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# Notes and Comments

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This issue contains a note by KIRBY SULLIVAN, a former member of the LAW REVIEW staff—now a member of the North Carolina Bar, and J. C. JOHNSON, JR., a student at the University of North Carolina Law School.



## NOTES AND COMMENTS

### Automobiles—Guest's Duty—Contributory Negligence as a Matter of Law

The Virginia Supreme Court in *Butler v. Darden*[1] recently held that under certain circumstances as a matter of law the guest rider in a car has a duty to warn the driver of approaching dangers. The facts show that plaintiff guest was sitting in the front seat of defendant's car. The car was approaching a railroad crossing, with which the guest

[1] 189 Va. 459, 53 S. E. 2d 146 (1949).

was familiar, at ten miles per hour, and the guest did not, until within ten feet of the tracks, give any warning of the train which crashed into the automobile in which he was a passenger. The Court held that failure of plaintiff to give warning was contributory negligence as a matter of law and set aside a verdict for plaintiff. Mr. Justice Cardozo in criticizing a like result under similar circumstances pointed out that negligence of the guest is to be determined by the facts and circumstances of the particular case.[2] Consideration of whether the passenger believed the driver would take the necessary precautions, whether a warning was needless, or whether the warning of the guest might be dangerous were all possibilities to be weighed by triers of the facts. The North Carolina view is that it is the duty of the guest to keep a reasonable lookout for trains as the automobile approaches the tracks, and to warn the driver of any impending danger of a collision if it is apparent to the guest that the driver has not seen the engine, or having seen it, does not appreciate the danger of a collision.[3]

In the principal case the Court considers the position of the guest in the car, his familiarity with the road, and other factors as imposing on the guest a high degree of care for his own safety. Poor visibility has been considered by other courts as requiring from the guest a sharper lookout.[4] Certainly, if circumstances determine the degree of altertness required, poor visibility should demand that the guest keep a more alert watch for dangers.

Generally a distinction is made between the duty imposed on the guest rider approaching a busy street intersection as compared with his duty at a railroad crossing. The failure to give warning, if the guest had a chance to look, at a railroad intersection is contributory negligence as a matter of law, but at a highway crossing, contributory negligence of the guest is generally a jury question.[5] The basis for the distinction is premised on the inability of trains to stop as quickly as automobiles or to turn aside to avoid any obstacle upon the track.[6] Considering the

[2] Baker v. Lehigh Ry., 248 N. Y. 131, 161 N. E. 445 (1928).

[3] Johnson v. Atlantic Coast Line Ry., 205 N. C. 127, 170 S. E. 120 (1933); Smith v. Atlantic & Y. Ry., 200 N. C. 177, 156 S. E. 508 (1931); See Notes, 11 N. C. L. REV. 349 (1932), 9 N. C. L. REV. 98 (1930).

[4] Ames v. Terminal Ry. Ass'n., 332 Ill. App. 187, 75 N. E. 2d 42 (1947); Gilly v. Harris, 152 So. 378 (La. App. 1934); Peasley v. White, 129 Me. 450, 152 Atl. 530 (1930); Adams v. Hutchinson, 113 W. Va. 217, 167 S. E. 135 (1932); *But cf.* Uren v. Purity Dairy Co., 252 Wis. 446, 32 N. W. 2d 615 (1948).

[5] Hill v. Lopez, 228 N. C. 433, 45 S. E. 2d 296 (1947); Campion v. Eakle, 79 Colo. 320, 246 Pac. 280 (1926); Hunsavage v. Rocek, 74 Colo. 163, 219 Pac. 1080 (1923); Earhart v. Treatbar, 148 Kan. 42, 80 P. 2d 4 (1938); Moore v. Retz, 314 Mich. 52, 22 N. W. 2d 68 (1946); Landy v. Rosenstein, 325 Pa. 209, 188 Atl. 855 (1937); Hancock v. Norfolk & W. Ry., 149 Va. 829, 141 S. E. 849 (1928); Gilkerson v. Baltimore & O. Ry., 129 W. Va. 649, 41 S. E. 2d 188 (1946); Jones v. Virginia Ry., 115 W. Va. 665, 177 S. E. 621 (1934).

[6] Chicago & N. W. Ry. v. Golay, 155 F. 2d 842 (10th Cir. 1946); Leclair v. Boudreau, 101 Vt. 270, 143 Atl. 401 (1928).

higher speeds obtained by cars and the greater number of highway intersections, should a lesser duty be required at a highway intersection than at a railroad crossing? The more logical solution would be to let the jury determine that degree of care required in both situations.

Passengers of automobiles take note: the back seat is at a premium. The occupant of the back seat has less duty of lookout than if he were in the front seat.[7] Mr. Justice Cardozo criticized as contrary to the common standard of conduct the rule requiring the same duty of lookout by a guest, whether in the front or back seat, when approaching a railroad.[8] The basis, however, upon which the guest is barred from recovery is that he did not exercise a reasonable degree of care for his own safety.[9] Following this rule, the guest cannot rely blindly upon the alertness of the driver, but must, under the circumstances, exercise a reasonable degree of care for his own safety.

If the guest because of age, inability to operate an automobile, or for other reasons, is unfamiliar with dangers of automobile travel, he has no duty to give warning of dangers.[10] This type of guest would not recognize dangers apparent to others, and, under the circumstances, would be exercising the required degree of caution for his own safety.

Does the paying passenger have the same degree of duty as the gratuitous guest?[11] A bus passenger[12] and taxi occupant[13] have been held to have no duty to keep a lookout. The "share-the-ride" passenger, paying for his transportation, can rely more on the driver than the gratuitous guest.[14] It would seem that in consideration of the fare, the passenger is relieved from maintaining a lookout. The guest's own negligence may, however, preclude a recovery although he has paid for the ride.[15]

The guest statutes are not phrased to cover the duty of the guest to the host or himself, but only the duty of the driver to his gratuitous guest.[16] The guest's duty is in need of clarification. One of the dangers recognized by the courts is that by requiring too active a part from the guest in the operation of the automobile, back-seat driving will be

[7] Davis v. Joseph, 164 So. 467 (La. App. 1935); Banks v. Adams, 135 Me. 270, 195 Atl. 206 (1937); Fabiano v. Carey, 279 Mich. 269, 271 N. W. 754 (1937).

[8] Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 121 (1921).

[9] Smith v. Atlantic & Y. Ry., 200 N. C. 177, 156 S. E. 508 (1931).

[10] Kelly v. Hanwick, 288 Ala. 336, 153 So. 269 (1934); Banks v. Adams, 135 Me. 270, 195 Atl. 206 (1937); Noakes v. New York C. & H. Ry., 121 App. Div. 716, 106 N. Y. Supp. 322 (1907), *aff'd*, 195 N. Y. 543, 88 N. E. 1126 (1909).

[11] Silver v. Silver, 280 U. S. 117 (1929).

[12] Miller v. Blue Ridge Transp. Co., 123 W. Va. 428, 15 S. E. 2d 400 (1941).

[13] Yellow Cab Co. v. Eden, 178 Va. 325, 16 S. E. 2d 625 (1941); Scales v. Boynton Cab Co., 198 Wis. 293, 223 N. W. 836 (1929).

[14] Dennis v. Wood, 357 Mo. 886, 211 S. W. 2d 470 (1948).

[15] HUDDY, THE LAW OF AUTOMOBILES 196 (1927); 1 LAW OF AUTOMOBILES IN NORTH CAROLINA §55 (3rd Michie ed. 1947).

[16] MALCOLM, AUTOMOBILE GUEST LAW 1 (1937). North Carolina does not have guest statute. See Note 9 N. C. L. REV. 47 (1930) (proposed guest statute).

encouraged.[17] It is negligence to interfere with the driver in some situations, but in others, non-interference will bar the guest from recovery. Any rigid rule to apply to all situations is undesirable. The probable North Carolina rule is that when danger arising out of the operation of a vehicle by another is manifest to a passenger or guest who has adequate opportunity to control the situation by warning the driver, and he sits without protest and permits himself to be driven to his injury, his negligence will bar a recovery—such negligence is not the negligence of the driver imputed to him as a passenger, but his own negligence in joining with the driver and facing manifest danger.[18] The courts should, however, consider each situation upon its facts, and apply the usual negligence rule of the conduct of the reasonable man under the circumstances. The adoption of a statute to cover this situation in inadvisable because a statute cannot be phrased to cover all the variations that are sure to arise. The rule that a guest must exercise reasonable care under the circumstances should be applied in all cases, regardless of the guest's position in the automobile or his familiarity with automobile travel. Further, unless negligence or the lack of it is clear, the issue of negligence should be submitted to the jury. Constant application of this rule might lead to clarification of an automobile guest's duty to keep a lookout.

HUNTER D. HEGGIE.

**Chattel Mortgages—Recordation—Persons Protected**

At common law a chattel mortgage was valid as between the parties thereto without change of possession;[1] but, in order to be upheld against the attack of interested third persons, a transfer of possession to the mortgagee was essential.[2] The early registration acts,[3] designed pri-

[17] Hedges v. Mitchell, 69 Colo. 285, 194 Pac. 620 (1920); Bradley v. Interurban Ry., 191 Iowa 1351, 183 N. W. 493 (1921); Chambers v. Hawkins, 223 Ky. 211, 25 S. W. 2d 363 (1930); Young v. White Sulphur Ry., 96 W. Va. 534, 123 S. E. 433 (1924).

[18] 1 LAW OF AUTOMOBILES IN NORTH CAROLINA §35 (3rd Michie ed. 1947).

[1] Williams v. Jones, 95 N. C. 504 (1886); McCoy v. Lassiter, 95 N. C. 88 (1886); Leggett v. Bullock, 44 N. C. 283 (1853); Pike v. Armstead, 16 N. C. 110 (1827).

[2] McCoy v. Lassiter, 95 N. C. 88 (1886); *see* Cowan v. Dale, 189 N. C. 684, 128 S. E. 155 (1925); 1 JONES, CHATTEL MORTAGES AND CONDITIONAL SALES §176 (Rev. ed. 1933); cases cited 10 AM. JUR., CHATTEL MORTGAGES, §157.

[3] N. C. Act of 1715, c. 38 §11: ". . . , That every mortgage of . . . goods or chattels, which shall be first registered in the register's office . . . where the mortgager (sic) liveth, shall be taken, deemed, judged, allowed of and held to be the first mortgage, and be good, firm, substantial and lawful; in all courts of Justice within this government; any former or other mortgage of the same . . . , goods or chattels, not before registered, notwithstanding; unless such prior mortgage be registered within fifty days after the date." N. C. Act of 1820, c. 3 §1: "That no mortgage, nor deed or conveyance in trust for any estate, whether real or personal . . . , shall be good and available in law against creditors or purchasers for a valuable consideration, unless the same shall have been proven and

marily to eliminate the necessity of transfer, were often inadequate and led to unfortunate results. In North Carolina under the act of 1715, courts of equity upheld unregistered chattel mortgages against the claims of creditors or purchasers of the mortgagor who had notice of the existence of the mortgage,[4] and this rule was extended to give protection against an incumbrance registered after the execution of such mortgage when there had been actual notice, even though the prior mortgage had not been registered within the statutory time.[5] In order to avoid this result, the act of 1820 was passed, extending the time within which a mortgage could be registered and yet retain its priority, and declaring a mortgage not registered within such time null and void as against purchasers and creditors of the mortgagor. The privilege thus conferred upon the mortgagee was much abused in that he could intentionally withhold his mortgage from record as long as possible in order to allow the mortgagor greater freedom in dealing with his creditors.[6] The Act of 1829,[7] which, in effect, is substantially the same today, was enacted to meet this situation. This statute has not affected the common law rule as to the validity of the mortgage between the parties,[8]

registered . . . , within six months after the execution of such mortgage or deed, or conveyance in trust; but that all mortgages, deeds, and conveyances in trust, not so proven and registered within the time aforesaid, shall be held as against such creditors or purchasers, as utterly null and void."

[4] Pike v. Armstead, 16 N. C. 110 (1827); *see* Cowan v. Dale, 189 N. C. 684, 128 S. E. 155 (1925); Robinson v. Willoughby, 70 N. C. 358 (1874); Fleming v. Burgin, 37 N. C. 584 (1843).

[5] Pike v. Armstead, 16 N. C. 110 (1827). This rule was equitable in its operation, if, as appears to have been the case, it applied only when there was actual notice of the existence of the unrecorded mortgage prior to the credit extension. In such case, there could have been no possibility of prejudice through action in reliance on the unincumbered state of the title. There were, however, other considerations which the equity doctrine failed to take into account, namely, the legislative policy of encouraging prompt registration, and the desirability of having the public record full and conclusive.

[6] See, for example, Leggett v. Bullock, 44 N. C. 283 (1853); Fleming v. Burgin, 37 N. C. 584 (1843).

[7] N. C. Act of 1829, c. 20 §1. In its present form this is N. C. GEN. STAT. §47-20 (1943): "No deed of trust or mortgage for real or personal estate shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor or mortgagor, but from the registration of such deed of trust or mortgage in the county where the land lies; or in the case of personal estate, where the donor, bargainor or mortgagor resides; or in case the donor, bargainor or mortgagor resides out of the state, then in the county where the said personal estate, or some part of the same, is situated; . . ."

[8] See discussion in Leggett v. Bullock, 44 N. C. 283 (1853); 1 JONES, *op. cit. supra,* note 2, §237; cases cited 14 C. J. S., CHATTEL MORTGAGES §134. Since an unrecorded mortgage is binding on mortgagor, it follows that it is binding on all claiming in mortgagor's right: Hinkle Crauge Co. v. Greene, 125 N. C. 489, 34 S. E. 554 (1899); Williams v. Jones, 95 N. C. 504 (1886) (wife's claim for year's allowance or dower); McBrayer v. Harrill, 152 N. C. 712, 68 S. E. 204 (1910); ANNO., 91 A. L. R. 299 (1934) (heir or personal representative).

Although valid, an unrecorded mortgage does not create an equity in favor of the mortgagee in the property which would be superior to the rights of creditors, purchasers or subsequent mortgagees with notice thereof. Such an equity arises only when the transaction need not be in writing and thus is without the purview of the registration statute. Roberts v. Massey, 185 N. C. 164, 116 S. E. 407 (1923)

but its uniform construction has been that mere notice of the unregistered mortgage does not make it valid as against a purchaser for a valuable consideration.[9] Furthermore, if the person taking the property is placed by law in the position of a purchaser,[10] he has been held to be within the protected class who may take advantage of the failure to record.

When the third person claiming against the rights of an unregistered mortgage is of the description "creditor," more difficulty arises. In the case of *Finance Corp. v. Hodges*,[11] recently decided by the North Carolina Supreme Court, a creditor procured a judgment against the mortgagor nine months before a chattel mortgage was given to secure part of the purchase price of an automobile. During the period of less than a month when the mortgage was unrecorded, the judgment creditor caused execution to issue and the sheriff levied upon the chattel. Four days later an assignee of the mortgagee caused the mortgage to be recorded and instituted suit to recover possession. *Held:* The judgment creditor by his levy had obtained the prior lien. The decision appears to be in accord with the settled rule in this state since the creditor had armed himself with legal process which entitled him to an interest in the property *before* the mortgage was registered.[12] A dictum in the case indicated that *only* a creditor who has fastened a lien upon the mortgaged property can claim protection against an unrecorded mortgage. Since the statute does not declare an unrecorded mortgage void, but only that it is invalid to pass any property interest but from registration, this conclusion is logical. There appears to be, however, no direct holding to the effect that it is *absolutely* necessary that a lien

(correction of omission in deed due to mutual mistake); Spence v. Pottery Co., 185 N. C. 218, 117 S. E. 32 (1923) (parol trust); *cf.* Finance Corp. v. Hodges, 230 N. C. 580 582, 55 S. E. 2d 201, 203 (1949).

[9] *E.g.* Weil v. Herring, 207 N. C. 6, 195 S. E. 836 (1934); Carolina Discount Corp. v. Landis Motor Co., 190 N. C. 157, 129 S. E. 414 (1925); Cowan v. Dale, 189 N. C. 684, 128 S. E. 155 (1925); Bank of Colerain v. Cox, 171 N. C. 76, 87 S. E. 967 (1916); Robinson v. Willoughby, 70 N. C. 358 (1875). *But cf.* Fleming v. Burgin, 37 N. C. 584 (1843); Note 24 N. C. L. REV. 63, 65-66 (1945). Same rule applies when suit in equity. *See* Leggett v. Bullock, 44 N. C. 283, 286 (1853).

A purchaser for value within purview of statute may be one who takes in payment of preexisting debt. Starr v. Wharton, 177 N. C. 323, 98 S. E. 818 (1919); Brem v. Lockhart, 93 N. C. 191 (1885); Potts v. Blackwell, 57 N. C. 58 (1858). *But cf.* Finance Corp. v. Hodges, 230 N. C. 580, 55 S. E. 2d 201 (1949), Headnote 4 of which states the contrary rule, but this related to dictum dealing with creation of an equity resting in parol. See examples note 8 *supra*.

[10] For example, assignee for benefit of creditors, Starr v. Wharton, 177 N. C. 323, 98 S. E. 818 (1919), and cases cited therein; *cf.* Cowan v. Dale, 189 N. C. 684, 128 S. E. 155 (1925). *But see*, JONES, *op. cit. supra* note 2, §244.

[11] 230 N. C. 580, 55 S. E. 2d 201 (1949).

[12] *E.g.* Salassa v. Mortgage Co., 196 N. C. 501, 146 S. E. 83 (1928) (attachment lien prior to recordation); Jordan v. Wetmur, 202 N. C. 279, 162 S. E. 610 (1932) (subsequent mortgage recorded prior to conditional sale agreement); Observer Co. v. Little, 175 N. C. 42, 94 S. E. 526 (1918) (receiver appointed prior to recordation); *accord* Bostic v. Young, 116 N. C. 766, 21 S. E. 552 (1895).

be acquired prior to registration. Dicta in other cases may be urged in support of conflicting rules,[13] but in view of the doctrine generally accepted by other jurisdictions[14] and the federal construction[15] given the statute, there is little doubt that the court would hold that a general creditor does not come within the class protected. In applying this rule there would be no distinction between a prior or existing creditor, and a creditor subsequently extending credit.[16]

The purpose to be served by a registration statute and the rights and interests to be protected are properly considered in determining whether a particular type of creditor ought to be protected. As has been pointed out, the primary aim in the enactment of the present statute was to provide a satisfactory method whereby the mortgagor, without possible injury to innocent third parties, might retain possession of the property.[17] Another purpose was to encourage prompt registration by making such registration conclusive notice, and to protect the rights of a mortgagee who acted with diligence and good faith.[18] This statute, as it has been construed by the North Carolina Supreme Court, fails to accomplish these purposes in two major aspects: (1) A general creditor, who has extended credit to a mortgagor on the faith of lack of prior existing rights against the mortgagor, may, without fault on his part, find that he must suffer loss upon subsequent registration of a mortgage executed prior to the credit extension; (2) A mortgagee, who with dili-

[13] That all creditors without limitation are included, *see* Ellington v. Raleigh Building Supply Co., 196 N. C. 784, 789, 147 S. E. 307, 310 (1929); Sneeden v. Nurnberger's Market, 192 N. C. 439, 441, 135 S. E. 328, 330 (1926); Harris v. Seaboard Air Line Ry. Co., 190 N. C. 480, 485, 130 S. E. 319, 322 (1925).

That only creditors acquiring liens while mortgage withheld from record are included, *see* Observer Corp. v. Little, 175 N. C. 42, 43, 94 S. E. 526, 527 (1918); Francis v. Herren, 101 N. C. 497, 507, 8 S. E. 353, 358 (1888); *accord,* Williamson v. Bitting, 159 N. C. 321, 74 S. E. 808 (1912).

[14] See note 33 *infra.*

[15] *Creditors* as used in the North Carolina statute means lien creditors only. Southern Dairies v. Banks, 92 F. 2d 282 (4th Cir.), *cert. denied,* 302 U. S. 761 (1937); Elk Creek Lumber Co. v. Hamby, 84 F. 2d 144 (4th Cir. 1936); *In re* Cunningham, 64 F. 2d 296 (4th Cir. 1933); National Bank of Goldsboro v. Hill, 226 Fed. 102 (D. C. N. C. 1915); *see* Hartford Accident & Indemnity Co. v. Coggin, 78 F. 2d 471, 475 (4th Cir.), *cert. denied,* 296 U. S. 621 (1935).

[16] Under the present North Carolina construction the sole question appears to be whether a creditor has acquired a lien prior to recordation, and no distinction is made between a creditor who extended credit prior to the execution of the mortgage and one who extended credit during the interval when the mortgage was unrecorded. That a prior creditor acquiring a lien while the mortgage was unrecorded is included, *see* Finance Corp. v. Hodges, 230 N. C. 580, 55 S. E. 2d 201 (1949); Fleming v. Graham, 110 N. C. 374, 14 S. E. 922 (1892); *cf.* Credit Co. v. Walters, 230 N. C. 443, 53 S. E. 2d 520 (1949). Likewise, subsequent creditors thus acquiring a lien are included. Salassa v. Mortgage Co., 196 N. C. 501, 146 S. E. 83 (1928); Jordan v. Wetmur, 202 N. C. 279, 162 S. E. 610 (1932).

[17] Cowan v. Dale, 189 N. C. 684, 128 S. E. 155 (1925); McCoy v. Lassiter, 95 N. C. 88 (1886); *see* Credit Corp. v. Walters, 230 N. C. 443, 447, 53 S. E. 2d 520, 523 (1949).

[18] Acceptance Corp. v. Mayberry, 195 N. C. 508, 142 S. E. 767 (1928); Smith v. Fuller, 152 N. C. 7, 67 S. E. 48 (1910); Fleming v. Burgin, 37 N. C. 584 (1843). Compare Note, 27 N. C. L. Rev. 376, 377 (1949).

gence seeks to record and preserve his lien, may find that a creditor with knowledge of the reasonable delay in recordation has acquired a prior lien.

An examination of the recording statutes of other jurisdictions reveals much diversity of phraseology. The types of statutes may be generally classified as follows: (1) Those declaring the mortgage to be a valid and prior lien from the date of recordation,[19] thus dealing only with when the lien of a mortgage shall become effective. No mention is made of the invalidity of the mortgage as to any specified group of persons. (2) Those providing that no mortgage shall be valid against the rights and interests of any third person, or persons other than the mortgagor or his heirs, unless it is recorded.[20] These statutes do not specify the effect a later recordation will have on the rights of those persons as to whom it was once void. (3) Those declaring an unrecorded mortgage void, inoperative, or of no effect against specified types of claimants, including creditors of the mortgagor, until recordation.[21] The principal difference from the second group is the designation of the class protected. Those jurisdictions whose statutes come within the first class have primarily faced the problem of determining whether there has been a sufficient compliance with the statute,[22] and the question of which creditors are protected has apparently not been raised. Since these statutes do not provide that a mortgage is void as to named third persons, but rather that a lien vests in the mortgagee upon recordation, the creditor who has not acquired a prior right in the property would seem to be eliminated. On the other hand, the statutes of the

[19] ARK. STAT. ANN. §16-201 (1947); DEL. REV. CODE §§3333, 3336 (1935); GA. CODE ANN. §§67-108, 109, 2501 (1935); LA. GEN. STAT. §5022.4 (1949 Supp.); MD. ANN. CODE, art. 21 §§45, 52, 54, 56 (1939); MONT. REV. CODE ANN. §§8278, 8279 (1935); PA. STAT. ANN. tit. 21 §§940.5, 13 (1948 Supp.).

[20] COLO. STAT. ANN. c. 32 §§1, 8 (1935); CONN. STAT. tit. 58 §7268 (1949); ILL. ANN. STAT. c. 95 §§1, 4 (1934); ME. REV. STAT. c. 164 §1 (1944); ANN. LAWS MASS. c. 255 §1 (1932); MO. REV. STAT. ANN. §3486 (1942); N. H. REV. LAWS c. 262 §§17 *et seq.* (1942); R. I. GEN. LAWS c. 442 §10 (1938); UTAH CODE ANN. §13-0-1 (1949 Supp.); VT. STAT. §§2713 *et seq.* (1947); WIS. STAT. §§241:08, 241:10 (1947), as amended, Wis. Laws 1949, c. 429.

[21] ALA. CODE ANN. tit. 47 §§110, 123 (1940); ARIZ. CODE ANN. §62-523 (1939); CALIF. CIVIL CODE §2957 (1945 Amdt.); FLA. STAT. ANN. §698.01 (1944); IDAHO CODE §45-1103 (1948); BURNS IND. STAT. ANN. §51-504 (1947 Supp.); IOWA CODE ANN. tit. 24 §556.3 (1950); KAN. GEN. STAT. ANN. §58-301 (1935); KY REV. STAT. §382.270 (1948); MICH. STAT. ANN. §§26.926, 927, 929 (1949 Supp.); MINN. STAT. §511.01 (Henderson 1945); MISS. CODE ANN. §§868, 869 (1942); NEB. REV. STAT. §36-301 (1943); NEV. COMP. LAWS §§987, 988 (Supp. 1931-1941); N. J. STAT. ANN. §§46:28-5, 10 (1940); N. MEX. STAT. ANN. §63-502 (1941); N. Y. LIEN LAW §230 (1940); N. D. REV. CODE §35-0406 (1943); OHIO GEN. CODE ANN. §§8560 *et seq.* (1938); OKLA. STAT. ANN. tit. 46 §§57, 58 (1936); ORE. COMP. LAWS ANN. §§68-203, 207 (1943 Supp.); S. C. CODE ANN. §8875 (1942); S. D. CODE §§39.0408; 39.0411 (1939); TENN. CODE ANN. §7192 (Williams, 1934); TEXAS CIVIL STAT. ANN. art. 5490 (1949 Supp.); VA. CODE ANN. §§5194; 5200 (1942); WASH. REV. STAT. ANN. §3780 (1943 Supp.); W. VA. CODE ANN. §3993 (1943); WYM. COMP. STAT. ANN. §§59-105, 113 (1945).

[22] Gasconade Development Co. v. Trust Co., 195 Ark. 404, 112 S. W. 2d 653 (1938).

second class are as broad as possible in their terms, thus admitting of almost any interpretation to effectuate their purposes. Generally, these jurisdictions have given protection to the general creditor.[23] There are, however, other states,[24] which have narrowly defined the class protected, excluding general creditors whether prior or subsequent. Those states having statutes of the third type make up by far the largest group. Of these, Idaho and New Mexico have given an express legislative mandate that only lien creditors are intended.[25] The legislatures of Kentucky and Washington have specified otherwise, expressly providing that the term "creditors" shall include all creditors irrespective of whether they have acquired a lien.[26] The South Carolina statute is limited in its operation to those creditors extending credit while the mortgage is withheld from record.[27] Aside from these exceptions, no qualification or limitation is attached to designate those classes of creditors intended, thus leaving the courts to their own determination.

In the construction of recordation statutes the courts have followed various lines of reasoning. Several jurisdictions[28] have treated the situation as involving two separate consideration: the first, the legal right of protection; the second, the procedure necessary before a creditor with such legal right is in a position to derive benefit therefrom. Following this approach, there is *prima facie* agreement that a general creditor, whether prior or subsequent, is given the legal right of protection.[29] This apparent uniformity ceases when it is sought to determine what the protected creditor must do to keep his protection. At this point some jurisdictions make a distinction between prior and sub-

[23] Basing their decisions on the policy of the statute and a comparison of the broad phraseology of their statutes with those of other jurisdictions, Utah and Missouri have reached the result that a mortgage is void as to those extending credit while unrecorded and no lien is required before recordation. Volker Lumber Co. v. Utah and Oregon Lumber Co., 45 Utah 603, 148 Pac. 365 (1915); Harrison v. South Carthage Min. Co., 95 Mo. App. 80, 68, S. W. 963 (1902). Connecticut, Illinois, Maine, Massachusetts, and Rhode Island, whose statutes provide that mortgages must be recorded within a designated time have concluded that a mortgage not so recorded remains void as to interim creditors even though subsequently recorded. Collateral Finance Co. v. Braud, 298 Ill. App. 130, 18 N. E. 2d 392 (1938); *compare* Drew v. Streeter, 137 Mass. 460 (1884) *with* Connecticut Valley Onion Co., 281 Mass. 287, 183 N. E. 526 (1932); Bordick v. Coates, 22 R. I. 410. 48 Atl. 389 (1901).

[24] Bogdon v. Fort, 75 Colo. 231, 225 Pac. 247 (1924); Graham v. Perry, 200 Wis. 211, 228 N. W. 135 (1929).

[25] IDAHO CODE §45-1103 (1948); N. MEX. STAT. ANN. §63-502 (1941).

[26] KY. REV. STAT. §382.270 (1948); WASH. REV. STAT. ANN. §3780 (Supp. 1943).

[27] S. C. CODE ANN. §8875 (1942).

[28] *E.g.* Cameron v. Marvin, 26 Kans. 612 (1881); Harrison v. South Carthage Min. Co., 95 Mo. App. 80, 68 S. W. 963 (1902); *In re* Shay's Estate, 157 Misc. 615, 285 N. Y. Supp. 379 (1935); Union National Bank v. Oium, 3 N. D. 193, 54 N. W. 1034 (1892); Raney v. Riedy, 70 S. D. 174, 16 N. W. 2d 194 (1944); Wasatch Live Stock Loan Co. v. Nielson, 90 Utah 307, 56 P. 2d 613 (1936); 10 AM. JUR., CHATTEL MORTGAGES, §103.

[29] Cases cited note 28 *supra.*

sequent creditors, requiring the prior creditor to arm himself with a lien prior to recordation, while allowing a subsequent creditor to retain protection without a lien.[30] In such a case, even though the subsequent creditor can claim no interest in the chattel until he has acquired a lien, this may be done at any time, and a later transfer of possession or recordation of the mortgage is ineffective even though made before the creditor obtains his lien. Other jurisdictions treat prior and subsequent creditors alike. Several of these, while professing to give general creditors protection, require the procurement of a lien before recordation in both instances.[31] Others hold the statute absolute in its terms, and a mortgage not recorded as required is void as to all creditors. Subsequent action by the mortgagee cannot give it validity.[32]

The great majority of courts[33] have made no attempt to divide their holdings into legal rights and procedure, but have flatly announced that "creditors" as used in their statutes does not include "mere general creditors." Thus, unless a creditor has perfected a lien prior to recordation, his rights and interests are subordinated to those of the mortgagee. The reason generally assigned for this holding is that any debtor has a right to prefer one creditor over another, and general creditors should not be allowed to complain when priority is given a mortgage upon its recordation, since they are then in the same position as if the mortgage had been executed at the time of recordation.[34] Such reasoning is logically sound in so far as it applies to creditors who extended credit prior to the original execution of the mortgage.[35] When applied to a creditor

[30] Ransom & Randolph Co. v. Moore, 272 Mich. 31, 261 N. W. 128 (1935); Harrison v. South Carthage Min. Co., 95 Mo. App. 80, 68 S. W. 963 (1902); Wilkinson, Gaddis & Co. v. Bolen, 88 N. J. L. 680, 97 Atl. 279 (1916); Union National Bank v. Oium, 3 N. D. 193, 54 N. W. 1034 (1892); Hollenbeck v. Louden, 36 S. D. 320, 152 N. W. 116 (1935).

[31] Such jurisdictions claim allowance of protection since general creditors are free to acquire a lien, a right they would not otherwise have. When the lien must be acquired prior to recordation, the apparent leniency disappears, and the result is the same as if the court had declared only lien creditors protected. See Cameron v. Marvin, 26 Kans. 612 (1881). *But cf.* Campbell v. Killion, 124 Kans. 124, 257 Pac. 752 (1927).

[32] Chelhar v. Acme Garage, 18 Calif. App. 2d 755, 61 P. 2d 1232 (1936) (lien acquired after possession taken by mortgagee); Karst v. Gane, 136 N. Y. 316, 32 N. E. 1073 (1893); Skilton v. Codington, 185 N. Y. 80, 77 N. E. 790 (1906) (lien acquired after unreasonable delay in recording). See generally: Union National Bank v. Oium, 3 N. D. 193, 54 N. W. 1034 (1892).

[33] *Compare* Moore v. Chilson, 26 Ariz. 244, 224 Pac. 818 (1924) *with* C. I. T. Corp. v. Seaney, 53 Ariz. 72, 85, P. 2d 713 (1938); Bogdon v. Fort, 75 Colo. 231, 225 Pac. 247 (1924); McEwen v. Larson, 136 Fla. 1, 185 So. 866 (1939); *In re* Lewis' Estate, 230 Iowa 694, 298 N. W. 842 (1941); Munck v. Security Bank, 175 Minn. 47, 220 N. W. 400 (1928); Boody v. Star Furniture Co., 45 S. W. 2d 291 (Tex. Civ. App. 1931); 1 JONES, *op. cit. supra* note 2, §247b; 14 C. J. S., CHATTEL MORTGAGES, §137.

[34] Cases cited 14 C. J. S., CHATTEL MORTGAGES, §137.

[35] But prior creditors are entitled to some protection notwithstanding this reasoning. "The injury that an unfiled chattel mortgage may occasion an antecedent creditor is likely to arise from the apparent unincumbered ownership of the property in the possession of the debtor, justifying the inference of perfect security,

subsequently extending credit, the consideration is overlooked that he may have acted on the assumption that there were no outstanding rights against the property, and although the debtor may prefer in the future, the creditor contemplates that risk.[36]

In recent years a growing minority of states have realized that those constructions adopted by their courts are failing to carry out the policy behind recordation. These states have modified their statutes in order to compel a result giving adequate protection to subsequent creditors even though they have acquired no property interest prior to recordation.[37] If the recordation statute of North Carolina were modified in this aspect, its operation would be logically sound and in accord with the purposes of such statutes.

The second failure of the North Carolina rule, although not as great as the first, should be given consideration. If protection is to be extended to third persons when they adhere to the policy of the law, in all fairness equal protection should be extended to innocent and diligent mortgagees. In attempting to meet this situation a few jurisdictions have given the mortgagee a limited time within which to record his mortgage and preserve his lien against others intervening between the making of the mortgage and its recordation.[38] Although the early rule in this state to this effect proved unjust in its operation,[39] this was due largely to the long period of time allowed within which to record. A short, designated period of grace, consistent with the use of due diligence, would accomplish the desired results.[40]

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and inducing delay in the enforcement of his claim. Were none but subsequent creditors within the purview of the statute, the [prior] judgment creditor may also be injured by the levying of an execution on property described in a secret mortgage, instead of the unincumbered property of the judgment debtor; . . ." Pierson v. Hickey, 16 S. D. 46, 91 N. W. 339 (1902). *But cf.* Credit Corp. v. Walters, 230 N. C. 443, 447, 53 S. E. 2d 520, 523 (1949).

[36] Union National Bank v. Oium, 3 N. D. 193, 54 N. W. 1034 (1892).

[37] Conn. Pub. Acts 1945, c. 274 §905h; Mass. Stat. 1874, c. 111 §1; Me. Laws 1919, c. 121 §1; R. I. Acts 1899, c. 614 §1 (a mortgage must be recorded within a specified number of days, and recording thereafter void. If a creditor acquires a lien before the mortgage recorded, it is prior even though mortgage subsequently recorded within the time specified); Ill. Laws 1931 p. 669 §1 (mortgage not valid as against creditors unless filed or recorded within 10 days. Construed to include general creditors when compared with other provisions. Collateral Finance Co. v. Braud, 298 Ill. App. 130, 18 N. E. 2d 392 (1938), 27 ILL. BAR. JOUR. 345 (1939)); Ky. Acts 1916, c. 41; Wash. Laws 1915, p. 277 §1 (express provision inserted that *creditors* shall include all creditors irrespective of whether they have acquired a lien).

[38] DEL. REV. CODE §§3333, 3336 (1935) (10 days); ME. REV. STAT. c. 164 §1 (1944) (20 days); WASH. REV. STAT. ANN. §3780 (Supp. 1943) (10 days).

[39] See note 3 *supra*. Also discussion in Leggett v. Bullock, 44 N. C. 283, 286 (1853).

[40] Compare Note 26 N. C. L. REV. 173, 178 (1948).

**Corporations—Dissolution at Instance of Minority Stockholders**

At one time minority stockholders were unable under any circumstances to sue for and obtain a dissolution of winding up[1] of a corporation and a distribution of its assets. It was uniformly[2] held that courts of equity, by virtue of their lack of inherent power, *i.e.*, lack of power absent statutory delegation,[3] were incapable of affording such drastic relief[4] in a suit from that quarter.[5]

Prior to the widespread enactment of general incorporation laws, one of the reasons for the rule was that the corporate charter was a special dispensation of the State—from which it was inferred that only the State could revoke it. But the deep entrenchment of the rule and the uniformity of its application were ultimately due in large measure to the then extreme rarity of corporate abuses that would justify dissolution, in contrast to the abundance of circumstances for which a lesser remedy, or no remedy at all, would be suitable. This extreme disproportion served as a basis upon which the courts confounded the alleged lack of power with the undesirability of exercising it in a great majority of cases.[6] Thus the courts arrived, by way of an overweening generalization, at a rule which was categorical both in statement and application; but which in statement was essentially unsound, and in application occasionally unjust.

That courts of equity do have the power in the absence of statute to dissolve or wind up a corporation and distribute its assets at the instance of minority stockholders is strikingly illustrated by decisions repudiating the old view, handed down in jurisdictions whose previous adherence to that view had been undeviating.[7] These courts which have reversed their positions together with others, which on first impression have adopted the new rule, now constitute a majority.[8] Under this common

[1] The distinction between winding up and dissolution is formal only; in either case the corporate existence is effectively terminated. See Verplanck v. Mercantile Ins. Co., 2 Paige 438, 452 (N. Y. 1831).

[2] The first case to hold to the contrary was decided in 1892. Miner v. Belle Isle Ice Co., 93 Mich. 97, 53 N. W. 218 (1892).

[3] The first statute of this kind was enacted in 1848. 11 & 12 Vict., c. 45, §5(8) (1848). The earliest enactment in this country was prior to 1868. W. VA. CODE c. 53, §57 (1868).

[4] The appointment of a temporary receiver is a common example of a less drastic measure of relief.

[5] Hardon v. Newton, 11 Fed. Cas. 500, No. 6,054 (C. C. Conn. 1878); Wheeler v. Pullman Iron & Steel Co., 143 Ill. 197, 32 N. E. 420, 17 L. R. A. 818 (1892); Bayless v. Orne, Freem. Ch. 161 (Miss. 1840); Verplanck v. Mercantile Ins. Co., 1 Edw. Ch. 84 (N. Y. 1831); Strong v. McCogg, 55 Wis. 624, 13 N. W. 895 (1882).

[6] See Note, 43 A. L. R. 242, 288 (1926).

[7] *E.g.*, compare the following cases with cases from the same jurisdictions cited in note 5 *supra:* Potter v. Victor Page Motors Corp., 300 Fed. 885 (D. Conn. 1924); Metropolitan Fire Ins. Co. v. Middendorf, 171 Ky. 771, 188 S. W. 790 (1916); Brent v. B. E. Brister Sawmill Co., 103 Miss. 876, 60 So. 1018 (1913); Goodwin v. von Cotzhausen, 171 Wis. 351, 177 N. W. 618 (1920).

[8] Hornstein, *A Remedy for Corporate Abuse,* 40 COL. L. REV. 220 (1940).

law view it has been held that the court has power to wind up a corporation in a variety of appropriate circumstances, including, separately or immingled, gross mismanagement,[9] deadlock,[10] fraud,[11] abandonment of the corporate functions,[12] and failure of the corporation's principal object or purpose.[13] Most of the jurisdictions which assert a lack of power "in the absence of statute," along with those recognizing an inherent power, have enacted statutes specifying grounds—the aforementioned[14] and/or others[15]—upon which suit may be brought.

The power must be exercised cautiously,[16] and its exercise is prohibited where a lesser remedy would be adequate.[17] Accordingly, the cases are legion where the courts, while acknowledging the power to dissolve in an appropriate case, refuse to exercise it because such a case has not been made out.[18]

In a recent Virginia case[19] minority stockholders of a corporation, organized for the principal purpose of conducting a leaf tobacco business, brought suit for dissolution alleging that the principal purpose had

[9] *E.g.,* Klugh v. Coronaca Milling Co., 66 S. C. 100, 44 S. E. 566 (1903).

[10] *E.g., In re* Dissolution of the Waldorf Amusement Co., 13 Ohio App. 438 (1920).

[11] *E.g.,* Tower Hill-Connellsville Coke Co. of W. Va. v. Piedmont Coal Co., 64 F. 2d 817 (4th Cir.), *cert. denied,* 290 U. S. 675 (1933).

[12] *E.g.,* Central Land Co. v. Sullivan, 152 Ala. 360, 44 So. 644 (1907).

[13] Riley v. Callahan Mining Co., 28 Idaho 525, 155 Pac. 665 (1916); Kroger v. Jaburg, 231 App. Div. 641, 248 N. Y. Supp. 387 (1st Dep't 1931). See Hall v. City Park Brewing Co., 294 Pa. 127, 136-137, 143 Atl. 582, 585 (1928).

[14] CAL. CORP. CODE §4651 (1947) (abandonment, deadlock, fraud); CONN. GEN. STAT. §5226 (1949) (fraud, gross mismanagement, abandonment), ILL. ANN. STAT. c. 32, §157.86 (1935) (deadlock, fraud); LA. GEN. STAT. ANN. §1135 (1939) (failure of objects, abandonment, deadlock); ME. REV. STAT. c. 49 §100 (1944) (fraud, gross mismanagement); MINN. STAT. §301.49 (Henderson 1945) (failure of objects, abandonment, fraud, deadlock, mismanagement); MO. REV. STAT. ANN. §4997.88 (1939) (fraud, deadlock); NEV. COMP. LAWS ANN. §1648.01 (Supp. 1942) (fraud, gross mismanagement, abandonment); OHIO GEN. CODE ANN. §8623-86 (1938) (deadlock, abandonment, failure of objects); OKLA. STAT. ANN. tit. 18, §1.195 (Supp. 1948) (failure of objects, abandonment, deadlock); PA. STAT. ANN. tit. 15, §2852-1107 (1938) (failure of objects, abandonment, fraud, deadlock); R. I. GEN. LAWS c. 116, §57 (1938), as amended, R. I. Acts 1945 c. 1610 (fraud); VA. CODE ANN. §3810b (Supp. 1948) (failure of principal purpose); WASH. REV. STAT. ANN. §3803-50 (Supp. 1932) (failure of objects, abandonment, deadlock).

[15] CAL. CORP. CODE §4651 (1947) (liquidation reasonably necessary to protect stockholder's interests); CONN. GEN. STAT. §5226 (1949) (any good and sufficient reason); ILL. STAT. ANN. c. 32, §157.86 (1935) (misapplication and waste of assets); IOWA CODE §491.66 (1946) (good cause); ME. REV. STAT. c. 49, §100 (1944) (imminent danger of insolvency); NEV. COMP. LAWS §1648.01 (collusion, misfeasance, malfeasance, nonfeasance); N. D. REV. CODE §10-1607 (1943) (one year suspension of ordinary business); OKLA. STAT. ANN. tit. 18, §1.195 (Supp. 1948) (beneficial to interests of stockholders); S. C. CODE ANN. §7725 (1942) (nonpayment of dividends or inability to pay dividends in good faith over stated intervals); W. VA. CODE ANN. §3093 (1) (1943) (sufficient cause).

[16] See discussion in Goodwin v. von Cotzhausen, 171 Wis. 351, 361, 177 N. W. 618, 622 (1920).

[17] Thwing v. Minowa Co., 134 Minn. 148, 158, N. W. 820 (1916).

[18] *E.g.* Penn v. Pemberton & Penn, Inc., 189 Va. 649, 53 S. E. 2d 823 (1949).

[19] Penn v. Pemberton & Penn, Inc., 189 Va. 649, 53 S. E. 2d 823 (1949).

failed. It was shown that the majority stockholders in control had suspended the tobacco business during the war period—when that business was highly speculative—and during the postwar period of inflation, and had invested the corporation's idle capital, profitably, in stocks and bonds. The court held that although by the general rule, of which the statute[20] in part is declaratory,[21] a court of equity has inherent power to dissolve a solvent corporation because of fraud or gross mismanagement or failure of the corporate purpose, dissolution was not warranted by the facts presented. The case is significant inasmuch as it expressly recognizes that a court of equity has the power to dissolve independently of statute, and that the exercise of the power depends upon the application of general principles of equity to the merits of the case.

North Carolina has provided by statute[22] certain general and specific grounds upon which dissolution may be granted in suits instituted therefor by minority stockholders. These include (1) abuse of the corporate powers to the injury of stockholders, (2) nonuser of the corporate powers for two or more consecutive years, (3) suspension of ordinary business for want of funds, or imminent danger of insolvency, and (4) nonpayment of dividends for certain intervals. But certain of the grounds enumerated above, *viz.*, fraud, gross mismanagement, deadlock, and abandonment[23] for less than a two year period, for which the remedy is commonly available in appropriate cases in most jurisdictions, are either excluded completely or subject to inclusion only by future construction of the statute. Fraud very probably is an abuse of the corporate powers within the meaning of the statute;[24] but it would be more difficult to find that the same is true of gross mismanagement where fraud is lacking. Both deadlock and abandonment for less than two years are distinctly without the purview of the statute, and failure of the corporate purposes is at best only partially embraced.

The question whether in North Carolina equity has "power" to dissolve or, more accurately, will recognize its power to dissolve, in the absence of statutorily specified circumstances, is therefore one of practical moment.

Although there are no holdings on the question,[25] there is one statement by a dissenting judge, uttered at a time when the weight of au-

[20] VA. CODE ANN. §3810b (Supp. 1948).
[21] Penn v. Pemberton & Penn, Inc., 53 S. E. 2d 823, 825 (Va. 1949).
[22] N. C. GEN. STAT. §§55-124, 55-125 (1943).
[23] Abandonment is the critical fact; nonuser, except under statutory provision, is merely evidence of it. Sullivan v. Central Land Co., 173 Ala. 426, 55 So. 612 (1911).
[24] In one case, however, where fraud was clearly present, but where imminency of insolvency was not so clearly present, the court, in appointing a receiver, rested its decision on the latter basis, neglecting to construe the "abuse of power" provision. Mitchell v. Aulander Realty Co., 169 N. C. 516, 86 S. E. 358 (1915).
[25] *Contra:* Note, 34 VA. LAW REV. 56, 57 (1948).

thority was in the process of shifting,[26] to the effect that ". . . it is well settled . . . that in the absence of statutory provision to the contrary, only the State which created the corporation can sue to dissolve it."[27] Cited in support of the contention that the rule is well settled are one treatise[28] and four North Carolina cases.[29] The writer of the treatise asserts that equity has, as a general rule, no power or jurisdiction to dissolve, in the absence of statute, upon the suit of minority stockholders,[30] but lists, with evident approbation, several exceptional circumstances (including most of the aforementioned appropriate grounds) in which equity may properly exercise that power.[31] Thus the writer, by admitting the "exceptions," admits the existence of the power, but in his statement of the "general" rule, with regard to the reason why dissolution should not be granted in inappropriate cases, seems to be involved in the persistent verbal confusion between the existence of the power and the desirability of exercising it.

The dissenting statement finds even less support in the cases cited. In two[32] of these, suits were brought by minority stockholders for dissolution on statutory grounds, but no statement appears which negates, either expressly or by implication, equity's power in the absence of statute.[33] The other two cases,[34] although they contain statements ostensibly applicable upon inspection, in fact involve suits brought by parties other than those interested in the corporation for a remedy unrelated to dissolution, and are as distinctly irrelevant in law as in fact to the "well settled" rule which they were cited to support.[35]

[26] Compare Note, 19 IOWA LAW REV. 95 (1933), with Hornstein, *A Remedy for Corporate Abuse*, 40 COL. LAW REV. 220 (1940). For observations that the rule had previously changed, *see* Hall v. City Park Brewing Co., 294 Pa. 127, 132-133, 143 Atl. 582, 583-584 (1928); Goodwin v. von Cotzhausen, 171 Wis. 351, 358-361, 177 N. W. 618, 621-622 (1920); BALLENTINE, PRIVATE CORPORATIONS §253 (1927).

[27] *See* Kistler v. The Caldwell Cotton Mills Co., 205 N. C. 809, 814, 172 S. E. 373, 375 (1933) (dissenting opinion).

[28] 16 FLETCHER, CORPORATIONS (1933 ed.) §8077.

[29] Lasley v. Mercantile Co., 179 N. C. 575, 103 S. E. 213 (1920); Lasley v. Scales, 179 N. C. 578, 103 S. E. 214 (1920); Bass v. Navigation Co., 111 N. C. 439, 16 S. E. 402 (1892); Torrence v. Charlotte, 163 N. C. 562, 80 S. E. 53 (1913).

[30] 16 FLETCHER, CORPORATIONS (Perm. ed.) §§8080, 8098.

[31] 16 *id.* §§8080, 8081, 8082, 8098.

[32] Lasley v. Mercantile Co., 179 N. C. 575, 103 S. E. 213 (1920); Lasley v. Scales, 179 N. C. 578, 103 S. E. 214 (1920).

[33] Indeed, a statement in the earlier of these two cases may be, and has been, interpreted as a recognition of equity's power in the absence of statute. See 19 C. J. S. Corporations §1716 (1940).

[34] Torrence v. Charlotte, 163 N. C. 562, 80 S. E. 53 (1913); Bass v. Navigation Co., 111 N. C. 439, 16 S. E. 402 (1892).

[35] The later case merely quotes the pertinent statements of the earlier one. The facts of both cases were essentially the same. The grantors of land (under eminent domain proceedings) to the defendant corporations sued to recover the land, alleging that the existence of the corporations had been terminated, and thus their charters forfeited, by virtue of changes in the originally chartered purposes for which the land had been taken. Thus, when the court says in Bass v. Navigation Co., *supra*, note 12, at p. 449, "It rests with the sovereign to insist upon the forfeiture

Another case,[36] wherein dissolution was granted under circumstances encompassed by statutory provision,[37] but wherein proceedings had not been brought pursuant to the statute, might plausibly stand for the proposition that dissolution may be granted independently of statute, and hence for the principle that equity has power in the absence of statute. That the action, although brought in equity, was brought on a statutory ground, and was for that reason[38] entertained or condoned by the court, might suggest a contrary inference.

The justice and equity of dissolution in proper cases may be founded on principles of trust and contract. The tenet of majority rule in corporate management is qualified by an implicit trust relationship between the directors, or the majority stockholders, and the individual stockholder. Accordingly, it is the duty of those in control to manage the corporate affairs honestly for the benefit of all concerned—not merely for the benefit of the majority or controlling interests.[39] Consequently, if the corporate objects fail, if the corporate functions are abandoned, or if the corporation is doomed to eventual insolvency, that duty is breached by a failure to wind up the corporation. Otherwise, the stockholder's investment would probably be subject, not merely to futile stagnation, but to the various intrigues of the controlling interests, and to progressive dissipation in taxes and salaries.

The pertinent principle of contract is that by which one party has the right to "rescind (*e.g.*, withdraw from the corporation) after the other has persistently failed to comply with his part of the contract (*e.g.*, refused to act in the collective interest of the group)."[40]

The contention that the power can be abused is perhaps the most persistent objection to it. But difficult as it is to foresee general consequences in matters of this kind, it would be still more difficult to see how judicial abuses of the power, as cautiously as it has been exercised

for failure on the part of the corporation to comply with its charter . . . .", and at p. 454, ". . . only the sovereign state itself can demand the forfeiture and assert its right to dissolve the corporation. . . .", it is saying merely that the corporate existence is not subject to collateral attack by a logically disinterested party; *i.e.*, that as between the state and such a party, the power to dissolve rests exclusively in the state, and has no bearing on that party's rights. The existence of the statute recognizing the right of minority stockholders to sue for dissolution in certain circumstances renders it particularly obvious that the court was not denying that right.

[36] Greenleaf v. Land & Lumber Co., 146 N. C. 505, 60 S. E. 424 (1908).

[37] N. C. GEN. STAT. §55-124 (2) (1943) (nonuser of powers for two or more years).

[38] "We can perceive no good reason, however, for dismissing this action, wherein all parties in interest are now or, under his Honor's order, will be brought into court and the same relief awarded as if the provisions of the statute had been complied with." Greenleaf v. Land & Lumber Co., 146 N. C. 505, 507-508, 60 S. E. 424, 425 (1908).

[39] *See, e.g.*, Altoona Warehouse Co. v. Bynum, 242 Ala. 540, 545-546, 7 So. 2d 497, 502-503 (1942); Miner v. Belle Isle Ice Co., 93 Mich. 97, 109-110, 114-115, 53 N. W. 218, 222, 224 (1892); Note, 41 MICH L. REV. 714, 716 (1943).

[40] Hornstein, *A Remedey for Corporate Abuse*, 40 COL. L. REV. 220, 225 (1940).

in the past,[41] could approach the intracorporate abuses rendered perpetrable by non-recognition or denial of the power.[42]

Thus far, the only situations to arise in which the courts have deemed it just and equitable to decree dissolution have arisen within the categories already mentioned. But these categories are mere collections of abuses already presented rather than inflexible limits of the rule; so that the real reason for applying the remedy in a particular case is now, as it was initially, that such action is just, equitable,[43] and socially desirable.

As previously noted, all the presently appropriate circumstances for dissolution are not covered by statute in North Carolina. If they were, then it would, presently, make no practical difference whether the court had "inherent power" or not; in that event the question would, for the time being, be academic. The history of the remedy, however, has shown that the growth of circumstances warranting dissolution is concomitant with the growth and variegation of corporate activity. Assuming that this concomitancy will continue, statutory coverage of the ground, however liberal, must assuredly lag behind the evolving demands of justice and equity.[44] It is hoped, therefore, that when confronted with an appropriate case the court will recognize and exercise its inherent power, refusing to construe the statute as exclusive.[45]

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## Damages—Mental Anguish—Action Arising Out of Contract

Plaintiff contracted with the defendant undertakers to bury plaintiff's deceased husband. Approximately four months after internment,

[41] Decisions refusing to decree dissolution, even in jurisdictions which recognize the power, disproportionately exceed the decisions granting the remedy.

[42] Alternative judgments to the effect that complainant be paid his pro rata share of the assets (or the "fair cash value" of his stock) or that the corporation be dissolved, may be a solution to this problem. CONN. GEN. STAT. §5228 (1949); W. VA. CODE ANN. §3093 (1943); Riley v. Callahan Mining Co., 28 Idaho 525, 155 Pac. 665 (1916).

[43] The Companies Act of England provides for winding up where ". . . the court is of opinion it is just and equitable. . . ." The Companies Act, 1929, 19 & 20 Geo. V, c. 23, §168 (6).

[44] There is, however, one adequate statutory solution to the problem. By a Rhode Island enactment it has been expressly provided that the grounds for dissolution specified in the statute are not to be construed as limits on the general equity powers of the court and that the same relief may be obtained in equity. R. I. GEN. LAWS c. 116, §§61, 62 (1938).

[45] Analagous grounds for such refusal may be found in the case of *In re* Hotel Raleigh, 207 N. C. 521, 528-529, 177 S. E. 648, 652 (1935), where, in a proceeding under statute for the appointment of a receiver, the court said, "We do not hold that, in a proper case, the superior court of this state, in the exercise of its equitable jurisdiction, is without power to appoint a receiver of a corporation, whose business has been improperly conducted, with resulting loss to its creditors or stockholders, because of irreconcilable dissensions among its stockholders or directors. . . . We hold only that, in the summary proceeding provided by C. S. §1177, the judge of the superior court is without such power."

plaintiff discovered that the vault, during a very rainy spell of weather, had risen about six inches above the ground level, and mud had permeated the tomb. Plaintiff brought suit to recover damages for mental anguish caused by defendants' failure to bury her husband properly. The trial judge instructed the jury, in part, that plaintiff's alleged injuries to be actionable must have resulted from "unlawful, willful negligence and carelessness" of defendants. The North Carolina Supreme Court reversed, holding the case to be essentially an action for damages for breach of contract in which a recovery for mental anguish might be had without a showing of willful negligence.[1]

It is often stated as a general rule that, in actions for breach of contract, damages for mental suffering are not recoverable. In a majority of the jurisdictions, action for breach of contract to marry are repeatedly cited as the one exception to this general rule.[2] Following the majority rule, the Indiana Court,[3] in an action similar to the principal case, held that an action could not be maintained for mental anguish suffered because of defendant undertaker's breach of contract in failing to have a photograph made of plaintiff's deceased daughter before burial.

Even those jurisdictions which deny compensation for mental suffering resulting from a breach of contract will permit recovery for such injuries in an action where the defendant is a common carrier, or an innkeeper whose servants have insulted or abused the plaintiff who was a passenger or a guest.[4] The true basis for these decisions, however, is the breach of a "public calling" duty, and the action sounds as much in tort as in contract. These same jurisdictions also allow recovery of mental anguish damages against the proprietor of a public resort (not a "public calling") for publically ejecting a patron.[5] It seems that the prospects of recovery for mental anguish in these cases vary in direct proportion to the number of people who would probably be witnesses to the ejection.

[1] Lamm v. Shingleton, 231 N. C. 10, 55 S. E. 2d 810 (1949).

[2] Many of the pertinent cases are reviewed in Western Union Telegraph Co. v. Choteau, 28 Okla. 644, 115 Pac. 879 (1911). Also see McCORMICK, DAMAGES §145 (1935); SEDGWICK ON DAMAGES §45 (9th ed. 1912); Thrush v. Fullhart, 230 Fed. 24 (C. C. A. 4th 1915).

[3] Plummer v. Hollis, 213 Ind. 43, 11 N. E. 2d 140 (1937).

The principal case cites Renihan v. Wright, 125 Ind. 563, 25 N. E. 822 (1890) (breach by undertaker of contract with next of kin to keep safely a corpse until next of kin desired to inter same) as supporting authority. This case, however, was overruled by Western Union Telegraph Co. v. Ferguson, 157 Ind. 64, 60 N. E. 674, 54 L. R. A. 846 (1901) which adopted the majority rule.

[4] Indiana Ry. v. Orr, 41 Ind. App. 426, 84 N. E. 32 (1907) (conductor gave plaintiff wrong transfer; plaintiff subsequently ejected from another street car of defendant's line); Frewen v. Page, 238 Mass. 499, 131 N. E. 475, 17 A. L. R. 134 (1921); Boyce v. Greeley Square Hotel Co., 228 N. Y. 106, 126 N. E. 647 (1920).

[5] Aaron v. Ward, 203 N. Y. 351, 96 N. E. 736 (1911) (ejection from a public bath house).

North Carolina and a growing minority of jurisdictions[6] have taken a more liberal view and allow recovery for mental suffering in exceptional cases.

The North Carolina cases involving this question of mental anguish damages seem to be logically divisible into actions *ex contractu* and actions *ex delicto*. In the cases decided prior to the principal case the court made no such division but tended to emphasize the defendant's negligence as the basis for its decisions even though in some instances it was clearly a case of breach of contract.[7] The court, however, in the principal case ruled out the allegation of negligence and based recovery directly on breach of contract.[8]

### Actions Ex Contractu

The cases falling within the general category of contracts may be divided into two classes, namely, actions where one of the contracting parties suffers mental anguish as a result of the breach, and actions where a third party beneficiary of the contract suffers mental anguish.

The principal case is representative of the first class, since here the plaintiff was one of the two contracting parties. In contracts which are personal in nature and are such that a breach thereof would naturally cause grief and distress of mind, the court allows recovery.[9] In such case, it is said, the party sought to be charged is presumed to have contracted with reference to the payment of damages of that character in the event such damages should accrue on account of his breach of contract.

Within the second class falls the so-called "telegraph cases" where the telegraph company fails or delays in delivering, or erroneously transmits a message and the recipient, not a party to the contract, as a con-

[6] Loy v. Reid, 11 Ala. App. 231, 65 So. 855 (1914) (defendant breached his contract to embalm properly body of plaintiff's child; held, plaintiff entitled to damages for mental anguish suffered because of decomposition of body prior to burial); Westesen v. Olathe State Bank, 78 Colo. 217, 240 Pac. 689 (1925) (bank breached contract to furnish plaintiff credit for trip to another state by refusing to honor his checks upon arrival there). See Note, 6 N. C. L. Rev. 322 (1928). ". . . where other than pecuniary benefits are contracted for, other than pecuniary standards will be applied to the ascertainment of damages flowing from the breach." Wadsworth v. Western Union Telegraph Co., 86 Tenn. 695, 703, 8 S. W. 574, 576 (1888).

[7] ". . . an action may lie either in contract or in tort . . . ." Penn v. Western Union Telegraph Co., 159 N. C. 306, 309, 75 S. E. 16, 18 (1912); "It seems to us that this action is in reality in the nature of tort for negligence. . . ." Young v. Western Union Telegraph Co., 107 N. C. 370, 385, 11 S. E. 1044, 1048 (1890).

[8] Lamm v. Shingleton, 231 N. C. 10, 13, 55 S. E. 2d 810, 812 (1949).

[9] In Thomason v. Hackney, 149 N. C. 298, 74 S. E. 1022 (1912) defendant photographer lost films taken of plaintiff's deceased child. The mother was denied recovery for the resulting anguish. The court, however, based its decision on the fact that the aunt, who delivered the film to defendant, did not inform him that she was acting as agent for the mother. Had this been done it seems clear that recovery would have been allowed.

sequence is subjected to mental anguish.[10] It was this type of action which introduced the first exception to the general rule in actions for breach of contract. The Texas Court, in 1881, allowed recovery for mental suffering in contract actions by awarding damages to a son for mental anguish caused by the failure of the telegraph company to deliver a message announcing the death of his mother, whereby he was prevented from being present at her burial.[11] North Carolina adopted this exception in 1890,[12] and this is still the law as to intrastate messages.[13] If the telegraph message is sent across state lines, the federal rule applies and a claim for damages for mental distress due to the delay cannot be maintained by the person affected even in the courts of a state which allows such damages.[14]

### Actions Ex Delicto

The cases, where no contract is involved but the action sounds in tort only, may be divided into three groups: first, actions where mental pain and suffering results from a willful, wanton, or intentional act; second, actions where there has been a negligent breach of a duty, resulting in physical injury accompanied by mental suffering; and third, actions where there is a negligent breach of a duty resulting in mental anguish only.

In cases where the mental pain was caused intentionally,[15] or in the ordinary personal injury cases where there is a physical injury accompanied by mental suffering, the court has been willing to allow mental anguish damages. Mental disturbance alone, however, where there is

[10] See Green v. Western Union Telegraph Co., 136 N. C. 489, 504, 49 S. E. 165, 171 (1904) for a list of the states affirming and states repudiating the right to recover damages for mental suffering due to negligent delay in the delivery of telegrams.

[11] So Relle v. Western Union Telegraph Co., 55 Tex. 308, 40 Am. Rep. 805 (1881).

[12] Green v. Western Union Telegraph Co., 136 N. C. 489, 49 S. E. 165 (1904) (defendant company late delivering wire informing addressee to meet sender's young daughter upon arrival of her train; no one met her when she arrived after midnight; recovery allowed for mental suffering and fright upon finding herself alone and unprotected at such a late hour in a strange city despite fact that no actual harm befell her); Young v. Western Union Telegraph Co., 107 N. C. 370, 11 S. E. 1044 (1890); Thompson v. Western Union Telegraph Co., 107 N. C. 449, 12 S. E. 427 (1890).

[13] Russ v. Western Union Telegraph Co., 222 N. C. 504, 23 S. E. 2d 681 (1943).

[14] Western Union Telegraph Co. v. Speight, 254 U. S. 17, *reversing* 178 N. C. 146, 100 S. E. 351 (1919) (death message sent from point in North Carolina and directed to another point in North Carolina, but routed by defendant through an out of state office; held, interstate message, no recovery for mental anguish).

[15] It seems the trial judge attempted to place the principal case in this group since he charged the jury, in part, that plaintiff's alleged injuries to be actionable must have resulted from "unlawful, willful negligence and carelessness" of defendants. Lamm v. Shingleton, 231 N. C. 10, 13, 55 S. E. 2d 810, 812 (1949); Kirby v. Jules Chain Stores Corp., 210 N. C. 808, 188 S. E. 625 (1936) (defendant called plaintiff a deadbeat and yelled threats of arrest from an automobile causing plaintiff to have miscarriage). See Note, 18 N. C. L. Rev. 71 (1939).

no showing of impairment of health or loss of bodily power,[16] cannot serve as a basis for recovery.[17]

The premises upon which recovery is denied where the physical injury is lacking are (1) the difficulty of measurement, and (2) the danger of fraudulent claims. The first objection is of doubtful validity since the measurement of mental anguish alone is no more difficult than its measurement accompanied by a physical injury. The second objection is also vulnerable. Courts should not refuse to hear and decide the merits of just claims merely to avoid the possibility of fraudulent ones. To do so is plainly an admission of their inability to detect fraud.[18]

There is one North Carolina case[19] which could be classified as an action *ex contractu* or *ex delicto,* but perhaps better falls within the former category. In this case the plaintiff husband was allowed to recover mental anguish damages sustained while watching his wife suffer as a result of improper care by defendant hospital. Even though the court stressed negligence, the breach of contract to care for the wife properly was lurking in the background and offered a peg upon which the court could hang mental suffering damages.

Thus, the present state of the law seems to be that mental anguish damages are treated as parasitic in nature and can be awarded only in connection with a wrong, such as breach of contract or a negligent act resulting in physical injuries, which apart from such mental suffering constitutes a cause of action. Even if it were necessary to have such a peg on which to hang recovery, it appears that the negligent breach of duty without the physical injury would be substantial enough. This is especially true in view of the fact that a technical breach of contract was sufficient in the principal case.

The principal case represents an addition to the growing list of exceptions to the general rule disallowing recovery for mental anguish in

[16] *See* "While fright and nervousness alone, unaccompanied or followed by physical injury, do not constitute an element of damages, if this fright and nervousness is a natural and direct result of the negligent act of the defendant and naturally and directly causes an impairment of health or loss of bodily power, then this would constitute an element of injury to be considered by the jury." Sparks v. Tenn. Mineral Products Corp., 212 N. C. 211, 213, 193 S. E. 31, 33 (1937).

[17] Helmstetler v. Duke Power Co., 224 N. C. 821, 32 S. E. 2d 611 (1945); "It may be admitted that mental anguish, suffered in connection with a wrong which, apart from such mental pain, constitutes a cause of action, may be a proper element of compensatory damages. But the general rule is that mental suffering, unrelated to any other cause of action, is not alone a sufficient basis for the recovery of substantial damages." Hinnant v. Tidewater Power Co., 189 N. C. 120, 128, 126 S. E. 307, 312 (1925).

[18] See Goodrich, *Emotional Disturbance as Legal Damage* 20 MICH. L. REV. 497, 505 (1922) where it is contended: ". . . skilled medical men have developed a technique for distinguishing the real sufferer from the fraudulent imposter."

[19] Bailey v. Long, 172 N. C. 661, 90 S. E. 809 (1916); *But cf.* Benevolent Association v. Neal, 194 N. C. 401, 139 S. E. 841 (1927) where a mother was refused mental anguish damages resulting from alleged malpractice of defendant on her son, the court held such damages to be too speculative and remote.

breach of contract actions. As in the case of any new development in the law, the process is one of slow and cautious growth, but at some future time the "general rule" may be swallowed up by the exceptions and the exceptions may become the rule.

CHARLES E. KNOX.

**Domestic Relations—Custody of Child—Rights of Natural Parent**

One of the greatest responsibilities that can be placed upon a court is that of determining the proper custodian of a child. This is not a field of the law suited to the application of fixed rules or maxims, but rather one in which the courts should carefully weigh all the individual and social interests involved. These include the ultimate welfare of the child, the natural emotions of the parent and the interest of the state.[1]

The North Carolina Supreme Court in the recent case of In re *Cranford*[2] appears to have reached its decision without giving careful thought to all the individual and social interests involved. In that case, a habeas corpus proceeding was instituted by the mother of an illegitimate child to regain the child's custody from the mother's aunt. The lower court found that shortly after the birth of the child, the mother and the child went to the home of the mother's aunt and remained there until the mother's subsequent marriage to a person not the father of the child; that the mother then established residence elsewhere, abandoning the child by surrendering it to the unqualified custody of the aunt and asserting that she would make no further claim to it. It was further found that the aunt was a fit person to have the custody of the child and that her home was a proper place to rear it; and that the mother of the child was a woman of good character and that her home was a proper place for the child to visit. Upon these findings the lower court awarded the custody and control of the child to the aunt, allowing the mother to visit the child at stated periods.

The Supreme Court on appeal reversed on the grounds that they were not bound by the lower court's finding that there was an abandonment by the mother, and that the natural parent, unless shown to be unfit, has a legal right to the possession of the child.

One wonders what effect this and like decisions[3] will have on the willingness of persons to take helpless children into their homes in the

[1] *See* Commonwealth v. Lindsay, 156 Pa. Super. 560, 562, 40 A. 2d 881, 882 (1944) ("Lacking prescience, the choice is always difficult"); Commonwealth v. Shannon, 107 Pa. Super. 557, 164 Atl. 352 (1933).

[2] 231 N. C. 91, 56 S. E. 2d 35 (1949).

[3] In another recent case, *In re* Adoption of Doe, 231 N. C. 1, 56 S. E. 2d 8 (1949), the mother of an illegitimate child consented to its adoption; she married the reputed father; a temporary adoption order was entered; and then the mother revoked her consent. The court held that the child must be returned to the parents

future. They might well fear that the child will be taken from them after they have cared for and become attached to it. The willingness of persons to take in and provide for helpless children affects the welfare of the child and society. There are many institutions provided to care for these unfortunates; but beneficial and commendable as they may be, they can never take the place of private homes where, from close personal contact and cooperation, mutual love and affection develop between the children and those persons standing *in loco parentis*.[4]

At common law, the child was regarded somewhat as a chattel and the property interest of the parent was paramount to the welfare of the child.[5] The modern American rule, however, is contrary to that common law principle and now the child's welfare is said to be controlling.[6] As stated by Roscoe Pound,[7] "Recent legislation and judicial decisions have changed the old attitude of the law with respect to dependent members of the household. Courts no longer make the rights of parents with respect to children the chief basis of their decisions. The individual interests of parents which used to be the one thing regarded has come to be almost the last thing regarded as compared with the interests of the child and the interests of society. In other words, here also social interests are chiefly regarded."

In the principal case, the preferred status of the parent prevailed. Modern courts, although recognizing the welfare of the child as the ultimate consideration, tend to prefer the natural parents. The basis of such preference is a presumption that the natural affections of the parent for its child will result in the child receiving better care from the parents than from strangers.[8] Still, such a presumption is rather effectively rebutted where the parent has failed to care tenderly for the child in the past.[9] Therefore, when a parent voluntarily parts with the custody of the child for an unreasonable length of time and allows another to perform the parental duties that the parent should have per-

[4] See Waite, *The Adoption and Rearing of Children*, 21 PA. B. A. Q. 40, 43 (1949).

[5] Commonwealth v. Tracy, 155 Pa. Super. 257, 38 A. 2d 405 (1944).

[6] *See* Keener v. Keener, 139 Tenn. 211, 221, 201 S. W. 779, 782 (1918) ("The dominant thought is that children are not chattels, but intelligent and moral beings, and that as such their welfare and their happiness is a matter of first consideration."); Seeley v. Seeley, 30 App. D. C. 191 (1907), *cert. denied*, 209 U. S. 544 (1908) (Rationale: the state must perpetuate itself and good citizenship is essential to that end.); Commonwealth v. Stephens, 127 Pa. Super. 188, 193 Atl. 80 (1937); State v. Postletehwaite, 106 W. Va. 383, 145 S. E. 738 (1928); MADDEN, PERSONS AND DOMESTIC RELATIONS 371 (1931) and cases cited.

[7] POUND, THE SPIRIT OF THE COMMON LAW 189 (1921).

[8] Chapsky v. Wood, 26 Kan. 650 (1881); *see* Buchanan v. Buchanan, 93 Kan. 613, 616, 144 Pac. 840, 841 (1914); MADDEN, PERSONS AND DOMESTIC RELATIONS 372 (1931).

[9] Peese v. Gullerman, 51 Tex. Civ. App. 39, 110 S. W. 196 (1908).

formed, that parent thereby seriously impairs his right to have the child's custody awarded him by judicial decree.[10]

It is somewhat surprising that the North Carolina Court based its decision on the sole ground that the natural right of the parent is superior, absent proof of the mother's unfitness, inasmuch as North Carolina has frequently recognized and followed the almost unanimous American rule that the welfare of the child is the controlling factor.[11] In fact, the best interest of the child has prevailed over the natural right of the parent in many North Carolina cases even though the parent was not shown to be unfit.[12]

Recognizing the welfare of the child as the objective to be obtained, no consideration bearing on its welfare should be overlooked. In the principal case, there is no indication that the court considered the length of time the child was in the custody of the aunt—a vital factor. "It is an obvious fact, that the ties of blood weaken, and ties of companionship strengthen, by lapse of time; and the prosperity and welfare of the child depend on the number and strength of these ties, as well as on the ability to do all which the promptings of these ties compel.[13]

In addition to considering the length of time the aunt had custody of the child, the court should have weighed the conduct of the parties during that period.[14] The actions of the mother during that period

[10] Commonwealth v. Stephens, 127 Pa. Super. 188, 193 Atl. 80 (1937); Hoxie v. Potter, 16 R. I. 374, 17 Atl. 129 (1888); Cunningham v. Barnes, 37 W. Va. 746, 17 S. E. 308 (1893).

[11] "It is also held with us in well considered cases, and they are in accord with the rule now generally prevailing, that the right of the parents is not universal and absolute; but even as between individuals, the same may be modified and disregarded when it is made to appear that the welfare of the child clearly requires it." Atkinson v. Downing, 175 N. C. 244, 95 S. E. 487 (1918); Hardee v. Mitchell, 230 N. C. 40, 51 S. E. 2d 884 (1949); Ridenhour v. Ridenhour, 225 N. C. 508, 35 S. E. 2d 617 (1945); Walker v. Walker, 224 N. C. 751, 32 S. E. 2d 318 (1944); Pappas v. Pappas and Elkin v. Pappas, 208 N. C. 220, 179 S. E. 661 (1935); Clegg v. Clegg, 186 N. C. 28, 118 S. E. 824 (1923); *In re* Rosa Hamilton, 182 N. C. 44, 108 S. E. 385 (1921); Brickwell v. Hines, 179 N. C. 254, 102 S. E. 309 (1920); *In re* Alderman, 157 N. C. 507, 73 S. E. 126 (1911); *In re* Constance Turner, 151 N. C. 474, 66 S. E. 431 (1909).

[12] Atkinson v. Downing, *supra* note 11; Tyner v. Tyner, 206 N. C. 776, 175 S. E. 144 (1934); *In re* Daisey Bell Warren, 178 N. C. 43, 100 S. E. 76 (1919). *Contra: In re* Jones, 153 N. C. 312, 69 S. E. 217 (1910).

In the principal case the court based its decision, that the mother was not shown to be unfit, on the fact that the lower court found her of proper character for the child to visit. In *Tyner v. Tyner* the lower court found the mother to be a woman of good character, and a proper and suitable person for the children to associate with, but nevertheless failed to find that she was a suitable person for their custody.

[13] Chapsky v. Wood, 26 Kan. 650 (1881) (leading case).

[14] ". . . the conduct of the father, during nearly the whole life of the child, furnishes reason for supposing that he surrendered his rights over the child by a tacit understanding, if not by an express agreement. He has, for eight years or more, been able to retake the child, and has made no offer to do so. No demand or offer has been made that he should contribute to her support. His present assertion of his rights is in consequence of what he deems an unreasonable refusal of a different request. By his own acquiesence he has allowed the affections on

might have amounted to a willful disregard for the welfare of her child.[15] On the other hand, a study of her conduct might have shown that the natural ties of affection were present, but that a temporary relinquishment of custody was necessary for economic or other justifiable reasons.[16]

Another factor the court failed to take into account was the attitude and character of the husband of the child's mother, which would seem to have a direct and important bearing on the future welfare of the child.[17]

Many courts are influenced by the preference or desire of the child if the child has reached the "age of discretion."[18] The court listens to the wishes of the child because it is material for the court to understand them, that it may be better prepared to exercise its discretion wisely. It is not the whim or caprice of the child which the court respects, but its feelings, its attachments, its reasonable preference and its probable contentment.[19] The "age of discretion" is fixed by statute in some states,[20] but ordinarily it is left to the judgment of the trial court which determines it by appraising the capacity, information, intelligence and judgment of the child.[21]

Other vital elements that should enter into the determination of the award[22] are the health,[23] age,[24] sex,[25] pecuniary prospects,[26] education

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both sides to become engaged in a manner he could not but have anticipated, and which cannot be altered without risking the happiness and interests of his child. He has allowed the parties to go on for years in the belief that his legal rights were waived. Therefore he is not now in a position to require the interference of the court in favor of a controlling legal right on his part, against the rights, such as they are, the feelings, and the interests of the parties." Hoxie v. Potter, 16 R. I. 374, 17 Atl. 129 (1888).

[15] Society v. Davis, 211 Ala. 344, 100 So. 325 (1924); Lancey v. Shelley, 232 Iowa 178, 2 N. W. 2d 781 (1942); Chapsky v. Wood, 26 Kan. 650 (1881).

[16] Wood v. Shaw, 92 Kan. 70, 139 Pac. 1165 (1914).

[17] This factor would seem to be especially relevant here inasmuch as the mother of the child had already married at the time she relinquished custody to the aunt. See *In re* Daisey Bell Warren, 178 N. C. 43, 100 S. E. 76 (1919); Bonnett v. Bonnett, 61 Iowa 199, 16 N. W. 91 (1883) (court considered fact that stepfather was under no legal obligation to provide for child). See State v. Dewey, 195 N. C. 628, 143 S. E. 216 (1928) (stepfather has no legal obligation to provide for child).

[18] *See* Harris v. Harris, 115 N. C. 587, 589, 20 S. E. 187, 188 (1894); Spears v. Snell, 74 N. C. 210, 215 (1876); Bridges v. Matthews, 276 Ky. 59, 122 S. W. 2d 1021 (1938); Cummings v. Bird, 230 Ky. 296, 19 S. W. 2d 959 (1929); Commonwealth v. Wilcox, 319 Pa. 183, 179 Atl. 808 (1935).

[19] HURD, HABEAS CORPUS 529 (1858).

[20] *E.g.* OHIO GEN. CODE ANN. §8033 (1938) (14 years).

[21] HURD, HABEAS CORPUS 532 (1858).

[22] Weinman, *The Trial Judge Awards Custody,* 10 LAW AND CONTEMP. PROB. 721, 734 (1944).

[23] *In re* Rosa Hamilton, 182 N. C. 44, 108 S. E. 385 (1921); See Note, 48 A. L. R. 137 (1927) and cases cited.

[24] In the principal case, there is no mention of the age of the child. The parent would seem to have a stronger case where the child is of tender years. See Scog-

and development,[27] and religious welfare of the child[28] and in addition, the character and feelings of the parties desiring custody.[29] Furthermore, a decision in this type of case involves judicial discretion. Being familiar with the surrounding circumstances, hearing the testimony, seeing the witnesses, and interviewing the child are all matters which place the trial court in a better position to determine what is for the child's best interest, and its decision should not be lightly overturned.[30]

In the light of the above discussion, it is submitted that a parent should not be denied the custody of his child without a good and sufficient cause, but in determining whether such cause does in fact exist, all factors affecting the welfare of the child should be considered.

RODDEY M. LIGON, JR.

## Federal Jurisdiction—Removal—Separate and Independent Claim or Cause of Action

Suit divisibility as a basis for removal to the federal courts has long been available to non-resident defendants who were joined with resident defendants in a single action. The act of July 27, 1866, brought into being the right of these defendants to remove on the ground of "separable controversy."[1] At this time the case was split into two parts, with the part involving the non-resident defendant removed to the federal court and the part involving the resident defendant left in the state court. It was not until the act of March 3, 1875, that the removal of the entire suit was allowed where a "separable controversy" was found to exist.[2] Under the last act the court was permitted, upon removal, to remand in whole or in part as justice required. This last revision continued in substantially the same form until September 1, 1948.[3] During

gins v. Scoggins, 80 N. C. 319 (1897); Haskell v. Haskell, 152 Mass. 16, 24 N. E. 859 (1890).

[25] See Scoggins v. Scoggins, *supra* note 24, where three girls awarded to mother and one boy to father.

[26] Lancey v. Shelley, 232 Iowa 187, 2 N. W. 2d 781 (1942); Dunkin v. Siefert, 123 Iowa 64, 98 N. W. 558 (1904); Buchanan v. Buchanan, 93 Kan. 613, 144 Pac. 840 (1914); Weinman, *The Trial Judge Awards Custody,* 10 LAW AND CONTEMP. PROB. 721, 733 (1944).

[27] *See* Spears v. Snell, 74 N. C. 210, 213 (1876); Dunkin v. Siefert, *supra* note 26.

[28] Atkinson v. Downing, 175 N. C. 244, 95 S. E. 487 (1918); Moore v. Dozier, 128 Ga. 90, 57 S. E. 110 (1907); Friedman, *The Parental Right to Control the Religious Education of a Child,* 29 HARV. L. R. 485, 488 (1916).

[29] Sheers v. Stein, 75 Wis. 44, 43 N. W. 728 (1889).

[30] Pappas v. Pappas and Elkin v. Pappas, 208 N. C. 220, 197 S. E. 661 (1935); Clegg v. Clegg, 186 N. C. 28, 118 S. E. 824 (1923); *In re* Rosa Gray Hamilton, 182 N. C. 44, 108 S. E. 385 (1921); Stokes v. Cogdell, 153 N. C. 181, 69 S. E. 65 (1910); Pra v. Gherardini, 34 N. Mex. 587, 286 Pac. 828 (1930).

[1] 14 STAT. 306 (1866).

[2] 18 STAT. 470 (1875).

[3] 36 STAT. 1094 (1911). "And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and

this period the question of whether a "separable controversy" was contained in a given action continually afforded one of the most perplexing problems of federal jurisdiction.

One approach to the problem of determining the existence of a separable controversy within a suit has been on the basis of *parties.*[4] According to this view, when the joinder of defendants is permissive rather than necessary, then the nonresident defendant so joined may remove the whole case on the ground that it contains a separable controversy as to him. Thus, in a proceeding against several insurers who were members of an association which insured the plaintiff's property, the non-resident defendants were allowed to remove the entire case to the federal courts.[5]

During the process of development of removal jurisdiction under the separable controversy statute, the courts evidently believed that in certain types of actions all of the case should not be removed to the federal courts. Thus they devised the "separate controversy" concept, which allowed the federal courts to retain only a part of the case and to remand the remainder. The cases so split up were those which involved joinder of distinct claims and not merely joinder of parties.[6] Hence, an action by a railroad corporation to condemn land for a right of way was separate as to the claim or cause of action against each individual landowner of tracts along the way. The non-resident defendant landowners were allowed to remove that portion of the case as between themselves and the railroad, but the remainder of the case was remanded to the state court.[7]

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which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district." This statute was familiarly known as the "separable controversy" statute. For historical sketch, see 3 MOORE, FEDERAL PRACTICE §101.02 (2d ed. 1948).

[4] 3 MOORE, FEDERAL PRACTICE §101.06 (2d ed. 1948).

[5] Des Moines Elev. & Grain Co. v. Underwriter's Grain Ass'n., 63 F. 2d 103 (8th Cir. 1933); *cf.* Texas Employer's Ins. Ass'n. v. Felt, 150 F. 2d 227 (5th Cir. 1945) (action brought in alternative against three insurance carriers because uncertain as to who was employer at time of worker's accident); Branchville Motor Co. v. American Surety Co. of N. Y., 27 F. 2d 631 (E. D. S. C. 1928) (suit against surety on bond joined with action in tort against insured's employee). For excellent discussion see Note, *The Content of "Separable Controversy" for Purpose of Removal to Federal Courts,* 36 COL. L. REV. 788 (1936).

[6] 3 MOORE, *op. cit. supra* note 4, §101.06.

[7] Deepwater Ry. v. Western Pocanhontas Coal & Lumber Co., 152 Fed. 824 (C. C. S. D. W. Va. 1907); *cf.* Tillman v. Russo Asiatic Bank, 51 F. 2d 1023 (2d Cir.), *cert. denied,* 285 U. S. 539 (1931) (two causes of action joined, first based on dishonor of plaintiff's check, second on refusal to pay own draft); Little Six Oil Co. v. Noble, 17 F. 2d 728 (5th Cir. 1927) (action against contracting party and one who has assumed his obligation); Alabama Power Co. v. Gregory Hill Gold Mining Co., 5 F. 2d 705 (M. D. Ala. 1925) (condemnation proceedings); Wright v. Ankeny, 217 Fed. 988 (W. D. Wash. 1914) (liability of each subscribing stockholder of insolvent corporation on stock subscription); Manufacturer's Comm. Co. v. Brown Alaska Co., 148 Fed. 308 (C. C. S. D. N. Y. 1906) (contracts and liability of maker of promissory note and several indorsers thereon are separate and distinct).

Moreover, an important procedural rule had been developed under this statute. Where under the state law[8] the plaintiff was allowed to allege the liability of the defendants jointly, such as in the joint tort-feasor and master-servant cases, and he elected to do so, then the joint allegation made it unnecessary to determine whether the suit could be removed on the ground of separable or separate controversy. Such joint allegation effectively barred consideration of the question of removability under the removal statutes prior to 1948, and the case was deemed nonremovable.[9]

In view of the uncertainty and the confusion caused by the language of the old statute, Congress has adopted a new removal statute, which provides that:

> "Whenever a separate and independent claim or cause of action, which would be removable if sued on alone, is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, at its discretion, may remand all matters not within its original jurisdiction."[10]

Thus Congress has abolished "separable controversy" as a ground of removal and has substituted therefor "a separate and independent claim or cause of action."[11]

The most significant result of the few decisions under the new statute has been the apparent retention of the procedural rule under the old statute that an allegation of concurrent negligence and joint liability bars removal. Only two decisions, from the same district court, have been

[8] There is a conflict as to whether it is obligatory on the part of the federal courts to follow state statutes and decisions in such cases. It has been held that a state court decision on the removability to a federal court of a cause of action pending before it, is not binding upon the federal court sitting in that jurisdiction; but a state court decision as to the nature of the obligation under the state laws, as joint or several, which affects the right to remove, must be accepted by the federal courts. Fournet v. De Vibliss, 24 F. Supp. 60 (W. D. La. 1938). Cases collected in Note, 140 A. L. R. 733, 735 (1942).

[9] "If a plaintiff alleges that the concurrent negligence of the railroad company and its employee, Johnson, was the cause of his injury, he has a right to join them in one action. If he elects to do so, it supplies no ground for removal because he might have sued them separately." Chicago, R. I. & Pac. Ry. v. Dowell, 229 U. S. 102 (1912); Pullman Co. v. Jenkins, 305 U. S. 534 (1939); Hay v. May Department Stores Co., 271 U. S. 318 (1926); McAllister v. Chesapeake & O. Ry., 243 U. S. 320 (1917); American Car and Foundry Co. v. Kettlehake, 236 U. S. 311 (1914); Chesapeake & O. Ry. v. Cockrell, Administrator, 232 U. S. 146 (1913); Chicago, R. I. & Pac. Ry. v. Schwyart, 227 U. S. 184 (1912); Chicago, B & Q. R. R. v. Willard, 220 U. S. 413 (1911); Southern Ry. v. Miller, 217 U. S. 209 (1910); Illinois C. R. R. v. Sheegog, 215 U. S. 308 (1909); Wecker v. National Enameling Co., 204 U. S. 176 (1906); Cincinnati, N. O. & Tex. Pac. Ry. v. Bohon, 200 U. S. 221 (1905); Alabama & G. So. Ry. v. Thompson, 200 U. S. 206 (1905); Chesapeake & O. Ry. v. Dixon, 179 U. S. 131 (1900); Chicago, R. I. & Pac. Ry. v. Martin, 178 U. S. 245 (1899).

[10] 28 U. S. C. §1441(c) (1949).

[11] For further discussion of the effect of §1441(c), see MOORE, COMMENTARY ON THE U. S. JUDICIAL CODE §0.03(37) (1949).

opposed to this view. In *Bentley v. Halliburton Oil Well Cementing Co.*, the district court said, ". . . a separate and independent claim or cause of action had been alleged against the defendant tortfeasor," and allowed removal.[12] This court ignored completely the concurrent negligence allegation. It followed up this decision with a like result in *Buckholt v. Dow Chemical Co.*, another joint tort-feasor case.[13] The court of appeals reversed the district judge in *Bentley v. Halliburton Oil Well Cementing Co.*, and remanded the case to the state court, saying, "Joint liability for the whole tort negatives the idea of a separate and independent claim."[14] Four district courts agreed with this latter view under the new statute.[15] In *Butler Manufacturing Co. v. Wallace & Tiernan Sales Corp.*, the district court in the absence of an allegation of joint liability found it implied in the facts as set out in the complaint and remanded the entire case to the state court. The district judge said:

> "Only separate and independent claims joined in one action, which is sued on alone and within the original jurisdiction of United States District Courts are now subject to removability. In the instant case, it appears that the complaint charges a cause of action for damages caused at a singular time and place by separate wrongful acts of defendants. In light of the substantive law of the State of Missouri the complaint can only be construed to charge joint and several liability against the defendants. Consequently, no right of removal exists because of the existence of 'a separate and independent claim or cause of action' as asserted by the removing defendent."[16]

Therefore the same procedural rule that applied to such cases under the old statute applies equally under the new.

There was clearly an intent to change the right of removal under this new statute by abolishing separable controversies and substituting "a single and independent claim or cause of action." The federal court under the old statute allowed removal in *Texas Employers Insurance Ass'n. v. Felt* where three insurance carriers, two resident and one non-resident, were being sued in the alternative, since it was uncertain which was liable under th Workman's Compensation Act.[17] Now under the new statute it seems evident that this removal would not be allowed inasmuch as there was only one claim or cause of action asserted against the defendants. In a joint tortfeasor case clearly there is but one cause

[12] 81 F. Supp. 323 (S. D. Tex. 1948).
[13] 81 F. Supp. 463 (S. D. Tex. 1948).
[14] 174 F. 2d 788 (5th Cir. 1949).
[15] Board of Directors v. Whiteside, 87 F. Supp. 69 (W. D. Ark. 1949); Robinson v. Missouri Pac. Tran. Co., 85 F. Supp. 235 (W. D. Ark. 1949); Smith v. Waldemar, 85 F. Supp. 36 (E. D. Tenn. 1949); English v. Atlantic C. L. Ry., 80 F. Supp. 681 (E. D. S. C. 1948).
[16] 82 F. Supp. 635 (W. D. Mo. 1949).
[17] 150 F. 2d 227 (5th Cir. 1945).

of action. It appears that under the prior statute, if the liability was severally alleged, rather than jointly, a non-resident defendant could remove the case. The new statute, however, would not allow removal since there is only one claim or cause of action stated. Apparently it is the intent of the revisors of the statute that a single claim sued on may no longer be separated into parts so as to effect a removal of a single claim or cause of action from a state to a federal court. In this respect, the new statute may result in a decrease in the volume of federal litigation.[18] A clear example of the type of case applying the new statute, in which there are related but separate causes of action, is *McFadden v. Grace Lines, Inc.*[19] The complaint stated eleven causes of action arising out of similar claims on shipments made by plaintiffs, some on different dates. The district court, in its discretion, refused to remand any of the causes and tried the entire case.

While the new statute may prove to be an improvement over the earlier one, still the use of the language "separate and independent claim or cause of action" leaves much to be desired in the matter of clarity. What is mant by a "cause of action" has long been the subject of earnest debate among the profession.[20] As one writer has said, "A lengthy period of uncertainty will almost inevitably result from the adoption of 1441(c)."[21] The substantial rights of parties should not depend on the unpredictable tests established under an uncertain statute, and hence the need for a clearer statute is apparent.[22] Either a denial of the right of removal, absent complete diversity between the parties,[23] or a defini-

[18] H. R. REP. No. 308, 80th Cong., 1st Sess. A 134 (1947). But see Wills and Boyer, *Proposed Changes in Federal Removal Jurisdiction and Procedure,* 9 OHIO ST. L. J. 257 (1948), where it is said, "In another respect, however, section 1441 (c) may increase the amount of federal litigation in that it will permit removal of suits containing entirely separate and independent causes of action, which are now remanded under the separable controversy limitation. Thus, it is entirely conceivable that total federal litigation may increase."

[19] 82 F. Supp. 495 (S. D. N. Y. 1948).

[20] McCaskill, *The Elusive Cause of Action,* 4 U. OF CHI. L. REV. 281 (1937); Wheaton, *The Code Cause of Action,* 22 CORN. L. Q. 1 (1936); Clark, *The Cause of Action,* 82 U. PA. L. REV. 354 (1934); Harris, *What Is a Cause of Action?,* 16 CALIF. L. REV. 459 (1928).

[21] Wills and Boyer, *Proposed Changes in Federal Removal Jurisdiction and Procedure,* 9 OHIO ST. L. J. 257 (1948).

[22] "The most expedient and sensible approach to the separable controversy problem, however, would be to deny removal to diversity cases except where federal jurisdiction exists under the rule in *Strawbridge v. Curtiss* [*infra* note 23] which allows federal jurisdiction in diversity cases only where every plaintiff could sue every defendant in the federal courts." Note, 42 ILL. L. REV. 105 (1948). Another view is that "it would seem distinctly preferable to retain the separable controversy for the present. We have a large number of cases construing the clause. Although these cases cannot be harmonized, they can at least be classified." Wills and Boyer, *Proposed Changes in Federal Removal Jurisdiction and Procedure,* 9 OHIO ST. L. J. 257 (1948).

[23] This would be a return to the original grounds for removal as set out in *Strawbridge v. Curtiss,* 3 Cranch 267 (U. S. 1806) (All parties on one side of the suit [plaintiffs] must be diverse in citizenship from all the parties on the other [defendants] in order to have removal to the federal courts). See note 22 *supra.*

tion of a "separate and independent claim or cause of action" for the purposes of this statute, may lend certainty to this disputed area and serve to effectuate the original intent of the revisors.

J. C. JOHNSON, JR.

**Municipal Corporations—Tort Liability—Governmental and Proprietary Functions**

A municipal corporation is legally limited in its acts to those which are for a public purpose.[1] The liability of a municipality in tort depends upon whether the act complained of, even though committed in an undertaking for a public purpose, is characterized as governmental or proprietary. If the undertaking is characterized as governmental, then there is no liability unless imposed by statute; if it is characterized as proprietary, then the municipality is liable as any other corporation would be.[2]

In the case of *Rhodes v. Asheville*,[3] the Supreme Court of North Carolina was faced with the problem of determining in which of these two categories the operation of a municipally owned airport fell. Plaintiff's intestate had been fatally wounded by a watchman employed at the airport. In a resulting action for wrongful death, the municipal defendants maintained that N. C. GEN. STAT. §63-50 (Supp. 1947) declared such an operation to be a public, municipal, governmental function and that therefore no action would lie.[4] Their demurrer was overruled and they appealed. The Supreme Court, in affirming the lower court's decision, held that the statute only declared such operation to be for a public purpose. The Court then classified the undertaking as proprie-

[1] Nash v. Tarboro, 227 N. C. 283, 42 S. E. 2d 209 (1947); Airport Authority v. Johnson, 226 N. C. 1, 36 S. E. 2d 211 (1944); Reidsville v. Slade, 224 N. C. 48, 29 S. E. 2d 215 (1944).

[2] Millar v. Wilson, 222 N. C. 340, 23 S. E. 2d 42 (1942); Parks v. Princeton, 217 N. C. 361, 8 S. E. 2d 217 (1940); Hodges v. Charlotte, 214 N. C. 737, 200 S. E. 889 (1938); Lewis v. Hunter, 212 N. C. 504, 193 S. E. 814 (1937); Broome v. Charlotte, 208 N. C. 729, 182 S. E. 325 (1935); Cathey v. Charlotte, 197 N. C. 309, 148 S. E. 426 (1929); Scales v. Winston-Salem, 189 N. C. 469, 126 S. E. 543 (1925); James v. Charlotte, 183 N. C. 630, 112 S. E. 423 (1922); Snider v. High Point, 168 N. C. 608, 85 S. E. 15 (1915); Harrington v. Greenville, 159 N. C. 632, 75 S. E. 849 (1912); McIlhenney v. Wilmington, 127 N. C. 146, 37 S. E. 187 (1900).

[3] Rhodes v. Asheville, 230 N. C. 134, 52 S. E. 2d 371 (1949).

[4] "The acquisition of any lands for the purpose of establishing airports or other air navigation facilities; the acquisition of airport protection privileges; the acquisition, establishment, construction, enlargement, improvement, maintenance, equipment and operation of airports and other air navigation facilities, and the exercise of any other powers herein granted to municipalities, are hereby declared to be public, governmental and municipal functions exercised for a public purpose and matters of public necessity, and such lands and other property, easements and privileges acquired and used by such municipalities in the manner and for the purposes enumerated in this article, shall are are hereby declared to be acquired and used for public, governmental and municipal purposes and as a matter of public necessity." N. C. GEN. STAT. §63-50 (Supp. 1947).

tary which would render the municipality liable under the doctrine of *respondeat superior*.[5]

The holding of the Court, excluding any consideration of the statute, is in line with the weight of authority in this country. Of the ten courts other than North Carolina which have passed upon this point, seven have held the operation of an airport by a municipality to be a proprietary function.[6] Of these only one was faced with a statute pertinent to the situation here considered. The statute involved provided for municipal immunity, but the Texas court held this to be invalid under both the Federal and state Constitutions.[7]

In the other three jurisdictions the courts held the operation of an airport was a governmental function.[8] Each of these cases, however, involved statutes which expressly gave immunity to the municipalities. In Tennessee the court held that a statute granting municipal immunity was constitutional.[9]

The North Carolina Court was faced with an operation which in and of itself had been classified as proprietary at common law, and yet seemingly was declared to be governmental by statute. The Court had previously held that in the final analysis the determination of whether a particular undertaking is for a public purpose is for the court and not for the legislature.[10] It had also previously held that the operation of an airport was for a public purpose.[11] Therefore, under the Court's ruling in the principal case, it would seem that the statute adds nothing to the existing law in this state. As the statute now stands, it is simply a legislative attempt to declare a particular undertaking to be a public purpose, a function which the court has said the legislature could not exercise. As was pointed out in the Court's opinion, only in those jurisdictions having statutes has immunity been granted. The statute in this state indicates that the undertaking is ". . . a public, municipal, governmental function exercised for a public purpose. . . ." Granted that the statutes in the other jurisdictions were

[5] The case was settled for $9,000 and costs. The News and Observer, Nov. 15, 1949, p. 6, col. 1.

[6] Mayor and Council v. Crown Cork & Seal Co., 122 F. 2d 385 (4th Cir. 1941); Mobile v. Lartigue, 23 Ala. App. 479, 127 So. 257 (1930); Pignet v. Santa Monica, 29 Cal. App. 2d 286, 84 P. 2d 166 (1938); Coleman v. Oakland, 110 Cal. App. 715, 295 P. 59 (1930); Peavey v. Miami, 146 Fla. 629. 1 So. 2d 614 (1941); Blackwell v. Lee, 178 Okl. 338, 62 P. 2d 1219 (1936); Mollencop v. Salem, 139 Ore. 137, 8 P. 2d 783, 83 A. L. R. 315 (1932); Christopher v. El Paso, 98 S. W. 2d 394 (Tex. 1936).

[7] Christopher v. El Paso, 98 S. W. 2d 394 (Tex. 1936).

[8] Mayor and Aldermen v. Lyons, 54 Ga. App. 661, 189 S. E. 63 (1936); Abbott v. Des Moines, 230 Iowa 494, 298 N. W. 649, 138 A. L. R. 120 (1941); Stocker v. Nashville, 174 Tenn. 483, 126 S. W. 2d 339, 124 A. L. R. 345 (1939).

[9] Stocker v. Nashville, 174 Tenn. 483, 126 S. W. 2d 339, 124 A. L. R. 345 (1939).

[10] Nash v. Tarboro, 227 N. C. 283, 42 S. E. 2d 209 (1947); Briggs v. Raleigh, 195 N. C. 223, 141 S. E. 597 (1928).

[11] Turner v. Reidsville, 224 N. C. 42, 29 S. E. 2d 211 (1944).

more specific, the use of the term governmental function usually carries with it a well defined meaning. Regardless, the Court in an unanimous decision held that the legislature intended the statute only as a declaration that such an undertaking was for a public purpose.

Following this decision the municipal defendants petitioned for a rehearing on the basis that neither of the parties sought a construction of the statute but that the defendants had merely asked the Court to give effect to the statute as plainly intended by the legislature. The Court in denying this petition said that "unquestionably" the legislature intended that such an undertaking was to be in furtherance of a governmental function, but that the determination of such was for the courts and not for the legislature.[12] The Court in explanation of its prior opinion said that the construction placed upon the language used in the statute was ". . . to bring it within the legislative authority of the General Assembly and make it consistent with the validity of the statute in which it is used." The Court did not, however, attempt to explain why it suggested in its former opinion that it might be a wise policy to exempt municipalities from liability in such a situation but that this ". . . should be expressly granted by the Legislature, rather than by judicial decree." From these statements it would seem that if the General Assembly intends to grant immunity, it *cannot* do so by merely declaring a particular undertaking to be a governmental function; and whether an express legislative grant of immunity, though the function be proprietary, is constitutional, *quaere?*[13]

KENNETH R. HOYLE.

**Pleading—Wrongful Death Statute—Allegation That Action Is Brought within One Year**

There has been considerable confusion, under the North Carolina Wrongful Death Statute,[1] as to the necessity for a specific allegation in a complaint that the action is brought within one year from the death.[2] In a long line of decisions[3] the statutory requirement that an action for wrongful death must be instituted within one year after the

[12] Rhodes v. Asheville, 230 N. C. App. (1949).

[13] *Compare* Christopher v. El Paso, 98 S. W. 2d 394 (Tex. 1936) (unconstitutional), *with* Stocker v. Nashville, 174 Tenn. 483, 126 S. W. 2d 339, 124 A. L. R. 345 (1949) (constitutional); *cf.:* Mack v. Charlotte, 181 N. C. 383, 107 S. E. 244 (1921) (grant of immunity constitutional where governmental function).

[1] N. C. GEN. STAT. §28-173 (1943) (". . . an action . . . to be brought within one year after such death.").

[2] See N. C. GEN. STAT. §28-173 (1943), Anno.: II, *Limitation of the Action* ("Hence it must be alleged and proved by the plaintiff to make out a cause of action. . . ."); MCINTOSH, N. C. PRACTICE AND PROCEDURE §196 (1929) ("The plaintiff should allege and prove that the action is within the time specified."); 16 AM. JUR., Death §286 (1938); 107 A. L. R. 1049.

[3] Wilson v. Chastain, 230 N. C. 390, 53 S. E. 2d 290 (1949); McCoy v. Atlantic C. L. Ry. Co., 229 N. C. 57, 47 S. E. 2d 532 (1948); Webb v. Eggleston,

death has been stated to be a condition annexed to the plaintiff's cause of action, and not a mere statute of limitations to be pleaded by the defendant. The court has said that the plaintiff must introduce evidence at the trial showing that the action was brought within the statutory period to make out a cause of action. The cases leave the impression that this statutory requirement is a part of the plaintiff's cause of action; as a consequence, it is readily understandable how a pleader might deduce that such an allegation is necessary in a wrongful death complaint. Moreover, the North Carolina Supreme Court indicated by dictum in *Wilson v. Chastain*[4] that an allegation of compliance with the statutory time limit is necessary.

In the recent case of *Colyar v. Atlantic States Motor Lines*,[5] however, the court repudiated its former dictum, and held it is not necessary to allege specifically that the action is brought within the statutory period. In this case the complaint alleged the date of the death, but there was no allegation that the action had been brought within one year from the death. It appeared from the summons that the action had been brought within the year. The court reasoned that the statutory period is "not an element of the cause of action," and that the plaintiff could prove compliance with the statutory requirement by introducing the summons in evidence.

The following conclusions seem warranted from a review of the cases. Where the complaint alleges only the date of the death, and the summons shows that the action has been brought within a year, the plaintiff has a complaint sufficient against demurrer;[6] since dates which appear as a matter of record may be considered by the court in ruling on a demurrer,[7] and the statutory period is not an element of the cause of action. Conversely, where the summons shows that the suit was not brought within the statutory period, the complaint is subject to a demurrer or motion to dismiss.[8] Where the complaint contains a specific allegation that the action was brought within the year, and the dates

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228 N. C. 574, 46 S. E. 2d 700 (1948); Curlee v. Duke Power Co., 205 N. C. 644, 172 S. E. 329 (1934); Mathis v. Camp Mfg. Co., 204 N. C. 434, 168 S. E. 515 (1933); Tieffenbrun v. Flannery, 198 N. C. 397, 151 S. E. 857 (1930); Neely v. Minus, 196 N. C. 345, 145 S. E. 771 (1928); Hanie v. Penland, 193 N. C. 800, 138 S. E. 165 (1927); McGuire v. Montvale Lumber Co., 190 N. C. 806, 131 S. E. 274 (1925); Hatch v. Alamance Ry. Co., 183 N. C. 617, 112 S. E. 529 (1922); Bennett v. N. C. Ry. Co., 159 N. C. 345, 74 S. E. 883 (1911); Trull v. Seaboard A. L. Ry. Co., 151 N. C. 545, 66 S. E. 586 (1909); Gulledge v. Seaboard A. L. Ry., 148 N. C. 567, 62 S. E. 732 (1908).

[4] *See* 230 N. C. 390, 391, 53 S. E. 2d 290, 291 (1949).

[5] 231 N. C. 318, 56 S. E. 2d 647 (1949), Erwin, J. dissenting on basis of the general rule that what the pleador must prove, he must plead.

[6] *See* Bailey v. Michael, 231 N. C. 404, 408, 57 S. E. 2d 372, 375 (1950).

[7] George v. Southern Ry. Co., 210 N. C. 58, 185 S. E. 431 (1936); Harper v. Bullock, 198 N. C. 448, 152 S. E. 405 (1930); Harrington v. Wadesboro, 153 N. C. 437, 69 S. E. 399 (1910).

[8] Hanie v. Penland, 193 N. C. 800, 138 S. E. 165 (1927).

alleged leave doubt as to whether the action has been brought within this period, the complaint will withstand demurrer.[9] The requirement that the action be brought within a year is absolute, and no explanation as to why the institution of the action is delayed is availing.[10] "The lapse of the statutory period not only bars the remedy but destroys the liability."[11]

The question remains as to the sufficiency of a complaint which fails to allege either the date of the death or that the action has been brought within one year of the death, assuming a cause of action to have been stated otherwise. Certain language in the *Colyar* case seems to indicate that such a complaint would withstand demurrer.[12]

It is believed that the result of the *Colyar* case is practical and based on sound reason. The purpose of this statutory time limit is said to be to give notice to the defendant so that the evidence may be secured and preserved.[13] This notice is given when the plaintiff institutes his action within the year. It seems unduly technical to require a specific allegation that "this action is brought within one year of the death" when compliance with the statutory requirement may be shown by reference to the summons. If it were held that such an allegation is necessary, then questions would arise as to whether a complaint without this allegation failed to state a cause of action, or merely constituted a defective statement of a good cause of action. If it were held that such a complaint does not state a cause of action, then an amendment after the statutory period containing the required allegation would not relate back to the complaint, and the plaintiff would be defeated on a technicality.[14] It must be remembered that the purpose of the pleadings is to frame the issues between the parties for a trial on the merits of the case, rather than to create a pitfall for the unwary pleader.

MASON P. THOMAS, JR.

**Restraint of Trade—Fair Trade Acts—Constitutionality**

Manufacturers have long sought ways to protect their good will in the trade-marks, brands, or names of their commodities. One means

[9] Wilson v. Chastain, 230 N. C. 390, 53 S. E. 2d 290 (1949) (Complaint alleged death ". . . occurred on or about midnight of 21-22 November, 1947, and which is less than one year next proceeding the institution of this action. . . ." Summons was served on November 22, 1948).

[10] Curlee v. Duke Power Co., 205 N. C. 644, 172 S. E. 329 (1934); Best v. Kinston, 106 N. C. 205, 10 S. E. 997 (1890); Taylor v. Cranberry Iron Co., 94 N. C. 525 (1886).

[11] *See* Webb v. Eggleston, 228 N. C. 574, 577, 46 S. E. 2d 700, 702 (1948).

[12] *See* 231 N. C. 318, 319, 56 S. E. 2d 647, 648 (1949) ("The plaintiff complied with the statute when she brought her suit within the prescribed time.").

[13] *See* Trull v. Seaboard A. L. Ry. Co., 151 N. C. 545, 548, 66 S. E. 586, 587 (1909).

[14] Davis v. Rhodes, 231 N. C. 71, 56 S. E. 2d 43 (1949); Webb v. Eggleston, 228 N. C. 574, 46 S. E. 700 (1948), 27 N. C. L. REV. 160; Note, *Amendments Changing the Cause of Action—Limitations of Actions,* 25 N. C. L. REV. 76 (1946).

employed is the fixing of the prices that the retailer is to charge the consumer, thus preventing that price-cutting by the retailer which is likely to create in the minds of the public a feeling that the goods are not worth the prices usually charged[1]

With the passage of the Sherman Anti-Trust Act in 1890, "every contract, combination . . . or conspiracy in restraint of trade or commerce among the several states, or with foreign nations" was declared illegal.[2] In *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,[3] the Supreme Court of the United States held that price-fixing by means of minimum resale price maintenance contracts was prohibited by the Sherman Act. Some state courts reached the same result in cases involving intrastate commerce, basing their decisions on the contracts being in restraint of trade and illegal under common law principles or state anti-trust laws. The majority of the states, however, upheld their legality.[4] Various devices, such as refusing to sell to those who do not maintain prices,[5] or the constituting of "good faith agencies,"[6] were used to circumvent the Supreme Court ruling in the *Dr. Miles* case; but they were not widely used and when attempted were difficult to administer.[7]

[1] FTC, 1 RESALE PRICE MAINTENANCE 8 (1929).

[2] 15 U. S. C. 1 (1946).

[3] 220 U. S. 373 (1911); *accord,* United States v. A. Schrader's Son, Inc., 252 U. S. 85 (1920).

[4] Holding the contracts invalid: Mills v. General Ordnance Co., 113 Kan. 479, 215 Pac. 314 (1923); New Century Mfg. Co. v. Scheurer, 45 S. W. 2d 560 (Tex. App. 1932); *cf.* Texas Standard Cotton Oil Co. v. Adoue, 83 Tex. 650, 19 S. W. 274 (1892).

Holding the contracts valid: D. Ghirardelli & Co. v. Hunsicker, 164 Cal. 355, 128 Pac. 1041 (1912); Grogan v. Chaffee, 156 Cal. 611, 105 Pac. 745 (1909); Garst v. Charles, 187 Mass. 144, 72 N. E. 839 (1905); Garst v. Harris, 177 Mass. 72, 58 N. E. 174 (1900); Clark v. Frank, 17 Mo. App. 602 (1885); Murphy v. Christian Press Ass'n. Pub. Co., 38 App. Div. 426, 56 N. Y. Supp. 597 (1899); Fisher Flouring Mills Co. v. Swanson, 76 Wash. 649, 137 Pac. 144 (1913).

[5] United States v. Colgate & Co., 250 U. S. 300 (1919); Harriet Hubbard Ayer, Inc. v. FTC, 15 F. 2d 274 (2d Cir.), *cert. denied,* 273 U. S. 759 (1926).

[6] United States v. General Electric Co., 272 U. S. 476 (1926) (retail dealers were appointed agents; goods consigned to them with the manufacturer paying transportation charges and the dealer meeting all other expenses, the dealer to account periodically, and the merchandise remaining the property of the manufacturer until sold by the dealers).

Another method was issuing bona fide licenses containing minimum resale price clauses as to patented articles. WEIGEL, THE FAIR TRADE ACTS 27 (1938).

[7] Among the methods held illegal were:

(1) Use by the manufacturer of "cooperative steps," which consisted in ascertaining price-cutters by an elaborate and market-wide follow-up system of espionage and reporting, and a refusal to sell to the price-cutters until securing their assurances of price maintenance. FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922), *Resale Price Maintenance,* 1 N. C. L. REV. 36; NORWOOD, TRADE PRACTICE AND PRICE LAW 134 et seq. (1938).

(2) Issuing "licenses" which were obviously a sham to protect prices on patented articles. Strauss v. Victor Talking Machine Co., 243 U. S. 490 (1917) (manufacturer received full compensation before parting with the possession of the merchandise; no accounting by the retail dealer required; no recordation of title retention by the manufacturer); Boston Store v. American Graphophone Co., 246 U. S. 8 (1918).

Several states, with California in 1931 being the first, encouraged minimum resale price-fixing by enacting what were called Fair Trade Acts.[8] These Acts provide that vertical contracts[9] prescribing minimum resale prices for trade-marked, branded, or named commodities in free and open competition with commodities of other manufacturers of the same general class will be legal and enforceable.[10] But in view of the Sherman Act such contract were legal only in intrastate commerce.

In 1937, Congress passed the Miller-Tydings Amendment[11] to the Sherman Act legalizing minimum resale price maintenance contracts in interstate commerce where such contracts are legal in intrastate commerce under the law of the state where the resale is to be made. To date, Fair Trade Acts have been enacted in all jurisdictions except Missouri, Texas, Vermont, and the District of Columbia.[12]

Immediately after their inception the constitutionality of the Fair Trade Acts was questioned on various grounds, including denial of due process, impairment of the obligation of contract, improper delegation of legislative power, denial of equal protection of the law, and miscellaneous state constitutional provisions.[13] At first several lower state courts, as well as the Court of Appeals of New York, held them unconstitutional.[14] Reversing this early trend, the Supreme Court of the United States in *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*[15] ruled that these Acts passed by the states were not in contra-

(3) Affixing a notice to a patented article warning that cut-price sales would constitute a patent infringement. Bauer v. O'Donnell, 229 U. S. 1 (1913).

[8] WEIGEL, THE FAIR TRADE ACTS 32 *et seq.* (1938).

[9] A vertical contract is one between manufacturer and retailer, or between wholesaler and retailer, etc., as distinguished from a horizontal contract, one between producers, between wholesalers, or between retailers.

[10] An analysis of the different provisions of the state Fair Trade Acts is found in AMERICAN FAIR TRADE COUNCIL, INC., A PRACTICAL GUIDE TO FAIR TRADE LAW 10-11 (1948).

[11] 15 U. S. C. 1 (1946). The Amendment, which expressly excludes horizontal contracts from its provisions, was passed as a rider to an appropriations bill for the District of Columbia. President Roosevelt, when signing the bill on August 17, 1937, denounced this practice and expressed fear that the law would lead to increased prices to consumers. 2 CCH TRADE REG. REP. ¶7058 (1948).

For a discussion of the Amendment's limitations, see NORWOOD, TRADE PRACTICE AND PRICE LAW 139 *et seq.* (1938).

[12] AMERICAN FAIR TRADE COUNCIL, INC., A PRACTICAL GUIDE TO FAIR TRADE LAW 4-5 (1948). The North Carolina statute is N. C. GEN. STAT. §§66-50 through 66-57 (1943), 15 N. C. L. REV. 367 (1937).

By express statute, "fair trade" is illegal in Missouri, Texas, and the District of Columbia. 2 CCH TRADE REG. REP. ¶7098 (1949). Its status in Vermont is still uncertain. 2 CCH TRADE REG. REP. ¶7096 (1949).

[13] See Note, 125 A. L. R. 1339 (1940).

[14] Doubleday, Doran & Co. v. Macy & Co., 269 N. Y. 272, 199 N. E. 409 (1936), *overruled by* Bourjois Sales Corp. v. Dorfman, 273 N. Y. 167, 7 N. E. 2d 30 (1937).

See WEIGEL, THE FAIR TRADE ACTS 36 *et seq.* (1938) for the early history of the Fair Trade Acts and the uncertainty as to their constitutionality.

[15] 299 U. S. 183 (1936); *accord,* The Pep Boys v. Pyroil Sales Co., 299 U. S. 198 (1936).

vention of the Constitution of the United States. Heavily relying on this affirmation of constitutionality, state courts, including North Carolina, almost uniformly held that the Fair Trade Acts did not violate the constitution of the state, all earlier decisions to the contrary being reversed or overruled.[16]

Recently, "fair trade" has suffered what has been called its "stiffest blow" since its inception in California in 1931.[17] In *Liquor Store, Inc. v. Continental Distilling Corp.*,[18] the Florida Supreme Court held that the Florida Fair Trade Act violated the state constitution. The court stated that although the Florida Act may have been constitutional when passed in 1939, under present economic conditions it is arbitrary, unreasonable, and wholly outside the enacting powers of the state legislature.

The Florida Court should have recognized that whether "fair trade" be economically wise or unwise, the weighing of all the interests involved should more properly be a matter for legislative discretion than a subject for judicial pronouncement.[19]

[16] Miles Laboratories, Inc. v. Seignious, 30 F. Supp. 549 (E. D. S. C. 1939); Lilly & Co. v. Saunders, 216 N. C. 163, 4 S. E. 2d 528 (1939); Max Factor & Co. v. Kunsman, 5 Cal. 2d 446, 55 P. 2d 177 (1936); Pyroil Sales Co. v. The Pep Boys, 5 Cal. 2d 784, 55 P. 2d 194 (1936); Burroughs Welcome & Co. v. Johnson Wholesale Perfume Co., 128 Conn. 596, 24 A. 2d 841 (1942); Seagram-Distillers Corp. v. Old Dearborn Distributing Co., 363 Ill. 610, 2 N. E. 2d 940 (1936); International Cellucotton Products v. Kraus Co., 200 La. 959, 9 So. 2d 303 (1942); Goldsmith v. Mead Johnson & Co., 176 Md. 682, 7 A. 2d 176 (1939); Weco Products Co. v. Sam's Cut Rate, Inc., 296 Mich. 190, 295 N. W. 611 (1941); Johnson & Johnson v. Weissbard Brothers, 121 N. J. Eq. 585, 191 Atl. 873 (1937); Bourjois Sales Corp. v. Dorfman, 273 N. Y. 167, 7 N. E. 2d 30 (1937), *overruling* Doubleday, Doran & Co. v. Macy & Co., 269 N. Y. 272, 199 N. E. 409 (1936); Broxmeyer v. Polikoff, 39 Pa. D. & C. 224 (1940); Welch Grape Juice Co. v. Frankfort Grocery Co., 36 Pa. D. & C. 653 (1939); Miles Laboratories, Inc. v. Owl Drug Co., 67 S. D. 523, 295 N. W. 292 (1940); Sears v. Western Thrift Stores of Olympia, Inc., 10 Wash. 2d 372, 116 P. 2d 756 (1941); Weco Products Co. v. Reed Drug Co., 225 Wis. 474, 274 N. W. 426 (1937) (except a provision exempting non-profit cooperatives).

The Florida Supreme Court, in Bristol Myers Co. v. Webb's Cut Rate Drug Co., 137 Fla. 508, 188 So. 91 (1939), declared the Florida Fair Trade Act unconstitutional since the title did not show that the Act applied to non-signers. This defect was soon remedied by legislative action.

[17] Business Week, April 23, 1949, p. 19.

[18] 40 So. 2d 371 (Fla. 1949).

[19] In an attempt to get around the court's decision, the 1949 Florida legislature passed a new Fair Trade Act, SEN. BILL No. 592, Laws of 1949, effective June 1, 1949, with two notable changes: (1) A "finding of fact" by the legislature that "fair trade" best serves the interests and general welfare of the state of Florida (To this the court would probably reply, ". . . the mere designation of an act as best serving [the interests and general welfare of the state] does not preclude judicial appraisal, and courts of equity will not be misled by mere devices or baffled by mere forms, but they will disregard names and penetrate disguises of form to discover the substance of an act or transaction." Liquor Stores, Inc. v. Continental Distilling Corp., 40 So. 2d 371, 385 (Fla. 1949)), and (2) the Attorney-General is empowered "to bring actions to restrain performance of any fair-trade contracts that prevent competition in the manufacture, making, transportation, sale, or purchase of commodities of the same general class." Business Week, June 18, 1949, p. 72; 63 HARV. L. REV. 546 (1950).

Indeed, it was not even necessary for the Florida court to consider the question of constitutionality. By the court's own admission, the contracts under consideration could have been declared invalid since there was not that *free and open competition* which the Miller-Tydings Amendment and the Florida Fair Trade Act require, inasmuch as the plaintiff was a subsidiary of a corporation which with four others controlled from eighty to ninety per cent of the supply of alcoholic liquors in the United States.[20] Nevertheless, contrary to the usual judicial procedure, the court went out of its way to declare the Act unconstitutional.

Soon after the decision of the Florida Supreme Court, a Mississippi lower court, faced with questions similar to those posed before the Florida Court, decided that the Fair Trade Act of that state was unconstitutional.[21]

In states where the power of the legislature to pass Fair Trade Acts has been affirmed, courts have recently been critical of the manner in which the legislature has undertaken to exercise this power. The Illinois court has ruled that the Mandatory Fair Trade Act, requiring all liquor sold in Illinois to be "fair-traded" and a list of such prices filed with the state liquor-regulatory body, is unconstitutional since it is not complete in itself but refers to the Fair Trade Act without explaining what constitutes "fair trade."[22] New York has held that the legislature unduly delegated its powers when it created a commission with authority to decide for itself whether or not liquor should be "fair-traded," and at what prices it should be sold.[23]

Oklahoma has taken the same critical attitude. Where the "fair trade" price allowed the retailer a profit of about 375%, resale at that price was ruled unenforceable as being an arbitrarily and capriciously fixed price which allowed an unreasonable margin of profit.[24] If the reasoning of the Oklahoma court is followed, courts may be able to eliminate some of the evils of high prices resulting from "fair trade" without the necessity of declaring the Fair Trade Act itself unconstitutional.

There has never been a direct ruling on the constitutionality of the Miller-Tydings Amendment, but anti-fair traders think the present Supreme Court would declare that it contravenes the United States Constitution.[25] About thirty states have yet to rule on the constitu-

[20] Liquor Stores, Inc. v. Continental Distilling Corp., 40 So. 2d 371, 376 (Fla. 1949).
[21] Shaeffer Pen Co. v. Barret, 4 CCH TRADE REG. REP. ¶62,399 (Miss. 1949).
[22] Illinois Liquor Control Commission v. Chicago's Last Chance Liquor Store, Inc., 88 N. E. 2d 15 (Ill. 1949).
[23] Levine v. O'Connell, 88 N. Y. S. 2d 672 (Sup. Ct. 1949).
[24] Julius Schmid, Inc. v. McKay, 4 CCH TRADE REG. REP. ¶62,509 (Okla. 1949).
[25] Business Week, April 23, 1949, p. 19, at 20.

tionality of their Fair Trade Acts.[26] The Anti-Trust Division of the Department of Justice[27] and the Federal Trade Commission[28] are at present leading an attack in Congress on the Miller-Tydings Amendment;[29] and bills have been introduced in at least three state legislatures to repeal or emasculate the Fair Trade Act of that state.[30] If either attack on the federal law should prove successful, then minimum resale price maintenance contracts would be illegal in interstate commerce under the provisions of the Sherman Anti-Trust Act.[31] In the event of a successful attack on a state law, resale price maintenance contracts in that state would probably be illegal in intrastate commerce;[32] in which case the Miller-Tydings Amendment, even if retained, makes them illegal in interstate commerce if the resale is to take place in a state where the contracts are not valid.

Among the chief grounds of attack on "fair trade" in the legislatures will be the assertions that it tends to eliminate competition,[33] that the property rights of the retailer in the goods are encroached upon,[34] and

[26] See note 16 *supra*. Only three out of the six judges who held the Fair Trade Act of North Carolina constitutional in Lilly & Co. v. Saunders, 216 N. C. 163, 4 S. E. 2d 528 (1939) are still on the bench. The lone dissenter, J. Barnhill, is still on the court.

[27] Herbert A. Bergson, head of the Anti-Trust Division of the Dept. of Justice, has said, "It [the Miller-Tydings Amendment] creates a disturbing conflict between legal price fixing and the general price fixing inhibitions of the Sherman Act." Shoenfeld, *Congress Squares Off for a Scrap on Fair Trade Repeal*, 62 SALES MANAGEMENT, p. 81, 83 (June 1, 1949). See TNEC, INVESTIGATION OF CONCENTRATION OF ECONOMIC POWER, FINAL REPORT AND RECOMMENDATIONS 232 *et seq.* (1941), attacking the manner in which the enactment of the Miller-Tydings Amendment and the state Fair Trade Acts was secured, and asserting that many "fair trade" contracts do not comply with one or both of those laws.

[28] "The Miller-Tydings Amendment legalizes contracts whose object is to require all dealers to sell at not less than the resale price stipulated by contract without reference to their individual selling costs or selling policies. The Commission believes that the consumer is not only entitled to competition between rival products but to competition between dealers handling the same branded product." REPORT OF THE FEDERAL TRADE COMMISSION ON RESALE PRICE MAINTENANCE, LXIV (1945).

[29] XXXIX Fortune, Jan. 1949, p. 70 Rep. O'Toole (D., N. Y.) has introduced a bill to repeal the Amendment, and Rep. Celler (D., N. Y.) has proposed an investigation of it by the House Judiciary Committee. Business Week, April 23, 1949, p. 19. Rep. Klein (D., N. Y.), however, has introduced a bill to validate minimum price agreements in the District of Columbia. Shoenfeld, *Congress Squares Off for a Scrap on Fair Trade Repeal*, 62 SALES MANAGEMENT 81 (June 1, 1949).

[30] Business Week, April 23, 1949, p. 19; Shoenfeld, *Congress Squares Off for a Scrap on Fair Trade Repeal*, 62 SALES MANAGEMENT 81 (June 1, 1949).

As an indication of the trend in thought, the North Carolina House of Representatives rejected by a 41-40 vote a measure to put into effect in North Carolina the Unfair Practices Act, now law in about thirty states, which would have made it illegal for merchants to sell goods at less than cost in order to discourage or destroy competition. News and Observer, April 20, 1949, p. 14, col. 3.

[31] See OPPENHEIM, CASES ON FEDERAL ANTI-TRUST LAWS 383-387 (1948).

[32] See note 4 *supra*.

[33] Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U. S. 373, 400 (1911).

[34] Liquor Store, Inc. v. Continental Distilling Co., 40 So. 2d 371, 375 (Fla. 1949).

that higher prices result from these contracts.[35] Leading counter-arguments will be that this method is the only effective way to protect the good will of the manufacturer,[36] that the dealer takes the goods with the contract attached,[37] and that the prices on non-fair-traded goods have risen more sharply than those on fair-traded commodities.[38]

Future litigation and legislative controversy over resale price maintenance appear to be a certainty. Whether "fair trade" be economically wise or unwise, the trend shows that it is in for some minute examination by the courts and legislative bodies.

KIRBY SULLIVAN.

**Trial Practice—Prosecutor's Comments—Arguing Possibility of Parole or Pardon as Reason for Withholding Recommendation for Life Imprisonment**

"Gentlemen, . . . With our system in Georgia, a man is entitled to parole or pardon after seven years, and when his application is put in all the judges or interested parties are usually out of office and no one recalls the facts in the crime. If this jury sentenced this defendant to life imprisonment and he should be given his release on parole in seven

[35] XXXIX Fortune, April 1949, p. 75; XXXIX Fortune, Jan. 1949, p. 85; Shoenfeld, *Congress Squares Off for a Scrap on Fair Trade Repeal*, 62 SALES MANAGEMENT 81 (June 1, 1949).

Other arguments of those opposed to "fair trade" are:

(1) As the "fair trade" fields become more crowded there will tend to be an elimination of the small retailer since the old-timers will try to restrict the number of new dealers. XXXIX Fortune, April 1949, p. 75, 76. This is claimed to have already happened to some extent in England. XXXIX Fortune, Jan. 1949, p. 70, 166.

(2) The manufacturer can adequately protect his good will by refusing to sell to those who refuse to comply with a resale price agreement. Liquor Store, Inc. v. Continental Distilling Corp., 40 So. 2d 371, 388 (Fla. 1949).

(3) Chain stores reap unnecessarily juicy profits by reason of less expense in marketing "fair-traded" goods, and they often sell similar products under their own brand or trade name at cheaper prices. XXXIX Fortune, April 1949, p. 75; TNEC INVESTIGATION OF CONCENTRATION OF ECONOMIC POWER, FINAL REPORT AND RECOMMENDATIONS 232, 234-5 (1941).

[36] Newcomb, *In Defense of Fair Trade*, 13 JOURNAL OF MARKETING 84, 85 (July 1948).

[37] Callman, *"Fair Trade" and Anti-Trust Law*, 10 U. OF PITT. L. REV. 443, 462 (1949).

[38] Griffiths, *Further Comments on Fair Trade*, 13 JOURNAL OF MARKETING 85 (July 1948).

Other arguments urged in support of "fair trade" are:

(1) The "fair trade" system has been of tremendous benefit to a number of industries. Behoteguy, *Resale Price Maintenance in the Tire Industry*, 13 JOURNAL OF MARKETING 315, 319 (Jan. 1949).

(2) "Fair trade" protects the consumer from deceptive price-cutting tactics. AMERICAN FAIR TRADE COUNCIL, INC., A PRACTICAL GUIDE TO FAIR TRADE LAWS 34 (1948).

(3) "Fair trade" is no barrier to competition between rival articles. Callman, *"Fair Trade" and Anti-Trust Law*, 10 U. OF PITT. L. REV. 443, 452 (1949).

(4) In those states allowing fixed prices, the manufacturer may hold down prices.

years, you would be turning him loose upon society after a few years imprisonment." Such was the argument of counsel for the state in *Bryan v. State*.[1] The jury found the defendant guilty of murder in the first degree and withheld a recommendation of mercy. The death sentence automatically followed. In affirming the judgment, the Supreme Court of Georgia held that the refusal of the trial court to declare a mistrial was not error under the rulings in *McLendon v. State*.[2] One judge dissented. Two concurred specially "for the reason only that this Court is bound by former full-bench decisions."[3]

The full-bench decisions referred to begin with *Lucas v. State*,[4] where such an argument was held not improper since the recommendation of mercy was within the discretion of the jury and had nothing to do with the guilt of the accused. Subsequent unanimous decisions,[5] interspersed with "majority-dissent" cases[6] and one which affirms a verdict by an equally divided court,[7] condemn the argument as tending to prejudice the jury against the accused but hold that corrective measures on the part of the trial court will prevent the necessity of declaring a mistrial.[8]

The propriety of such comments on the part of prosecuting attorneys has been most frequently considered in the state of Kentucky. The practice has been repeatedly disapproved and, under special circumstances, has contributed to reversals.[9] However, the Kentucky court has consistently refused to reverse on this point alone,[10] having affirmed

[1] 206 Ga. 73, 55 S. E. 2d 574 (1949).

[2] 205 Ga. 55, 52 S. E. 2d 294 (1949).

[3] One of these concurring judges (Wyatt, J.) wrote the opinion in McLendon v. State, *supra* note 2, wherein he expressed the same personal dissatisfaction, saying that such argument was improper and should result in a mistrial unless the trial court (1) acted promptly to prevent it and (2) instructed the jury to disregard. "Full-bench," as here used, seems to indicate unanimity of opinion as well as perfection of attendance.

[4] 146 Ga. 315, 91 S. E. 72 (1916).

[5] Brady v. State, 199 Ga. 566, 34 S. E. 2d 849 (1945); Thornton v. State, 190 Ga. 783, 10 S. E. 2d 746 (1940); Manchester v. State, 171 Ga. 121, 155 S. E. 11 (1930).

[6] Sloan v. State, 183 Ga. 108, 187 S. E. 670 (1936); White v. State, 177 Ga. 115, 169 S. E. 499 (1933).

[7] Biggers v. State, 171 Ga. 596, 156 S. E. 201 (1930).

[8] From its continued use, it is apparent that Georgia prosecutors believe the argument to be effective notwithstanding instructions to the jury to disregard. On the other hand, the repeated expressions of dissatisfaction emanating from the Georgia court apparently encourage defense counsel to argue the point on appeal in the hope that the court will eventually reverse itself.

[9] Crawford v. Commonwealth, 264 Ky. 498, 95 S. W. 2d 12 (1936) (youthful defendant convicted on questionable evidence); Berry v. Commonwealth, 227 Ky. 528, 13 S. W. 2d 521 (1929) (abundant evidence of insanity); Estepp v. Commonwealth, 185 Ky. 156, 214 S. W. 891 (1919) (other errors). The *Berry* case was expressly overruled in Powell v. Commonwealth, 276 Ky. 234, 123 S. W. 2d 279 (1938).

[10] Bass v. Commonwealth, 296 Ky. 426, 177 S. W. 2d 386 (1944); Powell v. Commonwealth, 276 Ky. 234, 123 S. W. 2d 279 (1938); Underwood v. Commonwealth, 266 Ky. 613, 99 S. W. 2d 467 (1936); Lee v. Commonwealth, 262 Ky. 15, 89 S. W. 2d 316 (1935); Lotheridge v. Commonwealth, 260 Ky. 500, 86 S. W. 2d

judgments imposing the death penalty where objections to such remarks were overruled by the trial court.[11] This court has at times marvelled that prosecutors continue to use the argument in the face of its disapproval,[12] but has since seemed content to hold it not prejudicial to the "substantial rights of the accused."[13]

What are the substantial rights of the accused, and have they been prejudiced? In most jurisdictions where the jury has power to reduce the penalty in capital cases by recommendation, it is discretionary;[14] and a few of these courts hold that the jury may properly consider the effect of a possible pardon or parole in determining whether to qualify their verdict.[15] Theoretically, at least, the measure of punishment becomes important only after the guilt of the accused has been ascertained. It may then be argued that, being guilty of a capital offense, the criminal can demand, as a matter of right, nothing more than that his execution proceed according to law. On the other hand, whether guilty or innocent, the accused has a right of trial by an *impartial* jury,[16] and the

278 (1935); Tate v. Commonwealth, 258 Ky. 685, 80 S. W. 2d 817 (1935); Glenday v. Commonwealth, 255 Ky. 313, 74 S. W. 2d 332 (1934); Holmes v. Commonwealth, 241 Ky. 573, 44 S. W. 2d 592 (1931); Miller v. Commonwealth, 236 Ky. 448, 33 S. W. 2d 590 (1930); Moore v. Commonwealth, 223 Ky. 128, 3 S. W. 2d 190 (1928); Hall v. Commonwealth, 207 Ky. 718, 270 S. W. 5 (1925); Bolin v. Commonwealth, 206 Ky. 608, 268 S. W. 306 (1925).

[11] Lee v. Commonwealth, 262 Ky. 15, 89 S. W. 2d 316 (1935); Moore v. Commonwealth, 223 Ky. 128, 3 S. W. 2d 190 (1928).

[12] "We are loath to believe that such action on their [the prosecutors'] part is encouraged because these arguments, although condemned, have under the particular facts in the cases involved been held by us not so prejudicial as to warrant a reversal." Seymour v. Commonwealth, 220 Ky. 348, 354, 295 S. W. 142, 145 (1927). Again in Lee v. Commonwealth, 262 Ky. 15, 19, 89 S. W. 2d 316, 317 (1935): "Time after time we have condemned the use of such arguments by attorneys for the commonwealth, and why they will persist in the use of it we cannot understand; but in only one case have we reversed a judgment on that account. . . ."

[13] Bass v. Commonwealth, 296 Ky. 426, 177 S. W. 2d 386 (1944); *cf.* Long v. Commonwealth, 288 Ky. 83, 155 S. W. 2d 246 (1941).

[14] Winston v. United States, 172 U. S. 303 (1899) (federal statute). "They may do so with or without a reason, and they may decline to do so with or without a reason. They may do so as a matter of public policy, or out of mere sympathy for the prisoner, or they may decline to do so for reasons of public policy, or on account of absence of sympathy for the accused." Lucas v. State, 146 Ga. 315, 326, 91 S. E. 72, 77 (1916). From the absolute discretion here depicted by the Georgia court, the power of the jury runs through varying degrees of restriction depending on the offense and the jurisdiction. An extensive treatment of this point may be found in 17 A. L. R. 1117 (1922) and Supplements, 87 A. L. R. 1362 (1933); 138 A. L. R. 1230 (1942).

[15] Sullivan v. State, 47 Ariz. 224, 55 P. 2d 312 (1936); House v. State, 192 Ark. 476, 92 S. W. 2d 868 (1936); Watts v. State, 82 N. E. 2d 846 (Ind. 1948); Massa v. State, 37 Ohio App. 532, 175 N. E. 219 (1930); State v. Carroll, 52 Wyo. 29, 69 P. 2d 542 (1937). See Notes, 51 HARV. L. REV. 353 (1937); 90 U. PA. L. REV. 221 (1941). One court adheres to this view under a statute providing for a recommendation by the jury ". . . upon and after the consideration of all the evidence." N. J. STAT. ANN. §2:138-4 (1939), State v. Molnar, 133 N. J. L. 327, 44 A. 2d 197 (1945). The quoted provision was added by Pub. Laws 1919, c. 134, §1 after the court had construed the power of recommendation to be within the unlimited discretion of the jury. State v. Martin, 92 N. J. L. 436, 106 Atl. 385 (1919).

[16] *Compare* U. S. CONST. AMEND. VI ("impartial jury"), *with* N. C. CONST. Art. I, §13 ("good and lawful men").

legislative delegation of the power to reduce the penalty to that same body would seem to evince an intent that the power be exercised with impartiality. Equality under the law is not to be attained by permitting the prosecuting attorney to prevail upon the jury to forego what may be an otherwise satisfactory course of action in order to preclude the future application of that which he considers bad parole law administered by irresponsible officials.[17] Here, under the cloak of "due process," is something savoring of mob rule.

At any rate, the great majority of courts denounce the argument as improper in that it interferes with the discretion of the jury[18] or presents a possibility of prejudice,[19] or because the granting or withholding of pardons and paroles is not a jury function.[20] Yet, no case has been found in which the mere injection of the argument, without aggravating circumstances, has been held so prejudicial as to require a reversal of a judgment imposing the death penalty. The usual test for prejudice has been its positive appearance[21] and, since the penalty imposed is discretionary, only the evidence supporting that portion of the verdict determining the defendant's guilt is considered reviewable.[22]

[17] "If prosecuting officers have any complaint to make because of the exercise of certain powers that are conferred by law upon another tribunal, they should make such complaints at a proper time and place, and not seek to influence a jury to do something to prevent such other tribunal from passing judgment upon the case upon its merits, when it is actually brought before it. Neither the prosecutor nor the jury are or can be held responsible for the acts of the 'power' whose duty it may become to pass upon the question whether a sentence shall be commuted or not." State v. Thorne, 41 Utah 414, 431, 126 Pac. 286, 293 (1912).

[18] "No self-respecting judge would permit a prosecuting officer to lecture him as to his right to fix the punishment within lawful limits, and in the present instance the trial judge should have interposed to protect the jury and the defendant from the attorney's assumption of privileges the law gives to the jury alone." Jacobs v. State, 103 Miss. 622, 627, 60 So. 723, 724 (1913).

[19] Peterson v. State, 231 Ala. 625, 166 So. 20 (1936); People v. Caetano, 29 Cal. 2d 616, 177 P. 2d 1 (1947); Brady v. State, 199 Ga. 566, 34 S. E. 2d 849 (1945); People v. Murphy, 276 Ill. 304, 114 N. E. 609 (1916); State v. Junkins, 147 Iowa 588, 126 N. W. 689 (1910); Crawford v. Commonwealth, 264 Ky. 498, 95 S. W. 2d 12 (1936); State v. Henry, 196 La. 217, 198 So. 910 (1940); Augustine v. State, 201 Miss. 277, 28 So. 2d 243 (1946); Tapedo v. State; 34 Okla. Crim. App. 165, 245 Pac. 897 (1926); Commonwealth v. Earnest, 342 Pa. 544, 21 A. 2d 38 (1941); Dingus v. Commonwealth, 153 Va. 846, 149 S. E. 414 (1929); State v. Knapp, 194 Wash. 286, 77 P. 2d 985 (1938).

[20] Lovely v. United States, 169 F. 2d 386 (4th Cir. 1948); Farrell v. People, 133 Ill. 244, 24 N. E. 423 (1890); Pena v. State, 137 Tex. Crim. Rep. 311, 129 S. W. 2d 667 (1939); State v. Thorne, 41 Utah 414, 126 Pac. 286 (1912).

[21] As explained by the Kentucky court, ". . . whether the error thereby committed [by the argument] would be sufficiently prejudicial in all cases to authorize a reversal of a conviction would necessarily depend upon the particular facts of the case; *i.e.*, whether the error in the light of the proven facts was calculated to produce such a prejudicial effect on the verdict of the jury as to entitle the convicted defendant to a new trial, or whether, under the facts, the argument, though improper, could not possibly produce such a prejudicial effect and was therefore immaterial." Tiernay v. Commonwealth, 241 Ky. 201, 204, 43 S. W. 2d 661, 663 (1931).

[22] *But see* Dent, J., dissenting in State v. Shawen, 40 W. Va. 1, 12, 20 S. E. 873, 877 (1894): "Granting that the prisoner was guilty of murder in the first degree, . . . the law, in tender consideration of human frailties, seeks to distinguish

Prior to 1941, a conviction of any of the four capital crimes[23] in North Carolina carried the mandatory death penalty and a recommendation of mercy contained in a jury's verdict was treated as surplusage.[24] In that year the jury was authorized to reduce the penalty for burglary and arson to life imprisonment by appending a recommenation to their verdict,[25] but the question here under discussion seems not to have arisen. In March, 1949, however, all four sections were rewritten to permit such a recommendation, apparently to be discretionary,[26] The pertinent North Carolina parole statute[27] provides that all prisoners serving a life sentence shall become entitled to a hearing on an application for parole after a minimum service of ten years.

Under this state of the law, it would seem but a matter of time until the propriety of arguing parole law in urging the jury to withhold a recommendation of mercy comes before the Supreme Court of North Carolina. This Court has previously decided, in cases not involving the jury's power to recommend mercy, that reference to the right of appeal or the possibility of executive clemency if the defendant should be convicted constitutes reversible error.[28] These cases may indicate that the similar practice here considered will likewise be condemned. But the similarity is deceiving. Whereas the one assumes a verdict and attempts to prevent a discretionary qualification, the other seeks to influence the jury in arriving at the verdict itself.[29]

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between the different degrees of depravity entering into each particular commission of the highest of crimes. . . . The intemperate and unjustifiable language used by the prosecutor was to inflame the minds of the jury, and prevent this discrimination on their part. He accomplished his purpose [the death penalty], which is the best evidence possible that the prisoner was prejudiced by his conduct."

[23] N. C. CODE ANN. (Michie, 1939) §4200 (first degree murder), §4204 (rape), §4233 (first degree burglary), §4238 (arson).

[24] State v. Day, 215 N. C. 566, 2 S. E. 2d 569 (1939).

[25] N. C. Pub. L. 1941, c. 215, §§ 1, 2.

[26] ". . . shall suffer death, provided, if the jury, at the time of rendering the verdict in open court, shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury." N. C. Sess. L. 1949, c. 299, §§1-4; 27 N. C. L. REV. 449 (1949). N. C. GEN. STAT. §14-20 (1943) (killing adversary in a duel) and *id.* §14-278 (malicious train-wrecking resulting in a homicide) which also impose the death penalty were not mentioned. The question arises whether they must also be deemed amended since their validity under N. C. CONST. Art. XI, §2, which restricts the death penalty to the four named crimes, depends upon their being treated as statutory specifications of situations constituting first degree murder wherein deliberation and premeditation are conclusively presumed.

[27] N. C. GEN. STAT. §148-58 (1943).

[28] State v. Hawley, 229 N. C. 167, 48 S. E. 2d 35 (1948); State v. Little, 228 N. C. 417, 45 S. E. 2d 542 (1947).

[29] Care should be exercised to distinguish between the two separate purposes, depending on the situation at trial, which may be subserved by informing the jury of possible leniency to be extended the prisoner by some other agency of government:

(1) Where there is a reasonable doubt as to the guilt of the accused, the possibilities of executive clemency or appellate reversal for error may be advanced as an invitation to the jury to assume the psychological position of a small cog in the machinery of justice and thus shed the responsibility for their verdict. *E.g.*,

It is believed, however, that in order to avoid the dilemma existing in Georgia and Kentucky, a definite stand should be taken either for or against the use of the argument.[30] Of these two positions, it is submitted that the injection of this line of argument into the proceedings of a capital case should be held to result in a mistrial since (1) it cannot be said with certainty that the impression thereby created can be erased from the minds of the jurors, (2) the parole statutes pertain to a dis-

Goff v. Commonwealth, 241 Ky. 428, 44 S. W. 2d 306 (1931); State v. Little, *supra* note 28; Commonwealth v. Balles, 160 Pa. Super. 148, 50 A. 2d 729 (1946). As this tends directly to alter the weight of evidence necessary to a conviction, it is generally held highly prejudicial and doubt has been expressed whether its evil effect can be eradicated by action of the trial court. See State v. Hawley, *supra* note 28.

(2) Where the guilt of the accused is all but conceded and the statute permits the jury to assess the punishment, this becoming the principal issue involved, the jury may be asked to avoid the effect of a future pardon or parole. The argument seeks to impose upon the jury the responsibility for the inadequate punishment and prospective crimes of the defendant by depicting the paroling authority as irresponsible or the existing penal law as a farce. See, *e.g.* Bolin v. Commonwealth, 206 Ky. 608, 268 S. W. 306 (1925) ("weak-kneed governors and parole commissioners"); Cobb v. State, 251 Ala. 505, 38 So. 2d 279 (1949) ("rotten" penal system). Here, the prejudice, if any, is not so apparent, for assuming that the jury has acted directly upon the suggestion, it remains to be determined whether any rights of the accused have been violated.

Tacit recognition of this distinction may be implied from State v. Howard, 222 N. C. 291, 22 S. E. 2d 917 (1942) where, after a review of the cases involving parole arguments designed to prevent a recommendation of mercy, the court decided that a prosecutor's reference to paroles was not so prejudicial as to warrant a reversal of a conviction of embezzlement.

[30] Due to local variations in the wording of the statutes, the vigilance of the trial judges, the respect accorded to and the degree of control exercised by the appellate courts, the results of any holding cannot be conclusively predicted for any given jurisdiction. But with the situations in Georgia and Kentucky, compare those in the following states where the question is apparently settled:

(1) *Arizona:* Argument held proper in Sullivan v. State, 47 Ariz. 224, 55 P. 2d 312 (1936). The only subsequent case found involving the point followed the former without comment. State v. Macias, 60 Ariz. 93, 131 P. 2d 810 (1942).

(2) *Arkansas:* Argument held not improper in House v. State, 192 Ark. 476, 92 S. W. 2d 868 (1936).

(3) *Illinois:* Overruling of objection to similar argument held reversible error in Farrell v. People, 133 Ill. 244, 24 N. E. 423 (1890). The only subsequent case found is People v. Murphy, 276 Ill. 304, 114 N. E. 609 (1916) wherein the overruling of an objection was held error but in as much as the argument was directed toward two defendants, one of whom received a sentence of 99 years, the court saw no apparent effect on the verdict.

(4) *Louisiana:* Overruling of objection to the argument held reversible error in State v. Johnson, 151 La. 625, 92 So. 139 (1922) and where objection was sustained, the argument itself contributed to a reversal in State v. Henry, 196 La. 217, 198 So. 910 (1940). The only other cases found are State v. Edwards, 155 La. 305, 99 So. 229 (1923) in which the argument appeared ineffective in that the death penalty was not imposed, and State v. Burks, 196 La. 374, 199 So. 220 (1940) where the effect of the argument was held eradicated by the trial court's instructions.

(5) *Ohio:* Instructions by *court* on pardon and parole held proper. Liska v. State, 115 Ohio St. 283, 152 N. E. 667 (1926); Massa v. State, 37 Ohio App. 532, 175 N. E. 219 (1930).

(6) *Virginia:* Overruling of objection to the argument contributed to a reversal. Dingus v. Commonwealth, 153 Va. 846, 149 S. E. 414 (1929).

(7) *West Virginia:* Argument held not improper. State v. Shawen, 40 W. Va. 1, 20 S. E. 873 (1894).

tinct phase of our penal and correctional system with which the jury, as such, has no concern,[31] and (3) to supply the deficiencies in existing penal law is not the responsibility of the jury in the individual case.[32]

If, on the other hand, it be decided that matters of policy should be left to the individual jury, such should be placed squarely before them in the unbiased instructions of the trial judge rather than by an impassioned plea of the prosecuting attorney.

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[31] Lovely v. United States, 169 F. 2d 386 (4th Cir. 1948).
[32] See note 17 *supra*.