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## RECENT CASE COMMENTS

## ADMINISTRATIVE LAW—SPECIAL TRIBUNALS—RES JUDICATA—

In the recent case of *Board v. Little et al*<sup>1</sup> it was decided that the refusal, by a board of adjustment under a zoning ordinance, to grant a permit to erect a filling station was *res judicata*, and that the proceedings without an allegation of any new conditions or additional facts could not be reopened by the board at the request of the same parties.<sup>2</sup>

Where a board or a committee is acting in a ministerial capacity—that is, doing only what is provided by statute—it can give no judicial effect to its findings.<sup>3</sup> But, on the other hand, a judgment on the merits rendered by courts of either an inferior or general jurisdiction is a conclusive adjudication unless new facts or different parties appear.<sup>4</sup> There is also much authority for the view that the findings of administrative boards and special tribunals, when confirmed by courts upon review, prevent the same parties from reopening their case before the board.<sup>5</sup> But the question before the court in the instant case is: Can a judgment rendered by an administrative board and not sustained by the court upon review act as a bar to further proceedings before the board? It seems that the court is right in holding that it can. In *Harden v. Raleigh*<sup>6</sup> the court said, "the board of adjustment is clothed, if not with judicial, at least with quasi-judicial powers . . . it being its duty to investigate facts . . . and to exercise discretion . . ." though "every decision is subject to a review by proceedings in the nature of *certiorari*."<sup>7</sup>

<sup>1</sup> 195 N. C. 793, 143 S. E. 827 (1928).

<sup>2</sup> Mrs. Harden first applied to the board for the permit in December 1924. She was refused, but the ruling of the board was reversed by the Superior Court, whose decision was in turn reversed by the Supreme Court. *Harden v. Raleigh*, 192 N. C. 395, 135 S. E. 151 (1926).

<sup>3</sup> *In re Smiling*, 193 N. C. 448, 137 S. E. 319 (1927), in which action of committee appointed by legislature to pass on applications for entrance to Indian school held not to be *res judicata*; cf. *School District No. 2 of Multnomah County v. Lambert County Treas.*, 28 Ore. 209, 42 Pac. 221 (1895).

<sup>4</sup> *Brunfield v. Freeman*, 80 N. C. 213 (1879), *Justice of the Peace; Malone v. Meres*, 109 So. 677 (Fla., 1926); *Benavides v. Garcia*, 283 S. W. 611 (Tex., 1926), facts given effect by the highest state court.

<sup>5</sup> *Puget Sound Electric Ry. v. Lee*, 207 Fed. 860 (1913); *Burlingame v. Brown*, 5 R. I. 410 (1858); *Barbour v. Town of New Scotland*, 71 N. Y. S. 1052 (1901); cf. *Bluthenthal and Bickart v. Bigbee Brothers & Co.*, 33 App. D. C. 209 (1909).

<sup>6</sup> *Supra* note 2.

<sup>7</sup> N. C. Code Ann., 2776 (x). But its decisions will not be reviewed unless arbitrary and oppressive. *Rosenthal v. Goldsboro*, 149 N. C. 128, 62 S. E.

There are cases, however, holding that similar boards and commissions are performing ministerial functions, and that they would, therefore, not be within the scope of protection of the rule of *res judicata*.<sup>8</sup>

The only other direct authority for the holding in the instant case is found in two New York cases<sup>9</sup> where decisions of a board of appeals under a zoning ordinance were upheld by the Supreme Court. When the applicants attempted to have the board "reopen and rehear" their petitions without showing a change of conditions, the court held in both instances that the board acted judicially and did not have the power to reopen and rehear what was already decided. The court based its decisions on the clause in the Greater New York Charter<sup>10</sup> which says that the findings of the board shall be reviewable through a writ of *certiorari* by the Supreme Court. which provision so worded expressly prohibits the board from reviewing its own decisions.

J. B. LEWIS.

APPEAL AND ERROR—LAW OF THE CASE—In a recent South Carolina case<sup>1</sup> the facts were as follows: in the original action the court of common pleas granted the plaintiff punitive damages for alleged slander, assessing \$150.00 damages against the defendant Cooper and \$2,000.00 damages against the other defendant, Cooper's employer, the Southern Railway Company. On appeal to the Supreme Court this judgment was reversed on the grounds that punitive damages could not be thus apportioned, and the case was remanded

905, 20 L. R. N. A. S. 809 (1908); *Lee v. Waynesville*, 184 N. C. 565, 115 S. E. 51 (1922).

<sup>8</sup> *State ex rel N. C. C. C. et al v. So. Ry. Co.*, 151 N. C. 447, 66 S. E. 427 (1909); *State ex rel L. C. Caldwell v. James W. Wilson*, 121 N. C. 425, 28 S. E. 554 (1897); *Reagan v. Farmers Loan and Trust Co.*, 154 U. S. 362 (1894); *cf. In re Film of Dempsey-Tunney Fight*, 22 F. (2d) 837 (1927); *Custer Co. v. Chicago, B. and O. Ry. Co.*, 62 Nebr. 657, 87 N. W. 341 (1901). *Contra: Express Co. v. R. R.*, 111 N. C. 463, 16 S. E. 393, 32 Am. St. Rep. 805, 18 L. R. A. 393 (1892), held to be a court of record but without power to enforce its judgment.

<sup>9</sup> *People ex rel Swedish Hospital v. Leo*, 198 N. Y. S. 397 (1923); *McGarry v. Walsh*, 210 N. Y. S. 286 (1925); *cf. Osterhoudt v. Rigney*, 98 N. Y. 222 (1885); *People ex rel Thompson v. Board of Supervisors of County of Schenectady*, 35 Barb. 408 (N. Y., 1861); *Dennison v. Payne*, 293 Fed. 333 (1923); see *People ex rel Brennan v. Walsh*, 195 N. Y. S. 264 (1922).

<sup>10</sup> Sec. 719 (a), similar to the provision in 2776 (x) of N. C. Code Ann., *supra* note 7.

<sup>1</sup> *Jenkins v. Southern Ry. Co. et al*, 143 S. E. 13 (S. C., 1928).

for a new trial.<sup>2</sup> In a later case between other parties this decision with respect to apportionment of punitive damages was overruled.<sup>3</sup> Plaintiff in the first action, no new trial having been held, sought to take advantage of the rule in the subsequent case and sued for an injunction restraining the defendants from enforcing the former judgment. *Held*, that the former decision was *res judicata* and the law of the case, questions of law determined on appeal being binding throughout any subsequent trials of the cause until it is finally disposed of.

It is well settled in the majority of states that where the facts of the case are substantially the same as they were upon a former appeal, questions of law decided upon such former appeal become the law of the case and may not be reopened or reexamined on the second appeal.<sup>4</sup> And this is true even though the former decision was erroneous<sup>5</sup> or has been overruled.<sup>6</sup> And the language of the cases indicates that the courts regard this as an inflexible rule, admitting of no alternative, though Mr. Justice Holmes states that, "the phrase, law of the case . . . merely expresses the practice of the courts generally to refuse to reopen what has been decided, not a limit to their power."<sup>7</sup>

Missouri and Nebraska do not follow the general rule, the courts of those states reserving the liberty of reversing themselves when convinced that the prior decision was erroneous.<sup>8</sup> Texas allows reconsideration upon a second appeal at the discretion of the court.<sup>9</sup> In Alabama a statute frees the court from adherence to the rule.<sup>10</sup>

<sup>2</sup> *Jenkins v. Southern Ry. Co.*, 130 S. C. 180, 125 S. E. 912 (1924).

<sup>3</sup> *Johnson v. Southern R. Co.*, 142 S. C. 125, 140 S. E. 443 (1927). See (1927) 6 N. C. L. Rev. 330.

<sup>4</sup> *Note* (1895), 34 L. R. A. 321.

<sup>5</sup> *Jones v. C. & W. C. Ry. Co.*, 65 S. C. 410, 43 S. E. 884 (1903).

<sup>6</sup> *Thompson, Judge, v. Louisville Bkg. Co.*, 21 Ky. Law Rep. 1611, 55 S. W. 1080 (1900). Where the judges unanimously disapproved of the former decision and where such former decision had been overruled, it was nevertheless held to be binding. *Saulsbury v. Iverson*, 73 Ga. 733 (1884).

<sup>7</sup> *Messinger v. Anderson*, 225 U. S. 436, 444, 32 Sup. Ct. 739, 740, 56 L. Ed. 1152, 1156 (1912).

<sup>8</sup> *Mangold v. Bacon*, 237 Mo. 496, 141 S. W. 650 (1911); *Murphy et al v. Barron*, 286 Mo. 390, 228 S. W. 492 (1921); *Hastings v. Foxworthy*, 45 Neb. 676, 63 N. W. 955, 34 L. R. A. 321 (1895); *Eccles v. Walker et al*, 75 Neb. 722, 106 N. W. 977 (1906). Particularly full and lucid discussions of the rule may be found in *Mangold v. Bacon* and *Hastings v. Foxworthy*.

<sup>9</sup> *Meyers v. Dittmar*, 47 Tex. 373 (1877); *Kempner v. Huddleston*, 90 Tex. 182, 37 S. W. 1066 (1896).

<sup>10</sup> Ala. Civ. Code (1923), §10287.

An exception is made where a state court has followed a federal decision on the first appeal (in a matter within the jurisdiction of the federal court, such as the construction of a federal statute) and, between the time of the first and second appeals in the state court, the federal decision has been overruled. In such case the state court follows the latest decision of the federal court.<sup>11</sup> The same exception obtains in cases where the federal courts follow the state courts.<sup>12</sup> Another exception has been made where the prior decision had been overruled and it became necessary to reverse the judgment, on the second appeal, on other grounds.<sup>13</sup>

As in the case furnishing the subject of this comment, the law of the case is often confused with *res judicata* or *stare decisis*. The three terms should be distinguished. *Res judicata* implies that the case has been finally determined, and *stare decisis* is a rule of precedent. Hence the law of the case can hardly be said to be based directly on either of them.<sup>14</sup> Perhaps the most accurate statement is that the law of the case is "in the nature of *res judicata*."<sup>15</sup>

In states adhering to the rule and refusing to allow the same question to be raised on a second appeal, the only way such question may be reopened is by a petition to rehear. The appellant is not permitted to escape the safeguards and requirements exacted for rehearings by merely taking another appeal.<sup>16</sup>

HENRY BRANDIS, JR.

BANKS AND BANKING—CONSTITUTIONAL LAW—STATUTORY PRESUMPTIONS—Writs of error were brought by Ferry, formerly a bank director, and by the executor of one Kramer, a deceased director, to set aside judgments against them in suits by depositors in the bank, on the ground that the statutes of Kansas, purporting to establish the directors' liability were contrary to the Fourteenth Amendment of the Constitution of the United States. *Revised Statutes*, Kansas, 1923, 9-163, 9-164, require directors to examine the affairs of the bank, and impose individual responsibility for

<sup>11</sup> *Sands v. American Ry. Express Co.*, 159 Minn. 25, 198 N. W. 402 (1924); *American Ry. Express Co. v. Davis*, 158 Ark. 493, 250 S. W. 540 (1923).

<sup>12</sup> *St. Louis & S. F. Ry. et al v. Quinette*, 251 Fed. 773 (1918).

<sup>13</sup> *Barton v. Thompson*, 56 Iowa 571, 9 N. W. 899 (1881).

<sup>14</sup> (1909) 22 HARVARD L. REV. 438.

<sup>15</sup> *Mangold v. Bacon*, *supra* note 8.

<sup>16</sup> *Holley v. Smith*, 132 N. C. 36, 43 S. E. 501 (1903); *Hospital Ass'n. v. A. C. L. Ry. Co. et al*, 157 N. C. 460, 73 S. E. 242 (1911).

deposits received during insolvency, in case of failure to do as required, and also providing that insolvency or failing circumstances at the time of receiving a deposit shall be prima facie evidence of knowledge of such insolvency, and of assent by him to the receipt of the deposit at such time. *Held*: The statute is not in violation of the due process clause of the Fourteenth Amendment and the judgment should be affirmed. *Ferry v. Ramsey*, 48 S. Ct. 443 (1928).

While there is a conflict in the decisions, the weight of authority sustains the power of the legislature to declare, even in criminal cases, what shall be presumptive evidence of any pertinent fact.<sup>1</sup> Statutes similar to the ones now under discussion, which create a criminal as well as a civil liability on the part of the officers or directors of a bank, have been held to be no infringement of the constitutional guaranty of due process, such statutes declaring that the receipt of the deposit during insolvency shall be, in criminal and civil suits respectively, prima facie evidence of intent to defraud, or prima facie evidence of knowledge of condition.<sup>2</sup> North Carolina is in sharp contrast. C. S., section 224 (g) makes the director criminally liable by declaring it a felony to receive deposits with knowledge of insolvency. An interpretation of this section by the Supreme Court places the burden upon the state of proving beyond a reasonable doubt the fact of a deposit and the fact that the officer or director had knowledge of the failing condition of the bank.<sup>3</sup>

Statutes similar to the ones under discussion seem rather novel, although legislatures have frequently, in the past, declared what shall constitute a prima facie case. For example, they have enacted that an injury will be prima facie evidence of negligence;<sup>4</sup> that possession of whiskey shall be prima facie evidence of intent to sell;<sup>5</sup> that oath and examination of the mother of a bastard child shall be presumptive evidence against the person accused;<sup>6</sup> that possession of opium shall create a presumption of guilt;<sup>7</sup> that finding of apparatus for distilling shall be prima facie evidence that the person in actual possession of the premises knew of the existence

<sup>1</sup> *Hawes v. State of Georgia*, 258 U. S. 1; 42 S. Ct. 204 (1922); *Manly v. State*, 144 S. E. 170 (1928, Georgia). *Contra*: *Hammond v. State*, 78 Oh. St. 15; 84 N. E. 416 (1916).

<sup>2</sup> *Meadowcroft v. People*, 163 Ill. 56; 45 N. E. 303; L. R. A. 1915C, 720.

<sup>3</sup> *State v. Hightower*, 187 N. C. 300; 121 S. E. 615 (1924).

<sup>4</sup> *Pennsylvania Co. v. McCann*, 54 Oh. St. 10; 42 N. E. 768 (1896).

<sup>5</sup> *State v. Barrett*, 138 N. C. 630; 50 S. E. 506 (1905).

<sup>6</sup> *State v. Rogers*, 119 N. C. 793; 26 S. E. 142 (1896).

<sup>7</sup> *Yee Hem v. U. S.*, 268 U. S. 178; 45 S. Ct. 470.

of the apparatus.<sup>8</sup> However, this legislative power to enact what shall be *prima facie* evidence is subject to two limitations: (1) The rules of evidence expressly enshrined in the constitution,<sup>9</sup> and under these rules such legislative enactments are not unconstitutional unless made conclusive of the rights of the party;<sup>10</sup> and (2) there must be a reasonable connection between the fact proven and the one to be inferred.<sup>11</sup> If the law provides that certain facts are conclusive proof, an arbitrary mandate, it is unconstitutional.<sup>12</sup>

As a practical matter, knowledge by directors of insolvency seldom keeps the bank from continuing to receive deposits. The officer who happens to know that his bank is in difficulty, will do all he can to secure the necessary funds to tide the situation over. The general rule is, however, that the average director knows nothing of the insolvency until the cashier absconds, or, in rare instances, he is informed of the fact by the state bank examiner. The bank in the instant case was insolvent for several years before closing its doors. When the state experts fail to discover the situation, it is absurd to think that the directorate, consisting, perhaps, of the "butcher, baker and candle-stick maker," will be aware of a shortage in accounts. Therefore, the investigation required by the statutes will not reveal the situation to the director and the effect of the statutes is to impute a knowledge that he has no reasonable way of ascertaining. Clearly this is so in the instant case as regards Kramer, whose illness prevented his attendance to business. Mr. Justice Holmes, writing the majority opinion, in which he does not refer to any previous cases in point, goes upon the theory that since the legislature could have made the liability absolute, they could, of course, raise a *prima facie* case. This position is criticized by Mr. Justice Sutherland, dissenting as to Kramer, who contends that it is what the legislature has actually enacted that must be taken into consideration. The latter view is preferable; otherwise, the question would resolve itself into whether the legislature had power to enact such a statute, not whether there is a statute covering a definite

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<sup>8</sup> *Hawes v. State of Georgia*, *supra* note 1.

<sup>9</sup> 2 WIGMORE, §1356.

<sup>10</sup> *Mobile, Jackson and Kansas City R. R. v. Turnipseed*, 219 U. S. 35; 31 S. Ct. 136 (1910).

<sup>11</sup> *McFarland v. American Sugar Refining Co.*, 241 U. S. 79; 36 S. Ct. 498 (1916).

<sup>12</sup> *State v. Beach*, 43 N. E. 949; 36 L. R. A. 179 (1896, Indiana).

situation. Apparently it is the meaning of the majority holding that the legislature did not do even as much as it could have done.

From an economic viewpoint such legislation would seem likely to detract from banking stability. It might have the tendency to enhance public confidence, but in the end, it will have the effect of keeping the more conservative business man off the directorate.

DAVID M. FEILD.

CONSTITUTIONAL LAW—SPECIAL LEGISLATION UNDER NORTH CAROLINA AND GEORGIA CONSTITUTIONS—The Constitution of Georgia prohibits special legislation which conflicts with or overlaps any general law.<sup>1</sup> The Supreme Court of Georgia defines a "general law" as one which operates uniformly throughout the state, upon all persons or things, or all persons or things of a class within the state,<sup>2</sup> excluding no person or thing within the state or class from the force of the particular law.<sup>3</sup> Where the legislature classifies, the groups or classes so set apart must have distinguishing characteristics which naturally and reasonably relate to the subject-matter of the law.<sup>4</sup>

A statute providing that juries shall have the power to fix sentences in certain criminal cases in counties having from 60 to 70,000 was held special on the grounds that population was not a reasonable and natural basis of classification.<sup>5</sup> The same was held true for a statute providing that towns having between 400 and 500 population, and being situated across a county line, might, by a majority vote of the inhabitants, change the county line so that the town would be wholly within one county.<sup>6</sup> Likewise, a game law which applied to only one county was held to be a special law.<sup>7</sup>

The Georgia court has held that it is of no consequence that there be but one person or thing within the class, if the basis of classifi-

<sup>1</sup> Ga. Const. Art. I, §4, par. 1.

<sup>2</sup> *Lorentz v. Alexander*, 87 Ga. 444, 13 S. E. 632 (1891); *Abbott v. Comrs.*, 160 Ga. 657, 129 S. E. 38 (1925); *Cooper v. Rollins*, 152 Ga. 588, 110 S. E. 726, 20 A. L. R. 1105 (1922); 25 R. C. L. 815-816.

<sup>3</sup> Note 2 *supra*; *Futrell v. George*, 135 Ga. 265, 269, 69 S. E. 182 (1910); *Thomas v. Austin*, 103 Ga. 701, 30 S. E. 627 (1898).

<sup>4</sup> *State v. King*, 144 S. E. 6 (Ga., 1928); *Mayor of Danville v. Wilkinson County*, 143 S. E. 769 (Ga., 1928); *Stewart v. Anderson*, 140 Ga. 31, 78 S. E. 457 (1913), "... basis of classification must have some reasonable relation to the subject-matter of the law, and must furnish a legitimate ground of differentiation"; *Wright v. Hirsh*, 155 Ga. 229, 116 S. E. 795 (1923).

<sup>5</sup> *King v. State*, *supra* note 4.

<sup>6</sup> *Mayor of Danville v. Wilkinson County*, *supra* note 4.

<sup>7</sup> *Downs v. State*, 158 Ga. 669, 124 S. E. 166 (1924).



cation has a natural and reasonable relation to the law. An act placing a special tax on automobile dealers in counties having over 150,000 population was held to be a general law, although only one county was affected, on the grounds that population was, in the particular case, a natural and reasonable basis of differentiation;<sup>8</sup> similarly, an act providing for a change from a fee to a salary system for county officials in all counties of over 200,000 population was held to be a general law.<sup>9</sup> The conception of "general" and "special" law, held by the Supreme Court of Georgia, seems to be in accord with that of the majority of the courts of the United States.<sup>10</sup>

The North Carolina Constitution allows the legislature to pass local, private, or special acts or resolutions, except in certain specified cases, for example, legislation "relating to health, sanitation, and the abatement of nuisances . . . authorizing the laying out, opening, maintaining, or discontinuing of highways, streets or alleys; relating to ferries or bridges . . . establishing or changing the lines of school districts. . ."<sup>11</sup>

The Supreme Court of North Carolina has given the term "general law" a broader meaning than that given by the Supreme Court of Georgia. It is not essential, under the North Carolina decisions, that a law operate uniformly upon all persons or things, or upon all persons or things of a class throughout the whole state in order that it be a "general law." An act to provide districts in one particular county, wherein sanitary sewers or sanitary measures might be provided, was held constitutional on the grounds that it did not come within the class of acts relating to "health, sanitation, and the abatement of nuisances." It was suggested in the opinion, however, that the act was not local, private, or special since it applied *generally* to the whole county.<sup>12</sup> This suggestion is repeated in a subsequent decision, which held an act to create a sanitary district within certain described boundaries a special act.<sup>13</sup> Nor does the North Carolina court, in cases involving special legislation, invoke the rule that classification must have a reasonable relation to the subject matter.

<sup>8</sup> Adams Motor Co. v. Cler, 149 Ga. 818, 102 S. E. 440 (1920).

<sup>9</sup> Abbott v. Comrs., *supra* note 2.

<sup>10</sup> Comrs v. McMullen, 134 Ill. 170, 25 N. E. 676 (1890); Givens v. Hillsborough County, 46 Fla. 502, 35 So. 88, 110 Am. St. Rep. 104 (1903); 25 R. C. L. "Statutes" §66.

<sup>11</sup> N. C. Const., Art. II, §29 (1917).

<sup>12</sup> Reed v. Howerton Engineering Co., 188 N. C. 39, 123 S. E. 479 (1924).

<sup>13</sup> Drysdale v. Prudden, 195 N. C. 722, 143 S. E. 530 (June, 1928).

The North Carolina Supreme Court defines a special law as one which is "directly addressed to the accomplishment of a single designed purpose at a specific spot."<sup>14</sup> An act commanding the commissioners of a particular county to build a bridge at a specified spot was held special.<sup>15</sup> So with an act providing for the establishment of a school district in a certain location;<sup>16</sup> an act to establish a tubercular hospital at a certain place;<sup>17</sup> and, an act to create a sanitary district within territory described by metes and bounds.<sup>18</sup>

A. B. RAYMER.

CRIMINAL LAW—ARREST AND SEIZURE WITHOUT WARRANT—INTOXICATING LIQUORS—Defendant, a deputy sheriff, arrested Spivey, who was walking along the road with a suitcase, on information that he was transporting liquor. Spivey resisted with a heavy stick (deadly weapon), and the defendant shot Spivey with his pistol. The defendant was indicted for assault and battery. The presiding judge instructed as a matter of law, that under the evidence the defendant did not have a right to make the arrest. This was held to be error in a recent decision.<sup>1</sup>

At common law, an officer could under no circumstances arrest without a warrant for a misdemeanor not amounting to a breach of the peace committed in his presence.<sup>2</sup> Many American states adhere to the common law rule.<sup>3</sup> Many other jurisdictions hold that an officer may arrest for any misdemeanor, less than a breach of the peace, committed in his presence.<sup>4</sup>

In the instant case, the North Carolina court has apparently followed the latter rule, relying on a number of cases which do not

<sup>14</sup> Day v. Comrs., 191 N. C. 780, 133 S. E. 164 (1926); note 13 *supra*.

<sup>15</sup> Note 14 *supra*.

<sup>16</sup> Board of Trustees of Fairmont Graded School Dist. v. Mutual Loan and Trust Co., 181 N. C. 306, 107 S. E. 130 (1921); Robinson v. Comrs of Brunswick County, 182 N. C. 590, 109 S. E. 855 (1921).

<sup>17</sup> Armstrong v. Comrs., 185 N. C. 405, 117 S. E. 388 (1923).

<sup>18</sup> Note 13 *supra*.

<sup>1</sup> State v. Sherman Jenkins, 195 N. C. 747, 143 S. E. 538 (1928).

<sup>2</sup> CLARK, CRIMINAL PROCEDURE (1 ed.), p. 40; 1 BISHOP, NEW CRIMINAL PROCEDURE, §183.

<sup>3</sup> Stittgen v. Rundle, 99 Wis. 78, 74 N. W. 536 (1898); Schnider v. Montross, 158 Mich. 263, 122 N. W. 534 (1909); Commonwealth v. Wright, 158 Mass. 149, 33 N. E. 82 (1893).

<sup>4</sup> Wright v. Commonwealth, 85 Ky. 123, 2 S. W. 904 (1887); Stearns v. Titus, 193 N. Y. 272, 85 N. E. 1077 (1908); Conkling v. Whitmore, 132 Ill. App. 574 (1907); Collegenia v. State, 9 Okl. Cr. 425, 132 Pac. 375 (1913).

support so broad a proposition.<sup>5</sup> In *Neal v. Joyner* the arrest was on suspicion of a felony, and in *Martin v. Houck*, *State v. Blackwelder*, and *State v. Fowler* the arrest was for a felony already committed; *State v. McAfee*, for a breach of the peace committed in the officer's presence; *State v. McNinch*, *State v. Hunter*, and *Brewer v. Wynne* for a nuisance committed in the officer's presence.

It seems that previously the North Carolina court followed the common law rule.<sup>6</sup> Apparently the first extension of that rule was in the case of a nuisance committed in the officer's presence, which was a misdemeanor, though not a breach of the peace.<sup>7</sup> Another extension was made by way of dictum in *State v. Campbell*,<sup>8</sup> and in *State v. Simmons*<sup>9</sup> and *State v. Jenkins*<sup>10</sup> this dictum appears to become law. On this theory the decision may be supported without further discussion.

Concerning the search of the suitcase without a warrant, C. S. 3411(f)<sup>11</sup> explicitly requires an officer upon discovering one in the act of transporting liquor in any vehicle, to seize the liquor, and arrest the person in charge. It explicitly denies the officer the right to search any vehicle, or baggage accompanying any vehicle,<sup>12</sup> for

<sup>5</sup> *Neal v. Joyner*, 89 N. C. 287 (1883); *State v. McAfee*, 107 N. C. 812, 12 S. E. 435, 10 L. R. A. 607 (1890); *State v. Hunter*, 106 N. C. 796, 11 S. E. 366 (1890); *State v. McNinch*, 90 N. C. 695 (1884); *Martin v. Houck*, 141 N. C. 317, 54 S. E. 291 (1906); *Brewer v. Wynne*, 163 N. C. 319, 79 S. E. 629 (1913); *State v. Fowler*, 172 N. C. 910, 90 S. E. 408 (1916); *State v. Blackwelder*, 182 N. C. 899, 109 S. E. 644 (1921); *State v. Campbell*, 182 N. C. at p. 914, 110 S. E. 86 (1921).

<sup>6</sup> *State v. Belk*, 76 N. C. p. 13 (1877), "A peace officer may arrest upon suspicion of a felony and for a breach of the peace and for 'some other misdemeanors.' But these others we conceive are only those which some statute gives a right to arrest for without a warrant."

<sup>7</sup> *State v. Hunter*; *State v. McNinch*; *Brewer v. Wynne*, *supra* note 5.

<sup>8</sup> *Supra* note 5.

<sup>9</sup> 183 N. C. 684, 110 S. E. 591 (1922).

<sup>10</sup> *Supra* note 1.

<sup>11</sup> "When any officer of the law shall discover any person in the act of transporting, in violation of the law, intoxicating liquor in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquor found therein being transported contrary to law. Whenever intoxicating liquor transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team, automobile, boat, air or water craft, or other conveyance, and shall arrest any person in charge. . . . Provided, that nothing in this section shall be construed to authorize any officer to search any automobile or other vehicle or baggage of any person without a search warrant duly issued, except where the officer sees or has absolute personal knowledge that there is intoxicating liquor in such vehicle or baggage." This proviso is not in the Volstead Act—U. S. C. A.—Title 27, §40. See *Carroll v. U. S.*, 267 U. S. 132, 45 S. Ct. 227 (1924).

<sup>12</sup> Construction in *State v. Jenkins*, *supra*, note 1, at page 750.

liquor without a search warrant unless: (1) he sees, or (2) has absolute personal knowledge that there is liquor in such vehicle or baggage. It appears under the construction in the instant case that if Spivey had been riding in a vehicle with the suitcase containing liquor, the officer, under such information as he had here,<sup>13</sup> could not have arrested him without a search warrant. Should Spivey have been subject to arrest without a warrant because he was walking, and not riding in a vehicle? .

A. W. GHOLSON, JR.

CRIMINAL LAW—NECESSITY OF CHARGING JURY ON DEGREES OF MURDER—In *State v. Newsome*<sup>1</sup> a conviction of murder in the first degree was reversed because the trial judge failed to charge the jury on second degree murder. It seems that the evidence tended to show that the homicide was committed by lying in wait, or in an attempt to commit rape, or after premeditation and deliberation. The new trial was granted on the ground that the evidence presented an inference of second degree murder.

"At common law homicide was either murder or manslaughter and there were no degrees of murder."<sup>2</sup> In 1794 Pennsylvania enacted a statute which established degrees of murder.<sup>3</sup> One hundred years later the Legislature of North Carolina enacted a similar statute.<sup>4</sup> Many other states have similar statutory provisions.<sup>5</sup> But the Federal Courts of the United States still maintain the common law idea of one degree of murder.<sup>6</sup>

The judicial constructions of these similar statutes are not in harmony. In the birthplace of the definition of the degrees of murder, a peremptory instruction which deprives the jury of the possibility of determining the degree of murder, even though all the evidence tends to show a murder in the first degree, is erroneous.<sup>7</sup> The reason for this holding is based on the assumption that the

<sup>13</sup> "Knowledge being a firm belief. Personal knowledge—knowledge of the truth in regard to a particular fact or allegation, which is original, and does not depend on information or hearsay." *State v. Simmons*, 192 N. C. at p. 697, 135 S. E. 866 (1926); *State v. DeHerrodora*, 192 N. C. 749, 136 S. E. 6 (1926).

<sup>1</sup> 195 N. C. 552, 143 S. E. 187 (1928).

<sup>2</sup> WHARTON, *HOMICIDE* (3rd. Ed. by Bowlby) p. 147.

<sup>3</sup> Pa. Stat. (West, 1920) §7994.

<sup>4</sup> The Act of 1893 (now C. S. §§4200, 4642).

<sup>5</sup> Note, 21 A. L. R. 628 (1921).

<sup>6</sup> *United States v. Outerbridge*, 5 Sawy. 620, Fed. Case No. 15, 978 (1868).

<sup>7</sup> *Commonwealth v. Ferko*, 269 Pa. 39, 112 Atl. 38 (1920).

judge has invaded the province of the jury, and on the belief, set forth in *Rhodes v. Commonwealth*, 48 Pa. 396, 399 (1864), that "many men have been convicted of murder in the second degree, who really guilty of a higher crime, would have escaped punishment altogether but for this distinction in degrees so carefully committed by statute to juries." This viewpoint is upheld in several jurisdictions.<sup>8</sup>

The contrary view is that if all of the evidence and inferences tend to show that the homicide was committed in a manner designated by the statute as murder in the first degree, a peremptory charge which omits second degree murder is not erroneous.<sup>9</sup> This view is maintained in spite of statutory provisions that the jury shall determine the degree of the murder. These opinions are based on two major reasons: first, that the judge may determine the sufficiency of the evidence; second, that, if there is neither any evidence nor any inference of second degree murder, it is the duty of the judge to charge the jury to find either first degree murder or an acquittal.

North Carolina at one time followed the doctrine of the Pennsylvania courts.<sup>10</sup> The contrary view was later adopted in *State v. Spivey*.<sup>11</sup> This contrary view has continued to be the doctrine of the North Carolina courts, and it is followed and upheld in *State v. Newsome*,<sup>12</sup> the entire court agreeing on this point of law. The court disagreed on the inferences to be drawn from the evidence, four members saying that there was an inference of second degree murder. It would seem that the evidence for such an inference was a confession made by the defendant to a psychiatrist appointed by the trial judge. The important part of the confession was this: "He said that he cut her after he caught up with her; that he cut her because she said she was going to tell her father."<sup>13</sup> Does it not seem that the reasonable and fair inference to be drawn from this confession is that the killing was done in a willful, deliberate, and

<sup>8</sup> *Jones v. State*, 128 Tenn. 493, 161 S. W. 1016 (1913); *State v. Gray*, 19 Nev. 212, 8 Pac. 456 (1885).

<sup>9</sup> *People v. Rogers*, 163 Cal. 476, 126 Pac. 143 (1912); *People v. Page*, 198 Mich. 524, 164 N. W. 755 (1917); *State v. Sexton*, 147 Mo. 89, 48 S. W. 452 (1898); *State v. Zeller*, 77 N. J. L. 619, 73 Atl. 489 (1909); *King v. State*, 57 Texas Crim. Rep. 363, 123 S. W. 135 (1909); *State v. Pepoon*, 62 Wash. 635, 114 Pac. 449 (1911).

<sup>10</sup> *State v. Gadberry*, 117 N. C. 811, 23 S. E. 477 (1895).

<sup>11</sup> *State v. Spivey*, 151 N. C. 676, 65 S. E. 995 (1909), directly overruling *State v. Gadberry*, *supra* note 10.

<sup>12</sup> *State v. Newsome*, *supra* note 1.

<sup>13</sup> *State v. Newsome*, 195 N. C. 552, 559, 143, S. E. 187, 191 (1928).

premeditated manner? A willful, deliberate and premeditated killing is murder in the first degree.<sup>14</sup>

While purporting to follow the doctrine that, where all of the evidence and the fair inferences tend to show a murder in the first degree, the trial judge should instruct the jury that it is their duty to return a verdict of guilty of murder in the first degree or of not guilty, this case will make it extremely dangerous for a judge, under any circumstances, to give a peremptory charge omitting second degree murder.

A. K. SMITH.

EVIDENCE—ADMISSIONS AND DECLARATIONS AGAINST INTEREST—ARE THEY LIMITED BY RULES REQUIRING PERSONAL KNOWLEDGE AND BY THE OPINION RULE?—A recent North Carolina case<sup>1</sup> involves the admissibility in evidence of declarations against interest and extra-judicial admissions. The action was brought by insurance companies, pursuant to subrogation agreements between them and the insured whereby the latter assigned his right of action, against the railroad, to recover the sums paid to the insured for cotton destroyed by fire, the cotton having been stored on a platform on the railroad right of way. On cross-examination by counsel for the defendant the insured was asked whether he had not, prior to the signing of the subrogation receipt, stated that in his opinion the railroad company was not responsible for the fire. Over the plaintiff's objection the insured was permitted to answer, "I expressed the opinion that I did not think the railroad company burned it. Yes, sir; I did that." The insured further testified that he did not of his own knowledge know how the fire occurred, that he did not on that day notice the conditions around the platform. On appeal to the Supreme Court the plaintiff contended that the testimony was incompetent, since it permitted the witness to give his opinion as to the cause of the fire when he had no personal knowledge thereof. The defendant sought to sustain the trial court's ruling on the ground that the testimony presented a declaration against interest. The court treated the reported utterance as an admission; and, in granting a new trial, *held*, "But even an admission must be the acknowl-

<sup>14</sup> C. S., §4200.

<sup>1</sup> Royal Insurance Company v. Atlantic Coast Line R. R. Co., 195 N. C. 693, 143 S. E. 516 (1928).

edgement of a fact and not of a mere opinion having no foundation either in knowledge or from observation."

It is obvious that the defendant's contention that the reported testimony was a declaration against interest could not be sustained, as the court briefly showed by quoting the prerequisites for the competency of such declarations from the leading case in this jurisdiction.<sup>2</sup> An essential requirement is that the declarant be dead; in this case he was actually the witness.

A more difficult situation presents itself when the utterance is considered as an (extra-judicial) admission. An admission is a statement of a party to the action.<sup>3</sup> In the instant case the insured was not technically a party; but he was the assignor of the plaintiff, and this jurisdiction holds,<sup>4</sup> as do all of the others,<sup>5</sup> that any competent declaration made by the assignor prior to the assignment is admissible against the assignee. The testimony was therefore not open to the objection that it was not made by a party.

The leading commentators have differed as to the basis for the competency of admissions as an exception to the rule excluding hearsay;<sup>6</sup> however, it is now generally conceded that admissions are received as substantive evidence, for the truth of the matter asserted.<sup>7</sup> The statement here, although reported on the witness stand by the admitter himself, was such as the hearsay rule would exclude, unless it could be treated as an exception thereto, for it was an extra-

<sup>2</sup> Smith v. Moore, 142 N. C. 277, 55 S. E. 275 (1906).

<sup>3</sup> Roe v. Journegan, 175 N. C. 261, 95 S. E. 495 (1918); 2 WIGMORE, EVIDENCE (1923) § 1048.

<sup>4</sup> Shaffer v. Gaynor, 117 N. C. 15, 23 S. E. 154 (1895).

<sup>5</sup> 2 WIGMORE, EVIDENCE (1923) §1080 *et seq.*

<sup>6</sup> "The party whose declarations are offered against him is in no position to object on the score of lack of confrontation or of lack of opportunity for cross-examination. He ought not to be heard to complain that he was not under oath. All of the substantial reasons for excluding hearsay are therefore wanting." E. M. Morgan, *Admissions as an Exception to the Hearsay Rule*, 30 YALE L. J. 355, 361.

"The Hearsay Rule, therefore, is not a ground of objection when an opponent's assertions are offered against him; in such case, his assertions are termed admissions. But the Hearsay Rule is a ground of objection by the first party when the opponent's assertions are offered in his favor; and such statements are then not termed 'admissions.'" 2 WIGMORE, EVIDENCE (1923), §1048.

"The competency of an admission is not so much an exception to the rule excluding hearsay as based upon a quasi-estoppel which controls the right of a party to disclaim responsibility for any of his statements. He is concluded as to the admissibility of the declaration but not necessarily as to its effect." CHAMBERLAYNE, *THE MODERN LAW OF EVIDENCE* (1911) §1292.

<sup>7</sup> E. M. Morgan, *supra*, note 6.

judicial utterance, not under oath, not subject to cross-examination, and was offered for the truth of the matter asserted therein.

In rejecting this offer because the admitter was not testimonially qualified by personal knowledge or observation, the North Carolina court takes a rather unique stand, which is not in harmony with the prevailing view. The admission is always offered against the declarant or, as here, against one having an identity of interest, so he should not object to its being received as *prima facie* trustworthy.<sup>8</sup> The mental attitude of the admitter, who should be required to ascertain at his peril the truth of the facts by him asserted,<sup>9</sup> is sought in such a case to be shown; and it is natural to assume that he will not make admissions against himself unless they are true.<sup>10</sup> It is sought by the introduction of admissions especially to discredit the party's present claim,<sup>11</sup> but this does not place a hardship upon the admitter, who may offer any evidence which serves as an explanation for his former assertion.<sup>12</sup> In *Reed v. McCord*,<sup>13</sup> the action was for personal injuries alleged to have resulted from the defendant's negligence. The extra-judicial statements of the defendant as of his own knowledge, as to the circumstances and causes of the injury, were held admissible, although he was not present when the injury occurred, and his statements were not based on personal knowledge. *Ross v. Salminen*<sup>14</sup> is a case of similar facts and holding. Cases holding that the admitter need not be testimonially qualified by personal knowledge or observation are numerous and seem to be sustained by the weight of authority.<sup>15</sup>

For similar reasons admissions are not subject to the limitations of the opinion rule.<sup>16</sup>

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ross v. Salminen*, 191 Fed. 504 (1911).

<sup>10</sup> *Kitchen v. Robbins*, 29 Ga. 713 (1860), which is probably the leading case in support of the theory that the admitter need not be testimonially qualified, and which *held*, that the extra-judicial admission by the defendant innkeeper that the plaintiff guest had lost goods in his house was competent, although founded on statements made to him by the plaintiff.

<sup>11</sup> 2 WIGMORE, EVIDENCE (1923) §1053.

<sup>12</sup> E. M. Morgan, *supra* note 6.

<sup>13</sup> 160 N. Y. 330, 54 N. E. 737 (1899).

<sup>14</sup> *Supra* note 9.

<sup>15</sup> *Miller v. Denman*, 8 Yerg. 233 (Tenn. 1835), the earliest case; *Read v. Reppert*, 194 Iowa 620, 190 N. W. 32 (1922), one of the latest; 2 WIGMORE, EVIDENCE (1923) §1053; JONES, THE LAW OF EVIDENCE IN CIVIL CASES, 3d. ed., §296 (1924); CHAMBERLAYNE, THE MODERN LAW OF EVIDENCE (1911) §1305.

<sup>16</sup> "The Opinion Rule does not limit the use of a party's admissions. The reason for that rule does not apply to a party's admissions. Moreover, every case presented in the allegations of pleadings and witnesses includes both facts



The source from which a knowledge of the facts is derived by the admitter is a circumstance for the jury to consider in estimating the weight of the evidence.<sup>17</sup> In this case the admitter clearly did not have personal knowledge of the facts admitted, but it is submitted that his utterance was nevertheless a competent admission and should have been received in evidence.

CHARLES F. ROUSE.

EVIDENCE—DISTINCTION BETWEEN VICARIOUS ADMISSIONS OF AGENT AND *RES GESTAE*—AGENT'S NARRATIVE OF PAST TRANSACTIONS ADMISSIBLE—In an action for personal injuries sustained by the plaintiff while working for defendant company, an employer's liability insurance investigator testified that he had a talk with the foreman of the bricklayers, in charge of the work in which plaintiff was injured, after the accident about witnesses for the case, and that the foreman informed him he thought one of three men recently discharged had caused the injury to plaintiff. *Held*: Testimony admissible as admission of defendant through agent acting within the scope of his authority. *Duke v. Luke*, 143 S. E. 692 (Va., 1928).

The rule for vicarious admissions is usually stated to be: the declarations of an agent are admissible as admissions against his principal (1) when made with express authority; or (2) when made within the scope of his agency while engaged in the very business about which the declaration is made, as part of the *res gestae*.<sup>1</sup> Declarations expressly authorized do not often arise in litigation, and are easily dealt with.

It is believed that the term *res gestae* in this connection might well be discarded for the reason that it has so many meanings, inapplicable here, that it leads to confusion.<sup>2</sup> The use of the phrase

and inferences without discrimination. To extend the arbitrary trivialities of the Opinion Rule to parties' admissions would be the extreme of futility. 2 WIGMORE, EVIDENCE (1923) §1053, (2).

<sup>17</sup> 15 L. R. A. (N. S.) 1096, where *Kitchen v. Robbins*, *supra* note 10, is discussed and cases in point cited.

<sup>1</sup> *McComb v. R. R.*, 70 N. C. 178 (1874) (statement inadmissible although clearly authorized); *R. R. v. Smitherman*, 178 N. C. 599, 101 S. E. 208 (1919); see *Nance v. Norfolk Southern R. R.*, 189 N. C. 638, 127 S. E. 635 (1925) (where lack of authority for agent's statement is apparent, the court states the rule to be: "The agent's statement to these witnesses was not competent as a declaration characterizing or qualifying an act presently done within the scope of his agency and constituting a part of the *res gestae*; it was narrative of a past event, and, of course, inadmissible against the defendant").

<sup>2</sup> Wigmore, EVIDENCE (1923), §§1767, 1048, 1069.

to allow the admission of contemporaneous statements, and the requirement that the declaration be made at the time of the transaction referred to,<sup>3</sup> has probably resulted through a confusion of the admissions exception to the hearsay rule with the spontaneous statements exception.<sup>4</sup> The two have nothing whatever in common. Spontaneous statements are admitted as evidence, regardless of the agency, because of the probability of the truth of such statements.<sup>5</sup> The use of the phrase to describe operative utterances which form part of the transaction authorized is also misleading.<sup>6</sup> Using the term in this meaning, some courts have refused to admit statements made in separate transactions clearly within the scope of the declarant's agency.<sup>7</sup> Such declarations are verbal acts, are offered to prove not the truth of what was said, but that it was said, and are not hearsay any more than any other physical act sought to be proved.<sup>8</sup>

The basis of the rule allowing admissions of agents is: that the extrajudicial declarations of a party-opponent are allowed in evidence as an exception to the hearsay rule for the obvious reason that the party whose declarations are offered against him is in no position to

<sup>3</sup> See *McEntyre v. Levi Cotton Mills*, 132 N. C. 598, 44 S. E. 109 (1903) (declaration subsequent to transaction inadmissible).

<sup>4</sup> Although unauthorized, the declaration may be admitted as a spontaneous statement. Cf. *Coalgate Co. v. Hurst*, 25 Okla. 588, 107 Pac. 657 (1910), where court said of statement of employee to co-employee thirty minutes after the accident, inadmissible: "Was it part of *res gestae*? If so, it should have been admitted, otherwise not. Was the alleged statement spontaneous and so connected with the main fact under consideration as to illustrate its character, or to form in conjunction with it one continuous act?" (Are *res gestae* and "spontaneous statement" synonymous?)

<sup>5</sup> Wigmore, EVIDENCE (1923), §1747.

<sup>6</sup> However, such use is the most plausible and legitimate made of the phrase (*e.g.*, as part of a verbal act, a *res gesta*).

"Such utterance may be of three different sorts: (1) Words the utterance of which is a fact forming part of the issue (*e.g.*, a contract or slander); (2) words uttered at the time of doing an equivocal act, and forming part of the total conduct which determines the legal significance of the act (*e.g.*, words of ownership accompanying occupation of land); and (3) words used circumstantially as indirect evidence (*e.g.*, words of notification, as evidence that the person notified received knowledge)." Wigmore, EVIDENCE (1923), §1746.

*Robertson v. Plymouth Co.*, 165 N. C. 4, 80 S. E. 894 (1914) (contract); cf. *Laudie v. Western Union*, 126 N. C. 431, 35 S. E. 810 (1900) (misinformation of telegraph operator, assurance of delivery).

<sup>7</sup> *McComb v. R. R.*, *supra* note 1; *State Bank v. Bracton Fruit Juice Co.*, 208 N. Y. 492, 102 N. E. 591 (1913); *Carroll v. E. Tenn., Va. and Ga. Ry.*, 82 Ga. 452, 10 S. E. 163 (1889) (declarations authorized but subsequent to event not admitted).

<sup>8</sup> Wigmore, EVIDENCE (1923), §1768 (hearsay rule excludes extrajudicial utterances only where offered as assertions to evidence the truth of what they assert).

object on the score of lack of confrontation of the declarant, lack of opportunity for cross-examination, or that the admitter was not under oath.<sup>9</sup> The declarations of the agent, on the other hand, are admissible because *through authorization* they become declarations of the party-opponent. Therein is combined an evidence rule with a substantive rule of the law of agency. In dealing with the declarations of the principal himself, there is no mention of any *res gestae* requirement, because such declarations are obviously offered as admissions *about* the transaction and not as a part of the transaction itself. Wherefore the ritualistic recital of a *res gestae* requirement in dealing with admissions through agency?

The phrase is doubtless used because authorized statements frequently do accompany authorized acts.<sup>10</sup> But with equal frequency authorized statements, purely narrative, made after the event, are properly admitted.<sup>11</sup> Conversely, unauthorized contemporaneous declarations of the agent (not being "spontaneous" declarations) should be excluded. The distinct weight of authority makes the criterion whether the agent has acted within the scope of his authority, regardless of *res gestae*, or the time of utterance, or its narrative tenor.<sup>12</sup> The authority to make the statement, not to do the act prescribed, is important.<sup>13</sup>

<sup>9</sup> E. M. Morgan, *Admissions as Exception to the Hearsay Rule*, 30 YALE LAW JOURNAL 355; WIGMORE, EVIDENCE (1923), §1048.

<sup>10</sup> *Styles v. Manufacturing Co.*, 164 N. C. 376, 80 S. E. 417 (1913) (memo by agent while cutting logs for principal); *Gazzam v. Insurance Co.*, 155 N. C. 330, 71 S. E. 434 (1911) (statement made during sale of insurance policy); *cf. Xenia Bank v. Stewart*, 114 U. S. 227 (1884).

<sup>11</sup> *Bank v. Wilson*, 12 N. C. 489 (1828) (cashier's declaration concerning past transactions); *Nelson v. Charleston, and W. C. Ry.*, 92 S. C. 151, 121 S. E. 198 (1912) (by conductor day after the wreck to person from whom he was attempting to get a statement); *Citizens' Bank of Tifton v. Timmons*, 15 Ga. App. 772, 84 S. E. 232 (1915) (time of utterance unimportant); *Iron Clad Mfg. Co. v. Stanfield and Son*, 112 Md. 360, 76 Atl. 854 (1910) (superintendent's statement concerning damage to factory floor).

<sup>12</sup> *Barnes v. R. R.*, 161 N. C. 581, 77 S. E. 855 (1913); *Bank v. Stewart*, *supra* note 10; *Myer v. Great Western Ins. Co.*, 104 Calif. 381, 38 Pac. 82 (1894). *Contra: McComb v. R. R.*, *supra* note 1. See *Rumbough v. Improvement Co.*, 112 N. C. 751, 17 S. E. 536 (1893); *cf. Southerland v. R. R.*, 106 N. C. 100, 11 S. E. 189 (1890) (admission of tort liability); *Coal Company v. Hughes*, 224 Fed. 58 (C. C. A., 8th, 1915) (engineer's statement before coroner inadmissible); *Warner v. Me. R. R. Co.*, 111 Me. 149, 88 Atl. 403, 47 L. R. A. N. S. 830 (1913), note; *Dumie v. A. C. L. Ry.*, 161 N. C. 520, 77 S. E. 756 (1913) (endorsement by agent on bill of lading of shortage in shipment *within scope of authority*. Why not the same criterion for subsequent statements?).

<sup>13</sup> *Johnson v. Insurance Co.*, 172 N. C. 142, 90 S. E. 124 (1916) (agent authorized to sell policy but not to make statements concerning the sale at maturity of policy). Authority to do the act described is often confused with

The court in the principal case was not embarrassed by the ambiguous requirement of *res gestae*, but recognized the basis of the rule as that of authorization, and properly admitted declarations by the agent of the corporation, in response to timely inquiries in an authorized investigation, relating to matters under his charge, to which it was his duty to reply.<sup>14</sup>

J. H. ANDERSON, JR.

**INJUNCTIONS—NUISANCE—FILLING STATIONS IN RESIDENTIAL SECTIONS**—Defendant proposed to erect a filling station in a residential district. He demurred to a bill to enjoin which alleged that the station would be ten feet distant from plaintiff's home, and a continuing nuisance because of smoke, noise, noxious gases, odors, danger of fire, and prohibitory insurance rates. *Held*, demurrer sustained. Allegations do not show that filling station will be so erected or operated as to be a nuisance in fact. *Thompson v. Texas Co.*, 143 S. E. 376 (Ga., 1928).

There have been three lines of resistance against the intrusion of filling stations into residential districts. Their erection has been enjoined because of the violation of a zoning ordinance<sup>1</sup> and because of an applicable restrictive covenant against the location of business enterprises.<sup>2</sup> The question in such cases has been whether the station came within the purview of the ordinance or deed and courts have not had to consider whether it was or would be properly conducted.

In the absence of these two grounds the neighbors have been forced to rely upon the doctrine of nuisance. All cases agree that

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authority to make the statement: *Indemnity Co. v. Lehman*, 28 F. (2d.) 1, (C. C. A., 7th, 1928) says—"... if the act or declaration concerning which the admission or declaration is made be in furtherance of the conspiracy, then it may be said that the admission is in furtherance of the conspiracy." Cf. *Miller v. Eaglestar and Brit. Dom. Ins. Co.*, 143 S. E. 692 (S. C., June 11, 1928) (insurance agent's statement at maturity of policy *re* knowledge at issuance of policy admissible).

<sup>14</sup> *Accord*: *Hildebrand v. United Artisans*, 46 Ore. 134, 91 Pac. 592 (1907). *Contra*: *McComb v. R. R.*, *supra* note 1. [The statement of the station agent to the shipper of goods, about the goods left at the station, was clearly within the scope of his agency and authority, but the court, erroneously it is believed, held that such a statement, to be admissible, must have been made as part of the transaction referred to. This the source of the numerous dicta to the same effect since 1874 by North Carolina courts.]

<sup>1</sup> *Long v. Scott*, 133 Atl. 767 (N. J. L., 1926); *Magnolia Petroleum Co. v. Wright*, 124 Okla. 55, 254 Pac. 41 (1927).

<sup>2</sup> *Phillips v. Donaldson*, 269 Pa. 244, 112 Atl. 236 (1920); *Weiss v. Jack*, 236 Mich. 490, 211 N. W. 90 (1927).

a properly conducted garage or filling station is not a nuisance *per se*.<sup>3</sup> Automobiles are of such general use that public garages and supply stations are essential and cannot well be dispensed with.<sup>4</sup> But a filling station may become a nuisance in fact.<sup>5</sup>

Do the normal attributes of a filling station render it a nuisance if located in a residential district or must it be improperly conducted or erected?

Where business enterprises have substantially changed the residential character of a district, courts will not enjoin a filling station merely because of its location.<sup>6</sup> Even in exclusively residential sections, however, the majority holding is that an alleged threat of depreciation in value of property, increase in the fire hazard and insurance rates, and even the judicially known discomforts from the ordinary noise and odors caused by filling stations are not enough to render the proposed operation a nuisance.<sup>7</sup> Thus the Georgia court, while refusing either to go quite as far as an earlier court which said, "We know of no sound, however discordant, that may not, by habit, be converted into a lullaby, except the braying of an ass or the tongue of a scold,"<sup>8</sup> or to agree with the Oklahoma court which protected a plaintiff against "the ejaculations of the most ubiquitous of automobiles," nevertheless held filling-station noises insufficient to invoke relief. Something more than the ordinary evils of a filling station are necessary.<sup>9</sup>

One reason why the mere construction of a gasoline filling station is not more generally enjoined as a nuisance is that the manner in which it will be conducted cannot be foreseen.<sup>10</sup> To enjoin a

<sup>3</sup> Wasilewski v. Bredrzycki, 180 Wis. 633, 192 N. W. 989 (1923); Mitchell v. Guaranty Co., 283 Pa. 361, 229 Atl. 114 (1925); Hanes v. Car. Cadillac Co., 176 N. C. 350, 97 S. E. 162 (1918); (1928) 26 MICH. L. REV. 941.

<sup>4</sup> Hanes v. Car. Cadillac Co., *supra* note 3, at 351, 97 S. E. at 162; Nevins v. McGavock, 214 Ala. 93, 106 So. 597 (1925).

<sup>5</sup> See note 3.

<sup>6</sup> Lansing v. Perry, 216 Mich. 23, 184 N. W. 473; see Lewis v. Burney, 230 S. W. 246 (Tex. Civ. App., 1921); Hunter v. Wood, 277 Pa. 250, 120 Atl. 781 (1923).

<sup>7</sup> Brown v. Easterday, 110 Neb. 729, 194 N. W. 789 (1923); Bourgeois v. Miller, 80 N. J. Eq. 285, 104 Atl. 388 (1918); Nevins v. McGavock, *supra* note 4; Standard Oil Co. v. Kahn, 141 S. E. 643 (Ga., 1928); Hanes v. Car. Cadillac Co., *supra* note 4.

<sup>8</sup> Standard Oil Co. v. Kahn, 141 S. E. 643, 645.

<sup>9</sup> McPherson v. First Presbyterian Church of Woodward, 120 Okla. 40, 248 Pac. 561 (1926).

<sup>10</sup> White v. Gulf Refining Co., 2 S. W. (2d.) 414 (Tenn., 1928); Sherman v. Livingston, 128 N. Y. S. 581 (1910); Bourgeois v. Miller, *supra* note 7.

threatened nuisance it must appear that the injury complained of would be irreparable in damages and that there is a clear and reasonable probability that the injury will be done.<sup>11</sup>

In at least one case, however, the operation of an established filling station on a corner in a residential section was enjoined as a nuisance in fact because the headlights of cars being served came into plaintiff's home, destroying his privacy and sleep.<sup>12</sup> Similarly, the maintenance in a residence district of a double row of storage garages for twenty cars, facing each other on a fifty foot lot with a driveway of fourteen and one-half feet, was enjoined as a nuisance because of the noise, fumes, and depreciation in value of the surrounding property.<sup>13</sup> And several courts have enjoined proposed filling stations in residential sections, simply because their inherent attributes make them a nuisance there.<sup>14</sup>

It is probable that the trend of the authorities will be increasingly in the direction of the cases last cited.

S. SHARP.

INSURANCE—CONDITIONAL SALES—"SOLE AND UNCONDITIONAL OWNERSHIP" CLAUSE—In *Cook v. Citizens' Insurance Company of Missouri*, 143 S. E. 113 (W. Va., 1928) the plaintiff was the buyer of store fixtures under a conditional sale, the title to remain in the vendor until the price was paid. The plaintiff insured his interest against fire under a policy issued by the defendant which was to be void if the insured's interest be other than "sole and unconditional ownership." At the time of the fire, \$260 remained unpaid. *Held*, judgment for the plaintiff affirmed.

It is well settled that the buyer of a chattel in possession under

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<sup>11</sup> *Polish Political Club v. Cloper*, 157 N. E. 705 (Mass., 1927); see *McPherson v. First Presbyterian Church of Woodward*, *supra* note 9; note (1923) 26 A. L. R. 937.

<sup>12</sup> *Nat'l Refining Co. v. Batte*, 135 Miss. 819, 100 So. 388 (1924); note (1924) 35 A. L. R. 95.

<sup>13</sup> *George v. Goodovich*, 288 Pa. 48, 135 Atl. 719 (1927); note (1927) 50 A. L. R. 107.

<sup>14</sup> *Mitchell v. Guaranty Co.*, 283 Pa. 361, 129 Atl. 114 (1925), residential section containing one small store, two churches and a school; *Slingluff v. Tyson*, 280 Pa. 206, 124 Atl. 420 (1924), highest class residential section in town; *Huddelson v. Burnett*, 172 Ark. 216, 287 S. W. 1013 (1926), residential section; *McPherson v. First Presbyterian Church*, *supra* note 9, across street from church; but see *Texas Co. v. Brandt*, 79 Okla. 97, 191 Pac. 166 (1920); *Lewis v. Burney*, 230 S. W. 246 (Tex. Civ. App., 1921); *cf. Marshall v. City of Dallas*, 253 S. W. 887 (Tex. Civ. App., 1923).

a conditional sale contract has an insurable interest.<sup>1</sup> He has all the beneficial elements of ownership in proportion to his payments except bare legal title.<sup>2</sup> The vendor cannot refuse to convey title when paid in full;<sup>3</sup> on that occasion the title automatically passes.<sup>4</sup> The buyer has a property right which he can sell,<sup>5</sup> or assign,<sup>6</sup> or mortgage,<sup>7</sup> and which can, subject to the protection of the vendor's rights by recording acts or otherwise,<sup>8</sup> be reached by the buyer's creditors.<sup>9</sup>

The weight of authority sustains the view that, in the absence of a contract to the contrary, the buyer has the risk of loss.<sup>10</sup> Indeed, this is now statutory in those states which have adopted the Uniform Conditional Sales Law.<sup>11</sup>

What, then, is the effect of a clause in a fire insurance policy issued to the buyer rendering it void if the insured's interest is not "sole and unconditional ownership?" The purpose of the clause, as used in the standard policy, seems to have been to prevent over-insurance, that is, to prevent recovery of full insurance by one bearing only a part of the loss.<sup>12</sup> Nevertheless, the courts are divided. The majority, having regard more for the technical state of legal title, hold that, until final payment has been made, the interest of the buyer does not satisfy the requirements of the clause, and that, if loss occurs, the insurer is not liable.<sup>13</sup> The minority, more con-

<sup>1</sup> BOGERT, COMMENTARIES ON CONDITIONAL SALES (1924), §32.

<sup>2</sup> Phenix Insurance Co. v. Hilliard *et al.*, 59 Fla. 590, 52 So. 799 (1910).

<sup>3</sup> Tuffs v. Griffin, 107 N. C. 47, 12 S. E. 68, 10 L. R. A. 526, 22 Am. St. Rep. 868 (1890). Cases collected, BOGERT, §18.

<sup>4</sup> American Soda Fountain Co. v. Vaughn, 69 N. J. L. 582, 55 Atl. 54 (1903); BOGERT, §27.

<sup>5</sup> Petton Waterwheel Co. v. Oregon Iron Co., 87 Ore. 248, 170 Pac. 317 (1918).

<sup>6</sup> Duante v. Minick, 87 Wash. 539, 148 Pac. 600 (1915); BOGERT, §21.

<sup>7</sup> Karalis v. Agnew, 111 Minn. 522, 127 N. W. 440 (1910); BOGERT, *supra* note 6.

<sup>8</sup> C. S. 3312.

<sup>9</sup> Commercial Investment Trust v. Albemarle Motor Co., Stanly Bank and Trust Co., and A. P. Harris, Trustee, 193 N. C. 663, 137 S. E. 874 (1927).

<sup>10</sup> Whitlock v. Auburn Lumber Co., 145 N. C. 120, 58 S. E. 909 (1907); Tuffs v. Griffin, *supra* note 3; note (1925) 38 A. L. R. 1319; WILLISTON, SALES, §304.

<sup>11</sup> UNIFORM LAWS ANNOTATED, Vol. 2, §27. "After delivery of the goods to the buyer, and prior to the retaking of them by the seller, the risk of injury and loss shall fall upon the buyer."

West Virginia has adopted this section. W. VA. CODE ANN. (Barnes, 1923) c. 99—A §27. N. C. has not adopted this statute.

<sup>12</sup> RICHARDS, INSURANCE, 3 ed., p. 355.

<sup>13</sup> Virginia Fire and M. Ins. Co. v. Lennon, 140 Va. 766, 125 S. E. 801 (1924); note (1925) 38 A. L. R. 186; COOLEY, BRIEFS ON INSURANCE, 2 ed., p. 2199 (1925); 11 VA. L. REG. 313.

cerned with risk of loss than the question of title, protect the buyer unless it appears, either as between the buyer and the seller or between the buyer and a third person, that the buyer is not to stand the entire loss. Aided by a canon of construction of the policy in favor of the insured, these courts regard the buyer, if not in default, as "the beneficial owner."<sup>14</sup> The same diversity of views characterizes the application of the clause to the interest of the vendor.<sup>15</sup>

It is submitted that the minority view, which is law in North Carolina, is the more desirable under modern instalment buying conditions.<sup>16</sup> Otherwise, when an insurance company issues a policy containing such a clause, with knowledge of the facts, to a buyer under a conditional sale, it says, in effect, "You are buying insurance to become effective only after you have acquired the full title upon final payment."<sup>17</sup> This is not the bargain.

N. S. SOWERS.

PUBLIC UTILITIES—CONSTITUTIONAL LAW—FIXING RATES FOR EMPLOYMENT AGENCIES—The legislature of New Jersey passed an act<sup>1</sup> giving the Commissioner of Labor power to fix the maximum rates which an employment agency could charge for its service. The Supreme Court of the United States held this statute to be in violation of the due process clause of the Fourteenth Amendment to the Constitution.<sup>2</sup> The court admitted that a state had the power to require a license and to regulate the business of an employment agency<sup>3</sup> but declared that employment agencies were not so affected with a public interest as to allow rate fixation.<sup>4</sup>

<sup>14</sup> *Lancaster v. Ins. Co.*, 153 N. C. 285, 69 S. E. 214, 138 Am. St. Rep. 665 (1910); *Simms v. American Cent. Ins. Co.*, 296 Fed. 115 (1924); note (1925) 38 A. L. R. 200; *VANCE, INSURANCE*, c. 12, p. 444.

<sup>15</sup> Note (1925) 38 A. L. R. 204.

<sup>16</sup> In *Lancaster v. Ins. Co.*, *supra* note 14, at page 290, the court, after stating the familiar principles that in a conditional sales agreement risk of loss is on the vendee, added: "From this we think it follows that, by analogy to the position obtaining in case of real estate, that the vendee under the facts existent here, is unconditional and sole owner of the goods, within the meaning of the contract and there has been no breach of the same in this respect." See *Harden v. Ins. Co.*, 189 N. C. 423, 127 S. E. 353 (1925).

<sup>17</sup> Some courts meet this by saying that in such a situation, the insurer waives its privileges under the clause. *Glens Falls Ins. Co. v. Michael et ux*, 74 N. E. 964 (Ind., 1905).

<sup>1</sup> P. L., N. J., 1918, p. 822.

<sup>2</sup> *Ribnik v. McBride*, 48 S. Ct. 545 (1928).

<sup>3</sup> *Brazee v. Michigan*, 241 U. S. 340, 36 S. Ct. 662 (1916); *Adams v. Tanner*, 244 U. S. 590, 37 S. Ct. 662 (1917); *Williams v. Fears*, 179 U. S. 270, 43 S. Ct. 66, (Ga., 1900).

<sup>4</sup> *Ribnik v. McBride*, *supra* note 2, p. 545.



Businesses affected with a public interest may be classified as follows: (1) those carried on under a public grant, imposing a duty of public service; (2) exceptional occupations, recognized from earliest times; and (3) businesses which, though not public at their inception, have risen to be such.<sup>5</sup> In deciding the instant case it is necessary to examine the rules laid down in cases belonging to the third class.<sup>6</sup> There is no well-defined test for determining when a business has become clothed with a public interest.<sup>7</sup> The court found the facts of this case to be analagous to those of a recent New York case<sup>8</sup> where the legislature attempted to fix the maximum fee that a ticket broker could charge for the resale of theatre tickets. That statute was held to be in contravention of the Fourteenth Amendment, the court declaring that the businesses of the broker, the baker, the butcher, and the wood-chopper had never been clothed with a public interest. The business must be such "as to justify the conclusion that it has been *devoted* to a public use and its use thereby, in effect, *granted* to the public."<sup>9</sup>

The dissenting justices in *Ribnik v. McBride*<sup>10</sup> argue that occupations are affected with a public interest "whenever any combination of circumstances seriously curtails the regulative force of competition, so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that a legislature might reasonably anticipate serious consequences to the community as a whole."<sup>11</sup> They then offer abundant authority to the effect that employment agencies are afflicted with evils, which are causing serious consequences in many communities; and they then assert that price regulation is the only

<sup>5</sup> Classification of Mr. Chief Justice Taft in *Wolff v. Industrial Court*, 262 U. S. 522, 43 S. Ct. 630 (Kan., 1923).

<sup>6</sup> *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77 (1870); *Budd v. New York*, 143 U. S. 517, 12 S. Ct. 468 (1892); *German Alliance Insurance Co. v. Lewis*, 233 U. S. 389, 34 S. Ct. 612 (Kan., 1914); *Block v. Hirsh*, 256 U. S. 135, 41 S. Ct. 458 (Dist. of Col., 1921); *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 22 S. Ct. 1 (Tenn., 1901); *McLean v. Arkansas*, 211 U. S. 539, 29 S. Ct. 206 (1909).

<sup>7</sup> *Tyson & Bro. v. Banton*, 273 U. S. 418, 47 S. Ct. 426 (N. Y., 1926); *Adkins v. Children's Hospital*, 261 U. S. 525, 43 S. Ct. 394 (Dist. of Col., 1922).

<sup>8</sup> *Tyson & Bro. v. Banton*, *supra* note 7.

<sup>9</sup> It is clear that the court is using a fiction because there is no *actual grant* by private concerns to the public. See *Tyson & Bro. v. Banton*, *supra* note 7, p. 438 (47 S. Ct. 431); Freund, *POLICE POWER*, §372, p. 381.

<sup>10</sup> *Ribnik v. McBride*, *supra* note 2.

<sup>11</sup> *Ribnik v. McBride*, *idem.* p. 547; *American Coal Mining Co. v. Special Coal and Food Commission of Indiana*, 268 Fed. 563 (1920); Freund, *POLICE POWER*, §388; 35 YALE L. J. 438; 19 MICH. L. REV. 74, 415.

kind that will remedy those evils.<sup>12</sup> They further argue that this case is more in line with *Munn v. Illinois*<sup>13</sup> than with *Tyson v. Banton*.<sup>14</sup> Finally, they show, by a long line of decisions, that the court has from time to time widened the range of businesses affected with a public interest and argue that employment agencies should also be included.

This case raises the broad question of the expediency of governmental interference with private business. The constitutionality of state interference, in fixing rates under certain circumstances, was first established in *Munn v. Illinois*,<sup>15</sup> in 1870, where the State of Illinois was allowed to convert all the grain elevators into public utilities and to regulate the storage charges for grain. Since then, because of the growing complexity of our economic life, other situations have occurred which give rise to circumstances justifying state interference. We think the real issue of the case is: Have employment agencies grown to the stage where their evils make necessary governmental price regulation to protect the interests of the public? We are not in a position to know the actual conditions of employment agencies but the fact that in addition to New Jersey twenty-one states<sup>16</sup> have limited the fees that may be charged is a strong indication that there is a need for price regulation in the industrialized State of New Jersey. The result of the case in question is to permit the state to regulate all features of the business except those seeming to demand regulation. If it is constitutional for a state to regulate at all, it should be constitutional for a state to regulate those parts of a business which demand it.

J. FRAZIER GLENN, JR.

PUBLIC UTILITIES—INTERSTATE COMMERCE—STATE TAX ON INTERSTATE BUSES AS UNCONSTITUTIONAL BURDEN—A South Bend, Indiana, city ordinance prohibited the operation on its streets of any motor bus, unless licensed by the city. The ordinance prescribed

<sup>12</sup> There are evils common to employment agencies other than those affecting the fees. *Adams v. Tanner*, *supra* note 3, pp. 597-616 (244 U. S. 590), but it is obvious in a business where the chief source of income is from the collection of fees that there will be numerous evils occurring in their collection, such as, excessive fees, discriminatory fees, and fee-splitting with the employer. See *Ribnik v. McBride*, *supra* note 2, p. 549.

<sup>13</sup> *Supra* note 6.

<sup>14</sup> *Tyson & Bro. v. Banton*, *supra* note 7.

<sup>15</sup> *Munn v. Illinois*, *supra* note 6.

<sup>16</sup> *Ribnik v. McBride*, *supra* note 2, p. 551, footnote 15.

license fees varying with the seating capacity of the bus; that for a bus with seats for twelve persons was fifty dollars a year. No distinction was made between buses engaged exclusively in interstate, in partly interstate and partly intrastate, or exclusively in intrastate traffic. The defendant operated a bus from South Bend to Niles, Michigan, a distance of about nine miles, and though his business was primarily interstate, he served suburban traffic to points within the state, but required all passengers to pay the fare to some Michigan point. The defendant refused to apply for a license from the city and was convicted of a violation of the ordinance. *Held*, the conviction was error. The ordinance was void for the imposition of the license fee, it being a tax on the privilege of engaging in interstate commerce. *Sprout v. City of South Bend*, 48 Sup. Ct. 502 (1928).

The instant case is another illustration of the constantly recurring attempts of bus companies to evade state regulation by the use of various tricks and subterfuges. A somewhat analogous situation arose in the case of *Inter-City Coach Co. v. Atwood*,<sup>1</sup> where the bus company ran its line from a point in the state just across the state line and back to points within the same state, the crossing of the state line being merely an attempt to make the traffic interstate.<sup>2</sup> In the principal case, the ticket was sold to a point in another state, which made it, on its face, an interstate transaction, since the passenger had a contract right against the bus company for an interstate transportation; when in fact, the passengers, with the knowledge of the operator, were only going to a point within the state. The court held that this part of the bus line's operations was intrastate, the test being the actual nature of the transaction. Though the present case is clearer than the *Atwood* case, both are difficult to reconcile with the Supreme Court holdings that where there is transportation between *termini* in the same state, over a route lying partly outside

<sup>1</sup> 21 F. (2d.) 83 (1927); commented on in 41 HARV. L. REV. 260; 6 N. C. L. REV. 208; 26 MICH. L. REV. 222; see also, *Baltimore & Ohio S. W. R. v. Settle*, 260 U. S. 166, 43 Sup. Ct. 28 (1922); *Crigler v. Comm.*, 120 Ky. 517, 87 S. W. 276; *Interstate Buses Corporation v. Holyoke St. Ry. Co.*, 273 U. S. 45, 47 S. Ct. 298.

<sup>2</sup> In the *Atwood* case, the court spoke of such attempts at evasion as "incredible subterfuges" and "mere fictions of interstate commerce," and that interstate commerce must include something more than running buses across state lines. Such evasions are frequently attempted; for instance, see press report in the *Evening Bulletin*, Philadelphia, Thursday, Oct. 11, 1928.

of the state, the commerce is interstate<sup>3</sup> and the intention of evading the application of local regulation should not change the character of the transportation, since whether a given transaction is interstate is solely a question of fact.<sup>4</sup> It is safe to say, however, that when such devices and tricks are used to avoid local regulation, it will be of no avail, even though the buses cross the state lines.

This question, however, was of no importance in the principal case, it being admitted that the business of the bus company was primarily interstate, and though it was also engaged in intrastate traffic, the statute imposed a privilege tax upon all buses without distinction between whether they were engaged exclusively in interstate, partly in interstate and partly in intrastate, or exclusively in intrastate traffic; consequently, it was void.<sup>5</sup>

Interstate bus transportation is, in the absence of action by Congress, the proper subject of local regulation, provided the regulation is reasonable and does not constitute a direct or material burden on interstate commerce.<sup>6</sup> Accordingly, the states may impose upon interstate bus lines, undiscriminatory regulations for the purpose of insuring the public safety and convenience, and may require a license for this purpose;<sup>7</sup> they may also impose upon such vehicles a reasonable charge for the maintenance and repair of the highways.<sup>8</sup> On

<sup>3</sup> *Hanley v. Kansas City So. Ry.*, 187 U. S. 617, 23 Sup. Ct. 214 (1903); *Western Union Tel. Co. v. Speight*, 254 U. S. 17 (1920); *cf. Lehigh Valley R. R. v. Pennsylvania*, 145 U. S. 192 (1892); *Ewing v. City of Leavenworth*, 226 U. S. 464 (1913). See 6 HARV. L. REV. 457 (1913).

<sup>4</sup> *Kirmeyer v. Kansas*, 236 U. S. 568, 35 S. Ct. 419 (1915); *Western Union Tel. Co. v. Speight*, *supra* note 3. See 73 U. of PA. L. REV. 210.

<sup>5</sup> *Buck v. Kuykendall*, 267 U. S. 307, 45 Sup. Ct. 324 (1925); *Bush v. Maloy*, 267 U. S. 317, 45 Sup. Ct. 326, 327 (1925); *Red Ball Transit Co. v. Marshall*, 8 F. (2d.) 635 (1926).

<sup>6</sup> *Cooley v. Board of Wardens*, 12 How. 299 (U. S., 1851); *Hendrick v. Maryland*, 235 U. S. 610, 35 Sup. Ct. 140 (1914).

<sup>7</sup> *Kane v. New Jersey*, 242 U. S. 160, 37 Sup. Ct. 30 (1916); *Hendrick v. Maryland*, *supra* note 6.

<sup>8</sup> *Clark v. Poor*, 274 U. S. 554 (1926); *Interstate Buses Corp. v. Blodgett*, 48 Sup. Ct. 230 (1928). This type of regulation allowed the states is an exercise of the states' police power as that term is used in its primary sense, *i.e.*, "measures of police" (FREUND, POLICE POWER, §70), in that it concerns itself with the primary social interests: safety, order, and morals; in contradistinction to "measures of revenue," which deal with economic interests: rates, service, and limitations or prohibitions of competition. The latter type will not be upheld unless the matter is of local concern not requiring uniform legislation. *Pennsylvania Gas Co. v. Pub. Serv. Comm.*, 252 U. S. 23 (1920) (upheld); *Missouri v. Kansas Gas Co.*, 265 U. S. 298 (1913) (overthrown). The cases cited are in the public utility field. It seems that regulations of rates and service have not been attempted in the bus field as yet, though discriminatory restrictions and prohibitions of competition have been attempted and condemned. *Buck v. Kuykendall*, *supra* note 5.

the other hand, if the provisions of the statute have no reasonable connection with these interests, it will not be upheld; consequently, interstate bus operators may not be required to provide insurance,<sup>9</sup> or indemnity bonds.<sup>10</sup> Likewise, if it unduly burdens, obstructs and *a fortiori*, if it prohibits such traffic, it is obnoxious to the Commerce Clause, and is void.<sup>11</sup> The Supreme Court has allowed the states a good deal of freedom in this regard. As a result, a wide range of state statutes have been upheld. The instant case is significant in that it indicates that the court, in the face of its recent attitude, has not retreated from its position that a statute which prohibits interstate commerce is invalid.

R. T. GILES.

PROCEDURE—EXECUTION AGAINST THE PERSON—It is provided by statute in North Carolina, as follows:

"If the action is one in which the defendant might have been arrested, an execution against the person may be issued to any county in the state, after a return of an execution against the property wholly or partly unsatisfied. But no execution shall issue against the person of the judgment debtor, unless an order of arrest has been served, as provided in the article Arrest and Bail, or unless the complaint contains a statement of facts showing one or more of the causes of arrest required by law, whether such statement of facts is necessary to the cause of action or not."<sup>1</sup>

Referring to the article Arrest and Bail<sup>2</sup> it is provided that there are five cases in which arrest is allowed: (1) In an action for damages not arising out of contract where the defendant is not a resident of the state or where he is about to remove from the state or where the injury is to the person or character or for injuring or wrongfully taking and detaining property; (2) in an action for a fine or penalty, for seduction, for money received, embezzlement by any fiduciary or person acting in that capacity, or for any misconduct in office or professional employment; (3) for the concealment of personal property in an action for its possession where it has been concealed with the intent that it should not be found or with the intent to deprive the plaintiff of the benefit thereof; (4) for fraud in in-

<sup>9</sup> Red Ball Transit Co. v. Marshall, *supra*, note 5.

<sup>10</sup> Michigan Commission v. Duke, 266 U. S. 570, 45 Sup. Ct. 191 (1924).

<sup>11</sup> Buck v. Kuykendall; *supra* note 5.

<sup>1</sup> C. S. 673.

<sup>2</sup> C. S. 768.

curing a debt; and (5) when the defendant has removed, or disposed of his property, or is about to do so, with intent to defraud his creditors.

It will be seen that it is necessary for an execution against the person that there be an order of arrest served beforehand or there must be a statement of facts in the complaint which would justify an arrest, whether such statement be necessary for the cause of action or not. In this regard the court has laid down three classes of cases.<sup>3</sup> In the first class there has been an arrest of the defendant under proper application. In the second class the cause of arrest is set forth in the complaint but is collateral and extrinsic to the plaintiff's cause of action. The third class is where the cause of arrest is set forth in the complaint and is necessary to and part of the whole of the plaintiff's cause of action.<sup>3\*</sup> In this instance no order of arrest is required but the complaint must state sources of information and must be verified.

As to verification of the complaint there seems to be some doubt. It seems that the need of verification arose when the statement of facts in the complaint was to be used as an affidavit for arrest, that is, the second or third class referred to above. It would seem that the need of verification has been eliminated by the fact that the jury must pass upon the issue, but although there is no direct holding on this point the cases seem to imply that the complaint must be verified.<sup>4</sup>

The cause for arrest set forth in the complaint must be found by the jury.<sup>5</sup> It is not sufficient that there is a verified complaint setting forth the cause for arrest. There must be submitted to the jury an issue on the cause of action and also the cause for arrest and these must be found in the affirmative. When the facts alleged are in relation to an injury the jury must find still further that the injury was done wilfully—that is, voluntarily and of set purpose, or

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<sup>3</sup> *Peebles v. Foote*, 83 N. C. 102 (1880).

<sup>3\*</sup> *Harris v. Singletary*, 193 N. C. 583, 137 S. E. 724 (1927).

<sup>4</sup> *Huntley v. Hasty*, 132 N. C. 279, 43 S. E. 844 (1903); *Carroll v. Montgomery*, 128 N. C. 278, 38 S. E. 874 (1901).

<sup>5</sup> *Ledford v. Emerson*, 143 N. C. 527, 55 S. E. 969 (1906); *Turlington v. Aman*, 163 N. C. 555, 79 S. E. 1102 (1913); *Michael v. Leach*, 166 N. C. 223, 81 S. E. 1135 (1914); *Doyle v. Bush*, 171 N. C. 10, 86 S. E. 165 (1915); *Oakley v. Lasater*, 172 N. C. 96, 89 S. E. 1063 (1916).

of free will, without yielding to reason,<sup>6</sup> or with some element of violence, fraud, or criminality.<sup>7</sup>

The cause for arrest having been determined by the jury the question of judgment arises. Some of the cases say that it is necessary that the judgment should direct that an execution against the person be issued because the execution must follow the judgment since its purpose is to enforce it.<sup>8</sup> Other cases say that it is not necessary that the judgment contain such matter.<sup>9</sup> The latter view appears to be the more reasonable one for an execution against the person follows naturally, the facts having been found by the jury and stated in the judgment,<sup>10</sup> after an execution against the property of the judgment debtor has been returned unsatisfied.

ANDREW C. MCINTOSH.

REAL PROPERTY—DEEDS—BUILDING RESTRICTIONS—IS AN APARTMENT HOUSE A DWELLING HOUSE?—Building restrictions in a deed provided that the lot thereby conveyed should "be used for residential purposes only" and that there should "not at any time be more than one residence or dwelling house on said lot." *Held*, that the restrictions were not violated by the erection of a four-family apartment house on the lot.<sup>1</sup> All of the relevant North Carolina cases were cited in the opinion. Of these the two recent decisions that restrictions prohibiting the erection of more than "one residence" on a lot exclude apartment houses<sup>2</sup> and that restrictions limiting the use of the property to "residence purposes only" do not exclude apartment houses<sup>3</sup> are well-accepted propositions.<sup>4</sup> And it may be

<sup>6</sup> *McKinney v. Patterson*, 174 N. C. 483, 93 S. E. 967 (1917).

<sup>7</sup> *Oakley v. Lasater*, 172 N. C. 96, 89 S. E. 1063 (1916); *Overton v. Combs*, 182 N. C. 4, 108 S. E. 357 (1921).

<sup>8</sup> *Ledford v. Emerson*, 143 N. C. 527, 55 S. E. 969 (1906).

<sup>9</sup> *Turlington v. Aman*, 163 N. C. 555, 79 S. E. 1102 (1913); *Michael v. Leach*, 166 N. C. 223, 81 S. E. 1135 (1914).

<sup>10</sup> *Doyle v. Bush*, 171 N. C. 10, 86 S. E. 165 (1915).

<sup>1</sup> *Charlotte Cons. Construction Co. v. Cobb*, 195 N. C. 690, 143 S. E. 522 (1928).

<sup>2</sup> *Bailey v. Jackson*, 191 N. C. 61, 131 S. E. 567 (1925).

<sup>3</sup> *Huntington v. Dennis*, 195 N. C. 759, 143 S. E. 521 (1928). In this case it was held further that the erection of an eight-family apartment house at a cost of \$28,000 would not be a violation of a provision that any residence erected on the property should cost not less than \$7,500. The provision itself suggests that the erection of an apartment house was not anticipated. Thus the provision did not cover the case of an apartment house but only that of an ordinary single-family residence.

<sup>4</sup> *Courtney v. Hunter*, 159 Ga. 332, 125 S. E. 714 (1924); *Teagan v. Keywell*, 212 Mich. 649, 180 N. W. 454 (1920); *Arnoff v. Williams*, 94 Ohio St. 85, 113 N. E. 661 (1916).

asserted generally that the court's problem of construction arises only where the terms of the restrictions do not clearly indicate whether erections are limited generally to any sort of abode or particularly to one kind of abode.<sup>5</sup> The singular of "dwelling" or "dwelling house" is in the twilight zone.<sup>6</sup> Where no buildings "other than a dwelling house" may be erected on a lot, the Michigan court would hold the erection of an apartment house a violation of the restrictions.<sup>7</sup> North Carolina<sup>8</sup> has followed Illinois<sup>9</sup> and Pennsylvania<sup>10</sup> in adopting the contrary construction. In the present case erections were limited to "one residence or dwelling house." The court, conceding that an apartment house might be more than one residence, denied that it was more than one dwelling house or that "residence" and "dwelling house" were used synonymously. It is conceivable that the draftsman and the parties did not regard the latter term as broader than the former. If it was broader the former was mere surplusage. But the court has spoken and effected a result quite in keeping with the policy in favor of the free use of property. Because of the increasing use of apartments in the cities for "residential purposes" and the fact of their erection in the better residential areas it would not be unwise for the draftsman of building restrictions who would limit erections to one particular sort of abode to the exclusion of others to say so in explicit terms. The safer way is to set forth what structures are excluded rather than those only which may be erected.

J. B. FORDHAM.

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<sup>5</sup> Where structures were limited to "one house only on each lot" it was taken as clear that single-family houses only were permitted. *Arnoff v. Chase*, 101 Ohio St. 331, 128 N. E. 319 (1920). And the same view is taken as to restrictions limiting buildings to private dwellings. *Taylor v. Lambert*, 279 Pa. 514, 124 A. 169 (1924); *Walker v. Haslett*, 44 Cal. App. 394, 186 P. 622 (1920).

<sup>6</sup> The Ohio court has frankly said that restrictions limiting erections to "one dwelling" are capable of two constructions, *vis.* that only one building could be erected or that only one family house could be erected. *Frederick v. Hay*, 104 Ohio St. 292, 135 N. E. 535 (1922). Where the plural of "dwelling" or "dwelling house" has been used the tendency is to hold apartment houses not excluded. *Ministers, etc. R. P. Dutch Church v. Madison Ave. Bldg. Co.*, 214 N. Y. 268, 108 N. E. 444 (1915).

<sup>7</sup> *Schadt v. Brill*, 173 Mich. 647, 139 N. W. 878 (1913); *Thompson v. Langan*, 172 Mo. App. 64, 154 S. W. 808 (1913).

<sup>8</sup> *De Laney v. Van Ness*, 193 N. C. 721, 138 S. E. 28 (1927).

<sup>9</sup> *Hutchinson v. Ulrich*, 145 Ill. 336, 34 N. E. 556 (1893).

<sup>10</sup> *Rohrer v. Real Estate Co.*, 259 Pa. 297, 102 A. 1050 (1918).



TORTS—DECEIT—RELIANCE ON REPRESENTATION—NEGLIGENCE AS TEST—An agent authorized to sell land visited the property with the prospective purchaser. He pointed out its boundaries when three-quarters of a mile away and admitted that he had never been on the *locus in quo* until the day before. Afterwards, the purchaser had ample opportunity to investigate. Held that the misrepresentation was an honest mistake, and as the purchaser could have easily ascertained the truth, he should not have relied solely on the statement.<sup>1</sup> The court in laying down the elements of actionable fraud said, "It (the representation) must be reasonably relied on by the other party." Evidently it concluded that here the reliance was entirely unreasonable. The result is correct, but the decision could have been based on the sole ground that the representation was an honest mistake. It is doubtful whether a duty of due care should be imposed on the plaintiff in actions of deceit. Rather the test should be whether the deceived actually relied, using the standard of reasonable diligence to ascertain whether as a matter of fact, reliance was placed on the representation or whether the defrauded party acted from his own beliefs and without regard for the statements.

The problem is well stated in a Kentucky case<sup>2</sup> which holds that, "The policy of the courts is, on the one hand, to suppress fraud, and on the other hand, not to encourage negligence and inattention to one's own interests . . . is it better to encourage negligence in the foolish, or fraud in the deceitful?" It is apparent that there is danger in either course, but the same case concluded that, "Judicial experience shows the former to be less objectionable. The law is not designed to protect the vigilant, or tolerably vigilant alone, although it rather favors them, but is intended as a protection to even the foolishly credulous, as against the machinations of the designedly wicked."

The weight of authority holds that ordinarily false representations are not actionable unless the hearer relies thereon while exercising common prudence and diligence.<sup>3</sup> However, courts have shown an increasing tendency to get away from the injustice caused at times by this rule, by including as "reasonable reliance" conduct which was in former cases held to be negligent.<sup>4</sup>

<sup>1</sup> *Peyton v. Griffin*, 195 N. C. 685, 143 S. E. 525 (1928).

<sup>2</sup> *Western Mfg. v. Cotton*, 126 Ky. 749, 104 S. W. 758 (1907).

<sup>3</sup> *Cooley on Torts*, Vol. 2, 3 ed., p. 931; 26 C. J. 1142.

<sup>4</sup> *Aultman Machine Co. v. Schierkolh*, 95 Kan. 737, 149 Pac. 680 (1915).

The early cases take the view that where the victim had opportunities to investigate and through lack of due care did not do so, the blame was on himself and he could not recover,<sup>5</sup> even though the representor made positive statements and was in a position to know the truth,<sup>6</sup> as a statement concerning quantity of land,<sup>7</sup> or its boundaries,<sup>8</sup> or that a note was for a certain amount.<sup>9</sup>

While these principles have been upheld in later decisions,<sup>10</sup> many of the cases have been modified.<sup>11</sup> Numerous cases now hold that one may rely on a representation without an investigation: (1) where statements are a matter of knowledge of the person making them or are matters which from their nature and situation are peculiarly within his power of knowledge;<sup>12</sup> (2) where representor makes positive statements fraudulently;<sup>13</sup> (3) and where there is a confidential relation existing between the parties.<sup>14</sup> So it was held reasonable to rely on the statement of owner of land as to its boundaries<sup>15</sup> and to representations by insurance agent to blind man concerning terms of the policy.<sup>16</sup>

"The tendency of modern decisions is not to extend but to restrict the rule requiring diligence."<sup>17</sup> One court boldly proclaims, "The liability of vendor arises from his own fraud and is not affected by the question of diligence on the part of the vendee."<sup>18</sup> Further, a number of cases hold that the sole question is whether the repre-

<sup>5</sup> *Saunders v. Hatterman*, 24 N. C. 32 (1841); *Lytle v. Bird*, 48 N. C. 223 (1854).

<sup>6</sup> *Credle v. Swindell*, 63 N. C. 305 (1868).

<sup>7</sup> *Fagan v. Newson*, 12 N. C. 20 (1826).

<sup>8</sup> *Lytle v. Bird*, *supra*.

<sup>9</sup> *Fields v. Rouse*, 48 N. C. 72 (1855).

<sup>10</sup> *Cash Register Co. v. Townshend*, 137 N. C. 652, 50 S. E. 306 (1905); *Conley v. Coffin*, 115 N. C. 563, 20 S. E. 207 (1894).

<sup>11</sup> *Walsh v. Hall*, 66 N. C. 233 (1871); *May v. Loomis*, 140 N. C. 350, 52 S. E. 728 (1905).

<sup>12</sup> *Unitype Co. v. Ashcraft Bros.*, 155 N. C. 63, 71 S. E. 61 (1911).

<sup>13</sup> *Machine Co. v. Bullock*, 161 N. C. 1, 76 S. E. 634 (1912); *Shell v. Roseman*, 155 N. C. 90, 71 S. E. 86 (1910).

<sup>14</sup> *Riply v. Cronen*, 131 Ky. 631, 115 S. W. 791 (1909).

<sup>15</sup> *Stout v. Martin*, 87 W. Va. 1, 104 S. E. 157 (1920).

<sup>16</sup> *Whitehurst v. Life Ins. Co. of Va.*, 149 N. C. 273, 62 S. E. 1067 (1908). Also held reasonable to rely on statements as to conditions of mill machinery and quantity of merchantable timber. *May v. Loomis*, 140 N. C. 350, 52 S. E. 728 (1905); and on representation as to amount of business done although the books were placed at buyer's disposal. *Smith v. Werkheiser*, 152 Mich. 177, 115 N. W. 964 (1908).

<sup>17</sup> *Kraus v. Commerce National Bank*, 140 Minn. 108, 167 N. W. 353 (1918).

<sup>18</sup> *Hale v. Philbrick*, 42 Iowa 81 (1875).

sensation deceived the person involved.<sup>19</sup> "That is the real question and not whether the defrauded one was reasonably diligent."<sup>20</sup>

LAWRENCE WALLACE.

**TORTS—PROXIMATE CAUSE—RES IPSA LOQUITUR—JOINT TORT-  
FEASORS**—In a recent North Carolina case,<sup>1</sup> the plaintiff's intestate was electrocuted. A car was shunted off the end of a spur track belonging to defendant railroad. It struck a guy-rope which supported a pole belonging to defendant power company. This pole was within the right-of-way of the railroad. The force of the blow injured a transformer attached to the pole. The intestate was employed in a laundry which was supplied with electric current by the power company. In the course of his ordinary duties, he grasped a switch and was killed by the excessive current produced by the injury to the transformer. The power company was negligent in not having inspected its wires. The railroad company was negligent, first, in having permitted the pole to be placed within its right-of-way and, second, in shunting the car off the end of the track. In the lower court, the plaintiff recovered damages from both of the defendants and this was affirmed on appeal.

The causal connection is clear. The negligence of defendants is concurrent. That there can be more than one proximate cause for an injury, even though these causes are not concurrent, is well set-

<sup>19</sup> *Bowee v. Gage*, 127 Wis. 245, 106 N. W. 1074 (1906).

<sup>20</sup> *Halsell v. First National Bank of Muskogee*, 48 Okla. 535, 150 Pac. 489 (1915); *Judd v. Walker*, 215 Mo. 312, 114 S. W. 979 (1908); *Fargo Gas and Coke Co. v. Fargo Gas and Electric Co.*, 4 N. D. 219, 59 N. W. 1066 (1894), holding that "the unmistakable drift is toward the just doctrine that the wrong doer cannot shield himself from liability by asking the law to condemn the credulity of his victim. General rule is that the question is one of reliance by the buyer upon the false statements of the seller and whether he was prudent or negligent is immaterial." See *BIGELOW on TORTS*, 524.

In a North Carolina case, *Pittman v. Tobacco Grower's Coöperative Ass'n.*, 187 N. C. 340, 121 S. E. 364 (1924), plaintiff signed a contract to join the defendant coöperative association and was an active worker in interesting others. He passed out a number of contracts, asked people to read them and join, but he did not read the contract himself. Later he sued for fraudulent representations in the contract as to number of members previously signed. The court held the reliance was not reasonable. It is suggested that the court should have considered the case as one where no reliance was placed on the terms of the contract at all, since he neither read the contract nor made any inquiries, but probably desired to repudiate the contract for other reasons. Thus his failure to use due care is evidence that he signed the contract independently of any reliance upon its terms.

<sup>1</sup> *Ramsay v. Carolina-Tennessee Power Co. and Louisville and Nashville Railroad*, 195 N. C. 788, 143 S. E. 861 (1928).

tioned.<sup>2</sup> The question of proximate cause has been "hashed" by the courts for a long while. In most cases in which the question has arisen, there is a clear casual connection, as in the instant case, but the question actually decided by the courts in these cases, under the guise of proximate cause, is whether the interest of the plaintiff is protected by the rule of law which the defendant violated.<sup>3</sup>

Another question is whether the doctrine of *res ipsa loquitur* applies. The principal case holds that it does. The North Carolina cases seem to lean in this direction. The doctrine of *res ipsa loquitur* was held to apply to the electrocution of an employee of a foundry who came in contact with an overcharged wire,<sup>4</sup> to a permanent injury sustained when attempting to turn on an electric light.<sup>5</sup> And the court indicated that the doctrine would apply in the case of a boy who was injured by touching an uninsulated wire while climbing a tree.<sup>6</sup> In other jurisdictions there are similar cases where the rule was similarly applied, to injuries received while using a telephone<sup>7</sup> and while turning on an electric light.<sup>8</sup> There is every reason for holding that this rule is applicable in such cases, because, when a company uses such a dangerous instrumentality as electricity, the burden of going forward with the evidence should be placed upon its shoulders. The application of the rule of *res ipsa loquitur* does not relieve the plaintiff of the burden of proof, but simply entitles the jury to infer negligence from the plaintiff's evidence.<sup>9</sup>

As to suing two defendants jointly in such cases, it has been well decided that when two defendants have contributed to an injury, both may be held liable, especially when their negligence is concurrent. "The fact that other causes may have concurred with the defendant's wrong in producing the injury does not relieve it of liability; for joint tortfeasors contributing to the same injury are jointly and severally liable. When the injury is produced from two

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<sup>2</sup> Horton v. Telephone Co., 141 N. C. 455, 54 S. E. 299 (1906); Mangum v. R. R., 188 N. C. 689, 125 S. E. 549 (1924).

<sup>3</sup> GREEN, THE RATIONALE OF PROXIMATE CAUSE, pp. 11-14.

<sup>4</sup> Houston v. Traction Co., 155 N. C. 4, 71 S. E. 21 (1911).

<sup>5</sup> Shaw v. Public Service Corporation, 168 N. C. 611, 84 S. E. 1010 (1915).

<sup>6</sup> Benton v. Public Service Corporation, 165 N. C. 354, 81 S. E. 448 (1914).

<sup>7</sup> Cain v. Telephone Co., 219 Mass. 504, 107 N. E. 380 (1914); Delahunt *et al* v. United Telephone and Telegraph Co., 215 Pa. 241, 64 Atl. 515 (1906).

<sup>8</sup> Alabama City G. and A. Ry. Co. v. Appleton, 171 Ala. 324, 54 So. 638 (1911).

<sup>9</sup> Womble v. Grocery Co., 135 N. C. 474, 47 S. E. 493 (1904).

causes operating together, the party putting in motion one of these is liable the same as though it were the sole cause."<sup>10</sup>

CHARLES S. MANGUM.

TRUSTS—LEASE BY TRUSTEE BEYOND DURATION OF TRUST—In a recent North Carolina case,<sup>1</sup> a city building was devised to a trustee to collect the income therefrom, and to pay an annuity to *A* for life and then the whole to *B* and *C*. Upon the death of *B* and *C*, the trustee was directed to convey to their heirs or to a church upon failure of heirs. *Held*, that the lease for thirty years executed under the authority of the court which had jurisdiction of all parties *in esse* who might take, was valid notwithstanding the lease might extend beyond the duration of the trust.

Trustees who are directed to pay income from trust property have an implied power to lease, since income is usually derived from trust property by leases.<sup>2</sup>

No problem arises when the period of the trust is certain, for ten years, for example. But when the period of the trust is uncertain, a trust for life as in the principal case, a problem arises as to the length of time for which the trustee may lease. According to the terms of the trust the remaindermen are entitled to take immediately upon the death of the life beneficiary. If literal effect is given the terms it is obvious that the trustee will be hampered in making advantageous leases; for a person knowing that his term might be interrupted by the death of the life beneficiary might well refuse to take a lease subject to such a contingency and certainly would not pay as much for it. The result is that the property would be fettered in commerce and the beneficiaries would not derive a fair income. On both grounds it seems right that the court, with all parties represented,<sup>3</sup> and all facts indicating that no injustice would result to the remaindermen, should empower the trustee to make a lease which may extend beyond the duration of the trust.<sup>4</sup>

<sup>10</sup> *Clark v. Patapsco Guano Co.*, 144 N. C. 64, 56 S. E. 858 (1907).

<sup>1</sup> *Waddell, Trustee v. United Cigar Stores*, 195 N. C. 434, 142 S. E. 585 (1928).

<sup>2</sup> 2 PERRY, TRUSTS (6 ed.) §528; 2 THOMPSON, PROPERTY §1094.

<sup>3</sup> Where the court has jurisdiction of all parties *in esse* who might take, it is deemed to have jurisdiction over all not *in esse*, their interests being identical. *In re Upham*, 152 Wis. 275, 140 N. W. 5 (1913).

<sup>4</sup> The trustee may lease for periods *not likely* to extend beyond the duration of the trust without authority of the court. *Naylor v. Arnitt*, 1 Russ & M. 501 (1830); *Black v. Ligon*, 1 Harper's Eq. (S. C.) 205 (1824); *Hubbell v.*

The courts usually authorize those leases which *are likely* to terminate during the trust period. In the principal case, a lease for thirty years was authorized when the trust would terminate upon the death of children who, under the mortuary tables, had an expectancy of forty-four years. In another case<sup>5</sup> a lease for ninety-nine years was denied where the trust would terminate twenty-one years after the death of persons with a small expectancy.

Where there are unusual circumstances making a lease for a longer period extremely desirable, courts have authorized leases for much longer periods. In a recent case<sup>6</sup> a lease for ninety-nine years was authorized when the trust would terminate upon the death of a beneficiary at that time fifty-two years of age. In another case<sup>7</sup> a lease for ninety-nine years was authorized when but a few months of the five years trust remained. In still another case<sup>8</sup> a lease for the same period was authorized when the trust would end at the death of a life beneficiary.

Whether the court authorizes a lease likely to terminate during the trust period or whether it authorizes a much longer lease, its decision rests upon economic grounds: the desirability of keeping the property in commerce at its maximum productivity and affording the life beneficiaries a fair income without doing injustice to the remaindermen.

J. N. SMITH.

VENDOR AND PURCHASER—REGISTRATION—MORTGAGES—PRIORITIES AS BETWEEN JUNIOR MORTGAGE AND PRIOR UNREGISTERED PURCHASE MONEY MORTGAGE—On December 2, 1924, one Brock executed a deed to a parcel of land to one Owens in consideration of \$10,000. Contemporaneously with the delivery of the deed, Owens delivered to the plaintiff trust company a deed of trust on the land to secure the repayment of the money which the bank had advanced

Hubbell, 135 Iowa 637, 113 N. W. 512 (1907); St. Louis Union Trust Co. v. Van Raalte, 214 Mo. App. 172, 259 S. W. 1067 (1924); Sweeney v. Hagertown, 114 Md. 612, 125 Atl. 522 (1924). But upon the death of the life beneficiary terminating the trust, the remainder of the lease executed without the authority of the court is void. Cram v. Dietrich, 81 N. Y. S. 27 (1903); Standard Metallic Paint Co. v. Prince Mfg. Co., 133 Penn. St. 474, 19 Atl. 411 (1890); Cox v. Kinston Carolina Railroad and Lumber Co., 175 N. C. 299, 95 S. E. 623 (1918).

<sup>5</sup> Hubbell v. Hubbell, *supra* note 4.

<sup>6</sup> *In re Upham*, *supra* note 3.

<sup>7</sup> Denegre v. Walker, 214 Ill. 113, 73 N. E. 409 (1905).

<sup>8</sup> Marsh v. Marsh, 184 Ill. 623, 56 N. E. 306 (1900).

Owens with which to make the purchase. Pursuant to an agreement made between Brock and Owens at the time the deed was delivered, Owens, on December 9, 1924, executed and delivered to Brock a deed of trust to the same premises to secure a previous indebtedness. On December 13, Brock recorded his deed of trust. On December 15, the trust company recorded its trust deed, and on December 27 Owens recorded the deed to the land. This suit was brought by the trust company, which had advanced Owens the purchase money, to have its trust deed declared the first lien on the land. It was held by the court that the deed of trust to the trust company had priority over the one to Brock, in spite of the fact that Brock's trust deed was first recorded.<sup>1</sup>

It is well settled that a purchase money mortgage, executed simultaneously with the deed of purchase excluded any *prior* claim, mortgage, lien, judgment, or any other right arising through the mortgagor.<sup>2</sup> In North Carolina, this principle is applicable not only where the vendor of the land takes back a mortgage to secure the purchase price, but also, where a third party advances money to the vendee to pay the purchase price, and takes back a mortgage to secure such advances contemporaneously with the execution and delivery of the deed.<sup>3</sup> Both of these principles, however, are subject to the rule that a purchase money mortgage, like any other mortgage, must be immediately recorded, and due diligence is required of the mortgagee in doing so.<sup>4</sup> It is submitted that the court did not give proper weight to this last consideration. The court, in the instant case, rests its decision principally upon the theory that the execution of the deed from Brock to Owens, and the mortgage from Owens

<sup>1</sup> Savings Bank and Trust Co. v. Brock et al, 196 N. C. 24 (Sept. 1928).

<sup>2</sup> Bunting v. Jones, 78 N. C. 242 (1877); Hinton v. Hicks, 156 N. C. 24, 71 S. E. 1086 (1911); 1 JONES, MORTGAGES, (8th ed.) §582; Freeman, Judgments, §373.

<sup>3</sup> Weil v. Casey, 125 N. C. 356, 34 S. E. 506 (1899); Moring v. Dickenson, 85 N. C. 466 (1881). But see 1 JONES, MORTGAGES (8th ed.), §584 and note 59, where the comment is made that "In some states a provision of statute, that a mortgage for purchase money shall be preferred to any previous judgment which may have been obtained against the purchaser, applies only to the mortgage made by the purchaser to the vendor, and not to a mortgage made to a third person to secure the payment of money which was applied by the purchaser to the purchase money of the land. . . . As between the purchaser and a third party, it is simply borrowed money. To give this provision any other construction would be to assign and enlarge the vendor's lien without limit."

<sup>4</sup> Trust Co. v. Sterchie, 169 N. C. 21, 25 S. E. 40 (1914); Chemical Co. v. Walston, 187 N. C. 817, 123 S. E. 196 (1924); 1 JONES, MORTGAGES (8th ed.), §§582 and 584.

to the trust company was part of one single transaction; that the seisin of the grantee Owens was momentary only; and that the title did not rest in him long enough for any liens to attach. *Weil v. Casey*,<sup>5</sup> is cited as the authority for that principle. That case is indisputably the settled law in this jurisdiction for the principles of law for which it stands, but not for the proposition for which the court has invoked it in the instant case. The *Weil* case is only authority for the proposition that the lien of the purchase money mortgagee is superior to any liens against the grantee, or against the premises, that were docketed prior to the acquisition of the premises by the grantee and the giving of the purchase money mortgage by him—and no more. Nowhere in that case, nor in our books, is the proposition advanced that the lien of the purchase money mortgage is superior to a *mortgage*, executed subsequently to the acquisition of the property, and recorded prior to the purchase money mortgage, as are the facts here. Moreover, in the *Weil* case, no question is raised as to the purchase money mortgagee failing to record his mortgage immediately; such question seems quite pertinent here.<sup>6</sup> On the basis of this analysis it seems that the true doctrine of the *Weil* case has been either misapprehended, or has been extended to cover widely different facts.

The North Carolina court has distinctly held that a mortgage given for the purchase money of land is not entitled to priority over a junior mortgage, which is registered first, although the junior mortgagee had notice of the prior encumbrance.<sup>7</sup> The court does not cite this decision in the instant case, but it does say that "priority of registration did not determine priority of lien under the facts admitted in the pleadings and established by the verdict." The only essential facts admitted in the pleadings and established by the verdict in this case were that *A* executed a deed to *B*; simultaneously, *B* executed a purchase money mortgage to *C*; subsequently, *B* executed a junior mortgage to *A*<sup>8</sup> for valuable consideration. *A* regis-

<sup>5</sup> 125 N. C. 356, 34 S. E. 506 (1899).

<sup>6</sup> The same distinguishing features will apply to the cases of *Moring v. Dickinson*, *supra* and *Bunting v. Jones*, *supra*, upon which the decision in the *Weil* case is based, as well as to the case of *Hinton v. Hicks*, *supra*.

<sup>7</sup> *Quinnerly v. Quinnerly*, 114 N. C. 145, 19 S. E. 99 (1893).

<sup>8</sup> The fact that *A*, the original grantee, who ultimately received the purchase money advanced *B* by *C*, was the recipient of the junior mortgage, in no way effected the decision in the case, for the court said: "Whether or not the defendant, C. H. Brock, is estopped, in the absence of fraud, from disputing the



tered his junior mortgage first; *C* later registered his purchase money mortgage; finally, *B* records the deed to the land.<sup>9</sup> Applying to these facts the rule of law first enunciated in this paragraph, it is difficult to understand just why "priority of registration does not determine priority of lien."

It is well settled in this state that no notice, however full and formal, can take the place of registration.<sup>10</sup> Viewing this principle, together with the decision in the instant case, it is interesting to speculate just how the court will handle the case where a junior mortgagee without notice of the existence of a prior purchase money mortgage takes a mortgage from one who he knows owns the mortgaged premises, and puts it on record before the registration of either the deed to the mortgagor, or the prior purchase money mortgage executed by the mortgagor to the original vendor of the land. It seems unfortunate that the court was not presented with this state of facts before it was called upon to decide the instant case. It is earnestly submitted that for the purposes of the present decision, our registration statutes were not given their usual strict application. At any rate, it is difficult to anticipate how the court can consistently follow its decision in the instant case into all of its logical applications and variations without undermining the effect of the Connor Act.

ALVIN S. KARTUS.

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priority of the lien created by the deed of trust to Kramer, trustee (for the Trust Co.) over the deed of trust to Aydtlett, trustee (for Brock), under which he claims, need not be decided."

<sup>9</sup>The fact that the deed was the last of the three instruments to go on record should in no way effect the rights of the parties to this action, since the registration of an instrument is not a requisite to passing title as between the parties. *C. S. 3309*; *Warren v. Williford*, 148 N. C. 474, 62 S. E. 697 (1908); *Weston v. Lumber Co.* 160 N. C. 263, 75 S. E. 800 (1912). The Court indicates, however, that liens upon land do not attach until the registration of the deed. *Johnson v. Leavitt*, 188 N. C. 682, 125 S. E. 490 is cited as in support of this principle. Here, again, the instant case can be distinguished from the operation of the principle enunciated in the case cited. *Johnson v. Leavitt*, as well as *Cyc. 1381*, cited therein, holds that liens, as against *after-acquired* property vest at the same time, equally and without reference to the date of docketing. In the instant case, we are not dealing with liens against *after-acquired* property, but with a mortgage against an undisputed *present title*, capable of being encumbered at any time after the execution and delivery of the deed.

<sup>10</sup>*Robinson v. Willoughby*, 70 N. C. 358 (1873); *Blacknall v. Hancock*, 182 N. C. 369, 109 S. E. 72 (1921).