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Notes and Comments

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present entrance requirement of two years of college work. The new trustee regulation requiring three years of college preparation for entrance to the Law School will take effect in September, 1932.

For the first time, the law students have a separate dormitory of their own. The Carr Building, adjacent to the Law Building, has been remodeled and set aside for this purpose. It now houses its capacity of 62, all of whom are students in the Law School.

Last winter the faculty of the Law School presented 10 bills to the General Assembly, proposing changes in the procedural law and, to a less extent, changes in the substantive law of the state. Four of these bills became law, including the Uniform Declaratory Judgment Act, as slightly revised by Professor Atwell C. McIntosh of the Law School. To continue the process of law-school participation in law-making thus begun, the legislature created the Law Improvement Commission, to consist of representatives of the Wake Forest, Duke and North Carolina law faculties, and of the laity and the bench and bar. Judge George W. Connor of the Supreme Court is chairman and Albert Coates of the Law School, secretary. The North Carolina Judicial Conference was abolished.

The new Constitutional Revision Commission has accepted the Law School's offer of research assistance in connection with its work, and has invited the Wake Forest College and Duke University Law Schools to participate. In close relation to this work, Professor R. H. Wettach will conduct during the spring semester, a research course in North Carolina Constitutional Law, with especial emphasis on the need for amendment and revision.

NOTES AND COMMENTS

Attorneys—Disbarment—Failure to Comply with Technical Requirements of Disbarment Statute.

The case of *Grievance Committee v. Strickland*[1] is the first in which disbarment proceedings founded upon a charge of "ambulance chasing" have been reviewed by the North Carolina Supreme Court. The accusation, brought by the Grievance Committee of the State Bar Association, was based upon the affidavit of Biggers, but the accused was found guilty only on evidence furnished by Fellos,

[1] Committee on Grievances of the State Bar Association v. Strickland, 200 N. C. 630, 158 S. E. 110 (1931).

whose name appeared for the first time in the solicitor's citation. *Held,* disbarment reversed, on the ground that the bounds of the statute governing such proceedings had been exceeded.

Only in one instance[2] has a disbarment proceeding been decided on appeal unfavorably to a North Carolina attorney. The other decisions rest on one of three technical considerations: (1) strict construction of the statute,[3] (2) dubiously-worded disavowals,[4] and (3) meticulous attention to terminology.[5]

By the majority of decisions, an action for disbarment is not criminal in nature, but rather civil or even *sui generis,* and is to be governed, not by the technical nicety of criminal pleadings, but by rules peculiar to itself.[6] Likewise, nearly all courts agree that punishment of the offending attorney is neither the primary nor the ultimate purpose of the proceeding, but that it is invoked mainly to protect the courts, the profession, and the public from ministration by persons unfit to practice.[7] If the accused is fully and fairly informed of the general nature of the charges against him, and in a broad sense the proof corresponds with the allegations, it has been held that slight variations between proof and allegation are imma-

[2] State v. Johnson, 171 N. C. 799, 88 S. E. 437 (1916).

[3] *Ex parte* Schenck, 65 N. C. 353 (1871) (publishing letter derogatory to superior court judge); Kane v. Haywood, 66 N. C. 1 (1872) (failure to account for client's money).

[4] *In re* Moore, 63 N. C. 397 (1869) [disavowal admits purpose (of publication) was to express disapprobation of the conduct of individuals occupying high judicial stations]; *Ex parte* Biggs, 64 N. C. 202 (1870) (D insisted that by becoming an attorney, he did not surrender any right as editor, and as such was entitled "to fully comment on all public officers").

[5] *In re* Ebbs, 150 N. C. 44, 63 S. E. 190 (1908) ("convicted" held not equivalent to "guilty").

[6] Philbrook v. Newman, 85 Fed. 139 (Circuit Court, Cal., 1898); Maloney v. State, 182 Ark. 510, 32 S. W. (2nd) 423 (1930); Gould v. State, 127 So. 309 (1930); *In re* Ulmer, 268 Mass. 373, 167 N. E. 749 (1929); *Re* Vaughan, 189 Cal. 491, 209 Pac. 353 (1922); People v. Stonecipher, 171 Ill. 506, 111 N. E. 496 (1916) (deposition taken in another state held admissible); *In re* Breidt, 84 N. J. Eq. 222, 94 Atl. 214 (1915); State v. Peck, 88 Conn. 447, 91 Atl. 274 (1914); Bar Association v. Scott, 209 Mass. 200, 95 N. E. 402 (1911) fraud proved in instance other than that named in petition); *In re* Ebbs, *supra* note 5; *In re* Smith, 73 Kan. 743, 85 Pac. 584 (1906); (1921) MINN. L. REV. 141; (1921) CAL. L. REV. 484. *Contra: In re* Eaton, 235 N. W. 587 (1931).

[7] McIntosh v. State Bar, 211 Cal. 261, 294 Pac. 1067 (1930); Gould v. State, *supra* note 6; State v. Kern, 233 N. W. 629 (1930); *In re* Egan, 52 S. D. 394, 218 N. W. 1 (1928); State v. Ledbetter, 127 Okla. 85, 260 Pac. 454 (1927); *Re* Stolen, 193 Wis. 602, 214 N. W. 379 (1927); *Re* Vaughan, *supra* note 6; *Re* Kerl, 32 Idaho 737, 188 Pac. 40 (1920); *In re* Rouss, 221 N. Y. 81, 116 N. E. 782 (1917); *In re* Breidt, *supra* note 6; Bar Association v. Greenhood, 168 Mass. 169, 46 N. E. 568 (1897); *Ex parte* Wall, 107 U. S. 265, 2 Sup. Ct. 569 (1882) (leading case); (1921) 5 MINN. L. REV. 141.

terial.[8] There is also authority for the statements that where the charges are sufficient and clearly apparent upon the face of the complaint, the procedure by which the matter is brought to the attention of the court need not comply with any particular statutory or common-law form, and that discrepancies not invading some substantial right of the respondent are not cause for reversal.[9] Statutes, while they may set up additional grounds for disbarment or define the procedure to be utilized, are usually held to be merely cumulative, and not to limit or impair the inherent constitutional right of the court to deal with such cases in a proper, though non-statutory, way;[10] nor should they be construed as importing to the general assembly an intention to abridge such power.[11]

The statement by the court in the principal case, supported by cases not dealing with disbarment, that a statutory method of procedure, if provided, "is exclusive and must be first resorted to and in the manner specified therein," does not find support in "courts everywhere."[12] But, conceding the statutory provisions to be the basis of the action, the majority opinion appears to have misconstrued the requirements of the statute. Though it is provided that proceedings "shall be instituted and prosecuted only by the Committee on Grievances of the North Carolina State Bar Association,"[13]

[8] Bar Association of Boston v. Scott, *supra* note 6.

[9] *In re* Ulmer, *supra* note 6; *In re* Bailey, 30 Ariz. 407, 248 Pac. 29 (1926); State v. Peck, *supra* note 6 (complaint in narrative form); Hess v. Conway, 93 Kan. 246, 144 Pac. 205 (1914); Bar Association v. Scott, *supra* note 6; *In re* Smith, *supra* note 6; State v. Hays, 64 W. Va. 45, 61 S. E. 355 (1908); Bar Association v. Greenhood, *supra* note 7; *In re* Lowenthal, 78 Cal. 427, 21 Pac. 7 (1889) (facts stated in narrative form, no allegations connecting them with charges); *Ex parte* Wall, *supra* note 7.

[10] *In re* Eaton, *supra* note 6; Gould v. State, *supra* note 6; *In re* Royall, 34 N. M. 554, 286 Pac. 156 (1930); *Re* Cohen, 261 Mass. 484, 159 N. E. 495 (1928); State v. Cannon, 196 Wis. 534, 221 N. W. 603 (1928); *Re* Law Association, 288 Pa. 331, 135 Atl. 732 (1927); State v. Ledbetter, *supra* note 7; Hertz v. U. S., 18 F. (2nd) 52 (C. C. A. Eighth Circuit, 1927); *In re* Wolfe's Disbarment, 288 Pa. 331, 135 Atl. 732 (1927); State v. Reynolds, 22 N. M. 1, 158 Pac. 413 (1916); People v. Harris, 273 Ill. 413, 112 N. E. 978 (1916) (allowing of testimony by unauthorized relator held no objection); Bar Commissioners v. Sullivan, 35 Okla. 745, 131 Pac. 703 (1912); Wernimont v. State, 101 Ark. 210, 142 S. W. 194 (1911); *In re* Tharcher, 80 Ohio St. 492, 89 N. E. 39 (1909); *In re* Egan, 22 S. D. 355, 117 N. W. 874 (1908); *Ex parte* Schenck, *supra* note 3; (1928) 37 YALE L. J. 1154; (1928) 13 MINN. L. REV. 62; see Snyder's Case, 301 Pa. 276, 152 Atl. 33 (1930).

[11] *In re* Egan, *supra* note 10; Hale v. State, 55 Ohio St. 210, 45 N. E. 199 (1896).

[12] *In re* Bailey, *supra* note 9; *Re* Law Association, *supra* note 10; *In re* Wolfe's Disbarment, *supra* note 10; Bar Commissioners v. Sullivan, *supra* note 10; *In re* Thatcher, *supra* note 10.

[13] N. C. ANN. CODE (Michie, 1927) §208.

there is also a requirement that in all cases the solicitor shall "appear and prosecute the accusation and be responsible for the faithful discharge of the duties required of him."[14] It is submitted that the statute requires only that charges be initiated or "instituted" by the grievance committee, and the solicitor, in securing additional affidavits, merely "faithfully discharged" his duties.[15]

JAMES M. LITTLE, JR.

Bankruptcy—Proof of Contingent Claims.

The Supreme Court of the United States in the case of *Maynard v. Elliott*[1] held that the liability of a bankrupt as endorser of negotiable notes, some of which did not mature for more than a year after the filing of the petition in bankruptcy, was a provable claim against his estate.

Section 63 of the present bankruptcy act in providing for claims provable against the estate of a bankrupt makes no specific provision for the proof of contingent claims.[2] The status of the claim at the time of the filing of the petition determines whether or not it is provable.[3] Hence the provability of contingent claims founded upon contract depends on whether subdivision (1)[4] of this section to the

[14] N. C. ANN. CODE (Michie, 1927) §214.

[15] See People v. Harris, *supra* note 10.

Cited in appellant's brief were: *In re* Evans, 130 Pac. 217 (Utah, 1913); Bar Association v. Sullivan, 185 Cal. 621, 198 Pac. 7 (1921); *In re* Hudson, 36 Pac. 812 (Cal., 1894); Grievance Committee v. Ennis, 84 Conn. 594, 80 Atl. 767 (1911); and People v. Matthews, 217 Ill. 94, 75 N. E. 444 (1905). Three of these would seem to be not in point. The first decision rests upon the fact that the petitioners were condemned unheard on charges concerning which no evidence had been adduced; in the second case no misconduct other than that specifically charged was alleged in the accusation or included in charges filed; and the last reversal was due to the lack of an affidavit to support the information. Nor did the fourth case turn alone on the technical point involved, since the deficiency in the complaint was only "another reason" for setting aside the order for suspension.

[1] 283 U. S. 273, 51 Sup. Ct. 390, 75 L. ed. 518 (1931) [reversing 40 F. (2d) 17 (C. C. A. 6th, 1930)].

[2] 30 Stat. 562 (1898) 11 U. S. C. A. §103 (1927). "A contingent claim is one as to which it remains uncertain, at the time of the filing of the petition in bankruptcy, whether or not the bankrupt will ever become liable to pay it." *In re* Mullings Clothing Co., 238 Fed. 58, 67 (C. C. A. 2nd, 1916); (1927) 12 MINN. L. REV. 60, n. 1.

[3] Zavelo v. Reeves, 227 U. S. 625, 33 Sup. Ct. 365, 57 L. ed. 676 (1913); Swartz v. Fourth National Bank, 117 Fed. 1 (C. C. A. 8th, 1902); *In re* Bingham, 94 Fed. 796 (D. Vt. 1899).

[4] (A) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, . . . Bankruptcy Act, of 1898, *supra* note 2.

effect that a provable claim must be, "a fixed liability . . . absolutely owing at the time of the filing of the petition in bankruptcy," shall be construed as limiting subdivision (4)[5] which provides for the proof of claims founded upon a contract express or implied.

Prior to the decision in the principal case the proof of contingent claims was a source of considerable confusion. In the case of *Moch v. Market Street National Bank*[6] the court permitted proof of a claim against a bankrupt as indorser of negotiable notes due after the filing of the petition on the ground that subdivision (1) and (4) are to be construed as separate and independent; hence though contingent and not provable under subdivision (1), the claim is provable under subdivision (4) as founded upon contract. This construction of the statute was followed by a majority of the lower federal courts as regards claims on the indorsement of negotiable notes due after the filing of the petition.[7] By an opposite construction of the statute claims for rent to accrue after the filing of the petition were by the weight of authority held contingent and therefore not provable.[8] *In re Roth & Appel*,[9] again representing the majority view,[10] held that a claim based on a stipulation in the lease giving the lessor the right to terminate the lease upon the bankruptcy of the lessee and hold the lessee for the difference between the contract price and the re-rental value of the premises was not provable because contingent, the court

[5] (A) Debts of the bankrupt may be proved and allowed against his estate which are, . . . (4) founded upon an open account, or upon a contract express or implied. Bankruptcy Act of 1898, *supra* note 2.

[6] 107 Fed. 897 (C. C. A. 3rd, 1901).

[7] *In re* Phillip Semmer Glass Co., 135 Fed. 77 (C. C. A. 2nd, 1905); *In re* Rothenburg, 140 Fed. 798 (S. D. N. Y. 1905); *In re* Smith, 146 Fed. 923 (D. R. I. 1906); *In re* Amdur Shoe Co., 13 F. (2d) 147 (D. Mass. 1926); *In re* Henry & S. G. Lindeman, 238 Fed. 639 (S. D. N. Y. 1916); *In re* Gerson, 105 Fed. 891 (E. D. Pa. 1901); *In re* Shatz, 251 Fed. 351 (E. D. Pa. 1918); *In re* T. A. McIntyre & Co., 198 Fed. 579 (S. D. N. Y. 1912); *In re* Buzzini & Co., Inc., 183 Fed. 827 (S. D. N. Y. 1910); see Heyman v. Third National Bank of Jersey City, 216 Fed. 685, 687 (D. N. J. 1914). *Contra:* First National Bank v. Elliott, 19 F. (2d) 426 (C. C. A. 6th, 1927) (the Moch case expressly disapproved).

[8] *In re* Rubel, 166 Fed. 131 (E. D. Wis. 1908); *In re* Mlle. Lemaud, Inc., 13 F. (2d) 208 (D. Mass. 1926); Wells v. 21st St. Realty Co., 12 F. (2d) 237 (C. C. A. 6th, 1926); Britton v. Western Iowa Co., 9 F. (2d) 488 (C. C. A. 8th, 1925); Coleman v. Withoft, 195 Fed. 250 (C. C. A. 9th, 1921) *Contra: In re* Spies-Alper Co., 231 Fed. 535 (D. N. J. 1916). (the Moch case expressly followed); Courtney v. Fidelity Trust Co., 219 Fed. 57 (C. C. A. 6th, 1914).

[9] 181 Fed. 667 (C. C. A. 2nd, 1910).

[10] Watson v. Merrill, 136 Fed. 359 (C. C. A. 8th, 1905); *In re* Ells, 98 Fed. 967 (D. Mass. 1910); Slocum v. Soliday, 183 Fed. 410 (C. C. A. 1st, 1910). *Contra: In re* Caloris Mfg. Co., 179 Fed. 722 (E. D. Pa. 1910) (the Moch case expressly followed).

attempting to distinguish the Moch case on its facts. However, an acceleration clause which provides that in the event of the bankruptcy of the lessee the lease shall terminate and all rent become immediately due creates a liability fixed and owing at the time of the filing of the petition and is provable.[11]

Provisions for the collection of attorney's fees in notes of the bankrupt maturing subsequent to the filing of the petition have been held not provable as contingent;[12] guaranty contracts made by the bankrupt where the principal obligation had not been breached before the filing of the petition have been held not provable because contingent;[13] while a surety contract under the same circumstances has been held provable even though contingent.[14]

The field of contingent claims provable under section 63 was considerably widened when the Supreme Court held that bankruptcy could be considered as an anticipatory breach of an executory contract, creating a claim immediately due, founded upon contract and provable as such.[15] Under this decision the test of provability for claims of this nature is very comprehensive,[16] easily covering claims against a bankrupt on unexpired employment contracts.[17]

[11] *In re* Kieth-Gara Co., 203 Fed. 585 (E. D. Pa. 1913); *In re* Schechter, 39 F. (2d) 18 (C. C. A. 3rd, 1930); *In re* Pittsburg Drug Co., 64 Fed. 482 (W. D. Pa. 1908).

[12] *In re* Garlington, 115 Fed. 999 (N. D. Tex. 1902); *In re* Gimbel, 294 Fed. 883 (C. C. A. 5th, 1923); *In re* Thompson, 144 Fed. 314 (W. D. Tex. 1906); *cf.* British & American Mtg. Co. v. Stuart, 210 Fed. 425 (C. C. A. 5th, 1914) (stipulation in mortgage due after the filing of the petition for the payment of attorney's fees held not provable); First Savings Bank & Trust Co. v. Stuppi, 2 F. (2d) 822 (C. C. A. 8th, 1924) *semble*.

[13] *In re* Merrill & Baker, 186 Fed. 312 (C. C. A. 2nd, 1911); *In re* Kaplan, 44 F. (2d) 669 (N. D. Tex. 1930); *In re* Adair Realty & Trust Co., 35 F. (2d) 531 (N. D. Ga. 1929); Bibb Mfg. Co. v. Pope, 22 F. (2d) 557 (S. D. N. Y. 1925); *In re* Pettingill & Co., 137 Fed. 143 (D. Mass. 1905).

[14] *In re* Lyons Beet Sugar Refining Co., 192 Fed. 445 (W. D. N. Y. 1911).

[15] Central Trust Co. v. Chicago Auditorium Ass'n., 240 U. S. 581, 36 Sup. Ct. 412, 60 L. ed. 811 (1916) (the court distinguishes claims for rent to accrue after the filing of the petition as resulting from the "diversity between duties which touch the realty, and the mere personalty," citing Co. Litt., 292, b, para 513); *cf.* Wells v. 21st St. Realty Co., *supra* note 8 (the court followed the above distinction and refused to apply the doctrine of anticipatory breach to rent to accrue after the filing of the petition).

[16] "The test of provability under the act of 1898 may be stated thus: If the bankrupt, at the time of the bankruptcy, by disenabling himself from performing the contract in question, and by repudiating its obligation, could give the proving creditor the right to maintain at once a suit in which damages could be assessed at law or in equity, then the creditor can prove in bankruptcy on the ground that bankruptcy is the equivalent of disenablement and repudiation." Central Trust Co. v. Chicago Auditorium Ass'n., *supra* note 15 at 592.

[17] *In re* Schultz & Guthrie, 235 Fed. 907 (D. Mass. 1916); *In re* Rouden Mfg. Co., 278 Fed. 663 (E. D. N. Y. 1921).

The purpose of the present bankruptcy act is to discharge the bankrupt from existing obligations and distribute his assets ratably among his creditors.[18] By construing subdivision (4) as independent of subdivision (1) the logic of the principal case would allow proof of practically all contingent claims founded upon contract. This construction seems to be in furtherance of the purpose of the act, in that it allows these contingent claims to be proved and discharged. A meritorious limitation upon this broad rule is found in the English bankruptcy act to the effect that the amount of the damages be ascertainable with reasonable certainty.[19]

F. D. HAMRICK, JR.

Conflict of Laws—Validity of Foreign Contracts—Effect of Domestic Usury Laws.

The receiver for a bankrupt North Carolina corporation sued the defendant, a credit company, incorporated in Delaware with principal office in Baltimore, for twice the amount of usurious interest allegedly paid by the lumber company.[1] By a "covering agreement" the lumber company "sold" and the credit company "bought" acceptable accounts, notes, drafts, and other paper taken from the former's customers and mailed to defendant in Baltimore. Defendant advanced 77 per cent on acceptance and the balance when the customer paid the lumber company as defendant's agent and the latter remitted. If the customer did not pay, defendant served notice and charged the amount back. For this and other services not deemed material by the court, the credit company collected 1/30 of 1 per cent of the net face value of accounts for each day, and other charges amounting to 15 per cent. The contract stipulated that the law of Delaware should govern, also that it was not to be effective until accepted by defendant in Baltimore. (Corporations cannot take ad-

[18] Central Trust Co. v. Chicago Auditorium Ass'n., *supra* note 15 at 591; Williams v. U. S. Fidelity Co., 236 U. S. 549, 554, 35 Sup. Ct. 289, 59 L. ed. 713 (1915).

[19] (1883) 46 & 47 VICT. c. 52, para. 37 (1) (3), 1 CHIT. STAT. 702; *cf.* Dunbar v. Dunbar, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. ed. 1084 (1903) (the contract of a husband to pay his wife an annuity so long as she should remain a widow held not a provable claim in bankruptcy because the value of the annuity was so uncertain as to be incapable of estimation).

[1] N. C. ANN. CODE (Michie, 1927) §2306, provides that all interest is forfeited for charging usury, and twice the interest may be recovered for usurious interest paid.

vantage of the usury statute in Delaware or Maryland.[2]) *Held:* This was a loan. The contract was made in Maryland. If made in good faith without intent to evade the North Carolina usury law, Maryland law applies, otherwise North Carolina law. The issue of good faith should have been submitted to the jury, hence reversed and remanded.[3]

The first question is was this a loan or a sale? The court looks through form to substance.[4] This is always the rule. Thus in one case the language is found: "Where a transaction is in reality a loan of money (it will be so treated), whatever may be its form," and "by whatever name the charge may be called." The identical contract involved in the instant case has been construed by one District Court to be a loan,[5] and by another District Court to be a sale.[6] Our court is "of the opinion that the agreement contemplates a loan." This seems the sound, analytical view, for the credit company took no risk, charging all unpaid accounts back to the lumber company.

The authorities are in great confusion as to what law governs the validity of a contract, and the same court will often enunciate inconsistent theories. The courts have laid down three general rules: (1) the law of the place of making; (2) the law of the place of performance; (3) the law intended by the parties. The latter is the English rule, probably the majority rule in this country, and is modified by presumptions and limitations.[7]

Early North Carolina cases went on the intention rule. If there was no place of payment or performance different from the place of making, the court presumed the parties intended the law of the latter place to govern, or they would have stipulated otherwise.[8] Where

[2] MD. ANN. CODE (Bagby, 1924), art. 49, §5. No corporation can plead usury as a defense, nor maintain an action based upon usury.

DELAWARE, GENERAL CORPORATION ACT, §4, provides that corporations created to deal in notes, accounts, etc., shall not be construed as engaging in the business of banking, and may charge such amounts as the respective parties agree upon.

[3] Bundy v. Commercial Credit Co., 200 N. C. 511, 157 S. E. 860 (1931).

[4] Burwell v. Burgwyn, 100 N. C. 639, 6 S. E. 409 (1888); Bank v. Wysong, 177 N. C. 380, 99 S. E. 199 (1918); Lumber Co. v. Trust Co., 179 N. C. 211, 102 S. E. 205 (1919); Ripple v. Mortgage Co., 193 N. C. 422, 137 S. E. 156 (1927).

[5] Brierly v. Commercial Credit Co., 43 F. (2d) 724-30 (E. D. Pa. 1929).

[6] *In re* Eby, 39 F. (2d) 76 (E. D. N. C. 1929).

[7] GOODRICH, CONFLICT OF LAWS 228.

[8] Arrington v. Gee, 27 N. C. 590 (1845); Houston v. Potts, 64 N. C. 33 (1870); Williams v. Carr, 80 N. C. 294 (1879); Hilliard & Co. v. Outlaw, 92 N. C. 266 (1885); Morris v. Hockaday, 94 N. C. 286 (1886); Wood v. Wheeler, 111 N. C. 231, 16 S. E. 418 (1892); Copeland v. Collins, 122 N. C.

the places differed, some cases presumed that the parties intended the law of the place of performance to govern,[9] others the law of the place of making.[10] But not if money was loaned at usury in another state secured by a mortgage on land in North Carolina,[11] or if there was evidence of intent to evade the North Carolina usury law,[12] or if the capacity of the contracting party, as a married woman, were in question, the law of the forum—likewise the domicile—being applied.[13] Unusually strong authority for the intention theory is found in a decision of the elder Judge Connor written in 1907: "That, in the absence of such a statute, the parties may agree upon the place of the contract, is well settled."[14]

The latter cases practically all apply the law of the place of making.[15] This is the rule urged by the *Restatement of Conflict of Laws*.[16] But the instant case talks about the presumption that the parties intended, or must have intended, this law to govern.[17]

619, 30 S. E. 315 (1898); Exchange Bank v. Appalachian Land and Lumber Co., 128 N. C. 193, 38 S. E. 813 (1901); Cannady v. Railroad, 143 N. C. 439, 55 S. E. 836 (1906).

[9] Roberts v. McNeely, 52 N. C. 506 (1860).

[10] Bryan v. Western Union Telegraph Co., 133 N. C. 604, 45 S. E. 938 (1903); Hancock v. Telegraph Co., 137 N. C. 498, 49 S. E. 952 (1905); Hall v. Telegraph Co., 139 N. C. 369, 52 S. E. 50 (1905); Johnson v. Western Union Telegraph Co., 144 N. C. 410, 57 S. E. 122 (1907). (All four of the preceding cases were suits on the contract against telegraph companies for negligent transmission or delivery of messages.) Bank of Charlotte v. Simpson, 90 N. C. 467 (1884); Taylor v. Sharp, 108 N. C. 377, 13 S. E. 138 (1891).

[11] Commissioners of Craven v. Atlantic & N. C. Railroad Co., 77 N. C. 289 (1877); Rowland v. Old Dominion Building and Loan Association, 115 N. C. 825, 18 S. E. 965 (1894); Meroney v. Atlanta Building and Loan Association, 116 N. C. 882, 21 S. E. 924 (1895); Faison v. Grandy, 128 N. C. 438, 38 S. E. 897 (1901).

[12] Meroney v. Atlanta Building and Loan Association, 112 N. C. 842, 17 S. E. 537 (1893); see Roberts v. McNeely, 52 N. C. 506 at 508 (1860).

[13] Armstrong, Cator & Co. v. Best, 112 N. C. 59, 17 S. E. 14 (1893); Hanover National Bank v. Howell, 118 N. C. 271, 23 S. E. 1005 (1896).

[14] Williams v. Mutual Reserve Fund Life Association, 145 N. C. 128, 58 S. E. 802 (1907).

[15] National Exchange Bank of Baltimore v. Rook Granite Co., 155 N. C. 43, 70 S. E. 1002 (1911); Pfeifer & Co. v. Israel, 161 N. C. 409, 77 S. E. 421 (1913); Carpenter, Baggott & Co. v. Hanes, 167 N. C. 551, 83 S. E. 577 (1914); Wilson v. Order of Heptasophs, 174 N. C. 628, 94 S. E. 443 (1917); Kesler v. Mutual Benefit Life Insurance Co., 177 N. C. 394, 99 S. E. 207 (1919).

Draft No. 2, §§333, 353.

[16] CONFLICT OF LAWS RESTATEMENT (Am. L. Inst. 1931), Proposed Final

[17] Bundy v. Commercial Credit Co., *supra* note 3. "It is a generally accepted principle that 'the test of the place of a contract is as to the place at which the last act was done by either of the parties essential to a meeting of the minds.' It is clear the contract was executed in Baltimore, because the last act essential to completion of the agreement was performed there. Nothing else appearing, it follows that the parties intended the laws of Maryland to govern its validity and performance."

And there are exceptions: where the contract is contrary to a state statute;[18] contrary to good morals;[19] injurious to the forum or its citizens;[20] violative of the fixed public policy of the state;[21] where the loan or place of payment is in another state, but is secured by a loan upon real estate here, even though the contract stipulated the law of another state should govern;[22] and others.[23]

In the usury cases there is still a strong tendency to adopt the intention test, presuming the intention of the parties to be to adopt the law which will make their contract valid.[24] It is required, however, that there be no bad faith and no intent to evade the usury law.[25] This issue of good faith, which the court says should have gone to the jury in the instant case, often becomes very difficult to decide. It is especially so when the court reverses a former position[26] and says that the charging of more than 6 per cent interest under a contract made in another state is not necessarily contrary to public policy. One commentator observes that this is attaching a penalty to knowledge of the law.[27]

The issue of the principal case becomes impressively important in this era of industrialization of North Carolina. Briefly, do we need and do we want 15 per cent loans, and can our industry prosper on 15 per cent loans? Or is this better than no capital available at a theoretical rate of 6 per cent? The court seems to have been very cognizant of the issues at times.[28]

MARION R. ALEXANDER.

[18] Burrus v. Witcover, 158 N. C. 384, 74 S. E. 11 (1912); Bluthenthal & Beckhart, Inc. v. Kennedy, 165 N. C. 372, 81 S. E. 337 (1914); Standard Fashion Co. v. Grant, 165 N. C. 453, 81 S. E. 606 (1914).

[19] See Burrus v. Witcover, *supra* note 18, at 385.

[20] See Burrus v. Witcover, *supra* note 18, at 385.

[21] Bluthenthal & Beckhart, Inc. v. Kennedy, *supra* note 18; Williamson v. Postal Telegraph-Cable Co., 151 N. C. 223, 65 S. E. 974 (1909) [Stipulation on telegraph message limiting liability of telegraph company for transmitting unrepeated message. The federal rule applies now and this is changed. Hardie v. Western Union Telegraph Co., 190 N. C. 45, 128 S. E. 500 (1925)]. See Burrus v. Witcover, *supra* note 18, at 385.

[22] Meroney v. Atlanta Building and Loan Association, *supra* note 11.

[23] See special exception in usury cases, *infra* note 25, *supra* note 4.

[24] Bundy v. Commercial Credit Co., *supra* note 3.

[25] Arrington v. Gee, *supra* note 8; Roberts v. McNeely, *supra* note 9; Houston v. Potts, *supra* note 8; Morris v. Hockaday, *supra* note 8; Ripple v. Mortgage Corporation, *supra* note 4; Bundy v. Commercial Credit Co., *supra* note 3.

[26] Ripple v. Mortgage Corporation, *supra* note 4.

[27] Note (1921) 21 COL. L. REV. 585.

[28] Burwell, J., in Meroney v. Atlanta Building and Loan Association, *supra* note 11, at 889: "Comity does not require that we allow foreign corporations

Corporations—Agency—Imputation of Knowledge Where Two Corporations Have Common Officer or Agent.

A was vice-president and general manager of *X* corporation and also secretary and treasurer of *Y* corporation. The two corporations occupied the same offices and had virtually the same board of directors. *Y* corporation made a loan on land which *X* corporation, three years previously, had foreclosed as trustee under a deed of trust. *A* knew that *X* corporation had failed to pay, out of the proceeds of the foreclosure sale, certain bonds secured by the foreclosed deed of trust. In an action by the holder of the unpaid bonds, *held, inter alia,* that *A*'s knowledge that the bonds had not been paid was not imputed to *Y* corporation.[1]

The general rule is that notice to, or knowledge of,[2] a corporate officer or agent while he is acting in his official capacity or within the scope of his authority, and in relation to a matter which his authority comprehends, is imputable to the corporation.[3] Knowledge is attributed to the corporate principal by a rule of substantive law which renders actual communication immaterial[4] and which has for

to enforce contracts here if such enforcement would work against our own citizens, and give to foreigners an advantage which the resident citizen has not."

[1] Cheek v. Squires *et al.*, 200 N. C. 661, 158 S. E. 198 (1931). Conceivably it might have been urged that the two corporations were so nearly identified that there should have been a disregard of the corporate fiction and that knowledge should have been imputed. See, generally, Ballantine, *Separate Entity of Parent and Subsidiary Corporations* (1927) 100 CENT. L. J. 107 or (1925) 14 CALIF. L. REV. 12; (1929) 42 HARV. L. REV. 1077. But this approach did not appear in briefs of counsels, nor was it alluded to in the opinion.

[2] "Notice" and "knowledge" are distinguishable, though often treated synonomously. See 4 FLETCHER, CYCLOPEDIA OF CORPORATIONS (1918) §2216. "Absolute notice" and "notice which means knowledge" are discussed in Seaver, *Notice To An Agent* (1916) 65 U. OF PA. L. REV. 1.

[3] Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 12 Sup. Ct. 239, 35 L. ed. 1063 (1892); Follette v. U. S. Mutual Accident Ass'n., 110 N. C. 377, 14 S. E. 923 (1892); LeDuc v. Moore *et al.*, 111 N. C. 516, 15 S. E. 888 (1892); Short v. LaFayette Life Ins. Co., 194 N. C. 649, 140 S. E. 302 (1927); BALLANTINE, CORPORATIONS (1927) 112; 4 FLETCHER, *op. cit. supra* note 2, §2215; for general agency background, see Note (1925) 10 Iowa L. BULL. 231.

[4] 10 Iowa L. BULL., *supra* note 3, at 234, 235. True, any liability resulting from the imputation of notice attaches to the corporation in its abstract sense, that is, as a legal entity; but it is erroneous to conceive of imputation as based on a duty to communicate to the corporation as an impersonal entity. For since the corporate functions can be realized only through natural persons acting as agents, communication must (except in the case of notice directly to a stockholders' meeting) be to some duly authorized officers or agents who are, for the particular transaction, "the corporation." These persons may be those who acquire the knowledge; or they may be those "higher up" in the corporate organization to whom the persons who acquire the knowledge are under a duty to communicate. See RESTATEMENT OF AGENCY, TENTATIVE DRAFT 5, §500; 2 MECHEM, AGENCY. (2d ed. 1914) §1843.

its object the protection of third persons who deal with the corporation.[5]

There are three well established exceptions to the general rule. Knowledge is not imputable: (1) where the knowledge consists of confidential communications which it would be improper for the agent to disclose;[6] (2) where the officer or agent is acting in his own or in another's interest and adversely to the corporation;[7] (3) where the party seeking to have the knowledge imputed colluded with the officer or agent to defraud the corporation.[8] Many courts recognize an exception to exception (2): even if the conduct of the officer or agent is adverse to the interest of the corporation, his knowledge will be imputed if he is the *sole representative* of the corporation in the transaction.[9]

There is substantial authority for the rule that knowledge is not imputable if it be acquired by the officer or agent before the period of agency or within the period of agency while he was acting in his private or individual capacity.[10] But the view which prevails in England,[11] and that which has been recognized by the Supreme

[5] MECHEM, *op cit. supra* note 4, §1802.

[6] Sebald v. Citizens Bank, 105 S. W. 130 (Tex. 1907).

[7] American Nat. Bank of Nashville v. Miller, 229 U. S. 517, 33 Sup. Ct. 883, 57 L. ed 1310 (1913); Ohio Millers' Mut. Ins. Co. v. State Bank, 39 F. (2d) 400 (C. C. A. 5th 1930) (adverse interest relied on *inter alia*); Innerity v. Bank, 139 Mass. 332, 1 N. E. 282 (1885); Corcoran v. Snow Cattle Co., 151 Mass. 74, 23 N. E. 727 (1890); see Bank v. Burgwyn *et al.*, 110 N. C. 267, 275, 276, 14 S. E. 623, 624 (1891); (1925) 19 ILL. L. REV. 595; (1929) 15 VA. L. REV. 782. For a slightly different statement of essentially the same exception, see (1924) 8 MINN. L. REV. 452.

[8] Western Mortgage & Investment Co. Ltd. v. Ganzer *et al.*, 63 Fed. 647 (C. C. A. 5th, 1894); MECHEM, *supra*, note 4, §1826; this exception applies to corporations; *ibid.* §1845.

[9] First Nat. Bank of Blaine v. Blake, 60 Fed. 78 (D. Ore. 1894); McFerson *et al. v.* Bristol, 73 Colo. 214, 214 Pac. 395 (1923); Mays *et al.* v. First State Bank of Keller, 247 S. W. 845 (Tex. 1923); State Bank of Pamplin v. Payne *et al.*, 159 S. E. 163 (Va. 1931); 2 FLETCHER, *op. cit. supra* note 2, §2251; (1925) 12 VA. L. REV. 73; (1926) 39 HARV. L. REV. 645. The North Carolina court seems to have recognized what was in effect the "sole representative" rule in Brite v. Penny, 157 N. C. 87, 72 S. E. 964 (1911). Apparently this doctrine is not squarely accepted by the U. S. Supreme Court. See Curtis, Collins, and Holbrook v. United States, 262 U. S. 215, 224, 43 Sup. Ct. 570, 573, 67 L. ed. 956, 960 (1923); see also Kean *et al.* v. National City Bank, 294 Fed. 214, 224 (C. C. A. 6th, 1923).

[10] Brennan *et al.* v. Emery-Bird-Thayer Dry-Goods Co., 99 Fed. 971 (W. D. Mo. 1900); Peoples Bank of Talbotton v. Exchange Bank of Macon, 116 Ga. 820, 43 S. E. 269 (1902); Bangor & P. Ry. Co. v. American Bangor Slate Co. *et al.*, 203 Pa. 6, 52 Atl. 40 (1902); Taylor *et al.* v. Taylor *et al.*, 88 Tex. 47, 29 S. W. 1057 (1895); Grayson County Nat. Bank v. Hall, 91 S. W. 807 (Tex. 1906). This rule was recognized as to the agent of a natural person in Warrick v. Warrick and Kniveton, 3 Atkyns 219 (1745).

[11] Dresser v. Norwood, 17 C. B. (N. S.) 466 (1864).

Court of the United States[12] as well as by many of the state courts, is that any knowledge which the agent possesses (i.e., which is actually present in his mind) while he is acting with regard to the subject matter of his agency and which is so pertinent to the subject matter that he owes a duty to communicate it, is imputable to the corporation, *regardless of when such knowledge was acquired.*[13]

Where two corporations which deal with each other have a common officer or agent, the question is presented: is his knowledge imputable to either or both corporations?

If the officer or agent acts with the consent of both corporations, and he owes a duty to each to communicate his knowledge, both principals will be charged with his knowledge.[14] Where there is no such consent, and the two corporations are adversely interested, there are two possible situations: (1) if the officer or agent represents only one of them, his knowledge is obviously imputable to this one alone;[15] (2) if he occupies a representative position in both, it is said that there is a conflict of duty on his part, and there is no imputation, the question of knowledge under such circumstances depending on actual communication.[16] It may be generally stated that where there is an interlocking officer or agent, his knowledge is not imputable to either of the corporations unless he acquires or possesses the knowledge under such circumstances that it becomes his duty to communicate it.[17]

Two reasons (perhaps three[18]) are advanced in support of the

[12] "The Distilled Spirits," 11 Wall. (U. S.) 356, 20 L. ed. 367 (1871).

[13] Willard v. Denise, 50 N. J. Eq. 482, 26 Atl. 29 (1893); Craigie *et al.* v. Hadley, 99 N. Y. 131, 1 N. E. 537 (1885); Union Bank v. Campbell, 23 Tenn. (4 Humph.) 394 (1843); Tagg v. Tennessee Nat. Bank, 56 Tenn. (9 Heisk.) 479 (1870); see Red River Land & Investment Co. v. Smith, 7 N. D. 236, 74 N. W. 194, 197 (1898). MECHEM, *supra* note 4, §1850.

[14] First State Bank of Keota v. Bridges, 39 Okla. 355, 135 Pac. 378 (1913).

[15] Utah Const. Co. v. Western Pac. Ry. Co., 174 Cal. 156, 162 Pac. 631 (1917); Benton *et al.* v. German American Nat. Bank, 122 Mo. 332, 26 S. W. 975 (1894); Central Nat. Bank of Springfield v. Pipkin, 66 Mo. App. 592 (1896); Cherry v. First Texas Chemical Mfg. Co. *et al.*, 144 S. W. 306 (Tex. 1912); Casco Nat. Bank of Portland v. Clark *et al.*, 139 N. Y. 307, 34 N. E. 908 (1893); Wardlaw v. Troy Oil Mill, 74 S. C. 368, 54 S. E. 658 (1906).

[16] Note (1886) 36 Am. Dec., 188, 193.

[17] *In re* Fenwick, Stobart Co., Ltd., (1902) 1 Ch. 507, in which Buckley, J., says: "What the court has to see is whether the information he gets, as secretary of one company, comes to him under such circumstances as that it is his duty to communicate it to the other company." 3 THOMPSON, CORPORATIONS (3d ed. 1927) §1770.

[18] Mr. Justice Connor states in the opinion that there was no finding that *A* "acted for or represented" *Y* corporation in the negotiation of the loan, but does not comment further on this. If *A* did not represent *Y* corporation in

holding in the instant case: (1) *A* did not acquire the knowledge while acting as an officer of *Y* corporation; (2) it was to the interest of *X* corporation that *Y* corporation should not know of irregularities in title to the land; hence, it could not be presumed that *A* would communicate the knowledge to *Y* corporation.

The fact that *A* did not acquire the knowledge while acting as an officer of *Y* corporation would not have been conclusive, in many jurisdictions, if it had appeared that he had acted for *Y* corporation with the knowledge actually in mind;[19] but there was no such finding. Furthermore, the sole-representative doctrine is not applicable to the facts.[20] The second reason advanced seems entirely adequate. That *A* would communicate his knowledge to *Y* corporation under the circumstances is contrary to experience.[21]

WM. ADAMS, JR.

Criminal Law—Effect of Void Sentence.

Plaintiff was indicted on three counts, convicted and sentenced to one term of one year and one day and to two terms of six months each; confinement in Leavenworth. A federal statute provided that no prisoner be sentenced to a penitentiary except the period be for longer than one year.[1] After plaintiff had served the first two terms and two months on the third, he petitioned for a writ of habeas corpus, contending that the sentence under which he was serving was void in that the court did not have jurisdiction to impose it. *Held,* sentences two and three are void. Writ ordered to be issued but without prejudice to the United States to have plaintiff sentenced in accordance with the law on the verdict against him.[2]

the particular transaction, there remains only one possibility of imputation of knowledge through *A* to *Y* corporation; and that is, that *A*'s authority was so general as to constitute him the *alter ego* of the corporation in respect to all its business. The statement of facts would indicate that he had quite general authority: "The two corporations occupied the same offices and were under the general control and management of" *A*. Does the court recognize such general authority in *A*, or instead, does it regard his authority as limited, and therefore rely on the absence of a finding that he was acting in regard to a matter over which his authority extended?

[19] See note 13, *supra.*

[20] Because *Y* corporation was also represented in the transaction by a loan committee, which considered the details of the loan. See McFerson *et al.* v. Bristol, *supra* note 9, at 396, in which the court intimates that the sole actor rule would not have been applicable had there been a discount committee involved, and not only the agent alone.

[21] 14a C. J. 491, §2359 (2).

[1] 13 Stat. 500 (1865), 18 U. S. C. A. §695 (1927).

[2] Copeland v. Archer, 50 F. (2d) 836 (C. C. A. 9th, 1931).

If plaintiff was guilty of three separate offences, sentences two and three were rightly held to be void,[3] since it is necessary that judgments in criminal cases conform strictly to the statute both as to the character and extent of the punishment inflicted.[4] But under the doctrine of *Ex parte Friday*,[5] which is to the effect that where there is but one indictment, one trial and one judgment, there can be but a single sentence, the sentence in the instant case would not be treated as void but as merely irregular, and the term of imprisonment thereunder as for two years and one day—the total of the three sentences.

The weight of authority sustains the principal case, but query whether the doctrine of *Ex parte Friday* does not offer a better solution. Under the principal case, the plaintiff was not freed when the writ of habeas corpus was granted, but, having been lawfully convicted, he was subjected to the possibility of a longer sentence;[6] whereas, under *Ex parte Friday*, the sentence would have been valid except for the excess[7] over the statutory provisions (one day[8]), and the writ would not have issued.[9]

PAUL BOUCHER.

[3] *Ex parte* Karstendick, 93 U. S. 396, 23 L. ed. 889 (1876) (as to when confinement must be in a federal penitentiary, when in a state penitentiary, and when discretionary).

[4] Harman v. U. S., 50 Fed. 921 (D. Kan. 1892); Harman v. U. S., 68 Fed. 742 (D. Kan. 1895) (motion to resentence); Woodruff v. U. S., 58 Fed. 776 (D. Kan. 1893); Reynolds v. U. S., 96 U. S. 145, 25 L. ed. 244 (1878); *In re* Pridgeon, 57 Fed. 200 (S. D. Ohio, 1893); *In re* Christian, 82 Fed. 199 (W. D. Ark. 1897); *Ex parte* Karstendick, *supra* note 3; *In re* Graham, 138 U. S. 461, 11 Sup. Ct. 363, 34 L. ed. 1051 (1890); *Ex parte* Lange, 85 U. S. 163, 21 L. ed. 872 (1873); *In re* Mills, *supra* note 4; *In re* Johnson, 46 Fed. 477 (D. Mass. 1891); Whitworth v. U. S., 114 Fed. 302 (C. C. A. 8th, 1902); BYRNE, FEDERAL CRIMINAL PROCEDURE, §365.

[5] 43 Fed. 916 (N. D. N. Y. 1890) (fact situation similar to principal case; indictment for larceny on three counts with three separate sentences, one and two being for one year each confinement to be in a penitentiary).

[6] *In re* Medley, 134 U. S. 160, 10 Sup. Ct. 384, 33 L. ed. 835 (1889); *In re* Christian, *supra* note 4; Hammers v. U. S., 279 Fed. 265 (C. C. A. 5th, 1922); *In re* Bonner, 151 U. S. 242, 14 Sup. Ct. 323, 38 L. ed. 107 (1890); U. S. v. Harman, *supra* note 4; U. S. v. Motherwell, 103 Fed. 198 (E. D. Pa. 1900) rehearing 107 Fed. 437 (C. C. A. 3rd, 1901). *Contra: Ex parte* Lange, *supra* note 4. *Cf.* Ny Fung Ho v. White, 259 U. S. 276, 42 Sup. Ct. 492, 66 L. ed. 938 (1921); Kwock Jan Fat v. White, 253 U. S. 454, 40 Sup. Ct. 566, 64 L. ed. 1011 (1919); Chin Yow v. U. S., 208 U. S. 8, 28 Sup. Ct. 182, 52 L. ed. 379 (1919); Charlie Wong v. Esola, 6 F. (2d) 828 (C. C. A. 9th, 1925).

[7] De Bara v. U. S., 99 Fed. 942 (C. C. A. 6th, 1900); Harlan v. McGourin, 218 U. S. 442, 31 Sup. Ct. 44, 54 L. ed. 1101 (1910); U. S. v. Peeke, 153 Fed. 156 (C. C. A. 2nd, 1907); Collins v. Morgan, 243 Fed. 495 (C. C. A. 8th, 1917).

[8] 35 Stat. 1113 (1909), 18 U. S. C. A. §240 (1927) (maximum sentence two years).

[9] De Bara v. U. S., *supra* note 7; *In re* Pridgeon, *supra* note 4; *In re* Bonner, *supra* note 6; *In re* Swan, 150 U. S. 637, 14 Sup. Ct. 225, 37 L. ed. 787 (1893).

Criminal Law—Former Jeopardy—Tests for Identity of Offense.

Defendant was indicted for larceny of six bushels of corn. He pleaded *autrefois acquit,* contending that he had previously been indicted for the identical offense. *Held,* plea good; the two offenses grew out of the same transaction and only one indictment can be sustained therefor.[1]

Three principal tests for the identity of offenses have been applied by the courts. (1) The "same evidence" rule inquires whether defendant could have been convicted on the first indictment upon proof of the facts alleged in the second.[2] (2) The "same transaction" test asks whether the crimes grew out of a single transaction.[3] (3) The "essential element" test looks to whether the first prosecution was for any essential part or whole of the crime prosecuted in the second indictment.[4] Some courts use these as interchangeable,[5] some as mutually exclusive,[6] and others as over lapping.[7] An application of these rules to concrete fact situations reveals some interesting results.

[1] Harris v. State, 159 S. E. 603 (Ga. 1931).

[2] Winn v. State, 82 Wis. 571, 52 N. W. 775 (1892); Barker v. State, 188 Ind. 263, 120 N. E. 593 (1918); 16 CORPUS JURIS 264; CLARK, CRIMINAL PROCEDURE (2nd ed. 1923), 457; 1 BISHOP, CRIMINAL LAW (9th ed. 1923) §1052. The North Carolina rule is stated by Ruffin, J., in State v. Nash, 86 N. C. 650, 41 Am. Rep. 472 (1882): "the true test is, 'could the defendant have been convicted upon the first indictment upon proof of the facts, not as brought forward in evidence, but as alleged in the record of the second'."

[3] "It is a fundamental rule of law that out of the same facts a series of charges shall not be preferred," Cockburn, J., in Regina v. Elrington, 1 B. & S. 688, 9 Cox C. C. 86 (1861); Jones v. State, 55 Ga. 625 (1876); Newton v. Commonwealth, 198 Ky. 707, 249 S. W. 1017 (1923); State v. Keep, 85 Ore. 265, 166 Pac. 936 (1917); 16 CORPUS JURIS 272; 1 BISHOP, CRIMINAL LAW (9th ed. 1923) §1051.

[4] "It is elementary to say that a prosecution for any part of a single crime bars any further prosecution based upon the whole or part of the crime," Hurt, C. J., in Runyon v. Morrow, 192 Ky. 785, 234 S. W. 304, 19 A. L. R. 632 (1921); U. S. v. Weiss, 293 Fed. 992 (N. D. Ill. 1923); Sanford v. State, 75 Fla. 393, 78 So. 340 (1918); State v. Cheeseman, 63 Utah 138, 223 Pac. 762 (1924); 16 CORPUS JURIS 270.

[5] Mitchell v. State, 16 Ala. App. 635, 80 So. 730 (1918) (The first decision of the court was based on a combination of the "essential element" and "same transaction" tests, while a rehearing rested its decision on the "same evidence" test.); State v. Elder, 65 Ind. 282 (1879); Commonwealth v. Vaughn, 101 Ky. 603, 42 S. W. 117 (1897); Arrington v. Commonwealth, 87 Va. 96, 12 S. E. 224 (1890).

[6] Morgan v. Devine, 237 U. S. 632, 35 Sup. Ct. 712, 59 L. ed. 1153 (1915); U. S. v. Farhat, 269 Fed. 33 (S. D. Ohio 1920); Roberts v. State, 14 Ga. 8 (1853); Foran v. State, 195 Ind. 55, 144 N. E. 529 (1924); State v. Jacobson, 197 Iowa 1028, 198 N. W. 329 (1924).

[7] "*Autrefois acquit* is only available in cases where the transaction is the same and the two indictments are susceptible of, and must be sustained by the same proof," White, P. J., in Simco v. State, 9 Tex. App. at 348 (1880);

In a 1931 federal case[8] defendant was indicted for illegally selling morphine. Three counts were based on a statute requiring sales to be from the original package, and others on a statute requiring a government order before any sale. The sales were on successive days to the government detective. An application of the "same evidence" test allowed conviction on all counts.[9] The same facts would have given rise to an identical holding under the "essential element" test. The sale without order was in no way an integral part of the sale from an illegal package. In analogous situations under the "same transaction" rule the series of sales might be considered one offense[10] or several.[11]

In California, a defendant was indicted for attempting to murder his wife. By the shot intended for her, he killed another person. On the murder indictment he pleaded the attempt indictment as former jeopardy.[12] The "same evidence" rule would not allow the plea. If a murder was proved to have been committed by defendant, it could not have convicted him on the first trial for an attempt on the life of another. Nor is an attempt on one person's life in any way an "essential element" of the murder of another. On the "same transaction" test a division of opinion exists,[13] but some courts would hold but one offense indictable.[14]

"The rule is that where one offense is a necessary element in, and constitutes part of another and both are in fact one transaction, an acquittal or conviction of one should bar prosecution for the other," Snow, J., in People v. Cook, 236 Mich. 333, 210 N. W. 296 (1926); State v. Foster, 156 La. 891, 101 So. 255 (1924); State v. Shaver, 197 Iowa 1028, 198 N. W. 329 (1924).

[8] Blockburger v. U. S., 50 F. (2d) 795 (C. C. A. 7th, 1931).

[9] "It cannot be said that the evidence necessary to establish the truth of either of the two counts in controversy would establish the other, for indeed the opposite is true," Sparks, J., in Blockburger v. U. S., *supra* note 8.

[10] "I do not think the penalty section of the statute contemplates such double punishment for the same transaction. . . . I believe that this 'one and continuous performance,' initiated and enacted under the 'personal direction' of the government agent, and financed by the government, represents but a single infraction of the law," Alschuyler, J., dissenting in Blockburger v. U. S., *supra* note 8; State v. Needham, 194 Mo. App. 201, 186 S. W. 585 (1916); State v. Covington, 147 Tenn. 659, 222 S. W. 1 (1920); State v. Linton, 283 Mo. 1, 217 S. W. 874 (1920).

[11] Bowman v. State, 23 Ala. App. 504, 127 So. 911 (1930); State v. Cleaver, 196 Iowa 1278, 196 N. W. 119 (1923); State v. Wilbur, 85 Ore. 565, 166 Pac. 51 (1917); State v. Keep, *supra* note 3. See State v. Sepanic, 117 Kans. at 110, 230 Pac. at 306 (1924).

[12] People v. Brannon, 70 Cal. App. 225, 233 Pac. 88 (1924).

[13] Note (1922) 20 A. L. R. 341; Note (1883) 41 Am. Rep. 475.

[14] "The same transaction test adopted in this state may make a trial for the murder of one person a bar to the prosecution for assault with intent to murder a different person. For instance, if the defendant shot at *A*, intending to

Suppose a defendant has killed three persons by rapidly successive shots, and pleads acquittal for *A's* murder in defense of that of *C*.[15] Proof of the missiles striking each of the three would be entirely different, thus three indictments would lie on the "same evidence" rule.[16] The act in relation to one of the three was no "essential" part of the act in relation to another, hence three indictments lie on the "essential element" rule. Conceding three transactions to have taken place, each shot constituting one, the question arises as to what would be the situation where one shot kills three persons. Some courts have carried the "same transaction" test to its logical conclusion and would, on a basis of previous decisions, sustain but one indictment.[17]

The "same transaction" test then is flexible, leaving to the court the definition of a single transaction. But the other tests are also flexible, changing with application. From a practical standpoint the courts in effect reach the same conclusions on any of the tests, with the possible exception, as noted, of the "same transaction" test, where several offenses grow out of the same act.

ERNEST W. EWBANK, JR.

Criminal Law—Quashing Indictment for Incompetent Evidence Before Grand July.

The defendant moved to quash his indictment on the ground that all the evidence (testimony of two witnesses) heard by the grand jury was hearsay and incompetent. Motion denied, and, in affirming, the Supreme Court *held:* There is a distinction to be made between in-

kill him, and by reason of bad marksmanship struck and killed *B*, whom he did not intend to kill, the transaction, the assault with intent to kill *A* and the actual murder of *B* are legally the same." Powell, J., in Burnam v. State, 2 Ga. App. 395, 58 S. E. 683 (1907); Gunter v. State, 111 Ala. 23, 20 So. 632 (1896) (the court draws the distinction here between a situation where two shots are fired and where only one occurs); Hurst v. State, 86 Ala. 604, 6 So. 120 (1889); Clem v. State, 42 Ind. 420 (1873).

[15] State v. Corbett, 117 S. C. 356, 109 S. E. 133, 20 A. L. R. 328 (1921).

[16] The court's decision rested on an application of the "same evidence" test, it being held that a different proof was necessary in the case of each murder.

[17] The following cases represent the development of the rule in Georgia: Roberts v. State, 14 Ga. 8 (1853); Holt v. State, 38 Ga. 187 (1868); Knight v. State, 73 Ga. 804 (1884); Lock v. State, 122 Ga. 730, 50 S. E. 932 (1905); Burnam v. State, *supra* note 14; see 1 BISHOP, CRIMINAL LAW (9th ed. 1923) §1054. It appears in Lillie v. State, 79 Tex. Crim. Rep. 615 at 616, 187 S. W. 482 at 483 (1916), that in the opinion of the court, if two persons are killed or injured by the same shot, a conviction of the murder or assault of one of them would be a bar to a subsequent prosecution for the murder or assault of the other. The cases of Sadberry v. State, 39 Tex. Crim. Rep. 466 46 S. W. 639 (1898); and Wright v. State, 17 Tex. App. 152 (1884), would sustain but one conviction on a plea of *autrefois convict.*

competent evidence and disqualified witnesses as ground for a motion to quash. Only in the latter case, and where all of the witnesses before the grand jury were disqualified, should the indictment be quashed.[1]

There are at least three rules with regard to quashal of an indictment on the ground of incompetency or illegality of evidence heard by the grand jury.[2] (1) Some courts hold that an indictment cannot be quashed for this cause unless all of the evidence was incompetent, and, if there was the slightest legal or competent evidence, the court cannot inquire into the matter of its sufficiency.[3] (2) New York admits the total-incompetency test, but adds that in extreme instances the indictment may be quashed also for insufficiency.[4] (3) A rule, which appears to be increasingly favored, is that the court is without power to go behind the indictment to examine the evidence heard, and consequently an indictment can in no case be quashed for incompetency or illegality of evidence.[5] Any other course, it is said, would destroy the secrecy of proceedings before the grand jury; moreover, the grand jury is an inquisitorial body, its finding is not final, and all illegal evidence will be excluded on the trial of the case.[6] The latter rule is followed in a number of states where statute provides that none but legal evidence shall be heard.[7] The apparent effect of such statutes is avoided by the desirable but tenuous construction that they are merely directory and do not empower the court to disturb the grand jury's finding.[8]

[1] State v. Levy, 200 N. C. 586, 158 S. E. 94 (1931).

[2] See Note (1924) 31 A. L. R. 1479.

[3] Royce v. Territory, 5 Okla. 61, 47 Pac. 1083 (1897); State v. Logan, 1 Nev. 509 (1865); Estill v. State, 277 P. 256 (Okla. 1929); United States v. Rubin, 218 F. 245 (D. Conn. 1914); People v. Duncan, 261 Ill. 339, 103 N. E. 1043 (1913); State v. Coates, 130 N. C. 701, 41 S. E. 706 (1902).

[4] People v. Sexton, 187 N. Y. 495, 80 N. E. 396, 116 Am. St. Rep. 621 (1907). And see People v. Glen, 173 N. Y. 395, 66 N. E. 112, 115 (1903); People v. Hess, 110 Misc. 76, 179 N. Y. Supp. 734, 739 (1920). Several decisions by the Federal courts have indicated that an indictment found on "utterly insufficient or palpably incompetent" evidence may be quashed, but the prerogative is more sparingly exercised than in New York. McKinney v. United States, 199 Fed. 25 (C. C. A. 8th, 1912); United States v. Silverthorne, 265 Fed. 853 (W. D. N. Y. 1920).

[5] State v. Chance, 29 N. M. 34, 221 Pac. 183, 31 A. L. R. 1466 (1923); People v. Collins, 60 Cal. App. 263, 212 Pac. 701 (1923); Holliman v. State, 108 Tex. Crim. Rep. 92, 299 S. W. 249 (1927); Murphy v. State, 171 Ark. 620, 286 S. W. 871 (1926).

[6] State v. Chance, *supra* note 5.

[7] People v. Fealy, 33 Cal. App. 605, 165 Pac. 1034 (1917); State v. Chance, *supra* note 5; Murphy v. State, *supra* note 5.

[8] Murphy v. State, *supra* note 5.

The purpose of the grand jury is to seek probable cause for trial; its indictment is a formal accusation and in no way a final adjudication against the defendant. On principle, it would seem that rule (3) is the sound one.[9] North Carolina, until the Levy decision, has blandly followed the total-incompetency rule.[10] The language of the principal case manifests an inclination to hold with the modern trend that in no case can the court examine the evidence, but precedent forbade such a course; hence the distinction between disqualified witnesses and incompetent evidence. The writer's investigation has not revealed that a like distinction obtains in any other jurisdiction. The North Carolina court failed to complete its jump toward the liberal view, and appears to have established a rule quite its own.

J. G. ADAMS, JR.

Criminal Law—Sufficiency of Indictment Under National Motor Vehicle Theft Act.

The *National Motor Vehicle Theft Act*[1] makes it a crime to sell any motor vehicle moving as, or which is a part of, or which constitutes interstate commerce, knowing the same to have been stolen. In *Grimesly v. U. S.*[2] an indictment, drawn up under this act, charging the sale of a motor vehicle with knowledge that it had been transferred in interstate commerce and theretofore stolen was held insufficient, on the ground that it was not alleged that the automobile was moving in interstate commerce and that it did not further state that the automobile had been stolen.

The Sixth amendment provides, that, "in all criminal prosecutions the accused shall enjoy the right—to be informed of the nature and cause of the accusation. . . ." Congress, in order to limit the courts in testing whether or not the accused has been sufficiently informed,

[9] As to fundamentals of the grand jury system, see 1 WIGMORE, EVIDENCE (2nd ed. 1923) 20.

[10] "When an indictment is found upon testimony, all of which is incompetent, or of witnesses, all of whom are disqualified, the bill will be quashed. But where some of the testimony or some of the witnesses were incompetent, the court will not go into the barren inquiry how far such testimony or witnesses contributed to the finding of the bill," State v. Coates, *supra* note 3. The opinion of the principal case quotes the same extract, and points out that since the Coates case actually concerned only disqualified witnesses the court's statement of the rule to include incompetent evidence was so much too broad. But if it be granted that *all* of the evidence heard by the grand jury in a given case is incompetent, where is a logical basis for the distinction?

[1] 41 Stat. 324 (1919); 18 U. S. C. A. §408 (1927).

[2] 50 F. (2d) 509 (C. C. A. 5th, 1931).

has said, "No indictment . . . shall be deemed insufficient nor the trial affected by reason of any defect or imperfection in manner of form only, which shall not tend to prejudice of defendant."[3] Most of the courts are liberal in this matter and consider the true test whether or not the information enabled the accused to make a good defense.[4]

In the principal case the majority view was that, for all the indictment showed, the automobile might have come to rest in Florida long before defendant sold it. They were of the opinion that the essential element was that the car be moving in interstate commerce and that the indictment showed only an offense against the laws of the state. The same question was raised in *Katz v. U. S.*[5] and the court there said the defendants should not escape punishment because they supposed that they were violating only a state and not a federal law. The majority in the Grimesly Case were of the opinion that it should be specifically stated that the car in question was stolen. Most of the cases favor a more liberal view and hold it sufficient if it is alleged that the accused knew the care to be stolen.[6]

As stated in the strong dissent the sole defense was that the defendant did not know that the car in question was stolen, and the case

[3] N. C. ANN. CODE (Michie, 1927) §4623.

[4] Statute made it a crime to knowingly and fraudulently import liquor into the United States; indictment charging defendant with "unlawfully and feloniously" importing was held sufficient. Wishart v. United States, 29 F. (2d) 103 (C. C. A. 8th, 1928); indictment charging receipt and possession of goods knowing the same to have been stolen from an interstate freight car was held sufficient where the statute made it a crime to have in possession goods stolen from an interstate freight car, Grandi v. United States, 262 Fed. 123 (C. C. A. 6th, 1920); Espionage Act (1918) 40 Stat. 553 (1918), 50 U. S. C. A. 33 (1927) made it a crime against the United States to make seditious statements with the intent to hinder the operations of the Army or the Navy, indictment in Shilter v. United States, 257 Fed. 724 (C. C. A. 9th, 1919) drawn under this act charged defendant with making seditious statements and was held insufficient because there was nothing to connect defendant's acts directly or indirectly with the Army or the Navy; Sonnenberg v. United States, 264 Fed. 327 (C. C. A. 9th, 1920) a later case under the same act held it was not necessary that the words be spoken to some one in service; where the indictment drawn up under the statute prohibiting the use of the mails to defraud and merely charged defendant with having devised a scheme to defraud, held insufficient in United States v. Hess, 124 U. S. 483, 8 Sup. Ct. 571 (1888). By comparing the dates of these cases we see that the modern courts are more liberal in their views of the sufficiency of indictments.

[5] 281 Fed. 129 (C. C. A. 6th, 1922).

[6] Isbell v. United States, 26 F. (2d) 24 (C. C. A. 8th, 1928); Wendell v. United States, 34 F. (2d) 92 (C. C. A. 4th, 1929); Brooks v. United States (1925), 276 U. S. 432, 45 Sup. Ct. 345, 69 L. ed. 699; Heglin v. United States, 27 F. (2d) 310 (C. C. A. 8th, 1928); Abraham v. United States, 15 F. (2d) 911 (C. C. A. 8th, 1926).

was tried exactly the same as if the indictment had been letter perfect or exactly like it will be on new trial. The dissenting opinion is more in keeping with modern liberal decisions.[7]

J. H. SEMBOWER.

Criminal Law—Tests of Legality of Searches and Seizures in North Carolina and Federal Courts.

Four federal cases[1] decided within the past five months call attention to the conflict between the right of the state to make reasonable searches and seizures and the individual right to be secure against unreasonable searches and seizures. Here are opposed the social need that crime be repressed and the social need that law shall not be flouted by the insolence of office.[2]

Search warrants were unknown to the common law and "crept in by imperceptible practice."[3] The Fourth Amendment embodies an old common law principle[4] of protection against unreasonable searches and seizures and though it does not apply to the states,[5] nevertheless all the states have included its equivalent in their constitutions.[6] The purpose of this protection, obviously, was not to afford a shield to the guilty. That it should be so is an inescapable incident to the preservation of the right to the people generally and affords a challenge to the law enforcement machinery to solve and reduce this result to a minimum.

If the situation is one where a lawful arrest may be made, then, it is permissible to search the person and things under the control and in the possession of the arrested person at the time of the arrest.[7]

[7] AM. LAW INST. CODE OF CRIM. PROC. §159.

[1] Strom v. U. S., 50 F. (2d) 547 (C. C. A. 9th, 1931); U. S. v. Dean, 50 F. (2d) 905 (D. Mass. 1931); U. S. v. Murray, 51 F. (2d) 516 (D. Md. 1931); U. S. v. Ruffner, 51 F. (2d) 579 (D. Md. 1931).

[2] People v. Defore, 242 N. Y. 13, 150 N. E. 585 (1926), 270 U. S. 657, 46 Sup. Ct. 353, 70 L. ed. 784 (1925) (certiorari denied).

[3] Entick v. Carrington, 19 How. St. Tr. 1030, 2 Wils. K. B. 274 (1765).

[4] Wilkes v. Wood, 19 How. St. Tr. 1153 (C. B., 1763); Entick v. Carrington, *supra* note 3.

[5] Burdeau v. McDowell, 256 U. S. 465, 41 Sup. Ct. 574, 65 L. ed. 1048, 13 A. L. R. 1159 (1921).

[6] N. C. CONST., art. 1, §15; Fraenkel, *Concerning Searches and Seizures* (1921) 34 HARV. L. REV. 361.

[7] Strom v. U. S., *supra* note 1; Haverstick v. State, 196 Ind. 145, 147 N. E. 625 (1925); People v. Chiagles, 237 N. Y. 193, 142 N. E. 583 (1923), 32 A. L. R. 676 (1924); State v. Laundy, 103 Ore. 443, 204 Pac. 958 (1922); Hughes v. State, 145 Tenn. 544, 238 S. W. 588, 20 A. L. R. 639 (1922); State v. Deitz, 136 Wash. 228, 239 Pac. 386 (1925).

Arrest without a warrant has been sanctioned from the earliest times.[8] It is permissible where reasonable grounds existed for belief that a felony has been committed and where a breach of the peace was committed in the presence of the officer.[9] Some jurisdictions have extended the latter to misdemeanors in general.[10]

When, however, a search becomes necessary to procure evidence to justify the arrest a different question is presented. Thus where it is a misdemeanor to carry concealed weapons the officer cannot arrest a person in his presence unless the offense can be detected through the senses.[11] This has been carried over to the liquor cases.[12]

In *Carroll v. U. S.*[13] the emphasis was not placed on the arrest but the right to search was treated as independent. Probable cause as a sufficient ground for search was there adopted regardless of whether the act in question amounted to a felony or misdemeanor. The prohibition is against unreasonable searches and seizures and if there is probable cause then it would appear not to be within its scope.

This reversal of emphasis affords a possible justification for the holding in a recent North Carolina case.[14] Nevertheless, the principle has not been expressly adopted, but rather the technical distinction between felonies and misdemeanors has been disregarded in stressing the enforcement of the liquor laws. Thus arrests for misdemeanors have been held valid though not detected by the senses of the officer and probable cause only existed.[15] Where liquor is being transported in a vehicle, North Carolina, by statute,[16] demands more than probable cause, specifically, actual sight or personal knowledge acquired through the senses. This results in a nebulous distinction between a man walking and one riding[17] and fails to recognize the

[8] 1 STEPHEN, HISTORY OF THE CRIMINAL LAW (1883) 189.
[9] 1 WHARTON, CRIMINAL PROCEDURE (10th ed. 1889) 71.
[10] State v. Deitz, *supra* note 6; Wilgus, *Arrest Without a Warrant* (1924) 22 MICH. L. REV. 673, 703-709.
[11] Roberson v. State, 43 Fla. 156, 29 So. 535, 52 L. R. A. 751 (1901); Hughes v. State, 2 Ga. App. 29, 58 S. E. 390 (1907). *Contra:* People v. Esposito, 118 Misc. 867, 194 N. Y. Supp. 326 (1922).
[12] Douglass v. State, 152 Ga. 379, 110 S. E. 168 (1921).
[13] 267 U. S. 132, 45 Sup. Ct. 280, 69 L. ed. 543, 39 A. L. R. 790 (1925); (1927) 26 MICH. L. REV. 827.
[14] State v. Simmons, 183 N. C. 684, 110 S. E. 591 (1922). (Officers suspecting *D* of liquor violation followed him in house and opened suitcase, found liquor and arrested *D*.)
[15] State v. Campbell, 182 N. C. 911, 110 S. E. 86 (1921).
[16] N. C. PUB. LAWS (1923) c. 1, §6, N. C. ANN. CODE (Michie, 1927) §3411 (f); State v. Godette, 188 N. C. 497, 125 S. E. 24 (1924).
[17] State v. Jenkins, 195 N. C. 747, 143 S. E. 538 (1928); (1928) 7 N. C. L. REV. 67.

reasonable difference between a vehicle and a building which is adhered to in the federal rule. North Carolina thus goes farther in permitting arrests but not so far in permitting searches. If there is no probable cause and mere suspicion alone, *a fortiori* the search is illegal.[18]

A man's home is still his castle and belief, no matter how well founded, that an article sought is concealed in a dwelling, furnishes no justification for a search of that place without a warrant.[19] Such warrant cannot be issued to secure evidentiary matter only[20] and in liquor cases cannot be secured by a federal officer for a *bona fide* residence unless a commercial feature is involved.[21] This protection, however, does not extend to woods and open fields at a distance from the residence;[22] nor to unoccupied houses not within the curtilage;[23] nor to a bare licensee.[24]

The privilege to be free from unlawful searches and seizures is a personal one and may be waived[25] but such waiver must appear by clear and positive proof and not be open to question, for the courts do not put the citizen in the position of either contesting the officer's authority by force or waiving his constitutional privileges.[26] If the defendant disclaims dominion over the place and property he cannot question the validity of the search, two cases[27] hold, but a recent

[18] Batts v. State, 194 Ind. 609, 144 N. E. 23 (1924); Eiler v. State, 196 Ind. 562, 149 N. E. 62 (1925); State *ex rel* Houston v. De Herrodora, 192 N. C. 749, 136 S. E. 6 (1926).

[19] Agnello v. U. S., 269 U. S. 20, 46 Sup. Ct. 4, 70 L. ed. 145 (1925), 51 A. L. R. 409 (1927).

[20] Gouled v. U. S., 255 U. S. 298, 41 Sup. Ct. 261, 65 L. ed. 647 (1921).

[21] Staker v. U. S., 5 F. (2d) 312 (C. C. A. 6th, 1925); (1931) 5 CIN. L. REV. 103.

[22] Hester v. U. S., 265 U. S. 57, 44 Sup. Ct. 445, 68 L. ed. 898 (1924); Simmons v. Commonwealth, 210 Ky. 33, 275 S. W. 369 (1925); (1927) 13 VA. L. REG. (N. S.) 164.

[23] Robie v. State, 36 S. W. (2d) 175 (Tex. 1931). *Contra:* Welch v. State, 154 Tenn. 60, 289 S. W. 510 (1926).

[24] Duke v. Commonwealth, 201 Ky. 365, 256 S. W. 725 (1923). But see Allen v. State, 161 Tenn. 71, 29 S. W. (2d) 247 (1930).

[25] Raine v. U. S., 299 Fed. 407 (C. C. A. 9th, 1924), 266 U. S. 611, 45 Sup. Ct. 94, 69 L. ed. 467 (certiorari denied).

[26] Amos v. U. S., 255 U. S. 313, 41 Sup. Ct. 266, 65 L. ed. 654 (1920); Dukes v. U. S., 275 Fed. 142 (C. C. A. 4th, 1921); U. S. v. Ruffner, *supra* note 1; Coleman v. Commonwealth, 219 Ky. 139, 292 S. W. 771 (1927); State v. Luna, 266 S. W. 755 (Mo. App. 1924); Hancock v. State, 35 Okla. Cr. App. 96, 248 Pac. 1115 (1926); *cf.* State *ex rel.* Muzzy v. Uotila, 71 Mont. 351, 229 Pac. 724 (1924). But *cf.* Wibmer v. State, 182 Wis. 303, 195 N. W. 936 (1923).

[27] McMillan v. U. S., 26 F. (2d) 58 (C. C. A. 8th, 1928); Patterson v. U. S., 31 F. (2d) 737 (C. C. A. 9th, 1929).

case[28] appears more consistent in that the government should not be permitted to maintain that he is the owner for the purpose of convicting him and not the owner for the purpose of searching.

The following rule is suggested as a solution to the conflict: (1) where the object to be searched is a building there shall be no searches without a warrant, except as incidental to a valid arrest;[29] (2) where the object is not a building searches shall be permitted on probable cause.[30]

HUGH BROWN CAMPBELL.

Equity—Injunctions—Power to Enjoin an Extraterritorial Nuisance.

In a case brought in the Supreme Court of the United States by the state of New Jersey to enjoin the city of New York from dumping garbage into the Atlantic Ocean and thereby fouling the New Jersey beaches, one of the contentions of the defendant was that since the actual dumping occurred on the high seas beyond the territorial waters of the United States, the court had no jurisdiction. The court held that having jurisdiction of the party defendant it could in the exercise of its original equity jurisdiction, grant the injunction.[1]

[28] U. S. v. Dean, *supra* note 1. This question is raised under the federal rule as to the inadmissibility of evidence obtained by an illegal search and seizure. Weeks v. U. S., 232 U. S. 383, 34 Sup. Ct. 341, 58 L. ed. 652 (1914); Gouled v. U. S., 255 U. S. 298, 41 Sup. Ct. 261, 65 L. ed. 647 (1921); Burdeau v. McDowell, *supra* note 5; State v. Arregui, 44 Idaho 43, 254 Pac. 788 (1927), 52 A. L. R. 463 (1928); Fraenkel, *Concerning Searches and Seizures, loc. cit. supra* note 6; Atkinson, *Prohibition and the Doctrine of the Weeks Case* (1925) 23 MICH. L. REV. 748; Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures* (1925) 25 COL. L. REV. 11; Fraenkel, *Recent Developments in the Law of Search and Seizure* (1928) 13 MINN. L. REV. 1. It would not obstruct a conviction in states where the evidence is admissible. People v. Defore, *supra* note 2; *In re* Siracusa, 125 Misc. Rep. 882, 212 N. Y. Supp. 400 (1925); 4 WIGMORE, EVIDENCE (2d ed. 1923) §§2183, 2184; Wigmore, *Using Evidence Obtained by Illegal Search and Seizure* (1922) 8 A. B. A. J. 479. North Carolina is probably in the latter group, though no direct holding where motion made to suppress before trial. State v. Wallace, 162 N. C. 623, 78 S. E. 1 (1913), 36 ANN. CAS. 423 (1915); see State v. Fowler, 172 N. C. 905, 914, 90 S. E. 408, 411 (1916); State v. Simmons, *supra* note 14, at 686, 110 S. E. at 592.

[29] U. S. v. Borkowski, 268 Fed. 408 (S. D. Ohio 1920); Miller v. U. S., 9 F. (2d) 382 (C. C. A. 9th, 1925); State v. Thomas, 105 W. Va. 346, 143 S. E. 88 (1928); State v. Vandetta, 108 W. Va. 277, 150 S. E. 736 (1929); *cf.* Staker v. U. S., *supra* note 21; Schroeder v. U. S., 14 F. (2d) 500 (C. C. A. 9th, 1926), (1927) 27 COL. L. REV. 300, 304; (1927) 26 MICH. L. REV. 86; see Adair v. Williams, 24 Ariz. 422, 210 Pac. 853, 856 (1922).

[30] U. S. v. Murray, *supra* note 1.

[1] State of New Jersey v. City of New York, 283 U. S. 473, 51 Sup. Ct. 519 (1931).

The opinion, written by Mr. Justice Butler, cites only four cases as sustaining the power of the court. Of these, three involved title to foreign land and the fourth an attempt to evade the insolvency laws of the forum.[2]

In the instant case, while the injury was caused by an act completed on the high seas, that act began in the United States. The barges bearing the noxious material were loaded at the docks in New York City and hauled out to sea where it was dumped and allowed to float directly onto the beaches of New Jersey. Thus, an act started within the jurisdiction of the court proximately caused an injury within the same jurisdiction. Therefore it would hardly seem necessary to invoke the court's power to enjoin a foreign tort, its authority to issue injunctions against local nuisances being ample to care for the entire situation.

But even if it is assumed that the complaint here is concerned only with the tort committed outside the continental United States, four lines of decisions were available to support the decree issued by the court. (1) Injunction against a foreign tort, defendant being ordered by the terms of the decree to refrain from a positive act.[3] Thus the New York Courts ordered a railway company to stop switching cars on the Canadian end of the international bridge across the Niagara

[2] Massie v. Watts, 6 Cranch, 148, 3 L. ed. 181 (1810) (Agent to locate a warrant took for himself title to land that should have surveyed for his principal. The court ordered him to convey to his principal though the land lay in another state); Hart v. Sansom, 110 U. S. 151, 3 Sup. Ct. 586, 28 L. ed. 101 (1884) (suit for the removal of cloud upon title to land in another state. Service of summons by publication only. *Held:* Decree was necessarily in personam in this case and so cannot operate as a bar to suit for the land, because the court below never had jurisdiction of the person of the defendant); Philadelphia Co. v. Stimson, 223 U. S. 605, 32 Sup. Ct. 340, 56 L. ed. 570 (1912) (suit to enjoin the Secretary of War from bringing threatened criminal prosecution against a riparian owner for reclamation and occupation of land beyond the harbor limits of Pittsburgh was properly brought in a court of the District of Columbia having jurisdiction of the person of the defendant); Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. 269, 38 L. ed. 538 (1890) (defendant may be enjoined from bringing suit in another state in an effort to evade the insolvency law of his own state and defraud other credtors of the bankrupt).

[3] Rickey Land & Cattle Co. v. Miller and Lux, 218 U. S. 258, 31 Sup. Ct. 77, 54 L. ed. 1032 (1910) (federal court in Nevada may enjoin defendant from diverting an excessive amount of water from an interstate stream though the diversion occurred in another state); Great Falls Manufacturing Co. v. Worster, 23 N. H. 462 (1857) (defendant ordered not to go into an adjoining state to dynamite one end of an interstate dam); Niagara Falls International Bridge Co. v. Grand Trunk Railway Co. of Canada, 241 N. Y. 85, 148 N. E. 797 (1925); Lord Portarlington v. Soulby, 3 M. & K. 104 (1854) (defendant not to sue in foreign jurisdiction for collection of a bill of exchange given for a gambling debt).

River because such use injured the whole bridge, a part of which was in New York. (2) Discontinuance of a foreign nuisance, when compliance with the decree will necessitate affirmative action.[4] In the *Salton Sea Cases* the defendant was maintaining dams in Mexico which flowed water from the Colorado River onto the plaintiff's land and into the Salton Sea in California. The federal court in California enjoined the continuance of the cause of the injury, which decree was the equivalent of an order to go into Mexico and take immediate affirmative steps to remedy the situation. (3) Cases in which the court has definitely ordered the defendant to perform some positive act in a foreign jurisdiction,[5] as, to perform a contract for the delivery of a stallion, to install meters on irrigation ditches, or, specifically to perform a contract for laying off the boundaries of a province on another continent. (4) Injunction against going into a foreign jurisdiction to commit a tort.[6]

Therefore although the result of the present case is sound, it is respectfully submitted that the opinion did not adequately analyze the problem or the law applicable. The case is unique in being free from the usual objection that the court is interfering with another sovereign, no nation having authority over the point of dumping.[7]

ALLEN LANGSTON.

Evidence—The Hearsay Rule—Confession of Third Party as Admission Against Penal Interest.

Defendant was indicted for murder. He offered a witness to prove that a third party who was no longer available as a witness had

[4] Salton Sea Cases, 172 Fed. 792 (C. C. A. 9th, 1910); Note (1910) 41 HARV. L. REV. 390; Beale, *Jurisdiction of Courts over Foreigners* (1913) 26 HARV. L. REV. 193, 283.

[5] Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co., 245 Fed. 9 (C. C. A. 9th, 1917); Madden v. Rosseter, 114 Misc. 416, 187 N. Y. Supp. 462 (1921); Penn v. Lord Baltimore, 1 Ves. Sr. 444 (1750); *Contra:* Miss. & Mo. Ry. Co. v. Ward, 2 Black 485, 17 L. ed. 311 (1862); Port Royal Railway Co. v. Hammond, 58 Ga. 523 (1877).

[6] Western Union Tel. Co. v. Pittsburgh, C. C. & St. L. Ry. Co., 137 Fed. 435 (C. C. N. D. Ill. 1905) (a federal court having the parties before it will enjoin defendant from going into another state or district and there injuring the plaintiff's property); Schmaltz v. York Manufacturing Co., 204 Pa. St. 1, 53 Atl. 522 (1902) (defendant ordered not to go into New York and remove an ice machine from a brewery); Kempson v. Kempson, 61 N. J. Eq. 303, 48 Atl. 244 (1901); *Id.* 63 N. J. Eq. 783, 52 Atl. 360 (1902) (equity may order a defendant not to go into another state to procure a divorce); French v. Maguire, 55 How. Pr. 471 (1878) (defendant in New York ordered by a court of that state not to produce a certain play in San Francisco).

[7] JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION. Chapter II and III.

confessed committing the crime. This evidence was rejected. *Held:* on appeal that the evidence was properly rejected as hearsay.[1]

The decision is supported by the North Carolina decisions,[2] as well as by a great majority of the decisions of other jurisdictions.[3] There can be no doubt but that the evidence is hearsay. Therefore if such evidence is to be admitted it must necessarily be done under an exception to the hearsay rule, which rule excludes extrajudicial declarations not made under oath and subject to cross examination. In this state extrajudicial declarations made against the pecuniary and proprietary interests of the declarant, if he is dead, are admitted as an exception to the hearsay rule.[4] The court regards such evidence as especially trustworthy due to the fact that it in no way serves the declarant, but is made in contradiction to his interests. There seems to be no valid reason why the limitation of the exception should not be extended to include declarations against penal interests. The argument has been advanced that the accused could exonerate himself by procuring false testimony but all evidence is open to the same abuse.

[1] State v. Stephen English, 201 N. C. 295, 159 S. E. 318 (1931).

[2] State v. May, 15 N. C. 328 (1833); State v. Duncan, 28 N. C. 236 (1846); State v. White, 68 N. C. 158 (1872); State v. Gee, 92 N. C. 756 (1884); State v. Jones, 80 N. C. 415 (1878); State v. Boon, 80 N. C. 461 (1878) State v. Hayes, 71 N. C. 79 (1874); State v. Lane, 166 N. C. 333, 81 S. E. 620 (1914); State v. Church, 192 N. C. 658, 135 S. E. 769 (1926).

[3] Beach v. State, 138 Ga. 265, 75 S. E. 139 (1912); Kennedy v. State, 9 Ga. App. 219, 70 S. E. 986 (1911); Foster v. State, 92 Miss. 257, 45 So. 859 (1908); State v. Bailey, 74 Kan. 873, 87 Pac. 189 (1906); State v. Jones, 127 La. 694, 53 So. 959 (1911); State v. Jennings, 48 Ore. 483, 87 Pac. 524 (1906); Siple v. State, 154 Ind. 647, 57 N. E. 544 (1900); Selby v. State, 25 Ky. Law Rep. 2209, 80 S. W. 221 (1904); State v. Young, 107 La. 618, 31 So. 993 (1901); State v. Levy, 90 Mo. App. 643 (1901); Cox v. State, 160 Tenn. 221, 22 S. W. (2d) 225 (1929); Commonwealth v. Sacco, 259 Mass. 126, 156 N. E. 57 (1927); Moya v. People, 79 Colo. 104, 244 Pac. 69 (1926); Green v. State, 153 Ga. 215, 111 S. E. 916 (1922); Commonwealth v. Wakelin, 230 Mass. 567, 120 N. E. 209 (1918); Factor v. State, 28 Okla. Cr. R. 78, 229 Pac. 154 (1924); McCoslin v. State, 96 Tex. Cr. R. 58, 256 S. W. 295 (1923), Mays v. State, 72 Neb. 723, 101 N. W. 979 (1904); State v. Totten, 72 Vt. 73, 47 Atl. 105 (1899); State v. Hunter, 18 Wash. 670, 52 Pac. 247 (1898); Buel v. State, 104 Wis. 132, 80 N. W. 78 (1899); Donnelly v. United States, 228 U. S. 243, 33 Sup. Ct. 449, 57 L. ed. 820 (1913); Childs v. State, 55 Ala. 25 (1876); People v. Zimmerman, 65 Cal. 307, 4 Pac. 20 (1884); State v. Porter, 74 Iowa 623, 38 N. W. 514 (1888).

[4] Smith v. Moore, 142 N. C. 277, 55 S. E. 275 (1906); Peace v. Jenkins, 32 N. C. 355 (1849); Brantley v. Marshbourn, 166 N. C. 527, 82 S. E. 959 (1914); Ratcliff v. Ratcliff, 131 N. C. 425, 42 S. E. 887 (1902); Dill-Cramer-Truitt Corp. v. Downs, 201 N. C. 478, 160 S. E. 492 (1931).

The North Carolina decisions require that the declarant be dead at the time the declarations are offered as evidence. It would seem that any other form of unavailability should serve equally as well.

A distinction is made between declarations against interest and admissions. 2 WIGMORE, EVIDENCE (2d. ed. 1923) §1048.

Although most jurisdictions still follow the rule in the principal case it has been severely criticized.[5] Justice Brogden recognizes the injustice of the rule as is manifest by his apologetic reason for the decision.[6] It would seem that there should be no hesitancy in overruling an arbitrary rule of law, based on erroneous reasoning, created as a historical accident, and so unjust as to be termed barbarous by so great a writer as Mr. Wigmore and roundly assailed by so eminent a jurist as Judge Holmes.

DALLACE MCLENNAN.

Juries—Challenge for Racial Prejudice.

A negro was tried and convicted of the murder of a white man. Upon the *voir dire* examination of prospective jurors, the trial judge overruled the defendant's request that a question relative to racial prejudice be propounded to each and every juror. *Held,* the ruling of the trial court was erroneous and the judgment of conviction must be reversed.[1]

The propriety of such an inquiry to determine a disqualifying state of a juror's mind has been generally recognized with reference to the negro race,[2] other races,[3] and the defendant's nationality.[4]

[5] 2 WIGMORE, EVIDENCE (2d ed. 1923) §§1476, 1477; Donelly v. United States, *supra* note 4, Judge Holmes' dissenting opinion.

[6] "The writer of this opinion speaking for himself strings with the minority but it is the duty of the trial judge to apply the law as it is written." If this is true can this rule ever be changed by judicial decision?

[1] Aldridge v. U. S., 283 U. S. 308, 51 S. Ct. 470, 75 L. ed. 628, 73 A. L. R. 1203 (1931) [reversing 47 F. (2d) 407 (Ct. of App. D. C. 1931)].

[2] Pinder v. State, 27 Fla. 370, 8 So. 837, 26 Am. St. Rep. 75 (1891); Hill v. State, 112 Miss. 260, 72 So. 1003 (1916); State v. McAfee, 64 N. C. 339 (1870); Fendrick v. State, 39 Tex. Cr. R. 147, 45 S. W. 589 (1898); State v. Sanders, 103 S. C. 216, 88 S. E. 10 (1916); People v. Decker, 157 N. Y. 186, 51 N. E. 1018 (1898); State v. Brown, 188 Mo. 451, 87 S. W. 519 (1905); Johnson v. State, 88 Neb. 565, 130 N. W. 282, ANN. CAS. 1912B 965 (1911); Bass v. State, 59 Tex. Cr. R. 186, 127 S. W. 1020 (1910); Moore v. State, 52 Tex. Cr. R. 336, 107 S. W. 540 (1907); State v. Casey, 44 La. Ann. 969, 11 So. 583 (1892); Hamlin v. State, 101 Ark. 257, 142 S. W. 151 (1911); Cavitt v. State, 15 Tex. App. 190 (1883); Brumfield v. Consolidated Coach Corporation, 40 S. W. (2d) 356 (Ky. 1931); Strong v. State, 85 Ark. 536, 109 S. W. 536, 14 ANN. CAS. 229 (1908); Lester v. State, 2 Tex. App. 432 (1877). But see Crawford v. U. S., 59 App. D. C. 356, 41 F. (2d) 979 (1930).

[3] Horst v. Silverman, 20 Wash. 233, 55 Pac. 52, 72 Am. St. Rep. 97 (1898) (Jews); Potter v. State, 86 Tex. Cr. R. 380, 216 S. W. 886 (1919) (Jews); People v. Car Soy, 57 Cal. 102 (1880) (Chinese).

[4] State v. Stafford, 89 W. Va. 301, 109 S. E. 326 (1921) (Italian); People v. Potigan, 69 Cal. App. 257, 231 Pac. 593 (1924) (Armenian); State v. Guidice, 170 Iowa 731, 153 N. W. 336, ANN. CAS. 1917C 1160 (1915) (Italian); People v. Reyes, 5 Cal. 347, (1885) ("foreigners"); *cf.* Watson v. Whitney, 23 Cal. 375 (1863) "squatters").

The question usually assumes the form of a specific interrogatory with the purpose of determining the existence of a prejudice which will influence the juror's verdict, as contrasted with a mere preference for one's own race or nationality to that of the defendant's.[5] The question is, therefore, consistent with other questions propounded to jurors; such as, whether they are members of an organization or association which is interested in the prosecution of the particular defendant;[6] or whether the juror is a stockholder in a corporation which is a party to the suit;[7] or whether the juror is an employee of the defendant;[8] or whether the juror's opinion of the death penalty will influence his verdict in a prosecution for a capital crime.[9] It is generally held that affirmative answers to such questions constitute sufficient grounds for challenges for cause.[10]

Where the juror admits the existence of a prejudice against the defendant's race, but states that he can render a fair verdict upon the law and evidence, he is usually held competent for jury service.[11] Such rulings may be questioned on the ground that the juror is merely expressing a belief in his own ability to render an impartial verdict regardless of his prejudice.[12]

A person, under the constitution and laws of the United States, is entitled to a fair and impartial trial. If a prospective juror possesses a racial prejudice that would prevent his giving a fair and impartial verdict, he is unfit to sit in the jury box. How, then, is it

[5] Pinder v. State; Hill v. State; Fendrick v. State; Strong v. State; Cavitt v. State, all *supra* note 2.

[6] State v. Sultan, 142 N. C. 569, 54 S. E. 1002 9 ANN. CAS. 310, n. 312 (1906); Bethel v. State, 162 Ark. 76, 257 S. W. 740, 31 A. L. R. 402, n. 411 (1924). But mere membership in an organization or association whose policies are adverse to the defendant, but which is not actively interested in the prosecution of the defendant, does not in itself constitute disqualification.

[7] Murchison National Bank v. Dunn Oil Mills Co., 150 N. C. 683, 64 S. E. 883 (1909); Walters v. Lumber Co., 165 N. C. 388, 81 S. E. 453 (1914); Note (1912) 40 L. R. A. (N. S.) 978; Note (1917) 16 R. C. L. 274.

[8] Oliphant v. Atlantic Coast Line Ry. Co., 171 N. C. 303, 84 S. E. 425 (1916); Blevin v. Cotton Mills, 150 N. C. 493, 64 S. E. 428 (1909); Norris v. Mills, 154 N. C. 474, 70 S. E. 949 (1911); Hufnagle v. Delaware & Hudson Co., 227 Pa. 476, 76 Atl. 205, 40 L. R. A. (N. S.) 982 (1910).

[9] State v. Vick, 132 N. C. 995, 43 S. E. 626 (1903); Grant v. State, 67 Tex. Cr. R. 155, 148 S. W. 760, 42 L. R. A. (N. S.) 428 (1912); Demato v. People, 49 Colo. 147, 111 Pac. 703, 35 L. R. A. (N. S) 621 (1910); Johnson v. State, 88 Neb. 565, 130 N. W. 282, ANN. CAS. 1912B 965 (1911); Note (1917) 16 R. C. L. 271.

[10] See note 3-10, *supra*.

[11] State v. Brown; Johnson v. State; Bass v. State; Moore v. State; Hamlin v. State; Brumfield v. Consolidated Coach Corporation, all *supra* note 3. State v. Guidice, *supra* note 5.

[12] State v. Brooks, 57 Mont. 480, 188 Pac. 942 (1920).

possible to ascertain whether he is prejudiced or not, unless such questions are propounded to him?[13] It would seem that the court in the instant case has made satisfactory answer to this question.

JAMES O. MOORE.

Libel and Slander—Liability of Estate for Libel in Will.

The will of testatrix contained an implication that her grandson was illegitimate. The grandson sued the estate for libel and recovery was allowed.[1] The appellate court, in conscious disregard of common law principles, based its decision on the theory that everyone is presumed to intend the natural consequences of his act, and that since testatrix deliberately inserted the defamatory statement in her will, knowing it would be published, her estate should be held liable. No attempt was made to place liability on the executor, as the legal requirement that the will be probated[2] makes the act privileged.[3]

Libel and slander are personal actions, and are abated by the death of the tortfeasor.[4] The Georgia court, however, evades this difficulty by holding that as the cause of action did not accrue until the probate of the will, which was after the death of the testatrix, it was not abated by her death.

Only two other decisions have been found involving the same question and both these cases allowed recovery on the theory that the executor was the agent of the testator and therefore the estate was liable.[5] This theory has been severely criticized.[6] There can be no agency where no principal exists.[7] If an agency is created before death, death will ordinarily revoke the agency,[8] and it has been held that death cannot create an agency.[9] The Georgia court men-

[13] People v. Reyes, *supra* note 5.

[1] Hendricks v. Citizens' & Southern Nat. Bank, 158 S. E. 915 (Ga. 1931).

[2] GA. ANN. CODE (Michie, 1926) §3868.

[3] 2 COOLEY, THE LAW OF TORTS (3rd ed. 1906) 1503.

[4] *Actio personalis moritur cum persona.*

[5] Gallagher's Estate, 10 Pa. Dist. R. 733 (1901); Harris v. Nashville Trust Co., 128 Tenn. 573, 162 S. W. 584, 49 L. R. A. (N. S.) 897, ANN. CAS. 1914C, 885 (1914).

[6] (1914) 12 MICH. L. REV. 489; (1914) 23 YALE L. J. 534; (1914) 62 U. PA. L. REV. 643.

[7] 1 MECHEM, THE LAW OF AGENCY (2nd. ed. 1914) §26, n. 2.

[8] Hunt v. Rousmanier's Adm'rs., 8 Wheaton 174 (1823); 1 MECHEM, THE LAW OF AGENCY (2nd ed. 1914) §§651, 652, 655. The two exceptions to this rule—where the agency is coupled with an interest in the subject matter, and when the revocation would involve the agent in liability to third parties—obviously do not apply.

[9] Moore v. Weston, 13 N. D. 574, 102 N. W. 163 (1904).

tions but does not base its holding on this theory, preferring to indulge in a little judicial legislation in order to give plaintiff relief.

Admitting that plaintiff has suffered a wrong for which he should have a remedy, still it seems unwise to entirely disregard common law principles. In the first place, the probate of the will, which is the basis of plaintiff's suit, is required by statute,[10] and no tort can be predicated upon an act which is required by law, for in legal contemplation there can be no wrong if the act complained of is legal.[11] Secondly, permitting plaintiff to recover seems to violate the rule that an estate can only be held for debts owed by the testator at his death.[12] Thirdly, it has been suggested[13] that if the rule of the instant case is to prevail, it might enable the testator to avoid certain statutes[14] based on public policy forbidding the devising of money above a certain proportion of the estate to certain classes, as mistresses and illegitimates. The testator could, in such case, by simply inserting any libellous statement in his will, allow them to obtain a larger portion of his estate. Fourthly, even if recovery is allowed, it is obvious that it would be a tax not on the testator or his property but on the inheritance, as the property vests in the heirs as of the testator's death.[15] The common law conceives of death as extinguishing preëxisting tort liability, *a fortiori* the impossibility of affixing liability for a tort initiated by a testator but accruing only after his death.

In England such a suit has never arisen. The English practice is to expunge from a will defamatory matter which is not dispositive.[16] The American courts have been reluctant to adopt this view. Only one case has been found where a scandalous clause was stricken from probate.[17] Several cases hold that the court has no authority to strike out any part of a will.[18] In view of the American holdings it

[10] GA. ANN. CODE (Michie, 1926), *supra* note 2.
[11] 2 COOLEY, THE LAW OF TORTS, *supra* note 3.
[12] Eustace v. Jahns, 38 Cal. 1, 23 (1869); 2 WILLIAMS ON EXECUTORS (4th ed. 1855) §§1470, 1471.
[13] (1914) 23 YALE L. J., *supra* note 6 at 538.
[14] S. C. CODE OF LAWS (1922) §5217; LA. REV. CIV. CODE (Saunders, 2nd ed. 1920) §1470.
[15] GA. ANN. CODE (Michie, 1926) §3831.
[16] GATLEY, LIBEL AND SLANDER (2nd ed. 1929) 458, n. 15; 2 REDFIELD, THE LAW OF WILLS (3rd ed. 1866) 43; see In the Goods of Honywood, L. R. 2 P. & D. 251, 252 (1871).
[17] *In re* Bomar's Will, 27 Abb. N. C. 425, 44 N. Y. S. R. 304, 18 N. Y. Supp. 214 (1892).
[18] Woodruff v. Hundley, 127 Ala. 640, 29 So. 98, 85 Am. St. Rep. 145 (1900); *In re* Pforr's Estate, 144 Cal. 121, 77 Pac. 825 (1904); *In re* Meyer, 72 Misc. 566, 131 N. Y. Supp. 27 (1911).

seems desirable for the legislature to give to the probate court authority to expunge from a will any libellous matter which is not strictly dispositive. This solution, in accord with the time-proven English practice, tends to preserve common law principles and at the same time prevents injurious publication.

ROBERT A. HOVIS.

Malicious Prosecution—Probable Cause as Question for Judge or Jury—Authority of Agent to Institute Prosecution Under Bad Check Law.

In the recent case of *Dickerson v. Atlantic Refining Co.*,[1] the plaintiff gave an agent of the defendant company a check in payment for certain goods. Three hours later, and before presentation of the check to the drawee bank, the plaintiff was arrested on a warrant sworn out by said agent charging him with uttering a worthless check. Due to a subsequent deposit, the check was paid when presented by the general manager of the local branch of the defendant corporation. The case against the plaintiff was *"nol. pros'd.* with leave," and this action for malicious prosecution was then instituted against the defendant company and its agents. It was *held* that a prosecution for uttering a worthless check, instituted chiefly to collect a debt and before presentation, was *prima facie* evidence that the prosecution was without probable cause, and that the evidence was sufficient to take the case to the jury.

Although some of the earlier decisions are to the effect that probable cause is a question to be determined by the jury,[2] the more numerous and later cases establish the principle that it is a question of law to be determined by the court.[3] The jury are to find the facts

[1] 201 N. C. 90, 159 S. E. 446 (1931).

[2] Thurber v. Building and Loan Ass'n., 118 N. C. 129, 24 S. E. 730 (1896); R. R. v. Hardware Co., 143 N. C. 54, 55 S. E. 422 (1906).

[3] Overton v. Combs, 182 N. C. 4, 108 S. E. 357 (1921); Humphries v. Edwards, 164 N. C. 154, 80 S. E. 165 (1914) (when the facts are admitted or established, the question of probable cause is one of law); Bowen v. Pollard and Co., 173 N. C. 129, 91 S. E. 711 (1921) (is a question of law to be decided by the court upon the facts as they may be found by the jury); Tyler v. Mahoney, 166 N. C. 509, 82 S. E. 870 (1917) (a mixed question of law and fact); see Jones v. R. R., 125 N. C. 227, 229, 34 S. E. 398, 399 (1899).

Despite this fact many cases state that a criminal prosecution for the purpose of collecting a debt is prima facie evidence of lack of probable cause. McDonald v. Schroeder, 214 Pa. 411. 63 Atl. 1024, 6 L. R. A. (N. S.) 701, 6 ANN. CAS. 506 (1906); Wenger v. Philips, 195 Pa. 214, 45 Atl. 27, 78 Am. St. Rep. 810 (1900) (is not conclusive in establishing want of probable cause, but is prima facie evidence).

and the judge is to instruct them hypothetically as to the existence or non-existence of probable cause under the different views that might be taken of the evidence. A rule that certain facts establish a *prima facie* case of probable cause and a rule that the court determines the question cannot, in logic or practice, both exist at the same time. The former requires a permissive instruction;[4] the latter, a mandatory one. The instant holding reversing a nonsuit with instructions to submit the question of probable cause to the jury is therefore an effectual, though inarticulate, repudiation of the established rule.[5]

Under our "Bad Check Law"[6] was the defendant justified in having the plaintiff arrested without having presented the check to the bank for payment? No general rule can be laid down due to the diversity in form of the statutes in the different states;[7] but the majority holding under the more recent statutes seems to be that the giving of a check does not of itself represent that the drawer has with the drawee bank sufficient funds out of which it will be paid, but simply that the check will be paid in the ordinary course of business.[8] In construing the North Carolina statute, the Supreme Court seems

In Hotel Supply Co. v. Reid, 16 Ala. App. 563, 80 So. 137 (1918) it was held an abuse of criminal process.

[4] "Of course, a prima facie showing does not necessarily mean that the plaintiff is entitled to recover. It is sufficient to carry the case to the jury, and it is for the jurors to say whether or not the crucial and necessary facts have been established. We express no opinion as to the weight of the evidence, other than its prima facie character, which means only that it is legally sufficient to carry the case to the jury and to warrant a recovery, nothing else appearing. It neither insures nor compels a recovery, however." Dickerson v. Refining Co., 201 N. C. 90, 96, 159 S. E. 446, 450 (1931).

[5] Of course, the ruling of nonsuit might have been reversed on the ground that the plaintiff's evidence, taken as true under the motion for nonsuit, showed want of probable cause as a matter of law. That is, it might be established as a rule of substantive law that a prosecution under the "Bad Check Law" instituted either before presentation or for a collateral purpose, and not to vindicate public justice, is want of probable cause as a matter of law. But the theory of reversal here is solely that the case should have gone to the jury.

[6] N. C. ANN. CODE (Michie, 1927) §4283(a). It shall be unlawful for any person . . . to draw, make, utter or issue and deliver to another, any check or draft . . . knowing at the time of making, drawing, uttering, issuing, and delivering . . . that the maker or drawer thereof has not sufficient funds on deposit in or credit with the bank . . . with which to pay the same upon presentation.

[7] Note (1925) 35 A. L. R. 344, and Note (1925) 35 A. L. R. 380.

[8] Maxey v. State, 85 Ark. 499, 108 S. W. 1135 (1908); Arrington v. State, 296 S. W. 568, Tex. Cr. App. (1927), in which the defendant was held not guilty of uttering a worthless check, although he had given a check knowing that he did not have sufficient funds on deposit with which to pay the same. Before the check could have been presented he paid a part and promised payment of the balance. See (1927) 14 VA. L. REV. 134.

to indicate that presentation of the check to the drawee bank is necessary before the drawer can be convicted under the act.[9] The statute makes no reference to post-dated checks; but it has been held that a post-dated check is not a representation that the drawer has funds for payment upon presentation, and the maker is not guilty of uttering a worthless check.[10] Even though it were ascertained by the payee that the maker of the check did not have sufficient funds on deposit at the time of the drawing, there should be a presentation of the check to the drawee bank, before criminal proceedings are instituted by the payee, to avoid liability for malicious prosecution or false arrest.[11]

When an agent is acting within the scope of his employment, a prosecution undertaken for the purpose of furthering the master's business would, if unfounded, impose liability upon the master.[12] As a general rule it appears that general managers and agents employed for collection purposes are acting within their authority when instituting proceedings against anyone uttering a worthless check payable to the master.[13] If such prosecution is instituted without probable cause, for the purpose of collecting a debt due the employer, then the

[9] Stacy, C. J., in State v. Crawford, 198 N. C. 522, 152 S. E. 504 (1930), states that "our statute is specifically directed against the issuance of checks or drafts on any bank or depository when the maker or drawer thereof has not sufficient funds on deposit in or credit with such bank or depository with which to pay the same *upon presentation.*"

In State v. Yarboro, 194 N. C. 498, 140 S. E. 216 (1927), our court passed on the constitutionality of and construed the statute. Note (1927) 6 N. C. L. REV. 300.

[10] State v. Crawford, *supra* note 5. *Contra:* State v. Avery, 111 Kan. 588, 207 Pac. 838 (1922); State v. Johnson, 116 Kan. 390, 226 Pac. 758 (1924); People v. Westerdahl, 316 Ill. 86, 146 N. E. 737 (1925).

Statutes against obtaining property by false pretenses do not include post-dated checks. State v. Ferris, 171 Ind. 562, 86 N. E. 993 (1909); (1928) 34 W. VA. L. Q. 207.

[11] If the prosecution is instituted before presentation of the check it should be lack of probable cause and evidence of malice, if the check is paid when presented. This was in effect held in Dickerson v. Atl. Ref. Co., *supra* note 1; *supra* note 5.

If there is an agreement to hold a check and then a criminal prosecution is instituted, it is evidence of malice, and also of lack of probable cause. Aldana v. Tarazon, 15 S. W. (2d) 678, (Tex. Civ. App. 1929); Turner v. Brenner, 138 Va. 232, 121 S. E. 510 (1924).

[12] Jackson v. Amer. Tel. and Telegraph Co., 139 N. C. 347, 51 S. E. 1015, 70 L. R. A. 738 (1905); Kelly v. Shoe Co., 190 N. C. 406, 130 S. E. 32 (1925); (but if the agent exceeds his authority the master is not liable) Buttery v. Wilhite, 208 Ala. 573, 94 So. 585 (1922).

[13] Sweatman v. Linton, 66 Utah 208, 241 Pac. 309 (1925); Hostettler v. Carter, 73 Okla. 125, 175 Pac. 244 (1918); Gorman-Gammill Seed and Dairy Co. v. Morton, 203 Ala. 530, 84 So. 766 (1919).

principal may be liable for malicious prosecution or false arrest.[14] It was recently held that if an agent is expressly forbidden to accept checks except at his own risk, and he then procures the arrest of a person for cashing a worthless check, the employer is not responsible, unless there is a subsequent ratification of the act of the agent.[15]

To avoid liability for a malicious prosecution the owner of a business enterprise should forbid its agents to institute proceedings under the Worthless Check Act, until the check has been presented and returned from the bank;[16] or else, to vindicate public justice and not merely to collect a debt, make a full and fair disclosure of the facts to a reliable attorney before commencing the prosecution;[17] or so limit the authority of the agent that he will be acting outside the scope of his employment if he institutes criminal proceedings to enforce payment of a check.[18]

A. T. ALLEN, JR.

[14] Hotel Supply Co. v. Reid, *supra* note 3; Hostettler v. Carter; Sweatman v. Linton, both *supra* note 13.

If there is probable cause for the arrest, and no evidence of malice on the part of the agent, the master is not liable. Genovesse v. Piggly Wiggly, 32 S. W. (2d) 379, Tex. Civ. App. (1930).

[15] Lamm v. Charles Stores Co., 201 N. C. 134, 159 S. E. 444 (1931), in which the store manager's arrest of the plaintiff on a charge of cashing a worthless check was held to be an unauthorized act. There were written instructions to the store manager in the following words: "If a manager cashes a personal check, it is his own responsibility and he will positively be held responsible." There was no evidence of ratification of the act of the agent and the master was not held liable for the false imprisonment.

Counsel in this case seems to have overlooked the rule of *Price v. Neal,* that the loss on the forged check should have been borne by the drawee bank. Bank v. Trust Co., 168 N. C. 605, 85 S. E. 5, L. R. A. 1915 D 1138 (1915).

Whether the agent had authority to take checks was not decided, but the fact that the store manager did take checks and that this was known by the employer, would seem to imply such authority. Even though the manager was acting within the scope of his employment in accepting checks in payment would not necessarily imply that he had the further authority to prosecute, since he accepted the checks at his own risk, and there could be no benefit to the principal. Whereas, in Dickerson v. Refining Co., *supra* note 1, the agents instituted the proceedings to collect a debt due the principal, and whether they were within the scope of their authority, or whether there was a ratification of their act, was held for the jury to determine. You must look to the facts in each particular case. There was such a difference in the facts to the two cases as to justify the different conclusions reached.

[16] Dickerson v. Atl. Refining Co., *supra* note 1.

[17] The advice of counsel, given in good faith on a full and fair statement of all the facts, is a defense in an action for malicious prosecution. Moser v. Fable, 164 Ky. 517, 175 S. W. 997 (1915); J. B. Colt Co. v. Grubbs, 206 Ky. 809, 268 S. W. 817 (1925); Downing v. Stone, 152 N. C. 525, 68 S. E. 9, 136 Am. St. Rep. 841, 21 ANN. CAS. 753 (1910) (not a complete defense, but evidence to be submitted to the jury on the issue of probable cause as well as the issue of malice).

[18] Lamm v. Charles Stores Co., *supra* note 15.

Practise and Procedure—Reading Dissenting Opinion in Argument to Jury as Cause of Reversal.

In a personal injury action,[1] the North Carolina Supreme Court, with two judges dissenting, recently held that it was not permissible for an attorney to read to the jury a dissenting opinion of the late Chief Justice Clark of that court; and remanded the case for a new trial. The court expressed the view that a dissenting opinion cannot be classified either as a fact or as the law applicable to the facts, but that it is in the same category as newspaper editorials, magazine articles, pamphlets and "other writings which have not received the judicial sanction of a court."

A majority of the courts condemn the reading of law to the jury in civil cases.[2] The basis of this rule is that the determination of the law applicable is not within the province of the jury and that argument by counsel could only be confusing, leading to diversity and uncertainty in the administration of justice. Thus the Supreme Court of Illinois in a recent case[3] held a statute making juries in criminal cases judges of the law and the facts, unconstitutional.[4]

In North Carolina, by statute,[5] "the whole case as well of law as of fact may be argued to the jury." Although its policy has not been openly questioned, the broad language of the statute has been subjected to the following judicially imposed limitations: counsel may read the facts in an adjudicated case,[6] but cannot comment upon them as being similar to the facts in the case at bar;[7] counsel may not detail

[1] Conn v. Seaboard Air Line Railway Co., 201 N. C. 157, 159 S. E. 331 (1931).

[2] Press Pub. Co. v. McDonald, 63 Fed. 238, 26 L. R. A. 531 (C. C. A. 2d, 1894); Richmond's Appeal, 59 Conn. 226, 21 A. M. St. Rep. 85 (1890); HYATT ON TRIALS, (1924) §494.

[3] People v. Bruner, 343 Ill. 146, 175 N. E. 400 (1931); Note (1931), 17 A. B. A. J. 209.

[4] The grant of "judicial power" to department created therefor is exclusive and exhausts the entire power. And constitution retaining right of trial by jury, as "heretofore" enjoyed, did not refer to modifications in procedure by statute but related to past; recourse must be had to English common law to determine true meaning; under common law juries could not decide questions of law, but only applied to facts, law stated by the court. People v. Bruner, *supra* note 3.

[5] N. C. ANN CODE, Michie (1927) §203 (passed in 1844).

[6] Such facts are not read as evidence, but as illustrations of legal propositions involved. Horah v. Knox, 87 N. C. 483 (1882).

[7] "The exhortation is implied, if not expressed, 'to go thou and do likewise'." *Hyatt loc. cit., supra* note 2. Horah v. Knox, *supra* note 6; State v. Powell, 94 N. C. 965 (1896). See also MCINTOSH, N. C. PRAC. & PRO., 620.

facts delivered on an appeal of a former trial in the same cause.[8] But the privilege of arguing the point of law involved is not denied.[9]

The instant case for the first time in England or America raises the question as to the effect of reading a dissenting opinion to the jury. Conceivably, a dissenting opinion may be classified under one of three distinct heads: (1) It may be based upon the same rule of law as relied upon by the majority, and yet arrive at a different conclusion, through another application to the facts.[10] (2) It may state a different rule of law. (3) It may conclude there is no such rule as laid down in the decision of the court.[11] Apparently, however, these and other possible distinctions between different types of dissenting opinions would be without significance under the decision of the majority in the principal case. For one might guess that the Court feels that the statute goes far enough in permitting even majority opinion to become part of the jury's raw material. Or perhaps the Court felt that a dissenting opinion by a judge properly eulogized[12] as one of "our great chief justices" might tend to weaken a subsequent instruction given by a less famous presiding judge.

[8] State v. Smallwood, 78 N. C. 560 (1878); McINTOSH *loc cit. supra* note 7; Gray v. Little, 127 N. C. 304, 37 S. E. 270 (1900).

[9] Forbes v. Harrison, 181 N. C. 461, 107 S. E. 447 (1921).

[10] A dissenting opinion may contain a correct statement of an abstract rule of law, such rule of law may be as correct as any abstract rule of law, whether from a text book, a concurring opinion, or the decision of the court. It may be urged that since the law of one case can never be the law of another until so adjudged, counsel must necessarily argue what *he thinks* is the law applicable—subject, of course, to the discretion of the trial judge—and if counsel must argue correct law then any argument by counsel would be open to objection, since the law of one case in the final analysis can only be determined by the supreme court. Jones v. Detroit Taxie Cab Co., 218 Mich. 673, 188 N. W. 394 (1922); Ross v. Chicago City Ry. Co., 198 Ill. App. 600 (1922).

The objection to reading a dissenting opinion to the jury, however, would arise through the application of the law to the facts, since this would involve a matter of personal discretion.

[11] "It is an elemental principle that an erroneous decision is not bad law, it is not law at all." Suppose that when the case of Mial v. Ellington, 134 N. C. 189, 46 S. E. 964 (1904), was being tried in the lower court, counsel has read to the jury the dissenting opinion of Judge Clark in Taylor v. Vann, 127 N. C. 243, 37 S. E. 263 (1901). The dissenting opinion suggested that the law of the case as determined in Hoke v. Henderson, 15 N. C. 1 (1834), should be overruled. According to the Conn case, the reading of the dissent would have been reversible error. Then upon appeal the court actually overrules Hoke v. Henderson and adopts the dissenting opinion as the law. What would be the result? It would seem that the court has merely corrected a mistake in the former decisions, and that they were "not bad law, but no law at all," and that the dissenting opinion was really the law all the time. But see (1927) 5 N. C. L. REV. 170.

[12] "On a second trial counsel cannot eulogize the justice who delivered the opinion and endeavor to impress on the jury the latter's merits and character. Croom v. State, 90 Ga. 430, 17 S. E. 1003 (1892).

It may be the last supposition explains why this particular error became a cause for reversal. For it has been held that if the judge states the law incorrectly in his instructions, he may later recall the jury and correct the mistake; or, that if the judge fails to make this correction, a proper verdict will cure the error.[13]

EDWIN E. BUTLER.

Suretyship—Liability on Bond in Excess of Statutory Penalty.

The defendant surety company executed an official bond with a penalty of $25,000. The statute requiring such bond specified an amount "not more than $15,000."[1] In a summary proceeding provided by statute for cases of default on official bonds,[2] *held,* that since the surety acted voluntarily and accepted premiums on the larger amount, it is estopped to deny the validity of the bond, and recovery may be had for the full amount.[3]

When a statutory bond supersedes the statute in the amount of its penalty, three possibilities arise: the bond may be (1) void, (2) valid up to the statutory amount, (3) valid to the full amount of its penalty.

Where the excessive penalty is extorted *colore officii,* or is not given voluntarily, bonds have been held completely void.[4] But where the larger penalty is voluntarily assumed, the general rule is that the bond is good to the full extent of the penalty if not prohibited by

[13] "We believe the district attorney's law good, but even if it were bad, verdicts are not set aside because the district attorney has argued bad law to the jury." State v. Wren, 121 La. 55, 46 So. 99 (1908).

Also, Roundtree v. Britt, 94 N. C. 104 (1886); Glenn v. Charlotte & S. C. R. R. Co., 63 N. C. 510 (1868); Vincent v. Corbin, 85 N. C. 108 (1881); MCINTOSH *op. cit. supra* note 7 at 673.

[1] N. C. ANN. CODE (Michie, 1927) §927.

[2] N. C. ANN. CODE (Michie, 1927) §356.

[3] State v. Gant, 201 N. C. 211, 159 S. E. 427 (1931) (official bond of clerk of superior court).

[4] Bail bonds have been held void where the sheriff required a larger penalty than the court directed: Barringer v. State, 27 Tex. 553 (1864); Neblett v. State, 6 Tex. App. 316 (1879); Roberts v. State, 34 Kan. 151, 8 Pac. 246, 6 Am. Crim. Rep. 61 (1885); Waugh v. People, 17 Ill. 561 (1856). Appeal bonds have been held void where the court exacted a larger penalty than the statute required: Commonwealth v. Wistar, 142 Pa. 373, 21 Atl. 872 (1891); Newcombe v. Worster, 7 Allen 198 (Mass. 1863); An official bond was declared void where an excess penalty was extorted *colore officii* by superior officers: United States v. Humason, 6 Sawy. 199, Fed. Cas. 15421 (1879). Embargo bonds have been held void for the same reason: United States v. Morgan, 3 Wash. C. C. 10, Fed. Cas. 15809 (1811); United States v. Gordon, 1 Brock. 190, Fed. Cas. 15232 (1811), writ of error dismissed in 7 Cranch (U. S.) 287, 3 L. ed. 347 (1813).

statute.[5] However, there are a few cases which hold that recovery cannot be had for a greater amount than the statute provides.[6]

Closely analogous to the present situation is that in which the bond supersedes the statute by requiring certain conditions for which the statute does not provide. The general rule is that if the added or extra-statutory conditions are separable from those required by the statute, they will be rejected as mere surplusage,[7] since the bond is measured by the statute.[8] This rule has been applied to practically every type of bond,[9] even where the extra-statutory conditions are

[5] Henderson v. Matlock, 9 N. C. 366 (1822) (official bond of sheriff); State Bank v. Twitty, 9 N. C. 5 (1822) (official bond of sheriff); Governor v. Witherspoon, 10 N. C. 42 (1824) (official bond of sheriff); Parks v. Allen, 2 Head. 523 (Tenn. 1859) (bond of the contestants of a will); The Stevens v. Treasurers, 2 M'Cord. L. 107 (S. C. 1822) (official bond of a sheriff); State v. Taylor, 10 S. D. 185, 72 N. W. 408, 66 Am. St. Rep. 709 (1897) (official bond of a treasurer); Matthews v. Lee, 25 Miss. 417 (1853) (tax collector's bond); *In re* Read, 34 Ark. 239 (1879) (official bond of a county treasurer); Burroughs v. Lowder, 8 Mass. 373 (1812) (bond on a debt); Johnson v. Gwathney, 2 Bibb 186, 4 Am. Dec. 694 (Ky. 1810) (official bond of a sheriff); Speake v. United States, 9 Cranch 28, 3 L. ed. 645 (1815) (embargo bond).

[6] Graham v. State, 66 Ind. 386 (1879) (official bond of a county auditor); M'Caraher v. Commonwealth, 5 W. & S. 21, 39 Am. Dec. 106 (Pa. 1842) (official bond of a recorder of deeds); State v. Rhoades, 6 Nev. 352 (1870) (official bond of a state treasurer); Meador *et al.* v. Adams, 33 Tex. Civ. App. 167, 76 S. W. 238 (1903) (bond for the sale of malt liquors); The Treasurers v. Bates, 2 Bail L. 362 (S. C. 1831) (official bond of a sheriff).

[7] United States Fidelity Co. v. Iowa Telephone Co., 174 Iowa 476, 156 N. W. 727 (1916) (bond in compliance with a municipal ordinance to insure restoration of excavated streets).

[8] Globe Indemnity Co. v. Barnes, 288 S. W. 121 (Tex. Com. App., 1926) (bond for the sale of school books to the state); Joint Board of Supervisors v. Title Guaranty and Surety Co., 198 Iowa 1382, 201 N. W. 88 (1924) (drainage contractor's bond); Tug River Lumber Co. v. Smithey, 107 W. Va. 482, 148 S. E. 850 (1929) (building contractor's bond); Hicks v. Randich, 106 W. Va. 109, 144 S. E. 887 (1928) (public contractor's bond).

[9] This rule has been most commonly applied in the case of a contractor's bond: Wholesale Grocer Co. v. Prutsman, 1 La. App. 731 (1926); John H. Murphy Iron Works v. United States Fidelity and Guaranty Co., 169 La. 163, 124 So. 768 (1930); State v. Jackson and Co., 137 La. 945, 69 So. 751 (1915); Miller v. Bonner, 163 La. 332, 111 So. 776 (1927); Philip Carey Lumber Co. v. Maryland Casualty Co., 201 Iowa 1063, 206 N. W. 808, 47 A. L. R. 495 (1926); Nebraska Culvert and Manufacturing Co. v. Freeman, 197 Iowa 720, 198 N. W. 7 (1924); Charles City v. Rasmussen, 232 N. W. 137, 72 A. L. R. 638 (1930); Monona County v. O'Connor, 205 Iowa 1119, 215 N. W. 803 (1927); American Surety Co. v. School District, 117 Neb. 6, 219 N. W. 583 (1928). Other kinds of bonds where the rule has been applied are: Dallas County v. Perry National Bank, 205 Iowa 672, 216 N. W. 119 (1927) (depository bond); Lee v. Waring, 3 Desauss Eq. 57 (S. C. 1809) (official bond of a state treasurer); United States v. Howell, 14 Wash. C. C. 620, Fed. Cas. 15405 (1826) (official bond); Skellinger v. Yendes, 12 Wend. 306 (N. Y. 1834) (official bond of a constable); Zapf v. Ridenhour, 198 Iowa 1006, 200 N. W. 618 (1924) (broker's bond); Curtis v. Michaelson, 206 Iowa 111, 219 N. W. 49 (1928) (liability insurance bond); Pratt v. Wright, 54 Va. 175, 67 Am. Dec. 767 (1856) (guardian's bond); Branch v. Richmond Cold Storage Co., 146 Va. 680, 132 S. E. 848

voluntarily assumed.[10] If the excess conditions be extorted *colore officii,* the bond will be declared absolutely void by some courts.[11]

Contra to the general rule, however, there are cases which hold that where the extra-statutory conditions are voluntarily assumed[12] for a sufficient consideration,[13] the bond will be enforced to the full extent as a valid common law obligation or voluntary bond,[14] provided it is not repugnant to any statute or contrary to public policy.[15] A few courts hold that after deriving the benefits secured by the bond the surety will be estopped to deny its validity.[16]

In following the weight of authority in regard to excess penalties the instant case lays down a rule that is both reasonable and just, since

(1926) (suspending bond); State v. Read, 164 La. 315, 113 So. 860 (1927) (peace bond); Yost v. Ramey, 103 Va. 117, 48 S. E. 862 (1904) (executor's bond); Sheppard v. Collins, 12 Iowa 570 (1861) (attachment bond); State v. Castleberry, 23 Ala. 85 (1853) (bastardy bond); Probate Court v. Adams, 27 R. I. 97, 60 Atl. 769, 8 ANN. CAS. 1028 (1905) (executor's bond); Lowe v. Guthrie, 4 Okla. 287, 44 Pac. 198 (1896) (official bond of a city clerk); See Ainsworthy v. Territory, 3 Wash. Terr. 277, 14 Pac. 590, 591 (1882) (bail bond); State of Ohio v. Findlay, 10 Ohio 51, 54 (1840) (official bond of a county treasurer); Sochet v. Sochet, 70 Colo. 23, 196 Pac. 192, 193 (1921) (*ne exeat* bond); Sauer v. Fidelity and Deposit Co., 192 Ky. 758, 234 S. W. 434, 436 (1921) (policeman's bond).

[10] Long Bell Lumber Co. v. South Dakota Car. Construction Co., 133 So. 438 (La. 1931) (contractor's bond); Schisel v. Marvill *et al.,* 198 Iowa 725, 197 N. W. 662 (1924) (contractor's bond).

[11] United States v. Tingey, 5 Pet. (U. S.) 115, 8 L. ed. 66 (1831) (purser's bond); District of Columbia v. Waggman, 4 Mackey 328 (D. C. 1886) (real estate agent's bond); See State *ex rel* Griffith v. Purcell, 31 W. Va. 44, 5 S. E. 301, 314 (1888) (injunction bond).

[12] Slutter v. Kirkendall, 100 Pa. St. Rep. 307 (1882) (attachment bond); Franklin Bank v. Cooper, 36 Me. 179 (1853) (official bond of cashier covering past receipts as well as future property); United States Fidelity and Guaranty Co. v. Rainey, 120 Tenn. 357, 113 S. W. 397 (1908) (official bond); Manitowoc Co. v. Truman, 91 Wis. 14, 64 N. W. 307 (1895) (depository bond); Fitzgerald v. Neal *et al.,* 113 Ore. 103, 231 Pac. 645 (1924) (public contractor's bond); Ring v. Gibbs, 26 Wend. 502 (N. Y. 1841) (bond to release a ship); State *ex rel* Griffith v. Purcell, *supra* note 11.

[13] Fidelity and Guaranty Co. v. Rainey, *supra* note 12; Manitowoc Co. v. Truman, *supra* note 12.

[14] Coons v. People, 76 Ill. 383 (1875) (official bond of a county collector); Chadwick v. United States, 3 Fed. 750 (C. C. D. Mass. 1880) (collector's bond); Taylor v. Fleckenstein, 30 Fed. 99 (C. C. D. Ore. 1887) (bail bond); cases cited, *supra* note 12. It is interesting to note that Virginia applies this rule only to a contractor's bond: Aetna Casualty Co. v. Earle-Lansdell Co., 142 Va. 435, 129 S. E. 263 (1925).

[15] Taylor v. Fleckenstein, *supra* note 14; City of Philadelphia v. Shallcross, 14 Phila. 135 (Pa. 1880) (official bond of a tax receiver); Manitowoc Co. v. Truman, *supra* note 12; Coons v. People, *supra* note 14; Duke v. National Surety Co., 130 Wash. 276, 227 Pac. 2 (1924), judgment affirmed on rehearing, 131 Wash. 700, 230 Pac. 102 (1924) (bank's bond).

[16] Coons v. People, *supra* note 14; United States v. Hodson, 10 Wall. (U. S.) 395, 19 L. ed. 937 (1870) (bond of licensed distiller).

the surety in executing an official bond is presumed to know the terms of the statute under which he executed the bond.[17]

In certain respects the case is unusual: it is a strong holding in that the statute specifically provided that the bond be "not more than $15,000"; and it was decided on the basis of estoppel, which basis might be seriously questioned since it is difficult to see wherein the surety was estopped as to the state.

It is of especial interest to note that the case involved a summary proceeding under the statute. The summary remedy has been declared constitutional in North Carolina,[18] but its use has been denied where the penalty superseded the statute[19] as in the present case, the reason assigned by the court being that since the bond was not in conformity with the statute, it was not a statutory bond to which the summary remedy would apply. As there is no essential difference between the then existent statute on summary remedy[20] and the one now in force, the present case is apparently a direct reversal of the previous holding.

FRANK P. SPRUILL, JR.

Taxation—Discriminatory License Classifications—Limitations of Equal Protection and Commerce Clauses.

The 1931 General Assembly of North Carolina imposed a license tax of $50 per truck upon persons, firms or corporations who sell fresh fish, fruits or vegetables and who do not maintain a permanent place of business in the State, but exempted persons, firms or cor-

[17] See Fogarty v. Davis, 305 Mo. 288, 264 S. W. 879, 880 (1929) (school contractor's bond); Crawford v. Ozark Insurance Co., 97 Ark. 549, 134 S. W. 951, 952 (1911) (statutory bond); 9 C. J. 34, §56.

[18] Anonymous Case, 2 N. C. 29 (1794) (judgment against receivers of public monies); Oats v. Darden, 5 N. C. 500 (1810) (summary remedy against a sheriff); Broughton v. Haywood, 61 N. C. 380 (1867) (summary proceeding against sureties for Clerk and Master in Equity).

[19] State Bank v. Twitty; Henderson v. Matlock; Governor v. Witherspoon, all *supra* note 5.

[20] Acts of North Carolina Assembly of 1795, c. VIII, §5: "And be it further enacted that when any constable or constables in any county within this state shall or may have received any money in virtue of his office or appointment as constable, and shall fail to pay the same to the person or persons entitled to receive it, that then and in that case it shall and may be lawful upon motion made in the court of the county in which said constable resides for said court to give judgment against said constable or constables and his or their securities for all sum or sums of money so received and collected, together with costs, and to award execution thereon in the same manner as other executions issuing from said court, *provided,* such constable has ten days previous notice of such motion. . . ."

porations selling these products if they are grown in this State or the fresh fish taken in the waters of this State.[1] A specially constituted three-judge federal court declared the tax unconstitutional since it discriminates against the products of other states and so constitutes a burden upon interstate commerce.[2] It is surprising that, in face of many emphatic decisions enforcing this constitutional prohibition of State legislation discriminatory against other States' products, such legislation actuated by local interests and flagrantly violative of the commerce clause is still enacted. This tax which is so clearly discriminatory raises the question of discrimination in license taxes generally.

License classifications which discriminate against either products[3] of other States or residents[4] of other States are promptly condemned by the courts. The equal protection of laws and the equal privileges and immunities clauses which prohibit legislation aimed at non-resident persons have augmented the commerce clause to prevent the States from harassing each other with rival and spiteful measures. A State may tax the sale within its borders of produce brought from other States if the tax applies impartially to produce from within as well as from without the State,[5] and it may tax business within the State conducted by non-residents, but the tax must not be unlike that imposed upon business conducted by residents.[6]

When interstate commerce and non-resident considerations are not involved in the classification, the courts recognize considerable discretion in the legislature to classify business for license taxes. De-

[1] N. C. PUB. LAWS (1931) c. 427, §121½. "The Finance Committee several times rejected a tax proposal similar to this, but in the long, drawn-out session this modified section was enacted." Commissioner of Revenue A. J. Maxwell, U. S. Daily, Aug. 22, 1931, at 1430. Merchants in several South Carolina towns threatened to boycott North Carolina goods in protest against the tax.

[2] Gramling v. Maxwell, 52 F. (2d) 256 (W. D. N. C. 1931). Suit to enjoin the Revenue Commissioner from enforcing the act. Complainant operated trucks selling South Carolina peaches in North Carolina. A temporary restraining order was obtained from the District Judge and an interlocutory injunction granted by the three-judge court. No appeal was taken.

[3] Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347 (1875); Webber v. Virginia, 103 U. S. 344, 26 L. ed. 565 (1880); Walling v. Michigan, 116 U. S. 446, 29 L. ed. 691 (1886). Nor may a tax discriminate against the products of the taxing State. State v. Hoyt, 71 Vt. 59, 42 Atl. 973 (1899).

[4] Bethlehem Motors Co. v. Flynt, 256 U. S. 421, 41 Sup. Ct. 571, 65 L. ed. 1029 (1921), reversing 178 N. C. 399, 100 S. E. 693 (1919).

[5] Wagner v. City of Covington, 251 U. S. 95, 40 Sup. Ct. 93, 64 L. ed. 157 (1919).

[6] Chalker v. Birmingham and N. W. Ry. Co., 249 U. S. 522, 39 Sup. Ct. 366, 63 L. ed. 748 (1917).

cisions under the equal protection of laws clause require that persons who are similarly situated shall be similarly taxed.[7] Although the North Carolina constitutional provision for taxation by a uniform rule[8] applies expressly only to taxes on property,[9] the decisions have established the rule that a license tax not uniform upon persons in substantially the same situation is inconsistent with the intent so apparent in the provision and that its collection would be restrained as unconstitutional.[10] As such equality is guaranteed under the federal constitution, these decisions do not promulgate a new rule. The requirement of reasonable classification is satisfied when the court can conceive that the legislature could regard the classification as having a "connection with the duties of citizens as taxpayers.[11] Thus, differences in types of business, volume of business, opportunities afforded the business, or burdens which the business places upon government are held to afford reaonable bases for classification, whereas personal attributes would not justify classification. The differences may be minute; they are invalid only when they are palpably arbitrary.

This equality which the courts require may be termed "formal equality," for a classification is legal if there is a genuine difference in business organization. This difference may not actually be an economic justification for the dissimilar tax treatment which results. For example, it is legal to impose a license tax on hand laundries without imposing one on steam laundries.[12] The legislature may select a number of businesses for special taxes, and because those types of business are unlike others in external appearances they are legally subject to a tax not imposed on the others. In the 1931 Revenue Act license taxes are laid on piano dealers[13] and radio dealers,[14] while there is not a tax on furniture dealers; manufacturers

[7] See Toyota v. Hawaii, *226* U. S. 184, 33 Sup. Ct. 47, 57 L. ed. 180 (1912).
[8] N. C. CONST., Art. V, §3.
[9] State v. Williams, 158 N. C. 610, 73 S. E. 1000 (1912).
[10] Gatlin v. Tarboro, 78 N. C. 119 (1878); Worth v. Petersburg Ry. Co., 89 N. C. 301 (1883); State v. Carter, 129 N. C. 560, 40 S. E. 11 (1901); State v. Williams, *supra* note 9; Tea Company v. Doughton, 196 N. C. 145, 144 S. E. 701 (1928).
[11] See American Sugar Refining Co. v. Louisiana, 179 U. S. 89, 21 Sup. Ct. 43, 45 L. ed. 102 (1900).
[12] Quong Wing v. Kirkendall, 223 U. S. 59, 32 Sup. Ct. 192, 56 L. ed. 192 (1912).
[13] N. C. PUB. LAWS (1931) c. 427, §147a.
[14] N. C. PUB. LAWS (1931) c. 427, §147d.

of ice cream[15] and of bottled drinks[16] are taxed, while other manufacturers are not; a tax is imposed on electricians, plumbers and gasfitters,[17] but not on carpenters or brickmasons. Here is a departure from a natural interpretation of equality.

It appears that this system of taxes in North Carolina has developed from a few fees imposed in 1715 for regulation of "Ordinary Keepers and Tippling Houses," and in 1752 extended to "Traders, Peddlers and Petty Chapmen,"[18] with random and illogical additions to the present time. A license system framed judiciously would seem to have a valuable function in a revenue system. There is a group of occupations which the State desires to restrict, and to accomplish this it imposes a heavy tax upon them.[19] Again, there are enterprises in which State inspection is considered necessary, and a license fee can be imposed to defray this expense.[20] Also, where an occupation causes the State an extra expense not connected with inspection a license tax can be used for reimbursement.[21] License taxes can be utilized to correct inequalities in taxation. There are some enterprises which have very little taxable property but which nevertheless earn large profits, and the license tax is a way to offset this escape from other taxes.[22] These latter enterprises which cause extra expense or which escape other taxes present peculiar differences from other forms of business as taxpayers, and to require a special tax from them is not a departure from equality. The use of a license tax merely to curtail an undesired activity is a departure from actual equality, and it is a questionable use of the taxing power.

If there is to be more than a formal equality in license taxes, the system should be confined to enterprises with real differences of obli-

[15] N. C. PUB. LAWS (1931) c. 427, §161.
[16] N. C. PUB. LAWS (1931) c. 427, §134.
[17] N. C. PUB. LAWS (1931) c. 427, §155.
[18] PARKER, HISTORY OF TAXATION IN NORTH CAROLINA DURING THE COLONIAL PERIOD (1928) 129. CLARKE, LAWS OF NORTH CAROLINA, Vol. 23, p. 79, 371-375.
[19] Among these are phrenologists, fortune tellers, peddlers, employment agents, trading stamps. N. C. PUB. LAWS (1931) c. 427 §116, §124, §121, §154, §156.
[20] Licenses on hotels, restaurants, soda fountains and barber shops would come within this classification. N. C. PUB. LAWS (1931) c. 427, §126, §127, §144, §140.
[21] For example, a business which conducts frequent sales may place an extra burden upon the police; in like manner carnivals and circuses will cause extra expense. Heavy trucks cause greater injury to the roads than lighter motor vehicles, and the tax upon them is accordingly greater. N. C. PUB. LAWS (1931) c. 427, §165.
[22] Real estate agents, peddlers, traveling carnivals.

gation to the state, or, if business as such owes an extra obligation,[23] the tax should be on all business.

In addition to a lack of actual equality in classification the license system is subject to criticism as regards the measure of the tax on enterprises within the same formal classification. In effect, when the same tax applies to firms of diverse ability to pay this is a discrimination against the smaller firms. Some taxes are flat rates without regard to extent of activity;[24] others are graduated according to the population of the town in which the business operates,[25] which manifestly is an inaccurate gauge of ability; other licenses are measured by various external signs which may not be good criteria for the levying of taxes.[26] If the license tax is not imposed for revenue but for regulation, in which the ability principle is not an important consideration, the measure should be selected with regard to the purpose in view.

E. M. PERKINS.

Taxation—Exemption of Property Bought with Federal War Risk Insurance or Compensation Money.

An act of congress[1] provides that the money payable to veterans of the World War shall be exempt from "all taxation." A later section[2] adds that "no sum payable under this chapter . . . shall be subject . . . to national or state taxation." Three state supreme

[23] T. S. Adams, *The Taxation of Business,* PROC. NAT. TAX ASSN. (1917) 185. "A large part of the cost of business is traceable to the necessity of maintaining a suitable environment." ". . . business ought to be taxed because it costs money to maintain a market and those costs should in some way be distributed over all the beneficiaries of that market."

[24] Of 131 license taxes in the 1931 Revenue Act, 37 are flat rates, 25 are measured according to population, and 69 have various measuring devices such as type and size of equipment used, gross receipts, persons accommodated, persons employed.

At first thought net income would seem to be the most equitable and efficacious measuring device. However, administrative difficulties of a tax measured by net income might prohibit such a device.

[25] Moving pictures, soda fountains, laundries, and automotive service stations are among those measured by population. N. C. PUB. LAWS (1931) c. 427, §105, §144, §150, §153. Obviously the individual enterprises within these groups are of diverse profitableness.

[26] Various measures have been sustained. Gatlin v. Tarboro, 78 N. C. 119 (1878) (volume of business); State v. Stevenson, 109 N. C. 730, 14 S. E. 385 (1891) (amount of purchases); Cobb v. Commissioners, 122 N. C. 307, 30 S. E. 338 (1898) (gross receipts); State v. Carter, 129 N. C. 560, 40 S. E. 11 (1901) (population); Clark v. Maxwell, 197 N. C. 604, 150 S. E. 190 (1929) (tonnage of trucks).

[1] 43 Stat. 613 (1924), 38 U. S. C. A. §454 (1928).

[2] 43 Stat. 125 (1924), 38 U. S. C. A. §618 (1928).

courts have construed these sections recently with somewhat varying results. The Kansas court decided that corporate securities bought with federal insurance money were not exempt from state taxation.[3] The Georgia court decided that land bought with such money was exempt.[4] The North Carolina court held that land and an automobile bought in part with compensation money could not escape any part of the assessed taxation.[5]

The Georgia court in reaching its conclusion that, under these statutes, land bought with federal insurance money was exempt from all taxation, applied the specific exemption of a "sum" to property bought with this "sum" as well. The underlying reason for the decision seems to have been one of policy. The court reasons that such exemption from state taxation adds value to the federal aid; that it encourages World War veterans to buy homes for themselves instead of spending foolishly the money paid them by the federal government.

In view of this decision some pertinent questions might be raised as to what extent the Georgia court would carry its exemption policy. Would land for which this exempted land had been exchanged also be exempt? Would personal property bought either with the "sum" or with the proceeds of the sale of this exempted land be exempt? Would profit realized from transactions involving this exempted sum be exempt even as to the income tax?[6] Does this exemption apply with reference to the inheritance tax?[7] If either the legal justification or the policy of this decision is followed to its logical conclusion it seems that these questions would have to be answered in the affirmative. The complications and absurdities to which such holdings would lead are apparent. It would be possible

[3] State, *ex rel* Smith, Att'y. Gen'l. v. Board of County Commissioners of Shawnee County, 132 Kan. 233, 294 Pac. 915 (1931).

[4] Rucker, Tax Collector v. Merck, 159 S. E. 501 (Ga. 1931).

[5] Martin v. Guilford County, *et al*, 201 N. C. 63, 158 S. E. 847 (1931).

[6] Bednar v. Carroll, 133 Iowa 338, 116 N. W. 315 (1908), holds that interest on pension money exempt from taxation is not itself exempt.

[7] The question of the application of the inheritance tax has been passed upon. In Watkins v. Hall, 107 W. Va. 202, 147 S. E. 876 (1929), it was held that since the heirs took as beneficiaries under the policy, they were exempt by the express provision of these statutes from paying the inheritance tax. See also: Commonwealth v. Rife, 119 Ohio St. 83, 162 N. E. 390 (1928); *In re* Harris' Estate, 179 Minn. 450, 229 N. W. 781 (1930); The Succession of Greier, 155 La. 167, 99 So. 26 (1924). But in *In re* Schaefer's Estate, 224 N. Y. Supp. 305 (1927), it was held that the inheritance tax was a tax on the right to inherit and not on the property itself. Therefore, an exemption of the property by statute would not affect this tax.

for war veterans to build up small fortunes that the state could not tax. It would be a very difficult task to administer the tax laws.

The policy of the decision might be further questioned. Is it the function of the state to protect payments by the federal government to veterans of National Wars? Granting this, it does not seem that the protection should take the form of exempting real estate from taxation.[8]

The North Carolina[9] and Kansas courts[10] have reached a much more desirable result, both from the standpoint of policy in tax exemptions and that of practical administration of tax laws. Congress, they say, had no intention by these statutes to exempt property in the states from taxation. Under these decisions no property is taken out of taxation; the complicated problem of taxing property bought in part only with war risk money does not arise; nor does there arise the perplexing question as to how far and to what extent the exemption should apply.

However, the reasoning of the Kansas court, which the North Carolina court apparently adopts, leads one to believe that it would hold the money itself taxable once it had been paid to the veteran.[11] The court says the exemption of a "sum payable" means an exemption only while it remains payable; that is, unpaid. After it is paid it is no longer payable, hence the provision for tax exemption does

[8] This would place an increased burden on tax payers by reducing the amount of property to be taxed. Theoretically, in a state that makes no distinction between the taxation of tangible and intangible property, there would be no less property to be taxed, since the money paid by the veteran for the property could be taxed in the hands of the vendor. But actually, the money paid for such real estate could be invested in an intangible form of property and not declared, thus escaping taxation. This would necessitate an increased tax rate, to be borne by those who could not hide their property.

[9] Martin v. Guilford County, et al, *supra* note 5.

[10] State, *ex rel* Smith, Att'y. Gen'l. v. Board of County Commissioners of Shawnee County, *supra* note 3.

[11] The Kansas court draws an analogy between the present statute and one passed in 1873, having reference to pensions. 17 Stat. 576 (1873), 38 U. S. C. A. 54 (1928). The court holds that "payable" in the statute under consideration means the same as the words, "due or to become due" in the statute of 1873. The words of the latter statute have been construed by the Supreme Court of the United States to provide for an exemption only up to the time of the delivery of the money. McIntosh v. Aubrey, 185 U. S. 122, 22 Sup. Ct. 561, 46 L. ed. 834 (1902). But there is a distinction between these two statutes. The last part of the statute of 1873 clearly limits the first part and makes it applicable only to money in the process of transmission to the pensioner. However, the New York Supreme Court in 1927 in *In re* Schaefer's Estate, *supra* note 7, places the same interpretation on the federal statute of 1924 as does the Kansas court in State, *ex rel.* Smith, Att'y. Gen'l. v. Board of County Commissioners of Shawnee County, *supra* note 3.

not apply. This construction seems contrary to the intention of congress,[12] and it is an unreasonable and somewhat strained interpretation of the actual language of the statutes. It might lead to difficulties should the actual case for the taxation of the money itself be presented.

WILLIAM MEDFORD.

Taxation—Exemption of State Governmental Instrumentalities from Federal Taxation.

The plaintiff, a manufacturer of motorcycles in Massachusetts, sold one of its machines to a Massachusetts municipality for use in its police department. An excise tax was levied and collected from the plaintiff in conformity with Revenue Act, 1924,[1] §600, which provides that there shall be paid upon motorcycles, etc., sold or leased by the manufacturer, producer, or importer a tax equivalent to five per cent of the price for which so sold or leased. The plaintiff sued to recover the amount of the tax. *Held:* The tax was on the sale alone and could not be upheld as it infringed the exemption of state governmental instrumentalities from federal taxation.[2]

The instant case follows the language of a bare majority decision of the Supreme Court in *Panhandle Oil Co. v. Mississippi*,[3] where a state excise tax levied on the distributor of gasoline, assessed on the number of gallons sold, was disallowed on a sale to a federal agency. In the intervening case of *Wheeler Lumber Co. v. U. S.*,[4] a united court upheld a tax on transportation charges for materials sold and shipped to state instrumentalities, on the ground that the tax was not on the materials or the sale but on a preliminary service rendered the seller. Decisions of a federal district court[5] and of a state supreme

[12] Congress, by these two acts, expressly provides for the exemption of this money from taxation. The money, in the hands of federal authorities, could not be assessed and taxed against an individual who has not received it. Therefore, this provision for tax exemption would seem superfluous in the light of the reasoning of the Kansas court.

Two cases have applied the provisions of the instant statute to money already paid the veteran. Payne v. Jordan, 152 Ga. 356, 110 S. E. 4 (1921) (money held by administrator exempt from claims of creditors of veteran); Wilson v. Sawyer, 177 Ark. 492, 6 S. W. (2d) 825 (1928), (sum paid to veteran not subject to garnishment proceedings).

[1] 43 Stat. 322 (1924), 26 U. S. C. A. §881 (1927).

[2] Indian Motorcycle Co. v. U. S., 283 U. S. 570, 51 Sup. Ct. 601 (1931). Justice Stone dissents; Justice Brandeis concurs.

[3] 277 U. S. 218, 48 Sup. Ct. 451, 72 L. ed. 857, 56 A. L. R. 583 (1928) which overruled 147 Miss. 663 112 So. 584 (1927). Justices Holmes, Brandeis, Stone, and McReynolds dissent.

[4] 281 U. S. 572, 50 Sup. Ct. 419, 74 L. ed. 1047 (1930).

court[6] have upheld taxes on the sellers of a fire engine and gasoline, in the first case assessed on the price received, in the other on the number of gallons sold, and in each case involving a sale to governmental agencies, as being occupational excise taxes alone. The same tendency shown in all the above cases to uphold or disallow the taxes involved on the ground of verbal differences in the way the tax is imposed is recognizable in cases involving franchise taxes.[7]

However, sporadic references to two fundamental conceptions, although surrounded by discussions of the verbal variations of the cases involved, lead to the conclusion that the real issue in each case is between an absolute rule that the principle of exemption is not affected by the extent of the resulting interference[8] and the degree rule that immunity is given only from taxes that directly and substantially interfere with the efficient exercise of governmental functions.[9] The degree-rule is to be preferred because the absolute-rule by its own inclusiveness overrules all taxes imposing even a remote interference, whereas the degree rule sets up a flexible standard, similar to that of the "reasonable man" test in negligence issues, under which the court may fully consider the factual situations and the economic consequences involved in such a tax. But no decision is based solely upon either rule. Only in some dissenting opinions, as of Justice Holmes in the *Panhandle Oil case*[10] and of Justice Stone in the principal case[11] is the fundamental issue clearly shown.

[5] American-La France Fire Engine Co. v. Riordan, 294 Fed. 567 (W. D. N. Y. 1923) overruled on other grounds in 6 F. (2d) 964 (C. C. A. 2d, 1925).

[6] Grayburg Oil Co. v. State, 286 S. W. 489 (TEX. CIV. APP., 1926), affirmed 3 S. W. (2d) 427 (1928), reversed 278 U. S. 582, 49 Sup. Ct. 185, 73 L. ed. 519 (1928) in *per curiam* decision on authority of Panhandle case, *supra* note 3.

[7] (1931) 9 N. C. L. REV. 475, 477.

[8] There is no expressed constitutional guarantee of mutual immunity of federal and state governmental instrumentalities from taxation, but the rule was implied to preserve our dual system of government. Collector v. Day, 11 Wall. 113, 125, 20 L. ed. 122 (1871). The absolute rule, regardless of resulting burdensome effect, following the "power to tax is the power to destroy" theory, was announced in McCulloch v. Maryland, 4 Wheat. 316, 430, 4 L. ed. 579 (1819). It has been quoted in many cases, as in the principal case, *supra* note 2, at 575, 51 Sup. Ct. at 603.

[9] Union Pacific R. R. Co. v. Peniston, 18 Wall. 5, 30, 21 L. ed. 787, 793 (1873) "It cannot be said that a state tax which remotely affects the efficient exercise of a federal power is for that reason alone inhibited by the constitution. To hold that would be to deny to the states all power to tax persons or property." Metcalf v. Mitchell, 269 U. S. 514, 524, 46 Sup. Ct. 172, 70 L. ed. 384 (1926); Educational Films Corp. v. Ward, 282 U. S. 379, 391-2, 51 Sup. Ct. 170, 75 L. ed. (Adv. 223), 71 A. L. R. 1226 (1930); Wilcutts v. Bunn, 282 U. S. 216, 225, 51 Sup. Ct. 125, 75 L. ed. (Adv. 155), 71 A. L. R. 1260 (1930).

[10] *Supra* note 3, at 225. "The power to tax is not the power to destroy while this court sits. . . . The question of interference with government, I repeat, is