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# Notes and Comments

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# NOTES AND COMMENTS

**Administrative Law—Taxation—Review of Discretionary Decisions.**

The Commissioner of Internal Revenue reassessed a corporate taxpayer after having determined an overpayment and paid a refund.[1] Such determination was not reviewable by the courts.[2] The taxpayer contended that the Commissioner was precluded from redetermining tax liability here because the refund had already been paid and the discretionary power had been exhausted.[3] The court, relying on *McIlhenny v. Commissioner*,[4] held such redetermination proper, implying that ordinarily, in the absence of a closing agreement or the running of the statute of limitations, the tax administrators may reopen and redetermine as often as they choose.[5]

At first blush it seems highly irregular that an official, whose discretionary decision is conclusive against the taxpayer, may redetermine; but it appears sounder upon the realization that here was a refund

[1] This overpayment and consequent refund came as a result of a special assessment after the general assessment had been made and the tax paid. Under the Revenue Acts of 1917 and 1918 the commissioner was empowered to grant a special assessment of income and profits tax after the regular assessment upon petition by a taxpayer who could show great hardship as a result of the regular tax. The standard was the amount of tax paid by other similar concerns under the regular provisions of the taxing acts. These relief provisions were designed to administer the hastily raised tax more equitably in unusual cases. 40 STAT. 300 (1917); 40 STAT. 1057, 1088, 1093 (1918). In a recent Congressional enactment, basis for the arising of a similar situation was laid in the Second Revenue Act of 1940 whereby the commissioner was empowered to make discretionary special assessments to avoid hardships. Pub. L. No. 801, 76th Cong., 3rd Sess. (Oct. 8, 1940) §§721, 722.

[2] Williamsport Co. v. United States, 277 U. S. 551, 48 Sup. Ct. 587, 72 L. ed. 985 (1927); *cf.* Blair v. Osterlein Machine Co., 275 U. S. 220, 48 Sup. Ct. 87, 72 L. ed. 249 (1927). Ordinarily general and special tax assessments may be reviewed in a court of law. In effect this interpretation prevented a taxpayer from attacking the commissioner's decision under this particular special determination power.

[3] Butte, Anaconda & Pacific Ry. v. United States, 290 U. S. 127, 54 Sup. Ct. 108, 78 L. ed. 222 (1933), (1934) 43 YALE L. J. 503.

[4] 39 F. (2d) 356 (C. C. A. 3rd, 1930). The commissioner was allowed to reopen an income tax case, in which he had allowed a deduction and in which the tax had been paid, in the absence of evidence of fraud or other new evidence. A closing agreement being available, and no binding agreement having been entered into, the commissioner still had power to reconsider. 42 STAT. 227 (1921). This case leads in giving general effect to the closing agreement provisions of the Revenue Act of 1921 in connection with all federal tax cases settled after its passage even though the tax itself was based on a prior tax law. Burnet v. Porter, 283 U. S. 230, 51 Sup. Ct. 416, 75 L. ed. 996 (1931) (Supreme Court expressed approval of McIlhenny v. Commissioner, *supra*).

[5] New Jersey Worsted Mills v. Gnichtel, 31 F. Supp. 908 (D. N. J. 1940) (By following McIlhenny v. Commissioner, 39 F. (2d) 356 (C. C. A. 3rd, 1930), cited *supra* note 4, the court not only admits the general application of the closing agreement provisions of the Revenue Act of 1921, but also sanctions its application in this exceptional case where no court review is available to the taxpayer.).

based on an exception to the general tax, *i.e.*, a gratuity.[6] The taxpayer's hardship arises not so much from the commissioner's power to reopen as from his own inability to obtain a court review of the determination;[7] however, here the taxpayer petitioned for a special assessment and may thus be said to have assented to this hardship.[8] Reassessments being allowed generally, should this unusual situation constitute an exception to that rule?

Congress, by providing for a definite method for obtaining finality, *viz.* a closing agreement, may properly be said to have negatived other modes.[9] Proof that Congress intended no exceptions is found in the fact that substantially these same provisions have been thrice enacted.[10] Thus the question resolves into one of desirability.

The Commissioner may reassess for fraud or mistake of fact or law,[11] and under present statute he may reconsider ordinary tax assessments within the statute of limitations period.[12] Previously refunds could be recovered any time within that period in the absence of closing agreements, but statute has narrowed this to two years after payment.[13] There is express authorization of successive deficiency assessments,[14]

[6] See note 1, *supra* (This was a refund based on an exception to the general tax law). See Lynch v. United States, 292 U. S. 571, 577, 54 Sup. Ct. 840, 842, 78 L. ed. 1434, 1439 (1934) (taxpayer receives no vested interest in refunds); Frisbie v. United States, 157 U. S. 160, 166, 15 Sup. Ct. 586, 588, 39 L. ed. 657, 659 (1895).

[7] This hardship, pointed out to be unusual in note 2, *supra*, the taxpayer suffered in the original special assessment. The question, then, is whether or not commissioners should be allowed to reconsider their discretionary decisions. Assuming this to be answered "yes", one still sees no change, resulting from the reconsideration, in the rights of the taxpayer to seek a review of the commissioner's decision. If he had it in the first place, he has it after the reconsideration; if he didn't have it at first, he has been deprived of nothing by lacking it after the reconsideration.

[8] See United States v. Henry Prentiss & Co., 288 U. S. 73, 87, 53 Sup. Ct. 283, 286, 77 L. ed. 626, 632 (1933); Michigan Iron & Land Co. v. United States, 10 F. Supp. 563 (Ct. Cl., 1935); Central Iron & Steel Co. v. United States, 6 F. Supp. 115 (Ct. Cl., 1934), *cert. denied*, 293 U. S. 563, 55 Sup. Ct. 75, 79 L. ed. 663 (1934).

[9] Botony Worsted Mills v. United States, 278 U. S. 282, 49 Sup. Ct. 129, 73 L. ed. 379 (1928). But see Loewy & Son v. Commissioner, 31 F. (2d) 652, 654 (C. C. A. 6th, 1929).

[10] 42 STAT. 313 (1921); 43 STAT. 340 (1924); 44 STAT. 113 (1926). Oak Worsted Mills v. United States, 38 F. (2d) 699, 702 (Ct. Cl., 1930). For comprehensive history of these statutes see 26 U. S. C. §3772.

[11] Woodworth v. Kales, 26 F. (2d) 178 (C. C. A. 6th, 1928); Boyne City Lumber Co. v. Doyle, 47 F. (2d) 772 (W. D. Mich. 1930); see Penrose v. Skinner, 298 Fed. 335, 337 (D. Colo. 1923).

[12] 52 STAT. 573 (1938), 26 U. S. C. §3760(a) (Supp. 1939). United States v. Green, 28 F. Supp. 549 (E. D. Pa. 1939).

[13] United States v. Wurts, 303 U. S. 414, 58 Sup. Ct. 637, 82 L. ed. 932 (1937). When the two-year period in which suit may be allowed after rejection of a claim for a refund has expired, the commissioner has no authority to reopen the rejected claim for the refund. First National Bank v. United States, 102 F. (2d) 907 (C. C. A. 7th, 1939), *cert. denied*, 307 U. S. 641, 59 Sup. Ct. 1038, 83 L. ed. 103 (1939).

[14] 48 STAT. 740, 26 U. S. C. §271 (1934). An erroneous refund is recoverable

bordering upon a denial of *res judicata* principles; however, in the absence of a definite statutory determination of the matter, unanimity has not existed among all the courts, for there was some earlier insistence upon finality.[15] Foremost among cases so insisting was *Woodworth v. Kales*[16] which prevented the commissioner from revaluating stock already assessed for income tax determination, which assessment was approved and re-approved by himself and his predecessors in office. Although possessing elements of estoppel, this case stood on the principle that no redetermination may be made of a discretionary decision in the absence of fraud or gross error. This position has been distinguished and discredited until it is now of little more than historic value.[17] Dissents have infrequently taken a stand for conclusiveness,[18] but since 1930, courts have consistently allowed the Commissioner to redetermine at any time within the statute of limitations, thereby achieving uniformity.[19] Final sanction would occur if the Supreme Court

by a subsequent deficiency assessment. Burnet v. Porter, 283 U. S. 230, 51 Sup. Ct. 416, 75 L. ed. 996 (1931).

[15] Bonwit Teller & Co. v. United States, 283 U. S. 258, 51 Sup. Ct. 395, 75 L. ed. 1018 (1931) (used up his jurisdiction by signing certificate of overassessment and receiving waiver from taxpayer); United States v. Detroit Steel Products Co., 20 F. (2d) 675 (E. D. Mich. 1927) (in authorizing refund, commissioner acted quasi-judicially, and in the absence of fraud or gross error his decision is binding on the government); Buick Motor Co. v. City of Milwaukee, 43 F. (2d) 385 (E. D. Wis. 1930), *aff'd*, 48 F. (2d) 801 (C. C. A. 7th, 1931), *cert. denied*, 284 U. S. 655, 52 Sup. Ct. 33, 76 L. ed. 555 (1931) (authorized judgment of tax official on competent evidence not generally subject to reconsideration . . . must be error or new facts); Boyne City Lumber Co. v. Doyle, 47 F. (2d) 772 (W. D. Mich. 1930) (slight error in base evaluation of property for income tax computation after sale was insufficient to allow reconsideration); see Kaufman v. United States, 11 Ct. Cl. 659, 670, *aff'd*, 96 U. S. 567, 24 L. ed. 792 (1878); Penrose v. Skinner, 298 Fed. 335, 337 (D. Colo. 1923); Daube v. United States, 289 U. S. 367, 372, 53 Sup. Ct. 597, 599, 77 L. ed. 1261, 1264 (1933).

[16] 26 F. (2d) 178 (C. C. A. 6th, 1928), (1929) 27 MICH. L. REV. 677 (flagrant abuse of power motivated by political animosity is the possible explanation for this case). But *cf.* James Couzens, 11 B. T. A. 1040 (1928).

[17] Holmquist v. Blair, 35 F. (2d) 10 (C. C. A. 8th, 1929); Austin v. Commissioner, 35 F. (2d) 910 (C. C. A. 6th, 1929) (presumption that commissioner is acting under the right to change, *i.e.* fraud or error); Oak Worsted Mills v. United States, 38 F. (2d) 699 (Ct. Cl., 1930); McIlhenny v. Commissioner, 39 F. (2d) 356 (C. C. A. 3rd, 1930); Page v. Lafayette Worsted Co., 66 F. (2d) 339 (C. C. A. 1st, 1933), *cert. denied*, 290 U. S. 692, 54 Sup. Ct. 127, 78 L. ed. 596 (1933) (distinguished).

[18] See Austin v. Commissioner, 35 F. (2d) 910, 913 (C. C. A. 6th, 1929); Page v. Lafayette Worsted Co., 66 F. (2d) 339, 342 (C. C. A. 1st, 1933), *cert. denied*, 290 U. S. 692, 54 Sup. Ct. 127, 78 L. ed. 596 (1933). For comparison see excerpt from the commissioner's general order of January 20, 1923 in McIlhenny v. Commissioner, 39 F. (2d) at 358 (C. C. A. 3rd, 1930).

[19] Burnet v. Porter, 283 U. S. 230, 51 Sup. Ct. 416, 75 L. ed. 996 (1931), *aff'g.* McIlhenny v. Commissioner, 39 F. (2d) 356 (C. C. A. 3rd, 1930); Stanford University Book Store v. Helvering, 83 F. (2d) 710 (App. D. C. 1936). The changed determination may involve a revaluation on the same facts. Levy v. Commissioner, 48 F. (2d) 725 (C. C. A. 9th, 1931). However, the courts have refrained from an out and out declaration allowing the commissioner, in the absence of specific statutory allowance, to reverse his discretionary decision as to the granting of statutory special assessments when faced with the same facts.

adopted the holding in *The Sweets Co. of America v. Commissioner*,[20] that ". . . whether he believed his predecessor's ruling erroneous in law or fact is immaterial . . . Within the statutory period of limitations and in the absence of a binding settlement, the commissioner had authority to re-examine and redetermine the petitioner's tax liability."

In current federal taxation statutes the legislative intent is clear insofar as the statutes providing for closing agreements and deficiency assessments are the only restrictions on the commissioner's power of review.[21] In the interest of arriving at a proper and uniform tax this vested discretion appears justified.

State tax administration has pursued an opposite course yielding to the argument that taxpayers experienced annoyance and uncertainty from numerous reassessments, especially when merely representative of a changed view of the same facts.[22] Statutes often provide for back assessments of omitted property,[23] but a reassessment because of official omission or undervaluation of property included in the taxpayer's returns has usually been denied since such property has already been subjected to tax, however inadequate.[24] Even a statutory provision for reassessment upon incorrect levies has been interpreted to give that power only when new facts come to light.[25] Actual collusion with gov-

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Austin v. Commissioner, 35 F. (2d) 910, (C. C. A. 6th, 1929); Page v. Lafayette Worsted Co., 66 F. (2d) 339, *cert. denied*, 290 U. S. 692, 54 Sup. Ct. 127, 78 L. ed. 596 (1933). Omaha Baum Iron Store v. United States, 8 F. Supp. 703 Ct. Cl., 1934); United States v. Green, 28 F. Supp. 549 (E. D. Pa. 1939) (though the law relied on at the time of the determination was the only law in existence, a subsequent change of the law by the Supreme Court allows the commissioner to recover the refund previously granted, if he acts within the statute of limitations period). *Contra:* Tumulty v. District of Columbia, 102 F. (2d) 254 (App. D. C. 1939) (personal property tax).

[20] 40 F. (2d) 436, at 438 (C. C. A. 2d, 1930).

[21] 52 STAT. 573 (1938), 26 U. S. C. §3760(a) (Supp. 1939) (provides for a binding closing agreement as to future tax liability). 48 STAT. 740, 26 U. S. C. §271 (1934) (provides for successive deficiency assessments). 52 STAT. 578, 26 U. S. C. §3761 (1938) (provides for compromise agreements, the statutory method being the only final one).

[22] Champlin v. Oklahoma Tax Commission, 163 Okla. 185, 20 P. (2d) 904 (1933). An additional consideration is the apparent injustice of permitting the government to reopen questions of tax liability while the taxpayer is concluded by his payment on the original assessment. Coulter v. Louisville Bridge Co., 114 Ky. 42, 70 S. W. 29 (1902).

[23] IOWA CODE (1939) §7105.1; MISS. CODE ANN. (1930) §3197; N. C. CODE (Michie, 1939) §7971(163)(5).

[24] Hunt v. District of Columbia, 108 F. (2d) 10 (App. D. C. 1939); Langhout v. First National Bank, 191 Iowa 957, 183 N. W. 506 (1921); Commonwealth v. Robinson, Norton & Co., 146 Ky. 218, 142 S. W. 406 (1912); Wolfenden v. Commissioners, 152 N. C. 83, 67 S. E. 319 (1910); Chowan County v. Commissioner of Banks, 202 N. C. 672, 163 S. E. 808 (1932); County of Buncombe v. Beverly Hills, Inc., 203 N. C. 170, 165 S. E. 335 (1932); Town of Rockingham v. Hood *ex rel.* Bank of Pee Dee, 204 N. C. 618, 169 S. E. 191 (1933). But *cf.* Adams v. Clarke, 80 Miss. 134, 31 So. 216 (1902).

[25] State *ex rel.* Schuster Realty Co. v. Lyons, 184 Wis. 175, 197 N. W. 585 (1924).

ernment agents is necessary to warrant reopening assessments for fraud,[26] and courts seem even less inclined to allow reassessments where the error is of law.[27] Despite the concession that as a practical matter taxing officials rely on taxpayers' returns in the exigency of voluminous work, and that a flexible system is desirable,[28] assessments are still extensively held conclusive.[29] There might be good reason for the presence of greater finality in property and franchise taxes, assessed by the officials,[30] but state income taxes are so like the federal, the taxpayers assessing themselves, that there seems no good reason for this difference. In many cases it appears as the application by courts of the broad principles enunciated in property cases to this newer tax.[31] Gradually by legislation and judicial interpretation states are introducing into taxation administrative leeway.[32]

[26] Compare State *ex rel.* Tax Commission v. Sinclair Prairie Oil Co., 171 Okla. 498, 41 P. (2d) 876 (1935) with Adams v. Clarke, 80 Miss. 134, 31 So. 216 (1902). Deliberate failures to list property items or to report accurate valuations have not been deemed sufficiently reprehensible to overcome the presumption that the tax assessor had performed his duty. Commonwealth v. Robinson, Norton & Co., 146 Ky. 218, 142 S. W. 406 (1912); Sudderth v. Brittain, 76 N. C. 458 (1876).

[27] Anniston City Land Co. v. State, 185 Ala. 482, 64 So. 110 (1913). But *cf.* Buick Motor Co. v. Milwaukee, 43 F. (2d) 385 (E. D. Wis. 1930), *aff'd,* 48 F. (2d) 801 (C. C. A. 7th, 1931), *cert. denied,* 284 U. S. 655, 52 Sup. Ct. 33, 76 L. ed. 555 (1931), in which the court introduces some of the federal tax system's flexibility into the state system.

[28] See dissent in Miller v. Copeland's Estate, 139 Miss. 788, 812, 104 So. 176, 177 (1925), which argues that permitting unlisted property to go untaxed is both unfair to the other taxpayers and conducive to fraud.

[29] Coulter v. Louisville Bridge Co., 114 Ky. 42, 70 S. W. 29 (1902) (franchise tax); Commonwealth v. Kentucky Heating Co., 176 Ky. 35, 195 S. W. 459, *modified,* 180 Ky. 607, 203 S. W. 538 (1918) (corporation tax); State *ex rel.* Ford Motor Co. v. Gehner, 325 Mo. 24, 27 S. W. (2d) 1 (1930) (income tax); State *ex rel.* Tax Commission v. Sinclair Prairie Oil Co., 171 Okla. 498, 41 P. (2d) 876 (1935) (property tax).

[30] Tennessee Coal, Iron & R.R. v. Board of Education, 80 F. (2d) 307 (C. C. A. 5th, 1935).

[31] State *ex rel.* Ford Motor Co. v. Gehner, 325 Mo. 24, 27 S. W. (2d) 1 (1930); State *ex rel.* Schuster Realty Co. v. Lyons, 184 Wis. 175, 197 N. W. 585, *aff'd,* 184 Wis. 492, 199 N. W. 48 (1924); Arizona Tax Commission v. Tucson Gas, Electric Light & Power Co., 103 P. (2d) 467, *modified,* 103 P. (2d) 955 (Ariz. 1940).

[32] N. C. CODE (Michie, 1939) §7971(163)(6) (property tax provision allowing for reassessment where facts newly come to the attention of the assessor which would permit a board of equalization, if they were confronted with this same new evidence, to raise the assessment). Head v. McKenney, 61 Ga. App. 552, 6 S. E. (2d) 405 (1939) (where state income tax law provided that the tax should be one-third of that paid to the federal government, an additional assessment by the federal government against the taxpayer permitted an additional assessment by the state). *Cf.* N. C. CODE (Michie, 1939) §7880(152) (taxpayer must report any change in his federal income tax to the state officials; for failure to report he cannot claim the running of the statute of limitations). The implication of this statute points toward the allowance of reassessments by state officials, but could they change their decision, as in the instant case, where there has been a general assessment, a discretionary special assessment whereupon the state makes its first change, and then a change of the special assessment by the federal officials? Clearly state officials should have the power to reconsider

Close analogies are found in other fields, including determinations by the interstate commerce commission,[33] land patent board,[34] workmen's compensation commission,[35] and immigration department[36] which are characterized as quasi-judicial and thus afford ground for holding that the body making the decision has no power to change it.[37] It is reasoned that since all administrative power arises from statute, these decisions may be held final as against the official in the absence of statutory provisions to the contrary[38] as over against the rationale that such absence of statute leaves the field wide open for reconsiderations.[39] Another theory is that the officer's authority is exhausted by its initial exercise,[40] this conflicting with the idea that such freedom of redetermination achieves greater justice.[41] Actually whether finality is to be accorded to administrative determinations or whether they may be reopened by their determiners appears governed by particular circumstances and not by any comprehensive judicial rule.[42] Where legislative policy remains unexpressed, it appears desirable to decide the power of administrative agencies to reverse their former actions according to the nature of the proceedings involved and the nature of the substantive law administered. A policy of judicial *laissez faire* seems preferable, since administrative agencies are best qualified to develop their own

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in cases where the provisions of the state law involved depend upon the disposition of the same matter by the federal officials, but may the state officials change their decisions where the state law provisions are independent and the state official's decision is also independent of outside considerations?

[33] Butte, Anaconda & Pac. Ry. v. United States, 290 U. S. 127, 54 Sup. Ct. 108, 78 L. ed. 222 (1933); Note (1940) 49 YALE L. J. 1250.

[34] Noble v. Union River Logging R. R., 147 U. S. 165, 13 Sup. Ct. 271, 37 L. ed. 123 (1893); Ballinger v. United States *ex rel.* Frost, 216 U. S. 240, 30 Sup. Ct. 338, 54 L. ed. 464 (1910); Lane v. Watts, 234 U. S. 525, 34 Sup. Ct. 965, 58 L. ed. 1440 (1914); Kern River Co. v. United States, 257 U. S. 147, 42 Sup. Ct. 60, 66 L. ed. 175 (1921); Great Northern Ry. v. Steinke, 261 U. S. 119, 43 Sup. Ct. 316, 67 L. ed. 564 (1923); West v. Standard Oil Co., 278 U. S. 200, 49 Sup. Ct. 138, 73 L. ed. 265 (1929).

[35] Notes (1940) 49 YALE L. J. 1250, (1929) 27 MICH. L. REV. 677; (1927) 4 WIS. L. REV. 175.

[36] Sharp, *Conclusive Administrative Decisions* (1930) 5 IND. L. J. 563.

[37] Lilienthal v. Wyandotte, 286 Mich. 604, 282 N. W. 837 (1938); Shugg v. Anaconda Copper Mining Co., 100 Mont. 159, 46 P. (2d) 435 (1935).

[38] Connor's Case, 126 Me. 37, 115 Atl. 520 (1921); Hyland v. Waldo, 158 App. Div. 654, 143 N. Y. Supp. 901 (1st Dep't 1913).

[39] Pearson v. Williams, 202 U. S. 281, 26 Sup. Ct. 608, 50 L. ed. 1029 (1906); Gage v. Gunthar, 136 Cal. 338, 68 Pac. 710 (1902).

[40] State *ex rel.* Gillespie v. Thursby, 104 Fla. 103, 139 So. 372, *rehearing denied*, 104 Fla. 103, 140 So. 775 (1932); Kern River Co. v. United States, 257 U. S. 147, 42 Sup. Ct. 60, 66 L. ed. 175 (1921); see dissent in Austin v. Commissioner, 35 F. (2d) 910, 913 (C. C. A. 6th, 1929).

[41] Holmquist v. Blair, 35 F. (2d) 10 (C. C. A. 8th, 1929); United States v. Green, 28 F. Supp. 549 (E. D. Pa. 1939); Omaha Baum Iron Store v. United States, 8 F. Supp. 703 (Ct. Cl. 1934).

[42] Compare *In re* Smiling, 193 N. C. 448, 137 S. E. 319 (1927), with Board v. Little, 195 N. C. 793, 143 S. E. 827 (1928).

*res judicata* practices out of intimate acquaintance with their individual problems.[43]

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**Civil Procedure—Use of Motion to Strike.**

If appealed cases afford an accurate criterion, the statutory motion to strike from pleadings is becoming much more prevalent in the North Carolina courts. In the last completed volume of the North Carolina Reports, there are five cases raising the point as compared to only twenty-five in the previous sixteen volumes. The part of the statute with which this note is concerned provides in effect that irrelevant or redundant matter may be stricken out on the motion of the aggrieved party, if made before answer or demurrer, or before extension of time is granted in which to plead.[1]

In a recent suit against a railroad and its employee for negligent injuries from the use of firearms in the hands of the employee, the trial court, on defendant's motion, struck from the amended complaint allegations that the individual defendant was possessed of a nervous and irritable disposition, and of a violent and ungovernable temper. On appeal the Supreme Court reversed the trial court only as to the nervous disposition, saying "Irritability and violent and ungovernable temper could hardly be a contributing factor to negligence, while nervousness may readily be a concomitant part thereof, and the retaining of a person equipped with firearms with which to guard the railway station of which he was in charge, when such person was known to possess a nervous disposition, might constitute negligence on the part of the railway company."[2] In passing it may be said that such a distinction is rather difficult to comprehend. The reverse appears nearer the truth.

The principal case lays down a general rule that seems quite popular with the court: "On a motion to strike out, the test of relevancy of a pleading is the right of the pleader to present the facts to which the allegation relates in the evidence upon the trial."[3] The difficulty of this rule is in its application. There is no apparent reconcilable or pre-

[43] Note, *Res Judicata in Administrative Law* (1940) 49 YALE L. J. 1250. Also see Culp, *Administrative Remedies In the Assessment and Enforcement of State Taxes* (1938) 17 N. C. L. REV. 118, in which a hands-off policy is suggested to the courts insofar as upsetting expert administrative determinations as to tax liability, thereby relying more heavily on the bodies' expertness.

[1] N. C. CODE ANN. (Michie, 1939) §537.

[2] Whitlow v. Southern Ry., 217 N. C. 558, 8 S. E. (2d) 809 (1940).

[3] Pemberton v. Greensboro, 203 N. C. 514, 166 S. E. 396 (1932); Patterson v. Southern Ry., 214 N. C. 38, 198 S. E. 364 (1938); Virginia Trust Co. v. Dunlop, 214 N. C. 196, 198 S. E. 645 (1938); Duke v. Crippled Childrens' Hospital, 214 N. C. 570, 199 S. E. 918 (1938); Wadesboro v. Coxe, 215 N. C. 708, 2 S. E. (2d) 876 (1939); Sayles, Adm'x v. Loftis, 217 N. C. 674, 9 S. E. (2d) 393 (1940).

dictable consistency in the decisions. On occasion the court will go into a lengthy discussion of the merits of the particular pleading being attacked by the motion. If the conclusion is that it constitutes part of the pleader's cause of action or defense, it will remain because evidence to support it may be presented at the trial;[4] otherwise it will be stricken.[5] In other cases the court has announced itself in opposition to a policy of "charting the course of the trial in advance", and therefore has refused to sustain a motion to strike without considering the question of the relevancy of the attacked pleading. The protection afforded the moving party where this procedure is followed lies in an objection to the evidence when presented at the trial.[6]

Why this diametrically opposite treatment? The reason is probably founded on very practical considerations. Where the court allows or disallows the motion after a discussion of the merits of the case, it does so because it is sure of the ground on which it treads; that is, there is no doubt in the court's mind that the particular pleading is relevant or irrelevant to the suit at hand.[7] Or else, in rare cases, the court might feel that the pleading is so worded as to make a profound impression when read to an easily prejudiced jury, which would be definitely harmful to the moving party.[8] On the other hand, where the court refuses to "chart the course of the trial in advance", it would seem that it is uncertain, at least at the early stage in which such motion arises, whether or not the pleading will be proper.[9] Consequently the moving party is left to the adequate remedy of objecting to the evidence, if and when it is offered.

"When made in apt time, it (motion to strike) is not addressed to the court's discretion, but is made as a matter of right." This rule is found in numerous decisions.[10] As contrasted with "discretion", it would seem that "matter of right" should mean that the moving party has a right to have his motion decided on the merits, from which decision either party can appeal. This is true where the motion is allowed,

[4] Scott v. Bryan, 210 N. C. 478, 187 S. E. 756 (1936); Barron v. Cain, 216 N. C. 282, 4 S. E. (2d) 618 (1939).

[5] Duke v. Crippled Childrens' Hospital, 214 N. C. 570, 199 S. E. 918 (1938); Whitlow v. Southern Ry., 217 N. C. 558, 8 S. E. (2d) 809 (1940); Herndon v. Massey, 217 N. C. 610, 8 S. E. (2d) 914 (1940); *cf.* Federal Reserve Bank v. Atmore, 200 N. C. 437, 157 S. E. 129 (1931).

[6] Hardy v. Dahl, 209 N. C. 746, 184 S. E. 480 (1936); Hildebrand v. Southern Bell Tel. & Tel. Co., 216 N. C. 235, 4 S. E. (2d) 439 (1939).

[7] *Cf.* Duke v. Crippled Childrens' Hospital, 214 N. C. 570, 199 S. E. 918 (1938).

[8] *Cf.* Patterson v. Southern Ry., 214 N. C. 38, 198 S. E. 364 (1938).

[9] Hardy v. Dahl, 209 N. C. 746, 184 S. E. 480 (1936); *cf.* Hildebrand v. Southern Bell Tel. & Tel. Co., 216 N. C. 235, 4 S. E. (2d) 439 (1939).

[10] Federal Reserve Bank v. Atmore, 200 N. C. 437, 157 S. E. 129 (1931); Poovey v. Hickory, 210 N. C. 630, 188 S. E. 78 (1936); Herndon v. Massey, 217 N. C. 610, 8 S. E. (2d) 914 (1940); *cf.* Fayetteville v. Spur Distilling Co., 216 N. C. 596, 5 S. E. (2d) 838 (1939).

for the Superior Court judge has necessarily made a "merit" decision in order to have determined that the contested pleading is irrelevant. The injured party may then except and immediately appeal. There is no justifiable escape from this, for he may be entitled to have his lost pleading remain and it would be most unfair to force him, against his will, to go to the expense of continuing the trial to its end before he is allowed to raise the point. For if he lost and then established his right to material pleadings, the trial would have been in vain. When deciding such an appeal, the Supreme Court may determine the merits of the case,[11] or refuse to chart the course of the trial in advance.[12] Either method, under these circumstances, will adequately protect the injured party.

The problem, as it relates to appeals, is more difficult of solution where the motion to strike is denied and the contested pleading remains. In this situation, what is the meaning of the court's statement that the motion is made as a "matter of right"? It seems to mean that the court will either determine whether or not the pleading is relevant,[13] or will refuse to chart the course of the trial in advance.[14] When this "chart" rule is used, the only effect is to decide the motion itself by merely postponing a decision as to the relevancy of the particular pleading. The use of this rule appears to rest entirely in the Supreme Court, in view of its policy of hearing immediate appeals. There is nothing to indicate that any leeway has been given the Superior Court judge in his invocation of this rule. He apparently is as liable to be reversed when he invokes it as when he decides the motion on the merits.

Assuming that the North Carolina Court is going to continue its use of the "chart" rule, it should grant the Superior Court judge wide discretion in applying it, and allow no appeal from his ruling. Awareness of the possibilities of such a procedure may have caused the recently expressed doubt of the Supreme Court concerning the right of immediate appeal where the motion is denied.[15] Overwhelming factors argue against such an appeal. Although C. S. 638 allows an appeal from every judicial order affecting a substantial right, such right is

[11] Patterson v. Southern Ry., 214 N. C. 38, 198 S. E. 364 (1938); Whitlow v. Southern Ry., 217 N. C. 558, 8 S. E. (2d) 809 (1940); *cf.* Federal Reserve Bank v. Atmore, 200 N. C. 437, 157 S. E. 129 (1931).

[12] Hildebrand v. Southern Bell Tel. & Tel. Co., 216 N. C. 235, 4 S. E. (2d) 439 (1939).

[13] Duke v. Crippled Childrens' Hospital, 214 N. C. 570, 199 S. E. 918 (1938); Barron v. Cain, 216 N. C. 282, 4 S. E. (2d) 618 (1939); Sayles, Adm'x v. Loftis, 217 N. C. 674, 9 S. E. (2d) 393 (1940).

[14] Pemberton v. Greensboro, 205 N. C. 599, 172 S. E. 196 (1934); Hardy v. Dahl, 209 N. C. 746, 184 S. E. 480 (1936); *cf.* Virginia Trust Co. v. Dunlop, 214 N. C. 196, 198 S. E. (2d) 645 (1938).

[15] Virginia Trust Co. v. Dunlop, 214 N. C. 196, 198 S. E. 645 (1938); *cf.* Scott v. Bryan, 210 N. C. 478, 187 S. E. 756 (1936).

sufficiently protected by allowing the moving party to object to the evidence. The infrequent argument that the reading of the pleadings to the jury will prejudice them seems, in actuality, rather negligible, for juries apparently pay little attention to the pleadings when presented.[16] Also it is possible that evidence may not be presented to support such allegations. In view of the safeguards to the moving party, it seems rather unfair to leave the other party without any choice but to submit to the expense of defending such an unnecessary appeal. Since it is apparent that the use of the motion to strike is becoming more frequent, and since, as it stands now, the discretion as to charting or not charting the course of the trial is in the Supreme Court, thus necessitating their consideration of such appeals, their work will be burdened with deciding an increasing number of questions which are of no material benefit. To refuse appeal in this situation would obviously remedy these problems, and would put the discretion in the Superior Court judge where it rightfully belongs.

The "law of the case" is that a court, having ruled on a certain question, will not again hear the case upon the same point.[17] To what extent does this pertain to motions to strike? On appeals, if the motion is allowed, evidence to support the stricken allegations cannot be admitted, as the court has ruled on the merits that the particular pleading is improper. However, this should not bar such evidence for a secondary purpose, such as impeachment of an adverse witness, for here there would be no attempt to introduce it in support of the wrongful allegations. On the other hand, where the court denies the motion on its merits, it seems that the trial judge would be bound to allow the evidence to come in. Where the "chart" rule is invoked, nothing has been decided. Consequently the moving party must prepare to defend, in view of a possible adverse ruling by the trial judge on his objection to the evidence.

Often a party who has suffered an adverse ruling on a motion to strike may feel that an immediate appeal is unnecessary or undesirable. How should he protect himself so that he may have the privilege of contesting the ruling in case he should lose his case and appeal? If the Superior Court judge allows the motion the injured party must except. Logically, an offer of the evidence at the trial should be unnecessary, for in allowing the motion, the judge has, in effect, ruled that he will not admit the evidence, and consequently any offer of it would be useless. However, a careful attorney, to show that he is still relying on his exception and to prevent any question of his having

[16] *Cf.* Poovey v. Hickory, 210 N. C. 630, 188 S. E. 78 (1936); Warren v. Virginia Carolina Joint Stock Land Bank, 214 N. C. 206, 198 S. E. 624 (1938).
[17] McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE (1929) §28.

waived his right to do so, should make some offer of the evidence that he would like to prove under the stricken pleadings. Where the motion is denied, the moving party's only remedy is to object to the evidence when presented. If it is denied on the merits, the Superior Court judge has made his decision to allow the evidence to come in. In this situation the moving party should except to the denial and then object to the evidence. If he does not except to the denial he may be considered to have waived his right to object to the evidence by acquiescing in it; while if he fails to object to the evidence, he may, on appeal, be considered to have waived his right to his exception to the denial. If the judge denies the motion by invoking the "chart" rule, he is simply deferring a decision on the question until the evidence is offered. Thus it seems that the moving party would not have to except in order to object to the evidence. However, in many instances the judge may give no reason for his denial, and exception should be taken in all such cases to prevent any subsequent contention that the judge's ruling was on the merits.

In the interest of simplicity, and in order to clarify the difficult, and in many cases unnecessary problems that develop from the use of the motion to strike, it seems that it would be advantageous from both the point of view of the court and of the parties litigant, for the court to lay down the following set rule on motions to strike made in apt time: (1) Where allowed, the aggrieved party may (a) except and appeal immediately, and obtain a decision as to whether or not he may support the contested allegations by evidence at the trial, or (b) except to the ruling and be allowed to raise the question if the case is subsequently appealed, provided, at least, that he has preserved his exception by offering the evidence at the trial. (2) Where denied, he may not appeal, but must seek his relief by excepting to the ruling and objecting to the evidence when and if it is offered.

J. B. CHESHIRE, IV.

**Contracts—Effect of Second Contract With Defaulter Upon Rights for Breach of First.**

An elementary rule of contract law is that a party injured by a breach of contract has a "duty"[1] to mitigate any damages suffered

[1] Strictly speaking the "duty" to mitigate damages is not a duty at all, not an affirmative obligation. The rule merely sets up a standard for ascertainment of damages, recognizing a disability in the injured party to collect avoidable damages. RESTATEMENT, CONTRACTS (1932) §336, comment (d); 5 WILLISTON, CONTRACTS (Rev. Ed. 1937) 3795, 3813. In the interests of brevity the word "duty" is used throughout this note as qualified by this footnote.

thereby.[2] Yet, in a recent case[3] where the injured party entered into a second contract with the defaulting party, in order to dispose of products left on his hands by the breach, the court held that the second contract "superseded and rescinded" the first, and thereby barred any recovery of damages for breach of that contract. The majority reasoned that since the two contracts were inconsistent with each other and performance of both was impossible, the first was abrogated by the second, despite lack of an express provision to that effect. Thus, the court, while recognizing the doctrine of mitigation of damages, interpreted the making of the second contract as indicating no such intent, but rather the intent to terminate all rights under the first contract. In a vigorous dissent, one judge[4] contended that by virtue of the "duty" on the injured party to mitigate damages resulting from the breach of the first contract, he should be allowed to enter into the second contract with the party in default without barring his rights to recover damages for the former breach.

Cases involving employment contracts have often given rise to the question of the effect of a subsequent contract on the rights of the parties to a breached contract. These cases arise where the employee has been wrongfully discharged by his employer, who subsequently makes an offer of re-employment. In view of the recognized "duty" to mitigate damages, it is usually held that if the best offer, within the limits set up by the mitigation rule, comes from the defaulting employer, then the employee must either accept or else forfeit a *pro tanto* amount of the damages suffered.[5] Thus, these cases impliedly hold that the second contract will not rescind the first.

[2] McCORMICK, DAMAGES (1935) 127, 132; RESTATEMENT, CONTRACTS (1932) §336 (1); 5 WILLISTON, CONTRACTS (Rev. Ed. 1937) 3795, 3875.

[3] United States v. Brookridge Farm, Inc., 111 F. (2d) 461 (C. C. A. 10th, 1940).

[4] Huxman, Circuit Judge; *id.* at 465. In the principal case another judge dissented on the ground that damages should not be recoverable for breach of the first contract because that contract was not one that could be enforced in court. It seemed that there was no competition when the first contract was made, and this judge was of the idea that the seller had taken advantage of this fact to charge the buyer, the United States, an exorbitant price for the goods. When the second contract was made between the parties there was competition, and the seller's bid for the second contract was approximately 30% less than his bid for the first contract had been.

[5] Morris Shoe Co. v. Coleman, 187 Ky. 837, 221 S. W. 242 (1920); Flikema v. Henry Kraker Co., 252 Mich. 406, 233 N. W. 362, 72 A. L. R. 1046 and note (1930). However, this duty to re-accept employment is a qualified one, extending only to employment offered in good faith; Gray v. Pacific Suction Cleaner Co., 171 Cal. 234, 155 Pac. 469 (1915); Schisler v. Perfection Milker Co., 193 Minn. 160, 258 N. W. 17 (1934); within the same general line of business; Russellville Special School Dist. v. Tinsley, 156 Ark. 283, 245 S. W. 831 (1922); Hussey v. Holloway, 217 Mass. 100, 104 N. E. 471 (1914); 5 WILLISTON, CONTRACTS (Rev. Ed. 1937) 3811; and not to an offer of re-employment more menial than that for which he originally contracted; Cooper v. Stronge & Warner Co., 111 Minn. 177, 126 N. W. 541 (1910); Connell v. Averill, 8 App. Div. 524, 40

In one leading case,[6] the seller refused to deliver goods to the buyer on credit according to the contract, but instead offered to deliver the same goods at a reduced cash price. The court held that the buyer should have mitigated his damages by accepting the new offer if he had the cash and was unable to obtain similar goods elsewhere, but ruled that the new contract did not terminate rights for damages under the original contract. This decision was based upon dicta in *Warren v. Stoddart*[7] to the effect that when a buyer refused to accept a seller's new cash offer, after breach of the original contract to ship goods on 30 days credit, then the buyer could recover only nominal damages for the breach of that contract. Many courts treat a second contract with the defaulting party as a proper method of mitigating damages,[8] refusing to allow recovery of damages that could have been, but were not,

N. Y. Supp. 855 (4th Dep't 1896); nor to work that would be degrading; Buffalo Bayou Co. v. Lorentz, 177 S. W. 1183 (Tex. Civ. App. 1915); Williams v. School Dist., 104 Wash. 659, 177 Pac. 635 (1919); 3 SUTHERLAND, DAMAGES (4th Ed. 1916) 2564; offensive; Price v. Davis, 187 Mo. App. 113, 173 S. W. 64 (1915); 5 WILLISTON, CONTRACTS (Rev. Ed. 1937) 3798; or unreasonable; Hirsch v. Georgia Iron & Coal Co., 169 Fed. 578 (C. C. A. 6th, 1909); 5 WILLISTON, CONTRACTS (Rev. Ed. 1937) 3798; nor does it apply if he already has another position; see Birdsong v. Ellis, 62 Miss. 418 (1884). Where the new offer varies the terms of the original contract so that its acceptance would force an abandonment of rights under the first agreement, there is no duty on the discharged employee to accept; Morris Shoe Co. v. Coleman, 187 Ky. 837, 221 S. W. 242 (1920); Holloway v. Levine, 107 Vt. 396, 180 Atl. 889 (1935); 5 WILLISTON, CONTRACTS (Rev. Ed. 1937) 3814; unless it expressly stipulates that entrance into the new contract will not prejudice the employee's rights under the first contract; Comey v. United Surety Co., 217 N. Y. 268, 111 N. E. 832 (1916). If, after a reasonable time the employee cannot locate equivalent employment, then he should accept work for which he is best suited; Kramer v. Wolf Cigar Stores Co., 99 Tex. 597, 91 S. W. 775 (1906); retaining of course his right to recover damages for the breach of the former contract.

[6] Lawrence v. Porter, 63 Fed. 62 (C. C. A. 6th, 1894).

[7] 105 U. S. 224, 230, 26 L. Ed. 1117, 1120 (1882). In Lawrence v. Porter, *id.* at 67, Lurton, Circuit Judge, said of this case: "The opinion in *Warren v. Stoddart* rests upon the theory that the buyer does not surrender or yield any right of action he may have for the breach of contract. It rests wholly upon the duty of mitigating the loss by replacing the goods by others, if they are obtainable by reasonable exertion. If this duty be such as to require him to buy from the delinquent seller; if the article can be obtained only from him, or because he offers it cheaper than it can be obtained from others, such a purchase from the seller is not an abandonment of the original contract by the substitution of another, nor would the purchase operate to the seller's advantage save in so far as the damage resulting from his bad faith was thereby reduced. If the seller offers to sell for cash at a reduced price, or to sell for a less price than the market price, though in excess of the contract price, with the condition that it should operate as a waiver of the original contract, or of any right of action for its breach, then the buyer would not be obligated to treat with the seller, nor would the seller's offer, if rejected, operate as a reduction of damages."

[8] Key v. Kingwood Oil Co., 110 Okla. 178, 236 Pac. 598 (1925); Plesofsky v. Kaufman & Flonacker, 140 Tenn. 208, 204 S. W. 204 (1918); Holloway v. Levine, 107 Vt. 396, 180 Atl. 889 (1935); Stone v. United Fuel Gas Co., 111 W. Va. 569, 163 S. E. 48 (1932); 1 SUTHERLAND, DAMAGES (4th Ed. 1916) 324; 5 WILLISTON, CONTRACTS (Rev. Ed. 1937) 3876; See collection of cases in Notes (1902) 54 L. R. A. 718, (1919) 1 A. L. R. 436, (1927) 46 A. L. R. 1192, (1931) 72 A. L. R. 1049.

thus avoided,[9] and some of these expressly reject the idea that the second contract is a rescission of the first, barring rights thereunder.[10] The defaulter cannot escape liability under this rule by stipulating that the acceptance of the new contract will be an abandonment of the original right of action,[11] for the injured party need not accept such an

Conversely, some courts hold that entrance into a second contract, inconsistent with an earlier one between the same parties, operates to rescind the prior contract, and to extinguish the right to sue for the breach of that contract.[12] The reasoning applied is that the injured party had an election either to enforce the original contract or relinquish his rights thereunder, and that by entering into the second contract he chose the latter course.[13] However, several of these decisions may be distinguished from the principal case on the ground that there had been no breach before the second contract was made.[14] Frequently, as in the principal case, courts will merely recite that contracts incon-

[9] Lawrence v. Porter, 63 Fed. 62 (C. C. A. 6th, 1894); Schisler v. Perfection Milker Co., 193 Minn. 160, 258 N. W. 17 (1934); Hickey v. Perkins Dry Goods Co., 229 S. W. 951 (Tex. Civ. App. 1921). It is often held that "all reasonable steps" should be taken by the injured party to mitigate his damages; Gilson v. Royster Guano Co., 1 F. (2d) 82 (C. C. A. 3rd, 1924); Payzu, Ltd. v. Saunders, (1919) 2 K. B. 581, (1919) 18 MICH. L. REV. 702; but it is ordinarily said that it is not reasonable to require the injured party to borrow money in order to accept the defaulting seller's offer to sell for cash when credit was contracted for; Weber Implement Co. v. Acme Harvesting Mach. Co., 268 Mo. 363, 187 S. W. 874 (1916); Stanley Manly Boy's Clothes, Inc. v. Hickey, 113 Tex. 482, 259 S. W. 160 (1924). In instances where it is impossible to get the same goods elsewhere; Lawrence v. Porter, 63 Fed. 62 (C. C. A. 6th, 1894); as in public utilities; Henrici v. South Feather L. & W. Co., 177 Cal. 442, 170 Pac. 1135 (1918); Note, (1927) 46 A. L. R. 1192, 1195; or if a refusal to enter into the second contract would greatly aggravate damages; Ingraham v. Pullman Co., 190 Mass. 33, 76 N. E. 237 (1906); the courts are fairly consistent in holding that there is a "duty" to enter into the second agreement with the party in default, thus impliedly holding that the second contract would not of itself rescind the former agreement and bar rights thereunder.

[10] Comey v. United Surety Co., 217 N. Y. 268, 111 N. E. 832 (1916); Siegle v. Hamilton-Carhartt Cotton Mills, 89 Okla. 68, 213 Pac. 305 (1923); Allen v. Maronne, 93 Tenn. 161, 23 S. W. 113 (1893); 2 SUTHERLAND, DAMAGES (4th Ed. 1916) 2298.

[11] Farmer's Co-operative Ass'n v. Shaw, 171 Okla. 358, 42 P. (2d) 887 (1935), (1936) 20 MINN. L. REV. 300; Holloway v. Levine, 107 Vt. 396, 180 Atl. 889 (1935); 5 WILLISTON, CONTRACTS (Rev. Ed. 1937) 3797, 3876.

offer.

[12] Wiley v. Dixie Oil Co., 43 F. (2d) 51 (C. C. A. 10th, 1930); McCabe Const. Co. v. Utah Const. Co., 199 Fed. 976 (D. Ore. 1912); Arizona-Parral Mining Co. v. Forbes, 16 Ariz. 395, 146 Pac. 504 (1915); Riverside Coal Co. v. American Coal Co, 107 Conn. 40, 139 Atl. 276 (1927); McKay v. Fleming, 24 Colo. App. 380, 134 Pac. 159 (1913); Agel & Levine v. Patch Mfg. Co., 77 Vt. 13, 58 Atl. 792 (1904); Snowball v. Maney Bros., 39 Wyo. 84, 270 Pac. 167 (1928).

[13] Wood v. Brighton Mills, 297 Fed. 594 (C. C. A. 3rd, 1924); McCabe Const. Co. v. Utah Const. Co., 199 Fed. 976 (D. Ore. 1912); McKay v. Fleming, 24 Colo. App. 380, 134 Pac. 159 (1913); Johnson v. Ford, 147 Tenn. 63, 245 S. W. 531 (1922).

[14] Housekeeper Pub. Co. v. Swift, 97 Fed. 290 (C. C. A. 8th, 1899); Wiley v. Dixie Oil Co., 43 F. (2d) 51 (C. C. A. 10th, 1930); Arizona-Parral Mining Co. v. Forbes, 16 Ariz. 395, 146 Pac. 504 (1915).

sistent with each other cannot stand together since performance of one renders performance of the other impossible,[15] ignoring the possibility that a right of action remains and the entering of the second contract was in mitigation of damages.[16]

It is true that performance of the second contract renders performance of the original contract impossible, but the injured party agrees to the second contract only after the other party has, by repudiation, made it plain that the original contract will not be performed. When there is no breach of the first agreement, it is but reasonable to assume that the second agreement, inconsistent with the first, was intended to replace it and indicate a rescission of the first contract. In such a case the making of the new agreement caused the first one not to be performed, so that the non-performance can be called consensual. But where the new agreement was made only after such a repudiation by one party as to indicate that the original agreement was not to be carried out, then the new agreement should not indicate any intent to rescind its predecessor. Rather, the repudiation is the reasonable explanation of the non-performance of the original contract, and the new agreement made after the repudiation appears to be not a consent to the non-performance, but a device adopted by the parties to meet a situation where non-performance of the earlier agreement was already assured. It is true, as said by the court in the principal case, that the injured party entered into the new agreement because he felt that it was the best course for him to follow under the circumstances, but this statement is equally true of all mitigation arrangements. Performance of both contracts in such a situation, while impossible, is no more impossible than performance of both where the injured party has contracted with a third party rather than the defaulter, yet the courts never speak of impossibility in the latter case. A contract with a third party is the usual method of mitigating damages,[17] and no court contends that such a contract *ipso facto* bars the injured party's rights to recover for breach of the prior contract.

[15] Housekeeper Pub. Co. v. Swift, 97 Fed. 290 (C. C. A. 8th, 1899); McCabe Const. Co. v. Utah Const. Co., 199 Fed. 976 (D. Ore. 1912); McKay v. Fleming, 24 Colo. App. 380, 134 Pac. 159 (1913); 2 BLACK, RESCISSION AND CANCELLATION (1916) 1249.

[16] Some few courts consider and expressly reject the mitigation of damages doctrine, especially in employment contracts where it is usually held that to accept re-employment at less wages than those contracted for would be an abandonment of the original right of action, regardless of the "duty" to mitigate damages. McCabe Const. Co. v. Utah Const. Co., 199 Fed. 976 (D. Ore. 1912); People's Co-operative Ass'n v. Lloyd, 77 Ala. 387 (1884); Trawick v. Peoria & Ft. C. Ry., 68 Ill. App. 156 (1896); Moore v. Yazoo & M. V. R. R., 176 Miss. 65, 166 So. 395 (1936); 3 SUTHERLAND, DAMAGES (4th Ed. 1916) 2557.

[17] RESTATEMENT, CONTRACTS (1932) §336, comment (a); 1 SUTHERLAND, DAMAGES (4th Ed. 1916) 324; 5 WILLISTON, CONTRACTS (Rev. Ed. 1937) §§1353, 1385.

Although the Restatement of Contracts[18] provides that "A contract containing a term inconsistent with a term of an earlier contract between the same parties is interpreted as including an agreement to rescind the inconsistent terms of the earlier agreement . . .", this has no express application *after* a breach of the first contract. Where there has been no breach of the first contract, the generally recognized doctrine of novation, or substitution of contracts, will apply.[19] Seemingly it is this rule to which the Restatement refers.

It appears unreasonably paradoxical to hold that a party injured by a breach of contract is precluded from recovering damages by virtue of entrance into a second contract with the defaulter, when under a court-made rule he has a "duty" to mitigate his damages, and his best opportunity lies in the form of a new offer from the party in default. Surely no court could hold that after a seller breached a contract for the sale of goods for $1,000, yet offers to sell the same goods to the buyer for $1,100, the buyer could buy from a third party for $1,250 and then recover $250 from the seller for the breach! Thus, some courts would reach the strange conclusion that if the buyer did not enter into the second contract with the defaulter he could recover only a part of his damages, while if he did enter into the second contract he could not recover any of his damages.[20] If the second contract is allowed without a waiver of the right to sue for damages, the original contract between the parties would in effect be enforced, as the buyer could recover any differential. Since the courts impose a "duty" to mitigate damages after a breach of contract, it seems highly desirable to allow the achievement of this by entrance into a second contract with the defaulter, especially where this appears to be the most effective method of minimization, yet to preserve the right to recover any damages ensuing from the breach of the first contract unless there is an express waiver of such right. Such a decision as the instant one leaves a court enmeshed in contradictory cross-purposes.

Due to the conflict of decisions, it seems that the best available assurance that the second contract may be entered into safely, is to provide expressly therein that such contract is not to be construed as

[18] RESTATEMENT, CONTRACTS (1932) §408.

[19] Housekeeper Pub. Co. v. Swift, 97 Fed. 290 (C. C. A. 8th, 1899); Wiley v. Dixie Oil Co., 43 F. (2d) 51 (C. C. A. 10th, 1930); Arizona-Parral Mining Co. v. Forbes, 16 Ariz. 395, 146 Pac. 504 (1915); 1 BLACK, RESCISSION AND CANCELLATION (1916) 11.

[20] Compare Deere v. Lewis, 51 Ill. 254 (1869), with Trawick v. Peoria & Ft. C. Ry., 68 Ill. App. 156 (1896); Birdsong v. Ellis, 62 Miss. 418 (1884), with Moore v. Yazoo & M. V. R. R., 176 Miss. 65, 166 So. 395 (1936); Plesofsky v. Kaufman & Flonacker, 140 Tenn. 208, 204 S. W. 204 (1918), with Johnson v. Ford, 147 Tenn. 63, 245 S. W. 531 (1922).

a waiver or abandonment of any rights which have accrued under the breached contract.[21]

P. DALTON KENNEDY, JR.

**Constitutional Law—Police Power—Municipal Prohibition of House to House Peddling.**

A Georgia city, having statutory authority to "license, regulate and control . . . peddlers of all kinds,"[1] declared by ordinance that every solicitor, peddler, hawker, itinerant merchant and transient vendor of merchandise, who went uninvited to a private home for the purpose of conducting business, was a (public) nuisance.[2] *Held*, such an unqualified provision is an unreasonable and arbitrary interference with legal rights, in violation of the due process clause of the Federal Constitution.[3]

A preliminary question to be decided in every such case is: Has the legislature given the municipality power to pass such a law? This is of particular significance in that courts seem to find an affirmative grant of power a persuasive argument for constitutional validity. For, ordinances identical to the one under consideration have been upheld in all cases when passed by cities granted the specific power to "prohibit" hawkers and peddlers.[4] Likewise, this ordinance has been upheld in the only case arising where passed by another city under the delegated power to "regulate" similar activities.[5] Whenever a city had neither the power to regulate nor suppress this business, such an

[21] In Comey v. United Surety Co., 217 N. Y. 268, 111 N. E. 832 (1916), Cardozo, J., said of such an express provision in the second contract: "The contract itself . . . says in so many words that the old contract is not to be deemed revived, and that no rights that have accrued under it are waived. The cause of action against the defendant was thus plainly preserved." Even such an express reservation might leave some room for argument if the language of Mr. Justice White in International Contracting Co. v. Lamont, 155 U. S. 303, 15 Sup. Ct. 97, 39 L. Ed. 160 (1894), is to be taken literally. In that case it was said, at p. 310, "A party cannot avoid the legal consequences of his acts by protesting at the time he does them that he does not intend to subject himself to such consequences."

[1] LAWS OF GEORGIA 1901, Part III, Title I, Sect. 37.

[2] This ordinance is identical with that originated by Green River, Wyoming, and upheld in Green River v. Fuller Brush Co., 65 F. (2d) 112 (C. C. A. 10th, 1933).

[3] De Berry v. La Grange, 8 S. E. (2d) 146 (Ga. App. 1940).

[4] Green River v. Fuller Brush Co., 65 F. (2d) 112 (C. C. A. 10th, 1933) *rev'g* 60 F. (2d) 613 (D. C. Wyo. 1932); McCormick v. Montrose, 99 P. (2d) 969 (Colo. 1940) (court used this reasoning); *cf.* Goodrich v. Busse, 247 Ill. 366, 93 N. E. 292 (1910) (similar ordinance upheld for this reason).

[5] Shreveport v. Cunningham, 190 La. 481, 182 So. 649 (1938). Accord: *Ex parte* Camp, 38 Wash. 393, 80 Pac. 547, 548 (1905). But *cf.* Cosgrove v. City Council, 103 Ga. 835, 31 S. E. 445 (1898); Good Humor v. Board of Comm'rs., 124 N. J. L. 162, 11 A. (2d) 113 (1940); Virgo v. Toronto, 22 Can. Sup. Ct. 447 (1893) (passing on similar ordinances).

ordinance has been held invalid.[6] However, this distinction is rarely articulated by the courts.

It is frequently questioned whether such activity actually constitutes a public nuisance. Although a public nuisance is indictable, a visitation which merely offends a householder may be only a private nuisance and not punishable as a crime. Cities cannot by ordinance declare to be a public nuisance that which is not one in substance.[7] Although one solicitation may not, of itself, be such a nuisance as to be punishable, the types of salesmen prohibited by the ordinance in question are increasing to such an extent that each uninvited visit may be deemed a public nuisance because of the frequent repetition of calls by one solicitor after another. Such annoyances have become so general and common that a court has taken judicial notice that the frequent ringing of doorbells of private residences by the prohibited persons is in fact a nuisance to the occupants of homes.[8] After all, the terms "public" and "private" are but labels descriptive of conclusions yet given as reasons for decisions. In the final analysis, the problem is whether the courts feel that there exists a *public need* of suppression so as to empower the city to pass such an ordinance.

Aside from the question of authorization, the validity of such an ordinance is usually, and particularly in a case of this nature, held to depend upon its being a proper exercise of police power. Of necessity this power is one of indefinable flexibility, and represents an ever-changing compromise in a "contest between the restraining power of due process of law and the legitimizing energy of police control."[9] In its liberal present-day scope, it has been said to include interference

[6] Prior v. White, 132 Fla. 1, 180 So. 347 (1938); Jewel Tea Co. v. Bel Air, 172 Md. 536, 192 Atl. 417 (1937) (court used this reasoning); McAlester v. Tea Co., 98 P. (2d) 924 (Okla. 1940) (court used this reasoning); Orangeburg v. Farmer, 181 S. C. 143, 186 S. E. 783 (1936); White v. Culpeper, 172 Va. 630, 1 S. E. (2d) 269 (1939).

[7] Prior v. White, 132 Fla. 1, 180 So. 347 (1938); McAlester v. Tea Co., 98 P. (2d) 924 (Okla. 1940); White v. Culpeper, 172 Va. 630, 1 S. E. (2d) 269 (1939). But see McCormick v. Montrose, 99 P. (2d) 969, 972 (Colo. 1940); 1 BISHOP, CRIMINAL LAW (9th ed. 1923) §234 ("whenever the public deems an act of private wrong to be of a nature requiring its intervention for the protection of the individual, it holds the act punishable at its own suit; in other words, makes it a crime").

[8] Green River v. Fuller Brush Co., 65 F. (2d) 112 (C. C. A. 10th, 1933). The prohibited persons frequently claim exemption from the ordinance on grounds of implied invitation to call, and because usage and custom would constitute them at least licensees. However, the ordinance simply abolishes existing implied consent, if any, and creates a presumption of lack of consent until an invitation can be shown. Each householder may withdraw consent at any time and so constitute persons entering, trespassers; it would be a strange anomaly in our law if the people individually could accomplish an act which they could not do collectively through their government. McCormick v. Montrose, 99 P. (2d) 969, 974 (Colo. 1940); see Windsor v. Blake, 49 N. C. 332, 334 (1875).

[9] 3 WILLOUGHBY, CONSTITUTIONAL LAW OF THE UNITED STATES (2d ed. 1929) §1168, p. 1765.

by the state wherever the public interests require it, since the government is obligated to protect and promote the public welfare.[10] A profitable comparison may be made between the instant ordinance and past exercises of the police power which received judicial approval. Hawkers and peddlers have been confined to certain districts;[11] the ordinance in question forbids uninvited visitation of private homes. The sale of drugs or medicines by itinerants has been forbidden;[12] whereas the ordinance regulates not what is sold but only the place of sale. To promote public order and comfort, itinerants have been forbidden to sell within certain distances of religious meetings and fairs.[13] Are not people in their homes entitled to like consideration?

Since entering private premises against the consent of the owner may be forbidden,[14] it appears that a majority of the people, acting through their representatives, might decree any vendor's entrance to be against the consent of the owner, until an actual invitation is obtained. Zoning laws go further than the ordinance in question inasmuch as they prevent one from using his own property for certain purposes,[15] while the ordinance at issue merely declares that one shall not use *another's* property for his own business purposes without the invitation of the owner.

In *Williams v. Arkansas*,[16] the United States Supreme Court held valid a statute making it unlawful to solicit business on the trains or in the depots of any railroad operating within the state, and unlawful for any railroad knowingly to permit such practices. Certainly people in their own homes are entitled to as much protection against unpleasantness and annoyance as those who travel, especially as the latter voluntarily expose themselves to business contacts, while the individual in the home seeks escape from uninvited disturbance. The ordinance in the principal case is not as stringent as that upheld by the above

[10] Fuller Brush v. Green River, 60 F. (2d) 613, 615 (D. Wyo. 1932); 2 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 1226 ("The public need is the polestar of the enactment, interpretation, and application of the law.").

[11] *Ex parte* Hogg, 70 Tex. Crim. Rep. 161, 156 S. W. 931 (1913); Stevens Point v. Bocksenbaum, 225 Wis. 373, 274 N. W. 505 (1937); see *Ex parte* Camp, 38 Wash. 393, 395, 80 Pac. 547, 548 (1905); Note (1936) 105 A. L. R. 1051.

[12] Notes (1928) 54 A. L. R. 730, 735.

[13] State v. Reynolds, 77 Conn. 131, 58 Atl. 755 (1904); Meyers v. Baker, 120 Ill. 567, 12 N. E. 79 (1887); State v. Cate, 58 N. H. 240 (1878); State v. Stoval, 103 N. C. 416, 8 S. E. 900 (1889); State v. Read, 12 R. I. 137 (1879).

[14] McCormick v. Montrose, 99 P. (2d) 969, 975 (Colo. 1940); Saxton v. Peoria, 75 Ill. App. 397 (1897); Brownsville v. Cook, 4 Neb. 101 (1875); State v. Glenn, 118 N. C. 1194, 23 S. E. 1004 (1896).

[15] Reinman v. Little Rock, 237 U. S. 171, 35 Sup. Ct. 171, 59 L. ed. 900 (1914); Hadacheck v. Sebastien, 239 U. S. 394, 36 Sup. Ct. 143, 60 L. ed. 348 (1915); Texas Co. v. Tampa, 100 F. (2d) 347 (C. C. A. 5th, 1938); 2 COOLEY, *op. cit. supra* note 10, at 1315 (zoning laws upheld).

[16] 217 U. S. 79, 30 Sup. Ct. 493, 54 L. ed. 673 (1910), *aff'g* 85 Ark. 464, 108 S. W. 838 (1908).

decision, since it reserves to the householder the power to invite the prohibited persons for any desired business. It has been said that all lawful occupations are subject to reasonable regulations, including licensing, and a recognized mode of regulation is by prescribing the places where a given occupation may or may not be conducted.[17] The ordinance in the principal case does not suppress the business of peddling, but merely prohibits a particular phase of it in an effort to protect the privacy of homes.

Some courts insist that if the law seeks to relieve the occupant of the house from disturbance, then it is not sufficiently comprehensive because it fails to cover solicitors of alms and charity.[18] However, a state may, without arbitrary discrimination, direct its laws against what it deems the existing evil, without covering the whole field of possible abuses.[19] And here there seems ample reason for the discrimination so as to constitute no denial of equal protection. Certainly the prohibited class is a conspicuous example of what the legislative body seeks to prevent. Solicitors of alms appear less frequently than hawkers and peddlers and a householder is ordinarily more willing to hear charitable requests than to be urged to buy something he does not desire sufficiently to invite the seller onto his premises. Where home-merchants are specifically exempted from the application of ordinances like the one in question, courts have found discrimination;[20] but in the principal ordinance there is no such discrimination because resident merchants are subject to the same restrictions.

The constitutionality of the law when applied to solicitors for out-of-state firms hinges upon whether such prohibition is a direct burden on interstate commerce. In *Green River v. Fuller Brush Co.*,[21] the Circuit Court of Appeals upheld an identical ordinance saying that interstate commerce was only indirectly affected, and that the commerce clause did not prevent the state from exercising its police power, at least in the absence of Congressional regulation. A regulation discriminating against interstate commerce or designed to gain local benefit at its expense, is almost invariably invalidated as a direct burden.[22] However, the fact that its subject matter is one not requiring

[17] *Ex parte* Quong Wo, 161 Cal. 220, 118 Pac. 714 (1911) (and cases cited); *ex parte* Barmore, 174 Cal. 286, 163 Pac. 50 (1917).

[18] Fuller Brush v. Green River, 60 F. (2d) 613 (D. C. Wyo. 1932).

[19] Green River v. Bunger, 50 Wyo. 52, 58 P. (2d) 456 (1936) (citing Central Lumber Co. v. South Dakota, 226 U. S. 157, 160, 33 Sup. Ct. 66, 67, 57 L. ed. 164 (1912)); 2 COOLEY, *op. cit. supra* note 10, at 1226.

[20] Jewel Tea Co. v. Bel Air, 172 Md. 536, 192 Atl. 417 (1937) (identical ordinance with additional clause exempting home-merchants); Good Humor v. Board of Comm'rs., 124 N. J. L. 162, 11 A. (2d) 113 (1940), *rev'g.* 123 N. J. L. 21, 7 A. (2d) 824 (Sup. Ct., 1939).

[21] 65 F. (2d) 112 (C. C. A. 10th, 1933).

[22] South Carolina State Highway Dep't. v. Barnwell Bros., 303 U. S. 177, 185, 58 Sup. Ct. 510, 82 L. ed. 734, 739 (1937) (and cases cited); ROTTSCHAEFER, CONSTITUTIONAL LAW (1939) 283.

uniformity of national regulation is frequently relied upon to support regulation which only affects interstate commerce incidentally.[23] Regulation accomplished by the instant ordinance seems purely a matter of local interest, and one which affects interstate commerce only indirectly. It has been said that this type of ordinance is not aimed at the solicitation of orders for purchase of goods which flow through interstate commerce, but at the "place" of solicitation.[24] The ordinance does not prohibit the former, but only the latter.

In the principal case, appellant pleaded that his constitutional rights as a Jehovah's Witness were contravened by the ordinance.[25] Admittedly a deprivation of the right to propogate religious belief is unconstitutional.[26] Yet the same clause of the Constitution also protects all from having religious beliefs of others thrust upon them against their will.[27] The Constitution does not guarantee protection to the form of worship of a particular sect.[28] In neither the principal decision nor in other decisions involving similar ordinances has there been any discussion of freedom of worship. For it seems that the constitutional guaranty of such freedom does not insure the right to sell from house to house as the appellant was attempting to do.

Since all reasonable doubts should be resolved in favor of the constitutionality of a law, the Georgia Court in the principal case might well have reached an opposite conclusion. Furthermore, there is a growing need for upholding such ordinances, since it is a matter of common knowledge that the restricted types of persons are noticeably increasing, to the annoyance, inconvenience, and disturbance of the public in their homes, against which private redress is of slight value as a remedy. This ordinance does not prohibit business; rather it regulates the "place" of carrying it on. There are numerous ways of obtaining the required invitation if the property owner is really interested in the merchandise.

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[23] South Carolina State Highway Dep't. v. Barnwell Bros., 303 U. S. 177, 58 Sup. Ct. 510, 82 L. ed. 734 (1937); *cf.* Best & Co. v. Maxwell, 216 N. C. 115, 3 S. E. (2d) 292 (1939); Note (1939) 18 N. C. L. REV. 48 (direct or indirect burden of taxation on interstate commerce).

[24] Green River v. Fuller Brush, 65 F. (2d) 112 (C. C. A. 10th, 1933); Green River v. Bunger, 50 Wyo. 52, 58 P. (2d) 456 (1936); *cf.* Real Silk Hosiery Mills v. Portland, 268 U. S. 325, 45 Sup. Ct. 525, 69 L. ed. 982 (1925) (license tax and examination required by ordinance for purpose of preventing fraud, declared direct burden on interstate commerce).

[25] De Berry v. La Grange. In appellant's brief, pp. 21 to 42, he pleaded that his sect's Biblical Principle commanded him to go to everyone with the scriptures, and that this ordinance prohibited that practice.

[26] 2 COOLEY, *op. cit. supra* note 10, at 969.

[27] Pittsburgh v. Ruffner, 134 Pa. Super. 192, 4 A. (2d) 224, 227 (1939); 2 COOLEY, *op. cit. supra* note 10, at 969, n. 1.

[28] Davis v. Beason, 133 U. S. 333, 10 Sup. Ct. 299, 33 L. ed. 637 (1890); Maplewood Township v. Albright, 13 N. J. Misc. 46, 176 Atl. 194 (C. P., 1934); McMasters v. State, 21 Okla. Cr. 318, 207 Pac. 566 (1922).

**Constitutional Law—Validity of Parking Meter Ordinances**

The North Carolina Supreme Court recently held that a parking meter ordinance exceeded the power of a municipality to regulate parking.[1] The court decided that there was no substantial relation between the meter charge and the prevention of parking for an unreasonable length of time; that the meter charge was not a proper inspection fee; that the power to regulate did not authorize the imposition of a tax upon the privilege sought to be regulated; and that the ordinance violated a statute restricting municipal license fees on operating motor vehicles to $1.00.

In determining the validity of parking meter ordinances, the following questions have arisen:[2]

*Does a Municipality Have the Power to Charge a License Fee as a Reasonable Means of Regulating Parking?*

The authority of a municipality to regulate parking is universally recognized, whether such authority be derived from statutes authorizing regulation of traffic and the use of the streets[3] or specifically authorizing the regulation of parking.[4] The standards of reasonable regulation are fundamentally the same in both instances, the courts upholding only those regulations which have a substantial relation to traffic safety.[5]

[1] Rhodes, Inc. v. Raleigh, 217 N. C. 627, 9 S. E. 389 (1940).

[2] Problems, other than those discussed, presented by the parking meter cases are: (a) Does a municipality have power to pledge revenue from parking meters to pay for their purchase and installation? By the great weight of authority this power exists: Franklin Trust Co. v. Loveland, 3 F.(2d) 114 (CCA 8th 1924); Ward v. Chicago, 342 Ill. 167, 173 N. E. 810 (1930); Brockenbrough v. Water Comm'rs., 134 N. C. 1, 46 S. E. 28 (1903) (pledge of tolls or rents from waterworks to pay for their installation). But see Brodkey v. Sioux City, 291 N. W. 171, 175 (Iowa 1940) (a parking meter case) "We have affirmed the rule that the pledging by a city of revenue is unauthorized in absence of specific statutory authority"; Van Eaton v. Sidney, 211 Iowa 986, 231 N. W. 475, 71 A. L. R. 820 (1930). (b) May a municipality delegate to a commissioner the power to install meters at his discretion and regulate their use? See Brodkey v. Sioux City, 291 N. W. 171, 173 (Iowa 1940). (c) Is the licensing of the exclusive use of parking meter spaces for one hour a leasing of property dedicated to public use? See Birmingham v. Hood-McPherson Realty Co., 233 Ala. 352, 172 So. 114, 116 (1937) (suggesting that such exclusive use would be a leasing); *cf.* Schilling v. Melbourne (1928), Vict. L. R. 302, 16 B. R. C. 45 (holding an ordinance invalid which purported to permit drivers to park vehicles in certain designated street zones for one shilling per day). But see *In re* Opinion of Justices, 8 N. E. (2d) 179, 182 (Mass. 1937).

[3] State *ex rel.* Harkow v. McCarthy, 126 Fla. 433, 171 So. 314 (1936); Rhodes, Inc., v. Raleigh, 217 N. C. 627, 9 S. E. (2d) 389 (1940). See cases cited *infra* note 6.

[4] Clark v. New Castle, 32 D. & C. 371 (Pa. 1938); County Court of Webster County v. Roman, 3 S. E. (2d) 631 (W. Va. 1939). Notice that the N. Y. VEHICLE CODE, §54, as amended by N. Y. Pub. Laws of 1937, c. 502, specifically authorizes use of parking meters in municipal traffic regulation.

[5] District of Columbia v. Smith, 68 App. D. C. 104, 93 F. (2d) 650 (1937) (upholding an ordinance prohibiting parking between 2 a.m. and 8 p.m. to facilitate snow removal); State v. Carter, 205 N. C. 761, 172 S. E. 415 (1934);

A decided majority[6] of the parking meter decisions have upheld the meter fee as a reasonable means of regulating parking, if imposed in a zone in which municipal regulation for parking is permitted, ruling, in effect, that ". . . whatever tends to make regulation effective is a proper exercise of that power. It justifies the charge of a fee and the imposition of a penalty."[7]

The opposite and minority view is expressed by the Rhode Island court, which held that without specific delegation of authority a municipality could not exact a fee for parking, since a statute delegating power to regulate parking ". . . cannot be enlarged by implication unless that is *necessary* to make the statute effective and to accomplish its object."[8]

The instant case did not question the power of a municipality generally to secure regulation by means of a license fee although the power to license is not specifically delegated. Instead, it was held that a municipality had no power to impose a particular license fee which neither bore a "substantial relation" to parking regulation, nor constituted a proper license fee; hence, the court concluded that it must be an excise tax, and as such could not be imposed under the police power to regulate parking.[9]

*Is the Revenue Derived So Excessive As to Make the Ordinance a Taxing Measure?*

Few cities have express authority to tax the use of city streets for revenue. Where this power exists, however, an ordinance imposing a tax upon parking would seem valid.[10] But where a parking meter or-

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Wonewoc v. Taubert, 203 Wis. 73, 233 N. W. 755, 72 A. L. R. 229 (1930) (upholding an ordinance prescribing manner of parking).

[6] State *ex rel.* Harkow v. McCarthy, 126 Fla. 433, 171 So. 314 (1936); *In re* Opinion of Justices, 8 N. E. (2d) 179 (Mass. 1937); Hendricks v. Minneapolis, 290 N. W. 427 (Minn. 1940); Gilsey Bldgs., Inc., v. Great Neck Plaza, 170 Misc. 945, 11 N. Y. Supp. (2d) 694 (Sup. Ct., 1939); *Ex parte* Duncan, 179 Okla. 355, 65 P.(2d) 1015 (1937); Clark v. New Castle, 32 D. & C. 371 (Pa. 1938); Owens v. Owens, 8 S. E. (2d) 339 (S. C. 1940); Harper v. Wichita Falls, 105 S. W. (2d) 743 (Tex. Civ. App. 1937); *Ex parte* Harrison, 122 S. W. (2d) 314 (Tex. Crim. App. 1938); County Court v. Roman, 3 S. E. (2d) 631 (W. Va. 1939) (strong dissenting opinion by Fox, President). *Contra:* Birmingham v. Hood-McPherson Realty Co., 233 Ala. 352, 172 So. 114 (1937); Rhodes, Inc., v. Raleigh, 217 N. C. 627, 9 S. E. (2d) 389 (1940); *In re* Opinion to House of Representatives, 9 R. I. 94, 5 A.(2d) 455 (1939).

[7] Buffalo v. Stevenson, 207 N. Y. 258, 100 N. E. 798 (1913) (upholding municipal ordinance requiring a paid permit to open any city street to connect with a sewer, water, or power main).

[8] 59 R. I. 94, 5 A. (2d) 455, 457 (1939) (italics supplied); see dissenting opinion in County Court of Webster County v. Roman, 3 S. E. (2d) 631, 634 (W. Va. 1939); 1 DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911) §237.

[9] Rhodes, Inc., v. Raleigh, 217 N. C. 627, 630, 9 S. E. (2d) 389, 391 (1940).

[10] A license fee on the operation of a motor vehicle imposed by a home rule city in Ohio has been upheld as a valid excise tax under OHIO CONST., art. XVIII, §3; Saviers v. Smith, 101 Ohio St. 132, 128 N. E. 269 (1920). Accord: State

dinance is passed as a regulatory measure under the police power, no greater fee should be charged than is necessary to cover the costs of supplying the privilege and regulating its use.[11] For a municipality cannot under "the guise of a police regulation impose a revenue tax where it has no authority to impose a revenue tax."[12]

But courts give great weight to the presumption that a license fee is reasonable;[13] this may be overcome only by showing a glaring discrepancy between revenue and administrative costs.[14] The burden of proving such discrepancy rests upon the complainant, and necessitates proof not only of the revenue of the meters and the expense of installing them but proof of all the expenses of regulating parking.[15] The courts have indicated that they may consider expenses of police patrolling, costs of maintaining records, possible liability for torts arising from parking supervision, and, perhaps, loss by wear on the roads as among those "incidental expenses."[16] Thus, it is not surprising that only one court to date has ruled the parking meter ordinance invalid because of excessive revenue,[17] and that a Florida case sustained a parking meter ordinance which brought a township $55,000 annual revenue as opposed to $4,000 annual expenses for maintaining meters.[18] The question of reasonable revenue was never raised in the principal case, although in their nine months of operation Raleigh's parking meters, installed for $10,000, collected a total revenue of $11,494.[19]

It is interesting to speculate upon the possible decisions of these courts should a glaring discrepancy be revealed between the revenue from the meters and the expenses of administration over a substantial

*ex rel.* Zielonka v. Carrel, 97 Ohio St. 220, 124 N. E. 134 (1939) (recognizing the power of home rule cities in Ohio to place an excise tax on occupations). Note (1938) OHIO STATE UNIV. L. J. 198 (discussing parking meter fees as an excise tax).

[11] *In re* Opinion of Justices, 8 N. E. (2d) 179 (Mass. 1937); *Ex parte* Duncan, 179 Okla. 355, 65 P.(2d) 1015 (1937); *Ex parte* Harrison, 122 S. W. (2d) 314 (Tex. Civ. App. 1938). 3 MCQUILLAN, MUNICIPAL CORPORATIONS (2d ed. 1928) 1089, 1102.

[12] 4 COOLEY, TAXATION (4th ed. 1924) §1680. Accord: State v. Beam, 91 N. C. 554 (1884).

[13] State *ex rel.* Harkow v. McCarthy, 126 Fla. 433, 171 So. 314 (1936); *Ex parte* Holt, 74 Okla. 226, 178 Pac. 260 (1918); Clark v. New Castle, 32 D. & C. 371 (Pa. 1937); Gilsey Bldgs. v. Great Neck Plaza, 170 Misc. 945, 11 N. Y. Supp. (2d) 694 (Sup. Ct., 1939). 2 DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911) §672.

[14] Atkins v. Phillips, 26 Fla. 433, 8 So. 409 (1918); State *ex rel.* Harkow v. McCarthy, 126 Fla. 433, 171 So. 314 (1936); Van Baolen v. People, 40 Mich. 258 (1878). 2 DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911) §592.

[15] See cases cited *infra* note 18.

[16] State *ex rel.* Harkow v. McCarthy, 126 Fla. 433, 171 So. 314, 317 (1936); Hendricks v. Minneapolis, 290 N. W. 428, 430 (Minn. 1940); Clark v. New Castle, 32 D. & C. 371, 381 (Pa. 1938).

[17] Brodkey v. Sioux City, 291 N. W. 171 (Iowa 1940).

[18] State *ex rel.* Harkow v. McCarthy, 126 Fla. 433, 171 So. 314 (1936); American City, Aug., 1936, p. 56.

[19] Popular Government, July-Aug., 1940, p. 11.

period of time.[20] For there is authority that a municipal ordinance will not be impeached because "incidentally the city's receipts of moneys are increased," unless this increment is so excessive as to indicate that the ordinance was literally passed "for tax purposes."[21] Furthermore, most courts regard the parking fee as having a regulatory force. *Clark v. New Castle* states: "The novel feature of the parking device is that not only does the nickel toll pay the cost of regulation, but it is the nickel itself which regulates. Rather than pay the nickel the motorist will park elsewhere than in the restricted street, or will cut his stay short."[22]

If it can be proved that a smaller fee would not effectively accomplish regulation, a fee yielding excessive revenue might escape invalidity, as being necessary for effective regulation. But if the court should find, as it did in the principal case, that the ordinance "does not depend in any way upon the meter charge, but, as heretofore, upon a specification of the period during which it is lawful to park,"[23] this contention, resting upon a contrary presumption, necessarily fails.

*Is the Installation of Parking Meters an Unwarranted Invasion of the Public's Right to Free and Unobstructed Use of the Streets?*

In as much as the right of passage is subject to reasonable regulation,[24] any permanent obstructions on the highway designed to promote such regulation, such as sign posts, elevated safety zones, and stop signs, are permissible. Thus, the parking meter device if reasonably designed to promote traffic regulation would not be an actionable nuisance *per se*.[25] The public's *right to free passage* is generally considered an absolute right which cannot be subjected to charge by municipalities.[26] Parking, however, is generally defined as a mere *privilege*, incident to this right of passage and free use of the streets.[27] Thus, it is

[20] Recent reports of parking meter revenues suggest that they are producing revenue far in excess of administrative costs: American City, May, 1936, p. 87; July, 1939, p. 53; June, 1940, p. 46; Oct., 1940, p. 13, 99. Notes (1937) 22 IOWA LAW REV. 713; (1937-38) 4 OHIO L. J. 198; (1939) 3 UNIV. DETROIT L. J. 22.

[21] See Van Baolen v. People, 40 Mich. 258 (1879); *cf.* Mankato v. Fowler, 32 Minn. 364, 20 N. W. 361 (1884); see Atkins v. Phillips, 26 Fla. 281, 302 So. 429, 432 (1890); see State *ex rel.* Harkow v. McCarthy, 126 Fla. 433, 171 So. 314, 317 (1936); note (1931) 75 A. L. R. 17 and cases cited.

[22] 32 D. & C. 371, 378 (Pa. 1937); *cf.* Harper v. Wichita Falls, 105 S. W. (2d) 150 (Tex. Civ. App. 1937). For reports of effect of parking meters on traffic safety see citations *infra* note 50.

[23] Rhodes v. Raleigh, 217 N. C. 627, 631, 9 S. E. (2d) 389, 391 (1940).

[24] See State *ex rel.* Harkow v. McCarthy, 126 Fla. 433, 171 So. 314, 316 (1936); 2 ELLIOTT, ROADS AND STREETS (4th ed. 1926) §828.

[25] See *In re* Opinion of Justices, 8 N. E. (2d) 179, 181 (Mass. 1937).

[26] See Harper v. Wichita Falls, 105 S. W. (2d) 743, 750 (Tex. Civ. App. 1937). See note 27, *supra*.

[27] Owens v. Owens, 8 S. E. (2d) 339, 343 (S. C. 1940); see Harper v. Wichita Falls, 105 S. W. 743, 750 (Tex. Civ. App. 1937). Accord: Welsh v. Morristown,

analogous to the privileged use of the streets by taxis, busses, and carriers, which may be charged a license fee independent of the limited license fee upon all motor vehicles.[28] This rather elusive distinction is clearly recognized in *Ex parte Duncan.*[29] There the court declared that a statutory restriction on a municipality's power to license the *free use of the public highways* did not forbid a license fee on the *privilege* of parking. However, the North Carolina court has interpreted a statute limiting the fee a municipality may impose upon the privilege of operating a motor vehicle to $1.00,[30] as excluding imposition of any other fee by a municipality for use of the streets by motor carriers.[31] Accordingly this statute is construed in the instant case to prohibit a license fee on the parking privilege.

Stopping a vehicle to load or unload passengers or freight is generally recognized as a right incident to that of passage.[32] Many of the later parking meter ordinances, including the one in question, specifically exempt vehicles thus engaged from the operation of the statute.[33] Even in the absence of such a provision, the courts usually read it in, either ruling that such stopping is an incident of passage[34] or that a vehicle being loaded cannot be considered parked—a parked car being by definition unattended.[35]

The Alabama Supreme Court ruled that a city departed from the

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98 N. J. L. 630, 121 Atl. 697 (Sup. Ct. 1923); *Ex parte* Duncan, 179 Okla. 355, 65 P.(2d) 1015 (1937).

[28] Southeastern Exp. Co. v. Charlotte, 186 N. C. 668, 120 S. E. 475 (1923); *Ex parte* Holt, 740 Okla. 226, 178 Pac. 260 (1919). Accord: Ewing v. Leavenworth, 226 U. S. 464, 33 Sup. Ct. 157, 57 L. ed. 303 (1913); note (1924) 31 A. L. R. 589.

[29] 179 Okla. 355, 65 P(2d) 1015 (1937).

[30] MOTOR VEHICLE ACT, c. 2, §29, N. C. Pub. Laws 1921; N. C. CODE ANN. (Michie 1935), §2612a. Compare statutory limitation invoked in other parking meter cases: Shreveport v. Brister, 194 So. 566 (La. 1940); Monsour v. Shreveport, 194 La. 569 (La. 1940).

[31] State v. Fink, 179 N. C. 712, 120 S. E. 475 (1923) (invoking N. C. Public Laws of 1919, c. 189, §5). But *cf.* Southeastern Exp. Co. v. Charlotte, 186 N. C. 668, 120 S. E. 475 (1923) (holding N. C. Public Laws of 1921, c. 2, §29 constitutional, said act authorizing municipalities to charge a license fee not exceeding $50 against intra-urban carriers).

[32] Pugh v. Des Moines, 176 Iowa 593, 156 N. W. 892 (1916); *cf.* Lowell v. Pendleton Auto Co., 123 Ore. 383, 261 Pac. 415 (1927); Wonewoc v. Taubert, 203 Wis. 73, 233 N. W. 755 (1930). Compare Haggenjos v. Chicago, 336 Ill. 573, 168 N. E. 661 (1921) (holding invalid an ordinance prohibiting all parking in Chicago's loop district) with Chicago v. McKinley, 344 Ill. 279, 176 N. E. 261 (1931) (upholding a subsequent ordinance prohibiting all stopping but that for purposes of loading or unloading passengers or freight).

[33] Section 12 of the Raleigh parking meter ordinance provides: "During actual loading and unloading of delivery vehicles within said parking zones, the operator of such vehicles shall be exempt from the provisions of this ordinance."

[34] *Ex parte* Duncan, 179 Okla. 355, 65 P.(2d) 1015 (1937).

[35] Gilsey v. Great Neck Plaza, 170 Misc. 945, 11 N. Y. Supp. (2d) 694 (Sup. Ct., 1939); Clark v. New Castle, 32 D. & C. 371 (Pa. 1938).

terms of a dedicatory deed when it charged a fee for parking.[36] Parking was discussed as an incident of that "free use of the streets" (as a right and not a privilege), which had been secured to the public in the deed. This decision applied the rule that a trustee municipality may be enjoined against deviating from the terms of a dedicatory deed at the suit of any injured part. Other cases granting such injunctions have denied that a municipality was authorized under the deed to erect telephone poles, install railway lines, or widen the streets to the destruction of the sidewalks.[37] But heretofore none has held that a dedicatory deed could place a limitation upon the power of a municipality to regulate traffic and the use of the streets.

*Does the Installation of Parking Meters Constitute an Unreasonable Interference with the Property Rights of Abutting Land Owners So As to Deprive Them of Property without Due Process?*

Another basis for the Alabama decision was that rights of the plaintiff as an abutting land owner had been violated by the installation of parking meters in front of his property.[38] The rights of abutting landowners vary in each state,[39] yet most courts agree that an abutter possesses an absolute right of ingress and egress, whether labeled as easements or property rights,[40] which cannot be terminated or even restricted except in case of public necessity.[41] Generally, however, the municipality is admitted to have authority to determine where and in what manner a property owner shall exercise this right.[42]

The Alabama court states unequivocally that "the right of ingress and egress is necessarily burdened with the right, within reasonable limitations, of parking a vehicle or car" and that any fee charged the abutting owner for the exercise of this right is an obstruction to that

[36] Birmingham v. Hood-McPherson Realty Co., 233 Ala. 352, 172 So. 114 (1937).

[37] Brown v. East Point, 149 Ga. 18, 95 S. E. 962 (1918); Collier v. Baker, 160 Tenn. 571, 27 S. E. (2d) 1085 (1930); Road Comm. v. Chesapeake & Ohio Ry., 115 W. Va. 647, 177 S. E. 530 (1934); note (1935) 41 A. L. R. 1410.

[38] Birmingham v. Hood-McPherson Realty Co., 238 Ala. 352, 172 So. 114 (1937).

[39] See Savier v. New York, 206 U. S. 536, 27 Sup. Ct. 686, 57 L. ed. 117 (1906) *aff'g* 180 N. Y. 27, 72 S. E. 579 (1904).

[40] The abutter's right of access is generally considered a property right if he owns the fee in the street and an easement if the fee is held by the city; State v. Burkett, 119 Md. 609, 87 Atl. 514 (1913); see *In re* Ollinger, 160 App. Div. 96, 103, 145 N. Y. Supp. 173, 179 (1st Dep't. 1914).

[41] Breinig v. Allegheny, 2 A (2d) 842 (Pa. 1938).

[42] Boston v. Perry, 22 N. E. (2d) 627 (Mass. 1939) (upholding ordinance prohibiting construction of driveways across certain busy sidewalks): Fowler v. Nelson, 213 Mo. App. 82, 246 S. W. 638 (1923) (held that abutter with rear alley had no absolute right to construct a driveway across busy sidewalk). See Gilsey Bldgs. v. Great Neck Plaza, 170 Misc. 945, 11 N. Y. Supp. (2d) 604 (Sup. Ct., 1939). 3 DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911) §1125.

free access and hence unconstitutional.[43] But by the weight of authority an abutter has no right or private easement to park in front of his property different from that incidental privilege of parking he shares with the public in its easement of travel.[44] And the courts uniformly hold that once upon the public highway he is subject to all the regulations and limitations imposed on the traveling public in general.[45]

When an abutting owner proves that parking meters in front of his place of business drive away customers, who rather than pay the parking fee will go elsewhere and deal with his competitors, he may prove a loss of property which the courts have in many instances protected.[46] Certainly if the abutting owner can present substantial evidence that enforcement of the ordinance constitutes an arbitrary discrimination against him, the courts will grant him relief.[47] Whether or not the courts will invalidate a regulation which indirectly discriminates between particular enterprisers because of their location depends upon the reasonableness of the measure as an exercise of police power. Zoning ordinances which place similar discriminating restrictions on business and property rights solely on the basis of their location have been consistently upheld, when found to have a substantial relation to promoting public health, safety, morals, or general welfare.[48]

Current reports from municipal governments indicate that parking

[43] Birmingham v. Hood-McPherson Realty Co., 233 Ala. 352, 172 So. 114 (1937). This conclusion that an abutting owner has an absolute right to park before his property finds support in decisions granting injunctions against taxi stands on the street adjoining complainant's property; Eubank v. Yellow Cab Co., 84 Ind. 144, 149 N. E. 647 (1925); Odell v. Bretney, 93 App. Div. 607, 87 N. Y. Supp. 655 (1st Dep't 1904); and against motorists who consistently park before complainant's property for an unreasonable length of time; Decker v. Goddard, 233 App. Div. 139, 251 N. Y. Supp. 440 (4th Dep't 1932) *rev'g* 139 Misc. 824, 249 N. Y. Supp. 381 (Sup. Ct., 1931).

[44] Montgomery v. Parker, 21 So. 452, 454 (Ala. 1897); Duluth v. Esterley, 115 Minn. 64, 131 N. W. 791 (1911).

[45] See Clark v. New Castle, 32 D. & C. 371, 388 (Pa. 1938). Accord: Jones Beach Boulevard Estate, Inc. v. Moses, 368 N. Y. 362, 197 N. E. 313 (1935) (denying that an abutting owner had any right to ignore ordinance prohibiting left turn, though thereby he was required to go ten miles out of his way to reach his property). See cases cited *supra* note 54. But see Birmingham v. Hood-McPherson Realty Co., 233 Ala. 352, 172 So. 114 (1937) (considering stopping as an incident of abutter's right of access, hence not subject to charge).

[46] See Lauf v. Shinner & Co., 82 F.(2d) 68, 72 (C. C. A. 7th, 1936), *rev'd* 303 U. S. 323, 58 Sup. Ct. 578, 82 L. ed. 872 (1938). Accord: Callahan v Gilman, 107 N. Y. 360, 14 N. E. 264 (1887) (recognizing special damage to complainant's business interests by D's use of loading platform across sidewalk nearby, obstructing the passage of complainant's potential customers).

[47] Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. ed. 220 (1885); see Crowley v. Christensen, 137 U. S. 86, 94, 47 Sup. Ct. 675, 71 L. ed. 1228, 53 A. L. R. 1210 (1927).

[48] Euclid v. Ambler, 272 U. S. 365, 47 Sup. Ct. 114, 71 L. ed. 303, 54 A. L. R. 1016 (1932); Larrabee v. Bell, 56 App. D. C. 121, 10 F.(2d) 986 (1926); Appeal of Parker, 214 N. C. 51, 197 S. E. 706 (1939). 3 WILLOUGHBY, THE CONSTITUTION OF THE UNITED STATES (2d ed. 1929) §1190. *Cf.* note (1924) 32 A. L. R. on the validity of municipal regulations excluding or limiting automobile traffic in certain streets.

meters are proving singularly effective in traffic regulation, diminishing the difficulty in finding parking spaces, reducing the number of patrolmen necessary to regulate parking, and in some instances, apparently reducing the number of traffic accidents by as much as thirty-five per cent.[49] Moreover they seem to be rapidly acquiring public approval wherever installed. If these reports are representative, a more lenient judicial attitude toward parking meters appears warranted.[50] But it is becoming increasingly apparent that revenue derived from the five-cent-per-hour fee generally imposed far exceeds any reasonable estimate of the costs of regulating parking,[51] and this issue may well be the determining factor in future parking meter decisions.

V. LAMAR GUDGER.

**Deeds—Defective Registration as Breach of Warranty.**

A recent North Carolina decision, *Dorman v. Goodman*,[1] has received considerable attention and has inspired some comment[2] as an important ruling on an aspect of the recording and registry laws, namely, the effect of improperly indexing the name of the grantor. Another, and perhaps equally important, holding in the case was disregarded by the comment in the *Harvard Law Review*, and was almost ignored by the court itself. Accordingly, the case raises an unusual question concerning the legal remedies of persons damaged by the operation of registration statutes.

In 1925, *A* conveyed a parcel of land to *B* by warranty deed which was recorded, but the entry in the "grantors" index was defective by reason of a wrong initial. In 1925, *B* conveyed to *C* by warranty deed one half of the parcel of land, and in 1930, *B* conveyed the remaining half to *C* by warranty deed. Both of these deeds were properly recorded and indexed. In 1932, *C* conveyed the land to *D* by warranty deed properly recorded and indexed. In 1934, judgments against *A*, which had been obtained in 1926, were docketed by *X*. Execution was issued and the land sold by the sheriff, being bid in by *D*. *D* now sued *C* for breach of warranty of title. The court held that these judgments, when docketed, became a lien upon the land in question because of the improper indexing of the deed from *A* to *B*. The court further held that this encumbrance was in breach of the warranties contained in the deed from *C* to *D*. Only fourteen words of the opinion were devoted to this latter holding: ". . . In breach of the covenants and warranties in the deed from defendants to plaintiff."

[49] American City, July, 1939, p. 53; June, 1940, p. 46; Oct., 1940, p. 13.
[50] American City, Dec., 1939, p. 63; June, 1940, p. 81; Oct., 1940, p. 99.
[51] See note 22, *supra*.

[1] 213 N. C. 406, 196 S. E. 352 (1938).
[2] Note (1938) 52 HARV. L. REV. 170.

In holding that a subsequently docketed judgment created a lien on the parcel of land, the court was faced with a highly controversial question in interpreting N. C. CODE ANN. (Michie, 1919) §3561,[3] but in allocating the liability arising therefrom upon the defendant in this action, it passed into even more doubtful doctrine, and without much apparent deliberation. It should be noted that there was no encumbrance upon, nor defect in title to the land at the time the above defendant, *C,* executed and delivered his deed to the above plaintiff, *D.* The judgment lien attached, and the execution sale took place two years after that time. A serious question arises, therefore, whether a title to land or a right in land arising after the covenants in a deed have been made can be considered a breach of those covenants, and if so, to what extent and under what circumstances?

It seems to have been nowhere contended that a defect in registration or, indeed, the total absence of any recording of prior deed are circumstances within the scope of the covenants contained in an ordinary warranty deed, and there seems little reason to believe that they are, since a failure to record does not of itself create any encumbrance or impairment of title. Accepting that to be the sound view, we may discard for the purposes of the present inquiry those covenants operative *in praesenti,* such as covenants of seisin, good right to convey, and against encumbrances, for these are breached, if at all, when made.[4] However, covenants such as general warranties of title, covenants to warrant and defend, and for quiet enjoyment are operative *in futuro,* in that they are breached by the successful assertion of a hostile, paramount title, claim, right, or interest in the property at some time in the future.[5] The problem is to correctly construe these covenants in the light of the "probable intention of the parties" or, to be more realistic, "what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used";[6] and since constant judicial decisions have established these covenants as formulae expressing a complexity of rights and obligations their meaning has become more a question of law than of fact and is to be found in an analysis of those decisions.

Rawle emphatically says that a covenant of warranty extends only

[3] Note (1911) 24 HARV. L. REV. 505.

[4] Eames v. Armstrong, 142 N. C. 506, 55 S. E. 405 (1906); Fishel v. Browning, 145 N. C. 71, 58 S. E. 759 (1907); Pridgen v. Long, 177 N. C. 189, 98 S. E. 451 (1919); Thompson v. Avery County, 216 N. C. 405, 5 S. E. (2d) 146 (1939); see Wiggins v. Pender, 132 N. C. 628, 636, 44 S. E. 362, 364 (1903); Guy v. First Carolinas Joint Land Bank of Columbia, 202 N. C. 803, 804, 164 S. E. 323, 324 (1932).

[5] Hodges v. Latham, 98 N. C. 239, 3 S. E. 495 (1887); Mizell v. Ruffin, 118 N. C. 69, 23 S. E. 927 (1896); Wilson v. Vreeland, 176 N. C. 504, 97 S. E. 427 (1918); Cover v. McAden, 183 N. C. 641, 112 S. E. 817 (1922).

[6] HOLMES, COLLECTED LEGAL PAPERS (1921) 204.

to "elder and better titles—to those then existing and not to those subsequently acquired."[7] He quotes from *Grenclife v. W——:* "All the judges agreed that when a man bound himself and his heirs to warranty, they are not bound to warrant new titles of action accruing through the feoffee or any other after the warranty made, but only such titles as are *in esse* at the time of the warranty made."[8] As a more modern authority for his view, he cites *Wade v. Comstock*[9] which has received the approval of other courts.[10] In that case the Ohio court found that "from the time of Lord Coke to the present, and with the exception presently to be noted, they (the authorities) all establish and confirm the position, that the covenant of general warranty relates solely to the title *as it was at the time the coveyance was made,* and merely binds the grantor to protect the grantee and his assigns against a lawful better title, *existing before or at the date of the grant."*[11] The exception to be noted was *Curtis v. Deering,*[12] which Rawle condemns as being wrong in principle and contrary to all authority.

The warranty discussed in *Grenclife v. W——,*[13] and by Coke in his commentaries upon Littleton[14] was an early common law warranty, and not the covenant of warranty now generally used in American conveyancing. "There is no evidence that the covenant in such general use in this country, called 'the covenant of warranty', ever had a place in English conveyancing."[15] But while some of the remedies available under the common law warranty are no longer available, that warranty was sometimes treated as a covenant upon which a tenant could bring a personal action for damages against the warrantor,[16] and to that extent, at least, is analogous to the modern warranty of title.[17]

While the conclusion of *Dorman v. Goodman* seems erroneous under any theory found in the authorities, the broad rule supported by Rawle cannot be unqualifiedly endorsed. Much would seem to depend upon the nature and source of the fault which causes the provisions of the registration statute to operate to bestow the subsequent right or title to the land. If a grantor convey to one grantee who fails to record his deed, and thereafter deliberately conveys to another grantee who records, the first grantee should be allowed to have an action against the grantor upon the warranties contained in his deed. But if a grantor

[7] RAWLE, COVENANTS FOR TITLE (5th ed. 1887) 168, n. 5.
[8] 1 Dyer 42(a), 42(b) (K. B. 1539).
[9] 11 Ohio 71 (1860).
[10] Maeder v. Carondelet, 26 Mo. 112 (1857); Lukens v. Nicholson, 4 Phil. R. 22 ( ).
[11] 11 Ohio 71, 79 (1860) (italics by the court).
[12] 12 Me. 499 (1835).
[13] 1 Dyer 42(a) (K. B. 1539).
[14] 2 Co. LITT. *388(b).
[15] RAWLE, COVENANTS FOR TITLE (5th ed. 1887) 17.
[16] Marston v. Hobbs, 2 Mass. 433 (1807).
[17] Biwer v. Martin, 294 Ill. 488, 128 N. E. 518 (1920).

conveys to a grantee, who fails to record, and thereafter a judgment is docketed against the grantor, then the grantor should not be held liable. *Dorman v. Goodman* is in essence like this latter hypothetical situation, for there fault could be imputed to no one except the register of deeds.

In *Curtis v. Deering*[18] the Maine court made the distinction above drawn. Land had been conveyed in mortgage, with covenants for seisin and of warranty, but the mortgagee failed to record the mortgage. The land was then conveyed in fee by the mortgagor to a purchaser without notice, who recorded his deed. Under the registry statutes of Maine, this purchaser thereupon took title free and clear of the mortgage. Forthwith the mortgagee brought an action against the mortgagor on the covenant of warranty, and the court allowed recovery. The court reasoned that a conveyance in fee by the mortgagor in disregard of the rights of the mortgagee, was a wrongful act. The justification for this premise need not detain us; the fact that the court deemed such a premise indispensable to its conclusion is the important thing.

Other courts draw the same distinction,[19] and support is also found in analogous cases holding that a covenant of warranty extends to all acts of the covenantor himself whether tortious or otherwise.[20] Tortious acts of strangers are not embraced within the covenant since the law provides the grantee another remedy, and it would be unreasonable to make the grantor an insurer against such acts.[21] But where the grantor himself enters under claim or assertion of right the cases seem uniform in holding that a breach of the covenant has occurred.[22] Certainly, then, if a grantor enables a stranger to prevail over the original grantee by wrongfully issuing a second deed to land already conveyed, he has violated that covenant.[23]

The grantor may be guilty of no wrongful act, yet the grantee may suffer an impairment of his property rights in four instances, *viz.*, by the omission or negligence of either himself, his immediate grantor, some prior grantor, or the official charged with the duty of recording and indexing deeds. In the absence of willful wrong on the part of the grantor, a grantee who neglects to have his own deed recorded should bear the consequences. The venerable case of *Grenclife v. W——*,[24]

[18] 12 Me. 499 (1835).

[19] Scott v. Scott, 70 Pa. 244 (1871).

[20] Shrago v. Gulley, 174 N. C. 135, 93 S. E. 458 (1917); RAWLE, COVENANTS FOR TITLE (5th ed. 1887) 167.

[21] Andrus v. St. Louis Smelting & Refining Co., 130 U. S. 643, 9 Sup. Ct. 645, 32 L. ed. 1054 (1889); Tierney v. Whiting, 2 Colo. 620 (1875); Jerald v. Elly, 51 Iowa 321, 1 N. W. 639 (1879); Wilder v. Ireland, 53 N. C. 85 (1860); Noyes v. Rockwood, 56 Vt. 647 (1884).

[22] Avery v. Dougherty, 102 Ind. 443, 2 N. E. 123 (1885); RAWLE, COVENANTS FOR TITLE (5th ed. 1887) 167.

[23] Cincinnati, U. & Ft. W. Ry. v. Pearce, 28 Ind. 502 (1867); Eaton v. Hopkins, 71 Fla. 615, 71 So. 922 (1916); Williamson v. Williamson, 71 Me. 442 (1880).

[24] 1 Dyer 42(a), 42(b) (K. B. 1539).

sanctions this, for the court there holds that the plaintiff, whose failure to pay rent to the lord had caused his title to fail, "is the cause of the breach of the condition, whereof he shall not himself take advantage, so as to give himself an action by his own act." The three remaining possibilities cannot be so neatly disposed of; yet the authorities allowing a grantee to recover for warranty breached by a right arising subsequent to the conveyance require that such right arise as a result of an unlawful act by the grantor, and it would be strange to hold that the mere election of an owner not to record his own deed amounted to an unlawful act, to say nothing of the situations in which the defect in registration is the fault of the recording officer, or the omission of some remote grantor. As the grantor does not warrant the chain of deeds to the land to be accurately recorded, it appears unreasonable to construe his covenant to include any subsequent judgment docketed against him or a prior owner, or any unlawful conveyance of a prior owner. The books of registration are open to both vendor and purchaser. Further, where the gap in registration occurs by the neglect or fault of a public official, the injured grantee has a remedy against him. In North Carolina, the register of deeds must furnish an official bond to cover such contingencies.[25]

In *Wade v. Comstock,* the Ohio court attributes to the covenant of quiet enjoyment qualities and characteristics not possessed by the covenant to warrant and defend, but does so without discussion or citation of authority.[26] Several reasons weigh against an extended consideration of that point here. First, the principal case was concerned with no specific covenant for quiet enjoyment;[27] second, it is not customary to insert such a covenant in deeds used in North Carolina;[28] and third, covenants of quiet enjoyment and covenants of warranty have long been considered identical in operation and effect.[29]

When the Supreme Court of North Carolina again has occasion to pass on the instant question, it may well refuse to be bound by the scanty discussion in *Dorman v. Goodman.* At any event, we may hope for an articulation of the theory underlying the rule there applied.

DANIEL K. EDWARDS.

[25] N. C. CODE ANN. (Michie, 1939) 3555, State *ex rel.* Kivett v. Young, 106 N. C. 567, 10 S. E. 1019 (1890); State *ex rel.* Daniel v. Grizzard, 117 N. C. 105, 23 S. E. 93 (1895).

[26] 11 Ohio 71, 83 (1860).

[27] Information from counsel in the case.

[28] SIMMS AND SIMMS, MANUAL OF LAW AND FORMS (9th ed. 1938) 596.

[29] Keel v. Ikard, 222 Ala. 617, 133 So. 906 (1931); Biwer v. Martin, 294 Ill. 488, 128 N. E. 518 (1920); Grist v. Hodges, 14 N. C. 198 (1831); Huntley v. Waddell, 34 N. C. 32 (1851); Fishel v. Browning, 145 N. C. 71, 58 S. E. 759 (1907).

**Dower—Widow's Claim in Insolvent Estate After Foreclosure of Mortgage in Which She Joined.**

Plaintiff's husband died seized of land encumbered with mortgages in which *P* had joined. These mortgages were foreclosed, realizing no surplus. The estate being insolvent, *D*, Administratrix, sold other unencumbered land to make assets. *P* then filed a claim equivalent to her dower in the foreclosed parcels, contending that such claim took preference over the unsecured creditors and was entitled to prior payment out of the estate assets. *Held,* the widow's position was that of a surety whose property had been sold to pay the debt of her principal, and she was thus subrogated to the unsecured position of the mortgagee in these assets.[1]

At common law a widow received no dower from her husband's equitable estate. When she joined in his mortgage she released any right to dower in the property itself, and since her husband retained only an equity of redemption no further dower right could attach.[2] Today, the widow's right to dower in her husband's equitable estate is generally recognized; hence, joinder in his mortgage is not a final relinquishing of dower. However several views are taken as to the amount of dower the widow may receive from such mortgaged property. (1) A majority[3] restrict her dower to one-third of the surplus derived from foreclosure, on the theory she has released her contingent right of dower in the whole of the land and takes only from the remaining equitable estate. (2) Other states[4] compute her dower as one-third of the entire sale price payable out of the surplus, but do not discuss the problem arising where there is insufficient surplus. Their rationale is that the wife signs away her dower only as further security for her husband's debt; and that she still has against all but the mortgagee a prior lien on the property to the amount of her dower. Tennessee[5] has allowed the wife one-third of the surplus and then one-third of an amount which the mortgagee could have recovered as his

[1] Brown v. McLean, 217 N. C. 553, 8 S. E. (2d) 807 (1940).

[2] Steele v. Carroll, 12 Pet. 201 (U. S. 1838); Needermeyer, Inc. v. Fehl, 153 Ore. 656, 57 P. (2d) 1086 (1936).

[3] *In Re* Gish, 32 F. (2d) 322 (W. D. Ky. 1928) (statute); Trawbridge v. Sypher, 55 Iowa 353, 7 N. W. 567 (1880); McClain v. McClain, 151 Ky. 356, 151 S. W. 926 (1912) (statute); Bank of Commerce v. Owens, 31 Md. 320 (1869); Burrall v. Berder, 61 Mich. 608, 28 N. W. 731 (1866); Hawley v. Bradford, 9 Paige 200 (N. Y. 1841); Hoy v. Varner, 100 Va. 600, 42 S. E. 690 (1902); Poteet v. International Harvester Co., 153 Va. 304, 149 S. E. 512 (1929).

[4] Oades v. Standard Savings & Loan Ass'n., 257 Mich. 469, 241 N. W. 262 (1932); Turner v. Washington Realty Co., 130 S. C. 501, 126 S. E. 137 (1925); Zion's Savings Bank & Trust Co. v. State Tax Commissioner, 90 Utah 415, 62 P. (2d) 270 (1936); Commercial Banking and Trust Co. v. Dudley, 76 W. Va. 322, 86 S. E. 307 (1915); *Re* Lesperance, 61 Ont. L. R. 94, 4 D. L. R. 391 (1927).

[5] Yoe v. Sanson, 48 S. W. 317 (Tenn. 1898); Flynn v. Flynn, 1 Tenn. App. 188 (1925).

pro-rata share had he first gone into the personalty, which was primarily liable. (3) North Carolina[6] and Ohio[7] pursue a quasi-suretyship theory and allow the widow one-third of the whole to be taken from the surplus, or if there is no surplus she becomes *ipso facto* a creditor of her husband's estate. In adopting the "suretyship" analogy, the two courts admit that "properly speaking she is not a surety,"[8] yet decide that "as between each other he (the husband) would be the principal and she the surety."[9] Since this doctrine is one of convenience,[10] it appears likely that the wife would not be held to assume the full status of a surety, with its attendant rights and obligations.

Conceding that the wife retains a dower claim, what is its relation to other claims against the estate? Where the estate is solvent, it is generally held that as against the heirs the wife is entitled to full exoneration from the personalty,[11] although New York[12] allows no reimbursement beyond the foreclosure surplus.

Where the estate is insolvent the problem is more intricate. Since any surplus remaining after foreclosure is deemed to be realty, the widow has a prior lien to the extent of her allotted dower.[13] Under the North Carolina "suretyship" view there is a similar result where a surplus exists, yet if it appears that there will be insufficient surplus the widow may adopt either of two procedures: (1) She is entitled[14] to have the mortgage satisfied by first selling the two-thirds of the land not embraced by dower and the reversion in the other third, then having any residue[15] of the debt paid ratably out of the administration

[6] Creecy v. Pearce, 69 N. C. 67 (1837); Gwathmey v. Pearce, 74 N. C. 398 (1876); Gore v. Townsend, 105 N. C. 288, 11 S. E. 160 (1890); Virginia-Carolina Chemical Co. v. Walston, 187 N. C. 817, 123 S. E. 196 (1924); Barnes v. Crawford 201 N. C. 434, 160 S. E. 464 (1931); Parsons v. Leak, 204 N. C. 92, 167 S. E. 567 (1933); Realty Purchase Corp. v. Hall, 216 N. C. 237, 4 S. E. (2d) 514 (1939); See Trust Co. v. Benbow, 135 N. C. 303, 312, 47 S. E. 435, 438 (1904).

[7] Mandel v. McClave, 46 Ohio St. 407, 22 N. E. 290 (1889).

[8] Gore v. Townsend, 105 N. C. 228, 230, 11 S. E. 160, 161 (1890).

[9] Mandel v. McClare, 46 Ohio St. 407, 414, 22 N. E. 290, 292 (1889).

[10] Could not these courts adopting the second view, by applying the principle of subrogation, obtain a result similar to that of the suretyship state. They already apply a rule under which the husband's interest is completely exhausted before that of the widow's. See Commercial Banking & Trust Co. v. Dudley, 76 W. Va. 332, 342, 86 S. E. 307, 311 (1915) ("A suggested relationship of suretyship between the husband and wife is not at all essential to the conclusion," in that since the wife signs the mortgage only for the benefit of the mortgagee she has relinquished nothing against the heirs and unsecured creditors.)

[11] Whitehead v. Bautwell, 218 Ala. 109, 117 So. 623 (1928); Gore v. Townsend, 105 N. C. 228 (1890); Mowry v. Mowry, 24 R. I. 565, 54 Atl. 383 (1902).

[12] House v. House, 10 Paige 158 (N. Y. 1843); Mosely v. Marshall, 22 N. Y. 200 (1889).

[13] See Virginia-Carolina Chemical Co. v. Walston, 187 N. C. 817, 824, 123 S. E. 196, 200 (1924).

[14] Caroon v. Cooper, 63 N. C. 386 (1869); Overton v. Hinton, 123 N. C. 1 (1898).

[15] Creecy v. Pearce. 69 N. C. 67, 70 (1873) ("We adopt the analogy in bank-

of the estate. Then if any part of the mortgage debt remains unsatisfied it will be a charge on the dower land.[16] Or (2) she may allow the sale of the property as a whole and become a creditor of her husband's estate for the amount of her dower sold and not satisfied out of the surplus.[17] The principal case holds that since the widow suffered the sale without demanding protection of her dower, she becomes only an unsecured creditor of the estate. This seems to intimate that had she insisted upon the first procedure, she would have been a priority creditor of the estate (probably on the ground that her dower status had not been abandoned). In no North Carolina case has a dower claim been given priority in the personalty of an insolvent estate. *Gwathmey v. Pearce*[18] is absolutely contrary to such a distinction. In that case the supreme court in a previous appeal[19] had ordered sale of the property under the first method outlined, and after a necessary sale of the dower interest the widow was deemed by the lower court an unsecured creditor entitled to share pro-rata in the estate. The supreme court found no error.

Certain dicta in *Virginia-Carolina Chemical Co. v. Walston*[20] was relied upon by the plaintiff to establish her priority as a creditor. Concerning the rights of a widow in the personalty of an insolvent estate, it was there said "that the widow's dower is superior to the rights of unsecured creditors . . . and the widow is entitled to dower as against unsecured creditors, devisees and legatees." In support thereof were cited *Creecy v. Pearce*[21] and *Campbell v. Murphy*,[22] but in those cases the court expressly dismissed such rule as inapplicable where there is a mortgage. Often the rule of "priority in the surplus" is loosely stated and may easily mislead a reader into the erroneous belief that the court is stating a rule of the widow's position as to the personalty.

No authority supports a priority view under either of the two procedures, and it is difficult to conceive "on what principle it is that a debt which because a charge on the land, is also to have priority in respect to the personal estate."[23] Had the mortgagee suffered a deficiency his status against the estate would have been that of an un-

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rupt cases where a creditor having collateral security is only allowed to prove the balance after exhausting the collateral security.")

[16] Creecy v. Pearce, 69 N. C. 67 (1873); see Virginia-Carolina Chemical Co. v. Walston, 187 N. C. 817, 823, 123 S. E. 196, 199 (1924).

[17] Of necessity, under the suretyship theory she is to become a creditor, for she is a surety whose property has been sold to pay the debt of the principal. American Blower Co. v. MacKenzie, 197 N. C. 152, 147 S. E. 829 (1929); see Trust Co. v. Benbow, 135 N. C. 303, 312, 47 S. E. 435, 438 (1904).

[18] 74 N. C. 398 (1876).

[19] Creecy v. Pearce, 69 N. C. 67 (1873).

[20] 187 N. C. 817, 824, 123 S. E. 196, 200 (1924).

[21] 69 N. C. 97 (1873).

[22] 55 N. C. 357 (1836).

[23] See Creecy v. Pearce, 69 N. C. 67, 69 (1873).

secured creditor, and it appears paradoxical to subrogate the widow to a more favored position. To hold it a priority claim is to make the unsecured creditors insurers of the wife to the value of a property interest which she has validly contracted away.

There appears no persuasive logic in allowing the claim under the first procedure and not under the second. The inconsistency of such a distinction is clearly illustrated by a hypothetical application of the two methods to an insolvent estate with a piece of property mortgaged for $1,000.00. (1) Under the first procedure assume that the mortgagee sells for $500.00 the two-thirds and remainder in the one-third of the dower property, leaving $500.00 to share ratably in the personalty. Assuming also that the estate is paying 40% on claims, thus paying mortgagee $200.00 and leaving a deficiency of $300.00 to be taken from the dower. The sale of the dower brings exactly $300.00. Thus the creditor is paid entirely and the widow becomes a creditor of the estate for $300.00, and if the intimation of the instant case governs, she will be a priority creditor. Under this view the corpus of the estate suffers two invasions to the extent of $500.00. (2) Under the second procedure, where the whole property is sold: Assuming that the sale brings $800.00, the mortgagee becomes a creditor of the estate for $200.00 and the wife for $300.00 (the value of her dower interest), each receiving 40%, for the principal case intimates that under this procedure the wife is not a priority creditor. Thus the estate pays the creditor $80.00 and the wife $120.00 or a total of $200.00. Even if the widow were held a priority creditor, receiving $300.00, the maximum paid by the estate would be slightly under $380.00, considerably less than the $500.00 paid under the first procedure. Therefore, there would seem to be more reason for allowing the widow's priority under the second procedure than under the first, because even with the same priority the estate would pay less. It would also bring increment to the estate in that a single sale of the whole property would ordinarily bring a higher price than selling parts separately. Although the mortgagee receives at least $120.00 less under the second procedure, he is a party to his own injury since he failed to adopt the first method.

It is difficult to see why the court should not favor the second procedure and allow the wife no superior priority as a result of following the first,[24] for only under the second can the "Bankruptcy Rule" and "Suretyship Rule" function together smoothly. In contrast, under the first method inequity and uncertainty will of necessity arise, it being necessary to pro-rate the claims once without the widow's claim included, since only after the pro-rata share of the mortgagee is determined can the amount taken from dower be known, thereby determin-

[24] See note 22, *supra*.

ing the claim of the widow. Then the subsequent addition of the widow's claim will have one of two inequitable results: (1) If all the liabilities computed in the pro-rata are paid at once, the estate will be exhausted, having nothing for the subsequent claim of the widow, or (2) if only the mortgagee be paid and the widow's claim then thrown in with the other unpaid creditors, it will reduce their pro-rata share, thereby making the mortgagee's claim preferred to those of other creditors of equal rank. Under the first procedure it is impossible to avoid this problem, because if the mortgagee draws on the personalty, dower cannot remain untouched, for the insolvent estate pays only a ratable share, thus leaving a residue of debt which will ultimately bring in the widow as creditor. However, if the second method be used, all the claims are definite and simultaneously computable, thus facilitating the administration of estates and correcting the inequities arising from two computations.

Accordingly, it is recommended that North Carolina follow its precedents in allowing priority only in a surplus existing after satisfaction of the mortgage debt, and that the intimation of the principal case receive no embodiment in our law.

J. KENYON WILSON, JR.

**Injunctions—Courts—Injunction Against Threatened Violation of Agreement Not to Sue.**

Plaintiffs petitioned Polk County Superior Court to enjoin the husband of one of them from instituting against the other plaintiff a civil action in Forsyth County Superior Court for alienation of plaintiff wife's affections. It was alleged that defendant husband had signed separation papers accompanied by an agreement to refrain from bringing such a suit, that the threatened suit would violate said agreement, and would do irreparable injury to plaintiff wife's character. The trial judge granted a temporary injunction until the final hearing, and defendant appealed. *Held,* affirmed.[1]

The problem of enjoining litigation brought or threatened in violation of an agreement not to sue may involve litigation in the courts of another state,[2] in a local inferior court,[3] or in a court of concurrent jurisdiction with that in which the injunction is sought or in another branch of the same court. This note deals with the latter situation.

Some states by statute[4] or by judicial decision,[5] purport to deprive

[1] Boone v. Boone, 217 N. C. 722, 9 S. E. (2d) 383 (1940).
[2] Note (1935) 13 N. C. L. REV. 235.
[3] Bomeisler v. Forster, 154 N. Y. 229, 48 N. E. 534 (1897).
[4] Judicature Act, 1873, 36 & 37 Vict., c. 66; 17 HALSBURY, LAWS OF ENGLAND (1911) 261.
[5] State v. Rightor, 39 La. Ann. 619, 2 So. 385 (1887); Schumert-Warfield-Buja, Inc. v. Buie, 148 La. 726, 87 So. 726 (1921); Kuhn v. Beard, 151 La. 546, 92

the courts of power to entertain an independent action for injunction. Particularly is this so when the litigation is pending in a court which has taken jurisdiction[6] and which can afford adequate relief by equitable defense.[7] Other states, however, concede that power exists[8] to enjoin the litigation in an independent action but hold that it is error[9] to exercise it save in the exceptional case where an equitable defense or counterclaim in the same action will not sufficiently help.[10] Both lines of cases are motivated by a desire to conserve the economy of judicial administration[11] in a concurrent or single judicial system. The distinction between a void injunction and an erroneous one is vital in contempt proceedings.[12]

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So. 52 (1922); Grant v. Quick, 5 Sandf. 612 (N. Y. 1852); Bennet v. Le Roy, 14 How. Pr. 178 (N. Y 1857); Winfield v. Bacon, 24 Barb. 154 (N. Y. 1857); Nielson v. Schiller, 92 Utah 137, 66 P. (2d) 365 (1937). But see note 10, *infra*.

[6] State v. District Court, Fourth Judicial Dist., 195 Minn. 169, 262 N. W. 155 (1935); Mo. REV. STAT. (1919) §1951, Wabash Ry. v. Sweet, 103 Mo. App. 267, 77 S. W. 123 (1903); Childs v. Martin, 69 N. C. 126 (1873); Young v. Rollins, 85 N. C. 485 (1881).

[7] Anthony v. Dunlap, 8 Cal. 27 (1857); Wilson v. Baker, 64 Cal. 475, 2 Pac. 253 (1884); S. C. CODE (1932) §6004, Aetna Casualty & Surety Co. v. Yance, 181 S. C. 369, 187 S. E. 536 (1936).

[8] Engels v. Lubeck, 4 Cal. 31 (1854); Meredith v. Crowder, 81 Ind. App. 221, 142 N. E. 876 (1924); Williams v. Payne, 150 Kan. 462, 94 P. (2d) 341 (1939); Davison v. Hough, 165 Mo. 561, 65 S. W. 731 (1901); Capitain v. Mississippi Valley Trust Co., 240 Mo. 484, 144 S. W. 466 (1912); State ex rel. Terry v. Allen, 308 Mo. 230, 271 S. W. 469 (1925); Erie Ry. v. Ramsey, 45 N. Y. 637 (1871); Van Sinderen v. Lawerence, 50 Hon. 272, 3 N. Y. Supp. 25 (1888); Metropolitan Trust Co. v. Stalla, 166 App. Div. 639, 152 N. Y. Supp. 183 (1st Dep't 1915).

[9] Bickett v. Johnson, 8 Cal. 34 (1857); Wilson v. Baker, 64 Cal. 475, 2 Pac. 253 (1884); Galey v. Board of Com'rs., 174 Ind. 181, 91 N. E. 593 (1910); State v. District Court, Fourth Judicial Dist., 195 Minn. 169, 262 N. W. 155 (1935); Wabash Ry. v. Sweet, 103 Mo. App. 267, 77 S. W. 123 (1903); Burke v. Burke, 212 N. Y. 303, 160 N. E. 62 (1914); Rosenberg v. Mount Carmel Cemetery Ass'n., 244 N. Y. 573, 155 N. E. 902 (1927); McReynolds v. Harshaw, 37 N. C. 195 (1842); Childs v. Martin, 69 N. C. 126 (1873); Young v. Rollins, 85 N. C. 485 (1881); Davis v. Federal Land Bank, 217 N. C. 145, 7 S. E. (2d) 373 (1940); Aetna Casualty & Surety Co. v. Yance, 181 S. C. 369, 187 S. E. 536 (1936).

[10] Erie Ry. Co. v. Ramsey, 45 N. Y. 637 (1871). *Cf* note 5, *supra*.

[11] Conversely, for this same reason, the court first taking jurisdiction sometimes finds it necessary to enjoin other litigation respecting the same subject matter. Davison v. Hough, 165 Mo. 561, 65 S. W. 731 (1901); Capitain v. Mississippi Valley Trust Co., 240 Mo. 484, 144 S. W. 466 (1912); State ex rel. Terry v. Allen, 308 Mo. 230, 271 S. W. 469 (1925); Van Sinderen v. Lawerence, 50 Hun. 272, 3 N. Y. Supp. 25 (1888); Metropolitan Trust Co. v. Stalla, 166 App. Div. 639, 152 N. Y. Supp. 183 (1st Dep't 1915); See Wabash Ry. v. Sweet, 103 Mo. App. 276, 280, 77 S. W. 123, 124 (1903); Erie Ry. v. Ramsey, 45 N. Y. 637, 647 (1871).

[12] Pitcock v. State, 91 Ark. 527, 121 S. W. 742 (1909); People v. Barrett, 203 Ill. 99, 67 N. E. 742 (1903); State v. Meyer, 86 Kan. 793, 122 Pac. 101 (1912); Saginaw Lumber & Salt Co. v. Griffore, 145 Mich. 287, 108 N. W. 681 (1906); McHenry v. State, 91 Miss. 562, 44 So. 831 (1907); St. Louis, K. & S. Ry. v. Wear, 135 Mo. 230, 36 S. W. 357 (1896); *In re* Knaup, 144 Mo. 653, 46 S. W. 151 (1898); Cauffman v. Van Buren, 136 N. Y. 253, 32 N. E. 775 (1892); Savage v. Sternberg, 19 Wash. 679, 54 Pac. 611 (1898); Cline v. Whitaker, 144 Wis. 439, 129 N. W. 400 (1911).

Where, however, the litigation prohibited by the agreement not to sue has not been instituted but is merely threatened, other considerations, of a *quia timet* nature, become important. Even if an equitable defense might suffice had the suit been brought, it may be that an independent injunction is justified where the very threat of litigation works irreparable harm. For example, such a threat might operate as a cloud on title and frighten away the prospective purchasers of land.[13] If, on the other hand, it is the actual institution of the suit itself which is feared, specific performance of the agreement not to sue, effectuated through an equitable defense[14] to the main suit once it has been brought, would appear to be the appropriate remedy[15] in most cases.

The situation in the principal case does not appear to have warranted independent injunction. Rather, it might better have been left to be dealt with by an equitable defense, based upon the agreement not to sue, to the action for alienation of affections when brought. Such a disposition of the matter would have been more in harmony with the relations necessary between two coordinate branches of the North Carolina Superior Court and with the policy of effectuating, as far as possible, complete relief in the same action. Any notion that the plaintiff wife needed an independent injunction to protect her reputation against the allegations and proofs in the threatened action for alienation of affections is strangely at variance with her own disclosures of misconduct in the injunction suit.

The court relied upon a North Carolina case[16] of injunction against litigation in the courts of another state and a New York case[17] of injunction against litigation pending in a local inferior court. Neither situation parallels that of the principal case. In the first, the North Carolina case, the foreign court was not in a reciprocal position. In the second, the *Bomeisler* case, the litigation enjoined was pending in the superior court of the city of New York and not in another branch of the state-wide supreme court. The opinion does not deal with the fact that as between such branches independent injunctions against litigation, once regarded as nullities,[18] are now held, unless indispen-

[13] N. C. CODE ANN. (Michie, 1939) §1743, Power Co. v. Power Co., 175 N. C. 668, 96 S. E. 99 (1918).

[14] N. C. CODE ANN. (Michie, 1939) §519, Russell v. Adderton, 64 N. C. 417 (1870); Harshaw v. Woofin, 64 N. C. 568 (1870); Evans v. Roper, 74 N. C. 639 (1876); Craven v. Freeman, 82 N. C. 361 (1880); MCINTOSH, N. C. PRACTICE AND PROCEDURE (1929) §461(6).

[15] MCINTOSH, N. C. PRACTICE AND PROCEDURE (1929) §862, n. 87; Burke v. Burke, 212 N. Y. 303, 106 N. E. 62 (1914).

[16] Wierse v. Thomas, 145 N. C. 261, 59 S. E. 58 (1907). See note 2, *supra*.

[17] Bomeisler v. Forster, 154 N. Y. 229, 48 N. E. 534 (1897).

[18] Grant v. Quick, 5 Sandf. 612 (N. Y. 1852); Bennet v. Le Roy, 14 How. Pr. 178 (N. Y. 1857); Winfield v. Bacon, 24 Barb. 154 (N. Y. 1857).

sable, to be erroneous and reversible upon appeal.[19] Moreover, two suits had begun following two successive settlements, and the court felt that a mere defense to the pending action would not effectively prevent the repetition of this persistent persecution. Finally, the New York court has since reversed an injunction against an action pending, in violation of a settlement, in another branch of the supreme court; compelled resort to a defense in that action, even though the complaint therein attacked the character of the plaintiff in the injunction suit; and restricted the *Bomeisler* case to its special facts.[20]

It is submitted that the principal case unnecessarily complicates the North Carolina procedure.

PHILIP E. LUCAS.

**Receiverships—Priority of Operating Expenses Over Secured Creditors in the Corpus.**

At the instance of parties other than the secured creditors a lumber corporation was put in the hands of a receiver with authority to continue the business. The court ordered the receiver to sell certain lumber, which was the sole asset of the company, and which had been pledged to appellants (secured creditors). The court further ordered the receiver to retain twenty percent of the money realized from the sale to pay the expenses of the receivership and to remit the balance to the secured creditors. *Held,* order affirmed. Where a receivership enures to the benefit of a lienholder, his lien is subordinate to the administrative expenses.[1]

In *Fosdick v. Schall,*[2] the United States Supreme Court adopted the rule that in railroad receiverships the operating expenses have a priority in payment out of the current income over the mortgagees of the corpus, and a payment to the mortgagees out of the current income is a diversion which gives the operating expenses a priority on the corpus equal in amount to the diversion. The court declared that railroads were affected with such vital public interest that they were obligated to continue operation. This rule has been unanimously followed as to railroads,[3] and later cases have added that if the current income be in-

[19] Erie Ry. Co. v. Ramsey, 45 N. Y. 637 (1871); Burke v. Burke, 212 N. Y. 303, 106 N. E. 62 (1914).

[20] Burke v. Burke, 212 N. Y. 303, 106 N. E. 62 (1914).

[1] Wood v. Woodbury & Pace, Inc., 217 N. C. 356, 8 S. E. (2d) 240 (1940).

[2] 99 U. S. 235, 25 L. ed. 339 (1878).

[3] Burnham v. Bowen, 111 U. S. 776, 4 Sup. Ct. 675, 28 L. ed. 596 (1884); Calhoun v. St. Louis & S. E. Ry., 14 Fed. 9 (C. C. D. Ind. 1880); Clark v. Central R. R. & Banking Co., 66 Fed. 803 (C. C. A. 5th, 1895); Central Bk. & Tr. Co. v. Greenville & Western R. R., 248 Fed. 350 (W. D. S. C. 1918); Central Tr. Co. of N. Y. v. Pittsburg S. & N. R. R., 223 N. Y. 347, 119 N. E. 565 (1918); McIlhemey v. Bing, 80 Tex. 4, 13 S. W. 655 (1890); Bellingham Bay Improv. Co. v. Fairhaven & N. W. Ry., 17 Wash. 371, 49 Pac. 514 (1897).

sufficient to meet the expenses of operation under the receivership, then they shall be a prior lien on the property itself.[4] However, it has been pointed out that this latter doctrine is based on an extraordinary equitable power and is to be limited to cases where the public is interested in the continued operation of the business.[5] The majority of courts have extended this doctrine to other public utilities[6] such as telegraph companies,[7] canal companies,[8] and power and water companies.[9] At this point there is a split of authority because other courts have held the doctrine inapplicable in cases other than those involving railroads.[10] Since the rule has been held not to embrace other public utilities or quasi-public utilities, some courts have refused to apply it in cases involving gas companies[11] and electric power companies.[12]

When attempts were made to include strictly private corporations within the rule, the majority of courts deemed themselves without the power to do so.[13] A New Jersey court[14] went so far as to say, "The general power to authorize the issue of receiver's certificates of indebtedness for the purpose of continuing a business which exists in the case of a public corporation does not exist in the case of a private corporation. When a receiver is appointed of a private corporation, the court may authorize him to continue the business temporarily, but with the purpose of winding up, provided that the receiver has in his possession sufficient assets to enable him to go on; but if he should find it necessary to borrow money with which to continue the business, the

[4] Meyer Rubber Co. v. Georgetown & W. R. R., 174 Fed. 731 (C. C. E. D. S. C. 1909); Central Tr. Co. v. Thurman, 94 Ga. 735, 20 S. E. 141 (1894); Standard Steel Works Co. v. Williams, 155 Ga. 177, 116 S. E. 636 (1923); Craver v. Greer, 107 Tex. 356, 179 S. W. 862 (1916).

[5] Craver v. Greer, 107 Tex. 356, 179 S. W. 862 (1916).

[6] 1 CLARK, RECEIVERS (2d ed. 1929) §470 (a).

[7] Keelyn v. Carolina Mutual Tel. & Tel. Co., 90 Fed. 29 (C. C. D. S. C. 1898).

[8] Hewitt v. Great Western Beet Sugar Co., 20 Idaho 235, 118 Pac. 296 (1911).

[9] Citizens Tr. Co. v. Nat'l Equipment & Supply Co., 178 Ind. 167, 98 N. E. 865 (1912).

[10] Farmers Loan & Tr. Co. v. Burbank Power & Water Co., 196 Fed. 539 (E. D. Wash. 1912); Belknap Savings Bank v. Lamar Land & Canal Co., 28 Colo. 326, 64 Pac. 12 (1901); Central Tr. & Savings Bank v. Chester County Electric Co., 9 Del. Ch. 247, 80 Atl. 801 (1911); Wiggins v. Neversink Light & Power Co., 47 Misc. 315, 93 N. Y. Supp. 853 (Sup. Ct., 1905); McDermott v. Pentrass Gas Co., 82 W. Va. 230, 95 S. E. 841 (1918).

[11] McDermott v. Pentrass Gas Co., 82 W. Va. 230, 95 S. E. 841 (1918).

[12] Farmers Loan & Tr. Co. v. Burbank Power & Water Co., 196 Fed. 539 (E. D. Wash. 1912).

[13] Hanna v. State Tr. Co., 70 Fed. 2 (C. C. A. 8th, 1895); Smith v. Shenandoah Valley Nat'l Bank, 246 Fed. 379 (C. C. A. 4th, 1917); Standley v. Hendrie & Bolthoff Mfg. Co., 27 Colo. 331, 61 Pac. 600 (1900); Oldroyd v. McCrea, 65 Utah 142, 235 Pac. 580 (1925); 1 CLARK, RECEIVERSHIPS (2d ed. 1929) §470 (b).

[14] Lockport Felt Co. v. United Box Board & Paper Co., 76 N. J. Eq. 686, 70 Atl. 980 (Ch., 1908).

rule undoubtedly is that he should not be authorized to issue receiver's certificates to raise money therefor, which shall displace the lien of a subsisting encumbrance. The reason for this is very obvious. It would be a violation of that clause of the Federal Constitution which prohibits the states from passing laws violative of the obligations of contract."[15] Other courts do not deem themselves without the power to order the business continued in cases of private corporations, but are reluctant to act.[16] This is due to a feeling ". . . that the issuance of receiver's certificates in the case of private enterprise is not a sound exercise of judgment, rather than to any conclusion that they lack the power to issue certificates in such cases. Indeed the failure to distinguish between the power to issue and the propriety of issuing receiver's certificates has led to some confusion. Fundamentally the courts have as much right to issue receiver's certificates in the case of a strictly private enterprise as in the case of a quasi-public one."[17] But regardless of theory, most courts refuse to allow the receiver of a private corporation to issue certificates with a prior lien on the corpus ahead of the mortgagees.[18]

The Supreme Court of the United States has not yet declared the doctrine inapplicable as to private corporations, but lower federal courts uniformly hold with the majority.[19] It is a fear of abridging the mortgage contract and of taking the mortgagee's property right, his security, that causes these courts to proceed with the greatest caution in cases involving quasi-public utilities and to reject the doctrine where private corporations are involved.

North Carolina, in an early case, followed the rule of the majority,[20] refusing to apply the doctrine to private corporations. In that case a receiver was appointed for a lumber corporation, with authority to take charge of all the corporate property. The receiver, pursuant to this authority, attempted to take possession of lumber in the hands of a creditor who held subject to a mechanic's lien. The court, upholding the creditor, said: "His lien, if he has one, appears to have attached to the lumber before the appointment of the receiver, and he has the clear right under section 1783 of *The Code* to the full amount of any lien he may be entitled to, free from any possible or probable charges which might be fixed upon it, if it went into the hands of a receiver, for costs and expenses of the suit including the receiver's

[15] *Id.* at 690, 70 Atl. at 981.
[16] *In re* Holmes Mfg. Co., 19 F. (2d) 239 (D. Conn. 1927); Glenn v. Martin, 208 Ala. 247, 94 So. 351 (1922); Cox v. Snow, 47 Idaho 229, 273 Pac. 933 (1929).
[17] Cox v. Snow, 47 Idaho 229, 234, 273 Pac. 933, 935 (1929).
[18] See notes 13 and 16, *supra.*
[19] Note (1926) 40 A. L. R. 244, 247.
[20] Huntsman Bros. & Co. v. Linville River Co., 122 N. C. 583, 29 S. E. 838 (1898).

charges."[21] This rule was later recognized in a strong *dictum*: "the doctrine of *Fosdick v. Schall* seems to be restricted to railroads and similar, or *quasi,* corporations. The weight of authority is that the rule applicable to railroad cases in regard to the displacement of the lien of the mortgage does not extend to private corporations. . . . 'Where the parties are all before the court, and do not object, and where it is necessary to put the property in a marketable shape, it seems that the court may authorize the payment of claims in preference to mortgage liens. But the weight of authority holds that it is not the province of a court of equity to undertake the management of a private business, and to create liens thereon without the consent of the mortgagee, and that it cannot displace the lien of the mortgage where the mortgagee asserts an independent title under his instrument of mortgage giving him the right of possession'."[22] One year after this decision, North Carolina ignored this rule. In *Armour & Company v. Peoples Laundry Co.*,[23] where a receiver was appointed on a creditor's bill to wind up an insolvent laundry corporation, the court authorized the receiver to carry on the business by the issuance of certificates which were given a priority in the corpus ahead of the mortgagee. This was done despite the fact that the mortgagee did not consent to the proceeding. The court cited no authority; neither did it attempt to limit the power to allow receivership expenses a priority in the corpus ahead of the mortgagee in other or similar situations. North Carolina had enacted a statute fifteen years before, which was not mentioned in the decision. The statute provides: "Before distribution of the assets of an insolvent corporation among the creditors or stockholders, the court shall allow a reasonable compensation to the receiver for his services, not to exceed five percent upon receipts and disbursements, and the cost and expenses of administration of his trust and of the proceeding in said court, to be first paid out of said assets."[24] The court in the foregoing case may have adhered to the statute as a basis for its decision. However, the statute fails to explain the *Armour* case, since it was also in force at the time of the earlier dictum which pronounced a contrary view. What, then, is the basis for the *Armour* case? A privately owned laundry is obviously not a public utility affected with

[21] *Id.* at 586, 29 S. E. at 839. Code section today is N. C. CODE ANN. (Michie, 1939) §2435, which provides, as it did then, for the securing of mechanic's liens.

[22] See Roberts v. Bowen Mfg. Co., 169 N. C. 27, 32, 85 S. E. 45, 48 (1915).

[23] 171 N. C. 681, 89 S. E. 19 (1916). The case of Cox v. Snow, 47 Idaho 229, 273 Pac. 993 (1929), cites this North Carolina case with others to demonstrate the right of a court to authorize receiver's certificates where the purpose is other than the preservation of the property, but provided no vested interests are disturbed.

[24] N. C. CODE ANN. (Michie, 1939) §1215.

a public interest. The court does not say that the issuance of the receiver's certificates was essential to the preservation of the property pending liquidation. It merely says that protection of the fund demanded that the property be placed in the hands of a receiver and so managed as to produce the best results for the creditors. The court in this case seems to have limited its concern to the unsecured creditors, to the unreasonable detriment of the secured creditors who had loaned money to the corporation in reliance on the supposed security which a mortgage gives.

A later case, concerning a private corporation, involved the relative priority of claims growing out of a receivership obtained by a simple contract creditor without objection.[25] The following order of priorities was observed: the mortgages existing on the property at the time of purchase and the purchase money mortgages, the court costs and expenses of receivership, claims for labor incurred prior to the receivership, tort claims accruing prior to the receivership, and finally, *the claim of the mortgagees under mortgages executed by the corporation prior to the receivership*. The purchase money mortgage gained its priority on the theory that whenever property is acquired by a purchase money mortgage the vendee never has the legal title but only the equity of redemption. The expenses of the receivership achieved priority under C. S. 1215, previously referred to. The claims for tort and labor took priority by virtue of a statute,[26] in existence at the time, which provided that mortgages of corporate property did not take priority over executions on tort or labor judgments against the corporation. The ordinary mortgages of the corporation are placed last on the list of priorities on the theory that one who takes a mortgage on corporation property does so with the knowledge of these statutes. It is to be noted that the court applied C. S. 1215 as applying to expenses incurred by operation of the business in receivership.

The majority of courts have recognized two exceptions to the rule that the doctrine is inapplicable to private corporations. Expenses may be placed ahead of secured creditors: first where the expenses were necessary to preserve the property from deterioration pending the liquidation[27] and, second, where the secured creditors consent.[28] As above shown, North Carolina at times has failed to recognize the rule at all. Assuming that it recognizes the rule, it apparently, by the principal case

[25] Humphrey Bros. v. Buell-Crocker Lumber Co., 174 N. C. 514, 93 S. E. 971 (1917).

[26] N. C. CODE ANN. (Michie, 1939) §1140. This was formerly contained in two sections but has been incorporated into one and amended to apply only to public service corporations.

[27] Note (1909) 7 MICH. L. REV. 239.

[28] 1 CLARK, RECEIVERSHIPS (2d ed. 1929) §477.

and a previous one,[29] has added a third exception, namely, that if the court feels an operating receivership will enure to the benefit of the secured creditors by making the liquidation of the assets more successful, either by selling them in the usual course of business rather than by a forced sale or by caring for them pending the sale, then the court is justified in granting a receivership with the expenses being first paid out of the fund realized by the sale, although the secured creditor did not consent thereto.

Where the majority rule is ignored, as in the *Armour* case, general creditors of a private corporation are allowed to try the experiment of a receivership with authority to operate the business in the hope that the business can be made to pay under the receivership, although it failed to do so under its officers. This is done at the expense of the non-consenting secured creditors if the experiment is a failure.

CLAUD WHEATLY, JR.

**Taxation—Alimony Trusts—Power of Divorce Court to Modify as Determining Settlor's Taxability.**

In the recent case of *Helvering v. Fuller*,[1] a wife obtained a Nevada divorce, the decree incorporating and approving a pre-divorce agreement. The agreement provided for an irrevocable trust, created by the husband, income from which was payable to the wife for ten years for her support and maintenance, when the corpus was to become hers absolutely; for other property settlements; and for waiver by each of all claims against the other. *Held:* Trust income was not taxable to the husband.

In the companion case of *Helvering v. Leonard*,[2] a wife obtained a New York divorce, the decree incorporating and approving a pre-divorce agreement. The agreement provided for the creation by the husband of an irrevocable trust comprised partly of bonds the principal and interest of which he guaranteed. The trust income[3] was payable to the wife for life for her support and maintenance, corpus to be held for their children on her death. *Held:* The trust income was taxable to the husband.

Why this disparity in tax liability growing out of facts essentially similar, differing only in minor detail? The opinion in the *Leonard* case relies on two distinguishing characteristics which determine the issue: 1st—Taxpayer Leonard guaranteed the principal and interest on

[29] Bank of Pinehurst v. Mid-Pines Country Club, Inc., 208 N. C. 239, 179 S. E. 882 (1935).

[1] 310 U. S. 69, 60 Sup. Ct. 784, 84 L. ed. 715 (1940).
[2] 310 U. S. 80, 60 Sup. Ct. 780, 84 L. ed. 721 (1940).
[3] $5000 a year was to be paid to each of three children, remaining amount to the wife.

the trusteed bonds; 2nd—he was a party to a divorce obtained in New York. Obviously the former, subject to the acquiescence of the wife, was at the outset within his control; and had he chosen to be less generous, that decisive element would have been eliminated. The latter suggests, at least, the advisability of a more discreet choice of jurisdiction.

There is no attempt here to extol the virtues of a tax policy which in all cases so outlines its requisites as to leave the incidence to the free discretion of the taxpayer, nor to determine the justice or advisability of taxing one rather than the other party to similar transactions. However, there is a provocative implication, worthy of pursuit, in the dissent of Mr. Justice Reed that "Fine distinctions are necessary in reasoning but most undesirable in a national tax system."[4]

The controversy centers around the application of the doctrine of *Douglas v. Willcuts*[5] to these fact situations. That principle,[6] arising wholly without the express aid of statute,[7] has represented an effort by the Court to supplement the work of Congress in reducing the effectiveness of the trust as an instrument of tax avoidance. Briefly stated, it taxes the settlor on the income of any trust, not otherwise so taxable, which is applied to discharge his legal obligations. Underlying is the doctrine of "constructive receipt"[8]—that having received the benefit of the income, settlor may not now escape its attendant liabilities merely because it was directed through the medium of a trust to the payment of an otherwise non-deductible expense. Hence, the primary requisite is a "continuing obligation", running from settlor to beneficiary, to which the income is devoted. In the *Douglas* case, such an obligation was found in the general duty of husband to support wife, made specific by a divorce decree and continuing thereafter. Amounts paid in discharge of that duty are not deemed income to the wife,[9] and a hus-

[4] Helvering v. Fuller, 310 U. S. 69, 60 Sup. Ct. 784, 789, 84 L. ed. 715, 720 (1940).

[5] 296 U. S. 1, 56 Sup. Ct. 59, 80 L. ed. 3 (1935).

[6] See generally MERTENS, LAW OF FEDERAL INCOME TAXATION (1939 Cum. Supp.) §34.168; Bloomenthal, *Income Tax Aspects of Alimony Trusts* (1939) 17 TAX MAG. 455; Paul, *Five Years With Douglas v. Willcuts* (1939) 53 HARV. L. REV. 1; Tye, *Federal Taxation of Irrevocable Trusts Reëxamined* (April 1940) 18 TAX MAG. 216, 220; Notes (1937) 23 CORN. L. Q. 178, (1939) 52 HARV. L. REV. 804, (1939) 87 U. OF PA. L. REV. 337.

[7] Income not received by settlor is expressly taxed to him only under §§166, 167 of the Federal Revenue Act. 52 Stat. 519 (1938), 26 U. S. C. §166 (1940); 52 Stat. 519 (1938), 26 U. S. C. §167 (1940). The Court has construed the "gross income" provision, 52 Stat. 457 (1938), 26 U. S. C. §22a (1940) as well as 52 Stat. 464 (1938), 26 U. S. C. §24 (1940), relating to non-deductible items, as covering the maintenance trust situation.

[8] See Burnet v. Wells, 289 U. S. 670, 675, 679, 53 Sup. Ct. 761, 763, 764, 77 L. ed. 1439, 1442, 1444 (1933); Paul, *supra* note 6, at 6, n. 17.

[9] Douglas v. Willcuts, 296 U. S. 1, 8, 56 Sup. Ct. 59, 62, 80 L. ed. 3, 8 (1935) citing Audubon v. Shufeldt, 181 U. S. 575, 577, 21 Sup. Ct. 735, 736, 45 L. ed. 1009, 1010 (1901) and Gould v. Gould, 245 U. S. 151, 153, 38 Sup. Ct. 53, 62 L. ed. 211, 213 (1917).

band may receive no deduction for them.[10] There the decree of divorce incorporated the terms of a trust agreement under which the wife would receive a stipulated annual income "in lieu of, and in full settlement of alimony, and of any and all dower rights or statutory interests in the estate of" her husband, and "in lieu of any and all claims for separate maintenance and allowance for her support." Holding the husband taxable on this income, the Court points out that "the income of the trust fund . . . stands substantially on the same footing as though he had received the income personally and had been required by the decree to make the payments directly."[11] Further, "upon the pre-existing duty of the husband the decree placed a particular and adequate sanction, and imposed upon the petitioner the obligation to devote the income in question, through the medium of the trust, to the use of his divorced wife."[12] The Court dwelled at length on the legal status of such a decree in Minnesota, pointing out, although not elaborating upon, the power of the court later to modify the award. That the husband had agreed to make up deficiencies in the trust income and the property was to revert to him free of the trust on his wife's death received no consideration in the opinion.

Subsequently, in *Helvering v. Fitch*,[13] the Supreme Court disclosed the importance of the elements undiscussed in the *Douglas* case, indicating definite limitations to the once broad doctrine.[14] Here the trust, providing for the separate maintenance of the wife, comprised certain property, the rent from which was to be paid to her each month during her life. The corpus was irrevocably alienated by a provision that it should go to the children on the death of wife and settlor; and no portion of the monthly payments was guaranteed. The divorce decree confirmed the property and alimony settlement. The Court points out two factors, absent here, which they feel influenced the result of the *Douglas* case: (1) Douglas agreed to make up any deficiencies in the income; (2) the corpus was to revest in him on the death of his wife. These, it is said, made it evident that the "alimony trust, which was approved by the decree, was merely security for a continuing obligation of the taxpayer to support his divorced wife."[15] A third factor which they feel conclusively determined the status of the Douglas trust was the power of the Minnesota court subsequently to alter and revise its

[10] 52 Stat. 464 (1938), 26 U. S. C. §24a (1940).
[11] Douglas v. Willcuts, 296 U. S. 1, 9, 56 Sup. Ct. 59, 63, 80 L. ed. 3, 9 (1935).
[12] *Id.* at 8, 56 Sup. Ct. at 62, 80 L. ed. at 8.
[13] 309 U. S. 149, 60 Sup. Ct. 427, 84 L. ed. 399 (1940).
[14] See Bloomenthal, *supra* note 6, at 457 where it is indicated that the Board of Tax Appeals has in the past disclosed a tendency to follow the first broad implications of the doctrine.
[15] Helvering v. Fitch, 309 U. S. 149, —, 60 Sup. Ct. 427, —, 84 L. ed. 399, 400 (1940).

decree and the provisions therein for the wife's benefit. After surveying the law of Iowa, state of the Fitch divorce, they find the husband taxable, since he has at least not sustained the burden of proving that no such power exists in the divorce courts of that state.

"If we were to conclude that this case is an exception to that rule *(Douglas v. Willcuts)* we would be acting largely on conjecture as to Iowa law. That we cannot do. For if such a result is to obtain it must be bottomed on clear and convincing proof, and not on mere inferences and vague conjectures, that *local law and the alimony trust* have given the divorced husband a full discharge and leave no continuing obligation *however contingent.*[16] Only in that event can income to the wife from an alimony trust be treated under the revenue acts the same as income accruing from property after a debtor has transferred that property to his creditor in full satisfaction of his obligation—unless of course Congress decides otherwise."[17]

Thus, the principle seems to have these limits: 1—The pre-existing obligation may be terminated; and if it is, the settlor will not be taxable since there is no longer an obligation to which the trust income is devoted. Consequently, where this result obtains, the nature of the trust is altered, and the income therefrom becomes analogous to that accruing from property which has been transferred from debtor to creditor in full payment of a debt—which, as the Court implies, would certainly not be taxable to the debtor.[18] 2—But whether the obligation is so terminated depends upon (a) stipulations in the trust agreement itself, such as a covenant to make up deficiencies, which leave an obligation continuing after the divorce; or (b) provisions in the state law, such as the power to modify the decree, which have a like effect. If these factors, or either of them, exist the trust becomes "merely security for a continuing obligation" to support.

Carried to its logical extreme, and supported by the actual result of the *Fitch* case, the ultimate criterion of taxability thus becomes the power of the divorce court to modify its decree. More than that, the issue may finally turn upon the ability of the settlor to convince the Court that no such power exists, for as said in the *Leonard* case, "all

[16] Italics supplied.

[17] Helvering v. Fitch, 309 U. S. 149, —, 60 Sup. Ct. 427, —, 84 L. ed. 399, 403 (1940).

[18] Although there has been no express holding, dictum in the *Fitch* case (see note 15, *supra*) indicates that a husband's reversionary interest in the corpus might prevent the trust from assuming this character. This factor alone might determine his taxability, since the trust would then seem more nearly a "channel for the application" of his income than an outright transfer of property. It may be significant that in the *Fuller* case, the only one of this series in which the husband escaped tax, the corpus was to be transferred outright to the wife after ten years. The effect of remainders over to others than the husband or wife, such as to their children who would otherwise be the object of his bounty, remains to be disclosed by future cases where that point alone is present.

we do hold is that respondent has not shown by 'clear and convincing proof' that the court lacks the power. . . ."[19] Thus, two trusts,[20] identical in every detail, incorporated in decrees granting divorces based on the same facts, but decided in different states, may have opposite tax results merely because of fortuitous distinctions in local law.

Recently in *Lyeth v. Hoey*,[21] the Court reiterated the rule under which it adverts to state law in construing the Federal Revenue Act:[22]

"In dealing with the meaning and application of an act of Congress enacted in the exercise of its plenary power under the Constitution to tax income and to grant exemptions from that tax, it is the will of Congress which controls, and the expression of its will, in the absence of language evidencing a different purpose, should be interpreted so as to give a uniform application to a nation-wide scheme of taxation. . . . Congress establishes its own criteria and the state law may control only when the federal taxing act by express language or necessary implication makes its operation dependent upon state law."[23]

Obviously, where the statute is expressly dependent upon state law, the Court is powerless to avoid any inequities which may result from local legal divergencies. However, when the statute is silent and the question becomes one of legislative intent, the Court is in a favorable position to effect "a uniform application" of the tax. Thus, where a particular economic result or benefit is the criterion for the tax, state law may be applied to establish its existence; but where the result or benefit exists independently of its characterization in local law, that law may be disregarded.[24] For example, whether title to certain property has passed is, for most purposes, a matter of state law;[25] whether it has passed by "inheritance" or otherwise is exclusively a federal question.[26] However, an anomalous situation has arisen where, in construing the "gross income" provision, the Court has given effect to the characterization of income by the community property states, which is unlike that obtaining elsewhere.[27] As many authorities contend, the

[19] Helvering v. Leonard, 310 U. S. 80, —, 60 Sup. Ct. 780, 784, 84 L. ed. 721, 724 (1940).

[20] Compare Helvering v. Fuller, 310 U. S. 69, 60 Sup. Ct. 784, 84 L. ed. 715 (1940) with Helvering v. Fitch, 309 U. S. 149, 60 Sup. Ct. 427, 84 L. ed. 399 (1940).

[21] 305 U. S. 188, 59 Sup. Ct. 155, 83 L. ed. 119 (1938).

[22] See generally, PAUL, SELECTED STUDIES IN FEDERAL TAXATION (2nd Ser. 1938) 1-52; 5 PAUL & MERTENS, LAW OF FEDERAL INCOME TAXATION (1934) §53.38; Note (1934) 34 COL. L. REV. 526.

[23] Lyeth v. Hoey, 305 U. S. 188, 194, 59 Sup. Ct. 155, 158, 83 L. ed. 119, 124 (1938).

[24] Burk-Waggoner Oil Ass'n v. Hopkins, 269 U. S. 110, 46 Sup. Ct. 48, 70 L. ed. 183 (1925); Burnet v. Harmel, 287 U. S. 103, 53 Sup. Ct. 74, 77 L. ed. 199 (1932).

[25] See 5 PAUL & MERTENS, *op. cit. supra* note 22, at 863.

[26] Lyeth v. Hoey, 305 U. S. 188. 59 Sup. Ct. 155, 83 L. ed. 119 (1938).

[27] Poe v. Seaborn, 282 U. S. 101, 51 Sup. Ct. 58, 75 L. ed. 239 (1930) (holding each spouse taxable on only one-half of community income, since under state

consequence has been gross inequality in tax results although the economic benefits are identical.[28] For the most part, however, the court has achieved singular success in this endeavor to distribute the tax burden equally. Since this expedient is an outgrowth of that judicial and legislative approach to tax questions which seeks substance rather than form of taxable transactions,[29] no definite rules may be evolved as a guide to future cases. The course followed in each case must necessarily vary with the nature of the tax, the subject, and the policy to be effectuated. That the Court should be left free to effectuate a clear policy of Congress is not to be questioned; but where the procedure adapted to that end involves inequities plainly unforeseeable by Congress, the Court should await its more detailed articulation.

In taxing the income from alimony trusts, the statute by whose implication the Court has justified its advertence to state law merely says that no deduction shall be allowed for "family expenses" in computing net income.[30] That this statute covers the present situation is clear when it is recalled that payment of such an expense by the income from an irrevocable trust is, in effect, an attempt by a circuitous route to receive a prohibited deduction. Thus, by indirection, the Court has reasoned that payments to a divorced wife are in discharge of a "family expense" where the obligation to support continues—the continuance of that obligation depending *ultimately* upon the power of the divorce court to modify its decree. Therefore, state law is applied to determine if that power exists.

A general survey will disclose that the conditions under which this power may be exercised vary considerably from state to state and often in a manner wholly unrelated to basic rights or liabilities of the husband.[31] But accepting the basic premise of the Court that the power to modify will render the obligation to support continuing and the trust a mere security for that obligation, a recourse to state law is inescapable since the condition upon which the tax attaches may only be found there. However, such recourse may at the same time result in a lack of uniformity in the incidence of the tax if the power to modify has merely a theoretical rather than a substantial effect on the present relation of the divorced couple.

Whether this effect upon the nature of the "post-marital" relation

law wife technically had a "vested" interest as distinguished from an "expectancy" in the income.) MAGILL, TAXABLE INCOME (1936) 268-274.

[28] See PAUL, *op. cit. supra* note 22, at 40-44; Altman, *Community Property: Avoiding Avoidance by Adoption in the Revenue Act* (1938) 16 TAX MAG. 138.

[29] See Burnet v. Wells, 289 U. S. 670, 677, 53 Sup. Ct. 761, 763, 77 L. ed. 1439, 1443, (1933).

[30] 52 Stat. 464 (1938), 26 U. S. C. §24a (1940).

[31] See Note (1937) 109 A. L. R. 1068; also see Note (1940) 40 COL. L. REV. 677, 679, n. 17.

is substantive or merely formal is a question of the most abstruse logic. However that may be, the *economic* relation of husband to wife is identical except in one respect; *i.e.* where the power exists, the husband may be later called upon to add to the settlement previously approved. As a practical matter, what substantial obligation is being discharged by his trust income which is not also being discharged by that of the husband more fortunately residenced? What benefits accruing to the former are denied the latter? Far from being continuing, the obligation to further contribute has yet to arise. Yet, the Court would answer, "the existence of wholly contingent obligations—is adequate to support the results reached in *Douglas v. Willcuts.* . . ."[32] To the practical mind this might suggest that the contingent obligation is being discharged by trust income; therefore, settlor is taxable. Obviously this is not true in the sense that the specific obligation has arisen. Then does it mean that the contingent obligation is subject to being discharged by trust income once the contingency has occurred? Not only would such reasoning seem to remove the case from the basic rule since in fact the obligation is not now being so discharged, but it also seems, at best, a half-truth since, when the obligation does arise (unless there is a re-allocation of trust income), it might be discharged in ways wholly unrelated to the trust originally set up. Clearly, the meaning is simply that since there is a *possibility* of the husband's having to contribute further, the decree does not make his general duty to support sufficiently definitive to be subject to absolute discharge in the same manner that a liquidated debt is satisfied by a lump sum settlement; thus, the duty to support continues. Certainly there may be contingent liabilities remaining, such as those arising from the trust agreement itself, which lend more definite reality to this position. But granted that where the power to modify exists, the husband is not completely discharged, the possibility of its exercise seems of too little consequence in most cases to justify its being designated as the dividing line between taxability and non-taxability. If the power were never exercised, clearly the *actual* nature of the post-marital relation would have been the same as if no such power had ever existed, whatever its abstract nature might have been. The logic of the Court seems to depend upon a distinction without a substantial difference, and results in a disparity of treatment not justified by a difference in practical enjoyment or benefit.

The Court might well have viewed the power to modify, not as assuming the continuance of an obligation to support, but rather as referable to a public policy which authorizes adjustments of post-marital

[32] Helvering v. Leonard, 310 U. S. 80, —, 60 Sup. Ct. 780, 783, 84 L. ed. 721, 723 (1940).

financial arrangements as exigencies arise. If, in that event, the trust approved by the decree appeared to be in final satisfaction of the obligation made specific by that judgment itself, the continuity of the general duty to support would be broken; and the obligation would exist only as and when declared in a modifying judgment. Should the new decree place burdens upon the husband which are discharged in a manner unconnected with the original trust, it is clear that the trust payments should not have been taxed to him. Thus, not the mere potentiality of its exercise, but the exercise of the power itself in the form of a modifying judgment, which prescribed new obligations and the manner of their discharge, would be looked to in determining taxability. Not only does this view seem to conform more closely to the realities of the situation, but also its adoption would eliminate the inequities which arise from the use of a criterion found in local law, the effect whose existence or non-existence is more often theoretical than real.

Although the uniformity of tax incidence guaranteed by the Constitution is "geographic" rather than "intrinsic",[33] and a statute conforming to the present view of the Court would no doubt be sustained on this ground, it is highly desirable from the point of view of both the Government and the taxpayer to avoid any inequalities not justified by considerations peculiar to the particular tax.[34] No such considerations are apparent here. The uncertainties inherent in the present holdings suggest the need of a statute expressly designed to cover the maintenance trust situation. Meanwhile, rather than to adopt a policy which often permits discrimination, the Court might well have sanctioned a tax upon the settlor in all such cases, an approach which the dissent asserts is most consistent with the choice first made in *Douglas v. Willcuts*.[35] But whether a statute is forthcoming, it should be strongly emphasized that insistence upon highly doctrinary theory will not always assure that reality of treatment which the Court itself has so often encouraged and tax administration demands.

E. H. SEAWELL.

**Torts—Municipal Corporations—Liability for Death or Injury to Prisoner.**

Two recent North Carolina cases[1] involve injuries committed by one prisoner on a fellow-prisoner. It is significant to note that on

[33] Knowlton v. Moore, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. ed. 969 (1900); Florida v. Mellon, 273 U. S. 12, 47 Sup. Ct. 265, 71 L. ed. 511 (1927).

[34] See PAUL, *op. cit. supra* note 22, at 49-52.

[35] See Helvering v. Fuller, 310 U. S. 69, —, 60 Sup. Ct. 784, 789, 84 L. ed. 715, 720 (1940).

[1] Dunn v. Swanson, 217 N. C. 279, 7 S. E. (2d) 563 (1940); Parks v. Princeton, 217 N. C. 361, 8 S. E. (2d) 217 (1940).

strikingly similar facts different statutes were invoked, a different class of defendants named, and different results reached. These variances make pertinent an investigation of the contrasting liabilities where suit has been against the individual officers, against the town, against the county and against the state.

### *A. Suits Against the Individual Officers*

In the principal case of *Dunn v. Swanson*, suit was against the sheriff, jailer and surety company for jailer's negligence in putting *X* in a cell with a prisoner whom the jailer knew to be violently insane, and who beat *X* to death with a table leg. Recovery was allowed under C. S. 354[2] which provides that a sheriff and his surety shall be civilly liable, on an officer's bond, for "all acts done by said officer by virtue or *under color of* his office". Prior to the addition of the words "under color of" to the statute in 1883, recovery had been limited to instances where the injury resulted from a type of negligence specifically enumerated in the bond.[3] After such statutory change, several decisions correctly effectuated the legislative purpose of increasing the scope of liability.[4] Then in two later decisions the court inconsistently reverted to the old precedents, ignoring the broadened scope of the statute.[5] *Price v. Honeycutt*[6] and the principal case apparently represent a return to a liberal construction of the statute, and in so doing accord with the general rule that a prison official is liable when he knows of, or in the exercise of reasonable care should anticipate, danger to the prisoner, and with such knowledge or anticipation fails to take the proper

[2] N. C. CODE ANN. (Michie, 1939) §354.

[3] Crumpler v. Governor, 12 N. C. 52 (1826) (surety not liable for sheriff's failure to collect tax not mentioned in bond); State v. Long, 30 N. C. 415 (1848) (surety not liable for sheriff's taking cash money in lieu of bail bond); Eaton v. Kelly, 72 N. C. 110 (1875) (surety not liable for unauthorized sale conducted by sheriff); Holt v. McLean, 75 N. C. 347 (1876) (surety not liable for register of deed's issuance of marriage license to girl under age).

[4] Kivett v. Young, 106 N. C. 567, 10 S. E. 1019 (1890) (register of deeds and surety liable for failure to properly record a deed when bond specifically covered such duty); Joyner v. Roberts, 112 N. C. 111, 16 S. E. 917 (1893); Daniel v. Grisette, 117 N. C. 105, 23 S. E. 93 (1895) (register of deeds liable on bond for failure properly to index a mortgage); Warren v. Boyd, 120 N. C. 56, 26 S. E. 700 (1897) (constable liable on bond for illegal arrest and false imprisonment).

[5] Sutton v. Williams, 199 N. C. 546, 155 S. E. 160 (1930); Davis v. Moore, 215 N. C. 449, 2 S. E. (2d) 366 (1939). Explaining its switch from these latter two cases to the present view in the Dunn case, the court said: "A re-examination of the authorities convinced the court that . . . the court was not justified in ignoring the plain terms of the statute as it had been correctly interpreted and applied in *Kivett v. Young*, and other cases decided after its passage, all, of course, subsequent to *Crumpler v. Governor*, 12 N. C. 52, and other decisions of a similar nature rendered prior to the statute. It is only fair to say that in *Davis v. Moore* neither the correcting statute nor the cases interpreting it were called to the attention of the court."

[6] 216 N. C. 270, 4 S. E. (2d) 611 (1939).

precautions to safeguard his prisoners.[7] No test of what constitutes "reasonable care" has been prescribed by our court, but a case from another jurisdiction intimates that it at the least extends to searching incoming prisoners for any possible weapons.[8]

Only one North Carolina decision deals with the liability of an officer for wilful injuries,[9] and it is one of the two aforementioned instances in which the court narrowly construed C. S. 354 and refused recovery on the bond. Yet recovery was allowed under C. S. 4407, which provides that any keeper of a jail who shall do or cause any unlawful injury to the prisoners in his charge shall pay treble damages to the person injured and be guilty of a misdemeanor. Apparently this statute had never before been cited in its 145 years of existence, and even in this case was not adhered to by the court in its assessment of damages. Explanation for the signal lack of reliance on this statute perhaps lies in the fact that no cases involving wilful injuries have arisen, and also in the belief that such a statute was designed to supplement rather than to substitute for the common law action. Seemingly our court holds an officer responsible for any excessive and unnecessary injuries, whether occasioned by acts within the scope of his employment or *ultra vires*.[10] Since the principal case overrules the prior narrow construction of C. S. 354, liability will extend to the bonding surety except in those cases where the officer acts beyond his powers and so assumes sole responsibility.[11]

### *B. Suits Against the City or Town*

Suits against a municipality for injury or death of a prisoner ordinarily involve the question of adequate furnishings of a jail in regard to health and sanitation. The usual rule is that maintenance of a city jail is a governmental (as distinguished from a proprietary) func-

[7] Gunther v. Johnson, 36 App. Div. 437, 55 N. Y. Supp. 869 (2d Dep't 1899) (sheriff not liable for damages inflicted by assault as he knew of no trouble in jail); Hixon v. Cupp, 5 Okla. 545, 49 Pac. 927 (1897) (sheriff and surety liable for injuries inflicted by "kangaroo court" as he knew of its existence and danger); Stinnett v. Sherman, 43 S. W. 847 (Tex. Civ. App. 1897) (chief of police not liable to prisoner attacked by insane cell-mate when he knew of neither's presence); Riggs v. German, 81 Wash. 128, 142 Pac. 479 (1914) (sheriff knew of "kangaroo court" but not liable for injuries inflicted by it since there was no evidence that he knew or had reason to know that prisoners contemplated an assault on plaintiff).

[8] Kusah v. McCorkle, 100 Wash. 318, 170 Pac. 1023 (1918) (sheriff liable for failure to search insane cell-mate who attacked plaintiff); *cf.* Gunther v. Johnson, 36 App. Div. 437, 55 N. Y. Supp. 869 (2d Dep't 1899).

[9] Davis v. Moore, 215 N. C. 449, 2 S. E. (2d) 366 (1939) (deputy closed door on plaintiff's thumb).

[10] Hobbs v. Washington, 168 N. C. 293, 84 S. E. 391 (1915), see note 24, *infra;* for cases from other jurisdictions so holding see Note (1927) A. L. R. 111. For the proposition that an officer may be personally liable although not liable on his bond, see Holt v. McLean, 75 N. C. 347 (1876).

[11] Sutton v. Williams, 199 N. C. 546, 155 S. E. 160 (1930).

tion,[12] and therefore the municipality is not liable to a prisoner for injuries due to improper construction or negligent maintenance.[13] North Carolina departs from the general rule insofar as liability is imposed by Article XI, Section 6, of the Constitution, which provides that "competent legislation" shall require that the "structure and superintendence" of penal institutions of the state, city and county "secure the health and comfort" of the prisoners. What will satisfy the constitutional requirement as to "structure" is uncertain, but apparently almost any pretense is sufficient, for *Nichols v. Fountain,*[14] held adequate a second floor cell in a frame building which caught fire in the absence of any attendants and burned the prisoner to death. Speaking in ambiguous generalities, the court said that there was no liability as long as the jail was constructed properly and "reasonable provision" made for comfort and protection. Should a town be held blameless for locking up and deserting a prisoner in a cell manifestly dangerous? Was "reasonable provision" made for comfort and safety when no guard was near to rescue from just such an eventuality? Other jurisdictions answer affirmatively.[15] But encouragingly, the court has held that an 8 by 14 foot cell underneath a garbage-strewn marketplace helped "accelerate" death "by the noxious air of the guardhouse", and further intimated that absence of a chair, bed, blanket, would attach liability to the city.[16]

The legislation enacted pursuant to the Constitutional requirement makes it the duty of the sheriff or keeper of a jail to cleanse daily the cells of the prisoners, to furnish adequate food and water, fuel, and "every necessary attendance".[17] Six cases have arisen under this law, and only twice were facilities found sufficiently inadequate to warrant recovery.[18] No recovery for injuries due to unsanitary conditions has

[12] For a textual statement of the distinction, see 6 McQUILLEN, MUNICIPAL CORPORATIONS (6th ed. 1928) §§2795 to 2798.

[13] 4 DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911) §1656. *Contra,* Edwards v. Pocahontas, 47 Fed. 268 (C. C. W. D. Va. 1891) (city not absolutely required to maintain a jail and, if it does so, it is liable).

[14] 165 N. C. 166, 80 S. E. 1059 (1914).

[15] McAuliffe v. Victor, 15 Colo. App. 337, 62 Pac. 231 (1900) (prisoner died in jail that burned through negligence of jailer); Alvord v. Richmond, 3 Ohio N. P. 136 (1896) (town not liable for negligence of jailer in not watching fire in faulty stove—but officials liable for plaintiff's death); Carty v. Winooski, 78 Vt. 104, 62 Atl. 45 (1905) (plaintiff suffocated by fumes from fire of unknown origin in mattress); Brown v. Guyandotte, 34 W. Va. 299, 12 S. E. 707 (1890) (jail consumed by fire while keeper was away); McKenzie v. Chilliwhack, 15 B. C. 256 (1909) (prisoner burned to death by fire of unknown origin during temporary absence of jailer on official duties).

[16] Lewis v. Raleigh, 77 N. C. 229 (1887).

[17] N. C. CODE ANN. (Michie, 1939) §1346.

[18] Recovery allowed: Lewis v. Raleigh, 77 N. C. 229 (1877); Shields v. Durham, 118 N. C. 450, 24 S. E. 794 (1896) (on rehearing). Recovery denied: Moffitt v. Asheville, 103 N. C. 237, 9 S. E. 695 (1889); Shields v. Durham, 116 N. C. 394, 21 S. E. 402 (1895); Coley v. Statesville, 121 N. C. 301, 28 S. E. 482 (1897); Hobbs v. Washington, 168 N. C. 293, 84 S. E. 391 (1915).

been allowed since the turn of the century. This may be attributed less to the indifference of the court regarding jail conditions than to the improvement brought about in jail standards by the regular inspections of the State Board of Health and the Board of Charities and Public Welfare.[19]

*Notice* has several times been held prerequisite to a city's liability. An early case permitted recovery without mention of the necessity that the city have knowledge of the inadequacy, saying: "No question arises as to how far the city is liable for the misconduct of its officials, because the act complained of (leaving the prisoner in an unsanitary cell) is the act of the city itself."[20] In the next case against a city,[21] for a jailer's failure to replace broken windows and worn-out bedding, the court held that there was no liability in the absence of a showing that the governing officers of the town had actual notice of the condition, but intimated that if they had such notice and retained incompetent or careless jailers after awareness of their negligent character, there would be liability. A long-standing condition of filth and neglect was held sufficient notice in *Shields v. Durham*[22] particularly since the chief of police informally told the commissioners of the bad facilities. A final opinion[23] held that knowledge of the chief of police concerning defective jail equipment was not adequate notice to impose liability, unless communicated. This leaves the question of what constitutes notice shrouded with uncertainty; but any requirement of notice appears unjust and contrary to the rule that knowledge of the agent is knowledge of the principal. The interests of justice would seem better served if the court imposed liability on a showing that the city had allowed jail conditions to fall below the constitutional and statutory standards. Such a change might well prompt a salutary civic alertness and concern.

In the principal case of *Parks v. Princeton,* the city was held not liable for the negligence of the jail-keeper in putting an unsearched and violent drunk in a cell with the plaintiff, when the drunk wrapped the sleeping plaintiff in an inflammable mattress and set fire to it. Justification was supplied by the time-worn formula that a municipality has no liability for injuries arising out of the performance of a governmental function. The plaintiff introduced evidence to show lack of lights, toilet facilities, ventilation, and proper bedding, apparently seek-

[19] N. C. CODE ANN. (Michie, 1939) §§5008, 7050.
[20] Lewis v. Raleigh, 77 N. C. 229, 231 (1877).
[21] Moffitt v. Asheville, 103 N. C. 237, 9 S. E. 695 (1889).
[22] Shields v. Durham, 118 N. C. 450, 24 S. E. 794 (1896) (plaintiff's feet frozen in filthy cell with window glass out and insufficient bedding).
[23] Coley v. Statesville, 121 N. C. 301, 28 S. E. 482 (1897) (plaintiff died from filth and poor ventilation of jail). Absence of the requirement of notice in other jurisdictions is probably due to the fact that such jurisdictions have no statute comparable to C. S. 1346.

ing to recover on the basis of the town's failure to meet the required standards of construction and supervision, but the court declared that, even conceding sub-standard conditions, there was no causal connection between such omissions and the injury of the plaintiff.[24] Seemingly the court might with more equity have decided oppositely on both rulings. First, the immunity of governmental units, particularly municipalities, to suits of this nature is open to strong criticism.[25] No longer does close adherence to this antiquated precedent promote justice or adequately protect the public under modern conditions of society. Secondly, assuming the prison conditions to have violated the constitutionally-imposed standard, causal connection might reasonably have been found in the utter lack of any safety appliance or means of summoning help to meet such an emergency.

Had the plaintiff sued the sheriff under C. S. 354 on the basis of his deputy's negligence in placing the violent drunk in the same cell, chances of recovery would seem excellent, for such a prisoner was foreseeably dangerous, and the exercise of reasonable care would seem to demand a search of the inebriated prisoner for matches or other dangerous instruments before admitting him.[26] Suit under such a theory is obviously easier of proof than an attempt to establish (assuming a causal connection): (1) violation by the city of a loosely construed constitutional standard of maintenance, and (2) notice of such violation by the city.

### *C. Suits Against the County and the State*

No exception has been found in this state to the general rule that counties are not liable for injuries to prisoners in the absence of some specific statute.[27] In two instances[28] recovery was denied against a

[24] In Hobbs v. Washington, 168 N. C. 293, 84 S. E. 391 (1915), the town and sheriff were joint defendants and no liability attached to the town for the *ultra vires* act of a county official in putting plaintiff in the *city* jail where he suffered from filth and exposure, yet the officer was held personally responsible. Would not the city have been liable if, (1) the plaintiff had been arrested by an authorized city officer, and placed in the contaminating city jail, or, (2) the city and county jointly provided jail facilities?

[25] The dissenting opinion of Justice Wanamaker in Fowler v. City of Cleveland, 100 Ohio St. 158, 126 N. E. 72 (1919), although little followed in later decisions, is the classic revolt against the immunity rule. For comment on this decision, see Notes (1920) 54 AM. L. REV. 916; (1920) 20 COL. L. REV. 772; (1919) 5 CORN. L. Q. 90; (1920) 34 HARV. L. REV. 66; (1920) 18 MICH. L. REV. 708; (1920) 4 MINN. L. REV. 460; (1921) 7 VA. L. REV. 383; (1920) 29 YALE L. J. 911.

[26] Kusah v. McCorkle, 100 Wash. 318, 170 Pac. 1023 (1918) (sheriff held liable for failure of deputy to search insane prisoner before committing him).

[27] The general rule and an analysis of the cases thereunder will be found in: Notes (1906) 2 L. R. A. (N. S.) 95; (1924) 31 A. L. R. 293; (1929) 61 A. L. R. 569; 4 DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911) §1640.

[28] Manuel v. Board of Commr's, 98 N. C. 9, 3 S. E. 826 (1887); Moye v. McLawhorn, 208 N. C. 812, 182 S. E. 493 (1935).

county and its commissioners for injuries sustained in the county jail. In one case non-liability for injuries resulting from the negligent failure to provide blankets was rationalized by a recital of the rule that a county, being a subdivision of the state, is immunized against the acts of its agents in the absence of an express statute.[29] Other states would hold the jailer personally liable,[30] and C. S. 354 warrants North Carolina in likewise holding a sheriff and his surety liable for failure to provide heat or food, or for injurious subjection to unnecessary filth. The second case[31] is comparable to the principal cases in that injury arose from actions of fellow-prisoners who subjected the plaintiff to a mock trial by their "kangaroo court" and, upon his refusal to pay a fine, severely beat him. The county commissioners knew of the illicit court, but had taken no steps to safeguard newly admitted prisoners. Instead of suing the sheriff upon his statutory bond,[32] the plaintiff elected to rely on C. S. 1317, requiring the commissioners to pass regulations governing the prisoners; but the court held the statute to impose only a "discretionary" duty, and that only on proof of corrupt and malicious motives would the commissioners incur individual liability.[33]

The immunity of a sovereign state to suit[34] (without its consent) and the inapplicability of the rule of *respondeat superior* to agents of the state effectively prevent recovery against the state for injuries to prisoners. North Carolina has held the state prison non-suable in the absence of express statute,[35] and has also exempted the state from liabil-

[29] Manuel v. Board of Commr's, 98 N. C. 9, 3 S. E. 829 (1887). This case also discusses the distinction between the liabilities of city and county, which distinction is further commented on in Note (1934) 12 N. C. L. REV. 172.

[30] Topeka v. Boutwell, 53 Kan. 20, 35 Pac. 819 (1894); Nixa v. McMullin, 198 Mo. App. 1, 193 S. W. 596 (1917) (marshal liable for placing plaintiff in unsanitary cell); Richardson v. Capwell, 63 Utah 616, 176 Pac. 205 (1918) (marshal liable for exposing prisoner to cold, poor food, and unsanitary conditions); Clark v. Kelly, 101 W. Va. 650, 133 S. E. 365 (1926) (jailer liable for placing plaintiff in unsanitary jail); *cf.* Martin v. Moore, 99 Md. 41, 57 Atl. 671 (1904); Williams v. Adams, 3 Allen 171 (Mass. 1861) (prisoner confined in house of correction recovered against master for negligent failure to furnish food, heat, and clothes); Rose v. Toledo, 24 Ohio C. C. 540 (1903); Lunsford v. Johnson, 132 Tenn. 615, 179 S. W. 151 (1915); Bishop v. Lucy, 21 Tex. Civ. App. 326, 50 S. W. 1029 (1899) (neither policeman nor marshal liable for janitor's transfer of prisoner to filthy cell, in absence of showing that defendants were responsible for condition of cell, or had ordered the transfer, or were aware of it).

[31] Moye v. McLawhorn, 208 N. C. 812, 182 S. E. 493 (1935).

[32] For the view that a recovery could have been obtained in such event: Ratcliff v. Stanley, 224 Ky. 819, 7 S. W. (2d) 230 (1928); Hixon v. Cupp, 5 Okla. 545, 49 Pac. 927 (1897); Taylor v. Slaughter, 171 Okla. 152, 42 P. (2d) 235 (1935); Eberhart v. Murphy, 110 Wash. 158, 188 Pac. 17 (1920). In each of these cases there was a "kangaroo court" whose existence and dangerous propensities were known to the jailer.

[33] Authority for the latter statement is contained in Hipps v. Ferrall, 173 N. C. 167, 91 S. E. 831 (1917).

[34] McGuire, *State Liability for Tort* (1916) 30 HARV. L. REV. 20.

[35] Moody v. State's Prison, 128 N. C. 12, 38 S. E. 131 (1901).

ity where a convict was injured through negligence of a state supervisor while working on the streets (a proprietary function to which liability ordinarily attaches).[36]

An investigation of other jurisdictions reveals cases of fellow-prisoner injuries analagous to the two principal cases, and in no instance has a city been held liable for the negligence of its agents in not regulating prisoners more carefully.[37] However, where suit has been against the individual bonded officer, there has been recovery in nearly all cases in which the officer knew or should have known of the danger to the prisoner.[38] Thus the knowledge rule has extended not only to "kangaroo court" and direct assault cases, but to a situation where a prisoner caught small-pox due to the jailer's failure to isolate an inmate known to be diseased,[39] and to a situation where the sheriff knew of an inmate's wounds but failed to secure medical aid.[40]

Thus North Carolina accords with the weight of authority in granting recovery when the sheriff is defendant and denying it when the town is defendant, on substantially identical fact-situations. From a social point of view the result reached in the Parks case is palpably undesirable, yet remedy lies only in a statutory imposition of liability on town and county for negligence in the exercise of its "governmental" functions.

CHARLES EDWIN HINSDALE.

**Workmen's Compensation—Injury from Personal Assault as Arising Out of Employment.**

While at work, *P* was jeeringly taunted by his supervisor until he retaliated with abusive language. Thereupon the supervisor struck and injured *P*. Recovery was allowed under Workman's Compensation Act.[1]

Admittedly the injury occurred in the "course of employment." But it is highly controversial whether an assault flowing from purely personal bickering may be said to "arise out of employment." Difficulty inheres in the necessity of establishing a sufficient causal connection between the injury and the employment.[2]

[36] Clodfelter v. State, 86 N. C. 51 (1882).
[37] In each case the jailer had reason to anticipate the danger from the prisoner, but liability was denied against the city on the basis of immunity to suit for injuries arising out of governmental functions.
[38] See note 31, *supra*.
[39] Hunt v. Rawton, 14 Okla. 181, 288 Pac. 342 (1930).
[40] Moxley v. Roberts, 43 S. W. 482 (Ky. 1897).

[1] Hartford Accident & Indemnity Co. v. Cardillo, 112 F. (2d) 11 (App. D. C. 1940).
[2] Coronado Beach Co. v. Pillsbury, 172 Cal. 682, 158 Pac. 212 (1916); Connelly v. Samaritan Hospital, 259 N. Y. 137, 181 N. E. 76 (1932).

The potential flexibility of the phrase "out of employment" has been wielded with increasing liberality in favor of injured employees.[3] Where employment leads to passage along public streets, injuries from vehicles,[4] slipping or tripping,[5] falling objects,[6] and explosions[7] are compensable. Justification is found in the forced exposure to the risks of the street, even though such risks are common to the public and not peculiar to the employee. Recovery is further allowed where presence on the street is casual and collateral to employment, as where occasioned by telephoning[8] or seeking a toilet.[9] Narrower construction occurs in a North Carolina holding that a mad dog bite was not compensable although the bitten employee was at his post of work.[10]

Illustration of the liberal trend occurs also in cases involving accidental shooting. Compensable injury occurred to a traveling representative shot on a station platform,[11] to a janitor shot while cleaning steps,[12] and to a waiter by a gun being cleaned by a policeman.[13] In such cases North Carolina, however, holds fast to the moderate view, and does not allow compensation unless the nature of the employment subjects the employee to the particular hazard. Hence no recovery was allowed an employee shot by a boy hunting sparrows.[14]

"Horseplay" cases reveal varying degrees of liberality. Most jurisdictions allow recovery where the injured worker was a non-participant;[15] some allow recovery despite the injured worker's participation

[3] McLaughlin v. Davies Lumber Co., 220 Ala. 440, 125 So. 608 (1929); Billiter, Miller & McClure v. Hickman, 247 Ky. 211, 56 S. W. (2d) 1002 (1933); Industrial Comm. of Ohio v. Weigandt, 102 Ohio St. 1, 130 N. E. 38 (1921).

[4] Western Pacific R. R. v. Industrial Accident Comm. of Cal., 193 Cal. 413, 224 Pac. 754 (1925); Cook's Case, 243 Mass. 572, 137 N. E. 733 (1923).

[5] McCullough v. Pittsburgh Glass Co., 107 Conn. 164, 140 Atl. 114 (1927); New Amsterdam Casualty Co. v. Hoage, 62 F. (2d) 468 (App. D. C. 1932); Redner v. K. C. Faber & Son Co., 223 N. Y. 379, 119 N. E. 482 (1918).

[6] Mahold v. Thompson-Starrett Co., 134 Minn. 113, 158 N. W. 913 (1916).

[7] Kozdeba v. People's Gas Light & Coke Co., 232 Ill. App. 495 (1924); Roberts v. J. F. Newcombe and Co., 201 App. Div. 759, 195, N. Y. Supp. 405 (3d Dep't 1922).

[8] Mueller Const. Co. v. Industrial Brd., 283 Ill. 148, 118 N. E. 1028 (1918).

[9] Zabriskie v. Erie R. R., 86 N. J. L. 266, 92 Atl. 384 (1914).

[10] Plemmons v. White's Service, 213 N. C. 148, 195 S. E. 370 (1938); Bodenheimer v. Ragan, 3 N. C. I. C. 95 (1931). But see Katz v. Radans, 232 N. Y. 420, 134 N. E. 330 (1922) (Employee stabbed by insane man while filling employer's truck).

[11] Frigidaire Corp. v. Industrial Accident Comm., 103 Cal. App. 27, 283 Pac. 974 (1929).

[12] Greenberg v. Voit, 250 N. Y. 543, 116 N. E. 318 (1929).

[13] Entrocut v. Paramount Bakery & Restaurant Co., 222 App. Div. 844, 226 N. Y. Supp. 808 (3rd Dep't 1928).

[14] Bain v. Travora Mfg. Co., 203 N. C. 466, 166 S. E. 301 (1932); Whitley v. N. C. State Highway Comm., 201 N. C. 539, 160 S. E. 827 (1931) (Claimant shot by hunter while working on employer's truck). Contra: Boris Const. Co. v. Haywood, 214 Ala. 162, 106 So. 799 (1925) (Compensation allowed in identical case).

[15] Leonbruno v. Champlain Silk Mills, 229 N. Y. 470, 128 N. E. 711 (1920);

provided such "horseplay" was a common occurrence and so known to the employer.[16] A few permit compensation even where the "horseplay" was neither customary nor within the employer's knowledge.[17] These latter decisions lean heavily upon a doctrine that outbursts of "horseplay" are inevitable by-products of continuous human association and accordingly "arise out of employment." Such a rationale is succinctly put by Judge Cardozo: "The claimant's presence in the factory in association with other workmen involved exposure to risk of injury from the careless acts of those about him. . . . Whatever men and boys will do, when gathering together in such surroundings, at all events if it is something reasonably expected was one of the perils of his service."[18]

Where an employee suffers a wilful assault from either a fellow workman[19] or a third person,[20] compensation is contingent upon whether the altercation bore any relation to the employment. North Carolina adheres to this view.[21] Other cases have anticipated the principal decision and allowed recovery for assaults unrelated to the employment, and even where the injured claimant was guilty of provocation. Injury was held to have risen "out of employment", where a co-worker made a sudden assault merely to satisfy personal spleen,[22] where the claimant was shot by an employee who returned intoxicated

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Chambers v. Union Oil Co. Inc., 199 N. C. 28, 163 S. E. 594 (1930); Badger Furniture Co. v. Industrial Comm., 195 Wis. 134, 217 N. E. 734 (1928); Notes (1921) 13 A. L. R. 540, (1925) 36 A. L. R. 469, (1926) 43 A. L. R. 492.

[16] Kokomo Steel & Wire Co. v. Irick, 80 Ind. App. 610, 141 N. E. 769 (1923); Anderson v. Kerr State Industrial Comm., 155 Okla. 137, 7 P. (2d) 902 (1932); Note (1930) 9 N. C. L. REV. 105.

[17] East Ohio Gas Co. v. Coe, 420 Ohio App. 610, 182 N. E. 123 (1923) (Claimant in jest took ruler from co-worker, and struggle followed resulting in fatal injury); Brown v. Vacuum Oil Co., 171 La. 707, 132 So. 117 (1930) (Claimant sprinkled a co-worker in fun; latter attempted to take hose and injured former); Note (1932) 46 HARV. L. REV. 166.

[18] Leonbruno v. Champlain Silk Mills, 229 N. Y. 470, 471, 128 N. E. 711, 712 (1920).

[19] Globe Indemnity Co. v. Industrial Accident Comm., 193 Cal. 470, 225 Pac. 273 (1924); Little v. Atlas Drop-Forge Co., 221 Mich. 604, 192 N. W. 619 (1923); Janchimsky v. E. U. Bliss Co., 198 App. Div. 8, 189 N. Y. Supp. 154 (3d Dep't 1923); Brown, *Arising out of Employment* (1932) 8 WIS. L. REV. 217; Note (1933) B. U. L. REV. 184; Note (1936) 8 ROCKY MT. L. REV. 301.

[20] *Ex Parte* Terry, 211 Ala. 418, 100 So. 768 (1924); Clark v. Industrial Comm., 356 Ill. 641, 191 N. E. 209 (1934); Rosmuth American Radiator Co., 200 App. Div. 207, 193 N. Y. Supp. 769 (3d Dep't 1922).

[21] Conrad v. Cook-Lewis Foundry Co., 198 N. C. 723, 153 S. E. 266 (1930); Winberry v. Farley Stores, Inc., 204 N. C. 79, 167 S. E. 476 (1933); Wilson v. Boyd & Goforth, 207 N. C. 344, 177 S. E. 178 (1934).

[22] Grosberg v. H. and H. Taxi Corp., 250 App. Div. 804, 294 N. Y. Supp. 201 (3d Dep't 1937) (Claimant accused of being a chiseler and assaulted by fellow employee); Ferguson v. Cady-McFarland Gravel Co., 156 La. 871, 101 So. 248 (1924) (Claimant while in stooping position was suddenly struck on head by a co-worker). In both cases there is a strong indication that the assault was not due merely to personal ill-will but originated from the work.

while off duty;[23] where claimant was stabbed by an insane stranger;[24] and where the claimant provoked an assault by abusive language.[25] Yet where an employee was injured in an assault which he initiated as aggressor, recovery was denied.[26] None of the cases extend to the situation where a quarrel has its beginnings entirely outside of and disassociated from work, and employment only affords an opportunity for previously aroused animosity to break into physical violence. However, the reasoning of the more liberal courts appears sufficiently comprehensive to include even such an eventuality.

Obviously the instant decision departs from the weight of precedent and widens the scope of the formula, "out of employment." The court repudiates the time-honored necessity that the act be in line of duty, or forward the work, or create a special risk; instead it finds sufficient causal connection in the perils of human association. It reasons that "in bringing men together, work brings these qualities together, caused friction between them, creates occasions for lapses into carelessness, for fun making and emotional flareup. These expressions of human nature are incidents inseparable from working together." Inescapeably this reflects the alloy of legal reasoning with judicial notion of desirability. It veers sharply toward the implication that any injury sustained during working hours may sufficiently "arise out of employment" regardless of the absence of a legalistic causal relation.[27]

Such a trend may profitably be examined in the light of the evils sought to be corrected by Workman's Compensation legislation. Industry was to bear the reasonable cost of human injury found to be inseparable from and necessarily attributable to its functioning.[28] Absolute liability was never sought to be imposed,[29] and such attempt would hazard constitutional rejection for the Supreme Court has declared: "It may be assumed that where an accident is in no matter related to

[23] Wakefield v. World Telegram, 249 App. Div. 884, 292 N. Y. Supp. 588 (3d Dep't 1937); *cf.* Wilson v. Boyd & Goforth, 207 N. C. 344, 177 S. E. 178 (1934) (Claimant being chased by drunken co-worker fell and sustained injuries).

[24] Hartford Accident & Indemnity Co. v. Hoage, 85 F. (2d) 417 (App. D. C. 1936) (Seemingly compensation allowed solely because claimant was in "course of employment").

[25] Keybee v. Woodward-Walker Lumber Co., La., 147 So. 830 (1933); *cf.* Carbone v. Loft, 219 N. Y. 646, 114 N. E. 1062 (1916).

[26] Fazio v. Cardillo, 109 F. (2d) 835 (App. D. C. 1940).

[27] A few statutes merely require that the injury occur "in the course of employment"; others require that the injury arise "out of *or* in the course of employment." Yet such statutes have received only a slight difference in treatment from those containing a dual requirement. DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION (1936) 680-683.

[28] See Newman v. Industrial Comm., 203 Wis. 358, 360, 234 N. W. 495 (1931).

[29] Mueller Const. Co. v. Industrial Board, 283 Ill. 148, 118 N. E. 1028 (1918); *cf.* dissenting opinion of Mr. Justice McKenna in Arizona Copper Co. v. Hammer, 250 U. S. 400, 39 Sup. Ct. 553, 63 L. ed. 1058 (1919).

the employment, an attempt to make the employer liable would be so clearly unreasonable and arbitrary as to subject it to the ban of the constitution.[80] The instant decision is dangerously far-reaching in its implications. A scrutiny of the aims underlying Workman's Compensation legislation may well prompt other courts to refuse to follow.

J. G. LAMONT.

[80] Cudahy Packing Co. v. Parramore, 263 U. S. 418, 423, 44 Sup. Ct. 153, 154, 68 L. ed. 366 (1923).