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The result of the instant case and the similar cases involving railroads with charters containing the two-year bar[15] seems unduly harsh on the landowner. For an understanding of why the legislature and the court have so favored the railroad in acquiring its right-of-way, it is necessary to look to the history and development of the railroad industry.[16] During the years 1830-1900 when most of the charters were granted and the roads built, the population was sparse, land cheap, and railroads greatly in demand. To induce investment of capital and construction of railroads the legislature granted the companies large privileges.[17] It was with this in mind that the legislature granted charters containing the two-year bar and passed N. C. GEN. STAT. §1-51. As stated by the North Carolina Supreme Court, "when the road has been constructed and the benefits enjoyed, although new and unexpected conditions have arisen, the rights granted may not be withdrawn, although the long-deferred assertion of their full extent may work hardships."[18]

WILLIAM T. JOYNER, JR.

Taxation—Duplication—North Carolina Policy Against

Double taxation, as that term is used by the courts, denotes two distinct concepts, and an understanding of the distinction between them is necessary to comprehend the nature of the problems arising on the subject. To constitute true double taxation two or more taxes must be imposed on the same property by the same governmental unit, during the same taxing period, and for the same purpose.[1] Taxation by two or more governmental units of the same income to the same person does

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railroad was chartered before 1868.); *see* Tighe v. Seaboard A. L. R. R., 176 N. C. 239, 244, 97 S. E. 164, 167 (1918).

Similar cases involving the width of a right-of-way have arisen where the owner has given the railroad a deed containing an indefinite description as to the width of the right-of-way. In these cases the rule is that the deed conveys the maximum width which the railroad would be allowed to condemn. Seaboard A. L. R. R. v. Olive, 142 N. C. 257, 55 S. E. 263 (1906); Hendrix v. Southern Ry., 162 N. C. 9, 77 S. E. 1001 (1913); Heaton v. Kilpatrick, 195 N. C. 708, 143 S. E. 644 (1928). For cases recognizing the rule, but holding that the deed restricted the width *see,* Wearn v. North Carolina R. R., 191 N. C. 575, 132 S. E. 576 (1926); Tighe v. Seaboard A. L. R. R., 176 N. C. 239, 97 S. E. 164 (1918).

[15] See note 10 *supra.*

[16] See CONNOR'S HISTORY OF NORTH CAROLINA, Chap. 28, *The Railroad Era.*

[17] *See* Seaboard A. L. R. R. v. Olive, 142 N. C. 257, 273, 55 S. E. 263, 269 (1906).

[18] Seaboard A. L. R. R. v. Olive, 142 N. C. 257, 274, 55 S. E. 263, 269 (1906). *See* Parks v. Southern Ry., 143 N. C. 289, 297, 55 S. E. 701, 704 (1906) where the court, after commenting on the policy of the state when the railroads were being built, said, "Conditions have changed, lands have increased in value and rights deemed of little value when the roads were built have become of importance. The courts, while endeavoring to have the law work out substantial justice, cannot change their decisions to meet these conditions."

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[1] COOLEY, TAXATION §223 (4th ed. 1924); 61 C. J., Taxation §69.

not fall within the strict definition, since the tax by another unit is not a tax for the purposes of the unit whose tax is objected to.[2] However, the latter situation is sometimes referred to as double taxation, and to distinguish the two, it is frequently called "double taxation in the loose sense."[3] Some courts speak of such taxation as duplicate taxation and this use seems to make the distinction clear. Even using the term in its strict sense, although universally condemned as contrary to the policy of the law, such a tax is not prohibited by the Federal Constitution[4] nor by the state Constitution.[5] It follows that "double taxation in its loose sense" or duplicate taxation is not unconstitutional.

Constitutionally a state might levy a tax on the income of all residents irrespective of the source of this income.[6] It has also been held within the power of the states to levy an income tax on all income derived from property located in the state, as well as income from any business, trade, or profession carried on therein.[7] From these principles it can readily be seen that when business interests transcend state lines, a person can be subjected to a tax by two states with respect to the same income.

The basic provisions of the income tax law of North Carolina make full use of constitutional allowances, and thus would clearly lead to excessive duplicate taxation.[8] However, the legislature has seen fit to modify these basic provisions, so that gross injustices will not arise.[9]

[2] Ohio Tax Cases, 232 U. S. 576 (1914); Middlekauf v. Galloway, 163 Or. 671, 99 P. 2d 24 (1940); West Publishing Co. v. McColgan, 27 Cal. 2d 705, 166 P. 2d 861 (1946), *aff'd*, 328 U. S. 823 (1946); *see also* cases collected, 61 C. J., Taxation §73.

[3] 1 COOLEY, *op. cit. supra*, note 1 §223. But courts not uniform in use of phraseology, *see* Vol. 13, WORDS AND PHRASES, PERM. ED. "Double Taxation" and "Duplicate Taxation" (1940).

[4] Illinois Central R. R. v. Minnesota, 309 U. S. 157 (1940); Baker v. Druesedow, 263 U. S. 137 (1923); Shaffer v. Carter, 252 U. S. 37 (1920); *see* St. Louis Southwestern Ry. v. Arkansas, 235 U. S. 250, 267 (1914); Sabine v. Gill, 229 N. C. 599, 603, 51 S. E. 2d 1, 3 (1948); Kenilworth v. Hyder, 197 N. C. 85, 93, 147 S. E. 736, 740 (1929).

[5] Kenilworth v. Hyder, 197 N. C. 85, 147 S. E. 736 (1929); Person v. Watts, 184 N. C. 499, 115 S. E. 336 (1922); State v. Wheeler, 141 N. C. 773, 53 S. E. 358 (1906); Comm'rs of Durham County v. Blackwell Durham Tobacco Co., 116 N. C. 441, 21 S. E. 423 (1895).

[6] Guaranty Trust Co. v. Virginia, 305 U. S. 19 (1938); New York *ex rel.* Cohn v. Graves, 300 U. S. 308 (1937); Lawrence v. State Tax Comm'n, 286 U. S. 276 (1932); Note, 87 A. L. R. 380 (1933).

[7] International Harvester Co. v. Dep't of Taxation, 322 U. S. 435 (1944); Travis v. Yale & Towne Mfg. Co., 252 U. S. 60 (1920); Shaffer v. Carter, 252 U. S. 37 (1920); *see* McCulloch v. Maryland, 4 Wheat. 316, 428 (1819); Note, 156 A. L. R. 1373 (1945).

[8] N. C. GEN. STAT. §105-131 (1943) (Purpose of Article 4, Schedule D, chapter 105 is to impose tax on net income of every resident and of every non-resident having a business or agency in this state or income from property owned, and from every business, trade, profession or occupation carried on in this state.); N. C. GEN. STAT. §105-133 (1943) (imposes tax in accord with purpose); 29 Ops. Att'y Gen. 192 (1947).

[9] N. C. GEN. STAT. §105-147(5) (1945 Supp.) (dividends from stock in a cor-

The purpose of this note is to determine the extent of this modification.[10]

When a resident of this state performs services or has income from property in another state, North Carolina recognizes the right of the state wherein the income is earned to levy a tax. If such state levies a tax, this state does not impose a similar tax.[11] But if the other state does not tax the income thus earned, the person is required to pay a tax thereon here.[12] Non-residents who earn income from a business or agency in this state or from a trade, profession, or occupation carried on here, although taxable under the general rule, are given a credit against such tax for any tax paid to their home state.[13] However, this policy is limited by a reciprocal provision, and in order for a non-resident to be entitled to such credit he must be a resident of a state which allows a similar credit to residents of this state, or which follows a policy of exempting from taxation the income of non-residents earned within the state.[14] Therefore, (1) if the other state levies no income tax or follows a policy similar to North Carolina, the individual is required to pay a tax to only one state; (2) if the other state, while having a reciprocal provision for non-residents, follows a policy of taxing its residents on their total income, the individual must pay only the amount of the higher of the two taxes, although parts of that amount may actually be paid to two states; but (3) if the other state does not follow a relaxed tax policy, but taxes its residents on their entire income and allows no reciprocal credit to residents of other states, the individual must pay the full amount of the tax to both states, thus resulting in duplicate taxation.

Generally, a partnership is not considered a separate taxable entity and is required to file only an information return.[15] When all the partners are residents of North Carolina, the individual partners are required to report their share of the partnership income on their individual return.[16] But when one of the partners is a non-resident a

poration which has paid tax on income to state); N. C. GEN. STAT. §105-147(10) (1945 Supp.) (resident individuals having established business or investment in real or tangible property in another state which is taxed by other state); N. C. GEN. STAT. §105-151(1) (1943) (resident taxed by another state on income from services performed therein); N. C. GEN. STAT. §105-151(2) (1943) (credit allowed non-resident taxpayer).

[10] The scope of this note does not include double or duplicate taxation as it may arise due to taxation other than income, nor to Federal Income Taxation, nor to Federal and state taxation of corporations.

[11] N. C. GEN. STAT. §105-147(10)(b) (1945 Supp.) (property); N. C. GEN. STAT. §105-151(1) (1943) (services).

[12] N. C. GEN. STAT. §105-147(10)(b) (1945 Supp.); *cf.* N. C. GEN. STAT. §105-151(1) (1943).

[13] N. C. GEN. STAT. §105-151(2) (1943); 29 Ops. Att'y Gen. 663 (1947); 26 Ops. Att'y Gen. 203 (1942); 25 Ops. Att'y Gen. 118 (1939).

[14] N. C. GEN. STAT. §105-151(2) (1943); 29 Ops. Att'y Gen. 663 (1947).

[15] N. C. GEN. STAT. §105-154(2) (1945 Supp.).

[16] N. C. GEN. STAT. §105-142(3) (1943); *see* 29 Ops. Att'y Gen. 219 (1947).

different rule applies. North Carolina requires the partnership to file a return for this partner's distributive share and pay a tax thereon.[17] Although it is the partnership through its manager that must file the return, the statute allows the amount of the tax paid to be deducted from the non-resident's distributive share of the income. Logically it would seem that since this tax is assessed on the individual basis the non-resident, in accordance with the policy towards non-residents with a business or agency in this state, ought to be allowed a credit. However, the statute in express terms excludes this possibility. Thus if duplicate taxation is to be avoided, the state of the partner's residence must make provision therefor. On the other hand where a partner of a foreign partnership is a resident of this state, he is entitled to deduct his distributive share of the income if the state wherein the income was earned and the partnership located imposed a tax thereon.[18] Insofar as resident partners are concerned North Carolina has eliminated duplication of taxes.

Trust relationships, although they give rise to several taxable entities, are usually taxed but once when both the trustee and beneficiary are residents.[19] But when either the trustee or beneficiary is a non-resident and the other a resident, the problem of duplicate taxation again arises.[20] Here again the North Carolina policy seems to be to tax the income but once. Thus if income, regardless of its source, is distributed to a resident beneficiary within the income year, he is taxed thereon; but he is given the same credits and allowances as if the trustee were not involved.[21] The tax policy towards him is the same as that pointed out as applicable to individuals, and when income was earned and taxed in another state, the same allowances are made. If the income is held by a non-resident trustee for the benefit of a resident beneficiary, and is not distributed within the income year in which it is earned, a tax is imposed on the trustee.[22] But again such trustee is entitled to all credits and allowances as if the income were earned by an individual. When income is distributed to a non-resident beneficiary by a resident trustee, taxation by North Carolina depends on the source

[17] N. C. GEN. STAT. §105-142(3) (1943).
[18] N. C. GEN. STAT. §105-47(10)(b) (1945 Supp.); 29 Ops. Att'y Gen. 219 (1947).
[19] N. C. GEN. STAT. §§105-139, 142(4), (1943); Maxwell v. Waddell, 212 N. C. 572, 194 S. E. 315 (1937); 29 Ops. Att'y Gen. 662 (1947). If income is distributed within income year, taxable to beneficiaries; if not distributed, taxable to fiduciary.
[20] Instances arising when settlor may also be subject to tax, as in case of a revocable trust, are not considered herein.
[21] N. C. GEN. STAT. §105-142(4) (1943); *see* Maxwell v. Waddell, 212 N. C. 572, 574, 194 S. E. 315, 317 (1937); 29 Ops. Att'y Gen. 662 (1947).
[22] N. C. GEN. STAT. §105-139 (1943) (applies whether the fiduciary is resident or non-resident and regardless of source of income).

of the income.[23] If such income was earned in North Carolina a tax is imposed, but against such tax a credit would be allowed as in the case of other non-resident individuals earning income in this state.[24] Also if the undistributed income is held for the benefit of a non-resident no tax is imposed on the resident trustee when the income is earned outside the state, but if it is earned in the state then there is a tax.[25] This practice is logically consistent since the income was earned within the state, and although it might subsequently be taxed elsewhere, such a tax would not be during the same taxing period.

The above policy toward trusts seems to be limited to the case in which the trustee does not have active discretionary and investment duties to perform. In a recent case before the North Carolina Supreme Court,[26] income derived from a testamentary trust whose corpus consisted of an operating business in Virginia managed by trustees as partners was distributed, first, to the resident estate of the settlor, which was managed by a co-trustee and executor, and then by such executor to a resident beneficiary under the will. The income thus received was taxed to the beneficiary. Payment was made under protest and it was contended that the income so derived was deductible under the income exemption statute,[27] since the tax had been paid thereon by the trustees to the State of Virginia. *Held,* the estate and not the beneficiary has the equitable interest in the business and therefore the beneficiary does not come within the provisions of the statute. In the course of the opinion the court distinguishes this situation from those in which the trustee is a passive agent or conduit and is therefore sometimes disregarded in determining who has the real taxable interest.[28] The decision in this case, although justifiable on the wording of the statute, does sanction duplicate taxation. Had the taxpayer been a partner in the operation of the business, no tax would have been levied by this state.[29] Also had the income been non-distributable within the current income year, the trustee and co-executor would not have been liable for a tax to North Carolina.[30] Yet when the income is distributable a tax is

[23] Sabine v. Gill, 229 N. C. 599, 51 S. E. 2d 1 (1948); 29 Ops. Att'y Gen. 111 (1946) (if earned within the state, taxable); 27 Ops. Att'y Gen. 112 (1942) (if earned without, not taxable).

[24] N. C. GEN. STAT. §105-142(4) (1943); 29 Ops. Att'y Gen. 111 (1946).

[25] N. C. GEN. STAT. §105-139 (1943).

[26] Sabine v. Gill, 229 N. C. 599, 51 S. E. 2d 1 (1948).

[27] N. C. GEN. STAT. §105-147(10) (1943) "Resident individuals and domestic corporations having an established business in another state, or investment in property in another state, may deduct the net income from such business or investment if such business or investment is in a state that levies a tax upon such net income. . . ."). Subsequently amended, but no significant changes made. N. C. Sess. L., c. 708, s. 4 (1945).

[28] Ops. Att'y Gen. 662 (1947); cf. 27 Ops. Att'y Gen. 112 (1942).

[29] See Note 18 *supra.*

[30] N. C. GEN. STAT. §105-139 (1943); N. C. GEN. STAT. §105-147(10)(b) (1945 Supp.); 29 Ops. Att'y Gen. 219 (1947).

imposed on the beneficiary. This result seems to be inconsistent with the principles applicable in other cases.

Although the taxing of corporations is beyond the scope of this note, it should be considered to some extent to give a complete picture of the tax policy toward the individual. There is no question but that a state has the power to tax a corporation on its net income since it is a separate entity for the purposes of taxation,[31] yet the policy of North Carolina in this respect is to tax the income of the corporation only once. Thus when the income upon which a corporation has paid a tax to the state is paid out in dividends to residents, the individual is not required to pay a tax thereon.[32] The same is true of a foreign corporation which earns part of its income in this state. It pays the state a tax on the proportionate part of its income earned here and its dividends paid to residents of the state are exempt from income tax to this extent.[33] However, this policy of exemption is not carried to the same extent as that toward individually earned income. Thus income earned within this state is taxed by other states when paid out in dividends to residents of those states and likewise North Carolina taxes dividends received by its residents from corporations which have paid taxes elsewhere, but not to this state.[34]

North Carolina, through legislative enactment, has expressed a definite policy to avoid duplicate taxation. In almost every instance this policy has been perfected. However, the decision in the *Sabine* case clearly points out that here is a situation which is inconsistent. The taxpayer in that case was a resident of this state and yet was required to pay a tax when a similar tax had already been paid to another state. In other cases of residents, whether it be one having property or performing services in another state, a partner in a foreign partnership, or a beneficiary of a simple trust, duplicate taxation has been avoided by this state. A modification in the terms of the applicable statute could eliminate this single instance of duplication.

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[31] N. C. GEN. STAT. §§105-131, 134 (1943).

[32] N. C. GEN. STAT. §105-147(5) (1945 Supp.); 29 Ops. Att'y Gen. 662 (1947). A policy otherwise would be constitutional. Welch v. Henry, 305 U. S. 134 (1938).

[33] N. C. GEN. STAT. §105-135 (1943); N. C. GEN. STAT. §105-147(5) (1945 Supp.).

[34] N. C. GEN. STAT. §105-135 (1943); *cf.* N. C. GEN. STAT. §105-147(5) (1945 Supp.).