UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 11 | Number 1 Article 7

12-1-1932

Proposals for Legislation in North Carolina

North Carolina Law Review

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CHECKS ON FAILED BANKS

A recent table shows that eighteen per cent of the nation's banks failed between January, 1930, and September, 1932.[1] In North Carolina matters were worse. More than one-third of the banking institutions were closed and nearly one-third of the total bank deposits tied up in that twenty months' period. At every bank failure there is outstanding in the hands of the public a large volume of bank checks whose status is a source of doubt and controversy. If the check was promptly presented the drawer remains liable and must pay it in full. But if presentment was delayed and loss was caused by the delay, as of course it is in case of a bank suspension after the check should have gone through, the holder must stand that loss. The uncertainty lies in the question of loss. Few failed banks pay out in full. Some pay almost nothing. No one, not even the receiver, knows what will be paid when liquidation is complete. At a trial of the issue before a jury that body must determine this question as best it can. The result is obviously a guess, no worse perhaps than other jury guesses but in this case a perfectly useless one. By a simple amendment to Section 186 of the Negotiable Instruments Law the exact result intended by the law could be accomplished without the necessity of any jury guess or the taking of time to make it. The law has said that the loss caused by the delay should fall upon the holder. Obviously part of that loss to the depositor is waiting for his money. If the holder of the check was made an assignee of a like amount of the deposit which is tied up in a failed bank he would get exactly the sum the law provides for him with exactly the amount of delay which he ought to bear. For that reason the suggestion is again made to amend the Negotiable Instruments Law, North Car-

* This article has been prepared by the members of the law faculty of the University of North Carolina. Frank P. Spruill, Jr., Research Assistant, collaborated in the preparation of the discussion of Comparative Negligence. For similar proposed legislation and the results of the proposals see: *Proposals for Legislation in North Carolina* (1930) 9 N. C. L. REV. 13; Van Hecke, *Four Suggested Improvements in the North Carolina Legislative Process* (1930) 9 N. C. L. REV. 1; *A Survey of Statutory Changes in North Carolina in 1931* (1931) 9 N. C. L. REV. 347, at 380.

[1] (1932) 5 STATE GOVERNMENT 13. Some of these funds were later released by reopenings or new banks.

olina Code (Michie, 1931) Chapter 58, Section 3168 by adding the following:

"Provided, however, that when such check is found not to have been presented within a reasonable time and the drawer had the right at the time of presentment to have the check paid by the drawee, the drawer shall be entitled to be fully discharged from liability thereon by assigning to the holder thereof a portion of his claim against the drawee equal to the amount of the check."

Not only would this proposed amendment add to the certainty of the relief afforded but it would obviously reduce litigation by indicating at the outset the exact extent and character of the recovery in case of delayed presentment, a thing upon which the parties now must speculate to the obvious encouragement of suits.

Comparative Negligence

Contributory negligence is of such great importance in questions of tort liability today that it is difficult to realize that the doctrine is a fairly recent development. The industrial age, particularly modern transportation, is responsible for the prominence which contributory negligence holds in our law. Thus the greatest development has come in the last thirty years with the use of motor vehicles, until today proposals are being made to treat automobile accidents under a plan of compensation analogous to that afforded industrial accidents under Workmen's Compensation laws.[1]

The common law doctrine of contributory negligence demands that a person who is capable of taking care of himself, must take the same reasonable precautions for his own interests as are required of others. If he fails to do so and is injured as a result of his own lack of care, he must bear the loss—the entire loss—although the negligence of another was joined to produce the injury. Thus, if the plaintiff's negligence constitutes 3/4, 1/2, 1/4 or 1/10 of the total actionable cause of the injury, he can recover nothing. Also, if the plaintiff's negligence is different in quality, slight as compared with gross, he must lose. The common law throws the entire risk of loss on the plaintiff while it permits the defendant, also a wrongdoer, and often the greater wrongdoer, to go scot-free. If a jury in a common law negligence case in this state today finds that the plaintiff

[1] Report by the Committee to Study Compensation for Automobile Accidents (1932).

was negligent and that the plaintiff's negligence contributed to produce the injury, there must be a verdict for the defendant.[2]

This harsh result at common law has been unpopular, as out of line with modern ideas of justice, and there are numerous attempts by courts and legislatures to alleviate the situation. The doctrine of the last clear chance is a judicial development, by which a plaintiff, who is contributorily negligent, is enabled to recover from a defendant, if the latter had the opportunity to avoid the injury after the plaintiff's perilous position was discovered,[3] or, in some jurisdictions, after it should have been discovered by the exercise of care.[4] This involves a comparison of the negligence of plaintiff with that of the defendant to determine which came later in point of time. If the negligent defendant had in fact a later opportunity than the negligent plaintiff to avert the accident, then he must pay the plaintiff's total damage. By judicial decision, contributory negligence is not a defense against children of tender years,[5] or when the defendant has violated a statute passed to safeguard a particular dependent class, of which the plaintiff is a member,[6] or when the defendant is guilty of wilful or wanton misconduct.[7] Further judicial limitations on the strict rule of contributory negligence are seen in the "humanitarian doctrine" of Missouri[8] and in the so-called doctrine of "first clear chance."[9] Tennessee holds as a matter of common law, applicable to all cases of contributory negligence, that, if the injury might have been avoided by the use of ordinary care and caution by the defendant, he will be liable, the plaintiff's contributory negligence merely reducing the damages.[10]

[2] Allen v. Yarborough, 201 N. C. 568, 160 S. E. 833 (1931), commented on in (1932) 10 N. C. L. REV. 220.

[3] Davies v. Mann, 10 M. & W. 546 (1842); Pickett v. Wilmington & W. R. R. Co., 117 N. C. 616, 23 S. E. 264 (1895); Kansas City So. R. Co. v. Ellzey, 275 U. S. 236, 48 Sup. Ct. 80, 72 L. ed. 259 (1927).

[4] Radley v. London & N. W. R. Co., 1 App. Cas. 754 (1876); Pickett v. Wilmington & W. R. R. Co., *supra* note 3.

[5] Campbell v. Model Steam Laundry, 190 N. C. 649, 130 S. E. 638 (1926).

[6] Lenahan v. Pittston Coal Min. Co., 218 Pa. 311, 67 Atl. 642 (1907). *Contra*, as to violation of child labor law, Leathers v. Blackwell's Durham Tobacco Co., 144 N. C. 330, 57 S. E. 11 (1907).

[7] Atchison, T. & S. F. R. Co. v. Baker, 79 Kan. 183, 98 Pac. 804 (1908).

[8] Hutchinson v. St. Louis & M. Riv. R. R. Co., 88 Mo. App. 376 (1901).

[9] Loach v. British Col. Elec. Ry. Co. (1916) 1 A. C. 719 (Privy Council, 1915); Green, *Contributory Negligence and Proximate Cause* (1927) 6 N. C. L. REV. 3, 31.

[10] East Tenn., V. & G. Ry. v. Fain, 12 Lea 128 (Tenn. 1885); Mole and Wilson, *A Study of Comparative Negligence* (1932) 17 CORN. L. Q. 333 and 604, at 611.

The legislatures have been as eager as the courts to afford relief against the strict application of the common law rule of contributory negligence. Thus, in industrial accidents, the defense is abolished altogether under Workmen's Compensation laws. But most of the legislation in this field has borrowed heavily from the Roman Law—Civil Law doctrine of comparative negligence—to divide the damage in proportion to the negligence attributable to the parties, or, if the proportion cannot be ascertained, to divide the loss equally.[11] The present admiralty rule in England[12] and other leading countries, except the United States, is that loss will be apportioned in proportion to the fault of each ship. The United States admiralty rule provides for equal division of damages.[13]

Probably, the most significant instance of recognition given to the doctrine of comparative negligence is found in the adoption of the Second Federal Employer's Liability Act,[14] applying to interstate carriers, and providing that "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." The Act has, with no considerable difficulty, been consistently applied and accorded a uniform construction by state and federal courts. If the injury or death of the employee was proximately caused in whole or in part by the carrier's negligence, a recovery is allowed.[15] However, if the employee's negligence proximately contributed to the injury or death, recovery is limited to an amount which bears the same proportion to the full damages sustained as the negligence of the carrier bears to their combined negligence; in other words, the total damages sustained are diminished in the proportion that the employee's negligence bears to the combined negligence of both.[16] It

[11] Mole and Wilson, *supra* note 10, at 337; RADIN, HANDBOOK OF ROMAN LAW (1927) 148-151; 2 SHERMAN, MODERN ROMAN LAW (1917) 383; GERMAN CIVIL CODE §254.

[12] ENGLISH MARITIME CONVENTIONS ACT (1911) 1.

[13] The Schooner Catherine, 17 How. 170 (U. S. 1854). The article by Mole and Wilson, *supra* note 10, gives an excellent account of the admiralty rule and of the entire problem of comparative negligence.

[14] 35 STAT. 65, 66 (1908), as amended by 36 STAT. 291 (1910); 45 U. S. C. A. §53.

[15] Southern R. Co. v. Hill, 139 Ga. 549, 77 S. E. 803 (1913); Ritchie v. R. Co., 192 N. C. 666, 135 S. E. 770 (1926); McLean v. Hardwood Co., 200 N. C. 312, 156 S. E. 528 (1931).

[16] Cobia v. R. Co., 188 N. C. 487, 125 S. E. 18 (1924).

is only when the employee's negligence was the sole proximate cause of the injury or death that recovery is entirely barred.[17]

That the rule of the federal act has received approbation is amply evidenced by the subsequent action of state legislatures. Many states, including North Carolina, have lifted bodily the rule from the federal act and applied it to intrastate carriers.[18] Other states, using the federal act as a working basis, have drafted new comparative negligence statutes, differing from the federal act only in application and extent of operation.

Florida has passed two such statutes. The first applies to actions against a railroad brought by one not an employee, for injury to person or property, and provides that "if the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributable to him."[19] The second applies to actions by an employee in certain specified hazardous occupations, including railroads.[20] In Georgia "the fact that an employee may have been guilty of contributory negligence not amounting to a failure to exercise ordinary care shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."[21] In Michigan the employee may recover, "provided that the negligence of such employee

[17] McLean v. Hardwood Co., *supra* note 15.

[18] ILL. STAT. ANN. (Callaghan, 1924) c. 114, §323; IOWA CODE (1931) §8158; KAN. REV. STAT. ANN. (1923) §66-238; KY. STAT. ANN. (Carroll, 1930) §820b-2; MINN. STAT. (Mason, 1927) §4935; MONT. REV. CODE (Choate, 1921) §6606; N. C. CODE ANN. (Michie, 1931) §3467; N. D. COMP. LAWS ANN. (Supp. 1913) §4803a2; S. C. COMP. LAWS (1922) Vol. 3, 4915; S. D. COMP. LAWS (1929) §9709; TEX. REV. STAT. ANN. (Vernon, 1925) §6440; VA. CODE ANN. (Michie, 1930) §5792; WYO. COMP. STAT. ANN (1920) §5387.

[19] FLA. COMP. LAWS ANN. (1927) §7052. This statute is broader than the federal act in that it extends to loss of an injury to property, but it is narrower in that it does not cover loss of life. The question of diminution of damages has received the same interpretation as has the federal act. Florida Central & P. R. Co. v. Foxworth, 41 Fla. 1, 25 So. 338 (1899); Florida Central & P. R. Co. v. Williams, 37 Fla. 406, 20 So. 558 (1896). Georgia has a similar statute. GA. CODE ANN. (Michie, 1926) §2781.

[20] FLA. COMP. LAWS ANN. (1927) §7060, applying to the following occupations: "Railroading, operating street railways, generating and selling electricity, telegraph and telephone business, express business, blasting and dynamiting, operating automobiles for public use, boating, when boat is propelled by steam, gas, or electricity." *Id.* §7058. Arizona also has a statute modeled after the federal act and applying to certain hazardous trades. ARIZ. REV. CODE ANN. (Struckmeyer, 1928) §1388. An Arkansas statute also similar to the language of the federal act applies to all corporations not common carriers except those engaging in interstate commerce. ARK. STAT. (Crawford & Moses, 1921) §7145.

[21] GA. CODE ANN. (Michie, 1926) §2783.

was of a lesser degree than the negligence of such company, its officers, agents, or employees."[22] The Oregon statute, applying to the relationship of employer and employee in certain building and contracting trades, provides simply that "the contributory negligence of the person injured shall not be a defense, but may be taken into account by the jury in fixing the amount of damage."[23] The Ohio[24] and California[25] rule, applying generally to employers and employees, is that recovery will not be barred "where the employee's contributory negligence is slight and the negligence of the employer is gross in comparison." The Nevada statute,[26] to the same effect, covers only mine or mill owners and common carriers.

Four states have enacted comparative negligence statutes of general application, but in all but one of these, namely Mississippi, the extent of their operation is limited in some respect. In Georgia "if the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover."[27] The Nebraska rule is that contributory negligence shall not completely bar recovery "when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison."[28] The Wisconsin statute of 1931 provides that con-

[22] MICH. COMP. LAWS (1929) §8630. Arkansas has a similar statute. ARK. STAT. (Crawford & Moses, 1921) §7145. The question as to greater or lesser degree of negligence is for the jury, as is that of diminution of damages. Darling v. Grand Rapids R. Co., 184 Mich. 607, 151 N. W. 701 (1915).

[23] ORE. CODE ANN. (1930) §49-1706. The Oregon court construes "be a defense" as "bars a recovery." Nelson v. Brown and McCabe, 81 Ore. 472, 159 Pac. 1163 (1916).

[24] OHIO CODE ANN. (Throckmorton, 1929) §6245-1; *id.* §9018 applies only to railroads and provides diminution where contributory negligence of the employee was slight and that of the employer "greater in comparison."

[25] CAL. GEN. LAWS (Deering, 1931) Act 4747, §1.

[26] NEV. COMP. LAWS (Hillyer, 1929) §9198.

[27] GA. CODE ANN. (Michie, 1926) §4426. It has been suggested that "although the Georgia rule in terms requires the plaintiff to exercise ordinary care to avoid the consequences of the defendant's negligence, this prerequisite is so limited and qualified by judicial decision that Georgia cases approximate the result obtainable under the rule of comparative negligence." Mole and Wilson, *supra* note 10 at 637.

[28] NEB. COMP. STAT. (1929) §20-1151. The slightness of the plaintiff's contributory negligence is the basis for comparison, and a recovery cannot be had if that contributory negligence is in any degree more than slight, regardless of the grossness of the defendant's negligence. Bauer & Johnson Co. v. National Roofing Co., 107 Neb. 831, 187 N. W. 59 (1922). And if the defendant's negligence falls in any degree short of gross negligence, the plaintiff's contributory negligence, however slight, will defeat recovery. Mitchell v. Mo. Pac. R. Corp., 114 Neb. 72, 206 N. W. 12 (1925). *Cf.* Gibson v. Kelkenny, 112 Neb. 524, 199 N. W. 838 (1924); McMullen v. Nash Sales Co., 112 Neb. 371, 199 N. W. 721 (1924). The question is ordinarily for the jury.

tributory negligence shall operate only to diminish the damages "if such negligence was not as great as the negligence of the person against whom recovery is sought."[29] Mississippi is the only state in the Union which applies the comparative negligence doctrine to the fullest extent.[30] The statute applies generally to all actions for negligence resulting in death, injury to person, and injury to property. Furthermore, it does not anticipate an inquiry as to who was less or more negligent, and contributory negligence, no matter how gross, goes only in mitigation of damages.[31]

It cannot be doubted that comparative negligence more closely approximates ideal justice than does the harsh common law rule of contributory negligence. The latter, if it was originally intended as a deterrent, has long outlived its usefulness, since it allows a complete defense to one who in most cases is mainly responsible for the injury.[32] Conceding the possibility of the contrary, the defendant in any event should be answerable for his portion of the fault. There seem to be no reasonable grounds for allowing the plaintiff's conduct to exonerate completely a concededly negligent defendant. Comparative negligence apportions the fault equitably.

In answer to the objection that the introduction of general comparative negligence into our jurisdiction would present a difficult administrative problem, it is well to refer to the wholly successful operation of other comparative negligence statutes, and particularly

Day v. Metropolitan Utilities District, 115 Neb. 711, 214 N. W. 647 (1927). But in a clear case the court may direct a verdict. Haffke v. Mo. Pac. R. Corp., 110 Neb. 125, 193 N. W. 257 (1923).

[29] WIS. STAT. (1931) §331.045. Miles Lambert, in Note (1931) 7 WIS. L. REV. 122, says that "this feature of the act seems unfortunate. If the plaintiff has been guilty of negligence equal to that of the defendant, he can recover no damages whatsoever. If his negligence is in the slightest degree less than that of the defendant, he can, apparently, recover nearly one half of his damages. A very slight difference in the amount of negligence makes a great difference in the judgment. If the principle of comparative negligence is accepted, there is no logical reason why the plaintiff's negligence should be a complete bar to the action where it is equal to or greater than the negligence of the defendant." For an explanation of the new Wisconsin statute by one of its framers, see Padway, *Comparative Negligence* (1931) 16 MARQ. L. REV. 3. For a discussion of the same, see Campbell, *Wisconsin Comparative Negligence Law* (1931) 7 WIS. L. REV. 222.

[30] MISS. CODE ANN. (1930) §511. The statute has received the same construction on the question of diminution of damages as has the federal act. Yazoo R. Co. v. Mullins, 125 Miss. 242, 87 So. 490 (1921). The Ontario statute provides that where it is impracticable to determine the amount of damages attributable to each party, the plaintiff shall receive one half his damages. ONT. REV. STAT. (1927) c. 103.

[31] Cumberland Tel. & Tel. Co. v. Cosnahan, 105 Miss. 615, 62 So. 824 (1913).

[32] (1932) 17 CORN. L. Q. 604, at 644.

that of Mississippi,[33] where the doctrine is fully accepted. Again, North Carolina courts for almost twenty years have been applying without difficulty the federal act and its state equivalent.[34] The adoption of a statute of general application, unrestricted in extent of operation, would mean simply an extension of our existing statute[35] so as to cover all actions based on negligence resulting in death and in personal and property injury. The usual argument that it is impossible for juries to achieve accuracy in determining the quantum of negligence attributable to each party loses its force with the realization that jury verdicts as to negligence are necessarily arbitrary in any event. The judge's charge to the jury would be similar to the charge now given in suits by employees against railroads for injuries sustained during employment. Juries would answer the same issues that they are already accustomed to answer in the above cases. The change in administration would scarcely be noticeable. Repeated encroachments upon the law of contributory negligence[36] have sufficiently weakened its hold upon state and national law to dispel any uneasiness as to the result of further encroachment in that direction.

Finally, a comparative negligence statute will not affect existing statutes abrogating the defense of contributory negligence,[37] such as the *Workmen's Compensation Law.* Since contributory negligence is an affirmative defense in North Carolina,[38] the rules as to burden

[33] In *A Study of Comparative Negligence* (1932) 17 CORN. L. Q. 604, at 642, Mole and Wilson say that "the comparative negligence statute has been applied in Mississippi satisfactorily for over a score of years; courts, juries, counsel, and litigants appear satisfied with its operation and administration." In Note (1931) 7 WIS. L. REV. 122, at 125, Miles Lambert mentions that "it is not to be expected that juries will achieve great accuracy in determining the respective amounts of negligence to be attributed to the parties, but they have been doing it for years under other statutes, and, apparently, efficiently enough."

[34] Lamm v. R. Co., 183 N. C. 74, 110 S. E. 659 (1922); Hines v. R. Co., 185 N. C. 72, 116 S. E. 175 (1923); Cobia v. R. Co., *supra* note 4; Ritchie v. R. Co.; McLean v. Hardwood Co., both *supra* note 3.

[35] N. C. CODE ANN. (Michie, 1931) §3467.

[36] Statutory encroachments on the common law rules of negligence consist of the application of comparative negligence to maritime law, the Federal Employer's Liability Act as to interstate carriers, the state statutes as to intrastate carriers and other employers, the workmen's compensation laws, the statutes limiting the liability of automobile owners and operators for injuries to guests, and the comparative negligence statutes of general application.

[37] In Mobile & O. R. Co. v. Campbell, 114 Miss. 803, 821, 75 So. 554, 557 (1917), the court made the point that "the purpose of the new statute is simply to afford a right of recovery in those cases where the plaintiff's negligence had operated as a complete bar." This would seem to indicate that the doctrine of "last clear chance" would not be affected.

[38] N. C. CODE ANN. (Michie, 1931) §523.

of proof will not be changed.[39] The statute will in no respect affect the laws of proximate cause,[40] negligence *per se*,[41] imputed negligence,[42] and voluntary assumption of risk.[43]

It is submitted that there is a real need in North Carolina for a general application of comparative negligence, and the following new statute is suggested:

"Contributory negligence shall not bar a recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, but any damage allowed shall be diminished by the jury in proportion to the amount of negligence attributable to the person recovering."

EVIDENCE

Comment by Judge on Evidence.

It is clear that judges at common law had the power to comment to the jury on the weight and credibility of testimony adduced in a trial.[1] A recent investigation has brought to light the fact that in 1795 North Carolina was the first of some forty-two American states to abrogate this power.[2] This was done, it seems, in the midst of a heated controversy which was being waged between bench and bar over causes too numerous to detail. "There seems little doubt," the investigator concludes, "but that the legislative act restraining the power of the judges was a final consequence of the bitter feud with the judges, who were no doubt high handed at times."[3]

[39] Yazoo & M. V. R. Co. v. Lucken, 137 Miss. 572, 102 So. 393 (1924); see Jones v. R. Co., 194 N. C. 227, 229, 139 S. E. 242, 243 (1927), where in an action brought under our comparative negligence statute applicable to carriers, *supra* note 38, the court mentions contributory negligence "as alleged in the answer."

[40] McLean v. Hardwood Co., *supra* note 15.

[41] But it would be necessary to determine the quantum of the negligence *per se* as of any other kind of negligence.

[42] The language, "amount of negligence *attributable* to the person recovering," affords sufficient assurance that the doctrine of imputed negligence will be left intact.

[43] Seaboard Air Line Ry. Co. v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. ed. 1062 (1913). Since assumption of risk arose most frequently in cases between employer and employee, which now come under the Workmen's Compensation law, it is likely that there will be few cases under the Comparative Negligence statute in which the question will be raised. Texas has a statute providing that assumption of risk arising from knowledge of the defect or danger in employment is to be treated and considered as contributory negligence, going only in mitigation of damages. TEX. REV. STAT. ANN. (Vernon, 1925) §6437.

[1] HALE, HISTORY OF THE COMMON LAW OF ENGLAND (4th ed. 1792) 291, quoted in MORGAN, THE LAW OF EVIDENCE (1927) 9.

[2] Johnson, *Province of Judge in Jury Trials* (1928) 12 J. Am. Jud. Soc. 76.

[3] *Ibid.*

Whether or not the practice was saddled upon us by historical accident, the present-day considerations for abandoning it are many. Without the power of comment (so the familiar figure runs) the trial judge is demoted to the position of umpire for the game between litigants and counsel, and the jury is deprived of the advice and guidance of the only impartial expert at the trial. Without preliminary aid from the judge, the jury, in the wake of the oratory of counsel, must undertake the difficult task of appraising witnesses and analyzing testimony. Furthermore, to keep the judge within his circumscribed sphere has required many a reversal by the Supreme Court based on the quibble that the judge below commented on the evidence.

The Committee to Propose Specific Reforms in the Law of Evidence,[4] appointed in 1920 by the Commonwealth Fund, marshalled convincing arguments and data to show the need for returning to state judges their common law power of comment. Basing their conclusions on fifteen hundred and sixty-five replies in answer to a questionnaire sent to lawyers who had practiced in federal courts, which allow comment, and state courts which prohibit it, the Committee reports that "The privilege of proper comment has the following beneficial effects: (1) It saves time and expense by bringing quicker verdicts, reducing the number of disagreements, and diminishing the number of new trials and applications for new trials. (2) It has an appreciable effect upon a substantial percentage of attorneys in making them spend less time in examining prospective jurors. (3) It operates to a considerable degree to induce the trial judge to pay close attention to the conduct of the trial."[5] The Committee finds further that two objections have been made to permitting such comment: (1) That the jury will be so influenced that the verdict will merely reflect the judge's opinion, rather than their independent judgment. (2) That trial judges are incapable of performing this function impartially and efficiently. These objections are answered as follows: "A jury incapable of properly appraising the remarks of an impartial judge, and of exercising its independent

[4] This committee was composed of the following distinguished personnel: Edward M. Morgan, Harvard University, Chairman; Zechariah Chafee, Jr., Harvard University; Ralph W. Gifford, Columbia University; Edward W. Hinton, University of Chicago; Charles M. Hough, Judge of the United States Circuit Court of Appeals; William A. Johnston, Chief Justice of the Supreme Court of Kansas; Edson R. Sunderland, University of Michigan; John H. Wigmore, Northwestern University.

[5] Morgan, *op. cit. supra* note 1, 20.

judgment in the light of those remarks is obviously incompetent to determine the credibility of witnesses, to detect the fallacies in the arguments of counsel, not unskilled in sophistry, to keep in mind a complicated mass of testimony, distinguishing that actually received from that merely offered, and to analyze the evidence so as to make the truth appear. If juries are of such low mentality that they cannot be trusted to hear the opinions of judges upon the facts, then a jury trial is merely a method of resolving issues by conjecture. The latter objection has been decisively answered by Mr. Moorfield Storey: 'You give a judge the power to set aside a verdict absolutely. Can you not trust him to caution a jury in advance?' "[6]

It is submitted that North Carolina Code (1931) Section 564 be supplanted with the following:

The trial judge may express to the jury, after the close of the evidence and arguments, his opinion as to the weight and credibility of the evidence or any part thereof.[7]

Interested Survivors.

The common law prohibition against testimony by witnesses having an interest in the action has been generally abandoned as a discredited antiquity.[8] There lingers with us, however, a remnant of it. N. C. Code (Michie, 1931) Section 1795 disqualifies an interested survivor from testifying against the representative of a deceased person. Theoretical and practical considerations show that this, too, is obsolete and should be discarded.

At the outset, it should be confessed that a good deal of judicial encomium has to be answered. The recent opinion of Mr. Chief Justice Stacy in *In re Will of Brown*,[9] approving the disqualification, contains the typical reasons that are advanced in favor of it:

The disqualification of such witnesses to give evidence concerning personal transactions or communications had with a decedent, rests not merely upon the ground "that the dead man cannot have a fair showing, but upon the broader and more practical ground that the other party to the action has no chance by the oath of the relevant witness to reply to the oath of the party to the action." . . . Men quite often understand and interpret personal transactions and communications differently, at best; hence, the Legislature, in its wisdom, has provided that an ex parte version of such matters may not

[6] *Id.* at 18.
[7] This is the text of the statute proposed by the Committee.
[8] N. C. CODE ANN. (Michie, 1931) §1792.
[9] 203 N. C. 347 (1932).

be received in evidence except as above stated and as further provided by the statute. . . . The reason for the provision was stated by Rodman, J., as follows: "No interested party shall swear to a transaction with the deceased, to charge his estate, because the deceased cannot swear in reply. If, however, the representative of the deceased will swear in such a transaction, to benefit the estate, fair play requires the rule to be altogether dispensed with."

Unless both parties can be heard, it is better to hear neither, because it not only has the appearance of unfairness, but where only one participant can speak, it affords an easy opportunity, and a temptation perhaps, to commit perjury.

> "If self the wavering balance shake,
> It's rarely right adjusted."
> —Burns, Epistle to a Young Friend.

Taking up these reasons in reverse order, we may again resort to the answering arguments of the Committee to Propose Specific Reforms in the Law of Evidence. As to the second reason advanced above—danger of perjury—the Committee says: "These statements [i.e. similar to that above], in the first place, assume that to permit the interested survivor to testify to a transaction with the decedent will not only subject him to an irresistible temptation to perjury but will also endow him with such consummate skill in lying that opposing counsel will be powerless to expose him, and court and jury will be incompetent to evaluate his testimony. . . . Secondly, a claimant so corrupt as to commit perjury would not hesitate to suborn perjury. The pertinent statutes do not forbid disinterested persons from giving in evidence communications and transactions with the decedent. And if human nature is so depraved, the claimant will have little difficulty in finding a disinterested witness ready and willing to furnish the requisite proof."[10] As to the first reason advanced in the above opinion—unfairness to the deceased—the Committee says: "Furthermore, to attempt to justify these exclusionary statutes upon the theory that it is unfair to permit the survivor to speak when the lips of the decedent are sealed is to commit a double blunder. It overlooks the fact that court and jury will inevitably scrutinize with great care the testimony of the survivor under such circumstances, and it assumes that the only method of effecting substantial equality is by closing the mouth of the survivor without considering the alternative of making admissible self-serving declarations of the decedent."[11]

[10] Morgan, *op. cit. supra* note 1, 26.

In addition to the objection that the disqualification in question is specious in theory, there is the consideration that it has been difficult both to comprehend and to administer. Up to 1919 this statute had been before the court in two hundred and twenty-one cases, resulting in many subtle and elusive refinements. And experience in other states shows that we have gained nothing in the promotion of justice or ascertainment of truth from this momentous judicial effort. For example, two statutes in Connecticut in 1848 and 1850 did away with the disqualification of the survivor and provided for the admissibility of the pertinent declarations of the deceased.[12] Of one hundred and fifty-two Connecticut lawyers having experience in cases where these statutes were involved, and whose opinions were canvassed by a questionnaire of the aforementioned Committee, sixty per cent favored the statutes. The justices of the Supreme Court unanimously favored them, and eighty-one per cent of the Superior Court judges were of the same opinion.[13]

It is submitted that North Carolina Code (1931) Section 1795 be repealed and that the following be substituted in its stead:

No person shall be disqualified as a witness in any action, suit or proceeding by reason of his interest in the event of the same as a party or otherwise.

In actions, suits or proceedings by or against the representatives of deceased persons, or the committee of a lunatic, including proceedings for the probate of wills, no statement of the deceased, or lunatic, whether oral or written, shall be excluded as hearsay provided that the trial judge shall find as a fact that the statement was made, and that it was made in good faith and on the declarant's personal knowledge.

Hearsay Declarations Against Penal Interest.

A change, less sweeping than the foregoing suggestions but no less desirable, is called for by the recent ruling in *State v. English*.[14] Defendant, on trial for murder, offered the voluntary confession of a third party that he had killed deceased. The evidence was excluded, and defendant's exception thereto was overruled on appeal. Mr. Justice Brogden, in delivering the opinion of the court, expresses his personal dissatisfaction with the doctrine which deprives defendant of this important testimony, but concludes that "the trial judge has correctly applied the law as written."

Undoubtedly, the "law as written" calls for the exclusion of the confession in question. Of course, the exception to the hearsay rule

[11] *Id.* at 27.
[12] CONN. GEN. STAT. (1918) §§5735, 5736.
[13] Morgan, *op. cit. supra* note 1, 31.
[14] 201 N. C. 295, 159 S. E. 318 (1931).

for declarations adverse to the interest of the declarant (and consequently especially trustworthy) is well established. But there is engrafted upon this exception the arbitrary limitation that the adverse interest affected must be pecuniary or proprietary.[15] Common sense decrees that a man's neck is more important to him than his material goods and that of the two he will be less likely to endanger the former by the assertion of a falsehood.

Mr. Wigmore, with characteristic eloquence, points out a striking case of the possible injustice of the present rule. He says: "Those who watched (in 1899) with self-righteous indignation the course of proceedings in Captain Dreyfus' trial should remember that, if that trial had occurred in our own courts, the spectacle would have been no less shameful if we, following our supposed precedents, had refused to admit what the French Court never for a moment hesitated to admit,—the authenticated confession of the escaped Major Esterhazy, avowing himself the guilty author of the treason there charged."[16]

It is submitted that the hearsay exception for declarations against interest should be liberalized by the enactment of the following:

Upon the trial of any criminal action, the confession of a person other than the defendant admitting that such other person committed the crime for which the defendant is accused may be received in evidence.

Home Site Statutes

In 1919 the General Assembly of North Carolina enacted what has been called the "Home Site" statute.[1] It was entitled "An act to protect the inchoate right of dower and to prohibit the sale of the home by the husband without the written assent of the wife." The text of the statute reads as follows:

No deed or other conveyance, except to secure purchase money, made by the owner of a home site, which shall include the residence and other buildings, together with the particular lot or tract of land upon which the residence is situate whether actually occupied by said owner or not, shall be valid to pass possession or title during the lifetime of the wife, without the voluntary signature and assent of his wife signified on her private examination according to law: *Provided,* the wife does not commit adultery or has not and does not abandon the husband and live separate and apart from him.

The legislature, in enacting such a statute, apparently was attempting to secure to the wife the enjoyment of the home during

[15] 3 Wigmore, Evidence (2d ed. 1923) §§1455-1477.
[16] *Id.* §1477.
[1] P. L. 1919, c. 123; N. C. Code Ann. (Michie, 1931) §4103.

the joint lives of her husband and herself against the conveyance thereof by the husband without her consent, and to protect her, after his death, from controversies and litigation with respect to the allotment of her dower in her husband's lands of which he was seized during coverture. Prior to this statute the husband could alien his interest in any property he owned, including the home site, without his wife's assent, and could by his deed pass both the title and the possession to his grantee who would take subject only to the wife's dower right.[2] (This statement assumes that the *homestead* has not been allotted. If it has been laid off, a deed executed by the homesteader without the joinder of his wife is invalid and passes no interest.)[3] Except as to the limitation placed by the present statute upon the husband's conveyance of the home site, his power to alienate his interest in his property, without his wife's assent and subject only to her dower right, is as unfettered as ever.

Unfortunately, the home site statute, as passed by the legislature, is couched in such terms as to render its meaning ambiguous and rather uncertain. It places the Supreme Court in a quandary with regard to the proper interpretation and construction of it in all the cases that may arise under it.

In the case of *Boyd v. Brooks*,[4] where for the first time[5] the problem of construing the statute was presented to the court, Chief Justice Stacy contended vigorously in a dissenting opinion that the statute was void because it was incapable of judicial interpretation as to its meaning. The majority of the court, while admitting that there would arise cases in which it would be difficult to construe and interpret the provisions of the statute, held it to be valid. However, the court's construction of the statute was confusing, and by no means clearly interpreted the legislative intent. Judge Stacy pointed out three variant interpretations made by the court of that part of the statute which provides that a conveyance of the home site made by the husband without his wife's assent "is invalid to pass possession or title during the lifetime of the wife." The Chief Justice also indicated a number of other points on which the statute is not clear.

We agree with Judge Stacy that the present home site statute is uncertain and ambiguous in its terminology and we feel that unless

[2] N. C. Code Ann. (Michie, 1931) §4101.

[3] N. C. Const. Art. X, §8; Dalrymple v. Cole, 170 N. C. 102, 86 S. E. 988 (1915).

[4] 197 N. C. 644, 150 S. E. 178 (1929).

[5] The statute had previously been referred to, but not construed, in Johnson v. Leavitt, 188 N. C. 682, 686, 125 S. E. 490, 493 (1924) and Southern State Bank v. Sumner, 188 N. C. 687, 688, 125 S. E. 489 (1924).

it is amended by the legislature it will serve no useful purpose. Let us consider, briefly, some of its defects.

The statute provides that the husband's conveyance of the home site without the wife's assent is invalid to pass either title or possession thereto during the lifetime of the wife. Does this mean that the possession and title of the husband's grantee are postponed literally until the wife's death, regardless of when her husband's death occurs with the consequent accrual of the right of dower consummate? Since, under the statute, both the legal title and right to possession remain in the husband at least until the death of one of the spouses (unless the wife has committed adultery or has abandoned him and is living separate and apart from her husband) what rights, legal or equitable, does the husband's grantee take by the prior delivery of the deed? Assuming that the rights of title and possession accrue to the grantee upon the death of the husband prior to the wife, is the title burdened only by the wife's dower right; or is it subject also to the rights of the heirs and creditors of the husband, or to the rights of a prior grantee of both the husband *and wife?* The statute leaves the legal title of the home site somewhat *in nubibus.* What would be the effect of the acquisition of other "home sites" by the husband? What effect would a prior or subsequent separation or divorce have upon the deed executed by the husband without the wife's proper joinder? "On all these matters the statute is silent, and it would require considerable amendment, by way of judicial legislation, to answer them."[6]

In view of the defective condition of the present statute, we suggest that it be repealed and that another be enacted in lieu thereof which will clarify some of the uncertainties and will more definitely express the legislative intent. We propose a statute similar in form to the following:

A BILL TO BE ENTITLED AN ACT TO REPEAL SECTION 4103, CONSOLIDATED STATUTES OF NORTH CAROLINA, AND TO SUBSTITUTE IN LIEU THEREOF A NEW ACT TO PROTECT INCHOATE RIGHT OF DOWER AND TO QUALIFY THE SALE OF THE HOME SITE BY THE HUSBAND WITHOUT THE WRITTEN ASSENT OF THE WIFE.

The General Assembly of North Carolina do enact:

Section 1. That Section four thousand one hundred and three of the Consolidated Statutes be and the same is hereby repealed and that there be substituted in lieu thereof the following:

[6] Stacy, C. J., in Boyd v. Brooks, 197 N. C. 644, 655, 150 S. E. 178, 184 (1929).

"The word 'home site' as used in this act shall be construed to mean the residence and other buildings together with the particular lot or tract of land upon which the residence is situate, and which is used in connection therewith, whether actually occupied by said owner or not.

Whenever the owner of a home site, as herein defined, makes a deed or other conveyance affecting said home site, except to secure purchase money, without the voluntary signature and assent of his wife, signified on her private examination according to law, the grantee or party to whom said conveyance of the home site shall be made shall get legal title to the estate or interest of the husband therein (subject to the wife's right of dower should she survive her husband) with the right to the possession of said home site deferred until the death of the husband or wife: Provided, the right to possession shall accrue immediately to the grantee or party to whom conveyance of said home site shall have been made upon the death of the wife, the husband surviving; and upon the death of the husband, the wife surviving, subject to the wife's right of dower: Provided, if a decree of divorce absolute shall be granted to either husband or wife, or if the husband and wife shall cease to use the said particular premises as a home site, or if the wife commits adultery, or abandons the husband and lives separate and apart from him, then in any of these events the right to possession shall accrue immediately to the said grantee.

Section 2. That this act shall not apply to pending litigation.

Section 3. That all laws and clauses of laws in conflict with this act are hereby repealed.

It will be noticed that we do not attempt to define what constitutes a home site beyond the generalization found in the old statute. We think this is definite enough since it specifies the particular lot or tract of land upon which the residence is situated. To attempt to define the home site in terms of acres or feet or value would lead to untold complications.

To avoid the uncertainty caused by the present statute with reference to the locus of the title when the husband has attempted to convey the home site without the assent of his wife, we propose to give to the grantee, or the party to whom the conveyance is made, the legal title to the estate of the husband subject to the wife's dower interest should she survive her husband. In this respect the conveyance by the husband of the home site without his wife's consent would be analogous to his conveyance under the present law[7] of any other part of his real property without her consent. We go further, however, in this statute and defer the right to the possession of the said home site in the grantee of the husband until the death of the husband or the wife. This will not only assure the husband and wife of a home *during their joint lives,* but will also tend certainly

[7] N. C. CODE ANN. (Michie, 1931) §4101.

to prevent the purported purchaser thereof from buying at all since he will get only the naked legal title to the land and not the immediate right of possession, which, of course, is the most valuable incident of ownership.

Under our statute, if the wife predeceases the husband, at her death the husband's grantee takes possession immediately; if the husband predeceases the wife, at his death the husband's grantee takes possession subject to the wife's right to have her dower allotted out of the property. Also, since the legal title has already passed to the husband's grantee, the rights of the husband's heirs and creditors will be adjusted in the light of this fact.

It will be noticed, also, that our statute provides for the accrual of the right of possession in the grantee if a divorce absolute be granted to either the husband or the wife. This, for the reason that such a divorce cuts off all marital rights.[8]

We have also included a provision whereby the grantee would get immediate right to possession when the husband and wife cease to use the particular premises as a home site. This is to obviate the possibility of the parties acquiring several home sites with the legal title outstanding in the husband's grantee and the right of possession deferred until the happening of the other contingencies mentioned in our statute.

We believe that the possibility of one's confusing the homestead exemption, as defined by the Constitution, with the home site right preserved by the statute, will be reduced to a minimum under the provisions of the new statute. Of course it is obvious that if the homestead has been already allotted in the tract of land which constitutes the home site, any subsequent conveyance thereof by the husband without the wife's consent will be void for any purpose.[9]

If a home site statute has any place at all on the statute books, we feel that the proposed statute would be preferable to the existing one.

Uniform Sales Act

North Carolina has passed ten of the acts drafted by the Commissioners on Uniform State Laws,[1] including the Negotiable In-

[8] N. C. Code Ann. (Michie, 1931) §2522.

[9] *Supra* note 3.

[1] Handbook of the National Conference of Commissioners on Uniform State Laws (1931) 530. The acts adopted in this state are the Act Regulating Traffic on Highways, Aeronautics Act; Arbitration Act; Bills of Lading Act; Declaratory Judgments Act; Fiduciaries Act; Negotiable Instruments Act; Proof of Statutes Act; Veterans Guardianship Act; and Warehouse Receipts Act.

struments Act, but not the Uniform Sales Act. The first of these two acts has been almost universally adopted in this country. The second is now law in thirty-three American jurisdictions, including the neighboring state of Tennessee, and such important commercial states as New York, Pennsylvania, Massachusetts, Ohio, Illinois, and California.[2] The reasons for the adoption of the two acts are much the same. Like the Instruments Act the Sales Act deals with commercial transactions. It is more important that the law governing such transactions be uniform among the several states than that it reflect local differences of opinion. In the law governing such subjects as the grounds for divorce or the penalties for certain types of crimes there may be room for differences founded on the varying traditions and moral convictions of the divergent populations found in the different states. There is little occasion for any such differences in law dealing with cold, technical business relationships. The reason for local differences is at a minimum; the need for uniformity among the states is, on the other hand, at a maximum. Most of our large industrial and business concerns both sell their products in other states and make purchases in other states. Where the law governing sales is different from state to state a practice which may be perfectly safe at home may plunge such a concern into legal difficulties abroad.

The very fact that thirty-three American jurisdictions have already adopted the Uniform Sales Act is an excellent reason why it should be adopted here. It is the law in most of the states in which our business men make sales or purchases. Confusion and uncertainty as to the law would be reduced if the law which governs their local sales and purchases be made the same as that which already governs most of their transactions of this nature beyond our borders.

Of course, only substantial, not absolute uniformity will be produced even among the states passing the act. Some minor changes in the act have been made by the states adopting it. There are also differences in interpretation and application by the courts.[3] These differences are prevented so far as possible by the specific provision of Section 74: "This act shall be so interpreted and construed, if

[2] HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (1931) 530.

[3] MARIASH, SALES (1930) §2. See Fordham, *The Federal Courts and the Construction of Uniform State Laws* (1929) 7 N. C. L. REV. 423, 431, n. 36 for instances in which the North Carolina Supreme Court has construed the Negotiable Instruments Act contrary to the construction made in the majority of jurisdictions.

possible, as to effectuate its general purpose, to make uniform the laws of those states which enact it."

The adoption of the act affords some prospect of another desirable kind of uniformity; that is, uniformity in the law of sales as applied by the state courts and by the Federal courts having jurisdiction in the state. The Federal courts are likely to treat as binding upon them the decisions of the state supreme court interpreting such an act on the ground that the construction of a state statute by a state court is conclusive. On the other hand, if the law of sales is embodied merely in state decisions as to the common law, the Federal courts are likely to apply their own rules if the cases before them involve matters of "general commercial law."[4]

A number of additional advantages of the Act may be listed. It gathers into one compact, concise code law which otherwise would be found in many cases scattered through the books. It is far more complete than the case law of the state, and settles points which would otherwise remain uncertain until judicial decision. Thus it enables the advisors of business men to keep them clear of legal difficulties. Furthermore, litigation is an expensive lawmaking process.

The number of decisions and of statutes is tremendous, and the rate of increase is growing rapidly. Uniform legislation makes the law more graspable since it makes a considerable bulk of the statutes the same in the various jurisdictions, and affords some assurance that the decisions will follow the same lines.

The law of sales, dealing with formal business transactions, is susceptible of exact statement and codification.[5]

The act is founded on the British Sale of Goods Act,[6] which was introduced to bring harmony into the sales law of the United Kingdom;[7] embodies what competent authorities believed to be the best rules produced by the long experience of the common law; and has

[4] See Fordham, *supra* note 3. The author points out that the circuit court of this circuit in Savings Bank of Richmond v. Nat. Bank of Goldsboro, 3 F. (2d) 970 (C. C. A. 4th, 1925) has decided in favor of conformity to state decisions construing uniform laws, and that the point has not been decided by the United States Supreme Court. No decision has been made on the point by that court since the date of the article.

[5] See Crook, *Uniform State Laws* (1926) 4 TEX. L. REV. 316, for a discussion of the advantages of the Act and of other uniform legislation.

[6] Note (1928) 6 N. C. L. REV. 195, n. 15.

[7] For a comparison of the British Sale of Goods Act and the Uniform Sales Act see Brown, *The Law of Sales in the United States* (1908) 8 COL. L. REV. 82.

been in successful operation in the majority of American jurisdictions.

North Carolina has no statutory codification of its sales law. The Uniform Sales Act, if adopted here, would not, then, be a replacement of any existing code, but largely new legislation. It would not be practicable to set forth here the act in full,[8] nor to outline all the changes it would make in the present common law of the state. Instead there will be presented one sample of a typically statutory feature which the Act would add to our law; two samples of changes which the Act would make in our common law; and one sample of a subject now partially covered by judicial decision which would be more completely dealt with by the Act.

This state now has no statute of frauds with regard to sales of personal property. Apparently there need be no writing,[9] regardless of the size of the sale. The Act provides as follows:

"Section 4.—(Statute of Frauds.) (1) A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upward[10] shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.

(2) The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract or sale be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply.

(3) There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by word or conduct his assent to becoming the owner of those specific goods."

[8] Copies of the Act may be obtained from the National Conference of Commissioners on Uniform State Laws, John H. Voorhees, Secretary, 1140 N. Dearborn St., Chicago, Ill.

[9] See Odum v. Clark, 146 N. C. 544, 60 S. E. 513 (1908).

[10] Fifteen jurisdictions have adopted the $500 limitations; 8 have a $50 limitation; 2 have $100; one, $200; one, $2500; and one no limitation. MARIASH, SALES (1930) §45 n. 4. The British Act provides a limitation of ten pounds. Sale of Goods Act, §4 (56 and 57 Vict. c. 71, §4 [1894]). The statute of frauds provision of the Uniform Sales Act is the one most frequently altered by states adopting the Act. Crook, *supra* note 5.

The reasonableness of requiring a writing, in order to prevent false claims based on alleged oral transactions, where the sale or contract is large and would ordinarily be accompanied by such a formality, is apparent. On the other hand, to require a writing where the sale is a small one and would usually be oral would bring about more fraud than it would prevent.[11] The figure of $500 or more set by the Act is a good place to draw the line.

The exceptions in the Act are apparently designed to dispense with the writing in some cases where the other circumstances demonstrate that the bargain has in truth been made.

An instance in which the Act would change the existing common law of the state has been pointed out, and the change advocated, in a previous volume of this law review.[12] The author shows that when goods are delivered to a carrier by the seller consigned to the buyer the general rule is that title passes to the buyer. If, however, the seller takes the bill of lading to himself or order, he retains title. But under the Uniform Sales Act, where except for the form of the bill of lading the property would have passed to the buyer on shipment of the goods, the seller's property in the goods is deemed to be retained for security purposes only,[13] and the goods are at the buyer's risk from the time of delivery to the carrier.[14] But North Carolina has held that the risk of loss in such a situation is on the seller.[15] The court did not look beyond the fact that the seller had title. The court should have recognized that the seller retained only a security title, and that the loss should have fallen on the buyer as in other cases of retention of security title, for example, conditional sales. The seller's interest is held to obtain his pay. For other purposes the goods are the buyer's.

Another change which the Act would make in North Carolina law is the establishment of the fungible goods doctrine. In a case arising in this jurisdiction seller sold buyer 2,822 bushels of corn out of a mass of 3,134 bushels which seller had stored with *X*, and gave buyer an order on *X* for the corn. Buyer gave seller his bill in payment. The corn remained in storage until it was burned. The 2,822 bushels were never separated from the mass. The court held

[11] Crook, *supra* note 5.
[12] Note (1922) 1 N. C. L. Rev. 43.
[13] Uniform Sales Act §20 (2).
[14] *Id.* §22a.
[15] Penniman v. Winder, 180 N. C. 73, 103 S. E. 908 (1920). See Davis v. Gulley, 188 N. C. 80, 123 S. E. 318 (1924).

that the loss fell on the seller without even discussing the question whether the corn was a fungible good, i.e., a good each unit (bushel) of which is the same as every other unit.[16] The court said, "If the corn is in bulk, so that there is no telling what corn in particular was sold, there the property does not pass, although it was the intention of the parties to consider it as delivered and that the property should pass." The court further said, "It is impossible by an intention to change an *indefinite* into a *definite* thing.—It cannot be told what corn is his (the buyer's) until it is separated."[17] If the goods are fungible, the short answer is, what difference does it make whether it can be told what corn is the buyer's? Any 2,822 bushels are the same as any other 2,822 bushels. The Uniform Sales Act provides:

"In the case of fungible goods, there may be a sale of an undivided share of a specific mass, though the seller purports to sell and the buyer to buy a definite number, weight or measure of the goods in the mass, and though the number, weight or measure of the goods in the mass, is undetermined. By such a sale the buyer becomes owner in common of such a share of the mass as the number, weight or measure bought bears to the number, weight or measure of the mass. If the mass contains less than the number, weight or measure bought, the buyer becomes the owner of the whole mass and the seller is bound to make good the deficiency from similar goods unless a contrary intent appears."[18]

The seller's right of stoppage in transitu affords an example of a subject partially covered by North Carolina decisions, but more completely dealt with in the Act. It provides, in part:

"Section 57.—(Seller may Stop Goods on Buyer's Insolvency.) Subject to the provisions of this act, when the buyer of goods is or becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu; that is to say, he may resume possession of the goods at any time while they are in transit, and he will then become entitled to the same rights in regard to the goods as he would have had if he had never parted with the possession."[19]

[16] See UNIFORM SALES ACT §76.

[17] Waldo v. Belcher, 33 N. C. 609 (1850). See Brazier v. Ansley, 33 N. C. 12 (1850). These cases have never been overruled.

[18] UNIFORM SALES ACT §6 (2). The British Sale of Goods Act has no corresponding section. The English law is probably still the same as that of North Carolina. See Brown, *supra* note 7.

[19] UNIFORM SALES ACT §57.

It further provides, Section 58: "(2) Goods are no longer in transit within the meaning of Section 57—

"(a) If the buyer, or his agent in that behalf, obtains delivery of the goods before their arrival at the appointed destination;

. . . . . .

"(c) If the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf.

. . . . . .

"(4) If part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped in transitu, unless such part delivery has been made under such circumstances as to show an agreement with the buyer to give up possession of the whole of the goods."[20]

These provisions of Section 58 are a few illustrations of specific provisions concerning stoppage in transitu which cover points never decided in North Carolina.[21] The Act contains many other such provisions.

Wage Assignments and Small Loans

The law of North Carolina has dealt sparingly with wage assignments. Two statutes have touched the problem at different points. One, enacted in 1925, prohibits the assignment of claims against the state or any of its departments, bureaus, commissions or institutions except by negotiation of the warrant issued in payment.[1] The other, enacted in 1927, added to the usury law loans "upon any assignment or sale of wages, earned or to be earned."[2] The only Supreme Court decision relating directly to wage assignments held that the claim of a deputy U. S. Marshal for compensation was not a claim against the government but lay against the marshal as an individual, and was therefore assignable.[3]

It is believed that adequate protection of the interests of the public, employees, employers, and mercantile houses and legitimate lendors requires a more definite regulation, by statute, of this type of security.[4] The public is interested in the maintenance of a steady

[20] *Id.* §58.

[21] The only North Carolina cases dealing with stoppage in transitu are Farrell v. Richmond & D. R. R. Co., 102 N. C. 390, 9 S. E. 302 (1889); Williams v. Hodges, 113 N. C. 36, 18 S. E. 83 (1893). See Gwyn v. Richmond & D. R. R. Co., 85 N. C. 429 (1881). None of the matters provided for in the excerpts from §58 of the Act are touched on in these cases.

[1] P. L. 1925, c. 249; N. C. Code (Michie, 1931) §7675 (d).

[2] P. L. 1927, c. 72; N. C. Code (Michie, 1931) §4509.

[3] Wallace v. Douglass, 103 N. C. 19, 9 S. E. 453 (1889).

[4] Havighurst, *Effect of Provision in Employment Contract that Wages Should Not be Assignable Without Employer's Consent* (1932) 26 Ill. L. Rev. 800.

and self reliant group of workers. It is also interested in minimizing, especially in times like these, the dependence upon charitable and relief organizations of the families of men who actually have jobs. The employees, and in particular those with such small incomes that they have no other assets, are interested, in times of emergency, in realizing as much as possible upon their future earning power, free from oppression and subject to protection against their own improvidence. Employers are anxious to avoid extra bookkeeping, the risk of litigation with assignees of the wages of their employees, and the harmful effects upon their labor morale of extravagant indebtedness. Mercantile companies dealing on the instalment plan are interested in a clear delineation of their rights and in holding down the percentage of loss in collections. And everyone is interested in eliminating the oppressive tactics of the unregulated loan shark.

The courts have limited their functions, in the absence of statute, to determining what wage claims are and are not assignable, drawing the line between existing and future employments. Except in granting specific performance of contracts to assign wages to be earned in future employments,[5] they have not taken cognizance of the actual economics of the situations presented by the assignee's enforcement of wage claims. Regulation of the matter by provisions in the contract of employment, mainly predicated upon the protection of the employer against interference with his own convenience,[6] and insisted upon at the cost of the job, has not given the employee a necessary borrowing power. It has remained, therefore, for legislation[7] to attempt to protect all of the various interests involved in wage assignments. Beginning in New England seventy years ago, the first statutes were designed to protect local tradesmen who had furnished groceries to families of transient workers. In the 1890's, the statutes began to protect the worker and his family from the oppression of usurious lendors. Since then, there has been a steady development of more comprehensive and more detailed provisions, each step aimed at evasions practiced by unlicensed loan sharks, until today wage assignments are controlled by statutes in some thirty-nine states, both in the North and in the South.

[5] GALLERT, HILBORN AND MAY, SMALL LOAN LEGISLATION (1932) 182, n. 3.

[6] State Street Furniture Co. v. Armour & Co., 345 Ill. 160, 177 N. E. 702 (1931), commented upon by Havighurst, *supra* note 4.

[7] The best discussion of this legislation will be found in the excellent book referred to *supra* in note 5, at pages 179 to 233.

"The tests of experience and of survival of the fittest seem to recommend that the wage-earner and his family should be protected against improvidence: (1) by limiting the amount that may be taken from any one wage payment, preferably to ten per cent thereof; (2) by requiring the consent of the wife or spouse to any assignment of wages, and (3) by limiting such assignments to debts contracted simultaneously with the delivery thereof. That he should be protected against fraud: (1) by requiring the assignee to deliver to him at the time of the transaction either copies of all papers connected therewith, containing all the details thereof, or a detailed memorandum of the transaction which will bind the assignee, as well as a receipt for all payments, and (2) by requiring that all papers be executed by the assignor in person. And that the assignor should be protected against extortion by (1) limiting the rate of interest or return to the assignee and giving the state full supervisory power over him, in return for which a reasonable rate greater than the usual contract rate of interest in the state should be allowed . . . ; and (2) by inflicting severe civil and criminal penalties in case of disobedience of the law, particularly as regards the rate of interest or return."[8]

The following statute is suggested for adoption in North Carolina:

Section 1. No transaction, wherever made, whereby any payment or loan of three hundred dollars ($300) or less in money, credit, goods, or things in action is made for or upon the security of any assignment or sale of or order for the payment of wages, salary, commissions or other compensation for services, whether earned or to be earned, shall be either valid or enforceable in this state unless

(a) The payment or loan is made at the time of the execution of the assignment or sale; and unless

(b) The principal details of the transaction are reduced to a single writing, with a copy of this Act printed in full upon the reverse side, and signed in person by the borrower or seller and, if married, by both husband and wife. The signature of the other spouse shall not be necessary if the husband and wife have been living separate and apart for a period of at least six months; and unless

(c) Copies of this writing, verified under oath by the lendor or purchaser or by his or its agent shall have been delivered by the lendor or purchaser to the borrower or seller at the time of the transaction and to the employer of the borrower or seller within ten days thereafter; and unless

(d) The interest and charges, however computed, and including the amount by which the compensation assigned exceeds the amount of the payment or

[8] GALLERT, etc., *op. cit. supra* note 5, at page 200.

loan actually made, does not exceed three and one-half per cent (3½%) per month on the unpaid monthly balance.[9]

Section 2. No greater sum than ten per cent of the compensation regularly due to the borrower upon any one pay day shall be collectible from his employer under any such assignment. And no compensation paid by the employer to the borrower or seller shall be deemed the property of the lendor or purchaser.

Section 3. Any transaction and any promise to pay made in connection with any transaction violative of the provisions of this Act shall be void with the result that no principal, interest, charges, or compensation shall be collectible either from the borrower or from his employer thereunder.

Wage assignments, however, constitute only a part of a larger problem, namely, that of the regulation by the state of the business of making small loans. North Carolina has no such regulation. Drafted by a committee of what is now the American Association of Personal Finance Companies (composed of reputable loan brokers licensed in many states under small loan laws) and by the Russell Sage Foundation, a Uniform Small Loan Law, embodying a regulation both of the business of making small loans and of wage assignments taken as security therefor, is, with various modifications of detail, on the statute books of some thirty-six states, including Alabama, Florida, Georgia, Louisiana, Maryland, Missouri, Tennessee, Virginia and West Virginia. The proposed bill quoted just above this paragraph is an adaptation of the provisions of that Uni-

[9] Thus preventing interest charges of between 200% and 500% per annum, now levied by the unregulated loan shark. "It is to be expected that the interest demanded on consumers' loans should be higher than on large loans for purposes of production for the following reasons:

1. The risk is relatively greater. The security is generally of a character not usually acceptable to a commercial bank. The duration of the loan is longer than that ordinarily allowed by commercial banks.

2. The operating expense is high. The amount of each loan is relatively small and must be collected in periodic instalments. The borrower is not known to the money-lender as the borrower is known to the bank; his reliability must be investigated.

3. The profit anticipated is of a different sort. The commercial bank lends the money deposited by its clients, on which it pays no interest or only low interest. The small loan agency can lend only its cash capital. The conventional rate charged by the bank need net only a broker's profit; the rate charged by the money-lender must net a tradesman's profit.

If the ordinary usury law is successful, it prohibits the small loan business; capital will not flow into an enterprise without adequate return. If, on the other hand, the law is not successfully enforced, the money-lender operates at a rate which is high because of the added risk and the social stigma that attach to an illegal undertaking." GALLERT, etc., *op. cit. supra* note 5, at pages 11-12.

A provision like that in §4509 of the present North Carolina Code limiting the rate to 6% is unwise.

form Small Loan Law insofar as they relate to wage assignments. The provisions relating to the regulations of the business are too detailed to be quoted here. Briefly, they require those engaging in the business of making loans of $300 or under to be licensed and supervised by the state commissioner of banks, and forbid the carrying on of that business by others. Full disclosure of facts by application, reports, and inspections is provided for. The lendor is to give bond to abide by the state's regulations. Strict requirements are laid down with which the lendor must comply to obtain and keep a license. The license may be revoked or suspended for cause. The interest rate[10] is limited to three and one-half per cent (3½%) per month on the unpaid monthly balance, the method of its computation is prescribed and limited, and the details of making and repayment of loans are definitely specified. Consent judgments are forbidden. The Act does not apply to banks, savings banks, trust companies, building and loan associations, credit unions or licensed pawnbrokers doing business under the laws of the state or of the United States. If it be contended that the facilities of industrial banks and Morris-plan banks render the Uniform Small Loan Law unnecessary, it could be answered, first, that these banks cannot afford to loan less than approximately $150 to a customer, and, second, that those who patronize loan sharks are usually unable to furnish two-name paper. It is contemplated that a redraft of this Uniform Small Loan Law, revised to fit North Carolina conditions, and with the above wage assignment provisions incorporated therein, will be presented to the next General Assembly.

[10] See note 9, *supra.*