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Torts -- Contributory Negligence of Minors -- Question for Court or Jury

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power.[10] The North Carolina use tax[11] does not have the ten dollar maximum which is contained in the retail sales tax.[12] However, the Commissioner of Revenue construed the two to have the same maximum. This power was given to him in the revenue act and such construction is prima facie correct.[13] Therefore the North Carolina Use Tax statute cannot be assailed as discriminatory.

There are court decisions to the effect that a use tax is not a property tax and thus not subject to the uniformity provisions of the state constitutions.[14] The North Carolina court has held that a use tax is not a property tax,[15] and while under our court decisions this would not necessarily exempt it from the uniformity rule, the effect of the rule is only to require uniformity within each valid classification made by the legislature.[16] Many practical distinctions between the two types of taxes suggest themselves. A property tax is collected annually while a use tax is collected only once. A property tax is due on a certain date while a use tax is not. And finally the manner of collecting the two is different.[17]

Thus it seems that the principal case is sound both from a legal and practical standpoint. This is a progressive attempt on the part of the state to meet a practical problem in a practical way. It is not an attempt by the state to erect a barrier to interstate commerce, but rather an effort by the state to secure the revenue which it justly deserves.

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Torts—Contributory Negligence of Minors—Question for Court or Jury.

Plaintiff, a boy of 12, while roller skating was injured when hit by defendant's negligently driven car. He testified that he was unable to stop when warned of the approaching vehicle by his playmates and that he "thought that he could make it but missed." He further testified that he realized that he ought not to have gone into the street. The judge

[10] Gregg Dyeing Co. v. Query, 286 U. S. 472, 52 Sup. Ct. 631, 76 L. ed. 1232 (1932); Vancouver Oil Co. v. Henniford, 183 Wash. 317, 49 P. (2d) 14 (1935).

[11] See Note 1, *supra.*

[12] N. C. CODE ANN. (Michie, 1935) §7880 (156)e(12).

[13] N. C. CODE ANN. (Michie, 1935) §7880 (191). The construction of a statute by its administrative officer carries great weight in the interpretation by a court. Cannon v. Maxwell, 205 N. C. 420, 171 S. E. 624 (1933); People Park Reservoir Co. v. Hinderlider, 57 P. (2d) 894 (Colo. 1936).

[14] Vancouver Oil Co. v. Henniford, 183 Wash. 317, 49 P. (2d) 14 (1935).

[15] Stedman v. Winston-Salem, 204 N. C. 203, 167 S. E. 813 (1933), holding that tangible personal property is one thing and the use thereof another, and one may be taxed and the other exempt.

[16] Tea Co. v. Maxwell, 199 N. C. 433, 154 S. E. 838 (1930).

[17] Forster, *Constitutionality of California Use Tax* (1936) 9 So. CALIF. L. REV. 261.

submitted the case to the jury on the issue of contributory negligence and there was a verdict for the plaintiff. Affirmed.[1]

Had the acts of minor plaintiff been those of an adult, defendant would have been entitled to a nonsuit on the ground that plaintiff by his own evidence conclusively established contributory negligence.[2]

Would the North Carolina court ever hold as a matter of law that a minor is guilty of contributory negligence?

Two tests are used in determining an infant's capacity for exercising care and his consequent liability for negligence.[3] One is the Subjective test and uses as its criterion the psychological rather than chronological age of the child. In applying this test the court takes into consideration the age, knowledge, experience, and discretion of the particular child. This is the minority view, but there is a growing tendency on the part of courts to employ it as the more rational solution to the problem.[4] The second test is commonly called the Objective, and uses the child's calendar age as a basis for determining his capacity, *i.e.* by reference to the average child of the same age.[5] The weakness of this test is its failure to weigh the individual differences, both mental and physical, apparent in the makeup of children. What has been thought of as a third test is the criminal law analogy[6] by which there is a conclusive

[1] Hollingsworth v. Burns, 210 N. C. 40, 185 S. E. 476 (1936).

[2] Nowell v. Basnight, 185 N. C. 142, 116 S. E. 87 (1923); Lunsford v. Manufacturing Co., 195 N. C. 510, 146 S. E. 129 (1928); Scott v. Telegraph Co., 198 N. C. 795, 153 S. E. 413 (1930). For further treatment of contributory negligence see Bohlen, *Contributory Negligence* (1908) 21 HARV. L. REV. 233.

[3] RESTATEMENT, TORTS (1934) §464(2); BURDICK, TORTS (4th ed. 1926) §65 (462); 2 COOLEY, TORTS (3d ed. 1906) §§818-822; SALMOND, TORTS (6th ed. 1924) §9(4).

[4] See Central R. R. and Banking Co. v. Ryles, 87 Ga. 491, 495, 13 S. E. 584, 585 (1891). The court said, "The better rule would be for the jury to deal with each case upon its own facts, unhampered by presumptions of law either for or against the competency of the child." Berdos v. Tremont and Suffolk Mills, 209 Mass. 489, 494, 95 N. E. 876, 878 (1911). Rugg, C. J. speaking for the court, "There is no hard and fast rule that at any particular age a minor is presumed to comprehend risks or to be capable of negligence. . . . But the sounder doctrine seems to be that age is an important though not decisive factor in determining capacity, and that the decision of that question is not helped or hampered by any legal presumption." Camardo v. New York State Rys., 247 N. Y. 111, 116, 159 N. E. 879, 880 (1928). Lehman, J. stated, "The law does not disregard variations in capacity among children of the same age, and does not arbitrarily fix an age at which the duty to exercise some care begins or an age at which an infant must exercise the same care as an adult."

[5] Washington R. R. Co. v. State, 153 Md. 119, 137 Atl. 484 (1927) (a child cannot be required to exercise any higher degree of care than might be expected of one of similar age); Rasmussen v. Whipple, 211 Mass. 546, 98 N. E. 592 (1912) (boy's conduct must be measured by that of an ordinary, prudent boy of the same age).

[6] Renaldi v. Lengar Structural Co., 97 N. J. L. 162, 117 Atl. 42 (1922). The court *held* that a child of very tender years was incapable of contributory negligence as a matter of law, but stated that the child's capacity, etc. is the test for more mature children. Wells v. McNutt, 136 Tenn. 274, 189 S. W. 365 (1916) (child under seven presumed incapable of contributory negligence but not conclusively so); Von Sax v. Barnett, 125 Wash. 639, 217 Pac. 62 (1923). A child of

presumption of incapacity for children under seven, a rebuttable presumption of incapacity for children between the ages of seven and fourteen, and a presumption of capacity for those over fourteen. This is really a rule of law as to children under seven, but, as to children between seven and fourteen, it is still necessary to use either the Subjective or the Objective test in order to rebut the presumption of incapacity.

In the first North Carolina case on this question,[7] the court followed the Subjective test as expounded by the United States Supreme Court in 1873, which declared that, "An infant of tender years is not held to the same degree of discretion as that of an adult, and the degree depends upon its age and knowledge. The caution required is according to the maturity and capacity of the child."[8] The North Carolina court has followed this doctrine in most of its decisions.[9] But in certain cases the court has followed the criminal law analogy,[10] and in others has unconsciously attempted to blend the two doctrines.[11] Their contrariety is apparent. Such confusion was present in the instant case as the judge charged the jury that, "If the boy had been the age of fourteen, or an adult, the court would instruct you as a matter of law that he was guilty

five was held incapable of contributory negligence as a matter of law. *Contra:* Johnson's Adm'r v. Rutland R. Co., 93 Vt. 132, 106 Atl. 682, 685 (1919). In commenting on the analogy to the rule involving criminal conduct of infants the court said, "There is little, if any, support for the rule by the analogy. Capacity to commit crime, involving, as it does, discretion to understand the nature and illegality of the particular act constituting the crime, is one thing, and capacity to care for one's personal safety is another and quite a different thing. . . . While the rule has the merit of simplicity, it is purely arbitrary, and lacks the sanction of reason and experience."

[7] Manly v. R. R., 74 N. C. 655 (1876).

[8] See Washington and Georgetown R. R. v. Gladman, 15 Wall 401 (U. S.), 21 L. ed. 114, 116.

[9] Murray v. R. and D. R. R., 93 N. C. 92 (1885); Alexander v. Statesville, 165 N. C. 527, 81 S. E. 763 (1914); Fry v. Utilities Co., 183 N. C. 281, 111 S. E. 354 (1922); Ghorly v. R. R., 189 N. C. 634, 127 S. E. 634 (1925); Hoggard v. R. R., 194 N. C. 256, 139 S. E. 372 (1927); Brown v. R. R., 195 N. C. 699, 143, S. E. 536 (1928); Tart v. R. R., 202 N. C. 52, 161 S. E. 720 (1931); Morris v. Sprott, 207 N. C. 358, 177 S. E. 13 (1934).

[10] Bottoms v. R. R., 114 N. C. 699, 19 S. E. 730 (1894) (child of twenty-two months held incapable of negligence as a matter of law); Ashby v. Norfolk Southern Ry., 172 N. C. 98, 89 S. E. 1059 (1916) (negligence could not be attributed to a boy of eight); Campbell v. Model Steam Laundry, 190 N. C. 699, 130 S. E. 638 (1925) (child of four incapable of negligence as a matter of law).

[11] Rolin v. Tobacco Co., 141 N. C. 300, 53 S. E. 891 (1906). The court stated that a child under twelve was presumed to be incapable of understanding and appreciating dangers from a negligent act, but that contributory negligence on the part of a child is to be measured by his age and ability to discern and appreciate the circumstances of danger. Caudle v. Seaboard Air Line Ry., 202 N. C. 404, 163 S. E. 122 (1931) A prima facie presumption exists that an infant between the ages of seven and fourteen is incapable of contributory negligence, but the presumption may be overcome. However the court further stated that the test in determining whether a child is contributorily negligent is whether it acted as a child of its age, capacity, discretion, knowledge, and experience would ordinarily have acted under similar circumstances.

of contributory negligence."[12] That the plaintiff's capacity to understand the situation and appreciate its dangers was evident to the trial judge is shown by the admission in his charge that had the child been two years older a nonsuit would have been ordered. By arbitrarily setting an age of presumptive capacity the trial court had deviated in part from the Subjective test. When a child's capacity to appreciate the circumstances is obvious, why should a rebuttable presumption of incapacity keep the judge from directing a verdict for the defendant? Had the trial court used the criminal law analogy, there was nothing to prevent a directed verdict for the defendant as the presumption of incapacity was rebutted by the child's obvious appreciation of his own danger. Though there has never been a case in North Carolina where a child under fourteen has been held guilty of contributory negligence as a matter of law,[13] there seems to be no reason why it should not be so held where the circumstances admit of but one inference. In this same type of case there is good authority in other jurisdictions holding binding instructions for the defendant proper "where reasonable minds cannot differ."[14]

In most cases a blending of the criminal law analogy with the Subjective test does not hamper the trial court's effectiveness in applying the latter test, but in cases like the instant one where the child's capacity is apparent, the presumption seemed to prevent the court's deciding the case solely upon the infant's knowledge, maturity, and discretion.

It seems that the best solution to this difficult problem would be to use the Subjective test in its "pure form." It is true this plan would offer no definite standard of measurement, yet its adoption would prevent the arising of the confusion manifest in the principal case. Where any doubt existed as to the child's capacity, the question would be left to the jury, but where the evidence was clear that the child was either capable or incapable, the question would be rightfully one for the judge's discretion.

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[12] Hollingsworth v. Burns, 210 N. C. 40, 44, 185 S. E. 476, 478 (1936).

[13] Two cases hold children guilty of contributory negligence as a matter of law, but on the theory that the question is always one for the court and that to submit it to a jury would cause a shifting standard. Baker v. Seaboard Airline Co., 150 N. C. 562, 64 S. E. 506 (1909); Foard v. Tidewater Power Co., 170 N. C. 48, 86 S. E. 804 (1915). These two cases stand alone and are criticized in Fry v. Utilities Co., 183 N. C. 281, 290, 111 S. E. 354, 359 (1922).

[14] See Moeller v. United Rys., 13 Mo. App. 168, 112 S. W. 714, 716 (1908). A boy of twelve sued for personal injuries and the court said, "The question is one for the jury, unless the only conclusion that can reasonably be drawn from the evidence is that he was guilty of contributory negligence." In Payne v. Blevius, 280 Fed. 310 (C. C. A. 4th. 1922) the court *held* that the determination of whether a thirteen year old boy was guilty of contributory negligence was a question for the court where the evidence admits of but one conclusion and the fact is one about which reasonable minds cannot differ. Scherer v. Wood, 19 Ohio App. 381 (1924) (when the age of the child admits of no doubt as to its capacity to avoid danger, the court will decide the question as a matter of law).