' land, the elevation of which, prior to the flooding, was such that the waters of the river did not hinder or prevent its full and complete use as farming property. The appellants' claim that the property had been "taken" within the meaning of the Fifth Amendment to the Constitution of the United States was dismissed by the district court,[2] and on appeal to the circuit court of appeals the judgment was affirmed.[3] The court based its decision on three grounds: first, that the suit "sounded in tort", and, therefore, there could be no recovery due to the limitations of the Tucker Act;[4] second, that riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the Government in that regard; and third, that there was not an actual "taking" of private property for public use.

The Tucker Act precludes recovery against the United States in either the Court of Claims or, as was attempted in the case in question, in the district courts of the United States, for "injuries sounding in tort".[5] If the plaintiffs recover, it must be upon an implied contract,[6] for, as stated in *Tempel v. United States*,[7] ". . . the law cannot imply a promise by the Government to pay for a right over, or interest in, land which right or interest the Government claimed and claims it possessed before it utilized the same. If the Government's claim is unfounded, a property right of the plaintiff's is violated; but the cause of action, if

[1] Franklin v. United States, 16 F. Supp. 253 (W. D. Tenn. 1936).

[2] 42 STAT. 1505 (1923), 33 U. S. C. A. §702a (1928).

[3] Franklin v. United States, 101 F. (2d) 459 (C. C. A. 6th, 1939), *cert. granted*, — U. S. —, 59 Sup. Ct. 834, 83 L. ed. Adv. Ops. 812 (U. S. 1939).

[4] 24 STAT. 505 (1887), 28 U. S. C. A. §§250(1), 41(20) (1928).

[5] Hill v. United States, 149 U. S. 593, 13 Sup. Ct. 1011, 37 L. ed. 862 (1893); Hijo v. United States, 194 U. S. 315, 24 Sup. Ct. 727, 48 L. ed. 994 (1904) (holding that if the action is, in fact in tort, the statute (Tucker Act) cannot be avoided by framing the action in contract); Bigby v. United States, 188 U. S. 400, 23 Sup. Ct. 468, 47 L. ed. 519 (1903); Sanguinetti v. United States, 264 U. S. 146, 44 Sup. Ct. 264, 68 L. ed. 608 (1924); Pendleton v. United States, 56 Ct. Cl. 222 (1921); Flynn v. United States, 65 Ct. Cl. 33 (1928).

[6] United States v. Russell, 13 Wall. 623, 20 L. ed. 474 (U. S. 1871); United States v. Great Falls Manufacturing Co., 112 U. S. 645, 5 Sup. Ct. 316, 28 L. ed. 846 (1884); United States v. Palmer, 128 U. S. 262, 9 Sup. Ct. 104, 32 L. ed. 442 (1888). In all of these cases the United States appropriated private property for public use. The important thing about these cases is that the officers who appropriated and used the property did not deny the plaintiffs' title.

[7] Tempel v. United States, 248 U. S. 121, 131, 39 Sup. Ct. 56, 59, 63 L. ed. 162, 165 (1918).

any, is one sounding in tort, for which the Tucker Act affords no remedy." When the Government claims title to the property, no contract arises;[8] but when it appropriates private property without asserting title, an implied contract to pay the owner the value of the land arises, although no formal proceedings are instituted for the condemnation of the property.[9] Nor is an express promise to pay necessary in order that the plaintiff may bring suit, as the promise to pay is imposed by the Fifth Amendment to the Constitution.[10]

In several instances, compensation has been denied riparian owners in suits against the United States on the theory that the riparian owner's right to have the stream come to him in its natural condition, as against the other individual riparian owners, is subject to the paramount power of the United States to improve navigation, and that the "consequential" injuries sustained as a result of the exercise of this power are non-compensable.[11] The courts invariably state, however, that if there has been an actual "taking" of the property, even in the exercise of the right to control navigation, compensation must be made to the riparian owner.[12]

[8] Langford v. United States, 101 U. S. 341, 25 L. ed. 1010 (1880); Hill v. United States, 149 U. S. 593, 13 Sup. Ct. 1011, 37 L. ed. 862 (1893); Bedford v. United States, 192 U. S. 217, 24 Sup. Ct. 238, 48 L. ed. 414 (1904); Henry v. United States, 38 Ct. Cl. 635 (1903); Peabody v. United States, 43 Ct. Cl. 5 (1907); Andrus v. United States, 59 Ct. Cl. 851 (1924); Cadwalader v. United States, 59 Ct. Cl. 533 (1924).

[9] United States v. Great Falls Manufacturing Co., 112 U. S. 645, 5 Sup. Ct. 306, 28 L. ed. 846 (1884) (taking property under legislative authority); Schillinger v. United States, 155 U. S. 163, 15 Sup. Ct. 85, 39 L. ed. 108 (1894); Philippine Sugar Estates Development Co. v. United States, 40 Ct. Cl. 33 (1904); Brooks v. United States, 39 Ct. Cl. 494 (1904). In the *Brooks* case the court extended the doctrine to all property, stating: "It is settled law that where an officer of the Government, having authority to act, takes or appropriates to public use property, admitting it to be private, an implied contract will arise to make compensation." *Id.* at 502.

[10] Jacobs v. United States, 290 U. S. 13, 54 Sup. Ct. 26, 78 L. ed. 142 (1933) (damage caused by backwater from dam); United States v. Chicago B. and Q. R. R., 82 F. (2d) 131 (C. C. A. 8th, 1936); Spoenbarger v. United States, 101 F. (2d) 506 (C. C. A. 8th, 1939).

[11] Gibson v. United States, 166 U. S. 269, 17 Sup. Ct. 578, 41 L. ed. 996 (1897); Scranton v. Wheeler, 179 U. S. 141, 21 Sup. Ct. 48, 45 L. ed. 126 (1900); Bedford v. United States, 192 U. S. 217, 24 Sup. Ct. 238, 48 L. ed. 414 (1904); United States v. Chandler-Dunbar Water Power Co., 229 U. S. 53, 33 Sup. Ct. 667, 57 L. ed. 1063 (1913); Lewis Blue Point Oyster Co. v. Briggs, 229 U. S. 82, 33 Sup. Ct. 679, 57 L. ed. 1083 (1913); Jackson v. United States, 230 U. S. 1, 33 Sup. Ct. 1011, 57 L. ed. 1363 (1913); Cubbins v. Mississippi River Comm., 241 U. S. 351, 36 Sup. Ct. 671, 61 L. ed. 1041 (1916).

[12] Pumpelly v. Green Bay Co., 13 Wall. 166, 20 L. ed. 557 (U. S. 1871); United States v. Lynah, 188 U. S. 445, 23 Sup. Ct. 349, 47 L. ed. 539 (1903); United States v. Cress, 243 U. S. 316, 37 Sup. Ct. 380, 61 L. ed. 756 (1917); Tompkins v. United States, 45 Ct. Cl. 66 (1910). Accord: Monongahela Navigation Co. v. United States, 148 U. S. 312, 13 Sup. Ct. 622, 37 L. ed. 463 (1893); see Scranton v. Wheeler, 179 U. S. 141, 153, 21 Sup. Ct. 48, 53, 45 L. ed. 126, 133 (1900), in which the court stated that "undoubtedly compensation must be made or secured to the owner when that which is to be done is to be regarded as a taking of private property for public use within the meaning of the Fifth Amendment of the Con-

The determination of whether there has been a compensable "taking", therefore, would seem to depend upon whether the damage resulting from the acts done by the Government is immediate and direct, or merely "consequential". There is great difficulty in making such a determination, because, apparently, there are two divergent lines of authority in the cases decided by the United States Supreme Court, and, in some particulars, the cases seem irreconcilable. The cases in which compensation was denied present situations where the lands of the plaintiffs were flooded by diversion of the current, in *Bedford v. United States*[13] and *Jackson v. United States,*[14] and where the plaintiff's boat landing was rendered virtually useless by reason of the construction of a dike and the lowering of the water level, in *Gibson v. United States.*[15] In the latter case, there was no flooding of the plaintiff's land, but a decrease in the value of the land due to a diversion *away from* rather than *over* the land; the court held that riparian ownership is subject to suffer the consequences of an improvement of navigation, and since the injuries sustained were "consequential" to the lawful and proper exercise of a governmental power, no compensation would be allowed. In the *Bedford* case, the Government constructed revetments along the bank of the Mississippi River six miles upstream from the plaintiff's land, and as a result of the construction of these revetments, the land of the plaintiff was flooded some time later. The Court denied compensation on the ground that this was a "consequential" injury, and that the purpose of the revetments was to prevent further erosion at the point of construction. In the *Jackson* case, the Court held that the Government is not liable to riparian owners for damages caused by overflow or for failure to construct additional levees along the Mississippi River for the protection from the levees built at other points. However, in this case, the appellants stated that there had been flooding of the lands in question before the construction of the levees. Too, the damage occurred over a period of twenty years, which would seem to indicate that it was "consequential" rather than direct. These cases appear to show that compensation will not be allowed when the injury to the land comes about as a result of the *diversion* of the stream for the purposes of improving navigation.

The cases in which compensation was awarded seem to show that if the injury is a result of the water being thrown *back* upon the land by the structure built in the aid of navigation, there is a "taking". In

stitution; and of course in its exercise of the power to regulate commerce, Congress may not override the provision that just compensation must be made when private property is taken for public use."

[13] 192 U. S. 217, 24 Sup. Ct. 238, 48 L. ed. 414 (1904).

[14] 230 U. S. 1, 33 Sup. Ct. 1011, 57 L. ed. 1363 (1913).

[15] 166 U. S. 269, 17 Sup. Ct. 578, 41 L. ed. 996 (1897).

Pumpelly v. Green Bay Company,[16] the lands of the plaintiff were overflowed because of a dam constructed downstream, and the court hold that the flooding of the land, which previously was free from flooding, was direct, and therefore constituted a "taking". This case established the rule that there could not be a total destruction of property without constituting a "taking", and that this would amount to an invasion of private right under the pretext of the public good.[17] In *United States v. Lynah*[18] it was held that there had been a "taking" of the land, a rice plantation, when an overflow caused by the construction of a dam turned the land into a useless bog. In the case of *United States v. Cress,*[19] locks and dams were built by the Government in the improvement of navigation, and the plaintiff's land was thereby subjected to *intermittent* floodings. Compensation was allowed here in proportion to the decrease in the value of the land, apparently indicating that there does not have to be a complete destruction to constitute a compensable "taking".

What, then, is the distinction? There seems to be only one possible ground on which the Court relied in denying compensation in the *Gibson, Bedford,* and *Jackson* cases, and that was that the Government could, in the exercise of the right to control navigation, change the course of the river, so long as no structure was built in the river which threw water back upon the lands of the plaintiff. However, it is difficult to see why an invasion caused by diversion of the river current should be considered less "direct" than one caused by the backing up of the water. The Court does not state a given rule or distinction, in any of the cases, which will hold up in the light of other cases on the point. The Court merely says that the injuries were "direct" and allow compensation, or that they were "consequential" and deny compensation. What actually constitutes a "taking" is apparently a matter of judicial discretion, incapable of exact definition.

[16] 13 Wall. 166, 20 L. ed. 557 (U. S. 1871).

[17] The Court adopted a very liberal attitude, stating, "It would be a very curious and unsatisfactory result, if in construing a provision of the constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for the invasion of private right under the pretext of the public good which had no warrant in the laws or practices of our ancestors." *Id.* at 177, 20 L. ed. at 560.

[18] 188 U. S. 445, 23 Sup. Ct. 349, 47 L. ed. 539 (1903).

[19] 243 U. S. 316, 37 Sup. Ct. 380, 61 L. ed. 746 (1917).

It would seem that the statement made by the Court in *Transportation Company v. Chicago*[20] to the effect that the right of the public in regard to navigation extends to the natural state of the stream, and that beyond that property cannot be taken without compensation being made to the owners, would seem more just and equitable than the rule that the Government may divert the course of the stream as much as desired —even over land that has never been flooded before, as in the principal case. As pointed out by the Circuit Court of Appeals for the Eighth Circuit,[21] in some instances there has been added to the word "taken" the words "or damaged". This suggestion, if followed, would allow the property owner to recover damages when the land was not actually appropriated for the public use, but seriously damaged for the public use.

Due to the diversity of reasoning advanced in the cases cited and commented on in this note, and due to the inconsistent and sometimes inequitable results reached, it is suggested that the federal courts might well adopt the test applied by some of the state courts in determining whether there is a "taking", e.g., if the property has been "damaged" for a public use this injury is compensable. This is provided for by statute in most cases.[22] However, it must be borne in mind that property is not "taken" when it is *destroyed* by the state to protect the public interest, under the police power.[23] The state takes property by eminent domain because it is useful to the public, and destroys it under the police power because it is harmful. "Appropriation can be necessary only where possession is of positive value to the public, and if so, there is really a case of eminent domain."[24] It would seem that the land in the instant case was put to a public use, and not destroyed because of its harmful nature.

Even if this test is not adopted, an exception should be made when it is inevitable that the plaintiff suffer complete destruction of the property as a result of the improvement of navigation, where there is no claim to the land by the Government, if his lands were free from flooding prior to the construction of the dike. One person should not be compelled to bear the brunt of the injuries, when the public as a whole is benefited.

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[20] 99 U. S. 635, 25 L. ed. 336 (U. S. 1897).
[21] United States v. Chicago B. and Q. R. R., 82 F. (2d) 131 (C. C. A. 8th, 1936).
[22] James Poultry Co. v. Nebraska City, 284 N. W. 273 (Neb. 1939); Harrison v. Louisiana Highway Comm., 186 So. 354 (La. 1939); Guaranty Savings and Loan Association v. City of Springfield, 113 S. W. (2d) 147 (Mo. App. 1938); note (1936) 13 VA. L. REV. 334.
[23] Bowditch v. Boston, 101 U. S. 16, 25 L. ed. 981 (U. S. 1880).
[24] FREUND, POLICE POWER (1904) 547.

Constitutional Law—Privilege Tax—Temporary Use of Rooms for Solicitation of Sales in Interstate Commerce.

A North Carolina statute imposes an annual privilege tax of $250 upon "Every person, firm, or corporation, not being a regular retail merchant in the state of North Carolina, who shall display samples, goods, wares, or merchandise in any hotel room, or in any house rented or occupied temporarily, for the purpose of securing orders for the retail sale of such goods, wares, or merchandise so displayed. . . ." Plaintiff, a New York corporation, rented for several days a room in a Winston-Salem hotel for the display of samples, and thereby secured retail orders for merchandise to be shipped from New York. Since plaintiff was not a regular retail merchant in the state, a tax was assessed against it under this statute. In an action to recover the tax paid under protest, the Court held that this was not a direct and undue burden on interstate commerce, but that the activity was a preliminary and incidental one which transpired prior to the beginning of the flow of events which constitutes the movement of goods in interstate commerce.[2]

A tax imposed by a state, or a municipal subdivision thereof, may be invalidated as an improper exercise of power with respect to interstate commerce by reason of the fact either that the tax discriminates against the citizens or products of another state[3] or that the tax imposes a direct burden upon a transaction in interstate commerce.[4] The purpose of the statute in the principal case, and the actual result of its application, may be to discriminate against wares displayed by extra-state merchants, but the act is not so phrased. Its language, taken literally, imposes the tax upon the privilege of displaying any wares, regardless of their origin.[5]

The Supreme Court of the United States has, in numerous decisions, beginning with the case of *Robbins v. Shelby County Taxing District*,[6] held consistently that a license or privilege tax upon persons soliciting orders for goods to be shipped in interstate commerce is a direct burden

[1] N. C. CODE ANN. (Michie, Supp. 1937) §7880 (51) (e) (a subsequent section provides that a like levy may be imposed by the county or municipality wherein the activity takes place).

[2] Best & Co. v. Maxwell, 216 N. C. 114, 3 S. E. (2d) 292 (1939).

[3] Tiernan v. Rinker, 102 U. S. 123, 26 L. ed. 103 (1880); O'Connell v. Kontojohn, 131 Fla. 783, 179 So. 802 (1938).

[4] Robbins v. Shelby County Taxing Dist., 120 U. S. 489, 7 Sup. Ct. 592, 30 L. ed. 694 (1887).

[5] But it would seem that the provision of the statute which excludes all regular retail merchants in the state might be susceptible of the construction that it exempts every resident of North Carolina, because, by engaging in the taxed activity he necessarily becomes a regular retail merchant in the state. The adoption of such a construction would seem to result in discrimination against non-residents.

[6] 120 U. S. 489, 7 Sup. Ct. 592, 30 L. ed. 694 (1887).

upon such commerce,[7] even though the seller has a fixed place of business in the state where the orders are solicited.[8]

Without finding any direct authority to sustain the tax, the North Carolina court relied largely upon the recent trend by the judiciary toward a ". . . broadening of the states' taxing power over matters touching the fringe of the garment of interstate commerce."[9] As pointed out in a recent law review article,[10] this trend has been especially pronounced in sales and use tax cases. In *Helson v. Kentucky*,[11] an early use tax case, the United States Supreme Court declared that a state may not tax the use of an article employed in interstate commerce. However, in subsequent decisions, this rule has been greatly relaxed to permit the levy of taxes imposing as great a burden upon interstate commerce. The Court has upheld a license tax on the business of selling gasoline[12] and a privilege tax upon the sale, storage, or distribution of gasoline, where the purchasers and the owners made use of it solely in interstate commerce.[13] A tax upon the privilege of transporting motor vehicles over the highways for resale[14] and a tax upon goods brought into the state to be installed upon interstate transportation equipment[15] have also been sustained. These taxes were held not to be a direct burden on interstate commerce, for they were imposed upon

[7] Robbins v. Shelby County Taxing Dist., 120 U. S. 489, 7 Sup. Ct. 592, 30 L. ed. 694 (1887); Corson v. Maryland, 120 U. S. 502, 7 Sup. Ct. 655, 30 L. ed. 699 (1887); Asher v. Texas, 128 U. S. 129, 9 Sup. Ct. 1, 32 L. ed. 368 (1888); Stoutenburg v. Hennick, 129 U. S. 141, 9 Sup. Ct. 256, 32 L. ed. 637 (1889); Brennan v. Titusville, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. ed. 719 (1894); Stockard v. Morgan, 185 U. S. 27, 22 Sup. Ct. 576, 46 L. ed. 785 (1902); Caldwell v. North Carolina, 187 U. S. 622, 23 Sup. Ct. 229, 47 L. ed. 336 (1903); Norfolk & Western R. R. v. Sims, 191 U. S. 441, 24 Sup. Ct. 151, 48 L. ed. 254 (1903); Rearick v. Pennsylvania, 203 U. S. 507, 27 Sup. Ct. 159, 51 L. ed. 295 (1906); Dozier v. Alabama, 218 U. S. 124, 30 Sup. Ct. 649, 54 L. ed. 965 (1910); Crenshaw v. Arkansas, 227 U. S. 389, 33 Sup. Ct. 294, 57 L. ed. 565 (1913); Rogers v. Arkansas, 227 U. S. 401, 33 Sup. Ct. 298, 57 L. ed. 569 (1913); Stewart v. Michigan, 232 U. S. 665, 34 Sup. Ct. 476, 58 L. ed. 786 (1914); Davis v. Virginia, 236 U. S. 697, 35 Sup. Ct. 479, 59 L. ed. 795 (1915); Western Oil Refining Co. v. Lipscomb, 244 U. S. 346, 37 Sup. Ct. 623, 61 L. ed. 1181 (1917); Real Silk Hosiery Mills v. Portland, 268 U. S. 325, 45 Sup. Ct. 525, 69 L. ed. 982 (1925). But *cf.* Ficklen v. Shelby County Taxing Dist., 145 U. S. 1, 12 Sup. Ct. 810, 36 L. ed. 601 (1892).

[8] Stockard v. Morgan, 185 U. S. 27, 22 Sup. Ct. 576, 46 L. ed. 785 (1902); Heyman v. Hays, 236 U. S. 178, 35 Sup. Ct. 403, 59 L. ed. 527 (1915).

[9] Best & Co. v. Maxwell, 216 N. C. 114, 118, 3 S. E. (2d) 292, 296 (1939).

[10] Warren and Schlesinger, *Sales and Use Taxes: Interstate Commerce Pays Its Way* (1938) 38 COL. L. REV. 49.

[11] 279 U. S. 245, 49 Sup. Ct. 279, 73 L. ed. 683 (1929).

[12] Eastern Air Transport v. South Carolina Tax Comm., 285 U. S. 147, 52 Sup. Ct. 340, 76 L. ed. 673 (1932).

[13] Nashville, C. & St. L. R. R. v. Wallace, 288 U. S. 249, 53 Sup. Ct. 345, 77 L. ed. 730 (1933); Edelman v. Boeing Air Transport, 289 U. S. 249, 53 Sup. Ct. 591, 77 L. ed. 1155 (1933).

[14] Morf v. Bingaman, 298 U. S. 407, 56 Sup. Ct. 756, 80 L. ed. 1245 (1936).

[15] Southern Pacific Co. v. Gallagher, — U. S. —, 59 Sup. Ct. 389, 83 L. ed. Adv. Ops. 352 (1939); Pacific Tel. & Tel. Co. v. Gallagher, — U. S. —, 59 Sup. Ct. 396, 83 L. ed. Adv. Ops. 369 (1939).

property which had not yet begun or had ceased to be used in interstate commerce.[16] The so-called compensating use taxes reach the same result, economically, as the imposition of a tax upon the interstate sale itself, since the very purpose of the tax is to destroy the advantage of buying tax-free goods in a state having no sales tax.[17] The approval given to such taxes by the courts represents not only a modification of the rule as to what constitutes a direct burden on interstate commerce, but also as to what constitutes discrimination against such commerce.

The Court in the instant case sought to liken the activity of the plaintiff to an incident transpiring before interstate commerce began, and relied upon the trend of the judiciary to declare such preliminary action as separable from the interstate transaction itself. But, by the very terms of the statute, the activity subjected to the tax was the actual solicitation of orders for an interstate sale, which has been held to be a part of the commerce itself, and not preliminary to, or separable from, such commerce.[18]

Conceding the fact that the courts have materially expanded their definitions of what constitutes activity prior or subsequent to, and separable from, the interstate transaction itself, could a state impose a tax upon billboard advertisements of a product which could be bought only from an extrastate seller, or upon the display of goods by an agent who had not the power to take orders, or upon the distribution of samples of goods with order blanks attached? An affirmative answer to these questions may find some support in the decision of the United States Supreme Court in *Western Live Stock v. Bureau of Revenue*,[19] where it held valid a privilege tax based upon the gross receipts from the sale of advertising space by newspapers and magazines where some of the advertisements were procured from extrastate advertisers and the publication was circulated in interstate commerce.

The Court sought further to sustain the levy upon the ground that it is a "use tax" imposed upon the use of North Carolina property. The tax cannot properly be classified as a "use tax", for it is a tax upon the interstate commerce itself rather than upon the use of property prior or subsequent to its employment in interstate commerce. Furthermore, the tax cannot be designated as a "use tax" for the reason that the

[16] In these cases the court expressly found that there was no discrimination against interstate commerce, either because the levy was upon all property of that class within the state, or, if it was an imposition upon property purchased in an extra-state market, because the use tax was complemental to the state sales tax.

[17] An able discussion of sales and use taxes is embodied in Warren & Schlesinger, *loc. cit. supra* note 10.

[18] Robbins v. Shelby County Taxing Dist., 120 U. S. 489, 497, 7 Sup. Ct. 592, 596, 30 L. ed. 694, 697 (1887) (where the court said: ". . . to tax the sale of such goods, or the offer to sell them, before they are brought into the state, . . . seems to us clearly a tax on interstate commerce itself").

[19] 303 U. S. 250, 58 Sup. Ct. 546, 82 L. ed. 823 (1938).

classification upon which the tax is based is the use of the room for the purpose of displaying goods and securing orders for interstate sales, and, therefore, the tax is, in reality, one upon the privilege of selling rather than upon the privilege of use.

The tax having been shown to fall within the classification of a privilege tax,[20] the rule laid down in the *Robbins* case[21] and its successors[22] would seem applicable to invalidate it as being a direct and undue burden upon interstate commerce. Recent decisions have modified the rule of the *Robbins* case as to what constitutes an interstate sale. *Banker Brothers v. Pennsylvania*[23] apparently limited the application of the rule to cases where the out-of-state manufacturer or his agent makes the sale; and *Wiloil Corporation v. Pennsylvania* held that to constitute an interstate sale the contract must require interstate transportation.[24] Despite the modifications embodied in these decisions it seems that the principal case does not fall within their scope, and must, therefore, be governed by the rule as originally laid down. The Supreme Court in so recent a case as *Southern Pacific v. Gallagher*,[25] citing the *Robbins* case, reiterated the rule that "A license tax on sales by samples burdens one selling only goods from other states."

MARSHALL V. YOUNT.

Federal Jurisdiction—Courts—Acquiring Jurisdiction by Attachment of Nonresident's Property and Constructive Service.

Originating with *Toland v. Sprague*,[1] an unbroken line of Supreme Court decisions[2] have decreed that a federal court cannot acquire original jurisdiction over a nonresident of the district in which the court is

[20] The Revenue Act of 1937, of which this tax is a part, classifies it as a privilege tax.

[21] Robbins v. Shelby County Taxing Dist., 120 U. S. 489, 7 Sup. Ct. 592, 30 L. ed. 694 (1887).

[22] See note 7, *supra*.

[23] 222 U. S. 210, 32 Sup. Ct. 38, 56 L. ed. 168 (1911) (Banker Bros. of Pennsylvania kept no cars in stock, but sold by the use of demonstrators' cars manufactured in New York. Purchasers contracted with Banker Bros. to buy cars and pay the freight from New York, and received a warranty from the manufacturer. Banker Bros. accepted the drafts drawn on them by the manufacturer, received the cars, and delivered them to the purchasers. The Pennsylvania 2% general sales tax was held applicable to such sales).

[24] 294 U. S. 169, 55 Sup. Ct. 358, 79 L. ed. 838 (1935) (a tax of 3 cents per gallon on fuels sold and delivered by distributors in Pennsylvania was held to apply to a Pennsylvania corporation taking orders through agents and shipping from Delaware to purchasers in Pennsylvania); Sears, Roebuck & Co. v. McGoldrick, 279 N. Y. 184, 18 N. E. (2d) 25 (1938) (to the same effect).

[25] —U. S. —, —, 59 Sup. Ct. 389, 392, 83 L. ed. Adv. Ops. 352, 355 (1939).

[1] 12 Pet. 300, 9 L. ed. 1093 (U. S. 1836).

[2] *Ex parte* Des Moines & M. Ry., 103 U. S. 794, 26 L. ed. 461 (1880); Laborde v. Ubarri, 214 U. S. 173, 29 Sup. Ct. 552, 53 L. ed. 955 (1909); Big Vein Coal Co. v. Read, 229 U. S. 31, 33 Sup. Ct. 694, 57 L. ed. 1053 (1913).

sitting by attaching his property within the district and serving him only constructively, at least where the cause of action is a purely personal one;[3] but that attachment is an ancillary proceeding, available only when jurisdiction *in personam* is acquired by personal service or a general appearance.[4]

Contrary to this restriction is the practice common to the state courts whereby, pursuant to statutory authorization, property of a nonresident defendant may be attached although the defendant is served only constructively.[5] The constitutional validity of such procedure has not been seriously doubted since the decision of *Pennoyer v. Neff*.[6] Sanction was found in the state's jurisdiction over all property within its boundaries for the state court's judgment against the property seized, although the judgment had no efficacy beyond that.[7] Constructive service was deemed sufficient notice to the defendant when coupled with the presumptive notice resulting from seizure of his property by attachment.[8]

Recent developments tend to spotlight the history of the federal position. Closely adhering to a prior circuit court decision,[9] the United States Supreme Court, in *Toland v. Sprague,* laid down the following

[3] But where the cause of action is purely *in rem, e.g.,* to enforce a claim to property rather than to enforce a personal obligation against the defendant, a federal district court has jurisdiction to proceed against property lying within its district although a nonresident defendant is served only constructively. This authority arises from 18 STAT. 472 (1875), 28 U. S. C. §118 (1934), which embraces two classes of cases: (1) Suits to *enforce* any legal or equitable *lien* upon, or claim to, real or personal property within the district; (2) suits to *remove* any encumbrance or lien or cloud upon the title to such property.

[4] The doctrine set forth in *Toland v. Sprague* has been followed in a host of lower federal court decisions. Richmond v. Drefous, 20 Fed. Cas. No. 11,799 (C. C. D. R. I. 1831); Day v. Newark India Rubber Mfg. Co., 7 Fed. Cas. No. 3,685 (C. C. S. D. N. Y. 1850); Chittenden v. Darden, 5 Fed. Cas. No. 2,688 (C. C. N. D. Ga. 1875); Anderson v. Shaffer, 10 Fed. 266 (C. C. S. D. Ohio 1881); Boston Electric Co. v. Electric Gas Lighting Co., 23 Fed. 838 (C. C. D. Mass. 1885); Noyes v. Canada, 30 Fed. 665 (C. C. D. Kan. 1887); Perkins v. Hindryx, 40 Fed. 657 (C. C. D. Mass. 1889); Lackett v. Rumbaugh, 45 Fed. 23 (C. C. W. D. N. C. 1891): Bucyrus Co. v. McArthur, 219 Fed. 266 (M. D. Tenn. 1914); Cleveland & W. Coal Co. v. J. H. Hillman & Sons Co., 245 Fed. 200 (N. D. Ohio 1917).

[5] An extensive collection of state decisions construing their respective statutes, which permit constructive service on a nonresident defendant, is found in 9 ROSE'S NOTES ON UNITED STATES REPORTS (rev. ed. 1918) 1115-1120, as supplemented by 2 ROSE'S NOTES ON UNITED STATES REPORTS (Supp. 1932) 702-704.

[6] 95 U. S. 714, 24 L. ed. 565 (1877); see Huling v. Kaw Valley Ry. & Imp. Co., 130 U. S. 559, 563, 9 Sup. Ct. 603, 605, 32 L. ed. 1045, 1048 (1890); Arndt v. Griggs, 134 U. S. 316, 323, 10 Sup. Ct. 557, 561, 33 L. ed. 918, 920 (1890); Roller v. Holly, 176 U. S. 398, 405, 20 Sup. Ct. 410, 412, 44 L. ed. 520, 523 (1900); Grannis v. Ordean, 234 U. S. 385, 393, 34 Sup. Ct. 779, 782, 58 L. ed. 1363, 1368 (1914).

[7] Cooper v. Reynolds, 10 Wall. 308, 19 L. ed. 931 (U. S. 1870); Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565 (1877); Clark v. Wells, 203 U. S. 164, 27 Sup. Ct. 43, 51 L. ed. 138 (1906).

[8] Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565 (1877); *cf.* Owenby v. Morgan, 256 U. S. 94, 111, 41 Sup. Ct. 433, 438, 65 L. ed. 837, 846 (1921).

[9] Picquet v. Swan, 19 Fed. Cas. No. 11,134 (C. C. D. Mass. 1828).

propositions: (1) the federal courts may issue no process beyond the territorial limits of their respective districts and may serve only persons found within those limits, in the absence of positive legislation to the contrary;[10] (2) Congressional acts[11] adopting the state practice for the federal courts did not operate to enlarge the sphere of the federal courts' jurisdiction, but merely prescribed the forms and modes of process to be used in acquiring jurisdiction over persons within the reach of such process; and (3) an attachment against a person's property may issue out of a federal court only as a part of, or together with, process served upon him personally. Major reliance was placed upon the Eleventh Section of the Judiciary Act of 1789[12] (hereinafter referred to as Section 739) which provided that no civil suit should be brought in a district or circuit court ". . . by any original process in any other district than that whereof he [the defendant] is an inhabitant or in which he shall be found at the time of serving the writ." Four of the justices dissented from that part of the opinion dealing with attachment upon constructive service on the ground that it was unnecessary for the decision, and, in two instances, expressed the belief that such procedure was available in federal courts.

After the decision in *Toland v. Sprague,* two significant statutory changes occurred. The Act of 1872[13] (hereinafter referred to as Section 915) provided: "In the common law cases in the circuit and district courts, the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the state in which such court is held for the courts thereof; and such circuit and district courts may, from time to time, by general rules adopt such state laws as may be in force in the states where they are held in relation to attachment and other process. . . ." And the Act of 1887,[14] amending the venue restrictions of Section 739, provided that in diversity-of-citizenship cases suit might be brought in the district of either the plaintiff's or the defendant's residence. Without straining the meaning of these enactments, it could be said that they destroy the basis for the decision in *Toland v. Sprague.*[15] Yet when that contention was advanced, the Supreme

[10] By virtue of Rule 4(f) of the Federal Rules of Civil Procedure, a federal district court, sitting in a state containing more than one district, may issue its process throughout the entire state.

[11] 1 STAT. §93 (1789) and 1 STAT. §275 (1792), 28 U. S. C. §724 (1934).

[12] REV. STAT. §739 (1875), 28 U. S. C. §112 (1934).

[13] REV. STAT. §915 (1875), 28 U. S. C. §726 (1934).

[14] 24 STAT. §552 (1887) as amended 25 STAT. 433 (1888), 28 U. S. C. §112 (1934).

[15] Two lower federal courts asserted that Section 915 enlarged their jurisdiction to permit the acquiring of original jurisdiction over a nonresident defendant by means of attachment and publication of summons. Guillow v. Fontain, 11 Fed. Cas. No. 5,861 (C. C. E. D. Pa. 1875); Brooks v. Fry, 45 Fed. 776 (C. C. W. D.

Court, in the *Big Vein Coal Co.*[16] case reiterated the doctrine that attachment in the federal courts is not a device for acquiring jurisdiction, but is available solely as an auxiliary remedy when there has been personal service. Section 915 was summarily dealt with by remarking that it had been before the Court in *Ex parte Des Moines & M. Ry.*[17] Furthermore, the Court reasoned that the Act of 1887 did not abrogate the necessity for personal service, for had Congress intended such a radical change it would have expressly so provided.[18]

The Court's position in these cases was somewhat compromised, at least from the standpoint of consistent policy, by its decision of a related question in cases removed from state courts. Although a federal court could not proceed *originally* against a nonresident by attachment and constructive service, if a state court had acquired jurisdiction by that procedure, a federal court succeeded to that jurisdiction upon removal.[19] And that was true where the state court had attached the nonresident's property, but had not, prior to removal, completed the formalities of service by which its jurisdiction would be perfected. In the latter event, the federal court acquired an inchoate jurisdiction which ripened into full jurisdiction over the attached property when the formalities of service were completed.[20] Again, however, the Court found statutory authority for its position.[21]

Ark. 1891). However, numerous other lower federal court decisions had construed Section 915 to pertain only to forms and modes of practice to be observed when the federal court could obtain *in personam* jurisdiction: Nazro v. Cragin, 17 Fed. Cas. No. 10,062 (C. C. D. Iowa 1874); Harland v. United Lines Tel. Co., 40 Fed. 308 (C. C. D. Conn. 1889); Lackett v. Rumbaugh, 45 Fed. 23 (C. C. W. D. N. C. 1891); Central Trust Co. of N. Y. v. Chattanooga R. & C. R. R., 68 Fed. 685 (C. C. E. D. Tenn. 1895); United States v. Brooke, 184 Fed. 341 (S. D. N. Y. 1910); Smith v. Reed, 210 Fed. 968 (N. D. Ohio 1912).

[16] Big Vein Coal Co. v. Read, 229 U. S. 31, 33 Sup. Ct. 694, 57 L. ed. 1053 (1913).

[17] 103 U. S. 794, 26 L. ed. 461 (1880) (the Court omitted any mention of Section 915).

[18] Lower federal courts had previously held that the Act of 1887 introduced no new principle obviating the necessity for personal service. Harland v. United Lines Tel. Co., 40 Fed. 308 (C. C. D. Conn. 1889); United States v. Brooke, 184 Fed. 341 (S. D. N. Y. 1910); Smith v. Reed, 210 Fed. 968 (N. D. Ohio 1912).

[19] Courtney v. Pradt, 196 U. S. 89, 25 Sup. Ct. 208, 49 L. ed. 398 (1905); Crocker Nat. Bank v. Ragenstecher, 44 Fed. 705 (C. C. D. Mass. 1890); Richmond v. Brookings, 48 Fed. 241 (C. C. D. R. I. 1891); Vermilya v. Brown, 65 Fed. 149 (C. C. S. D. N. Y. 1894); Blumberg v. A. B. & E. L. Shaw Co., 131 Fed. 608 (C. C. N. Y. 1904).

[20] Clark v. Wells, 203 U. S. 164, 27 Sup. Ct. 43, 51 L. ed. 138 (1906) (suggesting that no publication of service was necessary in federal court since defendant had sufficient notice as evidenced by his special appearance to secure removal); Lebensburger v. Scofield, 139 Fed. 380 (C. C. A. 6th, 1905) (publication of summons ordered by district court); Friedman Bros. & Sons Neckwear Co., Inc. v. Greaney, 297 Fed. 478 (S. D. N. Y. 1923).

[21] REV. STAT. §646 (1875), 28 U. S. C. §79 (1934) provides: "When any suit shall be removed from a state court to a district court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the state court shall hold the goods or estate so attached or sequestered

In the recent case of *Rorick v. Devon Syndicate, Ltd.*,[22] suit was brought in a state court against the nonresident defendant on a personal cause of action. An attachment was levied upon property of the defendant, and service by publication completed. The defendant secured a removal to the federal district court on a special appearance. A supplemental attachment issued from the district court and was levied upon additional property of the defendant. On defendant's motion, this latter attachment was dissolved on the ground that no personal service had been made upon the defendant. This ruling was affirmed in the circuit court of appeals.[23] Speaking for the Supreme Court, Mr. Justice Douglas proceeded to assail vigorously the holding in *Toland v. Sprague* and the cases subsequently affirming it. Three arguments buttress his attack: First, if Section 739[24] justified the Court's conclusion that a defendant must be personally served to permit the levy of an attachment, that justification was removed by the statutory revisal authorizing suit in the district of either the plaintiff's or defendant's residence. Second, the philosophy underlying the decision in *Toland v. Sprague* and the *Big Vein Coal Co.* case, *viz.*, that it is unjust to adjudicate a person's rights without affording him notice by personal service,[25] was repudiated by Section 646[26] and by the decision in the removal cases. Third, Congress has, in Section 915,[27] expressly granted to plaintiffs in the federal courts the same remedies by attachment or other process that are available in the state courts.

The actual decision in the principal case is confined to the proposition that, where attachment has supplied *quasi-in-rem* jurisdiction to a state court prior to removal, the federal court is permitted to issue a supplemental attachment, provided such a remedy is available under the state procedure. Hence, the hostile and extended consideration of the doctrine of *Toland v. Sprague* appears to be gratuitous *dictum*, for the

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to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which said suit was commenced. . . ."

[22] 306 U. S. 626, 59 Sup. Ct. 643, 83 L. ed. Adv. Ops. 620 (1939).

[23] Rorick v. Devon Syndicate, 100 F. (2d) 844 (C. C. A. 6th, 1939). Additional factors, irrelevant to the present discussion, which were relied on in the disposition of the case, were: (1) the district court held the original affidavit in attachment void because taken before a notary disqualified as an "interested" party; (2) the circuit court held the attachment issued by the state court to be premature and void because executed before commencement of service by publication, in violation of a state statute. Both these holdings were subsequently reversed by the Supreme Court as being based on an erroneous construction of the state statutes.

[24] REV. STAT. §739 (1875), 28 U. S. C. §112 (1934).

[25] See Toland v. Sprague, 12 Pet. 300, 329, 9 L. ed. 1093, 1105 (U. S. 1836); Picquet v. Swan, 19 Fed. Cas. No. 11,134 at 613 (C. C. D. Mass. 1828); Nazro v. Cragin, 17 Fed. Cas. No. 10,062 at 1260 (C. C. D. Iowa 1874).

[26] REV. STAT. §646 (1875), 28 U. S. C. §79 (1934); see note 22, *supra*.

[27] REV. STAT. §915 (1872), 28 U. S. C. §726 (1934).

question actually raised and the reasoning of the lower courts could have been disposed of by reference to the removal cases discussed above.

Speculation arises as to the motives of the Court in discussing—and then adversely—the doctrine of *Toland v. Sprague*. Was it merely an attempt to educate the lower courts on the distinction between the use of attachment in cases of removal and in cases of original jurisdiction? Such a purpose would hardly necessitate criticism of the doctrine. Or was the Court intimating that on a future occasion it may not refuse to allow a federal district court to acquire original jurisdiction by way of attachment and constructive service? Such an intimation would not be surprising from a Court which has recently displayed its willingness to re-examine any questionable precedents.[28] The disparity between the scope of attachment in the state courts and in the federal courts may be an unfortunate retention.[29] In the light of the recent revision of federal procedure allowing federal process to run throughout the state in which the court sits,[30] a change permitting federal courts to acquire original jurisdiction over a nonresident defendant by means of attachment and constructive service might be a desirable adjunct to the usefulness of the federal courts.

JAMES K. DORSETT, JR.

Libel and Slander—Publication—Privilege—Dictation to a Stenographer.

Plaintiff, having been discharged from the employ of defendant company for alleged misconduct, went to defendant's manager and requested a separation notice which was required to be filed with the Unemployment Compensation Commission. The manager made a notation on a blank notice that the cause of separation should be "Misconduct", and, at his request, plaintiff took the notice to defendant's stenographer who filled it out and inserted as the cause of separation the word "Misconduct". In an action for libel, the Court sustained the defendant's demurrer, holding that there was no publication to support the action, as communication to a stenographer was insufficient.[1]

Much authority supports the decision reached here. On the theory that a corporation can act only through its agents,[2] it is held that com-

[28] Erie R. R. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. ed. 1188 (1938); Graves v. New York *ex rel.* O'Keefe, 306 U. S. 466, 59 Sup. Ct. 595, 83 L. ed. Adv. Ops. 577 (1939).

[29] Early criticism was found in Dormitzer v. Illinois & St. Louis Bridge Co., 6 Fed. 217, 218 (C. C. D. Mass. 1881).

[30] Federal Rules of Civil Procedure 4(f).

[1] Satterfield v. McLellan Stores, 215 N. C. 582, 2 S. E. (2d) 709 (1939).

[2] Cartwright-Caps Co. v. Fischel and Kaufman, 113 Miss. 359, 74 So. 278 (1917).

munications between agents of a corporation concerning corporate business are not thereby published.[3] A leading case,[4] cited and followed by the North Carolina Supreme Court, holds that the acts of a manager and stenographer of a corporation constitute a single corporate act. Those involved are not regarded as third parties for the purpose of publication, but as common servants with a duty to carry out the single act of the corporation.[5] As to the stenographer of an individual, the same result would probably be reached, the stenographer being considered only the confidential instrumentality of the employer.[6] Under modern business conditions, a stenographer is necessary to the transaction.[7] The taking and transcribing of the dictation is mainly a mechanical process,[8] so the stenographer is not considered to possess such an independent third party personality as would warrant a holding of publication.[9] "It is inconceivable how the business of the country, under the present conditions, can be carried on, if a business man or corporation must be subject to litigation for every letter containing some statement too strong, where it is only sent to the person to whom directed, and only heard by a stenographer to whom the letter is dictated."[10]

A number of cases adopt the view that dictation to a stenographer is by itself sufficient to constitute publication.[11] Under this view, a

[3] Briggs v. Atlantic Coast Line Ry., 66 F. (2d) 87 (C. C. A. 5th, 1933); George v. Georgia Power Co., 43 Ga. App. 596, 159 S. E. 756 (1931); Prins v. Holland-North American Mortgage Co., 107 Wash. 206, 181 Pac. 680 (1919).

[4] Owen v. Ogilvie Publishing Co., 32 App. Div. 465, 53 N. Y. Supp. 1033 (2d Dep't. 1898).

[5] Central of Georgia Ry. v. Jones, 18 Ga. App. 414, 89 S. E. 429 (1916); Cartwright-Caps Co. v. Fischel and Kaufman, 113 Miss. 359, 74 So. 278 (1917); Wells v. Belstrat Hotel Corp., 212 App. Div. 366, 208 N. Y. Supp. 625 (1st Dep't. 1925); Freeman v. Dayton Scale Co., 159 Tenn. 413, 19 S. W. (2d) 255 (1929); Chalkley v. Atlantic Coast Line Ry., 150 Va. 301, 143 S. E. 631 (1928). Accord: Briggs v. Atlantic Coast Line Ry., 66 F. (2d) 87 (C. C. A. 5th, 1933); Prins v. Holland-North American Mortgage Co., 107 Wash. 206, 181 Pac. 680 (1919); *cf.* George v. Georgia Power Co., 43 Ga. App. 596, 159 S. E. 756 (1931).

[6] See Freeman v. Dayton Scale Co., 159 Tenn. 413, 19 S. W. (2d) 255 (1929); *cf.* Morgan v. Wallis, 33 T. L. R. 495 (K. B. 1917).

[7] Wells v. Belstrat Hotel Corp., 212 App. Div. 366, 208 N. Y. Supp. 625 (1st Dep't. 1925).

[8] Freeman v. Dayton Scale Co., 159 Tenn. 413, 19 S. W. (2d) 255 (1929); *cf.* Western Union Tel. Co. v. Cashman, 149 Fed. 367 (C. C. A. 5th, 1906).

[9] Freeman v. Dayton Scale Co., 159 Tenn. 413, 19 S. W. (2d) 255 (1929).

[10] Cartwright-Caps Co. v. Fischel and Kaufman, 113 Miss. 359, 363, 74 So. 278, 279 (1917).

[11] Nelson v. Whitten, 272 Fed. 135 (E. D. N. Y. 1921); Ferndon v. Dickens, 161 Ala. 181, 49 So. 888 (1909); Berry v. City of New York Ins. Co., 210 Ala. 369, 98 So. 290 (1923); Gambrill v. Schooley, 93 Md. 48, 48 Atl. 730 (1901); Ostrowe v. Lee, 256 N. Y. 36, 175 N. E. 505 (1931); Bradley v. Conners, 169 Misc. 442, 7 N. Y. Supp. (2d) 294 (Sup. Ct. 1938); Pullman v. Hill, (1891) 1 Q. B. 524; see Sun Life Assurance Co. v. Bailey, 101 Va. 443, 445, 44 S. E. 692, 693 (1903); *cf.* Bacon v. Michigan Central Ry., 55 Mich. 224 (1884); Kennedy v. James Butler, Inc., 245 N Y. 204, 156 N. E. 666 (1927). RESTATEMENT, TORTS (1938) §557, comment (h).

stenographer's transcription of the dictated matter is more than a mere mechanical process; there is produced in the mind as full and clear a perception of the dictated material as if there had been a slower copying by one not so skilled in stenographic work.[12] The stenographer, therefore, whether of a corporation or of an individual, in reading and transcribing the notes, is the human third party necessary to publication.[13] It is further argued that statements so communicated to a stenographer are no less injurious,[14] as they will certainly influence the stenographer in his estimation of the person defamed, who is as much entitled to the respect and esteem of the stenographer as of anyone else.[15] Where the communication is sent to the person defamed, "the outrage is without redress if the libel is not published when written out and read" by the stenographer.[16]

It seems to be the more logical and better rule to hold every dictation to a stenographer a publication, because actually the stenographer is a separate and distinct human being, as required by the law of defamation. Even under this holding, the defendant is not deprived of other defenses, unless he dictated the communication maliciously.

The principal case might have been decided without considering the question of defendant's publication to the stenographer. The plaintiff went to the defendant's manager and requested the separation notice, and the reason for her discharge was stated on the blank that she took to the stenographer. As a consequence, the plaintiff might have been denied recovery as she only got what she asked for,[17] because she herself, and not the defendant's manager, published it.[18]

Where there is a publication, the defendant may still escape liability if his communication is privileged. "The question of privilege must be kept distinct from the question of publication. Privilege, of course, in no sense negatives publication; it justifies it."[19] In order for a defendant to rely on this defense, there must have been a privileged

[12] Gambrill v. Schooley, 93 Md. 48, 48 Atl. 730 (1901).

[13] Bradley v. Conners, 169 Misc. 442, 7 N. Y. Supp. (2d) 294 (Sup. Ct. 1938); Adams v. Lawson, 17 Gratt. 250 (Va. 1867).

[14] Nelson v. Whitten, 272 Fed. 135 (E. D. N. Y. 1921).

[15] Berry v. City of New York Ins. Co., 210 Ala. 369, 98 So. 290 (1923).

[16] Ostrowe v. Lee, 256 N. Y. 36, 40, 175 N. E. 505, 506 (1931).

[17] Melcher v. Beeler, 48 Colo. 233, 110 Pac. 181 (1910); Hoff v. Pure Oil Co., 147 Minn. 195, 179 N. W. 891 (1920); Miller v. Donovan, 16 Misc. 453, 39 N. Y. Supp. 820 (Sup. Ct. 1896); Schoepflin v. Coffey, 162 N. Y. 12, 56 N. E. 502 (1900); Taylor v. McDaniels, 139 Okla. 262, 281 Pac. 967 (1029). Accord: Burdett v. Hines, 125 Miss. 66, 87 So. 470 (1921); *cf.* Beeler v. Jackson, 64 Md. 589, 2 Atl. 916 (1885). But *cf.* Nelson v. Whitten, 272 Fed. 135 (E. D. N. Y. 1921).

[18] Shepard v. Lamphier, 84 Misc. 498, 146 N. Y. Supp. 745 (Sup. Ct. 1914); Fonville v. McNease, Dud. Eq. 303 (S. C. 1838); Sylvis v. Miller, 96 Tenn. 96, 33 S. W. 921 (1896): Wilcox v. Moon, 64 Vt. 450, 24 Atl. 244 (1892).

[19] 18 HALSBURY, THE LAWS OF ENGLAND (1911) 658.

occasion for the publication, and the defendant must have remained within the scope of the privilege.[20]

A communication is privileged, although it contains matter otherwise defamatory, and therefore actionable, if it is honestly made in good faith on a subject concerning which the sender and receiver both have an interest or duty.[21] Communications between parties engaged in a common business transaction or dispute,[22] or between an employer and employee or a principal and agent,[23] relating to the subject matter of the business involved, fall within the limits of a privileged communication. Both parties to the communication have an interest and duty therein, since it concerns the business in which both are engaged. To insure the establishment of a privilege, a communication must be confined to the subject matter or purpose of the business involved, and not go beyond it by dwelling on irrelevant matter.[24]

There is also a privilege when a person gives information, either voluntarily or by request, concerning the character of a former employee who seeks to obtain employment from another.[25] Such privilege is based on a moral or social duty to give the information,[26] and the communication need not be confined to facts which the sender knows of his own knowledge, or to information which he has fully investigated.[27]

[20] Bohlinger v. Germania Life Ins. Co., 100 Ark. 477, 140 S. W. 257 (1911); Stewart v. Riley, 114 W. Va. 578, 172 S. E. 791 (1934).

[21] Montgomery Ward & Co. v. Watson, 55 F. (2d) 184 (C. C. A. 4th, 1932); Aetna Life Ins. Co. v. Mutual Benefit Ass'n., 82 F. (2d) 115 (C. C. A. 8th, 1936); Bohlinger v. Germania Life Ins. Co., 100 Ark. 477, 140 S. W. 257 (1911); Missouri Pacific Transportation Co. v. Beard, 179 Miss. 764, 176 So. 156 (1937); Harrison v. Garrett, 132 N. C. 172, 43 S. E. 594 (1903); Brown v. Elm City Lumber Co., 167 N. C. 9, 82 S. E. 961 (1914); Alexander v. Vann, 180 N. C. 187, 104 S. E. 360 (1920); Elmore v. Atlantic Coast Line Ry., 189 N. C. 658, 127 S. E. 110 (1925).

[22] Brown v. Elm City Lumber Co., 167 N. C. 9, 82 S. E. 961 (1914); Roff v. British and French Chemical Mfg. Co. (1918) 2 K. B. 677; Osborn v. Thomas Boulter & Son, L. R. (1930) 2 K. B. 226. Accord: Edmondson v. Birch & Co. (1907) 1 K. B. 371.

[23] Bohlinger v. Germania Life Ins. Co., 100 Ark. 477, 140 S. W. 257 (1911); Nichols v. Eaton, 110 Iowa 509, 81 N. W. 792 (1900); Missouri Pacific Transportation Co. v. Beard, 179 Miss. 764, 176 So. 156 (1937). Accord: Hebner v. Great Northern Ry., 78 Minn. 289, 80 N. W. 1128 (1899); Lawless v. Anglo-Egyptian Cotton and Oil Co., L. R. (1869) 4 Q. B. 262; *cf.* Louisiana Oil Corp. v. Renno, 173 Miss. 609, 157 So. 705 (1934).

[24] Bohlinger v. Germania Life Ins. Co., 100 Ark. 477, 140 S. W. 257 (1911).

[25] Solow v. General Motors Truck Co., 64 F. (2d) 105 (C. C. A. 2d, 1933); Radovich v. Douglas, 84 Colo. 149, 268 Pac. 575 (1928); Fresh v. Cutter, 73 Md. 87, 20 Atl. 774 (1890); Dale v. Harris, 109 Mass. 193 (1871); Doane v. Grew, 220 Mass. 171, 107 N. E. 620 (1915); McKenna v. Mansfield Leland Hotel Co., 55 Ohio App. 163, 9 N. E. (2d) 166 (1936). Accord: Missouri Pacific Ry. v. Behee, 2 Tex. Civ. App. 107, 21 S. W. 384 (1893). NEWELL, SLANDER AND LIBEL (4th ed. 1924) §404.

[26] Radovich v. Douglas, 84 Colo. 149, 268 Pac. 575 (1928); NEWELL, SLANDER AND LIBEL (4th ed. 1924) §404.

[27] Doane v. Grew, 220 Mass. 171, 107 N. E. 620 (1915); NEWELL, SLANDER AND LIBEL (4th ed. 1924) §404.

That the communication contains untrue or mistaken statements will not necessarily destroy the privilege.[28] The only material requirement is that the communication be made in good faith with a belief in its truth.[29] Herein lies the ground upon which the decision of the principal case should have been reached. There was a privilege between the defendant and the Unemployment Compensation Commission that would protect the communication. The Commission, by its very nature, had a duty to receive the notice from the plaintiff's former employer and file it in order that the plaintiff might receive its benefits. When the notice was requested, to be filed with the Commission as required, the defendant's manager had a duty to give it, and there is no indication that he did not do so in good faith, or that he did not believe in its truth. A privilege once established protects the defendant who uses the reasonable and customary methods of communication.[30] Dictation of the communication to a stenographer or clerk is within this rule as an ordinary way for a corporation or business man to handle legitimate business, so that such dictation does not destroy the privilege.[31]

Since dictation to a stenographer is not an excessive publication a plaintiff cannot recover without proof of excess malice.[32] Mere mistake[33] or falsity[34] in the communication is insufficient to constitute

[28] McKenna v. Mansfield Leland Hotel Co., 55 Ohio App. 163, 9 N. E. (2d) 166 (1936); Missouri Pacific Ry. v. Behee, 2 Tex. Civ. App. 107, 21 S. W. 384 (1893); NEWELL, SLANDER AND LIBEL (4th ed. 1924) §404.

[29] Fresh v. Cutter, 73 Md. 87, 20 Atl. 774 (1890); Doane v. Grew, 220 Mass. 171, 107 N. E. 620 (1915). Accord: Solow v. General Motors Truck Co., 64 F. (2d) 105 (C. C. A. 2d, 1933); McKenna v. Mansfield Leland Hotel Co., 55 Ohio App. 163, 9 N. E. (2d) 166 (1936). NEWELL, SLANDER AND LIBEL (4th ed. 1924) §404.

[30] Globe Furniture Co. v. Wright, 265 Fed. 873 (App. D. C. 1920); Lawless v. Anglo-Egyptian Cotton and Oil Co., L. R. (1869) 4 Q. B. 262; Boxsius v. Goblet Frères, (1894) 1 Q. B. 842; Edmondson v. Birch & Co., (1907) 1 K. B. 371; Roff v. British and French Chemical Mfg. Co., (1918) 2 K. B. 677; Osborn v. Thomas Boulter and Son, L. R. (1930) 2 K. B. 226.

[31] Boxsius v. Goblet Frères, (1894) 1 Q. B. 842; Edmondson v. Birch & Co., (1907) 1 K. B. 371; Osborn v. Thomas Boulter & Son, L. R. (1930) 2 K. B. 226. Accord: Globe Furniture Co. v. Wright, 265 Fed. 873 (App. D. C. 1920); Roff v. British and French Chemical Mfg. Co., (1918) 2 K. B. 677; *cf.* Bohlinger v. Germania Life Ins. Co., 100 Ark. 477, 140 S. W. 257 (1911). *Contra:* Gambrill v. Schooley, 93 Md. 48, 48 Atl. 730 (1901); Pullman v. Hill, (1891) 1 Q. B. 524 (these two cases, holding that the prevalence of business conditions or business pressure do not warrant resort to stenographic assistance, if rightly decided, were so decided because the respective courts found that business conditions at the time did not justify disclosing any letter to another employee).

[32] A court will not imply or impute malice when privilege has been established. Bohlinger v. Germania Life Ins. Co., 100 Ark. 477, 140 S. W. 257 (1911); Hebner v. Great Northern Ry., 78 Minn. 289, 80 N. W. 1128 (1899); Missouri Pacific Transportation Co. v. Beard, 179 Miss. 764, 176 So. 156 (1937); Harrison v. Garrett, 132 N. C. 172, 43 S. E. 594 (1903); Brown v. Elm City Lumber Co., 167 N. C. 9, 82 S. E. 961 (1914); Stewart v. Riley, 114 W. Va. 578, 172 S. E. 791 (1934); Flynn v. Western Union Tel. Co., 199 Wis. 124, 225 N. W. 742 (1929).

[33] Brown v. Elm City Lumber Co., 167 N. C. 9, 82 S. E. 961 (1914).

[34] Bohlinger v. Germania Life Ins. Co., 100 Ark. 477, 140 S. W. 257 (1911).

malice. Malice may be shown if the plaintiff can prove that the communication was not made in good faith,[35] but that the defendant availed himself of the privileged occasion wilfully and knowingly for the purpose of defaming the plaintiff,[36] or made the communication in reckless disregard of the justifiability of the defamatory statements.[37]

It seems rather unfortunate that the North Carolina court, in deciding its first case on this point, should base its opinion on the artificial holding that there is no publication to the stenographer because she is not a third person in her duties as an employee of a corporation, when the same result could have been more logically reached on the grounds of a privileged publication. If this latter method had been used, subsequent plaintiffs would be more adequately protected against similar communications maliciously dictated.

J. B. CHESHIRE, IV.

Mortgages—Deeds of Trust—Power of Sale—Rights of Mortgagor Not in Default After Wrongful Sale.

P procured a loan from *D* land bank, securing the bank by a deed of trust on her farm. *P* then made an agreement with *W*, joined as a defendant, whereby he became her tenant and agreed to apply a certain rental each year toward discharging the principal of the obligation and the interest thereon. *P* alleges that *W* failed to apply the rents and profits properly, and that instead he entered a separate agreement with the bank whereby he became its tenant; and that after several years, during which *W* and *D* failed properly to apply rental value, and committed waste by selling timber, *D* declared *P* in default, and procured a sale by the trustee. The bank, *D*, was the purchaser, and later conveyed to *H*, also joined as a defendant, from whom *W* subsequently acquired through purchase. *P* claims that she was improperly deprived of her land through the fraud of the defendants, and of others whose mention is not necessary; she asks for an accounting as to rents and profits, for the sale of the land to be set aside as void, for recovery of the amount of waste and of timber cut, and for a chance to redeem her land.

P was nonsuited in the lower court, and the Supreme Court sustained this as to all defendants save *D*. The court was of the opinion that the evidence in the light most favorable to *P* showed that *D* had become

[35] Missouri Pacific Transportation Co. v. Beard, 179 Miss. 764, 176 So. 156 (1937); Brown v. Elm City Lumber Co., 167 N. C. 9, 82 S. E. 961 (1914); Elmore v. Atlantic Coast Line Ry., 189 N. C. 658, 127 S. E. 110 (1925).

[36] Missouri Pacific Transportation Co. v. Beard, 179 Miss. 764, 176 So. 156 (1937); Elmore v. Atlantic Coast Line Ry., 189 N. C. 658, 127 S. E. 110 (1925).

[37] Missouri Pacific Transportation Co. v. Beard, 179 Miss. 764, 176 So. 156 (1937).

mortgagee in possession, and that *P* was consequently entitled to an accounting for rents and profits during the period of such relationship. The court said, further, that if, as *P* claims, nothing was due *D* at the time of the sale, and the latter brought about the sale wrongfully, *P* would ordinarily be entitled to redeem the land, unless this has been rendered impossible by *D*'s conduct, in which eventuality the remedy of damages is available.[1] The case raises the question as to what rights a mortgagor not actually in default has when his land is conveyed to an innocent purchaser under the power in the instrument, and leaves a good deal of doubt as to what "conduct" by the mortgagee would render redemption impossible.

Even in lien states, where the mortgagor and not the mortgagee is entitled to possession, the latter may obtain the rights of a "mortgagee in possession". Some states allow him these rights only if he enter with the express or implied consent of the mortgagor;[2] others extend the doctrine to peaceable entry in good faith under color of law;[3] a third group requires only that the possession be peaceably acquired.[4] One who has become a "mortgagee in possession" may not be divested of this status until the obligation is satisfied.[5] Once the character of mortgagee in possession has been assumed, whether the jurisdiction be title or lien, he enters into some well settled rights and obligations. He is chargeable with the rents and profits from such land,[6] which he must apply as payment on the debt and interest thereon accruing;[7] with waste;[8] and with acts amounting to flagrant mismanagement.[9] He must keep the premises in such repair as will conserve the property and prevent ruin and decay, and he must account for losses resulting from

[1] Fleming v. North Carolina Joint Stock and Land Bank, 215 N. C. 414, 2 S. E. (2d) 3 (1939).

[2] Jones v. Rigby, 41 Minn. 530, 43 N. W. 390 (1899); Herrmann v. Land Cabinet Co., 217 N. Y. 526, 112 N. E. 476 (1916).

[3] Cameron v. Ah Quong, 175 Cal. 377, 165 Pac. 961 (1917); Pettit v. Louis, 88 Neb. 496, 129 N. W. 1005 (1911).

[4] Stouffer v. Harlan, 68 Kan. 135, 74 Pac. 610 (1903); Jagar v. Plunkett, 81 Kan. 565, 106 Pac. 280 (1910); (1928) 7 TEX L. REV. 170.

[5] Cory v. Santa Ynes Land Co., 151 Cal. 778, 91 Pac. 647 (1907). An exception to the rule occurs when there is gross mismanagement by the mortgagee in possession. Harding v. Garber, 20 Okla. 11, 93 Pac. 539 (1907); 3 JONES, MORTGAGES (8th ed. 1928) §1931; note (1935) 35 COL. L. REV. 1248, 1253, n. 31.

[6] Union Bank of Columbia v. Cook, 110 S. C. 99, 96 S. E. 484 (1918) (in absence of evidence, the rent may be assumed to equal the interest); 2 JONES, MORTGAGES §1425.

[7] Peugh v. Davis, 113 U. S. 542, 5 Sup. Ct. 622, 28 L. ed. 1127 (1885); Green v. Rodman, 150 N. C. 176, 63 S. E. 732 (1909); 2 JONES, MORTGAGES §1437; WALSH, MORTGAGES (1934) §§19, 20.

[8] American Freehold Land Mortgage Co. v. Pollard, 132 Ala. 155, 32 So. 630 (1902) (timber removed); Smith v. Stringer, 228 Ala. 630, 155 So. 85 (1934) (grapevines destroyed).

[9] Baumgard v. Bowman, 31 Ohio App. 266, 167 N. E. 166 (1928); see note 5, *supra*.

his failure to discharge such duty.[10] He is credited with reasonably necessary repairs,[11] but not with what are clearly improvements, unless these were made under the mistaken belief that he was actually the owner in fee.[12] He can usually demand credit for tax payments,[13] for the paying off of prior liens,[14] and for any insurance outlay,[15] unless this is made solely for his own purposes.[16]

The right of the mortgagor in the instant case to an accounting from the mortgagee is therefore clear, since the mortgagee was in possession because the mortgagor's tenant had become its tenant. If on such an accounting it turns out that there was nothing due the mortgagee at the time of the foreclosure, the problem is raised as to the rights of *P* as against the bank, *D*, purchaser at the sale, and *W*, who eventually acquired the title. This is a phase of the larger question: "What rights and remedies does a mortgagor have after a foreclosure sale, or sale under power, which is in some way defective?"

In general, sales under power in a mortgage or deed of trust may be set aside at the instance of the mortgagor where he suffers injury by reason of fraud or deceit on the part of the mortgagee or trustee making the sale;[17] where the price received has been so grossly inadequate as to shock the conscience, if there is also any evidence of collusion, oppression, or even gross mismanagement by the mortgagee or the trustee:[18] or where the mortgagee or trustee becomes purchaser at his own sale, unless specifically authorized to do so either by the terms of the

[10] Dozier v. Mitchell, 65 Ala. 511 (1880); 3 POMEROY, EQUITY JURISPRUDENCE (3d ed. 1905) §1217; WALSH, MORTGAGES (1934) §21; *cf.* Brown v. South Boston Savings Bank, 148 Mass. 300, 19 N. E. 382 (1889).

[11] Lynch v. Ryan, 137 Wis. 13, 118 N. W. 174 (1908); 3 POMEROY, EQUITY JURISPRUDENCE §1217; WALSH, MORTGAGES (1934) §21.

[12] Mickle v. Dillaye, 17 N. Y. 80 (1858); Turk v. Page, 64 Okla. 251, 167 Pac. 462 (1917); WALSH, MORTGAGES (1934) §21.

[13] Hays v. Christiansen, 114 Neb. 764, 209 N. W. 609 (1926).

[14] Harper v. Ely, 70 Ill. 581 (1873); Madison Baptist Church v. Oliver Street Baptist Church, 73 N. Y. 82 (1878).

[15] Hays v. Christiansen, 114 Neb. 764, 209 N. W. 609 (1926); 2 JONES, MORTGAGES §1452.

[16] Wise v. Layman, 197 Ind. 393, 150 N. E. 368 (1926).

[17] The mortgagor can usually proceed against the mortgagee for damages at law, or have the deed canceled; but if the land goes to an innocent purchaser, the only recourse is a suit for damages against the offending mortgagee. Warren v. Susman, 168 N. C. 457, 84 S. E. 760 (1915); Pritchard v. Smith, 160 N. C. 79, 75 S. E. 803 (1912); *cf.* Carr v. Graham, 128 Ga. 622, 57 S. E. 875 (1907); Rich v. Brooks, 179 N. C. 204, 102 S. E. 207 (1920).

[18] Sargent v. Shumaker, 193 Cal. 122, 223 Pac. 464 (1924); *cf.* Holton Park Co. v. Gary, 133 Md. 509, 105 Atl. 751 (1919). Mere inadequacy of price, standing alone, cannot upset a duly advertised sale. Gadreault v. Sherman, 250 Mass. 145, 145 N. E. 49 (1924); Roberson v. Matthews, 200 N. C. 241, 156 S. E. 496 (1931); Elkes v. Interstate Trustee Corp., 209 N. C. 832, 184 S. E. 826 (1936); note (1933) 11 N. C. L. REV. 172. Also see in this connection N. C. CODE ANN. (Michie, 1935) §2593(b) (statutory provision for enjoining sales at which the price offered is inadequate).

instrument or by statute.[19] It is widely held that a sale which fails to comply with requirements as to notice and advertisement which are specified in the instrument, or by statute, is void and ineffective to pass legal title.[20] A sale will not usually be set aside on the ground of mere informality or irregularity not affecting the right to sell or the substantial rights of the parties involved.[21]

The instant case raises the question of the effect of a sale when there has been no default. Here the decisions are somewhat conflicting. It has been indicated in a few cases that if the mortgage has been paid before the sale, such sale is voidable, and a purchaser obtains at most a bare legal title which he holds in trust for the benefit for the mortgagor, or owner of the mortgaged estate,[22] but this view does not seem to be very generally followed. A number of states, in which payment of the debt automatically extinguishes the mortgage securing it and the power of sale contained therein, have adopted the rule that any sale made under the power after the debt is paid is void, even as against a bona fide purchaser.[23] The reason for this rule, as stated in *Rogers v. Barnes*,[24] a leading case, is that since default of the mortgagor is a condition precedent to the right of sale, this right does not accrue and cannot be exercised until default occurs. According to this case, the mortgagor may elect whether to recover full damages on account of the unlawful sale of the land, thus ratifying the title of the innocent purchaser; or to repudiate the sale and redeem the premises.[25] It has

[19] There is a presumption of fraud at such sale, although there may be none. Gibson v. Barbour, 100 N. C. 192, 6 S. E. 766 (1887). The mortgagor can usually affirm the sale and thus ratify it; or he may avoid it and set it aside. Joyner v. Farmer, 78 N. C. 196 (1878). But an innocent purchaser for value gets a good title even from a mortgagee who thus buys. Very v. Russell, 65 N. H. 646, 23 Atl. 522 (1874); see Froneberger v. Lewis, 79 N. C. 426, 431 (1878); *cf.* Smith v. Greensboro Bank, 213 N. C. 343, 196 S. E. 481 (1938).

[20] Cox v. American Freehold & Land Mortgage Co., 88 Miss. 88, 40 So. 739 (1906). *Contra:* Fountain v. Pateman, 189 Ala. 153, 66 So. 75 (1914); see Everett v. Woodward, 162 Va. 419, 422, 174 S. E. 864, 867 (1934). A subsequent purchaser is protected from defects in the proceedings which do not appear of record, and of which he had no notice, actual or constructive. Fountain v. Pateman, 189 Ala. 153, 66 So. 75 (1914); Phipps v. Wyatt, 199 N. C. 727, 155 S. E. 721 (1930); see Laramore v. Jones, 157 Ga. 366, 372, 121 S. E. 411, 414 (1924). WALSH, MORTGAGES (1934) §85.

[21] Farmers Bank v. Murphree, 200 Ala. 574, 76 So. 932 (1917); Flynn v. Curtis & Pope Lumber Co., 245 Mass. 291, 139 N. E. 533 (1923); Jessup v. Nixon, 186 N. C. 100, 118 S. E. 908 (1923); Brown v. Sheets, 197 N. C. 268, 148 S. E. 233 (1929).

[22] See Askew v. Sanders, 84 Ala. 356, 358, 4 So. 167, 168 (1888); Chapin v. Billings, 91 Ill. 539, 544 (1879); Fleming v. Barden, 126 N. C. 450, 456, 36 S. E. 17, 19 (1900); note (1903) 92 Am. St. Rep. 597.

[23] Redmond v. Packenham, 66 Ill. 434 (1872); Crowley v. Adams, 226 Mass. 582, 116 N. E. 241 (1917); Huntington v. Crafton, 76 Tex. 497, 13 S. W. 542 (1890); see Wells v. Estes, 154 Mo. 291, 299, 55 S. W. 255, 257 (1900); Ferguson v. Coward, 59 Tenn. 572, 573 (1872).

[24] 169 Mass. 179, 47 N. E. 602 (1897).

[25] The Massachusetts court said further, however, that a parol ratification of the sale and the deed thereunder would make the purchaser's title secure, and that

also been indicated that if the innocent purchaser is in possession after the sale, a court of equity may set the sale aside and compel a reconveyance of the legal title, so as to remove the cloud on the mortgagor's title.[26]

As opposed to this, however, there is the more general rule governing defective sales, which is followed in North Carolina, that a purchaser without actual or constructive notice of irregularity in the proceedings, gets a valid title, although the mortgagor might redeem as against the person making the sale.[27] A subsequent or remote grantee is not bound to look beyond the recitals of the trustee's deed, and, when he acts in good faith, he takes a good title as against any defects in the sale of which he had no actual or constructive knowledge.[28] In accordance with this, it has been held a number of times that where a mortgage containing a power of sale has in fact been discharged, but the mortgagor has failed to have such release made of record, an innocent purchaser at a sale made thereafter will be protected, the mortgagee being held responsible to the mortgagor for whatever damage he suffers through this wrongful sale.[29] In North Carolina, in the leading case of *Burnett v. Dunn Commission and Supply Co.*,[30] the court held invalid an attempted exercise of a power of sale after the debt had been satisfied. According to this case, the mortgagor has an election of remedies: he can ratify the sale and accept the proceeds thereof in settlement; he can, by repudiating the sale, sue the trustee or mortgagee for the wrong done in making such sale and hold him liable for the worth of the property;[31] or he can mantain an action to set aside the sale, "assuredly so as against the defendant [mortgagee], and one purchasing with notice".[32] The implication is that if the land has gone to an innocent third person, the mortgagor might, perforce, be remitted to his

laches or acts amounting to an estoppel might prevent the mortgagor from contesting the validity of such a title.

[26] Redmond v. Packenham, 66 Ill. 434 (1872).

[27] Shillaber v. Robinson, 97 U. S. 68, 24 L. ed. 967 (1878); Hinton v. Hall, 166 N. C. 477, 82 S. E. 847 (1914); 3 JONES, MORTGAGES §2441; WALSH, MORTGAGES (1934) §85.

[28] Hinton v. Hall, 166 N. C. 477, 82 S. E. 847 (1914); Brewington v. Hargrove, 179 N. C. 279, 100 S. E. 308 (1919).

[29] Garrett v. Crawford, 128 Ga. 519, 57 S. E. 792 (1907); Merchant v. Woods, 27 Minn. 396, 7 N. W. 826 (1881); Bausman v. Eads, 46 Minn. 148, 48 N. W. 769 (1891); 2 JONES, MORTGAGES §2453 (the measure of damages allowed is usually the full worth of the property at the time of the sale since that is the amount the mortgagor has lost through the mortgagee's tort).

[30] 180 N. C. 117, 104 S. E. 137 (1920).

[31] *Cf.* Stansberry v. McDowell, 194 Mo. 194, 186 S. W. 757 (1916) (an allowance of punitive damages when the mortgagee's tortious foreclosure is intentionally oppressive and wanton).

[32] Burnett v. Dunn Commission and Supply Co., 180 N. C. 117, 118, 104 S. E. 137, 138 (1920).

remedy of damages, as in the cases involving other irregularities in the sale.

In the principal case (assuming the accounting will show that nothing was owing at the time of foreclosure) the right to exercise the power of sale had not yet accrued, and hence the sale was unauthorized. Since *D* bank, the creditor secured by the deed of trust, purchased at the sale and could not be considered a purchaser without notice of the defect, the sale could be avoided as to *D*. But the bank sold to *H*, who sold to *W*. If *H* is a purchaser for value without notice, then under the general rule followed in North Carolina that a subsequent grantee is not charged with defects in the foreclosure sale of which he had no notice, *P* could not avoid the sale and recover the land if *H* still held it.[33] Although, in such a situation, as that in the principal case, *W* would certainly be no grantee without notice, still if the land goes from the bona fide purchaser to a subsequent vendee with notice, the latter's title is unassailable, provided he did not participate in the wrong.[34] Here it would by no means be clear that *W* did not so participate. Therefore, even admitting that a bona fide purchaser would take title under the defective sale, whether any cause of action existed as against *W* would seem to depend on whether *H* was indeed a bona fide purchaser, and whether *W* was a participator in the bank's wrong.

In support of the rule that a purchaser without notice should keep the land as against the mortgagor, it may be argued that there is little danger that an innocent mortgagor will suffer any great injustice if he takes any reasonable precautions in safeguarding his interests. If the debt has in fact been paid, the mortgagor may protect himself against any sale to an innocent purchaser by having this discharge made of record with the register of deeds in compliance with our North Carolina recordation statute.[35] There is small likelihood of any sale being held without the mortgagor's knowledge in view of the customary notice and advertisement before sale.[36] He has the right to file in the register of deeds office a *lis pendens,* which is notice to all subsequent purchasers of land in such county that they buy subject to the outcome of a suit which the mortgagor is to bring.[37] Simpler still, the mortgagor could appear at the sale and give unmistakable notice that he protests; this certainly would give any immediate purchaser notice. Since silence or failure to give any protest at the sale,[38] or subsequent ratification and

[33] Brown v. Sheets, 197 N. C. 268, 148 S. E. 233 (1929); Lockridge v. Smith, 206 N. C. 174, 173 S. E. 36 (1934); Davis v. Doggett, 212 N. C. 589, 194 S. E. 288 (1937).

[34] Brown v. Sheets, 197 N. C. 268, 148 S. E. 233, 63 A. L. R. 1362 (1929).

[35] N. C. CODE ANN. (Michie, 1935) §2594.

[36] *Id.* §687. [37] *Id.* §§500-502.

[38] Lewis v. Nunn, 180 N. C. 159, 104 S. E. 470 (1920).

rental from the purchaser,[39] or unreasonable delay such as to constitute laches,[40] may preclude the mortgagor from getting his equitable relief, he would do well to assiduously avoid any conduct or inactivity which might work an estoppel on him in his attempt to have the sale set aside. This would seem true in some measure of this case. The mortgagor, so far as appears, made no attempt to warn prospective buyers, and waited five years after the sale to bring this bill to account and redeem. On the other hand, instances of hardship are quite conceivable in cases where, through absence, mistake, or ignorance, the mortgagor may not have actually known of the sale, and hence have given no notice or indication that the sale was wrongful before an innocent purchaser for value bought. If, in addition, the mortgagee who has perpetrated the wrong prove insolvent, under North Carolina law as it has been shown to be, it would seem that an innocent mortgagor would have no remedy. Albeit this may work hardships in isolated cases, it is submitted that from the standpoint of logic as well as of social policy, the North Carolina court is entirely consistent in upholding the rights of an entirely innocent purchaser without notice, as against those of an innocent mortgagor who through some inadvertence has failed to make use of the safeguards afforded him in his character of landowner.

A. H. GRAHAM, JR.

Municipal Corporations—Power to Exercise Previous Restraint on Freedom of Speech and Assembly.

An ordinance forbade public parades or public assemblage in or upon the public streets, highways, public parks or public buildings of Jersey City without a permit from the Director of Public Safety, who could only refuse a permit for the purpose of preventing a riot, disturbances, or disorderly assemblage. The circuit court of appeals,[1] modifying and affirming the district court,[2] held the ordinance unconstitutional on the ground that it permitted previous restraint upon the right of freedom of speech in a public place and forbade peacable assemblage except upon terms repugnant to free speech, contrary to the provisions of the Fourteenth Amendment. On certiorari the United States Supreme Court affirmed this decision, with modifications.[3]

[39] Flake v. High Point Perpetual Bldg. & Loan Ass'n., 204 N. C. 650, 169 S. E. 223 (1933).

[40] Schwartz v. Loftus, 216 Fed. 320 (C. C. A. 8th, 1914); see First Nat. Bank of Opp v. Wise, 235 Ala. 124, 128, 177 So. 636, 639 (1937); Walker v. Schultz, 175 Mich. 280, 292, 141 N. W. 543, 548 (1913).

[1] Hague v. Committee for Industrial Organization, 101 F. (2d) 774 (C. C. A. 3rd, 1939).

[2] Committee for Industrial Organization v. Hague, 25 F. Supp. 127 (D. N. J. 1938).

[3] Hague v. Committee for Industrial Organization, — U. S. —, 59 Sup. Ct. 954, 83 L. ed. Adv. Ops. 928 (1939).

Freedom of assembly was recognized in the English Bill of Rights[4] and has become firmly fixed in the English legal tradition. The colonists brought it with them to America, where it has been secured to the people against encroachment by the states in at least forty-four state constitutions.[5] In the beginning it was secured against encroachment by the National Congress under the First Amendment to the Federal Constitution.[6] In recent years, United States Supreme Court decisions have secured it against encroachment by the states under the Fourteenth Amendment to the Federal Constitution.[7]

In England and America freedom of speech and assembly have been limited by the common law prohibitions against riot, rout, unlawful assembly, and breach of the peace.[8] However, the fear that an assembly may lead to such consequences does not in itself justify its prevention.[9] Blackstone said, "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure from criminal matter when published."[10] This doctrine of previous restraint has been uniformly adopted by the United States Supreme Court.[11]

Under the doctrine, the Supreme Court has held unconstitutional a statute which authorized the courts to restrain any publication which regularly produced scandalous, malicious or defamatory matter,[12] a statute taxing newspaper advertisement receipts according to whether or not the paper had a circulation of twenty thousand,[13] and a city ordinance prohibiting distribution of literature on the streets without a permit from the city manager.[14] It has also been indicated that the fact that publication of certain materials would lead to public disturbances and breaches of the peace would not justify imposing previous restraint on the publication.[15] In the instant case the court declared invalid on

[4] Bill of Rights, 1688, 1 WILL. & M., sess. 2, c. 2.
[5] Jarrett and Mund, *The Right of Assembly* (1931) 9 N. Y. U. L. Q. REV. 1. The North Carolina constitutional provision is found in N. C. CONST. art. 1, §25.
[6] U. S. CONST. Amend. I.
[7] Gitlow v. New York, 268 U. S. 652, 45 Sup. Ct. 625, 69 L. ed. 1138 (1925); Fiske v. Kansas, 274 U. S. 380, 47 Sup. Ct. 655, 71 L. ed. 1108 (1927); Near v. Minnesota, 283 U. S. 697, 51 Sup. Ct. 625, 75 L. ed. 1357 (1931); DeJonge v. Oregon, 299 U. S. 353, 57 Sup. Ct. 255, 81 L. ed. 278 (1937); Lovell v. Griffin, 303 U. S. 444, 58 Sup. Ct. 666, 82 L. ed. 949 (1938).
[8] Jarrett and Mund, *loc. cit. supra* note 5.
[9] Hague v. Committee for Industrial Organization, 101 F. (2d) 774 (C. C. A. 3rd, 1939).
[10] 4 BL. COMM. *152.
[11] Walsh, *Freedom of Speech and Press* (1933) 21 GEO. L. J. 161.
[12] Near v. Minnesota, 283 U. S. 697, 51 Sup. Ct. 625, 75 L. ed. 1357 (1931).
[13] Grosjean v. American Press Co., 297 U. S. 233, 56 Sup. Ct. 444, 80 L. ed. 660 (1936).
[14] Lovell v. Griffin, 303 U. S. 444, 58 Sup. Ct. 666, 82 L. ed. 949 (1938).
[15] See Dearborn Publishing Co. v. Fitzgerald, 271 Fed. 479, 482 (N. D. Ohio 1921).

its face an ordinance authorizing the Director of Public Safety in Jersey City to refuse permits for public assemblies "for the purpose of preventing riots, disturbances, or disorderly assemblages". The court said as to this ordinance: ". . . it permits the imposition of previous restraint upon the right of the individual to speak before an assembly of his fellows in a public place. The ordinance therefore prohibits peaceable assemblage except upon terms repugnant to free speech".[16] The theory of these cases seems to be that the risks of suppression are greater than the risks of riot.

In relation to disorderly assembly, state statutes, which, generally, make it unlawful to be a member of any organization which advocates industrial or political change by force or violence, have been upheld by the Supreme Court.[17] The Court has taken the view that such statutes are presumed to be constitutional unless proved to be an unreasonable and arbitrary exercise of the police power. Where the indictment is for the language used advocating such changes by violence, the Court, after finding the validity of the statute, looks only to find if the language came within the prohibition.[18] However, it has been suggested that the language ought to be tested as to whether it has a clear and present danger to bring about the substantive evils which the state has a right to prevent.[19]

Public authorities thus required to run the risk of riot in the effort to give life and meaning to the constitutional guaranties of free speech and assembly may, nevertheless, take legal measures to reduce the risk. The great majority of cases take the view that a permit may be required in order to use public property for lawful assemblies,[20] but the standards which should govern the issuance of these permits are not clearly defined. The courts agree that a city may require a permit to protect its streets and parks from congestion and interference with normal use when this is the primary consideration of the ordinance.[21] Most of the

[16] Hague v. Committee for Industrial Organization, 101 F. (2d) 774, 782 (C. C. A. 3rd, 1939).

[17] Gitlow v. New York, 268 U. S. 652, 45 Sup. Ct. 625, 69 L. ed. 1138 (1925); Whitney v. California, 274 U. S. 357, 47 Sup. Ct. 641, 71 L. ed. 1095 (1927); Fiske v. Kansas, 274 U. S. 380, 47 Sup. Ct. 655, 71 L. ed. 1108 (1927).

[18] Gitlow v. New York, 268 U. S. 652, 45 Sup. Ct. 625, 69 L. ed. 1138 (1925).

[19] See dissenting opinion in Gitlow v. New York, 268 U. S. 652, 672, 45 Sup. Ct. 625, 632, 69 L. ed. 1138, 1148 (1925); concurring opinion in Whitney v. California, 274 U. S. 357, 372, 47 Sup. Ct. 641, 647, 71 L. ed. 1095, 1104 (1927).

[20] Davis v. Massachusetts, 167 U. S. 43, 17 Sup. Ct. 731, 42 L. ed. 71 (1897); Fitts v. Atlanta, 121 Ga. 567, 49 S. E. 793 (1905); Commonwealth v. Abrahams, 156 Mass. 57, 30 N. E. 79 (1892); Love v. Phelan, 128 Mich. 545, 87 N. W. 785 (1901); People *ex rel.* Doyle v. Atwell, 232 N. Y. 96, 133 N. E. 364 (1921); note, *The Hague Injunction Proceedings* (1938) 48 YALE L. J. 257.

[21] Sullivan v. Shaw, 6. F. Supp. 112 (S. D. Cal. 1934) (ordinance requiring permit from city council to parade on certain streets); *In re* Flaherty, 105 Cal. 558, 38 Pac. 981 (1895) (ordinance prohibiting beating of drums and certain other loud noises on the streets without permission of the police); State v. Coleman,

ordinances requiring permits leave the granting and denying thereof to certain officials without laying down any rules for guidance. A number of cases have held such ordinances unconstitutional since they leave the issuance of permits to the arbitrary discretion of one person or group.[22] The majority view, however, is that these ordinances are constitutional.[23] It has been suggested, however, that limitations on the exercise of discretion are to be implied, the discretion being confined to considerations of the normal use of the streets and parks or other reasonable considerations.[24] It has also been held that the exercise of discretion is subject to review by the courts,[25] so that it would seem that, even under this view, the issuing official may not act merely from whim or caprice. Such ordinances must be uniform and apply equally to all persons similarly situated,[26] so various ordinances excepting

96 Conn. 190, 113 Atl. 385 (1921) (ordinance prohibiting making of speeches on the streets except by permission of the chief of police); Fitts v. Atlanta, 121 Ga. 567, 49 S. E. 793 (1905) (ordinance forbidding public meetings in the streets without consent from the mayor and council or mayor and chairman of board of police commissioners); Burkitt v. Beggans, 103 N. J. Eq. 7, 142 Atl. 181 (1928) (ordinance requiring permit to speak on streets); Buffalo v. Till, 192 App. Div. 99, 182 N. Y. Supp. 418 (4th Dep't. 1920) (ordinance prohibiting participation in any parade or assembly which had not been authorized by written permit from mayor); People *ex rel.* Doyle v. Atwell, 232 N. Y. 96, 133 N. E. 364 (1921) (ordinance requiring permit from mayor to hold public meetings in the street); Duquesne v. Fincke, 269 Pa. 112, 112 Atl. 130 (1920) (ordinance requiring permit from mayor to make speeches on the streets); see Anderson v. Tedford, 80 Fla. 376, 379, 85 So. 673, 674 (1920) (ordinance prohibiting public meetings on streets without consent of mayor or majority of city councilmen); Commonwealth v. Abrahams, 156 Mass. 57, 60, 30 N. E. 79 (1892) (rule of park board that there could be no orations in the park without their prior consent).

[22] State v. Coleman, 96 Conn. 190, 113 Atl. 385 (1921); Chicago v. Trotter, 136, Ill. 430, 26 N. E. 359 (1891); Anderson v. Wellington, 40 Kan. 173, 19 Pac. 719 (1888); *In re* Frazee, 63 Mich. 396, 30 N. W. 72 (1886); *In re* Garrabad, 84 Wis. 585, 54 N. W. 1104 (1893).

[23] Davis v. Massachusetts, 167 U. S. 43, 17 Sup. Ct. 731, 42 L. ed. 71 (1897) (ordinance requiring permit to use Boston Common to make speeches, etc.); *In re* Flaherty, 105 Cal. 558, 38 Pac. 981 (1895); Coughlin v. Chicago Park Dist., 364 Ill. 90, 4 N. E. (2d) 1 (1936) (ordinance prohibiting public speeches and meetings in Soldiers' Field without permit, and forbidding use to speak on controversial political and economic subject); Love v. Phelan, 128 Mich. 545, 87 N. W. 785 (1901) (ordinance prohibiting public addresses within a half mile radius of the city hall except by permission of mayor); People *ex rel.* Doyle v. Atwell, 232 N. Y. 96, 133 N. E. 364 (1921); note, *The Hague Injunction Proceedings* (1938) 48 YALE L. J. 257. In a number of cases no mention is made of the fact that issuance of permits was left to the discretion of one or more officials, the courts apparently assuming the ordinance to be valid on this point. Fitts v. Atlanta, 121 Ga. 567, 49 S. E. 793 (1905); Burkitt v. Beggans, 103 N. J. Eq. 7, 142 Atl. 181 (1928); Roderick v. Whitson, 51 Hun. 620, 4 N. Y. Supp. 112 (1889).

[24] See Coughlin v. Chicago Park Dist., 364 Ill. 90, 111, 4 N. E. (2d) 1, 10 (1936); Love v. Phelan, 128 Mich. 545, 551, 87 N. W. 785, 788 (1901); People *ex rel.* Doyle v. Atwell, 232 N. Y. 96, 102, 133 N. E. 364, 366 (1921).

[25] People *ex rel.* Doyle v. Atwell, 232 N. Y. 96, 133 N. E. 364 (1921).

[26] Fitts v. Atlanta, 121 Ga. 567, 49 S. E. 793 (1905); Anderson v. Wellington, 40 Kan. 173, 19 Pac. 719 (1888); *In re* Frazee, 63 Mich. 396, 30 N. W. 72 (1886); People v. Garabed, 20 Misc. 127, 45 N. Y. Supp. 827 (1897); Commonwealth v. Mervis, 55 Pa. Super. 178 (1913); Commonwealth v. Curtis, 55 Pa. Super. 184 (1913); *In re* Garrabad, 84 Wis. 585, 54 N. W. 1104 (1893).

named groups from their operation have been held invalid.[27] However, it has been suggested that this does not necessarily preclude classification of different types of assemblies and the requiring of permits only for certain types if the classification is reasonable.[28] In two cases where permits were refused because of the fear of riot or disorder, the action of the issuing authority was upheld,[29] and the ordinance in the instant case was upheld in a state court mandamus proceeding.[30] However, in the light of the other permit cases, these three cases appear to be out of line.

W. O. COOKE.

Torts—Debtor and Creditor—Intentional Infliction of Fright—Liability for Resulting Mental and Physical Injury.

A creditor gave to the defendant, a credit reporting agency, a debt for collection which was owed the creditor by the plaintiff, the operator of a dry-cleaning establishment. The plaintiff was suffering from high blood pressure, due to which he had lost, but was slowly recovering, his sight; to effect a recovery it was necessary that he be free from worry and excitement. The defendant sent the debtor three letters containing threats of action which would be taken by the defendant and the creditor if the debt were not paid; namely, the reporting by the defendant of the plaintiff's "poor pay" record to the members of its credit association, and the institution by the creditor of some of the various legal proceedings open to creditors. The plaintiff suffered a relapse upon receipt of the letters, and sued for damages, alleging malicious intent on the part of the defendant. The defendant's demurrer was sustained in the lower court, but overruled in the circuit court, on the ground that to indulge in conduct intended or likely to

[27] Anderson v. Wellington, 40 Kan. 173, 19 Pac. 719 (1888) (ordinance forbidding parades and assemblages on the streets without consent of mayor except funerals, fire companies, state militia, and United States troops); *In re* Frazee, 63 Mich. 396, 30 N. W. 72 (1886) (ordinance requiring a permit from mayor and councilmen to hold a parade with the exception of funeral and military processions); Commonwealth v. Mervis, 55 Pa. Super. 178 (1913) (ordinances forbidding parades and assemblages on the streets without notifying the police, except the National Guard, fire and police departments, and Grand Army of the Republic); *In re* Garrabad, 84 Wis. 585, 54 N. W. 1104 (1893) (ordinance forbidding marching on certain streets without written consent of the mayor except fire companies, state militia, and funeral processions, and providing that no permit could be refused to any political party having a regular state organization).

[28] People *ex rel.* O'Connor v. Smith, 263 N. Y. 255, 188 N. E. 745 (1934) (ordinance requiring permit only for public worship on the streets and not for other types of assemblages).

[29] Sullivan v. Shaw, 6 F. Supp. 112 (S. D. Cal. 1934) (however, this decision was based also on the fact that the parade for which the permit was requested might congest traffic); Coughlin v. Chicago Park Dist., 364 Ill. 90, 4 N. E. (2d) 1 (1936) (this decision was based partly on the ground that all parties were not properly before the court).

[30] Thomas v. Casey, 121 N. J. L. 185, 1 A. (2d) 866 (Sup. Ct. 1938).

cause physical illness is actionable. The majority of the court passed over the question of the effect of the demurrer as to the plaintiff's allegation of lack of justification, apparently assuming that the effect was to admit the truth of the allegation. However, the dissenting judge was of the opinion that lack of justification not only was not admitted, but that the facts which were admitted would not warrant such a conclusion.[1]

At common law, the only protection which was given to mental tranquillity itself was that afforded in the action for assault, a highly specialized form of intentional harm.[2] However, if the mental disturbance accompanied an independent tortious act, recovery would be allowed for the disturbance, as well as for any physical injury resulting therefrom.[3] Thus, when a creditor engages in conduct which constitutes a recognized tort, such as assault,[4] battery,[5] false imprisonment,[6] libel,[7] slander,[8] invasion of privacy,[9] etc., the primary question is whether the technical requirements of the particular tort alleged have been fulfilled. If so, the accompanying mental suffering may be considered in estimating the damages.[10]

[1] Clark v. Assoc. Retail Credit Men, 105 F. (2d) 62 (App. D. C. 1939).

[2] Braun v. Craven, 175 Ill. 401, 51 N. E. 657 (1898); Spade v. Lynn & B. R. R., 168 Mass. 285, 47 N. E. 88 (1897); Lehman v. Brooklyn City Ry., 47 Hun 355 (N. Y. 1888); Mitchell v. Rochester Ry., 151 N. Y. 107, 45 N. E. 354 (1896); Ewing v. Pittsburgh, C., C., & St. L. Ry., 147 Pa. 40, 23 Atl. 340 (1892); Lynch v. Knight, 9 H. L. Cas. 577 (1861); Victorian Ry. Comm. v. Coultas, 13 A. C. 222 (1888); see Gatzow v. Buening, 106 Wis. 1, 20, 81 N. W. 1003, 1009 (1900); I COOLEY, TORTS (3d ed. 1906) §94 (". . . mere mental pain and anxiety are too vague for legal redress where no injury is done to person, property, health or reputation."); HARPER, LAW OF TORTS (1933) §§18, 67; RESTATEMENT, TORTS (1934) §46.

[3] Western Union Tel. Co. v. Ferguson, 157 Ind. 64, 60 N. E. 674 (1901); Holdorf v. Holdorf, 185 Iowa 838, 169 N. W. 737 (1918); Meagher v. Driscoll, 99 Mass. 281, 96 Am. Dec. 759 (1868); Larson v. Chase, 47 Minn. 307, 50 N. W. 238 (1891); Beaulieu v. Great Northern Ry., 103 Minn. 47, 114 N. W. 353 (1907); Barbee v. Reese, 60 Miss. 906 (1883); Hickey v. Welch, 91 Mo. App. 4 (1901); Kurpgeweit v. Kirby, 88 Neb. 72, 129 N. W. 177 (1910); Davidson v. Lee, 139 S. W. 904 (Tex. Civ. App. 1911); Newell v. Whitcher, 53 Vt. 589 (1880); Summerfield v. Western Union Tel. Co., 87 Wis. 1, 57 N. W. 973 (1894); RESTATEMENT, TORTS (1934) §47(b); notes (1920) 6 A. L. R. 1062, (1926) 40 A. L. R. 297.

[4] Stockwell v. Gee, 121 Okla. 207, 249 Pac. 389 (1926). In Whitsel v. Watts, 98 Kan. 508, 159 Pac. 401 (1916), the facts would seem to constitute an assault, but the court does not so name it.

[5] Davis v. Lindsay Furniture Co., 19 La. App. 169, 138 So. 439 (1931).

[6] Davidson v. Lee, 139 S. W. 904 (Tex. Civ. App. 1911); Salisbury v. Poulson, 51 Utah 552, 172 Pac. 315 (1918).

[7] Holtz v. National Furniture Co., 57 F. (2d) 446 (App. D. C. 1932); McCravy v. Schneer's, 47 Ga. App. 703, 171 S. E. 391 (1933); Estes v. Sterchi Bros. Stores, 50 Ga. App. 619, 179 S. E. 222 (1935); McClain v. Reliance Life Ins. Co., 150 S. C. 459, 148 S. E. 478 (1929); notes (1919) 3 A. L. R. 1596, (1928) 55 A. L. R. 971.

[8] Galloway v. Cox, 172 S. C. 101, 172 S. E. 761 (1934).

[9] Brents v. Morgan, 221 Ky. 765, 299 S. W. 967 (1927); Judevine v. Benzies Montanye Fuel & Warehouse Co., 222 Wis. 512, 269 N. W. 295 (1936).

[10] Rogers v. Williard, 144 Ark. 587, 223 S. W. 15 (1920), 11 A. L. R. 1115

The problem presented by the principal case is that of intentional infliction of mental disturbance followed by physical injury, no independent tort action existing. *Wilkinson v. Downton*[11] is probably the root of the few pure cases of intentional infliction of mental suffering which are to be found, other than those in which there was an actual assault. It is usually treated as a case of intentional harm, but as is true of practically all of these cases, the physical injury for which recovery was sought was not actually intended, although some injury should have been anticipated by the defendant, and he did intend to do the act which caused the injury. The theory of *Wilkinson v. Downton* may be illustrated by the words of Justice Wright, who wrote the opinion: "The defendant has, as I assume for the moment, wilfully done an act *calculated to cause physical harm* to the plaintiff—that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her. That proposition without more appears to me to state a good cause of action, *there being no justification alleged for the act.*"[12] It will be observed that there are two important elements present in this formula: (1) whether there was an undue risk of serious *physical* consequences from the defendant's act, and (2) whether the act of the supposed wrongdoer was justified.[13]

Where the creditor's intentional acts do not constitute a tort in themselves and have resulted in fright alone, or fright followed by physical injury. the cases appear to be split. Those which have allowed recovery have done so not on the *Wilkinson v. Downton* theory, but on the basis that damages may be recovered for mental suffering itself when the defendant's conduct has been wilful, wanton, malicious, wrongful, with an utter disregard of consequences, and would naturally cause *mental*

(1921); Lyons v. Smith, 176 Ark. 728, 3 S. W. (2d) 982 (1928); Kitchens v. Williams, 52 Ga. App. 422, 183 S. E. 345 (1935); Duncan v. Donnell, 12 S. W. (2d) 811 (Tex. Civ. App. 1928); see note 3, *supra*.

[11] (1897) 2 Q. B. 57.

[12] *Id.* at 58. Magruder, *Mental and Emotional Disturbance in the Law of Torts* (1936) 49 HARV. L. REV. 1033, at 1058: "We would expect, then, the gradual emergence of a broad principle somewhat to this effect: that one who, without just cause or excuse, and beyond all the bounds of decency, purposely causes a disturbance of another's mental and emotional tranquillity of so acute a nature that harmful physical consequences, might be not unlikely to result, is subject to liability in damages for such mental and emotional disturbance even though no demonstrable physical consequences actually ensue."

[13] The formula proposed is really nothing more than the negligence formula with a safety valve tacked on in the way of "justification" to protect a defendant where his act was necessary for the protection of his rights or for the protection of the rights of another. There is need for such protection where the acts of the defendant are necessary, or have positive economic value, and the good to be achieved by the acts is greater than the harm apt to ensue therefrom. The court in *Wilkinson v. Downton*, after finding that the elements of the formula had been satisfied, then *imputed* to the defendant an intention to cause the physical injury.

and/or physical suffering.[14] This "wilful wrong" rule is applied regardless of the existence of physical injury resulting from the mental disturbance. Actually, however, there are very few collection cases where recovery was allowed in the absence of physical injury.[15] Usually there are threats of illegal action made by letter[16] or personally and in a violent manner.[17] One novel method used was the withholding of cremation of the corpse of plaintiff's son.[18] Many plaintiffs suffer miscarriage, or an aggravation of an existing condition easily apprisable by the actor, although the physical injury alleged in the cremation case was merely shock and a loss of weight.

Although some physical injury actually resulted in most of these cases, this rule carried to its logical conclusion, assuming it to mean that intentionally caused mental disturbance is actionable, would lead to ridiculous conclusions; the courts would be flooded with cases involving nothing more than hurt feelings. Therefore, as a practical matter, the rule must contain in it some place for drawing the line.

On the other hand, recovery has been denied in a number of cases even when physical injury has resulted as a direct consequence of the fright. One reason given is that the defendant could not reasonably be expected to have foreseen the *physical* consequences of the fright produced by his allegedly wrongful acts. In one of these cases a landlord used violent language while on the tenant's property, resulting in St. Vitus' dance, and in another a salesman tried to coerce the plaintiff to buy a vacuum cleaner she did not want, resulting in apoplexy.[19] One court places its decision squarely on the ground that there is no recov-

[14] Engle v. Simmons, 148 Ala. 92, 41 So. 1023 (1906); Herman Saks & Sons v. Ivey, 26 Ala. App. 240, 157 So. 265 (1934); American Security Co. v. Cook, 49 Ga. App. 723, 176 S. E. 798 (1934); Interstate Life & Acc. Co. v. Brewer, 56 Ga. App. 599, 193 S. E. 458 (1937); Barnett v. Collection Service Co., 214 Iowa 1303, 242 N. W. 25 (1932); Patapsco Loan Co. v. Hobbs, 129 Md. 9, 98 Atl. 239 (1916); LaSalle Extension University v. Fogarty, 126 Neb. 457, 253 N. W. 424, 91 A. L. R. 1491 (1934); Kirby v. Jules Chain Stores Corp., 210 N. C. 808, 188 S. E. 625 (1936); Gadbury v. Bleitz, 133 Wash. 134, 233 Pac. 299 (1925).

[15] Barnett v. Collection Service Co., 214 Iowa 1303, 242 N. W. 25 (1932); LaSalle Extension University v. Fogarty, 126 Neb. 457, 253 N. W. 424 (1934).

[16] Herman Saks & Sons v. Ivey, 26 Ala. App. 240, 157 So. 265 (1934); Barnett v. Collection Service Co., 214 Iowa 1303, 242 N. W. 25 (1932); LaSalle Extension University v. Fogarty, 126 Neb. 457, 253 N. W. 424 (1934).

[17] Engle v. Simmons, 148 Ala. 92, 41 So. 1023 (1906); Atlanta Hub Co. v. Jones, 47 Ga. App. 778, 171 S. E. 470 (1933); American Security Co. v. Cook, 49 Ga. App. 723, 176 S. E. 798 (1934); Interstate Life & Acc. Co. v. Brewer, 56 Ga. App. 599, 193 S. E. 458 (1937); Patapsco Loan Co. v. Hobbs, 129 Md. 9, 98 Atl. 239 (1916); Kirby v. Jules Chain Stores Corp., 210 N. C. 808, 188 S. E. 625 (1936).

[18] Gadbury v. Bleitz, 133 Wash. 134, 233 Pac. 299 (1925).

[19] Braun v. Craven, 175 Ill. 401, 51 N. E. 657 (1898) (St. Vitus' dance); Oehler v. Bamberger & Co., 4 N. J. Misc. 1003, 135 Atl. 71 (1926), *aff'd*, 103 N. J. L. 703, 137 Atl. 425 (1927) (apoplexy); *cf.* Doherty v. Mississippi Power Co., 178 Miss. 204, 173 So. 287 (1937).

ery for fright without impact or precedent physical injury,[20] relying on the decision in a practical joke case[21] where the defendant was a half-wit. Another court[22] holds that the defendant did not intend to cause mental suffering, could not have foreseen the fright and physical injury which resulted, and was *justified* in making to the plaintiff a simple statement of purpose based on a clear legal right. In that case, the defendants personally told plaintiff, who was eight months advanced in pregnancy, that if her mortgaged furniture was not paid for they would move it out. This was done in a calm manner in plaintiff's living room. In all but one[23] of the cases denying recovery, on the facts, some justification for the defendant's acts might be found, satisfying the second element of the formula proposed. It would seem, also, that the courts *denying* recovery, by using the foreseeability test have treated the question of *physical injury* caused by fright in the same way that a negligence question would be treated, thus considering the first element of the formula.

In practically all the decided cases dealing with intentionally caused fright, whether collection cases or not, the need for applying the *Wilkinson v. Downton* formula has not arisen. This is because the defendant's conduct has been so apt to cause serious physical consequences that the need for considering justification has been subjugated to the more important duty of the courts to protect the plaintiff's interest in freedom from bodily harm caused by fright. This is probably the reason that the "wilful wrong" rule has been satisfactory in most instances where it has been applied. But in a close case, such as the principal one, where the defendant's conduct is not so clearly "wilful", the question of justification deserves more consideration. The very existence of a debt should give rise to this consideration in the collection cases.

The principal case, although it professed to follow the doctrine of *Wilkinson v. Downton,* failed to consider the question of justification, and held the defendant liable on the grounds of intentional infliction of mental harm which should have been expected to result in serious physical consequences, i.e., the old "wilful wrong" rule. As a matter of fact, however, the debt was not disputed, the threats were merely of legal action, and the tone of the letters was very mild, so that it would seem that the defendant was justified in taking this course of action.

Just how far a creditor may go in dunning a debtor has not yet

[20] Alexander v. Pacholek, 222 Mich. 157, 192 N. W. 652 (1923).
[21] Nelson v. Crawford, 122 Mich. 466, 81 N. W. 335 (1899).
[22] Peoples Finance & Thrift Co. v. Harwell, 82 P. (2d) 994 (Okla. 1938).
[23] Oehler v. Bamberger & Co., 4 N. J. Misc. 1003, 135 Atl. 71 (1926), *aff'd,* 103 N. J. L. 703, 137 Atl. 425 (1927).

been specifically decided: The principal case, although doing lip-service to the right of a creditor to inflict some worry and concern, would seem to restrict the field of action considerably. It is to be hoped that the question of whether the creditor has acted justifiably, for which inquiry there is already precedent,[24] will be given more weight in the future.

SAMUEL R. LEAGER.

Wills—Compromise of Caveat Proceedings—Right to Share in Proceeds of Compromise.

Plaintiffs and defendants were heirs-at-law of one Smith who died leaving a will under which a $35,000 note was bequeathed to one Brawley, a stranger to the blood. Defendants notified plaintiffs of their intention to contest the will and upon being informed by plaintiffs that they would have nothing to do with the proceedings, filed a caveat. Defendants then effected a secret compromise with the legatee whereby they received $15,000 from him in consideration of their withdrawal from the contest. Plaintiffs brought this action to recover $5,000 claiming that they would have been entitled to one-third of the estate had the will been set aside. *Held,* a contract to compromise a caveat proceeding is valid, and as defendants received the money by virtue of their contract with Brawley, and not by virtue of the laws of descent and distribution, the plaintiffs were not entitled to a share therein.[1]

It is the majority rule that a contest of a will may be compromised by the parties to the proceedings[2] if there is no fraud or collusion involved,[3] and if the parties compromise nothing beyond their own interests.[4] The courts supporting this rule base their holdings on the ground that they do not wish to encourage litigation, and, since the legatees under a will cannot be made to accept their legacy, they are entitled to settle disagreements with parties having a valid claim to a caveat, before a will is probated in solemn form. These courts hold that since caveat proceedings are *in rem,* and there are actually no adverse parties, any

[24] Peoples Finance & Thrift Co. v. Harwell, 82 P. (2d) 994 (Okla. 1938); Barnett v. Collection Service Co., 214 Iowa 1303, 1312, 242 N. W. 25, 28 (1932): ". . . the door to recovery should be opened but narrowly and with due caution. A creditor or his agent has a right to urge payment of a just debt and to threaten to resort to proper legal procedure to enforce such payment."

[1] Bailey v. McLain, 215 N. C. 150, 1 S. E. (2d) 372 (1939).

[2] Dunham v. Slaughter, 268 Ill. 625, 109 N. E. 673 (1915); Baxter v. Stephens, 209 Mass. 459, 95 N. E. 854 (1911); Schoonmaker v. Gray, 208 N. Y. 209, 101 N. E. 886 (1913); Callaghan v. Corbin, 255 N. Y. 401, 175 N. E. 109 (1931); *In re* Seip's Estate, 163 Pa. 423, 30 Atl. 226 (1894).

[3] *In re* Wickersham's Estate, 138 Cal. 355, 70 Pac. 1076 (1903).

[4] *In re* Seip's Estate, 163 Pa. 423, 30 Atl. 226 (1894).

person cited in the proceedings may withdraw at any time for any reason.

There are a few states, however, notably Wisconsin, which will not allow such a compromise of proceedings to contest a will, on the ground that such a compromise is against public policy, as it amounts to an illegal contract for the purpose of suppressing evidence in a proceeding before the court.[5] These courts also hold that a caveat proceeding is *in rem,* but take the view that since such a proceeding has an effect as against the whole world, the court will complete the proceeding on its own motion, the issue having been raised, even though one of the parties withdraws.

In North Carolina any interested person may file a caveat,[6] but all other persons affected must be cited to "see proceedings"[7] and are bound by the decision.[8] After a caveat has been filed, the court will decide the issue of *devisavit vel non,* regardless of objecting parties; and neither proponent nor contestant may suffer a nonsuit or withdraw the caveat, nor may the court dismiss the suit.[9] These cases seem to follow the minority, or Wisconsin, view rather than the majority.

The result of the instant case seems to be inconsistent with the North Carolina rules governing caveat proceedings. It appears that the contestants were allowed to do indirectly (compromise the proceedings by withholding evidence), what they could not do directly (compromise by withdrawing the caveat). They were allowed to withdraw in a body, with the result that there was no evidence presented on the issue of *devisavit vel non.* Until the principal case was decided, cases of family settlement[10] represented the only instances in which the North Carolina court allowed any compromise of a dispute over a will, but in this case, the doctrine clearly does not apply, since the legatee was a stranger in blood to the testator and to the contestants. Although the present holding appears inconsistent in principle with the earlier decisions, it is at least arguable that the court has now adopted a sounder point of view in this particular situation in the light of the reasons advanced by the courts adopting the majority rule.

[5] Lazenby v. Lazenby, 132 Ga. 829, 65 S. E. 120 (1909); *In re* Staab's Estate, 166 Wis. 587, 166 N. W. 326 (1918); Taylor v. Hoyt, 207 Wis. 520, 242 N. W. 141 (1932).

[6] N. C. CODE ANN. (Michie, 1935) §4158.

[7] *Id.* §4159.

[8] Redmond v. Collins, 15 N. C. 430 (1834); see Mills v. Mills, 195 N. C. 595, 597, 143 S. E. 130, 132 (1928).

[9] Hutson v. Sawyer, 104 N. C. 1, 10 S. E. 85 (1889); see Collins v. Collins, 125 N. C. 98, 104, 34 S. E. 195 (1890); *In re* Westfeldt, 188 N. C. 702, 705, 125 S. E. 531, 533 (1924).

[10] Tise v. Hicks, 191 N. C. 609, 132 S. E. 560 (1926); see *In re* Will of McLelland, 207 N. C. 375, 376, 177 S. E. 19, 20 (1934); Reynolds v. Reynolds, 208 N. C. 578, 622, 182 S. E. 341, 347 (1935).

Assuming that the compromise of a caveat is valid, what effect does such a compromise have on parties not actively participating in the caveat or in the compromise? There is very little authority involving this direct point. *In re Seip's Estate,*[11] a Pennsylvania case, allowed a party cited inadvertently as a proponent, but who paid part of the expenses of the contest, to recover a part of the proceeds of the compromise. However, the court said that it was not necessary that the party claiming part of the compromise money take an active part in the caveat proceedings, since all persons must be brought in, and, if notice of the compromise was not given to all interested parties the party not receiving notice might have the verdict, handed down on the contest proceedings, set aside.[12]

In a later Pennsylvania case[13] the plaintiff asked to have an appeal from probate proceedings reinstated after defendants had compromised the proceedings. Plaintiff sought relief under a statute[14] allowing compromise of will disputes, but which provides that if a compromise is made without notice to all interested parties, the party not receiving notice may have the verdict set aside and the caveat reinstated. Plaintiff had received no notice, but failed to have the proceedings reinstated, for the reason that plaintiff was not an interested party under the act. However, the court said by way of dictum: "Clearly, active contestants to a will may not secretly agree to settle their contest to the prejudice of other parties in interest, whose inactivity may be due to a justified reliance upon the active parties to see that the contest is prosecuted to a deliberate conclusion by the court . . . likewise where contestants of a will receive money in virtue of a settlement of the contest, they may not exclude from a share therein one who is equally entitled, although not an active contestant of the will and not a party to the settlement."[15]

Jenness v. Ambler,[16] a New Hampshire case, followed by the court in the instant case, did not allow recovery when a party who refused to join in the appeal of the probate later sued to share in the money paid under a compromise agreement. The court held that it was inequitable to allow the plaintiff to recover when she had a chance to aid in the appeal and refused to do so. This case is distinguishable from the principal case because the plaintiff had notice of the compromise and also refused to sign an agreement drawn up by the heirs-at-law providing for a committee to negotiate with the legatee and for distribution of the proceeds of any compromise among them, whereas, in the principal case the plaintiff had no notice of the compromise. But the court

[11] 163 Pa. 423, 30 Atl. 226 (1894). [12] *Id.* at 433, 30 Atl. at 227.
[13] *In re* Crawford's Estate, 320 Pa. 444, 182 Atl. 252 (1936).
[14] PA. STAT. (Purdon, 1936) tit. 20, §787.
[15] See *In re* Crawford's Estate, 320 Pa. 444, 447, 182 Atl. 252, 253 (1936).
[16] 62 N. H. 569 (1883).

in *Jenness v. Ambler* made no mention of the effect of notice on the plaintiff's right to recover, basing its decision solely on the plaintiff's refusal to join in the contest in any way.

Of the two views, apparent in these cases, the better rule would seem to be that which allows a party having no notice of the compromise to recover a part of the proceeds thereof, even though such party did not engage in the caveat. If the caveat had been prosecuted to a successful conclusion, such party would have shared in the proceeds, therefore he should share in the compromise. Even if he is allowed to reinstate the proceedings, it is possible that he might have no evidence on which to base a caveat. This rule would also serve to prevent one group of heirs-at-law from defrauding another group by making a secret compromise with the legatee.

On the other hand, where, as in the instant case, the plaintiff has an opportunity to participate in the caveat and refuses, it may be argued that he is in no position to demand participation in the benefits produced by the diligence of the caveator, even though the benefits of the caveat would have enured to the plaintiff if the proceeding had been prosecuted to a successful conclusion.

The better result might be achieved by the adoption in North Carolina of a statute similar to the Pennsylvania act.[17] However, such a statute should state clearly whether the party not receiving notice of the compromise is confined to the remedy of reinstatement of the proceedings or whether such a party might also sue for a share in the proceeds of the compromise.

FRANK N. PATTERSON, JR.

[17] PA. STAT. (Purdon, 1936) tit. 20, §787.