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Comments by Henry Irwin Coffield, Jr. and Virginia A. Douglas, law students not members of the Student Board of Editors, appear in this issue.

James A. Wellons, Jr., author of a comment in this issue, was graduated from the Law School, August, 1937.

NOTES AND COMMENTS

Adverse Possession—Color of Title.

X, the owner in fee simple of realty, had in 1912 conveyed to *A* who went into possession but did not register his deed. Later in the same year *A* conveyed to *B* who registered his deed immediately. After several registered mesne conveyances, the property was finally conveyed in 1924 to plaintiffs, who immediately registered their deed. Plaintiffs claim title by adverse possession under the registered deeds as color of title. A creditor of *X* claims title under judgments against *X* which were obtained and docketed in 1925. *Held,* seven years

possession under the registered deeds constitutes sufficient possession under color of title and bars the judgment creditor's claim.[1]

Color of title has been defined as being a writing upon its face professing to pass title, but which fails to, either from want of title in the person making it or defect in the mode of conveyance. The defect must not be so obvious and plain that no man of ordinary capacity would be misled by it.[2] Possession for seven years under color of title by statute in North Carolina results in a bar against other claimants.[3]

The Connor Act,[4] passed in 1885, requires the registration of a conveyance of land before it will become effective to pass the property as against creditors or purchasers for a valuable consideration from the grantor. Before the Connor Act an unregistered deed was held to constitute color of title.[5] *Austin v. Staten*,[6] however, in applying the Connor Act held that where one makes a deed for land and the grantee fails to register it, but enters into possession thereunder and remains therein for more than seven years, such deed does not constitute color of title as against a grantee in a subsequent registered deed given for a valuable consideration. Other North Carolina cases are in accord with *Austin v. Staten* where a common source of title is involved.[7] In *Collins v. Davis*[8] the court followed *Austin v. Staten* on a similar set of facts, but said by way of dictum that the rule of that case did not mean that unregistered deeds could never be color of title, and except for cases coming within the rule of that case, the rights acquired by adverse possession for seven years under color of title are not disturbed or affected by the Connor Act. Justice Hoke in *Janney v. Robbins*[9] said the principle of *Austin v. Staten* did not extend to a

[1] Glass *et al.* v. Lynchburg Shoe Co. *et al.* 212 N. C. 70, 192 S. E. 899 (1937).

[2] Tate v. Southard, 10 N. C. 119 (1824); Smith v. Proctor, 139 N. C. 314, 324, 51 S. E. 889, 892 (1905); Seals v. Seals, 165 N. C. 409, 413, 81 S. E. 613, 614 (1914); Crocker *et al.* v. Vann *et al.*, 192 N. C. 422, 429, 135 S. E. 127, 131 (1926).

[3] N. C. CODE ANN. (Michie, 1935) §428.

[4] N. C. CODE ANN. (Michie, 1935) §3309.

[5] Campbell *et al.* v. McArthur, 9 N. C. 33 (1822); Hardin v. Barrett, 51 N. C. 159 (1858); Davis v. Higgins, 91 N. C. 382 (1884); Hunter *et al.* v. Kelly *et al.*, 92 N. C. 285 (1885); Avent v. Arrington, 105 N. C. 377, 10 S. E. 991 (1890); King v. McRackan, 168 N. C. 621, 624, 84 S. E. 1027, 1028 (1915) ("Prior to the Connor Act of 1885 an unregistered deed was in all cases color of title if sufficient in form.").

[6] 126 N. C. 783, 36 S. E. 338 (1900).

[7] Collins v. Davis, 132 N. C. 106, 43 S. E. 579 (1903); McClure v. Crow, 196 N. C. 657, 146 S. E. 713 (1929); see King v. McRackan *et al.*, 168 N. C. 621, 624, 84 S. E. 1027, 1028, (1915); Buchanan v. Hedden, 169 N. C. 222, 224, 85 S. E. 417 (1915); Rook v. Horton, 190 N. C. 180, 182, 129 S. E. 450, 451 (1925).

[8] 132 N. C. 106, 43 S. E. 579 (1903).

[9] 141 N. C. 400, 53 S. E. 863 (1906) (The plaintiff and defendant claim through sources entirely independent of each other. *Held*, unregistered deed was color of title sufficient to give a good title after possession for seven years against a party claiming from a different source of title.).

claim by adverse possession held continuously for the requisite time under deeds foreign to the true title or entirely independent of the title under which the plaintiff makes his claim.[10] However, even where the same source of title is involved, if a subsequent purchaser is not one for value or fails so to prove, then the unregistered deed will constitute color of title.[11] Thus it is color of title against donees.[12]

No distinction is made in the Connor Act or in the opinions of the Court, construing and applying the statute, between the rights of creditors and purchasers for value. In *Eaton v. Doub*[13] it was held that where there is a conflicting claim between the judgment creditor of the grantor and his grantee, whose deed is dated prior to, but not registered at the date of the docketing of the judgment, the unregistered deed is not color of title as against the judgment creditor, and possession thereunder of the requisite kind and for the requisite duration will not bar the judgment creditor's rights against the property.

The principal case relied upon *Johnson v. Fry*[14] and distinguished *Eaton v. Doub*.[15] However, in *Johnson v. Fry* those who held under the unregistered conveyance had been in possession adversely for more than twenty years, and it was this twenty years of adverse possession and not seven years under color of title upon which they based their claim and prevailed over the judgment creditor. *Eaton v. Doub*, distinguished by the court in the principal case, differs from the principal case on its facts in that in *Eaton v. Doub* there were no recorded conveyances subsequent to the unrecorded conveyance. Does this difference warrant a different holding in the principal case? It can be forcefully argued in the affirmative, since registered deeds running back to an unregistered deed should have the same status as registered deeds from a person having no title. *I.e.*, we start with the first registered deed after the unregistered deed, and if there is seven years of possession under this first registered deed it is color of title. On the other hand, can the purpose of the Connor Act be carried out successfully when the first link in the chain of title is unrecorded and no one be penalized in law simply because the plaintiff and the other grantees in the chain of title had recorded their deeds and been in possession under the recorded deeds for seven years? Where the chain of title runs back to the same party through which the creditor or purchaser

[10] Janney v. Robbins, 141 N. C. 400, 53 S. E. 863 (1906); Gore v. McPherson, 161 N. C. 638, 77 S. E. 835 (1913); Anderson v. Walker, 190 N. C. 826, 130 S. E. 840 (1925).

[11] King v. Mc Rackan *et al.*, 168 N. C. 621, 84 S. E. 1027 (1915); Klutz v. Klutz, 172 N. C. 622, 90 S. E. 769 (1916).

[12] Dissent in Clendenin v. Clendenin, 181 N. C. 465, 107 S. E. 458 (1921).

[13] 190 N. C. 14, 128 S. E. 494 (1925).

[14] 195 N. C. 832, 143 S. E. 857 (1928).

[15] See note 13, *supra*.

for value claims, then it seems that each link in the chain should be registered because if it were, then the creditor or purchaser could rely on the records and determine the status of the title from them. Where the chain of title does not run back to the person from whom the creditor claims then there is more reason for not applying the Connor Act. That would be a real case of independent or foreign source of title where the Connor Act is inapplicable. Registration of each link or conveyance in such a case would be of no assistance to a creditor or purchaser searching the record, since the registered link or conveyance would not appear in the chain of title descending from the judgment debtor.[16]

JAMES A. WELLONS, JR.

Attorney and Client—Wrongful Discharge—Remedies of Attorney.

Because it is necessary that a client have confidence in his attorney, the courts proclaim in unison that a client has the power to discharge his attorney at any time, with or without cause.[1] But there is disagreement as to the remedies of the attorney when the client has exercised this privilege.[2]

In accord with the rule applicable to the usual employer-employee contract, the majority of jurisdictions hold that the attorney discharged without cause may treat the contract as continuing and recover damages for the client's breach.[3] The measure of damages is usually the full

[16] Now suppose *X*, who is not the true owner of the property, makes a conveyance of it to *A*, who does not register it. Subsequently *X* makes another conveyance of the same property to *B* for a valuable consideration and this deed is registered but after *A* has held for more than seven years under his unregistered deed. Would the Connor Act be applicable and give *B* title since both claim from a common grantor or would the color of title statute apply? Registration in such a case would be insufficient to pass title since the deeds from *X* are defective because of lack of title in *X*. Thus it would seem that in such a case the party who first holds for seven years continuously under his deed would prevail. Both deeds are defective since *X* lacks title, but both could constitute color of title. But if *A* had registered his deed then *B* would have had notice of it and would not have been misled.

[1] Atchison v. Hulse, 107 Cal. App. 640, 290 Pac. 916 (1930); Lawler v. Dunn, 145 Minn. 281, 176 N. W. 989 (1920); Martin v. Camp, 219 N. Y. 170, 114 N. E. 46, L. R. A. 1917F 406 (1916).

[2] Generally an attorney discharged for a justifiable cause can have no recovery. *In re* Badger, 9 F. (2d) 560 (C. C. A. 2d, 1925); Cahill v. Baird, 138 Cal. 691, 70 Pac. 1061 (1902); Holmes v. Evans, 129 N. Y. 140, 29 N. E. 233 (1891); Bloom v. Irving Trust Co., 152 Misc. 50, 272 N. Y. Supp. 637 (1934). *Contra:* Goodin v. Hays, 28 Ky. L. 112, 88 S. W. 1101 (1905) (attorney discharged for cause allowed to recover on *quantum meruit*. As to what constitutes cause, see 1 THORNTON, ATTORNEYS AT LAW (1914) 239.

[3] Webb v. Trescony, 76 Cal. 621, 18 Pac. 796 (1888); Moyer v. Cantieny, 41 Minn. 242, 42 N. W. 1060 (1889); Kent v. Fishblate, 247 Pa. 361, 93 Atl. 509 (1915).

contract price.[4] Some courts deduct from the contract price a sum representing the proportional amount of work remaining to be done.[5] If the fee is contingent, the measure of damages is reasonable compensation for services actually rendered, rather than the possible contingent fee.[6] If the attorney prefers, he may under the majority view sue in *quantum meruit*.[7] Recovery in such cases is not limited to the contract price.[8]

Following the lead of New York, several states have turned down the majority view and hold that there is an implied term in every contract that the client may terminate the relationship without any further liability other than payment for the reasonable value of services actually rendered.[9] This view is limited to the employment of an attorney for a specific purpose, and does not apply to a general retainer contract for a definite period of time,[10] which is more in the nature of an ordinary master-servant contract than one for professional services.[11] According to the New York courts, the so-called "right" of the client to discharge his attorney is not sufficient protection if the attorney still has his action for the contract price.[12]

Though intended to protect the client, this *quantum meruit* rule backfired to the client's injury in the case of *In re Montgomery*.[13]

[4] Mutter v. Burgess, 87 Colo. 580, 290 Pac. 269 (1930); Whittle v. Tompkins, 94 S. C. 237, 77 S. E. 929 (1913); Sessions v. Warwick, 46 Wash. 165, 89 Pac. 482 (1907).

[5] Brodie v. Watkins, 33 Ark. 545 (1878); Bowser v. Patrick, 23 Ky. L. 1578, 65 S. W. 824 (1901); *cf.* Searson v. Sams, 142 S. C. 558, 141 S. E. 107 (1928) (Wrongfully discharged attorneys were held entitled to recover from their clients the contract price, less an agreed reduction for the services yet to be performed.).

[6] Owens v. Bolt, 218 Ala. 344, 118 So. 590 (1928); Western Union Tel. Co. v. Semmes, 73 Md. 9, 20 Atl. 127 (1890); Clayton v. Martin, 108 W. Va. 571, 151 S. E. 855 (1930).

French v. Cunningham, 149 Ind. 632, 49 N. E. 797 (1898); Philbrook v. Moxey, 191 Mass. 33, 77 N. E. 520 (1906); Shevalier v. Doyle, 88 Neb. 560, 130 N. W. 417 (1911).

[7] Lessing v. Gibbons, 6 Cal. App. (2d) 598, 45 P. (2d) 258 (1935); Thompson v. Smith, 248 S. W. 1070 (Tex. 1923).

[8] Louque v. Dejan, 129 La. 519, 56 So. 427 (1911); Lawler v. Dunn, 145 Minn. 281, 176 N. W. 989 (1920); Martin v. Camp, 219 N. Y. 170, 114 N. E. 46, L. R. A. 1917F 406 (1916); Ritz v. Carpenter, 43 S. D. 236, 178 N. W. 877 (1920); Enos v. Keating, 39 Wyo. 217, 271 Pac. 6 (1928).

[9] Martin v. Camp, 219 N. Y. 170, 114 N. E. 46, L. R. A. 1917F 406 (1916); Greenberg v. Remick & Co., 230 N. Y. 70, 129 N. E. 211 (1920).

[10] Roxana Petroleum Co. v. Rice, 109 Okla. 161, 235 Pac. 502 (1924) held that when the attorney entered the general employment of his client, he "changed his position" by giving up other clients and incurring expenses. Hence, when wrongfully discharged he could recover as damages the fees provided by the contract. But to follow this reasoning would be to destroy the New York rule. An attorney would always change his position when he accepted employment in that he could not later serve the adverse party.

[11] The courts will not specifically enforce contracts of personal service (see 5 WILLISTON, CONTRACTS (rev. ed. 1937) §1423A; RESTATEMENT, CONTRACTS (1932) §379); hence the only possible benefit the client could derive from a "right to discharge" would be to prevent his being bound by the attorney's acts.

[12] 272 N. Y. 323, 6 N. E. (2d) 40, 109 A. L. R. 674 (1937), (1937) 6 BROOKLYN L. REV. 462; (1937) 25 GEO. L. J. 734; (1937) 21 MINN. L. REV. 863;

Here the contract price was $5,000; the reasonable value of the attorney's services, $13,000. The court awarded the plaintiff $13,000, saying that since the contract had been cancelled it could not limit recovery.[14] The result is undesirable. Clients in the future will not feel free to discharge their attorneys if there is a possibility that *quantum meruit* will exceed the contract price.[15]

In applying the New York rule, the courts are faced with the problem of what factors should be considered in determining *quantum meruit.* The amount and character of the services rendered, labor, time and trouble, character and importance of the litigation, the professional standing of counsel, financial responsibility of the client, even the contract price—all these have been held relevant.[16] The detriment to the attorney, rather than the benefit resulting to the client, is the prime consideration.[17]

Both the New York and majority views have been severely criticized. The attack on New York's *quantum meruit* view, led by Williston,[18] involves these points: (1) The attorney has lost the chance to serve the adverse party; and if discharged before he has rendered any substantial service, his *quantum meruit* recovery would be negligible, whereas his actual loss might be considerable. But, it might be answered, if the attorney has actually suffered loss in this manner, it might well be considered by the jury in determining the amount of recovery. (2) The client can unjustifiably deprive the attorney of the benefits of the contract, except as to a right of restitution, though the services were substantially complete. But where there is any considerable discrepancy between the contract price and *quantum meruit,* the inference is strong that the attorney has taken advantage of his position to impose on the client. (3) *Quantum meruit* is difficult to determine. True, but it is nevertheless closer to the just fee than is the contract price. (4) The attorney might recover much more than the contract price, as in *In re Montgomery.* However, it is doubtful if the rule of this case will be followed by the other minority jurisdictions. Under the minority view neither party is regarded as being at fault, hence

(1937) 14 N. Y. U. L. Q. Rev. 527; (1937) 23 Va. L. Rev. 601; (1936) 21 Corn. L. Q. 455.

[14] Accord: *In re* Krooks, 257 N. Y. 329, 178 N. E. 548 (1931); *In re* Tillman, 259 N. Y. 133, 181 N. E. 75 (1932).

[15] The same criticism is valid as to the majority rule, which allows the attorney to sue in *quantum meruit* if he desires and which does not limit recovery to the contract price.

[16] Starin v. Mayor of N. Y., 106 N. Y. 82, 12 N. E. 643 (1887); *In re* Potts' Estate, 213 App. Div. 59, 209 N. Y. Supp. 655 (1925); French v. Roberts Abbott Pub. Co., 223 App. Div. 276, 228 N. Y. Supp. 62 (1928); *In re* Montgomery, 272 N. Y. 323, 6 N. E. (2d) 40, 109 A. L. R. 674 (1937).

[17] French v. Cunningham, 149 Ind. 632, 49 N. E. 797 (1898).

[18] 4 Williston, Contracts (rev. ed. 1936) §1029. See also Notes (1917) 2 Corn. L. Q. 109; (1920) 4 Minn. L. Rev. 441.

the contract price should limit recovery, as is true in the case of death of one of the parties.[19]

On the other hand, the majority view is weak[20] in that: (1) The attorney may have done almost no work, may have suffered no loss, yet he can recover the full contract price. (2) Unlike other cases of breach of a personal service contract, there is no duty to minimize damages, and the courts do not subtract what the plaintiff earns in other employment during the contract period.[21] (3) The client, even though dissatisfied, will likely allow the attorney to continue in his employment, rather than pay the full stipulated fee. This is not in accord with the public policy of encouraging the client to break the relationship when he has ceased to have confidence in his attorney.

It is uncertain which view the North Carolina court will adopt when the problem is squarely presented. There are only two North Carolina cases bearing even remotely on the problem, and they furnish little light. In *Johnston v. Cutchin,*[22] plaintiff was to receive four-ninths of any sums he might recover from the estate of the father of his clients. He sued the estate but failed to obtain a judgment. In a later action his clients were represented by a different attorney and recovered. The court denied plaintiff's claim to four-ninths of the sum, since he himself had recovered nothing from the estate. However, the court added that if his clients "prevented him from further prosecuting their demand and claim against the executors after the failure of the first action, he may have his remedy against them by a civil action, but he can claim no lien upon the recovery as equitable assignee."[23] In another oblique decision, *Hamme v. Lineberger,*[24] the attorney was employed to institute an action for damages to property caused by the diversion and contamination of water. He recovered judgment for his client, who refused to pay on the ground that he was required to sign an easement and his wife would not join in the conveyance. The attorney was allowed to recover his fee, since he had fully discharged all duties he was employed to perform.

These decisions leave North Carolina free to follow whichever rule seems wiser. Since the attack on the majority view appears justifiable, it is to be hoped that North Carolina, when the question arises, will see fit to follow New York, with the additional stipulation that the recovery shall in no case exceed the contract price.

CHAS. AYCOCK POE.

[19] Sargent v. New York Cent. & H. R. R., 209 N. Y. 360, 103 N. E. 164 (1913); see RESTATEMENT, CONTRACTS (1932) §468 (1), (3).
[20] See Notes (1921) 30 YALE L. J. 514; (1936) 21 CORN. L. Q. 455.
[21] Dixon v. Volunteer Co-op. Bank, 213 Mass. 345, 100 N. E. 655 (1913).
[22] 133 N. C. 119, 45 S. E. 522 (1903).
[23] *Id.* at 123, 45 S. E. at 523.
[24] 199 N. C. 342, 154 S. E. 313 (1930).

Bankruptcy—Priority of Claims for Taxes—Personal Liability of Trustee in Bankruptcy for Neglecting to Pay Taxes.

The trustee in bankruptcy for a Delaware corporation distributed assets and wound up the bankrupt estate without paying franchise taxes due to the state of Delaware. The State sought to hold the trustee personally liable for failure to give to the tax claims the priority conferred upon them by the National Bankruptcy Act. *Held,* in the absence of an allegation that the trustee had knowledge of the existence of the taxes, the defendant trustee was entitled to judgment on the pleadings.[1]

The priority given claims for taxes in bankruptcy proceedings is required by two statutes. The first, enacted in 1797 and still in effect with modifications, applies generally to the various types of liquidation, including bankruptcy. It provides that "debts due to the United States shall be first satisfied"[2] and imposes personal liability upon the trustee or other liquidator who fails to respect such priority in distributing the assets of an insolvent estate.[3] The second statute, the Bankruptcy Act itself, supersedes the first to the extent that, in bankruptcies, certain wage claims are to be satisfied before taxes, that priority is given to state, county, district, and municipal as well as federal taxes, and that all taxes are given precedence over non-tax debts due the United States.[4] Where the bankrupt's assets are not sufficient to satisfy the claims of all taxing units, it has been held that the United States, the states, and municipalities are to share *pro rata* in the payment of taxes.[5] The priority afforded taxes under the Bankruptcy Act does not extend to taxes already secured by a lien upon the property taxed.[6]

Tax claims need not be proved in the same manner as other claims. It is said that claims for taxes are not claims for "debts" in the ordinary sense of the word; that the rights and remedies of a sovereign are not limited by a statute unless the sovereign is specifically men-

[1] Delaware v. Irving Trust Co., 92 F. (2d) 17 (C. C. A. 2d, 1937).

[2] REV. STAT. §3466 (1875), 31 U. S. C. A. §191 (1927); United States v. Fisher, 2 Cranch 358, 2 L. ed. 304 (U. S. 1804) (statute held constitutional); Price v. United States, 269 U. S. 492, 46 Sup. Ct. 180, 70 L. ed. 373 (1926) ("debts due to the United States" construed to include federal taxes).

[3] REV. STAT. §3467 (1875) as amended 48 STAT. 760, 31 U. S. C. A. §192 (Supp. 1936).

[4] 30 STAT. 563 as amended 32 STAT. 800, 34 STAT. 267, and 44 STAT. 666, 11 U. S. C. A. §104 (1937).

[5] Missouri v. Ross, 299 U. S. 72, 57 Sup. Ct. 60, 81 L. ed. Adv. Ops. 6 (1936); *In re* Waterman Mfg. Co., 291 Fed. 589 (D. Me. 1923); *In re* Wyley Co., 292 Fed. 900 (N. D. Ga. 1923); see *In re* Fountain, Inc., 295 Fed. 873, 874 (S. D. N. Y. 1924); but *cf.* Spokane v. United States, 279 U. S. 80, 49 Sup. Ct. 321, 73 L. ed. 621 (1929) (holding that in a receivership, by reason of REV. STAT. §3466 (1875), 31 U. S. C. A. §191 (1927), taxes due the United States have priority over state taxes).

[6] *In re* Dublin Veneer Co., 1 F. Supp. 313 (S. D. Ga. 1932).

tioned; and, therefore, that the provisions of the Bankruptcy Act relative to the proof and allowance of claims do not bind the government.[7] It follows that the present period of six months[8] allowed for the filing and proof of claims, as was true of the former one-year period,[9] does not limit the time in which claims for taxes may be filed and proved.[10] Indeed, it has been held that it is not necessary that claims for taxes be filed or proved at all.[11] But the bankruptcy court is not altogether without protection against unreasonable delay in the settlement of an estate, caused by the failure of federal, state, or local governments to file their claims for taxes. As an incident to the jurisdiction of the court to determine the amount and validity of taxes,[12] the referee may, upon petition of the trustee and after service of notice upon the proper government officials, require tax claims to be proved within a time fixed by the court or thereafter be barred.[13]

Not infrequently a claim for taxes, as was true in the principal case, will not be presented until the trustee has distributed the assets of the bankrupt in whole or in part. In such event what is the responsibility of the trustee? A trustee in bankruptcy, like any other trustee, is personally liable for a breach of duty. As one court expressed it:

"His duties and responsibilities are as heavy as those of other trustees, including administrators and executors. . . . If in the performance of . . . duties he violates the law or acts so negligently or carelessly as to inflict loss upon the estate or persons interested therein, he must answer in damages, according to the principles applied to any trustee or fiduciary."[14]

The trustee has been held personally liable for breach of duty both

[7] *In re* Brezin, 297 Fed. 300 (D. N. J. 1924); *In re* De Angeles, 36 F. (2d) 218 (C. C. A. 10th, 1929); *In re* Servel, 45 F. (2d) 660 (E. D. Idaho 1930) (claims for taxes need not be verified).

[8] 30 STAT. 561 as amended 44 STAT. 666, 11 U. S. C. A. §93 (n) (Supp. 1936).

[9] 30 STAT. 561, 11 U. S. C. A. §93 (n) (1927).

[10] Period of six months: *In re* Rheem, 78 F. (2d) 740 (App. D. C. 1935); *In re* Reimer, 82 F. (2d) 162 (C. C. A. 2d, 1936). One year period: *In re* Cleanfast Hosiery Co., 4 Am. B. R. 702 (S. D. N. Y. 1900); *In re* Menist Co., 294 Fed. 532 (C. C. A. 2d, 1923); *In re* Brezin, 297 Fed. 300 (D. N. J. 1924); Villere v. United States, 18 F. (2d) 409 (C. C. A. 5th, 1927), *cert. denied* 275 U. S. 532, 48 Sup. Ct. 29, 72 L. ed. 410 (1927).

[11] *In re* Chandler Motors of New England, Inc., 17 F. (2d) 998 (D. Mass. 1926).

[12] 30 STAT. 563; 11 U. S. C. A. §104 (a) (1937); New Jersey v. Anderson, 203 U. S. 483, 27 Sup. Ct. 137, 51 L. ed. 284 (1906) (bankruptcy court had jurisdiction to decide whether New Jersey franchise tax was "tax" within meaning of the Bankruptcy Act.).

[13] New York v. Irving Trust Co., 288 U. S. 329, 53 Sup. Ct. 389, 77 L. ed. 815 (1933); *In re* Anderson, 279 Fed. 525 (C. C. A. 2d, 1922); *In re* Stavin, 12 F. (2d) 471 (S. D. N. Y. 1925); *In re* Morgenstern, 57 F. (2d) 163 (C. C. A. 2d, 1932); United States v. Elliot, 57 F. (2d) 843 (C. C. A. 6th, 1932) ("bar order" may be revoked within the discretion of the court in order to permit proof of claims for taxes after the designated period has expired).

[14] *In re* Montgomery and Son, 17 F. (2d) 404, 405 (N. D. Ohio 1927).

for failure to collect[15] or conserve[16] assets and for improper distribution thereof. Disbursements to creditors are to be made by the trustee under orders from the referee, and the trustee has been found negligent where he made improper payments without securing such an order.[17] However, the fact that the trustee has acted pursuant to the referee's orders is not, in itself, a defense.[18] The trustee's duty is to see that the assets of the estate are properly distributed; and if he is aware, or reasonably should be aware that the order is wrong, or if a payment is erroneously ordered at the request of the trustee or because he neglects to give proper information to the referee, then the order is not a defense.

If a trustee, having notice of taxes owed by the bankrupt, distributes the assets of the estate without paying the taxes, clearly he is guilty of a breach of duty and should be held personally responsible. But if the trustee has no notice of the existence of the taxes, and without paying them winds up the estate under orders of the court, as in the principal case, his liability, if any, must be predicated upon the breach of an affirmative duty to search for taxes and bring them to the attention of the court.

Numerous dicta support the proposition that a duty to search for taxes does exist.[19] For example in *In re Kallak*[20] the court said:

> "It is the duty of the trustee to ascertain from the public records the amount due for taxes and bring the matter to the attention of the court. . . ."

On the other hand, in *United States v. Eyges*,[21] a federal district court squarely held that the trustee is under no duty to search for taxes and cannot be held personally liable in the absence of notice of their existence. Furthermore, it is to be observed that in the cases in which the trustee in bankruptcy has been charged personally with responsibility for failure to pay taxes or debts due the United States there has been some element of notice present.[22] The decision in the prin-

[15] *In re* Reinboth, 157 Fed. 672 (C. C. A. 2d, 1907); *In re* Kuhn Bros., 234 Fed. 277 (C. C. A. 7th, 1916).

[16] Carson, Pierce, Scott and Co. v. Turner, 61 F. (2d) 693 (C. C. A. 6th, 1932).

[17] *In re* Rude, 101 Fed. 805 (D. Ky. 1900); *In re* Hoyt and Mitchell, 127 Fed. 968 (E. D. N. C. 1904).

[18] Louisville Woolen Mills v. Tapp, 239 Fed. 463 (C. C. A. 6th, 1917); *In re* Montgomery and Son, 17 F. (2d) 404 (N. D. Ohio 1927); see *In re* Cobb, 112 Fed. 655, 656 (E. D. N. C. 1901).

[19] Stanard v. Dayton, 220 Fed. 441, 444 (C. C. A. 8th, 1915); *In re* Montgomery and Son 17 F. (2d) 404, 406 (N. D. Ohio 1927); *In re* De Angeles, 36 F. (2d) 218, 219 (C. C. A. 10th, 1929); *In re* Servel 45 F. (2d) 660, 661 (E. D. Idaho 1930).

[20] 147 Fed. 276, 277 (D. N. D. 1906).

[21] 286 Fed. 683 (D. Mass. 1923).

[22] United States v. Barnes, 31 Fed. 705 (C. C. S. D. N. Y. 1887) (taxes); Dallas v. Menezes, 16 F. (2d) 779 (C. C. A. 5th, 1927) (taxes); *Re* Monsarrat,

cipal case, therefore, rests upon sound authority; but the question of the existence of a duty to search has never been settled by the Supreme Court, and, in view of the dicta to the effect that there is such a duty, a different result might be reached in that Court.

It cannot be denied that there is merit in the conclusion that an absolute duty to search for and discover *all* taxes owed by a bankrupt should not be imposed upon a trustee. The probability that certain types of taxes are due should be obvious to the trustee, but others are more obscure, and the most diligent search might not reveal the existence of all of them. Perhaps it would impose a great hardship to require the trustee of a bankrupt Delaware corporation to discover at his peril every tax levied upon the bankrupt by the states of Idaho, Oregon, and California, but it does not seem that a rule which would require the trustee to ascertain the existence of franchise taxes owed to the state under which the bankrupt was incorporated would be unduly rigorous. The latter burden seems even less severe when as in the principal case the trustee is an incorporated trust company, familiar with and experienced in the administration of bankrupt estates, and when it is remembered that a trustee may always resort to a bar order to compel a lazy or uninformed tax official to file claims for taxes. In following the policy of protecting a trustee against responsibility for failure to pay tardy tax claims of which he was never aware, the policy of insuring the adequacy of public revenues, which lies behind the priority statutes, should not be overlooked. Might not the court, while refusing to impose an absolute duty to search for and ascertain the existence of tax claims, nevertheless require of the trustee that *reasonable* efforts be directed toward their discovery?

MOSES BRAXTON GILLAM, JR.

Carriers—Duties to Persons Accompanying Passengers—Assaults.

Plaintiff, who had entered the station of the defendant railway station for the purpose of meeting a fellow mail clerk to take him home,[1] was assaulted by the general manager of the defendant. The provocation was the fact that the plaintiff had testified adversely to the defendant in a hearing before the Corporation Commission. *Held,*

25 Am. B. R. 820 (D. Hawaii 1911) *semble* (taxes); United Sattes v. Dewey, 39 Fed. 251 (C. C. S. D. N. Y. 1889) (debt due the United States); United States v. Kaplan, 74 F. (2d) 664 (C. C. A. 2d, 1935) (debt due the United States).

[1] Record on Appeal, p. 15, Snow v. Debutts and A. and Y. Ry., 212 N. C. 120, 193 S. E. 224 (1937).

defendant railway company is not liable for the assault of its agent since he was acting outside the scope of his employment.[2]

An adequate treatment of the problem involved here necessarily requires a consideration of the duty of a carrier to protect the following classes of persons from assaults: (a) passengers; (b) invitees; (c) licensees;[3] (d) trespassers. Although a carrier is not an absolute insurer of the safety of its passengers,[4] it does have an absolute duty to protect them from assaults by employees,[5] and to exercise a high degree of care to prevent assaults by co-passengers[6] or strangers.[7] As to invitees, licensees, and trespassers, there is merely the duty to prevent assaults by employees committed in the course of employment.[8] Invitees are owed the additional duty of protection from assaults by third parties, which reasonably could have been foreseen.[9]

[2] Snow v. Debutts and A. and Y. Ry., 212 N. C. 120, 193 S. E. 224 (1937).

[3] A licensee is one who enters the premises for his own purposes under a permission to do so. Pennsylvania R. R. v. Lackner, 246 Fed. 931 (C. C. A. 3d, 1917); Hyde v. Atlantic and W. R. R. R., 47 Ga. App. 139, 169 S. E. 854 (1933); Bullock v. New York Central R. R., 152 App. Div. 132, 142 N. Y. Supp. 219 (1913); Gillis v. Pennsylvania R. R., 59 Pa. 129 (1868); International and G. N. Ry. v. Kent, 58 Tex. Civ. App. 272, 124 S. W. 179 (1909). An invitee is one who comes upon the premises pursuant to an invitation which the carrier holds out to those of the public who enter in the interest of the passenger and/or the carrier. St. Louis, I. M. and S. Ry. v. Grimsley, 90 Ark. 64, 117 S. W. 1064 (1909); Atlantic and B. Ry. v. Owens, 123 Ga. 393, 51 S. E. 404 (1905); Fournier v. New York, N. H., and H. R. R., 286 Mass. 7, 189 N. E. 574 (1934); Fortune v. Southern Ry., 150 N. C. 695, 46 S. E. 759 (1909); Dougherty v. Davis, 48 N. D. 883, 187 N. W. 616 (1922); St. Louis and S. F. R. R. v. Stacy, 77 Okla. 165, 171 Pac. 870 (1918); Hamilton v. Texas and P. Ry., 64 Tex. 251 (1885); Note (1934) 92 A. L. R. 614. Some courts have confused the two classifications and have held that those persons who come on the premises in the interests of the passenger and/or the carrier are licensees. Izlor v. Manchester and A. R. R., 57 S. C. 332, 35 S. E. 583 (1900); Galveston, H. and S. A. R. R. v. Matzdorf, 102 Tex. 42, 112 S. W. 1036 (1908). However the majority hold them to be invitees. 3 ELLIOTT, RAILROADS (3d ed. 1921) §1794; Note (1893) 29 Am. St. Rep. 54.

[4] The Korea Maru, 254 Fed. 397, 399 (C. C. A. 9th, 1918) ("Although the carrier does not insure that the passenger will be carried safely, still it is bound to exercise as high a degree of care, skill, and diligence in receiving a passenger, conveying him to his destination, and setting him down safely, as the means of conveyance employed and the circumstances of the case will permit."); Owens v. Wilmington and W. Ry., 126 N. C. 139, 141, 35 S. E. 259, 260 (1900).

[5] Bledsoe v. West, 186 Mo. App. 460, 171 S. W. 622 (1914); Williams v. Gill, 122 N. C. 967, 29 S. E. 879 (1898); Neville v. Southern Ry., 126 Tenn. 96, 146 S. W. 846 (1912); Whitlock v. Northern Pacific Ry., 59 Wash. 15, 109 Pac. 188 (1910); 5 ELLIOTT, RAILROADS (3d ed. 1922) §2887.

[6] Hines v. Miniard, 208 Ala. 176, 94 So. 302 (1922); New Orleans, St. L. and C. R. R. v. Burke, 53 Miss. 200 (1876).

[7] Southern Ry. v. Haynes, 186 Ala. 60, 65 So. 339 (1914); Seawell v. Carolina Central R. R., 132 N. C. 856, 44 S. E. 620 (1903).

[8] Lynch v. Florida Central R. R., 113 Ga. 1105, 39 S. E. 411 (1901); Central of Georgia Ry. v. Morris, 121 Ga. 484, 49 S. E. 606 (1904); Hudson v. Missouri, K. and T. Ry., 16 Kan. 470 (1876); Mead v. Chicago, R. I. and P. Ry., 68 Mo. App. 92 (1896); Daniel v. Petersburg R. R., 117 N. C. 592, 23 S. E. 327 (1895); Pierce v. North Carolina R. R., 124 N. C. 83, 32 S. E. 399 (1899); Cook v. Southern Ry. 128 N. C. 333, 38 S. E. 925 (1901); 3 ELLIOTT, RAILROADS (3d ed. 1921) §1805; PIERCE, RAILROADS (1881) 277.

[9] Blaisdell v. Long Island R. R., 152 App. Div. 218, 136 N. Y. Supp. 768

The rule laid down in the principal case seems unobjectionable when applied to trespassers and licensees. Licensees, for example, peddlers, newsboys, those using restrooms, coming to the station to see distinguished visitors, or coming there to transact business purely personal to them and employees of the carrier, are on the premises with the bare permission of the carrier for their own private purposes and have no connection with the passengers or the business of transporting them. However, another rule, imposing greater liability upon the carrier, should be applied to invitees reasonably necessary to passengers, for instance, persons carrying bags, assisting children or the aged or infirm to board or alight from trains, or transporting passengers to and from the station and aiding in their departure. Likewise, although it must be admitted that the case is weaker, this same increased liability should be extended to invitees present for the mere convenience of passengers, such as persons greeting incoming friends or bidding farewell to those departing. Both of these classes of persons are at the station to facilitate the very function that the carrier holds itself out to perform.

It would seem that the courts should cease basing the liability of the carrier to both the above types of invitees solely upon the doctrine of *respondeat superior*.[10] When the assaults are committed by the carrier's own employees, then the invitee should be protected by the same rule which is applicable to passengers, *i.e.*, hold the carrier liable whether or not the employee is acting within the scope of his employment. These invitees are there in connection with the passengers, and consequently, in direct connection with the carrier's business of transporting passengers. They are reasonably necessary to the convenience, well-being, and safety of the passengers, and the policy of permitting their assistance in helping travelers to and from trains has proved to be a good business procedure for the carrier because it has built up good will, thus increasing passenger traffic.[11] Likewise, it has proved to be a matter of practical necessity, for otherwise the carrier would be forced to greater expense in adequately rendering its services to the public. In addition, the vast distinction between the nature of a private and a public enterprise should justify the application of different rules to each. The public business must extend the use of its facilities to all who come to avail, or to aid others in availing, themselves of the services which it renders to the public; whereas, in contrast, the private business is not required to do so, but may deal with whom it pleases.

(1912); *contra,* Houston and T. C. R. R. v. Phillio, 96 Tex. 18, 69 S. W. 994 (1902).

[10] See note 8, *supra.*

[11] See Little Rock and F. S. Ry. v. Lawton, 55 Ark. 428, 432, 18 S. W. 543, 544 (1892); (1932) 11 CHI.-KENT REV. 31, 35.

Some courts have applied the rule advocated by this note in order to hold the carrier liable in cases involving negligence.[12] In those instances the courts have declared that the invitee was either a passenger or that he was due the same protection as the passenger whom he was assisting.

However, if it is not considered feasible to adopt a rule of absolute liability, a compromise might be reached as suggested by one court, in declaring that the duty to keep the premises in a reasonably safe condition for invitees includes a duty to use due care to protect them from illegal assaults by employees, whether acting within the scope of their employment or not.[13]

HENRY IRWIN COFFIELD, JR.

Constitutional Law—Electricity—Federal Loans to Erect Publicly Owned Electric Plants.

Defendant county and defendant Ickes, administrator of public works, entered into a contract for a loan and grant of federal funds to the county for the construction of a publicly owned electric plant. The plaintiff power company, operating in the area under a non-exclusive franchise, sought to restrain the execution of the agreement on the ground that the act under which federal aid was extended was unconstitutional, and that the ensuing competition would seriously damage its business. The district court granted the injunction.[1] The circuit court of appeals remanded the case for reconsideration in the light of a new contract between the defendants[2] (omitting rate control by the administrator).[3] The trial court adhered to its original decision;[4] the circuit court reversed the decision, holding the act constitutional.[5] The Supreme Court held, *per curiam*, that the remand, without vacating the decree of the lower court, had unduly limited the rehearing, and sent the case back for another hearing.[6] This time the district court held the act constitutional.[7] On the third appearance

[12] Louisville and N. R. R. v. Crunk, 119 Ind. 542, 21 N. E. 31 (1889); Evansville and T. H. R. R. v. Athon, 6 Ind. App. 295, 33 N. E. 469 (1893); Galloway v. Chicago, R. I. and P. Ry., 87 Iowa 458, 54 N. W. 447 (1893); Cherokee Packet Co. v. Hilson, 95 Tenn. 1, 31 S. W. 737 (1895); Texas and P. Ry. v. McGilvary, 29 S. W. 67 (Tex. Civ. App. 1894); 5 ELLIOTT, RAILROADS (3d ed. 1922) §2388, n. 65.

[13] Krantz v. Rio Grande W. Ry., 12 Utah 104, 41 Pac. 717 (1895).

[1] Duke Power Co. v. Greenwood County, 10 F. Supp. 854 (W. D. S. C. 1935).

[2] Greenwood County v. Duke Power Co., 79 F. (2d) 995 (C. C. A. 4th, 1935).

[3] No change has ever been made in the rates originally adopted by the county and approved by the administrator.

[4] Duke Power Co. v. Greenwood County, 12 F. Supp. 70 (W. D. S. C. 1935).

[5] Greenwood County v. Duke Power Co., 81 F. (2d) 986 (C. C. A. 4th, 1936).

[6] Duke Power Co. v. Greenwood County, 299 U. S. 259, 57 Sup. Ct. 202, 81 L ed. Adv. Ops. 149 (1936).

[7] Duke Power Co. v. Greenwood County, 19 F. Supp. 932 (W. D. S. C. 1937).

of the case in the circuit court of appeals, *held,* Title II of the N.I.R.A.[8] is constitutional as a valid exercise of the spending power under the general welfare clause; it is not a violation of the Tenth Amendment or an unconstitutional delegation of legislative authority; and, as the county has a right to compete with the plaintiff, any damage suffered is *absque injuria,* and the plaintiff is without standing to raise the issue of the constitutionality of the federal appropriation.[9]

It is apparently settled that the plaintiff is not entitled as a federal taxpayer to question the validity of a federal appropriation.[10] However, the power company's non-exclusive franchise is property within the meaning of the Fourteenth Amendment and will be protected against illegal competition.[11] That the franchise does not protect its holder from lawful competition by a municipality or county is well recognized.[12] But the construction of a competing municipal plant may be enjoined by an existing utility *as a franchise holder,* where the construction if allowed would be illegally financed, as, for instance, by the issuance of bonds in violation of a statutory or constitutional debt limitation.[13] In such cases, the municipality's "right" to compete is unquestioned, yet the franchise holder has a standing in court to contest the legality of the financing arrangement.[14] It would seem, then, in the principal case that, though the county has an admitted right to compete with the plaintiff,[15] the validity of the complete financing

[8] 48 STAT. 200 (1933), 40 U. S. C. A. §401 (1934).

[9] Duke Power Co. v. Greenwood County, 91 F. (2d) 665 (C. C. A. 4th, 1937), *cert. granted* Oct. 25, 1937, 58 Sup. Ct. 120, 82 L. ed. Adv. Ops. 36 (1937).

[10] Frothingham v. Mellon, 262 U. S. 447, 43 Sup. Ct. 597, 67 L. ed. 1078 (1923); *cf.* United States v. Butler, 297 U. S. 1, 56 Sup. Ct. 312, 80 L. ed. 477 (1936) (where the taxpayer was allowed to question the validity of the tax as a step in an unauthorized plan to regulate agriculture by expenditure of the earmarked tax proceeds); Helvering v. Davis, 57 Sup. Ct. 904, 81 L. ed. Adv. Ops. 804 (1937) (where the constitutionality of old age benefit payments was determined in a stockholder's suit to restrain the corporation from paying the excise tax).

[11] Frost v. Corp. Comm., 278 U. S. 515, 49 Sup. Ct. 235, 73 L. ed. 483 (1928).

[12] Madera Water Works v. Madera, 228 U. S. 454, 33 Sup. Ct. 571, 57 L. ed. 915 (1913); Puget Sound Power & Light Co. v. Seattle, 291 U. S. 619, 54 Sup. Ct. 542, 78 L. ed. 1025 (1934); Little Falls Electric & Water Co. v. Little Falls, 102 Fed. 663 (C. C. Minn. 1900).

[13] Campbell v. Arkansas-Missouri Power Co., 55 F. (2d) 560 (C. C. A. 8th, 1932); Illinois Power & Light Corp. v. Centralia, 11 F. Supp. 874 (E. D. Ill. 1935); Oklahoma Utilities Co. v. Hominy, 2 F. Supp. 849 (N. D. Okla. 1933). Accord: Kansas Gas & Electric Co. v. Independence, 79 F. (2d) 32 (C. C. A. 10th, 1935) (bonds authorized by an insufficient number of voters); Colorado Central Power Co. v. Municipal Power Development Co., Inc., 1 F. Supp 961 (D. Colo. 1932) (city's adoption of sketchy, incomplete specifications for the plant violated statutory requirement that the bid go to the lowest responsible bidder).

[14] Iowa Southern Utilities Co. v. Cassill, 69 F. (2d) 703 (C. C. A. 8th, 1934) (relief denied since financing arrangement not illegal where no debt created). Accord: Gallardo v. Porto Rico Ry., Light & Power Co., 18 F. (2d) 918 (C. C. A. 1st, 1927) (relief denied as financing arrangement was legal where statute authorizing governmental development of water power held valid).

[15] That the county's proposed action was valid under state law was conclusively determined by the state supreme court in Park v. Greenwood County, 174 S. C. 35, 176 S. E. 870 (1934).

of such competition by another governmental division would be subject to question by the power company as a franchise holder,[16] entitling it to maintain the suit.[17]

Though Congress may delegate to others powers which the legislature may rightfully exercise itself, the delegated legislation must contain a sufficiently definite standard and policy for the guidance of the exercise of administrative discretion thereunder.[18] While the line is never clearly drawn between what is definite and what indefinite, an appropriation in the present act "to reduce and relieve unemployment,"[19] to be spent "with a view to increasing employment quickly"[20] on many types of public works, including public highways, parks, development of power, and low-cost housing, seems sufficiently restricted as to its expenditure by the executive branch.[21] The terms of the act do not approach the nebulousness of the Congressional delegation successfully attacked in early New Deal cases,[22] but on the contrary seem to fall

[16] Since any action by the county is entirely voluntary on its part, the principal case should be distinguished from those cases in which the defendant maliciously, or through unlawful coercion induces a third party to exercise a legal right resulting in damage to the plaintiff. Truax v. Raich, 239 U. S. 33, 36 Sup. Ct. 7, 60 L. ed. 131 (1915); Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 38 Sup. Ct. 65, 62 L. ed. 260 (1917); Hammer v. Dagenhart, 247 U. S. 251, 38 Sup. Ct. 529, 62 L. ed. 1101 (1918); Duplex Printing Press Co. v. Deering, 254 U. S. 443, 41 Sup. Ct. 172, 65 L. ed. 349 (1920); Pierce v. Society of Sisters, 268 U. S. 510, 45 Sup. Ct. 571, 69 L. ed. 1070 (1924); United States Fidelity & Guaranty Co. v. Millonas, 206 Ala. 147, 89 So. 732 (1921).

[17] Missouri Public Service Co. v. Concordia, 8 F. Supp. 1 (W. D. Mo. 1934); Washington Water Power Co. v. Coeur D'Alene, 9 F. Supp. 263 (D. Idaho 1934); Illinois Power & Light Corp. v. Centralia, 11 F. Supp. 874 (E. D. Ill. 1935); Kansas Gas & Electric Co. v. Independence, 79 F. (2d) 32 (C. C. A. 10th, 1935). Accord: The Citizens' Electric Illuminating Co. v. The Lackawanna & Wyoming Valley Power Co., 255 Pa. 145, 99 Atl. 462 (1916) (defendant power company enjoined from selling power, in violation of its charter, *etc.*, to third power company which had a legal right to compete with the plaintiff). *Contra:* Missouri Utilities Co. v. California, 8 F. Supp. 454 (W. D. Mo. 1934); Alleghan v. Consumers' Power Co., 71 F. (2d) 477 (C. C. A. 6th, 1934); Arkansas-Missouri Power Co. v. Kennett, 78 F. (2d) 911 (C. C. A. 8th, 1935); Alabama Power Co. v. Ickes, 91 F. (2d) 303 (App. D. C. 1937); *cf.* Iowa Southern Utilities Co. v. Lamoni, 11 F. Supp. 581 (S. D. Iowa 1935) (administrator not a party defendant); Kansas Utilities Co. v. Burlington, 141 Kan. 926, 44 P. (2d) 223 (1935) (administrator not a party defendant).

[18] Wayman v. Southard, 10 Wheat. 1, 6 L. ed. 253 (U. S. 1825); see cases cited *infra* note 23.

[19] 48 STAT. 195 (1933), 15 U. S. C. A. §701 (1934).

[20] 48 STAT. 201, 202 (1933), 40 U. S. C. A. §§402, 403 (a) (1934).

[21] From the practical necessities of the case, Congress should not have to prescribe minute details for the expenditure of the huge sums it appropriates. Recently, in Cincinnati Soap Co. v. United States, 57 Sup. Ct. 764, 81 L. ed. Adv. Ops. 707 (1937), the Court confirmed the validity of large general appropriations to be allotted and expended as directed by designated government agencies.

[22] Panama Refining Co. v. Ryan, 293 U. S. 388, 55 Sup. Ct. 241, 79 L. ed. 446 (1935) (President authorized, without any standard for guidance of discretion, to prohibit the foreign or interstate transportation of "hot" oil); A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 490, 55 Sup. Ct. 818, 79 L. ed. 1566 (1935) (general aims of rehabilitation, correction, expansion laid down as standards for executive promulgation of N. R. A. codes for business).

safely within standards previously approved by the Court.[23] Furthermore, since Congress may ratify acts which it might have authorized,[24] if the standard laid down for administrative guidance was not sufficiently clear, the defect has been remedied by subsequent legislation giving recognition and approval to the administrator's action and program.[25]

However, the major constitutional issue which the principal case will probably serve to clarify is the extent of the power of the legislature to spend money under the general welfare clause.[26] Discarding its time-worn policy of evading a decision as to the proper interpretation of that clause,[27] the Court in the *A.A.A.* case[28] set the age-old con-

[23] "Although the Court has in the past (before the *Hot Oil* case) seemed to require the legislature in making a valid delegation, merely to lay down some 'intelligible principle,' Hampton v. U. S., 276 U. S. 394, 48 Sup. Ct. 308, 72 L. ed. 624 (1928), 'declared policy,' Mahler v. Eby, 264 U. S. 32, 40, 44 Sup. Ct. 283, 68 L. ed. 564 (1924) or 'primary standard,' Buttfield v. Stranahan, 192 U. S. 470, 496, 24 Sup. Ct. 349, 48 L. ed. 525 (1904) for the guidance of the executive, many indefinite declarations of policy have been judicially approved. Thus in Martin v. Mott, 12 Wheat. 19, 6 L. ed. 537 (U. S. 1827); 'such number of the militia . . . as he may deem necessary'; in Field v. Clark, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. ed. 294 (1892) 'reciprocally unequal and unreasonable,' 'suspend . . . for such time as he shall deem just'; Buttfield v. Stranahan, *Supra*, 'Establish uniform standards of purity, quality and fitness'; Union Bridge Co. v. U. S., 204 U. S. 364, 27 Sup. Ct. 367, 51 L. ed. 523 (1907) 'unreasonable obstruction of navigation'; U. S. v. Grimaud, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. ed. 563 (1911) 'such rules . . . as will insure the objects of such reservation'; United States v. Chemical Foundation, Inc., 272 U. S. 1, 47 Sup. Ct. 1, 71 L. ed. 131 (1926) 'in the public interest'; Radio Commission v. Nelson Bros., 289 U. S. 266, 53 Sup. Ct. 627, 77 L. ed. 1166, (1933) 'public convenience, interest or necessity.'" Cowan, *Federal Spending Power and Delegation* (1937) 5 GEO. WASH. L. REV. 809, 827, n. 69.

It would seem that the degree of definiteness required in an appropriation measure should not be as great as that required in a regulatory measure to which criminal penalties are attached, as in the *Hot Oil* and *Schechter* cases. See note 21, *supra*.

[24] Mattingly v. District of Columbia, 97 U. S. 687, 24 L. ed. 1098 (1878); Wilson v. Shaw, 204 U. S. 24, 27 Sup. Ct. 233, 51 L. ed. 351 (1906); United States v. Heinszen, 206 U. S. 370, 27 Sup. Ct. 742, 51 L. ed. 1098 (1907); Tiaco v. Forbes, 228 U. S. 549, 33 Sup. Ct. 585, 57 L. ed. 960 (1913); Charlotte Harbor & Northern Ry. v. Welles, 260 U. S. 8, 43 Sup. Ct. 3, 67 L. ed. 100 (1922); Isbrandtsen-Moller Co., Inc. v. United States, 57 Sup. Ct. 407, 81 L. ed. Adv. Ops. 344 (1937); Swayne & Holt, Ltd. v. United States, 57 Sup. Ct. 478, 81 L. ed. Adv. Ops. 400 (1937).

[25] Emergency Relief Appropriation Act, 49 STAT. 115 (1935), 15 U. S. C. A. §728 note (1936) (authorized continuance of functions of P. W. A.) Emergency Relief Act, 49 STAT. 1608, 15 U. S. C. A. §728 note (1936) (further appropriation for projects of which administrator had previously approved; time limit not to apply to projects which had been enjoined in the courts).

[26] "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . ." U. S. CONST. Art. I, §8.

[27] Head Money Cases, 112 U. S. 580, 5 Sup. Ct. 247, 28 L. ed. 798 (1884); Field v. Clark, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. ed. 294 (1892); United States v. Realty Co., 163 U. S. 427, 16 Sup. Ct. 1120, 41 L. ed. 215 (1896); Bradfield v. Roberts, 175 U. S. 291, 20 Sup. Ct. 121, 44 L. ed. 168 (1899); Milliard v. Roberts, 202 U. S. 429, 26 Sup. Ct. 674, 50 L. ed. 1090 (1906); Wilson v. Shaw, 204 U. S. 24, 27 Sup. Ct. 233, 51 L. ed. 351 (1907); Smith v. Kansas City Title Co., 255 U. S. 180, 41 Sup. Ct. 309, 65 L. ed. 594 (1921); Massachusetts v. Mellon, 262 U. S. 447, 43 Sup. Ct. 597, 67 L. ed. 1078 (1923).

[28] United States v. Butler, 297 U. S. 1, 56 Sup. Ct. 312, 80 L. ed. 477 (1935).

troversy[29] at rest by its adoption of the "Hamiltonian" view, *i.e.*, that the power of Congress to spend for the general welfare is limited only by the requirement that the welfare be general, not particular. In *Helvering v. Davis*[30] the Court recognizes that "Spreading from state to state, unemployment is an ill not particular but general, which may be checked, if Congress so determines, by the resources of the nation." Relief of unemployment being thus judicially approved as a valid objective of the exercise of the power to spend, the remaining question is whether a nation-wide program of public works is a means reasonably related to accomplishing that end. As public works construction has long been used to aid economic distress caused by unemployment and other factors,[31] history, as well as the actual results of the P.W.A.,[32] justifies the legislative determination that public works are a reasonable means. While the benefits arising from the *use* of each individual project are restricted to a local area, benefits from the *construction* of many individual projects in a huge scheme are national in effect.[33] As Mr. Justice Stone said of payment of unemployment benefits in *Carmichael v. Southern Coal and Coke Co.*, "When public evils ensue from individual misfortunes or needs, the legislature may strike at the evil at its source. If the purpose is legitimate because public, it will not be de-

[29] There are three possible views of the meaning of the general welfare clause: (1) that "to provide for the general Welfare" is a separate delegation of power enabling Congress to legislate fully in that regard; (2) that the clause is a limitation on the taxing power, and Congress may spend only for the powers enumerated elsewhere in the Constitution; (3) that Congress, irrespective of other enumerated powers, may spend for any welfare that is general in nature.

The first view has been discredited by construction, since the other delegation of powers to Congress would have been superfluous. See I STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (5th ed. 1905) §§909-10. The second view was Madison's interpretation of the clause, and Hamilton urged the adoption of the third theory. See TUCKER, THE CONSTITUTION OF THE UNITED STATES (1899) 470-501; Hamilton, *Report on Manufacturers* (1791), 4 WORKS OF HAMILTON (Lodge ed. 1904) 70, 151; *The General Welfare Clause: The Hamilton and Madison Views* (1936) 22 A. B. A. J. 115. Congress, of course, has appropriated for many years in the light of the Hamiltonian interpretation, which has been accepted by most modern authorities. See McGuire, *The New Deal and the Public Money* (1935) 23 GEO. L. J. 155; Corwin, *The Spending Power of Congress* (1923) 36 HARV. L. REV. 548; Collier, *Judicial Bootstraps and the General Welfare Clause* (1936) 4 GEO. WASH. L. REV. 211; Perkins, *The Power of Congress to Lay Taxes for Distribution to the States* (1934) 12 N. C. L. REV. 326; Note (1937) 50 HARV. L. REV. 802; (1936) 36 COL. L. REV. 667.

[30] 57 Sup. Ct. 904, 909, 81 L. ed. Adv. Ops. 804, 808 (1937).

[31] 9 & 10 VICT. c. 107 (1846); 5 EDW. VII, c. 18 (1905); 9 EDW. VII, c. 47 (1909); 46 STAT. 1086 (1931), 29 U. S. C. A. §48 (d) (1936).

[32] "In 1934 the average monthly direct employment on PWA projects was 496,483; in 1935 it was 284,287. See PWA, THE FIRST THREE YEARS (1936) 24. Up to Aug. 1, 1936, $2,521,769,475 had been spent, and of this, $826,943,588 went directly to wages. See *id.* at 26. Of the $1,452,278,296 which went to materials, 60% went into wages. See *ibid.* The indirect employment created is three times the direct employment. See *id.* at 27." Note (1937) 50 HARV. L. REV. 802, 811 n. 83.

[33] See note 32, *supra.*

feated because the execution of it involves payments to individuals."[34] The general welfare consists, then, of many particular welfares, and a national scheme of public works improvements fully satisfies the requirement of generality.

However, in the *A.A.A.* case the Court imposed on the spending power a limitation which proponents of the Hamiltonian view had never thought to exist. Without deciding whether agricultural payments for crop reduction were in aid of general welfare, the Court declared the statute unconstitutional because the conditions imposed on the recipient of the federal grant sought to regulate a matter reserved to the states under the Tenth Amendment. To sustain such an attack on the statute here involved, there would apparently have to be a finding that the primary purpose of the act was not relief of unemployment, but federal regulation of a matter reserved to the states.[35] Since the state (or its subdivision) has its option of applying for P.W.A. loans and grants, under previous authority[36] there is no abdication or invasion of state powers. Economic pressure, which was said to preclude a free choice by the individual farmer under the A.A.A.,[37] would hardly be held by the Court to be exerted on a sovereign state that suffers no competition.[38] Moreover, the conditions here imposed on the recipient of P.W.A. money relate to the expenditure of the money (in order to secure the greatest possible reduction of unemployment for the money used),[39] rather than to conduct unrelated thereto as in the *A.A.A.* case. While scant reliance can be placed on the declared judicial policy of refusing to look beyond the face of an act for regulatory effects,[40] the incidental "regulation by competition" of local

[34] 57 Sup. Ct. 868, 876, 81 L. ed. Adv. Ops. 811, 821 (1937).

[35] Such a finding would be difficult in the face of existing facts. Of 9,389 non-federal projects of the P.W.A. on January 1, 1937, only 282 were power projects. Of the 282 only 92 were competing with private companies. While over $27,000,000 were allotted to the competitive projects, this amount was only .98% of the total allotments to non-federal projects. Brief for Respondents, p. 17.

[36] See cases cited *infra* note 38.

[37] United States v. Butler, 297 U. S. 1, 70, 56 Sup. Ct. 312, 321, 80 L. ed. 477, 491 (1935).

[38] See Massachusetts v. Mellon, 262 U. S. 447, 480, 43 Sup. Ct. 597, 598, 67 L. ed. 1078, 1082 (1923); Steward Machine Co. v. Davis, 57 Sup. Ct. 883, 890, 81 L. ed. Adv. Ops. 779, 787 (1937).

[39] Conditions under which P.W.A. spending is carried on are: (1) no convict labor be used; (2) a maximum of human labor be used; (3) working hours be limited; (4) a just wage be paid; (5) preference be given veterans seeking employment. With the possible exception of the fifth, all the conditions are clearly related to furthering the reduction of unemployment. See Hale, *Unconstitutional Conditions and Constitutional Rights* (1935) 35 COL. L. REV. 321; (1936) 36 COL. L. REV. 667; (1936) 31 ILL. L. REV. 259.

[40] McCray v. United States, 195 U. S. 27, 24 Sup. Ct. 769, 49 L. ed. 78 (1904) (Oleomargarine Tax Act); United States v. Doremus, 249 U. S. 86, 39 Sup. Ct. 214, 63 L. ed. 493 (1919) (Narcotic Act); Sonzinsky v. United States, 57 Sup. Ct. 554, 81 L. ed. Adv. Ops. 556 (1937) (National Firearms Act).

utility rates by making it financially possible for the county to compete can scarcely be deemed an invasion of state power, since the state retains control of the electric rates of both the power company and the county.

The most substantial ground of the plaintiff's complaint is, in effect, that the administrator has exceeded his statutory authority in the administration of the P.W.A. power program. It was found as a fact that, at the time the application for a loan and grant was approved and the original contract signed, the primary criterion applied to applications for loans to power plants was whether by granting the loans a reduction in existing rates would be effected.[41] If the privately owned power company would lower its rates to meet the proposed municipal or county rate, the application was denied.[42] As the act declares its purpose to be relief of unemployment, the approval or denial of applications on the basis of such a "non-statutory" criterion would seem to be lacking in statutory authority,[43] rather than to be the exercise of administrative discretion behind which the courts will not inquire to ascertain the official's motive.[44] However, the policy practiced by the P.W.A. purportedly underwent quite a renovation. The trial court found the fact that, as to making the second contract and allotting funds to Greenwood County, the administrator was actuated by no other purpose or policy than that set out in the act of Congress, and that his only interest in the rates charged by the plaintiff was that of a prospective bondholder of a competitor of the plaintiff.[45] In the light of such a finding, the administrator's action appears justified under the authority conferred on him by a constitutional statute. One cannot but feel, however, as does Judge Soper (dissenting), that the purported change from the former policy of rate reduction by the administrator amounted to "little more than an expression of regret that what had been widely proclaimed as a praiseworthy public policy had become a source of danger to the establishment of municipal projects",[46] and

[41] Duke Power Co. v. Greenwood County, 19 F. Supp. 932, 946 (W. D. S. C. 1937).

[42] *Id.* at 938.

[43] Anchor Coal Co. v. United States, 25 F. (2d) 462 (App. D. C. 1928); Sterling v. Constantin, 287 U. S. 378, 53 Sup. Ct. 190, 77 L. ed. 375 (1932); Southern Pacific Co. v. Interstate Commerce Commission, 219 U. S. 433, 31 Sup. Ct. 288, 55 L. ed. 283 (1911); Work v. Louisiana, 269 U. S. 250, 46 Sup. Ct. 92, 70 L. ed. 258 (1925); St. Louis & O'Fallon Ry. v. United States, 279 U. S. 461, 49 Sup. Ct. 384, 73 L. ed. 798 (1928); Atchison, T. & S. F. Ry. v. Interstate Commerce Commission, 190 Fed. 591 (Commerce Ct. 1911).

[44] Martin v. Mott, 12 Wheat. 19, 6 L. ed. 537 (U. S. 1827); Dakota Central Telephone Co. v. South Dakota, 250 U. S. 163, 39 Sup. Ct. 507, 63 L. ed. 910 (1919); Louisiana v. McAdoo, 234 U. S. 627, 34 Sup. Ct. 938, 58 L. ed. 1506 (1913); Ferris v. Wilbur, 27 F. (2d) 262 (C. C. A. 4th, 1928).

[45] Duke Power Co. v. Greenwood County, 91 F. (2d) 665, 671 (C. C. A. 4th, 1937).

[46] *Id.* at 679.

that the omission of rate control by the administrator in the second contract was a change merely in form to meet legal objections.[47]

C. A. GRIFFIN, JR.

Constitutional Law—Regulating Closing Hours of Business.

An ordinance, avowedly "in the interest of the public health, safety and welfare",[1] fixed the hours of business of barber shops. Bills in equity brought by four separate plaintiffs to enjoin the city from enforcing the ordinance, were heard together and dismissed, the court saying that if a regulation has "a reasonable relation to the protection of public health, safety or welfare" the court may not hold it invalid merely because the court believes it to be unwise. The ordinance was deemed valid because not proved unreasonable or arbitrary.[2]

As early as 1773, the New York Colonial Assembly passed an act forbidding the auctioning of goods after sunset.[3] Since then, numerous closing-hour ordinances have been applied to various businesses and occupations. Those passed upon by courts of final jurisdiction may be classified rather arbitrarily into six groups, based on subjects regulated.

I. Ordinances forbidding auction sales of jewelry at night have generally been held valid as being not unreasonable or arbitrary.[4] The Virginia court held that the purpose for which such an ordinance was passed could be shown to prove its validity, but not to prove its invalidity.[5] The prevention of fraud is most often the expressed purpose, as it was in this case. The Georgia court, admitting that such an ordinance had been lobbied through by regular jewelers to destroy competition, said, in effect, "Even so"—and held the possibility of fraud made the ordinance a reasonable exercise of a municipality's police power.[6]

II. Ordinances fixing hours of business for pawnbrokers, loan offices, junk dealers, *etc.*, have been held valid in two cases. One court frankly approved the ordinance's purpose of depriving thieves of the opportunity to sell stolen goods at night,[7] while the other, after talking

[47] The United States Supreme Court held, in a unanimous decision Monday, Jan. 3, 1938, that no legal right of the plaintiff was violated by construction of the county plant and that plaintiff was without standing to challenge the validity of the administrator's act.

[1] CINCINNATI, OHIO CODE OF ORDINANCES No. 306-1936.
[2] Feldman v. City of Cincinnati *et al.*, 20 F. Supp. 531, 536 (S. D. Ohio 1937).
[3] Acts of Colonial Assembly of New York, c. 1615 (1773).
[4] Clein *et al.* v. City of Atlanta *et al.*, 164 Ga. 529, 139 S. E. 46 (1927); Wagman v. City of Trenton *et al.*, 102 N. J. L. 492, 134 Atl. 115 (1926); Biddles, Inc., *et al.* v. Enright, 239 N. Y. 354, 146 N. E. 625, 39 A. L. R. 773 (1925); Miller *et al.* v. City of Greenville *et al.*, 134 S. C. 314, 132 S. E. 591 (1926); City of Roanoke v. Fisher, 137 Va. 75, 119 S. E. 259 (1923).
[5] City of Roanoke v. Fisher, 137 Va. 75, 119 S. E. 259 (1923).
[6] Clein *et al.* v. City of Atlanta *et al.*, 164 Ga. 529, 139 S. E. 46 (1927).
[7] Hyman v. Boldrich, 153 Ky. 77, 154 S. W. 369 (1913).

about various evils existing in pawn shops, *etc.*, presumed that the city council had reasonable grounds for enacting the ordinance.[8]

III. "Liquor saloons and pool rooms, slot machines, and other things of that character" is a category from a Florida opinion which upholds an ordinance[9] regulating hours of operation of slot machines. In 1904, North Carolina held that hours during which liquor might be sold in a barroom might be regulated, since liquor traffic is dangerous to society in its moral effects. The court also said the ordinance was not an unreasonable restriction on the use of barroom property.[10] Ordinances have been sustained which close pool and billiard rooms after seven[11] in the evening (the court assumed, without discussion, that the ordinance was reasonable); after nine[12] (the court said it could not find the ordinance unreasonable, since billiard halls were "vicious in their tendencies", and hence more subject to regulation than more desirable businesses); or after midnight[13] (the court said that the ordinance was reasonable because pool rooms were ordered closed during the hours when lawless persons would tend to congregate in them). But where complainant's customers worked during the day, an ordinance closing pool rooms at 6:00 P.M. was held invalid as conflicting with a state license permitting him to operate a pool room.[14] Florida called the maintenance of a slot machine "a business which may only be operated because of the permissive statute," and decided that it, together with pool and billiard rooms, was a fit subject for regulation, because it tended to have a harmful effect on society.[15]

IV. The courts are divided on the subject of closing hours for mercantile businesses. In 1873, Kentucky sustained as reasonable an ordinance fixing market hours from dawn till 8:00 or 9:00 A.M., depending on the season of the year.[16] Twenty years later, Mississippi sustained an ordinance closing at 4:00 P.M. the meat markets of those not having city permits.[17] Over thirty years later California held valid two ordinances preventing the sale of uncured or uncooked meats during the hours when the inspectors were not on duty, the ordinance being deemed reasonably related to wholesome condition of meat.[18]

[8] City of Butte v. Paltrovich, 30 Mont. 18, 75 Pac. 521 (1904).
[9] Curtis v. Hutchingson, 125 Fla. 440, 170 So. 135, 136 (1936).
[10] Paul v. Washington, 134 N. C. 363, 47 S. E. 793 (1904).
[11] Purvis v. City of Ocilla *et al.*, 149 Ga. 771, 102 S. E. 241 (1920).
[12] City of Tarkio v. Cook, 120 Mo. 1, 25 S. W. 202, 203 (1894).
[13] *Ex parte* Brewer, 68 Tex. Cr. 387, 152 S. W. 1068 (1913); *Ex parte* Pitchios, 68 Tex. Cr. 376, 152 S. W. 1074 (1913).
[14] Craig *et al.* v. Mayor and Alderman of Town of Gallatin, 168 Tenn. 413, 79 S. W. (2d) 553 (1935).
[15] Curtis v. Hutchingson, 125 Fla. 440, 170 So. 135 (1936); Curtis v. Hutchingson, 125 Fla. 440, 170 So. 136 (1936).
[16] City of Bowling Green v. Carson, 10 Bush 64 (Ky. 1873).
[17] Porter v. City of Water Valley, 70 Miss. 560, 12 So. 828 (1893).
[18] *Ex parte* Lowenthal, 92 Cal. App. 200, 267 Pac. 886 (1928); *Ex parte*

That section of an ordinance which provided that all meat markets must close at 6:00 P.M. was held invalid in Washington on the ground that the regulation had no reasonable relation to its accepted purpose, which was to prevent the smuggling of meat after dark.[19] The court expressly refused to say that no closing hours could be set up in the meat selling business.[20] In the same vein, Ohio in 1937 held that an ordinance closing food stores at 7:30 P.M. on five days a week went too far. The court found that the inspection laws insured the purity of foods, and said that if the people desired regulations like the ordinance in question, they would have to amend the federal and state constitutions.[21]

In 1902, the North Carolina court passed on an ordinance closing barrooms and mercantile establishments (drug stores excepted), at 7:30 P.M. during the summer months. Construing the legislative grant of power strictly, the court held that letting the city pass such an ordinance would be giving it equal power with the legislature to restrict personal and property rights. But the court expressly refused to decide the validity of a legislative enactment that would fix closing hours. It is perhaps noteworthy that the defendant in the case was the owner not of a barroom, but of a grocery store.[22]

An ordinance prohibiting the delivery of bakers' goods between 6:00 P.M. and 6:30 A.M. was held invalid as an unreasonable interference with the carrying on of a lawful business, and because it had no reasonable relation to its supposed purpose of keeping the goods clean.[23] An ordinance prohibiting the hawking of newspapers between 9:00 P.M. and 7:00 A.M. was held invalid as discriminating in favor of news stands.[24]

V. Several cases involving the validity of ordinances regulating hours of business for laundries have arisen in California. In 1884, the court held that in restricted areas of San Francisco the operation of public laundries might be prohibited after 10:00 P.M. and before 6:00 A.M. The court cited no authorities, but held that it could not say "it is not necessary, for the proper police and sanitary conditions of the city" (to establish the closing hours).[25] The next year the

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Hennessy, 95 Cal. App. 762, 273 Pac. 826 (1928); Accord: Justesen's Food Stores, Inc., v. City of Tulare *et al.*, 70 P. (2d) 529 (Cal. 1937). But *cf.* Deese *et al.* v. City of Lodi *et al.*, 69 P. (2d) 1005 (Cal. 1937) (Ordinance closed grocery stores, meat and fruit markets, *etc.*, but expressly excepted pool, billiard and dance halls.).

[19] Brown v. City of Seattle *et al.*, 150 Wash. 203, 272 Pac. 517 (1928).

[20] *Id.*, 272 Pac. at 522.

[21] Olds v. Klotz, 131 Ohio St. 447, 3 N. E. (2d) 371 (1936).

[22] State v. Ray, 131 N. C. 814, 42 S. E. 960, 60 L. R. A. 634 (1902).

[23] Skaggs *et al.* v. City of Oakland *et al.*, 6 Cal. (2d) 222, 57 P. (2d) 472 (1936).

[24] People v. Kuc, 272 N. Y. 72, 4 N. E. (2d) 939 (1936).

[25] *Ex parte* Moynier, 65 Cal. 34, 36, 2 Pac. 728, 730 (1884).

United States Supreme Court sustained a similar ordinance. The Court, pointing to the many wooden buildings to be endangered by the constant fires necessary in laundries, held that such an ordinance might well be necessary.[26] The same Court refused in another case to recognize the argument that such an ordinance had been passed to discriminate against the Chinese.[27]

By 1914, the closing hour for laundries in San Francisco had become 6:00 P.M., and had been applied to the entire city. Justifying the earlier closing hour, the California court held a fair measure to be the "usual period of business activity in similar sorts of employment."[28]

VI. And, finally, thirteen decisions involving closing hours of barber shops have been handed down in fifteen years. Ten states[29] held that such ordinances were invalid as being arbitrary and unreasonable, and left the barber "free to work out his destiny as impulse, education," *etc.*,[30] might direct, insofar as his destiny was affected by week-day closing hours. Other arguments advanced by the various courts included that of unfair discrimination against barbers.[31] One court said that isolated instances of liquor and narcotic law violations in barber shops after dark afforded no grounds for regulation of hours;[32] others, that regulation of closing hours had no reasonable relation to the prevention of unsanitary barber shops;[33] still another, that an ordinance

[26] Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. ed. 923 (1885).

[27] Soon Hing v. Crowley, 113 U. S. 703, 5 Sup. Ct. 730, 28 L. ed. 1145 (1885).

[28] *Ex parte* Wong Wing, 167 Cal. 109, 111, 138 Pac. 695, 696 (1914); *Contra:* Yee Gee v. City and County of San Francisco *et al.*, 235 Fed. 757 (N. D. Cal. 1916) (The court held the danger of fires not to exist over the whole city, laundries not to be in and of themselves offensive or dangerous, and so much of the ordinance as fixed closing hours, invalid; *Ex parte* Mark, 6 Cal. (2d) 516, 58 P. (2d) 913 (1936) (An ordinance forbidding also the soliciting, delivering, *etc.*, of laundry at night, was held to be a regulation of hours of labor, and as such was considered invalid by the California court, as depriving employees of liberty without due process.).

[29] Ganley v. Claeys *et al.*, 2 Cal. (2d) 266, 40 P. (2d) 817 (1935); City and County of Denver v. Schmid, 98 Colo. 32, 52 P. (2d) 388 (1935); Chaires v. Atlanta, 164 Ga. 755, 139 S. E. 559, 55 A. L. R. 242 (1927); City of Alexandria v. Hall, 171 La. 595, 131 So. 722 (1930); Eanes *et al.* v. City of Detroit *et al.*, 279 Mich. 531, 272 N. W. 896 (1937); State *ex rel.* Pavlich v. Johannes, 194 Minn. 10, 259 N. W. 537 (1935); Knight v. Johns, 161 Miss. 519, 137 So. 509 (1931); Ernesti *et al.* v. City of Grand Island *et al.*, 125 Neb. 688, 251 N. W. 899 (1933); Patton v. City of Bellingham *et al.*, 179 Wash. 566, 38 P. (2d) 364 (1934); State *ex rel.* Newman v. City of Laramie *et al.*, 40 Wyo. 64, 275 Pac. 106 (1929).

[30] *Ex parte* Jentysch, 112 Cal. 468, 44 Pac. 803, 804 (1896).

[31] City and County of Denver v. Schmid, 98 Colo. 32, 52 P. (2d) 388 (1935); Chaires v. Atlanta, 164 Ga. 755, 139 S. E. 559, 55 A. L. R. 242 (1927); Ernesti *et al.* v. City of Grand Island *et al.*, 125 Neb. 688, 251 N. W. 899 (1933); Patton v. City of Bellingham *et al.*, 179 Wash. 566, 38 P. (2d) 364 (1934); State *ex rel.* Newman v. City of Laramie *et al.*, 40 Wyo. 64, 275 Pac. 106 (1929).

[32] Chaires v. Atlanta, 164 Ga. 755, 139 S. E. 559, 55 A. L. R. 242 (1927).

[33] Ganley v. Claeys *et al.*, 2 Cal. (2d) 266, 40 P. (2d) 817 (1935); City of Alexandria v. Hall, 171 La. 595, 131 So. 722 (1930); State *ex rel.* Pavlich v. Johannes, 194 Minn. 10, 259 N. W. 537 (1935); Ernesti *et al.* v. City of Grand Island *et al.*, 125 Neb. 688, 251 N. W. 899 (1933); State *ex rel.* Newman v. City of Laramie *et al.*, 40 Wyo. 64, 275 Pac. 106 (1929).

was invalid because, among other reasons, it was not an hours of labor measure and discriminated in favor of beauty parlors.[34] Several courts said the hours during which barber shops might remain open could not be regulated merely to suit the convenience of inspectors.[35]

In three cases, in addition to the principal case, ordinances regulating closing hours of barber shops have been held valid. The earliest of these arose in New Jersey, where the court was influenced in its decision by the fact that the ordinance was passed pursuant to a state statute specifically authorizing cities to regulate hours in barber shops.[36] The Ohio Court, citing eight cases against the validity of closing hour ordinances, relied on dissenting opinions, the New Jersey case, and a constitutional grant of power to municipalities to pass ordinances not in conflict with general laws. To find the ordinance not in conflict with general laws, the court looked at the state laws relating to barbers, found no mention of closing hours, and held that field not to have been preëmpted by the legislature. The Ohio Court said further that fixing closing hours might "be to the legislative mind the only effective way to regulate hours of labor[37] in this trade."[38] The one- or two-man barber shop might compete with the two- or three-shift shop without having to stay open long hours. But a United States District Court, in a case arising in Washington, held that complainant had a property right in the good will he had built up by operating his small barber shop until 11:00 P.M. for twenty-five years. So while the court found the closing hour ordinance valid as not being unduly discriminatory merely because it did not close beauty parlors, the court found the ordinance invalid as applied to complainant.[39]

It is difficult to formulate any rules from the preceding cases. Very generally, however, it may be said that an ordinance regulating hours of business will be held valid unless it is shown that: 1. The ordinance has no reasonable relation to the end sought to be accomplished; or 2. a constitutional right has been infringed; or 3. the nature of the business does not render it a fit subject for regulation.

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[34] City and County of Denver v. Schmid, 98 Colo. 32, 52 P. (2d) 388, (1935).
[35] *Ibid.*; Knight v. Johns, 161 Miss. 519, 137 So. 509 (1931); Ernesti *et al.* v. City of Grand Island *et al.*, 125 Neb. 688, 251 N. W. 899 (1933).
[36] Falco v. Atlantic City *et al.*, 99 N. J. L. 19, 122 Atl. 610 (1923).
[37] See (1933) 12 N. C. L. REV. 156 for discussion of hours of labor legislation.
[38] Wilson v. City of Zanesville, 130 Ohio St. 286, 294, 199 N. E. 187, 191 (1935), *aff'g* City of Zanesville v. Wilson, 51 Ohio App. 433, 1 N. E. (2d) 638 (1935).
[39] McDermott v. City of Seattle *et al.*, 4 Fed. Supp. 855 (W. D. Wash. 1933).

Criminal Law—Embezzlement.

Defendant, a bank receiver, was indicted for embezzlement. The indictment was quashed. *Held,* judgment affirmed. Receivers of insolvent corporations do not come within the purview of the embezzlement statute.[1]

Embezzlement was not a crime at common law.[2] The first statute to make embezzlement a crime concerned the embezzlement of court records and documents and was enacted in 1429.[3] One hundred years later, in 1529, the statute of 21 Hen. VIII, c. 7—the "granddaddy" of all modern embezzlement statutes—made it felonious for a servant to embezzle money or chattels entrusted to him by his master. It soon became apparent, however, that servants and persons in possession of court records were not the only ones occupying such a position that a misappropriation of goods belonging to another would not amount to larceny, and Parliament began the long and tedious process of extending the law in order to include these persons. At first Parliament contented itself with the enactment of a few disconnected statutes which added lodgers,[4] post office servants,[5] and servants of the Bank of England.[6] The first general embezzlement statute, extending the law to cover "any servant or clerk, or any person employed for the purpose in the capacity of servant or clerk, to any person or persons whatsoever, or to any body corporate or politick", was not passed until as late as 1799.[7] Since then the additions have come rapidly. Certain bankers were added in 1826.[8] A second general statute, passed in 1827, which re-enacted the Larceny Act[9] of that year, named "any Banker, Merchant, Broker, Attorney, or other Agent", tenants and lodgers, and persons taking shipwrecked goods.[10] During the next thirty years, members of joint stock banks,[11] persons entrusted with woolen, worsted, linen, cotton, mohair, flax or silk materials for the purpose of manufacture, and with tools or apparatus for such manufacture,[12] and collectors of poor rates under the provisions of the Poor Law[13] were added at various times. A third general statute, passed in 1857, included trustees acting under express trust, persons acting under powers of attorney for the sale or transfer of property, bailees, and directors, managers or public officers of any body corporate or public company.[14] This latter statute was re-enacted by the Larceny Act

[1] State v. Whitehurst, 212 N. C. 300 (1937).
[2] MILLER, CRIMINAL LAW (1934) §116.
[3] 8 HEN. VI, c. 12.
[4] 3 & 4 WILL. & MARY c. 9 (1691).
[5] 9 ANNE c. 10 (1710), 5 GEO. III, c. 25 (1765), 7 GEO. III, c. 50 (1766).
[6] 15 GEO. II, c. 13 (1742).
[7] 39 GEO. III, c. 85.
[8] 7 GEO. IV, c. 46, §9.
[9] 7 & 8 GEO. IV, c. 27.
[10] 7 & 8 GEO. IV, c. 29, §§ 18, 19, 45, 49.
[11] 3 & 4 VICT. c. 111, §2 (1840).
[12] 6 & 7 VICT. c. 40 (1843).
[13] 12 & 13 VICT. c. 103, §15 (1849).
[14] 20 & 21 VICT. c. 54, §§ 1, 3, 4, 5, 17.

of 1861, which, in addition, named persons in the Queen's service and in the police, factors, and officers of the Bank of England.[15] Since then, at various times, the following persons have been added: officers of savings banks;[16] persons in possession of naval stores;[17] members of copartnerships "or being one of two or more beneficial owners";[18] officers and members of trades unions;[19] any person connected with a building society;[20] officers, clerks, or other persons in the customs service;[21] army officers and soldiers (public or regimental money or property, or property or money belonging to comrades);[22] any person coming into the possession of the property of any industrial society;[23] seamen or apprentices to the sea service, or any officer appointed by a local marine board;[24] persons fraudulently converting property belonging to any Friendly Society;[25] and members of the Army and Air Force.[26] In 1901 Parliament enacted a very broad statute making it felonious for "whosoever being entrusted . . . with . . . any property, or having . . . received any property" to embezzle such property,[27] which apparently extends the law to all persons who may be in a position fraudulently to convert property belonging to another. Obviously, then, the English law of embezzlement, as it stands today, is the result of a continuous process of enacting, re-enacting and amending the statutes in order to extend the law so as to include within its scope novel and unforeseen situations as they arise.

The history of the law of embezzlement in North Carolina closely parallels that of England. North Carolina, when it ceased to be a colony and became a state, retained on its books those English statutes which made embezzlement by servants[28] and by persons in possession of court records and documents[29] criminal offenses.[30] The inadequacy of the law became apparent at a very early date, for, in 1792, the members of the court differed on the question of whether or not a merchant's clerk came within the statute applying to servants.[31] This particular defect, however, was not remedied until eighty years later, although,

[15] 24 & 25 VICT. c. 96, §§ 70, 73, 78.
[16] 26 & 27 VICT. c. 87, §9 (1863).
[17] 29 & 30 VICT. c. 109, §33 (1866).
[18] 31 & 32 VICT. c. 116 (1868).
[19] 34 & 35 VICT. c. 31, §12 (1871).
[20] 37 & 38 VICT. c. 42, §31 (1874).
[21] 39 & 40 VICT. c. 36, §29 (1876).
[22] 44 & 45 VICT. c. 58, §§ 17, 18 (1881).
[23] 56 & 57 VICT. c. 39, §64 (1893).
[24] 57 & 58 VICT. c. 60, §§ 225(1) (f), 248 (1894).
[25] 59 & 60 VICT. c. 25, §87 (1896), 8 EDW. VII, c. 32, §9 (1908).
[26] 22 & 23 GEO. V, c. 22, §§ 9, 14, schs. 2, 3 (1932).
[27] 1 EDW. VII, c. 10.
[28] 21 HEN. VIII, c. 7 (1529).
[29] 8 HEN. VI, c. 12 (1429).
[30] MARTIN, COLLECTION OF THE STATUTES OF THE PARLIAMENT OF ENGLAND IN FORCE IN NORTH CAROLINA IN 1792 (1792) 130, 188.
[31] State v. Higgins, 1 N. C. 36. For other decisions construing the term "servant," see State v. Costin, 89 N. C. 511 (1883); State v. Lanier, 89 N. C. 517 (1883).

during the interim, statutes covering shipwrecked goods[32] and public arms[33] were enacted. The Legislature of 1871-72 realized the necessity of extending the law and passed what is today referred to as "the embezzlement statute", which covered "any officer, agent, clerk, employee, or servant of any corporation, person or copartnership".[34] Since then the statute has been amended a number of times: in 1889, "consignee" was inserted;[35] in 1891, as a result of the decision in *State v. Connelly*,[36] in which the court ruled that a clerk of the superior court was not included within the terms of the statute, the words "public officer, clerk of the superior or other court, sheriff, or other person exercising a public trust or holding a public office" were added;[37] in 1897, guardians, administrators, and executors were brought within the scope of the statute;[38] and finally, in 1931, the statute was further extended to include trustees.[39]

The General Assembly did not, however, confine itself to the enacting and amending of one statute. During the '70s other acts were passed covering the following persons: "any officer, agent or employee of the state, or other person having or holding in trust for the same . . . ";[40] "any officer, agent or employee of any city, county, or incorporated town, or of any penal, charitable, religious or educational institution", or any person holding property in trust for such institution;[41] "any treasurer or other financial officer of any benevolent or religious institution, society or congregation";[42] "any president, secretary, treasurer, director, engineer, agent, or other officer of any railroad company", or any person conspiring with such president, director, *etc.*;[43] and officers collecting certain taxes and fines for the state.[44] The Legislature of 1883 added "any officer appropriating to his own use the state, county, school, city or town taxes".[45] At the turn of the century, the General Assembly again directed its attention to the law of embezzlement, enacting additional statutes covering insurance agents,[46] surviving partners,[47] and "any president, director, cashier,

[32] N. C. Laws 1801, c. 599, §6.
[33] N. C. Laws 1831, c. 45, §5.
[34] N. C. Pub. Laws 1871-72, c. 145, §1.
[35] N. C. Laws 1889, c. 226.
[36] 104 N. C. 794, 10 S. E. 469 (1889).
[37] N. C. Laws 1891, c. 188.
[38] N. C. Pub. Laws 1897, c. 31.
[39] N. C. Laws 1931, c. 158.
[40] N. C. Laws 1874-75, c. 52.
[41] N. C. Laws 1876-77, c. 47.
[42] N. C. Laws 1879, c. 105. According to State v. Dunn, 134 N. C. 663, 46 S. E. 949 (1904) treasurers of mutual benefit societies do not fall within this statute.
[43] N. C. Pub. Laws 1870-71, c. 103, §§1, 2.
[44] N. C. Laws 1872-73, c. 144, sch. 6, §§6, 7 as amended by N. C. Pub. Laws 1883, c. 136, §48.
[45] N. C. Pub. Laws 1883, c. 136, §49.
[46] N. C. Pub. Laws 1899, c. 54, §115 as amended by N. C. Pub. Laws 1911, c. 196, §8.
[47] N. C. Pub. Laws 1901, c. 640, §9.

teller, clerk or agent of any bank or other corporation."[48] Finally, in 1921, possibly as a result of a Supreme Court decision approving an instruction in the case of *State v. Blackley*[49] to the effect that if the jury should find that the defendant was a partner, rather than an agent, he could not be convicted under the existing statutes, an act adding "any person engaged in a partnership business" was passed.[50]

The situation presented by the instant case, then, is one which has occurred before. The problem is now one for the legislature, and, as Chief Justice Stacy suggests, "what the General Assembly has written

[48] N. C. Pub. Laws 1903, c. 275, §15 as amended by N. C. Pub. Laws 1921, c. 4, §83 and N. C. Pub. Laws 1927, c. 47, §16.
[49] 138 N. C. 620, 50 S. E. 310 (1905).
[50] N. C. Pub. Laws 1921, c. 127.

DEVELOPMENT OF THE LAW OF EMBEZZLEMENT IN NORTH CAROLINA

Code	*Servants*	*Court Documents*	*Wrecked Goods*	*Public Arms*	*Tax Officer*	*General Statute*	*Public Officers (State Property)*	*Public Officers*	*Treasurers of Benevolent, Etc. Institutions*	*R. R. Officials, Etc.*	*Conspiring with R. R. Officials*	*Insurance Agents*	*Surviving Partners*	*Bank Officers*	*Partners*
Rev. Stat. (1837)	c.34, § 19	c.34, § 33	c.123, § 9 (enacted in 1801)	c.92, § 8 (enacted in 1831)											
Rev. Code (1855)	c.34, § 18	c.34, § 31	c.120, § 11	c.89, § 8											
Battle's Revisal (1873)	c.32, § 16	c.32, § 33	c.120, § 11	c.92, § 8		c.32, § 136 (enacted 1871-1872)									
Code (1883)	§1065	§1071	§3861	§3556	§3678 §3705 (enacted 1883)	§1014 (amended 1889, 1891, 1897)	§1015 (enacted 1874-1875)	§1016 (enacted 1876)	§1017 (enacted 1879)	§1018 (enacted 1870-1871)	§1019 (enacted 1870-1871)				
Rev. Code (1905)	§3499	§3508		§3542	§3410	§3406	§3407	§3408 (amended 1891)	§3409	§3403	§3404	§3489 (enacted 1899)	§3405 (enacted 1901)	§3325 (enacted 1903)	
Pell's Revisal (1908)	§3499	§3508		§3542	§3410	§3406	§3407	§2408	§3409	§3403	§3404	§3489 (amended 1911)	§3405	§3325	
Consol. Stat. (1919)	§4253	§4255		§6884	§4276	§4268	§4269	§4270	§4271	§4272	§4273	§4274	§4275	§4401 (amended 1921, 1927)	
Consol. Stat. (Michie, 1935)	§4253	§4255		§6884	§4276	§4268 (amended 1933)	§4269	§4270	§4271	§4272	§4273	§4274	§4275	§4401 §224(e)	§4274(a) (enacted 1921)

it has written, and if it be not satisfied with its writing, it can write again."[51] Obviously the statute should be amended so as to include receivers within its scope, but it is suggested that, instead of merely adding receivers, the next enactment be framed to prevent, by the use of all inclusive language, the arising of other specific instances of misappropriation of money or property not covered by the terms of the statute.

An examination of the embezzlement statutes of the other forty-seven states reveals that these states have apparently gone through the same process of extending their statutes as have England and North Carolina; most of them, like our own state, having started out with laws based upon the early English statutes.[52] In general, the various states may be divided into three classifications, according to their statutes. Into the first class fall those states[53] which are content with simply naming a number of specific persons.[54] The second group, which is by far the largest numerically, is comprised of those states having statutes which, in addition to naming specific persons, contain general phrases covering all other persons of the type specifically named, *i.e.*, "other bailee", "other person acting in a fiduciary capacity", "other person transporting goods for hire", "other person officially connected with the court", "other person employed in such capacity", "other person upon whom such trust has devolved", "other person connected with a building and loan association", *etc.*[55] Into the third

[51] State v. Whitehurst, 212 N. C. 300, 305 (1937).

[52] 2 BISHOP, CRIMINAL LAW (8th ed. 1892) §324.

[53] MONT. REV. CODES ANN. (Anderson & McFarland, 1935) §§190, 5124, 6014.124, 6014.128, 10124, 11318, 11368, 11416.1, 11382; ORE. CODE ANN. (1930) §§14-325, 14-326, 14-327, 14-332, 14-333, 22-1503, 67-602; ORE. CODE ANN. (Supp. 1935) §§14-348a, 25-311; R. I. GEN. LAWS (1923) §§6073, 6074; WASH. REV. STAT. ANN. (Remington, 1932) §§2569, 2571, 2601, 4226, 4227, 7091; WIS. STAT. (1931) §§221.39, 289.02, 312.05, 343.20.

[54] Persons named in other states that are not specifically mentioned in the North Carolina statutes: broker, factor, assignee, bailee, common carrier, judge, coroner, stockholder, warehouseman, wharfinger, wagoner, contractor (funds for purpose of paying labor and materialmen and not used for that purpose), storage, forwarding and commission merchant, master in chancery, commissioner, conservator, officer or member of any fraternal beneficiary society or other voluntary association, solicitor, mortgagor using proceeds of a loan negotiated for improving real property for other purposes, lodger, tenant, lessee, officers and employees of building and loan associations, auctioneer, lessee of personal property, one in possession of property under a contract to purchase, attorney in fact, innkeeper, consignor, lessee of a motor vehicle, porter, tutor, mandatary, depositary, curator, member of joint stock company, trade union members and officers, member of co-operative association, receiver, lessor, person to whom clothes or other property has been furnished for personal use or for use in trade or business, person removing property from a burning building and not returning it to the rightful owner, mortgagee of personal property, bank or trust company official who receives a deposit when he knows at the time that the institution is insolvent, landlord, person to whom materials have been delivered for manufacture.

[55] ALA. CODE ANN. (Michie, 1928) §§3355 (7), 3960-3973, 5405; ALA. CODE ANN. (Michie, Supp. 1936) §§7111 (37), 3973, 3963 (1); ARIZ. REV. CODE ANN. (Struckmeyer, 1928) §§4764-4769, 4734; ARK. DIG. STAT. (Crawford & Moses,

and final class fall those states which have, in many instances in addition to statutes of the foregoing types, very broad statutes covering all persons who have legitimately come into possession of property belonging to another, apparently intended to serve as catch-alls for just such situations as that presented by the instant case.[56] The construction

1921) §§2498-2507, 5062-3, 2832, 9497, 9709; CAL. PEN. CODE (Deering, 1931) §§424, 484, 490a, 503-514; CAL. GEN. LAWS (Deering, Supp. 1933) p. 333, §506b; CAL. GEN. LAWS (Deering, Supp. 1935) p. 147, §484, Act 3748, §1730, Act 5132, §§220-2; COLO. STAT. ANN. (Michie, 1935) c. 48, §§98-103, 151, c. 18, §§25, 105, c. 25, §91, c. 67, §2, c. 117, §14, c. 161, §31, c. 176, §§107, 242; CONN. GEN. STAT. (1930) §§6364-6367, 6372-74, 6388, 6112, 3555; CONN. GEN. STAT. (Supp. 1935) §1717c; DEL. REV. CODE (1936) §§5209-5252; FLA. COMP. GEN. LAWS ANN. (Skillman, 1927) §§1341, 5560(4), 7244-7257, 7456, 7492; FLA. COMP. GEN. LAWS ANN. (Skillman, Supp. 1936) §§7251, 7254, 7257(1); GA. CODE (1933) §§13-9920, 26-2801 to 26-2811, 2901, 2902, 89-9903; IDAHO CODE ANN. (1932) §§15-1848, 17-3601—17-3607, 25-608, 25-1101, 25-1104, 30-2602, 40-904; ILL. REV. STAT. (Cahill, 1933) c. 21, ¶17, c. 38, ¶¶38, 39, 186-196, 390, c. 105, ¶¶48, 60; Ill. Laws 1937, c. 484; IND. STAT. ANN. (Burns, 1933) §§6-2101, 6-610, 10-1701—10-1717, 10-3013, 45-1012, 47-1519, 49-1814; Ind. Acts 1935, c. 233, §1; IOWA CODE (1935) §§9221, 9304, 9388, 9401, 4753-al8, 13027-13037; KAN. GEN. STAT. ANN. (Corrick, 1935) §§21-545 to 21-548, 9-140, 17-1020, 17-2014, 17-10a02, 19-529, 22-1301 to 22-1305, 75-616, 75-617, 79-2201, 79-2202; KY. STAT. ANN. (Carroll, 1936) §§717, 1202-1207, 1358a, 2747; LA. GEN. STAT. ANN. (Dart, 1932) §§678-681, 744.43, 744.42, 583; LA. CODE CRIM. PROC. ANN. (Dart, 1932) §§779, 912-918; MAINE REV. STAT. (1930) c. 48, §5, c. 57, §47, c. 77, §70, c. 80, §34, c. 131, §§8, 10; MD. ANN. CODE (Bagby, 1924) art. 27, §§126-137; MICH. COMP. LAWS (1929) §§340, 364, 365, 687, 850, 1877, 4649, 4749, 4917, 11963, 12037, 12090, 12160, 12369, 12399, 15660, 16640, 16911, 16914, 16932, 16977-16983, 17028; MICH. COMP. LAWS (Mason, Supp. 1935) §§17115-17174; MINN. STAT. (Mason, 1927) §§5020, 7740, 8806, 10302, 10304, 10358, 10369, 10662; MISS. CODE ANN. (1930) §§889, 892-898; MO. STAT. ANN. (1932) §§63-67, 4071, 4072, 4079-4082, 4086, 4091, 4093, 4103, 4104, 5907, 5926, 11637, 13405, 14304, 14305; NEB. COMP. STAT. (1929) §§2-505, 2-705, 8-165, 28-544 to 28-555, 30-321, 38-512, 79-2008, 84-711; NEV. COMP. LAWS (Hillyer, 1929) §§682, 10333, 10340-10349; NEV. COMP. LAWS (Hillyer, Supp. 1934) §747.32; N. H. PUB. LAWS (1926) c. 387, §§28-31; N. J. COMP. STAT. (1911) tit. Crimes, §§167-183, tit. Savings Banks and Savings Associations, §4715; N. J. COMP. STAT. (Supp. 1934) tit. 52, §168; N. M. STAT. ANN. (Courtwright, 1929) §§35-1801 to 35-1802, 13-127, 71-149; N. M. LAWS 1931, c. 34; N. Y. CONSOL. LAWS (Cahill, 1930) c. 41, §§1290, 1302, 1302-a, 1310-1313; N. Y. CONSOL. LAWS (Cahill, Supp. 1935) c. 34, §§25-a, 25-b, 36-b, c. 41, §130-b; N. Y. CONSOL. LAWS (Cahill, Supp. 1937) c. 41, §1302-a; N. D. COMP. LAWS ANN. (1913) §§5217, 8387, 8388, 8800, 9827, 9929-9935; OHIO GEN. CODE ANN. (Page, 1926) §§12467-12476(2), 12873, 12876, 12878, 12884, 12885, 12919; OKLA. STAT. ANN. (1936) tit. 6, §§239, 240, tit. 19 §641, tit. 21, §§341, 531, 1451-1456, 1463, tit. 46 §72; OKLA. STAT. ANN. (Supp. 1937) tit. 6, §§257-258; PA. STAT. (Purdon, 1936) tit. 14, §19, tit. 18, §§2481-2489, 2501-2514, 2516, 2531, 2532, 2551, 2552, 2571-2573, 2591, 2594, 2611, 2851; R. I. GEN. LAWS (1923) §§6073, 6074; S. C. CODE (1932) §§985, 1149, 1196, 1227, 1282, 1283, 1510; S. D. COMP. LAWS (1929) §§3354, 3766, 4227-4231, 4237, 6956, 8991, 9062; TENN. CODE ANN. (Williams, 1934) §§671, 7943-7945, 10957, 10958, 10961; TEX. ANN. PEN. CODE (Vernon, 1935) arts. 95, 97, 541, 544, 567, 576, 588, 590, 1134, 1534-1536, 1541, 1544; TEX. ANN. REV. CIV. STAT. (1925) §§3467, 4234, 8318; TEX. ANN. PEN. CODE (Vernon, 1937) arts. 427d, 544, 1544b; UTAH REV. STAT. ANN. (1933) §§57-9-7, 87-5-10, 102-11-17 to 102-11-19, 102-13-15, 103-15-2 to 103-15-7; VT. PUB. LAWS (1933) §§491, 5810, 8450-8457; WASH. REV. STAT. ANN. (Remington, 1932 §§2569, 2571, 2601, 4226, 4227, 7091; W. VA. CODE ANN. (Michie, 1932) §§11-14-15, 59-1-32, 61-3-20 to 61-3-23; WYO. REV. STAT. ANN. (Courtwright, 1931) §§32-338 to 32-353, 109-516.

[56] ARIZ. REV. CODE ANN. (Struckmeyer, 1928) §4765; CAL. PEN. CODE (Deering, 1931) §484; GA. CODE (1933) §26-2809; ILL. REV. STAT. (Cahill, 1933) c. 38, §186; IOWA CODE (1935) §13030; KY. STAT. ANN. (Carroll, 1936) §1358a; ME. REV. STAT. (1930) c. 131, §10; MASS. ANN. LAWS (1933) c. 266, §30; MISS.

of criminal statutes by the North Carolina court appears to furnish sufficient guaranty that these broad provisions will be turned neither into dead-letters nor into drag-nets. "By the rule of strict construction," says Chief Justice Stacy, in the case under review, "is not meant that the statute shall be stintingly or even narrowly construed, but it means that everything shall be excluded from its operation which does not clearly come within the scope of the language used."[57] At any rate, the General Assembly will have the foregoing avenues of approach to guide it, if and when it undertakes to extend the law of embezzlement in North Carolina.

JAMES D. CARR.

Evidence—Opinion Evidence on the Issues before the Jury.

In a suit for benefits under the disability clause of an insurance policy several witnesses were allowed to testify, over objection, that in *their opinion* plaintiff was unable to farm, it having already been shown that the plaintiff was not trained to perform any other work except farming. On appeal the Court held that the evidence did not impinge the rule that opinion evidence is inadmissible on the exact question which the jury is to determine, and even if it did, it was not prejudicial, as there was other evidence of like effect to which no objection was made by the defendant.[1]

Although the witness has the necessary qualifications and the opinion is conceded to be pertinent, nevertheless, many courts hold that an opinion, whether expert or non-expert, cannot be admitted when it touches the very issue before the jury.[2] North Carolina in many cases has purported to follow the rule. The local decisions fall into the following classifications: 1. The rule is strictly applied and the opinion is held inadmissible.[3] 2. The existence of the rule is recog-

CODE ANN. (1930) §892; N. M. STAT. ANN. (Courtwright, 1929) §35-1802; N. Y. CONSOL. LAWS (Cahill, 1930) c. 41, §1290; PA. STAT. (Purdon, 1936) tit. 18, §2486; S. C. CODE (1932) §1149; VA. CODE ANN. (Michie, 1936) §4451.

[57] State v. Whitehurst, 212 N. C. 300, 303 (1937).

[1] Leonard v. The Pacific Mut. Life Ins. Co. of Cal., 212 N. C. 151, 193 S. E. 166 (1937).

[2] 4 WIGMORE, EVIDENCE (2d ed. 1923) §1921, n. 1.

[3] United States v. Sauls, 65 F. (2d) 886 (C. C. A. 4th, 1933) (where it was held error to allow witness to testify that *P*'s physical condition was such that he could not engage continuously in a gainful occupation); Wolf and Co. v. Arthur, 112 N. C. 691, 16 S. E. 843 (1893) (where it was held error to allow witness to testify that a transaction was *bona fide*); Smith v. Smith, 117 N. C. 326, 23 S. E. 270 (1895) (where it was held error to allow witness to state that deed, "was good" as deceased "was a man of great will power"); Phifer v. Carolina Cent. Ry., 122 N. C. 940, 29 S. E. 578 (1898) (where it was held error to admit the answer to the question "Were you careful?"); Raynor v. Wilmington Seacoast R. R., 129 N. C. 195, 39 S. E. 821 (1901) (where the witness was not allowed to testify whether any more force was used by the officials in ejecting *P* from the train than was necessary); Latta-Martin Pump Co. v. Southern Ry., 138 N. C. 301, 50 S. E.

nized but held not to apply, the statement being construed as a shorthand statement of fact, not as an opinion.[4] 3. The admission of an opinion is held not to be error if given in answer to a properly put hypothetical question.[5] 4. A violation of the rule is noted, but is held

686 (1905) (where it was held error to allow witness to testify that there had been an overcharge); Stewart v. Stewart, 155 N. C. 341, 71 S. E. 308 (1911) (where it was held improper to allow witness to state that *D* exerted a controlling influence over the testator); Kerner v. Southern Ry., 170 N. C. 94, 86 S. E. 998 (1915) (where witness was not allowed to testify that the fire could not possibly have started from a spark emitted from the smokestack and boiler of *P*); Smith v. Board of Comm'rs of Lexington, 176 N. C. 466, 97 S. E. 378 (1918) (where witness was not allowed to testify as to the amount of voltage that killed the deceased); Marshall v. Interstate Tel. and Tel. Co., 181 N. C. 292, 106 S. E. 818 (1921) (where witness was allowed to testify that the place where *P* was working was not safe, *held* error); Snyder v. Town of Asheboro, 182 N. C. 708, 110 S. E. 84 (1921) (where witness was not allowed to testify as to whether it was necessary for *P* to put his hand on rollers to determine why corn was not being ground); Stanley v. Whiteville Lumber Co., 184 N. C. 302, 114 S. E. 385 (1922) (where witness was allowed to testify that if machine had been covered with a protector *P* would not have been hit in the eye, *held* error); Hill and Brooks v. Louisville and N. R. R., 186 N. C. 475, 119 S. E. 884 (1923) (where it was held error to allow witness to give his opinion as to cause of damaged condition of mules); Pace v. McAden, 191 N. C. 137, 131 S. E. 629 (1926) (where witness was not allowed to give opinion as to the location of a grant of land); American Trust Co. v. United Cash Store Co., 193 N. C. 122, 136 S. E. 289 (1927) (where it was held error to allow witness to express an opinion as to whether there was any fraud in the procurement of a note); Parks v. Sanford and Brooks, 196 N. C. 36, 144 S. E. 364 (1928) (where witness was not allowed to express an opinion as to whether a place was unsafe); State v. Carr, 196 N. C. 129, 144 S. E. 698 (1928), (1929) 7 N. C. L. REV. 320 (where it was held error to allow witness to testify that it was impossible for deceased to have shot himself); Broom v. Monroe Coca Cola Bottling Co., 200 N. C. 55, 156 S. E. 152 (1930) (where it was held error to allow witness to testify that glass found in the bottle could not have passed through bottling machine); Denton v. Shenandoah Milling Co., Inc., 205 N. C. 77, 170 S. E. 107 (1933) (where witness was not allowed to testify as to the purchase and ownership of a draft by the bank); Potts v. Life Ins. Co. of Va., 206 N. C. 257, 174 S. E. 123 (1934) (where witness was not allowed to testify that the deceased was in sound health at the time policy was issued); Minton v. Ferguson, 208 N. C. 541, 181 S. E. 553 (1935) (where it was held error to allow witness to testify that he understood the article to have been written with malice and to damage and slander *P*); Cheek v. Barnwell Warehouse and Brokerage Co., 209 N. C. 569, 183 S. E. 729 (1936) (where it was held error to allow witness to testify that the collision occurred on intestate's side of the road); Bevan v. Carter, 210 N. C. 291, 186 S. E. 321 (1936) (where witness was not allowed to testify that there was no possible way for him to avoid hitting *P*).

[4] Burney v. Allen, 127 N. C. 476, 37 S. E. 501 (1900) (where witness was allowed to testify that from his knowledge of the room he would say that testator could have seen the paper when it was subscribed by the witness); Taylor v. Security Life and Annuity Co., 145 N. C. 383, 59 S. E. 139 (1907) (where witness was allowed to testify that deceased was temperate); State v. Leak, 156 N. C. 643, 72 S. E. 567 (1911) (where witness was allowed to testify that while *D* was committing the assault he (*D*) "would kind of listen"); Renn v. Seaboard A. L. Ry., 170 N. C. 128, 86 S. E. 964 (1915) (where *P* was allowed to testify that he was careful while walking).

[5] The proper form of a hypothetical question, as set forth in Summerlin v. Carolina and N. W. R. R., 133 N. C. 551, 554, 45 S. E. 898, 900 (1903), is: "If certain facts assumed in the question to be established by the evidence should be found by the jury, what would be the witness's opinion, upon the facts thus found true, of the matter involved and to which the inquiry is directed." Pace Mule Co. v. Seaboard A. L. Ry., 160 N. C. 252, 254, 75 S. E. 994, 995 (1912) (where witness in answer to question as to cause of death of mule testified, "My opinion is

not to constitute a reversible error.[6] 5. The rule is completely disregarded.[7] Opinion evidence is admitted on the very issue before the jury when it involves the question of sanity,[8] solvency,[9] identity,[10] handwriting,[11] value,[12] or damages.[13] This is apparently a recognition of

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that the mule was jammed up in the car." This was held to be error, but the court stated that should the jury find that mules had been jammed up in the car, witness could testify that such jamming could have caused death of the mule); Holder v. Giant Lumber Co., 161 N. C. 177, 76 S. E. 485 (1912) (where opinion given as to effect of wound upon the knee, and cause of suffering); Lynch v. Rosemary Mfg. Co., 167 N. C. 98, 83 S. E. 6 (1914) (where witness was allowed to testify that the removal of deceased was the cause of the death); Martin v. P. H. Hanes Knitting Co., 189 N. C. 644, 127 S. E. 688 (1925) (where witness was allowed to give his opinion as to cause of death); Godfrey v. Western Carolina Power Co., 190 N. C. 24, 128 S. E. 485 (1925) (where witness was allowed to say that certain conditions would produce certain results, namely malaria, of which *P* complains).

[6] Prevette v. United States, 68 F. (2d) 112 (C. C. A. 4th, 1934), *cert. denied* 292 U. S. 622, 54 Sup. Ct. 633, 78 L. ed. 1478 (1934) (where witness testified that *P* was not totally and permanently disabled, *held* error but not prejudicial because witnesses for *P* were allowed to express an opinion on the same issue); Britt v. Carolina N. R. R., 148 N. C. 37, 61 S. E. 60 (1908) (where witness was allowed to testify that double chain would be safer than a single chain, *held* if error it was harmless); Wilson v. Suncrest Lumber Co., 186 N. C. 56, 118 S. E. 797 (1923) (where witness testified that a certain appliance furnished *P* was not proper, suitable, or safe); Street v. Erskine-Ramsey Coal Co., 196 N. C. 178, 145 S. E. 11 (1928) (where witness testified that "forepoling" would have protected the employee). The principal case falls within this classification, Leonard v. The Pacific Mut. Life Ins. Co. of Cal., 212 N. C. 151, 193 S. E. 166 (1937), cited *supra* note 1.

[7] Autry v. Floyd, 127 N. C. 186, 187, 37 S. E. 208 (1900) (where in an action for malicious prosecution *D* was not allowed to answer question, "Were you influenced by malice in instituting the prosecution?", *held* error); State Bd. of Ed. v. Roanoke R. R. and Lumber Co., 158 N. C. 313, 73 S. E. 994 (1912) (where witness was allowed to testify that the land was "swamp land"); Barnes v. Seaboard A. L. Ry., 178 N. C. 264, 100 S. E. 519 (1919) (where witness was not allowed to testify that the method of loading was dangerous and unsafe, *held* error); Vann v. Atlantic C. L. R. R., 182 N. C. 567, 109 S. E. 556 (1921) (where witness was allowed to testify whether the crossing was constructed by the correct method); State v. Fox, 197 N. C. 478, 149 S. E. 735 (1929) (where witness was allowed to state that in his opinion deceased was lying down when shot); Nelson v. Jefferson Standard Life Ins. Co., 199 N. C. 443, 154 S. E. 752 (1930) (where witness was allowed to testify that deceased was disabled both mentally and physically); Dempster v. Fite, 203 N. C. 697, 167 S. E. 33 (1932) (where witness was allowed to testify that the injury was total and permanent); Gossett v. Metropolitan Life Ins. Co., 208 N. C. 152, 179 S. E. 438 (1935) (where witness was allowed to testify that *P* was not able to do any kind of physical work).

[8] Criminal actions: State v. Banner, 149 N. C. 519, 63 S. E. 84 (1908); State v. Alexander, 179 N. C. 759, 103 S. E. 383 (1920). Civil actions: *In re* Will of Brown, 203 N. C. 347, 166 S. E. 72 (1932); *In re* Will of Sudie Hargrove, 206 N. C. 307, 173 S. E. 577 (1934).

[9] State v. Hightower, 187 N. C. 300, 121 S. E. 616 (1924); State v. Brewer, 202 N. C. 187, 162 S. E. 363, 81 A. L. R. 1431 (1932); State v. Shipman, 202 N. C. 518, 163 S. E. 657 (1932).

[10] State v. Combs, 200 N. C. 671, 158 S. E. 252 (1931).

[11] LaRoque v. Kennedy, 156 N. C. 360, 72 S. E. 454 (1911); Note (1937) 106 A. L. R. 721 (concerning typewritten documents and typing machines).

[12] Wade v. Carolina Tel. and Tel. Co., 147 N. C. 219, 60 S. E. 987 (1908); Note (1933) 86 A. L. R. 1449, 1488.

[13] Harper v. Town of Lenoir, 152 N. C. 723, 68 S. E. 228 (1910); South Atlantic Waste Co. v. Raleigh C. & S. Ry., 167 N. C. 340, 83 S. E. 618 (1914).

the impossibility of making proof of the fact in issue except by opinion evidence.

The usual reason given for the rule is that the admission of such evidence would be an invasion or usurpation of the province of the jury. However, such evidence invades the province of the jury no more than direct evidence of an eye-witness to a decisive fact. In either case the evidence is conclusive of the issue only if the jury is satisfied of the trustworthiness of the evidence. Of course, there is the danger[14] of too much weight being given the opinion of a reputable citizen, or recognized expert, but that danger is lessened by a thorough cross-examination, testing the soundness of the conclusion, together with a proper instruction by the trial judge. The reason stated for the rule assumes that the jury will accept at face value all opinions. It overlooks the fact that the credibility of the witness as well as the reasonableness of his conclusion always remain for the jury's determination, and that unless they are resolved by the jury favorably to the proponent of the witness, the latter's opinion will go for naught.

Inasmuch as North Carolina has purported to adopt the rule one would expect to find the cases falling into two categories:[15] (1) cases in which the rule was held applicable; (2) cases in which it was held not applicable. Instead we find *five* categories—and without any attempt by the Court to explain the necessity for their existence. Nor do the factual situations in the cases themselves reveal any basis for the classification, with the result that there is not only no apparent reason for the five-part classification but no element of predictability as to what the Court will do in a particular case.

The test for the admissibility of an opinion of a witness should be, not whether it is on the very issue before the jury, but whether it will aid the jury under the circumstances of the case. Evidence on the very point in issue would seem to be of the highest pertinency. Thus a strict application of the rule leads to the absurd result that admissibility varies in inverse proportion to relevancy. A study of all the cases reveals the impracticability of its application, and leads to but one logical conclusion. Not only should the limitation itself be discarded, but the opinion rule[16] in its entirety should be abolished. This could be easily accomplished by statute.[17]

WM. R. DAWES.

[14] In (1929) 7 N. C. L. REV. 320, 321 the question is raised, "Is there a real danger attached to admitting these opinions, or isn't this overshadowed by the extremely high value and importance of this type of evidence?"

[15] With a possible third category of cases in which the rule was either erroneously applied or not applied but held not to constitute reversible error.

[16] For history and discussion of the opinion rule, see 4 WIGMORE, EVIDENCE (2d ed. 1923) §§1917-1929.

[17] Dean Wigmore has suggested the following statute: "An inference or opin-

Libel—Ambiguous Words.

Plaintiff, automobile dealer, had a contract with defendant credit company, to assist him in financing his purchases. He placed an order for several vehicles, but before they arrived defendant sent him the following telegram, "Due to your previously having converted floor planned cars will not be able to lift draft number D-3105 stop necessary to make other arrangements at once." Plaintiff, alleging that the sending of the above telegram was a publication of defamatory matter concerning him, sued the defendant for libel. The jury in the trial court found for the plaintiff. *Held,* the trial judge should have granted defendant's motion for non-suit as there was neither allegation nor proof that the telegram was understood by the employees of the telegraph company, to whom alone publication was made, as conveying a defamatory meaning.[1]

The great weight of authority is to the effect that a libel is published by the communication of the defamatory matter to some third person or persons.[2] This communication can be effected in various ways; by dictating a libelous letter to a stenographer,[3] by delivering a message containing defamatory matter to the telegraph company,[4] by the transmission of a message from one agent of the telegraph company to another,[5] by the writing of a libel on an envelope which is put in the mail,[6] by the author reading a defamatory message to some

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ion may always be stated to the tribunal by a witness experientially qualified to form it, provided either that he has had adequate personal observation of the matter in question, or if not, and if an expert, that he states on cross-examination the data from which the inference is drawn. It is immaterial whether or not the data are capable of being so stated by him or by others that the tribunal is equally capable of drawing the inference, and whether or not the data are stated by him before stating his inference, and whether or not the inference involves the very subject of the issue, or one of the issues, before the tribunal; provided that the trial judge may in any case in his discretion exclude testimony involving an inference from data observed, or any other superfluous testimony, whenever in his judgment such testimony is undesirable because merely cumulative or of undue personal weight." 4 WIGMORE, EVIDENCE (2d ed. 1923) §1929.

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[1] Wright v. Commercial Credit Co., 212 N. C. 87, 192 S. E. 844 (1937).

[2] Vicknair v. Daily States Pub. Co., 153 La. 676, 96 So. 529 (1923); Sproul v. Pillsbury, 72 Me. 20 (1880); Lewis v. Carr, Guy and Baird, 178 N. C. 578, 101 S. E. 97 (1919); NEWELL, SLANDER AND LIBEL (4th ed. 1924) §175; GATLEY, LIBEL AND SLANDER (2d ed. 1929) 91.

[3] Nelson v. Whitten, 272 Fed. 135 (E. D. N. Y. 1921); Ferdon v. Dickens, 161 Ala. 181, 49 So. 888 (1909); Gambrill v. Schooley, 93 Md. 48, 48 Atl. 730, 52 L. R. A. 87 (1901); Pullman v. Walter Hill and Co. Ltd., [1891] 1 Q. B. 524.

[4] Munson v. Lathrop, 96 Wis. 386, 71 N. W. 596 (1897).

[5] Peterson v. Western Union Tel. Co., 75 Minn. 368, 77 N. W. 985, 43 L. R. A. 981 (1899); Whitfield v. Southeastern Ry., 4 Jur. (N. S.) 688 (Eng. 1858).

[6] Muetze v. Tuteur, 77 Wis. 236, 46 N. W. 123 (1890).

third person before sending it to the addressee,[7] and, according to some of the courts, by mailing a postal card on which a libel is written.[8]

It is universally held that where the words on which the action is based are ambiguous or capable of more than one meaning, some innocent and others defamatory, their interpretation is a question for the jury;[9] and the judge construes them only when reasonable men could not differ concerning their meaning.[10]

A large majority of the courts in this country hold that the testimony of hearers or readers as to their understanding of alleged defamatory matter is admissible only when the words in controversy are ambiguous,[11] and even then the witnesses' interpretations are not binding or conclusive on the jury.[12] However, the minority hold this evidence inadmissible because, they say, since facts never conspire to commit perjury and witnesses sometimes do, it is better to permit the persons to whom publication was made to testify only as to circumstances under which the words were spoken or written and

[7] Snyder v. Andrews, 6 Barb. 43 (N. Y. 1849).

[8] M'Cann v. Edinburg Roperie and Sailcloth Co., L. R. 28 Ir. 24 (1891); *contra,* McKeel v. Latham, 202 N. C. 318, 162 S. E. 747 (1932) *overruling* Logan v. Hodges, 146 N. C. 38, 59 S. E. 349 (1907).

[9] Baker v. Warner, 231 U. S. 588, 34 Sup. Ct. 175, 58 L. ed. 384 (1913); Commercial Pub. Co. v. Smith, 149 Fed. 704 (C. C. A. 6th, 1907); Washington Times Co. v. Murray, 299 Fed. 903 (App. D. C. 1924); Ogren v. The Rockford Star Printing Co., 288 Ill. 405, 123 N. E. 587 (1919); Branch v. Publishers; George Knapp Co., 222 Mo. 580, 121 S. W. 93 (1909); Sucha v. Sprecher, 84 Neb. 241, 121 N. W. 106 (1909); First Nat'l Bank of Waverly v. Winters, 225 N. Y. 47, 121 N. E. 459 (1918); Lucas v. Nichols, 52 N. C. 32 (1859); State v. Howard, 169 N. C. 312, 84 S. E. 807 (1915); Vincent v. Pace, 178 N. C. 421, 100 S. E. 581 (1919); McCue v. Equity Co-op. Pub. Co. of Fargo, 39 N. D. 190, 167 N. W. 225 (1918); Hubbard v. Furman Univ., 76 S. C. 510, 57 S. E. 478 (1907); Guisti v. Galveston Tribune, 105 Tex. 497, 150 S. W. 874 (1912); York v. Cole, 190 Wis. 179, 208 N. W. 944 (1926); NEWELL, SLANDER AND LIBEL (4th ed. 1924) §254; (1928) 7 N. C. L. REV. 3, 5. However, where words innocent on their face are capable of a defamatory meaning only by reason of extrinsic facts, plaintiff must show these facts and also prove that they were known to the hearers or readers. Daily v. New York Herald Co., 151 Fed. 114 (C. C. S. D. N. Y. 1907); Ten Broeck v. Journal Printing Co. and Another, 166 Minn. 173, 207 N. W. 497 (1926); Duncan v. The Record Pub. Co., 145 S. C. 196, 143 S. E. 31 (1928); Powell v. Young, 151 Va. 985, 144 S. E. 624 (1928); (1928) 7 N. C. L. REV. 3, 5.

[10] Commercial Pub. Co. v. Smith, 149 Fed. 704 (C. C. A. 6th, 1907); E. I. Du Pont De Nemours Co. v. Nashville Banner Pub. Co., 12 F. (2d) 231 (C. C. A. 6th, 1926); First Nat'l Bank of Waverly v. Winters, 225 N. Y. 47, 121 N. E. 459 (1918); McCue v. Equity Co-op. Pub. Co. of Fargo, 39 N. D. 190, 167 N. W. 225 (1918); NEWELL, SLANDER AND LIBEL (4th ed. 1924) §254; GATLEY, LIBEL AND SLANDER (2d ed. 1929) 129; (1928) 7 N. C. L. REV. 3, 5.

[11] Hawks v. Patton, 18 Ga. 52 (1854); Proctor v. Pointer, 127 Ga. 134, 56 S. E. 111 (1906); Branch v. Publishers; George Knapp and Co., 222 Mo. 580, 121 S. W. 93 (1909); Smart v. Blanchard, 42 N. H. 137 (1860); Shaw v. Shaw, 49 N. H. 533 (1870); Jenkins v. Southern Ry., 130 S. C. 180, 125 S. E. 912 (1924); Knapp v. Fuller and Smith, 55 Vt. 311 (1883).

[12] Emery Evening Printing Co. v. Butler, 144 Fed. 916 (C. C. A. 3d, 1906); Nelson v. Borchenius, 52 Ill. 236 (1869); Freeman v. Sanderson, 123 Ind. 264, 24 N. E. 239 (1890); Lemaster v. Ellis, 173 Mo. 332, 158 S. W. 904 (1913); Frazier v. Grobb, 194 Mo. App. 405, 183 S. W. 1083 (1916); Smart v. Blanchard, 42 N. H. 137 (1860); Smith v. Miles, 15 Vt. 245 (1843).

then let the jury draw their own conclusions.[13] The North Carolina rule allows witnesses to give evidence as to their understanding of alleged defamatory matter only when the language in question consists of cant phrases, local words, or nicknames, or when the defendant takes advantage of facts, known to the hearers or readers, to give otherwise innocent words a defamatory meaning.[14] The above rules of evidence are applied by the courts to both slander and libel cases, and they rely on cases in one field to support holdings in the other.

The question what formula should be given the jury to guide them in determining whether or not ambiguous words, alleged to be defamatory, are, in fact, defamatory has received but little attention. However, most of the courts hold that they should apply the so-called objective or reasonable man test.[15] A few of the decisions go even further in the case of a publication made to small children, and hold it unnecessary to prove the children understood the meaning of the words used.[16] In one case it is stated, by way of dictum, that where the defamatory matter is written, even though in a foreign language, the plaintiff does not have to prove that the persons to whom publication was made understood the language.[17] Although a number of the state courts pay lip service to the subjective, or actual understanding of the hearers' test[18] only a few really apply it.[19]

[13] White v. Sayward, 33 Me. 322 (1851); Callahan v. Ingram, 122 Mo. 355, 26 S. W. 1020 (1894); Van Vechten v. Hopkins, 5 Johns 211 (N. Y. 1809); NEWELL, SLANDER AND LIBEL (4th ed. 1924) §270.

[14] Briggs v. Byrd, 33 N. C. 353 (1850); See Sasser v. Rouse, 35 N. C. 142, 144 (1851); Sowers v. Sowers, 87 N. C. 303, 305 (1883).

[15] Washington Post Co. v. Chaloner, 250 U. S. 290, 39 Sup. Ct. 448, 63 L. ed. 987 (1919); Commercial Pub. Co. v. Smith, 149 Fed. 704 (C. C. A. 6th, 1907); Washington Times Co. v. Murray, 299 Fed. 903 (App. D. C. 1924); Nelson v. Borchenius, 52 Ill. 236 (1869); Ball v. Evening American Pub. Co., 237 Ill. 592, 86 N. E. 1097 (1909); King v. Pillsbury, 115 Me. 528, 99 Atl. 513 (1917); Sucha v. Sprecher, 84 Neb. 241, 121 N. W. 106 (1909); McCall v. Sustair, 157 N. C. 177, 72 S. E. 974 (1911); State v. Howard, 169 N. C. 312, 84 S E. 807 (1915); Cotton v. Fisheries Co. 177 N. C. 56, 97 S. E. 712 (1919); Vincent v. Pace, 178 N. C. 421, 100 S. E. 581 (1919); Elmore v. Atlantic Coast Line R. R., 189 N. C. 658, 127 S. E. 710 (1925); Oates v. Wachovia Bank and Trust Co., 205 N. C. 14, 189 S. E. 869 (1933). However, since the court in the principal case held that the defendant's motion of non-suit should have been granted, one wonders whether or not it will be necessary in North Carolina, in the future, to allege that the hearers or readers actually understood the language in its defamatory sense, regardless of the meaning it would convey to the reasonable man.

[16] Hammond v. Stewart, 72 Ill. App. 512 (1897); Batten v. Cox, 118 Kan. 78, 233 Pac. 1040 (1925).

[17] See Palmer v. Harris, 60 Pa. 156, 161 (1869).

[18] Maynard v. Fireman's Fund Ins. Co., 34 Cal. 48 (1867); Cosland v. Lee, 11 Ind. App. 511, 38 N. E. 1099 (1894); Floyd v. Fordyce 53 Ind. App. 449, 101 N. E. 825 (1913); Briggs v. Bird, 33 N. C. 252 (1850); Castello v. Phelps, 198 N. C. 454, 152 S. E. 163 (1930).

[19] Desmond v. Brown, 33 Iowa 13 (1871); Julian v. Kansas City Star Co., 209 Mo. 35, 107 S. W. 496 (1907); Lemaster v. Ellis, 173 Mo. App. 332, 158 S. W. 904 (1913); Traylor v. White, 185 Mo. App. 325, 170 S. W. 412 (1914); Thomas v. City of Kennett, 192 Mo. App. 13, 178 S. W. 254 (1915); Nichols v. Chicago R. I. and P. Ry., 232 S. W. 275 (Mo. 1921).

Since the majority rule allows witnesses to testify as to their understanding of the words in question only when the language relied on is ambiguous,[20] the subjective standard seems to be inconsistent with it because the jury would have difficulty in determining the sense in which the words were understood by the hearers or readers without first hearing these persons testify as to their understanding. The application of the subjective standard in North Carolina would be even more inconsistent as our courts admit this testimony only in a restricted class of defamation cases.[21] In those jurisdictions which follow the minority and never admit such evidence,[22] the use of the subjective test would be positively absurd. Again, there seems to be no good reason for giving the jury a subjective formula when the judge, in deciding whether or not the case shall go to the jury, uses the objective standard,[23] which is much easier to understand and apply. The danger of perjured testimony is greatly reduced by the use of the objective formula as it is not necessary to admit evidence concerning the sense in which the persons, to whom publication was made, understood the alleged defamatory words.

In view of the foregoing considerations, if reasonable men could have differed as to the meaning of the term "converted floor planned cars," then it seems the view of the dissenting opinion in the principal case should have been followed and the verdict of the jury left undisturbed.

J. NATHANIEL HAMRICK.

Names—Married Women—Change of Name by Legal Process—Notice.

The plaintiff's judgment was obtained before but docketed in debtor's former name after her marriage. Debtor then sold after-acquired real property to defendant. Plaintiff was permitted to enforce a lien under the statute[1] providing that a docketed judgment constitutes a lien on after-acquired real property from the time of docketing until ten years after its rendition. The court evidently felt that defendant had constructive notice of the judgment since he knew debtor's former name and a record search under that name would have revealed the judgment.[2]

[20] See note 11, *supra*.
[21] See note 14, *supra*.
[22] See note 13, *supra*.
[23] See note 10, *supra*.

[1] N. C. CODE ANN. (Michie, 1935) §§613, 614; McCaskill v. Graham, 121 N. C. 190, 28 S. E. 264 (1897) (land subject to judgment lien is freed therefrom after the lapse of ten years); Harrington v. Hatton, 130 N. C. 89, 40 S. E. 848 (1902) (land subject to judgment lien can be sold free from the lien after the lapse of the judgment).

[2] Henry v. Sanders, 212 N. C. 239, 193 S. E. 15 (1937).

Since the court does not indicate whether the result would have been different had defendant not known of debtor's former name, the decision possibly might be construed as imposing a duty on the title searcher to search for judgments under debtor's former name. To require the title searcher to realize the obvious fact that married women had former names, and to search under those names for claims would not seem to be unduly harsh. Certainly, a careful title searcher in North Carolina should realize the above possibility and make the requisite search.

Defendant, to show lack of notice, relied on a California case[3] where a judgment was secured and docketed in debtor's maiden name after her marriage on obligations incurred before marriage. The California court held that although defendant knew debtor's maiden name, this fact did not put him on notice as to her business transactions while unmarried, since a married woman was enabled by statute to acquire and convey property under her married name. The North Carolina court said the reasoning of the case was persuasive, but declined to apply it to the facts in the principal case. The only fundamental factual difference between the two cases, in so far as the point under discussion is concerned, is that in the California case the action was brought after the marriage, while in the principal case judgment was rendered by a Justice of the Peace before the marriage. The North Carolina court might reasonably have considered this factual difference a valid ground for distinction. In North Carolina a judgment rendered by a Justice of the Peace must be docketed in the office of the Clerk of the Superior Court of the county within a year if it is to act as a lien on the debtor's after-acquired property.[4] Therefore, if such a judgment were obtained before the debtor's marriage, it could be discovered by a search under debtor's former name before her marriage, and only one year, at most, after her marriage. But, if such a judgment in debtor's former name were obtained after her marriage, or a judgment of the superior court were obtained either before or after marriage, and such judgments when docketed were constructive notice after marriage, the efficient title searcher would be required to search under debtor's maiden name for at least ten years prior to the sale or mortgage. Since the latter requirement would put quite a burden on the title searcher, this might have been the distinction in the Court's

[3] Huff v. Sweetster, 8 Cal. App. 689, 97 Pac. 705 (1908).

[4] Lowdermilk v. Butler, 182 N. C. 502, 509, 109 S. E. 571, 575 (1921). It was urged on the court that the judgment was not required by statute to be docketed within a year in order to be a lien on the property, but the court held to the contrary, in line with former cases. No specific statutes were mentioned in the opinion, but the ones under discussion probably were what are now N. C. CODE ANN. (Michie, 1935) §§1517, 1521.

mind between the California and principal cases. Hence, if a case arose involving a judgment of a Justice of the Peace rendered after debtor's marriage but not docketed within a year of the marriage, or a judgment of the superior court obtained either before or after marriage, but not docketed within a year after the marriage, the Court, distinguishing the principal case on its facts, might follow the California case and hold that docketing the judgment in debtor's former name is not constructive notice to persons subsequently dealing with debtor in her married name.

The principal case suggests a similar problem: If *A* has a properly docketed judgment against *B*, what would *A*'s rights be if *B* changed his name by legal process, acquired real property, and then mortgaged or sold it to *C*, who was unaware of *B*'s change of name? This situation is to be distinguished from that of change of name by marriage, since here there would be nothing to put the title searcher *C* on notice as to the name change. Here *A* and *C* have done all that could be expected of them. If North Carolina should choose to follow the principle of the California case, probably *C* would be held not to have had constructive notice of the lien, and hence would have a superior right to the property.

An argument in favor of *A*'s priority could be made that the record of the name change of *B* serves as constructive notice to the world, and therefore land bought or taken as security by *C* is taken with constructive notice of the prior lien, since a search of the records under *B*'s former name would have revealed it. Although the North Carolina Court has not passed on the point, the language of the statute pertaining to change of name seems to suggest that the legislature intended the record to serve as public notice.[5]

An argument against *A*'s contention is that the statute does not expressly provide that the record of the name change shall charge with notice parties subsequently dealing with *B*. Had the legislature intended that the record of the name change be notice to the world, it would have expressly so provided.

No matter which view the court takes, its decision will probably be affected by the practical consideration whether it desires further to burden title searchers.

If, before *C* seeks to acquire the land, *A* should discover *B*'s change of name, he would probably be under no duty to amend the judgment, if we assume that *C* would have constructive notice of *B*'s change in

[5] N. C. CODE ANN. (Michie, 1935) §§2970-2975 (After the requirements as to reason for changing name, character, *etc.*, have been satisfied it is the duty of the clerk of the superior court to grant the application for name change, and to issue an order changing the name of the applicant. He must issue a certificate under his hand and seal to this effect, and he must record the application and order on the docket of special proceedings in his court.).

name. However, because name changes occur so seldom, and because title searchers inquire so infrequently into this aspect of the records, as a practical matter *A* should be required to take reasonable steps to correct the record. And, conversely, if *C* should discover *B*'s change in name, he should be charged with knowledge of what a search of the record under *B*'s original name would reveal.

If the record of the name change does not serve as constructive notice of the change, the problem remains whether the docketing of the judgment in *B*'s prior name is, in and of itself, notice to the world of *A*'s lien. If it is, of course, *A* would prevail over *C*. There is, however, substantial ground for contending that the mere docketing of *A*'s judgment in *B*'s former name would not be constructive notice to *C*. The North Carolina Court has consistently said that the doctrine of record notice is to be strictly applied,[6] and in searching the record ". . . if anything appears to a party calculated to attract attention or stimulate inquiry the person is affected with notice of all the inquiry would have disclosed".[7] This, and other statements,[8] furnish grounds for argument that there was no constructive notice to *C* of *A*'s lien, since a thorough tracing of the chain of title would in no way indicate the change of *B*'s name so as to stimulate inquiry on the part of *C*'s title searcher. If the court should hold neither record of name change, nor record of judgment in *B*'s prior name to be constructive notice, then of course, *C* would prevail against *A* as a bona fide actor without notice.

JOSEPH M. KITTNER.

Negligence—Proximate Cause—Weather Conditions.

The defendant railroad allowed its train to block a highway at night for twenty minutes during a snow storm without lights or any other warning of its presence. The deceased was killed when the automobile in which he was riding as guest skidded on the icy highway and collided with the train. The visibility of the driver of the automobile was impaired by falling snow and he could not see the train

[6] Quinnerly v. Quinnerly, 114 N. C. 145, 19 S. E. 99 (1894); New Bern Cotton Oil and Fertilizer Co. v. Lane, 173 N. C. 184, 91 S. E. 953 (1917); Dye v. Morrison, 181 N. C. 309, 107 S. E. 138 (1921).

[7] Wynn v. Grant, 166 N. C. 39, 45, 81 S. E. 949, 952 (1914).

[8] Bryan v. Hodges, 107 N. C. 492, 498, 12 S. E. 430, 432 (1890) (". . . if the party obtains knowledge or information of facts tending to show the existence of a prior claim in conflict with the interest which he is seeking to obtain, and which are sufficient to put an ordinarily prudent man upon inquiry . . . he is affected with knowledge of all the inquiry would have disclosed."); Ijames v. Gaither, 93 N. C. 358, 362 (1885) ("For whatever is sufficient to put a party on inquiry, he is presumed to have notice of every fact and circumstance which a proper inquiry would enable him to find out."). It could be argued, in the problem under discussion, that there were not sufficient facts or circumstances to put *C* on inquiry.

in time to stop on the icy road. In an action against the railroad for the wrongful death of the deceased the lower court gave judgment for the plaintiff but the appellate court reversed, saying that as a matter of law the ice was the proximate cause of the injury and the railroad was not liable.[1]

The problem raised in the principal case is to be distinguished from the problem of insulating negligence. North Carolina has recognized that the negligence of a third party may intervene and insulate the negligence of a defendant, on the ground that the insulating negligence becomes the proximate cause of the plaintiff's injury.[2] In the principal case there was no intervening insulating negligence. The weather condition (icy road), which the court in the principal case said was the proximate cause of the plaintiff's injury, existed before the railroad became negligent in blocking the highway. Also no question of concurring negligence is involved because there was no negligence on the part of the driver of the automobile. The court made it clear that there was no such negligence, but even if there had been it would not have been imputed to the plaintiff guest so as to prevent recovery in the absence of a joint enterprise,[3] or joint control.

The problem in the principal case is presented in two groups of cases with somewhat similar fact situations:

1. Where the train was moving when the collision occurred.

Recovery has been denied when a moving train, in the absence of fog or other adverse weather conditions, failed to give any signals, and hit an automobile that was skidding over ice,[4] or other slippery substances.[5] Here the courts said the skidding and not the defendant's neg-

[1] Megan v. Stevens, 91 F. (2d) 419 (C. C. A. 8th, 1937).

[2] Haney v. Lincolnton, 207 N. C. 282, 176 S. E. 573 (1934), (1934) 13 N. C. L. Rev. 245.

[3] Miller v. Union Pac. R. R., 290 U. S. 227, 154 Sup. Ct. 172, 78 L. ed. 285 (1933); City of Louisville v. Heitkemper's Adm'x, 169 Ky. 167, 183 S. W. 465 (1916); Thomas v. City of Lexington, 168 Miss. 107, 150 So. 816 (1933); Dickey v. Atlantic C. L. R. R., 196 N. C. 726, 147 S. E. 15 (1929). These cases should not be confused with those in which there is a duty upon the guest to warn the driver, because of the guest's peculiar knowledge of the dangerous situation. In such a case the guest is deemed negligent and not permitted to recover. Warth v. Jackson County Court, 71 W. Va. 184, 76 S. E. 420 (1912).

[4] Hickey v. Missouri Pac. R. R. Corp. in Neb., 8 F. (2d) 128 (C. C. A. 8th, 1925) (Here there was some conflict in testimony as to whether defendant gave any warning.); Barrett v. United States R. R. Adm'n, 196 Iowa 1143, 194 N. W. 222 (1923); Straud v. Chicago M. & St. P. Ry., 75 Mont. 384, 393, 243 Pac. 1089, 1092 (1926) (proximate cause is one "which in a natural and continuous sequence, unbroken by any new, independent cause, produces the injury, and without which the injury would not have occurred.").

[5] Pifer v. Chicago M. St. P. & P. R. R., 215 Iowa 1258, 247 N. W. 625 (1933) (Here gravel was upon the road and the court held, as a matter of law, that the skidding over this gravel was the proximate cause of the collision.); Gilman v. Central Vt. Ry., 93 Vt. 340, 107 Atl. 122 (1919) (The skidding was caused by oil upon the road. The court stated that the railroad company could anticipate that travelers would see the train in time to stop. The court also stressed the fact that the railroad company was not responsible for the oil being upon the road.).

ligence in failing to give warning was the proximate cause of the injury. However, one court in New York held that under such circumstances it was error for the lower court to grant a motion for a nonsuit in an action by the car driver.[6] There is a split of authority as to whether a railroad is liable when its train approaches a crossing during a foggy night without giving any warning, and a collision occurs. In a majority of such cases, the railroad was deemed negligent and a recovery was allowed,[7] the court assuming without discussion that the negligence was the proximate cause of the injury. One case represents the contrary view and the court denies recovery on the same facts,[8] saying that there was no negligence.

2. Where the train was stopped when the collision occurred. It is well settled that a railroad company, in its necessary operations, can block a highway for a reasonable time and under ordinary conditions the mere presence of the train is sufficient warning to travelers.[9] But if the visibility of the people upon the highway is impaired by fog or other adverse weather conditions and a train blocks the road without giving any warning, there is a split of authority as to whether the railroad company is liable for a resulting collision with an automobile. In some cases the railroad is relieved from liability,[10] again, on the ground of no negligence. But many courts hold the railroad liable under such circumstances,[11] especially where it has induced reliance by customarily giv-

[6] Swinderman v. Pennsylvania R. R., 243 App. Div. 233, 276 N. Y. Supp. 483 (1935) (The court, in reversing a nonsuit, held that whether plaintiff was contributorily negligent in driving eight miles an hour over the slippery road was a question for the jury.).

[7] Fretz v. Chicago & Erie R. R., 173 Ind. 519, 90 N. E. 76 (1909); Holland v. Missouri Pac. R. R., 112 Kan. 609, 212 Pac. 90 (1923); Robertson v. Missouri Pac. R. R., 165 So. 527 (La. 1936); Kerr v. Bush, 198 Mo. App. 607, 215 S. W. 393 (1919); Agee v. Missouri Pac. R. R., 288 S. W. 992 (Mo. 1926); Malone v. St. Louis-San Francisco Ry., 220 Mo. App. 9, 285 S. W. 123 (1926); Briggs v. New York S. & W. R. R., 136 Atl. 416 (N. J. 1927).

[8] Dunlap v. Pacific Electric Ry., 12 Cal. App. (2d) 473, 55 P. (2d) 894 (1936).

[9] Mabray v. Union Pac. R. R., 5 F. Supp. 397 (D. Colo. 1933); Sisson v. Southern Ry., 68 F. (2d) 403 (App. D. C. 1933); Philadelphia & R. Ry. v. Dillon, 31 Del. 247, 114 Atl. 62 (1921); Coleman v. Chicago B. & Q. R. R., 287 Ill. App. 483, 5 N. E. (2d) 103 (1936); Pennsylvania R. R. v. Huss, 96 Ind. App. 71, 180 N. E. 919 (1932); Witherly v. Bangor & A. R. R., 131 Me. 4, 158 Atl. 362 (1932); Ausen v. Minneapolis, St. P. & S. S. M. R. R., 193 Minn. 316, 258 N. W. 511 (1935); Gulf, M. &. N. R. R. v. Holifield, 152 Miss. 674, 120 So. 750 (1929); Gulf M. & N. R. R. v. Kennard, 164 Miss. 380, 145 So. 110 (1933); Nadasky v. Public Service R. R., 97 N. J. L. 400, 117 Atl. 478 (1922); Killen v. New York C. R. R., 225 App. Div. 8, 232 N. Y. Supp. 76 (1928); Scott v. Delaware L. & W. R. R., 222 App. Div. 409, 226 N. Y. Supp. 287 (1928); Thompson v. St. Louis S. W. Ry. of Tex., 55 S. W. (2d) 1084 (Tex. 1932).

[10] Driskell v. Powell, 67 F. (2d) 484 (C. C. A. 5th, 1933); Bowers v. Great N. Ry., 65 N. D. 384, 259 N. W. 99 (1935); Morris v. Atlantic C. R. R., 100 N. J. L. 328, 126 Atl. 295 (1924).

[11] Central of Ga. Ry. v. Heard, 36 Ga. App. 332, 136 S. E. 533 (1927); Shelley v. Pollard, 55 Ga. App. 88, 189 S. E. 570 (1936); Richard v. Maine Cent. R. R., 132 Me. 197, 168 Atl. 811 (1933); Elliot v. Missouri Pac. R. R., 227 Mo. App. 225, 52 S. W. (2d) 448 (1932); Adams v. Kansas City S. Ry., 83 S. W. (2d)

ing signals.[12] Here again the courts decide the cases on the basis of negligence, assuming that the negligence was the proximate cause of the injury. It has been held that when an automobile skidded over a slippery road and caught a pedestrian between it and a train which was blocking the road, thus injuring him, no recovery could be had against the railroad since the skidding was the proximate cause of the injury.[13] Several courts say that if the condition at the crossing is extra-hazardous the railroad is negligent in not using extra precautions when it blocks the highway,[14] but this information still leaves to be determined what is meant by extra-hazardous.

Questions similar to that in the principal case also arise from various fact situations which do not involve railroads. Where a defendant maintained a defective shed near an alley and the plaintiff's motorcycle skidded over the ice in the alley and hit the shed which fell upon him, it was held that the defendant was liable.[15] On the other hand, where an automobile skidded into a defective bridge, negligently kept by the city, the skidding on the ice and not the negligence of the defendant city was held to be the proximate cause of the injury.[16]

There are several courts which say that if an act of God concurs with the act of the defendant to cause an injury the defendant is nevertheless liable.[17] This principle has been extended to cover a case in which sparks negligently emitted from the defendant's train burned a canvas from the plant bed of the plaintiff, thus making it possible for frost to kill the plants.[18] Here the railroad was held liable on the ground that its negligence was the proximate cause of the injury.

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913 (Mo. 1935); Short v. Pennsylvania R. R., 46 Ohio App. 77, 187 N. E. 737 (1933); Prescott v. Hines, 114 S. C. 262, 103 S. E. 543 (1920).

[12] Mallet v. Southern Pac. Co., 65 P. (2d) 93 (Cal. 1937), *aff'd on rehearing*, 68 P. (2d) 281 (1937).

[13] Missouri-Kan.-Tex. R. R. v. McLain, 105 S. W. (2d) 206 (Tex. 1937) (The court in the principal case cited a decision of the intermediate court in this case as being contra to its holding. However, the state supreme court reversed the holding in the intermediate court so that the final decision is in accord with the principal case.).

[14] See Southern Ry. v. Lambert, 230 Ala. 162, 160 So. 262, 263 (1935); Los Angeles & Salt Lake R. R. v. Lytle, 56 Nev. 192, 47 P. (2d) 934 (1935).

[15] Durst v. Wareham, 132 Kan. 785, 297 Pac. 675 (1931) (In principle this case seems to be contrary to the principal case. Although they are very different otherwise on their facts, in both cases a vehicle skidded over an icy road into a stationary object. It would seem that the skidding bore the same relation to the injury in both cases, but the courts reached different results on the proximate cause point.).

[16] McCracken v. Curwensville Borough, 309 Pa. 98, 163 Atl. 217 (1932) (Here the borough was held liable because it had failed to perform its duty in keeping the ice removed from the streets. The court was definite in pointing out that the ice was the proximate cause of the injury.).

[17] Johnson v. Kosmos Portland Cement Co., 64 F. (2d) 193 (C. C. A. 6th, 1933); Atlantic C. L. R. R. v. Hendry, 112 Fla. 391, 150 So. 598 (1933).

[18] Benedict Pineapple Co. v. Atlantic C. L. R. R., 55 Fla. 514, 46 So. 732 (1908).

From this review of the cases it can be seen that the result in the principal case is in accord with that reached in a majority of the cases with similar fact situations, and under it the railroad is absolved from all liability. Skidding caused by ice or slippery road, but not poor visibility due to fog, rain or snow, prevents defendant's negligence, granting that defendant is negligent, from operating as the proximate cause of the collision. If the cases which say that extra precautions are demanded of the railroad where the condition is extra-hazardous mean anything more than a mere gesture of sympathy from the courts it is suggested that the principal case was a proper one for the use of extra precautions by the railroad. The question whether the railroad should have been aware of the icy condition of the highway might also be raised in an effort to determine whether it should reasonably have foreseen the plaintiff's injury. This would have some bearing on the court's decision as to the proximate cause of the injury. The court could reasonably have held that the negligence of the railroad and not the ice, was the proximate cause of the plaintiff's injury.

C. W. GRIFFIN.

Taxation—North Carolina Gift Tax.

In 1932 with the increase in emergency expenditures and the need for additional revenues mounting, Congress raised the rates on the federal estate tax. Coincidentally with large increases in federal estate tax rates, escape, by means of gifts to prospective heirs, was made more difficult by the enactment of a federal gift tax statute.[1] The purpose of the tax as stated in the report of the Senate Committee on Finance is as follows: "As a protection to both estate and income taxes, a gift tax is imposed." Quick to follow the lead of the federal government the states of Oregon[2] and Wisconsin[3] enacted similar gift taxes the next year. Virginia followed in 1934.[4] Not until 1937, however, did North Carolina,[5] along with Colorado[6] and Minnesota,[7] thus attempt to tap this additional source of revenue.[8]

[1] 47 STAT. 245 (1932), 26 U. S. C. A. §550 (1935). The 1932 act was amended in 1934 whereby the rates were increased and the specific exemption lowered from $50,000 to $40,000. 48 STAT. 758 (1934), 26 U. S. C. A. §§551-554 (1935). The constitutionality of the gift tax was upheld in Bromley v. McCaughn, 280 U. S. 124, 50 Sup. Ct. 46, 74 L. ed. 226 (1929). For a helpful treatise on the federal gift tax see BREWSTER, IVINS, AND PHILLIPS, THE FEDERAL GIFT TAX (1933); WINSLOW, DEATH TAXES (3d ed. 1937) pp. 66-124.

[2] ORE. CODE ANN. (Supp. 1935) §§1601-1628.

[3] Wis. Laws 1933, c. 363 §4.

[4] VA. CODE ANN. (Michie, 1936) app. tax code §120(1).

[5] N. C. CODE ANN. (Michie, Supp. 1937) §7880(156) ee-nn.

[6] COLO. STAT. ANN. (Michie, Supp. 1937) c. 75A.

[7] Minn. Laws 1st Spec. Sess. 1937, c. 70.

[8] Unsuccessful attempts were made to pass gift tax statutes in the following states. 1934—La., Wash.; 1935—Ark., Cal., Pa., Wyo.; 1937—Conn., Del., D. C., Ind. On the problem of jurisdiction, not considered herein, see (1937) 64 TRUST COMPANIES MAG. 577.

The North Carolina tax, like that of the federal government, is levied upon the donor. It is due for the first time on March 15, 1938.[9] While our act is undoubtedly an offspring of the federal tax, yet there are many striking differences between this offspring and its parent. The language of the act suggests many puzzling questions, but an examination of some of its more important provisions, along with the federal act and those of other states, may help to clear up the seemingly ambiguous sections.

I. *RATES*—The rates of the federal tax are approximately three-quarters of the federal estate tax rates, and are graduated according to the amount of the gift.[10] The same rates apply regardless of whether the donee is of the blood of the donor or an utter stranger. As has been pointed out, the tax was passed to offset in a degree the escape from the estate tax by way of gifts. However, the gift tax still furnishes an incentive for the donor to divide part of his estate by way of *inter vivos* gifts. The "bargain" offered by this tax can be illustrated in the following example. Suppose *A* is possessed of a net estate of $1,000,000. If he dies without having disposed of any of this property the estate tax would be $177,800 (reflecting the 80% credit for state taxes). But if *A* gave away $200,000 of this property during his life, the tax on such gift would be only $14,212, even though the gift be only to one person and all made in the same year. This would leave $800,000 to be taxed at his death which tax would amount to $131,400. Thus, by taking advantage of the gift tax rates and splitting the transfers so that each has fallen into a lower tax bracket, *A* saves $32,188 in federal taxes, assuming that the gifts need not thereafter be included in the donor's estate. The division or partial distribution of an estate through gifts will also ordinarily result in reducing the combined total of income taxes assessed against the donor and donees by dropping the donor's income into lower brackets and so reducing his income taxes more than it usually will increase those of the donee.

The rates under the North Carolina statute are the same as those of our inheritance tax,[11] but as our primary death tax is imposed on each beneficiary for his respective gift the saving of taxes by a partial division of the estate during the donor's life will not be as great as under the federal taxes. Unlike the federal tax the rates under our act vary according to the relationship between the donor and the donee.[12] Where the gift is small a saving may be obtained in this state similar to that under the federal act, by gaining the advantage of lower brackets in the income tax.

[9] N. C. CODE ANN. (Michie, Supp. 1937) §7880(156)nn.
[10] 48 STAT. 761 (1934), 26 U. S. C. A. §551 (1935).
[11] N. C. CODE ANN. (Michie, Supp. 1937) §7880(156)ee.
[12] N. C. CODE ANN. (Michie, Supp. 1937) §7880(3)-(5).

II. *EXEMPTIONS*[12a]—(a) *Small gifts.* The federal act provides that the first $5,000 of any gift given to any donee during the calendar year need not be included in the tax return of the total amount of gifts made during such year.[13] Thus a donor may give away an infinite amount of property each year tax-free so long as gifts to any one donee are limited to $5,000. There is no comparable provision in the North Carolina law. In fact, no mention is made of exempting gifts, however small, to a stranger. Hence, following the literal terms of our act, a gift of as trivial an amount as $1 or property of that value would subject the donor to a tax on such gift. The omission to provide an exemption for these small gifts was undoubtedly an oversight on the part of the legislature. Every other state that has enacted a gift tax has provided that such gifts need not be listed in the donor's tax return.[14]

(b) *Specific exemptions*—Provision is made in the federal statute for a specific exemption of $40,000. This may be used by the donor in one year or piecemeal over a period of years until the amounts so used total $40,000.[15] This exemption should not be confused with the unlimited exemption already mentioned which is applicable to small gifts of $5,000 or less. North Carolina has provided for no specific exemption comparable with that of the federal act. Oregon, which provides

[12a] There is no recurring-tax provision in the gift tax act such as that set forth in the inheritance tax law. N. C. CODE ANN. (Michie, Supp. 1937) §7880(12). Accordingly gifts by *A* to *B* of property lately received by *A* as a gift from another are taxable.

[13] 47 STAT. 247 (1932), 26 U. S. C. A. §553(b) (1935). "Gifts less than $5,000. In the case of gifts (other than of future interests in property) made to any person by the donor during the calendar year, the first $5,000 of such gifts to such person shall not, for purposes of subsection (a), be included in the total amount of gifts made during such year."

[14] COLO. STAT. ANN. (Michie, Supp. 1937) c. 75A §9. ". . . no return shall be required in event the transfer by gift to any one person or corporation in any calendar year shall be less than $500, and the first $500 of any such transfer to any person or corporation during any calendar year shall be deemed not to be a gift for any purposes under this chapter." The Minnesota statute provides that the first $2,500 of value in gifts (other than of future interests in property) made to any person by the donor during any calendar year is exempt from the tax. C. C. H. Inher. Estate and Gift Tax Serv. ¶15,045; ORE. CODE ANN. (Supp. 1935) 69 c. 16 §1604. "Gifts less than one thousand dollars ($1,000). In case of gifts (other than of future interests in property) made to any person by the donor during the calendar year, the first one thousand of such gifts to such person shall not, for the purposes of subsection (a) be included in the total amount of gifts made during such year." VA. CODE ANN. (Michie, 1936) app. tax code §120(1). ". . . So much of such property as has the actual value of one thousand dollars and so passes to or for the use of any class C beneficiary shall be exempt from taxation hereunder." (Class C is explained previously as including everyone not included in class A or B.); C. C. H. Inher. Estate and Gift Tax Serv. ¶15,107 (Property of the clear value of $1,000 transferred to any donee in any calendar year is exempt under Wis. statute).

[15] 49 STAT. 1025 (1935), 26 U. S. C. A. §554(1) (Supp. 1936). "In computing net gifts for any calendar year there shall be allowed as deductions: . . . (a)(1) Specific exemption. An exemption of $40,000, less the aggregate of the amounts claimed and allowed as specific exemption for preceding calendar years."

a specific exemption of $10,000, is the only state to follow the federal act in granting such an exemption in addition to the exclusion of small gifts.[16]

(c) *Personal exemptions*—This class of exemptions includes those gifts made to donees who are usually dependent financially upon the donor or connected with him by close blood ties. The federal act, paralleling in theory the federal estate tax, provides for no personal exemptions. Both federal taxes fall upon the donor, and the specific exemptions granted him in both cases bear no relation to the class of the recipient. Though the North Carolina inheritance and gift taxes both provide personal but no specific exemptions, the former tax is levied upon the donee while the donor must bear the latter.

The North Carolina act specifies that the exemptions shall be the same as those set out in the inheritance tax, except that the gift tax statute allows an exemption of $5,000 to each child in any one year, while under the inheritance tax only minor children are allowed that much. Adult children are granted but $2,000.[17] The attempt to enact the gift tax partially by new provisions and partially by referring to and incorporating inheritance tax provisions has resulted in several inconsistencies. For example, the inheritance tax provides that grandchildren of the decedent are allowed collectively the same exemption as their parent *whether he be living or deceased.*[18] But in the gift tax it is provided that grandchildren of the donor are allowed collectively the same exemption as their parent *where such parent is deceased.*[19] Thus, interpreting the gift tax strictly, the grandchildren of the donor would not be allowed the same exemption as their parent unless such parent was deceased at the time of the gift. This inconsistency is undoubtedly the result of faulty draftsmanship and officials of the department of revenue have indicated that in regard to *inter vivos* gifts to the donor's grandchildren, the same exemptions will be allowed whether the parent be living or deceased.

The gift tax specifies no exemptions on gifts to the donor's spouse, while the inheritance tax provides for an exemption of $10,000 for be-

[16] ORE. CODE ANN. (Supp. 1935) 69-1605. "In computing net gifts for any calendar year there shall be allowed as deductions: (a) Specific Exemption. A specific exemption of ten thousand dollars [$10,000.], less the aggregate of the amounts claimed and allowed as specific exemption for preceding calendar years."

[17] N. C. CODE ANN. (Michie, Supp. 1937) §7880(3)-(5). Those entitled to exemptions under the inheritance tax are as follows: minor children, $5,000 each; adult children, $2,000 each; widow, $10,000; widower, $2,000; grandchildren collectively the same exemption as their parent. Lineal issue or lineal ancestors not specifically mentioned above are allowed $2,000 each.

[18] N. C. CODE ANN. (Michie, Supp. 1937) §7880(3).

[19] N. C. CODE ANN. (Michie, Supp. 1937) §7880(156)ee. ". . . Children of a deceased parent shall be allowed collectively the same amount of exemption as a child of the donor."

quests to a decedent's widow and $2,000 on bequests to a widower.[20] Did the legislature intend that the same exemptions applicable to *bequests* between spouses should also apply to *gifts* between them? Here again the tax officials have informed the writer that the act will be interpreted as applying like exemptions in both cases. There is no apparent reason why some exemptions should not be allowed on gifts between spouses. Other states have specifically provided such exemptions.[21]

The next question is the extent to which these personal exemptions are allowable. The statutes of other jurisdictions specify in clear language whether they are allowable annually or but once.[22] The North Carolina act states, "The total exemptions that may be allowed under this section shall not exceed eight times the exemption allowed for a single year."[23] While this provision may be subject to one or more interpretations it seems safer to say that it would be construed to mean that the total exemptions allowed to any one donee would be eight times the exemption allowed to such donee for any one year. This would seem to be the logical construction in view of the fact that the exemptions to all donees are not the same. For example, if donor *A* wanted to make a series of gifts to each of his children and to his father, he would be allowed to give each child $40,000 and his father $16,000. This is the construction that is placed upon this provision by the Department of Revenue. In order to take advantage of the maximum allowed, the gifts must be spread over a minimum period of eight years. And according to the revenue officials no "swapping" of exemptions from one donee to another is allowed.

(d) *Charitable exemptions*—In enumerating the class of donees to

[20] See note 18, *supra.*

[21] COLO. STAT. ANN. (Michie, Supp. 1937) c. 75A §5. "Transfers to a wife shall be taxable only to the extent that the value of the property transferred exceeds twenty thousand ($20,000.00) dollars and transfers to any other person in Class A [this includes husband] shall be taxable only to the extent that the value of the property exceeds ten thousand ($10,000.00) dollars."; Minn. Laws 1st Spec. Sess. 1937, c. 70 (wife $10,000, husband $10,000); Ore. Laws 1937, c. 250 (donor entitled to annual exemption of $5,000 from the total amount of gifts made to the spouse); VA. CODE ANN. (Michie, 1936) app. tax code §120(1). "So much of such property as has the actual value of five thousand dollars and so passes to or for the use of any class A beneficiary [husband and wife are included under this class] shall be exempt from taxation hereunder."; C. C. H. Inher. Estate and Gift Tax Serv. ¶15,107 (personal exemptions of $15,000 to the wife and $2,000 to the husband under Wis. statute).

[22] COLO. STAT. ANN. (Michie, Supp. 1937) c. 75A §5. "The exemption, at the option of the donor or donors may be taken in its entirety in a single year, or be spread over a period of five years in such amounts as he or they see fit, but after the limit has been reached no further exemption is allowable."; Minn. Laws 1st Spec. Sess. 1937, c. 70 (exemptions allowed once); Ore. Laws 1937, c. 250 (The donor is entitled to an annual exemption of $5,000 from the total amount of gifts made during the calendar year to each donee, *etc.*); VA. CODE ANN. (Michie, 1936) app. tax code §120(1) (No mention is made as to the extent of the exemptions, but the implication from the act is that they are allowable yearly); Wis. Laws 1933, c. 363 §4(6) (full exemptions allowed once; annually thereafter an exemption equal to one-fifth the full exemptions).

[23] N. C. CODE ANN. (Michie, Supp. 1937) §7880(156)ee.

which charitable gifts may be made the federal act follows almost *verbatim* the provisions of the federal estate tax.[24] The donees listed in the North Carolina act[25] are practically the same as those of our inheritance tax, except that there is no specific mention made in the gift tax, in the language of the inheritance tax,[26] of exempting transfers made to institutions incorporated in other states which receive and disburse funds donated in this state. While the provisions of the gift tax[27] and the inheritance tax are verbally dissimilar, yet the purposes of the two are similar and it is likely that the court will make no distinction in their construction.

In both the federal tax and North Carolina tax charitable gifts may be deducted only if the charitable gifts are first included in the report of the total gifts for the year.[28] The amounts which may be given are unlimited and this exemption is exclusive of all other exemptions. In both the federal and North Carolina acts no provision is made for deductions on charitable gifts to individuals.

III. *COMPUTATION*—The federal tax is unique in that in ascertaining the rates applicable to the net gifts of any year, the gifts of the donor for all preceding years back to and including the calendar year 1932 must be considered.[29] The first step in the determination of the tax is to ascertain the amount of net gifts for the calendar year. Gifts of $5,000 or less made to any beneficiary, as already pointed out, need

[24] 47 STAT. 247 (1932), 48 STAT. 760 (1934), 26 U. S. C. A. §554(a)(2) (1935) (gift tax); 44 STAT. 72 (1926), 47 STAT. 282 (1932), 48 STAT. 755 (1934), 26 U. S. C. A. §412(d) (1935) (estate tax). In both taxes in order for the donor to deduct the gift the donee must meet three tests: (1) It must be organized and operated for one or more of the purposes specified in the statute; (2) it must be organized and operated exclusively for such purpose or purposes; and (3) no part of its earnings shall inure to the benefit of private shareholders or individuals.

[25] N. C. CODE ANN. (Michie, Supp. 1937) §7880(156)ee. ". . . so much of such property as shall pass exclusively . . . for charitable, educational or religious purposes within this state, and so much of such property as shall so pass for the exclusive benefit of any institution, association, or corporation in this state, the property of which is exempt from taxation by the laws of this state, shall be exempt from any and all taxation under the provisions of this article."

[26] N. C. CODE ANN. (Michie, Supp. 1937) §7880(2)(c). "Property passing to religious, educational, or charitable corporations, not conducted for profit, incorporated under the laws of any other state, and receiving and disbursing funds donated in this state for religious, educational, or charitable purposes." (Note: Taken literally it would be sufficient if the donee merely received funds donated in this state. It would likely be construed as meaning the donee must also disburse the funds in North Carolina.)

[27] N. C. CODE ANN. (Michie, Supp. 1937) §7880(156)ee. ". . . the property of which is exempt from taxation *by the laws of this state* [italics ours], shall be exempt from any and all taxation under the provisions of this article." This would seem to be referring to N. C. CODE ANN. (Michie, Supp. 1937) §§7971 (129)(8), (130)(8).

[28] 47 STAT. 247 (1932), 26 U. S. C. A. §554(c) (1935); N. C. CODE ANN. (Michie, Supp. 1937) §7880(156)ee. While accomplishing the same result, the federal statute handles this situation by means of a deduction; the North Carolina act by means of an exemption.

[29] 47 STAT. 246 (1932), 26 U. S. C. A. §551 (1935).

not be considered in the return, nor the first $5,000 of any larger gift. In ascertaining the total net gifts for the year so much of the $40,000 specific exemption as the donor prefers to use during that year may be deducted from the total of all gifts made during such year. Charitable gifts are included in the return but may then be deducted when they meet the statutory requirements. After following the above steps the donor will have reached the total net gifts for the year. But before computing the tax he must compile a total of all net gifts made for the preceding years beginning with 1932. The net gifts for the preceding years are then added to the net gifts of the current year. On this total the tax is figured at the current rates. But before arriving at the final amount a tax figured only on the gifts for the preceding years, at the present rate, is subtracted therefrom.

There is some doubt as to whether or not the North Carolina tax is cumulative. Our act specifies, ". . . where two or more gifts are made in excess of the exemption the tax shall be calculated on the total amount of gifts in excess of the exemption."[30] This may be construed to mean that where taxable gifts are made to the same beneficiary in different years, the tax will be computed on the total amount of taxable gifts; then, after subtracting the amount of tax for taxable gifts in prior years, the difference will amount to the tax for the current year.[31] Thus by following the above interpretation the same method of computation would be employed as under the federal act. Literally the act seems to say that the tax is to be computed on the total of all taxable gifts made for the current year. But to follow this construction in all cases would result in a mathematical impossibility because different rates are applicable to different donees, and where gifts were made to members of different classes no common table could be used in computing the total. It also seems unlikely that the legislature intended the tax to be cumulative as between years, without an express statement to this effect, in view of the great difference in amounts resulting from the two methods of computation. It is more probable that this provision will be construed to mean that in computing the tax for any year, a total of all taxable gifts made to one donee for that year will be the basis for such computations.

Although under the North Carolina act the rates are the same for both the inheritance and the gift taxes, in the computation the tax on the gifts will actually figure less. For example, donor *A* bequeaths $100,000 to donee *B*, a stranger. The tax falls upon *B* and would be computed on the entire $100,000 even though *B* would only receive

[30] N. C. CODE ANN. (Michie, Supp. 1937) §7880(156)ee.

[31] This is the view taken by Prof. Charles L. B. Lowndes of the Duke University Law School. (1937) 64 TRUST COMPANIES MAG. 569.

$89,850 after paying the tax of $10,150. But if *A* gave *B* $89,850 by *inter vivos* gift the tax would fall upon *A* and amount to only $9,033.50. Thus if the gift had been made *inter vivos,* $1,116.50 would have been saved.

IV. *PROPOSED CHANGES*—By reason of the difficulties of construction to which the present act is subject, it is proposed that several changes be made by the next legislature. Furthermore, other suggestions will be made which should add to the effectiveness of the tax and enlarge the revenue to be derived therefrom.

Before passing such a tax it would seem logical to consider the underlying purpose for its enactment. If its sole purpose is to produce added revenue for the state treasury then there can be seen no reason why the rates and exemptions should be the same as those of the inheritance tax, because both historically and practically there is little similarity between the right of an individual to transfer property by *inter vivos* gift and the right to bequeath it by testamentary disposition. If the purpose of the tax is to prevent the escape from inheritance taxes then the rates and exemptions of both taxes should be practically the same. If, however, there is the additional purpose of encouraging the immediate "splitting up" of large estates then the rates of the tax should be lower than those of the inheritance tax and the exemptions more liberal.[32]

The present tax will likely produce little revenue on account of the liberal personal exemptions that are allowed. In the majority of cases it is improbable that the state will derive one cent.

For example if donor *A* had five children, a wife, and both parents living he would be able to give, over a period of eight years, property tax-free to the value of $40,000 to each of his five children, $80,000 to his wife, and $16,000 to each of his parents, a grand total of $312,000! As someone has said, "*A* is allowed to die eight times." If *A* decided to dispose of this property by testamentary disposition a total of only $39,000 would be exempt from the inheritance tax. Hence, assuming that the legislature attempted to prevent escape from our inheritance tax, the above hypothetical case illustrates the futility of this attempt, except with respect to estates measured in millions. To prevent the transfer of large amounts of property tax-free it is proposed that the personal exemptions be allowed but once with respect to each beneficiary. It is further proposed that a specific exemption be

[32] See Magill, *Federal Regulation of Family Settlements* (1937) 4 U. OF CHI. L. REV. 265. Under the North Carolina Revenue Law when property has been given and the gift tax paid, that property is not later to be included for inheritance taxation in the donor's estate, even, it seems, if the gift turns out to have been made in contemplation of death. See N. C. CODE ANN. (Michie, Supp. 1937) §7880(1) (third).

allowed which could be used with respect to gifts to donees not entitled under the statute to personal exemptions. Many such gifts should be encouraged regardless of the relationship between the donor and donee. The amount could be set at a figure smaller than any of those allowed to donees entitled to personal exemptions. By specifying that this exemption be allowable only on gifts to strangers the total already allowed for personal exemptions would not be increased.

That the tax should provide an exemption on *all* gifts of small or trifling value, as a matter of practical convenience, seems hardly debatable. As previously pointed out, the present act exempts no gift, however small in value, unless made to one of a class entitled to personal exemptions. Department of Revenue officials admit the impossibility of enforcing the present law in this respect. Cases are likely to arise where the donor and the tax officials will disagree as to the insignificance of a particular gift. Without a statutory line of demarcation it would be difficult to predict where insignificance ends and substantiality begins. The Colorado statute specifies, ". . . the first $500 of any such transfer to any person or corporation during any calendar year shall be deemed not to be a gift. . . ."[33] While it would seem reasonable to relieve the donor from listing all gifts of $500 or less, there is apparently no reason for following the Colorado statute to the extent of exempting the first $500 where the gift is of a larger amount. The purpose of such a provision should be to exempt trifling gifts and not to extend the exemption on larger amounts.

As has been pointed out, the table of rates provided by reference to the inheritance tax has proved to be impracticable. Any single table, however ingeniously drawn, would hardly be workable for both taxes on account of the obvious differences in the two. *A new and separate table of exemptions and rates should be devised for the gift tax.*

It is further suggested that the date when the tax falls due be changed from March the fifteenth, because both the income tax and the tax on intangible personal property are due on this date, and the payment of these taxes at one time will work an undue hardship on the taxpayer. In most cases a person taxable under the gift tax would also be taxed on income and intangible personal property. Such a change would materially benefit the taxpayer, yet in no way prejudice the state.

HARRY LEE RIDDLE, JR.

THE NORTH CAROLINA STATE BAR

The January meeting of the Council of the North Carolina State Bar occurred too late for inclusion of a summary of its proceedings in the February issue of the LAW REVIEW.

[33] COLO. STAT. ANN. (Michie, Supp. 1937) c. 75A §9.