UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 23 | Number 1 Article 8

12-1-1944

Notes and Comments

North Carolina Law Review

NOTES AND COMMENTS

Jurisdiction—Resident Judge and Regular Judge at Chambers or on Vacation

Is the jurisdiction of a resident judge at chambers concurrent with that of the regular term judge at chambers? Two recent North Carolina cases have thrown a shadow across this question. In the first of these cases, *Hill* v. *Stansbury*,[1] the plaintiffs sued Guilford County Commissioners for an accounting of public funds unlawfully expended and at that time disclaimed any right personally to participate in the recovery. Judgment was awarded to the plaintiff. Both sides noted an appeal and then later entered a consent judgment before the resident judge of the 12th Judicial district at chambers. The amount of the judgment was paid to the clerk of Guilford County. The plaintiff then filed petition before the same resident judge asking for reimbursement for expenses and counsel fees, and this petition was granted. On appeal the Supreme Court held that the resident judge had no jurisdiction over the petition for expenses; also the court questioned the right of the resident judge to enter the consent judgment by saying, "His jurisdiction over the matter, *if at any time he had any (Italics supplied.)*, ended with the signing of the consent judgment dismissing the appeals."[2] In the second case, *State Distributing Corp.* v. *Travelers Indemnity Co.*,[3] involving the validity and extent of an insurance binder, a resident judge entered judgment at chambers upon an agreed statement of facts. In the Supreme Court the majority entirely omitted any reference to the jurisdictional phase but reversed the lower court's decision on another ground. Justice Barnhill[4] voted to affirm the lower court's decision, but primarily argued that there had been no jurisdiction in the lower court. The jurisdictional argument was based on two points: (1) Although G. S. 7-65[5*] apparently confers concurrent jurisdiction on a resident judge in those matters of which the Superior Court has jurisdiction out of term, actions pending on the civil issue

[1] 224 N. C. 356, 30 S. E. (2d) 150 (1944).

[2] Hill v. Stansbury, 224 N. C. 356, 357, 30 S. E. (2d) 150, 151 (1944), cited *supra* note 1.

[3] 224 N. C. 370, 30 S. E. (2d) 377 (1944).

[4] Justices Seawell and Devin concurred in the dissent.

[5*] N. C. GEN. STAT. ANN. (Michie, Sublett, & Stedman, 1943) §7-65. "In all cases where the superior court in vacation has jurisdiction, and all of the parties unite in the proceedings, they may apply for relief to the superior court in vacation, or in term time, at their election. The resident judge of the judicial district and the judge regularly presiding over the courts of the district, shall have concurrent jurisdiction in all matters and proceedings where the superior court has jurisdiction out of term."

docket are not included. In support of this Justice Barnhill pointed to the dictum of the *Stansbury* case as controlling. (2) Since this was a controversy without action under G. S. 1-250,[6*] only the judge who would have had jurisdiction *had the cause been submitted to a jury (Italics supplied.)* had authority to hear it at term or, by consent, out of term.

Often there are two or more judges of the Superior Court in the same district at the same time, *i.e.*, the resident judge of the district and the judge holding the regular terms of court.[7*] In some instances this situation leads to confusion, well illustrated by the two instant cases, as to which judge has jurisdiction. "It may be generally stated that the judge holding the courts of the district in regular succession is the only proper judge, and has sole jurisdiction in civil actions in such district during the six months of his assignment. The resident judge has no more authority than any other judge, except when holding the courts of his district, unless specially authorized by statute."[8] However, G. S. 7-65[9] literally gives the resident judge of the judicial district and the judge regularly presiding over the courts of that district concurrent jurisdiction in all matters of which the Superior Court has jurisdiction "out of term." According to McIntosh, ". . . 'term time' means the time while the court is actually in session; that is, from the day of the opening of the court to the day of the adjournment when the judge finally leaves the bench. 'Vacation' is the period of time between two terms of court in a county, and it may also refer to the time during a term when the court is not actually in session, as during a recess."[10] The latter half of this statement refers to what is called "chambers business." Further substantiating the synonymy of these phrases, McIntosh says, "Hearings before a judge outside of the courthouse, or out of the regular session of the court at which business is to be done, are said to be at chambers and are called 'chambers business.' "[11] "In a case of motions,

[6*] *Id.* §1-250. "Parties to a question in difference which might be the subject of a civil action may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought. But it must appear by affidavit that the controversy is real, and the proceedings in good faith to determine the rights of the parties. The judge shall hear and determine the case, and render judgment thereon as if an action were pending."

[7*] The North Carolina Superior Court system is divided into two divisions, the east and the west, which are further subdivided into districts whose number is determined by the legislature. Each district elects a judge of the Superior Court who resides in that district and who rotates from district to district within his division for terms of court. The districts include a number of counties, and a judge holding a term of court in a district spends some time in each county. N. C. GEN. STAT. ANN. (Michie, Sublett, & Stedman, 1943) §§7-68, 7-69; MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE IN CIVIL CASES (1929) §§26, 27, 41-46.

[8] MCINTOSH, *op. cit. supra* note 9, §49.

[9] *See* note 5 *supra.*

[10] MCINTOSH, *op. cit. supra* note 9, §50.

[11] *Id.* at §51.

orders and other proceedings which may be heard by the judge out of term, that is, in vacation or at chambers, the court is always open. . . ."[12] Syllogizing, it would appear that the jurisdiction of the regular judge of the district out of term, that is to say, of the business conducted between two terms of court *or* in chambers in recess of a session, would be concurrent with the jurisdiction of a resident judge who likewise is in vacation or at chambers. Case examination leads to a confused picture of this situation.

The term "regular" judge will be used hereafter to designate the judge who at that time is holding a regular term of court in order to distinguish him from the "resident" judge.[13*] The first phase of the problem to be discussed is the jurisdiction of the regular judge at chambers or in vacation.

An early North Carolina case, *Bynum* v. *Powe,* laid down a set of rules as to what may be done out of term: ". . . all ordinary civil actions must be brought to and proceeded in to their regular determination at regular terms of the Superior Courts. This is the general course and extent of procedure, and there is no authority of the court or judge to grant orders, judgments, or take any action in such action out of term, except in respects specially provided for, such as provisional remedies, proceedings supplementary to execution, submitting a controversy without action, confessing judgments without action, applications for mandamus and the like."[14] Two cases prior to the *Bynum* case allowed the regular judge out of term to amend the records,[15] and to appoint a receiver and amend an order made at term.[16] There is another situation when there may be jurisdiction out of term. In addition to what is strictly chambers business as set out in the *Bynum* case, the regular judge may hear matters or motions outside of the courtroom with the consent of the parties.[17] Such consent has been given in cases involving a judgment settling dower rights given after a term of court expired;[18] a judgment rendered in vacation in another county than where the action was pending;[19] a judgment given out of term in an action for damages for trespass;[20] an action for dissolution and settlement of a corporation;[21] and a petition by a stockholder for appoint-

[12] *Id.* at §40.

[13*] This comment does not include, in scope, a discussion of the jurisdiction of special judges.

[14] 97 N. C. 374, 382, 2 S. E. 170, 173 (1887).

[15] Falkner v. Hunt, 68 N. C. 476 (1873).

[16] Coates Bros. v. Wilkes, 94 N. C. 174 (1886).

[17] State v. McLeod, 222 N. C. 142, 22 S. E. (2d) 223 (1942); Delafield v. Lewis Mercer Construction Co., 115 N. C. 21, 20 S. E. 167 (1894).

[18] Shackelford v. Miller, 91 N. C. 181 (1884).

[19] McDowell v. McDowell, 92 N. C. 228 (1885).

[20] Hawkins v. Richmond Cedar Works, 122 N. C. 87, 30 S. E. 13 (1898).

[21] Clark v. Eugenia Mfg. Co., 150 N. C. 372, 64 S. E. 178 (1909).

ment of a receiver of a corporation.[22] An interesting fact situation is found in *Bank* v. *Gilmer*[23] where the plaintiff sued on a note, and the defendant filed no answer. The plaintiff consented not to enter judgment by default on the condition that if any other creditor of the defendant entered a judgment, the plaintiff's judgment by default could be signed by another judge in vacation in another county. Such out of term signing was upheld. In *Cogburn* v. *Henson,*[24] the trial ended on a Saturday, and since the judge wanted to catch a train, both parties agreed that the jury might return a verdict and that the judgment might be signed out of term and out of county. This case was upheld even though the judge did not sign a verdict consistent with the jury's findings, the Supreme Court refusing to read into the agreement any words limiting the judge's signing of the judgment to that which the jury decided.

On the other hand, an early case refused jurisdiction at chambers to a regular judge of an action of *mandamus* to compel the state auditor to collect a tax. This case turned on a strict interpretation of a statute whereby *mandamus* must be made by summons and complaint, and the summons "shall be returnable to the regular term of the Superior Court."[25] In a case of a *mandamus* action to enforce a money demand, the court refused jurisdiction to a judge at chambers because a statute made service for *mandamus* for a money demand returnable only at term time; but applications for writs to enforce other demands could be returnable at chambers.[26] Where a receiver for an insolvent corporation was appointed and property ordered sold and an interpleader was entered for a prior lien on the property, on which interpleader the parties joined issues, it was held reversible error for a regular judge at chambers to decide the merits of the interpleader.[27] In a case where a judgment by default was entered in a civil action to require the defendant to deliver a tax deed, it was decided that the judge, who at his home after the term of court ended signed an order vacating the judgment by default, had no authority to do this.[28] A judge who signed a judgment while standing in front of his boarding-house after he left the courtroom was found to have no jurisdiction.[29] A similar case ruled that a judge had no authority to amend a judgment, after a session of court, in his hotel room without the consent of the opposing counsel.[30]

[22] Killian v. Maiden Chair Co., 202 N. C. 23, 161 S. E. 546 (1931).
[23] 118 N. C. 668, 24 S. E. 423 (1896).
[24] 179 N. C. 631, 103 S. E. 377 (1920).
[25] Belmont v. Reilly, 71 N. C. 260, 262 (1874).
[26] Rodgers v. Jenkins, 98 N. C. 129, 3 S. E. 821 (1887).
[27] N. C. Bessemer Co. v. Piedmont Hardware Co., 171 N. C. 728, 88 S. E. 867 (1916).
[28] Dunn v. Taylor, 187 N. C. 385, 121 S. E. 659 (1924).
[29] May v. Nat. Fire Ins. Co., 172 N. C. 795, 90 S. E. 890 (1916).
[30] Hinton v. Life Ins. Co. of Va., 116 N. C. 22, 21 S. E. 201 (1895).

In a bastardy proceeding the court decreed that a judge at chambers could not decide an appeal without the consent of the prosecutrix.[31]

Since an examination of those cases which have denied jurisdiction to a regular judge at chambers or in vacation has revealed nothing which would preclude a regular judge from hearing matters, other than strictly chambers business, out of term by consent of the parties, it would seem that in the *Stansbury* case consent judgment could have been heard adequately out of term. But the *Stansbury* case had one further point in that the consent judgment was entered not only out of term, but by a resident judge instead of by the regular judge who would have heard the case had it come up on the civil issue docket. It is this point that Justice Barnhill in the *Indemnity Co.* case stresses so strongly. Based upon the previous inference drawn from a literal interpretation of the G. S. 7-65, it would seem that if the jurisdiction of the resident judge and the regular judge at chambers are concurrent in proceedings where such consent had been given for the judgment to be rendered out of term, it would not matter if it were heard before a resident judge or the regular judge before whom it might have been heard according to the civil issue docket.

The conclusion that there should be no difference in jurisdiction between a regular judge at chambers and a resident judge at chambers despite the fact that the case was pending on a civil issue docket seems to have some foundation in the case of *City of Reidsville* v. *Slade*.[32] Here the defendant obtained a restraining order from the regular judge of the 10th Judicial district to prevent the plaintiff from taking his land by eminent domain. The plaintiff then had the injunction dissolved before the resident judge of the 12th Judicial district at chambers while he was holding courts of the 21st district, and the jurisdiction of the resident judge at chambers was upheld. Concededly, this verdict may have been substantially justified by the injunction statute in question, G. S. 1-498, but it seems to be some authority also for a resident judge deciding an issue which was pending on a civil issue docket in another district. In *Edmundson* v. *Edmundson*,[33] there is found a case somewhat parallel with the fact situation in the *Stansbury* case. In the *Edmundson* case the question turned on whether a resident judge had jurisdiction at chambers to sign a consent judgment out of the county and out of the district in which the cause was pending when at that time by the law of rotation he was holding the courts of another district. The Supreme Court held that he had such jurisdiction. It is to be noted however, that the resident judges, in both of these cases, were holding courts in districts other than that of their residence al-

[31] State v. Parsons, 115 N. C. 730, 20 S. E. 511 (1894).
[32] 224 N. C. 49, 29 S. E. (2d) 215 (1944).
[33] 222 N. C. 181, 22 S. E. (2d) 424 (1942).

though both decisions were rendered when the courts were not in session but at chambers. It could be argued that they rendered the decisions in the capacity of resident judges of their home districts.

Nothing more is to be found in the *Stansbury* case to substantiate the idea that the resident judge could not have rendered the consent judgment which was pending on the civil issue docket other than the slight doubt cast by the court as to the jurisdiction of the judge who signed a subsequent petition—"if at any time he had any." It would appear that the *Edmundson* case at least would support the jurisdiction of the resident judge on this point and be in accord with the conclusion drawn from G. S. 7-65.

Yet jurisdiction of a resident judge has been restricted in two cases before the *Edmundson* case. In *Moore* v. *Moore*[34] the plaintiff appealed from a judgment reducing alimony in a divorce action pending in A. county, which was rendered by a resident judge of the 13th district at chambers who at that time was assigned to duty in the 15th district. The court in granting the appeal said that the judge of the district who was assigned under the rotation system had sole jurisdiction except in those cases otherwise specially provided by statute, and those exceptions in civil cases are restricted to restraining orders, injunctions, appointment of receivers and *habeas corpus* proceedings. In *Ward* v. *Agrillo*[35] a resident judge was refused jurisdiction to hear and determine an appeal from a judgment of a Superior Court clerk of any county in his district because he was not at any time holding courts of his district under assignment or by exchange or under special commission.

Whether the decision of the *Edmundson* case in effect overruled these earlier cases was a question avoided by the court in deciding the *Stansbury* case. The court in the latter case only hinted at the fatality of the jurisdiction of the resident judge to render a consent judgment in a case pending on a civil issue docket. It would seem that Justice Barnhill in his dissent to the *Indemnity Co.* case perhaps placed more reliance on the *Stansbury* case than was justified.

The *Indemnity Co.* case involved a controversy without action which was submitted to the jurisdiction of a resident judge while pending on the civil issue docket. There are numerous cases where controversies without action have been submitted to regular judges at chambers for decision.[36] In each of these however, the judge was judge of the

[34] 131 N. C. 371, 42 S. E. 822 (1902).

[35] 194 N. C. 321, 139 S. E. 451 (1927); *accord,* Howard v. Queen City Coach Co., 211 N. C. 329, 190 S. E. 478 (1937).

[36] Consolidated Realty Co. v. Koon, 216 N. C. 295, 4 S. E. (2d) 850 (1939); Privott v. Graham, 214 N. C. 199, 198 S. E. 635 (1938); General Realty Co. v. Lewis, 212 N. C. 45, 192 S. E. 902 (1937); Swain County v. Welsh, 208 N. C. 439, 181 S. E. 321 (1935); Webb v. Port Commission, 205 N. C. 633, 172 S. E.

district, presiding out of term or at chambers by consent of the parties. The question of a resident judge's jurisdiction to decide at chambers a controversy without action seems to be a new problem. A somewhat analogous situation arose in the case of *Greene* v. *Stadiem* where it was held that a special judge had no jurisdiction to decide at chambers a controversy without action when he was not holding a term of court. This decision was based on a narrow interpretation of G. S. 1-250. It is this same interpretation that Justice Barnhill argued for in the dissent of the *Indemnity Co.* case. G. S. 1-250 allows a controversy without action to be brought before any court which would have had jurisdiction if an action had been brought. Since G. S. 7-65 confers concurrent jurisdiction on the resident judge only in those matters of which the Superior Court has jurisdiction out of term, and since controversies without action may be submitted before the regular judge of a district at chambers or out of term by the consent of the parties, it would seem that the resident judge would have concurrent jurisdiction; and, apparently, the majority of the court in the *Indemnity Co.* case so thought —as nothing whatsoever was mentioned in the opinion as to the jurisdictional question. However, Justice Barnhill seems to have read G. S. 1-250 as a limitation on G. S. 7-65 so as to leave only the judge who would have had jurisdiction had the cause been submitted to a jury the authority to hear it out of term by the consent of the parties.

Justice Barnhill concluded his dissent on the jurisdictional phase with the thought that the resident judge should be given concurrent jurisdiction in all matters not requiring the intervention of a jury or in which trial by jury has been waived. It is submitted that perhaps that authority is already established, as the majority in the *Indemnity Co.* case seemed to think, by a literal reading of G. S. 7-65; but it is agreed that legislative action definitely settling this problem of overlapping jurisdiction would be welcomed by the legal profession.

IDRIENNE E. LEVY.

Damages—Personal Injuries—Reduction to "Present Value" for Future Injury—Instructions—Appeal and Error

In a recent case[1] the plaintiff was injured by the negligence of the defendant's truck driver at Pope Field, Fort Bragg, N. C. The following charge was submitted by the trial court relative to the measure of damages: " . . . if you come to consider that question (damages) you have a right to take into consideration the age of the plaintiff at

377 (1934); Mitchell v. Board of Education, 201 N. C. 55, 158 S. E. 850 (1931); City of Charlotte v. Shepard, 120 N. C. 411, 27 S. E. 90 (1897); Arnold v. Porter, 119 N. C. 123, 25 S. E. 785 (1896); Brem v. Lockhart, 93 N. C. 191 (1885); Harrell v. Peebles, 79 N. C. 26 (1878); Hervey v. Edmunds, 68 N. C. 243 (1873).

[1] Daughtery v. Cline, 224 N. C. 381, 30 S. E. (2d) 322 (1944).

the time, his physical and mental condition since, resulting from this accident; his means and ability to engage in useful and gainful occupation for his livelihood, his ability to make money, and you may take into consideration the pain he has suffered, the loss of time, the lack of opportunity to engage in profitable employment or gainful occupation as a result of this injury. You may consider all these things and let your answer be in one lump sum, what you think would be a fair amount to fairly compensate him for his pain and suffering, physical ills and disabilities . . . ; and his reduced earning capacity and inability to carry on . . . , and say in one lump sum what would be a fair amount of award to compensate him for his injuries."[2] From an adverse verdict the defendant appealed assigning as error the above quoted instruction, contending that the damages for losses which may accrue in the future were not limited to the present value of such damages. The court *held,* by a 5-2 decision, that a new trial should be granted as the instruction was defective in not limiting recovery for future losses to their present value. Stacy, C. J., and Winborne, J., dissented, contending that the defendant should have requested an instruction as to "present value"; that the silence of the defendant, upon being invited to submit instructions desired, constituted a waiver of his right to object; and that with liability established, if a new trial is to be ordered, it should be limited to the issue of damages.

In an action for personal injury it is generally held that damages may be assessed covering reasonable nursing and medical expenses,[3] for mental and physical pain and suffering, past, present, and prospective,[4] for loss of time,[5] and for the diminution of future earning capacity.[6] That these items may be considered by the jury in assessing damages is well settled, but it is equally well settled that in their application the trial judge must conform to the rules and specifications prescribed for the proper measure of damages.

In allowing damages for future injury from the original wrong, the limitation of such recovery to its present value is generally recognized.[7] The reason for this rule is well put in *Hill* v. *Railroad*[8] wherein Walker, J., said that "Something must be allowed because he (plaintiff) is compensated for them (the injuries) before the time when they would actually be suffered." Again, in the case of *Johnson* v. *Seaboard Air*

[2] *Id.* at 384, 30 S. E. (2d) at 324.
[3] Williams v. Charles Stores Co., 209 N. C. 591, 184 S. E. 496 (1936).
[4] Kepler v. Chicago St. P. M. & O. Ry. Co., 111 Neb. 273, 196 N. W. 161 (1923).
[5] Kirkpatrick v. Crutchfield, 178 N. C. 348, 100 S. E. 602 (1919).
[6] Adskim v. Oregon—Washington Ry. & Nav. Co., 134 Ore. 574, 294 Pac. 605 (1930).
[7] McCormick on Damages (1st ed. 1935) 304 (future earnings); 4 Sutherland, Damages (4th ed. 1916) §1249.
[8] 180 N. C. 490, 493, 105 S. E. 184, 186 (1920).

Line Ry. Co.[9] the "present worth rule" is justified by the court's statement that "Any other principle . . . would enable a plaintiff to recover more than could possibly be earned, as no man realizes at once the full earnings or accumulations of a lifetime." While these various reasons are given, and the "present worth rule" thereby amplified, its entire foundation would seem to find support in the universal phrase "money had presently is more valuable than money to be had in the future."[10*]

PAIN AND SUFFERING

Nevertheless there seems to be a decided conflict as to whether damages for prospective pain and suffering are to be reduced to their present value. There is appreciable authority representative of both positions, but the majority would appear to be against such reduction.[11] Thus in *Chicago & N. W. Ry. Co.* v. *Candler*[12] where the reduction of damages, for future pain and suffering and inconvenience, to present value was refused, the court very aptly stated: "At the best the allowance is an estimated sum determined by the intelligence and conscience of the jury, and we are convinced that a jury would be much more likely to return a just verdict, considering the estimated life as one single period, than if it should attempt to reach a verdict by dividing the life into yearly periods, setting down yearly estimates, and then reducing the estimates to their present value. The arbitrariness and artificiality of such a method is so apparent that to require a jury to apply it would be an absurdity." Rather than the "present value rule" the *Candler* case, *supra,* propounds the "reasonable compensation rule," the reasonableness of which is to be determined by the jury's observation, experience, and sense of fairness and right.[13] The Pennsylvania court, in following the "reasonable compensation rule," states that the jury can easily grasp the meaning of the word "compensation," but that the words "present worth" would have no meaning whatever to them.[14*] The rule expounded by the *Candler* case[15] has been adopted and followed by numerous courts.[16] But in the case of *Rigley* v.

[9] 163 N. C. 431, 453, 79 S. E. 690, 699 (1913).

[10*] MCCORMICK ON DAMAGES (1st ed. 1935) 304 (if a person be allowed his total diminution of earning capacity, it ". . . would be more than compensation, for it would enable the plaintiff to get his future wages long in advance *and to reap interest on the money during the intervening period.*") *(Italics supplied.).*

[11] NOTES (1922) 28 A. L. R. 1177, (1930) 77 A. L. R. 1439, 1451.

[12] 283 Fed. 881, 885 (C. C. A. 8th, 1922).

[13] *Ibid.*

[14*] McLane v. Pittsburgh Ry. Co., 230 Pa. 29, 70 Atl. 237 (1911); *accord,* Yost v. W. Penn. Rys. Co., 336 Pa. 407, 410, 9 A. (2d) 368, 369 (1939) (Nor may damages for future medical expenses be so reduced, as "future medical attention presupposes an out-of-pocket expenditure. . . ."); Bostwick v. Pittsburgh Ry. Co., 255 Pa. 387, 100 Atl. 123 (1917) (The jury should assess such reasonable sum as they find from all the evidence and circumstances will fairly compensate the plaintiff.).

[15] Chicago & N. W. Ry. Co. v. Candler, 283 Fed. 881 (C. C. A. 8th, 1922).

[16] Louisville & N. Ry. Co. v. Maffett, 36 Ga. App. 513, 137 S. E. 404 (1927);

Pryor[17] the Missouri court sustained an instruction limiting recovery for future pain and suffering to the present worth thereof.[18] North Carolina finds its place among those decisions supporting the "present worth rule." In a fairly recent case, the trial court's instruction to the jury that ". . . the plaintiff is to have a reasonable compensation . . . for the loss of both bodily and mental powers . . ." was held defective in that it failed to limit the plaintiff's recovery to the present worth of a fair and reasonable compensation for his mental and physical pain and suffering.[19] However, better reason would seem to support the "reasonable compensation rule," for it is difficult to see how the present worth of future suffering could be determined since the assessment of such damages involves, unavoidably, a high degree of speculation.

Earning Capacity

While the application of the "present worth rule" in assessing damages for prospective pain and suffering is not supported by the weight of authority, its applicability in measuring damages for impairment of earning capacity is recognized by the vast majority of the courts.[20] And even though the plaintiff earns the same amount subsequent to the injury as he was earning before that time, but in a different type of job, and even though it would be evidence tending to show no impairment of his earning capacity, the jury may consider the work he had performed, both prior to and since the accident; and if the conclusion of impairment of earning capacity is justly reached, damages may be awarded.[21] Thus it is generally held that the present value of future earnings should be computed by determining the plaintiff's life expectancy,[22] taking into consideration his age, condition, station in life,

Southern Ry. Co. v. Bottoms, 35 Ga. App. 804, 134 S. E. 824 (1926); Louisville & N. Ry. Co. v. Gayle, 204 Ky. 142, 263 S. W. 763 (1924); Kepler v. Chicago, St. P. M. & O. Ry. Co., 111 Neb. 273, 196 N. W. 161 (1923); Le Van v. McLean, 276 Pa. 361, 120 Atl. 395 (1923).

[17] 290 Mo. 10, 233 S. W. 828 (1921).

[18] *Accord,* St. Louis I. M. & S. R. Co. v. McMichael, 115 Ark. 101, 171 S. W. 115 (1914); Howell v. Lansing City Elec. Ry. Co., 136 Mich. 432, 99 N. W. 406 (1904).

[19] Shipp v. United Stage Lines, Inc., 192 N. C. 475, 478, 135 S. E. 339, 341 (1926).

[20] Alabama G. S. R. Co. v. Carroll, 84 Fed. 772 (C. C. A. 5th, 1898); O'Brien v. White & Co., Inc., 105 Me. 308, 74 Atl. 721 (1909); Culver v. Union Pac. Ry. Co., 112 Neb. 441, 199 N. W. 794 (1924); Lamont v. Highsmith Hospital, Inc., 206 N. C. 111, 173 S. E. 46 (1934); Hill v. North Car. Ry. Co. & Dir. Gen. of Rys., 180 N. C. 490, 105 S. E. 184 (1920); Kirkpatrick v. Crutchfield, 178 N. C. 348, 100 S .E. 602 (1919); Fry v. North Car. Ry. Co., 159 N. C. 357, 74 S. E. 971 (1912); Adskim v. Oregon-Washington Ry. & Nav. Co., 134 Ore. 574, 294 Pac. 605 (1930); Littman v. Bell Tel. of Penn., 315 Pa. 370, 172 Atl. 687 (1934); Bockelcamp v. Lackawanna & W. Va. Ry. Co., 232 Pa. 66, 81 Atl. 93 (1911); *see,* Yost v. W. Penn. Rys. Co., 336 Pa. 407, 410, 9 A. (2d) 368, 370 (1939).

[21] Bockelcamp v. Lackawanna & W. Va. Ry. Co., 232 Pa. 66, 81 Atl. 93 (1911).

[22] Lanier v. Palms, 129 Mich. 671, 89 N. W. 694 (1902).

occupation, health and surroundings.[23] And it is well settled that mortuary tables will be received in evidence to determine such life expectancy,[24*] which is to be predicated on the condition of the plaintiff at the time of trial rather than the time prior to the injury.[25] From the time of the injury to the time of trial the plaintiff may recover for actual pain, suffering and inconvenience, medical and nursing expenses, and loss of time; but these items are usually merged in a general recovery for permanent injuries.

In stating this rule the courts have used different language. The court, in *Littman* v. *Bell Tel. Co. of Penn.*,[26] stated: "The award for permanent impairment of earning power must not exceed, though it should equal, the worth at the date of the verdict, of a sum which would be made up by adding the many losses the injured party would sustain from year to year by reason of such impairment of his ability to earn money during the reasonably expected duration of his life's future earning period."[27] And in *Johnson* v. *Seaboard Air Line Ry. Co.*[28] the court held erroneous an instruction which allowed the jury to award plaintiff the difference between what he would make with the injury and what he would have made had he not been injured, saying that the plaintiff is entitled only to the present value of his diminished earning power.[29*] But in the case of *Adskim* v. *Oregon-Washington Ry. & Nav. Co.*[30] a different situation is presented. There the jury was instructed to award an amount which would fully and fairly compensate the plaintiff for his injuries. The defendant appealed asserting

[23] City of Denver v. Scherret, 88 Fed. 226 (C. C. A. 8th, 1898); Wolf v. Schmidt & Sons Brewing Co., 236 Pa. 240, 84 Atl. 778 (1912).

[24*] Powell v. Augusta & S. R. Co., 77 Ga. 192, 3 S. E. 757 (1886); Patton v. Sanburn, 133 Iowa 650, 110 N. W. 1032 (1907); North Texas Const. Co. v. Crawford, 39 Tex. Civ. App. 56, 87 S. W. 233 (1905); Waterman v. Chicago & A. R. Co., 82 Wis. 613, 52 N. W. 247 (1892); N. C. GEN. STAT. ANN. (Michie, Sublett & Stedman, 1943) §8-46 ("Mortuary tables as evidence.—Whenever it is necessary to establish the expectancy of continued life of any person from any period of such person's life, whether he be living at the time or not, *the table hereto appended shall be received in all courts and by all persons having power to determine litigation, as evidence, with other evidence as to the health, constitution and habits of such person,* of such expectancy represented by the figures in the columns. . . .") *(Italics supplied.)*, Russell v. Windson Steamboat Co., 126 N. C. 961, 36 S. E. 191 (1900) (The tables should be considered with the other evidence as to health, constitution and habits of the injured party.), Coley v. Statesville, 121 N. C. 301, 28 S. E. 482 (1897) (Tables are competent as evidence without being specially put in evidence since they are a public act.).

[25] Hughes v. Chicago R. I. & P. Ry. Co., 150 Iowa 232, 129 N. W. 956 (1911); Howell v. Lansing City Elec. Co., 136 Mich. 432, 99 N. W. 406 (1904); Webb v. Omaha & S. I. Ry. Co., 101 Neb. 596, 164 N. W. 564 (1917).

[26] 315 Pa. 370, 172 Atl. 287 (1934).

[27] *Id.* at 377, 172 Atl. at 690.

[28] 163 N. C. 431, 79 S. E. 690 (1913).

[29*] *Accord*, Kilpatrick v. Kinston Mfg. Co., 175 N. C. 201, 95 S. E. 168 (1918) (For partial loss of earning power a person is only entitled to the present value of his diminished earning power in the future.); Fry v. N. C. Ry. Co., 159 N. C. 357, 74 S. E. 971 (1912).

[30] 134 Ore. 574, 294 Pac. 605 (1930).

that the charge should have included the "present value rule," but the court held that the amount awarded by the jury was less than the present value of the diminished earning capacity, and that since the defendant was not prejudiced the verdict would stand. The Oregon court's decision represents a very commendable attitude, and would appear to facilitate the administration of justice. However, North Carolina adheres strictly to the "present value rule" as to both future pain and suffering and impairment of future earning capacity.[31]

With the "present value rule" established and followed, the further question arises concerning the duty of the court to instruct the jury as to the application of the rule. While the failure of the court to instruct as to this rule, without having been requested to do so by the defendant, has in a number of cases been held reversible error,[32] there are a few decisions, while recognizing and approving the rule, which hold this omission to be harmless error.[33]

It has been observed, however, that "The most common ground for refusing relief on appeal, from a verdict rendered in the absence of a charge limiting recovery for loss of future benefit to present worth, is the failure of counsel for the defendant to request such an instruction, the general instruction being correct, and, hence, the error being one of non-direction rather than mis-direction."[34] Upon this observation was based the chief contention in the argument of the dissent in the principal case,[35] which finds strong support among the cases.[36] Thus

[31] Taylor v. J. A. Jones Const. Co., 193 N. C. 775, 138 S. E. 129 (1927); Shipp v. United Stage Lines, Inc., 192 N. C. 475, 135 S. E. 339 (1926); Kilpatrick v. Kinston Mfg. Co., 175 N. C. 201, 95 S. E. 168 (1918).

[32] Central of Geo. Ry. Co. v. Goens, 30 Ga. App. 770, 119 S. E. 669 (1923) (death action under the Fed. Employer's Liability Act); Chesapeake & O. Ry. Co. v. Dixon, 212 Ky. 738, 280 S. W. 93 (1926) (action for personal injury under the Fed. Employer's Liability Act); O'Brien v. Loeb, 229 Mich. 405, 201 N. W. 488 (1924) (personal injury action); Stunks v. Payne, 184 N. C. 582, 114 S. E. 840 (1922) (death action under the Fed. Employer's Liability Act); Wilkinson v. North East, 215 Pa. 486, 64 Atl. 734 (1905) (personal injury action).

[33] Louisville & N. Ry. Co. v. Morris, 179 Ala. 239, 60 So. 933 (1912) (The rule should not be treated as a hard and fast one.); McKaffrey v. Schwartz, 284 Pa. 561, 132 Atl. 810 (1926) (Omission would result in only a slight inadequacy.); Maloney v. Wisconsin Power, Light & Heat Co., 180 Wis. 546, 193 N. W. 399 (1923) (Court's instructions were substantially correct.).

[34] NOTE (1930) 77 A. L. R. 1439, 1459.

[35] *See,* Daughtery v. Cline, 224 N. C. 381, 388, 30 S. E. (2d) 322, 326 (1944) (dissenting opinion).

[36] Louis. & Nash. Ry. Co. v. Holloway, 246 U. S. 525, 38 Sup. Ct. 379, 62 L. ed. 867 (1918); St. Louis I. M. & S. Ry. Co. v. McMichael, 115 Ark. 101, 171 S. W. 115 (1914); Cuthbertson v. Hoffa, 205 Iowa 666, 216 N. W. 733 (1927); Greenway v. Taylor County, 144 Iowa 332, 112 N. W. 943 (1909); Clark v. Chicago R. I. & P. Ry. Co., 318 Mo. 453, 300 S. W. 758 (1927); Bourke v. Butte Elec. & Power Co., 33 Mont. 267, 83 Pac. 470 (1905); Kennedy v. Telegraph Co., 201 N. C. 756, 161 S. E. 389 (1931); Dulin v. Henderson-Gilmer Co., 192 N. C. 638, 135 S. E. 614 (1926); Murphy v. Suncrest Lumber Co., 186 N. C. 746, 120 S. E. 342 (1923); Hill v. N. C. Ry. Co., 180 N. C. 490, 105 S. E. 184 (1920); Harris v. Turner, 179 N. C. 322, 102 S. E. 502 (1920) (Plaintiff sues for back wages and defendant counterclaims in debt.); Futch v. Atl. Coast Line Ry. Co.,

we see in the case of *Louisville & Nashville Ry. Co.* v. *Holloway*,[37] where the administrator of the decedent brought a death action against the railroad, the court instructed the jury, in effect, that the plaintiff was entitled to recover such an amount as would fairly and reasonably compensate the widow. This instruction was held to be generally correct, and the court stated that the defendant should have requested instructions as to reduction to present value.[38*] And in the case of *St. Louis I. M. & S. Ry. Co.* v. *McMichael*[39] the defendant complained on appeal that the "present value rule" was not included in the instructions. But the court there held that since defendant tendered no request, after being specifically invited to do so by the court, he was not prejudiced and the instruction would stand.[40] North Carolina would seem to take its place among these decisions, upholding the proposition that while the charge is generally correct, though not as definite and full as it might have been, had the "present value rule" been instructed, if the defendant desired a more elaborate statement, he should have requested it.[41] The case which seemingly pioneered this rule in our state as to personal injuries is *Hill* v. *North Carolina Ry. Co. & Dir. Gen. of Rys.*,[42] where the plaintiff sued for personal injuries received due to the negligence of the defendant. On appeal the defendant asserted omission to charge the "present value rule" below. But the court held, while recognizing the correctness of the "present value rule," that the charge did not completely ignore the rule and that "if the defendant desired it to be stated more fully . . . he should himself have asked for an instruction sufficient to present his view. . . ."[43] In *Murphy* v. *Suncrest*

178 N. C. 282, 100 S. E. 436 (1919) (suit in contract); State v. Yellowday, 152 N. C. 793, 67 S. E. 480 (1910) (Defendant convicted for unlawfully entering the land of another.); Davis v. Keen, 142 N. C. 496, 55 S. E. 359 (1906) (action to set aside a sale for fraud); McKaffry v. Schwartz, 284 Pa. 561, 132 Atl. 810 (1926); El Paso Elec. Ry. Co. v. Kitt, 99 S. W. 587 (Tex. Civ. App. 1907); McAfee v. Ogden Union Ry. & Depot Co., 62 Utah 115, 218 Pac. 98 (1923).

[37] 246 U. S. 525, 38 Sup. Ct. 379, 62 L. ed. 867 (1918).

[38*] *Accord,* Cuthbertson v. Hoffa, 205 Iowa 666, 216 N. W. 733 (1927) (Appellant is in no position to complain because request was not made for a more certain and complete instruction concerning present worth.); Greenway v. Taylor County, 144 Iowa 322, 122 N. W. 943 (1909) (It may well be assumed that the jurors appreciated, without explicit explanation, that they were to estimate the present value of the future earnings lost by the injured party.); El Paso Elec. Ry. Co. v. Kitt, 99 S. W. 587 (Tex. Civ. App. 1907) (Explanation of the rule, if desired, should have been requested.).

[39] 115 Ark. 101, 171 S. W. 115 (1914).

[40] *Accord,* Clark v. Chicago R. I. & P. Ry. Co., 318 Mo. 453, 300 S. W. 758 (1927); McAfee v. Ogden Union Ry. & Depot Co., 62 Utah 115, 218. Pac. 98 (1923) (Partial noninstruction, or omission to charge as to a particular isssue, does not constitute reversible error in absence of a specific request for a more comprehensive instruction.).

[41] Kennedy v. Telegraph Co., 201 N. C. 756, 161 S. E. 389 (1931); Dulin v. Henderson-Gilmer Co., 192 N. C. 638, 135 S. E. 614 (1926); Murphy v. Lumber Co., 186 N. C. 746, 120 S. E. 342 (1923); Hill v. N. C. Ry. Co., 180 N. C. 490, 105 S. E. 184 (1920).

[42] 180 N. C. 490, 105 S. E. 184 (1920). [43] *Id.* at 493, 105 S. E. at 186.

Lumber Co.[44] the trial judge charged the jury ". . . the injured party is entitled to be awarded and to recover such an amount as will reasonably compensate him for his loss sustained, past, present and in the future. . . . Such losses may embrace actual expenses for medical care and attention . . . ; they likewise may include the . . . impairing of the ability of the injured person to perform labor. . . ."[45] The court held that the "present worth rule" was not altogether ignored in this instruction, although it was not stated as fully as it might have been, and that it was incumbent upon the defendant to ask for a fuller statement if he desired it. The rule of these cases has been further amplified in this jurisdiction, and would appear to have been established as a fixed and settled doctrine.[46]

Upon examination of the principal case,[47] it would appear that the majority disregarded the *Hill* and *Murphy* cases, *supra,* as argued by the dissenting judges. The trial judge specifically inquired of counsel: "Gentlemen, are there any prayers or instructions or anything you care to have me give in the charge?"; but there was no response.[48] The instruction given in this case was substantially that given in the *Murphy* case.[49] Certainly it cannot be seriously contended that the twice repeated expression ". . . let your answer be in one lump sum . . ."[50] was not capable of the interpretation, and not intended to be interpreted, to mean "a cash settlement of plaintiff's injuries, past, present and prospective."[51] On the basis of the above decisions, it would seem that the charge in the principal case states correctly the general principles of law, and that the defendant has waived his right to complain, not having requested an instruction as to present value when invited to do so by the trial court.

It would also appear reasonable and just that if a new trial is to be awarded, it should be awarded to the damages question alone; and that the issue of negligence be considered *res adjudicata.* "If there are several issues which are separable, the court may, for error found, direct a new trial to be had upon one or more of the issues, and allow the verdict to stand as to the others. . . ."[52] This is supported by overwhelming authority.[53] There are cases which flatly refuse to recognize

[44] 186 N. C. 746, 120 S. E. 342 (1923).
[45] *Id.* at 748, 120 S. E. at 343.
[46] Kennedy v. Telegraph Co., 201 N. C. 756, 161 S. E. 389 (1931); Dulin v. Henderson-Gilmer Co., 192 N. C. 638, 135 S. E. 613 (1926).
[47] Daughtery v. Cline, 224 N. C. 381, 30 S. E. (2d) 322 (1944).
[48] *Id.* at 355, 30 S. E. (2d) at 326.
[49] Murphy v. Lumber Co., 186 N. C. 746, 120 S. E. 342 (1923).
[50] Daughtery v. Cline, 224 N. C. 381, 384, 30 S. E. (2d) 322, 324 (1944).
[51] *Id.* at 389, 30 S. E. (2d) at 327.
[52] McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE 805.
[53] Swann-Day Lumber Co. v. Cornett, 161 Ky. 98, 170 S. W. 516 (1914); Faulkner v. Middleton, 186 Miss. 355, 188 So. 565 (1939); McLaughlin v. R. W. Fagan-Peel Co., 125 Miss. 116, 87 So. 471 (1921); White v. McRee, 111 Miss.

this equitable solution.[54*] It must clearly appear that the matter, in regard to which error has been committed, is entirely distinct and separate from the matters involved in the other issues, and that the new trial can be had without danger of complications as to these other matters.[55*] Therefore in the case under consideration, the negligence of the defendant being settled, the issue as to the measure of damages is not so closely allied to those of negligence and contributory negligence as to require a new trial of the entire case. Had the new trial been limited to damages much expense and time of the court, the parties, counsel and witnesses would have been avoided.

JAMES G. HUDSON, JR.

Legitimation—Bastardy—Effect on Right of Inheritance of Legitimated Child by Subsequent Marriage of Bastard's Parents

In an action brought by the assignee of a granddaughter of an intestate against his administrators to recover a sum alleged to be due the granddaughter, as the balance of her share in her grandfather's estate, a recent Georgia case[1] held that the granddaughter, born out of wedlock, was made legitimate for all purposes by the subsequent marriage of her father and mother and the recognition of the child by the father as his own, and was entitled to inherit from her grandfather through her father.

Plaintiff contended that the right of inheritance by the granddaughter rested on two Georgia statutes: (1) " * * * The marriage of the mother and reputed father of an illegitimate child, and the recognition of such child as his, shall render the child legitimate; and in

---

502, 71 So. 804 (1916); Borough Const. Co. v. City of New York, 200 N. Y. 149, 93 N. E. 480 (1910); Pinnix v. L. A. Smithdeal, 182 N. C. 410, 109 S. E. 265 (1921); Jones v. Insurance Co. of Va., 153 N. C. 388, 69 S. E. 266 (1910); Rushing v. Railroad, 149 N. C. 158, 62 S. E. 890 (1908); Tillett v. Ry. Co., 115 N. C. 616, 23 S. E. 264 (1895); *see*, Fry v. N. C. Ry. Co., 159 N. C. 357, 366, 74 S. E. 971, 975 (1912) (dissenting opinion).

[54*] Torr v. United Rys. of San Francisco, 187 Cal. 505, 202 Pac. 671 (1922) (Where the verdict for personal injuries is inadequate, the appellate court cannot merely reverse that portion of the judgment fixing the amount and affirm that portion fixing the liability of the defendant; but the entire case must be retried.).

[55*] Rushing v. Railroad, 149 N. C. 158, 62 S. E. 890 (1908); *accord*, Dean v. Bridges, 260 App. Div. 48, 20 N. Y. S. (2d) 747 (1st Dept., 1940) (Where trial court rendered verdict for plaintiff for malicious prosecution and false imprisonment, there being no separation of damages with respect to the causes of action, it was *held*, that if the recovery could not be sustained as to one of these there must be a reversal as to the entire judgment.); Morrell v. Lallonde, 45 R. I. 112, 120 Atl. 435 (1923) (The question of damages is so closely connected with and so dependant upon the findings of facts in issue, that it is impossible to try the case fairly without presenting it entirely to the jury.); Olsen v. Brown, 186 Wis. 179, 202 N. W. 167 (1925) (The perverseness of the jury manifested as to the question of damages might well have extended to affect the question of the contributory negligence; thus a new trial should be awarded as to all the issues involved.).

[1] Morris v. Dilbeck et al., — Ga. —, 31 S. E. (2d) 93 (1944).

such case the child shall immediately take the surname of the father."[2] (2) "An illegitimate child, or bastard, is a child born out of wedlock, and whose parents do not subsequently intermarry. * * *"[3] The court in upholding plaintiff's position stated that ". . . it seems clear that it was the intention of the law to make the child legitimate *for all purposes (Italics supplied.)* from the date of its birth."[4]

At common law a bastard was said to be *filius nullius,* the son of no one.[5] He could inherit from no one,[6] and none could inherit from him except his direct descendants. The intermarriage of the parents of an illegitimate child at common law did not legitimate such child; but by both the civil and canon law the subsequent marriage of the parents legitimized their offspring born before marriage.[7] Today, in all of the fifty-one American jurisdictions the legislatures have provided means for mitigating the harsh rules of the common law,[8] and in all these jurisdictions are found provisions under which the child may become legitimate by the act of one or both parents.[9]

North Carolina has provided by statute for the legitimation of bastards by the subsequent marriage[10] of the mother and the reputed father.[11]* Some jurisdictions, including Georgia,[12] require in addition to the marriage that the father acknowledge the child in order to complete the legitimation. In California[13] in order to give the child certain rights of inheritance it is necessary for his parents to have intermarried before his death, and his father acknowledge him as his child, or "adopt" him into his family.

Ordinarily, the statutes under consideration are declared by the courts to be remedial and are given a liberal construction.[14] While

[2] GA. CODE ANN. (Park, et al., 1937) tit. 74, §101.
[3] GA. CODE ANN. (Park, et al., 1937) tit. 74, §201.
[4] Morris v. Dilbeck et al., — Ga. —, 31 S. E. (2d) 93 (1944).
[5] Thayer v. Thayer, 189 N. C. 502, 507, 127 S. E. 553, 556, 39 A. L. R. 428, 433 (1925).
[6] Wolf v. Gall, 32 Cal. App. 286, 163 Pac. 346, 350 (1917); Houghton et al. v. Dickinson, 196 Mass. 389, 82 N. E. 481 (1907).
[7] Thayer v. Thayer, 189 N. C. 502, 505, 127 S. E. 553, 555, 39 A. L. R. 428, 432 (1925).
[8] 4 VERNIER, AMERICAN FAMILY LAWS (1936) §242.
[9] *Ibid.*
[10] As to what constitutes a "marriage" within the meaning of a statute legitimating issue of all marriages null in law, *see* NOTE (1933) 84 A. L. R. 499.
[11]* N. C. GEN. STAT. ANN. (Michie, Sublett & Stedman, 1943) §49-12: "When the mother of any illegitimate child and the reputed father of such child shall intermarry or shall have intermarried at any time after the birth of such child, the child shall in all respects after such intermarriage be deemed and held to be legitimate and entitled to all the rights in and to the estate, real and personal, of its father and mother that it would have had had it been born in lawful wedlock."
[12] GA. CODE ANN. (Park, et al., 1937) tit. 74, §101.
[13] CAL. PROB. CODE (Deering, 1941) §255.
[14] Haddon v. Crawford, 49 Ind. App. 551, 97 N. E. 811 (1912); *In re* Hoagland's Estate, 125 Misc. Rep. 376, 211 N. Y. Supp. 629 (1925); James v. James, 253 S. W. 1112 (Tex. Civ. App. 1923); Goodman v. Goodman, 150 Va. 42, 142 S. E. 412 (1928); Ash v. Way's Adm'rs et al., 2 Gratt. 203 (Va. 1845).

comparatively little direct authority is available as to the right to inherit from the kindred of the legitimated person's parents, the prevailing view seems to be that the statutes should be interpreted so as to permit inheritance of that sort. As early as 1845, it was held that where a bastard marries, and dies, leaving a legitimate child; and then the parents of the bastard marry, and the bastard is recognized by the father as his child both before and after his marriage to her mother, the illegitimate's child may inherit through his mother from her father.[15] Since then it has been established in California,[16*] Kentucky,[17*] Louisiana,[18*] and other jurisdictions[19] that upon the parents' subsequent marriage, a child born before wedlock becomes legitimate for all purposes[20] from the date of its birth.[21]

The Supreme Court of North Carolina in passing on a similar problem *In re Estate of Wallace*[22] where the intestate left surviving him the son of a deceased sister—this nephew being born while his mother was unmarried; held that the subsequent marriage of the bastard's mother and his reputed father, though legitimizing the child, simply gave him the right to inherit from his father and mother, and went no further, thus rejecting his claim to a share as one of the next of kin of his maternal uncle who had survived the claimant's mother. It was said that the provisions of C. S., 279,[23] ". . . being in derogation of the common law . . . should be strictly construed."[24] The statute

[15] Ash v. Way's Adm'rs et al., 2 Gratt. 203 (Va. 1845).

[16*] Wolf v. Gall, 32 Cal. App. 286, 163 Pac. 346 (1917) (Right to inherit from grandmother by grandchildren representing deceased father who had been legitimated was upheld.).

[17*] Jackson v. Moore, 8 Dana 170 (Ky. 1849) (An antenuptial child who was legitimated by the parents' marriage and father's recognition, entitled child to inherit from an uncle, the father's brother.).

[18*] Cormier et al. v. Cormier et al., 185 La. 968, 171 So. 93 (1936) (By implication the court held that a grandchild, son of a legitimated father, could represent his father and inherit from father's parents.); Armant's Succession, 1 La. App. 258 (1924).

[19] Brewer v. Hamor, 83 Me. 251, 22 Atl. 161 (1891); Geisler v. Geisler, 160 Minn. 463, 200 N. W. 742 (1924); *In re* McDade's Estate, 95 Okla. 120, 218 Pac. 532 (1923) (Writ of error dismissed for want of jurisdiction in 269 U. S. 529, 46 Sup. Ct. 16, 70 L. ed. 396 (1925)); James v. James, 253 S. W. 1112 (Tex. Civ. App. 1923).

[20] Cases cited *supra* notes 15-19; also, Houghton et al. v. Dickinson, 196 Mass. 389, 82 N. E. 481 (1907); *In re* Wray's Estate, 93 Mont. 525, 19 P. (2d) 1051 (1933); Green et al. v. Wilson et al., 112 Okla. 228, 240 Pac. 1051 (1925); Goodman v. Goodman, 150 Va. 42, 142 S. E. 412 (1928).

[21] *See* Blythe v. Ayres, 96 Cal. 532, 31 Pac. 915, 19 L. R. A. 40 (1892); *In re* Jessup, 81 Cal. 408, 21 Pac. 976, 6 L. R. A. 594 (1899), *aff'd on rehearing*, 22 Pac. 742 (1889), *motion to vacate rehearing* denied, 22 Pac. 1028 (1889); Brisbin v. Huntington, 128 Iowa 166, 103 N. W. 144, 5 Ann. Cas. 931 (1905); Allison v. Bryan, 21 Okla. 557, 97 Pac. 282, 18 L. R. A. (N. S.) 931, 17 Ann. Cas. 468 (1908); Eddie v. Eddie, 8 N. D. 376, 79 N. W. 856, 73 Am. St. Rep. 765 (1899).

[22] 197 N. C. 334, 148 S. E. 456, 64 A. L. R. 1121 (1929).

[23] Now N. C. GEN. STAT. ANN. (Michie, Sublett & Stedman, 1943) §49-12, *supra*, note 11.

[24] *In re* Estate of Wallace, 197 N. C. 334, 337, 148 S. E. 456, 457, 64 A. L. R. 1121, 1124 (1929).

relied on by the claimant was enacted in 1917,[25] subsequent to the marriage of the mother and reputed father of the claimant, but in *Stewart* v. *Stewart*[26] this statute, by its express language, was declared retroactive as well as prospective in effect. It would seem that the North Carolina Court in making its decision in this case could have safely relied upon the construction given similar statutes in other jurisdictions without doing violence to the provisions of the statute. In all probability the decision must have been influenced by the provisions of the two preceding statutes, the first[27*] providing for legitimation by petition of the putative father, and the second[28*] stating the effects of such legitimation. The Court in *Love* v. *Love*[29] interpreted this latter statute[30] to mean that "The word 'only' as used in this section qualifies the words 'inherit from the father,' and not the words 'real estate,' thereby limiting the right of inheritance to the properties of the adopting father, and this is emphasized by the fact that the remaining part of the sentence provides that the adopted child is also entitled to the personal estate of his father."[31] The position of the Court in *Love* v. *Love*[32] and its reasoning can well be sustained, but there seems to be no necessity for applying the construction of a statute,[33] which limits the effects of legitimation when that legitimation is effected by a petition presented to the court by the putative father, to the following statute[34] prescribing legitimation by the marriage of the *parents* of the bastard. The Supreme Court of North Carolina by its decision *In re Estate of Wallace*[35] seems to have violated the intent of the legislature since the act[36] was entitled "An Act to Legitimate Bastard Children upon the Marriage of their Reputed Father and

[25] N. C. PUB. L. 1917, c. 219, §1.
[26] 195 N. C. 476, 142 S. E. 577 (1928).
[27*] N. C. GEN. STAT. ANN. (Michie, Sublett & Stedman, 1943) §49-10: "Legitimation.—The putative father of any illegitimate child may apply by petition in writing to the superior court of the county in which he resides, praying that such child may be declared legitimate; and if it appears that the petitioner is reputed the father of the child, the court may thereupon declare and pronounce the child legitimated; and the clerk shall record the decree."
[28*] N. C. GEN. STAT. ANN. (Michie, Sublett & Stedman, 1943) §49-11: "Effects of legitimation.—The effect of such legitimation shall extend no further than to impose upon the father all the obligations which fathers owe to their lawful children, and to enable the child to inherit from the father only his real estate, and also to entitle such child to the personal estate of his father, in the same manner as if he had been born in lawful wedlock. In case of death or intestacy, the real and personal estate of such child shall be transmitted and distributed according to the statute of descents and distribution among those who would be his heirs and next of kin in case he had been born in lawful wedlock."
[29] 179 N. C. 115, 101 S. E. 562 (1919).
[30] *Supra* note 28.
[31] Love v. Love, 179 N. C. 115, 117, 101 S. E. 562 (1919).
[32] 179 N. C. 115, 101 S. E. 562 (1919).
[33] *Supra* note 28.
[34] *Supra* note 11.
[35] 197 N. C. 334, 148 S. E. 456, 64 A. L. R. 1121 (1929).
[36] N. C. PUB. L. 1917, c. 219.

Mother," and was passed to abrogate the view that a child is either born a legitimate one or a bastard; at common law the theory being that "God alone can make the heir, not man."[37] It would seem that in view of the remedial purpose of the enactment, a liberal construction was intended, but not received.

There is no doubt but that the principal case in its liberal construction of the legitimation statute stands approved by an overwhelming majority. The view taken by North Carolina on this question stands alone and should be corrected by appropriate legislation.

R. I. LIPTON.

Duress—Effect of Threats of Arrest and Imprisonment on Validity of Contracts

A recent Georgia case[1] raises one of the problems of duress which confront the courts. In that case the plaintiff was continually pressed for three hours to execute a deed to property for a price which she thought to be inadequate. Finally one of the defendants informed the plaintiff that she would have to sign the papers or go to jail. This statement greatly frightened the plaintiff, whereupon she signed the instrument, still insisting that it was against her will. In the plaintiff's petition to set aside the deed the court refused to do so, saying that mere empty threats to arrest, where neither warrant has been issued nor proceedings commenced, do not amount to duress.

Under the common law duress was divided into two classes: duress by imprisonment and duress *per minas*. Duress by imprisonment existed where an individual was deprived of his liberty, and duress *per minas* was present where there was a threat to life, limb, or liberty.[2*]

It is usually held that what constitutes duress is a matter of law, but whether duress exists in a particular transaction is a matter of fact.[3] Under the old common law duress must have been such as would deprive a constant and courageous man of his free will, but the modern tendency is to include all such threats as would overcome the will of a person of only ordinary firmness.[4] Recently some of the courts are rejecting any objective standard and are simply inquiring whether the

[37] *See* Deák and Robbins, *The Familial Property Rights of Illegitimate Children: A Comparative Study* (1930) 30 COL. L. REV. 308 at 318.

[1] Hoover v. Mobley et al. — Ga. —, 31 S. E. (2d) 9 (1944).

[2*] 1 BL. COMM.* 131 (". . . there are two sorts (of duress): duress of imprisonment, where a man actually loses his liberty . . . , and duress *per minas*, where the hardship is only threatened and impending."); 2 COKE INSTITUTES* 483; *see* Hatter's Ex'r v. Greenlee, 1 Port. 222, 227, 26 Am. Dec. 370, 373 (Ala. 1834).

[3] Galusha v. Sherman, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417 (1900).

[4] Brown v. Pierce, 7 Wall. 214, 19 L. ed. 134 (U. S. 1869); Bane v. Detrick, 52 Ill. 19 (1869); Morse v. Woodworth, 155 Mass. 233, 27 N. E. 1010 (1892).

threat did in fact overcome the will of the person in question.[5*] In any case, however, it is unnecessary to show, in order to establish the defense of duress, that actual violence was used, because consent is the very essence of contract; and, if there be physical compulsion, there can be no binding consent.[6] From this it is seen that there is no universally accepted legal standard of resistance which a person must come up to at the peril of being remediless for a wrong done to him, and no definite rule as to the sufficiency of facts to produce duress.[7] But there must be actual force or threats of force amounting to compulsion present, for "The law does not recognize duress by mere suggestions, advice, or persuasion, especially where the parties are at arm's length and representing opposing interests."[8] Duress will not ordinarily invalidate a contract entered into with full knowledge of all facts, and with ample time and opportunity for investigation, consultation, and reflection.[9] It is the person seeking to avoid a contract on the grounds of duress who has the burden of proof.[10]

The tort of duress should be clearly distinguished from the compounding of a felony. It is well accepted that money spent to suppress a crime cannot be recovered.[11*] From this doctrine comes the rule that an action may not be maintained to recover money paid wholly or partly to compound a felony. The courts in civil cases based on compounding a felony hold the parties in *pari delicto,* and leave them in their present status.[12*]

[5*] McClair v. Wilson, 18 Colo. 82 (1892); Williamson-Halsell, Frazier Co. v. Ackerson, 77 Kan. 502, 94 Pac. 807, 20 L. R. A. (N. S.) 484 (1908); Sabinal State Bank v. Ebell,294 S. W. 226 (Tex. Civ. App. 1927); Galusha v. Sherman, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417 (1900); RESTATEMENT, CONTRACTS (1932) §493 ("Duress may be exercised by . . . (c) threats of physical injury, or of wrongful imprisonment or prosecution of a husband, wife, child, or other near relative . . . that compel a person to manifest assent to a transaction without his volition or cause such fear as to preclude him from exercising free will and judgment in entering into a transaction.").

[6] *See* U. S., Lyon et al. v. Huckabee, 16 Wall. 414, 431, 21 L. ed. 457, 463 (U. S. 1872).

[7] Galusha v. Sherman, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417 (1900).

[8] Clement v. Buckley Mercantile Co., 172 Mich. 243, 253, 137 N. W. 657, 660 (1912).

[9] *Id.* at 257, 137 N. W. at 661. [10] *Ibid.*

[11*] Collins v. Blantern, 2 Wils. 341, 95 Eng. Rep. R. 847 (K. B. 1765) (Plaintiff had paid £700 to suppress a prosecution for perjury.).

[12*] We have two important decisions on this point in the United States. In Hayes v. Rudd, 102 N. Y. 372, 7 N. E. 287, 55 Am. Rep. 815 (1886) the plaintiff gave a note to the defendant to settle a claim against the plaintiff's son, who was in the employ of the defendant. This note was given to compound and settle a supposed felony and was extorted from the plaintiff by threats. The judge refused to charge, as requested by the defendant, ". . . that if the compounding of a felony entered into and formed a part of the consideration of the note, the plaintiff could not recover"; and also, ". . . that if the motive of the plaintiff in giving the note was in part for the purpose of compounding a felony, he could not be entitled to recover." The New York Court of Appeals held this refusal to charge as requested to be error, saying that if the consideration of the note was in any way affected by the compounding of a felony, or if it entered into the

At one time in our legal history imprisonment was a generally permitted means to enforce an execution which could not be satisfied from the debtor's property. Therefore imprisonment for a valid debt by regular process, and *a fortiori* a threat of such imprisonment, did not amount to duress, unless accompanied with circumstances of unnecessary oppression or hardship. In such situations the courts laid down the rule: To constitute duress at law, the arrest must have been originally unlawful, or made so by a subsequent abuse of it.[13*] Today in some jurisdictions certain civil claims may be enforced by arrest and imprisonment. In such case the old rule prevails.[14*] But even in these jurisdictions, if the imprisonment is unlawful—or if lawful but improperly oppressive—an assent so obtained to a contract will amount to duress.[15*]

---

same, or such a motive actuated the plaintiff in any respect, then the contract was illegal and should not be upheld.

Another important decision is Merwin v. Huntington, 2 Conn. 209 (1817). In this case the plaintiff was indicted for violation of an embargo. The United States District Attorney accepted from him a sum of money totalling the estimated costs and expenses and turned it over to the public treasury, then dismissed the prosecution. The Connecticut Court refused recovery of the money, saying that since it was illegal for the Attorney to accept the money, it was equally illegal for the defendant to offer it. Hence the parties were in *pari delicto,* and the court left them as they stood.

See Bertschinger v. Campbell, 99 Wash. 142, 168 Pac. 977, L. R. A. 1918C, 65 (1917).

[13*] Crowell v. Gleason, 1 Fairchild 325 (Me. 1833) (The court refused recovery of land conveyed to defendant by plaintiff to secure release under articles of peace, saying that there was a lawful arrest and no duress.); Watkins v. Baird, 6 Mass. 506, 4 Am. Dec. 170 (1810) (If the deed be originally lawful, yet if the party obtaining the deed detain the prisoner unlawfully by covin with the jailer, this duress will avoid the deed. It is a general rule that imprisonment by order of law is not duress. To constitute duress by imprisonment, either the imprisonment or the duress after must be tortious.); Richardson v. Duncan, 3 N. H. 508 (1826) (The arrest was lawful, but the plaintiff was refused advice of counsel upon examination by the magistrate.); *cf.* Stouffer v. Latshaw, 2 Watts 165 (Pa. 1834) (Defendant was arrested on a *capias* and gave six notes for a valid debt to receive his release. The court held there was no evidence of any constraint.).

[14*] Jones v. Peterson, 117 Ga. 58, 43 S. E. 417 (1903) (Defendant was charged with bastardy by the plaintiff and placed under lawful arrest. While in this state he and the mother reached an understanding whereby the defendant gave his note in settlement thereof. The court held this not to be duress.); Prichard v. Sharp, 51 Mich. 432, 16 N. W. 798 (1883) (Defendant was arrested on a *capias* and could not get bail. On giving the plaintiff a secured note, he was discharged. The arrest was caused in good faith for an injury which the plaintiff supposed had been done by the defendant, and the notes were taken in satisfaction of the injury. The court held that the notes could not be cancelled, since no duress was present on the facts.); Dunham v. Griswold, 100 N. Y. 224, 3 N. E. 76 (1885) (Defendant promised to pay $9,000 as an accord and satisfaction for certain goods he had converted, belonging to the plaintiff. The court held that a mere threat to arrest in order to enforce the agreement did not constitute duress.).

[15*] Whitefield v. Longfellow, 13 Me. 146 (1836) (The magistrate ordered the defendant, who was arrested under a bastardy proceeding, to settle with the plaintiff or go to jail, and also refused defendant's offer to produce bond. The court held that the jury should have been instructed that if the defendant did not execute the bond of settlement freely, but through fears of unlawful commitment, he acted under duress.).

If no warrant has been issued and proceedings have not commenced, the courts are split as to whether mere threats of criminal prosecution will constitute duress. In those jurisdictions which hold that there is no duress, a mere threat of indictment does not constitute duress if it is for a crime in another jurisdiction,[16] or if the threatened arrest is for an illegal payment,[17*] or if the threat to arrest is made by a person who has no authority to make an arrest with or without a warrant.[18*] "It is not duress for one who believes that he has been wronged to threaten the wrongdoer with a civil suit; and, if the wrong includes a violation of the criminal law, it is not duress to threaten him with criminal prosecution. It is not to be supposed that a man smarting under a sense of wrong and injury will not use some such threats."[19] To constitute duress the threat must be of imminent and immediate arrest. Hence, a threat of prosecution before the commencement of any legal proceedings does not necessarily include an arrest. It is no more than an assertion that proper steps will be taken to institute a legal process, and an ordinary person could not be put into fear thereby.[20*]

In all cases a threat of arrest, imprisonment, and prosecution does not constitute duress unless the person so threatened is charged with having committed an act or acts constituting a crime or misdemeanor.[21] Hence a threat to sue is not duress.[22]

Some courts attempt to make a distinction between threats of lawful arrest or prosecution and similar threats of unlawful arrests and prosecution. One view is that the threat of lawful arrest or lawful imprisonment does not constitute duress so as to discharge a threatened person from liability on a contract which he has been induced to sign by means of such threat.[23*] If there is an arrest under a warrant based on an

[16] Phillips v. Henry, 160 Pa. 24, 28 Atl. 477, 40 Am. St. Rep. 706 (1894).

[17*] Chaflin v. McDonough, 33 Mo. 412, 84 Am. Dec. 54 (1863) (Collector threatened the plaintiffs with prosecution for dealing as merchants without licenses if the plaintiff did not pay a licensing tax, which was declared to be unconstitutional and void. The court held the payment to be voluntary since the parties knew the facts of the case.).

[18*] Williams v. Stewart, 115 Ga. 864, 42 S. E. 256 (1902) (County tax collector had no such powers.).

[19] Hilborn v. Buckham, 78 Me. 485, 487, 7 Atl. 272, 273, 57 Am. St. Rep. 816, 818 (1886).

[20*] Horton v. Bloedorn, 37 Neb. 666, 56 N. W. 321 (1893) (Particularly true if the person threatened knew at the time that the persons making the threat had no present means of carrying it into execution.); *see* Harmon v. Harmon, 61 Me. 227, 230, 14 Am. Rep. 556, 558 (1873). [Why could not an ordinary person be put into fear if he were ignorant of the law? Ed.]

[21] Bond v. Kidd, 1 Ga. App. 198, 57 S. E. 944 (1907).

[22] Jones v. Houghton, 61 N. H. 51 (1881).

[23*] Smith v. Commercial Bank of Jaspar, 77 Fla. 163, 81 So. 154, 4 A. L. R. 862 (1919) (Threats of lawful arrest for an offense which has actually been committed does not constitute duress so as to discharge a mortgage entered into because of such threats where the mortgagee did not take part in the threats.); Kronmeyer v. Buck, 258 Ill. 586, 101 N. E. 935 (1913) (A deed to property given

unfounded charge, there is no duress present if an agreement is entered into which is the result of a compromise.[24*] Where a warrant is issued, it must be based on truth or probable cause; and this is a question wholly for the jury to determine.[25] If the warrant is legal, but was executed merely to compel payment of a debt not falling within the group mentioned in footnote 14, this would be an abuse of legal process; and a threat of arrest in such case constitutes duress.[26]

Where the threats of arrest would constitute unlawful imprisonment, duress is easily found.[27*] In such case the courts make a distinction between threats of arrest to an innocent person and threats to a guilty one. Even here the decisions in different jurisdictions are in hopeless conflict. In deciding that a threat of prosecution and imprisonment made to an innocent person does not constitute duress, the Missouri Court has stated: "We do not think that a threat of prosecution addressed to a man conscious of innocence is such a threat as would induce in any man of ordinary firmness an overwhelming fear of immediate imprisonment."[28] The Colorado Court, holding directly contra, said in *Lighthall* v. *Moore*:[29] "The conduct of persons accused of crime, although they may be entirely innocent, is often most inexplicable. Such persons often magnify manifold the dangers that surround them. Under such circumstances their fears are easily wrought upon, and the law will not always require of them the exercise of that fear and accurate judgment that would otherwise be expected."[30]

Where the threatened person is guilty of a crime, he may avoid a

---

in settlement of money misappropriated is not invalid on the ground of duress, although criminal prosecution was threatened.); Thorn v. Pinkham, 84 Me. 101, 24 Atl. 718, 30 Am. St. Rep. 335 (1891) (A promissory note taken in payment for money embezzled is not void by reason of duress because obtained on threats of criminal prosecution, and is held for good consideration, to wit, the money stolen.); Eddy v. Herrin, 17 Me. 338, 35 Am. Dec. 261 (1840) (Where the defendant was induced by the threats of a lawful imprisonment upon a warrant for an assault and battery upon plaintiff to submit to others the amount to be paid as satisfaction for the injury, and also to give a note for the amount thus ascertained, such note cannot be avoided for duress.).

[24*] Clark v. Turnbull, 47 N. J. L. 265, 54 Am. Rep. 157 (1860) (Plaintiff had defendant arrested for appropriating plaintiff's money. While under arrest the defendant indorsed certain paper to the plaintiff. In a suit to recover on such paper the defendant set up the defense of duress and that no debt was due. The court held that imprisonment by order of law was no defense, and that an agreement to pay money in a compromise suit was valid, regardless of the validity of the plaintiff's claim.).

[25] *See* Hatter v. Greenlee, 1 Port. 222, 225, 26 Am. Dec. 370, 373, (Ala. 1834).

[26] *See* Morrill v. Nightengale, 93 Cal. 452, 28 Pac. 1068, 27 Am. St. Rep. 207 (1892); Hackett v. King, 88 Mass. 58 (1863); NOTE (1938) 16 N. C. L. REV. 277.

[27*] Bane v. Detrick, 52 Ill. 19 (1896) (Arrest would have been illegal because the warrant was issued by a Justice of the Peace in one state for an arrest in another state.).

[28] Buchanan v. Sahlein, 9 Mo. App. 552, 558 (1882).

[29] 26 Colo. App. 554, 559, 31 Pac. 511, 512 (1892).

[30] *Cf.* Landa v. Obert, 78 Tex. 33, 14 S. W. 297 (1890).

contract under duress in some jurisdictions and be held to it in others. In those jurisdictions which hold that there may be duress even though the threatened party is guilty,[31] duress is easily found if the threats of arrest and prosecution are for offenses not connected with the demand for which the prosecution is threatened.[32] Holding directly contra, the Illinois Court has said:[33] "Duress is not available as a defense against a note or other instrument executed by one who is, in fact, guilty of misappropriating the money of another, although the execution of the instrument is obtained by threatened prosecution for a debt honestly due. In such case the law regards the existence of a debt, and not the threatened prosecution, as the consideration."

The general rule is that the defense of duress is open only to the party upon whom the duress is imposed; and a third party who has become surety cannot avail himself of the plea, unless he signed the obligation without knowledge of the duress.[34] To this rule there is a well-established exception pertaining to close family relationships. Thus it has been held that duress exists where there is a threat of arrest and a contract is entered into by a member of a family to secure the release of the person threatened.[35] In these instances it has been held immaterial whether the threatened party is guilty or not, or whether he could have claimed duress or not.[36] But where there is a surety on a deed, such deed cannot be invalidated by showing that it was given to secure the grantor's release from distress.[37]

Perhaps the best rule is laid down in those courts which hold that whether or not a threat constitutes duress is a question of fact, depending upon the surrounding circumstances and the actual effect of such threats on the mind of the person acted upon. Under this rule if the threats of arrest and prosecution actually excite the mind of the person threatened and cause him to believe that he is in danger of imminent arrest, duress exists; and there can be no contract thereunder.[38] It is

[31] Morse v. Woodworth, 155 Mass. 233, 29 N. E. 525 (1892).

[32] Thompson v. Niggley, 53 Kan. 664, 35 Pac. 290, 26 L. R. A. 803 (1894); Thompson v. Hicks, 100 S. W. 357 (Tex. Civ. App. 1907).

[33] Kronmeyer v. Buck, 258 Ill. 586, 596, 101 N. E. 935, 939 (1913).

[34] NOTES (1923) 23 COL. L. REV. 72, (1927) 21 ILL. L. REV. 636, (1926) 33 W. VA. L. Q. 123.

[35] Sharon v. Gager, 46 Conn. 189 (1878) (Aunt and Nephew); Jordan v. Beecher, 143 Ga. 143, 84 S. E. 549, L. R. A. 1915D, 1122 (1915) (Husband and Wife); Bradley v. Irish, 42 Ill. App. 85 (1891) (Grandmother and Grandson); Davis v. Luster, 64 Mo. 43 (1876) (Brothers); Merchant v. Cook, 21 Wash. L. Rep. 83 ( ) (Parent and Child); Davis v. London & P. Marine Ins. Co., 38 L. T. R. (N. S.) 478 (Ch. 1878) (Friend).

[36] Koons v. Vauconsant, 129 Mich. 260, 88 N. W. 630, 95 Am. St. Rep. 438 (1902); Adams v. Irving Nat. Bank, 116 N. Y. 606, 23 N. E. 7, 6 L. R. A. 491 (1809).

[37] Simms v. Barefoot's Ex'r, 3 N. C. 402 (1806).

[38] Cribbs v. Sowle, 87 Mich. 340, 24 Am. St. Rep. 166 (1891); Simmons v. Mann, 92 N. C. 12 (1885); Coon v. Metzler, 161 Wis. 328, 154 N. W. 377, L. R. A. 1916 B, 677 (1915).

submitted that the Georgia Court might have reached a better result had they accepted this view.

CECIL J. HILL.

Insurance—Torts—Liability of Agent for Failure to Insure

The plaintiff purchased from the defendants certain equipment under a conditional sales contract and installed it in his theatres. Defendants carried insurance on their interest in the property, and two years later agreed to provide the plaintiff with repair or replacement insurance for one year against loss by fire on equipment installed in one of plaintiff's theatres. Extended coverage arrangement was agreed on, and bills for premiums were rendered and paid at 90-day intervals. The defendants provided such insurance for the first three quarters of the year; but when the plaintiff's equipment was destroyed by fire 11 months later, it was discovered that no insurance had been provided for the last quarter. Defendants denied liability, but the jury returned a verdict for the plaintiff from which judgment thereon the defendants appealed. The Supreme Court *held* that when an agent or broker undertakes to procure insurance for another, affording protection against a designated risk, the law imposes upon him a duty, in the exercise of reasonable care, to perform the obligation which he has assumed, and within the amount of the proposed insurance, he may be held liable for the loss properly attributable to his negligent default.[1] In so holding, the court followed a long line of decisions, both in this jurisdiction,[2] and in other jurisdictions—domestic[3] and foreign.[4]

It is well settled that the law will not impose on one agreeing gratuitously to effect insurance the duty to perform his promise.[5*] But where a person voluntarily takes steps toward effecting insurance, the law immediately imposes upon him a duty of care to carry out the

[1] Meiselman v. Wicker, 224 N. C. 417, 30 S. E. (2d) 317 (1944).

[2] Boney v. Central Mutual Ins. Co. of Chicago, 213 N. C. 563, 197 S. E. 122 (1938); Elam v. Smithdeal Realty & Ins. Co., 182 N. C. 599, 109 S. E. 632, 18 A. L. R. 1210 (1921); *see* Mack International Motor Truck Corp. v. Wachovia Bank & T. Co., 200 N. C. 157, 164, 156 S. E. 787, 790 (1931); Case v. Ewbanks, Ewbanks & Co., 194 N. C. 775, 779, 140 S. E. 709, 711 (1927).

[3] Mayhew v. Glazier, 68 Col. 350, 189 Pac. 843 (1920); Mallery v. Frye, 21 App. D. C. 105 (1903); Criswell v. Riley, 5 Ind. 496, 30 N. E. 1101 (1892); Rezac v. Zima, 96 Kan. 752, 153 Pac. 500 (1915); Backus v. Ames, 79 Minn. 145, 81 N. W. 766 (1900); Milliken v. Woodward, 64 N. J. 444, 45 Atl. 796 (1900); Canfield v. Newman, 265 S. W. 1052 (Tex. Civ. App. 1924); Journal Co. v. General Acc. Fire & Life Assur. Corp. Ltd., 188 Wis. 140, 205 N. W. 800 (1925); Milwaukee Bedding Co. v. Graebner, 182 Wis. 171, 196 N. W. 533 (1923); *see* Cushinberry v. Grecian, 112 Kan. 778, 212 Pac. 681 (1923); Feldmeyer v. Engelhart, 54 S. D. 81, 222 N. W. 598, 599 (1928).

[4] Wilkinson v. Coverdale, 1 Esp. Rep. 75, 170 Eng. Rep. R. 284 (1793).

[5*] Prescott v. Jones, 64 N. H. 305, 41 Atl. 352 (1898) ("While a gratuitous promise is binding in honor, it does not create a legal liability."); Thorne v. Deas, 4 Johns. 84 (N. Y. 1808); HUGHES, LAW OF INSURANCE (1828) 94.

undertaking.[6] It is in the imposition of this duty upon various persons and in various fact situations that the accepted rule finds difficulty of application and need for qualification.[7]

It would seem that an agent who acts gratuitously is liable only in case of gross negligence;[8] whereas, if he acts for a commission, his liability is based upon want of ordinary diligence.[9] The term "gross negligence," however, is not in itself determinative of the point at which liability of a gratuitous agent will arise, since the nature of the negligence may be tempered by the facts of each case.[10]* Nor can it always be ascertained with certainty what will constitute "ordinary diligence" without taking into consideration relative factors.[11]* Indeed, the courts have interpreted and qualified the term "diligence" until it has acquired numerous and sometimes hardly distinguishable prefatory adjectives: "common diligence."[12] "due diligence,"[13]* and "reasonable diligence"[14]* are exemplary of this state of affairs.

A major factor in determining the amount of diligence to be required in the particular case is the skill and experience of the agent.[15] In *Milliken* v. *Woodward*[16] the court regarded a fire insurance broker as a specialist in the field of fire insurance who holds himself out to the world as possessing sufficient skill requisite to his calling. The court held that if the agent failed to exercise the proper care and skill in securing the insurance of the property of the person for whom he is acting, under his instructions and agreement with such person, the neglect of such skill and diligence would be actionable if it proximately resulted in loss or damage to the insured by whom the agent was retained and employed.

[6] Wade v. Robinson, 216 Ala. 383, 113 So. 246 (1927); ANGELL, FIRE AND LIFE INSURANCE (1854) 433; MAY, LAW OF INSURANCE (1873) 124; 1 MECHEM, LAW OF AGENCY (2d ed. 1888) 914; PATTERSON, ESSENTIALS OF INSURANCE LAW (1st ed. 1935) 63; 2 PHILLIPS, THE LAW OF INSURANCE (1867) 533.

[7] Tiribassi v. Parnell, Cowher & Co., 106 Pa. Super. 168, 161 Atl. 477 (1932).

[8] Siegel v. Spear & Co., 234 N. Y. 479, 138 N. E. 414 (1923); Beardslee v. Richardson, 11 Wend. 25 (N. Y. 1883); JONES, LAW OF BAILMENTS (1806) 44.

[9] Mallery v. Frye, 21 App. D. C. 105 (1903); Rezac v. Zima, 96 Kan. 752, 153 Pac. 500 (1915); Milliken v. Woodward, 64 N. J. 444, 45 Atl. 796 (1900).

[10]* East Tennessee Telephone Co. v. Simms' Adm'r, 100 Ky. 404, 36 S. W. 171 (1896) ("The word 'gross,' when used to qualify 'negligence' is a relative one, and is supposed to emphasize merely a want of due care and negligence as gross or ordinary, according to the circumstances, relations, and conditions in which due care is omitted to be exercised.").

[11]* Erie Bank v. Smith, 3 Brewst. 9, 14, 17 (Pa. 1868). ("Ordinary diligence is that degree of care which men of common prudence generally exercise in their affairs *in the country and age in which they live.*") *(Italics ours.)*.

[12] *See* Litchfield v. White, 7 N. Y. 438, 442 (1852).

[13]* Perry v. City of Cedar Falls, 87 Iowa, 315, 54 N. W. 225 (1893) ("Due diligence is the diligence due from one as a reasonable and prudent man *under the same circumstances.*") *(Italics ours.)*.

[14]* Bacon v. Casco Bay Steamboat Co., 90 Me. 46, 37 Atl. 328, 329 (1897) ("Reasonable diligence is that diligence which would be deemed reasonable by reasonable and prudent men *under the same circumstances.*") *(Italics ours.)*.

[15] Colpe Inv. Co. v. Seeley & Co., 132 Cal. App. 16, 22 P. (2d) 35 (1933).

[16] 64 N. J. 444, 45 Atl. 796 (1900).

Thus, where the broker has, by his mere act of undertaking to procure insurance for another, held himself out to possess the requisite skill, the court has held him liable to the extent of the damage to an automobile, where the policy which he had undertaken to effect on the automobile was invalid because of his misdescription of the manufacture of the car.[17] So, too, in a Kansas case[18*] it was held that where a firm of agents representing several fire insurance companies were instructed to insure certain goods in a "No. 1 Company," they were liable to the insured for the amount of the policy where—upon the occurrence of a loss—it was discovered that the company chosen was not licensed to do business in the state.

The Tennessee court in *Morton* v. *Hart Bros.*[19] has announced the same principle where the insured had instructed the agent to secure the policy from a "good company" and the company selected had insufficient capital to comply with statutory requirements. Where insurance brokers are employed by the insured with no specific instructions as to the companies from which the policies are to be secured, and they are intrusted by the insured with the physical possession and control of the policies, it is the duty of the brokers to (1) get policies that insure the property; (2) inform the insured if they fail to secure valid insurance; and (3) inform the insured of the conditions of the policies they obtain, so that the insured may live up to all conditions contained in the policies.[20] Liability has also been imposed on the agent where he obtained a policy containing an invalidation clause and thus failed to protect the insured against designated risk.[21*]

Where the agent or broker has undertaken to procure the insurance and has exercised reasonable diligence to obtain it on the terms and conditions agreed upon but has been unable to procure it on the agreed terms and conditions, the law imposes upon him the further duty of giving timely notice to his principal.[22] The Minnesota view as expressed in *Backus* v. *Ames*[23] seems somewhat more lenient since it expressly provides that the broker's duty to notify the principal should arise only after he has had reasonable time to determine whether the

[17] Affleck v. Kean, 50 R. I. 405, 148 Atl. 324 (1929) (misdescribed Willys-Overland as Willys-Knight).

[18*] Latham Mercantile & Commercial Co. v. Harrod, 71 Kan. 565, 81 Pac. 214 (1905); Mallery v. Frye, 21 App. D. C. 105 (1903) (Company had not undergone examination of their affairs and had not appointed resident agent as required by statute.).

[19] 88 Tenn. 427, 12 S. W. 1026 (1890).

[20] Fries-Breslin Co. v. Bergen & Snyder, 99 C. C. A. 384, 176 Fed. 76, 38 INS. L. J. 1216 (1909); *cert. den.* 215 U. S. 609, 30 Sup. Ct. 410, 54 L. ed. 347 (1909).

[21*] Ursini v. Goldman, 118 Conn. 554, 173 Atl. 789 (1934) (Theft policy contained a clause making it invalid if insured had sustained loss by burglary within the previous five years.).

[22] Rezac v. Zima, 96 Kan. 752, 153 Pac. 500 (1915).

[23] 79 Minn. 145, 81 N. W. 766 (1900).

insurance could be placed. In this case the court held that, as bearing on the question of the broker's negligence, evidence tending to show the hazardous nature of the risk to be insured against and the difficulty of securing insurance on the property in question was competent and material.

Relative agreement seems to exist in regard to the duties of agents in cases where the insurer becomes insolvent after the effecting of the policy. In *Diamond* v. *Duncan*,[24] the insurer became insolvent and suspended business before the term of the original policy expired; and the principal not knowing of that fact, requested the agent to reinsure the property. This the broker agreed to do, and the property burned before any insurance had been procured. The court held that it was the duty of the broker to notify the insured of the insolvency so that the insured might take steps to protect himself. To the contrary the Kentucky court[25] held that where the insurer became insolvent subsequent to the effecting of the original policy and the agent—rather than fraudulently representing the insurer to be solvent—merely failed to notify the policy holders of the insolvency of the company, there was no liability. This court reasoned that the imposition on him of such a duty to notify would be to require him to perform an act not in the interests of the company, which act might be deemed by the company a breach of his duties to it. However the Kentucky court agreed with the decision in *Diamond* v. *Duncan, supra,* that if the agent fraudulently represented the company to be solvent when he knew it to be insolvent, and thus procured the insured to take the policy, he would be liable for the fraud so practiced. The law will impose no liability on an insurance broker if, in the exercise of reasonable care and diligence, he selects a company then in good standing though it subsequently becomes insolvent.[26]

In an attempt at recovery for loss through failure of a broker to effect insurance, the insured, if he can show a pre-existing duty in the broker, may bring the action on either a contract or tort theory.[27] If recovery is to be had in contract, the insured must show the existence of a valid contract between the broker and himself. Should he succeed, the recovery is generally the amount of loss for which the insured would have been compensated had the insurance actually been effected.[28] In the *Elam* case the court held: "Where, in a case of this

[24] 138 S. W. 429 (Tex. Civ. App. 1911); *cf.* Dargan v. Robinson, 140 S. W. (2d) 561 (Tex. Civ. App. 1940).

[25] Eastham v. Stumbo, 212 Ky. 685, 279 S. W. 1109 (1926).

[26] Gettins v. Scudder, 71 Ill. 86 (1873); *cf.* Hartmen & Daniels v. Hollowell, 127 Iowa 643, 102 N. W. 524 (1905); Beckman v. Edwards, 59 Wash. 411, 110 Pac. 6, Ann. Cas. 1912 B 40 (1910); RESTATEMENT, AGENCY (1933) sec. 422, comment c.

[27] Ursini v. Goldman, 118 Conn. 554, 173 Atl. 789 (1934).

[28] Lindsay v. Pettigrew, 5 S. D. 500, 59 N. W. 726 (1894); Sheller v. Seattle Title Trust Co., 120 Wash. 140, 206 Pac. 847 (1922).

kind, the action is for tort, and there is a negligent default on the part of the plaintiff contributing to the injury [injury meaning lack of insurance at time of loss], this would have the effect of defeating the action. But where the action is brought for breach of contract, and that is established, contributory negligence is not allowed to defeat the action *in toto,* but the negligence of the claimant contributing is to be properly considered on the issue as to damages."[29]

Many of the cases in contract involving the effecting of insurance arise out of a clause in the conditional sales contract giving the seller an option to insure.[30] The diversity of wording of these options makes for difficult interpretation. The Washington court, in a case where the plaintiff purchased an automobile under a conditional sales contract containing the clause that the seller could insure during the life of the contract, and the seller exacted from the buyer at the time of the sale—in addition to the selling price—sufficient money to keep it insured, held that the contract between the buyer and seller was valid and enforceable.[31] In spite of the seller's promise to insure, should the seller later choose not to exercise his option, the buyer—after he has received notice that the lessor has not procured insurance—cannot thereafter rely on the lessor to furnish the insurance, but is required to insure himself.[32] In *Black Motor Co.* v. *Thomas*[33] there was an automobile conditional sales contract which provided that the seller or assignee could purchase theft or other insurance in such form and amounts as the seller or assignee might require relating to the respective interests of conditional seller and buyer. The Kentucky court held that the agreement merely authorized the seller to secure insurance to protect itself as well as the buyer and was not an agreement on the part of the seller to act as insurance broker for the buyer.

Where buyer and seller enter into a contract of conditional sale which imposes on the buyer the duty to insure, but grants the seller an option to insure, which option he undertakes to exercise, the buyer cannot set up the complaint that the seller did not insure for an amount equal to what he had agreed by verbal stipulations, since such agreement was invalid and without consideration; and the seller, exercising an option rather than performing a duty to insure, cannot be held to

[29] Elam v. Smithdeal Realty & Ins. Co., 182 N. C. 599, 109 S. E. 632, 18 A. L. R. 1210 (1921); HALE, DAMAGES (2nd ed. 1912) 68.

[30] Black Motor Co. v. Thomas, 285 Ky. 267, 147 S. W. (2d) 696 (1941).

[31] Dahlhjelm Garages, Inc. v. Mercantile Ins. Co. of America, 149 Wash. 184, 270 Pac. 434 (1928).

[32] Automotive Collateral Co. v. I. F. Huntzinger Co., 102 N. J. 430, 131 Atl. 896 (1926).

[33] 285 Ky. 267, 147 S. W. (2d) 696 (1941) (distinguished from Eastham v. Stumbo, 212 Ky. 685, 279 S. W. 1109 (1926); Gay v. Lavina State Bank, 61 Mont. 449, 202 Pac. 753 (1921); Elam v. Smithdeal Realty & Ins. Co., 182 N. C. 599, 109 S. E. 632, 18 A. L. R. 1210 (1921) in that here the Motor Company had something at stake as well as did Thomas).

the exercise of good faith and reasonable care in the manner of doing so.[34]

In Wisconsin, where the agent agrees under an oral contract to procure insurance for another person and negligently fails to do so, he cannot be held liable as an insurer, since a state statute prohibits issuance of fire insurance contracts by anyone except authorized fire insurance companies.[35]

It was in *Wallace* v. *Hartford Fire Ins. Co.*[36] that the Idaho court held that the failure of the agent, through negligence, to obtain a policy of insurance, where the agent has led the insured not to obtain insurance elsewhere through an oral agreement that the agent should write insurance in his company in the same amount as that expressed in an expiring policy, is a tort for which both principal and agent are liable; the agent for his negligence and the company as responsible for his acts as agent within the scope of his employment and in the course of his duties. The dissenting judge, however, contended that the action was not brought to recover damages on account of the failure of the agent and company to perform any duties required by law, but was based on the oral agreement of the parties. The same question might well have been raised in the *Meiselman* case, for the parties had entered into an agreement that the equipment should be insured for the period of one year. However, the writer feels that the better method is that of treating the action as one in tort, where the court may better apply the rules of negligence to the facts at hand.

CHARLES F. COIRA, JR.

[34] Gober Motor Co. v. Morrow, 218 Ala. 324, 118 So. 545 (1928); *cf.* Cunningham v. Holzmark, 225 Mo. 762, 37 S. W. (2d) 956 (1931); motion overruled 47 S. W. (2d) 1097.

[35] WIS. STAT. (Brossard, 1941) §203.07.

[36] 31 Idaho 481, 174 Pac. 1009 (1918).