University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

Published Monthly, Except July, August and September, by the University of Pennsylvania Law School, at No. 8 West King St., Lancaster, Pa., and 34th and Chestnut Streets, Philadelphia, Pa.

SUBSCRIPTION PRICE, $2.50 PER ANNUM; SINGLE COPIES, 35 CENTS

NOTES

CRIMINAL PROCEDURE—JURISDICTION OF STATE OVER EXTRA-TERRITORIAL CRIMES COMMITTED BY ITS CITIZENS—There is a general proposition of criminal law which has been so frequently reiterated and so generally accepted without question that it has become almost axiomatic. It is, that crimes are purely local and punishable only in the jurisdiction where committed. As a broad statement of the law, this is true, but there is one important phase of the situation which seems to have been so engulfed by the very generality of this proposition, that it has been lost sight of by members of the bar, and has allowed some of our courts to go astray in its application, or rather non-application. An excellent example of this failure to discern one of the basic principles of government is the late New Jersey case of *State* v. *Stow*,[1] holding that a citizen of New Jersey who, in Pennsylvania, committed an offense against the election laws of the former state, nevertheless cannot be punished in New Jersey because the crime was not there committed.

The contention upon which the criticism of this case is rested is, that a state has control not only over all property and persons

[1] State v. Stow, 84 Atl. Rep. 1063 (N. J., 1912).

within its territory, but also over the person of its own citizens, no matter where they be. This is one of the fundamental incidents of sovereignty which cannot be doubted.[2] But its corollary, which should be equally as clear, has failed of recognition in many courts. This is, that a state may take jurisdiction of and punish, for a crime committed outside its territory, one of its own citizens, where the crime was against its own laws.[3] This rule is not recognized at common law,[4] although it does seem that the ancient Court of the Constable and Marshal exercised just such power.[5] But this jurisdiction may be conferred by statute, provided the constitution of the state does not prohibit. There does not seem to be any valid objection other than that of constitutionality which could be raised to such legislation. Public policy cannot stand in the way because, after all, that is the creation and creature of the legislature. The argument could be made that a state might even go so far as to punish acts committed against it in another state by persons *not* its own citizens. In fact, a Texas statute which did just that thing was held valid.[6] But the early North Carolina case of *State* v. *Knight*[7] points out the theory of government opposed to any such legislation. The court says: "The right of punishing, being founded upon the consent of the citizens, express or implied, cannot be directed against those who never were citizens, and who likewise committed the offense beyond the territorial limits of the state claiming jurisdiction."

England's statutes give jurisdiction for offenses committed outside its boundaries by its citizens in the case of treason,[8] murder or manslaughter,[9] bigamy,[10] and offenses against such special acts as the Foreign Marriage Act,[11] the Foreign Enlistment Act,[12] the Official Secrets Act[13] and the Explosive Substances Act,[14] etc. There are many such statutes, both federal and state, in the United States.[15]

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[2] Story on Conflict of Laws, Sect. 22.

[3] Commonwealth v. Kunzmann, 41 Pa. 429 (1862).

[4] Lord Brougham in Warrender v. Warrender, 9 Bligh 89 (Eng., 1834) at P. 119 says: "The *lex loci* must needs govern all criminal jurisdiction, from the nature of the thing and the purpose of that jurisdiction."

[5] Coke, 3 Inst. 48: "If two of the king's subjects go over into a foreign realm and fight there, and the one kill the other, this murder being done out of the realm, cannot be for want of trial heard and determined by the common law, but it may be heard and determined before the constable and marshal."

[6] Hanks v. State, 13 Tex. App. 289 (1882). This statute subjected to punishment *any* person who, within or without the state, forged any instrument affecting the title of land in Texas.

[7] State v. Knight, 1 Taylor's North Carolina Rep. 65 (1799).

[8] Statute 35 Hen VIII, c. 2, s. 1 (1543).

[9] 24 and 25 Vict., c. 100, s. 9 (1861).

[10] 24 and 25 Vict., c. 100, s. 57 (1861).

[11] 55 and 56 Vict., c. 23, s. 15 (1892).

[12] 33 and 34 Vict., c. 19, ss. 16, 17 (1870).

[13] 52 and 53 Vict., c. 10, s. 9 (1889).

[14] 46 and 47 Vict., c. 3, s. 7 (1883).

[15] See Hanks v. State, 13 Tex. App. 289 (1882); State v. Haskell, 33 Maine 127 (1851); People v. Botkin, 132 Cal. 231 (1901); Commonwealth v. Gaines, 2 Va. Cas. 172 (1819); 1 Bishop New Cr. Law, Sect. 121; 3 U. S. Comp. Stat. [1901], Sect. 5335.

There is some strong dissent in the United States to the proposition here contended for. The leading case for the stand against punishing *extra*-territorial crimes is *People* v. *Merrill*[16] in New York. In that case, a state statute provided for the punishment of anyone who should sell a negro that had been kidnapped from the state. The court refused to give it force as applied to a sale outside the state. Other cases oppose the doctrine just as strongly,[17] so that there is no uniformity on the question in the states, however clear it should be from the point of view of logic and the theory of government. But on just one point, practically every sovereignty agrees. That is, that it has the power to punish for all crimes done on a ship under its flag, whether in its own waters, on the high seas, or in foreign ports,[18] even though the foreign state may also have jurisdiction over the crime.[19]

J. F. N.

EVIDENCE—PROOF OF ONE SEXUAL CRIME AT A TRIAL FOR ANOTHER—In *People* v. *Gibson*,[1] a prosecution for statutory rape, evidence that the accused had sexual intercourse with a playmate of prosecutrix in the same room a few minutes after the act charged was not admitted, on the ground that the two acts were not so connected as to be part of the same transaction.

"The general rule is that on a prosecution for a particular crime evidence which in any manner shows or tends to show that the accused has committed another crime wholly independent of that for which he is on trial, even though it be a crime of the same sort, is irrelevant and inadmissible."[2] That is a principle to which no court will dissent, but it is upon the application of the exceptions to the general rule that the courts differ. The following exceptions may be regarded as the most important, being those which are included in the classification given by most authorities.[3] Evidence of other offenses is admissible if such offenses are relevant (1) as part of the *res gestae*, or to prove or show (2) identity of person or crime, (3) knowledge, (4) intent, (5) motive, (6) system or scheme, (7) malice. There must be some logical and natural connection between the extraneous crime offered in evidence and the crime charged, and whether the connection necessary to render it relevant and admissible exists is a question for the trial judge to determine. If the evidence be so dubious that the judge does not clearly per-

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[16] People v. Merrill, 2 Parker's N. Y. Cr. Rep. 590 (1855).

[17] U. S. v. Smiley, 6 Sawyer 640 (U. S. C. C., 1864); Johnson v. Commonwealth, 86 Ky. 122 (1887); Cruthers v. State, 161 Ind. 139 (1903); State v. Cutshall, 110 N. C. 538 (1892).

[18] Reg. v. Armstrong, 13 Cox C. C. 184 (Eng., 1875); Reg. v. Anderson, 11 Cox C. C. 198 (Eng., 1868).

[19] Wildenhus's Case, 120 U. S. 1 (1886).

[1] 99 N. E. Rep. 599 (Ill., 1912).

[2] 12 Cyc. 405.

[3] Wigmore, Evidence, Sects. 300, 306; Wharton, Criminal Evidence (10th Ed., 1912) Sect. 31; People v. Molineaux, 168 N. Y. 264, 293 (1901).

ceive the connection, the benefit of the doubt should be given to the accused and the evidence rejected.[4] Such is the test and it is obvious that evidence will often be deemed relevant by one judge and not by another. The discussion in this note will be confined principally to the admissibility of other offenses in prosecutions for rape and other sexual crimes.

A consideration of the cases of prosecution for rape whe.e a different kind of crime was offered shows that such evidence is admissible (1) if it is a part of the *res gestae*, *i. e.*, if a narration of the crime charged necessarily involves a description of the other offense, or, to use a phrase much preferred by Professor Wigmore,[5] if the two crimes are "inseparably connected." Thus, in a charge of rape, evidence that the accused struck a relative of the prosecutrix to prevent an interference with commission of crime charged was admitted.[6] In a charge of rape, evidence that the accused searched and robbed the escort of prosecutrix immediately before commission of the crime charged was admitted.[7] (2) To prove identity of accused.[8] (3) Proof of a specific intent in a sexual crime is essential only in a charge of assault with intent to rape.

In prosecutions for rape, evidence of prior similar offenses committed by the accused upon females other than the prosecutrix is admissible where both offenses were committed upon the same occasion, *i. e.*, part of the *res gestae*.[9] Under this rule, the evidence

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[4] Underhill, Criminal Evidence (2nd Ed., 1910), 160; Shaffner v. Com. 72 Pa. 60 (1872), a leading case.

[5] Sect. 218.

[6] Thompson v. State, 11 Texas App. 51 (1881); Oakley v. State, 135 Ala. 15 (1902).

[7] State v. Taylor, 118 Mo. 153 (1893). There are many cases where, on a charge for murder of one person, evidence that accused also killed other persons is admissible on the ground that the several crimes were inseparably connected. Hickman v. People, 137 Ill. 75 (1891); State v. Perry, 136 Mo. 126 (1896); State v. Porter, 32 Ore. 135 (1891); State v. Hayes, 14 Utah 118 (1896); a leading case in which the facts did not come within the rule is People v. Molineux, 168 N. Y. 264 (1901).

[8] Vickers v. U. S., 1 Okla. Crim. 452, 461 (1908). In a trial for rape, evidence that accused had burglariously taken a weapon belonging to the witness just prior to crime charged was admitted to show the accused's identity. Dabney v. State, 82 Miss. 252 (1903). In a trial for rape, evidence of larceny in an adjoining room during the same night was excluded on the ground that the evidence was unnecessary to prove identity. The latter case appears to be the sounder law.

[9] As a matter of fact the principal case seems to conflict with a case in the same jurisdiction, People v. Abrams, 249 Ill. 619 (1911). In a prosecution for crime against nature, evidence of a similar act upon another child at the same time was admitted. The court said, p. 623, "but when the whole testimony is considered these contradictions [as to which of the children had been mistreated first] become unimportant. Both girls testified positively that the offense was committed upon each of them." In Harmon v. Territory, 15 Okla. 147, 159 (1905), upon a charge of common law rape, evidence that a sister of prosecutrix was contemporaneously raped in the same house by other men was admitted because it was relevant especially to show lack of consent and the use of force; the court took occasion to say (p. 162): "We conclude that the two

offered in the principal case should have been admitted and it is submitted that although the other offense was subsequent to the crime charged, yet it was so proximate in point of time as to give color to and corroborate that crime.

In a charge of assault with intent to commit rape the admission of evidence of similar offenses upon other females for purpose of proving the specific intent can hardly be said to be any wider. Wigmore[10] says: "Accordingly, where the charge is assault with intent, former acts of the sort should be received without any limitation except as to time; though the courts can hardly be said to have accepted this result fully."[11]

In prosecutions for sexual offenses, the weight of authority is decidedly in favor of the admission of similar offenses between the same parties which were prior to the crime charged.[12] The reasons given are various, *e. g.*, as corroborative evidence; as tending to characterize or explain the crime charged; to show the true relation existing between the parties; and to show a specific intent where that is necessary. As to the admissibility of subsequent offenses between the same parties the authorities are in conflict, the weight of authority and better reasoning seeming to reject

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crimes . . . . are so interwoven in their details and circumstances that the proof of one is corroborative evidence of the other." In Proper v. State, 85 Wis. 615, 628 (1893), in a charge of rape, evidence that the accused had sexual intercourse with another girl in the same room upon the same occasion was admitted as corroborative evidence.

In the following cases the evidence was rejected as irrelevant: Janzen v. People, 159 Ill. 440 (1896); State v. LaMont, 23 S. D. 174 (1909); Nickolizack v. State, 75 Neb. 27 (1905).

[10] Evidence, Vol. I, p. 432.

[11] Such evidence was admitted in State v. Desmond, 109 Iowa 72 (1899); State v. Sheets, 127 Iowa 73 (1905); in the latter case it does not appear whether the other offenses were prior or subsequent to the crime charged; at any rate, all occurred upon the same occasion.

The evidence was rejected in State v. Walters, 45 Iowa 389 (1877); State v. Marselle, 43 Wash. 273 (1906); Webb v. State, 7 Ga. App. 35 (1910); McAllister v. State, 112 Wis. 496 (1901); in the latter case the prior assault was committed only one hour before the assault charged; case is regarded as unsound by Wigmore.

[12] Wharton, p. 170; Lawson v. State, 20 Ala. 65 (1852); People v. Boers, 13 Cal. App. 686 (1910); Bigcraft v. People, 30 Colo. 298 (1902); Brevaldo v. State, 21 Fla. 789 (1886); Bass v. State, 103 Ga. 227 (1897); State v. Walters, 45 Iowa 389 (1877); People v. Gray, 251 Ill. 431 (1911); State v. Snover, 64 N. J. L. 65 (1899); People v. O'Sullivan, 104 N. Y. 481 (1887); State v. Guest 100 N. C. 410 (1888); Com. v. Bell, 166 Pa. 405 (1895); in State v. Sykes, 191 Mo. 62, 80 (1905), evidence that accused aided and abetted the commission of rape by another male upon the prosecutrix was admitted as part of the *res gestae;* in U. S. v. Griegs, 11 N. M. 392 (1902), evidence of an adulterous act committed four years previously was admitted.

Contra, Rex v. Floyd, 7 Car. and P. 318 (1833); State v. Riggio, 124 La. 614 (1909); State v. Dlugozima, 7 Dela. 151 (1909); State v. Bates, 10 Conn. 372 (1834); Barnett v. State, 44 Tex. Cr. 592 (1903), overruling Hamilton v. State, 36 Tex. Cr. 372 (1896).

such evidence.[13] In one of the cases,[14] it was said: "Proof of previous acts of sexual intercourse would tend to show a much greater probability of the commission of a similar act charged to have occurred subsequent thereto, but the converse of this proposition would not be true, as the proof of a crime committed by parties on a certain day could have no tendency to prove that they had, previous thereto, committed a similar offense."

I. B.

MORTGAGES—MERGER—SUBROGATION—In a recent English case of involved facts the time-honored rule of merger was applied in spite of the fact that the case arose in chancery, where the oft expressed doctrine that equity looks with disfavor on merger originated.[1] As is too often the case, if one is to believe the decision, the outcome was due to the "stupid ingenuity" of the unsuccessful litigant's solicitor. In order to transfer a mortgage and the equity of redemption at the same time to separate parties, the defendants in this action, the mortgagee deeded back the premises to the mortgagor, which is necessary under the English theory of the mortgage. The mortgagor then conveyed by warranty deed to one of the defendants, who in turn executed a mortgage to the other defendant for the same amount as the replaced encumbrance. The three deeds were executed within the space of forty-eight hours. There was a second mortgage unknown to all the parties but the original mortgagor. It was held that the second mortgagee was entitled to priority. At first blush this would seem a clear case of extinguishment. The debtor has paid his debt, the mortgage is cancelled and the second lien arises to a new dignity. That a mortgagor cannot set up one mortgage which he has discharged against a later one of his own making is legal gospel.[2] A reason frequently

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[13] Pope v. State, 137 Ala. 56 (1903); State v. Markins, 95 Ind. 464 (1884); People v. Fowler, 104 Mich. 449 (1895); St. v. Palmberg, 199 Mo. 233 (1906); People v. Robertson, 88 N. Y. App. Div. 198 (1903); Smith v. State, 44 Tex. Cr. 137 (1902).

Admitted in Crane v. People, 168 Ill. 397 (1897); Com. v. Nichols, 114 Mass. 285 (1873); State v. Witham, 72 Maine 531 (1881); State v. Robertson, 121 N. C. 551 (1897); State v. Bridgman, 49 Vt. 202 (1876).

[14] People v. Clark, 33 Mich. 112, 115 (1876).

[1] Manks v. Whitely, 81 L. J. Ch. D. 457 (1912), reversing the decision of Parker, J., 80 L. J. Ch., 696 [1911], Fletcher-Moulton, L. J., dissenting.

[2] Otter v. Vaux, 6 De G. M. and G. 638 (Eng., 1858); Lewin on Trusts, Vol. 2 (8th Ed.), § 728; Pomeroy, Eq. Juris., Vol. 2, § 797. Purchase of mortgage by trustee in bankruptcy of mortgagor does not existinguish it, Brown v. Lapham, 3 Cush. 551 (Mass., 1849). The mortgagor's payment of the mortgage does not extinguish it as to a purchase, from him, of the equity of redemption, Stillman v. Stillman, 21 N. J. Eq. 126 (1870); Stanhope's Estate, 184 Pa. 414 (1898).

If a purchaser of the equity of redemption personally assumes the mortgage, an assignment of it to him operates as an extinguishment, Burke v. Abbot, 109 Ired. 1 (S. C., 1885); McCabe v. Swap, 14 Allen 188 (Mass., 1867); Jones, Mortgages, § 864. *Contra*, Young v. Morgan, 89 Ill. 199 (1878). On the other hand, subrogation was allowed when the premises were sold subject to

given for this rule is that the second mortgagee contracts for that privilege which belongs to every encumbrancer whether he acquires his lien by contract or by judgment or statute. The rule is nothing more than an application of the legal as well as moral commandment that one must pay his debts.

There are reasons, however, which certainly would seem to justify a suspension of the rule in this case. The mortgagor did not in reality pay his debt. He was unable to pay it and induced the defendants to take the property. Before the three deeds were executed the defendants paid the first mortgagee the amount of his claim, the defendant mortgagee providing the amount of the principal sum. Subsequently the defendant mortgagor paid the balance of the purchase price. This appears to be nothing more than a purchase of the mortgage and of the equity of redemption separately, In fact the court seems to have treated it as such and a majority concluded that even then the second mortgagee was entitled to priority. The decision was based on the theory of merger which is, in brief, that where two interests unite in the same the lesser sinks into the greater. But against this rule of law equity will give relief where there is an intention on the part of the person holding the two interests to keep them separate. This intention may be manifested by his acts and conduct or, in the absence of express intention, it will be presumed from the position of the dual owner. If it would be against his interest to permit a merger then the presumption is that he intended to keep the two separate.[3] In the absence of any intention the courts will apply the rule of law, and, in the case under discussion, it was said that inasmuch as there was no intention expressed, nor could one be presumed, merger must follow. The reason given for refusing to presume an intention to keep separate was that although it was manifestly to the defendants' interest to keep the two estates apart, nevertheless since they were ignorant of the fact there must have been an intent to merge and that this intent once formed cannot be changed. Certainly this is good logic, but hardly called for under the circumstances and in view of the evident preponderance of equity in favor of the defendants. In at least one American jurisdiction, the court considers this presumption of intention a rule of law and holds that there will never be a merger where it is contrary to the owner's interest, whether he knew of that interest or not.[4] On the other hand it has been held that so long as third parties who acquire their rights subsequently to the union of the two estates are not affected, the time for the presumption of an intention is ex-

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the mortgages and the purchaser paid the mortgage debt. Barnes v. Mott, 64 N. Y. 397 (1876); Capitol Nat'l. Bank v. Holmes, 43 Col. 154 (1908); Ryer v. Gass, 130 Mass. 227 (1888). So where one of two joint mortgagors pays the debt, the mortgage is not extinguished. Duncan v. Drury, 9 Pa. 332 (1848); Saint v. Cornwall, 207 Pa. 270 (1903).

[3] Forbes v. Moffatt, 18 Ves. Jr. 384, (1811); James v. Morey, 2 Cow. 246 (N. Y., 1823).

[4] Stanton v. Thompson, 49 N. H. 272 (1870).

tended, just as it is in the case of an actual intention expressed.[5] The decision of the principal case was based on *Toulmin* v. *Steere*,[6] a case which has been criticized by text writers and confined by the cases to its peculiar facts.[7]

The counsel and court did not discuss the question whether or not the first mortgage could not be revived by means of the equity of subrogation. This would hinge primarily on the interpretation of the transactions of the parties. If the payment to the first mortgagee should be considered as made by the mortgagor with money loaned him by the defendants then the latter would not be entitled to substitution unless they had expressly contracted for that right. It would not be sufficient to presume such a "conventional" subrogation if they accepted another mortgage believing that it was the only lien.[8] Subrogation is based on the theory that there has been an equitable assignment arising from an express contract of the parties or from the fact that the present claimant had some interest in the property which he attempted to protect by discharging the first lien.[9] But the mere fact that one's loan has been used to pay off a mortgage does not entitle one to subrogation.

Assuming however that the payment to the first mortgagee was made directly by the defendants, so as to create in them an equitable right in the mortgage, would the subsequent reconveyance by the first mortgagee, their trustee, with their consent, work an extinguishment, so as to give the plaintiff priority? There are several American cases which reach a negative conclusion.[10] They state the law to be that where the mortgagee has accepted a new mortgage and surrendered his prior security or has satisfied it of record he will be entitled to a revival of his lien if there was another encumbrance of which he had no actual notice at the time, although the latter was on record; and in so holding they have devised a

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[5] Howard v. Clark, 71 Vermont 424 (1899); Brooks v. Rice, 56 Cal. 428 (1880). And the fact that the second mortgage was on record makes no difference. Shaffer v. McCloskey, 101 Cal. 576 (1894).

[6] 3 Merivale 210 (1817). There was constructive notice in this case, not by record, but through actual knowledge on part of purchaser's solicitor. Mocatto v. Murgatryod, 1 P. Wms. 393 (1717); Greshold v. Graham, 2 Ch. Cases 170 (1685). And in the latter case it was held that as to liens of which the purchaser had no notice, he was entitled to priority.

[7] Pomeroy, Vol. 2, § 791, note; Lewin, *729, *729, notes; Stevens v. Mid-Hants Ry. Co., L. R. 8 Ch. App. 1064 (1873); Thorn v. Conn., 64 L. J. Ch. 1 (1895); Adams v. Angell, 46 L. J. Ch. 352 (1877); Liquidation, etc. Co. v. Willoughby, 67 L. J. Ch. 252 (1898).

[8] Nelson v. McKee, 99 N. E. Rep. 447 (Ind., 1912); Frederick v. Gehrling, 137 N. W. Rep. 998 (Neb., 1912); Suley v. Bacon, 34 Atl. Rep. 139 (N. J. Ch., 1896); Sash, etc. Co. v. Case, 42 Neb. 281 (1894).

[9] 3 Pom., § 1212.

[10] Jones, § 971, Sheldon Subrogation, § 19 and cases cited there; Bruse v. Nelson, 35 Ia. 157 (1872); Campbell v. Trotter, 100 Ill. 281 (1881); but when the mortgagee has actual notice of the other lien and cancels his old mortgage accepting a new one he loses his priority, Attkinson v. Plumb, 50 W. Va. 104 (1901).

new ground for subrogation, *i. e.*, mistake. They presume that the mortgagee would not have so acted had he known the whole truth. That the same is the rule in England would appear from a case which held that a mortgagee did not lose his priority by reconveying and accepting other security which was a charge on the land.[11] That case was not called to the attention of the court in the principal case.

J. S. B.

PROPERTY—FIXTURES—AS BETWEEN TENANT AND MORTGAGEE—In *Equitable Guarantee & Trust Company* v. *Hukill*,[1] an injunction was asked by a mortgagee of land to restrain the removal of buildings erected by a tenant of the mortgagor. The tenant occupied the premises under a lease which expressly gave him authority to erect frame structures for the storage of lumber in the course of his business and to remove them during the term. The tenant being about to remove the buildings so erected, this suit was brought before the expiration of his term, and before a foreclosure of the mortgage. In dismissing the bill, the court held that under these circumstances, as it was not shown that the original security would be impaired, the tenant might remove the buildings as against the prior mortgagee of his landlord.

In spite of the old maxim, *quicquid planatur solo, solo cedit*, the exceptional right of the tenant to remove fixtures annexed for the purposes of trade has long been recognized,[2] and it may be stated generally that the tenant is permitted to remove chattels annexed to the realty of his landlord, which were so placed for purposes of trade, provided that such annexed articles are removable without material injury to the freehold.[3] As between mortgagor and mortgagee, however, the old, stricter rule has been applied, and a mortgagor may not remove fixtures which he has attached to the freehold subsequent to the mortgage, as against his mortgagee. That such fixtures have been attached for trade purposes seems to be immaterial.[4]

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[11] Stevens v. Mid-Hants Ry. Co., L. R. 8 Ch. App. 1064 (1874).

[1] 85 Atl. Rep. 60 (Del., 1912).

[2] See Henry's case, Y. B. 20 Hen. VII, 13, pl. 24 (1505); Poole's Case, Salk. 368 (1703).

[3] Elwes v. Maw, Salk. 368 (1703); Whitehead v. Bennett, 27 L. J. Ch. 474 (1858); Doty v. Gorham, 5 Pick. 487 (Mass., 1827); Van Ness v. Packard, 2 Pet. 137 (1829); Holbrook v. Chamberlin, 116 Mass. 155 (1874); see also Collamore v. Gillis, 149 Mass. 578 (1889); Wiggins Perry Company v. O. and M. Railway, 142 U. S. 396 (1891); Ewell on Fixtures, Second Edition, pp. 121, 126; Amos & Ferrard on Fixtures, Third Edition, pp. 40 *et seq.*; 2 Tiffany, Landlord and Tenant, p. 1570; Bronson on Fixtures, Sect. 30.

[4] Walmsley v. Milne, 7 C. B. N. S. 115 (1859); Longbottom v. Berry, L. R. 5 Q. B. 123 (1869); Climie v. Wood, L. R. 4 Exch. 328 (1869); Holland v. Hodgson, L. R. 7 C. P. 328 (1872); Day v. Perkins, 2 Sandf. Ch. 359 (N. Y., 1845); Butler v. Page, 7 Met. 40 (Mass., 1843); Jones on Mortgages, Vol. I, Sect. 441; Bronson on Fixtures, Sect. 62; Amos and Ferrard on Fixtures, Third Edition, p. 293; Tyler on Fixtures, pp. 561, *et seq.*

Where the question arises between a mortgagee and a tenant of the mortgagor, there is an irreconcilable conflict of decision as to the tenant's right of removal. Some courts hold that the mortgagor cannot grant to another a greater right than he himself has, and as he cannot, as against the mortgagee, remove fixtures attached to the land even for trade purposes, he cannot, as against the mortgagee, grant such right to his lessee, and the lessee can be restrained from removing chattels after annexation thereof, even though the original value of the mortgage security be not impaired.[5] Other courts have adopted the rule that if the original value of the security for the payment of the mortgage debt is not affected by the removal of the fixture, then the morgtagee has no just ground of complaint against the removal.[6]

In *Merchants' National Bank* v. *Stanton*,[7] Mitchell, J., explains this conflict of decision as follows: "It undoubtedly was formerly the rule that all fixtures annexed subsequent to the execution of the mortgage, whether annexed by the mortgagor or by his tenant or licensee under a lease or license subsequent to the mortgage, became as to the mortgagee, a part of the realty. But this rule was founded upon the old common-law doctrine that a mortgage was a conveyance under which the mortgagee became the legal owner, and was entitled to immediate possession, the mortgagor in possession being considered strictly his tenant at will. . . But in those states where a mortgage is, as with us, a mere security, there is a general tendency to repudiate the old rule as inapplicable, and to hold that, as to fixtures placed on the mortgaged premises subsequently to the execution of the mortgage, there is no absolute presumption that they were annexed for the benefit of the realty,

[5] Ewell on Fixtures, Second Edition, p. 412; Brown, Fixtures, 4th Edition, p. 60; Clary v. Owen, 15 Gray 522 (Mass., 1860); Lynde v. Rowe, 12 Allen 100 (Mass., 1866).

A similar rule has been applied in Massachusetts and some other jurisdictions as between a prior mortgagee and a third person annexing chattels to the premises, as a conditional vendor, licensee, etc.; it would appear to be immaterial whether the right to remove the fixture is asserted before or after foreclosure of the mortgage. See Meagher v. Hayes, 152 Mass. 228 (1890); Tarbell v. Page, 155 Mass. 257 (1892); Wight v. Gray, 73 Maine 297 (1882); Young v. Chandler, 102 Me. 251 (1906).

[6] Bronson, Fixtures, Sect. 70c; Belvin v. Raleigh Paper Company, 123 N. C. 139 (1898); Broaddus v. Smith, 121 Ala. 335 (1898); Ellis v. Glover and Hobson, 1 K. B. 388 (1908). The right of removal in the tenant was sustained even after foreclosure of the mortgage in Pioneer Savings & Loan Co. v. Fuller, 57 Minn. 60 (1894), and Ferris v. Quimby, 41 Mich. 202 (1879), also in Sprague National Bank v. Erie Railroad Co., 48 N. Y. S. 65 (1897), and Bernheimer v. Adams, 75 N. Y. S. 93 (1902); but *cf.* McFadden v. Allen, 134 N. Y. 489 (1892). McFadden v. Allen, though decided by the Court of Appeals of New York, while the later cases in New York are merely Supreme Court decisions, was not a case involving trade fixtures and seems not inconsistent with the later decisions.

The right of a third party to remove as against a prior mortgagee is sustained in Campbell v. Roddy, 44 N. J. Eq. 244 (1888); Binkley v. Forkner, *et al.*, 117 Ind. 176 (1888); Paine v. McDowell and Tucker, 71 Vt. 29 (1898); Oil City Boiler Works v. the Light Company, 81 N. J. L. 491 (1911).

[7] 55 Minn. 211, at p. 220 (1893).

and that, where the intention or agreement of the mortgagor and the party making the annexation was that the thing annexed should not become part of the realty, the absence of a concurrent agreement to that effect on the part of a prior mortgagee will not of itself make the annexation a part of the mortgage security. This would seem just, for, the annexation not having been made when he took his mortgage, he has not been misled, or advanced anything on the faith of it, and hence ought not to be permitted to avail himself of it as a part of his security, contrary to the intention of the party making the annexation."

In *Broaddus* v. *Smith*,[8] where, as in the principal case, there was an express agreement between mortgagor and tenant that the latter might remove certain fixtures, the court held that "Where the owner of real estate contracts or agrees with a tenant that the tenant may erect or affix anything on the realty, and that the thing so affixed shall remain the property of the tenant, a prior mortgagee of the real estate acquires no interest in the chattel attached, subject, however, to the limitations that the mortgagor and tenant may not, by their acts, do anything to impair the mortgagee's security."

The particular question involved in our principal case seems not to have arisen before in Delaware. The court distinguishes *Watertown Company* v. *Davis*.[9] In that case, there had been a conditional sale of an engine and boiler to a mortgagor, who made default in payment of the purchase price. The question arose between the purchaser of the premises upon foreclosure and the conditional vendor. It appeared that the equipment had been attached to the soil as a permanent improvement to the property. These circumstances would seem sufficient to warrant the court's concluding in that case that the rights of the mortgagee rose higher than those of the conditional vendor.

On the whole, it would seem that where there is evident a legal intention of both lessor and lessee not to make trade fixtures, or improvements, a part of the land, and as between these persons, the buildings remained chattels, removable during the term, the mortgagee has no equitable ground of complaint when it is not alleged or shown, that the value of the security which he had when the mortgage was made, and on which he relied, is impaired by the annexation and removal of buildings by the tenant during the term and prior to a foreclosure of the mortgage. It may be said therefore that the court, approaching a question new in the jurisdiction, upon which there is considerable conflict of authority, very properly followed the modern tendency in favor of the lessee's right to remove trade fixtures as against the prior mortgagee of the premises.

H. A. L.

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[8] 121 Ala. 335 (1898).
[9] 5 Houst. 192 (Del., 1877).

PRACTICE—WILLS—CONCLUSIVENESS OF FOREIGN PROBATE—A statute in West Virginia[1] provides that the ancillary probate of foreign wills of personalty or realty (if it is shown in the latter case that the will conformed in execution, *etc.*, to the *lex rei sitae*) may be attacked within five years upon the following grounds: (1) that the authenticated copy was not a true copy of the will; (2) that the probate of such will has been set aside by the court admitting it to probate; (3) that such probate was inproperly made. In a recent case[2] the Supreme Court of West Virginia held that a state court of equity had no general jurisdiction, nor jurisdiction given by the above statute, to set aside a will of realty or personalty on the ground of fraud in the procurement thereof, such will having been duly probated in the state of the testator's domicile, and subsequently duly admitted to probate in West Virginia on the filing of a duly certified copy.

Even in the absence of such a statute it seems to be settled that as regards personalty a probate in the jurisdiction of the testator's domicile is conclusive in the jurisdiction where the property is situated.[3] In such cases, the courts seem to have considered as decisive the general principle that the succession to personalty is governed by the *lex domicilii*.

As regards realty, however, there is very considerable confusion in the decisions.[4] The conclusiveness of a foreign probate is a question of practice and not of substantive law, and a failure to observe this distinction renders it impossible, in most of the cases on the subject, accurately to define the limits of the decisions. The well established rule that real property is subject to the exclusive jurisdiction of the courts of its locus requires that a will, to be an effectual disposition of such property, must conform in all substantive respects to the law of such locus;[5] therefore, although a court might consider a foreign probate conclusive as to matters which it properly determines, yet it need give such probate no effect as regards real property unless it be shown that the will was executed as required by the *lex rei sitae*. In *Sneed* v. *Ewing*[6] the Supreme Court of Kentucky seems to have observed this distinction: "There is an essential difference between the probate and the effect of a will. And the probate in Indiana, being in the nature of a judgment *in rem*, can not operate conclusively on land which is in Kentucky. It cannot conclude more than the jurisdiction *in rem* gave the court power to decide. The consequence is, that if the probate had been conclusive as to property in Indiana, it could not conclude the rights of the parties as to the land in Ken-

[1] Code of 1906, Chap. 77, Sect. 25.

[2] Woofter, *et al.* v. Matz, *et al.*, 76 S. E. Rep. 131 (W Va., 1912).

[3] Goodman v. Winter, 64 Ala. 410 (1881); Willett's App., 50 Conn. 330 (1883); Knight v Wheeldon, 104 Ga. 309 (1899); Nelson v. Potter, 50 N. J. L. 324 (1889).

[4] The cases on this point are collected in a note to State *ex rel.* Ruef v. Distrcit Court, 6 L. R. A. (N. S.) 617 (1906).

[5] White v. Howard, 46 N. Y. 144 (1871); Brock v. Frank, 51 Ala. 85 (1874).

[6] 5 J. J. Marsh. 460 (Ky., 1831).

tucky. As to that land, the will was liable to be contested whenever offered as evidence of title, unless it had been recorded in Kentucky according to her laws; and whenever so recorded, the right to contest it in chancery resulted *ipso facto.*"

Although in this case the will was held invalid as to lands in Kentucky on a question of substantive law, yet the court intimates that the probate would not be conclusive even as to the question of practice it decides. The cases, as stated above, are unsatisfactory on this exact point, but their general trend, as it may be gathered, seems to be in the same direction. A foreign probate, because of the lack of jurisdiction, is not entitled to "full faith and credit" in the state where the realty is located.[7] The argument on the other side is predicated on the nature of a probate decree. That is, the statement that the governing law of wills of real property is the *lex rei sitae* properly refers only to requirements of substantive law and not to matters of practice. In this view a foreign decree of probate should be conclusive as to that which it purports to determine, *i. e.*, presence of testamentary capacity and absence of undue influence.

In most states today, there are statutes regulating the effect of foreign probate as regards both real and personal property. Such statutes may be, for general purposes, divided into two classes: those which abrogate the common law rule governing the disposition of real property, and those which simply provide that the ancillary probate shall be conclusive that such was in fact the testator's will. The latter class, of which the West Virginia statute quoted at the beginning of this note is an example, seems to constitute the majority. There are similar enactments in New York,[8] Rhode Island,[9] Georgia,[10] and Ohio.[11] Where there are such statutes it is still necessary that the will conform in execution and other substantive requirements to the *lex rei sitae*, whether there is express provision to such effect in the act or not.

Statutes of the former class are comparatively rare. The Maryland statute[12] provides that every will made outside of the state shall be valid in Maryland (1) "if made according to the forms required by the law of the place where the same was made," or (2) "by the law of the place where the testator was domiciled when the same was made," or (3) "according to the forms required by the law of this state." In a recent decision[13] under this act, it was held that an unattested holographic will made in accordance with the laws of a foreign country where the testator was residing would pass realty in Maryland, although such will was not in the form required by the law of the latter state. There are similar

[7] Robertson v. Pickrell, 109 U. S. 608 (1883).
[8] New York Code Civ. Proc., § 2703.
[9] Rhode Island Rev. Stat., Sect. 9, Chap. 155.
[10] Georgia Civil Code, § 3298.
[11] Act of May 3, 1852, § 52.
[12] Maryland, Code of 1904, § 327.
[13] Lindsay v. Wilson, 103 Md. 252 (1906).

statutes in Massachusetts[14] and Connecticut,[15] but the tendency of legislation and judicial interpretation seems to be in favor of the common law rule which requires conformity with the law of the situs.

S. A.

QUASI-CONTRACTS—WHAT CONSTITUTES UNJUST ENRICHMENT—The term "unjust enrichment" is frequently used by the courts and text writers in stating the basis of liability in quasi-contract actions. Owing, perhaps, to the great variety of the cases grouped under this general head, there is a certain amount of conflict and more or less confusion as to just what is meant by enrichment. Sometimes the word is used in a manner to indicate that an actual increase of the defendant's estate is requisite.[1] Undoubtedly in many cases such an increase is essential to a right of action. For instance, where improvements have been put upon land by a lessee, without the request of the lessor, the recovery, if any, can be only for the enhanced value of the land,[2] as that is the only benefit which the lessor can be said to have received.

Fabian v. *Wasatch Orchard Company*[3] is a case in the Supreme Court of Utah holding that the plaintiff may recover the reasonable value of his services, although the net result of his employment was a loss to the defendant. The Orchard Company hired Fabian to make a market for its canned asparagus. With the consent of the defendant a large quantity was sold, below the cost of production. Fabian, being unable to sue on the contract because it was unenforceable under the statute of frauds, brought a quasi-contract action. The Orchard Company defended that the action could not be maintained as no enrichment was shown, but the court took the view that Fabian should be allowed to recover the reasonable value of his services, and need not show that the Orchard Company had profited.[4]

While this is not a universal view,[5] it is submitted that it is a proper one, and represents the better considered cases. Since the defendant has received the services bargained for, it would be most unjust were the plaintiff denied a recovery of their value. It is true an action upon a constructive or quasi-contract is based upon the theory of restoring a benefit received by the defendant,

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[14] Massachusetts, Gen. Sts., Chap. 92, § 8; Slocomb v. Slocomb, 13 Allen 38 (Mass., 1866).

[15] Conn. Gen. Sts., Chap. 24, § 293; Irwin's App., 33 Conn. 140 (1865).

[1] Keener, "Quasi-Contracts," pp. 278, 279; Gillis v. Cobbe, 177 Mass. 584 (1901).

[2] Greer v. Vaughan, 96 Ark. 524 (1910); Adams v. Kells, 79 Kans. 564 (1909); Union Hall Ass'n v. Morrison, 39 Md. 281 (1873); Wendell v. Moulton, 26 N. H. 41 (1852).

[3] 125 Pac. Rep. 860 (Utah, 1912).

[4] Cozad v. Elam, 115 Mo. App. 136 (1905); Wojahn v. Bark, 144 Wis. 646 (1911); Werre v. N. W. Thresher Co., 131 N. W. Rep. 721 (S. D., 1911).

[5] Gillis v. Cobbe, *supra;* but note a strong dissent.

and that the measure of damage is the value of the benefit to the defendant. But it is not easy to see the force of the argument that the plaintiff should be paid only when the defendant makes a profit. That seems to be deducting the unmarketability of the goods from the value of the services. While the original contract cannot be sued upon, it is, nevertheless, good evidence that the services in question were of value; and it was proper that that value should be restored to the plaintiff.

The principal case is clearly distinguishable from a case where labor and materials are used in constructing a machine, or building a monument, in misreliance upon an unenforceable contract.[6] When the defendant in such a case repudiates the contract, and refuses to take the machine, or the monument he has received nothing that he can restore. So, too, where services are rendered to a third person on the request of the defendant, nothing has been received by the defendant.[7]

Fabian v. *Wasatch Orchard Company* finds support in an analogous line of cases, where, under a contract, which for some reason is not enforceable, improvements are placed on the land of the defendant. In these cases, he has received a benefit in the same sense that a benefit was received in the principal case, and is generally held for the value of the labor and materials, whether or not he has been enriched by an increase in the market value of the property.[8]

J. C. D.

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[6] Dowling v. McKenney, 124 Mass. 478 (1877); Barker v. Henderson, 58 N. J. L. 26 (1895).

[7] Bristol v. Sutton, 115 Mich. 365 (1897).

[8] White v. Wieland, 109 Mass. 291 (1872); Smith v. Smith, 28 N. J. L. 208 (1860). "The plaintiff's right is to recover upon an implied contract to pay for labor and materials used upon his property at his request. . . . . The right does not depend upon the ultimate benefit received by the owner." Vickers v. Ritchie, 202 Mass. 247 (1909), commenting upon Gillis v. Cobbe, *supra*.