UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 26 | Number 3 Article 4

4-1-1948

Notes and Comments

North Carolina Law Review

The
North Carolina
Law Review

VOLUME 26 APRIL, 1948 NUMBER 3

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NOTES AND COMMENTS

Administrative Law—Crop Insurance—Adequacy of Notice

In a recent United States Supreme Court case[1] the plaintiff, an Idaho farmer, sued the Federal Crop Insurance Corporation[2] to recover

[1] Federal Corp. Ins. Corporation v. Merrill,—U. S.—, 68 Sup. Ct. 1, 92 L. Ed. 51 (1947), *reversing* 174 P. 2d 834 (Idaho 1946).
[2] 52 STAT. 72 (1938), 7 U. S. C. §1503 (1940).

for the destruction of his spring wheat crop by drought. In applying for the insurance the plaintiff had informed the Corporation's local agent that he was reseeding 400 acres of his spring wheat on winter wheat acreage, and the agent had advised him that his entire crop was insurable. After the drought the Federal Crop Insurance Corporation refused to pay the loss because, prior to the plaintiff's application, the Corporation had promulgated its Wheat Crop Insurance Regulations which were duly published in the Federal Register.[3] The regulations stated that spring wheat which had been reseeded on winter wheat was not insurable. The Court held in a five to four decision that the plaintiff could not recover.

The Federal Crop Insurance Corporation is expressly given the power to sue and be sued.[4] If this had meant that the Corporation was to be held subject to the same rules of liability as private insurance companies, then it would have been liable in this case. Under the insurance law of Idaho[5] and the majority of states[6] the knowledge of the agent is the knowledge of the company and his representations in a situation like the present one would bind the company. However, the Court did not apply this rule because to have done so would have been to ignore the regulations promulgated by the Corporation and published in the Federal Register.

Prior to the Federal Register Act of 1935[7] there was no uniform or systematic method of publicizing executive orders or administrative regulations. The great confusion that this led to was strikingly emphasized in the case of *Panama Refining Co. v. Ryan*[8] where the case was argued through two lower courts upon the assumption that the Petroleum Code contained a paragraph which in fact had been eliminated by executive order. To correct this difficulty an act was passed requiring all executive orders and administrative regulations[9] of general applica-

[3] Wheat Crop Insurance Regulations 414-37(v), 10 FED. REG. 1591 (1945).

[4] 52 STAT. 73 (1938), 7 U. S. C. §1506(d) (1940). This section provides that the Federal Crop Insurance Corp. shall not be subject to garnishment, attachment, or injunction.

[5] Maybee v. Continental Casualty Co., 37 Idaho 667, 219 Pac. 598 (1923); Carroll v. Hartford Fire Ins. Co., 28 Idaho 466, 154 Pac. 985 (1916).

[6] *E. g.*, Triple Link Mutual Indemnity Ass'n v. Williams, 121 Ala. 138, 26 So. 19 (1899); Commercial Credit Co. v. Eisenhour, 28 Ariz. 112, 236 Pac. 126 (1925); Connecticut Fire Ins. Co. v. Moore, 154 Ky. 18, 156 S. W. 867 (1913); Crossman v. American Ins. Co. of Newark, N. J., 198 Mich. 304, 164 N. W. 428 (1917); Cox v. Assurance Society, 209 N. C. 778, 185 S. E. 12 (1936); Steuernagel v. Supreme Council of Royal Arcanum, 234 N. Y. 251, 137 N. E. 320 (1922).

[7] 49 STAT. 500 (1935), 44 U. S. C. §§301-314 (1940).

[8] 293 U. S. 388, 412 (1935).

[9] Section 5 of the Federal Register Act requires specifically the publication of presidential proclamations and executive orders, such other documents as the president may determine, and such documents as Congress may determine. Under this section the president issues regulations requiring the rules of administrative agencies to be published. See Ronald, *Publication of Federal Administrative Legislation*, 7 GEO. W. L. REV. 51, 71 (1938). The Federal Administrative Procedure

bility and legal effect to be published in the Federal Register. According to the Act filing of the regulation with the Division of the National Archives Establishment is sufficient to give notice of its contents to the public.[10] The cases[11] involving the point have held, with one exception,[12] that publication in the Federal Register does give notice to interested parties. Thus the Court in the principal case held that publication of the Corporation's regulations in the Federal Register gave legal notice of their contents, and they were binding on the plaintiff though neither he nor the Corporation's local agent had actual knowledge of them.

The question then arises as to whether a government corporation which engages in commercial activity should be held subject to the same rules of law as to its liability as a private corporation similarly situated. As a matter of public policy a strong argument can be made that it should not. Government corporations are not on the same basis as private ones in that their purpose is not to make profit but rather to procure benefits which inure to the public generally. In the principal case, for instance, it was pointed out that all-risk crop insurance had been too great a commercial hazard for private insurance companies, so the government entered the field to give the farmers much needed protection.[13]

However, the benefits which the government corporations are giving the public would seem to be somewhat illusory when these corporations are allowed to escape liability in situations where private corporations would be held. Such cases may tend to create distrust of government corporations. The courts have tended, in the absence of express con-

Act, 60 STAT. 238 (1946), 5 U. S. C. APP. §1002(a) (Supp. 1947), supplements this and requires all substantive rules and statements of policy of administrative agencies to be published in the Federal Register.

[10] Publication in the Federal Register would seem to afford interested persons substantially the same opportunity to acquaint themselves with pertinent administrative regulation as they would have to acquaint themselves with pertinent statutes passed by Congress. However, to the effect that even lawyers seldom have access to or know how to use the Federal Register, see Wigmore, *The Federal Register and Code of Federal Regulations,* 29 A. B. A. JOUR. 10 (1943); 22 MICH. ST. B. JOUR. 23 (1943).

[11] Flannagan v. United States, 145 F. 2d 740 (C. C. A. 9th 1944); Henderson v. Baldwin, 54 F. Supp. 438 (D. C. Pa. 1942); Henderson v. Nixon, 66 Idaho 780, 168 P. 2d 594 (1946).

[12] Hall v. Chaltis, 31 A. 2d 699 (D. C. Mun. App. 1943). In this case it was held that a price regulation filed two days before and published on the day that defendant made the sale at a price above that required by the regulation did not give sufficient notice to defendant to render him liable to a $50 penalty. A concurring opinion said of the Federal Register, "I think we can take judicial notice that the average shopkeeper does not see that publication and probably is unaware that such a publication exists."

[13] See REPORT AND RECOMMENDATIONS OF THE PRESIDENT'S COMMITTEE ON CROP INSURANCE, H. Doc. No. 150, 75th Cong., 1st Sess. 2-4, 11-12; H. REP. No. 1479, 75th Cong., 1st Sess. 2; 81 CONG. REC. 2866, 2867, 2887, 2891, 2893, 2895 (1937).

gressional intent to the contrary, to treat them as private corporations.[14] This view was well stated in *United States v. Thomas*[15] where the court said, "In commercial transactions the Government should require of no citizen adherence to a rule between men that it is unwilling to follow."

Examples of the courts denying government corporations[16] the privileges and immunities usually afforded the Government itself are numerous. Thus government corporations may be sued without their consent[17] even where Congress has not authorized suit against them.[18] They are liable for interest[19] and court costs.[20] Their actions have been held to be barred by statutes of limitations and laches.[21] It has

[14] Thurston, *Government Proprietary Corporations*, 21 VA. L. REV. 465, 503 (1935), where the author says "in the law of government proprietary corporations the public interest is best served by regarding them as private."

[15] 27 F. Supp. 433 (N. D. Tex. 1939).

[16] There are two principal types of government corporations, those which are incorporated directly by an act of Congress and those which are incorporated under the law of some state pursuant to an act of Congress. However, it is believed that the general principles applicable to one are applicable to the other. For an opinion that there is no distinction to be drawn between the two types see, Coffman, *Legal Status of Government Corporations*, 7 FED. B. J. 389 n.* (1936). The Government Corporations Control Act, 59 STAT. 597, 602 (1945), 31 U. S. C. APP. §869 (Supp. 1947) provides that government corporations must be created directly by act of Congress and any existing corporations chartered under state law must be reincorporated by act of Congress before June 30, 1948.

[17] Keifer & Keifer v. Reconstruction Finance Corporation, 306 U. S. 381 (1939); Olson v. United States Spruce Production Corporation, 267 U. S. 462 (1925); Sloan Shipping Corp. v. United States Shipping Board Emergency Fleet Corporation, 258 U. S. 549 (1922); Federal Sugar Refining Co. v. United States Sugar Eq. Board, 268 Fed. 575 (S. D. N. Y. 1920); *cf.* Bank of the United States v. Planter's Bank of Georgia, 9 Wheat. 904 (U. S. 1824).

[18] In creating corporations Congress has almost uniformly included "sue and be sued" clauses. *E.g.*, Farmer's Home Corporation, 50 STAT. 527 (1937), 7 U. S. C. §1014 (1940); Federal Savings and Loan Insurance Corporation, 48 STAT. 1246, 1256 (1934), 12 U. S. C. § 1725 (1940); Home Owner's Loan Corporation, 48 STAT. 128, 129 (1933), 12 U. S. C. §1463 (1940); Tennessee Valley Authority, 48 STAT. 58, 60 (1933), 16 U. S. C. §831 (1940); Reconstruction Finance Corporation, 47 STAT. 5, 6 (1932), 15 U. S. C. §604 (1940); Inland Waterways Corporation, 43 STAT. 360, 362 (1924), 49 U. S. C. §155 (1940); National Agricultural Credit Corporation, 42 STAT. 1454, 1462 (1923), 12 U. S. C. §1171 (1940); Foreign Banking Corporations, 41 STAT. 378 (1919), 12 U. S. C. §614 (1940).

[19] United States v. The Thekla, 266 U. S. 328 (1924); National Home For Disabled Volunteer Soldiers v. Parrish, 229 U. S. 494 (1913); *accord*, Standard Oil Company v. United States, 267 U. S. 76 (1925) (interest allowed against United States on a policy of war risk insurance, though not administered by a government corporation. The court, per Holmes, said, "When the United States went into the insurance business, issued policies in familiar form and provided that in case of disagreement it might be sued, it must be assumed to have accepted the ordinary incidents of suits in such business.").

[20] Reconstruction Finance Corporation v. J. G. Menihan Corp., 312 U. S. 81 (1941); *see* Walling v. Norfolk Southern Ry., 162 F. 2d 95, 97 (C. C. A. 4th 1947).

[21] Lindgren v. United States Shipping Board Merchant Fleet Corp., 55 F. 2d 117 (C. C. A. 4th 1932); The No. 34, 11 F. 2d 287 (C. C. A. 2d 1925); Bank of the United States v. McKenzie, 2 Fed. Cas. 718, No. 927 (C. C. Va. 1829); *see* United States v. Morse, 26 F. Supp. 341, 342 (S. D. Me. 1939). *But cf.* Davis v. Corona Coal Co., 265 U. S. 219 (1924).

been held that government corporations can be estopped.[22] They are liable for their torts.[23] Some courts have held that they are subject to garnishment and attachment.[24]

In holding government corporations liable in situations where the Government itself would be immune, many courts merely say that the corporation is a separate and distinct entity[25] or that the Government in becoming a corporation and descending to the level of the business world divests itself of its sovereignty.[26] The more recent view on liability is that it is a matter of congressional intent.[27] Congress may clothe the corporation with the Government's immunity.[28] Whether or not it has done so must be determined by considering the statute creating the corporation and the nature and purposes of the corporation created.[29]

Thus the question in the principal case would be: did Congress intend the law of private insurance companies to be bodily applicable to the Federal Crop Insurance Corporation? That Congress authorized the Government to enter into a commercial field, that it chose a corporate form to administer the insurance,[30] and that it gave it power to sue

[22] Providence Engineering Corporation v. Downey Shipbuilding Corporation, 294 Fed. 641 (C. C. A. 2d 1923); *see* The Falcon, 19 F. 2d 1009, 1014 (D. C. Md. 1927); *cf.* Cushman v. United States, 43 F. Supp. 810 (S. D. Cal. 1942).

[23] Keifer & Keifer v. Reconstruction Finance Corporation, 306 U. S. 381 (1939); Panama Railroad Co. v. Johnson, 264 U. S. 375 (1924); Sloan Shipyard Corp. v. United States Shipping Board Emergency Fleet Corporation, 258 U. S. 549 (1922); Federal Sugar Refining Co. v. United States Sugar Equalization Board, 268 Fed. 575 (S. D. N. Y. 1920).

[24] Federal Land Bank v. Priddy, 295 U. S. 229 (1935); Commonwealth Finance Corporation v. Landis, 261 Fed. 440 (E. D. Pa. 1919); Central Market v. King, 132 Neb. 380, 272 N. W. 244 (1937); Gill v. Reese, 53 Ohio App. 134, 4 N. E. 2d 273 (1936); Haines v. Lone Star Shipbuilding Co., 268 Pa. 92, 110 Atl. 788 (1920); *cf.* Federal Housing Administration v. Burr, 309 U. S. 242 (1939). *Contra:* McCarthy v. United States Shipping Board Merchant Fleet Corporation, 53 F. 2d 923 (App. D. C. 1931); Home Owners' Loan Corporation v. Hardie & Caudle, 171 Tenn. 43, 100 S. W. 2d 238 (1936).

[25] *See, e.g.,* Olson v. United States Spruce Production Corporation, 267 U. S. 462, 467 (1924); National Home For Disabled Volunteer Soldiers v. Parrish, 229 U. S. 494, 496 (1913); Bank of the United States v. Planter's Bank of Georgia, 9 Wheat. 904, 907 (U. S. 1824); Lindgren v. United States Shipping Board Merchant Fleet Corporation, 55 F. 2d 117, 120 (C. C. A. 4th 1932).

[26] Bank of the United States v. Planters Bank of Georgia, 9 Wheat. 904, 907 (U. S. 1824).

[27] Reconstruction Finance Corporation v. J. G. Menihan Corp., 312 U. S. 81 (1941); Keifer & Keifer v. Reconstruction Finance Corporation, 306 U. S. 381 (1939); Federal Land Bank v. Priddy, 295 U. S. 229 (1935); Sloan Shipyard Corporation v. United States Shipping Board Emergency Fleet Corporation, 258 U. S. 549 (1922); *cf.* Federal Housing Administration v. Burr, 309 U. S. 242 (1939).

[28] *See* Reconstruction Finance Corporation v. J. G. Menihan Corp., 312 U. S. 81, 84 (1941); Keifer & Keifer v. Reconstruction Finance Corporation, 306 U. S. 381, 389 (1939); Federal Land Bank v. Priddy, 295 U. S. 229, 231 (1935).

[29] See note 27 *supra.*

[30] Not all government insurance is handled by government corporations. National Service Life Insurance is administered by the Administrator of Veterans' Affairs and payment is made from a fund in the Treasury. 54 STAT. 1008, 1012

and be sued would seem to indicate that it intended the Corporation to be subject to the same rules of law as private insurance companies. The Supreme Court could have avoided the effect of the Corporation's Wheat Crop Insurance Regulations in the same manner as did the Idaho Supreme Court.[31] That court said that Congress did not intend such regulations to be binding law but merely rules for the Corporation's own guidance and for the guidance of its agents. However, the Court did not find that Congress intended the law of private insurance companies to be applicable to the Corporation.

In the future, if government corporations which are engaging in commercial activities are to be held amenable to the same rules of law as private corporations Congress must clearly manifest that intention in the statutes creating them.

WILLIAM T. JOYNER, JR.

Adoption—Invalidation for Want of Consent

In *Allen v. Morgan*,[1] the Court of Appeals of Georgia upheld the action of the trial court in denying plaintiff's petition for adoption of defendants' child, and vacating the interlocutory order of adoption granted eight months prior to entry of the judgment.

The defendants were married after conception but before birth of the child. On learning of this the husband's step-mother began to apply pressure to have the child adopted. The defendants testified that the step-mother "suggested" that the mother go to a waiting home and put the child out for adoption, in order that the step-mother could hold up both "her head" and "her social standing." One month after its birth they took the child to Saluda, North Carolina and left it in the care of a doctor, until the defendants "could get situated." Three days later the defendants signed the consent, "because of the constant pressure being put on us day and night." The plaintiffs were residents of Georgia and were qualified in every way to become adoptive parents. Neither they nor their attorney had knowledge of any coercion that might have been practiced on the defendants.

The court, in construing the statute[2] requiring consent of the natural parents, held that both the letter and spirit of the statute gives the court, "full and unrestricted power to examine into the nature and kind of consent by parents to an adoption, not only because it is absolutely

(1940), 38 U. S. C. §§801, 805 (1940). The War Risk Insurance of the First World War was administered by the Bureau of War Risk Insurance in the Treasury Department. 40 STAT. 398 (1917).

[31] Merrill v. Federal Crop Ins. Corporation, 174 P. 2d 834 (Idaho 1946).

[1] 44 S. E. 2d 500 (Ga. 1947).

[2] GA. CODE ANN. (Harrison, 1937) §74-403 (Supp. 1945) ". . . no adoption shall be permitted except with the written consent of the living parents of the child. . . ."

prerequisite to the validity of an order granting a prayer for adoption, but because the wisdom of the grant, the welfare of the child and of the other parties, as well as the public policy of the State is involved."

With the exception of Maryland,[3] the states uniformly require the consent of the natural parent or parents to give validity to an adoption, absent special circumstances such as abandonment. Prior to 1941, North Carolina required that the consent be given to the specific adoption,[4] but in 1941 an amendment was added to the statute, overruling these decisions.[5]

There is a wide divergence of opinion as to whether or not consent, voluntarily given, may be arbitrarily withdrawn at any time before entry of the final decree.[6] Some courts refuse to grant the final order of adoption over the objection of the natural parents, even though they had previously consented to it.[7] It may be stated generally that this view emanates from the now outmoded doctrine of strictly construing adoption statutes in favor of the rights of the natural parents.

Conversely, many tribunals have denied the right to revoke and have based such denials on: (1) principles of contract;[8] (2) estoppel or other equitable grounds;[9] (3) public policy favoring the adoption of children, particularly illegitimates;[10] (4) welfare of the child.[11]

Analysis of these cases discloses that though the courts speak in terms of contract, estoppel, public policy and welfare of the child, much depends on the facts and circumstances of the particular case. Indeed, at least one court[12] has announced this to be the rule. Accordingly, parents were allowed to revoke[13] shortly after execution of their consent and before entry of the final decree, and before adoptive parents had

[3] Adoption of Lagumis, 46 A. 2d 189 (Md. 1946) ("The Maryland statute differs from that of most of the states in not requiring the consent of the parents in any case. . . .").

[4] Hanft, *Thwarting Adoptions,* 19 N. C. L. REV. 127, 143 (1941).

[5] N. C. GEN STAT. (1943) §48-5: ". . . and no further consent of the parent, parents, or guardian to a subsequent specific adoption shall be necessary. . . ."

[6] N. C. GEN. STAT. (1943) §48-5 provides among other things that where the child has been surrendered to a licensed child-placing agency or to the Superintendent of Public Welfare of the County, the attending consent is irrevocable. Where surrendered to others for adoption, the attending consent becomes irrevocable after six months.

[7] *In re* McDonnell's Adoption, 176 P. 2d 153 (Cal. 1947); *In re* White's Adoption, 300 Mich. 378, 1 N. W. 2d 579 (1942); Platzer v. Beardsley, 149 Minn. 435, 183 N. W. 956 (1921); Wright v. Fitzgibbons, 198 Miss. 471, 21 So. 2d 709 (1945); Application of Graham, 199 S. W. 2d 68 (Mo. 1947); Adoption of Caparelli, 175 P. 2d 153 (Ore. 1946); *In re Nelms,* 153 Wash. 242, 279 Pac. 748 (1929); *see* Allen v. Morgan, 44 S. E. 2d 500, 506 (Ga. 1947).

[8] Durden v. Johnson, 194 Ga. 689, 22 S. E. 2d 514 (1942); Stanford v. Gray, 42 Utah 228, 129 Pac. 423 (1913).

[9] Wyness v. Crowley, 292 Mass. 459, 198 N. E. 758 (1935).

[10] *In re* Adoption of a Minor, 144 F. 2d 644 (App. D. C. 1944); *Ex parte* Schultz, 181 P. 2d 585 (Nev. 1947).

[11] Lee v. Thomas, 297 Ky. 858, 181, S. W. 2d 457 (1944).

[12] Hammond v. Chadwick, 199 S. W. 2d 547 (Tex. 1947).

[13] *Id.*

custody of the child for a considerable time and had spent much money on it.[14] On the other hand, the right to revoke was denied where the fully qualified adoptive parents took custody of the child and devoted time and money toward carrying out their duty as foster parents for fifteen months without objection from the consenting mother.[15]

The extreme on this point was reached by the Court of Appeals of the District of Columbia in the case of *In re Adoption of a Minor*.[16] Basing its decision on the public policy of Congress in maintaining the new relationship, the court held that consent of the mother given two months before birth of the child was valid and irrevocable. Though on its face the decision was based on congressional policy, with a hint at estoppel,[17] the facts of the particular case seemed to control the outcome. These facts were that the adoptive parents had taken custody, that the court had acted on the consent that the attempt to revoke came two months after birth, the illegitimacy of the child, and the qualifications of the adoptive parents to rear the child.[18]

There is a definite trend toward denial of the right arbitrarily to revoke consent that is voluntarily given. These decisions are parallel to, and grow out of, the trend toward a more liberal construction of adoption statutes with a view toward maintaining the new status of the child.[19]

The decided cases establish the proposition that the decree of adoption may be set aside for: (1) fraud practiced on the court;[20] (2) undue influence practiced on the adopting parent by the natural parent;[21] (3) undue influence practiced by the adoptee;[22] (4) gaining of the consent

[14] *Accord*, Skaggs v. Gannon, 293 Ky. 795, 170 S. W. 2d 12 (1943) (where sufficient reason is shown, mother may revoke consent within sixty days allowed for appeal from the adoption order).

[15] Lee v. Thomas, 297 Ky. 858, 181 S. W. 2d 457 (1944).

[16] 144 F. 2d 644 (App. D. C. 1944).

[17] *Id.* at 651. Consent was irrevocable, ". . . especially after having been presented to the court and acted upon by the appellants who were . . . innocent strangers who acted in good faith."

[18] A different construction of the case—i.e. consent given before birth is irrevocable regardless of the peculiar facts of the case—would lead to an extremely harsh result. There can be no reason to cause a mother to face the ordeal of giving birth to a child which she knows she cannot keep, just because she erred in giving her consent, possibly in one of the trying moments that often accompany pregnancy, which she now wishes to withdraw. It is difficult to believe that Congress intended its policy to be so far reaching.

It also seems that a good argument against such a rule could be made on the basis of public policy.

[19] *Compare Ex parte* Schultz, 181 P. 2d 585 (Nev. 1947), *with* Platzer v. Beardsley, 149 Minn. 435, 183 N. W. 956 (1921); Application of Graham, 199 S. W. 2d 68 (Mo. 1947).

[20] Platt v. Magagnini, 110 Cal. 699, 251 Pac. 205 (1920) (defendants adopted the child while knowing it could not live, in order to inherit from it); Stevens v. Halstead, 168 N. Y. S. 142, 181 App. Div. 198 (1917) (adult woman lived in adultery with an aged man in order to induce him to adopt her).

[21] Phillips v. Chase, 203 Mass. 556, 89 N. E. 1049 (1909).

[22] Greene v. Fitzpatrick, 220 Ky. 590, 295 S. W. 896 (1927).

of the natural parents by the use of fraud or undue influence;[23] and (5) such grounds as would entitle the court to vacate any other order or decree.[24]

No cases are found which distinguish between fraud and undue influence which is practiced by the adoptive parents and that practiced by third persons. In *Lambert v. Taylor*[25] there was fraud in the *factum* of the written consent. Fraud was induced by persons in the natural father's family, but there was no showing of participation by the adoptive parents. The court set aside the decree, reciting the usual rule as to fraud.[26]

To set aside an adoption decree on the ground that the natural parents' consent thereto was due to mistake or fraud, such mistake or fraud must have been with respect to an existing fact, rather than a mere matter of opinion or belief as to something to happen in the future, regardless of how greatly such matter influenced the giving of the consent.[27] Likewise, "undue influence," such as will warrant setting the adoption aside means that the person exercising the influence so far dominated the will of the other as to substitute his will for such other, so that his act is in reality the act of the person exercising the influence.[28] Accordingly, it was held that advice of doctors, made in good faith, that the plaintiff would not survive her case of tuberculosis was not fraud.[29] Duress was not established by showing that the consent was given due to the "irresistible pressure of the circumstances" and plaintiff's "mental condition" caused by her husband's refusal to support her and threats of leaving her after learning that she was the mother of an illegitimate child.[30] The same result was reached where the plaintiff was "put to shame" and "great emotional tension" as a result of pleas of her brother that she put her illegitimate child out for adoption.[31]

It appears, therefore, that the instant case is not only against the weight of authority on this point, but is patently wrong.[32] This fact situation, from which the court found duress, is the rule rather than the ex-

[23] Lambert v. Taylor, 150 Fla. 680, 8 So. 2d 159 (1942).
[24] State *ex rel* Bradshaw v. Probate Court of Marion County, 73 N. E. 2d 769 (Ind. 1947).
[25] 150 Fla. 680, 8 So. 2d 159 (1942). (The result of this case is indefensible because there was a delay of five years in bringing the suit. The court noted the laches but cast it aside because no such issue was properly presented. These adoptive parents, who spent their money, love, and affection on the child for five years, cannot regard very highly the "justice" of such a harsh penalty for their unfortunate choice of attorneys.).
[26] Decree may be set aside for fraud.
[27] Nealon v. Farris, 131 S. W. 2d 858 (Mo. 1939).
[28] Phillips v. Chase, 203 Mass. 556, 89 N. E. 1049 (1909).
[29] Nealon v. Farris, 131 S. W. 2d 858 (Mo. 1939).
[30] Stanford v. Gray, 42 Utah 228, 129 Pac. 423 (1913).
[31] Adoption of Caparelli, 175 P. 2d 153 (Ore. 1946).
[32] *But* see Westendorf v. Westendorf, 187 Iowa 659, 174 N. W. 359 (1919).

ception. In the case of illegitimacy there is likely to be someone in the mother's family applying pressure on her to have the child adopted so that the family can "hold up their heads." Let such "duress" be valid grounds for setting aside the adoption—add to this the fact that the majority of adoptees are illegitimate[33]—and the result is that a substantial percentage of adoptions have been undermined. Knowing of this decision, all the mother who has changed her mind has to do, to have a perfectly valid adoption set aside, is to have a relative come into court and tell how he or she put the mother to great shame by showing her what a disgrace the illegitimate child was going to be and "suggesting" that she put it out for adoption.

The decision completely ignores the fact that the plaintiffs are perfectly innocent third persons who had nothing to do with the "duress," and who, in good faith, put forth their money, love and affection only to be forced to stand by and watch their efforts go up in the "smoke" of a family squabble with which they were not concerned.

The case seems to be another product of the outworn theory that adoption statutes, being in derogation of the common law and the parents' natural rights, should be strictly construed.[34] This theory was announced by the court.[35] The more modern view recognizes the fact that such legislation is not intended to supplement the common law, but completely to supplant it. Accordingly, it is held that the statutes should be construed liberally, to the end that the adoption may be upheld and the assumed relation sustained.[36]

The North Carolina decisions, prior to 1943, are based on the strict view,[37] and resulted in the wholesale thwarting of adoptions.[38] Then came the case of *Locke v. Merrick*[39] wherein Mr. Justice Schenck, quoted from[40] and cited with approval the case of *McConnell v. McConnell*,[41] which is a leading case for the liberal view. Due to the high degree of success and the social desirability of adoption as compared to

[33] Hanft, *Thwarting Adoptions*, 19 N. C. L. Rev. 127, 131 (1941).

[34] Smith v. Smith, 180 P. 2d 853 (Idaho 1947); Application of Graham *et al*, 199 S. W. 2d 68 (Mo. 1947); Adoption of Caparelli, 175 P. 2d 153 (Ore. 1946).

[35] 44 S. E. 2d 500, 506 (Ga. 1947).

[36] *In re* Adoption of a Minor, 144 F. 2d 644 (App. D. C. 1944); McConnell v. McConnell, 345 Ill. 70, 177 N. E. 692 (1931); Seibert v. Seibert, 170 Iowa 561, 153 N. W. 160 (1915); *Ex parte* Schultz, 181 P. 2d 585 (Nev. 1947); Locke v. Merrick, 223 N. C. 799, 22 S. E. 2d 523 (1943).

[37] Ward v. Howard, 217 N. C. 799, 7 S. E. 2d 625 (1940).

[38] Hanft, *Thwarting Adoptions*, 19 N. C. L. Rev. 127 (1941).

[39] 223 N. C. 799, 22 S. E. 2d 523 (1943).

[40] *Id.* at 803 ". . . it is well to remember that since the right of adoption is not only beneficial to those immediately concerned but, likewise, to the public, construction of the statute should not be narrow or technical nor compliance therewith examined with a judicial microscope in order that every slight defect may be magnified . . . ." The value of the case as a precedent is questionable because no mention was made of the previous North Carolina cases, and the decision would likely have been the same under the strict view.

[41] 345 Ill. 70, 177 N. E. 692 (1931).

institutions or leaving children with unfit parents,[42] the liberal view is the more desirable one, and it is to be hoped that our court will follow the attitude expressed in the *Locke* case.[43]

Because the law of North Carolina thwarted adoptions instead of furthering them, necessary changes were made in the statute in 1941.[44] The statute was made cumbersome by this patchwork, therefore in 1947 a complete revision of the old statute was passed for the purpose of organization and clarification.[45] Because the enacting clause was omitted, however, the North Carolina Supreme court held that the attempted enactment is entirely null and void.[46] This statute expressly embodied the liberal policy here advocated.[47] It would be highly beneficial if the next legislature would see fit to re-enact the statute, with additional improvements[48] and the necessary enacting clause.

The better view as provided by statute in North Carolina,[49] is that entry of the final decree is final and cannot be set aside for failure fully to protect the rights of the natural parents where they are made parties. By the logic of the instant case it would make no difference whether the final decree had been entered or not, because according to the rule laid down, a decree without consent is no decree at all, and consent given under duress is no consent at all. Even conceding the contention that there was duress the case still has potentialities of thwarting adoptions. The person on whom the duress has been practiced can wait for years and assert his rights at leisure, the adoptive parents in the meantime having expended all the effort that accompanies parenthood in bringing the child through the most difficult years. Greater consideration than this should be given to the attachment between the adoptive parents and the child that has grown out of the new relationship. Since it is highly desirable that the break between the infant and the mother be abrupt and final,[50] the natural parents should not be heard to assert any such objection after the probationary period is over and the final decree entered. Public policy demands that the adoption statutes should not

[42] Hanft, *Thwarting Adoptions*, 19 N. C. L. REV. 127 (1941).

[43] For an excellent discussion of modern policy toward adoptions see: *In re* Adoption of a Minor, 144 F. 2d 644 (App. D. C. 1944).

[44] *Statutory Changes in N. C. in 1941*, 19 N. C. L. REV. 435, 449-453 (1941).

[45] *A Survey of Statutory Changes*, 25 N. C. L. REV. 376, 408-412 (1947).

[46] *In re* Advisory Opinion, 227 N. C. Appendix, 43 S. E. 2d 73 (1947).

[47] N. C. Pub. Laws, 1947, c. 885.

The statute included in its express declaration of primary purposes ". . . and to protect them (children) from interference, long after they have become properly adjusted in their adoptive homes, by natural parents who may have some legal claim because of a defect in the adoption procedure."

It included in its express declaration of secondary purposes ". . . and to protect foster parents . . . and prevent later disturbance of their relationship to the child by natural parents whose legal rights have not been fully protected."

[48] *A Survey of Statutory Changes*, 25 N. C. L. REV. 376, 408-412 (1947).

[49] N. C. GEN. STAT. (1943) §48-5.

[50] *In re* Adoption of a Minor, 144 F. 2d 644 (App. D. C. 1944).

be nullified by a decision that causes the public to fear the consequences of adopting a child when their efforts are at the whim and caprice of the natural parent.[51]

J. W. ALEXANDER, JR.

Bills and Notes—Reacquisition—Liability of Intermediate Indorser to Purchaser from Reacquiring Payee

The payee of a negotiable promissory note indorsed the note to the defendant. The defendant shortly thereafter indorsed it back to the payee, who indorsed to the plaintiff. Plaintiff was admittedly a holder in due course. All indorsements were special. *Held:* Reacquisition by the payee gave the note a "fresh start," terminating the contractual liability of the intermediate indorser, so that he could not be regarded as in the line through which the holder traced his title.[1]

It is important that the problem of the instant case be distinguished at the outset from that arising under §58[2] of the Negotiable Instruments Law.

We are here concerned with a holder who is a holder in due course in his own right. The specific question is: Does an indorser remain liable to a subsequent holder in due course, in spite of reacquisition by a prior party, when the holder took with notice of the reacquisition?

Section 58,[3] on the other hand, deals with defenses available to prior parties when the instrument is in the hands of a holder *not* in due course. This section reads as follows: "In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But a holder who derives his title through a holder in due course and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter." Thus the specific question arising under this section is: Under what circumstances can a holder *not* in due course avoid the defenses of prior parties?

This distinction is necessary, for, as will be noted below, the courts have confused the issue somewhat in discussing the instant problem, by drawing §58 into the picture, though it is obviously inapplicable.[4]

[51] *Ex parte* Schultz, 181 P. 2d 585 (Nev. 1947).

[1] Denniston's Adm'r v. Jackson, 304 Ky. 261, 200 S. W. 2d 477 (1947), briefly noted in 46 MICH. L. REV. 97.

[2] N. C. GEN. STAT. (1943) §25-64 (quoted in text below).

[3] N. C. GEN. STAT. (1943) §25-64.

For an extensive discussion of the problem arising under this section, see Chafee, *The Reacquisition of a Negotiable Instrument by a Prior Party*, 21 COL. L. REV. 538 (1921). Also see Note, 1 N. C. L. REV. 187 (1923).

[4] See 46 MICH. L. REV. 97, 98 (1947) (brief discussion of the difference between these two problems).

The exact problem of the principal case has arisen very few times either under the law merchant[5] or the Negotiable Instruments Law.[6] There was a split of authority under the law merchant,[7] and that split has been carried forward[8] by virtue of the fact that the Negotiable Instruments Law has no express provision covering the situation. Thus in North Carolina *Adrian v. McCaskill*[9] released the intermediate indorser, and its doctrine was applied under the Negotiable Instruments Law by *Ray v. Livingston;*[10] while in Massachusetts, *West Boston Savings Bank v. Thompson*[11] held the indorser, and was approved after adoption of the Negotiable Instruments Law by *State Finance Corp. v. Pistorino.*[12] The one other case decided under the Negotiable Instruments Law cited the Massachusetts cases and allowed the purchaser from the reacquiring payee to hold the intermediate indorser, only to be reversed on appeal on another ground.[13]

[5] Howe Mach. Co. v. Hadden, 12 Fed. Cas. 710, No. 6, 785 (C. C. Ind. 1878) (releasing the indorser); West Boston Savings Bank v. Thompson, 124 Mass. 506 (1878) (holding the indorser); Adrian v. McCaskill, 103 N. C. 182, 9 S. E. 284 (1889) (releasing the intermediate indorser); *see* Herrick v. Carman, 12 Johns. 159, 161 (N. Y. 1815) (Note the interpretation of the holding of this case in Hall v. Newcomb, 7 Hill 416, 420 [N. Y. 1844].).

[6] Denniston's Adm'r v. Jackson, 304 Ky. 261, 200 S. W. 2d 477 (1947); State Finance Corp. v. Pistorino, 245 Mass. 402, 139 N. E. 653 (1923) (holding the indorser); Ray v. Livingston, 204 N. C. 1, 167 S. E. 496 (1933), 17 MINN. L. REV. 808 (releasing the indorser); Persky v. Bank of America Nat. Ass'n, 235 App. Div. 146, 256 N. Y. S. 572 (1932) (holding the indorser), *rev'd on other grounds,* 261 N. Y. 212, 185 N. E. 77 (1933). (The decision in the *Persky* case, holding the indorser, relied heavily on several cases in which the plaintiff purchased the instrument before maturity from the party primarily liable thereon, and was allowed to recover from a defendant who had indorsed prior to such acquisition or reacquisition by the primary party. Rogers v. Gallagher, 49 Ill. 182 [1868] [Payee indorsed a bill to the acceptor and was held liable to a purchaser who took from the acceptor before maturity.]; Eckert v. Cameron, 43 Pa. 120 [1862] [note reacquired by the maker and negotiated to the plaintiff]; *cf.* Horn v. Nicholas, 139 Tenn. 453, 201 S. W. 756 [1918]. See also National Bank v. Lindsey, 25 Del. 83, 78 Atl. 407 [1910] [Note was indorsed to plaintiff by maker after indorsing to and reacquiring from the defendant. Recovery was allowed.]; *see* Peltier v. McFerson, 67 Colo. 505, 507, 186 Pac. 524, 525 [1920]; Chicago Title & Trust Co. v. Bidderman, 275 Ill. App. 457, 468-73 [1934]. See Note L. R. A. 1918 E 170 [and the cases cited therein] for an extensive discussion of this problem. It is submitted by the writer that the analogy between the problem of these cases and that of the principal case is certainly well drawn. It should be noted that the Kentucky court, in *Denniston's Adm'r v. Jackson,* referred to its being influenced by the Kentucky position, "differing from the majority," that "when a maker of a note acquires it by assignment or endorsement, the obligation is extinguished and cannot be revived." Conley v. Louisa Nat. Bank, 296 Ky. 797, 178 S. W. 17 [1943]; Long v. Bank of Cynthiana, 11 Ky. 290 [1822]. The court recognized, of course, the fact that these cases did not preclude its holding the intermediate indorser.).

[7] See note 5 *supra.*

[8] See note 6 *supra.*

[9] 103 N. C. 182, 9 S. E. 284 (1889).

[10] 204 N. C. 1, 167 S. E. 496 (1933).

[11] 124 Mass. 506 (1878).

[12] 245 Mass. 402, 139 N. E. 653 (1923).

[13] Persky v. Bank of America Nat. Ass'n, 235 App. Div. 146, 256 N. Y. S. 572 (1932), *rev'd on other grounds,* 261 N. Y. 212, 185 N. E. 77 (1933).

That was the situation at the time the Kentucky court approached the problem, in the instant case, and in reaching its conclusion the court relied largely on the two North Carolina cases. Therefore a critical comment on the decision in *Denniston's Adm'r v. Jackson*[14] necessitates an analysis of *Adrian v. McCaskill,* and its life-giver under the Negotiable Instruments Law, *Ray v. Livingston.*

In the *Adrian* case the plaintiff purchased the note in question, after maturity, from the payee. At the time it bore two blank indorsements—that of the payee followed by that of the defendant. Plaintiff knew nothing of any prior transaction between the payee and the defendant. In affirming a judgment rendered for the defendant, the court noted the law merchant rule[15] which prevented a reacquiring party from holding liable a subsequent indorser to whom he would in turn be liable. With no reference to the origin of this rule, and without citing any authority, the court read in the following extension:[16] "It must be equally clear that one who derives possession from him, with notice of the fact, cannot hold such intermediate indorsers liable. . . ." The court stated that the indorsements were sufficient to charge the plaintiff with notice of the reacquisition.

Forty-four years later, after the adoption of the Negotiable Instruments Law, the North Carolina court approved the rule of the *Adrian* case and applied it in *Ray v. Livingston.* The plaintiff was a holder in due course. The note bore only two genuine signatures—the indorsement of the payee followed by that of the defendant. The signatures of three co-makers and four additional blank indorsements were forged. The circumstances under which the defendant had indorsed did not appear, but the note was purchased by the plaintiff from the payee, and the court assumed a negotiation by the payee to the defendant and a renegotiation—the possession of the payee raising a presumption of ownership. Plaintiff brought suit on the warranties for which the defendant's indorsement stood by virtue of §66[17] of the Negotiable In-

[14] 304 Ky. 261, 200 S. W. 2d 477 (1947).

[15] Bishop v. Hayward, 4 T. R. 470, 100 Eng. Rep. 1124 (1791) (The payee of a note was not allowed to recover from the defendant, to whom the payee had originally indorsed. The court admitted that there might have been circumstances under which he could have recovered, in which no circuity would be involved. Thus the ground for so holding was *circuity of action.*); Britten v. Webb, 2 B. & C. 483, 107 Eng. Rep. 463 (1824) (Drawer of bill to own order was not allowed to recover from the party to whom he had originally indorsed. Plaintiff sought to make this one of the exceptions mentioned in the *Bishop* case, by alleging agreement by defendant to indorse as security for payment by drawee, but the court said there was no consideration for the agreement, so the case involved *circuity of action* and the rule of the *Bishop* case applied.).

[16] Adrian v. McCaskill, 103 N. C. 182, 186, 9 S. E. 284, 285 (1889).

[17] N. C. GEN. STAT. (1943) §25-72: "Every indorser who indorses without qualification warrants to all subsequent holders in due course (1) the matters and things mentioned in subdivisions one, two, and three of §25-71 [genuineness, good title, and capacity of prior parties to contract]; and (2) that the instrument is at

struments Law, and, in pressing his claim, relied on the language of that section, that "Every indorser who indorses without qualification, warrants to *all* [italics supplied] subsequent holders in due course. . . ."

The court did not let this language trouble it however. It merely stated that the section should be considered in connection with the other provisions of the Negotiable Instruments Law, and proceeded to muddle the picture by injecting the problem arising under §58. The court then quoted §50[18] (in part a codification of the common law rule preventing suit by a reacquiring party against a subsequent indorser), and concluded by restating the law as announced in *Adrian v. McCaskill.*

Thus the court set out to reason away the efficacy of §66, and wound up without having done so[19] by reciting the codification of the rule of the law merchant of which the *Adrian* case was an extension, and holding directly on the basis of that case.[20]

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the time of his indorsement valid and subsisting. And in addition he engages that on due presentment it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken he will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay it."

[18] N. C. GEN. STAT. (1943) §25-56: "Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this chapter, reissue and further negotiate the same. But *he* [italics supplied] is not entitled to enforce payment thereof against any intervening party to whom he was personally liable."

[19] "The decision is clearly wrong. The court relied on the last sentence of section 50, but clearly overlooked tha fact that by section 66 the warranty runs to all subsequent holders in due course." BRANNAN'S NEGOTIABLE INSTRUMENTS LAW, 532 (6th ed., Beutel, 1938). "The court evidently overlooked the word 'all' in this section [§66]." *Id.* at 814.

Professor Britton began a recital of the holding of this case: "Without reference to Sections 65 and 66. . . ." BRITTON, BILLS AND NOTES §299 n. 2 (1943).

[20] The court made no reference to the possibility of the plaintiff's having relied on the defendant's indorsement as having been for the accommodation of the payee. Evidently the question was not raised by the parties. In Adrian v. McCaskill, 103 N. C. 182, 188, 9 S. E. 284, 285 (1889), the court intimated that had the plaintiffs purchased before maturity so as to be "'bona fide holders before maturity,'" they might have been able to recover from the intermediate indorser because of such reliance. It should be noted that in each of these two N. C. cases the indorsements were in blank, and the payees, from whom the plaintiffs had purchased, had not indorsed after the defendant. Some courts have held the intermediate indorser on these grounds, saying that the indorsements import accommodation. Mauldin v. Branch Bank, 2 Ala. 502 (1841); Palmer v. Whitney, 21 Ind. 58 (1863) (Intermediate indorsement is presumed to be for accommodation "in absence of contrary proof." The court said the bill was indorsed by the payee to the defendant, back to the payee, and by him indorsed to the plaintiff, but did not say whether by special or blank indorsements.); *see* Howe Mach. Co. v. Hadden, 12 Fed. Cas. 710, No. 6, 785 (C. C. Ind. 1878) (The court discussed these cases, but did not follow them, for it was dealing with special indorsements, and, in addition, the complaint disclosed that the plaintiff had actual knowledge of the fact that the instrument had been negotiated to the defendant by the payee.).

Note the interpretation of State Finance Corp. v. Pistorino, 245 Mass. 402, 139 N. E. 653 (1923), in 17 MINN. L. REV. 808 (as restricting the application of the rule of the *Ray* case to regular indorsers, because the court remarked that the trial court had found the defendants to be accommodation indorsers).

Thomas B. Paton, General Counsel for the American Bankers Ass'n, gave as his opinion that when a note payable to the order of the maker is purchased by the holder before maturity from the maker, on which appear an indorsement by the maker, an indorsement by an individual, and another by the maker, the individual is liable as an accommodation indorser. 1 PATON'S DIGEST §2722 (1926).

An analysis of the *Denniston* case again shows no consideration of the history of the common law rule on which §50 is based. The Kentucky court gave no more adequate consideration to the effect of the Negotiable Instruments Law on the problem at hand than did the North Carolina court in *Ray v. Livingston.* In fact, only two sections were cited, §§ 50 and 58, and it is again submitted that the latter has no application to this particular situation.

Those two cases under the Negotiable Instruments Law which held the intermediate indorser gave no extensive reasons for so doing, but reached what is believed to be much the sounder conclusion.[21] That result is suggested by the history of the common law rule that is embodied in §50. The rule was aimed solely at preventing circuity of action, with no suggestion, express or implied, of a rational basis for its extension to relieve an intermediate indorser of the liability to subsequent purchasers which he assumes by virtue of his indorsement.[22] It did not extinguish this liability; it merely prevented the action by the reacquiring party.[23] The rule was based on the policy of the law to prevent circuity of action,[24] and therefore is necessarily applicable only where it will do so. Would circuity of action be the result of allowing a purchaser from a reacquiring payee to hold the intermediate indorser? Emphatically no—no more so than it results from a holder's suing the third indorser rather than the first, or the maker. Thus the situation under discussion is not within the rationale of §50, and the purchaser from a reacquiring party, a holder in due course, should take free of "defenses available to prior parties among themselves," under §57,[25] unless the Negotiable Instruments Law affords some other basis for saying that reacquisition discharges the intermediate indorser, so that he is not a party "liable thereon."[26]

Is there any such basis? As shown above, the courts have found none, and that is fairly indicative of the answer. The writer submits that there is none.

[21] See Chafee, *The Reacquisition of a Negotiable Instrument by a Prior Party,* 21 COL. L. REV. 538, 551-53 (1921) (His discussion deals with reacquisition and reissue by a primarily liable party, favoring holding the intermediate indorser, but he mentions that the same principle applies to reacquisition by any prior party.); see BRITTON, BILLS AND NOTES §300 (1943) (He argues that even a purchaser after maturity should be allowed to recover from an intermediate indorser.).

[22] "The provisions just quoted from Sections 50 and 121 were put in, therefore, to prevent circuity of action. The phrasing of these statutory rules unites with the reason for the rules strongly to suggest that they were not directed against any person other than the reacquirer." BRITTON, BILLS AND NOTES, §300 (1943).

[23] Cases cited note 15 *supra.*

[24] Cases cited note 15 *supra.*

[25] N. C. GEN. STAT. (1943) §25-63: "A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

[26] See note 25 *supra.*

Section 121[27] may be disregarded, for its use of the word "paid" strongly suggests, when considered in the light of §88[28] (defining payment in due course), that it applied only to parties reacquiring after maturity, by virtue of payment in due course, rather than to a reacquisition in the usual course of business before maturity.[29] There remains §120,[30] which explicitly enumerates the means by which a party secondarily liable may be discharged, and there is no mention of discharge through reacquisition by a prior party. Its manner of expression would seem to indicate that it was meant to exhaust the field.[31]

Nor is there any reason, speaking purely on the merits of the problem, why such an indorser should be discharged[32] "because of the fortuitous event that the instrument got back into the hands of a subsequent holder."[33]

Thus is should follow that an intermediate indorser is liable to a holder in due course who purchased from a reacquiring payee, even

[27] N. C. GEN. STAT. (1943) §25-128: "When the instrument is paid by a party secondarily liable thereon it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except (1) where it is payable to the order of the third person and has been paid by the drawer; and (2) where it was made or accepted for accommodation and has been paid by the party accommodated."

[28] N. C. GEN. STAT. (1943) §25-95: "Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective."

[29] See BRITTON, BILLS AND NOTES §294 (1943). But see Chafee, *supra* note 21, at 548. The origin of the first exception of §121 also supports the above construction of that section, for it is generally recognized as having been created by Lord Mansfield in Beck v. Robley, 1 H. Bl. 89, 126 Eng. Rep. 54 (1788) (See Chafee, *supra* note 21, at 552.), in which a bill was not paid when due, and was taken up by the drawer. Thus, as it originated, the "paid" of the exception was payment after maturity.

[30] N. C. GEN. STAT. (1943) §25-127: "A party secondarily liable on the instrument is discharged (1) by any act which discharges the instrument; (2) by the intentional cancellation of his signature by the holder; (3) by the discharge of a prior party; (4) by a valid tender of payment made by a prior party; (5) by a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved; (6) by any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable or unless the right of recourse against such party is expressly reserved."

[31] See BRITTON, BILLS AND NOTES §300 (1943).

[32] It should be noted that in several of the cases the defendant originally took the instrument for security purposes only. Denniston's Adm'r v. Jackson, 304 Ky. 261, 200 S. W. 2d 477 (1947); West Boston Savings Bank v. Thompson, 124 Mass. 506 (1878); Adrian v. McCaskill, 103 N. C. 182, 9 S. E. 284 (1889). Thus it might be argued that his position differs somewhat from that of an intermediate indorser who really purchases an instrument and sells it back to a prior party, if the subsequent purchaser from the reacquiring party has actual knowledge of the transaction. This goes purely to the merits however, for there is nothing in the present law to warrant any such distinction. In the opinion of the writer, the argument is tenuous at best, for the party who takes for security need not indorse the instrument in order to return it to his indorser, and if he does he should be held liable.

[33] BRITTON, BILLS AND NOTES §300 (1943).

though the holder had actual knowledge of the reacquisition. This view is supported by that language of §66 which was so completely disregarded in *Ray v. Livingston.*

The Negotiable Instruments Law is now being revised by the National Conference of Commissioners on Uniform State Laws and the American Law Institute, as a part of their Commercial Code project.[34] This problem should be dealt with explicitly so that there will be no question but what an intermediate indorser will be held to that liability which he assumes.[35]

ALFRED D. WARD

Criminal Law—North Carolina Bastardy Statute—Support of Illegitimate Children

In *State v. Stiles,*[1] the defendant was indicted for willful failure to support his illegitimate child. In order to secure a conviction under this indictment, it is necessary that the State prove two elements. First, that the defendant is the father of the illegitimate child, and second, that his failure to support the child was willful.[2]

The prosecutrix's testimony as to the conception presented sufficient evidence on the point of paternity to support the jury's finding that the defendant was the father of the child. Since the defendant admitted having failed to support the child, it was only incumbent upon the prosecution to show that his failure to support was accompanied by a willful intent. When the State proved that the defendant had known of the prosecutrix's pregnant condition and her requests for "aid" even before the birth of the child, the jury was fully justified in finding that his subsequent failure to support the child was willful, without justification or excuse. However, had the State failed to establish the requisite willful intent, the defendant would have been guilty of no crime, since the statute makes willfullness a necessary ingredient of the offense.[3]

The present statute[4] under which the defendant was indicted superseded the old Bastardy Proceedings. Bastardy Proceedings[5] were civil

[34] See HANDBOOK AND PROCEEDINGS, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 143 (1944).

[35] It has been learned through correspondence that the revision in its present tentative form includes a provision discharging an intermediate indorser on reacquisition by a prior party. This draft is, of course, "subject to change without notice," and the writer hopes that such will be the fate of the provision in question.

[1] 228 N. C. 137, 44 S. E. 2d 728 (1947).

[2] N. C. GEN. STAT. (1943) §49-2.

[3] State v. Vanderlip, 225 N. C. 610, 35 S. E. 2d 885 (1945); State v. Hayden, 224 N. C. 779, 32 S. E. 2d 333 (1944); State v. Allen, 224 N. C. 530, 31 S. E. 2d 530 (1944); State v. Moore, 220 N. C. 535, 11 S. E. 2d 660 (1941); State v. McLamb, 214 N. C. 322, 199 S. E. 81 (1938); State v. Tarlton, 208 N. C. 734, 182 S. E. 481 (1935); State v. Tyson, 208 N. C. 231, 180 S. E. 85 (1935).

[4] N. C. GEN. STAT. (1943) §49-2.

[5] N. C. CODE ANN. (Michie, 1931) §265.

in nature and to secure a court decree for the maintenance and support of the child, it was only necessary that the State show by the preponderance of the evidence that the defendant was the father of the child. Under the present laws, however, the establishment of paternity only satisfies the proof of one of the two requisite elements, and since it is a criminal statute, the State must prove beyond a reasonable doubt rather than by a preponderance of the evidence that the defendant willfully failed to support the child. The defendant enters the trial with a presumption of innocence, and this includes innocence from any willful failure on his part to support his child.[6] The failure to support may be an evidential fact tending to prove his willful intent. However, the judge will commit reversible error to charge the jury that the mere finding of a failure to support gives rise to a presumption of willfulness.[7]

In the principal case, the judge instructed the jury that the defendant was indicted for Bastardy, and that North Carolina had a statute which made it a crime for a man to have intercourse with a woman and become the father of an illegitimate child. He later stated that the State was not relying on this statute. He further instructed the jury that the crime included a failure to support and pay medical expenses incurred when the child was born. Considering the first part of these instructions, the jury was at liberty to render a verdict of guilty based solely upon the fact that they found the defendant to be the father of the child, and yet no statute exists in this State making such conduct a criminal offense.[8] The Judge's attempted curative statement that the State was not relying on this statute, at most only served to confuse the jury, and not to lessen the prejudice already heaped upon the defendant. The instructions concerning medical expenses were incorrect as a matter of law, for willful failure to provide such expenses is not a criminal offense although the court may require provision therefor upon the defendant's conviction.[9]

The trial judge's error illustrates one of the many difficulties which may arise in the application of this statute. The Supreme Court of North Carolina more than once has criticized this act for its ambiguity and impossibility of satisfactory construction.[10]

The legislature has provided that the court may order the defendant to pay the mother the necessary medical expenses incurred in bearing the child. However, this order can be issued only after the defendant

[6] State v. Spellman, 210 N. C. 271, 186 S. E. 322 (1936); State v. Cook, 207 N. C. 261, 176 S. E. 757 (1934).
[7] State v. Cook, 207 N. C. 261, 176 S. E. 757 (1934).
[8] State v. Tyson, 208 N. C. 231, 108 S. E. 85 (1935).
[9] State v. Summerlin, 224 N. C. 178, 29 S. E. 2d 462 (1944).
[10] State v. White, 225 N. C. 351, 34 S. E. 2d 139 (1945); State v. Summerlin, 224 N. C. 178, 29 S. E. 2d 462 (1944); State v. Dill, 224 N. C. 57, 29 S. E. 2d 145 (1944).

has been found guilty of a willful failure to support the child. Medical expenses are no part of a child's support.[11] The reputed father is under no duty to support a dead child. Therefore, the mother apparently has no grounds upon which to bring an action under the statute to collect such medical expenses when the child dies at birth.[12] It is doubtful that the legislature intended this result in view of the fact that the former statute[13] afforded her compensation for such expenses, and further considering that the legislature in the present act expressly recognizes the father's duty to pay for such expenses.

The difficulty of interpreting the legislative intent concerning medical expenses again arises when such expenses are considered in light of the statute of limitations.[14] Payments for the support of the child by the reputed father within three years of birth will extend the statute of limitations.[15] This is allowed upon the theory that the payment by the reputed father is an acknowledgment of his issue. But since medical expenses incurred in birth are not a part of the child's support, payment of these alone will apparently not extend the statute in favor of the mother.[16] If the basis of this extension is the acknowledgment by the reputed father of his issue, could it be reasonably contended that payment of medical expenses incurred in birth is any less an acknowledgment than payments made to support the child?

The statute of limitations in part reads, "Proceedings under this article to establish paternity of such child may be instituted at any time within three years next after the birth of the child, and not thereafter."[17] To understand why the legislature restricted the application of the statute of limitations to proceedings to establish paternity, it is necessary to consider the general purpose of the chapter and the operation of the diverse sections within it. The act expressly recognizes that the statutory crime consists of two elements, one, the establishment of paternity, and two, proof of willful failure to support. Affirmative proof of the first is a condition precedent to allowing a verdict of guilty upon the second. Hence, if proof of paternity is barred there can be no action for failure to support. But, if paternity is established within the allowed three years, the legislature must have intended that the State be able to prosecute the action at anytime within the first fourteen years of the child's life. This should be true since failure to support is a continuing crime.[18] The provisions for bringing preliminary proceedings would

[11] State v. Summerlin, 224 N. C. 178, 29 S. E. 2d 462 (1944).
[12] This issue has not yet been decided by the North Carolina Supreme Court.
[13] N. C. CODE ANN. (Michie, 1931) §273.
[14] N. C. GEN. STAT. (1943) § 49-4.
[15] N. C. GEN. STAT. (1943) §49-4.
[16] This issue has not yet been decided by the North Carolina Supreme Court.
[17] N. C. GEN. STAT. (1943) §49-4.
[18] See Mr. Justice Barnhill, dissenting in State v. Dill, 224 N. C. 57, 29 S. E. 2d 145 (1944).

be meaningless if the three year statute of limitations is construed to bar all action under this act. For, if this were so, even after the establishment of paternity in a preliminary proceeding, it would still be incumbent upon the State to bring an action for failure to support within three years from birth. Since paternity may be establishd in the prosecution for failure to support, there would be no purpose in having preliminary proceedings if all action under the act is barred three years after birth. It would seem that if the legislature had intended this result they would have said prosecutions under this article are barred rather than designating specifically preliminary proceedings.

A proviso is written into the statute of limitations which is as follows: "provided however that when the reputed father has acknowledged paternity of the child by payments for the support of such child within three years from the date of birth thereof, and not later, then, in such case, prosecution may be brought under the provisions of such sections within three years from the date of such acknowledgment of paternity of such child by the reputed father thereof."[19] The proviso by its own language limits its operation to the particular case of acknowledgment by payments, and does not act as a restriction upon the three year statute of limitations. It is intended to give additional rights, and not to limit those already given. Construed thus, the proviso gives the mother the additional right to have the defendant prosecuted for failure to support, even though the statute of limitations prevents her from establishing paternity in a preliminary hearing. Since the father has affirmatively recognized his child, it is reasonable to conclude that the legislature intended that the mother should be given a further opportunity to force the father to perform his duty to the child.

In final analysis, the mother, if she establishes paternity in a preliminary proceedings, is given fourteen years from the birth of the child to have the State institute action for failure to support; however, if she fails to establish such paternity in preliminary proceedings within the allowed time, the State must institute action for failure to support within the extended period of three years from the last payment in support made within three years from birth or the action is forever barred.[20]

The North Carolina Supreme Court to date has not accepted this interpretation of the statute of limitations. In *State v. Bradshaw*,[21] the court held that the statute of limitations[22] (which read at that time, "Proceedings under this act may be instituted at any time within three years after birth of the child and not thereafter") barred any action

[19] N. C. GEN. STAT. (1943) §49-4.

[20] State v. Dill, 224 N. C. 57, 29 S. E. 2d 145 (1944). This would seem to be in accord with the separate dissenting views presented by Justices Seawell and Barnhill.

[21] 214 N. C. 5, 197 S. E. 564 (1938).

[22] N. C. CODE ANN. (Michie, 1935) §276(c).

under the statute after the expiration of three years from the birth of the child. In 1939 the statute of limitations was amended to its present form.[23] The effect of the 1939 amendment on the former statute of limitations was first considered in *State v. Killian,* where the court said: "This section (the former statute of limitations) however was definitely changed by Section 3 of Chapter 217 Public Laws 1939 (the present statute of limitations) which limited the application thereof to proceedings to establish the paternity of such child."[24] Considering this statement, it is difficult to understand why the court has held that "the only material change wrought by the particular amendatory proviso was to extend the time within which prosecutions may be brought when the reputed father has acknowledged his child by payments. . . ."[25] Therefore, today the law in North Carolina requires that prosecutions be commenced within three years of birth or they are barred by the statute of limitations, unless the proviso is made operative because of payments in acknowledgment, in which case the maximum limit for commencing the action would be six years from birth.

A father's initial gift to an illegitimate child is universal condemnation. This irreparable disservice should not be further perpetuated by allowing the father to escape the financial responsibility of his wrongful act because of ambiguity in our law. Nor could the legislature have intended such a result. The legislature has expressly distinguished proceedings and prosecutions, but, if there be any uncertainty, society and common decency dictate that it should be construed in favor of the unfortunate child.

THOMAS A. WADDEN, JR.

Federal Jurisdiction—Joinder of Non-Federal Claim with Federal Question

Plaintiff brought an action against FBI agents to recover damages allegedly resulting from an unlawful search and seizure of the plaintiff's property and from a deprivation of his liberty and property without due process of law in violation of his immunities guaranteed by the Fourth and Fifth Amendments of the United States Constitution. The district court dismissed for lack of jurisdiction on the ground that the complaint failed to state a federal claim for which relief could be granted, and the Circuit Court of Appeals affirmed.[1] The Supreme Court reversed[2] on the grounds that the plaintiff had clearly and in

[23] N. C. GEN. STAT. (1943) §49-4.
[24] State v. Killian, 217 N. C. 339, 341, 7 S. E. 2d 702, 703 (1940).
[25] 224 N. C. 57, 29 S. E. 2d 462 (1944); *see* State v. Killian, 217 N. C. 339, 341, 7 S. E. 2d 702, 703 (1940).

[1] Bell v. Hood, 150 F. 2d 96 (C. C. A. 9th 1945).
[2] Bell v. Hood, 327 U. S. 678 (1946). Mr. Chief Justice Stone and Mr. Justice Burton dissented on the ground that "The district court is without jurisdiction as

good faith founded his claim on provisions of the Constitution, and that the claim was substantial and not frivolous so that the district court should have taken jurisdiction before determining whether or not relief could be granted. The district court then took jurisdiction and *held:* 1., that no provision of the Constitution or laws of the United States gave a right of action in any person against a federal officer who violates that person's immunities under the Fourth and Fifth Amendments, and 2., that the federal court was without jurisdiction to consider any non-federal cause of action for trespass and false imprisonment arising out of the facts alleged, since a federal cause of action was entirely wanting.[3] The present note is concerned only with the second part of the district court's holding.

The problem might be stated: to what extent and under what circumstances may issues, which are non-federal in character, be joined in a suit before a federal court in cases where jurisdiction depends not on the nature and relation of the parties[4] but on the subject of the action. Prior to 1933 a variety of approaches to the subject had been taken by the courts resulting in the inevitable conflict in the cases.[5] Beginning with Marshall's statement in *Osborn v. Bank of the United States*[6] the general rule was developed that all issues actually raised in a case were within the judicial power of the district court once jurisdiction had been acquired over the case by virtue of the substantial federal question involved, even if the federal question was decided adversely to the party presenting it, or even if it was not decided at all.[7] This rule, however, had found expression most frequently in proceedings to enjoin state action on the ground that it would be a violation both of the Federal Constitution and of the State Constitution or laws,[8] and in the

a federal court unless the complaint states a cause of action arising under the Constitution or laws of the United States," at p. 685, and since neither the federal law nor the Constitution affords a remedy in this case, no cause of action is stated. The Justices further observed that the only effect of the majority holding is to require the district court to pass upon the local question of trespass, citing Hurn v. Oursler, 289 U. S. 238 (1933).

[3] Bell v. Hood, 71 F. Supp. 813 (S. D. Cal. 1947).

[4] The new Federal Rules of Civil Procedure, 28 U. S. C. A. following §723(c), Rule 18(a) provides that a party ". . . may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party," if joinder of parties and other rules are satisfied, so that where there is diversity of citizenship almost unlimited joinder of claims is permitted. See 2 MOORE'S FEDERAL PRACTICE 2118-2123 (1938).

[5] Note, 40 HARV. L. REV. 298 (1926).

[6] 9 Wheat. 738, 823 (U. S. 1824) ". . . when a question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it."

[7] Sterling v. Constantin, 287 U. S. 378, 393 (1923); Lincoln Gas & Electric Light Co. v. City of Lincoln, 250 U. S. 256, 264 (1919); Siler v. Louisville & Nashville R. R., 213 U. S. 175, 191 (1909).

[8] Chicago G. W. Ry. v. Kendall, 266 U. S. 94 (1924); Davis v. Wallace, 257

main had been disregarded in the great mass of cases where a claim for unfair competition was sought to be joined in a suit for patent, trademark or copyright infringement.[9] In 1933 the United States Supreme Court, in the case of *Hurn v. Oursler*,[10] endeavored to resolve the conflict, holding that a common law claim for unfair competition should have been passed on by the district court on its merits when joined with a claim for copyright infringement over which the court had assumed jurisdiction, even though it found there had been no infringement. But in "attempting to formulate some rule on the subject"[11] the court is said to have prescribed two conditions, *viz.*, that the claims must rest on "substantially identical" facts,[12] and that the non-federal claim must not be actually a separate and distinct cause of action simply joined in the complaint with a federal cause.[13] Courts not in sympathy with this decision have availed themselves of these limitations (that they find in it) to dismiss non-federal claims which would appear to fall well within the intent or purpose, and some even within the explicit wording, of the rule allowing jurisdiction. Thus, the simplest device for avoiding the *Hurn* case has been to find that some additional, even if closely related, fact must be presented to make out the non-federal claim.[14]

U. S. 478 (1922); Greene v. Louisville & Interurban R. R., 244 U. S. 499 (1917); Louisville & Nashville R. R. v. Greene, 244 U. S. 522 (1917); Ohio Tax Cases, 232 U. S. 576 (1914); and cases cited note 7 *supra*.

[9] The cases seem to have relied principally on language in Stark Bros. Co. v. Stark, 255 U. S. 50 (1921); Leschen & Sons Rope Co. v. Broderick, 201 U. S. 166 (1906) and Elgin Nat'l Watch Case Co. v. Illinois Watch Case Co., 179 U. S. 665 (1901). *See* Geneva Furniture Co. v. Karpen & Bros., 238 U. S. 254 (1915); Standard Paint Co. v. Trinidad Asphalt Co., 220 U. S. 446 (1911). For citations to lower court holdings see Schulman and Jaegerman, *Some Jurisdictional Limitations on Federal Procedure*, 45 YALE L. J. 393, 406 (1936) and Note, 52 YALE L. J. 922, 923 (1943); indicating the various approaches, Note, 1 U. OF CHI. L. REV. 480, 482 (1934).

[10] 289 U. S. 238 (1933). Three claims were joined in the complaint, (1) for infringement of the copyrighted play, (2) for unfair competition with regard to the copyrighted play, and (3) for unfair competition with regard to an uncopyrighted version of the same play. The third was dismissed for lack of jurisdiction.

[11] *Id.* at 241.

[12] *Id.* at 246 "Indeed, the claims of infringement and unfair competition so precisely rest on identical facts as to be little more than the equivalent of different epithets to characterize the same group of circumstances." Read in its context, this statement appears rather to emphasize the fact that in the case only one right was alleged because the two claims rested upon identical facts.

[13] *Id.* at 245-6 "But the rule [of the cases cited *supra* note 7 allowing jurisdiction] does not go so far as to permit a federal court to assume jurisdiction of a separate and distinct nonfederal cause of action because it is joined in the same complaint with a federal cause of action." Accordingly, the court dismissed a third claim for lack of jurisdiction. See note 10 *supra*.

[14] Derman v. Stor-Aid, Inc., 141 F. 2d 580 (C. C. A. 2d 1944); Zalkind v. Scheinman, 139 F. 2d 895 (C. C. A. 2d 1943) *cert. denied*, 322 U. S. 738 (1944); Musher Foundation, Inc. v. Alba Trading Co., Inc., 127 F. 2d 9 (C. C. A. 2d 1942) *cert. denied* 317 U. S. 641 (1942); Foster D. Snell, Inc. v. Potters, 88 F. 2d 611 (C. C. A. 2d 1937). In the last cited case the court not only relies on the contention that the facts are different, but the non-federal claim "relates to a different period of time . . . Stark Bros. Co. v. Stark, 225 U. S. 50, 41 S. Ct. 221, 65 L. ed. 496, is a flat authority that an action for damages resulting from unfair

But not less common is the more technical and complex method, that of finding that the facts alleged in reality present two causes of action.[15]

In *Bell v. Hood*,[16] the court seems not to have pursued either of these courses in a clear-cut manner. It does state that the *Hurn* case is not applicable when the facts relied on to establish the federal claim are not substantially identical with those setting forth the non-federal claim[17] citing four second circuit cases[18] and one district court decision,[19] but does not discuss whether or not that defect appears in the case before it. Indeed, it is difficult to see how it could.[20] Rather the

competition prior to registration of the plaintiff's trade-mark is not within the federal jurisdiction. We do not read the opinion in *Hurn v. Oursler* as overruling that decision and we think it controls the case at bar." The same court had previously supposed that the *Hurn* case had over-ruled the *Stark* case, "at least in [its]*ratio decindendi*." L. E. Waterman Co. v. Gordon, 72 F. 2d 272, 274 (C. C. A. 2d 1934). See Judge Clark's statement in Treasure Imports, Inc. v. Henry Amder & Sons, Inc., 127 F. 2d 3, 5 (C. C. A. 2d 1942), and Zalkind v. Scheinman, *supra*, at 901 n. 14. Whether or not the *Stark* case was overruled, some courts continue to exclude from consideration of unfair competition claim, any act done prior to the alleged patent, copyright or trade-mark. Treasure Imports, Inc. v. Henry Amdur & Sons, Inc. *supra* opinion of Hand and Swan, JJ. at page 6; Hydraulic Press Mfg. Co. v. Columbus Malleable Iron Co., 35 F. Supp. 603 (S. D. Ohio 1940); Slaymaker Lock Co. v. Reese, 24 F. Supp. 69 (E. D. Pa. 1938); Mitchell & Webber, Inc. v. Williams-Bridge Mills, Inc., 14 F. Supp. 954 (S. D. N. Y. 1936). For a criticism of this rule see Note, 52 YALE L. J. 922 (1943).

[15] Crabb v. Welden Bros., 164 F. 2d 797 (C. C. A. 8th 1947); Newport Industries, Inc. v. Crosby Naval Stores, Inc., 139 F. 2d 611 (C. C. A. 5th 1944); American Broadcasting Co. v. Wahl Co., 121 F. 2d 412 (C. C. A. 2d 1941); Lewis v. Vendome Bags, Inc., 108 F. 2d 16 (C. C. A. 2d 1939); Foster D. Snell, Inc. v. Potters, 88 F. 2d 611 (C. C. A. 2d 1937); Fred Benioff Co. v. Benioff, 55 F. Supp. 393 (N. D. Cal. 1944). Danials v. Barfield, 71 F. Supp. 884 (E. D. Pa. 1947) action brought (1) to gain reemployment under provision of Selective Service Act and (2) to recover back pay on claim that employment had been at less than union wage scale. The objection that the causes are separate seems better applied here, and also in California Water Service Co. v. City of Redding, 304 U. S. 252 (1938) and General Motors Corp. v. Rubsam Corp., 65 F. 2d 217 (C. C. A. 6th 1933) *cert. denied* 290 U. S. 688 (1933).

[16] 71 F. Supp. 813, 820 (S. D. Cal. 1947).

[17] *Id.* at 820.

[18] Dermon v. Stor-Aid, Inc., 141 F. 2d 580 (C. C. A. 2d 1944); Zalkind v. Scheinman, 139 F. 2d 895 (C. C. A. 2d 1943); Musher Foundation, Inc. v. Alba Trading Co., 127 F. 2d 9 (C. C. A. 2d 1942); American Broadcasting Co. v. Wahl Co., 121 F. 2d 412 (C. C. A. 2d 1941). Professor Moore observes that the "second circuit rule," to which express reference was made in Hurn v. Oursler, fn. at p. 241, was in that case "repudiated by the Supreme Court. Naturally, the second circuit cannot verbally cling to its former rule; but as a practical matter it does in many cases just about what it did before, although it now achieves the result by refusing jurisdiction over the claim of unfair competition by calling it a separate and distinct cause of action." I MOORE'S FEDERAL PRACTICE (1947 Cum. Supp.) §2.04, p. 94.

[19] Fred Benioff Co. v. Benioff, 55 F. Supp. 393, 397 (D. C. Cal. 1944). In what respect the facts differed does not clearly appear, rather, the court seems to have looked to the merits.

[20] CALIF. CONST. Art. I, §19 is identical to the Fourth Amendment of the Federal Constitution. If anything, more facts would be required to make out a violation of the latter, among them, evidence that the defendants were federal officers acting by color of their office. The complaint, set out in the margin of Bell v. Hood, 327 U. S. 678, 679 (1946), would seem to allege facts more than sufficient to state a cause of action for trespass and false imprisonment.

judge states that if the two causes of action[21] rest on substantially identical facts jurisdiction should be taken of the entire case, but that "in any event, the federal court cannot acquire jurisdiction over the non-federal cause of action unless the complaint also alleges a federal cause of action."[22]

First, it is at least doubtful whether the complaint here alleges two causes of action, or only one, based on two theories of recovery or predicated on two provisions guaranteeing a single right.[23] This, of course, depends upon the meaning given to a "cause of action." True the Court in *Hurn v. Oursler,* while recognizing that "cause of action" may mean one thing for one purpose and something else for another, indicated[24] that for the purpose of determining the bounds between state and federal jurisdiction courts should stay within the meaning given in *Baltimore S. S. Co. v. Phillips,* "the number and variety of the facts alleged do not establish more than one cause of action so long as their result. . . . is the violation of but one right by a single legal wrong."[25] Even so, can it be said that a person has one right to the protection of a copyrighted play and two rights to the protection of his person and papers so that an encroachment upon the former gives him but one cause of action while a violation of the latter gives two?

However this may be, the requirement that a federal *cause of action* must be alleged before the federal court may take jurisdiction over a non-federal issue arising from the same set of facts seems to be without authority in the cases.[26] The only time failure of the federal claim is

[21] "Cause of action," or "ground"? In the rule laid out in the *Hurn* case, at 246, which runs to the crux of this problem, great care was taken to distinguish between cases where two *grounds* support a single cause of action and those where two separate *causes of action* are alleged. (Words italicized by the court). It would seem for the sake of clarity, in reiterating the rule, the same care should be taken in the use of these terms.

[22] Bell v. Hood, 71 F. Supp. 813, 820 (S. D. Cal. 1947).

[23] See Clark concurring in Collins v. Metro-Goldwyn Pictures Corp., 106 F. 2d 83 (C. C. A. 2d 1939); R.C.A. Manufacturing Co. v. Columbia Recording Corp., 36 F. Supp. 247 (S. D. N. Y. 1940); Clark, *The Code Cause of Action,* 33 YALE L. J. 817 (1924).

[24] 289 U. S. 238, 246 (1933).

[25] 274 U. S. 316, 321 (1927). 1 MOORE'S FEDERAL PRACTICE §2.04 n. 46 (1938) ". . . it is true that the Hurn case uses language reminiscent of Pomeroy's definition of a cause of action as one primary right plus a delict or breach thereof, but its decision must be based on a more pragmatic notion, for the jurisdiction which was sustained embraced two rights—a statutory and a common law right, and alleged violations of both."

[26] L. E. Waterman Co. v. Gordon, 72 F. 2d 272, 274 (C. C. A. 2d 1934) ". . . it is only necessary that we should hold that the cause of suit upon the [federal ground] was substantial enough to support the jurisdiction of the district court." Southern Pacific Co. v. Van Hoosear, 72 F. 2d 903, 912 (C. C. A. 9th 1934) "And as the federal question here presented was a substantial one (and unlike cases of diversity of citizenship, this suffices) [*sic*] there was no jurisdictional obstacle on this score to a judgment for the intrastate rate." Hurn v. Oursler, 289 U. S. 238, 246 (1933) ". . . where the federal question averred it not plainly wanting in substance, the federal court . . ." may dispo e of the case on the non-federal ground. Field Packing Co. v. Glenn, 5 F. Supp. 4, 5 (W. D. Ky. 1933), *modified as to another matter and aff'd* 290 U. S. 177 (193.).

fatal to jurisdiction of the non-federal matter is where the former is plainly "unsubstantial," made fraudulently for the purpose of gaining access to federal courts, or made colorable.[27] But, in this case the Supreme Court had already declared that the contention that the constitutional provisions give no cause of action when violated "does not show that [plaintiff's] cause is unsubstantial or frivolous, and the complaint does in fact raise serious questions both of law and fact . . ." and "That question [whether violations of the Amendments give rise to a cause] has never been specifically decided by this court."[28]

It would seem then that the request to have the issues of trespass and false imprisonment determined should not have been denied for the reasons given by the district judge. Had he found that the two issues were not based on substantially identical facts, or that they were two separate and distinct causes of action, without much question the result would be within the rule of the *Hurn* decision, though in this writer's opinion, either would have been a finding not warranted by the facts of the case.[29]

The decision may be explained by the fact that the situation is an unusual one, and to this we get a clue in the judge's statement that "the [*Hurn*] decision seems to have been prompted by those considerations which find expression in the familiar maxim—'Equity delights to do justice and not by halves' . . . [and] a review of the decisions discloses that in practice, almost without exception, the rule of *Hurn v. Oursler* has been applied only to equity cases."[30] While it is true that suits to enjoin infringement of protected articles have been the primary cause for invoking the doctrine, neither the Supreme Court nor the lower courts have intimated that the rule is in any way confined to such cases, and no reason has been advanced indicating that it should be.[31]

However, the judge in the instant case is not without support from others of the bench[32] in his apparent desire to limit the practice of liberal joinder in this respect, and the topic of whether the doctrine of the *Hurn* case is wise from the standpoints of constitutional theory, of political expediency, and of trial convenience, is a lively one among

[27] *See* Bell v. Hood, 327 U. S. 678, 682 (1946); Siler v. Louisville & Nashville R. R., 213 U. S. 175, 191 (1909). Rudolf Lesch Fine Arts, Inc. v. Metal, 51 F. Supp. 69 (S. D. N. Y. 1943). It may be unsubstantial because a recent decision has made it wholly without merit. California Water Service Co. v. City of Redding, 304 U. S. 252 (1938).

[28] Bell v. Hood, 327 U. S. 678, 685 (1946).

[29] See notes 20 and 23 *supra*.

[30] Bell v. Hood, 71 F. Supp. 813, 820 (S. D. Cal. 1947).

[31] An example of a sound application of the rule in a law action can be found in Southern Pacific Co. v. Van Hoosear, 72 F. 2d 903 (C. C. A. 9th 1934).

[32] See courts cited notes 14 and 15 *supra*. But see 60 HARV. L. REV. 424, 430 (1947) indicating Congressional proposal, H. R. 7124 §1338(b), to adopt Hurn rule in Federal Judicial Code with regard to actions on patents, copyrights and trade-marks.

writers and judges particularly interested in federal jurisdiction and procedure.[33] The argument is made on the one hand that jurisdiction, where it might conflict with state or local interests should be carefully confined to limitations clearly established by the Constitution and the Congress, since our federal system at best is one of peculiar political sensitivity.[34] On the other hand it would seem a waste of time and expense both for the judiciary and the litigants serving no real purpose to require that substantially the same facts presented in an action before a federal court should be retried in a state court when one action should suffice.[35] It has been suggested that *Hurn v. Oursler* was carefully calculated to strike a compromise between these two opposing considerations,[36] and indeed, in the very limitations noted above, this seems apparent. The joinder rule of the *Siler* case is adopted as one of general application, but only where judicial economy will thereby be served ("substantially identical" facts) and only if the local matter is in reality a part of the transaction giving rise to the federal claim. The necessity for showing the federal claim to be substantial has always been a requisite to federal jurisdiction, absent diversity. As has been pointed out elsewhere,[37] the district court is protected by these limitations from frivolous suits, purely local litigation, and the states from intrusion by the federal judiciary. "We may concede that problems of allotment of jurisdiction between state and national courts are fundamentally problems of government, calling for wise and shrewd statesmanship by any arbiter of the relations of states to nations in a federal system. . . .

[33] *E.g.*, dissenting opinions of Judge Clark in Zalkind v. Scheinman, 139 F. 2d 895, 905 (C. C. A. 2d 1943), Musher Foundation, Inc. v. Alba Trading Co., 127 F. 2d 9, 11 (C. C. A. 2d 1942), and in Lewis v. Vendome Bags, Inc. 108 F. 2d 16, 18 (C. C. A. 2d 1939). 1 MOORE'S FEDERAL PRACTICE (1947 Cum. Supp.) 91 *et seq.*; 2 *id.* 25 *et seq.* Note, 52 YALE L. J. 922 (1943).

[34] See Mutual Life Ins. Co. v. Johnson, 293 U. S. 335, 339 (1934). For cases illustrating the reluctance of the courts to decide local issues before determination by the state courts, see I MOORE'S FEDERAL PRACTICE (1947 Cum. Supp.) 180-184. See generally, Frankfurter, *Distribution of Judicial Power Between United States and State Courts,* 13 CORN. L. Q. 499 (1928).

[35] To this end the Hurn rule has been applied by the second circuit in at least six instances (cited in Zalkind v. Scheinman, 139 F. 2d 895, 901 n. 7 (C. C. A. 2d 1943)) and in several other circuits, General Shoe Corp. v. Rosen, 111 F. 2d 95 (C. C. A. 4th 1940); E. Edelman & Co. v. Triple-A Specialty Co., 88 F. 2d 852 (C. C. A. 7th 1937); Illinois Watch Case Co. v. Hingeco Mfg. Co., 81 F. 2d 41 (C. C. A. 1st 1936); Hemmeter Cigar Co. v. Congress Cigar Co. 118 F. 2d 64 (C. C. A. 6th 1941). It might be said that no time is saved in considering evidence on a non-federal cause where as in the case under comment the federal cause is dismissed at the outset. But, non-federal claims have been retained after patent or copyright held invalid; United Lens Corp. v. Duray Lamp Co. 93 F. 2d 969 (C. C. A. 7th 1937); Bulova Watch Co. v. Stolzberg, 69 F. Supp. 543 (D. Mass. 1947); and even where the federal claim was not considered, Glenn v. Field Packing Co., 290 U. S. 177 (1933); Best & Co. v. Miller, 67 F. Supp. 809 (S. D. N. Y. 1946).

[36] Shulman and Jaergerman, *Some Jurisdictional Limitations on Federal Procedure,* 45 YALE L. J. 393, 400 (1936).

[37] Note, 52 YALE L. J. 922 (1943).

Even so, there will be no loss to statecraft if in the daily activities of courts the needs of practical judicial administration may have some sway to persuade against compelling two lawsuits where one will more completely serve the interests of the litigants."[38]

ERNEST W. MACHEN, JR.

Mortgages—Foreclosures—Partial Sale of Land

A executed a deed of trust on four tracts of land to *T* to secure the payment of a series of notes payable to *C* and maturing in 1925. In 1926, *T* advertised under the power of sale of the deed and sold one of the tracts of land included therein. In 1928, *T* advertised and sold two additional tracts of land. The latter tracts were bought in by *C*, who went into possession, but no deed was given him for the land until 1943, some 18 years after the maturity of the debt. Under the law then existing, unless a mortgagee was in possession, the foreclosure sale and the execution and delivery of the deed pursuant thereto, in order to be valid, must have been completed within 10 years from the date the debt matured. In a suit by the heirs of *A* against the heirs of *C* to quiet title to the land, the issue became one of whether or not *C* was a mortgagee in possession of the two tracts to which he had no deed. *Held:* For the heirs of *A*. It is a general rule that there can be only one foreclosure of a mortgage or deed of trust. When a mortgagee or a trustee under a deed of trust elects to sell only a portion of the pledged property to satisfy the debt, the remainder of the security is released, and he cannot thereafter assert any right to it. Therefore, *C* was not and could not have been a mortgagee in possession after the execution and delivery of the deed made pursuant to the foreclosure sale held in 1926.[1]

The rule against successive foreclosures of the mortgage security has been widely applied where a decree is sought in a court of equity,[2] on the theory that a mortgage represents but a single security and therefore but a single cause of action, which cannot be split. Therefore, the foreclosure cannot be piecemeal. The basic idea of not splitting the mortgagee's cause of action has, in several states, been enacted into statutes which set out that "there shall be but one single action for the enforce-

[38] Judge Clark, dissenting in Lewis v. Vendome Bags, Inc., 108 F. 2d 16, 20 (C. C. A. 2d 1939).

[1] Layden v. Layden, 228 N. C. 5, 44 S. E. 2d 340 (1947).

[2] Dumont v. Taylor, 67 Kan. 727, 74 Pac. 234 (1903) (mortagee got one decree and order of sale, but withdrew it; second foreclosure refused); Hanson v. Dunton 35 Minn. 189, 28 N. W. 221 (1886) (mortagee had foreclosed once for part of the debt, sought a second foreclosure for the remainder); Long v. W. P. Devereux Co., 87 Mont. 209, 286 Pac. 406 (1930) (no second foreclosure on wheat grown on mortgaged land, where mortgagee had failed to assert his right to the wheat in the first foreclosure by having a receiver appointed); Nebraska Loan and Trust Co. v. Damon, 4 Neb. (unof.) 334, 93 N. W. 1022 (1903) (foreclosure of mortgage for interest only, where whole debt is due, exhausts lien); Dooly v. Eastman, 28 Wash. 564, 68 Pac. 1039 (1902).

ment of any right secured by a mortgage."[3] Indeed, the problem of successive foreclosures is but one of many which the "one single action" theory raises.[4]

To say, absolutely, that a mortgagee may foreclose but one time in any situation would be a harsh rule, and strictly applied, a trap for many an unwary mortgagee. As a result, courts of equity, in their decrees, have made several provisions for his benefit. As might be suspected, where it is a procedural impossibility to foreclose in one suit, a second suit is not barred.[5] Likewise, where, inadvertently, all parties having an interest in the property are not joined the first time, a second foreclosure may be had on the interest of the omitted party.[6]

The rest of the cases fall into two general groups—(1) where the debt has matured only in part and (2) where the debt has matured in whole. The first concerns the situation which arises where the mortgage secures a debt which falls due in successive installments, and the mortgage contains no acceleration clause. If a foreclosure decree is had for a part of the debt due (i.e., upon default of an installment where other installments have yet to mature), the property is discharged from the lien of the mortgage, and the mortgagee cannot foreclose again when the subsequent installments are not paid[7] To save this situation, equity courts will treat as incorporated into the decree a provision for the preservation of the lien, enabling the mortgagee to sell later under the same decree other parcels of land to satisfy subsequent installments.[8] Or, if the property is not readily divisible, the whole may be sold, and the court will direct that the sale be subject to a lien for the unmatured portion of the debt;[9] or, will direct that the whole security be sold, and after the due portion of the debt is paid, that the surplus be applied to the unmatured installments; or, will direct that the surplus be invested until such installments become due.[10] Accordingly, though there is a

[3] CALIF. CODE CIV. PROC. (Deering, 1941) §726; IDAHO LAWS ANN. (1943) §9-101; MONT. REV. CODES (Anderson and McFarlane, 1935) §9567; NEV. COMP. LAWS (Hillyer, 1929) §9048; UTAH CODE ANN. (1943) §104-55.1.

[4] 1 GLENN, MORTGAGES §96 (1st ed. 1943).

[5] Widman v. Hammack, 110 Wash. 77, 187 Pac. 1091 (1920) (land in two different states).

[6] Brackett v. Barnegas, 116 Cal. 278, 48 Pac. 90 (1897) (mortgage foreclosed without making wife a party where homestead had been previously declared); Chrystal River Lumber Co. v. Knight Turpentine Co., 69 Fla. 288, 67 So. 974 (1915) (holders of contract rights to timber on land not made parties); McCague v. Eller, 77 Neb. 531, 110 N. W. 318 (1906) (equity of redemption left in part of the premises in heirs at law of mortgagor).

[7] Curtis v. Cutler, 76 Fed. 16 (C. C. A. 8th 1896); Cadd v. Snell, 219 Iowa 728, 259 N. W. 590 (1935).

[8] Black v. Reno, 59 Fed. 917 (C. C. Mo. 1894).

[9] Light v. Federal Land Bank of St. Louis, 177 Ark. 846, 7 S. W. 2d 975 (1928); Chicago Title and Trust Co. v. Prendergast, 335 Ill. 646, 167 N. E. 769 (1929).

[10] *See* Black v. Reno, 59 Fed. 917 (C. C. Mo. 1894).

rule against partial foreclosure, proper steps in equity may preserve the lien of the mortgage.[11]

In several states these principles have been incorporated into statutes which are expressly designed to save the mortgage lien from extinction when foreclosure is made on one installment of an obligation.[12]

Where the whole debt is due, there are no piecemeal foreclosure provisions in favor of the mortgagee, unless there exists some special equity in his favor.[13] He has his opportunity then and there to realize on all of his security. If he forecloses on only a portion of a divisible security for the whole of the debt, then the partial foreclosure rule bars him from a second action.[14]

In the subject case, the court found no reason why the rule should not be applied to a power of sale in a deed of trust. The extension seems a legally logical one. Foreclosure by decree in equity and by advertisement under a power of sale, though different in method, are similar in principle. The mortgage still represents a single security which should not be foreclosed piecemeal, whether the foreclosure be inside the court or out. Moreover, one purpose of the rule is to prevent the harassment of the debtor by continued sales, and a power of sale, not being exercised under the guidance of the court, is more capable of being so used.

In other states where the power of sale is frequently used, the application of the rule has been recognized,[15] and statutes have been passed to protect the lien of the mortgage where the debt matures in installments.[16]

North Carolina has no statute protecting any piecemeal foreclosure.[17]

[11] 2 WILTSIE, MORTGAGE FORECLOSURE §832 (5th ed. Fribourg, Elting and Fribourg, 1939).

[12] ARIZ CODE (1939) §21-1226; IDAHO LAWS ANN. (1943) §9-103; MICH. STAT. ANN. (Henderson, 1935) §27-1145 through 1148; MINN. STAT. (Henderson, 1941) §580.09; MONT. REV. CODES (Anderson and McFarlane, 1935) §9469; NEV. COMP. LAWS (Hillyer, 1929) §9050; N. J. STAT. ANN. (1939) §2:65046 through 65058; N. D. REV. CODE (1943) §32-1915; N. Y. CIV. PRAC. ACT §1086; S. D. CODE (1939) §37:2909; UTAH CODE ANN. (1943) §104-55-5; WASH. REV. STAT. ANN. (Remington, 1931) §1127; WISC. STAT. (Brossard, 1943) §278:06.

[13] Gerig v. Loveland, 130 Cal. 512, 62 Pac. 830 (1900); Berrie, Sheriff v. Smith, 97 Ga. 782, 25 S. E. 757 (1896); Swift and Co. v. First National Bank of Barnesville, 161 Ga. 547, 132 S. E. 99 (1926); Herzog v. Union Debenture Co., 94 Neb. 820, 144 N. W. 814 (1913).

[14] Long v. W. P. Devereux Co., 87 Mont. 209, 286 Pac. 406 (1930).

[15] Walton v. Hollywood, 47 Mich. 385, 11 N. W. 209 (1882) (no second foreclosure for taxes and insurance premiums paid subsequent to foreclosure under power of sale).

[16] MICH. STAT. ANN. (Henderson, 1935) §27. 1222, *applied in* Bridgman v. Johnson, 44 Mich. 491, 7 N. W. 83 (1880); MINN. STAT. (Henderson, 1941) §580.09; N. D. REV. CODE (1943) §35-2205; S. D. CODE (1939) §37:3003; WISC. STAT. (Brossard, 1943) § 297:03 (if the mortgage be payable by installments, each installment after the first is deemed to be secured by a separate mortgage and foreclosure may be had for each installment as if a separate mortgage had been given for each).

[17] But see in this connection N. C. GEN. STAT. (1943) §45-27 (sale of land where land consists of two separate tracts lying wholly in different counties).

This creates a problem from the standpoint of both the debtor and the creditor where the land is divisible into parcels and foreclosure is made under a power of sale. The mortgagee, when only part of his debt is matured, must sell the whole security subject to a lien for the remainder of the debt. There is no equitable decree to provide for saving the lien, so that he may sell in parcels as the debt matures. Moreover, when he sells, whether only part or all of the debt is due, he must be sure that he sells enough of the land to make him whole. He has no second opportunity to foreclose if the first foreclosure does not provide enough.

From the viewpoint of the mortgagor, the rule designated to aid him becomes a detriment where he has pledged land grossly in excess of the amount of his debt. The mortgagee will sell all of the security, or at least substantially more than is necessary, in order to protect himself, regardless of whether the mortgagor would rather have the surplus land than the surplus from the proceeds of the sale.

For those who want to avoid the problem so raised, the simplest method seems a provision in the mortgage contract providing for a continuing power of sale authorizing the mortgagee to sell the mortgaged property in parcels from time to time until the whole debt is satisfied, but directing that only so much of the property be sold as is necessary to satisfy the debt then due. The court, in the instant case, indicated the propriety of such a clause.[18]

As has been pointed out, many states protect the lien of the mortgage where the debt matures in installments. Alabama, evidently feeling that the rule against partial foreclosure should not apply to the sale of land in parcels whether the debt had matured in part or in whole, has made such a clause statutory. The statute sets out that foreclosure, either by power of sale or in equity, shall operate as foreclosure only as to the property sold, and provides that every power of sale contained in a mortgage shall be a continuing power of sale unless it is expressly provided otherwise.[19]

The need for such a statute in North Carolina must be determined by a balancing of the respective interests of the mortgagor and the mortgagee. Since the rule against partial foreclosure may operate to the detriment of the mortgagor where the land is divisible, and is a detri-

[18] Layden v. Layden, 228 N. C. 5, 8, 44 S. E. 2d 340, 342 (1947).

[19] ALA. CODE (1940) tit. 47, §169: "The sale of any part of the property conveyed by mortgage, either under power of sale contained in the mortgage or by foreclosure in a court of equity, shall operate as a foreclosure of the mortgage only as to the property sold, and if the mortgage indebtedness is not thereby settled in full, the other property contained in the mortgage continues as security for the mortgage debt and there may be a further foreclosure of the mortgage, either by sale under power of sale or in equity. Every power of sale contained in the mortgages hereafter executed shall, unless otherwise expressly provided therein, be held to give a continuing power of sale authorizing the mortgagee or his assignee after the law day of the mortgage to sell the mortgaged property from time to time in separate lots or parcels as it comes into his possession."

ment in any event to the mortgagee, it is submitted that a statute in the nature of the one in Alabama would best serve the interests of both. It should include, in addition, a clause providing that only so much property should be sold as is necessary to satisfy the debt then due. Under such a statute partial foreclosure would then operate to cut off the lien of the mortgage in one case: that is, where only a portion of the debt had matured and the mortgagee foreclosed on the whole property without preserving the lien.

LEMUEL H. GIBBONS

Workmen's Compensation—Falls Due to Dizziness, Vertigo, Epilepsy and Like Causes

It was recently held by the Georgia Court of Appeals that a fractured skull sustained by a department store salesman, when he suffered an epileptic attack and fell against a sharp cornered table, was an accident arising out of the employment. The State Board of Workmen's Compensation granted the award on a finding that the exertion of the work brought on the attack.[1] Without rejecting the finding of the Board, the Court rather ambitiously advanced an entirely different theory. It was said that irrespective of whether the exertion caused the attack, the injury was compensable, since the table which claimant struck constituted a "special hazard" of the employment.[2] That anything so commonplace as a table should be denominated a "special hazard" and made the basis of liability for an injury may shock those employers who are not aware of some of the recent trends in workmen's compensation.

The Georgia statutes[3] do not make the employer liable for every accident which happens while the worker is on the job, but require the employment in some manner contribute to the injury. In theory, at

[1] The finding of exertion was not based on any immediate act, instead the whole nature of the employment was examined, which included climbing stairs and standing for a ten-hour work day.

Note that North Carolina apparently requires some particular act of exertion beyond the usual requirements of the employment. Neely v. Statesville, 212 N. C. 365, 193 S. E. 664 (1937); Moore v. Engineering & Sales Co., 214 N. C. 424, 199 S. E. 605 (1938); For annotations of N. C. Industrial Commission decisions, see N. C. W. C. A. Ann. (1946) p. 25-26. *But see* Edwards v. Piedmont Publishing Co., 227 N. C. 184, 187, 41 S. E. 2d 592, 594 (1947) (concurring opinion).

[2] United States Casualty Co. v. Richardson, — Ga. App. —, 43 S. E. 2d 793 (1947). Compare language of same court twelve years before where workman fainted and fell at water fountain. The decision was found not to be in conflict with the main case. "The better and more generally followed rule would seem to be that followed by Judge Stanley of the Department of Industrial Relations, to the effect that an injury arising from a physical seizure not induced by or related to the employment is not such an accident as would afford compensation, even though it might appear that the particular consequences of the seizure were such as would not have resulted elsewhere than at the place of the employment." Bibb Mfg. Co. v. Alford, 51 Ga. App. 277, 179 S. E. 912, 914 (1935).

[3] GA. CODE ANN. (Park, 1937) §114-102 (1935). "'Injury' and 'personal injury' shall mean only injury by accident arising out of and in the course of the employment. . . ."

least, this contributing factor must be one peculiar to the employment and not common to the general public.[4] The courts, torn between a desire to construe the statute liberally in favor of the employee, and at the same time bedeviled with common law notions of proximate cause, have not always reached uniform nor logical decisions.

In early cases where an employee's fall was brought on solely by a personal disease,[5] compensation was granted only when the employment required the worker to be in such a position or location that any fall would result in almost certain injury. This "location doctrine" seems to stem from an English case where an epileptic fell into a hatchway near which his employment required him to stand.[6] The case was followed in American courts where a painter became dizzy and fell eleven feet from a scaffold,[7] where a factory worker fell into a nearby machine from a heart attack,[8] and where an epileptic fell into a pit of hot ashes.[9] The "special hazard" of these situations was apparent. However, some American courts took the view that although the distance one fell or the object one fell against might increase the injury, it did not change the liability for a fall caused by a personal condition of the employee.[10] The courts which accepted the "location doctrine," rationalized that the fall itself constituted an accident and was the immediate proximate cause of the injuries. If the employment in any manner increased the risk or contributed to the injury, then the original cause of the fall, i.e., the physical condition of the employee, was too remote for the court to consider.[11] Simply put, the difference in the two theories seems to be,

[4] "But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause, and comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work, and not common to the neighborhood." Liberty Mutual Ins. Co. v. Neal, 55 Ga. App. 790, 191 S. E. 393, 399 (1937).

[5] To be distinguished are cases where the employee falls from some known cause connected with the employment, and not from a personal condition. In such cases, compensation is almost universally given. Horovitz, *Current Trends in Workmen's Compensation,* 12 LAW SOCIETY JOURNAL 611, 649 (1947).

[6] Wicks v. Dowell & Co., 2 K. B. 225 (1905); *Accord,* Wilson v. Chatterton, K. B. 360 (1946) (Agriculture worker had epileptic fit, fell into furrow half full of water and drowned). *Contra:* Butler v. Burton-on-Trent Union, 106 L. T. N. S. 824, 5 B. W. C. C. 355 (1912) (where employee suffering from tuberculosis, in fit of coughing fell down stairways).

[7] Gonier v. Chase Companies, 97 Conn. 46, 115 Atl. 677 (1921).

[8] Dow's Case, 231 Mass. 348, 121 N. E. 19 (1918).

[9] Rockford Hotel Co. v. Industrial Commission, 300 Ill. 87, 132 N. E. 759 (1921). For annotations of many cases see: 19 A. L. R. 95; 28 A. L. R. 204; 60 A. L. R. 1299; 5 SCHNEIDER, WORKMEN'S COMPENSATION TEXT §1376 (3d ed. 1946); Horovitz, *Current Trends in Workmen's Compensation,* 12 LAW SOCIETY JOURNAL 611, 649 (1947).

[10] Cox v. Kansas City Refining Co., 108 Kan. 320, 195 Pac. 863, 19 A. L. R. 90 (1921) (epileptic fell on hot pipes); Van Gorder v. Packard Motor Car Co., 195 Mich. 588, 163 N. W. 107 (1917) (epileptic fell off scaffold); Brooker v. Industrial Commission, 176 Cal. 275, 168 Pac. 126 (1917) (epileptic fell thirty-nine feet off scaffold).

[11] See note 9 *supra.*

that in the former the court isolates the reason for the fall and looks solely to the injury, while in the latter, the court examines only the factors producing the fall and ignores the injury. Obviously, the correct rule depends on the particular fact situation. If the employment truly creates a "special hazard" which enhances the injuries, an award of compensation is proper. The great majority of courts today hold that falls from purely personal physical conditions are compensable if from a height, on a stairway, or against any object.[12] But what of a fall to the bare floor,[13] or against some objects found in every home? How then, can the fall be said to be an "accident arising out of the employment"? Perhaps the only answer is in the often repeated statement "that this is an act for the giving and not the withholding of compensation."[14] But with only this guide the decisions are likely to go to ridiculous lengths. The court which finds that a concrete floor is more apt to cause an injury than one of wood, will soon be called on to determine that oak is harder than pine, that pine is harder than rubber and *ad absurdum*. Unfortunately, many courts continue to give lip service to the term, "special hazard" and find in these situations that except for the employment the particular consequences of the accident would not have occurred. New terms such as "contributing cause"[15] and "concurring cause"[16] have flourished but have added little to the formulation of a clear test.

Some courts have revised their definitions of "arising out of" to include not just "special hazards" of the employment, but also risks which are common to the general public, and which in hindsight can be said to have contributed to the injury.[17] But once the test of "special hazard" is abandoned, the courts are in effect striking from the statutes the phrase "arising out of." While such a step would no doubt eliminate

[12] National Automobile & Casualty Ins. Co. v. Industrial Accident Commission, 75 Cal. App. 2d 677, 171 P. 2d 594 (1946) (epileptic fell against sawhorse—court in reviewing many cases said overwhelming majority favor compensation where the injury is contributed to by some factor peculiar to the employment, even though the fall has its origin in some idiopathy of the employee); Connelly v. Samaritan Hospital, 259 N. Y. 137, 181 N. E. 76 (1932) (fall against a laundry table due to cardiac condition); Tavey v. Industrial Commission, 106 Utah 479, 150 P. 2d 379 (1944) (fainted and fell against bookshelf). For annotations of recent cases, see 5 SCHNEIDER, WORKMEN'S COMPENSATION TEXT §1376 (3d ed. 1946).

[13] National Automobile & Casualty Ins. Co. v. Industrial Accident Commission, 75 Cal. App. 2d 677, 171 P. 2d 594 (1946) (court says states are about evenly divided where fall is to bare floor).

[14] 62 L. Q. REV. 300, 301 (1946).

[15] Reynolds v. Passaic Valley Sewerage Commission, 130 N. J. L. 437, 33 A. 2d 595 (1943), *aff'd*, 131 N. J. L. 327, 36 A. 2d 429 (1944).

[16] Connelly v. Samaritan Hospital, 259 N. Y. 137, 181 N. E. 76 (1932).

[17] Savage v. St. Arden's Church, 122 Conn. 343, 350, 189 Atl. 599, 601 (1937); Connelly v. Samaritan Hospital, 259 N. Y. 137, 181 N. E. 76 (1932); *accord*, Goodyear Aircraft Corp. v. Industrial Commission, 62 Ariz. 398, 409; 158 P. 2d 511, 516 (1945). *See* Burroughs Adding Machine Co. v. Dehn, 110 Ind. App. 483, 493, 39 N. E. 2d 499, 507 (1942).

much litigation, it would make the employer the insurer of his employees subject to falls from idiopathic conditions. Any fall, while on the job, resulting in injury would be compensable. Without concern as to whether the Workmen's Compensation Statute should be so extended, it seems clear that the matter should be left to the legislatures and not to the courts.

The marked trend towards greater liberality in this field is particularly noticeable from an examination of the decisions of the North Carolina Industrial Commission over the last fifteen years. In 1931, when a filling station employee had a convulsion and fell into a showcase, the Commission found the resulting injuries did not arise out of a risk incident to the employment.[18] Similar results were reached when workers fell due to fainting,[19] cerebral hemorrhages,[20] and dizziness.[21] In 1935, however, compensation was allowed where a worker became dizzy and fell from a roof.[22] And in 1940, the Commission clarified their position by stating that when the employment subjects the worker to especial danger from falls, injuries received thereby are compensable, "irrespective of whether or not the condition of the employee, which originally set in motion the dangerous hazard of the employment was foreign or connected with his employment."[23] The gamut was completed in 1946 when the Commission said it was immaterial whether an epileptic seizure caused a worker to fall backwards on a cement floor, since the cement constituted a "special hazard" and a greater risk than the worker would have been subjected to outside the employment.[24]

It is not entirely clear just where the North Carolina Supreme Court stands in this controversial field in the absence of a decision directly in point. When a fire chief, during a fire, collapsed on a stairway from a heart attack, compensation was denied since the court could find no accident.[25] But when a millworker fell backwards from some undetermined cause, compensation was allowed. It was pointed out that when the cause of a fall is unknown it is presumptive that it arose out of the employment.[26] In a dictum the court distinguished cases where the fall was due to a physical infirmity or some other force external to

[18] Boyette v. Thompson-Wooten Oil Co., 2 I. C. 378 (1938).
[19] Beam v. Presbyterian Hospital, 4995 (1935) N. C. W. C. A. Ann. (1946) p. 24.
[20] Kirkman v. Greensboro, 8530 (1939) N. C. W. C. A. Ann. (1946) p. 24.
[21] Cooke v. Roanoke Mills Co. No. 2, A-1288 (1942) N. C. W. C. A. Ann. (1946) p. 24.
[22] Garland v. Bordner & Co., 4809 (1935) N. C. W. C. A. Ann. (1946) p. 24.
[23] Howard v. J. L. Miller, 9324 (1940) N. C. W. C. A. Ann. (1946) p. 24.
[24] Record, p. 61, Devine v. Dave Steel Co., 227 N. C. 684, 44 S. E. 2d 77 (1947).
[25] Neely v. Statesville, 212 N. C. 365, 193 S. E. 664 (1937) (evidence that death was due to the heart attack instead of the fall).
[26] Robbins v. Bossong Hosiery Mills, 220 N. C. 246, 17 S. E. 2d 20 (1941).

the employment.[27] In 1946, the court handed down a decision which appears to overrule that dictum; in fact the Georgia court in the principal case cited the North Carolina decision as supporting the theory of compensation for a fall irrespective of its cause if the employment enhances the injuries. In that case an employee, suffering from a disease which caused fainting, fell from the window of a washroom on the eleventh floor of an office building. While there was at least strong circumstantial evidence that the deceased fainted, the hearing commission found as a fact, based on investigations conducted ten months later, that in an effort to get air at the open window, the deceased slipped on the "very slick tile floor" which constituted a "special hazard." On appeal the court treated this as a case of first impression and favorably reviewed cases from other jurisdictions where compensation had been granted for falls due to idiopathic diseases.[28] But it should be noted these cases are distinguishable in light of the findings of the commission. Here, the slippery floor, not the disease, caused the fall and compensation could have been granted by virtue of the "special hazard."[29] Unless one is to believe that the court was dissatisfied with the finding of facts of the commission and felt that the fall was actually the results of fainting, it is difficult to see why the court relied on a line of decisions to support that point.

A 1947 decision has failed to throw any light on the position of the North Carolina Supreme Court. In this case a watchman, while lowering a flag, fell backwards onto the cement on which he was standing, and received a fractured skull from which he never regained consciousness. Although there was evidence that deceased suffered from epilepsy, the commission rejected any inference that this fall was the results of an epileptic attack. Instead the cause of the fall was left undetermined, but the commission found death arose out of the employment because deceased was required to stand on cement.[30] The court, without adopting all of the reasons assigned by the commission, affirmed the award.[31] Since the cause of the fall was unexplained the court was not called on

[27] "If, however the cause is known and is independent of, unrelated to, and apart from the employment—the results of a hazard to which others are equally exposed—compensation will not be allowed." Robbins v. Bossong Hosiery Mills, 220 N. C. 246, 248, 17 S. E. 2d 20, 22 (1941).

[28] Rewis v. New York Life Ins. Co., 226 N. C. 325, 38 S. E. 2d 197 (1946).

[29] Howell v. Standard Ice & Fuel Co., 226 N. C. 730, 40 S. E. 2d 197 (1946) (fell from trestle); Brown v. Carolina Aluminum Co., 224 N. C. 766, 32 S. E. 2d 320 (1944) (pushed backward on cement floor by fellow worker); Gorden v. Thomasville Chair Co., 205 N. C. 739, 172 S. E. 485 (1934) (slipped on ice); Clark v. Carolina Cotton & Woolen Mills, 204 N. C. 529, 168 S. E. 816 (1933) (slipped on stairway).

[30] Record, p. 37, Devine v. Dave Steel Co., 227 N. C. 684, 44 S. E. 2d 77 (1947) (There was expert medical testimony that a fall onto concrete is more likely to produce a fractured skull than one onto dirt.).

[31] Devine v. Dave Steel Co., 227 N. C. 684, 44 S. E. 2d 77 (1947).

to decide the effect of a fall which resulted from a condition personal to the employee.[32]

However, one gathers from the tenor of these decisions that the court is willing to go along with a liberal interpretation of the Workmen's Compensation Act. Until an employee survives his fall and gives direct testimony as to the cause, leaving no room for favorable presumptions or fact finding based on circumstantial evidence, we can only guess as to the real position of the court. But if one can rely on dicta and the overall trend toward liberality, it seems probable that any fall resulting in injuries will be compensable in the future. It will be interesting to see how long the court can reconcile such awards with their traditional requirement that for injury to arise out of the employment it must be by a peculiar risk, uncommon to the general public.[33] Liability without fault has become generally accepted, but it now appears employers are facing liability without practical means of avoidance.[34] Some employers may find the only alternative to upholstering their entire premises will be to refuse to hire those suffering from physical infirmities.[35]

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[32] Robbins v. Bossong Hosiery Mills, 220 N. C. 246, 17 S. E. 2d 20 (1941).

[33] Bryant v. T. A. Loving Co., 222 N. C. 724, 24 S. E. 2d 751 (1943); Lockey v. Cohen, Goldman & Co., 213 N. C. 356, 196 S. E. 342 (1938); Plemmons v. White's Service Inc., 213 N. C. 148, 195 S. E. 370 (1938).

[34] Much the same trend has occurred where the injury is on the street or by act of God. "The street hazard constitutes a well-recognized relaxation of this rule: If an employee has been sent out on the streets and sustains an injury there, he can recover compensation, although, he was exposed to no more danger than the general public on the streets at the time." Note, 20 TEX L. REV. 387, 388 (1942); See Note, 23 N. C. L. REV. 159 (1945). For examples of injury by act of God, see Caswell's Case, 305 Mass. 500, 26 N. E. 2d 328 (1940) (when hurricane caused wall of factory to fall on employee, compensation allowed even though it was conceded that, by remaining in the brick building, employee was subjected to less hazard than he would have been at home). For recent cases see Horovitz, *Current Trends in Workmen's Compensation*, 12 LAW SOCIETY JOURNAL 466, 511 (1947).

[35] 42 *Science N. L.* 307 (1942) (It is estimated that there are 350,000 epileptics in the United States, two thirds of whom are capable of doing useful work, but can't get jobs because many employers fear they will be made liable for the consequences of an attack while on the job. It is estimated that more than 15% of the brain injuries of the last war, will result in epilepsy.).