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NOTES AND COMMENTS

Automobiles—Protection of the Accident Victim—Survey of Financial Responsibility Laws

In the case of *Reitz v. Mealey*¹ the United States Supreme Court held constitutional the New York Automobile Financial Responsibility Law.² The Court held that the law, as amended in 1936³ and in 1939,⁴ was neither a violation of the due process clause nor of the Federal Bankruptcy Act.⁵ The New York Act represents the latest development in the field of Financial Responsibility Laws. In addition to the usual

¹ *Reitz v. Mealey*, 62 S. Ct. 24, 86 L. ed. Adv. Ops. 8 (1941).

² CONSOL. LAWS OF N. Y., c. 71, §94b.

³ NEW YORK LAWS 1936, c. 448.

⁴ NEW YORK LAWS 1939, c. 618.

⁵ 42 STAT. 354 (1922); 11 U. S. C. A. 35 (1927).

provision found in these laws for restoration of driver's license and registration certificates (upon payment of judgment and proof of financial responsibility) this act provided that upon written permission of the unpaid judgment creditor, the debtor's license may be restored for a period of six months without the necessity of first paying the judgment. The act further provided that the clerk of court was under a duty to certify an unpaid judgment only upon the written demand of the judgment creditor or his attorney.

During recent years, because of the widespread use of the highways, and the increased number of cars owned by those persons who are not responsible financially, a major social problem has arisen in the form of the uncompensated motor accident victim.⁶ Fortunately, society has recognized this problem, and by various methods has attempted to solve it. The judiciary of some nineteen states has met this problem in part by the adoption of the Family Purpose Doctrine.⁷ In other instances the agency concept has been expanded (by statute as well as by judicial decision) until in some jurisdictions the fact that one is driving another's car gives rise to a presumption of agency.⁸ Massachusetts has enacted the compulsory insurance law.⁹ Out of certain investigations carried on by other legislatures has come the suggestion of an automobile compensation plan patterned after the Workman's Compensation Acts.¹⁰ Some thirty-four American jurisdictions have attempted solution by enacting some form of a Financial Responsibility Law.

The first Financial Responsibility Law was enacted in Connecticut in 1925, to go into effect in 1926.¹¹ This act in its original form was repealed in 1931,¹² and replaced by the present law of Connecticut.¹³ Minnesota followed suit in 1927, and added the additional feature (now found in practically all of the acts) of requiring proof of financial responsibility on conviction of certain violations of the motor vehicle code.¹⁴

A bare two years after these statutes began to operate, the American Automobile Association began to sponsor this form of law. In 1928 the first draft of their model act ("The Uniform Motor Vehicle Safety

⁶ Studies made in Connecticut show that in one year 62 per cent of those injured temporarily and 72 per cent of those injured permanently received less than their actual expenses as compensation. Of the amount which was received 14 per cent came from sources other than those responsible for the accident. Corstvet, *The Uncompensated Accident and Its Consequences* (1936) 3 LAW & CONTEMP. PROB. 466.

⁷ See, McCall, *The Family Automobile* (1930) 8 N. C. L. REV. 256.

⁸ *Young v. Mosci*, 289 U. S. 253, 53 S. Ct. 599, 77 L. ed. 1158 (1933); McCall, *The Family Automobile* (1930) 8 N. C. L. REV. 256.

⁹ 3 ANN. LAWS OF MASS. (1930) c. 9, §34 (a-j).

¹⁰ FRENCH, *AUTOMOBILE COMPENSATION PLAN* (1933).

¹¹ CONN. LAWS 1925, c. 183.

¹² GEN. STAT. OF CONN. (1935 Supp.), §621(c).

¹³ CONN. LAWS 1931, c. 254.

¹⁴ LAWS OF MINN. 1927, c. 351, §§1-22.

Responsibility Law") was presented. This act was revised in 1930, again in 1932, and again in 1935.¹⁵ It has been adopted in some form or variation in at least twenty states. A draft of a law which was somewhat like that of the A.A.A., but which avoided some of its weaknesses, was submitted in 1930 by the National Conference of Commissioners on Uniform State Laws.¹⁶ This act has been adopted by one state and one territory. These organizations, along with other sponsors, have been very energetic in their support of the Financial Responsibility Laws, especially where the legislatures of the states were seriously considering either the Compulsory Insurance plan or the Automobile Compensation plan. The cause for this energy can readily be seen when the nature of the sponsors is examined closely. Most of them either issue insurance on automobiles or have some close connection with insurance companies.

These Responsibility laws, though far from uniform, are all based on the common plan of securing some proof of financial responsibility from those motorists who have shown themselves most likely to produce damages. Generally these laws provide that upon conviction of certain enumerated violations of the motor vehicle code and/or proof of an unsatisfied judgment stemming from an automobile accident, the commissioner of vehicles is to suspend the driver's license of the person so involved, and, if that person owns the car, to take his registration papers away. This suspension or revocation can only be lifted when the person convicted furnishes proof in the specified manner (by presentation of an insurance policy, a surety bond, or certain securities) that he will be responsible for damages done in the future. Usually this proof must be maintained for a specified period, at the end of which, if the person's driving record is satisfactory, the proof will no longer be required. Most of the states provide that if the person suffering such a judgment or conviction is a chauffeur, the owner of the auto may furnish the required proof, and license will be issued to the chauffeur on the condition that he may drive his employer's car only.

Many states make payment of the unsatisfied judgment, as well as proof of financial responsibility, a condition precedent to restoration. Where such is the case there is a uniform provision that credit of certain amounts on judgments for large sums will be considered payment, and that, with the court's permission, payment may be by installments.

Other provisions are to the effect that a discharge in bankruptcy is not payment. The Supreme Court, in upholding this provision, said in the *Reitz* case: "The penalty which [the statute] imposes for injury due to careless driving is not for the protection of the creditor merely,

¹⁵ Note (1937) 12 WIS. L. REV. 96. ¹⁶ Note (1937) 12 WIS. L. REV. 96.

but to enforce a public policy that irresponsible drivers shall not, with impunity, be allowed to injure their fellows. The scheme of the legislation would be frustrated if the reckless drivers were permitted to escape its provisions by the simple expedient of ordinary bankruptcy, and, accordingly, the legislature declared that a discharge in bankruptcy should not interfere with the operation of the statute."¹⁷

In support of the Financial Responsibility Laws, many writers have compared their results with those derived from the compulsory insurance plan.¹⁸ Financial Responsibility Laws are said to have produced the following results: (1) promoted careful driving (carelessness imposes the necessity of proving responsibility); (2) segregated the careless motorist; (3) promoted voluntary insurance; (4) promoted an increase in voluntary settlements out of court; (5) they are consistent with sound underwriting principles (undesirable risks are not forced on the carriers); and (6) they do not impose a burden on the careful motorist. In connection with the compulsory insurance plan, these writers say that the following undesirable results are produced: (1) carelessness is sponsored by removal of fear of loss; (2) insurance rates are caused to skyrocket; (3) exaggerated claims are induced; (4) juries are influenced in favor of the plaintiff; (5) such compulsory insurance is one of the manifestations of the rising tide of socialism; (6) the innocent motorist is unduly burdened; (7) the poor man is driven off the road; (8) automobile and accessory business is adversely affected; (9) and it has proved unsatisfactory in Massachusetts.

Although all of these arguments are either not borne out by the record or are answerable, the courts generally have favored these laws. They have almost unanimously been held to be constitutional,¹⁹ and the courts have been very sympathetic in attempting to effectuate the purpose of these laws in construing them.²⁰

These statutes fall quite naturally into four broad categories, with variations in each category.²¹ In Class I proof of financial responsibility must be furnished, and the unsatisfied judgment paid; proof must also be furnished in consequence of certain violations of the motor vehicle code. Twenty-one states, one territory, and the District of Columbia,

¹⁷ *Reitz v. Mealey*, 62 S. Ct. 24, 27, 86 L. ed. 8, 11 (1941). But see, *In Re Perkins*, 3 F. Supp. 697 (N.D.N.Y. 1933); *In Re Hicks*, 133 F. 739 (N.D.N.Y. 1905).

¹⁸ Note (1931) 16 N.Y.U.L.Q. 126, 132.

¹⁹ *Hedge Co. v. Cincinnati*, 284 U. S. 335, 52 S. Ct. 144, 76 L. ed. 323 (1931); *Sprout v. South Bend*, 277 U. S. 163, 48 S. Ct. 502, 72 L. ed. 833 (1928); *Packard v. Banton*, 264 U. S. 140, 44 S. Ct. 257, 68 L. ed. 596 (1924); *Munz v. Harnett*, 6 F. Supp. 158 (S.D.N.Y. 1933); *Watson v. State Division of Motor Vehicles*, 212 Cal. 279, 298 Pac. 481 (1931); *In Re Opinion of Justices*, (Mass.) 147 N. E. 680, 681 (1925).

²⁰ *Walashin v. Century Indemnity Co.*, 116 N. J. L. 577, 186 Atl. 45 (1936).

²¹ Note (1937) 12 Wis. L. Rev. 96.

have adopted laws which fall into this class. They are: Arizona,²² California,²³ Colorado,²⁴ Delaware,²⁵ District of Columbia,²⁶ Hawaii,²⁷ Kansas,²⁸ Kentucky,²⁹ Idaho,³⁰ Illinois,³¹ Indiana,³² Maryland,³³ Michigan,³⁴ Montana,³⁵ Nebraska,³⁶ New Hampshire,³⁷ New Jersey,³⁸ New York,³⁹ North Carolina,⁴⁰ Oregon,⁴¹ Pennsylvania,⁴² Washington,⁴³ West Virginia,⁴⁴ and Wisconsin.⁴⁵

As shown in the *Reitz* case, New York varies somewhat from the usual pattern by providing that the judgment creditor may cause the suspension to be lifted by giving his permission, and that the clerk of court is under a duty to certify an unsatisfied judgment only when the judgment creditor so demands. These provisions constitute added inducements to the debtor to satisfy the existing judgment; but in so providing these inducements, the legislature has robbed the statute, to a large extent, of its power to secure financially responsible drivers in the future.

The Kansas statute provides that when a judgment remains unsatisfied for three years, and the judgment debtor shows that he is unable to pay it or to produce evidence of financial responsibility, his license and registration certificates shall be restored. Such a provision is unfortunate in that it will return to the highway those motorists who have demonstrated that they are absolutely financially irresponsible.

The District of Columbia and Montana provide that a discharge in bankruptcy will constitute payment.

New Hampshire requires that the commissioner shall suspend the license of any motorist involved in an accident which causes more than \$25 damage. The suspension is to continue until the person has re-

²² CODE OF ARIZ. (1939) §§66-248.

²³ VEHICLE CODE OF CAL. (1937) §§410-418.

²⁴ COLO. STAT. ANN. (1935) c. 16, §§39-75.

²⁵ REV. CODE OF DEL. (1935) §§5705-12.

²⁶ D. C. CODE (1939) tit. 6, §255 (a-o).

²⁷ REV. LAWS OF HAWAII (1935) §§2680-2706.

²⁸ GEN. STAT. OF KAN. (1939 Supp.) §§8-701 to 8-721.

²⁹ CARROLL'S KY. STAT. (Baldwin, 1936 Revision) §§2739n1-36.

³⁰ IDAHO SESS. LAWS 1939, c. 117.

³¹ ANN. ILL. STAT. (Smith-Hurd, 1938) c. 95, §38 (B-K).

³² IND. ACTS 1939, c. 73.

³³ ANN. CODE OF MD. (1939) Art. 56, §§165-181.

³⁴ MICH. STAT. ANN. (1933) §§9.1541-47.

³⁵ MONT. SESS. LAWS 1937, c. 129; 1939, c. 89.

³⁶ NEB. CONSOL. STAT. (1939 Supp.) §§60-601 to 60-624.

³⁷ N. H. LAWS 1937, c. 161; 1939, c. 49.

³⁸ 39 N. J. STAT. ANN. (1931) §§6-2 to 6-22.

³⁹ CONSOL. LAWS OF N. Y. (1941) c. 71.

⁴⁰ N. C. CODE ANN. (Michie, 1939) §2621 (112-126).

⁴¹ 8 ORE. COMP. LAWS ANN. (1940) §§115-401 to 115-437.

⁴² STAT. OF PA. ANN. (Purdon, 1931) §1253.

⁴³ LAWS OF WASH. 1939, c. 158.

⁴⁴ W. VA. CODE (1937) §1721 (1-19).

⁴⁵ WIS. STAT. (1937) §85.08.

ceived a release or a judgment in his favor, or has satisfied an adverse judgment, and, in either case, filed proof of financial responsibility. If the injured or aggrieved party has not brought suit within one year the statute allows the commissioner to issue such persons new licenses.

Pennsylvania provides that proof must be furnished by a driver who has had two or more accidents in any twelve-month period and has not as yet settled therefor.

Indiana provides that proof of responsibility must be maintained only one year in the case of first offenders and three years for multiple offenders.

North Carolina, probably out of an excess fear for the constitutionality of the statute, provides that if the offender is a resident of the state his license may be restored on payment of the judgment *or* presentation of proof of responsibility. However, in the case of non-residents the provision is that there must be payment *and* proof. This would seem to raise a constitutional question of discrimination.⁴⁶

Statutes in Class II make no requirement that the unsatisfied judgment be paid, but provide that if the judgment debtor files proof of responsibility he may continue to operate his vehicle. Minnesota,⁴⁷ Ohio,⁴⁸ Vermont,⁴⁹ and Virginia⁵⁰ have adopted this type of statute.

Statutes in Class III provide only for payment of the unsatisfied judgment. Iowa,⁵¹ Maine,⁵² South Dakota,⁵³ and Virginia⁵⁴ have enacted laws of this type.

Virginia is listed in both Class II and III since, while it provides primarily for payment of the judgment, if after a year the commissioner feels that the debtor has made a bona fide effort to pay, he may issue license upon presentation of proof of responsibility.

Class IV deals with offenders against the motor vehicle code only. Here there is no mention of unsatisfied judgment. Connecticut,⁵⁵ Rhode Island,⁵⁶ and North Dakota⁵⁷ have enacted laws of this type.

Connecticut requires proof of financial responsibility of anyone who is shown to be responsible for an accident resulting in death.

To evaluate these statutes the results attained by them must be weighed against the results expected of them. It is claimed that these

⁴⁶ See, Legislation (1930) 9 N. C. L. Rev. 384.

⁴⁷ LAWS OF MINN. 1933, c. 351, §§1-22.

⁴⁸ OHIO GEN. CODE (Page, 1935) §6298-1.

⁴⁹ PUB. LAWS OF VER. 1933, §§5190 to 5199.

⁵⁰ VA. CODE ANN. (Michie, 1936) §2154 (204-8).

⁵¹ CODE OF IOWA (1939) §§5021.01, et. seq.

⁵² REV. STAT. OF MO. (1930) c. 29, §§91 to 98.

⁵³ CODE OF S. D. (1939) §44.0504.

⁵⁴ VA. CODE ANN. (Michie, 1936) §2154 (204-8).

⁵⁵ GEN. STAT. OF CONN. (Supp. 1931, 33, 35) §621c.

⁵⁶ GEN. LAWS OF R. I. (1932) c. 98, §§1-17.

⁵⁷ LAWS OF N. D. 1939, c. 167.

laws will segregate the bad driver from the good, but obviously they will not be as effective as a well-administered license law.⁵⁸ Under the present statutes a thoroughly irresponsible driver may furnish proof of his ability to respond in damages and be allowed to drive, whereas a competent driver might be unable to furnish such proof. Thus, the failure to achieve segregation becomes apparent.

Everyday observation shows the invalidity of the claim that these laws will prevent or decrease automobile accidents.⁵⁹ "The argument is that the fewer bad drivers on the road the fewer accidents we have. Unfortunately the accident rate in the various states seems to have little or no relation to the number of revocations or suspensions. The question is whether the responsibility laws, independent of revocation, decrease accidents. The answer is obvious when it is seen that proof of financial responsibility nullifies many suspensions and revocations."⁶⁰

It is claimed that these laws compel the known bad driver to insure; but this cannot be, for the class that is intended to be reached is by far too small to include the known bad drivers. This class is not effectively reached. Only the bad driver is aimed at, but before this class can be segregated they must be allowed to show their propensities—they must be allowed to have their "first bite". Conceding that after these tenden-

⁵⁸ Feinsinger, *Operation of Financial Responsibility Laws* (1936), 3 LAW & CONTEMP. PROB. 519, 522.

⁵⁹ Over two per cent (30,114) of all the deaths (1,381,491) in the United States in 1938 were caused by auto accidents. VITAL STATISTICS OF THE UNITED STATES (1938) Part II, Table 6, p. 93. AUTO FACTS AND FIGURES (1924-36), a publication of the Automobile Manufacturers Association, Inc., gives the following table as indicative of the steady increase in traffic accidents:

Year	Number of Fatalities Per 100,000 Autos Registered
1917	178
1918	154
1919	130
1920	119
1921	118
1922	112
1923	109
1924	100
1925	100
1926	105.9
1927	110.9
1928	111.8
1929	117.3
1930	122.5
1931	129.8
1932	121.6
1933	132
1934	145

In connection with the contention in the body of the note, it is interesting to observe that the first consistent climb in the accident rate began in the year (1926) in which the first financial responsibility law went into effect.

⁶⁰ Feinsinger, *The Operation of Financial Responsibility Laws* (1936), 3 LAW & CONTEMP. PROB. 519, 523.

cies have been shown the class is indicated, a conviction or final judgment must be had before proof of financial responsibility is required.⁶¹

It is believed that the Financial Responsibility Laws are not very effective in securing the payment of past judgments. In many states the judgment must be above a certain minimum amount to come within the statute. Statistics show that the actual number of cases where proof is required after judgment is very small.⁶²

It is claimed that Financial Responsibility Laws increase the proportion of insured cars and drivers. Conceding this to be so, would not this result follow from any law which publicized the desirability of insurance?⁶³

The desirability of these laws—to some people, at least—is attested by the fact that they have enjoyed such widespread and continuous popularity; but as one surveys the field the conclusion is almost inevitable that the chief attainment of these laws has been to serve as a sedative for those who should have the solution of the problem of the uncompensated motor accident most at heart. Little, if anything, has been solved by these laws. It would certainly be to the interest of society to discard such laws and find a more satisfactory means of assuring the victim of a motor vehicle accident of satisfactory compensation.

FRED R. EDNEY.

Contracts—Gratuitous Service—Rebutting Evidence — Pleading—Recovery on Quantum Meruit When Express Contract Pleaded

In *Graham v. Hoke*,¹ *P* alleged that for several years prior to decedent's death, she had worked for decedent, at his request, both in his house and in his store; that she was not receiving any weekly pay, but "was treated as a member of (decedent's) family", decedent informing her that she would be taken care of at his death and "giving her [a]

⁶¹ The weakness of the requirement that a conviction or a final judgment must be obtained before proof of financial responsibility is required lies in the fact that (a) a conviction may be reversed, may never be recorded, or may possibly in other ways escape the attention of the commissioner of vehicles; and (b) that judgment may never be taken, the action may be compromised, the injured person may never sue, judgment may be set aside or vacated, or it may not exceed the amount required by statute as a condition precedent to requiring proof of ability to respond in damages. Feinsinger, *The Operation of Financial Responsibility Laws* (1936), 3 LAW & CONTEMP. PROB. 519, 524.

⁶² Feinsinger, *The Operation of Financial Responsibility Laws* (1936), 3 LAW & CONTEMP. PROB. 519, 528. In Connecticut in 1930, financial responsibility laws caused payment of 18 claims out of 88 complaints and 13,585 cases of personal injury and property damage. REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS TO THE COLUMBIA UNIVERSITY COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES (1930), p. 102.

⁶³ Feinsinger, *The Operation of Financial Responsibility Laws* (1936), 3 LAW & CONTEMP. PROB. 519, 529.

¹ 219 N. C. 755, 14 S. E. (2d) 790 (1941).

contract . . . as evidence of his promises and intentions." The alleged "written agreement" was in the form of a check, payable to plaintiff at the death of the drawer, decedent. The lower court overruled a demurrer to the complaint by decedent's administratrix, but this was reversed on appeal. The Supreme Court, without citing authority, gave the following reasons for reversal: (1) The check was invalid as a written contract; (2) Since "It is specifically alleged that plaintiff *was a member* (italics supplied) of the family" she was "presumed to have rendered the alleged services gratuitously, and in the absence of a valid special contract that she was to be paid therefor there is no cause of action alleged"; and (3) Since plaintiff declared only on a "written agreement" as a special contract, she is not entitled to a recovery on *quantum meruit*.²

Since the death of the drawer terminates the authority of the bank to pay,³ it may be assumed and granted that the check was invalid *as a check*. Still, if there was consideration for the check,⁴ the drawer

² The court said further that plaintiff "may have pleaded an implied contract as well as a special contract in the alternative, but when the case came on for trial she could have been compelled to elect upon which declaration she would proceed." Even this requirement of an election is doubtful under the past liberality of North Carolina procedure [McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE (1929) 377, 420], but assuming this to be the correct rule, it seems to be no reason for sustaining a demurrer to the complaint.

³ Guild v. Eastern Trust & Banking Co., 122 Me. 514, 121 Atl. 13 (1923); Zane, *Death of the Drawer of a Check* (1904) 17 HARV. L. R. 104; OGDEN, NEGOTIABLE INSTRUMENTS (4th. ed, 1938) 462; Note (1913) 43 L.R.A. (N.S.) 109; 7 AM. JUR. 440 (Banks §606).

⁴ Foxworthy v. Adams, 136 Ky. 403, 124 S. W. 381 (1910); Keeler v. Hiles' Estate, 103 Neb. 465, 172 N. W. 363 (1919); Zane, *supra* note 3, at 106.

It is generally conceded today that the payee of a check given to him, either *inter vivos* or *causa mortis*, without consideration, cannot enforce payment of the same. [Brissler v. Russell, 197 Ia. 166, 197 N. W. 22 (1924); Guild v. Eastern Trust and Banking Co., 122 Me. 514, 121 Atl. 13 (1923); Notes (1922) 20 A. L. R. 177, (1926) 44 A. L. R. 625, (1928) 53 A. L. R. 1119.] Prior to the adoption of the Uniform Negotiable Instruments Law, there was some conflict of authority on this point. The minority of the courts held that such a gift was valid and that payment of the check could be enforced, reasoning that the check operated as an assignment of that amount of money from the maker's bank account; the check thus being an executed gift, with only performance delayed. The majority denied this rule, holding that a check was not an assignment of specific funds, therefore payment could not be enforced for there was no consideration for the maker's promise to pay. The Uniform Negotiable Instruments Law adopted the latter view [N. I. L. §189; N. C. CODE (Michie, 1939) §3171; Note (1913) 43 L. R. A. (N. S.) 109; 7 AM. JUR. 383 (Banks §532)], resolving the conflict of decisions.

In defendant's appellate brief, much consideration was given to the definition of the word "give" contained in the complaint. This was not discussed in the report of the case, but it seems worthwhile to mention this in connection with the consideration question. Plaintiff alleged that decedent informed her that "she would be taken care of at his death and *giving* (italics supplied) her the contract" as evidence of his promises. Defendant contended that this was equivalent to admitting that the check was without consideration. It is true that the technical definition of the word "give" implies a gratuity, but it is a matter of common knowledge that it is used popularly in the sense of transferring, delivering, or handing over. [Crawford v. Hurst, 307 Ill. 243, 138 N. E. 620 (1923); 3 WORDS AND PHRASES (5th ed.) 27; WEBSTER'S NEW INTERNATIONAL DICTIONARY

would be liable thereon, or for that amount, for the check implies a binding obligation to pay on the part of the drawer,⁵ or in case of his death on the part of his executor or administrator.⁶ Numerous cases hold that a check is a sufficient memorandum of an oral agreement upon which liability may be based;⁷ in fact, there is some authority for the position that a check itself is a special contract.⁸ It is submitted that the court could well have upheld this purported check as the basis for contractual liability, regardless of its validity or invalidity as a check after the drawer's death.

On the second point, *supra*, the pleadings show that plaintiff *did not* allege that she "was a member of the family" of decedent; she alleged that she "was treated as a member" of his family. The rule of law on which the court based this portion of its decision is that when services are rendered by one member of a family to another member thereof, such services are presumed to be gratuitous.⁹ The problem as to who are members of the family within this rule has been the subject of much discussion, some courts going so far as to hold that all members of the household, including servants, are members of the family.¹⁰ Conversely, it has been held that only the relation of parent and child in the same home, will call for the application of this presumption.¹¹ As recently as 1938 the North Carolina Court has said that the fact of

(2nd Unabridged Edition, 1940).] It seems that this was the sense in which the word was used in the complaint, and though unwisely used, it should not be construed technically against the plaintiff; and indeed the report does not indicate that it was.

⁵ By making and delivering the check, the drawer implies that he is paying a valid obligation, and that he intends to be bound thereby. *Guild v. Eastern Trust and Banking Co.*, 122 Me. 514, 121 Atl. 13 (1923); *Baxter v. Brandenburg*, 136 Minn. 411, 163 N. W. 516 (1917). See N. I. L. §61, N. C. CODE (Michie, 1939) §3042.

⁶ *Baxter v. Brandenburg*, 136 Minn. 411, 163 N. W. 516 (1917); 21 AM. JUR. 567 (Ex. & Adm. §327).

⁷ *Harper v. Battle*, 180 N. C. 375, 104 S. E. 658 (1920); *Neaves v. No. State Mining Co.*, 90 N. C. 412 (1884); *Patterson v. Chapman*, 179 Cal. 203, 176 Pac. 37, 2 A. L. R. 1467 and Note (1918).

⁸ *Guild v. Eastern Trust and Banking Co.*, 122 Me. 514, 121 Atl. 13 (1923). See *Patterson v. Chapman*, 179 Cal. 203, 176 Pac. 37 (1918); *Jenkins v. Sullivan*, 110 Md. 539, 73 Atl. 264 (1909).

⁹ *Brown v. Williams*, 196 N. C. 247, 145 S. E. 233 (1928); *Winkler v. Killian*, 141 N. C. 575, 54 S. E. 540 (1906); *Young v. Herman*, 97 N. C. 280, 1 S. E. 792 (1887); *Dodson v. McAdams*, 96 N. C. 149, 2 S. E. 453 (1887); *Hudson v. Lutz*, 50 N. C. 217 (1857); 1 WILLISTON, CONTRACTS (1936) §91A; 1 MORDECAI, LAW LECTURES (2nd ed., 1916) 113, 115; Note (1908) 11 L. R. A. (N. S.) 873. But see, *Hauser v. Sain*, 74 N. C. 552 (1876); *Barron v. Cain*, 216 N. C. 282, 4 S. E. (2d) 618 (1939) making no mention of a presumption in allowing a recovery by plaintiff against his grand-uncle, for services rendered after defendant induced plaintiff to live with him during his life.

¹⁰ *Krukowski v. Paluszewski's Estate*, 240 Mich. 291, 215 N. W. 358 (1927); Note (1908) 11 L. R. A. (N. S.) 873; WEBSTER'S NEW INTERNATIONAL DICTIONARY (2nd Unabridged Edition, 1940). But see, *Ellis v. Davis*, 90 Ky. 183, 14 S. W. 74 (1890).

¹¹ *Gerz v. Weber*, 162 Pa. 530, 29 Atl. 761 (1894).

"family unity" alone would *not* give rise to the presumption of gratuitous services;¹² that "there must also be a certain relationship between the parties from which it may be supposed the services were referable to some moral or legal duty which the servitor recognizes as impelling."¹³ While the presumption can apply even though the parties are of no blood relationship,¹⁴ it seems clear that there need be some duty or obligation on the part of the servitor to render the services.¹⁵ In the principal case, no such duty or obligation was shown on the part of the plaintiff. Rather, the facts indicate that decedent had merely hired plaintiff as housekeeper, payment for her services being postponed until the death of the employer. Since there was no impelling "moral or legal duty" on the plaintiff to render these services, it is submitted that the presumption of gratuitous services should not have been applied.

Assuming, however, that the presumption was properly applied, it seems clear that the allegations of the complaint present sufficient facts from which the jury would be entitled to find that the presumption was rebutted. The court holds that without an allegation of a valid special contract showing that plaintiff was to be paid for her services, no cause of action is alleged. Many previous North Carolina cases have held that all the facts and circumstances are to be considered by the jury in determining whether or not the presumption has been overcome,¹⁶ implying that no special contract is required. Here, the implied obligation assumed by the drawer in giving plaintiff the check, albeit invalid, seems to be the best evidence that the services were not to be rendered gratuitously. Also, plaintiff alleged that deceased informed her that "she would be taken care of at his death." Further, a check in itself implies that it was given for a consideration.¹⁷ These allegations, if believed, would clearly justify the jury in finding that there was an agreement between the parties that the services were not to be rendered gratuitously, and in the light of the earlier cases, if such an agreement is found, the presumption, if applied at all, would be rebutted, entitling plaintiff to a recovery on *quantum meruit*. Therefore, it seems clear that plaintiff *has* stated a good cause of action by showing the rendition

¹² Landreth v. Morris, 214 N. C. 619, 200 S. E. 378 (1938).

¹³ *Id.* at 624, 200 S. E. at 381.

¹⁴ Winkler v. Killian, 141 N. C. 575, 54 S. E. 540 (1906); Krug v. Mills, 159 Md. 670, 152 Atl. 493 (1930); 1 WILLISTON, CONTRACTS (1936) §91A; Note (1908) 11 L. R. A. (N. S.) 873, 887. See Callahan v. Wood, 118 N. C. 752, 24 S. E. 542 (1896).

¹⁵ Landreth v. Morris, 214 N. C. 619, 200 S. E. 378 (1938); Sutch's Estate, 201 Pa. 305, 50 Atl. 943 (1902).

¹⁶ Keiger v. Sprinkle, 207 N. C. 733, 178 S. E. 666 (1935); Wood v. Wood, 186 N. C. 559, 120 S. E. 194 (1923); Debruhl v. Trust Co., 172 N. C. 839, 90 S. E. 9 (1916); Winkler v. Killian, 141 N. C. 575, 54 S. E. 540 (1906); Dodson v. McAdams, 96 N. C. 149, 2 S. E. 453 (1887); Williams v. Barnes, 14 N. C. 348 (1832).

¹⁷ See *supra* note 5.

of the services and evidence that they were not being rendered gratuitously; thus, defendant's demurrer should have been overruled, allowing the case to go to the jury on the question of whether or not the presumption had in fact been rebutted by the conduct of the parties.

The court held that since plaintiff alleged the special contract only, and had not declared on an implied contract, she was not entitled to a recovery on *quantum meruit*. Since the case of *Jones v. Mial*¹⁸ in 1880, the Supreme Court of North Carolina has consistently held that "The judgment where there is an answer, may be for any relief consistent with the case made by the complaint and embraced within the issue. . . . It is the apparent purpose of the new system [the Code of Civil Procedure] . . . to afford any relief to which a plaintiff may be entitled upon the facts set out in his complaint, although misconceived and not specially demanded in his prayer . . . [When] the essential facts are contained in the pleadings, and whether the remedy is on the special contract or on what are called the common counts, it ought not be denied."¹⁹ Since it has been shown that plaintiff here clearly had a cause of action in *quantum meruit* for the value of the services rendered decedent (by alleging the rendition of those services plus facts from which the jury could find that the presumption of gratuity had been rebutted), it seems that the demurrer to the complaint should have been overruled, for "A complaint will be sustained against a demurrer . . . if any parts present facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be gathered from it under a liberal construction of its terms . . . a complaint will not be overthrown by demurrer unless it is wholly insufficient—that is, if from all its parts we can see that there is a cause of action and sufficient ground for relief in law or equity."²⁰ Numerous cases in North Carolina previously have held that a plaintiff's failure to prove an alleged special contract does not preclude recovery on *quantum meruit* for services shown to have been rendered.²¹

¹⁸ 82 N. C. 252, adopting opinion of Smith, C. J., dissenting on previous hearing in 79 N. C. 164 at 167. In this case plaintiff presented his evidence and failed to prove the alleged special contract, and the trial court ruled that his complaint did not permit evidence to be offered as to the *quantum meruit* value of his services, and nonsuited him. This was affirmed in 79 N. C. 164, but on rehearing in 82 N. C. 252, the trial court and the former decision were reversed.

¹⁹ *Jones v. Mial*, 79 N. C. 164, 167 (1878). Dissenting opinion adopted on rehearing in *Jones v. Mial*, 82 N. C. 252 (1880).

²⁰ *Hartsfield v. Bryan*, 177 N. C. 166, 168, 98 S. E. 379, 380 (1919). See, *Sexton v. Farrington*, 185 N. C. 339, 117 S. E. 172 (1923); *Conrad v. Board of Education*, 190 N. C. 389, 130 S. E. 53 (1925).

²¹ *Wittkowski v. Harris* (C. C., W. D. N. C., 1894) 64 Fed. 712; *Lipe v. Trust Co.*, 206 N. C. 24, 173 S. E. 316 (1934); *Edwards v. Matthews*, 196 N. C. 39, 144 S. E. 368 (1928); *Dorsey v. Corbett*, 190 N. C. 783, 130 S. E. 842 (1925); *Wood v. Wood*, 186 N. C. 559, 120 S. E. 194 (1923); *Debruhi v. Trust Co.*, 172 N. C. 839, 90 S. E. 9 (1916); *Blackmore v. Winders*, 144 N. C. 212, 56 S. E. 874 (1907); *Wright v. Insurance Co.*, 138 N. C. 488, 51 S. E. 55 (1905); *Burton v. Mfg. Co.*, 132 N. C. 17, 43 S. E. 480 (1903); *Sams v. Price*, 119 N. C. 572, 26 S. E. 170 (1896); *Roberts v. Woodworking Co.*, 111 N. C. 432, 16 S. E. 415

It is submitted that the trial court was correct in overruling the demurrer to the complaint in the principal case, for even assuming that the check was invalid as the alleged special contract, there were facts alleged which would entitle the jury to find that the presumption of gratuitous services had been rebutted, and the pleadings were sufficient to allow a recovery on *quantum meruit*.

P. DALTON KENNEDY, JR.

Injunction Against Burdensome Suit Instituted Under Federal Employer's Liability Act

Section 56 of the Federal Employer's Liability Act¹ authorizes prosecution of personal injury actions arising thereunder in the United States District Court in any one of the following places: (1) The district of the residence of the railroad (the district in which the railroad has its domicile and principal office), (2) the district in which the accident occurred, or (3) any district in which the railroad shall be doing business at the time such action is initiated. The same section provides that state courts shall have concurrent jurisdiction with federal courts in suits instituted under the Act.

Employee, a resident of Ohio, filed suit in Federal District Court of New York against employer railroad, which was doing business in that district, for personal injuries sustained in Ohio while engaged in the service of the railroad. Thereafter, defendant railroad instituted suit in an Ohio state court to enjoin employee from proceeding in the foreign federal court on the ground that courts were available to employee in his resident district, and that no substantial benefit would be gained by employee through the foreign suit. The petition further showed that such foreign suit subjected the railroad to unnecessary additional expense, inconvenience and oppression in that the forum selected was 700 miles from the residence of the plaintiff and from the residence of numerous witnesses for the railroad. *Held*: A state court cannot enjoin a resident from prosecuting an action under the Federal Employer's Liability Act in a federal court of another state which is given jurisdiction by the Act. This was held to be true even though courts were available locally and suit in the foreign federal court might cause great inconvenience and expense to the defendant without resulting in any substantial benefit to the employee.²

(1892); *Fulps v. Mock*, 108 N. C. 601, 13 S. E. 92 (1891); *Stokes v. Taylor*, 104 N. C. 394, 10 S. E. 566 (1889); *Lewis v. RR*, 95 N. C. 179 (1886); *McINTOSH*, NORTH CAROLINA PRACTICE AND PROCEDURE (1929) 377; 1 MORDECAI, LAW LECTURES (2nd. ed., 1916) 127.

¹ 36 STAT. 291 (1910), 45 U. S. C. A. §§51-59 (1928).

² *Baltimore & Ohio R. Co. v. Kepner*, 62 S. Ct. 6, 86 L. ed. Adv. Ops. 37 (1941) (Stone, C. J., Roberts and Frankfurter, J. J., dissenting) *Aff'd* 137 Ohio St. 206, 409, 28 N. E. (2d) 982 (1940).

The history of the Federal Employer's Liability Act shows that Congress has from time to time enlarged the rights and privileges of the employee.³ The original act neither designated courts (state or federal) in which action might be brought nor attempted to establish venue.⁴ Under the second act venue of actions was left to the general venue statute,⁵ which fixed venue of suits in federal courts in the resident district of the railroad. This contained no reference to actions instituted in state courts. This compelled the injured employee to bear the expense and inconvenience of seeking the railroad's domicile and transporting witnesses and evidence there. Such a result prompted the enactment of the present liberal statute permitting the injured employee to select his forum in any one of the three listed places. The net result of the whole development, as the principal case illustrates, can well be to shift the burden of expense, vexation, and inconvenience from the injured employee under the former act to the railroad under the present act.

Under the present act, prior to the immediate decision, an important distinction had been made between suits instituted in foreign *state* and foreign *federal* courts. State courts of equity, upon application of the railroad, have been willing to restrain injured employees from instituting proceedings in a foreign state court where such actions would subject defendants to inconveniences, hardships, and increased expenses. Injunctions have been granted where (1) one of the purposes of the foreign action was to secure some unfair advantage arising under the law of the foreign state;⁶ (2) an undue burden on interstate commerce resulted (removing employees, as witnesses, from their work to the trial in some distant state causing an interruption in the operating facilities of the railroad);⁷ (3) the distant action caused inconvenience to

³ *Baltimore & Ohio R. Co. v. Kepner*, 137 Ohio St. 409, 414, 30 N. E. (2d) 982, 984. While the doctrine of comparative negligence is adopted in both the original and present acts, the latter act provides that where the carrier has violated the Safety Appliance Act, 45 U. S. C. A. §1, it cannot allege the contributory negligence of the employee as a defense to employee's suit.

⁴ 34 STAT. 232 (1906) (the employee had one year in which to bring his action).

⁵ 35 STAT. 65 (1908) (the statute of limitations was extended from one to two years). Also see *Cound v. Atchison, T. & S. F. R. Co.*, 173 Fed. 527 (CC 5th, 1909) (where jurisdiction is in federal court of defendant's residence).

⁶ *Reed's Adm'x. v. Illinois Central R. R. Co.*, 182 Ky. 455, 206 S. W. 794 (1918). (Cause of action arose in Kentucky and suit instituted in Minnesota state court. Because Minnesota law permits a verdict by 10 of 12 jurors, courts of this state had become popular for damage suits against railroads. An action was instituted in state court of Kentucky to enjoin the Minnesota proceedings. *Held*: Injunction granted.)

⁷ *Kern v. Cleveland C. C. & St. L. R. R. Co.*, 204 Ind. 595, 185 N. E. 446 (1933). (Accident in Indiana, suit instituted in state court of Missouri necessitating removal of 25 witnesses from their regular work in Indiana to scene of trial, thereby burdening and delaying interstate commerce and causing unreasonable expense to railroad. State court of Indiana granted injunction against Missouri proceedings.)

witnesses;⁸ (4) and where fraud was likely to be practiced upon the foreign state court.⁹ These decisions accord with the more general practice of equity courts of restraining out of state litigation on causes of action arising within the state, where the foreign suit would impose an unreasonable and inequitable burden upon the petitioning party.¹⁰ As to the power of a *federal* court to enjoin suits under the Act instituted in foreign *state* courts, no decisions have been discovered. Apparently a federal court could not enjoin actions in a foreign state court because of the statute prohibiting federal injunctions against state court proceedings.¹¹

Where the railroad institutes action in a state or federal court to enjoin the injured employee's suit in a foreign *federal* court, injunction has been denied even though continuance of such suit in the foreign forum may result in hardship and increased expense to the defendant;¹² inconvenience to witnesses;¹³ promotion of excessive litigation;¹⁴ and

⁸ *Reed's Adm'x. v. Illinois Central R. R. Co.*, 182 Ky. 455, 206 S. W. 794 (1918). (Cause of action arose in Kentucky; suit instituted in state court of Minnesota and where witnesses would have to be transported 1,000 miles to scene of trial. State court of Kentucky enjoined proceedings in Minnesota court).

⁹ See, *Chicago, Milwaukee & St. Paul R. R. Co. v. McGinley*, 175 Wis. 565, 572, 185 N. W. 218, 220 (1921) "Federal Employer's Liability Act indicates no intent to prohibit an equity court of a state from regulating the conduct of its citizens when suing under such act in another state by injunction, to prevent hardship, oppression, or fraud where such power existed prior to the act."

¹⁰ *O'Haire v. Burns*, 45 Colo. 432, 101 Pac. 755 (1909); *Mason v. Harlow*, 84 Kan. 277, 114 Pac. 218 (1911); *Hawkins v. Ireland*, 64 Minn. 339, 67 N. W. 73 (1896); *Bigelow v. Old Dominion Copper Co.*, 74 N. J. Eq. 457, 71 Atl. 153 (1908). Jurisdiction of the equity court is over the person of the equity defendant by reason of domicile within the jurisdiction of the court. On the other hand, some state courts are reluctant in enjoining suits under the Act instituted in other state courts. *Taylor v. Atchison, T. & S. F. Ry.*, 292 Ill. App. 457, 11 N. E. (2d) 610 (1937); *Lancaster v. Dunn*, 153 La. 15, 18, 95 So. 385, 388 (1922); *Peterson v. Chicago, B. & Q. Ry. Co.*, 187 Minn. 228, 244 N. W. 823 (1932); *Southern Pacific Co. v. Baum*, 39 N. M. 22, 38 P. (2d) 1106 (1934).

¹¹ 36 STAT. 1162 (1911), 28 U. S. C. A. 379 (1928). *Toucey v. New York Life Ins. Co.*, 62 S. Ct. 139, 86 L. ed. 107 (1941). See also *Wells Fargo & Co. v. Taylor*, 254 U. S. 175, 41 S. Ct. 93, 65 L. ed. 205 (1920). While these decisions indicate that there are some exceptions to the anti-injunction rule, none of the exceptions seem to apply to the situation here under discussion. This is true even if it be assumed that the *Toucey* case has not narrowed the exceptions asserted to exist by the opinion in the *Wells Fargo* case.

¹² *Chicago, M. & St. P. R. Co. v. Schendel*, 292 Fed. 326 (C. C. A. 8th, 1923).

¹³ *McConnell v. Thompson*, 212 Ind. 161, 8 N. E. (2d) 986 (1937) *aff'd* in 213 Ind. 16, 11 N. E. (2d) 183 (1937). (Accident occurred in Indiana, residence of deceased employee, where all the railroad's witnesses were available. Adm'r. of deceased instituted suit in federal court of Missouri. Railroad then sought injunction in Indiana state court to enjoin federal suit in Missouri. Held: Injunction denied.)

¹⁴ *Chicago, M. & St. P. R. Co. v. Schendel*, 292 Fed. 326, (C. C. A. 8th, 1923) (an Iowa statute designed to prohibit a so-called practice of "ambulance chasing" was declared unconstitutional as interfering with a citizen's right under the federal act to bring his suit in a foreign court. The statute had stated that all actions for injuries arising within the state must be instituted in Iowa courts). Cf. *Rader v. Baltimore & Ohio R. R. Co.*, 108 Fed. (2d) 980, (C. C. A. 7th, 1940) (where Illinois federal court refused to recognize supplemental order of Ohio state court since it had acquired jurisdiction at time of supplemental order).

burdening interstate commerce.¹⁵ The reluctance of the state courts to enjoin employee's foreign federal suit is based on a fear that granting such injunction would constitute interference with the jurisdiction of federal courts and with the federal right of the employee under the Act in question.¹⁶ As to suits instituted in federal courts to enjoin suits under the Act brought in other federal courts, the injunction is usually denied on the ground that the employee cannot be enjoined from suing in any federal court in which he is expressly authorized to bring action by federal statute.¹⁷

The majority opinion in the instant case clearly means that a state court has no power to enjoin actions instituted in foreign federal courts under the Federal Employer's Liability Act if the Act's venue provisions are satisfied. However, the reasoning adopted by the court contains much broader implications. Every argument used in the opinion is available to sustain the conclusion that, under similar circumstances, a state court has no authority to enjoin proceedings under the Act instituted in foreign state courts. This is true since the right to sue in such foreign state court seems to have become a federal right (because expressly provided by the Act) to the same extent as the right to sue in a foreign federal court. And it would seem to be immaterial whether injunction be sought in a state or federal court. Consequently, the situation seems to be that no injunction may issue, in any case, to prevent bringing of the action in any court, state or federal, authorized to take jurisdiction under the Act. The dissenting opinion of Mr. Justice Frankfurter puts this interpretation on the majority opinion¹⁸ (though, as seen above, proceedings under the Act in foreign state courts have commonly been enjoined).¹⁹ If this is the proper construction of the Act, it merits no criticism for placing foreign state and foreign federal actions on the same basis. Under any other construction, even where state proceedings could be enjoined, a clever attorney seeking to harass the railroad with a distant suit could always find an injunction-free haven in federal courts.²⁰ Therefore, to permit the enjoining of state proceedings would be important only in denying access to foreign state judges or jurors known to be unfavorable to railroads.

Thus the Supreme Court apparently declared the venue clause of the Act to mean that every litigant under that act receives a federal

¹⁵ *Schendel v. McGee*, 300 Fed. 273, 278 (C. C. A. 8th, 1924); *Connelly v. Central R. Co. of N. J.*, 238 Fed. 932 (D. C. New York, 1916).

¹⁶ *McConnell v. Thompson*, 213 Ind. 16 at 29, 8 N. E. (2d) 986 at 991 (1937). See *Chicago, M. & St. P. R. Co. v. Schendel*, 292 Fed. 326 (C. C. A. 8th, 1923).

¹⁷ *Chesapeake & Ohio R. Co. v. Vigor*, 90 F. (2d) 7 (C. C. A. 6th, 1937); *Southern R. Co. v. Cochran*, 56 F. (2d) 1019, 1020 (C. C. A. 6th, 1932).

¹⁸ *Baltimore & Ohio R. Co. v. Kepner*, 62 S. Ct. 6, 14, 86 L. ed. Adv. Ops. 37, 45 (1941).

¹⁹ *Supra* note 6, 7, 8, and 9.
²⁰ See the history of the litigation in *Rader v. Baltimore & Ohio R. R. Co.*, 108 Fed. (2d) 980, (C. C. A. 7th, 1940).

right to originate action in any one of the three designated jurisdictions, free from collateral interference and regardless of contravening equities. However, an equitable construction of the venue clause, as interpreted by Justice Frankfurter's dissenting opinion, would warrant no such finding; for to forbid the granting of injunction in all cases leaves an undesirable situation since the courts are left utterly powerless to give the relief ordinarily granted by courts of equity. Thus it seems that the more equitable solution would be to permit injunction not only where the foreign suit is in a state court, but also where it is in a federal court. And the power to enjoin should be exercisable by either a state or federal court, though the latter, in so far as it contemplates injunction against state action, would probably require amendment of the general federal anti-injunction statute. Admittedly, the Congressional purpose was to give the injured employee every possible opportunity to institute suit in a court convenient to both witnesses and parties.²¹ However, it can hardly be supposed that Congress, by giving the employee this privilege, intended for it to be used as a sword to harass the railroad into an inequitable settlement outside of court. Therefore, it seems that this privilege should be subordinated to the right and duty of the court to change the venue where the convenience of witnesses and the ends of justice would be promoted thereby.²² And thus, if an employee has in good faith brought a suit in a location reasonably convenient to him, even though somewhat inconvenient to the railroad, the obvious intention of the Act would prohibit injunction. On the other hand, where the injured employee institutes suit in a forum distant from his home and the scene of the accident, for no other apparent reason than to harass the railroad or to obtain a larger verdict or a more favorable judge, injunction should issue. Allowing state courts to enjoin such foreign federal actions, while taking no substantive right from the injured employee, would avoid the heretofore anomalous situation of enjoining distant state suits but allowing similarly unreasonable and burdensome federal actions to go on unhindered. The fact that there is no express Congressional prohibition of this equitable practice is a weighty factor in favor of its use.

But should the federal courts continue to frown upon this injunctive power, another solution may be suggested. It seems that the Act could be construed as giving the federal courts discretion to dismiss burdensome suits under a plea of *forum non conveniens*,²³ similar to

²¹ *Connelly v. Central R. Co.*, 238 Fed. 932 (D. C. N. Y., 1916); *Trapp v. Baltimore & Ohio R. Co.* 283 Fed. 655 (D. C. Ohio 1922).

²² *State ex rel. Warren v. Dist. Co. of Mannomen County*, 156 Minn. 394, 400, 194 N. W. 876, 879 (1923).

²³ Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law* (1929) 29 Col. L. Rev. 1, 34.

that which operates at civil law, instead of as creating mandatory jurisdiction.²⁴ It has been held by the Supreme Court itself that when a foreign state court in its discretion declines jurisdiction as a *forum non conveniens*, the employee is not denied a federal right under the statute.²⁵ Therefore, it should follow that a foreign federal court could, at its discretion, dismiss suit without denying a federal right.²⁶ Such an hypothesis seems logical since the statute, in terms, draws no distinction between state court and federal court jurisdiction. While possibly containing some contrary implications, the majority opinion in the instant case does not necessarily prohibit the invocation of the *forum non conveniens* doctrine. It does not overrule the prior decisions approving its exercise by state courts; and, under the language of the Act, it is difficult to see why it could be exercised by state courts unless it can also be exercised by federal courts. The net effect of the principal case, if followed by recognition of this doctrine, would be to shift the discretion to prevent serious injustice from the courts near the scene to the court selected by the plaintiff as the original forum.²⁷

Another solution to the problem presented in the principal case would be a redrafting of those provisions of Section 56 set forth above. Provision (2) would remain unchanged, but a qualification would be added to the third provision. As that provision now reads, "the action may be brought in any district in which the railroads may be doing business at the time the suit is initiated." The redrafting provision might provide that upon a showing by the defendant railroad that the suit was instituted in the particular forum solely for the purpose of harassing the defendant by forcing him to go to unnecessary expense and inconvenience in defending the distant suit, no benefit resulting to the employee, the court may in its discretion grant removal to a forum which, under all the circumstances, would be most convenient for all parties. A similar qualification might be added to the first provision.

Remarkably enough, the authorities are substantially uniform in support of the result reached, on the particular facts presented, by the majority opinion in the principal case. It is submitted that these deci-

²⁴ *Southern R. R. Co. v. Cochran*, 56 F. (2d) 1019 (C. C. A. 6th, 1932); *Schendel v. McGee*, 300 Fed. 273 (C. C. A. 8th, 1924). These cases apparently regard the jurisdiction as mandatory.

²⁵ *Douglas v. New Haven R. R. Co.*, 279 U. S. 377; 49 S. Ct. 355; 73 L. ed. 747 (1929); *McConnell v. Thompson*, 213 Ind. 16, 11 N. E. (2d) 183 (1937).

²⁶ See *Canada Malting Co. v. Paterson Steamships*, 285 U. S. 413, 422, 52 S. Ct. 413, 76 L. ed. 837, 843 (1932); also *Massachusetts v. Missouri*, 308 U. S. 1, 19, 60 S. Ct. 39, 84 L. ed. 3, 10 (1939).

²⁷ Some state courts apparently do not recognize the *forum non conveniens* doctrine. See *Holm v. Lake Shore & M. S. R. Co.*, 188 Mich. 605, 155 N. W. 504 (1915) and see *Mondou v. N. Y. N. H. & H. R. Co.*, 223 U. S. 1, 32 S. Ct. 169, 56 L. ed. 327 (1912). To this extent, unfortunately, apparently no court would have such discretion.

sions have, however, undoubtedly defeated the purposes of Congress by permitting the employee to use his shield as a sword. The instant decision permits an impractical situation to remain unsolved.

WILLIAM J. RENDLEMAN.

Landlord and Tenant—Statutory Liens on Crops— Rent Notes—Double Liability of Tenant

T leased farm lands from *L* for one year at a stipulated cash rental. Subsequently *L* gave an agricultural lien to *X*, a farmers' supply house, for supplies. The lien described all the lands of *L*, including those leased to *T*. The supplies given to *L* by *X* were never received by *T* nor used in any way on the lands which he rented. A few days after *L*'s execution of the crop lien *T* gave *L* a negotiable rent note for the amount of the rental. *L* assigned the note for value to *Y*. *X*, the holder of the lien, and *Y*, the holder of the note, both claimed the rent which *T* owed. *T* voluntarily paid *Y*, but the court found *X* to be entitled to the proceeds of the crop to the amount of the rental.¹

After the War Between the States the vital agricultural economy of the South lay shattered. Many farmers had lost their lands, others were land-poor, and the farm laboring class, freed negroes, were ignorant and irresponsible. To secure those who extended credit needed for cultivation and so to accelerate the return of agricultural production, Southern legislatures provided for the attachment of various statutory liens to crops.² Two of these statutory liens, the landlord's lien for rent and advances³ and the agricultural lien for advances,⁴ are involved in the instant case.

The landlord's lien statute provides that the crops raised on the land shall be "vested in possession" of the landlord or his assigns until the rents are paid and until the stipulations of the lease are performed or damages paid in lieu thereof, and until the landlord is paid for all "advancements made and expenses incurred in making and saving said crops." The statute provides that this lien is to have preference over all other liens.⁵

¹ *Rhodes v. Smith-Douglas Fertilizer Co.*, 220 N. C. 21, 16 S. E. (2d) 408 (1941).

² The North Carolina agricultural lien was created in 1867. N. C. Pub. Laws 1866-67, c. 1. The North Carolina laborer's lien law was passed in 1869 primarily to protect the rights of freed negroes who were dependent on their manual labor on the soil. *Whitaker v. Smith*, 81 N. C. 340 (1879). Later, in 1869, the first landlord's lien statute was passed. N. C. Pub. Laws 1868-69, c. 156, §§13, 14, 15. This latter statute has been amended frequently, but reached substantially its present form in 1877. N. C. Pub. Laws 1876-77, c. 283.

³ N. C. CODE ANN. (Michie, 1939) §2355.

⁴ N. C. CODE ANN. (Michie, 1939) §2480.

⁵ The common law remedy of distress has never existed in North Carolina, and prior to the landlord's lien statute the landlord had no remedy which differed from that of other creditors of his tenant. *Reynolds v. Taylor*, 144 N. C.

Once the relation of landlord and tenant is established the lien attaches automatically.⁶ Under our statute a tenant and a "cropper"—one who farms the land for a share of the crop—have the same status as far as ownership of the crop is concerned,⁷ constructive possession of the entire crop being in the landlord⁸ but the cultivator having the right to actual possession for purposes of making and gathering the crop.⁹ Until his claim is satisfied the landlord may sue for conversion either the tenant¹⁰ or any purchaser from the tenant who denies his right to the crop,¹¹ and may follow the crop through as many hands as necessary.¹² The tenant or anyone who aids him in removing the crop without the landlord's consent and before satisfaction of the landlord's claim

165, 56 S. E. 871 (1907); *Howland v. Farrar*, 108 N. C. 567, 13 S. E. 173 (1891); *Deaver v. Rice*, 20 N. C. 567 (1839); *Dalglish v. Grandy*, 1 N. C. 161 (1800). On the remedy of distress and its gradual disappearance in the United States, see Note (1886) 15 Am. Dec. 584.

⁶ *Burwell v. Cooper Co-operative Co.*, 172 N. C. 79, 89 S. E. 1064 (1916); *Ford v. Green*, 121 N. C. 70, 28 S. E. 132 (1897); *Jones v. Jones*, 117 N. C. 254, 23 S. E. 214 (1895); *Crinkley v. Egerton*, 113 N. C. 445, 18 S. E. 669 (1893); *Spruill v. Arrington*, 109 N. C. 192, 13 S. E. 779 (1891). But cf. *Warrington v. Hardison*, 185 N. C. 76, 116 S. E. 166 (1923); *Taylor v. Taylor*, 112 N. C. 27, 16 S. E. 924 (1893); 1 JONES, LIENS (3rd ed. 1914) §553. Liens created by express covenant in the lease are not within the scope of this note.

⁷ Alabama has also abolished any distinction between tenant and cropper by raising the cropper's legal status to that of a tenant. ALA. CODE ANN. (Michie, 1928) §8807. But in other states where the distinction has not been affected by statute the cropper is either a tenant in common of the crops with the landlord (Texas, Tennessee, Mississippi), or the crops belong to the landlord alone subject to the cropper's lien as a laborer for his share (Arkansas, South Carolina, Georgia). On the other hand, outside of North Carolina, a tenant, as distinguished from a cropper, is generally held to be the sole owner of the crop and entitled to its possession. The provision in our statute that the landlord shall be "vested in possession" of the crop seems unique as applied to tenants. Book, *The Legal Status of Share-Tenants and Share-Croppers in the South* (1937) 4 LAW & CONTEMP. PROB. 539; Cotton, *Regulations of Farm Landlord-Tenant Relationships* (1937) 4 LAW & CONTEMP. PROB. 508; Notes (1913) 46 L. R. A. (N. S.) 53, (1894) 23 L. R. A. 258. For surveys of landlords' statutory liens see 1 JONES, LIENS (3rd ed. 1914) §602 *et seq.*; Notes (1908) 119 Am. St. Rep. 122, (1891) 12 L. R. A. 605.

⁸ *State v. Austin*, 123 N. C. 749, 31 S. E. 731 (1898) (landlord may repel by force any attempt by tenant or cropper to remove the crop before satisfaction of the landlord's lien); *Boone v. Darden*, 109 N. C. 74, 13 S. E. 728 (1891); *Brewer v. Chappell*, 101 N. C. 251, 7 S. E. 670 (1888). But cf. *Tobacco Growers' Co-operative Ass'n v. Bissett*, 187 N. C. 180, 121 S. E. 446 (1924).

⁹ *Batts v. Sullivan*, 182 N. C. 129, 108 S. E. 511 (1921) (cropper has insurable interest in undivided crop). Compare *Rich v. Hobson*, 112 N. C. 79, 16 S. E. 931 (1893) with *Jordan v. Bryan*, 103 N. C. 59, 9 S. E. 135 (1889); *State v. Copeland*, 86 N. C. 692 (1882).

¹⁰ *McGehee v. Breedlove*, 122 N. C. 277, 30 S. E. 311 (1898); *Rich v. Hobson*, 112 N. C. 79, 16 S. E. 931 (1893); *Livingston v. Farish*, 89 N. C. 140 (1883). The original landlord also has a lien on the crops of a subtenant. *Never Fail Land Co. v. Cole*, 197 N. C. 452, 149 S. E. 585 (1929); *Moore v. Faison*, 97 N. C. 322, 2 S. E. 169 (1887); *Montague v. Mial*, 89 N. C. 137 (1883); Note (1916) Ann. Cas. 1916E 826.

¹¹ *McGehee v. Breedlove*, 122 N. C. 277, 30 S. E. 311 (1898); *Thigpen v. Maget*, 107 N. C. 39, 10 S. E. 272 (1890).

¹² N. C. CODE ANN. (Michie, 1939) §2355; see *Belcher v. Grimsley*, 88 N. C. 88, 91 (1883).

is liable both civilly and criminally.¹³ On the other hand it has been held that the North Carolina landlord's lien relates only to crops,¹⁴ attaches only to crops planted during the year for which the lands are rented, and secures only the rent for that particular year.¹⁵

The landlord's lien for advances is on a parity with his lien for rent and the above provisions as to rent seem to apply also to advances.¹⁶ His aggregate claim for both has priority over all other claims on the crop.¹⁷ Evidently the advancements made must be of the same nature as those which give rise to an agricultural lien. As indicative of legislative intent to this effect there is an express provision in the statute that the same price limitations shall apply to advancements secured by landlords' liens as to those secured by agricultural liens.¹⁸ Supplies obtained from others on the landlord's credit are considered advancements of the landlord,¹⁹ but where the landlord is merely a surety for the tenant's debt for supplies the advancements are not secured by the landlord's lien.²⁰ The advancements either of money or supplies must be made for the purpose of *making or saving* the crop. But the tenant is the judge of his own needs and the landlord is not required to see that the supplies are actually used on the land. Anything of value supplied by the landlord in good faith, directly or indirectly for the purpose of making or saving the crop could be secured by the landlord's lien (or the agricultural lien).²¹

¹³ N. C. CODE ANN. (Michie, 1939) §2362 (Unlawful seizures by the landlord are also prohibited).

¹⁴ Reynolds v. Taylor, 144 N. C. 165, 56 S. E. 871 (1907); Howland v. Forlaw, 108 N. C. 567, 13 S. E. 173 (1891).

¹⁵ Glover v. Dail, 199 N. C. 659, 155 S. E. 575 (1930); Brooks v. Garrett, 195 N. C. 452, 142 S. E. 486 (1928); Ballard v. Johnson, 114 N. C. 141, 19 S. E. 98 (1894); Slaughter v. Winfrey, 85 N. C. 159 (1881) (landlord's lien includes cost of legal action necessary to recover rent); Notes (1935) 96 A. L. R. 249, (1920) 9 A. L. R. 300.

¹⁶ Brooks v. Garrett, 195 N. C. 452, 142 S. E. 486 (1928).

¹⁷ Brooks v. Garrett, 195 N. C. 452, 142 S. E. 486 (1928). In some states the landlord's lien for rent is prior to all others but his lien for advances is limited to the same status as that of others who extend advances to the tenant. S. C. CODE (1932) §8771.

¹⁸ The landlord, or other persons advancing agricultural supplies, may not charge more than 10% over the retail cash price for such supplies, and the 10% shall be in lieu of interest on the debt. N. C. CODE ANN. (Michie, 1939) §2482.

¹⁹ Ransom v. Eastern Cotton Oil Co., 203 N. C. 193, 165 S. E. 350 (1932); Powell v. Perry, 127 N. C. 22, 37 S. E. 71 (1900).

²⁰ Kaufman v. Underwood, 83 Ark. 118, 102 S. W. 718 (1907); Swann v. Morris, 83 Ga. 143, 9 S. E. 767 (1889). Note (1908) 119 Am. St. Rep. 121, 130.

²¹ Some things, such as guano, seed, farm implements, subsistence for farm animals, and the like are *per se* advances which are presumed to have been given for the purpose of making the crop. Windsor Bargain House v. Watson, 148 N. C. 295, 62 S. E. 305 (1908); Brown v. Brown, 109 N. C. 124, 13 S. E. 797 (1891); Thigpen v. Maget, 107 N. C. 39, 10 S. E. 272 (1890); Womble v. Leach, 83 N. C. 84 (1880). But cf. Branch v. Galloway, 105 N. C. 193, 10 S. E. 911 (1890). This is likewise true of the extension of subsistence to the tenant, or board for the tenant and his wife at the landlord's table. Brown v. Brown, 109 N. C. 124, 13 S. E. 797 (1891). Where the supplies advanced are not in them-

An additional type of security established by statute in North Carolina is the agricultural lien, as distinguished from the landlord's lien for rent and/or advances. This claim may be secured by anyone who extends money or supplies to be expended in the cultivation of a crop. The leading case in this state, *Clark v. Farrar*,²² sets up five requisites for a valid agricultural lien. The advancements must be (1) money or supplies;²³ (2) made to the persons engaged, or about to engage in the cultivation of the soil;²⁴ (3) made after the lien agreement;²⁵ (4) made to be expended in cultivation of the crop during that year;²⁶ and (5) the lien must be on the crop of that year, made by reason of the advances so given.²⁷ Though the statute provides that the lien is to be written and registered, this provision is for the protection of creditors, subsequent purchasers, and other third parties, and has no effect on the validity of the claim as between the lienor and lienor.²⁸ No particular form is required, but rather the existence of an agricultural lien depends on the intention of the parties.²⁹ Agricultural liens may apply to all crops planted within a year of the date of the advances regardless of the number of crops planted during the year.³⁰ The courts require that the lands on which the crop is to be grown must be so definitely described as to be capable of present ascertainment.³¹ By statute, this type of claim is made superior to all others against the crop except the landlord's and laborer's liens.

selves agricultural in nature, such as snuff, calico, homespun, velvet, kerosene, shoes, soap, salt, thread, buttons, tobacco, coffee, cakes, and candy, it must be shown affirmatively that they were extended for the purpose of aiding, no matter how indirectly, the tenant to make and gather his crop. *Nichols v. Speller*, 120 N. C. 75, 26 S. E. 632 (1897); *Brown v. Brown*, 109 N. C. 124, 13 S. E. 797 (1891); *Ledbetter v. Quick*, 90 N. C. 276 (1884). As a practical matter, under the paternalistic system of share-cropping which prevails throughout the South, the landlord often supplies nearly all the tenant's physical needs from birth to burial. Vance, *Human Factors in the South's Agricultural Readjustment* (1934) 1 LAW & CONTEMP. PROB. 259.

²² 74 N. C. 686 (1876).

²³ See note 21 *supra*.

²⁴ *Womble v. Leach*, 83 N. C. 84 (1880) (advances made to cultivator's order).

²⁵ *Lowdermilk v. Bostick*, 98 N. C. 299, 3 S. E. 844 (1887); *Patapsco v. Magee*, 86 N. C. 350 (1882). But cf. *Reese v. Cole*, 93 N. C. 87 (1885).

²⁶ See note 21 *supra*.

²⁷ *Loftin v. Hines*, 107 N. C. 360, 12 S. E. 197 (1890) (liens for a second or greater number of years are void because of public policy); *Wooten v. Hill*, 98 N. C. 48, 3 S. E. 846 (1887).

²⁸ *Odum v. Clark*, 146 N. C. 544, 60 S. E. 513 (1908); *Reese v. Cole*, 93 N. C. 87 (1885); *Gay v. Nash*, 78 N. C. 100 (1878).

²⁹ *Jones-Phillips Co. v. McCormick*, 174 N. C. 82, 93 S. E. 449 (1917); *Meekins v. Walker*, 119 N. C. 46, 25 S. E. 706 (1896); *Townsend v. McKinnon*, 98 N. C. 103, 3 S. E. 836 (1887); *Rawlings v. Hunt*, 90 N. C. 270 (1884) (the same instrument may operate as an agricultural lien and as a chattel mortgage).

³⁰ *Legis.* (1926) 4 N. C. L. REV. 4.

³¹ *Crinkley v. Egerton*, 113 N. C. 142, 18 S. E. 341 (1893); *Perry v. Bragg*, 109 N. C. 303, 14 S. E. 97 (1891); *Weil v. Flowers*, 109 N. C. 212, 13 S. E. 761 (1891); *Gwathney v. Etheridge*, 99 N. C. 571, 6 S. E. 411 (1888).

In the instant case the landlord automatically obtained a landlord's lien by virtue of his status. When he executed the agricultural lien to *X* he thereby assigned his landlord's lien as additional security. Therefore the crop is subject to the claim of *X* to the extent of the landlord's lien. But the tenant would also be liable on the personal obligation in the form of the negotiable note which he gave *L*, since *Y* is a holder in due course for value.³² Thus, while the claim of *X* is preferred to that of *Y*, *T* must pay both.

The tenant farmer who executes a rent note is subjected to this risk of unjust double liability by the action of the landlord in assigning his lien and the rent note to separate third parties.³³ Where such separate assignments are made, there are three possible situations: (1) The note might be assigned before the assignment of the landlord's lien. In such a case the lien would follow the note;³⁴ and therefore it would seem that any subsequent attempted assignment of the landlord's lien, by creation of an agricultural lien or otherwise, would be ineffective—the tenant would be liable only to the holder of the note. (2) The note might be received by the landlord before any assignment but not assigned until after the assignment of the landlord's lien. (3) The rent note might be both received and assigned by the landlord subsequent to his assignment of his landlord's lien. This latter situation is the instant case.

Under the law as it now stands it seems that the tenant would be subjected to double liability for rent in the last two cases.³⁵ Allowing the landlord to control the tenant's liability through merely shifting the

³² N. C. CODE ANN. (Michie, 1939) §§3033, 3038; *Standing Stone Nat. Bank v. Walser*, 162 N. C. 53, 77 S. E. 1006 (1913).

³³ For discussion of a somewhat analogous situation see *Ross, The Double Hazard of a Note and Mortgage* (1932) 16 MINN. L. REV. 123.

³⁴ *Wise Supply Co. v. Davis*, 194 N. C. 328, 139 S. E. 599 (1927); *Avera v. McNeill*, 77 N. C. 50 (1877); *Lee v. Spence*, 5 Tenn. App. 363 (1927); 2 WILLISTON, CONTRACTS (rev. ed. 1936) §§432, 447A.

³⁵ It might be argued that the assignee of the landlord's lien should take it subject to any existing defenses which the tenant might have against the landlord. This doctrine applies to assignments of debts and choses in action. 2 WILLISTON, CONTRACTS (rev. ed. 1936) §432. Due to the nature of the North Carolina landlord's lien its assignment is more in the nature of a transfer of a property right than the assignment of a chose in action, and therefore it is believed that such an argument would be rejected. Furthermore, even this argument would not prevent double liability in the instant case where the landlord's lien was transferred through execution of an agricultural lien which was recorded before the tenant executed his rent note. This recordation probably gave constructive notice of the assignment to the tenant [N. C. CODE ANN. (Michie, 1939) §2480 (agricultural liens must be registered); N. C. CODE ANN. (Michie, 1939) §3311; *Blalock v. Strain*, 122 N. C. 283, 29 S. E. 408 (1898) (where the recording act applies constructive notice is all important and actual notice is immaterial). *But see* 2 WILLISTON, CONTRACTS (rev. ed. 1936) §437 (in general actual notice is necessary). As to whether the recordation statute applies to agricultural liens for this purpose, *quere?*], and the rights of the assignee could not be defeated by any subsequent defense which might arise against the landlord. 2 WILLISTON, CONTRACTS (rev. ed. 1936) §433.

order of his assignments, obviously places an undesirable risk on the tenant, as is shown by the result of the instant decision. The possibility that after expensive litigation the tenant might obtain a judgment against the landlord is no solution.

In situation (2), double liability would be prevented by ruling that when the landlord accepted the rent note the lien attached to the note itself as additional security for its payment. The ultimate holder of the note would then be also the holder of the lien and the tenant would not be liable to anyone else. The separate assignee of the landlord's lien would take at his peril under the doctrine of caveat emptor.³⁶ The same result could be reached by holding that the landlord's lien was lost by waiver when the note was accepted, but such a holding is contrary to the weight of authority.³⁷ By holding that the lien attached to the note the landlord's security would be preserved and the tenant would also be freed from risk of double liability.

Such a solution of course would be of no avail in the third situation above (the instant case), for there the statutory lien is assigned before the acceptance of the note and consequently before any attachment could occur. The rights of the first assignee should not be impaired by any subsequent action of the landlord or tenant.³⁸ Nor should the tenant escape his personal liability to the holder in due course of his negotiable paper.³⁹ It is believed that the only adequate solution to the difficulty is through statutory revision. A statutory proviso that the landlord's lien may not be assigned without the service of written notice on the tenant would be socially beneficial. The tenant would thus receive actual notice of any attempted assignment and would be on his guard against any subsequent execution of a note. Many claims and liens which arise by implication of law are already non-assignable, either because of the personal relation of the parties or for reasons of public policy.⁴⁰ There seems no valid objection to qualifying in the manner suggested the lien given to the agricultural landlord.

Though the result of the instant case may have been inescapable, the language of the decision is unfortunate. By failing to point out the clear-cut distinction between the landlord's lien and the agricultural lien the court leaves the law somewhat confused. In the instant fact situation, the assignment of the landlord's lien on the tenant's crop was

³⁶ *Carpenter v. Longan*, 16 Wall. (U. S.) 271, 274, 21 L. ed. 313, 315 (1872) (mortgage held to attach to note so that an assignment of the note carried the mortgage with it, while assignment of the latter alone was a nullity). But the cases are divided as to whether a mortgage attaches to a note. See Ross, *The Double Hazard of a Note and Mortgage* (1932) 16 MINN. L. REV. 123.

³⁷ 1 JONES, LIENS (3rd ed., 1914) §585.

³⁸ See 2 WILLISTON, CONTRACTS (rev. ed. 1936) §433; note 35 *supra*.

³⁹ See note 32 *supra*.

⁴⁰ 2 WILLISTON, CONTRACTS (rev. ed. 1936) §§405, 411, 411A, 417.

made automatically as additional security for an agricultural lien covering all the lands of the landlord. The supplies given to the landlord by the lienor were never received by the tenant or used on his land. This of course would not be necessary to the validity of an assignment of the landlord's lien,—the landlord-assignor having received his consideration for the assignment and being under no obligation to turn it over to anyone else. However, the decision seems to imply that the landlord has the further power to execute a valid agricultural lien on the tenant's crop without turning over any of the supplies to the tenant. No case has been found to justify such a conclusion. True, many cases say that the lienor is not required to see that the supplies are used on the land, and that his rights are not defeated if the supplies are diverted to another purpose by the lienor.⁴¹ But in all such cases the supplies were extended to the cultivator of the soil, or to his order. Indeed, *Clark v. Farrar* (recognized as a sound decision in the instant case) sets up the rule that the supplies must be extended to the "persons engaged, or about to engage in the cultivation of the soil." This clearly seems to preclude the landlord from executing a lien on the crops grown on the lands of a tenant.⁴² To hold otherwise would allow the landlord to encumber the crops without even the actual knowledge of the tenant. It should not be necessary for the tenant continually to resort to the courthouse to see if a lien has been recorded on his crop. The court in the instant decision says, "The risk that the landlord might create a lien upon the crops to be raised by Sherrod [the tenant], which has been so unfortunate for him, was assumed by him when he entered into his contract of rental."⁴³ The landlord's lien is conferred by statute. While by statute it may be assigned, the landlord should have no power to "create" any other lien on the crop beyond the landlord's interest,—and that is covered by the landlord's lien. The implication in the instant case, if intended by the court, is regrettable. It seems unjust to compel the tenant to assume the risk of any such additional lien.

The social and economic degradation of the modern Southern farm tenant is notorious. Often illiterate, and usually forced by the most

⁴¹ *Nichols v. Speller*, 120 N. C. 75, 26 S. E. 632 (1897); *Womble v. Leach*, 83 N. C. 84 (1880); *Brown v. Brown*, 109 N. C. 124, 13 S. E. 797 (1891) (landlord's lien); *Ledbetter v. Quick*, 90 N. C. 276 (1884) (landlord's lien); see *Collins v. Bass*, 198 N. C. 99, 103, 150 S. E. 706, 708 (1929).

⁴² In Australia the prospective lienor has the burden of seeing that the supplies are extended to the person actually working on the land. Advancements made to the owner or lessee legally entitled to possession are not sufficient. Note (1939) 13 *Aust. L. J.* 270.

⁴³ In support of this statement the court cites two cases which hold that one who takes an agricultural lien from a tenant assumes the risk that the tenant will not satisfy the landlord's lien or will abandon the crop and so forfeit his share. In both of these cases it is the person who deals with the tenant of another, and not the tenant himself, who assumes the risk of loss. *Thigpen v. Maget*, 107 N. C. 39, 10 S. E. 272 (1890); *Thigpen v. Leigh*, 93 N. C. 47 (1885).

stringent economic necessity to labor on the land, his pitiful condition retards not only his own development but also that of the society in which he lives.⁴⁴ Under the interpretation of the instant case, the statutory liens which were granted to succor agriculture, place excessive power in the hands of the unscrupulous landlord. Because of the obvious inequality in bargaining power between the landlord and the farm tenant it is believed that social policy demands more adequate legal protection of the rights of the tenant, with proportionate restrictions on the power of the landlord. Therefore it is submitted: 1. that the instant case should not be followed in so far as it implies that the landlord may execute an agricultural lien on crops grown by the tenant; and 2. that the North Carolina Landlord's Lien statute should be amended to prohibit any assignment of the lien without the service of written notice on the tenant.

JOHN T. KILPATRICK, JR.

Municipal Corporations—Extension of Boundaries— Separability of Unconstitutional Statutory Provisions

Chapter 463 of the Public Local Laws of 1941 provided for an extension of the corporate limits of the City of Raleigh, subject to approval by the combined ballot of the voters of Raleigh and of the territory to be annexed. Section 4 of this act states that upon a majority vote for extension, the territory shall be annexed on January 1, 1942; providing further that, if the annexed territory does not receive the same services and privileges, within the two years succeeding its incorporation, as shall be afforded similar properties now within the city limits, this annexed territory shall be exempt from taxation by the City of Raleigh until such services are extended to the territory to be annexed. In a declaratory judgment proceeding to determine the validity of Chapter 463, a divided North Carolina Supreme Court declared the taxation proviso in Section 4 to be unconstitutional, but upheld the remainder of the act as valid and separable.¹

The present statute differs from the more common form of extension act in that certain conditions precedent to its taking effect are set up by the legislature, whereas the usual act is a mere legislative declaration of extension (19 out of 21 extension acts passed in 1941 being of the latter type).² In spite of this usual practice, however, the cases

⁴⁴ ODUM, *SOUTHERN REGIONS* (1st ed. 1936) 486, 489; Symposium on *Agricultural Readjustment in the South* (June, 1934) 1 *LAW & CONTEMP. PROB.* 259-291, 390-397; Symposium on *Farm Tenancy* (October, 1937) 4 *LAW & CONTEMP. PROB.* 424-572; Note (1937) 25 *GEO. L. J.* 387.

¹ *Banks v. Raleigh*, 220 N. C. 35, 16 S. E. (2d) 413 (1941).

² Brief of Raleigh Junior Chamber of Commerce, *Amicus Curiae*, p. II, *Banks v. Raleigh*, 220 N. C. 35, 16 S. E. (2d) 413 (1941).

indicate that the legislature of the State is free to impose almost any condition precedent to the taking effect of the act,³ provisions having been sanctioned requiring submission of the act (1) to the combined voters of both city and the territory to be annexed,⁴ (2) to the voters of the city,⁵ (3) to the voters of the territory,⁶ and (4) to the approval of the mayor and city commissioners.⁷ The court has further held that the legislature may annex even where annexation is expressly opposed and disapproved of by the majority of the citizens of the territory to be annexed.⁸ Thus, the condition precedent contained in the instant act is clearly within the traditional practice of the Legislature and conforms to the long-standing decisions of the court.

The Supreme Court, however, on authority of *Anderson v. City of Asheville*,⁹ declared invalid the provision making the power of the City of Raleigh to tax, within the limits covered by the extension, dependent upon the type of service rendered. In rendering this decision, however, the court did not call attention to the new constitutional provision for classification of taxes¹⁰ adopted since the case of *Anderson v. City of Asheville*.¹¹ But the result reached by the court raises many interesting questions, which unfortunately the court did not discuss: (1) is this provision in fact a classification or an exemption; (2) if a classification, does the new constitutional provision permit a classification based on location of the property; and (3) if an exemption, just how far may the legislature go in exempting property in view of the fact that apparently taxes need no longer be based upon the true value of the land taxed. Furthermore, even with an unfavorable determination of these problems, it is at least arguable that, since the legislature

³ *Dunn v. Tew*, 219 N. C. 286, 13 S. E. (2d) 536 (1941); *Highlands v. Hickory*, 202 N. C. 167, 162 S. E. 471 (1931); *McGraw v. Merryman*, 133 Md. 247, 104 Atl. 540 (1918); *Groff v. Frederick City*, 44 Md. 67 (1876).

⁴ *Lutterloh v. Fayetteville*, 149 N. C. 65, 62 S. E. 758 (1908); LAWS OF N. C., PRIVATE LAWS OF 1925, c. 105 (Edenton); LAWS OF N. C., PRIVATE LAWS OF 1925, c. 21 (Fayetteville).

⁵ *State v. Westport*, 116 Mo. 582, 22 S. W. 888 (1893).

⁶ *Watson v. Commissioners*, 82 N. C. 17 (1880); LAWS OF N. C., PUBLIC LAWS OF 1873-74, c. 152 (allow township in Beaufort to vote on question of annexation to Pamlico county).

⁷ *Manly v. Raleigh*, 57 N. C. 370 (1859).

⁸ *Dunn v. Tew*, 219 N. C. 286, 13 S. E. (2d) 563 (1941); *Highlands v. Hickory*, 202 N. C. 167, 162 S. E. 471 (1931); *Lutterloh v. Fayetteville*, 149 N. C. 65, 62 S. E. 758 (1908); *Manly v. Raleigh*, 57 N. C. 370 (1859).

⁹ *Anderson v. Asheville*, 194 N. C. 117, 138 S. E. 715 (1927).

¹⁰ N. C. CONST. ART. V, §3: "The power of taxation shall be exercised in a just and equitable manner and shall never be surrendered, suspended, or contracted away. Taxes on property shall be uniform as to each class of property taxed. Taxes shall be levied only for public purposes and every act levying a tax shall state the object to which it is applied." (This section replaces the old ART. VII, §9.)

¹¹ N. C. CONST. ART. VII, §9: "All taxes levied by any county, city, or township shall be uniform and ad valorem on all property in the same, except property exempted by this Constitution." (This provision has since been stricken from the Constitution of N. C.)

could have declared the territory automatically out of the city had the improvements not been granted,¹² they could equally well have enacted a lesser penalty upon the city by preventing collection of these taxes if the condition be unperformed.

The question remains, however: what effect does a declaration that the aforesaid proviso is invalid have upon the constitutionality of the act as a whole?

The rule of severability as applied in North Carolina¹³ has been well stated by Walker, J., in *Commissioners v. Boring*.¹⁴ "Where a part of a statute is invalid, the remainder, if valid, will be enforced, provided it is complete in itself and capable of being executed in accordance with the apparent legislative intent; but if the void clause cannot be rejected without causing the statute to enact what the Legislature did not intend, the whole of it must fall."¹⁵ Obviously this is a mere application to a particular problem of the general rule that all statutes must be construed so as to carry out the apparent legislative intent.¹⁶ And thus, although a statute is presumed to be valid until its unconstitutionality is clearly shown,¹⁷ once any part of an act is declared invalid the valid remainder will be allowed to survive only "where it is plain that Congress (*i.e.*, the Legislature) would have enacted the legislation with the unconstitutional provision eliminated."¹⁸

Although as a whole the North Carolina cases on severability appear to be somewhat conflicting in their application of this rule,¹⁹ the Supreme Court has repeatedly held that, where acts containing invalid tax provisions are in question, the act will not be deemed severable when the effect of striking out the "offending proviso would result in enlarging the effect and operation of the body of the law."²⁰ And in *Claywell v. Commissioners*²¹ the court held that the unconstitutionality of an amendment providing for the exclusion of certain towns from the operation of a Burke County highway improvement statute rendered

¹² 43 C. J. §77 (4) (a).

¹³ *Archer v. Joyner*, 173 N. C. 75, 91 S. E. 699 (1917); *Smith v. Wilkins*, 164 N. C. 136, 80 S. E. 168 (1913); *Harper v. Commissioners*, 133 N. C. 106, 45 S. E. 526 (1903); *Riggsbee v. Durham*, 94 N. C. 800 (1886).

¹⁴ 175 N. C. 105, 95 S. E. 43 (1918).

¹⁵ *Id.* at p. 111, 95 S. E. at 46.

¹⁶ *Keith v. Lockhart*, 171 N. C. 451, 88 S. E. 640 (1916); *Lowery v. School Trustees*, 140 N. C. 33, 52 S. E. 267 (1905); 1 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed., 1927) 376.

¹⁷ See *Pullen v. Corp. Comm.*, 152 N. C. 548, 68 S. E. 155 (1910); *Blair v. Coakley*, 136 N. C. 405, 48 S. E. 804 (1904).

¹⁸ See *Bank v. Lacy*, 188 N. C. 25, 28, 123 S. E. 475, 476 (1924) (quoting from *White, J.*, in *Employers' Liability Cases*, 207 U. S. 463, 501, 28 S. Ct. 141, 146, 52 L. ed. 297, 310 (1907)).

¹⁹ 17 N. C. DIGEST (Michie, 1937) p. 106, Key 64 of *Statutes*.

²⁰ See *Keith v. Lockhart*, 171 N. C. 451, 458, 88 S. E. 640 (1916); *Riggsbee v. Durham*, 94 N. C. 800 (1886).

²¹ 173 N. C. 657, 92 S. E. 481 (1917).

the entire act invalid, since such a judicial declaration of partial invalidity would materially alter the *scope* of the operation of the act as intended by the Legislature.

On the other hand, where the invalid proviso, rather than limiting the powers granted in the primary clause of the statute, actually conveys an additional power consistent with the legislative purpose of the entire act, the Court has generally construed the legislative intent to be to promote the primary purpose of the statute regardless of the fate of the proviso (particularly when the proviso appears to be merely a method of assisting this primary purpose). Thus, in *Rodman-Heath v. Waxhaw*,²² the Supreme Court upheld the provisions of a statute incorporating the Town of Waxhaw, while striking out the clause in that statute permitting said town to pledge its credit for other than "necessary expenses." Similarly, in *Keith v. Lockhart*,²³ a statute properly declaring a discontinuance of the stock law in Pender County was upheld although certain provisions of this statute (setting up a special tax for erecting a fence around the county) were declared invalid.

There are apparently no cases in North Carolina which have upheld as valid the primary clause of a statute on which a subordinate and invalid clause works a limitation. And if any rule is to be derived from the cases discussed it is that: Wherever an unconstitutional provision in an otherwise valid statute operates as a substantial limitation upon the operation of the remainder of the act, the unconstitutionality of the proviso permeates the entire act, rendering it totally invalid.²⁴ For it cannot be presumed that the Legislature would have passed the act without the limitation; and the primary and subordinate clauses are necessarily and by definition interdependent and dis severable.

The proviso in the instant case is apparently intended to work a limitation upon the power of the City of Raleigh to tax properties over which by the operation of the annexation clause it would otherwise obtain complete taxing power. Removing this limitation obviously increases the scope and effect of the act (recognizing a municipal power denied by the proviso), and seems to place the questioned statute within the very terms of the decisions in *Claywell v. Commissioners*²⁵ and *Keith v. Lockhart*.²⁶

It is regrettable that the Supreme Court did not discuss the effect that the instant decision is intended to have upon this doctrine. Instead the majority of the Court merely declared the proviso to be unconstitu-

²² 130 N. C. 293, 41 S. E. 488 (1902).

²³ 171 N. C. 451, 88 S. E. 640 (1916).

²⁴ *Keith v. Lockhart*, 171 N. C. 451, 88 S. E. 640 (1916).

²⁵ 173 N. C. 657, 92 S. E. 481 (1917).

²⁶ 171 N. C. 451, 88 S. E. 640 (1916).

tional, to be only incidental and subordinate to the primary clause providing for annexation, and to be "divisible and separable from the remainder of the statute."

If this decision was the result of a justified conclusion that the legislature "would have enacted the legislation with the unconstitutional provision eliminated,"²⁷ then the result is desirable, and the "scope and effect" doctrine heretofore applied by the Court should yield to the doctrines of "primary purpose" and "controlling legislative intent."

It is submitted, however, that such a conclusion is hardly possible without looking beyond the face of the annexation statute. And this may account for the split in the court and the barely audible minority opinion that "the presumption of inseparability should prevail and the entire act be declared void."²⁸

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²⁷ *Bank v. Lacy*, 188 N. C. 25, 28, 123 S. E. 475 (1924).

²⁸ *Banks v. City of Raleigh*, 220 N. C. 35, 16 S. E. (2d) 413 (1941). In writing the opinion of the Court, Justice Stacy indicated that the majority of the Court deemed the statute severable, whereas the minority considered it inseparable, "the diversity of opinion [arising] over a different conception of the significance to be ascribed to the unconstitutional provision in section 4 of the Act and the effect of its elision." At no place on the record do the names of the Justices supporting either of the two conflicting opinions appear. Fortunately, this procedure, if not unique, is quite unusual in North Carolina.