

1922

## Editorial Board/Editorial Notes

North Carolina Law Review

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### Recommended Citation

North Carolina Law Review, *Editorial Board/Editorial Notes*, 1 N.C. L. REV. 31 (1922).Available at: <http://scholarship.law.unc.edu/nclr/vol1/iss1/6>

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# The North Carolina Law Review

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Volume One

JUNE, 1922

Number One

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Published in November, January, April and June, by The School of Law,  
The University of North Carolina, Chapel Hill

Two Dollars a Year

Fifty Cents a Copy

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## EDITORIAL NOTES

THE REVIEW—It is hoped that this REVIEW may be of service to the law students, the law teachers, the members of the bar, and to the judges upon the bench, and, through them, to the people of the state.<sup>1</sup>

As a supplement to the routine daily class work of the School, it will afford to the second and third year students, a means of intensive training in legal writing. To them, the independent experience, under faculty supervision, in the analysis, investigation and critical discussion of current problems in North Carolina law will be invaluable. As the REVIEW goes into volumes year by year, it will constitute a collection of reference materials on the local law, of definite value as collateral readings in connection with class discussion.

To the faculty of the School, the REVIEW will be an added incentive to systematic research in the state law and a medium for the

publication of the results achieved. To the members of the bar and the judges upon the bench, the REVIEW will make available, in the form of leading articles, editorial notes and comments, discussions of important legal problems, statements of the significance of outstanding recent state and federal decisions, and historical accounts of the development of distinctive topics and doctrines of North Carolina law. In other words, the REVIEW will carry to the active members of the legal profession, the work the School is doing in tracing the development of law in North Carolina and in the country at large.

Of equal importance to the law student and to the law teacher, will be the opportunity afforded by the REVIEW to learn of the attitude, the needs, and the problems of the attorneys and judges in active practice. It is hoped that those who are daily carrying on the litigation and the legal work of the state may find in the REVIEW a means of expressing their reactions to, and their constructive suggestions for dealing with, the difficulties encountered in the practical administration of

<sup>1</sup> For an interesting account of the possible uses of such a publication as this, see Herbert F. Goodrich, *The Scope and Function of a State Law Review*, Proceedings, Association of American Law Schools, 1920, 157.

the law. Only through this closer contact and understanding can the lawyer, the judge, the law student, and the law teacher effectively unite in what should be a common effort for the solution of modern legal problems. In this latter connection, namely, that of the public service of the legal profession as a whole, particular attention will be given in the pages of the REVIEW to the influence upon legal problems of matters of legislation, government, business, and social and economic conditions.

**THE SCHOOL OF LAW**—The School of Law opened its seventy-ninth year last fall with an initial registration of 113 students, the largest in the history of the School.

The new three year course of study has been in operation this year, with thirteen third year students, thirty-three in the second year class, and sixty-seven in the first year class. A number of the courses formerly given have been considerably enlarged and extended, and new courses have been offered in Public Utilities, Trusts, Administrative Law, and Practice.

The faculty has been increased from four to five full time teachers. The new position was filled in September, 1921, by the appointment of Maurice Taylor Van Hecke, Ph. B., J. D., as associate professor of law. Mr. Van Hecke did his undergraduate work at Beloit College and the University of Chicago, and received his legal training at the University of Chicago Law School. For a time, he practiced law in Chicago, and then served for three years as a member of the legal staff of the Illinois Legislative Reference Bureau. During 1920-21, he held the position of assistant professor of law in West Virginia University. He has charge of the courses in Private Corporations, Equity II, Evidence, Use of Law Books, Public Utilities, and Statutes, and is editor-in-charge of THE NORTH CAROLINA LAW REVIEW.

Assistant Professor Oscar Ogburn Efird, A. M. LL.B., resigned early last summer to enter private practice in Winston-Salem. The vacancy thus created was filled in September, 1921, by the appointment of Robert H. Wettach, A. M., LL.B., S. J. D., as assistant professor of law. Mr. Wettach received his collegiate and professional training at the University of Pittsburgh. After some experience in the practice of law in that city, he entered the graduate course in the Harvard Law School, and received his doctor's degree from that school last June. He will give the courses in Criminal Law,

Persons, Negotiable Instruments, Agency, Sales, and Conflicts of Laws, and will have charge of the Law Clubs.

The other three members of the faculty are well known to the North Carolina Bar. They are: Lucius Polk McGehee, A. B., who, as professor of law and later as Dean, has been connected with the School of Law, with the exception of one year, since 1904; Patrick Henry Winston, professor of law since 1909; and Atwell Campbell McIntosh, A. M., who came to the School from Trinity College as professor of law in 1910. Mr. McGehee has charge of the courses in Property I and II, Constitutional Law, and Administrative Law. Mr. Winston gives the courses in Torts, Equity I, Partnerships, Wills, Insurance, Practice, and Trusts. Mr. McIntosh has the courses in Contracts, Common Law Pleading, Equity Pleading, Procedure Under the Code, Municipal Corporations, Federal Courts, and Bankruptcy.

In December, 1920, the School became a member of the Association of American Law Schools, an association of some fifty-six of the leading law schools in the United States and Canada, dedicated to the improvement of legal education in America. The School was represented at the December, 1921, meeting of the Association by Messrs. McGehee, Van Hecke and Wettach. In February, 1922, Mr. McGehee represented the School at the Washington Conference on Legal Education of Delegates of State and Local Bar Associations.

The summer session of the School will open June 15th and extend until just prior to the bar examinations in August. The summer faculty will consist of four of the regular members of the faculty of the School, and Associate Justice Walter Parker Stacy, of the North Carolina Supreme Court.

The new home of the School of Law is described elsewhere in this issue.

**THE NEW LAW BUILDING**—By a happy coincidence, the REVIEW is able to announce, in its first number, that before the end of the academic year 1922-1923, the new Law Building authorized by the last legislature will be ready for occupancy. The School will go out of its present cramped and almost impossible quarters with a profound sense of relief and satisfaction. The present Law Building, though beautiful architecturally, is utterly inadequate for the special purposes of the School. It can, however, be advantageously devoted to some other need of the University—perhaps to the theatre so earnestly desired

by Professor Koch for the Carolina Play-makers. How wretched the present accommodations of the School and library are, how disheartening the conditions of work have been, only those can realize who have struggled on with the existing equipment. It is with the greatest gratitude and pride that the School sees before it a new era of improved facilities for work and usefulness.

As the goal of many years' exertions draws near, it may be of interest to put on record a short statement as to the previous homes of the School. When the School was founded by Judge William H. Battle eighty years ago, it was conducted in one of the offices in the yard of the present Battle house. At that time the two offices, now both to the right as one enters the yard, stood one on either side of the entrance, and it was in the office on the left that the School had its home from 1843 until some years after the Civil War. When Dr. John Manning was elected to the professorship of law in 1881, he moved to Chapel Hill and established his law office and the Law School in the small building on Henderson Street, near the present post office, now occupied by the telephone exchange. The next home of the School was the room directly opposite the main entrance on the first floor of the Old South Building. It moved into these quarters after Dr. Manning's death in 1899, when the School was finally and formally absorbed into the University. From this room it passed, about 1907, during the Deanship of Judge James C. McRae, to the present Law Building, which had been previously the University Library. Now at last the School is to have a permanent home adequate for its needs and worthy of its long history and the devoted part its alumni have played in the development of the University.

The new Law Building will stand northwest of the Emerson Stadium, forming the eastern end of a quadrangle opening toward the west, the north and south sides of which will be the new Social Science and Language Buildings. This group will occupy the place now used for tennis courts south of the Steele Dormitory and the Gymnasium. With the Steele Dormitory and other buildings to be erected in line with that dormitory to the south, the Law, Social Science and Language buildings will ultimately form the eastern side of the mall or avenue extending south from the South Building and designed to form the central axis of the new campus.

The Law Building, facing toward the mall, will extend north and south about 140 feet

with a depth of 40 feet. The plans show an impressive and graceful building in the colonial Georgian style of architecture. Looking at it from the front, the eye will be arrested by a portico rising the entire height of the building, supported by six Ionic columns. The sky-line of the roof will be broken by a colonial cupola. The outside material of the building will be brick finished with Indiana limestone. It will be built in the fire-proof reinforced concrete type of construction, a matter of especial importance as it will be the permanent home of the law library.

The ground plan of the building will include three parts; a central section 48 feet long, and two wings each about 47 feet long. There will be a well lighted basement, above which will rise two floors surmounted by a mezzanine floor.

The basement, entered by the stairways descending from the two ends of the entrance hall on the main floor, will contain, immediately under the entrance hall, space for lockers for the students' books and coats. Under one wing will be a large room where the students may rest, without feeling that they are in the way or obstructing work, when they are not attending lectures or working in the library. The importance of this student's room is especially emphasized. It will relieve the upper parts of the building, lecture-rooms, library, reading-rooms, passages and halls from noise and will help to develop an atmosphere of study and industry in connection with the portions of the building devoted to serious work. It must be remembered, too, that the Law Building will be the exclusive workshop and home of the students from the time that lectures begin in the morning until the building is closed at night, and the success of the School is dependent upon the atmosphere of professional study and discussion developed about and associated with that building. The other wing of the basement will be devoted to storage rooms and toilets.

Entering the main floor, the student will find himself in an entrance hall, extending across the front of the central part of the building, 48 feet long, with a width of 24 feet. At each end of this will be stairways descending into the basement and rising upward to the library floor. This hall will contain four pillars supporting the library floor above. Behind this entrance hall, and occupying the remainder of the central section of the building will be a lecture room for small classes, 48 feet long by 15 feet wide. At each end of

the entrance hall and opening into it will be a lecture room about 46 feet by 40 feet. These rooms will be lighted by four large windows in each side. There will be no windows in the wall next the central section of the building, nor in the end opposite. This is so in order that neither the students nor the instructor may have to face the light directly. The lecturer's desk is placed at the inside end of the room. The rooms will be fitted with concentric rows of seats, the backs of each row being provided with a shelf or simple desk for the row behind, so that the student may have room to spread out before him his notebook and casebook or textbook.

The second floor, access to which is by stairways at the ends of the entrance hall, is given up to the library, reading rooms, and administrative offices of the School, and to a woman's room with its necessary accessories. The space between the stairways on the second or library floor will be devoted to the office and desk of the librarian. From this central position the librarian will be able to see what is going on in the reading rooms and to maintain a general supervision of the whole floor.

The library floor is lighted by windows at the sides and ends of the building and by small skylights. In the stack room the main light will be artificial. The ceiling height of the library, including the mezzanine floor, will be about 21 feet. One of the wings on this floor will be devoted to the stack room of the library. This will be fitted with steel stacks providing space, with the use of the mezzanine above, for 25,000 volumes. The stack room will be flanked on each side toward the front and rear of the building with small offices for the accommodations of the Dean and for the administrative work of the School. This wing will also contain the woman's room, and toilet facilities for the instructors and librarian.

Immediately in front of the librarian's desk, occupying the rest of the central section of the building will be a reading room 24 by 48 feet. This room will not provide enough space for the necessary accommodations of instructors, students and others, engaged in study or research work in the library, but for some years the space in the wing opposite that used as a stack room will be devoted wholly or in part to a reading room and to a room for the editorial work incident to the NORTH CAROLINA LAW REVIEW.

Ultimately, when it is needed, it is hoped that the building as originally designed may

be completed. The original plan includes a semi-circular apse at the back of the central section of the building with a radius of 24 feet. The first floor of this apse, added to the small lecture room on the main floor, of which mention has been made, will when completed provide a large lecture room and assembly hall for the entire School, suited for use either as a class-room, a room for general lectures, or for other special occasions. The second floor of the apse, added to the smaller central reading-room will, when erected, afford an entirely adequate and well lighted reading room for the library. This will release the second floor of the other wing, now to be used as a reading room, for additional stack space for the library. It was found inadvisable to construct this apse at the present time, but the plan of construction provides for its erection, when the growth of the School requires it.

L. P. McG.

**WIFE'S SEPARATE ACTION FOR PERSONAL INJURY TO HUSBAND**—In *Hipp v. Dupont*,<sup>1</sup> the Supreme Court of North Carolina holds that a personal injury to the husband, caused by the negligence of a third person, entitles the wife to maintain an action in her own name for the consequent loss to her of the husband's consortium. As this is the first case in which this result has been reached, although the question has arisen in several other courts, the ground of decision ought to be carefully examined.

At common law, of course, no such question could arise or was conceivable. The wife could not sue in her own name under any circumstances, and if she could have sued and recovered, the recovery would have inured to the husband. Her position at common law was one of frank inferiority. Upon marriage, she not only lost the capacity to sue, but the marriage operated as an assignment to the husband of her immediate property rights.

This state of things, however, has long passed. By the doctrine of a "married woman's separate equitable estate," elaborated during the eighteenth century by the English Court of Chancery, the wife who enjoyed a marriage settlement was enabled to retain her own property free from her husband's control. The nineteenth century, under the influence of a quickened perception of right and social justice and a deepened feeling of responsibility for social wrong, worked for the complete emancipation of woman and to raise her to a position of equality with man.

<sup>1</sup> 182 N. C. 9, 108 S. E. 318 (1921).

It was only just before the dawn of that century in 1792, that her sense of wrong and her aspirations first found articulate expression in Mary Wolstoncraft's *Vindication of the Rights of Women*. But by the middle of the century, legislatures under the influence of a deeping conviction, began to enact the married women's acts now almost universal, which gave her a legal title to her own property and a right to sue. Under these statutes, cases began to arise which required the courts to re-examine the relation of husband and wife and the rights of the parties. The latest is the case under discussion.

In the *Hipp* case, the wife was allowed to recover for pecuniary losses sustained and expenses incurred, services rendered and maintenance lost in consequence of the injury, and also for mental anguish and loss of consortium. The court recognizes that the relation of husband and wife is now a relation of entire equality; that technical obstacles to an action by her have been removed, so that if she has a right she can assert it; and it finds in loss of consortium and the other losses stated, a legal cause of action.

So far as her pecuniary losses are established, including mental anguish under the recognized doctrine in North Carolina, it is hard to see how any other result could be reached. These injuries appear to be the direct result of the defendants wrongful act.<sup>3</sup>

But a different question is presented with respect to losses resulting to the wife because her husband's weakened physical condition rendered him less able to support her, and because his consortium was less satisfactory than before the injury. In his own action for personal injuries, he recovers or is supposed to recover complete indemnity for his own decreased earning power, and the wife's loss (apart from definite pecuniary injuries, nursing and extra expenditures) is a mere consequence of wrongs for which he has received compensation, which is shared in part by her. To allow her another separate action would be to give a double recovery for one wrong. Her losses are remote and consequential. With regard to her husband's consortium, it is not the natural and probable consequence of a physical injury to decrease the society, companionship and affection between the spouses; and loss which results to

her can only be because the consortium of which she is still in the enjoyment is less satisfactory and valuable than formerly. It is remote and consequential. Such is the reasoning of the cases now to be considered.

Courts which have reached a conclusion opposed to the *Hipp* case and which deny a right of recovery in the wife for personal injuries to the husband, for loss of maintenance due to decreased earning power and for loss of consortium, include the highest courts of Massachusetts, Indiana, Ohio, Maryland, and Missouri, and lower courts in New York and Illinois.<sup>3</sup> These cases, of which the leading case is the *Feneff* case, postulate, as does the *Hipp* case, the equality of husband and wife and her right to sue. But recovery is denied as opposed to two fundamental rules of law: separate recoveries for a single cause of action, and recovery for remote and consequential damages. Two lines of precedents were considered in these cases. In one, married women were allowed damages for direct and intentional invasions of their rights to the consortium of the husband, such as actions for criminal conversation with the husband or for alienating his affections. Actions for injuries to consortium of this type are recognized in all jurisdictions.<sup>4</sup> The other class of precedents consists of those allowing the husband to recover consequential damages for loss of consortium arising from personal injuries negligently inflicted on the wife. This was an old common law action.<sup>5</sup>

Under the modern doctrine of equality of husband and wife does such an action still exist? This is crucial. If recognized as existing for the husband, it ought to exist for the wife; if it is not recognized in favor of the wife, no such action should exist for the husband. In considering the question, actions for intentional direct invasion of consortium

<sup>3</sup> *Feneff v. N. Y. Cent., etc., R. R. Co.* 203 Mass. 278, 89 N. E. 436 (1909); *Gearing v. Berkson*, 223 Mass. 257, 111 N. E. 785 (1916); *Brown v. Kistelman*, 177 Ind. 692, 98 N. E. 631 (1912); *Smith v. Nicholas Building Co.*, 93 Ohio St. 101, 112 N. E. 204 (1915); *Emerson v. Taylor*, 133 Md. 192, 104 Atl. 538 (1918); *Bernhardt v. Perry*, 276 Mo. 612, 208 S. W. 462 (1919); *Goldman v. Cohen*, 30 Misc. (N. Y.) 336, 63 N. Y. S. 459 (1900); *Potelski v. Snyder*, 179 Ill. App. 24 (1913).

<sup>4</sup> *Nolin v. Pearson*, 191 Mass. 283, 77 N. E. 890 (1906); *Turner v. Heavrin*, 182 Ky. 65, 206 S. W. 23 (1918). In both of these cases the authorities are collected and examined. In North Carolina such action is recognized. *Brown v. Brown*, 124 N. C. 19, 32 S. E. 320 (1899). Action for wilfully and knowingly selling morphine to the husband, a drug addict, has been held within this principle. *Flandermeyer v. Cooper*, 85 Ohio St. 327, 98 N. E. 102 (1912).

<sup>5</sup> *Grey v. Livesay*, Cr. Jac. 501 (1619); subnom. *Grey v. Lusz*, 2 Rolle 551.

<sup>3</sup> See *Whitcomb v. N. Y., etc., R. R.*, 215 Mass. 440, 102 N. E. 663 (1913); *Blair v. Seitner Dry Goods Co.*, 184 Mich. 304, 151 N. W. 724 (1915); and as to mental anguish, see *Bailey v. Long*, 172 N. C. 661, 90 S. E. 809 (1916).

have no bearing,<sup>6</sup> since as has been seen, direct intentional invasion is generally recognized as giving a cause of action.

In many jurisdictions, the common law action in favor of the husband is still recognized; in most courts, perhaps, in deference to precedent.<sup>7</sup> But according to a well reasoned series of recent cases, such an action can no longer be maintained by the husband, for the same reasons which prevent the wife recovering under similar circumstances.<sup>8</sup>

In *Blair v. Seither Dry Goods Co.*, *supra*, it was held, following the *Fenefee* case, that there could be no recovery by the husband for mere loss of wife's consortium (affection, companionship and marital society), through negligent personal injury to her, merely rendering her society less valuable and satisfactory; but recovery was allowed for definite and ascertainable pecuniary loss for services habitually performed. Of course, like the wife, he may maintain an action for direct intentional invasion of the consortium, such as criminal conversation or alienation of affections.

The correctness of the reasoning of the opposing cases depends, not assuredly as suggested in the *Hipp* case on the common law doctrines of merger of wife's identity and her incapacity to sue, or on the recognition of a right to consequential damages in the husband not allowed to the wife. Nor does it depend on a "clinging to consuetudinary law after the reason for the custom has ceased," because these cases are founded on a thorough and careful attempt by able courts to apply the new idea of equality to the marital relation. The real ground for divergence of opinion is

<sup>6</sup> Thus, *Flandermeyer v. Cooper*, *supra*, being specifically based on direct invasion of consortium. So, too, *Holleman v. Harvard*, 119 N. C. 150, 25 S. E. 972 (1896), (husband allowed to recover for damages for sale of drugs to wife, an addict). These cases are relied on in *Hipp v. Dupont*. See *Jaynes v. Jaynes*, 39 Hun (N. Y.) 40 (1886), (wife's action for alienation of affections), also relied on in *Hipp* case.

<sup>7</sup> *Mageau v. Great Northern R. Co.*, 103 Minn. 290, 115 N. W. 651 (1908); it is recognized in North Carolina; *Kimberly v. Howland*, 143 N. C. 398, 55 S. E. 778 (1906); *Bailey v. Long*, *supra*. In commenting on these North Carolina cases in the *Hipp* case, the court distinguishes the right of recovery of the husband for the wife's earnings, in case of injury to her, of which statutes have deprived him, and for the loss of the companionship of his wife, which is "a loss purely personal to him and the direct consequence of the wrong of the defendant." The consequential character of the loss as already involved in the husband's right of recovery is of course denied. See also *Guevin v. Manchester St. Ry. Co.*, 78 N. H. 289, 99 Atl. 298 (1916).

<sup>8</sup> *Marri v. Stamford St. Ry. Co.*, 84 Conn. 9, 78 Atl. 582 (1911); *Bolger v. Boston El. R. Co.*, 205 Mass. 420, 91 N. E. 389 (1910); *Whitcomb v. N. Y. etc. R. Co.*, 215 Mass. 440, 102 N. E. 663 (1913).

whether the recognized common law principle of remoteness of damages is applicable.

The *Hipp* case says: "Our precedents establish that such damages are not remote for the husband, and on parity of reasoning they are not remote for the wife."

The opposing cases say: "Such damages can be recovered by neither spouse. To allow the wife to recover for merely consequential unintentional losses resulting from negligent injury to the husband is opposed to the principle refusing consequential and remote damages and is not supported by any analogous line of cases. Old precedents allowing the husband to recover for injuries to the wife avail nothing, as they are founded on a barbarous exploded theory of the husband's ownership of the wife at a time when she was considered an inferior." L. P. McG.

RESALE PRICE MAINTENANCE—The *Beech-Nut* Case was brought to the Supreme Court of the United States on *certiorari* proceedings from the Circuit Court of Appeals, the question at issue being the authority of the Federal Trade Commission under sec. 5 of the Federal Trade Commission Act, to order the Beech-Nut Packing Co. to desist from carrying out a certain sales policy whereby standard prices were maintained on its products in the hands of dealers at wholesale and at retail.<sup>1</sup>

From the agreed statement of facts presented to it, the Court selected the following for mention in its review of the case: "The Company refused to sell its products to those who did not maintain the resale prices suggested by it. It also refused to sell to those who sold to others who had failed to maintain those suggested prices. It refused to sell to mail-order houses, or to dealers who sold its products to mail-order houses. It employed 'specialty salesmen' who solicited 'turn-over orders' directly from retailers, but permitted such orders to be filled only by wholesalers who maintained the prices. It reinstated distributors previously cut off upon promises and assurances that they would support the company's price policy. New distributors were added to the list only upon similar assurances. In addition, the Company utilized a system of key numbers or symbols marked upon the cases of 'Beech-Nut Brand Products,' so that in the event of price irregularities, the identity of the offending dealers might readily be traced. It also maintained card records 'containing the names of thousands of jobbing, wholesale and retail

<sup>1</sup> *Federal Trade Commission v. Beech-Nut Packing Co.* 42 Sup. Ct. 150 (1922).

distributors, and . . . listed upon those cards . . . the words 'Undesirable—Price Cutters,' 'Do Not Sell,' . . . or expressions of a like character, to indicate that the particular distributor was in the future not to be supplied with respondent's goods on account of failure to maintain the suggested retail prices . . . Additional card records were kept of 'selected' distributors."

The decision of the Court, while sustaining in general the "cease and desist order" of the Federal Trade Commission, nevertheless, does not in any way impair the right of the company to refuse to sell its products to any one whomsoever, or its right to determine the circumstances under which it will sell or decline to sell.

Some of the critics of the case have expressed inability to take the above view of its effect, and have maintained that the Court in pronouncing the "Beech-Nut Policy" illegal, has taken a position inconsistent with that taken by the same tribunal in other recent cases involving similar issues. It has been contended that the agreed statement of facts upon which the decision was based brought the case within the *Colgate* Case, discussed later in this note, but that the Court arrived at an opinion adverse to the *Colgate* decision without overruling it or questioning it, or "recognizing any inconsistency in the two positions."<sup>2</sup> Elsewhere, it is stated, following a generally adverse criticism of the Court's opinion, that "In effect, the Court has nullified a desirable exception to a questionable rule," the "questionable" rule by implication being that laid down in the *Colgate* Case relative to the right to refuse to sell.<sup>3</sup>

Reply to these criticisms will best follow a summary of prior cases involving price maintenance as the major issue.

In the case of *Dr. Miles Medical Co. v. John D. Park and Sons Co.*,<sup>4</sup> it was held that specific contracts between manufacturer and dealers to maintain certain resale prices were unenforceable on grounds of public policy. The theory of the Court then expressed, and subsequently adhered to, was: "The complainant having sold his products at prices satisfactory to himself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic."

In *Bauer v. O'Donnell*,<sup>5</sup> the famous "Sanatogen Case," the question at issue was:

May a patentee by notice limit the price at which future retail sales of the patented articles may be made, such article being in the hands of a retailer by purchase from a jobber who has paid the agent of the patentee the full price asked for the article sold? The Court in its negative answer reiterated the doctrine of the former case.

A still different type of attempt to coerce dealers into acceptance of standard resale prices, by use of a so-called "license notice" was frustrated by the Court in *Straus v. Victor Talking Machine Co.*<sup>6</sup> In a contemporaneous decision concerning motion pictures, the averseness of the Court to the idea of the manufacturer's control over his products, after their sale, goes so far as to achieve a complete overthrow of the well-known *Dick* Case,<sup>7</sup> until that time one of the legal mainstays of attempted price control by patentees.

The next case to come before the Court, *Boston Store of Chicago v. American Graphophone Co.*<sup>8</sup> is of interest because of its comprehensive review of the legal doctrines involved in price maintenance contracts. Relative to the question before it, the Court said: ". . . There is no room for controversy concerning the subjects to which the questions relate, as every doctrine which is required to be decided in answering the questions is now no longer open to dispute . . ."

It was at this juncture, when the prohibition of resale price maintenance seemed well established and when the proponents of resale price maintenance seemed convinced that no remedy was available for them except "the curative power of legislation," that relief apparently arrived in the form of the *Colgate* Case.<sup>9</sup>

In the bill of indictment, the *Colgate* Co. was charged with having attempted to maintain resale prices through the method of refusing to sell to price-cutting dealers, the refusal-to-sell action being in accordance with previously published announcements to that effect. No mention was made in the indictment of contracts with dealers, express or implied, or of any "follow-up" system designed to discover and report non-complying dealers. In a later reference to this case, the court declared that, "the only act charged

<sup>2</sup> 243 U. S. 490 (1917).

<sup>3</sup> *Motion Picture Patents Co. v. Universal Film Manufacturing Co.*, 243 U. S. 502 (1917); *Henry v. Dick*, 224 U. S. 1 (1912).

<sup>4</sup> 246 U. S. 8, 38 Sup. Ct. 257 (1918).

<sup>5</sup> *U. S. v. Colgate Co.*, 250 U. S. 300, 39 Sup. Ct. 465 (1919).

<sup>6</sup> 31 Yale L. J. 653.

<sup>7</sup> 35 Harv. Law Rev. 772.

<sup>8</sup> 220 U. S. 373, 31 Sup. Ct. 376 (1911).

<sup>9</sup> 229 U. S. 1 (1913).



amounted to the exercise of the right of the trader or manufacturer . . . to exercise his own discretion as to those with whom he would deal, and to announce the circumstances under which he would refuse to sell."<sup>30</sup> The Court was emphatic in declaring the conduct, as thus described, legitimate. Moreover, it took occasion later, in the cases of *U. S. v. Schrader's Son, Inc.*,<sup>31</sup> and *Frey & Co. v. Cudahy Packing Co.*,<sup>32</sup> to reaffirm its legality, although each of the latter cases involved refusal-to-sell methods which were pronounced illegal. The distinction lay in the existence of implied agreements.

The above cases constitute the legal background of the *Beech-Nut* Case. They clearly foreshadowed defeat for the *Beech-Nut* selling methods as described in the beginning of this discussion, unless the Company's methods could be established as identical with those of the *Colgate* policy. However, the Court properly refused to admit any such identity, holding that the respondent's plan of marketing while including the practices of the *Colgate* Co., yet went much further in that it utilized a closely-knit and effectively applied follow-up system in connection with its selling, in which jobbers, retailers, and the agents of the company participated. In short, it was an elaborate espionage system in which an army of individuals both in and out of the employ of the *Beech-Nut* Packing Co. were under pressure to observe and to report to the Company, each upon the actions of the others. If coöperative action of this type is not to be regarded as conspiracy in restraint of trade and therefore an unfair method of competition within the meaning of sec. 5 of the Federal Trade Commission Act, then conspiracy has no meaning in American business law.

To any one familiar with the problems and intricacies involved in the competitive marketing of manufactured goods, it is incomprehensible that the rule of free choice of customers as pronounced in the *Colgate* decision should be regarded as a "questionable rule." The only alternative to such a rule in practice would be compulsory sales to whomsoever would buy, which would preclude the possibility of manufacturer selecting his own channels of commodity distribution. Free choice of the agencies of distribution is essential in many instances to efficient market-

ing for reasons wholly outside price-maintenance considerations.

The doctrine as laid down in the *Beech-Nut* Case, far from being an undesirable exception to the above rule, is neither an exception nor undesirable. It does not limit the choice of customers, but merely invalidates certain designated methods of procuring the information upon which the choice is made. The fact that certain manufacturers find it difficult to procure the desired information without the use of the prescribed methods is wholly aside from the question. The same objection may be directed against the illegality of any procedure which stands in the way of easy accomplishment of an end legitimate in itself.

From the economic point of view, the *Beech-Nut* decision has made the legal status of price maintenance more equitable.<sup>33</sup> Had this case been brought within the scope of the *Colgate* ruling, it would have created a situation in which only the more powerful of specialty manufacturers could have effected price control, for only this type could afford the elaborate and broadly-based follow-up system of espionage and reporting requisite to success. Admittedly, the law is not presumed to be cognizant of the mere size of a business, unless monopoly is attained or attempted. But in the eventuality above suggested, business men would have faced the fact that every known method of attaining price maintenance would have been by court ruling made illegal, except the one method which is effective only in the hands of the largest interests. The application of the *Colgate* rule to the *Beech-Nut* Case would at once have rendered farcial all prior rulings of the Court relative to resale price maintenance contracts. It would have been tantamount to legitimatizing the use of Big Berthas in war while forbidding the use of one-pounders.

At present all manufacturers may be said to occupy the same position as regards the practical as well as the theoretical aspects of resale price maintenance. Price control to the extent of preventing the extreme instances of price-cutting in the main still remains wholly feasible. Price control in its most rigid form has been rendered virtually impossible, an end highly desirable economically.<sup>34</sup> The principle of freedom of choice

<sup>30</sup> Reference in *Beech-Nut* decision, 42 Sup. Ct. 150 (1922).

<sup>31</sup> 252 U. S. 85, 40 Sup. Ct. 251 (1920).

<sup>32</sup> 256 U. S. 208, 41 Sup. Ct. 451 (1921).

<sup>33</sup> Cf. Kales, *Contracts and Combinations in Restraint of Trade*.

<sup>34</sup> For the economic aspects of price maintenance in detail, see Murchison, *Resale Price Maintenance* (1919), Columbia University Studies in Political Science, Vol. 82, No. 2.

in the selection of customers, than which no principle of business law should be regarded as more sacred, has been wholly preserved, and at the same time rendered comparatively free from abuse by elimination of certain accessory devices in themselves repressive and contrary to public policy.<sup>15</sup>

C. T. MURCHISON

Associate Professor of Business Economics,  
University of North Carolina

**DIMINUTION OF JUDGES' SALARIES BY AN INCOME TAX**—The Constitution of North Carolina<sup>1</sup> provides that "the salaries of the judges shall not be diminished during their continuance in office." Similar provisions are found in the federal Constitution and in the constitutions of many of the states. Under these clauses the question has arisen whether the government is prohibited from applying a general income tax to the salaries of judges. One view is that such a tax does not diminish these salaries within the meaning of the Constitution, but that it constitutes merely a means of distributing the cost of the government equally over the general mass of citizens. On the other hand, the proposition that a general income tax is inapplicable to judicial salaries under a constitutional provision against diminution is strongly upheld in most jurisdictions.<sup>2</sup>

The first view suggested was adopted in an early Pennsylvania case, and has recently received support in Wisconsin.<sup>3</sup> The strength of the first case, is of course, somewhat impaired by the briefness of the opinion and by the fact that no authorities are cited in support of its holding. And it was virtually overruled by a later case in the same jurisdiction.<sup>4</sup> Probably the ablest presentation of the view that a general income tax does not diminish the salaries of the judges within the meaning of the constitution, is found in the dissenting opinion of Mr. Justice Holmes in

<sup>15</sup> Cf. Brown, *The Right to Refuse to Sell*, 25 Yale L. J., 194.

<sup>1</sup> Art. IV, sec. 18.

<sup>2</sup> It should be borne in mind that the proposition under discussion has no direct connection with the problem as to whether a state may tax the salary of an officer of the Federal Government, and *vice versa*. The solution of that problem depends upon the considerations of policy involved in one sovereignty taxing the agencies of another and not upon the interpretation of such a constitutional clause as that herein involved. See *Collector v. Day*, 11 Wall. 113 (1870); *Purnell v. Page*, 133 N. C. 125, 45 S. E. 534 (1903); and *Gillespie v. Oklahoma*, — U. S. —, 66 L. ed. 211 (adv. ops., 1922).

<sup>3</sup> *Commissioners v. Chapman*, 2 Rawle (Pa.) 73 (1829); *State v. Nygaard*, 159 Wis. 396, 150 N. W. 513 (1915).

<sup>4</sup> *Commonwealth ex. rel. Hepburn v. Mann*, 5 Watts & Serg. 403 (1843).

the recent case of *Evans v. Gore*,<sup>5</sup> in the Supreme Court of the United States. It is there suggested that the salaries of federal judges are, for two reasons, subject to a general federal income tax. In the first place, it is said that the clause in the federal Constitution was intended to secure the independence of the judges from legislative coercion, and that to require them to pay the same income taxes that all other men have to pay, could not possibly influence their judicial action. Moreover, it was felt to be unnecessary to exempt the official salaries of judges as such from taxation, while that part of those salaries which has been converted into other forms of property is made taxable.<sup>6</sup> In the second place, the dissenting opinion urged, as cannot be said in the state cases, that the Sixteenth Amendment, which provides for the taxation of incomes, "from whatever source derived," authorizes the subjection of judicial salaries to a general income tax, and that the majority view on this phase of the case disregards the probable significance of that clause.<sup>7</sup>

The view, however, that judicial salaries are not taxable under these diminution provisions is supported by the great majority of the decided cases.<sup>8</sup> The argument for this position is that the power to tax is the power to destroy, and that even the upholding of the applicability of a relatively small and general income tax might become a precedent for a more direct and coercive measure. The firmness with which that position is maintained is emphasized by the fact that not even the apparently explicit language of "from whatever source derived" in the Sixteenth Amendment was sufficient to overcome it. The answer to this contention is that the sustaining of the applicability to judicial salaries of a general income tax could not in the nature of things later preclude the court from nullifying an actually harmful tax, one that does come within the purview of the Constitution, and that there will be time and opportunity enough to grapple with that situation when it arises.

In North Carolina, the attitude that judicial salaries are non-taxable has long been prevalent, although it should be noted that heretofore the Court has not as such rendered an

<sup>5</sup> 253 U. S. 264 (1920).

<sup>6</sup> See 30 Yale L. J. 75.

<sup>7</sup> See 34 Harv. Law. Rev. 70.

<sup>8</sup> See *Evans v. Gore*, 253 U. S. 245 (1920); *New Orleans v. Lea*, 14 La. Ann. 197 (1859), and cases cited in *State v. Nygaard*, 159 Wis. 396, 150 N. W. 513 (1915).

opinion on the question, but has simply relied upon opinions submitted by the state attorneys-general.<sup>9</sup> In the recent North Carolina case of *Long v. Watts*,<sup>10</sup> the question was again presented whether or not a general income tax is a diminution of the judges' salaries within the constitutional prohibition. One of the state Superior Court judges brought an action to restrain the state commissioner of revenue from collecting an income tax on his official salary, alleging the invalidity of such an application of the income tax act of 1920.<sup>11</sup> The defendant contended that since the constitutional amendment of 1920 regulating the rate of income taxes and the exemptions therefrom, the official salaries of judges were subject to taxation.<sup>12</sup>

In an unanimous and somewhat vigorous opinion the Court held that although the private incomes and property of judges are subject to taxation, their official salaries are exempted. The decision is supported by the clear weight of authority. As an original question, however, and in view of the purpose of the constitutional provision and the considerations suggested by Mr. Justice Holmes, the result would be unnecessary.

N. Y. P.

#### BANK'S LIABILITY FOR PAYMENT ON UNAUTHORIZED INDORSEMENT OF PAYEE'S NAME.

—A recent North Carolina case raises a question as to the liability of a bank for payment of a check on an unauthorized indorsement of the payee's name.<sup>1</sup> The facts were as follows: A owed C \$1,000. A told C that if the latter would loan him \$3,000, he would repay the \$1,000, and give as security a deed of trust on his sister B's land. This was agreed to. C made the check payable to B, whose name purported to be signed to the trust deed, and delivered it to A, whereupon he indorsed it "B by A," and deposited it to his own credit in the defendant bank. Later, A paid C the original debt by check on his account. B had no notice or knowledge of the transaction. C, upon discovering the

fraud, seeks to hold the bank for payment of the check on the unauthorized indorsement of the payee's name. Held, plaintiff could recover the difference between the face value of the check and the amount repaid to him by A.

A drawee bank is liable for payment on the forged indorsement of a payee's name.<sup>2</sup> It cannot charge the amount so paid to the drawer's account, unless the latter has been guilty of negligence causing the payment. It may disburse only in conformity with the drawer's directions.<sup>3</sup> Likewise, when a drawee bank pays a check indorsed by an agent, it must assure itself of his authority at its peril.<sup>4</sup> Such authority may of course be implied as a necessary incident to an actual agency.<sup>5</sup> The Negotiable Instruments Act<sup>6</sup> provides that no right can be acquired under a signature made without the authority of the person whose signature it purports to be, "unless the party against whom it is sought to enforce such right is precluded from setting up the want of authority." The right of action in this connection inures to the drawer and not to the payee, because the check never becomes the property of the payee.<sup>7</sup>

When the drawee bank complies with the instructions of the drawer, it will be protected. So where A, representing himself as B, obtains an instrument payable to B, the drawer intends the person before him to be payee, although he erroneously supposes that person to be B.<sup>8</sup> Personal presence is a surer means of identification than a name.<sup>9</sup> Thus, the bank, having followed the drawer's directions, should not be liable to him.<sup>10</sup> But where A, representing himself as B's agent, obtains an instrument payable to B, nothing else appearing, the drawer does not intend to make A payee, nor to authorize A to indorse.<sup>11</sup> Here, the name is the only basis for identification. Therefore, the bank will be liable for

<sup>1</sup> *Shipman v. Bank of State of New York*, 126 N. Y. 318, 27 N. E. 371 (1891); *Yarborough v. Trust Co.*, 142 N. C. 377, 55 S. E. 296 (1906).

<sup>2</sup> See 22 Harv. Law Rev. 605.

<sup>3</sup> 2 Bolles, *Modern Law of Banking*, 730; *Bank v. Hay*, 143 N. C. 326, 55 S. E. 811 (1906).

<sup>4</sup> Where one merely professes authority to indorse, which in fact does not exist, it is not forgery. 1 *Mechem on Agency*, 2nd ed. 266.

<sup>5</sup> C. S., sec. 3003.

<sup>6</sup> *First National Bank of Chicago v. Pease*, 168 Ill. 40, 48 N. E. 160 (1897).

<sup>7</sup> See 14 Harv. Law Rev. 60. *Elliott v. Smith-erman*, 19 N. C. 338 (1837). See 50 L. R. A. 75, note.

<sup>8</sup> *Robertson v. Coleman*, 141 Mass. 231, 4 N. E. 619 (1886).

<sup>9</sup> *Land Title and Trust Co. v. Northwestern National Bank*, 196 Pa. St. 230, 46 Atl. 420 (1900).

<sup>10</sup> See 15 Harv. Law Rev. 152.

<sup>9</sup> Opinion of Attorney General Batchelor, 48 N. C., Appendix, p. 544 (1856); Opinion of Attorney General Walser, N. C. Pub. Doc., (1899), p. 95; *In Re Taxation of Salaries of Judges*, 131 N. C. 692, 42 S. E. 970 (1902).

<sup>10</sup> 110 S. E. 765 (N. C. 1922).

<sup>11</sup> P. L., 1921, Ch. 34.

<sup>12</sup> Constitution of North Carolina Art. V, sec. 3. The effect of this amendment was simply to remove the prohibition against taxing incomes derived from property already taxed, to limit the maximum rate of taxes upon incomes to 6 percent thereof, and to specify certain exemptions.

<sup>1</sup> *McKaughon v. Merchants Bank and Trust Co.*, 182 N. C. 543, 109 S. E. 355 (1921).

payment on an unauthorized indorsement thereof.<sup>12</sup>

The principal case, quite anomalously, partakes of the essence of both of these situations. A represented himself to C as the agent of B. But, as a matter of fact, C intended that A should receive the proceeds of the check. C was making the loan to A, and at his request. C looked to him for payment of the prior loan from those proceeds, and delivered the check to him, payable to B, without any reference to his authority as agent. It seems this was but a nominal use of B's name in the nature of a fictitious payee.<sup>13</sup> Would payment to A on his unauthorized indorsement of B's name be a compliance with the drawer's intention and direction? To distinguish this from payment to A where he has represented himself to C as B<sup>14</sup> is a close refinement. Where the drawee pays on an unauthorized indorsement and the proceeds find their way back to the drawer, the former is not liable as for a wrongful payment; the drawer is not damaged by the payment.<sup>15</sup> Likewise, where money gets into the hands of him whom the drawer intended to designate as payee.<sup>16</sup> It is submitted that the same rule should prevail when the money gets into the hands of him whom the drawer intended to receive it.<sup>17</sup> The indorsement and payment accord with the intention of the drawer, and he might be estopped to complain that he was injured thereby. It seems that in the principal case the court should at least have weighed these considerations against the drawee's negligence in paying on an unauthorized indorsement.

Moreover, it seems arguable that under the particular circumstances here, the check was payable to a fictitious payee.<sup>18</sup> Section 2990 of the Consolidated Statutes of North Carolina, provides, *inter alia*, that a check is payable to a fictitious payee when "it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable." This section states the well settled rule that the intention of the drawer determines the fictitious

character of the payee.<sup>19</sup> Where the payee is a stranger to the transaction, and has no interest therein, it has been held that he may be regarded as a nonentity.<sup>20</sup> If the name of the payee represents the real person entitled to receive the amount of the check, and the drawer intends that the check should be delivered to the real payee and should not go into circulation otherwise than through delivery to and indorsement by the payee named, then, the payee is not fictitious.<sup>21</sup> The fictitious character of the drawer's direction to pay does not depend upon the identification of the payee named with some existent person, but upon the intention underlying the act of the drawer in inserting the name.<sup>22</sup> It seems arguable that the drawer in the principal case did not intend B to be the real payee.

The principal case allowed the drawer to recover, but restricted the amount to the difference between the face value of the check and the amount repaid to him by A. It seems that when A wrongfully obtained the money from defendant bank to pay C, he became a constructive trustee thereof for the bank.<sup>23</sup> When C accepted it in payment of the prior debt, he became a purchaser for value, and without notice.<sup>24</sup> Thus, he took it free of all equities.<sup>25</sup> The money was not the property of the defendant bank, but became the drawer's property, for which he paid value. So the drawer's loss was not cured by the payment from A. It seems, therefore, that if the drawer was not precluded as above suggested, he should have recovered the full amount of the original check.

C. L. N.

THE CY PRES DOCTRINE IN NORTH CAROLINA—"In the law of charitable trusts in England and in all but a very few states,<sup>1</sup> there prevails a principle called the doctrine of *cy pres*. Under this doctrine, when property is given for a particular charitable purpose, and when that purpose becomes impos-

<sup>12</sup> *Coggill v. The American Exchange Bank*, 1 N. Y. 113 (1847).

<sup>13</sup> *Ibid.*

<sup>14</sup> *Shipman v. Bank of State of N. Y.*, 126 N. Y. 318, 27 N. E. 371 (1891).

<sup>15</sup> *Phillips v. Mercantile National Bank*, 140 N. Y. 556, 35 N. E. 982 (1894).

<sup>16</sup> *Newton v. Porter*, 69 N. C. 133 (1877). See 19 Harv. Law Rev. 55. *Edwards v. Culbertson*, 111 N. C. 343, 16 S. E. 233 (1892).

<sup>17</sup> *Mechanic's Bank v. Chardavoyne*, 69 N. J. L. 256, 55 Atl. 1080 (1903).

<sup>18</sup> *Nassau Bank v. Bank of Newburg*, 159 N. Y. 456, 54 N. E. 66 (1899).

<sup>19</sup> The cases are collected in 5 L. R. A. 33, note, 6 *ibid.* 147, 14 L. R. A. (n. s.) 59, note, and 37 *ibid.* 1007, note.

<sup>12</sup> *Armstrong v. Pomeroy National Bank*, 46 Ohio St. 512, 22 N. E. 866 (1889).

<sup>13</sup> See note 16, *post*.

<sup>14</sup> See note 7, *supra*.

<sup>15</sup> *Andrews v. Northwestern National Bank*, 107 Minn. 196, 117 N. W. 621 (1908).

<sup>16</sup> See 14 Harv. Law Rev. 60.

<sup>17</sup> See *Banks and Banking*, 7 C. J. Secs. 400, 414.

<sup>18</sup> Such check would be payable to bearer. C. S. sec. 2990.

sible of accomplishment, the courts may authorize the application of the property to other charitable purposes, provided those other purposes, as well as the expressed purpose, fall within a more general charitable purpose of the donor. The doctrine also applies when the particular charitable purpose of the donor is or becomes illegal.<sup>2</sup> This concept originated in mediaeval times, when, "as . . . pious donations were the price paid to Heaven or to its more exacting broker, the Church, for its favor, 'one kind of charity' would indeed have 'embalmed the testator's memory, as well as another,' for his intent was not the application of the purchase money, but the delivery of the goods purchased. . . . The testator's paramount object being salvation, the means were immaterial."<sup>3</sup>

The doctrine of *cy pres* is not, however, recognized in North Carolina. This note indicates the development of that attitude in this state.

The pioneer North Carolina case on the jurisdiction of a court of equity to enforce a charitable trust, is *Griffin v. Graham*,<sup>4</sup> decided in 1820. From the altogether sweeping acceptance in that case of the complete jurisdiction of the English chancellors over charitable trusts, it might be inferred that the Court would not have been unwilling, had the question been before it, to recognize also, as a corollary of that jurisdiction, the availability of *cy pres* relief. Eight years later, however, in *McAuley v. Wilson*,<sup>5</sup> when the question first arose, the Court flatly repudiated the doctrine of *cy pres*. This seems to have been mainly because of the feeling that a court ought not to make over a person's will in the absence of proper proof that the alteration would have had the testator's approval. In other words, the view was that a court ought to hesitate long before substituting for the terms of the will a guess as to what the deceased would have desired had he known of the impediment in the way of carrying out his expressed wish. This reasoning was augmented in the case of *Holland v. Peck*,<sup>6</sup> decided in 1842, by the assertion that the doctrine of *cy pres* was admitted by the English courts to be unsound, that many of the results in England had been revolting, and that

the concept had never been accepted by any of the American courts.

Although, as has been seen, most American courts have now adopted<sup>7</sup> the *cy pres* doctrine, the North Carolina view seems analytically correct. "That such a doctrine (that of *cy pres*) should not only have survived the state of society and of belief in which it originated, but should also have been developed into an integral part of the jurisprudence of a social order and faith radically diverse, may occasion surprise. And a doubt may arise whether in administering it, the peculiar circumstances of its beginning and development—we might indeed say the necessary conditions of its existence—are borne in mind; or whether it is considered that the modern testator, not intending a purchase of Heaven with his '*bona caducis*' but a specific bequest to a specific charity, may be presumed to have known not merely what he intended, but what he did not intend, in the case of a charity, as well as any testamentary disposition made by him; or that the court in imputing to him what he did not say, because he might have said it, may not run some risk of making him say what he would have emphatically repudiated."<sup>8</sup>

The Supreme Court of North Carolina has had occasion to refer to and discuss the doctrine of *cy pres* in connection with some four types of cases.

One situation has been that in which the testator has not designated with sufficient definiteness the beneficiaries of a charitable trust and the means to be used in its accomplishment. While, on the one hand, the Court seems to have become more liberal as to the exactness with which these matters must be fixed<sup>9</sup> by the terms of the will, the view is firmly maintained that the doctrine of *cy pres* may not be resorted to in North Carolina to enable the Court to uphold the trust by supplying the omissions mentioned.<sup>9</sup>

Another has been the case where the funds available were insufficient to accomplish the full intent of the testator. The fact that the doctrine of *cy pres* is not recognized has not operated, in this situation, to prevent the application of the funds, as far as possible, to the purpose set forth in the will. As the

<sup>2</sup> See note 1, *supra*.

<sup>3</sup> See note 3, *supra*.

<sup>4</sup> *Holland v. Peck*, 37 N. C. 255 (1842); *Bridges v. Plesants*, 39 N. C. 26, 44 Am. Dec. 94 (1845); *Taylor v. Am. Bible Society*, 42 N. C. 201 (1857); *Keith v. Scales*, 124 N. C. 497, 32 S. E. 809 (1899). And see note 14, *post*. Cf. *Fairbault v. Taylor*, 58 N. C. 219 (1859), in which, however, no charitable trust was involved.

<sup>5</sup> Austin W. Scott, *Education and the Dead Hand*, 34 Harv. Law Rev. 1, 5.

<sup>6</sup> Joseph Willard, *Illustrations of the Origin of Cy Pres*, 8 Harv. Law Rev. 69, 91.

<sup>7</sup> 8 N. C. 96, 9 Am. Dec. 619 (1820).

<sup>8</sup> 16 N. C. 276, 18 Am. Dec. 587 (1828).

<sup>9</sup> 37 N. C. 255 (1842).

Court said in a recent case,<sup>10</sup> "this is not the doctrine of the *cy pres*, which is to apply the sum to some other purpose 'equally as good,' but is the application of the fund to the very purpose named, as far as it will go."<sup>11</sup>

The third case has been that in which some obstruction has arisen to make it impossible to carry out the expressed purpose of the testator. Here the Court has been compelled to decree, that as to the property involved, the donor died intestate, "for we do not, as they do in England, apply it to other objects of a similar kind, by what is called the doctrine of *cy pres*."<sup>12</sup>

And the same result has obtained where the trust was for an illegal purpose.<sup>13</sup>

In the recent North Carolina case of *Wachovia Bank and Trust Company v. Ogburn*,<sup>14</sup> the facts were these: Three hundred acres of land, known as Vade Mecum Springs, and \$209,000 were "to be set apart and held in trust to conserve, protect and beautify said property, contribute to the construction of suitable roads to and through the premises as well as to a railroad . . . and erect thereon a commodious and permanent auditorium or assembly room for the meeting and gathering of educational, religious, scientific, medicinal or other worthy organizations or associations. My object and hope being that the same may be developed into and become not only a watering resort, but an institution after the order of a chautauqua." The heirs contended that the trust was invalid on the grounds, among others, that the beneficiaries and the details of the plans had not been named with sufficient definiteness, and that the funds available were insufficient to carry out fully the wishes expressed in the will. The trust was held valid, however, the Court saying: "It is sufficient if the testator describes definitely the general nature of the trust. He may leave the details of its execution to the trustee under the superintendence of the court of equity. A gift to charity is complete without reference to any of the suggestions or directions of the testator as to the details of the manner in which it shall be carried into effect, . . . provided the objects are specific

enough that the Court by decree can effectuate them. . . . It is true that the doctrine of *cy pres* is not recognized in this state, and it is not called for here simply by the fact that the testator wisely did not attempt to work out all the details of the plan which he knew must be modified by future developments." It was presumed that the trustee would "cut the coat according to the cloth" and the funds in hand were applied as far as they would go, toward carrying out the contemplated project. This result is in accord with the decisions and *dicta* in the first and second groups of cases noted above.

R. R.

**RISK OF LOSS WHERE SELLER RETAINS SECURITY TITLE.**<sup>1</sup> "In a transaction of a purchase of goods where nothing is to be done, the price agreed upon and nothing said about payment or delivery, the property passes at once and the future risk is put upon the purchaser, although he cannot take the goods away before he pays the price."<sup>2</sup> In *Jenkins v. Jarrett*,<sup>3</sup> there was a contract for the sale of a horse, with no stipulation as to payment or delivery. The court applied the principle involved in the quotation, holding that title passed to the purchaser immediately although he could not take away the horse without paying the price. In these cases, there is no reservation of title, but the seller retains possession of the goods to secure payment of the purchase price. It is correctly assumed that the risk of loss accompanies the ownership of the goods, that it is upon the seller until the property in the goods passes to the buyer, and that after title passes, it is upon the buyer.

A conditional sale gives rise to a more difficult situation. Suppose the ordinary case in which the seller delivers property to the buyer under an agreement that the seller shall retain title until the price is paid. Before the time of payment, the property is destroyed. Should the loss fall upon the seller merely because he holds the legal title? Some courts<sup>4</sup>

<sup>1</sup> This discussion is based very largely on North Carolina decisions, because the Sales Act has settled the difficulty in the states which have adopted it. For a general discussion of the whole question, see: Williston, *Sales*, sec. 274 et seq., particularly 284, 304, 305; Williston, *Progress of the Law*, 34 Harv. Law Rev. 741; Williston, *The Risk of Loss After an Executory Contract of Sale in the Common Law*, 9 Harv. Law Rev. 106; Benjamin, *Sales*, 6th ed. 419-467; Tiffany, *Sales*, 162-173.

<sup>2</sup> *Richardson v. Insurance Company*, 136 N. C. 314, 48 S. E. 733 (1904).

<sup>3</sup> *Jenkins v. Jarrett*, 70 N. C. 255 (1874).

<sup>4</sup> *Glisson v. Heggie*, 105 Ga. 30, 31 S. E. 118 (1898); *Soda Fountain Co. v. Blue*, 146 Ala. 682, 40 So. 218 (1906).

<sup>10</sup> *Wachovia Bank and Trust Co. v. Ogburn*, 181 N. C. 324, 328, 107 S. E. 238 (1921).

<sup>11</sup> *University v. Gatling*, 81 N. C. 508 (1879); *Paine v. Forney*, 128 N. C. 237, 38 S. E. 885 (1901). And see note 14, post.

<sup>12</sup> *McAuley v. Wilson*, 16 N. C. 276, 18 Am. Dec. 587 (1828); *Trustees v. Chambers*, 56 N. C. 253 (1857).

<sup>13</sup> *Lemmond v. Peoples*, 41 N. C. 137 (1848).

<sup>14</sup> 181 N. C. 324, 107 S. E. 238 (1921).

have so held. A consideration of the nature of the transaction will give us the answer.

"A conditional sale is a sale, but upon condition, in which the purchaser sustains the relation of the mortgagor and the seller that of the mortgagee. And a discharge of the debt—the condition—by the purchaser is a discharge of the lien of the seller."<sup>6</sup> In other words, it is exactly as if the seller sold the goods to the buyer and the buyer gave the seller a chattel mortgage back as security for the payment of the price.<sup>6</sup> In *Puffer v. Lucas*,<sup>7</sup> the seller brought an action for possession of a soda fountain, which had been sold to the defendant under a so-called lease. The lease called for a certain amount of rent in installments, title to vest in the lessee when full payment was made. The court correctly held that this was a conditional sale, although called a lease, and that since about four-fifths of the installments had been paid, it would be "contrary to the fundamental principles observed in courts of equity" to allow the lessor (seller) to take the property and declare all payments forfeited. The court decided, however, that the defendant (buyer) should be allowed a reasonable time in which to pay the sum due the plaintiff, and if not then paid, there should be a sale of foreclosure to pay off such balance due plus the costs of action, the residue, if any, to be paid to the defendant. We are all familiar with the example which the court had before them, that of a court of equity in dealing with a mortgage of real estate and allowing the mortgagor (buyer) an equity of redemption and providing for a foreclosure.

That the risk of loss in a conditional sale falls on the buyer is well settled in this state. In a leading case,<sup>8</sup> a certain dry kiln, which

was sold with other articles under a conditional sale, was held by the seller for delivery at the request of the buyer. It was destroyed without any fault of the seller and the court held that he could recover the price. Walker, J. said, "The real and substantial nature of the transaction for the purpose of determining who should bear the loss is that of mortgagor and mortgagee or lienor and lienee. The contract, it is true, creates technically a conditional sale, but the vendor, in fact, only retains the legal title as a security in equity and the title otherwise passes to the vendee with a lien for the purpose named."<sup>9</sup>

Let us now consider the situation where there is an executed sale, with the additional element that the seller, for the purpose of securing the purchase price, has the bill of lading for the goods made out to his own order. In such cases, if there were no bill of lading, it is clear that title would pass upon delivery to the carrier. As a general rule, when the seller delivers goods to the proper carrier, consigned to the buyer, the title and possession of the goods passes to the buyer.<sup>10</sup> This is true, however, only if the goods conform to specifications, for if the goods are not what the buyer ordered, title remains in the seller.<sup>11</sup>

Then what effect does the bill of lading to the shipper's order have on the transaction? What do the parties intend? When business men ship goods in this way, they intend that the substantial property interest shall pass to the buyer. They look at the transaction as an executed sale, with the bill of lading made out to the shipper's order for one purpose only, i. e., to secure the purchase price, just as the seller in a conditional sale secures the purchase price by reserving legal title. Business usage regards the sale as executed with the seller reserving a bare legal title for security.

The Sales Act, which, however, is not in force in North Carolina, provides that where

<sup>6</sup> *Singer Mfg. Co. v. Gray*, 121 N. C. 168, 28 S. E. 257 (1897).

<sup>7</sup> In *Chicago Railway Equipment Co. v. Merchants Bank*, 136 U. S. 268, 283 (1890), Harlan, J. said, "The agreement that the title should remain in the payee until the notes were paid . . . is a short form of chattel mortgage. The transaction is, in legal effect, what it would have been if the maker, who purchased the cars, had given a mortgage back to the payee, securing the notes on the property until they were all fully paid."

<sup>8</sup> *Puffer v. Lucas*, 112 N. C. 377, 17 S. E. 174 (1893).

<sup>9</sup> *Whitlock v. Lumber Co.*, 145 N. C. 120, 58 S. E. 909 (1907). In *Tufts v. Griffin*, 107 N. C. 47, 12 S. E. 68 (1890), the plaintiff sued for the price of a soda fountain which had been delivered to the defendant under a conditional sale. The court held that the plaintiff should recover, though the property had been destroyed, and quoted from a case involving similar facts, *Burnley v. Tufts*, 66 Miss. 48, 5 So. 627 (1889), in part as follows: "Burnley unconditionally and absolutely promised to pay a certain sum for the property, the possession of which he received from Tufts. The fact that the property

has been destroyed . . . before the time of payment of the note last due, does not relieve him of payment of the price agreed upon. He got exactly what he contracted for, viz., the possession of the property and the right to acquire an absolute title by payment of the agreed price. The transaction was something more than an executory conditional sale. The seller has done all he was to do except to receive the purchase price; the purchaser has received all that he was to receive as the consideration of his promise to pay."

<sup>10</sup> *Whitlock v. Lumber Co.*, 145 N. C. 120, 58 S. E. 909 (1907).

<sup>11</sup> *Gwynn Co. v. Railroad*, 85 N. C. 429, 39 Am. Rep. 708 (1881); *Acme Paper Box Factory v. Railroad*, 148 N. C. 421, 62 S. E. 557 (1908).

<sup>12</sup> *Richardson v. Woodruff and Sons*, 178 N. C. 46, 100 S. E. 173 (1919).

goods are shipped and by the bill of lading are deliverable to the seller or order . . . the seller thereby reserves the property in the goods. "But if, except for the form of the bill of lading, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance, by the buyer of his obligations under the contract."<sup>12</sup> In such case, the goods are at the buyer's risk from the time of delivery to the carrier.<sup>13</sup> The North Carolina Supreme Court in the late case of *Penniman v. Winder*,<sup>14</sup> however, did not look beyond the mere fact that the seller had retained title.<sup>15</sup> It was held that the risk of loss during transit was upon the seller. In that case, the plaintiff and defendant entered into a contract for the sale of 95 tons of lime, f. o. b. vessel at Baltimore. The buyer arranged with ship brokers for a certain ship to receive the lime at Baltimore for him. This was done and the bill of lading was made to the shipper's order, notify the buyer. This bill of lading was attached to a sight draft for the price and sent through a bank for collection. On the voyage, the ship sank and this action was to recover the purchase price. Judgment of non-suit was given and this was affirmed in the Supreme Court, Brown, J. saying, "The general rule in mercantile law is that the risk follows the title. If title had passed to the defendant, then, the risk of loss was on him. If, on the contrary, title had not passed to the defendant, but was retained by the plaintiff, then, the risk in transit was on the plaintiff and he cannot recover the price of the lime. We think the undisputed evidence shows that the title to the lime was retained by the plaintiff for his own protection, and that it was only to be delivered to the defendant upon payment of the draft attached to the bill of lading. When the seller ships goods to order, notify, and draws for the purchase money, the title and the right of possession to the property is reserved by the seller until the draft is paid. No title passes to the buyer and any loss in transit must be borne by the seller."<sup>16</sup>

The argument for the result in this case is more fully set out in an earlier case,<sup>17</sup> where the court argues that when goods are shipped to the consignor's order, it is almost decisive of the seller's intention to reserve the *jus disponendi* and to prevent the property from passing to the buyer. This, because by the terms of the bill of lading, the carrier is the consignor's agent and not the consignee's; the contract is executory until the draft is paid and if before that time the goods are destroyed, the loss falls upon the consignor.

This is a strict legal argument in which *jus disponendi* and property are erroneously treated as the same thing. This does not accord with the modern mercantile view, as represented in the Sales Act, which is now in force in half of our states, including all the important commercial and manufacturing states of the East and Middle West. By applying the reasoning of the cases referred to in the discussion of conditional sales, the North Carolina courts might reach the same result as the Sales Act reaches in the sections cited. These cases recognize that the holder of a security title should not bear the risk of loss, because his only interest in the goods is to be paid for them. Rather it should be borne by the buyer, because he has the equitable ownership, the beneficial incidents of title. Suppose such reasoning had been followed in *Penniman v. Winder*. It is clear that, except for the bill of lading, the parties intended title to pass to the buyer when the lime was placed on board the buyer's ship at Baltimore. The shipper had the bill of lading made out solely to secure the price and what he thus retained was only a security title. That the buyer had something in the nature of ownership is shown by the cases which allow the buyer, on making tender of the price, to maintain trover or replevin against anyone except a purchaser for value of the bill of lading.<sup>18</sup> The situation is in legal effect the same as an absolute sale to the

<sup>12</sup> Sales Act, sec. 20 (2).

<sup>13</sup> Sales Act, sec. 22 a. In *Alderman Bros. Co. v. Westinghouse*, 92 Conn. 419, 103 Atl. 267 (1918) decided under the Sales Act, the buyer was held liable for the price of goods destroyed in transit although the bill of lading was made to the seller's order.

<sup>14</sup> 180 N. C. 73, 103 S. E. 908 (1920).

<sup>15</sup> See 34 Harv. Law Rev. 741, 752.

<sup>16</sup> In *York v. Jeffreys*, 182 N. C. 452, 109 S. E. 80 (1921), the defendant asked for instructions that

as the goods were shipped by bill of lading "to their own order, notify buyer," that the plaintiffs assumed the risk of any delay, because they retained title to the goods during the course of transportation and until delivery to the defendants upon payment of the draft. This was not denied, but the court decided that the shipment moved under a special contract, which relieved the sellers of liability for delay over which they had no control, in this case an embargo on shipping during the war.

<sup>17</sup> *Asheboro Co. v. Railroad*, 149 N. C. 261, 62 S. E. 1091 (1908).

<sup>18</sup> *Williston, Sales*, sec. 284, and cases cited. See *Price Brokerage Company v. Railroad*, 199 S. W., 732 (Mo. App. 1917).



buyer and a mortgage back to the seller to secure the payment of the price.

The difficulty, as Professor Williston points out, is that the courts do not understand that both the seller and the buyer have incidents of ownership. There is no difficulty in understanding this distinction in case of a mortgage of land in equity. A security title is not different in its nature because it refers to personal property, or is held in the form of a chattel mortgage, a conditional sale, or a bill of lading to the seller's order.<sup>19</sup>

R. H. W.

**REVOCATION OF PAROLE AFTER EXPIRATION OF SENTENCE**—A North Carolina statute<sup>1</sup> authorizes the governor to grant a pardon "subject to such conditions, restrictions and limitations as he considers proper and necessary" and, upon proof of violation of any of the conditions, to order the offender reconfined for the unexpired portion of the original sentence. No credit thereon is to be given for the time that has elapsed between the date of the conditional pardon and the date of the rearrest. If, at the time of revocation, the offender is serving any other sentence of imprisonment, the reconfinement is to begin upon the termination of that sentence. Under this statute, in the recent case of *State v. Yates*,<sup>2</sup> the Supreme Court of North Carolina had occasion for the first time to determine whether the governor has the power to revoke a conditional pardon, more familiarly known as a parole, after expiration of the period of sentence. The facts in that case were these. In October, 1919, Yates was convicted of violation of the prohibition laws and sentenced to twelve months on the roads. After serving forty-two days of his sentence, he was paroled for the balance of his term upon condition that he maintain good behavior. In December, 1921, upon proof of recent violations of the prohibition laws, the governor revoked the parole and ordered Yates returned to prison for the remainder of his term. Upon *certiorari* to review the refusal of a writ of *habeas corpus*, it was held that the prisoner was in lawful custody.

This is a problem that has given rise to some interesting discussion<sup>3</sup> and to conflicting

decisions from the courts.<sup>4</sup> Some of the cases seem to have been concerned with the scope of that power to grant conditional pardons which is implied from a general constitutional pardoning power. Others, as the instant case, have involved the interpretation of general provisions in statutes authorizing conditional pardons or paroles.

Those courts which have upheld the power of the governor to revoke a parole after expiration of sentence seem to have been mainly impelled by three considerations: (a) The pardon or parole is an act of executive clemency and may be granted on any conditions, not illegal, immoral or incapable of performance, which the governor may prescribe. And the requirement that a man obey the laws during the remainder of his life is not thought to be among these categories. (b) The prisoner need not accept the pardon or parole, and, if he does, he accepts the obligation to perform the conditions annexed with the consequences attendant upon their violation. (c) The actual amount of punishment is the important thing, and not the date of its termination.

As opposed to these considerations, the courts which take the view that the governor, in the absence of express statutory authority, is without power to revoke a parole after expiration of sentence, do so mainly on these grounds: (a) A condition of a pardon or parole whose performance extends beyond the time for termination of the original sentence is illegal in that it amounts to an executive lengthening of that sentence. That is, a paroled convict is so hedged about with restrictions upon his conduct and movements as to be essentially in the position of a prisoner on leave rather than that of a free man. (b) That a convict's consent to postponement of sentence upon compliance with certain conditions can hardly be said, in view of the nature of the alternative, to be a wholly free and voluntary undertaking. (c) The time element, that is, the period of life during which punishment is suffered, is a vital factor in any treatment of an offender. One case, at

<sup>4</sup> The cases are collected and commented upon in the discussions cited in note 3, and in 5 L. R. A. (N. S.) 1064; 16 *Ibid.* 304, and 20 R. C. L. 555. Important decisions in accord with the principal case are *Fuller v. State*, 122 Ala. 32, 26 So. 146 (1899); *State v. Horne*, 52 Fla. 125, 42 So. 388 (1906). Representative of the equally numerous decisions *contra* are *In re Prout*, 12 Idaho 494, 86 Pac. 275 (1906); and *Woodward v. Murdock*, 124 Ind. 439, 24 N. E. 1047 (1890).

<sup>19</sup> See 34 Harv. Law Rev. 741, 751, 752.

<sup>1</sup> C. S. sec. 7642-45.

<sup>2</sup> 111 S. E. 337 (1922).

<sup>3</sup> See the notes in 2 Harv. Law Rev. 181, 231; 22 *Ibid.* 541, and 27 *Ibid.* 595.

least, has gone so far as to hold that, in the absence of contrary provisions in the pardon itself, the conditions upon which it was granted will be held to have lapsed at the termination of the original sentence.<sup>5</sup> It is submitted that this is the view most consistent with the nature and purpose of the modern system of conditional pardons or paroles. There seems to have been nothing in the North Carolina constitution or statute to have required the holding of the principal case.

On the contrary, there seems to be what is at least a statutory analogy against it. The statute mentioned at the beginning of this note, and the only statute relied upon by the Court, is an act of 1905, regulating the governor's pardoning power generally. It is found in the chapter on state officers. It does not expressly deal with the matter of termination of conditional pardons. There is another statute on this subject, however, an act of 1917, found in the fourth article of the chapter relating to the state prison. This article is concerned with the powers and duties of the advisory board of parole. Apparently this statute relates mainly to the parole of inmates of the state's prison. Sec. 7753, the fifth section of that article, contains the following significant sentence: "Such parole shall be for such time as will fill out the term of imprisonment to which the prisoner was sentenced." It is true, of course, that *Yates* was never an inmate of the state's prison, and his case does not seem to have been handled by the advisory board of parole. But it is interesting to note that the legislative conception of the period during which conditional pardons or paroles of the most serious type of offenders, those sentenced to the penitentiary, may be enforced, is less stringent than that of the Court as to lesser criminals, namely, those sentenced to local jails and road gangs. In determining the meaning of such a statute as sec. 7644, regulating generally the governor's powers as to revocations of conditional pardons, and the legality of conditions imposed under a constitutional pardoning power, whose performance extends beyond the termination of the original period of sentence, this limitation in sec. 7753 should have been of definite persuasive force.

Regardless, however, of the correctness of the *Yates* case as a matter of law, the decision has a direct bearing upon the development of a more thorough-going statutory

system of pardon and parole in North Carolina. The effect of the case is to give the state, in the case of lesser offenders, a life jurisdiction over a prisoner released on conditional pardon or parole, regardless of the nature of his crime, with the attendant right of supervision of his conduct, and the power to return the parole violator to prison. From one point of view this indefinite continuance of parole should have a salutary effect on the conduct of this class of paroled men. They will always have hanging over them the fear of a summary return to prison if they fail to go straight. The value of this with certain types of weak-willed offenders is obvious. The outstretched hand of the law ready to insist on payment for their former crime without further legal formalities may be just what is needed to strengthen their determination to live as law abiding citizens.

On the other hand, are not those courts right which say that what is virtually life parole constitutes an unwarranted extension of punishment? The paroled man, who is released under the terms of a conditional pardon before the expiration of his prison sentence, retains, until discharged from parole, the status of a prisoner. In the case of a paroled inmate of the state's prison, at least, he is required by law<sup>6</sup> to report to the Superior Court once a month and to give satisfactory evidence that his conduct has been in accord with the conditions of the parole. In case of an alleged violation of his parole, the governor may order his return to prison without a jury trial as to his guilt. Parole must therefore be regarded as a substitute for imprisonment rather than as a conditional suspension or postponement of the prison term. And it is easily conceivable that the indefinite continuance of parole may work a greater hardship on the convicted man than the original sentence<sup>7</sup> contemplated. Any man adjudged worthy of being released on parole ought to be able to look forward to the time when he can recover his original status and feel himself to be on an equality with other men. If the state retains indefinitely the right of supervision of men released on parole, their only hope of absolute freedom from the legal consequences of their former crime lies either in a full and complete pardon, or in the abandonment of their homes and the concealment of their identities under assumed names in new environments.

It is suggested that one practical way out of this difficulty would be to enact a statute

<sup>5</sup> *Huff v. Dyer*, 4 Oh. Cir. Ct. Rep. 595.

<sup>6</sup> C. S. sec. 7754.

providing, as is done in many states,<sup>7</sup> that paroles of all persons should terminate either automatically upon expiration of the maximum sentence or by formal discharge from parole at that time by the proper authorities.

M. T. V. H., and

JESSE F. STEINER.

Professor of Social Technology,  
University of North Carolina

PART PERFORMANCE AND THE STATUTE OF FRAUDS IN NORTH CAROLINA—"Taking cases out of the Statute of Frauds by part performance is an anomaly."<sup>1</sup> There is, however, a strong historical justification for so doing, found in the attitude of the English chancellors during the 17th and 18th centuries toward the acts of Parliament and in the broad conception of their power to make things over along ethical lines.<sup>2</sup> This attitude is also seen in the hostility exhibited by the chancellors of this period toward the Statute of Limitations. It was due, perhaps, to a feeling that their power was too great to be circumscribed by an act of Parliament.<sup>3</sup> In this country, there are a number of different views as to taking cases of oral contracts for the purchase and sale of land out of the Statute of Frauds by part performance. By the weight of authority, taking possession alone is sufficient.<sup>4</sup> In some jurisdictions, not only must possession be taken under the oral contract, but valuable improvements must be erected.<sup>5</sup> In others, possession must be taken and part or all of the purchase money paid.<sup>6</sup> In four jurisdictions, including North Carolina, the doctrine of part performance has been repudiated.<sup>7</sup> This note discusses the main features of the North Carolina view.

<sup>7</sup> See E. R. Cass, *A Study of Parole Laws and Methods in the United States*, Prison Association of New York, 1921.

<sup>1</sup> Roscoe Pound, *The Progress of the Law*, 1918-1919; Equity, 33 Harv. L. Rev. 933, 935.

<sup>2</sup> *Ibid.*; p. 941.

<sup>3</sup> "When chancellors held such ideas, a substantial livery of seisin, the substance of a common law conveyance, or a serious hardship upon purchaser, which might be brought under the all embracing and magic word, 'fraud,' might well suffice to move them to dispense with the Statute." *Ibid.*; p. 941.

<sup>4</sup> *Butcher v. Stapely*, 1 Vernon 363 (1685), 1 Ames Eq. Cas. 279, and note.

<sup>5</sup> *Burns v. Dagget*, 141 Mass. 368, 6 N. E. 723 (1886); see 18 Harv. L. Rev. 137. See also *Moore v. Small*, 19 Pa. 461 (1852).

<sup>6</sup> *Wright v. Raftree*, 181 Ill. 464, 473, 54 N. E. 998 (1899). See also n. 15, *post*.

<sup>7</sup> The three other jurisdictions are Miss., Ky. and Tenn. See *Houston v. Jordan*, 42 Miss. 380 (1869); *Dean v. Cassidy* 88 Ky. 572, 11 S. W. 601 (1899); *Batton v. McClure*, Mart & Y. (Tenn.) 333 (1828). Apparently the rule in these jurisdictions was formerly the rule in Mass. See *Buck v. Dowley*, 16 Gray 555 (1860); *Glass v. Hulbert*, 102 Mass. 24, 33 (1869). The present rule in Mass. is less stringent; *Potter v. Jacobs*, 111 Mass. 32 (1872); *Low v. Low*, 173 Mass. 580, 54 N. E. 257 (1899). See Story, Eq. Jur., 14 ed., sec. 1045; Clark, *Equity*, sec. 133-134; Bispham, *Equity*, 9 ed., sec. 384.

In *Ballard v. Boyette*,<sup>8</sup> after pointing out that there is no doctrine in North Carolina whereby part performance may take a case out of the Statute of Frauds, the Court calls attention to the fact that the owner of land, who makes a parol agreement, cannot repudiate it and also claim the benefits thereof, whether money paid on the purchase price or the improvements made by the purchaser. In the opinion in that case, the late Judge W. R. Allen cites, among other cases, *Ellis v. Ellis*,<sup>9</sup> and quotes the general rule from *Pitt v. Moore*,<sup>10</sup> as follows: "Whatever may have been the ancient rule, it is now well settled by many decisions, from *Baker v. Carson*,<sup>11</sup> in which there was a divided court, but in which Ruffin, C. J., and Gaston, J. concurred, and *Albea v. Griffin*,<sup>12</sup> by a unanimous court, to *Hedgepeth v. Rose*,<sup>13</sup> that where the labor or the money of a person had been expended in a permanent improvement and enrichment of the property of another by a parol contract or agreement, which cannot be enforced because, and only because, it is not in writing, the party repudiating the contract, as he may do, will not be allowed to take and hold the property thus improved and enriched, 'without compensation for the additional value which these improvements have conferred upon the property,' and it rests upon the broad principle that it is against conscience that one man shall be enriched to the injury and cost of another induced by his own act."

This, on principal, is the logical and correct view, although it may sometimes fail to do justice between the parties in a particular case. As an act of the North Carolina legislature, the Statute of Frauds, if constitutional, is binding, and judicial legislation should not be undertaken by the courts to thwart the plain language of the authorized lawmakers, whatever may be the opinion of the judges as to its wisdom, and whatever may have been the 17th century conception of the effect of an act of Parliament. If a modification of legislation is needed it is for the people to command, not for the judiciary to legislate.

Judge Story presents<sup>14</sup> the majority view of the English and American courts as follows: "The distinct ground upon which courts of equity interfere in cases of this sort is, that otherwise, one party would be enabled to practise a fraud upon the other; and it could never be the intention of the Statute to

<sup>8</sup> 171 N. C. 24, 86 S. E. 175 (1915).

<sup>9</sup> 16 N. C. 341 (1829).

<sup>10</sup> 99 N. C. 85; 5 S. E. 389 (1888).

<sup>11</sup> 21 N. C. 381 (1836).

<sup>12</sup> 22 N. C. 9 (1838).

<sup>13</sup> 95 N. C. 41 (1886).

<sup>14</sup> 2 Story, Eq. Jur., 14 ed., sec. 1045.

enable any party to commit such a fraud with impunity. Indeed fraud in all cases constitutes an answer to the most solemn acts and conveyances." The Statute says *contra*, however, and there is no fraudulent result where, as in North Carolina, the purchaser is allowed compensation, for the value of his improvements. Judge Story's statement, however, of the qualifying principle which ought to govern in cases of this sort is enlightening, and it would be well if it had been consistently applied. He states that nothing is to be considered as a part performance which does not put a party into a situation which will amount to a fraud upon him if the agreement is not fully performed.<sup>12</sup>

Dean Pound concludes that "the equities of one who has been put in possession or of one who has partly performed, call for making him whole for what he is out upon faith of the contract, so far as a court of equity may do so. Hence they amply justify the view of certain Southern courts, which carry equitable relief so far as to give the purchaser an accounting and a complete restitution, but no further."<sup>13</sup> After referring to Lord Selborne's opinion in *Maddison v. Alderson*,<sup>14</sup> as the best rationalization of part performance to be found, he concludes that the "tendency of the American courts to require something more than merely taking possession under the contract, and the refusal of many courts to grant relief even in hard cases of service, where no possession is taken, without some act solely referable to the contract, are well justified and are in the right line to progress toward a satisfactory law upon this subject."<sup>15</sup>

It is pointed out in a note in the Harvard Law Review,<sup>16</sup> that the results of the North Carolina view are not always just. The case referred to in this note is *Pass v. Brooks*,<sup>20</sup> where, under an oral contract for the purchase of land the defendant entered into possession, paid the purchase price and made permanent improvements. It was held that in cases within the Statute of Frauds a court of equity will not grant specific performance. With reference to the justice of such a case, suffi-

cient importance does not seem to have been attached by the writer of the note in the Harvard Law Review to the fact that the Court in the *Pass* case required restitution of the purchase money and compensation for improvements. The comment in the note on the rule is as follows: "That such a rule will often fail to do justice between the parties, is obvious, and the results of the prevailing doctrine are far more satisfactory, though usually not reached without some violence to the words of the Statute."<sup>21</sup> The view there expressed is that injustice results if specific performance is not allowed. It is submitted that the Statute clearly makes that result inevitable, and that justice is done by the other relief given.

The North Carolina cases fall chiefly into groups where possession was taken and valuable improvements made,<sup>22</sup> or where a part or all of the purchase money was paid,<sup>23</sup> or where as in the recent case of *Perry v. Norton*,<sup>24</sup> the plaintiff worked under a parol agreement and also made valuable improvements. In that case, the defendant was to pay plaintiff \$40.00 a month and in addition to deed him the cottage and lot occupied in lieu of higher wages he could have received by working elsewhere. Held, defendant is liable for improvements made by plaintiff. The plaintiff's equity "rests upon the broad principle that it is against conscience for one man to be enriched to the injury and cost of another, which was induced by his own acts."<sup>25</sup>

In the recent case of *Carter v. Carter*,<sup>26</sup> the court holds that where the full amount of the

<sup>12</sup> See also 12 Harv. L. Rev. 506. Compare: *Wilkie v. Womble*, 90 N. C. 254 (1884), (cited in note in 19 L. R. A. 879); *Murdock v. Anderson*, 57 N. C. 77 (1858); *Ellis v. Ellis*, 16 N. C. 398 (1830). See note 26, *post*.

<sup>13</sup> *Luton v. Badham*, 127 N. C. 96, 37 S. E. 143 (1900); citing *Ellis v. Ellis*, 16 N. C. 341 (1829); *Albee v. Griffin*, 22 N. C. 9 (1838); *Lyon v. Crissman*, 22 N. C. 268 (1839); *Pitt v. Moore*, 99 N. C. 85, 5 S. E. 389 (1888); *Tucker v. Markland*, 101 N. C. 422, 8 S. E. 169 (1888); *Chambers v. Massey*, 42 N. C. 286 (1851); *Thomas v. Kyles*, 54 N. C. 302 (1854); *Love v. Neilson*, 54 N. C. 339 (1854).

<sup>14</sup> *Ballard v. Boyette*, 171 N. C. 24, 86 S. E. 175 (1915); *Kelly v. Johnson*, 135 N. C. 647, 47 S. E. 674 (1904); *Ford v. Stroud*, 150 N. C. 362, 64 S. E. 1 (1909); *Hedgepeth v. Rose*, 95 N. C. 41 (1886); *Daniel v. Crumpler*, 75 N. C. 184 (1876); *Carter v. Carter*, 182 N. C. 186, 108 S. E. 765 (1921).

<sup>15</sup> 182 N. C. 585, 109 S. E. 641 (1921).

<sup>16</sup> Citing *Luton v. Badham*, 127 N. C. 96, 37 S. E. 143, 53 L. R. A. 337, 80 Am. St. Rep. 783 (1900); *Ford v. Stroud*, 150 N. C. 362, 64 S. E. 1 (1909); *Ballard v. Boyette*, 171 N. C. 24, 86 S. E. 175 (1915); and citing also "the very able and the writer (Walker J.) thinks, conclusive opinion of Smith C. J., in *McCracken v. McCracken*, 88 N. C. 272 (1883)."

<sup>20</sup> 182 N. C. 186, 108 S. E. 765 (1921).

<sup>12</sup> 2 Story, Eq. Jur., 14 ed., sec. 1047, n. 1. See also note 6, *supra*.

<sup>13</sup> 33 Harv. L. Rev., 933, 936, 939, 944.

<sup>14</sup> 8 App. Cas. 467, 475-476 (1883).

<sup>15</sup> 33 Harv. L. Rev. 933, 944. "As a matter of principle, it would seem that this minority view and the theory by which it is usually explained is the preferable one." Clark, *Equity*, sec. 135.

<sup>16</sup> 13 Harv. L. Rev. 410.

<sup>20</sup> 125 N. C. 129, 34 S. E. 228 (1899). A petition to rehear this case was allowed in 127 N. C. 119, 37 S. E. 151 (1900). The result of the case, however, was not materially changed.

purchase money is paid and the purchaser enters into possession and makes improvements under a parol contract to convey land, and where the vendor afterward repudiates by refusing to convey, the purchaser may recover the price and, in addition, the value of his improvements to the extent that they have enhanced the value of the land. On page 766, the Court refers to *Jones v. Sandlin*,<sup>71</sup> and says that "the general rule is that if one is induced to improve land under a promise to convey the same to him, which promise is void or voidable, and after the improvements are made he refuses to convey, the party thus disappointed shall have the benefit of the improvements to the extent that they increased the value of the land."<sup>72</sup>

Thus it seems that North Carolina has consistently, in all fact situations, enforced the equities between the parties by making the disappointed vendee whole, as far as practicable, even though the unwritten contract as such has been thought to be unenforceable because of the effect of the Statute.

As late as 1900, however, Judge Douglas could not even concur in the judgment in *Luton v. Badham*,<sup>73</sup> because it seemed to him "to fly in the teeth of the statute of frauds." The Court held in that case that the vendor in possession, who repudiates a parol contract to convey land, is liable to the vendee for the value of the improvements made by the latter. Judge Douglas felt that the vendee's claim for improvements was a purely defensive remedy. He thought that the Statute "though founded on acknowledged principles of public policy and repeatedly affirmed and reaffirmed by legislative enactment was doomed to ultimate emasculation by the well-meaning, but dangerous relaxations of the courts, based upon the extension of equitable principles." He pointed out that the plaintiff was not in possession and that this distinguished the case from previous cases. If he felt this way about the North Carolina view how must he have felt about the majority elsewhere? He

referred to *McCracken v. McCracken*,<sup>74</sup> as the only case where the vendee had even asked for the value of the improvements. In that case the vendor offered to let the vendee take his improvements, one of them being a mill race dug in the ground. But as Judge Douglas pointed out, "A hole in the ground is not a very valuable piece of property when severed from the realty, and so the vendee asked the court to give him something else instead."<sup>75</sup>

The rule for estimating the value of the improvements is declared in *Wetherall v. Gorman*.<sup>76</sup> It is not what they cost the defendant, but how much they have added to the value of the premises.<sup>77</sup> P. H. W.

**LEGISLATIVE POWER TO PENALIZE VIOLATION OF ADMINISTRATIVE RULE**—For many years, the existence of administrative agencies to carry into effect the general policies of legislation has been found convenient and necessary to the attainment of governmental ends. As the complexities of social and economic affairs have increased, there has been a definite tendency to relieve the legislature of more and more technical and detailed tasks, and to place those responsibilities upon administrative agencies.<sup>78</sup> And, irrespective of the familiar proposition that legislative power cannot be delegated, these agencies may in fact be vested with the power to enact reasonable rules and regulations to carry the general legislative policy into effect.<sup>79</sup> Somewhat like the principle underlying the validity of broad delegations of legislative power to municipalities, which may be considered as an historical and inherent exception to the general rule,<sup>80</sup> this kind of legislation, namely, a grant of rule-making authority, has been upheld upon the necessity for entrusting to especially skilled enforcement officers the task of specifying more technical and detailed rules and regulations in furtherance of the general policies embraced in the statute.<sup>81</sup>

<sup>70</sup> 88 N. C. 272 (1883).

<sup>71</sup> 127 N. C., at p. 108, 37 S. E., at p. 147.

<sup>72</sup> 74 N. C. 603 (1876).

<sup>73</sup> See also *Chatham v. Realty Co.*, 174 N. C. 671, 94 S. E. 447 (1917); *Daniel v. Crumpler*, 75 N. C. 184 (1876).

<sup>74</sup> *State v. Crosby*, 92 Minn. 176, 99 N. W. 636 (1904); *Cook v. Burnquist*, 242 Fed. 321 (1917).

<sup>75</sup> *Interstate Commerce Com. v. Goodrich Trans. Co.*, 224 U. S. 194, 56 L. Ed. 729, 737 (1912); *State v. Atlantic Coast Line R. R.*, 56 Fla. 617, 47 So. 969, 32 L. R. A. (n. s.) 639, 659 (1908).

<sup>76</sup> *Tyrrell County v. Holloway*, 182 N. C. 64, 108 S. E. 337 (1921); *Cooley on Taxation*, 3d Ed., 101.

<sup>77</sup> *Atlantic Express Co. v. W. & W. R. R.*, 111 N. C. 463, 16 S. E. 393 (1892); *Georgia R. R. v. Smith*, 70 Ga. 694 (1883); *Buttfield v. Stranahan*, 192 U. S. 470, 496, 24 Sup. Ct. 349, 48 L. Ed. 525 (1904).

<sup>77</sup> 160 N. C. 150, 154, 75 S. E. 1075, 1077 (1912).

<sup>78</sup> Citing *Kelly v. Johnson*, 135 N. C. 647, 47 S. E. 674 (1904); *Reed v. Exum*, 84 N. C. 430 (1881); *Luton v. Badham*, 127 N. C. 96, 37 S. E. 143, 53 L. R. A. 337, 80 Am. St. Rep. 783 (1900); *Albea v. Griffin*, 22 N. C. 9 (1838); *Hedgepeth v. Rose*, 95 N. C. 41 (1886); *Pitt v. Moore*, 99 N. C. 85, 5 S. E. 389, 6 Am. St. Rep. 489 (1888). *McCracken v. McCracken*, 88 N. C. 272, 276 (1883), is also referred to as is the fact that Judge Ruffin (the younger, and not the Chief Justice who was on the bench when Judge Gaston wrote *Albea v. Griffin* and he himself wrote *Baker v. Carson*) said that *Albea v. Griffin* is "often referred to as the leading case on the subject."

<sup>79</sup> 127 N. C. 96, 37 S. E. 143, 53 L. R. A. 337, 80 Am. St. Rep. 783 (1900).

Granting that the legislature may delegate to an administrative agency the power to make rules and regulations which will have the force of law for all civil purposes,<sup>5</sup> may the legislature make the violation of these rules a criminal offense?<sup>6</sup> There are at least two conceivable fact situations. Suppose the legislature should enact that all the existing rules and regulations of a certain administrative agency are adopted and made statutory, and that any violation thereof should be punishable as a criminal offense. Here, there can be no doubt as to the power of the legislature because it raises the rule into law itself.<sup>7</sup> In other words, the legislature defines the rule of conduct as effectually as if the rules and regulations penalized had been originally enacted in the legislative halls. On the other hand, suppose, as is the familiar case, that the legislature, upon creating a new administrative agency, with the power to promulgate reasonable rules and regulations, should, in advance, provide that a violation of any such rule should be a crime. Is this a valid exercise of legislative power? Is this not delegating to an administrative board the authority to establish a standard of conduct and to define a criminal offense?<sup>8</sup> The ultimate question is, which authority by prescribing the rule of conduct defines the offense? Is it the legislature, when it provides for the punishment and establishes a broad standard of conduct? Or, is it the administrative board, which determines the precise rule of conduct and specifies the exact facts and circumstances under which punishment is to be invoked?

If it is the legislature itself which prescribes the rule of conduct and thus defines the offense, it must be because the legislature in advance ordains that a certain general standard of conduct is to be maintained in a given general connection—that fish are to be protected in breeding season—and then leaves it to the enforcement agency on the ground to make the standard more specifically applicable to the facts. In other words, this view is that the agency merely defines more exactly a standard of conduct already broadly established by the legislature; that the stand-

ard violated is that of a general character established by statute.

But if it is the prescription of the detailed rule by the board and not the action of the legislature which really defines the offense, then the justification lies rather in expediency than in legal doctrine. The contrariety of opinion on this point indicates the possible unsoundness in holding that this latter conception is not one of an actual delegation of legislative power.<sup>9</sup> The practical effect of the decisions is such as to establish the belief that they were influenced more by the tendency of the time and necessity of the case than by reconciliation with the theory that legislative power may not be delegated.<sup>10</sup>

In the case of *United States v. Grimaud*,<sup>11</sup> the Supreme Court of the United States was confronted with an extreme situation, and by upholding the legislation there involved, it was compelled not only to reverse a long line of decisions of inferior federal courts but to overrule, as well, its own prior decision in the same case.<sup>12</sup> An Act of Congress had created certain forest reservations and had vested in the Secretary of Agriculture general supervisory power with authority to make such rules and regulations as would accomplish the purpose specified. Any violation of a regulation passed by the Secretary of Agriculture and published for a certain length of time was made a criminal offense. The defendant, having been indicted for grazing sheep upon the reservation without a permit, contrary to a regulation adopted by the Secretary of Agriculture and promulgated as required by the Act of Congress, demurred to the indictment. The demurrer was sustained in the District court on the ground that there was no offense stated in the indictment, Congress alone having power to create a criminal offense. Upon appeal by the United States, the Supreme Court first affirmed the decision of the District Court. On a rehearing, however, the Court overruled its prior decision and sustained the validity of the legislation. The following extract is from the opinion in this case: "But

<sup>9</sup> See note 6, *supra*.

<sup>10</sup> Ernst Freund, *Principles of Legislation*, 10 Am. Pol. Sci. Rev. 1, 14; J. B. Cheadle, *Legislative Functions*, 27 Yale L. J. 892.

<sup>11</sup> 220 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563 (1910).

<sup>12</sup> Reversing 170 Fed. 205 (1909); *Light v. U. S.* 220 U. S. 523, 31 Sup. Ct. 485, 55 L. Ed. 570 (1910); *U. S. v. Rizzinelli*, 182 Fed. 675 (1910); *U. S. v. Burke*, 221 Fed. 1014 (1915). Judgment Reversed, *Sales v. U. S.*, 234 Fed. 842, 148 C. C. A. 440 (1916); *Contra*, see *U. S. v. Matthews*, 146 Fed. 306 (1906).

<sup>5</sup> *U. S. v. Shannon*, 160 Fed. 870 (1908); *U. S. v. Dasternignes*, 118 Fed. 199 (1902).

<sup>6</sup> *U. S. v. Maid*, 116 Fed. 650, 652 (1902); *U. S. v. Eaton*, 144 U. S. 677, 688, 12 Sup. Ct. 764, 36 L. Ed. 591 (1892).

<sup>7</sup> *Ex Parte Siebold*, 100 U. S. 371, 25 L. Ed. 717 (1880).

<sup>8</sup> *U. S. v. Matthews*, 146 Fed. 306 (1906); *Ex Parte Kollock*, 165 U. S. 526, 533, 41 L. Ed. 813, 815 (1897).

the authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from administrative to a legislative character because the violation thereof is made a criminal offense." The Court seems to come to the conclusion that the mere enactment of the administrative regulation did not of itself create the offense, that this was done by the action of the legislature in the first instance.<sup>13</sup>

The result of the *Grimaud* Case has often been reached by the Supreme Court of North Carolina. Perhaps the most interesting cases arising in this state involving this question have been concerned with the compulsory vaccination and cattle tick laws. The vaccination law authorizes certain boards of health in emergencies to require the vaccination of all inhabitants of the specified territory.<sup>14</sup> The cattle tick law vests in the Board of Agriculture the power in emergencies to declare certain districts under quarantine, and to require all tick infested animals within the district to be dipped.<sup>15</sup> The violation of the rules made pursuant to these acts is made a criminal offense. Both laws have been upheld in every particular.<sup>16</sup> It should be noted that here the problem involves elements both of contingent legislation and of legislative power to penalize violation of administrative rules. That is to say, the board determines when the emergency exists

under which the power to make rules becomes operative, and, in advance of their enactment, violations thereof are made punishable by law.

The most recent decision in North Carolina is that of *State v. Dudley*.<sup>17</sup> The Fisheries Board was created for the purpose of carrying out a general statutory policy of preserving the fish supply. Pursuant to legislative authority vested in it to make regulations, the violation of which was made a crime, the Board enacted a regulation prohibiting, in certain waters of the state, the taking of scallops with drags. The defendant was found guilty of violating this regulation and the Supreme Court in upholding the conviction cited and approved the *Grimaud* Case. The Court decided the case, however, as if it were mainly concerned with contingent legislation, and took the view that it was the legislature which defined the offense.

It is submitted that a violator of a rule or regulation of an administrative agency actually commits a breach of a duty imposed, not by the general language of the statute, but by the more definite provisions of the rule or regulation, and that the legislature, when it authorizes the enactment of rules and regulations and penalizes violations thereof, actually delegates legislative power to define a rule of future conduct. The results of the cases discussed represent an inevitable and entirely desirable relaxation of the theoretical principle prohibitive of the delegation of legislative power.

D. W. I.

<sup>13</sup> But see dissenting opinion of Field, J., in *Ex Parte Siebold*, *supra*, note 7.

<sup>14</sup> C. S. sec. 7164.

<sup>15</sup> C. S. sec. 4688, 4873.

<sup>16</sup> *Morgan v. Stewart*, 144 N. C. 424, 57 S. E. 149 (1907); *State v. Hodges*, 180 N. C. 751, 105 S. E. 417 (1920). See also *Smith v. State*, 74 Tex. Cr. 232, 168 S. W. 522 (1914).

<sup>17</sup> 182 N. C. 822, 109 S. E. 63 (1921). Accord, *Payne v. Providence Gas Co.*, 31 R. I. 295, 77 Atl. 145, Ann. Cas. 1912 B 65 (1910).