

2-1-1932

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*, 10 N.C. L. REV. 189 (1932).Available at: <http://scholarship.law.unc.edu/nclr/vol10/iss2/3>

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.

The North Carolina Law Review

Volume Ten

February, 1932

Number Two

EDITOR IN CHARGE

ROBERT H. WETTACH

ASSOCIATE FACULTY EDITORS

M. S. BRECKENRIDGE
JAMES H. CHADBOURN
ALBERT COATES

FRANK W. HANFT
FREDERICK B. MCCALL
A. C. MCINTOSH

M. T. VAN HECKE

STUDENT BOARD OF EDITORS

WILLIAM T. COVINGTON, JR., *Editor in Chief*

JUNIOUS G. ADAMS, JR.
WILLIAM J. ADAMS, JR.
MARION R. ALEXANDER
A. T. ALLEN, JR.
G. PAUL BOUCHER
TRAVIS BROWN
EDWIN E. BUTLER
HUGH BROWN CAMPBELL
ERNEST W. EWBANK
FRED P. HAMRICK, JR.

ROBERT A. HOVIS
ALLEN LANGSTON
J. M. LITTLE, JR.
DALLACE MCLENNAN
WILLIAM MEDFORD
JAMES O. MOORE
EDWIN M. PERKINS
J. H. SEMBOWER
FRANK P. SPRUILL

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

Taxation—A System of Federal Credits for Taxes Paid to States—The Clarkson Tobacco Tax Resolution.

The 1931 General Assembly of North Carolina passed a resolution that Congress be requested to enact a law providing "that whenever any State of the Union levies a tax for revenue on any commodity or article upon which the United States government levies a like or similar tax the United States government will remit to the person, firm or corporation paying said tax an amount equal to the tax levied by the State for said purpose upon said commodity or article, provided the State tax does not exceed 20 per cent of the tax

levied by the United States government."¹ Should Congress enact this proposal, the states in which the federal government collects commodity taxes would impose taxes on the commodities to the amount of 20 per cent of the federal tax. The state levies would not increase the federal taxpayer's burden since his federal taxes would be decreased by the amount paid to the state. The preamble to the resolution, which was introduced by State Senator Francis O. Clarkson of Mecklenburg County, recites that for 1930 the federal government collected from tobacco and cigarette taxes imposed in North Carolina, \$256,729,938.33, and in the last eleven years over two billion dollars; that in 1929 North Carolina collected for all state purposes, from income, inheritance, license and franchise taxes, \$15,-823,932.63; that the tobacco farmers are estimated to have received in 1930 an average of about 12 cents a pound for tobacco, whereas the federal government placed a tax of about 96 cents a pound on tobacco and cigarettes. In 1930 the federal government received from tobacco taxes over 450 million dollars² while the farm value of that year's crop was less than 217 million dollars.³ And in the same year that the tobacco manufacturers in North Carolina paid 256 million dollars in tobacco taxes the North Carolina farmer received only 70 million dollars for the crop.⁴ The contrast is even more striking at present when the farmers are getting still less for the 1931 crop.

The tobacco industry has long contributed a substantial amount of revenue to the federal government. As early as 1794 Congress levied a tax on snuff, but the early tobacco taxes were short-lived.⁵ From 1862 the system has been utilized constantly, and the tobacco

¹ N. C. PUB. LAWS (1931), Resolution No. 11. The resolution requested Governor O. Max Gardner to appoint a committee to memorialize Congress as to this tax. Members of the committee are, F. O. Clarkson, Chairman, Robert Lassiter, Charles Whedbee, John W. Hinsdale, John C. McBee, Kenneth Royall, N. J. Rouse, Leland Kitchin.

² Note 7 *infra*.

³ YEARBOOK OF AGRICULTURE (1931) 700.

⁴ Note 12 *infra*.

⁵ In 1794 Congress levied a tax of 8 cents per pound upon snuff manufactured in the United States. 1 Stat. 384 (1794). The following year the tax was taken off snuff and laid on snuff mills, 1 Stat. 426 (1795), and this tax was repealed in 1800. 2 Stat. 54 (1800). In 1802 the entire system of internal duties was repealed. 2 Stat. 148 (1802). A 20 per centum ad valorem tax on "tobacco, manufactured segars and snuff" was levied in 1815, 3 Stat. 180 (1815), and repealed in 1816. 3 Stat. 254 (1816). The internal revenue system was revived in 1862. 12 Stat. 463 (1862).

taxes have grown from \$3,090,000 in 1863⁶ to \$450,339,000 in 1930,⁷ constituting in 1930 about 11 per cent of the total revenue of the federal government.⁸

However, all contributors to the production of this profitable tax source do not fare as well as does the federal government. A study made by the North Carolina Tax Commission shows the average net income in 1927 of representative farms in the tobacco growing sections of North Carolina. In the Piedmont area the average net income, including cash and products of the farm utilized (food, wood and use of house) was \$1,215, and in the Tidewater section the average net income was \$1,241.⁹ The study shows that in 1927 the return on investment in farms in the Piedmont section was 2.6 per cent, and in the Tidewater section 4.7 per cent.¹⁰ The report was of the opinion that tobacco and cotton conditions were somewhat better than normal in 1927. During the same year the percentage return on invested capital of the four largest tobacco manufacturing companies was from 4 per cent to 20 per cent.¹¹ Since that time the tobacco farmers' condition has not improved,¹² while the manufac-

⁶ SMITH, THE U. S. FEDERAL INTERNAL TAX HISTORY 1861-71 (1914) 333.

⁷ REPORT OF THE SECRETARY OF THE TREASURY FOR FISCAL YEAR 1930, 512. Cigars, \$21,441,500; cigarettes, \$341,881,000; snuff, \$7,542,000; chewing and smoking tobacco, \$60,098,000; cigarette papers and tubes, \$1,323,800; miscellaneous collections relating to tobacco, \$50,981.

⁸ The total ordinary receipts of the federal government in the fiscal year 1930 were \$4,177,941,702. REPORT OF THE SECRETARY OF THE TREASURY, *supra* note 7, at p. 2.

⁹ REPORT OF THE N. C. TAX COMMISSION (1928) 121, 125.

¹⁰ *Supra* note 9, at 113, 115.

¹¹ 62 STANDARD TRADE AND SECURITIES, STATISTICAL SECTION, No. 18, §2, p. 92 (1931).

¹² In 1928 the North Carolina tobacco crop of 493,180,438 pounds sold for \$100,043,086, or an average of 20 cents per pound; the 1929 crop of 493,226,562 pounds sold for \$90,037,272 or an average of 18 cents per pound; the 1930 crop of 565,556,018 pounds sold for \$70,091,439, an average of 12 cents per pound. NORTH CAROLINA FARM FORECASTER, May 1931, at p. 12.

"The tobacco farmers today are poor, disgruntled and resentful. Their incomes are among the lowest farm incomes in the country and they are usually in debt to the supply merchant.

"On the other hand the tobacco manufacturers are among the most prosperous concerns in the country. Their officials are high-salaried, and their stockholders not only receive fat dividends but they also participate in the increased equities resulting from the plowing of profits back into the industry," WOOFER, THE PLIGHT OF CIGARETTE TOBACCO (1931) 5.

Profits derived from a 150 pound pile of tobacco have been thus analyzed: At 8 cents a pound it brought \$12.00. The auction fee was 15 cents, warehouse charges 10 cents and a 2 1-3 per cent commission on the \$12.00 was 30 cents, making a total sales charge of 55 cents deducted from the \$12.00. This left \$11.45 as pay for growing the 150 pounds of tobacco. This amount of tobacco will make 50,000 cigarettes—2,500 packages of 20 cigarettes each for the retail trade to sell at 15 cents a package, or \$375.00 for the finished product. This

turers have continued to prosper.¹³ A recent study¹⁴ points out that the tobacco companies do not compete seriously in the purchase of tobacco, and in such a situation the farmers are offered only such prices as will cause them to continue to produce what the industry needs. It is also pointed out that an increase in the price paid for raw tobacco will cause an increased production and subsequent lower prices. Thus it would seem that a reduction in the federal tobacco taxes would not be passed on to the farmers in the way of higher prices, and, if it were, the increase in production would nullify the temporary increase in price. The request of the General Assembly is founded on the belief that it is the duty of the federal government to take steps which will indirectly better the conditions in the agricultural branch of the tobacco industry. "Certainly it can be maintained that in any industry which contributes as much to the Government as does the tobacco industry, it is the moral obligation of the Government to do all in its power to see that all contributors to the industry receive a fair share."¹⁵ The revenue diverted to the states under the credit clause proposed by the Clarkson resolution would enable them to provide for improved schools and relieve local taxation which bears heavily on the farmer.¹⁶ An increase in the price paid for raw tobacco would stimulate production of the crop, but a reduction of the land tax might be a means of positively decreasing tobacco acreage. When the farmer has to raise money for taxes, he is forced to produce a money crop and the live-at-home movement is militated against.

The plan is not designed for the benefit of a single state. Although 57 per cent of the federal tobacco taxes were collected in North Carolina in 1930, there were six other states which together

leaves \$362.55 to divide between the manufacturer, the government, the jobber and the retailer: the government exacts \$3.00 per 1,000 which in this case would be \$150.00 leaving the manufacturers, jobbers and retail dealers \$213.55 as their share.—*Raleigh News and Observer*, January 11, 1932, from *The Progressive Farmer*.

¹³ In 1930 the per cent earned on invested capital of the four largest manufacturing companies was, American Tobacco, 16.5; Liggett and Myers, 16.3; P. Lorillard Co., 5.3; R. J. Reynolds, 21.7. 62 STANDARD TRADE AND SECURITIES, STATISTICAL SECTION, No. 18, §2, p. 92 (1931).

¹⁴ WOOFER, THE PLIGHT OF CIGARETTE TOBACCO (1931) 11.

¹⁵ *Supra* note 14, p. 64.

¹⁶ See Heer, *The Rural Tax Problem* (1929) 8 SOCIAL FORCES 109; HOBBS, NORTH CAROLINA, SOCIAL AND ECONOMIC (1930) Ch. XI; REPORT OF THE TAX COMMISSION (1928) 55.

contributed 34 per cent.¹⁷ Two of these,¹⁸ however, are not tobacco growing states, and there are fourteen states¹⁹ in which tobacco is grown but not manufactured to any large extent. The result would be that the tobacco growing states in which there is no manufacturing could not levy a tax similar to that levied by the federal government, which is a tax on the manufactured product, and consequently farmers in these states would not benefit from the credit provision. Another plan has been suggested by which the federal government would "rebate to the tobacco growing States an amount equal to an excise tax levied by the State on the sales of raw tobacco."²⁰ This plan would take care of the states growing the tobacco although no federal tax on the manufactured product is collected within the state; and relief for tobacco growing states appears to be the desired object. A tax on the sale of raw tobacco, however, would be a tax on an activity of the farmer. It would seem better to place the tax on the purchase of the raw tobacco at the tobacco warehouses. The purchasers would then sell their tax receipts to the manufacturers who would receive credits for them on their federal tobacco taxes.

Besides the tobacco taxes there are fifteen other federal taxes²¹ which would probably come within the scope of the Clarkson resolution. The total of these taxes in 1930 was \$111,000,000,²² and the collections were diffused over a large number of states. Consequently, under the present federal revenue system the resolution would be of substantial benefit to only the tobacco manufacturing states. The enactment of current proposals enlarging the federal commodity tax system would enable the credit system to benefit a larger group of states.²³

¹⁷ *Supra* note 7, North Carolina, \$256,729,938, 57 per cent; Virginia, \$77,-598,461, 17.23 per cent; New Jersey, \$20,592,005, 4.57 per cent; Kentucky, \$16,-092,218, 3.57 per cent; New York, \$15,090,231, 3.35 per cent; California, \$13,-668,198, 3.04 per cent; Ohio, \$11,412,226, 2.53 per cent.

¹⁸ New Jersey, California. YEARBOOK OF AGRICULTURE (1930) 709.

¹⁹ Tennessee, Georgia, South Carolina, Pennsylvania, Wisconsin, Connecticut, Maryland, Indiana, Florida, Massachusetts, West Virginia, Missouri, Minnesota, Louisiana.

²⁰ *Supra* note 14, p. 64.

²¹ *Supra* note 7, p. 210: bonds of indebtedness, capital stock issues, capital stock sales and transfers, sales of produce for future delivery, playing cards, oleomargarine, adulterated and process or renovated butter, filled cheese, mixed flour, dues and initiation fees, admission to theatres, pistols and revolvers, distilled spirits, fermented liquors, and narcotics.

²² *Supra* note 7, p. 211.

²³ On December 9, 1931, the Secretary of the Treasury in his annual report recommended to Congress the enactment of taxes on manufacturer's sales of automobiles, trucks, and accessories; a stamp tax on conveyances of realty; a

A proposal for a federal credit or rebate will meet with the attack that "the function of the federal government is not to play the fairy godmother to needy state revenues." However, where state and local governmental expenditures aggregate 60 per cent and federal expenditures 40 per cent,²⁴ where the political system appears ineffective equitably to provide state and local revenues, and where coördination of federal, state and local tax systems will result in an adequate revenue and its just distribution, then such coördination involving a system of federal credits would not be a gift, but a desirable fiscal reform. Recent years have seen determined efforts to relieve property of its heavy tax load. But the property tax is the only tax which is effective against interstate competition. In 1924 Florida amended the state constitution and forbade the imposition of an inheritance tax.²⁵ This tempting invitation to the wealthy of other states was defeated by the enactment of the federal estate tax credit clause of 1924 which gave a credit on the federal tax of all state tax paid up to 25 per cent of the federal tax;²⁶ and in 1926 this credit was increased to 80 per cent.²⁷ The effect of the clause is to eliminate sanctuaries of escape from inheritance taxes. In 1930 Florida re-amended the constitution²⁸ and the next session of the legislature passed an inheritance tax law taking advantage of the federal credit.²⁹

Less than half of the states have personal income taxes, and the rates imposed by the states which do use the tax are very low and relatively unproductive³⁰ except in the more wealthy states. The

tax on manufacturer's sales of radio and phonograph equipment and accessories; a stamp tax on checks and drafts; and a tax on telephone, telegraph, cable and radio messages. U. S. DAILY, December 10, 1931, at 2295.

²⁴ NATIONAL INDUSTRIAL CONFERENCE BOARD, *COST OF GOVERNMENT IN THE UNITED STATES 1928-1929* (1931) 12. Percentage distribution of governmental expenditures in 1928, federal, 31.5 per cent; state, 14.5 per cent; local, 54.0 per cent.

²⁵ Art. IX, §11.

²⁶ 43 Stat. 303 (1924).

²⁷ 44 Stat. 70 (1926); 26 U. S. C. A. §1093 (1928).

²⁸ See COMPILED GEN. LAWS FLORIDA (1930 Supp.) 688, ". . . the legislature may provide for a tax upon inheritances, or for the levying of estate taxes not exceeding in the aggregate the amounts which may by any law of the United States be allowed to be credited against . . . similar taxes levied by the United States on the same subject, but the power of the legislature to levy such inheritance taxes or estate taxes . . . shall exist only so long as . . . a similar tax is enforced by the United States against Florida inheritances or estates. . . ."

²⁹ U. S. DAILY, May 12, 14, 21, 1931, at 614, 624, 684.

³⁰ In the fiscal year ending June 30, 1930, the North Carolina personal income tax yielded \$1,780,307 out of a total of \$15,293,565 collected under the revenue act for the general fund for that year. REPORT OF THE N. C. TAX COMMISSION (1930) 441, 442.

states are reluctant to adopt this tax or to increase the rates lest such action drive the rich into other states. It has been suggested³¹ that the credit principle utilized in inheritance taxation be applied to the personal income tax: that the federal government allow a credit on the federal personal income tax of the amount paid in state personal income tax up to a certain percentage of the federal tax. Again, the effect of the credit clause would be to remove interstate competition.

It is common knowledge that corporations seek to arrange their organizations so that their activities and income which are taxed will be allocated to states where franchise and income taxes are light. So long as one state is able to offer cut-rate corporate advantages it will be difficult for other states satisfactorily to develop corporation taxes. A subsidiary corporation may be organized in a state with favorable tax laws, and the parent and subsidiary corporations may transact business in such a manner that only the subsidiary in the low tax state receives an appreciable income.³² Also, where franchise taxes are measured by extent of business, the corporation may arrange to have those factors which determine extent of business predominate in a low tax state. The principle of the federal credit may be turned to account to nullify this circumvention. There will not be the incentive to escape state taxation when that escape only increases the corporation's federal taxes.

Legislatures in their perennial searches for more productive tax sources, are giving increased consideration to sales taxes. One objection to the adoption by a state of this form of taxation is the disadvantage at which it will place local business in competition with business in neighboring states.³³ Local dealers who pass the tax on

³¹ Mark Graves, Director of the Budget, New York State, *Available Sources of Revenue for Equalization of Taxes*, U. S. DAILY, October 6, 1931, at 1782; *A Federal Income Tax Credit*, NEW REPUBLIC, November 11, 1930, at 339. "No quarrel could be found with any state which, through the operation of economies in its state and local governments, was able to boast of a lower general level of taxes than its sister states. Such fiscal competition would be healthy and a beneficial influence for the country as a whole. But no condemnation can be too severe for the fiscal hijacking whereby one state seeks to steal a particular class or group of taxpayers from its neighbors by offering them favors at the expense of the rest of its own taxpayers."

³² See *Palmolive Co. v. Conway*, 43 F. (2d) 226 (W. D. Wis. 1930); *Buick Motor Co. v. City of Milwaukee*, 48 F. (2d) 801 (C. C. A. 7th, 1931); Breckenridge, *Tax Escape by Manipulations of Holding Company* (1931) 9 N. C. L. REV. 189; Magill, *Allocation of Income by Corporate Contract* (1931) 44 HARV. L. REV. 935.

³³ Governor Gardner speaking before the N. C. General Assembly: "Any tax that we add to sales within the State helps to turn the scale against business in North Carolina and in favor of business outside of North Carolina. I can

to the consumer may find themselves losing business to out-of-state competitors who find it profitable to conduct a mail-order business with consumers in the taxing state, and if the local dealers, in order to prevent this, pay the tax out of profits, this smaller margin of profit will weaken their competitive position. A federal sales tax, either general or on selected commodities, with an allowance of credits for sales taxes paid to the states up to a certain percentage of the federal tax would seem to be a solution to one problem of effective sales tax administration.

Systems of taxation designed for isolated states are antiquated today by an economic life which flows freely across state boundaries.³⁴ The situation calls for concerted action by the governmental units, and it seems that can best be accomplished through the guiding influence of the federal government. It is not sufficient that the federal government satisfactorily finance the work delegated to it and then leave the states to contest among themselves for revenue for state purposes, when the federal government has the power to assist in the creation of revenue systems which can cope with mobile tax sources. The tobacco tax credit differs from other proposed federal credits in that the benefits are for a smaller group of states. However, if it is granted that effective tax administration requires federal action, a tobacco credit would appear to have a proper place in a general system of credits, and other states would receive compensatory benefits from similar credits. The tobacco credit may seem a federal aid because federal grants may previously have been looked upon as benevolences, but instead the credits would be a part of a general plan of government finance. The tobacco tax is very profitably handled by the federal government, but that government should not overlook the needs of state and local government when it selects sources of revenue. The credit is necessary to the wholesome existence of this remunerative tax source. It is questionable whether all tobacco taxes are passed on to the consumer, or whether some are

not favor any system of taxation that imposes this additional burden on the retail merchants of North Carolina, and that penalizes business within and encourages business without the State." U. S. DAILY, March 26, 1931, at 205.

³⁴ "The ideal relationship between federal, state and local revenue systems is one of unity. The financial system of a nation should be highly if not completely, integrated. The revenue system should be under the control of a single governmental unit—the national government—so as to secure uniformity of laws, administration and burdens, and to make possible effective adjustment of tax loads as changing economic conditions and governmental needs may require." Leland, *The Relations of Federal, State and Local Finance*. PROCEEDINGS NATIONAL TAX ASSO. (1930) 94, 96.

not paid out of manufacturer's profits. If the latter is true, the federal tax lessens the amount of tax which the manufacturing states can safely impose on the manufacturers. When the federal government places a heavy tax on an industry, the industry's ability to pay state taxes is decreased. Probably the stronger reason for the tobacco credit is the moral responsibility of the federal government, which receives the largest benefit in the tobacco industry, to do all in its power to see that the basic producers in this industry get a living wage. This would not be a federal aid, but merely justice.

The constitutionality of the federal inheritance tax law containing the 80 per cent credit clause was upheld in *Florida v. Mellon*.³⁵ Florida asserted that the act was an invasion of the sovereign rights of the state, an effort to coerce state legislation, and a violation of the requirement that federal excises be uniform throughout the United States. The United States Supreme Court replied: "The act is a law of the United States made in pursuance of the Constitution and, therefore, the supreme law of the land, the constitution or laws of the States to the contrary notwithstanding. Whenever the constitutional powers of the Federal government and those of the State come into conflict the latter must yield." As to uniformity, the Court said, "All that the Constitution (Art. I, §8, cl. 1) requires is that the law shall be uniform in the sense that by its provisions the rule of liability shall be the same in all parts of the United States." By the terms of the act the tax is uniform. Any departure from uniformity comes about through dissimilar laws and conditions in the states.

The inheritance tax credit and other credit plans are particularly obnoxious to states' rights advocates. It is contended that they are attempts of the federal government indirectly to determine state tax-

³⁵ 273 U. S. 12, 47 Sup. Ct. 265, 71 L. ed. 511 (1927). Florida sought to enjoin the Secretary of the Treasury and the Commissioner of Internal Revenue from attempting to collect federal inheritance taxes in Florida. The court denied the state leave to file the bill, and then continued to express an opinion as to the constitutionality of the act. It is pointed out that if the court could not hear the case, the opinion on the constitutionality is not decision, but dictum. Machen, *The Strange Case of Florida v. Mellon* (1928) 13 CORNELL LAW QUARTERLY 351. The enunciation of the court in this case on the question of uniformity has been cited in two cases, *Poe v. Seaborn*, 282 U. S. 101, 51 Sup. Ct. 58, 75 L. ed. 27 (1930); *Phillips v. Commissioner*, 283 U. S. 589, 51 Sup. Ct. 608, 75 L. ed. 791 (1931), and that Florida considers the case decisive may be inferred from the subsequent action of the state in modifying its constitution to take advantage of the credit.

ation policies which it cannot do directly.³⁰ Certainly a system of federal credits has that result, but it seems pertinent to question whether the result is not justified in view of changing conditions of economic life which make state areas too small for adequate administration of certain taxes. The growing integration of business demands a corresponding integration of the fiscal structure.

E. M. PERKINS.

Banks and Banking—Liability to Statutory Assessment Where Stock Held in Trust for Minors.

A transferred shares of bank stock to four persons to hold for the benefit of minors. The transaction was recorded in the books of the bank with the word "trustee" following the name of each of the transferees. The trust was made in good faith, without any disposition to escape the statutory liability, and the trustees never had any personal interest in the stock. The bank having become insolvent, recovery of the statutory assessment on the stock was denied as against both the trustees personally and the estates of the minor beneficiaries.¹

At common law a trustee is personally liable on all contracts made by him in the administration of the trust, unless his individual liability is expressly excluded in the instrument.² Ordinarily the word "trustee" appearing after the name is held to be merely descriptive and insufficient to constitute an exclusion of personal responsibility.³ Under the general rule, the trustee is subject to

³⁰ Protests from 32 governors and 4,239 members of state legislatures were filed in the Senate hearings when the increase of the inheritance credit from 25 per cent to 80 per cent was before the Finance Committee. These protests, in the main, were against "the principle involved of having Congress dictate to the States the rate and manner of levying taxes." *HEARINGS ON THE REVENUE BILL, SENATE FINANCE COMMITTEE*, January 9, 1926, at p. 47.

¹ *Rutledge v. Stackley*, 160 S. E. 429 (S. C. 1931).

² *BOGERT, TRUSTS* (1921) 296; *Scott, Liabilities Incurred in the Administration of Trusts* (1915) 28 HARV. L. REV. 725.

³ *Flynn v. American Banking & Trust Co.*, 104 Me. 141, 69 Atl. 771 (1908); *BOGERT, TRUSTS* (1921) 296; *Scott, op. cit. supra*, at 738; Note (1928) 57 A. L. R. 772; see *American Trust Co. v. Jenkins*, 193 N. C. 761, 138 S. E. 139 (1927) (beneficiary must be "named on record or in certificate"). *Contra: Andrew v. Commercial Savings Bank*, 205 Iowa 42, 217 N. W. 431, 57 A. L. R. 767 (1928); 6 *THOMPSON, CORPORATIONS* (3rd ed. 1927) §4043.

The trustee is estopped to deny his liability where by his acts or representations he has purported to be the owner. *Rust v. MacLaren*, 29 F. (2d) 288 (1928); *Chapman v. Pettus*, 269 S. W. 268 (Tex. Civ. App. 1925); *Kerr v. Urie*, 86 Md. 72, 37 Atl. 789, 38 L. R. A. 119 (1897). Massachusetts holds the trustee personally responsible on his legal ownership regardless of notice of the relationship existing. *Commissioners v. Tremont Trust Co.*, 259 Mass. 162, 156 N. E. 7 (1927); see *Grew v. Breed*, 10 Met. 569 (Mass. 1846).

statutory liabilities imposed on stock, when he buys or holds shares for the beneficiary.⁴ Although statutory provisions in most jurisdictions shift this burden to the funds and estates in the trustee's hands,⁵ in South Carolina, where the principal case arose, there is no such enactment. It is not clear, therefore, why there was no appeal in the principal case from the master's report releasing those whose names appeared on the books of the bank as holders of the stock. In the absence of a specific statute or agreement, a creditor of a trust estate may only reach the assets held for the beneficiaries where the trustee is shown to be unavailable or insolvent.⁶ The principal case might better have been placed upon this ground, for no statute or agreement was available. The statutes placing liability to assessment on the trust estate list no exceptions and disregard possible disability of the beneficiaries.⁷ The decisions, however, seem to support the principle case in holding, even under such legislation, that an estate held for an infant beneficiary is exempt.⁸ The theory is that the

⁴ *Rosenberg v. Bennett*, 35 Ga. App. 86, 132 S. E. 119 (1926) (purchase by guardian); *Foster v. Chase*, 75 Fed. 797 (C. C. Vt. 1896); *Furr v. Chapman*, 276 S. W. 475 (Tex. Civ. App. 1925); (1915) 28 HARV. L. REV. 726.

The trustee remains liable, although after assessment but before filing of suit the minor has legally affirmed, since the cause of action is deemed to have arisen upon assessment, at which time the minor was incapable of assent. *Foster v. Wilson*, 75 Fed. 797 (C. C. Vt. 1896).

⁵ 12 U. S. C. A. §66; N. C. ANN. CODE (Michie, 1931) §219 (c); GA. CODE ANN. (Michie, 1926) §2366 (140); CAHILL'S CONSOLIDATED LAWS OF N. Y. (1922) c. 3, §120; *McNair v. Darragh*, 31 F. (2d) 906 (C. C. A. 8th, 1929), *certiorari* denied 280 U. S. 563, 50 Sup. Ct. 19, 74 L. ed. 617 (1929); *Clay v. Mobley*, 171 Ga. 548, 156 S. E. 194 (1930); *Fowler v. Gowing*, 152 Fed. 801 (C. C. N. D. N. Y. 1907); *Smathers v. Western Carolina Bank*, 155 N. C. 283, 71 S. E. 345 (1911); *Clark v. Ogilvie*, 111 Ky. 181, 63 S. W. 429 (1901).

By illegal investment of trust funds the trustee makes himself personally liable. *Mobley v. Phinizy*, 42 Ga. App. 33, 155 S. E. 73 (1930).

⁶ *Scott, loc. cit. supra* note 2; Note (1931) 9 N. C. L. REV. 443; *Roberts v. Aberdeen-Southern Pines Syndicate*, 198 N. C. 387, 157 S. E. 865 (1930).

⁷ *Witters v. Sowles*, 35 Fed. 640 (C. C. Vt. 1888) (no capacity to act on part of stockholder necessary).

Attempts to compare infants' liability to that of married women under common law disability have been made, though the analogy has been expressly repudiated. *Foster v. Chase*, *supra* note 4. Coverture is held to be no defense. *Chapman v. Pettus*, 269 S. W. 268 (Tex. Civ. App. 1925); *Bryan v. Bullock*, 84 Fla. 179, 93 So. 182 (1922); *Smathers v. Western Carolina Bank*, *supra* note 5; *Christopher v. Norvell*, 201 U. S. 216, 26 Sup. Ct. 502, 50 L. ed. 732 (1906); *Dickinson v. Traphagan*, 147 Ala. 442, 41 So. 272 (1906); *Keyser v. Hitz*, 133 U. S. 138, 10 Sup. Ct. 290, 33 L. ed. 531 (1890); *Witters v. Sowles*, *supra*; *Bundy v. Cocke*, 128 U. S. 185, 9 Sup. Ct. 242, 32 L. ed. 396 (1888) (suit in equity).

⁸ *Commissioner v. Tremont Trust Co.*, *supra* note 3; 6 THOMPSON, CORPORATIONS (3rd ed. 1927) §4899; see *Mobley v. Phinizy*, *supra* note 5; *Mellott v. Love*, 152 Miss. 860, 119 So. 913 (1929).

liability is contractual in character,⁹ and subject to the minor's privilege of disaffirmance,¹⁰ which the law presumes to have been exercised where the transaction has resulted to his detriment.¹¹ Ordinarily, of course, the purchaser of bank stock is held to have assumed the liability imposed by statute as a part of the consequences of the purchase.¹² There would seem to be no reason for implying any less assumption of responsibility in the case of an accepted gift.¹³ And, as either the trustee or, as in the instant case, the creator of the trust, as distinguished from the infant beneficiary, establishes the stockholder relation with the bank, the reason for the privilege seems hardly applicable.

The usual purpose underlying statutes imposing double liability on stockholders is to protect creditors and depositors of the bank,¹⁴ and infants are not among the classes expressly excluded from responsibility. No personal judgment against the minors was involved in the principal case, but merely a levy on holdings equitably held for

⁹ *Tunncliffe v. Noyes*, 135 So. 505 (Fla. 1931); *Fischer v. Chisolm*, 159 S. C. 395, 157 S. E. 139 (1931) (distinguished from penalty); *Andrew v. State Bank*, 209 Iowa 1153, 229 N. W. 905 (1930); *Austin v. Strong*, 117 Tex. 263, 1 S. W. (2d) 872 (1928); *Hirning v. Hamlin*, 200 Iowa 1322, 206 N. W. 617 (1925) (held as obligatory as original obligation to pay for the stock); *Home State Bank v. Swartz*, 72 Mont. 425, 234 Pac. 281 (1925) (distinguished from penal liability); *Allen v. McFerson*, 77 Cal. 186, 235 Pac. 346 (1925); *Golden v. Cervenka*, 278 Ill. 409, 116 N. E. 273 (1917); *Bernheimer v. Converse*, 206 U. S. 516, 30 Sup. Ct. 409, 54 L. ed. 341 (1907) (Holmes, J., doubting result here, finds difficulty in reconciling this case with *McLaine v. Rankin*, *infra*); *Myers v. Knickerbocker Trust Co.*, 71 C. C. A. 199, 139 Fed. 111 (1905); *Whitman v. Oxford Bank*, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. ed. 587 (1900); *Howarth v. Angle*, 162 N. Y. 179, 56 N. E. 489 (1900); *Witters v. Sowles*, *supra* note 7 (held similar to duty to pay taxes on the shares). But see *Lange v. Taylor*, 40 S. W. (2d) 781 (Ark. 1931); *McLaine v. Rankin*, 197 U. S. 154, 25 Sup. Ct. 410, 49 L. ed. 702 (1905) (statute of limitations held to run as against action to enforce statutory liability, not breach of contract); *Crisp v. Norvell*, 201 U. S. 216, 26 Sup. Ct. 502, 50 L. ed. 732 (1906); *Bryan v. Bullock*, 84 Fla. 179, 93 So. 182 (1922); *Smathers v. Western Carolina Bank*, *supra* note 5; *Aldrich v. Bingham*, 131 Fed. 363 (W. D. N. Y. 1904).

¹⁰ *Mellott v. Love*, *supra* note 8 (infant's right to avoid contract held not affected by supervention of rights of third parties).

¹¹ *Early v. Richardson*, 280 U. S. 496, 50 Sup. Ct. 176, 74 L. ed. 575, 69 A. L. R. 658 (1930); *Shaw v. McMillan*, 24 S. W. (2d) 536 (Tex. Civ. App. 1930); *Aldrich v. Bingham*, *supra* note 9.

¹² *Howarth v. Angle*, *supra* note 9; *Tunncliffe v. Noyes*, *supra* note 9; *Chavous v. Gornto*, 89 Fla. 12, 102 So. 754 (1925).

¹³ *Commissioner v. Cosmopolitan Trust Co.*, 253 Mass. 205, 148 N. E. 609, 41 A. L. R. 658 (1925). Liability has been imposed in the absence of actual assent by the holder; *Bain v. Rogers*, 158 S. C. 417, 155 S. E. 619 (1930), though usually acceptance must be shown; *Shaw v. Rogers*, 36 S. W. (2d) 533 (Tex. Civ. App. 1931); *Witters v. Sowles*, *supra* note 7. See *Bryan v. Bullock*, *supra* note 7.

¹⁴ *American Trust Co. v. Jenkins*, 193 N. C. 761, 138 S. E. 139 (1927).

them. Hence the position taken by the dissenting opinion,¹⁵ that the liability was entirely statutory, would seem from the standpoint of accuracy and policy to be the more desirable. As the case stands, with the trust estate, the former owner,¹⁶ and the trustees personally all free from liability, it is difficult to see from what source the bank's creditors are to seek relief.

JAMES M. LITTLE, JR.

Civil Procedure—Estoppel by Judgment.

Plaintiff broke his leg in an automobile accident. Defendants, who attended his injury, brought suit for services rendered (although not expressly stated in the report, it may fairly be inferred that the plaintiff was not then aware of the extent of his injury) and recovered \$525. Plaintiff later brought an action for malpractice in not properly setting the bone. *Held*, that for physicians to recover in their action for services it was necessary to allege and prove that the services were rendered and were reasonably worth a certain amount, therefore, the matter had been adjudicated and plaintiff is estopped by the judgment from maintaining the suit.¹

"The doctrine of estoppel as applied to judgments means that when a fact has been agreed on, or decided in a court of record, neither of the parties shall be allowed to call it in question and have it tried over again at any time thereafter so long as the judgment stands unreversed."² There are three views as to what matters are included in the prior suit so as to estop the litigant.³ The strict view is that only those matters which were actually presented by the pleadings and determined by the issues are included in the estoppel. The liberal view is that the estoppel includes not only matters actually determined but all others which properly belong to the litigation and which might have been determined by it. The intermediate view is that estoppel includes what was actually raised by the pleadings or what might properly have been predicated upon them, but not matters which

¹⁵ By Cothran, J.

¹⁶ Cases in note 11 *supra*. The policy of requiring the liability incident to ownership of the stock to be at all times attributable to some legally responsible person has undoubtedly caused some injustice in cases of large scale transactions carried out through the medium of brokers. This rule is more extensively followed in England.

¹ *Garrett v. Kendrick*, 201 N. C. 388, 160 S. E. 349 (1931).

² *McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE* (1929) §657; *Armfield v. Moore*, 44 N. C. 157, 161 (1851).

³ 2 *BLACK ON JUDGMENTS* (1891) §614; *McINTOSH, op cit., supra* note 2, §659.

might have been brought into them. Although the language of some of the North Carolina cases is that of the broad view, the decisions and the language of most of the cases show that this state has accepted the intermediate view.⁴ It seems that some doubt might arise as to whether the intermediate view is broad enough to include the matters in the principle case since there is no reference in the pleading to any malpractice.

A clear understanding of the court's decision in this type of case can be reached only after an understanding of the remedies of recoupment and counter-claim. Counter-claim is a code remedy being unknown at common law except as represented by a cross bill in equity.⁵ It includes both recoupment and set-off.⁶ The latter two remedies may become counter-claims depending on how they are used by the defendant. If used in the nature of a defense to defeat a part or all of a plaintiff's claim they retain their original character of either recoupment or set-off. But, if an affirmative judgment is sought in excess of plaintiff's claim then either may become a counter-claim.⁷ The general rule in North Carolina is that a counter-claim may or may not be pleaded at the option of the defendant and failure to so plead will not estop him from bringing an independent suit.⁸ Recoupment on the other hand is a common law remedy in the nature of a defense in that the matter sought to be used must have arisen in the same transaction as the plaintiff's claim and could be used at most only to defeat plaintiff's claim, no excess judgment being allowed.⁹ If the claimant did not set it up it was lost since it was so

⁴ *Piedmont Wagon Co. v. Byrd*, 119 N. C. 460, 26 S. E. 144 (1896); *Durham Consolidated Land Co. v. Guthrie*, 123 N. C. 185, 31 S. E. 601 (1898); *Case Manufacturing Co. v. Moore*, 144 N. C. 527, 57 S. E. 213, 10 L. R. A. (N. S.) 734, 119 Am. St. Rep. 983 (1907); *Moore v. Haskins*, 179 N. C. 167, 101 S. E. 564 (1919); *Polson v. Strickland*, 193 N. C. 299, 136 S. E. 873 (1927); *Price v. Edwards*, 178 N. C. 493, 101 S. E. 33 (1919); *Stelges v. Simmons*, 170 N. C. 42, 86 S. E. 801 (1915); *Coltrane v. Laughlin*, 157 N. C. 282, 72 S. E. 961 (1911); *Shakespeare v. Caldwell Land & Lumber Co.*, 144 N. C. 516, 57 S. E. 213 (1907); *Tyler v. Capeheart*, 125 N. C. 64, 34 S. E. 108 (1899); *Tuttle v. Harvill*, 85 N. C. 456 (1880); *Roberts v. Pratt*, 158 N. C. 50, 73 S. E. 129 (1911); *Williams v. Clouse*, 91 N. C. 322 (1884).

⁵ 34 Cyc. 642 (1910); *McINTOSH*, *op. cit. supra* note 2, §463.

⁶ *Hurst v. Everett*, 91 N. C. 399 (1884); *McINTOSH*, *NORTH CAROLINA PRACTICE AND PROCEDURE* (1929) §463; *POMEROY*, *CODE REMEDIES* (5th ed. 1929) §613.

⁷ *Hurst v. Everett*, 91 N. C. 399 (1884); 34 Cyc. 642 (1910); *McINTOSH*, *op. cit. supra* note 2, §463.

⁸ *Woody v. Jordan*, 69 N. C. 189 (1872); *Francis v. Edwards*, 77 N. C. 272 (1876); *Mooney v. Hamilton*, 132 N. C. 303, 43 S. E. 903 (1902); *Trust Co. v. McKinnie*, 179 N. C. 328, 102 S. E. 385 (1920).

⁹ *Hurst v. Everett*, 91 N. C. 399 (1884); *POMEROY*, *op. cit. supra* note 6, §607; 34 Cyc. 642 (1910).

intimately related to plaintiff's claim that it must necessarily be drawn into controversy.¹⁰ As pointed out above, this is not the rule as to counter-claim generally.¹¹ However, one other case has been decided in North Carolina under the code practice in which the rule of recoupment was retained.¹² So that this case and the principle case must have been governed by the common law conception of recoupment rather than that of the modern code remedy of counter-claim. It might be questioned whether the application of the common law rule as to the use and effect of recoupment should be applied strictly under the more liberal code practice as to counter-claim. The policy of the rule is undoubtedly to prevent multiplicity of suits, yet this case shows that it will work a great hardship when defendant does not know the extent of his injury at the time he is sued by the physician for services.

DALLACE MCLENNAN.

Copyrights—Radio Broadcasting—Infringement by Reception of Musical Composition.

Out of the continued development of radio broadcasting has arisen the question whether the reception¹ by radio of a broadcast musical composition will constitute an infringement of the copyright of the composition. This problem was first presented for decision in a Federal District Court of Missouri.² A hotel in Kansas City had installed a master radio receiving set which actuated loud-speakers placed in both the public and private rooms. A broadcast program received by the master set was thus available to guests throughout the hotel. A Kansas City broadcasting station, without license from the copyright owners, transmitted a copyrighted musical composition. Without any pre-arrangement between the broadcaster and the hotel proprietor, the broadcast composition was received on the master set

¹⁰ 34 Cyc. 623 (1910); POMEROY, *op. cit. supra* note 6, §607.

¹¹ See note 8, *supra*.

¹² Allen v. Sally, 179 N. C. 147, 101 S. E. 545 (1919).

¹ It is now settled that the *broadcasting* of a copyrighted musical composition without the consent of the copyright owners constitutes infringement. Jerome H. Remick & Co. v. American Automobile Accessories Co., 5 F. (2d) 411, 40 A. L. R. 1511 (C. C. A. 6th, 1925), *certiorari* denied, 269 U. S. 556, 46 Sup. Ct. 19, 70 L. ed. 409 (1925); Jerome H. Remick & Co. v. General Electric Co., 16 F. (2d) 829 (S. D. N. Y., 1926); Messenger v. British Broadcasting Co., Ltd., [1927] 2 K. B. 543, *rev'd* as to another point, [1928] 1 K. B. 660, [1929] A. C. 151; (1927) 75 U. of PA. L. Rev. 549; Davis, *Copyright and Radio*, (1929) 16 VA. L. REV. 40.

² Buck v. Jewell-La Salle Realty Co., 32 F. (2d) 366 (W. D. Mo. 1929). This decision was only the first stage in the litigation. *Infra* note 5.

and heard by guests of the hotel. The copyright owners sued for an injunction and damages. The basis of their action was the Copyright Act of 1909,³ which provides, among other things, that the owner of the copyright of a musical composition shall have the exclusive right to perform it publicly for profit.⁴ The outcome of the litigation, which has thus far progressed through four stages, is that the acts of the hotel proprietor are held to constitute a "public performance for profit," and an infringement of the copyright.⁵

If liability for infringement is to be predicated on reception, it must first appear that the reception constituted a "public performance for profit." Therefore, one who, in his own residence, receives by radio and makes audible to friends a broadcast composition is not an infringer.⁶

The determination of whether the acts of the hotel in the principal case were public or for profit presented little difficulty in view of existing authority.⁷ The work of providing entertainment for the many guests of a city hotel seems clearly "public." Further, while it is true that the hotel did not receive, or expect to receive, any direct compensation for the item of "music" as such, it did, unquestionably, anticipate an indirect profit from the entertainment of its guests. And the Supreme Court has held indirect profit sufficient to bring the acts within the purview of the statute.⁸ There thus

³ 35 STAT. 1075 (1909), 17 U. S. C. A. §1 (e) (1927).

⁴ "Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right: . . . (e) To perform the copyrighted work publicly for profit if it be a musical composition and for the purpose of public performance for profit."

⁵ The progress of the litigation has been as follows: (1) The District Court held that the hotel proprietor had not infringed the copyright. *Buck v. Jewell-La Salle Realty Co.*, *op. cit. supra* note 2; commented on in (1930) 9 ORE. L. REV. 182. (2) Plaintiffs appealed to the Circuit Court of Appeals which, being in doubt on the question of "performance," certified that issue to the Supreme Court. (3) It was there held that the acts of the hotel proprietor did constitute "performance." *Buck v. Jewell-La Salle Realty Co.*, 283 U. S. 191, 51 Sup. Ct. 410, 75 L. ed. 971 (1931); commented on in (1931) 26 ILL. L. REV. 443. (4) The Circuit Court of Appeals then proceeded with the case, and held this "performance" to be "public" and "for profit." *Buck v. Jewell-La Salle Realty Co.*, 51 F. (2d) 726 (C. C. A. 8th, 1931).

⁶ See *Buck v. Jewell-La Salle Realty Co.*, *op. cit. supra* note 5, at 196, 51 Sup. Ct. at 411, 75 L. ed. at 975.

⁷ The terms "public" and "for profit" have received liberal construction. *Herbert v. Shanley Co.*, 242 U. S. 591, 37 Sup. Ct. 232, 61 L. ed. 511 (1917); *M. Witmark & Sons v. L. Bamberger & Co.*, 291 Fed. 776 (D. N. J. 1923).

⁸ *Herbert v. Shanley Co.*, *op. cit. supra* note 7. See *Remick v. Accessories Co.*, *op. cit. supra* note 1, at 411, 40 A. L. R. at 1513, where it is said: "It suffices that the purpose of the performance be for profit, and not eleemosynary; it is against a commercial, as distinguished from a purely philanthropic, public use of another's composition, that the statute is directed."

remains the issue of performance. In deciding it, the Supreme Court considered the function of the radio receiver. Mr. Justice Brandeis demonstrated that radio reception does not constitute mere audition, but reproduction: just as a phonograph record requires a separate mechanism (the phonograph) for the reproduction of the recorded composition, so radio waves require an instrument (the receiver) for their transformation into audible sound waves.⁹ "Reproduction in both cases amounts to performance." Intention to perform the copyrighted composition is not necessary in order for liability for infringement to attach; therefore, the hotel "performed" even though it had no control over the selection of the broadcast program.¹⁰

Shortly after the first decision in the litigation of the principal case, there arose in California another case which involved infringement by reception—that of *Buck v. Debaum*.¹¹ A cafe owner received and made audible to guests in his cafe a musical composition which had been broadcast *with* the consent of the copyright owners. It was held that there was no infringement, for the reason that, having regularly licensed the broadcaster, the copyright owners would be regarded as having impliedly licensed the commercial reception of the program by any person. It is interesting to speculate as to what the Supreme Court would have held regarding performance, if the broadcaster in the hotel case had been licensed by the copyright owners. While the court does hold that the copyright monopolies are not necessarily exhausted with the broadcasting of the composition,¹² thus indicating that there might be as many "performances" as there were parties receiving the composition, there is a suggestion by Mr. Justice Brandeis that *Buck v. Debaum* might have been followed, and a license for reception implied.¹³

⁹ "The guests of the hotel hear a reproduction brought about by the acts of the hotel in (1) installing, (2) supplying electric current to, and (3) operating the radio receiving set and loud-speakers. There is no difference in substance between the case where a hotel engages an orchestra to furnish the music and that where, by means of the radio set and loud-speakers here employed, it furnishes the same music for the same purpose." Mr. Justice Brandeis in *Buck v. Jewell-La Salle Realty Co.*, *op. cit. supra* note 5, at 201, 51 Sup. Ct. at 413, 75 L. ed. at 978.

¹⁰ The Supreme Court reversed the holding of the District Court (*Buck v. Jewell-La Salle Realty Co.*, *op. cit. supra* note 2) that infringement must be an intentional performance, as where one plays a phonograph record.

¹¹ *Buck v. Debaum*, 40 F. (2d) 734 (S. D. Cal. 1929).

¹² *Buck v. Jewell-La Salle Realty Co.*, *op. cit. supra* note 5, at 197, 51 Sup. Ct. at 411, 75 L. ed. at 976.

¹³ *Buck v. Jewell-La Salle Realty Co.*, *op. cit. supra* note 5, at 198, footnote 5, 51 Sup. Ct. at 412, footnote 5, 75 L. ed. at 976, footnote 5.

The principal case, while logically construing the statute, arrives at a regrettable result. The proprietors of a great many stores, hotels, and restaurants utilize radio reception for the diversion of their guests. The enforcement of the copyright law against such parties will be a most difficult, if not impossible, task, and because of their lack of control of the broadcast programs, an unfair one. A writer in the December, 1931, issue of the *Illinois Law Review*¹⁴ suggests that because of the obstacles in the path of the administration of a law so construed, and because of the "prolific and vexatious litigation" that is likely to follow, the desirable course is to declare the copyright monopolies exhausted with the performance of the broadcaster. The copyright owner, in such an event, would be afforded sufficient protection by making allowance, in the fee charged the broadcaster, for the possibility of commercial reception.¹⁵ Policy demands such a conclusion. Were it embodied in legislation, a commendable step would be made toward dispensing with the necessity of settling controversies connected with copyright and broadcasting by reference to a statute which was enacted many years before radio broadcasting developed,¹⁶ and which is thus wholly inadequate in its contemplation of the contemporary scene.¹⁷

WM. ADAMS, JR.

Criminal Procedure—Motion for New Trial After Conviction Affirmed on Appeal.

The question whether the Superior Courts in North Carolina have the power to grant a new trial in a capital case on the ground of newly discovered evidence after a verdict of guilty has been affirmed on appeal was presented for the first time in *State v. Casey*.¹ The court in a three to two decision ruled in the affirmative.

The common law rule was that the courts could not grant new trials in criminal cases involving felonies.² The reason assigned was

¹⁴ (1931) 26 ILL. L. REV. 443.

¹⁵ Mr. Justice Brandeis alludes to this possibility in the court's opinion. *Buck v. Jewell-La Salle Realty Co.*, *op. cit. supra* note 5, at 199, 51 Sup. Ct. at 412, 75 L. ed. at 976.

¹⁶ The Act was passed in 1909. Radio broadcasting on a commercial scale is said to have commenced in 1920. *Buck v. Jewell-La Salle Realty Co.*, *op. cit. supra* note 5, at 196, footnote 2, 51 Sup. Ct. at 411, footnote 2, 75 L. ed. at 975, footnote 2.

¹⁷ (1931) 26 ILL. L. REV. 443, at 444.

¹ 201 N. C. 620, 161 S. E. 81 (1931).

² *State v. Turner*, 143 N. C. 641, 57 S. E. 158 (1907); 16 C. J. 2615 (1918); UNDERHILL, CRIMINAL EVIDENCE (3rd ed) §785 (1912).

that executive clemency was always open to one who thought himself unjustly convicted.³ The common law rule has been changed in practically all of the states, including North Carolina, by statutes which usually fix a definite time limit within which such a motion must be made.⁴ The North Carolina statute⁵ has no such time-fixing element. It provides that "The courts may grant new trials in criminal cases when the defendant is found guilty, under the same rules and regulations as in civil cases." Despite the seeming clearness of the statute, the practice in criminal cases has differed in two important respects from the practice in civil cases.

In civil cases a motion for a new trial on the ground of newly discovered evidence can be made in the Superior Court during the trial term.⁶ On appeal the motion can be made in the Supreme Court until the judgment there has been certified down.⁷ Afterwards the motion can only be made in the Superior Court at the next term before final judgment has been rendered.⁸

In criminal cases the motion can be made in the Superior Court during the trial term as in civil cases.⁹ On appeal the Supreme Court has consistently refused to entertain such a motion,¹⁰ and the trial court is without jurisdiction, as the case is not then pending in that court.¹¹ After affirmance and certification down, in cases less than capital, the practice has been for the trial court to entertain the motion.¹² In capital cases the prevailing view seems to have been that no such motion could be made.

The reasons assigned for the refusal of the Supreme Court to entertain motions in criminal cases are: (1) that the statute was in-

³ *State v. Turner*, *supra* note 2.

⁴ FLA. COMP. LAWS (1927) §4497 (four days); GA. CODE ANN. (Michie, 1926) §1090 (thirty days); IND. ANN. STAT. (Burns, 1926) §2325 (thirty days); N. Y. CRIM. CODE (Gilbert, 1929) §466 (one year).

⁵ N. C. CODE ANN. (Michie, 1931) §4644.

⁶ *England v. Duckworth*, 75 N. C. 309 (1875); *Stilley v. Goldsboro Planing Mills Co.*, 161 N. C. 517, 77 S. E. 760 (1913).

⁷ *Turner v. Davis*, 132 N. C. 187, 43 S. E. 637 (1903); *Chrisco v. Yow*, 153 N. C. 434, 69 S. E. 422 (1910).

⁸ *Black v. Black*, 111 N. C. 300, 16 S. E. 412 (1892); *Allen v. Gooding*, 174 N. C. 271, 93 S. E. 740 (1917).

⁹ *State v. Trull*, 169 N. C. 363, 85 S. E. 133 (1915); *State v. Hartsfield*, 188 N. C. 357, 124 S. E. 629 (1924); *State v. Jackson*, 199 N. C. 321, 154 S. E. 402 (1930).

¹⁰ *State v. Starnes*, 94 N. C. 973 (1885); *State v. Lilliston*, 141 N. C. 857, 54 S. E. 427 (1906); *State v. Griffin*, 190 N. C. 133, 129 S. E. 410 (1925).

¹¹ *Bledsoe v. Nixon*, 69 N. C. 82 (1873); *State v. Casey*, 201 N. C. 185 (1931).

¹² *State v. Casey*, *supra* note 1, at p. 627.

tended to refer only to the trial courts, since it is placed under the heading "Trial, Superior Courts";¹³ (2) that the constitution confers upon the Supreme Court the power to review the decisions of the lower courts only upon matters of law and legal inference;¹⁴ (3) that, since the governor has the pardoning power, there is no necessity for an assumption of the power.¹⁵ It is worthy of note that the leading decisions on this point were by a divided court.¹⁶

In reaching the decision in the instant case the court had to overrule the prevailing view that the Superior Courts could not entertain a motion for new trial in a capital case after affirmance on appeal. Only one case has been found involving this point, and there the trial court asserted it had the power to entertain the motion, though refusing it on the merits.¹⁷ Since this decision in 1886 two statutory changes have modified the procedure.¹⁸ One of these statutes provides that upon affirmance on appeal in a capital case, execution shall take place on the third Friday after the filing of the opinion of the Supreme Court.¹⁹ The contention of the dissenting judges in the instant case was that this statute was a limitation of the power conferred by the statute making procedure as to new trials in criminal cases conform to that in civil cases. The majority opinion took the view that such a construction would violate the constitutional guaranty of the equal protection of the laws²⁰ by refusing to one convicted of a capital offense the right to move for a new trial after appeal, although such a right remains to one convicted of a lesser offense.

The result reached in the instant case seems desirable, though it is to be doubted whether a contrary result would have violated the

¹³ N. C. CODE ANN. (Michie, 1931) §§4632-4646; *State v. Lilliston*, *supra* note 10.

¹⁴ N. C. CONST., art. 4, §8; *State v. Starnes*, *supra* note 10. In *State v. Lilliston*, *supra* note 10, at 867, Chief Justice Clark speaking for the court, says: "Motion for new trials for newly discovered evidence were equitable in their nature and did not extend to criminal actions until §3272 of the Revisal (now C. S. 4644), which extended the power only to the Superior Courts."

¹⁵ *State v. Lilliston*, *supra* note 10; *State v. Turner*, *supra* note 2.

¹⁶ *State v. Lilliston*, *supra* note 10 (three to two); *State v. Turner*, *supra* note 2 (three to two); *State v. Arthur*, 151 N. C. 653, 65 S. E. 758 (1909) (four to one).

¹⁷ *State v. Starnes*, 97 N. C. 423, at p. 428 (1886).

¹⁸ N. C. CODE ANN. (Michie, 1931) §4654 (providing that an appeal shall not be construed as vacating the judgment of the trial court, as had been the practice); N. C. CODE ANN. (Michie, 1931) §4663.

¹⁹ N. C. CODE ANN. (Michie, 1931) §4663.

²⁰ U. S. CONST., Amend. 14.

constitutional amendment as to the equal protection of the laws.²¹ It would seem unjust to limit one convicted of a capital offense to an appeal for pardon, while one convicted of a lesser offense has the additional right of a motion for new trial. Before the governor the prisoner is presumed to be guilty, while in a trial he has the benefit of a presumption of innocence. Furthermore, a pardon, if granted, does not carry the same mark of innocence as does an acquittal by a jury.

The principal case brings the procedure in criminal cases one step nearer to that in civil cases. The only remaining difference is that the Supreme Court will not entertain motions for new trials in criminal cases, while it will do so in civil cases. It seems unlikely that the court will reverse itself on that point, in view of the long line of decisions, and the practical obstacles presented above. Such a change, if desirable, could better be accomplished by a constitutional amendment.

ROBERT A. HOVIS.

Federal Procedure—Injunction Against Judgment of State Court.

The defendant, in violation of a written contract of employment with the plaintiff, started suit for personal injuries in a state court against a railroad over which the plaintiff ran its trains. The plaintiff, since by contract it had to hold the railroad harmless, filed this suit in a federal court to enjoin the defendant from proceeding. *Held*: Injunction granted to stay the execution of judgment if rendered.¹

The Federal Judicial Code, since 1793, has provided that "The writ of injunction shall not be granted by any court of the United States to stay the proceedings in any court of a state, except in cases where such injunction shall be authorized by any law relating to bankruptcy."²

²¹ The construction given this Amendment by the United States Supreme Court allows for a "reasonable classification." Thus, so long as all capital offenders have the same right it seems that the equal protection of the laws would not be denied. In *Bowman v. Lewis*, 101 U. S. 22 (1880), the Court says, the Fourteenth Amendment "has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons in the same place and under like circumstances. . . . Each state prescribes its own mode of judicial proceeding."

¹ *Western Union v. Tompa*, 51 F. (2d) 1032 (C. C. A. 9th 1931).

² 36 STAT. 1162 (1911), 28 U. S. C. A. §379 (1928).

Some courts hold that this prohibits the enjoining of the prosecution of proceedings of state courts at any stage,³ unless the suit relates to bankruptcy. Others, however, narrow its restrictions so as to allow a federal court to prevent the institution of proceedings to enforce statutes contrary to the Constitution of the United States;⁴ or to stay the proceedings in a state court when the rightful jurisdiction of the federal courts is being disregarded,⁵ or when property in the custody of the federal court is being interfered with by proceedings in the state courts,⁶ or when the state court denies the removal to the federal court of a cause that is by law removable.⁷ There are still others that take a middle ground, and, while they will not enjoin the prosecution of judicial proceedings, will stay the issuance of an execution after judgment, if the judgment has been secured by fraud,⁸ or is void,⁹ or ought not according to good conscience be

³ *Chapman v. Brewer*, 114 U. S. 158, 5 Sup. Ct. 799, 29 L. ed. 83 (1885); *Fenwick Hall Co. v. Old Saybrook*, 66 Fed. 389 (C. C. D. Conn. 1895); *Security Trust Co. v. Union Trust Co.*, 134 Fed. 301 (C. C. E. D. Pa. 1904); *Leathe v. Thomas*, 97 Fed. 136 (C. C. A. 7th 1899); *Southern Bank and Trust Co., v. Falsom*, 75 Fed. 929 (C. C. A. 6th 1896).

⁴ *Mo. v. B. & Q. R. Co.*, 241 U. S. 333, 36 Sup. Ct. 715 (1916); *Phoenix Ry. v. Geary*, 239 U. S. 277, 36 Sup. Ct. 45, 60 L. ed. 287 (1915); *Minn. Brewery Co. v. McGillivray*, 104 Fed. 258 (C. C. D. S. D. 1900)

Contra: Rensselaer & S. R. Co. v. Bennington & R. R. Co., 18 Fed. 617 (C. C. D. Vt. 1883); *Terrace v. Thompson*, 263 U. S. 197, 44 Sup. Ct. 15, 68 L. ed. 255 (1923).

⁵ *French v. Hay*, 22 Wall. (U. S.) 250, 22 L. ed. 875 (1875); *Terre Haute & I. R. Co. v. Peoria & P. U. R. Co.*, 82 Fed. 943 (C. C. N. D. Ill. 1897); *Riverdale Cotton Mills v. Ala. etc. Mfg. Co.*, 111 Fed. 431 (C. C. N. D. Ga. 1901); *Chesapeake & O. Ry. Co. v. McCabe*, 213 U. S. 207, 29 Sup. Ct. 430, 53 L. ed. 735 (1908).

⁶ *Oppenheimer v. San Antonio Land & Irrigation Co.*, 246 Fed. 934 (C. C. A. 5th 1917); *Havner v. Hegnes*, 269 Fed. 537 (C. C. A. 8th 1920).

⁷ *U. S. v. Brown*, 281 Fed. 657 (C. C. A. 8th 1922); *Jessup v. Wabash, St. L. & P. Ry. Co.*, 44 Fed. 663 (C. C. N. D. Ohio 1890).

⁸ *Marshall v. Holmes*, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. ed. 870 (1891) (plaintiff introduced forged letter in evidence); *Hewitt v. Hewitt*, 17 F. (2d) 716 (C. C. A. 9th 1927) (widow did not disclose to adm'r that husband had an adopted son); *Chicago, R. I. & R. R. Co. v. Callicotte*, 267 Fed. 799 (C. C. A. 8th 1920), 16 A. L. R. 386 (1922) (plaintiff produced temporary paralysis by artificial means and secured judgment for injuries); *Lehman v. Graham*, 135 Fed. 39 (C. C. A. 5th 1905) (holder of note secured by mortgage collected note then secured judgment for foreclosure on mortgage).

⁹ Several states have statutes which provide that service of process upon a certain state official shall be deemed to be service upon a foreign corporation, if that corporation has no agent upon which process may be served. The following cases hold that judgment by default where process was not actually served upon the defendants was void regardless of the statute. *Simon v. Sou. Ry.*, 195 Fed. 56 (C. C. A. 5th 1912); *Aff'd* on appeal, 236 U. S. 115, 35 Sup. Ct. 255, 59 L. ed. 492 (1915); *Nat. Surety v. State Bank*, 120 Fed. 593 (C. C. A. 8th 1903); *Joseph Reid Gas Engine Co. v. Exchange Nat. Bank*, 281 Fed. 847 (W. D. La. 1912); *Mohawk Oil Co. v. Layne*, 270 Fed. 841 (W. D. La. 1921).

enforced.¹⁰ The instant case falls in this last class. But the courts uniformly agree that such relief will not be given after the writ of execution has reached the sheriff.¹¹

This statute, if taken literally, plainly deprives the federal courts of the power to enjoin the prosecution of proceedings in any state court, regardless of any notions of equity or justice. Probably some liberality of construction is justified by the change in attitude towards the relations between the state and federal courts since 1793. But the instant case, by staying the enforcement of a judgment before that judgment is secured, is going very far. Regardless of how desirable a more extensive jurisdiction might be the change should be left to Congress.

WILLIAM MEDFORD.

Federal Procedure—Test of Jurisdictional Amount in Injunction Cases.

Plaintiff, a Massachusetts corporation, owning a hunting preserve valued in excess of \$50,000, the chief utility of which was for shooting wild fowl, sought an injunction in a federal court to restrain poaching by the defendants, citizens of North Carolina. *Held*, since the defendants' acts were such as substantially to destroy the chief utility of the land, the requisite jurisdictional amount of \$3,000 is involved.¹

The mere fact that a suit involves diversity of citizenship does not confer jurisdiction on a federal court.² There must be involved

¹⁰ *Wells Fargo & Co. v. Taylor*, 254 U. S. 175, 41 Sup. Ct. 93, 65 L. ed. 205 (1920) (facts almost identical with those in instant case except judgment had already been obtained); *Pierce v. Nat. Bank of Commerce*, 268 Fed. 487 (C. C. A. 8th 1920) (defendant after realizing money from collateral secured judgment in the state court on obligation); *Fetzer v. Johnson*, 15 F. (2d) 145 (C. C. A. 8th 1926) (defendant who had enjoyed the benefit of an improvement to be paid for out of an assessment upon lands benefitted, secured judgment setting aside assessment on his lands on grounds of technicality in making the assessment).

But the courts will not enjoin a mere irregularity in procedure. *Lauderdale Co. v. Forster*, 23 Fed. 516 (C. C. W. D. Tenn. 1885); or for error in construction or application of law, *Hartford Life Ins. Co. v. Johnson*, 268 Fed. 30 (C. C. A. 8th 1920); *Wagner Electric Mfg. Co. v. Lyndon*, 282 Fed. 219 (C. C. A. 8th 1922).

¹¹ *Mills v. Provident Life & Trust Co.*, 100 Fed. 344 (C. C. A. 9th 1900); *Leathe v. Thomas*, 97 Fed. 136 (C. C. A. 7th 1899); *Fenwick Hall Co. v. Old Saybrook*, *supra* note 3; *Security Trust Co. v. Union Trust Co.*, *supra* note 3. See DOBIE, *FEDERAL PROCEDURE* (1928) 676.

¹ *Swan Island Club v. Ansell*, 51 F. (2d) 337 (C. C. A. 4th, 1931).

² *Ingrain Day Lumber Co. v. United States Shipping Board Emergency Fleet Corporation*, 267 Fed. 283 (S. D. Miss. 1920).

in addition an amount in excess of \$3,000, exclusive of interests and costs.³ This applies to suits in equity as well as to actions at law.⁴ There seems to be no clearly defined method used in arriving at the amount in controversy, due mostly to ambiguous language continually employed by the majority of the courts. This ambiguity is especially rife in suits for injunction. In the main, though indistinctly, five tests have been resorted to.

First, the court may be confronted with a situation in which the plaintiff has a definite subject matter which he seeks to protect from the acts of the defendant. If the subject matter is capable of evaluation, it will determine the amount in controversy.⁵ Thus, when it is a tract of land, and the defendant's acts cause a permanent injury to that land, the value of the land will be the chief factor.⁶ Where the suit is to enjoin unlawful interference with the plaintiff's business, the value of that business will be the amount in controversy.⁷ And where the plaintiff seeks to restrain the infringement of a trade-mark, the court will look at the value of that trade-mark.⁸

The second method employed is collateral to the first. Where there is a definite subject matter to be protected, the cases in this group determine the amount in controversy not only by the value of the subject matter to be protected, but proceed one step further and add the amount of pecuniary damages which the plaintiff has already sustained.⁹ Thus, where the plaintiff seeks to protect a flume, the amount in controversy would be the value of the flume plus the dam-

³ 36 STAT. 1087 (1911), 28 U. S. C. A. §292 (1927).

⁴ *Farmers and Merchants Bank of Monroe, N. C. v. Federal Reserve Bank of Richmond*, 274 Fed. 235 (W. D. N. C. 1921).

⁵ *Louisville R. Co. v. Bitterman*, 144 Fed. 34 (C. C. A. 5th, 1907), *aff'd.*, 207 U. S. 205, 28 Sup. Ct. 91, 52 L. ed. 171, 12 ANN. CAS. 693 (1907) (scalping of nontransferable round trip tickets at a reduced fare); *Texas R. Co. v. Bitterman*, 144 Fed. 46 (C. C. A. 5th, 1906) (same); *Harris v. Brown*, 6 F. (2d) 922 (W. D. Ky. 1925) (suit to enjoin directors of corporation from doing harmful and illegal acts).

⁶ *Swan Island Club v. Ansell*, *supra* note 1; *In re Turner*, 119 Fed. 231 (C. C. S. D. Iowa 1902); *Northern Pacific R. Co. v. Cunningham*, 103 Fed. 708 (C. C. S. D. Wash. 1900); *Smith v. Bivens*, 56 Fed. 352 (C. C. D. S. C. 1893); *Fidler v. Roberts*, 41 F. (2d) 305 (C. C. A. 7th, 1930); *Port of Seattle v. Oregon & W. R. Co.*, 242 Fed. 986 (W. D. Wash. 1917).

⁷ *Lambert v. Yellowley*, 4 F. (2d) 915 (C. C. A. 2nd, 1925), *aff'd.*, 272 U. S. 581, 47 Sup. Ct. 210 (1926); *American Fisheries Co. v. Lennen*, 118 Fed. 869 (C. C. D. Conn. 1902); *Campbell Baking Co. v. City of Maryville*, 31 F. (2d) 466 (W. D. Mo. 1929).

⁸ *Hennessy v. Hermann*, 89 Fed. 669 (C. C. N. D. Cal. 1898).

⁹ *Denver & R. G. R. Co. v. Mills*, 222 Fed. 481 (C. C. A. 8th, 1915) (suit to restrain railroad company from taking right of way).

age already done to it.¹⁰ The plaintiff under this method obviously has a better chance to stay in court than under the first, though the difference in many instances would prove to be negligible.

Cases employing the third method proceed on the basis of prospective damage to the plaintiff, were the injunction not granted. It is in this group that ambiguity is most prevalent. The language of the courts deals with rights and their supposed values, the amount in controversy being the value of the right which the plaintiff seeks to protect,¹¹ which in effect is equivalent, in a pecuniary sense at least, to the prospective damage to the plaintiff should the injunction not issue. However, most courts refrain from using the latter language. The right of the plaintiff to conduct his business free from unlawful interference¹² would perhaps be equal to the damages which he would sustain if the defendant's interference were not enjoined. Likewise, the value of the plaintiff's right to restrain the enforcement of an order by the railroad commission, reducing his rates,¹³ would be the amount of damage he will sustain if the order is enforced. And in a suit to enjoin the collection of a tax, the right has the identical evaluation as the plaintiff's prospective damage, *i.e.*, the amount of the tax,¹⁴ and in a few cases, that amount plus the immediate damages which the tax will probably occasion, such as the extinction of a business.¹⁵ Most cases, however, refuse to go beyond the amount of the tax.¹⁶ Some of the courts in this third group do not camouflage what they really mean with a discussion of rights, but attack the problem in an understandable way by asking themselves directly the question as to how much damage the plaintiff would sustain were the injunction not to issue.¹⁷

¹⁰ *Maffet v. Quine*, 95 Fed. 199 (C. C. D. Ore. 1899).

¹¹ *Packard v. Banton*, 264 U. S. 140, 44 Sup. Ct. 257, 68 L. ed. 596 (1924) (suit to restrain enforcement of unconstitutional statute); *Sun Maid Raisin Growers of California v. Avis*, 25 F. (2d) 303 (N. D. Ill. 1928) (suit to restrain infringement of a trade-mark); *Del Monte Special Food Co. v. California Packing Corporation*, 34 F. (2d) 774 (C. C. A. 9th, 1929) (suit to restrain unfair competition); *General Petroleum Corporation of California v. Beanblossom*, 47 F. (2d) 826 (C. C. A. 9th, 1931).

¹² *Mutual Oil Co. v. Zehrung*, 11 F. (2d) 887 (D. Neb. 1925) (suit to enjoin municipal corporation from competing with plaintiff in selling gasoline).

¹³ *Illinois Central R. Co. v. Kentucky Railroad Commission*, 1 F. (2d) 805 (E. D. Ky. 1924).

¹⁴ *Bank of Arizona v. Howe*, 293 Fed. 600 (D. Ariz. 1923).

¹⁵ *St. Louis S. W. R. Co. v. Emmerson*, 30 F. (2d) 322 (C. C. A. 7th, 1929); *Gallardo v. Questrell*, 29 F. (2d) 897 (C. C. A. 1st, 1928).

¹⁶ *Turner v. Jackson Lumber Co.*, 159 Fed. 923 (C. C. A. 5th, 1908) (tax on land); *Purnell v. Page*, 128 Fed. 496 (C. C. E. D. N. C. 1903) (personal tax constituting cloud on title to realty).

¹⁷ *Fjardo Sugar Co. of Porto Rico v. Holcomb, Auditor*, 16 F. (2d) 92 (C. C. A. 1st, 1926) (suit to enjoin a re-audit of plaintiff's books to ascertain

The fourth method is complementary to the third. The amount in controversy is determined on the basis of prospective damage plus past damage.¹⁸ Where the suit is to enjoin the enforcement of illegal regulations, costing the plaintiff \$1,600 annually, the amount involved is the damage the plaintiff has already sustained plus that which he will probably sustain in the future.¹⁹

The procedure of the fifth group is an unqualified and clean-cut departure from that adopted by the other four groups in that it views the situation from the defendant's side, the amount involved being determined by the prospective damage to the defendant in case the injunction should issue.²⁰ These cases sometimes involve a nuisance situation, the value of the property or activity resulting in the nuisance being the amount in controversy.²¹ The reason for this inverse procedure is made apparent when it is disclosed that in these cases the plaintiff's right is either negligible or incapable of evaluation.

To say that these five methods are distinct and clearly defined would be far from the truth. They are, rather than mere methods, groups into which the federal courts have inadvertently fallen. The instant case is no exception. It cites cases that do not fall within its own group. This confusion clearly demonstrates the intensive need of a uniform basis of evaluation to ascertain the amount in controversy. The following rule is suggested: The amount in controversy is always to be determined by the pecuniary damage which the plaintiff would probably sustain if the defendant's acts were al-

income tax); *Bronson v. Boards of Sup'rs*, 237 Fed. 212 (N. D. Iowa 1916) (suit to restrain construction of drainage ditch, causing overflow on plaintiff's land).

¹⁸ *Reed, Fears, and Miller v. Miller*, 2 F. (2d) 280 (E. D. Pa. 1924), *aff'd.*, 5 F. (2d) 1018 (C. C. A. 3rd, 1925) (suit to restrain defendant from entering business similar to that of plaintiff); *Railroad Commission of Louisiana v. Texas & P. R. Co.*, 144 Fed. 68 (C. C. A. 5th, 1906) (suit to enjoin further imposition of fine by commission).

¹⁹ *Chesapeake & Delaware Canal Co. v. Gring*, 159 Fed. 662 (C. C. A. 4th, 1908), *certiorari* denied, 212 U. S. 571, 29 Sup. Ct. 682, 53 L. ed. 655 (1908).

²⁰ *Nueces Valley Town-Site Co. v. McAdoo*, 257 Fed. 143 (W. D. Tex. 1919) (suit to restrain acts of railroad administration, which acts saved it \$400 per month); *Northern Pac. Ry. Co. v. Pacific Coast Lumber Manufacturers Ass'n.*, 165 Fed. 1 (C. C. A. 9th, 1908) (suit to enjoin railroad companies from establishing a new schedule of rates); *Union Pac. R. Co. v. Oregon & Washington Lumber Manufacturers Ass'n.*, 165 Fed. 13 (C. C. A. 9th, 1908) (same).

²¹ *American Smelting Co. v. Godfrey*, 158 Fed. 225, 14 ANN. CAS. 8 (C. C. A. 8th, 1907), *certiorari* denied, 207 U. S. 597, 28 Sup. Ct. 262, 52 L. ed. 357 (1907); *Rainey v. Herbert*, 55 Fed. 443 (C. C. A. 3rd, 1893); *Whitman v. Hubbell*, 30 Fed. 81 (C. C. S. D. N. Y. 1887).

lowed to continue;²² and the plaintiff shall not be turned out of court unless it clearly appears that the jurisdictional amount is not involved. It is believed that a strict adherence to this rule would not only remedy the confusion now existent in injunction suits, but would work a fair and plausible result, as being based upon the very purpose for which the suit is brought.

The value of the object to be protected should never control, unless the damage inevitably goes to the whole value of that object. Past damages cannot reasonably be considered as a part of the matter in controversy. And to base the amount in controversy on the defendant's prospective damage is to repudiate the principles on which the purpose of the suit is founded. The fact that the plaintiff's right is either negligible or incapable of evaluation furnishes no excuse for such an inverse procedure. If the plaintiff's right is negligible, he should be thrown out of court; if incapable of evaluation, he should be allowed jurisdiction under the suggested rule.²³

FRANK P. SPRUILL, JR.

Municipal Corporations—Eminent Domain—Right of Abutting Owner to Compensation When Street Closed.

Pursuant to an agreement between the city and railroad company for the elimination of grade crossings, the street on which plaintiff's property abutted was closed at the end of the block, thus cutting off his direct means of travel toward the business section and leaving his premises fronting in a cul-de-sac. Plaintiff was held entitled to compensation for the impairment of his easement, since he had suffered special damages not common to the public at large.¹

It is generally agreed by the courts that an abutting landowner has an easement in the street for the purpose of ingress and egress,²

²² The following rule is suggested in DOBIE, *FEDERAL JURISDICTION AND PROCEDURE* (1928) §56: "The amount in controversy in the United States District Court is always to be determined by the value to the plaintiff of the right which he in good faith asserts in his pleading that sets forth the operative facts which constitute his cause of action." Mr. Dobie calls this the "Plaintiff-viewpoint Rule." He discusses it more fully in a law review article: Dobie, *Jurisdictional Amount in the United States District Court* (1925) 38 HARV. L. REV. 733.

²³ For a collection of cases on the amount in controversy in injunction suits, see 28 U. S. C. A. §292 to §305 (1927).

¹ *Hiatt v. City of Greensboro*, 201 N. C. 515, 160 S. E. 749 (1931).

² *City of Texarkana v. Lawson*, 168 S. W. 867 (Tex. Civ. App. 1914) (ownership of lot abutting on a street carries with it the right of free and unimpaired access thereto and egress from); *Moose v. Carson*, 104 N. C. 431, 10 S. E. 689 (1889); *O'Brien v. Central Iron & Steel Co.*, 158 Ind. 218, 63 N. E. 302, 57 L. R. A. 503, 92 Am. St. Rep. 305 (1902); *Schimmelman v. Lake Shore etc. R. Co.*, 83 Ohio St. 356, 94 N. E. 840, 36 L. R. A. (N. S.) 1164 (1911).

and this is a property right which cannot be taken without just compensation.³ The owner of property immediately abutting on the vacated portion of the street is entitled to damages in practically all cases, whether such damages are expressly authorized by statute or not.⁴ But in the cases where the property does not abut directly on the closed section the authorities are not in accord.⁵ As a general rule, under these circumstances, the owner is not entitled to compensation if he still has access to the main system of streets.⁶ But if such owner can show that he has suffered special damages differing in kind, as well as in degree, from those sustained by the general public, then he is entitled to damages.⁷ If the closing of the street

³ *Gargan v. Louisville, N. A. & C. Ry. Co.*, 89 Ky. 212, 12 S. W. 259, 6 L. R. A. 340 (1889); *Illinois Cent. Ry. Co. v. Moriarity*, 135 Tenn. 446, 186 S. W. 1053 (1916) (if a street is obstructed so as to destroy or substantially impair owner's easement he is entitled to compensation); 2 ELLIOTT, *ROADS AND STREETS* (4th ed. 1926) 1679, §1180; see *Colvin v. Power Co.*, 199 N. C. 353, 359, 154 S. E. 678, 681 (1930).

Acts vacating or closing streets have been held unconstitutional because no compensation was provided for abutting owners. *Bannon v. Rohmeiser*, 90 Ky. 142, 13 S. W. 444, 29 Am. St. Rep. 355 (1890); *Houston v. Town of West Greenville*, 126 S. C. 484, 120 S. E. 236 (1922) (street closed and plaintiff's property left in a cul-de-sac). See (1923) 10 VA. L. REV. 484.

⁴ *Young v. Nichols*, 152 Wash. 306, 278 Pac. 159 (1929); *State v. Comm. of Deer Lodge County*, 19 Mont. 582, 49 Pac. 147 (1897); 2 ELLIOTT, *loc. cit. supra* note 3. Note (1910) 15 ANN. CAS. 687. See Note (1916) 16 COL. L. REV. 139.

In many states the right of the abutting owner to compensation for the vacation or closing of a street is based upon a statute. Note (1910) 15 ANN. CAS. 688; *Newark v. Hatt*, 79 N. J. L. 548, 77 Atl. 47, 30 L. R. A. (N. S.) 637 (1910); *Re Hoyt*, 162 App. Div. 469, 147 N. Y. Supp. 599 (1914), *aff'd*, in 213 N. Y. 651, 107 N. E. 1079 (1914); *Hedrick v. City of Harrisburg*, 278 Pa. 274, 122 Atl. 281 (1923).

The Federal Constitution, as well as most state constitutions, provides that private property cannot be taken for public use without just compensation. U. S. CONST., AMEND. 5. The North Carolina constitution provides that no person shall be deprived of his property except by the law of the land. N. C. CONST., art. 1, §17. When the owner does not abut directly upon the closed portion of the street, there is usually no taking of property within the meaning of the constitutional provisions. The constitutional provision in some states has been expanded so that no property can be taken or damaged without just compensation. See Note (1926) 13 VA. L. REV. 334. Thus the damage to this right of easement appurtenant to the property has been compensated when there is no actual taking of the property.

⁵ *Tomaszewski v. Palmer Bee Co.*, 223 Mich. 565, 194 N. W. 571 (1923) (mere inconvenience of property owner required to take a longer route is not a taking of his property). *Contra*: *Maletta v. Oliver Iron Mining Co.*, 135 Minn. 175, 160 N. W. 771 (1916) (allows compensation). See (1929) 39 YALE L. J. 128.

⁶ *Warner v. New York, N. H. & H. R. Co.*, 86 Conn. 561, 86 Atl. 23 (1913); *Symons v. San Francisco*, 115 Cal. 555, 42 Pac. 913 (1897); *In re Hull*, 163 Minn. 439, 204 N. W. 534, 49 A. L. R. 320 (1925); Note (1927) 49 A. L. R. 330.

⁷ This rule was laid down in *Smith v. Boston*, 7 Cush. 534 (Mass. 1851), and is now recognized in practically all jurisdictions. *Re Mellon Street*, 182

does not deprive the owner of access to and egress from his property, but merely forces him to take a more circuitous route to reach the main system of streets or the business section of the city, he is not, as a rule, entitled to compensation since he has suffered no special damages.⁸ But if the property is left fronting in a cul-de-sac, that is, in a street with only one outlet, and direct access to the business section is cut off, it is generally agreed that the owner may recover damages.⁹ Where access has been cut off from one direction the question that has perplexed the courts is whether the damages sustained constitute *damnum absque injuria*, or whether, as a matter of fact, he has been so placed in a cul-de-sac as to be entitled to compensation under the exception to the general rule.¹⁰

Pa. 397, 38 Atl. 281, 38 L. R. A. 275 (1897); *Texarkana v. Lawson*, *supra* note 2; *Denver Union Terminal Ry. Co. v. Goldt*, 67 Colo. 115, 186 Pac. 904 (1920); *Lowell v. Buffalo County*, 119 Neb. 776, 230 N. W. 842 (1930).

⁸ 2 ELLIOTT, *op. cit.* *supra* note 3, 1681, §1181; *Kochele v. Bridgeport Hydraulic Co.*, 109 Conn. 151, 145 Atl. 756 (1929); *Robinett v. Price*, 74 Utah 512, 280 Pac. 736 (1929); *German Evan. L. Church v. Mayor etc. of Baltimore*, 123 Md. 142, 190 Atl. 983, 52 L. R. A. (N. S.) 889 (1914) (although approach from one direction is completely cut off). *Contra*: *Illinois Cent. R. Co. v. Moriarity*, *supra* note 3 (property was a corner lot and the owner was allowed compensation for the closing of one of the streets on which the lot abutted).

An abutting landowner is not entitled to compensation for the closing of neighboring streets, since the damages sustained are same as those of the general public. *Hyde v. Minnesota, D. & P. Ry. Co.*, 29 S. D. 220, 136 N. W. 92, 40 L. R. A. (N. S.) 48 (1912); *Cook v. City of Portland*, 298 Pac. 900 (Ore. 1931) (lot opposite the end of a vacated street intersecting street on which property fronted held not to "abut" on the vacated portion so as to entitle owner to compensation).

⁹ *Vanderburg v. City of Minneapolis*, 98 Minn. 329, 108 N. W. 480, 6 L. R. A. (N. S.) 741 (1906); *Falender v. Atkins*, 186 Ind. 455, 114 N. E. 965 (1917) (fact that property is left fronting in a cul-de-sac is taken with the other facts to show special damages); *Park City Yacht Club v. City of Bridgeport*, 85 Conn. 366, 82 Atl. 1035 (1912) (cul-de-sac is exception to general rule); *Maletta v. Oliver Iron Mining Co.*, *supra* note 5; Note (1927) 49 A. L. R. 333.

Where statutes provide for compensation to abutting owners for the vacation or closing of the street, compensation is allowed when the property is left fronting in a cul-de-sac. *In Re Walton Ave.*, 131 App. Div. 696, 116 N. Y. Supp. 471 (1909); *aff'd.* in 197 N. Y. 518, 90 N. E. 59 (1909); *Newark v. Hatt*, *supra* note 4.

¹⁰ In *City of Lynchburg v. Peters*, 145 Va. 1, 133 S. E. 674 (1926), the street upon which the lot abutted was vacated at one end, but not in front of the property, leaving the owner an outlet upon two streets. It was held that the damages sustained were *damnum absque injuria*, since they differed merely in degree from the damages suffered by the public. See Note (1927) 13 VA. L. REV. 334.

Cram v. City of Laconia, 71 N. H. 41, 51 Atl. 631 (1901) (owner was held not to have suffered special damages when the street was closed at the end of the block on which his premises abutted, resulting in a diversion of travel, and a depreciation of the value of the property); *cf.* *City of Chicago v. Burchy*, 158 Ill. 103, 42 N. E. 178 (1895) (recovery allowed when access from one direction had been cut off); *City of Texarkana v. Lawson*, *supra* note 2.

Although there is no statute in North Carolina providing for compensation to abutting landowners when the street is closed or vacated, the holding in the instant case is entirely in harmony with the decisions allowing a recovery when the property is left fronting in a cul-de-sac.¹¹ The closing of the street amounted practically to a discontinuance of the highway in front of the plaintiff's premises, interfering with his access to the business section of the city, and thereby diminishing the value of his property.¹² The plaintiff, therefore, sustained special damages differing in kind as well as in degree from those suffered by the public generally.¹³ Upon the facts and the law it would seem that the result reached by the court in the instant case is correct.

A. T. ALLEN, JR.

Negotiable Instruments—Discharge of Indorser—Consent to Extension of Time by "Subscribers."

In an action on a promissory note the indorsers set up the defense that the holder made a binding agreement to extend the time of payment. The maker replies that there is a stipulation in the note that "the *subscribers* agree to continue and remain bound notwithstanding any extension of time granted the principal, hereby waiving any and all notice of extension of time, nonpayment, or dishonor or protest in any form or any other notice whatsoever." *Held*: The indorsers are discharged. The word subscribers does not include persons signing as indorsers on the back of the note.¹

Literally, the word subscribe means to write one's name beneath or to sign at the end of an instrument.² It refers to the place of signature rather than to the manner thereof;³ therefore the term sub-

¹¹ *Vanderburgh v. City of Minneapolis*; *Falender v. Atkins*, both *supra* note 9; *Maletta v. Oliver Iron Mining Co.*, *supra* note 5; *Gargan v. Louisville, N. A. & C. Ry. Co.*, *supra* note 3 (held there was no authority to close street without the owners consent, as it would be depriving them of their property without due process of law); *O'Brien v. Central Iron & Steel Co.*, *supra* note 2. See (1923) 8 MINN. L. REV. 342.

¹² *Johnston v. Old Colony R. Co.*, 18 R. I. 642, 29 Atl. 594, 49 Am. St. Rep. 800 (1894) (measure of damages is the difference in value of the property); *Illinois Cent. R. Co. v. Moriarity*, *supra* note 3.

¹³ *Vanderburgh v. City of Minneapolis*; *Park City Yacht Club v. City of Bridgeport*, both *supra* note 9; *Denver Union Terminal Ry. Co. v. Goldt*, *supra* note 7 (owner was allowed compensation when only a narrow way was left).

¹ *Corporation Commission v. Wilkinson*, 201 N. C. 344, 160 S. E. 295 (1931).

² BOUVIER, LAW DICTIONARY (1914); WEBSTER'S NEW INTERNATIONAL DICTIONARY (1931); 37 CYC. 479 (1911); WORDS & PHRASES (2d 1914).

³ *Loughran v. Bonniwell & Co.*, 125 Iowa 518, 101 N. W. 287 (1904).

scriber includes only those who have consented to the waiver in the note by underwriting their names.

Prior to the adoption of the Negotiable Instruments Law persons who indorsed in blank, before delivery, for the accommodation of the maker, might have proved as between themselves and against anyone but a holder without notice that they signed as co-makers, guarantors, or indorsers.⁴ At present they are, nothing else appearing, indorsers,⁵ and their liability in the absence of a waiver, is conditioned upon due presentment, demand and notice of dishonor.⁶ Furthermore, a valid extension⁷ of time without the knowledge and consent of the indorser⁸ operates to discharge him.

At common law a waiver on the face of a note was binding upon all the indorsers, that being a part of the contract of indorsement⁹ unless expressly excluded.¹⁰

The principal case seems correct in holding that the language used expressly excludes defendant indorsers so far as extensions are

⁴ BIGELOW, *THE LAW OF BILLS, NOTES AND CHECKS* (1928) §253 and cases there cited; *Davis v. Morgan*, 64 N. C. 570 (1870); *Baker v. Robinson*, 62 N. C. 191 (1869); *Mendenhall v. Davis*, 72 N. C. 150 (1875); *Hoffman v. Moore*, 82 N. C. 313 (1880); *Southerland v. Fremont*, 107 N. C. 565, 12 S. E. 237 (1869).

⁵ N. I. L. §§63, 64, N. C. CODE ANN. (Michie, 1931) §§3044, 3045; *Houser v. Fayssoux*, 168 N. C. 1, 83 S. E. 692 (1914); *Bank v. Wilson*, 168 N. C. 557, 84 S. E. 866 (1915); *Perry Co. v. Taylor Bros.*, 148 N. C. 362, 62 S. E. 423 (1908); *Meyers Co. v. Battle*, 170 N. C. 168, 86 S. E. 1034 (1915); *Critcher v. Ballard*, 180 N. C. 111, 104 S. E. 134 (1920); BRANNAN, *THE NEGOTIABLE INSTRUMENTS LAW*, 577, 578, and cases there cited.

⁶ *Dillard v. Mercantile Co.*, 190 N. C. 225, 129 S. E. 598 (1925); *Perry v. Taylor*, *supra* note 5; *Houser v. Fayssoux*, *supra* note 5; *Bank v. Wilson*, *supra* note 5; *Meyers v. Battle*, *supra* note 5; *Gilliam v. Walker*, 189 N. C. 189, 126 S. E. 424 (1925); *Wren v. Cotton Mills*, 198 N. C. 89, 150 S. E. 676 (1929); BRANNAN, *THE NEGOTIABLE INSTRUMENTS LAW*, 588 and cases there cited.

⁷ If it be for a definite period and supported by a sufficient consideration. N. I. L. §120 (6), N. C. CODE ANN. (Michie, 1931) §3102 (6); *EATON & GILBERT, COMMERCIAL PAPER* (1903) §123; *Second Nat'l Bank v. Graham*, 246 Pa. 256, 92 Atl. 198 (1914); *Union Trust Co. v. M'Crum*, 145 App. Div. 409, 129 N. Y. Supp. 1078 (1911); *Nat'l Park Bank v. Koehler*, 204 N. Y. 174, 97 N. E. 468 (1912); *Wren v. Cotton Mills*, *supra* note 6; *Bank v. Lineberger*, 83 N. C. 454 (1880); *Fertilizer Co. v. Eason*, 194 N. C. 244, 139 S. E. 376 (1927).

⁸ He being a party secondarily liable, *Trust Co. v. York*, 199 N. C. 624, 155 S. E. 263 (1930); *Noble v. Beeman-Spaulding Co.*, 65 Ore. 93, 131 Pac. 1006 (1913); *First Nat'l Bank v. Drake*, 185 Iowa 879, 171 N. W. 115 (1919); N. I. L. §192, N. C. CODE ANN. (Michie 1931) §2977.

⁹ *EATON & GILBERT, COMMERCIAL PAPER* (1903) par. 116 (f); 2 DANIEL, *NEGOTIABLE INSTRUMENTS* (6th ed. 1919) §§1092, 1092 (a); *Gordon v. Montgomery*, 19 Ind. 110 (1862); *Swoope v. Boone County Bank*, 125 Ky. 433, 101 S. W. 334 (1907); *Williams Bros. v. Rosenbaum*, 79 S. W. 594 (Tex. Civ. App. 1904); *Bryant v. Bank of Ky.*, 71 Ky. 43 (1871).

¹⁰ *Williams v. Merchants Nat'l Bank of Kansas City*, 67 Tex. 609, 45 S. W. 163 (1887).

concerned. The Negotiable Instruments Law adopts the common law rule as to notice of dishonor¹¹ but contains no provisions relative to agreements consenting to extensions.¹² It is submitted that the holding would be similar had the present case arisen by reason of failure to give notice of dishonor or any other condition necessary to charge an indorser.¹³

The standard form of notes in use throughout the state of North Carolina generally includes such provisions as will obviate the difficulty presented by the instant case.¹⁴ Nevertheless this decision should serve as a danger signal to all banks and bankers¹⁵ and motivate them to a minute inspection of their formal notes. If such defect be found it would be cured by inserting such words as, "all parties hereto, including makers, indorsers, guarantors, and sureties waive . . . etc., and agree to continue and remain bound notwithstanding."¹⁶

PAUL BOUCHER.

Trial Practice—Inconsistent Verdict—Special Issues in Negligence.

The jury, on the issues submitted in an action for personal injuries, found that the defendant was negligent, that the plaintiff was contributorily negligent, and that the plaintiff was entitled to damages. The judge ruled that the verdict was inconsistent, and again submitted the issues, charging that damages could be found for the plaintiff only if the second issue was answered "No." On an appeal from this ruling it was held, that the first verdict rendered was not inconsistent, and that it entitled defendant to judgment.¹

¹¹ N. I. L. §110; BRANNAN, *THE NEGOTIABLE INSTRUMENTS LAW* (4th ed. 1926) 707; *Bank of Fredericksburg v. Knopp*, 256 S. W. 319 (Tex. Civ. App. 1923); *Frank-Taylor-Kendrick Co. v. Voissement*, 142 La. 973, 77 So. 895 (1918); *Leach v. Urschel*, 112 Kan. 629, 212 Pac. 111 (1923); *Newton County Bank v. Montgomery*, 175 S. W. 803 (Tex. Civ. App. 1915); *Owensboro Bank & Trust Co. v. Haynes*, 143 Ky. 534, 136 S. W. 1004 (1911).

¹² N. I. L. §126, N. C. CODE ANN. (Michie, 1931) §3092 (6).

¹³ *Supra* note 11; EATON & GILBERT, *COMMERCIAL PAPER* (1903) §108; *Perry v. Taylor*, *supra* note 5; see *Bank v. Johnson*, 169 N. C. 526, 86 S. E. 360 (1915); *Gillian v. Walker*, *supra* note 6.

¹⁴ An examination of the formal notes in use by many North Carolina banks, representative of the different sections, disclosed only one note containing such a defect.

¹⁵ Under the N. I. L. it is submitted that all the states should reach a similar holding.

¹⁶ Such a provision does not impair the negotiability of the note. *Taft v. Covington*, 199 N. C. 51, 153 S. E. 597 (1930) ("the drawer and endorser and all sureties hereto . . ."); *First Nat'l Bank of Pomeroy v. Battery*, 17 N. D. 326, 116 N. W. 341 (1908) ("the makers and indorsers herein"); BRANNAN, *NEGOTIABLE INSTRUMENTS LAW* (4th ed. 1926) 757.

¹ *Allen v. Yarborough*, 201 N. C. 568, 160 S. E. 833 (1931).

When a verdict is inconsistent, repugnant, or insensible, so that no judgment can be rendered thereon, it may be sent back to the jury for reconsideration.² However, a finding which is mere surplusage does not vitiate the whole verdict.³ The verdict in the principal case, while falling more nearly into the latter category, is not in a strict sense a "surplusage" verdict. It results from the practice in North Carolina of submitting several issues of specific fact to the jury, and may best be explained in terms of such practice.

In many jurisdictions the general issue, "Is the plaintiff entitled to recover of the defendant, and if so, in what amount?" could have been submitted here.⁴ Upon this the jury would make a general finding for the plaintiff or defendant, which would include both law and fact.⁵ This general issue is not submitted in negligence cases in North Carolina, but instead issues of particular controverted facts.⁶ These facts being found, it is left to the judge to determine, as a

² *State v. Hudson*, 74 N. C. 246 (1876); *State v. Whitaker*, 89 N. C. 473 (1883); *Mitchell v. Brown*, 107 N. C. 322, 12 S. E. 130 (1890); *Kornegay v. Kornegay*, 109 N. C. 188, 13 S. E. 770 (1890); *Johnson v. Townsend*, 122 N. C. 442, 29 S. E. 419 (1898); *State v. Parker*, 152 N. C. 790, 67 S. E. 35 (1909); *West Lumber Co. v. Keen*, 237 S. W. 236 (Tex. Comm. App. 1922); *Williams v. Zang*, 279 S. W. 815 (Tex. Crim. App. 1926); 1 HYATT, TRIALS (1924) §736; MCINTOSH, N. C. PRACTICE AND PROCEDURE (1929) §663; 38 Cyc. 1926 (1911).

³ *State v. Arrington*, 7 N. C. 571 (1819); *Hawkins v. House*, 65 N. C. 614 (1871); *McCaskill v. Curry*, 113 N. C. 313, 18 S. E. 252 (1893); *Equitable Co. v. Stout*, 135 Ind. 444, 33 N. E. 623 (1893); *Chic. & E. Ry. Co. v. Barger*, 82 Ind. App. 266, 144 N. E. 646 (1924); *Aycock v. Paraffine Oil Co.*, 210 S. W. 851 (Tex. Civ. App. 1919); 1 HYATT, TRIALS (1924) §824; MCINTOSH, N. C. PRACTICE AND PROCEDURE (1929) §601; 27 R. C. L. 883 (1920).

⁴ *Brown v. Wright*, 100 Conn. 193, 123 Atl. 7 (1923); *McKoy v. City of Wichita*, 86 Kan. 943, 122 Pac. 894 (1912); *Barnett v. Roberts*, 243 Mass. 233, 137 N. E. 353 (1922); 38 Cyc. 1869 (1911); 27 R. C. L. 866 (1920).

⁵ "The peculiarity of the general verdict is the merger into a single residuum of all matters, however numerous, whether of law or fact. It is a compound made by the jury which is incapable of being broken up into its constituent parts. . . . Three elements enter into the general verdict (1) the facts, (2) the law, and (3) the application of the law to the facts." *Sunderland, Verdicts, General and Special*, 29 YALE L. J. 250 (1920); 1 HYATT, TRIALS (1924) §712; 38 Cyc. 1869 (1911); 27 R. C. L. 834 (1920). See also note 4, *supra*.

⁶ *Denmark v. Atl. Ry. Co.*, 107 N. C. 185, 12 S. E. 54 (1890); *Kimberly v. Howland*, 143 N. C. 398, 55 S. E. 778, 7 L. R. A. (N. S.) 545 (1906). These are designated as "general" verdicts in North Carolina. *Porter v. Western N. C. Ry. Co.*, 97 N. C. 66, 2 S. E. 580 (1887); *Witsell v. West A. & S. Ry. Co.*, 120 N. C. 557 (1897); MCINTOSH, N. C. PRACTICE AND PROCEDURE (1929) 653. The corresponding issues of fact in other jurisdictions are termed "special" verdicts. *Chicago Brick Co. v. Rembarg*, 150 Ill. 192, 37 N. E. 239 (1894); *Texas Elect. Ry. v. Burt*, 272 S. W. 255 (Tex. Civ. App. 1925); *Innes v. City of Milwaukee*, 96 Wis. 170, 70 N. W. 1064 (1897); WIS. STAT. (1921) §2858.

matter of law, who is entitled to judgment.⁷ This judgment is given only after considering the findings as a whole, and in their relation to one another.⁸ Thus each finding has a special bearing on the construction of the verdict.

Under this practice the instant decision seems correct. The defendant's negligence does not preclude contributory negligence on the part of the plaintiff, for this is a typical situation in negligence cases.⁹ But unless there is a statute by which contributory negligence is considered only in mitigation of damages,¹⁰ or the "last clear chance" doctrine is invoked,¹¹ the plaintiff's contributory negligence will prevent his recovery.¹² The issue of damages in the principal case is not a general verdict for the plaintiff, but is only one of the issues determining the plaintiff's right to recover.¹³ As the other findings did not establish such right, the plaintiff cannot recover.¹⁴ The right to recover not being established, the damage issue is a surplusage only in a sense of being unnecessary to a final judgment.

⁷ "The provision in our present system of procedure for submitting issues was adopted for the purpose of enabling the jury to find the material facts with as little consideration as possible of principles of law, sometimes difficult for them to understand and apply, and so that the court, upon the facts thus found, may with greater care and accuracy declare the law, and thus determine the legal rights of the parties." Walker, J., in *Hatcher v. Dobbs*, 133 N. C. at 241, 45 S. E. at 562 (1903); *Bowen v. Whitaker*, 92 N. C. 367 (1885); *Burton v. Rosemary Mfg. Co.*, 132 N. C. 17, 43 S. E. 480 (1903).

⁸ *Holton v. Moore*, 165 N. C. 549, 81 S. E. 779, ANN. CAS. 1915 D. 246 (1914) (Where plaintiff on all the findings was not allowed to recover, though a finding of damages was in his favor); *Baker v. R. R.*, 118 N. C. 1015, 24 S. E. 415 (1895).

⁹ *Morrison v. Cornelius*, 63 N. C. 346 (1868); *Manley v. Wilmington Ry. Co.*, 74 N. C. 655 (1876); *McCausland v. Chicago City Ry. Co.*, 198 Ill. App. 200 (1916); *Morris v. Kansas City Light Co.*, 302 Mo. 475, 258 S. W. 431 (1924); *Penn. Ry. Co. v. Jenkins* 119 Va. 186, 89 S. E. 96 (1917); CLARK, LAW OF TORTS (1926) §133; 45 C. J. 976 (1928).

¹⁰ FEDERAL EMPLOYER'S LIABILITY ACT, c. 1, 49 STAT. 1908, §3, 45 U. S. C. A. §53; N. C. CODE ANN. (Michie, 1931) §3467; MINN. STAT. (Mason, 1927) §4935; MISS. LAWS (1913) c. 622; MASS. GEN. LAWS (1921) c. 160, §232; NEB. COMP. STAT. (1922) §8834; OHIO ANN. CODE (Throckmorton, 1929) §6245-1.

¹¹ *Gunter v. Wicker*, 85 N. C. 310 (1880); *Clark v. R. R.*, 109 N. C. 430, 14 S. E. 43 (1891); *Pickett v. R. R.*, 117 N. C. 616, 23 S. E. 264 (1898); *McManus v. Seaboard Ry. Co.*, 174 N. C. 735, 94 S. E. 455 (1917); *Fry v. Sou. Pub. Utilities Co.*, 183 N. C. 281, 111 S. E. 354 (1922); *Dover v. Archambault*, 57 Cal. App. 659, 208 Pac. 178 (1922); *Tullock v. Conn. Co.*, 94 Conn. 201, 108 Atl. 556 (1919); *State v. Glen Echo Park Co.*, 137 Md. 529, 113 Atl. 85 (1921); CLARK, LAW OF TORTS (1921) §134; 45 C. J. 984 (1928).

¹² *Supra* note 9.

¹³ *Hamilton v. Lumber Co.*, 160 N. C. 48, 75 S. E. 1087 (1912); *Sasser v. Lumber Co.*, 165 N. C. 242, 81 S. E. 320 (1913); *McKoy v. Craven*, 198 N. C. 180, 151 S. E. 94 (1930).

¹⁴ For the plaintiff's own negligence precluding his recovery see *supra* note 9.