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Notes and Comments

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Torts—Actionable Fraud—Promissory Representations

In a recent North Carolina case,[1] the defendant was sued on a conditional sales contract for the price of machinery bought by him. Defendant admitted the execution of the contract but pleaded fraud in the inducement of the contract, in that the plaintiff's agent had represented that the machinery would be better for the work of the defendant, and would save defendant time and labor. Defendant claimed that the machinery was far from what the agent had represented it to be. The court held these statements to be ". . . promissory representations, looking to the future as to what the vendee can do with the property, how much he can make on it, and, in this case, how much he can save by the use of it, [and] are on a par with false affirmations and opinions as to the value of property, and do not generally constitute legal fraud."[2] There was a dissent by three justices in this case on the ground ". . . though the declarations may be clothed in the form of opinions or estimates, when there is doubt as to whether they were intended and received as mere expressions of opinion or as statements of facts to be regarded as material, the question must be submitted to the jury."[3]

The general rule, which is supported by numerous decisions in almost all jurisdictions, is that fraud must relate to a present or pre-existing fact, and cannot ordinarily be predicated on unfulfilled promises or statements as to future events.[4] While this general rule seems absolutely clear in itself, the courts in dealing with cases in which an actual

[1] The American Laundry Machinery Co. v. Skinner, 225 N. C. 285, 34 S. E. (2d) 190 (1945).

[2] *Id.* at 290, 34 S. E. (2d) at 194.

[3] *Id.* at 292, 34 S. E. (2d) at 195; *See* also Unitype Co. v. Ashcraft, 155 N. C. 63 at 66, 71 S. E. 61 at 62.

[4] McCormick v. Jackson, 209 N. C. 359, 182 S. E. 369 (1936) (applying rule); Colt Co. v. Norwood, 202 N. C. 819, 161 S. E. 706 (1932) (applying rule); Hotel Corp. v. Overman, 201 N. C. 337, 160 S. E. 289 (1931) (recognizing rule); Hinsdale v. Phillips, 199 N. C. 563, 155 S. E. 238 (1930) (recognizing rule); Shoffner v. Thompson, 197 N. C. 664, 150 S. E. 195 (1929) (applying rule); Potter v. Miller, 191 N. C. 814, 133 S. E. 193 (1926); Erskine v. Chevrolet Motors Co., 185 N. C. 479, 117 S. E. 706, 32 A. L. R. 196 (1923) (recognizing rule); Planters Bank & Trust Co. v. Yelverton, 185 N. C. 314, 117 S. E. 299 (1923) (recognizing rule); Pritchard v. Darley, 168 N. C. 330, 84 S. E. 392 (1915); Whitehurst v. Life Ins. Co., 149 N. C. 273, 62 S. E. 1067 (1908) (recognizing rule); Williamson v. Holt, 147 N. C. 515, 61 S. E. 384, 17 L. R. A. (N.S.) 240 (1908); Braddy v. Elliott, 146 N. C. 578, 60 S. E. 507, 16 L. R. A. (N.S.) 1121, 125 Am. St. Rep. 523 (1908); National Cash Register Co. v. Townsend, 137 N. C. 652, 50 S. E. 306, 70 L. R. A. 349 (1905); Troxler v. New Era Bldg. Co., 137 N. C. 51, 49 S. E. 58 (1904) (recognizing rule); Hill v. Gettys, 135 N. C. 373, 47 S. E. 449 (1904) (recognizing rule).

fraudulent intent existed have made various exceptions and limitations. The weight of authority holds that fraud may be predicated on promises made with an intention not to perform the same, or on promises made without an intention of performance.[5] In these cases, the promisor by implication asserts that there is a bona fide intention to perform, and if this intention does not exist, there is a misrepresentation of a fact upon which fraud can be predicated.[6] It must be remembered that the courts have held that the state of mind of a person at the time he makes a promise is a fact, necessarily within the exclusive knowledge of the promisor; therefore a misrepresentation of a state of mind is a misrepresentation of a then existent fact. And so, fraud may be predicated on a false representation as to what one thinks about the occurrence of future events. In the principal case, the issue centered around the "representations" of the plaintiff's agent as to the potentialities of machinery. The pleadings do not bring into issue the state of mind of the agent, and there is nothing in the opinion to indicate that this was in question. If, at the time the agent made his statements to the defendant, he did so knowing that the machinery would not do the work, you would then have the question arise whether he, the agent, was misrepresenting his state of mind—therefore, a possible ground for fraud in the inducement of the contract. In *Planters' Bank & Trust Co.* v. *Yelverton*[7] the court said that as a general rule fraud cannot be predicated upon promissory representations, because a promise to perform an act in the future is not in the legal sense a representation, but that it may be predicated upon the nonperformance of a promise when the promise is a device to accomplish the fraud.[8]

Even though the representations relate to the future, and the per-

[5] Mitchell v. Mitchell, 206 N. C. 546, 174 S. E. 447 (1934); Hinsdale v. Phillips, 199 N. C. 563, 155 S. E. 238 (1930); Clark v. Laurel Park Estates, 196 N. C. 624, 146 S. E. 584 (1929); Erskine v. Chevrolet Motors Co., 185 N. C. 479, 117 S. E. 706, 32 A. L. R. 196 (1923); Planters' Bank & Trust Co. v. Yelverton, 185 N. C. 314, 117 S. E. 229 (1923); White v. Fisheries Products Co., 185 N. C. 68, 116 S. E. 169 (1923); Williams v. Hedgepeth, 184 N. C. 114, 113 S. E. 602 (1922); Herndon v. Durham & S. R. Co., 161 N. C. 650, 77 S. E. 683 (1913); Braddy v. Elliott, 146 N. C. 578, 60 S. E. 507, 16 L. R. A. (N.S.) 1121, 125 Am. St. Rep. 523 (1908); Troxler v. New Era Bldg. Co., 137 N. C. 51, 49 S. E. 58 (1904); Hill v. Gettys, 135 N. C. 373, 47 S. E. 449 (1904); Blake v. Blackley, 109 N. C. 257, 13 S. E. 786, 26 Am. St. Rep. 566 (1891).

[6] A promise is usually without the domain of the law unless it creates a contract, but if made when there is no intention of performance, and for the purpose of inducing action by another, it is fraudulent, and may be made the ground for relief. *See* Erskine v. Chevrolet Motors Co., 185 N. C. 479, 117 S. E. 706, 32 A. L. R. 196 (1923); Herndon v. Durham & S. R. Co., 161 N. C. 650, 77 S. E. 683 (1913).

[7] 185 N. C. 314, 117 S. E. 299 (1923).

[8] This was a case of fraud inducing execution of a note for stock subscriptions, consisting in representations that the maker of the note would never be called on for any money, but that the note would be held until after a certain date, when certain stock of the company would be offered for sale to discharge the note.

son making them does not intentionally deceive the other party, it seems that, if they are positively stated as facts by one who is in a position to know, and whose duty it is to know, the truth, and are relied on to his injury by one in ignorance of their falsity, they may be found to be misrepresentations of fact on which fraud may be predicated. In *Whitehurst* v. *Life Insurance Co.*,[9] there was evidence from which it seems a jury might have inferred intentional fraud on the part of the representor, but the decision does not seem to be based on this ground. The representor was an insurance agent who, to induce one to take out a policy of insurance, read over to the prospect, who was blind, a provision of the policy stating that, if the insured was living at the end of ten years, the policy might be surrendered and the insured receive the cash surrender value with interest; the agent explained to the prospect that this meant that the company would, at the end of the ten-year period, return the whole amount paid by him, with interest. The court said it is not always required, for the establishment of actionable fraud, that a false representation should be knowingly made; that under certain conditions, if a party to a bargain avers the existence of a material fact recklessly, or affirms its existence positively, when he is consciously ignorant whether it is true or false, he may be held responsible, and that this doctrine is expressly applicable where the parties are not on equal terms with reference to the representations; that the stipulations in the policy were to some extent ambiguous and indefinite, and that it was a question for the jury as to whether the assurances given by the agent were intended as statements of fact, accepted and reasonably relied upon by the plaintiff as a material inducement to the contract; that the verdict established actionable fraud imputable to the insurance company, entitling plaintiff to recover the premiums paid and interest.

If the party making the representations as to the future does not believe the same, and the person to whom they are made does believe them, and relies on them to his injury, it seems that they may be of such a nature that they should be regarded merely as an expression of opinion on which fraud cannot be predicated, unless there are special circumstances, as superior knowledge on the part of the person making the representations or confidential relations. The *Whitehurst* Case was an example of persons on an unequal footing plus a quasi-confidential relationship.

The doctrine that fraud may not ordinarily be predicated on an unfulfilled promise or statement as to a future event finds application or recognition[10] especially where the statements related were made to

[9] 149 N. C. 273, 62 S. E. 1067 (1908).
[10] Hinsdale v. Phillips, 199 N. C. 563, 155 S. E. 238 (1930) (representations

induce the purchase of land.[11] It is held in *Braddy* v. *Elliot*[12] that, while a mere failure by one party to an exchange of land to comply with his agreement to construct buildings on the land granted by him is not sufficient to justify a rescission of the entire contract by a court of equity, yet, if the promises are made without intent on the part of the promisor to fulfill them, there is such fraud as will entitle the other party to a rescission. So, it was held in *Clark* v. *Laurel Park Estates*[13] that fraud warranting rescission of a contract for the purchase of a lot in a subdivision might be predicated on representations of the sales agents, made without intention of performance, as to improvements which would be made on or near the tract.

It seems evident that statements made by promoters to induce persons to subscribe to stock must be accepted merely as expressions of opinion on which fraud cannot be predicated in the event they are not realized.[14] Without discussion of the question, the court in the *Planters' Bank* Case held that for the purpose of showing fraudulent intent, evidence was admissible, in an action on notes given for the purchase price of corporate stock, where, as an inducement to purchase the stock, the sales agent represented to the purchaser that he would never have to pay for the stock except from dividends therefrom, and that the dividends would fully care for and pay off the purchase price. Where there was a promise to hold notes given for subscription to corporate stock until the maker of the notes sold a certain farm, and to return the notes on failure to sell the farm, the North Carolina court has held that if there is no intention of performance, fraud may be predicated thereon.[15]

In *National Cash Register Co.* v. *Townsend*,[16] the court said that fraud may not ordinarily be predicated on a representation by the seller

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as to pavements, sewer, and water system to be installed in tract of land, made in good faith and with an attempt to perform); Potter v. Miller, 191 N. C. 814, 133 S. E. 193 (1926) (promise by grantor to secure outstanding life estate for the grantee); Williamson v. Holt, 147 N. C. 515, 61 S. E. 384, 17 L. R. A. (N.S.) 240 (1908) (representation by vendor of ice plant that with some repairs it would turn out about a certain amount of ice per day, the same being a mere expression of opinion as to a future event, made to a vendee having knowledge of the condition of the plant and full opportunity of investigation).

[11] Troxler v. New Era Bldg. Co., 137 N. C. 51, 49 S. E. 58 (1904) (representation, inducing sale of lot, that the vendee would erect thereon a building, thereby enhancing the value of the vendor's other property).

[12] 146 N. C. 578, 60 S. E. 507, 16 L. R. A. (N.S.) 1121, 125 Am. St. Rep. 523 (1908).

[13] 196 N. C. 624, 146 S. E. 584 (1929).

[14] Hotel Corp. v. Overman, 201 N. C. 337, 160 S. E. 289 (1931) (oral representations to induce a subscription to stock in a hotel corporation, all promissory in their nature); Pritchard v. Darley, 168 N. C. 330, 84 S. E. 392 (1915) (representation as to the future value of, or profits to be derived from stock).

[15] White v. Fisheries Products Co., 185 N. C. 68, 116 S. E. 169 (1923).

[16] 137 N. C. 652, 50 S. E. 306, 70 L. R. A. 349 (1905).

of a cash register that its use would save the expense of a bookkeeper and half of a clerk's time. The court regarded such statements as merely "dealer's talk," on which the purchaser could not safely rely. It is said, however, that there was no evidence that the sales agent knew that these statements were false when he made them. The court in the principal case rely heavily on the *Townsend* Case as expressing the general rule as to promissory representations; i.e., promissory representations do not constitute legal fraud. The majority opinion "without going into a dialectic discussion of what may be a fact and what may not be a fact . . ." holds as a matter of law that actionable fraud was not present.[17] This seems to be the point on which the dissent disagreed.[18]

The habit of vendors to exaggerate the value and suitability of their articles is well known. A purchaser is certainly not justified in placing *substantial* reliance on the seller's opinion as to the article in question. Puffing of value as well as quality is an accepted part of bargaining transactions. But it seems obvious that the recipient is entitled to assume that a representation of facts which are material in determining his decision to engage or not to engage in a particular transaction is honestly made, unless its falsity is obvious to his senses. A purchaser is justified in assuming that even his vendor's opinion has some basis of fact and therefore in believing that the vendor knows of nothing which makes his opinion fantastic. In the Restatement of Torts the following illustration is made:[19]

"A, in order to induce B to buy a heating device, states that it will give a stated amount of heat while consuming only a stated amount of fuel. B is justified in accepting A's statement as an assurance that the heating device is capable of giving the services which A promises."

It would seem in the principal case that the vendee might have justifiably relied on the vendor's statements;[20] and the question as to whether these statements were opinion honestly made or mere puffing would seem to be for the jury.

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[17] The American Laundry Machinery Co. v. Skinner, 225 N. C. 285, 290, 34 S. E. (2d) 190, 193 (1945).

[18] *See* Wolf Co. v. Smith Mercantile Co., 189 N. C. 322, 127 S. E. 208 (1925); Case Threshing Machine Co. v. McKay, 161 N. C. 584, 77 S. E. 848 (1913); White Sewing Machine Co. v. Bullock, 161 N. C. 1, 76 S. E. 634 (1912); Case Threshing Machine Co. v. Freezer, 152 N. C. 516, 67 S. E. 1004 (1910).

[19] §525, Illustration 2.

[20] See Note (1928) 7 N. C. L. REV. 90 on reliance on representation.

Criminal Procedure—Effect upon Appeal of Plea of Guilty in Recorders Court

Defendant was charged in a recorders court with assault with a deadly weapon. He was without counsel and pleaded guilty. Upon appeal to the Superior Court, from a judgment of two years' imprisonment, counsel for D sought to withdraw the plea of guilty entered below. This motion was refused. On appeal questioning this ruling it was *held:* That the motion to withdraw the plea of guilty was addressed to the sound discretion of the Superior Court judge and could not as a matter of right be withdrawn.[1] Three judges dissented and were of the opinion that the statute controlling appeals from the particular recorders court involved entitled the D to enter an original plea of not guilty. The majority purports to follow *State* v. *Warren*,[2] which was a criminal case originating in a justice of the peace court. There the plaintiff pleaded guilty to the use of profane language in an area prohibited by statute. He was fined fifty dollars and appealed to the Superior Court. The report of the case fails to show what his plea was in the Superior Court; however, it is stated that the record shows that D was found guilty by a jury. This would be inconsistent with a plea of guilty. The Superior Court granted D's motion to arrest judgment on the grounds that the statute under which he was convicted was unconstitutional, and D's plea of guilty precluded him from raising other questions. The dissent points out that the *Warren* case did not directly raise the question here presented, and that the original record in that case reveals that there was also a verdict by the jury in the Superior Court.

Assuming that the cases raise the same question, the *Warren* case would seem to be authority, since the statute regulating appeals from the particular recorders court here involved[3] and that regulating appeals from a justice of the peace in criminal cases are similar.[4] This comparison is accepted by the dissent.

Although the case is fundamentally one of statutory construction, it involves the effect of a plea of guilty. Just what is the effect of such a plea? A plea of guilty is a formal confession of guilt before the court in which the defendant is arraigned, and differs from a volun-

[1] State v. Crandall, 225 N. C. 148, 33 S. E. (2d) 861 (1945).

[2] 113 N. C. 683, 18 S. E. 498 (1893).

[3] N. C. PUB. LOCAL LAWS (1911) c. 74 §7(e): ". . . and any person convicted in said court shall have the right to appeal to the Superior Court of Beaufort County and upon such appeal the trial in the Superior Court shall be de novo on papers certified from said recorders court."

[4] N. C. GEN. STAT. (1943) §15-17: "The accused may appeal from the sentence of the justice to the Superior Court of the county. . . . In all such cases of appeal, the trial shall be anew, without prejudice from the former proceedings."

tary confession in that the latter is merely evidence of guilt.[5] Such a plea, accepted and entered by the court, is a conviction or the equivalent of a conviction of the highest order.[6] The courts agree that once the plea is accepted it is equivalent to a conviction in that the court may give judgment thereon. It is when a plea of guilty is entered in an inferior court, and the defendant is brought before a higher court upon appeal, with the upper court looking back on the plea, that differences in a guilty plea and a conviction have been noted.

In this state a conviction in an inferior court cannot be used as evidence of guilt when the defendant is tried anew upon appeal to the Superior Court.[7] On the other hand, when a defendant pleads guilty in an inferior court the plea is admissable as evidence of defendant's guilt on trial de novo in the Superior Court.[8] Again, a defendant appealing from a conviction upon a plea of not guilty in an inferior court must plead anew in the Superior Court,[9] while under the doctrine of the principal case, if a defendant pleads guilty in an inferior court and appeals, he comes into the Superior Court with that plea.

Courts of other states have made further distinctions. A statute requiring twenty-four hours delay between a conviction and sentence does not apply to a plea of guilty.[10] Where a physician or an attorney pleads guilty to a crime involving moral turpitude, and in a separate action to revoke his license, under a statute providing that same may be done upon "conviction," the statute was held not to apply to a plea of guilty before final judgment was entered thereon.[11] To the same effect, where a statute provided a heavier penalty for persons previously "convicted," and defendant had pleaded guilty on three previous occasions and sentence had been suspended, it was held that he had not been thrice convicted within the meaning of the statute.[12]

It is due to a guilty plea's conclusiveness, together with its collateral and subsequent effect, that it is often stated that it should be accepted with caution.[13] The caution should be exercised in proportion to the gravity of the offense.[14] At least three states require by statute that

[5] State v. Branner, 149 N. C. 559, 63 S. E. 169 (1908).
[6] Marks v. People, 204 Ill. 248, 68 N. E. 436 (1903).
[7] State v. John Moore, 209 N. C. 44, 182 S. E. 692 (1935).
[8] State v. Libby, 209 N. C. 363, 183 S. E. 414 (1936); State v. Ingram, 204 N. C. 557, 168 S. E. 837 (1933).
[9] State v. Lueders, 214 N. C. 558, 200 S. E. 22 (1938).
[10] State *ex rel.* Chicola v. Gen. Mgr. La. State Penitentiary, 188 La. 694, 177 So. 804 (1937).
[11] State Medical Board v. Rodgers, 190 Ark. 266, 79 S. W. (2d) 83 (1935); *ex parte* Tanner, 40 Ore. 31, 88 P. 301 (1907).
[12] People *ex rel.* Marcley v. Lawes, 254 N. Y. 249, 172 N. E. 487 (1930).
[13] 4 Bl. Comm. 329; Note (1931) 79 U. of Pa. L. Rev. 484 (deals with withdrawals of pleas of guilty, but cites numerous authorities for the proposition stated).
[14] Bishop, Criminal Procedure, vol. 1, §795.

the trial judge admonish the defendant before accepting his plea of guilty,[15] and it has been held apart from any statutory provisions, that the trial judge should give admonition to the effect of the guilty plea before it is accepted and sentence given thereon.[16] Other jurisdictions leave to the discretion of the trial judge whether to accept or refuse such a plea from the defendant, and in the absence of explanatory evidence will presume that D understood the significance of his plea.[17]

Since the effect of a plea of guilty gives its greatest difficulty when a court is exercising a retrospective view of the plea, the problem becomes in part one of the relationship between the inferior courts and the Superior Court. The constitution allows the legislature to provide methods other than jury trials for petty misdemeanors, with the right to appeal.[18] Thus it is held that recorders courts are constitutional, and a defendant's right to a jury trial is not denied when he is allowed a jury trial in the Superior Court.[19] Assuming that the right to a jury trial is preserved by the constitutional right to an appeal, when and under what circumstances may the right be waived? It may be waived in the Superior Court by a plea of guilty entered there.[20] The defendant in a misdemeanor case may consent to a verdict of less than twelve, and by not objecting to the entry in the record that it was a verdict of a jury may estop himself to deny that he has had a jury trial.[21] He may likewise waive the right by consenting to a judgment of an inferior court or by not appealing, although the statutory time limit for the appeal has not run.[22] Has a defendant who pleads guilty in an inferior court waived this right? The dissent thinks not where the statute defining the scope of the appeal from the inferior court provides that ". . . upon such appeal the trial in the Superior Court shall be *de novo*." The majority might have given a short answer to the whole question by simply holding that the right to a trial *de novo,* by the express terms of the statute, applied where a defendant was *convicted* in the recorders court and had no application

[15] ILL. ANN. STAT. (Smith-Hurd, 1934), c. 38, §732; COLO. STAT. ANN. (Michie, 1935), c. 48, §482; TEXAS ANN. CODE CRIM. PROC. (Vernon, 1938), art. 501. *Cf.* MICH. STAT. ANN. (Henderson, 1936), §28-1058.

[16] Mislik v. State, 184 Ind. 72, 110 N. E. 551 (1915); Lowe v. State, 111 Md. 1, 73 A. 637, 24 L. R. A. (N.S.) 439, 18 Ann. Cas. 744 (1909); Hordzog v. State, 47 Okla. 244, 293 P. 1107 (1930).

[17] State v. Ingram, 204 N. C. 557, 168 S. E. 837 (1933); State v. Hill, 81 W. Va. 676, 95 S. E. 21, 6 A. L. R. 687 (1918).

[18] N. C. CONST. ART. 1, §13.

[19] State v. Pulliam, 184 N. C. 681, 114 S. E. 394 (1922); State v. Shine, 149 N. C. 480, 62 S. E. 1080 (1908).

[20] State v. Branner, *supra* note 5.

[21] State v. Robert Wheeler, 185 N. C. 670, 116 S. E. 413 (1923).

[22] State v. Lockey, 191 N. C. 571, 132 S. E. 570 (1926); State v. Pasley, 180 N. C. 695, 104 S. E. 533 (1920).

where the defendant pleaded guilty.[23] It is evident that the court did not intend to make any distinction between "conviction," as used in the statute and a plea of guilty, for the decision purports to follow a case where the appeal was from a justice of the peace. There the relative statute provides that the defendant may appeal from the sentence and upon such appeal the trial shall be anew, without prejudice from the former proceedings.[24] These latter provisions merely spell out the right to a trial *de novo*.

Where the statute provides for a trial *de novo*, just what do such provisions mean? Generally *de novo* means anew, but it is not so broad in misdemeanor cases as to prevent a trial in the Superior Court on the original warrants.[25] Neither are the warrants so binding as to prevent amendments,[26] but they cannot be so amended as to charge a new or a different offense.[27] The Superior Court when considering a case *de novo* may increase the punishment given below.[28]

When it comes to the effect of a plea of guilty entered below upon the statutory provisions for an appeal and a trial *de novo* the courts seem to have taken three views: (1) The right to appeal is nonexistent after such a plea is entered or is waived thereby. (2) The right to appeal is not affected, but the guilty plea is retained in the new trial. (3) The right to appeal is not affected and the defendant may plead anew in the appellate trial.

The courts taking the first view are in keeping with the general rule as stated by law encyclopedias that in a criminal case a party cannot have a judgment properly entered on a plea of guilty reviewed by appeal or error proceedings.[29] Statutory or constitutional provisions for an unrestricted appeal from the inferior court does not alter the result. These courts treat the guilty plea as a waiver of the existing right.[30] Although these courts speak as if there is no right of appeal after such plea is entered, some merely decide that the appeal should be dismissed.[31] Courts of this view make exceptions when the

[23] *Cf.* People v. Brown, 87 Cal. 261, 286 P. 859 (1930). (Statute provided: "If any person convicted of any criminal offense before any justice of the peace, shall wish to appeal to the county court he or she shall . . . etc." *Held:* Statute did not give right to an appeal when defendant pleaded guilty before the justice.)

[24] *Supra* note 4.

[25] State v. Boykin, 211 N. C. 407, 191 S. E. 18 (1937).

[26] State v. Hunt, 197 N. C. 707, 150 S. E. 353 (1929); State v. Johnson, 188 N. C. 591, 125 S. E. 183 (1924); State v. Millis, 181 N. C. 530, 106 S. E. 677 (1921).

[27] State v. Goff, 205 N. C. 545, 172 S. E. 407 (1934).

[28] State v. Stafford, 113 N. C. 635, 18 S. E. 256 (1893).

[29] 2 AM. JUR. 987; 2 R. C. L., Appeal and Error, §41.

[30] State v. Eckert, 123 Wash. 403, 212 P. 551 (1923); State v. Putnam, 121 Wash. 438, 209 P. 679 (1922).

[31] Stokes v. State, 122 Ark. 56, 182 S. W. 521 (1916); Dudney v. State, 136 Ark. 453, 206 S. W. 898 (1918); Philpot v. State, 65 N. H. 250, 20 A. 955 (1890).

case on appeal is one that the court thinks is meritorious.[32] The weight of authority is against this view and will allow an appeal from a court not of record where the statute provides for an unrestricted appeal.[33]

The courts taking the second view treat the plea of guilty and its entry upon the record as the defendant's plea upon appeal, the effect being to limit the appellate court's consideration to those things not admitted by the plea of guilty. Perhaps the leading case for this position is *Commonwealth* v. *Mahoney*,[34] where Grey, C. J. said, "If he pleads guilty on his first arraignment, and the plea is received by the court and recorded, it is an admission of all the facts well charged in the indictment or complaint and a waiver of his right to a jury trial thereon." The difference between the first two views is that the first makes the plea a waiver of the right to appeal while the second makes it a waiver of the right to a jury trial.[35] Courts adopting this position make the same rule applicable to a plea of not guilty entered below.[36]

The courts adopting the third view say the stated rule that a judgment by confession cannot be reviewed on appeal is wholly inapplicable to statutory appeals that are made triable *de novo*.[37] This view was taken by the Texas court in *Ex parte Jones*.[38] There defendant had pleaded guilty before a justice of the peace and appealed to the county court. When the case was called in the county court the defendant wanted to plead not guilty, but was denied the right to do so. The Texas constitution provides that in all appeals from justice courts there shall be a trial *de novo*. Upon appeal questioning this ruling by the county court the Supreme Court said, "Without reviewing the statutes and constitutions of those states whose courts have held contrary to the view we entertain, we deem it only necessary to say, the language of our constitution and statutes as above quoted are so plain as to almost demand apology for an argument or any other citation. A trial *de novo* literally is a trial from the beginning, as if no former trial had been had." The same question was before the Florida court

[32] Fletcher v. State, 12 Ark. 169 (1850); Nicley v. Butcher, 81 W. Va. 247, 94 S. E. 147 (1917).

[33] State v. Stevens, 3 Harr. (Del.) 479, 139 A. 78 (1927); Yeager v. State, 197 Ind. 401, 131 N. E. 42 (1921); State v. Hedges, 67 Kan. 176, 72 P. 528 (1903); State v. Funderburk, 130 S. C. 352, 126 S. E. 140 (1925); Weaver v. Kimball, 59 Utah 72, 202 P. 9 (1921); Duckerson v. Commonwealth, 162 Va. 787, 173 S. E. 543 (1934).

[34] 115 Mass. 151 (1874).

[35] State v. Down, 41 Idaho 199, 239 P. 279 (1925); Doench v. State, 89 Ind. 52, 165 N. E. 777 (1929).

[36] Cline v. State, 25 Ind. 331, 58 N. E. 210 (1900); Commonwealth v. Blake, 94 Mass. 188 (1865).

[37] Jenkins v. State, 173 Miss. 546, 54 So. 158 (1911).

[38] 128 Tex. Cr. App. 380, 81 S. W. (2d) 706 (1935).

in *State* v. *Frederick*.[39] The Florida constitution provides: "Appeal from justice of the peace courts in criminal cases may be tried *de novo* under such regulation as the legislature may prescribe." Pursuant to this provision the legislature provided that the circuit court should try all cases on appeal from justice of the peace courts *de novo* as though the proceeding had been originally begun in the circuit court. The defendant pleaded guilty of assault and battery before a justice, was given four months in jail, and appealed to the circuit court, where his appeal was dismissed. Considering a petition for a writ of mandamus directing the circuit court judge to reinstate the case the Supreme Court said, "The right to appeal and demand a trial *de novo* in the circuit court from a justice of the peace court conviction is entirely regulated by statute. The statute imposes no limitation on the right to appeal such as to confine the right only to those who have pleaded not guilty. . . . Justice of the peace courts in Florida are not courts of record. On the contrary they proceed with utmost informality. For the latter reason such courts are best made to serve the purpose of justice through according to the accused an unconditional trial *de novo* in the circuit court under proper forms of accusations and before a judge and jury of the highest degree of capability." The Virginia court, when confronted with the question in *Dickerson* v. *Commonwealth*,[40] reversed a former opinion in keeping with the first view and adopted the third stated view. The circuit court had dismissed defendant's appeal from a justice of the peace where he had pleaded guilty. The Supreme Court when considering this ruling held that the statutes there neither expressly nor by implication limit the right to appeal to persons convicted upon a plea of not guilty. The case was remanded to the circuit court for a trial *de novo* with the right to the accused to withdraw his plea of guilty. Courts adopting this view are of the opinion that the former proceedings must be disregarded and find this to be the legislative intent in providing for unrestricted appeals and *de novo* trials.[41]

It is submitted that in the principal case if the statute is construed to mean the same as statutes governing like situations from justice of the peace courts the dissent is supported by the greater and better authority.

CYRUS F. LEE.

[39] 124 Fla. 290, 168 So. 252 (1936).
[40] *Supra* note 33.
[41] People v. Richmond, 57 Mich. 399, 24 N. W. 124 (1885).

Criminal Law—Deadly Weapons—Classification in North Carolina

The problem of the classification of instrumentalities used in the perpetration of assaults as deadly weapons and the added question of whether this classification should be made by judge or jury, provide an extensive and often intricate subject of research for the attorney seeking information concerning this branch of the criminal law. Fortunately for the North Carolina practitioner, the Supreme Court of this state has from the time of its original consideration of these questions laid down and adhered to sound fundamental rules and distinctions in determining the deadliness of a weapon. It is the purpose of the writer to enumerate these distinctions and to cite cases illustrative of each.[1]

The first general classification of deadly weapons is that into which fall those instruments which are deadly *per se*. In *State* v. *West*[2] the court enumerated as weapons deemed in law to be deadly a gun, a sword, a large knife or bar of iron, or any other heavy instrument by a blow from which a grievous hurt would probably be inflicted. In a later case[3] the court named a pistol and a dirk-knife as instruments which are of themselves deadly.

Where the indictment, under a count for assault with a deadly weapon, stated merely that the assault had been made with "a club," the court held that the term "club" *ex vi termini* imputed a deadly weapon.[4] So also, the mere description of the weapon as an axe,

[1] N. C. PUB. LAWS 1919, c. 101, expressly made assault with a deadly weapon punishable as a felony. The original legislation on this point was under chapters seven and eight of N. C. PUB. LAWS of 1869-70, wherein assault with a deadly weapon without intent to kill was made punishable by imprisonment in the State's prison not to exceed five years, and assault with a deadly weapon with intent to kill by imprisonment not exceeding ten years. These two sections were repealed by Chapter 43 of N. C. PUB. LAWS of 1870-71, and no further legislation on this point took place until that of 1919.

There seems to be some conflict as to the gravity of the offenses of assault with or without a deadly weapon under the 1868-69 provisions. In State v. Swann, 65 N. C. 330 (1871), the court held that the offense of assault with a deadly weapon with intent to kill, under the legislation of 1869-70, was not a felony. However, in State v. Bentley, 223 N. C. 563, 27 S. E. (2d) 738 (1943), Mr. Justice Seawell, in a review of this legislation, stated that the laws of 1870-71 reduced the offenses from felonies to misdemeanors, and he cited State v. Tyson, 223 N. C. 492, 27 S. E. (2d) 113 (1943) and State v. Smith, 174 N. C. 804, 93 S. E. 910 (1917) as supporting this position.

It would seem that much of this uncertainty arises from the fact that it was not until 1891 that the General Assembly classified as a felony any crime punishable by death or imprisonment in the State's prison, for the *Swann* case was decided before this classification was established. The *Bentley* case appears to be the latest authority on the point, and therefore determinative of the question as now presented.

For a general discussion of the classification of crimes see, Coates, *Punishment for Crime in North Carolina* (1938) 17 N. C. L. REV. 205.

[2] 51 N. C. 506 (1859).

[3] State v. Huntley, 91 N. C. 617 (1884); State v. Brewer, 98 N. C. 607, 3 S. E. 819 (1887).

[4] State v. Phillips, 104 N. C. 786, 10 S. E. 463 (1889).

without any further description in the indictment, has been held to be sufficient to charge assault with a deadly weapon.[5] The court has also likened a blackjack to a shotgun or pistol which *ex vi termini* import their deadly character.[6]

The number of weapons which from their very nature may be termed deadly, however, is comparatively few. More often the weapon attains the status of a deadly one through the circumstances of its use. Whether or not death results from the use of a weapon is not the determining factor as to its deadliness. It appears clear that weapons which are *per se* deadly may not always inflict fatal injuries, while an instrument which does not possess inherently deadly qualities may become deadly by the use which is made of it.

When the deadliness of the weapon must be deduced from the circumstances of use, proper consideration should be given to the size and nature of the weapon, the manner in which it is used, and the size and strength of the assailant and the assaulted.[7] When there is controversy as to these circumstances, the issue of the deadliness is generally one of law to be determined by the court.[8] In *State v. Smith*[9] the Supreme Court upheld the action of the court below in determining as a question of law that a baseball bat, if viciously used, was a deadly weapon. The opinion stated that where the alleged deadly weapon and its manner of use are of such character as to admit of but one conclusion, the question is one of law, and the court must take the responsibility of so declaring.

However, where the weapon may or may not produce death or bodily harm, according to the manner of its use, the part of the body at which the blow was aimed, and the relative size and condition of the parties, the question of the deadliness of the instrument is one of fact for the determination of the jury.[10] This rule was laid down in one of the earliest reported North Carolina cases involving the determination of the deadliness of a weapon.[11] There a piece of curled hickory about the size of a walking cane, used by a person much older and larger than the assailed, was held to be a deadly weapon, the court stating that it fell peculiarly within the province of the jury to ascertain whether such a weapon, in the hands of the particular assailant, and in the method in which it was used, was likely to produce fatal consequences.

[5] State v. Shields, 110 N. C. 497, 14 S. E. 779 (1892).
[6] State v. Hefner, 199 N. C. 778, 155 S. E. 879 (1930).
[7] State v. Sinclair, 120 N. C. 603, 27 S. E. 77 (1897).
[8] State v. Collins, 30 N. C. 407, 413 (1848) ("Whether the instrument used was such as is described by the witnesses, where it is not produced, or, if produced, whether it was the one used, are questions of fact; but, these ascertained, its character is pronounced by law."); State v. Speaks, 94 N. C. 865 (1886).
[9] 187 N. C. 469, 124 S. E. 737 (1924).
[10] State v. Watkins, 200 N. C. 692, 158 S. E. 593 (1931).
[11] State v. Jarrott, 23 N. C. 76 (1840).

To the same effect was the later case of *State* v. *Huntley*,[12] where a switch the thickness of a woman's little finger was found by a jury to be a deadly weapon because it was applied violently and repeatedly by the defendant upon the back of his frail wife. The Supreme Court, taking into consideration the violence of the attack and the physical advantage of the aggressor, upheld the finding of the jury.[13]

Perhaps the most striking example of how the manner of use of the instrument and the subject upon which it is used may determine its deadly nature is the case of *State* v. *Norwood*.[14] There the defendant was indicted for the murder of her infant child, the death being caused by pushing two pins down the child's throat. In finding no error on the part of the court below in submitting the question of deadliness to the jury, the Supreme Court followed the reasoning of the *Huntley* case, *supra*, in holding that the question of whether an instrument is a deadly weapon depends not infrequently more upon the manner of its use than upon the intrinsic character of the instrument itself. It appears clear that death might reasonably be expected to ensue from the pushing of a pin down the throat of an infant.

In the majority of the cases where the relative strength and size of the parties to the assault are considered in the determination of the question of the deadliness of the weapon used, the assailant's physical advantage is evident, and the obvious lack of inherent deadliness in the weapon is overcome by that factor. However, in the case of *State* v. *Sinclair*[15] was demonstrated the converse of that situation. There the assailant was a feeble, sickly boy of seventy-five or eighty pounds, while the victim of the assault was a full-grown man who was being held by two other men. The instrument used was a piece of pine weather boarding five to six inches wide, a quarter of an inch thick, and fourteen to eighteen inches long. It appears that the sole injury inflicted was a bruise on the assailed's leg. In holding the instrument not to be deadly, the court took into consideration the size and nature of the weapon, the manner in which it was used, the size and strength of the party using it, and the person upon whom it was used. The test seems particularly applicable and well applied here.

In the case of *State* v. *Watkins*[16] the Supreme Court held as error the instruction of the lower court that an assault when made with an instrument such as a pair of handcuffs would constitute in law an

[12] 91 N. C. 617 (1884).
[13] A two and a half foot piece of buggy trace has also been held to be a deadly weapon where the assailant was a strong, robust man and the victim was a frail, weak woman. State v. Archbell, 139 N. C. 537, 51 S. E. 801 (1905).
[14] 115 N. C. 789, 20 S. E. 712 (1894).
[15] 120 N. C. 603, 27 S. E. 77 (1897).
[16] 200 N. C. 692, 158 S. E. 593 (1931).

assault with a deadly weapon, the handcuffs not being presented in evidence and no evidence being introduced as to their size, weight, character or manner of use. Mr. Justice Clarkson dissented vigorously, basing his contention for the deadliness of the weapon largely upon the proven physical incapacity of the victim at the time of the assault, it appearing that he was then suffering acutely from heat prostration and that he died therefrom twelve hours after the assault.

The two most recent cases on the question of determination of the deadliness of a weapon are *State* v. *Davis*[17] and *State* v. *Harrison.*[18] In both of these cases, the former involving a hoe and the latter an ice pick, the trial judge charged the jury that the weapon was deadly *per se,* although there was no further particular description of either instrument in the indictments, and upon neither trial was the weapon presented for inspection by either judge or jury. In both cases the Supreme Court held the charge to be erroneous, and held that the question of the deadliness of the weapon should have been submitted to the jury under proper instructions. It would appear that the safest method of determining the question of deadliness, where the trial court is uncertain of whether the weapon is deadly *per se,* is to submit the question to the jury under instructions directing them to consider the matter of its use as well as other circumstances attending the assault and relevant to the question. For if the weapon is deadly *per se,* and the jury decides the question of deadliness in the affirmative, the failure to so instruct them will be cured by verdict.

Thus it can be seen that the court of last resort of North Carolina has provided clear and sensible guideposts for both the practicing lawyer and the trial judge, both of whom are faced so frequently with the question of the deadliness of a weapon in the prosecution of criminal offenses. It is an ever present possibility that some new and previously unclassified instrumentality may come before the court for classification. But when that event occurs, the likelihood of a proper determination of the question in the court below is greatly increased by its ability to resort to such a long and unwavering line of well-considered authority.

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Automobiles—Recording of Liens—Certificate of Title

Expanding production of new automobiles and its stimulation of trading in used cars renews interest in the legal problems of the sale and distribution of automobiles on credit. A timely reexamination of the

[17] 222 N. C. 178, 22 S. E. (2d) 274 (1942).
[18] 225 N. C. 234, 34 S. E. (2d) 1 (1945).

law applicable to these credit transactions will bring to light instances in which the law has failed to keep pace with the economics of installment selling. It is the purpose of this note to review one such instance, and to suggest remedial legislation.

The chief instruments of installment selling are conditional sale contracts and chattel mortgages, both of which are devices designed to give the seller security title[1] until the purchase price is paid, and the buyer possession and use of the car while paying for it. By statute in North Carolina both chattel mortgages and conditional sale contracts must be recorded.[2] The purpose of recording is to publish notice of the divided ownership of the property, to protect creditors or purchasers of the mortgagor from secret liens and encumbrances;[3] and to accomplish this the processes of recordation, and its corollary, investigation, must be simple, convenient and consistent with sound business prac-

[1] Or, in some states, a lien only. JONES, CHATTEL MORTGAGES & CONDITIONAL SALES (6th ed. 1933) §1.

[2] N. C. GEN. STAT. (1943) §47-20: "No deed of trust or mortgage for real or personal estate shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor or mortgagor, but from the registration of such deed of trust or mortgage in the county where the land lies; or in case of personal estate, where the donor, bargainor or mortgagor resides; or in case the donor, bargainor or mortgagor resides out of the state, then in the county where said personal estate, or some part of the same, is situated; or in case of choses in action, where the donee, bargainee, or mortgagee resides. For the purposes mentioned in this section the principal place of business of a domestic corporation is its residence."

N. C. GEN. STAT. (1943) §47-23: "All conditional sales of personal property in which the title is retained by the bargainor shall be reduced to writing and registered in the same manner, for the same fees and with the same legal effect as is provided for chattel mortgages, in the county where the purchaser resides, or, in case the purchaser shall reside out of the state, then in the county where the personal estate or some part thereof is situated, or in case of choses in action, where the donee, bargainee or mortgagee resides." By construction and extension of the language of §47-23 the court has developed the rule that conditional sales are in legal effect chattel mortgages in North Carolina. Hetherington & Sons, Ltd. v. Rudisill, 28 F. (2d) 713 (C.C.A. 4th, 1928); Union Trust Co. v. Southern Sawmills Co., 166 Fed. 193, 200 (C.C.A. 4th, 1908); Grier v. Weldon, 205 N. C. 575, 172 S. E. 200 (1933); State v. Stinnett, 203 N. C. 829, 167 S. E. 63 (1925); Harris v. Seaboard Air Line Ry., 190 N. C. 480, 130 S. E. 319 (1925); Observer Co. v. Little, 175 N. C. 42, 94 S. E. 526 (1918); Piano Co. v. Kennedy, 152 N. C. 196, 67 S. E. 488 (1910); Hamilton v. Highlands, 144 N. C. 279, 56 S. E. 929 (1907); Singer Mfg. Co. v. Gray, 121 N. C. 168, 28 S. E. 257 (1897); Quinnerly v. Quinnerly, 114 N. C. 145, 19 S. E. 99 (1894); Butts v. Screws, 95 N. C. 215 (1886); Note (1943) 21 N. C. L. REV. 387, 390. Whether the full implications of this view will be realized and followed for all purposes, it is clear that in matters of registration conditional sales will be treated as chattel mortgages. Therefore, throughout this note the terms "mortgage," "mortgagee" and "mortgagor" will include respectively, "conditional sale contract," "conditional vendor" and "conditional vendee." On the distinction between chattel mortgages and conditional sales generally see JONES, *op. cit. supra* note 1, §§26-33(b), pp. 937-48; Magill, *The Legal Advantages and Disadvantages of the Various Methods of Selling Goods on Credit* (1923) 8 CORN. L. Q. 210.

[3] Smith v. Fuller, 152 N. C. 7, 13, 67 S. E. 48, 51 (1910); Empire Drill Co. v. Allison, 94 N. C. 548, 553 (1886); Brem v. Lockhart, 93 N. C. 191, 192 (1885); Blevins v. Barker, 75 N. C. 436, 438 (1876); JONES, *op. cit. supra* note 1 §§190, 1004; WILLISTON, SALES (2d ed. 1924) §327.

tices. Tested by these considerations the present North Carolina recording statutes are unsatisfactory in their application to the sale or mortgage of motor vehicles.

In this jurisdiction the registration of mortgages on real and personal property has been held of prime importance,[4] and a strict application of the necessity and effect of recording has prevailed. Although the stated purpose of registration is notice of the mortgage lien,[5] registration acting as constructive notice, the settled and oft-quoted rule in this state is that no actual notice, however full and formal, will supply the place of registration.[6] Nor will a reference in a mortgage to a prior unregistered lien establish the validity of that lien in law,[7] unless the mortgage is expressly made subject to the earlier lien.[8] Thus, though registration is not necessary to the validity of the mortgage between the parties,[9] failure to register, or delayed or defective registration, has severe consequences. The seller loses his security interest to creditors[10] or purchasers for value[11] from the buyer-mortgagor,

[4] Whitehurst v. Garrett, 196 N. C. 154, 157, 159, 144 S. E. 835, 837, 838 (1928).

[5] Fleming v. Burgin, 37 N. C. 584, 588 (1843).

[6] Brown v. Burlington Hotel Corp., 202 N. C. 82, 161 S. E. 735 (1931); Threlkeld v. Land Co., 198 N. C. 186, 151 S. E. 99 (1929); Fertilizer Co. v. Lane, 173 N. C. 184, 91 S. E. 953 (1917); Springs v. Cole, 171 N. C. 418, 88 S. E. 721 (1916); Collins v. Davis, 132 N. C. 106, 43 S. E. 579 (1903); Blalock v. Strain, 122 N. C. 283, 29 S. E. 408 (1898); Robinson v. Willoughby, 70 N. C. 358 (1874); Notes (1931) 72 A. L. R. 165, (1930) 68 A. L. R. 274. However, a mortgagee who takes possession of the property to enforce his lien before any subsequent rights attach has a valid prior lien, such possession taking the place of recorded notice. Cowan v. Dale, 189 N. C. 684, 128 S. E. 155 (1925). *Cf.* Jordan v. Wetmur, 202 N. C. 279, 162 S. E. 566 (1932).

[7] Pruitt v. Parker, 201 N. C. 696, 161 S. E. 212 (1931); Lawson v. Key, 199 N. C. 664, 155 S. E. 570 (1930); Story v. Slade, 199 N. C. 596, 155 S. E. 256 (1930); Hardy v. Abdallah, 192 N. C. 45, 133 S. E. 195 (1926); Blacknall v. Hancock, 182 N. C. 369, 109 S. E. 72 (1921); Piano Co. v. Spruill, 150 N. C. 168, 63 S. E. 723 (1909).

[8] Hardy v. Fryer, 194 N. C. 420, 139 S. E. 833 (1927); Avery County Bank v. Smith, 186 N. C. 635, 120 S. E. 215 (1923); Bank v. Vass, 130 N. C. 590, 41 S. E. 791 (1902); Brasfield v. Powell, 117 N. C. 140, 23 S. E. 106 (1895); Hinton v. Leigh, 102 N. C. 28, 8 S. E. 890 (1889)

[9] General Motors Acceptance Corp. v. Mayberry, 195 N. C. 508, 142 S. E. 767 (1928); Dry-Kiln Co. v. Ellington, 172 N. C. 481, 90 S. E. 564 (1916); Kornegay v. Kornegay, 109 N. C. 188, 13 S. E. 770 (1891); Butts v. Screws, 95 N. C. 215 (1886); Deal v. Palmer, 72 N. C. 582 (1875); Leggett v. Bullock, 44 N. C. 283 (1853). And the widow or personal representative of deceased mortgagor stands in his shoes. McBrayer v. Harrill, 152 N. C. 712, 68 S. E. 204 (1910); Hinkle v. Greene, 125 N. C. 489, 34 S. E. 554 (1899); Williams v. Jones, 95 N. C. 504 (1886). An unregistered mortgage is good against sheriff's seizure of automobile for illegal use by mortgagor without knowledge of mortgagee. General Motors Acceptance Corp. v. United States, 23 F. (2d) 799 (C.C.A. 4th, 1928); South Georgia Motor Co. v. Jackson, 184 N. C. 328, 114 S. E. 478 (1922); Skinner v. Thomas, 171 N. C. 98, 87 S E. 976 (1916).

[10] Creditors include those obtaining a lien by attachment, execution, or other proceeding, but not general creditors. Elk Creek Lumber Co. v. Hamby, 84 F. (2d) 144 (C.C.A. 4th, 1936); *In re* Cunningham, 64 F. (2d) 296 (C.C.A. 4th, 1933); National Bank of Goldsboro v. Hill, 226 Fed. 102 (E.D.N.C. 1915); Moore v. Ragland, 74 N. C. 343 (1876). Receivers in insolvency proceedings are creditors. National Furniture Mfg. Co. v. Price, 195 N. C. 602, 143 S. E.

even if these outside parties had full knowledge of the encumbrance. And the buyer-mortgagor may lose his possession and interest in the car or have to pay the claims of prior lienors. If the recording acts are to be rigorously enforced it is imperative that they provide a system suited to modern conditions.

While local registration is perfectly adapted to mortgages on real property, it has not solved the problem of the movable chattel, specifically, the automobile.[12] Like many states,[13] North Carolina requires registration of a chattel mortgage in the county where the purchaser resides, or in the case of an out of state purchaser the county where the chattel is situated.[14] Such registration is not in fact adequate notice or protection against fraud. It is too easy for the mortgagor to sell the car in another county or state, representing it to be unencumbered.[15] It is too difficult for the prospective purchaser or creditor to search the records of several counties to uncover liens.[16] And if

208 (1928); General Motors Acceptance Corp. v. Mayberry, 195 N. C. 508, 142 S. E. 767 (1928); Yelverton Hardware Co. v. Garage Co., 184 N. C. 125, 113 S. E. 601 (1922); Observer Co. v. Little, 175 N. C. 42, 94 S. E. 526 (1917). Section 70(c) of the National Bankruptcy Act, 52 STAT. 879 (1938), 11 U. S. C. §110(c) (1940), gives a trustee in bankruptcy the status of lien or judgment creditor. 4 COLLIER ON BANKRUPTCY (14th ed. 1942) §§70.56-8.

[11] Purchasers for value include subsequent mortgagees. Wallace v. Cohen, 111 N. C. 103, 15 S. E. 892 (1892); Southerland v. Fremont, 107 N. C. 565, 12 S. E. 237 (1890); Weaver v. Chunn, 99 N. C. 431, 6 S. E. 370 (1888); Brem v. Lockhart, 93 N. C. 191 (1885); Todd v. Outlaw, 79 N. C. 235 (1878); Moore v. Ragland, 74 N. C. 343 (1876); Potts v. Blackwell, 57 N. C. 58 (1858). Assignees for benefit of creditors are purchasers for value. Cowan v. Dale, 189 N. C. 684, 128 S. E. 155 (1925); Starr v. Wharton, 177 N. C. 323, 98 S. E. 818 (1919). But a tort-feasor against the mortgaged chattel is neither purchaser nor creditor. Harris v. Seaboard Air Line Ry., 190 N. C. 480, 130 S. E. 319 (1925). In Wallace v. Benner, 200 N. C. 124, 156 S. E. 795 (1930), the registration statute was held not to defeat application of the doctrine of equitable subrogation of lien in favor of one advancing money to pay off existing mortgage liens upon the property. *Cf.* Blacknall v. Hancock, 182 N. C. 369, 109 S. E. 72 (1921).

[12] Note (1939) *A Comparison of Land and Motor Vehicle Registration*, 48 YALE L. J. 1238.

[13] JONES, *op. cit. supra* note 1, §§190, 1008 *et seq.*

[14] N. C. GEN. STAT. (1943) §§47-20, 23; See also Industrial Discount Corp. v. Radecky, 205 N. C. 163, 170 S. E. 640 (1933) (residence means actual residence and not domicile); Ward v. Southern Sand & Gravel Co., 33 F. (2d) 773 (M.D.N.C. 1929) (foreign corporation has no residence in state regardless of location of its principal place of business).

[15] Compare Applewhite Co. v. Etheridge, 210 N. C. 433, 187 S. E. 588 (1936) with Hornthal v. Burwell, 109 N. C. 10, 13 S. E. 721 (1891). N. C. GEN. STAT. (1943) §14-114 makes the fraudulent disposal of mortgaged property by the mortgagor a misdemeanor. See (1940) 26 VA. L. REV. 1074 commenting on Virginia statute requiring filing of liens on motor vehicle certificate of title.

On the problems of recordation in conflict of laws: JONES, *op. cit. supra* note 1, §§260, 1158-61; WILLISTON, *op. cit. supra* note 4, §339; Notes (1938) 17 N. C. L. REV. 56, (1928) 41 HARV. L. REV. 779, (1922) 6 MINN. L. REV. 153, (1934) 6 MISS. L. J. 416; (1928) 28 COL. L. REV. 111; (1929) 13 MINN. L. REV. 724; (1926) 74 U. OF PA. L. REV. 749.

[16] A properly recorded mortgage need not be recorded again in the county to which the property is removed by the mortgagor. Barrington v. Skinner,

recording is in the wrong county, which is not unlikely in view of shifting residences and shifty buyers, the mortgagee is at the mercy of parties dealing with the mortgagor.[17]

Out of the complex security transactions of dealers, manufacturers and finance companies[18] rises one of the most vexing situations in this field—the clash between a recorded mortgage on the dealer's cars and a sale to an innocent purchaser from the stock in trade. Recognizing the common failure to check dealers' titles and the hindrance to business such checking would occasion, most courts protect the purchaser without actual notice by finding an express or implied agency in the dealer to sell free of the mortgage lien, or an estoppel against the mortgagee's enforcement of the lien.[19] North Carolina has applied the agency doctrine,[20] but not the broader principle of estoppel.[21]

Since defective registration is no registration at all, sellers or mortgagees may find themselves ensnared by technical pitfalls in the recording process. Chattel mortgages and conditional sale agreements must be acknowledged and probated before registration,[22] and proper index-

117 N. C. 47, 23 S. E. 90 (1895); Harris v. Allen, 104 N. C. 86, 10 S. E. 127 (1889). A few states permit filing of mortgages on movable chattels with the secretary of state, thus making them effective anywhere in the state. Legis. (1933) 19 VA. L. REV. 635, 639.

[17] *In re* Franklin, 151 Fed. 642 (E.D.N.C. 1907) (mortgagor had no fixed place of residence and recording in county where mortgage executed was proper); Sloan Bros. v. Sawyer-Felder Co., 175 N. C. 657, 96 S. E. 39 (1918) (Georgia mortgage of truck located in N. C. not recorded in N. C.); Bank of Colerain v. Cox, 171 N. C. 76, 87 S. E. 967 (1916) (mortgage of sawmill and fixtures registered in county where mill located); Weaver v. Chunn, 99 N. C. 431, 6 S. E. 370 (1888) (mortgage of stock of goods of branch store registered in county where store located).

[18] See Adelson (1935) *The Mechanics of the Installment Credit Sale*, 2 LAW & CONTEMP. PROB. 218. The article states that large finance companies find it more economical to set up a reserve against losses to third parties from failure to record than to comply with recording statutes. Myerson (1935) *Practical Aspects of Some Legal Problems of Sales Finance Companies*, 2 LAW & CONTEMP. PROB. 244, at 250.

[19] Fogle v. General Credit, 122 F. (2d) 45 (App. D. C. 1941), 136 A. L. R. 814, 821 (1942); (1927) 27 COL. L. REV. 334; (1939) 23 MINN. L. REV. 846; (1931) 15 MINN. L. REV. 837; (1930) 2 ROCKY MT. L. REV. 261; (1940) 3 U. OF DETROIT L. J. 152; (1932) 80 U. OF PA. L. REV. 755.

[20] Atlantic Discount Corp. v. Young, 224 N. C. 89, 29 S. E. (2d) 29 (1944); Merritt v. Kitchin, 121 N. C. 148, 28 S. E. 358 (1897); Etheridge v. Hilliard, 100 N. C. 250, 6 S. E. 571 (1888); Bynum v. Miller, 89 N. C. 393 (1883).

[21] Whitehurst v. Garrett, 196 N. C. 154, 144 S. E. 835 (1928); Rogers v. Booker, 184 N. C. 183, 113 S. E. 671 (1922); Note (1929) 7 N. C. L. REV. 306; (1929) 42 HARV. L. REV. 573. The purchaser from the mortgagor without knowledge of the recorded mortgage may be sued by the mortgagee for conversion. Whitehurst v. Nixon, 196 N. C. 823, 146 S. E. 599 (1929).

[22] N. C. GEN. STAT. (1943) §§47-1 through 47-17; National Bank of Goldsboro v. Hill, 226 Fed. 102 (E.D.N.C. 1915); Cowan v. Dale, 189 N. C. 684, 128 S. E. 155 (1925); Best v. Utley, 189 N. C. 356, 127 S. E. 337 (1925); Allen v. Stainback, 186 N. C. 75, 118 S. E. 903 (1923); Lance v. Tainter, 137 N. C. 249, 49 S. E. 211 (1904); Blanton v. Bostic, 126 N. C. 418, 35 S. E. 1035 (1900); Quinnerly v. Quinnerly, 114 N. C. 145, 19 S. E. 99 (1894); Long v. Crews, 113 N. C. 256, 18 S. E. 499 (1893); White v. Connelly, 105 N. C. 65, 11 S. E. 177 (1890); Todd v. Outlaw, 79 N. C. 235 (1878); Starke v. Etheridge, 71 N C. 240 (1874).

ing and cross-indexing are essential parts of registration.[23] On the other hand, recording within a specified time limit is not required, the instrument simply taking effect against subsequent parties from the date and hour of recordation.[24] And as recording is good until cancellation of the mortgage, or the expiration of fifteen years,[25] renewal during the life of the average car is unnecessary.

If a different method of registering automobile liens were available, one which provided central registration for the whole state, simplified the procedure of registration and investigation, and combined actual notice through documents in common use in the trade with constructive notice through recording in one place, would its adoption not be highly desirable? As a matter of fact, the fundamentals of such a system exist at present in the provisions of the North Carolina Motor Vehicle Act[26] requiring a certificate of title for every automobile operated on the public highways,[27] and without major change this Act can supersede the general recording acts in their application to mortgages on this class of extremely mobile chattels.

Every owner[28] must apply to the department of motor vehicles for registration of his automobile and issuance of a certificate of title.[29] The department has broad powers to investigate the genuineness and legality of the application,[30] and may refuse registration for stated causes, one of which is a reasonable belief that issuance of the certificate would constitute a fraud against the rightful owner or lienor.[31] The certificate contains owner's name and address, date of issuance,

[23] N. C. GEN. STAT. (1943) §161-22; Tocci v. Nowfall, 220 N. C. 550, 18 S. E. (2d) 225 (1941); Dorman v. Goodman, 213 N. C. 406, 196 S. E. 352 (1938); Pruitt v. Parker, 201 N. C. 696, 161 S. E. 212 (1931); Story v. Slade, 199 N. C. 596, 155 S. E. 256 (1930); Whitehurst v. Garrett, 196 N. C. 154, 144 S. E. 835 (1928); Merchant & Farmers Bank v. Harrington, 193 N. C. 625, 137 S. E. 712 (1927); Fowle v. Ham, 176 N. C. 12, 96 S. E. 639 (1918); Ely v. Norman, 175 N. C. 294, 95 S. E. 543 (1918); (1938) 52 HARV. L. REV. 170. For a justification of courts' demands for strict compliance with the statutory details of recording, see (1930) 28 MICH. L. REV. 351.

[24] Blacknall v. Hancock, 182 N. C. 369, 109 S. E. 72 (1921); Carolina-Tennessee Power Co. v. Hiawassee Riv. Power Co., 175 N. C. 668, 96 S. E. 99 (1918); McKinnon v. McLean, 19 N. C. 79 (1836); Davison v. Beard, 9 N. C. 520 (1823).

[25] N. C. GEN. STAT. (1943) §45-37(5).

[26] *Id.* §§20-38 through 20-84; 220-3.

[27] Certain vehicles are exempt from the registration and certificate of title requirements, for example, federal government vehicles, cars brought into the state by non-residents under reciprocity permission, farm tractors and other farm implements, and new cars held by manufacturers or dealers for sale. N. C. GEN. STAT. (1943) §20-51.

[28] N. C. GEN. STAT. (1943) §20-38(t) defines owner to include conditional vendee and chattel mortgagor.

[29] N. C. GEN. STAT. (1943) §§20-50, 20-52. The application must bear the written signature of the owner, acknowledged by him before a person authorized to administer oaths.

[30] N. C. GEN. STAT. (1943) §§20-44 through 20-46.

[31] *Id.* §20-54.

description of the car, and "a statement of the owner's title and of all liens and encumbrances upon the vehicle therein described, and whether possession is held by the owner under a lease, contract or conditional sale, or other like agreement."[32] Where liens exist the certificate is mailed to the holder of the first lien, to be retained until payment.[33] Certificates remain valid until cancelled by the department for cause or upon transfer of title or interest.[34] A transfer is accomplished by endorsing an assignment, warranty of title and notation of liens on the back of the instrument,[35] and forwarding it to the department, which then issues a new certificate showing any liens or encumbrances.[36] The same procedure is followed for a lienholder's release or assignment of his interest to the owner.[37]

No certificates are needed for new automobiles held by manufacturers or dealers,[38] but upon sale to other parties applications must be forwarded to the department.[39] And every vendor of used cars must accompany delivery of the machine with an endorsed certificate of title.[40] Other sections of the Act cover keeping of records in the state agency,[41] their inspection by the public,[42] fees for issuance and transfer of certificates,[43] and monthly reports by manufacturers and dealers of vehicle transfers.[44] Operation of an automobile for which no certifi-

[32] *Id.* §20-57(d).
[33] *Id.* §20-57(f).
[34] *Id.* §20-57(h).
[35] *Id.* §20-72(b).
[36] N. C. GEN. STAT. (1943) §20-73. Where transferor is a conditional vendor or mortgagor he may then forward the certificate to department for recording of the lien. *Id.* §20-72(b). Where transferee is a dealer he need not forward until resale of the car. *Id.* §20-75. If certificate is lost or unlawfully detained the department may issue a new one upon proper application. *Id.* §20-76. §20-77 provides for transfers by operation of law, such as bankruptcy, execution sale, repossession by vendor; transfers by inheritance, devise or bequest; and notice of sale under mechanics lien.
[37] N. C. GEN. STAT. (1943) §§20-58(a), 20-59.
[38] *Id.* §§20-51, 20-79(b). Several states require the delivery of a manufacturer's or importer's certificate of origin upon sale of a new automobile to dealer, and the assignment of this certificate to a purchaser from the dealer. NEB. COMP. STAT. (Kyle, Supp. 1941) §§60-1002, 4, 5; OHIO GEN. CODE ANN. (Page, 1938) §§6290-2, 4, 5; TEX. ANN. PEN. CODE (Vernon, Supp. 1945) art. 1436-1, §§28, 29.
[39] N. C. GEN. STAT. (1943) §20-52. Both the dealer and purchaser fill out the application form, thus insuring a double check on the amount and nature of any lien created.
[40] N. C. GEN. STAT. (1943) §20-221. A statute requiring sellers of used cars brought in from other states to post bonds to save purchasers harmless from title failures and assessing a ten dollar fee for each bond filed was declared unconstitutional as an interference with interstate commerce. *Id.* §§20-220, 20-222, 20-223; McLain v. Hoey, 19 F. Supp. 990 (E.D.N.C. 1937).
[41] Registration and title certificates are filed by registration number, owner's name and engine number, and these records are checked prior to any vehicle registration. N. C. GEN. STAT. (1943) §§20-55, 20-56. All applications and surrendered certificates of title are retained to permit tracing of title. *Id.* §20-78.
[42] N. C. GEN. STAT. (1943) §20-43.
[43] *Id.* §20-85 (fifty cents for each new certificate).
[44] *Id.* §20-82.

cate has been issued is made unlawful,[45] and penalties are provided for this and other violations of the statute.[46]

In view of these comprehensive provisions for lien recording it is not surprising that the argument was soon advanced that the statement of mortgages and conditional sales on a certificate of title was sufficient notice to third parties. The court answered this contention in *Carolina Discount Corporation* v. *Landis Motor Company*[47] by declaring the Act "a police regulation to protect the public from fraud, imposition and theft of motor vehicles,"[48] and holding that it did not repeal by implication the general registration acts.[49] This decision is in accord with the refusal of other courts to construe similar statutes as recording acts,[50] except where a contrary legislative intent is clear.[51]

However, the legislative trend has been toward utilization of certificates of title as the exclusive method of recording liens on automobiles, as well as aids in recovery of stolen vehicles and administration of state taxes.[52] Today fifteen states and the District of Columbia make the certificates constructive notice of liens and encumbrances, and exempt mortgages on automobiles from the general recording acts.[53] The

[45] *Id.* §20-111(a).

[46] *Id.* §§20-176, 20-177. See also §§20-39, 20-59, 20-71, 20-74, 20-108, 20-111, 20-112.

[47] 190 N. C. 157, 129 S. E. 414 (1925). The case involved the original certificate of title act, N. C. PUB. LAWS 1923, c. 236, but its provisions are basically those of the present statute.

[48] Carolina Discount Corp. v. Landis Motor Co., 190 N. C. 157, 160, 129 S. E. 414, 416 (1925).

[49] After deciding that defendant purchaser from the mortgagor was owner of the automobile, the court suggested that the superior court could properly order plaintiff to deliver the certificate of title to defendant. *Id.* at 161, 129 S. E. at 417 (1925). For the same results by an action to recover possession of the certificate, see Fogle v. General Credit, 122 F. (2d) 45 (App. D. C. 1941); Associates Discount Corp. v. Hardesty, 122 F. (2d) 18 (App. D. C. 1941).

[50] Meyer Herson Auto Sales Co. v. Faunkhauser, 65 F. (2d) 655 (App. D. C. 1933); *In re* Rosen, 23 F. (2d) 687 (D. Md. 1928); L. B. Motors, Inc. v. Prichard, 303 Ill. App. 318, 25 N. E. (2d) 129 (1940); Nelson v. Viergiver, 230 Mich. 38, 203 N. W. 164 (1925); Commercial Credit Co. v. Schreyer, 120 Ohio St. 568, 166 N. E. 808 (1929); Metropolitan Securities Co. v. Warren State Bank, 117 Ohio St. 69, 158 N. E. 81 (1927); King-Godfrey v. Rogers, 157 Okla. 216, 11 P. (2d) 935 (1932); *accord,* Amick v. Exchange State Bank, 164 Minn. 136, 204 N. W. 639 (1925). *Cf.* Merchants Rating & Adjusting Co. v. Skaug, 4 Wash. (2d) 46, 102 P. (2d) 227 (1940). Note (1932) 8 NOTRE DAME LAWYER 97.

[51] *In re* Berlin, 147 F. (2d) 491 (C.C.A. 3rd, 1945); *In re* Wiegand, 27 F. Supp. 725 (S. D. Cal. 1939); Van Syckle v. Keats, 125 N. J. L. 319, 15 A. (2d) 321 (1940); Commercial Credit Co. v. Amer. Mfg. Co., 155 S. W. (2d) 834 (Tex. Civ. App. 1941).

[52] Legis. (1936) 12 WIS. L. REV. 92.

[53] ARIZ. CODE ANN. (1939) §66-231; CODES OF CAL. (Deering, 1943) *Vehicle Code* §§195-8; DEL. REV. CODE (1935) §5574(a); FLA. STAT. ANN. (1943) §319.15; MICH. STAT. ANN. (Henderson, Supp. 1944) §9.1497 (applies to accessories only); MONT. REV. CODES ANN. (Anderson & McFarland, 1935) §1758.3; NEB. COMP. STAT. (Kyle, Supp. 1941) §60-1009, as amended by NEB. SESS. LAWS 1943, c. 134, §4; NEV. COMP. LAWS (Supp. 1931-41) §4435, as amended by NEV. STAT. 1945, c. 240, §§15(a)-(g); N. J. STAT. ANN. (1940) §39:10-14 (con-

great need is of course uniformity throughout the nation, and there have been demands for a national registration system.[54] However, an effective state-wide recording system supplies uniformity within the state, and through its tie-up with state registration plates and certificates of title provides real notice and protection to out of state purchasers and creditors.

In order to simplify automobile financing, protect innocent parties, preserve the security interest of conditional vendors and mortgagees, and eliminate opportunities for fraud, the following provisions should be added to the North Carolina Motor Vehicle Act:[55]

1. No mortgage, deed of trust, conditional sale or title retention contract, or other lien or encumbrance[56] on or covering a motor vehicle or on any equipment or accessories affixed or sold to be affixed to such vehicle shall be valid as against creditors or subsequent purchasers or encumbrances but from its registration in compliance with section 2 to 6 of this act.[57]

2. There shall be deposited with the register of deeds in the county where such instrument is executed a copy of the instrument evidencing such lien or encumbrance, with an attached or endorsed certificate of a notary public, accompanied by the certificate of title last issued for such vehicle, or if no certificate has been issued there-

ditional sales only); N. M. STAT. ANN. (1941) §§68-113-9, as amended by N. M. LAWS 1943, c. 73, §§8, 10; OHIO GEN. CODE ANN. (Page, 1938) §6290-9; PA. STAT. ANN. (Purdon, Supp. 1944) tit. 75, §§33, 38; TEX. ANN. PEN. CODE (Vernon, Supp. 1945) art. 1436-1, §§41-5; UTAH CODE ANN. (1943) §§57-3a-80-7; VA. CODE ANN. (Michie, Sublett & Stedman, 1942) §2154(64)(b); D. C CODE (1940) §40-702.

In addition to these states, seventeen states, including North Carolina, require certificates of title for motor vehicles, but do not make notation of liens on the certificates constructive notice. Legis. (1936) 12 WIS. L. REV. 92.

[54] Isaacs, *Installment Selling: The Relation Between Its Development in Modern Business and the Law,* (1935) 2 LAW & CONTEMP. PROB. 140 at 146.

[55] Upholding the constitutionality of similar acts are State v. Taggart, 134 Ohio St. 374, 17 N. E. (2d) 758 (1938) and *In re* Fell, 16 F. Supp. 987 (E. D. Pa. 1936).

[56] This would include trust receipts used in the purchase of motor vehicles. General Motors Acceptance Corp. v. Mayberry, 195 N. C. 508, 142 S. E. 767 (1928).

[57] Just as under present recording acts this would leave an unregistered mortgage good between the parties. See discussion of Virginia statute in Janney v. Bell, 111 F. (2d) 103 (C. C. A. 4th, 1940). The amendment would not make the certificate of title conclusive as to ownership of the car. The statutes of California, Iowa, Kansas, Missouri, Montana, Nebraska, Ohio, and Utah provide that every transfer of title or interest in a motor vehicle is void unless in compliance with the certificate of title act. Notes (1939) 37 MICH. L. REV. 758, (1935) 94 A. L. R. 948. This strict title registration system represents a radical departure from the normal requirements of a valid sale or transfer of personal property, and tends to produce more uncertainty and litigation than at present; it is not considered advisable for this jurisdiction. However, an amendment to the Act making certificates of title *prima facie* evidence of title would promote regularity and reliability of title papers without the disadvantages of a rigid system of registration.

for, by an application by the owner for an original certificate of title. Upon receipt of the above documents in proper order the register of deeds shall endorse thereon the date and hour received, and shall collect a registration fee, which shall be uniform throughout the state. On the same day on which received, the register of deeds shall forward said documents, together with such part of the fee charged as may be prescribed by statute, to the department of motor vehicles for filing and recording of the lien or encumbrance upon the certificate of title. Further filing or registration in the office of register of deeds shall not be required nor of legal effect.

3. Upon receipt of the copy of the instrument evidencing a lien or encumbrance and the certificate of title or application therefor, the department shall file the same, and shall issue a new certificate of title in usual form, giving the name of the owner and a statement of all liens and encumbrances certified to the department against said vehicle. The department shall maintain an appropriate index of all lien, encumbrance or title retention instruments filed, and shall furnish upon request information on liens and encumbrances against motor vehicles.[58]

4. Such filing and the issuance of a new certificate of title shall constitute the exclusive method of giving constructive notice of all mortgages, deeds of trust, conditional sale or title retention contracts or other liens or encumbrances against the vehicle described therein,[59] and such mortgages and other instruments shall be exempt from the provisions of sections 47-20 and 47-23 of the General Statutes of North Carolina. Provided, that if the documents referred to above are received and time of receipt endorsed thereon by the register

[58] To provide for instances of loss caused by departmental errors in issuing and transferring certificates of title, recording liens and furnishing information, the department should be required to set up an insurance fund for payment to injured parties. See Maryland Credit Finance Corp. v. Franklin Credit Finance Corp., 164 Va. 579, 180 S. E. 408 (1935) for an example of such a loss.

[59] It may be wise to provide specifically for mechanics' liens created by N. C. GEN. STAT. (1943) §44-2. By judicial construction of this statute a mechanic's lien on a motor vehicle is superior to the lien of a recorded mortgage or conditional sales contract. Reich v. Triplett, 199 N. C. 678, 155 S. E. 573 (1930); Johnson v. Yates, 183 N. C. 24, 110 S. E. 603 (1922) (in a strong dissent Clark, C. J., argues that the decision permits the mortgagor to "improve the owner out of his property"); Carolina Sales Co. v. White, 183 N. C. 671, 110 S. E. 607 (1922); *cf.* Willis v. Taylor, 201 N. C. 467, 160 S. E. 487 (1931); Twin City Motor Co. v. Rouger Motor Co., 197 N. C. 371, 148 S. E. 461 (1929); Notes (1922) 1 N. C. L. REV. 127, (1927) 40 HARV. L. REV. 762, (1934) 88 A. L. R. 1185, (1936) 104 A. L. R. 267. A suggested provision: "Liens and encumbrances noted upon certificates of title shall have priority over any other liens against such motor vehicle, however created or recorded, except the mechanics' lien for repairs given by §44-2 of the General Statutes of North Carolina, to the extent of fifty ($50) dollars." See CODES OF CAL. (Deering, 1943) *Vehicle Code* §425; VA. CODE ANN. (Michie, Sublett & Stedman, 1942) §2154(64)(b).

of deeds within six days after date said documents were excuted, constructive notice shall date from the time of execution, otherwise from the time of receipt as shown by the endorsement of the register of deeds thereon.

5. The holder or owner of every mortgage, deed of trust, conditional sale or title retention contract or other lien or encumbrance on any vehicle registered in another state and filed or recorded in that state shall within ninety days after such vehicle is removed to this state file with the department of motor vehicles the original or a certified copy of such mortgage or other instrument. Every mortgage or other such instrument not so filed shall be subject to any lien or encumbrance against such vehicle thereafter filed with the department according to this act, provided said vehicle shall have continuously remained in this state for said period of ninety days.

6. This act shall be in full force and effect from and after the date of its ratification, except that it shall not affect the validity of any mortgage, deed of trust, conditional sale or title retention contract, or other lien or encumbrance on a motor vehicle which was executed and registered according to law at the date of such ratification. But all such mortgages and other instruments not filed with the department within a period of six months after said date of ratification shall be subject to liens and encumbrances thereafter filed against such vehicle.

WALLACE C. MURCHISON.

Federal Jurisdiction—Removal of Causes—Removal by an Automobile

A considerable contribution to legal animism is made by a recent opinion of a Federal District Court sitting in South Carolina.[1] A state statute[2] provides that when a motor vehicle is operated in violation of law or negligently one thereby sustaining personal injuries or property damage has a lien on the vehicle for his damages and may attach it in the manner provided for other attachments.[3] A native son was killed in an automobile accident and his administrator brought action in the State Court for $25,000 against the car's owner (who was apparently also its driver) and, pursuant to South Carolina practice, against the car itself. The owner was served personally and the car was attached. The car was licensed in Pennsylvania, of which state

[1] Weatherford v. Radcliffe *et al.*, 63 F. Supp. 107 (D.C.S.C. 1945). The "al." is "one Sport Model four-door Ford Automobile, 1944 Pennsylvania License No. IFC76."

[2] Code of Laws of S. C. (1942) §8792.

[3] This statute has been in force, without amendment, since 1912. It refers to damages to "a buggy or wagon or other property."

the individual defendant was a citizen. The individual defendant secured removal to Federal District Court. The Judge of that Court remanded, the controlling factor being that the automobile had not joined in the removal petition.

The result thus rests upon the concept of the motor vehicle as a legal person. Once this hurdle is taken, the opinion lays down the propositions: (1) that the individual defendant and the automobile were joint tort feasors; (2) that there was thus no separable controversy;[4] and (3) that the rule applying in such cases is that all defendants must join in the removal petition.[5]

Considerable attention is devoted to the fact that the suit against the car is an *in rem* proceeding, the opinion pointing out that libels in admiralty and under forfeiture statutes are such proceedings with which Federal courts are familiar. "In an *in rem* case the thing sued may be represented and appear in court and defend and exercise all rights it may have. I am, therefore, of the opinion that the defendant automobile would have had a right to file a petition or join in a petition for removal."[6] The creation of personality for the vehicle is then carried to its logical conclusion: "I hold: 1. That there is diversity of citizenship between the plaintiff and defendants. . . ."[7]

Wisely, the opinion makes no attempt to draw an analogy between the automobile and a corporation. While concededly there are intellectual difficulties in clothing a corporation with citizenship for diversity purposes, its normally recognized powers to sue and be sued, to own property, to enter into contracts and to carry on business generally, present a much stronger claim for the privilege than can be made for the automobile. However, the Court's apparent reliance on an analogy to admiralty and forfeiture cases furnishes even less support for the result. No ship has yet been made a citizen of a State and when the United States sues 75 tubs of butter it does not endow either the tubs or the butter with citizenship. Obviously diversity jurisdiction is not involved in such cases.[8] To concede that an inanimate object may be

[4] That there is no separable controversy when it appears from the complaint that defendants are joint tort feasors is the general rule in negligence cases. HUGHES, FEDERAL PRACTICE (1931) §2377. The South Carolina Court has held that when an individual and car are sued jointly, the individual can remove the case against him to the county of his residence, leaving the case against the car in the county of attachment. Ackerman v. One Mack Truck and Trailer, 191 S. C. 74, 3 S. E. (2d) 684 (1939); Mahon v. Burkett, 160 S. C. 48, 158 S. E. 141 (1931). Despite discussion of jurisdiction in these opinions, the Federal Court in the principal case correctly held that they actually dealt with venue, not jurisdiction.

[5] This is the general rule. DOBIE, HANDBOOK ON FEDERAL JURISDICTION AND PROCEDURE (1928) §93.

[6] 63 F. Supp. 107, 111.

[7] 63 F. Supp. 107, 112.

[8] *Cf.* Boom Company v. Patterson, 98 U. S. 403, 25 L. ed. 206 (1878), approving removal, on diversity grounds, of a condemnation proceeding brought by a corporation clothed by state statute with power of eminent domain. The diversity found, of course, was between the plaintiff corporation and the property owner.

treated for some purposes as a defendant in a law suit is one thing. To say that it thus acquires citizenship is under some suspicion of being a *non sequitur*.

When a result like this is reached, some search for an explanation outside of the reasoning in the opinion is in order, but in this case it is none too fruitful.

One possibility is that the Judge was led astray by defendant's counsel. The opinion indicates, without intimating the tactical reason, that the individual defendant's counsel believed the case against the car should remain in the State Court.[9] Thus apparently neither side was attempting to have the entire case litigated in Federal Court (though it also appears that the answer filed in Federal Court by the same counsel was a joint answer for the individual and the car). In this somewhat confused situation it is doubtful that tactics of counsel should be seized upon to absolve the Court of so patent a departure from reality.

A second possibility is that the Judge was enforcing a policy of restricting diversity jurisdiction to the maximum extent possible. There is some language which might be so construed.[10] However, if this was the objective, a much more adequate solution would have been to say flatly that the automobile, though a party, cannot be a citizen of a state and hence there could be no removal.[11] Further, the opinion purports to confine itself to the specific facts; and it will not operate to

[9] Counsel may possible have had in mind some notion of getting two bites at the cherry, while confining the opposition to one, by some non-mutual application of *res judicata*. However, the joint answer in Federal Court seems inconsistent with such a notion. The petition for removal alleged that there was a separable controversy and counsel so argued in opposition to the motion to remand, relying on the distinction between an action *in personam* against the individual and one *in rem* against the car. This, also, is inconsistent with the position that the case against the car should remain in State Court, as ordinarily the entire case is removed when a separable controversy is found to exist.

[10] "The Removal Statutes must be strictly construed and due regard for the rightful independence of the state governments requires that federal courts scrupulously confine their own jurisdiction to the precise limits of their statutory authority." 63 F. Supp. 107, 111.

[11] Prior to the April 20, 1940, amendment to 28 U. S. C. A. §41 citizens of the District of Columbia could not qualify as citizens of a State for diversity purposes. And in Ralya Market Co. v. Armour & Co., 102 F. 530 (C. C. Iowa 1900), it was held that a partnership, sued in the firm name under authority of a state statute, was not a citizen and the case could not be removed, at least in the absence of an application to the State Court by the individual partners to be substituted for the firm as defendants. In McLaughlin v. Hallowell, 228 U. S. 278, 33 Sup. Ct. 465, 57 L. ed. 835 (1913), a similar result was reached by the lower Federal Court and the State Court subsequently denied the application of the partners to be substituted as defendants. Thus no removal was ever permitted, but the U. S. Supreme Court did not pass on the merits of the lower Federal Court's order of remand. The more usual result in partnership cases is to allow the citizenship of the partners to govern. Raphael v. Trask, 194 U. S. 272, 24 Sup. Ct. 647, 48 L. ed. 973 (1904); Great Southern Fire Proof Hotel Co. v. Jones, 177 U. S. 499, 20 Sup. Ct. 690, 44 L. ed. 842 (1900).

Of course, refusing to allow removal because of non-citizenship of the automobile would still emphasize the legal entity of the vehicle as contrasted with the citizenship of the owner.

prevent removal in any case duplicating its facts, provided only that the car joins in the petition. So, if this confinement of the reach of the opinion is to be taken at face value, a desire to restrict diversity jurisdiction was not the motivating cause of the result. However, the reasoning involved might operate to prohibit removal of cases with different facts—for instance, when the car is registered in South Carolina. (This is just a suggestion, as the available data do not yet furnish reliable criteria for determination of the citizenship of an automobile.)

Probably the most important factor in the decision is the simple fact that the South Carolina practice sanctions naming the car as a defendant. This apparently lead the Judge to overlook the obvious analogy to actions in which, while only individuals are named as defendants, property is attached, either as a basis for jurisdiction or as ancillary to personal service.[12] In fact, it is difficult to see why the principal case is not controlled by the express language of 28 U. S. C. A. §79: "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 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." This statute is not cited in the opinion.

On the facts of the instant case it seems reasonably clear that the only true defendant is the individual, that the car is attached simply as an aid to collection of damages or to encourage settlement, and that the state practice of naming the car as a defendant should not entail consideration of its citizenship or its participation in the removal petition.

The obvious next question is how to treat a case in which the driver and owner of the car are different people. Even there, if both are sued for personal judgment, the owner being joined on a theory of imputed negligence, or if the owner is sued on such an imputation without joinder of the driver, attachment should not prevent consideration of the removal question solely on the basis of the citizenship of and requests made by the individual defendants or defendant.

If the non-driving owner is not named as a defendant,[13] other questions are raised.[14] It still seems reasonably clear that, as far as the

[12] It has been held that when the State Court's jurisdiction is based on attachment, the case can be removed to Federal Court even though, had the case originated in Federal Court, jurisdiction could not have been predicted solely on the attachment. Clark v. Wells, 203 U. S. 164, 27 Sup. Ct. 43, 51 L. ed. 138 (1906). See also Rorick v. Devon Syndicate, Ltd., 307 U. S. 299, 59 Sup. Ct. 877, 83 L. ed. 1303 (1939).

[13] The South Carolina Court has held that the car may be sued without making the owner, operator or other person a party defendant. Tolbert v. Buick Car, 142 S. C. 362, 140 S. E. 693 (1927)

[14] Where driver and car are joined, there is perhaps an argument that the

action against the car is concerned, the governing citizenship should be that of the owner, just as it would be in an ordinary attachment case in which an individual defendant, though named as such, cannot be personally served.[15] However, will shifting the inquiry from citizenship of the car to that of the owner: (1) influence the decision as to existence of a separable controversy? (2) influence the finding as to jurisdictional amount?

The principal case would still answer the first question by saying that there is a joint tort. It is, therefore, necessary to go one step further in depersonalizing the automobile. What is needed here is an approach typified by the old gag about the sheep's legs. Question: "If you call a sheep's tail a leg, how many legs will it have?" Answer: "Four. You can't make a tail a leg by calling it one." That the car is the instrument by which a tort is committed is obvious, but that it can be a tort feasor, joint or several, for the purpose of determining removability does not follow. (At least, it is assumed that we are unlikely to arrive at a rule of law that an automobile is liable if, under all the circumstances, it fails to conduct itself as would a reasonably prudent automobile.)

What the South Carolina legislature has actually done is to provide that a car owner whose car is driven negligently to plaintiff's damage is liable to the plaintiff to the extent of his interest in the car, regardless of whether he could be adjudged negligent or otherwise held respon-

attachment is merely ancillary and the driver alone can remove. If it prevailed, it would furnish a relatively simple rule, eliminating further questions as to separable controversy and jurisdictional amount. However, since the property attached would not be the property of the removing defendant, and the action against it is in reality one to foreclose the rights of its owner, the attachment seems hardly to be ancillary to the case against the driver. It is doubtful, indeed, if it would be so held if the owner appears, either for himself or in the name of the car, and objects to removal or his citizenship would, if controlling, prevent removal. On the other hand, wherever personal judgment is sought against the owner, the attachment is probably properly regarded as ancillary to the case against him, though the question may be of no practical importance in the absence of other claimants to rights in the car.

The statute, 28 U. S. C. A. §79, quoted in the text, does not authorize removal by driver alone, as it presupposes a proper basis for removal, and the question at issue is whether such basis is present when the car owner can not or does not join in the petition. Further, its reference to the property of the defendant probably means property of the defendant requesting removal.

[15] If the owner does not appear in the case, it might be treated in the same way as a case in which two defendants are named, but one is not served and does not appear. The rule there is that if the defendant not served is a non-resident, the other (also a nonresident) may remove alone; but if he is a resident, the other may not remove in the absence of a separable controversy. Pullman Co. v. Jenkins, 305 U. S. 534, 59 Sup. Ct. 347, 83 L. ed. 334 (1939). That this rule might apply even where the property of the defendant not served has been attached, is indicated by Hunt v. Pearce, 284 F. 321 (C. C. A. 8th, 1922). However, even if these cases apply generally in the situation under discussion, their rule could not apply when the owner appears or is a co-citizen with plaintiff. An appearance nominally made on behalf of the car should be treated, for this purpose, as an appearance by the owner.

sible under common law principles.[16] Plaintiff's rights against the owner may still turn on his rights against the driver, since he has no lien unless the car was being driven negligently or in violation of law. But that dependence does not alone render the driver and owner joint tort feasors or create a master-servant or principal-agent relation between them in the common law sense. The separable controversy decision should turn on these considerations rather than on the pat assumption that driver and car are joint tort feasors.[17]

As to the jurisdictional amount, the instant case holds that removal can be had, if the car joins in the petition, regardless of the fact that the car is not worth more than $500. "Both defendants have been served and the amount of damages alleged is over the sum of $3,000, and although one defendant can not respond in payment of a verdict that may be obtained of more than $3,000, that does not alter the fact that the amount sued for is the amount actually in controversy whatever may be the financial responsibility or the liability of the respective defendants."[18] This, except for the word "liability," sounds like a further personalization—an analogy to an insolvent individual. If that is to be followed, it would apply equally well (and equally inappropriately) to the case of the non-driving owner. The opinion apparently approves an unreported decision from the same District holding that where the only individual sued was not served, and bond of $1,000 was substituted for the vehicle, the jurisdictional amount was not present. However, the opinion furnishes no clue to whether that rule would also be applied to the case of the non-driving owner if the defendant driver is personally served.

Again the only realistic approach is to look at the owner of the car. He is obviously not in the situation of an insolvent defendant. The only relief sought against him is the application of the value of the car; and this is pretty clearly the "amount in controversy" as between plaintiff and the owner.[19] The case should be decided in the same way

[16] The statute contains an exception for cases in which "the motor vehicle shall have been stolen by the breaking of a building under a secure lock, or when the vehicle is securely locked."

[17] Though there are master and servant cases holding that a separable controversy is present when one defendant's liability is predicated on a statute and the other's liability on the common law—see HUGHES, FEDERAL PRACTICE (1931) §2381—the rule announced by the Supreme Court seems to be that if State decisions hold the defendants jointly liable there is no separable controversy, regardless of this feature. Chicago, R. I. & P. Ry. Co. v. Schwyhart, 227 U. S. 184, 33 Sup. Ct. 250, 57 L. ed. 473 (1913); Southern Ry. Co. v. Miller, 217 U. S. 209, 30 Sup. Ct. 450, 54 L. ed. 732 (1910). *Cf.* concurring opinion of Mr. Justice Black in Pullman Co. v. Jenkins, *supra* note 15.

[18] 63 F. Supp. 107, 111.

[19] It has been held that when jurisdiction is based on attachment the amount sued for controls, even though the value of the property attached is less than the jurisdictional amount. Salmon Falls Mfg. Co. v. Midland Tire & Rubber Co., 285 F. 214 (C. C. A. 6th, 1922); Gershowitz v. Lane Cotton Mills, 21 F. Supp. 579 (D. C. Tex. 1937); Randall v. Becton-Dickinson Co., 18 F. (2d) 631 (D. C. Mass. 1927). However, at this point the analogy between the ordinary attach-

as any other case in which there are several defendants and the relief sought against one does not equal the jurisdictional amount.[20]

It may be conceded that the approach herein suggested does not automatically furnish clear answers to all the questions which may arise, and even that some confusion could creep into cases resting on such an approach. However, endowing the automobile with citizenship, the ability to commit a tort, and net worth will not eliminate the confusion, but merely confound it.

Something might be made over the fact that, if this case continues to be good law, there are multiple opportunities for enlarging its application. The statutory idea can be readily applied to the pistol with which plaintiff is shot, the factory which omits noxious fumes, the scaffold which collapses under the plaintiff, or any other property instrumental in the commission of a tort.[21] Indeed, it might be possible to allow the property to be named as a defendant in every attachment suit and even in actions to foreclose mortgages or to quiet title.[22] Foreign corporations, not now barred from removal because their stockholders are co-citizens with plaintiff, might be barred because their real estate and manifold chattels are.[23] And there would, perforce, be a great blossoming of the law on the *locus* of citizenship of property. It is pretty obvious that this is not going to happen; and, very probably, as part of the history of its non-happening, the instant case will be repudiated.

HENRY BRANDIS, JR.

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ment case and the case of the non-driving owner breaks down. In the latter the relief sought, when there is no imputed negligence alleged, can never exceed the value of the car. In a rare case plaintiff might allege damages less than the value of the car, and in such case the damages alleged should govern. A comparable situation is found in the lien cases holding that the amount of the claim, not the value of the property, controls. Lion Bonding & Surety Co. v. Karatz, 262 U. S. 77, 43 Sup. Ct. 480, 67 L. ed. 871 (1923); City of Pawhuska v. Midland Valley R. Co., 33 F. (2d) 487 (C. C. A 8th, 1929).

[20] The decision would, under the cases, turn on whether owner's and driver's liabilities to plaintiff are "joint" or "several"—also stated as whether they have a "common and undivided interest." McDaniel v. Traylor, 196 U. S. 415, 25 Sup. Ct. 369, 49 L. ed. 533 (1905); Walter v. Northeastern R. Co., 147 U. S. 370, 13 Sup. Ct. 348, 37 L. ed. 206 (1893); Stemmler v. McNeill, 102 F. 660 (C. C. N. C. 1900). See also Clay v. Field, 138 U. S. 464, 11 Sup. Ct. 419, 34 L. ed. 1044 (1891). This question, therefore, involves something of the same considerations as are involved in determining whether there is a separable controversy. If both decisions are controlled by the same considerations, then: (1) If there is a "joint" liability, there is no separable controversy, but jurisdictional amount is present. Hence there would be no removal if the owner is a co-citizen with plaintiff or does not join in the petition. (2) If there is "several" liability, there is a separable controversy and the driver alone, if a nonresident, could remove.

[21] Perhaps somewhere along the line there would be a due process limitation on such absolute liability statutes.

[22] Due process would hardly be a bar here, since there is no question about the validity of the underlying cause of action and the right to proceed by attachment is clearly recognized. There might be trouble if the statute could be said to be intended primarily to defeat Federal jurisdiction. See Terral v. Burke Const. Co., 257 U. S. 529, 42 Sup. Ct. 188, 66 L. ed. 352, 21 A. L. R. 186 (1922).

[23] There are some, of course, who advocate restricting or eliminating the right of foreign corporations to remove to Federal Court, but none has been found who based his advocacy on the citizenship of the corporate property.