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Notes and Comments

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Banks and Banking—Collection Claims against Assets of Insolvent National Banks.

The National Banking Act directs the comptroller to make ratable distribution of the assets of insolvent national banks.[1] This prevents preferred claims against the assets of an insolvent national bank, except where property is held in trust by the bank,[2] or in situations which justify an application of the equitable doctrine of constructive trust,[3] as where deposits were received at a time when the bank was knowingly insolvent.[4] Thus the owner of an item sent for collection and remittance to a national bank which became insolvent after collecting the item but before remitting the proceeds is in the position of a general creditor, unless he shows, first, that a particular fund has been augmented by the collection transaction, or that the proceeds have been segregated, and, second, that the receiver has acquired the augmented fund or the segregated assets.[5]

State court decisions upon the priority of claims against the assets of banks which have collected items and failed before remitting the proceeds have varied widely. In some states the strict rule which applies to national banks has also prevailed in respect to state banks.[6] In other states the owner of an item sent for collection has been granted a preference, even where the obligor pays the item with a check drawn upon his account in the collecting bank.[7]

[1] 12 U. S. C. A. §194 (1927); "From time to time, after full provision has been made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller may make a *ratable dividend* of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

[2] Capital National Bank v. First National Bank of Cadiz, 172 U. S. 425, 19 Sup. Ct. 202, 43 L. ed. 502 (1929); Bartlof v. Millett, 22 F. (2d) 538 (C. C. A. 8th, 1927); Fiman v. State of South Dakota, 29 F. (2d) 776 (C. C. A. 8th, 1928), *cert. denied*, 279 U. S. 841, 49 Sup. Ct. 254, 73 L. ed. 987 (1929).

[3] Townsend, *Constructive Trusts and Bank Collections* (1930) 39 YALE L. J. 980.

[4] St. Augustine Paint Co. v. McNair, 59 F. (2d) 755 (D. C. Fla. 1932); Gering v. Buerstella, 118 Neb. 54, 223 N. W. 625 (1929).

[5] Lucas County v. Jamison, 170 Fed. 338 (C. C. Iowa, 1908); St. Augustine Paint Co. v. McNair, 59 F. (2d) 755 (D. C. Fla. 1932); Note (1934) 44 YALE L. J. 341.

[6] Yesner v. Commissioner of Banks, 252 Mass. 358, 148 N. E. 224 (1925); Zimmerli v. Northern Bank & Trust Co., 111 Wash. 624, 191 Pac. 788 (1920).

[7] Edwards v. Lewis, 98 Fla. 212, 124 So. 746 (1929); Winkler v. Veigel, 176 Minn. 384, 223 N. W. 622 (1929).

Judicial treatment of collection claims upon the assets of insolvent banks is

The American Bankers Association Bank Collection Code, drafted in 1929 and later adopted by eighteen states,[8] was designed to simplify and make uniform the law governing check collections.[9] This code provides that the assets of an agent collecting bank shall be impressed with a trust in favor of the owner of items sent for collection and that such owner shall have a preferred claim upon the bank's assets if it should fail before remittance, irrespective of whether the proceeds of such item can be traced and identified.[10]

Three recent decisions, two in the United States Supreme Court and one in the Circuit Court of Appeals, have held such provisions in state banking laws unconstitutional when applied to national banks, on the ground that they conflict with the ratable distribution provision of the National Banking Act.[11]

In 1934 the Commissioners on Uniform State Laws tentatively adopted the fifth draft of a Bank Collection Act. This act provides that when a collecting bank receives the proceeds of an item for remittance, but closes before remittance is made, the proceeds will be

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discussed at length in Note (1934) 44 YALE L. J. 341, where the various holdings in regard to both state and national banks are carefully analyzed.

[8] Idaho; Illinois; Indiana; Kentucky; Maryland; Michigan; Missouri; Nebraska; New Jersey; New Mexico; New York; Oregon; Pennsylvania; South Carolina; Washington; West Virginia; Wisconsin; Wyoming.

[9] FOREWORD TO AMERICAN BANKERS ASSOCIATION BANK COLLECTION CODE (1929).

[10] Sec. 13 (3): "Where an agent collecting bank other than the drawee or payor shall fail or be closed for business . . . , after having received in any form the proceeds of an item or items entrusted to it for collection, but without such item or items having been paid or remitted for by it either in money or by an unconditional credit given on its books or on the books of any other bank which has been requested or accepted so as to constitute such failed collecting or other bank debtor therefor, *the assets of such agent collecting bank which has failed or been closed for business . . . shall be impressed with a trust in favor of the owner or owners of such item or items for the amount of such proceeds and such owner or owners shall be entitled to a preferred claim upon such assets, irrespective of whether the fund representing such item or items can be traced and identified as part of such assets or has been intermingled with or converted into other assets of such failed bank.*"

[11] Old Company's Lehigh v. Meeker, 55 Sup. Ct. 392 (U. S. 1935); Jennings v. United States Fidelity & Guaranty Co., 55 Sup. Ct. 394 (U. S. 1935); Spradlin v. Royal Mfg. Co., 73 F. (2d) 776 (C. C. A. 4th, 1934). While North Carolina has not adopted the Bankers Bank Collection Code a similar provision has been enacted to govern the collection situation. N. C. CODE ANN. (Michie, 1931) §218 (c) ((14)): "Liquidation of Banks: Declaration of Dividends; Order of Preference— . . . Provided, that when any bank, or any officer, clerk, or agent thereof, receives by mail, express or otherwise, a check, bill of exchange, order to remit note, or draft for collection, with request that remittance be made therefor, the charging of such item to the account of the drawer, acceptor, indorser, or maker thereof, or *collecting any such item from any bank or other party, and failing to remit therefor, or the non-payment of a check sent in payment therefor, shall create a lien in favor of the owner of such item on the assets of such bank making the collection,* and shall attach from the date of the charge, entry or collection of any such funds. . . ."

deemed to be held in trust.[12] The trust feature of this act is, of course, subject to the same constitutional objection as the corresponding provisions of the Bankers Collection Code.

The obvious effect of these decisions is to seriously impair the effectiveness of both proposed collection laws and to further accentuate the division of banking into two systems, national and state. It is also an interesting speculation, since the owner of an unremitted item would have a lien upon the assets of an insolvent state bank but not upon the assets of a national bank, whether the courts would consider a collecting agent negligent who sent an item to a national bank for collection and remittance where a state bank was equally available.[13]

To remedy the present situation in the law as to national banks Congressional action will be necessary. Three forms of action are possible. First, Congress may enact either the Bankers Bank Collection Code or the Uniform Bank Collection Act. Second, a statute may be adopted stating the priorities of each of the various classes of creditors who may have claims.[14] Third, an amendment may be made to the National Banking Act giving priority to claims for items collected by national banks but for which remittance was not made before insolvency. The third proposal is the simplest and would work less change and disturbance in the present structure of the law relating to

[12] Sec. 24: *"When a collecting bank receives the proceeds of an item for remittance, but closes before making remittance in the proper form,* and which, if by draft or other remittance item, is not dishonored upon due presentment, *a debtor-creditor relation will not be deemed to exist as to the proceeds but they will be deemed held in trust,* subject to any lien or other interest the bank may have acquired therein. Should the proceeds be in the form of a credit to the bank with a correspondent or with some other bank, or should they not be identified or otherwise traced into specific assets of the closed bank, they will be conclusively presumed to be traced into its general assets, exclusive of previously acquired bank buildings and other real estate and any fixtures or equipment. If such proceeds be received in the form of a draft or other remittance item which upon due presentment is dishonored because the drawer thereof has closed, the bank will not be deemed in receipt of proceeds for purposes of this section but will hold the item at the disposal of its customer."

[13] It has been stated that if two or more courses of collection are open to a collecting bank, one of which may prove damaging to the payee, the bank is liable if damage results from a selection of that course. Federal Land Bank v. Barrow, 189 N. C. 303, 309, 127 S. E. 3, 6 (1925). But it has also been held that where a statute alleviates the strict rule that a check is payable only in cash by authorizing the payment of checks by means of bank exchanges when presented by a Federal Reserve Bank or by mail, a selection of these courses by agent collecting banks do not render them liable for resultant losses. Braswell v. Citizens National Bank, 197 N. C. 229, 148 S. E. 236 (1929); Morris v. Cleve, 197 N. C. 253, 148 S. E. 256 (1929). Both cases are discussed in Note (1929) 8 N. C. L. REV. 55.

[14] See the order of preference contained in the North Carolina Banking Law, N. C. CODE ANN. (Michie, 1931) §218 (c) ((14)). This possible course of Congressional action was suggested by the Commissioners on Uniform State Laws. UNIFORM BANK COLLECTION ACT §24, note.

national banks. It is therefore suggested that the National Banking Act[15] be amended by adding the following italized proviso:

From time to time, after full provision has been made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; ***provided, that when, prior to its closing, such banking association had received an item or items for collection and remittance and had collected the proceeds thereof in any manner but either had not remitted therefor or had remitted by an exchange draft which was dishonored on due presentment because of the closing of such association, the amount of said item or items collected shall constitute a preferred claim on the assets of the association in the comptroller's hands notwithstanding that the proceeds of such item or items cannot be traced into the assets of the bank and cannot be shown to have augmented said assets;*** **and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held.**

Such an amendment to the National Banking Act would simplify the collection situation in respect to national banks by obviating the difficulties of tracing and identifying a constructive trust *res*. It would make uniform the check collection law as to state as well as national banks; and it would assure the protection which the Bankers Collection Code and the Uniform Bank Collection Act were designed to give to both collecting banks and check owners.

However, it is possible that Congress may approve of none of these proposed changes in the national banking laws. It was a current thought twenty years ago that the restrictions imposed by Congress upon national banks would leave them unable to successfully compete with state banks, and that national banks would therefore be driven out of existence. With the creation by Congress of Federal Deposit Insurance[16] the competitive odds appear to favor national banks. Before state banks may enjoy the benefits of insured deposits they must submit to national regulation.[17] Sensing the possibility of virtually making all banks national banks through regulation, Congress may prefer to let

[15] 12 U. S. C. A. §194 (1927). [16] 12 U. S. C. A. §264 (1934).

[17] 12 U. S. C. A. §264 (e) (1934). The effect of this section is to require that state banks join the Federal Reserve System as a prerequisite to the insurance of their deposits.

competition drive the nonconforming state banks out of existence and to retain national banking laws as they presently exist.

JOHN R. JENKINS, JR.

Common Carriers—Railroads—Possibility of Changes in the Law Due to Changed Economic Conditions.

That the law of railroads—and perhaps of other common carriers—is entering upon a period of metamorphosis does not seem to be an extravagant prediction.[1] Rather does it appear to be an almost inevitable conclusion. An unmistakable warning of that change is implicit throughout the opinion of the Supreme Court of the United States in the case of *Nashville, C. & St. L. Ry. v. Walters*.[2] It is not the actual decision in the case which prompts the above prediction; it is the discussion of Mr. Justice Brandeis.

A Tennessee statute imposes upon a railroad one-half the cost of eliminating a grade crossing over its road, when such elimination is ordered by the state highway commission.[3] Plaintiff railroad was ordered to contribute one-half the cost of an underpass at a point where a new federal-aid highway intersected its line. It did not question the power of the state to build the proposed highway; its power to require the separation of grades; the appropriateness of the plan adopted for such separation; nor the reasonableness of the cost. It conceded the settled rule of law that, ordinarily, the state may, under its police power, impose upon a railroad the whole cost of eliminating a grade crossing, or such part thereof as it deems appropriate.[4] It did contend, however, that, in view of special circumstances set forth, the order, and the statute as so applied, were so unreasonable and arbitrary as to deprive it of property without due process of law in violation of the Fourteenth Amendment. The trial court found that, with but one exception, the evidence fully supported every averment of fact in the bill, and upheld plaintiff's contention. The Supreme Court of Tennessee reversed the trial court, holding the statute constitutional upon its face, and declining to consider the special facts relied upon by the railroad.[5] The Supreme Court of the United States decided that the state Court erred in refusing to consider those facts.

The Court summarizes the special facts alleged in the bill as relating to "the revolutionary changes incident to transportation wrought in re-

[1] No attempt will be made herein to predict specific changes.
[2] 55 Sup. Ct. 486 (U. S. 1935).
[3] Tenn. Pub. Acts 1921, c.132; amended by Pub. Acts 1923, c.35; Pub. Acts 1925, c.88.
[4] See 55 Sup. Ct. 486, 487 (U. S. 1935), and cases cited in n. 3.
[5] Nashville, C. & St. L. Ry. v. Baker, 167 Tenn. 470, 71 S. W. (2d) 678 (1934).

cent years by the widespread introduction of motor vehicles; the assumption by the federal government of the functions of road builder; the resulting depletion of rail revenues; the change in the character, the construction, and the use of highways; the change in the occasion for elimination of grade crossings, in the purpose of such elimination, and in the chief beneficiaries thereof; and the change in the relative responsibility of the railroads and vehicles moving on the highways as elements of danger and causes of accidents."[6] These topics, which the Court discusses at length, relate basically to the changed economic condition of the railroads, with emphasis, of course, upon those factors which may have contributed to that change, and which are relevant to the particular issue presented.

If, then, problems in railroad law must be viewed in the light of the present economic condition of the railroads, it may not be amiss to consider some aspects of that condition. The railroads are no longer the business and financial giants of two decades ago. They are fighting for their very existence, and in that fight, they are weighed down by the burdens imposed upon them in a bygone—and, for them, happier—age. Perhaps the most graphic commentary upon the present condition of the railroads is the news that nearly eighty of them are now in receivership, bankruptcy, or in the process of reorganization under the recent amendments to the Bankruptcy Act.[7] These eighty roads operate approximately one-fifth of the total railroad mileage in the country.[8] Furthermore, roads operating 67 per cent of the total mileage, and with an aggregate capitalization of more than $2,500,000,000, were in default at the end of 1934.[9] This picture is set out in bolder relief by the knowledge that it exists, in spite of the fact that, up to the end of February of this year, the Reconstruction Finance Corporation had loaned over $450,000,000 to railroads;[10] the Railroad Credit Corporation made loans of over $73,500,000 during the fifteen months ending May 31, 1933; and the Public Works Administration had, up to

[6] 55 Sup. Ct. 486, 489 (U. S. 1935).

[7] MOODY, RAILROADS (1934) a 11, a 124; *id.* (1935) 708.

The amendments of the Bankruptcy Act referred to are to be found in §77, 11 U. S. C. A. §205 (1934 Supp.).

[8] According to the WORLD ALMANAC (1935) 327, total mileage owned in 1933 was 245,703. The roads referred to in the text operate nearly 50,000 miles. MOODY, RAILROADS (1934) a 11, a 124.

In this connection, it is interesting to note that total mileage owned has been dropping off steadily since the 1916 high of 254,037. WORLD ALMANAC (1935) 327. For a discussion of the extent, character, and causes of abandonments, see MOULTON, AMERICAN TRANSPORTATION PROBLEM (1933) 147-52.

[9] WORLD ALMANAC (1935) 84.

[10] MOODY, RAILROADS (1935) 721. The same agency has authorized an additional $7,600,000, approximately, in loans to railroads, which had not, at that time, been disbursed.

August 1, 1934, disbursed $86,400,000 of the $190,950,500 allotted to railroads.[11]

The depression is not alone responsible for these conditions. It served only to accelerate the operation of forces which were at work before 1929. The railroads were in a very strong financial position in the period roughly from 1906 to 1913. From 1910 to 1920 a progressive weakness was evident. For the portion of this period from 1916 on, the main explanation of the weakness lies in the failure of rates during the war period to follow the upward movement of prices and wages. From 1921 to 1929 there was a recovery, which, while substantial, did not restore the strength of the period ending in 1913.[12] The decline beginning in 1930 has, of course, been sharp.[13] But passenger service petition of motor vehicles.[14] And although the volume of freight traffic had been dropping off since 1920, chiefly because of the increased com-

[11] MOODY, RAILROADS (1934) a 41-3. According to more recent figures, the railroads have received loans of $200,000,000 from the Public Works Administration. WORLD ALMANAC (1935) 84.

[12] These are substantially the conclusions reached by Dr. Moulton after a study of the financial trend of the railroads during the period 1890-1929. MOULTON, *op. cit., supra* note 8, 26-48. Dr. Moulton's study includes the analysis of numerous indices of financial condition, such as, operating ratio (ratio of operating expenditure to operating revenue), ratio of income to expense, relationship between income available for capital and the investment, and relationship between net income and the equity of the stockholders in the property, separately, and then as compared with one another. He supplements this aspect of the study by an investigation of the railroads' ability to raise capital during the period.

[13] The most important reaction of the railroad business to the depression is reflected in the volume of business. Net ton miles of revenue freight handled by Class I roads dropped from 433 billion in 1928 to 383 billion in 1930, and to 309 billion in 1931. The latter figure was slightly below the low record of 1921 and far lower than that of any other year in the post-war period. The first eleven months of 1932 showed a further drop of 25 per cent below the figure for the corresponding period in 1931.

The decline in passenger service was even more pronounced. Revenue passenger mileage of Class I roads decreased in 1931 13 per cent below the 1928 figure, and in 1931 20 per cent below the 1930 figure. There was a further loss of 23.5 per cent in the first eleven months of 1932. MOULTON, *op. cit., supra* note 8, 49-50.

Unfortunately, no figures for these indices have been found which bring the picture up to date. However, it does appear that the number of passengers carried showed a further decline in 1933, while the number of tons of freight carried increased slightly. This was reflected by a decline in passenger revenue, and a slight increase in freight revenue. However, both revenue per ton mile, and per passenger mile decreased. WORLD ALMANAC (1935) 327.

The figures for 1934 are even farther removed from the original indices; they will serve, however, to convey a general idea of the trend. Gross operating revenues for the first ten months of 1934 showed a gain of 6.3 per cent over the same 1933 period. However, the gain was more than absorbed by the restoration of the wage deduction and higher prices for fuel, materials, and supplies resulting from the application of codes under the National Recovery Act. The result was a decrease of 1.9 per cent below 1933 in net operating income. Passenger revenues showed the first increase in 1934 since 1923. This latter change reflects the roads' intensive effort to reclaim passenger business through reduced and special fares and special equipment. WORLD ALMANAC (1935) 84.

[14] As early as 1918, automobiles replaced the railways as the most important

was still increasing up to 1929, the rate of increase was much lower than before the war, and the railroads' percentage of the total volume of traffic was falling.[15] Thus the decline in railway traffic since 1929 reflects in part a decrease in the total volume of transportation work being done, in part a diversion to other agencies which would have taken place even under prosperity conditions, and in part the increased severity of the competition of these other agencies under depression conditions.[16]

This decline in volume of traffic has been reflected in a marked decline in gross operating revenues,[17] rates having changed but little.[18] Operating expenses have been elastic enough to keep pace with the reduction in operating revenues to some extent,[19] but in contrast with that elasticity, taxes and fixed charges have remained relatively rigid.[20] The result appears in the fact that net earnings dropped off sharply after 1929,[21] and in 1932, 150 railroads showed an aggregate net deficit of over $150,000,000, followed by a similar deficit of nearly $14,000,000 in 1933.[22] This inelasticity of taxes and fixed charges introduces another problem stressed by the Court in the principal case.

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agency for passenger traffic. MOULTON, *op. cit., supra* note 8, 15, 17, 51, 86-98. Compare tables WORLD ALMANAC (1935) 327. See also last two sentences in note 13 *supra*.

[15] MOULTON, *op. cit., supra* note 8, 18, 51.

[16] *Ibid.*

[17] Gross operating revenues have declined steadily from $6,508,678,781 in 1926 to $3,138,185,942 in 1933. WORLD ALMANAC (1935) 328. See also the last paragraph of note 13 *supra*.

As to Class I roads, the 33 per cent decline in gross operating revenues from 1928 to 1931 was the joint result of a 30 per cent drop in freight revenue, a 40 per cent drop in passenger revenue, a 45 per cent drop in express revenue, a 25 per cent drop in miscellaneous revenue, and a trifling increase in mail revenue. MOULTON, *op. cit., supra* note 8, 57.

[18] MOULTON, *op. cit., supra* note 8, 53-6.

[19] The ratio of operating expense to operating revenue shows that revenue shrank more rapidly than expense, but not to the extent which might be anticipated. The ratio varied as follows: 1929, 71.85%; 1930, 74.56%; 1931, 77.10%; 1932, 77.06%; 1933, 72.82%; 1934 (first ten months), 74.32%. WORLD ALMANAC (1935) 328, 84. For a more detailed discussion of the factors involved, see MOULTON, *op. cit., supra* note 8, 57-61.

[20] See MOULTON, *op. cit., supra* note 8, 61; WORLD ALMANAC (1935) 328. Federal taxes are not of the kind to create the railroad tax problem, although they have amounted to substantial sums during the past 20 years. They are largely taxes which vary in proportion to the roads' ability to pay, and have never amounted to more than one-fourth of the taxes paid by Class I roads. During the depression, they have been reduced to only about 3.5 per cent of the taxes imposed upon railroads.

It is the state and local taxes which are the principal factor in the railroad tax problem. They constitute well over three-fourths of the railroads' tax burden, and are relatively inflexible in the face of changes in business conditions. Except for 1915, this group of taxes increased every year from 1912 to 1930 inclusive, and after the increase in 1930, decreased only $14,000,000 below the 1929 level of $306,565,000 in 1931. See MOULTON, *op. cit., supra* note 8, 231-72.

[21] MOODY, RAILROADS (1934) a 7.

[22] *Ibid.*

Mr. Justice Brandeis forcefully points out[23] that plaintiff railroad was paying nearly 28 per cent of its gross revenues for state and local taxes and the cost of maintaining the roadway acquired and constructed at its own expense. In contrast, motor carriers, which have contributed appreciably by their competition to the present plight of the railroads, pay not more than 7 per cent of their gross revenues in state and local taxes,[24] and operate upon a roadway supplied by the state. Whether or not railroads are too heavily taxed is one problem, and one which has provoked severe criticism of tax policies.[25] But another problem, quite as important to the railroads and to the public, is whether or not motor carriers should be subsidized by the state to the extent of having their roadways furnished, and still be taxed at only the same, or perhaps a lower, rate than that imposed upon the railroads with which they are in competition. Furthermore, it is not impossible that a portion of the fixed charges now borne by the railroads is attributable directly, or indirectly through refunding issues, to outlay for the acquisition and construction of roadways. Seemingly there is no justification for such a policy of governmental favoritism. Our transportation system is capable of paying its own way. The process of selecting those agencies which can serve the public most efficiently and most cheaply should be conducted on the basis of equal opportunity. Therefore, plain justice would seem to require that motor carriers, competing with other transportation agencies, should be required to pay in taxes, not only a percentage equal to that imposed upon their competitors, but if the competitors have to acquire, construct, and maintain their own roadways, while the carriers operate upon governmentally built highways, an additional percentage which will equalize the burden cast upon the respective types of agency.[26]

[23] 55 Sup. Ct. 486, 494 (U. S. 1935).

[24] The figures used by the Court here relate specifically to the plaintiff railroad, and presumably to motor carriers in Tennessee. Unfortunately, no figures for a general comparison have been found.

[25] See, for example, McDermott, *The Over-Taxation of the Railroads* (1928) 116 BANKERS MAG. 329, in which the author depends upon such graphic facts as that the railroads pay over $1,000,000 a day in taxes, and that the New York Central Lines pay the revenues from one-fourth of their total mileage in the form of taxes. Compare MOULTON, *op. cit., supra* note 8, 231-72.

[26] Compare REPORT OF THE NATIONAL TRANSPORTATION COMMITTEE (1933). The Report reads (I): "Government policies should be freed of any purpose either to favor or to handicap any form of transportation with relation to any other form." At I (b), it reads: "Government has a positive duty to see to it that neither the railroads nor their competitors are either unduly handicapped or unduly advantaged. . . . In a fair field and no favor, economic competition must decide the question of survival under private ownership and operation." Again, at I (5), we find: "Automotive transportation should be put under such regulation as is necessary for public protection. It should bear its fair burden of tax but only on a basis of compensation for public expenditure on its behalf, plus its share of the general tax load."

A current complaint against the railroads condemns their practices as wasteful, inefficient, and without foresight. The charge may be, to some extent, justified; certainly it is not so well founded as to explain altogether the predicament in which the railroads now find themselves. The war left the railroads in such weak financial condition that the period since 1920 has been one of struggle for greater efficiency. Just how effective that struggle has been is probably not fully realized by the public. That it has been of considerable influence is not to be doubted.[27] But the results have been purchased at a cost—a cost mounting to over a billion dollars for the year 1923, representing the investment for additions and betterments to existing lines.[28] That is not to say that the railroads have done all that could be done to promote efficiency.[29] But it should be borne in mind that improvements leading to increased efficiency in railroad operations are expensive, and that, in view of the present impecuniousness of the railroads, not too much is to be expected of them.[30]

Probably no one doubts the economic importance of an efficient transportation system. Very few will admit any doubt as to the essential part played by the railroads in the American system.[31] The problem, then, is to put the system into its strongest and most efficient position. This requires a preservation of the railroads.[32] That this result cannot be accomplished alone by a change of business policies of, and in respect to, the railroads is clear. Many of the changes must come from the coöperation and application of the law, both by way of statutory enactment and judicial decision. In this respect, the law cannot remain a bare abstraction—the major premise upon which cases are decided. A statute cannot be satisfactory "upon its face." The abstractions of railroad and other law were induced by the applica-

[27] See MOULTON, *op. cit., supra* note 8, 99-111.

[28] *Id.* at 101. The amount spent for additions and betterments dropped off to $314,674,000 in 1931.

[29] Both the National Transportation Committee and Dr. Moulton have suggestions as to methods for increasing efficiency, within the several roads as units in the system, and within the system as a whole. See REPORT OF THE NATIONAL TRANSPORTATION COMMITTEE (1933), and MOULTON, *op. cit., supra* note 8, part VIII.

[30] See MOULTON, *op. cit., supra* note 8, 778, where he says, "During the next few years it is improbable . . . that the necessary capital can be obtained to effect significant operating improvements—and in any event the most obvious types of improvements have already been effected."

[31] In spite of the inroads made by competing agencies upon the business of the railroads, the ton mileage on the railways in 1929, for example, was roughly two and one-half times that on all other forms of agency combined. In 1930, the capital invested in railroads was greater than that represented by the country-wide system of highways. As to the relative importance of the various transportation agencies, see MOULTON, *op. cit., supra* note 8, 14-18.

[32] The opening sentence of the REPORT OF THE NATIONAL TRANSPORTATION COMMITTEE (1933) reads: "The railroad system must be preserved."

tion of policies in view of then existing facts. Now the Supreme Court of the United States announces that the law must be tested by the application of policies upon *present* facts. If it does not meet the test, it must be replaced. The decision in the principal case is an enlightened one.

D. W. MARKHAM.

Conflict of Laws—Forum's Use of the Construction Given a Foreign Statute by a Third State.

Plaintiff, a gratuitous guest in defendant's automobile, was injured in an accident occurring in South Carolina. Suit was brought in Georgia, and the South Carolina "guest statute"[1] was pleaded as the basis of recovery. The complaint, which relied on the host's unlawful speed, failure to equip the car with a suitable steering apparatus, operation of the car with knowledge of its defective condition, and inattention while driving, was *held* demurrable as failing to show that the accident was "intentional on part of the owner or operator or caused by his heedlessness or his reckless disregard of the rights of others" so as to permit recovery under the statute.[2]

In attempting to apply the rule of *lex loci*,[3] the Georgia court, as the forum, found it necessary to find the meaning of the terms "heedlessness or reckless disregard" as used in the South Carolina statute in order to construe and apply that statute to the facts alleged in the complaint.[4]

The statutes of a foreign jurisdiction are generally given the same construction by the courts of the forum as that given by the courts of last resort in the foreign state.[5] But the statute in question here had never been construed by the South Carolina court. In view of this fact, the forum considered the Connecticut court's construction of the Connecticut "guest statute"[6] on the presumption that South Carolina in adopting a statute verbally the same adopted it in view of previous Connecticut constructions. This presumption is supported by reason

[1] S. C. CODE (1932) §5908. This statute, passed in 1930, changed the common law rule of ordinary negligence to require intent or heedlessness or reckless disregard on the part of the owner or driver before his gratuitous guest could claim a right of action against him. See notes 8 and 20, *infra*.

[2] Lee v. Lott, 177 S. E. 92 (Ga. App. 1934).

[3] White v. Seaboard Air Line Ry., 14 Ga. App. 139, 80 S. E. 667 (1914); Wise v. Hollowell, 205 N. C. 286, 171 S. E. 82 (1933); GOODRICH, CONFLICT OF LAWS (1927) §92; RESTATEMENT, CONFLICT OF LAWS (1934) §§411X, 413.

[4] Lee v. Lott, 177 S. E. 92, 94 (Ga. App. 1934).

[5] Magnolia Petroleum Co. v. Turner, 188 Ark. 177, 65 S. W. (2d) 1 (1933); Georgia, Fla. & Ala. R. Co. v. Sasser, 4 Ga. App. 276, 61 S. E. 505 (1908); White v. Seaboard Air Line Ry., 14 Ga. App. 139, 80 S. E. 667 (1914).

[6] Conn. Pub. Acts 1927, c. 308.

and authority[7] and affords the forum a practical means of approximating the law of the foreign state. However, the forum did not content itself with an examination of Connecticut decisions but also considered Georgia and South Carolina rulings on degrees of negligence and willful misconduct.[8]

In view of the cases examined, the forum seems amply justified in sustaining the demurrer.[9] But suppose the Georgia definitions had been so different from those of Connecticut that if followed a different result would have obtained.[10] Would the forum, having presumed the *lex loci* to be the same as the law of Connecticut, feel inescapably bound by this "foreign law" to the exclusion of its own? The question involves more than the old difficulties of defining degrees of culpable conduct, for an adequate answer necessitates a choice between two conflicting views of the bases of conflict of laws.

The Restatement adopts the "vested rights" or "obligatio" theory of foreign created rights.[11] According to this view, the only source of the tort obligation is the *lex loci* and therefore that alone must determine the existence and the extent of the obligation.[12] This limits,

[7] Fuller v. South Carolina Tax Comm., 128 S. C. 14, 121 S. E. 478 (1924); Shiveley's Adm'r. v. Norfolk & W. Ry. Co., 125 Va. 384, 99 S. E. 650 (1919).

[8] Lee v. Lott, 177 S. E. 92, 94 (Ga. App. 1934). Under the Conn. decisions "heedlessness or reckless disregard" was construed as "heedless and reckless disregard." Bordonaro v. Senk, 109 Conn. 428, 147 Atl. 136, 137 (1929). And "wanton misconduct" is equivalent to "reckless disregard." Menzie v. Kalmonowitz, 107 Conn. 197, 139 Atl. 698, 699 (1928). The examination of the Georgia and South Carolina cases was to further define "wanton misconduct" and "recklessness."

Georgia has no "guest statute" but follows the "Mass. rule" (Massaletti v. Fitzroy, 228 Mass. 487, 118 N. E. 168 [1917]) of "gross negligence." Epps v. Parrish, 26 Ga. App. 399, 108 S. E. 297 (1923).

[9] Silver v. Silver, 108 Conn. 371, 143 Atl. 240 (1928); Bordonaro v. Senk, 109 Conn. 428, 147 Atl. 136, 137 (1929); Central of Ga. R. Co. v. Moore, 5 Ga. App. 562, 63 S. E. 642, 644 (1909); Buffington v. Atlanta, Birmingham & Coast R. Co. 47 Ga. App. 85, 169 S. E. 756, 757 (1933); Hull v. Seaboard Air Line Ry. 76 S. C. 278, 57 S. E. 28 (1907).

[10] The forum will not enforce a foreign statute if penal or if violative of the public policy of the forum. Southern Rwy. v. Decker, 5 Ga. App. 21, 62 S. E. 678 (1908). No constitutional provision expressly prohibits the forum from wholly disregarding the foreign facts and foreign law, though the due process clause has been applied as a limitation on legislative power in such cases as Allgeyer v. Louisiana, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. ed. 832 (1897). See, in this regard, Stumberg, *Conflict of Laws, Foreign Created Rights* (1930) 8 TEX. L. REV. 173; note (1935) 13 N. C. L. REV. 213. The Restatement enters a caveat here: RESTATEMENT, CONFLICT OF LAWS (1934) §45. But see Cardozo, J., in Loucks v. Standard Oil Co. of N. Y., 224 N. Y. 99, 120 N. E. 198, 202 (1918).

[11] RESTATEMENT, CONFLICT OF LAWS (1934) §43; Slater v. Mexican National Rwy., 194 U. S. 120, 24 Sup. Ct. 581, 48 L. ed. 900 (1904); Western Union v. Brown, 234 U. S. 542, 124 Sup. Ct. 955, 58 L. ed. 1457 (1914); Loucks v. Standard Oil Co. of N. Y., 224 N. Y. 99, 120 N. E. 198 (1918); BEALE, CONFLICT OF LAWS (1916) 106; GOODRICH, CONFLICT OF LAWS (1927) 10; Stumberg, *Conflict of Laws, Torts, Texas Decisions* (1930) 9 TEX. L. REV. 26.

[12] GOODRICH, CONFLICT OF LAWS (1927) §94. See Western Union v. Brown; Slater v. Mexican National Rwy.; Loucks v. Standard Oil Co., all *supra* note 11.

by implication at least, the power of the forum to do more than recognize and enforce a "foreign created right," the *lex fori* being material only as setting a policy beyond which the obligation will not be enforced there.[13]

A contrary view, as expressed by Cook, Lorenzen and others,[14] holds that there is nothing fundamental in the application of foreign law and that, in fact, the plaintiff's right is always determined by the *lex fori* which "imposes an obligation of its own as nearly homologous as possible to that arising in the place where the tort occurred."[15] Under this view the effect of the foreign law as a factor in the case "depends on ideas of expediency, policy, and fairness at the forum and not upon a hypothesis of power abroad to create rights."[16]

Since, in the last analysis, the forum must determine the rights of the parties before it, whatever legal rules and principles it chooses as a model for its decree, should not the approach to conflict of laws problems be from this pragmatic basis rather than from an *a priori* assumption of "foreign created rights"? Only by such an approach is reference possible to all the circumstances that might have a bearing on reaching the best result.[17]

The "foreign created rights" view as a valid and controlling principle is challenged by the Georgia court's holding that if the liability of the defendant had been of common law rather than of statutory origin, the *lex fori* rather than the *lex loci* would have controlled.[18] Also if the forum should consider the degree of negligence required to impose liability under the *lex loci* inconsistent with the policy of the forum, it might enforce a "right" different in scope from that of a "right" under the decisions of the foreign court, and this could not then be accurately called a "foreign right."[19] Even if a forum nominally adopts the *lex*

[13] Cuba R. Co. v. Crosby, 222 U. S. 478, 32 Sup. Ct. 132, 56 L. ed. 274 (1911).

[14] Cook, *The Logical and Legal Bases of the Conflict of Laws,* (1924) 33 YALE L. J. 457; Cook, *Recognition of Mass. Rights by N. Y. Courts* (1918) 28 YALE L. J. 67; Lorenzen, *Territoriality, Public Policy and the Conflict of Laws* (1924) 33 YALE L. J. 736; Stumberg, *loc. cit. supra* note 11; Stumberg, *loc. cit. supra* note 10.

[15] Learned Hand, J., in Guinness v. Miller, 291 Fed. 769, 770 (S. D. N. Y. 1923).

[16] Stumberg, *supra* note 10, at 174; Stumberg, *supra* note 11, at 21, n. 1.

[17] Stumberg, *supra* note 10, at 194.

[18] Hall v. Slaton, 168 Ga. 710, 148 S. E. 741 (1929) reversing 38 Ga. App. 619, 144 S. E. 827 (1928) (plaintiff suing for injury occurring in Alabama where ordinary negligence permits guest's recovery, is held to Georgia's requirement of gross negligence.) This is not the prevailing view, however: Askowith v. Massell, 260 Mass. 165, 156 N. E. 875 (1927); Wise v. Hollowell, 205 N. C. 286, 171 S. E. 82 (1933) but see note 20 *infra*; RESTATEMENT, CONFLICT OF LAWS (1934) §413 X.

[19] Cook, *Tort Liability and Conflict of Laws* (1935) 35 COL. L. REV. 202. Similarly, where damages are being assessed and estimated the rule of the forum may be applied. Georgia, F. & A. Ry. Co. v. Sasser 4 Ga. App. 276, 61 S. E. 505 (1908); Dorr Cattle Co. v. Des Moines Nat'l Bank, 127 Iowa 153, 98 N. W. 918, 922 (1904); Note (1932) 24 A. L. R. 1268.

loci as controlling, it may accept only the terminology of the foreign law and look to its own decisions for substantive definitions.[20]

Among the American decisions,[21] the results reached and the language employed seem to support the "'vested rights" theory, but on closer examination, particularly of contract cases, it is evident that rulings have been shaped with a view to the result desired and without any real basic theory common to all the cases.[22] It is submitted that the hypothesis of the "vested rights" theory of conflict of laws does not accurately describe the legal phenomena with which it treats and that it involves limitations on the power of the forum which make it impractical and undesirable as a binding rule for the guidance of the courts.[23]

R. MAYNE ALBRIGHT.

Constitutional Law—Police Power—Price Control of Milk.

The New York Milk Control Act prohibited the sale within the state of milk purchased from producers in other states at a price less than the minimum payable to producers within the state.[1] Plaintiff dealer in New York City purchased milk from producers in Vermont at prices below the minimum fixed by the Act, and sold it in New York both in the original containers and in bottles. Plaintiff was denied a dealer's license because he refused to comply with the provisions of the Act and the regulations thereunder. After being threatened with prosecution for trading without a license, plaintiff sued to enjoin enforcement of the Act. A District Court of three judges granted an injunction against the enforcement of the Act as to sales in the original cans but denied relief as to sales in bottles after removal from the cans.[2] On

[20] Wise v. Hollowell, 205 N. C. 286, 171 S. E. 82 (1933) (N. C. accepted the Virginia common law rule of "gross negligence" but applied its own definitions to the terms). See a criticism in (1934) 12 N. C. L. REV. 247. For a criticism of the N. C. rule of ordinary negligence, see Brogden, J., dissenting in Norfleet v. Hall, 204 N .C. 573, 169 S. E. 143 (1933). For a proposed statute for N. C., see (1930) 9 N. C. L. REV. 47.

[21] England does not recognize the "vested rights" theory in tort cases but requires the foreign wrong to be such as would have been actionable if committed in England. Phillips v. Eyre, L. R. 6 Q. B. 1 (Ex. 1870).

[22] Stumberg, *supra* note 10, at 184, 186.

[23] Lorenzen, *supra* note 14, at 751.

[1] New York Agriculture and Markets Law, Laws 1934, c. 126, 258m (4), article 21-A; formerly Laws 1933, c. 158, 312 (g), article 25 ("It is the intent of the legislature that the instant, whenever that may be, that the handling within the state by a milk dealer of milk produced outside of the state becomes a subject of regulation by the state, in the exercise of its police powers, the restrictions set forth in this article respecting such milk so produced shall apply and the powers conferred by this article shall attach. After any such milk so produced shall have come to rest within the state, any sale, within the state by a licensed dealer or a milk dealer required by this article to be licensed, of any such milk purchased from the producer at a price lower than that required to be paid for milk produced within the state purchased under similar conditions, shall be unlawful.")

[2] Seelig v. Baldwin, 7 F. Supp. 776 (S. D. N. Y. 1934).

appeal, the Supreme Court held an injunction should issue as to all the milk brought in, whether sold in the original packages or in bottles, because the Act had the "aim and effect of establishing an economic barrier against competition with the products of another state" and was "an unreasonable clog upon the mobility of commerce."[3]

It was established in *Nebbia v. New York*[4] that a state could fix milk prices to be paid the producer, the wholesaler, and the retailer. The Supreme Court did not base its decision on the existence of an emergency in the industry, and neither did it resort to the old doctrine that the business "was affected with a public interest;" it held that price control, like any other regulation, "is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt." Thus the prospect of saving the dairy industry from bankruptcy and of assuring New York an ample supply of wholesome milk necessary to its public health appeared very bright until the principal case was decided. In this latter case the court was of the opinion that the purpose of the legislation was to restrict competition from outside the state. Though it may not appear on the face of the Act, the real concern and the underlying purpose of the legislation was to assure the people of New York a sufficient quantity of milk, whether it be produced within or without the state. To accomplish this purpose the Act simply attempted to give the producers outside of New York the same protection accorded the local producers. The system of price control approval in the *Nebbia Case* is bound to fail now that the Commerce Clause has been invoked to deny protection to the producers outside the regulating state. Forthwith the dealers will begin purchasing outside the state at lower prices in order to increase their profits. The New York producers will have to cut prices in an effort to regain lost business; this will result in an orgy of unbridled competition the con-

[3] Seelig v. Baldwin, 55 Sup. Ct. 497 (1935).

[4] 291 U. S. 502, 54 Sup. Ct. 505, 78 L. ed. 940 (1934). This decision was concerned with an intrastate situation and did not touch on the problem involved in the principal case. In approving the New York Milk Control plan the court declared, at page 538, that if the legislature "concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interest, produce waste harmful to the public, threatened ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming public. And this is especially so where, as here, the economic maladjustment is one of price, which threatens harm to the producer at one end of the series and the consumer at the other." And again, at page 537, the court stated, "So far as requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that legislation adopted to its purpose."

sequences of which will be a bankrupt industry, a failure of the milk supply from without as well as from within the state, and injury to public health.[5]

It is imperative that some means be devised to preserve a constant supply of milk and this depends upon saving the producers from economic ruin. It is possible that New York might accomplish this end by imposing a sales tax upon the milk dealers equal to the differential between the price actually paid the producer, whether he be in Vermont or New York, and the minimum price fixed by law. Such a tax would apply to all milk whether sold in the original package or not.[6] There would be no discrimination against the out of state producer since the dealer selling imported milk would pay the same tax required of the dealer in domestic milk who failed to pay the minimum price.[7] Some

[5] At the time the principal case was tried New York received thirty percent of its milk from outside the state. The statute controlling prices will fall short of its goal when even this percentage of the producers have no protection. It is only natural that the dealers should buy outside the state to increase their profits. The result of this is that the producers outside the state who supply New York will greatly increase in number and will compete with each other to force the price down. The New York producers will not find a market for their milk when the imported milk may be sold for less than the minimum fixed price. New York will be forced to abandon her present price control system and this will result in ruinous competition between the increased number of producers supplying New York from outside the state and the local producers. The producer received only two cents per quart for milk before the legislature determined to fix minimum prices in order to prevent destruction of the industry and to safeguard the consumers. Unless some control measure is sustained, prices will drop below the old figure and the producers without as well as within New York will be bankrupt.

[6] Sonneborn Brothers v. Cureton, 262 U. S. 506, 43 Sup. Ct. 643, 67 L. ed. 1095 (1923). The original package doctrine was first applied in Brown v. Maryland, 25 U. S. 419, 6 L. ed. 679 (1827) and it was held that the foreign imports could not be taxed by the states so long as they remained in the hands of the importer and in the original package. It was implied in that early case that domestic imports could not be taxed so long as they remained in the original package but this *obiter* has been overruled by later cases. *Infra* note 7.

[7] Woodruff v. Parham, 75 U. S. 123, 19 L. ed. 382 (1868) (The defendant auctioneer was engaged in selling goods brought in from another state in the original package, as well as local goods. The court held that a tax which did not discriminate against sales of goods from other states, and which was imposed upon sales of all merchandise, whether the origin of the goods was in the local state or in another state, was not "an attempt to fetter commerce among the States," and that it was applicable to the goods sold in the original package).

Hinson v. Lott, 75 U. S. 148, 19 L. ed. 387 (1868) (Alabama law imposed a levy of fifty cents per gallon before it should be lawful for a dealer to introduce liquor *into* the state for sale. This was held not an attempt to burden interstate commerce because by another section of the same law every distiller in the state was bound to pay fifty cents per gallon. The two sections were complementary in order to "make the tax equal on all liquors sold in the State.")

The possible objection that such a tax would burden interstate commerce seems to be discredited in Sonneborn Brothers v. Cureton, 262 U. S. 506, 43 Sup. Ct. 643, 67 L. ed. 1095 (1923). A tax on the sale of oil in the original package was sustained. In considering the rule followed in Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. 681, 31 L. ed. 128 (1890) as to the necessity of sale to complete importation to sustain the view that the sale was a part of interstate commerce, the court pointed out the radical difference between state legislation preventing any

practical objections to such a plan suggest themselves at once: there would be difficulty in establishing the differential between the price actually paid the producer and the fixed minimum price for the purpose of measuring the tax on the individual transaction, also purchasers in the original container could easily avoid the tax by making the purchase outside the state and having the milk shipped direct to them instead of purchasing from the local dealer who has brought it into the state.[8] Thus it seems that the state acting alone cannot effectively legislate to assure itself of an ample supply of milk.

If the holding in *Hammer v. Daggenhart*[9] is followed, it is doubtful that Congress could control the price of milk by excluding it from interstate commerce when the producer was not paid the minimum price. Perhaps there can be no effective control unless Congress can be prevailed upon to divest milk of its interstate character as it has done in the cases of intoxicating liquors,[10] oleomargarine,[11] and convict-made goods,[12] so that the laws of the state may apply when the milk is shipped into the state for sale and use therein.

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sale at all accompanied by forfeiture of the merchandise, and a provision for an occupational tax applicable to all sales of such merchandise whether domestic or brought in from another state. It was determined that the first clearly interferes with or destroys the commerce, while the second merely puts the merchandise on an equality with all the other and is no hindrance to introducing the merchandise into the state for sale upon the basis of equal competition.

[8] In such a situation the sale would take place in the producing state and the receiving state would have no sale to tax.

[9] 247 U. S. 251, 38 Sup. Ct. 529, 62 L. ed. 1101 (1918). This case held unconstitutional the effort of Congress to regulate the hours of labor of children by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities which they helped to produce. This was held to be an attempt to regulate an intrastate matter which was outside the power of Congress. An attempt on the part of Congress to fix the price of milk by refusing to allow it to be shipped in interstate commerce on the ground that the producer did not receive the minimum price seems closely analogous and would likely be held unconstitutional.

The federal courts are divided over the validity of the federal control over milk prices established under the Agricultural Adjustment Act, 48 STAT. 31-41 (1933), 7 U. S. C. A. §§601-19 (1934 Supp.). The statute was approved in the following cases: Economy Dairy Co. v. Wallace, (Leading Decisions, IX-N. R. A.) (Sup. D. C. 1933) (This case held that the statute was applicable even though the milk did not cross a state line); Capital City Milk Producers' Assn. v. Wallace, (Leading Decisions, IX-N. R. A.) (Sup. D. C. 1933); United States v. Shissler, 7 F. Supp. 123 (N. D. Ill. 1934); United States v. Dwyer, (Leading Decisions IX-N. R. A.) (D. C. Mass. 1934). The statute was held invalid in Edgewater Dairy Co. v. Wallace, 7 F. Supp. 121 (N. D. Ill. 1934). It was held in the following cases that the statute did not apply where the milk was not in interstate commerce, Mellwood Dairy Co. v. Sparks, (Leading Decisions IX-N. R. A.) (W. D. Ky. 1934); Royal Farms Dairy, Inc. v. Wallace, 8 F. Supp. 975 (D. C. D. Md. 1934).

[10] The Wilson Act, 26 STAT. 313 (1890), 27 U. S. C. A. §121 (1928); The Webb-Kenyon Act, 37 STAT. 699 (1913), 27 U. S. C. A. §122 (1928).

[11] 32 STAT. 193 (1902), 21 U. S. C. A. §25 (1927).

[12] The Hawes-Cooper Act, 45 STAT. 1084 (1929), 49 U. S. C. A. §65 (1934

Contracts—Insane Persons' Transactions in North Carolina.

Controversies concerning the status of deeds and contracts made by insane persons have caused the courts perennial difficulty. Conflicts which arise between a desire to protect lunatics on one hand and innocent persons dealing with them on the other, and also between the rule that intent to be bound is necessary to form a contract and the rule that no person may stultify himself by his own plea[1] have caused much contradiction among the authorities.[2] The purpose of this note is to consider the North Carolina decisions relating to these transactions.

Because a "meeting of the minds" is of the essence of a contract, it has been said in this state that at law the contract of a person *non compos mentis* is void and an action for damages for non-performance will fail.[3] Although this is good authority as to entirely executory contracts, when there has been partial or complete performance the rule is not followed. When this is the case the insane person is treated as seeking rescission in equity and relief is granted on the basis of constructive fraud.[4]

This theory throws on the alleged lunatic the burden of proving insanity; but only a preponderance of the evidence is required.[5] The

Supp.) This statute did not go into effect until 1934 and the Supreme Court has not yet passed upon its validity. One of the main purposes of this legislation was to prevent the competition of cheap prison-made goods with the goods produced by free labor.

[1] This rule is not recognized in North Carolina. Craddock v. Brinkley, 177 N. C. 125, 98 S. E. 280 (1919).

[2] Such deeds are variously said to be void, as in Hood v. Holligan, 158 So. 759 (Ala. 1935); absolutely voidable, as in Brewster v. Weston, 235 Mass. 14, 126 N. E. 271 (1920); and voidable only on certain conditions, as in England. Imperial Loan Co., Ltd. v. Stone, [1892] 1 Q. B. 599. The general holdings are thoroughly covered by Note (1932) 32 COL. L. REV. 504. The English law is discussed at length in Cook, *Mental Deficiency and the English Law of Contract* (1921) 21 COL. L. REV. 424.

[3] Carr v. Holliday, 21 N. C. 344 (1836); Cameron-Barkley Co. v. Thornton Light & Power Co., 138 N. C. 365, 50 S. E. 695 (1905).

[4] Wadford v. Gillette, 193 N. C. 413, 137 S. E. 314 (1927); Searcy v. Hammett, 202 N. C. 42, 161 S. E. 733 (1931). This rule does not apply to contracts of marriage which are by statute void unless there is birth of issue. N. C. CODE ANN. (Michie, 1931) §2495. However, a proceeding to set aside a marriage for this cause is a proceeding to dissolve the marriage bonds and alimony may be awarded *pendente lite*. Lea v. Lea, 104 N. C. 603, 10 S. E. 488 (1889). But cohabitation after recovery will not cure the defect. Sims v. Sims, 121 N. C. 297, 28 S. E. 407 (1897).

[5] Lamb v. Perry, 169 N. C. 436, 86 S. E. 179 (1915). While it is true that only a preponderance of the evidence and not "clear, strong, and convincing proof" is required, there is a "natural presumption" of sanity which must be overcome by the preponderance. Jones v. Winstead, 186 N. C. 536, 120 S. E. 89 (1923). Mental incapacity may be shown by non-expert witnesses. Hodges v. Wilson, 165 N. C. 323 81 S. E. 340 (1914). A finding of insanity by an inquisition for that purpose raises a presumption of fact that such is the case, and is to be admitted as such a finding and not as the opinion of twelve good men and true. Arrington v. Short, 10 N. C. 71 (1824); Armstrong v. Short, 8 N. C. 11 (1820). But the finding is not binding and may be rebutted. Parker v. Davis, 53 N. C. 460 (1862).

cases approve two charges as a measure of mental capacity: 1. Did the party know what he was about? 2. Did the party realize the nature and scope of his acts? Either of these is sufficient, but both may be used.[6] If the evidence satisfies this test the insane person is entitled to relief.[7] This statement is, however, subject to an exception based on a policy of protecting innocent persons who have dealt with lunatics; but a party relying on this has the burden of establishing certain conditions which the court has laid down as prerequisite to sustaining the contract or deed of an insane person.[8]

The exact scope of these conditions is somewhat in doubt. An early case sets them out thus: That the other party must have acted (1) in good faith, (2) without knowledge of the incapacity, (3) without taking advantage of the lunatic, (4) for a full consideration, (5) which manifestly went for the benefit of the insane person.[9] A later case in a similar list omits the last of these, but adds another, that the person *non compos mentis* be unable to restore the *status quo*.[10] The most recent North Carolina decision in point apparently not only disregards the requirement of benefit to the lunatic, but also that the consideration must be full.[11] There are dicta, but, so far as a thorough search revealed, no direct holdings, to the effect that the contracts and deeds of a person adjudicated insane are void and not voidable only, hence this exception does not apply to such cases.[12]

[6] Cameron-Barkley Co. v. Thornton Light & Power Co., 138 N. C. 365, 50 S. E. 695 (1905). The same tests apply to cases of extreme drunkenness. Burch v. Scott, 168 N. C. 602, 84 S. E. 1035 (1915).

[7] Goodwin v. Parker, 152 N. C. 672, 68 S. E. 208 (1910). Since the basis of setting aside deeds in this state is fraud, a subsequent *bona fide* purchaser without notice is protected. Adam v. Riddick, 104 N. C. 515, 10 S. E. 609 (1889). Hence, it is a fraud for one who has knowingly dealt with a lunatic to convey any property which he has obtained to another and the proceeds of such sale may be traced as a trust. Sprinkle v. Wellborn, 140 N. C. 163, 52 S. E. 666 (1905).

[8] Riggan v. Green, 80 N. C. 237 (1879); Ipock v. Atl. & N. C. Ry. Co., 158 N. C. 445, 74 S. E. 352 (1912).

[9] Riggan v. Green, 80 N. C. 237 (1879).

[10] Wadford v. Gillette, 193 N. C. 413, 137 S. E. 314 (1927).

[11] Searcy v. Hammett, 202 N. C. 42, 161 S. E. 733 (1931) (Suit by payee on defendant's endorsement of an extension note by a corporation of which he was a stockholder. Defendant was insane at the time and the only benefit which he received was the extension of time on the debt of the corporation. A judgment for the defendant was reversed. The court said that there was consideration for the note. Thus, although the holding may be regarded as merely that the note was ordinarily enforceable, it would seem unnecessary to send the case back unless there was also enough benefit to the lunatic to meet the requirement. But this extension can hardly be said to have been a full consideration manifestly to the benefit of the insane person.)

[12] Ipock v. Atl. & N. C. Ry. Co., 158 N. C. 445, 74 S. E. 352 (1912); Wadford v. Gillette, 193 N. C. 413, 137 S. E. 314 (1927).

Contracts as to necessities are enforced on a theory of implied contract and are not really an exception to the general rule. Thus a person who furnishes money at the request of one not an agent or guardian of the insane may recover. Surles v. Pipkin, 69 N. C. 513 (1873).

The lunatic's privilege to rescind is not, however, an absolute one. He must tender back any benefit which he has received,[13] or at least the court has within its discretion the power to require him to do so.[14]

Another class of cases in which fraud is presumed must be distinguished. In these, the showing is not total incompetency, but only mental weakness. In order to raise a presumption of fraud under such proof it is necessary to demonstrate some further "inequitable incidents —such as undue influence, great ignorance, want of advice, and inadequate consideration."[15] The fraud presumed from these circumstances is fraud in fact and may be rebutted by any evidence. Accordingly, it would seem that "presumption" here means "enough evidence to go to the jury on an issue of fraud."[16]

The trend of the cases seems to be away from the earlier rule of according high protection to insane persons in their business dealings and toward a policy of protecting those who in good faith trade with them. Particularly is this true in the cases involving the title to land. The question essentially resolves itself into a choice between throwing a loss on one of two innocent parties. A frank recognition of this problem by the courts would perhaps bring about a more satisfactory result in particular cases than the present *a priori* rules.

PETER HAIRSTON.

Insurance—Misrepresentation—Effect of Agent's Knowledge of Falsity of Statements in Application for Policy.

In an action on an insurance policy it appeared that insured had stated in his application for reinstatement of the policy that he was in good health, when as a matter of fact he had diabetes. Both insured and the agent who wrote the policy knew this. The trial court charged that in the absence of fraud or collusion between the agent and insured, the agent's knowledge would be imputed to the company. The jury found for the plaintiff. *Held,* judgment affirmed.[1]

Perhaps the clearest type of situation calling for the application of the doctrine stated by the trial judge in this case is found when the policy provides that it shall be void if certain facts are present, and the agent has full knowledge of the presence of such facts. Thus, where

[13] West v. Seaboard Air Line Ry. Co., 151 N. C. 231, 65 S. E. 979 (1909).
[14] Ipock v. Atl. & N. C. Ry. Co., 158 N. C. 445, 74 S. E. 352 (1912).
[15] Smith v. Beatty, 37 N. C. 456 (1843); Dixon v. Green, 178 N. C. 205, 100 S. E. 262 (1919).
[16] Suttles v. Hay, 41 N. C. 124 (1848). The issue submitted to the jury in these cases is not mental competency, but fraud. Dixon v. Green, 178 N. C. 205, 100 S. E. 262 (1919).

[1] Colson v. State Mutual Assurance Co., 207 N. C. 581, 178 S. E. 211 (1935).

the agent knew that a building sought to be insured stood on leased ground but assured the owner that this was an immaterial circumstance, it was properly held that the agent's knowledge would be imputed to the company, and that the company would then be estopped to assert the breach of the condition in the policy as a defense.[2] If the agent knows of a circumstance prohibited by the policy, but nothing is said between him and insured on the subject, the North Carolina decisions still hold that the same doctrine applies.[3] This holding is sound; if the company delivers a policy knowing, through the knowledge of its agent, of a circumstance which by the terms of the policy makes it void, then to permit the company to assert the circumstance as a defense would be to permit it to sell a policy which it knew to be void.

However, may it be argued against the position of the court as above described that the insured is under a duty to read his policy, and that if he does, he will discover the violated provision, and should be obliged to have the policy corrected? In a case presenting different facts our court has held that one who can read will not be heard to say that he was ignorant of the contents of his policy in the absence of fraud or mistake.[4] The court's position, however, was rendered uncertain by a later decision in which it appeared that the agent had induced insured not to read his policy.[5] There it was said, "It is unnecessary to determine the interesting question whether, if plaintiff had not thus been misled by the agent . . . his omission to read could be imputed to him as negligence which would exonerate the company." No reference was

[2] Bergeron v. Pamlico Ins. & Banking Co., 111 N. C. 45, 15 S. E. 883 (1892); *cf.* National Life Ins. Co. v. Grady, 185 N. C. 348, 117 S. E. 289 (1923).

[3] The rule has been applied where the agent knew the status of the ownership of the property: Grabbs v. Farmers' Mutual Fire Ins. Co., 125 N. C. 389, 34 S. E. 503 (1899); Aldridge v. Greensboro Fire Ins. Co., 194 N. C. 683, 140 S. E. 706 (1927); Hauck v. American Eagle Fire Ins. Co., 198 N. C. 303, 151 S. E. 628 (1930); where he knew a building was still under construction and therefore uninsurable: Johnson v. Rhode Island Ins. Co., 172 N. C. 142, 90 S. E. 124 (1916); where he knew the "iron safe clause" would be violated: Bullard v. Pilot Fire Ins. Co., 189 N. C. 34, 126 S. E. 179 (1924); where he knew that dynamite was kept on the premises: Midkiff v. N. C. Home Ins. Co., 197 N. C. 139, 147 S. E. 812 (1929); Midkiff v. Palmetto Fire Ins. Co., 198 N. C. 568, 152 S. E. 792 (1930); and where he knew that other insurance was carried on the property: Laughinghouse v. Great National Ins. Co., 200 N. C. 434, 157 S. E. 131 (1931). But if the agent has an interest in the insured property, notice to him will not be imputed to the company: Roper v. National Fire Ins. Co., 161 N. C. 151, 76 S. E. 869 (1912); nor does the doctrine apply where the agent gains his knowledge after the inception of the policy: Green v. Aetna Ins. Co., 196 N. C. 335, 145 S. E. 616 (1928). A member of a fraternal order knowing of the restrictions on its agents' powers will not be allowed to invoke the doctrine: Robinson v. Brotherhood of Locomotive Firemen and Engineers, 170 N. C. 545, 87 S. E. 537 (1915).

[4] Cuthbertson v. N. C. Home Ins. Co., 96 N. C. 480, 2 S. E. 258 (1889); *cf.* Weddington v. Piedmont Fire Ins. Co., 141 N. C. 234, 54 S. E. 271 (1906).

[5] Collins v. U. S. Casualty Co., 172 N. C. 543, 90 S. E. 585 (1916). This seems to be the only case involving notice to the agent in which the question of insured's duty to read his policy has been raised.

made to the former decisions in this state, but cases supporting both sides were cited from other jurisdictions.

A second type of case in which this doctrine of imputed notice is applied is where in his application the insured makes a misrepresentation in good faith, but the agent is aware that the statement made is false. For example where insured stated that he had no bodily infirmity when in fact he was partially deaf, it appearing that he did not consider deafness a bodily infirmity, it was held that he could recover upon showing that the agent of defendant company knew of the deafness.[6] Here again the equities are in favor of insured, and it would be unjust to refuse a recovery.

In a third type of case in which both agent and insured know of the falsity of the representation the doctrine has been applied on the basis of a jury finding that there has been no fraud or collusion.[7] Such is the situation in the instant case. But how can a jury say that one who has knowingly signed his name to a false statement, thus procuring insurance which otherwise he could not have obtained, is not guilty of a fraud? It is submitted that in these cases the fact that both agent and insured knew of the falsity of the representation is in itself fraud and collusion sufficient to exonerate the company from liability. This view is supported by authority in other jurisdictions.[8]

Finally there may be a question as to the materiality of the misrepresentation made. In the instant case it is said, "We see no error in the exclusion of the opinion of this doctor as to whether a person who has diabetes has an insurable risk. It was immaterial to the controversy—it may not be amiss to say that the evidence is to the effect that Colson did not die of diabetes, but another cause wholly apart from this disease." If by this it is meant to say that a misrepresentation concerning a matter not contributing to loss under the policy will not be regarded as material, it is submitted that the ruling is *contra* to the previous

[6] Follette v. U. S. Mutual Accident Ass'n., 107 N. C. 240, 12 S. E. 370 (1890) (judgment for defendant reversed); same case in 110 N. C. 377, 14 S. E. 923 (1892) (judgment for plaintiff affirmed); *cf.* Fishblate v. Fidelity Co., 140 N. C. 589, 53 S. E. 354 (1906); Short v. Lafayette Life Ins. Co., 194 N. C. 649, 140 S. E. 302 (1927).

[7] Gardner v. North State Mutual Life Ins. Co., 163 N. C. 367, 79 S. E. 806 (1913); Marsh v. Durham Life Ins. Co., 199 N. C. 341, 154 S. E. 313 (1930). But where there was strong evidence of a conspiracy between insured, agent, and the examining physician, it was error to charge that notice to the agent was notice to the company: Sprinkle v. Knights Templar Indemnity Co., 124 N. C. 405, 32 S. E. 734 (1899); judgment for defendant affirmed in 126 N. C. 678, 36 S. E. 112 (1900).

[8] Triple Link Mutual Indemnity Ass'n. v. Williams, 121 Ala. 138, 26 So. 19 (1899); Globe Res. Mutual Ins. Co. v. Duffy, 76 Md. 293, 25 Atl. 227 (1892); Mudge v. Supreme Court, I. O. F., 149 Mich. 467, 112 N. W. 1130 (1907); Newsholme Brothers v. Road Transport Ins. Co. [1929] 2 K. B. 356; Rocco v. Northwestern National Ins. Co., 64 Ont. L. Rep. 559 (1929).

North Carolina cases on the subject.[9] The cases heretofore have held that the important factor in determining the materiality of a representation is whether it is one that would have influenced the company in deciding the important questions of accepting the risk and fixing the premium rate.

FRANKLIN T. DUPREE, JR.

Mortgages—Corporations—Removal of Trustees under Security Deeds of Trust.

The defendant was named as trustee in a Georgia real estate mortgage securing a number of bonds. Thereafter the holders of ninety-two per cent of these bonds filed a petition in the Georgia court praying the defendant's removal from the trusteeship on the grounds that he was insolvent, that he had misappropriated trust funds committed to his care, that he had been convicted of a fraudulent breach of trust, and that for other reasons he was not a suitable person to act as trustee. Service was by publication. The lower court ruled that the action was properly brought. *Held,* by the Georgia Supreme Court, that the action should have been dismissed, since, *inter alia,* the proceeding was *in personam,* and service by publication was insufficient to give the court jurisdiction.[1]

Contrary to a proposition advanced by the court in its opinion,[2] it has been quite generally conceded that, even in the absence of statutory authority,[3] the equity court's inherent supervisory power over all trusts includes the power, in a proper case, to remove an unfit mortgage trustee.[4] In the situation which is perhaps most analagous in so far as the

[9] Fishblate v. Fidelity Co., 140 N. C. 589, 53 S. E. 354 (1906); Gardner v. North State Mutual Life Ins. Co., 163 N. C. 367, 79 S. E. 806 (1913).

[1] Caldwell v. Hill, 176 S. E. 381 (Ga. 1934).

[2] 176 S. E. at 382-385.

[3] Quite commonly statutes now provide a procedure for the removal of trustees. The grounds for removal are also stated in many. For example, KAN. REV. STAT. (1923) Ch. 67-412: "Trustees having violated or attempting to violate any express trust, or becoming insolvent, or of whose solvency or that of their sureties there is reasonable doubt, or for other cause, in the discretion of the court having jurisdiction, may, on petition of any person interested, after hearing, be removed by such court; and all such vacancies in express trusteeships may be filled by such court." These provisions are applicable to mortgage trusteeships. Sanders v. Hall, 74 F. (2d) 399 (C. C. A. 10th, 1934). The North Carolina statute, N. C. CODE ANN. (Michie, 1931) §2583 (a), provides for removal by vote of a majority of the note or bondholders, when the trustee has removed from the state, become a bankrupt, or, if corporate, ceased to do business, etc. This provision, however, is expressly stated to be "in addition to the rights and remedies now provided by law." §2583, as amended, Public Laws 1933, c. 493, provides for a proceeding before the clerk for the appointment of a successor where the trustee has absented himself or become otherwise incompetent.

[4] 4 THOMPSON, CORPORATIONS (3rd ed. 1927) §2667. On the removal of trustees generally see 1 PERRY, TRUSTS (6th ed. 1911) §275 *et seq.*

point here considered is concerned, *i.e.*, the trusteeship under the usual corporate mortgage,[5] this proposition has rarely been brought to question. The court, though reluctant[6] to alter a situation which the parties by their contract have created, will, nevertheless, remove a mortgage trustee when, in the exercise of a sound discretion, this expedient is necessary to a proper administration of the trust. A mere innocent breach of duty, however, though subjecting the trustee to liability for the damage caused thereby, will not justify his removal in the absence of evidence that such a course will result in some substantial benefit to the estate.[7] It must be shown that the trustee has become an incompetent person to execute the trust, either because of some personal disability, or because he has placed himself in a position antagonistic to the interests of the bondholders whom he represents. Insolvency,[8] permanent absence from the state,[9] collusion with the mortgagor,[10] willful breach of duty,[11] refusal to execute the trust upon proper demand be-

[5] Though the mortgagor was an individual in this case, the situation presented is comparable to that of the corporate mortgage in that the indenture was executed to secure an issue of coupon bonds rather than, as is the usual case with an individual's mortgage, one or a few promissory notes. Consequently the cases considered herein deal, in the main, with corporate mortgages.

[6] "It is generally a difficult thing to induce a court to remove a trustee. A court of equity has the power to do so, but will not regularly use that power." 4 COOK, CORPORATIONS (8th ed. 1923) §819.

[7] Matthews v. Murchison, 17 Fed. 760 (C. C. E. D. N. C. 1883). In Connover v. Guarantee Trust Co., 88 N. J. Eq. 450, 102 Atl. 844 (1918), the indenture provided that the bonds were to be secured by mortgages assigned and transferred to the trustee by the issuing corporation. The trustee accepted the corporation's own mortgages executed to itself. This was held to be beyond the authority of the trustee, consequently it was liable to the bondholders for any damages which might accrue, but the court refused to remove the trustee. There was no bad faith on its part, and "the trustee is a responsible banking institution. . . . The removal of a trustee is a matter directed to the sound discretion of a court; in the absence of bad faith upon the part of a trustee, he should not be removed unless some benefits to the trust can be accomplished by such removal."

[8] Insolvency does not *ipso facto* terminate the trust. Sanders v. Hall, 74 F. (2d) 399 (C. C. A. 10th, 1934); Mitchell v. Shuford, 200 N. C. 321, 156 S. E. 513 (1930). But it has long been recognized as a ground for removal, whether the trustee be an individual or a corporation. Iowa & Cal. Land Co. v. Hoag, 132 Cal. 627, 64 Pac. 1073 (1901); Reynolds v. New York Security & T. Co., 88 Hun 569, 34 N. Y. S. 890 (1895), *aff'd*, 157 N. Y. 689, 51 N. E. 1092 (1898); Clay v. Shela Valley Irr. Co., 14 Wash. 543, 45 Pac. 141 (1896). This is usually contained in the statutes providing for removal of trustees, see note 3 *supra*. If the trustee is no more than a bare stakeholder for the security, with no active duties to perform, the court in its discretion might properly refuse to remove him upon the grounds of insolvency alone.

[9] Ketchum v. Mobile & O. R. Co., 2 Woods 532, Fed. Cas. No. 7, 737 (C. C. S. D. Ala. 1876); 3 JONES, MORTGAGES (8th ed. 1928) §2296; *cf.* Ettlinger v. Schumacher, 142 N. Y. 189, 36 N. E. 1055 (1894) (holder of corporate bonds permitted to foreclose when trustee beyond the jurisdiction and unobtainable); Washington Etc. R. R. Co. v. Alexandria Etc. R. R. Co., 19 Gratt. 592, 100 Am. Dec. 710 (Va. 1870).

[10] Matter of Mechanics' Bank, 2 Barb. 446 (N. Y. Supreme Ct. 1848).

[11] North Carolina R. R. Co. v. Wilson, 81 N. C. 223 (1879) (trustee lent sinking fund money to a banking firm of which he was a member in violation of the provisions of the indenture).

ing made,[12] or any other fact showing the trustee to be incompetent will suffice. As this relief may be preventative as well as remedial, the trustee should be removed where he has placed himself in such a position that future injury may accrue to the trust therefrom. Thus where, at the time of foreclosure, the same party occupies the trusteeship under both prior and junior mortgages, he should be displaced from one or the other to obviate future embarrassment which may result from conflicts between the interests which he represents.[13] "Public policy requires, where controversies are brought into court, that each party should be represented by someone whose single object it is to secure all to which such party is entitled, unhampered by personal relations to an adverse party."[14]

A method of removal and substitution of trustees is frequently provided in the mortgage itself. Though the parties by their contract may not entirely deprive the court of its jurisdiction in this regard,[15] these provisions are generally upheld,[16] and an appointment made in compliance therewith will not be disturbed by the court except to correct some obvious abuse.[17] Thus where the power of removal and substitution is given to the majority of the bondholders under a corporate

[12] Harrison v. Union Trust Co., 144 N. Y. 326, 39 N. E. 353 (1895) (removal granted where trustee refused to convey property when ordered to do so by foreclosure decree).

[13] Farmer's Loan & Trust Co. v. Northern Pac. R. Co., 70 Fed. 423 (S. D. N. Y. 1895); Northampton Trust Co. v. Northampton Traction Co., 270 Pa. 199, 112 Atl. 871 (1921). *Contra:* Clyde v. Richmond & D. R. Co., 55 Fed. 445 (C. C. E. D. Va. 1893) (trustee held under twelve different mortgages on the same railroad system; bondholders committee was denied the right to intervene in foreclosure proceedings in the absence of a positive showing of negligence or inability to represent their interests upon the part of the trustee).

[14] Kephart, J., in Northampton Trust Co. v. Northampton Traction Co., 270 Pa. 199, 112 Atl. 871, 872 (1921). Some of the decisions, however, have displayed a reluctance to remove the trustee or to allow intervention by bondholders merely because of some mutual interest existing between trustee and mortgagor, majority bondholders committee, etc. Bowling Green Trust Co. v. Virginia Passenger & Power Co., 132 Fed. 921 (C. C. E. D. Va. 1904) (trustee corporation and mortgagor corporation controlled by the same group); Continental & C. Trust & S. Bank v. Allis-Chalmers Co., 200 Fed. 600 (E. D. Wis. 1912) (trustee "coöperating" with a combination to reorganize the mortgagor company); Fidelity Trust Co. v. Washington-Oregon Corp., 217 Fed. 588 (W. D. Wash. 1914) (trustee's position as depositary for bonds under reorganization agreement not grounds for removal); McPherson v. Commercial Bldg. & Securities Co., 206 Iowa 562, 218 N. W. 306 (1928) (trustee indirectly interested in protection of directors of mortgagor and will not proceed as "aggressively" as would bondholder).

[15] *Cf.* Wright v. Pitts, 62 App. D. C. 217, 66 F. (2d) 197 (1933).

[16] JONES, *loc. cit. supra* note 9. *Cf.* Fletcher v. Rutland & B. R. Co., 39 Vt. 633 (1858) (statute, passed after the execution of the mortgage, which in effect nullified power of appointment was in violation of the contract clause of the United States Constitution); Farmers' Loan & Trust Co. v. Hughes, 11 Hun 130 (N. Y. Supreme Ct. 1877) (former trustee enjoined from bringing actions as trustee after removal).

[17] However, the court will be very reluctant to disregard the method provided. Dillaway v. Boston Gaslight Co., 174 Mass. 80, 54 N. E. 359 (1899).

mortgage, the motives for its exercise cannot be questioned so long as no abuse of trust to the detriment of minority bondholders appears; with this limitation, the decision of the majority as to the adequacy of the reasons for removal is conclusive.[18] However, a strict construction is always accorded these provisions.[19] Any failure to comply with the stipulated formalities is likely to prove fatal.[20] But it is unnecessary to follow the statutory procedure, where one exists, since the trustee is replaced under the contract of the parties rather than through the ordinary legal machinery.[21] Likewise, the appointee will succeed to the trusteeship without any formal conveyance from his predecessor.[22] Where the mortgage was executed by an individual, some of the earlier cases have shown a tendency to weaken the effect of the power of appointment by construing it as personal to the creditor named in the indenture. It has been held that it is neither assignable with the debt,[23] nor delegatable to an agent.[24] But even where this view has been adopted the more recent cases show a tendency to construe the instrument so as to avoid its application,[25] and no such limitations are placed upon the power when granted to the holders of bonds secured by a corporate mortgage.[26]

Removal pursuant to such mortgage provision may be accomplished without notice to interested persons, even though court approval be the final step required. The parties by their contract have provided the remedy, thus rendering the customary legal formalities unnecessary.[27] But where no such provision is found in the mortgage, there must be some jurisdictional basis for the court to take action in the matter. Either all the parties concerned must be joined in the litigation, or the property involved must have been brought within the ambit of the court's control. In the former case the action is *in personam.* Mort-

[18] March v. Romare, 116 Fed. 355 (C. C. A. 5th, 1902).

[19] THOMPSON, *op. cit. supra* note 4, §2668.

[20] The attempted substitution was held ineffectual in the following cases. Speers Sand & Clay Works, Inc. v. American Trust Co., 37 F. (2d) 572 (C. C. A. 4th, 1930); Griffin v. Haden, 172 Ga. 478, 157 S. E. 686 (1931); Equitable Trust Co. v. Fisher, 106 Ill. 189 (1883); James v. James, 260 Mass. 19, 156 N. E. 745 (1927). But *cf.* Balfour-Guthrie Inv. Co. v. Woodworth, 124 Cal. 169, 56 Pac. 891 (1899) (method of proof of appointment of successor trustee provided in the mortgage not exclusive); Underhill v. Whitney, 88 Colo. 608, 299 Pac. 12 (1931) (court refused to allow collateral attack by one who was a stranger to the trust).

[21] Raleigh Real Estate & Trust Co. v. Padgett, 194 N. C. 727, 140 S. E. 714 (1927).

[22] Craft v. Indianapolis, D. & W. Ry. Co., 166 Ill. 580, 46 N. E. 1132 (1897).

[23] Clark v. Wilson, 53 Miss. 119 (1876).

[24] Watson v. Perkins, 88 Miss. 64, 40 So. 643 (1906). *Contra:* Michael v. Crawford, 150 S. W. 465 (Tex. Civ. App. 1912).

[25] West v. Union Naval Stores Co., 117 Miss. 153, 77 So. 961 (1918).

[26] City Bank & Trust Co. v. Graf, 175 Ga. 340, 165 S. E. 238 (1932).

[27] Macon & Agusta R. Co. v. Georgia R. Co., 63 Ga. 103 (1879); Pillsbury v. Consolidated E. & N. A. Ry. Co., 69 Me. 394 (1879).

gagor, trustee, and bondholders, or their representatives, are necessary parties.[28] Here the court has power over the person of the trustee to compel a transfer by him of his interest in the entire *res* to his successor. Where a part of the security is real property located in another jurisdiction the conveyance will be recognized in the courts of its *situs*. It is not the decree of the removing court which is being effectuated but the act of the parties which, though perhaps under judicial duress, is none the less valid.[29] But if the trustee be not found within the state, the court must obtain jurisdiction over the property before it may divest the trustee of his interest therein. The decree will be *in rem*, and cannot operate upon property beyond the state line.[30] Once this jurisdiction over the property is acquired, interested parties not otherwise obtainable may be served by publication.[31] Where the trustee's interest in the security is dubbed "legal title," or "lien," there is little doubt but that he can be served by publication. However, the situation presented to the Georgia court is more perplexing. Under the rule prevailing in that state the trustee has no more than a mere power or agency in regard to the property, while the legal title to the security is in the bondholders.[32] On this basis it was held that there was nothing before the

[28] Hidden v. Washington-Oregon Corp., 217 Fed. 303 (W. D. Wash. 1914); Inhabitants of Anson v. Somerset R. Co., 85 Me. 79, 26 Atl. 891 (1892); Cory v. Clmstead, 154 Tenn. 513, 290 S. W. 31 (1926).

[29] Smith v. Davis, 90 Cal. 25, 27 Pac. 26 (1891); Poindexter v. Burwell, 82 Va. 507 (1886) ("The doctrine is that if the person to do the act decreed is within the jurisdiction of the court, and the act may be done without the exercise of any authority *operating territorially* within the foreign jurisdiction, the court may act *in personam*, and oblige the party to convey, or otherwise to comply with its decree."); Penn v. Lord Baltimore, 1 Ves. Sr. 444 (Ch. 1750); Beale, *Equitable Interests in Foreign Property* (1907) 20 HARV. L. REV. 382. It has been held that a court may appoint a receiver and decree foreclosure though the property lies beyond its jurisdiction. Paget v. Ede, L. R. 18 Eq. 118 (1874). Likewise the court of one state can order foreclosure of a mortgage upon a railroad which extends through several states. Craft v. Indianapolis, D. & W. Ry. Co., 166 Ill. 580, 46 N. E. 1132 (1897); Union Trust Co. v. Olmsted, 102 N. Y. 729, 7 N. E. 822 (1882). But here again it is the conveyance of the parties which is recognized by a foreign court. The decree cannot *per se* have an extraterritorial effect. Lynde v. Columbus, C. & I. C. Ry. Co., 57 Fed. 993 (C. C. D. Ind. 1893). Statutes commonly provide that the court's decree may in certain cases operate as a conveyance. N. C. CODE ANN. (Michie, 1931) §607. The degree, however, cannot have the effect of transferring property beyond the jurisdiction of the court which renders it. This must be done by compelling the parties to execute a conveyance. 4 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1919) §§1317, 1318.

[30] Parker v. Kelley, 166 Fed. 968 (C. C. W. D. N. Y. 1908); *cf.* Lindsley v. O'Reilly, 50 N. J. L. 636, 15 Atl. 379 (1888).

[31] Ketchum v. Mobile & O. R. Co., 2 Woods 532, Fed. Cas. No. 7,737 (C. C. S. D. Ala. 1876) (trustee served by publication): State Nat. Bank v. Syndicate Co. of Eureka Springs, Ark., 178 Fed. 359 (W. D. Ark. 1910) (nonresident bondholders may be served by publication); Marshall v. Kraak, 23 App. D. C. 129 (1904) (removal valid even without service by publication where trustee had left the jurisdiction). But *cf.* Washington Etc. R. R. Co. v. Alexandria Etc. R. R. Co., 19 Gratt. 592, 100 Am. Dec. 710 (Va. 1870).

[32] See the court's discussion 176 S. E. 384-385.

court upon which service by publication could be predicated, despite the fact that the security was Georgia realty. This conclusion is not altogether without support,[33] and it follows logically from the premise if we permit our deductions to lead us through the esoteric technicalities with which the field of mortgage law is replete. But in this respect there is no empirical difference between trustees of Georgia and of North Carolina real estate. In the last analysis what the trustee does have, whether it be legal title, lien, power, or whatnot, is intimately associated with the property conveyed as security. The court's control over the latter should form a basis for publication of service. Mere names should not alter the situation. Otherwise substantial interests of bondholders may sometimes be sacrificed for the preservation of this legal will-o'-the-wisp that is the trustee's interest, an interest that exists only for the protection of the bondholders, and serious difficulties might arise should the trustee choose to absent himself at a time when his services are most necessary.[34]

JOEL B. ADAMS.

Trial Practice—Power of Court to Increase Damages as Condition to Denial of Motion for New Trial.

A jury in a federal district court awarded the plaintiff $500 damages for personal injuries caused by the defendant's negligence. On the plaintiff's motion a new trial was ordered because of inadequacy of damages unless the defendant consented to increase the verdict to $1500. The defendant consenting, the motion for new trial was automatically denied, and the plaintiff appealed to the circuit court of appeals where the trial court's action was reversed.[1] Defendant obtained certiorari in the Supreme Court, which divided five to four in upholding the action of the intermediate appellate court.[2]

Mr. Justice Sutherland, writing the majority opinion, said that the imposition of such a condition on the denial of a motion for a new trial violated the plaintiff's right to jury trial, as guaranteed by the Seventh Amendment. He traced the historical development in early English mayhem cases of the procedure followed by the trial court in this case, but concluded that those cases had been overruled and were not the common law at the time the Constitution was adopted. The converse

[33] *Cf.* Sanders v. Hall, 74 F. (2d) 399 (C. C. A. 10th, 1934).

[34] Ordinarily a trustee must obtain court approval in order to free himself from the trust if he chooses to resign. Under the doctrine of the principal case, the Tennessee court would have authority to approve such resignation, since the *situs* of the trust is within its jurisdiction. *Cf.* Sanders v. Hall, 74 F. (2d) 399 (C. C. A. 10th, 1934).

[1] Schiedt v. Dimick, 70 F. (2d) 558 (C. C. A. 1st, 1934).

[2] Dimick v. Schiedt, 55 Sup. Ct. 296 (U. S. 1935).

procedure of allowing a plaintiff to make a remittitur when a verdict is excessive in lieu of granting the defendant a new trial was criticized by the majority as being based on poor authority and illogical reasoning. This practice of remittitur was said to be too well settled to be disturbed and, "is not without plausible support in the view that what remains is included in the (jury's) verdict along with the unlawful excess. . . . But where the verdict is too small, an increase by the court is a bald addition of something which in no sense can be said to be included in the verdict."

Mr. Justice Stone, speaking for the minority, relied upon two principal grounds in support of the trial judge's order. First, it is logically inconsistent and practically inexpedient to permit the use of remittitur when damages are excessive and to deny the addition of damages in cases of inadequacy. Second, a trial court's exercise of judicial discretion in the decision of motions for new trials on the grounds of excessive or inadequate damages is not open to review on appeal. This opinion points out many procedures which were unknown to the common law and yet are firmly embedded in federal practice.[3]

The court purposely refrained from any consideration of the state court decisions, but in view of the conflict of authority, and since the question decided in the principal case is an open one in most of the states, it is believed that a review of these cases will not be profitless.

The great majority of the state courts hold that a new trial may be granted by the trial judge, if, in the exercise of his sound judicial discretion, he considers the damages excessive[4] or inadequate.[5] A new trial because of inadequate damages in actions for injury to person or reputation, or where the damages equal the actual pecuniary loss sustained by the plaintiff, is prohibited by statute in several states.[6]

An overwhelming majority of the state cases, following the federal rule, permit the trial judge to condition the denial of a defendant's motion for a new trial because of excessive damages upon the plaintiff's consent to a remittitur of the excess to be fixed by the judge.[7] The

[3] Dimick v. Schiedt, 55 Sup. Ct. 296, 303 (U. S. 1935). Since 1836 the federal courts have had the power to treble damages awarded by jury in patent cases when the court thought that defendant should be punished. Stimpson v. The Railroads, 23 Fed. Cases No. 13, 456 (C. C. 3d Cir. 1847).

[4] Cables v. Bristol Water Co., 86 Conn. 223, 84 Atl. 928 (1912); Ostrander v. Messmer, 315 Mo. 1165, 289 S. W. 609 (1926); Hogg v. Plant, 145 Va. 175, 133 S. E. 759 (1926).

[5] Anglin v. City of Columbus, 128 Ga. 469, 57 S. E. 780 (1907); Tathwell v. City of Cedar Rapids, 122 Iowa 50, 97 N. W. 96 (1903); Brown v. Wyman, 224 Mich. 360, 195 N. W. 52 (1923).

[6] Note (1934) 88 A. L. R. 943.

[7] Edwards v. Willey, 218 Mass. 363, 105 N. E. 986 (1914); Herrman v. U. S. Trust Co. of N. Y., 221 N. Y., 143, 116 N. E. 865 (1917); McIntyre v. Smyth, 108 Va. 736, 62 S. E. 930 (1908).

state decisions are practically unanimous in holding that the plaintiff must submit to a new trial, the verdict being set aside, upon his refusal to consent to a remittitur. The defendant's consent is not necessary.[8]

Some cases permit the trial judge to condition the granting of a new trial upon the payment of attorneys' fees and costs by the moving party.[9] Other conditions are occasionally attached to orders for new trials.[10]

The procedure followed by the trial court in the principal case has been directly upheld in four states: Illinois,[11] New Jersey,[12] Wisconsin,[13] and Washington.[14] In condemnation cases the practice is allowed in California;[15] and although money damages were not involved, the denial of the plaintiff's motion for a new trial upon the defendant's consent to an increased liability is allowed in Iowa.[16] In Virginia, by statute,[17] the trial court may raise the jury's verdict, if it is clearly inadequate and the facts conclusively show the amount it should be.[18]

In two states, Louisiana and Washington, the appellate court may increase an award of damages which is inadequate. In Louisiana neither

[8] Note (1928) 53 A. L. R. 779.

[9] Brown v. Cline, 109 Cal. 156, 41 Pac. 862 (1895); Wooster v. Calhoun, Circuit Judge, 150 Mich, 459, 114 N. W. 232 (1907); Myers v. Fox, 129 App. Div. 31, 113 N. Y. S. 116 (1908); Jaquish v. Kelly, 167 App. Div. 523, 153, N. Y. S. 114 (1915); Pennsylvania Coal Co. v. Schmidt, 155 Wis. 242, 144 N. W. 283 (1913).

[10] Dunning v. Crofutt, 81 Conn. 101, 70 Atl. 630 (1908); Wirsing v. Smith, 222 Pa. 8, 70 Atl. 906 (1908); Hall v. Northwestern R. R. Co., 81 S. C. 522, 62 S. E. 848 (1908); Honaker v. Shrader, 115 Va. 318, 79 S. E. 391 (1913).

[11] Carr v. Miner, 42 Ill. 179 (1866); James v. Morey, 44 Ill. 352 (1867).

[12] Gaffney v. Illingsworth, 90 N. J. Law 490, 101 Atl. 243 (1917) (compare the reasoning in this opinion with the opinion of Mr. Justice Stone in the principal case).

[13] Risch v. Lawhead, 211 Wis. 653, 248 N. W. 127 (1933) (dictum that the plaintiff may have a new trial if he refuses to take the increased verdict, implying that the whole procedure is optional with both parties); *cf.* Gosczinski v. Carlson, 157 Wis. 551, 147 N. W. 1018 (1914); Reuter v. Hickman, Lawson, and Diener Co., 160 Wis. 284, 151 N. W. 795 (1915); Campbell v. Sutcliff, 193 Wis. 370, 214 N. W. 374 (1927).

[14] Clausing v. Kershaw, 129 Wash. 67, 224 Pac. 573 (1924); Hillman v. City of Seattle, 163 Wash. 401, 299 Pac. 514 (1931).

[15] Adamson v. Los Angeles County, 52 Cal. App. 125, 198 Pac. 52 (1921); *cf.* Taber v. Bailey, 22 Cal. App. 617, 623, 35 Pac. 975, 979 (1913).

[16] Smith v. Ellyson, 137 Iowa 391, 115 N. W. 40 (1908) (Jury found that defendant must maintain half of a fence. It was held proper for the trial court to deny plaintiff's motion for a new trial upon condition that defendant maintain more than half the fence).

[17] VIRGINIA CODE ANN. (Michie 1930) §6251.

[18] Blake Co., Inc. v. Smith & Son, Ltd., 147 Va. 960, 133 S. E. 685 (1926); *cf.* Forbes v. Southern Cotton Oil Co., 130 Va. 245, 108 S. E. 15 (1921). The statute is not applicable in the federal courts sitting in Virginia, because the Seventh Amendment would be infringed. Norton v. City Bank etc. Co., 294 Fed. 839, 843 (C. C. A. 4th, 1923). But see Schuerholz v. Roach, 58 F. (2d) 32 (C. C. A. 4th, 1932).

party has any option to a new trial, nor any further appeal.[19] In Washington the appellate court gives the plaintiff an option of taking the increased verdict or a new trial.[20]

In two states, Georgia and Massachusetts, the cases are conflicting. The older cases in both these states disapprove the procedure,[21] but a more recent case from each state decides differently.[22] In only one state, Michigan,[23] are the cases unanimously in accord with the majority decision in the principal case.

A South Carolina case inferentially supports the majority of the state decisions;[24] while in Indiana and Missouri the authorities indicate that the procedure would be disallowed.[25]

Although the majority state rule thus permits the conditioning of a plaintiff's motion for new trial because of inadequate damages upon the defendant's consent to an increase of the verdict, the practice is said to be limited to clear cases and should be sparingly used.[26]

The exact question involved in the principal case does not appear to have been raised in North Carolina. It has been held in this state that the trial judge may set aside a verdict and grant a new trial when he regards the damages assessed by the jury as excessive[27] or inadequate.[28] His exercise of judicial discretion in passing upon motions for new

[19] Sullivan v. Vicksburg, S. & P. R. R. Co., 39 La. Ann. 800, 2 So. 586 (1887); Caldwell v. Vicksburg, S. & P. R. R. Co., 41 La. Ann. 624, 6 So. 217 (1889).

[20] Bingamin v. City of Seattle, 139 Wash. 68, 245 Pac. 411 (1926).

[21] Jones v. The Water Lot Co., 18 Ga. 539 (1855); Scott v. Taylor, 57 Ga. 168 (1876); Shanahan v. Boston & N. St. Ry. Co., 193 Mass. 412, 79 N. E. 751 (1907).

[22] Anderson v. Jenkins, 99 Ga. 299, 25 S. E. 648 (1896); Clark v. Henshaw Motor Co., 246 Mass. 386, 140 N. E. 593 (1923) (The court said that the jury must not be separated before the conditional order for new trial is entered, as was the situation in Shanahan v. Boston & N. St. Ry. Co., 193 Mass. 412, 79 N. E. 751 (1907) cited *supra* note 21, and the cases are distinguished on this basis); *cf.* Gordon v. Mitchell, 68 Ga. 11, 22 (1881).

[23] Lorf v. City of Detroit, 145 Mich. 265, 108 N. W. 661 (1906); Goldsmith v. Detroit, J. & C. Ry., 165 Mich. 177, 130 N. W. 647 (1911). However, the Michigan court permits the practise of remittitur. North Michigan Land Co. v. Kneeland, 149 Mich. 495, 112 N. W. 1114 (1907).

[24] Laney v. Bradford, 4 Rich. 1 (S. C. 1850) (held that the trial court might impose reciprocal conditions).

[25] De Ford v. Urbain, 48 Ind. 219 (1874); Kortjohn v. Altenbernd, 14 Mo. App. 342 (1883) (It was held error to order a new trial unless the defendant, for whom the jury found a verdict, would allow judgment against him for part of the damages claimed by the plaintiff; but if the defendant consents then the error is not a ground for reversal on the plaintiff's appeal.)

[26] Carr v. Miner, 42 Ill. 179, 192 (1866); Risch v. Lawhead, 211 Wis. 653, 657, 248 N. W. 127, 130 (1933).

[27] Goodson v. Mullen, 92 N. C. 211 (1885); Norton v. North Carolina R. R., 122 N. C. 910, 29 S. E. 886 (1898); Boney v. Atlantic & N. C. R. R., 145 N. C. 248, 58 S. E. 1082 (1907); Johnson v. Seaboard Air Line Ry. Co., 163 N. C. 431, 79 S. E. 690 (1913).

[28] Harton v. Reavis, 4 N. C. 256 (1815); Benton v. Collins, 125 N. C. 83, 34 S. E. 242 (1899); Burns v. Asheboro etc. R. R. Co., 125 N. C. 304, 34 S. E. 495 (1899); Jarrett v. High Point Trunk & Bag Co., 142 N. C. 466, 55 S. E. 338 (1906).

trials upon these grounds is said to be not reviewable on appeal,[29] unless there is a gross abuse of discretion.[30] In an early case there is a dictum that a trial judge may not revise or correct the verdict of a jury, but is limited to setting it aside in a proper case.[31] However, more recent cases indicate that the judge does have the power to revise a jury's verdict, although no case affirmatively holds that a trial judge may deny a motion for a new trial upon condition that the non-moving party consent to a reduction or increase in damages, according as they are excessive or inadequate. It has been held that a trial judge may not enter a verdict for a less amount than that found by the jury without the plaintiff's consent.[32] The compelling inference to be drawn from this case is that if the plaintiff consented to a remittitur the court might deny the defendant a new trial. The same implication is found in another case.[33] Three other recent cases[34] clearly indicate that the practice of the trial judge reducing excessive verdicts upon the consent of the plaintiff is widely followed in North Carolina. These cases are based upon a statute[35] which authorizes the trial court to set aside excessive verdicts.

When the problem of the principal case is presented to the North Carolina Supreme Court, it is submitted that the court will pursue a wiser course if the majority state cases are followed. Such a result would be logically consistent with the procedure approved in the cases mentioned above. It would tend to accelerate the now sluggish processes of trial and appellate practise, thereby reducing the costs of litigation. After the jury has first determined where the liability falls, there is no serious invasion of its functions in permitting the trial judge to revise the amount of damages.

WELCH JORDAN.

Vendor and Purchaser—Restrictive Covenant—Marketable Title.

A covenant restricting the use of real property is perhaps the most widely used device for protecting residential districts from the inroads of business and industrial establishments.[1] While first enforced in

[29] See cases cited *supra*, notes 27 and 28.
[30] Pender v. North State Life Insurance Co., 163 N. C. 98, 79 S. E. 293 (1913).
[31] Shields v. Whitaker, 82 N. C. 516, 522, 523 (1880).
[32] Isley v. Virginia Bridge & Iron Co., 143 N. C. 51, 55 S. E. 416 (1906).
[33] Decker v. Norfolk & Southern R. R. Co., 167 N. C. 26, 83 S. E. 27 (1914).
[34] Bizzell v. Auto Tire & Equipment Co., 182 N. C. 98, 108 S. E. 439 (1921); Bailey v. Dibbrell Mineral Co., 183 N. C. 525, 112 S. E. 29 (1922); Hyatt v. McCoy, 194 N. C. 760, 138 S. E. 405 (1927).
[35] N. C. CODE ANN. (Michie 1931) §591.

[1] The more recent development and use of zoning ordinances offers another method of protection. For a comparison of the utility of the two methods, see

equity against a subsequent owner of the restricted property on a theory of prevention of unjust enrichment,[2] courts today enforce these covenants upon two general theories: first, as contracts concerning land;[3] and second, as easements or servitudes on the property restricted.[4] An objection to the first view is that it may result in creating a right where none should exist. Thus, where an injunction against breach of the covenant would be refused because of radical change in the character of the neighborhood, it was still held that a vendee was justified in refusing a deed on the grounds that the possibility of an action at law for damages rendered the vendor's title unmarketable.[5] Though the restriction had long been obsolete, its ghost was allowed to continue to haunt the unfortunate realty owner.[6]

But the second theory has also given some difficulty. For example, if the character of the neighborhood has so radically changed that the property is no longer useful for residential purposes, courts quite commonly refuse an injunction.[7] Yet under the proprietary theory this amounts to a deprivation of property. As a way out some courts have

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Van Hecke, *Zoning Ordinances and Restrictions in Deeds* (1928) 37 YALE L. J. 407.

[2] "Of course the price would be affected by the covenant, and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken." Tulk v. Moxhay, 2 Phil. 774 (Ch. 1848).

[3] Wiegman v. Kusel, 270 Ill. 520, 110 N. E. 884 (1915); Windemere-Grand Improvement Ass'n v. American Bank, 205 Mich. 539, 172 N. W. 29 (1919); Stone, *The Equitable Rights and Liabilities of a Stranger to a Contract* (1918) 18 COL. L. REV. 291; 2 TIFFANY, REAL PROPERTY (2nd ed. 1920) §396.

[4] Weil v. Hill, 193 Ala. 407, 69 So. 438 (1915); Riverbank Improvement Co. v. Chadwick, 228 Mass. 242, 117 N. E. 244 (1917); Pound, *The Progress of the Law, 1918-1919; Equitable Restrictions* (1919) 33 HARV. L. REV. 813.

[5] Bull v. Burton, 227 N. Y. 101, 124 N. E. 111 (1919) (Covenant of 1864 against use of lot on Fifth Avenue for "any stable either public or private." In 1919 the lot was worth $19,700 a foot on the Avenue. Though the restriction would not have been enforced in equity, it was thought to be yet sufficiently alive "at law" to make the owner's title unmarketable.); see Genske v. Jensen, 188 Wis. 17, 205 N. W. 548 (1925); *cf.* Postley v. Kafka, 213 App. Div. 595, 211 N. Y. S. 382 (1925).

[6] Another objection which has been raised to this theory is that even with a very liberal application of the third party beneficiary doctrine it is difficult to justify the right of action commonly given certain parties. "It seems an unreal conclusion to say that when A promised a realty development company not to conduct a business upon Blackacre, a contract was made of which an intended beneficiary was A's son, B, in a suit against A's daughter C, upon descent and division of Blackacre." CLARK, COVENANTS AND INTERESTS RUNNING WITH LAND (1929) 151. While this objection might have some weight in a state such as New York where the right of a third party beneficiary to a contract to sue is narrowly confined, it should not present any difficulties in states where that right is not so limited.

[7] Hurt v. Hejhal, 259 Ill. App. 221 (1930); Klug v. Kreisch, 246 Mich. 14, 224 N. W. 339 (1929); Trustees of Columbia College v. Thacher, 87 N. Y. 311 (1882); Starkey v. Gardner, 194 N. C. 74, 138 S. E. 408 (1927); Notes (1928) 54 A. L. R. 812; (1933) 85 A. L. R. 985.

suggested a recovery of damages after denial of the injunction.[8] But this is in effect to force a sale of a property right for a private purpose.[9]

In view of these difficulties the following has been suggested as a better solution: while these restrictions are servitudes on the land itself, and should be enforced as such, when the purpose of the restriction can no longer be carried out the servitude comes to an end for all purposes; i.e., the duration of the servitude is determined by its purpose.[10]

The North Carolina Court has in effect reached this very result. In *Starkey v. Gardner*[11] an injunction was denied on the ground that changed conditions had made impossible the fulfillment of the purpose for which the restriction was imposed. The judgment of the lower court, affirmed on appeal, was that "the restrictions created in said deed . . . *are no longer in effect,* and the property of the defendant *is no longer subject to said restrictions,* . . . and that the said defendant, her agents or assigns, *are not bound by the terms of said restrictions,* and they are permitted to use said lands and property for any lawful purposes."[12] There is here no hint of the possibility that the restriction is still alive for the purpose of collecting damages for its breach. This conclusion receives additional support in the recent case of *Snyder v. Caldwell.*[13] This was an action by the vendor for specific performance of a contract to exchange lands. The vendee had refused to accept a deed on the ground that the plaintiff could not convey good title since there was a restrictive covenant. But the court held for the plaintiff, basing its decision on the *Starkey* case, and holding that the restriction was no longer enforceable because of changed conditions. While the case does not specifically exclude the possibility that damages might still be collected at law, it is a familiar rule that the purchaser of land is not required to accept a title which invites or exposes him to

[8] Ewertsen v. Gerstenberg, 186 Ill. 344, 57 N. E. 1051 (1900); Jackson v. Stevenson, 156 Mass. 496, 31 N. E. 691 (1892); Page v. Murray, 46 N. J. Eq. 325, 19 Atl. 11 (1890); McClure v. Leaycraft, 183 N. Y. 36, 75 N. E. 961 (1905).

[9] A statute which sought to provide expressly for the procedure adopted offhand by the decisions was held unconstitutional as depriving the dominant owners of rights in real property for a private use contrary to the Bill of Rights, in Riverbank Improvement Co. v. Chadwick, 228 Mass. 242, 117 N. E. 244 (1917).

[10] "When such burdens are terminated by change in the character of the neighborhood—now a recognized form of termination—or otherwise, the interest definitely ceases. No pale relics are left to trouble and not to benefit the property owners." CLARK, COVENANTS AND INTERESTS RUNNING WITH LAND (1929) 153; Pound, *The Progress of the Law, 1918-1919; Equitable Servitudes* (1919) 33 HARV. L. REV. 813.

[11] 194 N. C. 74, 138 S. E. 408 (1927). This case is followed in Higgins v. Hough, 195 N. C. 652, 143 S. E. 212 (1928); Oldham v. McPheeters, 203 N. C. 141, 164 S. E. 731 (1932).

[12] Italics added.

[13] 207 N. C. 626, 178 S. E. 83 (1935).

litigation.[14] It would seem inferentially, therefore, that the title of the plaintiff in the instant case was now clear of the restriction even to the extent of being free from the possibility of liability for damages because of breach of the restriction. In short, the net effect of the North Carolina cases is that the restriction may be terminated by changed conditions, and when so terminated it is ended for all purposes.

F. M. PARKER.

Wills—Remainders—Life Tenant Vested with Absolute Power of Disposal.

The testator devised his real property to his wife giving her the "right and privilege to use, sell or dispose of the same as she may see fit during her lifetime," and he further provided that any property remaining at his wife's death should belong to the plaintiff. At her death the wife devised the property to the defendant. The West Virginia Supreme Court of Appeals adhered to an "ancient rule" in holding that the testator's will vested a fee simple estate in the wife thereby cutting off the plaintiff's remainder.[1]

It is generally accepted that a remainder over after a devise of an unlimited estate plus an absolute power of disposal is invalid since the first taker is vested with a fee simple.[2] A few jurisdictions, including West Virginia, have held that a devise of a *life estate* and the attachment thereto of an unlimited power of disposition created a fee simple in the life tenant to the exclusion of any remainder.[3] The fee simple estate thus vested was subject to all incidents normally attended upon

[14] Wesley v. Eells, 177 U. S. 370, 44 L. ed. 811, 20 Sup. Ct. 661 (1900).

[1] Hustead v. Murray, 177 S. E. 898 (W. Va., 1934).

In this case note the author has endeavored, in so far as it was possible, to consider only those cases in which a life estate in realty was expressly limited to the first taker and in which his power of disposal was unlimited. However, some of the difficulties involved in any classification or generalization concerning the construction of wills are indicated in the following quotation: "Seldom, if ever, will two wills be found the exact counterpart of each other, either in language or circumstances. We may look to cases for general rules as guides, but, after all, each case must be decided upon the language used by the testator, and upon his intention, to be gathered from the whole instrument." Jones v. Denning, 91 Mich. 481, 51 N. W. 1119 (1892).

[2] Hambright v. Carroll, 204 N. C. 496, 168 S. E. 817 (1933); see Gildersleeve v. Lee, 100 Ore. 578, 198 Pac. 246 (1921). ROOD, WILLS (2nd ed. 1926) 534. Note (1931) 75 A. L. R. 71.

[3] Gibson v. Gibson, 213 Mich. 31, 181 N. W. 41 (1921); Van Deventer v. McMullen, 157 Tenn. 571, 11 S. W. (2d) 867 (1928); Steffey v. King, 126 Va. 120, 101 S. E. 62 (1919); National Surety Co. v. Jarrett, 95 W. Va. 420, 121 S. E. 291 (1924); Notes (1925) 36 A. L. R. 1218; (1932) 76 A. L. R. 1166.

However, the attachment of a limited power of disposition would not enlarge the life tenant's interest to a fee. Waller v. Sproles, 160 Tenn. 11, 22 S. W. (2d) 4 (1929); Woodbridge v. Woodbridge, 88 W. Va. 187, 106 S. E. 437 (1921); Note (1930) 8 TENN L. REV. 209.

such an estate.[4] This rule was based upon the theory that the remainder was subordinate and repugnant to the power of disposition and was consequently void.[5] In this effort to be consistent the courts violated the primary axiom[6] of testamentary construction by ignoring, at least partially, the apparent intention of the testator; and, motivated by a desire to protect this intention these jurisdictions have enacted statutes which preserve the remainder if the life tenant fails to exercise his power to dispose of the property.[7] The West Virginia statute was not applied in the principal case because the will involved took effect several years prior to the statute's adoption.[8]

However, the prevailing authorities hold that the addition of a power of disposal does not enlarge a life estate into a fee,[9] but in exercising the power the holder of the life estate may convey a fee.[10] Only a few jurisdictions limit his power of disposition to his own life estate.[11] Thus the life tenant is vested with authority sufficient to

[4] For example, the first taker could convey a good title in fee simple to a purchaser. Van Deventer v. McMullen, 157 Tenn. 571, 11 S. W. (2d) 867 (1928). The property could be subjected to execution for obligations of the holder. National Surety Co. v. Jarrett, 95 W. Va. 420, 121 S. E. 291 (1924). If the holder died intestate the property passed to his heirs under the canons of descent. Bradley v. Carnes, 94 Tenn. 27, 27 S. W. 1007 (1894).

[5] See Bowen's Adm'r v. Bowen's Adm'r, 87 Va. 438, 12 S. E. 885 (1891); Morgan v. Morgan, 60 W. Va. 327, 55 S. E. 389 (1906).

[6] "It has been declared a fundamental maxim, the first and greatest rule, the sovereign guide, the polar star, in giving effect to a will, that the intention of the testator as expressed in the will is to be fully and practically observed so far as it is consistent with established rules of law." ROOD, WILLS, (2nd ed. 1926) 352.

[7] MICH. COMP. LAWS (1929) §13003; TENN. CODE (1932) §8093; VA. CODE ANN. (Michie, 1930) §5147; W. VA. CODE (1931) c. 36 art. 1 §16. See Quarton v. Barton, 249 Mich. 474, 229 N. W. 465 (1930); Southworth v. Sullivan, 162 Va. 325, 173 S. E. 524 (1934).

[8] This will under which the plaintiff claims became effective in 1926 while the West Virginia statute was not enacted until 1931. In speaking of the statute, Judge Kenna, the author of the opinion in the principal case, said, "It is to be hoped that it may be the means of freeing the courts of the state from adherence to an ancient rule, the effect of which is to defeat in part the apparent purpose of the testator."

[9] Paxton v. Paxton, 141 Iowa 96, 119 N. W. 284 (1909); Greenwalt v. Keller, 75 Kan. 578, 90 Pac. 233 (1907); Cagle v. Hampton, 196 N. C. 470, 146 S. E. 88 (1929); Notes (1925) 36 A. L. R. 1177; (1932) 76 A. L. R. 1153; ROOD, WILLS (2nd ed. 1926) 535.

[10] Heney v. Manion, 14 Del. Ch. 167, 123 Atl. 183 (1924); Cagle v. Hampton, 196 N. C. 470, 146 S. E. 88 (1929) (the court grants specific performance of a contract to convey land where the seller was a life tenant possessing an absolute power of disposal); Auer v. Brown, 121 Wis. 115, 98 N. W. 966 (1904).

[11] Brant v. Virginia Coal & Iron Co., 93 U. S. 326, 23 L. ed. 927 (1876); Patty v. Goolsby, 51 Ark. 61, 9 S. W. 846 (1888); Douglas v. Sharp, 52 Ark. 113, 12 S. W. 202 (1889); Bachtell v. Bachtell, 135 Md. 474, 109 Atl. 198 (1920). But *cf.* Archer v. Palmer, 112 Ark. 527, 167 S. W. 99 (1914); Reeside v. Annex Building Ass'n, 165 Md. 200, 167 Atl. 72 (1933).

Some courts follow this rule: where a power of disposal accompanies a devise of a life estate, the power is limited to such a disposal as a tenant for life can make, unless there are other words clearly indicating that a larger power was intended. Pratt v. Skiff, 289 Ill. 268, 124 N. E. 534 (1919); Winchester v.

defeat the remainder, but it must be used in good faith.[12] A fraudulent conveyance for the sole purpose of cutting off the remainder will be void.[13] Liability for waste will attach where the value of the remainder is diminished by reckless and extravagant use.[14] Many states have statutes which enlarge the life tenant's estate to a fee where the interests of creditors and purchasers for value are involved,[15] but in the absence of statute the creditors of the life tenant cannot subject the fee to execution for the satisfaction of his obligations.[16] In the assessment of inheritance taxes[17] and the allotment of dower[18] the holder's interest is deemed to be only a life estate. While the power of disposition authorizes the life tenant to transfer an estate in fee he cannot convey such an interest by gift *inter vivos*[19] or by devise,[20] and the authorities differ as to his ability to encumber the remainder with a mortgage.[21]

Hoover, 42 Ore. 314, 70 Pac. 1035 (1902). However, words indicative of the larger power are usually uncovered. Gildersleeve v. Lee, 100 Ore. 578, 198 Pac. 246 (1921).

[12] See Braley v. Spraggins, 221 Ala. 150, 128 So. 149 (1930); Reddin v. Cottrell. 178 Ark. 1178, 13 S. W. (2d) 813 (1929); Shapleigh v. Shapleigh, 69 N. H. 577, 44 Atl. 107 (1899); Gibony v. Hutcheson, 20 Tex. Civ. App. 581, 50 S. W. 648 (1899).

[13] Cales v. Dressler, 315 Ill. 142, 146 N. E. 162 (1924); *In re* Davies' Estate, 242 N. Y. 196, 151 N. E. 205 (1926).

[14] Cross v. Hendry, 39 Ind. App. 246, 79 N. E. 531 (1906) (an injunction against waste was granted); see Shapleigh v. Shapleigh, 69 N. H. 577, 44 Atl. 107 (1899); Ballinger v. Bartolett, 3 N. J. Misc. Rep. 80, 127 Atl. 671 (1925); Johnson v. Johnson, 51 Ohio St. 446, 38 N. E. 61 (1894). *Contra:* Young v. Campbell, 175 S. W. 1100 (Tex. Civ. App., 1915) (a plea for an injunction to prohibit wasteful disposition denied); see Brant v. Va. Coal & Iron Co., 93 U. S. 326, 23 L. ed. 927 (1876).

[15] For example: ALA. CODE ANN. (Michie, 1928) §6928; N. Y. CONSOL. LAWS (Cahill, 1930) c. 51, §149; OKLA. COMP. ST. (1921) §8522; WIS. REV. ST. (1927) §232.08.

[16] Pace v. Pace, 41 Ohio App. 130, 180 N. E. 81 (1931).

[17] Kemp v. Kemp, 223 Mass. 32, 111 N. E. 673 (1916); *In re* Meldrum's Estate, 149 Minn. 342, 183 N. W. 835 (1921); *In re* Sonnenburg's Estate, 133 Misc. Rep. 42, 231 N. Y. S. 191 (1928).

[18] *In re* Davies' Estate, 124 Misc. Rep. 541, 209 N. Y. S. 296 (1925).

[19] Methodist Episcopal Church v. Walters, 50 F. (2d) 416 (W. D. Mo. 1928); Adams v. Prather, 176 Cal. 33, 167 Pac. 534 (1917); Evans v. Leer, 232 Ky. 358, 23 S. W. (2d) 553 (1930); Johnson v. Johnson, 51 Ohio St. 446, 38 N. E. 61 (1894); see Quarton v. Barton, 249 Mich. 474, 229 N. W. 465 (1930); Holland v. Bogardus-Hill Drug Co., 314 Mo. 214, 284 S. W. 121 (1926). *Contra: In re* Cooksey's Estate, 203 Iowa 754, 208 N. W. 337 (1926) (the life tenant received a nominal consideration); see Bynum v. Swope, 201 Ala. 19, 75 So. 170 (1917); *In re* Ithaca Trust Co., 220 N. Y. 437, 116 N. E. 102 (1917).

In some instances gifts to charity are permissible. Dana v. Dana, 185 Mass. 156, 70 N. E. 49 (1904); Thrall v. Spear, 63 Vt. 266, 22 Atl. 414 (1891).

[20] Smith v. Judge, 133 Kan. 112, 298 Pac. 651 (1931); Struck v. Lilly, 219 Ky. 604, 293 S. W. 153 (1927); Selig v. Trost, 110 Miss. 584, 70 So. 699 (1916); Jones v. Fullbright, 197 N. C. 274, 148 S. E. 229 (1929) (personal property); Mooy v. Gallagher, 36 R. I. 405, 90 Atl. 663 (1914). *Contra:* Burbank v. Sweeney, 161 Mass. 490. 37 N. E. 669 (1894). But *cf.* Ford v. Ticknor, 169 Mass. 276, 47 N. E. 877 (1897).

[21] The life tenant has no difficulty making a valid mortgage on the fee where the terms constituting the power of disposition expressly include this authority.

Once he has exercised his power of disposition, the life tenant is under no obligation to account for the proceeds,[22] but at his death any of the proceeds which remain in his possession, whether in the form of money or other property, will pass to the remainderman.[23]

As a whole these conclusions are satisfactory. By permitting the life tenant to transfer a fee and yet protecting the remainder by the regulations attendant upon the disposition of the proceeds, the courts have succeeded in giving full effect to the apparent intention of the testator. Furthermore, substantial justice has resulted as the rights of all interested parties are amply protected.

N. A. TOWNSEND, JR.

Wills—Requirements for Holographs—Printed Forms.

The testatrix's will, attested by two witnesses, was written by her own hand in the blanks of a printed will form, a part of which was torn

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Reeside v. Annex Building Ass'n, 165 Md. 200, 167 Atl. 72 (1933); Selig v. Trost, 110 Miss. 584, 70 So. 699 (1916). If the power of disposition is absolute the life tenant's mortgage on the fee is valid. Kent v. Morrison, 153 Mass. 137, 26 N. E. 427 (1891); Whitfield v. Lyon, 93 Miss. 443, 46 So. 545 (1908); Grace v. Perry, 197 Mo. 550, 95 S. W. 875 (1906); Lord v. Roberts, 84 N. H. 517, 153 Atl. 1 (1931); Rose City Co. v. Langloe, 141 Ore. 242, 16 P. (2d) 22 (1932); see Hamilton v. Hamilton, 141 Iowa 321, 128 N. W. 380 (1910). However, there is some conflicting authority. Downie v. Downie, 4 Fed. 55, (C. C. Ind. 1880); see Thrall v. Spear, 63 Vt. 266, 22 Atl. 414 (1891). In Rhode Island a mortgage of the fee by a life tenant who has a power of disposal is good provided the proceeds are used to erect improvements on the property. *In re* Jenks, 21 R. I. 390, 43 Atl. 871 (1899).

[22] Keniston v. Mayhew, 169 Mass. 612, 47 N. E. 612 (1897); Redman v. Barger, 118 Mo. 568, 24 S. W. 177 (1893); see Alford v. Alford, 56 Ala. 350 (1876).

[23] Bynum v. Swope, 201 Ala. 19, 75 So. 170 (1917) (the proceeds from the sale of the property had been invested in other real estate); Walker v. Pritchard, 121 Ill. 221, 12 N. E. 336 (1887) (the life tenant still retained some of the money received as the purchase price of the property); Barton v. Barton, 283 Ill. 388, 119 N. E. 320 (1918); *In re* Beatty's Estate, 172 Iowa 714, 154 N. W. 1028 (1915) (the proceeds of the sale were traced to a bank deposit); Olson v. Weber, 194 Iowa 512, 187 N. W. 465 (1922) (the proceeds from the sale were used to buy another tract of land which was exchanged for a third); *In re* Eddy's Adm'r, 134 Misc. Rep. 511, 236 N. Y. S. 275 (1929) (the money received from the sale of the property was traced to certain stocks and bonds); see *In re* McCullough's Estate, 272 Pa. 509, 116 Atl. 477 (1922); *cf.* Davis v. Badlam, 165 Mass. 248, 43 N. E. 91 (1896). *Contra:* McMurray v. Stanley, 69 Tex. 139, 6 S. W. 412 (1887); Feegles v. Slaughter, 182 S. W. 10 (Tex. Civ. App., 1916).

In some instances the life tenant is only entitled to a share of the proceeds coexistent with his life estate with the residue immediately becoming the property of the remainderman. Darden v. Mathews, 173 N. C. 186, 91 S. E. 835 (1917); see *In re* Meldrum's Estate, 149 Minn. 342, 183 N. W. 835 (1921).

This problem was raised in a recent North Carolina case, Fletcher v. Bray, 201 N. C. 763, 161 S. E. 383 (1931), in which the life tenant was given the power to dispose of the growing timber. In holding that the proceeds from the sale of the timber belonged to the life tenant's heirs rather than the remainderman the court distinguished the case of Darden v. Mathews, 173 N. C. 186, 91 S. E. 835 (1917) on the ground that it involved a bare power of sale and not an absolute power of disposal.

off, destroying portions of the writing on both sides of the sheet. The instrument was admitted to probate as a holographic will. *Held,* the mere presence of printed words on the sheet will not invalidate the instrument as a holographic will if the printing is not essential to the meaning of the handwriting, and the writing itself contains dispositive words sufficient to make a complete will in itself. In such a case the printed words are disregarded as being mere surplusage.[1]

Requirements for the valid execution of holographic wills are prescribed by statutes in the various states, which usually provide that the will must be entirely written, dated and signed by the testator in his own handwriting.[2] The construction of such wills in which printed matter appears has been based on two theories:[3] (1) whatever the testator intended to include as a part of the instrument is a part of the will,[4] and (2) whatever is not essential to the meaning of the written words is mere surplusage and is not to be construed with the will.[5]

Under the intent theory, any printed word which the testator intended to include as a part of the will invalidates it;[6] the mere presence of printed words on the sheet is immaterial only if they are entirely dissociated from the will and not intended as a part thereof.[7] For instance, a will in which part of the year date was printed was denied probate even though the instrument had also been dated entirely in the handwriting of the testator.[8] However, in a later case from the same jurisdiction another will of this nature was held to have been properly executed where the testator subsequently dated the instrument in his own handwriting.[9] Various cases have held instruments invalid which were entirely in the testator's handwriting except for part of the figures in the year date.[10]

[1] *In re* Will of Parsons, 207 N. C. 584, 178 S. E. 78 (1934).

[2] However, some states do not require that the instrument be dated, and two states (N. C. and Tenn.) make the additional requirement that the purported will be found among the valuable papers of deceased to show that some importance is attached to it as a testamentary disposition. For a compilation of state statutes, see Bordwell, *Statute Law of Wills* (1928) 14 IOWA L. REV. 1, 25. In North Carolina the will must be entirely written, but not necessarily dated, in the handwriting of the testator, with his name inserted in some part thereof, and the handwriting must be proved by three credible witnesses; in addition the document must be found among the valuable papers of the deceased, N. C. CODE ANN., (Michie, 1931), §§4131, 4144 (2).

[3] Mechem, *Integration of Holographic Wills* (1934) 12 N. C. L. REV. 213.

[4] *In re* Thorn's Estate, 183 Cal. 512, 192 Pac. 19 (1920); *In re* Francis' Estate, 191 Cal. 600, 217 Pac. 746 (1923).

[5] Gooch v. Gooch, 134 Va. 21, 113 S. E. 873 (1922).

[6] Estate of Billings, 64 Cal. 427, 1 Pac. 701 (1884).

[7] *In re* Oldham's Estate, 203 Cal. 618, 265 Pac. 183 (1928) (the will was written on a letterhead).

[8] *In re* Francis' Estate, 191 Cal. 600, 217 Pac. 746 (1923).

[9] *In re* Whitney's Estate, 103 Cal. App. 577, 284 Pac. 1067 (1930).

[10] Estate of Billings, 64 Cal. 427, 1 Pac. 701 (1884).
In re Plumel's Estate, 151 Cal. 77, 90 Pac. 192 (1907); *In re* Francis's Estate,

The following cases are not clearly within either the intent or surplusage theories:[11] In Mississippi, where the whole will was written except for the caption "My Will" the court said that the printed words would not affect the validity of a will unless without them the meaning and purpose were in some may materially affected.[12] In Louisiana a will containing a printed year date was rejected, since a date was necessary under the statute;[13] but in a subsequent case a will containing two immaterial words in another's handwriting was admitted to probate on the ground that the presence or absence of the words would not change the meaning or alter the provisions made by testator in his own handwriting.[14]

Under the surplusage theory, the will will be allowed to stand if the written portions are sufficient to make a testamentary disposition of the property without the aid of the printed words.[15] Few cases are clearly within this theory,[16] but in *Gooch v. Gooch*[17] the Virginia court upheld a will written on a printed form, and allowed it to revive a previously revoked will, saying that if the written portions of the will are complete and entire in themselves the printed portions may be regarded as surplusage.

Where the instrument is typewritten, even by the testator himself, it is not good as a holographic will under either theory.[18] Typewriting is essentially a process of printing, and "writing" means a mannerism in the formation of letters, by which the testator may be identified with the instrument offered for probate.

The North Carolina statute provides in effect that the will and every part thereof must be in the testator's own handwriting,[19] and it is said

191 Cal. 600, 217 Pac. 746 (1923); Succession of Robertson, 49 La. Ann. 868, 21 So. 586 (1897). But see *In re* Whitney's Estate, 103 Cal. App. 577, 284 Pac. 1067 (1930); Jones v. Kyle, 168 La. 728, 123 So. 306 (1929). In these two cases a date subsequently written in the testator's own handwriting was sufficient even where the previous date was printed.

[11] The surplusage theory condones any writing sufficient to stand alone as a testamentary disposition. These cases, while not depending entirely on the testator's intent, do not follow the liberal surplusage theory announced by the North Carolina court, and the result—something of a cross between the intent and surplusage doctrines—is based on the holding that printed matter, even where it is intended to be included in the will by the testator, will invalidate the will only if it materially affects the meaning of the written words.

[12] Baker v. Brown, 83 Miss. 793, 36 So. 539 (1904).

[13] Succession of Robertson, 49 La. Ann. 868, 21 So. 586 (1897). But see Jones v. Kyle, 168 La. 728, 123 So. 306 (1929) (a subsequent dating in the testator's handwriting was sufficient even where the previous date was printed).

[14] Heirs of McMichael v. Bankston, 24 La. Ann. 451 (1872).

[15] *In re* Lowrance's Will, 199 N. C. 782, 155 S. E. 876 (1930).

[16] See note 11, *supra*.

[17] 134 Va. 21, 113 S. E. 873 (1922).

[18] *In re* Dreyfus' Estate, 175 Cal. 417, 165 Pac. 941 (1917); Adams' Executrix v. Beaumont, 226 Ky. 311, 10 S. W. (2d) 1106 (1928); see Langfit v. Langfit, 108 W. Va. 466, 151 S. E. 715 (1930).

[19] N. C. CODE ANN. (Michie, 1931) §§4131, 4144 (2).

that the provisions of the statute are mandatory, not directory;[20] yet the court in the instant case has effectively changed the statute to read "every portion thereof which is in the handwriting of the testator and testamentary in its nature may be admitted to probate."[21] Other courts under substantially the same statute, have held purported holographic wills written on printed forms invalid.[22] Only the Virginia case, *Gooch v. Gooch*,[23] sustains the extreme position taken by the North Carolina court. Considered academically the instant case seems to have been wrongly decided, but as a matter of practical policy the decision may be correct on principle if not on the facts. The legislature was obviously attempting to protect the testator from fraud practiced after his death, on the theory that handwriting may be sufficiently identified to connect the testator with anything he himself might write.[24] There is nothing about the printed form of a will which can be altered to change the testator's wishes, and he is just as much connected with the form through his writing in the blanks as in a paper written entirely by himself, for the dispositive portions of the will are entirely in the handwriting of the maker of the will. However, the court holds that the printed portions of a purported will must be disregarded for the purposes of the statute where the writing is sufficient to stand alone. It is doubtful if this instrument shows any testamentary intent on its face without the aid of the printed portions, as the testatrix merely writes "I give etc.," which is entirely consistent with the idea of a gift *inter vivos*, invalid because not completed by delivery during the lifetime of the donor.[25] Parol evidence was admitted in the case, not to explain the language used by the testatrix, and to prove that she intended it to operate as a posthumous disposition of her property, but to show that the instrument actually disposed of her property in accordance with the expressed wishes of the testatrix. In fact, no evidence was disclosed by the opinion relating directly to this instrument itself, but the court apparently is influenced by the subsequent declarations of the testatrix

[20] "The provisions of the statute are, of course, mandatory, and not directory, and therefore there must be a strict compliance with them, before there can be a valid execution and probate of a holographic script as a will; but this does not mean that the construction of the statute should be so rigid and binding as to defeat its clearly expressed purpose. It must be construed and enforced strictly, but at the same time reasonably." *In re* Jenkins' Will, 157 N. C. 429, 435, 72 S. E. 1072, 1074 (1911); *In re* Will of Lowrance, 199 N. C. 782, 155 S. E. 876 (1930).

[21] See Estate of Rand, 61 Cal. 468, 44 Am. Rep. 555 (1882).

[22] *In re* Wolcott's Estate, 54 Utah 165, 180 Pac. 169 (1919) ("The fact that the matter written by deceased in her own hand, standing alone, might constitute a complete testamentary disposition of the property, does not alter the case." Such writing is not what testatrix prepared as her will), Estate of Rand, 61 Cal. 468, 468 Am. Rep. 555 (1882).

[23] 134 Va. 21, 113 S. E. 873 (1922).

[24] Alexander v. Johnson, 171 N. C. 468, 88 S. E. 785 (1916).

[25] Adams v. Maris, 213 S. W. 622 (Tex. Com. App., 1919).