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THE LOTUS; CRIMINAL JURISDICTION ON THE HIGH SEAS

The Permanent Court of International Justice in September of last year rendered an important decision [1] on a case which had already attracted much attention.[2] The case came before the court under a special agreement signed at Geneva in 1927 by the French and Turkish governments, submitting a question of jurisdiction which had arisen between them.

[1] The Case of the S. S. "Lotus," Permanent Court of International Justice (1927) Series A, No. 10, Judgment No. 9.

[2] See Beckett, *Criminal Jurisdiction Over Foreigners* (1927) BRITISH YEAR BOOK OF INTERNATIONAL LAW 108, 109: "It is perhaps the first case which has come before the Court in which the question for decision is a point of general international law. The exercise of criminal jurisdiction over foreigners is a sphere in which juridical literature and speculation abound

In August, 1926, a collision occurred on the high seas between the *Boz-kourt* and the *Lotus*, the former a Turkish and the latter a French steamship. As a result of this collision the Turkish ship sank, and eight Turkish subjects were drowned. Upon the subsequent voluntary entrance into Constantinople of the French ship, Lieutenant Demons, officer of the watch on the *Lotus*, was arrested and put on trial by the Turkish authorities in accordance with Turkish law. The French government alleged that the Turkish court acted without jurisdiction. This the Turkish government denied, and the difference finally resulted in the special agreement, referred to above, which took the form of two questions.

1. Has Turkey in taking jurisdiction acted in conflict with principles of international law, and if so what principles?

2. Should the reply be in the affirmative what pecuniary reparation is due M. Demons, provided, according to the principles of international law, reparation should be made?

We are concerned only with the first question. On this point the court held, 7 to 5, that Turkey had not so acted.[3] In the opinion of some members of the court this question involved another. Was article 6 of the Turkish Penal Code[4] in contravention of any principle of international law?[5] Although the

and are conflicting even in the matter of first principles, but international precedent is rare and indecisive. Whatever the result of the case may be, the judgment can hardly avoid being something of an event in the development of international law."

[3] Judge Moore's opinion, listed among the dissenting opinions, concurred on this point.

[4] Article 6 of the Turkish Penal Code, Law No. 765 of March 1, 1926. See S. S. Lotus, *supra* note 1, at 14:

"Any foreigner who, apart from the cases contemplated by Article 4, commits an offence abroad to the prejudice of Turkey or of a Turkish subject, for which offense Turkish law prescribes a penalty involving loss of freedom for a minimum period of not less than one year, shall be punished in accordance with the Turkish Penal Code provided that he is arrested in Turkey. The penalty shall however be reduced by one third and instead of the death penalty, twenty years of penal servitude shall be awarded."

[5] Judge Moore insisted that since the proceedings of the Turkish court were taken under the statute, the question of the international validity of the act was before the court. He stated that the claim of Turkey of a right to try and punish foreigners for acts committed in foreign countries not only against Turkey but against Turkish citizens was contrary to the principles of international law. He said at page 92:

" . . . to assert that this right of jurisdiction covers acts done before the arrival of the foreign subjects in the country is in reality to set up a claim to concurrent jurisdiction with other States as to acts done within them, and so to destroy the very principle of exclusive territorial jurisdiction.

" . . . It is evident that this claim is at variance not only with the principle of the exclusive jurisdiction of a State over its own territory, but also with the equally well-settled principle that a person visiting a foreign

validity of this section of the Turkish Code was not raised by the special agreement, it seems that the Turkish government in its argument before the court based its claim to jurisdiction largely on this section. It was evidently for this reason that Judge Moore found it necessary to discuss and condemn the validity of such a provision as violating the generally accepted theory of territorial jurisdiction, especially in the light of the fact that there are similar provisions in the Italian and Brazilian Codes. The majority, however, held that while the prosecution was instituted in pursuance of Turkish legislation, the special agreement does not indicate what clause or clauses of that legislation apply, and adds that no document was submitted to the court indicating on what article of the Turkish Penal Code the prosecution was based.[6]

The problems which confronted the court may be divided into four sub-topics. The first involves the application of the theory that a ship is part of the territory of the country of the flag.

While for purposes of taxation, insurance, etc., a ship is undoubtedly regarded as a chattel, writers on international law and courts have long regarded it as analogous to territory,[7] or at least as having a quasi-territorial character for many purposes.[8] So when a crime is committed on the high seas, jurisdiction over the wrongdoer is generally recognized to lie in the country to which the ship belongs.[9] (Where the crime actually occurred

country, far from radiating for his protection the jurisdiction of his own country, falls under the dominion of the local law."

[6] See S. S. Lotus, *supra* note 1, at 14, par. 5.

[7] See WHEATON, INTERNATIONAL LAW (8th ed. 1866) pt. 2, c. 5, § 106: "He (Vattel) also considers the vessels of a nation on the high seas as portions of its territory," but then adds, " . . . jurisdiction which the nation has over its public and private vessels on the high seas, is exclusive only so far as respects offences against its own municipal law."

[8] See 1 MOORE, INTERNATIONAL LAW DIGEST (1906) c. 5, § 174, p. 930: "It is often stated that a ship on the high seas constitutes a part of the territory of the nation whose flag it flies . . . In the legal sense, it means that a ship on the high seas is subject to the exclusive jurisdiction of the nation to which, or to whose citizens, it belongs. The jurisdiction is quasi-territorial."

[9] Reg. v. Anderson, 11 Cox C. C. 198 (1868) (conviction of defendant, a citizen of the United States, for manslaughter committed on British ship, when on tidal river in France, affirmed); Reg. v. Armstrong, 13 Cox. Cr. C. 184 (1875) (especially where the defendant is a British ship, although the murder took place on an African tidal river). See Costa Rica Packet Case, reported in 5 MOORE, INTERNATIONAL ARBITRATIONS (1898) 4948-53, where an award following a convention signed at the Hague in 1895, submitting for arbitration a claim of Great Britain against the Netherlands, growing out of the arrest and detention in Netherlands Indies of the master of a British ship for alleged theft of a native boat on the high seas gave a decision in favor of Great Britain: ". . . on the high seas even merchant vessels constitute detached portions of the territory of the state whose flag they

in the instant case will be later considered.) Because in a series of cases the country of the flag was allowed jurisdiction without objection by other nations, a shorthand expression was evolved for describing the situation. The ship was said to be part of the territory of the country of the flag. This has resulted in the drawing of a vicious circle in which some courts have been caught, while others have tried to cut a way out to a more accurate analytical understanding of the questions involved.[10] One half circle is formed by the statement that, since the country of the flag has jurisdiction in regard to matters occurring on the high seas, it is part of the territory of the country of the flag.

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bear, and, consequently, are only justiciable of their respective national authorities for acts committed on the high seas." See paper by Mr. Evarts, Sec. of State, to Mr. Welsh, Minister to England, in 1 MOORE, *op. cit. supra* note 8, at 932, 933, in the case of a British subject who, while on board an American ship on the high seas killed an officer of the ship while the vessel was on its way from New York to Calcutta where the British Government took jurisdiction:

"No principle of public law is better understood . . . than that merchant vessels on the high seas are under the jurisdiction of the nation to which they belong, and that as to common crimes committed on such vessels while on the high seas, the competent tribunals of the vessel's nation have *exclusive* jurisdiction of the questions of trial and punishment of any person thus accused of the commission of a crime against its municipal laws."

[10] See the dissenting opinion of Amplett, J., in Queen v. Keyn, L. R. 2 Ex. Div. 63, 118, 119 (1876): "Now according to the decision in R. v. Coombes (1 Lea Cr. C. 388) the crime must be, for the purpose of determining the venue, held to have been committed on the English ship where the death occurred; but that doctrine, founded as it us upon a convenient fiction, and binding no doubt upon a British subject, does not decide the question before us, which is, whether a foreigner who committed the offence while he was *de facto* outside the English territory, could be made amenable to English law." See the dissenting opinion of Lindley, J., at 93, in reference to the contention that a merchant ship is part of the territory of the country whose flag she bears:

"It is obvious that she is not so in point of fact, and it is easy to show that the doctrine holds good to a very limited extent indeed. (Cites as examples 1—Where foreign merchant ship enters ports, harbors, rivers they become subject to English law. 2—Territoriality of foreign merchant ship within three miles of another state does not exempt it or crew from revenue or fishing laws of that state. 3—In war, territoriality of ship does not subject it to capture when within three miles of neutral coast. 4—In war, so-called territoriality of neutral ship does not exempt it from invasion in search of contraband of war). . . . In all these cases the territoriality of the ship becomes an unmeaning phrase, and care must be taken not to be misled by it, and not to allow the general assertion that a ship is part of the territory whose flag she bears to pass unchallenged, and to be made the basis of a legal argument.

"When, indeed, a ship is out at sea . . . it is right that those on board her should be subject to the laws of the country whose flag she bears; for otherwise they would be subject to no law at all. To this extent a ship may be said to be part of the territory of the country of her flag."

Queen v. Keyn was later overruled by a statute passed for this purpose.

The completing half lies in the deduction that since a ship on the high seas is part of the territory of the country of the flag, such country has exclusive jurisdiction in the case before the court at any time or on any set of facts.

Both the writers of the majority decision and some of the dissenting members of the court seem to fall into this error. One senses so swift a shifting from the basis of fact description to legal conclusion, that one is made to see that such a term as territory, having within it at least the germ of the legal conclusion as to jurisdiction, is permitted to enter the picture before the reasons for and against granting jurisdiction on a new set of facts have been thoroughly weighed.[11]

The second question for the court, intimately connected with the first, is one of interpretation of jurisdiction under two separate and distinct territorial theories.[12] Judge Moore in describing various theories of criminal jurisdiction divided the actual territorial theory into two types, (1) *subjective,* which he described as relating to offenses committed by persons other than diplomatic officers in the territory, and (2) *objective,* which he described as relating to offences committed within a territory by a person outside.[13] He gave as examples a shot fired on one side of a boundary taking effect on the other, and an infernal machine, a swindling letter, poisonous food, or counterfeit money sent into a country by a person outside.

" 'The principle that a man who outside of a country wilfully puts in motion a force to take effect in it is answerable at the place where the evil is done, is recognized in the criminal jurisprudence of all countries . . . it was held (at common law) that a man who erected a nuisance in one county which took effect in another was criminally liable in the county in which the injury was done.' " [14]

In the instant case the alleged negligent act of Lieutenant Demons took place on a French ship on the high seas. The effect resulted in the sinking of a Turkish ship with loss of life to Turkish nationals. The real question for the court was whether under these facts it can be deemed to have taken effect in or on Turkish "territory" and whether Turkey could thus properly

[11] Perhaps this is but another example of the human tendency to reify, or "thingify" rights and other legal relations. See Cook, *The Logical and Legal Bases for the Conflict of Laws* (1924) 33 YALE LAW JOURNAL 457, 476.

[12] See Beckett, *supra* note 2. The writer there states that both "subjective" and "objective" territorial jurisdiction are comprised within the territorial theory as alternatives, and that each is a ground for jurisdiction recognized in fact in the legal systems of all states and consequently recognized by the law of nations.

[13] See 2 MOORE, *op. cit. supra* note 8, § 202 p. 243.

[14] *Ibid.* 244.

assume jurisdiction.[15] It may be worth noting that while a majority of the judges follow the objective theory, several judges, including Loder, Weiss and Nyholm, seem to accept the subjective theory of territoriality in no uncertain terms.

The third sub-topic is the contribution which precedent has to offer to the deciding of the instant case. There have been a few cases, none of them recent, tried in national courts, which might throw some light on the question before the court.[16] But there is no decision which might reasonably seem conclusive of the case as presented to the International Court.

The fourth problem, which was inevitably bound up with the decision, though not treated articulately by the members of the court, lies in the development or expansion of the territorial theory of criminal jurisdiction in "international law." A tendency in international law to find "general" or "fundamental" principles which shall in all cases determine what a particular country or state "can" and "cannot" do, has formed the background of the territorial theory.[17] This is not based to a sufficient extent on observation of what has been done or upon a prophecy of what the courts will do. While such a general theory may guide the courts, the instant case exemplifies the fact that the general theory is capable of expansion and change, that when a new set of facts arises it must either be included, so enlarging the scope of the theory, or excluded, which will in itself be a limitation or narrowing of the formula.

In determining a question of criminal jurisdiction which involves more than one nation, inquiry should be directed along two lines, first, the purpose of criminal law in the eyes of the court before which the case is brought, and second, the extent of positive limitations imposed by international law. If the purpose of criminal law, in the eyes of the court, is not merely to punish,[18] or satisfy a desire for revenge, but rather to protect society against further activity which is deemed to be socially undesirable, the limitation of any country's jurisdiction over an

[15] Whether it should be granted in a new case, would be largely controlled by the balance of convenience, of expediency. Where offences are committed within a certain distance of the boundary of two adjacent states or countries, concurrent jurisdiction is sometimes exercised. See 2 MOORE, *op. cit. supra* note 8, at 244, n. a.

[16] *Supra* note 9.

[17] See, Cook, *op. cit. supra* note 11, at 458, 459.

[18] Compare WESTLAKE, INTERNATIONAL LAW (1904) pt. I, c. 11, at 251: "Man should not be prosecuted criminally in a country not his own for a fact not committed in that country, such prosecution wanting both a territorial base in the locality of the crime and a personal base in the nationality of the accused, and involving the pretension of the state of prosecution to regulate by penalties the behavior of persons not its subject in territory not its own."

alleged wrongdoer found within its territory could only be based either on existing prohibitions of international law, or on reasons of expediency.

"My conclusion then is, that while, so long as we have the territorial organization of modern political society, the law of a given state or country can be *enforced* only within its territorial limits, this does not mean that the law of that state or country cannot, except in certain exceptional cases, affect the legal relations of persons outside its limits. As we have seen, "law" is not a material phenomenon, which spreads out like a light wave until it reaches the territorial boundary and then stops. Whatever be the legal limitations upon the power of a state or country to affect the legal relations of persons anywhere in the world, they must be found in positive law of some kind —be the same international law or constitutional law, and do not inhere in the constitution of the legal universe. Whether international law imposes limitations and if so, what they are, can be determined only by observation." [19]

The refusal of the majority of the court, on its failing to find such positive prohibition in "international law," to further delimit criminal jurisdiction in the instant case may have the effect of furthering a more practical and less narrowly theoretical view of the function and purpose of allowing criminal jurisdiction to a country where an international problem arises between civilized nations. This the court was able to do by adopting the device of here again treating the Turkish ship as part of the territory of the country of the flag.

STIPULATIONS FOR ATTORNEY'S FEES

In view of the not infrequent practice, on the part of obligors, of filing an answer to a suit on an obligation with the sole purpose of delaying payment, the use of stipulations for payment of the obligee's attorney's fees in case of suit on the obligation would seem desirable as a means of expediting collection. Furthermore, it seems proper that the obligee should be indemnified for such expenses, and that the defaulter should be responsible therefor. The weight of authority allows and enforces these stipulations,[1] although in some states they are still held void as against

[19] See Cook, *op. cit. supra* note 11, at 484.

[1] Stipulations for attorneys' fees in event of default are valid in the following states, with certain qualifications, as noted: Alabama, Arizona, California, Colorado, Connecticut (*infra* note 13), Florida, Georgia (*infra* note 13), Idaho, Illinois, Indiana (*infra* note 13), Iowa (*infra* notes 13, 22), Louisiana, Maryland, Minnesota, Mississippi, Missouri, Montana (*infra* note 13), Nevada, New Mexico, New York, Oklahoma, Oregon (*infra* note 23), Pennsylvania, South Carolina, Tennessee, Texas, Utah, Washington, Wisconsin, Virginia. They are also valid in the federal courts, where not inconsistent with state law. *Infra* note 15.

public policy on the ground that they are usurious, or that they lack consideration or are penalties.[2] In general, these states will not enforce such stipulations, even though they are valid in the jurisdiction where the contract was made.[3]

These stipulations cannot validly be criticised as usurious.[4] They do not increase the amount due or raise the rate of interest, for assuming that an obligation—moral if not legal—is entered upon with the intention of satisfying it at maturity, the stipulation is inoperative. It is only when the debtor is in default that the amount due is increased, and the attorney's fees are not compensation to the creditor for his loan, as is interest, but are re-imbursements for charges incurred by the creditor in enforcing a legal right against a debtor who, by his own default, obliges the creditor to act. Such is the usual case. The debtor is safeguarded against the use of such stipulations to cover usury, both by his power to avoid them by payment at maturity, and by the well settled interpretation given to these clauses, by which only a reasonable indemnity is allowed the creditor.[5] This reasoning also meets the argument that such stipulations are penalties. Although, in effect, the obligor is penalized for defaulting and the obligee's recovery augmented, the latter's net recovery is only the amount properly due, after he has paid his attorney. Stipulated attorney's fees are therefore no more penalties than are costs. In fact, attorney's fees are considered as costs in some jurisdictions, for their theory is not one of punishment, but of indemnity.[6] The situation is not dissimilar to that where, in measuring damages for a money claim either on an unpaid loan or a sale on credit, interest is allowed from the due date to indemnify the creditor.[7] Certainly the loan or other advantage

[2] Such stipulations are invalid in Arkansas, Kansas, Kentucky, Michigan, Nebraska, North Carolina, North Dakota, Ohio, South Dakota, and West Virginia.

[3] Kan. Rev. Stat. (1923) § 67-312; Carsey & Co. v. Swan & James, 150 Ky. 473, 150 S. W. 534 (1912); Continental Supply Co. v. Syndicate Trust Co., 52 N. D. 209, 202 N. W. 404 (1924); Security Finance Co v. Hendrey, 189 N. C. 549, 127 S. E. 629 (1925). *Contra*: Westwater v. Murray, 215 Fed. 427 (C. C. A. 6th, 1917).

[4] Commercial Investment Trust, Inc. v. Eskew, 126 Misc. 114, 212 N. Y. Supp. 718 (Sup. Ct. 1925). See also Benson, *Validity of Provision for Payment of Attorneys' fees for Collection in Note* (1916) 2 VA. L. REG. (N. S.) 321. *Contra:* Tinsley v. Hoskins, 111 N. C. 340, 16 S. E. 325 (1892); Raleigh County Bank v. Poteet, 74 W. Va. 511, 82 S. E. 332 (1914).

[5] Mechanics'-American National Bank v. Coleman, 204 Fed. 24 (C. C. A. 8th, 1913). That the amount must be reasonable is established, practically without exception.

[6] Jones v. First National Bank of Ft. Collins, 74 Colo. 140, 219 Pac. 780 (1923). For attorney's fees as costs, see *infra* notes 23, 24.

[7] See Sturges, *Commercial Arbitration or Constitutional Application of Common Law Rules of Marketing* (1925) 34 YALE LAW JOURNAL 480, 482.

sought by the obligor is a good and valuable consideration for such stipulations, even though there be other consideration in the form of interest.[8]

The adoption of the Negotiable Instruments Law [9] has, in Virginia, been construed as breaking down the older view adverse to these stipulations, and making them valid.[10] In other states, however, it has been held not to change any rule against such stipulations,[11] and in some instances the clause has been so altered as to retain the view of invalidity.[12] Statutes deal specifically with attorney fee stipulations in some states.[13] A statute

[8] See Weigley v. Matson, 125 Ill. 64, 67, 16 N. E. 881, 882 (1888).

[9] Uniform Negotiable Instruments Act § 2 (5): "The sum payable is a sum certain within the meaning of this act, although it is to be paid . . . with costs of collection or attorney's fees, in case payment shall not be made at maturity."

[10] Colley v. Summers Parrott Hardware Co., 119 Va. 439, 89 S. E. 906 (1916); Ann. Cas. 1917 D, 375, 378, annotation; Conway v. American National Bank, 146 Va. 357, 131 S. E. 803 (1926). Such appears to be the desirable view. (1912) 10 MICH. L. REV. 485.

[11] Fidelity Trust and Safety Vault Co. v. Ryan, 109 Ky. 240, 58 S. W. 610 (1900); Raleigh Co. Bank v. Poteet, *supra* note 4; Bank of Holly Grove v. Sudbury, 121 Ark. 59, 180 S. W. 470 (1915). This appears to be the prevalent and perhaps more logical view, although undesirable in that it does not produce uniformity.

[12] Neb. Comp. Stat. (1922) § 4613: ". . . provided nothing herein contained shall be construed to authorize any court to include in any judgment any sum for attorney's fees." To the same effect, see N. C. Cons. Stat. (1919) § 2983; S. D. Rev. Code (1919) § 1706.

[13] A Connecticut statute provides that attorney fee stipulations shall be valid in all instruments, but be construed as agreements for fair compensation, not for any stipulated amount. Conn. Public Acts 1927, c. 171. In Georgia, a stipulation for attorney's fees is valid only if notice of intent to sue is given ten days prior to filing suit. Ga. Civ. Code (1926) § 4252. The Iowa Code fixes the amount in cases of attorney fee stipulations. Iowa Code (1927) §§ 11644, 11645, 12358. Kan. Rev. Stat. (1923) § 67-312, provides that attorney fee stipulations in any note, bill of exchange, bond, or mortgage shall be null and void. Mont. Rev. Code (1921) § 9798, provides that in an action to foreclose a mortgage or pledge the court will allow reasonable attorney's fees, regardless of any stipulations. The Dakotas hold attorney fee stipulations void. N. D. Comp. Laws Ann. (1913) § 7791; S. D. Rev. Code (1919) §§ 1706, 2604. Wash. Comp. Stat. (Rem. 1922) § 475, provides that no fee shall be fixed above the amount stipulated.

In Indiana, what appears to be an express prohibition of attorney fee stipulations has been construed so as to be readily avoided. Ind. Ann. Stat. (Burns, 1926) § 11359 ("Attorney fee stipulations . . . depending on any condition . . . are illegal and void."). Unless a condition is expressly stated, none will be implied, and the phrase " if not paid promptly," has been held not to be a condition making the stipulation void. Easley v. Deer, 69 Ind. App. 264, 121 N. E. 542 (1919). For the Oregon statute, see *infra* note 23. As to the effect on attorney fee stipulations in rent notes of a Mississippi statute allowing landlords a lien for rent, see O'Keefe v. McLemore, 125 Miss. 394, 87 So. 655 (1921).

making stipulations invalid in negotiable instruments has been held not to effect such stipulations in other obligations.[14]

The Federal courts follow the rule of the states concerned.[15] In bankruptcy cases they may grant a reasonable attorney's fee as a matter of procedure, regardless of the validity of stipulations for such fees under state law.[16] Where a note and mortgage or bond securing it contains a stipulation for attorney's fees, it is immaterial which instrument contains the stipulation as both are construed together.[17] In general, a stipulation does not make an instrument non-negotiable, even though such stipulation be void by state law, in which case, of course, it should be held to have no effect at all.[18] Under the Bankruptcy Act, requiring debts provable in bankruptcy to be liquidated—a sum certain —at the time of the petition in bankruptcy, stipulated attorney's fees can be recovered only when the petition is filed after the maturity of the obligation.[19]

The wording of the stipulation is strictly construed, the fee being allowed only under the conditions set out. A stipulation for attorney's fees in a case of foreclosure, or in event of the instruments being placed in the hands of an attorney for collection, are, therefore, limited to the contingency provided for.[20]

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[14] Snider v. Greer-Wilkinson Lumber Co., 51 Ind. App. 348, 96 N. E. 960 (1912).

[15] See British and American Mortgage Co. v. Stuart, 210 Fed. 425 (C. C. A. 5th, 1914); Mercantile Trust Co. of St. Louis v. Wilmot Road Dist., 12 F. (2d) 718 (C. C. A. 8th, 1926). But see Mechanics'-American Nat. Bank v. Coleman, *supra* note 5, at 28.

[16] In Dodge v. Tulleys, 144 U. S. 451, 12 Sup. Ct. 728 (1892), the court refused to grant the stipulated attorney's fee, following the Nebraska law, but allowed reasonable attorney's fees as a matter of procedure in bankruptcy cases.

[17] Jones v. First Nat. Bank of Ft. Collins, *supra* note 6; Rockwell v. Thompson, 124 Wash. 176, 213 Pac. 922 (1923); *cf.* American Surety Co. v. Lauber, 22 Ind. App. 326, 53 N. E. 793 (1899) (stipulation in contract for attorney's fee enforced in suit on bond given to secure performance).

[18] Note (1921) 21 COL. L. REV. 812; see Benson, *op. cit. supra*, note 3, at 321; L. R. A. 1916 B, 675, 677, annotation.

[19] In re Ledbitter, 267 Fed. 893 (D. Ga. 1920); In re Gimbel, 294 Fed. 883 (C. C. A. 5th, 1923); In re Stamps, 300 Fed. 162 (D. Ga. 1924); First Savings Bank & Trust Co. v. Stuppi, 2 F. (2d) 822 (C. C. A. 8th, 1924); COLLIER, BANKRUPTCY (13th ed. 1923) 1394.

[20] Where a mortgage stipulated attorney's fees in event of foreclosure, they could not be collected where notes were put in the hands of an attorney for collection after maturity, but were paid before the foreclosure suit on the mortgage they secured was actually instituted. Pool v. Thomas, 111 So. 625 (Fla. 1927). Where a mortgagor sued to enjoin foreclosure by the mortgagee, the latter was not allowed attorney fees stipulated in event of action on notes securing the mortgage. Middleton v. Zachary, 136 Miss. 395, 101 So. 558 (1924). But where a trust deed stipulated for all expenses incurred in any suit concerning the debt, the plaintiff was allowed to collect attorney's fees in suits on a mechanic's lien on property

The danger of such stipulations operating in an oppressive manner, as is feared by those supporting the view of their invalidity, is largely obviated by the qualification of all such stipulations that they be reasonable. The stipulations may provide either for a reasonable fee or for a certain percentage, usually 5, 10, or 15 percent, of the amount due at maturity.[21] In the latter type of stipulation courts may hold the stipulation reasonable in absence of proof to the contrary, or may disregard the specified percent and grant a reasonable fee not exceeding the amount stipulated. In Iowa the amount is fixed by statute.[22] In Oregon a stipulation for anything but a reasonable fee is void.[23] The foregoing discussion, and the practice of the federal courts of granting a reasonable attorney's fee in bankruptcy cases, suggests that court control of attorney's fees authorized by appropriate legislation would be desirable, fees being allowed the successful party as costs. Such is the law in England.[24]

It is submitted that the use of attorney's fee clauses in obligations such as notes, bills of exchange, mortgages, bonds, leases, and contracts do not, under the present rules in most jurisdictions, work undue hardship on the obligor. They tend to discourage litigation,[25] and encourage prompt payment, and their utility in preventing groundless defenses entered to postpone payment might well commend them to those harassed by such procedural filibustering.

RECORDATION OF CONDITIONAL SALES

The present inquiry seeks to ascertain the extent and manner of protection accorded to the reservation of title by a conditional vendor in statutory or common law states. The seller's position is considered as against the claims of the buyer and third

under the deed, in an action of ejectment, and on a suit to foreclose. Huber v. Brown, 243 Ill. 274, 90 N. E. 748 (1909).

[21] A stipulation in excess of 15% would probably be unreasonable and construed as stipulating for only a reasonable fee.

[22] *Supra* note 13. The code provides that stipulations for a certain amount shall be disregarded, and that fees shall be determined by a fixed scale, 10 per cent on amounts up to two hundred dollars, 5 per cent on amounts of two hundred to five hundred dollars, 3 per cent between five hundred and one thousand dollars, and 1 per cent on any higher amount. The amount is to be decreased proportionately if the claim is paid before the return day or before judgment.

[23] Or. Laws (Olsen, 1920) § 561, and cases cited.

[24] 26 HALSBURY, LAWS OF ENGLAND (1914) §§ 1258, 1311.

[25] It has been stated that such stipulations tend to increase litigation. See Raleigh County Bank v. Poteet, *supra* note 4, at 516, 82 S. E. at 334. It seems more likely, however, that for every creditor who goes to court to take advantage of a stipulation for a reasonable attorney's fee, a dozen debtors file frivolous defenses to delay payment, at slight cost to themselves.

parties claiming under the buyer such as "purchasers," chattel mortgagees, pledgees, receivers or trustees in bankruptcy, mechanic lienors, and the lessors, mortgagees or purchasers of real property to which the subject matter of the sale has been affixed.

In the majority of states recording acts have been passed. In those jurisdictions which have no requirement of recordation more difficulties are experienced. The differing provisions, statutory and otherwise, which control conditional sales in various states necessitate a consideration of the decisions in each state individually. The situations outlined above have been considered in the following statutory and common law states: California, Connecticut, Illinois, Massachusetts, New Jersey, New York and Washington. The purpose of this comment is informative purely, and no attempt is made to denote the content of the term "conditional sale," nor to develop any hypothesis.

CALIFORNIA

Although there is no statute requiring recordation of conditional sales, they have been favored by the courts and it is well settled that, as between the parties, they will be enforced according to the terms of the contract.[1]

Purchasers—Bona fide purchasers[2] or subsequent mortgagees[3] of the buyer are not protected against the seller unless the court finds that because of his conduct the seller should be "estopped." If the seller authorized the buyer to resell he will not be permitted to assert his title against a purchaser in good faith in the ordinary course of trade.[4] This result is also attained by statute.[5] The fact that resale was expressly authorized will not estop the seller if the third person had notice of the conditional nature of the buyer's possession.[6]

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[1] Johnson v. Kaeser, 196 Cal. 686, 239 Pac. 324 (1925); Pac. Carbonator Co. v. Haydes, 26 Cal. App. 607, 147 Pac. 988 (1915). This rule obtains generally. See cases cited *infra* under sections on Connecticut, Illinois, Massachusetts, New Jersey, New York, and Washington.

[2] Liver v. Mills, 155 Cal. 459, 101 Pac. 299 (1909); Lundy Furniture Co. v. White, 128 Cal. 170, 60 Pac. 759 (1900); Van Allen v. Francis, 123 Cal. 474, 56 Pac. 339 (1899); Bice v. Arnold, Inc., 75 Cal. App. 629 (1925).

[3] Greene v. Carmichael, 24 Cal. App. 27, 140 Pac. 45 (1914).

[4] A seller who authorizes resale may not recover from the assignee of the buyer's vendee. In a dictum the court said that cancellation of a pre-existing debt as consideration for a sale will not prevent the buyer from being an innocent purchaser. Anglo-Californian Trust Co. v. Pac. Acc. Corp., 70 Cal. App. 41 (1924). An assignee of the seller who allows the seller to retake and resell will be estopped. Chucovich v. San Francisco Securities Corp., 60 Cal. App. 700, 214 Pac. 263 (1923).

[5] Cal. Civ. Code (Deering, 1923) § 1142.

[6] Rodgers v. Bachman, 109 Cal. 552, 42 Pac. 448 (1895); Putnam v. Lamphier, 36 Cal. 151 (1868); Marker v. Williams, *infra* note 10.

Creditors—Receivers—Trustee in Bankruptcy—The reservation of title by the seller will be held effective as against all creditors of the buyer, whether they be judgment creditors or not.[7] It is hardly surprising, therefore, that a receiver or the trustee in bankruptcy acquires no right to possession as against the seller.[8]

Fixtures—When the seller reserves title to chattels which are affixed to the realty he will be protected against the lessor of the buyer[9] but if the realty is subsequently sold or mortgaged to an innocent third party the reservation of title will be ineffective against him.[10]

Mechanics liens—By statute mechanics liens are expressly authorized and may be enforced against the chattel notwithstanding the fact that the seller reserved title in himself.[11]

CONNECTICUT

A Connecticut statute provides that all contracts of conditional sale must be "acknowledged and recorded within a reasonable

[7] Holt Mfg. Co. v. Collins, 154 Cal. 265, 97 Pac. 516 (1908); King v. Cline, 49 Cal. App. 696, 194 Pac. 290 (1920) (an attaching creditor may be placed in the shoes of the buyer upon tendering performance). But see Morris v. Allen, 17 Cal. App. 684, 121 Pac. 690 (1911) (a conditional buyer has no attachable interest).

[8] Perkins v. Mettler, 126 Cal. 100 (1899); In re Farmer's Dairy Ass'n, 234 Fed. 118 (S. D. Cal. 1916). Under § 47 (a) (2) of the Bankruptcy Act as amended in 1910 (U. S. Comp. Stat. (1916) § 9631), the trustee is vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings. This has been construed to confer on trustees in bankruptcy the same power to avoid conditional sales as creditors would have had under the state law. See In re Dancy Hardware & Furniture Co., 198 Fed. 336, 339 (D. Ala. 1912); In re Smith Flynn Com. Co., 292 Fed. 465, 473 (C. C. A. 8th, 1923); Martin v. Commercial Nat. Bank, 245 U. S. 513, 519, 38 Sup. Ct. 176, 178 (1917).

[9] Hendy v. Dinkerhoff, 57 Cal. 3 (1880) (where the seller recovered possession of a boiler from the owner of the land though it was affixed "by means of iron bolts, timber and masonry, . . . and could not be removed without destroying the masonry and greatly damaging the timbers" of the mill); Byron Jackson Iron Works v. Hoge, 49 Cal. App. 700, 194 Pac. 45 (1920).

[10] Oakland Bank v. Cal. Pressed Brick Co., 183 Cal. 295, 191 Pac. 524 (1920); Harter v. Delno, 49 Cal. App. 729, 194 Pac. 300 (1920). See also Marker v. Williams, 39 Cal. App. 674, 179 Pac. 735 (1919), where it was held that notice that an ice making machine, then incorporated into a hotel, had been purchased after the hotel was built, was notice that it might be a fixture subject to detachment as personalty, and sufficient to defeat the claims of both purchaser and mortgagee as against the conditional seller.

[11] Cal. Civ. Code (Deering, 1923) § 3051; Davenport v. Grundy Motor Sales Co., 28 Cal. App. 409, 152 Pac. 932 (1915). Note, however, that since one who has a mechanic's lien, has a lien only upon the property of the owner of the realty, he does not acquire a lien upon a chattel which is affixed to the realty even though he had no notice of the reservation of title. Jordan v. Myres, 126 Cal. 565, 58 Pac. 1061 (1899).

time"[12] or else the sale "shall be held to be *absolute, except as between vendor and vendee or their personal representatives.*"[13] Accordingly, as between buyer and seller there is no question as to the validity of an agreement of conditional sale on the ground that it is not recorded.[14]

Purchasers—If the reservation of title is not acknowledged and recorded, a subsequent bona fide purchaser from the buyer is entitled to protection.[15] But if the goods were bought for *resale,* the seller would probably not be protected as against a purchaser for value from the buyer in the ordinary course of business, even though the conditional sale was recorded;[16] or the purchaser had actual notice.[17] In other situations a purchaser with knowledge of the condition cannot invoke the aid of the statute to defeat the seller's right to possession.[18]

Creditors—Receiver—Trustee in Bankruptcy—Creditors of the buyer are within the protection of the statute if, without knowledge[19] of the seller's interest, they have attached the goods

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[12] Conn. Gen. Stat. (1918) § 4744. Recordation without acknowledgement is insufficient. Craig v. Uncas Paper Board Co., 104 Conn. 559, 133 Atl. 673 (1926). Failure to record within two months is unreasonable. Camp v. Thatcher Co., 75 Conn. 165, 52 Atl. 953 (1902).

The provisions of this section do not apply to household furniture, musical instruments, phonographs, phonograph supplies, radios, bicycles, or property exempt from attachment and execution. Conn. Laws 1927, c. 153.

[13] Conn. Gen. Stat. (1918) § 4746.

[14] See In re Wilcox & Howe Co., 70 Conn. 220, 230, 39 Atl. 163, 166 (1898).

[15] Universal Machinery Co. v. Skinner, 105 Conn. 584, 136 Atl. 468 (1927); *cf.* Lee v. Cram, 63 Conn. 433, 28 Atl. 540 (1893). No cases have been found discussing the question as to what in the nature of value must be given by the purchaser to come within the protection of the statute. *Cf.* Universal Machinery Co. v. Skinner, *supra* (creditors' committee which released attachments on buyer's property in consideration of an assignment of all his assets held a purchaser for value as against the seller).

[16] This question has apparently not been discussed under the statute. But even prior to the adoption of statutes requiring conditional sales to be recorded, it was recognized that a purchaser from a retailer in the ordinary course of trade was protected as against a conditional seller. New Haven Wire Co. Cases, 57 Conn. 352, 18 Atl. 266 (1888); see Robinson Appeal, 63 Conn. 290, 296, 28 Atl. 40, 41 (1893). This is in effect the rule of the Uniform Conditional Sales Act § 9. See cases cited *infra* notes 62 and 82. See 47 A. L. R. 85 (1927) annotation. But in Romeo v. Martucci, 72 Conn. 504, 45 Atl. 1 (1900), a purchaser of an entire stock in trade from the buyer was not protected on the ground that the transaction between buyer and seller constituted a consignment and not a conditional sale.

[17] See New Haven Wire Co. Cases; Robinson's Appeal, both *supra* note 16.

[18] Liquid Carbonic Co. v. Black, 102 Conn. 390, 128 Atl. 514 (1925).

[19] Recordation of an unacknowledged conditional sale does not charge creditors of the buyer with notice. Craig v. Uncas Paper Board Co., *supra* note 12. Knowledge of buyer's trustee before appointment is not imputed to creditors. Nat'l Cash Register Co. v. Woodbury, 70 Conn. 321, 39 Atl. 168 (1898).

in the buyer's possession.[20] And recordation does not always protect the seller. Thus, an agreement of conditional sale used to secure the payment of a past debt to the plaintiff was held void as to creditors even though duly recorded.[21]

It is well settled that a receiver or trustee is not the "personal representative" of the buyer within the meaning of the statute.[22] But it is not certain whether the receiver or trustee must represent "lien" creditors in order to defeat the seller's claim.[23] It has been held that where the seller has retaken possession before any attachment of the goods, or before the appointment of a receiver the latter cannot recover for the benefit of creditors.[24] But if the receiver or trustee is in possession, it is held that failure of the seller to record renders the sale "absolute." [25] It seems, therefore, that in Connecticut the appointment of a receiver or trustee is tantamount to a levy of an attachment for this purpose.[26]

Fixtures—An unrecorded conditional sale of chattels to be affixed to realty is void as to a subsequent bona fide purchaser or mortgagee of the realty.[27] Failure to comply with the old general recording statute has been held to defeat the conditional seller's claim as against the lessor of the premises to which the chattels conditionally sold were attached.[28]

Mechanic's Liens—A mechanic's lien is superior to a conditional seller's right to possession even though the conditional sale was duly recorded.[29]

ILLINOIS

Conditional sales were from an early date looked upon with disfavor and accordingly it was held for many years that,

[20] Cohen v. Schneider, 70 Conn. 505, 40 Atl. 455 (1898); American Clay Machinery Co. v. N. E. Brick Co., 87 Conn. 369, 87 Atl. 731 (1913). Otherwise, if the transaction is regarded as a consignment. Harris v. Coe, 71 Conn. 157, 41 Atl. 552 (1898) (stock in trade). Or a lease. Lambert Hoisting Engine Co. v. Carmody, 79 Conn. 419, 65 Atl. 141 (1906).

[21] Cappelletti v. Tierney, 101 Conn. 562, 126 Atl. 839 (1924). *A*, owing money to *B*, executed an absolute bill of sale of his auto to *B* who, as part of the same transaction, executed a condition bill of sale of the auto to *A* for the amount of the debt. *A* was in continuous possession except for one day. The transaction was deemed fraudulent as to *A's* creditors.

[22] In re Wilcox and Howe, *supra* note 14; Nat'l Cash Register Co. v. Woodbury, *supra* note 19; Craig v. Uncas Paper Board Co., *supra* note 12.

[23] See *supra* note 8.

[24] American Clay Machinery Co. v. N. E. Brick Co., *supra* note 20.

[25] See cases cited *supra* note 22; In re Steinberg, 300 Fed. 881 (D. Conn. 1924).

[26] See In re Steinberg, *supra* note 25, at 883.

[27] Conn. Laws 1927, c. 277.

[28] Camp v. Thatcher Co., *supra* note 1; 45 A. L. R. 967 (1926) annotation.

[29] N. B. Real Estate Co. v. Collington, 102 Conn. 652, 129 Atl. 780 (1925).

whereas the retention of title was effective as between seller and buyer,[30] it would not be protected against innocent creditors, mortgagees or bona fide purchasers from the buyer.[31] In 1915 the Uniform Sales Act was adopted and in 1925 the Illinois Supreme Court in *Sherer-Gillett Co. v. Long*[32] construed § 20[33] of that act to be an express authorization of conditional sales and held that it had therefore changed the law in that regard.

Purchasers—The *Sherer Case* held that the seller who reserved title to a display counter to be used in a grocery store would be protected against the claims of an innocent purchaser for value from the buyer.[34] What the court would hold in a contest between the seller and a purchaser from a buyer who was authorized to resell is a matter of conjecture only, though it was intimated in the *Sherer Case* that the vendor might be estopped to assert his title if he misled a third party by something more than merely parting with possession.[35]

Creditors—Trustee in Bankruptcy—The conditional seller has a right to possession as against judgment creditors of the buyer who levy execution on the chattel.[36] In recognition of the validity now accorded conditional sales, the Federal Circuit Court of Appeals held in a recent case that, even though a contract covering farm tools authorized resale by the buyer, the seller could recover the tools from the trustee in bankruptcy of the buyer.[37]

Mechanics liens—Liens for labor or repairs are entitled to priority over properly recorded prior chattel mortgages[38] and

[30] Emerson Piano Co. v. Maund, 85 Ill. App. 453 (1898); Daniels v. Thompson, 48 Ill. App. 393 (1892).

[31] Gilbert v. Nat'l Cash Register Co., 176 Ill. 288, 52 N. E. 22 (1898) (recording under the chattel mortgage act would not protect seller against execution creditor); Chickering v. Bastress, 130 Ill. 206, 22 N. E. 542 (1889); McCormick v. Hadden, 37 Ill. 370 (1865) (one who merely extended credit protected against conditional seller); Brundage v. Camp, 21 Ill. 330 (1859); Starver Carriage Co. v. Richardson, 203 Ill. App. 620 (1916).

[32] 318 Ill. 432, 149 N. E. 225 (1925).

[33] Ill. Rev. Stat. (Smith, 1921) c. 121½, § 20: "Where there is a contract to sell specific goods . . . the seller may, by the terms of the contract or appropriation, reserve the right of possession or property in the goods until certain conditions have been fulfilled . . ."

[34] The court held that section 23 of the act prevented title passing to the purchaser. Ill. Rev. Stat. (Smith, 1921) c. 121½, § 23: "Subject to the provisions of this act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had unless the seller is by his conduct precluded from denying the seller's authority to sell."

[35] *Supra* note 32, at 434, 149 N. E. at 226.

[36] Graver Bartlett Nash Co. v. Krans, 239 Ill. App. 522 (1925).

[37] John Deere Plow Co. v. Hamilton, 19 F. (2d) 965 (C. C. A. 7th, 1927).

[38] Ehrlich v. Chapple, 228 Ill. App. 293 (1923); *cf.* (1928) 37 YALE LAW JOURNAL 527.

it is believed that the court would also protect the lien as against the claims of the conditional seller.

In the absence of a recording act and with so recent a change in policy, the law on conditional sales is still in a formative stage.

MASSACHUSETTS

From very early times sales in which the seller reserved title have been recognized and protected by the courts, and as against the seller the buyer does not get title until he has fulfilled the conditions.[39] In general there is no necessity for recordation before the seller's interest will be protected against the claims of third parties, but in sales of railroad rolling stock,[40] household furniture,[41] and heating apparatus [42] statutory regulations must be complied with.

Purchasers—Although there is no requirement of recordation, the seller's reserved title is held to be superior to the claims of bona fide purchasers [43] or subsequent mortgagees [44] of the buyer unless the seller has by his conduct misled the third party.[45] This protection, however, will not be accorded the seller who expressly or impliedly authorizes the buyer to resell and the courts have estopped him in this situation from asserting his title against an innocent purchaser.[46]

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[39] Hussey v. Thornton, 4 Mass. 404 (1808); Cottrell & Sons Co. v. Carter, Rice & Co., 173 Mass. 155, 53 N. E. 375 (1899); Moors v. Drury, 186 Mass. 424, 71 N. E. 810 (1904).

[40] Mass. Gen. Laws (1921) c. 159, § 55. See Lorrain Steel Co. v. Norfolk St. Ry., 187 Mass. 500 (1905), where it was held that this statute applies only to completed cars and does not require a conditional sale of trucks, motors, and motor equipment to be recorded.

[41] Mass. Gen. Laws (1921) c. 255, § 12 (conditional sales of furniture or other household effects must be in writing and a copy must be furnished the vendee).

[42] See *infra* note 49.

[43] Lynn Morris Plan Co. v. Gordon, 251 Mass. 323 (1925) (purchaser of an automobile from vendee's assignee, a dealer, not protected); Carter v. Kingman, 103 Mass. 517 (1870); Hirschorn v. Canney, 98 Mass. 149 (1867) (defendant not protected though he purchased 70,000 cigars from plaintiff's vendee, a dealer); Deshon v. Bigelow, 8 Gray 159 (Mass. 1857); Blanchard v. Child, 7 Gray 155 (Mass. 1856) (purchaser at execution sale); Sargent v. Metcalf, 5 Gray 306 (Mass. 1855); Coggill v. Hartford & New Haven R. R., 3 Gray 545 (Mass. 1855) (seller replevies wool from bailee of innocent purchaser from seller's vendee, a wool manufacturer).

[44] Robinson v. Bird, 158 Mass. 357, 33 N. E. 391 (1893); Armour v. Pecker, 123 Mass. 143 (1877) (pledgee); Benner v. Puffer, 114 Mass. 376 (1874).

[45] Silver v. Roberts Garage, Inc., 240 Mass. 571 (1922).

[46] Guaranty Security Corp. v. Eastern Steamship Co., 241 Mass. 120, 134 N. E. 364 (1922); Spooner v. Cummings, 151 Mass. 313, 23 N. E. 839 (1890). *Contra:* Burbank v. Crooker, 7 Gray 158 (Mass. 1856) (where the vendor of a stock of goods with power in the vendee to resell, recovered for conversion from an innocent purchaser of the whole stock). See

Creditors—Trustee in Bankruptcy—Creditors of the buyer who attach or levy execution upon the property are responsible to the seller for conversion and he may recover the chattel in replevin from them or those who hold under them.[47] Nor may the trustee in bankruptcy take or hold the goods as against the seller, even though the seller authorized resale, as long as the reservation of title was in good faith.[48]

Fixtures—The seller who reserves title to personal property which is to be affixed to the realty will be protected by statute[49] as to those fixtures expressly mentioned therein, or such as are of the same type,[50] but as to other articles so affixed his title will not prevail as against prior mortgagees of the land[51] and subsequent mortgagees and grantees without notice.[52]

Hirschorn v. Canney, *supra* note 43, where the sale of 70,000 cigars to a tobacco dealer without any provision against resale was not held sufficient to estop the seller against a bona fide purchaser.

[47] Treeful v. Mills, 234 Mass. 141, 125 N. E. 183 (1919); Nichols v. Ashton, 155 Mass. 205, 29 N. E. 519 (1892); Hill v. Freeman, 3 Cush. 257 (Mass. 1849); Barrett v. Pritchard, 2 Pick. 512 (Mass. 1824) (where a reservation of title to wool "before manufactured, after being manufactured, or in any stage of manufacturing" was upheld against an attaching creditor); Marston v. Baldwin, 17 Mass. 605 (1822).

[48] Guaranty Security Corp. v. Reed, 299 Fed. 265 (C. C. A. 1st, 1924) (the agreement between the parties was that the proceeds of the resale were to be appropriated to the seller). But otherwise, where the court finds that the seller clothed the buyer with "indicia of ownership." In re Metropolitan Motor Car Co., 299 Fed. 320 (D. Mass. 1924). And where, because there was no allocation of proceeds and no separation of the seller's goods from the buyer's, the court finds the reservation of title made in bad faith. Flanders Motor Co. v. Reed, 220 Fed. 642 (C. C. A. 1st, 1915).

[49] Mass. Gen. Laws (1921) c. 184, § 13: "No conditional sale of heating apparatus, plumbing goods, ranges, or other articles of personal property, which are afterwards wrought into or attached to the real estate, whether they are fixtures at common law or not, shall be valid as against any mortgagee, purchaser or grantee of such real estate, unless not later than ten days after the delivery thereon of such personal property a notice such as is herein prescribed is recorded in the registry of deeds for the county or district where the real estate lies . . ." Nichels v. Scholl, 228 Mass. 205, 117 N. E. 34 (1917).

[50] No protection is given to the title of the vendor of bowling alleys as against the lessor of the buyer. Gerlach Co. v. Noyes, 241 Mass. 69, 134 N. E. 612 (1922). The statute does not protect a seller of iron staircases against a subsequent grantee of the realty. Babcock Davis Corp. v. Paine, 240 Mass. 438, 134 N. E. 342 (1922).

[51] Clary v. Owen, 15 Gray 522 (Mass. 1860); Hunt v. Bay State Iron Co., 97 Mass. 279 (1867); Gerlach Co. v. Noyes, *supra* note 50, at 72, 134 N. E. at 613. But if the mortgagee has consented to treat the property as personalty, neither he nor his assignee can resist the conditional seller's right to possession. Bartholomew v. Hamilton, 105 Mass. 239 (1870).

[52] Hunt v. Bay State Iron Co., *supra* note 51; Ridgway Stone Co. v. Way, 141 Mass. 557, 6 N. E. 714 (1886); see Wentworth v. Woods Mach. Co., 163 Mass. 28, 32, 39 N. E. 414, 415 (1895).

Mechanic's Liens—Liens secured by a bailee of the buyer are protected by statute and prevail over the reserved title. It is necessary, however, that the work be done without actual notice of the conditional sale and that the property was delivered to the lienor prior to the breach of any condition of the sale.[53]

NEW JERSEY

For many years, statutes in New Jersey have required conditional sales to be recorded in order that a reservation of title by the seller be sustained against third parties,[54] but the rule is otherwise as between buyer and seller.[55]

Purchasers—It is now well settled that an unrecorded conditional sale is void as to a bona fide purchaser [56] from the buyer.[57] But it is apparently an open question as to what in the nature of "value" must be paid by the purchaser in order to be within the protection of the recording act. Under an earlier statute,[58] an antecedent debt was held sufficient value to protect a chattel mortgagee as against a prior unrecorded conditional sale.[59] It remains to be seen whether the same result will be reached under the present act.[60] Where, however, a seller has "expressly or impliedly" assented [61] to a *resale* of the goods by a buyer, it is held that a purchaser *for value* from the buyer in the "ordinary course of business" is protected even though the conditional sale is duly recorded.[62] A typical transaction of this sort

[53] Mass. Gen. Laws (1921) c. 255, § 35.

[54] The present act is in form the Uniform Conditional Sales Act. Laws 1919, c. 210, p. 461; N. J. Comp. Stat. (Cum. Supp. 1911-1924) §§ 182-87 to 182-118.

[55] N. J. Comp. Stat. (Cum. Supp. 1911-1924) § 182-90. In re B & B Motor Sales Corp., 277 Fed. 808 (D. N. J. 1922).

[56] Purchaser for this purpose includes mortgagee and pledgee. N. J. Comp. Stat. (Cum. Supp. 1911-1924) § 182-87.

[57] N. J. Comp. Stat. (Cum. Supp. 1911-1924) § 182-91; Gen'l Motors Acceptance Corp. v. Smith, 101 N. J. L. 154, 127 Atl. 179 (1925); Halliwell v. Finance Co., 98 N. J. L. 133, 118 Atl. 837 (1922); Nat'l Cash. Reg. Co. v. Daly, 80 N. J. L. 39, 76 Atl. 325 (1910). The rule was otherwise in the absence of statute. Marvin Safe Co. v. Norton, 48 N. J. L. 410, 7 Atl. 418 (1886).

[58] N. J. Laws 1889, c. 421.

[59] Knowles Loom Works v. Vacher, 57 N. J. L. 490, 31 Atl. 306 (1895).

[60] The decision in the Knowles case, *supra* note 59, was based on the fact that the statute in force at the time merely required that the mortgage be "in good faith." N. J. Comp. Stat. (Cum. Supp. 1911-1924) § 182-91 does not stipulate that the purchase be "for value." But *cf.* Board of Education v. Zinc, 137 Atl. 713 (N. J. 1927). See also, (1926) 36 YALE LAW JOURNAL 564.

[61] This would ordinarily be the case in the event of a sale to a dealer in such commodities.

[62] N. J. Comp. Stat. (Cum. Supp. 1911-1924) § 182-95; Finance Corp. v. Jones, 97 N. J. L. 106, 116 Atl. 227 (1922), *aff'd* 98 N. J. L. 165, 119 Atl. 171 (1922).

is one in which an investment company finances the purchase of automobiles by a dealer, reserving title to the automobiles by a contract of conditional sale as security. Under such circumstances it seems that only a purchaser from the dealer for value in the strict sense will be protected.[63]

Creditors—Receiver—Trustee in Bankruptcy—Under the present statute, an unrecorded conditional sale is void as to any creditor who, without notice,[64] acquires a lien by attachment or levy before it is filed, unless filed within ten days after making the conditional sale.[65] Thus, although attachment occurred prior to recordation, the seller is protected if the contract is recorded within the ten day period.[66] But this period is not an absolute limitation. In a recent case [67] it was held that a conditional bill of sale which was not recorded within ten days but which was in fact recorded long anterior to the issuance of a writ of attachment was valid as against the attaching creditor.

An unrecorded conditional sale is valid as against a receiver unless he represents creditors having a lien by levy or attachment.[68] The appointment of the receiver, or his taking possession of the goods does not have this effect.[69] The same result

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[63] N. J. Comp. Stat., *supra* note 62, is apparently to be strictly construed so that mortgagees, pledgees, or creditors of the dealer will not be protected. See case cited *supra* note 62; 47 A. L. R. 85 (1927) annotation; (1922) 2 U. L. A. 16.

[64] The mere fact that on the day the writ of attachment was issued the seller retook the goods is not notice that the sale was conditional. Brown v. Christian, 97 N. J. L. 56, 117 Atl. 294 (1921).

[65] N. J. Comp. Stat. (Cum. Supp. 1911-1924) § 182-91. At common law, seller's "title" was paramount to the claims of buyer's creditors. See Thayer Mercantile Corp. v. First Nat'l. Bank., 98 N. J. L. 29, 32, 119 Atl. 94, 95 (1922). Neither were creditors protected under the statute of 1894. Wooley v. Geneva Wagon Co., 59 N. J. L. 278, 35 Atl. 789 (1896) (attaching creditor). By statute in 1898 an unrecorded conditional sale was void as to "judgment" creditors. Gen'l Electric Co. v. Transit Equipment Co., 57 N. J. Eq. 460, 42 Atl. 101 (1898). The present statute protects "lien" creditors. Morey Co. v. Schaad, 98 N. J. L. 799, 121 Atl. 622 (1923); *cf.* Commercial Credit Co. v. Vineis, 98 N. J. L. 376, 120 Atl. 417 (1922) (landlord who distrained goods of tenant bought on conditional sale held not a "lien" creditor for this purpose). On this question see 45 A. L. R. 949 (1926) annotation.

[66] Huber v. Cloud, 130 Atl. 562 (N. J. 1925).

[67] Morey Co. v. Schaad, *supra* note 65; see In re Press Printers, 12 F. (2d) 660, 666 (C. C. A. 3d, 1926), *rev'g* on this point In re Press Printers 4 F. (2d) 159 (D. N. J. 1924).

[68] Koerner v. United States Paper Co., 94 N. J. Eq. 655, 121 Atl. 338 (1923); Olson v. Vorhees, 292 Fed. 113 (C. C. A. 3d, 1923); *cf.* Wood v. Cox, 92 N. J. Eq. 307, 113 Atl. 501 (1921); Rapoport v. Rapoport Express Co., 90 N. J. Eq. 519, 107 Atl. 822 (1919); Falaenau v. Reliance Steel Foundry Co., 74 N. J. L. 325, 69 Atl. 1098 (1908) (all decided under former act protecting "judgment"creditors).

[69] Koerner v. United States Paper Co., *supra* note 68.

should obtain as against the buyer's trustee in bankruptcy. But under § 47 (a) (2) of the bankruptcy act.[70] The same result considered as having the status of a "lien" creditor as of the date of the filing of the petition in bankruptcy.[71] This would require recordation prior to the filing of the petition in order to be effective against the trustee.[72] It would seem, however, that where the trustee represents general creditors his status for this purpose should be that of a general creditor.[73]

Fixtures—If the goods conditionally sold are so attached to the realty as "to become a part thereof" and as not to be removable without "material" injury to the realty, recordation is ineffective to protect the seller as against anyone not consenting to the annexation.[74] But if the goods may be detached without "material" injury to the realty, the conditional seller can protect his interest by recording the contract in the office where a deed of the realty to which the chattels are attached is recorded.[75] As against an owner of realty, a reservation of title to fixtures is void unless it is duly recorded before they are affixed.[76]

Mechanic's Liens—In New Jersey, as in many other states, a mechanics lien is protected despite the fact that the chattel

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[70] U. S. Comp. Stat. (1916) § 9631.

[71] Bailey v. Baker Ice Machine Co., 239 U. S. 268, 36 Sup. Ct. 50 (1915).

[72] *Ibid.* See In re Press Printers, *supra* note 67, at 666.

[73] In other words it would seem that § 47 (a) (2) merely means that in those states where certain procedure must be complied with by *lien creditors* who *alone* are protected by the local recording statute, the appointment of a trustee in bankruptcy obviates such procedure. In In re Golden Cruller & Doughnut Co., 6 F. (2d) 1015 (D. N. J. 1925), the conditional sale was not recorded until after the filing of the petition in bankruptcy and there were no "lien" creditors. The court avoided the issue and held for the seller on the ground that the schedules of the petitioner stating that the goods were bought on conditional sale were notice to the trustee of the seller's title.

[74] N. J. Comp. Stat. (Cum. Supp. 1911-1924) § 182-93; Olson v. Vorhees, 292 Fed. 113 (C. C. A. 3d, 1923) (conditional sale of elevator held void as to receiver in bankruptcy of buyer). This provision did not appear in earlier statutes.

[75] Halbren v. Samuels, 1 N. J. Misc. Rep. 515 (1923). Failure to do so invalidates the conditional sale as against "subsequent purchasers of the realty for value without notice." N. J. Comp. Stat. (Cum. Supp. 1911-1924) § 182-93; Lee Co. v. Jersey City Bill Posting Co., 78 N. J. L. 150, 73 Atl. 1046 (1919); In re Savage Baking Co., 259 Fed. 976 (D. N. J. 1919) (subsequent mortgagee); Behn v. Nat'l Bank, 65 N. J. L. 591, 48 Atl. 527 (1901) (subsequent mortgagee). *Contra:* Falaenau v. Reliance Steel Foundry Co., *supra* note 68 (mortgage probably given prior to conditional sale).

[76] N. J. Comp. Stat. (Cum. Supp. 1911-1924) § 182-93; see 45 A. L. R. 967 (1926) annotation; *cf.* Palmateer v. Robinson 60 N. J. L. 433, 38 Atl. 957 (1897).

impressed with the lien was sold under a contract of conditional sale which was duly recorded.[77]

NEW YORK

The Uniform Conditional Sales Act was recently adopted in New York.[78] Under this statute the common law rule that a contract of conditional sale is valid as between buyer and seller, although not recorded, is not changed.[79]

Purchasers—The New York statutes have uniformly required conditional sales to be recorded in order to be valid as against subsequent "bona fide purchasers" from the buyer.[80] But the statutes make no mention of whether the "purchaser" must be a "purchaser for value" in order to be within the protection of the recording act.[81] In the present act, however, it is provided

[77] Cattell v. Rehrer, 94 N. J. Eq. 292, 119 Atl. 374 (1922).

[78] N. Y. Laws 1922, c. 642, § 2.

[79] N. Y. Laws 1922, c. 642, § 2 (§ 62); see Rivara v. Stewart Co., 241 N. Y. 259, 265, 149 N. E. 851, 852 (1925); Van Derveer v. Canzano, 206 App. Div. 130, 200 N. Y. Supp. 563 (4th Dept. 1923); Hunt Mach. Co. v. Stewart, 57 Hun 545, 11 N. Y. Supp. 448 (3d Dept. 1890).

[80] N. Y. Laws 1922, c. 642, § 2 (§ 65). The present act (§ 62) expressly defines purchasers to include pledgees and mortgagees.

With the exception of the statute in 1884 which only protected subsequent purchasers and mortgagees, the statutes have uniformly protected subsequent bona fide purchasers, mortgagees, and pledgees of the buyer as against an unrecorded conditional sale. Campbell Printing Press Mfg. Co. v. Oltrogge, 13 Daly 247 (N. Y. 1885) (purchaser); Holley v. Motor Co., 188 App. Div. 798, 177 N. Y. Supp. 429 (4th Dept. 1919) (purchaser); Berner v. Kaye, 14 Misc. 1, 35 N. Y. Supp. 181 (1895) (mortgagee). Vincinguerra v. Fagan, 57 Misc. 224, 109 N. Y. Supp. 317 (1907) (mortgagee); Leonard v. Harris, 147 App. Div. 458, 131 N. Y. Supp. 909 (3d Dept. 1911) (pledgee).

In the absence of statute it was held that the conditional seller could recover as against a subsequent "purchaser" from the buyer. Austin v. Dye, 46 N. Y. 500 (1871) (mortgagee); Puffer v. Reeve, 35 Hun 480 (1st Dept. 1885) (purchaser). But compare Comer v. Cunningham, 77 N. Y. 391 (1879).

A "purchaser" with knowledge cannot invoke the aid of the statute. Creamery Mfg. Co. v. Horton, 178 App. Div. 467, 165 N. Y. Supp. 257 (3d Dept. 1917); Am. Soda Fountain Co. v. Najarian, 119 Misc. 219, 195 N. Y. Supp. 555 (Sup. Ct. 1922).

The burden of proof is on the purchaser from the buyer to show that he is a bona fide purchaser. Berner v. Kaye, *supra;* Craine Silo Co. v. Alden Bank, 218 App. Div. 263, 218 N. Y. Supp. 143 (4th Dept. 1926).

[81] No cases have been found discussing the question under the present act. It has been held, however, that a chattel mortgage given in consideration of an antecedent debt was not entitled to protection as against a prior unrecorded conditional sale. Duffus v. Howard Furnace Co., 8 App. Div. 567, 40 N. Y. Supp. 925 (4th Dept. 1896). But under § 51 of the N. I. L. a transferee in consideration of an antecedent debt is a holder for value. First Nat'l Bank of New Haven v. Moir, 125 Misc. 722, 211 N. Y. Supp. 482 (Sup. Ct. 1925) It is doubted that the same result will be reached for

that if the seller has "expressly or impliedly" authorized a *re-sale* of the goods by the buyer, recordation is ineffective to protect a reservation of title as against "purchasers in good faith *for value* and without actual knowledge" of the condition.[82]

Creditors—Receivers—Trustee in Bankruptcy—Prior to the amendment of 1922, creditors of the buyer were not within the protection of recording acts.[83] Under the present statute,[84] a creditor of the buyer is protected, if, without notice[85] of the conditional sale, he has acquired a lien, "by attachment or levy" before it is recorded. Consequently, it was held that an unrecorded conditional sale was void as to the buyer's trustee in bankruptcy, who, by virtue of § 47 (a) (2) was said to have the status of a "lien" creditor.[86] But in a recent decision by the same court, it was held that a receiver appointed under a general creditor's bill was not entitled to possession as against a conditional seller, even though the conditional sale was not recorded, since to defeat the seller's title, the receiver must represent "lien" creditors.[87] It would seem that the same result should obtain in the case of the trustee in bankruptcy as to hold otherwise is to misconstrue the meaning of § 47 (a) 2 of the bankruptcy act.[88]

Fixtures—The provisions of the New York statute concerning conditional sales of fixtures are identical with those of New Jersey.[89] In short, a conditional seller may protect his interest

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the purpose of protecting a transferee of the buyer as against an unrecorded conditional sale.

[82] N. Y. Laws 1922, c. 642, § 2 (§ 69). A delivery of goods to a buyer for consumption or sale is inconsistent with continued ownership of a seller as against a purchaser from the buyer who buys in good faith and without actual notice of the condition and who pays full consideration. Fitzgerald v. Fuller, 19 Hun 180 (N. Y. 1879); *cf.* Clark v. Flynn, 120 Misc. 474, 199 N. Y. Supp. 583 (Sup. Ct. 1923). Under similar circumstances a reservation of property has been held void as to creditors of the buyer. Ludden v. Hazen, 31 Barb. 650 (N. Y. 1860); Cook v. Gross, 60 App. Div. 446, 69 N. Y. Supp. 924 (2d Dept. 1901). *Contra:* Cole v. Mann, 62 N. Y. 1 (1875). But creditors of the buyer would probably not be protected under the statute. See *supra* note 63.

[83] Fennikoh v. Gunn, 59 App. Div. 132, 69 N. Y. Supp. 12 (2d Dept. 1901) (execution creditor). Accordingly, it was held that an unrecorded conditional sale was not void as to the buyer's trustee in bankruptcy. In re Remson Mfg. Co., 232 Fed. 594 (C. C. A. 2d, 1916).

[84] N. Y. Laws 1922, c. 642, § 2 (§ 65).

[85] An unrecorded conditional sale has priority over a levy by a judgment creditor who knew of the condition. Biederman v. Edson, 128 Misc. 455, 219 N. Y. Supp. 115 (Sup. Ct. 1926).

[86] In re Master Knitting Corp., 7 F. (2d) 11 (C. C. A. 2d, 1925).

[87] Quinn v. Bancroft Jones Corp., 18 F. (2d) 727 (C. C. A. 2d, 1927).

[88] *Supra* note 73.

[89] N. Y. Laws 1922, c. 642, § 2 (§ 67).

by duly recording the conditional sale,[90] so long as the chattels may be detached without "material" injury to the realty.[91]

Mechanic's Liens—A conditional seller cannot claim priority over liens for labor or repairs furnished at the instance of the buyer even though the conditional sale is duly recorded.[92]

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[90] Under § 67, *supra* note 89, although the chattels may be severed without "material" injury to the realty, if they have been so attached as to "become a part" of the realty a reservation of title to the chattels by contract of conditional sale, which is not duly recorded, is void as to subsequent bona fide purchasers and mortgagees of the realty for value. Kohler Co. v. Brasun, 128 Misc. 507, 219 N. Y. Supp. 432 (Sup. Ct. 1926) (purchaser); Kirk v. Crystal, 118 App. Div. 32, 103 N. Y. Supp. 17 (1st Dept. 1907), *aff'd.* 193 N. Y. 622, 86 N. E. 1126 (1908) (purchaser) (under § 62 of former statute); Hammond v. Carthage Sulphite Paper Co., 8 F. (2d) 35 (C. C. A. 2d, 1925) (mortgagee—former act); Cohoes Iron Foundry Co. v. Glavin, 190 App. Div. 87, 179 N. Y. Supp. 357 (3d Dept. 1919) (building loan mortgagee). Otherwise, if the chattels do not "become a part" of the realty. Craine Silo Co. v. Alden Bank, *supra* note 80 (silo). Central Union Gas Co. v. Browning, 210 N. Y. 10, 103 N. E. 822 (1913) (gas ranges). Chattels attached under a conditional sale duly filed are not subject to the lien of a prior mortgage of the realty. DeBevoise v. Maple Ave. Const. Co., 228 N. Y. 496, 127 N. E. 487 (1920); Fitzgibbons Boiler Co. v. Manhasset Realty Corp., 198 N. Y. 517, 92 N. E. 1084, *rev'g* 125 App. Div. 764, 110 N. Y. Supp. 225 (1st Dept. 1908).

As against the owner of the building, recordation must occur prior to the attachment of the goods to the realty, to protect the conditional seller. *Cf.* Otis Elevator Co. v. Rochester Friendly Home, 103 Misc. 76, 169 N. Y. Supp. 389 (Sup. Ct. 1918) (under former act).

[91] If the chattels have been so attached as not to be severable without "material" injury to the realty the seller may not claim the goods as against anyone not expressly consenting to the reservation. *Supra* note 89. No cases have been found applying this provision. *Cf.* East N. Y. Electric Co. v. Petmaland Realty Co., 243 N. Y. 477, 154 N. E. 538 (1926) (electric wiring) decided under the former statute. (1927) 36 YALE LAW JOURNAL 713. See Olsen v. Vorhees, *supra* note 74.

Under § 64 of the former Conditional Sales Act [N. Y. Laws 1909, c. 45] a conditional sale of fixtures was valid for the period of one year for each filing subject to a renewal by filing within 30 days of the expiration of the existing term. The Uniform Conditional Sales Act expressly repealed this provision and provided a term of three years for the original filing. N. Y. Laws 1922, c. 642, § 71. Provisions for re-filing were also made. Failure to re-file made the conditional sale void as provided in § 67. See *supra* notes 90, 91. Thus, although under the former Act creditors were generally protected by a failure to re-file, they may not be protected in all instances under the Uniform Act. See Crocker-Wheeler Co. v. Genesee Recreation Co., 140 App. Div. 726, 730, 125 N. Y. Supp. 721, 725 (4th Dept. 1910) (former act). Curiously, § 64 of the former act has since been slightly amended despite its repeal. N. Y. Laws 1925, c. 561. If the effect of the amendment is to re-enact the former act, the interpretation of the resultant statutory conflict is a matter of conjecture. See Cahill's N. Y. Cons. Laws Ann. (Supp. 1927) 532. Chronologically it is a limitation of § 71 of the Uniform Act.

[92] Terminal & Town Taxi Corp. v. O'Rourke, 117 Misc. 761, 193 N. Y. Supp. 238 (Mun. Ct. 1922).

WASHINGTON

Conditional sales as between the parties are valid and enforceable even though the recording statute is not complied with.[93] Recordation under the statute[94] is necessary, however, before the seller can assert his title against innocent third parties.[95]

Purchasers—The statute protects bona fide purchasers[96] from the buyer under an unrecorded contract,[97] but it is well settled that if the sale is properly recorded such purchasers get no rights superior to the seller's.[98] Notwithstanding recordation, if the contract authorizes resale, or if the seller knew or should have known that the buyer would sell or pledge the property, he will be estopped from asserting his title against innocent mortgagees[99] or purchasers.[100]

Creditors—Receivers—Trustee in Bankruptcy—Creditors, "whether or not they have or claim a lien" are protected against unrecorded conditional sales by the statute, but in order to claim this protection they must have extended credit subsequently to the sale.[101] The receiver[102] and the trustee in bankruptcy[103] of

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[93] Jones v. Reynolds, 45 Wash. 371, 88 Pac. 577 (1907); Quinn v. Parke & Lacy Machine Co., 5 Wash. 276, 31 Pac. 866 (1892).

[94] Wash. Comp. Stat. (Rem. 1922) § 3790: "That all conditional sales of personal property, or leases thereof, containing a conditional right to purchase, where the property is placed in the possession of the vendee, shall be absolute as to all bona fide purchasers, pledgees, mortgagees, encumbrancers and subsequent creditors, whether or not such creditors have or claim a lien upon such property, unless within ten days after the taking of possession by the vendee, a memorandum of such sale, stating its terms and conditions and signed by the vendor and vendee, shall be filed in the auditor's office of the county wherein, at the date of the vendee's taking possession of the property, the vendee resides."

[95] Eisenberg v. Nichols, 22 Wash. 70, 60 Pac. 124 (1900).

[96] One who loans money to another to be used to purchase an automobile and who subsequently takes a chattel mortgage on the car without notice of an unrecorded conditional sale is a bona fide "encumbrancer" and protected by the statute. Worley v. Metropolitan Motor Car Co., 72 Wash. 243, 130 Pac. 107 (1913). A purchaser of property in consideration of a pre-existing debt is protected by the statute from an unrecorded conditional sale. Johnston v. Wood, 19 Wash. 441, 53 Pac. 707 (1898). An assignee for the benefit of creditors is not a bona fide purchaser. Sunel v. Riggs, 93 Wash. 314, 160 Pac. 950 (1916).

[97] Eisenberg v. Nichols, *supra* note 95.

[98] State Bank v. Johnson, 104 Wash. 550, 177 Pac. 340 (1918).

[99] Gen. Motors Acc. Corp. v. Land Co., 118 Wash. 593, 204 Pac. 194 (1922).

[100] Gramm-Bernstein Motor Truck Co. v. Todd, 121 Wash. 145, 209 Pac. 3 (1922).

[101] Bornstein & Sons v. Allen, 127 Wash. 314, 220 Pac. 301 (1923); American Multigraph Sales Co. v. Jones, 58 Wash. 619, 109 Pac. 108 (1910).

[102] Nat'l Bread Wrapping Mach. Co. v. Crowl, 137 Wash. 621, 243 Pac. 840 (1926).

[103] See *supra* note 8. In re Krache, 1 F. (2d) 606 (W. D. Wash. 1924); Wood v. Brunswick Balke-Collender Co., 190 Fed. 935 (C. C. A. 9th, 1911); Chilberg v. Smith, 174 Fed. 805 (C. C. A. 9th, 1909).

the buyer, since they represent creditors, may hold the property only if the sale is unrecorded within the statutory period.

Fixtures—When the seller has reserved title to property to be affixed to the realty he will be protected against the claims of prior mortgagees of the realty if the property can be removed without impairing the mortgagee's security as of the time it was acquired.[104] The courts seek to determine whether a mortgagee or an incumbrancer when he acquired his security should have relied on the assumption that the particular part of the building in question was a fixture or a part thereof.[105] Consequently actual knowledge of the conditional sale will defeat the claims of subsequent purchasers[106] and mortgagees.[107] If there is no notice, however, the seller's title will not be protected.[108] The effect of recordation is uncertain.[109] It is believed, however, that if properly recorded the seller's title will be protected.

Mechanic's Liens—In order to enforce a mechanics lien against the property if the sale is properly recorded, it is necessary that the lienor show that the seller expressly requested, sanctioned, or authorized the labor.[110]

MODERN SURVIVAL OF IMPRISONMENT FOR DEBT

In the recent case of *Read v. Dunn,* 138 Atl. 210 (R. I. 1927), the petitioner sought a writ of prohibition to restrain the respondent justice from proceeding upon a complaint in which the prisoner requested the benefits of the poor debtor's oath in order to secure his release from jail. The petitioner had recovered, in an action of trespass against the prisoner, a judgment for damages for the death of his wife caused by the act of the prisoner in running her down with an automobile. Following this, an execution against the body of the prisoner had been issued, resulting in his commitment. The court held that the respondent justice

[104] German Savings & Loan Society v. Weber, 16 Wash. 95, 47 Pac. 224 (1896). Machines capable of being used in any building, though bolted to the floor, are not such fixtures as pass to a prior mortgagee of the land and factory. Cherry v. Arthur, 5 Wash. 787, 32 Pac. 744 (1893).

[105] See King v. Title Trust Co., 111 Wash. 508, 518 (1920).

[106] Allis-Chalmers Mfg. Co. v. City of Ellensburg, 108 Wash. 533, 185 Pac. 811 (1919).

[107] See King v. Title Trust Co., *supra* note 105, at 514.

[108] King v. Title Trust Co., *supra* note 105; Scott v. Farnum, 55 Wash. 336, 104 Pac. 639 (1909); Wade v. Donan Brewing Co., 10 Wash. 284, 38 Pac. 1009 (1894).

[109] See King v. Title Trust Co., *supra* note 105, at 523-4, "We do not want to be understood as intimating any opinion as to whether or not such a filing of the contract would have required appellants to have noticed it and rendered it effective as against them."

[110] Wash. Comp. Stat. (Rem. 1922) § 1154. Wilcox v. Mobley, 116 Wash. 118, 198 Pac. 728 (1921).

should be restrained by a writ of prohibition for the reason that the action resulting in the body execution was trespass, and that by statute [1] one thus committed was not privileged to take the poor debtor's oath for six months. Had the action been trespass on the case for negligence, the prisoner would have been privileged to take the oath at once, since this action is not included in the statute.[2] The action was held to be trespass, apparently because, in an action under the Rhode Island statute to recover for a death caused by wrongful act, "the damages are for, and are measured by the loss to the estate of the deceased, and because the wrong to the estate may be considered as immediate and direct, if the wrongful act causing the death was immediate and direct."

It has been stated [3] that

"It is well known that the cases in which an execution may issue against the body of a defendant have been very materially diminished by statutes enacted during the present century, both in this country and in England. Such executions may, nevertheless, issue in many cases . . .[4]

"In one form or another prohibitions against imprisonment for debt are found in most, if not all, of our state constitutions. . . .[5] Their manifest intent is to exempt from imprisonment the honest debtor who is poor and in good faith unable to pay his debts."

This construction of such constitutional provisions, or of similar statutory provisions, has been frequently adopted where there has arisen the question of criminal imprisonment, of imprisonment for contempt, or of the issuance of a body execution following a judgment in a civil action. This construction has been approved where the validity of criminal imprisonment for the non-payment of fines and penalties has been sustained,[6] where

[1] R. I. Gen. Laws (1923) c. 377, § 10; c. 378, § 1.

[2] In re Kimball, 20 R. I. 688, 41 Atl. 230 (1898).

[3] 3 FREEMAN, EXECUTIONS (3d ed. 1900) 2393.

[4] The author continues by saying: "The statutes on the subject are by no means uniform. Most of them authorize an execution against the body of the defendant whenever he has been found guilty of a fraud, or tort, or of misconduct in office, or in a professional employment, or of the embezzlement or conversion of the plaintiff's property; and also where the defendant is about to abscond, or where he has disposed or is about to dispose of his property for the purpose of defrauding his creditors; and also where he has property which he conceals and refuses to apply to the satisfaction of a judgment against him."

[5] *Cf.* INDEX DIGEST OF STATE CONSTITUTIONS (N. Y. St. Const. Convention Comm. 1915) 759. No such prohibitions exist in the constitutions of the following states: Connecticut, Delaware, Louisiana, Maine, Massachusetts, New Hampshire, New York, Virginia, West Virginia.

[6] Thus, imprisonment was permitted in the following cases for non-payment: State v. Montroy, 37 Idaho 684, 217 Pac. 611 (1923) (costs of

the imprisonment has followed a prosecution for fraud,[7] and where it was for the attempted evasion of a license tax.[8] By the same interpretation, courts have held enactments to be unconstitutional for declaring mere non-payment of money to be a crime and permitting criminal imprisonment of an honest debtor.[9] In contempt proceedings, the same provisions have been construed as prohibiting the imprisonment of an honest debtor who was unable to obey a decree which ordered the payment of sums of money.[10] A similar construction has caused an execu-

prosecution); Ruggles v. State, 120 Md. 553, 87 Atl. 1080 (1913) (fine imposed for not procuring a license to operate a motor vehicle); In re McDonald, 4 Wyo. 150, 33 Pac. 18 (1893) (fine imposed for criminal libel); see State v. Mace, 5 Md. 337, 350 (1854) (fine for violating a lottery act); *cf.* Ex parte Dig, 86 Miss. 597, 600, 38 So. 730, 731 (1905) (generally).

[7] Imprisonment resulted in the following cases, which admit the power of the legislature to provide for the incarceration of employers fraudulently withholding pay. In re Oswald, 76 Cal. App. 347, 244 Pac. 940 (1926); see Arizona Power Co. v. State, 19 Ariz. 114, 116, 166 Pac. 275, 276 (1917). Or of a guest attempting to defraud a hotel. Smith v. State, 141 Ga. 482, 81 S. E. 220 (1914); State v. Sibley, 152 La. 825, 94 So. 410 (1922). Or of a debtor who gives a worthless check with intent to defraud. Hollis v. State, 152 Ga. 182, 108 S. E. 783 (1921); State v. Meeks, 247 Pac. 1099 (Ariz. 1926).

[8] In re Diehl, 8 Cal. App. 51, 96 Pac. 98 (1908); In re Johnson, 47 Cal. App. 465, 190 Pac. 852 (1920).

[9] People v. Holder, 53 Cal. App. 45, 199 Pac. 832 (1921) (act making the misappropriation of money by a building contractor an embezzlement without requiring proof of fraud); Hubbell v. Higgins, 148 Iowa 36, 126 N. W. 914 (1910) (statute making a failure by a hotel keeper to pay an inspection fee a misdemeanor without requiring proof of his ability to pay); State v. Williams, 150 N. C. 802, 63 S. E. 949 (1909) (act making the procurement of advances by a tenant from his landlord for making crops, and the wilful abandonment of the same without just cause, a misdemeanor without requiring proof of fraud); see State v. Coal Co., 130 Tenn. 275, 278, 170 S. W. 56 (1914) (act making the non-payment of employees at stated periods a misdemeanor without requiring proof of fraud); see Comment (1927) 15 CALIF. L. REV. 153, 154; *cf.* Waldron v. Olsen, 81 N. J. L. 326, 79 Atl. 1061 (1911) (denying the power of the legislature to provide for the attachment of a debtor for contempt without requiring proof of fraud); State v. McCarroll, 138 La. 454, 70 So. 448 (1915) (distinguishable, due to the lack of constitutional and statutory provisions).

[10] Imprisonment was prohibited in the following, where the debtor was unable to obey a decree to pay alimony. Galland v. Galland, 44 Cal. 475 (1872); Blake v. People, 80 Ill. 11 (1875); Peel v. Peel, 50 Iowa 521 (1879); Steller v. Steller, 25 Mich. 159 (1872); Newhouse v. Newhouse, 14 Or. 290, 12 Pac. 422 (1886); see Hurd v. Hurd, 63 Minn. 443, 445, 65 N. W. 728, 729 (1896); Cain v. Miller, 109 Neb. 441, 449, 191 N. W. 704, 707 (1922); In re Whallon, 6 Ohio App. 80, 86 (1915); Clark v. Clark, 152 Tenn. 431, 440, 278 S. W. 65, 67 (1925); Ex parte Davis, 101 Tex. 607, 612, 111 S. W. 394, 396 (1908); West v. West, 126 Va. 696, 700, 101 S. E. 876, 878 (1920). Likewise, where the debtor was unable to obey an order requiring him to pay money due on a contract. Leonard v. State, 170 Ark. 41, 278 S. W. 654 (1926); Myers v. Superior Court, 46 Cal. App. 206, 189 Pac. 109 (1920).

tion against the body of a debtor to be denied upon failure to satisfy a judgment following a contract action,[11] or upon the non-payment of a debt arising from some form of tort action not specifically excepted by statute from the constitutional prohibition.[12] A Washington court has denied the validity of a body execution following a judgment in any civil action, whether contract or tort, where the defendant is poor and in good faith unable to satisfy the judgment.[13]

A reason frequently advanced to justify imprisonment for crime is that it is a deserved punishment for some unlawful act or omission. A better reason is that this form of imprisonment is of some undeterminable value in affording a deterrent,[14] *i. e.*, a stimulus to proper behavior in order to protect some relatively important public interest. The interest of the prosecuting wit-

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Likewise, where the debtor was unable to obey some other decree. State v. District Court, 37 Mont. 485, 97 Pac. 841 (1908) (order requiring the repayment of money recovered on a judgment, where the judgment was subsequently set aside); In re Jaramillo, 8 N. M. 598, 45 Pac. 1110 (1896) (order requiring an administrator to pay a sum due his co-administrator upon the settlement of an estate); see State v. Reese, 43 Utah 447, 463, 135 Pac. 270, 276 (1913) (order requiring the support of a bastard); Rudd v. Rudd, 184 Ky. 400, 410, 214 S. W. 791, 795 (1919) (same).

[11] In re Morse, 26 Ariz. 450, 226 Pac. 537 (1924); Mass. Breweries Co. v. Colburn, 72 N. H. 472, 57 Atl. 653 (1904); Second Nat'l Bank v. Becker, 62 Ohio St. 289, 56 N. E. 1025 (1900); *cf.* Cowles v. Day, 30 Conn. 406 (1862); see Note (1926) 26 COL. L. REV. 1007, 1011.

[12] In re Kimball, *supra* note 2. Specific exceptions were made by statute in the following: Wright v. Muehlberg, 78 Colo. 461, 242 Pac. 634 (1926) (where a body execution was issued upon a judgment in an action for negligence consisting of a reckless or willful disregard of the rights or safety of others); People v. Walker, 286 Ill. 541, 122 N. E. 92 (1919) (where a body execution was issued upon a judgment in a tort case where malice was the gist of the action). See also N. Y. Cons. Laws (1923) c. 12, § 138; Parnass, *Imprisonment for Civil Obligations in Illinois* (1921) 15 ILL. L. REV. 559.

[13] Bronson v. Syverson, 88 Wash. 264, 152 Pac. 1039 (1915), where the prisoner was discharged after an execution had been levied against his body, he having been unable to satisfy a judgment in an action for seduction. The court said, *supra* at 281, 152 Pac. at 1045, "The reason for the contrary rule lies in the fact that the action is not only compensatory, but is vindictive and punitive, and in the nature of quasi punishment for the violation of law. But this court early announced, and has consistently adhered to the rule, that vindictive, exemplary, or punitive damages are not recoverable in this state unless the legislature had expressly so provided; that compensation is the fundamental principle of the law of damages, the right to punish for crime being the prerogative of the state." *Cf.* Ex parte Prader, 6 Cal. 239 (1856) (so holding, where the action was assault and battery, under CAL. CONST. of 1849, Art. 1, § 15); see Light v. Canadian Bank, 2 Okla. 543, 551, 37 Pac. 1075, 1077 (1894). See also (1922) 31 YALE LAW JOURNAL 439.

[14] SUTHERLAND, CRIMINOLOGY (1924) c. 25.

[15] See In re Diehl and In re Johnson, both *supra* note 8.

ness is always treated as of secondary importance. Viewed comparatively, this kind of stimulus is drastic, due to the fact that, where the sentence consists of fine or imprisonment, inability to pay the former is not an excuse for evading the latter. It is often stated that the prisoner is able to "work off his fine in prison." Thus, where there is an attempt to evade the payment of a public tax and a subsequent failure to pay the fine imposed,[15] or where there is involved a public interest in upholding "good morals and honest dealing," [16] the act has been declared a crime and made punishable by imprisonment. Again, this form of stimulus is approved where the benefits of a court order or a civil judgment would be nullified by the inequality of the individuals,[17] or where some other public interest is involved.[18]

Where the public interest is such as to justify declaring an act to be a crime, imprisonment is still regarded as a proper means of securing that interest; but where the interest to be secured is merely that of a private individual, and the public has no interest other than that of the efficient administration of justice between individuals, imprisonment can seldom be justified under modern constitutions, statutes, and decisions. In certain classes of civil cases, however, the public is still believed to have an interest justifying imprisonment as a remedy. In civil cases where imprisonment is permissible after a contempt proceeding for the non-payment of alimony or for failure to support a dependent, its stimulus protects a supposed public interest in having payment made. Included in this interest is generally that of preventing persons from becoming a public charge.[19] Here the party conducting the original suit and the

[16] Clark v. State, 171 Ind. 104, 84 N. E. 984 (1908) (guest attempting to defraud a hotel keeper); Smith v. State, *supra* note 7 (same); State v. Sibley, *supra* note 7 (same); State v. Avery, 111 Kan. 588, 207 Pac. 838 (1922) (giving a worthless check with intent to defraud); State v. Meeks, *supra* note 7 (same); Hollis v. State, *supra* note 7 (same).

[17] Thus, an employer would be more loath to fraudulently withhold wages than he would be if the employee's only remedy was in a civil action, the result of which would probably be payment followed by the dismissal of the employee. See In re Oswald and Arizona Power Co. v. State, both *supra* note 7.

[18] Rich v. People, 66 Ill. 513 (1873) (non-support of a bastard); Voelkel v. Cincinnati, 112 Ohio St. 374, 147 N. E. 754 (1925) (practicing dentistry without a license); State v. Latham, 136 Tenn. 30, 188 S. W. 534 (1916) (non-support of wife without good cause); Ruggles v. State, *supra* note 6; In re McDonald, *supra* note 6; see Turner v. Wilson, 49 Ind. 581, 584 (1875) (begetting a bastard); State v. Mace, *supra* note 6.

[19] See, for example, Miller v. Miller, 107 So. 251 (Fla. 1926); Jackson v. Jackson, 168 Minn. 196, 209 N. W. 901 (1926); Gross v. Gross, 53 N. D. 480, 206 N. W. 793 (1925); Josey v. Josey, 114 Okla. 224, 245 Pac. 844 (1926); State v. Reese, *supra* note 10; Rudd v. Rudd, *supra* note 10; *cf.* Commonwealth v. Micheli, 154 N. E. 586 (Mass. 1927) (where criminal

subsequent prosecution is often not the one to whom the immediate benefits of such suit would normally accrue.[20] The interest of such a beneficiary, as one who may be unable to sue because of his minority, is thus protected by the stimulus of this form of imprisonment, while the public interest is also being protected. It is not as drastic a stimulus as is that of criminal imprisonment, for, as has already been observed,[21] the constitutional provisions have generally been construed as prohibiting the imprisonment of a debtor who is in good faith unable to obey such decrees. In this way the penurious debtor is at liberty to earn the means of satisfying the court order. If he refuses to attempt to do so, however, the courts will imprison him.

In civil cases where execution against the body of a defendant is permitted, the interest of a specific individual is usually more important than is that of the public. Where the plaintiff wishes to force the defendant to satisfy a judgment which he refuses to pay, although able to do so, the plaintiff is generally permitted by statute to levy execution upon the goods of the defendant,[22] and if the goods are concealed or fraudulently transferred, upon the body.[23] The public interest may be considered sufficient to allow the plaintiff the assistance of incarceration in order to coerce satisfaction, but it is left to the initiative of the plaintiff to take advantage of it.[24] The underlying attitude is that the plaintiff should look out for his own interests.

The above classification of the public and private interests protected by the stimuli which the various types of imprisonment afford is not complete. It indicates, however, that where the public interest is primary, it is usually protected by criminal

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imprisonment was imposed for the non-support of a bastard); Commonwealth v. Susanek, 88 Pa. Super. Ct. 428 (1926) (same).

[20] *Supra* note 19.

[21] *Supra* note 10.

[22] Conn. Gen. Stat. (1918) c. 303; Del. Rev. Code (1915) c. 121, art. 6; Ill. Rev. Stat. (1921) c. 77; and see other statutes.

[23] Conn. Gen. Stat. (1918) § 6142; Del. Rev. Code (1915) § 4025; Ill. Rev. Stat. (1921) c. 77, § 65; Me. Rev. Stat. (1916) c. 115, § 45; W. Va. Code (1923) c. 50, § 40; *cf.* Ark. Dig. Stat. (Crawford, 1921) § 5893 (making it a felony to withhold assets with intent to defraud creditors). See also, Tatlow v. Bacon, 101 Kan. 26, 165 Pac. 835 (1917) (body execution held valid in order to coerce defendant into disclosure and satisfaction of the judgment); Cowles v. Day, *supra* note 11 (same); see Jones v. Jones, 87 Me. 117, 119, 32 Atl. 779, 780 (1895) (justifying the use of a body execution where disclosure of the defendant's assets is sought).

[24] The customary statutes provide that, upon a return of *nulla bona*, the plaintiff shall first file an affidavit stating that he believes that the defendant is concealing assets and giving the reasons for his belief; following this, the defendant must disprove the statements of the plaintiff in an examination; if he fails to do so, the plaintiff may levy execution upon the body of the defendant. Some statutes also provide that if the plaintiff fails to pay the jail board of the prisoner, the body execution will cease to run.

imprisonment, and reciprocally, that where the interest of an individual is primary, the customary procedure is to let the use of imprisonment depend largely upon the initiative of that individual. It likewise indicates what situations are generally considered as falling within or as being excepted from the constitutional prohibitions of imprisonment for debt.

In several instances where the question of the applicability of the constitutional prohibitions has arisen, decisions have been reached by the simple process of construing a "debt" as money which is owed and by applying the constitutional prohibitions irrespective of the origin of the debt. The results have at times been unusual.[25] Contrasted with these, contrary decisions have been reached by using a similarly inadequate process of logical deduction,[26] making the applicability of the constitutional prohibitions turn solely upon formal definitions of the word "debt." In the latter, the results have been in harmony with the ordinary rules, but the analysis is not adaptable generally.[27] The interpretation of the prohibitions as being applicable only to debts arising *ex contractu* and not to those based on tort[28] is not entirely accurate as an analysis of all situations where the validity of imprisonment is questioned,[29] and would not justify imprisonment in such cases. It is descriptive in a general way of the greater number of decisions, but does not adequately indicate reasons or policy for determining whether imprisonment is or is not valid in each case.

In several jurisdictions the issuance of a body execution is permitted where the defendant fails to satisfy a judgment in certain tort actions specified by constitutional or statutory pro-

[25] Coughlin v. Ehlert, 39 Mo. 285 (1866) (calling alimony a debt and holding imprisonment as for contempt invalid, although the defendant was able to satisfy the decree); In re Kinsolving, 135 Mo. App. 631, 116 S. W. 1068 (1909) (same); Ex parte Hardy, 68 Ala. 303 (1880) (holding a money judgment to be a debt in all cases); Carr v. State, 106 Ala. 35 (1894) (holding invalid a statute providing that if a bank president received deposits knowing that the bank was failing, and did not return them, it would be a misdemeanor); *cf.* (1923) 7 MINN. L. REV. 407.

[26] Ex parte Phillips, 43 Nev. 368, 187 Pac. 311 (1920) (holding that an order to pay alimony is not a debt); Fritz v. Fritz, 45 S. D. 392, 187 N. W. 719 (1922) (same).

[27] This analysis would be inapplicable where one is unable to obey a decree ordering payment. See *supra* note 10.

[28] (1922) 31 YALE LAW JOURNAL 439.

[29] *Supra* note 11. See In re Diehl, *supra* note 8, at 54, 96 Pac. at 99; Stiddam v. Dubose, 128 S. C. 318, 322, 121 S. E. 791 (1924). The following constitutional provisions prohibit imprisonment for debt in any civil action, on mesne or final process, except in cases of fraud: ARK. CONST. Art. 2, § 16; IOWA CONST. Art. 1, § 19; NEB. CONST. Art. 1, § 20; OHIO CONST. Art. 1, § 15; see also INDEX DIGEST OF STATE CONSTITUTIONS, *loc. cit. supra* note 5.

visions [30] as in *Read v. Dunn.* The time of imprisonment is usually limited by statute,[31] but the defendant may not avoid imprisonment on the ground that he is unable to pay.[32] It has been stated,[33] with reference to the statutory provisions of Illinois, that

"It is true, of course, that in this state, continued incarceration is possible only where the defendant is guilty of a malicious tort or dishonestly refuses to surrender his property for the satisfaction of a judgment against him, or is guilty of other fraud. It is nevertheless to be noted that execution against the body even in such cases presents the anomaly of imposing a criminal consequence upon a civil judgment,[34] a judgment which may have been entered by default, a judgment based on a verdict and on a trial of the issues wherein the charges need be proved merely by a preponderance of the evidence, and not, as in other cases where criminal consequences follow, beyond all reasonable doubt. And it presents the further anomaly that a finding by a jury that the defendant was not guilty of refusal to surrender his property or of fraud, unlike other cases wherein a defendant is placed in jeopardy of his liberty, is not final, and there may be an appeal."

If we assume that the defendant is poor and in good faith unable to satisfy the judgment, other anomalies appear. The justification of permitting imprisonment on the ground that it will coerce the defendant to use assets within his control to pay the debt does not exist. Again, his power of earning money with which to pay the judgment and keep his family from becoming a public charge is taken away during the period of imprisonment. This would not be rebutted adequately by the theory that the defendant might avoid imprisonment by obtaining sureties on a bail bond, since this would merely afford the prisoner an uncertain method of obtaining his release even where he was honest and intended to work for the means with which to pay the judg-

[30] Colo. Comp. Laws (1921) §§ 5963, 5964; Ill. Rev. Stat. (1921) c. 72, § 2; Mich. Comp. Laws (1915) § 14293; N. Y. Cons. Laws (1923) c. 12, § 138; Vt. Gen. Laws (1917) §§ 2310, 2384, 2386; R. I. Gen. Laws, *supra* note 1. See the following: Rusiewski v. Mickalski, 135 Mich. 530, 98 N. W. 1 (1904) (applicant not permitted to take a poor debtor's oath where execution was levied upon his body upon non-payment of a judgment in an action for assault and battery); Wright v. Muehlberg, *supra* note 12; People v. Walker, *supra* note 12; PARNASS, *loc. cit. supra* note 12; see Ford, *Imprisonment for Debt* (1926) 25 MICH. L. REV. 24, 34.

[31] Colo. Comp. Laws (1921) § 5965; Ill. Rev. Stat. (1921) c. 77, § 68; Mich. Comp. Laws (1915) §§ 13617, 13618; R. I. Gen. Laws, *supra* note 1.

[32] Colo. Comp. Laws, *supra* note 31; Ill. Rev. Stat., *supra* note 30; Mich. Comp. Laws, *supra* note 31; R. I. Gen. Laws, *supra* note 1; Vt. Gen. Laws (1917) § 2397.

[33] PARNASS, *op. cit. supra* note 12, at 571.

[34] *Query,* whether this type of imprisonment would bar a subsequent criminal prosecution for the same act or omission?

ment. Where an individual's earning power is little more than is necessary to support his family, where he may subsequently become incapacitated through illness or accident, and where the possibility exists that he may abscond, there are few who would risk going surety. If the purpose of such imprisonment were the protection of a public interest other than that of having payment made, there is the further anomaly of leaving the efficiency of such a stimulus largely dependant on the initiative of an individual rather than on that of the state.

But where a defendant may not avoid imprisonment following a body execution on the ground that he is unable to pay, it does not necessarily mean that only those who are poor and in good faith unable to pay are thereby imprisoned. Some debtors might well prefer imprisonment to paying their obligations, and such a stringent rule has the advantage of precluding debtors from attempting to conceal their assets in the hope of successfully undergoing an examination in connection with a poor debtor's oath.

If the court in *Read v. Dunn* had seen fit to do so, it could, by another line of reasoning, have refused to issue a writ of prohibition and could have held that the prisoner was privileged to take the poor debtor's oath. Where an injury is the result of negligent driving, the injured party may treat it either as a forcible trespass or as a negligent tort for the consequences of which an action on the case for negligence lies.[35] It has been held [36] that a plaintiff who unites in one suit causes of action under which the defendant can be arrested and those under which he cannot, waives the right to an execution against the person. By a parity of reasoning, where the plaintiff can recover against the defendant in trespass or in trespass on the case for negligence, the court might well treat the case as being brought in the less drastic form and allow the taking of the poor debtor's oath to escape continued imprisonment.[37] This would be more nearly in harmony with modern ideas of policy as illustrated in constitutions, statutes, and decisions, restricting imprisonment to cases where the public interest requires it as a deterrent against crime and to civil cases involving dishonesty or fraud together with the wilful disobedience of a court judgment or order.

[35] KEIGWIN, COMMON LAW PLEADING (1924) § 36; SALMOND, THE LAW OF TORTS (6th ed. 1924) 220, n. (g); Williams v. Holland, 10 Bing. 112 (1833); *cf.* KEIGWIN, CODE PLEADING (1926) § 29.

[36] State v. Helms, 101 Wis. 280, 77 N. W. 194 (1898).

[37] In re Kimball, *supra* note 2.