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Notes and Comments

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NOTES AND COMMENTS

Constitutional Law—Taxation—Special Taxes on Liquor Dealers in Dry States.[1]

A federal statute imposes annual taxes on all dealers in alcoholic beverages, at the following rates: retail beer $20, retail liquor $25, wholesale beer $50, wholesale liquor $100.[2] Another federal statute imposes in addition an annual tax of $1,000 on any person carrying on any such business contrary to the laws of any state or municipality.[3] In two cases the plaintiffs, residents of the dry states of Alabama and Georgia respectively, who had paid the taxes imposed under the first statute,[4] asked that defendant revenue officers be enjoined from collecting by distraint the assessment of $1,000 on the ground that it was not a revenue measure, but a penalty to regulate and prohibit liquor dealing in dry territories,[5] a matter beyond the control of Congress.

[1] The question of territorial uniformity is not treated in this note; however, it was held in United States v. Kesterson, 8 F. Supp. 680 (N. D. Okl. 1934) that the statute here considered did meet the constitutional requirement of uniformity. But in Constantine v. United States,—F. (2d)—(C. C. A. 5th, 1935) the court expressed grave doubt, should the act be construed as imposing an excise tax, that it meets the uniformity requirement.

[2] 20 STAT. 333, 342 (1879), 26 U. S. C. A. §205 (1928).

[3] 44 STAT. 95 (1926), 26 U. S. C. A. §206 (1928). This statute provided a special excise tax of $1000 to be paid annually by every person carrying on the business of a "brewer, distiller, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquor, retail dealer in malt liquor, or manufacturer of stills . . . in any State, Territory, or District of the United States contrary to the laws of such State, Territory, or District, or in any place therein in which carrying on such business is prohibited by local or municipal law." The statute does not exempt any person from any "punishment or penalty" provided by local law or authorize them to do business contrary to local law. The act provides further that if any person does business in a dry territory without paying the $1000 tax, he subjects himself to a fine of as much as $1000, or maximum imprisonment of one year, or both. The statute was passed originally in the Revenue Act of 1918 together with the Child Labor Tax and the tax on grain futures, both of which have been declared unconstitutional. The original statute was reënacted in 1921, 1924, and 1926; but as it now stands, it is treated as dating back to the Revenue Act of 1918: United States v. La Franca, 282 U. S. 568, 572, 51 Sup. Ct. 278, 75 L. ed. 551 (1931).

[4] 20 STAT. 333, 342 (1879), 26 U. S. C. A. §205 (1928), *supra* note 2.

[5] After the passage of REVISED STATUTES §3224, 26 U. S. C. A. §154 (1928), prohibiting the enjoining of any tax, grounds which usually give equity jurisdiction, such as resulting multiplicity of suits, or cloud on title, or unconstitutionality were specifically rejected. Dodge v. Osborn, 240 U. S. 118, 36 Sup. Ct. 275, 60 L. ed. 557 (1916). A "penalty" designed to regulate and prohibit, as contradistinguished from a "tax" designed to raise revenue, is not collectible by distraint proceedings, 26 U. S. C. A. §142 (1928), and may be enjoined since it does not come within the prohibition of the injunction statute. Lipke v. Lederer, 259 U. S. 557, 42 Sup. Ct. 549, 66 L. ed. 1061 (1922); Miller, *Restraining the Collection of Federal Taxes and Penalties by Injunctions* (1923) 71 U. PA. L. REV. 318. It was urged in Cleveland v. Davis, 9 F. Supp. 337 (S. D. Ala. 1934) that the bill to enjoin the so-called tax of $1000 on liquor dealers should be dismissed because plaintiff did not come into equity with clean hands since the bill showed he was doing business in the state of Alabama contrary to its laws; the court held that

Held, injunctions granted.[6] In a third case the defendant was convicted in the Northern District of Alabama for selling liquor without having paid the $1,000 tax; on appeal the conviction was reversed on the ground that the statute did not impose a tax, and that it "imposed a penalty as part of the enforcing machinery of the Eighteenth Amendment, and fell with it."[7]

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the government was not in position to raise the question, for by its statutes and regulations it put plaintiff in a position where he was absolutely remedyless unless the court would give him relief.

[6] Cleveland v. Davis, 9 F. Supp. 337 (S. D. Ala. 1934) (The court held the $1000 "tax" was a penalty, declaring: (1) that the exaction could not be a revenue measure because "Congress would have no right to impose two taxes or a double tax on the same business done at the same place," and the twenty-five dollars imposed under the first statute is the value Congress put upon the right to retail liquor everywhere; (2) that the lump sum applicable to the different dealers alike in the dry territories in disregard of the previous classification of the dealers everywhere was penal in its nature; and (3) that this was an attempt to punish for the violation of the local laws, a power which Congress does not have).

Green v. Page, 9 F. Supp. 844 (S. D. Ga. 1935) (This case went further than the preceding case to hold that crime was the basis of the imposition, and that the statute imposing the "tax," which was too high to produce revenue, was unconstitutional. Significance was attached to the fact that a high revenue official had pronounced, in a radio address, that the "tax" was prohibitive; and that the revenue department did not list this so-called tax with the liquor taxes on forms sent to their collectors and did not try to collect it for several months after the repeal of the Eighteenth Amendment).

[7] Constantine v. United States,—F. (2d)—(C. C. A. 5th, 1935) The District Court thought the intention and effect of the statute to impose a tax was plain on its face; that it was valid, and that since defendant failed to pay the $1000 assessment, after having paid the twenty-five dollar tax imposed on *all* retail liquor dealers, he was subject to be prosecuted and convicted under it. The Circuit Court did not "find the statutory intent and effect so plain as that its history and administrative interpretation may not be looked to for the light they throw." In deciding whether the act imposed a tax or a penalty, the court laid down the rule that "the question must be determined from a consideration of its language, its operation and effect, and particularly the consequences which one or the other construction will entail." In holding the imposition a penalty the court declared it was "beyond question that its function and purpose was to penalize and prohibit" on the ground that: (1) the language of the act requiring all types of dealers to pay the same amount instead of, as liquor taxing acts do, "making the exaction fit the business done;" (2) the history of the act from its first introduction Feb. 24, 1919 just prior to the ratification of the Eighteenth Amendment; (3) the fact that the imposition during the existence of the National Prohibition Act and the Eighteenth Amendment was judicially treated as a penalty; (4) the administrative rulings and acts of departmental officers treating it as a penalty; and (5) the failure of Congress to reënact the statute after the repeal of the Eighteenth Amendment. The court concluded that "it was enacted as a penalty, not a tax, and that it may not now, the Amendment which authorized it repealed, be enforced as a penalty."

It was held in United States v. La Franca, 282 U. S. 568, 572, 51 Sup. Ct. 278, 75 L. ed. 551 (1931) that, although the original statute was reënacted in 1921, 1924, and 1926, the $1000 tax was imposed by an act in force prior to the National Prohibition Act and the Eighteenth Amendment. Accepting this as the law, *quaere* as to whether the repeal of the Eighteenth Amendment repealed a statute passed prior to said Amendment? It seems that the better view is that the statute was passed originally as a regulatory or prohibitory measure without constitutional authority; that it was subsequently validated by the Eighteenth Amendment giving Congress the authority to regulate intrastate liquor traffic, and that by the repeal

It may be difficult to determine whether a statute is a regulatory or a revenue measure, yet the consequences of the distinction are material "when one sovereign can impose a tax only, while the power of regulation rests in another."[8] A tax of ten cents a pound on butter substitutes designed to protect the dairy interests,[9] a tax of $300 a pound on the manufacture of opium designed to restrict its manufacture,[10] and a registration tax of one dollar on dispensers of dope for the purpose of regulating its sale,[11] notwithstanding their regulatory character, were held to be taxes because "on their face" they were acts to raise revenue. The courts laid down the rule that they could not go beyond the face of the act to determine the motive or purpose of Congress. This trend toward a system of regulation through the taxing power in derogation of state rights was checked in the *Child Labor Tax Case*.[12] It was there held that a "tax" of ten per cent on the net profits of any-

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of the Eighteenth Amendment the act reverted to its original status and is therefore again unconstitutional.

[8] Bailey v. Drexel Furniture Co., 259 U. S. 20, 38, 42 Sup. Ct. 449, 66 L. ed. 817 (1922). See Note (1926) 10 MINN. L. REV. 511.

[9] McCray v. United States, 195 U. S. 27, 24 Sup. Ct. 769, 49 L. ed. 78 (1904) (There was a tax of only one-fourth of one cent on the plain oleomargarine while the tax on the colored was ten cents a pound. It was well known that this was a regulatory measure but the court confined itself to the "face of the act" to hold it a tax). See Cushman, *The National Police Power Under the Taxing Clause of the Constitution* (1920) 4 MINN. L. REV. 247.

[10] Lee Mow Lin v. United States, 250 Fed. 694 (C. C. A. 8th, 1918) (The statute provided that a "tax of $300 per pound shall be levied and collected upon all opium manufactured in the United States for smoking purposes. . . ." This court followed the test set up in the McCray Case, and stated at page 696, "The law on its face is a law imposing a tax for revenue purposes. The tax imposed of $300 a pound on all opium manufactured for smoking purposes may be so high as to defeat the purpose of raising revenue, but the power to tax, as has been said, is the power to destroy.")

[11] United States v. Doremus, 249 U. S. 86, 39 Sup. Ct. 214, 63 L. ed. 493 (1919) (The court went further in this case than in the previous cases to uphold a detailed system of regulation and control of the drug traffic under 38 STAT. 785 (1914), wherein the court practically admitted the moral purpose of the act, but upheld the government's argument that, on its face, its main purpose was revenue, and since Congress had power to tax, the judiciary would not look beyond the statute. The court was of the opinion that the regulatory provisions of the law could not be said to have no reasonable relation to the collection of the revenue although the tax amounted to only one dollar).

[12] Bailey v. Drexel Furniture Co., 259 U. S. 20, 42 Sup. Ct. 449, 66 L. ed. 817 (1922) (The court found here that the statute did not impose a tax with only an incidental restraint and regulation which a tax must inevitably involve, but that it attempted to regulate by a so-called tax. Chief Justice Taft was fearful of the invasion of state rights: "Grant the validity of the law, and all that Congress would have to do hereafter in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction over which is reserved to the states by the Tenth Amendment to the federal Constitution, would be to enact a detailed regulation of the subject and enforce it with a so-called 'tax' upon departures from it. To give such magic to the word tax would be to break down all constitutional limitations of the power of Congress and completely wipe out the sovereignty of the states." See also Hill v. Wallace, 259 U. S. 44, 42 Sup. Ct. 453, 66 L. ed. 822 (1922).

one who knowingly[13] employed child labor[14] in certain businesses was in fact a penalty to prohibit employment of children, and not a tax for revenue.[15] The court did not purport to reject the test applied in the earlier cases, but did apply it and found on the face of the act features which marked it as a regulatory rather than a revenue measure. Yet the *Child Labor Tax Case* seems inharmonious with the prior decisions although expressly[16] it does not overrule them.[17]

What, then, is the status of the $1,000 liquor tax involved in the principal cases? The special taxes upon the occupation of liquor dealers, which were enacted prior to the Eighteenth Amendment, remained in force[18] but took on a "new character and status under the Eighteenth Amendment;"[19] they were said to be no longer exactions for revenue purposes. They became "penalties or fines imposed for criminal misconduct."[20] The $1,000 assessment was included in the assessment on the defendants in *Thome v. Lynch*,[21] and it was adjudged a penalty on the ground that where an exaction is made by governmental authority upon an occupation which is expressly prohibited as criminal by the

[13] The court stressed the element of scienter, that the employer must know that the child is under age and that he is departing from the prescribed course, else he is not subject to the assessment. The court added, "Scienters are associated with penalties, not with taxes."

[14] The amount was not to be proportioned in any degree to the extent or frequency of the departures, but was, as the court stated at page 36, "to be paid by the employer in full measure whether he employs five hundred children for a year, or employs only one for a day."

[15] The court stated that this case could not be distinguished from Hammer v. Daggenhart, 247 U. S. 251, 38 Sup. Ct. 529, 62 L. ed. 1101 (1918) which held unconstitutional the effort of Congress to regulate the hours of labor of children by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities which they helped to produce. See Powell, *Child Labor, Congress, and the Constitution* (1922) 1 N. C. L. REV. 61.

[16] Bailey v. Drexel Furniture Co., 259 U. S. 20, 40-43, 42 Sup. Ct. 449, 66 L. ed. 817 (1922) (The court discussed and distinguished the preceding cases).

[17] It seems that the court could very well have followed the previous cases to sustain the Child Labor Tax, but it seems to have recognized that Congress was encroaching too much upon the reserved police power of the states and found features on the face of the act sufficient to distinguish this act from those previously sustained and which were almost as far reaching, and passed with the same regulatory intent. See Note (1922) 71 U. PA. L. REV. 54.

[18] La Franca v. United States, 37 F. (2d) 269 (C. C. A. 5th, 1930).

[19] Thome v. Lynch, 269 Fed. 995, 1003 (D. Minn. 1921).

[20] La Franca v. United States, 37 F. (2d) 269, 270 (C. C. A. 5th, 1930).

[21] 269 Fed. 995, 1007 (D. Minn. 1921). Assessment against one defendant:

1.	Taxes on retail liquor dealer, R. S. §3224	$ 25.00
2.	Above tax doubled by §35 of Nat. Prohibition Act	25.00
3.	Penalty of 25% on (1) and (2) under R. S. §3176	12.50
4.	Special tax on liquor dealer under 26 U. S. C. A. §206	1,000.00
5.	Above tax doubled by §35 of Nat. Prohibition Act	1,000.00
6.	Penalty of 25% on (4) and (5) under R. S. §3176	500.00
7.	Special penalty provided by §35 of Nat. Prohi. Act	500.00
		$3,062.50
8.	5% penalty under R. S. §3186	$ 153.13

same governmental authority, the exaction is a penalty unless it is clearly shown to be made for revenue purposes.[22] Section 35 of the National Prohibition Act[23] doubled the tax on the preëxisting dealer's licenses. In reference to that section, the Supreme Court in *United States v. La Franca*[24] declared:

"This, in reality, is but to say that a person who makes an illegal sale shall be liable to pay a 'tax' in double the amount of the tax imposed by preëxisting law for making a legal sale, which existing law makes it impossible to make . . . the exaction here involved is not a true tax, but a penalty involving the idea of punishment for infraction of the law."

The imposition was held a penalty, not because it was doubled, but because the occupation taxed had become unlawful.[25] Although the statute was here considered in connection with the National Prohibition Act, it seems the same thing may be said of the $1,000 "tax" standing alone following the adoption of the Twenty-first Amendment because the sole basis of the assessment is illegality,—the carrying on of a liquor business in violation of the law of a state or municipality. It would seem that the exaction is not a true tax but remains "a penalty involving the idea of punishment for infraction of the law" of dry territories. The *La Franca* Case expressly[26] does not overrule the decision in *United States v. One Ford Coupe Automobile*,[27] which held that the basic production tax on liquor did not become a penalty under the Eighteenth Amendment because the tax had always been applied to

[22] Thome v. Lynch, 269 Fed. 995, 1003 (D. Minn. 1921).

[23] 27 U. S. C. A. §52 (1928).

[24] 282 U. S. 568, 572, 51 Sup. Ct. 278, 75 L. ed. 551 (1931) (Civil suit by the United States to recover for non-payment of the double taxes, including the taxes levied by both statutes considered in the principal cases of this note and the additional penalty of $500 incurred by defendant's liquor sale in violation of the National Prohibition Act. Defendant pleaded in bar his prior conviction in a criminal prosecution for the same illegal sales. *Held,* the "tax" clearly involved the idea of punishment for infraction of law; the suit for these penalties, notwithstanding it was civil in form, amounted to a second punishment for the same acts, and the first prosecution barred the second action).

[25] Thome v. Lynch, 269 Fed. 995 (D. Minn. 1921).

[26] 282 U. S. 568, 572, 51 Sup. Ct. 278, 75 L. ed. 551 (1931).

[27] 272 U. S. 321, 47 Sup. Ct. 278, 71 L. ed. 279 (1926) (This decision was to the effect that the law taxing liquor was not in conflict with the law prohibiting its manufacture because the tax applies to the manufacture the same whether it was legally or illegally made. The court, at page 328, declared, "A tax on intoxicating liquors does not cease to be such because the sovereign has declared that none shall be manufactured, and because the main purpose in retaining the tax is to make law-breaking less profitable. . . . What was sought to be enforced and held to be a penalty in Lipke v. Lederer . . . was the so-called double tax. Here we are dealing with the basic production tax.") Lipke v. Lederer, 259 U. S. 557, 42 Sup. Ct. 549, 66 L. ed. 1061 (1922), referred to in the preceding case, held that the special license taxes doubled by §35 of the National Prohibition Act had become penal in their nature and must be treated as penalties although designated as taxes. The government was enjoined from collecting these doubled taxes by distraint on the ground that they were penalties and not within the scope of the statute preventing the enjoining of any taxes.

all liquor whether manufactured legally or illegally; otherwise any liquor unlawfully manufactured would be exempt from the tax.

No question is raised as to the validity of the tax imposed by the statute levying taxes on *all* dealers in alcoholic beverages,[28] because it was early established by the *License Tax Cases*[29] that a tax applicable everywhere over the country applied to the sale of liquor in the dry as well as the wet states; naturally illegal sales should not be exempt from taxation. The payment of this tax does not authorize the dealing in liquor but simply privileges the licensee from penal interference by the federal government during the period covered by the so-called license.[30] The $1,000 tax is *sui generis*,—the sole basis of the imposition being the violation of local laws, usually criminal offenses. It would seem the intention to derive revenue from taxes on criminal offenses as such should not be imputed to Congress.[31]

It may not be inferred solely from the heavy burden of a tax that a prohibition was intended;[32] but there is an indefinite limit beyond which a so-called tax ripens into a penalty, dependent upon the circumstances in the individual statute.[33] The taxes imposed by the first

[28] 20 STAT. 333, 342 (1879), 26 U. S. C. A. §205 (1928), *supra* note 2.

[29] 72 U. S. 462, 18 L. ed. 497 (1866) (13 STAT. 248 (1864) provided that no person should retail liquor without first obtaining a license from the United States. The statute is vastly different from the $1000 tax statute in question which is dependent upon crime for its application).

[30] North Carolina provides by statute, N. C. CODE ANN. (Michie, 1931) §3379 (1), that proof of possession of a federal license for the sale of liquors is *prima facie* evidence of a violation of the state law prohibiting possession of intoxicating liquors for purpose of sale.

[31] Thome v. Lynch, 269 Fed. 995, 1003 (D. Minn. 1921). It would seem that the imposition of a so-called tax upon any one who commits a specified criminal offence has as its purpose punishment for the commission of the crime. It should not matter that the offense be against the laws of a state instead of the laws of the federal governmnt since the statute has adopted the "criteria of wrongdoing."

[32] Trusler v. Crooks, 269 U. S. 475, 46 Sup. Ct. 165, 70 L. ed. 365 (1926) (In declaring that the federal "tax" of twenty cents per bushel on the dealing in grain "futures" was unconstitutional because regulatory, the court recognized that it could not infer prohibition solely from the heavy burden of the exaction. Nevertheless, in determining that the so-called tax was a penalty, the court attached significance to the fact that there would be a total destruction by the tax of the thing taxed); *cf.* Magnano v. Hamilton, 292 U. S. 40, 54 Sup. Ct. 599, 78 L. ed. 1109 (1934); Fox v. Standard Oil Co., 55 Sup. Ct. 333 (1935).

[33] Bailey v. Drexel Furniture Co., 259 U. S. 20, 38, 42 Sup. Ct. 449, 66 L. ed. 817 (1922) ("Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them, and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty, with the characteristics of regulation and punishment. Such is the case in the law before us. Although Congress does not invalidate the contract of employment, or expressly declare that the employment within the mentioned ages is illegal, it does exhibit its intent practically to achieve the latter result by adopting the criteria of wrongdoing, and imposing its principal consequence on those who transgress its standard.")

statute[34] are graduated as to the several dealers and are not prohibitive. The so-called tax under the second statute[35] is not graduated, but applies alike to the smallest retailer of beer in the tiny hamlet and to the largest wholesaler of liquor with the whole state as his territory; and it is, for most retailers at least, absolutely prohibitive. Furthermore the taxes on the conduct of the business in violation of local laws are not increased proportionately. The retail beer dealer has to pay fifty times as much "tax" as is imposed where his occupation is lawful; while the wholesale liquor dealer has to pay only ten times his original tax. The heaviest burden falls upon the dealer whom Congress considered the least able to pay under the first statute.[36] The great disparity between the tax on legal business and the further sum imposed upon illegal business would seem to show the latter to be penal in its nature although designated a "tax."[37] It seems from the language of

[34] 20 STAT. 333, 342 (1879), 26 U. S. C. A. §205 (1928), *supra* note 2.

[35] 44 STAT. 95 (1926), 26 U. S. C. A. §206 (1928), *supra* note 3.

[36] 20 STAT. 333, 342 (1879), 26 U. S. C. A. §205 (1928), *supra* note 2. As stated in the opening paragraph of this note, Congress placed different valuations on the right to engage in the liquor business; the wholesale liquor dealer was required to pay five times as much for his license as the retail beer dealer paid for his. If Congress intended the levy under the second statute to be a tax, it seems that it would have again recognized the difference in the scope of the several occupations. Considering the two statutes together, the imposition of a lump sum in the second clearly imports that it was designed to penalize the person who conducted his business unlawfully.

[37] Helwig v. United States, 188 U. S. 605, 23 Sup. Ct. 427, 47 L. ed. 614 (1903). This case involved an act imposing an additional "tax" equal to two per cent of the appraised value of imported merchandise for each one per cent that such value exceeded the valuation declared in the entry. The court, in holding that such an imposition was a penalty and not a tax, said at page 613: "Although the sum imposed by undervaluation may be simply described as a 'further sum' or an 'additional duty,' if it is yet so enormously in excess of the greatest amount of regular duty ever imposed upon an article of the same nature, and it is imposed by reason of the action of the importer, such facts clearly show it is a penalty in its intrinsic nature, but describing it as a 'further sum' or 'additional duty,' will not work a statutory alteration of the nature of the imposition, and it will be regarded as a penalty when by its very nature it is a penalty. It is impossible, judging simply from its language, to hold the provision to be other than penal in its nature."

It is submitted that the statement just quoted is applicable to the $1000 liquor tax in several respects, namely: this tax is in effect an "additional sum" imposed upon dealers in dry states; it is "enormously in excess" of that imposed by the first statute everywhere over the country; it is imposed "by reason of the action of the" dealer in violating the local laws; and, in considering the language of the two liquor tax statutes together, the $1000 imposition is "penal in its nature."

It is significant, though a court might not take notice of it, since it does not so appear "on its face," that the $1000 tax was added in 1919 after Congress had passed the Reed Amendment, 39 STAT. 1069 (1917), which made it a federal offense to transport liquor into dry states, and after it had submitted the Eighteenth Amendment for ratification.

The statute imposing the $1000 "tax" was in effect for such a short time before Congress was authorized by the Eighteenth Amendment to regulate the intrastate liquor traffic that the constitutionality of the act had not been tested until recently following the repeal of the Eighteenth Amendment. The courts in Constantine v. United States,—F. (2d)—(C. C. A. 5th, 1935) and Green v. Page, 9 F. Supp.

the act that this additional duty was laid for the purpose of enabling Congress to regulate by taxes the intrastate liquor traffic, a power which was withdrawn by the Twenty-first Amendment.

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Contracts—Adoption of Present and Future Laws therein.

In a mortgage the mortgagor declared "his assent to the passing of a decree by the Circuit Court of Baltimore City . . . for a sale of the property herein mortgaged in accordance with sections 720 to 723 inclusive of chapter 123 of the laws of Maryland passed at the January session of 1898, or any amendments or additions thereto".[1] The mortgagee assigned to the plaintiff part of the mortgage debt, but less than a one-fourth interest therein. Thereafter the legislature passed section 720A,[2] amending section 720 to the effect that during the emergency period holders of less than a one-fourth interest in mortgage debts should not have recourse to the summary remedies given under section 720. Upon subsequent default by the mortgagor, the plaintiff petitioned for relief under section 720, alleging that section 720A was unconstitutional, as impairing his contract rights and violating the equal protection clause. The judgment of the trial court, upholding both contentions of the plaintiff, was affirmed by the Maryland Court of Appeals on the basis of impairment of contract only. On appeal to the Supreme Court of the United States, judgment was reversed on the theory that the amendment did not impair the plaintiff's contract rights.[3]

The Maryland Court of Appeals took the position that assent of the mortgagor to a decree as provided by section 720 "or any amendments or additions thereto", did not amount to an agreement that the proceedings should be governed by "future amendments effective before application for the decree", but that the intention of the parties "embraced only such amendments as had been made prior to the execution of the mortgage". After quoting that argument, Justice McReynolds, for the United States Supreme court, said, "Prior to the mortgage there had been no such amendments, and it cannot be correctly said that the 'intention of the parties embraced only such amendments as had been made prior to the execution of the mortgage'. On the contrary the words

844 (S. D. Ga. 1935) hold directly that the statute is a regulatory measure and unconstitutional.

[1] Md. Laws 1898, c. 123, §720 (providing that where the mortgagor declared his assent to such decree, upon the petition of the mortgagee or his assigns to the named court, that court could issue such decree of sale and prescribe terms for same).

[2] Md. Laws 1933, c. 56, §1.

[3] United States Mortgage Co. v. Matthews, — U. S. —, 55 Sup. Ct. 168, 79 L. Ed. 191 (1934).

employed seem to us to embrace the amendments and additions thereafter made".

Problems connected with relief legislation, which this case suggests, have been adequately discussed elsewhere.[4] The scope of this note will be confined to the examination of questions raised by the express adoption into the mortgage contract of an existing statute and "any amendments or additions thereto".

As to law in existence when the contract is made, the familiar rules may be briefly summarized. When the parties do not refer to it: (a) All valid law applicable becomes a part of the contract;[5] (b) but that is not true of unconstitutional law, even if such law specifically recites that it is a part of contracts[6] to which it is made applicable. When the parties do refer to it: (a) Express inclusion of valid law is unnecessary, since it applies anyway;[7] but express adoption of unconstitutional law makes it a part of the contract, unless it was written therein merely in compliance with mandatory provisions of the law, or unless it is unenforceable because contrary to public policy.[8] (b) An express exclusion of valid law is of no effect if the attempt is to exclude substantive rules of contract,[9] such as those relative to consideration; but if the attempt is to exclude only laws of a non-mandatory nature, such as procedural requirements, the intention of the parties will be given effect.[10] (c) Without going into the implications connected with Conflicts of Laws, it is pertinent to mention here the doctrine that parties may successfully stipulate that their rights are to be governed by the substantive law of another state or nation, unless their purpose is evasion of their own state's laws.[11]

However, as to law enacted after the execution of the contract, some

[4] On Retroactivity and Mortgage Relief Legislation, see: Notes (1934) 47 HARV. L. REV. 299 and 661; (1934) 28 ILL. L. REV. 830; (1934) 32 MICH. L. REV. 545; (1934) 12 N. C. L. REV. 363; (1934) 20 VA. L. REV. 122.

[5] Hood *ex rel* Bank of Summerfield v. Simpson, 206 N. C. 748, 175 S. E. 193 (1934); Knight v. Clinkscales, 51 Okla. 508, 152 Pac. 133 (1915); Lunati v. Progressive Bld. and Loan Assoc., 167 Tenn. 161, 67 S. W. (2nd) 148 (1934).

[6] People v. Choler, 166 N. Y. 1, 59 N. E. 716 (1901); Palmer v. Tingle, 55 Ohio St. 423, 45 N. E. 313 (1896).

[7] Cases cited *supra,* note (5).

[8] People v. Choler, 166 N. Y. 1, 59 N. E. 716 (1901); See: Palmer v. Tingle, 55 Ohio St. 423, 45 N. E. 313 (1896); City of Cleveland v. Clements Bros. Construction Co., 67 Ohio St. 197, 65 N. E. 885 (1902).

[9] See: Miller v. Thompson, 40 Nev. 35, 160 Pac. 775 (1916); Specht v. Collins, 81 Tex. 213, 16 S. W. 934 (1891); (both cases holding that an attempt to exclude from a contract legal impossibility imposed by the law of the state was ineffective); 4 PAGE, CONTRACTS (2nd ed. 1920) §2049.

[10] Symser v. Fair, 73 Kan. 773, 85 Pac. 408 (1906) (allowing waiver of notice otherwise required by law); William Lindeke Land Co. v. Kalman, 190 Minn. 601, 252 N. W. 650 (1934).

[11] Clark v. Gibbs, 69 F. (2d) 364 (C. C. A. 5th, 1934); Castleman v. Canal Bank and Trust Co., — Miss. —, 156 So. 648 (1934).

difficulty is encountered. When the parties do not refer to such law in their agreement, ordinarily the rule is that only remedial measures become a part of their contract,[12] but that substantive enactments will not operate retroactively to impair vested rights,[13] apart from a valid exercise of the police power.[14] But when there is an expression of mutual assent by the parties to the adoption into the contract of an existing statute and all amendments and additions thereto, there arises a problem of construction relative to three specific fact situations:

First, there is the situation wherein amendments exist at the time of the making of the contract, but no further ones are enacted before the suit. Here, obviously the amendments form part of the contract, regardless of the express adoption, because they were valid law when the contract was made.[15]

Second, there is the situation wherein there are amendments existing at the time of making the contract, and also new amendments passed before the suit. Here, if it appeared that the parties knew or thought amendments existed at the time of entering the agreement, it would logically appear that their intention was to include only such additions, since to include the new ones also would make their contractual rights uncertain.[16] It is submitted that in this situation the intention of the parties should be given effect, and the application of the new amendments excluded, in spite of the fact that their expression of incorporation is literally broad enough to cover the new statutes. This contention is based on the rule that though ordinarily contractual rights are determined strictly by expressions of agreement,[17] still, when the expressions of agreement differ from the agreements intended by the parties, courts will often accept the interpretation of the parties, or rescind the contract.[18]

Third, there is the case in which there are no amendments in exis-

[12] Walker v. Whitehead, 83 U. S. 314, 21 L. ed. 357 (1872); Strand v. Griffith, 63 Wash. 334, 115 Pac. 512 (1911); See: 3 JONES, MORTGAGES (8th ed. 1928) §1693.

[13] Barnitz v. Beverly, 163 U. S. 118, 16 Sup. Ct. 1042, 41 L. ed. 93 (1895); Hard v. State *ex rel* Baker, — Ala. —, 154 So. 77 (1934); See: 2 LEWIS AND SUTHERLAND, STATUTORY CONSTRUCTION (2nd ed. 1904) §660; 3 JONES, MORTGAGES (8th ed. 1928) §1694.

[14] See note (4) *supra* on Relief Legislation.

[15] Cases cited *supra* note (5).

[16] In reaching the result of the instant case, the court, by stressing the point that "prior to the mortgage there had been no such amendments", indicates by inference agreement with the contention made in the text.

[17] Robinson v. Bowe, 73 F. (2d) 238 (C. C. A. 8th, 1935); Birk v. Jackson, — Tex. Civ. App. —, 75 S. W. (2d) 918 (1934).

[18] Morgan v. United States, 8 F. Supp. 746 (Ct. Cl. 1934); Cage v. Black, 97 Ark. 613, 134 S. W. 942 (1911); Metropolitan Life Ins. Co. v. Humphrey, 167 Tenn. 421, 70 S. W. (2d) 361 (1934); See: 3 WILLISTON, CONTRACTS (1922) §1541.

tence when the contract is executed but amendments are enacted before the bringing of the action. Here there are three possibilities: (1) If from the circumstances, as unusual particularity of language in the contract, it appeared that the parties knew there were no amendments existing when they entered the agreement, it would seem that they did intend to embrace the amendments enacted thereafter, since that would be the only meaning of the language including amendments.[19] (2) But if there were not convincing indications of such knowledge, it would seem that their intention was not to include future additions to the statute, but only additions they thought might exist when the contract was made, for the same reason as given in the second situation.[20] (3) But even if the parties knew there were no amendments to the statute when the agreement was made, still if the future additions were so sweeping as completely to change their agreement or work forfeitures, it could not logically be said that they intended such amendment to be a part of their contract, because it is not normal for parties to include in their agreements such chances of losing rights for which they bargained.[21] Here again it is believed that the intention of the parties should be given effect, so as to exclude the operation upon their contract of the future statutes, both for the reason given in the second situation, and also because the courts prefer a construction that makes the contract fair and avoids a forfeiture.[22]

In both the second and third situations, it is conceivable that for some reason, such as opposite beliefs as to the existence of amendments at the time of making the contract, one party might intend future additions to apply to the contract, while the other party did not so intend. In this case, aside from possible questions involving misrepresentation resulting in erroneous belief as to the existence of amendments, or negligence of parties in signing express agreements, it is thought that the clause purporting to adopt amendments, in so far as future additions are concerned, should be without effect, because of misunderstanding.[23]

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[19] It seems that the principal case belongs in this category; and hence that it properly represents one of the rare situations in which such expressions are reliable indications of the intent of the parties to make future statutes a part of their contract.

[20] See material cited *supra*, notes 16 and 18.

[21] For primary rules of interpretation, see: 2 WILLISTON, CONTRACTS (1922) §618 ("The writing will be read as a whole; and if possible it will be construed so as to give effect to its general purpose").

[22] Conway Co. v. Chicago, 274 Ill. 369, 113 N. E. 703 (1916); Flieschman v. Furgeson, 223 N. Y. 235, 119 N. E. 400 (1918); Dumphrey v. Commercial Union Assur. Co., 107 Tex. 107, 174 S. W. 814 (1915).

[23] Peerless Co. v. Pacific Crockery Co., 121 Cal. 641, 54 Pac. 101 (1898); Metropolitan Life Ins. Co. v. Humphrey, 167 Tenn. 421, 70 S. W. (2d) 361 (1934); Raffles v. Wichelhaus, 2 H. & C. 906 (Exch. 1864); See: 1 WILLISTON, CONTRACTS (1922) §95.

Criminal Procedure—Special Verdicts.

The defendant was indicted for the violation of an ordinance regulating the operation of taxi cabs, and by amendment at the trial the complete terms of the ordinance were incorporated in the warrant. The jury returned a special verdict finding "that the defendant committed the acts prohibited by the ordinance, as set out in the amendment to the warrant". The trial court ruled that the ordinance was void and adjudged the defendant not guilty. On appeal by the State the judgment was reversed on the ground that the special verdict was fatally defective due to its failure to find the facts essential to an adjudication of the defendant's guilt or innocence.[1]

"A special verdict is that by which the jury find the facts only, leaving the judgment to the court,"[2] and in criminal cases the State may appeal from a judgment of not guilty entered upon a special verdict.[3] It has been declared that the return of a general or a special verdict is optional with the jury,[4] but in the final analysis the trial court has control of the "option," since it may refuse to accept a special verdict and insist that the jury return a general verdict of guilty or not guilty.[5] However, if received, the special verdict is defective if a material finding is omitted,[6] if the findings are contradictory,[7] if the findings are merely a statement of the evidence,[8] or if the form of the verdict is otherwise improper.[9] No judgment may be entered upon a verdict defective in

[1] State v. Gulledge, 207 N. C. 374, 177 S. E. 128 (1934). The trial court based its decision upon the authority of a previous case, State v. Sasseen, 206 N. C. 644, 175 S. E. 142 (1934), in which this ordinance had been declared unconstitutional.

[2] N. C. CODE ANN. (Michie, 1931) §585.

[3] N. C. CODE ANN. (Michie, 1931) §4649. See State v. Lane, 78 N. C. 547 (1878) (rule before the statute was adopted). But *cf.* State v. Padgett, 82 N. C. 544 (1880) (the state cannot appeal from a ruling of the trial court setting aside a special verdict even though the court subsequently enters a judgment of not guilty).

[4] See State v. Moore, 29 N. C. 228 (1847); State v. Holt, 90 N. C. 749, 47 Am. Rep. 544 (1884); State v. Stewart, 91 N. C. 566 (1884). See also the dissent of Connor, J., State v. Leeper, 146 N. C. 655, 674, 61 S. E. 585 (1908) ("Again, it is elementary that a defendant, after joining issue, is entitled to a general verdict unless the jury of their own motion find a special verdict.").

[5] State v. Colonial Club, 154 N. C. 177, 69 S. E. 771 (1910).

[6] State v. Curtis, 71 N. C. 56 (1874); State v. Crump, 104 N. C. 763, 10 S. E. 468 (1889); State v. Bradley, 132 N. C. 1060, 44 S. E. 122 (1903); State v. McCloud, 151 N. C. 730, 66 S. E. 568 (1909); State v. Barber, 180 N. C. 711, 104 S. E. 760 (1920).

"The special verdict must find unequivocally and explicitly all the material facts that might warrant the court in adjudging the guilt or innocence of the defendant." State v. Yount, 110 N. C. 597, 15 S. E. 231 (1892). It is defective if the court must supply a single fact or draw the slightest inference. State v. Bray, 89 N. C. 480 (1883); State v. Allen, 166 N. C. 265, 80 S. E. 1075 (1914).

[7] State v. White Oak River Corp., 111 N. C. 661, 16 S. E. 331 (1892).

[8] State v. Watts, 32 N. C. 369 (1849); State v. Hanner, 143 N. C. 632, 57 S. E. 154 (1907); State v. Fenner, 166 N. C. 247, 80 S. E. 970 (1914).

[9] A special verdict which does not include the following statement, or words

any of these particulars,[10] and the trial court may instruct the jury to retire and correct the error, or it may grant a new trial.[11] If the trial court errs by entering judgment upon a defective verdict the appellate court will order a *venire de novo*,[12] but if the court errs as a matter of law in judging the defendant to be guilty or not guilty the case will be remanded for the entry of the proper adjudication.[13] If the jury returns a special verdict and fails to make a finding concerning one of several offenses charged the court must declare the defendant not guilty on that particular count.[14]

After the trial judge has decided whether the facts found by the special verdict do or do not constitute the offenses charged it is not necessary that he instruct the jury to render a verdict in accordance with his decision, although such a procedure was once required and is not now improper.[15] It is sufficient that the judgment of the court be entered upon the special verdict. Following a plea of not guilty the submission of an agreed statement of facts, even with the consent of the defendant's attorney, in order that the court without a jury might determine the guilt or innocence of the accused is not proper,[16] and the decision of the court is not a special verdict.[17]

In the principal case if the trial court had realized the inadequacy

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to the same effect, is defective in form: "If, upon said facts, the defendant is guilty, the jury then finds him guilty. If, upon said facts he is not guilty, the jury finds him not guilty." State v. Wallace, 25 N. C. 195 (1842); State v. Stewart, 91 N. C. 566 (1884); State v. Divine, 98 N. C. 778, 4 S. E. 477 (1887). But *cf.* State v. Scott, 142 N. C. 602, 55 S. E. 270 (1906).

[10] State v. Lowry, 74 N. C. 121 (1876); State v. Bray, 89 N. C. 480 (1883); State v. McCloud, 151 N. C. 730, 66 S. E. 568 (1909).

[11] State v. Oakley, 103 N. C. 408, 9 S. E. 575 (1889).

[12] State v. Curtis, 71 N. C. 56 (1874); State v. Blue, 84 N. C. 807 (1881); State v. Finlayson, 113 N. C. 628, 18 S. E. 200 (1893); State v. Barber, 180 N. C. 711, 104 S. E. 760 (1920).

[13] State v. Robinson, 116 N. C. 1047, 21 S. E. 701 (1895); State v. Ditmore, 177 N. C. 592, 99 S. E. 368 (1919); State v. Winston, 194 N. C. 243, 139 S. E. 240 (1927).

[14] State v. Fisher, 162 N. C. 550, 77 S. E. 121 (1913).

[15] At one time it was considered a reversible error for the trial judge to fail to instruct the jury to render a verdict in accordance with his decision of the defendant's guilt or innocence. State v. Stewart, 91 N. C. 566 (1884); State v. Morris, 104 N. C. 837, 10 S. E. 454 (1889); State v. Moore, 107 N. C. 770, 12 S. E. 249 (1890). However, this requirement has been overruled as superfluous, and it is now proper for the court to enter the judgment upon the special verdict without requiring a further verdict by the jury. State v. Ewing, 108 N. C. 755, 13 S. E. 10 (1891); State v. Spray, 113 N. C. 686, 18 S. E. 700 (1893); State v. Gillikin, 114 N. C. 832, 19 S. E. 152 (1894).

[16] The submission of an agreed statement of facts for determination by the court sitting without a jury is a violation of the constitutional principle that in a criminal case all facts must be found by the jury. State v. Wells, 142 N. C. 590, 55 S. E. 210 (1906); State v. Allen, 166 N. C. 265, 80 S. E. 1075 (1914); State v. Straughn, 197 N. C. 691, 150 S. E. 330 (1929).

[17] State v. Holt, 90 N. C. 749 (1884). But *cf.* State v. Davis, 159 N. C. 455, 74 S. E. 916 (1912) (for the purpose of the appeal the court treats the submission of an agreed statement of facts as a special verdict).

of the findings as a special verdict it might have considered their substance and very logically have treated them as a general verdict of guilty. In which event the invalidity of the ordinance would have been a proper basis for an arrest of the judgment.[18] However, speaking from authority rather than logic the decision of the principal case is not open to criticism because the finding of facts was palpably insufficient to support any judgment.

As a device the special verdict has its defects and has been subjected to attack.[19] The underlying theory of relieving the jury of applying the law to the facts is good, but the technical requirements of exactness and precision have caused trouble.[20] The favorable features of the special verdict have been retained and the objections countered by the procedure of submitting special interrogatories which the jury must answer in addition to their duty of returning a general verdict. While this development of the special verdict has been used extensively in civil actions, it has met with approval in only a few criminal cases.[21] There is a statute in North Carolina authorizing the use of these special questions in civil cases,[22] but the Supreme Court has indicated an unfortunately hostile attitude toward their employment in criminal prosecutions.[23]

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[18] A convicted defendant may move to arrest judgment if the matter charged is not a criminal offense. State v. Turner, 170 N. C. 701, 86 S. E. 1019 (1915). Certainly the violation of an unconstitutional ordinance after it had been declared void would not be a criminal offense.

The repeal of a statute pending a prosecution for an offense created under it withdraws all authority to pronounce judgment, and a motion in arrest of judgment is proper. State v. Long, 78 N. C. 571 (1878); State v. Williams, 97 N. C. 455, 2 S. E. 55 (1887). By analogy the judicial decision that a statute is unconstitutional should have the same effect as the legislative action of repeal.

[19] Sunderland, *Verdicts, General and Special* (1920) 29 YALE L. J. 253.

[20] "At the bottom the special verdict represents a valuable idea, but as put into operation it has no vitality. To require such excessive exactness of a lay body, or even of lawyers, in the heat of trial, is to demand the impossible. Such requirements cramped the life out of the special verdict." Green, *A New Development in Jury Trial* (1927) 13 A. B. A. J. 715, 716.

There are nearly sixty cases in the North Carolina Reports in which a special verdict has been reversed because of some technical defect. Although it is practically impossible to ascertain the number of cases in which the special verdict has been used successfully, the large number of reversals indicate that the percentage of failure would be high.

[21] State v. McCarty, 210 Iowa 173, 230 N. W. 379 (1930); State v. Wells, 162 S. C. 509, 161 S. E. 177 (1931).

[22] N. C. CODE ANN. (Michie, 1931) §587.

[23] The statute, N. C. CODE ANN. (Michie, 1931) §587, has never been construed as applicable or not applicable to a criminal case, but in one opinion, in speaking of special interrogatories, the court said, "This practice is not to be advised in criminal cases. It will be found inconvenient and, moreover, it tends to impair the undoubted rights of juries to find general verdicts, or at least to discourage its exercise." State v. Belk, 76 N. C. 10 (1877).

Declaratory Judgments—Jurisdiction of the Federal Courts.

The first important question to arise under the recently enacted Federal Declaratory Judgment Act[1] is one of jurisdiction. In the absence of express provision to the contrary,[2] it is generally held that declaratory judgment acts do not enlarge a court's jurisdiction as to parties and subject-matter of a suit.[3] Jurisdiction is a preliminary matter to be determined according to prevailing rules. Thus if parties of diverse citizenship are engaged in an actual controversy over property exceeding $3,000.00 in value, such a case would be within a federal court's jurisdiction[4] for purposes of a declaratory judgment suit. If the value of the property is less than $3,000.00, it would not.[5] Similarly, if jurisdiction hinges on whether a given question is a "federal question," this ought to be decided in the affirmative[6] in order to be eligible for a declaratory judgment.

A more difficult problem is presented when the question is admittedly a "federal question," arising under an Act of Congress, which act, however, prescribes a special procedure. For example, a labor union in Illinois sought a declaration of its rights under the famous Sec. 7 (a) of the N.I.R.A.[7] The N.I.R.A. provides that proceedings to enforce the Act shall be instituted by or under the direction of the Attorney-General.[8] The court dismissed the suit, holding that it was without jurisdiction to entertain a private suit.[9] The court relied upon a similar construction of the Sherman Anti-Trust Law,[10] and upon

[1] 48 STAT. 955, 28 U. S. C. A. §400 (1934).

[2] The major provision of the federal statute merely declares, "In cases of actual controversy the courts of the United States . . . shall have power to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed." Declaratory Judgment Act, *supra* note 1.

[3] BORCHARD, DECLARATORY JUDGMENTS (1934) 135 *et seq.*

[4] 18 STAT. 470 (1875), 28 U. S. C. A. §41 (1927); General Outdoor Advertising Co. v. Williams, 9 F. (2d) 165 (D. Mass. 1925); Home Life Insurance Co. v. Sipp, 11 F. (2d) 474 (C. C. A. 3rd, 1926).

[5] *Supra* note 4.

[6] 18 STAT. 470 (1875), 28 U. S. C. A. §41 (1927); Hays v. Port of Seattle, 251 U. S. 233, 40 Sup. Ct. 125, 64 L. ed. 243 (1920) *affirming* 226 Fed. 287 (1915); Miss. Power & Light Co. v. City of Jackson, 9 F. Supp. 564 (S. D. Miss. 1935) (jurisdiction in suit for declaratory judgment denied because the subject matter of the suit, an intrastate utilities rate controversy, had by statute been withdrawn from federal jurisdiction).

[7] 48 STAT. 198 (1933), 15 U. S. C. A. §707 (a) (1934) (providing for collective bargaining).

[8] 48 STAT. 196 (1933), 15 U. S. C. A. §703 (c) (1934) (". . . It shall be the duty of the several district attorneys of the United States, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain . . . violations.")

[9] Hary v. United Electric Coal Co., 8 F. Supp. 655 (E. D. Ill. 1934).

[10] Paine Lumber Co. v. Neal, 244 U. S. 459, 37 Sup. Ct. 718, 61 L. ed. 1256 (1916) (Petitioner sought to enjoin concerted action to prevent use of nonunion-made materials manufactured in other states. Suit dismissed, Justices McKenna,

the assumption that Congress in enacting the N.I.R.A. must have adopted that result.[11]

A decision to the contrary was made in Michigan. Certain milk distributors who were being harassed by administrative officials for non-compliance with regulations promulgated under the A.A.A. sought a declaratory judgment of their duties. The A.A.A. contains a provision similar to the N. I. R. A. and the Sherman Anti-Trust Law, providing that enforcement proceedings shall be instituted by the Attorney-General.[12] In this case the court, without discussing the question of jurisdiction, ruled that the petitioner was entitled to a declaratory judgment.[13]

These two cases may be distinguished in one respect. In the N.I.R.A. case the petitioner was definitely seeking to determine what rights had affirmatively risen by virtue of the act.[14] In the A.A.A. case the petitioner, far from seeking to discover any right, was interested rather in the negative aspect; that is, whether the law imposed any new duties upon him.[15] However, in substance, the two petitioners were equally interested parties seeking a declaration of legal relations created by a federal statute.

Which case presents the preferable attitude? It is suggested that there is a valid distinction between a suit in which the subject matter and parties could never be within the federal jurisdiction and a suit in which the whole problem hinges on an Act of Congress which admittedly would present a proper federal question if only the suit were instituted by the Attorney-General. Further, it is open to serious question whether a declaration of private rights is within the conception of Congress as to what should constitute enforcement by the government. At the time of the enactment of the Sherman Act, no such question could have arisen for declaratory judgments were then unknown in America. The "New Deal" statutes raise a host of problems the

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Pitney, Van Devanter, and McReynolds dissenting.) The Sherman Anti-Trust Act, 26 STAT. 209 (1890), 15 U. S. C. A. §4 (1927), was amended in 1914, 38 STAT. 737 (1894), 15 U. S. C. A. §4 (1927), extending the right of injunctive relief to private persons threatened with special damage.

[11] Progressive Miners of America v. Peabody Coal Co., 7 F. Supp. 340 (E. D. Ill. 1934). However, in Yarnell v. Hillsborough Packing Co., 70 F. (2d) 435 (C. C. A. 5th, 1934), the court entertained an injunction suit brought by citrus fruit growers against an A. A. A. control board and denied relief on the merits of the case without discussing the question of jurisdiction.

[12] 48 STAT. 37 (1933), 7 U. S. C. A. §610 (h) (1934).

[13] Black v. Little, 8 F. Supp. 867 (E. D. Mich. 1934).

[14] Hary v. United Electric Coal Co., 8 F. Supp. 655 (E. D. Ill. 1934) (petitioner sought to determine what new rights of collective bargaining had been granted to labor under §7 (a) of the N. I. R. A.).

[15] Black v. Little, 8 F. Supp. 867 (E. D. Mich. 1934) (petitioner sought to determine whether the A. A. A. required intrastate milk distributors to conform to licensing requirements of A. A. A. boards.).

solution of which may change the entire course of government and industry. If the N.I.R.A. or the A.A.A. is to be interpreted by any court, that is, if any court ever has jurisdiction, it will be a federal court. No one can be a more interested party than one whom the statutes and codes in express terms purport to affect. It is frequently said that an interest in security, the preservation of social equilibrium, and an avoidance of unnecessary disputes underlie the declaratory judgment acts. Therefore, when jurisdiction hinges on the question as to who may sue under a given statute, it would seem more in keeping with the appropriate social policy to hold a private suit sufficient for a declaratory judgment.

HARRY W. MCGALLIARD.

Evidence—Hearsay—Admissibility of Medical Records.

Plaintiff brought an action under a war risk policy to recover for alleged total disability. The defense introduced evidence of a position of employment formerly held by the plaintiff, and also a notation, made by a physician, since deceased, upon the plaintiff's application for such employment reading as follows, "Showing no disease with heart and lungs o.k. application accepted". This latter was objected to as hearsay. *Held,* that the evidence was properly admitted as part of the *res gestae* of plaintiff's applying for employment.[1]

The most common situation in which the admissibility of medical records has been litigated is that involving medical history charts and other records of hospitals. Such records, when containing communications made by a patient to his physician for the purpose of treatment, are protected by the statutory physician-patient privilege,[2] even though the records be kept pursuant to some legal requirement.[3] However, once

[1] Jennings v. United States, 73 F. (2d) 470 (C. C. A. 5th, 1934).

[2] Massachusetts Mut. Life Ins. Co. v. Board of Trustees of Mich. Asylum for the Insane, 178 Mich. 193, 144 N. W. 538 (1913) (writ of mandamus to permit examination of the records of insane asylum denied); Price v. Standard Life & Acc. Ins. Co., 90 Minn. 264, 95 N. W. 1118 (1903) (hospital records denied admission as evidence); Metropolitan Life Ins. Co. v. Swain, 149 Miss. 455, 115 So. 555, 557 (1928) ("The records consisted of statements of the physician who treated [insured] while a patient in the hospital. The relation of physician and patient exists between the physician who has cause to make an examination and diagnosis of him in a hospital, as well as outside of a hospital, or whether a pay patient or charity patient, and such physician may not deliver his testimony so acquired in open court or have it written down in so-called reports for consideration as evidence in contravention of our privileged communication statute."); Toole v. Franklin Inv. Co., 158 Wash. 696, 291 Pac. 1101 (1930) commented upon (1930) 5 TEMP. L. Q. 300.

It should be noted that the privilege granted by the North Carolina statute is not absolute. N. C. CODE ANN. (Michie, 1931) §1798 contains this proviso: "That the presiding judge of a superior court may compel such a disclosure, if in his opinion it is necessary to a proper administration of justice."

[3] Smart v. Kansas City, 208 Mo. 162, 105 S. W. 709 (1907).

this privilege has been waived, or found to be inapplicable to the case in hand, there are various theories under which hearsay objections to these records may be obviated. Clearly they are permissible for the purpose of refreshing the memory of a witness then in court,[4] or, when failing to thus induce present recollection, may be admitted as past recorded recollection, provided the witness can testify that the record embodies his past perception and was correct when made.[5] Likewise, when the recorder is dead, out of the jurisdiction, or otherwise unavailable, they are usually[6] held to be within the exception to the hearsay rule for entries in the regular course of business.[7] Furthermore, if, as is

[4] Generally see 2 WIGMORE, EVIDENCE (2nd ed. 1923) §§758-765. *Cf.* Levy v. Mott Iron Works, 143 App. Div. 7, 127 N. Y. S. 506 (1911) (physician's testimony based upon hospital records inadmissible where he could not swear that they were correct, and they did not refresh his memory).

[5] *In re* Hock's Will, 74 Misc. Rep. 15, 129 N. Y. S. 196 (1911); *cf.* Barfield v. South Highland Infirmary, 191 Ala. 553, 68 So. 30 (1915) (admitted in malpractice action to show factors considered by defendant in prescribing treatment); Buck v. Brady, 110 Md. 568, 73 Atl. 277 (1909) (admitted in connection with expert opinions). The ordinary rules governing the admissibility of past recorded recollection would, of course, be applicable. These principles are discussed in 2 WIGMORE, EVIDENCE (2nd ed. 1923) §734 *et seq.*

[6] Due, perhaps, to the fact that hospital records were less complete and methodical formerly than now, some of the earlier cases indicate that their use should be limited to that of refreshing the recollection of a witness then in court. Baird v. Reilly, 92 Fed. 884, C. C. A. 2nd, 1899); McMahon v. Bangs, 5 Penn. 178, 62 Atl. 1098 (Del. Super. 1904); National Life & Acc. Ins. Co. v. Cox, 174 Ky. 683, 192 S. W. 636 (1917); Griebel v. Brooklyn Heights R. Co., 95 App. Div. 214, 88 N. Y. S. 767 (1904); Harkness v. Borough of Swissvale, 238 Pa. 544, 86 Atl. 478 (1913); *cf.* Wright v. Upson, 203 Ill. 120, 135 N. E. 209 (1922); Kimber v. Kimber, 317 Ill. 561, 148 N. E. 293 (1925).

[7] Boss v. Illinois Cent. R. R. Co., 221 Ill. App. 504 (1921); Ribas v. Revere Rubber Co., 37 R. I. 189, 91 Atl. 58 (1914); *cf.* Chernov. v. Blakeslee, 95 Conn. 617, 111 Atl. 908 (1921) ("The hospital record, except as to the dates of admission and discharge . . . was not admissible as independent proof of the statements of fact contained therein."); Richmond v. City of Norwich, 96 Conn. 582, 115 Atl. 11 (1921) (hospital bill admitted); Firemen's Ins. Co. v. Seaboard Air Line Ry., 138 N. C. 42, 50 S. E. 452 (1905) (train dispatcher's sheets admitted); Jones v. Atlantic Coast Line R. Co., 148 N. C. 42, 62 S. E. 521 (1908) (freight conductor's report rejected). The persons who made the entries must be unavailable as a witness. Cashin v. New York, N. H. & H. R. Co., 185 Mass. 543, 70 N. E. 930 (1904); Delaney v. Framingham Gas Fuel & Power Co., 202 Mass. 359, 88 N. E. 773 (1909); Osborne v. Grand Trunk Ry. Co., 87 Vt. 104, 88 Atl. 512 (1913). The records must be properly authenticated, etc. Jordan v. Apter, 93 Conn. 302, 105 Atl. 620 (1919); State v. Trimble, 104 Md. 317, 64 Atl. 1026 (1906); Metropolitan Life Ins. Co. v. Dabudka, 232 Mich. 36, 204 N. W. 771 (1925). But, in this connection, it seems that the "ancient documents" rule is applicable. Inhabitants of Townsend v. Inhabitants of Pepperell, 99 Mass. 40 (1868); see *In re* Barney's Will, 185 App. Div. 782, 174 N. Y. S. 242, 254 (1919). The fact that the records are kept upon loose-leaf sheets or filing cards rather than in a bound volume should not affect their admissibility. Matson Navigation Co. v. United Engineering Works, 213 Fed. 293 (C. C. A. 9th, 1914) (workmen's time and material cards admitted); Graham & Corry v. Work, 162 Iowa 383, 141 N. W. 428 (1913) (accounts kept by a system of sales tickets); Armstrong Clothing Co. v. Boggs, 90 Neb. 499, 133 N. W. 1122 (1912) (loose-leaf ledger). But *cf.* Hamilton v. Fusco Const. Co., 87 N. J. L. 62, 94 Atl. 50 (1915). It has been held that opinions contained in such records will be excluded unless they are those of persons who could qualify as expert witnesses. Paxos v. Jarka Corp.,

increasingly the case, the records are kept in accordance with the requirements of a statute[8] or municipal ordinance, under the majority rule they may be admitted as "public documents".[9]

But hospital records are usually composed of entries made by numerous doctors, nurses and interns during the course of the patient's illness. All of these entrants may be available to testify at the trial, and if there is no statute entitling the records to admission under the "public documents" exception, a party may be deprived of valuable evidence unless he sees fit to summon a large portion of the hospital staff as witnesses. The eminent reliability of these records, coupled with the fact that such a course would not only involve increased costs of litigation, but seriously interfere with the hospital's daily routine as well, appears to have formed the basis for a new exception to the hearsay rule in a few jurisdictions. Legislative intervention has solved the problem in some,[10] but in a few others the courts seem to have sponsored the exception. Occasionally this departure has been indicated by direct language in judicial decisions,[11] more often by an obviously liberal attitude on the part of the court.[12]

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314 Pa. 148, 171 Atl. 468 (1934) commented upon (1934) 19 ST. LOUIS L. REV. 255.

[8] For example, Mo. REV. ST. (1929) §9056. Compare N. C. CODE ANN. (Michie, 1931) §7104.

[9] Galli v. Wells, 209 Mo. App. 460, 239 S. W. 894 (1922) (municipal ordinance); Shaw v. American Ins. Union, 33 S. W. (2d) 1052 (Mo. App. 1931) (statute); Dallas Coffee & Tea Co. v. Williams, 45 S. W. (2d) 724 (Tex. Civ. App. 1932) ("bedside notes" in state hospital, statute required records to be kept) commented upon (1932) 10 TEX. L. REV. 510; Hempton v. State, 111 Wis. 127, 86 N. W. 596 (1901); *cf.* Fondi v. Boston Mut. Life Ins. Co., 224 Mass. 6, 112 N. E. 612 (1916) (record of state board of health inadmissible as it was not required by statute); State v. Tarwater, 293 Mo. 273, 239 S. W. 480 (1922); Laird v. Boston & M. R. R., 80 N. H. 58, 114 Atl. 275 (1921) (findings of board of draft examiners inadmissible); Casey v. Kennedy, 52 D. L. R. 326 (New Brunswick, 1920) (medical history sheet made out by medical board which examined plaintiff for military service is admissible). So long as the records are kept pursuant to a legal requirement, it should not be necessary that they be open to public inspection. Casey v. Kennedy, *supra.*

[10] For example, MASS. LAWS ANN. (Michie, 1933) vol. 8, c. 233, §79 provides that certain hospital records shall be admissible in evidence "so far as such records relate to the treatment and medical history of such cases; but nothing therein contained shall be admissible as evidence which has reference to the question of liability." This statute has been before the court in several cases. Raymond v. Flint, 225 Mass. 521, 114 N. E. 811 (1917); Whipple v. Grandchamp, 261 Mass. 40, 158 N. E. 270 (1927); *cf.* Inangelo v. Petterson, 236 Mass. 439, 128 N. E. 713 (1920); Kelley v. Jordan Marsh Co., 278 Mass. 101, 179 N. E. 299 (1932). But *cf.* Commonwealth v. Sacco, 255 Mass. 369, 151 N. E. 839 (1926).

[11] Globe Indemnity Co. v. Reinhart, 152 Md. 439, 137 Atl. 43 (1927); Mack v. Western & Southern Life Ins. Co., 53 S. W. (2d) 1108 (Mo. App. 1932); St. Louis v. Boston & M. R. R., 83 N. H. 538, 145 Atl. 263 (1929). But *cf.* Kirkpatrick v. American Creosoting Co., 225 Mo. App. 438, 37 S. W. (2d) 996 (1931). Professor Wigmore is a staunch advocate of such an exception. See vol. 3 of his work on EVIDENCE (2nd. ed. 1923) §1707.

[12] Lund v. Olson, 182 Minn. 204, 234 N. W. 310 (1931); Smith v. Missouri Ins.

It is to be noted, however, that such an exception, if there be one, should be strictly limited to hospital records. The necessity in that case, *i.e.* the multiplicity of entrants, is not present in the case of the usual physician's office records, notations of physicians examining applicants for employment and the like. Nevertheless, in such cases the other principles mentioned above are applicable,[13] and the evidence in the present case would seem to be admissible as an entry in the regular course of business.[14]

JOEL B. ADAMS.

Federal Procedure—Jurisdiction of Federal Courts—Appointment of Ancillary Receivers.

There is a firmly established rule that a federal court has jurisdiction of an ancillary proceeding, regardless of the citizenship of the parties, the amount in controversy, or any other factor that ordinarily would determine jurisdiction, provided the court had jurisdiction of the principal suit.[1] In the case of *Mitchell v. Maurer*,[2] the Supreme Court of the United States raised two questions regarding the application of the rule, which, it stated, did not appear to have been decided by that Court, and which it declined to decide, as unnecessary to the disposition of the problem presented. First—may the rule ever be applied to a proceeding brought in the federal court of another district? Secondly—if so, is a

Co., 60 S. W. (2d) 730 (Mo. App. 1933); Pickering v. Peskind, 43 Ohio App. 401, 183 N. E. 301 (1930).

[13] Douler v. Prudential Ins. Co. of America, 143 App. Div. 537, 128 N. Y. S. 396 (1911) (records of doctors and nurses admitted as past recorded recollection); Adler v. New York Life Ins. Co., 33 F. (2d) 827 (C. C. A. 8th, 1929) (office record of deceased physician admitted as regular entry); New York Life Ins. Co. v. Bullock, 59 F. (2d) 747 (S. D. Fla. 1932) (physician's medical history card admitted as regular entry); Royal Indemnity Co. v. Industrial Commission, 88 Colo. 113, 293 Pac. 342 (1930) (examining physician's report made in connection with laborer's application for employment admitted as regular entry); Leburn v. Boston & M. R. R., 83 N. H. 293, 142 Atl. 128 (1928) (report of employer's physician who examined plaintiff after former injury admissible as regular entry); *cf.* Simmons v. Means, 8 Smedes & M. 397 (Miss. 1847) (physician's account book admitted); Clark v. Smith, 46 Barb. 30 (N. Y. 1866) (physician's books admissible to show number of calls made by him). A collection of cases bearing on the admissibility of physician's records to show birth, death, etc. will be found in Note L. R. A. 1915 F. 803. There seems to be a split of authority over the admissibility of physicians' death certificates. Cases on this point are collected in Note (1922) 17 A. L. R. 359.

[14] It is not clear, however, upon what principle the evidence was admitted. The following is quoted from the opinion: "The doctor's notations on the card were admissible as a part of the *res gestae* of the plaintiff's application for work. They were shown to have been made under circumstances making it reasonably apparent that they truly represented the facts they purported to set down. They are in effect declarations by the plaintiff himself that he was fit and able to work." 73 F. (2d) at 473.

[1] 2 HUGHES, FEDERAL PROCEDURE (1931) §1192.

[2] 55 Sup. Ct. 162 (1934).

proceeding for the appointment of ancillary receivers in another federal district an ancillary suit within the meaning of the rule?

In the principal case, primary receivers appointed by a state court had petitioned for the appointment of ancillary receivers in the federal district court in another state. The Circuit Court of Appeals[3] had affirmed the appointment made by the District Court, remarking[4] that "an ancillary suit in a federal court does not depend on diverse citizenship". The Supreme Court reversed the decree, on the ground that the requisite diversity of citizenship was lacking,[5] and stated that the position of the Circuit Court was unsound, in view of the fact that the primary appointment was made by a state court. The opinion, however, expressly recognizes the rule as applicable to proceedings in intervention, and to independent suits which are ancillary to an original suit in the same court.[6]

It is to be noted that the questions raised refer to *federal,* not *equity* jurisdiction,[7] and are not coincidental with the question of the power of a receiver to sue out of the district of his appointment.[8]

Statements such as that of the Circuit Court of Appeals apparently find their origin in authority in a *dictum* of the Circuit Court of Appeals in *Bluefields S. S. Co. v. Steele.*[9] That *dictum* clearly answers both questions raised by the Supreme Court in the principal case in the affirmative. The Court said, "While an ancillary proceeding of the kind here considered [a proceeding for the appointment of an ancillary receiver] will be controlled by the court before which it is prosecuted, and in that sense is an independent proceeding, its ultimate object is to aid the purpose of the original suit, and in that sense it is ancillary. Jurisdiction in such an ancillary suit therefore no more depends on diversity of citizenship than it does in a suit ancillary to an original suit pending in the same court." It will be noticed, however, that the Court, during the course of its discussion of this point, cited but one case[10]—one which does not support its proposition.

[3] 69 F. (2d) 233 (C. C. A. 9th, 1934). [4] *Id.* at 238.

[5] One of the three primary receivers was a citizen of Delaware, as was the defendant insurance company. This point was apparently relied upon at no stage of the proceedings, but was looked to by the Supreme Court on its own motion.

[6] 55 Sup. Ct. 162, 164 (1934), citing Cincinnati, etc., R. Co. v. Indianapolis, etc., Ry. Co., 270 U. S. 107, 46 Sup. Ct. 221, 70 L. ed. 490 (1926), and White v. Ewing, 159 U. S. 36, 15 Sup. Ct. 1018, 40 L. ed. 67 (1895).

[7] For cases illustrating aspects of the latter problem, see, for example, Bluefields S. S. Co. v. Steele, 184 Fed. 584 (C. C. A. 3d, 1911); Walker v. U. S. Light & Heating Co., 220 Fed. 393 (S. D. N. Y., 1915); Trustees System Co. of Pa. v. Payne, 65 F. (2d) 103 (C. C. A. 3d, 1933).

[8] See Note (1906) 4 L. R. A. (N. S.) 824; HIGH, RECEIVERS (4th ed. 1910) 271-85.

[9] 184 Fed. 584, 587 (C. C. A. 3d, 1911).

[10] Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 257, 20 Sup. Ct. 347, 44 L. ed. 458 (1900).

On the other side is the decision in *Winter v. Swinburne*.[11] It was there held that a creditors' bill could not be prosecuted in the circuit court in aid of an execution on a money decree recovered in the district court (in the same district) in admiralty, or for enforcement or collection of such a decree, all parties being citizens of the same state. The Court based its conclusion upon the premise that the rule—that "where a bill filed on the equity side of the court is not an original suit, but ancillary and dependent, jurisdiction is maintained without regard to the citizenship of the parties"—applied only where the ancillary bill was filed in the same court. The cases cited by the Court were illustrative of the rule as applied to proceedings which were in fact in the same court, but none of them *required* that the proceedings all be in the same court. The opinion expressly admits that "direct adjudication of the precise question involved is wanting."[12] Since the facts are so clearly distinguishable, we are again left with the bare, abstract proposition that the first question should be answered in the negative.

With such a paucity of judicial expression upon the problem, it remains one requiring all the considerations of logic and policy attending one of first impression. As to the second question, it is difficult to perceive why, if suits by and against a receiver, as such, in the court of his appointment are ancillary,[13] such suits in the court of another district would be any the less so.[14] Further, if, in order to maintain such suits in a foreign district, ancillary appointment is necessary,[15] why is not the petition for such appointment clearly ancillary to the purpose of the principal action? To hold otherwise would be to put a new connotation upon the word itself.[16] To that extent, the Court in the *Bluefields* Case would seem to be upon safe ground.

If the second question is to be answered in the affirmative, no very cogent arguments present themselves for answering the first otherwise, especially where the question involves courts of the same sovereign. An action, having the requisite elements to give a federal district court jurisdiction, can be brought as well in one district as in another, provided, of course, that the improper venue is waived.[17] If that is so, either of—say—two district courts could take jurisdiction of the principal suit, and the one having jurisdiction of the principal suit would

[11] 8 Fed. 49 (C. C. E. D. Wis. 1881).
[12] *Id.* at 52.
[13] HIGH, RECEIVERS (4th ed. 1910) §§60a-b; 2 HUGHES, FEDERAL PROCEDURE (1931) §§1205, 1208.
[14] See Conklin v. U. S. Shipbuilding Co., 123 Fed. 913, 917 (C. C. Me. 1903).
[15] 2 HUGHES, FEDERAL PROCEDURE (1931) §1213.
[16] BLACK, LAW DICTIONARY (3d ed. 1933).
[17] A well-established principle, impliedly recognized by the Court in the principal case, 55 Sup. Ct. 162, 165 (1934). Also, 3 HUGHES, FEDERAL PROCEDURE (1931) §2223.

then have jurisdiction also of the ancillary proceedings, regardless of the usual requisites for federal jurisdiction in the latter. In view of that situation, would it not be a bit incongruous to hold that, if one district court had jurisdiction of the principal suit, the other could not rely upon *that* jurisdiction to sustain the ancillary proceedings brought before it? Policy would seem to demand that the district courts stand in readiness to aid one another without undue formality, and that, as long as the system of equity receiverships exists, it be given every assistance to the speedy and efficient accomplishment of its purpose.[18]

D. W. MARKHAM.

Mortgages—Contract of Assumption—Consideration.

A certain E. C. Vest was heavily indebted to various persons. Some of these creditors held first and second mortgages on two lots owned by him; the rest were unsecured. In order to put this property beyond the reach of the latter group, he conveyed it to his mother-in-law, Mrs. Booth; and, apparently for the purpose of creating the appearance of a sufficient consideration, she assumed the secured debts. She then reconveyed by warranty deed to her daughter, Mrs. Vest. The property having been sold to satisfy a prior lien, the second mortgagee makes claim in the present suit against Mrs. Booth's estate on the agreement of assumption.[1] The West Virginia court *held,* the promise was without consideration and hence unenforceable.[2]

Under this view of the transaction, Mrs. Booth was only a conduit,[3] and the conveyance to her was merely a sham device to get title

[18] Compare §56 of the Judicial Code, 28 U. S. C. A. §117 (1927), and REPORT PAMPHLET No. 1: THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK (1926-27), ANNUAL REPORT OF SPECIAL COMMITTEE ON EQUITY RECEIVERSHIP, 19-31.

[1] The suit was originally brought in chancery by the receiver of a bank, which held an unsecured claim reduced to judgment against Mrs. Booth, to set aside certain conveyances made by her to her children and children-in-law on the grounds that they were voluntary and made without consideration and to defraud and hinder creditors. Pending this suit, Mrs. Booth died. Thereupon, her administrator was substituted, and he made all of her heirs and all persons making claims against the estate parties defendant. The appellee, a second mortgagee of the lots, was made a party as one of the latter group. She answered by setting up the claim against the estate in her cross-bill. Brief of Appellee in the Supreme Court of Appeals of West Virginia in the case of Lawhead v. Booth, 177 S. E. 283 (W. Va. 1935) pages 2-5.

[2] Lawhead v. Booth, 177 S. E. 283 (W. Va. 1935). The sole authority cited by the court was 1 WILLISTON, CONTRACTS (1920) §394, which says that a promisor of a third party beneficiary contract may set up want of consideration as a defense to a suit by the beneficiary.

[3] The so-called "conduit" cases are, however, not in point. They deal with the problem of the attaching of liens upon the property of the conduit. Stow v. Tifft, 15 Johns. 458 (N. Y. 1818) (Does dower attach to the interest of a purchase money mortgagor?); Mills v. Van Voorhies, 20 N. Y. 412 (1859).

seemingly based on good consideration into her daughter.[4] It was never intended that she get the property, and so her promise to assume was not based on any consideration. If this is the proper interpretation to be put on the case, the court is correct; but the parties took an extremely dangerous means to accomplish their end, for there are other equally logical conclusions which may be drawn from the facts.

Thus, the same line of reasoning used in considering the deeds as constituting a single transaction might have led to the opposite result. If Mrs. Booth were a person of some means,[5] her purpose may have been not only "to save" the lots, but also to help the Vests out of a bad financial situation and to give her daughter control of the property. If that were the state of facts, then even a deed made directly to the daughter would furnish sufficient consideration.[6] This is probably consistent with the finding of fraud by the lower court, for the lots would still have been put beyond the immediate reach of creditors without liens. Color is lent this view by the facts that only the mortgage debts were assumed, that the mother-in-law gave a warranty deed, that the deeds were made during the period of economic optimism in April 1928 when the land probably had some speculative value, and that Mrs. Booth did not resist the claim in her lifetime.

There is, however, yet another method by which the estate could have been held, even apart from the question of fraud. The deeds might have been taken at their face value, that is that they were two separate transactions. The mother-in-law, then, got the land in return for her agreement to assume the debts and the fact that she later gave it to her daughter would not alter the already binding contract. The form of the instruments seems to make this the most obvious analysis.[7]

Finally, the court might have reasoned that the plea of no consideration was substantially a setting up by Mrs. Booth of her own fraud. The ostensible consideration for her assumption was the land. To say,

[4] For a discussion of defense available to a grantee of mortgaged realty who assumes the debt see Note (1934) 12 N. C. L. REV. 383. In Boyd v. White, 65 Okla. 141, 164 Pac. 781 (1917), it was held, analogously, that an assumption in a deed which created a resulting trust in the grantor was not based on sufficient consideration.

[5] This assumption is justified from a reading of the appellate briefs submitted in the case and also from correspondence with counsel representing the parties.

[6] Riddle v. Hudson, 68 Okla. 172, 172 Pac. 921 (1919); 1 WILLISTON, CONTRACTS (1920) §102 ("That a detriment suffered by the promisee at the promisor's request is sufficient, though the promisor is not benefited is well settled"); RESTATEMENT, CONTRACTS (1932) §75 (2), ann. (1934) 13 N. C. L. REV. 41.

[7] This point is strongly urged by counsel for appellee in their petition for rehearing dated Nov. 7, 1934. They contend therein that the reconveyance to Mrs. Vest could not have been made at the same time as the original deed since it refers to the volume and page of the Book of Deeds in which that conveyance was recorded and that the second deed was a mere "pocket deed" to be used in case of Mrs. Booth's death.

therefore, that she did not get the land is to say in substance that she held it to keep it away from Vest's creditors or that she immediately conveyed it to her daughter for the same purpose. It is to be doubted whether she should not be estopped to relieve herself of an obligation by the use of such a plea.

The brief of the appellee-mortgagee reveals no less than six conveyances made by or to Mrs. Booth within some three years' time for the sole purpose of defrauding and hindering her own or the Vests' creditors.[8] In such a situation, created by the mother-in-law as well as the Vests and participated in by the whole family, it would seem that any doubts should be resolved in favor of the creditors.

On the court's interpretation of the facts, the result reached in the principal case is defensible. It would not have been under other interpretations. The opinion does not adequately indicate the problems involved.

PETER HAIRSTON.

Mortgages—Fiduciary Relationship of the Parties.

The defendant operated an automobile sales agency. He borrowed money from the plaintiff acceptance company to purchase a car, delivering to the company his promissory note, a mortgage upon, and a bill of sale to, the car, and a trust receipt. That document stated that the defendant would hold the car in storage as the property of the company and would not dispose of it until the note was paid. While in the defendant's display room, the car was sold without the plaintiff's consent. The defendant failed to remit the purchase price; rather he filed a petition in bankruptcy and received his discharge. The acceptance company had been listed as a creditor in the bankruptcy proceedings. Following the filing of the petition, this action for conversion was instituted. The company contended that the defendant's acts came within section 17(4) of the Bankruptcy Act,[a] which provides that discharge in bankruptcy does not release liabilities created by "fraud, embezzlement, misappropriation, or defalcation while acting in any . . . fiduciary capacity." Judgment was rendered for the defendant.[1]

It may be safely stated that the line of cleavage between those who

[8] Brief filed on behalf of Elizabeth E. Keiffer, Appellee, in the Supreme Court of Appeals of West Virginia in the case of Lawhead v. Booth *et al.*, page 8.

[a] 11 U. S. C. A. 35 (4) (1927).

[1] Davis v. Aetna Acceptance Co., U. S., 79 L. ed. 137, 55 Sup. Ct. 151 (1934) (The problem of whether the defendant had wilfully and maliciously injured the plaintiff's property within the terms of subdivision two of the same sections was also presented. The court decided that the evidence showed a technical but not a malicious conversion); *cf. In re* Burchfield, 31 F. (2d) 118 (W. D. N. Y. 1929).

are and who are not in a "fiduciary capacity" within the meaning of the Bankruptcy Act is clear. That term applies only to expressed or technical trusts as contrasted to those situations where the courts imply an obligation from the trust or confidence reposed in the debtor.[2] It is essential that the relationship exist before the debt from which the cause of action arose was contracted.[3] Thus it has been held that the exception stated in the Act does not apply to a broker,[4] a partner,[5] a mortgagor,[6] or, as in the principal case, to one who gave a trust receipt upon a consignment of cars.[7] If a debtor who has posted security to protect his creditor is not a fiduciary within the meaning of the exception, an interesting problem arises in determining just what, if any, is the extent of the confidential relation existing between these parties.

Where the debtor wrongfully disposes of the security, the injured creditor has a right of action against him.[8] He may even follow the proceeds derived from the sale as long as they can be definitely identified and have not passed into the hands of a *bona fide* purchaser for value.[9] Though these remedies are settled, there exists some dispute as to the theory upon which they are based. In a leading case in Maine,[10] it was said that "the Law *imputes* a trust in the mortgagor." That the application of such a doctrine to the problem under discussion is unnecessary is shown by a more recent decision from Wyoming.[11] There the same result was obtained by treating the mortgagor as an agent of the mortgagee. Still other courts have held that while in using the security in the ordinary course of business the mortgagor is no trustee, he is under a duty to preserve that security intact.[12]

Correspondingly, the courts are faced with the same difficulty of nomenclature in determining the reverse situation—the nature of a credi-

[2] Chapman v. Forsythe, 69 U. S. 202, 11 L. ed. 250 (1844); *In re* Harber, 9 F. (2d) 551 (C. C. A. 2d, 1925).

[3] Upshur v. Briscoe, 138 U. S. 365, 11 Sup. Ct. 313, 34 L. ed. 931 (1891); Clair v. Colmes, 245 Mass. 281, 139 N. E. 519 (1923).

[4] *In re Codman*, 284 Fed. 273 (D. Mass. 1922).

[5] *In re Frazzetta*, 1 F. Supp. 122 (W. D. N. Y. 1932); Karger v. Orth, 116 Minn. 124, 133 N. W. 471 (1911).

[6] Bryant v. Kenyon, 127 Mich. 152, 86 N. W. 531 (1901). But *cf.* Johnson v. Worden, 47 Vt. 457 (1874); Darling v. Woodward, 54 Vt. 101 (1881) (where a different result was reached. However, in neither of these cases does it appear within which specific exception to the Bankruptcy Act the defendant was included.)

[7] Bloomingdale v. Dreher, 31 F. (2d) 93 (C. C. A. 3d, 1929).

[8] Davis v. Virginia Ry. & Power Co., 229 Fed. 633 (C. C. A. 4th, 1915).

[9] Columbia Basin Wool Warehouse Co. v. First Nat. Bank of Fairchild, 290 Fed. 260 (D. Idaho 1923); First Nat. Bank of Auburn v. Eastern Trust & Banking Co., 108 Me. 79, 76 Atl. 4 (1911); *cf.* Texas Moline Plow Co. v. Kingman Texas Implement Co., 32 Tex. Civ. App. 343, 80 S. W. 1042 (1904) (where the question of what constitutes identification is discussed).

[10] McLarren v. Brewer, 51 Me. 402 (1863).

[11] Thex v. Shreve, 38 Wyo. 285, 267 Pac. 92 (1928).

[12] Davis v. Virginia Ry. & Power Co., 229 Fed. 633 (C. C. A. 4th, 1915).

tor's duty toward his debtor. Here, however, a greater number of cases have arisen than in the above situation; thus one has the benefit of the added judicial expression. Roughly the decisions may be divided into two classes: Those that arise in states which treat the mortgagee as having a mere lien upon the debtor's property; and those which hold that the giving of a mortgage transfers legal title to the mortgagee. In North Carolina, which is within the latter class, the mortgagee is deemed to hold the legal title in trust for the mortgagor.[13] Except for taking possession of the property and the institution of foreclosure proceedings on default, he is permitted to do no act detrimental to his debtor's interest.[14] Thus it has been held that he may not extinguish the mortgagor's equity of redemption by a purchase of the security at a tax sale,[15] or at a foreclosure of either a prior encumbrance,[16] or his own mortgage.[17] Nor may he contract to acquire his debtor's equity of redemption without assuming the burden of showing that the transaction was fair.[18] At least one other state that accepts the "title" theory is in accord.[19] A different principle is advanced in those states that consider the mortgagor as having legal title to the security,[20] although even here it has been held that the mortgagee is a trustee.[21] That doctrine was aptly stated in a case arising in New York,[22] where it was said

[13] Taylor v. Heggie, 83 N. C. 244 (1880).
[14] McLeod v. Bullard, 86 N. C. 210 (1882).
[15] Cauley v. Sutton, 150 N. C. 327, 64 S. E. 3 (1909).
[16] Taylor v. Heggie, 83 N. C. 244 (1880).
[17] Dawkins v. Patterson, 87 N. C. 384 (1882); Warren v. Susman, 168 N. C. 457, 84 S. E. 760 (1915).
[18] Pritchard v. Smith, 160 N. C. 79, 75 S. E. 803 (1912); Cole v. Boyd, 175 N. C. 555, 95 S. E. 77 (1918).
[19] Stebbins v. Clendenin, 136 Ark. 391, 206 S. W. 681 (1918). *Contra,* Lee v. Fox, 113 Ind. 98, 14 N. E. 889 (1888).
[20] Waterson v. Devoe, 18 Kan. 223 (1877) (where the mortgagee was purchaser at a tax sale); Threlkeld v. Walker, 141 Ky. 737, 133 S. W. 772 (1911) (where the mortgagee became assignee of a purchaser at the foreclosure of a prior lien); Holliday v. McGraw, 101 Misc. Rep. 661, 176 N. Y. S. 661 (1919) (where the mortgagee's agent sold part of the security on credit); Bailey v. Frazier, 62 Ore. 142, 124 Pac. 643 (1912) (where creditor bought debtor's equity of redemption); see Hennequin v. Clews, 111 U. S. 676, 682, 28 L. ed. 565, 4 Sup. Ct. 576, 579 (1883).
[21] Block Motor Co. v. Melia, 247 S. W. 666 (Tex. Civ. App. 1923).
[22] Ten Eyck v. Craig, 62 N. Y. 406, 421 (1875) (continuing on page 422, the court stated the principle to be this: "A mortgagee is often called a trustee, and in a very limited sense this character may be attributed to him. There may be a duty resting upon a mortgagee in possession to discharge a particular claim against the land. If in such a case he omits to do it, and allows the land to be sold on such a claim, and becomes the purchaser, he would hold the title in trust for the mortgagor. A mortgagee in possession is allowed, and it may be his duty to pay the taxes on the land out of the rents and profits. If he suffers the land to be sold for taxes in violation of his duty, and purchases at the sale, he would upon general principles be deemed to hold title as trustee. . . . A mortgagee in possession is bound to account for rents and profits; and in that respect . . . he may be denominated a trustee. But, except in some special sense, that is not the relation he bears to the mortgagor."

that "There is, in truth, no relation analogous to that of trustee and *cestui que trust* between the mortgagor and mortgagee created by the execution of the mortgage. The mortgagee is not a trustee of the legal title because, under our law, he has no title whatever. . . . He may deal with the mortgagor, in respect to the mortgaged estate, upon the same footing as any other person; he may buy in encumbrances for less than their face, and hold them against the mortgagor for the full amount; he may do what any other person may do, and his acts are not subject to impeachment simply because he is mortgagee."

It may be admitted that both parties occupy a fiduciary relationship toward each other in the sense that each owes the duty of using reasonable means to protect the other's interest; yet to make the unqualified statement that one party is a trustee for the other seems to be grafting upon the law of trusts an extension that may prove dangerous. Is it not both safer and more accurate to say that, like principal and agent, the mortgagor and mortgagee are bound to act fairly in respect to each other and to the property in which they are mutually interested? If the terms trustee and *cestui que trust* must be used to denote the relationship, it should always be remembered that they are not being applied in their technical sense.

EMMETT C. WILLIS, JR.

Mortgages—Suretyship where Grantee of Mortgagor Assumes Mortgage Debt.

The maker of a bond secured by a mortgage sold the mortgaged premises, his grantee assuming payment of the bond. Thereafter the mortgagee dealt directly with the grantee, receiving partial payments on the bond, and agreeing to an extension of time thereon without the mortgagor's consent. In a suit on the bond by the mortgagee against the mortgagor, *held,* as between the mortgagee and the mortgagor the character of the latter was not changed from principal to surety by the fact that his grantee "assumed" the mortgage. The mortgagor was therefore not discharged by the extension of time granted without his consent by the mortgagee to the grantee.[1]

Where the grantee "assumes" the mortgage debt it is generally held that he becomes personally liable therefor.[2] As a corollary to this

[1] Commercial National Bank of Charlotte v. Carson, 207 N. C. 495, 177 S. E. 335 (1934). This case proceeds upon the authority of Brown v. Turner, 202 N. C. 227, 162 S. E. 608 (1932), noted in (1932) 11 N. C. L. REV. 96.

[2] Keller v. Ashford, 133 U. S. 610 10 Sup. Ct. 494, 33 L. ed. 667 (1889); 2 JONES, MORTGAGES (8th ed. 1928) §934. This liability may be based upon either of two theories: first, that the mortgagee is subrogated to the rights of the mortgagor; or second, that the mortgagee, as a third party beneficiary, may sue the grantee directly. N. C. now allows a suit under either theory. Rector v. Lyda,

proposition, the great majority of cases hold that while the mortgagor is not released, still if the mortgagee recognizes the liability of the grantee at all, then he must also recognize that the liability of the original mortgagor has become "secondary" and that a suretyship relation has arisen.[3] In jurisdictions adopting this view, if the mortgagee and the grantee deal with the property so as to injure the mortgagor without his consent, he is released wholly[4] or at least *pro tanto* to the extent of his injury.[5] This result is based upon the familiar principle of suretyship that the creditor must do no act without the surety's consent which will impair the rights of the surety upon pain of releasing the latter.[6] Thus, a binding extension of time granted by the mortgagee to the grantee operates to discharge the mortgagor[7] unless the extension is assented to by the mortgagor,[8] or unless the rights of the mortgagee against the mortgagor are expressly reserved.[9] If the mortgage debt is evidenced by a negotiable instrument, then some jurisdictions which adopt the majority view as to the creation of a creditor-surety relationship hold

180 N. C. 577, 105 S. E. 170 (1920); Parlier v. Miller, 186 N. C. 501, 119 S. E. 898 (1923); Keller v. Parrish, 196 N. C. 733, 147 S. E. 9 (1929); Coxe v. Dillard, 197 N. C. 344, 148 S. E. 545 (1929); Notes (1922) 21 A. L. R. 439; (1927) 47 A. L. R. 339.

[3] Union Mut. L. Ins. Co. v. Hanford, 143 U. S. 187 12 Sup. Ct. 437, 36 L. ed. 118 (1891); Smith v. Davis, 67 Colo. 128, 186 Pac. 519 (1920); Blumenthal v. Serota, 129 Me. 188, 151 Atl. 138 (1930); Calvo v. Davies, 73 N. Y. 211 (1878); see White v. Augello, 142 Misc. Rep. 233, 254 N. Y. S. 228 (1931).

[4] Blumenthal v. Serota, 129 Me. 188, 151 Atl. 138 (1930); United States Bldg. and L. Asso. v. Burns, 90 Mont. 402, 4 P. (2d) 703 (1931); Bank of Rochester v. Scanlon, 146 Misc. Rep. 695, 262 N. Y. S. 790 (1933) (three day extension of time released mortgagor *in toto* from liability on a bond for $170,000).

[5] Mutual Benefit Life Ins. Co. v. Lindley, 183 N. E. 127 (Ind. App. 1932); Travers v. Dorr, 60 Minn. 173, 62 N. W. 269 (1895); Zastrow v. Knight, 56 S. D. 554, 229 N. W. 925 (1930).

[6] Miller v. Stewart, 22 U. S. 680, 6 L. ed. 189 (1824). In Rees v. Berrington, 2 Ves. Jr. 540 (Ch. 1795) the principle is stated thus: "It is the clearest and most evident equity not to carry on any transaction without the privity of him (the surety) who must necessarily have a concern in every transaction with the principal debtor." 1 BRANDT, SURETYSHIP (3rd ed. 1905) §376; 2 WILLISTON, CONTRACTS (1920) §1222.

[7] Fischer v. Boller, 227 Mo. App. 52, 51 S. W. (2d) 141 (1932); Bank of Rochester v. Scanlon, 146 Misc. Rep. 695, 262 N. Y. S. 790 (1933); Wright v. Bank of Chattanooga, 166 Tenn. 4, 57 S. W. (2d) 800 (1933); Gillman v. Purdy, 167 Wash. 659, 9 P. (2d) 1092 (1932); see Hamilton Co. v. Rosen, 53 R. I. 346, 166 Atl. 691 (1933). To effect a discharge of the mortgagor, he must show that at the time of granting the extension the mortgagee had actual knowledge that the grantee had assumed the mortgage. Mississippi Valley Trust Co. v. Bussey, 49 F. (2d) 881 (C. C. A. 5th, 1931); Chilton v. Brooks, 72 Md. 554, 20 Atl. 125 (1890); Erickson v. Todd, 252 N. W. 879 (S. D. 1934).

[8] Burden of showing assent by the mortgagor rests on the mortgagee. Burgess v. Ohio Nat. Life Ins. Co., 48 Ga. App. 260, 172 S. E. 676 (1934).

[9] A reservation of rights against the surety is effectual to prevent his discharge because it is construed as preserving to him all his rights against the principal obligor unimpaired. Hodges v. Elyton Land Co., 109 Ala. 617, 20 So. 23 (1895); Meredith v. Dibrell, 127 Tenn. 387, 155 S. W. 163 (1913).

that the provisions of the N. I. L. apply so as to prevent the mortgagor maker of the instrument from being discharged.[10]

However, a few courts follow the view of the principal case and hold that as between the mortgagee and the mortgagor no creditor-surety relationship arises.[11] The logical result of this holding is that no subsequent dealings between the mortgagee and the grantee, such as an extension of time on the debt, can have the effect of discharging the mortgagor.[12]

In the principal case the court intimated that its judgment did not preclude the mortgagor, who had been compelled to pay, from recovering over against the grantee. If this means that the mortgagor may hold the grantee immediately and before the extension of time has expired,[13] then obviously the grantee has been cut out of the benefit of the extension agreement for which he has given valuable consideration.[14] On the other hand, if the mortgagor may not recover over against the grantee until after the extension of time has expired, then he is being held to an extension agreement to which he never assented and to which he was not even a party;[15] meanwhile the grantee may have gone bank-

[10] Peter v. Finzer, 116 Neb. 380, 217 N. W. 612 (1928) (maker of note who was by its terms unconditionally bound to pay was primarily liable under section 192 of N. I. L. Section 119, which provides for discharge of a negotiable instrument, and so for discharge of one primarily liable thereon, does not provide for any discharge by an extension of time); Washer v. Tontar, 128 Ohio St. 111, 190 N. E. 231 (1934); Sloan v. Gates, 166 Tenn. 446, 62 S. W. (2d) 52 (1933); Atlantic Life Ins. Co. v. Carter, 165 Tenn. 628, 57 S. W. (2d) 449 (1933); Continental Mut. Sav. Bank v. Elliott, 166 Wash. 283, 6 P. (2d) 638 (1932); *cf.* Finzer v. Peter, 120 Neb. 389, 232 N. W. 762 (1930); Wright v. Bank of Chattanooga, 166 Tenn. 4, 57 S. W. (2d) 800 (1933). *Contra:* Stapler v. Anderson, 177 Ga. 434, 170 S. E. 498 (1933); Burgess v. Ohio Nat. Life Ins. Co., 48 Ga. App. 260, 172 S. E. 676 (1934); Prudential Ins. Co. of America v. Bass, 257 Ill. 72, 191 N. E. 284 (1934); Mutual Benefit Life Ins. Co. v. Lindley, 183 N. E. 127 (Ind. App. 1932); Jefferson County Bank v. Erickson, 188 Minn. 354, 247 N. W. 245 (1933); Zastrow v. Knight, 56 S. D. 554, 229 N. W. 925 (1930). Blocki, *Is Mortgagor's Liability Extinguished by Extension of Time of Payment Without His Consent?* (1932) 11 CHICAGO-KENT REV. 1; Note (1933) 19 VA. L. REV. 618.

[11] Pfeifer v. W. B. Worthen Co., 74 S. W. (2d) 220 (Ark. 1934); Boardman v. Larrabee, 51 Conn. 39 (1883); Iowa Title and Loan Co. v. Clark Bros., 209 Iowa 169, 224 N. W. 774 (1929); Bradstreet v. Gill, 22 N. M. 202, 160 Pac. 354 (1916).

[12] Wolfe v. Murphy, 47 App. D. C. 296 (1918); Denison University v. Manning, 65 Ohio St. 138, 61 N. E. 706 (1901); Brecht v. Bialas, 19 Pa. Dist. R. 664 (1910).

[13] That the mortgagor may sue immediately, see: Iowa Title and Loan Co. v. Clark Bros., 209 Iowa 169, 224 N. W. 774 (1929); Denison University v. Manning, 65 Ohio St. 138, 61 N. E. 706 (1901).

[14] If there had been no consideration for the extension agreement, then the mortgagor would not be released at all, since in no jurisdiction does mere indulgence given by the mortgagee to the purchaser have this effect. Boardman v. Larrabee, 51 Conn. 39 (1883); Olmstead v. Latimer, 158 N. Y. 313, 53 N. E. 5 (1899); Erickson v. Todd, 252 N. W. 879 (S. D. 1934); Gillman v. Purdy, 167 Wash. 659, 9 P. (2d) 1092 (1932).

[15] No case has been found in which the mortgagor was held liable and at the same time was denied immediate rights over against his grantee. It is to be noted,

rupt, rendering the delayed remedy ineffectual. Thus, whatever happens, one or the other party must lose a valuable right. This dilemma seems unavoidable under the holding of the principal case that no surety relationship arises. In view of this difficulty, and since there is North Carolina authority flatly *contra* to the principal case,[16] it is suggested that North Carolina should reverse its present position on this point so as to follow the majority view and its own previous holding.[17]

F. M. PARKER.

Negligence—Infant Trespassers—the Attractive Nuisance Doctrine.

The plaintiff's eight year old girl wandered onto a cement walk across defendant's bridge and, while dropping rocks from a pile of crushed stone on the bridge into the water below, fell off and was drowned. Several small children lived in a mill settlement nearby. A nonsuit was affirmed on the grounds that infants are as essentially trespassers as adults and may not recover under the attractive nuisance doctrine unless the facts are sufficient to impose the duty of anticipation or prevision.[1]

But in another case decided the same day the court held that the defendant should reasonably have anticipated that small children would be attracted to and injured by his property where the plaintiff's two infant children were drowned in an unguarded, abandoned cistern or reservoir around and in which children had been accustomed to play and fish for a number of years.[2]

The doctrine of attractive nuisance is an exception to the general rule that a landowner is not responsible to a trespasser for a condition

however, that the majority view, according to which the mortgagor is released from liability to the mortgagee, goes upon the assumption that by granting the extension of time the mortgagee has put it out of the power of the mortgagor to have the same remedy over he would have had but for such extension. See Mississippi Valley Trust Co. v. Bussey, 49 F. (2d) 881 (C. C. A. 5th, 1931).

[16] Hamilton v. Benton, 180 N. C. 79, 104 S. E. 78 (1920) (while a chattel mortgage was involved here, no reason is seen why this should justify a distinction between this and the principal case. However, the result of this case was also placed upon another ground.)

[17] This might be effected by a statute somewhat as follows: Whenever any real or personal property incumbered by a mortgage shall be conveyed subject to such mortgage, and in such conveyance there shall be a provision that the grantee shall assume and pay such incumbrance, if the holder of the mortgage thereafter recognizes the liability of the grantee to him, by accepting payments on the mortgage debt or otherwise, then, as against such holder of the mortgage, the grantee shall be considered the principal debtor and the mortgagor or intermediate grantee who may likewise have assumed the mortgage shall be considered a surety.

[1] Boyd v. Atlanta S. C. A. L. R. Co., 207 N. C. 390, 177 S. E. 1 (1934).

[2] Brannon v. Sprinkle, 207 N. C. 398, 177 S. E. 114 (1934).

of the premises.[3] Liability has been based on two theories:[4] (1) general negligence of the landowner where the attractive instrumentality is so dangerous as to impose the duty of anticipating some injury from leaving it unguarded[5] (all the North Carolina cases lie in this group);[6] and (2) an invitation to enter the premises implied from the allurement.[7] Several requirements are necessary to establish liability under this latter theory: (a) the object must be unusually attractive to children of tender years;[8] (b) the thing must be on defendant's own land;[9]

[3] Loftus v. Dehail, 133 Cal. 214, 65 Pac. 379 (1901); Kramer v. Southern R. Co., 127 N. C. 328, 37 S. E. 468 (1900); COOLEY, TORTS (3rd ed. 1906) 1258, 1268.

[4] Some jurisdictions have refused, however, to recognize the doctrine at all: Savannah, F. & W. R. Co. v. Beavers, 113 Ga. 398, 39 S. E. 82 (901); Kidder v. Sadler, 117 Me. 194, 103 Atl. 159 (1918); State v. Machen, 164 Md. 579, 165 Atl. 695 (1933); Ryan v. Tower, 128 Mich. 463, 87 N. W. 644 (1901); Frost v. Eastern R. R., 64 N. H. 220, 9 Atl. 790 (1887); Hockstein v. Congregation Talmud Torah Sons etc., 144 Misc. Rep. 207, 258 N. Y. S. 479 (1932); Filer v. McNair, 158 Va. 88, 163 S. E. 335 (1932); Addie & Sons v. Dumbreck, (1929) A. C. 358.

[5] Sioux City S. Pac. R. R. Co. v. Stout, 84 U. S. 657, 21 L. ed. 745 (1873); Rataz v. N. Y. Eskimo Pie Corp., 73 F. (2d) 184 (C. C. A. 3rd, 1934); Clark v. Pacific Gas & Electric Co., 118 Cal. App. 344, 5 P. (2d) 58 (1931); Stark v. Holtzclaw, 90 Fla. 207, 105 So. 330 (1925); Peters v. Pierce, 146 La. 902, 84 So. 198 (1920); Ann Arbor R. Co. v. King, 68 Ohio St. 210, 67 N. E. 479 (1903); Gilmartin v. City of Philadelphia, 201 Pa. 518, 51 Atl. 312 (1902); Whirley v. Whiteman, 38 Tenn. 610 (1858); RESTATEMENT, TORTS (1934) §330 comments to (a), (b).

[6] Kramer v. Southern R. Co., 127 N. C. 328, 37 S. E. 468 (1900); Briscoe v. Henderson Lighting & Power Co., 148 N. C. 396, 62 S. E. 600 (1908); Ferrell v. Dixie Cotton Mills, 157 N. C. 528, 73 S. E. 142 (1911); Starling v. Selma Cotton Mills, 168 N. C. 229, 84 S. E. 388 (1915); Comer v. Winston-Salem, 178 N. C. 383, 100 S. E. 619 (1919).

[7] United Zinc & Chemical Co. v. Britt, 258 U. S. 268, 42 Sup. Ct. 299, 66 L. ed. 615 (1922); Best v. Dist. of Columbia, 291 U. S. 411, 54 Sup. Ct. 487, 78 L. ed. 882 (1934); Arkansas Power & Light Co. v. Kilpatrick, 185 Ark. 678, 49 S. W. (2d) 353 (1932); Howard v. City of Rockford, 270 Ill. App. 155, (1933); Biggs v. Consolidated Barbwire Co., 60 Kan. 217, 56 Pac. 4 (1899).

[8] Clark v. Pacific Gas & Electric Co., 114 Cal. App. 344, 5 P. (2d) 58 (1931); Peters v. Pearce, 146 La. 902, 84 So. 198 (1920); Walsh v. Fitchburg R. Co., 145 N. Y. 301, 39 N. E. 1068 (1895); Flippen Prather Realty Co. v. Mather, 207 S. W. 121 (Tex. Civ. App., 1918). The children must be of tender years, but no age has been determined at which the court can say as a matter of law that the doctrine is applicable; Central of Ga. R. R. v. Robins, 209 Ala. 6, 95 So. 367 (1923). Various courts have held that the child must be: (a) below the age of puberty, Central of Ga. R. R. v. Robins, *supra:* (b) below the age of 14, Lipscomb v. Cincinnati, N. & C. St. R. Co., 238 Ky. 572, 39 S. W. (2d) 465 (1931); (c) of such a tender age as not to appreciate the danger of her acts, Loftus v. Dehail, 133 Cal. 214, 65 Pac. 379 (1901); or that it is a question for the jury to decide whether the doctrine applies to the individual child; Biggs v. Consolidated Barbwire Co., 60 Kan. 217, 56 Pac. 4 (1899).

[9] Kramer v. Southern R. Co., 127 N. C. 328, 37 S. E. 468 (1900); RESTATEMENT, TORTS (1934) §339. The attractive nuisance doctrine was developed essentially to protect children *trespassing* on the *property* of another, but the doctrine has, in some cases, been extended to cover any object which might reasonably be expected to lure infants to their injury. See Rataz v. N. Y. Eskimo Pie Corp., 73 F. (2d) 184 (C. C. A. 3rd., 1934) (playing with dry ice); Kansas City, Ft., S. & M. R. Co. v. Matson, 68 Kan. 815, 75 Pac. 503 (1904); Harper v. Kapp, 24 Ky. Law Rep. 2342, 73 S. W. 1127 (1903); Ramsey v. Nat. Contracting Co., 49

(c) the children must be lured onto the land by the dangerous instrumentality itself;[10] (d) the danger must be latent;[11] (e) it must be practical to guard the thing without great expense or inconvenience to the owner;[12] (f) the condition must be artificial in some jurisdictions, and a few have refused to apply the doctrine to any body of water, whether artificial or not.[13]

It seems obvious that the idea of implied invitation is based on a fiction, both of law and of fact, and a fiction which cannot be given its full logical extension.[14] The rule announced by the North Carolina court in the instant cases is sound. If liability of the owner is based on common law principles of negligence, that is, reasonable foreseeability, all the characteristics of the attractive nuisance doctrine are retained[15] with a flexibility which makes it possible to shape the rule to fit the facts of each case, a necessity in the field of torts.[16] That may well be illustrated by the results of the principal cases. In one there was an unguarded reservoir, in the other an unguarded cement walk over a river; in both the owner knew or had reason to know that children would be attracted to his premises, and might reasonably have been expected to anticipate the accident. It is difficult to distinguish the

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App. Div. 11, 63 N. Y. S. 286 (1900); Campbell v. Model Steam Laundry, 190 N. C. 649, 130 S. E. 638 (1925).

[10] United Zinc & Chemical Co. v. Britt, 258 U. S. 268, 42 Sup. Ct. 299, 66 L. ed. 615 (1922); Salt River Valley Water Users' Ass'n v. Compton, 39 Ariz. 491, 8 P. (2d) 249 (1932); Payne v. Utah-Idaho Sugar Co., 52 Utah 598, 221 Pac. 568 (1923). But see Arkansas Power & Light Co., 185 Ark. 678, 49 S. W. (2d) 353 (1932) (a dangerous situation in close proximity to an attractive situation must be considered together as forming a dangerous and attractive whole).

[11] Loftus v. Dehail, 133 Cal. 214, 65 Pac. 379 (1901); Clark v. Pacific Gas & Electric Co., 118 Cal. App. 344, 5 P. (2d) 58 (1931); McCall v. McCallie, 48 Ga. App. 99, 171 S. E. 843 (1933); Erickson v. Great Northern Ry. Co., 82 Minn. 60, 84 N. W. 462 (1900). In Coleman v. Robert Graves Co., 39 Misc. Rep. 85, 78 N. Y. S. 893 (1902), it was held that the object must be virtually a trap, but ordinarily it seems to be sufficient if the danger is not common and well-known. However, the owner is not bound to anticipate danger from the unusual or improper use of an object safe in itself; Gilmartin v. City of Philadelphia, 201 Pa. 518, 51 Atl. 312 (1902).

[12] See *infra* note 18.

[13] McCall v. McCallie, 48 Ga. App. 99, 171 S. E. 843 (1916); Atlantic Coast Line R. Co. v. O'Neal, 178 S. E. 451 (Ga. 1934); Gurley v. Southern Power Co., 172 N. C. 690, 90 S. E. 943 (1916), but in this case the court apparently was influenced by the fact that the defendant's agent, secretly and against his instructions, operated a tank on the property as a swimming pool; Fiel v. City of Racine, 203 Wis. 149, 233 N. W. 611 (1930); RESTATEMENT, TORTS (1934) §339.

[14] Wilson, *Limitations on the Attractive Nuisance Doctrine* (1922) 1 N. C. L. REV. 162.

[15] It has repeatedly been held that adults are bound to anticipate "childish instincts". Howard v. City of Rockford, 270 Ill. App. 155 (1933); Powers v. Harlow, 53 Mich. 507, 19 N. W. 257 (1884); Campbell v. Model Steam Laundry, 190 N. C. 649, 130 S. E. 638 (1925); Whirley v. Whiteman, 38 Tenn. 610 (1858); RESTATEMENT, TORTS (1934) §290.

[16] Wilson, *Limitations on the Attractive Nuisance Doctrine* (1922) 1. N. C. L. REV. 162.

cases on the facts, yet the court reaches opposite results in each and both are amply supported by authority.[17] However, the cases may be reconciled by a theory which does not appear in the opinions. In the *Brannon* case, the reservoir was useless and abandoned, and could easily have been made safe for children. In the *Boyd* case, the property in question served a very useful purpose which might have been wholly or partly destroyed had the decision of the court been any different, since children could hardly be kept off the bridge without a complete barricade of it. At any rate, the safe-guarding of the premises would have been attended with great expense and inconvenience to the owner, and every railroad bridge in North Carolina which is near a small settlement would necessarily have to be altered. Thus the court appears to have invoked public policy in balancing the utility of the object with the danger to trespassing children.[18] It is submitted that the two principal cases, though aparently conflicting, are correctly decided.

MAURICE V. BARNHILL, JR.

Nonsuit—Waiver of Motion by Cross-Examination of Codefendant.

In a damage suit against the driver of an automobile and the driver's employer, both defendants moved for nonsuit at the close of the plaintiff's evidence and entered exceptions to the order overruling their motions. The driver then introduced evidence including his own testimony. The employer cross-examined the driver and witnesses introduced by him, but offered no evidence himself. Plaintiff offered

[17] Liability was established under substantially the same circumstances in the following: Price v. Atchison Water Co., 58 Kan. 551, 50 Pac. 450 (1897); Howard v. City of Rockford, 270 Ill. App. 155 (1933); Comer v. Winston-Salem, 178 N. C. 383, 100 S. E. 619 (1919); *cf.* Davoren v. Kansas City, 308 Mo. 513, 273 S. W. 401 (1925). Recovery was denied in the following: McCall v. McCallie, 48 Ga. App. 99, 171 S. E. 843 (1933); Gurley v. Southern Power Co., 172 N. C. 690, 90 S. E. 943 (1916). But see comment in note 13, *supra;* Fiel v. City of Racine, 203 Wis. 149, 233 N. W. 611 (1930).

[18] This was originally a primary consideration. In the Stout case, *infra,* it was said that the turntable might have been made safe by the addition of a simple and inexpensive lock. The omission of such simple safe-guards is negligent in comparison with the unreasonable risk to children, but where such further safeguards are required as to interfere with the utility of the condition maintained by defendant, then it cannot be said that the defendant is negligent in not rendering the condition safe. See Sioux City S. Pac. R. R. Co. v. Stout, 84 U. S. 657, 21 L. ed. 745 (1873); Peters v. Bowman, 115 Cal. 345, 47 Pac. 113 (1896); Loftus v. Dehail, 133 Cal. 214, 65 Pac. 379 (1901); Brown v. Salt Lake City, 33 Utah 222, 93 Pac. 570 (1908); RESTATEMENT, TORTS (1934) §339 Comment (d) (A landowner is liable for injuries to children trespassing on his land caused by a structure or other artificial condition thereon, if "the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein"); Bauer, *The Degree of Danger and the Degree of the Difficulty of Removal of the Danger as Factors in "Attractive Nuisance" Cases* (1934) 18 MINN. L. REV. 523.

evidence in rebuttal. Both defendants then renewed their motions for nonsuit and upon denial again excepted. After judgment against both defendants, employer contends that on appeal he is entitled to the benefit of his first exception. *Held,* employer's motion for nonsuit should have been granted whether evidence taken after his first exception be considered or not.[1]

Under the North Carolina statute,[2] a motion to nonsuit must be made at the close of plaintiff's evidence.[3] If refused, defendant may except and go to the jury upon the evidence;[4] or he may introduce evidence[5] and renew his motion for nonsuit at the close of all the evidence.[6] If he introduces no evidence, his exception to his first motion is heard upon appeal; but if he elects to introduce evidence he waives the benefit of his first exception and only his second exception is heard upon appeal.[7] The instant case presents, but without the necessity for an answer, the interesting question of whether defendant's subsequent cross-examination of his codefendant and codefendant's witnesses constitutes a waiver of his previous motion for nonsuit.[8]

[1] Van Landingham v. Singer Sewing Machine Co., 207 N. C. 355, 177 S. E. 126 (1934).

[2] N. C. CODE ANN. (Michie, 1931) §567; Riley v. Stone, 169 N. C. 421, 86 S. E. 348 (1915) (the power to grant an involuntary nonsuit is altogether statutory and did not exist prior to the Hinsdale Act of 1897).

[3] McKellar v. McKay, 156 N. C. 283, 72 S. E. 375 (1911) (reversible error to sustain a motion to nonsuit upon plaintiff's evidence before he has rested his case); Penland v. French Broad Hospital, Inc., 199 N. C. 314, 154 S. E. 406 (1930) (where defendant has not moved at close of plaintiff's evidence he cannot avail himself of the statute by motion to dismiss at the end of all the evidence).

[4] N. C. CODE ANN. (Michie, 1931) §567; Nowell v. Basnight, 185 N. C. 142, 116 S. E. 87 (1923).

[5] Under the statute, defendant may introduce evidence as a matter of right; formerly it was a matter of discretion with the court. Means v. Carolina Cent. R. R. Co. 126 N. C. 424, 35 S. E. 813 (1900); *cf.* Stith v. Lookabill, 71 N. C. 25 (1874); MCINTOSH, N. C. PRACTICE AND PROCEDURE (1929) 612, N. 94.

[6] Means v. Carolina Cent. R. R. Co., 126 N. C. 424, 35 S. E. 813 (1900); Penland v. French Broad Hospital, Inc., 199 N. C. 314, 154 S. E. 406 (1930). Motion not allowed: after verdict, Vaughan v. Davenport, 159 N. C. 369, 74 S. E. 967 (1912); nor after verdict set aside, Riley v. Stone, 169 N. C. 421, 86 S. E. 348 (1915); nor after judgment by default and inquiry, Mason v. Stephens, 168 N. C. 370, 84 S. E. 527 (1915).

[7] Debnam v. Rouse, 201 N. C. 459, 160 S. E. 471 (1931). The original act, P. L. 1897, Ch. 109, was construed to change the common law so as to allow defendant the benefit of both exceptions on appeal. Purnell v. Raleigh & Gaston R. R. Co., 122 N. C. 832, 29 S. E. 953 (1898). But this result was criticised by the court, Cox v. Norfolk & Carolina R. R. 123 N. C. 604, 31 S. E. 848 (1898), and the act was amended, P. L. 1899. Ch. 131 and P. L. 1901, Ch. 594, to make subsequent introduction of evidence by defendant a waiver of his first motion and exception.

[8] The question may be important to a defendant, for a nonsuit will be denied if there is more than a *scintilla* of evidence to go to the jury, and on the first motion the court considers only plaintiff's favorable evidence introduced before that motion was made, while on the second motion the court looks at the whole case and considers all evidence favorable to plaintiff whether introduced by plaintiff, defendant, or elicited from any of the witnesses on direct or on cross-examination. Gates v. Max, 125 N. C. 139, 34 S. E. 266 (1899); Smith v. Cumberland

Where a coparty testifies for himself at his own instance and is cross-examined by his coparty, he does not become the latter's witness.[9] Evidence elicited on cross-examination is generally regarded as testimony of the party calling the witness and not of the party cross-examining.[10] Thus, at first glance, it would seem that defendant has not "introduced evidence" within the rule of the statute, and therefore has not waived his right to stand on the motion made at the conclusion of plaintiff's evidence. But the case should be decided on broader grounds.

After a defendant has had the benefit of two rulings by the court and one by the jury, should he be given still another "bite at the cherry"[11] by appellate review of his first position when only part of the evidence was before the court? Even if defendant took no affirmative action whatever, why should not all the evidence in the case be considered on appeal? If there is but a single defendant in the case and he elects to introduce no evidence after his motion for nonsuit is denied, the case goes immediately to the jury. Where there are codefendants, the court may enter a nonsuit as to one and permit the action to proceed against the other.[12] But where nonsuits are denied codefendants and either of them elects to introduce evidence, the other defendant cannot appeal until the whole case goes to the jury and verdict is rendered against him. Suppose in the meantime other parties and witnesses present evidence sufficient for a jury verdict against both defendants. Should the appellate court ignore the additional evidence, the verdict and the judgment, and nonsuit a plaintiff who has obtained a just judg-

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County Agricultural Society, 163 N. C. 346, 79 S. E. 632 (1913); Nash v. Royster, 189 N. C. 408, 127 S. E. 356 (1925).

[9] 2 WIGMORE, EVIDENCE, (2nd. ed. 1923) §916 (4); See MCKELVEY, EVIDENCE (4th ed. 1932) §283.

[10] Brown v. Chevrolet Motor Co., 39 Cal. App. 738, 179 Pac. 697 (1919); Smith v. Atlanta & Charlotte Air Line R. Co., 147 N. C. 603, 61 S. E. 575 (1908). North Carolina follows the so-called "orthodox rule," which permits a party to cross-examine as to every issue in the case, whether presented by the direct examination or not, without making the witness his own. MCINTOSH, N. C. PRACTICE AND PROCEDURE (1929) §566 (2); See WIGMORE, EVIDENCE (2nd. ed. 1923) §1885.

[11] At common law, the court disapproved of defendant's having "two bites at a cherry" by "fishing for the opinion of the court" by a demurrer to the evidence and afterwards introducing evidence if his demurrer was overruled. Stith v. Lookabill, 71 N. C. 25 (1874); State v. Graves, 119 N. C. 822, 25 S. E. 819 (1896). The court criticised the rule of the statute before the "waiver" amendment was added. Cox v. Norfolk & Carolina R. R., 123 N. C. 604, 31 S. E. 848 (1898) cited note 7 *supra*. The present statute must be strictly complied with before defendant can avail himself of it. Penland v. French Broad Hospital, Inc., 199 N. C. 314, 154 S. E. 406 (1930); see note (1931) 9 N. C. L. REV. 320.

[12] McNamee v. Borough Development Co., 134 App. Div. 666 119 N. Y. S. 510, (1909); Lee v. Penland, 200 N. C. 340, 157 S. E. 31 (1931).

ment?[13] Such procedure would be a departure from the court's progressive policy of reversing only for prejudicial error and of settling litigation in one suit wherever possible.[14]

The court is authorized by statute "to render such sentence, judgment and decree as on inspection of the *whole record* it shall appear to them in law ought to be rendered thereon."[15] It is submitted that this statute should be invoked to prevent useless nonsuits when sufficient evidence for a judgment on the merits has been presented while the defendant is still before the court.

R. MAYNE ALBRIGHT.

Real Property—Disposition of Real Property of Eleemosynary Corporation upon Its Dissolution.

In 1912 Rosa Campbell conveyed for nominal consideration a lot to "Rose Campbell Mission." The deed was in the usual form of deeds of conveyance, and it contained no recitals as to the object or purpose of the conveyance and no provisions as to trusts to be set up. Rosa died in 1915, and the work of the Mission ceased. In 1931 the lot was condemned as a site for a high school, and an award was made to the owners. Heirs of Rosa Campbell filed a petition claiming an interest in the fund. A trustee, acting in behalf of the Mission, filed an exception to the auditor's report which directed the funds to be paid to the heirs. The lower court overruled the exception. *Held,* since the Mission was an unorganized society (it had not complied with the statute providing for incorporation of such organizations) and had wholly disbanded, the title to the land remained in the donor and accrued to her heirs. Further, if the Mission had been organized and had dissolved, the land would have reverted to the said heirs either under a District of Columbia statute or at common law.[1]

The question presented by the principal case is, what (in the absence

[13] This is the "old-fashioned and mechanical way" not the "modern and progressive way" of dealing with technical errors of the trial court. WIGMORE, *Evidence, Impeachment of Witness on Cross-examination* (1932) 26 ILL. L. REV. 686, 687. See Cox v. Norfolk & Carolina R. R., 123 N. C. 604, 31 S. E. 848 (1898).

[14] Ball v. McCormack, 172 N. C. 677, 90 S. E. 916 (1916); Kimbrough v. Atlantic Coast Line R. R. Co., 182 N. C. 234, 109 S. E. 11 (1921); *In re* Ross, 182 N. C. 477, 109 S. E. 365 (1921).

[15] N. C. CODE ANN. (Michie, 1931) §1412; MCINTOSH, N. C. PRACTICE AND PROCEDURE (1929) §694; N. C. CODE ANN. (Michie, 1931) §658. *Cf.* Amendment to Section 269 of Judicial Code, 28 U. S. C. A. §391. It is now the settled rule of appellate courts that verdicts and judgments will not be set aside for harmless error, or error which results in no substantial prejudice to appellant. *In re* Ross, 182 N. C. 477, 109 S. E. 365 (1921).

[1] Rose Campbell Mission v. Richardson, 73 F. (2d) 661 (App. D. C. 1934). A District of Columbia statute provides that the property in this situation shall revert to the donor or his heirs. D. C. CODE (1929) Tit. 5 §321.

of a statute) becomes of realty apparently granted in fee simple absolute to an eleemosynary corporation upon the dissolution of the corporation? At one time under the common law real property held by any corporation reverted upon its dissolution to the grantor or his heirs.[2] It was said that the law annexed a condition of return, or the grant was construed to be one only for the life of the corporation.[3] At this period, however, there were only municipal, ecclesiastical, and eleemosynary organizations, and business corporations of the modern type were unknown. With the growth of the business corporation equity intervened to protect the rights of creditors and stockholders,[4] and now the law is well settled that the property held by a business corporation goes upon dissolution first to pay the creditors and the remainder is distributed among the stockholders.[5]

The law is not so well settled where eleemosynary corporations are concerned. The same rule that governs business corporations has been applied to eleemosynary corporations, thus allowing the property on dissolution to go to the members.[6] It has also been held that the property on dissolution may escheat to the state.[7] Some jurisdictions apply the *old* common law rule and allow it to revert to the grantor or his heirs.[8] Other courts allow the property to revert to the grantor if it is a gift,[9] but if it is a grant for valuable consideration, the members of the defunct corporation are allowed to take it.[10] One court has held that if it is a grant for valuable consideration, it will escheat to the state.[11] The principal case in holding that the property procured by donation reverted to the heirs of the donor is in line with a majority of the cases.[12]

The Supreme Court of the United States has held that property owned by an eleemosynary corporation, upon its dissolution without

[2] Commercial Bank v. Lockwood, 2 Har. (Del.) 14 (1841); Bingham v. Weiderwax, 1 Comstock 509 (N. Y. 1848); Fox v. Horah, 36 N. C. 358 (1840); 1 BL. COMM. 484.

[3] 1 BL. COMM.* 484; 1 Co. LITT.* 157.

[4] See Bacon v. Robertson, 59 U. S. 480, 15 L. ed. 499 (1855); Havemeyer v. Superior Court, 84 Cal. 327, 24 Pac. 121 (1890).

[5] Richards v. North Western Coal and Mining Co., 221 Mo. 149, 119 S. W. 953 (1909); Wilson v. Leary, 120 N. C. 90, 26 S. E. 630 (1897); Service and Wright Lumber Co. v. Sumpter Valley Ry., 81 Ore. 32, 158 Pac. 175 (1916).

[6] McAlhany v. Murray, 89 S. C. 440, 71 S. E. 1025 (1911) commented on (1911) 10 MICH. L. REV. 121.

[7] Mason v. Atlanta Fire Co. Number 1, 70 Ga. 604 (1883).

[8] Mott v. Danville Seminary, 129 Ill. 403, 21 N. E. 927 (1889).

[9] People v. Brancher, 258 Ill. 604, 101 N. E. 944 (1913).

[10] Mobile Temperance Hall Ass'n. v. Holmes, 189 Ala. 271, 65 So. 1020 (1914); Bates v. Palmetto Society in Columbia, 28 S. C. 476, 6 S. E. 327 (1888).

[11] People of The State of California v. The President and Trustees of The College of California, 36 Cal. 1166 (1869).

[12] Mott v. Danville Seminary, 129 Ill. 403, 21 N. E. 927 (1889); People v. Brancher, 258 Ill. 604, 101 N. E. 944 (1913).

creditors, goes to the sovereignty to be applied to a purpose similar to that intended by the grantor.[13] This solution is the best, for it is consistent with the rule of construction that the instrument is to be construed most strongly against the grantor; it obviates the necessity of deciding that the transaction is either a gift or purchase; it comes nearest to carrying out the intention of the grantor; it eliminates a windfall either for the heirs of the donor or members of the defunct corporation, and at the same time secures support for a worthy cause without doing harm to any equities.

ROBERT BOOTH.

Taxation—Classification—Discrimination between Corporations and Natural Persons.

A Louisiana statute imposed upon every individual, firm, or corporation engaged in a dyeing, cleaning, pressing, or laundering business a license tax measured by the gross receipts of the business.[1] The Louisiana Constitution,[2] as construed by the Supreme Court of Louisiana, exempted from license taxes persons engaged in mechanical pursuits who perform their work with their own hands.[3] A number of corporations, engaged in the laundry, dry cleaning, and dyeing business, sued to enjoin the enforcement of the tax, asserting that it denied to them equal protection of the laws. A three-judge Federal District Court denied the injunction and *held:* that the statute is not invalid under the Fourteenth Amendment; that the tax is not one upon receipts or upon property, but that it is a license tax for the privilege of doing business—measured by gross receipts; that although corporations are excluded from the exempt class for the reason that they, imaginary beings, cannot perform manual labor, the discrimination between corporations and individuals is not unreasonable.[4]

[13] Church of Jesus Christ of Latter-Day Saints v. United States, 136 U. S. 1, 10 Sup. Ct. 792, 34 L. ed. 478 (1889).

[1] LA. GEN. STAT. (Dart, 1932) §8612, provides: "That for every individual, firm, association or corporation carrying on the profession or business of steam dyeing, steam cleaning, steam pressing, or the business of steam or electric laundering, the license (tax) shall be based upon the gross annual receipts from such profession or business, . . ."

[2] Art. 10, sec. 8, reads as follows: "License taxes may be levied on such classes of persons, associations of persons and corporations pursuing any trade, business, occupation, vocation or profession, as the Legislature may deem proper, except clerks, laborers, ministers of religion, school teachers, graduated trained nurses, those engaged in mechanical, agricultural, or horticultural pursuits or in operating saw mills. . . ."

[3] State v. Up-To-Date Shoe Repairing Co., 175 La. 917, 144 So. 714 (1932) (this case also directly decides that the constitutional exemption does not apply to corporations engaged in mechanical pursuits).

[4] White Cleaners & Dyers v. Hughes, 7 F. Supp. 1017 (D. C. La. 1934). The Court decides that the tax is "for the privilege of doing business as distinguished

This decision raises again the question, when, for purposes of tax classification, may States discriminate between natural persons and corporations?

The right to classify subjects of taxation is a part of the taxing power of the State.[5] The only restriction upon the exercise of this right is that the classification must not be arbitrary, but must be reasonable under the circumstances and based upon some real difference in the situation and character of the subjects taxed.[6]

Tax discrimination between corporations and individuals may be attributed to a number of causes, chief of which have been the fear of corporate power; the desire to exact from corporations a consideration for the advantages of doing business in corporate form; the effort to aid individual enterprises by placing tax burdens upon their corporate competitors; a widespread feeling that corporations are better able to pay; and the fact that the difficulty of concealing corporate property has made the collection of taxes from corporations easier than from individuals.[7]

The Supreme Court early decided that the States may impose upon

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from either property tax or a tax upon the business or its receipts." In distinguishing a tax upon a business from a tax upon the privilege of doing business the Court relies upon Flint v. Stone Tracy Co., 220 U. S. 107, 31 Sup. Ct. 342, 55 L. ed. 389 (1911); and it is also said that there is a difference between the "gross receipts" tax, which was held invalid in Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389, 48 Sup. Ct. 553, 72 L. ed. 927 (1928), and the privilege tax imposed by the Louisiana statute.

The Court's application of these two cases seems subject to criticism. Although it was said in Flint v. Stone Tracy Co. that the tax was for "a carrying on or doing of business in the designated capacity" (corporate form of business organization), 220 U. S. 107, 150, the actual decision of that case does not cover the present tax. There the tax was for the privilege of doing business in corporate form. It was a franchise tax applicable only to corporations. Whereas the present tax is a general license imposed upon everyone who exercises the privilege of doing a cleaning and dyeing business, and it is equally applicable to individuals, partnerships and corporations. It would seem that the Louisiana tax and the tax involved in Flint v. Stone Tracy Co. are of different natures and are imposed upon different classes of subjects. The Court avoids the Quaker City Cab decision by distinguishing a tax upon the privilege of doing business from a tax upon the business. This distinction may be questioned upon the ground that the two taxes result in the same ultimate burden upon a business.

[5] Home Insurance Co. v. New York, 134 U. S. 594, 10 Sup. Ct. 593, 33 L. ed. 1025 (1890); Brown-Foreman Co. v. Kentucky, 217 U. S. 563, 30 Sup. Ct. 578, 54 L. ed. 883 (1910); see Stebbins v. Riley, 268 U. S. 137, 140-143, 45 Sup. Ct. 424, 426, 69 L. ed. 884 (1925).

[6] Bell's Gap R. R. v. Pennsylvania, 134 U. S. 232, 10 Sup. Ct. 533, 33 L. ed. 892 (1889); Adams Express Co. v. Ohio Auditor, 165 U. S. 194, 17 Sup. Ct. 305, 41 L. ed. 683 (1897); Royster Guano Co. v. Virginia, 253 U. S. 412, 40 Sup. Ct. 560, 64 L. ed. 989 (1920).

[7] See, dissenting opinions of Mr. Justice Brandeis in Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389, 410, 48 Sup. Ct. 553, 558, 72 L. ed. 927 (1928), and in Louis K. Liggett Co. v. Lee, 288 U. S. 517, 541, 53 Sup. Ct. 481, 490, 77 L. ed. 929 (1933); Neihoff, CORPORATIONS AND THE TAX LAWS (1931) 17 ST. LOUIS L. REV. 27.

corporations franchise and excise taxes which are not required of individuals. In 1868 two decisions sustained franchise taxes upon savings institutions measured by the amount of their deposits.[8] A third case in the same year upheld a tax upon the income of insurance companies as an excise upon their business.[9] In 1873 a tax equivalent to a percentage of the capital stock of railroad and canal companies was held valid as a franchise tax upon corporations as legal entities;[10] and in 1890 it was decided that a franchise tax upon all corporations measured by capital stock did not violate the equal protection clause of the Fourteenth Amendment.[11] A tax imposed by Congress upon the gross annual receipts, in excess of $250,000, of corporations carrying on the business of refining sugar was sustained as an excise tax.[12]

It is also well established that corporations may not be classified separately from individuals on the sole basis of the ownership of property.[13] For this reason property taxes permitting the deduction of mortgages on land owned by individuals, when a like deduction in the case of land owned by corporations was not allowed, have been found to violate the Fourteenth Amendment.[14] However, it has been held that corporations may be treated differently from individuals for the purpose of collecting back taxes.[15]

In the case of *Flint v. Stone Tracy Co.*, which was before the Court in 1911,[16] a federal tax of one per cent of the net income of corporations

[8] Society for Savings v. Coite, 73 U. S. 594, 18 L. ed. 897 (1868); Provident Institution v. Massachusetts, 73 U. S. 611, 18 L. ed. 907 (1868).

[9] Pacific Insurance Co. v. Soule, 74 U. S. 433, 19 L. ed. 95 (1868).

[10] Minot v. Philadelphia, Wilmington & Baltimore R. Co., 85 U. S. 206, 21 L. ed. 888 (1873).

[11] Home Insurance Co. v. New York, 134 U. S. 594, 10 Sup. Ct. 593, 33 L. ed. 1025 (1890).

[12] Spreckles Sugar Refining Co. v. McClain, 192 U. S. 397, 24 Sup. Ct. 376, 48 L. ed. 496 (1904).

[13] County of San Mateo v. Southern Pacific R. Co., 13 Fed. 722 (C. C. Cal. 1882); County of Santa Clara v. Southern Pacific R. Co., 18 Fed. 385 (C. C. Cal. 1883). See Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389, 402, 48 Sup. Ct. 553, 555, 72 L. ed. 929 (1928); Gamble-Robinson Fruit Co. v. Thoresen, 53 N. D. 28, 204 N. W. 861, 865 (1925). In Northern Pacific R. Co. v. Walker, 47 Fed. 686 (C. C. N. D. 1891), Mr. Justice Caldwell said, "Property of the same kind, in the same condition and used for the same purpose, must be taxed by a uniform rule without regard to its ownership."

[14] County of San Mateo v. Southern Pacific R. Co., 13 Fed. 722 (C. C. Cal. 1882); County of Santa Clara v. Southern Pacific R. Co., 18 Fed. 385 (C. C. Cal. 1883).

[15] Florida Cent. & Peninsular R. R. v. Reynolds, 183 U. S. 471, 22 Sup. Ct. 176, 46 L. ed. 283 (1902) (back taxes from railroads); Fort Smith Lumber Co. v. Arkansas, 251 U. S. 532, 40 Sup. Ct. 304, 64 L. ed. 396 (1920) (back taxes owed by corporations upon stock held in other corporations); White River Lumber Co. v. Arkansas, 279 U. S. 692, 49 Sup. Ct. 457, 73 L. ed. 903 (1929) (back taxes on land owned by corporations).

[16] 220 U. S. 107, 31 Sup. Ct. 342, 55 L. ed. 389 (1911).

was upheld as a tax upon the privilege of doing business in a corporate capacity. The rule was there laid down that corporations may be taxed differently from individuals, inasmuch as there is a substantial difference between a business conducted by corporations and the same business when done by private individuals.[17] But *Quaker City Cab Co. v. Pennsylvania*[18] decided that a state tax upon the gross receipts of transportation corporations, not imposed upon partnerships and natural persons engaged in transportation business, violated the equal protection clause, because the tax was not peculiarly applicable to corporations. This decision seems to restrict the broad rule laid down in *Flint v. Stone Tracy Co.* governing tax discrimination between corporations and individuals. Mr. Justice Brandeis dissented from the *Quaker City Cab* decision[19] on the ground that the imposition of heavier taxes on corporations than upon individuals had been approved in the *Flint* case, and that a tax on gross earnings was a proper means of imposing the heavier burden. The chain store tax cases, which have upheld tax classification on the basis of the economic advantages incident to different types of business organization,[20] may mark a change in the Court's attitude away from the strict test applied in the *Quaker City Cab* case and back to the general rule as stated in *Flint v. Stone Tracy Co.*

The instant case presents a license or occupation tax, measured by gross receipts and imposed on corporations while individuals are exempt. In view of the *Quaker City Cab* test the present decision appears to be wrong, for the license tax would have been equally applicable to individuals and partnerships engaged in the cleaning and pressing business. However, the conclusion of the Court in upholding the tax is supported by authority which was unquestioned before the decision of *Quaker City Cab Co. v. Pennsylvania* and by subsequent cases which appear to have shaken the standing of the *Quaker City Cab* holding.

The present decision seems to approve the imposition of a new tax upon corporations. In addition to franchise taxes already placed on the privilege of existing as a corporation, another tax is now applicable to the privilege afforded the corporate personality of doing a particular type of business in competition with natural persons. It would seem that the result of this decision is that corporations may be subjected to both general franchise taxes and special license taxes upon the privilege of engaging in grocery, manufacturing, banking, or any

[17] 220 U. S. 107, 161.
[18] 277 U. S. 389, 48 Sup. Ct. 553, 72 L. ed. 927 (1928).
[19] 277 U. S. 389, 403.
[20] State Board of Tax Com'rs of Indiana v. Jackson, 283 U. S. 527, 51 Sup. Ct. 540, 75 L. ed. 1948 (1931); Louis K. Liggett Co. v. Lee, 288 U. S. 517, 53 Sup. Ct. 481, 77 L. ed. 929 (1933).

other business in a corporate capacity, without the imposition of these taxes on individuals.[21]

JOHN R. JENKINS, JR.

Vendor and Purchaser—Construction of Instruments—Meaning of Words "More or Less".

After pointing out its boundaries and corners to the plaintiff, defendant contracted to exchange his farm, said to contain about 246 acres and valued at $18,000, for the plaintiff's farm plus $8,000. The contract described defendant's farm as containing "247 acres more or less." Several years later an anticipated sale of this farm was defeated by the discovery of a forty acre shortage. In an action to recover for this shortage, *held* judgment for defendant on the ground that this was a sale by tract and the risk of deficiency was on the purchaser.[1]

The words "more or less" have been accorded varying significance by the courts. The older rule, which purported to treat the words as if they had a fixed and definite meaning in all deeds and land contracts, announced that these words of themselves negatived a sale by acre, all risk of variation being thereby placed upon the vendor in case of a surplus, or upon the purchaser in case of a deficiency.[2]

Realizing that the problem in such cases is one of construction, and that the intention of the parties should be objectively ascertained in order to give actual meaning to these words, most courts take into consideration the surrounding facts and circumstances of each case. Even so, their treatment tends to become categorical. First, if the sale is intended to be by acre, the words "more or less" will permit only slight errors of survey or estimation,[3] and will not excuse substantial dis-

[21] A tendency to impose this additional tax upon corporations may be further marked by a New York tax statute which provided that every transportation corporation, in addition to a franchise tax, "shall pay for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state, . . ." an additional franchise tax. N. Y. CONS. LAWS (Cahill, 1930) c. 61, §184. This tax has been upheld by memorandum decision, People *ex rel.* New York & Albany Litherage Co. v. Lynch, 229 App. Div. 823, 242 N. Y. S. 903 (1930), *aff'd per curiam* 259 N. Y. 638. 182 N. E. 214 (1932), *aff'd per curiam* 288 U. S. 590, 53 Sup. Ct. 400, 77 L. ed. 969 (1933) commented upon (1933) 33 COL. L. REV. 738.

[1] Huffman v. Landes, 177 S. E. 200 (Va., 1934).

[2] Musselman v. Moxley, 152 Md. 13, 136 Atl. 48 (1927); Jollife v. Hite, 1 Call. 301 (Va., 1789); Keyton v. Brawford, 5 Leigh. 48 (Va., 1834); *cf.* Clark v. Carpenter, 19 N. J. Eq. 328 (1868). A series of more recent Georgia cases consider the fact situation but hold the words "more or less" to be controlling: Goette v. Sutton, 128 Ga. 179, 57 S. E. 308 (1907); White v. Adams, 7 Ga. App. 764, 68 S. E. 271 (1910); Georgia etc. Co. v. Buck, 134 Ga. 674, 68 S. E. 514 (1910); Milner v. Tyler, 9 Ga. App. 659, 71 S. E. 1123 (1911).

[3] Hodges v. Denny, 86 Ala. 226, 5 So. 492 (1888); Rathke v. Tyler, 136 Iowa 284, 111 N. W. 435 (1907); Wilson v. Randall, 67 N. Y. 338 (1876); Paine v. Upton, 87 N. Y. 327 (1882).

crepancies.[4] Second, where the sale is said to be in gross the courts have laid down four different rules: (1) many cases hold the contract to be one of hazard, placing the risk of variation on the parties to the contract;[5] (2) another large group holds that the words merely guard against slight errors of quantity,[6] and a substantial deviation will be grounds for relief;[7] (3) a few have pronounced a definite percentage of variation as a dividing line between the granting and refusing of relief;[8] and (4) two courts have held the recital of area to be a warranty of quantity despite the "more or less" qualification.[9]

[4] Triplett v. Allen, 26 Gratt. 721 (Va., 1875); Pratt v. Bowman, 37 W. Va. 721, 17 S. E. 210 (1893); *cf.* Sullivan v. Ferguson, 40 Mo. App. 79 (1867); Frenche v. Chancellor, 51 N. J. Eq. 624, 27 Atl. 140 (1893).

[5] Libby v. Dickey, 85 Me. 362, 27 Atl. 253 (1893) (relief denied when deficiency was 400 out of 800 acres); Erskine v. Wilson, 41 S. C. 198, 19 S. E. 489 (1893) (no recovery for 125 acres deficiency in 253); Waters v. Hutton, 85 Tenn. 109, 1 S. W. 787 (1886) (no relief when vendor's title to 64 acres out of 307 failed); Trinkle v. Jackson, 86 Va. 238, 9 S. E. 986 (1889) (no relief for 440 acre deficiency in 2376); Southern v. Sine, 95 W. Va. 634, 123 S. E. 436 (1924) (no recovery for 29 acre deficiency in 170). See also Stebbins v. Eddy, Fed. Cas. No. 13,342 (C. C. R. I. 1827); Frederick v. Youngblood, 19 Ala. 680 (1851); Harrell v. Hill, 19 Ark. 102 (1857); Dale v. Smith, 1 Del. Ch. 1 (1814); Beall v. Berkhalter, 26 Ga. 564 (1858); Armstrong v. Brownfield, 32 Kan. 116 (1884); Foster v. Byrd, 119 Mo. App. 168, 96 S. W. 224 (1906); Sprague v. Eypper and Beckman Inc., 108 N. J. Eq. 239, 154 Atl. 615 (1931).

[6] Scott v. Dunkel Box etc. Co., 106 Ark. 83, 152 S. W. 1025 (1912); Russo v. Corideo, 102 Conn. 663, 129 Atl. 849 (1925); Kendall v. Wells, 126 Ga. 343, 55 S. E. 41 (1906); King v. Brown, 54 Ind. 368 (1876); Kitzman v. Carl, 133 Iowa 340, 110 N. W. 587 (1907); Couse v. Boyles, 4 N. J. Eq. 212 (1842); Oakes v. DeLancey, 133 N. Y. 227, 30 N. E. 974 (1892); Watson v. Cline, 42 S. W. 1037 (Tex. Civ. App. 1897); Quesnel v. Woodlief, 2 Va. 173 (1808); *cf.* Wilson v. Rafter, 188 Mo. App. 356, 174 S. W. 137 (1915); White v. Miller, 22 Vt. 380 (1850); McComb v. Gilkeson, 110 Va. 406, 66 S. E. 77 (1909).

[7] Hostleton v. Dickinson, 51 Iowa 244, 1 N. W. 550 (1879); Belknap v. Sealy, 14 N. Y. 143 (1856); Bigham v. Madison, 103 Tenn. 358, 52 S. W. 1074 (1899) (rescission granted for 12.5 acre deficiency in 25); Pratt v. Bowman, 37 W. Va. 721, 17 S. E. 210 (1893) (relief granted vendor where there was an 80 per cent excess). See also Hays v. Hays, 126 Ind. 92, 93, 25 N. E. 600, 601 (1890); Wheeler v. Boyd, 69 Tex. 293, 297, 6 S. W. 614, 617 (1887).

[8] See Bigham v. Madison, 103 Tenn. 358, 363, 52 S. W. 1074, 1075 (1899) (maximum discrepancy allowable is 10 to 15 per cent, 20 per cent is too great, and 33 1-3 per cent is such an amount as "universally has obtained relief" even though sale is in gross.) *Cf.* Pratt v. Bowman, 37 W. Va. 721, 17 S. E. 210 (1893). In Kentucky an inflexible rule was laid down in Harrison v. Talbot, 32 Ky. 258 (1834) (limits discrepancies in all sales in gross to ten per cent). Followed: Anthony v. Hudson, 131 Ky. 185, 114 S. W. 782 (1908); Travis v. Taylor, 118 S. W. 988 (Ky. 1909); Boggs v. Bush, 137 Ky. 95, 122 S. W. 220 (1909); Paisley v. Hatter, 143 Ky. 633, 137 S. W. 250 (1911); Salyer v. Blessing, 151 Ky. 459, 152 S. W. 275 (1913); Cook v. McKee, 235 Ky. 1, 29 S. W. (2d) 571 (1930). If sale is by boundary without reference to the number of acres, no recovery for any shortage may be had. Wilson v. Morris, 192 Ky. 469, 233 S. W. 1049 (1921); *cf.* Sanders v. Lindsey, 204 Ky. 57, 263 S. W. 718 (1924) (where deed specifically provided "that this land is sold by the boundary and not by the acre," the purchaser of "300 acres, be the same more or less" could not recover for 45 acre deficiency); Sheets v. McDonald, 213 Ky. 595, 281 S. W. 536 (1926) (no recovery was allowed for 19.5 acre deficiency in 138, because it clearly appeared that the parties intended to risk the contingency of quantity). Thus, by careful drafting of deeds and contracts the effects of a rigid rule may be avoided.

[9] Gardner v. Kiburz, 184 Iowa 1268, 168 N. W. 814 (1918); Mahrt v. Mann, 203 Iowa 880, 210 N. W. 566 (1926) (because of Statute of Limitations plain-

In general the North Carolina cases consider the surrounding facts, but they, too, place the cases in categories and decide them on the basis of strict rules. Thus, if the parties to the contract intended a sale by acre, a deficiency or surplus is a basis for relief,[10] following the general rule stated in the preceding paragraph. However, if the sale is held to be in gross, then the first of the four rules mentioned above is applied, and in the absence of fraud or misrepresentation the risk of divergence is on the parties.[11] In these sale by tract cases the doctrine of *caveat emptor* is applied, the court denying relief even where the deficiency is very great.[12] However, a vendor's representation of quantity, although orally made, is held to be binding upon him.[13]

In construing these contracts the purpose of the courts should be to effectuate the intention of the contracting parties, so far as possible, as well as to preserve predictability of decisions for practical reasons. The most reliable means of determining what is intended by the words "more or less" is to construe them in the light of all the facts of the transaction: price, type of land, size of tract, and situation of the parties are highly relevant. Even where the sale is actually in gross the words should not place risk of discrepancies upon the contracting parties unless the facts show clearly that they anticipated assumption of the risk. This test is applied in the instant case with a desirable outcome. Definition and resultant legal effect must vary from case to case. It is submitted that loss of consistency in decision (the most compelling reason for the rigid North Carolina rule applied in the gross sales cases) is compensated by the obviation of hardship in most cases.

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tiff's only remedy was for breach of the implied warranty); Miller v. Wissert, 38 Okla. 808, 134 Pac. 62 (1913). In these cases the courts call the transactions sales in gross, but in deciding the cases on the facts treat them as sales by acre. In effect the courts delete the words "more or less" from the agreement.

[10] Duffy v. Phipps, 180 N. C. 313, 104 S. E. 655 (1920).

[11] McArthur and Walker v. Morris, 84 N. C. 405 (1881) (no relief for 90 acre shortage in 245); Smathers v. Gilmer, 126 N. C. 758, 36 S. E. 153 (1900) (no recovery for 238 acre shortage in 500); Bethell v. McKinney, 164 N. C. 71, 80 S. E. 162 (1913); Turner and Parker v. Vann, 171 N. C. 127, 87 S. E. 985 (1916) (no relief for deficiency of 170 acres in 550).

A failure of title in the absence of the covenant of seizin brings the same result as in Smathers v. Gilmer, *supra,* when recital of acreage is qualified by the words "more or less." Lantz v. Howell, 181 N. C. 401, 107 S. E. 437 (1921); *cf.* Guy v. Joint Stock Land Bank of Columbia, 205 N. C. 357; 171 S. E. 341 (1933).

[12] Walsh v. Hall, 66 N. C. 233 (1872); Etheridge v. Vernoy, 70 N. C. 713 (1874). See also cases cited note 11, *supra.*

[13] Stern v. Benbow, 151 N. C. 460, 66 S. E. 445 (1909); and note language in Smathers v. Gilmer, 126 N. C. 758, 759, 36 S. E. 153, 154 (1900).