NORTH CAROLINA LAW REVIEW

Volume 14 | Number 2 Article 3

2-1-1936

Editorial Board/Notes and Comments

North Carolina Law Review

The
North Carolina Law Review

VOLUME XIV | FEBRUARY, 1936 | NUMBER 2

NOTES AND COMMENTS

Agency—Master's Liability for Torts of His Agents.

The defendant corporation employed five men, including the manager, who had general authority over the store, in one of its chain grocery stores. One afternoon a school boy, the manager, and two other employees, to amuse themselves, took a rifle (which the school boy had brought to the store) to the basement for target practice. Some of the shots penetrated a wooden door which opened upon the street and one shot killed the plaintiff's intestate who was passing. The plaintiff now sues the defendant corporation for the wrongful death of his intestate. *Held,* the employees were not acting in the scope of employment and therefore were not the agents of the defendant so as to make the defendant liable for their acts. There is no absolute duty to control one's employees, but such duty may arise after knowledge of improper conduct. When the manager turned away to frolic, he was no longer in the employment of the defendant and therefore his knowl-

edge was not imputed to the defendant, so the defendant had no notice of the improper conduct of its employees and therefore was not liable.[1]

The liability of the master for the torts of his servants is usually based upon the doctrine of *respondeat superior*.[2] Recovery is allowed on this ground when it is found that the servant was acting in the scope of his employment[3] when he inflicted the injury. The courts have been unable to decide with any degree of unanimity just what constitutes "scope of employment."[4] However, the courts generally agree that a servant is no longer acting in the scope of his employment when he turns away to frolic or to take part in sport.[5] Nevertheless it has been held that, where the servant was performing his duty at the same time, he was acting in the scope of his employment.[6] All courts would agree that the employees in the instant case were not acting in the scope of their employment when they inflicted the injury.

There are many instances where the master has been held liable for the torts of his servants even though committed outside the scope of employment. The most common of these is where the master owes an affirmative or special duty which has been violated through some act of his servant.[7] It has been said that such an affirmative or special duty is owed by railroads to their passengers,[8] by hotels to their guests,[9] and occasionally it has been held that other places of business owe to their

[1] Ford v. Grand Union Co., 268 N. Y. 243, 197 N. E. 266 (1935).

[2] 2 MECHEM, AGENCY (2d ed. 1914) §1857.

[3] RESTATEMENT, AGENCY (1933) §228 defines the *scope of employment* as follows: "(1) The conduct of a servant is within the scope of employment if but only if: (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master. (2) It is a question of fact, depending upon the extent of departure, whether or not an act, as performed in its setting of time and place, is so different in kind from that authorized, or has so little relation to the employment, that it is not within its scope."

[4] Notes (1931) 37 W. VA. L. Q. 441; (1931) 6 WIS. L. REV. 239; (1931) 10 TEX. L. REV. 69.

[5] American Ry. Express Co. v. Davis, 152 Ark. 258, 238 S. W. 50 (1922); Sullivan v. Louisville & N. Ry., 115 Ky. 447, 74 S. W. 171 (1903) (foreman of the switching crew not in the scope of employment when he placed a torpedo under the wheels of a locomotive in sport); Goupiel v. Grand Trunk Ry., 96 Vt. 191, 118 Atl. 586 (1922) (engineer in sport moved the engine for the purpose of exploding torpedo to frighten section hand held not in the scope of employment); Note (1924) 30 A. L. R. 693.

[6] Great Atlantic and Pacific Tea Co. v. Roch, 160 Md. 189, 153 Atl. 22 (1931) (employee sent a rat instead of bread); Soderland v. Chicago, M. & S. P. Ry., 102 Minn. 240, 113 N. W. 449 (1907) (employees used hand-car in the course of employment; on this occasion they speeded up the hand-car "just for fun"; held to be in the course of employment).

[7] Comment (1928) 37 YALE L. J. 518.

[8] Ramsden v. Boston & Albany Ry., 104 Mass. 117 (1870); Hull v. Ry., 210 Mass. 159, 96 N. E. 58 (1911); Strother v. Aberdeen & Ashboro Ry., 123 N. C. 197, 31 S. E. 386 (1898); Craker v. Chicago & N. W. Ry., 36 Wis. 657 (1875). *Contra:* Dugger v. Central of Ga. Ry., 36 Ga. App. 782, 138 S. E. 266 (1927).

[9] Clancy v. Barker 71 Neb. 83, 98 N. W. 44 (1904); Note (1931) 45 HARV. L. REV. 342. *Contra:* Clancy v. Barker, 131 Fed. 161 (C. C. A. 8th, 1904).

customers a similar duty.[10] Courts have by implication read into bailment contracts an assumption of risk by the bailee,[11] thus holding him liable for the torts of his servants committed on the bailed chattel outside the scope of their employment.[12] It should be pointed out that a special duty is found only in cases where there was a contractual relationship or the injured party was treated as an invitee. In the principal case there was no such relationship between the plaintiff's intestate and the defendant out of which a special or affirmative duty could arise.

The master's liability for the torts of his servants acting outside the scope of their employment is based in some instances upon the *dangerous instrumentality* doctrine. The theory is that the master has intrusted his servant with a dangerous instrument which is likely to be misused.[13] The master's liability under this doctrine is usually limited to cases where the servants use the dangerous instrument "playfully."[14] It is evident that the defendant in the principal case could not be held under this doctrine because not only was the rifle which was used by the employees not intrusted to them by the defendant, but the defendant knew nothing about it.

In some cases the principal is liable for the acts of third persons where there is an apparent agency on the doctrine of estoppel.[15] The same doctrine has been used to hold the master liable for the torts of his servants outside of the scope of employment where the master has placed the servant in a position of apparent authority.[16] In both of the above circumstances the doctrine of estoppel can only be applied where there is some reliance by the injured party[17] (however remote)—which is clearly not present in the instant case.

It is evident that the master may be liable for his own negligence even though the injury was inflicted by the servant while acting outside

[10] Saloons have been said to owe their customers a special duty. Curran v. Olson, 88 Minn. 307, 92 N. W. 1124 (1903); Beike v. Carroll, 51 Wash. 395, 98 Pac. 1119 (1909). A taxi company owes its patrons a special duty. Korner v. Cosgrove, 108 Ohio St. 484, 141 N. E. 267 (1923). For other examples, see Notes (1927) 21 ILL. L. REV. 619; (1928) 27 MICH L. REV. 229.

[11] Note (1932) 45 HARV. L. REV. 342.

[12] National Liberty Ins. Co. v. Sturteuant-Jones Co., 116 Ohio 299, 156 N. E. 446 (1927); Note (1927) U. OF CIN. L. REV. 482. *Contra:* Fireman Fund Ins. Co. v. Schrieher, 150 Wis. 42, 135 N. W. 507 (1912).

[13] Horack, *The Dangerous Instrument Doctrine* (1916) 26 YALE L. J. 224.

[14] Robinson v. Melville Mfg. Co., 165 N. C. 495, 81 S. E. 681 (1914); Note (1928) 42 HARV. L. REV. 269. The same reasoning is used in cases where the master confides to his servants duties which involve the use of force, but in these cases the result is reached by saying that the act is in the scope of employment. New Ellerslie Fishing Club v. Stewart, 123 Ky. 8, 93 S. W. 598 (1908); Sturgis v. Kansas City Ry.,-Mo. App.-, 228 S. W. 861 (1921).

[15] Fields Ins. Co. v. Evans, 36 Ohio App. 153, 172 N. E. 702 (1929); Notes (1931) 29 MICH. L. REV. 640; (1933) 12 N. C. L. REV. 49.

[16] 2 MECHEM, AGENCY (2d ed. 1914) §720; HUFFCUTT, AGENCY (2d ed. 1901) §103; RESTATEMENT, AGENCY (1933) §261.

[17] Notes (1928) 27 MICH. L. REV. 697; (1929) 38 YALE L. J. 827.

of his employment. The master would be negligent if he failed to prevent his servants from acting on his premises in such a way as to endanger others, when he knows or should know of such conduct.[18] Thus in the instant case the court admits that if the corporation had known of the acts of its employees and then had failed to take some action to prevent it, it would have been liable. It could only have knowledge through its agents. Knowledge which an agent has will only be imputed to his principal (as a general rule) if it is gained while the agent is acting in the scope of his employment.[19] The doctrine of imputing an agent's knowledge to his principal is based upon the agent's duty to communicate all material information to his principal and a presumption that he has done so.[20] In the principal case the manager, by going to the basement and taking part in the target practice, had departed from the scope of employment and so his knowledge concerning the target practice was not imputed to his employer. The presumption of communication which is the basis of the above doctrine cannot apply to knowledge of the agent's own misdoings in departing from the scope of his employment. The decision seems especially hard in relieving the defendant of liability because the manager took an active part—when his duty was to prevent just such conduct by the other employees. It is to be remembered that the manager by taking part in the practice was doing two things at once: (1) he was stepping out of his employment of the corporation—thereby relieving the corporation of liability for his acts and knowledge, and, at the same time, (2) he was starting on a mission which would result in a wrong to the plaintiff's intestate. Even though it seems hard, the court by applying the recognized rules of the law of agency could not logically have reached any other result. The plaintiff still has his remedy against the employees as individuals.

ROBERT BOOTH.

Contracts—Mortgages—Right of Second Mortgage Bondholders to Prevent Impairment of Security by Wilful Breach of Contract.

In 1929 *A Gas Co.* contracted to sell to *B Manufacturing Co.* its entire output of natural gas for a period of years. The *A Co.* was organized solely for the purpose of executing this contract, which was its principal asset. To finance its operations, *A Co.* issued $1,500,000 of bonds secured by a first mortgage on all of its assets, expressly including among the mortgaged assets the contract with *B Co.*, and $500,000 of

[18] Hoyle v. Franklin Mfg. Co., 199 N. Y. 388, 92 N. E. 794 (1910).
[19] Notes (1927) 1 So. CALIF. L. REV. 176; (1928) 15 VA. L. REV. 782; (1931) 11 B. U. L. REV. 537; (1932) 10 N. C. L. REV. 68.
[20] *Ibid.*

bonds secured by a second mortgage on the same assets. In 1932 the holders of the second mortgage bonds filed an intervening petition in a receivership proceeding against *A Co.* in which they alleged that the *B Co.* had breached its contract with *A Co.*, thereby causing *A Co.* to default in payments on its bonds; that *B Co.* had then secretly bought 92% of the first mortgage bonds at prices greatly reduced by the default, intending thereby to force a foreclosure of the first mortgage, buy in the mortgaged property, including the right of action against itself, and thus effectively relieve itself of all liability for breach of contract. The second mortgagees contended that, by reason of the relationship of the parties and the conduct of the *B Co.*, a fiduciary duty devolved on the *B Co.* to account as trustee to the *A Co.* for the first mortgage bonds, the bonds so purchased to be surrendered by the *B Co.* upon being reimbursed for the actual outlay incurred in their purchase. *Held,* there was no fiduciary relationship between the *A Co.* and the *B Co.* Therefore the *B Co.* took the bonds with all the rights of an ordinary holder, including the right to foreclose in the event of default.[1] A dissenting opinion found a fiduciary relationship in the contract and dealings between the parties.[2]

In seeking protection from the effects of *B Co.*'s conduct, the second mortgagees invoked the familiar rule that where one party to a fiduciary relationship buys in an outstanding interest in the subject matter, a constructive trust will be imposed in favor of the other party.[3] Thus, the court's decision in the principal case was made to turn on the question whether a fiduciary relationship was involved. The concept of "fiduciary," one of the most flexible known to the law, has been invoked in a great variety of situations.[4] Reluctance to interfere unduly with

[1] Bell v. Wayne United Gas Co., 181 S. E. 609 (W. Va. 1935). The majority further argued that, even had there been a fiduciary duty with respect to the bonds purchased by the *B Co.*, the bonds would not be held for the benefit of the *A Co.* or the junior lienors, since "their rights were subject to the bonded debt at face value. A different situation might arise at the suit of a complaining former owner of the bonds." In thus noting the obvious injury caused by *B Co.*'s conduct toward the former owners of the first mortgage bonds, the majority seems to lose sight of the more obscure injury to *A Co.* and to the *junior* lienors, resulting from the fact that *B Co.* has now acquired control of the foreclosure proceedings. The dissent clearly points this out. "By purchasing these bonds, the glass companies [*B Co.*] presumably placed themselves in position to control the sale of the gas company's [*A Co.*'s] properties, and, incidentally, to get rid of the troublesome gas contract."

[2] *Id.* at 619. "Confidence was reciprocal. The gas company [*A Co.*] spent large sums of money on the basis of that confidence, and when default on its bonds seemed imminent, June 1, 1932, full disclosure of that situation was made to the glass companies [*B Co.*]."

[3] Trice v. Comstock, 121 Fed. 620 (C. C. A. 8th, 1903); Consumers Co. v. Parker, 227 Ill. App. 552 (1923); Wells v. Cline, 19 Ohio App. 165 (1924); 3 BOGERT, TRUSTS AND TRUSTEES (1935) §485.

[4] Moto Meter Co. v. National Guage & Equipment Co., 31 F. (2d) 994 (D. Del. 1929) (a fiduciary relationship held to exist between owner of royalties and owner

arm's length dealing has perhaps retarded the extension of the concept;[5] yet even if parties to ordinary commercial contracts have not usually been considered to be in such a relationship, the type of "entire-output" bargain encountered in the principal case does entail a large degree of mutual trust. Such contracts have proven to be commercially useful and should be encouraged.[6]

But if it is stretching traditional concepts too far to say that the contract in the instant case in itself created a fiduciary relationship, would *B Co.*'s breach create such a status? The majority decided that it would not. When the facts of the case, however, are considered independently of a constructive-trust formula, the relevancy of the court's whole discussion of the "fiduciary" issue seems doubtful. The court might have come more directly to grips with the merits of the case had it considered instead the question whether *B Co.* may properly be allowed to take advantage of the result of its own breach of contract to effectively escape from paying damages for that breach and even perhaps to make a tidy profit on the side.[7] The court discusses the case in terms of "fiduciary relationships" and "constructive trusts" at least in part because these are the traditional concepts which are most readily suggested by the facts of the principal case. The difficulty is that the principal case presents an unusual situation which may not readily be fitted into the traditional bounds of these well-known legal formulæ, and raises a doubt as to their validity.

The concrete results of imposing a trust in favor of *A Co.* would have been: first, to prevent *B. Co.*'s profiting from its breach; and second, to give a windfall to *A Co.* and the second mortgagees at the expense of the original owners of the first mortgage bonds. Aversion to

---

of patents; in this case the constructive-trust formula was invoked to aid the plaintiff out of a procedural difficulty); Johnson v. Umsted, 64 F. (2d) 316 (C. C. A. 8th, 1933) (illiterate negro woman and financial adviser); Bradley Co. v. Bradley, 37 Cal. App. 263, 173 Pac. 1011 (1918) (confidential agent); Miller v. Henderson, 140 Kan. 46, 33 P. (2d) 1098 (1934) (surviving partner and widow of deceased partner); Lewis v. Schafer, 163 Okla. 94, 20 P. (2d) 1048 (1933) (employee reposing confidence in employer); Note (1932) 39 W. VA. L. Q. 52 (a discussion of West Virginia cases on what constitutes a confidential or fiduciary relationship.)

[5] Thayer v. Leggett, 229 N. Y. 152, 128 N. E. 133 (1920) ("Between the assignor and the assignee of a lease no relation of trust or confidence arises. They deal at arm's length." Therefore a subtenant who obtained a new lease as against his lessor was not subject to a constructive trust.)

[6] For a discussion of the commercial advantages and the legal position of such contracts, see Havighurst and Berman, *Requirement and Output Contracts* (1932) 27 ILL. L. REV. 1.

[7] If the court in refusing to find a fiduciary relationship did so as a result of a preliminary determination that it would be practically undesirable to so encroach upon the *laissez-faire* theory of contract, one might merely agree or disagree with such a determination. An opinion written in such terms would, however, seem more desirable than the probably legalistic "fiduciary" rationale which hides from view the really determining factors.

the second result undoubtedly influenced the court against imposing the trust on *B Co.*[8] But the court's refusal to act merely left the windfall with *B Co.* and gave no solace to the original owners of the first mortgage bonds. In either event their position would be the same. It would seem preferable at least to prevent *B Co.* from succeeding in its savage business methods.

The objections raised, both doctrinal and practical, to imposing a trust in the instance case lead to the inquiry whether a better solution might not have been possible without resort to the constructive-trust formula. In their intervening petition the second mortgagees, in addition to asking that the trust be imposed on *B Co.*, asked for an adjudication of the breach of contract on the part of *B Co.* and a decree for the amount of the resultant damages. Instead, would it not have been a better course for the intervening petitioners simply to have asked for a decree that *B Co.* specifically perform its contract with *A Co.*? The fiction that damages would be adequate could hardly be indulged here, since, even though damages were collected, the inevitable result of allowing *B Co.* to breach the contract will be the financial ruin of the *A Co.* The difficulties of supervising the carrying out of the specific performance decree should not be so great as to prevent the court from giving that remedy. The result of specific performance should be to restore the solvency of the *A Co.* and allow it to cure the default on its bond.[9] Foreclosure of the first mortgage would be prevented, so that, even should *B Co.* retain the bonds,[10] it could no longer by that method effectively cancel the court's action. Both the second mortgagees and *A Co.* should thus secure complete protection.

F. M. PARKER.

[8] Bell v. Wayne United Gas Co., 181 S. E. 609, 618 (W. Va. 1935). According to the majority, " . . . it is difficult to say by what reasoning the bonds would be held for the benefit of the Wayne United Gas Co. [*A Co.*] or of its junior lienors. Neither of them had any property rights in the bonds. . . ."

[9] There was no specific finding of fact to this effect, but it was alleged in the bill of complaint "that the money to be derived from a proper performance of the contract on the part of the buyers would be ample to meet all the requirements of the Wayne United Gas Co. [*A Co.*]."

[10] Of course, a decree of specific performance would also result in restoring the full value of the first mortgage bonds now in the hands of *B Co.* The inquiry would then arise as to whether there was any remedy which the original owners of those bonds might assert against *B Co.* This question was left open by the court in the instant case, the court saying, "A different situation might arise at the suit of a complaining former owner of the bonds if it were shown that, in consequence of fraudulent conduct of the glass companies [*B Co.*], bonds had been parted with at a price substantially lower than their true and actual value. In such a case it might be said that the glass companies, if their fraud were shown, held the bonds as trustees for the former owner." The complaining former owner might also obtain relief under some analogy to the modern "economic compulsion" doctrine by which a transaction, induced by a threatened breach of contract which would result in irreparable damages, may be set aside. Hazelhurst Oil Mill & Fertilizer Co. v. U. S., 42 F. (2d) 331 (Ct. Cl. 1930); *cf.* Hartsville Oil Mill v.

Guaranty—Payment and Discharge.

One *S* entered into a continuing guaranty, whereby she guaranteed protection to the plaintiff bank against any debts or liabilities incurred by the Company. *S* died, and at the time of her death, the plaintiff held four notes of the Company covered by the guaranty. Later the plaintiff took the Company's demand note and credited the proceeds thereof to the account of the Company. Against the credit so created, the Company drew a check and the proceeds were applied to the four notes held by the bank. The discounted note of the Company recited that the four notes already held by the bank should be retained as collateral security. The plaintiff now brings suit against the executrix of the estate of *S* on the contract of guaranty covering the four old notes; to which the defendant entered three pleas: the check was payment of the indebtedness evidenced by the old notes; the new note was a change in the obligation and, being made after the death of the guarantor, operated as a discharge; and the demand note was in effect an extension of time. *Held,* the directed verdict for the plaintiff below should be affirmed on the grounds that there was no discharge from, nor change in, the original indebtedness, nor was there a binding extension of time.[1]

Clearly, the taking of the demand note was not such an extension as would release the guarantor, since the note was instantly due and suit might have been brought thereon at the moment that it was delivered.[2]

Whether there was a payment and discharge of the old notes depends upon the intent of the parties, expressed or implied,[3] and it seems that the court erred in not submitting that question to the jury. It is well settled that a renewal note does not amount to payment, nor does it raise a presumption of payment.[4] Moreover the fact that the demand

U. S., 271 U. S. 43, 46 Sup. Ct. 389, 70 L. ed. 822 (1926). Thus, had the *B Co.* threatened to breach its contract with *A Co.*, and so destroy the value of the bonds, in order to induce the former owner to part with the bonds at a low price, a good case of "economic compulsion" might have been made out. When the *B Co.*, instead of merely threatening a breach, adopted the more vicious course of actually consummating a breach, and then taking advantage of the natural result of that breach to acquire the bonds, should not the original owners of the first mortgage bonds still be protected?

[1] Sulter v. Citizens Bank & Trust Co., 181 S. E. 694 (Ga. App. 1935).

[2] Farmers' State Bank of Lisbon v. Fausett, 54 N. D. 696, 210 N. W. 638 (1926) (demand renewal note merely evidenced an indulgence in pressing collection which could have been given under the original notes); Mercantile Trust Co. v. Donk, 178 S. W. 113 (Mo. 1915) (demand renewal note was simply a change of form of evidence of the indebtedness).

[3] Malsons Bank v. Bermon, 224 Mich. 609, 195 N. .W 75 (1923); Lancaster v. Stanfield, 191 N. C. 340, 132 S. E. 21 (1926); Hatten Realty Co. v. Boylies, 42 Wyo. 69, 290 Pac. 561 (1930); 3 DANIEL, NEGOTIABLE INSTRUMENTS (7th ed. 1933) §1447.

[4] Bridge v. Connecticut Mut. Life Ins. Co., 167 Cal. 774, 141 Pac. 375 (1914); Bank of Benson v. Jones, 147 N. C. 419, 61 S. E. 193, 16 L. R. A. (N. S.) 343, and note (1908) (presumption of non-payment). But the courts of Indiana, Mas-

note recited that the old one should be held as collateral security tends to show an intent that the maker's obligation was still in force,[5] the new note operating only as a suspension of the debt evidenced by the original. The old notes would stand as security for the plaintiff bank only in the event that the contract of guaranty was applicable to them. Had there been payment, the liability that the contract created would have been destroyed,[6] but the Court based its decision on the fact that the withholding of the notes must have shown an intent for non-payment, concluding that the contract was still operative. The fact that a payment would occasion a loss of security to the creditor, in itself, raises a strong presumption against such payment.[7]

An opposite intent of the parties is indicated by the bank's discounting the new note and the Company's drawing a check against the credit so created and applying it to the old note. Thus considered, the contracts are essentially separate and distinct; the new note was not founded upon the consideration of the old ones, but upon a loan newly created by the bank's discount.[8]

Had the maker cashed the check at a place other than plaintiff bank upon which said check was drawn, and then applied the cash to the old note, doubtless there would have been a payment. Though the entire transaction was accomplished by the check and the entries on the books, it appears that, in effect, there was a withdrawal of the money obtained through the discounting of the new note, and a return of the same money

---

sachusetts, Maine, and Vermont hold that the taking of a negotiable note for a pre-existing, unsecured debt is presumed to be payment. 3 DANIEL, NEGOTIABLE INSTRUMENTS (7th ed. 1933) §1448.

[5] The mere retention of the original note by the creditor raises the presumption that there was an intent for the original note to remain in force. German Sav. Bank v. Bates Addition Imp. Co., 111 Iowa 432, 82 N. W. 1005 (1900); Jackson v. Home Nat. Bank of Baird, 185 S. W. 893 (Tex. 1916); 3 DANIEL, NEGOTIABLE INSTRUMENTS (7th ed. 1933) §1455. Even though the original note is cancelled and surrendered, the weight of authority is that the old note is not presumed to be paid. The minority view seems sounder. (1930) 8 TEX. L. REV. 444. But see Philadelphia & Reading Coal & Iron Co. v. Willinger, 137 Md. 46, 111 Atl. 132 (1920).

[6] 1 BRANDT, SURETYSHIP AND GUARANTY (3d ed. 1905) §364.

[7] Savings & Loan Soc. v. Burnett, 106 Cal. 514, 39 Pac. 922 (1895); Cotton v. Atlas Nat. Bank, 145 Mass. 43, 12 N. E. 850 (1887); Davis v. Thomas, 66 Neb. 26, 92 N. W. 187 (1902); Rushing v. Citizens' Nat. Bank, 162 S. W. 460 (Tex. 1914).

[8] Niblock v. Adler, 209 Ill. App. 156 (1917) (notes stamped paid and surrendered); Slaymaker v. Gundacker's Ex'rs, 10 S. & R. 75 (Pa. 1823) (original note surrendered and court held that a new loan was created and new discount paid); First Nat. Bank of Pawtucket v. Littlefield, 28 R. I. 411, 67 Atl. 594 (1907) (note stamped paid). "It may well be, that by common understanding and usage, when a note is discounted by a bank to take up a prior note held by the bank against the party procuring the discount and the avails are credited to him, the transaction is to be regarded as an extinguishment of the prior note, although it may not have been actually surrendered." Andrews, J., in Phoenix Insurance Co. v. Church, 81 N. Y. 218 at 226 (1880).

in discharge of the old notes.[9] If additional evidence of the old indebtedness was all that the parties intended and desired, why should they have resorted to the circuity used when they might have effected the same result by merely having the maker give the plaintiff bank the new note?

In view of the conflicting evidence as to the intent of the parties, the jury should have been left to determine the question of payment.

S. J. STERN, JR.

Injunction—Appeal as Adequate Remedy Precluding Decree against Administrative Agency.

A broadcasting company applied to the Communications Commission for a modification of its license so as to permit a night-time schedule. Another broadcasting company, one of five in the immediate area whose night-time service would thus be seriously affected, petitioned for leave to intervene at the hearing. One of the Commission's rules permits intervention by any person, firm, company, corporation, government department, officer or subdivision whose interest in the subject matter of the hearing is substantial. The petition was denied. The petitioner then sought an injunction to prevent a hearing without its participation. *Held,* bill dismissed,[1] plaintiff's remedy by appeal from any order modifying the license being plain, adequate, complete and exclusive. By statute,[2] this appeal was available to any person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing an application.

Injunctions against the enforcement of the decisions of administrative tribunals on the merits are frequently denied where plaintiff has failed to take advantage of provisions for administrative or judicial review.[3] Special circumstances, however, have sometimes operated to

[9] Letcher v. Bank of the Commonwealth, 31 Ky. 82 (1833).

[1] Sykes v. Jenny Wren Co., 78 F. (2d) 729 (App. D. C. 1935).

[2] 48 STAT. 1093, 47 U. S. C. A. §402 (b) (2) (1934).

[3] First National Bank of Greeley v. Board of Com'rs. of Weld County, 264 U. S. 450, 44 Sup. Ct. 85, 68 L. ed. 784 (1924) (tax assessment; administrative review); Gorham Mfg. Co. v. State Tax Commission of New York, 266 U. S. 265, 45 Sup. Ct. 80, 69 L. ed. 279 (1924) (imposition of franchise tax; administrative review); Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co., 289 U. S. 266, 53 Sup. Ct. 627, 77 L. ed. 1166 (1933) (respondent sought no further hearing than that before the chief examiner); American Bond & Mortgage Co. v. U. S. 52 F. (2d) 318 (C. C. A. 7th, 1931) (appeal); A. Rafelson Co., Inc. v. Tugwell, Acting Secretary of Agriculture, 79 F. (2d) 653 (C. C. A. 7th, 1935) (appeal); White v. Federal Radio Commission, 29 F. (2d) 113 (N. D. Ill. 1928) (appeal); Denver & S. P. R. Co. v. Englewood, 62 Colo. 229, 161 Pac. 151 (1916) (Utilities Commission of Colorado ordered a rate in conflict with a city ordinance; appeal); Chicago v. O'Connell, 278 Ill. 591, 116 N. E. 210 (1917) (order of Illinois Public Service Commission relative to routing and equipping street railway cars; appeal); Lowe v. Board of Com'rs., 156 Ind. 163, 59 N. E. 466 (1901) (construction of road;

require an injunction notwithstanding that omission.[4]

But that situation is to be distinguished from the principal case. Here the essential question is one of due process. In the case of *Chastleton Corporation v. Sinclair*[5] the United States Supreme Court held that the statutory provision for appeal from orders of the Rent Commission of the District of Columbia was not an adequate solution of that question. There the Rent Commission had issued an order establishing new rental rates, and the complainants subsequently purchased the apartment building at a foreclosure sale. No notice as was required by statute was given to either the mortgagee or the complainants. Therefore, an injunction was sought to restrain the enforcement of the order. In granting the injunction the Court said: "It is objected that the plaintiffs have an adequate remedy at law by way of appeal. But apart from the fact that it is doubtful whether the plaintiffs were not entitled to treat the order as a nullity so far as they were concerned, it is open to equal doubt whether in a proceeding under the law they could assail its validity. . . . However looked at, a bill in equity is the natural and best way of settling the parties' rights." The Court of Appeals of the District of Columbia has followed this decision in *Gilbert v. Sargent*[6] and *Linkins v. Sargent*.[7] And in *Saltzman v. Stromberg-Carlson Tel. Manufacturing Company*[8] the same court granted an injunction without mentioning an appeal where the Federal Radio Commission changed the frequency of the plaintiff's broadcasting station without notice or opportunity for a prior hearing.

The dissent in the principal case has the better of the argument. The Commission's denial of intervention, because petitioner had no property right involved, was arbitrary, in violation of its own rules, and devoid of any semblance of due process of law. The statutory appeal from a final order was not, for three reasons, such an adequate remedy

appeal); Kinney v. Howard, 133 Iowa 94, 110 N. W. 824 (1917) (condemnation proceedings; appeal); Nixon v. City of Burlington, 141 Iowa 316, 115 N. W. 238 (1908) (paving assessment; appeal); Clay v. Independent School District, 187 Iowa 89, 174 N. W. 47 (1919) (granting a teacher's certificate; appeal).

[4] Pacific Tel. & Tel. Co. v. Kuykendall, 265 U. S. 196, 44 Sup. Ct. 553, 68 L. ed. 975 (1924) (writ of review did not suspend enforcement of confiscatory rate pending review); Banton v. Belt Line Ry. Corp., 268 U. S. 413, 45 Sup. Ct. 534, 69 L. ed. 1020 (1924) (rate set became confiscatory pending rehearing); Proctor & Gamble v. Sherman, 2 F. (2d) 165 (C. C. A. 1st, 1924) (invalid tax; Commission had ruled against complainant; application for revision of ruling would be formality.)

[5] 265 U. S. 543, 44 Sup. Ct. 405, 68 L. ed. 841 (1923).

[6] 19 F. (2d) 681 (App. D. C. 1927). Plaintiff sought an injunction to restrain order of the Rent Commission on ground he had had no notice and was not a party to the proceedings. *Held,* that the objection that the remedy was by appeal from Commission's determinations was of no avail.

[7] 19 F. (2d) 683 (App. D. C. 1927) (the Court held that the holding in the *Gilbert Case* covered this case).

[8] 46 F. (2d) 612 (App. D. C. 1931).

as would justify the refusal of an injunction against a hearing without plaintiff's participation. (1) The Court on appeal is limited to questions of law; the facts found by the Commission are binding. (2) Thus the appeal comes too late to permit the plaintiff to be heard on the effects of the admission to its area and time of a new station. (3) If the plaintiff was a party aggrieved or adversely affected by an order granting additional broadcasting facilities for purposes of appeal, it was sufficiently interested to be heard in the first instance.

STATON P. WILLIAMS.

Municipal Corporations—Liability of Officer for Public Funds.

Plaintiff city seeks to recover on a bond of defendant surety company, claiming that the city treasurer, for whom the bond was given, has not faithfully discharged his duties in not paying over certain moneys to the authorized person. As a defense defendant sets forth a state statute authorizing councils to designate certain banks as depositories in which the treasurer shall deposit city funds; a designation by the council of plaintiff city of certain banks in which treasurer deposited funds, and a failure of such banks with the resulting loss of the funds. *Held,* not liable for such loss notwithstanding there was no express provision in the statute relieving the treasurer of liability in such a case.[1]

The decisions of the state courts, as well as the views of the text writers, are not harmonious concerning the character of the responsibility assumed by public officers who have custody of public funds.[2] The weight of authority, however, seems to adhere to the doctrine of strict liability, which is known as the "insurance rule."[3] It is based on (1) public policy;[4] (2) the theory that the officer is debtor for the funds

[1] City of Scranton v. Aetna Casualty & Surety Company, 11 F. Supp. 986 (M. D. Pa. 1935).

[2] Jordan v. Baker, 252 Ky. 40, 66 S. W. (2d) 84 (1933). Tax collector, after having given proper bonds and security, collected certain amounts which he deposited in a duly designated depository which became insolvent. *Held,* officer not liable, the court saying that there was a divergence of opinion as to officer's liability, both within the same court and within different courts.

[3] American Surety Co. v. Smith, 49 Ga. App. 40, 174 S. E. 262 (1934) (county officer made deposit of county funds in bank which became insolvent; *held,* liable as insurer); City of Fayette v. Silvey, 290 S. W. 1019 (Mo. App. 1927) (city officer collected certain funds and deposited them in depository used by city; *held,* liable as insurer when bank became insolvent); Ferrell v. Town of Mountain View, 127 Okla. 246, 260 Pac. 470 (1927) (city treasurer invested funds in certificates of deposit lost by reason of bank failure; *held,* liable even though invested under direction of town board); Jordan v. Baker, 252 Ky. 40, 66 S. W. (2d) 84 (1933), cited *supra* note 2.

[4] American Surety Co. v. Smith, 49 Ga. App. 40, 174 S. E. 262 (1934), cited *supra* note 3 (the standard of responsibility based on public policy); Jordan v. Baker, 252 Ky. 40, 66 S. W. (2d) 84 (1933), cited *supra* note 2 (insurance rule based on public policy); University City v. Scholl, 275 Mo. 667, 205 S. W. 631

that he receives;[5] and (3) the terms of the bond,[6] which make the officer an insurer of the funds, except where the loss was caused by an act of God or the public enemy.[7] The origin of this rule goes back to the time when there were few banks.[8] A few courts have realized the harshness of such a rule and have sought to modify this strict doctrine by invoking the "bailee rule," which is adopted upon the theory that the officer is only a bailee of the funds he collects and thus liable only for the exercise of ordinary business prudence and care.[9] Some state legislatures have passed statutes similar to the one in the present case.[10] These statutes relieve the officer from strict liability either expressly or by implication.[11] Some courts have taken a liberal attitude in construing these statutes[12] and by so doing have recognized the harshness of the insurer rule. When such a statute relieves the treasurer and his

(1918) (public policy back of strict rule saying that mayor or board of aldermen cannot free officer by ordinance); Overton County v. Copeland, 96 Tenn. 296, 34 S. W. 427, 428 (1896) (officer, in some cases, held liable on broad grounds of public policy).

[5] Overton County v. Copeland, 96 Tenn. 296, 34 S. W. 427 (1896), cited *supra* note 4 (officer regarded as debtor for the funds that go into his hands).

[6] Lamb v. Dart, 108 Ga. 602, 34 S. E. 160 (1899) (condition in bond that officer should faithfully discharge all his duties and turn funds over to his successor which he was unable to do because of bank failure; *held,* liability of officer determined by contract which is expressed in terms of his bond); Overton County v. Copeland, 96 Tenn. 296, 34 S. W. 427 (1896), cited *supra* note 4 (officer held liable according to terms of bond).

[7] American Surety Co. v. City of Thomasville, 73 F. (2d) 584 (C. C. A. 5th, 1934) (Georgia statute provided that mayor and aldermen would have power to elect treasurer and prescribe his powers and duties; *held,* officer must ordinarily keep funds safely in all events, and is not excused from loss unless perhaps when caused by act of God or public enemy).

[8] Jordan v. Baker, 252 Ky. 40, 66 S. W. (2d) 84 (1933), cited *supra* note 2 (insurance rule based on public policy and having historical origin years ago when there were few banks and cash was used instead).

[9] Jordan v. Baker, 252 Ky. 40, 66 S. W. (2d) 84 (1933), cited *supra* note 2 (bailee theory requires only exercise of ordinary business prudence and care in preserving funds collected by him); York County v. Watson, 15 S. C. 1 (1880) (bond required officer to well and truly perform his duty; held only to use of prudence and due care when county funds deposited in solvent bank which later failed; Overton County v. Copeland, 96 Tenn. 296, 34 S. W. 427 (1896), cited *supra* note 4.

[10] State v. McCloud, 64 Okla. 126, 166 Pac. 1065 (1917) (the statute provided that county commissioners should designate certain banks as depositories, that the county treasurer was to make deposits of county funds in such banks, which banks were to give bonds).

[11] Edgerton Independent Consolidated School District v. Volz, 50 S. D. 107, 208 N. W. 576, 578 (1926) (statute required treasurer to deposit county funds in banks within the state; *held,* in many depository acts in this and other states it is expressly provided that a compliance with the act will relieve the treasurer from such liability, but such express provision is not necessary to accomplish the same result).

[12] American Surety Co. v. City of Thomasville, 73 F. (2d) 584 (C. C. A. 5th, 1934), cited *supra* note 7 (legislature gave mayor and aldermen power to elect treasurer and designate his duties; *held,* authorities could designate depository and when treasurer deposited funds there he was no longer responsible).

bondsman from liability, the bank is required to give security directly to the county,[13] which may be in the form of a pledge of its assets.[14]

North Carolina apparently follows the majority or insurer rule and seeks to justify it on grounds of public policy, at the same time expressly recognizing the harshness of the rule.[15] However, cities and towns in North Carolina are governed by the provisions of the county Fiscal Control Act[16] which provides in substance that any person collecting public funds shall deposit them with the county treasurer or with a bank designated by the county board of commissioners, who shall require such depository to give adequate bond as security for such deposits.[17] It would seem that North Carolina, following this statute, would adopt the more liberal view in a case similar to the principal case.

It appears inconsistent to hold the treasurer absolutely liable on the theory that the money became his, and, at the same time, require a bond to be given to the city on the theory that the money belongs to it. The more desirable procedure would be to pass statutes requiring officials to deposit public funds in designated depositories which should furnish security for deposits, and then release the treasurer from liability by express provision, thus reaching the same result as the principal case. Even in such a case there might be some objections to requiring depositories to furnish security,[18] and it might be better to have an extension of the federal deposit insurance plan as to public deposits[19] and permit insurance for greater amounts than $5,000. There is some justification for the harsher rule, in that, if such a rule were not followed, the door

[13] Hinton v. State *ex rel.* Neal, 57 Okla. 777, 156 Pac. 161 (1916) (statute required duly designated depository to give bond securing deposits; *held,* treasurer relieved from liability).

[14] Schomick v. Butler, 205 Ind. 305, 185 N. E. 111 (1933) (certain notes held by bank given as security to indemnify surety on depository bond of bank holding public deposits; *held,* bank may pledge its assets to protect personal sureties on its depository bond); Richmond Co. v. Page Trust Co. 195 N. C. 545, 142 S. E. 786 (1928) (bank assigned certain notes to secure certificates of deposit issued by it; *held,* valid); Comments (1933) 11 N. C. L. Rev. 306; (1931) 79 U. of Pa. L. Rev. 608; (1933) 18 Corn. L. Q. 577.

[15] Havens v. Lathene, 75 N. C. 505 (1876) (clerk's bond required him to account for and pay over all money received by virtue of his office; *held,* liable as an insurer in all events; imposes harsh rule as a matter of public policy).

[16] N. C. Code (1935) §2969 (n).

[17] N. C. Code (1935) §1334 (70).

[18] See *supra* note 14.

[19] (1933) 11 N. C. L. Rev. 201; 1934 Ann. Rep. Fed. Dep. Ins. Corp. (If the same state, county, town or other political subdivision or body maintains more than one account representing funds owned by such political subdivision or body in the same capacity and in the same right, such accounts shall be treated as a single deposit owned by one depositor and the amount thereof, not exceeding $5,000 in the aggregate, should be reported as eligible for insurance. In such event it is immaterial whether such accounts represent funds for specific purposes or general funds of such state, county, town, or other political subdivision or body.)

would be open to fraudulent practices and evasion by public officials.[20] However, if such a rule is followed, it has been suggested that no man of financial standing or business prudence would accept public trusts involving the handling of public money.[21] Considering the reasons for stricter and more liberal views, the better conclusion would be to authorize the deposit of funds in banks required to give security directly to the public authority selecting the banks for deposit.

J. D. MALLONEE, JR.

Property—Future Interests in Chattels Personal.

S, about sixty days prior to his death, executed to his wife a deed in due form for a tract of land, and "also all the personal property that I own of every kind and description, including household and kitchen property, choses in action, notes and mortgages, *etc.* Always reserving to said party of the first part the complete use and control of said property during his natural life." Upon the death of *S,* his sons by a former marriage claimed an interest in the personal property, contending the deed was a nullity as to such property. *Held,* that "a reservation of a life estate in personal chattels, in a deed attempting to convey them in remainder, reserves the whole estate, and the limitation over is void."[1]

Originally no legal right of property could be created in chattels personal other than an absolute and indefeasible one; a gift for an hour was a gift forever.[2] In the middle of the seventeenth century the distinction was made that one could bequeath the "use" of a chattel, which was not necessarily consumable in its use, to *A* for life; but *A* acquired no property, he got only the "use" of the property for his life.[3] By the end of the same century bequests of the chattels themselves to *A* for life and then to *B* were sustained, but the bequests were construed as giving only the "use" of the property to *A* while the legal title in the form of a future interest vested in *B.*[4] While it has long

[20] Officer might collude with politically-minded banks whereby the treasurer or designating body might agree to deposit its funds in that bank in return for certain privileges.

[21] Overton County v. Copeland, 96 Tenn. 296, 34 S. W. 427, 428 (1896), cited *supra* note 4.

[1] Speight v. Speight, 208 N. C. 132, 179 S. E. 461 (1935).

[2] BROOKE, ABR. DEVISE (1576) 13.

[3] Anonymous, March, 106, pl. 183 (K. B. 1641); Vachel v. Vachel, 1 Ch. Cas. 129 (1669); GRAY, RULE AGAINST PERPETUITIES (3d ed. 1915) §83; KALES, FUTURE INTERESTS IN ILLINOIS (2d ed. 1920) §107.

[4] Smith v. Clever, 2 Vern. 38, 59 (Ch. 1668); Hyde v. Parratt, 2 Vern. 331 (Ch. 1695); GRAY, RULE AGAINST PERPETUITIES (3d ed. 1915) §84; KALES, FUTURE INTERESTS IN ILLINOIS (2d ed. 1920) §107; see Tissen v. Tissen, 1 P. Wms. 500 (Ch. 1718); Randall v. Russell, 3 Mer. 190, 195 (Ch. 1817); 1 FEARNE, CONTINGENT REMAINDERS (4th Am. ed. 1845) 404.

been possible to create legal future interests in chattels personal in England by will, it is still impossible to create such interests in that country by deed or other instrument operating *inter vivos*.[5]

The courts of the United States, with one exception, have gone farther than the English courts to permit the creation of legal future interests in chattels personal by deed as well as by will.[6] North Carolina stands alone in adhering to the English view,[7] and has steadfastly refused to permit the creation of such interests by deed.[8] Thus, in North Carolina, where a grantor conveys chattels by deed to *A* for life with a limitation over to *B* on *A*'s death, it is held that *A* takes the entire interest, and that the remainder to *B* is void.[9] Likewise, as demonstrated in the instant case, where the grantor reserves a life estate to himself with a limitation over on his death to *A*, it is held that the grantor retains the entire interest, and that the limitation of the estate to *A in futuro* is void.[10] At the same time, the courts of this jurisdiction have consistently upheld legal future interests in chattels personal, which are not necessarily consumable in their use, when created by will, whether the first taker is given a life estate[11] or a fee defeasible.[12] The

[5] GRAY, RULE AGAINST PERPETUITIES (3d ed. 1915) §§829, 844; KALES, FUTURE INTERESTS IN ILLINOIS (2d ed. 1920) §107; see Hyde v. Parratt, 2 Vern. 331 (Ch. 1695).

[6] Price v. Price, 5 Ala. 578 (1843); Williamson v. Mason, 23 Ala. 488 (1853); Sharman v. Jackson, 30 Ga. 224 (1859); Keen v. Macy, 6 Ky. 39 (1813); Tucker v. Stevens, 4 S. C. Eq. 532 (1814); McCall v. Lewis, 13 S. C. Law 442 (1847); Nix v. Ray, 16 S. C. 423 (1852); see Lyde v. Taylor, 17 Ala. 270 (1850); Jones v. Hoskins, 18 Ala. 489 (1851); Kirkpatrick v. Davidson, 2 Ga. 297, 301 (1847); McCall v. Lee, 120 Ill. 261 (1887); Owen v. Cooper, 46 Ind. 524 (1874); Sampson v. Randall, 72 Me. 109 (1881); Fuller v. Fuller, 84 Me. 475 (1892); Harris v. McLaran, 30 Miss. 533, 568 (1855); Aikin v. Smith, 33 Tenn. 304 (1853); Bradley v. Mosby, 3 Call. 50 (Va. 1801); GRAY, RULE AGAINST PERPETUITIES (3d ed. 1915) §§91, 95; KALES, FUTURE INTERESTS IN ILLINOIS (2d ed. 1920) §108; Simes, *Future Interests in Chattels Personal* (1930) 39 YALE L. J. 771.

[7] *Supra* note 6.

[8] MORDECAI, LAW LECTURES (2d ed. 1916) 850, 1092.

[9] Cutlar v. Spiller, 3 N. C. 130 (1798); Gilbert v. Murdock, 3 N. C. 182 (1802); Dowd v. Montgomery, 4 N. C. 198 (1815); Smith v. Tucker, 13 N. C. 541 (1830); Hunt v. Davis, 20 N. C. 36 (1838); Harrell v. Davis, 53 N. C. 359 (1861).

[10] Vass v. Hicks, 7 N. C. 493 (1819); Graham v. Graham, 9 N. C. 322 (1823); Foscue v. Foscue, 10 N. C. 538 (1825); Sutton v. Hollowell, 13 N. C. 185 (1828); Morrow v. Williams, 14 N. C. 263 (1831); Hunt v. Davis, 20 N. C. 36 (1838); Foscue v. Foscue, 37 N. C. 321 (1842); Outlaw v. Taylor, 168 N. C. 511, 84 S. E. 811 (1915); Speight v. Speight, 208 N. C. 132, 179 S. E. 461 (1935), cited note 1, *supra*.

[11] Jones v. Zollicoffer, 4 N. C. 645 (1817); Burnett v. Roberts, 15 N. C. 81 (1833); Knight v. Wall, 19 N. C. 125 (1836); Knight v. Leak, 19 N. C. 133 (1836); Carter v. Spencer, 29 N. C. 14 (1846); MORDECAI, LAW LECTURES (2d ed. 1916) 850.

In the case of a bequest to *A* for life without a limitation over, there is a reversion in the testator's heirs: Anonymous, 3 N. C. 161 (1802); James v. Masters, 7 N. C. 110 (1819); Black v. Ray, 18 N. C. 334 (1835); Cresswell v. Emmerson, 41 N. C. 151 (1849); see Newell v. Taylor, 56 N. C. 374 (1857).

[12] Threadgill v. Ingram, 23 N. C. 577 (1841); Braswell v. Morehead, 45 N. C. 26 (1852).

Legislature, by Act of 1823,[13] made an exception as to slaves, permitting the creation of future interest in them by deed as well as by will.[14] On the basis of this statute, it seems that the Supreme Court might have departed from its decisions to permit the creation of future interests in other chattels by deed; but, quite to the contrary, it regarded this statute as a re-indorsement of the common law rule as to all other chattels.[15]

There is no sound reason why a person should be denied the privilege of creating a future interest in chattels personal by deed operating *inter vivos* when at the same time he is permitted to create such interests by will to take effect upon his death. The distinction seems purely arbitrary.[16] It is to be regretted that in the present case the court did not seize the opportunity to hold that this common law rule had "become obsolete" within the meaning of Consolidated Statutes, Section 970,[17] and on that ground declare it no longer in force in this jurisdic-

[13] Public Laws 1823, c. 33.

[14] Tillman v. Sinclair, 23 N. C. 183 (1840); Bonner v. Latham, 23 N. C. 271 (1840); Baldwin v. Joyner, 29 N. C. 123 (1846); Sutton v. Craddock, 36 N. C. 134 (1840); Murphy v. Merritt, 48 N. C. 37 (1855); Holton v. McAlister, 51 N. C. 12 (1858). This statute was held not applicable to the case of a gift of a slave for life of *A* when there was no limitation over, Newell v. Taylor, 56 N. C. 374 (1857); but this was remedied by an amendment to make the statute read, as follows: "Every kind of estate in slaves, be the same vested or contingent, or for life or for years, which is allowed to be created and limited by any last will and testament, may be created and limited by way of reservation, remainder, reversion, or otherwise, by any written conveyance of slaves." Rev. 1854, c. 37, §21.

[15] Lance v. Lance, 50 N. C. 413 (1858); Dail v. Jones, 85 N. C. 221 (1881).

[16] In referring to this distinction, Mr. Kales stated, "this seems to be the law to-day [in England] though the reason for it is not apparent." KALES, FUTURE INTERESTS IN ILLINOIS (2d ed. 1920) §107. The basis for the distinction is historical rather than logical; when the English courts altered the ancient common law rule in the seventeenth century to permit creation of future interests by executory devises and trusts, they simply failed to relax that rule as to a mere common law conveyance. Possibly the courts thought they had greater latitude in giving effect to intention when expressed in wills. At any rate the later courts interpreted this as denying the privilege of creating legal future interests by deeds, without regard to its arbitrariness. The American courts readily departed from this rigid law because it was unsupported by any sound legal principle and, further, because a person should be accorded the same privilege of disposing of his property by transfer *inter vivos* as he enjoys by will upon his death. See Bradley v. Mosby, 3 Call. 50 (Va. 1801). The North Carolina Legislature apparently recognized this when it passed a statute in 1823 to permit the creation of legal future interests in slaves by deed as well as by will. *Supra* notes 13 and 14. Unfortunately, the Supreme Court was not induced by this act of the Legislature to depart from the common law rule as to other chattels.

[17] N. C. CODE (1935). In holding that the court could not depart from the common law rule followed in North Carolina, Stacy, C. J., declared that "it should be remembered, however, that [under C. S. 970] so much of the common law 'as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State . . . and which has not been . . . abrogated or repealed, or become obsolete,' is declared by C. S. 970 to be in full force and effect in this jurisdiction." In the opinion of the writer, the arbitrary rule of denying the right to create a future interest in chattels by deed when it is freely permitted by will, is an "obsolete" law, which is evidenced by the fact that no other state in America recognizes the arbitrary distinction.

tion. Such a decision would have placed North Carolina in line with all the other states of the Union, and, furthermore, it would have constituted a return to the sound view of Blackstone that "if a man either by deed or will limits his books or furniture to *A* for life, with remainder over to *B*, this remainder is good."[18]

Although the law of North Carolina does not permit the creation of *legal* future interests in chattels personal by deed, it does allow the grantor the privilege of creating *equitable* future interests in such property. This is accomplished by the establishment of a trust. So, if the grantor wishes to make an *inter vivos* gift of his chattels to *A*, reserving a life estate in himself, he may do so by conveying the same to a trustee for the use of himself for life and then to *A*. A similar arrangement should be resorted to when the grantor wishes to make an *inter vivos* gift to *A* for life with a limitation over to *B*. In the latter case, the conveyancer should never deed the chattel to *A* in trust for himself for life and afterwards to *B*, because it has been held in such a situation that *A*'s interest was absolute and that *B* took nothing in equity.[19] However, it has been held in a deed of a chattel to *A*, in trust for the grantor for life, and at the death of the grantor, in trust for himself *(A)*, that *A* was entitled to the property upon the grantor's death.[20] Nevertheless, it seems the wiser policy to appoint a disinterested third party as trustee of the property. Had the grantor in the instant case resorted to the trust device, his intention would have been carried out, and the arbitrary rule of law, by which the court considered itself bound, would have been obviated.

THOMAS H. LEATH.

Workmen's Compensation Act—Bar of Common Law Recovery for Non-Compensable Injuries.

Plaintiff, employee, and defendant, employer, operated under the Workmen's Compensation Act. Defendant gratuitously permitted plaintiff to use defendant's rip saw for plaintiff's personal benefit while plaintiff was off duty. Plaintiff was injured by the saw due to the alleged negligence of defendant. The Industrial Commission denied compensation on the ground that the injury did not "arise out of and in the course of" the employment. Plaintiff made no appeal from the ruling of the Commission, but instigated suit at common law. *Held:* non-suit affirmed; plaintiff and defendant were bound by the Workmen's Compensation Act, and the remedy thereunder is exclusive.[1]

[18] 2 BL. COMM. *398.
[19] Butler v. Godley, 12 N. C. 94 (1826).
[20] Harrell v. Harrell, 58 N. C. 229 (1859).

[1] Francis v. Carolina Wood Turning Co., 208 N. C. 517, 181 S. E. 628 (1935).

Where employer and employee operate under the Workmen's Compensation Act and the employee sustains an injury which is clearly within the scope and purview of the Act, it is universally held that the Act is a bar to any common law recovery by the injured employee.[2] If the injuries are only partially within the scope and purview of the Act, the same rule is generally applied, even though the result is to give the employee compensation for slight injuries only, and to bar his action at common law for more serious injuries not compensable under the Act.[3] If, however, the injury, although arising out of the employment relationship, is not within the scope and purview of the Act so that the employee can get no compensation thereunder, the weight of authority is to allow the employee to sue at common law. Such cases arise where the employer has been negligent but the injury, although arising out of and in the course of the employment, does not come within the express or implied terms of the Act, usually because it is found not to be an "accident" or "personal injury," or is found to be an "occupational disease."[4]

[2] Hyett v. Northwestern Hospital, 147 Minn. 413, 180 N. W. 552 (1920); Gregutis v. Waclark Wire Works, 86 N. J. L. 610, 92 Atl. 354 (1914); McNeely v. Asbestos Co., 206 N. C. 568, 174 S. E. 509 (1934); Murray v. Wasatch Grading Co., 73 Utah 430, 274 Pac. 940 (1929); N. C. WORKMEN'S COMPENSATION ACT §11; N. C. CODE (1935) §8081 (r).

[3] Hyett v. Northwestern Hospital, 147 Minn. 413, 180 N. W. 552 (1920) (*P* suffered minor injuries for which he was paid a $44 award under the Act; he also suffered injury to a testicle rendering him totally impotent; the Act made no provision for award except for such injuries as impaired earning power. The court denied recovery at common law on the ground that the Act gave the exclusive remedy, and said: "Matters of that character are proper elements of damage in the negligence action, but our Compensation Act makes no provision for a consideration thereof in the award to an injured employee, even though they may constitute his major or principal grievance."); Morris v. Muldoon, 190 App. Div. 689, 180 N. Y. Supp. 319 (1st Dept. 1920) ("If, however, in every case where there could be found some injury not mentioned under the schedule of section 15 of the act, there is a separate right of action at common law for the damages sustained thereby, the Compensation Law would become a farce, and a recovery could be had under the Compensation Law, with the right of action still existing for the injuries not mentioned in the schedule."); Farnum v. Garner Print Works & Bleachery, 184 App. Div. 911, 170 N. Y. Supp. 1079 (2d Dept. 1908) (memorandum decision), *aff'd without opinion*, 229 N. Y. 544,129 N. E. 912 (1920) (Appellate Division dismissed on the ground that sole remedy was under the Act, although it did not appear whether there were any minor injuries compensable thereunder); Smith v. Baker, 157 Okla. 155, 11P. (2d) 132 (1932); Freese v. John Morrell & Co., 58 S. D. 634, 237 N. W. 886 (1931). But *cf.* Boyer v. Crescent Paper Box Factory, 143 La. 368, 78 So. 596 (1918) (apparently the only damage here compensable under the Act was the disability for the period in the hospital while being treated for the major injury which was not covered by the Act, and for which common law recovery was allowed. Hence, perhaps this case should be cited as in accord with the authorities cited in note 4, *infra*). A number of states have amended their Acts to allow compensation for cases where formerly only a part of the injuries were compensable. N. C. WORKMEN'S COMPENSATION ACT §31, last paragraph.

[4] Kendrickson v. Continental Fibre Co., 3 Harr. 304, 136 Atl. 375 (Super. Ct., Del. 1926); Echord v. Rush, 124 Kan. 521, 261 Pac. 820 (1927); Jellico Coal Co. v. Adkins, 197 Ky. 684, 247 S. W. 972 (1923); Smith v. International High Speed

A similar problem as to common law recovery against the employer is raised if the exclusion from compensation under the Act is by virtue of the term "arising out of and in the course of" the employment. The problem does not, however, occur very often because in most cases where the employee is denied compensation on this ground some third party or the employee himself is usually to blame and the employer is not.[5] It is only the exceptional case where the employer's negligence is the cause of an injury not "arising out of and in the course of" the employment. If such is the situation there is good authority for allowing the employee to recover at common law.[6] The important issue would appear to be whether the injured party was an employee at the

---

Steel Co., 98 N. J. L. 574, 120 Atl. 188 (1923); Trout v. Wickwire Spencer Steel Corp., 195 N. Y. Supp. 528 (Sup. Ct. 1922); Jones v. Rinehart & Dennis Co., 113 W. Va. 414, 168 S. E. 482 (1933). *Occupational disease:* Zajkowski v. American Steel & Wire Co., 258 Fed. 9 (C. C. A. 6th, 1918); Kane v. Federal Match Corp., 5 F. Supp. 507 (M. D. Pa. 1934) ("Section 303 of the Pennsylvania Workmen's Compensation Act does not affect the release of an employee's common-law right of action for injuries against his employer, except within the scope of the act. The mere fact that the act deals with one phase of the relationship between employer and employee cannot possibly be construed as meaning that every other obligation existing between employer and employee is renderd a nullity."); Donnelly v. Minneapolis Mfg. Co., 161 Minn. 240, 201 N. W. 305 (1924); Barrencotto v. Cocker Saw Co., 266 N. Y. 139, 194 N. E. 61 (1934). *Contra:* Webb v. Tubize-Chatillon Corp., 45 Ga. App. 744, 165 S. E. 775 (1932); Mabley & Carew Co. v. Lee, 129 Ohio St. 69, 193 N. E. 745 (1934). If the injury is covered by the Act but is not compensable, common law action will be barred. Repka v. Fedders Mfg. Co., 239 App. Div. 271, 267 N. Y. Supp. 709 (4th Dept. 1933); *cf.* Shanahan v. Monarch Engineering Co., 219 N. Y. 469, 114 N. E. 795 (1916). The employee in these actions may be defeated by the common law defense of assumption of risk. Wager v. White Star Candy Co. Inc., 217 App. Div. 316, 217 N. Y. Supp. 173 (3d Dept. 1926).

[5] White v. Eastern Mfg. Co., 120 Me. 62, 112 Atl. 841 (1921); Ballman v. D'Arcy Spring Co., 221 Mich. 582, 192 N. W. 596 (1923); Morey v. City of Battle Creek, 229 Mich. 650, 202 N. W. 925 (1925); Adams v. Uvalde Asphalt Paving Co., 205 App. Div. 784, 200 N. Y. Supp. 886 (3d Dept. 1923); Pederson & Voechting v. Kromrey, 201 Wis. 599, 231 N. W. 267 (1930). Hence the employee's only chance may be to recover under the Act where he does not have to prove negligence. In a great many of the cases arising under this term the finding is that the injury did "arise out of and in the course of" the employment; then, of course, the Act governs and all common law rights and defenses are eliminated. See cases cited note 2, *supra.*

[6] National Biscuit Co. v. Litzby, 22 F. (2d) 939 (C. C. A. 6th, 1927); Kendall Lumber Co. v. State, 132 Md. 93, 103 Atl. 141 (1918); Conrad v. Youghiogheny & Ohio Coal Co., 107 Ohio St. 387, 140 N. E. 482 (1923); Collins v. Troy Laundry Co., 135 Ore. 580, 297 Pac. 334 (1931); Norwood v. Tellico River Lumber Co., 146 Tenn. 682, 244 S. W. 490 (1922); Cox v. United States Coal & Coke Co., 80 W. Va. 295, 92 S. E. 559 (1917). But *cf.* Lamm v. Silver Falls Timber Co., 133 Ore. 468, 277 Pac. 91 (1929), *rev'd on rehearing,* 286 Pac. 527 (1930), *rehearing denied,* 291 Pac. 375 (1930), *dismissed for want of substantial federal question,* 282 U. S. 812, 51 Sup. Ct. 214, 75 L. ed. 727 (1931); Varrelmann v. Flora Logging Co., 133 Ore. 541, 277 Pac. 97 (1929), *rev'd on rehearing,* 286 Pac. 541 (1930), *rehearing denied,* 290 Pac. 751 (1930), *dismissed for want of substantial federal question,* 282 U. S. 413, 51 Sup. Ct. 214, 75 L. ed. 728 (1931); Kirby Lumber Co. v. Scurlock, 112 Tex. Civ. App. 115, 246 S. W. 76 (1922). *Contra:* Gordon v. Travelers' Ins. Co., 287 S. W. 911 (Tex. Civ. App. 1926) (adversely criticised (1927) 5 TEX. L. REV. 294-300).

time of the injury as determining the legal status of the parties, that is, whether the injury is so connected with the employment relationship as to make the relation of the parties, so far as their legal rights are concerned, that of employer and employee or that of strangers.[7] For example, assume that employer and employee are both pleasure driving on the highway in their respective automobiles, and the employee is injured by the negligence of the employer. The Act passed to compensate for industrial accidents would clearly have no relation to such a situation, and the injured one should have the same common law rights to recovery as any third party stranger. No case as extreme as this has been found, doubtless because it is so obvious, but it was on this basis that recovery was sustained in the closer cases where the issue was litigated.[8]

The short opinion in the principal case does not make it clear what position North Carolina has taken.[9] It is stated that the plaintiff made no appeal from the ruling of the Industrial Commission denying him compensation on the ground that his injury did not arise out of and in the course of his employment. This ruling is supported by convincing authority elsewhere on facts similar to those in the principal case, and hence, so far as recovery under the Act was concerned, the plaintiff's

[7] Wirta v. North Butte Mining Co., 64 Mont. 279, 210 Pac. 332 (1922), and cases cited in note 7, *supra*. *Cf.* Knowles v. Bureau, 52 N. D. 563, 203 N. W. 895 at 897 (1925). Consider the similar problem raised as to whether an employee of a railroad while riding thereon for his own purposes is an employee or a passenger. Simmons v. Oregon R. Co., 41 Ore. 151, 69 Pac. 440 (1902); Putnam v. Pacific Monthly Co., 68 Ore. 36, 136 Pac. 835 (1913); see Lamm v. Silver Falls Timber Co., 133 Ore. 468, 291 Pac. 375 (1930) (where rehearing was denied but this problem was well discussed). Similarly where railroad employees are injured out of hours while using cars as sleeping quarters. Moyse v. Northern Pac. Ry. Co., 41 Mont. 272, 108 Pac. 1062 (1910). Consider also the similar problem at common law where an employee is injured by fellow servants while outside the direct scope of his employment, and it is sought to defeat recovery by the claim that the master and servant relationship existing would deprive him of his recovery as a third party. Dwan v. Great Eastern Lumber Co., 15 Ga. App. 108, 82 S. E. 666 (1914); Holliday v. Merchants' & Miners' Transportation Co., 32 Ga. App. 567, 124 S. E. 89 (1924).

[8] Cases cited in note 7, *supra*. In Collins v. Troy Laundry Co., 135 Ore. 580, 297 Pac. 334, 336 (1931) the court said: "When plaintiff left her employer's building and reached a public street, on no business connected with her employer, she was a free agent and might choose to go hither or yon. She ceased to be a unit of her employer's force and became simply a unit of the general public. She was under no more restriction than any other member of the general public using that part of the street." In Cox v. United States Coal & Coke Co., 80 W. Va. 295, 92 S. E. 559 (1917) the court said: "But it was surely not the purpose of the Legislature to relieve an employer from liability for a negligent act causing injury to one of his employees who happens not at that particular moment to be engaged in performing labor for him. The construction of the statute contended for would destroy a long-existing common-law right without giving anything in return therefor. It would be both unwise in policy, as tending to promote carelessness among employers, and repugnant to justice."

[9] The court cites and follows the case of Pilley v. Cotton Mills, 201 N. C. 426, 160 S. E. 479 (1931) which apparently was similar to the instant case, but the opinion in that case is also short and of little assistance.

failure to appeal would appear well advised.[10] Recovery, if any, would have to be at common law. Jurisdictional findings of the Commission are not binding,[11] and the fact that an employee mistakenly, and hence unsuccessfully, attempts to recover under the Act is generally held to be no bar to a subsequent common law action.[12] Yet in the principal case the Court denied the plaintiff's right to sue at common law without deciding why he was bound by the Act or whether he was an employee at the time of the accident. This would appear to mean that North Carolina may deny common law rights between the parties in all cases

[10] The following cases would appear to be authority for the ruling of the Industrial Commission, but do not involve the issue of common law recovery against the employer. Vickers v. Ala. Power Co., 218 Ala. 140, 117 So. 650 (1928) (employee injured using employer's saw for making tool box for himself; no express permission); Mann v. Glastonbury Knitting Co., 90 Conn. 116, 96 Atl. 649 (1928); Vitas v. Grace Hospital Society, 107 Conn. 512, 141 Atl. 368 (1928) (employee injured while pressing her own curtains during noon hour; injury occurred during period of employment, at place she might reasonably be, but did not "arise out of" her employment; emphasis on question of permission); Otto v. Chapin, 243 Mich. 256, 220 N. W. 661 (1928); Lybolt v. Hinman, 85 N. H. 262, 157 Atl. 579 (1931) (injured while using employer's steam shovel after hours for own benefit; no mention of permission); Dally v. Bates, 224 N. Y. 120, 120 N. E. 118 (1918) (laundress injured while doing her own work after quitting time); Strand v. Harris Structural Steel Co., 209 App. Div. 310, 204 N. Y. Supp 463 (3d Dept. 1924); Lucky-Kidd Mining Co. v. State Industrial Commission, 110 Okla. 27, 236 Pac. 600 (1925); El Reno Mill & Elevator Co. v. Kennedy, 149 Okla. 303, 300 Pac. 382 (1931) (injured on employer's saw while using for own benefit); Hinton Laundry Co. v. DeLozier, 143 Tenn. 399, 225 S. W. 1034 (1920) (employee injured pressing skirt for co-employee after hours; permission; *held*, no award; did not "arise out of her employment or while performing any service for the defendant, or in any service in which it was interested . . . the service was purely voluntary . . . for the accommodation of a fellow employee"); Traders & General Insurance Co. v. Ratcliff, 54 S. W. (2d) 223 (Tex. Civ. App. 1932); Radtke Bros. v. Industrial Commission, 174 Wis. 212, 183 N. W. 168 (1921) (no permission). But *cf.* Sheffield v. Atlantic Refining Co., 34 Ga. App. 303, 129 S. E. 667 (1925); Knowles v. Bureau, 52 N. D. 563, 203 N. W. 895 (1925).

[11] Conrad v. Youghiogheny & Ohio Coal Co., 107 Ohio St. 387, 140 N. E. 482 (1923); Ayecock v. Cooper, 202 N. C. 500, 163 S. E. 569 (1932).

[12] State v. District Court, 136 Minn. 151, 161 N. W. 388 (1917); Liverani v. John T. Clark & Son, 191 App. Div. 337, 181 N. Y. Supp. 696 (2d Dept. 1920); Conrad v. Youghiogheny & Ohio Coal Co., 107 Ohio St. 387, 140 N. E. 482 (1926) (Seems to be particularly in point. Employee was killed after working hours while riding on employer's car, transportation not furnished by employer. The Industrial Commission denied compensation on the ground that at the time of the injury the deceased was not engaged as an employee. The administratrix then sued at common law. The defendant claimed that the attempted recovery under the Act was an election. The Ohio court sustained plaintiff's action at common law saying (140 N. E. 482 at 484), "Conceivably a case might be presented where an injured party is entitled to redress where the facts determining the forum are extremely uncertain. Shall a mistake in the choice of a forum preclude the party from thereafter seeking the true one? The Commission's jurisdiction extends only to those employees and employers covered by the act. If the injury was not occasioned at a time when the employee's relationship existed, the further exercise of jurisdiction by the Commission ceased. It could make no award. Its finding was equivalent to a judgment that the applicant had sought the wrong forum for his remedy, and was in effect a dismissal for want of jurisdiction."); Bringardner v. Rollins, 102 W. Va. 66, 135 S. E. 662 (1926). Comment (1932) 41 YALE L. J. 915. See also N. C. WORKMEN'S COMPENSATION ACT §24 (b).

where the Industrial Commission finds that the injury does not arise out of and in the course of the employment, or that an employee loses the right to occupy the position of a third party stranger with respect to his employer by choosing the Industrial Commission as a forum.

However, although the Court made no mention of any earlier case between the parties, and specifically stated that the plaintiff made no appeal from the finding of the Industrial Commission,[13] it appears that the same parties, relative to the same accident, had been before the Court previously on an appeal from a similar ruling of the Industrial Commission.[14] The history of the litigation appears to be that, after receiving the injury, the plaintiff first applied to the Industrial Commission for award under the Workmen's Compensation Act. The Commission ruled that the plaintiff did not receive an injury arising out of and in the course of the employment as he was not an employee at the time of the accident.[15] From this ruling the plaintiff appealed to the Superior Court, which reversed the award of the Commission, held that the plaintiff was an employee at the time of the accident, received an injury arising out of and in the course of his employment, and ordered that the plaintiff be paid compensation in accordance with provisions of the Act. The defendant then appealed to the Supreme Court.[16] The Supreme Court affirmed the lower court on the holding that the plaintiff was an employee at the time of the accident, but reversed the lower court's judgment directing an award to be made to the plaintiff for compensation. The reversal was on the ground that the Industrial Commission alone had jurisdiction to determine the defendant's liability. This was the first case between the parties, relative to the same accident, and it was not referred to in the principal case.

The plaintiff then applied to the Industrial Commission a second time. The Commission again refused compensation on the ground that the plaintiff did not receive an injury arising out of and in the course of his employment.[17] Plaintiff made no appeal from this last ruling,[18] but brought the present suit at common law.

[13] The language of the Court is misleading. Francis v. Wood Turning Co., 208 N. C. 517, 518, 181 S. E. 628 (1935) ("Shortly after he was injured, the plaintiff instituted a proceeding before the North Carolina Industrial Commission. . . . Plaintiff did not appeal from the award denying compensation.")

[14] Francis v. Wood Turning Co., 204 N. C. 701, 169 S. E. 654 (1933).

[15] Francis v. Wood Turning Co., N. C. Ind. Comm. Docket No. 2269 (Aug. 15, 1932).

[16] Francis v. Wood Turning Co., 204 N. C. 701, 169 S. E. 654 (1933).

[17] Francis v. Wood Turning Co., N. C. Ind. Comm. Docket No. 2269 (Oct. 5, 1933). The distinction between this award and the award of the Industrial Commission in the first case (Docket No. 2269, Aug. 15, 1932) would appear to be that the first award was a finding of no jurisdiction, whereas the second was a denial of compensation on the merits. The first hearing of the Commission denied compensation on the ground that plaintiff did not receive an injury arising out of

If the two cases may properly be taken together it is believed that the principal case is not subject to the construction first put upon it here. Considered alone it seemed to lead to the conclusion that an employee could never occupy the position of a third party stranger with respect to his employer, or that he lost that position by first applying to the Commission. But considered in connection with the previous litigation it appears that the holding in the principal case was but a necessary consequence of the former decision. In the first case the Court had given the plaintiff a hearing on the question of his relationship to his employer at the time of the accident, and decided that he was an employee. That decision determined the question of jurisdiction and decided that the Industrial Commission was the proper forum for the litigation. Plaintiff's legal status, with regard to that particular accident, was then fixed permanently. Hence in the principal case, since it had already been determined that the plaintiff's position was that of an employee and not that of a third party, he was restricted to recovery under the Act and denied the right to maintain an action at common law.

The result of the two cases is to place the plaintiff in the unfortunate position of not being able to recover either under the Act or at common law. This would seem to mean that there is a zone in which injuries, although not arising out of and in the course of the employment so as to be compensable under the Act, are nevertheless so closely connected with the employment relationship that the legal status of the parties with regard to the injuries is that of employer and employee and not that of strangers, with the result that the employee is also barred at common law. On the merits of the principal case something might be said in favor of such a category,[19] but no cases to support it have been found

---

and in the course of his employment as he was not an employee at the time of the accident. The award would necessarily be the same if the accident was still further dissociated from the employment, as in the illustrative case of the highway accident where clearly the plaintiff would not be an employee at the time of the accident and the Industrial Commission would have no jurisdiction. At the second hearing, however, the Supreme Court had determined that the Industrial Commission did have jurisdiction, hence the award the second time was a denial of compensation on the merits.

[18] There was no use to appeal from this award for the Supreme Court had already passed on the only issue on which the plaintiff could reasonably have appealed, that is, whether or not he was an employee at the time of the accident, and had specifically denied the power of the Superior Court to order compensation to be paid under the provisions of the Act.

[19] The facts appear to be that the plaintiff, a boy of about seventeen, had been employed by the defendant for several months past. The accident occurred about the middle of the week. Plaintiff had worked and been paid up to and including the Saturday before the accident, but on the day he was hurt and for a few days preceding he had been around the mill working on a table for his grandmother. He would have been subject to call if any work had arisen in his line, but it did

from other states.[20]

It is suggested that the Court in the first case between the parties did not give proper consideration to the consequences of that decision. An inspection of authority from other jurisdictions would have shown that the plaintiff was practically sure to lose if his case was remanded

---

not. Plaintiff had gotten express permission from the defendant's manager, Stearns (co-defendant in this action), to use a rip saw to complete the work on his table. His regular work did not include the use of the saw, but apparently he had had some experience with it. Defendant encouraged employees to do their own work when off duty. There was conflicting evidence on whether the saw was equipped with a safety appliance. If so, plaintiff did not use the safety guard. Thus the plaintiff, if he was not an employee, was certainly not in the position of a paying business guest. He was a bare licensee, or at most an invitee, using the premises for his own purposes and benefit. Such a privilege would scarcely have been extended to a third party stranger. For him to sue in such a situation is like biting the hand that feeds him, and gives a sympathetic jury a chance to impose an unjust penalty on the defendant. This, however, is an indictment of the jury system. In theory at least, since there was alleged negligence on the part of the defendant, the plaintiff was entitled to a trial.

Consider the problem of the degree of care owed and the liability for negligence where driver of an automobile gratuitously gives a ride to a hitchhiker. Likewise in the case of bailments, where the bailment is gratuitous and for exclusive benefit of the bailee.

Counsel for plaintiff argued that the complaint was good against the defendant Stearns, manager of the defendant company, who had given plaintiff permission to use the saw. On this point see Landrum v. Middaugh, 117 Ohio St. 608, 160 N. E. 691 (1927), holding that the acts of a foreman if within the regular course of his employment, and not willful or malicious, are the acts of the employer, and the defense of the Workman's Compensation Act is available. But *cf.* Charchill v. Stephens, 91 N. J. L. 195, 102 Atl. 657 (1917) (where action by employee against negligent foreman was sustained. The court said, "It is said that the defendant is not a 'third person' within the meaning of the act. We see no reason for attributing to the words 'third person' any other meaning than the usual one. It must mean . . . a person other than the employer or employee."); Webster v. Stewart, 219 Mich. 13, 177 N. W. 230 (1920) (suit by employee against president director of employer company).

[20] In Kirby Lumber Co. v. Scurlock, 112 Tex. App. 115, 246 S. W. 76 (1922), employee was killed by a train of the defendant, employer, while the employee was riding home on a velocipede, not furnished by defendant, on defendant's tramroad. The accident occurred one-and-a-half miles from defendant's mill on a day when the employee was not working. The court reversed a common law judgment, which they had previously affirmed in favor of the plaintiff (229 S. W. 975(1921)), on the ground that the deceased was an employee at the time of the injury, and hence recovery was restricted to that under the Act. The court said the injury arose in the course of the employment, but did not say that it arose "out of" the employment. Whether or not plaintiff subsequently recovered under the Act is not known. If the Industrial Commission should have denied an award, the case would appear to fall into the category of the principal case suggested above. It is submitted that the Commission might have denied an award on at least three grounds, to wit, that the injury was received: (1) after hours when the employee was using the employer's premises for his own benefit (see cases cited in note 11); (2) while the employee was going from work by means of transportation not furnished by the employer [Hunt v. State, 201 N. C. 707, 161 S. E. 203 (1931); Bray v. Weatherly & Co., 203 N. C. 160, 165 S. E. 332 (1932)]; (3) "in the course of" but not "arising out of" the employment, (Vitas v. Grace Hospital Society, 107 Conn. 512, 141 Atl. 368 (1928); *In re* Sanderson's Case, 224 Mass. 558, 113 N. E. 355 (1916); Lucky-Kidd Mining Co. v. State Industrial Commission, 110 Okla. 27, 236 Pac. 600 (1925); *cf.* Davis. v. Veneer Corp., 200 N. C. 263, 156 S. E. 859 (1931); Hunt v. State, *supra.*) On the other hand the Commission might

to the Commission,[21] though it does not appear that this point was urged on the Court. His only chance then to recover or even get a hearing on the question of the defendant's negligence[22] would be to sue at common law. The Court precluded this by fixing his status as that of an employee.

FRANKLIN S. CLARK.

---

have allowed an award on the ground that using the employer's tramroad was an incident or hazard of the employment. Lamm v. Silver Falls Timber Co., 133 Ore. 468, 286 Pac. 527 (1930).

Another situation which might conceivably present such a case would be where an employee driving a conveyance furnished by the employer was injured by the negligent and defective equipment of such conveyance at a time when the employee had deviated so substantially from his legitimate course as to be barred from recovery under the Act on the ground that the injury did not arise out of and in the course of the employment. If he should then sue his employer at common law, the question might be raised whether, on account of the close connection between the injury and the employment relationship, his legal status should be that of an employee or of a stranger.

Cases from other states show that plaintiff had a poor chance to get an award for compensation from the Industrial Commission even though he was held to be an employee at the time of the accident. See cases cited in note 11, *supra.* The North Carolina Industrial Commission recognized this in their opinion on plaintiff's first proceeding before them. Francis v. Wood Turning Co., D. 2269. ("In as much as the plaintiff was performing work purely for his own personal benefit there is a serious question as to whether the case would be compensable even if the Commission should find that he was an employee.")

[21] Another consequence of the decision was to deprive the plaintiff of ever getting a trial on the question of the defendant's negligence. The judgment that he was an employee restrictd his recovery to the Act, and under the Act negligence is no issue. Industrial Commission of Colo. v. Aetna Life Insurance Co., 64 Colo. 480, 174 Pac. 589 (1918); Leonbruno v. Champlain Silk Mills, 229 N. Y. 470, 128 N. E. 711 (1920); Stasmas v. R. I. Coal Mining Co., 80 Okla. 221, 195 Pac. 762 (1921).

[22] Whether the question of the employment relationship is for the court or for the jury, or both, see El Reno Broom Co. v. Roberts, 138 Kan. 235, 281 Pac. 273 (1929); Wirta v. North Butte Mining Co., 64 Mont. 279, 210 Pac. 332 (1922); Echert v. Merchants Shipbuilding Corp., 280 Pa. St. 340, 124 Atl. 477 (1924).