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Notes and Comments

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NOTES AND COMMENTS

Administrative Law—Court Review of Agency Decision Under Statute—Suit by Government Against Interstate Commerce Commission

The United States as a war-time shipper by complaint before the Interstate Commerce Commission sought recovery from certain railroads for their failure and refusal to provide wharfage and handling services

or an allowance in lieu thereof inasmuch as these charges were absorbed in the line-haul rates accorded private shippers and the same rates were exacted from the Government even though the Government had performed the services itself.[1] The Commission dismissed the Government's complaint whereupon the United States brought this action to set aside the order of the Commission.[2] Under the statute[3] suits to enjoin orders of the Commission are to be brought against the United States. The court, faced by this apparent disregard of the accepted rule that "No person may sue himself,"[4] found no case of controversy, refused to review the Commission order, and did not reach the merits of the case. The anomaly of the situation was manifest when the petition filed by the United States and the answer filed in its behalf were both signed by the same Assistant Attorney General. Under this holding the statute authorizing judicial review of orders of the Commission affords no review to the United States.

Once any person has acquired standing as a party in interest in proceedings before the Commission, he should have the right to appear as a party in any suit brought in court involving the validity of an order made by the Commission.[5] Even though the parties seeking review of a Commission order were not parties in the original proceedings before the Commission, they still may maintain a suit to enjoin, annul, or suspend a Commission order if they were "necessarily affected"[6] or "injuriously affected."[7] Under these criteria enunciated by the courts, though admittedly concerning private parties, it is evident that the United States is a proper party to seek judicial review of the Commission's orders; the United States was a party in the original proceedings and its interests were affected injuriously by the dismissal of its complaint.[8]

Here, however, we are faced with a statutory provision that "suits

[1] For the Commission's report and order, and two prior reports in the same proceeding, see United States v. Aberdeen & R. R. R ., 269 I. C. C. 141 (1947), 264 I. C. C. 683 (1946), 263 I. C. C. 303 (1945).

[2] United States v. Interstate Commerce Comm'n, 78 F. Supp. 580 (D. D. C. 1948); *probable jurisdiction noted mem.*, 69 Sup. Ct. 134 (1948).

[3] Pub. L. No. 773, 80th Cong., 2d Sess., §2322, §2324 (June 25, 1948); revising, 28 U. S. C. §46 (1946).

[4] Globe & Rutgers Fire Ins. Co. v. Hines, 273 F. 774 (C. C. A. 2d 1921).

[5] McLean Lumber Co. v. United States, 237 F. 460 (E. D. Tenn. 1916); *e.g.*, Youngstown Sheet & Tube Co. v. United States, 295 U. S. 476, 479 (1935); Baltimore & O. R. R. v. United States, 264 U. S. 258, 268 (1924).

[6] Atlantic C. L. R. R. v. Interstate Commerce Comm'n, 194 F. 449 (Com. C. 1911).

[7] Diffenbaugh v. Interstate Commerce Comm'n, 176 F. 409 (C. C. W. D. Mo. 1910).

[8] While the total reparations sought by the Government are not known, one of the original seven railroads against whom claims were filed made a compromise settlement during the proceedings before the Commission for approximately $865,000.

to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the district court against the United States."[9] It has been held that in a suit to stay an order of the Commission, the United States is an indispensable party[10] and as such would be one without which the suit cannot proceed.[11] The statute, in effect, makes the United States and not the agency the party defendant and charges the Department of Justice with the duty of defending Commission orders in the courts.[12] Does this statute serve to place the Government outside the pale of judicial protection when it is the party complaining of the Commission action? Essentially, the situation would be unchanged if the agency itself were made liable to suit. The courts, however, apparently encounter no difficulty in suits wherein the United States or an agency thereof has sought relief from the actions of another agency of the Government; and the agency, not the Government, is the party defendant.

In *United States v. Public Utilities Commission*[13] the Government as a customer of a public utility company sought judicial review of agency action with reference to the reasonableness of utility rates. The court specifically recognized the problem herein involved and stated:

> "The United States is seeking in this case, to establish its right to appeal—as a person or corporation affected—from an order of one of its own lesser creatures, an administrative agency."[14]

Nevertheless, the issue as to a suit between coordinate units of the Government was not raised and the review was afforded.

In *Interstate Commerce Commission v. Mechling*,[15] Mechling, the Inland Waterways Corporation and the Secretary of Agriculture brought suit to set aside the order of the Commission in the district court. The Commission argued that no right existed in the Government to bring suits against the Commission. The Supreme Court disposed of this argument with the terse statement, "We see no error in this."[16] The Government urged this precedent in the present case, but the court dis-

[9] Pub. L. No. 773, 80th Cong., 2d Sess., §2322, §2324 (June 25, 1948); revising, 28 U. S. C. §46 (1946).

[10] Lambert Co. v. Baltimore & O. R. R., 258 U. S. 377 (1922).

[11] DOBIE, FEDERAL PROCEDURE §68 (1928).

[12] Other statutes providing that suits to enjoin, set aside, annul, or suspend agency orders shall be brought against the United States: COMMUNICATIONS ACT, OF 1934, 48 STAT. 926 (1934), as amended, 48 STAT. 1093 (1934), 50 STAT. 197 (1937), 47 U. S. C. §402 (1946); PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930, 46 STAT. 535 (1930), 7 U. S. C. §499k (1946); PACKERS AND STOCKYARDS ACT, 42 STAT. 168 (1921), 7 U. S. C. §217 (1946); EMERGENCY RAILROAD TRANSPORTATION ACT, 1933, Pub. L. No. 91, 73rd Cong., 1st Sess., §16 (June 16, 1933).

[13] 151 F. 2d 609 (App. D. C. 1945) (Public Utilities Commission of the District of Columbia, a federal agency).

[14] *Id.* at 610.

[15] 330 U. S. 567 (1947).

[16] *Id.* at 573.

tinguished the facts and pointed out that the Secretary of Agriculture was specifically authorized by statute to seek judicial relief. "Consequently [the court concluded], it was not a case in which the United States was both plaintiff and defendant."[17] It is submitted that the specific statutory authorization to sue does not change the *Governmental* character of the Secretary of Agriculture as a party litigant. If the court desired to draw a distinction between the Secretary of Agriculture as an agent of the Government in the performance of Governmental functions and his principal, the United States, the distinction in denomination is without difference in effect.[18]

In *McLean Trucking Co. v. United States*,[19] the Secretary of Agriculture joined with the trucking company in a court action to set aside an order of the Interstate Commerce Commission granting an application for the merger and consolidation of certain trucking lines.[20] The Court, however, did not mention the propriety of the suit but decided the case on its merits. A comparable situation arose in *Interstate Commerce Commission v. Jersey City*[21] wherein the Economic Stabilization Director was allowed to oppose a Commission order raising railroad fares in Jersey City. The Court again did not question the appropriateness of the parties in the litigation.

Cases such as *Defense Supplies Corporation v. United Lines Co.*[22] relied on by the court in the principal case have no relevancy here. If the decision therein sought had been rendered, it would have resulted in a loss of funds on the part of one Governmental agency for the benefit, not of a private party, but of another Governmental agency. The problem was essentially one of internal management which could have been remedied by executive action. In the principal case the Government is deprived of its remedy against parties with whom it has no connection, and the Government as an entity is to be wholly deprived of the funds sought by its claim for reparations.

If the court in the principal case seeks to draw a distinction between

[17] United States v. Interstate Commerce Comm'n, 78 F. Supp. 580, 583 (1948).

[18] *Cf.* Defense Supplies Corp. v. United States Lines Co., 148 F. 2d 311 (C. C. A. 2d 1945), *cert. denied*, 326 U. S. 746 (1945).

"The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record but by the question of the effect of the judgment or decree which can be entered." Minnesota v. Hitchcock, 185 U. S. 373, 387 (1902); *accord*, Louisiana v. McAdoo, 234 U. S. 627 (1914); Boeing Air Transport, Inc. v. Farley, 75 F. 2d 765 (App. D. C. 1935). Courts will now look behind the designation of parties on the record and seek to determine who are real parties to litigation. Mine Safety Appliance Co. v. Knox, 59 F. Supp. 733 (D. D. C. 1945).

[19] 321 U. S. 67 (1943).

[20] The Anti-Trust Division of the Department of Justice had opposed the action sought to be enjoined in the proceedings before the Commission.

[21] 322 U. S. 503 (1944).

[22] 148 F. 2d 311 (C. C. A. 2d 1945), *cert. denied*, 326 U. S. 746 (1945).

suits against an agency and those against the United States because the agency attorneys would handle the defense in the first instance whereas the Department of Justice would be charged with the responsibility in the second instance, the distinction is fruitless. In practice the Department of Justice has on occasion admitted the allegations made by plaintiffs regarding defects in the Commission's orders whereupon the Commission has taken up the defense and the litigation has proceeded to a conclusion.[23] In other instances the Department of Justice has failed to take part in litigation due to conflicting allegations by coordinate agencies of the Government and the Commission has continued the suit to its final determination.[24]

Section 9 of the INTERSTATE COMMERCE ACT provides that any person or persons claiming to be damaged may either make complaint to the Commission or bring suit in any district court of competent jurisdiction.[25] If the result of this decision prevails upon appeal, the Government in similar cases will be obliged to choose the alternative remedy provided by the statute and bring suit against the individual carrier in the district court instead of litigating before the Commission unless it is willing to forego its right to contest the initial decision. Thus, if the Government is relegated to the use of the federal courts for the ajudication of its claims, it will be deprived of the expert technical ability of the Commission.

It is submitted that the interest of the Commission as defended by the United States is not that of a party litigant which stands to gain or lose by the outcome of the suit. While it is true that the Commission has an interest in the integrity of its orders, the court's decision would in no manner result in the imposition on the Commission of pecuniary liability. The individual railroads, in the final analysis, are the actual parties to be pecuniarily affected by the present decision. The fact that the Commission has been the trial tribunal should not result in one of the parties in interest before it being precluded from contesting the suit.

Once the Interstate Commerce Commission has ruled on a case coming before it, there remains only the course pursued by the Government

[23] Interstate Commerce Comm'n v. Mechling, 330 U. S. 567 (1947) (United States admitted allegations of complaint in district court, whereupon I. C. C. intervened and defended the order.); McLean Trucking Co. v. United States, 321 U. S. 67 (1943) (United States confessed error before district court and I. C. C. defended.).

[24] Interstate Commerce Comm'n v. Jersey City, 322 U. S. 503 (1944) (United States was named a defendant but filed a neutral answer because two Government agencies were in opposition to each other.); Interstate Commerce Comm'n v. Inland Waterways Corp., 319 U. S. 671 (1943) (Attorney General did not participate, giving as his reason the existence of a conflict in litigation between coordinate agencies of the Government, the A. A. A. and the I. C. C.).

[25] 24 STAT. 382 (1887), as amended, 36 STAT. 1167 (1911), 49 STAT. 543 (1935), 49 U. S. C. §9 (1946).

in the principal case to enjoin the Commission's order.[26] This means that the Government is without remedy in its present action whereas the railroads in a Commission ruling adverse to their interests would have been able to have brought the case before the district court for review of the Commission ruling.[27]

"The Government is always at liberty . . . to avail itself of all the remedies which the law allows to every person, natural or artificial, for the vindication and assertion of its rights."[28] And yet the decision in the principal case provides a judicial cloak behind which private interests may seek immunity from judicial review sought by the Government of decisions favorable to those private interests.

ROBERT D. LARSEN.

Automobiles—Repurchase Option Contracts—Enforceability Thereof

To combat the practice of quick resale to a "used car" lot, where today's demand permits new motor vehicles to be sold far above their original price, many dealers have employed a repurchase option contract. These provide that, if during the life of the agreement (usually six months) the purchaser wishes to sell the car, he will give the first refusal to the dealer for a fixed or determinable price. In addition, some contracts stipulate that for failure to perform, a certain sum shall be paid as liquidated damages.

In any suit to enforce such a contract the defense that the law does not favor restrictions deterring the sale of chattels must be met. But in light of the present situation in the automobile market, there should be a strong public policy in favor of these contracts as a device for cutting the price of "used cars" by accelerating delivery to legitimate purchasers.

Another problem present in all these contracts is that of consideration. The contract states that it is a part of the consideration for the sale of the car, and this interpretation has been upheld.[1] A close analogy to the contracts in questions may be found in similar transactions relating to corporate stock. In such a situation the Massachusetts court[2] said that the consideration was the purchase price plus the agreement to offer the

[26] Lambert Co. v. Baltimore & O. R. R., 258 U. S. 377 (1922); North Dakota v. Chicago & N. W. Ry., 257 U. S. 485, 490 (1922) ("Complete justice requires that the railroads not be subjected to the risk of two irreconcilable commands—that of the I. C. C. enforced by a decree on the one side and that of this court on the other.").

[27] *Cf.* United States v. Griffin, 303 U. S. 226 (1938).

[28] United States v. Lee, 106 U. S. 196, 222 (1882).

[1] Schuler v. Dearing Chevrolet Co., 76 Ga. App. 570, 46 S. E. 2d 611 (1948).

[2] New England Trust Co. v. Abbott, 162 Mass. 148, 38 N. E. 432 (1894).

stock to the company if a sale were contemplated. In this respect a seller's agreement to repurchase is the same as his option to repurchase insofar as the duty upon the buyer is concerned, for in either case he is bound to offer before selling elsewhere; therefore the rulings of such cases are authority here. These cases uniformly say that such agreements are valid terms of the sale, supported by its consideration, and that the claim of lack of mutuality of obligation is not a defense.[3]

For the equitable enforcement of these contracts there are three theories: specific performance, rescission for fraud, and equitable servitude. To succeed on the first theory the dealer must overcome the barrier that specific performance is not usually granted in personal property contracts unless the remedy at law is inadequate.[4] To show inadequacy he can plead injury to his good will and reputation in that if his cars are seen on "used car" lots, people will say that he is not careful to whom he sells, which in turn may lead to repercussions from national headquarters. A resale may result in damage actually impossible to ascertain, for dealers usually have repair and servicing shops from which a large part of their income is derived, and they have reason to expect that most cars kept in the hands of the purchaser will be returned to them for some later work. Furthermore, under a policy directed toward eliminating such resales, damages would not be as efficient a remedy.

A second theory that the dealer might pursue is rescission of the sale for fraudulent intent not to abide by this repurchase contract when the sale was made. Unless there were witnesses to testify as to the purchaser's intention, the proof of it would have to be circumstantial, in which case it would be strongest when the resale was made within a few days.

A third equitable theory would be that of a servitude. But since it is seldom recognized for personal property[5] and its use here would add nothing that could not be accomplished by specific performance, it is not recommended. Furthermore, the purpose of this doctrine seems to be to force holders of the chattel who were not in privity with the original contract to comply with the servitude, while in the situation in question the objective of the dealer is to keep the chattel from being transferred from the first purchaser; therefore it appears that this is not the type of problem for which the equitable servitude theory was intended.

[3] 46 AM. JUR., Sales §509; see Note, 60 A. L. R. 215, 232 (1929).

[4] As to the adequacy of damages in suits on dealer's contracts to sell new cars see Note, 62 HARV. L. REV. 149 (1949), and Simpson, *Equity* in 1947 ANN. SUR. AM. LAW 811 (1948).

[5] Chafee, *Equitable Servitudes on Chattels*, 41 HARV. L. REV. 945 (1928); Baer, *Performer's Right to Enjoin Unlicensed Broadcasts of Recorded Renditions*, 19 N. C. L. REV. 202, 205 (1941).

Present in the enforcement by any one of these theories is the problem of giving notice of the contract to any third party who might buy the car. Since in the majority of cases the car will already have been resold when the dealer learns of it, notice is necessary to prevent a bona fide purchaser from cutting off the equitable remedies. This could usually be accomplished by writing on the title that such a contract had been made relating to this automobile. Even though there may be no place reserved on the title for this entry, there seems to be no legal objection to putting such a notation on the certificate. If in seeking one of these remedies adequate notice has not been provided for third party purchasers, the dealer, under the theory that the purchaser was threatening to sell, would have to take steps to restrain a resale before it was made.[6] To avoid the question of notice the dealer could retain the title for six months, but for reasons of salesmanship and future good will it does not appear feasible.

In regard to the effectiveness in North Carolina of notice of this contract being placed on the certificate of title, the rules laid down in *Carolina Discount Corp. v. Landis Motor Co.*,[7] that the sale of an automobile without the transfer of title is valid and that the protection for mortgagees is in recordation, are broad enough to cover the issue here.[8] Although the certificate ordinarily would pass on sale, it does not have to, hence notice on it would not be a complete safeguard; but it seems that if the contract were put on record as a lien the requisite notice would have been given.

In lieu of or after failure of other remedies directed toward the return of the chattel itself, the dealer can seek the legal remedy of damages for the breach of the contract between the parties. In proving his damages the dealer's ethical problem may appear delicate for he must show the price that he could have realized had he resold it as a "used car" or had he, instead of the defendant, sold the car to a "used car" dealer. Legally, however, there is no restriction on the price at which a "used car" may be sold. Furthermore, if such profits were to be made, the contract stipulated who was to receive them and should be binding on the parties. If his contract is one of those which contains a provision for liquidated damages, the dealer need only plead the contract as it stands, leaving the burden of proof on the defendant to show that

[6] The defendant could be subjected to contempt proceedings if he did not obey the restraining order.

[7] 190 N. C. 157, 129 S. E. 414 (1925).

[8] The court held that the statutes governing transfer and registration of titles for automobiles [N. C. GEN. STAT. §§20-50, 72, 74 (1943)] did not replace the recordation law for mortgages, liens, and encumbrances. They distinguished the North Carolina statutes from those of other states which read that the sale without transfer of title is invalid or void.

the damages are such as to be a penalty.[9] Even though under such a contract the dealer is not required to prove his actual damage,[10] it would be safer to do so and to show that it was difficult to estimate the amount accurately when the contract was drawn.

In the two cases now reported involving the enforcement of these contracts, it has not been necessary for the courts to pass directly on the main issues. In *Larson Buick Co. v. Mosca*[11] the facts disclosed obvious fraud and the resale had been enjoined before an innocent purchaser intervened. In *Schuler v. Dearing Chevrolet Co.*[12] the purchaser's demurrer was sustained because the company's pleadings did not show that it had been damaged. However, from an over-all survey it appears that the first problem is whether such contracts will be recognized at all by the courts, to which it is submitted that in light of the present situation in the automobile business they are highly desirable. The second problem, notice to the third party who buys from the original purchaser, can be met by a notation on the title where it must be transferred as part of a sale or by recordation of the contract in states like North Carolina which do not make this requirement.

The solution most advantageous to the dealer would be a repurchase contract which had its liquidated damages secured by a non-negotiable note and a recorded chattel mortgage. Since this note and mortgage would take effect only in event of a breach, they cannot be attacked as a promise to pay more than the regular purchase price for the car. Such a contract would deter reselling for it is not likely that a "used car" dealer would want a vehicle with a mortgage against it which must be paid to perfect the title. It would also give the notice necessary for the use of an equitable remedy and protect against a breach by an insolvent person. The majority of states recognize comity for recordation, therefore a chattel mortgage properly recorded would be constructive notice to a purchaser outside the state.[13]

MARSHALL T. SPEARS, JR.

Constitutional Law—Declaratory Judgment—Remedy in Federal Constitutional Cases

The basic accomplishment of proceeding by declaratory judgment is "that it enables the point in dispute to be raised at the inception of the controversy, before damage has been done by acting upon one's own

[9] MCCORMICK, DAMAGES §157 (1935); Pace v. Zellmer, 194 Iowa 516, 186 N. W. 420 (1922).

[10] If the court took judicial notice of the prevailing situation with regard to "used cars," the opposition's claim of penalty would be met; if not, the better procedure would be to show the situation to rebut the claim.

[11] 79 N. Y. S. 2d 654 (Sup. Ct. 1948).

[12] 76 Ga. App. 570, 46 S. E. 2d 611 (1948).

[13] 10 AM. JUR., Chattel Mortgages §21; see Note, 57 A. L. R. 702, 711 (1928).

view of his rights. . . ."[1] In the field of constitutional law this accomplishment has various facets:

1. Plaintiff can prevent uncertainty and insecurity in personal and business transactions without waiting until the damage has been done.[2]
2. Plaintiff can proceed on his own initiative to obtain a declaration of his constitutional rights.[3]
3. Plaintiff can avoid the dilemma of making a choice, based on *his* judgment of constitutionality, either of complying with a statute and its restrictions, which may be unconstitutional all the while, or of refusing to obey the statute and thereby subjecting himself to its penalties if it later proves to be constitutional.[4]
4. Plaintiff need seek no coercive relief in order to obtain an adjudication of his constitutional rights.[5]
5. Plaintiff can avoid circuity of action and multiple litigation in many cases by a single declaration of constitutionality.[6]
6. Plaintiff can pursue his action to a speedier conclusion.[7]
7. Also, plaintiff *should* not have to show that there is impending irreparable injury[8] or that his remedy at law is inadequate.[9]

In view of the extensive and seemingly successful utilization of the declaratory judgment in other jurisdictions,[10] Congress passed the Federal Declaratory Judgments Act,[11] and apparently intended that the

[1] BORCHARD, DECLARATORY JUDGMENTS 55 (2d ed. 1941).

[2] "Under the present law you take a step in the dark and then turn on the light to see if you stepped into a hole. Under the declaratory judgment law you turn on the light and then take the step." Representative Ralph Gilbert in 69 CONG. REC. 2108 (1928).

[3] "It is true that (the plaintiffs) might translate their claims into actions, and await prosecutions, but that is precisely the dilemma from which (the declaratory judgment) was designed to afford relief." Faulkner v. Keene, 85 N. H. 147, 155, 155 Atl. 195, 200 (1931).

[4] "Either course was fraught with danger. To afford relief to parties in such a situation is the very purpose of the Declaratory Judgments Act." Acme Finance Co. v. Huse, 192 Wash. 96, 108, 73 Pac. 2d 341, 346 (1937).

[5] UNIFORM DECLARATORY JUDGMENTS ACT §1; 48 STAT. 955, 28 U. S. C. §400 (1934), as amended, 49 STAT. 1027 (1935), 28 U. S. C. §400 (1946).

[6] Socony-Vacuum Oil Co. v. City of New York, 287 N. Y. Supp. 288 (1936), *aff'd*, 272 N. Y. 668, 5 N. E. 2d 385 (1936).

[7] "The court may order a speedy hearing of an action for declaratory judgment and may advance it on the calendar." FED. R. CIV. P., 57.

[8] Nashville, C. & St. L. Ry. v. Wallace, 288 U. S. 249 (1933) so held, but later cases have indicated a tendency to the contrary as will be shown.

[9] "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." FED. R. CIV. P., 57.

[10] UNIFORM DECLARATORY JUDGMENTS ACT is now adopted substantially in thirty-two states; see also New Zealand Declaratory Judgments Act, 1908, 8 Edw. VII, No. 220; Dill v. Hamilton, 137 Neb. 723, 291 N. W. 62 (1940) (statute regulating religious activities); Edgerton v. Hood, 205 N. C. 816, 172 S. E. 481 (1934) (banking statute).

[11] 48 STAT. 955, 28 U. S. C. §400 (1934), as amended, 49 STAT. 1027 (1935), 28 U. S. C. §400 (1946).

full advantage of this new procedure should inure to the benefit of federal constitutional litigants.[12]

But the federal judiciary has found difficulty envisaging the declaratory judgment as a proper remedy in many constitutional cases. Before the Federal Declaratory Judgments Act was passed the Supreme Court had apparently waged a campaign through its decisions to avert enactment, by continued reference to the declaratory judgment as a mere advisory opinion.[13] A drastic change occurred in *Nashville, C. & St. L. Ry. v. Wallace,*[14] arising under the Tennessee Declaratory Judgments Act, when the Court accepted as valid the distinction between an advisory opinion and a declaration of constitutional rights in a real and substantial controversy. However, a year later in 1934 the Court said, "This court may not be called on to give advisory opinions or to pronounce declaratory judgments."[15] But later the Supreme Court in *Aetna Life Ins. Co. v. Haworth*[16] held the Federal Declaratory Judgments Act constitutional and declaratory relief appropriate where there is an actual controversy, even though the litigant be in no position to seek coercive relief and suffers no irreparable injury. However, since the *Haworth* case it has become increasingly apparent that the federal judiciary, in line with its earlier attitude, is still reluctant to grant declaratory judgments as to constitutional issues.[17]

The reason most often advanced by the Supreme Court in denying declarations of constitutionality is "no case or controversy," based on the old conception of the declaratory judgment as a mere advisory opinion. A labor union sued under a state declaratory judgment act for a declaration that a statute regulating the union as to strikes and pickets, and subjecting union officials to possible imprisonment if violated, was unconstitutional. *Held:* that since the plaintiff had not violated the statute, there was no justiciable controversy, no concrete factual basis for a decision.[18] The union and its officers were thereby forced to violate statutory regulations in order to test the constitutionality of the statute, subjecting themselves to fines and possible imprisonment.[19] Similarly the Circuit Court of Appeals for the Ninth Circuit held that

[12] Sen. Rep. No. 1005, 73d Cong., 2d Sess. 2, 3; H. R. Rep. No. 1264, 73d Cong., 2d Sess. 2.

[13] Willing v. Chicago Auditorium Ass'n, 277 U. S. 274 (1928); Liberty Warehouse Co. v. Grannis, 273 U. S. 70 (1927); Note, *Declaratory Relief in the Supreme Court,* 45 HARV. L. REV. 1089 (1932).

[14] 288 U. S. 249 (1933).

[15] Alabama v. Arizona, 291 U. S. 286, 291 (1934).

[16] 300 U. S. 277 (1937).

[17] See Comment, *Declaratory Judgments in Federal Courts,* 41 YALE L. J. 1195 (1932) in reply to Note, *Declaratory Relief in the Supreme Court,* 45 HARV. L. REV. 1089 (1932).

[18] Alabama State Fed. of Labor v. McAdory, 325 U. S. 450 (1945). The effect of a state court decision was used as a secondary basis for the decision.

[19] *Contra:* Dill v. Hamilton, 137 Neb. 723, 291 N. W. 62 (1940).

there was no case or controversy where plaintiff sued for a declaration that the Arizona Train Limit Law was unconstitutional, alleging that penalties for violation would cost plaintiff $1,600 to $37,000 per day, while losses in freight if it obeyed would amount to not less than $300,000 per year.[20] The court held that since there had been no violation, there was no controversy. The court failed to perceive that until its constitutionality was declared, the statute was a real threat to plaintiff, leaving his legal and financial position in a state of suspension.[21] Even where the SEC sought to enforce the no-mail penalties for failure to register under the Public Utilities Holding Company Act and defendant asked by counterclaim for a declaratory judgment that the Act was unconstitutional, it was held that defendant had no case or controversy because it had not registered under the Act.[22] Thus defendant was compelled either to register under the Act in order to contest the validity of any part thereof, or refuse to subject itself to rigorous controls by registering and thereby lose United States mail privileges.[23] One of the most flagrant violations of the spirit and intent of declaratory judgment legislation is the case of *United Public Workers v. Mitchell*,[24] where the Supreme Court held that civil service employees who desired to participate in political activities forbidden under the Hatch Act had no justiciable controversy as to the constitutionality of the Act until they had actually violated the Act and thereby subjected themselves to possible dismissal from governmental service with simultaneous loss of seniority. Justice Douglas, dissenting in part, presented the more realistic viewpoint:[25]

> "Declaratory relief is the singular remedy available here to preserve the *status quo* while the constitutional rights of these appellants to make these utterances and to engage in these activities are determined. The threat against them is real not fanciful, immediate not remote. The case is therefore an actual not a hypothetical one."

It is submitted that each of the above cases involved justiciable con-

[20] Southern Pac. Co. v. Conway, 115 F. 2d 746 (C. C. A. 9th 1940).

[21] *Contra:* ". . . the mere continued existence of article 88 under the color of right and authority constitutes a continuing threat to collect, exact, and enforce the tax." Socony-Vacuum Oil Co. v. City of New York, 287 N. Y. Supp. 288, *aff'd*, 272 N. Y. 668, 5 N. E. 2d 385 (1936).

[22] Electric Bond and Share Co. v. SEC, 303 U. S. 419 (1938). Even though the suit was to enforce the no-mail penalties of the statute, the Court said of the counterclaim, "It presents a variety of hypothetical controversies which may never become real." Mr. Justice McReynolds dissented without opinion.

[23] *But cf.* Carter v. Carter Coal Co., 298 U. S. 238 (1936) in which the more limited injunction was granted, although the provision of the statute held to render it unconstitutional was not even shown to be involved in plaintiff's case.

[24] 330 U. S. 75 (1947); see Sunderland, *A Modern Evolution in Remedial Rights—The Declaratory Judgment*, 16 MICH. L. REV. 69 (1917).

[25] 330 U. S. 75, 119 (1947).

troversies well within the limits of the declaratory remedy. It is difficult to appraise these decisions without concluding that the test of justiciability was more rigidly applied by the federal courts because the remedy sought was declaratory judgment.[26]

Increasingly apparent in Supreme Court decisions is a failure to distinguish the declaratory judgment from injunction. There seems to be a concerted attempt by the Supreme Court to restrict the use of declaratory relief in constitutional cases to the area already covered by injunction, requiring irreparable injury with no other adequate remedy. Although the declaratory judgment is closely related to equitable actions, it is not exclusively an equitable remedy, but a remedy *sui generis*, applicable in both law and equity.[27] Under the Federal Rules, the availability of declaratory relief is by express provision *not* dependent on the inadequacy of other remedy.[28]

Yet in two recent cases involving the constitutionality of statutes, where declaratory judgment and injunction were jointly sought, the Court based much of its reasoning in throwing out the declaratory judgment, as well as the injunction, on adequacy of remedy at law.[29] Such reasoning was applicable to the injunction only,[30] the court overlooking the fact that there are many instances in which declaratory relief is appropriate where the technical prerequisites for injunction are not found.[31]

The Supreme Court has in one instance misrepresented the import of its former words as to the necessity for showing threatened irreparable injury in a declaratory judgment action. In deciding in *Nashville, C. & S. L. Ry. v. Wallace* that irreparable injury was not necessary, injunction not being involved, the Court said:[32]

> "Thus the narrow question presented for determination is whether the controversy before us, *which would be justiciable in this*

[26] See Note, 25 N. C. L. Rev. 436 (1947).

[27] Grosse Pointe Shores v. Ayres, 254 Mich. 58, 235 N. W. 829 (1931); Borchard, Declaratory Judgments 239 (2d ed. 1941).

[28] See note 9 *supra*.

[29] Aircraft & Diesel Equipment Corp. v. Hirsch, 331 U. S. 752 (1947) (exhaustion of administrative remedy was involved); Coffman v. Breeze Corp., 323 U. S. 316 (1945).

[30] "We see no reason why the statute (declaratory judgment statute) should not, we think it should, be given the prophylactic scope to which its language, in the light of its purpose, extends, under its disputants as to whose right there is actual controversy, may obtain a binding judicial declaration as to them, before damage has actually been suffered, and without having to make the showing of irreparable injury and the law's inadequacy required for the granting of ordinary preventive relief in equity." Gully v. Interstate Natural Gas Co., 82 F. 2d 145, 149 (1936), *cert. denied*, 298 U. S. 688 (1936).

[31] "Its (the declaratory judgment's) purpose is to obtain a judicial determination of legal relations that are uncertain and the subject of dispute, and to avoid . . . occasions for injunctive relief." 3 Moore's Federal Practice §57.02 (1st ed. 1938); Borchard, *The Next Step Beyond Equity—The Declaratory Action*, 13 U. of Chi. L. Rev. 145 (1946).

[32] 288 U. S. 249, 262 (1933). [Italics added to quotation.]

> *Court if presented in a suit for injunction,* is any *less* so because through a modified procedure (declaratory judgment) appellant has been permitted to present it . . . without praying for an injunction or alleging that irreparable injury will result. . . ."

But in *Colgrove v. Green,* a 1946 case, one portion of this statement was lifted from its context and quoted thus:[33]

> ". . . the test for determining whether a federal court has authority to make a declaration . . . is whether the controversy *'would be justiciable in this court if presented in suit for injunction.'* . . ."

Clearly this is a direct misrepresentation of the *Nashville* decision which held no irreparable injury was necessary if only declaratory judgment were sought. The same year of the *Colegrove* case, Justice Rutledge dissented in *Cook v. Fortson,* feeling that both the *Colegrove* case and the *Cook* case should be reheard together. He explained his reasons in a footnote:[34]

> "It was to avoid the limitations resulting from the fact that injunctive or other immediately effective equitable relief could not be given that relief by way of declaratory judgment was authorized by Congress. This Court has not yet determined that declaratory relief cannot be given beyond the boundaries fixed by the pre-existing jurisdiction in equity. . . ."

A 1948 decision of the Supreme Court indicates that the majority of the Court now regard the declaratory judgment as an action requiring the equity prerequisites, if not an actual action in equity.[35]

The Court has been confronted in many declaratory judgment cases with adversative conditions more drastic than those in earlier cases where the supposedly more restricted injunction was upheld,[36] but has failed to perceive in many instances the potentialities of the declaratory

[33] 328 U. S. 549, 552 (1946). The opinion of the Court was supported by only three Justices, Frankfurter, who wrote the opinion, Reed, and Burton. Justice Jackson took no part in the case. Justice Rutledge concurred only in result. Justice Black dissented and was joined by Justices Douglas and Murphy. [Italics added.]

[34] 329 U. S. 675, 677 (1946). However, the appeal was dismissed per curiam over the opinion of Justice Rutledge.

[35] "But as we have seen, the Bank's grievance here is too remote and insubstantial, too speculative in nature, to justify an injunction against the Board of Governors, and *therefore equally inappropriate for a declaration of rights.*" Eccles v. Peoples Bank of Lakewood Village, Cal., 68 Sup. Ct. 641 (1948). Justice Reed, dissenting, with whom Justice Burton joined, felt that the case should be heard on its merits, saying, "If governmental power is being unlawfully used to constrain respondent's operation of its business, respondent is entitled to protection *now.*" [Italics added.]

[36] Compare three earlier injunction cases, where, although a statute was either not yet applied to plaintiff or not yet even in force, the Court heard the cases on their merits, saying that there was an actual controversy. Village of Euclid v. Ambler Realty Co., 272 U. S. 365 (1926); Pierce v. Society of Sisters, 268 U. S. 510 (1925); Terrace v. Thompson, 263 U. S. 197 (1923).

judgment in allowing unconstitutional legislation to be quickly and effectively contested before irretrievable loss has occurred. It is submitted that the Supreme Court could properly allow the declaratory judgment a more liberal application in federal constitutional litigation, consonant with its status and intended use, without being forced to decide any hypothetical cases based on insufficient facts.[37]

RALPH M. STOCKTON, JR.

Eminent Domain—Hydroelectric Adaptability as Element of Just Compensation—Effect of Federal Power Act

The Constitutional provisions[1] for payment of "just compensation" for land taken by means of eminent domain proceedings have generally been regarded as securing to the owner the market value of the land considering its best possible future use, *i.e.*, the price which would be agreed upon at a voluntary sale between an owner willing to sell and a purchaser willing to buy.[2] This general rule is applied where dam sites are condemned,[3] but a complicating factor arises when the owner claims the special adaptability of his land for hydroelectric development as an element of value. This special adaptability has generally been allowed as a factor to be considered where a reasonable possibility of connection with the other required tracts has caused purchasers in the open market to take hydroelectric possibilities into account, quite apart from the needs of the condemnor.[4] The tendency has been in the direction of a more strict application of this rule so as to eliminate any consideration of dam site adaptability where it appears that combination of the tracts by open market purchases is not reasonably probable.[5]

[37] "If the remedy through a declaratory judgment does not at least in part fill the gap between law and equity there would be little purpose in enacting the statutes providing for such procedure." Schaefer v. First Nat. Bank of Findlay, 134 Ohio St. 511, 518, 18 N. E. 2d 263, 267 (1938).

[1] U. S. CONST. AMEND. V; AMEND. XIV requires the states to provide just compensation for private property taken. Most state constitutions have such a provision. Lenhoff, *Development of the Concept of Eminent Domain*, 42 COL. L. REV. 596 (1942); McKean, *Constitutional Limitations Upon the Power of Eminent Domain*, 6 ROCKY MT. L. REV. 16 (1933); Recent Cases, 7 U. OF CHI. L. REV. 166 (1939).

[2] BAUER, ESSENTIALS OF THE LAW OF DAMAGES 427 (1919); FIELD, THE LAW OF DAMAGES §846 (1876); II LEWIS, THE LAW OF EMINENT DOMAIN IN THE UNITED STATES §478 (2d ed. 1900); III SEDGWICK, DAMAGES §1171 (9th ed. 1920); IV SUTHERLAND, THE LAW OF DAMAGES §1064 (4th ed. 1916).

[3] See Note, 106 A. L. R. 955 (1937).

[4] McCandless v. United States, 298 U. S. 342 (1936), *reversing* 74 F. 2d 596 (C. C. A. 9th 1935); Ford Hydroelectric Co. v. Neely, 13 F. 2d 361 (C. C. A. 7th 1926), *cert. denied*, 273 U. S. 723 (1926); *accord*, Mississippi and Rum River Boom Co. v. Patterson, 98 U. S. 403 (1878). See Notes, 124 A. L. R. 910 (1940), 106 A. L. R. 955 (1937); Note, 2 WASH. L. REV. 192 (1927).

[5] Olson v. United States, 292 U. S. 246 (1934), *affirming* 67 F. 2d 24 (C. C. A. 8th 1933); *accord*, North Kansas City Development Co. v. Chicago B. & Q. R. Co., 147 F. 2d 161 (C. C. A. 8th 1945), *cert. denied*, 325 U. S. 867 (1945);

For compensation to be allowed for the land's special adaptability for hydroelectric development, the use of the property for power purposes must have been reasonably probable without the use of eminent domain to obtain the other tracts necessary for the dam and reservoir.[6] This last rule has limited the possibility of considering such special adaptability in assessing just compensation, since the typical situation is one where many tracts must be acquired for such a project, the result being that the special adaptability is of no value to a hypothetical market that has no power of eminent domain in order to effect such combination.[7] If the condemnor is the United States and the likelihood of combining the land of the condemnee with necessary land of others by purchase is too remote to affect market value, the fact that the condemnee actually has the power of eminent domain from a state and might thereby acquire the other tracts will not be considered in determining whether there is a reasonable possibility of the condemnee's land being combined with other tracts necessary for a power development.[8]

In the case which established this refinement, it was stipulated that the stream concerned was non-navigable. Where the stream is navigable, the effect of the commerce clause of the United States Constitution must be considered if the United States is the condemnor. Resting on the argument that a private riparian owner has no property right in the water power of a navigable stream, the rule seems well established that the United States need not pay compensation for dam site adaptabil-

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Baetjer v. United States, 143 F. 2d 391 (C. C. A. 1st 1944), *cert. denied*, 323 U. S. 772 (1944); United States v. Boston, C. C. and N. Y. Canal Co., 271 Fed. 877 (C. C. A. 1st 1921). Dolan, *Present Day Court Practice in Condemnation Suits*, 31 VA. L. REV. 9 (1944); Note, 35 HARV. L. REV. 76 (1921); Comment, 26 TEX. L. REV. 199 (1947).

[6] McCORMICK, LAW OF DAMAGES §129 (1935); *Developments in the Law—Damages*, 61 HARV. L. REV. 113 (1947).

[7] New York v. Sage, 239 U. S. 57 (1915), *reversing* In re Bensel, 206 Fed. 369 (C. C. A. 2d 1913); McGovern v. New York, 229 U. S. 363 (1913); Medina Valley Irr. Co. v. Seekatz, 237 Fed. 805 (C. C. A. 5th 1916); Note, 44 YALE L. J. 1095 (1935). N. C. follows these principles regarding special adaptability value. Nantahala Power and Light Co. v. Moss, 220 N. C. 200, 17 S. E. 2d 10 (1941).

[8] United States *ex rel.* and for the Use of Tennessee Valley Authority v. Powelson, 319 U. S. 266 (1943), *reversing* 118 F. 2d 79 (C. C. A. 4th 1941), *modifying* T. V. A. v. Southern States Power Co., 33 F. Supp. 519 (W. D. N. C. 1940), *mandate conformed to*, 138 F. 2d 343 (C. C. A. 4th 1943), *cert. denied*, 321 U. S. 773 (1944). This case extends the rule that dam site value need not be compensated for (1) where the likelihood of combining the necessary tracts is too remote to affect market value, or (2) it could only be done by one armed with a power of eminent domain. Simply stated, the extension is that even though the condemnee has a power of eminent domain granted by a state, this will not be considered as bearing on the matter of reasonable possibility of combining the necessary tracts where the land is taken through the exercise of Federal eminent domain powers. It is significant, however, that Parker, J., refused to allow the condemnee's land to be valued solely on the basis of small separated tracts of wild mountain land in conforming to the higher Court's mandate. Notes, 38 ILL. L. REV. 218 (1943), 18 TENN. L. REV. 300 (1944).

ity value,[9] the rights and relations being fixed by the adoption of the Constitution.[10]

Grand River Dam Authority v. Grand-Hydro[11] presented for the first time the question of whether a licensee of the Federal Power Commission acquired by reason of its license any of the Federal Government's immunity from liability for the payment of compensation based on hydroelectric adaptability when condemning a dam site on a navigable stream. Grand-Hydro, a private corporation, had been granted a franchise and eminent domain powers by the State of Oklahoma for development of hydroelectric power on the Grand River. Several years later, the state legislature created the Grand River Dam Authority, a conservation and reclamation district, for hydroelectric development of the Grand River Basin.[12] Grand-Hydro owned the land constituting the Pensacola dam site which GRDA condemned in an action brought in the state courts. GRDA maintained that no evidence of value as a dam site should be admitted for several reasons based on local law, but all these were decided against GRDA. The contention that since GRDA had a license from the Federal Power Commission and Grand-Hydro did not, GRDA was the only agency which could legally build a dam at the site concerned and should not have to pay Grand-Hydro for a value the latter could not legally enjoy was also rejected.[13] On appeal,

[9] United States v. Chandler-Dunbar Water Power Co., 229 U. S. 53 (1913); Washington Water Power Co. v. United States, 135 F. 2d 541 (C. C. A. 9th 1943), *modifying* 41 F. Supp. 119 (E. D. Wash. 1941), *cert. denied*, 320 U. S. 747 (1943); Continental Land Co. v. United States, 88 F. 2d 104 (C. C. A. 9th 1937), *cert. denied*, 302 U. S. 715 (1937); United States v. West Virginia Power Co., 56 F. Supp. 298 (S. D. W. Va. 1944); *accord*, United States v. Appalachian Electric Power Co., 311 U. S. 377 (1940), *reversing*, 107 F. 2d 769 (C. C. A. 4th 1939).

[10] Continental Land Co. v. United States, 88 F. 2d 104 (C. C. A. 9th 1937), *cert. denied*, 302 U. S. 715 (1937).

[11] 69 Sup. Ct. 114 (1948), *affirming*, 201 P. 2d 225 (Okla. 1947).

[12] OKLA. STAT. ANNOTATED, tit. 82 §§861-881. The statutory grant of power to exercise a power of eminent domain read as follows: "To acquire by condemnation any and all property of any kind, real, personal, or mixed, or any interest therein within or without the boundaries of the District necessary or convenient to the exercise of the powers, rights, privileges and functions conferred upon it by this Act, in the manner provided by general law with respect to condemnation." OKLA. STAT. ANNOTATED, tit. 82 §862(f) (Supp. 1948). The general law referred to is OKLA. STAT. ANNOTATED, tit. 66 §§51-63 (1937). In North Carolina, N. C. GEN. STAT. §§56-1 to 56-10 (1943) grants eminent domain powers to power companies with the proceedings for condemnation to be as set out in N. C. GEN. STAT. §§40-11 to 40-29 (1943). Apparently, the general condemnation procedure in both states was designed originally for railroads.

[13] Grand-Hydro v. Grand River Dam Authority, 192 Okla. 693, 139 P. 2d 798 (1943) reversed the lower court which had excluded evidence of dam site value. That the Oklahoma Court did not reach this decision without considerable difficulty is attested to by a decision affirming the judgment which was subsequently withdrawn: 130 P. 2d 311 (advance sheets only, as decision withdrawn before bound volume 130 P. 2d published). The second trial resulted in a judgment in favor of Grand-Hydro for full dam-site value and was affirmed by the state court. Grand River Dam Authority v. Grand-Hydro, 201 P. 2d 225 (Okla. 1947), *cert.*

the United States Supreme Court affirmed 5-4 without deciding this vital federal question.

The Court was content to let the Oklahoma decision stand that such a federal license was not necessary on the part of Grand-Hydro in order for the evidence of dam site value to be considered.[14] This result was based on the following: (1) the petition for condemnation made no reference to the Federal Power Act or rights claimed thereunder; and (2) the Federal Power Act had merely attached conditions to the use of the land for a power site rather than rendering the site valueless to an owner for that purpose. The state law as to measure of compensation, consequently, was held to be unaffected by the Act.

The first point is narrow for a decision of such public significance. The second seems contrary to the plain language of the Federal Power Act,[15] for it certainly seems to have rendered a power site valueless for power uses insofar as a non-licensee owner is concerned.[16] The issue of whether a licensee of the FPC has the rights of the United States in the waters of the flowing stream under the commerce clause is not decided.

The history of the Federal Power Act and the earlier Federal Water Power Act is one of an attempt to preserve the water power in a navigable stream for the public, rejecting the idea of private ownership of the power in a navigable stream.[17] There is authority that such water

denied, 332 U. S. 841 (1947), *cert. granted*, 333 U. S. 852 (1948), *aff'd*, 69 Sup. Ct. 114 (1948).

In July, 1939, the Federal Power Commission had granted a license to GRDA on the basis of a finding that the proposed construction would affect interstate commerce because of its effect on the Arkansas River, a navigable stream.

[14] The assumption that there could be two valid outstanding FPC licenses to different parties covering the same site has no foundation in the Federal Power Act.

[15] 41 STAT. 1063, as amended, 49 STAT. 838, 16 U. S. C. §§791a-825r (1946).

[16] Since the condemning party already has a license, the present owner is powerless to get one. Should he or any grantee other than the licensee attempt to develop the site, it seems that 16 U. S. C. §817 (1941) would be violated: "It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States . . . except under and in accordance with the terms of a . . . license granted pursuant to this chapter."

Though the Oklahoma Court relied to some extent on the fact that the Federal Power Commission found that the GRDA came under the Act because the Grand River dam affected interstate commerce rather than because it was a navigable stream, the United States Supreme Court decision does not rest on this distinction. Apparently, federal regulation and control apply equally in the two situations. *See* Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U. S. 508, 525 (1941); Gatchell, *The Role of the Federal Power Commission in Regional Development*, 32 IOWA L. REV. 283 (1947).

[17] Fly, *The Role of the Federal Government in the Conservation of Water Resources*, 86 U. PA. L. REV. 274 (1938); Pinchot, *The Long Struggle for Effective Federal Water Power Legislation*, 14 GEO. WASH. L. REV. 9 (1945); Scott, *Is Federal Control of Water Power Development Inconsistent With State Interests*, 9 GEO. WASH. L. REV. 631 (1941); Comment, 39 MICH. L. REV. 976 (1941). For

in a navigable stream is not property at all, but if anyone has a property interest it would seem to be the public for public uses.[18] Thus, it does *not* follow that a private owner of land bordering a stream coming within federal control should be paid for the water power potentialities; to do so would reimburse him for something not owned by him, or, as Justice Douglas expresses it in the dissent, "give private parties an entrenched property interest in the public domain, which the Federal Power Act was designed to defeat."[19] The policy expressed in this argument and in prior cases[20] dealing with the effect of the commerce clause on dam site condemnation appears to have been rejected mainly because the licensee here had brought the condemnation suit in a state court, relying primarily on eminent domain powers granted by the state. The Court intimates that were the licensee seeking to condemn the dam site by virtue of its federal license, value due to dam site adaptability would not be an element of compensation.

Under the Federal Power Act, a licensee is granted the power of eminent domain, and it is expressly provided that the power can be exercised in the state courts or federal district courts, the practice and procedure of the state where the land lies being followed as nearly as may be if the proceeding is in the federal district court.[21] This can hardly mean that the state court can ignore substantive rights based on federal statutes.[22] Since the licensee relies on a federal statute, the

another point of view see Le Boeuf, *An Industry Appraisal of Federal Regulation of Electric Utilities Under the Federal Power Act*, 14 GEO. WASH. L. REV. 174 (1945).

[18] Bennett, *Some Uncertainties in the Law of Water Rights*, 21 So. CALIF. L. REV. 344 (1948).

[19] *See* Grand River Dam Authority v. Grand-Hydro, 69 Sup. Ct. 114, 122 (1948) (dissenting opinion). To allow the private owner without a license to be compensated for the site taken on the basis of its value as a hydroelectric site is to allow the owner a benefit in terms of money which the Federal Power Act denies him as far as actual use is concerned. Is such a "loophole" consistent with the Act and the policy it represents?

[20] See note 9, *supra*.

[21] 41 STAT. 1074 (1920), 16 U. S. C. §814 (1946). Proposed Federal Rule of Civil Procedure No. 71A will provide a federal condemnation procedure superseding this provision if it is accepted. *Proposed Rule to Govern Condemnation Cases in the District Courts of the United States Prepared by the Advisory Committee on Rules for Civil Procedure*, 7 F. R. D. 503 (1948). There has been consideration of such a rule before. The proponents claim that "it is better to have a single procedure, even if it is not so good, than a lot of different procedures, which in themselves may be marvelous." Nichols, *The Federal Power of Eminent Domain*, 4 FED. B. A. J. 159 (1941). The order of the United States Supreme Court of December 29, 1948, authorizing the transmittal of new rules of civil procedure to the Attorney-General for reporting to the present session of Congress did not include proposed rule 71A. 93 L. Ed. 251 (1948).

[22] The question is not what happens in a federal district court proceeding where such practice and procedure is to be used, but rather concerns an action in a state court. Even if it has some significance in this case, recent decisions restrict the "practice and procedure of the state" provision to procedural matters only, the federal and not state law governing the basis and measure of damages since these matters arise under federal law. U. S. *ex rel.* and for Use of T. V. A.

Federal Power Act, it would seem that it would have to be considered since it is "the supreme law of the land."[23]

Probably the most equitable result would be to exclude any consideration of value based on dam site adaptability, but to reimburse the condemnee for expenditures made in good faith.[24] This principle would be limited considerably, however, if land owners and hydroelectric companies could be presumed to know the effect of the Federal Power Act on dam site value in condemnation proceedings and be required, therefore, to take it into account in transactions involving dam site lands. The difficulty in applying this principle is the uncertainty caused by the continually expanding definition of "navigable stream."[25] Actually, most private power companies do not pay large premiums for dam site adaptability in their condemnation of the land, so there seems no good reason to reimburse them on that basis.[26]

A decision that a federal licensee need not compensate for dam site value in a condemnation case would have the effect of stimulating private power companies to develop dam sites and accept FPC licenses where they have acquired the sites under state-granted eminent domain powers, but have delayed plans for proposed dams because of the conditions attached to the 50-year FPC license.[27] Otherwise, they would run the risk of a licensee taking the site under federal eminent domain powers, the site being valued as farm or mountain land only.

These uncertainties ought to be settled. With hundreds of unlicensed

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v. Powelson, 319 U. S. 266 (1943); United States v. Miller, 317 U. S. 369 (1943); Kimball Laundry Co. v. United States, 166 F. 2d 856 (C. C. A. 8th 1948); State of Nebraska v. United States, 164 F. 2d 866 (C. C. A. 8th 1947); United States. v. 13,255.53 Acres of Land, 158 F. 2d 874 (C. C. A. 3rd 1946); United States v. Johns, 146 F. 2d 92 (C. C. A. 9th 1944); *accord,* United States v. Causby, 328 U. S. 256 (1946). *Contra:* Central Nebraska Public Power and Irr. District v. Harrison, 127 F. 2d 588 (C. C. A. 8th 1942). Dolan, *Present Day Court Practice in Condemnation Suits,* 31 VA. L. REV. 9 (1944) contains an excellent discussion on this point. Also see Hitching and Claxton, *Practice and Procedure in Eminent Domain Cases Under the T. V. A. Act,* 16 TENN. L. REV. 952 (1941); Fitts and Marquis, *Liability of the Federal Government and Its Agents for Injuries to Real Property Resulting from River Improvements,* 16 TENN. L. REV. 801 (1941).

[23] U. S. CONST. Art. VI, §2.

[24] Hale, *Value to the Taker in Condemnation Case,* 31 COL. L. REV. 1 (1931); Steiner, *Eminent Domain Damages,* 6 Mo. L. REV. 166 (1941).

[25] Note, 19 N. C. L. REV. 379 (1941); Comment, 39 MICH. L. REV. 976 (1941). The use of the term "navigable" to determine whether a river comes within Federal control under the commerce clause has served its usefulness and should be discarded. It is a fiction now, for the Court no longer means "navigable" in the sense of navigation or transportation, but means that the river is too important to the commerce of the nation for any of a number of reasons to leave under state control.

[26] This is because such lands are typically owned by many small land owners when condemned and evidence of special adaptability for dam site development is not admissible in the usual case. See Note, 106 A. L. R. 955 (1937).

[27] Note, 19 N. C. L. REV. 379 n. 19 (1941).

plants apparently within the scope of federal control,[28] with many undeveloped power sites in private hands, with the absolute supremacy of the federal power of eminent domain over persons and states,[29] the vital question of whether compensation is to include dam site adaptability value should be decided.[30] If it is included, the public will have to pay for it either in rates[31] or on recapture after the end of fifty years.[32]

But the principal case has not helped at all for it indicates that the federal right involved may be recognized in a federal court but may be ignored in a state court. In a dissenting opinion written after the United States Supreme Court had affirmed the judgment of the Oklahoma Court, Chief Justice Hurst stated what must occur to all who crave simplicity in the law: "I see no reason why the rule should not be the same in both instances."[33]

LEONARD S. POWERS.

Evidence—Fornication and Adultery—Admissibility Under Statute of Extrajudicial Confessions for Corroboration

The statute declaring fornication and adultery a crime[1] concludes with the following proviso: *that the admissions or confessions of one* [participant] *shall not be received in evidence against the other.* The statute has remained on the books in that same language since 1854,[2] and the cases that have arisen under it are numerous. The interpretation given to the proviso had been regarded as well-settled—that it meant exactly what it says. Recently, however, the court went far toward emasculating ninety-four years of construction in the case of *State v. Davis.*[3] Defendant, superintendent of an orphanage, and Lola Mae Reeves, a fourteen-year-old girl in his charge, were indicted under the statute. After the State had accepted the *feme* defendant's plea of *nolo contendere,* she was placed upon the stand where she testified, over defendant's objection, that she had had intercourse with the defendant on at least six occasions during a certain three month's time. Marguerite

[28] Gatchell, *Jurisdictional Problems Under the Federal Water Power Act of 1920,* 14 GEO. WASH. L. REV. 42 (1945).

[29] Dolan, *supra,* note 22, at 10; Recent Cases, 44 HARV. L. REV. 305 (1930).

[30] That it is no trifling matter is demonstrated by the principal case where the difference in valuation of a little over 400 acres, with and without dam site adaptability being considered, meant nearly a million dollars to the jury.

[31] 41 STAT. 1073 (1920), 16 U. S. C. §§812, 813 (1946).

[32] 41 STAT. 1071 (1920), as amended, 49 STAT. 844 (1935), 16 U. S. C. §807 (1946). The Supreme Court expressly refused to recognize these two factors as having any bearing on the point.

[33] Grand River Dam Authority v. Grand-Hydro, 201 P. 2d 225, 235 (Okla. 1947) (dissenting opinion).

[1] N. C. GEN. STAT. §14-184 (1943).

[2] N. C. CODE c. 34, §45 (1854).

[3] 229 N. C. 386, 50 S. E. 2d 37 (1948).

Wooten, the orphanage matron, was allowed to testify that the *feme* defendant previously had made a similar confession to her. This, too, was admitted over defendant's objection. Defendant was convicted, and on appeal he attacked the verdict and judgment principally on the grounds that the *feme* defendant was rendered incompetent to testify against him by the proviso in the statute, and also that the proviso was disregarded to his prejudice in the admission of Miss Wooten's testimony. The conviction was upheld in a 4-3 decision, the majority being of the opinion that the *feme* defendant was competent to testify, that "the prohibition of the statute is directed not to the person testifying but against the use in evidence of his previous admissions and confessions." It may be conceded that the case of *State v. Phipps*[4] was determinative of this point.

But then, after declaring the statute to inhibit the use of the extrajudicial confessions of one defendant against his co-defendant, the court proceeded to hold that it was nevertheless competent to admit Miss Wooten's testimony (as to the *feme* defendant's extrajudicial confession) for the purpose of *corroborating* the testimony of the *feme* defendant. This latter holding seems patently to ignore the language of the proviso. The statute does not speak of purpose.[5] The majority cited two cases in support of its holding on this point, *State v. McKeithan*[6] and *State v. Gore*,[7] and while these cases admittedly support the bald proposition that a witness's previous consistent statements are admissible to corroborate his testimony on the stand (if restricted to this purpose), neither case involved an indictment under a statute containing an inhibition similar to the one under consideration in the principal case. Hence these cases are clearly distinguishable.

There are three possible explanations for the court's holding that the use of such admissions and confessions is allowable if restricted to purposes of corroboration. First, in holding that the statutory inhibition was directed not to the person testifying but to the use of his previous admissions and confessions, the court admitted that such a construction was, in effect, to declare the proviso a mere codification of the general

[4] 76 N. C. 203 (1877). After a nolle prosequi had been entered as to the feme defendant, she was introduced as a witness against the male defendant. The opinion, however, makes no mention of the statutory proviso under consideration in the principal case. Apparently the general rules of evidence were held to be controlling.

[5] *Compare* State v. Rinehart, 106 N. C. 787, 11 S. E. 512 (1890) (apparently holding that the admissions or confessions of one defendant are not admissible against the other defendant for any purpose) *with* State v. Roberts, 188 N. C. 460, 124 S. E. 833 (1924) (where admissions of the feme defendant were admitted because spoken in the presence of the male defendant).

[6] 203 N. C. 494, 166 S. E. 336 (1932) (prosecution for procuring a person to burn a dwelling house).

[7] 207 N. C. 618, 178 S. E. 209 (1934) (involved prosecution as accessory before the fact of murder).

rule of evidence which prohibits the use of such admissions and confessions as hearsay.[8] But this "mere codification" idea gets out of hand when the court goes on to hold that the admissions and confessions of one defendant are competent for purposes of corroboration simply because this is also the usual rule.[9] Second, the holding might be justified upon an examination of the theory behind the use of previous consistent statements for purposes of corroboration. Such statements are available to establish the credibility of the witness, not as substantive evidence to prove the fact asserted in the confession,[10] and on this basis it might be argued that they are not used against the defendant. But this is pure theory. The practical result of such a practice is to use them against the defendant if, without them, the witness will not be believed by the jury.[11] Third, the court in its haste to see justice done might have felt the objection more technical than substantial. Since the defendant could not show he was prejudiced by the testimony (how could he ever show prejudice in such a case?), the verdict was not to be overturned. But the statute is clear. If it has been disregarded, this alone is reason enough to grant a new trial.[12]

JAMES L. TAPLEY.

Insurance—Automobile Liability Policy—Scope of Loading and Unloading Clause

The question of coverage afforded under "loading and unloading" clauses in automobile insurance policies has been a center of controversy since the inception of such contracts.[1] The usual policy of this type contains a liability clause for injuries sustained from accidents "arising out of the ownership, maintenance or use" of the vehicle, with "use" further defined to include "loading and unloading."

In *London Guarantee & Accident Co. v. C. B. White and Bros.*[2] the Supreme Court of Appeals of Virginia brings to focus the disputations

[8] Commonwealth v. Epps, 298 Pa. 377, 148 Atl. 523 (1930); State v. Allison, 175 Minn. 218, 220 N. W. 563 (1928); 4 WIGMORE, EVIDENCE §1076 (3rd ed. 1940).

[9] 4 WIGMORE, EVIDENCE §§1125-1126, 1131 (3rd ed. 1940); STANSBURY, NORTH CAROLINA EVIDENCE §52 (1946 ed.).

[10] STANSBURY, NORTH CAROLINA EVIDENCE §§51, 52 (1946 ed.).

[11] Justice Stacy dissented vigorously in the principal case, saying pointedly that the suggestion that Miss Wooten's testimony was not offered against the defendant "has at least the merit of novelty."

[12] Hooper v. Hooper, 165 N. C. 605, 81 S. E. 933 (1914); Broom v. Broom, 130 N. C. 562, 41 S. E. 673 (1902); State v. Gee, 92 N. C. 756, 762 (1885); State v. Ballard, 79 N. C. 627 (1878).

[1] For other discussions on this problem of coverage see Gibson B. Witherspoon, *What Protection Is Afforded Under the "Loading and Unloading" Clause of an Automobile Insurance Policy?*, 52 COM. L. J. 58 (1947); see Note, 160 A. L. R. 1259 (1946).

[2] 49 S. E. 2d 254 (Va. 1948).

in which courts have engaged with regard to these clauses. In the instant case the plaintiff had contracted to deliver coal to the defendants and used a truck covered by the described policy. The truck deposited the coal at the curb, left the scene of delivery, and was some 100 feet away on the return trip when a pedestrian on the sidewalk fell over a lump of coal and injured herself. It appears that the coal was not left on the sidewalk by the truck, but had been thrown there by employees of the plaintiff who were completing the delivery by shoveling the coal from where it had been dumped through an opening in the sidewalk into the purchaser's coal bin.

The court, in determining whether this accident was covered by the policy, could have followed either of two basic theories—the "coming to rest" doctrine or the "complete operation" doctrine. The court chose the latter, concluding that the shoveling was an integral part of the unloading process.[3]

Before liability can be imposed[4] under either of the above theories the court must be satisfied that there is sufficient causal connection between the accident and the vehicle used.[5] Generally the accident is held within the scope of the clause if the loading or unloading was an efficient factor, and in the absence of some substantial intervening force bearing no direct relation to the truck this requirement creates no serious problem to the imposition of liability.[6]

All courts profess to apply the usual canons of construction of insurance policies while considering those of the type in question. They agree that the intent of the parties is to be ascertained, that if the words are unambiguous they are to be taken in their usual and ordinary sense, and that clauses indefinite as to their exact meaning should be construed

[3] London Guarantee & Accident Co. v. C. B. White & Bros., 49 S. E. 2d 254, 258 (Va. 1948).

[4] In a majority of the cases the courts require that two questions be answered in the affirmative before holding the insurer liable: (1) Did the accident occur during the unloading?; (2) was the unloading the proximate cause of the accident? However, where the unloading creates the condition causing the injury or starts the force producing the injury, it is not necessary that the accident happen during the unloading to allow the insured to recover. Therefore it follows that the answer to the second question ultimately determines whether or not there will be liability.

[5] Maryland Casualty Co. v. United Corp. of Mass., 35 F. Supp. 570 (D. C. Mass. 1940); Pacific Automobile Ins. Co. v. Commercial Casualty Ins. Co., 108 Utah 500, 161 P. 2d 423 (1945) ("must be some causal relation between the use of the insured vehicle as a vehicle and the accident for which recovery is sought"); Handley v. Oakley, 10 Wash. 2d 396, 116 P. 2d 833 (1941).

[6] Maryland Casualty Co. v. Cassetty, 119 F. 2d 602 (C. C. A. 6th 1941) (Court allowed recovery where person fell on coal which truck had dumped on sidewalk, saying, "If the coal hadn't been unloaded, presumably she wouldn't have been injured."); B. & D. Motor Lines v. Citizens Casualty Co., 181 Misc. 985, 43 N. Y. S. 2d 486 (N. Y. City Ct. 1943), *aff'd*, 267 App. Div. 955, 48 N. Y. S. 2d 472 (1st Dep't 1944), *motion for leave to appeal denied*, 268 App. Div. 755, 49 N. Y. S. 2d 274 (1st Dep't 1944); Wheeler v. London Guarantee & Accident Co., 292 Pa. 156, 140 Atl. 855 (1928).

in favor of the insured.[7] Since some of the courts approve the "coming to rest" doctrine and others approve the "complete operation" doctrine, it follows that the courts are either applying in different jurisdictions these canons of construction in different ways, or are allowing some other factor to determine which theory they will adopt.

The "coming to rest" doctrine includes within the insurance coverage only those acts comprised in the removing of the goods from the truck until they come to rest, and until every connection of the motor vehicle with the process of unloading[8] has ceased.[9] It distinguishes between unloading and delivery,[10] and stresses such factors as the time elapsed between the unloading and the accident, and the actual relation of the truck to the accident. The "complete operation" doctrine omits for all practical purposes any distinction between unloading and delivery,[11] and holds that the policy applies at all times until the goods are delivered to the place of final destination.[12]

While the distinction between the two doctrines is readily apparent, logical bases to support each are not so apparent. The grounds supporting the "coming to rest" doctrine are pretty clearly spelled out in the cases adopting it, but the reasons for the trend toward the "complete operation" doctrine are not so obvious and merit examination. What appeals to the writer as being the soundest of the theories which have led a majority of the courts toward following the "complete operation" doctrine can be briefly summarized as follows: The delivery of the goods

[7] American Casualty Co. v. Fisher, 195 Ga. 136, 23 S. E. 2d 395 (1942). Cases are not in accord as to whether "loading and unloading" is ambiguous. *Compare* Bobier v. National Casualty Co., 143 Ohio St. 215, 54 N. E. 2d 798 (1944), *with* Zurich Gen. Accident & Liability Ins. Co. v. American Mut. Liability Ins. Co., 118 N. J. L. 317, 192 Atl. 387 (Sup. Ct. 1937).

[8] Both doctrines apply to "loading" as well as to "unloading." These two aspects will be considered separately.

[9] Maryland Casualty Co. v. United Corp. of Mass., 35 F. Supp. 570 (D. C. Mass. 1940); Ferry v. Protective Indemnity Co., 155 Pa. Super. 266, 38 A. 2d 493 (1944); Stammer v. Kitzmiller, 226 Wis. 348, 276 N. W. 629 (1937).

A leading statement of the doctrine appears in *Stammer v. Kitzmiller:* "Where the goods have been taken off the automobile and have actually come to rest, when the automobile itself is no longer connected with the process of unloading, and when the material which has been unloaded from the automobile has plainly started on its course to be delivered by other power and forces independent of the automobile and the actual method of unloading, the automobile may be said to be no longer in use."

[10] St. Paul Mercury Indem. Co. v. Standard Accident Ins. Co., 216 Minn. 103, 11 N. W. 2d 794 (1943); American Oil & Supply Co. v. U. S. Casualty Co., 19 N. J. Misc. 7, 18 A. 2d 257 (Sup. Ct. 1940).

[11] Maryland Casualty Co. v. Tighe, 29 F. Supp. 69 (N. D. Cal. 1939), *aff'd*, 115 F. 2d 297 (C. C. A. 9th 1940) (condemning distinctions between unloading and delivery); Wheeler v. London Guarantee & Accident Co., 292 Pa. 156, 140 Atl. 855 (1928).

[12] State *ex rel.* Butte Brewing Co. v. District Court, 110 Mont. 250, 100 P. 2d 932 (1940); B. & D. Motor Lines v. Citizens Casualty Co., 181 Misc. 985, 43 N. Y. S. 2d 486 (N. Y. City Ct. 1943), *aff'd*, 267 App. Div. 955, 48 N. Y. S. 2d 472 (1st Dep't 1944), *motion for leave to appeal denied*, 268 App. Div. 755, 49 N. Y. S. 2d 274 (1st Dep't 1944).

to the purchaser is the main purpose for having the truck, and such delivery is but a step incident to the use of the truck and necessary to accomplish its purpose. The parties intended the insurance to cover accidents arising out of the use of the truck while accomplishing the purposes for which it is owned, and therefore to provide coverage for accidents incurred during the delivery.[13]

Whether or not this, and additional reasoning found in other cases,[14] offer a satisfactory explanation for the doctrine remains, as is evidenced by the cases, a moot question. It is believed that there are rational objections to the "complete operation" doctrine. The reasoning under it appears to permit no logical stopping place for limiting the liability of the insurer. As long as the sometime tenuous requirement of causal connection is satisfied, it would seem that delivery after "unloading" cover most any distance and be facilitated by any activities reasonably necessary to accomplish that purpose. The need for presence of or physical connection with the truck and closeness in time between the unloading and the accident bow to the policy of protecting the insured.

Recognizing the danger thus presented, most courts conclude that each case must be treated according to its peculiar facts,[15] and thus leave open an opportunity for "drawing the line" in cases obviously demanding that, where otherwise the doctrine would apply.[16]

Although there are very few cases on the problem, the same divergent views are expressed in construction of the "loading" clause.[17] One view

[13] State *ex rel.* Butte Brewing Co. v. District Court, 110 Mont. 250, 100 P. 2d 932 (1940).

[14] Some of the other reasons employed by courts adopting the doctrine are here briefly mentioned. The court said in Maryland Casualty Co. v. Cassetty, 119 F. 2d 602 (C. C. A. 6th 1941) that there appeared from the nature of the policy an attempt to secure general coverage, and because of that it was unwise to apply highly technical rules of construction. The value of this as shedding added light on the problem is dubious. In Pacific Automobile Ins. Co. v. Commercial Casualty Ins. Co., 108 Utah 500, 161 P. 2d 423 (1945) the court reasoned that the presence of "loading and unloading" in the policy clearly showed that the coverage should include some accidents when the vehicle is stationary, and that the parties would be deemed to contemplate accidents happening during the course of delivery at the time of making the policy. Therefore conformance with their intent would require that liability should be imposed for such injuries. In Bobier v. National Casaulty Co., 143 Ohio St. 215, 54 N. E. 2d 798 (1944) the court considered the phrase "loading and unloading" ambiguous, and since those were the words of the insurer, held they should be construed in favor of the insured.

[15] American Oil & Supply Co. v. U. S. Casualty Co., 19 N. J. Misc. 7, 18 A. 2d 257 (Sup. Ct. 1940). This is also the opinion of text authors. 7 APPLEMAN, INSURANCE §4322.

[16] Stating that cases must be so treated gives the court a loophole for not applying the "complete operation" doctrine in situations which fall within its logical import, yet are so singular in facts that they demand different treatment. This exception, for example, might likely be applied where the actual delivery of the goods after the removal from the truck would require unusual methods, considerable time, and cover long distances.

[17] See cases cited note 18 *infra*. Also see State *ex rel.* Butte Brewing Co. v. District Court, 110 Mont. 250, 256, 100 P. 2d 932, 934 (1940).

regards all continuous acts in moving the goods from their place of storage to the actual placing of them on the vehicle as within the policy,[18] while the alternate view regards acts other than the actual loading on the truck as merely preparatory and not within the scope of the policy.[19] Under decisions thus far reported it is difficult to determine just how much the courts will allow "loading" to cover. Again such factors as uninterrupted continuity of movement, and perhaps the time and distance involved, may well be factors of weight. It would seem, whether dealing with loading or unloading, that before the truck could properly be held as in "use" there should be a tangible relation between the truck itself and the goods.

In construing the phrase ". . . use . . ." as enlarged by "loading and unloading" it is submitted that there is merit in the contention that some courts have overlooked the fact that the latter clause is merely to extend "use" and does not, at least in the absence of other factors,[20] purport to completely divest it of its usual connotation. It is believed that the word "unloading" as generally thought of embraces only acts closely connected with the lifting of the goods off the truck, and that liability imposed for accidents lacking closeness in time and physical connection with the vehicle infringes on the intent of the parties.[21]

The upshot of those cases which contravene the intent of the parties will likely be the modification of insurance policies in order to obtain decisions more in keeping with the usual meaning of the words "loading and unloading." This could be accomplished by inserting in the insurance contract a definition of those words as the parties intend that they shall be used.

CHARLES L. FULTON.

Insurance—Loss Occasioned by False Pretenses—Coverage Under Automobile Theft Policy

Where title and possession to an automobile are obtained by a swindler using a preconceived plan of false pretense, may the insured owner

[18] Washington Assur. Corp. v. Maher, 31 Del. Co. Rep. 575 (Pa. 1942). *Contra:* Ferry v. Protective Indemnity Co., 155 Pa. Super. 266, 38 A. 2d 493 (1944) (on very similar facts).

[19] Ferry v. Protective Indemnity Co., 155 Pa. Super. 266, 38 A. 2d 493 (1944).

[20] Further explanations in the policy or a construction of the entire instrument might tend to expand the meaning of the phrase, as might an established course of dealing under the policy consistent with the enlarged interpretation.

[21] In Zurich Gen. Accident & Liab. Ins. Co. v. American Mut. Liab. Ins. Co., 118 N. J. L. 317, 192 Atl. 387 (Sup. Ct. 1937) an employee under the usual policy had taken milk off the truck and was putting it in an icebox inside a building when an ice pick in his pocket injured someone. The court, in denying liability under the policy, at page 319, 192 Atl. 388, said: "These words are plain and unambiguous, and delimit with understandable certainty the liability imposed upon the insurer. They relate to the vehicle itself, and exclude acts that are only remotely connected with its ownership, use, or operation."

of the property so lost recover under a policy protecting against loss from larceny and theft? Such a problem was presented in a recent case[1] decided by the Supreme Court of Arkansas. There, the owner of an automobile, who was induced to part with the car for a check on a bank in which the pretended buyer did not have an account, was seeking recovery under an insurance policy indemnifying against loss occasioned by theft, larceny, robbery or pilferage. The insurer resisted the claim on grounds that the automobile was lost through an act constituting false pretenses and that the policy did not protect the insured against such loss. *Held:* Even if the swindler in this case is guilty only of false pretense, still—under the Arkansas statute—such false pretense is deemed to be larceny and insured is entitled to recovery.

The decision in the case commends itself as a sound result. As to the reasoning of the court, in so far as it involves the problem of interpreting the coverage intended in the insurance contract, one cannot be quite so sure. Indeed when one reads the cases upon this branch of the American law he discovers little but chaos, both as to concrete decisions and as to reasons therefore.[2]

For convenience in analyzing the conflicting decisions involving an interpretation of the meaning of the words "theft" and "larceny" as used in an automobile insurance policy[3] the writer chooses to present them in two groups—(1) those apparently placing a controlling emphasis upon the label branded upon the crime committed thus giving to the words their legal and technical meaning; (2) those cases holding that the words should be given their usual meaning in the ordinary walks of life regardless of the crime for which the wrongdoer could be convicted.

An oversimplification of the reasoning used by those courts falling within the first classification in determining whether a given set of circumstances is within the risk contemplated appears to be as follows: *A* has been deprived of his car. He is insured against theft. Theft and larceny are synonymous, and, therefore, the insurer is liable to *A* only if the act by which he suffered his loss is larceny as defined in our criminal law.

Since the common law distinction between larceny and false pretenses still exists in the criminal codes of a majority of jurisdictions, it naturally follows that most courts using such an approach, when confronted by the question presented in the principal case, have denied

[1] Central Surety Fire Corp. v. Williams, —— Ark. ——, 211 S. W. 2d 891 (1948).

[2] Generally, see Notes in 14 A. L. R. 215; 19 A. L. R. 171; 24 A. L. R. 740; 30 A. L. R. 662; 38 A. L. R. 1123; 46 A. L. R. 534; 89 A. L. R. 465; 109 A. L. R. 1080; 133 A. L. R. 920; and 152 A. L. R. 1100.

[3] Unless otherwise noted, the decisions referred to in discussing both groups are distinguishable from the principal case in that the insurance policies involved therein provided for coverage against theft only.

recovery, saying that since the owner in parting with the property intended to invest the swindler with the title as well as possession, the latter has committed the crime of obtaining property by false pretense, an act not contemplated by the parties to the contract.[4] On the other hand, as in the principal case, recovery has been allowed in those jurisdictions wherein the act is deemed to be larceny.[5]

Though usually in accord in applying rules of construction applicable to insurance contracts in general,[6] there is little harmony in the results reached in those cases apparently falling within the second of the writer's classifications. Some say that "theft" is a broader and looser term than "larceny" and therefore such a loss is within its meaning as used in the policy.[7] On the other hand, others have concluded that "theft" as used in an insurance policy has a narrower meaning and that such a loss is not one fairly to be contemplated by the parties.[8] Thus recovery has been allowed even in jurisdictions where the common law distinction between larceny and false pretenses is recognized[9] and denied in another where the two crimes are no longer distinguishable.[10]

It is submitted that the reasoning of those courts falling within the second classification is the sounder, and, when properly applied, reaches

[4] Illinois Auto. Ins. Ex. v. Southern Motor Sales Co., 207 Ala. 265, 92 So. 429 (1922); Royal Ins. Co. v. Jack, 113 Ohio St. 153, 148 N. E. 923 (1925) (alternative holding); *cf.* Laird v. Employer's Liability Assur. Corp., 2 Terry, Del., 216, 18 A. 2d 861 (1941) (stock certificates); Cedar Rapids National Bank v. American Surety Co., 197 Iowa 878, 195 N. W. 253 (1923) (bank theft policy).

[5] Brady v. Norwich Union Fire Ins. Co., 47 R. I. 416, 133 Atl. 799 (1926); Gaudy v. N. C. Home Ins. Co., 145 Wash. 375, 260 Pac. 257 (1927) (recovery denied on other grounds); *accord,* Farmer's Loan & Trust Co. v. Southern Surety Co., 285 Mo. 621, 226 S. W. 926 (1920) (common law larceny).

[6] As a rule they agree that the policy should be interpreted in the light of its nature as a contract of insurance, in view of its purpose as such, and with a considerable degree of liberality in favor of the insured and against the insurer by reason of its having framed the contract, and that a risk fairly within its contemplation is not to be avoided by nice distinctions or artificial refinements in the use of words.

[7] Hill-Howard Motor Co. v. North River Ins. Co., 111 Kans. 225, 207 Pac. 205 (1922); Overland-Reno Co. v. International Indemnity Co., 111 Kans. 668, 208 Pac. 548 (1922); *cf.* Pennsylvania Indemnity Fire Corp. v. Aldridge, 73 App. D. C. 161, 117 F. 2d 774 (1941) (temporary larceny as theft coverage); Granger v. New Jersey Ins. Co., 108 Cal. App. 290, 291 Pac. 698 (1st Div. 1930); Fidelity and Casualty Co. of N. Y. v. Walker, 205 Ky. 511, 266 S. W. 4 (1924) (household theft policy); Toms v. Hartford Fire Ins. Co., 146 Ohio St. 39, 63 N. E. 2d 909 (1945) (temporary larceny). *But cf.* Royal Ins. Co. v. Jack, 113 Ohio St. 153, 148 N. E. 923 (1925).

[8] Fiske v. Niagara Fire Ins. Co., 207 Cal. 355, 278 Pac. 861 (1929) (by implication); Delafield v. London & Lancashire Fire Ins. Co., 177 App. Div. 477, 164 N. Y. S. 221 (1st Dep't 1917); *cf.* Van Vechten v. American Eagle Fire Ins. Co., 239 N. Y. 303, 146 N. E. 432 (1925) (temporary larceny).

[9] Hill-Howard Motor Co. v. North River Ins. Co., 111 Kans. 225, 207 Pac. 205 (1922); Nugent v. Union Automobile Ins. Co., 140 Ore. 61, 13 P. 2d 343 (1932) (by implication).

[10] Delafield v. London & Lancashire Fire Ins. Co., 177 App. Div. 477, 164 N. Y. S. 221 (1st Dep't 1917); *see* Van Vechten v. American Eagle Fire Ins. Co., 239 N. Y. 303, 306, 146 N. E. 432, 433 (1925).

the more justifiable result. Such gaps as resulted from the niceties and technical elements of common law larceny can be, and generally have been, eliminated in the criminal statutes. The parties to a contract of insurance should not be bound by any such artificial refinement. Unless it is obvious that words which appear in an insurance policy are intended to be used in a technical connotation, they should be given the meaning which common speech imparts. The common thought and common speech meaning of theft is that which prevails, not among lawyers and judges, but among people, the great majority of whom have never heard of any such technical distinctions.[11] The insured is purchasing protection against loss occasioned by an unlawful deprivation of his property and the insurer is in the business of selling such protection. If the act by which the loss results is fairly to be contemplated within the terms of the contract, giving to that instrument a considerable degree of liberality in favor of the insured and against the insurer by reason of its having framed the contract, recovery should be allowed, notwithstanding any label given the crime for which the wrongdoer may be tried and convicted. The loss to the insured is present and real whether the act of the swindler be technically "false pretenses" or "larceny."

Another consideration emphasizing the desirability of giving to the terms their common thought meaning is the need for uniformity of construction of the insurance contract. Theft insurance policies are generally standardized. They are not limited in protection to the jurisdiction wherein the policy is purchased. Theft in any other state is equally within its terms. This, without more, is sufficient to forbid a reading that would cause the risks to vary with the accident of local laws.[12] Neither insured nor insurer could reasonably have intended that the same act would be theft within the purview of the contract if committed in one jurisdiction but otherwise if committed in another. The prevailing disagreement in the decisions as to the common thought meaning of the terms is readily admitted; yet, it is beyond all reasonable expectations to believe that uniformity is within the realm of possibility when contracts of insurance are construed in terms of the criminal codes.

As has been noted, the lack of agreement as to whether theft as used in the contract is broader or narrower than larceny largely accounts for the varying results in those cases emphasizing the common thought meaning, and the presumption that they are synonymous terms is a necessary premise to any conclusion reached by those courts placing a controlling emphasis upon the label given the act committed. But, it should

[11] Pennsylvania Indemnity Fire Corp. v. Aldridge, 73 App. D. C. 161, 117 F. 2d 774 (1941).

[12] Van Vechten v. American Eagle Fire Ins. Co., 239 N. Y. 303, 146 N. E. 432 (1925).

be noted that the cases referred to in either group have, in the main, involved policies using only the term "theft" to describe the intended coverage. The policy in dispute in the principal case, as apparently do those in general use today, lists theft *and* larceny as coverages. One may reasonably predict that the inclusion of both should result in more uniform decisions granting recovery. No longer should it be necessary to arrive at the intended meaning of the word "theft" in terms of its relation to larceny and, therefore, the primary source of disagreement should have been eliminated by the terms of the agreement itself. Only in those states wherein the act proximating the loss in dispute is classified as larceny may one reasonably expect a controlling emphasis to be placed uopn the crime committed in construing such a policy. It would appear that the courts should concede that, in so far as theft is now used in the policy, it is not restricted in its meaning to that of larceny.[13] Any such concession would necessitate an abandonment of the reasoning applied by those courts heretofore denying recovery on grounds that the act of the wrongdoer is "false pretenses" and the policy only protects against an act amounting to "larceny." Those jurisdictions which have previously held "theft" to be a narrower term than "larceny" and thus denied recovery, even where under their criminal code the act involved is larceny, should be expected to grant recovery where the policy itself lists larceny as a coverage. It has been said that there is a growing trend in the more recent decisions to rule more strictly against insurance companies on the "theft" provisions of their policies.[14] In some of these decisions, though the direct point in question was not involved, the courts have taken cognizance of the comprehensive language of the new type policy and abandoned older stands on the strength thereof.[15] It is submitted, therefore, that even those jurisdictions having previously been confronted with the question under discussion and answered it in favor of the insurer would not necessarily reach the same result in a proper case brought under the comprehensive type policy now in general use.

The only North Carolina case[16] found involving a dispute based upon the coverage provisions of an automobile theft policy did not involve the

[13] *See* Mello v. Hamilton Fire Ins. Co., 71 R. I. 510, 514, 47A. 2d 621, 623 (1946) (concurring opinion).

[14] Baker v. Continental Ins. Co., 155 Kan. 26, 122 P. 2d 710 (1942).

[15] *Compare* Block v. Standard Ins. Co. of New York, 292 N. Y. 270, 54 N. E. 2d 821 (1944) (recovery allowed in temporary larceny situation), *with* Van Vechten v. American Eagle Fire Ins. Co., 239 N. Y. 303, 146 N. E. 432 (1925) (recovery denied). Also *compare* Toms v. Hartford Fire Ins. Co., 146 Ohio St. 39 63 N. E. 2d 909 (1945) (allowing recovery for temporary larceny), *with* Hoyne v. Buckeye Union Casualty Co., —— Ohio App. ——, 69 N. E. 2d 153 (1943) (recovery denied).

[16] Hanes Funeral Home, Inc. v. Dixie Fire Ins. Co., 216 N. C. 562, 5 S. E. 2d 820 (1939) (temporary larcency).

situation presented in the principal case; thus, one may only surmise as to what may be the result when, and if, such a question is properly presented to our highest tribunal. There is much in the language of that opinion, however, that would permit one to reasonably conclude that our court would follow the reasoning of those courts placing a controlling emphasis upon the label given the crime committed in reaching a decision denying recovery.[17] Yet, there is nothing in the opinion indicating that the policy under consideration was the comprehensive type policy purporting to protect the insured against loss due to "theft" *and* "larceny." It is not, therefore, too much to hope that our court when confronted with such a policy will recognize that "theft" as used therein should be given its common thought meaning, perhaps that found in *Bouvier's Law Dictionary*[18] where theft is thus defined:

"A popular term for larceny.
"It is a wider term than larceny and includes other forms of wrongful deprivation of property of another.
"Acts constituting embezzlement or swindling may be properly so called."

CLARK C. TOTHEROW.

Recordation—Priority by—Title by Estoppel as Affected by

Timber land was owned by three brothers and three sisters as tenants in common. One brother, without authority from the others, purported to sell all the timber to the defendant by an unsealed instrument dated November 15, 1946. On November 27, 1946, the sisters deeded their interest to the three brothers, whereby each brother acquired an additional one-sixth interest in the land. On December 14, 1946, all three brothers deeded the timber to the plaintiff, who had no actual notice of the earlier instrument. On December 16, 1946, the defendant recorded his instrument of November 15th. On December 18, 1946, the plaintiff's deed was recorded. Last, the deed from the sisters was recorded on January 15, 1947. Plaintiff sought an injunction against further cutting and removal of timber by defendant, to which the defendant counterclaimed and sought specific performance of the unsealed instruments against the three brothers and their grantee. *Held:* The unsealed instrument of November 15 was an enforceable contract to convey, by which the defendant was entitled to the original one-sixth interest owned by the vendor, but the plaintiff was entitled to the rest of the timber,

[17] Theft is defined as larceny. Larceny is given its common law definition including the requirement that the taking must be under such circumstances as to amount technically to a trespass. Great emphasis is placed on whether or not the act of the wrongdoer meets the common law or statutory requirements of larceny.
[18] BOUVIER, LAW DICTIONARY 3267 (Rawle's 3d ed. 1914).

including the one-sixth interest acquired by the brother after he had contracted to convey to the defendant.[1]

SECTION I—PRIORITY BY RECORDATION

The court ruled that when the defendant registered his instrument "he thereby established his right to receive a conveyance of the one-sixth undivided interest . . . even against a person *thereafter*[2] purchasing such interest . . . for a valuable consideration."[3] It is believed that such language was inapplicable to the facts, since the plaintiff acquired his interest *before* the defendant recorded.

Where *A* conveys an interest in realty to *B* and later conveys the same interest to *C*, with *C* recording first, our court has uniformly held that *C* has the better title, saying ". . . the one first registered will confer the superior right."[4] Here *C* is the subsequent purchaser and the recording acts have almost invariably been regarded as intended to protect subsequent purchasers and creditors only.[5] Thus under the recordation acts the grantor retains a power[6] to defeat his earlier conveyance, if not recorded, by a subsequent conveyance to a second grantee.[7] This encourages prompt recordation. In North Carolina, even though *C* has actual notice of the prior conveyance he will prevail. "No notice, however full or formal, will take the place of recording" and since *B* fails to record, *C* is not put on notice.[8] This oft-repeated and applied phrase is intended to give sanctity to the recording statutes. The two phrases last above quoted are of such common legal parlance that they are often used to reach decisions in which clear analysis would compel different results.

The instant decision demanded such clear analysis, where *A* contracted to convey to *B*, then conveyed to *C*, but *B* recorded prior to *C*. Failure to grasp the distinction between this situation and the one above mentioned where *C* recorded first, will lead to a trap into which some

[1] Chandler v. Cameron, 229 N. C. 62, 47 S. E. 2d 528 (1948).
[2] Italics supplied.
[3] Chandler v. Cameron, 229 N. C. 62, 64, 47 S. E. 2d 528, 530 (1948).
[4] Combes v. Adams, 150 N. C. 64, 68, 63 S. E. 186, 187 (1908).
[5] *E.g.*, Patterson v. Bryant, 216 N. C. 550, 5 S. E. 2d 849 (1939); Glass v. Lynchburg Shoe Co., 212 N. C. 70, 192 S. E. 899 (1937); Warren v. Williford, 148 N. C. 474, 62 S. E. 697 (1908); Wallace v. Cohen, 111 N. C. 103, 15 S. E. 892 (1892). As between the parties a conveyance is valid without registration, *e.g.*, Weston v. Lumber Co., 160 N. C. 263, 75 S. E. 800 (1912); McBrayer v. Harrill, 152 N. C. 712, 68 S. E. 204 (1910); Leggett v. Bullock, 44 N. C. 283 (1853).
[6] Concerning the nature of this power, see Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L. J. 710, 756 (1916); Aigler, *The Operation of the Recording Acts*, 22 MICH. L. REV. 405, 415 (1923).
[7] 5 TIFFANY, REAL PROPERTY §1262 (3d ed. 1939).
[8] *E.g.*, Patterson v. Bryant, 216 N. C. 550, 5 S. E. 2d 849 (1939); Lanier v. Roper Lumber Co., 177 N. C. 200, 98 S. E. 593 (1919); Fleming v. Burgin, 37 N. C. 584 (1843).

courts have fallen. The decision in the principal case is adverse to the subsequent purchaser who was misled by the state of the record, caused by the failure of *B* to record promptly. The court cites *Combes v. Adams,*[9] but in that case the subsequent purchaser recorded first, and the holding was correct that the first recorded instrument took priority. It is suggested that the court in the principal case could have bolstered its opinion by citing several North Carolina decisions[10] in which strong dicta appear to the effect that the subsequent purchaser must record first, to obtain priority in this situation. While the dicta seem to require the subsequent purchaser for value to register his deed before the prior purchaser records his, such was the fact in each case, therefore these are not square holdings that the subsequent purchaser would have lost priority had this not been true.

In *Builders' Sash & Door Co. v. Joyner,*[11] as in the instant case, the prior purchaser recorded before the subsequent purchaser. The Court held that the prior registry should prevail, without citing any authority to that effect, and without taking into account the considerations raised in this note.

The North Carolina registration act is without any express provision that the subsequent purchaser must record first to obtain priority.[12] The majority of courts with similar statutes hold their acts do not require a prior registration of the subsequent conveyance in order for it to have priority over an earlier executed one.[13] Recordation statutes

[9] 150 N. C. 64, 63 S. E. 186 (1908).

[10] *See, e.g.,* Tocci v. Nowfall, 220 N. C. 550, 561, 18 S. E. 2d 225, 232 (1941); Eaton v. Doub, 190 N. C. 14, 19, 128 S. E. 494, 497 (1925); Sills v. Ford, 171 N. C. 733, 741, 88 S. E. 636, 640 (1916); Collins v. Davis, 132 N. C. 106, 111, 43 S. E. 579, 581 (1903); Maddox v. Arp, 114 N. C. 585, 588, 19 S. E. 665 (1894).

[11] 182 N. C. 518, 109 S. E. 259 (1921) (where first grantee in plaintiff's chain of title, whose deed was prior in execution, registered his conveyance one day after date of deed to first grantee in defendant's chain); *accord,* McHan v. Dorsey, 173 N. C. 694, 92 S. E. 598 (1917) (deeds filed simultaneously for record, one prior in execution given priority).

[12] N. C. GEN. STAT. (1943) §§47-18 and 20. For a complete classification of the statutes in the various states, see, 2 POMEROY, EQUITY JURISPRUDENCE §646 (5th ed. 1941).

[13] Steele v. Spencer, 1 Peters 552, 7 L. Ed. 259 (U. S. 1828) (construing Ohio recordation act); Miller v. Merine, 43 Fed. 261 (1890) (construing Mo. statute); Steiner v. Clisley, 95 Ala. 91, 10 So. 240 (1891); Brown v. Nelms, 86 Ark. 368, 112 S. W. 373 (1908) [*contra:* Glasscock v. Mallory, 139 Ark. 83, 213 S. W. 8 (1919); Penrose v. Doherty, 70 Ark. 256, 67 S. W. 398 (1902)]; Van Eepoel Real Estate Co. v. Sarasota Mills Co., 100 Fla. 438, 129 So. 892 (1930) (where mortgagee did not record a purchase money mortgage until after mechanic without notice completed work, mortgagee was estopped to claim priority over mechanic's lien, though mechanic's lien was filed subsequent to recording of mortgage); Feinberg v. Stearns, 56 Fla. 279, 47 So. 797 (1890); Randell v. Hamilton, 156 Ga. 661, 119 S. E. 595 (1923); McGuire v. Barker, 61 Ga. 339 (1878); Bank of Farmington v. Ellis, 30 Minn. 270, 15 N. W. 243 (1883); Craig v. Osborne, 134 Miss. 323, 98 So. 598 (1924) (where doctrine was clearly stated); Owens v. Potts, 149 Miss. 205, 115 So. 336 (1928) (while noting that Miss. by statute in 1924 amended its recordation act so as to change the rule laid down in Craig v. Osborne, *supra,*

of many states require priority of registry by express provision that a conveyance is void against any subsequent purchaser "whose conveyance is first duly recorded."[14] Only three other jurisdictions[15] have been found which reach the result of the instant case without such express wording in their acts.

A clear illustrative decision of the majority view above, where the recordation statute is without such express provision, is *Swanstrom v. Washington Trust Co.*,[16] where the owner conveyed certain property to the appellant on December 5, 1903. A portion of the same property was conveyed to the respondents, for valuable consideration, on May 27, 1904. Appellant's deed was recorded June 10, 1904, and the respondent's deed was not recorded until March 7, 1905. The respondents contended their deed had priority, because they were bona fide purchasers without actual or constructive notice of the prior and unrecorded deed. The appellant contended that its deed had priority because it was first in time and first recorded. Judgment for the respondents was affirmed: "It is not necessary that the subsequent conveyance should be recorded in order to gain priority, unless the statute so provides."

As pointed out by one author,[17] "where through the neglect of the first grantee to record his deed, a subsquent party has been led to part with a valuable consideration, a race for registry between the two does not afford a proper criterion by which their rights should be determined." Another author,[18] commenting on the statutes requiring subsequent purchasers to record first to insure priority, notes that there is

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the court applied the rule of that case because the transaction involved occurred prior to the amendment); Sanborn v. Adair, 29 N. J. Eq. 338 (1878); Northrup v. Brehmer, 8 Ohio 392 (1838); Turpin v. Sudduth, 53 S. C. 295, 31 S. E. 245 (1898); King v. Fraser, 23 S. C. 543 (1885); Ranney v. Hogan, 1 Posey, Unrep. Cas. 253 (Tex. 1880); Nichols v. De Britx, 178 Wash. 375, 35 P. 2d 29 (1934); Swanstrom v. Washington Trust Co., 41 Wash. 561, 83 Pac. 76 (1906). *But cf.* Fallass v. Pierce, 30 Wis. 443 (1872) (after great deliberation and several rehearings court decided that its statute required the subsequent purchaser to record first by express provision to that effect, but was fully cognizant of the opposing view in absence of such provision).

[14] A typical statute of this type is CAL. CIV. CODE (1941) §1214, which provides: "Every conveyance of real property, other than a lease for a term not exceeding one year, is void against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, *whose conveyance is first duly recorded*, . . ." Insertion of such a clause does not solve all difficulty, see, Note, 14 CALIF. L. REV. 480 (1925).

[15] Simmons v. Stum, 101 Ill. 454 (1882); Houlahan v. Finance Consol. Mining Co., 34 Colo. 365, 82 Pac. 484 (1905) (Colo. adopted Ill. statute, hence the Ill. view was followed) (see AIGLER, CASES ON TITLES, 848 n. 17 (3d ed. 1942) for criticism that the Ill. court has read something into the statute); Whitesides v. Watkins, 58 S. W. 1107 (Tenn. 1900) (where court felt bound by its earlier decision of Copeland v. Bennett, 10 Yerg. 355 (Tenn. 1837), though Barton, J., stated that if the question was an open one, he would be of the opinion that the law was otherwise, giving a clear analysis of the problem).

[16] 41 Wash. 561, 83 Pac. 1112 (1906).

[17] WEBB, RECORD OF TITLE §13 (1891).

[18] 5 TIFFANY, REAL PROPERTY 1276 (3d ed. 1939).

considerable force to the opposite view and that the statutory provisions involve a departure from the theory that a purchaser is to be protected from a prior unrecorded conveyance because he is in effect a purchaser without notice thereof. Whatever may be the legalistic or logical arguments, it is believed that the intent and purpose of the registration acts is to require such recordation as will provide public records, which may be relied upon by parties about to acquire an interest in the property, to indicate the exact status of title.[19] It is believed that the instant decision has just the opposite effect. The failure of the first purchaser to record was a prejudice to the subsequent purchaser, who, by his best efforts at the time of parting with valuable consideration, could not determine from the record that the earlier conveyance had been made. The first purchaser was not prejudiced by the failure of the second grantee to record, since he had already parted with his consideration. To require a subsequent conveyance of title to be recorded so that a prior purchaser of the same property may be able to obtain information of its existence would not be in furtherance of the general purpose of the registration acts, which is to protect those who are entitled to rely on the public records from being undone by *prior* secret conyevances. The instant decision in effect writes into our recordation statute the clause noted above.[20]

It is conceivable that the present decision is an invitation to fraud. Such might be the case where *B* fails to record until he hears that *C* has just purchased relying on the record, and then beats *C* to the registry. If the court is faced with such a situation it might be induced, by such a clear instance of the obvious injustice of its present view to change its position to that of the weight of authority. This is especially true in view of the fact that the considerations brought forth in this comment have never been discussed and appraised by the court. The usual reason given by the court for its result, namely to encourage prompt registration, is unsound in this case, for *B*, whose failure to record promptly caused *C*'s difficulty, wins under this decision.

DAVID N. HENDERSON.

SECTION II—TITLE BY ESTOPPEL AS AFFECTED BY RECORDATION

The scope of this section is limited to the one-sixth interest the vendor acquired after he had purported to sell all the timber to defend-

[19] For avowals of such purpose, see Grimes v. Guion, 220 N. C. 676, 679, 18 S. E. 2d 170, 172 (1942); Dorman v. Goodman, 213 N. C. 406, 412, 196 S. E. 352, 355 (1938); Quinnerly v. Quinnerly, 114 N. C. 145, 148, 19 S. E. 99 (1894); Blevins v. Barker, 75 N. C. 436, 438 (1876); Womble v. Battle, 38 N. C. 182, 190 (1844); Fleming v. Burgin, 37 N. C. 584, 589 (1843).

[20] *Supra*, note 14.

ant, which plaintiff claimed by a deed from vendor subsequent to his acquisition of the interest. Plaintiff should have prevailed as to all the timber since failure of the defendant to record until after plaintiff purchased should give the latter priority, as heretofore pointed out.[21] The court overlooked that logic and, on the oft-repeated generality that first on record is first in priority, ruled that defendant was entitled to specific performance as to the original one-sixth interest owned by vendor. However, in holding that plaintiff was entitled to the one-sixth after acquired interest, it is believed the court failed to apply its priority rule consistently.

Defendant based his claim to the after acquired interest on the theory that one who purports to convey an interest in realty which he does not own but which he later acquires is estopped to assert title thereto inconsistent with the conveyance.[22] Historically, the estoppel depended on the presence of covenants of warranty in the instrument, the purpose being to avoid circuity of action;[23] today, if any part of the instrument shows an intention to convey a certain estate the vendor is thereafter estopped to assert he did not have title,[24] even though he has no liability on the instrument.[25] Apparently the present basis is analogous to estoppel in pais,[26] but distinguishable in that it depends solely on representation within the instrument.[27]

[21] See Section I, *supra.*

[22] *E.g.,* Keel v. Bailey, 224 N. C. 447, 31 S. E. 2d 362 (1944); Shenandoah Life Ins. Co., Inc. v. Sandridge, 216 N. C. 766, 775, 6 S. E. 2d 876, 881 (1939); Olds v. Cedar Works, 173 N. C. 161, 91 S. E. 846 (1917); Weeks v. Wilkins, 139 N. C. 215, 51 S. E. 909 (1903); Bell v. Adams, 81 N. C. 118 (1879).

For collection of decisions from other states see 58 A. L. R. 345-430 (1929), supplemented in 144 A. L. R. 554-585 (1943).

[23] BIGELOW, ESTOPPEL, 423 (6th ed. 1913); McGehee, *Estoppel and Rebutter in N. C.,* 1 N. C. L. REV. 152, 153 (1922).

[24] Van Rensselaer v. Kearney, 11 How. 297 (U. S. 1850); Keel v. Bailey, 224 N. C. 447, 31 S. E. 2d 362 (1944); Woody v. Cates, 213 N. C. 792, 197 S. E. 561 (1938); Baker v. Austin, 174 N. C. 433, 93 S. E. 949 (1917); Weeks v. Wilkins, 139 N. C. 215, 51 S. E. 909 (1893); Taggert v. Risley, 4 Ore. 235 (1872).

[25] RAWLE, COVENANTS FOR TITLE, 251 (5th ed. 1887).

[26] BIGELOW, ESTOPPEL, 361 (6th ed. 1913); 4 TIFFANY, THE LAW OF REAL PROPERTY 1230 (3d ed. 1939).

[27] Stevens v. United States, 29 F. 2d 904 (C. C. A. 8th 1928); N. C. Joint Stock Land Bank v. Moss, 215 N. C. 445, 2 S. E. 2d 378 (1939); Finch v. Smith, 171 Okla. 307, 58 P. 2d 850 (1936); Masterson v. Bouldin, 151 S. W. 2d 301 (Tex. Civ. App. 1941); *see* Brinegar v. Chaffin, 14 N. C. 108, 110 (1831). *But cf.* Cartwright v. Jones, 215 N. C. 108, 1 S. E. 2d 359 (1939); Jackson v. Mills, 185 N. C. 55, 115 S. E. 881 (1923).

Perhaps an important factor in the main case, although the court did not mention it, was that defendant knew the vendor owned only a one-sixth interest at the time of the agreement. Furthermore, only the vendor signed, while the language of the instrument was "*We* do hereby sell and convey all. . . ." It could be argued that the vendor never bound himself to sell unless all his co-owners signed. If the truth appears on the face of the instrument there is ordinarily no estoppel. Gilmer v. Poindexter, 10 How. 257 (U. S. 1850); *cf.* Ayer v. Philadelphia Brick Co., 159 Mass. 84, 34 N. E. 177 (1893); Harmon v. Christopher, 34 N. C. Eq. 459 (1881).

The instrument on which defendant sought specific performance contained all the necessary elements of a conveyance, except for a seal.[28] It is well established in North Carolina that an unsealed instrument otherwise adequate as a conveyance of land is treated as a contract to convey and enforcible against subsequent purchasers with record notice.[29] The court, relying on Corpus Juris, stated that the vendor, as distinguished from a subsequent purchaser claiming under him, would, by virtue of the instrument, be estopped to assert as against defendant any title inconsistent with that he had contracted to convey.[30] Although certain writers have said that the doctrine of title by estoppel cannot be applied to a contract to convey,[31] it is believed the North Carolina position is sound. The cases cited by these writers, and other cases in which the principle was urged but not applied, can be distinguished on the grounds that the courts were dealing either with void contracts or those not purporting to affect title to realty.[32] It is argued that the extent of the estoppel is only to prevent the vendor from asserting a title inconsistent with his purported conveyance, and the claim of an after acquired title is perfectly consistent with a mere promise to convey.[33] It should be noted that the language of the instrument with which we are concerned was not that of promise, but of present conveyance.[34] Furthermore, a contract to convey land is an actual conveyance of equitable title,[35] and specific performance is granted readily in equity.[36] In view of the close affinity of law and equity, it would

[28] Chandler v. Cameron, 227 N. C. 233, 41 S. E. 2d 763 (1947).

[29] Chandler v. Cameron, 227 N. C. 233, 41 S. E. 2d 763 (1947); Willis v. Anderson, 188 N. C. 479, 124 S. E. 834 (1924); Vaught v. Willisma, 177 N. C. 77, 97 S. E. 237 (1918). *Accord,* Winston v. Williams & McKeithan Lumber Co., 227 N. C. 339, 42 S. E. 2d 218 (1947); Lumber Co. v. Corey, 140 N. C. 462, 53 S. E. 300 (1906).

[30] 66 C. J., Vendor-Purchaser, p. 1031 (1934). The cases cited do not involve contracts to convey.

[31] PATTEN, TITLES §126 (1938); Lawler, *Estoppel to Assert an After Acquired Title in Pa.,* 3 U. OF PITT. L. REV. 165, 167 (1937).

[32] Harkness v. Underhill, 1 Black 316 (U. S. 1862) (contract void as against public policy); Palm Springs Co. v. Palm Springs Land Co., 36 Cal. App. 2d 730, 98 P. 2d 530 (1940) (inadequate description); Harkins v. Hatfield, 221 Ky. 91, 297 S. E. 1109 (1927) (contract void as against public policy); Mass. Gas & Oil Co. v. Go-Gas Co., 259 Mass. 585, 156 N. E. 871 (1927) (not a contract to convey); Oilphant v. Burns, 146 N. Y. 218, 40 N. E. 980 (1895) (not a contract to convey). *See* Bradley Estate Co. v. Bradley, 97 Minn. 161, 163, 106 N. E. 110, 111 (1906).

[33] Lawler, *Estoppel to Assert an After Acquired Title in Pa.,* 3 U. OF PITT. L. REV. 165, 167 (1937).

[34] "We do hereby sell and convey all the merchantable timber. . . . This conveyance is made. . . ." Chandler v. Cameron, 227 N. C. 233, 41 S. E. 2d 763 (1947).

[35] Winston v. Williams & McKeithan Lumber Co., 227 N. C. 339, 42 S. E. 2d 218 (1947).

[36] "While it is universally conceded that specific performance is a matter of discretion, the best authorities agree that where a contract relating to land is not objectionable legally, it is as much a matter of course for a court of equity to decree specific performance as it is for a court of law to give damages for a breach thereof." Stamper v. Stamper, 121 N. C. 251, 253, 28 S. E. 20, 21 (1897).

seem only logical that the doctrine of title by estoppel should apply to any instrument which legally or equitably affects title to land.[37]

In fact, there is good authority in equity for the same results as to the vendor, without reference to this estoppel doctrine. The fact that the vendor does not have title at the time he contracts to sell is no bar to specific performance, if he perfects title before performance is due.[38]

If we assume, as did the court, that the instrument would entitle the defendant to the after acquired interest as against the vendor, the next question is whether it will be effective against others. The theory that title by virtue of the estoppel inures by operation of law must be considered in connection with the policy of the recordation statutes to protect subsequent bona fide purchasers of land. North Carolina has adopted the rule that subsequent purhasers from the vendor are not bound unless they have record notice of the prior conveyance.[39] It is a generally recognized principle that a purchaser is not required to search the record beyond the time each vendor in the chain obtained title.[40] Obviously, as against subsequent purchasers, this rule defeats one claiming title by estoppel if he records before his vendor obtains the interest, since the record is off the chain of title.[41] To prevail he must record after the vendor acquires the interest and before the subsequent purchaser records.[42] This is exactly our case. Defendant recorded nineteen days after the vendor acquired the additional one-sixth interest, and two before plaintiff recorded his deed. On previous North Carolina holdings, as illustrated in this case as to the interest originally owned by the vendor,[43] defendant should have also prevailed as to the

[37] Allen v. Allan, 146 Ga. 204, 91 S. E. 22 (1916); Pring v. Swarm, 176 Iowa 153, 157 N. W. 734 (1916); Miller v. Miller, 283 S. E. 1085 (Tex. Civ. App. 1926); Texas Pacific Co. v. Fox, 228 S. E. 1021 (Tex. Civ. App. 1921); *cf.* James v. Nelson, 90 F. 2d 910 (C. C. A. 9th 1937), *cert. denied,* 302 U. S. 721 (1937).

[38] Nolan v. Highbough, 245 S. W. 146 (Ky. Ct. of App. 1922); Dennett v. Norwood Housing Ass'n, Inc., 241 Mass. 516, 135 N. E. 866 (1922); *accord,* McNeil v. Fuller, 121 N. C. 109, 28 S. E. 299 (1897); Hobson v. Buchanan, 96 N. C. 444, 2 S. E. 180 (1887); *cf.* Turnstall v. Cobb, 109 N. C. 316, 14 S. E. 28 (1891).

[39] Builders' Sash & Door Co. v. Joyner, 182 N. C. 518, 109 S. E. 259 (1921); *see* Virginia-Carolina Bank v. Mitchell, 203 N. C. 339, 344, 166 S. E. 69, 71 (1932).

[40] Wheeler v. Young, 76 Conn. 44, 255 Atl. 670 (1903); Builders' Sash & Door Co. v. Joyner, 182 N. C. 518, 109 S. E. 259 (1921); Truitt v. Grandy, 115 N. C. 54, 20 S. E. 293 (1894); Maddox v. Arp, 114 N. C. 585, 19 S. E. 665 (1894); Breen v. Morehead, 104 Tex. 254, 136 S. W. 1047 (1911). *Contra:* Mortgage Security Co. v. Fry, 143 Ala. 637, 42 So. 51 (1904); Perkins v. Coleman, 60 Ky. 611, 14 S. E. 640 (1890); White v. Patten, 24 Pick. 324 (Mass. 1837); Tefft v. Munson, 57 N. Y. 97 (1874); Javis v. Aikens, 25 Vt. 635 (1853).

[41] See note 40 *supra.*

[42] Semon v. Terhune, 40 N. J. Eq. 364, 2 Atl. 18 (1885); *see* Builders' Sash & Door Co. v. Joyner, 182 N. C. 518, 109 S. E. 259 (1921); PATTON, TITLES §45, p. 46 (1938). If Section I, *supra,* is followed, he must record before the subsequent purchaser *takes his interest.*

[43] Note criticism of this holding, Section I, *supra.*

after acquired interest on prior recordation. Surprisingly, the court found that the instrument, insofar as it related to this interest, was a mere personal contract not affecting title to land and hence not within the recordation statute. Of course, if the instrument was not within the statute, recordation would not give notice.[44] But it did give notice as to the original one-sixth owned by the vendor. The only possible conclusion is that what made the instrument a personal contract as to the one-sixth later-acquired was that it purported to convey an interest not then owned. The only authority cited, and from which the court apparently borrowed the term "personal contract," involves instruments which do not purport to convey land and would not affect title to any land whether or not the promisor owned it.[45]

By the same reasoning, a deed or mortgage purporting to deal with property not then held by the grantor would be a mere personal transaction and not within the recordation statutes. Obviously, if the case is consistently followed, the whole doctrine of title by estoppel will be destroyed as to subsequent purchasers, since it would be impossible to give constructive notive by recordation, and North Carolina has repeatedly held that actual notice is inadequate.[46] A striking inconsistency is that North Carolina recognizes the rule that where a mortgage contains a clause to the effect that any after acquired property will be subject to the mortgage, recordation of the mortgage is notice to subsequent claimants.[47] Although the mortgage clause embraces property not owned by the parties, the court has never referred to this clause as a personal contract.

Perhaps the court felt bound by precedent to follow North Carolina's harsh rule of priority of recordation as to the share originally owned by vendor, but was herein refusing to apply it to an after acquired interest. Unfortunately, nothing in the decision, except the results, suggests any such dissatisfaction or limitation on the rule of priority.

The court affirmed a holding of the lower court that title to the after acquired interest inured to plaintiff when the vendor recorded the deed under which he received the interest from his sisters. The implication is that the vendor acquired title only upon recording his deed.

[44] Black v. Solano Co., 114 Cal. App. 170, 299 Pac. 843 (1931) (contract to sell potential personal property); State v. Kirsch, 78 Ind. App. 431, 136 N. E. 36 (1932) (contract with neighbor not to sell to competitor); Sjoblom v. Mark, 103 Minn. 193, 114 N. W. 746 (1908) (contract not to sell liquors on land); Tremaine v. Williams, 114 N. C. 114, 56 S. E. 694 (1907) (contract to cut timber); *see* McAllister v. Purcell, 124 N. C. 262, 32 S. E. 717 (1899) (dictum that a faulty acknowledgment would make registration void).

[45] See note 44 *supra*.

[46] Turner v. Glenn, 220 N. C. 620, 18 S. E. 2d 197 (1942).

[47] Even though the recordation is prior to the acquisition of property by the mortgagor. Hickson Lumber Co. v. Gay Lumber Co., 150 N. C. 282, 63 S. E. 1045 (1909).

Unfortunately, language of similar effect has continued to creep into North Carolina decisions,[48] although the court has expressly repudiated the idea when the problem was squarely presented.[49] It has been repeatedly said that an unrecorded instrument is perfectly valid and passes title from the date of its delivery except as to subsequent purchasers or creditors of the *same* grantor.[50] There are no such parties, *i.e.,* grantees or creditors of vendor's sisters, involved in this case, and as to all the rest of the world the vendor had title from the date his deed was delivered. Apparently the confusion has grown out of the previously mentioned rule that a grantee is not bound by claims which are off the chain of title, *i.e.,* recorded before the grantor acquires title.[51] But that does not mean that a grantee can ignore the record prior to the time each grantor in the chain recorded. Rather, he must take notice of the date of the instrument under which his grantor took, which is presumed to be the date of delivery, and check for any claims recorded during the interval when his grantor had title but had not put it on record.[52] The court should consider carefully whether it intends to change the law that title passes on delivery of a deed and that outstanding liens or incumbrances good on acquisition of title take effect at that point, and to establish as law that this occurs instead at the time of recordation. If the court intends any such radical change it should be done expressly, upon clear analysis, and statement of adequate reasons. The present practice of making occasional loose statements to that effect is introducing needless confusion into the law.

GEORGE M. MCDERMOTT.

[48] Savings Bank & Trust Co. v. Brock, 196 N. C. 24, 28, 144 S. E. 365, 367 (1928); *see* Cooper v. N. C. Bank & Trust Co., 200 N. C. 724, 725, 158 S. E. 408, 409 (1931); Colonial Trust Co. v. Sterchie, 169 N. C. 21, 23, 85 S. E. 40, 41 (1915); Note, 7 N. C. L. REV. 96, 98 n. 9 (1928). *Contra:* Linker v. Linker, 213 N. C. 351, 196 S. E. 329 (1938); Johnson v. Leavitt, 188 N. C. 682, 125 S. E. 490 (1924) (in these cases the attachment of the liens is upon acquisition of the property, not upon registration).

[49] Durham v. Pollard, 219 N. C. 750, 14 S. E. 2d 818 (1941); Virginia-Carolina Bank v. Mitchell, 203 N. C. 339, 166 S. E. 69 (1932).

[50] Patterson v. Bryant, 216 N. C. 550, 5 S. E. 2d 849 (1939); Glass v. Lynchburg Shoe Co., 212 N. C. 70, 192 S. E. 899 (1937); Sills v. Ford, 171 N. C. 733, 88 S. E. 636 (1916); Warren v. Williford, 148 N. C. 474, 479, 62 S. E. 697, 699 (1908), Connor, J.: "Defendant says that until the registration of the deed R. had no title. This is a misconception of the registration act. The title vests as against the grantor, and all others except 'creditors and purchasers for value' from the delivery of the deed."

[51] See note 40 *supra.*

[52] See note 49 *supra.*