

4-1-1931

## Editorial Board/Notes and Comments

North Carolina Law Review

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>Part of the [Law Commons](#)

---

### Recommended Citation

North Carolina Law Review, *Editorial Board/Notes and Comments*, 9 N.C. L. REV. 291 (1931).Available at: <http://scholarship.law.unc.edu/nclr/vol9/iss3/4>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact [law\\_repository@unc.edu](mailto:law_repository@unc.edu).

# *The* North Carolina Law Review

---

Volume Nine

April, 1931

Number Three

---

## EDITOR IN CHARGE

ROBERT H. WETTACH

## ASSOCIATE FACULTY EDITORS

M. S. BRECKENRIDGE  
FREDERICK B. MCCALL

CHARLES T. MCCORMICK  
M. T. VAN HECKE

## STUDENT BOARD OF EDITORS

JAMES H. CHADBOURN, *Editor in Chief*  
WILLIAM T. COVINGTON, JR., *Assistant Editor*

JUNIUS G. ADAMS, JR.  
MILLS SCOTT BENTON  
TRAVIS T. BROWN  
HUGH B. CAMPBELL  
ROBERT M. GRAY, JR.  
ALLEN LANGSTON

HUGH L. LOBDELL  
WEX S. MALONE  
HENRY B. PARKER  
EDWIN M. PERKINS  
CLAUDE E. REITZEL, JR.  
JAMES A. WILLIAMS

*The contributions of the student editors in this issue have been written under the supervision of individual members of the law faculty. Publication of signed contributions from any source does not signify adoption of the views expressed either by the LAW REVIEW or its editors collectively.*

---

## NOTES AND COMMENTS

### Attorneys—Unauthorized Practice of Law.

Recent years have seen a decided encroachment by lay instrumentalities upon the traditional field of the lawyer. Regardless of the causes of this tendency, it is a subject in which every member of the profession is vitally interested and a discussion of the unauthorized practice of law may not be out of place.

The right to practice is not a natural right but is in the nature of a privilege which exists only upon a showing of competent knowledge and upright character.<sup>1</sup> Because of its inherent nature a cor-

<sup>1</sup> *Re Bailey*, 50 Mont. 365, 146 Pac. 1101 (1915); *In re Collins*, 188 Cal. 701, 206 Pac. 990 (1922) (a right or privilege the legislature may bestow); *In re Ellis*, 118 Wash. 484, 203 Pac. 957 (1922) (no *de jure* right to practice law); *State v. Rosborough*, 152 La. 945, 94 So. 858 (1922) (not a natural or constitutional right); *In re Loackwood*, 154 U. S. 116, 14 Sup. Ct. 1082, 38 L. ed. 929 (1894) (not a privilege or immunity of a citizen of the United States).

poration cannot make such a showing nor can it take the oath that is required before a person can become an "officer of the court." Indirect action through those who are qualified is an evasion that will not be tolerated. But, of more importance is the fact that the existence of the corporate intermediary is destructive of the essentially personal character of the attorney client relationship. It is thus everywhere agreed that a corporation cannot practice law.<sup>2</sup>

But no adequate definition of this phase of human activity has been found.<sup>3</sup> It is settled that it is not limited to work before a court or with reference to litigation.<sup>4</sup> Beyond that point no definite line has been drawn.<sup>5</sup> Most frequently it is spoken of in terms of

<sup>2</sup> 1 THORNTON, ATTORNEYS AT LAW (1914) §35; Matter of Co-operative Law Co., 198 N. Y. 479, 92 N. E. 15 (1910); People v. Cal. Protective Corp., 198 Cal. 469, 244 Pac. 1089 (1926); *In re Otterness*, 232 N. W. 318 (Minn. 1930); *In re Eastern Idaho Loan and Trust Co.*, 288 Pac. 157 (Idaho 1930); Note (1931) 92 B. U. L. REV. 92; (1927) 15 CALIF. L. REV. 120.

<sup>3</sup> *In re Duncan*, 83 S. C. 186, 65 S. E. 210 (1910) ("It embraces the preparation of pleadings and other papers incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients before judges and courts and in addition, conveyancing, the preparation of legal instruments of all kinds, and in general advice to clients and all actions taken for them in matters connected with the law.").

<sup>4</sup> *In re Duncan*, *supra* note 3; People v. Alfani, 227 N. Y. 334, 125 N. E. 671 (1919) (more essential that an attorney act in an out of court transaction than in one before a court because no judge is present to supervise); Eley v. Miller, 7 Ind. App. 529, 39 N. E. 836 (1893).

<sup>5</sup> It has been held to include:

PREPARATION OF CASE FOR TRIAL: *State v. Fisher*, 103 Neb. 736, 174 N. W. 320 (1919); *In re Bailey*, 50 Mont. 365, 146 Pac. 1101 (1915).

APPEARANCE BEFORE A COURT: *Tanenbaum v. Higgins*, 180 N. Y. Supp. 738 (1920) (application for *certiorari*); *U. S. Title Guaranty Co. v. Brown*, 217 N. Y. 628, 111 N. E. 828 (1916) (condemnation proceedings); *Ellis v. Bingham County*, 7 Idaho 86, 60 Pac. 79 (1900) (brief filed by layman stricken from files). A legislature or administrative body is not considered as a court and an appearance before them is not practicing law. *Bird v. Breedlove*, 24 Ga. 623 (1858) (application to legislature for a pardon); *People v. Class*, 70 Colo. 381, 201 Pac. 883 (1921) (appearance before legislature relative to a contested election return—the practice of law refers to courts "as generally understood"); *Crocker Nat. Fire Prevention Engineering Co. v. Cleaning & Dyeing Works*, 280 N. Y. Supp. 670 (1927) (appearance before board of standards and appeals); *Tanenbaum v. Higgins*, *supra* (services before tax commissioners).

COLLECTIONS: *Creditors Nat. Clearing House v. Baunwart*, 227 Mass. 579, 116 N. E. 886 (1917) (giving legal advice and making collections); *Buxton v. Lietz*, 136 N. Y. Supp. 829 (1912) (legal proceedings involved); *Midland Credit Adjustment Co. v. Donnelly*, 219 Ill. App. 271 (1920) (no legal proceedings); *Monroe v. Staser*, 6 Ind. App. 367, 32 N. E. 563 (1892) (agreement in note to pay attorney's fees covers fees for collection without suit); see *Meisel & Co. v. Nat. Jewelers Board of Trade*, 152 N. Y. Supp. 813 (1915) (not necessary that legal proceedings be involved).

LEGAL DOCUMENTS: *In re Pace*, 156 N. Y. Supp. 141 (1915) (papers of incorporation and other matters incidental thereto); *People v. Schrieber*, 250 Ill. 345, 95 N. E. 189 (1911) (conveyances and collections and holding himself

those things that are usually done by lawyers.<sup>6</sup> While this is undoubtedly a more simple standard, it is submitted that the nature of the act rather than the character of the actor should control<sup>7</sup> and that the practice of law should include all acts done for another which involve the application of a legally trained mind<sup>8</sup>—especially should this be true in view of the tendency of lay encroachment already noted. Thus only can the public and the courts be assured that those who represent or appear for others in transactions involving the law are adequately equipped mentally and morally. An essential element is that the act be done for another. If the actor has such an interest in the act that he may be said to be acting for himself, it is not the practice of law.<sup>9</sup> Sometimes it is required that the act be done for a fee or some consideration but this should only be a factor in so far as it shows the existence of a regular business.<sup>10</sup>

Practically all of the states have statutes forbidding the unauthorized practice of law. Some specify in detail the acts which may or may not be done, while others prohibit the practice in general terms. Until 1931, North Carolina was in the latter category.<sup>11</sup> However, the legislature now in session has enacted a detailed statute<sup>12</sup> which provides in substance that no individual who is not

out as "collection" attorney); *In re Eastern Idaho Loan and Trust Co.*, *supra* note 2 (Wills, trust agreements, deeds, mortgages, etc.); *People v. People's Trust Co.*, 167 N. Y. Supp. 767 (1917) (advertising as appropriate adviser for and drawing wills); *In re Otterness*, *supra* note 2 (wills); *People v. Alfani*, *supra* note 4 (advertising that he drew legal papers and drawing bill of sale and chattel mortgage). But *cf.* *People v. Title Guaranty and Trust Co.*, 227 N. Y. 366, 125 N. E. 666 (1919) (drawing bill of sale and chattel mortgage not practice of law but no evidence of holding out or that it was more than an isolated transaction).

Note (1918) 31 HARV. L. REV. 886; COHEN, THE LAW—BUSINESS OR PROFESSION? (1924) App. C, 467.

<sup>6</sup> *People v. Alfani*, *supra* note 4; *Dunlap v. Lebus*, 112 Ky. 237, 65 S. W. 441 (1901); *State v. Chamberlain*, 132 Wash. 520, 232 Pac. 337 (1925).

<sup>7</sup> Note (1920) 69 U. OF PA. L. REV. 356, 359.

<sup>8</sup> *In re Eastern Idaho Loan and Trust Co.*, *supra* note 5; (1930) MINN. L. REV. 107.

<sup>9</sup> *Copeland v. Dobbs*, 129 So. 88 (Ala. 1930); *In re Kelsey*, 173 N. Y. Supp. 860 (1919) (interest of title insurance company in mortgage sufficient to enable it to foreclose a mortgage).

<sup>10</sup> *In re Otterness*, *supra* note 2; *In re Eastern Idaho Loan and Trust Company*, *supra* note 2; *State v. Bryan*, 98 N. C. 644, 4 S. E. 522 (1887) (also placing emphasis upon "holding out" as a factor).

<sup>11</sup> N. C. ANN. CODE (Michie, 1927) (no person shall practice law without first obtaining a license).

<sup>12</sup> This statute is the first move by any North Carolina legislature relative to the practice of law since 1818 and was sponsored by the Wake County Bar Association. It is very similar in many respects to a bill presented to the present session of the Massachusetts legislature. (1931) Vol. 16, No. 4, MASS.

licensed to practice law in North Carolina and no corporation shall:<sup>13</sup>

1. Prosecute or defend actions or proceedings<sup>14</sup> before a court, judicial body, or the Industrial Commission, except in his or its own behalf.<sup>15</sup>

2. Perform or profess competence to perform legal services out of court, such as giving advice or drawing instruments (life insurance trusts excepted).<sup>16</sup>

Any person, corporation, or officer or employee thereof who violates the act is guilty of a misdemeanor. Furthermore, it is made the duty of the solicitor "upon the application of any member of the Bar, or of any bar association, of the State of North Carolina [to] bring such action in the name of the State as may be proper to enjoin any such person, corporation, or association."

Lay practice in proceedings growing out of bankruptcy, receiverships, and assignments for the benefit of creditors is declared illegal in a Senate bill which, at the present writing, has passed on the first reading.<sup>17</sup> The provisions of the statute discussed above seem broad enough to cover this phase of unauthorized practice. The other and more important provision of the proposed bill makes illegal the soliciting of creditors for authority to represent their claims in such proceedings. This provision applies to all persons, whether licensed to practice law or not:

"It shall be unlawful for any individual, corporation, or firm, or other association of persons, to solicit of any creditor any claim of such creditor in order that such individual, corporation, firm, or association may represent such creditor or present or vote such claim in any bankruptcy or insolvency proceeding, or in any action or proceeding for or growing out of the appointment of a receiver, or in any matter involving an assignment for the benefit of creditors."

L. Q. 43 (bill to prohibit the unauthorized practice of law and certain other legal activities).

<sup>13</sup> H. B. 566, March 21, 1931. Introduced by Mr. Huffman.

<sup>14</sup> An individual or corporate fiduciary, however, may transact "the necessary clerical business incidental to the routine or usual administration of estates, trusts, guardianships, or other similar fiduciary capacities." And insurance companies may bring and defend actions with reference to the insureds according to the terms of the policy. Also one attorney may act for several common carriers, associations, or corporations, if they so agree.

<sup>15</sup> Special reference is made to the foreclosure of mortgages by unauthorized persons. The fee can be divided only by one independent attorney with another.

<sup>16</sup> Exceptions are also made for creating fiduciary relationships and drawing wills in emergencies.

<sup>17</sup> S. B. 466. Introduced by Senator Clarkson.

The enacted statute attempts no definition of the practice of law. It specifies certain acts that may or may not be done but for the most part uses such general expressions as "legal documents," "legal advice," "act as an attorney," etc. Where no provision is made it thus remains with the courts to say in each instance whether an act is or is not included.

Such an enactment was badly needed in North Carolina. Its predecessor, in addition to being very general, contained no penalty for violations. Besides the remedies provided, *quo warranto* proceedings are appropriate.<sup>18</sup> The statute merely makes criminal what was already *ultra vires*. As for the individual who appears before a court without a license,<sup>19</sup> or who "practices law,"<sup>20</sup> contempt proceedings will lie. Even without the statute, it would seem that the unauthorized practice may be enjoined under a recent lower court decision in Ohio.<sup>21</sup>

Prohibitory legislation is not always effective. In New York, the Buffalo Bar Association has entered into an agreement with the banks and trust companies of that city as an additional aid. The same course has been followed with success in Chicago, Cleveland and elsewhere. Much can be accomplished through a spirit of friendly coöperation between the bar and the various lay agencies.<sup>22</sup>

From Massachusetts comes the suggestion that the bar resort to what is termed "collective advertising" as an additional defense against encroachment by corporations. It is urged that every bar

<sup>18</sup> *People v. Cal. Protective Corp.*, 76 Cal. 354, 244 Pac. 1089 (1926); *People v. Merchant's Protective Corp.*, 189 Cal. 531, 209 Pac. 363 (1921); *People v. Merchant's Protective Corp.*, 105 Wash. 112, 177 Pac. 694 (1919); COHEN, THE LAW—BUSINESS OR PROFESSION? (1924) 246 (a statute prohibiting the practice of law by corporations "only makes criminal what was *ultra vires*").

<sup>19</sup> *Re Moore*, 98 Vt. 85, 126 Atl. 550, 34 A. L. R. 527 (1924) (the Supreme Court has implied power, under the authority given to determine who shall practice law before the courts of the state, to punish for contempt those pretending to such office).

<sup>20</sup> *People v. Taylor*, 56 Colo. 441, 138 Pac. 762 (1914) (the rules of the Supreme Court relative to the requirements for a license are in effect an order of the court that no person shall "practice law" without complying therewith. Any violation thereof by practicing without a license is contempt of court and punishable as such).

<sup>21</sup> *Goodman v. Western Bank & Trust Co.*, 28 N. P. (N.S.) 272, OHIO LAW BULLETIN, March 2, 1931. (The right to practice law is sufficiently a property right for equity to protect regardless of the fact that practicing without a license is a misdemeanor and that a remedy at law exists in the form of *quo warranto* proceedings.)

<sup>22</sup> (1931) 40 YALE L. J. 482; (1930) 47 BANKING L. J. 819; Jackson, *Functions of the Trust Company in the Field of Law* (1929) 52 N. Y. BAR ASS'N. REP. 142.

association should have a public relations committee which shall do what it can in a dignified way to obtain favorable publicity for the profession and shall educate the public in elementary legal matters, so that it may realize the very important part played by the lawyer in modern life.<sup>23</sup>

When it is remembered that in most cases a member of the bar is actually participating in and making possible the unlawful practice, it will be seen that much can be accomplished through pressure exerted by a highly organized bar association insistent upon compliance with the code of legal ethics.<sup>24</sup>

The contention has been made that while these statutory prohibitions against encroachment are important and necessary, permanent relief can be gained only by a more adequate system of selecting and disbaring lawyers, higher efficiency and ethical standards on the part of the bar, and a reformed system of judicial administration. If a lawyer cannot perform a service as efficiently, cheaply, and expeditiously as a lay agency, it is blocking the wheels of progress to say that he alone can perform it. To retain his traditional position he must be willing and able to keep pace with the needs and requirements of the community he serves.<sup>25</sup>

T. C. SMITH, JR.

#### **Constitutional Law—Excessive License and Franchise Taxes.**

The 1929 General Assembly imposed on express companies doing an intrastate business in North Carolina a minimum annual franchise tax of \$15.00 per mile of railroad line over which the company operates within the state.<sup>1</sup> The Railway Express Agency does an

<sup>23</sup> (1931) Vol. 16, No. 4 MASS. L. Q. 12; see 53 N. Y. BAR ASS'N. REP. 432, 436 ("... we believe that the advantages of naming lawyers as executors and trustees should be brought home to the public...").

<sup>24</sup> A. B. A. CANON 27 ("... It is equally unprofessional to procure business by indirection through touters of any kind, whether allied real estate firms or trust companies advertising to secure the drawing of deeds or wills or offering retainers in exchange for executorships or trusteeships to be influenced by the lawyer..."). A. B. A. CANON 35 ("... The professional services of a lawyer should not be controlled by any lay agency, person or corporation, which intervenes between attorney and client... He should avoid all relations which direct the performance of his duties in the interest of such intermediary...").

<sup>25</sup> Shinn, *How to Deal With the Unlawful Practice of Law* (1931) 17 A. B. A. J. 98; Beardsley, *Lay Encroachments* (1930) 14 J. AM. JUD. SOC. 130.

<sup>1</sup> N. C. PUB. LAWS (1929) c. 345, §205. Where the income on the average capital invested during the year is 6 per cent or less, \$15.00 per mile of railroad line; more than 6 per cent and less than 8 per cent, \$18.00 per mile; 8 per cent and over, \$21.00 per mile.

In 1913 the General Assembly levied a tax of \$3.00 per mile. N. C. PUB.

intrastate and interstate business, and operates over 3,053.31 miles of railroad within North Carolina. It paid the demanded \$15.00 per mile aggregating \$45,799.65 and brought suit to recover this sum. The statute imposing the tax was attacked as unconstitutional on the ground that it was so excessive and burdensome as to amount to a confiscation of property. *Held*, under the circumstances of the particular case, the tax, slightly in excess of 12 per cent of the gross revenue exclusively derived from intrastate business, is not unconstitutional as being confiscatory.<sup>2</sup>

The tax on express companies is graded from \$15.00 per mile to a maximum of \$21.00 per mile depending on net earnings. The question was not squarely presented for decision and the court did not consider whether a tax of \$18.00 or \$21.00 per mile levied under the statute would be valid, nor did the court give an opinion whether a minimum of greater than \$15.00 per mile would be upheld. This is to be regretted, and especially so in view of the present readjustment of the tax burden in North Carolina. Current proposals are that taxes on property be reduced by approximately sixteen million dollars. This reduction is proposed with a view to relieve farmers and small property owners. However, under the uniformity clause<sup>3</sup> requiring that taxes on property be equal, the reduction must also be made on property owned by corporations, and the property so owned is one-third of the total assessed valuation in the state. If it is not intended that corporations be given relief, the only way to get back the reduction of their property taxes is through an increase in the corporation income tax or through an increase in franchise taxes. The income tax is limited by the Constitution to 6 per cent.<sup>4</sup> To in-

LAWS (1913) c. 201, §79a. This was increased to \$5.00 per mile in 1921. PUB. LAWS (1921) c. 34, §79a; and to \$7.50 per mile in 1925. PUB. LAWS (1925) c. 101, §86.

<sup>2</sup>*Railway Express Agency, Inc. v. Maxwell*, 199 N. C. 637, 155 S. E. 553 (1930). On February 4, 1931 the North Carolina Attorney General's office received information that the case would not be appealed. 5 U. S. DAILY 3719. The circumstances disclosed that the revenue produced from exclusively intrastate business was \$122,286.69 for a period of four months; that the revenue arising from interstate shipments received by the express company was \$762,853.98 for a period of four months; that the express company in constructing the comparison between revenue derived from intrastate commerce and interstate shipments gave no consideration to interstate shipments from points in North Carolina to points without the state; that the tax imposed on the express company was slightly in excess of 12 per cent of its gross revenue derived exclusively from intrastate business, taking no account of other items and factors.

<sup>3</sup>N. C. CONST., Art. V, §3.

<sup>4</sup>*Supra* note 3.



crease the tax from its present rate of  $4\frac{1}{2}$  per cent to 6 per cent would not make up the reduction in property taxes.<sup>5</sup> The only other way is to increase franchise taxes. The express companies operating within North Carolina will save approximately \$18,000 through reduced property taxes.<sup>6</sup> At present the franchise taxes paid by these companies amounts to \$67,872.<sup>7</sup> Can the franchise tax be increased by \$18,000 and be upheld? The uncertainty of the validity of such impositions places the state's finances in a dangerous position. Property taxes may be reduced and it may then be found that the court will not allow the reduction to be compensated for by increases in franchise taxes. If only the reduction of corporation property taxes is to be made up by increased franchise taxes, the aggregate tax burden on corporations will be no greater. They will, however, be prejudiced to the extent that other property owners receive a reduction in tax burden which is not allowed corporations. The express companies are, in effect, operating agents of the railroads, and the arrangements with the railroads is such as to leave no net income after the payment of transportation charges.<sup>8</sup> Thus it will not appear that the express companies operate at a profit. If the franchise tax must bear a relation to the value of the privilege for which it is imposed,<sup>9</sup> and that privilege does not result in profitable operation, will the courts sustain an increase in the franchise tax? The statement of the instant case assumes that the express company operated at a profit because its predecessor, the American Railway Express Co., made a profit. The assumption may not always be reasonable. The tax on express companies in 1925 was \$7.50 per mile. The 1929 imposition is a 100 per cent increase in four years. If the property tax reduction on the Railway Express Agency is made up by increas-

<sup>5</sup> The state corporation income tax yielded in 1929 a revenue of \$5,505,300. REPORT OF THE N. C. TAX COMMISSION (1930) p. 454. This was at the rate of  $4\frac{1}{2}$  per cent. An increase to the constitutional limit of 6 per cent would result in an increased yield of \$1,835,100. The reduction in property taxes of corporations would be \$5,340,000.

<sup>6</sup> The assessed valuation of property of express companies in North Carolina in 1929 was \$337,000. The total assessed valuation of all property within the state in 1929 was \$2,971,338,814. Thus the express companies will share approximately 113-1000 of 1 per cent of the \$16,000,000 reduction or \$18,000.

<sup>7</sup> REPORT OF THE N. C. TAX COMMISSION (1930), p. 192.

<sup>8</sup> Revenue arising from operation of the express company is apportioned among the railroads in the proportion that the gross express transportation revenues on the line bears to the gross express transportation revenues on the lines of all railroads. See the principal case, and see REPORT OF THE N. C. TAX COMMISSION (1930), p. 193.

<sup>9</sup> *Air-Way Electric Appliance Corporation v. Day*, 266 U. S. 71, 45 Sup. Ct. 12, 69 L. ed. 169 (1924).

ing the franchise tax, this will mean an increase from \$15.00 per mile to \$18.80 per mile.<sup>10</sup> The increase will be greater if corporation franchises must compensate for property tax reductions other than that of corporation property. The decisions lend the tax administrator little help by which a valid imposition may be determined. The most he knows is that the particular tax in the particular case is valid.<sup>11</sup>

The Constitution of North Carolina authorizes the General Assembly to tax trades, professions, and franchises.<sup>12</sup> It does not expressly limit the rate of taxation which may be imposed under this power. Limitations must be found implied in the North Carolina Bill of Rights; the due process and equal protection of laws clauses of the Federal Constitution; and in the commerce clause which is held to prevent taxation which unduly burdens interstate commerce.

Whether the amount of the tax is ever solely within the discretion of the legislature is not definitely decided. Chief Justice Marshall strongly supported the sole authority of the legislative body to determine the tax burden. It is, he said, "unfit for the judicial department to inquire what degree of taxation is the legitimate use

<sup>10</sup>The Railway Express Agency paid 45-67 of the franchise taxes paid by express companies in North Carolina in 1929. This proportion of an increase of \$18,000 in franchise taxes is \$11,947 or an increase of \$3.80 per mile.

With railroads the increase in the franchise tax would be more serious. At present the franchise tax is 2-5 of 1 per cent of the assessed valuation of their property within the state. The railroads will save \$1,239,000 from a property tax reduction. To recover this sum through the franchise tax it would be necessary to increase the tax from 2-5 of 1 per cent to approximately 9-10 of 1 per cent. In *Southern Ry. v. Watts*, 260 U. S. 519, 43 Sup. Ct. 192, 67 L. ed. 375 (1923) a franchise tax amounting to 1-5 of 1 per cent of the total assessed valuation of property within the state was upheld. The court was of the opinion that the total burden, the property tax, the franchise tax and the income tax, did not operate to obstruct interstate commerce. Under a shifting of the railroad property tax to the railroad franchise tax the total tax burden would remain the same. But there remains the question whether a franchise tax, a privilege tax, will be valid when it is made up of what is properly property tax.

<sup>11</sup>*Alaska Pacific Fisheries v. Territory of Alaska*, 236 Fed. 52 (C. C. A. 9th, 1916) (tax equalling 10 per cent of gross revenue held valid); *Pullman Co. v. Adams*, 189 U. S. 420, 23 Sup. Ct. 494, 47 L. ed. 877 (1903) (a tax of 12½ per cent of gross receipts held valid); *City of Grand Island v. Postal Telegraph Cable Co.*, 92 Neb. 253, 138 N. W. 169 (1912) (tax of 18 per cent of gross receipts held valid); *Salisbury v. Equitable Purchasing Co.*, 177 Ky. 348, 197 S. W. 813 (1917) (tax equalling 33 per cent of net income held invalid); *Williams v. Waynesboro*, 152 Ga. 696, 111 S. E. 47 (1922) (tax equalling 12 per cent of net income held invalid); *Southern Express Co. v. Town of Ty Ty*, 141 Ga. 421, 81 S. E. 114 (1914) (tax equalling 16 per cent of gross revenue held invalid).

<sup>12</sup>*Supra* note 3.

and what degree may amount to the abuse of the power."<sup>13</sup> The North Carolina court has expressed the same opinion: "The reasonableness or unreasonableness of the tax is a matter for the legislature, not for the courts."<sup>14</sup> However, the court in the principal case deems it proper to determine whether as a matter of law the tax imposed is confiscatory.<sup>15</sup> Judicial expression on the power of the court to review the legislative act is divided, but perhaps the prevailing view is that the court will determine whether a tax is excessive and consequently invalid.<sup>16</sup> The court will hesitate to override legislative discretion but must limit that discretion to taxes which are not clearly confiscatory or prohibitive of legitimate business. It would seem that the question whether a tax is confiscatory is interlocked with the question of equality. For if, to sustain its life, the state must take 12 per cent of all taxpayers' property, clearly the state has the power.

<sup>13</sup> *Providence Bank v. Billings*, 4 Pet. 514, 7 L. ed. 939, 955 (1830). ("The power of taxing the people and their property is essential to the very existence of government and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against oppressive taxation."); *McCulloch v. Maryland*, 4 Wheat. 316, 428, 4 L. ed. 579, 607 (1819); see 2 COOLEY, CONSTITUTIONAL LIMITATIONS, (8th ed. 1927) 987.

<sup>14</sup> *State v. Hunt*, 129 N. C. 686, 40 S. E. 216 (1901); see *State v. Robertson*, 136 N. C. 587, 48 S. E. 595 (1904) ("When the Constitution confers upon the legislature the power to levy taxes, the amount of the tax is committed to that department of the government, and is not open to review by the judicial department. We may inquire into the question of power, but not as to the manner of its exercise.").

<sup>15</sup> *In Towne v. McElligott*, 274 Fed. 960 (S. D. N. Y. 1921) Learned Hand, J., said, "The term 'confiscatory,' when so used, (in relation to Fifth Amendment) is clearly one of degree, because literally all taxes are *pro tanto* confiscatory."

<sup>16</sup> *In re Opinions of the Justices*, 123 Me. 573, 121 Atl. 902 (1923) (An excise tax which is so unreasonable or oppressive as to be confiscatory would be invalid); *In re Martin*, 62 Kan. 638, 64 Pac. 43 (1901) (We do not say that such discretion is unlimited. If the tax were flagrantly unreasonable courts might properly interfere); *Morton v. Macon*, 111 Ga. 162, 36 S. E. 627 (1900) (An occupation tax must be reasonable in amount and must not be discriminatory, confiscatory, or prohibitive).

But see, *Southern Car and Foundry Co. v. State*, 133 Ala. 624, 32 So. 235 (1902) (The extent of the tax imposed is entirely within the discretion of the taxing power); *Fluonoy v. Walker*, 126 La. 489, 52 So. 693 (1910) (The tax—does indeed seem to be heavy, but that is manifestly a consideration addressing itself to the legislature and not to the courts); *Alaska Fish Salting and By-Products Co. v. Smith*, 255 U. S. 44, 41 Sup. Ct. 219, 65 L. ed. 489 (1921) (Holmes, J., said, "Even if the tax should destroy a business it would not be made invalid or require compensation upon that ground alone. Those who enter upon a business take that risk."). Cf. *Panhandle Oil Co. v. Mississippi*, 277 U. S. 218, 48 S. Ct. 451, 72 L. ed. 857 (1928) (Per Holmes, J., "The power to tax is not the power to destroy while this court sits.").

The question is can the state take 12 per cent of one taxpayer's property without imposing a similar burden on all. The rule of uniformity prescribed by the North Carolina Constitution for taxes on property<sup>17</sup> is not expressly applied in the Constitution to taxes on trades, professions and franchises. The court has said, however, that a tax not uniform would be so inconsistent with the intent apparent in the section of the Constitution authorizing taxes that it would be restrained as unconstitutional.<sup>18</sup> But this does not prevent classification for purposes of taxation as long as there is uniformity within the class. Whether the classification is reasonable depends on whether there is a real and substantial difference between the particular type of business and others. The tax is excessive and confiscatory only if the classification is unreasonable.

### *License Taxes.*

Under the power to tax trades, professions, and franchises, the legislative body levies license and franchise taxes. Counties and municipalities are authorized by the legislature to impose similar taxes on certain forms of business.<sup>19</sup> These taxes are universal throughout the southern states and constitute a considerable item of revenue. License taxes for revenue are to be distinguished from license fees imposed under the police power and for the purpose of regulation.<sup>20</sup> It is to be presumed that the legislative body, when it has revenue and not regulation in mind, will not levy a tax so high that it will be confiscatory and defeat its purpose.<sup>21</sup> The court is

<sup>17</sup> *Supra* note 3.

<sup>18</sup> *State v. Williams*, 158 N. C. 610, 73 S. E. 1000 (1912).

<sup>19</sup> N. C. ANN. CODE (Michie, 1927) §§7880(27)-7880(115).

<sup>20</sup> While taxes are imposed without reference to peculiar benefits to particular individuals, fees are imposed because of a special service which the government renders to the individual. The courts accord the legislative body a wider discretion in the imposition of a revenue measure than in the imposition of a regulatory fee. The fee is determined by the expense of the supervision required by the particular type of business. If it were possible to prove in advance the exact cost, that would be the limit of the fee. As this is ordinarily impossible, the taxing body may make the charge large enough to cover reasonably anticipated expenses. *Atlantic and Pacific Tel. Co. v. Philadelphia*, 190 U. S. 160, 23 Sup. Ct. 817, 47 L. ed. 995 (1903); *State v. Lockey*, 198 N. C. 551, 152 S. E. 693 (1930). (Where \$6,000 per annum is appropriated from the fees to pay expenses of inspection of barber shops, \$5.00 temporary fee, and \$3.00 annual fee where there are about 4,158 barbers in the state is not disproportionate.) But see, *State v. Moore*, 113 N. C. 697, 18 S. E. 342 (1893) (fee of \$1,000 on emigrant agent where there was no supervision held invalid).

<sup>21</sup> That confiscatory revenue measures are not lacking, however, is evidenced by a large number of cases. There are fewer cases of excessive license taxes levied by the state than cases of excessive municipal taxes.

more often called upon to review a case where a municipality which has not been given power to license for revenue seeks to obtain revenue under the guise of regulation,<sup>22</sup> or where, under its revenue or police power, it seeks to prohibit a legitimate business.<sup>23</sup> Another class of cases is that involving interstate commerce. When a license tax is imposed on the intrastate privilege of an enterprise engaged also in interstate commerce, there is the danger that it will be held to operate as a burden on interstate business and consequently to violate the commerce clause. A license tax on the privilege of doing an intrastate business is valid when it does not make the paying of the tax a requisite to doing interstate business.<sup>24</sup> Until *Cudahy Packing Co. v. Hinkle* was decided it was generally accepted that the tax could be measured by the total capital stock of the business where there was a maximum limit placed on the tax, but there is now some doubt whether total capital stock may be used as a measure.<sup>25</sup> The tax may be measured by a proportion of the capital stock represented by property owned and business transacted within the state;<sup>26</sup> by property owned within the state;<sup>27</sup> by gross receipts from intrastate business;<sup>28</sup> by net income accruing from business carried on within the state;<sup>29</sup> by a physical criterion which is a rough measure of property or business carried on within the state as in *Railway Express Agency v. Maxwell*; or the tax may be a flat sum chargeable against

<sup>22</sup> *State v. Bean*, 91 N. C. 554 (1884) (City of Salisbury did not have power to tax butchers for revenue; tax of \$3.00 per month under police power held invalid).

<sup>23</sup> *Moffitt v. City of Pueblo*, 55 Colo. 112, 133 Pac. 754 (1913) *Ex parte McKenna*, 126 Cal. 429, 58 Pac. 916 (1899).

<sup>24</sup> *Osborne v. Florida*, 164 U. S. 650, 17 Sup. Ct. 214, 41 L. ed. 586 (1897).

<sup>25</sup> In *Baltic Mining Co. v. Mass.*, 231 U. S. 68, 34 Sup. Ct. 15, 58 L. ed. 127 (1913), the act under which the tax was levied provided a maximum sum (\$2,000) chargeable. The tax was held valid. In *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. ed. 355 (1910), the tax measured by capital stock was held invalid. There was not a maximum in this case. In *General Railway Signal Co. v. Virginia*, 246 U. S. 500, 38 Sup. Ct. 360, 62 L. ed. 854 (1918), the maximum was \$5,000. The tax was sustained but the court said "this case is on the borderline." Apparently this maximum is beyond the borderline, for in *Cudahy Packing Co. v. Hinkle*, 278 U. S. 460, 49 Sup. Ct. 204, 73 L. ed. 454 (1929), a tax measured by capital stock with a maximum of \$3,000 was held invalid. In *St. Louis Ry. Co. v. Stratton* (S. D. Ill. 1931), 6 U. S. DAILY 122 (tax invalid, following *Cudahy* case). See Powell, *Excises on Foreign Corporations*, PROC. NAT. TAX ASSN. (1919) 230, 239.

<sup>26</sup> *St. Louis S. W. Ry. v. Arkansas*, 235 U. S. 350, 35 Sup. Ct. 99, 59 L. ed. 265 (1914).

<sup>27</sup> *Southern Ry. v. Watts*, *supra* note 10.

<sup>28</sup> *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411, 8 Sup. Ct. 1127, 32 L. ed. 229 (1888).

<sup>29</sup> *Underwood Typewriter Co. v. Chamberlain*, 254 U. S. 113, 41 Sup. Ct. 45, 65 L. ed. 165 (1920).

all business of a class.<sup>30</sup> The measure must bear some reasonable relation to the extent of the intrastate business and the value of the right to transact that business.<sup>31</sup> There are dicta to the effect that though the legislative body may have the power to tax the intrastate business and a valid measure may be used in computing the tax, yet the tax may be invalid because its amount operates to burden interstate commerce. The question will arise where the intrastate business is conducted at a loss and the tax must be paid from interstate receipts. As indicated, the statement of the instant case assumes that the express company operated profitably, and since "in business activities and progress North Carolina was an average state of those through which the plaintiff operates," assumes that the intrastate business was also conducted at a profit. In *Williams v. Talladega*<sup>32</sup> the intrastate business resulted in a loss of 86 cents over a period of eleven months. The Supreme Court agreed with the Alabama court that this was "not a sufficiently accurate representation of the business conducted at Talladega to render the tax void,—and we are not satisfied that the tax is such as to impose a burden on interstate commerce." This implies that if the loss shown had been a "sufficiently accurate representation of the business," the court would have held the tax invalid because of its burdensome effect on interstate commerce.<sup>33</sup> In *Pullman Co. v. Adams*<sup>34</sup> evidence that intrastate receipts did not equal expenses chargeable against such receipts was rejected. The court upheld the tax because the company could discontinue its intrastate business if it wished. A different view was later taken in *Western Union v. Kansas*:<sup>35</sup> Where the intrastate business is necessary to a profitable operation of the interstate commerce, the tax is invalid if it can be avoided only by relinquishing

<sup>30</sup> *Williams v. Talladega*, 226 U. S. 404, 33 Sup. Ct. 116, 57 L. ed. 275 (1912).

<sup>31</sup> *Supra* note 9; and see generally, *Taxation of Public Service Corporations*, REPORT OF THE N. C. TAX COMMISSION (1928) 242, 258.

<sup>32</sup> *Supra* note 30; and see *Southern Ry. v. Watts*, *supra* note 10.

<sup>33</sup> The tax was, however, declared void because it taxed a Federal agency. There was no exemption of government messages.

<sup>34</sup> 189 U. S. 420, 23 Sup. Ct. 494, 47 L. ed. 877 (1903) ("The company cannot complain of being taxed for a privilege of doing a local business which it is free to renounce."). In *Postal Tel.-Cable Co. v. Fremont*, 255 U. S. 124, 41 Sup. Ct. 279, 65 L. ed. 545 (1921) the company was compelled by statute to do an intrastate business. However, the tax was upheld although the intrastate business was conducted at a loss, for the statute provided that the company might apply to the railway commission to raise the rates on its messages.

<sup>35</sup> *Supra* note 25. The tax in this case was also invalid because measured by total capital stock.

the intrastate business. Mr. Justice Holmes, who wrote the opinion in the first case, dissented in the Kansas case.

The presumption is in favor of the reasonableness of a tax.<sup>36</sup> The invalidity of the exaction must be made clearly to appear. The tax must be considered in its operation on all members of the class. It is not unconstitutional as being confiscatory because in isolated cases it might impose a hardship, but only where the general operation is such.<sup>37</sup> But if over a long period of time the tax is burdensome on certain members of the class but not on others, it must follow that the classification is unreasonable.

E. M. PERKINS.

#### **Bills and Notes—Extent of Notice From Reference to Mortgage—Record Notice.**

A note, regular and negotiable on its face, stipulating that it was secured by mortgage on real property, was negotiated for value to plaintiff. In an action to foreclose the mortgage it was held that the plaintiff endorsee took with notice of an acceleration clause and a provision as to the distribution of the proceeds under such clause, since these stipulations appeared on the face of the mortgage referred to.<sup>1</sup> To support this conclusion the court announced that, "Where a person is charged with notice, or actually knows, of an instrument, he is also charged with notice of all facts appearing on the face of the instrument or to the knowledge of which anything there appearing would conduct him."

It is submitted that the result reached in this case is an equitable and desirable one, but that the principle offered in its support is not generally accepted in the broad sense announced, and is likely to lead to confusion in future decisions where the rights of holders of negotiable instruments are involved.

When, and for what purposes is an assignee of a negotiable note charged with notice of the terms of the mortgage securing it? Obviously when he seeks to assert some right by virtue of the mortgage itself, such as a foreclosure, he should act in accordance with the provisions of the instrument. In such case he is charged with notice

<sup>36</sup> *Green v. Frazier*, 253 U. S. 233, 40 Sup. Ct. 499, 64 L. ed. 878 (1920).

<sup>37</sup> *Ohio Tax Cases*, 232 U. S. 576, 34 Sup. Ct. 372, 58 L. ed. 737 (1913).

<sup>1</sup> *Bank of Clinton v. Goldsboro Savings and Trust Company*, 199 N. C. 582, 155 S. E. 261 (1930). As to the effect of an acceleration clause in a mortgage on the maturity of the note itself, see Note (1931) 9 N. C. L. Rev. 201, discussing the same case.

of all matters of record concerning the property as well as those patent on the face of the deed itself.<sup>2</sup>

In a suit on the note itself, however, the rule is otherwise. It is established by sound principle and the weight of authority that a provision in a note, "Secured by mortgage on real property," does not impair the negotiability of the note nor give notice to the holder thereof. Thus, as to a holder in due course not a party to the instrument, the note, in so far as concerns the personal liability of the maker, is by the better view treated as a separate and distinct instrument unaffected by conditions or potential equities in the original contract.<sup>3</sup> This view is compatible with the modern trend towards facilitating negotiability, and with the N. I. L. which provides, "To constitute notice of an infirmity of the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had *actual knowledge* of the infirmity or defect or knowledge of such facts that his action in taking amounted to *bad faith*."<sup>4</sup> Thus equities or defenses to a recovery on the note, when written into the deed of trust, or knowledge of which can be made available by an inspection of the deed of trust,<sup>5</sup> should not be allowed

<sup>2</sup> 1 JONES, MORTGAGES (8th ed., 1928) §706. *National Hardwood Co. v. Sherwood*, *infra* note 3; *Holmes v. Parsons*, *infra* note 3.

<sup>3</sup> BIGELOW, BILLS AND NOTES (3d ed., 1928) §99; *Stevens v. Green*, 156 S. E. 626 (Ga. 1931); *Zollman v. Jackson Trust and Savings Bank*, 238 Ill. 290, 87 N. E. 296 (1909). But *cf.* *Holmes v. Parsons*, 18 Cal. App. 450, 123 Pac. 356 (1912); *National Hardwood Co. v. Sherwood*, 165 Cal. 1, 130 Pac. 881 (1913). By CAL. CIV. CODE (Deering, 1923) §726 a note secured by mortgage can be enforced only by foreclosure of the mortgage.

<sup>4</sup> N. C. ANN. CODE (Michie, 1927) §3037. See §2984 which provides in substance that an unqualified order or promise to pay is unconditional though coupled with a statement of the transaction that gives rise to the instrument. While not determinative, this section, or its equivalent, is often cited as a supporting argument. *Shanabarger v. Pharos*, *infra* note 6.

<sup>5</sup> For the same reason, namely that one to whom a secured note is endorsed has primarily a chose in action, an endorsee should not be subject to equities to the note when such appear only on record. The record should operate to give constructive notice only of rights in land, or in the case of a chattel mortgage, to those who acquire rights in or deal with the chattel itself. *Minnell v. Reed*, 26 Ala. 730 (1855); *Taylor v. American National Bank*, 64 Fla. 525, 60 So. 783 (1913); *Judy v. Warne*, 54 Ind. App. 82, 102 N. E. 386 (1913); *Moreland v. Harris*, 121 Ark. 634, 182 S. W. 521 (1916) (endorsee looked at record); *Farmer's National Bank v. Dew*, 262 Pac. 691 (Okla. 1927) (mortgaged property described on face of note); *Morgan v. Mulcahey*, 298 S. W. 242 (Mo. 1927) (endorsee adept at record examination). *Contra*: *Murphy v. Barnard*, 162 Mass. 72, 38 N. E. 29 (1894). The established rule in Oklahoma is that a holder in due course of a note secured by mortgage may *foreclose* irrespective of defects in the *title* of his assignor when the sole source of notice of such defects is that of record. *Foster v. Augustanna College*, 92 Okla. 96, 218 Pac. 335 (1923); *Gaither v. First National Bank*, 113 Okla. 111, 239 Pac. 461 (1925); *Landauer v. Sublett*, 125 Okla. 185, 259 Pac. 234 (1927).



to bar a recovery by one who is otherwise a holder in due course.<sup>6</sup> A right given solely by the note or other negotiable instrument should be clearly distinguished from a right predicated on the deed of trust or mortgage hypothecating the note.<sup>7</sup> Since the present case sets forth an attempt to evade the terms of the deed of trust, such was rightly held frustrated by a showing of constructive notice of the terms thereof.

W. S. MALONE.

### Bills and Notes—Qualified Indorsements—Implied Warranties.

*A* conveyed land to *B*, reserving a vendor's lien as security for purchase money notes. After maturity, one note was indorsed to *C* without recourse. *A* later released the vendor's lien. *C* was unable to collect the note, and sues *A* for breach of warranty. *Held*, whether *C* purchased the note from *A* or accepted it as collateral security for a loan to *B*, *A* impliedly warranted that he would do no act to prevent the assignee from collecting the note.<sup>1</sup>

The warranties that were usually implied from the transfer of paper by delivery or qualified indorsement are included in the Negotiable Instruments Law as §65.<sup>2</sup> Some courts under the rules of the law merchant also implied a warranty of validity.<sup>3</sup> Although this warranty is not expressly mentioned in §65, it would seem that the words of the first paragraph of the section—the instrument is "in all

The Oklahoma doctrine is perhaps an unwarranted extension of the principle. See note (1924) 8 MINN. L. REV. 347.

<sup>6</sup> *Zollman v. Jackson Trust and Savings Bank*, *supra* note 3; *Harris v. Courcier*, 119 So. 905 (La. App. 1929); *Howry v. Eppinger*, 34 Mich. 29 (1876); *Shanabarger v. Phores*, 86 W. Va. 64, 103 S. E. 349 (1920); *Thorpe v. Mindeman*, 123 Wis. 149, 101 N. W. 417 (1904). *Contra*: *Security Trust and Savings Bank v. Telford*, 211 Ill. App. 149 (1918); but *cf.* *Holmes v. Parsons*, *supra* note 3; *National Hardware Co. v. Sherwood*, *supra* note 3.

<sup>1</sup> This distinction is well drawn in *Shanabarger v. Phores*, *supra* note 6; also in *Thorpe v. Mindeman*, *supra* note 6.

<sup>2</sup> *Hoge v. Ward*, 155 S. E. 644 (W. Va. 1930).

<sup>3</sup> *Watson v. Cheshire*, 18 Iowa 202 (1865). Warranties by transferor under §65: (1) That the instrument is genuine and in all respects what it purports to be; (2) that he has good title to it; (3) that all prior parties had capacity to contract; (4) that he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

<sup>4</sup> *Hannum v. Richardson*, 48 Vt. 508 (1875); see *Meyer v. Richards*, 163 U. S. 385, 16 Sup. Ct. 1148, 41 L. ed. 199 (1896); Note (1919) 2 A. L. R. 216, 220. *Contra*: *First Nat. Bank of Sterling v. Drew*, 191 Ill. 186, 60 N. E. 856 (1901). The discredited case of *Littauer v. Goldman*, 72 N. Y. 506 (1878), held a transferor is never liable on an implied warranty unless he has knowledge of the defect.

respects what it purports to be"—might be construed as including it.<sup>4</sup>

In a number of the older cases there are dicta to the effect that an assignor without recourse impliedly warrants that he has done nothing and will do nothing to prevent the assignee from collecting the instrument assigned.<sup>5</sup> *Watson v. Cheshire*<sup>6</sup> is generally cited as authority for this rule, but the point is not involved in the case, and the court merely stated this to be the holding of *Eaton v. Mellus*.<sup>7</sup> In this latter case the defendant had assigned to a third party a claim against the government before he assigned it to the plaintiff. The court says an assignor of a debt warrants that no act of his "shall deprive his assignee of the right and authority to collect it of the debtor."<sup>8</sup> These two decisions, which are the ones relied on in the instant case, would therefore seem scant authority for implying a warranty that an indorser will not release the security for an instrument transferred.<sup>9</sup> Nevertheless, the court seems generally correct in saying, "It is only common sense that the law should raise and impose an implied warranty, attendant upon any assignment, that the assignor will not undermine or destroy that which he has assigned."<sup>10</sup> No language in §65 can be construed as covering such a warranty, so the court was faced with the problem of whether by enumerating certain warranties the N. I. L. excluded all others. The same problem is involved in construing §§30 and 52 in the payee-as-holder-in-due-course cases.<sup>11</sup> This latter type of case does not seem to have

<sup>4</sup> This would make the first part of paragraph 4 of the section mere surplusage if *validity* as there used is given its technical meaning. In the instant case the court uses *validity* in a sense closely approximating the meaning of *value* or *collectibility*: there is an "implied warranty that the assignor will do nothing to impair the validity of that which he has assigned," 155 S. E. at 646. Giving *validity* as used in paragraph 4 this meaning would seem to avoid both of Ames' objections to this part of the Act: (1) That the discredited case of *Littauer v. Goldman*, *supra* note 3, had been codified; (2) the warranty only attached if the instrument was entirely valueless. BRANNON, *NEGOTIABLE INSTRUMENTS LAW* (4th ed. 1926) 599.

<sup>5</sup> *Littauer v. Goldman*, *supra* note 3 at 509; *Miller v. Dugan*, 36 Iowa 433, 437 (1873); *Findley v. Smith*, 43 W. Va. 90, 26 S. E. 370, 372 (1896); *Notes* (1889) 7 Am. St. Rep. 365; (1919) 2 A. L. R. 216, 220.

<sup>6</sup> *Supra* note 2.

<sup>7</sup> 73 Mass. 566 (1856).

<sup>8</sup> At page 573.

<sup>9</sup> The citation of *Eaton v. Mellus*, *supra* note 7, for such a holding may no doubt be accounted for as giving a meaning to some of the language used therein different from the one intended by the court. At page 571 the court says "... the defendants ... prevented the plaintiff from receiving ... the amount of the claim." *Prevented* as there used clearly had no reference to releasing security.

<sup>10</sup> 155 S. E. at 646.

<sup>11</sup> *Ex parte Goldberg & Lewis*, 191 Ala. 356, 67 So. 839 (1914), construes §52 as not excluding from the position of holder in due course all those who

arisen in West Virginia, but when it does this court will no doubt follow those authorities holding a payee can well be a holder in due course, and again refuse to follow the maxim *expressio unius est exclusio alterius*.

The court in the instant case seems to have gone too far, however, in holding that *A* would be liable even if the instrument was transferred as security for a loan made by *C* to *B*.<sup>12</sup> If the general common law view that the suit is not on the indorsement, but rests purely on a vendor's warranty,<sup>13</sup> be taken, there would have to be a sale.<sup>14</sup> If the rule laid down by some of the courts since the adoption of the N. I. L., that the warranties in §65 become a part of the contract of indorsement,<sup>15</sup> be accepted, failure of consideration would seem a good defense.<sup>16</sup>

Another problem involved in a construction of §65 as read in connection with §66 is whether the warranties listed run only to a holder in due course.<sup>17</sup> At least one court has expressed such an opinion.<sup>18</sup> The courts refusing to thus limit the indorser's liability seem to have the better position.<sup>19</sup> *A fortiori* the additional warranty implied in the present case should not be limited, because of anything in §66, to one who meets the technical qualifications of a holder in due course.

HUGH L. LOBDELL.

### Constitutional Law—Reckless Driving—Right of Trial by Jury.

Defendant, arrested for driving his automobile upon the streets of Washington at a speed greater than 22 miles per hour, and recklessly,

do not meet the qualifications laid down therein. *Liberty Trust Co. v. Tilton*, 217 Mass. 462, 105 N. E. 605 (1914), holds there are ways of negotiating paper other than those laid down in §30.

<sup>12</sup> There was evidence that *C* simply made a loan to his friend *B*, and that although the note was transferred to *C* as security, the loan was not made as consideration for the endorsement by *A*. A note on this case in (1931) W. VA. L. Q. 219 does not consider this point.

<sup>13</sup> *Challiss v. McCrum*, 22 Kan. 157 (1879).

<sup>14</sup> 1 WILLISTON, SALES (2d ed. 1924) §181; (1919) 29 YALE L. J. 102, 103. By §58 of the Bills of Exchange Act the warranties of a transferor by delivery run only to a "holder of value."

<sup>15</sup> *State Bank of Lehr v. Lehr Auto & Machine Co.*, 54 N. D. 608, 210 N. W. 89 (1926).

<sup>16</sup> *Easton v. Pratchett*, 2 Cr. M. & R. 542 (1835) (suit on general endorsement, plea of failure of consideration held good).

<sup>17</sup> BRANNON, NEGOTIABLE INSTRUMENTS LAW (4th ed. 1926) 608.

<sup>18</sup> *Moody v. Morris-Roberts Co.*, 38 Idaho 414, 226 Pac. 278 (1924).

<sup>19</sup> *State Bank of Lehr v. Lehr Auto & Machine Co.* *supra* note 15; *Citizens Bank & Trust Co. v. Cook*, 9 La. App. 458, 121 So. 306 (1928). *Drennan v. Bunn*, 124 Ill. 175, 16 N. E. 100 (1888), is a similar holding before the N. I. L.

so as to endanger property and individuals, demanded a jury trial. He was summarily tried by a police magistrate. From conviction he appealed, and the Supreme Court of the United States held that because the offense charged was a crime at common law the defendant could not be tried without a jury.<sup>1</sup>

English and American courts have long held that it is an indictable offense at common law to drive a vehicle so furiously and recklessly upon the streets of a city as to endanger property and individuals, and that one who kills another while so driving may be held for some degree of felonious homicide.<sup>2</sup>

The opinion of the court in the principal case is in accord with the overwhelming weight of American authority in its holding that, when one is charged with an offense which was triable by jury at common law, as it existed at the time of the adoption of the Constitution, he is entitled to a trial by jury. In numerous opinions by the State and Federal Courts it is held that the provisions of the Constitution must be interpreted in the light of the common law, or the law of the jurisdiction, at the time the Constitution was adopted.<sup>3</sup> Under this doctrine, an offense triable by jury at the time of the adoption of the Constitution must remain so triable regardless of legislative fiat until the Constitution is changed. But it would seem that in the absence of some provision of the constitutions which would go further than merely to stipulate that the right to trial by jury shall remain inviolate, or that the trial of all crimes shall be by jury, the legislature may provide for summary trial, without a jury, of any offense which was not a crime at common law, so long as the punishment provided for it is not such that the courts will hold it to be infamous in fact, or of such nature as to deprive the citizen of his liberty.<sup>4</sup>

ALLEN LANGSTON.

<sup>1</sup>District of Columbia, v. Colts, 282 U. S. 63, 51 Sup. Ct. 52, 75 L. ed. 54 (1930), noted in 65 U. S. L. REV. 66 (1931), 44 HARV. L. REV. 465 (1931).

<sup>2</sup>U. S. v. Hart, Pet. C. C. 390, 3 Wheeler Cr. Cas. 304, Fed. Cas. 15,316 (1817); State v. Battery, 65 Tenn. 545 (1873); Bowles v. District of Columbia, 22 App. D. C. 321 (1903); Regina v. Swindall, 2 Car. & K. 230 (1865); Rex v. Walker, 1 Car. & P. 320 (1865).

<sup>3</sup>Callan v. Wilson, 127 U. S. 540, 8 Sup. Ct. 1301, 32 L. ed. 223 (1888); Schick v. U. S., 195 U. S. 65, 24 Sup. Ct. 826, 49 L. ed. 99 (1905); Low v. U. S. 169 Fed. 86 (C. C. A. 6th, 1909); U. S. v. Jackson, 20 D. C. 424 (1892); *In re* Stephen Faulden, 20 D. C. 433 (1892); Bowden v. Nugent, 26 Ariz. 485, 226 Pac. 549 (1924); *Ex parte* Johnson, 13 Okla. Cr. 30, 161 Pac. 1097 (1917); State v. Conlin, 27 Vt. 318 (1855).

<sup>4</sup>U. S. v. Herzog, 20 D. C. 430 (1892); State v. Rodgers, 91 N. J. Law 212, 102 Atl. 433 (1917); State v. Conlin, *supra*, note 3; Frankfurter and Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury* (1926) 29 HARV. L. REV. 917; Note (1930) 18 GEO. L. REV. 374.

**Constitutional Law—Taxation—Corporations—Equal Protection.**

Corporations in North Carolina are subject to three major types of taxation,—franchise, income, and property taxes. A North Carolina statute<sup>1</sup> enacted in 1925 provides that individuals and corporations shall not be required to pay a property tax on their shares of stock in domestic corporations already subject to tax, and that individuals shall not be required to pay such tax on their stock in foreign corporations. In a Federal District Court case<sup>2</sup> plaintiff corporation filed a bill in equity to enjoin the defendant from enforcing a tax on its stock in a South Carolina corporation, alleging that the statute authorizing the tax is an unconstitutional discrimination against corporations. The court held the statute a violation of the equal protection clause of the Fourteenth Amendment and granted the injunction.

It is well to note that the principal case has been appealed to the Circuit Court of Appeals, where two questions additional to that of the constitutionality of the statute are to be argued by counsel: (1) Did the single District judge have jurisdiction to try the cause?<sup>3</sup> (2) Did the plaintiff have an adequate remedy at law?<sup>4</sup> This discussion will attempt only to deal with the merits of the case.

It is established that a corporation is a person within the meaning of the Fourteenth Amendment.<sup>5</sup> A state, however, has the power to classify and impose different burdens on different groups without infringing the equal protection guarantee, subject to the limitation that "the classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without such basis."<sup>6</sup> Taxation forms no exception to the power to classify, and examples of such classifications, both arbitrary and reasonable, are abundant. A license tax upon sugar refineries excepting

<sup>1</sup> N. C. ANN. CODE (Supp. 1929) §7880 (312).

<sup>2</sup> Garysburg Manufacturing Company v. Pender County, 42 F. (2d) 500 (E. D. N. C. 1930).

<sup>3</sup> See *The Three Judge Rule* (1929) 38 YALE L. J. 955; (1929) 43 HARV. L. REV. 321; (1930) 8 TEX. L. REV. 111.

<sup>4</sup> See *Henrietta Mills v. Rutherford County*, 281 U. S. 120, 50 Sup. Ct. 270, 74 L. ed. 737 (1930); Note (1929) 8 N. C. L. REV. 62.

<sup>5</sup> *Kentucky Finance Company v. Paramount Exchange*, 262 U. S. 544, 43 Sup. Ct. 636, 67 L. ed. 1112 (1923); Note 14 L. R. A. 579, 585 (1891); Note 60 L. R. A. 321 (1901).

<sup>6</sup> *Gulf, Colorado, and Sante Fe Railway v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. ed. 666 (1897); *Royster Guano Company v. Virginia*, 253 U. S. 412, 40 Sup. Ct. 560, 64 L. ed. 989 (1920).

planters and farmers refining their own sugar,<sup>7</sup> an excise tax on corporations where individuals and partnerships carrying on the same type of businesses are exempted,<sup>8</sup> a property tax on telephone companies exempting those whose annual income is less than \$500,<sup>9</sup> a tax on wholesale oil dealers where wholesale dealers in other commodities are not similarly taxed,<sup>10</sup> have all been held reasonable and valid classifications. On the other hand, a provision for the assessment of a property tax where all but railway companies were allowed to deduct outstanding debts against their property in assessing its value,<sup>11</sup> a tax on mortgages not maturing within five years from the date of recording exempting those maturing within five years,<sup>12</sup> a gross receipts tax on taxicab corporations where unincorporated businesses of the same type are exempt,<sup>13</sup> have been held arbitrary, unreasonable, and unconstitutional. Of particular interest in North Carolina are the Chain Store License Tax statutes of 1927 and 1929:<sup>14</sup> the first required that operators of six or more stores should pay a special license tax for each store, and was held void under the Fourteenth Amendment as well as under the state constitutional provision with reference to uniformity of taxation;<sup>15</sup> the second declared that operators of two or more stores should pay the tax, and was held a reasonable and valid classification.<sup>16</sup>

The constitutionality of the statute questioned in the principal case would seem to depend on whether its classification of corporations and individuals is based on some revelant and reasonable difference between the two groups. In *Fort Smith Lumber Company v. Ar-*

<sup>7</sup> *American Sugar Refining Company v. Louisiana*, 179 U. S. 89, 21 Sup. Ct. 43, 45 L. ed. 102 (1900).

<sup>8</sup> *Flint v. Stone, Tracy Company*, 220 U. S. 107, 31 Sup. Ct. 342, 55 L. ed. 389, Ann. Cas. 1912B 1312 (1911).

<sup>9</sup> *Citizen's Telephone Company of Grand Rapids v. Fuller*, 229 U. S. 322, 33 Sup. Ct. 833, 57 L. ed. 1206 (1913).

<sup>10</sup> *Southwestern Oil Company v. Texas*, 217 U. S. 114, 30 Sup. Ct. 496, 54 L. ed. 688 (1913).

<sup>11</sup> *Railroad Tax Cases*, 13 Fed. 722 (D. Cal. 1882); cf. *Santa Clara County v. Southern Pacific Railway*, 18 Fed. 385 (D. Cal. 1883).

<sup>12</sup> *Louisville Gas Company v. Coleman*, 277 U. S. 32, 48 Sup. Ct. 423, 72 L. ed. 770 (1928).

<sup>13</sup> *Quaker City Cab Company v. Pennsylvania*, 277 U. S. 389, 48 Sup. Ct. 553, 72 L. ed. 927 (1928).

<sup>14</sup> N. C. PUB. LAWS (1927), c. 80, §162, and N. C. PUB. LAWS (1929), c. 345, §162.

<sup>15</sup> *The Great Atlantic and Pacific Tea Company et al v. Doughton*, 196 N. C. 145, 144 S. E. 701 (1928); Becker and Hess, *The Chain Store License Tax and the Fourteenth Amendment* (1929) 7 N. C. L. REV. 115.

<sup>16</sup> *The Great Atlantic and Pacific Tea Company v. Maxwell*, 199 N. C. 433, 154 S. E. 838 (1930); and see 31 COL. L. REV. 145 (1931); 40 YALE L. J. 431 (1931); 9 N. C. L. REV. 64 (1930).

*kansas*<sup>17</sup> the Supreme Court of the United States (four Justices dissenting) holds with regard to a similar discrimination that "it is within the power of a state, so far as the Constitution is concerned, to tax its own corporations in respect to stock held by them in other domestic corporations although unincorporated stockholders are exempt." In *Quaker City Cab Company v. Pennsylvania*,<sup>18</sup> which the principal case cites as its chief authority, the same court (three Justices dissenting) holds invalid a statute subjecting all corporations operating taxicabs to a tax on their annual gross receipts. The two cases, on principle, are difficult to distinguish. It would seem that every case must be considered on its own merits; once it is determined that a discrimination between "persons" exists, the consideration is, is there a reasonable ground for the discrimination? The answer in each case depends largely upon the court's interpretation of the demands of public policy.<sup>19</sup>

J. G. ADAMS, JR.

### Criminal Law—Double Jeopardy in Sale of Narcotics.

Defendant was indicted on two counts for the sale of an ounce of heroin. The first count charged that he made the sale without being registered and without having paid the special tax; the second charged that he made the sale (of the same ounce) without requiring from the purchaser a written order issued in blank by the Commissioner of Revenue. Defendant was sentenced to five years imprisonment on the first count and four years on the second. Having served the sentence imposed under the first count, he brought a writ of habeas corpus on the ground that the two counts charged a single offence. From an order refusing the writ, petitioner appealed. *Held*, Reversed as being two convictions for the same offence in violation of the double jeopardy clause of the Constitution.<sup>1</sup>

The Harrison Narcotic Act of 1914<sup>2</sup> provided that "every person who imports, manufactures, produces, compounds, sells, deals in, dis-

<sup>17</sup> 251 U. S. 532, 40 Sup. Ct. 304, 64 L. ed. 396 (1920).

<sup>18</sup> *Supra* note 13; cf. *Illinois v. Franklin National Insurance Co.*, (Ill.) 5 U. S. DAILY 3976 (Feb. 27, 1931).

<sup>19</sup> On the appeal of the principal case the contention will be made by appellant that the tax is one on the value of the capital stock of the appellee corporation rather than on its property as such, and that the classification is consequently valid. It is difficult, however, for the writer to see the tax as anything other than a direct property tax to which individuals and corporations might be subjected with equal convenience and reason.

<sup>1</sup> *Ballerini v. Aderholt*, 44 F. (2d) 352 (C. C. A. 5th, 1930).

<sup>2</sup> 38 STAT. 785, 26 U. S. C. A. §211 (1927).

penses, or gives away opium" or any derivative thereof shall register and pay a special tax. Under this act it was held that the mere possession of a small amount of opium for personal use was not an offence.<sup>3</sup> Further, "every person" was construed not to mean every person in the United States, but only the class with which the statute undertook to deal (importers, vendors, etc.)<sup>4</sup> It was considered to be strictly a revenue measure, even though it might have a moral end in view. In 1919 the Act was amended to read, "it shall be unlawful for any person to purchase, sell, dispense, or distribute. . . .,"<sup>5</sup> and this amended portion of the Act has been construed to the effect that "any person," to be criminally liable, need not be of the class required to register.<sup>6</sup> The amended Act further requires that books be kept, that sale be only upon written order on furnished blank forms, and that possession or control of any of these drugs by a person not registered shall be presumptive evidence of violation of the statute.<sup>7</sup> Obviously, possession without registration is an offence under the Act.<sup>8</sup> It is equally clear that a sale without registration is an offence.<sup>9</sup> But, in conjunction with each other, do they constitute one or two offences? Suppose the sale is to a purchaser who does not furnish the requisite written order. This is a separate offence. But, in the instant case, the Court held that each successive step was but a mere incident included in the completed transaction so as to constitute only one criminal act. This position is not without support,<sup>10</sup> but it is believed that the weight of authority is to the contrary.<sup>11</sup> The Su-

<sup>3</sup> U. S. v. Wilson, 225 Fed. 82 (W. D. Tenn. 1915).

<sup>4</sup> U. S. v. Jin Fuey Moy, 241 U. S. 394, 36 Sup. Ct. 658, 60 L. ed. 1061 (1916).

<sup>5</sup> 40 STAT. 1130, 26 U. S. C. A. §§692-705 (1927).

<sup>6</sup> U. S. v. Wong Sing, 260 U. S. 18, 43 Sup. Ct. 7, 67 L. ed. 105 (1922); Fyke v. U. S., 254 Fed. 225 (C. C. A. 7th, 1918); Braden v. U. S., 270 Fed. 441 (C. C. A. 8th, 1920).

<sup>7</sup> 40 STAT. 1130, 26 U. S. C. A. §§692-704 (1927), §705 reads: "Any person who violates or fails to comply with any of the requirements of sections 211 and 691 to 707 of this title shall, upon conviction, be fined not more than \$2000. or be imprisoned not more than five years, or both, in the discretion of the court."

<sup>8</sup> Casey v. U. S., 20 F. (2d) 752 (C. C. A. 9th, 1927); Brown v. U. S., 22 F. (2d) 293 (C. C. A. 7th, 1927).

<sup>9</sup> Solomon v. U. S., 26 F. (2d) 554 (C. of A. D. C. 1928); McIntosh v. White, 21 F. (2d) 934 (C. C. A. 8th, 1927); Vlassis v. U. S., 3 F. (2d) 905 (C. C. A. 9th, 1925); Taylor v. U. S., 19 F. (2d) 813 (C. C. A. 8th, 1927).

<sup>10</sup> Munson v. McClaughry, 198 Fed. 72 (C. C. A. 8th, 1912); Tritico v. U. S., 4 F. (2d) 664 (C. C. A. 5th, 1925); Patilo v. U. S., 7 F. (2d) 804 (C. C. A. 8th, 1925); U. S. v. Curtis, 229 Fed. 288 (N. D. N. Y., 1916); *Ex parte* Neilson, 131 U. S. 176, 9 Sup. Ct. 672, 33 L. ed. 118 (1888); State v. Cross, 101 N. C. 770, 7 S. E. 715 (1888).

<sup>11</sup> Morgan v. Devine, 237 U. S. 632, 35 Sup. Ct. 712, 59 L. ed. 1153 (1915); Sam Wong v. U. S., 2 F. (2d) 969 (C. C. A. 9th, 1925); Perez v. U. S., 10 F.



preme Court has said that the correct test is not the transaction as a whole but whether or not the separate acts have been committed with the requisite criminal intent and are such as are made punishable by Congress.<sup>12</sup> The fact that the two charges relate to and grow out of one transaction does not make a single offence where two are defined by the statutes.<sup>13</sup>

The prohibition and narcotic statutes are closely parallel in tone and scope.<sup>14</sup> Perhaps the greater moral turpitude is involved in the violation of the latter statute. And yet, the prohibition cases have almost uniformly held that the violation of any one of the provisions of the statute (manufacture, possession, sale, and transportation) is a separate and distinct offence.<sup>15</sup> In a recent case the Supreme Court said, "The possession and sale of liquor are distinct offences. One may obviously possess without selling, and one may sell and cause to be delivered a thing of which he has never had possession; or one may have possession and later sell, as appears to have been done in this case. The fact that the person sells the liquor which he possessed does not render the possession and the sale necessarily a single offence. There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction.<sup>16</sup> It would appear that one act may be an offence against two statutes.<sup>17</sup> Similarly, related portions of the same transaction may be broken into different offences under different statutes.<sup>18</sup> It has been held that if each statute requires proof of an additional fact which the other does not, then an acquittal or conviction under either statute does not bar prosecution and punishment under the other.<sup>19</sup>

(2d) 352 (C. C. A. 9th, 1926); *Greenberg v. U. S.*, 285 Fed. 865 (C. C. A. 8th, 1923); *Loewenthal v. U. S.*, 274 Fed. 563 (C. C. A. 6th, 1921); Note (1925) 39 A. L. R. 236.

<sup>12</sup> *Morgan v. Devine*, *supra* note 9.

<sup>13</sup> *Gavieres v. U. S.*, 220 U. S. 338, 31 Sup. Ct. 421, 55 L. ed. 489 (1911).

<sup>14</sup> Compare: 40 STAT. 1130, 26 U. S. C. A. (1927) §§692-707 and 41 STAT. 305, 27 U. S. C. A. (1927) §12 *et seq.*

<sup>15</sup> *Albrecht v. U. S.*, 273 U. S. 1, 47 Sup. Ct. 250, 71 L. ed. 505 (1926); *Hilt v. U. S.*, 12 F. (2d) 504 (C. C. A. 5th, 1926); *Melendez v. U. S.*, 15 F. (2d) 770 (C. C. A. 1st, 1926); *Ex parte Poole*, 273 Fed. 623 (D. Mont. 1921); *Beyer v. U. S.*, 282 Fed. 225 (C. C. A. 3rd, 1922); *Earl v. U. S.*, 4 F. (2d) 532 (C. C. A. 9th, 1925).

<sup>16</sup> *Albrecht v. U. S.*, *supra* note 15.

<sup>17</sup> *Ex parte Neilson*, *supra* note 8.

<sup>18</sup> *Burton v. U. S.*, 202 U. S. 344, 26 Sup. Ct. 688, 50 L. ed. 1057 (1905).

<sup>19</sup> *Morey v. Commonwealth*, 108 Mass. 433 (1871), cited with approval in *Carter v. McClaghry*, 183 U. S. 365, 395, 22 Sup. Ct. 181, 46 L. ed. 236 (1901).

It is respectfully submitted that the purpose of the Act<sup>20</sup> was only partially fulfilled and that in the light of the tendency expressed by the Supreme Court it would appear that the writ might justifiably have been denied.<sup>21</sup>

C. E. REITZEL.

### Garnishment—Prior Mailing of Check to Principal Debtor as Bar.

An attorney collected funds for his client and remitted by his personal certified check. He was served with summons of garnishment by a creditor of the client after the check had been mailed but not too late for him to have reclaimed it from the local post office. *Held*, the debt had not been paid, in absence of an agreement with the client, and the attorney was subject to the garnishment.<sup>1</sup>

Garnishment is a statutory remedy designed to make all the effects of the debtor available to satisfy his debts, in so far as that can be done without discouraging the debtor's industry or embarrassing commercial transactions.<sup>2</sup> The garnishing creditor is subrogated to the rights of the principal debtor where consonant with this policy.

A small minority at one time went so far in aid of the creditor as to permit the garnishment of the maker of an outstanding negotiable instrument.<sup>3</sup> Today, however, it must be affirmatively shown that the instrument has become due and is still the property of the principal debtor before the maker may be garnished.<sup>4</sup> The modern trend is away from going too far in aid of the creditor,<sup>5</sup> and so we find

<sup>20</sup> While the Narcotic Act is a revenue measure, it was also intended to suppress the unauthorized dissemination of habit-forming drugs. *Lowe v. Farbwerke-Hoechst Co.*, 240 Fed. 671 (C. C. A. 2nd., 1917); *Trader v. U. S.*, 260 Fed. 923 (C. C. A. 3rd, 1919), certiorari denied in 251 U. S. 555, 40 Sup. Ct. 119, 64 L. ed. 412 (1919).

<sup>21</sup> Note (1925) 39 A. L. R. 240.

<sup>1</sup> *McIntire v. Raskin*, 155 S. E. 799 (Ga. App. 1930).

<sup>2</sup> (1908) 7 MICH. L. REV. 56.

<sup>3</sup> *Steuart v. West*, 1 Harris and Johnson 536 (Md. 1804); *Somerville v. Brown*, 5 Gill 399 (Md. 1847) (Maker, garnishee, no longer liable on the note even to a subsequent holder in due course); *Quarles v. Porter*, 12 Mo. 76 (1848); *Colcord v. Daggett*, 18 Mo. 557 (1853) (If maker, garnishee has to pay the garnishing creditor then he is indemnified against a holder in due course who must resort to the garnishing creditor). Disapproved and authorities *contra* cited, *DRAKE, ATTACHMENT* (1854) §585 *et seq.*

<sup>4</sup> *Knapp v. Gray*, 153 Ark. 160, 239 S. W. 757 (1922); *Wilson v. McEachern*, 9 Ga. App. 584, 71 S. E. 946 (1911); 1 DANIEL, *NEGOTIABLE INSTRUMENTS* (6th ed. 1919) §800A. But *cf.* *Kirby Planing Mill Co. v. Titus*, 14 Ga. App. 1, 80 S. E. 18 (1913); *Ormond v. Moye*, 33 N. C. 564 (1850); *Oakdale Mfg. Co. v. Clarke*, 29 R. I. 192, 69 Atl. 681 (1908) (Overdue note still in the hands of the payee is not garnishable), (1908) 7 MICH. L. REV. 56.

<sup>5</sup> *Pickering v. Hartcock*, 221 Mo. App. 868, 287 S. W. 819 (1926), (1927) 40 HARV. L. REV. 784.

that he is not given the quasi-contractual rights of the principal debtor.<sup>6</sup> Likewise, where an employer, after service of the garnishment, pays wages in advance to avoid the garnishment, such payment is valid since at no time thereafter was the employer indebted to the principal debtor.<sup>7</sup> Thus the letter of the garnishment statute is complied with but the spirit is evaded. There have also been direct encroachments upon the scope of garnishment proceedings by statutes<sup>8</sup> and the proposed uniform bank collection act reveals this trend.<sup>9</sup> Under this act collection items are given priority over garnishments in order to avoid all possible litigation and so are deemed payable at the earliest practicable point.

When a check has been delivered to the principal debtor it is conditional payment till dishonored<sup>10</sup> and the drawer in the meantime is not garnishable and neither is he under any duty to stop payment.<sup>11</sup> The exact point of delivery is often difficult to determine, however, and we are faced with three possible situations, to wit, (1.) the garnishee has possession and is clearly subject to garnishment; (2.) the garnishee's agent has custody and the garnishee is required to use reasonable diligence to intercept it;<sup>12</sup> (3.) the check has been mailed. In this last situation, if the course of business between the parties impliedly authorizes such procedure, then the title is held to pass at the moment of mailing<sup>13</sup> and so should not be subject to garnishment. In other fields of the law there are analogies. The acceptance of a

<sup>6</sup> *Johnson v. Healey*, 35 R. I. 192, 85 Atl. 938 (1913); Note (1919) 2 A. L. R. 506. But cf. N. C. ANN. CODE (Michie, 1927) §823.

<sup>7</sup> *Steiner v. Bank of Montgomery*, 115 Ala. 575, 22 So. 72 (1897); *Holmberg v. General Electric Co.*, 211 Ill. App. 301 (1918); *Wilt v. Hartman Trunk Co.*, 215 Ill. App. 182 (1920); *Melin v. Stuart*, 119 Minn. 539, 138 N. W. 281 (1912).

<sup>8</sup> N. C. ANN. CODE (Michie, 1927) §721 (Exempts earnings for personal services for the sixty days next preceding, where necessary for the support of dependents), *Goodwin v. Claytor*, 137 N. C. 224, 49 S. E. 173, 67 L. R. A. 209 (1904); *Gardner v. Pioneer-Pacific Worsted Co.*, 288 Pac. 818 (Cal. App. 1930) (Garnishee only liable for debt owed at the time of serving garnishment and not for subsequent indebtedness). But cf. N. C. ANN. CODE (Michie, 1927) §819; *Goodwin v. Claytor*, *supra*; *Farley v. Colver*, 113 Md. 379, 77 Atl. 589 (1910) (Garnishee liable for debt owed at the time served but also liable for any debt due before trial and judgment).

<sup>9</sup> REPORT OF COMMITTEE ON A UNIFORM ACT ON COLLECTION BY BANKS (1929) §20; R. B. Turner, *Bank Collections* (1930) 39 YALE L. J. 468, 481.

<sup>10</sup> 2 MORSE, BANKS AND BANKING (6th ed. 1928) §546.

<sup>11</sup> *Swope v. McClure*, 239 Ill. App. 578 (1926); *Prewitt v. Brown*, 101 Mo. App. 254, 73 S. W. 897 (1903); *Ex parte Richdale. In re Palmer*, 19 Ch. Div. 409 (1882). But cf. *Alexiou v. Bridgeport Savings Bank*, 148 Atl. 374 (Conn. 1930), (1930) 78 PA. L. REV. 789.

<sup>12</sup> *Binkley v. Clay*, 112 Ill. App. 332 (1904).

<sup>13</sup> *Canterbury v. Bank of Sparta*, 91 Wis. 53, 64 N. W. 311 (1895).

contract is held to be from the time of mailing<sup>14</sup> and, likewise, an assignment dates from the time of mailing.<sup>15</sup>

Even if it be admitted that there has been no technical delivery,<sup>16</sup> the law should not aid a garnishing creditor to the extent of embarrassing business dealings by subjecting the garnishee to the hazards of litigation and by requiring him to draw fine distinctions between points of delivery.<sup>17</sup> If the garnishee's liability depends on whether or not he could have retrieved his check from the local post office, the question will have to be left to the jury with all the uncertainty involved. Why stop with the local post office when it can also be retrieved further along? Should the line be drawn at time of mailing, time of leaving local office,<sup>18</sup> time of arrival at terminal post office, or after it gets in the mail carrier's bag?

In view of analogies in other fields of the law, the ease and practicability of application, and the stability and certainty obtained, it is submitted that the time of mailing should close the door for garnishment.

HUGH BROWN CAMPBELL.

#### **Personal Property—Pledges—Effect of Delivery on Rights of Parties and Third Persons.**

Within an interval of three days, two apparently conflicting decisions involving the rights of a pledgee in goods retained by the pledgor were handed down by Georgia courts. On July 18, 1930, the Supreme Court held that a creditor, who had advanced money on the debtor's agreement that a quantity of hay and livestock on his farm should be security for the debt, was not entitled to an order restraining the debtor from disposing of the property.<sup>1</sup> On July 21, 1930, the Court of Appeals held that a creditor whose debt was secured by a note, remaining with the debtor for collection, had sufficient interest in the note to maintain an action for its conversion by a stranger.<sup>2</sup> In both cases the question was whether the given trans-

<sup>14</sup> *Adams v. Lindsell*, 1 B. & Ald. 681 (1818); 1 WILLISTON, CONTRACTS (1920) §81.

<sup>15</sup> *Dargan v. Richardson*, 1 Cheves' L. Reports 198 (S. C. 1840).

<sup>16</sup> *Watt-Harley-Holmes Hdw. Co. v. Day*, 1 Ga. App. 646, 57 S. E. 1033 (1907).

<sup>17</sup> *Cf. Kullberg Mfg. Co. v. Smith*, 173 Minn. 504, 218 N. W. 99, 101 (1928).

<sup>18</sup> POSTAL LAWS AND REGULATIONS OF THE U. S. A. (1924) 535, 536; *cf.* 1 WILLISTON, CONTRACTS (1920) §86.

<sup>1</sup> *Williams v. Williams*, 170 Ga. 814, 154 S. E. 260 (1930).

<sup>2</sup> *Carpenter v. Williams*, 41 Ga. App. 685, 154 S. E. 298 (1930).

action constituted a valid pledge between the parties, and the contrary results reached illustrate distinct stages in the development of the law of pledges.

The holding in the first case rests on the original conception of a pledge as a manual transfer of personal property from the pledgor to the pledgee.<sup>3</sup> But the requirement that there be an actual delivery has undergone substantial modification. The doctrine of constructive delivery dispensed with an actual delivery in the case of articles too bulky to be conveniently carried from one place to another.<sup>4</sup> Statutes have provided for symbolic delivery, which substitutes for an actual delivery of the thing pledged a delivery of something representing it,<sup>5</sup> as a warehouse receipt for goods stored in the warehouse.<sup>6</sup>

The corollary of the actual delivery requirement, that the pledgee must remain in possession of the pledge to retain his lien,<sup>7</sup> has been amplified to a similar extent. The pledgee may, of course, possess through an agent. When the agent is a third person, there is little difficulty<sup>8</sup> and this is true even when the third person is an employee of the pledgor.<sup>9</sup> But when the pledgor is himself the agent to hold for the pledgee, the cases should be considered in two classes—those in which the controversy is between the parties, and those in which the rights of third persons intervene. In the first class of cases there seems to be no real objection to the pledgor's holding the pledge for the pledgee. The formal requirement that the pledgee have posses-

<sup>3</sup>The First Nat. Bank of Macon v. Chas. Nelson & Co., 38 Ga. 391, 95 Am. Dec. 400 (1868) (attempted pledge of whiskey in debtor's store invalid); Propst v. Roseman, 49 N. C. 130 (1856) (agreement that slave on creditor's farm be security for debt held invalid for lack of delivery); Owens v. Kinsey, 52 N. C. 245 (1859) (anchor lost in Currituck Sound not pledged because not delivered); Milling Co. v. Stevenson, 161 N. C. 510, 77 S. E. 676 (1913) (piling cases of tomatoes in separate piles in debtor's warehouse insufficient delivery).

<sup>4</sup>*Ex parte Fitz*, 9 Fed. Cas. 4, 837 (D. Mass. 1876) (pledge of locomotive engine).

<sup>5</sup>N. C. ANN. CODE (Michie, 1927) (warehouseman has possession of goods for holder of negotiable receipt).

<sup>6</sup>Citizens Banking Co. v. Peacock, 103 Ga. 171, 29 S. E. 752 (1897) (warehouse receipt symbolical of cotton). See NOTE (1931) 19 CAL. L. REV. 333, discussing practice of "Field Warehousing."

<sup>7</sup>Geddes v. Bennett, 6 La. Ann. 516 (1851) (removal of whiskey from independent warehouse to pledgor's store divested pledgee's lien); Barrett v. Cole, 49 N. C. 40 (1856) (creditor immediately returned horse to debtor).

<sup>8</sup>Pierce v. Nat. Bank of Commerce, 268 Fed. 487 (C. C. A. 8th, 1920) (second pledge made while bonds in possession of first pledgee).

<sup>9</sup>Manufacturers' & Traders' Nat. Bank v. Gilman, 7 F. (2d) 94 (C. C. A. 1st, 1925) (general manager of debtor appointed trustee of creditor to hold engines stored in debtor's warehouse).

sion may be satisfied by the pledgor's acting as the pledgee's agent.<sup>10</sup> The object of the requirement, that the pledgor be prevented from defrauding innocent persons by virtue of his apparent title,<sup>11</sup> offers no obstacle as the rights of third persons are not in issue. A court adopting this attitude says that as between the parties the "possession" is where the contract places it.<sup>12</sup> Perhaps instead of thus straining the conception of possession it might be franker to say that as between the parties the pledge is good without possession.<sup>13</sup>

As contrasted to this tenuous compliance with the rule that the pledgee personally or through an agent must retain possession, some courts have made an exception. This exception applies when the pledgor admittedly has possession, but the possession must be for a "special purpose."<sup>14</sup> The phrase, "special purpose," as found in the opinions suggests that the exception was first made in view of unusual circumstances, where the necessity of the bailment elicited the sympathy of the court. But the meaning of "special purpose" in later cases seems to embrace any purpose at all. This enlarged exception can be justified in the first class of cases on the same grounds as the doctrine which, as between the parties, deems the possession to be where the contract places it, but as applied to the second class

<sup>10</sup> *Reeves v. Capper*, 5 Bing. N. C. 136 (1838) (pledgor used chronometer on voyage); *Ruff v. Anderson*, 145 Ga. 83, 88 S. E. 545 (1915) (pledge of future profits of grist mill gave pledgee equitable lien); *Davis v. Billings*, 254 Pa. 547, 99 Atl. 163 (1916) (cars remained in pledgor's storeroom); *Brown Co. v. Harris*, 88 S. C. 558, 70 S. E. 802 (1911) (pledgee had equitable lien on cotton remaining in pledgor's factory). *Contra*: *Huntington v. Sherman*, 60 Conn. 463, 22 Atl. 769 (1891) (tools remaining in pledgee's shop).

<sup>11</sup> *Casey v. Cavorac*, 96 U. S. 467, 24 L. ed. 779 (1877) (pledgor's retaining collateral gave no notice of pledge); *Huntington v. Clemence*, 103 Mass. 482 (1870) (secret agreement is evasion of laws respecting pledges); *Castello v. Jenkins*, 186 N. C. 166, 119 S. E. 202 (1923) (requirement that pledgee retain possession to prevent fraud and deception).

<sup>12</sup> *Keiser v. Topping*, 72 Ill. 226 (1874) (tile remained in pledgor's yards).

<sup>13</sup> *Live Stock State Bank v. Doyle*, 292 Fed. 465 (C. C. A. 8th, 1923) (unconditional delivery of certificate to pledgor because pledgee thought debt was paid).

<sup>14</sup> *Way v. Davidson*, 78 Mass. 465 (1859) (pledgor to substitute another note for the one pledged); *Clark v. Corser*, 154 Minn. 508, 191 N. W. 917 (1923) (redelivery of car to be revarnished and displayed for sale); *McClung v. Colwell*, 107 Tenn. 594, 64 S. W. 890 (1901) (pledgor to exchange pledged stock for stock in new corporation); *Lippman v. Ross*, 130 Wash. 319, 226 Pac. 1017 (1924) (pledgor to sell); *Darragh v. Elliotte*, 215 Fed. 340 (C. C. A. 6th, 1914) (for purpose of storage, displaying and selling); *Martin v. Reid*, 11 C. B. (N. S.) 730 (1862) (cart remained in pledgor's stable as pledgee had no place to put it); *Live Stock State Bank v. Doyle*, *supra* note 13 (no purpose—mistake).

of cases it may run counter to the policy of avoiding a fraudulent use of the pledgor's appearance of ownership.<sup>15</sup>

The fact that the pledgor had possession of the pledge for a purpose would not necessarily inform third persons dealing with him of the pledgee's claim. It seems that whether the bailment is for a purpose or not, the validity of the pledge as it affects third persons should depend on whether the situation was such as to give notice of the claim rather than on the reasons for the bailment.

The second of the Georgia decisions embodies the extensions of the strict rule laid down in the first case. It is interesting to note that this application of the strict and the amplified rules was made in the same jurisdiction within less than a week.

W. T. COVINGTON, JR.

### Practice and Procedure—Motions to Set Aside Verdict— Insufficient Evidence.

In a recent action<sup>1</sup> for personal injury, the defendant made a motion of non-suit at the conclusion of the plaintiff's evidence and again at the conclusion of all the evidence. Each motion was denied and exceptions taken. There was a verdict for the plaintiff and upon the defendant's motion the judge set aside the verdict as a matter of law because of the insufficiency of the evidence. On appeal, the order setting aside the verdict was reversed and the case remanded for further proceedings.

The authority of a trial judge to set aside a verdict is unquestioned.<sup>2</sup> If he sets it aside as a matter of law an appeal may be had; if he sets it aside in his discretion no appeal is allowed, but a new trial is to be had.<sup>3</sup> The distinction between grounds on which a judge may set aside a verdict as a matter of law and in his discretion has never been clearly defined. Mr. Justice Connor touches on it in *Abernathy v. Yount*,<sup>4</sup> holding that the verdict should be set aside as a matter of law for errors appearing on the record, and as a matter of discretion when the errors do not appear of record, as the conduct of jurors, witnesses, etc. He states that setting aside a verdict for in-

<sup>15</sup> *Bodenhammer v. Newsom*, 50 N. C. 107 (1857) (delivery to pledgor not good against third person).

<sup>1</sup> *Godfrey v. Queen City Coach Co.*, 200 N. C. 41, 156 S. E. 139 (1930).

<sup>2</sup> N. C. ANN. CODE (Michie, 1927) §591.

<sup>3</sup> *State v. Kiger*, 115 N. C. 746, 20 S. E. 456 (1894); *Abernathy v. Yount*, 138 N. C. 337, 50 S. E. 696 (1905); *Ferrall v. Ferrall*, 153 N. C. 174, 69 S. E. 60 (1910); *Likas v. Lackey*, 186 N. C. 398, 119 S. E. 763 (1923).

<sup>4</sup> *Supra*, note 3.

sufficient evidence is a matter within the judge's discretion; and other cases adopt that view.<sup>5</sup>

If it was error for the trial judge to set the verdict aside as a matter of law what is the practice on appeal? The Supreme Court in the instant case vacated the order setting the verdict aside and sent the case back, with the verdict standing, for further proceedings. It is presumed that the judge will sign a judgment for the plaintiff on the verdict. May the defendant then appeal on his exceptions taken during the progress of the trial? It seems so, since he has not been heard on his exceptions, and the appellate court did not order a new trial. Ordinarily there may be only one appeal from one trial, but the language in the case of *Vann v. Edwards*<sup>6</sup> as to the rights of the parties to appeal on a point not covered on the first appeal is broad enough to cover this case, even though a second trial had intervened in that case. However, it would seem a better practice to follow the opinion in *Powell v. City of Wilmington*<sup>7</sup> where the court says that on an appeal from setting aside a verdict as a matter of law the plaintiff should incorporate the defendant's exceptions with his own so that the whole case can be decided on one appeal. A statute permitting the Supreme Court to render final judgments<sup>8</sup> seems to contemplate such a practice. Suppose in the instant case there had been no exceptions taken during the progress of the trial except to refusals to grant motions of non-suit. If the defendant is allowed to appeal on those grounds the court will have before it the very question the parties tried to get it to consider on the first appeal, *i.e.*, the sufficiency of the evidence. It is submitted that all exceptions should be required to be presented on an appeal, and all exceptions not so presented be deemed to have been waived.

The instant case presents another interesting problem. Our court has held on numerous occasions that a judge's refusal to grant a motion of non-suit at the conclusion of the plaintiff's evidence and again at the conclusion of all the evidence is conclusive.<sup>9</sup> He may not again rule on the sufficiency of the evidence by setting the verdict aside as a matter of law. May he, in his discretion, set it aside for insufficient evidence after having refused the usual motions of non-suit?

<sup>5</sup> *State v. Kiger*, *supra* note 3; *Lee v. Penland*, 200 N. C. 340 (1931).

<sup>6</sup> *Vann v. Edwards*, 135 N. C. 661, 47 S. E. 784 (1904).

<sup>7</sup> *Powell v. City of Wilmington*, 177 N. C. 361, 99 S. E. 102 (1919).

<sup>8</sup> N. C. ANN. CODE (Michie, 1927) §658.

<sup>9</sup> *Stith v. Lookabill*, 71 N. C. 25 (1874); *Riley v. Stone*, 169 N. C. 421, 86 S. E. 348 (1915).



If he may do so he is permitted to rule on the sufficiency of the evidence a third time. If he has not previously passed on a motion of non-suit he may set the verdict aside for insufficient evidence.<sup>10</sup> There is a dictum<sup>11</sup> to the effect that he may set it aside in his discretion if he has previously passed on the motions of non-suit.<sup>12</sup> Thus if the trial judge in the instant case felt that he had erred in letting the case go to the jury he should have set aside the verdict in his discretion. It is conceivable that the Supreme Court might have sent the case back for a new trial on the theory that since the judge had attempted to set the verdict aside as a matter of law for insufficient evidence he was of the opinion that the plaintiff should not recover on the evidence, and that he would now set the verdict aside in his discretion, requiring a new trial, if opportunity to entertain that motion (which must be made at the trial term) had not been lost. No case seems to have been settled in exactly that manner, but several show an inclination in that direction.<sup>13</sup>

Our court does not favor a trial judge's setting aside his verdict as a matter of law for it works a hardship on the plaintiff in that it requires him to appeal from a verdict in his favor.<sup>14</sup> The better practice is to enter judgment on the verdict and let the dissatisfied party appeal on his exceptions. If such party has not taken his exceptions at the proper time the trial judge might then set the verdict aside in his discretion, if to do so would prevent injustice. A verdict should never be set aside for "errors in law" unless those errors are specified.

The difficulties of this and many other recent cases can be avoided if counsel and trial judges keep in mind just what motions may be made after verdict is rendered. They are as follows:

(1) To set aside the verdict as a matter of law, from which an appeal may be taken<sup>15</sup> (this motion is not favored by the Supreme Court).

(2) To set aside the verdict in the trial judge's discretion, from which no appeal may be had.<sup>16</sup>

<sup>10</sup> *Jernigan v. Neighbors*, 195 N. C. 231, 141 S. E. 586 (1928); *Morgan v. Owen*, 200 N. C. 34, 156 S. E. 161 (1930); *Lee v. Penland*, 200 N. C. 340 (1931).

<sup>11</sup> *State v. Kiger*, *supra* note 3.

<sup>12</sup> See *Abernathy v. Yount*, *supra* note 3, construing N. C. ANN. CODE (*Michie*, 1927) §591.

<sup>13</sup> All, *supra* note 10.

<sup>14</sup> *Powell v. City of Wilmington*, *supra* note 7.

<sup>15</sup> All, *supra* notes 2 and 3.

<sup>16</sup> All, *supra*, notes 2 and 3.

(3) By the plaintiff for verdict *non obstante veredicto* when the defendant has confessed the plaintiff's pleadings and set up an avoidance insufficient in law.<sup>17</sup>

(4) To grant motion to dismiss for want of jurisdiction.<sup>18</sup>

(5) Or for plaintiff's failure to state a cause of action.<sup>19</sup>

HENRY BRYCE PARKER.

### Real Property—Joint Transfer of Estate by Entireties as Fraudulent Conveyance.

In a recent North Carolina case,<sup>1</sup> an insolvent debtor procured his wife to join him in conveying their estate by entirety to their granddaughter. It was his purpose by the conveyance to defeat the rights of judgment creditors to have the land sold under execution for satisfaction of a judgment rendered against him, in the event he should become the owner of the land by survivorship. Plaintiff, the judgment creditor, sought to have the court declare the deed void, as to the plaintiff, and that the land be subjected to the payment of a judgment now owned by the plaintiff against the husband. *Held*, plaintiffs are not entitled to the relief demanded in this action, and the conveyance is valid to pass fee simple.

When land is conveyed or devised to husband and wife as such, they take the estate as tenants by the entirety,<sup>2</sup> and a conveyance by one without joinder of the other is void.<sup>3</sup> It is elementary that in North Carolina this estate still possesses the same incidents and properties as it did at common law.<sup>4</sup> The incident germane to the present discussion is that, although the husband has a right to the usufruct—

<sup>17</sup> *Shives v. Cotton Mills*, 151 N. C. 290, 66 S. E. 141 (1909).

<sup>18</sup> *Rankin v. Oates*, 183 N. C. 517, 112 S. E. 32 (1922); *Shives v. Cotton Mills*, *supra* note 17; *Riley v. Stone*, *supra* note 9.

<sup>19</sup> *All*, *supra* note 18.

<sup>1</sup> *Winchester Simmonds Co. et al. v. Cutler et al.*, 199 N. C. 709, 155 S. E. 611 (1930).

<sup>2</sup> *Harrison v. Ray*, 108 N. C. 215, 12 S. E. 993, 23 Am. St. Rep. 57, 11 L. R. A. 722 (1891); *Davis v. Bass*, 188 N. C. 200, 124 S. E. 566 (1924).

<sup>3</sup> *Gray v. Bailey*, 117 N. C. 439, 23 S. E. 318 (1895); *Bruce v. Nicholson*, 109 N. C. 202, 13 S. E. 790, 26 Am. St. Rep. 562 (1903).

<sup>4</sup> *McKinnon v. Caulk*, 167 N. C. 411, 83 S. E. 559 (1914) ("It has been held in several well considered decisions of this court that our Constitution and the later statutes relative to the property and rights of married women have not thus far destroyed or altered the nature of this estate by entireties"); *Freeman v. Belfer*, 173 N. C. 581, 92 S. E. 486 (1917); *Long v. Barnes*, 87 N. C. 329 (1882); *Phillips v. Hodges*, 109 N. C. 248, 13 S. E. 769 (1891); *Davis v. Bass*, *supra* note 2.

rents and profits—this interest is not leviable at the instance of the husband's creditors.<sup>5</sup>

Generally speaking, one of the requisites of a fraudulent conveyance which will cause the courts to interfere is that the property disposed of must be of some value, out of which the creditor could have realized at least a portion of his claim.<sup>6</sup> A conveyance cannot be termed fraudulent if it transfers property which cannot be made to contribute to the satisfaction of the grantor's debts; hence it is conceded in many jurisdictions that property which is exempt from execution cannot be reached by creditors on the ground that it has been fraudulently transferred.<sup>7</sup>

Of course joint creditors of both husband and wife can levy on an estate by the entirety.<sup>8</sup> It follows that they can have a fraudulent transfer executed by both spouses set aside. Under three lines of decisions the same remedy is probably available for the husband's creditors alone. Extreme decisions hold the husband's contingent right to be subject to sale by his judgment creditor, provided the wife's right to lifetime possession and enjoyment of the entire estate is not interfered with.<sup>9</sup> Another line of decisions holds that while a judgment against the husband is a lien on his contingent interest, it is not enforceable during coverture, but only after the expectant interest has vested, and it is subject to possible extinction by the death of the husband before the wife.<sup>10</sup> And in a few jurisdictions an execution sale of the interest of one of the spouses in an estate by the entirety is sustained on the ground that by the Married Woman's Act this

<sup>5</sup> *Greenville v. Gornto*, 161 N. C. 341, 77 S. E. 222 (1913); *Simonton v. Cornelius*, 98 N. C. 433, 4 S. E. 38 (1887); *West v. Railroad*, 140 N. C. 620, 53 S. E. 477 (1906); *Long v. Barnes*, *supra* note 4; *Moore v. Trust Co.*, 178 N. C. 118 (1919); *Davis v. Bass*, *supra* note 2; *Note* (1931) 9 N. C. L. Rev. 216.

<sup>6</sup> *Blake v. Boisjoli*, 51 Minn. 296, 53 N. W. 637 (1892); *Baldwin v. O'Laughlin*, 28 Minn. 544, 11 N. W. 77 (1881); *O'Conner v. Ward*, 60 Miss. 1036 (1883); *Sewing Machine Co. v. Zeigler*, 58 Ala. 224 (1877); *WARR, FRAUDULENT CONVEYANCES* (3rd ed. 1897) §15.

<sup>7</sup> *Bank of Talladega v. Browne*, 128 Ala. 557, 29 So. 552 (1901); *Ferguson v. Little Rock Trust Co.*, 99 Ark. 45, 137 S. W. 555 (1911); *Patten v. Smith*, 4 Conn. 450 (1823); *Burk v. Putnam*, 113 Iowa 232, 84 N. W. 1053 (1901); *Davis v. Feltman*, 112 Ky. 293, 65 S. W. 615 (1901); *McDaniel v. Ragsdale*, 71 Tex. 23, 8 S. W. 625 (1888).

<sup>8</sup> *Martin v. Lewis*, 187 N. C. 473, 122 S. E. 180 (1924).

<sup>9</sup> *Cochran v. Kerney*, 9 Bush 199 (Ky. 1872); *Simpson v. Biffle*, 63 Ark. 289, 38 S. W. 345 (1896); *Cole Mfg. Co. v. Collier*, 95 Tenn. 115, 31 S. W. 1000 (1895).

<sup>10</sup> *Fleek v. Zillhaver*, 117 Pa. 213, 12 Atl. 420 (1887); *Hetzel v. Lincoln*, 216 Pa. 60, 64 Atl. 866 (1906); *Beihl v. Martin*, 236 Pa. 519, 84 Atl. 953 (1912); *McCurdy v. Canning*, 64 Pa. St. 39 (1870).

estate is in effect changed to an estate in common with the right of survivorship.<sup>11</sup>

In North Carolina, since only joint creditors can levy on the estate, the instant case shows that the creditors of a single spouse cannot set aside a fraudulent conveyance of such estate. However, by statute, a fraudulent conveyance of a homestead may be set aside.<sup>12</sup> The exemption attaches again, but presumably the creditor is benefited by forcing his debtor to keep property which possibly can serve as the basis for a fresh start in life. On a parity of reasoning the same statutory remedy might be given the creditor of one spouse holding an interest in an estate by the entireties. The possibility that his debtor may be the survivor, in which case a lien attaches, gives the creditor an interest in keeping the estate vested in the two spouses.

R. M. GRAY, JR.

### Right of Privacy—Photographing Corpse of Abnormal Infant.

The plaintiff's son, born with his heart outside of his body, was operated on unsuccessfully at a hospital. The hospital allowed the nude remains to be photographed. The photographer sold several copies of the picture for his own gain and informed the public of the facts of the case through a newspaper. The plaintiffs allege that this breach of confidence by the hospital has resulted in a trespass upon their rights of privacy, causing them humiliation, great mental suffering, and impairment of health, for which they seek damages from the hospital, photographer, and newspaper and an injunction to stop publication of the picture. *Held*, the petition set forth a cause of action, and it was error in the lower court to sustain a general demurrer.<sup>1</sup>

The courts have been reluctant to recognize the existence of a

<sup>11</sup> *Bartkowiak v. Sampson*, 73 Misc. 446, 133 N. Y. Supp. 401 (1911); *Coleman v. Bresnahan*, 54 Hun. 621, 8 N. Y. Supp. 158 (1889); *Hiles v. Fisher*, 144 N. Y. 306, 39 N. E. 337, 30 L. R. A. 305, 43 Am. St. Rep. 762 (1895); *Zubler v. Porter*, 98 N. J. L. 516, 120 Atl. 194 (1923); *Bilder v. Robinson*, 73 N. J. Eq. 169, 67 Atl. 828 (1907); *Wortendyke v. Rayot*, 88 N. J. Eq. 331, 102 Atl. 2 (1917); *Buttler v. Rosenblath*, 42 N. J. Eq. 651, 9 Atl. 695 (1887) ("The just construction of this legislation . . . is that the wife is endowed with the capacity, during their joint lives, to hold in her possession one-half the estate in common with her husband, and that the right of survivorship still exists as at common law.").

<sup>12</sup> N. C. ANN. CODE (Michie, 1927) §1005.

<sup>1</sup> *Bazemore et al. v. Savannah Hospital et al.*, 155 S. E. 194 (Ga. 1930).

substantive right of privacy, in the absence of statute.<sup>2</sup> Only four jurisdictions have expressly accepted it, Georgia being the first.<sup>3</sup> An equal number have explicitly rejected it.<sup>4</sup> The right of privacy has not been concretely defined but is commonly known as "the right to be let alone, the right of a person to be free from unwarranted publicity."<sup>5</sup> The right is a personal one, and, according to the majority, recovery is limited to the person injured.<sup>6</sup> Thus a New York case held that a parent could not recover damages or secure injunctive relief against the unauthorized publication of a picture of his infant son.<sup>7</sup> The question of post-mortem privacy has been left in doubt. Several courts have stated that whatever right of privacy the injured person had did not survive.<sup>8</sup> But a Kentucky case upon facts similar to those in the principal case held to the contrary.<sup>9</sup> Upon the author-

<sup>2</sup> The courts refusing to accept the right of privacy say that the law does not undertake to remedy sentimental injury independent of redress for a wrong involving physical injury to person or property. It is up to the legislatures and not the courts to provide such a remedy. *Henry v. Cherry & Webb*, 30 R. I. 13, 73 Atl. 97, 136 Am. St. Rep. 928, 18 Ann. Cas. 1006, 24 L. R. A. (n. s.) 991 (1909); *Atkinson v. Doherty*, 21 Mich. 372, 80 N. W. 285, 46 L. R. A. 219 (1899).

<sup>3</sup> *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S. E. 68, 106 Am. St. Rep. 104, 69 L. R. A. 101 (1905); *Foster-Milburn Co. v. Chinn*, 134 Ky. 424, 120 S. W. 364 (1909); *Munden v. Harris*, 153 Mo. App. 652, 134 S. W. 1076 (1910); *Kunz v. Allen*, 102 Kan. 883, 172 Pac. 532, L. R. A. 1918 D 1151 (1918).

<sup>4</sup> *Atkinson v. Doherty*, *supra* note 2; *Roberson v. Rochester Folding Box Co.*, 171 N. Y. 538, 64 N. E. 442, 89 Am. St. Rep. 828, 59 L. R. A. 478 (1902); *Henry v. Cherry & Webb*, *supra* note 2; *Hillman v. Star Publishing Co.*, 64 Wash. 691, 117 Pac. 594, 35 L. R. A. (n. s.) 595 (1911).

<sup>5</sup> *Brents v. Morgan*, 221 Ky. 765, 299 S. W. 967, 970, 55 A. L. R. 964, 967, (1927). For a general discussion of the right of privacy, see Moreland, *The Right of Privacy Today* (1931) 19 Ky. L. J. 101; Note (1929) 7 N. C. L. Rev. 435.

<sup>6</sup> *Schuyler v. Curtis*, 147 N. Y. 434, 42 N. E. 22, 25, 49 Am. St. Rep. 671, 31 L. R. A. 286 (1895) "Whatever right of privacy Mrs. Schuyler had died with her. Death deprives us all of rights, in the legal sense of that term; and when Mrs. Schuyler died, her own individual right of privacy, whatever it may have been, expired at the same time." See *Atkinson v. Doherty*, *supra* note 2, 80 N. W. 288; *Murray v. Gast Lithographic & Engraving Co.*, 8 Misc. 36, 29 N. Y. Supp. 271 (1894).

<sup>7</sup> *Murray v. Gast Lithographic & Engraving Co.*, *supra* note 6, cited with approval in a dictum by Cobb, J., in *Pavesich v. New England Ins. Co.*

<sup>8</sup> *Schuyler v. Curtis*, *supra* note 6; *Atkinson v. Doherty*, *supra* note 4; see *Pavesich v. New England Ins. Co.*, *supra* note 3, at 209.

<sup>9</sup> *Stokes v. Douglas*, 149 Ky. 506, 149 S. W. 849, Ann. Cas. 1914B 374, 42 L. R. A. (n. s.) 386 (1912) (parents of Siamese twins who employed photographer to make photographs of the bodies allowed to recover from the photographer for his copyrighting the picture and selling copies elsewhere). It has been argued that the basis of decision here is violation of contract and breach of trust, as in *Corliss v. Walker Co.*, 57 Fed. 434, (C. C. D. Mass. 1893) s. c. 64 Fed. 280 (C. C. D. Mass. 1894). But the Kentucky court stated in *Brents v. Morgan*, *supra* note 5, that "the opinion in the case of *Douglas v. Stokes* could

ity of this latter case it is generally stated that an action lies for the misuse of a photograph taken of a dead body.<sup>10</sup>

Although there is no property in a strict sense in a dead body, there is a "quasi-property" right in the next of kin to the proper preservation of the remains.<sup>11</sup> Any unlawful interference therewith is a tort and gives rise to an action for damages.<sup>12</sup> Thus an unauthorized autopsy is held to be an actionable wrong, the right of the next of kin being to have the body kept as it was when death intervened.<sup>13</sup> No actual injury to the corpse is necessary. The right of a parent, who has the custody of the remains of his child for burial, to recover for injury to his feelings by any indignity perpetrated upon the corpse has been recognized in several cases.<sup>14</sup> By analogy to these cases a court would, therefore, have been able to grant relief for mental anguish in a case like the one under discussion without expressly invoking the right of privacy.

The situation there presented was one so shocking that any court would be inclined to extend itself before leaving the aggrieved remediless.

TRAVIS BROWN.

have been put on no ground other than the unwarranted invasion of the right of privacy."

<sup>10</sup> 17 Corpus Juris 1146; see WEINMAN, SURVEY OF LAW CONCERNING DEAD HUMAN BODIES, Bulletin of National Research Council, No. 93, at 91, to the same point, but adding that cases supporting the rule do not go upon the theory of the right of privacy but upon the theory that the feelings of the next of kin have been outraged.

<sup>11</sup> *Pierce v. Swan Point Cemetery*, 10 R. I. 237, 14 Am. Rep. 667 (1872); *Pettigrew v. Pettigrew*, 207 Pa. 313, 56 Atl. 878 (1904); *Floyd v. Atlantic Coast Line R. R. Co.*, 167 N. C. 55, 83 S. E. 12, L. R. A. 1915B 519 (1914).

<sup>12</sup> *Larson v. Chase*, 47 Minn. 307, 50 S. W. 238, 28 Am. St. Rep. 370, 14 L. R. A. 85 (1891); *Foley v. Phelps*, 1 App. Div. 551, 37 N. Y. Supp. 471 (1896); *Palenzke v. Bruning*, 98 Ill. App. 644 (1900).

<sup>13</sup> *Burney v. Children's Hospital*, 169 Mass. 67, 47 N. E. 401, 61 Am. St. Rep. 273, 38 L. R. A. 413 (1897); *Meyers v. Clarke*, 122 Ky. 866, 90 S. W. 1049, 5 L. R. A. (N. S.) 727, (1906) WEINMAN, *op. cit. supra* note 10, at 88-92.

<sup>14</sup> *Birmingham Transfer & Traffic Co. v. Still*, 7 Ala. App. 556, 61 So. 611 (1913) (negligent placing of trunks on child's coffin); *Wright v. Hollywood Cemetery Corp.*, 112 Ga. 884, 38 S. E. 94, 52 L. R. A. 621 (1901) (refusal to allow burial of grandchild in cemetery lot); *Louisville & N. R. R. Co. v. Hull*, 113 Ky. 561, 68 S. W. 433, 57 L. R. A. (1902) (delay in forwarding corpse); *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759 (1868) (superintendent of cemetery changing grave of child). *Contra*: *Gatzow v. Buehling*, 106 Wis. 1, 81 N. W. 1003, 80 Am. St. Rep. 1, 49 L. R. A. 475 (1900) (no recovery for mental anguish in preventing use of hearse in funeral); *Hockenhammer v. Lexington & E. R. R. Co.*, 24 Ky. L. 2, 383, 74 S. W. 222 (1903) (no damages for mental suffering allowed for child's body being thrown from wagon).

## Torts—Railway Crossing—Duty to Stop, Look, and Listen.

The North Carolina cases resulting from grade crossing accidents are both numerous and varied. Where a railroad track crosses a public highway, both the traveller and the railroad have an equal right to cross, but the traveller must yield the right of way to the railroad in the ordinary conduct of the latter's business.<sup>1</sup> The movement of trains across a public highway is not, of course, negligence *per se*. Irrespective of any statutory requirement, there is a common law duty imposed on the railroad company to give notice or warning of an approaching train at a crossing.<sup>2</sup> Failure to do so (as by blowing whistle or ringing bell) is evidence of negligence.<sup>3</sup> Where the view of the train is obstructed, such failure has been said to be strong evidence of negligence,<sup>4</sup> and in at least two decisions such failure has been termed negligence *per se*.<sup>5</sup> By statute<sup>6</sup> the railroad company is required to erect sign-boards at grade crossings. But the presence of signs should not relieve the railroad company of its duty to warn. Where a crossing is peculiarly dangerous mere absence of statute does not relieve the railroad company of a duty to maintain a flagman.<sup>7</sup>

A railroad track of itself is a signal of danger, and a person attempting to cross it must use some care for his safety, the necessary precaution varying with the circumstances.<sup>8</sup> At least he must use his senses or some of them.<sup>9</sup> Failure to look and listen has been held to be contributory negligence as a matter of law,<sup>10</sup> whereas failure to stop is only evidence of negligence in view of the circumstances and a

<sup>1</sup> *Duffy v. A. & N. C. R. R. Co.*, 144 N. C. 26, 56 S. E. 557 (1907); *Johnson v. Seaboard Air Line Ry. Co.*, 163 N. C. 431, 79 S. E. 690 (1913); see *Redmon v. Southern Ry. Co.*, 195 N. C. 764, 143 S. E. 829 (1928).

<sup>2</sup> *Earwood v. Southern Ry. Co.*, 192 N. C. 27, 133 S. E. 180 (1926); *Redmon v. Southern Ry. Co.*, *supra* note 1; *Collett v. Southern Ry. Co.*, 198 N. C. 760, 153 S. E. 405 (1930).

<sup>3</sup> *Goff v. Atlantic Coast Line R. Co.*, 179 N. C. 216, 102 S. E. 320 (1920); *Perry v. Norfolk-Southern R. Co.*, 180 N. C. 290, 104 S. E. 673 (1920); *Earwood v. Southern Ry. Co.*, *supra* note 2; *Pope v. Atlantic Coast Line R. Co.*, 195 N. C. 67, 141 S. E. 350 (1928); *Hill v. Norfolk-Southern R. Co.*, 195 N. C. 605, 143 S. E. 129 (1928); *Redmon v. Southern Ry. Co.*, *supra* note 1.

<sup>4</sup> *Shepard v. Norfolk-Southern R. Co.*, 166 N. C. 544, 82 S. E. 872 (1914); *Jackson v. Atlantic Coast Line R. Co.*, 181 N. C. 153, 106 S. E. 495 (1921); *Costin v. Tidewater Power Co.*, 181 N. C. 196, 106 S. E. 568 (1921).

<sup>5</sup> *Hinkle v. Richmond & D. R. Co.*, 109 N. C. 472, 13 S. E. 884 (1891); *Blum v. Southern Ry. Co.*, 187 N. C. 640, 122 S. E. 562 (1924).

<sup>6</sup> N. C. ANN. CODE (Michie, 1927) §2621(c).

<sup>7</sup> *Moseley v. Atlantic Coast Line R. Co.*, 197 N. C. 628, 150 S. E. 184 (1929).

<sup>8</sup> *Coleman v. Atlantic Coast Line R. Co.*, 153 N. C. 322, 69 S. E. 129 (1910).

<sup>9</sup> *Costin v. Tidewater Power Co.*, *supra* note 4; *Franklin v. Linville River Ry. Co.*, 192 N. C. 717, 135 S. E. 874 (1926).

<sup>10</sup> *Holton v. Kinston-Carolina R. Co.*, 188 N. C. 277, 124 S. E. 307 (1924).

question for the jury.<sup>11</sup> The North Carolina stop law<sup>12</sup> expressly provides that a failure to stop within a certain distance of a crossing shall not be contributory negligence *per se*, but is only one of the facts bearing on the plaintiff's contributory negligence. Thus the duty to stop is not absolute as is the duty to look and listen.

A "Stop, Look, and Listen" sign has no other legal effect than to call to the attention of a traveller, the duty imposed upon him by law to exercise ordinary care for his own safety.<sup>13</sup> A flagman's absence or failure to warn of an approaching train is an invitation to a traveller to cross the tracks on which the traveller may reasonably rely,<sup>14</sup> but a traveller who discovers that the flagman is absent is put on his guard and must look and listen for the approach of trains.<sup>15</sup>

Where there is conflicting evidence as to contributory negligence the trial court cannot direct a verdict upon it against the plaintiff.<sup>16</sup> Within a month after the much-cited *Goodman* case,<sup>17</sup> in which failure to "Stop, Look, and Listen" was held to be negligence as a matter of law, the Supreme Court of North Carolina held a nonsuit proper, basing its decision<sup>18</sup> on the *Goodman* case, and approving the language of Mr. Justice Holmes that "we are dealing with a standard of conduct."

Since this decision, the North Carolina Supreme Court has returned to its former doctrine of treating the failure to "Stop, Look, and Listen" as evidence of negligence for the jury, and not as a standard of conduct for the court.<sup>19</sup>

MILLS SCOTT BENTON.

<sup>11</sup> *Perry v. Norfolk-Southern R. Co.*, *supra* note 3; *Jackson v. A. C. L. R. Co.*, *supra* note 4; *Barber v. Southern Ry. Co.*, 193 N. C. 691, 138 S. E. 17 (1927); *Harris v. Black Mountain Ry. Co.*, 199 N. C. 798, 156 S. E. 102 (1930).

<sup>12</sup> N. C. ANN. CODE (Michie, 1927) §2621(b).

<sup>13</sup> *Perry v. Norfolk-Southern R. Co.*, *supra* note 3.

<sup>14</sup> *Barber v. Southern Ry. Co.*, *supra* note 11.

<sup>15</sup> *Hodgin v. Southern Ry. Co.*, 143 N. C. 93, 55 S. E. 413 (1906). To the effect that splitting a train at a crossing is evidence of negligence, see *Finch v. North Carolina R. Co.*, 195 N. C. 190, 141 S. E. 550 (1928).

<sup>16</sup> See *Butner v. Atlantic & Y. Ry. Co.*, 199 N. C. 695, 155 S. E. 60 (1930).

<sup>17</sup> *B. & O. R. Co. v. Goodman*, 275 U. S. 66, 48 Sup. Ct. 24, 72 L. ed. 167 (1927), commented on in (1928) 6 N. C. L. REV. 212; Note (1930) 43 HARV. L. REV. 926.

<sup>18</sup> *Harrison v. North Carolina R. Co.*, 194 N. C. 656, 140 S. E. 598 (1927).

<sup>19</sup> *Butner v. N. C. R. Co.*, *supra* note 16; *Harris v. Black Mountain Ry. Co.*, *supra* note 11. The only subsequent cases holding a nonsuit proper are those in which the plaintiff was a pedestrian. *Pope v. A. C. L. R. Co.*, *supra* note 3; *Bailey v. Black Mountain Ry. Co.*, 196 N. C. 515, 146 S. E. 196 (1929); *Dix v. High Point, T. & D. R. Co.*, 199 N. C. 651, 155 S. E. 448 (1930).