

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. 103 (1922).

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The North Carolina Law Review

Volume One

NOVEMBER, 1922

Number Two

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Published in November, January, April and June, for The School of Law,
The University of North Carolina Press, Chapel Hill
Two Dollars a Year Fifty Cents a Copy

EDITORIAL NOTES

THE SCHOOL OF LAW opened its eightieth session this fall with a net registration of 111 students, of whom 65 are in the first year class, 40 in the second year class, and 6 in the third year class. Of 111 enrolled, 99 have had some preliminary college training. Twenty-five of these have had but one year, 37 have had two years, 24 have had three years, and 13 have received a college degree. Of the 111 now in the School, 37 have indicated a desire to pursue the three year course leading to the degree of LL.B. Twenty of these are in the first year class, 13 in the second year class, and 4 in the third year class.

At its August meeting, the executive committee of the board of trustees created the Thomas Ruffin Lectureship in Law, and invited Hon. Henry G. Connor, judge of the United States District Court for the eastern district of North Carolina, to become its first incumbent. It is earnestly hoped by all friends of the School that Judge Connor will find it possible to accept the appointment. From an experience of twenty-two years in the practice of the law, of three terms in the legislature, of eight years as a judge of the Superior Court, of six years as an associate justice of the Supreme Court of North Carolina, and of thirteen years as a federal district judge, Judge Connor would bring to the

work of the School a practical point of view, a breadth of knowledge of the law, and a comprehension of its actual operation, of inestimable value.

Mr. Wilbur Stout, A. M., of Burlington, a graduate student in the Department of English, has been appointed secretary and librarian of the School of Law, on a one half time basis. This has resulted in the library being entirely rearranged, catalogued, and repaired, and in the reorganization of the registration and record work of the dean's office.

The library has been enlarged by the purchase during the summer of all of the English law reports since 1876, of complete sets of the leading legal periodicals, and of a considerable number of the more important treatises.

Work has been started on the new law building. It will be ready for occupancy late in the spring. Construction difficulties necessitated certain changes in the interior detail, but in general the plan remains the same as that described in the June number of the REVIEW. The new home of the School is to be known as Manning Hall, in honor of Dr. John Manning, who became the first professor of law in the University in 1881.

Through an inadvertence, the note in the June number of the REVIEW on *The New Law Building* failed to state that the School of Law was housed, for a number of years during the 'nineties, in the Old West Building.

THE TEACHING OF STATUTE LAW—There will be a round table conference on *The Teaching of Statute Law and Legislation*,¹ at the forthcoming meeting of the Association of American Law Schools, to be held in Chicago on December 28, 29, and 30. The *Statutes* conference will be held on Saturday morning, December 30, at 9:30 A. M. It is expected that the conference will be attended not only by law teachers, but by members of the American Political Science Association, and by representatives of official state and federal legislative bill-drafting agencies. In this connection, Professor Ernst Freund, of the University of Chicago Law School, has prepared an outline of a basis for the discussion at this conference. That outline, together with some comment, follows:

MEMORANDUM TO SERVE AS A BASIS FOR A ROUND TABLE DISCUSSION
OF A COURSE ON STATUTES.

A law school course in *Statutes* may mean one of the following five things:

(1) A course on the *Contents of the Statute Book and Legislative History*; (2) a course on the *Construction and Operation of Statutes*; (3) a course in *State Constitutional Law*; (4) a course on *Legislative Powers and Methods*; (5) a course on *Legislative Terms and Provisions*.

(1) A course on the *Contents of the Statute Book and Legislative History*:

This would be both practically valuable and juristically instructive. The difficulty is in the method of teaching. This would be almost inevitably through lectures. To some extent the aid of students might be enlisted in collecting material, particularly data relating to the history of legislation, and while much of

¹ In this whole connection, see W. F. Dodd, *Statute Law and the Law School*, 1 N. C. L. Rev. 1.

this may be tedious and unprofitable, other phases, as e.g., a gathering of historical data from state reports (both judicial and administrative) might furnish valuable contributions to the knowledge of state law. The course would be similar to the continental courses on *Administrative Law*, which are practically summaries of the statute law (other than private law and criminal law statutes) of the state. I am inclined to think that those who talk of teaching *Statutes* generally do not have such a course in mind.

(2) A course in *Construction and Operation of Statutes*:

A difference should be made between operation and construction: Operation, covering such matters as repealing effect, and particularly the civil consequences of violating statutes (liability, nullity of acts) is a subject of considerable practical value, and can be taught on the basis of cases. However, it is but one of the many common law topics that might be added to the law school curriculum, with no special claim to preëminence. Construction, i. e., rules and principles of interpretation, is of the greatest practical importance. The many law school courses dealing with statutory subjects cannot give adequate treatment to the problem as a special phase of jurisprudence. The difficulty is how to teach the subject. The ordinary case method is unsuitable, since what is important is not judicial doctrine, but judicial practice. A discussion of the proper method of teaching such a subject might be profitable.

(3) A course in *State Constitutional Law*: This course is as legitimate as a course in federal constitutional law, and of much the same character: instead of dealing with general constitutional principles, it deals with positive limitations and requirements and is concerned mainly with the construction of clauses. It incidentally serves to introduce the student to many fields of legislation with which he otherwise remains unfamiliar. At option, it may be treated on a purely local or on a national basis. A minor, but from the draftsman's point of view indispensable, part of the subject would be the procedural and style requirements regarding statutes. The course would be interesting, valuable and popular. But it should also be recognized that it is not a new type of a course. It deals with judicial decisions and uses the approved method of the study of cases. It does not give the student a new side of the law.

(4) A course on *Legislative Powers and Methods*: This course may be conceived as follows: The teacher would take up a number of current or typical legislative problems, and would inquire for each how it should be legislatively handled: locally, or by the state, or nationally; through civil legislation, criminal legislation, regulation, taxation, or appropriation of public resources. What would be the advantages and disadvantages of each method? What would be the structure of each type of statute? What would it involve in the way of administrative provisions? What perils would have to be guarded against? And so forth. This would be a new course in substance and in point of view; it would get away from exclusively judicial doctrine and case law. It would be constructively and positively what constitutional law is analytically and negatively. The drawback of the course is that there is little material available for it. Such

material could, of course, be built up, particularly with advanced classes. The danger is that with the usual training of law teachers, they would almost inevitably be drawn toward the constitutional problems which the course would present in considerable numbers, with which they are more familiar than with the constructive side, and which they could handle on the basis of cases. In the hands of most teachers the course would tend to become a course in *Constitutional Law*.

(5) A course on *Legislative Terms and Provisions*: This is the course that I am giving at present. It is of more restricted scope than course (4); instead of considering the economy of legislation in a large way, it deals with technique and formulae. On the other hand, it is compact and complete. The *Legislative Drafting Report of the American Bar Association*, of 1921, which serves as a syllabus, gives a tolerably exhaustive outline of the drafting problems peculiar to each type of statute, and irrespective of any particular subject matter. Material for the course is, therefore, available in print. Both courses (4) and (5) deal with statutes as something to be constructed and not simply to be construed, not as the given thing but as the thing to be found. They approach law not from the point of view of the court room, but from the point of view of the legislator who is called upon to produce legal results before a controversy has arisen,—a point of view that other law school courses present only in the most incidental fashion. They are based on statutory precedents and require the study of statute books.

In a round table discussion of the various types of courses, it should be considered particularly whether a course conducted on another basis than case law is desirable or practicable, also whether or not experience has shown that it is difficult to mingle in the same course the critical and constructive attitude, whether in other words it is possible to get the student away from his customary frame of mind, unless the point of view which forces the other mental attitude is made prominent, if not exclusive, in the course. If the difficulty exists, there is little use in suggesting as a compromise that the matter of courses (4) and (5) be handled incidentally to course (3).

It may be desirable to invite to the discussion teachers in graduate schools of political science, since the American Political Science Association has its meeting in Chicago at the same time. In that event, there should also be considered the more political phases of legislation, some of which might be of considerable interest to law teachers.

Would it not also be well to ask representatives of drafting bureaus to join the conference? We should certainly be advised what they consider as essential. Moreover, it may be that as a by-product of a course on *Statutes*, there may be devised and formulated standard clauses which may dispose once for all of some drafting problems. As to the practicability and value of such clauses the opinion of drafting experts would be important.

ERNST FREUND.

COMMENT ON MR. FREUND'S MEMORANDUM.

A comprehensive discussion of the teaching of *Statute Law and Legislation* should be prefaced by the following considerations:

(1) What should be the function of such a course in the law school? Should it be that of training professional legislative bill-drafters for the growing number of civic and governmental agencies devoted to the improvement of legislation? Or should the function of the course be that of contributing to the training of a bar that is coming more and more to deal with problems of statute law?²

(2) Is there not a possible distinction in this connection between the situation of a state university law school and that of a privately endowed national institution? That is to say, is it not conceivable that a state school might be expected to contribute something to the scientific development of the legal phases of the processes of state government, in return for state support? And with a definitely localized student body, could not a state school hope to direct attention in a *Statutes* course mainly upon the conditions peculiar to the local jurisdiction and thus integrate the course more positively with existing problems?

(3) In view of the present professional characteristics of law teachers, as a class, and of the present nature of the training available for law teachers, should not the type of law school course to be given, if any, be made to depend somewhat upon the type of instructor available to teach the course? Most law teachers are recruited from the bar, with its conventionalized training. Few law teachers have had contact with constructive statute law making. As Mr. Freund points out, there is a marked distinction between the various attitudes and emphases that might be expected from instructors with these different backgrounds. After all, the content of a law school course depends largely upon the training, experience, and attitude of the particular man in charge of the class.

(4) In view of the present overcrowded condition of the curriculum, a course in *Statutes* would probably be listed in the law school catalogue as an elective. While in the larger universities, a number of graduate students in political science might be expected to elect such a course, most of the men to whom the appeal would be directed would be law students. And whatever might be the aptitude of graduate students in political science for one or more of the various types of courses suggested in Mr. Freund's outline, the precise course to be given in the law school should be one that is adapted for a group of students whose time is mainly occupied with the negatively analytical handling of substantive and adjective law topics conveniently arranged and set forth in case-books. The suggestion in mind is that in the three essential considerations of necessary preliminary preparation, materials for study, and instructional technique, the law school course in *Statutes* must inevitably be adjusted to what can reasonably be expected of law students. What has just been said, however, should not be confused with the matter of the attitude and emphasis of the

² See Dodd, *op. cit.*, pages 2-4.

course. It is believed that the constructive legal engineering emphasis of a law school course in *Statutes* constitutes its most valuable asset.

Coming now to Mr. Freund's memorandum of five possible law school courses in *Statutes*, it will be noted that he has made no place for a course in what might be termed *Contemporary Legislative Policy*.³ Nor does any part of any of the courses mentioned purport to deal, as does Dean Wigmore's *Job Analysis Method of Teaching the Use of Law Sources*,⁴ with the problem of how to find the statute law and its relation in a particular jurisdiction to the case law. Moreover, the five courses listed are considered as separate possibilities. As he indicates near the close of the memorandum, Mr. Freund doubts the advisability of bringing various topics out of the five courses into a single course. It is conceivable, however, that some such combination might be both practical and consistent with the predominant constructive emphasis that is so much to be desired.

Mr. Freund's conception of course (1) on the *Contents of the Statutes Book and Legislative History* should be compared with Mr. W. F. Dodd's suggestion⁵ that the contents of the statute book be taught by the study of a carefully selected series of statutes and cases illustrating the function of the statute law in the legal system. In other words, Mr. Dodd's idea is that as a part of a broader course in *Statutes*, typical problems might be investigated to get at the relationship between the statute law and the case law, the extent to which common law principles have been replaced by statutes, the attitude of courts in the construction of statutes, and the respective functions of judicial and legislative law making.

The same suggestion might be made in connection with course (2) on the *Construction and Operation of Statutes*. If only the more important problems were gone into, the case method of instruction could be used in dealing with operation and construction as topics of a broader course. And judicial practice could be studied as well as judicial doctrine. Judicial practice is distinguished from judicial doctrine now in such case method courses as *Constitutional Law* and *Private Corporations*, particularly in the topics of interstate commerce, due process of law, and *de facto* corporations.

There should be room in the law school curriculum for course (3) on *State Constitutional Law*. An undeveloped and important field, its investigation is primarily the opportunity of the state university law schools. Dealing as it does with the organization and powers of the state, county, and local government units, and their operation in the fields of education, taxation, public welfare, etc., its subject matter vitally affects the civic interests of the state. No one who has undertaken to trace the development of the constitutional law of a particular state can deprecate either the intellectual gymnastics involved in such an exercise, or the difficulties inherent in the conflict of judicial policies. While, of course,

³ *Ibid.*, pages 4-5, and J. H. Wigmore, *Recent Phases of Contemporary Legislative Proposals*, 15 Ill. L. Rev. 141.

⁴ This course is described in an article under that title in 16 Ill. L. Rev. 499.

⁵ In *Statute Law and the Law School*, 1 N. C. L. Rev. 1.

the use of cases in courses on *State Constitutional Law* would follow the conventional plan, the subject matter of the course would be a startling revelation to the typical law student. And what might be termed the "vertical" case method necessarily involved in tracing the development of the law of the student's home jurisdiction would leave the student with a definite appreciation of the zig-zag path that has been pursued in bringing any one doctrine in a given jurisdiction up to its present status. From the standpoint of a course in *Statutes*, however, the matter of state constitutional law should be treated not as the subject matter of a separate course, but as a vital part of a broader course on *Statutes* as a whole.⁶ The function of state constitutional law in connection with the legislature, and the peculiar substantive, procedural, and formal limitations it imposes upon legislative power, are inseparably connected with the significance of statute law in the legal system and with constructive problems of legal engineering through statutes. For state constitutional law, in this connection, erects and controls the machinery for state legislative action.

Courses (4) and (5) on *Legislative Powers and Methods*, and *Legislative Terms and Provisions*, as conceived by Mr. Freund, furnish the constructive emphasis and focus of a course on *Statutes*. His views on the desirability of such an emphasis deserve the widest sanction. Probably no other place in the curriculum can be found so convenient for the making of such an emphasis. With his unique training, experience, and attitude toward statute law, Mr. Freund could give either course successfully. His course in *Statutes*, after some ten years of experiment, now takes the form of course (5). And it has been a popular and valuable course. The writer's whole interest in statute law springs from a stimulus originally received in that course in 1915. No criticism is directed here against the content of courses (4) and (5).⁷ It is believed that under the proper conditions, the subject matter of either course could be effectively taught. But there are two possible criticisms of Mr. Freund's suggestion that either course should constitute the entire content of a law school course in *Statutes*. In the first place, there are probably few men now in the teaching profession who could properly handle such a course. More men of this type should, however, be developed. In the second place, there is nothing in the law school curriculum to prepare the student for dealing so abruptly and intensively with the problems involved in courses (4) and (5). The average law student does not have the background against which such a course must be placed if it is to be fully comprehended. He should be led up to the problems involved in

⁶ *Ibid.*, page 6.

⁷ Mr. Dodd's criticism of course (5), *op. cit.*, page 4, is probably based largely upon the fact that the 1921 Report of the American Bar Association's Special Committee on Legislative Drafting was prepared as a manual for professional legislative draftsmen actually engaged in drafting work, with a view of furnishing these trained and experienced men with detailed precedents and suggestions for terms and formulae to meet constantly recurring drafting problems, rather than as a basis for instructing novices in their first approach to the whole significance of statute law-making. In other words, his objection is that Mr. Freund's course (5) means little or nothing in the training of a student unless the student has first something on which to hitch the material. A course on *Legislative Terms and Provisions*, in Mr. Dodd's opinion, is not a good training for a draftsman and means little or nothing unless it has as a preliminary basis some notion of how the process of enacting statutes fits into our legal and governmental situation. Just at this point reference should be made to Mr. Dodd's view, *op. cit.* page 4, that an accurate and comprehensive knowledge of the local technique of legislation and policy of governmental function is vital to the success of a draftsman's work.

these two courses through a study of the significance of statutes in our legal system and of the constitutional machinery used in the making of statute law. This would, of course, leave much less time available for the subject matter of courses (4) and (5). If the function of the law school course in *Statutes* is conceived to be that of training professional legislative bill-drafters, this would be a serious defect, for both courses (4) and (5) contain excellent and thorough-going training for draftsmen. On the other hand, if the function of the course should be thought of as that of contributing to the training of a bar that increasingly deals with statutory problems, then the defect would be less important, provided sufficient attention were given to the subject matter of courses (4) and (5) to impress the student with the type of problems involved and the general technique of their solution, and to furnish a strong constructive focus and emphasis as the climax of the course.

In general, the purpose of this comment upon Mr. Freund's memorandum has been that of directing attention to the issues raised by a comparison between Mr. Freund's views and those presented by Mr. Dodd in the June number of this REVIEW. The problem is important and difficult, and consists mainly of the question as to what, in view of the various conceptions of the purpose of a law course in *Statutes*, can be selected from the wide range of topics of statute law, and effectively taught to law students by professional law teachers.

M. T. V. H.

SHELLEY'S CASE AND LIMITATIONS OVER AFTER ESTATES TAIL IN NORTH CAROLINA—A disposition of property of frequent occurrence, especially in wills, is (a) a life estate to A, who is usually a near relative, say son or daughter of the testator, settler, or grantor, followed by (b) an estate tail to the heirs of A's body, with (c) on failure of such heirs of the body or issue or the like, a limitation over in fee simple to the heirs general of A.

The courts of North Carolina have usually, in considering the application of the Rule in Shelley's Case to such a series of limitations, considered the whole series as one limitation, just as would have been done at common law, and have thus determined the application or non-application of the Rule. The writer suggests that under our statutes, a simpler method would be to consider the limitations separately. The result as shown by the decisions would be in almost every case the same, but the reasoning would be much simpler, and being founded on the interpretation of our own statutes, would, if the suggestion is correct, be more satisfactory.

The Rule presupposes a freehold (in this state a life estate) in the ancestor¹

¹ At common law, as well as under that expression: the statute *de donis*, there were two freeholds which the ancestor might take under the limitation within the Rule, an estate for life and an estate tail. But in North Carolina since the statute of 1784, C. S. sec. 1734, there is left only a life estate which the ancestor may take under the limitations and which satisfies the conditions for the Rule. We might with a gain in simplicity and exactness embody this statutory result in our statement of the Rule, so as to make it, if Coke's language is adopted, read: "When by any gift or conveyance the ancestor takes a life estate," etc. or if Preston and Kent's statement is preferred, it could read: "When a person takes a life estate legally or equitably . . ." etc. See the statements of the Rule in the words of Coke and Kent, who follows Preston, in *Smith v. Proctor*, 139 N. C. 314, 51 S. E. 889, 2 L. R. A. (n. s.) 172 (1905). "Life estates" include, of course, estates *per autre vie* and life estates subject to special limitations, as estates *durante viduitate*. 1 Tiffany, *Real Property*, 1920 ed. 534; Challis, *Real Property*. 3rd ed. 162; *Ham v. Ham*, 21 N. C. 598 (1837). (bequest of slaves to heirs general after estate for widowhood).

and a remainder in the heir.² Consequently, in the series of limitations under consideration, if the limitation over, limitation (c) in the illustration above, is an executory limitation and not a remainder, the Rule is inapplicable to the limitation over.

The statute of 1784, C. S. sec. 1734, changed an estate tail to a fee simple in the first taker under the entail. The Rule by its very terms unites the life estate, (a) above, with the remainder in tail, (b) above, into a fee tail in the ancestor, which the statute of 1784 thereupon converts to a fee simple. The limitation over, (c) above, can no longer be a remainder after a fee tail, as at common law, upon which the Rule could operate, but becomes instantly a limitation over after a fee simple, that is, an executory limitation, which is not within the operation of the Rule.

This construction of the limitation over is the same as that given at common law to be a limitation over after an estate tail in chattels, or more accurately after a limitation which, if the subject matter were real property, would be an estate tail,³ and was adopted to preserve the limitation over so far as possible. That limitation must fail as a remainder, and even as an executory devise could not be effective, under the rule against perpetuities, if the failure of issue on which it was to vest was an "indefinite failure."^{3a} Consequently, to save it, the courts were astute to seize any phrase which would make the failure definite rather than indefinite.⁴ To such an extent was this method of construction carried that in a will including both real and personal property, the same phrase describing failure was held to make an indefinite failure as to realty and a definite failure as to personalty,⁵ while various expressions which, applied to realty were held to make an indefinite failure, and so to give a remainder after an estate tail, were held when applied to personalty, to make a definite failure and so not to invalidate the executory limitation over for remoteness.⁶

Under the statute of 1784, all limitations in real as well as personal property after what would at common law have been an estate tail, become limitations after a fee simple and therefore dependent for their validity on whether the contingency creates a definite rather than an indefinite failure.⁷ Applying to such

² This is embodied in every statement of the Rule. "The Rule does not apply when the subsequent limitation is an executory limitation." Challis, *Real Property*, 3rd ed. 165.

³ Words conferring an estate in tail in real, give an absolute interest in personal property. *Leventhope v. Ashbie*, Rolle's Abr. 831 pl. 1, Tudor's *Leading Cases, Real Property*, 4th ed. 382 and note (1635); *Nichols v. Cartwright*, 6 N. C. 137 (1812); *Davidson v. Davidson*, 8 N. C. 162 (1820); *Floyd v. Thompson*, 20 N. C. 478 (1839); *Swain v. Rascoe*, 25 N. C. 200 (1842); *Coon v. Rice*, 29 N. C. 217 (1847).

^{3a} *Cutlar v. Cutlar*, 3 N. C. 154 (1801), (bequest of slaves over after life estate void); *Williams v. Holly*, 4 N. C. 266 (1815), (limitation after fee in land void); *Folk v. Whitley*, 30 N. C. 133 (1847), (limitation over after fee in land void).

⁴ *Davidson v. Davidson*, 8 N. C. 162 (1820); *Ward v. Jones*, 40 N. C. 400 (1848). In cases involving personal property, so strong a demonstration of intention to exclude a general failure is not required as in cases of real property. *Allen v. Pass*, 20 N. C. 207 (1838).

⁵ *Forth v. Chapman*, 1 P. Wm. 663, Tudor's *Leading Cases, Real Property*, 4th ed., 371 (1720).

⁶ 4 Kent, *Commentaries*, 282 and note (a); 1 Tiffany, *Real Property*, 1920 ed. 66 and note. Words of distribution superadded to "heirs of body," give the first taker only a life estate in bequests of slaves. *Allen v. Pass*, 20 N. C. 207 (1838); *Swain v. Rascoe*, 25 N. C. 200, 38 Am. D. 720 (1842), overruling *Bradley v. Jones*, 37 N. C. 245 (1842).

⁷ *Smith v. Brisson*, 90 N. C. 284 (1884); *Sessoms v. Sessoms*, 144 N. C. 121, 56 S. E. 687 (1907); *Patterson v. McCormick*, 177 N. C. 448, 99 S. E. 401 (1919). In *Ward v. Jones*, 40 N. C. 400 (1848), which involved the construction of a will made in 1788, Pearson, J., in an admirable opinion throws a flood of light on the whole subject. He adverts to the difference which had grown up in England between the interpretation of devises of realty and bequests of personalty; shows that the attitude of the courts

limitations the rules developed at common law, our courts were compelled to hold many devises void for remoteness.⁸ And the various devices held applicable to bequests over were adopted with regard to devises over after an estate tail.⁹

But in 1827 the legislature relieved the situation by an act, now C. S. sec. 1737, which provided that all limitations after failure of issue or heirs or the like, should, in the absence of a clearly expressed contrary intention, be interpreted as meaning a failure at the death of the first taker, thus bringing all such limitations within¹⁰ the period allowed by the rule against perpetuities, and making them valid as executory limitations.¹¹ The statute of 1827 by saving all limitations over from the objection of remoteness and by validating them as executory limitations has tended to obscure the connection of the cases arising under it with the Rule. Questions of remoteness now come up as questions of statutory construction, to be decided on the principle of *lex ita scripta est*, and the principle that such limitations are validated as *executory devises* and not as

toward limitations after bequests of personal property grew out of the effort to preserve the limitations over from failing through remoteness; that the statute of 1784, by making limitations after estates tail executory, produces the same problem in limitations after devises in fee tail, as confronted courts before the statute as to bequests; and consequently that the rules for the construction of such bequests now govern such devises—the same principles as to expressions which save from remoteness, whether expressions of distribution or expressions which render a failure of issue over definite and not indefinite. As the will long antedated the statute of 1827, the opinion and ruling are entirely independent of that statute.

⁸ *Davidson v. Davidson*, 8 N. C. 162 (1820), (gift of land and chattels after implied estate tail, under statute 1784, both void for remoteness); *Sanders v. Hyatt*, 8 N. C. 246 (1821), (devise under the same condition void); *Hollohand v. Kornegay*, 29 N. C. 261 (1847), (same); *Folk v. Whitley*, 30 N. C. 133 (1847), (same).

⁹ Expressions of distribution such as "share and share alike," "equally to be divided," etc., super-added to a gift in tail of land in a limitation, were held to show a definite failure and prevent the application of the Rule, as had long been established in cases of personal property. *Moore v. Parker*, 34 N. C. 123 (1851); *Ward v. Jones*, 40 N. C. 400 (1848). This was contrary to the English rule laid down in *Jesson v. Wright*, 2 Bligh 1 (1820) which had been followed in *Ross v. Toms*, 15 N. C. 376 (1833). See *Mills v. Thorne*, 95 N. C. 362 (1886).

An intermediate period between the death of the testator and the ultimate failure of issue, such as arrival at full age, was seized on to save the limitation over. *Patterson v. McCormick*, 177 N. C. 448, 99 S. E. 40 (1919), explaining *Hilliard v. Kearney*, 45 N. C. 221 (1853).

¹⁰ The act of 1827 has been the subject of much discussion in the courts and an admirable examination and exposition of the cases under it by Clark, C. J., is contained in *Patterson v. McCormick*, 177 N. C. 448, 99 S. E. 40 (1919). This should put the construction of the statute at rest.

¹¹ *Smith v. Brisson*, 90 N. C. 284 (1884), (overruling *Ex parte McBee*, 63 N. C. 332 (1869); *Patterson v. McCormick*, 177 N. C. 448, 99 S. E. 40 (1919). The doctrine of alternative contingent remainders founded on "a contingency in a double aspect," *Loddington v. Kime*, Ld. Raym. 203, 1 Salk 224, 15 E. R. C. 729 (1694); or of limitations which in one event are contingent remainders and in another are executory devises, *Doe d. Herbert v. Shelby*, 2 B. & Cr. 926 (1824), 1 Tiffany, *Real Property*, 1920 ed. 581, cannot apply, for by the statute of 1784 the limitation to the first takers, heirs in tail, becomes a fee simple at the moment of the creation of the life estate in such first taker, and the remainder over at that instant, i. e., the creation of the limitation, becomes executory.

An excellent statement of the effect of alternative limitations upon such a series of limitations as we are considering, from the standpoint of common law, that is, exclusive of such a statute as C. S. sec. 1734, is contained in Leake's *Property in Land*, 2nd ed., 263-264.

In *Jarvis v. Wyatt*, 11 N. C. 227 (1825), Henderson, J., concurring, thought the act of 1784 gave the life tenant a fee simple, and not an estate tail converted into a fee simple. Judge Henderson's views as to the application of common law principles are almost unerring, but did he not for the moment lose sight of the fact that as the limitation stood there was nothing for the statute to operate upon? The life estate in the ancestor and the fee tail in remainder had first to be seized upon by the Rule and converted into a fee tail in possession of the ancestor, before there were the conditions required for the operation of the statute. At any rate this is the well established doctrine now. *Chambers v. Payne*, 59 N. C. 276 (1862); *Nichols v. Gladden*, 117 N. C. 497, 23 S. E. 459 (1895).

In *Watson v. Smith*, 110 N. C. 6, 14 S. E. 640 (1892), the doctrine of alternative remainders, following a suggestion in *Watson v. Dodd*, 68 N. C. 528 (1873), of Pearson, C. J., (who curiously enough wrote the opinion in *Ward v. Jones*, alluded to above), is adopted and applied to a limitation over, "if the life tenant dies without heirs living at his death." Of course there was and could be no question of the application of the Rule, but the question of the nature of the limitation over would seem the same. The court admitted that the question was not before it.

In *Smith v. Brisson*, 90 N. C. 284 (1884), land was limited by deed to A. and the heirs of his body, but if he dies without such heirs living at the time of his death, then over. Although the deed was within the statute of 1827 and therefore the failure was definite, and although A. never had heirs of his body, yet the statute of 1784 operated to change the estate tail to a fee simple and the limitation over was executory. See also the limitation in *Spruill v. Leary*, 35 N. C. 225, 408 (1851), all the judges holding the limitation over to be executory. But so far as the application of the Rule is concerned, the question is immaterial. If the first limitation is, because of the expressions used in its creation, not a remainder, *cadit questio*; if the limitation is a fee tail, then on principle and authority the second limitation is executory.

remainders is rarely necessarily considered. Thus the statute has split what was formerly of necessity a single line of decisions into two lines. One line deals with the application of the statute of 1827,¹² and the other considers the Rule as applied to such limitations.

In almost all the cases, the limitation over has been held to take the case out of the Rule on some common law principle applicable to the particular wording employed in the case.¹³ The reasoning in very many of these cases would have been much simplified if the theory of this note had been used. In a few cases, however, it has been held, again on common law principles, that the Rule is applicable to such limitations over. It is submitted that these last cases were incorrectly decided. The very consideration of the application of the Rule involves the assumption that the limitation over is a remainder, whereas under our statutes and decisions it is an executory limitation, to which it is impossible that the Rule should apply.¹⁴

L. P. McG.

DYING DECLARATIONS IN CIVIL CASES—The hearsay evidence rule was devised by the common law judges to exclude from the consideration of the jury, testimony based upon statements made to the witness outside of court, not un-

¹² See cases at beginning of note 11.

¹³ Since 1869, the cases holding the Rule inapplicable where there is a limitation over are as follows: *Patrick v. Morehead*, 85 N. C. 62 (1881); *Smith v. Brisson*, 90 N. C. 284 (1884), (overruling *Ex parte McBee*, 63 N. C. 332 (1869)); *Graves v. Trueblood*, 96 N. C. 495 (1887); *Howell v. Knight*, 100 N. C. 254, 6 S. E. 721 (1888); *Franks v. Whitaker*, 116 N. C. 518, 21 S. E. 175 (1895); *Bird v. Gilliam*, 121 N. C. 326, 28 S. E. 489 (1897); *May v. Lewis*, 132 N. C. 115, 43 S. E. 550 (1903); *Houser v. Crafts*, 134 N. C. 319, 46 S. E. 756 (1904); *Williamson v. Boyd*, 136 N. C. 46, 48 S. E. 516 (1904); *Thompson v. Crump*, 138 N. C. 32, 50 S. E. 457 (1905); *Smith v. Proctor*, 139 N. C. 314, 51 S. E. 889, 2 L. R. A. (n. s.) 172 (1905); *Faison v. Odom*, 144 N. C. 107, 56 S. E. 793 (1907); *Cox v. Jernigan*, 154 N. C. 584, 70 S. E. 949 (1911); *Puckett v. Morgan*, 158 N. C. 344, 74 S. E. 15 (1912); *Jones v. Whichard*, 163 N. C. 241, 79 S. E. 503 (1913); *Miller v. Harding*, 167 N. C. 53, 83 S. E. 725 (1914); *Shuford v. Brady*, 169 N. C. 224, 85 S. E. 303 (1915); *Williams v. Blizard*, 176 N. C. 146, 96 S. E. 957 (1918); *Pugh v. Allen*, 179 N. C. 307, 102 S. E. 394 (1920); *Blackledge v. Simmons*, 180 N. C. 535, 105 S. E. 202 (1920); *Wallace v. Wallace*, 181 N. C. 158, 106 S. E. 501 (1921); *Reid v. Neil*, 182 N. C. 192, 108 S. E. 769 (1921); *Hampton v. Griggs*, — N. C. — 113 S. E. 501 (1922). In *Morrisette v. Stevens*, 136 N. C. 160, 48 S. E. 661 (1904), and *Whitfield v. Garriss*, 134 N. C. 24, 45 S. E. 904 (1903), reaffirming on rehearing *Whitfield v. Garriss*, 131 N. C. 148, 45 S. E. 904 (1902), under such limitations the life tenant had heirs of his body and afterwards died, and it was correctly held that he had a fee tail under the act of 1784 subject to executory limitations over in the event of his leaving no issue, and that his estate became absolute on his death, leaving children. In *Sessoms v. Sessoms*, 144 N. C. 121, 56 S. E. 687 (1907), the statement of facts appears to be incomplete. It seems a similar case: if the first taker died without heirs of body it is believed he could have no absolute estate. See the following note.

¹⁴ *Tyson v. Sinclair*, 138 N. C. 23, 3 Ann. Cas. 397, 50 S. E. 450 (1905). Here the limitations were to grandson for life, then to the lawful heir of his body in fee simple, but on failure of such issue then to his right heirs in fee. It was held that under the Rule, the grandson took an estate in fee simple. It would seem that the Rule would unite the life estate and the remainder in tail, which the statute of 1784 would convert into a fee simple subject to an executory devise over in case the grandson died without issue. Consequently the grandson could not during his life have a fee simple absolute.

Wool v. Fleewood, 136 N. C. 460, 48 S. E. 785, 67 L. R. A. 444 (1904), was a devise of a life estate to children, L & E, at their death to their lawful heirs, and if they have no surviving heirs, then to my (testator's) right heirs. Held that the Rule applied and L & E took a fee simple. It is submitted that the phrase "if they have no surviving heirs" should have been read "if they have, or leave, no surviving heirs of their bodies." Such a course was adopted in *Davidson v. Davidson*, 8 N. C. 16 (1820); *Smith v. Brisson*, 90 N. C. 284, and *Rollins v. Keel*, 115 N. C. 68, 20 S. E. 209 (1894), to effectuate the intention of the testator. The statute of 1784 would then have applied, and the limitation over would have been executory.

Radford v. Rose, 178 N. C. 288, 100 S. E. 249 (1919), was a devise interpreted in effect as follows: To my daughter for life, and then to her bodily heirs to vest in possession on their attaining the age of twenty-one; but if she have no bodily heirs, then the property to go back to the Rose family. Held, following *Tyson v. Sinclair*, *supra*, that under the Rule the daughter took an estate in fee. The court distinguishes the case from *Puckett v. Morgan*, 158 N. C. 344, 74 S. E. 15 (1912), and *Jones v. Whichard*, 163 N. C. 241, 79 S. E. 503 (1913), on the ground that in those cases the devises over were to a different stock of descent. It is submitted that the daughter under the devise over held not a fee simple absolute, but a fee subject to an executory devise and during her life could give no perfect deed.

der oath, and not subject to cross examination. The feeling back of the rule was that statements uttered without these safeguards were unreliable.¹

It was early recognized, however, that under given conditions, certain checks other than the oath and cross examination might operate substantially as well to guarantee the impartiality at least of extra-forum statements forming the basis of testimony. Thus, especially when various considerations of history or of social policy required it, the hearsay evidence rule became subject to a number of exceptions and qualifications. And one of these permitted the introduction in evidence of reports of dying declarations.²

Today, the conditions incident to the admission of dying declarations are well established.³ They can be used only in prosecutions for the specific crime of homicide,⁴ not merely for an act actually resulting in death, but for an offence involving the resulting death of the declarant as an essential element. The declaration must have been uttered while its maker was conscious of the fact that he was about to die. It must deal with the cause of the killing and with the circumstances immediately connected with the act. And the declarant must actually have died prior to the trial.

The history of the development of the first of these conditions, however, is a matter upon which law writers do not agree. On the one hand,⁵ it has been urged that the original governing principle was simply that the witness being dead, there was a necessity for taking his only available trustworthy statements, namely, his dying declarations. These were deemed reliable because of a presumption that a God-fearing person who was conscious of the actual approach of death would be apt to tell the truth. This principle, if valid, was broad enough, of course, to warrant the use of dying declarations in all cases, civil as well as criminal. And the proponents of this principle insist that such was the established practice prior to the early 1800's. They explain the development of the modern practice of limiting the use of dying declarations to homicide cases, by the assertion that what was intended, in a treatise published in 1803,⁶ as a statement of the convenience of the use of dying declarations in certain murder cases, was misconstrued by later courts and law writers as an authoritative indication that the use of dying declarations was restricted and confined to such cases.⁷

¹ *Preston v. Bynum*, 137 N. C. 491, 49 S. E. 955 (1905); 1 Greenleaf, *Evidence*, 16th ed., sec. 98, and following; 2 Wigmore, *Evidence*, sec. 1360, and following; Lockhart, *Handbook of Evidence for North Carolina*, sec. 138.

² In general, see 1 Greenleaf, sec. 156; 2 Wigmore, sec. 1430; Lockhart, sec. 145.

³ *Barfield v. Britt*, 47 N. C. 41 (1854); *State v. Mills*, 91 N. C. 582 (1884); *State v. Laughter*, 159 N. C. 488, 74 S. E. 913 (1912); and authorities cited in note 2, *supra*.

⁴ The admission of dying declarations in such cases does not contravene the provision of the Bill of Rights, N. C. Const., art. 1 sec. 2, that "In all criminal prosecutions every man has the right . . . to confront the accusers and witnesses, etc." *State v. Tilghman*, 33 N. C. 513 (1850); 2 Wigmore, sec. 1398, note 6; 1 Greenleaf, sec. 163 f, note 5. This is because the established practice in vogue at the time of the adoption of the constitution cannot be said to have been abrogated by so broad a declaration of rights. Rather, the practice is cognizable under the constitution, as an exception. *Quære*, is a statute such as one of those mentioned in notes 16 and 17, *post*, extending the practice to other types of criminal cases, constitutional?

⁵ See 1 Greenleaf, sec. 156a; 2 Wigmore, sec. 1431; *McFarland v. Shaw*, 4 N. C. 200 (1815), overruled in *Barfield v. Britt*, 47 N. C. 41 (1854); *Thurston v. Fritz*, 91 Kas. 468, 138 Pac. 625 (1914).

⁶ 1 East, *Pleas of the Crown*, 353.

⁷ See 1 Greenleaf, *Evidence*, Redfield's ed. of 1860, sec. 156, note, and *Barfield v. Britt*, 47 N. C. 41 (1854).

The other view⁸ is that before the necessity arose for rationalizing the exceptions to the hearsay evidence rule and the rule itself, dying declarations were admitted as a matter of course, but mainly in homicide cases, that the instances of their admission in civil cases were only occasional and sporadic, and that in some of the civil cases the dying declarations were admitted not so much because the declarant was *in extremis* as because the statements were actually declarations against interest or statements forming part of the *res gestae*, within what were later to be classed as other exceptions to the hearsay evidence rule.⁹ In other words, this view is that the principle controlling the admission of dying declarations is more properly that of the public necessity of using such evidence in order to prevent manslaughter from going free in cases where there are no other eyewitnesses of the attack. It never has been indispensable, however, that there should be no other witnesses available. The principle is based upon a presumption that in the majority of cases there will be no other satisfactory evidence of the facts concerning the killing.¹⁰

Regardless of this conflict of views as to the history of the governing principle, it is clear that prior to the early 1800's there were relatively few instances of the use of dying declarations as evidence in civil cases,¹¹ and that since that time there has been an almost unanimous practice, both in England and in the United States, of confining their use to prosecutions for homicide. In large measure, no doubt, this has been due to the obviously unsatisfactory character of such evidence, and to the lack of opportunity afforded the party most directly affected by the declaration for checking its accuracy by cross examination.

On the other hand, the confinement of the use of dying declarations to homicide cases has sometimes been thought to be both unnecessary and unwise, and a few courts have sought to disregard this restriction. Notable instances of this are observable in the early North Carolina case of *McFarland v. Shaw*,¹² decided in 1815, where the dying declaration of the victim was admitted in an action of seduction brought by her father, and in the relatively recent Kansas case of *Thurston v. Fritz*,¹³ decided in 1914, where, in an action for the balance due upon a purchase of land, the court admitted the dying declaration of the vendor concerning the circumstances surrounding the transaction. *McFarland v. Shaw*, however, was expressly overruled in 1854, in *Barfield v. Britt*,¹⁴ and the Kansas case has been severely criticised,¹⁵ both upon the ground that it flew

⁸ See 27 Harv. L. Rev. 739, and *Wooten v. Wilkins*, note 12, *post*.

⁹ Dying declarations are still competent under these two exceptions. See *Barfield v. Britt*, 47 N. C. 41 (1854); 1 Greenleaf, sec. 156a.

¹⁰ See authorities cited in notes 2 and 3, *supra*, and *Commonwealth v. Roddy*, 184 Pa. 274, 39 Atl. 211 (1908). The version sometimes given, that the accused should not profit by his own wrong in putting the principal witness out of the way, assumes, of course, the truth of the issue being tried, the defendant's guilt of the killing.

¹¹ The cases are collected in 1 Greenleaf, sec. 156a, note 1; 2 Wigmore, sec. 1431, note 1, and 27 Harv. L. Rev. 739. See also 56 L. R. A. 360, note.

¹² 4 N. C. 200 (1815). See *Wooten v. Wilkins*, 39 Ga. 223, 99 Am. Dec. 456 (1869); *Jackson v. Vredenburgh*, 1 Johns. (N. Y.) 159, 163 (1806).

¹³ 91 Kas. 468, 138 Pac. 625, 50 L. R. A. (n. s.) 1164 (1914).

¹⁴ 47 N. C. 41 (1854).

¹⁵ See 27 Harv. L. R. 739, 14 Col. L. R. 520. and Humble, *Departure from Precedent*, 19 Mich. L. R. 608.

in the face of local decisions and statutory policies to the contrary, and upon the further ground that so radical a change in the rules of evidence is more properly a matter for legislative determination.

Legislatures have occasionally authorized the admission of dying declarations in prosecutions for abortion,¹⁶ in bastardy cases,¹⁷ and more recently in civil actions for wrongful death. Thus the amendment¹⁸ of 1919 to the North Carolina statute providing for the recovery of damages for death caused by wrongful act, neglect or default,¹⁹ is of particular interest. This amendment is as follows: "In all actions brought under this section, the dying declaration of deceased as to the cause of his death shall be admissible in evidence in like manner and under the same rules as dying declarations of deceased in criminal actions for homicide are now received in evidence."

This provision came before the Supreme Court of North Carolina in the two recent cases of *Tatham v. Andrews Mfg. Co.*,²⁰ and *Williams v. Railroad*.²¹ In both cases declarations made two years prior to the enactment of the amendment were admitted in evidence in actions brought after its passage. The court held in each instance that the statute was constitutionally applicable to such situations.²² In the *Tatham* case, it was also "contended for defendant that such declaration should not be allowed to avail the plaintiffs unless they carry conviction beyond a reasonable doubt." The court promptly replied, however, that the weight to be given to the dying declaration by the jury bore no relation to its competency, and suggested that the same weight is to be given by the jury to a dying declaration in an action for wrongful death as is given to other types of evidence in similar cases.²³ In other words, the court's conception of the significance of the statute in this connection is simply that it applies to the admissibility and consideration of dying declarations in this type of civil cases the same tests that are applicable in cases of prosecutions for homicide, and no more.

D. G. D.

M. T. V. H.

THE ENFORCEMENT OF SUSPENDED SENTENCES—Some courts hold that in the absence of an enabling statute, a criminal court is without power to suspend sentence, after conviction or plea of guilty, for probationary purposes.¹ Other courts regard such a statute as violative of the governor's constitutional pardon-

¹⁶ Mass. Stat. 1889, ch. 100; N. Y. Stat. 1875, ch. 352; Pa. Stat. 1895, June 26, P. L. 387, sec. 1.

¹⁷ Del. Rev. Stat., 1893, ch. 77, sec. 15; Miss. Ann. Code., 1892, sec. 357.

¹⁸ P. L., 1919, ch. 29.

¹⁹ C. S. sec. 160.

²⁰ 180 N. C. 627, 105 S. E. 423 (1920).

²¹ 182 N. C. 267, 108 S. E. 915 (1921).

²² The constitutional prohibition of *ex post facto* laws does not apply to changes in the rules of evidence. *Tabor v. Ward*, 83 N. C. 291, 294 (1880). Nor does one have a vested right in a rule of evidence. *State v. Barrett*, 138 N. C. 630, 50 S. E. 506, 1 L. R. A. (n. s.) 626 (1905); 1 Wigmore, sec. 7.

²³ As to impeaching or discrediting dying declarations, see Lockhart, sec. 145, and 16 A. L. R. 411, note.

¹ *Gray v. State*, 107 Ind. 177, 8 N. E. 16 (1886); *People v. Court of Sessions of Monroe County*, 6 Hun. (N. Y.) 550, 21 N. Y. Supp. 659; *State v. Abbot*, 87 S. C. 466, 70 S. E. 6, 33 L. R. A. (n. s.) 112, note (1911); *In re Webb*, 89 Wis. 354, 62 N. W. 177 (1895). For the common law practice of suspending sentences in various situations, see 4 Blackstone, *Commentaries*, 394; 1 Chitty, *Crim. Law*, 757.

ing power.² Most courts agree, however, that the power to withhold execution of sentence during compliance with various conditions is inherent in criminal courts of general jurisdiction.³ This is the view in North Carolina.⁴

Normally, the suspension of a particular sentence is a matter resting in the sound discretion of the trial judge.⁵ Similarly, whether there has in fact been a subsequent breach of any condition of the suspension, and whether sentence should be imposed and enforced, are properly questions for the original trial judge to decide, without the intervention of a jury.⁶ But if the probationer has already been adjudged not guilty of the offence alleged as a breach of a condition, by a court of competent jurisdiction, that judgment is conclusive of the matter.⁷

An essential condition of the suspension of a sentence is the consent of the prisoner.⁸ He may, if he wishes, take his punishment, instead. If payment of the costs is required as one condition, compliance is not regarded as part of the punishment so as to make the later enforcement of the sentence an additional penalty.⁹ On the other hand, if sentence is suspended mainly upon condition that specific acts be performed, such as the restitution of stolen goods or the abatement of a nuisance, which might have constituted a part of a sentence, performance of these acts strips the court of further power in the premises.¹⁰ The more common type of condition, however, is that the defendant maintain future good behavior. Whether the time during which good behavior can be required must be fixed and limited to the duration of the appropriate punishment, or whether such conduct can be required to continue indefinitely, is a matter upon which the courts do not agree. The better view is the one first suggested.¹¹ The North Carolina court has held, however, that sentence may be suspended indefinitely, so as to permit the trial judge later to enforce the sentence for an act of misbehavior occurring after the expiration of the originally available period of imprisonment.¹²

² *People v. Brown*, 54 Mich. 15, 19 N. W. 571 (1884); *Spenser v. State*, 125 Tenn. 64, 140 S. W. 597 (1911); *People v. Blackburn*, 6 Utah 347, 23 Pac. 759 (1890).

³ *Webber v. State*, 58 Ohio St. 616, 51 N. E. 116, 41 L. R. A. 472 (1898); *Commonwealth v. Dunleavy*, 16 Pa. Sup. Ct. 380; *Sylvester v. State*, 65 N. H. 193, 20 Atl. 954, 33 L. R. A. (n. s.) 112, note (1899).

⁴ *State v. Crook*, 115 N. C. 760, 20 S. E. 513 (1894); *State v. Hardin*, 183 N. C. 815, 112 S. E. 593 (1922).

⁵ *State v. Everett*, 164 N. C. 399, 79 S. E. 274 (1913); *Commonwealth v. Dowdican's Bail*, 115 Mass. 133 (1874). Under a statute authorizing the jury in rendering its verdict to provide for a suspended sentence, the courts of Texas require such a verdict as a condition precedent to the power of the court to suspend a sentence. *Johnson v. State*, 169 S. W. (Tex. Cr. App.) 1151 (1914).

⁶ *State v. Greer*, 173 N. C. 759, 92 S. E. 147 (1917); *Sylvester v. State*, *supra*, note 3; *State v. Hardin*, *supra*, note 4.

⁷ *State v. Hardin*, *supra*, note 4.

⁸ *Commonwealth v. Dowdican's Bail*, *supra*, note 5; *State v. Hardin*, *supra*, note 4. In the normal case, consent will be presumed. *State v. Everett*, *supra*, note 5.

⁹ *State v. Crook*, *supra*, note 4. See also, *State v. Miller*, 6 Baxter (Tenn.) 513 (1873); and *People v. Felix*, 45 Cal. 163 (1872).

¹⁰ *State v. Addy*, 43 N. J. L. 113, 39 Am. Rep. 547 (1881); *Ex parte Lange*, 18 Wall. (U. S.) 163, 21 L. Ed. 872 (1874). *State v. Gray*, 8 Vroom. (N. J.) 368 (1875).

¹¹ That good behavior must be for a definitely fixed duration: *U. S. v. Wilson*, 46 Fed. 748 (1891); *People v. Barrett*, 202 Ill. 287, 67 N. E. 23, 63 L. R. A. 82 and note (1903); *Grundel v. People*, 33 Col. 191, 79 Pac. 1022 (1905) *Ncal v. State*, 104 Ga. 509, 30 S. E. 858 (1899). See in this connection, 1 N. C. L. Rev. 46.

¹² *In re Hinson*, 156 N. C. 251, 72 S. E. 310 (1911). Compare *Scott v. Chichester*, 107 Va. 933, 60 S. E. 95 (1908), and *Ncal v. State*, *supra*, note 11. See also 33 L. R. A. (n. s.) 112, 16 L. R. A. (n. s.) 304, notes.

What is contemplated by the term "good behavior"? Clearly, no moral or ethical precepts are involved. It means conduct that does not violate law. But this does not imply that a suspended sentence may be enforced for a breach of contract or for a tort. Rather, the order of suspension, since it is for probationary purposes, contemplates only conformity with the criminal law. Moreover, a petty offense, entirely disproportionate to the seriousness of the original crime, would probably not invoke enforcement of the sentence.

A more difficult question is this: with what sovereign's criminal law must the probationer comply? It is usually held that the subsequent enforcement of a suspended sentence operates, not as a punishment for the misconduct constituting a breach of the condition of good behavior, but as a delayed punishment for the original crime.¹³ Conceivably, therefore, the violation of the criminal law of a foreign state, by an act occurring wholly in that state, might in a broad sense, constitute a breach of the condition of good behavior. Obvious practical considerations, however, would probably prevent the enforcement of a suspended sentence for foreign misconduct. An offense occurring within the borders of the state in which the original sentence was suspended, may, on the other hand, be a breach either of state or of federal law. Since, however, the delayed enforcement of the sentence is not a punishment for this offense, and since by the Constitution of the United States the federal laws enacted in pursuance thereof are made the supreme law of the land,¹⁴ equally obligatory with the state law upon the inhabitants of each state, it would seem to be immaterial which of the two bodies of law is violated. In either case there has been misbehavior in the sense of violation of positive law. The question as to which court has jurisdiction to enforce the particular law has no relation to the problem whether there has been such misconduct as to invoke enforcement of punishment for the original crime.

In this connection, the recent North Carolina case of *State v. Hardin*,¹⁵ is of particular interest. The facts in that case were these: Hardin was convicted in Superior Court, in July, 1921, of assault with intent to kill. On motion, prayer for judgment was continued, upon condition of payment of costs, of payment of the private prosecutors' counsel fees, and upon the further condition that "defendant appear at each criminal term of this court for two years and show that he has been of good behavior and has not violated the law in any respect." At the November term of court, on motion of the solicitor, Hardin was cited to show cause why sentence should not be imposed and enforced. The trial judge found merely these facts: that Hardin had manufactured and had in his possession more than 150 gallons of wine, that he had bought grapes in Bladen county, and that persons had been seen leaving his place in a drunken condition. Thereupon, the order suspending sentence was set aside, and Hardin was sentenced to serve twelve months on the roads. Upon appeal, the judgment was reversed and remanded for a new trial to determine whether there had been

¹³ *State v. Everitt*, *supra*, note 4; *Sylvester v. State*, *supra*, note 6.

¹⁴ Art. 6, sec. 2.

¹⁵ 183 N. C. 815, 112 S. E. 593 (1922).

a violation of the state law. The court held that the facts as found by the judge below did not constitute such an offense, and that even if they did constitute a violation of the federal prohibition law, such an offense could not amount to a violation of the condition in the suspension of sentence that Hardin maintain good behavior and not violate the law in any respect. The court felt that since the state court is without jurisdiction to enforce the federal laws on this subject, the order of suspension could not have contemplated a violation of the federal law as a breach of the condition. Chief Justice Clark, however, in a vigorous dissenting opinion, took the view suggested in this note.

It is respectfully submitted that the majority of the court did not give due emphasis to the significance of the federal law as an integral part of the body of law governing conduct in North Carolina, nor to the true function of the enforcement of a suspended sentence as established by prior decisions in this state. On both phases of the case, Chief Justice Clark seems to have taken the better view.

J. P. T.