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Notes and Comments

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NOTES AND COMMENTS

Accord and Satisfaction—Cashing Check Marked In Full Payment—Conditional Request to Stop Payment of Check

A dispute having arisen over coal transportation charges, the debtor, on May 26th, sent a check marked in full payment as shown in voucher. The voucher showed that the check covered the admitted difference between the freight and the claim for damages, but there was no further indication of the debtor's desire for an accord and satisfaction. That the creditor so understood the desire was shown, however, in his reply of the 27th, saying the check was acceptable only on account and, if not agreeable, for the debtor to stop payment on it. This letter reached the debtor on the 31st, the same day the check was collected, having been deposited on the 28th. The debtor did not stop payment and on June 3rd replied, reiterating the position taken in his first letter. *Held,* there was no accord and satisfaction, as the creditor did not voluntarily assent; and there was no compromise, as no new consideration was given, since the debtor had paid only the sum he admittedly owed and no part of the disputed amount.[1]

Did not the creditor voluntarily assent? There must be mutual assent but this does not necessarily involve mental assent, since assent will be implied from the circumstances and conduct inconsistent with a refusal.[2] It has been held that the acceptance of a check necessarily involves an acceptance of the conditions upon which it was tendered, even though at the time the creditor protests.[3] It is generally held that the creditor has but one alternative and must accept the amount

[1] Moore and McCormack Co. v. Valley Camp Coal Co., 37 F. (2d) 308 (C. C. A. 4th, 1930).

[2] Redmond v. Atlanta & B. Air Line Ry., 129 Ga. 133, 58 S. E. 874 (1907); Woburn National Bank v. Woods, 77 N. H. 172, 89 Atl. 491 (1914).

[3] Northern Trust Co. v. Knowles, 208 Ill. App. 258 (1917); G. & L. Realty Co. v. Friedman, 105 Misc. Rep. 632, 173 N. Y. Supp. 376 (1919); (1923) 9 VA. L. REG. (N. S.) 307; 3 WILLISTON, ON CONTRACTS, 1924, §1854; Note (1925) 34 A. L. R. 1044. But *cf.* Goldmith v. Lichtenberg, 139 Mich. 163, 102 N. W. 627 (1905); Day v. McLea, L. R. 22 Q. B. Div. 610, 60 L. T. (N. S.) 947, 58 L. J. Q. (N. S.) 293, 37 Week. Rep. 483, 53 J. P. 532 (Eng. 1889). But *cf.* Hirachand Punamchand v. Temple, 1911 2 K. B. Div. 330.

tendered upon the terms of the condition or return the check.[4] The right to name the terms rests alone with the debtor.[5]

Can the creditor shift the onus of acting upon the debtor and take the failure to stop payment as a confirmation? The offeree is at liberty to accept wholly, or reject wholly, but one of these things he must do; for if he answers proposing to accept under a modification, this is a rejection of the offer and constitutes a counter offer which necessitates an acceptance as did the original offer.[6] Generally speaking, if an offeror makes no reply to a counter offer, his silence and inaction cannot be construed as assent, and this is true even in the face of a statement that his silence would be taken as an acceptance.[7] A debtor must at least be given time to waive the conditions and, if the creditor acts before the conditions are waived, it should be considered as an acceptance of the former terms.[8] In the principal case the creditor evidently understood the debtor's desire[9] for an accord and satisfaction and, despite this, he acted before receiving the debtor's letter of June 3rd which was certainly no waiver of the conditions.

It is submitted that public policy will be better served by encouraging settlements and compromises out of court and that the result attained here will discourage such attempts, since the creditor

[4] Seeds, Grain & Hay Co. v. Conger, 83 Ohio St. 169, 93 N. E. 892, 32 L. R. A. (N. S.) 380 (1910); *Ex parte* Southern Cotton Oil Co., 207 Ala. 704, 93 Sou. 662, aff'd. 20 Ala. App. 1, 102 Sou. 149 (1922); 3 WILLISTON, ON CONTRACTS (1924) §1856; Hoop v. Kansas Flour Mills Co., 124 Kan. 769, 262 Pac. 544 (1928).

[5] Cunningham v. Standard Const. Co., 134 Ky. 198, 119 S. W. 765 (1909).

[6] Cozart v. Herndon, 114 N. C. 252, 19 S. E. 158 (1894).

[7] Felthouse v. Bindley, 11 C. B. (N. S.) 869, 31 L. J. C. P. 204, 6 L. T. 157, 10 W. R. 423, 142 Eng. Rep. 1037 (1862); Prescott v. Jones, 69 N. H. 305, 41 Atl. 352 (1898); 1 WILLISTON, ON CONTRACTS (1924) §§91-92. But *cf.* Haddow v. Owens Co., 172 Wis. 391, 179 N. W. 508 (1920); Burton Coal Co. v. Gorman Coal Co., 22 Ohio App. 383, 153 N. E. 863 (1926) (In face of obvious duty the debtor must act or otherwise the creditor's using the check will be no accord and satisfaction). Discussed in (1927) 1 CIN. L. REV. 218.

[8] Policastro v. Pitske, 65 Misc. Rep. 524, 120 N. Y. Supp. 743 (1910). (Creditor's using the check without waiver of the conditions by the debtor is an accord and satisfaction and the debtor's mere silence in face of a counter proposal was no waiver of his conditions); 4 PAGE, ON CONTRACTS (1920) §2504; Sylva Supply Co. v. Watt, 181 N. C. 432, 107 S. E. 451 (1921). When there is a fiduciary relationship between the parties then it is otherwise; Egan v. Crowther, 48 Cal. App. 362, 241 Pac. 900 (1925), discussed in (1925-26) 14 CALIF. L. REV. 250.

[9] In a few states the burden is on the debtor to make absolutely positive that the creditor understands his intention for an accord and satisfaction. Dimmick v. Banning, etc. Co., 256 Pa. 295, 100 Atl. 871 (1917). But *cf.* Davis Sulphur Ore Co. v. Powers, 130 N. C. 152, 41 S. E. 6 (1902) (Where, "which balances account," is held to sufficiently show intent).

can impose new duties on the debtor while having the advantage of the debtor's check in his possession as a threat. In any event, the reasoning of the present case seems open to criticism as it results in permitting the creditor to shift the burden of acting upon the debtor without giving a reasonable length of time in which to act. The same result could more logically be attained on the ground of lack of consideration, since no part of the disputed amount was paid but only the sum admittedly due.[10]

HUGH B. CAMPBELL.

Agency—Bills and Notes—Agent's Indorsement of Check Drawn to Principal's Order

An attorney, with authority to settle his client's claim, received a check payable jointly to himself and the client. He indorsed for both, cashed the check, and retained the proceeds. *Held,* the transaction amounted to payment to the attorney of the amount of cash represented by the check and received thereon, and was payment of client's claim.[1]

Although some courts show a tendency to hold that an attorney with authority to settle a client's claim has implied authority to indorse a check received in payment,[2] the rule generally laid down is that authority to indorse negotiable paper will not be implied unless it is absolutely necessary to the carrying out of the purpose of the agency.[3] By this rule, the check in the instant case was wrongfully indorsed.

[10] Whittaker Chain Tread Co. v. Standard Auto Supply Co., 216 Mass. 204, 103 N. E. 695 (1913) (Refuses to follow idea of no voluntary assent by creditor but gets the same result on ground of no consideration); Hamburger v. Economy Dept. Store, 222 N. W. 603 (S. D. 1928); (1929) 14 IOWA L. REV. 474. *Contra:* Chicago, etc. R. Co. v. Clark, 178 U. S. 353, 20 Sup. Ct. 924, 44 L. ed. 1099 (1899); 1 WILLISTON, ON CONTRACTS (1924) §129; Schnell v. Perlmon, 238 N. Y. 362, 144 N. E. 641, 34 A. L. R. 1023, aff'd 239 N. Y. 504, 147 N. E. 171 (1924). Discussed in (1924) 2 N. Y. L. REV. 414; Shapleigh Hardware Co. v. Farmer's Federation Inc., 195 N. C. 702, 143 S. E. 471 (1928). See also, May Bros. v. Doggett, 124 Sou. 476 (Miss., 1929). If the disputed portion belongs to a separate and distinct transaction then it cannot carry over so as to apply to the admitted indebtedness and create a dispute as to it, Brent v. Whittington, 214 Ala. 613, 108 Sou. 567 (1926). But *cf.* Sylva Supply Co. v. Watt, *supra* note 8. For general discussion see (1925) 9 MINN. L. REV. 458; (1929) 8 N. C. L. REV. 71.

[1] Patterson v. Southern Ry. Co., 151 S. E. 818 (Ga. App. 1930).

[2] Nat. Bank of the Republic v. Old Town Bank, 112 Fed. 726 (C. C. A. 7th, 1902); Brown v. Grimes, 74 Ind. App. 655, 129 N. E. 483 (1921); 1 THORNTON, ATTYS. AT LAW (1914) 363, 364.

[3] Bank of Morganton v. Hay, 143 N. C. 326, 55 S. E. 811 (1906); Crahe v. Mercantile etc. Bank, 295 Ill. 375, 129 N. E. 120 (1920); Note (1921) 12 A. L.

Under such circumstances, the weight of authority allows an action by the client or principal against the drawee bank, either on the theory that payment on unauthorized indorsement constitutes acceptance, or on the theory that the bank is guilty of a conversion.[4] If the check is cashed by a bank other than the drawee, and then collected, an action lies against the cashing bank[5]—even in jurisdictions which would not allow an action against the drawee.[6]

When the principal sues the debtor, however, he is generally denied recovery as in the instant case.[7] The basis of these decisions

R. 111; AGENCY RESTATEMENT (Am. Law. Inst. 1928) §§366 and 347 comment (d). *Contra:* Lorton v. Russel, 27 Neb. 372, 43 N. W. 112 (1889); Chamberlin, etc. Co. v. Bank of Pleasanton, 107 Kan. 79, 190 Pac. 742 (1920) (holding that a collecting agent has apparent authority to indorse checks received).

[4] Dawson & White v. Nat. Bank of Greenville, 197 N. C. 499, 150 S. E. 38 (1929) (acceptance); Louisville & N. R. Co. v. Citizens & Peoples Nat. Bank, 74 Fla. 385, 77 So. 104 (1917) (conversion); (1929) 38 YALE L. J. 1143; (1926) 26 COL. L. REV. 113; Note (1921) 14 A. L. R. 764.

First Nat. Bank v. Whitman, 94 U. S. 343, 24 L. ed. 229 (1877) is the leading case denying recovery on theory of acceptance. But see Fidelity & Deposit Co. v. Bank of Charleston, 267 Fed. 367, 370 (C. C. A. 4th, 1920) which intimates that under same circumstances an action for conversion would well lie.

Pennsylvania would probably refuse recovery on either theory. Tibby Bros. Glass Co. v. Farmers and Mechanics Bank, 220 Pa. 1, 69 Atl. 280 (1908).

[5] Schaap v. State Nat. Bank, 137 Ark. 251, 208 S. W. 309 (1918); Porges v. U. S. Mortgage & Trust Co., 203 N. Y. 181, 96 N. E. 424 (1911); (1929) 77 U. OF PA. L. REV. 127; Note (1924) 31 A. L. R. 1068.

The Pennsylvania rule is *contra:* Tibby Bros. Glass Co. v. Farmers & Mechanics Bank, *supra* note 4.

[6] Merchants Bank v. Nat. Capital Press, 288 Fed. 265 (Ct. of App., Dist. of Col., 1923). See also Fidelity & Deposit Co. v. Bank of Charleston, *supra* note 4.

[7] "When a debtor delivers his check to the creditor or his agent, duly authorized to receive it, and has funds in the bank to meet the check, the transaction, as between debtor and creditor, should be treated as payment, precisely as though cash had been paid, even though the agent forges an indorsement and steals the money." Burstein v. Sullivan, 134 App. Div. 623, 119 N. Y. S. 317, 319 (1909); Morris v. Hofferberth, 81 App. Div. 512, 81 N. Y. S. 403 (1903); Morrison v. Chapman, 155 App. Div. 509, 140 N. Y. S. 700 (1913); McFadden v. Follrath, 114 Minn. 85, 130 N. W. 542 (1911); Mills v. Hurley, etc. Co., 129 Ark. 350, 196 S. W. 121 (1917); Monacelli v. Traeger, 239 Ill. App. 30 (1925). But see Merchants Bank v. Nat. Capital Press, *supra* note 6, at 266.

As pointed out in McFadden v. Follrath, *supra,* Thomson v. Bank of British North America, 82 N. Y. 1 (1880) and Kansas City, M. & B. R. Co. v. Ivy Leaf Coal Co., 97 Ala. 705, 12 So. 395 (1892) are distinguishable.

Siegel v. Kovinsk, 93 Misc. 541, 157 N. Y. S. 340 (1916) relies on the Thomson case, *supra,* and says the debtor is still liable. In Siegel v. Kovinsk, however, the agent did not even have authority to collect cash.

The New York Supreme Court held the debtor liable in Bernheimer v. Herrman, 44 Hun 110 (1887) (check was given to bookkeeper). There seems to be no valid distinction between this case and the group holding the debtor was not liable.

seems to be equitable considerations rather than the result of legal reasoning.[8] In seeking to hold the debtor, it is generally argued that he can recoup his loss by bringing suit against the drawee bank; but in the words of the New York Supreme Court, "Defendant should not be compelled to pay twice, or be subjected to the hazard of a law suit with the bank, for having taken the precaution to protect plaintiffs by making a check payable to their order."[9] Justice Simpson of the Minnesota Court puts a supposed case in which the drawee bank becomes insolvent immediately after paying the check, and then says that the loss which must result should fall on the person who chose the dishonest agent.[10]

When the debtor gives a check or draft on himself and pays it on an agent's indorsement of the creditor's name, the case seems a stronger one for the debtor, since the paper is very much like a receipt signed in creditor's name by his agent.[11]

If the check was made payable to the agent, then *a fortiori* the principal's claim is paid.[12]

If an agent has authority to accept cash, many courts say that, in view of modern business methods, he has authority to accept a check.[13] However, the question as to such authority would seem to be immaterial if the check is actually paid.[14]

HUGH L. LOBDELL.

The Pennsylvania court apparently would hold the debtor liable. Tibby Bros. Glass Co. v. Farmers & Merchants Bank, *supra* note 4.

See (1916) 16 COL. L. REV. 430 for conclusion *contra* to the instant one.

[8] The reasoning of the Pennsylvania court in Tibby Bros. Glass Co. v. Farmers & Mechanics Bank, *supra* note 4, seems sounder from a purely analytical standpoint; the bank has paid out its *own* money, the debtor has lost nothing, and the original position of the debtor and creditor has not been altered.

[9] Burstein v. Sullivan, *supra* note 7, at 319.

[10] McFadden v. Follrath, *supra* note 7. It could be argued with equal force that the loss should fall on the depositor who chose an unsound bank.

[11] Nat. Fire Ins. Co. v. Eastern Bldg. & Loan Assn., 63 Neb. 698, 88 N. W. 863 (1902); Hart v. Northwestern, etc. Bank, 191 Ill. App. 396 (1915). But *cf.* Lochenmeyer v. Fogarty, 112 Ill. 572 (1884).

[12] Potter v. Sager, 184 App. Div. 327, 171 N. Y. S. 438 (1918); Pacific Acceptance Corp. v. Jones, 95 Cal. App. 365, 272 Pac. 1084 (1928); Gibson v. Ward, 9 Ga. App. 363, 71 S. E. 506 (1911); (1929) 38 YALE L. J. 995.

[13] Potter v. Sager; Gibson v. Ward, both *supra* note 12.

[14] Harbach v. Colvin, 73 Ia. 638, 35 N. W. 663 (1887); see Brown v. Grimes, *supra* note 2. But see Hamling v. Aetna Life Ins. Co., 34 F. (2d) 112, 116 (C. C. A. 8th, 1929) for theory that when he received the check, the agent became the *debtor's* agent to transmit the proceeds to the creditor.

Where agent takes collateral security without authority, the proceeds from its sale have been held payment of principal's claim, though the agent embezzled such proceeds. Block v. Drake, 2 Colo. 330 (1874); Holliday v. Thomas, 90 Ind. 398 (1883).

Bills and Notes—Checks—Burden and Manner of Proving Loss Caused Drawer by Delay in Presentment

In a recent case the defendant, drawer, gave his check to one McDaniels who had not presented the check for payment when the drawee bank closed its doors because of insolvency thirteen days later. The endorsee of the check brought action on it. The drawer demurred claiming the delay in presentment discharged him. The lower court sustained the demurrer. Reversed, on the ground that the defendant should not only show delay in order to be excused but also a loss.[1]

The frequent failures of banks at the present time make the question a very important one, since most of the causes of loss by unreasonable delay arises through failure of the drawee banks.[2]

Since the general rule applicable to bills of exchange, "that presentment is sufficient to charge the secondary parties, if made within a reasonable time from the last negotiation thereof"[3] has no application to the liability of the drawer of a check, to whom a special rule of liability is laid down,[4] no question concerning the liability of the drawer is raised, in the instant case, by the negotiation from the payee to Mrs. McDaniel.[5]

Reasonable Time for Presentment

In order to preserve his rights against the drawer of a check the holder must present it for payment to the drawee within a reasonable time, or in case of loss caused thereby the drawer is discharged to the

[1] McDaniel v. Mackey, 150 S. E. 439 (Ga. 1929).

[2] Carroll v. Sweet, 128 N. Y. 19, 27 N. E. 763 (1891); Gordon v. Levine, 194 Mass. 418, 80 N. E. 505, 10 L. R. A. (N. S.) 1153 (1907); Palmer v. Harris, 142 S. E. 276 (Ga. 1928). A rather unusual case is presented by Ferrari v. First Nat'l Bank of Connesville, Pa., 159 N. E. 178 (N. Y. 1927) where the drawer had no funds in the drawee, but the drawee bank agreed to cash the check and charge against the account of a bank in which the drawer did have funds, and the failure of this latter bank coupled with delay in presentment was held to excuse the drawer.

[3] N. I. L. §70; N. C. Cons. Stat. Ann. (1919) §3051.

[4] N. I. L. §186; N. C. Cons. Stat. Ann. (1919) §3168: A check must be presented for payment within a reasonable time after its issue or the drawer is discharged to the extent of his loss caused by the delay.

[5] The indorser is discharged by unreasonable delay in presenting the check regardless of the loss. And in this case the check must be presented for payment by the close of the business day following its delivery to the endorsee. Comer v. Dufour, 95 Ga. 376, 22 S. E. 543 (1895); Mauney v. Coit, 80 N. C. 300, 30 Am. Rep. 80 (1879); Kirkpatrick v. Puryear, 93 Tenn. 409, 24 S. W. 1130 (1894); Nuzum v. Sheppard, 87 W. Va. 243, 104 S. E. 587, 11 A. L. R. 1024 (1920).

extent of that loss.[6] Where the check is drawn on a local bank the check must be presented to the drawee bank for payment by the close of the next business day following receipt of it by the payee, in the absence of special circumstances.[7]

[6] N. I. L. §186; N. C. Cons. Stat. Ann. (1919) §3168, *supra* note 4; Carroll v. Sweet, *supra* note 2; Krauss v. Aleck, 209 N. W. 444 (Iowa 1926); Swift & Co. v. Miller, 62 Ind. App. 312, 113 N. E. 447 (1916); Hazard Bank and Trust Co. v. Morgan, 211 Ky. 137, 277 S. W. 307 (1925); Merritt v. Gate City Nat'l Bank, 100 Ga. 147, 27 S. E. 979 (1897); Koch v. Sandford Loan and Realty Co., 286 S. W. 732 (Mo. 1926).

[7] First Nat'l Bank of Charlotte v. Alexander, 84 N. C. 30 (1883); Lewis, Hubbard & Co. v. Montgomery Supply Co., 59 W. Va. 75, 52 S. E. 1017, 4 L. R. A. (N. S.) 132 (1906); Colwell v. Colwell, 92 Ore. 103, 179 Pac. 916, 4 A. L. R. 876 (1919); Gordon v. Levine, *supra* note 2.

However, when the holder has knowledge of the shaky condition of the drawee there are some jurisdictions which say the holder must present the check at the earliest time possible. Temple v. Carroll, 75 Neb. 61, 105 N. W. 989 (1905); First Nat'l Bank of Charlotte v. Alexander, *supra* note 7, approved in First Nat'l Bank of Kewanee v. Wine, 47 BANKERS LAW JOURNAL 220 (Ill. App. 1930).

If the drawee is located in another city or town from that in which the holder resides a different rule for presentment is laid down and the check must be sent by some usual means of communication on the day following its receipt for collection and the party who finally receives it for collection must present it to the drawee by the close of the business day following its receipt by him. Thus two days are allowed for each step in the chain of collection. Lewis, Hubbard & Co. v. Montgomery Supply Co., 59 W. Va. 75, 52 S. E. 1017 (1906). And no bank in the chain of collection is chargeable with negligence if it forwards the check on to the next bank by the close of the business day following its receipt. Wallace v. City Nat'l Bank, 202 Ala. 323, 80 So. 405 (1918); Douchester v. Merchant's Nat'l Bank of Houston, 106 Tex. 201, 163 S. W. 5 (1914); Plover Savings Bank v. Moodie, 135 Iowa 685, 110 N. W. 29 (1906). However, it seems that the next day rule should be straightened in one place. It seems only right that the intermediate banks in the chain of collection should mail the paper on to the next bank in the chain on the day of its receipt, unless it is received after the close of business hours. In fact some banks in Philadelphia, Chicago and Kansas City advertise that they maintain 24 hour transit departments. But it should not be supposed that sending the check on to another bank, no matter where it was, would satisfy the duty of the collecting bank. It has been considered unreasonable delay to send the check from, or across, the place of payment, instead of toward, or to it. Gifford v. Hardell, 88 Wis. 538, 60 N. W. 1064 (1894). This does not mean that the check must be sent in a line that a bird would fly, but merely by the usual commercial route. Sublette Exch. Bank v. Fitzgerald, 168 Ill. App. 240 (1912). This allows evidence as to the custom of banks to be put in to show the reasonableness of a route. But even custom will not justify the choosing of an absurd route. The Federal Reserve System has diminished the importance of this point and in all probability the routing of the Federal Reserve will be held free from negligence.

Two rather unusual cases of circuitous routing were: Where the payee sent a local check across Chicago to another bank which was not a member of the clearing house instead of presenting to the drawee as he might have reasonably done. And when the check was delayed in reaching the drawee, which had failed in the meantime, the drawer was discharged. National Plumbing and Heating Co. v. Stevenson, 213 Ill. App. 49 (1918). And where the local agent of a firm was given a check and instead of presenting the same for payment

Where the check is deposited in a local bank other than the drawee most jurisdictions refuse to allow extra time for collection through the clearing house, and hold that the check must still reach the drawee by the close of the next business day following receipt by the payee,[8] but some jurisdiction properly recognize the custom and demands of present day business and allow an extra day in such cases.[9] "Checks are not designed for circulation as mediums of exchange or credit but as cash items for immediate payment and so should be presented with all dispatch and diligence consistent with attendant circumstances."[10]

A failure to make presentment within the time stated is prima facie a case of failure to make presentment within a reasonable time.[11] And according to the majority view these facts coupled with the failure of the drawee will be prima facie a case of loss to the drawer, since he is presumed to draw his checks against sufficient funds to pay them. However, these facts will not preclude a finding, under facts peculiar to a particular case, that a longer delay was in fact reasonable.[12] In determining what is a reasonable time in a par-

he sent it on to headquarters and the check did not reach the drawee for nearly a week, it having failed before presentment, the drawer was discharged. Republic Metalware Co. v. Smith, 218 Ill. App. 130 (1920).

[8] Grange v. Reigh, 93 Wis. 552, 67 N. W. 1130 (1896); Carroll v. Sweet, *supra* note 2; Kirkpatrick v. Puryear, *supra* note 5; Smith v. Miller, 43 N. Y. 171 (1870); Edminstein v. Herpolsheimer Co., 66 Neb. 94, 92 N. W. 138, 59 L. R. A. 934 (1901); Alexander v. Burchfield, 7 Man & G 1061, 135 Eng. Rep. 431 (1842).

[9] Loux v. Fox, 171 Pa. 68, 33 Atl. 190 (1895); Willis v. Finley, 173 Pa. 28, 34 Atl. 213 (1895); Bristline v. Bentling, 39 Idaho 534, 228 Pac. 309 (1924).

[10] Gordon v. Levine, *supra* note 2; Kennedy v. Jones, 140 Ga. 302, 78 S. E. 1069 (1913); First Nat'l Bank of Wymore v. Miller, 37 Neb. 500, 55 N. W. 1064 (1893).

[11] Pelt v. Marlar, 95 Ark. 111, 128 S. W. 554 (1910).

[12] Such matters have been held to excuse a longer delay: Request by the drawer that the check not be presented immediately. Pollard v. Bowen, 57 Ind. 232 (1897); Tarasek v. Koscuiszko Bldg. & L. Assn., 218 Ill. App. 487 (1920). Lack of funds in the drawer's account to meet the check. Emory v. Hobson, 63 Me. 32 (1873); Bodner v. Rotman, 95 N. J. Eq. 510, 123 Atl. 529 (1924). Even if the funds are withdrawn after a reasonable time for presentment has expired this will still prevent the drawer from being discharged. Philadelphia Life Ins. Co. v. Hatworth, 296 Fed. 339 (C. C. A. 4th, 1924). Sudden and severe illness of such severeness as to prevent the holder from securing an agent to present. Wilson v. Senier, 14 Wis. 380 (1861). Other cases excusing delay: Joerns Bros. Mfg. Co. v. Burns, 173 Minn. 389, 217 N. W. 506 (1928); Coxe v. Boone, 8 W. Va. 500 (1875).

By reason of the special statute concerning them it was held that a railroad was not forced to present a check received for hauling goods promptly to keep from discharging the drawer. Fullerton v. Chicago M., St. P. & P. R. Co., 36 F. (2d) 180 (C. C. A. 8th, 1929).

ticular case regard must be had to the nature of the instrument, the usage or custom of trade or business (if any) both with respect to such instrument and also to the facts of the particular case.[13] Ordinarily this will be a question for the jury in each case.[14]

Burden of Proving Loss by Delay

Assuming the unreasonable delay, the further question arises as to whether the drawer must sustain the burden of proof upon the issue of loss as a defense, and show loss to himself, or whether the holder must negative the loss in order to recover.

All courts agree that if the payee puts the check in evidence and proves the drawer's signature he is entitled to recover, if nothing else appears,[15] and force the drawer wishing to rely on delayed presentment as a defense to prove the unreasonable delay.[16] But on the next

In the case of accepting checks for taxes under somewhat similar statutes requiring cash for payment, Palmer v. Harris, *supra* note 2, said that delay in presentment made the check become final payment to the extent of the drawer's loss. But Moritz v. Nicholson, Tax Collector, 141 Miss. 531, 106 So. 762 (1926) held that unreasonable delay in such cases did not discharge the drawer as this could only be done by actual payment.

[13] N. I. L. §193; N. C. Cons. Stat. Ann. (1919) §2978; McFadden v. Keesee, 16 S. W. (2d) 994 (Ark. 1929); Federal Land Bank of St. Louis v. Goodman, 292 S. W. 659 (Ark. 1927). Yates v. Goodwin, 96 Me. 90, 51 Atl. 804 (1901). When the drawer has a check certified and sent to the payee as a general rule it seems that this will not extend the time for presentment of the check, nor will it affect the rights of the parties. Blake v. Hamilton Dime Savings Bank Co., 79 Ohio St. 189, 87 N. E. 73, 20 L. R. A. (N. S.) 290, 16 Ann. Cas. 210 (1908); Blair & Hoge v. Wilson, 69 Va. 165 (1877). City of Brunswick v. Peoples Savings Bank, 194 Mo. App. 360, 190 S. W. 60 (1916). *Contra:* in Smith v. Hubbard, 205 Mich. 44, 171 N. W. 546 (1919), it was held that certification of a check by the drawer extended the time of presentment as in this condition the check became more of the nature of currency. But certification by the holder discharges the drawer at once without delay or loss since the holder substitutes the banks credit for that of the drawer. Met. Nat'l Bank v. Jones, 137 Ill. 634, 27 N. E. 533, 12 L. R. A. 492 (1891). As to cashier's checks and drafts the time for presentment varies with the circumstances. Lloyd Manufacturing Co. v. Davies, 51 N. D. 336, 199 N. W. 869, 36 A. L. R. 465 (1924).

[14] Tomlin v. Thorton, 99 Ga. 585, 27 S. E. 147 (1896); Empire Arizona Copper Co. v. Shaw, 20 Ariz. 471, 181 Pac. 464 (1919); Gordon v. Levine, *supra* note 2; Sinclair Refining Co. v. Keith, 97 Okla. 55, 221 Pac. 1003 (1924). But if the facts are undisputed, or are such that no reasonable man could differ concerning them, it becomes a question of law for the court. Bristline v. Bentling, *supra* note 9; Nuzum v. Shepard, *supra* note 5.

[15] Cook v. Moecher, 217 Ill. App. 479 (1920); Stull v. Daniel Machine Co., 207 Ala. 544, 93 So. 583 (1923); Jones v. Bank of Powder Springs, 31 Ga. App. 263, 120 S. E. 422 (1923). Of course in North Carolina since we do not have a directed verdict for the one sustaining the burden of proof the judge would merely charge the jury that if they believed the evidence that they might find for the plaintiff.

[16] Hazard Bank and Trust Co. v. Morgan, 211 Ky. 137, 277 S. W. 307 (1925); Bodner v. Rodman, *supra* note 12; Coldwell v. Coldwell, *supra* note 7; Gordon v. Levine, *supra* note 2.

issue we find a split of authority.[17] Georgia and other jurisdictions require the defendant to go further and prove that the delay caused him loss.[18] Another group place the burden upon the drawer to prove loss unless it is shown that the drawee bank has become insolvent, in which event they recognize a prima facie case of loss, thus forcing the holder to negative that loss in order to recover.[19] A third group merely require that the drawer prove unreasonable delay, and this being done the holder must come forward and negative the loss to the drawer or suffer an adverse verdict.[20]

But it seems in theory at least that the two latter groups are in error. The more equitable result would be reached by having the drawer sustain the burden of proving both the unreasonable delay and also the loss. Where no failure of the bank is shown the mere proof of non presentation of the check within a reasonable time does not raise any natural inference that a final loss has been or will be, suffered by the drawer.[21] And where we have the insolvency of the drawee bank shown, while this may cause a natural inference of some loss to the drawer, still it does not cause a natural inference of total loss.[22] And since the drawer is only discharged to the extent of his

[17] It is commonly stated that the weight of authority places the burden of disproving loss to the drawer on the holder in order for the holder to recover after delayed presentment and failure of the drawee bank is shown, but if such is the truth it exists by an exceedingly narrow margin.

However, all agree that loss to the drawer must be shown in some manner and it is no defense that there has been loss without delay, or delay without loss. It has been held that no delay short of the statute of limitations will discharge the drawer without loss. Coldwell v. Coldwell, *supra* note 7; Harzard Bank and Trust Co. v. Morgan, *supra* note 6.

[18] Merritt v. Gate City Nat'l Bank, *supra* note 6; Rosenbaum v. Hazard, 233 Pa. 206, 82 Atl. 62 (1911); Sims v. Hunter, 258 Pac. 550 (Idaho 1927); Empire Arizona Copper Co. v. Shaw, *supra* note 14; Cox v. Citizens State Bank, 73 Kan. 789, 85 Pac. 762 (1906). Anchor Duck Mills v. Harp, 150 S. E. 572 (Ga. App. 1929). For case where action is brought on the original consideration instead of the check see McEwen v. Cobb, 104 Misc. Rep. 477, 172 N. Y. S. 44 (1914).

[19] Willetts v. Paine, 43 Ill. 433 (1867); Watt v. Gans, 114 Ala. 264; 21 So. 1011 (1897); Hamlin v. Simpson, 75 Iowa 125, 74 N. W. 906 (1898); Little v. Phenix Bank, 2 Hill 425 (N. Y. 1842); Kirkpatrick v. Puryear, *supra* note 5.

[20] Griffin v. Kemp, 46 Ind. 172; McLain v. Lowther, 35 W. Va. 297, 13 S. E. 1003 (1892).

[21] Indeed he may be financially benefited in case of an account which draws interest on average daily balances.

[22] In the case of 105 insolvent national banks whose affairs were wound up in the year ending October 31, 1929, dividends paid to the creditors ranged from only one per cent to 111.5 per cent (principal and interest). The receiverships lasted from one to seven years. REPORT OF THE COMPTROLLER OF THE CURRENCY (1929) 26-27.

loss, it seems more reasonable that one seeking to apply a statute favorable to his cause should sustain the burden of proving that loss.

Manner of Proving Loss by Delay

But regardless of who sustains the burden of proof on the question of loss there still remains the problem as to the manner of determining its extent. At the date of the trial no one knows accurately what it will be, since these actions are usually brought just after the failure of the bank and it may not be known for several years what will be paid, though the receiver may give an opinion.[23] Most cases have ignored the question as to the extent of the loss entirely and seem to have assumed that if loss could be shown at all it would be presumed to be total.[24] In the few cases deciding the point the rule has been to leave the question to the jury to determine the loss, without any adequate evidence to aid them, and their verdicts seem to have been only a guess.[25] This is in part the fault of counsel but since the difficulty inheres in the nature of the case some other method of dealing with check-loss cases might be suggested.

1. The case might be tried only to the extent of determining whether the delay was or was not unreasonable, and if it was found that the delay was unreasonable, the case might then be continued until liquidation was complete, thus removing the necessity of a jury verdict on the question of loss.[26]

2. Judgment might be given for the holder for the whole amount of the check with a stay of execution allowing the drawer to satisfy the judgment by paying over to the holder whatever amount he should later receive on this portion of his deposit in the liquidation proceedings.[27]

[23] *Supra* note 22.

[24] Hamlin v. Simpson, *supra* note 19; Campbell v. Shark, 267 Pac. 458 (Idaho 1926); Kling Bros. v. Whipps, 123 Okla. 253, 270 Pac. 79 (1927); Commercial Investment Co. v. Lundgren-Witternsten Co., 173 Minn. 83, 216 N. W. 531 (1928); Northern Lumber Co. v. Clausen, 201 Iowa 701, 208 N. W. 72 (1926).

[25] Courtney v. McCartney, 30 Mo. 183 (1865); Fergus Motor Co. v. Blackweilder, 260 Pac. 734 (Idaho 1926); see also Merritt v. Gate City Nat'l Bank, *supra* note 6; Hamlin v. Simpson, *supra* note 19.

[26] The objections to this plan lie in the fact that this will necessitate the drawer giving a bond to reimburse the holder at the later date and it would involve also the question of whether the holder could be constitutionally deprived of his right to have the jury assess the damages at once, if he so desired.

[27] This arrangement too would require a bond if the plaintiff were properly protected, and the premium on such bonds whether assessed on plaintiff or dependent would seem to be an undesirable expense of the adjustment between the parties.

3. The court might render judgment for the holder for the whole amount of the check with leave to the drawer to satisfy it by assigning to the holder a portion of his deposit claim against the drawee bank equal to the amount of the check which has been dishonored. By this plan the case would be finally disposed of at once, and the amount of the plaintiff's recovery would be determined with mathematical accuracy. The loss which the plaintiff stood to suffer would be the exact amount intended by the Negotiable Instruments Law. And as the rule would have all the merits of speed and simplicity, it would seem a desirable substitute for jury guesses. The innovation might be put in force by a statute.[28]

HENRY T. POWELL.

Carriers—Allowance of Set-Off Against Freight Charges

A shipper, sued for freight charges, attempted to set off damages arising from negligence and delay in shipment. A federal District Court held that he was not entitled to plead set-off.[1]

Defendant shipped grapes over plaintiff's line. Plaintiff delivered without collecting freight and brought suit for the charges. Defendant set up loss due to delay and negligent handling and asked for a set-off which was allowed by the United States Supreme Court.[2]

[28] The problem might be solved by an amendment adding the following to §186 of the N. I. L.: "Provided, however, that when such check is found not to have been presented within a reasonable time, and the drawer had the right at the time of presentment, as between himself and the drawee, to have the check paid, the drawer shall be entitled to be fully discharged from liability thereon by assigning to the holder thereof the portion of his claim against the drawee equal to the amount of the check."

This is somewhat similar to §74 of the English Bills of Exchange Act, which after stating, in effect, §186 of the N. I. L., adds: "The holder of such check as to which such drawer or person is discharged, shall be a creditor, in lieu of such drawer or person, of such banker, to the extent of such discharge, and entitled to recover the amount from him."

This result may possibly be reached without an enabling statute by judicial decree at the time of trial. See Hawes v. Blackwell, 107 N. C. 196, 12 S. E. 245 (1890). However, constitutional objections might well be raised against such procedure.

There might be some ground for extending the language of the amendment above proposed to include also domiciled demand notes. See Note (1930) 8 N. C. L. REV. 184.

[1] Michigan Cent. R. Co. v. Carl & W. J. Piowaty, Inc., 36 F. (2d) 604 (N. D. Ill. 1929).

[2] Chicago & N. W. Ry. Co. v. Lindell, 50 Sup. Ct. 200 (1930).

These two cases, though representing opposing views, were decided only two months apart, the second being the first holding of the Supreme Court upon the question. Both the district courts and the various state courts have been nearly evenly divided in opinion.[3] The only decision[4] in a Circuit Court of Appeals forms the basis for the adverse holding of the first case here considered. It is there maintained that to allow a set-off would controvert the intention of Congress as expressed in the Interstate Commerce Acts to enforce uniform collection and prevent discrimination. Congress has attempted to destroy the practice of discriminating by means of rebates and allowances of claims for damages.[5] One device used in granting such rebates was for the shipper to file fictitious claims for damages.[6] Under the act of Congress a carrier cannot accept in payment for the transportation of interstate commerce anything but cash. If the shipper be allowed to set off claims for damages, the court must undertake the impossible task of holding the carrier to diligence and good faith in preparing and presenting its defense, in order to prevent the granting and receiving of rebates by insidious agreement between the parties.[7] So important is it that the collection of freight charges be uniform and above suspicion of favoritism that it seems against public policy to permit a counterclaim of this kind to be pleaded.[8]

The Supreme Court could not see that this manner of pleading was any more subject to collusion than any other and upheld the practicability of faster settlement of claims by the use of set-off and counterclaim.

The act[9] prohibiting carriers from refunding any part of charges does not prevent shipper from setting up counterclaim.[10] There is nothing in the letter or the spirit of this chapter which prevents the

[3] Pennsylvania R. Co. v. South Carolina Produce Ass'n., 25 F. (2d) 315 (E. D. S. C. 1928).

[4] Fullerton Lumber Co. v. Chicago, M., S. P. & P. R. Co., 36 F. (2d) 180 (C. C. A. 8th, 1929).

[5] Pennsylvania R. Co. v. South Carolina Produce Ass'n., *supra* note 3.

[6] Illinois Cent. R. Co. v. W. L. Hoopes & Sons, 233 Fed. 135 (S. D. Iowa, 1916).

[7] Chicago & N. W. Ry. Co. v. William S. Stein Co., 233 Fed. 716 (D. Neb. 1915); Johnson-Brown Co. v. Delaware, L. & W. R. Co. 239 Fed. 590 (S. D. Ga. 1917).

[8] *Supra* note 6.

[9] 28 U. S. C. A. §724 (Conformity of federal procedure to that of state in which district court is held); 49 U. S. C. A. §6 (7) forbidding carrier to refund in any manner any portion of charges does not prevent shipper setting up loss recoverable under par. 20 (11) as counterclaim.

[10] *Supra* note 2.

shipper from setting off damages of shipment against freight charges.[11] If in an action by the carriers for charges, a shipper cannot counterclaim for a cause of action ordinarily pleadable as such, then as a corollary, in an action by the shipper the carrier should not be permitted to counterclaim. There is no ground for differentiating or for treating suits by one wherein the other counterclaims as presumptively collusive.[12] It must be assumed that, when litigants come into a court, they are submitting a real controversy for settlement.[13] Adjustments of demands by counterclaims rather than by independent suit serves to avoid circuity of action and is encouraged by law.[14] Commendable economy and efficiency in judicial procedure would seem to justify the disposition of the entire related controversy in one action.[15]

G. A. LONG.

Conflict of Laws—Death by Wrongful Act—Limitations on Right of Action

Under the Florida laws, an action for damages for wrongful death may be brought at any time within two years after the death occurred.[1] The North Carolina wrongful death statute[2] specifies that the action must be brought within one year. More than one year, but less than two years, after a cause of action accrued in Florida, suit was instituted in North Carolina. *Held,* action barred.[3]

When common law actions are involved, the general rule is that the law of the place governs the right, and the law of the forum governs the remedy.[4] Since general statutes of limitation are procedural in nature, it follows that the limitation of common law actions is governed by the *lex fori.*[5] Thus, if action is barred by the statute of limitations of the forum, no action can be maintained

[11] Battle v. Atkinson, 9 Ga. App. 488, 71 S. E. 775 (1911); Pennsylvania R. Co. v. Bellinger, 101 Misc. Rep. 105, 166 N. Y. S. 652 (1917).
[12] Chicago & N. W. Ry. Co. v. E. C. Tecktonius Mfg. Co. 262 Fed. 715 (E. D. Wis. 1920).
[13] Wells Fargo & Co. v. Cuneo, 241 Fed. 727 (S. D. N. Y. 1917).
[14] North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co., 152 U. S. 596, 615-616, 14 Sup. Ct. 710, 715-716, 38 L. ed. 565 (1894).
[15] Payne, Director General v. Clark, 271 Fed. 525 (S. D. Cal. 1921).
[1] FLA. REV. GEN. STAT. (1920), §§4960-61, 2930 (6).
[2] N. C. CONS. STAT. ANN. (1919), §160.
[3] Tieffenbrun v. Flannery, 198 N. C. 397, 151 S. E. 857 (1930).
[4] Scudder v. Union Nat. Bank, 91 U. S. 406, 23 L. ed. 245 (1875); 1 WOOD, LIMITATIONS (4th ed. 1916) 62.
[5] McElmoyle v. Cohen, 13 Pet. 312, 10 L. ed. 177 (1839); Patton v. Lumber Co., 171 N. C. 837, 73 S. E. 167 (1916); Note (1900) 48 L. R. A. 625.

though the action is not barred in the state in which the cause of action arose.[6] Conversely, if an action is not barred by the *lex fori*, it may be maintained though it is barred by the *lex loci delicti*.[7]

The right of action for damages for wrongful death is unknown to the common law.[8] When the statute which creates the right specifies the time in which action must be brought, this limitation is a condition annexed to the right,[9] and, like other substantive matters,[10] is governed by the law of the place of the wrong. Consequently, no state will allow recovery on the statute after the limitation has elapsed.[11] The same result has been reached, moreover, when the limitation was not incorporated in the same statute which created the cause of action for wrongful death, but was directed expressly to that cause of action.[12]

On the theory, that when such prescribed limitation has expired, the cause of action is extinguished, recovery has been denied where suit was brought *after* the time provided by the *lex loci delicti* but *within* the time required for bringing action on a similar cause of

[6] CONFLICT OF LAWS RESTATEMENT (Am. L. Inst. 1929) §631. See McCoy v. Chicago etc. Ry. Co., 134 Mo. 622, 627, 114 S. W. 1124 (1909). But see Note (1913) 46 L. R. A. (N. S.) 687, 690.

[7] CONFLICT OF LAWS RESTATEMENT, *supra* note 6, §632; O'Shields v. Ga. Pac. Ry., 83 Ga. 621, 10 S. E. 268, 6 L. R. A. 152 (1889); Tarbell v. Grand Trunk Ry. Co., 94 Vt. 449, 111 Atl. 567 (1920). But where title to a chattel has been acquired by adverse possession under the law of the *situs*, the rights acquired will be respected in another jurisdiction to which the chattel has been subsequently removed, although the statute of limitations of the forum would not have barred the original owner's action. Shelby v. Guy, 11 Wheat. 361, 6 L. ed. 495 (1826).

[8] It was not until the enactment, in 1876, of Lord Campbell's Act that recognition was given to the doctrine that "it is oftentimes right and expedient that the wrongdoer in such cases should be answerable in damages" for the death so caused by him. (9 & 10 Vict. c. 93.)

[9] 2 WHARTON, CONFLICT OF LAWS (3rd. ed. 1905) 1261; Taylor v. Cranberry Iron Co., 94 N. C. 525 (1886); Hanie v. Penland, 193 N. C. 800, 138 S. E. 165 (1927). See also Engel v. Davenport, 271 U. S. 33, 46 S. Ct. 410, 70 L. ed. 813 (1926) (the time provision in a Federal Employers' Liability Act is substantive, and the shorter period prescribed by a state limitation statute will not prevail).

[10] Wrongful death statutes usually specify the party who must bring suit. See Notes (1926) 24 MICH. L. REV. 411; (1928) 37 YALE L. J. 666; (1923) 9 VA. L. REV. 567.

[11] The Harrisburg, 119 U. S. 199, 75 Sup. Ct. 140, 30 L. ed. 358 (1886); Boyd v. Clark, 8 Fed. 849 (E. D. Mich. 1881); CONFLICT OF LAWS RESTATEMENT, *supra* note 7, §433. See Note (1900) 48 L. R. A. 639.

[12] Negaubauer v. Gt. Northern Ry., 92 Minn. 184, 99 N. W. 620, 104 Am. St. Rep. 674, 2 Ann. Cas. 150 (1900). See also, Brunswick Terminal Co. v. National Bank, 99 Fed. 635, 48 L. R. A. 625 (C. C. A. 4th, 1900); Davis v. Mills, 194 U. S. 451, 24 Sup. Ct. 692, 48 L. ed. 1067 (1904). But see Gregory v. Sou. Pac. Co., 157 Fed. 113 (C. C. D. Ore. 1907) (Wrongful death statute contained no limitation, and general limitation statutes of *locus delicti* made no reference to this cause of action, held, *lex fori* will govern.); Munos v. Southern Pac. Ry., 51 Fed. 188 (C. C. A. 5th, 1892).

action arising within the forum.[13] But as to the reverse situation, where suit is brought *within* the time provided by the *lex loci delicti* but *after* the time required by the *lex fori,* the authorities are sharply divided.[14]

The determinative question in situations of this type is whether the time limit contained in the statute of the forum is, in reality, both a statute of limitation and a condition annexed to the substantive right.[15] Minnesota has held that the limitation is substantive only and, applying the general rule that the law of the state creating the right governs, has allowed action on a foreign wrongful death statute to be maintained even though the same action would have been barred had the wrong occurred in the state of the forum.[16] There are Federal Court decisions in accord.[17]

A contrary result was reached by the North Carolina court when the question was fairly presented by the principal case. If the North Carolina statute is substantive only, and not a statute of limitation, it inevitably follows that the one year limit contained therein is intended to govern actions for wrongful deaths occurring in North Carolina, and has no effect on admittedly, good, transitory[18] causes of action arising in other states and brought to the forum for trial. However, the declaration of the court that the time limit in the statute is both a condition annexed to the cause of action and a legislative declaration of the policy of the state as to when wrongful death actions shall be asserted in the state, is sound, is in accord with the suggestion made in the American Law Institute's *Restatement of Conflict of Laws,*[19] and will doubtless point the way for other decisions in this disputed area of the law.

THOMAS W. SPRINKLE.

[13] Wingert v. Carpenter, 101 Mich. 395, 59 N. W. 662 (1894); Ry. Co. v. Lacy, 49 Ga. 107 (1873).

[14] 2 WHARTON, *supra* note 9, 1264.

[15] See GOODRICH, CONFLICT OF LAWS (1927) 171.

[16] Negaubauer v. Gt. Northern Ry Co., *supra* note 12.

[17] Keep v. National Tube Co., 154 Fed. 121 (D. N. D. 1907); Theroux v. Northern Pac. Ry. Co., 64 Fed. 84 (C. C. A. 8th, 1894).

[18] Dennick v. Railroad, 103 U. S. 11, 26 L. ed. 439 (1880); Harrell v. South Carolina, etc. R. Co., 132 N. C. 655, 44 S. E. 109 (1903). But see McLay v. Slade, 48 R. I. 357, 138 Atl. 212 (1927), Noted (1927) 26 MICH. L. REV. 325. (When the death statute is penal, there can be no recovery in another state.)

[19] CONFLICT OF LAWS RESTATEMENT (Am. L. Inst. 1928) §433, comment (b), "The limit of time in the death statute of the forum may be interpreted as a statute of limitations for actions for death; and in that case the suit must be brought within the time limited in that statute, as well as within the time limited in the statute of the place of injury."

Constitutional Law—Public Utilities—Separate and Equal Accommodations in Motor Busses

In a recent North Carolina case[1] the Interracial Commission petitioned the Corporation Commission to make regulations to insure the negro traveling public separate but equal accommodations on the busses and in the passenger stations of the respondent bus companies The petition was dismissed by the Corporation Commission on the ground that it had no power to interpret carriers by bus to be common carriers within the terms of the 1927 statute.[2] On appeal to the Supreme Court it was held, (1) That bus lines operating within the state are common carriers, and (2) That the Corporation Commission has plenary power under the 1927 statute to require bus lines operating between points within the state in carrying passengers for hire to provide separate bus and station accommodations for white and negro passengers.[3]

The legislature has authority to provide reasonable rules and regulations for the supervision of common carriers and to prevent unjust discriminations and preferences.[4] This authority may be delegated to an administrative board or commission.[5] The Corporation Commission is specifically vested by the 1927 statute[6] with power to

[1] Corporation Commission v. Interracial Commission, 198 N. C. 317, 151 S. E. 648 (1930).

[2] The Corporation Commission was petitioned to make such regulations by virtue of §7, chapter 136, Public Laws 1927, which provides, "The Commission is hereby vested with power and authority to supervise and regulate every motor vehicle carrier under this article; to make or approve the rates, fares, charges, classifications, rules and regulations for service and safety of operation and checking of baggage of each such motor vehicle carrier; to supervise the operation of union passenger stations in any manner necessary to promote harmony among the operators and efficiency of service to the traveling public; . . . to require the increase of equipment capacity to meet public convenience and necessity; and to supervise and regulate motor vehicle carriers in all other matters affecting the relationship between such carriers and the traveling and shipping public. The Commission shall have power and authority, by general order or otherwise, to prescribe rules and regulations applicable to any and all motor vehicle carriers. . . ." N. C. Code Ann. (Michie 1927) §2613 (p).

[3] Since this case the Corporation Commission has notified certain bus lines to make arrangements to provide separate, but equal accommodations, for whites and negroes in passenger stations. See Greensboro (N. C.) *Daily News*, April 30, 1930, page 1, col. 2.

[4] Richmond & Danville R. R. Co. v. The Durham & Northern R. R. Co., 104 N. C. 658, 673, 10 S. E. 659 (1889); The Atlantic Express Co. v. The Wilmington & Weldon R. R., 111 N. C. 463, 16 S. E. 393, 18 L. R. A. 393, 32 Am. St. Rep. 805 (1892); Chicago, Burlington & Quincy R. R. Co. v. Iowa, 94 U. S. 155, 24 L. ed. 94 (1876).

[5] The Atlantic Express Co. v. The Wilmington & Weldon R. R., *supra* note 4.

[6] *Supra* note 2.

supervise and regulate motor vehicle carriers in matters affecting the relationship between such carriers and the traveling public. It seems clear from the language of this statute,[7] without necessity of construction by the Corporation Commission, that the motor vehicle carriers provided for were common carriers. In accord with the policy of the state with regard to separation of races in public conveyances,[8] the Commission should have issued orders for segregation upon the petition of the Interracial Commission.

Since the above litigation began, chapter 216, Public Laws of 1929[9] has gone into effect, but not being necessarily involved in the case was not thereby construed, although the Court discussed it.[10] The statute provides "that operators of motor vehicles or bus lines or taxicabs engaged in the transportation of passengers of one race only shall not be required to provide any accommodations for the other race." A state statute which requires the separation of the races, with equal accommodations, is not a denial of equal protection of the laws.[11] But no one can be excluded by a common carrier on account of color,[12] and a state law which authorizes race discrimina-

[7] The definition of terms provided by the same act defines, "the term 'motor vehicle carrier' means every corporation or person * * * owning, controlling, operating or managing any motor vehicle used in the business of transporting persons or property for compensation between cities, or between towns, or between cities and towns over the public highways of the state as public highways are defined herein." Also "the term 'service' means that motor vehicle service which is held out to the public and of which the public may avail itself at will for transportation over the public highways * * * irrespective of whether the service is on regular schedule or otherwise." Section 1, Chapter 136, Public Laws 1927; N. C. Code Ann. (Michie 1927) §2613 (j).

[8] "The policy of the legislative branch of the government is to have separation of the races—in the railroads, street cars, schools, public institutions, etc., of the state—with equal accommodations." State v. Williams, 186 N. C. 627, 634, 120 S. E. 224 (1923).

[9] N. C. Code Ann. (Michie 1929 Supp.) §2613 (p), amending §7, Chapter 136, Public Laws 1927, and N. C. Cons. Stat. Ann. (1919) §§3494, 3497.

[10] The Court said of the 1929 statute, "We think this act also authorizes the Corporation Commission to work out in good faith the manner and method left to the sound discretion of the Commission—a sane and sensible solution giving adequate and equal accommodation to the white and negro races, taking into consideration all matters including economical conditions relative to a workable solution." Corporation Commission v. Interracial Commission, *supra* note 1, at p. 320.

[11] Plessy v. Ferguson, 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. ed. 256 (1896); Chiles v. Chesapeake & Ohio Ry. Co., 218 U. S. 71, 30 Sup. Ct. 667, 54 L. ed. 936 (1910).

[12] Coger v. North West Union Packet Co., 37 Iowa 145 (1873); Meisner v. Detroit, B. I. & W. Ferry Co., 154 Mich. 545, 118 N. W. 14, 129 Am. St. Rep. 493 (1908); West Chester & Philadelphia R. R. Co. v. Miles, 55 Pa. 209, 93 Am. Dec. 744 (1867). "The law imposes on the carrier the duty of transporting every citizen paying the fare demanded. This right of the citizen and duty

tion by a public carrier of passengers is unconstitutional.[13] It is submitted therefore that the portion of the 1929 statute above set out is contrary to the equal protection clause of the fourteenth amendment.[14]

The statute also provides "that nothing contained in this act or the law amended hereby shall be construed to declare operators of busses and/or taxicabs common carriers." This provision appears to be superfluous. Whether a carrier is private or public depends upon the service it renders and not on legislation.[15] Whether the service rendered is public or private depends on the facts, and the fourteenth amendment prevents the legislature from declaring a carrier private or public unless there is a reasonable basis of fact for so doing.[16]

A. W. GHOLSON, JR.

Contracts—Consideration—Family Settlement

The testator, in disposing of his property among his children, made special bequests to two of his daughters, in recognition of their love and attention to himself and their mother. From statements made by the eldest son, an executor under the will, the children drew the inference that the two daughters had, and would enforce, a valid claim for wages against the estate, unless they were paid. To avoid litigation an agreement was drawn up, and signed and sealed by the children, whereby the two daughters were to receive $1,500 each in addition to the special bequests provided in the will and the unsigned and undated codicil. The children now seek to have the agreement set aside on the ground of lack of consideration. *Held,* that a court of equity looks with favor upon family settlements, and if asserted in

of the carrier exists by common law." U. S. v. Dodge, Fed. Cas. No. 14,976 (W. D. Texas 1877).

[13] McCabe v. Atchison, Topeka & Santa Fe Ry. Co., 235 U. S. 151, 35 Sup. Ct. 69, 59 L. ed. 169 (1914).

[14] See (1929) 7 N. C. L. REV. 391-392.

[15] Waldum v. Lake Superior Terminal & Transfer Ry. Co., 169 Wis. 137, 170 N. W. 729 (1919); State v. Public Service Com., 117 Wash. 453, 201 Pac. 765 (1921); Pacific Spruce Corp. v. McCoy, 294 Fed. 711 (D. C. Ore. 1923); Terminal Taxicab Co. v. Dist. of Col., 241 U. S. 252, 36 Sup. Ct. 583, 60 L. ed. 984, Ann. Cas. 1916 D 765 (1916).

[16] Frost v. R. R. Com. of Cal., 271 U. S. 583, 46 Sup. Ct. 605, 70 L. ed. 1101 (1926); Michigan Public Utilities Com. v. Duke, 266 U. S. 570, 45 Sup. Ct. 191, 69 L. ed. 445, 36 A. L. R. 1105 (1925). The state may declare a corporation a common carrier upon the application of the corporation, Corporation Commission v. Atl. Coast Line R. R. Co., 187 N. C. 424, 121 S. E. 767 (1924).

good faith, even though in fact unfounded, will sustain them as based on valid consideration.[1]

This case is sustainable regardless of consideration on the ground that the contract was under seal.[2] Though equity requires a consideration, regardless of any seal, to enforce an agreement,[3] it will not set a sealed agreement aside because of lack of consideration. The case might also be sustained as a compromise of a doubtful claim[4] asserted in good faith.[5] But regardless of the seal and compromise, the court's language was broad enough to indicate that the case would have been sustained on the ground of family settlement, even though the court found no consideration.

By the great weight of authority a bona fide agreement by one interested in a testator's estate, to refrain from contesting a will is valid.[6] It is not void as against public policy, since it lessens litigation.[7] The giving up of such contest, begun in good faith or so intended, is sufficient consideration for a promise to pay money or convey property.[8]

Consideration is in effect the price bargained for and paid for as the exchange for the promise.[9] The necessity for consideration is the result of a historical development.[10] It is analogous to, but not identical with the *causa* requirement under the Civil Law.[11] Its

[1] Weade v. Weade, 150 S. E. 238 (Va. 1929), commented on in (1930) 16 VA. L. REV. 406.

[2] Harris v. McKay, 138 Va. 448, 122 S. E. 137, 32 A. L. R. 156 (1924).

[3] Lamprety v. Lamprety, 29 Minn. 151, 12 N. W. 514 (1882); Pound, *Consideration in Equity* (1919) 13 ILL. L. REV. 667.

[4] 1 WILLISTON, CONTRACTS (1924) §135 at 295.

[5] Cole v. Cole, 292 Ill. 154, 126 N. E. 752, 38 A. L. R. 719 (1920); Layer v. Layer, 184 Mich. 663, 151 N. W. 759 (1915). Mere good faith alone is not sufficient consideration, Hardin v. Hardin, 201 Ky. 310, 256 S. W. 417, 38 A. L. R. 756 (1923), and the claim compromised must not be frivolous or unreasonable, Stellers v. Jones, 164 Ky. 458, 175 S. W. 1002 (1915); 1 WILLISTON, *op. cit. supra* note 4, at 296.

[6] In re Cook's Will, 244 N. Y. 63, 154 N. E. 823 (1926), 55 A. L. R. 806 (1928); Collins v. Collins, 151 Wash. 201, 275 Pac. 571 (1929). To the effect that the contestant must have an interest in the property, see Conklin v. Conklin, 165 Mich. 571, 131 N. W. 154 (1911).

[7] In re Cook's Will, *supra* note 6.

[8] Hollowoa v. Buck, 174 Ark. 497, 296 S. W. 74 (1927); Blount v. Dillaway, 199 Mass. 330, 85 N. E. 477, 17 L. R. A. (N. S.) 1036 (1908); Note (1925) 38 A. L. R. 734, 740.

[9] CONTRACTS RESTATEMENT (Am. L. Inst. 1928) §75.

[10] 2 STREET, FOUNDATIONS OF LEGAL LIABILITY (1906) Ch. 3.

[11] *Causa* is, in its proper meaning, the "reason" or "situation" for doing something; it has. through use, finally reached the point where it is very intangible and hard to define or qualify, RADIN, ROMAN LAW (1927) 297-300.

present purpose seems to be to avoid litigation over trivial promises not based upon any substantial motive.

The law still requires consideration. In its technical sense, as it is generally thought of, it is something of value given in exchange; this was the common law idea. It is, in its widest sense, the reason, motive or inducement, by which a person is moved to bind himself by an agreement.[12] But the conception of consideration is gradually broadening and the courts are now enforcing promises, made without any value given for them, to pay debts which are barred by the Statute of Limitations[13] or discharged in bankruptcy,[14] as promises to perform voidable duties.[15] This same tendency is evidenced by various other kinds of cases.[16] And the Uniform Written Obligations Act is a further example. Section 1 of the Act provides that a written promise made and signed shall not be unenforceable for want of consideration, if it contains a statement to the effect that the signor intends to be legally bound.[17] This seems to aim to carry out the intention of the parties as evidenced by the instrument, even in the absence of consideration.

The inflection, in the instant case, of the language of previous cases[18] clearly shows the broadening of the requirement of consideration in the law of contracts. This trend seems to lead to the logical conclusion that future cases will support family settlements despite want of consideration in the usual sense of legal detriment to the promisee or benefit to the promisor.

MILLS SCOTT BENTON.

Corporations—Negligence of Directors—Right of Corporate Creditor to Sue

The Supreme Court of North Carolina recently held that plaintiffs, corporation creditors, stated a good cause of action in a complaint which charged the defendants, directors of a now insolvent corpor-

[12] SALMOND, JURISPRUDENCE (7th ed. 1924) 374.
[13] CONTRACTS RESTATEMENT, *supra* note 9, §86.
[14] CONTRACTS RESTATEMENT, *supra* note 9, §87.
[15] CONTRACTS RESTATEMENT, *supra* note 9, §89.
[16] CONTRACTS RESTATEMENT, *supra* note 9, §§85-94.
[17] HANDBOOK OF THE NATIONAL CONFERENCE COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS (1925) 584.
[18] It is well settled that courts will go further to sustain family settlements than they will under ordinary circumstances, Baas v. Zinke, 218 Mich. 502, 188 N. W. 512 (1922); Trigg v. Read, 5 Humph. 528, 42 Am. Dec. 447 (Tenn. 1845); Price v. Winston, 4 Munf. 63 (Va. 1813); 1 PAGE, CONTRACTS (1920) §623; Note (1925) 38 A. L. R. 734.

ation with such negligence in the performance of their duties to the corporation that a dishonest official was enabled to defraud plaintiffs and others of large sums of money, and finally wreck the corporation itself.[1]

Concerning the liability of corporate directors, the general American view is that they are agents of the corporation, and liable only to it for their wrongful acts except under such circumstances as would render them personally liable were they acting as agents of a private individual.[2] But some states have adopted the so-called "trust fund doctrine" under which directors are liable as trustees of the corporate assets for the benefit of stockholders and creditors.[3]

There is likewise a split of opinion as to what conduct will render directors liable either to the corporation or its creditors. Some jurisdictions hold that the director is liable only for gross negligence or fraud;[4] the majority that he is liable for failure to exercise ordinary care and diligence in the discharge of his duties;[5] and a few, that he

[1] Minnis v. Sharpe, 198 N. C. 364, 151 S. E. 735 (1930).

[2] Allen v. Cochran, 160 La. 425, 107 So. 292, 50 A. L. R. 459 (1926); Union National Bank v. Hill, 148 Mo. 380, 49 S. W. 1012 (1899); Killen v. State Bank, 106 Wis. 546, 82 N. W. 536 (1900); Penney v. Bryant, 7 Nebr. 127, 96 N. W. 1033 (1903); Hart v. Evanson, 14 N. D. 570, 105 N. W. 942 (1895); Young v. Haviland, 215 Mass. 120, 102 N. E. 338 (1913); THOMPSON on CORPORATIONS (3rd ed.), §1276; FLETCHER, CYCLOPEDIA OF CORPORATIONS, §2558; MECHEM on AGENCY, §§1467, 1474.

[3] Delano v. Case, 121 Ill. 247, 12 N. E. 676 (1887); United Society of Shakers v. Underwood, 9 Bush 609 (Ky. 1873); Nix v. Miller, 26 Colo. 203, 57 Pac. 1084 (1899); Hauser v. Tate, 85 N. C. 82 (1880); and Pender v. Speight, 159 N. C. 612, 75 S. E. 851 (1912) (holding that the directors are trustees for the creditors as well as for the corporation); McCollum v. Dollar, 213 S. W. 259 (Tex. Civ. App. 1919) (The directors of a corporation are liable to its creditors for losses resulting from their negligent acts); Cameron v. First National Bank, 194 S. W. 469 (Tex. Civ. App. 1917) (A creditor has an immediate right of action against the directors.)

[4] Cohen v. Maus, 297 Pa. 454, 147 Atl. 103 (1929); Hart v. Evanson, *supra* note 2; Peck v. Cooper, 8 Ill. App. 403 (1881); Utley v. Hill, 155 Mo. App. 232, 49 L. R. A. 323 (1900) (Directors not liable though they could have prevented the loss by exercise of reasonable care); Aubrey's Administrator v. Stimson, 160 Ky. 563, 169 S. W. 991 (1914); Spering's Appeal, 71 Pa. St. 11, 10 Am. Rep. 684 (1872) (In the absence of fraud or misappropriation of funds, or realization of a profit not common to all the stockholders directors are not liable); FLETCHER, CYCLOPEDIA OF CORPORATIONS, §2573.

[5] Houston v. Thornton, 122 N. C. 365, 29 S. E. 827 (1898); Anthony v. Jeffress 172 N. C. 378, 90 S. E. 414 (1916); Braswell v. Morrow, 195 N. C. 127, 141 S. E. 489 (1928); Besselieu v. Brown, 177 N. C. 65, 97 S. E. 743 (1919); Moore v. Mason, 73 Ohio St. 275, 76 N. E. 932, 4 L. R. A. (N. S.) 597 (1906) (Directors are liable for failure to exercise ordinary care and prudence); Cameron v. Kenyon-Connell Commercial Co., 22 Mont. 312, 56 Pac. 353, 44 L. R. A. 508 (1899) (Directors are charged with reasonable care in the performance of their duties); Conaty v. Torghen, 46 R. I. 350, 128 A. 338 (1925); General Rubber Co. v. Benedict, 149 N. Y. S. 882 (1914); Mc-

must use all he care and diligence that a prudent man would bring to the management of his own business.[6] None, however, seems to hold that he is liable for simple mismanagement or errors of judgment.[7]

North Carolina adheres to the "trust fund doctrine," and holds directors to the care and diligence of ordinary prudent men.[8] Therefore it would seem that the defendants, by their demurrer, have admitted facts which would render them liable under the North Carolina law. The remaining question is largely a matter of proper parties to the suit.

Even in states holding the "trust fund doctrine" it is usual to require that unless there has been a direct wrong to the complaining creditor the right of action against the directors vests in the corporation, or in the receiver, for the benefit of all creditors similarly situated.[9] In case the receiver refuses to sue he may be made a party defendant to the suit to the end that whatever is recovered by means of such suit may be fairly distributed to all those having an equally good cause of action.[10] Strong support for this position is found in North Carolina cases. And it is submitted that a more equitable re-

Ewen v. Kelly, 140 Ga. 720, 79 S. E. 777 (1913); Briggs v. Spaulding, 141 U. S. 132, 35 L. ed. 662, 11 Sup. Ct. 924 (1891) (Directors must exercise ordinary care in the discharge of their duties, and they will not be shielded from liability because of the ignorance which is the result of gross inattention); Note. (1919) 2 A. L. R. 867.

[6] Kavanaugh v. Commonwealth Trust Co., 118 N. Y. S. 758 (1909); Hun v. Cary, 82 N. Y. 65 (1880); (1910) 8 MICH. L. REV. 137.

[7] By "simple mismanagement" is apparently meant that which arises not from carelessness, but solely as a result of non-negligent errors of judgment. The consequences of such mismanagement have something of the element of accident in them since they could hardly have been avoided by the exercise of ordinary care and skill.

[8] Bane v. Powell, 192 N. C. 387, 135 S. E. 118 (1926); Solomon v. Bates, 118 N. C. 311, 24 S. E. 478 (1896); Caldwell v. Bates, 118 N. C. 323, 24 S. E. 481 (1896); Tate v. Bates, 118 N. C. 287, 24 S. E. 482 (1896); Braswell v. Morrow, *supra* note 5; Anthony v. Jeffress, *supra* note 5; Besselieu v. Brown, *supra* note 5.

[9] Douglass v. Dawson, 190 N. C. 458, 130 S. E. 195 (1925); Ham v. Norwood, 196 N. C. 763, 147 S. E. 291 (1929); Bailey v. Mosher, 63 Fed. 488 (C. C. A. 8th, 1894) (Any liability of the directors is an asset in the hands of the corporation, to be recovered by the receiver for the benefit of all the creditors.) Priest v. White, 89 Mo. App. 609, 1 S. W. 361 (1886) (A wrong done to the corporation which may affect its credit, and its creditors generally is not a wrong to them as individuals, and they cannot maintain an action as for tort); Kelly v. Dolan, 233 Fed. 635 (C. C. A. 3rd, 1916) (The right to recover of the directors is a legal right vested in the corporation); Almiral Co. v. M'Clement, 202 N. Y. S. 139 (1923); Lewis v. Council, 291 Fed. 148 (E. D., N. C. 1923); Allen v. Cochran, *supra* note 2; THOMPSON, CORPORATIONS (3rd ed.) §1375.

[10] Douglass v. Dawson, *supra* note 9; Ham v. Norwood, *supra* note 9; Kelly v. Dolan, *supra* note 9; THOMPSON, CORPORATIONS (3rd ed.) 889.

sult would have been reached in the present case by the application of some such principle.

The wrong complained of was not one peculiar to the plaintiffs; furthermore, there had been an intervention by a dishonest official, an independent third party, between the negligence of the directors and the injury complained of. If, as here, the individual creditor who has been injured as a remote result of the defendant's negligence is allowed to recover for an injury not peculiar to himself without joining the corporation, or its receiver, litigation will be increased with the probable result that in such cases the aggressive creditors, and those who are financially able to prosecute lawsuits will be enabled to attach the available assets of the tort-feasors leaving the others to such recovery as may be had from the corporate assets left in the hands of the receiver.

ALLEN LANGSTON.

Criminal Law—Prohibition—Purchase of Liquor

Officers found a quantity of liquor, something less than a gallon, in the defendant's room which the defendant admitted having purchased for his own use. The defendant was indicted for transporting, purchasing, possessing, and having in possession for the purpose of sale intoxicating liquor. Upon a verdict of "guilty of purchasing liquor," the defendant appealed, contending that since the Volstead Act does not prohibit the purchase of liquor and the Turlington Act[1] was adopted to make the state law conform to the national law, the State was limited in its power to legislate more stringently upon the subject than Congress had done. *Held,* The state law prohibiting the purchase of liquor for beverage purposes is not in conflict with the federal law which does not prohibit purchase thereof.[2]

The Eighteenth Amendment is not the source of power of states to adopt and enforce prohibitory measures, but the power of the states is that originally belonging to them and preserved to them under the first ten amendments.[3] The concurrent power clause of

[1] N. C. Pub. Laws, 1923, c. 1, §2. "No person shall manufacture, sell, barter, transport, import, export, deliver, furnish, *purchase,* or possess any intoxicating liquors except as authorized in this act; and all provisions of this act shall be liberally construed to the end that the use of intoxicating liquors as a beverage shall be prevented." (Italics ours.) (An Act to Make the State Law Conform to the National Law in Relation to Intoxicating Liquors.)

[2] State v. Lassiter, 198 N. C. 352, 151 S. E. 721 (1930).

[3] Vigliotti v. Pennsylvania, 258 U. S. 403, 42 Sup. Ct. 330, 66 L. ed. 686 (1921); U. S. v. Lanza, 260 U. S. 377, 43 Sup. Ct. 141, 67 L. ed. 314 (1922); Hebert v. Louisiana, 272 U. S. 312, 47 Sup. Ct. 103, 71 L. ed. 270 (1926).

the Eighteenth Amendment negatived any inference that the amendment changed the source of police power of the states concerning intoxicating liquors or deprived them of that power, except in that it prevented them from authorizing what federal law prohibited.[4] Each state, as also Congress, may exercise independent judgment in selecting and shaping measures to enforce prohibition.[5] State prohibitory laws are in aid of and concurrent with the Eighteenth Amendment and Volstead Act[6] and, unless repugnant to the purpose thereof, are not invalid because more drastic in their nature.[7]

It is a mooted question at present whether there is anything in the Volstead Act making it a crime to purchase liquor. It has recently been urged that a buyer can be prosecuted as an accessory of the seller if the purchase involves transportation to the former,[8] but this contention had been overruled.[9] The purchaser is not guilty of the crime of aiding and abetting the crime of selling, and his coöperation would seem to be insufficient to make him chargeable with conspiracy.[10] Also the buyer's immunity is based on other grounds than lack of coöperation.[11] The immunity which attaches to the victims in certain offenses does not always protect such persons when prosecuted with conspiracy to commit the offenses in question.[12] It would

[4] Rhode Island v. Palmer, 253 U. S. 350, 40 Sup. Ct. 486, 588, 64 L. ed. 946 (1921); Commonwealth v. Nickerson, 236 Mass. 296, 128 N. E. 273, 10 A. L. R. 1568 (1920); State v. Montgomery, 121 Wash. 617, 209 Pac. 1099 (1922); Commonwealth v. Gardner, 297 Pa. 498, 147 Atl. 527 (1929).

[5] National Prohibition Cases, 253 U. S. 350, 40 Sup. Ct. 486, 64 L. ed. 946 (1919); U. S. v. Lanza, *supra* note 3.

[6] Rhode Island v. Palmer, *supra* note 4; State v. Booher, 148 Wash. 149, 268 Pac. 167 (1928).

[7] Powell v. State, 98 Ala. App. 101, 90 So. 138 (1921); People v. Wood, 264 Pac. 298 (Cal. App. 1928); State v. Hammond, 188 N. C. 602, 125 S. E. 402, 404 (1924); State v. Barkesdale, 181 N. C. 621, 107 S. E. 505 (1921); Youman v. Com., 193 Ky. 536, 237 S. W. 6 (1922); writ of error dismissed, 261 U. S. 625, 43 Sup. Ct. 358, 67 L. ed. 833 (1923).

[8] U. S. v. Kerper, 29 F. (2d) 744 (D. C. Pa. 1928).

[9] Norris v. U. S., 34 F. (2d) 839 (C. C. A. 3rd, 1929). Certiorari was granted on March 3, 1930. See the *U. S. Daily* (March 4, 1930), page 1, column 1.

[10] Singer v. U. S., 278 Fed. 415 (C. C. A. 3rd, 1922), certiorari denied, 258 U. S. 620, 42 Sup. Ct. 272, 66 L. ed. 795 (1922); Lott v. U. S., 205 Fed. 28, 29, 46 L. R. A. (N. S.) 409 (C. C. A. 9th, 1913); State v. Teahan, 50 Conn. 92 (1882).

[11] State v. Teahan, *supra* note 10 (the purchaser approaches the sale on the wrong side); Commonwealth v. Willard, 39 Mass. 476 (1839) (the substantive crime is too trivial to punish the abettor); Vannata v. U. S., 289 Fed. 424, 428 (C. C. A. 2nd, 1923) (statute in denouncing seller impliedly exempts the buyer).

[12] White Slave Act, see U. S. v. Holte, 236 U. S. 140, 35 Sup. Ct. 271, 59 L. ed. 504 (1914); Abortion, see Fixmer v. People, 153 Ill. 123, 38 N. E. 667 (1894) (decision under state statute).

seem easier as a matter of policy to punish the buyer for conspiracy to transport than to punish buying directly. Some courts in prosecuting for selling hold that the exemption of the purchaser does not extend to his agent[13] and in disregard of actual facts twist the relationship into one of agency for the seller.[14] However, the general rule is that the agent of the buyer is not guilty of selling provided he has no interest in the liquor or the price and acts solely as the intermediary for the buyer and not in subterfuge to aid the seller.[15]

The provisions of the National Prohibition Act and the Turlington Act are to be construed liberally to the end that the use of intoxicating liquors as a beverage may be prevented.[16] To accomplish this result the Turlington Act, which includes the word "purchase" in its list of offenses,[17] would seem to be more effectively worded than the national act. But the difficult problem raised by Prohibition has not been inadequacy of statute but inability of enforcement. The instant case raises an interesting query: Why have there been no cases in the North Carolina Supreme Court for the purchase of liquor in the seven years between the passage of the Turlington Act and the present case? It may be that the word "purchase" was inadvertently included in the state act, the legislature giving it no special significance at the time, or that the courts have followed public opinion, restricting punishment to the seller alone. As a matter of public policy the benefits derived from logically convicting the buyer as well as the seller of liquor may be more than counterbalanced by the risk incurred of greater disregard for law.

TRAVIS BROWN.

[13] Buchanan v. State, 40 Okla, Cr. 645, 112 Pac. 32, 32 L. R. A. (N. S.) 83 (1910); State v. Gear, 72 Ore. 501, 143 Pac. 890 (1914); Walters v. State, 127 Miss. 324, 90 So. 76 (1921).

[14] Mo Yaen v. State, 18 Ariz. 491, 163 Pac. 135 (1917); Wigington v. U. S., 296 Fed. 125 (C. C. A. 4th, 1924), certiorari denied, 264 U. S. 596, 44 Sup. Ct. 454, 68 L. ed. 867 (1924).

[15] Mitchell v. State, 148 Ala. 678, 41 So. 951 (1906); State v. Colonial Club, 154 N. C. 177, 69 S. E. 771, 31 L. R. A. (N. S.) 387 (1910); Cunningham v. State, 105 Ga. 676, 31 S. E. 585 (1898); Lindsay v. State, 143 Ark. 140, 219 S. W. 1025 (1920).

[16] National Prohibition Act (27 U. S. C. A., 41 Stat. 305), c. 12, §2, "and all provisions of this chapter shall be liberally construed to the end that the use of intoxicating liquors as a beverage may be prevented." These same words are contained in the Turlington Act, *supra* note 1.

[17] See State v. Winston, 194 N. C. 243, 139 S. E. 240 (1927); State v. Hickey, 198 N. C. 45, 150 S. E. 615 (1929) (declaring the seller and purchaser equally liable under the law).

Criminal Law—Suspended Sentence—Banishment as Condition

The *feme* defendant, convicted in the Superior Court of violating the prohibition laws, was sentenced to two years imprisonment, capias to issue at the discretion of the solicitor, if at the end of sixty days the defendant was found within the state. The defendant left the state within the sixty days, but, four years after her conviction and two years after her return to the state, on a motion of the solicitor, while she awaited trial on another prohibition charge, the sentence was ordered under the previous judgment. Both the judgment[1] and the order[2] were affirmed on appeal.

It is suggested in a Tennessee decision[3] that the suspended sentence having developed in England as an aid to substantial justice in lieu of criminal appeals, it is now properly employed only as an incident of procedure. An appellate court, however, cannot grant reprieve to a guilty prisoner, and trial courts have found this a desirable method of meeting frequently occurring situations.[4]

Definite probation systems have been adopted by thirty-three states[5] in which the use of the suspended sentence is directed to the end of achieving the reformation of certain offenders, but, in North Carolina, due to the absence of any law[6] regulating its use the trial judge[7] may use his own discretion as to whether the circumstances

[1] Except the provision that the capias was to issue at the discretion of the solicitor, which was held to be without authority, the power to issue the capias remaining in the court. State v. McAfee, 189 N. C. 320, 127 S. E. 204 (1925).

[2] State v. McAfee, 198 N. C. 507, 152 S. E. 391 (1930).

[3] A Tennessee court has no power to suspend sentence as a reformatory measure. Spencer v. State, 125 Tenn. 64, 140 S. W. 597, 37 L. R. A. (N. S.) 680 (1911).

[4] Under extenuating circumstances, especially in the case of young and first offenders, the interests of society and the offender are often best served not by exacting the prescribed penalty, but by granting conditional freedom.

[5] In thirty-two states probation laws apply to both adults and children; in fifteen states there are juvenile probation laws only; Wyoming has only adult probation. *National Directory of Probation Officers,* The National Probation Ass'n (1928).

A Pennsylvania act of June 19, 1911, provides that a court may suspend sentence when the prisoner has not been previously imprisoned, when his character and the circumstances are such as to make a recurrence of the offense unlikely, and when no duty to protect society is violated thereby, and that a convict on probation may be dismissed when he has met the conditions. *The Report of the Crimes Survey Committee,* The Law Ass'n of Philadelphia (1926).

[6] Public policy would probably prohibit its use in the case of the graver offenses.

[7] The sentence may be suspended by a Justice of the Peace, State v. Griffis, 117 N. C. 709, 23 S. E. 164 (1895); a municipal judge, State v. Greer, 173 N. C. 759, 92 S. E. 147 (1917); or a recorder, State v. Tripp, 168 N. C. 150, 83 S. E. 630 (1914).

warrant a reprieve,[8] he may suspend sentence indefinitely,[9] and he may impose conditions[10] limited only by the court's conscience and imagination. Although a sentence of banishment is void, a sentence suspended on condition that the defendant leave the state and never return has been upheld on the grounds that the exile was voluntary.[11] By this reasoning it is obvious that any condition may be adjudged legal, and the prisoner may be confronted with unusual and cruel alternatives[12] to the prescribed punishment. It is further left to the discretion of the court whether a given act amounts to a breach of the condition,[13] and, if so, whether the promised punishment will be imposed.[14]

[8] There are no statutory regulations, and the circumstances under which the reprieve was granted do not appear in the opinions of the Supreme Court, but sentence has been suspended where offenders were guilty of assault with a deadly weapon, State v. Hardin, 183 N. C. 815, 112 S. E. 593 (1922); operating a disorderly house, State v. Hatley, 110 N. C. 522, 14 S. E. 751 (1892); libel, State v. Sanders, 153 N. C. 624, 69 S. E. 272 (1910); trespass to land, State v. Griffis, *supra* note 7.

[9] The cases cited in note 8, *supra*, illustrate situations in which the sentence may be executed whenever the conditions are breached (Some courts hold that sentence may not be suspended indefinitely. Ex parte Bugg, 163 Mo. App. 44, 145 S. W. 831 [1912].), but the court sometimes stipulates a definite period for performance, as where the defendant was required to show for two years that he had not violated the prohibition laws, State v. Greer, *supra* note 7.

[10] Sentence is most frequently suspended on condition of good behavior, State v. Everett, 164 N. C. 399, 79 S. E. 274, 47 L. R. A. (N. S.) 848 (1913), but sentences have been suspended on condition that the prisoner leave the county and never return, Ex parte Hinson, 156 N. C. 250, 72 S. E. 310, 36 L. R. A. (N. S.) 352 (1911), that he pay the costs, State v. Griffis, *supra* note 7, that he pay the costs for himself and another, State v. Crook, 115 N. C. 760, 20 S. E. 513, 29 L. R. A. 260 (1894), that he keep the peace and not libel certain persons, State v. Sanders, *supra* note 8, that he show compliance with the prohibition laws for two years, State v. Greer, *supra* note 7. For comments upon North Carolina cases, see (1922) 1 N. C. L. Rev. 116 and (1928) 6 N. C. L. Rev. 327.

[11] State v. Hatley, *supra* note 8. There would seem to be some doubt whether leaving and remaining out of the state could be called strictly voluntary, when the only other course open to the prisoner is a term in jail. The South Carolina court takes this view in State v. Baker, 58 S. C. 111, 36 S. E. 501 (1900), where imprisonment was to be for five years if the convict left the state immediately thereafter, if not for two additional years, the court holding the condition involved perpetual banishment, and was therefore void: A condition in a sentence that the offender leave the county was held void in Hoggett v. State, 101 Miss. 269, 57 So. 811 (1912), but the Arkansas court holds that a governor may pardon on such a condition, Ex parte Hawkins, 61 Ark., 321, 33 S. W. 106, 30 L. R. A. 736, 54 Am. St. Rep. 209 (1895).

[12] A suspended sentence is not an alternative judgment, State v. Hatley, *supra* note 8, but it does offer a practical alternative to the prisoner.

[13] State v. Hoggard, 180 N. C. 678, 103 S. E. 891 (1920).

[14] In State v. Sanders, *supra* note 8, the court remarks on the fact that capias did not issue on an unequivocal breach of condition, and in the instant case the defendant operated a shop a few blocks from the court house for two years in open violation of the condition that she remain out of the state.

The Supreme Court, while recognizing the legality of suspending sentence, has not commended the practice,[15] but has indicated that evils would result from its indiscriminate use.[16] With the law governing the suspended sentence in its present state there is no assurance either to the community or to the convicted that under given circumstances sentence will be suspended, or on what conditions, or for what period, or that on a breach of condition the offender will be disciplined. The instant case suggests the need of a definite system of regulations designed to carry out the purpose of the suspended sentence, and to minimize the likelihood of its abuse.

W. T. COVINGTON, JR.

Damages—Carriers—Measure of Damages for Loss of Small Part of Shipment in Bulk

In a recent case the facts showed that the plaintiff purchased a carload of coal, while in transit. On arrival at destination there was a shortage of 5,500 pounds. At the time of arrival, plaintiff had not sold any of the coal. The shortage did not interfere with the maintenance of his usual stock, and no sales were lost as a result of it. The plaintiff did not go into the retail market to replace the shortage. Held, that the measure of damages was the wholesale price.[1]

It is the avowed aim of the courts in actions founded on contract to place the party injured in as good position pecuniarily as he would have occupied had the breach not occurred,[2] and damages are awarded, in the absence of special circumstances with this principle in mind.

The pertinent statutory expression is found in the so-called Cummins Act[3] which provides that the holder of a bill of lading for interstate rail shipment is entitled to recover for the "full actual loss" to his property. By judicial interpretation this has come to mean that such loss is to be ascertained with reference to the value at point of destination.[4]

[15] State v. Hatley, *supra* note 8.
[16] State v. Griffis, *supra* note 7; State v. Hilton, 151 N. C. 687, 65 S. E. 1011 (1909); State v. Everett, *supra* note 10.
[1] Illinois Cent. R. Co. v. Crail, 50 Sup. Ct. 180 (1930).
[2] Seaboard Air Line R. R. v. U. S., 261 U. S. 299, 43 Sup. Ct. 354, 67 L. ed. 664 (1922).
[3] 34 Stat. 593, 49 U. S. C. A. §20 (11).
[4] Chicago, etc. Ry. Co. v. McCaull-Dinsmore Co., 253 U. S. 97, 40 Sup. Ct. 504, 64 L. ed. 801 (1919).

Varying conceptions of "value" are to be encountered in the decisions. In general the rule is that value must be determined with reference to the quantity involved, and may not be determined with reference to a larger quantity.[5] This would seem to mean that if goods are bought in large quantities, the market price at retail is not the standard, but the market price at wholesale.[6]

Conversely, when it is sought to ascertain the value of goods in small quantities, or of a single chattel, (regardless, apparently, of the fact that it may have been one of a large number of like chattels, *e.g.*, the deliberate conversion of one article from the stock of a wholesale establishment) ordinarily the measure of damages is the retail price.[7]

The trend of decision is toward holding that where the consignee is under reasonable compulsion to re-purchase at retail rates to meet outstanding demands, the measure of damages should be based on retail rates.[8] However, this case is clearly out of that category. To allow the use of the latter standard would be to include all overhead expense of marketing at retail, such as clerk hire, rent, and bad debts, none of which had been incurred with regard to the shipment in question.[9]

The present decision satisfies the common law principle of full compensation for injuries received, at the same time bearing out the

[5] Bagley v. Findlay, 82 Ill. 524 (1876); James H. Rice Co. v. Penn Plate Glass Co., 117 Ill. App. 356 (1904); Grand Tower Co. v. Phillips, 90 U. S. 471, 23 L. ed. 71 (1874), in which it is declared that "the true rule would seem to be to allow the plaintiffs to show the price they would have had to pay for coal *in the quantities* which they were entitled to receive it under the contract." Compare this statement from Heidritter Lumber Co. v. Central R. R. of N. J., 100 N. J. L. 402, 122 Atl. 691 (1923), "the plaintiff was entitled to replace the coal at its value at destination because the quantity that was lost could not be bought at wholesale rates anywhere." It did not appear in this case that the plaintiff was compelled to purchase in the retail market to meet outstanding contract.

[6] 4 SUTHERLAND ON DAMAGES (4th ed.) §1098, p. 4178; Wendnagel v. Houston, 155 Ill. App. 664 (1910).

[7] 1 SEDGWICK ON DAMAGES (9th ed.) §248a, p. 500; SUTHERLAND ON DAMAGES, *supra* note 6. Compare: ". . . where part of a stock of goods is converted, the value of the goods in the retail market is not the measure of damages in an action of trover." Sedgwick, *supra*.

[8] Cobb v. Illinois C. R. Co., 39 Iowa 601 (1874); Bridgman v. The Emily, 18 Iowa 510 (1865); Kyle v. Laurens R. Co., 44 S. C. L. 382, 70 Am. Dec. 231 (1857).

[9] SUTHERLAND ON DAMAGES, *supra* note 6. See opinion of Cant, District Judge, in Crail v. Illinois Cent. R. Co., 21 F. (2d) 836 (D. C. Minn. 1927).

statutory requirement that awards are to be made for actual loss suffered.[10]

T. J. GOLD, JR.

Mortgages—Tenancy in Common—Right to Improvements

In the case of *Layton v. Byrd*[1] the defendant had purchased a tract of land from three tenants in common, *A, B,* and *C*. The interests of *B* and *C* were unencumbered, that of *A* was subject to a mortgage to *T,* unknown to the defendant. Defendant before foreclosure by *T,* and after purchase from *A, B,* and *C,* made permanent improvements on the land. Plaintiff subsequently purchased the one-third undivided interest formerly owned by *A* at foreclosure sale by *T*. In a bill for partition by plaintiff, *Held,* The rule entitling the tenant in common to the value of his improvements on partition[2] is inapplicable, the rule that improvements made on mortgaged lands by the mortgagor or one claiming under him inure to the benefit of the mortgagee[3] must be applied, and the plaintiff is entitled to a proportionate part of the improvements.

The court reaches its conclusion on the reasoning that, at the time the improvements were put upon the land, there was no tenancy in common in existence, but the land was held by Byrd, defendant, as sole owner. Consequently, since there was no co-tenant against whom he could assert his equity the tenant in common rule cannot

[10] Milwaukee & St. P. R. Co. v. Arms, 91 U. S. 489, 23 L. ed. 374 (1875); WILLISTON ON CONTRACTS (1920) §1338. Several cases have recognized the anomalous but equitable doctrine that occasionally the measure of damages cannot be determined by reference to either the wholesale or retail price. See Clark v. Parsons, 109 Mo. App. 432, 84 S. W. 1019 (1905). Thus in the United States v. New River Collieries Co., 262 U. S. 341, 43 Sup. Ct. 565, 67 L. ed. 1014 (1923) it was held that where coal was appropriated by the government, and where there was a free market for export coal, and the coal could have been sold in such market, the owner was entitled to the export price, although this was higher than domestic rates.

[1] 198 N. C. 466, 152 S. E. 161 (1930).

[2] If one tenant in common makes improvements on the common property he will be entitled upon partition to the value of his share in the land in its unimproved condition and the value of the improvements, if this can be done without prejudice to his co-tenants. Pope v. Whitehead, 68 N. C. 191 (1873); Collett v. Henderson, 80 N. C. 337 (1879); Fisher v. Toxaway Co., 171 N. C. 547, 88 S. E. 887 (1916); see Note (1919) 1 A. L. R. 1189; Bayley v. Nichols, 263 Ill. 116, 104 N. E. 1054 (1914); Crafts v. Crafts, 13 Gray 360 (Mass. 1859); Fenton v. Miller, 116 Mich. 45, 72 Am. St. Rep. 502, 74 N. W. 384 (1898).

[3] Wharton v. Moore, 84 N. C. 479 (1881); Belvin v. Raleigh Paper Co., 123 N. C. 138, 31 S. E. 655 (1898); see also Note (1926) 41 A. L. R. 601.

be applied. The mortgage was a conveyance of the legal title to the mortgagor's interest to *T* as security for the debt; the mortgagor to all other purposes remained owner, and continued so until his conveyance to Byrd. By operation of the mortgage rule the lien of the mortgage extends over one-third of the improvements.

A mortgage can convey no more to the mortgagee than an absolute conveyance can convey to the grantee. If *A* had deeded his interest in the land to *T*, the mortgagee, instead of making the mortgage, neither *T* nor his vendee could have obtained an interest in the improvements, by application of the tenant in common rule. Does it not follow, *a fortiori*, that *T* cannot obtain a benefit from the mortgage which he could not have obtained had he become absolute owner of the *A* interest? It is interesting, as well, to note that Byrd, by his purchase from *A*, *B*, and *C* was placed in a worse position than had he merely purchased the interests of *B* and *C*. Clearly, had *A* remained owner of his equity Byrd would have had a co-tenant against whom the tenant in common rule could be applied, and an indisputable claim to the whole of the improvements. In the instant case he lost the *A* interest by foreclosure, together with one-third the value of the improvements. It cannot be said that he was compensated by way of an increase in the value of the equity of redemption[4] in the *A* interest—the plaintiff bought without knowledge of the improvements, and there was no surplus of purchase money to go to Byrd.

If the improver himself had mortgaged the one-third undivided interest, or had he assumed payment of the mortgage, other considerations than those present in the principal case might well justify the court in holding as it did. However, the natural justice of the situation seems heavily on the side of the defendant—not only did the plaintiff, to the extent of his knowledge, buy and pay for the *A* interest in its unimproved condition, but, as well, Byrd made his improvements in good faith without any actual notice of the existence of the mortgage. The cases cited in the opinion in support of the mortgage rule[5] refer without exception to situations where the

[4] It has been argued in support of the mortgage rule that it not only adds to the value of the mortgagee's security, but also it increases the value of the mortgagor's equity, Butler v. Page, 7 Metc. 40 (Mass. 1843).

[5] Martin v. Beatty, 54 Ill. 100 (1870); Mutual Life Insurance Co. v. Huntington, 57 Kan. 744, 48 S. W. 19 (1897); Rice v. Dewy, 54 Barb. 455 (N. Y. 1862); Gibson v. American Loan and Trust Co., 58 Hun. 443, 12 N. Y. S. 444 (1890); Childs v. Dolan, 5 Allen 319 (Mass. 1862); Ivey v. Yancey, 129 Mo. 501, 31 S. W. 937 (1895).

mortgage wholly covers the mortgaged land, as distinguished from a mortgage of an undivided interest. The only case in point,[6] not cited by court or counsel in the Layton case, reaches a contrary result, applying the tenant in common rule denying the mortgagee's assignees the right to share in the improvements, and logic at least seems to support that holding. If *A*, the mortgagor, had retained his equitable title, as co-tenant he could not have shared in the improvements on partition, nor could *T* as mortgagee claiming under him.[7] Should the fact that the improver has purchased the interest of *A* increase the rights of the mortgagee? Could it not be strongly argued that there was a tenancy in common at the time the improvements were made? Since undeniably *T* was a legal tenant in common by virtue of his holding legal title, it seems that the tenant in common rule could be applied as against *T*.

J. G. ADAMS, JR.

Municipal Corporations—County Bonds—Effect of Thirty Day Limitation on Validity of Bond Ordinance

The County Finance Act of North Carolina provides, among other things, that ". . . no order shall be passed (by any county) for the issuance of bonds other than school bonds unless it appears from said sworn statement (order) that the net indebtedness for other than school purposes does not exceed five per cent of said assessed valuation (of the county). . . ."[1] It further provides, that the validity of a bond order shall not "be open to question in any court upon any ground whatsoever," unless the proceeding shall be commenced "within thirty days after the first publication of notice" of the bond order.[2] In *Kirby v. Board of Commissioners of Person County*,[3] a bond ordinance was adopted by the board of commissioners authorizing the issuance of bonds for court house and jail purposes. The amount of this bond order raised the total indebtedness of Person County above five per cent of its assessed valuation. Some ninety days after notice of the bond order had been published, the

[6] The defendant purchased all the shares of several co-tenants in land and erected improvements believing himself to be sole owner. The plaintiffs, assignees of the holder of a prior mortgage on the share of one co-tenant, sue to foreclose. Annely v. DeSaussure, 17 S. C. 394 (1881).

[7] Note (1926) 41 A. L. R. 621; Annely v. DeSaussure, *supra* note 6.

[1] N. C. Code (Michie, 1927) §1334 (17).

[2] N. C. Code (Michie, 1927) §1334 (20).

[3] 198 N. C. 440, 152 S. E. 165 (1930).

plaintiff instituted an action to restrain the commissioners of said county "from proceeding further in the issuing and sale of said court house and jail bonds and from levying said tax," because the issue exceeded the five per cent limitation. The Supreme Court of North Carolina held that "after the lapse of thirty days, if no suit had been instituted, the bond ordinance is deemed to be valid for all purposes." The broad language of this thirty day statute of limitation raises the question whether it extends to every defect which might possibly occur in the issuance of bonds under the Finance Act.

One of the main objects of the Finance Act was to raise the credit standing of the counties by creating a uniform system of issuing bonds and other instruments for obtaining money and of providing the means of paying therefor. The statute of limitation was inserted in the Act for the purpose of insuring the ready marketability of county bonds by precluding any attack upon the validity of the bonds after thirty days from publication of notice of bond orders.[4] It is doubted, however, if the curative effect of this provision is as broad as its language would seem to indicate, namely, that a bond order shall not "be open to question in any court upon any ground whatsoever" after thirty days from publication of notice. For, although the failure to attack a bond order within the prescribed period would admittedly validate the bond issue as to any statutory defects,[5] it ought not to apply to constitutional defects.

[4] The County Finance Act and the County Fiscal Control Act were both passed in 1927, at which time the financial status of several of the counties was deplorable. County debts were growing larger year by year and from administration to administration. Consequently, their credit standing was lowered. Also, these debts had to be paid. The Finance Act in providing for the funding and refunding of county debts remedied the situation as it then existed. The Fiscal Control Act, in requiring a yearly budget by each county of its expenditures, sought to prevent a recurrence of county deficits as existed prior to 1927.

The Finance Act, after setting forth certain purposes for which bonds may be issued, provides, in general, the following procedure which a county must comply with in issuing bonds: (1) The county commissioners must first introduce a resolution to issue bonds. This is known as an "order," and it cannot be passed at the meeting at which it is introduced. (2) This order shall state: (a) the purpose for which the bonds are to be issued; (b) the amount of the bonds; (c) that a tax sufficient to pay off these bonds, when due, shall be annually levied and collected; (d) that a statement of the county debt has been filed with the clerk, and is open to public inspection; (e) "and a clause stating the conditions upon which the order will become effective, and the same shall become effective in accordance with such clause, which clause shall be as follows:" [see N. C. Code (Michie, 1927) §1334 (9)].

[5] The General Assembly of North Carolina has the power over and control of taxation in the state (Art. II, §14, Const. of N. C.), thus, the Assembly may provide, in any way it deems wise, for the issuance of bonds by counties and prescribe the conditions upon which they shall become effective—so long

That is to say, the failure of the order to comply with any constitutional provision might be urged in attacking the validity of the bonds, at any time. For example, where the authority to issue bonds is not given in accordance with the constitutional provision, or where bonds are issued for other than necessary purposes, a vote of a majority of all the registered voters is required by the Constitution.[6] The Finance Act, in compliance with the Constitution, requires that "if the bonds are for a purpose other than the payment of necessary expenses, . . . the order shall take effect when approved by the voters of the county. . . ."[7] Suppose then, that a bond order stated that the bonds were to be issued for a necessary purpose, and was therefore not submitted to a vote of the people, when, in fact, the purpose for which they were issued was not a necessary one at all. To validate the bonds in the face of such a defect by holding that "after the lapse of thirty days, if no suit had been instituted, the bond ordinance is deemed to be valid for all purposes," would be to uphold a statutory enactment in direct contravention of a constitutional limitation.[8]

It is conceded that in the instant case plaintiff's failure to object within thirty days was fatal because the objection was based upon a statutory defect. It is submitted, however, that when the Supreme Court is called upon to review an attack on a bond issue which is based upon a failure to comply with some constitutional provision, the thirty day statute of limitation, as provided for in the Finance Act, will be held not to apply. It would seem that such a result was contemplated by the legislature, for the Finance Act provides that "every provision of this act shall be construed as being qualified by constitutional provisions whenever such construction shall be necessary in order to sustain the constitutionality of this act."[9]

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as such legislative action is in accordance with the constitutional limitations (Art. VII, §7, Const. of N. C.). See, Com'rs v. Smuggs, 121 N. C. 394, 28 S. E. 539 (1897); Claybrook v. Com'rs, 114 N. C. 453, 19 S. E. 593 (1894).

[6] Const. of N. C., Art. VII, §7.

[7] N. C. Code (Michie, 1927) §1334 (9).

[8] "In the absence of special constitutional restriction, the legislature may confer the taxing power upon municipalities in such measure as it deems expedient—in other words, with such limitations as it sees fit, as to the rate of taxation, the public purposes for which it is authorized, and the objects (the persons, business and property) which shall be subjected to taxation; but it cannot, of course, confer greater power than the state itself possesses, and it must observe the restrictions and limitations of the organic law." DILLON, MUNICIPAL CORPORATIONS (5th ed.), §1376 (640); *Ex parte* Montgomery, 64 Ala. 463 (1879).

[9] N. C. Code (Michie, 1927) §1334 (3).

Real Property—Restrictive Covenants—Recorded Plat as Implied Covenant

The owner of a tract of land divided it into streets and lots, the latter having not less than one hundred feet frontage and being not less than one-half acre in area. A map of the tract was recorded and one lot was sold to each of the nine defendants. The deeds to these lots referred to the plat; restrictive covenants were in the deeds but no express covenant bound the grantor with respect to any other lot. The grantor proposed to subdivide for sale the remaining eleven lots. He brought this action, alleging a cloud upon his title, to determine the validity of defendants' claims that each had a right to enjoin the proposed subdivision. *Held:* the vendees could not prevent the vendor from subdividing the remaining lots.[1]

The court decided that a recorded plat, incorporated by reference into each of the defendants' deeds, did not establish a general improvement plan or scheme. Had it been determined that the plat indicated such a general plan,[2] then the grantor would have been precluded from asserting the disputed right in regard to the land.[3] What is necessary to establish a development plan? It is said that whether or not restrictions appear in the deed is not conclusive that lots are or are not sold pursuant to a general plan.[4] It has been held that where there were restrictions in some of the deeds to the grantees and none in others, in an action between two of the grantees, that there was no uniform scheme of development.[5] A recent decision held that where a tract of land was divided into blocks and subdivided into lots, of which it does not appear that a plat was recorded, that it was not planned in accordance with a general development scheme.[6] Further, the mere recordation of a plat imposes

[1] Stephens v. Binder, 198 N. C. 295, 151 S. E. 639 (1930). The case relied upon by the court held that a map alone was insufficient to establish a general plan, Davis v. Robinson, 189 N. C. 589, 127 S. E. 697 (1925). *Accord:* Clark v. McGee, 159 Ill. 518, 42 N. E. 965 (1896); Milliken v. Denny, 141 N. C. 224, 53 S. E. 867 (1906).

[2] Bowen v. Smith, 76 N. J. Eq. 456, 74 Atl. 675 (1909).

[3] Rives v. Dudley, 56 N. C. 126, 67 Am. Dec. 230 (1856).

[4] Velie v. Richardson, 126 Minn. 334, 148 N. W. 286 (1914); Hano v. Bigelow, 155 Mass. 341, 29 N. E. 628 (1892).

[5] Snyder v. Heath, 185 N. C. 362, 117 S. E. 294 (1923). A land development company purchased a large acreage of lands adjoining a city, had it platted into lots, recorded the plat, and sold various lots to purchasers, some of whose deeds contained restrictions while others did not. *Held:* there was no uniform scheme of development. *Accord:* Donahoe v. Turner, 204 Mass. 274, 90 N. E. 549 (1910).

[6] Delaney v. Hart, 198 N. C. 96, 150 S. E. 702 (1930).

no duty on an owner of land to abide by it.[7] However, upon the specific facts of a case where reference was made in a deed to a recorded plat, it was said that the purchasers acquired the right to rely upon the continued and unchanged existence of the plan as indicated by the plat.[8]

It is said that the criterion in this class of cases is the intent of the grantor,—whether he intends the act, relied upon as the basis of the disputed implied easement, to inure to his own or to the benefit of the lot owners generally; and his intention is to be gathered from his acts and the attendant circumstances.[9] Now, as between grantees, the right to enforce an easement must be based upon the theory that each purchaser buying a lot with notice of something in the nature of a general building plan, impliedly assents thereto, and may be compelled to comply therewith at the suit of the owner of any other lot.[10]

It is submitted that in the sale of half-acre lots located in an exclusive residential-estate district (as in the instant case) an inference should arise that each vendee had paid an enhanced price for his property, in reliance upon the continuance and enforcement of the details of the recorded plat which is incorporated by reference into his deed.[11] Would it not be good policy to estop the vendor, who has induced the vendee to act in reliance upon the recorded plat, from subsequently disregarding it?[12]

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[7] Stephens Co. v. Homes Co., 181 N. C. 335, 107 S. E. 233 (1921). Where a body of land was platted, the plat recorded, and the land mapped into blocks, lots, and streets by several separate and distinct divisions, and lots sold with reference to later sub-divisional recorded maps respectively, it was held that the lots were not sold according to a general building plan and that the original recorded plat raised no such implication. *Accord:* Webber v. Landrigan, 215 Mass. 221, 102 N. E. 460 (1913).

[8] Collins v. Land Co., 128 N. C. 563, 39 S. E. 21 (1901) ("A map or plat, referred to in a deed, becomes a part of the deed, and the plan indicated on the plat is to be regarded as a unity, and the purchaser of a lot under it acquires the right to rely upon its continued unchanged existence"). See also: Conrad v. Land Co., 126 N. C. 776, 36 S. E. 282 (1900); Johnston v. Garrett, 190 N. C. 835, 130 S. E. 835 (1925).

[9] Bacon v. Sandberg, 179 Mass. 396, 60 N. E. 936 (1901).

[10] De Gray v. Monmouth Co., 50 N. J. Eq. 329, 24 Atl. 388 (1892).

[11] Hughes v. Clark, 134 N. C. 457, 47 S. E. 462 (1904); De Gray v. Monmouth Co., *supra* note 11; Allen v. Detroit, 167 Mich. 464, 133 N. W. 317 (1911).

[12] Rives v. Dudley, *supra* note 3; Grogan v. Hayward, 4 Fed. 164 (1880).

Real Property—Specific Performance—Interest of Tenant by Curtesy Initiate

Has a tenant by the curtesy initiate sufficient interest in the wife's land to support an action for specific performance, so far as his interest is concerned, under a contract of sale signed by said tenant and his wife, where the wife's privy examination is not taken? The Supreme Court of North Carolina thinks so.[1]

By constitutional[2] and statutory[3] provisions North Carolina has stripped the husband's curtesy right of its ordinary common law attributes.[4] Birth of issue alive capable of inheriting no longer gives the husband a present estate in the wife's land.[5] From the date of marriage he has the right of joint occupancy[6] with the wife, and upon birth of issue becomes a tenant by the curtesy initiate, conferring the privileges of joint occupancy with the wife, of serving as a tales juror,[7] and the possibility of gaining a freehold estate for life if the wife predecease him, dying intestate,[8] and he has not forfeited his right.[9] He has no vested interest [10] in the wife's realty, no present estate, and although the principal case terms it a "valuable interest"[11] others have held it to merely constitute a veto

[1] Colwell v. O'Brien, 198 N. C. 228, 151 S. E. 190 (1930), dismissing a petition to rehear from 196 N. C. 508, 146 S. E. 142 (1929).

[2] N. C. Const. Art. X, §6.

[3] N. C. Cons. Stat Ann. (1919) §2510.

[4] Thompson v. Wiggins, 109 N. C. 108, 14 S. E. 301 (1891), holding that a tenant by the curtesy initiate could not maintain an action for rents due on his wife's real estate, since the wife was the real party in interest.

[5] Thompson v. Wiggins, *supra* note 4.

[6] Walker v. Long, 109 N. C. 510, 14 S. E. 299 (1891) (that wife may sue alone in action involving her real property); Kilpatrick v. Kilpatrick, 176 N. C. 182, 96 S. E. 988 (1918); Jones v. Coffey, 109 N. C. 515, 14 S. E. 84 (1891).

[7] Thompson v. Wiggins, *supra* note 4; N. C. Cons. Stat. Ann. (1919) §2519; Hodgin v. R. R., 143 N. C. 92, 55 S. E. 413 (1906); Jackson v. Beard, 162 N. C. 105, 78 S. E. 6 (1913). But see Sipe v. Herman, 161 N. C. 107, 76 S. E. 556 (1912).

[8] Freeman v. Lide, 176 N. C. 434, 75 S. E. 936 (1918); Richardson v. Richardson, 150 N. C. 549, 64 S. E. 510 (1909); Tiddy v. Graves, 126 N. C. 620, 36 S. E. 127 (1900).

[9] N. C. Cons. Stat. Ann. (1919) §§2519, 2522 (divorce a vinculo and felonious slaying), 2524 (husband's living in adultery, etc., or divorce a mensa at wife's suit), 2516 (release).

[10] Kilpatrick v. Kilpatrick, *supra* note 6; Hallyburton v. Slagle, 132 N. C. 947, 44 S. E. 655 (1903) (not such a vested interest as to prevent abolishment by subsequent laws—a mere expectancy or possibility of future acquisition is not a vested right). Eames v. Armstrong, 146 N. C. 1, 59 S. E. 165 (1907) (husband's attempted redemption of wife's land sold for taxes ineffective since he had no interest therein).

[11] Colwell v. O'Brien, *supra* note 1.

power,[12] the right "to come home,"[13] the right of ingress and egress to the dwelling and society of the wife, with a "possibility of inheritance."[14] However, the present court does not feel that determination of the precise interest involved is necessary.[15]

The principal case presents for the first time in North Carolina[16] the question of whether the husband's modern-day estate by the curtesy initiate is of a sufficiently tangible nature to carry a monetary value so far as third parties are concerned. The answer of the North Carolina court not only establishes such monetary value, but sees in it sufficient tangibility to permit of specific performance. Which presents the question of the rights of the wife in the face of such a decree of specific performance.

Through the conveyance decreed by the court the purchaser succeeds to whatever rights the husband may ever have as tenant by the curtesy consummate—and by it the husband renders ineffective any subsequent joindure in his wife's deed to the property in question, so far as his interest therein is concerned. Hence, any subsequent purchaser from the wife, although the husband join in the deed, takes subject to the outstanding rights of the holder of the husband's deed to his curtesy right, should the wife die intestate before the husband. This prevents the wife's disposal of her property at full market value, since her purchaser faces the possibility of an intervening estate for the life of the surviving husband. Such impairment of the wife's estate constitutes a cloud on title,[17] and although placed there by judicial decree, such decree was aimed at the husband and should not be allowed to prejudice the rights of the wife in contravention of her constitutional privileges.[18]

[12] Dissenting opinion of Clark, C. J., in Jackson v. Beard, 162 N. C. 105, 111, 78 S. E. 6 (1913); Kilpatrick v. Kilpatrick, *supra* note 6.

[13] Manning v. Manning, 79 N. C. 293 (1878); State v. Jones, 132 N. C. 1043, 43 S. E. 939 (1903), refusing to allow trespass by wife against husband for coming on her lands against her orders, since such would constitute judicial separation by the criminal action of trespass. Clark, C. J., dissents, and would have allowed trespass.

[14] Dissenting opinion of Clark, C. J., in Jackson v. Beard, *supra* note 12; Kilpatrick v. Kilpatrick, *supra* note 6.

[15] To quote from the decision: "But without regard to the precise interest which a tenant by the curtesy initiate may have. . . ."

[16] No decisions dealing with the same matter have been found in any states under modern statutes similar to those of North Carolina. An analogy to common law curtesy right would not be pertinent.

[17] N. C. Cons. Stat. Ann. (1919) §1743 and annotations, dealing with quieting of titles.

[18] N. C. Const., Art. X, §6.

Nor is there simply a substitution of personalities whereby the wife now has to secure the signature of the husband's purchaser whereas she formerly had to secure her husband's consent. In order for her conveyance to be a deed at all she must have the written assent of her husband.[19] The effect of his joindure is two-fold, to validate her deed[20] and to convey his interest.[21] But all of the consideration moves to the wife.[22] Under the circumstances of the principal case, she must not only obtain the written assent of the husband in order to make her deed effective, she must secure the release of her husband's purchaser as well. Thus she is subjected to difficulties forbidden by constitution and statute.

Conceding that the conveyance of the husband would not prevent his joining in his wife's deed insofar as giving his written assent is concerned, such conveyance by the husband would render ineffective any subsequent attempt to transfer his so-called valuable interest in the wife's land. Now the wife is entitled to convey her real estate as she wishes, save that the written assent of the husband must be obtained, and her privy examination taken.[23] However, by the conveyance in question the husband has rendered it impossible for the wife to pass a fee simple to her realty, since the right to the husband's "valuable interest" rests in a third person, the purchaser of the husband. Granting that the husband has conveyed no portion of the wife's title, as such, he has rendered it impossible for her to convey a full title. Hence, in effect, it is the same as conveying an interest of the wife in her land.

By logical application the principal case establishes the right of the husband to convey his curtesy interest as he wills, under form of an ordinary sale. If the estate of the wife be thus subject to impairment by private sale or court decree of specific performance, what is the effect of North Carolina Consolidated Statutes §2510, providing that no real estate of the wife shall be subject to sale or lease by the husband, save with proper consent of the wife, and that no interest of the husband whatever in such property shall be subject to sale to satisfy any execution obtained against him, and that every such sale is null and void? What of North Carolina Const.

[19] N. C. Const., Art. X, §6.
[20] N. C. Const., Art. X, §6.
[21] Jackson v. Beard, *supra* note 12.
[22] Manning v. Manning, *supra* note 13; N. C. Cons. Stat. Ann. (1919) §2510; N. C. Const., Art. X, §6.
[23] N. C. Const., Art. X, §6; N. C. Cons. Stat. Ann. (1919) §2510.

Art. X, §6, providing that the wife's real and personal property "shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations, or engagements of her husband, and may be devised and bequeathed and, with the written assent of her husband, conveyed by her as if she were unmarried?"

WALTER HOYLE.

Taxation—Situs of Contract for Purchase of Federal Property

In *Port Angeles Western Ry. Co. v. Clallam County,*[1] the defendant assessed for taxation the interest of the plaintiff, a Delaware corporation, in a contract for the purchase of an unfinished railroad and certain lands lying in the State of Washington, from the United States. Title was to be retained by the vendor until the full purchase price had been paid and certain improvements made. In a previous case between the same parties it was held that the property itself, the subject matter of the contract, could not be taxed.[2] The present action was brought under a section of a Washington statute providing that the interest of purchasers under such contracts shall be personal property.[3] The court held the assessment valid and refused to enjoin its collection.

While the title to property remains in the United States either for the purpose of securing the purchase price or the performance of precedent conditions, it may not be taxed by the states.[4] When, however, all that is required of the purchaser under the terms of the contract has been done by him, a tax may be levied by the state even though there has been no formal transfer of legal title.[5] It is at

[1] 36 F. (2d) 956 (W. D. Wash. 1930).

[2] Port Angeles Western Ry. v. Clallam County, 20 F. (2d) 202 (W. D. Wash. 1927).

[3] Laws of Wash. Ex. Sess., c. 130, s. 33.

[4] Union Pac. Ry. v. McShane, 22 Wall. 444, 22 L. ed. 747 (1874); Kansas Pac. Ry. v. Prescott, 16 Wall. 603, 21 L. ed. 373 (1872); Irwin v. Wright, 258 U. S. 219, 42 Sup. Ct. 293, 66 L. ed. 573 (1921), although as between private parties the vendee may be taxed under such executory contract; Bowls v. City of Oklahoma City, 24 Okla. 579, 104 Pac. 902, 24 L. R. A. (N. S.) 1299 (1909), as may a non-resident mortgagee's interest be taxed; Savings & Loan Soc. v. Multnomah County, 169 U. S. 421, 18 Sup. Ct. 392, 42 L. ed. 803 (1898).

[5] State v. Itasca Lumber Co., 100 Minn. 355, 111 N. W. 276 (1907). "When the government has no longer any right or interest in the property which would justify it in witholding the patent, and the purchaser is in possession, the latter will be treated as the beneficial owner."

that time and not before that equitable title is considered as having passed.[6]

Whether or not the vendee has such an interest arising from the existence of such contract as the state may subject to taxation depends upon the nature of the interest and its situs. The purchaser being a non-resident, the property taxed must of necessity be an interest in the land and railroad as such in order that it have a domestic situs.[7] Should it be an intangible, whose value is the difference between the purchase price of the property sold under the contract and the market value of the contract, its situs would be the domicile of the purchaser. It has been held that a lease upon property owned by the United States may be taxed to the lessee.[8] And possessory rights in a mining location and in lands granted but not yet patented for the purpose of building a railroad have been taxed.[9] In such cases where the interest of the person taxed may be forfeited and sold under execution without beclouding the title of the United States to the land itself it would seem that the tax is not open to the objection that the property of the United States may not be taxed. But where as in the instant case, the contract may not be alienated

[6] For the purposes of taxation such view seems correct. The equitable title of a purchaser under an executory contract between private parties arises only from the fact that a court of equity will grant him specific performance. This type of remedy has now so long been available that it partakes of the nature of a right *in rem*. However, it is doubtful whether specific performance may be had against the United States upon refusal to convey, and it would seem that the purchaser has neither legal nor equitable title until an actual conveyance has been effected.

[7] No state may tax that which is not within her jurisdiction. Since the decision in State Tax on Foreign-Held Bonds, 15 Wall. 300, 21 L. ed. 179 (1872) it has uniformly been held that a property tax on intangible interests may be levied only by the domiciliary state of the debtor except in the case where the credits have acquired a "business situs." Otherwise, where there is no jurisdiction over the person, the tax must be upon physical property within the territorial limits of the taxing sovereign. Farmer's Loan & Trust Co. v. Minnesota, 280 U. S. 204, 50 Sup. Ct. 98 (1930). And see, Covington v. Covington Nat. Bank, 198 U. S. 10, 25 Sup. Ct. 562, 49 L. ed. 963 (1904); Hawley v. Madden, 232 U. S. 1, 34 Sup. Ct. 201, 58 L. ed. 477, Ann. Cas. 1918C 842 (1916); Welch v. City of Boston, 221 Mass, 155, 109 N. E. 174, Ann. Cas. 1917D 946, that there is no process by which the collection of a tax upon a non-resident's intangibles may be enforced.

[8] Garland County v. Gaines, 56 Ark. 227, 19 S. W. 602 (1892), even though the lease provided that there be no assignment without the assent of the Secretary of the Interior.

[9] Elder v. Wood, 208 U. S. 226, 28 Sup. Ct. 263, 52 L. ed. 464 (1908); Forbes v. Gracey, 94 U. S. 762, 24 L. ed. 313 (1876); *cf.* Irwin v. Wright, *supra* note 4. But in this type of case the possession of the lands is tacitly left open by the United States to anyone who desires to occupy them to develop their latent resources, and the government has no such interest in them as under valuable contracts of sale.

except with the consent of the government and then only upon the assumption of certain conditions, the right in the state to tax might easily interfere with the discretion of the United States in the disposition of its property.[10]

Attempts to tax the interest of a purchaser in United States land under statutes specifically providing that the interest of the United States is not assessed and wih other safeguards to the end that no cloud be cast upon the sovereign's title have not met with success.[11] No cases have been found permitting the levy of a tax under a statute which gives to the state an *in rem* action for its enforcement. Since the purchaser in the instant case is a non-resident, the State of Washington may levy no tax against him enforceable *in personam.*[12]

Though it may be highly undesireable that private corporations should receive the benefit of exemptions from taxation upon highly valuable properties tied up under long term installment contracts, yet under the present state of the law the instant case appears to be incorrectly decided.

HARRY ROCKWELL.

[10] Jaybird Mining Co. v. Weir, 271 U. S. 609, 46 Sup. Ct. 592, 70 L. ed. 1112 (1925); Weston v. City of Charleston, 2 Pet. 467, 7 L. ed. 481 (1864).

[11] In Pacific Spruce Corp. v. Lincoln County, 21 F. (2d) 586 (D. C. Ore. 1927) the statute under which the tax was levied provided that the terms real property and land shall be construed to include beside the land itself, any estate, right, title or interest whatever in the land less than the fee simple. Assessment was made against the "right, title and interest of the plaintiff, subject to the paramount title therein of the United States." The court denied the right to tax, saying, "This section has reference to the res. Consequently to real property, title to which is vested in the United States. All outstanding interests or estates therein less than the fee simple are exempt from taxation."

What the interest of the purchaser is, and the construction of the act under which the tax is levied is not a federal question, and the decisions of the highest state court are controlling. Central Pac. Ry. v. Nevada, 162 U. S. 512, 16 Sup. Ct. 885, 40 L. ed. 1057 (1895). But see Page v. Peirce County, 25 Wash. 7, 64 Pac. 802 (1901); Wildy v. Henry, 86 Wash. 387, 150 Pac. 620 (1915) holding that the purchaser has no equitable interest in the land subject to taxation.

In distinguishing the Pacific Spruce Corp. case, the court in the instant case makes it clear that the tax is levied not upon *an equitable or possessory right of the plaintiff in the land,* but upon an intangible interest arising from the assignable value of the contract. The fatal defect in such construction is apparent. *Cf.* People v. Burke, 128 Misc. 195, 217 N. Y. Supp. 803 (1926) where the right to tax under a statute similar to the one in the instant case was denied.

[12] *Supra* note 7.

Torts—Negligence—Liability of Power Company for Suspending Service

Plaintiff was undergoing a Caesarian operation at night in a hospital to which defendant company furnished electricity. The surgeon, with plaintiff's consent, was to remove the plaintiff's appendix at the same operation. After the child was delivered, but before the appendix was removed, the defendant company negligently allowed the lights to fail, causing a delay in the operation until flashlights could be procured and the wound closed. The appendix was not removed. The plaintiff was occasioned a great loss of blood, resulting in a weakened condition and physical suffering, and she has since been suffering from the diseased appendix. *Held:* the demurrer to the complaint should have been sustained.[1]

The decision in the instant case was based on a decision wherein the complaint alleged that by reason of the defendant's negligence in failing to deliver a message, the plaintiff was forced to give birth to a child without medical aid, thereby causing her great physical pain and suffering, and permanent impairment of health.[2] In refusing relief, the court relied on *Seifert v. Western Union Teleg. Co.*,[3] which was based on an analogous situation and in which it was alleged that defendant's negligence caused plaintiff nineteen hours of most intense suffering, retarded recovery, and brought on an illness from which plaintiff still suffered. The court, in the Seifert case, held that it was bound by the decision in *Chapman v. Western Union Teleg. Co.*[4] This case was the usual mental anguish case involving the negligence of the defendant in failing to deliver a death message promptly. The court decided not to allow recovery for mental anguish, and concluded: "There was no error in sustaining the demurrer to so much of the plaintiff's petition as sought recovery, simply for pain and anguish of mind." The court in the Seifert case indulged in a remarkable process of reasoning to bring the decision under the Chapman case.[5] It is submitted that the instant

[1] Ga. Power and Light Co. v. Haskins, 151 S. E. 668 (Ga. 1930).
[2] So. Bell T. & T. Co. v. Reynolds, 139 Ga. 385, 77 S. E. 388 (1913).
[3] 129 Ga. 181, 58 S. E. 699, 11 L. R. A. (N. S.) 1149 (1907).
[4] 88 Ga. 763, 15 S. E. 901, 17 L. R. A. 430 (1892).
[5] The court reasoned that since all physical suffering is accompanied by more or less mental suffering, and there can be no recovery for mental suffering, then physical suffering is on the same footing with mental suffering and cannot be a basis for recovery. The court also reasoned that plaintiff's suffering was not the natural and proximate result of defendant's negligence because it " would have been brought about if there had been no telegraph company and no message."

case is based upon an erroneous line of decisions.[6] The Georgia court is leaning over backward in its antagonism to mental anguish as a basis for recovery.

In the principal case the plaintiff probably would not have been allowed to recover on the merits. Admitting that the defendant's negligence was a substantial factor in producing injury to an interest of the plaintiff which the law recognizes and protects, *i.e.*, prolongation of physical suffering and resultant injury, it is extremely doubtful whether any court would extend the rule of law invoked by the plaintiff to cover the particular hazard involved.[7] An analogous line of cases is that in which a citizen sues a water company, under contract to the city to keep a sufficient supply of water on hand to fight fires, for damages to property proximately caused by the breach of that duty. It seems that only North Carolina,[8] Kentucky,[9] and Florida[10] have allowed recovery in such cases, while decisions to the contrary are numerous.[11] The instant case is more closely analogous to the situation in *Stroup v. Alabama Power Co.*,[12] where a

[6] Independent of the basis on which the Seifert case was decided, the holding is in the minority. The following cases are *contra:* Western Union Teleg. Co. v. Church, 90 N. W. 878, 57 L. R. A. 905 (Neb. 1902); Western Union Teleg. Co. v. Cooper, 71 Tex. 507, 98 S. W. 598 (1888); Carter v. Western Union Teleg. Co., 141 N. C. 374, 54 S. E. 274 (1906); Thompson v. Western Union Teleg. Co., 107 N. C. 449, 12 S. E. 427 (1890), where the message was to notify the husband of the feme plaintiff who was about to be confined; Western Union Teleg. Co. v. McCall, 9 Kan. App. 886, 58 Pac. 797 (1899); Western Union Teleg. Co. v. Morris, 28 C. C. A. 56, 83 Fed. 992 (C. C. A. 8th, 1897). In McNeal v. Seaboard Air Line Ry. Co., 23 Ga. App. 473, 98 S. E. 409 (1919), the Seifert case is cited in denying recovery for mental anguish. It is cited again in Hendricks v. Jones, 28 Ga. App. 383, 111 S. E. 81 (1922), denying recovery for injury received through defendant's negligence in failing to properly light the stairway, but the court also intimates that plaintiff was guilty of contributory negligence. See also Western Union Teleg. Co. v. Knight, 16 Ga. App. 203, 84 S. E. 986 (1915).

[7] This is according to the analysis of GREEN, RATIONALE OF PROXIMATE CAUSE (1927). And see also (1928) *The Duty Problem in Negligence Cases,* 28 COL. L. REV. 1014, by the same author.

[8] The leading case in North Carolina is Gorrell v. Water Co., 124 N. C. 328, 32 S. E. 720, 46 L. R. A. 513 (1899). See also Morton v. Washington Light and Water Co., 168 N. C. 582, 84 S. E. 1019 (1915), which lists the cases decided since, and adhering to, the Gorrell case.

[9] Paducah Lumber Co. v. Paducah Water Supply Co., 89 Ky. 340, 12 S. W. 554, 7 L. R. A. 77 (1889); Lexington Hydraulic and Mfg. Co. v. Oots, 19 Ky. 598, 84 S. W. 774 (1905); Graves County Water and Light Co. v. Ligon, 112 Ky. 775, 66 S. W. 725 (1902).

[10] Mugge v. Tampa Waterworks Co., 52 Fla. 371, 42 So. 81, 6 L. R. A. (N. S.) 1171 (1906); Woodbury v. Tampa Waterworks Co., 57 Fla. 249, 49 So. 556 (1909).

[11] See cases collected in Hone v. Presque Isle Water Co., 104 Me. 217, 71 Atl. 769 (1908) and Note (1909) 21 L. R. A. (N. S.) 1021.

[12] 216 Ala. 290, 113 So. 18 (1927).

demurrer was sustained to a count alleging that feme plaintiff was being treated in her home by a physician about 2 a.m. when the electric current was cut off, so that the physician was unable to assist her, to her damage, and that defendant could have notified her of its intention to suspend the service by the exercise of reasonable care and diligence.

PEYTON B. ABBOTT, JR.

Torts—Negligence—Proximate Cause

The plaintiff, an engineer on the defendant's railway, was scalded by a steam plug being blown from the engine boiler and was forced to jump from his cab. He landed between the rails of an adjacent track, suffering a broken leg and other severe injuries. While thus incapacitated, and before aid could reach him, he was further terrified by the approach of an engine upon the track on which he lay. Also, he heard other employees shouting "Stop 67!", which increased his fear of immediate death. The engine was stopped only a few feet from the plaintiff. Plaintiff sued for damages because of physical injuries and nervous shock, and recovered on both counts. The decision was affirmed.[1]

The unique feature of the case is that damages were allowed for nervous shock which occurred subsequent to the physical injury. The negligent omission, the physical injury, and the nervous shock, occurred in sequence. In allowing a recovery for nervous shock, the court treats it as proximately caused by the same negligence that caused the physical injury, and said that each forms a part of the natural and indivisible result.[2] From the reported facts, it appears that the real cause of the nervous shock was the approach of "67" and the shouts of the spectators.

The decision of the case is to be recognized as an extension of the recovery for nervous shock. There are yet states that require an actual impact, causing a contemporaneous nervous injury, and a subsequent physical injury, to permit a recovery for fright.[3] Others have recognized that such an impact, however slight, is a mere legal peg[4] upon which to hang a recovery when there is a nervous shock

[1] Baltimore & O. R. Co. v. McBride, 36 F. (2d) 841 (C. C. A. 6th, 1930).
[2] *Supra* note 1 at 842.
[3] Mitchell v. Rochester R. Co., 151 N. Y. 107, 45 N. E. 354, 34 L. R. A. 731 (1896) (Court is afraid of: (1) Fictitious and fraudulent litigation; (2) Difficulty of ascertaining damages; (3) Recovery against public policy). Spade v. Lynn & Boston R. Co., 168 Mass. 285, 47 N. E. 88 (1897).
[4] Throckmorton, *Damages for Fright* (1921) 34 HARV. L. REV. 260, 273.

followed by a consequent physical illness.[5] All allow a recovery when nervous shock and physical injury happen together, and when each aggravates the other.[6] Few jurisdictions allow a recovery for mental anguish alone. These recoveries are generally limited to the telegraph cases.[7]

The apparent weakness of the principal case is seen in the mechanical method utilized in reaching the decision. The doctrine of "foreseeability," as a test of causal connection, has been limited[8] and criticised[9] in recent years. The jury, in determining negligence, reviews and connects the known facts, and is not called upon to "foresee" the unknown. It deals with "past actualities and not future probabilities."[10] Also, the question of recovery for nervous shock should not be, "Was the negligent act too remote?" but, "Have the courts extended the right of recovery for fright to take in the facts of this case?"[11] It is submitted that the true test is whether

[5] Purcell v. St. Paul, etc. R. Co., 48 Minn. 134, 50 N. W. 1034 (1892); Mack v. South Bound R. Co., 52 S. C. 323, 29 S. E. 905 (1897); Kimberly v. Howland, 143 N. C. 398, 404, 55 S. E .778 (1906) ("If the fright and nervousness is the natural and direct result of the negligent act of the defendant, and if the fright and nervousness directly cause an impairment of the health or loss of power, then this would constitute an injury . . .); Pankopf v. Hinkley, 141 Wis. 146, 123 N. W. 625, 24 L. R. A. (N. S.) 1159 (1909).

The English rule is laid down in Hambrook v. Stokes Bros. (1925) 1 K. B. 141, 41 L. T. R. 125. According to D. Hughes Parry, *Nervous Shock as a Cause of Action in Tort* (1925) 41 L. Q. Rev. 297, the plaintiff may recover in an action for damages for nervous shock suffered as the result of a wrongful act by the defendant, provided such shock has caused physical injury to the plaintiff as its direct, or contemplated, result. The "act" may assume forms: physical impact; spoken words; or, conduct causing fright to the plaintiff. E. F. Albertsworth, *Recognition of New Interests in the Law of Torts* (1925), 10 Calif. L. Rev. 461, 487 et seq.

[6] Stutz v. Chicago & N. W. R. Co., 73 Wis. 147, 40 N. W. 653 (1888); Warren v. Boston & Me. R. Co., 163 Mass. 484, 40 N. E. 895 (1895); Consolidated Trac. Co. v. Lambertson, 59 N. J. Law 297, 36 Atl. 100 (1896); Denver & R. G. R. Co. v. Roller, 100 Fed. 738, 49 L. R. A. 77 (C. C. A. 9th, 1900); Illinois Cent. R. Co. v. Nelson, 212 Fed. 69 (C. C. A. 8th, 1914); Penn. R. Co. v. White, 242 Fed. 437 (C. C. A. 6th, 1917).

[7] A case comment in (1928-29) 3 St. John's L. Rev. 285, discussing Gibbs v. Western U. Teleg. Co., 196 N. C. 516, 146 S. E. 209 (1929) gives a list of the states allowing a recovery for mental anguish caused by failure to deliver death messages. These states are: Texas (1881); Tenn. (1888); Ala. (1890); N. C. (1890); Iowa (1895); Kentucky (1900); Nevada (1904). Recovery is denied in all the other states and in the Federal courts.

[8] Kimberly v. Howland, *supra* note 5, at 402. Throckmorton, *Damages for Fright* (1921) 34 Harv. L. Rev. 260, 271.

[9] Albert Levitt, *Proximate Cause and Legal Liability* (1920) 90 Cent. L. Jr. 188; Green, Rationale of Proximate Cause.

[10] Levitt, *op. cit. supra* note 9 at 194.

[11] Throckmorton, *op. cit. supra* note 8, at 268-272; D. Hughes Parry, *op. cit. supra*, note 5.

the negligence of the defendant was a substantial contributing factor to the plaintiff's injury.[12] The defendant's negligence in the principal case set the stage for the totality of the plaintiff's injuries, whether their occurrence was contemporaneous or consecutive.

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[12] Levitt, *op. cit. supra* note 9, at p. 194 *et seq.;* Milwaukee & St. Paul R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256 (1896). This case sets up the "foreseeability" test, but bases its decision on the answer to the question, "Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?" A consideration of the decision of the case on the facts will sustain the test advocated in this comment.