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## Editorial Board/Editorial Notes

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## EDITORIAL NOTES

**BAR ASSOCIATION MEETING**—THE LAW REVIEW is pleased to announce the annual meeting of the North Carolina Bar Association, which is to be held this year on May 1, 2 and 3 at Pinehurst. The headquarters will be at the noted Carolina Hotel. An early date was chosen this year in order not to conflict with the meeting of the American Bar Association at Philadelphia, which will be attended by a large number of North Carolina lawyers. The principal speaker from outside the state will be the President of the American Bar Association, R. E. L. Saner, of Dallas, Texas. The program for the meeting at Pinehurst is in charge of President E. S. Parker, Jr., E. M. Land, Chairman of the Executive Committee, and Secretary H. M. London. Those who attend may be assured of an excellent program and a good time, and the accessibility of Pinehurst should bring a large attendance.

**LIABILITY OF NEGLIGENT DRAWER OF CHECK**—In order that a bank may be enabled, without being misled, to comply with its obligation to honor a depositor's check immediately upon presentation at the counter, a depositor owes his bank a duty to use such care in drafting checks that the opportunities for alteration by

third persons may be minimized. Thus a depositor who writes a check complete as to parties, date, and amount, but so left with open spaces as to permit a swindler to raise the amount, must, as between himself and his bank, bear the loss. This doctrine was initiated by the English case of *Young v. Grote*,<sup>1</sup> decided in 1827. After a troubled history,<sup>2</sup> the principle was reestablished in English law by the case of *London Joint Stock Bank v. MacMillan*,<sup>3</sup> decided by the House of Lords in 1918. What little direct authority<sup>4</sup> there is in the United States supports this view. And "a strong analogy is found in the decisions which require a depositor to be careful in other respects. He has been held responsible if he mails the check to a person of the same name as the payee at another address,<sup>5</sup> if he fails to examine vouchers returned by the bank and discover forgeries,<sup>6</sup> or if he neglects to notify the bank<sup>7</sup> within a reasonable time after he does discover something wrong."<sup>8</sup>

A more difficult question, however, is the broader one whether the drawer of a check owes all future takers of the instrument a duty to use care in its drafting. These persons, at the time the check is issued, are not yet ascertained. They are not required to act upon receipt of the check, if at all, with the same speed that is demanded of the drawee bank. There are no contractual relations between them and the drawer, such as exist between a bank and its depositors, giving rise to a duty of care. That a general duty of care "not to give the opportunity for non-apparent alterations" is owed by the drawer of a check to all holders in due course is denied in England.<sup>9</sup> And the American courts are divided,<sup>10</sup> a majority holding that no such duty exists. The courts are also split upon the effect in this connection of the Negotiable Instruments Law.<sup>11</sup>

<sup>1</sup> 4 Bing. 253, 13 E. C. L. 491, 130 Eng. Reprint 764.

<sup>2</sup> See Beven, *Young v. Grote*, 23 L. Quart. Rev. 390, and the authorities cited in notes 3 and 9.

<sup>3</sup> L. R. (1918) A. C. 777, 9 B. R. C. 720, and note; 35 L. Quart. Rev. 5; 28 Yale L. J. 414; 17 Mich. L. Rev. 427. For criticisms of the decision of the Court of Appeal, which was reversed by the House of Lords, see 27 Yale L. J. 242, and a note in 31 Harv. L. Rev. 779, said to have been written by Professor Zechariah Chafee, of Harvard Law School. This is the most thorough discussion of the problem available. See also, Brannan's *Negotiable Instruments Law*, 3rd ed., Cincinnati, 1920, pp. 342-343.

<sup>4</sup> *Otis v. First National Bank* (1912) 163 Cal. 31, 124 Pac. 704; *Clifford Co. v. Donovan Co.* (1906) 195 Mo. 262, 94 S. W. 527; *Timbel v. Garfield* (1907) 121 N. Y. App. Div. 870, 106 N. Y. Supp. 497; *Trust Co. v. Conklin* (1909) 65 N. Y. Misc. 1, 119 N. Y. Supp. 367; *National Bank v. Nolting* (1897) 94 Va. 263, 266, 26 S. E. 826; 31 Harv. L. Rev. 779, 781, note 14.

<sup>5</sup> *Weisberger v. Barberton* (1911) 84 Oh. St. 21, 95 N. E. 379.

<sup>6</sup> *Leather v. Morgan* (1886) 117 U. S. 96, 6 Sup. Ct. 657; *First National Bank v. Allen* (1893) 100 Ala. 476, 14 So. 335; H. W. Arant, *Forged Checks—Duty of Depositor to His Bank*, 31 Yale L. J. 598.

<sup>7</sup> *Dana v. National Bank* (1882) 132 Mass. 156.

<sup>8</sup> 31 Harv. L. Rev. 779, 781.

<sup>9</sup> *Scholfeld v. Londesborough* (1896) A. C. 514; *Colonial Bank of Australasia v. Marshall* (1906) A. C. 559, Privy Council; *London Joint Stock Bank v. MacMillan* (1918) A. C. 777. See authorities cited in note 3.

<sup>10</sup> Upholding the duty: *Winter v. Pool* (1894) 104 Ala. 480, 16 So. 543; *Yocum v. Smith* (1872) 63 Ill. 321; *Hackett v. First National Bank* (1902) 114 Ky. 193, 70 S. W. 664; *Isnard v. Torres* (1885) 10 La. Ann. 103; *Humphrey v. Herrick* (1904) 72 Nebr. 878, 102 N. W. 1010; *Garrard v. Haddan* (1870) 67 Pa. St. 82.

<sup>11</sup> Denying a duty: *Fordyce v. Kosminski* (1886) 49 Ark. 40, 3 S. W. 892; *Knorville v. Clark* (1879) 51 Ia. 264, 1 N. W. 491; *Burrows v. Klunk* (1889) 70 Md. 451, 17 Atl. 378; *Greenfield v. Stowell* (1877) 123 Mass. 196; *Holmes v. Trumper* (1870) 22 Mich. 427; *Simmons v. Atkinson* (1892) 69 Miss. 862, 12 So. 263; *National Bank v. Lester* (1909) 194 N. Y. 461, 87 N. E. 779, 8 Col. L. R. 452; *Jones v. Hardin* (1893) 58 Fed. 140.

<sup>12</sup> Sec. 124 provides: "Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor." Sec. 196 provides that in any case not dealt with by the Act, the rules of the law merchant shall govern.

Statute held not applicable to problem discussed in text: *Timbel v. Garfield* (1907) 121 N. Y. App. Div. 870, 106 N. Y. Supp. 497; *Trust Co. v. Conklin* (1909) 65 N. Y. Misc. 1, 119 N. Y. Supp. 367.

Statute held to bar recovery: *Commercial Bank v. Arden* (1917) 177 Ky. 520, 197 S. W. 951; *Broad Street National Bank v. National Bank of Goldsboro* (1922) 183 N. C. 463, 112 S. E. 11. See 23 Col. L. Rev. 184, and Brannan's *Negotiable Instruments Law*, pp. 342, 343, 469, 470, 548, 549.

Professor Chafee has thus classified the more important objections voiced by the courts which deny the existence of a general duty of care: (a) "There is no duty to avoid crime and fraud. One need not go through life anticipating dishonesty and scanning every instrument with a detective's eye. We may assume men will act lawfully. . . . The protection against forgery is not the vigilance of the parties but the criminal law." That is to say: "The injury is caused by the intentional act of a third person. . . . A deliberate act, especially if fraudulent and criminal, breaks the chain of causation, so that the signer's carelessness is not the proximate cause of the injury. The person so intervening 'acts as a non-conductor' and 'insulates' the negligence. He is the one who is liable to the person injured." (b) "Finally, there is the objection of business convenience. There is no limit to the precautions which might have to be taken, as to paper, ink, photostographs. Much negotiable paper is executed by parties who have not in any just sense ordinary business capacity."

To these objections, the same writer has suggested these answers: (a) "Fraud and crime are facts in this world which can be foreseen and guarded against just like other facts. They are occasional and violent, but so are wash-outs and the escape of high-tension currents. Under some circumstances intentional unlawful acts are events which the average reasonable man would take care to avoid because of the injury threatened to others clearly within range. The criminal character of these acts then becomes immaterial for purposes of the law of negligence. There is a duty not to cause injury in this way any more than by non-human methods. . . . In situations where the defendant's duty to the plaintiff is imposed by contract or statute, so that the difficulty of working out a duty of care is avoided, intervening crime does not break the chain of causation. This is particularly true in the law of bills and notes. Thus if the maker leaves the amount of a note wholly blank and an agent fills it up in violation of instructions, the embezzlement does not prevent a bona fide purchaser from recovering; so, if a note payable to bearer is stolen and gets into circulation.<sup>12</sup> In these cases the existence of safeguards in the criminal law does not preclude additional civil remedies." (b) "Only the caution of a reasonable man under the circumstances is required. Drawers and makers cannot object when they issue business instruments if they are obliged to issue them in a business way or take the consequences. . . . It is a question of fact, no more difficult to decide than the many others that arise in negligence cases. Many of the decisions that dwell on the injustice of liability in the particular case ought to have held that there was no breach of the duty of care, instead of going out of their way to deny altogether the duty which properly exists."

As an illustration of how an apparently erroneous view that there had been no breach of any duty of care in a particular case influenced the court in holding that no duty of care existed, the North Carolina case of *Broad Street National Bank*

<sup>12</sup> See *Am. Nat. Bank v. Dew* (1917) 175 N. C. 79, 94 S. E. 708.

v. *National Bank of Goldsboro*,<sup>13</sup> decided in 1922, is of interest. A demurrer to the complaint admitted the following facts: One Massey purchased from the defendant Goldsboro bank four New York exchange checks for \$2, \$6, \$2, and \$3, respectively. The checks were issued by the defendant's president, while he and Massey were alone in the banking rooms, and after business hours. They were written in ink upon the plain white bond check paper ordinarily used by the bank and its customers. All of the spaces were properly filled out in full. No protectograph was used. Apparently the bank had not been in the habit of using sensitized safety paper, but it had followed the practice of making out its New York exchange checks with the aid of a protectograph. Massey erased the ink with chemicals, and, using both ink and a protectograph, raised the respective amounts of the four checks to a total aggregating over \$40,000. Massey deposited these checks, thus altered, with the plaintiff Broad Street National Bank of Richmond, where he had a regular account, and to which bank he was indebted. With a part of the proceeds, Massey extinguished this indebtedness. With the rest he made good two checks for \$9,000 and \$6,000, payable to the defendant Goldsboro bank and its president, respectively, which had previously failed of collection because of insufficient funds. This was an action, brought after the discovery of the fraud, for the aggregate raised amount of the four checks, by the plaintiff indorsee bank against the alleged negligent drawer bank. Held, the complaint did not state a cause of action.

It will be noted that these facts did not raise the problem discussed at the beginning of this note. Such a case would have been presented had Massey taken the checks directly to the New York bank upon which they were drawn, and had that institution attempted to charge the drawer Goldsboro bank with the raised value of the checks. There is some basis in the principal opinion, written by Justice Hoke, for an assumption that the court would have denied the existence of a duty of care even in that situation. Relying upon a law encyclopedia published in 1914, he stated that *Young v. Grote* is still repudiated in England<sup>14</sup> and that the weight of authority is *contra*. He does not mention the decision of the House of Lords in 1918, in the case of *London Joint Stock Bank v. MacMillan*<sup>15</sup> four years before the principal case, that reestablished *Young v. Grote* in English law in connection with the depositor-bank situation, and thus brought that phase of English law up to the standard already established by the American cases.<sup>16</sup> Justice Hoke was discussing, however, the broader question of the duty of care owed by the drawer of a check to all future takers of the instrument in good faith. That aspect of *Young v. Grote*, it is true, has been and still is repudiated in English law. And, as has been seen, the American courts are divided on the question, a majority taking the view that no such duty exists.

<sup>13</sup> 183 N. C. 463, 112 S. E. 11; 22 A. L. R. 1124, and note; commented upon in 23 Col. L. Rev. 184 and 32 Yale L. J. 413.

<sup>14</sup> But see authorities cited in note 3.

<sup>15</sup> *Ibid*.

<sup>16</sup> See authorities cited in note 4.

It was just that broader question that was properly raised by the case under consideration. For the plaintiff Richmond bank was not the drawee but an indorsee for value. Construing the action first as one brought upon the checks themselves, the court held that section 124 of the Negotiable Instruments Law precluded recovery except for the original tenor of the instruments.<sup>17</sup> The language of the statute is capable of that construction. Second, on the theory that the civil action under the code was the equivalent of the common law action on the case for negligence, the court denied the existence of any duty of care. Two reasons are given. First, "the possibility that the checks might be raised or altered by wilful fraud or forgery of another is too remote to afford the basis of an action either in tort or contract. In such a case the issuing could in no sense be considered the proximate cause of the injury." Second, "it would well-nigh withdraw these instruments from ordinary use, if any and every one who issues them without these precautionary devices of safety paper and protectographs would incur the risk of liability." These objections have already been discussed in this note.<sup>18</sup> It need only be said, in addition, that the very invention of safety paper and protectographs is sufficient evidence of the very real danger of alteration that threatens negotiable paper today, a danger that a bank at least must be charged with knowledge of. The question was not whether every drawer of a check must be required to use a protectograph and safety paper in order to prevent alteration. Rather, it was whether a banker, acting under the actual conditions and circumstances connected with the issuance of these four checks, should have been required to act reasonably.

Of course, unless the court could find a duty owed to one in the plaintiff's position, to use care, the question of actual negligence, i.e., of a breach of a duty of care, was immaterial. Clearly no statute or contract between these parties created any such duty. Nevertheless, the court seems to have been influenced considerably by the mere fact that all the spaces upon these checks had been filled out in ink, that the case was not one where open spaces left before or after the words and figures more or less invite alteration of the amount.<sup>19</sup> That is to say, the court seems to have felt that even assuming the existence of a duty, there was no possibility of a finding in this case that this defendant had not lived up to that duty. It is submitted that there were facts admitted by the demurrer which might well have justified a jury in finding that the defendant bank, by its president, did not do what the average reasonable bank would have done under the same or similar circumstances to guard against injury either to the drawee bank or bona fide purchasers for value. The checks were for very small amounts, \$2, \$6, \$2, and \$3, respectively. They were bought, after the bank had closed for the day, by a man known to the bank to deal customarily in large amounts, whose checks given to the bank and to its president for a total of \$15,000 had failed of collection because

<sup>17</sup> For the split of authorities on this question, see note 11. In any event, denial of liability in contract because of the statute should not preclude liability in tort for negligence.

<sup>18</sup> Compare the first group of cases cited in note 10.

<sup>19</sup> See the principal opinion at 112 S. E. 16. The court held that in such a case, recovery might be allowed.

of insufficient funds. The bank owned a protectograph. Apparently it had not been in the habit of using sensitized safety paper. It had, however, followed the practice of drawing its New York exchange checks with the aid of a protectograph. It is difficult to imagine why the president could not have used the protectograph in this instance, or why Massey could not reasonably have been asked to wait for such slight accommodations until the opening of the next business day, when the normal clerical and mechanical facilities of the bank could have been used.

Upon the whole, the dissenting opinion of Chief Justice Clark seems to express not only a clearer view of the problems involved and a more accurate knowledge of the law applicable, but, in addition, a keener appreciation of the changes in modern financial practice that should shape the development of this part of the law.

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MUNICIPAL CONTROL OF GRADE CROSSINGS—In the recent case of the *City of Durham v. Southern R. R. et al.*,<sup>1</sup> the important question of municipal control over grade crossings was presented. There was a unanimous decision in which Chief Justice Clark rendered the opinion, discussing fully the principles of law involved and citing numerous cases from this and other jurisdictions to sustain the view taken by the court. No attempt will be made to add to the very complete argument of the court, but in a case involving such a practical question it may be worth while to notice what was decided and the reasoning upon which it is based.

The tracks of three railroads cross, at grade, one of the principal streets of the city of Durham. It appearing to the city authorities that the condition of the crossing was dangerous to the public, on account of the location and the congested traffic, various attempts were made to arrive at some agreement with the railroads to remedy the defect. Failing in this, the city passed an ordinance to abolish this grade crossing as a menace to public safety, and directed the railroads to remove the danger by constructing an underpass according to certain specifications, defining the nature of the work to be done and fixing a time within which it should be begun and completed. The railroads refused to comply with the ordinance, and this proceeding was brought for a mandamus to compel compliance. The lower court directed that a mandamus issue, and upon appeal by the railroads this order was affirmed. The case is now pending in the Supreme Court of the United States, and the final disposition of the case will, of course, depend upon the view taken by that court.

The exercise of such authority by a municipal corporation is not new, and has been exercised in numerous cases which have been before the courts both state and federal. This is the first case, however, in this state in which a change of such a character and involving such a large expense has been considered. The principle of law controlling in such cases was discussed and explained in the case of *R. R. v*

<sup>1</sup> (1923) 185 N. C. 240.

*Goldsboro*,<sup>2</sup> which was later affirmed in the Supreme Court of the United States. In that case the line of railroad and the right of way included the whole street and the line was established before the city was incorporated. After arranging the grade of the whole street, the city passed an ordinance requiring the railroad to change its grade so as to conform to the grade of the street. The railroad asked for an injunction to prevent the city from enforcing this ordinance, but it was held to be a proper exercise of municipal authority. The amount involved in that case was about \$3,000, while in the present case the expense is very much larger.

The railroads resist the enforcement of the ordinance upon several grounds.

1. That the city has no authority to pass such an ordinance. It is not in the exercise of the right of eminent domain, by which private property may be taken for a public use upon making due compensation; but if the power exists, it is in the exercise of a police power delegated by the state to the municipality.<sup>3</sup> Where such power has not been delegated, the municipality cannot exercise it, and it is a question for the court whether or not the power exists.<sup>4</sup> Such authority must be given either specifically in the charter or under general laws for the regulation of municipal corporations; and it is held that even if the power does not exist in the charter, the city is authorized under the general law to make all reasonable regulations for keeping the streets in a safe condition for the protection of the public. In addition to other general regulations in regard to the care of the streets and to prohibiting nuisances, it is expressly provided that the municipality shall have the power,<sup>5</sup>

"To direct, control, and prohibit the laying of railroad and street railway tracks, turn-outs and switches in the streets, avenues and alleys of the city unless the same shall have been authorized by ordinance, and to require that all railroads, street railways, turnouts and switches shall be so constructed as not to interfere with the drainage of the city and with the ordinary travel and use of the streets, avenues, and alleys in the city, and to construct and keep in repair suitable crossings at the intersection of streets, avenues, and alleys, and ditches, sewers and culverts, where the governing body shall deem it necessary, and to direct the use and regulate the speed of locomotive engines, trains and cars within the city."

While the right of way in the railroad company is a property right, it holds such right, like every other property owner, to be exercised under reasonable police regulations for the protection of the public;<sup>6</sup> and while a line of railway along a street is a means of public travel, it is not an exclusive means, and should be exercised with due regard to other rights of the public. The city having the duty of keeping the streets in safe condition, and having authority to make reasonable regulations to that effect, was justified in the action taken, so far as the existence of the power was concerned.

<sup>2</sup> (1911) 115 N. C. 356, 71 S. E. 514, affirmed in Sup. Ct. of U. S. in 232 U. S. 548.

<sup>3</sup> Dillon, *Munic. Corp.* Sec. 301.

<sup>4</sup> *State of Ind. and City of Indianapolis v. Indianapolis Union R. R. Co.* (1903) 160 Ind. 45, 66 N. E. 163, 60 L. R. A. 831.

<sup>5</sup> C. S. ss. 2675, 2676, 2787, subs. 6, 11, 18, 26.

<sup>6</sup> Dillon, *Munic. Corp.* Sec. 301. *Tate v. R. R.* (1915) 168 N. C. 523, 84 S. E. 808.



Even if an agreement had been made with the city that the railroads in constructing their lines should not be required to make any changes later, such agreement would be invalid, since the municipality cannot barter away its exercise of governmental functions.<sup>7</sup>

2. The railroads contend that even if the power existed in the municipality, this was an unreasonable, arbitrary and oppressive use of the same. It is admitted that the police power is a delegated one, and must be exercised in a reasonable manner, but the presumption is in favor of the validity of the municipal action, and the burden is upon the railroads to show that it is unreasonable. In a Texas case,<sup>8</sup> it was held that the ordinance was unreasonable, because it appeared that the railroad was required to make changes in its grade at great expense, and when the changes were made the danger would not be materially reduced. In North Carolina, it is held that municipal corporations have an almost absolute discretion in the maintenance of the streets, and the courts will not interfere except in cases of fraud and oppression, constituting a manifest abuse of discretion.<sup>9</sup>

3. The railroads also contend that the order should not be complied with because it would be much more economical to build an overhead bridge than an underpass, and that this plan should have been adopted. This is only another way of presenting the preceding objection. The corporation using the highway has not the discretion to make such regulations as it may think most consistent with public safety or with its own economic burden. The power rests with the municipality, delegated by the state, and its decision must be final unless it clearly appears to be arbitrary and unreasonable.<sup>10</sup>

4. Whether the municipal corporation may compel the railroads to make the changes at their own expense has been decided by most courts in favor of the exercise of the power. Where the street was in existence before the railroad was located, it seems to be uniformly held that the expense should be borne by the railroad, since the duty of keeping the crossing in a safe condition rests upon the railroad both at common law and under statutes.<sup>11</sup> There is some difference of opinion where the street is established after the location of the railroad.<sup>12</sup> In the case of *State v. R. R.*,<sup>13</sup> it was held that the duty of constructing a bridge for a street established several years after the railroad was built, was upon the municipality and not upon the railroad. This was an indictment under a statute, and the court held that under a proper construction of the statute it applied only to streets estab-

<sup>7</sup> *State v. R. R.* (1906) 141 N. C. 736, 53 S. E. 290; *R. R. v. Goldsboro* (1911) 155 N. C. 356, 71 S. E. 514; *Chic. B. and O. R. R. v. Omaha* (1898) 170 U. S. 57, 42 L. Ed. 948, 41 L. R. A. 481, 53 A. S. R. 557; *N. Y. and N. E. R. R. v. Bristol* (1894) 151 U. S. 556, 38 L. Ed. 269; *State and Minneapolis v. St. Paul M. and M. R. R.* (1906) 98 Minn. 380, 108 N. W. 261, 28 L. N. S. 298, 120 A. S. R. 581, 8 A. and E. Ann. Cases 1047.

<sup>8</sup> *Houston and Tex. Cent. R. R. v. Dallas* (1905) 98 Tex. 396, 84 S. W. 648, 70 L. R. A. 850.

<sup>9</sup> *Tate v. City of Greensboro* (1894) 114 N. C. 392, 19 S. E. 767, 24 L. R. A. 671; *Rosenthal v. Goldsboro* (1908) 149 N. C. 128, 62 S. E. 905, 20 L. N. S. 809.

<sup>10</sup> Cases cited in note 9.

<sup>11</sup> *State and Minneapolis v. St. P. M. and M. R. R.* (1906) 98 Minn. 380, 108 N. W. 261, 120 A. S. R. 581, 8 A. and E. Ann. Cas. 1047, reported also in 28 L. N. S. 298 with elaborate note; S. C. affirmed 214 U. S. 497.

<sup>12</sup> See cases cited 11, *supra*.

<sup>13</sup> (1876) 74 N. C. 143, C. S. s. 3797.

lished prior to the construction of the railroad. That case does not seem to have been cited in later cases, but it has been held in the principal case and also in other cases, which were civil actions, that the same rule applied without regard to the time when the street was established.<sup>14</sup>

The rule established by the principle case and numerous other cases both state and federal is, that a railroad may be required to construct overhead crossings or viaducts at its own expense, "and that the consequent cost to the company as a matter of law is *damnum absque injuria*, or deemed to be compensated for by the public benefit which the company is supposed to share."<sup>15</sup>

5. The railroads also contend that to enforce this ordinance would be a violation of their rights under the Federal Constitution, in that it would be taking their property without due process of law, and it would also be an interference with interstate commerce, since these roads are engaged in interstate commerce. Both of these contentions are overruled by the court, based upon decisions of the Supreme Court of the United States.<sup>16</sup> These are federal questions and are subject to review in the appeal now pending in the Supreme Court of the United States.

6. The railroads further contend that the city cannot make and enforce such an ordinance, because the power to require such changes to be made is vested in the State Corporation Commission.<sup>17</sup> While the statute gives this power to the Corporation Commission, it is only a delegated power, and the state may exercise the police power either directly or through some delegated agency, and the designation of a particular agency does not necessarily make that exclusive.<sup>18</sup>

The result of the decision, so far as the question of substantive law is concerned, is that a municipal corporation may, under its charter or by general law, by proper ordinance, require a railroad company to construct, at its own expense, such crossings for the streets as will best promote the public safety in the use of the streets; that the nature of the crossing to be constructed is within the reasonable discretion of the municipal authorities, and that the presumption is in favor of the validity of the city ordinance.

The question is one of considerable public importance, not only for the cities where the congestion of traffic increases the danger, but also upon the highways in the state where travel has greatly increased by reason of the use of automobiles. This has been avoided to a certain extent by the regulation which requires drivers of automobiles to "stop, look, and listen" at a crossing,<sup>19</sup> thus necessarily giving the right of way to the railway train by reason of its greater size and speed and its inflexible line. The railroads have made some changes by relocating their lines, and the State Highway Commission has done much to eliminate this danger in

<sup>14</sup> *R. R. v. Goldsboro* (1911) 155 N. C. 356, 71 S. E. 514; *State and Morehead City v. R. R.* (1913) 164 N. C. 422, 79 S. E. 447.

<sup>15</sup> *Mo. Pac. R. R. v. Omaha* (1914) 235 U. S. 121; *Erie R. R. v. Pub. Util. Co.* (1920) 254 U. S. 394.

<sup>16</sup> Cases cited in note 15; *N. Y. and N. E. R. R. v. Bristol* (1894) 151 U. S. 556, 14 S. Ct. 437, 38 L. Ed. 269.

<sup>17</sup> C. S. s. 1048.

<sup>18</sup> *R. R. v. Goldsboro* (1911) 155 N. C. 356, 71 S. E. 514, affirmed 232 U. S. 548, 34 Sp. Ct. 346, 58 L. Ed. 721.

<sup>19</sup> Acts 1923, ch. 255.

the construction of the state highways by relocating the roads so as to avoid the crossings. This has been done at the public expense, which is compensated for by the greater safety and convenience. But this does not settle the right of railroads to maintain grade crossings nor how such crossings may be generally regulated.

The power to require the railroads to place their crossings in a safe condition is vested in the State Corporation Commission, but it has not been frequently used, probably because of the numerous instances to which it would apply and the expense and difficulty in enforcing it. In some states grade crossing statutes have been enacted and upheld by the courts.<sup>20</sup> In North Carolina there is the general law<sup>21</sup> which requires the railroads to construct their crossings so as not to impede the passage or transportation of persons or property along the same. "If any railroad corporation shall so construct its crossings with public streets, thoroughfares or highways, or keep, allow or permit the same at any time to remain in such condition as to impede, obstruct or endanger the passage or transportation of persons or property along, over or across the same, the governing body of the county, city, town, township or road district having charge, control or oversight of such roads, streets or thoroughfares may give notice to such railroad, in writing, directing it to place such crossing in good condition, so that persons may cross and property be safely transported across the same." A failure to put the crossing in good condition within thirty days after such notice subjects the railroad to indictment and punishment at the discretion of the court, and each month's delay constitutes a separate offense. This provision is in addition to any other law regulating the railroad crossings.

The above statute provides only for a criminal indictment, and another statute for a somewhat similar purpose was held to apply only to roads previously in existence.<sup>22</sup> Whether the other governing bodies mentioned, in addition to cities and towns, would have the power to determine what particular manner of crossing should be constructed and to enforce it by indictment or by civil action has not been determined; but the exercise of police power is not given to such authorities as it is in the case of cities and towns, and it would probably be unwise to extend it so far. This general power outside of cities and towns seems to be vested only in the Corporation Commission.

If an animal is killed by a railroad train at a crossing or elsewhere and an action is brought within six months, there is a presumption of negligence arising from the act of killing;<sup>23</sup> but this is not true in the case of persons. In several recent cases before the Supreme Court of the state, in dissenting or concurring opinions, it has been strongly argued that the occurrence of an accident at a grade crossing should be considered *prima facie* evidence of negligence on the part of the railroad.<sup>24</sup>

<sup>20</sup> *N. Y. and N. E. R. R. v. Bristol*, 151 U. S. 556, under Connecticut grade crossing act.

<sup>21</sup> C. S. ss. 3448, 3449, 3450.

<sup>22</sup> *State v. R. R.* (1876) 74 N. C. 144; C. S. s. 3797.

<sup>23</sup> C. S. s. 3482.

<sup>24</sup> *McMillan v. R. R.* (1916) 172 N. C. 853, 90 S. E. 683; *Goff v. R. R.* (1920) 179 N. C. 216, 102 S. E. 320, concurring opinion of Clark, C. J.; *Kimbrough v. Hines* (1920) 180 N. C. 274, 104 S. E. 684, dissenting opinion of Clark, C. J.

Another question presented in the principal case was the nature of the remedy as a matter of procedure. This was a proceeding for mandamus, and the order was granted. In the case of *New Bern v. R. R.*,<sup>25</sup> a mandatory injunction was granted to compel a railroad to pave a street under a contract to keep it in repair; and in *State v. R. R.*<sup>26</sup> there was an indictment for failure to make a proper crossing. All of these remedies have been recognized in different courts. Where the dual system of law and equity courts exists, it would be important to distinguish between the mandamus and the mandatory injunction; but since the remedy is here sought in the same court and in the same manner, the practical result is the same. The mandamus, however, is generally issued to compel the performance of a public duty, while the mandatory injunction is applied in the case of private rights.<sup>27</sup>

A. C. McI.

HOLOGRAPHIC WILLS IN NORTH CAROLINA—Wills written entirely by the testator<sup>1</sup> are evidently increasing in popularity,<sup>2</sup> and, consequently, the legal questions involved are of increasing importance. Fortunately every point, except one, which may arise in this connection seems to be definitely and clearly settled, and a correct conclusion on this point is entirely possible from a careful examination of the statutory provisions and the cases construing them. The point that has not been definitely passed on is, whether a letter addressed to a beneficiary with an express statement of intention to deposit it with him as a holographic will would be a good will. It seems to the present writer that it would, for while *Allston v. Davis*, holding a letter from a brother in Texas to a sister in North Carolina a good holographic will, has been overruled, that is because of a lack of testamentary intention. But if the writer of that letter had written on the outside of the envelope, "In mailing this letter to my sister I intend to deposit it with her as my will for safe-keeping," then it should be probated as his holographic will. There is no direct authority on this point, but the conclusion seems unassailable, and all other points seem to have been settled. They will be considered in the following order:

## I. GENERAL NATURE OF HOLOGRAPHIC WILLS

In view of the fact that a number of different papers may constitute a person's will it is important to note that some of these papers may be entirely in the

<sup>25</sup> (1912) 159 N. C. 542, 75 S. E. 807.

<sup>26</sup> See note 22, *supra*.

<sup>27</sup> *Telephone Co. v. Telephone Co.* (1912) 159 N. C. 9, 17, 74 S. E. 636.

<sup>1</sup>The term "holograph" or "olograph" is derived from the Greek "to write all," i.e. to write the entire will in one's own handwriting and not have it typewritten or written by an amanuensis, and signed by the testator, as in the case of the ordinary written, or attested will. No attestation is necessary, the only witnesses required being those to prove the testator's handwriting.

In the case of *In re Francis' Estate* (Cal. 1923) 217 Pac. 746, the date in a will offered for probate as a holographic will was composed of two written and two printed figures denoting the year 1919. It was held that the will was void as a holographic will. For comment on the case, see 24 Col. L. Rev. 100.

<sup>2</sup>After the death of the late President Graham of the University of North Carolina it was found that he would have died intestate except for the fact that he had scribbled a few notes while waiting in the lobby of the Yarrowbrough Hotel in Raleigh to attend the last meeting of the Trustees before his death.

Former Governor Bickett of North Carolina was a lawyer, and his will was holographic.

There are not many cases of holographic wills from the passage of the North Carolina statute in 1784 for a hundred years, but, since that time, they have been comparatively frequent, and there have been an increasing number in the last few years.

hand-writing of the testator and others may not. The important point is that each should comply with the statutory requirements. For example there may be added to the duly attested will of the testator a codicil wholly in his hand-writing which is not attested at all, and both papers will be entitled to admission to probate as a holographic will, provided their provisions are not inconsistent.<sup>3</sup>

But, aside from the statutory provisions, holographic wills possess the same requisites as other wills. There must be testamentary purpose, and no fraud, undue influence or coercion. The same mental capacity and ability to understand the nature of one's business are necessary. The statutes may, and frequently do, impose limitations upon holographic wills which do not apply to other wills like the provision in Idaho cited in *Scott v. Harkness*,<sup>4</sup> making a person competent to execute one kind although not the other. The substance of the provisions about holographic wills in general, however, are similar except those in North Carolina which have special provisions not appearing elsewhere.

## II. STATUTORY PROVISIONS

(1) *In General.* The necessity for witnesses in general resulted from the Statute of Frauds<sup>5</sup> which has been enacted with modifications in all of the United States. Where these statutes lay down certain rules with reference to execution, attestation and revocation of wills the fact that the will is wholly in the hand-writing of the testator does not exempt it from the rule, unless there is also a specific provision about this. As an illustration may be noted the Wyoming statute that wills must be in writing, signed and witnessed, and that a holographic will may be proved in the same manner that other private writings are proved. It is held that holographic wills are still subject to the provision requiring witnesses.<sup>6</sup>

(2) *In North Carolina and Tennessee.* In these two states the statute is unique in requiring that the holographic will in order to be efficacious must be deposited with the valuable papers of the deceased or left with some one for safekeeping. This is a requirement unknown in the case of an attested will.<sup>7</sup>

## III. DECISIONS ON THE FOLLOWING POINTS IN THE NORTH CAROLINA STATUTE:

(1) *What Is Sufficient Subscription?* In holographic as in other wills the place of the signature is not material unless made so by statute.<sup>8</sup> This is entirely clear in the North Carolina statute for although it uses the word "subscribed" it also says "or inserted therein," thus showing that the place is immaterial. Nor does the North Carolina statute have the provision found in some jurisdictions that the testator must "sign his name." Therefore, "I, John Jones do make and publish this my last will and testament" is good if John Jones wrote the above even though he did nothing further in the way of signing.

<sup>3</sup> *In re Loher* (1889) 78 Cal. 477, 21 Pac. 8.

<sup>4</sup> (1899) 6 Idaho 736, 59 Pac. 556.

<sup>5</sup> 29 Chas. II, c. 3.

<sup>6</sup> *Neer v. Cowhick* (1892) 4 Wyo. 49, 31 Pac. 862, 18 L. R. A. 588.

<sup>7</sup> See note to the case of *Estate of Foy* (1904) 145 Cal. 82, 78 Pac. 340 in 104 Am. St. Rep. 22.

<sup>8</sup> *In re Johnson's Estate*, Myr. Prob. 5 (Cal.).

(2) *What Are Valuable Papers?* Here as elsewhere, in construing statutory requirements about wills, holographic or otherwise, we are met with a divergence in the cases depending upon whether the court is of the opinion that the statute should be construed strictly in accordance with its wording or given a more liberal interpretation. The statute says that a holographic will must be found among the valuable papers and effects of the deceased.<sup>9</sup> This could be construed to mean the most valuable papers and effects by a strict interpretation. Viewed more liberally it might mean simply any papers and effects that the deceased regarded as valuable. The latter view is now established in North Carolina contrary to the earlier tendency. In *Little v. Lockman*<sup>10</sup> the script in question was found in a bureau drawer along with several other paper writings, in the handwriting of the deceased, purporting to be testamentary dispositions of his property, some finished and others incomplete. In the same drawer were found a number of receipts, merchant's accounts, and a purse which had belonged to a deceased child of the decedent, in which was about eighty cents. But the will was not admitted to probate because in another drawer in the same bureau were found the decedent's deeds and notes and other papers tied up in bundles and labelled. "It is well known," the court says, "how strictly, we may say sternly, the courts have demanded compliance with these provisions of the law."<sup>11</sup> The reply to the argument that this is too strict is "that it will be more likely to uphold the policy of the statute in its attempt to prevent heirs and next of kin from being deprived of their just rights." In *Winstead v. Bowman*<sup>12</sup> the court grants a new trial because the trial judge proceeded "upon the hypothesis of there being but one proper place of deposit." Referring to *Little v. Lockman* as the "leading case in this state, we may say the only one touching the question before us,"<sup>13</sup> the court "while not questioning the propriety of that decision" and "with great respect" thinks that too much stress was put in that case on the definite article "the" in the expression "the valuable papers." In *Brown v. Eaton*<sup>14</sup> the court still "not controverting the decision in *Little v. Lockman*" supra, holds that there may be two or more depositories and the finding in either will suffice. This has become the established rule. On this point the conclusion is the same in Tennessee, as pointed out in *Sheppard's Will*<sup>15</sup> where it is said that *Winstead v. Bowman*, supra, "criticised, if it does not overrule, the narrow rule which had been laid down in *Little v. Lockman*." So it took nearly a half century to "modify,"

<sup>9</sup> The change in the statute from "valuable papers or effects" to "valuable papers and effects" has been held immaterial. *Hughes v. Smith* (1870) 64 N. C. 493; *In re Jenkins* (1911) 157 N. C. 429, 72 S. E. 1072.

<sup>10</sup> (1857) 49 N. C. 494.

<sup>11</sup> The Statute of Frauds, citing as an illustration the provision requiring an ordinary written will to be attested in the testator's presence. See 2 Va. Law Review 403.

<sup>12</sup> (1872) 68 N. C. 170.

<sup>13</sup> It is interesting to note the infrequency with which for a century or more after the passage of the statute in 1784 cases found their way up to the Supreme Court, as compared with the relative frequency in the past twenty-five or thirty years. The first case seems to be *Jiggetts v. Mancy* (1809) 5 N. C. 258 in which we have all the circumstances required by the act and a discussion thereof by Taylor, J. This is followed in 1821 by *Harrison v. Burgess*, 8 N. C. 384, where in the opinion of Henderson, J., no cases are cited, but the conclusion is reached that a wife may be the depository of a holographic will, and that it is still holographic even though the name of a witness appears on it. This is approved in *Brown v. Beaver* (1856) 48 N. C. 516, 517, 67 Am. Dec. 255.

<sup>14</sup> (1844) 91 N. C. 26.

<sup>15</sup> (1901) 128 N. C. 54, 38 S. E. 27.

"abrogate," "distinguish" or "overrule" the strictness of *Little v. Lockman*. But, at any rate, it is now clear and the rule is strict no longer.<sup>16</sup> "Valuable papers are such as are kept and considered worthy of being taken care of."<sup>17</sup>

(3) *What Is Meant by "Depositing With Some One for Safe-Keeping"?* This is the most interesting clause of the statute and the most striking case is *Alston v. Davis*.<sup>18</sup> A brother in Texas writes his sister in North Carolina: "If I get sick or die in Texas I want you to have my farm." He simply mails her the letter. He does die in Texas, and she undertakes to probate the letter as a holographic will in North Carolina. But has it been deposited with some one for safe-keeping? The court held that it had and that the will should be probated. The result of this decision would clearly seem to be wrong because a reading of the letter discloses no *animus testandi* and that is necessary in any kind of a will. This has evidently been the chief factor in causing the North Carolina court to follow the dissenting opinion in the above case, and it did not take long to overrule the case as it did to overrule *Little v. Lockman*, supra, with reference to valuable papers. In *Spencer v. Spencer*<sup>19</sup> a letter mailed to the legatee is refused probate because it has not the earmarks of a will. "We admit that *Alston v. Davis* sustains plaintiff's position, but we are unwilling to follow it as a precedent." Let us assume that in such a case the writer of the letter indicates clearly that by mailing it to the addressee he intends to deposit it for safe-keeping as a will. This case has not arisen, but the writer is clearly of the opinion that such a paper should be probated.<sup>20</sup>

(4) *Animus testandi*. The rule here is the same as in the case of any will. There must be the intent, otherwise there is no will. This preliminary question should always be disposed of before considering the question of deposit; for if there is no intent there is no will, no matter where the script was found. This is the reason why probate was refused in the case of *In re Bennett*,<sup>21</sup> not because it was a letter and was mailed. This case shows what should have been the proper decision in *Alston v. Davis*, simply that it was not a will because it did not appear that there was any intention to make a will. A man cannot "make his will *onbenowins* to himself."<sup>22</sup> And so in *Johnson's case*<sup>23</sup> where the alleged testator says, "I want you to write my will for me. I want to give little J. \$100," indicating a purpose to have a will prepared, which is not sufficient. But in *Wise v. Short*,<sup>24</sup> "I am going to the hospital—I hope to God nothing happens, but if it does, everything is yours," has an air of finality which is sufficient and the letter was probated as a holographic will.

<sup>16</sup> Sheppard's case is approved in *Harper v. Harper* (1908) 148 N. C. 453, 62 S. E. 553.

<sup>17</sup> *In re Jenkins* (1911) 157 N. C. 429, 437, 72 S. E. 1072.

<sup>18</sup> 118 N. C. 202, 24 S. E. 15.

<sup>19</sup> (1913) 163 N. C. 83, 79 S. E. 291.

<sup>20</sup> In *The Case of Ledford*, 176 N. C. 610, 97 S. E. 482, the will was mailed to a third person for safe keeping and probate was allowed.

<sup>21</sup> (1920) 180 N. C. 5, 103 S. E. 917.

<sup>22</sup> In the dissenting opinion in *Alston v. Davis* (1896) 118 N. C. 202, 214, Furches, J., said, "In my opinion it must be the intention of the testator to make a will that is to dispose of his property by what he does, before it can be his will. . . . I do not believe that a man can make his will *onbenowins* to himself, and I have no idea that it ever occurred to Augustus Davis that he was making his will when he wrote this letter."

<sup>23</sup> (1921) 181 N. C. 303, 106 S. E. 841.

<sup>24</sup> (1921) 181 N. C. 320, 107 S. E. 134.

## IV. REVOCATION

The statute with reverence to revocation<sup>25</sup> by holographic will and that with reference to probate<sup>26</sup> of a holographic will are worded differently with reference to the clause under consideration. As to revocation it must be "lodged by him with some person for safe-keeping or left by him in some secure place, or among his valuable papers and effects." As to probate it is sufficient if it "was found among the valuable papers and effects of the decedent, or was lodged in the hands of some person for safe-keeping." Nevertheless, revocation of a holographic will or of an attested will presents the same problem as any other revocation. These two wills are of equal efficacy, once they are properly prepared. Both pass real and personal property. One has no superior power as compared with the other. Therefore, it seems clear that a holographic will may be revoked just as an attested will may, i.e. (1) by burning, tearing, canceling or obliterating or (2) by another will, which may be holographic or attested, provided only that the statutory requirements in each case are complied with.<sup>27</sup>

P. H. W.

**CRIMINAL INTENT IN BURGLARY**—That the crime of burglary at common law consists in the (1) breaking and (2) entry, (3) of the dwelling house of another, (4) in the night time, (5) with the intent to commit a felony therein, text-writers<sup>1</sup> and courts<sup>2</sup> agree.

That the breaking and entry both must be accompanied by a felonious intent in order to make out the crime, is made clear in decisions to the effect that there is no burglary if the felonious intent is acquired after both the breaking and entry,<sup>3</sup> nor if it is acquired after breaking but before entry.<sup>4</sup> It must exist at the time both of breaking and entry; and if the breaking and entry occur at different times both must be accompanied by the same intent.<sup>5</sup>

<sup>25</sup> C. S. 4133.

<sup>26</sup> C. S. 4144 (3).

<sup>27</sup> No witnesses are necessary on the holographic revocation. See 14 L. R. A. N. S. 968 and 112 Am. St. Rep. 822.

<sup>1</sup> Hawk, P. C., ch. 17; Beale's Cases Cr. Law, p. 816; 4 Bl. Com. 224; 2 Bishop. New Cr. Law 590 Clark's Cr. Law (Mikell's ed.), p. 294.

<sup>2</sup> *State v. Langford* (1827) 12 N. C. 253; *State v. Foster* (1901) 129 N. C. 704, discussing the changes effected in the common law of burglary in North Carolina by Act of 1889, Rev. s. 3330-31, C. S. 4232-33—changes which do not affect the question of the intent requisite to the commission of burglary on the facts presented by the case under review; *State v. Wilson* (1910) 225 Mo. 503, 125 S. W. 479; *State v. Ward* (La.—1920) 86 So. 552.

<sup>3</sup> *Louden v. State* (1879) 63 Ala. 143, 35 A. R. 9; *Collet v. State* (1893) 91 Ga. 705, 17 S. E. 840—where it was held correct to charge "if the entering was lawful—and he went in there for a lawful purpose, and being in there stole—that would not be burglary"; *Walders v. State* (1912) 101 Ark. 345, 142 S. W. 511.

<sup>4</sup> *State v. Farrand* (Iowa—1921) 185 N. W. 586—when the court, in holding the evidence was not sufficient to sustain a conviction for breaking and entering a dwelling with a felonious intent, said: "Even if it should be believed that appellant obtained entrance to the dwelling house without the consent or against the will of Mrs. Johnson, this alone will not sustain a conviction. It must appear beyond reasonable doubt that the entrance was effected by him with the felonious intent—"

*Carter v. Commonwealth* (Ky.—1923) 244 S. W. 321 where a charge that if the defendant "unlawfully, wilfully, and feloniously, entered the dwelling house—in the night time—with the intent to steal he was guilty of burglary," was held to be error in that it did not charge a felonious breaking.

*State v. Whalen* (Mo.—1923) 248, S. W. 931; *State v. Hays* (Mo.—1923) 252 S. W. 380.

<sup>5</sup> *State v. Moon* (1841) 12 N. H. 42—where it was held that the intent with which a guest in an Inn entered—did not relate back.



If the intent to commit a felony is co-existent with the breaking and entry, the crime of burglary is complete.<sup>6</sup> Consequently, it would appear to be immaterial to show that immediately after the breaking and entry the intent to commit a felony faded into an intent to commit a misdemeanor, or disappeared altogether, or that its disappearance was due to repentance or to the operation of external forces.<sup>7</sup> It would appear to be equally immaterial to show that the actual commission of the intended felony was inherently impossible due to the absence from the premises of the object of the felonious intent.<sup>8</sup> While repentance or retreat may be effective at any time prior to the entry, after the entry it comes too late.

If the specific intent to commit a felony is a positive element in the crime of burglary, and must be proved equally with the breaking and entry before the crime is made out,<sup>9</sup> anything which reasonably tends to show the non-existence of such an intent is admissible in evidence, not as a defence to the completed crime of burglary but as a proof that the crime of burglary is not complete. Thus, evidence of weak-mindedness of a sufficiently pronounced degree,<sup>10</sup> insanity,<sup>11</sup> intoxication,<sup>12</sup> may be admitted to negative the existence of specific intent and therefore to negative the commission of crimes requiring specific intent.

Such being the nature of the intent requisite for the crime of burglary, what is it necessary to allege in an indictment therefor? Is it enough to allege a "breaking and entry with intent to commit a felony"? Must the indictment go further and state the felony intended? Or must it go still further and state the elements of the felony intended? That an indictment alleging only an intent to commit a felony is insufficient, is clear both on principle and authority.<sup>13</sup> The word "felony" is expressive of a class of crimes, not of any particular crime. A felony can be

<sup>6</sup> *Harvey v. State* (1890) 53 Ark. 425, 14 S. W. 645—burglary with intent to commit rape; *State v. McDaniel* (1864) 60 N. C. 246 where the defendant was indicted for "burglariously breaking and entering a dwelling house with intent to commit rape" and it was held correct to charge that the burglary was complete when the "prisoner broke and entered into the dwelling house in the night time with the intent to commit rape on the prosecutrix." *Clark v. Commonwealth* (Va.—1923) 115 S. E. 704.

<sup>7</sup> *State v. Boone* (1852) 35 N. C. 244.

<sup>8</sup> *Monk v. State* (1912) 105 Ark. 12, 150 S. W. 133—where by statute there was not enough personal property on the premises to make the stealing of a felony; *State v. Beal* (1881) 37 Ohio St. 108, 41 A. R. 490; *Schultz v. State* (1911) 88 Neb. 613, 130 N. W. 105, 34 L. R. A. (N. S.) 243; *Thomas v. State* (1913) 107 Ark. 469, 155 S. W. 1165—where it was not shown that the personal property sought was on the premises.

<sup>9</sup> *State v. Meche* (1890) 42 La. Ann. 273, 7 So. 573; *Simpson v. State* (Fla.—1921) 87 So. 920—here the court in holding the specific intent to commit a felony to be an essential element of burglary, said, "the burden is on the state to prove affirmatively—that the act was done with the requisite specific intent. These facts (from which the specific intent may be inferred) must be something more than mere breaking and entry."

<sup>10</sup> *Pettigrew v. State* (1882) 12 Tex. App. 225, *Derby's Cases Cr. Law* (2nd ed.), p. 321.

<sup>11</sup> *McNaughton's Case* 10 Clark and F. 200 (1843); *People v. Willard* (1907) 150 Cal. 543, 89 Pac. 124; *State v. Potts* (1888) 100 N. C. 457.

<sup>12</sup> *State v. Murphy* (1911) 157 N. C. 614, 72 S. E. 1075. Here the Court in upholding this view said: "It is very generally understood that voluntary drunkenness is no legal excuse for crime, and the position has been held controlling in many cases in this state and on indictments for homicide, as in *State v. Wilson* 104 N. C. 868, *State v. Potts* 100 N. C. 457. The principle, however, is not allowed to prevail where, in addition to the overt act, it is required that a definite specific intent be established as an essential feature of the crime. . . . Accordingly since the statute dividing the crime of murder into two degrees, and in cases where it becomes necessary, in order to convict an offender of murder in the first degree, to establish that the killing was 'deliberate and premeditated,' these terms contain, as an essential element of the crime of murder—a mental process embodying a specific, definite intent, and if it is shown that an offender, charged with such crime is so drunk that he is utterly unable to form or entertain this essential purpose, he should not be convicted of the higher offence."

*State v. English* (1913) 164 N. C. 497, 80 S. E. 72. A limitation seems to be placed on this doctrine when the deliberate purpose to commit a crime is formed by the defendant while he is sober and the crime is committed after drunkenness ensues—see *State v. Shelton* (1913) 164 N. C. 513, 79 S. E. 883. This is entirely reasonable in that an intent already acquired may persist under a degree of intoxication which would render impossible its formation.

<sup>13</sup> *State v. Doran* (1904) 99 Me. 329, 59 Atl. 440, 105 A. S. R. 278; *People v. Jones* (1914) 263 Ill. 564, 105 N. E. 744; *State v. Celestin* (1915) 138 Ia. 407, 70 So. 342.

committed by, and only by, the commission of a particular crime, which falls within the common law or statutory classification of felony. It is from these crimes that the word "felony" gets its content and meaning. And since there are many such crimes, the requirement of sufficient particularity in an indictment to apprise the accused of the nature of the charge against him, renders it necessary to state the specific crime which it is alleged he intended to commit.<sup>14</sup> So, whereas it is logically and legally correct to define burglary as a breaking and entry with intent to commit a felony, it is neither logically nor legally sufficient to allege that without more, in the indictment. And it is held that this objection is not waived by a failure to demur to an indictment alleging only an "intent to commit a felony."<sup>15</sup> If the requirement of particularity is satisfied by stating in the indictment the particular felony alleged to have been intended, it would appear as the better view to be unnecessary to set out its constituent elements in the indictment.<sup>16</sup>

Then, can the defendant who is charged with burglary insist that the court in charging the jury define the crime which the indictment alleges he intended to commit? The state must prove the intent to commit a particular felony, along with the breaking and entry before it makes out a case of burglary. It would seem that the intent to commit a particular felony is not made out unless there is shown to be an intent to do all that is necessary to constitute that felony. It would seem to follow that the jury which determines whether or not an intent to commit a particular felony existed, ought to know the elements of which that felony consists, whether it be murder, larceny, rape, or any other felony. And this appears to be the significance of the decision by the Supreme Court of North Carolina in the case of *State v. Allen*.<sup>17</sup>

The same result was reached in the Texas case of *Mitchell v. State*,<sup>18</sup> which almost exactly parallels *State v. Allen*. There the court, in holding it error for the trial judge to refuse to define the character of force essential to rape, when the indictment was for burglary with intent to commit rape, said: "Proof must establish the fact that appellant entered the house with the intent to have carnal knowledge with (the female) without her consent and by the use of such force as might reasonably be supposed to be sufficient to overcome her resistance." And the same conclusion may be drawn from the recent Texas case of *Brown v. State*.<sup>19</sup>

<sup>14</sup> In *State v. Doran*, *supra*, the court said: "The indictment fails to specify the particular felony which it is alleged the defendant intended to commit. This is another fatal defect. The word 'felony' is not the name of any distinct offense. The averment that defendant broke and entered the car for the purpose of committing a felony wholly failed to apprise him of the specific offense it is alleged he intended to commit. The authorities are substantially unanimous in supporting the proposition that such an allegation is wanting in the precision and certainty required by the constitution and the rules of criminal pleading." Likewise in *People v. Jones*, *supra*, where the indictment alleged an "intent to commit a felony in said dwelling house, the exact nature of which is to the grand jurors unknown."

<sup>15</sup> *People v. Nelson* 58 Cal. 104.

<sup>16</sup> *State v. Ellsworth* (1902) 130 N. C. 690, 41 S. E. 548.

<sup>17</sup> *State v. Allen* (1923) 186 N. C. 301. This does not appear to be the equivalent of stating that it is "necessary to charge and prove that he intended to persist in his intent in spite of any opposition," as the dissenting opinion indicates. The question is, what was the intention at the time of the breaking and entry; not, was there an intention to persist in it.

<sup>18</sup> (Tex. App.—1893) 24 S. W. 280.

<sup>19</sup> (1923) 250 S. W. 170. But Texas is one of the jurisdictions requiring that all the elements of the intended felony be set out in the indictment.

It is clearly foreshadowed in the North Carolina case of *State v. Massey*,<sup>20</sup> overruling *State v. Neely*<sup>21</sup> and adopting the dissenting opinion in that case. There the defendant was indicted for assault with intent to commit rape. This required proof of the existence of a specific intent. The court said: "In order to convict a defendant on the charge of an assault with intent to commit rape, the evidence should show not only an assault, but that the defendant intended to gratify his passion on the person of the woman, and that he intended to do so at all events, notwithstanding any resistance on her part . . . Even conceding that the defendant pursued the prosecuting witness with the intent of gratifying his lustful desires upon her, does it follow that he intended to do so forcibly and against her will? That is an essential element of the crime charged and must be proved."

A. C.

**ACTIONS FOR PERSONAL TORT BY WIFE AGAINST HUSBAND AND CHILD AGAINST PARENT\***—That the function of law is to keep pace with advancing needs of society is evidenced by the remarkable development which has taken place in our law within the last century. Two interesting steps in this process of evolution have recently been contributed by the Supreme Court of North Carolina in the cases of *Roberts v. Roberts*<sup>1</sup> and *Small v. Morrison*.<sup>2</sup> In the former case a wife was allowed to sue her husband for injuries caused by his negligence,<sup>3</sup> while in the latter case the court, one judge *dissenting*, denied a child a similar right of action against its parent.<sup>4</sup> While apparently inconsistent in spirit, these decisions may be explained by the difference in the stages of evolution which they represent.

At common law, the wife's legal personality merged upon marriage with that of her husband, and no suit of any kind between husband and wife was tolerated.<sup>5</sup> The wife was practically the husband's chattel. With the coming of the industrial revolution, however, and the gradual entrance of woman into the fields of business, this position of the wife necessarily became a center of agitation. The result was the passage of the Married Women's Acts, which undertook to remove these various disabilities, and give to the married woman the same standing at law as she was winning for herself in society at large. But the interpretation of the statutes has varied as widely as their actual wording.<sup>6</sup> Most of them expressly

<sup>20</sup> (1881) 86 N. C. 658.

<sup>21</sup> (1875) 74 N. C. 425.

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<sup>1</sup> (1923) 185 N. C. 566, 118 S. E. 9.

<sup>2</sup> (1923) 185 N. C. 577, 118 S. E. 12.

<sup>3</sup> The action was brought under a statute which provides, "The earnings of a married woman by virtue of any contract for her personal services, and any damages for personal injuries or other torts sustained by her, can be recovered by her suing alone, and such earnings or recovery shall be her sole and separate property as fully as if she had remained 'unmarried.'" N. C. Gen. Sts. 1913, ch. 13, sec. 1.

<sup>4</sup> The plaintiff was injured in an accident caused by the negligence of her father, who held an indemnity policy with defendant company. The policy provided that the company should not be liable unless and until judgment had been obtained against the insured. The plaintiff sued the indemnity company and her father to recover damages. The company demurred on the ground, among others, that the plaintiff had no right of action against her father for a personal tort. The demurrer was sustained.

<sup>5</sup> *Phillips v. Barnett* (1876) L. R. 1 Q. B. 436; *Abbott v. Abbott* (1877) 67 Me. 304.

<sup>6</sup> For a classification of these divergent interpretations, see (1916) 16 Col. L. Rev. 606; Schouler, *Domestic Relations* (6th ed. 1921) sec. 633.

provide that the wife may hold property, contract, sue and be sued apart from her husband. During the first years following their enactment, they were considered in derogation of the common law and hence to be strictly construed. An action by a wife against her husband for a personal tort was everywhere denied as not within the purview of the statute.<sup>7</sup> Better to let the wife suffer in silence than to drag into the courts the details of stormy matrimonial ventures.<sup>8</sup> Full and adequate remedies are open to her through a criminal prosecution of the husband, or a suit for divorce, or a suit for alimony and separate maintenance—so reasoned the courts.

It was not without a struggle that the judicial consciousness was to rid itself of the old common law notion as to the status of the wife; nor is that struggle yet over.<sup>9</sup> The first intimation that the tide was starting to turn came in 1910 in the dissenting opinions of Justices Harlan, Hughes, and Holmes in the case of *Thompson v. Thompson*.<sup>10</sup> Four years later Connecticut blazed the trail by holding flatly that the wife could sue the husband for a wilful tort.<sup>11</sup> Since then at least six states have sustained such an action,<sup>12</sup> thus showing the gradual growth of the conviction as to its social necessity.<sup>13</sup> That this conviction is sound is shown by the wide commendation which these decisions have received.<sup>14</sup> The argument from public policy against airing family troubles to the public has never been accepted

<sup>7</sup> *Peters v. Peters* (1875) 42 Iowa, 182; *Freethy v. Freethy* (1865, N. Y. Sup. Ct.) 42 Barb. 641; *Schultz v. Schultz* (1882) 89 N. Y. 644; *Libby v. Berry* (1883) 74 Me. 286; *Banfield v. Banfield* (1898) 117 Mich. 80, 75 N. W. 287; Schouler, *op. cit. supra* note 6, sec. 633.

<sup>8</sup> The effect of giving so broad a construction to the Act of 1860 might be to involve the husband and wife in perpetual controversy and litigation—to sow the seeds of perpetual discord and broil—to produce the most discordant and conflicting interest of property between them, and to offer a bounty of temptation to the wife to seek encroachment upon her husband's property, which would not only be at war with domestic peace, but deprive her probably of those testamentary dispositions by the husband in her favor which he would otherwise be likely to make." *Longendyke v. Longendyke* (1863, N. Y. Sup. Ct.) 44 Barb. 366, 369.

<sup>9</sup> While the decided modern tendency is to sustain an action by the wife, the numerical weight of authority is against it, and many courts still cling to the stricter interpretation. *Strom v. Strom* (1906) 98 Minn. 427, 107 N. W. 1047; *Keister's Adm'r v. Keister's Ex'rs* (1918) 123 Va. 157, 96 S. E. 315; *Schultz v. Christopher* (1911) 65 Wash. 496, 118 Pac. 629; *Rogers v. Rogers* (1915) 265 Mo. 200, 177 S. W. 382; *Dishon's Adm'r v. Dishon's Adm'r* (1920) 187 Ky. 497, 219 S. W. 794; *Peters v. Peters* (1909) 156 Calif. 32, 103 Pac. 219. The New York courts have consistently denied the action. *Perlman v. Brooklyn City Ry.* (1921, Spec. T.) 117 Misc. 353, 191 N. Y. Supp. 891; *Newton v. Weber* (1922, Spec. T.) 119 Misc. 240, 196 N. Y. Supp. 113. See (1922) 32 Yale Law Journal, 196.

<sup>10</sup> " . . . Congress, under the construction placed by the court on the statute is put in the anomalous position of allowing a married woman to sue her husband separately in tort, for the recovery of her property, but denying her the right or privilege to sue him separately, in tort, for damages arising from his brutal assaults on her person." Harlan, J., dissenting in *Thompson v. Thompson* (1910) 218 U. S. 611, 623, 31 Sup. Ct. 111, 114.

<sup>11</sup> "So long as there remains to the parties domestic tranquility, while a remnant is left of that affection and respect without which there cannot have been a true marriage, such action would be impossible. When the purposes of the marriage relation have wholly failed by reason of the misconduct of one or both parties, there is no reason why the husband or wife should not have the same remedies for injuries inflicted on the other spouse which courts would give them against other persons. . . . No greater public inconvenience and scandal can thus arise than would arise if they were left to answer one assault with another, and one slander with another slander, until the public peace is broken, and the criminal law invoked against them." *Brown v. Brown* (1914) 88 Conn. 42, 48, 89 Atl. 889, 891.

<sup>12</sup> *Fiedler v. Fiedler* (1914) 42 Okla. 124, 140 Pac. 1022; *Gilman v. Gilman* (1915) 78 N. H. 4, 95 Atl. 657; *Fitzpatrick v. Owens* (1916) 124 Ark. 167, 186 S. W. 832; *Johnson v. Johnson* (1917) 201 Ala. 41, 77 So. 335; *Prosser v. Prosser* (1920) 114 S. C. 45, 102 S. E. 787; *Crowell v. Crowell* (1920) 180 N. C. 516, 105 S. E. 206.

<sup>13</sup> "Whether a man has laid open his wife's head with a bludgeon, put out her eye, broken her arm, or poisoned her body, he is no longer exempt from liability to her on the ground that he vowed at the altar to 'love, cherish, and protect' her. We have progressed that far in civilization and justice. Never again will the sun go back ten degrees on the dial of Ahaz. Isaiah 38.8." *Crowell v. Crowell*, *supra* note 12, at p. 524, 105 S. E. at p. 210.

<sup>14</sup> See (1918) 27 Yale Law Journal, 1081; (1920) 30 *ibid.* 188; (1922) 32 *ibid.* 196; (1914) 28 Harv. L. Rev. 109; (1921) 34 *ibid.* 676; (1923) 36 *ibid.* 346; Notes (1917) 1 Minn. L. Rev. 82; (1923) 21 Mich. L. Rev. 473.

against a criminal prosecution of the husband,<sup>15</sup> or against actions for divorce and alimony.<sup>16</sup> Nor do such remedies, while they may prevent future wrongs, compensate for past injuries. "If the wife may sue for a broken promise, why may she not for a broken arm?"<sup>17</sup> She would have the same relief, which she has against a stranger, also against her husband, when he has become a stranger.<sup>18</sup> Such a rule would not affect the happy marriage, as love and common interest will render unnecessary any action at law. It is only where the purposes of the marriage have utterly failed that the wife needs this relief. But while the right is being gradually established in the case of wilful torts, it has been until now steadfastly refused where the tort was merely negligent.<sup>19</sup> It was for the Supreme Court of North Carolina to take the next step in the evolution of this doctrine, and hold for the first time that it applies equally to negligent torts.<sup>20</sup> If the right be admitted in the case of wilful torts, it is but logical and reasonable to make this extension. It is interesting to note that this development is due entirely to a change in judicial attitude since the statutes, rather than to any express legislative enactment.

*Small v. Morrison*, on the other hand, represents an intermediate stage in a similar evolution of this right as between parent and child. At common law a parent has an undoubted privilege of inflicting modern chastisement on his child.<sup>21</sup> It is not until this privilege is abused, or an injury other than through chastisement is inflicted, that the parent commits a tort upon the child. In such a case, the parent is everywhere open to criminal prosecution.<sup>22</sup> But here too, in the few cases that have arisen on the point, the right to sue the parent civilly was denied the child.<sup>23</sup>

<sup>15</sup> The husband may be criminally prosecuted for assault and battery on his wife. *State v. Lankford* (1917, Del.) 6 Boyce, 594, 102 Atl. 63. Or for slandering his wife. *State v. Fulton* (1908) 149 N. C. 485, 63 S. E. 145. If death results from the assault, the husband is guilty of murder. *Clarke v. State* (1897) 117 Ala. 1, 23 So. 671. There is a conflict as to whether he can be guilty of larceny of his wife's property. Some courts hold that giving the wife exclusive control over her property does not sever the unity of husband and wife, and hence there can be no larceny. *State v. Phillips* (1912) 85 Ohio St. 317, 97 N. E. 976. *Contra*, that this unity is severed, and the husband is guilty of larceny. *Hunt v. State* (1904) 72 Ark. 241, 79 S. W. 769.

<sup>16</sup> "The wife's remedies by a criminal prosecution, or an action for divorce and alimony, which in some jurisdictions are allowed to stand as her adequate remedies for wrongs of the sort described in this complaint, so far from being adequate remedies, appear to us to be illusory and inadequate, while as for the policy which would avoid the public airing of family troubles, we see no reason why it should weigh more heavily against this action than those which courts universally allow." *Johnson v. Johnson*, *supra* note 12, at p. 44, 77 So. at p. 338.

<sup>17</sup> *Brown v. Brown*, *supra* note 11, at p. 46, 89 Atl. at p. 891.

<sup>18</sup> Other actions against the husband are allowed. *Cook v. Cook* (1900) 125 Ala. 583, 27 So. 918 (ejunction); *Shewalter v. Wood* (1916, Mo. App.) 183 S. W. 1127 (replevin); *Trayer v. Setzer* (1904) 72 Neb. 845, 101 N. W. 989 (contract); *Eshom v. Eshom* (1916) 18 Ariz. 170, 157 Pac. 974 (trover).

<sup>19</sup> *Woltman v. Woltman* (1922, Minn.) 189 N. W. 1022; *Heyman v. Heyman* (1917) 19 Ga. App. 634, 92 S. E. 25; *Newton v. Weber*, *supra* note 9.

<sup>20</sup> *Roberts v. Roberts*, *supra* note 1.

<sup>21</sup> The parent cannot be criminally prosecuted where the chastisement is only moderate. *Smith v. Slocum* (1872) 62 Ill. 354; *Turner v. State* (1896) 35 Tex. Cr. 369, 33 S. W. 972. The reasonableness of such punishment is by the weight of authority a question for the jury. *Hinkle v. State* (1891) 127 Ind. 490, 26 N. E. 777; *State v. Washington* (1900) 104 La. 443, 29 So. 55. A few courts hold that where there is no malice or serious injury, the judgment of the parent is final. *State v. Jones* (1886) 95 N. C. 588.

<sup>22</sup> *Hornbeck v. State* (1896) 16 Ind. App. 484, 45 N. E. 620; *State v. Koonse* (1907) 123 Mo. App. 655, 101 S. W. 139. Some courts hold that excessive punishment is sufficient to convict. *Hinkle v. State*, *supra* note 21. Others require something besides mere excessive punishment,—usually legal malice or permanent injury. *Dean v. State* (1890) 89 Ala. 46, 8 So. 38. If death occurs from such excessive punishment, the parent is guilty of murder. *Powell v. State* (1889) 67 Miss. 119, 6 So. 646. Or manslaughter, *Montgomery v. Commonwealth* (1901) 23 Ky. L. 732, 63 S. W. 747.

<sup>23</sup> Only five cases have been found involving such an action by child against parent. *Hewlett v. George* (1891) 68 Miss. 703, 9 So. 885; *McKelvey v. McKelvey* (1903) 111 Tenn. 388, 77 S. W. 664; *Roller v. Roller* (1905) 37 Wash. 242, 79 Pac. 788; *Taubert v. Taubert* (1908) 103 Minn. 247, 114 N. W. 763; *Foley v. Foley* (1895) 61 Ill. App. 577. *Taubert v. Taubert*, *supra*, combines a dictum that if the child were emancipated, such action would lie.

Such an action was condemned as against public policy.<sup>24</sup> Occasionally, a decision allowing such an action against one *in loco parentis* gave an intimation that there were limits to this supposed public policy.<sup>25</sup> And now through the dissenting opinion of Chief Justice Clark, the Supreme Court of North Carolina has given the first legal expression of a conviction that a suit by a child against its parent for a personal tort should be allowed. It is interesting, too, that this first indication should come in the case of a negligent tort. May not this prove, as were the dissenting opinions in *Thompson v. Thompson* in the case of the wife, the necessary preliminary step to a future decision to that effect? It is true that in the case of the wife, legislative action was a necessary step in perfecting her right. But there judicial action was hampered by notions of the common law unity of husband and wife, and its resulting disabilities. There has never been any identity of child and parent. The child's individual rights have always been recognized. The very helplessness of the child to seek legislative aid should indicate that judicial action is the proper remedy. The protection afforded the child, through the criminal courts, the juvenile courts, and welfare officers, does not give the child any reparation for past injuries, however severe and far-reaching they may be.<sup>26</sup> The law through its indirect sanctions recognizes the right, by providing for a punishment of the parent. There seems to be no reason why it should not directly sanction that right and give redress for the personal tort as it does in the case of a tort to the child's property.<sup>27</sup> Right and remedy are reciprocal; and to deny the remedy is to deny the right. The argument that this might undermine the foundations of the home and parental authority is also unsound, for the remedy would ordinarily be taken advantage of by the child only where the parent has so exceeded his authority that the state would intervene in any event. The natural love and respect which a child bears its parent would preclude any great danger of abuse. And a civil right against the father certainly would create no more discord than the present remedies.<sup>28</sup>

Undoubtedly actions by a child against its parent should not be encouraged; but where they are the only adequate remedy open to the child, no court of justice

<sup>24</sup> The conventional quotation to uphold this is the following: "The peace of society, and the families composing society, and a sound public policy designed to subserve the repose of families and the best interests of society forbid the minor child a right to appear in court in assertion of a claim to civil redress for personal injuries suffered at the hand of the parent. The state through its criminal laws will give the minor child protection from parental violence and wrong doing, and this is all the child can be heard to demand." *Hewlett v. George*, *supra* note 23 at p. 711, 9 So. at p. 887.

<sup>25</sup> *Nelson v. Johansen* (1885) 18 Neb. 180, 24 N. W. 730 (liability for failure to provide sufficient clothing); *Treschman v. Treschman* (1901) 28 Ind. App. 206, 61 N. E. 961 (step-child allowed damages for malicious assault); *Clasen v. Pruhs* (1903) 69 Neb. 278, 95 N. W. 640 (defendant charged with care of infant liable for cruel treatment).

<sup>26</sup> "We quite agree with appellant's counsel that courts should hesitate to invade the privacy of the home, or to question the mutual confidence which should obtain in the household. But this privacy and mutual confidence should not be permitted to shield the evil-doer from the consequences flowing from a palpable wrong. They are not sufficient to shield the parent from a criminal prosecution for assault and battery on his child . . . Nor can it be said that such criminal prosecutions are ample to correct and punish all such abuses. They may afford protection from parental violence and wrong doing thereafter, but the fine which the state has imposed leaves the clear and palpable injustice to the individual child still unredressed. It is not to be anticipated that acts so abhorrent to the family relation will be committed, but when they have been committed, and committed *mallo animo* as here charged, and an injury inflicted which can never be compensated for thereafter through the family relation, howsoever exemplary it may be, courts should not hesitate to redress the wrong in so far as it may be redressed through an action for damages." *Treschman v. Treschman*, *supra* note 25, at p. 210, 61 S. E. at p. 963.

<sup>27</sup> See *Walker v. Crowder* (1843) 37 N. C. 478; *Bowe v. Bowe* (1879) 42 Mich. 195.

<sup>28</sup> See (1923) 23 Col. L. Rev. 686.

should shut its doors. Especially is this true where the right, as in the North Carolina case, is but a condition precedent to a further undisputed right to recover on the policy,—which does not involve any element of family discord. That history will repeat itself and in time directly sanction this civil right of a child against its parent for a personal tort is to be hoped for and expected. Indeed such a direct sanction has already been granted by at least one court in an action by an illegitimate child against its parents for support.<sup>29</sup>

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### NOTICE

In the last issue, we called attention to the fact that we needed copies of the first issue of the NORTH CAROLINA LAW REVIEW. This is the issue of June 1922, Volume I and Number 1. It is now out of print, and we would like to supply as many copies as possible to libraries, which need them for binding. Since your copy has only a reference value, send it to us and we will send it to a library. The Chipman Law Publishing Company is also anxious to obtain copies of the same issue.

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<sup>29</sup> For discussion of this problem as applied to an illegitimate child, see *Doughty v. Engler* (1923, Kan.) 211 Pac. 619; Comments (1923) 32 Yale Law Journal, 825.

EDITOR'S NOTE: THE NORTH CAROLINA LAW REVIEW had been planning a joint discussion of the recent North Carolina cases of *Roberts v. Roberts* and *Small v. Morrison*. When the above note appeared in the *Yale Law Journal*, it was so satisfactory for our purposes that we requested permission to reprint it. This discussion is of especial interest to those who are interested in North Carolina legal development, and it accords with the purpose of the NORTH CAROLINA LAW REVIEW.

The case of *Roberts v. Roberts* is discussed in a comment in 10 Va. L. Rev. 161, which points out that the Virginia courts have refused recovery to a wife under similar circumstances.

The case of *Small v. Morrison* is discussed in recent case notes in 37 Harv. L. Rev. 275 and in 8 Minn. L. Rev. 71, both of which give strong approval to the majority opinion. "But the underlying reason for the rule is probably the social interest in preserving the family, the basis unit of society, against disruption from within. In line with the modern growth of the conception of the state as a universal parent, the interests of a destitute or injured child are better cared for in other ways than by allowing it as an individual to sue its parent." 37 Harv. L. Rev. 275.

But in 23 Col. L. Rev. 686, the dissenting opinion of Chief Justice Clark is supported, pointing out that "An additional remedy for excessive punishment and negligent injuries would not create more discord than the present remedies; filial devotion would preclude its too frequent use; and it would be advantageous in cases like the instant one where domestic disagreement is not an element."