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Morning Session, 9:30 o'clock

Address—Professor Roscoe B. Turner of the Yale University School of Law. Subject: The Administration of Banking Laws.
Unfinished Business.
Election of Officers.

NOTES AND COMMENTS

Bills and Notes—Executors and Administrators—Personal Liability on Notes for Benefit of Estate.

An administrator executed a note for premiums on a fire insurance policy covering property belonging to the estate. His signature was followed by the expression "administrator of" the estate. In a suit by the insurance company on the note, the maker was held personally liable.[1]

Administrators, executors, and trustees[2] are generally held personally liable on notes which they sign, even though they append to their signatures such expressions as "trustee," "executor of *X*," "administrator of *X* estate."[3] These expressions are regarded by most courts as mere *descriptiones personarum,* and not as an indication of status.[4] The fiduciary is considered not as an agent but as a principal.[5] One reason for this is that common-law courts, during

[1] Home Ins. Co. v. Parks, 156 S. E. 471 (Ga. 1931).

[2] This note will not deal with the execution of notes by agents. For a treatment of that subject, see 1 MECHEM, AGENCY (2d ed. 1914) §1121 *et seq.;* Note (1923) 72 U. OF PA. L. REV. 49.

[3] Hall v. Jameson, 151 Cal. 606, 91 Pac. 518 (1907) (note by "*A,* trustee"); Harrison v. McClelland, 57 Ga. 531 (1876) (note by administratrix); Rittenhouse v. Ammerman, 64 Mo. 197, 27 Am. Rep. 215 (1876) (note by executor for expense connected with trust); Morehead Banking Co. v. Morehead *et al.,* 116 N. C. 410, 21 S. E. 190 (1895) (note by executrix); Roger Williams National Bank v. Groton Mfg. Co. *et al.,* 16 R. I. 504, 17 Atl. 170 (1889) (note signed "*A, B, C,* trustees estate of *D*"); East Tenn. Iron Mfg. Co. v. Gaskell *et al.,* 70 Tenn. 742 (1879) (note by executors); NORTON, BILLS AND NOTES (4th ed. 1914) §33. As to individual liability on bond given by administrator, see McLean v. McLean, 88 N. C. 395 (1882).

[4] Stubbs v. Fourth Nat. Bank of Macon, 12 Ga. App. 539, 77 S. E. 893 (1913) (note signed "*A,* administrator of estate of *B*"); Nolin v. Mooty, 29 Ga. App. 97, 113 S. E. 814 (1922) (transfer of note by administratrix); Note (1928) 34 W. VA. L. Q. 397. For a judicial criticism of the general doctrine of *descriptio personae,* see Saul *et al.* v. Southern Seating & Cabinet Co., 6 Ga. App. 843, 65 S. E. 1065, 1067 (1909).

[5] Hall v. Jameson, *supra* note 3. The rule is thus stated by the Supreme Court of the United States in Taylor v. Mayo, 110 U. S. 330, 4 Sup. Ct. 147, 28 L. ed. 163 (1884):

the years in which they were distinct from courts of equity, could not take notice of the trust relationship. Creditors desiring to reach the assets of the fiduciary estate were therefore, except in a few jurisdictions,[6] limited to an equity of subrogation, dependent upon the responsibility of the fiduciary as an individual and upon the state of accounts between him and the estate.[7]

Although, in the absence of court order or authority in the instrument creating the trust, a fiduciary may not mortgage or pledge trust assets, even to secure a legitimate trust debt,[8] he may absolve himself from personal liability by appropriate express language in the instrument, *e.g.*, "as trustee, but not individually," or "as trustee, but not otherwise."[9] Section 20 of the N. I. L.[10] has been construed to relieve the fiduciary from personal liability if he signed in a representative capacity and was duly authorized.[11] If the fiduciary exercises

"When a trustee contracts as such, unless he is bound, no one is bound, for he has no principal. The trust estate cannot promise. The contract is therefore the personal undertaking of the trustee. As a trustee holds the estate, although only with the power and for the purpose of managing it, he is personally bound by contracts he makes as trustee, even when designating himself as such."

[6] BOGERT, TRUSTS (1921) 303-304.

[7] Norton v. Phelps, 54 Miss. 467 (1877) (supplies and money advanced for trust estate; trustee became non-resident); Mitchell v. Whitlock, 121 N. C. 166, 28 S. E. 292 (1897) (action for goods sold and delivered to trustee); Scott, *Liabilities Incurred in the Administration of Trusts* (1915) 28 HARV. L. REV. 725.

[8] Shannonhouse v. Wolfe, 191 N. C. 769, 133 S. E. 93 (1926) (power of trustees of charitable trust to mortgage not sanctioned by language of deed of trust); Tuttle v. First Nat. Bank of Greenfield, 187 Mass. 533, 73 N. E. 560 (1905) (denying right of trustee to pledge in absence of authority); BOGERT, *op. cit. supra* note 6, 305-314.

[9] Thayer v. Wendell, 1 Gall. (Fed.) 37, Fed. Cas. 13,873 (1812) (covenant by executor, in his capacity as such, but "not otherwise"); Shoe & Leather Nat. Bank v. Dix *et al.*, 123 Mass. 148, 25 Am. Rep. 49 (1877) (note beginning "We, as trustees but not individually, promise," etc., and signed "*A, B, C,* trustees"); Morehead Banking Co. v. Morehead *et al.*, 116 N. C. 413, 21 S. E. 191 (1895) (note containing phrase "*A,* executrix of *B,* but not personally"; not to be confused with case between same parties cited *supra* note 3). As to effect given covenant of trustee when read in connection with deed of trust and order of court having jurisdiction over the trust property, see Glenn v. Allison, 58 Md. 527 (1882); as to power of trustee to create charge against trust estate equivalent to his own lien for reimbursement, in favor of another by whom services are rendered, see Jessup v. Smith *et al.*, 223 N. Y. 203, 119 N. E. 403 (1918).

[10] "Where the instrument contains, or a person adds to his signature, words indicating that he signs for and on behalf of a principal or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative capacity, without disclosing his principal, does not exempt him from personal liability." N. C. ANN. CODE (Michie, 1927) §3001.

[11] Gutelius v. Stanbon *et al.*, 39 F. (2d) 621 (D. Mass. 1930) (note by trustees of realty trust); Charles Nelson Co. v. Morton *et al.*, 288 Pac. 845 (Cal.

this privilege of exoneration, the creditor may subject the trust estate to his claim by a suit in equity; and "to give the creditor a right against the estate it is necessary only that the trustee acted properly in incurring the debt."[12] The so-called Massachusetts business trust accomplishes the immunization of the trustees and beneficiaries from personal liability, and gives direct access to the trust assets, by putting creditors on notice of provisions in the trust instrument.[13]

The general rule illustrated by the principal case might well yield today to a working presumption that when signatures of fiduciaries are thus affixed to bona fide contracts, the intent is the same as when the more amplified wording is inserted.

WILLIAM J. ADAMS, JR.

Contracts—Liability of Father Under Later Promise for Son's Purchase on Sunday.

Automobile tires were furnished on Sunday to the minor son of the defendant. There was evidence that the father thereafter, on a secular day, promised to pay for the tires, and that he retained and used them. *Held,* even though the original contract be treated as illegal and void, continued use furnished consideration for the subsequent promise, and it was error to grant a nonsuit.[1]

On the question presented by this case there is practically an equal division of authority, a slight majority favoring the result of the decision.[2] The cases allowing recovery may be divided into four

1930) (note by trustees); First Nat. Bank of Salem v. Jacobs, 85 W. Va. 653, 102 S. E. 491 (1920) (note by executrix); see American Trust Co. v. Canevin, 184 Fed. 657, 661, 663 (C. C. A. 3d, 1911); 1 WILLISTON, CONTRACTS (1920) §§311, 312. But such a construction of the section does not seem to be quite logical in view of the fact that a fiduciary has no principal. And it is said in BRANNAN, NEGOTIABLE INSTRUMENTS LAW, ANNOTATED (4th ed. 1926) at 176: "Section 20 does not protect him (the trustee or executor) for the estate is not a principal and he is not its agent." The courts that uphold the applicability of the section to fiduciaries seem to do so on the ground that such a construction gives effect to the intention of the parties and is expedient from a business standpoint.

[12] Scott, *op. cit. supra* note 7, at 739, 740. As to the effect of authorization by the will on the power of executor to charge estate, see dicta in Harris v. Woodard, 133 Ga. 104, 65 S. E. 250, 252 (1909) and in Brown v. Fairhall, 213 Mass. 290, 100 N. E. 556, 557 (1913); NORTON, *op. cit. supra* note 3, 91, n. 78.

[13] Roberts v. Aberdeen-Southern Pines Syndicate *et al.*, 198 N. C. 381, 151 S. E. 865 (1930); Note (1928) 37 YALE L. J. 1103.

[1] Smith Motor Car Co. v. Goddard, 156 S. E. 724 (Ga. App. 1931).

[2] Rosenbloom v. Schachner, 84 N. J. L. 525, 87 Atl. 99 (1913); Banks v. Werts, 13 Ind. 203 (1859); Williamson v. Brandenberg, 6 Ind. App. 97, 32 N. E. 1022 (1893). *Contra:* Troewert v. Decker, 57 Wis. 46, 8 N. W. 26 (1881); Ladd v. Rogers, 93 Mass. 209 (1865); Note (1930) 68 A. L. R. 1487.

groups. One declares that a new contract, embodying the terms of the old one, may be proved to have been established[3] or informally adopted.[4] Consideration for the defendant's promise may be his moral obligation to pay,[5] work performed by the plaintiff under the invalid agreement,[6] benefit or detriment emanating from the tainted contract,[7] or retention of the property by the defendant.[8] Another group speaks in terms of ratification of the original contract,[9] professing to find consideration in essentially the same manner. Still another, considering the problem from a different angle, allows recovery on *quantum meruit* or *valebant* for the value of services performed or goods delivered.[10] Here, however, recovery is in assumpsit on an account, requiring no consideration. And, finally, a few courts invoke a doctrine of estoppel.[11] The principal case would seem to fit into the first group.

[3] Brewster v. Banta, 66 N. J. L. 367, 49 Atl. 718 (1901); Vinz v. Beatty, 61 Wis. 645, 21 N. W. 787 (1884); Helm v. Briley, 170 Okla. 314, 87 Pac. 595 (1906); Skinner Co. v. Burke, 231 Mass. 555, 121 N. E. 427 (1919); Harrison v. Colton, 31 Iowa 16 (1770); see Butler v. Lee, 11 Ala. 885, 889 (1847); Reeves v. Butcher, 31 N. J. L. 224, 228 (1865); Winfield v. Dodge, 45 Mich. 355, 7 N. W. 906, 906 (1881).

[4] Miles v. Janvrin, 200 Mass. 514, 86 N. E. 785 (1909); see Obrien v. Shea, 208 Mass. 528, 95 N. E. 99, 100 (1911).

[5] Tucker v. West, 29 Ark. 386 (1874); Gwinn v. Simes, 61 Mo. 335 (1875).

[6] Meriwether v. Smith, 44 Ga. 541 (1871); Hofgesang v. Silver, 232 Ky. 503, 23 S. W. (2d) 945 (1930); see Telfer v. Lambert, 79 N. J. L. 299, 75 Atl. 779, 780 (1910).

[7] Williams v. Paul, 6 Bing. (Eng.) 653; Brewster v. Banta, 66 N. J. L. 367, 49 Atl. 718 (1901); see Reeves v. Butcher, 31 N. J. L. 224, 228 (1865).

[8] See Catlett v. Church, 62 Ind. 365, 366 (1878). But see Troewert v. Decker, 51 Wis. 46, 8 N. W. 26, 27 (1881).

[9] Banks v. Werts, 13 Ind. 203 (1859); Williamson v. Brandenberg, 6 Ind. App. 97, 32 N. E. 1022 (1893); Hofgesang v. Silver, 232 Ky. 503, 23 S. W. (2d) 945 (1930). See Jones v. Belle Isle, 13 Ga. App. 437, 79 S. E. 357, 357 (1913). *Contra:* Ladd v. Rogers, 93 Mass. 209 (1865); Butler v. Lee, 11 Ala. 885 (1847); Winfield v. Dodge, 45 Mich. 355, 7 N. W. 906 (1881); Vinz v. Beatty, 61 Wis. 645, 21 N. W. 787 (1884); Tillock v. Webb, 56 Me. 100 (1868). See Brewster v. Banta, 66 N. J. L. 367, 49 Atl. 718, 718 (1901); King v. Graef, 136 Wis. 548, 117 N. W. 1058, 1058 (1908); Gist v. Johnson-Carey Co., 158 Wis. 188, 147 N. W. 1079, 1081 (1914); Spahn v. Willman, 1 Penn. (Del.) 125, 39 Atl. 787, 789 (1897); Miles v. Janvrin, 200 Mass. 514, 86 N. E. 785, 786 (1909).

[10] Thomas v. Hatch, 53 Wis. 296, 10 N. W. 399 (1881); Goletti v. Gray, 125 Miss. 646, 88 So. 175 (1921); Kesler v. Stults, 15 Ga. App. 735, 84 S. E. 201 (1915); Williams v Paul, 6 Bing. (Eng.) 653; Gist v. Johnson-Carey Co., 158 Wis. 188, 147 N. W. 1079 (1914); Spahn v. Willman, 1 Penn. (Del.) 125, 39 Atl. 787 (1897) see King v. Graef, 136 Wis. 548, 117 N. W. 1058, 1060 (1908); Bradley v. Rea, 96 Mass. 20 (1867). But see Jones v. Belle Isle, 13 Ga. App. 437, 79 S. E. 357, 358 (1913).

[11] Haacke v. Literary Club, 76 Md. 429, 25 Atl. 422 (1892); Traction Co. v. Burns, 257 Fed. 898 (C. C. A. 6th, 1919). But see Gist v. Johnson-Carey Co., 158 Wis. 188, 147 N. W. 1079, 1083 (1914).

Upon analysis it will be seen that practically an identical situation, and one wherein it is extremely difficult to discover any actual consideration, exists in all these cases. Moral obligation has, since the time of Lord Mansfield, been considered insufficient to support a promise; any benefit accruing from or because of the former agreement is obviously past consideration, hence insufficient,[12] and the position that any support is derived from the tainted original sale itself is untenable.[13] The conclusion is seemingly inevitable that there can be no contract, due to lack of consideration, or that ratification of a Sunday agreement needs none. This latter argument is recognized clearly in only one case allowing recovery,[14] but it is often announced as the reason for denying it.[15] The real reason for running roughshod over these factors has been best stated in a recent opinion in Arkansas:[16] "A buyer cannot retain possession of property and use it, then repudiate the contract as being void by reason of its execution on Sunday."

JAMES M. LITTLE, JR.

Criminal Law—Statutory Construction—Aeroplane as Motor Vehicle.

The defendant was a principal in the theft of an aeroplane and its transportation from Canada to Oklahoma. He was indicted under the National Motor Vehicle Theft Act,[1] which forbids the interstate transportation of stolen motor vehicles. The term "motor vehicle" is defined in such Act to include "an automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle not designed for running on rails." *Held,* the provisions of the Act do not include an aeroplane.[2]

It is the general rule that penal statutes are to be strictly construed.[3] If the statute admits of two reasonable and contradictory

[12] See Frey v. Fond du Lac, 24 Wis. 204, 207 (1869).
[13] Tillock v. Webb, 56 Me. 100 (1868); Jones v. Belle Isle, 13 Ga. App. 437, 79 S. E. 357 (1913); see Gwinn v. Simes, 61 Mo. 335 (1875).
[14] Gooch v. Gooch, 178 Iowa 902, 160 N. W. 333 (1916).
[15] Reeves v. Butcher, 31 N. J. L. 224 (1865); Ladd v. Rogers, 93 Mass. 209 (1865).
[16] McElhannon v. Coffman, 173 Ark. 60, 292 S. W. 393 (1927).
[1] 41 STAT. 324, c. 89, §2a (1919), 18 U. S. C. A. 408 (1927).
[2] McBoyle v. U. S., 51 Sup. Ct. 340 (March 1931), reversing 43 F. (2d) 273 (C. C. A. 10th, 1930), in which Cotteral, J., dissented.
[3] U. S. v. Wiltberger, 5 Wheat. 76, 5 L. ed. 37 (1870); Brace v. Gauger-Korsmo Const. Co., 36 F. (2d) 661 (C. C. A. 8th, 1929), *certiorari* denied, 281 U. S. 738 (1930); State v. Crawford, 198 N. C. 522, 152 S. E. 504 (1930); People v. Mooney, 87 Colo. 567, 290 Pac. 271 (1930).

constructions, that operating in favor of the accused is preferred.[4] The power of prescribing punishment is in the legislature, not the courts,[5] and the primary rule of construction is to ascertain and give effect to the legislative intent.[6] As a guide to the intent of a statute, the rule of *ejusdem generis* is widely accepted and acted upon, especially in penal statutes.[7] This rule is that where there are general words following particular and specific words, the former must be confined to things of the same kind or genus as those just enumerated, unless there is a clear manifestation of a contrary purpose.[8] Thus "other" following an enumeration of specific classes is to be read as "other such like" and to include only others of similar character.[9] This rule is applicable to the present statute and excludes aeroplanes, which are hardly other such types of vehicles as those specified. The rule of *ejusdem generis* is not applicable where the particular words embrace all objects of their kind so that the general words must be construed otherwise or be meaningless.[10] But the instant statute does not come within this exception.[11]

[4] Speeter v. U. S., 42 F. (2d) 937 (C. C. A. 8th, 1930); Harrison v. Vose, 9 How. 372, 13 L. ed. 179 (1849); Weirich v. State, 140 Wis. 98, 121 N. W. 652 (1909).

[5] See U. S. v. Wiltberger, *supra* note 3, at 95.

[6] 2 LEWIS' SUTHERLAND STATUTORY CONSTRUCTION §363 (2d ed. 1904); U. S. v. Woolen, 40 F. (2d) 882 (C. C. A. 10th, 1930); State v. Barco, 150 N. C. 792, 63 S. E. 673 (1909).

[7] U. S. v. Nichols, 186 U. S. 298, 22 Sup. Ct. 918, 46 L. ed. 1173 (1901); First National Bank of Anamoose v. U. S., 206 Fed. 374 (C. C. A. 8th, 1914); U. S. v. 1150 Pounds of Celluloid, 82 Fed. 627 (C. C. A. 6th, 1897).

[8] 2 LEWIS' SUTHERLAND STATUTORY CONSTRUCTION, *supra* note 6, §422, and §§423-435 for illustrations; see U. S. v. Sischo, 262 Fed. 1001, 1005 (N. D. Wash. 1919); State v. Craig, 176 N. C. 740, 744, 97 S. E. 400-401 (1918); Yarlott v. Brown, 192 Ind. 648, 138 N. E. 17, 19 (1923); State v. Hemrich, 93 Wash. 439, 161 Pac. 79, 83, L. R. A. 1917B 962 (1916).

[9] See Rhone v. Loomis, 74 Minn. 200, 204, 77 N. W. 31-32 (1898).

[10] U. S. v. Mescall, 215 U. S. 26, 30 Sup. Ct. 19, 54 L. ed. 77 (1909); American Ice Co. v. Fitzhugh, 128 Md. 382, 97 Atl. 999, Ann. Cas. 1917D 33 (1916); U. S. Cement Co. v. Cooper, 172 Ind. 599, 88 N. E. 69 (1909); Note (1924) 9 IOWA L. BULL. 196 (*ejusdem generis* rule not applied to auto insurance policies against collision with "any other automobile, vehicle, or object").

[11] The following conveyances have been held vehicles within the purview of various statutes: Emerson Troy Granite Co. v. Pearson, 74 N. H. 22, 64 Atl. 528 (1906) (road traction engine); Vincent v. Taylor Bros., 168 N. Y. S. 287, 288, 180 App. Div. 818 (1917) (threshing machine being drawn on wheels); Berg v. Hetzler Bros., 166 N. Y. S. 830, 831, 179 App. Div. 551 (1917) (horse drawn ice-scraper); Marselis v. Seaman, 21 Barb. 319, 323 (N. Y. 1856) (sleigh); Tulsa Ice Co. v. Wilkes, 540 Okla. 519, 153 Pac. 1169, 1172 (1916) (bicycle). It is submitted that "any other self-propelled vehicle" in the present statute refers to such conveyances as electrically-propelled cars, bicycles with motors attached, tractors, traction engines, and the like. But for a contrary argument see (1930) 5 TULANE L. REV. 139.

The word "vehicle" by its derivation and definition is comprehensive enough to include watercraft and aircraft.[12] Yet no cases have been found including boats or aeroplanes under this general term.[13] Statutes intended to apply to aircraft as well as to landcraft have expressly referred to both classes,[14] as the legislature presumably would have done in the instant case if such were its intent. Statutes defining crimes are not to be extended by the courts by intendment on the grounds that they should have been made more comprehensive.[15] "Vehicle" is understood generally to signify a conveyance operating on land. The court in the case under discussion has followed the common sense doctrine that "words of a statute are to be interpreted in accordance with the understanding of the common man from whose vocabulary they were taken."[16]

TRAVIS BROWN.

Equity—Injunction Against Unauthorized Veterinary Practice.

Two veterinary surgeons brought suit in a Virginia court to restrain from further practice of the profession one who had obtained his license without taking the examination required by statute. *Held,* No cause of action stated[1]

This seems to be the first American case to reach a court of final jurisdiction in which members of a licensed profession have sought to cut off the competition of an unlicensed practitioner by injunction. But an injunction was denied in a similar case by an Ohio Circuit

[12] See McBoyle v. U. S., 43 F. (2d) 273, 274 (C. C. A. 10, 1930).

[13] See Duckwall v. City of New Albany, 25 Ind. 283, 286 (1865) (A ferryboat is not a vehicle. The word "vehicle" is rarely applied to watercraft); Farmers' & Mechanics' National Bank v. Hanks, 104 Tex. 320, 137 S. W. 1120, 1125 (1911) (an elevator is not a vehicle); Davis v. Petrinovich, 112 Ala. 654, 21 So. 344 (1896) (vehicle defined as any carriage moving *on land,* either on wheels or runners); Conder v. Griffith, 61 Ind. App. 218, 111 N. E. 816, 818 (1916) (vehicle any carriage or conveyance capable of being used as a means of transportation *on land*). See definition of motor vehicle in N. C. PUB. LAWS (1927), c. 122, §1 (patterned after the Uniform Motor Vehicle Registration Act).

[14] 42 STAT. 854, 948 (1922), 19 U. S. C. A. §231b (1927) (including all forms of transportation on land, water, or in air); MASS. STAT. 1923 c. 370 (referring to aircraft, watercraft, or vehicle).

[15] See U. S. v. Chase, 135 U. S. 255, 262, 10 Sup. Ct. 756, 758, 34 L. ed. 117, 120 (1890); State v. Bishop, 128 Mo. 373, 31 S. W. 9, 12, 49 Am. St. Rep. 569, 575, 29 L. R. A. 200, 208 (1895).

[16] See U. S. v. Bhagat Singh Thind, 261 U. S. 204, 209, 43 Sup. Ct. 338, 341, 67 L. ed. 616, 620 (1923); Church v. Mundy, 15 Ves. 396, 406 (1808); Town of Union v. Ziller, 151 Miss. 467, 118 So. 293, 294 (1928).

[1] Drummond v. Rowe, 156 S. E. 442 (Va. 1931).

Court.[2] In a South African case, however, the court reached a contrary result, holding that traders who carried on their business in contravention of the statute should be enjoined at the instance of rival traders who claimed that their business was being hurt by the illegal competition.[3]

There are many cases in which the territory of enfranchised public utility companies, or others following a public calling, have been encroached upon by unlicensed competitors. In these cases there is an almost even split of opinion. Some courts hold that an injunction will not be issued against a violation of a statute at the instance of a private concern or individual, even when a franchise is being encroached upon, unless there is some showing of other and special injury to the property rights of the individual.[4] A few courts, however, have held in these cases that interference with franchise rights is sufficient ground for an injunction notwithstanding the act complained of its also a violation of the criminal law.[5]

Where the act complained of is a violation of the law which cannot be effectively handled by criminal prosecution, though there may be neither allegation nor proof of a public nuisance, injunctions are granted upon suit by public officials with increasing frequency.[6] Such

[2] Merz v. Murchison, 30 Ohio Cir. Ct. Rep. 646.

[3] Patz v. Green & Co., T. S. 427 (S. Af. 1907).

[4] Long Island Ry. v. Glen Cove and N. Y. Coach Corp., 130 Misc. 303, 223 N. Y. Supp. 398 (1927) (private company not entitled to bring a suit for an injunction because a rival has not complied with all the requirements of the law; its right, if any, must rest upon ground of special injury; case rests upon different ground than if the suit had been brought by public authorities); Healy v. Sidone, 127 Atl. 520 (N. J. Ch. 1926) (licensing statute alone does not give a private individual or company any standing in a court of equity); Passaic-Athenia Bus Co. v. Consolidated Bus Lines, 100 N. J. Eq. 185, 135 Atl. 284 (1926).

[5] New York, New Haven and Hartford Ry. Co. v. Diester, 253 Mass. 178, 148 N. E. 590 (1925) (the fact that defendant ran an unlicensed bus line along a route that paralleled plaintiff's railroad for a considerable distance *held* to constitute such an injury to plaintiff as to give it a standing in a court of equity; plaintiff's franchise not wholly exclusive, but is exclusive against one operating illegally); People's Transit Co. v. Louisville Ry. Co., 220 Ky. 728, 295 S. W. 1055 (1927) (Street Railway Company suing as a taxpayer may sue to enjoin a bus company from operating without a franchise); Note (1925) 24 MICH. L. REV. 393.

[6] U. S. v. Milwaukee Refrigerator Transit Co., 145 Fed. 1007 (C. C. E. D. Wis. 1906) (the acts complained of were in violation of the Elkins Act; *held* such a course of conduct as is here complained of will be enjoined: "If a complainant's rights, whether the higher and more sacred rights of person, or the lower and more sordid rights of property cannot be adequately protected elsewhere; and if a decree and writ that will be enforceable can be formed, no court of equity should acknowledge itself wanting in the primary power of devising decrees and writs to meet the needs of the situation."); State v. Canty, 207 Mo. 439, 105 S. W. 1078 (1907) (bull fights held in violation of the

injunctions are sometimes granted at the suit of private individuals, especially in zoning ordinance cases,[7] but the better opinion is that this should not be done, unless the plaintiff can show that he is suffering and will continue to suffer some peculiar property damage[8] or that public officials have refused to act.[9] A merely speculative or

law enjoined); State v. McMahon, 128 Kan. 772, 280 Pac. 906 (1929) (injunction against defendant's continuing longer in the business of lending money at highly usurious rates under contracts that were so cleverly drawn that prosecution under the usury laws of the state would be ineffective); Note (1930) 43 HARV. L. REV. 499.

[7] Goldfield Consolidated Mines Co. v. Richardson, 194 Fed. 198 (C. C. D. Nev. 1911) (injunction issued against operators of a pretended assay office which was in fact nothing more than a "fence" for stolen ores); Crolius v. Douglas Boat Club, 247 N. Y. Supp. 1 (1931) (suit by private citizen against the operation of a dance hall and bathing beach; *held* the fact that these establishments were being run by defendants without the requisite licenses alone warranted the issuance of the injunction); O'Bryan v. Highland Apartment Co., 128 Ky. 282, 108 S. W. 257 (1908); Rohrbach v. Cavallini, 210 Ill. App. 182 (1918); Rice v. Vanvrancken, 132 Misc. 82, 229 N. Y. Supp. 32 (1928) (property owners of the vicinity are the proper complainants in a suit to enjoin the violation of zoning ordinances).

[8] Southern Express Company v. Long, 202 Fed. 462 (C. C. A. 5th, 1913) (this suit was started in a lower federal court which granted Long, a licensed liquor dealer in Jacksonville, Fla., an injunction by which the express company was restrained from accepting liquor shipments from bootleggers within the state of Georgia which competed with Long's legal shipments into the state from Florida; injunction dissolved; "Private parties have no standing in court to enjoin or abate a public nuisance, unless their private property rights are certainly affected by it."); Daniels v. Portland Gold Mining Co., 202 Fed. 637 (C. C. A. 8th, 1912) injunction granted upon the complaint of gold mine operators in the Cripple Creek district against the continued operation of an assay office specializing in stolen ores *held* to be an inexcusable exercise of the judicial function); Christie St. Commission Company v. Chicago Board of Trade, 92 Ill. App. 604 (1900) (Board of Trade denied an injunction against the further use of its quotations in defendant's bucketshop operations); Hodson v. Walker, 170 Mo. App. 632, 157 S. W. 104 (1913) (suit for injunction against continued operation of a house of prostitution, *held* when complainant's only purpose is to restrain unholy and vicious practices he may not call upon a court of equity; complainant has failed to show a special property injury here; injunction denied.); Campbell v. Jackman Bros., 140 Iowa 475, 118 N. W. 755 (1908) (a private citizen may not enjoin the threatened commission of a crime or other public wrong in the absence of injury to the property rights of the individual complaining); *cf.* Glover v. Malloska, 238 Mich. 216, 213 N. W. 107 (1927) (persons engaged in the oil business have such rights therein as to authorize a court of equity to enjoin a competitor from conducting a lottery for the purpose of increasing his sales at a competitor's expense); Chicago, Burlington & Quincy Ry. v. Davis, 111 Nebr. 737, 197 N. W. 599 (1924) (lawyer enjoined from solicitation of personal injury cases to be tried outside of the state).

[9] Kennedy v. McCarty, 137 Misc. 524, 244 N. Y. Supp. 63 (1930) (private citizens may not enforce a zoning ordinance by injunction without showing that a demand has been made upon municipal authorities to enforce the law); Whiteridge v. Calestock, 100 Misc. 367, 165 N. Y. Supp. 640 (1917) (in a suit by property owners to enjoin the continued operation of a restaurant in a residential district the plaintiff should allege and show that the public authorities have refused to enforce the ordinance).

conjectural claim of injury to health, such as might be incurred from riding on cars where smoking is tolerated though in violation of a statute,[10] or disturbance of the Sabbath quiet by baseball games has been held insufficient.[11]

In the field of licensed professions or businesses there is respectable authority for holding that those who attempt to follow them without the requisite license may be enjoined at the instance of proper public officials, sometimes the examining or licensing board concerned;[12] more often by the public prosecutor,[13] but here, again, we find the courts divided as to what grounds will support an injunction.

The better opinion in British and American courts is that licensing statutes are enacted, not for the purpose of creating monopolies or special property rights in the holders of licenses such as would give them standing in a court of equity, but for the purposes of control and regulation in the interest of the whole public.[14]

ALLAN LANGSTON.

[10] Mellen v. Brooklyn Heights Ry. Co., 87 Misc. 65, 150 N. Y. Supp. 222 (1914).

[11] McMillan v. Kuehnle, 78 N. J. Eq. 251, 78 Atl. 185 (1910).

[12] Kentucky State Board of Dental Examiners v. Payne, 213 Ky. 382, 281 S. W. 188 (1926) (complainants, being charged with the enforcement of the statute requiring licenses for the practice of dentistry, may prevent further violations of the said statute by injunction); North American Insurance Co. v. Yates, 214 Ill. 272, 73 N. E. 423 (1905) (State Commissioner of Insurance may bring suit for injunction against an unlicensed insurance company carrying on its business within the state in violation of the statute).

[13] State v. Jewett Market Co., 228 N. W. 288 (Ia. 1929) (state's attorney is the proper complainant in suit to enjoin sale of drugs by one not having license to engage in that business); City of Rochester v Gutberlett, 73 Misc. 607, 133 N. Y. Supp. 541 (1911) (suit by the City of Rochester to enjoin defendant from collecting garbage without license required by the city ordinance); *contra:* City of Mount Vernon v. Seeley, 74 App. Div. 50, 77 N. Y. Supp. 250 (1902) (injunction will not lie to restrain the posting of bills in a city which does not constitute a nuisance, in violation of an ordinance making it a criminal offense to post bills without first obtaining from the mayor a permit to do so); State v. Maltby, 108 Nebr. 578, 188 N. W. 175 (1922) (suit to enjoin an unlicensed chiropractor from practice until she had obtained a license; *held* though defendant's practice may be dangerous to the public the state's remedy lies in stringent criminal prosecution, and, if such prosecution is not sufficient to deter her, that is the concern of the legislature and not of the court of equity).

[14] Goldsmith v. Jewish Press Publishing Co., 118 Misc. 789, 195 N. Y. Supp. 37 (1922) (suit by a certified public accountant to enjoin defendant from publishing the advertisements of unlicensed accountants; *held* the legislature, in enacting the law under which the complainant seeks to maintain this action was not creating new property rights or a monopoly, but trying to protect the public. Though the value of complainant's certificate may be diminished by the fact that unauthorized persons are holding themselves out as possessing the same qualifications, he has shown no right or injury which would warrant the interference of a court of equity); Healy v. Sidone, *supra* note 4 (the statutes requiring licenses were not enacted for the benefit of transportation companies, therefore these statutes can give the plaintiff no standing in a court of equity; injunction refused).

Evidence—Admissibility of Experiments.

In an action for wrongful death of a small child, plaintiff offered evidence that by an experiment it was found that a child dressed in deceased's clothing could be seen from locomotive for a distance of 600 to 1,200 feet from place where the accident occurred. *Held,* inadmissible, since it was not shown how or when deceased reached the track or where she had been immediately before the accident.[1]

Experimental evidence may be introduced if circumstances are shown to be the same[2] or essentially the same[3] at the time of the event and of the experiment, and the witnesses do not have to be experts except where technical knowledge is required.[4] The burden of proving that the circumstances were the same is upon the proponent,[5] after laying the foundation.[6] Time,[7] place,[8] and the seasons[9] may be considered in determining this similarity. Admissibility of such evidence is discretionary with the trial judge,[10] and subject to review only in case of abuse;[11] but trial judges are cautioned by expressions

[1] Neice v. Norfolk and Western R. R. Co., 154 S. E. 563 (Va. 1930).

[2] Langham v. Chicago R. I. & P. Ry. Co., 197 Iowa 1118, 198 N. W. 525 (1924); Going v. N. & W. R. R., 119 Va. 543, 89 S. E. 914 (1918); Owen v. Delano, 194 S. W. 756 (Mo. App. 1917). *Cf.* State v. Graham, 74 N. C. 646 (1876), and Cox v. R. R., 126 N. C. 103, 35 S. E. 237 (1900).

[3] St. Louis I. M. & S. Ry. Co. v. Kimbrell, 117 Ark. 457, 174 S. W. 1183 (1915); Arrowood v. R. R., 126 N. C. 629, 36 S. E. 151 (1900); Zimmer v. Fox, 123 Wis. 643, 101 N. W. 1099 (1905).

[4] Arrowood v. R. R., *supra* note 3. Bystander can testify. Hallawell v. Oil Co., 36 Cal. App. 672, 173 Pac. 177 (1918). Fact that person making experiments knew what he was looking for does not render evidence incompetent. Henderson v. R. R., 132 Va. 297, 111 S. E. 277 (1922).

[5] Riggs v. M. St. Ry. Co., 216 Mo. 304, 115 S. W. 969 (1909). But the duty of going forward with the evidence may shift, as where circumstances make a prima facie case. May Dept. Stores v. Runge, 241 Fed. 575 (C. C. A. 8th, 1917).

[6] Omaha St. Ry. Co. v. Larson, 70 Neb. 591, 97 N. W. 825 (1903); N. & W. Ry. v. Sollenberger, 110 Va. 606, 66 S. E. 726 (1909).

[7] Brewing Co. v. Ice Co., 156 N. Y. S. 410 (1915); Dow v. Bulfinch, 192 Mass. 281, 78 N. E. 416 (1906).

[8] Henderson v. R. R., *supra* note 4. The place where the experiment is made is immaterial, as long as conditions are essentially the same. Olivaros v. San Antonio Ry. Co., 77 S. W. 981 (Tex. Civ. App. 1903).

[9] Range Co. v. Vanderford, 217 Ala. 342, 116 So. 334 (1928).

[10] Beckley v. Alexander, 77 N. H. 255, 90 Atl. 878 (1914); May Dept. Stores v. Runge, *supra* note 5. This discretion does not extend to preliminary proof of similarity of conditions. Amsbary v. R. R., 78 Wash. 379, 139 Pac. 46 (1914).

[11] Augusta Ry. & Electric Co. v. Arthur, 3 Ga. App. 513, 60 S. E. 213 (1908); City of Manchester v. Beavers, 38 Ga. App. 337, 144 S. E. 11 (1928); Konald v. Rio Grande Ry. Co., 21 Utah 379, 60 Pac. 1021 (1900). The evidence may be so clearly relevant and material as not to be within the discretion of the trial judge to receive or reject it. May Dept. Stores v. Runge, *supra* note 5.

in at least two opinions to be wary of permitting experiments at the trial itself, which though permissible when made outside, might confuse the jury when made in court.[12]

Experiments are most often employed in cases involving accidents caused by railroads, automobiles, etc.,[13] cases involving defects in appliances or in construction,[14] cases in which chemical analyses figure,[15] cases involving the range of sight and hearing,[16] and in cases where it is necessary to determine personal responsibility for death.[17]

The following cases illustrate the application of the above principles and the difficulty of simulating actual conditions in an experiment: Defendant was indicted for rape of a young girl in a dark room which she shared with her mother. The mother testified that in the struggle defendant fired a pistol and that she recognized him by the flash. Defendant insisted that the jury be instructed to retire into a darkened room and ascertain whether defendant could be recognized by the gun-flash. *Held,* Not allowed, since the same circumstances could not be reproduced as a foundation for the experiment.[18] In another case, a suit for divorce, defendant offered evi-

[12] Jumpertz v. People, 21 Ill. 375 (1859); Spires v. State, 50 Fla. 121, 39 So. 181 (1905).

[13] Henderson v. R. R., *supra* note 4 (railroad); Panhandle R. R. v. Haywood, 227 S. W. 347 (Tex. Civ. App. 1921) (railroad); Truva v. Rubber Co., 124 Wash. 445, 214 Pac. 818 (1923) (auto); McCarthy v. Curry, 240 Mass. 442, 134 N. E. 339 (1922) (machinery).

[14] Boston Hose and Rubber Co. v. Kendall, 178 Mass. 232, 59 N. E. 657 (1901) (explosion of boiler); Bona v. Auto. Co., 137 Ark. 217, 208 S. W. 306 (1919) (defects in steering-gear); Smith's Adm'x v. Electric Co., 164 Ky. 46, 174 S. W. 773 (1915) (defect in transformer); Kimball Bros. Co. v. Gas and Electric Co., 141 Ia. 632, 118 N. W. 891 (1908) (motor test); Leonard v. Southern Pacific Co., 21 Ore. 555, 28 Pac. 887 (1892) (defects in bridge).

[15] Guinan v. Lasky Corporation, 167 N. E. 235 (Mass. 1929) (explosive quality of motion picture film); Heal v. Fertilizer Works, 124 Me. 138, 126 Atl. 644 (1924) (quality of fertilizer); Hershiser v. Railroad, 102 Neb. 820, 170 N. W. 177 (1918) (blood test); Graustein v. Wyman, 250 Mass. 290, 145 N. E. 450 (1924) (Babcock test); Standard Oil Co. v. Reagan, 15 Ga. App. 571, 84 S. E. 69 (1915) (distinguishing between gasoline and kerosene).

[16] Meaney v. Power Co., 282 Pac. 113 (Ore. 1929) (visibility); Klenk v. Klenk, 282 S. W. 153 (Mo. App., 1926) (visibility); Nelson v. R. R., 208 Mass. 159, 94 N. E. 313 (1901) (surveying); Harper v. Holcomb, 146 Wis. 183, 130 N. W. 1128 (1911) (shooting by mistake for deer); Kansas City R. R. v. Hall, 152 S. W. 445 (Tex. Civ. App. 1912) (visibility of coal chute); Lasityr v. City of Olimpia, 61 Wash. 651, 112 Pac. 752 (1911) (lighting effects); Smith v. Insurance Co., 234 Mich., 119, 208 N. W. 145 (1926) (distance person may be recognized at night); Gambrill v. Schooley, 95 Md. 260, 52 Atl. 500 (1902) (distance voice will carry).

[17] Huestis v. Aetna Life Insurance Co., 131 Minn. 461, 155 N. W. 643 (1915) (experiment with gun); Tackman v. Brotherhood, 132 Ia. 64, 106 N. W. 350 (1906) (experiments with rope); Jumpertz v. People, *supra* note 12 (experiment with door hooks).

[18] Spires v. State, *supra* note 12.

dence that plaintiff's stenographer, at her desk in adjoining room, saw a woman sitting in plaintiff's lap. Plaintiff offered as evidence an experiment to show that from where she was sitting the stenographer could not have seen him. *Held,* Inadmissible, since it was not proved that the furniture was in the same position as at the time of the event.[19] In an action for the wrongful death of a child in a railroad accident, plaintiff offered an experiment in evidence to show that defendant's engineer, when he saw an object upon the track, should have recognized it as a child from a point distant 1,200 feet. *Held,* Admissible, because, in the experiment, it was shown that the circumstances upon which the evidence was predicated could be substantially reproduced, since it was proved that the engineer actually saw the child on the track.[20]

In the principal case, the necessary foundation for the experiment could not be laid and, therefore, the ruling in the case was correct.

CHARLES S. MANGUM, JR.

Landlord and Tenant—Effect of Consent to One Assignment of Lease on Condition Not to Assign—Dumpor's Case.

A 1931 opinion[1] of the Supreme Court has ushered onto the North Carolina juristic stage the English case of *Dumpor v. Symms*[2] decided in 1603. In *Dumpor's Case* a condition that the lessee and his assigns would not convey the lease without special license from the lessor was held to have been extinguished, when one such license was given. This holding is obviously contrary to a common sense interpretation of the given transaction. The court based its decision on precedent, but it has been shown that the authorities were invoked by false analogy.[3] *Dumpor's Case* is no longer the law in England,[4] but its doctrine continues to prevail in several American jurisdictions.[5]

[19] Kuenk v. Klenk, *supra* note 16.
[20] Henderson v. R. R., *supra* note 4.
[1] Childs v. Warner Bros. Southern Theatres, Inc., 200 N. C. 333, 156 S. E. 923 (1931).
[2] 4 Coke 119 (1603).
[3] Dumpor's Case (1873) 7 AM. L. REV. 616, 623.
[4] The following statutes nullified the rule in Dumpor's case: 22 and 23 VICT. c. 35, §1 (1859) and 23 and 24 VICT. c. 38, 6 (1860).
[5] Reid v. Weissner & Sons Brewing Co., 88 Md. 234, 40 Atl. 877 (1898); Pennock v. Lyons, 118 Mass. 92 (1875); Aste v. Putnam Hotel Co., 247 Mass. 147, 141 N. E. 666 (1923); Murray v. Harvey, 56 N. Y. 337 (1874); see German Am. Savings Bank v. Gollmer, 155 Cal. 683, 102 Pac. 932, 934 (1909).

Judicial discussions[6] of the rule in *Dumpor's Case* have questioned its soundness; legal writers have vigorously criticised it;[7] no case has been found to approve it on principle; and its application has been narrowly restricted.[8] The following variations from the facts in *Dumpor's Case* have been held sufficient to prevent the operation of the doctrine it expresses: (1) a covenant instead of a condition,[9] (2) a waiver instead of a license,[10] or (3) a condition against subletting instead of a condition against assigning.[11] These distinctions, so far as their purpose is concerned, are without substance and the cases that rely on them, while not expressly contrary to *Dumpor's Case,* in effect repudiate it.[12]

Childs v. Warner Bros. Southern Theatres, Inc.,[13] suggests the question of whether *Dumpor's Case* will be followed in North Carolina. There the Berkley Co. leased a theatre building to Craver, the lease containing conditions that the lessee and his assigns[14] would pay the rent and would not assign without the consent[15] of the lessor.

[6] Doe v. Bliss, 4 Taunt, 735, 736 (1813) (Mansfield: "Certainly the profession have always wondered at Dumpor's case."); Moss v. Chappell, 126 Ga. 196, 54 S. E. 968, 973 (1900) ["The doctrine (in Dumpor's case) seems to us to be purely artificial and not founded on any sound reason."].

[7] 1 WASHBURN, REAL PROPERTY (4th ed. 1876) 472 n. ("Dumpor's case has always been, it is believed, a stumbling block in the way of the profession."); Dumpor's Case, *supra* note 3; Bronaugh, *Consent to Assignment of Lease—Dumpor's Case* (1924) 30 W. VA. L. Q. 277; Note (1925) 1 WASH. L. REV. 52.

[8] Dumpor's Case, *supra* note 3, at 632; North Chicago Street R. R. Co. v. Le Grand Co., 95 Ill. App. 435 (1900) (where a lease contains a renewal clause, if the rule in Dumpor's case dispenses with the condition, it does so only for the instant term).

[9] Paul v. Nurse, 8 Barn. & C. 486 (1828); Dakin v. Williams, 17 Wend. (N. Y.) 447 (1837). The difference between a covenant and a condition is that for breach of covenant the lessor can only bring an action for damages, while for breach of condition the lessor may reënter.

[10] Doe v. Bliss, *supra* note 6; Wertheimer v. Hosmer, 83 Mich. 56, 47 N. W. 47 (1890) (oral license amounted to a waiver). The difference between a license and a waiver is that license is consent before and waiver is consent after assignment.

[11] Fischer v. Ginzburg, 191 App. Div. 418, 181 N. Y. Supp. 516 (1920); see Doe v. Pritchard, 5 B. & Ad. 765, 781 (1833).

[12] A thorough elaboration of this point is contained in Investors' Guarantee Corporation v. Thompson, 31 Wyo. 264, 225 Pac. 590, 594 (1924).

[13] 200 N. C. 333, 156 S. E. 923 (1931).

[14] Where the lessee only is mentioned in the condition, he is bound personally and a license extinguishes the condition without the aid of the rule in Dumpor's case. Easley Coal Co. v. Brush Creek Coal Co., 91 W. Va. 291, 112 S. E. 512 (1922) (Dumpor's case recognized as the law, but held not to apply to "single" condition).

[15] An ingenious distinction is made between an oral and a written license in order to avoid the rule in Dumpor's case in Wertheimer v. Hosmer, *supra* note 10.

The Berkley Co. conveyed the reversion[16] to the plaintiff who consented to an assignment to the defendant. The defendant reassigned the lease to Carolina Theatres, and in response to a notice of the reassignment the plaintiff wrote the defendant, "I shall continue to recognize you as lessee of the property . . . and expect you to see that the payments (of rent) are made promptly and in accordance with the lease." A default in the payment of rent was made by Carolina Theatres for which the plaintiff sued the defendant. Judgment for the plaintiff below was affirmed on appeal.

The opinion of the court is largely devoted to a review of *Dumpor's Case,* but it does not clearly appear whether the rule in *Dumpor's Case* was involved in the decision. The lessor in the *Childs Case* was held entitled to recover from an assignee rent which accrued subsequent to a reassignment. The liability of an assignee to pay rent is generally said to be based on privity of estate and to cease when he transfers the lease.[17] The liability of a lessee to pay rent, however, is based also on privity of contract, which is not affected by an assignment.[18] It follows that the conclusion reached in the *Childs Case* must rest on one of two theories: either (1) that the defendant was under some contractual liability to pay rent, or (2) that there was no valid reassignment.

An assignee becomes contractually liable for rent only on some undertaking over and above the act of assignment.[19] The facts in the *Childs Case* disclose no such undertaking by the defendant, but the plaintiff writes, "I shall continue to recognize you (the defend-

[16] A grantee of the reversion may enforce the conditions in a lease. Investors' Guarantee Corporation v. Thompson, *supra* note 12.

[17] Paul v. Nurse, *supra* note 9 (reassignment in violation of covenant); Voigt v. Resor, 80 Ill. 331 (1875); Consolidated Coal Co. v. Peers, 166 Ill. 361, 40 N. E. 1105 (1896); Reid v. Weissner & Sons Brewing Co., *supra* note 5 (facts similar to those in the instant case); Mason v. Smith, 131 Mass. 510 (1881) (reassignment without knowledge of the lessor); Durand v. Curtis, 57 N. Y. 7 (1874); Tibbals v. Iffland, 10 Wash. 451, 39 Pac. 102 (1895) (reassignment without notice to the lessor). But see Krider v. Ramsay, 79 N. C. 354, 357 (1878).

[18] Keith v. McGregor, 163 Ark. 203, 259 S. W. 725 (1924) (lessor's acceptance of note from assignee for rent past due relieved lessor of his responsibility for that amount); McKeon v. Wendelken, 25 Misc. 711, 55 N. Y. Supp. 625 (1899) (lessee recovered from assignee amount of rent the lessee paid the lessor); Gusman v. Mathews, 29 Ohio App. 402, 163 N. E. 636 (1928) (99 year lease); Spitz v. Nunn, 34 Ohio App. 379, 171 N. E. 117 (1930) (sureties for lessee's payment of the rent not discharged by an assignment); see Alexander v. Harkins, 120 N. C. 452, 454, 27 S. E. 120, 121 (1897).

[19] Consumers Ice Co. v. Bixler, 84 Md. 437, 35 Atl. 1086 (1896) (assignee agreed that all the covenants of the lease should be binding between himself and the lessor).

ant) as lessee." The court intimates[20] that it considered the defendant under a contractual duty to pay rent and cites an early North Carolina case[21] embodying a dictum[22] to the effect that an assignee is ordinarily bound contractually for rent. If the decision is based on this theory, there was no occasion for the court to pass on the rule in *Dumpor's Case,* for the defendant was liable for the rent regardless of the reassignment.

If the defendant was under no contractual duty to pay rent, he would have been bound to do so only in case the reassignment was invalid.[23] No grounds of invalidity appear, except a violation of the condition not to assign without the lessor's consent. The application of the rule in *Dumpor's Case* in the *Childs Case* situation would have "wiped out" the condition before the reassignment. The judgment for the plaintiff, therefore, would entail the existence of the condition and a repudiation of the rule in *Dumpor's Case.*

If the defendant was under no contractual liability to pay rent, the North Carolina court has refused to perpetuate a "venerable error," and has placed a "reasonable construction" on a condition that the lessee and his assigns will not assign the lease. If the defendant was under contractual liability to pay rent, the language[24] of the court is strongly prophetic that the court will refuse to follow *Dumpor's Case* when a proper case is presented.

W. T. COVINGTON, JR.

Master and Servant—Ratification of Tort by Failure to Discharge.

Plaintiff passenger sues defendant railroad for alleged assault on her by a Pullman porter while she was reclining in her berth. *Held,*

[20] ". . . the lessee and his assigns agreed to pay the rent. . . . The covenant to pay rent is continuous in its nature, and such covenant is binding by express provision upon the assigns of the lessee. . . ." This view, however, is in conflict with the authorities cited in note 17 *supra,* and would make every assignee of the lease, for whatever length of time, responsible for the rent for the rest of the term.

[21] Krider v. Ramsay, *supra* note 17, at 357.

[22] "The privity of estate and privity of contract still subsist between the lessor and the assignee, as it did between the lessor and lessee."

[23] Cases cited in note 17 *supra.*

[24] Brogden, J.: ". . . a reasonable construction of the lease . . . leads to the conclusion that the restriction against assigning . . . operated upon . . . the assigns of the lessee as well as himself" and "one assignment did not waive the conditions of the lease" so that "thereafter any subsequent assignee could turn the (lessor's) property over to the use and occupancy of any undesirable and irresponsible person without his approval."

plaintiff may recover only actual damages, failure to discharge the porter not being a ratification of the tort to justify a recovery of punitive damages.[1]

A railroad, as a public service corporation, owes a special duty of care and protection to its passengers, the breach of which by a servant entails actual damages without resort to the doctrine of *respondeat superior*.[2] A ratification by the railroad of this breach entails punitive damages.[3]

As to what constitutes a ratification, railroad cases either hold,[4] or imply in dicta,[5] as in the principal case,[6] that retention is relevant evidence of ratification which may go to the jury, but not sufficient to warrant its submission to the jury unaccompanied by other evidence of ratification.[7] However, the fact of retention is irrelevant where the master is not fully aware of the tortious character of the servant's act and believes the servant's account of the affair.[8]

In cases of injury occurring outside the scope of employment, where the question is one of fixing liability for actual damages only, retention after knowledge of the tort[9] is either held,[10] or mentioned

[1] Pullman Co. v. Hall, 46 F. (2d) 399 (C. C. A. 4th, 1931).

[2] (1929) 17 CALIF. L. REV. 185.

[3] Bass v. Chicago & N. W. R. Co., 42 Wis. 654, 24 Am. Rep. 437 (1877) (expulsion from train by brakeman).

[4] Bass v. Chicago & N. W. R. Co., *supra* note 3; Goddard v. Grand Trunk R. Co., 57 Me. 202, 2 Am. Rep. 39 (1869) (assault by brakeman); St. Louis & Chicago R. Co. v. Burke, 53 Miss. 200, 24 Am. Rep. 689 (1876) (assault by servants off duty and conductor's refusal to interfere); Dillingham v. Anthony, 73 Tex. 47, 11 S. W. 139, 3 L. R. A. 634 (1889) (misconduct of conductor).

[5] See Tangner v. S. W. Mo. Electric R. Co., 85 Mo. App. 28, 32 (1900) (conductor's wanton conduct toward passenger); Pullman Co. v. Alexander, 117 Miss. 348, 78 So. 293, 294 (1918) (porter's mistreatment of negro passenger); Craker v. R. Co., 36 Wis. 657, 17 Am. Rep. 504, 513 (1875) (conductor's assault on female passenger); Gasway v. Atlanta W. P. R. Co., 58 Ga. 216, 221 (1877) (misconduct of conductor); Ricketts v. Chesapeake & O. R. Co., 33 W. Va. 433, 10 S. E. 800, 803 (1890) (assault on passenger).

[6] Pullman Co. v. Hall, *supra* note 1.

[7] Voves v. G. N. R. Co., 26 N. D. 110, 143 N. W. 760 (1913) (conductor's assault and battery on passenger); Toledo, St. Louis & W. R. Co. v. Gordon, 143 Fed. 95 (C. C. A. 7th, 1906) (expulsion from moving train by conductor).

[8] Donivan v. Manhattan R. Co., 21 N. Y. Supp. 457 (1893) (expulsion of passenger from platform); Williams v. Pullman Palace Car Co., 40 La. Ann. 87, 3 So. 631 (1888) (porter's vicious assault on passenger); Paul v. So. R. Co., 158 S. C. 550, 155 S. E. 884 (1930) (conductor's assault).

[9] It would be otherwise without such knowledge: Mann v. Life & Casualty Ins. Co. of Tenn., 132 S. C. 193, 129 S. E. 79 (1925) (slander by company's superintendent of agents); Turner v. American District Telegraph & Messenger Co., 94 Conn. 707, 110 Atl. 540 (1920) (a shooting by company's roundsman).

[10] Sullivan v. People's Ice Corp., 92 Calif. App. 740, 268 Pac. 934 (1928) (assault by driver of ice wagon).

in dicta,[11] to be relevant evidence of ratification which may be submitted to the jury when accompanied by other such evidence. However, some cases hold to the contrary and say that retention in such cases is not relevant.[12] Most cases place emphasis—and it seems quite correctly—on the question whether the tort purported to be in the master's interest, holding that if it did not, retention is not relevant evidence of ratification.[13] But at least one case disregards this distinction and holds that retention is not relevant even where the tort was committed in the master's interest.[14]

The instant case seems to be in line with the weight of authority in refusing to hold that retention alone amounts to a ratification of the servant's tort as a matter of law. Such a holding would indeed impose an injustice on master and servant alike. The same would be true of a rule that evidence of retention is alone sufficient to carry the case to the jury, since ordinary juries are notoriously prejudiced against railroads. To constitute ratification, the conduct should clearly evince an intent to ratify. The failure to discharge may be impelled by motives completely foreign to those of ratifying. Either rule might lead to the discharge of many innocent and worthy servants, due to the fact that the master would prefer to discharge rather than run the risk of assuming liability for the servant's act.

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[11] See Wells v. Robinson Bros. Mot. Co., 153 Miss. 451, 121 So. 141, 142 (1929) (assault and battery by automobile salesman); Cobb v. Simon, 119 Wis. 597, 97 N. W. 276, 278 (1903) (assault and false imprisonment of customer by floorwalker); McFadden v. Anderson Mot. Co., 121 S. C. 407, 114 S. E. 402, 403 (1922) (automobile collision with plaintiff); International & G. N. R. Co. v. McDonald, 75 Tex. 41, 12 S. W. 860, 862 (1889) (negligent railroad collision with automobile).

[12] Kastrup v. Yellow Cab & Baggage Co., 129 Kan. 398, 282 Pac. 742 (1929) (assault by superintendent trying to collect a bill); Gulf, Chicago & Santa Fe R. Co. v. Kirkbride, 79 Tex. 457, 15 S. W. 495 (1891) (plaintiff forced to jump from moving train); Edelman v. St. Louis Transfer Co., 3 Mo. App. 503 (1877) (collision with wagon driven by defendant's servant).

[13] Mandel v. Byram, 191 Wis. 446, 211 N. W. 145 (1926) (assault and battery by railroad rate clerk on plaintiff shipper); Chaney v. The Frigidaire Corp., 31 F. (2d) 977 (C. C. A. 5th, 1929) (assault by salesman on prospective female customer); Gratton v. Suedmeyer, 144 Mo. App. 719, 129 S. W. 1038 (1910) (assault by contractor's employee); Home Telephone & Electric Co. v. Branton, 7 S. W. (2d) 627 (Tex. 1928) (assault by local manager of telephone company); Knight v. Laurens Motor Car Co., 108 S. C. 179, 93 S. E. 869 (1917) (negligent act by mechanic during a joy ride); Everingham v. Chicago B. & Q. R. Co., 148 Iowa 662, 127 N. W. 1009 (1910) (assault); Kweichin v. Holms & Hallowell Co., 106 Minn. 148, 118 N. W. 668, 19 L. R. A. 255 (1908) (negligence of wagon driver).

[14] Pruitt v. Goldstein Millinery Co., 169 Ky. 655, 184 S. W. 1134 (1916) (slander by employee).

Mortgages—Distinction Between Mortgage and Security Deed—Subjection of Interests to Execution.

In a recent Georgia case, *X* as security for a loan, executed to *Y* a deed absolute in form. *Y* gave his bond, binding himself to reconvey upon payment of the debt. A creditor of *X* sought to levy an execution on the property. In affirming a judgment in *Y's* favor, the court said, "A security deed conveys absolute title, and leaves the grantor no interest in the land which can be subjected to levy and sale by a creditor whose judgment was obtained after the deed was executed."[1]

In Georgia, two types of security instruments are in common use. Besides mortgages—instruments containing a defeasance clause, describing the debt, and showing their purpose to be security—there are deeds conveying absolute title for the purpose of security, but accompanied by a separate bond for reconveyance. Where a mortgage is used, the common law rule that legal title passes to the mortgagee is not followed. Instead, legal title is held to remain in the mortgagor, and a mere lien in favor of the mortgagee is created. As a consequence, the Georgia court finds the mortgagor has such an interest as can be sold under execution, the purchaser taking the property subject to the lien of the mortgagee.[2] The mortgagee's lien is no doubt beyond the reach of an execution.[3]

In North Carolina a mortgage vests legal title in the mortgagee, a right of redemption remaining in the mortgagor.[4] Until made so by statute in 1812, this right of redemption was not subject to sale under execution.[5] The mortgagee's legal title is not an interest which can be levied upon.[6]

Thus, although the right of redemption remaining after legal title

[1] Smith v. Borders, 156 S. E. 690 (Ga. 1931).

[2] Davis v. Anderson, 1 Ga. 176 (1846); Sims v. Jones, 158 Ga. 384, 123 S. E. 614 (1924); GA. ANN. CODE (Michie, 1926) §3256. See Sturges and Clark, *Legal Theory and Real Property Mortgages* (1927) 37 YALE L. J. 691.

[3] Missouri Real Estate & Loan Co. v. Gibson, 282 Mo. 75, 220 S. W. 675 (1920).

[4] Stevens v. Turlington, 186 N. C. 191, 119 S. E. 210 (1923); MCINTOSH, N. C. PRACTICE AND PROCEDURE (1929) §725 (4).

[5] Allison v. Gregory & Sons, 5 N. C. 333 (1809); N. C. ANN. CODE (Michie, 1927) §677 (equitable and legal rights of redemption in real or personal property pledged or mortgaged made subject to levy and sale under execution). A second equity of redemption, however, is outside this statute, and not subject to levy. Thompson v. Parker, 55 N. C. 475 (1856) (*A* held certificate for land from state; mortgaged this equity to *B;* the remaining equity in *A* held not subject).

[6] Stevens v. Turlington, *supra* note 4.

has been vested in another for security is still not subject to levy in Georgia,[7] judgment creditors in the two states appear to be in the same position when the property levied upon is mortgaged either by or to their debtors.

An absolute deed coupled with bond for title, as in the instant case, is apparently more frequently used in Georgia security transactions than a mortgage.[8] When this means of security is used, legal title passes to the creditor.[9] Until a change was made in the recording statutes, the conveyance did not have to be recorded to defeat a subsequent judgment lien, the instrument not being a "mortgage" within the original act.[10] Though the debtor-grantor has an interest which he can sell[11] or mortgage,[12] he does not have an interest which can be levied upon.[13] However, there does not have to be a reconveyance to the debtor to restore such an interest to him; mere payment of the debt is sufficient.[14] The interest of a grantee in a security deed, unlike that of a mortgagee in either Georgia or North Carolina, can be sold under execution.[15]

The security deed is a "higher and better security" than a mortgage.[16] In *Bennett Lumber Co. v. Martin*[17] some of its advantages are pointed out: The grantee's security title is superior to the right of the debtor's wife to dower and the right of his family to a year's support; no homestead can be set aside; unrecorded materialmen's liens are cut off. Also, the grantee in a security deed is entitled to

[7] Robinson v. Clifton, 36 Ga. App. 188, 136 S. E. 90 (1926).
[8] GA. ANN. CODE (Michie, 1926) §3306 is statutory recognition of this device.
[9] West v. Bennett, 59 Ga. 507 (1877); note 8, *supra*.
[10] Gibson v. Hough & Sons, 60 Ga. 588 (1878). GA. ANN. CODE (Michie, 1926) §3307 now provides that such deeds are postponed to all liens obtained prior to recordation.
[11] Williams v. Foy Mfg. Co., 111 Ga. 856, 36 S. E. 927 (1900).
[12] Citizens Bank of Moultrie v. Taylor, 155 Ga. 416, 117 S. E. 247 (1923) (upon cancellation of security deed, title revests in debtor; inures to benefit of mortgagee). Where after subsequent mortgage has been given, the bond for title has been transferred to another creditor, both these claims must be paid before the mortgage can attach. Wood v. Dozier, 142 Ga. 538, 83 S. E. 133 (1914). But if judgments intervene between execution of the security deed and transfer of bond for title, judgment creditors have claim to residue of proceeds superior to that of transferee of bond for title. O'Connor v. Georgia R. Bank, 121 Ga. 88, 48 S. E. 716 (1904).
[13] Moss v. Stokeley, 107 Ga. 233, 33 S. E. 61 (1899) and authorities cited by the court in the instant case.
[14] Citizens Mercantile Co. v. Easom, 158 Ga. 604, 123 S. E. 883 (1924).
[15] Parrott v. Baker, 82 Ga. 364, 9 S. E. 1068 (1889); Duke v. Ayers, 163 Ga. 444, 136 S. E. 410 (1927).
[16] Bleckley, J., in Gibson v. Hough & Sons, *supra* note 10, at 589.
[17] 132 Ga. 491, 64 S. E. 484 (1909).

possession after default,[18] while a mortgagee is not.[19] In respect to foreclosure there seems no advantage, it being accomplished by this novel method: the grantee reduces his claim to judgment, reconveys the property to the grantor, and then levies an execution on it.[20] The reconveyance puts title in the debtor only for the purpose of levy and sale, and except for such purpose is declared to be a "mere escrow." Liens of third parties therefore do not attach.[21]

This "strange device," the security deed, is peculiar to Georgia.[22] It is apparently an anachronism. One of the early common law forms of security was a conveyance in fee, the creditor promising to reconvey upon payment of the debt,[23] and the security deed seems a modern adaptation of this ancient expedient. While elsewhere the mortgage and deed of trust have overshadowed other security plants, in Georgia the security deed has flourished; and due to its peculiar attributes, it will no doubt continue to hold its place in the sun.[24]

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Public Utilities—Regulation of Contracts With Holding and Affiliated Corporations.

In establishing a rate base for a local public utility, can a state public service commission demand a statement of the cost to the associated foreign corporation in each case: (1) of services to a local public utility rendered by a foreign holding company under a "service and management" contract; (2) of equipment sold to a local public utility by an affiliated foreign corporation? These two problems were raised and answered in the affirmative by the Supreme Court of the United States in the case of *Smith v. Illinois Bell Telephone Co.*[1] All contracts entered into by a public utility must be fair

[18] Thaxton v. Roberts, 66 Ga. 704 (1881).
[19] Elfe v. Cole, 26 Ga. 197 (1858).
[20] GA. ANN. CODE (Michie, 1926) §6037.
[21] Carlton v. Reeves, 157 Ga. 602, 122 S. E. 320 (1924).
[22] 1 JONES, MORTGAGES (8th ed. 1928) §354.
[23] 3 HOLDSWORTH, HISTORY OF ENGLISH LAW (3rd ed. 1923) 129.
[24] The security deed is impracticable in North Carolina. An absolute conveyance intended merely as security is held void as to creditors, the decisions being placed on the recording statutes. Holcombe v. Ray, 23 N. C. 340 (1840); Gulley v. Macy, 84 N. C. 434 (1881).
[1] 282 U. S. 133, 51 Sup. Ct. 65, 75 L. ed. 99 (1930). The chronological history of this case is interesting in that after seven years litigation the case was remanded for a new trial. See Smith *et al.* v. Illinois Bell Teleph. Co., 269 U. S. 531, 46 Sup. Ct. 22, 70 L. ed. 297 (1925) (restraining order affirmed); Moynihan *et al.* (City of Chicago, Intervenor) v. Illinois Bell Teleph. Co., 38 F. (2d) 77 (N. D. Ill. 1930) (permanent injunction granted because commis-

and reasonable,[2] and made with the interest of the utility in mind, else their inclusion in the rate base will lead to excessive capitalization[3] and excessive allowance for operating expense,[4] and ultimately to unfair rates to the consuming public.

The Service Contract with the Holding Company.

The American Telephone and Telegraph Co. owned 99% of the stock of the Illinois Bell Telephone Co. Under a "license and service contract," the Illinois Co. was permitted to use instruments belonging to the American Co. and received other enumerated services[5] for a return of 4½% of the gross yearly revenue of the Illinois Co. In 1927 the American Co. sold the rented instruments to the Illinois Co. and reduced the service rate to 2%. In 1929 the rate was further reduced to 1½%. The *Smith* case holds that there should be a specific finding by the special three judge district court of the cost to the American Co. of rendering these services to the Illinois Co., and of the reasonable amount which should be allowed to the operating expenses of the Illinois Co.[6]

With no fraud or bad faith appearing, the "percentage of gross revenue" contract has been sustained as having been made within the discretion of the directors of the subsidiary company.[7] The right of compensation for these services is generally conceded, but much crit-

sion's order in violation of the Fourteenth Amend.); Smith v. Illinois Bell Teleph. Co., *supra* (remanded to special three judge district court for special findings of fact).

[2] Union Dry Goods Co. v. Ga. Pub. Service Corp., 248 U. S. 372, 39 Sup. Ct. 117, 73 L. ed. 309, 9 A. L. R. 1420 (1919); Fort Smith Spelter Co. v. Clear Creek Oil & Gas Co., 267 U. S. 231, 45 Sup. Ct. 263, 69 L. ed. 588 (1925).

[3] Logan Gas Co. v. Pub. Service Comm. of Ohio, 121 Ohio St. 507, 169 N. E. 575; 2 SPURR, GUIDING PRINCIPLES OF PUBLIC SERVICE REGULATION (1925) 64. For examples of capitalized properties see *ibid.*, 64-78.

[4] Reno Power, Light & Water Co. v. Pub. Service Comm., 298 Fed. 790 (D. C. Nev. 1923); Mobile Gas Co. v. Patterson, 293 Fed. 208 (M. D. Ala. 1923); Consolidated Gas Co. v. Newton, 258 U. S. 165, 42 Sup. Ct. 264, 66 L. ed. 538 (1920); Chicago & G. T. Ry. Co. v. Wellman, 143 U. S. 339, 12 Sup. Ct. 450, 36 L. ed. 176 (1892); St. Louis & O'Fallon Ry. Co. v. Interstate Commerce Comm., 279 U. S. 461, 49 Sup. Ct. 384, 73 L. ed. 798 (1928).

[5] (1) Instrument Service; (2) General Staff Service, (a) Dept. of Development and Research, (b) Dept. of Operation and Engineering, (c) Dept. of Accounts and Finance, (d) Dept. of Law, (e) Dept. of Information and Publicity. Classified by GRONINGER, PUBLIC UTILITY RATE MAKING (1928) 191-200.

[6] Smith v. Ill. Bell Teleph. Co., *supra* note 1. But the court does not show how the cost is to be ascertained.

[7] Houston v. Southwestern Bell Teleph. Co., 259 U. S. 318, 42 Sup. Ct. 486, 66 L. ed. 961 (1922); Missouri *ex rel* Southwestern Bell Teleph. Co. v. Public Service Comm., 262 U. S. 276, 43 Sup. Ct. 544, 67 L. ed. 981, 31 A. L. R. 807 (1923); 2 SPURR, *op. cit. supra* note 3, 670-689; Lilienthal, *The Regulation of Public Utility Holding Companies* (1929) 29 COL. L. REV. 404, 412.

icism has been directed toward the basis of computation. Commissions and authors have characterized the contract as "inequitable and illogical"[8] and "unscientific and easily susceptible of abuse."[9] The 4½% contract has been disallowed and a lump sum allowed as operating expense,[10] and a per station payment in place of a percentage of the gross revenue basis has been attempted.[11]

The Michigan Supreme Court in *quo warranto* proceedings ousted the Michigan Bell Telephone Co. from the right to have credit in a computation of rates for payments to the American Co. under the 4½% license and management contract.[12] But the force of the decision was negatived by an amendment to the decree allowing "the reasonable value of the services rendered and the facilities furnished."[13] Refusing to follow the state court's apparent desire to disregard the corporate entity of the local company, the special three judge district court stated in a collateral case that the profits of a manufacturing company furnishing equipment could not be considered in determining rates, though both seller and purchaser were subsidiaries of the same parent company.[14]

[8] "Inequitable" because the American Co. is the real owner of the subsidiary and makes added profits on these special contracts instead of lowering the cost of telephone service. "Illogical" because the gross income may be increased without additional service being rendered. GRONINGER, *op. cit. supra* note 5, 191-200.

[9] When rates go up as the result of increased wages and cost of materials, the payment to the parent company goes up in proportion. 2 SPURR, *op. cit. supra* note 3, 670-689; Indiana Bell Teleph. Co. v. Public Service Comm. of Indiana *et al.*, 300 Fed. 190 (D. C. Ind. 1924); *In re* Chesapeake & Potomac Teleph. Co. (W. Va.) P. U. R. 1921B, 97; *In re* Chesapeake & Potomac Teleph. Co. (Va.) P. U. R. 1920F, 49; *In re* N. Y. Teleph. Co (N. J.) P. U. R. 1926C, 767.

[10] *In re* Southern Calif. Teleph. Co. (Cal.) P. U. R. 1922C, 97, 123; and *In re* Southern Calif. Teleph. Co., 1925C, 627, 664-667.

[11] Pacific Teleph. & Teleg. Co. v. Whitcomb, Director of Public Works (Wash.) P. U. R. 1923D, 113, 125. The 4½% contract said to be "wrong in principle, contrary to public policy, and compensation thereunder should be on a per station basis rather than on a percentage of the gross revenue." This finding was reversed in 12 F. (2d) 279 (W. D. Wash. 1926), and the latter was affirmed in 276 U. S. 97, 48 Sup. Ct. 223, 72 L. ed. 483 (1928). The district court held that the question had been foreclosed by the holding in Houston v. Southwestern Bell Teleph. Co. and Mo. *ex rel* Southwestern Bell Teleph. Co. v. Pub. Service Comm., both *supra* note 7; Sickler, *Regulation of Public Utility Integration on the Pacific Coast* (1930) 6 J. LAND & PUB. U. ECON., 51, 59-60.

[12] People *ex rel* Potter, Atty. Gen. v. Mich. Bell Teleph. Co., 246 Mich. 198, 224 N. W. 438 (1929); (1929) 28 MICH. L. REV. 66.

[13] P. U. R. 1929E 27; *Bulletin of Current Decisions*, No. 3432, of the American Telephone and Telegraph Co., cited by Lilienthal, *Recent Developments in the Law of Public Utility Holding Companies* (1931) 31 COL. L. REV. 189, 199, note 42.

[14] Mich. Bell Teleph. Co. v. Odell *et al.*, 45 F. (2d) 180 (E. D. Mich. 1930). A re-reference of the case was allowed after the decision in the *Smith* case was handed down.

The Equipment Contract with the Affiliated Company.

The Illinois Co. purchased practically all of its equipment from the Western Electric Co., another subsidiary of the American Co. The special three judge district court found that the average net profit of the Western Electric Co. over a period of fourteen years had varied between 7% and 10%. The Supreme Court stated that the finding was of evidentiary value but that it did not go far enough. The Western Electric Co. engaged in a wide field of manufacturing and selling activity, and it cannot be assumed that the net earnings from the entire business represented the net earnings made on the contract with the Illinois Co. Neither would a comparison of the prices charged by the Western Electric Co. to independent telephone companies, nor a comparison of prices charged by other manufacturing companies for comparable material, satisfy the court's holding that there must be findings on the cost of materials sold to the Illinois Co., and the extent to which the profit made by the Western Electric Co. figures in the estimate on which the charge of confiscation by the Illinois Co. was predicated.[15]

In *Houston v. Southwestern Bell Telephone Co.*[16] the court allowed charges for materials purchased under a similar contract on the showing by the company that the prices charged were "reasonable and less than the same could be obtained from other sources." A public utility cannot make a rate confiscatory by making improvident contracts with an affiliated corporation.[17] However, contracts between affiliated corporations are presumed valid in the absence of proof of fraud, bad faith, or that the purchasing company is not receiving substantial benefits.[18]

Conclusion.

It is submitted that the decision of the *Smith* case must be accepted as: (1) Demanding a more thorough investigation of contracts entered into between local utilities and foreign holding companies and affiliated corporations, in that it establishes that the *cost to the foreign corporations of rendering services to and manufacturing supplies for the local utility* are relevant considerations in determining the reasonableness of payments to such corporations. The

[15] Smith v. Ill. Bell Teleph. Co., *supra* note 107.
[16] *Supra* note 7.
[17] United Fuel Gas Co. v. Ry. Comm. of Ky., 278 U. S. 300, 49 Sup. Ct. 150, 73 L. ed. 390 (1928).
[18] United Fuel Gas Co. v. Ry. Comm. of Ky., *supra* note 17; Houston v. Southwestern Bell Teleph. Co., *supra* note 7.

former decisions appeared to hold that the *market value of services and supplies to the local utilities* was the proper criterion to follow in determining the reasonableness of payments made to parent and affiliated companies.[19] (2) Following the general view, applied in other spheres of intercorporate relationships, that the corporate entity of the local utility will not be disregarded unless fraud or bad faith is demonstrated in its contractual relations, or unless the local utility is relegated to the position of a mere agency or instrumentality of the foreign holding company.[20]

In order to expedite procedure and relieve the state regulatory bodies of great labor, it has been suggested that the burden of proof of the reasonableness of payments made under intercorporate contracts should be placed on the local utilities. Difficulty would still exist in determining the cost of services and the materials furnished, but the holding and affiliated companies would be anxious to prove the reasonableness of the cost of the services and materials, and they are in a better position to prove them than the state commissions are.[21]

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[19] Houston v. Southwestern Bell Teleph. Co.; Mo. *ex rel* Southwestern Bell Teleph. Co. v. Pub. Service Comm., both *supra* note 7; Lilienthal, *op. cit. supra* note 13, 197.

[20] Lilienthal, *ibid.*, 194-202.

DISREGARD OF THE CORPORATE FICTION: (1) *Torts.* Davis v. Alexander, 269 U. S. 114, 46 Sup. Ct. 34, 70 L. ed. 186 (1925); Costan v. Manila Elec. Co. *et al.*, 24 F. (2d) 383 (C. C. A. 2nd, 1928); Berkey v. Ry. Co., 244 N. Y. 84, 155 N. E. 58 (1926) (recovery not allowed on facts but same rule enunciated); Note (1926) 50 A. L. R. 611 (liability of parent corporations for torts of subsidiaries). (2) *Contracts.* Generally a holding company is not liable on the contracts of a subsidiary unless there is fraud, bad faith, or agency of the subsidiary in which the holding company rather than the subsidiary reaps the benefit. Pa. Canal Co. *et al.* v. Brown *et al.*, 235 Fed. 669 (C. C. A. 3rd, 1916) (*Certiorari* denied, 242 U. S. 646, 37 Sup. Ct. 240, 61 L. ed. 543 (1917); Ambridge v. Philadelphia Co., 283 Pa. 5, 129 Atl. 167 (1925); Note (1925) 39 A. L. R. 1071; Kingston Dry Dock Co. v. Lake Champlain Trans. Co., 31 F. (2d) 265 (C. C. A. 2nd, 1929) (recovery denied but court uses same language as employed in tort cases); Majestic Co. v. Orpheum Circuit, 21 F. (2d) 720 (C. C. A. 8th, 1927); 3 COOK, CORPORATIONS (8th ed. 1923) §§663-664, 2578-2590. (3) *Statutory evasion.* Southern Pac. Terminal Co. v. Interstate Commerce Comm. and Young, 219 U. S. 498, 31 Sup. Ct. 279, 55 L. ed. 310 (1910) (unlawful preference); U. S. v. Lehigh Valley Ry. Co., 220 U. S. 257, 31 Sup. Ct. 387, 55 L. ed. 458 (1911) (violation commodities clause); U. S. v. Delaware, L. & Ry. Co., 238 U. S. 516, 35 Sup. Ct. 873, 59 L. ed. 1430 (1915).

[21] Lilienthal, *op. cit., supra* note 13, 205; Sickler, *op. cit. supra* note 11, 64.

Sales—Validity of Unrecorded Trust Receipt Against Trustee in Bankruptcy.

By virtue of an unrecorded trust receipt, the plaintiff, a finance corporation, claimed title and right to possession of automobiles as against the trustee in bankruptcy of a local dealer. *Held,* for plaintiff, even if the trust receipt be construed as being within the conditional sales recording act, since no other creditors intervened between the giving of the trust receipt and the filing of the petition in bankruptcy.[1]

The trust receipt as an independent security device which vests and retains title in the holder thereof until the advances secured by same are paid, when not violative of the local recording act, has been generally upheld as against the trustee in bankruptcy of the person executing the trust receipt by both state[2] and federal[3] courts.

In transactions which are in effect domestic trust receipt transactions, but which were not designated or recognized as such, the federal courts hold that the unrecorded instrument given by the dealer to the finance company is invalid as against the dealer's trustee in bankruptcy.[4] The tripartite trust receipt transaction should be

[1] *In re* Bell Motor Co., 45 Fed. (2d) 19 (C. C. A. 8th, 1930). For form of trust receipts, see Hanna, *Trust Receipts* (1931) 19 CALIF. L. REV. 256.

[2] Brown v. Billington, 163 Pa. 76, 29 Atl. 904, 43 Am. St. Rep. 780 (1894); Baring v. Galpin, 57 Conn. 352, 18 Atl. 266 (1888); Mershon v. Wheeler, 76 Wis. 502, 45 N. W. 95 (1890); Mohr. v. First Nat'l Bank of Hartford, 69 Cal. App. 756, 232 Pac. 748 (1924); Moors v. Kidder, 106 N. Y. 32, 12 N. E. 818 (1887) (in effect importation trust receipt transaction); Peoples Nat'l Bank v. Mulholland, 228 Mass. 152, 117 N. E. 46 (1917).

[3] *In re* Killian Mfg. Co., 209 Fed. 498 (E. D. Pa. 1913); *In re* Cattus, 183 Fed. 733 (C. C. A. 2nd, 1910); Charavay & Bodvin v. York Silk Mfg. Co., 170 Fed. 819 (S. D. N. Y. 1909); *In re* Mulligan, 116 Fed. 715 (D. Mass, 1902); *In re* E. Reboulin Fils & Co., 165 Fed. 245 (D. N. J. 1908); *In re* Coe, 183 Fed. 745 (C. C. A. 2nd, 1910); Roth v. Smith, 215 Fed. 82 (C. C. A. 3rd, 1914); *In re* K. Marks & Co., 222 Fed. 52 (C. C. A. 2nd, 1915); Vaughn v. Mass. Hide Corp., 209 Fed. 667 (D. Mass. 1913); *In re* James, Inc., 30 F. (2d) 555 (C. C. A. 2nd, 1929); Houck v. General Motors Acceptance Corp., 44 F. (2d) 410 (W. D. Pa. 1930). *Contra: In re* Richeimer, 221 Fed. 16 (C. C. A. 7th, 1915); *In re* Bettman-Johnson Co., 250 Fed. 657 (C. C. A. 6th, 1918); Industrial Finance Corp. v. Capplemann, 284 Fed. 8 (C. C. A. 4th, 1922) (credit advanced between receipt of goods and bankruptcy of dealer).

[4] *In re* West York Motor Co., Inc., 17 F. (2d) 276 (M. D. Pa. 1927); Commerce-Guardian Trust & Savings Bank v. Devlin, 6 F. (2d) 518 (C. C. A. 6th, 1925); *In re* Cullen, 282 Fed. 902 (D. Md. 1922); *In re* Mass. Motor Co., 294 Fed. 98 (D. Mass. 1923); *In re* Schuttig, 1 Fed. (2d) 443 (D. N. J. 1924) (cars shipped to the order of the dealer). *Contra:* Guaranty & Security Corp. v. Reed, 299 Fed. 265 (C. C. A. 1st, 1924); *cf.* Frederick v. Motors Mortgage Corp., 1 F. (2d) 438 (W. D. Pa. 1924) (holder of trust receipt retook the cars more than eight months before the dealer went bankrupt); Federal Finance Corp. v. Reed, 296 Fed. 1 (C. C. A. 1st, 1924) (instrument executed by the dealer called bill of conditional sale, recorded and held valid);

distinguished from bipartite transactions which are held to be chattel mortgages and within the recording acts.[5]

State courts have, in some instances by classification of the transaction, held unrecorded trust receipts invalid as against bona fide purchasers from the importer[6] or dealer,[7] bona fide purchasers[8] and pledgees[9] of negotiable warehouse receipts obtained by the importer upon warehousing the goods, bona fide purchasers from the importer of negotiable bills of lading covering the goods,[10] mortgagees holding recorded mortgages,[11] and the trustee in bankruptcy of the dealer.[12] State courts have held unrecorded trust receipts valid as against bona

In re Hallbauer, 275 Fed. 126 (S. D. Fla. 1920) (recorded chattel mortgage on cars in show room held invalid); *In re* Mitchell Motor & Service Co., Inc., 274 Fed. 492 (W. D. Wash. 1921) (recorded chattel mortgage held valid).

[5] *In re* A. E. Fountain, Inc., 282 Fed. 816 (C. C. A. 2nd, 1922); American & British Securities Co. v. American & British Mfg. Corp., 275 Fed. 121 (S. D. N. Y. 1921); *In re* Gerstman, 157 Fed. 549 (C. C. A. 2nd, 1907); *In re* Ford-Rennie Leather Co., 2 F. (2d) 750 (D. Del. 1924).

[6] Brown v. William Clark Co., 22 R. I. 36, 46 Atl. 239 (1900) (not classified); Foreign Trade Banking Corp. v. Gerseta Corp., 237 N. Y. 265, 142 N. E. 607 (1923) (not classified). *Contra:* Canadian Bank of Commerce v. Baum, 187 Pa. 48, 40 Atl. 975 (1898) (not classified).

[7] Commercial Acceptance Trust v. Bailey, 87 Cal. App. 117, 261 Pac. 743 (1927); Jones v. Commercial Investment Trust, 64 Utah 151, 288 Pac. 896 (1924) (not classified); Glass v. Continental Guaranty Corp., 81 Fla. 687, 88 So. 876 (1921) (not classified); Clark v. Flynn, 195 N. Y. S. 583 (1923) (not classified); Ohio Savings Bank & Trust Co. v. Schneider, 202 Ia. 938, 211 N. W. 248 (1926) (by dicta trust receipt held conditional sale); *cf.* Perkins v. W. A. Lippincott Co., 260 Pa. 473, 103 Atl. 877 (1918) (not classified—holder of trust receipt recovered from the assignee of the importer, a bank account consisting of cash from a sale of the goods obtained under the trust receipt); Commonwealth Finance Corp. v. Schutt, 97 N. J. L. 225, 116 Atl. 722 (1922) (in effect domestic trust receipt transaction); State v. Caperam, 71 Utah 68, 262 Pac. 294 (1927) (in effect domestic trust receipt transaction).

[8] New York Security & Trust Co. v. Lipman, 157 N. Y. 551, 52 N. E. 595 (1899) (not classified); *cf. In re* Richeimer, *supra* note 3.

[9] General Motors Acceptance Corp. v. Sharp, 233 Ky. 290, 25 S. W. (2d) 405 (1930) (not classified); Arbuthnot, Latham & Co. v. Richeimer & Co., 139 La. 797, 72 So. 251 (1916) (not classified); Karuff v. Mutual Securities Co., 148 Atl. 159 (N. J. 1928) (trust receipt as chattel mortgage—holder of warehouse receipt would have won but for estoppel).

[10] Roland M. Baker Co. v. Brown, 214 Mass. 196, 100 N. E. 1025 (1913) (not classified); *cf.* Munroe v. Philadelphia Warehouse Co., 75 Fed. 745 (E. D. Pa. 1896).

[11] General Motors Acceptance Corp. v. Boddeker, 274 S. W. 1016 (Tex. Civ. App. 1925) (trust receipt as chattel mortgage); Commercial Investment Trust Co. v. Albemarle Motor Co., 193 N. C. 663, 137 S. E. 874 (1927) (trust receipt as conditional sale). *Contra:* General Motors Acceptance Corp. v. Huffer, 113 Neb. 228, 202 N. W. 627 (1925) (trust receipt as bailment for sale).

[12] Acceptance Corp. v. Mayberry, 195 N. C. 508, 142 S. E. 767 (1928) (trust receipt as conditional sale); General Motors Acceptance Corp. v. Boddeker, *supra* note 11.

fide lienors of importer,[13] purchasers from dealer with notice,[14] mortgagee with notice,[15] and as against the dealer himself.[16]

In the principal case the court based its decision on the ground that no credit was extended to the bankrupt while the trust receipt remained unrecorded. When the court refused to restrict the usefulness of the trust receipt by bringing it within the purview of the local conditional sales recording act, it followed the general trend of the state[17] and federal[18] decisions and preserved the integrity of the trust receipt as a commercially desirable financing device.

It seems desirable to uphold the trust receipt as a highly useful independent security device in financing both foreign and domestic purchases, and at the same time give creditors of and purchasers from the importer or dealer notice of its use. To this end it has been suggested that, instead of requiring the recordation of each individual trust receipt, the general plan of financing under which the goods are purchased be recorded, once and for all.[19]

F. D. HAMRICK, JR.

Taxation—Constitutionality of Income Allocation Formulae as Applied to Corporations.

The North Carolina allocation formula for determining the taxable income of a foreign corporation was, in a recent Federal Supreme Court decision,[1] held to result in a tax on income not rea-

[13] T. D. Downing Co. v. Shawmut Corp., 245 Mass. 106, 139 N. E. 525 (1923) (not classified); International Trust Co. v. Webster Nat'l Bank, 258 Mass. 17, 154 N. E. 330 (1926) (not classified); *cf.* Century Throwing Co. v. Muller, 197 Fed. 252 (C. C. A. 3rd, 1912).

[14] Ohio Savings Bank & Trust Co. v. Schneider, *supra* note 7 (trust receipt as conditional sale).

[15] Commercial Credit Co. v. Schleglelstorseth Motor Co., 23 S. W. (2d) 702 (Tex. App. 1930) (not classified).

[16] Industrial Finance Co. v. Turner, 215 Ala. 460, 110 So. 904 (1926) (trust receipt as conditional sale); Commercial Credit Co. v. Peak, 195 Cal. 27, 231 Pac. 340 (1924) (trust receipt as bailment); Brown v. Green Hickey Leather Co., 244 Mass. 169, 138 N. E. 714 (1923) (not classified).

[17] Cases cited, *supra* note 2.

[18] Cases cited, *supra* note 3.

[19] Vold, *Trust Receipts Security in Financing Sales* (1930) 15 CORN. L. Q. 543.

[1] Hans Rees' Sons Inc. v. State of North Carolina *ex rel* Maxwell, 51 Sup. Ct. 385 (April 13, 1931). Appellant, a New York corporation, operated a leather tannery in North Carolina. It applied to the Commissioner of Revenue for the readjustment of its income tax assessment. Revision was disallowed, and appeal taken to the Superior Court where evidence was excluded which would have shown the corporation's income to be divided into profits from buying, manufacturing, and selling, and that only 17 per cent of the entire net profit was due to manufacturing within North Carolina, but 80

sonably attributable to business within the state. The tax was 4½ per cent of such proportion of the corporation's entire net income as the value of its tangible property in North Carolina was to the value of all its tangible property.[2] The corporation admitted that the allocation was in full accord with the statute. Its sole contention was that the formula as applied in this case was arbitrary and unreasonable and violated the commerce and due process clauses. The state court was of opinion that the corporation was a unitary business and the statutory formula was an equitable method of allotting income to business within the state.[3] The Supreme Court rejected the formula, for there was evidence of three distinct sources of income, buying profit, manufacturing profit, and selling profit, and there was considerable discrepancy between the income derived from the one North Carolina activity, manufacturing, and the income assigned North Carolina by the statute.

The formula in question had been approved in its application in *Underwood Typewriter Co. v. Chamberlain*,[4] and the state court relied on that case to validate the tax. The Supreme Court, however, said that there was not in the *Underwood* case evidence to show that business within the taxing state did not produce the income allocated to it by the formula, whereas such evidence was offered in the present instance.

Because few corporations have accounting systems that can show the income derived from each economic activity, formulae are designed to apportion a part of the income to the taxing jurisdiction by comparison with a constant factor.[5] The formulae often reach a

per cent of its tangible property was located in North Carolina, with the result that the formula allotted 80 per cent of the income to this state. The state Supreme Court sustained the ruling of the trial court striking out this evidence, but said that if the evidence were deemed competent, it would not change the result.

[2] N. C. ANN. CODE (Michie Supp., 1929) §7880 (317). Formula applicable to corporations deriving profits from dealing in tangible property.

[3] 199 N. C. 42, 153 S. E. 850 (1930).

[4] 254 U. S. 113, 41 Sup. Ct. 45, 65 L. ed. 165 (1920). The court indicated that if it were shown that a formula caused actual injustice it would be rejected. "We have no occasion to consider whether the rule prescribed if applied under different conditions might be obnoxious to the constitution."; Notes (1920) 20 COL. L. REV. 324; (1920) 29 YALE L. J. 512; (1920) 33 HARV. L. REV. 736

[5] Of the factors used in allocating income of manufacturing corporations tangible property and gross sales receipts are the more common. For other factors see *infra* note 8; see 2 STATE INCOME TAXES 113, NATIONAL INDUSTRIAL CONFERENCE BOARD (1930); Isaacs, *The Unit Rule* (1926) 35 YALE L. J. 838.

fair distribution, but they sometimes operate unevenly.[6] North Carolina's formula, with property the constant factor, is well adapted to yield revenue in this state, which consumes a relatively small proportion of its manufactured goods. However, the North Carolina formula is extreme in the inclusion of only one factor and may result inequitably more often than a formula which embodies other elements of business in addition to property.[7] Such a formula which attributes most of the income to the manufacturing jurisdiction may possibly be justified on the ground that it is the manufacturing element which in ultimate economics produces the income, and buying and selling are more incidental. Also a tax allocated by manufacturing will enure to the benefit of those producing the goods who are residents of the taxing state, while frequently purchases and sales entered into in a large number of states are concluded at a central office. A tax levied there, measured by sales, will usually benefit a small group of employees only incidentally engaged in producing the income. Without such justification the North Carolina statute is unfortunate, and the more so since it is mandatory. In a number of states the tax authorities are empowered to set aside the formula and substitute a method which will with greater accuracy ascertain the income earned within the state. The *Hans Rees'* case, presenting a discrepancy of 60 per cent between the statutory method and the corporation's accounting, is palpably a situation demanding discretionary power in the tax authorities.

The North Carolina formula could be improved by including sev-

[6] If the corporation owns property only in North Carolina, this state will tax the entire net income although the corporation may do as much business in other states in leased premises. A result of unfair allocation fractions may be the organization of separate corporations to conduct the various activities. A corporation will be organized to buy and will contract with the manufacturing corporation, which in turn will be linked by contract with a sales corporation, and the corporation with the most profitable contract will be located in a state with favorable income tax laws or in one with no income tax law at all. If these corporations are given sufficient autonomy the tax authorities may find it difficult to reach their true earnings. See, Palmolive Co. v. Conway, 43 F. (2d) 226 (W. D. Wis. 1930); Buick Motor Co. v. City of Milwaukee, 43 F. (2d) 385 (E. D. Wis. 1930), aff'm'd. C. C. A. 7th, 6 U. S. Daily 448 (April 23, 1931); Breckenridge, *Tax Escape by Manipulations of Holding Company* (1931) 9 N. C. L. REV. 189; Magill, *Allocation of Income by Corporate Contract* (1931) 44 HARV. L. REV. 935. Income allocation formulae rejected in Standard Oil Co. of Indiana v. Thoresen, 29 F. (2d) 708 (C. C. A. 8th, 1928); Standard Oil Co. of Indiana v. Wisconsin Tax Commission, 197 Wis. 630, 223 N. W. 85 (1929); see Gorham Mfg. Co. v. Travis, 274 Fed. 975 (S. D. N. Y. 1911); Fisher v. Standard Oil Co., 12 F. (2d) 744 (C. C. A. 8th, 1926).

[7] *Infra* note 8.

eral material factors of business.[8] Wisconsin utilizes an arithmetical average of three factors, property, manufacturing cost, and sales.[9] Since allocation at best is but an average, this formula by taking into account three important elements, reduces the probability of unjust allocation. The Wisconsin authorities are authorized to omit any one of the three factors when it is shown to their satisfaction that its use would give an unreasonable final average, because the corporation does not to an appreciable extent employ the element. This seems to mean that the taxpayer takes the initiative to have the factor omitted. It would seem desirable to empower the tax authorities as well to initiate the move to omit the factor when including it would prejudice the state's interest.[10]

Two other methods of avoiding the *Hans Rees'* situation and employed in several states are: (1) discretionary power in the tax authorities to entirely depart from the formula and set up a new method apposite to the particular corporation;[11] (2) discretionary power to accept the separate accounting of the corporation showing the income within the state.[12] The first of these may be inexpedient

[8] The proposed 1931 Budget Revenue Bill, §311, provided that the formula be an arithmetical average of two factors, tangible property and manufacturing expenses, the latter to include cost of goods, payroll, and manufacturing overhead. The model plan of the National Tax Association utilizes two factors, for a mercantile or manufacturing business one-half the income to be allocated by ratio of tangible property within the state to total tangible property, and one-half by ratio of business within to total business. "Business" includes costs of labor, goods, materials and supplies, and receipts from sales. PROCEEDINGS NATIONAL TAX ASSOCIATION (1922) 198; 2 STATE INCOME TAXES 120, NATIONAL INDUSTRIAL CONFERENCE BOARD (1930). North Dakota has in effect adopted this formula, N. D. COMP. LAWS ANN. (Supp. 1925) §2346a6. States which use three or more factors, CAL. STAT. (1929) c. 13, §10, property, sales, payroll, purchases, expenses of manufacture; MASS. GEN. LAWS (1921) c. 63, §38, property, sales, payroll; Mo. LAWS (1929) §13106, sales, intrastate business, interstate business; N. Y. LAWS (1929) c. 385, §214, property, certain accounts receivable, shares of stock of other corporations owned; VA. CODE ANN. (Supp. 1926), Tax Bill, §10 (7), and WIS. STAT. (1927) §71.02, property, sales, manufacturing expenses.

[9] WIS. STAT. (1927) §71.02.

[10] Example, corporation takes orders in taxing state for goods to be shipped from factory in that state to the purchaser, the contract stipulating that it is subject to confirmation at office without the state and the sale to take place there.

[11] ARK. ACTS (1929) Act 118, §15; CAL. STAT. (1929) c. 13, §10; GA. LAWS (1929) H. B. 143, §14; MASS. GEN. LAWS 1921) c. 63, §42; MISS. ANN. CODE (Hemingway, 1927) §5663; N. Y. CONS. LAWS ANN. (Supp. 1927) c. 61, §211; N. D. COMP. LAWS ANN. (Supp. 1925) §2346a7; ORE. LAWS (1929) c. 427, §7; TENN. ANN. CODE (Supp. 1926) §723a14; VA. CODE ANN. (Supp. 1926) Tax Bill §10 (7); WIS. STAT. (1927) §71.02.

[12] ARK. ACTS (1929) Act 118, §15 and regulations; GA. LAWS (1929) H. B. 143; MASS. GEN. LAWS (1921) c. 63, §42; MISS. ANN. CODE (Hemingway, 1927) §5663; Mo. LAWS (1929) §13106; MONT. REV. CODE (1921) §2298, re-

because of the uncertainty as to the basis of allocation from year to year, which is objectionable from the viewpoint of management. Allocation by separate accounting will usually produce a figure very favorable to the corporation, and, though its acceptance is discretionary with the tax officials, they may be inclined in any doubtful case to accept the accounting without complete investigation. Another means of avoiding allocation by rigid formula, would be the enacting of several formulae and empowering the tax authorities to apply the one suited to the corporation.[13] The objection of uncertainty equally applies here.[14] The Wisconsin formula is not only definite but there is also the advantage of a restricted discretion in order to prevent manifest injustice.

It is believed this discretion in the authorities is constitutional.[15] Although legislative powers are not generally delegable, the ascertaining of net earnings is properly an administrative detail which, it is believed, can be delegated. The legislature dictates its intent that income from business within the state be taxed 4½ per cent, and determining the most equitable method of arriving at net income is a detail to accomplish that intent.

In the absence of any discretion in the North Carolina officials the result of the *Hans Rees'* case raises an awkward problem. Under the decision the allocation formula cannot be used for that corporation, and the tax officials have no power to depart from the formula.[16] Thus it seems that the corporation will, under the present law, escape taxation. Other corporations might raise the question of unequal taxation for here is one which is not taxed at all.

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quired; S. C. LAWS (1927) Act 1; VA. CODE ANN. (Supp. 1926) Tax Bill, §10 (7); WIS. STAT. (1927) §71.02.

[13] It does not appear that any state has this method.

[14] However, corporations might be classified and a formula be enacted for each class. This would narrow the chances of disparity incidental to a single formula for all corporations. Under the present law North Carolina has three classifications, corporations dealing in tangible property, those dealing in intangible property, and railroads and public service corporations. N. C. ANN. CODE (Michie Supp. 1929) §7880 (317), (318).

[15] Bank of Commerce v. Senter, 149 Tenn. 569, 260 S. W. 144 (1924), upholding Tennessee discretionary provision. See Hampton and Co. v. U. S., 276 U. S. 394, 48 Sup. Ct. 348, 72 L. ed. 624 (1928), President's discretionary power in administering flexible tariff; Notes (1927) 36 YALE L. J. 573; (1928) 37 YALE L. J. 1151; Frischer v. Bakelite Corp., 39 F. (2d) 247 (C. C. Cus. and Pat. App. 1930); Interstate Commerce Comm. v. Goodrich Transit Co., 224 U. S. 194, 32 Sup. Ct. 436, 56 L. ed. 729 (1912); Express Co. v. R. R., 111 N. C. 463, 16 S. E. 393 (1892).

[16] Although the tax law does not authorize the officials to depart from the formula, it appears that they do in fact sometimes compromise with the taxpayer.

Taxation—Patents and Copyrights as Immune Federal Instrumentalities.

The doctrine that federal and state governmental instrumentalities are reciprocally immune from taxation has been an elementary canon since *McCulloch v. Maryland.*[1] It was there that Mr. Chief Justice Marshall deduced from the Constitution by "necessary implication" this principle considered necessary to preserve a governmental structure of dual sovereignties. "General propositions," however, "do not decide concrete cases"; and two recent decisions which reach different results in considering the effect of state taxes on the federal function of issuing patents and copyrights give further sanction to this aphorism of Mr. Justice Holmes.

On January 12, 1931, the United States Supreme Court in *Educational Films Corp. v. Ward*[2] upheld the levy of a New York franchise tax on corporations for the privilege of doing business, although the tax was measured by net income made up in part from the returns on copyrights. On March 25, 1931, the North Carolina Supreme Court in *Maxwell v. Chemical Construction Co.*[3] refused to uphold the levy of an income tax, because part of such income was made up of royalties received from patents. The opinion relies chiefly on *Long v. Rockwood,*[4] a Federal Supreme Court case holding a similar tax invalid. The Attorney General, however, pointed out that the *Long* case was a five to four decision. This he suggested as a reason, especially strong in the light of the instant federal holding, for a decision in his favor.[5] The argument was repudiated on the ground that one was an income tax as contrasted with the other as a franchise tax. Despite the form of the tax, in both cases there is presented the fundamental problem of striking a practical and workable balance between the interest of the state in unimpaired taxing power and the interest of the federal government in the free exercise of its power to "promote the progress of Science and Useful Arts"[6] by issuing patents and copyrights. Cases involving the effect of these types of taxes on other federal powers may throw light on this problem.[7]

[1] 4 Wheat. 316 (1819).
[2] 51 Sup. Ct. 170 (1931).
[3] 200 N. C. 500 (1931).
[4] 277 U. S. 145, 48 Sup. Ct. 463, 72 L. ed. 824 (1928).
[5] Plaintiff Appellant's Brief, page 5.
[6] U. S. CONSTITUTION, Art. I, §8.
[7] For a discussion of the relation of other types of taxes to the encroachment problem see the following which begins a series of articles: Thomas

Income Taxes.

Taxes on income derived from federal instrumentalities are consistently declared invalid as hampering the operations of the federal government. In *Miller v. Milwaukee*[8] an income tax levied on corporate dividends paid directly from United States bonds was declared invalid as impairing the federal borrowing power. In *Gillespie v. Oklahoma*[9] the fact that part of the income consisted in profits from a lease of Indian lands served to invalidate the tax as interfering with the government's care of its wards. In neither case does there appear any disposition to determine whether the interference is negligible or substantial. In fact, the only reaction against a mechanical and technical application of the doctrine of reciprocal exemption in the income tax cases appears in the dissenting opinion of Holmes, J., in *Long v. Rockwood*.[10] He is willing to question whether patents are instrumentalities in the sense of the rule which forbids taxation thereon. This willingness to face actualities is perhaps more significant in the light of a long line of state cases holding patents immune from various kinds of taxation.[11]

Corporate Franchise Taxes.

The corporate franchise tax cases are more numerous and their history is more complex. The court has been reluctant to pierce the form of a franchise tax and recognize its actual effect on a federal instrumentality. And having perceived such an effect, it has not yet expressly based a decision on the theory that the interference of the

Reed Powell, *Indirect Encroachment on Federal Authority by the Taxing Powers of the States* (1918) 31 HARV. L. REV. 321. See also Note (1930) 30 COL. L. REV. 92.

[8] 272 U. S. 713, 47 Sup. Ct. 280, 71 L. ed. 487 (1927).

[9] 257 U. S. 501, 42 Sup. Ct. 171, 66 L. ed. 339 (1922). Holmes, J., differentiates cases in which the state tax is claimed to burden interstate commerce on the ground that they concern a regulatory power of the federal government and not an instrumentality. In these cases interference, he says, is a question of degree. On the other hand, "the rule as to instrumentalities of the United States is absolute in form and at least stricter in substance." For an apparent change in his view see *infra* note 22. In Oil Corp. v. Bass, 6 U. S. Daily 365 (1931) a federal income tax on income from a lease of state lands was upheld.

[10] *Supra* note 4.

[11] Edison Electric Co. v. Board of Assessors, 156 N. Y. 417, 51 N. E. 269 (1898) (property tax); Commonwealth v. Westinghouse Co., 151 Pa. St. 265, 24 Atl. 1107 (1892) (tax on corporate capital invested in patents); Celotex Co. v. Louisiana Tax Commission, 165 La. 195, 115 So. 457 (1928); Commonwealth v. Petty, 96 Ky. 452, 29 S. W. 291 (1895) (license tax on sale of patents); *In re* Sheffield, 64 Fed. 833 (C. C. Ky. 1894) (same); Quicksafe M'f'g. Corp. v. Graham, 29 S. W. (2d) 253 (Tenn. 1930); and see McCullock v. Maryland, *supra* note 1, at 432. *Cf.* Appeal of Ross, U. S. Daily, Sept. 2, 1930, at 7 commented on in (1930) 40 YALE L. J. 136.

state tax with the exercise of federal powers was not vital or substantial. In four early cases—three in 1867, one in 1889—the court upheld state franchise taxes on corporations measured by a percentage of net income part of which was made up of returns from United States securities.[12] The announced ground of the decisions was the seemingly futile distinction between a tax *on* such income and a tax *measured* by it. In 1910 the same conceptualism resulted in upholding the levy in the converse situation of a federal franchise tax on state corporations measured by net income derived in part from the returns on municipal bonds.[13] The two later cases of *Northwestern Mutual Life Insurance Co. v. Wisconsin*[14] and *Macallen Co. v. Massachusetts*[15] refused to uphold franchise taxes measured by gross and net income respectively where such income represented receipts from United States securities. In effect the decisions deny significance to the tenuous distinction between a tax on a subject and a tax measured by it, but the court refuses to carry its realism to the extent of considering the practical effect of the tax on the federal borrowing power judged by the degree of encroachment. Furthermore, the true significance of both cases is obscured by an attempt to avoid the appearance of overruling previous cases by laying down spurious tests to reconcile them. The vice of the tax in the *Northwestern* case is declared to be that it is measured by *gross* income. Obviously the federal agency is just as surely, if not as substantially, touched when the measure is *net* income.[16] The *Macallen* case is said to rest on the differentiating fact that the legislative history of the tax disclosed that it was passed for the specific purpose of taxing federal bonds, whereas no sinister legislative intent is disclosed in the other cases of this class.[17] And unfortunately the *Educational Films* case distinguishes the *Macallen* case on this ground.[18] Bad faith on the part of the legislature affects in no way the fact or the degree of en-

[12] Provident Institution v. Mass., 6 Wall. 611 (1867); Society for Savings v. Coite, 6 Wall. 594 (1867); Hamilton Co. v. Mass., 6 Wall. 632 (1867); Home Insurance Co. v. New York, 134 U. S. 594, 10 Sup. Ct. 593, 33 L. ed. 1025 (1889).

[13] Flint v. Stone Tracy Co., 220 U. S. 107, 31 Sup. Ct. 342, 55 L. ed. 389 (1910).

[14] 275 U. S. 136, 48 Sup. Ct. 55, 72 L. ed. 202 (1927).

[15] 279 U. S. 620, 49 Sup. Ct. 432, 73 L. ed. 875 (1928). See the following comments: T. R. Powell, *The Macallen Case—and Before* (1930) 8 N. I. T. M. 47, *ibid.* 91; (1930) 25 Ill. L. Rev. 103; Note (1930) 43 Harv. L. Rev. 280.

[16] For an argument that the distinction between gross and net income as a measure of franchise taxes is well taken see (1929) 15 Corn. L. Q. 127.

[17] This test appears also in Miller v. Milwaukee, *supra* note 8.

[18] Educational Films Corp. v. Ward, *supra* note 2.

croachment. Both suggested differentiations seem a resort to judicial duplicity in order that there may be created what Jerome Frank in his recent brilliant book has called "illusory certainty in law."[19]

The actual effect of the *Educational Films* case seems to be to reinstate franchise taxes measured by income constituted of returns from federal instrumentalities.[20] It is to be regretted that the opinion professes approval of the conceptualistic test developed in 1867 and the legislative motive test of the *Macallen* case. Language in the majority opinion,[21] however, coupled with previous expressions of the individual judges constituting the majority[22] suggests that perhaps the *ratio decidendi* of the opinion is that the tax is not a substantial burden on the efficient functioning of the federal government.

Holmes, Brandeis, and Stone, JJ., dissented in the *Long* and *Macallen* cases to express their approval of the income and franchise taxes there involved. With them are now joined Hughes, C. J., and Roberts, J., to make up the majority which approves the tax in the

[19] FRANK, LAW AND THE MODERN MIND (1930) 196.

[20] For example, the California court recently upheld on the authority of the Educational Films case a franchise tax levied under an act expressly declaring that no deductions in computing net income should be allowed for returns from Federal bonds. The Pacific Co. Ltd. v. Johnson, 6 U. S. Daily 346 (Calif. 1931). A probable further effect is to make safe the state taxation of national banks pursuant to 12 U. S. C. SUPP, III §548 (1929) (provides for state excise taxes on national banks measured by net income from all sources). Where the bank's capital was invested in U. S. securities, the Macallen case would perhaps prohibit this state tax. Under the Educational Films case there seems no such likelihood.

[21] Per Stone, J., in Educational Films Corp. v. Ward, *supra* note 2, at 173: "This court, in drawing the line which defines the limits of the powers and instrumentalities of state and national governments, is not intent upon a mechanical application of the rule that governmental instrumentalities are immune from taxation, regardless of the consequences to the operations of government. . . . Having in mind the end sought, we cannot say . . . that the present tax, viewed in the light of actualities, imposes any such real or direct burden on the federal government as to call for the application of a different rule."

[22] Holmes, J., dissenting (Brandeis and Stone, JJ., concurring) in Panhandle Co. v. Miss., 277 U. S. 218, 48 Sup. Ct. 451, 72 L. ed. 857 (1928): "The power to tax is not the power to destroy while this court sits. . . . The question of interference with government, I repeat, is one of reasonableness and degree, and it seems to me that the interference in this case is too remote." Stone, J., dissenting (Brandeis and Holmes JJ., concurring) in Macallen Co. v. Mass., *supra* note 15, at 637: "It would seem that only considerations of public policy of weight, which appear to be here wholly wanting, would justify overturning a principle (allowability of franchise tax measured by income from tax exempt securities) so long established. It has survived a great war, financed by the sale of government obligations; and it has never even been suggested that in any practical way it has impaired either the dignity or credit of the national government."