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Notes and Comments

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This plan was accepted by the representatives of the Press and of the Law School as likely to insure the widest possible distribution of the LAW REVIEW consistent with a subscription plan. The hope was expressed by the committee that, out of the 2,200 members of the State Bar, as many as 1,500 would take advantage of this opportunity. It was agreed that the expense of publication of the LAW REVIEW over and above such a sum as these subscriptions might yield would continue to be borne by the Press.

At the October meeting of the Council this plan was presented and approved, and at the annual meeting of the State Bar the following day it was announced to the membership. As a result, this issue inaugurates a new department under the caption, THE NORTH CAROLINA STATE BAR, edited by Mr. Kemp D. Battle, of Rocky Mount.

The new financing plan will be carried into effect when bills for membership dues are distributed in January, 1937.

The significance of the action of the committees representing the two bar organizations and of the Council as manifesting confidence in the value of the LAW REVIEW is gratefully appreciated by the publisher and by the editors.

NOTES AND COMMENTS

Banks and Banking—Interest—Equity.

In an action on a certified check where the plaintiff was subrogated to the rights of the government[1] the court took judicial notice of the present well-known banking situation, and held that the payment of the legal rate of interest should not be required, since the use of the funds had not been lucrative to the bank or damaging to the plaintiff to that extent. Interest was allowed at the rate of two per cent from the date of demand, that being the prevailing rate upon savings bank deposits.[2]

In an action for the detention of money or the non-payment of liquidated claims, interest at the statutory rate is usually recoverable from the date of demand,[3] or if no formal demand is made, from the institution of the action.[4] However, in actions on claims against insolvent

[1] 36 Stat. 965 (1911), 44 Stat. 120 (1926), 26 U. S. C. A. 1546 (1935).

[2] American Tobacco Co. v. South Carolina Nat. Bank, 15 F. Supp. 215 (E. D. S. C. 1936).

[3] Anderson v. Pacific Bank, 112 Cal. 598, 44 Pac. 1063 (1896); Hackleman v. Moat, 4 Black. 164 (Ind. 1836); Thomas v. Wells, 140 Mass. 517, 5 N. E. 485 (1886); Cochrane v. Forbes, 267 Mass. 417, 166 N. E. 752 (1929); McIlvaine v. Wilkins, 12 N. H. 474 (1841); Hyman v. Gray, 49 N. C. 155 (1856); Crawford v. The Bank of Wilmington, 61 N. C. 136 (1867); Bank of Charlotte v. Hart, 67 N. C. 264 (1872); Neal v. Freeman, 85 N. C. 441 (1881); McRae v. Malloy, 87 N. C. 196 (1882); Porter v. Grimsley, 98 N. C. 550, 4 S. E. 529 (1887).

[4] Kaufman v. Tredway, 195 U. S. 271, 25 Sup. Ct. 33, 49 L.ed. 190 (1904); McIlvane v. Wilkins, 12 N. H. 474 (1841); Di Crano v. Moore, 50 App. Div. 361, 64

banks most jurisdictions allow the recovery of interest only if the assets of the bank are more than sufficient to pay the principal of all claims, both preferred and non-preferred.[5]

"In claims of equitable origin for the recovery of funds, the courts seem not to confine themselves invariably to the legal rate in allowing interest as compensation, but to take into consideration the amount which the custodian has earned."[6] This is particularly true in the case of administrators, executors, and trustees who have acted in good faith but have not entirely fulfilled their duties.[7] Also, though equity generally follows the law as to the allowance of interest, it may in its discretion allow interest where it is not recoverable at law.[8]

Under its equitable jurisdiction the court in the principal case was fully justified in taking judicial notice of the banking situation, as have other courts in recent years been justified in taking judicial notice of economic conditions.[9] The result reached is desirable and equitable,

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N. Y. Supp. 3 (1900); Neal v. Freeman, 85 N. C. 441 (1881); Porter v. Grimsley, 98 N. C. 550, 4 S. E. 529 (1887).

[5] Green v. Stone, 205 Ala. 381, 87 So. 862 (1920); McGowan v. McDonald, 111 Cal. 57, 43 Pac. 418 (1896); People v. California Safe Deposit and Trust Co., 34 Cal. App. 269, 167 Pac. 181 (1917); Lamar v. Taylor, 141 Ga. 227, 80 S. E. 1085 (1914); Leach v. Sanborn State Bank, 210 Iowa 613, 231 N. W. 497, 69 A. L. R. 1210 (1930); People v. American Loan and Trust Co., 172 N. Y. 371, 65 N. E. 200 (1902); People v. Merchants' Trust Co., 187 N. Y. 293, 79 N. E. 1004 (1907); *Ex Parte* Stockman, 70 S. C. 31, 48 S. E. 736 (1904); State v. Park Bank and Trust Co., 151 Tenn. 195, 268 S. W. 638, 39 A. L. R. 457 (1925); Northwest Lumber Co. v. Scandinavian-American Bank, 132 Wash. 449, 231 Pac. 951 (1925). *Contra:* American Nat. Bank v. Williams, 101 Fed. 943 (C. C. A. 9th, 1900); American Surety Co. of New York v. Peyton, 186 Minn. 588, 244 N. W. 74 (1932), Shaw v. McCord, 18 S. W. (2d) 200 (Tex. 1929); see (1933) 11 N. C. L. REV. 155.

[6] McCORMICK, DAMAGES (1935) §52; Greenish v. Standard Sugar Refinery, Fed. Cas. No. 5,776 (D. Mass. 1877); John Agnew Co. v. Board of Education, 83 N. J. Eq. 49, 89 Atl. 1046 (1914) (includes an excellent discussion of the principles involved); Backus v. Crane, 87 N. J. Eq. 229, 100 Atl. 900 (1917).

[7] *In re* Smith's Estate, 112 Cal. App. 680, 297 Pac. 927 (1931); Ford v. Wilson, 85 Atl. 1073 (Del. 1913); Britton v. Brewster's Estate, 113 Mich. 561, 71 N. W. 1085 (1897); *In re* Grover's Estate, 233 Mich. 467, 206 N. W. 988 (1926); Cornet v. Cornet, 269 Mo. 298, 190 S. W. 333 (1916); *In re* Babcock's Estate, 2 Conn. 82, 9 N. Y. Supp. 554 (1889); *In re* Scudder's Estate, 21 Misc. 179, 47 N. Y. Supp. 101 (1897); *In re* Hoyt's Estate, 44 Misc. 76, 89 N. Y. Supp. 744 (1904); *In re* Wiley, 98 App. Div. 93, 91 N. Y. Supp. 661 (1904); Ellis v. Kelsey, 241 N. Y. 374, 150 N. E. 148 (1925); *In re* Haigh's Estate, 133 Misc. 240, 232 N. Y. Supp. 322 (1928); *In re* Ayvazian's Estate, 153 Misc. 467, 275 N. Y. Supp. 123 (1934); Appeal of Van Dyke, 183 Pa. 647, 39 Atl. 2 (1898); *In re* Hertzler's Estate, 192 Pa. 548, 43 Atl. 1028 (1899); Padelford v. Real Estate-Land Title and Trust Co., 183 Atl. 442 (Pa. 1936); *In re* Listman's Estate, 57 Utah 471, 197 Pac. 596 (1921).

[8] McCowen v. Pew, 18 Cal. App. 482, 123 Pac. 354 (1912); Thompson v. Davis, 297 Ill. 11, 130 N. E. 455 (1921); Duncan v. Dazey, 318 Ill. 500, 149 N. E. 495 (1925); Goldman v. City of Worcester, 236 Mass. 319, 128 N. E. 410 (1920); Woerz v. Schumacher, 161 N. Y. 530, 56 N. E. 72 (1900); Pryor v. City of Buffalo, 61 Misc. 162, 113 N. Y. Supp. 249 (1908).

[9] United States v. Calistan Packers, 4 F. Supp. 660 (N. D. Cal. 1933); United States Nat. Bank and Trust Co. v. Sullivan, 69 F. (2d) 412 (C. C. A. 7th, 1934);

as it is well known that in most instances in recent years the legal rate has not been realized on funds, and the plaintiff's damages probably did not amount to more than the two per cent allowed. Also as the defendant acted in good faith and had apparent grounds for the refusal of the plaintiff's demand for payment, the bank, its depositors and creditors should not be penalized by having to pay the legal rate of interest as damages.

C. M. IVEY, JR.

Constitutional Law—Bankruptcy—Municipal Corporations.

Congress in 1934, by the Sumners-Wilcox Municipal Debt Readjustment Act,[1] amended the Federal Bankruptcy Act[2] to permit any municipality or other political subdivision of any state to obtain a voluntary readjustment of its debts through proceedings in the Federal courts. A Texas water improvement district, claiming to be insolvent and unable to meet its debts as they matured, petitioned the United States District Court for a readjustment under the Sumners Act.[3] The Texas legislature in the meantime granted political subdivisions the express right to proceed under the Federal law.[4] The United States Supreme Court held the act invalid as an unconstitutional encroachment upon state sovereignty over the fiscal affairs of local governmental units,[5] regardless of the express consent of the state.

The majority of the court felt that as the power "to establish uniform Laws on the subject of Bankruptcies" and the power "to lay and collect taxes" were both granted in Article I, section 8 of the Constitu-

Lowden v. Iowa-Des Moines Nat. Bank and Trust Co., 10 F. Supp. 430 (S. D. Iowa 1935); Coral Gables Inc. v. Patterson, 166 So. 40 (Ala. 1936); Reif v. Barrett, 355 Ill. 104, 188 N. E. 889 (1933); Chicago Title and Trust Co. v. Chicago Trust Co., 1 N. E. (2d) 87 (Ill. 1936); Bolivar Tp. Board of Finance of Benton County v. Hawkins, 207 Ind. 171, 191 N. E. 158 (1934); United Shoe Stores Co. v. Burt, 142 So. 370 (La. 1932); Campbell v. City of Boston, 195 N. E. 802 (Mass. 1935); Shonnard v. Elevator Supplies Co., 111 N. J. Eq. 94, 161 Atl. 684 (1932); Williams v. Williams, 12 N. J. Misc. 641, 174 Atl. 423 (1934); Kuhn v. Cermac Realty Co., 148 Misc. 324, 265 N. Y. Supp. 861 (1933); *In re* Connelly's Estate, 151 Misc. 310, 271 N. Y. Supp. 368 (1934); State *ex rel.* Zimmerman v. Gibbes, 171 S. C. 209, 172 S. E. 130 (1933); Dukes v. Jefferson Standard Life Ins. Co., 172 S. C. 502, 174 S. E. 463 (1934).

[1] 48 Stat. 798, 11 U. S. C. A. §§301, 303 (1934).

[2] 30 Stat. 554 (1898), 11 U. S. C. A. §1 *et seq.* (1927).

[3] *In re* Cameron County Water Improvement Dist. No. 1, 9 F. Supp. 103 (D. C. Tex. 1934) (petition denied for lack of jurisdiction). *Contra:* Cameron County Water Improvement Dist. No. 1 v. Ashton, 81 F. (2d) 905 (C. C. A. 5th, 1936); *In re* East Contra Costa Irrigation Dist., 10 F. Supp. 175 (D. C. Cal. 1935); *In re* Imperial Irrigation Dist., 10 F. Supp. 832 (D. C. Cal. 1935), Note (1936) 34 MICH. L. REV. 731; see Carteret County v. Sovereign Camp, Woodmen of the World, 78 F. (2d) 337 (C. C. A. 4th, 1935).

[4] TEX. LAWS (1935) c. 107.

[5] Ashton v. Cameron County Water Improvement Dist. No. 1, 56 Sup. Ct. 892, 80 L. ed. adv. op. 910 (1936) (5-4 decision).

tion, they should be limited equally. Therefore, since the Federal Government cannot tax the states,[6] neither can it interfere with a state's sovereignty by the exercise of the bankruptcy power.

The court's viewpoint of an infringement on states' rights seems untenable. The Act specifically provides against any interference with states' rights[7] because: (1) the governmental units may not act except by a voluntary petition;[8] (2) this petition must have the written approval of the state agency if one has been created to handle municipal insolvency problems;[9] (3) the Federal judge must approve the plan of readjustment.[10] This element of consent would seem to remove the objection of interference with states' rights since either government may tax the other if consent is given,[11] and a state may even interfere with interstate or foreign commerce with consent of the Federal government.[12] Therefore if consent will validate a taxation burden there should be no objection to a beneficial debt readjustment privilege.[13] Fear of a future extension so as to amount to an encroachment is completely obliterated by judicial review of the Supreme Court.[14]

It was thought that the Act would be attacked upon the ground that municipalities are not the proper subject of bankruptcy,[15] there being no distributable assets, as property used for governmental purposes is not subject to attachment and private property of citizens may be reached only by taxation. However, distributable assets have been deemed unnecessary in the past,[16] and recent opinions appear to support this view.[17] Nor is the Act hostile to the nature of bankruptcy

[6] Collector v. Day, 78 U. S. 113, 20 L. ed. 122 (1870); *cf.* McCulloch v. Maryland, 17 U. S. 316, 4 L. ed. 579 (1819) (states cannot tax instrumentalities of Federal Gov't).

[7] 48 Stat. 798 §80(k), 11 U. S. C. A. §303(k) (1934).

[8] 48 Stat. 798 §80(a), 11 U. S. C. A. §303(a) (1934).

[9] 48 Stat. 798 §80(k), 11 U. S. C. A. §303(k) (1934).

[10] 48 Stat. 798 §80(a), 11 U. S. C. A. §303(a) (1934).

[11] Baltimore National Bank v. State Tax Comm., 297 U. S. 545, 56 Sup. Ct. 417, 80 L. ed. 588 (1936); United States v. California, 297 U. S. 175, 56 Sup. Ct. 421, 80 L. ed. 367 (1936).

[12] Wilkerson v. Rahrer, 140 U. S. 545, 11 Sup. Ct. 865, 35 L. ed. 572 (1891); James Clark Distilling Co. v. Western Maryland Railroad Co., 242 U. S. 311, 37 Sup. Ct. 180, 61 L. ed. 326 (1917); Whitfield v. Ohio, 56 Sup. Ct. 532, 80 L. ed. 527 (1936).

[13] (1935) 83 UNIV. OF PA. L. REV. 920.

[14] (1936) 34 MICH. L. REV. 1252, 1254.

[15] The Court assumed "for this discussion that the enactment is adequately related to the general subject of bankruptcies." But see Briggs, *Shall Bankruptcy Jurisdiction be Extended to Include Municipalities and Other Taxable Subdivisions?* (1933) 19 A. B. A. J. 637; GLENN, LIQUIDATION (1934) §419.

[16] See Vulcan Sheet Metal Co. v. North Platte Valley Irrigation Co., 220 Fed. 106, 108 (C. C. A. 8th, 1915).

[17] See: *In re* Bradford, 7 F. Supp. 665 (D. Md. 1934); *In re* Radford, 8 F. Supp. 489 (W. D. Ky. 1934), *rev'd by* Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, 55 Sup. Ct. 854, 79 L. ed. 1593 (1935), but on grounds of

by providing for a composition agreement[18] because composition was specifically granted by the bankruptcy act of 1867 and is available in our existing statute.[19] Therefore it would appear that the exclusion of municipalities in past bankruptcy legislation has been for reasons other than any inherent disability of the municipality.[20] As Mr. Justice Cardozo explains in his vigorous dissent, the concept of the field to be included within the term "Bankruptcy" has been a growing one, and "the act for the relief of local governmental units is a stage in an evolutionary process which is likely to be misconceived unless regarded as a whole."[21]

The situation which gave rise to the passage of the Sumners Act was and still is a serious one. Commencing with the collapse of the Florida "boom" in 1926 there has been an ever increasing number of municipal defaults in recent years. There were approximately 2,600 taxing districts, in 41 states, in default on November 1, 1934. Their aggregate defaults represented about 10 per cent of the total indebtedness of states and their local units.[22] The result was that local taxing agents were being subjected to continuous mandamus actions to compel them to tax and tax again to pay off creditors. This in turn was having a detrimental effect upon the credit of solvent taxing agents. Numerous schemes of voluntary refunding were devised and tried by the local governments with varying degrees of success. Also many states passed special legislation in an attempt to effectuate an adequate remedy. None were very successful because the Constitution expressly prohibits the States from passing any law impairing existing contracts. Federal action under the express constitutional power to enact bankruptcy legislation was necessary to avoid this constitutional restriction. There was little hope of a composition by consent of creditors as a mi-

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violation of due process clause of U. S. Constitution. Insolvency is not a necessary factor for bankruptcy jurisdiction. *In re* Foster Paint and Varnish Co., 210 Fed. 652 (E. D. Pa. 1914); George M. West Co. v. Lea Brothers and Co., 174 U. S. 590, 19 Sup. Ct. 836, 43 L. ed. 1098 (1899).

[18] *In re* Reiman, Fed. Cas. No. 11, 673 (D. C. N. Y. 1874); *affd.* No. 11,675 (C. C. S. D. N. Y. 1875).

[19] 30 Stat. 554 (1898), 11 U. S. C. A. §§30, 32 (c.) (1927).

[20] *In re* Landquist, 70 F. (2d) 929 (C. C. A. 7th, 1934); 7 REMINGTON, BANKRUPTCY (4th ed. 1935) §§3155.19, 3155.01.

[21] Ashton v. Cameron County Water Improvement Dist. No. 1, 56 Sup. Ct. 892, 898, 80 L. ed. adv. op. 910, 916, 917 (1936). For a history of the bankruptcy clause see: WARREN, BANKRUPTCY IN THE UNITED STATES (1935) 9; (1932) 17 MARQ. L. REV. 163; Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, 587, 588, 55 Sup. Ct. 854, 862, 79 L. ed. 1593, 1603, 1604 (1934); Continental Ill. National Bank and Trust Co. v. Chicago Rock Island and Pacific Railroad, 294 U. S. 648, 667, 55 Sup. Ct. 595, 602, 79 L. ed. 1110, 1123 (1935).

[22] 18 PUB. MANAG. 178 (1936); 24 NAT. MUN. REV. 32,335 (1935); *Hearings Before a Subcommittee of the Committee on the Judiciary* on S. 1868 and H. R. 5950, 73d Cong., 2nd Sess. (1934) 12.

nority group of bondholders would invariably refuse to accept a new arrangement. The Sumners Act remedied this by making recalcitrant holders accede to the plans of the majority.

Undoubtedly, governmental units actually petitioning the courts under the Municipal Debt Readjustment Act would, because of the publicity gained thereby, have their immediate future credit injured. But in the majority of cases the Act would not have to be used. The greatest value of the Act was that its presence would serve as a "persuasive influence" with which to threaten minority bondholders into agreement, thus making actual court action a last resort in extreme cases.[23]

Since the Court has denied a petition to rehear,[24] a solution to the problem must be found through legislative action by the respective states. A few have enacted measures to deal with the problem. A summary of the action taken by the various states is given in "Legislation and Municipal Debt" in the *American Bar Association Journal*.[25]

New Jersey[26] authorized readjustment procedure through the state supreme court. On a petition of the bondholders to the court stating that the municipality has defaulted, a Justice, if satisfied as to the default, may file an order to that effect, after which the municipality may seek the aid of the Municipal Finance Commission in refunding. The Commission then takes charge of the finances of the municipality until the indebtedness is within all statutory limits.

Oregon[27] also provides for control over defaulting municipalities by court action. Holders of defaulted obligations may petition the county court, which, with the consent of the municipality, appoints an administrator who takes over the financial affairs of the local unit. Refunding or liquidating plans must be approved by the court.

In Connecticut[28] when a municipality defaults on relief bonds, the State Emergency Relief Commission may apply to the superior court for the appointment of a receiver to have complete control of the financial affairs of the municipality.

Massachusetts,[29] on three occasions, has passed statutes which placed the finances of three defaulting municipalities in separate state commissions, the members of which were appointed by the Governor.

[23] For a report of the action taken under the Sumners-Wilcox Act throughout the United States see: 25 NAT. MUN. REV. 328 (1936).

[24] Ten states through their respective Attorneys General filed a brief as *amici curiae* in support of a petition for a rehearing by the Supreme Court. 4 U. S. Law Week 1 (1936). Petition for rehearing denied, 57 Sup. Ct. 5 (1936).

[25] 21 A. B. A. J. 370 (1935); Meriwether v. Garrett, 102 U. S. 472, 26 L. ed. 197 (1880) (action taken by Tennessee in 1877).

[26] N. J. LAWS (1931) c. 340, S. B. §365.

[27] ORE. LAWS (1933) c. 433, p. 1.

[28] CONN. GEN. STATS. (Supp. 1933) c. 32a, part II.

[29] MASS. ACTS 1931 c. 44; ACTS 1932 c. 223; ACTS 1933 c. 341.

Virginia[30] has a harsh law for defaulting counties. It allows the Governor, upon petition by the bondholders, to order the state comptroller to withhold payments to the county of state funds (except school funds) until the default is overcome.

Montana[31] provides for refunding if the refunding plan is approved by the state examiner.

The default problem in North Carolina[32] has been handled through the Local Government Commission which advises and aids local units in drafting refunding plans.

If neither Federal nor State action alone can solve this problem adequately, it has been suggested that a desirable result might be reached by making their legislation complementary. Through the "full faith and credit" clause "Congress might exercise its bankruptcy power by an act which would recognize the validity of state adjudications and state discharges wherever the jurisdiction of Congress extends."[33]

All of the above legislation has been an attempt to remedy the evil after it has come into existence. The state legislatures should prevent the formation of this evil in the future by enacting strict measures which would prevent local governmental units from burdening themselves during "boom" periods with excessive and unnecessary bonded indebtedness.

W. C. HOLT.

Constitutional Law—Minimum Wage Legislation.

The United States Supreme Court in a 5-4 decision[1] recently declared unconstitutional a New York minimum wage statute[2] for women. The Court based its conclusion entirely upon the case of *Adkins v. Children's Hospital*,[3] which banned an attempt of Congress to regulate wages for women in the District of Columbia as an "unconstitutional interference with the freedom of contract included within the guaranties of the due process clause of the Fifth Amendment."

[30] VA. LAWS (1932) c. 148.

[31] MONT. LAWS (EXTRA SESSION 1933) c. 6.

[32] In North Carolina over 250 local units have defaulted in the last six years. (1936). 25 NAT. MUN. REV. 323. There are at present 24 counties and 98 cities and towns in default, 3 POP. GOV'T 16 (1936).

[33] (1935) 22 VA. LAW REV. 39; (1936) 45 YALE L. J. 702 (discussing comity by the Federal Courts to state statutory receiverships of defaulting municipalities).

[1] Morehead v. People of New York, 56 Sup. Ct. 918, 80 L. ed. Adv. op. 921 (1936).

[2] N. Y. CONS. LAWS (Cahill's, Cum. Supp. 1931-1935) c. 32, §§550-567. Statute set up a wage board to conduct investigations concerning wage payment and to determine minimum wages in certain industries upon proof that the employee was being paid an "oppressive wage." An oppressive wage was defined as one "less than the fair and reasonable value of the services rendered and less than sufficient to meet the minimum cost of living necessary for health." Violation of this act was punishable by fine, imprisonment, or both.

[3] 261 U. S. 525, 43 Sup. Ct. 394, 67 L. ed. 785 (1922).

The condemning feature of the District of Columbia statute was that it required the employer to pay a sum sufficient to supply "the necessary cost of living" to the woman employee, thus exacting from him, in the words of the Court, "an arbitrary payment for a purpose and upon a basis having no causal connection with his business."[4] The majority stated that the statute looked at only the side of the employee and failed to consider the equal rights of the employer, thus leaving the impression that an act which would take into consideration the rights of both parties to the employment contract might be valid.

In addition to the standard used in the District of Columbia statute, and for the protection of the employer, the New York law added another requirement to its "living wage"; namely, that the amount paid be "reasonably commensurate with the services rendered."[5] A minimum wage, to be fair, must weigh the equities and needs of both employer and employee, as the New York Legislature undoubtedly intended should be done. Yet, the majority in the present case failed to see any sound distinction in the two acts on this point and argued that the acts differed merely in "details, methods, and time."

"There is grim irony," the minority believe, "in speaking of the freedom of contract of those who, because of their economic necessities, give their services for less than is needful to keep body and soul together."[6]

This freedom of contract that the Court believed so essential to personal liberty is not without restraint: businesses charged with a public interest may be regulated;[7] the character, method and time for payment of wages may be governed;[8] hours of labor may be fixed;[9] and even wages may be set to meet and tide over a temporary economic

[4] *Id.* at 558, 43 Sup. Ct. 394 at 401, 67 L. ed. 785 at 796.

[5] N. Y. CONS. LAWS (Cahill's Cum. Supp. 1931-35) c. 32, §551(8).

[6] Morehead v. People of New York, 56 Sup. Ct. 918, 932, 80 L. ed. Adv. Op. 921, 937 (1936).

[7] Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77 (1877) (Congress may regulate storage charges in grain elevators); Atkin v. Kansas, 191 U. S. 207, 24 Sup. Ct. 124, 48 L. ed. 148 (1903) (regulating hours of labor for employees of municipal corporation); Wilson v. New, 243 U. S. 332, 37 Sup. Ct. 298, 61 L. ed. 755 (1916) (regulating wages and hours of interstate railroad employees); Block v. Hirsh, 256 U. S. 135, 41 Sup. Ct. 458, 65 L. ed. 865 (1920) (letting of houses in the District of Columbia may become of such a public interest as to authorize legislative interference).

[8] McLean v. Arkansas, 211 U. S. 539, 29 Sup. Ct. 206, 53 L. ed. 315 (1908). (In those mines where it was customary to pay workers according to a specified rate per ton of raw coal, statute required coal to be weighed before screening).

[9] Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. ed. 780 (1898) (state regulation of hours the coal miner worked underground); Bunting v. Oregon, 243 U. S. 426, 37 Sup. Ct. 435, 61 L. ed. 830 (1916) (limitation on number of hours that employees worked in any mill, factory, or manufacturing establishment in the state); see Note (1934) 12 N. C. L. REV. 156.

exigency.[10] The Court in the *Adkins* case, however, was unable to put the Act of Congress within the purview of these exceptions. It was not applicable solely to businesses of a public nature, nor was it made a temporary measure; rather, it established a permanent policy for the District of Columbia. It made no effort to govern the character, method, or periods of wage payments, nor to prescribe hours or conditions under which labor was to be done. By holding the New York Act indistinguishable from the one considered in the *Adkins* case, the majority precluded any argument that this statute might be within these well defined exceptions.

Minimum wage legislation is by no means new.[11] Massachusetts was the pioneer in this field, enacting laws for the control of wages as early as 1912.[12] The problem was first presented to the United States Supreme Court in 1914 when an Oregon statute was held constitutional by a 4-4 vote in *Stettler v. O'Hara*.[13] Two years later, an act of Congress establishing a temporary minimum wage schedule applicable only to interstate railroads was pronounced to be within constitutional limitations as an emergency measure.[14] With this rather meager precedent, the *Adkins* case denied the authority of Congress to enact general minimum wage legislation.[15]

Notwithstanding the *Adkins* case, and regarding as doubtful the effect it might have upon subsequent legislation, several states due to changed economic conditions have enacted legislation for wage regulation of women workers.[16] The state courts have not found it difficult to uphold these statutes as a vaild exercise of the police power for the protection of the health and morals of the woman worker and for the

[10] Wilson v. New, 243 U. S. 332, 37 Sup. Ct. 298, 61 L. ed. 755 (1916) (act passed to counteract a temporary interruption of interstate commerce due to a railroad labor dispute).

[11] The first English statutes passed for wage regulation were the ORDINANCE of LABORERS in 1349 and the STATUTE OF LABORERS in 1351, requiring all persons of certain classes to work, and carefully fixing the most minute details of the wage contract. In effect, these two statutes fixed *maximum* wages rather than minimum.

[12] MASS. ACTS AND RESOLVES (1912) c. 706.

[13] 243 U. S. 629, 37 Sup. Ct. 475, 61 L. ed. 937. Although the case was argued in Dec. 1914, the decision was not handed down until April, 1917.

[14] Wilson v. New, 243 U. S. 332, 37 Sup. Ct. 298, 61 L. ed. 755 (1916).

[15] In 1923, the Court, in a memorandum decision, felt itself bound by the *Adkins* case, and declared unconstitutional an Arizona statute which was substantially like the District of Columbia statute. Murphy v. Sardle, 269 U. S. 530, 46 Sup. Ct. 22, 70 L. ed. 396 (1923).

[16] CAL. GEN. LAWS (Deering, 1931) §3613; COLO. COMP. LAWS (1921) §§4263-4283; ILL. REV. STAT. (Cahill, 1933) c. 48, §§238-256 (by express provision, in force only until July 1, 1935); MINN. STAT. (Mason, 1927) §§4210-4232; N. H. PUB. LAWS (1933) c. 87; N. J. LAWS (1933) c. 152; N. Y. CONS. LAWS (Cahill Cum. Supp. 1931-35) c. 32, §§550-567; OHIO LAWS (1933) p. 502; ORE. CODE ANN. (1930) §§49-301—49-319; S. D. COMP. LAWS (1929) §§10022-A—10022-E; UTAH LAWS (1933) c. 39; WASH. STAT. ANN. (Remington, Rev. 1932) §§7630-7641.

future well-being of the entire race.[17] In an important Washington case, which shows the attitude adopted by these tribunals, the court justified its decision by saying that the *Adkins* case is not conclusive as to the validity of a state law "enacted in the exercise of the police power of the state."[18]

It is not inconceivable that the Court could have found substantial difference in the District of Columbia statute and the New York wage law to justify a distinction between the two. Nor is it at all unlikely that the Court might have reached an opposite result had it considered the constitutional question involved from the broader aspects of present-day social policy. However, as a practical question, would it be advisable to regulate the wages of women workers when no such regulation is placed on men? If so, many industries might discharge their women employees and replace them with men willing to work for less than the state has set for women. Furthermore, a minimum wage might become a maximum wage. Lastly, was the Court, in passing on the validity of the New York Wage Law, defining a fundamental right of individuals to bargain for the amount of wages to be paid and received, subject to regulation by neither federal nor state government?

O. W. CLAYTON, JR.

Criminal Law—Double Jeopardy.

A and *B* while together, were held up and robbed by the defendants. *A* was killed. The defendants were tried and found innocent of the murder of *A*. Subsequently, they were indicted for robbery with firearms of *B* to which they pleaded not guilty and former jeopardy. The plea of former jeopardy was overruled; the North Carolina Supreme Court *held* the two crimes separate and distinct, as there was no identity of offenses.[1]

It is a fundamental principle that a person cannot be tried twice for the same offense, and a plea of former acquittal or conviction will be sustained,[2] if the defendant could have been convicted under the first

[17] Holcombe v. Creamer, 213 Mass. 99, 120 N. E. 354 (1918); Williams v. Evans, 139 Minn. 32, 165 N. W. 495 (1917); Simpson v. O'Hara, 70 Ore. 261, 141 Pac. 158 (1914); Malette v. City of Spokane, 77 Wash. 205, 137 Pac. 496 (1913); Larsen v. Rice, 100 Wash. 642, 171 Pac. 1037 (1918). *Contra*: Topeka Laundry Co. v. Court of Industrial Relations, 119 Kan. 12, 237 Pac. 1041 (1925); see Stevenson v. St. Clair, 161 Minn. 444, 201 N. W. 629 (1925) (statute constitutional as to minors).

[18] West Coast Hotel Co. v. Parrish, 55 P. (2d) 1083, 1089 (Wash. 1936). Probable jurisdiction of the case is noted in 57 Sup. Ct. 40. If certiorari is granted, this case is expected to decide more definitely the constitutionality of minimum wage legislation, and clear up the doubts left by the principal case.

[1] State v. Dills and Osborne, 210 N. C. 178, 185 S. E. 677 (1936).

[2] See State v. Mansfield, 207 N. C. 233, 236, 176 S. E. 761, 762 (1934); N. C. CONST., art. 1, §17; U. S. CONST., AMEND. V.

indictment.[3] The determination of whether one is being tried twice for the "same offense" is accompanied with no little difficulty.

Where crimes against two persons grow out of one act it has been consistently held that a prosecution and conviction, or acquittal, as to one of the victims is no bar to a prosecution as to the other victim.[4] "To support a plea of former acquittal it is not sufficient that the two prosecutions should grow out of the same transaction; but they must be for the same offense, in both fact and law."[5] The test applied in *Rex. v. Vandercomb*[6] and introduced into the law of this state[7] is: "Could the defendant have been convicted on the first indictment upon proof of the facts, not as brought forward in evidence, but as alleged in the record of the second."[8] If this be answered in the affirmative the defendant is being tried twice for the same offense.

In the principal case the first indictment was for the murder of A. The defendants could not possibly be convicted under that indictment upon proof of robbery with firearms of B. Accordingly, the offenses are separate and distinct.

A single act may be an offense against the statutes of two governments[9] and if either statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution under the other. In such a case the offenses are not the same in law and in fact.[10] Here again, the victims are different personalities, and for that reason the offense against each is separate and distinct.[11]

[3] State v. Birmingham, 44 N. C. 120 (1852); State v. Gibson, 170 N. C. 697, 86 S. E. 774 (1915).

[4] State v. Yancy, 4 N. C. 133 (1814) (contempt of court-assault and battery); State v. Nash, 86 N. C. 650 (1881) (shooting); State v. Bynum, 117 N. C. 752, 23 S. E. 219 (1895) (larceny).

[5] State v. Nash, 86 N. C. 650, 651 (1881).

[6] 2 Leach C. C. 708 (1796) (The defendant was acquitted of breaking and entering a dwelling and stealing. He was subsequently tried for breaking and entering with intent to steal.).

[7] State v. Nash, 86 N. C. 650 (1881).

[8] State v. Nash, 86 N. C. 650, 656 (1881). Ashe, J., dissenting: "In many cases it would be impossible to ascertain, except by the evidence, whether the offenses are the same, when there are different indictments for offenses that are of the same grade and character." State v. Hankins, 136 N. C. 621, 623, 48 S. E. 593, 594 (1904). "But this would not remove the fault unless the rule is further extended so as in terms to include the right of the defendant to prove the identity of the offenses charged in the two indictments, which might otherwise appear to be different."

[9] State v. Taylor, 133 N. C. 755, 46 S. E. 5 (1903) (disturbing the peace-assault and battery); State v. Stevins, 114 N. C. 873, 19 S. E. 861 (1894) (failure to procure state and municipal whiskey license); State v. Reid 115 N. C. 741, 20 S. E. 468 (1894); State v. Lytle, 138 N. C. 738, 51 S. E. 66 (1905); State v. Harrison, 184 N. C. 762, 114 S. E. 830 (1922) (violation of state and federal prohibition law).

[10] State v. Taylor, 133 N. C. 755, 46 S. E. 5 (1903).

[11] See State v. Stevens, 114 N. C. 873, 877, 19 S. E. 861, 862 (1894) (where a

Where the second indictment is for a crime greater in degree than the first, and where both indictments arise out of the same act, it is held that an acquittal or conviction for the first is a bar to a prosecution for the second.[12] If there could be a prosecution for the greater offense the defendant would be tried twice for the lesser crime,[13] as he could be convicted of the lesser crime when tried for the greater one.[14] If "the same offense" means literally the same offense, it would seem that the defendant is not being tried twice for the same crime, but only twice for the same act. The state, however, should not be allowed to divide an offense consisting of several trespasses into as many indictments as there are acts of trespass that would separately support an indictment, and afterwards indict for the offense compounded of them all. An exception to the rule is made when the first indictment is procured by the collusion of the defendant.[15] A conviction thereon is no bar to a subsequent indictment regularly brought. Under the first indictment the defendant is not in jeopardy for he is holding his fate in his own hand.

Where the second indictment is for a crime less in degree than the first, and where both indictments arise out of the same act, and the defendant could have been convicted under the first indictment of the lesser crime, the plea of former acquittal or conviction has been uniformly upheld.[16] In this situation the defendant could not be convicted

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license is required by the state and another by the town, selling the same glass of liquor may be a violation of the town ordinance and also a violation of the state law, if license has not been obtained from both; and further, the same act may be punishable by the federal government if in violation of its statute, and if the purchaser is a minor the same single act may constitute a fourth distinct offense of selling spiritous liquor to a minor—and even a fifth if the sale is on Sunday).

[12] State v. Ingles, 3 N. C. 4 (1797) (assault and battery-riot, beating, imprisoning); State v. Lewis, 9 N. C. 98 (1821) (larceny-robbery); State v. Albertson, 113 N. C. 633, 18 S. E. 321 (1893) (assault-affray); State v. Bell, 205 N. C. 225, 171 S. E. 50 (1933) (burglary-murder); State v. Clemmons, 207 N. C. 276, 176 S. E. 760 (1934) (arson-murder).

[13] State v. Lewis, 9 N. C. 98 (1821).

[14] N. C. CODE ANN. (Michie, 1935) §§4639, 4640.

[15] State v. Moore, 136 N. C. 581, 48 S. E. 573 (1904) (indictment for simple assault procured at the solicitation of the defendant was held no bar to subsequent prosecution for assault with a deadly weapon regularly brought); *cf.* State v. Cale, 150 N. C. 805, 63 S. E. 958 (1909).

[16] State v. Stanly, 49 N. C. 290 (1857) (affray-assault and battery. Associate Justice Battle, alone, intimated that in the case of a former conviction a different result should be reached from the case of a former acquittal. He stated that the test laid down in Rex. v Vandercomb applied only when there was a former acquittal of the greater crime and that there must be an exception in favor of a former conviction.); State v. Lindsay, 61 N. C. 468 (1867) (riot-intent to rape. It is specifically pointed out at page 102 that the defendant could not be convicted of assault with intent to commit rape upon an indictment for rape. Subsequent to this case N. C. CODE ANN. (Michie, 1935) §4639 was passed by the legislature, providing for conviction of assault upon an indictment for

under the first indictment upon the facts alleged in the second, but he could be convicted of the lesser crime upon the first indictment as the greater crime includes the smaller.[17] If the acts alleged in the second indictment are used against the defendant in the first, it is manifest that there is double jeopardy.[18]

Where there are two transactions and two separate crimes arise,[19] or where there is a repetition of the same crime,[20] a prosecution for one offense is clearly no bar to the other. If there is only one transaction and separate and distinct statutes are violated, the same result is reached.[21]

Where there is a failure to perform a legal duty, that omission of duty cannot be divided into separate offenses, because one prosecution will be a bar to subsequent proceedings.[22]

The principal case is consistent with those cases holding that crimes arising out of one transaction and invading the rights of two persons are separate and distinct offenses. Plainly, the defendant is not being put in double jeopardy when prosecuted separately for the offense against each victim. Just as the victims are different, the offenses are different.

C. C. BENNETT.

Criminal Law—Solicitation.

The defendant told a fifteen-year-old boy that if he would set fire to a certain dwelling he would reward him with a pistol and furnish him with the necessary matches and oil. The boy assented to the plan but upon leaving the defendant, disclosed it to the officers. The North

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rape. It is believed this statute would alter the result reached in this case, making it consistent with the other cases).

[17] N. C. CODE ANN. (Michie, 1935) §§4639, 4640.

[18] State v. Lindsay, 61 N. C. 468 (1867); State v. Lawson and Cheatham, 123 N. C. 740, 31 S. E. 667 (1898); State v. Freeman, 162 N. C. 594, 77 S. E. 780, (1913); *Cf.* State v. Hankins, 136 N. C. 621, 48 S. E. 593 (1904).

[19] State v. Robinson, 116 N. C. 1047, 21 S. E. 701 (1895) (concealed weapon-assault and battery); State v. Hooker, 145 N. C. 581, 59 S. E. 866 (1907) (stealing-breaking and entering); State v. Mansfield, 207 N. C. 233, 176 S. E. 761 (1934) (bastardy-abandonment).

[20] State v. Williams, 94 N. C. 891 (1886) (selling liquor to different persons); State v. White, 146 N. C. 608, 60 S. E. 505 (1908) (carrying concealed weapon on different occasions); State v. Jones, 201 N. C. 424, 160 S. E. 468 (1931) (abandonment of children).

[21] State v. Pierce, 208 N. C. 47, 179 S. E. 8 (1935) (burning barn-burning personal property in barn).

[22] State v. Roberson, 136 N. C. 591, 48 S. E. 596 (1904) (prosecution for failure to get an annual license bars a further prosecution within the year); State v. Commissioners of Fayetteville, 6 N. C. 371 (1818) (prosecution for failure to keep one street in repair bars a further prosecution as to other streets in disrepair at the same time); *cf.* State v. Jones, 201 N. C. 424, 160 S. E. 468 (1931) (failure to support children is continuing offense and prosecution therefore is not barred by conviction for prior time).

Carolina Supreme Court *held* the defendant guilty of the common-law offense of soliciting the commission of a felony.[1]

This is a case of first impression in North Carolina, though the solicitation of another to commit a felony was ruled a common-law offense in *Rex v. Higgins*[2] in 1801. The holding of the principal case is in line with the overwhelming weight of authority.[3]

The offense of solicitation, a misdemeanor,[4] is complete when the solicitor has attempted to persuade another to commit a crime. Whether or not the person solicited consents, or having consented, makes an effort to commit the crime is of no moment.[5] The act of soliciting is punishable as it, in and of itself, is sufficient to take the case out of the sphere of mere intent.

A few states have made solicitation an offense by statutory enactment.[6] In the absence of statutes it has been held indictable as a common-law offense to solicit any person to commit larceny,[7] murder,[8] arson,[9] sodomy,[10] assault and battery,[11] and adultery.[12]

[1] State v. Tony Hampton, 210 N. C. 283, 186 S. E. 251 (1936).

[2] 2 East. 5. The defendant solicited a servant to steal his master's goods. *Held:* defendant guilty of a misdemeanor, although the indictment did not charge that the servant stole the goods, nor that any other act was done other than the soliciting.

[3] United States v. Galleanni, 245 Fed. 977 (D. C. D. Mass. 1917); State v. Schleifer, 99 Conn. 432, 121 Atl. 805 (1923); State v. Donovan, 28 Del. 40, 90 Atl. 220 (1914); Commonwealth v. Flagg, 135 Mass. 545 (1883); People v. Hammond, 132 Mich. 422, 93 N. W. 1084 (1903); State v. Sullivan, 110 Mo. App. 75, 84 S. W. 105 (1904); Commonwealth v. Randolph, 146 Pa. 83, 23 Atl. 388 (1892); State v. Bowers, 35 S. C. 262, 14 S. E. 488 (1892); Wiseman v. Commonwealth, 143 Va. 631, 130 S. E. 249 (1925); Rudolph v. State, 128 Wis. 222, 107 N. W. 466 (1906); see State v. Hudon, 103 Vt. 17, 20, 151 Atl. 562, 564 (1930); Blackburn, *Solicitation to Crime* (1934) 40 W. VA. L. REV. 135. But see Cox v. People, 82 Ill. 191, 192, 193 (1876); 1 BISHOP, CRIMINAL LAW (9th ed. 1923) §768, c. 2; 1 McCLAIN, CRIMINAL LAW (1897) §220.

[4] State v. Avery, 7 Conn. 266 (1828); State v. Sullivan, 110 Mo. App. 75, 84 S. W. 105 (1904); Commonwealth v. Hutchinson, 6 Pa. Super. 405 (1897).

[5] United States v. Galleanni, 245 Fed. 977 (D. C. D. Mass. 1917); State v. Donovan, 28 Del. 40, 90 Atl. 220 (1914); Commonwealth v. Flagg, 135 Mass. 545 (1883); People v. Hammond, 132 Mich. 422, 93 N. W. 1084 (1903); State v. Bowers, 35 S. C. 262, 14 S. E. 488 (1892); see State v. Hudon, 103 Vt. 17, 20, 151 Atl. 562, 564 (1930).

[6] CAL. PENAL CODE (Deering, 1935) §653f (solicitation of certain felonies); CONN. GEN. STAT. (1930) §6072 (solicitation of injury to person or property); IOWA CODE (1935) §12917 (solicitation of murder); VT. PUB. LAWS (1933) c. 349, §8746 (solicitation of felonies).

[7] State v. Schleifer, 99 Conn. 432, 121 Atl. 805 (1923).

[8] Commonwealth v. Randolph, 146 Pa. 83, 23 Atl. 388 (1892); see State v. Lourie, 12 S. W. (2d) 43, 45 (Mo. 1928).

[9] State v. Donovan, 28 Del. 40, 90 Atl. 220 (1914); Commonwealth v. Flagg, 135 Mass. 545 (1883); Commonwealth v. Hutchinson, 6 Pa. Super. 405 (1897); State v. Bowers, 35 S. C. 262, 14 S. E. 488 (1892).

[10] See State v. George, 79 Wash. 262, 140 Pac. 337, 339 (1914).

[11] United States v. Lyman, Fed. Cas. No. 15646 (C. C. D. Mass. 1818).

[12] State v. Avery, 7 Conn. 266 (1828). *Contra:* Smith v. Commonwealth, 54 Pa. 209 (1867) (adultery in Pa. was a misdemeanor, not a felony).

Though the crime is apparently clear and definite there has been much confusion in its application. Not infrequently it has been confused with an attempt to commit a crime.[13] The soliciting of another is not a sufficient act—"a step in the direction of the crime"—to constitute an attempt, and as against one who is merely guilty of solicitation an indictment for an attempt will not lie.[14] Further, solicitation may be distinguished from an attempt as it is the act of a person who solicits another to commit a crime; while an attempt is the act of one who himself intends to commit the crime. Both are substantive offenses and should be treated as separate and distinct.

Though the courts have almost unanimously held the solicitation of a felony to be an offense, the courts differ when the solicitation is of a misdemeanor. One line of authority rules that there can be no offense of solicitation of a misdemeanor,[15] while another rules it a crime if the misdemeanor is of a "high or aggravated type".[16] The latter view seems the better, as the distinction between felonies and misdemeanors is usually arbitrary, being governed by no fixed or definite principles, as there is apparently no intrinsic difference between the two.[17] Also, often, certain misdemeanors are more detrimental to the interests of society than many of the felonies. The solicited crime in the principal case being that of arson, the North Carolina court was not called upon to rule on the misdemeanor problem.

It is to be hoped that in the future the North Carolina doctrine of solicitation will be extended to include "high or aggravated misdemeanors".

S. J. STERN, JR.

[13] See State v. Schleifer, 99 Conn. 432, 438, 439, 440, 121 Atl. 805, 806, 807 (1923); State v. Lavine, 96 N. J. 356, 358, 115 Atl. 335, 336 (1921); State v. Bowers, 35 S. C. 262, 264, 14 S. E. 488, 489 (1892); State v. George, 79 Wash. 262, 140 Pac. 337, 338 (1914); State v. Baller, 26 W. Va. 90, 92 (1885).

[14] State v. Donovan, 28 Del. 40, 90 Atl. 220 (1914); State v. Bowles, 70 Kan. 821, 79 Pac. 726 (1905); McDade v. People, 29 Mich. 50 (1874); State v. Lampe, 131 Minn. 65, 154 N. W. 737 (1915); State v. Davis, 319 Mo. 1222, 6 S. W. (2d) 609 (1928); Stabler v. Commonwealth, 95 Pa. 318 (1880); Hicks v. Commonwealth, 86 Va. 223, 9 S. E. 1024 (1889); State v. Butler, 8 Wash. 194, 35 Pac. 1093 (1894); State v. Baller, 26 W. Va. 90 (1885); CLARK AND MARSHALL, CRIMES (3d ed. 1927) §133. *Contra:* State v. Taylor, 47 Ore. 455, 84 Pac. 82 (1906); BISHOP, NEW CRIMINAL PROCEDURE (2d ed. 1913) §74.

[15] Smith v. Commonwealth, 54 Pa. 209 (1867); CLARK AND MARSHALL, CRIMES (3d ed. 1927) §132.

[16] State v. Schleifer, 99 Conn. 432, 121 Atl. 805 (1923); Cox v. People, 82 Ill. 191 (1876); Commonwealth v. Hutchinson, 6 Pa. Super. 405 (1897); State v. Keyes, 8 Vt. 57 (1836); see United States v. Galleanni, 245 Fed. 977, 978 (D. C. D. Mass. 1917); Commonwealth v. Flagg, 135 Mass. 545, 549 (1883); State v. Butler, 8 Wash. 194, 35 Pac. 1093, 1094 (1894).

[17] "The statutory classification of crime, as felony or misdemeanor, is governed by no fixed or definite principle, but is purely arbitrary. Legislative whim or caprice may alone determine in which category an offense, not a felony at common law, shall be placed." Commonwealth v. Hutchinson, 6 Pa. Super. 405, 409 (1898).

Deeds—Reversions—Conveyance to Heirs General of Grantor.

Grantor conveyed land to her daughter and the daughter's husband, for their joint lives, then to the survivor, remainder after the determination of the life estate to the daughter's children, begotten by her said husband, in fee simple; and in the event she had no children by the said husband, then an estate in fee simple forever, to the right heirs of the grantor. Subsequently the grantor, the daughter and her husband conveyed the land in fee simple to the defendant's grantor. The original grantor died first; then the husband. Finally, the grantor's daughter died leaving no children. Plaintiffs, collateral heirs of the grantor, sued for the land. *Held,* judgment for defendants. A reversion was created in the grantor upon the happening of the contingency, and her heirs take by descent rather than by purchase; therefore, they take nothing, their ancestor having previously granted the reversion.[1]

According to the English common law if an owner of land in fee simple sought to convey a life estate or an estate in tail, with a remainder to the grantor's heirs, the remainder was void and the grantor had a reversion in fee simple[2] which would go to his heirs, if at all, by descent and not by purchase. The reason for the rule was that to allow the heirs to take as purchasers would have deprived the grantor's overlord of the feudal rights of wardship and marriage in the case of a minor heir.[3] This rule was a positive rule of law like the rule in Shelley's Case, and was applied in every case where the limitation was to the heirs general of the grantor.[4] England in 1833, by statute, abolished the rule and since that time a grantor's or devisor's heirs take as purchasers.[5] The rule is strictly applied in some American jurisdictions as a positive rule of law,[6] in others it has been entirely ignored,[7] while some states have applied the rule as one of construction, having given consideration to the intent of the grantor as gathered from the whole instrument.[8]

North Carolina has recognized the principle that where the grantor

[1] Therrell v. Clanton, 210 N. C. 391, 186 S. E. 483 (1936).

[2] Godolphin v. Abingdon, 2 Atk. 57, 26 Eng. Reprint 432 (1740); 1 Simes, FUTURE INTERESTS (1936) §144; Comment (1934) 20 CORN. L. Q. 116.

[3] 1 Simes, FUTURE INTERESTS (1936) §145.

[4] 1 Simes, FUTURE INTERESTS (1936) §147.

[5] 3 & 4 WILL. IV, C. 106, §3 (1833).

[6] West Tenn. Co. v. Townes, 52 F. (2d) 764 (D. C. Miss. 1931); Hobbie v. Ogden, 178 Ill. 357, 53 N. E. 104 (1899); Nickols v. Davis, 188 Ky. 215, 221 S. W. 507 (1920); Williams v. Green, 128 Miss. 446, 91 S. 39 (1922); Robinson v. Blankenship, 116 Tenn. 394, 92 S. W. 854 (1906).

[7] Hall v. Realty and Investment Co., 306 Mo. 182, 267 S. W. 407 (1924); New Jersey Title Co. v. Parker, 84 N. J. Eq. 351, 93 Atl. 196 (1915), *aff'd,* 85 N. J. Eq. 557, 96 Atl. 574 (1915); (1934) 20 CORN L. Q. 116, 117 n. 10.

[8] Doctor v. Hughes, 225 N. Y. 305, 122 N. E. 221 (1919), Comment (1919) 4 CORN. L. Q. 83; Comment (1920) 28 YALE L. J. 713; Whittemore v. Equitable Trust Co., 250 N. Y. 298, 165 N. E. 454 (1929); Comment (1929) 29 COL. L. REV. 837; 1 Simes, FUTURE INTERESTS (1936) §147.

in a conveyance attempts, after creating a particular estate in favor of another, to limit by the same instrument a fee simple estate in favor of his heirs general who would properly take such an estate by descent from him, the limitation is invalid, and the grantor is regarded as having the reversion in fee simple.[9] The mere fact that the estate is called a remainder does not preclude the holding that it is in effect a reversion.[10] It is said that at common law such a remainder could not divest the grantor of the fee, under the rule that *nemo est haeres viventis*—no one is the heir of a living person.[11] However, the decisions, considered as a whole, are in confusion as to whether North Carolina has the rule and if so whether it is an inexorable rule of property. Some cases have construed a limitation to the heirs of the testator as a remainder;[12] others have said it was a reversion;[13] and still others, without considering the application of the rule under discussion, have digressed on the question as to whether the heirs of the testator should be determined as a group on the death of the life tenant, or in the orthodox manner, at the death of the settlor.[14] The operation of the common law rule may be affected by C. S. §1739 which provides that limitations by deed, will or other writing, to the heirs of a living person, shall be construed to be the children of such person unless a contrary intention appears by the deed or will.[15] The present writer has found but one case in which the statute was applied.[16] There a limitation to the heirs of the grantor was was construed to mean children, since it was clear from an examination of the entire deed that the grantor did not contemplate surviving his wife or that there was a possibility of reverter in him. The

[9] King v. Scoggins, 92 N. C. 99 (1885); Thompson v. Batts, 168 N. C. 333, 84 S. E. 347 (1915).

[10] King v. Scoggins, 92 N. C. 99 (1885) (principle recognized that although the limitation is called a remainder, it may be in effect a reversion).

[11] See Thompson v. Batts, 168 N. C. 333, 334, 84 S. E. 347, 347 (1915).

[12] Grantham v. Jinnette, 177 N. C. 229, 98 S. E. 724 (1919). The property was devised to the wife, at whose death the executor was to sell the property left by her and divide the proceeds among testator's legal heirs. There were no heirs to take under the will when wife died. *Held*, the widow is not the husband's heir at common law, and property will not descend to her heirs under the statute making her the heir of the husband if he has not devised the property. A contingent remainder was created here. Allen, J., dissenting, makes the point that the devise to legal heirs was void as a remainder; this left the reversion in fee in the testator at his death and it would pass to widow as his heir under the statute. Baugham v. Trust Co., 181 N. C. 406, 409, 107, S. E. 431, 432 (1921) "It is true that the limitation to the heirs of the testator is referred to in some of the cases as a remainder to the heirs, and in others as a reversion left in the testator."

[13] See Thompson v. Batts, 168 N. C. 333, 335, 84 S. E. 347, 348 (1915) (principle recognized).

[14] Jenkins v. Lambeth, 172 N. C. 466, 90 S. E. 513 (1916).

[15] N. C. CODE ANN. (Michie, 1935) §1739.

[16] Thompson v. Batts, 168 N. C. 333, 84 S. E. 347 (1915) (conveyance in contemplation of marriage to M, the intended wife, to descend to the heirs of the body of the said M in fee simple, the issue of such marriage, and on failure of issue to revert to the heirs of the grantor).

effect, however, of the court's decision was to bring the case within the doctrine, that, if by "heirs" the grantor meant "children" or those who would be his heirs if he died at the death of the life tenant, or if in any other way he indicated a class of remaindermen, which might differ from his heirs general, the rule would have no application.[17]

The principal case lays down the common law rule that when the limitation is to the heirs general of the grantor, such heirs take by descent since the grantor retained the reversion. Here the statute[18] was not regarded as applicable because the court apparently thought the intention of the grantor was otherwise as to the use of the word "heirs,"[19] and the rule under discussion was applied as a rule of property. It is submitted that the court, in so deciding, failed to consider the grantor's intention derived from the instrument as a whole. The conveyance was to the grantor's only child and to the child's husband, and to the survivor of them, then to their children, and if there were none, then to the grantor's own right heirs. It would thus seem that she had given up all interest in the land and her collateral heirs would be entitled to take. Instead of availing itself of the opportunity to change the rule to one of construction, the court preferred to follow its precedents laid down in the wills cases, where similar limitations were under consideration, and in which the rule was applied as one of property.[20] The North Carolina court in other decisions has inaugurated the commendable policy of disregarding the rigid technicalities of the common law[21] and has sought to give effect to the grantor's intention.[22] Since the ancient reasons for the rule no longer exist, the rule itself should be abolished; but if the court is going to apply it, then it should be applied as as a rule of construction so as not to defeat the intention of the grantor. This would be in keeping with the trend of modern authority.[23]

J. D. MALLONEE, JR.

[17] 1 Simes, FUTURE INTERESTS (1936) §147.

[18] N. C. CODE ANN. (Michie, 1935) §1739.

[19] One could hardly interpret "heirs" as meaning children here, since the daughter was an only child.

[20] Yelverton v. Yelverton, 192 N. C. 614, 135 S. E. 632 (1926); Note (1935) 14 N. C. L. REV. 90 (Doctrine of Worthier Title).

[21] Willis and Regan v. Mutual Loan and Trust Co., 183 N. C. 267, 269, 111 S. E. 163, 164 (1922) "The rigid technicalities of the common law have gradually yielded to the demand for a more rational mode of expounding deeds." Pugh v. Allen, 179 N. C. 307, 309, 102 S. E. 394 (1920) "It is the recognized position in this state that except when modified by some arbitrary principle of law like the Rule in Shelly's Case, this perhaps is the only exception now prevailing, a deed must be construed so as to effect the intention of the parties as expressed in the entire instrument."

[22] Boyd v. Campbell, 192 N. C. 398, 135 S. E. 121 (1926).

[23] 1 Simes, FUTURE INTERESTS (1936) §147.

Divorce—Separation.

Plaintiff separated from his wife without cause and without agreement, express or implied; however, from time to time he provided her with money for her support. In an action for an absolute divorce on the ground of two years of separation,[1] *held,* divorce denied because the mere living separate and apart for a period of two years would not entitle either party to a divorce. The statute authorizes divorce only where there has been a separation agreement.[2] Further, the court indicated that the abandoning party may not have a divorce at all in this state.[3]

A statute making separation a ground for divorce first appeared in 1907.[4] It required ten years of continuous separation, and a divorce under its provisions was conditioned upon there being no children born of the marriage.[5] Divorce under this 1907 statute could be had on application of either party, the injured party or the one at fault.[6] This was later changed by the 1919 consolidation[7] which restricted the right to secure a divorce to the injured party.[8] In 1921 the period of separation required was cut from ten years to five[9] and in 1933 from five to two years.[10]

However, in 1931, another statute had been enacted providing for

[1] P. L. N. C. 1933, c. 163, N. C. CODE ANN. (Michie, 1935) §1659(a), amending P. L. N. C. 1931, c. 72, provides: "Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony, on application of either party, if and when there has been a separation of husband and wife, either under a deed of separation or otherwise, and they have lived separate and apart for two years, and the plaintiff in the suit for divorce has resided in this state for a period of one year."

[2] For discussion of separation agreements: (1924) 2 N. C. L. REV. 192; (1926) 11 CORN. L. Q. 544; (1932) 27 ILL. L. REV. 315.

[3] Parker v. Parker, 210 N. C. 264, 186 S. E. 346 (1936).

[4] P. L. N. C. 1907, c. 89 amending §1561 of c. 31 of Revisal of 1905.

[5] P. L. N. C. 1917, c. 57 amended P. L. N. C. 1907, c. 89 by abolishing the requirement that no children shall be born of the marriage.

[6] Cooke v. Cooke, 164 N. C. 272, 80 S. E. 178 (1913). The defendant had previously obtained a divorce from bed and board and now the plaintiff sued for a divorce on the ground of ten years of separation. *Held:* there was nothing in the statute to indicate that only the injured party could sue. In the words of Justice Brown, "After ten long years of separation, why inquire into whose fault it was, why dig up from their graves the buried memories of broken lives?"

[7] C. S. 1919, c. 30, §5. The ten year separation statute which was consolidated with the other divorce statutes provided that marriages could be dissolved and the parties thereto divorced from the bonds of matrimony, on application of the party injured, where there had been a separation of husband and wife for ten years.

[8] Sanderson v. Sanderson, 178 N. C. 339, 100 S. E. 590 (1919). The court distinguished Cooke v. Cooke, 164 N. C. 272, 80 S. E. 178 (1913), on the ground that at the time the Cooke case was decided there was no restriction in the statute on the right of either party to sue, whereas the amended statute clearly gives the right only to the injured party. Lee v. Lee, 182 N. C. 61, 108 S. E. 352 (1921) (adhered to the Sanderson case in holding only the injured party could sue); Reeves v. Reeves, 203 N. C. 792, 167 S. E. 129 (1933).

[9] P. L. N. C. 1921, c. 63.

[10] P. L. N. C. 1933, c. 71.

divorce after five years separation on application of either party if no children had been born of the marriage.[11] This statute was not an amendment to the old law but was in addition to the then existing statute; thus there were two different separation statutes existing at the same time. The 1931 act was also amended in 1933 to cut the separation period from five to two years.[12]

Involuntary separation of defendant caused by incarceration in the state hospital for the insane[13] or by imprisonment in the state penitentiary[14] has been held not to be such separation as contemplated by the statute. In 1929 the statute was amended by allowing divorce if the separation was either voluntary or involuntary, provided involuntary separation was in consequence of a criminal act committed by the defendant prior to such divorce proceeding.[15] However, plaintiff may not obtain a divorce for separation where by court decree he was forced to live apart from his wife by reason of an assault on her.[16] *Cooke v. Cooke*[17] held that separation includes legal separation, hence a divorce from bed and board may become a ground for absolute divorce. The court in addition pointed out that there was nothing in the statute to indicate that separation must be by mutual consent.

The 1931 statute, already referred to,[17a] under which the present suit was brought, permits either party to sue.[18] Therein it is like the separation statute as it existed before 1919. Therefore the court in the principal case might have been expected to revert to its holding under the old law, and to have permitted either the injured or the injuring party to sue.[19] However, the court indicated that the party who has wrongfully abandoned the other may not obtain a divorce. Probably the court did not give the statute the meaning the legislature intended; the new 1931 law would seem to allow divorce to either party; the only requirement being that they live separate and apart for two years. The

[11] P. L. N. C. 1931, c. 72.

[12] P. L. N. C. 1933, c. 163, N. C. CODE ANN. (Michie, 1935) §1659(a) also removed condition "that no children shall have been born to the marriage").

[13] Lee v. Lee, 182 N. C. 61, 108 S. E. 352 (1921); (1919) 6 VA. L. REV. 133; (1919) 19 COL. L. REV. 505.

[14] Sitterson v. Sitterson, 191 N. C. 319, 131 S. E. 641 (1926); Comment (1926) 11 ST. LOUIS L. REV. 316.

[15] P. L. N. C. 1929, c. 6.

[16] Reynolds v. Reynolds, 208 N. C. 428, 181 S. E. 338 (1935). The court said that an action never lies where plaintiff must base his claim in whole or in part on a violation by himself of the criminal or penal laws of the state.

[17] 164 N. C. 272, 80 S. E. 178 (1913).

[17a] See Note 11 *supra*.

[18] Long v. Long, 206 N. C. 706, 175 S. E. 85 (1934). A separation agreement and a property settlement had been made. The court in granting divorce to the plaintiff, who had abandoned his wife, cited P. L. N. C. 1933, c. 163, and seemed to base its decision on the fact that the statute allowed either party to sue. Campbell v. Campbell, 207 N. C. 859, 176 S. E. 250 (1934).

[19] Cooke v. Cooke, 164 N. C. 272, 80 S. E. 178 (1913).

court's addition to the statute by interpretation reaches a desirable end, in that it prevents one party from abandoning the other without cause and then taking advantage of his own wrong to secure a divorce.

The court further declared that to obtain a divorce under the 1931 act there must be a separation by mutual agreement, express or implied.[20] The question then arises, where a party has been wrongfully abandoned without any agreement, is that party to be denied a divorce? The answer is that under the older statute, passed in 1907, and already discussed herein together with its subsequent modifications, the divorce may be secured.[21]

It is hard to see any necessity for two separation statutes, with diverse and confusing interpretations. The next legislature should pass a single separation statute and expressly repeal the others.

JAMES A. WELLONS, JR.

Insurance—Subrogation—Right of Insured Debtor and Creditor to Insurance Money.

X Company made a loan of $3,000 to *A* and took a mortgage on *A's* house as security. *A* conveyed the house to *B*, who assumed the mortgage, and as additional security the *X* Company took out an insurance policy on the life of *B*, paying the premiums therefor. Fifteen months later *B* conveyed to *C*, and *C* in turn to *D*, each assuming the mortgage. Title to the house remained in *D* until the death of *B* two and one-half year later. The *X* Company collected the insurance, kept an amount equal to the sum due on the mortgage, and sent the mortgate to *D* who cancelled it of record. The administratrix of *B* brought action for the surplus insurance and also asked to be subrogated to the position of *X* Company as to the mortgage, contending that the estate itself had satisfied the indebtedness. By agreement of the defendants, *X* company and *D*, the administratrix was allowed that portion of the insurance in excess of the debt. The court refused to allow subrogation, and thus allowed *D* to hold the property free from the mortgage indebtedness.[1]

[20] The words of the court are: "Where a husband and wife have lived separate and apart from each other for two years, following a separation by mutual agreement, express or implied, their marriage may be dissolved; but where they have lived separate and apart from each other for two years, without a previous agreement between them, neither is entitled to a divorce, under the statute, C. S. §1659(a)." Parker v. Parker, 210 N. C. 264, 266, 186 S. E. 346, 347 (1936). Hyder v. Hyder, 210 N. C. 486 (1936) followed Parker v. Parker.

[21] John A. Livingstone, *Grounds for Divorce*, The Raleigh *News and Observer*, September 13, 1936, at p. 3 discusses the case of Parker v. Parker. H. W. McGALLIARD, "WOMAN AND THE LAW" c. on Divorce, which shall soon be published by the N. C. Institute of Government.

[1] Miller v. Potter, 210 N. C. 268, 186 S. E. 350 (1936).

The practice of the creditor insuring his debtor is not a thing new or uncommon to the business world. In the usual situation the debtor takes out insurance, naming his estate as beneficiary, and then makes an assignment of the policy as collateral security to the creditor "as his interest might appear," the creditor thereafter paying the premiums. Inasmuch as a contract provision is involved the courts are uniform in allowing the estate of the insured the excess insurance.[2] Although the contract provision that the creditor take only to the extent of his interest be omitted, still the courts hold that the debtor is entitled to the surplus.[3] In the circumstance where the creditor takes out the policy and pays the premiums, the majority of the courts seem to say that the creditor will be allowed to retain only the insurance to the extent of his debt, the debtor's estate getting the remainder.[4] The courts reason that the policy, above the amount of the creditor's claim, is for the debtor's benefit and to hold otherwise the court would be supporting a wagering contract. However, it will be observed that in most of the cases that laid down the above rule, the evidence showed either an assignment by the debtor by way of collateral security or that the creditor had procured the insurance under an agreement with the debtor. In the absence of these factors there is good authority holding that the creditor may retain all, reasoning that the contract is one with which the debtor has no concern,[5] this seeming to be better from the logical standpoint. No case where the creditor took out the policy and the debtor paid the premiums has been found, but one textwriter, at least, intimates that the debtor would be entitled to the surplus.[6] Such

[2] Benes v. Bankers Life Ins. Co., 282 Ill. 236, 118 N. E. 443 (1917) (assignee had no interest, so he was not allowed to recover anything under the policy); Bush v. Kansas City Life Ins. Co., 214 S. W. 175 (Mo. 1919); Freeman v. Anding, 69 S. W. (2d) 822 (Tex. Civ. App. 1934).

[3] Deal v. Hainley, 135 Mo. App. 507, 116 S. W. 1 (1909); VANCE, INSURANCE (2d ed. 1930) §163; see Haberfield v. Mayer, 256 Pa. 151, 100 Atl. 587 (1917). *Contra:* Fitzgerald v. Rawlings Implement Co., 114 Md. 470, 79 Atl. 915 (1911).

[4] Tateum v. Ross, 150 Mass. 440, 23 N. E. 230 (1890); VANCE, *loc. cit. supra* note 3; see Warnocke v. Davis, 104 U. S. 775, 26 L. ed. 924 (1881) (assignment as collateral); Exchange Bank of Macon v. Loh, 104 Ga. 446, 31 S. E. 459 (1898) (assignment involved); Lanouette v. Laplante, 67 N. H. 118, 36 Atl. 981 (1892) (beneficiary took out policy with no interest in life of insured, but under agreement with insured, and the court allowed the estate of insured to recover entire policy, less premiums paid by the beneficiary); Roller v. Moore's Adm'r, 86 Va. 512, 10 S. E. 241 (1889) (*held:* assignee of insurance policy had no insurable interest above the debt).

[5] Grant's Adm'rs v. Kline, 115 Pa. 618, 9 Atl. 150 (1887) (insurance did not occupy the position of collateral security); Shaffer v. Spangler, 144 Pa. 223, 22 Atl. 865 (1891); VANCE, *loc. cit. supra* note 3; see Amick v. Butler, 111 Ind. 578, 12 N. E. 518 (1887) (assignment with agreement to reassign upon payment of debt, this condition not being met); Fitzgerald v. Rawlings Implement Co., 114 Ind. 470, 79 Atl. 915 (1911) (assignment, but provided that such was not to secure any indebtedness).

[6] MAY, INSURANCE (3d ed. 1891) §459(a).

a view seems to be in line with sound reasoning. The abandonment by the defendants in the principal case of their claim to the money not necessary to the satisfaction of the mortgage, puts them in the position of accepting the majority view.

The principal problem before the court involved subrogation. This doctrine is generally said to presuppose an existing indebtedness, and can only be invoked by one under liability.[7] Such a requirement was met in the instant case by an assumption of the mortgage by *B's* grantee, a principal-surety relationship arising.[8] In addition to the above, the party seeking to invoke subrogation must have paid the debt.[9] This prerequisite was not met since the facts of the case as stated in the court's decision indicate that *B* contributed nothing towards the insurance premiums. No right to subrogation could be invoked other than on this score.

However, under the facts as found by the referee, and to which no exceptions were filed, there appears to be an important omission in the opinion of the Supreme Court; namely, that although *X* company took out the policy, and paid the premiums, it was done with the insured's money, he having become liable for the premiums when he assumed the mortgage given by *A* to *X* Company.[10]

But, with the addition of these facts, can it be said that the money of plaintiff's intestate satisfied the mortgage indebtedness? In the recent case of *Russel v. Owen*[11] the beneficiary was surety for the insured upon an obligation secured by an assignment of the policy and a deed of trust. However, this policy, in fact, was not taken out on behalf of the beneficiary, but to secure the insurance company, it being the creditor. On the death of the insured the proceeds of the insurance were used in satisfying the obligation. The beneficiary brought an action to be subrogated to the rights of the creditor in the deed of trust and the court allowed her claim. The court reasoned that the beneficiary's interest became vested on the death of the insured and thus the beneficiary's money paid the obligation for which she was surety. The result reached is apparently in line with the conclusion reached by two other states.[12] But the decision has been criticized vigor-

[7] 1 BRANDT, SURETYSHIP AND GUARANTY (3d ed 1905) §363.

[8] 1 BRANDT, *op. cit. supra* note 7, §333; see (1935) 13 N. C. L. REV. 337 for a discussion of the problem of whether the mortgagor becomes a surety to the mortagee, when the mortgage is assumed by the grantee.

[9] 1 BRANDT, *op. cit. supra* note 7, §332.

[10] Record on Appeal 35, Miller v. Potter, 210 N. C. 268, 186 S. E. 350 (1936).

[11] 203 N. C. 262, 165 S. E. 687 (1932).

[12] Barbin v. Moore, 85 N. H. 362, 159 Atl. 409 (1932) (the insurance company was not the creditor); Katz v. Ohio Nat. Bank, 127 Ohio St. 531, 191 N. E. 782 (1934) (promisory notes involved, with no mortgage security); see Smith v. Wells, 72 Ind. App. 29, 122 N. E. 334 (1919) (subrogation allowed due to prior agreement).

ously.[13] due to its defeat of the evident intention of the insured, and at least one state has refused to override this intention.[14] In order to get a result in the principal case similar to the result reached above one assumption must be made; namely, that where a creditor takes out insurance on the debtor's life as security for his obligation, with the debtor paying the premiums, having in fact been under a liability to so do, the debtor's estate should be in substantially the same position as the beneficiary where a debtor takes out a policy of insurance, naming a beneficiary, and later assigns such policy to the creditor as collateral security for his obligation.

From the practical aspect of the principal case there seems to be no great dissimilarity between the two arrangements. The court had before it a very "close case," but subrogation "was invented to do substantial justice between the parties."[15] Therefore, since the deceased in effect has paid the premiums, and the creditor has been satisfied, the deceased's estate should receive the product of the insurance, namely, the satisfied mortgage.

J. WILLIAM COPELAND.

Parent and Child—Child's Right to Sue Parent for Support.

An infant of six years, by a next friend, instituted an action against her father for support and maintenance.[1] The parents of this minor child had been divorced and the custody awarded to the mother. The court held for the plaintiff.

The usual means of enforcing the obligation of a parent to support the child is an action by a third party against the parent for the value of necessaries furnished the child, or a decree for support of the child in a divorce suit, or criminal proceedings.[2] In allowing the child to sue its parent directly, the usual form of action being otherwise, the North Carolina court has shown itself most liberal in the treatment of the parent and child relationship.

At common law in England the duty of a parent to support his child was considered merely moral, and neither a suit by the child for support nor an action by a third party for necessaries was allowed.[3] In a great many of our jurisdictions the duty has been

[13] (1933) 11 N. C. L. REV. 169.
[14] Kash Ex'r v. Kash, 260 Ky. 508, 86 S. W. (2d) 273 (1935); Berger v. Berger, 264 Ky. 225, 94 S. W. (2d) 618 (1936).
[15] (1936) 14 N. C. L. REV. 295, 296.

[1] Green v. Green, 210 N. C. 147, 185 S. E. 651 (1936).
[2] Note (1920) 7 A. L. R. 1277.
[3] Mortimore v. Wright, 6 M. & W. 481 (1840); Shelton v. Springett, 11 C. B. 452 (1851); Bazeley v. Forder, L. R. 3 Q. B. 559 (1868).

called legal,[4] but in spite of this language of the courts, a direct action by the child has commonly been denied.[5] Special circumstances have given rise to attempted actions which may be grouped under four headings: (1) actions brought under statutory provisions; (2) actions by illegitimate children; (3) actions on contracts providing for the child's support; (4) actions after a divorce or separation of the child's parents.

(1) Under the statutory provisions, many states provide for criminal prosecution for non-support and abandonment,[6] but in such cases the proceeding is instituted by the state and not by the child. The most that the child can do is to complain to the proper authorities and hope that the parent will be coerced into providing for it. It is only under the so-called "poor laws" that the indigent child has been allowed to sue in its own name.[7]

(2) While at common law the putative father was under no legal obligation to support his illegitimate child,[8] the North Carolina court in *Sanders v. Sanders*[9] said, "There is a natural obligation to support even illegitimate children which the law not only recognizes, but enforces." Cases are found in the reports that bear out this dictum, and there is no doubt that in North Carolina since the decision in the principal case an illegitimate child may sue for support.[10] Nebraska and

[4] Dunbar v. Dunbar, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. ed. 1084 (1902); Worthingham v. Worthingham, 212 Mo. App. 216, 253 S. W. 443 (1923); SCHOULER, DOMESTIC RELATIONS (6th ed. 1921) §781.

[5] Huke v. Huke, 44 Mo. App. 308 (1891). A seventeen year old daughter's petition in equity against her father for support was dismissed because by the common law of England this obligation was without legal sanction, and there was no Missouri statute to compel the father to support her. A later Missouri case, Glaze v. Hart, 225 Mo. App. 1205, 36 S. W. (2d) 684 (1931), *held* that although the father might be criminally liable for failure to perform his duty and civilly liable to one who furnishes necessaries to his child, still the child himself would not be permitted to sue. Matter of Ryder, 11 Paige 185 (N. Y. 1844); Allings, v. Allings, 52 N. J. Eq. 92, 27 Atl. 655 (1893); *In re* Ganey 93 N. J. Eq. 389, 116 Atl. 19 (1922).

[6] N. C. CODE ANN. (Michie, 1935) §§4448, 4449, 4450, 4450(a).

[7] CAL. CIV. CODE (Deering, 1923) §206 (provides that it is the duty of the father, the mother, and the children of any poor person who is unable to maintain himself by work to maintain such person to the extent of their ability); Paxton v. Paxton, 150 Cal. 667, 89 Pac. 1083 (1907) (§206 imposes a legal obligation on parents to support an invalid adult child enforceable by the child in a suit in equity); Tuller v. Superior Court, 122 Cal. 242, 10 P. (2d) 43 (1932) (complaint by a child as a "poor person" against her father for non-support *held* not demurrable for failure to join the mother). *Contra:* Rawlings v. Rawlings, 121 Miss. 140, 83 So. 1259 (1919) (bill filed by an abandoned child to require sufficient support could not be entertained, notwithstanding a statute requiring certain relatives to support pauper members of the family).

[8] Cameron v. Baker, 1 C. & P. 268, 12 Ecl. 161 (1824); Furillio v. Crowther, 7 D. & R. 612, 16 Ecl. 302 (1826); Hard's Case, 2 Salk. 427 (1795).

[9] 167 N. C. 316, 319, 83 S. E. 490, 491 (1924).

[10] See Burton v. Belvin, 142 N. C. 151, 153, 55 S. E. 71, 72 (1926); Kimborough v. Davis, 16 N. C. 71, 75 (1827); Hyatt v. McCoy, 195 N. C. 762, 143 S. E. 518 (1928).

Kansas have also ruled on this question and allow these unfortunates to sue directly.[11]

(3) Pending divorce or separation, contracts are sometimes made between the parents for the support and education of the children that will be affected by their parting. These contracts are often made a part of the final decree of divorce or separation, but in no case have the children been allowed to sue the parent on the contract. The courts have ruled that the other parent is the proper party or must be joined in the bringing of the action.[12]

(4) After a divorce or a deed of separation, a majority of the states hold that a father remains liable for the support of his children on the ground that he owes both the children and society an obligation that even loss of custody and right to the child's services do not dissolve. In the following four situations he has been held liable: (a) where the divorce decree makes no provision for the child's custody or support;[13] (b) where the custody of the child is awarded to the mother, but no provision is made for its support;[14] (c) where the decree awards the custody of the child to the mother with sums to be paid by the father for support, but the provision for the child becomes insufficient. In such a case, upon the opening of the former decree, further compensation may be allowed;[15] (d) where there is neither a decree of divorce nor a deed of separation, but the parents are living separate and apart.[16]

Admitting that the father is under a duty to support the child in the above four instances, will the child be allowed to enforce directly the obligation? The courts in the past have answered in the negative.[17]

[11] Craig v. Shea, 102 Neb. 575, 168 N. W. 135 (1918) (there being no provision allowing bastardy proceeding to be brought by a married woman, and no other remedy being afforded except criminal prosecution, the illegitimate child, by its next friend, might maintain an action in equity against its putative father to declare its status and recover support and maintenance); Doughty v. Engler, 112 Kan. 583, 211 Pac. 619 (1923).

[12] Kendall v. Kendall, 200 App. Div. 702, 193 N. Y. Supp. 658 (1922); Cawthon v. Jones, 240 Ky. 380, 42 S. W. (2d) 498 (1931).

[13] Gilley v. Gilley, 79 Me. 292, 9 Atl. 623 (1887).

[14] Spencer v. Spencer, 97 Minn. 56, 105 N. W. 483 (1906); Evans v. Evans, 125 Tenn. 112, 140 S. W. 745 (1911).

[15] Graham v. Graham, 38 Colo. 453, 88 Pac. 852 (1906).

[16] Jacobs v. Jacobs, 136 Minn. 190, 161 N. W. 525 (1917).

[17] Sikes v. Sikes, 158 Ga. 406, 123 S. E. 694 (1924); Hooten v. Hooten, 168 Ga. 86, 147 S. E. 373 (1929); Cunningham v. Cunningham, 120 Tex. 491, 40 S. W. (2d) 46 (1927). In Yarborough v. Yarborough, 290 U. S. 202, 54 Sup. Ct. 181, 78 L. ed. 269 (1933) the parents were divorced in Georgia and in the same proceedings a lump sum for the child's maintenance and education was awarded. This sum was paid by the father. About a year later the child, residing in South Carolina, attached some of her father's property in that state and sued for additional money to enable her to educate herself. It was held by the United States Supreme Court that the Georgia decree fixing permanent alimony was binding on the child though it was not a party to the suit and was not repre-

These courts have held that such a proceeding would be contrary to public policy in that it would be detrimental to the integrity of the home, break the home ties, open the doors of the courts for actions by intractable children. Therefore, the recent North Carolina decision in allowing the child of divorced parents to sue for support sets a new landmark.[18] Would not public policy be best subserved by following this decision and awarding relief to the child? This is the most direct means of enforcing the parent's obligation. Such an action would not be detrimental to the integrity of the home as the home has already been disrupted by divorce, separation or abandonment.

WILLIAM THORNTON WHITSETT.

Public Utilities—Public Service Commissions—Power to Require Extensions—Dedication of Property by Public Utilities.

Pursuant to a joint resolution of the Senate and House,[1] the Georgia Public Service Commission ordered the Georgia Power Co. to supply the town of Andersonville with electricity. The Power Co. obtained an injunction against the enforcement of the order, and the Commission appealed to the Georgia Supreme Court. Judgment was reversed and the injunction dissolved. It appears from the facts that the Power Co., operating under a general charter right to supply electricity to cities and towns throughout the state, had obtained franchises to serve several cities around Andersonville, the nearest being about ten miles away, and that its transmission lines ran within

sented by a guardian *ad litem*. The Court, speaking through Mr. Justice Brandeis, held that the appearance of both parents in the Georgia divorce action gave that court complete jurisdiction over the marriage status and, as an incident, power to determine the extent of the father's obligation to support the child, though the child was residing in another state when the divorce judgment was entered. The Court held the Georgia decree binding on other states because of the full faith and credit clause. U. S. CONST. ART. IV, §1. Mr. Justice Stone, dissenting, contended that it should be no answer to this suit by the child that at some earlier time some provision for it had been made which was no longer available or adequate. He believed that the Georgia court had tied its own hands and its own policy, but should not at the same time be permitted to prescribe that policy for other states in which the child might happen to live. Hansberger v. Hansberger, 185 S. E. 810 (Ga. 1936); Bedrick v. Bedrick, 151 Misc. 4, 270 N. Y. Supp. 566 (1933) (parents separated but not by legal decree); Baker v. Baker, 169 Tenn. 589, 89 S. W. (2d) 763 (1935).

[18] Singleton v. Singleton, 217 Ky. 38, 288 S. W. 1029 (1926) (demurrer to divorced mother's plea for additional allowance for children sustained. Children intervened and their plea for additional allowance granted); Barrett v. Barrett, 39 P. (2d) 621 (Ariz. 1934) (knowledge of child that divorce decree had awarded custody of children to mother and imposed the duty of support upon her *held* not to deprive child of right to maintain his action against the father for reimbursement for necessaries furnished by him when the mother was incapable of supporting the children).

[1] Georgia Acts of 1935, p. 1248. It was not contended that this resolution enlarged in any way the powers of the Commission.

sixty-nine feet of the city limits of Andersonville. The city had applied for service and had offered the Power Co. an exclusive franchise. Although a showing was made of the costs of extending the service and the expected revenue, the company based its case not upon unreasonableness of the order,[2] but upon the proposition that its charter right imposed no duty to serve, and therefore the Commission's order amounted to a taking of property without due process of law. The court, however, held that the statute giving the Commission power to "require . . . public service companies under its supervision to establish and maintain such public services and facilities as may be reasonable and just"[3] was broad enough to include extensions into new territory within that covered by the charter right, and that the exercise of this power was not unconstitutional because the Power Co. had impliedly dedicated its property to the service of Andersonville in that its existing services and lines were so close by.[4]

This holding presents two fundamental questions. First, under such a statute can a public service commission require any reasonable and profitable extension within the charter right territory?[5] Second, can there be a dedication of property to the public service in any part of the charter right territory other than by an actual entering of the region in question? Much confusion exists in the law on these propositions. The court in the instant case cited as authority for the proposition that extensions into new territory may be ordered cases dealing with discontinuance of existing services,[6] and with discrimination between customers[7] without due regard for their exact holdings. Another distinction which should be made is between the present case and those concerning extensions ordered within the corporate limits of a city or town from which the utility has accepted an exclusive franchise. By accepting the franchise the utility pre-empts the territory and binds itself to supply

[2] Where the order is unreasonable and confiscatory in that the revenues will not be sufficient to pay a fair return on the investment, the courts are in accord that relief will be granted. Marr v. City of Glendale, 40 Cal. App. 748, 181 Pac. 671 (1919); Public Service Comm. of Md. v. Brooklyn and Curtis Bay Light and Water Co., 122 Md. 612, 90 Atl. 89 (1914); Ladner v. Miss. Public Utilities Co., 158 Miss. 678, 131 S. E. 78 (1930).

[3] GEORGIA CODE (1933) §§93-307.

[4] Georgia Public Service Comm. v. Georgia Power Co., 186 S. E. 839 (Ga., 1936).

[5] No case was found requiring extensions beyond the charter or franchise limits.

[6] Atlantic Coast Line Railroad Co. v. N. C. Corp. Comm., 206 U. S. 1, 27 Sup. Ct. 585, 51 L. ed. 398 (1907); N. C. Public Service Co. v. So. Power Co., 263 U. S. 508, 44 Sup. Ct. 164, 68 L. ed. 413 (1924) *aff'g* 282 Fed. 837 (1922); Salisbury and Spencer Ry. Co. v. So. Power Co., 179 N. C. 18, 101 S E. 593 (1919).

[7] N. C. Public Service Co. v. So. Power Co., 263 U. S. 508, 44 Sup. Ct. 164, 68 L. ed. 413 (1924); Smith v. Ky. Utilities Co., 233 Ky. 68, 24 S. W. (2d) 928 (1930); Salisbury and Spencer Ry. Co. v. So. Power Co., 179 N. C. 18, 101 S. E. 593 (1919).

all parts of the city subject, as usual, to the tests of reasonableness and profitableness. The Supreme Court of the United States has twice held such an order constitutional.[8] But these cases are not authority where a general charter right covering a large area is involved, and the question remains whether accepting such a charter right alone imposes a duty to serve.

Cases directly on this point are remarkably few. In *Interstate Commerce Commission v. Oregon-Washington Railroad and Navigation Co.*[9] the Supreme Court held that the I. C. C. could not require a railroad to build a line through new territory connecting existing lines. In so holding the court said: "Much is made of the circumstance that, when the complaint was filed, the company had a charter under which it was authorized to build a line on the location of that which the order describes. The possession of the franchise[10] is said to give rise to an implied agreement to serve the district. . . . But authority to build the line if the company were so minded, involved no commitment to construct it. Though by appropriate legislation the state might forfeit the charter for non-user, the continued existence of the franchise imposed no obligation to exercise the charter power." This statement clearly rules on the first proposition presented by the present case, and, the question being one of constitutionality, eliminates as authority any state holdings which allege such a duty.[11]

This leaves for consideration only the second proposition for which there is also remarkably little authority. Unfortunately the Oregon-Washington case leaves this question wide open. There may be, as is contended by the court in the instant case, an implication from certain passages in that case[12] that there can be an implied dedication other than an actual entering, but in view of the final holding these same

[8] N. Y. *ex rel.* N. Y. and Queens Gas Co. v. McCall, 245 U. S. 345, 38 Sup. Ct. 122, 62 L. ed. 337 (1917); N. Y. *ex rel.* Woodhaven Gaslight Co. v. Public Service Comm. of N. Y., 269 U. S. 244, 46 Sup. Ct. 83, 70 L. ed. 225 (1925). The few state courts which have ruled on this point are all in accord. Lukrawka v. Spring Valley Water Co., 196 Cal. 318, 146 Pac. 40 (1916); People *ex rel.* Woodhaven Gaslight Co. v. Nixon, 203 App. Div. 369, 196 N. Y. S. 623 (1922); Okla. Gas and Electric Co. v. State, 87 Okla. 174, 209 Pac. 777 (1922).

[9] 288 U. S. 14, 53 Sup. Ct. 266, 77 L. ed. 588 (1932).

[10] *I.e.* the general charter right. The Oregon-Washington had no exclusive franchise.

[11] Root v. New Britain Gaslight Co., 91 Conn. 134, 99 Atl. 559 (1916); Philadelphia Rural Transit Co. v. Public Service Comm. of Pa., 103 Pa. Super. 256, 158 Atl. 589 (1931).

[12] "We . . . think the power granted by par. 21 is confined to extensions within the undertaking of the carrier to serve and cannot be extended to embrace the building of what is essentially a new line to reach new territory." "Whether the railroad held itself out to serve the region in question must be decided in the light of all the facts. The record demonstrates that the territory to be traversed was one the company had neither actually nor impliedly agreed to serve with transportation facilities." 288 U. S. 14, 40, 43, 56 Sup. Ct. 266, 274, 275, 77 L. ed. 588, 604, 605 (1932).

passages could just as easily be interpreted to mean that something more than nearness of existing service to the new region is required. The Supreme Court of Missouri in *State ex rel. Ozark Power and Water Co. v. Public Service Commission of Mo.*[13] sustained an order of the Commission requiring an extension under circumstances very similar to those in the instant case, but there existed the additional fact that the company's agents had canvassed the territory for prospective customers and had induced several persons to have their houses wired in contemplation of receiving the service. It would seem that some such positive act on the part of the company should be required before an implied dedication is inferred. The few state courts which deny the power of public service comminsions to require extensions do not consider the question of implied dedication, but base their holdings solely upon the proposition contended for by the Power Co. in the present case, that the right carries no duty.[14] The question of implied dedication will necessarily remain unanswered until the Supreme Court of the United States rules squarely on the point.

JAMES W. DORSEY.

Taxation—Constitutional Law—State Use Tax.

A recent North Carolina statute[1] provides that every purchaser of a motor vehicle for use in North Carolina must pay a use tax of three per cent of the purchase price. If the purchaser has paid the North Carolina sales tax[2] the amount exacted under this statute is refunded.

The plaintiff, a resident of North Carolina, purchased an automobile in Virginia for use in North Carolina. The Commissioner of Revenue refused to issue him a license until he paid the tax imposed by the above statute. The plaintiff paid the tax under protest and sued to recover it contending that the statute under which it was collected was unconstitutional in that it burdened interstate commerce, was discriminatory, and further that it violated the provision of the State Constitution which requires all taxes to be by a uniform rule. The statute was held to violate neither the Federal nor the State Constitution.[3]

One of the primary objections urged against a retail sales tax is that it encourages out of state purchases. To remedy this evil with-

[13] 287 Mo. 522, 229 S. W. 782 (1921).

[14] Atchison, T. and S. F. Ry. Co. v. Railroad Comm. of Cal., 173 Cal. 577, 160 Pac. 828 (1916); Towers v. United Railways of Baltimore, 126 Md. 478, 95 Atl. 170 (1915); Mays v. Seaboard A. L. Ry., 75 S. C. 455, 56 S. E. 30 (1906).

[1] N. C. CODE ANN. (Michie, 1935) §7880(156)e(13); see *Statutory Changes in North Carolina in 1935* (1935) 13 N. C. L. REV. 420.

[2] N. C. CODE ANN. (Michie, 1935) §7880(156)e(12).

[3] Powell v. Maxwell, Comm'r. of Revenue, 210 N. C. 211, 186 S. E. 326 (1936).

out conflicting with the Commerce Clause of the Federal Constitution has proved to be an aggravating problem in state legislation. The above statute represents an attempt by North Carolina to eliminate evasion of its sales tax by those who go outside the state to purchase automobiles.

In 1935 several states, having a retail sales tax, made an attempt to solve this problem of tax evasion by adopting laws which taxed the use of personal property within their bounds.[4] Although North Carolina's use tax statute[5] is more restricted in its application than the more general use tax statutes,[6] the same constitutional questions are involved. While a state cannot burden interstate commerce,[7] it is well settled that a state may levy a tax upon the use of property within the state.[8] Since the automobile in the principal case had come to rest within the state it was no longer a part of interstate commerce and therefore the tax could not have been a burden upon interstate commerce.

Statutes[9] similar to the one in the principal case have been held not to be discriminatory since every purchaser pays the same amount of tax. The fact that the taxes are levied under different statutes makes no difference. Related statutes must be construed in conjunction with the one assailed and final effect rather than form made the test of constitutionality. A state may distribute its tax burden as it sees fit if the result taken in its totality is within the state's Constitutional

[4] In 1935 the following states enacted statutes taxing the use of personal property within their bounds. CAL. LAWS ANN. (Supp. 1935) Act 8495a p. 2018; OHIO CODE (Baldwin, Supp. 1936) §5546-26; OKLA. SESS. LAWS (Harlow, 1935) ACT. 7, c. 66 §4 (j); WASH. LAWS (1935) Title 4, c. 180 n 726.

[5] See Note 1, *supra.*

[6] See Note 4, *supra.*

[7] Kansas Southern Ry. v. Kaw Valley Dist., 233 U. S. 75, 34 Sup. Ct. 564, 58 L. ed. 857 (1914); Helson v. Commonwealth of Ky., 279 U. S. 245, 49 Sup. Ct. 279, 73 L. ed. 683 (1929); Baldwin v. Seelig, 294 U. S. 511, 55 Sup. Ct. 497, 79 L. ed. 1032 (1935).

[8] Bowman v. Continental Oil Co., 256 U. S. 642, 41 Sup. Ct. 606, 65 L. ed. 1139 (1921); Hart Refineries v. Harmon, 278 U. S. 499, 49 Sup. Ct. 188, 73 L. ed. 475 (1929); Gregg Dyeing Co. v. Query, 286 U. S. 472, 52 Sup. Ct. 631, 76 L. ed. 1232 (1932); Eastern Air Transport Inc. v. S. C. Tax Comm., 285 U. S. 147, 52 Sup. Ct. 340, 76 L. ed. 673 (1932); Edleman v. Boeing Air Transport Inc., 289 U. S. 249, 53 Sup. Ct. 591, 77 L. ed. 1155 (1933); Nashville Ry. Co. v. Wallace, 288 U. S. 249, 53 Sup. Ct. 345, 77 L. ed. 730 (1933); Piper v. Bingaman, 12 F. Supp. 755 (D. N. M. 1935); Harper v. England, 168 So. 403 (Fla. 1936).

[9] ACTS OF S. C. (1930) p. 1390. This statute provides for a license tax of six cents per gallon upon every person storing or using gasoline within the state. However, the tax is not applicable if the gasoline has been purchased from a S. C. dealer who has paid a tax to deal in gasoline equivalent to the use tax. WASH. LAWS (1935) Title 4, c. 180 n. 726. This statute provides for a tax upon the use of personal property within the state, but does not apply if the purchaser has paid a sales tax.

power.[10] The North Carolina use tax[11] does not have the ten dollar maximum which is contained in the retail sales tax.[12] However, the Commissioner of Revenue construed the two to have the same maximum. This power was given to him in the revenue act and such construction is prima facie correct.[13] Therefore the North Carolina Use Tax statute cannot be assailed as discriminatory.

There are court decisions to the effect that a use tax is not a property tax and thus not subject to the uniformity provisions of the state constitutions.[14] The North Carolina court has held that a use tax is not a property tax,[15] and while under our court decisions this would not necessarily exempt it from the uniformity rule, the effect of the rule is only to require uniformity within each valid classification made by the legislature.[16] Many practical distinctions between the two types of taxes suggest themselves. A property tax is collected annually while a use tax is collected only once. A property tax is due on a certain date while a use tax is not. And finally the manner of collecting the two is different.[17]

Thus it seems that the principal case is sound both from a legal and practical standpoint. This is a progressive attempt on the part of the state to meet a practical problem in a practical way. It is not an attempt by the state to erect a barrier to interstate commerce, but rather an effort by the state to secure the revenue which it justly deserves.

CLARENCE W. GRIFFIN.

Torts—Contributory Negligence of Minors—Question for Court or Jury.

Plaintiff, a boy of 12, while roller skating was injured when hit by defendant's negligently driven car. He testified that he was unable to stop when warned of the approaching vehicle by his playmates and that he "thought that he could make it but missed." He further testified that he realized that he ought not to have gone into the street. The judge

[10] Gregg Dyeing Co. v. Query, 286 U. S. 472, 52 Sup. Ct. 631, 76 L. ed. 1232 (1932); Vancouver Oil Co. v. Henniford, 183 Wash. 317, 49 P. (2d) 14 (1935).

[11] See Note 1, *supra.*

[12] N. C. CODE ANN. (Michie, 1935) §7880 (156)e(12).

[13] N. C. CODE ANN. (Michie, 1935) §7880 (191). The construction of a statute by its administrative officer carries great weight in the interpretation by a court. Cannon v. Maxwell, 205 N. C. 420, 171 S. E. 624 (1933); People Park Reservoir Co. v. Hinderlider, 57 P. (2d) 894 (Colo. 1936).

[14] Vancouver Oil Co. v. Henniford, 183 Wash. 317, 49 P. (2d) 14 (1935).

[15] Stedman v. Winston-Salem, 204 N. C. 203, 167 S. E. 813 (1933), holding that tangible personal property is one thing and the use thereof another, and one may be taxed and the other exempt.

[16] Tea Co. v. Maxwell, 199 N. C. 433, 154 S. E. 838 (1930).

[17] Forster, *Constitutionality of California Use Tax* (1936) 9 So. CALIF. L. REV. 261.

submitted the case to the jury on the issue of contributory negligence and there was a verdict for the plaintiff. Affirmed.[1]

Had the acts of minor plaintiff been those of an adult, defendant would have been entitled to a nonsuit on the ground that plaintiff by his own evidence conclusively established contributory negligence.[2]

Would the North Carolina court ever hold as a matter of law that a minor is guilty of contributory negligence?

Two tests are used in determining an infant's capacity for exercising care and his consequent liability for negligence.[3] One is the Subjective test and uses as its criterion the psychological rather than chronological age of the child. In applying this test the court takes into consideration the age, knowledge, experience, and discretion of the particular child. This is the minority view, but there is a growing tendency on the part of courts to employ it as the more rational solution to the problem.[4] The second test is commonly called the Objective, and uses the child's calendar age as a basis for determining his capacity, *i.e.* by reference to the average child of the same age.[5] The weakness of this test is its failure to weigh the individual differences, both mental and physical, apparent in the makeup of children. What has been thought of as a third test is the criminal law analogy[6] by which there is a conclusive

[1] Hollingsworth v. Burns, 210 N. C. 40, 185 S. E. 476 (1936).

[2] Nowell v. Basnight, 185 N. C. 142, 116 S. E. 87 (1923); Lunsford v. Manufacturing Co., 195 N. C. 510, 146 S. E. 129 (1928); Scott v. Telegraph Co., 198 N. C. 795, 153 S. E. 413 (1930). For further treatment of contributory negligence see Bohlen, *Contributory Negligence* (1908) 21 HARV. L. REV. 233.

[3] RESTATEMENT, TORTS (1934) §464(2); BURDICK, TORTS (4th ed. 1926) §65 (462); 2 COOLEY, TORTS (3d ed. 1906) §§818-822; SALMOND, TORTS (6th ed. 1924) §9(4).

[4] See Central R. R. and Banking Co. v. Ryles, 87 Ga. 491, 495, 13 S. E. 584, 585 (1891). The court said, "The better rule would be for the jury to deal with each case upon its own facts, unhampered by presumptions of law either for or against the competency of the child." Berdos v. Tremont and Suffolk Mills, 209 Mass. 489, 494, 95 N. E. 876, 878 (1911). Rugg, C. J. speaking for the court, "There is no hard and fast rule that at any particular age a minor is presumed to comprehend risks or to be capable of negligence. . . . But the sounder doctrine seems to be that age is an important though not decisive factor in determining capacity, and that the decision of that question is not helped or hampered by any legal presumption." Camardo v. New York State Rys., 247 N. Y. 111, 116, 159 N. E. 879, 880 (1928). Lehman, J. stated, "The law does not disregard variations in capacity among children of the same age, and does not arbitrarily fix an age at which the duty to exercise some care begins or an age at which an infant must exercise the same care as an adult."

[5] Washington R. R. Co. v. State, 153 Md. 119, 137 Atl. 484 (1927) (a child cannot be required to exercise any higher degree of care than might be expected of one of similar age); Rasmussen v. Whipple, 211 Mass. 546, 98 N. E. 592 (1912) (boy's conduct must be measured by that of an ordinary, prudent boy of the same age).

[6] Renaldi v. Lengar Structural Co., 97 N. J. L. 162, 117 Atl. 42 (1922). The court *held* that a child of very tender years was incapable of contributory negligence as a matter of law, but stated that the child's capacity, etc. is the test for more mature children. Wells v. McNutt, 136 Tenn. 274, 189 S. W. 365 (1916) (child under seven presumed incapable of contributory negligence but not conclusively so); Von Sax v. Barnett, 125 Wash. 639, 217 Pac. 62 (1923). A child of

presumption of incapacity for children under seven, a rebuttable presumption of incapacity for children between the ages of seven and fourteen, and a presumption of capacity for those over fourteen. This is really a rule of law as to children under seven, but, as to children between seven and fourteen, it is still necessary to use either the Subjective or the Objective test in order to rebut the presumption of incapacity.

In the first North Carolina case on this question,[7] the court followed the Subjective test as expounded by the United States Supreme Court in 1873, which declared that, "An infant of tender years is not held to the same degree of discretion as that of an adult, and the degree depends upon its age and knowledge. The caution required is according to the maturity and capacity of the child."[8] The North Carolina court has followed this doctrine in most of its decisions.[9] But in certain cases the court has followed the criminal law analogy,[10] and in others has unconsciously attempted to blend the two doctrines.[11] Their contrariety is apparent. Such confusion was present in the instant case as the judge charged the jury that, "If the boy had been the age of fourteen, or an adult, the court would instruct you as a matter of law that he was guilty

five was held incapable of contributory negligence as a matter of law. *Contra:* Johnson's Adm'r v. Rutland R. Co., 93 Vt. 132, 106 Atl. 682, 685 (1919). In commenting on the analogy to the rule involving criminal conduct of infants the court said, "There is little, if any, support for the rule by the analogy. Capacity to commit crime, involving, as it does, discretion to understand the nature and illegality of the particular act constituting the crime, is one thing, and capacity to care for one's personal safety is another and quite a different thing. . . . While the rule has the merit of simplicity, it is purely arbitrary, and lacks the sanction of reason and experience."

[7] Manly v. R. R., 74 N. C. 655 (1876).

[8] See Washington and Georgetown R. R. v. Gladman, 15 Wall 401 (U. S.), 21 L. ed. 114, 116.

[9] Murray v. R. and D. R. R., 93 N. C. 92 (1885); Alexander v. Statesville, 165 N. C. 527, 81 S. E. 763 (1914); Fry v. Utilities Co., 183 N. C. 281, 111 S. E. 354 (1922); Ghorly v. R. R., 189 N. C. 634, 127 S. E. 634 (1925); Hoggard v. R. R., 194 N. C. 256, 139 S. E. 372 (1927); Brown v. R. R., 195 N. C. 699, 143, S. E. 536 (1928); Tart v. R. R., 202 N. C. 52, 161 S. E. 720 (1931); Morris v. Sprott, 207 N. C. 358, 177 S. E. 13 (1934).

[10] Bottoms v. R. R., 114 N. C. 699, 19 S. E. 730 (1894) (child of twenty-two months held incapable of negligence as a matter of law); Ashby v. Norfolk Southern Ry., 172 N. C. 98, 89 S. E. 1059 (1916) (negligence could not be attributed to a boy of eight); Campbell v. Model Steam Laundry, 190 N. C. 699, 130 S. E. 638 (1925) (child of four incapable of negligence as a matter of law).

[11] Rolin v. Tobacco Co., 141 N. C. 300, 53 S. E. 891 (1906). The court stated that a child under twelve was presumed to be incapable of understanding and appreciating dangers from a negligent act, but that contributory negligence on the part of a child is to be measured by his age and ability to discern and appreciate the circumstances of danger. Caudle v. Seaboard Air Line Ry., 202 N. C. 404, 163 S. E. 122 (1931) A prima facie presumption exists that an infant between the ages of seven and fourteen is incapable of contributory negligence, but the presumption may be overcome. However the court further stated that the test in determining whether a child is contributorily negligent is whether it acted as a child of its age, capacity, discretion, knowledge, and experience would ordinarily have acted under similar circumstances.

of contributory negligence."[12] That the plaintiff's capacity to understand the situation and appreciate its dangers was evident to the trial judge is shown by the admission in his charge that had the child been two years older a nonsuit would have been ordered. By arbitrarily setting an age of presumptive capacity the trial court had deviated in part from the Subjective test. When a child's capacity to appreciate the circumstances is obvious, why should a rebuttable presumption of incapacity keep the judge from directing a verdict for the defendant? Had the trial court used the criminal law analogy, there was nothing to prevent a directed verdict for the defendant as the presumption of incapacity was rebutted by the child's obvious appreciation of his own danger. Though there has never been a case in North Carolina where a child under fourteen has been held guilty of contributory negligence as a matter of law,[13] there seems to be no reason why it should not be so held where the circumstances admit of but one inference. In this same type of case there is good authority in other jurisdictions holding binding instructions for the defendant proper "where reasonable minds cannot differ."[14]

In most cases a blending of the criminal law analogy with the Subjective test does not hamper the trial court's effectiveness in applying the latter test, but in cases like the instant one where the child's capacity is apparent, the presumption seemed to prevent the court's deciding the case solely upon the infant's knowledge, maturity, and discretion.

It seems that the best solution to this difficult problem would be to use the Subjective test in its "pure form." It is true this plan would offer no definite standard of measurement, yet its adoption would prevent the arising of the confusion manifest in the principal case. Where any doubt existed as to the child's capacity, the question would be left to the jury, but where the evidence was clear that the child was either capable or incapable, the question would be rightfully one for the judge's discretion.

HARRY LEE RIDDLE, JR.

[12] Hollingsworth v. Burns, 210 N. C. 40, 44, 185 S. E. 476, 478 (1936).

[13] Two cases hold children guilty of contributory negligence as a matter of law, but on the theory that the question is always one for the court and that to submit it to a jury would cause a shifting standard. Baker v. Seaboard Airline Co., 150 N. C. 562, 64 S. E. 506 (1909); Foard v. Tidewater Power Co., 170 N. C. 48, 86 S. E. 804 (1915). These two cases stand alone and are criticized in Fry v. Utilities Co., 183 N. C. 281, 290, 111 S. E. 354, 359 (1922).

[14] See Moeller v. United Rys., 13 Mo. App. 168, 112 S. W. 714, 716 (1908). A boy of twelve sued for personal injuries and the court said, "The question is one for the jury, unless the only conclusion that can reasonably be drawn from the evidence is that he was guilty of contributory negligence." In Payne v. Blevius, 280 Fed. 310 (C. C. A. 4th. 1922) the court *held* that the determination of whether a thirteen year old boy was guilty of contributory negligence was a question for the court where the evidence admits of but one conclusion and the fact is one about which reasonable minds cannot differ. Scherer v. Wood, 19 Ohio App. 381 (1924) (when the age of the child admits of no doubt as to its capacity to avoid danger, the court will decide the question as a matter of law).

Trusts—Principal and Income—Apportionment of Income from Part of Estate Used to Pay Legacies, Debts and Costs of Administration.

Action by a testamentary trustee to determine how properly to dispose of $11,946.13, income derived during the entire period of administration from that portion of the estate used to pay specific legacies, debts and costs of administration. Under the terms of the trust the income was to be paid to the testator's children and their issue during their lives, remainder over to members of a class. *Held,* the money in question was payable as income to the life tenants and not to corpus for the benefit of remaindermen.[1]

This is a case of first impression in North Carolina. Elsewhere, two rules, the English rule and the Massachusetts rule, have been developed to govern the trustee in meeting the problem.[2] The English rule, with which Connecticut,[3] Maryland,[4] New Hampshire,[5] New Jersey[6] and the Restatement of Trusts[7] are in accord, was originally formulated in the case of *Allhusen v. Whittell,*[8] as follows: "But the executors, when they have dealt with the estate, will be taken by the Court as having applied in payment of debts such a portion of the fund as, together with the income of that portion for one year, was necessary for the payment of the debts. . . . It is clear that the tenant for life ought not to have the income arising from what is wanted for the payment of debts, because that never becomes residue in any way whatever." That is to say,[9] "a life owner of a testator's estate must only receive income from that portion of the capital which forms the net, or more correctly, the actual residue of that estate."

The rule eventually required judicial modification to prevent injustice to the life tenant where payments on account of debts, legacies and expenses were made early in the year[10] and again where they were

[1] Wachovia Bank and Trust Co. v. Jones, 210 N. C. 339, 186 S. E. 335 (1936).

[2] See 4 BOGERT, TRUSTS AND TRUSTEES (1935) §811, n. 3; GODEFROI, TRUSTS AND TRUSTEES (5th ed. 1927) §284. The problem appears not to have been dealt with by the UNIFORM PRINCIPAL AND INCOME ACT, 9 U. L. A. 1935 CUM. ANN. POCKET PART 167.

[3] Bridgeport Trust Co. v. Fowler, 102 Conn. 318, 128 Atl. 719 (1925).

[4] York v. Md. Trust Co., 150 Md. 354, 133 Atl. 128 (1926).

[5] White v. Chaplin, 84 N. H. 208, 148 Atl. 21 (1929).

[6] Willard's Ex'r v. Willard, 21 Atl. 463 (N. J. Ch. 1891); *In re* Rowland's Trustees, 87 N. J. Eq. 307, 101 Atl. 52 (1917).

[7] RESTATEMENT, TRUSTS (1935) §234 (g).

[8] L. R. 4 Eq. 295, at p. 303 (1867). It is difficult, in view of the date of that case, to agree with the view expressed in the dissenting opinion of Chief Justice Stacy in the principal case, that under N. C. CODE ANN. (Michie, 1935) §970, the English rule is a part of that body of English common law which North Carolina adopted from the mother country, and which controls until changed by statute.

[9] STRACHAN, *The Rule in Allhusan v. Whittell* (1914) 30 LAW Q. REV. 481.

[10] *In re McEuen,* 2 Ch. 704 (1913).

made several years later.[11] This change[12] is thus phrased by the Restatement of Trusts:[13] "A proper method of determining the extent to which legacies, debts and expenses of administration should be paid out of the principal is by ascertaining the amount which, with interest thereon at the rate of return received by the executor upon the whole estate from the death of the testator to the dates of payment, would equal the amounts paid. This amount is charged to principal and the balance of the amount paid is charged to income." The resulting accounting problems[14] are so intricate and difficult that eminent English conveyancers have suggested the insertion in the will of a clause leaving the whole matter to the discretion of the trustee.[15]

The Massachusetts rule, adopted by statute[16] in New York in 1931, and followed by North Carolina in the principal case, awards to the life tenant the entire income from the date of the death on that part of the estate used to pay the charges in question. It is based on the theory that the residue is formed at the testator's death, subject to the payment of legacies, debts and expenses, and on a presumption that giving the income to the life tenant more nearly meets what probably would have been the testator's intention had his mind been directed to the question.[17]

The fact that the life beneficiaries in the principal case were children and grandchildren, while the remaindermen were those who would have been heirs had the trustor died intestate at the date of the vesting in the remainderman, made the availability of a rule based on probable intention particularly welcome. Accounting problems were thus avoided and definiteness and simplicity of administration facilitated.

JAMES M. VERNER.

[11] *In re* Wills, 1 Ch. 769 (1915).

[12] STRACHAN, *loc. cit. supra* note 9, ably discusses the net significance of the modification.

[13] RESTATEMENT, TRUSTS (1935) §234(g).

[14] Compare STRACHAN, *supra* note 9, and note (1924) 37 HARV. L. REV. 250.

[15] STRACHAN, *loc. cit. supra,* note 9.

[16] N. Y. PERS. PROP. LAW (1927 as amended 1931) c. 42, §17 b. Before this New York followed what later became the English view. Williamson v. Williamson, 6 Paige Ch. 298 (1837); *In re* Ryan's Estate, 250 N. Y. Supp. 522, 140 Misc. 364 (1931).

[17] Mulcahy v. Johnson, 80 Colo. 499, 252 Pac. 816 (1927); Weld v. Putnam, 70 Maine 209 (1879); Wethered v. Safe Deposit and Trust Co., 79 Md. 153, 28 Atl. 812 (1894); Minot v. Armory, 2 Cush. 377 (Mass. 1848); Lovering v. Minot, 9 Cush. 151 (1851); Treadwell v. Cordis, 5 Gray 341 (Mass. 1855); Loring v. Mass. Horticultural Society, 171 Mass. 401, 50 N. E. 936 (1898); Edwards v. Edwards, 183 Mass. 581, 67 N. E. 658 (1903); McDonough v. Montague, 259 Mass. 612, 157 N. E. 159 (1927); Old Colony Trust Co. v. Smith, 266 Mass. 500, 165 N. E. 657 (1929) (relied on heavily by the North Carolina court in the principal case); *cf.* Old Colony Trust Co. v. Forsyth Dental Infirmary, 271 Mass. 511, 171 N. E. 734 (1930), where the income went to corpus. Is the distinction between the two cases that the will did not manifest the usual intention well taken?; City Bank Farmers' Trust Co. v. Taylor, 53 R. I. 126, 163 Atl. 734 (1933); Will of Leitsch, 185 Wis. 257, 201 N. W. 284 (1924).

Vendor and Purchaser—Statute of Frauds—Sufficiency of Memorandum.

The existence of some fifty cases before the Supreme Court of North Carolina on the question of the sufficiency of a writing within the meaning of the Statute of Frauds[1] is evidence of the difficulty and the continuing importance of the subject. The frequency with which the problem has recurred on appeal suggests the difficulty of prediction with which the lawyer is confronted. This note was undertaken with the hope that a study of the cases would lead to the discovery of some more or less predictable rules. The hope has not been justified by the study. However, it is felt that a statement of available generalities, with a frank recognition of their limitations, along with the collection of cases on the point, will prove of some value to the practicing attorney.

The cases seem to group themselves around three general problems:

(1) the sufficiency of the written description of the land to be conveyed;

(2) the necessity of the statement of the consideration and the price;

(3) the sufficiency of signing.

(1) The cases uniformly announce the uselessly vague formula that the land to be conveyed must be described with "reasonable certainty."[2]

[1] N. C. CODE ANN. (Michie, 1935) §988. "All contracts to sell or convey any lands, tenements or hereditaments or any interest in or concerning them . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized."

[2] (a) The following descriptions, with the aid of parol testimony, were held sufficient: Mizell v. Burnett, 49 N. C. 249 (1857) (letter stating: "You can have my timber on the tract of land, known as the Walling tract, on Roanoke River . . . "); Carson v. Ray, 52 N. C. 609 (1860) ("My house and lot in the town of Jefferson"); Phillips v. Hooker, 62 N. C. 193 (1867) (memorandum to effect that agent agreed for "Mrs. Hooker to make a deed for her house and lot north of Kinston to the said J. R. Phillips . . ."); Thornburg v. Masten, 88 N. C. 293 (1883) ("Received of G. T. five hundred dollars on account of the sale of my interest in the 'Lenoir lands,' owned by myself and J. W. T."); Gordon v. Collet, 102 N. C. 532, 9 S. E. 486 (1889) ("Beginning at a stake on Grant's corner running north with the Rocky Ford road to Tate's line . . . and then with said line to the beginning; containing 1¼ acres, more or less"; on the same piece of paper: "Received of Austin Collett $33, in part payment on a lot on Rocky Ford road . . ." "M. C. Avery." On the opposite side of same paper: "I, Austin Collett, promise to pay Mrs. M. C. Avery 53 dollars on a lot adjoining W. Grant's on the Rocky Ford road, by March 1, 1886. Austin Collett"); Falls of Neuse Manufacturing Co. v. Hendricks, 106 N. C. 485, 11 S. E. 568 (1890) (land on which vendee "now lives"); Love v. Harris, 156 N. C. 88, 72 S. E. 150 (1911) (note made by auctioneer on back of notice of sale of lands to the effect, "Sold to C. J. for $1,500.22 January, 1910"); Bateman v. Hopkins, 157 N. C. 470, 73 S. E. 133 (1911) ("Received of W. E. Bateman $5, to confirm the bargain on the purchase of the farm on which I now live . . ."); Lewis v. Murray, 177 N. C. 17, 97 S. E. 750 (1918) ("Received on account of trade on home place one hundred dollars. From D. B. Lewis"); Buckharn Land and Timber Co. v. Yarbrough, 179 N. C. 335, 102 S. E. 630 (1920) (all that tract of land in two certain counties, lying on "both sides of old road between" designated points and bounded by lands of named owners "and others"); Norton v. Smith, 179 N. C. 553, 103 S. E. 14 (1920) (". . . J. A. Smith

This gives rise immediately to the problem of the admissibility of parol evidence. It may be said generally that if a particular piece of land is mentioned in the paper, and if parol evidence will reveal that such description refers to only one piece of land owned by the vendor, the writing is sufficient.[3] For example, under this test, a memorandum purporting to convey the land "on which I now live" has been held good.[4] On the other hand, if the attempted description is such that, as revealed by parol evidence, it may apply to one or more tracts of land owned by the vendor, the attempted conveyance is said to be within the

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has sold to W. H. Norton his entire tract or boundary of land consisting of 146 acres . . ."); Harper v. Battle, 180 N. C. 375, 104 S. E. 658 (1920) (a check stating that it was "payment on Watts Street House"); McCall v. Lee, 182 N. C. 114, 108 S. E. 380 (1921) (agreement by mother with her children that if they would convey her what their father had left them, she would combine the whole of their father's estate with the greater part of her own estate and make an equal division to the children); Gilbert v. Wright, 195 N. C. 165, 141 S. E. 577 (1928) ("Agreement made . . . of sale of her home property on Pennsylvania Avenue and Cypress Street. . . . Dr. Wright agrees to buy the vacant lot from Mrs. O. F. Gilbert, during the month of January, 1925, for the sum of fifteen hundred dollars.").

(b) The following descriptions were held insufficient and parol testimony held inadmissible: Allen v. Chambers, 39 N. C. 125 (1845) ("Received of Mr. Drury Allen two hundred and forty dollars, in part for a certain tract of land lying on Flat River, including Taylor Hicks' spring-house and lot, etc., and adjoining the land of Lewis Daniel, Womach, and others"); Plummer v. Owens, 45 N. C. 254 (1853) ("1841, W. P. to H. C. O., Dr. To 4 loads of Rock one lot at one year's credit, $125"); Murdock v. Anderson, 57 N. C. 77 (1858) ("Received of A. C. Murdock . . . in part payment of one house and lot in the town of Hillsboro"); Capps v. Holt, 58 N. C. 153 (1859) ("Received . . . of Henry Capps $100, in part payment . . . on a bargain made by us for a tract of land on the North side of the Watery Branch, in the County of Johnston, and state of North Carolina, containing 150 acres . . ."); Farmer v. Batts, 83 N. C. 387 (1880) ("Received of W. D. Farmer fourteen hundred dollars, in full payment of one tract of land, containing one hundred acres more or less, it being the interest in two shares adjoining the lands of James Barnes, Eli Robbins, and others"); Breaid v. Munger, 88 N. C. 297 (1883) ("In settlement with A. E. Breaid, Kipp and Munger owed him $316.30 to be applied to his 100 acres of land and the lot where he now lives is paid for in full"); Fortescue v. Crawford, 105 N. C. 29, 10 S. E. 910 (1890) ("Charles Crawford

Land	125.00
Paid	61.58
Balance due	$ 63.42

1 Jan., 1875"); Falls of Neuse Manufacturing Co. v. Hendricks, 106 N. C. 485, 11 S. E. 568 (1890) (bond for title to convey thirty acres of land of the "Deaver Tract," which tract contained more than thirty acres); Lowe v. Harris, 112 N. C. 473, 17 S. E. 539 (1893) ("19 April, 1880—James Harris has paid me $20 on his land, owes me six more on it.").

[3] Thornburg v. Masten, 88 N. C. 293 (1883); Falls of Neuse Manufacturing Co. v. Hendricks, 106 N. C. 485, 11 S. E. 568 (1890); Bateman v. Hopkins, 157 N. C. 470, 73 S. E. 133 (1911); Lewis v. Murray, 177 N. C. 17, 97 S. E. 750 (1918); Norton v. Smith, 179 N. C. 553, 103 S. E. 14 (1920); Harper v. Battle, 180 N. C. 375, 104 S. E. 658 (1920). For the description used in these cases, and for other cases, see (a) under note 2, *supra*.

[4] Falls of Neuse Manufacturing Co. v. Hendricks, 106 N. C. 485, 11 S. E. 568 (1890); Bateman v. Hopkins, 157 N. C. 470, 83 S. E. 133 (1911).

prohibitions of the Statute.[5] From this has evolved the familiar formula that parol evidence is admissible to identify the land already described in the paper, but not to a *describendum* not already indicated therein.[6] The value of such a rule is limited. Close cases make hazy the distinction between a description and an identification.[7] At first glance, it might seem that this difficulty is absolved by virtue of the presence of another statute which reads that "in all actions for the possession of or title to any real estate, parol testimony may be introduced to identify the land sued for. . . ."[8] But, whatever may have been the purpose of this statute, it has been treated as merely reiterating the same rule as to the admissibility of parol testimony as existed theretofore.[9] Thus it has had no effect in the evolution of a workable formula as to what constitutes a sufficient writing under the Statute of Frauds.

(2) A noted writer[10] on the subject has stated that a memorandum to be sufficient must contain all the essential elements of the agreement, including a statement of the consideration and the price. The North Carolina decisions are not in accord with this conclusion. It has been held that the consideration need not appear[11] in the memorandum, but that a statement of the price must.[12] This calls forth the explanation that "consideration" is a much broader term than that of "price."[13]

[5] Murdock v. Anderson, 57 N. C. 77 (1858); Farmer v. Batts, 83 N. C. 387 (1880); Fortescue v. Crawford, 105 N. C. 29, 10 S. E. 910 (1890); Lowe v. Harris, 112 N. C. 473, 17 S. E. 539 (1893). For the description used in these cases, see (b) under note 2, *supra*.

[6] Higdon v. Rice, 119 N. C. 623, 26 S. E. 256 (1896); Norton v. Smith, 179 N. C. 553, 103 S. E. 14 (1920); Gilbert v. Wright, 195 N. C. 165, 141 S. E. 577 (1928).

[7] Carson v. Ray, 52 N. C. 609 (1860) (memorandum called for sale of "My house and lot in the town of Jefferson," and the court held that parol evidence was admissible to identify the land). But in Murdock v. Anderson, 57 N. C. 77 (1858), where the description was "One house and lot in Hillsboro," parol testimony was held inadmissible, since that would be aiding the description and not identifying land already described.

[8] N. C. CODE ANN. (Michie, 1935) §1783.

[9] Lowe v. Harris, 112 N. C. 473, 17 S. E. 539 (1893). The court said that the Act did not change the law in reference to contracts and deeds relating to land, the word "description" being used in this Act to mean one which has a legal susceptibility of being aided by testimony so as to identify the land, not a description which is in law no description whatever.

[10] POMEROY, SPECIFIC PERFORMANCE OF CONTRACTS (3d ed. 1926) §87.

[11] Miller v. Irvine, 18 N. C. 103 (1834) (the court said consideration was not part of the contract, but only the inducement to it); Ashford v. Robinson, 30 N. C. 114 (1847); Nichols v. Bell, 46 N. C. 32 (1853); Green v. Thornton, 49 N. C. 230 (1856); Kent v. Edmonston, 49 N. C. 529 (1857); Thornburg v. Masten, 88 N. C. 293 (1883); Falls of Neuse Manufacturing Co. v. Hendricks, 106 N. C. 485, 11 S. E. 568 (1890); Haun v. Burrell, 119 N. C. 544, 26 S. E. 111 (1896); Peele v. Powell, 156 N. C. 553, 73 S. E. 234 (1911); Bateman v. Hopkins, 157 N. C. 470, 73 S. E. 133 (1911); Lewis v. Murray, 177 N. C. 17, 97 S. E. 750 (1918).

[12] Hall v. Misenheimer, 137 N. C. 183, 49 S. E. 104 (1904).

[13] In Hall v. Misenheimer, 137 N. C. 183, 49 S. E. 104 (1904), the court said: "It is true that the consideration of the contract need not be stated. . . . There is quite a difference between the price to be paid by the vendee and the consideration necessary to support the contract and enforce it against the vendor. The latter

There are two probable explanations for this. First, the court has applied the familiar rule that consideration may always be shown by parol testimony. Secondly, the party "to be charged" is usually the purchaser, and the court has said that the terms of the bargain necessary to bind him must appear in the memorandum. Since, under the first of these explanations, a statement of the consideration is not an essential part of the writing, the contract is enforceable against the vendor in the absence of a written inclusion of the consideration, but is not enforceable against a purchaser unless the writing contains a statement of the price. This seems an untenable inconsistency.

(3) The provision of the statute requiring that the agreement or memorandum thereof shall be signed "by the party to be charged" has been interpreted by the court to require a signing only by the party against whom the contract is sought to be enforced.[14] It follows, therefore, that the plaintiff who has not signed the paper, may enforce a specific performance, although no relief could be obtained against him on his correlative obligation. Hence the criticism that the doctrine of mutuality of obligation is violated.[15] The cases merely exemplify the general rule that the signing of an instrument requires the writing of one's name with the intention thereby to authenticate the instrument.[16] These prerequisites appearing, the precise manner of inscription on the paper is immaterial.[17] It need not be his own name;[18] it may be written by a third person;[19] and it may appear on any part of the instrument.[20]

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may be shown by parol, as at common law, and the writing . . . need not contain any matters but such as charge him, the vendor, that is, such stipulations as are to be performed on his part. He is to convey, and the writing must be sufficient to show that this duty rests on him as one of the parties to the contract when he is sought to be charged. The vendee is to pay a certain price, and the writing must likewise show his obligation—its nature and extent—when the action is against him. It must show the price, for, otherwise, the true contract of the vendee as to one of its essential terms would not be reduced to writing, and we could not see from the writing what it is so as to enforce it against him. If we permitted the vendor to supply this defect by parol proof, it would at once introduce all the mischiefs which the statute was intended to prevent."

[14] Hall v. Misenheimer, 137 N. C. 183, 49 S. E. 104 (1904); Lewis v. Murray, 177 N. C. 17, 97 S. E. 750 (1918).

[15] POMEROY, SPECIFIC PERFORMANCE OF CONTRACTS (3d ed. 1926) §75.

[16] McCall v. Textile Industrial Institute, 189 N. C. 775, 128 S. E. 349 (1925).

[17] Devereux v. McMahon, 108 N. C. 134, 12 S. E. 902 (1891) (name signed by "his mark"); Burris v. Starr, 165 N. C. 657, 81 S. E. 929 (1914) (endorsement on back of note); Harper v. Battle, 180 N. C. 375, 104 S. E. 658 (1920) (endorsement on a check).

[18] Hargrove v. Adcock, 111 N. C. 166, 16 S. E. 16 (1892) (agent signing in his own name).

[19] Devereux v. McMahon, 108 N. C. 134, 12 S. E. 902 (1891) (auctioneer's signature); Proctor v. Finley, 119 N. C. 536, 26 S. E. 128 (1896) (auctioneer's signature on notice of sale of lands); Combes v. Adams, 150 N. C. 64, 63 S. E. 186 (1908) (agent).

[20] Burris v. Starr, 165 N. C. 657, 83 S. E. 929 (1914); Flowe v. Hartwick, 167 N. C. 448, 83 S. E. 841 (1914).

In conclusion it may be said that the vagueness of the Statute itself and the constantly varying fact situations which arise make impossible the development of adequate rules as to what constitutes a sufficient writing. Although the cases are replete with judicial utterances that the Statute must be rigidly enforced, the court at times has been extremely lenient in upholding seemingly incomplete memoranda. This occasional laxity may be explained in two ways. There may be unusual hardship in the particular case. Or, the court may be seeking an indirect means of avoiding the strict North Carolina rule regarding part performance.[21]

STATON P. WILLIAMS.

Workmen's Compensation—Notice to Employer—Filing of Claims—Action Under Federal Employers' Liability Act.

Employee was killed in an accident in December, 1929, while in defendant's employ. Defendant was a self-insurer and reported the accident to the industrial commission at once, offering to pay the claim. Plaintiff, the employee's administrator, without filing a claim, notified the defendant and the commission that he would proceed under the Federal Employers' Liability Act rather than the Workmen's Compensation Act. After various rulings and an appeal under the Federal Act[1] the plaintiff took a voluntary nonsuit. In 1935 the plaintiff petitioned for an award under the Workmen's Compensation Act and requested a hearing before the industrial commission. The North Carolina Supreme Court *held* that the claim was not barred by the one year statute of limitations as it was pending before the industrial commission during the entire period.[2]

Generally, before the injured employee or his personal representative can recover compensation under the Workmen's Compensation Act he must comply with the statute in two respects. First, he must notify the employer of the accident either within a limited time after the injury or as soon thereafter as is practicable.[3] While the notice is usually

[21] North Carolina does not allow part performance of the contract to take the contract without the statute. Hall v. Misenheimer, 137 N. C. 183, 49 S. E. 104 (1904); (1922) 1 N. C. L. REV. 48.

[1] Hanks v. Utilities Co., 204 N. C. 155, 167 S. E. 560 (1933).

[2] Hanks v. Utilities Co., 210 N. C. 312, 186 S. E. 252 (1936).

[3] The statutes vary in different jurisdictions. Only a few are listed below. ALA. CODE ANN. (Michie, 1928) §7568 (notice to employer within 5 days; no compensation if after 90 days); ARIZ. CODE ANN. (Struckmeyer, 1928) §1446 (injury to be reported at once); GA. CODE ANN. (Harrison, 1933) §114-303 (notice immediately; barred after 30 days unless reasonable excuse and employer shown not to be prejudiced by delay); IOWA CODE (1935) §1383 (notice in 15 days; if in 30 days, not barred except as to extent employer was prejudiced; bar absolute after 90 days); KY. STAT. ANN. (Carroll; Baldwin's Rev., 1936) §§4914, 4915 (notice as soon as practicable); N. C. CODE ANN. (Michie, 1935) §8081

given in writing few states rule that written notice is a condition precedent to recovery.[4] The employer's actual knowledge of the injury[5] or verbal notice to him[6] or his agent[7] has been held sufficient. Second, the employee or his personal representative must file a claim with the industrial commission or board having jurisdiction of such proceedings, within a limited time, usually one year, from the date of injury or death.[8] A failure to follow this provision usually bars recovery[9] as the statute is generally held to be mandatory.[10] That which is necessary to constitute a sufficient filing and a sufficient claim is not clear but it has been held that a letter setting out in detail the facts of the accident[11] or

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(dd) (notice as soon as practicable; barred after 30 days unless reasonable excuse and employer shown not to be prejudiced by the delay); TENN. CODE (Shannon, 1932) §6872 (notice as soon as practicable; barred after 30 days, unless cause shown); UTAH REV. STAT. ANN. (1933) §42-1-92 (notice in 48 hours, or penalty; barred after one year).

[4] Babington v. Yellow Taxi Corp., 219 App. Div. 495, 220 N. Y. Supp. 420 (1927) (failure to give employer written notice of death caused reversal of compensation award); Beech v. Keicher, 154 Tenn. 329, 289 S. W. 519 (1926) (written notice of accident condition precedent to recovery notwithstanding employer's actual knowledge).

[5] Graver Corp. v. State Industrial Comm., 114 Okla. 140, 244 Pac. 438 (1926); Dep't of Game and Inland Fisheries v. Joyce, 147 Va. 89, 136 S. E. 651 (1927).

[6] Cook County v. Industrial Comm., 327 Ill. 79, 158 N. E. 405 (1927); Hughes v. Trustees of St. Patrick's Cathedral, 245 N. Y. 201, 156 N. E. 665 (1927).

[7] Sloss-Sheffield Steel and Iron Co. v. Foote, 231 Ala. 275, 164 So. 379 (1935) (report to employer's surgeon held sufficient); Wilson v. Clement Co., 207 N. C. 541, 177 S. E. 797 (1935) (compensation denied on other grounds); Ware v. Illinois Cent. Ry. Co., 153 Tenn. 144, 281 S. W. 927 (1926).

[8] ALA. CODE ANN. (Michie, 1928) §7570 (claim in one year); ARIZ. CODE ANN. (Struckmeyer, 1928) §1447 (claim in one year); GA. CODE ANN. (Harrison, 1933) §114-305 (claim in one year); IOWA CODE (1935) §1386 (claim in two years); KY. STAT. ANN. (Carroll; Baldwin's Rev., 1936) §4914 (claim in one year); N. C. CODE ANN. (Michie, 1935) §8081 (ff) (claim in one year); TENN. CODE (Shannon, 1932) §6874 (claim in one year); UTAH REV. STAT. ANN. (1933) §42-1-64 (death claims barred after one year).

[9] Hilty v. Fairbanks Exploration Co., 82 F. (2d) 77 (C. C. A. 9th, 1936); White v. U. S. Fidelity & Guaranty Co., 41 Ga. App. 514, 153 S. E. 574 (1930); Tricomo v. Ford Motor Co., 275 Mich. 541, 267 N. W. 731 (1936); Kaplan v. Kaplan Knitting Mills, 221 App. Div. 484, 224 N. Y. Supp. 262 (1927); Wilson v. Clement Co., 207 N. C. 541, 177 S. E. 797 (1935); State *ex rel.* Carr v. Industrial Comm. of Ohio, 130 Ohio St. 185, 198 N. E. 480 (1935); Menna v. Mathewson, 48 R. I. 310, 137 Atl. 907 (1927). *Cf.* Pacific Employers' Insurance Co. v. Pillsbury, 14 F. Supp. 156 (D. C. Cal., 1936) (failure to file claim within statutory time held to be no bar to recovery under the Longshoremen's and Harbor Workers' Compensation Act); *In re* Pahlke, 53 P. (2d) 1177 (Idaho, 1936) (state barred from recovering non-dependent compensation where claim was not filed within the statutory time).

[10] Bushnell v. Industrial Board, 276 Ill. 262, 114 N. E. 496 (1916); Kalucki v. American Car and Foundry Co., 200 Mich. 604, 166 N. W. 1011 (1918); Chmielewska v. Butte and Superior Mining Co., 81 Mont. 36, 261 Pac. 616 (1927); Wray v. Woollen Mills, 205 N. C. 782, 172 S. E. 487 (1934); 2 SCHNEIDER, WORKMAN'S COMPENSATION LAW (2d ed. 1932) §545.

[11] Williams v. Cities Service Gas Co., 139 Kan. 166, 30 P. (2d) 97 (1934); Roach v. Durham Const. Co., 52 S. W. (2d) 593 (Mo., 1932); Higgenbotham v. Oklahoma Portland Cement Co., 155 Okla. 264, 9 P. (2d) 15 (1932); Barwin v. Independent School Dist. of Sioux Falls, 61 S. D. 275, 248 N. W. 257 (1933); Hardy v. Industrial Comm. of Utah, 58 P. (2d) 15 (Utah, 1936). *Contra:*

an oral report to the commission[12] is enough. In North Carolina mere notice by the employer is an adequate compliance with the statute.[13] The courts have generally ruled that a common law action by the injured employee for damages is neither a claim nor notice of a claim.[14] After the accident is once reported and the commission recognizes the claim, its jurisdiction attaches and continues until the case is decided.[15]

In the principal case the plaintiff denied the validity of the Compensation Act and sought recovery under the Federal Act, waiting five years before making a formal claim for compensation under the State Act. The employer's notice, upon which the commission assumed jurisdiction, was held to be sufficient to preserve the rights of the plaintiff. Since the commission cannot dispose of a case except by some award, order, or judgment, final in its effect,[16] it follows that the plaintiff was entitled to a hearing. The bringing of the action under the Federal Act did not constitute an election of remedies or estop the plaintiff from thereafter asserting his rights under the Workmen's Compensation Act.[17]

The court by its liberal interpretation of the statute reading, "The right to compensation under this article shall be forever barred unless a claim be filed with the industrial commission within one year after the accident . . . ,"[18] is departing from the apparent intent of the legislature. However, the court is following the general tendency of promot-

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Higgins v. Heine Boiler Co., 328 Mo. 493, 41 S. W. (2d) 565 (1931); Murphy v. Burlington Overall Co., 225 Mo. App. 866, 34 S. W. (2d) 1035 (1931).

[12] Duford v. Escanaba Veneer Co., 246 Mich. 191, 224 N. W. 390 (1929); France v. Workmen's Compensation Appeal Board, 186 S. E. 601 (W. Va., 1936). *Contra:* Murphy v. Burlington Overall Co., 225 Mo. App. 866, 34 S. W. (2d) 1035 (1931). *Cf.* Yeaver v. State Compensation Comm., 113 W. Va. 257, 167 S. E. 617 (1933) (commission electing to investigate claim in which no report had been filed, must dispose of cases on merits); Cole v. State Compensation Comm., 113 W. Va. 579, 169 S. E. 165 (1933).

[13] Hardison v. Hampton and Sons, 203 N. C. 187, 165 S. E. 355 (1932); Hanks v. Utilities Co., 210 N. C. 312, 186 S. E. 252 (1936).

[14] Greeley Gas & Fuel Co. v. Thomas, 87 Colo. 486, 288 Pac. 1051 (1930); Pallanck v. Donovan, 109 Conn. 469, 147 Atl. 14 (1929); Cruse v. Chicago, R. I. and P. Ry. Co., 140 Kan. 704, 38 P. (2d) 672 (1934); Schild v. Pere Marquette R. Co., 200 Mich. 614, 166 N. W. 1018 (1918). *Contra:* Ackerson v. National Zinc Co., 96 Kan. 781, 153 Pac. 530 (1915).

[15] Kennedy v. Industrial Accident Comm., 50 Cal. App. 184, 195 Pac. 267 (1921); Choctaw Portland Cement Co. v. Lamb, 79 Okla. 109, 189 Pac. 750 (1920).

[16] Texas Employers' Ins. Ass'n v. Shilling, 259 S. W. 236 (Texas, 1923); Todd v. Southern Casualty Co., 18 S. W. (2d) 695 (Texas, 1929).

[17] McLead v. Southern Pac. Co., 64 Utah 409, 231 Pac. 440 (1924) (bringing action in another state under Federal Employers' Liability Act held not evidence of abandonment of claim for compensation); Utah Idaho Cent. Ry. Co. v. Industrial Comm., 84 Utah 364, 35 P. (2d) 842 (1934) (plaintiff who misconceived his remedy and brought action under Federal Employers' Liability Act held not estopped from pursuing legal remedy under State Workmen's Compensation Laws).

[18] N. C. CODE ANN. (Michie, 1935) §8081(ff)a.

ing the remedial nature of workmen's compensation laws. As most accidents are reported[19] the employees or their personal representatives will hereafter usually be privileged to institute experimental suits before seeking compensation under the Act. How can this undesirable situation be met? Though the commission has the power to call a hearing on its own motion[20] or on the motion of either party,[21] the burden of bringing contestable claims to a speedy settlement should not be placed on the commission, the employer, or the insurance carrier. To protect the employer and the insurance carrier from dormant claims an amendment is proposed[22] by which the employee or his personal representative would be compelled to take action on the claim within one year after its filing or his rights thereunder would be forever barred. This proposed amendment would not prejudice the rights of the plaintiff where he is seeking recovery under the Federal Act, as acceptance of the state compensation is not a bar to recovery under the Federal Act.[23] A further protection is given the plaintiff by the 1933 Amendment which allows the employee or his personal representative one year in which to commence an action at law in the event of an adverse judgment under the Workmen's Compensation Act.[24]

E. C. SANDERSON.

[19] The employer is under a statutory duty to report all injuries. N. C. CODE ANN. (Michie, 1935) §§8081(vvv)a, 8081(vvv)e.

[20] The Commission is not expressly given power to call a hearing on its own motion, but it is given express authority to make rules and regulations for carry-out the provisions of the Act. N. C. CODE ANN. (Michie, 1935) §8081(jjj)a. The commission claims to have the power. Rules and Regulations, no. 14. See American Employers' Insurance Co. v. Huffman, 187 N. E. 410 (Ind. App., 1933), where the compensation board was allowed to order that additional parties be joined. Hence it seems that the commission would not be exceeding its authority by acting on its own motion.

[21] N. C. CODE ANN. (Michie, 1935) 8081(mmm).

[22] Following is a proposal for the Amendment, N. C. CODE ANN. (Michie, 1935) §8081(ff)a: "The right to compensation under this Act shall be forever barred unless a claim be filed with the Industrial Commission within one year after the accident, and if death results from the accident, unless a claim be filed with the Commission within one year thereafter: and all claims upon which action is not taken under this statute by the claimant within one year after the date of filing shall be forever barred."

[23] New York Central R. R. Co. v. Winfield, 244 U. S. 147, 37 Sup. Ct. 546, 61 L. ed. 1045 (1917); Neumann v. Morse Dry Docks and Repair Co., 255 Fed. 97 (E. D., N. Y. 1918); Wetterer v. Atchison, T. and S. F. Ry., 277 Ill. App. 275 (1934).

[24] P. L. N. C. 1933, c. 449.