UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 28 | Number 4 Article 3

6-1-1950

Notes and Comments

North Carolina Law Review

The North Carolina Law Review

VOLUME 28 | JUNE, 1950 | NUMBER 4

This issue contains notes by JOSEPH K. BYRD and JOHN P. KENNEDY, JR., students at the University of North Carolina School of Law.

NOTES AND COMMENTS

Agency—Intentional Torts—Liability of the Master

Although there are early cases to the contrary,[1] it is now well settled that the master may be held liable for the intentional torts of his servant.[2] The liability of the master for such tortious conduct is said to

[1] MECHEM, LAW OF AGENCY §499 (3d ed. 1923); 57 C. J. S., MASTER AND SERVANT §572 (1936).

[2] Gillis v. Great Atlantic & Pacific Tea Co., 223 N. C. 470, 27 S. E. 2d 283 (1943); Hammond v. Eckerd's, 220 N. C. 596, 18 S. E. 2d 151 (1942); Long v. Eagle Co., 214 N. C. 146, 198 S. E. 573 (1938); Dickerson v. Atlantic Refining Co., 201 N. C. 90, 159 S. E. 446 (1931).

depend upon whether the servant was acting within the scope of his employment.[3] This rule is based on the theory that the master's work is being performed and that the master is in a better position to minimize the loss by preventing or spreading it.[4]

In the case of *Charles Stores Co. v. O'Quinn*,[5] the plaintiff was criminally prosecuted on a charge of stealing a blouse which he had found in his car and attempted to exchange. After being acquitted the plaintiff brought an action in the federal district court against the defendant company for malicious prosecution on the ground that the prosecution was instituted by the manager of the defendant's store. The district court found that since the title to the blouse was in doubt, the manager possessed the implied authority to recover the defendant's blouse by the criminal suit.[6] On appeal, the circuit court, reversing the lower court, declared that the title to the blouse was never in question and therefore the manager did not act within the scope of his authority in instigating the action. The latter court stated,[7] "It is too clear for argument that the recovery of stolen property, that had been in undisputed possession of the store manager for nearly a month before the arrest, was not the purpose of the prosecution." Since the cause of action arose in North Carolina, both courts applied the North Carolina law under the *Erie* doctrine.

Ordinarily it is held to be outside the scope of an employee's authority to prosecute an offender even where the offense is committed against the employer's property, unless the prosecution was previously authorized or subsequently ratified. Authority for the prosecution, however, may be implied when the action is brought by an employee who is intrusted with the custody of property for the purpose of protecting, preserving, or recovering such property.[8] Where the action is brought merely for the purpose of vindicating justice or punishing the offender no liability rests upon the master.[9]

The North Carolina courts have experienced great difficulty in determining what circumstances make the question of implied authority one for the jury. Thus, a carrier was held not liable as a matter of law

[3] RESTATEMENT, AGENCY §219(1) (1936).
[4] Douglas, *Vicarious Liability and Administration of Risk*, 38 YALE L. J. 584 (1929).
[5] 178 F. 2d 372 (4th Cir. 1949).
[6] O'Quinn v. Charles Stores Co., 86 F. Supp. 240 (M. D. N. C. 1949).
[7] Charles Stores Co. v. O'Quinn, 178 F. 2d 372, 376 (4th Cir. 1949).
[8] Hammond v. Eckerd's, 220 N. C. 596, 18 S. E. 2d 151 (1942).
[9] In Daniel v. Atlantic C. L. R. R., 136 N. C. 517, 522, 48 S. E. 816, 818 (1904) where a passenger was arrested in a hotel room and charged with larceny of the company's money at the instigation of the company's agent, the court dismissed the case, saying: "A servant intrusted with his master's goods may do what is necessary to preserve and protect them, because his authority to do so is clearly implied by the nature of the service, but when the property has been taken from his custody, or stolen, and the crime has already been committed, it cannot be said that a criminal prosecution is necessary for its preservation and protection."

where its dispatcher prosecuted a passenger who refused to abide by the carrier's segregation regulations;[10] but an earlier case allowed the jury to determine whether a carrier was liable where its driver wrongfully accused and prosecuted a passenger who refused to pay his fare.[11] In the former case, it might well be argued that the dispatcher's action was for the purpose of enforcing the master's regulations and not for the object of punishing the offender, thereby presenting a proper question for the jury.

In another case where a customer was prosecuted by an employee for uttering a supposedly worthless check, the jury was allowed to find the master liable since the action was commenced to collect the master's debt;[12] but where a manager was expressly forbidden, except at his own risk, to accept checks, and the agent prosecuted a party for supposedly issuing a bad check, the court held the act unauthorized.[13] It seems that in the latter case there was evidence of implied authority to prosecute inasmuch as the manager, though assuming personal responsibility for the checks, was permitted to vest the title in the principal by daily depositing them to the principal's bank account. Thus, the manager was at least partially serving the master's business.[14]

Cited in the principal case are several false arrest cases which follow the same general pattern as those of malicious prosecution. To hold the master liable for a false arrest instigated by his servant, the act must be done for the purpose of protecting his master's property or of furthering the master's business. So where the defendant's foreman had plaintiff arrested to get him "out of the way" so that the foreman could string telephone lines across the objecting plaintiff's land, the jury was allowed to find the defendant company liable.[15] Similarly, an employer has been held liable where his manager arrested a salesman suspected of embezzlement.[16]

In *Hammond v. Eckerd's of Asheville*,[17] cited in the instant case, a cigar clerk followed a customer out of a drug store, accused him of

[10] Pridgen v. Carolina Coach Co., 229 N. C. 46, 47 S. E. 2d 609 (1948).

[11] Kelly v. Durham Traction Co., 132 N. C. 368, 43 S. E. 923, *rehearing denied*, 133 N. C. 418, 45 S. E. 826 (1903).

[12] Dickerson v. Atlantic Refining Co., 201 N. C. 90, 159 S. E. 446 (1931), 10 N. C. L. REV. 90.

[13] Lamm v. Charles Stores Co., 201 N. C. 134, 159 S. E. 444 (1931), 9 N. Y. U. L. Q. REV. 238.

[14] Nelson Business College v. Lloyd, 60 Ohio St. 448, 54 N. E. 471 (1894) (janitor pushed electrician off table so janitor could finish cleaning).

[15] Jackson v. Am. Tel. & Tel. Co., 139 N. C. 347, 51 S. E. 1015 (1905).

[16] Kelly v. Newark Shoe Store Co., 190 N. C. 406, 130 S. E. 32 (1925). *Cf.* West v. Messick Grocery Co., 138 N. C. 166, 50 S. E. 565 (1905) (client not liable for attorney's arrest of debtor); Lovick v. Atlantic C. L. R. R., 129 N. C. 247, 40 S. E. 191 (1901) (client not liable for attorney's arrest of witness leaving court's jurisdiction). *But cf.* Parrish v. Boysell Mfg. Co., 211 N. C. 7, 188 S. E. 817 (1936) (employer not liable, master's property not being recovered).

[17] 220 N. C. 596, 18 S. E. 2d 151 (1942), 11 FORDHAM L. REV. 314 (criticizing the holding).

stealing cigars, and caused him to be searched. A divided court dismissed the customer's action for false arrest on the ground that the clerk's act was not done to protect the master's property, but merely to vindicate justice since the cigars had already been stolen. It was aptly pointed out in the dissenting opinion that the cigar clerk was in hot pursuit of the offender with the avowed purpose of recovering his master's property and that the question of authority should have been determined by the jury. In *Long v. Eagle Co.*,[18] a case almost identical on its facts, the court reached a result opposite to the holding in the *Hammond* case. A possible distinguishing feature is that in the *Eagle* case the arrest was instigated by an assistant manager rather than a clerk.

In the principal case the court seemed to rely in part on an express provision in the employment contract forbidding the manager to arrest or prosecute an offender. Like provisions have received little consideration by the court in many of the intentional tort cases. Thus, in a case concerning defamation,[19] an employer was held liable where a manager followed a customer to a parking lot and there accused her of stealing a package from the store. The court held that there was sufficient evidence to warrant the submission of the case to the jury in spite of the fact that such acts were violative of direct and positive instructions to the contrary. This result seems sound. If it were otherwise, an employer could rid himself completely of vicarious liability by the simple expedient of instructing his employees to commit no torts.

Analogous to the holding in the instant case are those cases involving assaults by servants. The master is generally held liable if the assault is actuated at least in part by a purpose to serve the master or protect his property. Under this rule a master has been held liable where he authorized some force, and excessive or improper force was used,[20] or where an assault occurred during a foreman's inspection of an em-

[18] Long v. Eagle Co., 214 N. C. 146, 198 S. E. 573 (1938). In Kelly v. Newark Shoe Store Co., 190 N. C. 406, 409, 130 S. E. 32 34 (1925), the court stated: "The term 'manager' applied to an officer or representative of a corporation, implies the idea that the management of the affairs of the company has been committed to him with respect to the property and business under his charge. Consequently his acts in and about the corporation's business, so committed to him, is within the scope of his authority. . . . The term 'general manager' may imply still greater authority, and although limited to the branch store at Wilmington, it still may imply authority to act in emergencies, or generally, as the principal officer of the corporation in reference to the ordinary business and purposes of the company in the conduct of such store."

[19] Gillis v. Great Atlantic & Pacific Tea Co., 223 N. C. 470, 27 S. E. 2d 283 (1943). *Cf.* West v. Woolworth Co., 215 N. C. 211, 1 S. E. 2d 546 (1939) (employer liable for employee's slander of customer); Sawyer v. Norfolk & S. Ry., 142 N. C. 1, 54 S. E. 793 (1906) (employer liable for employee's slander of former employee); Strickland v. Kress & Co., 183 N. C. 534, 112 S. E. 30 (1922) (employer not liable for employee's slander of former employee).

[20] Snow v. De Butts, 212 N. C. 120, 193 S. E. 224 (1937). *Cf.* Wilson v. Singer Sewing Machine Co., 184 N. C. 40, 113 S. E. 508 (1922).

ployee's machine;[21] but where an assault was committed in spite or hate, or to carry out an independent purpose of the servant, the master was not liable.[22]

The result reached in the principal case seems to be in line with many of the North Carolina cases in which intentional torts are involved. But the court appears to be particularly harsh in denying the plaintiff recovery because the prosecution was instigated for a crime already committed against the master's property instead of for the purpose of recovering such property. This distinction made by the court seems more apparent than real. Although the immediate object of the manager's action might well have been to vindicate the law and punish the offender, yet it cannot be denied that such prosecutions do tend to discourage future criminal acts and thereby indirectly serve the master's interests. This deterrent effect appears especially pertinent here in view of the fact that the manager had been previously bothered by shoplifters. This would seem to be sufficient evidence of an intention to further the master's business and to protect his property so as to leave the question for the determination of the jury.

In conclusion it might be pointed out that the North Carolina courts have been more willing to submit to the jury cases involving negligent torts of the servant as distinguished from willful torts. Perhaps this action on their part has not been deliberate.[23] Theoretically, however, such a distinction has no basis and it is to be hoped that in the future, where doubt exists as to the purpose for which a servant acted, such doubt will be resolved by the jury whether his act be classified as negligent or intentional.

GEORGE J. RABIL.

Associations—Injunctive Relief Against Violation of Its Rules by Members

It appears well settled that the constitution, rules, regulations and by-laws[1] of a voluntary association constitute a contract between the

[21] Fleming v. Tarboro Knitting Mills, 161 N. C. 436, 27 S. E. 309 (1913).

[22] In Snow v. De Butts, 212 N. C. 120, 193 S. E. 224 (1937), where a manager assaulted the plaintiff who had opposed the defendant employer's petition to the Corporation Commission, the defendant was held not liable although the act was committed with an intent to benefit the master. A later case refused to let the jury consider the master's liability where an employee assaulted a person outside the master's premises as a result of an argument arising inside the store. Robinson v. Sears, Roebuck & Co., 216 N. C. 322, 4 S. E. 2d 889 (1939), 18 N. C. L. REV. 163 (1940).

[23] It seems that as a practical solution to the tendencies of juries to find the "deeper pocketed" employer liable, the courts, particularly in the field of agency law, have frequently exercised judicial restraints in an effort to mete out justice as they see it in the individual cases.

[1] So long as the issue is the enforceability of the constitution, rules, regulations, charter or by-laws, no distinction is necessary between them, and for purposes of this note they are used synonymously.

association and its individual members which the courts will enforce if the rules and regulations are not unreasonable, immoral, unlawful or contrary to public policy.[2]

This proposition was involved in a recent North Carolina case, the widely discussed "rump sales" case.[3] There, the Bright Belt Warehouse Association sought to enjoin several of its members from conducting auction sales of leaf tobacco in the defendants' warehouses without compliance with certain rules and regulations promulgated by the plaintiff's Board of Governors.[4] Upon the verified complaint a temporary restraining order and notice to show cause were issued. At the hearing the defendants' demurrer *ore tenus* was overruled and the restraining order continued as a temporary injunction until final hearing. In reversing this decision, the North Carolina Supreme Court held only that the regulation in question was invalid as beyond the Board's delegated powers.[5] The Court, however, recognized the previously mentioned rule

[2] North Dakota v. North Central Ass'n, 23 F. Supp. 694 (E. D. Ill. 1938); Walker v. Medical Soc'y, 247 Ala. 169, 22 So. 2d 715 (1945); Local Union No. 57 v. Boyd, 245 Ala. 227, 16 So. 2d 705 (1944); Levy v. Magnolia Lodge, 110 Cal. 297, 42 Pac. 887 (1895); Sult v. Gilbert, 148 Fla. 31, 3 So. 2d 729 (1941); South St. Joseph Live Stock Exchange v. St. Joseph Stock Yards Bank, 223 Mo. App. 623, 16 S. W. 2d 722 (1929); Height v. Democratic Women's Luncheon Club, 131 N. J. Eq. 450, 25 A. 2d 899 (1942); Robinson v. Dahm, 94 Misc. Rep. 729, 159 N. Y. Supp. 1053 (1916); Weighers, Warehousemen and Cereal Workers' Union 38-123 v. Green, 157 Ore. 394, 72 P. 2d 55 (1938); Manning v. San Antonio Club, 63 Tex. 166 (1885).

[3] Bright Belt Warehouse Ass'n v. Tobacco Planters Warehouse, Inc., 231 N. C. 142, 56 S. E. 2d 391 (1949).

[4] The Association at its annual meeting adopted a resolution authorizing its Board of Governors "to announce and publish such rules and regulations as may in the opinion of the Board best provide for the proper and orderly marketing and handling of tobacco on auction warehouse floors." Pursuant to this delegation of authority, the Board met and adopted the following resolution:

"1. That an essential element of a bona fide sale of tobacco at auction is that there shall be assigned to such sale an adequate set of buyers prepared to bid at competitive sale. The minimum requirement of an adequate set of buyers is the following:

"(a) Buyers for each of the three major domestic tobacco companies (Reynolds Tobacco Company, American Tobacco Company, and Liggett & Myers Tobacco Company), and

"(b) Buyers of at least three other recognized companies purchasing tobacco for export or for export and domestic consumption.

"2. No warehouse should offer tobacco for sale at auction unless and until an adequate set of buyers as defined above has been assigned to and secured for such sale."

Four sets of buyers were assigned to the Rocky Mount market by the three major domestic companies, permitting four simultaneous sales, but the defendants conducted an additional or fifth sale when the buyers present did not include representatives from each of the three major companies. The plaintiff sought to enjoin this practice as a violation of its rules and regulations.

[5] The Court found that the authority delegated to the Board of Governors to promulgate regulations as to marketing and handling tobacco was insufficient to give the Board power altogether to prohibit auction sales, otherwise fair and in accord with announced marketing regulations, because of the absence of buyers of either of three named manufacturers.

and added that rules and regulations may be enforced by injunction.[6] Considering the facts of the case, the only logical inference from this language is that injunction is a proper remedy on the part of the association to restrain its members from violation of the reasonable and lawful rules and regulations of the organization.

At first blush injunctive relief might seem routine if the charter and by-laws constitute an enforceable contract between the association and its members. Surprisingly enough, the diligent counsel in the suit were unable to uncover a square holding either way.[7] Thus, the statement of the Court seems to be without direct authority. The question then arises as to just how far the Court is likely to go in applying its language.

In attempting to answer this question, a brief consideration of the general nature of voluntary associations and of the attitude of the courts toward judicial interference in their internal affairs seems in order. The term "association" is one of vague meaning. It is used to indicate a body of individuals or entities which have joined together to promote some proper objective.[8] Generally, the word covers a multitude of organizations ranging from labor unions and trade associations to social clubs and fraternities.

Associations, as a rule, neither need nor want judicial enforcement of their rules and by-laws.[9] A national labor union would have little occasion to call on the courts to enjoin a local union from violating its rules since the national union has powerful means of its own, such as a cancellation of the local charter, to insure adherence. And a trade association would be hesitant to seek judicial aid, even if it were experiencing difficulty with recalcitrant members over price or production standards, for fear of government investigation or regulation. The value of autonomy to all voluntary associations, by their very nature, is great.[10]

[6] The plaintiff here is an incorporated association, but there is no real difference between unincorporated and incorporated associations insofar as the issue is the binding effect of the constitution, rules and by-laws. Most of the law relied on by the Court falls under the heading of "Associations" which deals largely with unincorporated associations. 7 C. J. S. Associations, §11.

[7] Nor has the note writer been able to discover a case in point. The nearest case seems to be Sea Gate Ass'n v. Sea Gate Tenants Ass'n, 6 N. Y. S. 2d 387 (1938). There the plaintiff association got an injunction to prevent the violation of one of its rules prohibiting picketing on the property of the members. It did not appear, however, that the defendants were members of the plaintiff organization.

[8] W. R. Roach & Co. v. Harding, 348 Ill. 454, 181 N. E. 331 (1932); People v. Brander, 244 Ill. 26, 91 N. E. 59 (1910); Venus Lodge v. Acme Benevolent Ass'n, 231 N. C. 522, 58 S. E. 2d 109 (1950).

[9] The United States Senate Committee Trade Association Survey indicates that trade association executives do not believe that they have available sanction with which agreements on price or production can be enforced. TNEC Monograph No. 18, *Investigation of Concentration of Economic Power* 51-53 (1941).

[10] It is to be noted here that the Board of Governors of the Bright Belt Warehouse Association apparently will not make an issue of any possible "rump" sales in 1950, despite the language of the Supreme Court in the principal case. The 1950 marketing regulations were adopted without major change from those which prevailed in 1949. Raleigh News and Observer, March 8, 1950, p. 1, col. 7.

Coupled with the reluctance of associations to resort to the courts, there is a parallel reluctance on the part of the courts to interfere in the internal affairs of these organizations.[11] A great many jurisdictions insist that a property right be abridged before there can be judicial interference.[12] Others hold that the proceedings of the association are subject to judicial review only where there is fraud, oppression or bad faith,[13] or the proceedings are violative of the laws of the land,[14] or are ultra vires[15] or otherwise illegal.[16] Even when willing to take jurisdiction, some courts require that the injured party must first have exhausted all administrative remedies within the association before seeking judicial relief.[17] Any analysis or discussion of these limitations is beyond the scope of this note.[18]

Clearly, an association is entitled to injunctive relief against its members to restrain them from violating their contracts with the parent body where there is specific statutory authority to that effect. The North Carolina Co-operative Marketing Act[19] is an example of this type statute. The very lifeblood of the co-operative depends on its ability to enforce members' agreements to sell only to the co-operatives. The statute acknowledges this need and the public interest involved.[20] There was also an element of public interest in the "rump sales" case, expressly recognized by the Supreme Court, and the Court seems to have been on sound ground in indicating that injunction would have been the proper remedy for this association, had the rules in question been within the powers delegated to the Board of Governors. Difficulties, however,

[11] *In re* Rosenbaum Grain Corp., 13 F. Supp. 601 (N. D. Ill. 1935); Local Union No. 57 v. Boyd, 245 Ala. 227, 16 So. 2d 705 (1944); Board of Trade v. Nelson, 162 Ill. 431, 44 N. E. 473 (1896).

[12] Elfer v. Marine Engineers Beneficial Ass'n No. 12, 179 La. 383, 154 So. 32 (1934); Crutcher v. Eastern Div. No. 321, 151 Mo. App. 622, 132 S. W. 307 (1910); Rogers v. Tangier Temple, 112 Neb. 166, 198 N. W. 873 (1924); Carey v. Int'l Brotherhood of Paper Hangers, 123 Misc. Rep. 680, 206 N. Y. Supp. 73 (1924); Kenneck v. Pennock, 305 Pa. 288, 157 Atl. 613 (1931); Fraser v. Buck, 234 S. W. 679 (Tex. Civ. App. 1934).

[13] Most Worshipful United Grand Lodge F. & A. M. v. Murphy, 139 Md. 225, 114 Atl. 876 (1921); Plemenic v. Prickett, 97 N. J. Eq. 340, 127 Atl. 342 (1925).

[14] Elfer v. Marine Engineers Beneficial Ass'n No. 12, 179 La. 383, 154 So. 32 (1934); Fraser v. Buck, 234 S. W. 679 (Tex. Civ. App. 1934).

[15] Williams v. District Executive Board, U. M. W. of A., 1 Pa. D. & C. 31 (1921).

[16] Allee v. James, 68 Misc. Rep. 141, 123 N. Y. Supp. 581 (1910).

[17] Harris v. Missouri P. R. R., 1 F. Supp. 946 (E. D. Ill. 1931); People *ex rel.* Michajlowski v. Tanaschuk, 317 Ill. App. 380, 45 N. E. 2d 984 (1942); Carson v. Gikas, 321 Mass. 468, 73 N. E. 2d 893 (1947); Hickey v. Baine, 195 Mass. 446, 81 N. E. 201 (1907); Robinson v. Dahm, 94 Misc. Rep. 729, 159 N. Y. Supp. 1053 (1916); Loeffler v. Modern Woodmen, 100 Wis. 79, 75 N. W. 1012 (1898).

[18] For discussions of adjudications of internal disputes see Notes, 7 CORNELL L. Q. 261 (1922), 24 MICH. L. REV. 82 (1925), 34 VA. L. REV. 352 (1948), 25 WASH. U. L. Q. 621 (1940), 58 YALE L. J. 999 (1949), 31 YALE L. J. 328 (1922), 30 YALE L. J. 202 (1920).

[19] N. C. GEN. STAT. §54-152(c) (1943).

[20] *See* Tobacco Growers Co-operative Ass'n v. Battle, 187 N. C. 260, 261, 121 S. E. 629, 630 (1924).

are in store if injunction is to be applied to breaches of by-laws of other associations, such as clubs and fraternal organizations.

It seems clear that the courts should have jurisdiction to interfere in the internal affairs of voluntary associations, and that such jurisdiction should include power to grant injunctive relief to an association to restrain the violation of rules and regulations by its members. But it seems equally clear that the courts should not feel compelled to exercise this jurisdiction unless the circumstances of the particular case warrant interference. The contract theory relied on by the Supreme Court should not rigidly require the equity court to become the final interpreter and enforcement agent of the laws and rules of all voluntary associations, clubs, and fraternal orders.

Other theories concerning judicial interference in the internal affairs of associations have been advanced. Professor Chafee, considering cases of wrongful expulsion, suggests that tort is the proper basis for relief, that the wrong consists in the destruction of the relation between the member and the association.[21] The argument seems valid with regard to expulsion cases, but it could hardly be contended that the member is committing such a tort when he violates a by-law. The "rump sales" in the principal case could scarcely be considered torts.

A recent federal case, expressly repudiating the "property right" limitation, holds that equity should protect "personal rights" in a political organization by injunction.[22] This case presents a definite forward step in the field of association law, but its reasoning is not applicable to the problem at hand. There is no "personal right" in the association which would be abridged by a member's failure to adhere to by-laws and regulations.

The heterogeneous character of the organizations falling under the label "Association" is the seat of much of the difficulty in attempting to work out any rule of law which can be consistently followed. Specific performance of contract by injunction seems the most logical theory on which to base a decision allowing an association injunctive relief for the enforcement of its rules and regulations. This would enable the courts to be free to act or to refuse to exercise jurisdiction in accordance with

[21] Chafee, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993, 1007 (1930).

[22] Berrien v. Pollitzer, 165 F. 2d 21 (D. C. Cir. 1947). The suit involved a dispute within a non-profit corporation organized for the purpose of securing equality for women. Certain of the defendants, purporting to act as the National Council of the Party, adopted a resolution temporarily excluding from the Party headquarters all members of an "insurgent" group. One of the "insurgents," who had received no notice of the proposed resolution or of the meeting at which it was adopted, sued to enjoin this exclusion. The district court refused to assume jurisdiction on the ground that a court of equity can interfere only to protect "property rights." The court of appeals reversed, holding that "personal rights" of the plaintiff had been infringed, and that jurisdiction was warranted regardless of whether she had an interest in the assets of the association.

a discretion guided by certain criteria such as: (1) bad faith on the part of the member in violation of the rules; (2) disruptive friction which may be aroused within the organization by judicial interference; (3) the presence or absence of any interest of substance; (4) public interests and interests of third persons; (5) seriousness of the breach;[23] (6) probable effect of resort to the internal remedies of the association if such remedies might accomplish the desired result; (7) adequacy of other judicial remedies.

Whether or not the court will grant injunctive relief in the final analysis should depend on the particular circumstances of each case. The eventual answer must be one based upon practical considerations, a balance of the seriousness of violation and the need for relief against the disadvantages of intervening in the affairs of the particular association involved.

W. BRAXTON SCHELL.

Constitutional Law—Due Process—Admissibility of Confessions and Police Abuses

The Supreme Court of the United States, in an effort to protect the individual against certain police practices, is imposing on the state courts a new test for the admissibility of confessions. The test might be called the "pressure-abuses" test. It is prescribed for the states under the Due Process Clause of the Fourteenth Amendment and is designed to displace the old "testimonial trustworthiness" test. The latest application of the new test came in three cases decided last summer, *Watts v. Indiana*,[1] *Turner v. Pennsylvania*,[2] and *Harris v. South Carolina*.[3]

The old test, generally accepted over the country, was simply this: If a confession were the result of such pressure that there would be a fair chance that the accused would tell a lie, the confession was excluded. The courts talked of "voluntary" and "involuntary" confessions, of promises, threats, and physical abuses, but the underlying idea of nearly all the cases was that a confession would be excluded if it were given under such pressure that it would be untrustworthy.[4] The extent of police abuses—illegal detention, delay in arraignment, failure to ex-

[23] Dean Pound suggests that the chancellor might well ask these questions: Is the injury serious enough to warrant the extraordinary interposition of equity? Is it serious enough to warrant the expense and consumption of public time involved in a judicial proceeding? In cases involving fraternal orders, churches or secret societies, is it serious enough to balance the practical difficulty involved in the court's endeavor to learn, interpret and apply the laws and customs of the organization? Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640, 680 (1916).

[1] 338 U. S. 49 (1949). [2] 338 U. S. 62 (1949). [3] 338 U. S. 68 (1949).

[4] 3 WIGMORE, EVIDENCE §§822, 824 (3d ed. 1940). But Dean McCormick disagrees that the sole underlying basis for the confession rule is desire to protect against untrustworthiness. McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEXAS L. REV. 447, 451-457 (1938).

plain rights, etc.—was not considered, except in so far as those abuses might tend to make the confession untrustworthy from the evidence standpoint. North Carolina, too, followed the "testimonial trustworthiness" test.[5]

The test which the United States Supreme Court has now prescribed for the states is a stricter one. It says that not only will a confession be excluded which is testimonially untrustworthy, but also a confession will be excluded which, even though trustworthy, is obtained by some degree of pressure coupled with substantial police abuses.

In federal courts if a confession is obtained after the proper time for arraignment has passed, it is inadmissible regardless of its trustworthiness and regardless of the decorum of the police.[6] This federal court rule is based on the idea that there is little chance for police abuse if arraignment is early. The rule is one of evidence, not an expression of a constitutional right. The new state court test is much more nebulous. It demands a weighing of pressures and abuses, and it is made no easier to grasp and apply by the fact that the Supreme Court continues to talk of "voluntary" and "involuntary," language traditionally associated with the old test. Indeed it is only by examining the fact situations in particular cases and by reading some of the dissents that we can be sure a new test has been laid down.

Perhaps the first indication that the Supreme Court was going to demand more of state courts than testimonial trustworthiness came in *Ward v. Texas*,[7] decided in 1942, but it was not until the famous case of *Ashcraft v. Tennessee*[8] that the new test became clearly discernible. Ashcraft, a white man of good reputation and standing in the community, was arrested on a Saturday evening and questioned continuously until early Monday morning, when he confessed. There was no warrant for his arrest, and he was not arraigned until after his confession

[5] "The test accordingly laid down in the more recent decisions is whether the confession 'was made under circumstances that would reasonably lead the person charged to believe that it would be better to confess himself guilty of a crime he had not committed.'" STANSBURY, NORTH CAROLINA EVIDENCE §183 (1936).

[6] Upshaw v. United States, 335 U. S. 410 (1948); McNabb v. United States, 318 U. S. 332 (1942).

[7] 316 U. S. 547 (1942). The Court cited the following cases, but it is to be noted that none of them clearly adopts the new test: Wan v. United States, 266 U. S. 1 (1924) (arose in federal court); Brown v. Mississippi, 297 U. S. 278 (1936) (state court did not contend confessions anything but coerced); Chambers v. Florida, 309 U. S. 227 (1940) (case might be considered first to apply new test, but not clear that old test of testimonial trustworthiness not applied); Canty v. Alabama, 309 U. S. 629 (1940) (per curiam); White v. Texas, 310 U. S. 530 (1940) (brief opinion; not clear new test applied); Vernon v. Alabama, 313 U. S. 547 (1941) (per curiam); Lomax v. Texas, 313 U. S. 544 (1941) (per curiam, but facts given in state court opinions suggest that this decision looks toward new and stricter rule; police abuses seem less extreme than in some earlier cases; Lomax v. State, 136 Tex. Cr. R. 108, 124 S. W. 2d 126 (1939), *second appeal*, 142 Tex. Cr. R. 231, 144 S. W. 2d 555 (1940), *rev'd again per curiam*, 313 U. S. 544 (1941), *third appeal*, 146 Tex. Cr. R. 531, 176 S. W. 2d 752 (1943)).

[8] 322 U. S. 143 (1944).

on Monday. He was kept incommunicado and deprived of sleep. Even so there was evidence that his confession was not the result of intimidation by the police. Mr. Justice Black for the majority talked of the "inherently coercive"[9] situation and stressed the abuses of power by the police. He was not very greatly concerned with the testimonial reliability of the confession. Mr. Justice Jackson, writing a three-judge dissent, called attention to the fact that a new test was being imposed on the state courts.[10]

The *Ashcraft* doctrine was reaffirmed in *Malinski v. New York*.[11] Malinski was arrested before eight o'clock one morning and confessed late that afternoon. In the meantime he was held without warrant in a Brooklyn hotel room and made to strip. He may have feared a "shallacking," but he was not questioned continuously. Mr. Justice Douglas, for the Court, talked the old language of fear and coercion, but it seems clear that a much stricter test than that of testimonial trustworthiness was applied; the Court seems to have had one eye on police abuses. Mr. Justice Frankfurter, concurring, said that the whole proceedings "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous crimes."[12]

Again in *Haley v. Ohio*[13] a majority of the Court applied the new test. There a fifteen-year-old Negro boy was arrested about midnight and questioned for five hours or so until he confessed. The four dissenting justices seemed to think that something nearer the old test of testimonial trustworthiness should have been applied, for Mr. Justice Burton said, "The question in this case is the simple one—was the confession in fact voluntary?"[14] But the majority held that, in view of the boy's age and race and in view of the intensity of the questioning and of the fact that he was without counsel, there was a "disregard of the standards of decency." As in the *Ashcraft* case, the opinion emphasized the "inherently coercive" situation and refused to accept the jury's verdict that this particular defendant was not in fact coerced to the point of untrustworthiness.

The three cases decided last summer all involved Negroes arrested without warrants[15] and held for five or six days of more or less intensive questioning before confessions were obtained. No counsel or relatives were permitted to see the persons accused, and no preliminary examinations were held until after the confessions were obtained. In

[9] *Id.* at 154.
[10] *Id.* at 156.
[11] 324 U. S. 401 (1945).
[12] *Id.* at 417.
[13] 332 U. S. 596 (1948).
[14] *Id.* at 615.
[15] In Harris v. South Carolina, 338 U. S. 68 (1949), a warrant had been issued charging the accused with stealing a pistol, but the warrant was not read to him, and he was not informed of the charge against him. In actuality he was wanted as a suspected murderer.

one of the cases the accused was kept for two days in a place called "the hole,"[16] where he had to sleep on the floor. In another the accused was an illiterate,[17] and in all of the cases there were other aggravating circumstances. It seems from the facts given in the state and federal reports that the evidence of actual coercion in these three cases was greater than in the *Ashcraft* case and perhaps greater than in the *Ward, Malinski,* and *Haley* cases. And, although it is difficult to evaluate the various police abuses, they would seem to have been as flagrant in these three cases as in any of the four earlier cases.[18] Indeed the decision in the three latest cases, in view of *Ward, Ashcraft, Malinski,* and *Haley,* seems to have been a logical necessity. The fact that the state courts in the three cases did not use the new test may indicate either an unawareness that the old test has been changed or a dislike of the new one.[19]

The new test rests on a handful of opinions and a few per curiam decisions. In all of the cases with full opinions, the *Ward* case alone excepted, there were strong dissents. The *Ashcraft* and *Watts* cases were six-three decisions. The *Malinski, Haley, Turner,* and *Harris* cases were five-four decisions. The permanence of the new test seems, therefore, uncertain, especially in view of the fact that two of the justices who have consistently been with the majority, Justices Murphy and Rutledge, have died since the last cases were decided.

Pressure-abuses Test and the Due Process Clause

It has long been established that the Due Process Clause of the Fourteenth Amendment does not fasten on the states eighteenth or nineteenth century common law modes of trial and procedure. Rather the Clause guarantees "immunities . . . implicit in the concepts of ordered liberty,"[20] "standards of fundamental fairness,"[21] principles of justice so rooted in the traditions and consciences of our people as to be ranked

[16] Watts v. Indiana, 338 U. S. 49 (1949).
[17] Harris v. South Carolina, 338 U. S. 68 (1949).
[18] Under any system of weighing police abuses, clearly one important element would be length of time that a suspect is unlawfully detained before the confession is made. In the *Ward* case the time was perhaps 40 hours; in *Ashcraft,* 36 hours; in *Malinski,* 10 hours; in *Haley,* 5 hours; while in the three latest cases the time was five to six days. In the *Ashcraft* and *Haley* cases it might even be argued that there was no unlawful detention since the periods of detention were presumably at times magistrates were not available. Of course such other elements of police abuse as over-lengthy periods of questioning, failure to explain constitutional rights, and deprivation of sleep and food must be considered in connection with the length of detention and with the nature of the person accused.
[19] State v. Harris, 212 S. C. 124, 46 S. E. 2d 682 (1948) (court mentioned federal decisions but stated, without explaining, that they did not apply); Watts v. State, 82 N. E. 2d 846 (Ind. 1948) (no mention of United States Supreme Court decisions on admissibility); Commonwealth v. Turner, 358 Pa. 350, 58 A. 2d 61 (1948) (express statement that old rule on admissibility was proper one).
[20] Palko v. Connecticut, 302 U. S. 319, 324 (1937).
[21] Fay v. New York, 332 U. S. 261, 294 (1947).

as fundamental."[22] Indeed the Clause as construed seems nearly as large as fairness and justice themselves. It is clear that any conviction based on a confession that is not trustworthy would be a deprivation of life and liberty without fairness and would therefore violate the Clause.[23] But the new test says that an element which is to be considered along with pressure on the accused is police abuse. Does such a test represent a radical departure in interpretation of due process?

It should be noted first that the Clause has not been limited to a requirement that the proper result be reached in the particular trial; the Court has gone further and demanded that that result be reached with some dignity. Thus a reversal may sometimes be had even though the defendant is clearly guilty as charged.[24]

But has the Clause as traditionally interpreted extended to pre-trial events? Some of the language in cases, other than those which enunciate the new test, indicates that the Clause does extend beyond the trial and protect against substantial pre-trial irregularities.[25] Logic seems to demand this result; if at the trial itself we are concerned, not solely with getting a fair conviction, but also that that conviction be obtained with some dignity of method, why should that same dignity of method not be required of pre-trial events? An abuse before the trial is no less a violation of "civilized standards,"[26] no less a denial of "fundamental principles of liberty."[27] The pre-trial irregularity, however, is different in one important respect: a new trial cannot correct it; to hold it fatal would be to turn the criminal lose. The Supreme Court's solution is to consider the pre-trial irregularity but to insist that it contribute in some way to the result of the trial. A new trial which disregards the fruits of the irregularity is held to cure the defect. In *Lisenba v. California*[28] there were police abuses which the Court condemned, but the abuses had not led to the challenged confession. The Court refused to reverse for the abuses alone since they had not "fatally infected the trial."[29]

[22] Snyder v. Massachusetts, 291 U. S. 97, 105 (1934).

[23] *E.g.*, Brown v. Mississippi, 297 U. S. 278 (1936).

[24] *E.g.*, Tumey v. Ohio, 273 U. S. 510, 535 (1927). General statements of scope of Due Process Clause support this view. *E.g.*, Carter v. Illinois, 329 U. S. 173, 175 (1946) ("ultimate dignities of man") and Palko v. Connecticut, 302 U. S. 319, 324 (1937) ("ordered liberty").

[25] Chambers v. Florida, 309 U. S. 227, 236 (1940) (Fourteenth Amendment protects people "charged with or suspected of crime"). But in other cases there is language which sounds as if the Due Process Clause, except for its effect in restraining substantive laws of states, is limited to the trial itself. *E.g.*, Frank v. Mangum, 327 U. S. 309, 340 (1915); Twining v. New Jersey, 211 U. S. 78, 110 (1908) ("Due process requires that the court . . . shall have jurisdiction . . . and that there shall be notice and opportunity for hearing."). But such restrictive language has been used in cases involving only the trial itself; pre-trial irregularities were not under consideration.

[26] *Cf.* Malinski v. New York, 324 U. S. 401, 414 (1945) (Mr. Justice Frankfurter concurring).

[27] *Cf.* Hebert v. Louisiana, 272 U. S. 312, 316 (1926).

[28] 314 U. S. 219 (1941); *accord*, Lyons v. Oklahoma, 322 U. S. 596 (1944).

[29] 314 U. S. 219, 236 (1941).

It thus appears that the pressure-abuses test is not a radical departure in the theory of due process. But in practice the test obviously carries the Clause into new areas, and the question which immediately arises is: How far will this extension of application go? If the Court now frankly sets about to reform the manners of state police officials, will there be any stopping place short of complete standardization of police and court procedure throughout the country?

One answer to this widespread fear is that the Court has a long tradition of self-restraint on due process questions. The cases are full of statements that the states are free to choose their own methods for dealing with crime so long as "fundamental rights of the prisoner shall not be taken from him arbitrarily."[30] "We adhere to this policy of self-restraint and will not use this great centralizing Amendment to standardize administration of justice and stagnate local variations in practice."[31]

Certainly it is to be hoped that the Court will continue to recognize the value of local responsibility and initiative in the administration of justice. If the Court sits over the nation exercising its conscience on every detail of police procedure, state courts and legislatures will tend to abdicate their duties. State citizens will learn to feel that the solution to every police abuse comes, not from local and state initiative, but from the remote and standardizing opinions of the Court in Washington. Local experimentation will die along with local consciences. But if the police abuses are as gross as were those in the cases last summer, perhaps occasional interference from the Supreme Court will prove to be just the spur needed by state citizens and courts.

Pressure-abuses Test and Law Enforcement

It remains to be considered whether the new test on admissibility is desirable from the standpoint of its effect on law enforcement.

Miss Irene Savidge and Sir Leo Money were sitting on a bench in Hyde Park in 1928 when they were arrested by two policemen on a charge of behaving "in a manner reasonably likely to offend against public decency." They were taken before a magistrate, who dismissed the charge, but later the Director of Public Prosecutions asked that a statement be obtained from Miss Savidge. She was visited at her place of employment and voluntarily agreed to attend an inquiry at Scotland Yard. The inquiry lasted about four hours. Tea was served at four o'clock, and Miss Savidge and the two officers enjoyed a cigarette apiece. About six-thirty Miss Savidge was driven home by the chief inspector.[32]

[30] Frank v. Mangum, 327 U. S. 309, 334 (1915); Avery v. Alabama, 308 U. S. 444, 446 (1940) (Fourteenth Amendment "not intended to bring to the test of a decision of this Court every ruling made in the course of a state trial").

[31] Fay v. New York, 332 U. S. 261, 295 (1947).

[32] Reported in National Commission on Law Observance and Enforcement, Report No. 11, *Lawlessness in Law Enforcement*, 259-261 (1931).

This interrogation of Miss Savidge precipitated a debate on the floor of Commons, a commission of three to investigate the case, and a Royal Commission of eight to investigate the entire field of police powers and procedure—so sensitive are the English to police abuses!

The English police are told that after they have made an arrest they must forego any questioning at all until the prisoner is in the police station.[33] Then the charge is explained to the prisoner, and he is told that he is not obliged to talk but may do so if he wishes and that anything said may be used in evidence. Even if the prisoner then chooses to make a statement, no questions may be asked him except to clear up ambiguities. If the police have made no arrest but are merely seeking a statement from a prospective witness, it is suggested that they preface their remarks as follows: "I am a police officer. I am making inquiries into (so-and-so), and I want to know anything you can tell me about it. It is a serious matter, and I must warn you to be careful what you say."[34]

The new pressure-abuses test is a development in the direction of England, but the Supreme Court in this test is far indeed from prescribing English rules for our police.[35] The Court is not attempting to outlaw all arrests on suspicion nor all questioning before arraignment. In the *Watts* case the Court said that the evil aimed at was "protracted, systematic and uncontrolled subjection of an accused to interrogation."[36] It may be that the Court would even sanction an inquisitorial system modeled on that of the Continent provided the state adopting it also adopted that system's safeguards.[37] The attempt is to attain, whatever the system, the "rudimentary requirements of a civilized order."[38]

In 1931 the Wickersham Commission reported that the extortion of confessions by the police by mental or physical pressure was widespread in this country.[39] Although it may be hoped that such abuses are less

[33] Royal Commission on Police Powers and Procedure, CMD. No. 3297 at 114. Quoted 3 WIGMORE, EVIDENCE §847.

[34] *Ibid.*

[35] It is true, of course, that the problem of law enforcement in England is different from that in this country. England's well-selected and well-trained police operate in a small country and deal with a society which has a low crime rate and a strong tradition of respect for the police and of co-operation with them. But England and America are alike in sharing the accusatorial, as opposed to the inquisitorial system; in both countries formal presentment and the privilege against self-incrimination are basic assumptions in the administration of justice. Hence we may expect to learn something from England's experience in the hope of moving toward the "order, dignity, urbanity, and dispatch" which seem to characterize her criminal law. See HOWARD, CRIMINAL JUSTICE IN ENGLAND (1931).

[36] 338 U. S. 49 (1949).

[37] *Ibid.* The Court pointed out that under the accusatorial system the accused is "protected by the disinterestedness of the judge in the presence of counsel. See Keedy, *The Preliminary Investigation of Crime in France,* 88 U. OF PA. L. REV., 692, 708-712 (1940)."

[38] *Ibid.*

[39] National Commission on Law Observance and Enforcement, *op. cit. supra* note 32, at 153.

frequent now, the three cases of last summer indicate that long detentions and protracted examinations are not yet unknown. It has often been argued that such practices are necessary to law enforcement.[40] But England and those American cities which are almost completely free of the third degree provide a powerful counterargument.[41] What the third degree gains in the immediate case it seems to lose in the long run. When illegal procedures are adopted to achieve a worthy end, not only are the liberties of the individual infringed, but the police sacrifice some of the public's respect and willingness to co-operate. Secret detention naturally tempts to a distortion in Court of the facts of the detention. The end result is that the police are demoralized, and the public, suspecting abuse, fails to hold the police in the high esteem which proper enforcement of the law demands.[42] It seems logical to assume, moreover, that the possibilty of illegal detention and questioning discourages scientific investigation and leads to reliance on "unimaginative crude force."[43]

It is not within the scope of this note to say what the precise limitations on pre-arraignment police practices should be. But surely detention on mere suspicion of from five to seven days, deprivation of counsel and friends, and intensive questioning through the detention are an unjustifiable invasion of the liberty of one who is presumed to be innocent. Furthermore such practices, it is believed, are harmful in the long run to the police departments and to the cause of efficient law enforcement. Civil suits and criminal prosecutions against the officers have proved ineffective.[44] The exclusion of confessions obtained by such extreme abuses seems a salutary development in criminal law.

JOHN P. KENNEDY, JR.

Domestic Relations—Child's Interest in the Parental Relation—Suit by Infant for Enticement of Mother

One of the ideas most often asserted and most generally accepted in the field of jurisprudence in recent years is that law should be squared with the knowledge developed by the social sciences.[1] This does not

[40] For an excellent recent statement of this argument see Inbau, *The Confession Dilemma in the United States Supreme Court*, 43 ILL. L. REV. 442 (1948).

[41] See survey of third degree practices in fifteen representative cities, National Commission on Law Observance and Enforcement, *op. cit. supra* note 32, at 83-152, 188-189.

[42] *See* Chambers v. Florida, 309 U. S. 227, 240 n. 15 (1940).

[43] Haley v. Ohio, 332 U. S. 596, 606 (1948) (Mr. Justice Frankfurter concurring). See National Commission on Law Observance and Enforcement, *op. cit. supra* note 32, at 187-189; 8 WIGMORE, EVIDENCE §2251.

For a delightful discussion of the whole problem of police abuse see Warner, *How Can the Third Degree Be Eliminated?*, 1 BILL OF RIGHTS REV. 24 (1940). Also McCormick, *Admissibility of Confessions*, 24 TEXAS L. REV. 239 (1946).

[44] ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 28-31, 66 (1947).

[1] POUND, INTRODUCTION TO THE PHILOSOPHY OF LAW 98 (1922); CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 75 (1921).

mean that the law should bend and sway with every new theory in a field where many theories and theorists compete for attention; it does mean that social sciences bring to light a solid body of factual information, and that, to the extent that the law rests upon fact, it should take into account facts as they are demonstrated by the social sciences. A case which raises a problem upon which the social sciences shed genuine light is *Henson v. Thomas.*[2]

In that case two minor children, suing by their father as next friend, asked for damages from a third person, alleging that from time to time that person enticed their mother from the family home for the purpose of engaging in criminal conversation with her, thereby goading their father into leaving home. The alleged results of these acts were to disgrace the children socially, and to deprive them of the parental affection, training, and care of both their father and mother. From the trial court's overruling of a demurrer *ore tenus* to the complaint, the defendant appealed. In a 5-2 decision the Supreme Court of North Carolina reversed the trial court, declaring that no such cause of action is recognized in North Carolina.[3]

Mr. Justice Barnhill for the majority reasoned that: (1) Such a cause of action was not known at common law, and since no statute creates such a cause of action the court is "not permitted to find *a way out* [italics added] for plaintiffs by engaging in judicial empiricism," and (2) "It is not for the courts to convert the home into a commercial enterprise in which each member of the group has a right to seek legal redress for the loss of its benefits."[4]

"No one would question the fact that a child has an interest in all the benefits of the family circle," acknowledges the majority,[5] but any consideration of those interests in reaching the instant decision is neglected. The interests of the child in an undisturbed home include those of an economic nature, such as food, clothing, and physical care; those of the personality, such as psychologic support, affection, and moral training; those in the nature of honor, such as social acceptability, and a name free from the taint of immorality.

The child's economic interest in the parental relationship goes beyond the bare minimum of support. The maximum benefits from the family income are realized only when both parents are present in the home. Where the mother is absent, part of the income is used to provide substitutes for her care, management, and service. Each member of the family suffers a proportional economic loss. Where the father is absent but is meeting the obligation of support, an economic loss is sus-

[2] 231 N. C. 173, 56 S. E. 2d 432 (1949).
[3] Henson v. Thomas, 231 N. C. 173, 176, 56 S. E. 2d 432, 434 (1949).
[4] *Ibid.*
[5] Henson v. Thomas, 231 N. C. 173, 175, 56 S. E. 2d at 434 (1949).

tained through similar considerations. The division of income between two households prevents the family members from receiving benefits equal to that of an undisturbed family unit. Where the father is absent and the burden of support is shifted to the mother, a greater economic loss is sustained by each family member.

In a study in North Carolina of the income of families supported solely by wage or salary in 1939, the following results were obtained: The median income of such families was $1,360. The one-child families having a male head and the wife present had an income of 92.6 per cent of the median; such families with the wife absent had an income of 78.7 per cent, and where such families had a female head, the income was only 65 per cent of the median.[6] The composition of the family group has a marked bearing on the adequacy of the income for the benefit of the family members.

The child has an interest in the support and care of its parents because of their effect on his physical and mental health. Common sense and the conclusions of psychologists' studies agree that the child's sense of security and well-being is based upon its early experience of parental care and affection.[7]

In the following summation from the work of an eminent psychiatrist and physiologist[8] it will be noted that it is not the overt "breaking" of the home that affects the child so much as the disharmony, resentment, contempt, and conflicts in the relations of the parents. In the instant case such strained relations are aggravated, if not initiated by the defendant's wrongful interference.

The family structure is the continuing solid support which is necessary to the child's physical existence. The loss of such support arouses fear in the child just as the loss of the support of *terra firma* during an earthquake may cause insane fright in adults. The initial physical support is from the mother's feeding, clothing and nursing. Later, the father and siblings contribute to the life of the child. The child directly experiences the loss of support by separation from the parents, discord and quarrels, and feelings of insecurity from disharmony between the parents. The deprivation of assistance can only arouse anxiety and feelings of insupport in the helpless child. The breaking up of parents is likely to divide the child's loyalties within himself and produce feelings of insecurity. "Thus 'growing-up' involves a graded series of removals of support, and if a firm, resilient structuration of personality is to result, these removals should not be too alarming or too abruptly imposed."[9]

[6] *What of Children in North Carolina,* Report of a Study by The Committee on Services for Youth, State of North Carolina State Planning Board, 1947, p. 20.

[7] Shirley and Poyntz, *The Influences of Separation from the Mother on Children's Emotional Responses,* 12 JOURNAL OF PSYCHOLOGY 251 (1941).

[8] MURRAY, EXPLORATIONS IN PERSONALITY 292 (1938).

[9] *Ibid.*

A study of these matters from another perspective corroborates these observations. In a comparison of the backgrounds of 56 psychotic children from Massachusetts' mental hospitals with those of 56 average children of the same age and sex, thirty of the psychotic group, as compared with 10 in the average group, had lost either father or mother by death, divorce, separation or desertion. The study concludes: ". . . it can be stated without qualification that children have the right to expect of their homes and society the same privileges that we as adults, demand in our lives, namely, security, justice, love and opportunity."[10]

The home is the child's primary and continuing source of training in the traits of honesty and acceptable social conduct. The loss of parental care and affection deprives the child of essential emotional nourishment. The parent's sympathy is the child's first lesson in kindness and consideration of the interests of others.[11] Parental aid in adversities is the child's source of encouragement to renewed confidence and courage.

From the standpoint of pride and honor, the child also has an interest in a life of normal social relations, free from the stigma of immorality and disgrace brought about by the acts of an intruder in the family group. There can be no other conclusion than this, that the intruder who lures away a parent and breaks up the home has committed an offense inflicting a grievous injury upon the innocent child. There is no reason why such a wrongdoer should not bear the financial consequences of his misdeeds.

Consideration of the interests of society in the fostering of undisturbed family units leads to the same conclusion. The interests of society are not thwarted, but are furthered by securing the interests of the child in this situation. Society has an interest in being free from the shifted economic burden of care and support of the children, in having mentally mature and psychologically adjusted citizens, and in having citizens instilled with moral consciousness and ethical conduct.

Increasingly the burden of support in the broken home is shifted to society. North Carolina, recognizing the need to conserve and strengthen family life, assumed the burden of financial assistance in 1937 by its *Aid to Dependent Children Act*.[12] The appropriations of the state alone for this service increased from $520,000 in 1944-1945 to $1,467,500 in 1949-1950.[13] In 1942 the number of children in families receiving grants in aid was 21,950; at the close of 1948 the number had increased

[10] Yerbury and Newell, *Genetic and Environmental Factors in Psychoses of Children*, 100 AMERICAN JOURNAL OF PSYCHIATRY 599 (1944).

[11] Bridges, *Factors Contributing to Juvenile Delinquency*, 17 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 351 (1926).

[12] N. C. GEN. STAT. §108-44 (1943).

[13] Linquist and Woodson, *Families Receiving Aid to Dependent Children in North Carolina*, North Carolina State Board of Public Welfare, Information Bulletin No. 14 (1949) p. 5. In 1944-1945 funds from federal sources were $956,381 and from county sources were $432,460.

to 29,388. More than half these families were headed by the mother, and "[a]lmost 20 per cent of the mothers were carrying on alone because their husbands were absent from the home and providing no support for the family. Divorce, separation, or desertion was the explanation for most of these broken homes."[14] Where the maintenance of any semblance of a family unit is not possible, the economic cost of support is shifted to society through state services and private charities.[15]

Society has an interest in having a maximum of emotionally stable and mentally healthy individuals in its composition. This interest goes beyond the mere public expense of those children requiring institutional care. It goes to society's interest in being free from the offenses of juvenile delinquents and adult criminals. Here the home is the first line of action for producing morally, as well as emotionally, adjusted citizens.

Studies of the backgrounds of juvenile delinquents reveal a persistently prominent frequency of broken homes.[16] In a 1923 study of 1,649 boys in New York state correctional institutions, 45.2 per cent came from broken homes. The study and its comparison with a control group showed "an intimate association between abnormal marital relations of parents, i.e., death, divorce, or separation among parents, and juvenile delinquency."[17] Of the 12,052 delinquency cases handled by the North Carolina juvenile courts from 1939 to 1944, 49.5 per cent of the children were reported as from broken homes.[18] One writer, viewing similar results, remarks, "We need not repeat the truism that adult crime is to a large degree rooted in the delinquency of early life."[19]

Not only should law be squared with facts revealed by the social sciences, but law should also take morality into account. The majority opinion in the instant case avoids any intimation that justice according to law should bear a relationship to moral principles. By man's inherent moral discernment the act here complained of is immoral and constitutes a grievous wrong. Of all his physical desires man perceives none to have a higher value or produce a higher good than those resulting in the creation of the family and parent-child relationships.[20] The instant decision "finds a way out" for one who has violated these morally valu-

[14] *Id.* at 10.

[15] *What of Children in North Carolina, op. cit. supra* note 6, at 11. Private finances furnish 94 per cent of total expenditures for institutional care of children in North Carolina.

[16] A representative selection from the many studies on this matter is summarized in TAPPAN, JUVENILE DELINQUENCY 134 (1949).

[17] Slawson, *Marital Relations of Parents and Juvenile Delinquency,* 8 JOURNAL OF JUVENILE DELINQUENCY 278, 285 (1923).

[18] SANDERS, JUVENILE COURTS IN NORTH CAROLINA 94, 98 (1948). In the delinquency cases where the marital status of the parents was known, the home was broken by divorce, separation, or desertion in 13.4 per cent of the cases handled by courts in rural counties, and in 19.2 per cent of the cases handled by courts in cities.

[19] Henting, *Juvenile Delinquency and Adult Disorganization,* 35 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 87 (1944).

[20] 6 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 65 (1931).

able desires of man and turned them to the satisfaction of his own lust.

Possibly because of the reasons underlying the generally halting development of family law[21] the securing of the interests of children has been the most belated. The right of the child to its very life was secured only after centuries of crusading and education by the Judaic, Christian, and Mohammedan religions.[22] The Roman father could kill or sell his child into slavery at his will.[23] In English common law the father could not kill or sell his child, but in other matters his power was unquestioned. The courts would not interfere with his custody of the child, despite the father's open dereliction, and the child had no right to enforce parental care or support.[24] In America, the child's right to support is made a legal duty of the parent by statute, and it is not dependent upon the parent's custody or moral inclinations.[25] Recent legal history has been one of increasing legislative and judicial concern with the welfare and the rights of children.[26] Some courts recognize that the early common law concept of the family unit, wherein all rights were vested in the husband and father, has through centuries of change in social structures been replaced by the concept of the family as a cooperative unit with mutual rights and duties among all the members. In viewing this change as reflected in modern legislation and judicial rules, these courts hold that the minor child has legally protected rights in the family relationship against interference by outsiders, and that such an interference as an enticement of a parent from the home is an invasion of the child's rights for which the child can maintain a suit for damages.[27]

In refusing the child's cause of action in the instant case, the court referred to the decision in *Small v. Morrison*.[28] That case held that

[21] COOLEY, TORTS 464 (3d ed. 1906); HARPER, TORTS 553 (1933); POLLOCK, TORTS 225 (12th ed. 1923); Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177, 187 (1916).

[22] Fisher, *Pater Familias—A Cooperative Enterprise*, 41 ILL. L. REV. 27 (1946). Literature of early ages offers the accounts of Agamemnon who sacrificed Iphigenia to procure a fair wind for Troy, of Jephthah who slew his daughter pursuant to a vow made before battle, and of Virginius who killed his only child rather than surrender her into the wardship of the unjust judge.

[23] 3 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 375 (1931).

[24] Wellesley v. Duke of Beaufort, 2 Russ. 1, 38 Eng. Rep. 236 (1827).

[25] 4 VERNIER, AMERICAN FAMILY LAWS 18 (1936).

[26] Fisher, *Pater Familias—A Cooperative Enterprise*, 41 ILL. L. REV. 35-46 (1946). A recent judical enlargement of such rights is that of the child to recover for a prenatal injury in Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N. E. 2d 334 (1949), 28 N. C. L. REV. 245 (1950).

[27] Daily v. Parker, 152 F. 2d 174 (7th Cir. 1945); Russick v. Hicks, 85 F. Supp. 281 (W. D. Mich. 1949); Johnson v. Luhman, 330 Ill. App. 598, 71 N. E. 2d 810 (1947); Miller v. Monsen, 228 Minn. 400, 27 N. W. 2d 543 (1949). *Contra:* Edler v. MacAlpine-Downie, 180 F. 2d 385 (D. C. Cir. 1950); McMillan v. Taylor, 160 F. 2d 221 (D. C. Cir. 1946); Rudley v. Tobias, 84 Cal. App. 2d 454, 190 P. 2d 984 (1948); Taylor v. Keefe, 134 Conn. 145, 56 A. 2d 768 (1947); Morrow v. Yannantuono, 152 Misc. 134, 273 N. Y. Supp. 912 (Sup. Ct. 1934); Garza v. Garza, 209 S. W. 2d 1012 (Tex. Civ. App. 1948).

[28] 185 N. C. 577, 118 S. E. 12 (1923).

an unemancipated minor child, living as a member of the family, may not maintain an action against its father for a negligent injury. There, the court felt that the interests of society in the preservation of the family as an economic and educational institution, and the interests of the other family members in these same benefits forbade such an intra-family lawsuit.[29] The reasons underlying this policy are lacking in the instant case. Indeed, a situation more violently dissimilar is difficult to picture! Here the family is already disrupted.[30] Here the action is not against a parent but against one, not only a stranger to the family relationship, but an intruder whose very act was the causal force in destroying the home.

Precedents in North Carolina decisions recognize principles which would have sustained allowing the cause of action in the instance case.[31] A minor child living in the family home has been allowed to sue its father's employer for an injury inflicted by the father's negligence. The policy protecting the father did not extend to insulate the employer from such an action.[32] A minor child has been allowed to sue its parent directly for support,[33] although the child could not maintain such an action at common law[34] and no statute creates such a cause of action in the child. In the light of these decisions the court's contention in the instant case that it is powerless to provide a remedy is not persuasive.

RICHARD E. WARDLOW.

Eminent Domain—Principles and Procedure—Power to Condemn Dwelling-houses and Surrounding Premises for Highway Purposes

Eminent domain[1] is the power of the sovereign to take and use, alienate, or destroy for the benefit of the public any species of property whatsoever lying within its territorial jurisdiction.[2] It is, in effect, a funda-

[29] *Accord,* Villaret v. Villaret, 169 F. 2d 677 (D. C. Cir. 1948); Mesite v. Kirchenstein, 109 Conn. 77, 145 Atl. 753 (1929); Hewellette v. George, 68 Miss. 703, 9 So. 885 (1891); Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905); Wick v. Wick, 192 Wis. 260, 212 N. W. 787 (1927). *Contra:* Dunlap v. Dunlap, 84 N. H. 352, 150 Atl. 905 (1930); Lusk v. Lusk, 113 W. Va. 17, 166 S. E. 538 (1932).

[30] The policy preventing a minor child from suing its parent has been held inapplicable when the family unit was already disrupted. Green v. Green, 210 N. C. 147, 185 S. E. 651 (1936); Pickelsimer v. Critcher, 210 N. C. 779, 188 S. E. 313 (1936).

[31] For a discussion of the legal bases of such a cause of action and analagous North Carolina decisions see Note, 28 N. C. L. REV. 113 (1949).

[32] Wright v. Wright, 229 N. C. 503, 50 S. E. 2d 540 (1948).

[33] Green v. Green, 210 N. C. 147, 185 S. E. 651 (1936); Pickelsimer v. Critcher, 210 N. C. 779, 188 S. E. 313 (1936).

[34] Huke v. Huke, 44 Mo. App. 308 (1891); Mortimore v. Wright, 6 M. & W. 481, 151 Eng. Rep. 502 (1840); Shelton v. Springet, 11 C. B. 452, 138 Eng. Rep. 549 (1851).

[1] Grotius, an eminent publicist of the seventeenth century, originated the phrase. See Wissler v. Yadkin River Power Co., 158 N. C. 465, 74 S. E. 460 (1912).

[2] Griffith v. Southern Ry., 191 N. C. 84, 131 S. E. 413 (1926); Clifton v. Duplin Highway Comm'n, 183 N. C. 211, 111 S. E. 176 (1922); Jeffress v. Greenville, 154 N. C. 490, 70 S. E. 919 (1911).

mental condition attached to the ownership of property. Every title is in this respect defeasible.[3] The power is an inherent attribute of sovereignty.[4]

The fundamental limitation upon the right of eminent domain is that property can be condemned only for a public purpose.[5] No such provision is to be found in the North Carolina Constitution, but the principle is treated as so fundamental that statutes in violation thereof are held unconstitutional and void.[6] To meet this requirement, the use intended must be ". . . by or for the government, the general public, or some portion thereof *as such,* and not . . . by or for particular individuals or for the benefit of particular estates."[7] Many jurisdictions hold it sufficient if the intended use directly promotes the public welfare,[8] but North Carolina adopts a stricter test, holding that the general public must have the right to use the property.[9] Originally, property could be taken only for essential purposes, but the rule has been relaxed, so that now property can be taken for such non-essential purposes as parks, playgrounds, public buildings,[10] scenic highways,[11] cartways,[12] etc.[13] The question of whether a proposed condemnation is for a public purpose is open to

[3] Legal writers, in theorizing, often treat the power as arising from an implied condition in the original grant from the sovereign to the individual. The sovereign is said to have reserved the right to retake the property, should the interests of the public so require. Raleigh & G. R .R. v. Davis, 19 N. C. 451 (1837); MILLS, EMINENT DOMAIN §1 (1879).

[4] Although the Constitution of North Carolina contains no reference to eminent domain, it was held in 1837 that the power of the state to condemn is "indispensable, and incontestible." Raleigh & G. R. R. v. Davis, 19 N. C. 451 (1837); Jeffress v. Greenville, 154 N. C. 490, 70 S. E. 919 (1911); State v. Jones, 139 N. C. 613, 52 S. E. 240 (1905).

[5] Charlotte v. Heath, 226 N. C. 750, 40 S. E. 2d 600 (1946); Reed v. State Highway Comm'n, 209 N. C. 648, 184 S. E. 513 (1936); Yarborough v. North Carolina Park Comm'n, 196 N. C. 284, 145 S. E. 563 (1928); State v. Tyre Glen, 52 N. C. 321 (1859).

[6] Cozard v. Hardwood Co., 139 N. C. 283, 51 S. E. 932 (1905).

[7] Charlotte v. Heath, 226 N. C. 750, 40 S. E. 2d 600 (1946), quoting from Rindge Co. v. County of Los Angeles, 262 U. S. 700 (1922).

[8] Note, 15 N. C. L. REV. 361 (1937).

[9] Cozard v. Hardwood Co., 139 N. C. 283, 51 S. E. 932 (1905) (condemnation for a private railroad unconstitutional, even though the proposed use would have developed natural resources, attracted wealth and population, etc.); Cook v. Vickers, 141 N. C. 101, 53 S. E. 740 (1906) (sustaining condemnation for cartway purposes, under N. C. GEN. STAT. §136-68 *et seq.* (1943), inasmuch as cartways are open to the use of the public, even though laid out on application of, paid for by, and primarily intended for the use of, private individuals). The requirement is that the general public have the right to use, not that it actually use. And the terms upon which the public may use are subject to legislative regulation.

[10] Yarborough v. North Carolina Park Comm'n, 196 N. C. 284, 145 S. E. 563 (1928).

[11] Reed v. State Highway Comm'n, 209 N. C. 648, 184 S. E. 513 (1936).

[12] Parsons v. Wright, 223 N. C. 520, 27 S. E. 2d 534 (1943); Waldroup v. Ferguson, 213 N. C. 198, 195 S. E. 615 (1938); Cook v. Vickers, 141 N. C. 101, 53 S. E. 740 (1906).

[13] N. C. GEN. STAT. §40-2 (1943), and annotations, list a multiplicity of public and quasi-public corporations delegated the power of eminent domain.

judicial review;[14] but once it has been determined that the purpose is public, the wisdom, expediency, and proper extent of condemnation are matters primarily within the political discretion of the legislature and the grantee of the power.[15]

Although no provision in the North Carolina Constitution requires that just compensation be given for property taken under the power of eminent domain,[16] it was held in 1859 that any legislative act which attempts to take private property without just compensation is "unconstitutional and void."[17] The principle has never since been questioned.[18] It may be noted that laws passed in the proper exercise of governmental police powers which merely restrict the use of property, such as zoning ordinances, do not, properly speaking, take property by means of eminent domain, and therefore do not require compensation.[19] But governmental immunity extends no further, and compensation must be given for any direct encroachment upon property rights, even though the acts are done by express legislative authority, and in the proper exercise of governmental functions.[20]

[14] State Highway Comm'n v. Young, 200 N. C. 603, 158 S. E. 91 (1931); Yarborough v. North Carolina Park Comm'n, 196 N. C. 284, 145 S. E. 563 (1928). A legislative declaration that the condemnation is for a public purpose has persuasive, but not conclusive, weight. Reed v. State Highway Comm'n, 209 N. C. 648, 184 S. E. 513 (1936).

[15] Charlotte v. Heath, 226 N. C. 750, 40 S. E. 2d 600 (1946); Reed v. State Highway Comm'n, 209 N. C. 648, 184 S. E. 513 (1936); State Highway Comm'n v. Young, 200 N. C. 603, 158 S. E. 91 (1931); Yarborough v. North Carolina Park Comm'n, 196 N. C. 284, 145 S. E. 563 (1928). But the court has indicated that if there is bad faith, or manifest abuse of discretion, it will take cognizance of these matters. *See* Selma v. Nobles, 183 N. C. 322, 325, 111 S. E. 543, 544 (1922); Yadkin River Power Co. v. Wissler, 160 N. C. 269, 274, 76 S. E. 267, 269 (1912).

[16] U. S. CONST. AMEND. XIV, §1, ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law," ratified in 1868, was in 1896 construed to prohibit states from condemning land without giving just compensation. Chicago, B. & Q. Ry. v. Chicago, 166 U. S. 226 (1896). The Fifth Amendment, ". . . nor shall private property be taken for public use without just compensation," ratified in 1791, binds only the Federal Government. Staton v. Norfolk & C. R. R., 111 N. C. 278, 16 S. E. 181 (1892); Raleigh & G. R. R. v. Davis, 19 N. C. 451 (1837).

[17] State v. Tyre Glen, 52 N. C. 321 (1859). Early decisions sought to derive the necessity for compensation from N. C. CONST. Art. I, §17: "No person ought to be . . . deprived of . . . property but by the law of the land." State v. Tyre Glen, 52 N. C. 321 (1859); Raleigh & G. R. R. v. Davis, 19 N. C. 451 (1837). But later decisions proudly recognize that the principle is based solely on judicial fiat. Parks v. Board of County Comm'rs, 186 N. C. 490, 120 S. E. 5 (1923); State v. Lyle, 100 N. C. 497, 6 S. E. 379 (1888); Johnston v. Rankin, 70 N. C. 550 (1874).

[18] McKinney v. Deneen, 231 N. C. 540, 58 S. E. 2d 107 (1950); Lewis v. State Highway Comm'n, 228 N. C. 618, 46 S. E. 2d 705 (1948); Staton v. Norfolk & C. R. R., 111 N. C. 278, 16 S. E. 181 (1892); Johnston v. Rankin, 70 N. C. 550 (1874).

[19] McKinney v. Deneen, 231 N. C. 540, 58 S. E. 2d 107 (1950); *In re* Parker, 214 N. C. 51, 197 S. E. 706 (1938). *Cf.* State v. Tyre Glen, 52 N. C. 321 (1859). *But see* N. C. GEN. STAT. §136-19 (1943), concerning scenic easements. (No cases.)

[20] Clinard v. Kernersville, 215 N. C. 745, 3 S. E. 2d 267 (1939) (pollution of stream by discharge from municipal sewage disposal plant); Rhodes v. Durham,

The measure of damages is the difference between the fair market value of the entire tract immediately before the taking, and the fair market value of the remainder of the tract immediately after the taking.[21] The legislature may provide that damages are to be reduced by special and general benefits,[22] or by special benefits alone, or that no benefits shall be offset.[23] At different times in our history, all three rules have obtained, and all have been sustained by our court as "just compensation."[24] Usually, only special benefits are offset.[25]

The North Carolina Constitution declares that no person ought to be deprived of property "but by the law of the land."[26] With respect to condemnation, the effect of the provision is to require that the owner be given reasonable notice, and a fair opportunity to be heard, when compensation is fixed.[27] It is not necessary that he be heard as to the necessity for, or proper extent of, condemnation, that question residing within the legislative discretion.[28] It may be noted that the owner has

165 N. C. 679, 81 S. E. 938 (1914) (pollution of air by noxious odors from municipal sewage disposal plant); Hines v. Rocky Mount, 162 N. C. 409, 78 S. E. 510 (1913) (pollution of air by "foul stench" from municipal garbage and refuse dump).

[21] Proctor v. State Highway Comm'n, 230 N. C. 687, 55 S. E. 2d 479 (1949); Nantahala Power & Light Co. v. Sloan, 227 N. C. 151, 41 S. E. 2d 361 (1947); Nantahala Power & Light Co. v. Carringer, 220 N. C. 57, 16 S. E. 2d 453 (1941). In assessing compensation, the condemner is considered as having taken an interest in the remainder of the tract, to the extent of the depreciation in its market value. Nantahala Power & Light Co. v. Rogers, 207 N. C. 751, 175 S. E. 692 (1935); Western Carolina Power Co. v. Hayes, 193 N. C. 104, 136 S. E. 353 (1927); *cf.* Clinard v. Kernersville, 215 N. C. 745, 3 S. E. 2d 267 (1939).

[22] Special benefits are increases in property value "peculiar to the owner's land and not in common with other landowners in the vicinity." Carolina Power & Light Co. v. Reeves, 198 N. C. 404, 151 S. E. 871 (1930); Ayden v. Lancaster, 197 N. C. 556, 150 S. E. 40 (1929); Campbell v. Road Comm'rs, 173 N. C. 500, 92 S. E. 323 (1917). Any increase in property value shared by others in the vicinity is a general, not a special, benefit. Ward v. Waynesville, 199 N. C. 273, 154 S. E. 322 (1930).

[23] Miller v. Asheville, 112 N. C. 759, 16 S. E. 762 (1893); Elks v. Comm'rs, 179 N. C. 241, 102 S. E. 414 (1920); Lanier v. Greenville, 174 N. C. 311, 93 S. E. 850 (1917); Southport, W. & D. R. R. v. Platt Land, 133 N. C. 266, 45 S. E. 589 (1903).

[24] Elks v. Comm'rs, 179 N. C. 241, 102 S. E. 414 (1920); Southport, W. & D. R. R. v. Platt Land, 133 N. C. 266, 45 S. E. 589 (1903); Miller v. Asheville, 112 N. C. 759, 16 S. E. 762 (1893).

[25] Under N. C. GEN. STAT. §40-18 (1943) only special benefits may be offset by those corporations authorized to condemn by N. C. GEN. STAT. §40-2 (1943). But the State Highway and Public Works Commission, under N. C. GEN. STAT. §136-19 (1943), may offset both general and special benefits. See Elks v. Comm'rs, 179 N. C. 241, 245, 102 S. E. 414, 416 (1920), for an interesting rationale of the distinction.

[26] N. C. CONST. Art. I, §17. This language traces its lineage to section 29 of the Magna Carta.

[27] State Highway Comm'n v. Young, 200 N. C. 603, 158 S. E. 91 (1931); Yarborough v. North Carolina Park Comm'n, 196 N. C. 284, 145 S. E. 563 (1928); State v. Jones, 139 N. C. 613, 52 S. E. 240 (1905).

[28] State Highway Comm'n, v. Young, 200 N. C. 603, 158 S. E. 91 (1931); Jennings v. State Highway Comm'n, 183 N. C. 68, 110 S. E. 583 (1922); Jeffress v. Greenville, 154 N. C. 490, 70 S. E. 919 (1911); State v. Jones, 139 N. C. 613, 52 S. E. 240 (1905).

no constitutional right to a jury trial in condemnation proceedings, although N. C. GEN. STAT. §40-20 (1943) grants that privilege on appeal to the Superior Court.[29]

Extensive delegation of the power of eminent domain has frequently given rise to complex problems of statutory construction. In a recent case[30] the North Carolina Supreme Court questioned whether N. C. GEN. STAT. §40-10 (1943)[31] which exempts dwellings, gardens, etc., from condemnation by the corporations listed in N. C. GEN. STAT. §40-2 (1943), also exempts such property from condemnation for highway purposes by the State Highway and Public Works Commission (hereinafter referred to as the SH&PWC).[32]

"In the absence of constitutional or statutory restriction, the power of the State to appropriate private property to public use exends to every species of property within its territorial jurisdiction."[33] There are no constitutional restrictions in this state, and if any property is exempt from condemnation, it is only because some statute so provides.[34] But it is a familiar principle that inasmuch as statutes dele-

[29] N. C. CONST. Art. I, §19. A condemnation proceeding, in which the amount of damages is almost invariably the sole issue, "is not a controversy within the meaning of the Bill of Rights, nor such a trial by jury as that instrument declares shall be 'sacred and inviolable.'" Raleigh & G. R. R. v. Davis, 19 N. C. 451 (1837); State v. Floyd, 204 N. C. 291, 168 S. E. 222 (1933); State v. Jones, 139 N. C. 613, 52 S. E. 240 (1905).

[30] Proctor v. State Highway Comm'r, 230 N. C. 687, 694, 55 S. E. 2d 479, 484 (1949).

[31] "No such corporation shall be allowed to have condemned to its use, without the consent of the owner, his dwelling-house, yard, kitchen, garden, or burial ground, unless condemnation of such property is expressly authorized in its charter or by some provision of this code."

[32] The *State Highway Commission* was created in 1915. Until 1921 it was a purely advisory body, with primary control of all highways still vested in the counties, towns, and other political subdivisions of the state. In 1921, to meet the requirements of federal aid appropriations, the key act for the present system of state highways was passed. This act created a statewide system of about 5,500 miles of highways. In 1927 the State Highway Commission was empowered to take over additional roads, not to exceed 20% of what it had already taken over. Soon after, Governor Gardner became convinced that the best course was to discontinue entirely state grants of aid to counties for roads, and instead to centralize control of all public highways in one agency, the State Highway Commission. In 1931 this was done, but the State Highway Commission was authorized to decline to take over certain highways, in its discretion. In 1933 the State Highway Commission was combined with the Public Works Commission and became the State Highway and Public Works Commission. N. C. P. L. 1915, c. 113; N. C. P. L. 1921, c. 2; N. C. P. L. 1927, c. 200; N. C. P. L. 1931, c. 145; N. C. P. L. 1933, c. 172; Pate, *Highway Administration in the South* (1935)

[33] Parks v. Board of County Comm'rs, 186 N. C. 490, 500, 120 S. E. 46, 51 (1923); Selma v. Nobles, 183 N. C. 322, 111 S. E. 543 (1922); Clifton v. Duplin Highway Comm'n, 183 N. C. 211, 111 S. E. 176 (1922).

[34] Where an act gives "broadly and without restriction the right to condemn private property for highway purposes, the right so given will include dwelling-houses, tree and yards . . . unless such power is excluded under general or other State laws applicable." Parks v. Board of County Comm'rs, 186 N. C. 490, 500, 120 S. E. 46, 51 (1923); Clifton v. Duplin Highway Comm'n, 183 N. C. 211, 111 S. E. 176 (1922); Raleigh, C. & S. R. R. v. Mecklenburg Mfg. Co., 166 N. C. 168, 180, 82 S. E. 5, 10 (1914).

gating the power of eminent domain are "in derogation of the ordinary rights of private ownership" they are to be construed strictly against the delegatee.[35]

N. C. GEN. STAT. §136-19 (1943) delegates to the SH&PWC the power of condemnation for highway purposes[36] and provides that in exercising that power, "the ways, means, methods, and procedure of chapter 40, entitled 'Eminent Domain,' shall be used by it as near as the same is suitable for the purposes of this section." Does this provision indirectly restrict the power of the SH&PWC to condemn dwellings, gardens, etc., for highway purposes? Article I of Chapter 40 enumerates certain corporations and delegates to them the power of eminent domain, with certain special provisions in that regard, including the provision in question, that no such corporation shall condemn dwellings, gardens, etc., unless expressly authorized. Article II prescribes in detail the procedure to be followed in condemnation proceedings, and except for the prefatory provision in N. C. GEN. STAT. §40-11 (1943), is not concerned with the nature and extent of the power to condemn, but rather with the manner in which that power is to be exercised. Originally, the two Articles were codified in separate chapters,[37] but recent codifications have placed them in juxtaposition.[38] It is apparent that the two Articles are distinct, one delegating the power of eminent domain to certain corporations, and delineating the nature and extent of that power; and the other prescribing the special proceeding to be followed when that power is exercised.

As noted, N. C. GEN. STAT. 136-19, granting to the SH&PWC the *power,* makes reference to Chapter 40 only for the "ways, means, methods, and procedures." It, therefore, seems certain that the legislative intent was to provide that the SH&PWC should exercise its power of eminent domain in the manner prescribed in Article II of Chapter 40, but that an indirect limitation of the power itself was not contemplated. Neither Article I of Chapter 40, generally, nor N. C. GEN. STAT. §40-10 (1943), specifically, is concerned with "ways, means, methods, and procedure."

[35] Board of Education v. Forrest, 193 N. C. 519, 137 S. E. 431 (1927); Griffith v. Southern Ry., 191 N. C. 84, 131 S. E. 413 (1926); Carolina & N. R. R. v. Pennearden Lumber Co., 132 N. C. 644, 44 S. E. 348 (1903).

[36] N. C. GEN. STAT. §136-19 (1943) actually contains two distinct statutes, one passed in the initial act of 1921, dealing with the right to condemn for the state highway system; and the other passed in 1935, dealing with the right to condemn for the Blue Ridge Parkway. The two statutes are markedly dissimilar, and their codification into one section has wrought much confusion.

[37] The Code of 1883 placed what is now Article I in Chapter 38, Vol. I, entitled "Internal Improvements"; and placed what is now Article II in Chapter 49, Vol. I, entitled "Railroad and Telegraph Companies." The corporations delegated the power of eminent domain by Chapter 38 were to follow the procedure set out in Chapter 49.

[38] Rev. 1905, Chapter 61, Art. V; C. S. (1919), Chapter 33; N. C. GEN. STAT. (1943), Chapter 40.

Even if the exemption of dwellings, gardens, etc., were considered a way, means, method, or procedure, the same are to be applicable to the SH&PWC only insofar as "suitable for the purposes of this section." If the SH&PWC were forced to so locate its routes as to avoid every dwelling-house, garden, yard, kitchen, and burial ground encountered, the development of a state highway system would be seriously impeded. Such a result would hardly be compatible with the purposes of N. C. GEN. STAT. §136-19 (1943).

N. C. Sess. Laws 1947, c. 806, added a new subsection to N. C. GEN. STAT. §40-2 (1943) which, in effect, gives the SH&PWC the power to condemn land for facilities, a power not theretofore conferred upon it.[39] Inasmuch as the corporations listed in N. C. GEN. STAT. §40-2 (1943) are subject to the provisions of N. C. GEN. STAT. §40-10 (1943),[40] it would seem that in granting this additional power by amending N. C. GEN. STAT. §40-2 (1943), instead of by amending N. C. GEN. STAT. §136-19 (1943), the legislature intended to subject the power of condemnation *for facilities purposes* to the "dwelling house" limitation imposed in N. C. GEN. STAT. §40-10 (1943). But inasmuch as N. C. GEN. STAT. §136-19 (1943) grants the SH&PWC the power of eminent domain for highway purposes, and N. C. GEN. STAT. §40-2 (1943) grants only the additional power of eminent domain for facilities purposes, only that latter power should be limited by the provisions of N. C. GEN STAT. §40-10 (1943). It is hardly probable that the legislature intended, by the 1947 amendment, to limit indirectly the broad powers of condemnation for highway purposes elsewhere conferred upon the SH&PWC.

LLOYD S. ELKINS, JR.

Federal Income Taxation—Sale of Corporate Assets—Capital Gains Tax

When a corporation wishes to sell its assets the problem of capital gains taxable to the corporation arises. If there has been an appreciation in the value of the assets, as usually there has been, the selling corporation will be subject to a heavy capital gains tax on this appreciation, and, in addition, its stockholders will be subject to a capital gains tax on the proceeds of the sale when they are distributed, if the distribu-

[39] "The right of eminent domain may, under the provisions of this chapter, be exercised . . . by the bodies politic, corporation, or persons following. . . .

"9. The state highway and public works commission, for the purpose of acquiring such land or property as may be necessary for the erection of or addition to any building or buildings for the purpose of housing its offices, shops, garages, for storage of supplies, material or equipment, for housing, caring or providing for prisoners, or for any other purpose necessary in its work, including the administration of the state prison system."

[40] Clifton v. Duplin Highway Comm'n, 183 N. C. 211, 111 S. E. 176 (1922); Raleigh, C. & S. R. R. v. Mecklenburg Mfg. Co., 166 N. C. 168, 180, 82 S. E. 5, 10 (1914).

tion is in retirement of the outstanding stock under a plan of complete or partial liquidation.[1] Thus, a heavy double taxation may result from a sale of corporate assets. To avoid this, and so reduce taxes, several methods for the transfer of the selling corporation's assets have been devised.

One such possible method is to have the corporation liquidate and, upon liquidation, distribute its assets in kind to its stockholders in retirement of the outstanding stock. The stockholders may then sell the assets to the buyer. By the terms of U. S. Treas. Reg. 111, §29.22(a)-20 (1943), distribution in kind of assets on liquidation of a corporation is not subject to a capital gains tax. Thus, here, the only tax on the entire transaction is that levied upon the proceeds of the sale of the assets by the stockholders. By using this method the buyer gets only the desired assets of the corporation, free of its unwanted liabilities. It would seem desirable then to use this method of transfering the assets.

However, in *Court Holding Co. v. Commissioner*,[2] perhaps the most widely recognized case interpreting U. S. Treas. Reg. 111, §29.22(a)-20 (1943), the United States Supreme Court held that mere formal steps of liquidation and sale by the stockholders would not be permitted to disguise what was in substance a sale by the corporation. In that case, the petitioner, Court Holding Co., was a corporation formed to hold an apartment house as its only asset. The apartment house was leased and the lessees, after approximately one year's occupancy, stated their desire to purchase the property. Thereupon the two stockholders of petitioner, who were also two of the three directors, began negotiations and terms were eventually agreed upon, satisfactory both to the lessees and to the stockholders and directors of petitioner. The directors of petitioner, however, refused to execute the contract of sale because a heavy capital gains tax would result. On the same day, the directors voted to liquidate and distribute the assets in kind to the stockholders in return for all the outstanding stock. This being done, the stockholders, three days later, sold the apartment to the lessees, using the same terms previously agreed upon between the lessees and the directors. Though all the steps required by the regulation were carried out, the Court held that petitioner corporation was subject to a capital gains tax on the sale, with the result that the double tax was imposed. The Court reasoned that since the corporation had done all the negotiating and had agreed upon terms which the stockholders only carried out, the stockholders were mere conduits for a sale which in substance was one by the corporation.

From this decision it appeared that U. S. Treas. Reg. 111, §29.22

[1] INT. REV. CODE §115(c); Adams, *Some Tax Aspects of the Complete and Partial Liquidation of Corporations*, 28 N. C. L. REV. 36 (1949).
[2] 324 U. S. 331 (1945).

(a)-20 (1943) would not exempt a liquidation from the capital gains tax if such liquidation were made for the sole purpose of consummating a sale of the corporation's assets and avoiding a tax to the corporation. This principle is in line with the Court's policy of looking through a transaction to discover the substance and taxing it accordingly.[3]

Recently, however, *United States v. Cumberland Public Service Co.*,[4] a case involving the same regulation, was before the Court and it was there held that the corporation was not subject to the capital gains tax. There a closely held corporation was engaged in generating and distributing electric power, but the stockholders and directors, realizing the inability to compete with companies supplied with T.V.A. power, had offered to sell all the outstanding stock to an electric power cooperative using T.V.A. power. The cooperative refused to purchase the stock but offered to purchase certain of petitioner's assets. Petitioner rejected this offer due to the heavy capital gains tax involved in such a sale. Petitioner then called in an accountant to discuss a possible transfer of the assets which would avoid the double taxation. It was then decided that the petitioner should liquidate and distribute the assets to the stockholders who in turn would sell them to the cooperative.

These steps were carried out and the commissioner, relying upon the *Court Holding Co.* case, imposed a capital gains tax upon the petitioner. The Court of Claims, however, rejected the commissioner's claim,[5] reasoning that since the negotiations were started by the stockholders as such, rather than by the corporation, the *Court Holding Co.* rule should not apply. This was affirmed by the Supreme Court. Though it refused to overrule the *Court Holding Co.* case, how effective is the distinction made? Does not the *Cumberland* case rob the *Court Holding Co.* decision of its desired effect and underlying principle?

It is true that in the *Cumberland* case the stockholders acted as such, and not as the directors of the corporation, in carrying on the negotiations. But this distinction leads to the conclusion that the future decisions will be made to rest, in part at least, upon whether the directors, being cognizant of the tax problems involved, preface their negotiations for sale by an indication that they are acting as stockholders, or whether, being unaware of the tax problems, they act as directors and officers of the corporation. In a closely held corporation having only two or three stockholders, it is often difficult to determine whether it is the corporation or the stockholders who are negotiating. That the corpora-

[3] Weiss v. Stearn, 265 U. S. 242 (1924); United States v. Phellis, 257 U. S. 156 (1921); Muerer Steel Barrel Co. v. Commissioner, 144 F. 2d 282 (3d Cir.), *cert. denied*, 324 U. S. 860 *rehearing denied*, 325 U. S. 892 (1944) (Court construed the same regulation section as did the Court in *Court Holding Co. v. Commissioner*); Commissioner v. Ashland Oil & Refining Co., 99 F. 2d 588 (6th Cir.), *cert. denied*, 306 U. S. 661 (1938).

[4] 338 U. S. 451 (1950).

[5] 83 F. Supp. 843 (Ct. Cl. 1949).

tion owns the property during the negotiations is not decisive, since it has been held that a stockholder may negotiate and contract to sell property which he expects to receive by liquidation, though title to it is still in the corporation.[6] Thus, it cannot be said that the stockholder is presumed to be negotiating for the corporation simply because the title remains in the corporation and the stockholder who is negotiating is also a director of the corporation. This is true though no liquidation plan has yet been formulated.[7] On the other hand, the fact that the liquidation plan has been enacted by the directors prior to the negotiations for sale is not sufficient to enable courts to hold that the negotiations are being carried on by the stockholders, even though it might be said that the stockholders obtained equitable title to the assets by the enactment of the liquidation plan.[8]

In the *Court Holding Co.* case there was no binding contract entered into by the corporation before the liquidation. For this reason it seems that the Court might have held that adoption of the previous terms and execution of a written contract by the stockholders was sufficient to hold that the sale was one by the stockholders. They had the power to reject the previous terms and negotiate anew. They chose, however, not to exercise such power but rather to accept the terms already agreed upon. In the field of taxation a power is frequently decisive, even though not exercised,[9] and so it might have been here. Rather, the Court held the point immaterial and of no effect.

In the *Cumberland* case the Court said: "but congress has imposed no tax on liquidating distributions in kind or on dissolution, whatever may be the motive for such liquidation. Consequently, a corporation may liquidate or dissolve without subjecting itself to the corporate gains tax, even through a primary motive is to avoid the burden of corporate taxation."[10] There is nothing unusual about this statement. It is a long

[6] Howell Turpentine Co. v. Commissioner, 162 F. 2d 319 (5th Cir. 1947); United States v. Cumberland Public Service Co., 83 F. Supp. 843 (Ct. Cl. 1949). *But cf.* Kaufman v. Commissioner, 175 F. 2d 28 (3d Cir. 1949) (court held that since stockholders were also directors, they were under a legal duty to act as directors when dealing with corporate property; hence, they cannot, as stockholders, negotiate regarding corporate property before liquidation); Trippett v. Commissioner, 118 F. 2d 764 (5th Cir.), *cert. denied*, 314 U. S. 644 (1941).

[7] Howell Turpentine Co. v. Commissioner, 162 F. 2d 319, 324 (5th Cir. 1947).

[8] Borall Corp. v. Commissioner, 167 F. 2d 865 (2d Cir. 1948) (Directors resolved: (1) that the corporation distribute its assets to the stockholders, (2) that the assets be actually delivered to the stockholders or sold by an agent selected for them. Part of the assets, at the stockholder's election, the corporation turned over to a bank to sell for the stockholders and distribute the proceeds to them. *Held:* since the bank was selected by the corporation, the bank was a liquidation trustee of the corporation and sale was one by the corporation and not by the stockholders.).

[9] Helvering v. Clifford, 309 U. S. 331 (1940) (setting up the so-called *Clifford* doctrine, holding that certain powers, when retained in a trust by the settlor, make the income taxable to the settlor even though the powers are not exercised); Fulham v. Commissioner, 110 F. 2d 916 (1st Cir. 1940).

[10] 70 Sup. Ct. 280, 282 (1950).

established principle.[11] But, how can it be reconciled with the *Court Holding Co.* decision? A distinction is sometimes made between a transaction which serves a legitimate business purpose and one which is merely a cover for what is, in substance, an entirely different type of transaction.[12] Since in both the *Court Holding Co.* and *Cumberland* cases the business purpose behind the transactions was the sale of the assets to the buyer, it hardly seems that the liquidation in the one instance was more bona fide than in the other.

It seems that the mere form of the negotiations, and not the substance behind the transactions, is to be the deciding factor in cases of this type. We are left with a rigid set of facts on the one hand under which the tax may be reduced successfully, while on the other hand we have another set of facts which fails to accomplish this result. This is not surprising in view of the importance of minute procedural steps in the field of taxation.

This presents the problem of where, relative to the two sets of facts, the Court will draw the line between corporate and stockholder action. In the *Court Holding Co.* case the Court relied heavily upon the fact that the terms of the sale were exactly those reached in the negotiations between the directors and the lessees. Perhaps the result would have been different had the corporate negotiations left unsettled a material point which the stockholders later settled. On the other hand, the Court might have held that the sale was in effect one by the corporation, since a majority of the negotiations had been completed before the liquidation.

In a more recent lower court case,[13] the negotiations were begun by the president but were shortly assumed and completed by the stockholders, who made it plain from the beginning that an individual sale by the stockholders and not a corporate sale was contemplated. The court of appeals there held that since title was in the corporation during negotiations and since no liquidation steps were taken prior to starting negotiations, the stockholders were acting for the corporation. The result was that the sale by the stockholders following liquidation was held to be a corporate sale. Under the *Cumberland* rule it seems that this holding would be reversed by the Supreme Court, if brought before

[11] Motive of avoidance is immaterial if the means is legal. Commissioner v. Tower, 327 U. S. 280 (1945); Gregory v. Helvering, 293 U. S. 465 (1935). *But cf.* Commissioner v. Phipps, 336 U. S. 410 (1948) (In interpreting and approving the theory behind Commissioner v. Sansome, 60 F. 2d 937 (1932), the Court here says that a tax may be upheld solely on grounds of preventing tax avoidance. This looks like a statement of what has been the actual practice, though a contrary rule has been stated.).

[12] Gregory v. Helvering, 293 U. S. 465 (1935); Chisholm v. Commissioner, 79 F. 2d 14 (2d Cir.) *cert. denied*, 296 U. S. 641 (1935) (the purpose which counts is the one which defeats or contradicts the apparent transaction, not the purpose to escape taxation which the apparent, but not the whole, transaction would realize).

[13] Kaufman v. Commissioner, 175 F. 2d 28 (3d Cir. 1949).

it, but we must wait for the ruling on each set of facts as it is presented.

It is suggested, on the basis of present decisions, that in carrying out the liquidation and sale by the stockholders, the liquidation should be effected, if at all possible, before any definitive negotiating takes place. It should be done as soon as the idea to sell is conceived in order to prevent a holding that any part of the negotiations was corporate action. If the negotiations do take place before liquidation, they should be carried on in behalf of the stockholders by someone who is not an officer of the corporation.[14] When the assets are transferred to an agent for the stockholders, care should be taken that the corporation or the board of directors, as a body, has no hand in the appointment of such agent, but rather that a stockholder's petition or consent should be obtained appointing him.[15]

There should be a complete vesting of title to the assets in the stockholders before the sale takes place. It has been held that payment of a corporate debt out of the proceeds of the sale by the stockholders does not make the sale one by the corporation.[16] It is best, however, to avoid this since it is possible that courts may say that the sale was for the corporation's benefit and hence was corporate action. The rule which permits escape from double taxation in this situation is a just one but great care must be exercised to reap its benefits.

VICTOR S. BRYANT, JR.

Federal Jurisdiction—Amount in Controversy—Effect of Counterclaim

Under Rule 13 of the Federal Rules of Civil Procedure counterclaims are divided into two classes, compulsory and permissive. A compulsory counterclaim is one which must be pleaded if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim, does not require the presence of parties over whom the court cannot acquire jurisdiction, and is not the subject matter of a pending action.[1] A permissive counterclaim is any other claim against an opposing party.[2]

[14] Louisville Trust Co. v. Glenn, 65 F. Supp. 193 (W. D. Ky. 1946) (three man committee appointed by stockholders; only one member of committee was officer of corporation; liquidation resolution but no actual liquidation occurred before negotiations began).

[15] Borall Corp. v. Commissioner, 167 F. 2d 865 (2d Cir. 1948); Louisville Trust Co. v. Glenn, 65 F. Supp. 193 (W. D. Ky. 1946); Burnet v. Lexington Ice & Coal Co., 62 F. 2d 906 (4th Cir. 1933) (North Carolina federal case using what is now N. C. GEN. STAT. §55-132 (1943) which provides that corporation is still entity for winding up purposes for three years after dissolution, and holding that even after dissolution, agent appointed by corporation for stockholders actually corporation's trustee in liquidation and sale by him corporate sale).

[16] Louisville Trust Co. v. Glenn, 65 F. Supp. 193 (W. D. Ky. 1946).

[1] Fed. R. Civ. P. 13(a). [2] Fed. R. Civ. P. 13 (b).

Where jurisdiction of a district court is based on a general federal question, that is, where there is no special provision in an act being to the contrary, there is an additional requirement that the amount in controversy exceed $3,000, exclusive of interest and costs.[3] Where jurisdiction is based upon diversity of citizenship, again the amount in controversy must exceed $3,000, exclusive of interests and costs.[4]

Where a counterclaim is of the compulsory type, there seems to be no question that when the jurisdictional elements are present as to the plaintiff's claim,[5] the counterclaim is regarded as ancillary or auxiliary,[6] and the court will decide the counterclaim even though the opposing claim is denied on the merits.[7] However, if the court has no jurisdiction over the main transaction, even a compulsory counterclaim will be dismissed unless it has independent federal jurisdictional grounds.[8]

Where a counterclaim is of the permissive type, there must be independent grounds of federal jurisdiction or the counterclaim will be dismissed.[9] It has been said that in the case of a set-off, which is defined as a demand asserted to diminish or extinguish plaintiff's demand, which arises out of a transaction different from that sued on, and which must be liquidated and emerge from a contract or judgment, no independent grounds or federal jurisdiction are necessary.[10]

Aggregating the claims of both the plaintiff and defendant in order to make up the amount in controversy presents a more difficult question. In looking at this group of cases it is convenient to break the cases down into (1) cases originating in federal courts, and (2) removal cases.

In cases originating in federal courts and where the defendant's

[3] 28 U. S. C. §1331 (1948). [4] 28 U. S. C. §1332 (1948).

[5] When a defendant files a claim against a third party who is brought in as a defendant to this claim, the original defendant becomes a third party plaintiff, and the third party is denominated a third party defendant. If the third party defendant files a claim against the third party plaintiff, this claim is a counterclaim, and not a cross-claim. 3 MOORE'S FEDERAL PRACTICE ¶13.06 (2d ed. 1948).

[6] Moore v. New York Cotton Exchange, 270 U. S. 593 (1926) (decided under old Federal Equity Rule 30); United States, to Use and for Benefit of Foster Wheeler Corp. v. American Surety Co., 142 F. 2d 726 (2d Cir. 1944); Norton v. Agricultural Bond & Credit Corp., 92 F. 2d 348 (10th Cir. 1937); New York Life Ins. Co. v. Kaufman, 78 F. 2d 398 (9th Cir.), *cert. denied,* 296 U. S. 626 (1935).

[7] Kirby v. American Soda Fountain Co., 194 U. S. 141 (1904); Home Ins. Co. v. Trotter, 130 F. 2d 800 (8th Cir. 1942); Horwitz v. New York Life Ins. Co., 80 F. 2d 295 (9th Cir. 1935).

[8] Goldstone v. Payne, 94 F. 2d 855 (2d Cir.), *cert. denied,* 304 U. S. 585 (1938).

[9] Robinson Bros. v. Tygart Steel Products Co., 9 F. R. D. 468 (W. D. Pa. 1949); Jewish Consumptives Relief Society v. Rothfield, 9 F. R. D. 64 (S. D. N. Y. 1949); Cusimano v. Falciglia, 6 F. R. D. 586 (S. D. N. Y. 1947); Marks v. Spitz, 4 F. R. D. 348 (D. Mass. 1945); Donnelly Garment Co. v. Int'l Ladies Garment Workers Union, 47 F. Supp. 67 (W. D. Mo. 1942). See Kantar v. Garchell, 150 F. 2d 47, 49 (8th Cir. 1945) where the report does not state whether or not the counterclaim was raised on appeal, and so may be dictum.

[10] 3 MOORE'S FEDERAL PRACTICE ¶13.19 (2d ed. 1948). A dictum in Marks v. Spitz, 4 F. R. D. 348 (D. Mass. 1945) supports this proposition, but Robinson Bros. v. Tygart Steel Products Co., 9 F. R. D. 468 (W. D. Pa. 1949) is *contra.*

counterclaim is itself in excess of the jurisdictional amount, the meager authority on the point indicates that the federal court has jurisdiction of the entire suit, regardless of plaintiff's claim. *Roberts Mining and Milling Co. v. Schrader*[11] holds squarely that this is so. Dicta in *American Sheet and Tin Plate Co. v. Winzeler,*[12] *Central Commercial Co. v. Jones-Dusenbury Co.,*[13] *Ginsburg v. Pacific Mutual Life Insurance Co.,*[14] and an implication in *O. J. Lewis Mercantile Co. v. Klepner*[15] also support the view that jurisdiction exists.

Where the defendant's counterclaim is not in excess of $3,000, exclusive of interest and costs, but when added to the plaintiff's claim, the total exceeds the minimum jurisdictional amount, the courts again state that this should be allowed, but all of these statements can be classified as dicta. These dicta may be found in *Kirby v. American Soda Fountain Co.,*[16] *Central Commercial Co. v. Jones-Dusenbury Co.,* and *American Sheet and Tin Plate Co. v. Winzeler. Home Life Insurance Co. v. Sipp*[17] is a case in point, usually cited as *contra,* but the peculiar fact situation of that case coupled with language which the court used[18] would seem to be more of a recognition of the rule, with an exception being made. In *Lee v. Continental Insurance Co.*[19] there was a square holding that the amount of the counterclaim could be added to the claim of the plaintiff to make up the jurisdictional amount. This case originated in "a court of Utah territory" and was removed to the federal circuit court when Utah was admitted as a state.

In certain types of removal cases the effect of a counterclaim is quite clear. Although before 1941 there was a sharp and irreconcilable split of authority on the point,[20] *Shamrock Oil and Gas Corp. v. Sheets*[21] settled the proposition that if a non-resident plaintiff sued in a state court, for whatever amount, and defendant pleaded a counterclaim in excess of the jurisdictional amount, the plaintiff could not remove, be-

[11] 95 F. 2d 522 (9th Cir. 1938).
[12] 227 Fed. 321, 324 (N. D. Ohio 1915).
[13] 251 Fed. 13, 19 (7th Cir. 1918). [14] 69 F. 2d 97, 98 (2d Cir. 1934).
[15] See 176 Fed. 343, 346 (2d Cir.), *cert. denied,* 216 U. S. 620 (1909), where the court said that the defendant invoked the jurisdiction of the court for its own benefit by putting in a counterclaim, and was estopped to deny jurisdiction. This case has been criticized for its holding by Judge Dobie in an article, *Jurisdictional Amount in the United States District Court,* 38 HARV. L. REV. 733 (1925), and by the court in Home Life Ins. Co. v. Sipp, 11 F. 2d 474 (3d Cir. 1926), on the grounds that the cases cited to sustain the holding will not do so.
[16] 194 U. S. 141, 144 (1904). [17] 11 F. 2d 474 (3d Cir. 1926).
[18] "The counterclaim in this case—$423—is not in itself equal to the jurisdictional amount; nor when added to the plaintiff's demand [an even $3,000] does it raise the total to the amount the statute requires, for the reason that the counterclaim was pleaded not to recover anything from the plaintiff but merely to be deducted from any amount that might be found due the plaintiff, and particularly to be deducted from an amount which the defendant admits it owes."
[19] 74 Fed. 424 (C. C. D. Utah 1896).
[20] For a collection of cases see 28 U. S. C. A. §71, n. 668 (1926).
[21] 313 U. S. 100 (1941).

cause he was not a defendant within the meaning of the removal statutes.

It is equally clear that the defendant being sued in his home state cannot remove, because the statute explicitly limits the right of removal to a nonresident defendant or defendants.[22] By the weight of authority a non-resident defendant who pleads a counterclaim in a state court in excess of the jurisdictional amount cannot remove when the plaintiff claims only $3,000 or less. The courts take the view that it is the demand in the complaint which fixes the amount in controversy, and a counterclaim is not to be considered.[23]

When both original and removal suits are considered, the decisions do not warrant the statements frequently made by writers that it is generally held that a counterclaim can be used to make up the jurisdictional amount.[24] Most of the decisions cited as permitting such a proposition are only dicta.[25]

In conclusion this writer suggests that the existing practice of deciding compulsory counterclaims when there is jurisdiction over the plaintiff's complaint, regardless of the amount of the counterclaim, should be maintained. In addition the effect of a counterclaim upon the jurisdictional amount should be made clear by an amendment to Rule 13 of the Federal Rules of Civil Procedure. The simplest rule, and one which would be in line with the plaintiff's viewpoint theory, as well as the policy of restricting federal jurisdiction, would be a requirement that plaintiff's complaint show that an amount exceeding $3,000 exclusive of interest and costs, be in controversy, and no counterclaim would be considered to make up that amount. No distinction should be made between original and removal jurisdiction.

BASIL SHERRILL.

Federal Jurisdiction—Amount in Controversy—Unregistered Trade-marks and Trade Names

Where the owner of a trade-mark has registered it pursuant to the Federal Trade-Mark statutes, no jurisdictional amount is required in an action for infringement in the federal courts.[1] In addition, where a

[22] 28 U. S. C. §1441 (b) (1948).

[23] Gates v. Union Cent. Life Ins. Co., 56 F. Supp. 149 (E. D. N. Y. 1944); Haney v. Wilcheck, 38 F. Supp. 345 (W. D. Va. 1941); Harley v. Firemen's Fund Ins. Co., 245 Fed. 471 (W. D. Wash. 1913); Bennett v. Devine, 45 Fed. 705 (C. C. S. D. Iowa 1891); La Montagne v. T. W. Harvey Lumber Co., 44 Fed. 645 (C. C. E. D. Wis. 1891). *Contra:* Wheatley v. Martin, 62 F. Supp. 109 (W. D. Ark. 1945); Clarkson v. Manson, 4 Fed. 257 (C. C. S. D. N. Y. 1880). Mackay v. Uinta Development Co., 229 U. S. 173 (1913) *semble.*

[24] SIMKINS, FEDERAL PRACTICE §132 (3d ed. 1938); MONTGOMERY'S MANUAL OF FEDERAL JURISDICTION AND PROCEDURE §94 (4th ed. 1942); Shulman and Jaegerman, *Some Jurisdictional Limitations on Federal Procedure,* 45 YALE L. J. 393 (1936).

[25] Note, 25 MINN. L. REV. 356 (1941).

[1] 28 U. S. C. §1338(a) (1948).

claim for unfair competition is joined with a substantial and related claim of infringement, federal courts will accept and retain jurisdiction of the former irrespective of the amount in controvery[2] even though the latter claim fails.[3] Where, however, the action is not bottomed on a federally registered mark, federal courts have jurisdiction only where the amount in controversy exceeds $3,000 exclusive of interest and costs.[4] This note deals with the manner in which federal courts determine the requisite amount in actions to enjoin as infringement and unfair competition the use of an *unregistered* trade-mark or trade name.

The courts have employed two different but related tests for measuring the amount in controvery. Under one test the measure is the entire value of the trade-mark, trade name, or good will wherever found. Under the other test, jurisdictional amount is not measured by the entire value of the mark, name, or good will, but only by the injury to that value, both present and prospective.

In all the cases where the "entire value" test has been adopted, the courts have found the requisite jurisdictional amount.[5] The fact situations involved were not confined to any one type of unfair use but in-

[2] 28 U. S. C. §1338(b) (1948). *Cf.* Del Monte Special Food Co. v. California Packing Corp., 34 F. 2d 774 (9th Cir. 1929).

[3] Hurn v. Oursler, 289 U. S. 238 (1933); Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U. S. 315 (1938). For an analysis of this doctrine and a collection of cases, see 2 CALLMANN, UNFAIR COMPETITION AND TRADE-MARKS 1556-1572 (1945) and 2 MOORE'S FEDERAL PRACTICE 368-377 (1948).

[4] 28 U. S. C. §1332(a) (1948).

[5] Beneficial Industrial Loan Corp. v. Kline, 132 F. 2d 520 (8th Cir. 1942) (value of good will); Indian Territory Oil & Gas Co. v. Indian Territory Illuminating Oil Co., 95 F. 2d 711 (10th Cir.), *cert. denied,* 305 U. S. 607 (1938) (value of the business or right to be protected; good will is an intangible asset to be considered in ascertaining the value of the business or right); Harvey v. American Coal Co., 50 F. 2d 832 (7th Cir.), *cert. denied,* 284 U. S. 669 (1931) (value of trade name or good will); Wisconsin Electric Co. v. Dumore Co., 35 F. 2d 555 (6th Cir. 1929), *cert. granted,* 281 U. S. 710 (1930), *cert. dismissed,* 282 U. S. 813 (1931) (value of word as applicable to plaintiff's business); Del Monte Special Food Co. v. California Packing Corp., 34 F. 2d 774 (9th Cir. 1929) (value of good will); Ury v. Mazer Cigar Mfg. Co., 253 Fed. 551 (8th Cir. 1918) (value of property right); General Shoe Corp. v. Rosen, 29 F. Supp. 102 (S. D. W. Va. 1939), *rev'd on other grounds,* 111 F. 2d 95 (4th Cir. 1940) (value of good will and business); Great Atlantic & Pacific Tea Co. v. A. & P. Radio Stores, 20 F. Supp. 703 (E. D. Pa. 1937) (value of trade-mark and good will); Household Finance Corp. of Delaware v. Household Finance Corp. of West Virginia, 11 F. Supp. 3 (N. D. W. Va. 1935) (value of good will); Hennessy v. Harrmann, 89 Fed. 669 (C. C. N. D. Cal. 1898) (value of trade-mark); Great Atlantic & Pacific Tea Co. v. A. & P. Cleaners & Dyers, Inc., 10 F. Supp. 450 (W. D. Pa. 1934) *semble; cf.* Coca-Cola Co. v. Brown & Allen, 274 Fed. 481 (N. D. Ga. 1921) (The alleged unfair use differs from the other cases under consideration. Here the defendant was diluting plaintiff's syrup before mixing fountain Coca-Colas.); *see* Hanson v. Triangle Publications, Inc. 163 F. 2d 74, 79 (8th Cir. 1947), *cert. denied,* 332 U. S. 855 (1948) (value of good will); Adam Hat Stores, Inc. v. Scherper, 45 F. Supp. 804, 807 (E. D. Wis. 1942) (value of good will); American Viscose Corp. v. Crown Craft, Inc., 28 F. Supp. 884, 885 (S. D. N. Y. 1939) (value of good will); Eternit, Inc. v. J. J. Clarke Co., 18 F. 2d 607, 609 (E. D. La. 1927) (value of trade-mark).

cluded palming off of product,[6] confusion of source of product[7] or service,[8] confusion of ownership of the business,[9] and confusion of sponsorship.[10] The test has been applied where the products were in direct competition for a substantial market in the same area,[11] but in *Ury v. Mazer Cigar Manufacturing Co.*,[12] plaintiff of Detroit had only one customer in St. Louis where defendant's cigars were sold. And in *Household Finance Co. of Delaware v. Household Finance Co. of West Virginia*,[13] plaintiff not only was not doing business in defendant's area of operation and had not even qualified to do business in that state, but also there was no evidence offered of an intention ever to do business there. There was neither evidence of the volume and extent of defendant's business nor evidence of any probability of expansion. Since, however, plaintiff had advertised in local and national periodicals and maintained offices sixty miles away in a bordering state, the court found confusion and the "entire value" test was applied.[14] There are other cases where the parties were producing non-competing products but

[6] Hennessy v. Harrmann, 89 Fed. 669 (C. C. N. D. Cal. 1898) (defendant sold counterfeit labels to others who palmed off their brandy as plaintiff's).

[7] Wisconsin Electric Co. v. Dumore Co., 35 F. 2d 555 (6th Cir. 1929), *cert. granted*, 281 U. S. 710 (1930), *cert. dismissed*, 282 U. S. 813 (1931); Del Monte Special Food Co. v. California Packing Corp., 34 F. 2d 774 (9th Cir. 1929).

[8] Beneficial Industrial Loan Corp. v. Kline, 132 F. 2d 520 (8th Cir. 1942); Household Finance Corp. of Delaware v. Household Finance Corp. of West Virginia, 11 F. Supp. 3 (N. D. W. Va. 1935).

[9] Indian Territory Oil & Gas Co. v. Indian Territory Illuminating Oil Co., 95 F. 2d 711 (10th Cir.), *cert. denied*, 305 U. S. 607 (1938); Great Atlantic & Pacific Tea Co. v. A. & P. Cleaners & Dyers, Inc., 10 F. Supp. 450 (W. D. Pa. 1934).

[10] Hanson v. Triangle Publications, Inc., 163 F. 2d 74 (8th Cir. 1947), *cert. denied*, 332 U. S. 855 (1948).

[11] Harvey v. American Coal Co., 50 F. 2d 832 (7th Cir.), *cert. denied*, 284 U. S. 669 (1931).

[12] 253 Fed. 551 (8th Cir. 1918). There was however an accounting of $346 which indicates that defendant's volume of sales was substantial.

[13] 11 F. Supp. 3 (N. D. W. Va. 1935).

[14] The court pointed out that the injury to be guarded against was (1) to the public by palming off and (2) to the plaintiff by diverting trade. While there was confusion, in the absence of inferior service and business practices by defendant it is doubtful whether the public would actually be injured. [But injury to the public is not confined to a situation where the purchaser obtains an inferior product or service. There is prejudice to the public when the product or service it receives is different from that which it thought it was buying. See Federal Trade Commission v. Algoma Lumber Co., 291 U. S. 67 (1934).] And in view of the areas of operations of the parties it is questionable whether there was or would be a substantial amount of trade diverted. The court probably was greatly impressed by the fact that defendant, after eight years of operation under one name, changed its name to the exact name of plaintiff for the rather obvious purpose of obtaining an unfair benefit from plaintiff's advertising and good will. In this connection, see Beneficial Industrial Loan Corp. v. Kline, 132 F. 2d 520 (8th Cir. 1942), where plaintiff's subsidiaries had operated under the name "Personal Finance Co." in four different localities in Iowa for several years prior to liquidation and withdrawal in 1934. In 1940 a subsidiary re-entered Iowa. The next year defendant began operating under the same name as plaintiff's subsidiaries in a city where one of the subsidiaries had formerly operated. The circuit court of appeals stated that confusion would arise, the public would be deceived, and that defendant would reap where it had not sown.

nevertheless, there existed a probability of deception because plaintiff was carrying on a substantial amount of business in the defendant's area of operation and, while defendant was not yet doing a large volume of business, there were indications of expansion of volume and area by defendant.[15] In one case the court referred to the value of plaintiff's good will and advertising, not merely of the trade-mark in question but also of two other trade-marks which plaintiff was using or had used on its product.[16]

The second test used in the injunction cases restricts the amount in controversy to the injury, both present and prospective, to the value of the trade-mark, trade name, or good will.[17] Of the cases adopting this test, the strongest opinion is that of Judge Clark in *Pure Oil Co. v. Puritan Oil Co.*[18] There the plaintiff brought action for damages, an accounting, and injunction against infringement of trade-marks and unfair competition, but on trial renounced the prayer for damages and an accounting. Plaintiff sold gasoline and other petroleum products through filling stations in twenty-five states. Defendant operated a single unprofitable filling station in Hartford, Connecticut, under the name "Puritan" and sold oil and grease under the trade-marks of their producers and gasoline under the trade-mark "Pure." At least 95% of defendant's gasoline sales were to local residents. The plaintiff formerly had stations in Connecticut but had withdrawn them, and at the time of suit its only sales were of oils and grease for industrial use. Judge Clark squarely faced and rejected the contention that jurisdiction was to be measured by the entire value of plaintiff's good will.[19] In

[15] Wisconsin Electric Co. v. Dumore Co., 35 F. 2d 555 (6th Cir. 1929), *cert. granted,* 281 U. S. 710 (1930), *cert. dismissed,* 282 U. S. 813 (1931); Del Monte Special Food Co. v. California Packing Corp., 34 F. 2d 774 (9th Cir. 1929). In these two cases the products were of a kind which reach a large number of people.

[16] General Shoe Corp. v. Rosen, 29 F. Supp. 102 (S. D. W. Va. 1939), *rev'd on other grounds,* 111 F. 2d 95 (4th Cir. 1940).

[17] Food Fair Stores, Inc. v. Food Fair, Inc., 83 F. Supp. 445 (D. Mass. 1948), *aff'd,* 177 F. 2d 177 (1st Cir. 1949); Pure Oil Co. v. Puritan Oil Co., 39 F. Supp. 68 (D. Conn. 1941), *rev'd on other grounds,* 127 F. 2d 6 (2d Cir. 1942); Draper v. Skerrett, 116 Fed. 206 (C. C. E. D. Pa. 1902); Winchester Repeating Arms Co. v. Butler Bros., 128 Fed. 976 (N. D. Ill. 1904); Symonds v. Greene, 28 Fed. 834 (C. C. S. D. N. Y. 1886) (value of the injunction); Stork Restaurant, Inc. v. Marcus, 36 F. Supp. 90 (E. D. Pa. 1941) *semble; see* Moline Plow Co. v. Omaha Iron Store Co., 235 Fed. 519, 525 (8th Cir. 1916), *cert. denied,* 242 U. S. 649, *appeal dismissed, sub. nom.,* Omaha Baum Iron Store Co. v. Moline Plow Co., 244 U. S. 650 (1917).

[18] 39 F. Supp. 68 (D. Conn. 1941). The trade-marks were registered, but the district court held that it did not acquire jurisdiction under the Federal Act because there was no use by defendant in interstate commerce and that the court could not retain jurisdiction under the Hurn rule because there was no subsantial claim that defendant's use was in interstate commerce. The circuit court of appeals reversed on a finding of substantial claim. 127 F. 2d 6 (2d Cir. 1942).

[19] There are three distinct factors involved in these cases: (1) amount of injury to date (2) future injury (3) entire value of the trade-mark, trade name, or good will. The courts adopting the "entire value" of the good will test state the amount in controversy is not limited to (1) but is or includes (3). With apparently two

applying the injury test and finding a lack of jurisdictional amount, he emphasized that practically all of defendant's small volume of gasoline sales were to local residents; that there was no probability of expansion since defendant was operating at a loss; that there was no evidence of inferior service; and that plaintiff no longer sold its products through filling stations in Connecticut and offered no evidence of an intention to do so in the future.

The most recent decision on this question was the *Food Fair* case.[20] Defendant was operating a supermarket in Brookline, Massachusetts. Plaintiff's action was based on a Massachusetts statute which provided that injunction would lie for "likelihood of injury to business reputation or of dilution of the distinctive quality of a trade-mark or trade name . . . notwithstanding the absence of competition between the parties or of confusion as to source of goods or service."[21] The trial court adopted the injury test as stated in the *Pure Oil* case but unlike Judge Clark found jurisdictional amount involved. A comparison of these two cases indicates the chief difference to be that in *Pure Oil* plaintiff had withdrawn from Connecticut and offered no evidence of re-expanding; whereas, in *Food Fair* plaintiff's business was expanding and there was a probability that it was planning to commence business in Massachusetts. Without attempting to evaluate the injury that was or would be the result from dilution of the trade name, the district court held the value of plaintiff's "right to operate supermarkets in Massachusetts under the name Food Fair without being faced with a competitor in Brookline who has the same name and who probably would seek to enjoin plaintiff's expansion" exceeded $3,000.[22]

In computing jurisdictional amount in actions to enjoin as infringement and unfair competition the use of an unregistered trade-mark or

exceptions, *Miles Laboratories, Inc. v. Seignious* and *Caron Corp.* v. *Wolf Drug Co.*, both cited *infra* note 22, the courts make no specific mention of factor (2) in stating the test. Therefore, in a sense the courts adopting the "entire value" test do not squarely reject the "injury test."

Courts adopting the "entire value" of the good will test did not decide whether or not jurisdictional amount would be present had they applied only the "injury" to good will test. An analysis of these cases indicates that the requisite jurisdictional amount probably would not have been present in some instances had the latter test been applied.

[20] Food Fair Stores, Inc. v. Food Fair, Inc., 83 F. Supp. 445 (D. Mass. 1948), *aff'd*, 177 F. 2d 177 (1st Cir. 1949).

[21] Acts, 1947, c. 307, §7A.

[22] Food Fair Stores, Inc. v. Food Fair, Inc., 83 F. Supp. 445, 452 (D. Mass. 1948), *aff'd*, 177 F. 2d 177 (1st Cir. 1949).

In Fair Trade actions to enjoin sales below the standard price established by the producer, the courts have stated that price standardization is primarily effected to protect good will. Most of the cases measure jurisdictional amount by the entire value of the good will in a particular state. Miles Laboratories, Inc. v. Seignious, 30 F. Supp. 549 (E. D. S. C. 1939); Calvert Distilling Co. v. Brandon, 24 F. Supp. 857 (W. D. S. C. 1938); Caron Corp. v. Wolf Drug Co., 40 F. Supp. 103 (D. N. J. 1941). *Contra:* James Heddron's Sons v. Callender, 28 F. Supp. 643 (D. Minn. 1939).

trade name, it appears that the better test is the injury to the value of the trade-mark, trade name, or good will.[23] Numerous factors present themselves for consideration under this test. Among the more important factors are the extent of plaintiff's business and/or good will in defendant's area of influence, the character of both businesses and the class and number of people they serve, and whether either business is expanding or contracting in volume, area, or scope of use. Such factors are important whether injury be to the public by palming off or to the plaintiff by diverting trade, injuring good will by inferior product or service, or diluting the distinctive quality of the mark. In applying this test and evaluating the injury, the court should not restrict itself to arbitrary geographical boundaries but should look to the area of defendant's influence wherever its bounds may be.

It is the view of some writers that the Lanham Trade-Mark Act[24] provides for a substantive federal law of trade-marks and unfair competition.[25] Diggins interprets the Act as "national legislation along national lines" designed to provide uniformity in place of conflict and confusion. His view is that if the action "involves commerce which may lawfully be regulated by Congress" then it "arises under" the Act; and if it "arises under" the Act then the federal courts have original jurisdiction irrespective of registration. If this view is adopted by the courts, the conflict as to the proper method of calculating jurisdictional amount will be eliminated. Such interpretation of the Lanham Act has not yet been adopted by the courts and it is doubtful that it will be. In the absence of such interpretation of the Act by the courts, the lack of registration will continue to raise the problem of the amount in controversy.[26]

JOSEPH K. BYRD.

[23] There are exceptional cases where defendant's acts threaten to *destroy* the good will in a definite geographical area. In such case the value of the injury will be the entire value of the good will in that area. An interesting example of this is Scalise v. National Utility Service, Inc., 120 F. 2d 938 (5th Cir. 1941), where defendant fraudulently obtained a permit to do business in Florida under plaintiff's name thus preventing plaintiff from obtaining a permit to do business in that state under its own name.

[24] 60 State. 427 (1946), 15 U. S. C. §1051 (1948).

[25] See ROBERT, THE NEW TRADE-MARK MANUAL 167-180 (1947); Diggins, *Federal and State Regulation of Trade-marks*, 14 LAW & CONTEMP. PROB. 200 (1949). See also Bunn, *The National Law of Unfair Competition*, 62 HARV. L. REV. 987 (1949), where the author concluded that even before the Lanham Act Congress had provided for a national law of unfair competition in the Federal Trade Commission Act.

[26] Due to the expanded scope of marks and names registrable under the Lanham Act, the problem of jurisdictional amount may become less important. However, the anticipated rush to register theretofore unregistrable marks has not yet materialized.

Insurance—Liability—Injured Third Party in Action Against Insurer for Intentional Injuries

As a general rule, in the absence of statute, a liability insurance policy by its terms does not cover the claims of a third party arising by reason of assured's intentional[1] misconduct.[2] Most policies expressly exclude such coverage; and even when there is no contractual provision, courts ordinarily imply an exclusion of such liability.[3] Despite the existence of these contractual limitations, courts rarely invoke them to bar recovery by a third party against the liability insurer.[4] An understanding of judicial treatment of these liability insurance coverage provisions is important where the attorney represents either of the adverse parties, the willfully injured third person or the insurer.

A court faced with the problem of a third party intentionally injured by an assured may protect the third party and find against the insurer by following one of three principal approaches: (1) definition of certain key words in the coverage or exclusion provisions so as to achieve the desired result; (2) determination that a judgment against the assured predicated on negligence estops the insurer from subsequently asserting that the injury was willfully inflicted; and (3) construction of statutes

[1] Most courts distinguish between intentional or willful conduct and illegal conduct. On the theory that the assured cannot reasonably have intended to pay a premium for a "shadow" protection, courts have refused to so construe a policy as to make the degree of protection negligible. Zurich Gen. Acc. & Liability Ins. Co. v. Thompson, 49 F. 2d 860 (9th Cir. 1931) (drunken driving); Kautz v. Zurich Gen. Acc. & Liability Ins. Co., 293 Pac. 133 (Cal. App. 1931) (driving while intoxicated), *rev'd on other grounds*, 212 Cal. 576, 300 Pac. 34 (1931); Brock v. Travelers' Ins. Co., 88 Conn. 308, 91 Atl. 279 (1914) (unlicensed minor driving); McMahon v. Pearlman, 242 Mass. 367, 136 N. E. 154 (1922) (expired license); Fireman's Fund Ins. Co. v. Haley, 129 Miss. 525, 92 So. 635 (1922) (speeding); Messersmith v. Am. Fidelity Co., 232 N. Y. 161, 133 N. E. 432 (1921) (permitting minor to drive). See McNeely, *Illegality as a Factor in Liability Insurance*, 41 COL. L. REV. 26 (1941).

[2] Hotel Co. v. Zurich Gen. Acc. & Liability Ins. Co., 213 Ill. App. 334 (1917); Miller v. United States Fidelity & Cas. Co., 291 Mass. 445, 197 N. E. 75 (1935); Blair v. Travelers' Ins. Co., 291 Mass. 432, 197 N. E. 60 (1935); Sontag v. Galer, 279 Mass. 309, 181 N. E. 182 (1932); Baron v. Indemnity Co., 285 N. Y. Supp. 486 (1936); Am. Cas. Co. v. Brinsky, 51 Ohio App. 298, 200 N. E. 654 (1934); Commonwealth Cas. Co. v. Headers, 118 Ohio St. 429, 161 N. E. 278 (1928); County Gas Co. v. Gen. Acc. Fire and Life Assurance Corp., 56 S. W. 2d 1088 (Tex. Civ. App. 1933). *Accord*, Jackson v. Maryland Cas. Co., 212 N. C. 546, 193 S. E. 703 (1937).

[3] Hill v. Standard Mut. Cas. Co., 110 F. 2d 1001 (7th Cir. 1940); Rothman v. Metropolitan Cas. Ins. Co., 134 Ohio St. 241, 16 N. E. 2d 417 (1938); Sontag v. Galer, 279 Mass. 309, 181 N. E. 182 (1932); Langford Elec. Co. v. Employers Mut. Indemnity Corp., 210 Minn. 289, 297 N. W. 843 (1941); Messersmith v. Am. Fidelity Co., 232 N. Y. 161, 133 N. E. 432 (1921).

[4] New Amsterdam Cas. Co. v. Jones, 135 F. 2d 191 (6th Cir. 1943). *Cf.* Columbia Cas. Co. v. Abel, 171 F. 2d 215 (10th Cir. 1948); Sciaraffa v. Debler, 304 Mass. 240, 23 N. E. 2d 111 (1939); Floralbell Amusement Corp. v. Standard Surety & Cas. Co., 9 N. Y. S. 2d 959 (1937); Westerland v. Argonaut Grill, 187 Wash. 437, 60 P. 2d 228 (1936); Archer Ballroom Co. v. Great Lakes Cas. Co., 236 Wis. 525, 295 N. W. 702 (1941); Fox Wisconsin Corp. v. Century Indemnity Co., 219 Wis. 549, 263 N. W. 567 (1935).

requiring the maintenance of liability insurance under certain circumstances as requiring that the insurance so maintained include coverage for willfully inflicted injuries.

In determining the meaning of the phrase, "injuries arising out of accident," in the coverage provision of liability policies, the word "accident" has been interpreted by some courts to include injuries which were intentionally inflicted by the assured but unintentionally sustained by the third person.[5] These courts describe the injury as accidental or intentional according to whether or not the injuries could be said to be designed or effected by the injured third person, himself.[6] This line of reasoning would, where the victim was innocent, effectually nullify provisions excluding willful acts from the coverage of liability insurance policies.[7] A majority of courts, however, hold that injuries are accidental or not according to the manner in which they were inflicted.[8]

The definition of the term "willful," the converse of "accidental," is likewise used by some courts to enlarge the coverage of liability insurance policies. It is generally held that injuries resulting from "reckless," "wanton," or "wanton and willful" acts, without actual intent to injure, are clearly not within the "willful" exclusion provision of the policy.[9] Some courts go further and hold, in cases where it appears

[5] New Amsterdam Cas. Co. v. Jones, 135 F. 2d 191 (6th Cir. 1943), *affirming* 45 F. Supp. 887 (E. D. Mich. 1942).

The rule is well-settled that intentional injuries may be "accidental" insofar as recovery under ordinary accident insurance, as distinguished from liability insurance, is concerned. Employers' Indemnity Corp. v. Grant, 271 F. 136 (6th Cir. 1921); McCullough v. Liberty Life Ins. Co., 125 Kan. 324, 264 Pac. 65 (1928); Peterson v. Aetna Life Ins. Co., 292 Mich. 531, 290 N. W. 896 (1940). The same rule applies in regard to recovery under workmen's compensation laws. Liberty Mut. Ins. Co. v. Thompson, 171 F. 2d 723 (5th Cir. 1949).

[6] New Amsterdam Cas. Co. v. Jones, 135 F. 2d 191 (6th Cir. 1943); Hartford Acc. & Indemnity Co. v. Wolbarst, 95 N. H. 40, 57 A. 2d 151 (1948); *cf.* E. J. Albrecht Co. v. Fidelity & Cas. Co., 289 Ill. App. 508, 7 N. E. 2d 626 (1937); Robinson v. United States Fidelity & Guaranty Co., 159 Miss. 14, 131 So. 541 (1931); Georgia Cas. Co. v. Alden Mills, 156 Miss. 853, 127 So. 555 (1930); Washington Theatre Co. v. Hartford Acc. & Indemnity Co., 9 N. J. Misc. 1212, 157 Atl. 111 (1931); Westerland v. Argonaut Grill, 187 Wash. 437, 60 P. 2d 228 (1936); Fox Wisconsin Corp. v. Century Indemnity Co., 219 Wis. 549, 263 N. W. 567 (1935). See Woodhead, *Insurance Against the Consequences of Willful Acts*, INS. L. J. 310:867, Nov. 1948.

[7] The Court in the *Wolbarst* case, *supra* note 6, argued that the result would not encourage the assured in misconduct by the unanswerable logic that the assured did not intend to injure anyone when he took out the policy. Obviously, it would be more difficult to prove that the policy was taken out in contemplation of committing a willful injury than to prove that the specific act itself was willfully inflicted. Moreover, where it could be shown that the assured had no such intent at the time he obtained the liability insurance policy, the insurer would be required to pay the third party even though the injuries were willfully and maliciously inflicted and admittedly so.

[8] See cases note 3 *supra*.

[9] Sheehan v. Goriansky, 321 Mass. 200, 72 N. E. 2d 538 (1947); Westgate v. Century Indemnity Co., 309 Mass. 412, 35 N. E. 2d 218 (1941); Rothman v. Metropolitan Cas. Ins. Co., 134 Ohio St. 241, 16 N. E. 2d 417 (1938); Herrell v. Hickok, 57 Ohio App. 213, 13 N. E. 2d 358 (1937); United Services Automobile Ass'n v. Zeller, 135 S. W. 2d 161 (Tex. Civ. App. 1939). *Cf.* Huntington Cab Co. v. Am. Fidelity & Cas. Co., 63 F. Supp. 939 (S. D. W. Va. 1945).

clear from the actual facts that the injuries were intentionally inflicted, that the unlawful conduct was no more than gross negligence.[10] To arrive at this result these courts consider that although the assured fully intended to commit the act which caused the injuries, he may not have anticipated or intended the injurious result.[11]

The second and more generally used approach where the facts are appropriate is to find that the insurer is estopped to deny liability because of the existence of a judgment recovered in an action for negligence by the deliberately injured third party against the assured. Where there is such a prior judgment with execution returned unsatisfied, the injured person would succeed in an action against the insurer in a majority of states,[12] including North Carolina,[13] for the reason that the adjudication of negligence in the prior action is binding upon the insurer, both as to the coverage of the policy as well as to the establishment of the original claim, regardless of whether or not the insurer participated in the original action.[14]

In an important recent decision of the United States Court of Appeals for the Fourth Circuit[15] where the liability insurer sought a declaratory judgment that it was not liable for injuries deliberately inflicted by its assured, the Court reached a decision directly opposed to the weight of authority. The majority of the Court ruled that a judgment in favor of the injured third person against the assured, although predicated on negligence, did not adjudicate negligence for the purpose of policy coverage.[16] The insurer had not taken part in any capacity in the prior action.

[10] Am. Fidelity & Cas. Co. v. Werfel, 230 Ala. 552, 162 So. 103 (1935); Hartford Acc. & Indemnity Co. v. Wolbarst, 95 N. H. 40, 57 A. 2d 151 (1948).

[11] In addition to cases cited in note 10 *supra,* see Union Acc. Co. v. Willis, 44 Okla. 578, 145 Pac. 812 (1915); Shea v. Olsen, 85 Wash. Dec. 124, 53 P. 2d 615 (1936).

[12] Miller v. United States Fidelity & Guaranty Co., 291 Mass. 445, 197 N. E. 75 (1935); Jusiak v. Commerce Cas. Ins. Co., 11 N. J. Misc. 869, 169 Atl. 551 (1933); Stefus v. London & Lancashire Indemnity Co., 111 N. J. L. 6, 166 Atl. 339 (1933). *Accord,* Robbins v. Chicago, 4 Wall. 657 (U. S. 1866); E. I. Du Pont de Nemours & Co. v. Guano Co., 297 F. 580 (4th Cir. 1924); B. Roth Tool Co. v. New Amsterdam Cas. Co., 161 Fed. 709 (8th Cir. 1908); United Services Automobile Ass'n v. Zeller, 135 S. W. 2d 161 (Tex. Civ. App. 1939); State Farm Mut. Automobile Ins. Co. v. Wright, 173 Va. 261, 3 S. E. 2d 187 (1939). *Cf.* State Farm Mut. Automobile Ins. Co. v. Coughran, 303 U. S. 485 (1938).

[13] Jackson v. Maryland Cas. Co., 212 N. C. 546, 193 S. E. 703. After stating the rule that the insurer would ordinarily be estopped by the prior judgment of negligent injury, the court worked an estoppel against the injured third party and held that the latter could not deny the willful nature of the injuries by reason of the fact that the complaint in the suit against the assured alleged willful and intentional injuries. *Cf.* Distributing Co. v. Ins. Co., 214 N. C. 596, 200 S. E. 411 (1938); Campbell v. Cas. Co., 212 N. C. 65, 192 S. E. 906 (1937).

[14] *Quaere* whether this result is proper where the insurer took part in the original action only to the extent of supplying counsel for the assured, or, *a fortiori,* where the insurer took no part whatever in the original action.

[15] Farm Bureau Mut. Automobile Ins. Co. v. Hammer, 177 F. 2d 793 (4th Cir. 1950), *reversing* 83 F. Supp. 383 (W. D. Va. 1949).

[16] Parker, Chief Judge, dissented, following the reasoning of the prevailing view. Farm Bureau Mut. Automobile Ins. Co. v. Hammer, *supra* note 15 at 802.

The correct solution is the more difficult to ascertain because of strong, conflicting equities in the opposing parties. The third party with a judgment against the assured should not be forced to retry the facts and again establish the negligent injury. From his point of view it would appear reasonable that the insurer be required to assert its position in the original action, or thereafter be estopped to question the nature of the injury. On the other hand, the insurer should not be bound by a determination of negligence adjudicated in an action brought by a stranger to the insurance contract, wherein the subject of policy coverage was not directly involved and to which the insurer was not a party. The alternative of intervention by the insurer in the original action appears rather inadequate in view of the fact that its interests are adverse to those of its assured.[17]

The dilemma created by the conflicting equities of the injured third party and the insurer is ordinarily resolved in favor of the former. The Fourth Circuit case outlined above, in resolving the dilemma in favor of the insurer rather than the injured third party, rejects the device of estoppel by judgment, which has been the approach most frequently used in reaching decisions favorable to third persons.

The third method by which courts justify a holding for a third party intentionally injured is through construction of financial responsibility statutes. One type of such statutes requires that all motorists maintain liability insurance.[18] Most such statutes, however, merely provide that in the event of failure to satisfy a judgment arising out of accident in the use, operation, or ownership of a motor vehicle, the motorist forfeits his driving privilege pending satisfaction of the judgment and proof by the motorist of his future financial responsibility.[19] Under either of the above types of statutes, regardless of whether the policy was voluntarily taken out, it is uniformly held that injuries caused by

[17] Judge Parker observed that the fact that the insurer could assert in the original case the intentional nature of the injury only with serious prejudice to the defense of that case, meant merely that the defense which it had undertaken was "difficult." Farm Bureau Mut. Automobile Ins. Co. v. Hammer, 177 F. 2d 793, 802 (4th Cir. 1950).

[18] Though there have been many attempts to pass statutes requiring insurance for all drivers (*e.g.*, eighteen bills were introduced in state legislatures in 1949), Massachusetts is the only state which actually has in force such an act. Three jurisdictions require liability insurance for certain poor-risk drivers: CONN. GEN. STAT. §1561 (1930) (minors); HAWAII REV. LAWS, §§7408, 7414 (1945) (minors); R. I. GEN. LAWS ANN., c. 98, §3 (1938) (minors and drivers having had two accidents). Compulsory insurance laws have been for years in effect in many European countries. See Deak, *Automobile Accidents: A Comparative Study of the Law of Liability in Europe*, 79 U. OF PA. L. REV. 271 (1931).

[19] Some forty-four states and the District of Columbia have adopted some type of financial responsibility law; lacking such statutes are Louisiana, Mississippi, South Carolina and Texas. See Billings, *Impact of Financial Responsibility on Automobile Liability Insurance*, INS. L. J. 323:871, Dec. 1949; note, *Motor Vehicle Financial and Safety Responsibility Legislation*, 33 IOWA L. REV. 522 (1948). North Carolina's Motor Vehicle Financial Responsibility Act is found in N. C. GEN. STAT. §§20-224 *et seq.* (1949 Supp.).

the willful act of the assured are within the coverage of liability insurance where the policy was at the time of accident being used to certify financial responsibility pursuant to the statute.[20] This result is both logical and just. The purpose of the statute, the protection of the traveling public from irresponsible motorists, is effected. At the same time, the insurer is not subjected to any risk he could not reasonably have foreseen and provided for by appropriate charges, and is subrogated to the rights of the indemnified third party in all cases where coverage would ordinarily be excluded by the terms of the policy were it not for the effect of the financial responsibility statute.[21] Thus, the public is protected from irresponsible motorists without relieving the assured of ultimate responsibility for his own willful misconduct.

Even where a liability insurance policy was not being used to certify financial responsibility under the more usual type of statute, it has been held that the insurer was liable to a third party for the assured's wrongdoing.[22] In this case the policy was worded to conform to the requirements of the responsibility act in the event that it should subsequently be invoked, and the court ruled that this reference immediately incorporated the public policy of the statute into the insurance policy, thereby enlarging coverage to include injuries deliberately inflicted.[23] This result would appear readily avoidable by more careful drafting of policy provisions guided by the light of experience.

Courts following either the first or third approach outlined above are primarily concerned with redressing the injury of the innocent third party, and only incidentally with the contractual relationship of the insurer with the assured.[24] They concede that the assured, bound by the terms of his contract, has no right to be indemnified for his own willful misconduct. But they hold the insurer liable, where the third party is the claimant, by recognizing a subjective rather than an absolute concept of coverage; that is, those which follow the "definition approach" view coverage from the point of view of the claimant, and those which use

[20] Compulsory insurance statute: Wheller v. O'Connell, 297 Mass. 549, 9 N. E. 2d 544 (1937). Note that the compulsory insurance act is not applicable to property damage, being intended to apply only to personal injuries resulting from the faulty and tortious use of a motor vehicle on a public way.

Ordinary financial responsibility act: Ambrose v. Indemnity Ins. Co., 127 N. J. L. 248, 199 Atl. 47 (1938). See 7 APPLEMAN, INSURANCE LAW AND PRACTICE 72 (1942).

[21] Ocean Acc. & Guaranty Corp. v. Peerless Cleaning & Dyeing Works, Inc., 10 N. J. Misc. 1185, 162 Atl. 894 (1932). See SAWYER, AUTOMOBILE INSURANCE 132 (1936).

[22] Hartford Acc. & Indemnity Co. v. Wolbarst, 95 N. H. 40, 57 A. 2d 151 (1948).

[23] Statutory provisions are held to supercede any conflicting terms in the insurance policy. Newton v. Employers' Liability Assurance Corp., 107 F. 2d 164 (4th Cir.), cert. denied, 309 U. S. 673, *rehearing denied*, 309 U. S. 698 (1939).

[24] For an extensive discussion of the problems of financial protection for the automobile accident victim, see 3 LAW AND CONTEMP. PROB. 465-608 (1936).

"construction of the statute" view coverage in the light of public policy. Instead of viewing the third party strictly as a subrogee to the rights of the assured, and therefor disallowing his claim against the insurer,[25] they attribute to him rights independent of the assured, in effect treating him as a third-party-beneficiary.[26]

On the other hand, courts which follow the second approach, estoppel by judgment, rather than basing their decisions on the actual terms of the policy, are under no necessity of rationalizing their judgment for the third party in terms of third-party-beneficiary or analogous concepts, and in fact do reject any such theory. North Carolina[27] is one of this majority of courts[28] which utilizes the estoppel by judgment approach and rejects any suggestion that the third party has any greater rights than the assured.

Automobile liability insurance is coming to be thought of more as a social device for the reparation of injuries sustained than as a business contract to be strictly construed for the protection of the assured. It would appear that until liability insurance is required by law for all drivers, the judicial attitude will seek to find coverage of intentional injuries in the policy itself, or estoppel to deny that coverage.

CLYDE T. ROLLINS.

Labor Law—Fair Labor Standards Amendments of 1949—Suits for Unpaid Wages

A fundamental objective of the Fair Labor Standards Act[1] is to secure for workers the wages which they are required to be paid. In October, 1949, a new enforcement provision designed to further this objective was added to the Act. This is Section 16(c),[2] which gives to the Administrator of the Wage and Hour Division the authority to

[25] See 8 APPLEMAN, INSURANCE LAW AND PRACTICE 189-196 (1942).

[26] New Amsterdam Cas. Co. v. Jones, 135 F. 2d 191 (6th Cir. 1943); Franklin v. Georgia Cas. Co., 225 Ala. 58, 141 So. 702 (1932); Indemnity Co. v. Bollas, 223 Ala. 239, 135 So. 174 (1931); Antichi v. New York Indemnity Co., 126 Cal. App. 284, 14 P. 2d 598 (1932); Hartford Acc. & Indemnity Co. v. Wolbarst, 95 N. H. 40, 57 A. 2d 151 (1948). See 8 APPLEMAN, INSURANCE LAW AND PRACTICE 196 (1942).

[27] State Farm Mut. Automobile Ins. Co. v. James, 80 F. 2d 802 (4th Cir. 1936); MacClure v. Cas. Co., 229 N. C. 305, 49 S. E. 2d 742 (1948); Sears v. Maryland Cas. Co., 220 N. C. 9, 16 S. E. 2d 419 (1941); Peeler v. Cas. Co., 197 N. C. 286, 148 S. E. 261 (1929).

[28] Farm Bureau Mut. Automobile Ins. Co. v. Hammer, 177 F. 2d 793 (4th Cir. 1950); Summers v. Travelers' Ins. Co., 109 F. 2d 845 (8th Cir. 1940); Clements v. Preferred Acc. Ins. Co., 41 F. 2d 470 (8th Cir. 1930); Royal Indemnity Co. v. Morris, 37 F. 2d 90 (9th Cir. 1930); Guerin v. Indemnity Ins. Co., 107 Conn. 649, 142 Atl. 268 (1928); Coleman v. New Amsterdam Cas. Co., 247 N. Y. 271, 160 N. E. 367 (1928). See 8 APPLEMAN, INSURANCE LAW AND PRACTICE 189-191 (1942).

[1] 52 STAT. 1060 (1938), 29 U. S. C. §201 *et seq.* (1946), as amended, 63 STAT. 910, 29 U. S. C. §201 *et seq.* (Supp. 1949).

[2] 63 STAT. 919, 29 U. S. C. §216(c) (Supp. 1949).

supervise payment of employees' claims for unpaid minimum wages and unpaid overtime compensation. And, under this section, the Administrator, with the written consent of the employee-claimant, may bring suit to recover the amount of such claim, provided, "that this authority to sue shall not be used by the Administrator in any case involving an issue of law which has not been settled finally by the courts. . . ."

Prior to the enactment of this amendment there were three instruments of enforcement available for use against recalcitrant employers. (1) Section 16(b)[3] gives to the employee the right to sue for unpaid wages and an additional equal amount as liquidated damages, plus a reasonable attorney's fee. (2) Section 17[4] provides that the Administrator can get an injunction against employers found to be in violation of the Act. (3) Under Section 16(a)[5] the Administrator can obtain fines and jail sentences for willful violators on a second offense. Section 16(c) adds a fourth procedure to this already impressive array of sanctions.

As a matter of administrative practice the Wage and Hour Division had usually requested employers to make voluntary restitution of unpaid wages to employees. But this met with only partial compliance for two reasons: (A) even if the employer voluntarily paid the wages due, he was still subject to suit for the liquidated damages under 16(b); (B) some employers chose to gamble that they might not be sued at all—past experience had shown that many employees were reluctant to secure an attorney and bring suit, so the employer simply sat tight, gambling that employee inertia would persist long enough for the statute of limitations to run on the claim.[6]

Because employers were not making restitution voluntarily and because the Administrator was often powerless to require payment, the Department of Labor favored the adoption of 16(c), giving the Administrator authority to bring suit if requested by the employee to do so.[7]

In some situations, however, the Administrator *was* in position to require restitution. In 1948 the Supreme Court handed down its deci-

[3] 52 STAT. 1069 (1938), 29 U. S. C. §216(b) (1946).

[4] 52 STAT. 1069 (1938), 29 U. S. C. §217 (1946), as amended, 63 STAT. 919, 29 U. S. C. §217 (Supp. 1949).

[5] 52 STAT. 1069 (1938), 29 U. S. C. §216(a) (1946).

[6] At the hearings, Mr. William R. McComb, Administrator of the Wage and Hour Division, said: "The employer has found in many instances, I think, that his employees will not sue him, and he has refused to pay voluntarily. We have had a remarkable drop. We used to have voluntary payments from about 90 percent of those we found in violation. They are now down to 30 percent. The employer just does not pay. He knows the employee probably will not sue him." *Hearings before Committee on Education and Labor on H. R. 2033,* 81st Cong., 1st Sess. 115 (1949).

[7] *Hearings before Committee on Education and Labor on H. R. 2033,* 81st Cong., 1st Sess. 59 (1949). *Hearings before a Subcommittee of the Committee on Labor and Public Welfare on S. 653,* 81st Cong., 1st Sess. 72 (1949).

sion in *McComb v. Jacksonville Paper Co.*[8] In this case the Administrator instituted a civil contempt proceeding, alleging violations of a prior (1940) district court decree which enjoined the Paper Company from violating the minimum wage, overtime, and record-keeping provisions of the Act. In this proceeding the Administrator asked that the Company be required to make payment of unpaid statutory wages to employees affected. The Supreme Court held that the district court had the power to order the Company, *in order to purge their contempt,* to pay to the affected employees amounts of wages which were unpaid in violation of the Act.[9]

In the *Jacksonville* case the Court said, "We can lay to one side the question whether the Administrator, when suing to restrain violations of the Act, is entitled to a decree of restitution for unpaid wages."[10] The Court did not have that problem before it; it was dealing there with the power of the court to enforce compliance with its injunction. But the question which the Court "laid to one side" in the *Jacksonville* case was raised almost at once in *McComb v. Frank Scerbo & Sons.*[11] In this case the Administrator sought an injunction and, as ancillary relief, a contemporaneous order compelling the employer to pay unpaid overtime wages to employees affected. The court of appeals held that the order compelling payment was proper, citing the *Jacksonville* case as authority.[12]

The Administrator's victory was short-lived. Congress promptly negatived the effect of the *Scerbo* case by inserting the following proviso into Section 17: *no court shall have jurisdiction, in any action brought by the Administrator to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action.* This restricts the holding in the *Jacksonville* case to the precise situation there dealt with. That is, the Administrator can get an order requiring payment of wages only in contempt proceedings for enforcement of injunctions issued under section 17 for violations occurring subsequent to the issuance of such injunctions.[13]

Because existing wage collection machinery has proved ineffectual in many instances, Section 16(c), which gives the Administrator authority to bring suit for unpaid wages, was proposed. The Department of Labor and the unions supported its adoption, but many witnesses at

[8] 336 U. S. 187 (1948).
[9] McComb v. Crane, 174 F. 2d 646 (5th Cir. 1949).
[10] 336 U. S. 187, 193 (1948).
[11] 177 F. 2d 137 (2d Cir. 1949).
[12] The court said that the fact that the Supreme Court in the Jacksonville case had expressly left open the question whether the Administrator could obtain an order compelling restitution as ancillary to injunctive relief appeared to be "judicial caution, not the discovery of a vital difference." *Id.* at 139.
[13] H. R. REP. No. 1453, 81st Cong., 1st Sess. 32 (1949).

the hearings vigorously opposed it.[14] Without expressing the obvious objection that this power in the hands of the Administrator would be another club to hold over the head of the employer, many witnesses opposed the amendment as an improper enlargement of government action.[15] But, administrative authority to bring suit on behalf of a private claimant is no innovation in this country.[16] Many states have had similar provisions for a number of years,[17] and indeed in some states the mere existence of the authority to bring suit has been such an effective deterrent to violators that the power has seldom been resorted to.

But 16(c) as finally adopted was not in reality the amendment proposed by the Administrator, though both the House and the Senate Committees reported out the section substantially as he had proposed it.[18] In conference the section was saddled with a proviso which restricts the Administrator's authority to bring a suit for an employee to cases where the law has been settled finally by the courts.[19] The pro-

[14] The witnesses invariably represented the views of management. *Hearings on H. R. 2033, supra* note 7, at 226, 460, 582, 595, 954, 983, 1054, 1268, 1340, 1431, 1707.

[15] Mr. Peter T. Beardsley, Attorney, American Trucking Associations, had this to say: ". . . We fail to comprehend any legitimate reason why any government officer, no matter what his status, should be empowered to provide free legal services to a selected category of private litigants, at the expense of the general taxpayer." *Hearings on H. R. 2033, supra* note 7, at 595.

[16] Instances of such authority were not unknown in federal legislation. 49 STAT. 2037 (1936), 41 U. S. C. §36 (1946) (Walsh-Healey Public Contracts Act).

[17] Strongest of the state statutes is that of Rhode Island which makes it the "duty" of the director of the Dep't of Labor to institute actions for collection of wages. R. I. Pub. Laws, 1941, c. 1069, §6(a).

In Alaska, Connecticut, Hawaii, Massachusetts, Oregon, New York, and Utah, the appropriate administrative officer may, upon assignment of the wage claim to him, bring "any legal action necessary to collect such claim." Wisconsin limits this authority to claims of less than $100. ALASKA COMP. LAWS ANN. §43-1-5(4) (1949); CONN. GEN. STAT. §3796 (1949); HAWAII REV. LAWS §4363 (1945); MASS. ANN. LAWS c. 151, §20 (Supp. 1948); N. Y. LABOR LAW §199(2); ORE. COMP. LAWS ANN. §102-613(b) (1940); UTAH CODE ANN. §49-9-22 (1943); WIS. STAT. §101.10(14) (1947).

In California, Illinois, Kentucky, New Hampshire, New Jersey, Ohio, and Pennsylvania, the appropriate administrative officer may bring suit to collect unpaid wages owing to women and minors. CAL. LABOR CODE §1195.5 (1943); ILL. ANN. STAT. c. 48, §198.16 (Cum. Supp. 1948); KY. REV. STAT. §337.360 (1948); N. H. REV. LAWS c. 213, §23 (1942); N. J. STAT. ANN. §34:11-56 (1940); OHIO GEN. CODE ANN. §154-45s (1946); PA. STAT. ANN. tit. 43, §331(o) (1941).

In Arkansas, California, Nevada, and Washington, suit may be brought to collect wages of persons who are financially unable to employ counsel. ARK. STAT. §81-312 (1947); CAL. LABOR CODE §98 (1943); NEV. COMP. LAWS ANN. §2751 (Supp. 1941); WASH. REV. STAT. ANN. §7596-1 (Supp. 1940).

New Mexico's statute gives the labor commissioner authority to sue for collection of wage claims when, in his judgment, the claimant is "entitled to the services of the commissioner." N. M. STAT. ANN. §57-312 (1941).

And the South Carolina statute simply says that the labor commissioner shall "cooperate" with any employee in the enforcement of his wage claim. The statute does not seem broad enough to include authority to bring suit. S. C. CODE ANN. §7034-6(6) (1942).

[18] H. R. REP. No. 267, 81st Cong., 1st Sess. 10 (1949); SEN. REP. No. 640. 81st Cong., 1st Sess. 6 (1949).

[19] H. R. REP. No. 1453, 81st Cong., 1st Sess. 10 (1949).

viso was designed to prevent the Administrator from using his authority to bring test cases involving new or novel questions of law.[20] But the difficulties which the proviso injects are at once obvious. The phrasing of it supplies to ingenious defendants incentive to obscure the principal issue with a smoke screen of preliminary questions as to whether the case does, or does not, involve an issue of law which has been settled finally by the courts. Does the proviso mean that the Supreme Court must have ruled on the question? Or is it sufficient that certiorari has been denied? Or is it enough that one of the courts of appeals has ruled on the point? And what if there is disagreement among the circuits?[20a]

Employee suits will continue to be an important instrument for collection of wages,[21] and the *Jacksonville* case still provides a means for the Administrator to act as a collecting agent in a limited number of situations. Section 16(c), inasmuch as it provides that when an employee accepts payment under the Administrator's supervision or consents to an action on his behalf by the Administrator, he waives his right of action under 16(b) to sue for liquidated damages, should stimulate voluntary payments by fair-minded employers who formerly did not make payment voluntarily because they feared that a subsequent suit for liquidated damages might be brought. But 16(c) may prove not to be the panacea which the Administrator originally envisioned. The full efficacy of the section, in view of the proviso limiting the authority of the Administrator to bring suit to those cases in which the law has been settled with finality, will depend upon a determination of what the proviso really means. It is significant that though half the states have somewhat similar statutes none of these is similarly restricted.[22]

JAMES L. TAPLEY.

Negligence—Res Ipsa Loquitur—Application to Airplane Accidents

Decedent, who also held a pilot's license, was permitted by the pilot to ride in a dual control airplane which was to execute "precision spins" as part of a demonstration of airplane maneuvers. The pilot was in the instructor's seat when the plane took off, decedent being seated in the rear seat. The plane, once aloft, began the maneuver, but instead of pulling out of the spin and resuming level flight, it continued its downward movement until it crashed on the ground, killing both occupants. In a suit brought by decedent's administrator to recover for wrongful

[20] *Id.* at 32.

[20a] See note, 63 HARV. L. R. 1078 (1950), which appeared after this note was in proof.

[21] The Division can inspect each year less than 5% of the establishments now covered by the Act. *Hearings on S. 653, supra* note 7, at 74.

[22] See note 17 *supra.*

death from the pilot's employer, a nonsuit at the close of plaintiff's evidence was reversed by a divided court in *Bruce v. O'Neal Flying Service.*[1] The decision was based primarily on (1) the presumption that the pilot, having been in control of the airplane when it left the airport, continued to operate it until the moment of impact, despite the accessibility of the controls to the decedent, and (2) the expert testimony of two pilots who witnessed the accident attesting to the safety of the maneuver when properly performed.[2] *Res ipsa loquitur* was not mentioned. The dissent regarded *Smith v. Whitley,*[3] which refused to apply *res ipsa loquitur* to an unexplained airplane accident and which the majority endeavored to distinguish, as controlling the present case, and emphasized the lack of positive evidence of the cause of the accident and of who was in control.

The apparently inconsistent results of the *Smith* and *Bruce* cases, on almost identical facts, in deciding whether there was an inference of negligence sufficient for submission to the jury raise the issue of the applicability of *res ipsa loquitur in* North Carolina airplane accident cases. Since an earlier note in 1943 in this LAW REVIEW[4] has dealt with its applicability to airplane disasters generally, its application prior to the date of that note or in other situations in the law of negligence will not be considered.

In accordance with the usual requirements, in order to invoke the doctrine of *res ipsa loquitur,* it must be shown that the accident would not have occurred in the absence of negligence, that the airplane was within the control of defendant, that plaintiff is not in position to know the cause of the accident, and that the defendant possesses, or may acquire, superior knowledge as to the cause of the accident.[5]

In recent years *res ipsa loquitur* has been considered with regard to aircraft accidents most frequently in cases involving private or non-carrier aircraft. Eight courts have rejected the doctrine either expressly[6] or by implication.[7] On the other hand, in two cases, both of

[1] 231 N. C. 181, 56 S. E. 2d 560 (1949).

[2] ". . . the pilot . . . just overdid it a little bit too much . . . he tried to make it too good. He just went too low."

[3] 223 N. C. 534, 27 S. E. 2d 442 (1943). The pilot and passenger survived the crash and testfied respectively, "the plane went into a spin and crashed and I do not know why," and "I don't know just why the plane crashed; it just came down in a spin with the nose to the ground." A judgment of nonsuit was affirmed; the court expressly stated that *res ipsa loquitur* did not apply to such accidents.

[4] Note, 22 N. C. L. REV. 160 (1943).

[5] Parker v. James E. Granger, Inc., 4 Cal. 2d 668, 52 P. 2d 226 (1934), *cert. denied,* 298 U. S. 644 (1936).

[6] Morrison v. Le Tourneau Co., 138 F. 2d 339 (5th Cir. 1943) (plane with dual controls; hence, no theory upon which jury could infer negligence; court said case not to be decided solely by speculation of jury); Deojay v. Lyford, 139 Me. 234, 29 A. 2d 111 (1943) (while landing, plane swerved off of concrete runway, and tail assembly struck and injured a workman; held, not analogous to car running off highway because not unusual for airplanes to swerve in this manner when

which concerned military aircraft, the doctrine has been indorsed and applied.[8] Three of those courts rejecting *res ipsa loquitur*[9] have been confronted with crashes of dual control aircraft, as in the *Bruce* case, and have based their decisions in part at least, on defendant's lack of complete control.

The courts have been more amenable to the application of *res ipsa loquitur* where air carriers have been involved. For example, in *Smith v. Pennsylvania Central Airlines Corp.*[10] the airplane crashed into a mountainside while on a scheduled flight; the administrator of a de-

landing, and no inference of negligence therefrom); State for use of Piper v. Henson Flying Service, 60 A. 2d 675 (Md. 1948) (*res ipsa loquitur* rejected because of evidence of decedent's negligence in failing to switch from empty to full gas tank); Smith v. Whitley, 223 N. C. 534, 27 S. E. 2d 442 (1943) (not clear whether carrier or non-carrier involved; facts would seem to indicate that it was non-carrier); Towle v. Phillips, 180 Tenn. 121, 172 S. W. 2d 806 (1943) (plane equipped with dual controls and therefore not completely within control of defendant).

[7] Brewer v. Thomason, 219 S. W. 2d 758 (Ark. 1949) (ground observers testified that while plane in flight motor suddenly "went dead"; held, there must be some evidence of negligence upon which verdict may be based; *res ipsa loquitur* not alluded to); Hall v. Payne, 189 Va. 140, 52 S. E. 2d 76 (1949) (dual control airplane crashed while in flight; testimony that immediately prior to take-off motor did not appear to be functioning properly; held, jury may not decide case by conjecture or speculation; the court stated, "It is not contended that *res ipsa loquitur* applies."); Neel v. Henne, 30 Wash. 2d 24, 190 P. 2d 775 (1948) (motor ceased to operate immediately after plane took off; held, jury could determine cause of resulting crash only by conjecture; *res ipsa loquitur* not mentioned).

[8] San Diego Gas & Elec. Co. v. United States, 173 F. 2d 92 (9th Cir. 1949) (Coast Guard plane observed flying continually at hazardously low altitude; five seconds later, while not observed, collided with plaintiff's power line at altitude of 187 feet; held, there was presumption of continuing negligence and *res ipsa loquitur* applied); Yukon Southern Air Transp., Ltd. v. The King [1943] 1 D. L. R. 305 (Ex. 1941) (while taking off, R. C. A. F. fighter plane collided with plaintiff's empty passenger plane parked near runway, killing pilot).

[9] Morrison v. Le Tourneau Co., 138 F. 2d 339 (5th Cir. 1943); Towle v. Phillips, 180 Tenn. 121, 172 S. W. 2d 806 (1943); Hall v. Payne, 189 Va. 140, 52 S. E. 2d 76 (1949).

[10] 76 F. Supp. 940 (D. D. C. 1948); *accord*, Bratt v. Western Air Lines, 169 F. 2d 214 (10th Cir.), *cert. denied*, 335 U. S. 886 (1948) (air carrier crashed on scheduled flight killing plaintiff's decedent; plaintiff relied on *res ipsa loquitur* and structural failure; held, doctrine properly applied, but jury verdict for defendant affirmed); La Tour v. United Air Lines, Inc., 65 N. Y. S. 2d 839 (Sup. Ct. 1946) (held, plaintiff's general allegations of negligence had effect of invoking *res ipsa loquitur*, and defendant could not force plaintiff to give bill of particulars because plaintiff may not have sufficient definite facts at his disposal); Malone v. Trans Canada Lines [1942] 3 D. L. R. 369 (Ont. C. A.) (while landing, air liner made approach too precipitously; endeavored to pull up; crashed; killed all aboard).

Two courts have avoided a decision on the doctrine by ruling that inferences of negligence were sufficient to carry plaintiff's case to the jury. Kamienski v. Bluebird Air Service, Inc., 321 Ill. App. 340, 53 N. E. 2d 131 (1944), *aff'd*, 389 Ill. 462, 59 N. E. 2d 853 (1945) (evidence that cause of engine failure was defective cam gear; held, without alluding to *res ipsa loquitur*, failure of *defendant* to prove due care by mechanics who inspected cam gear justified verdict for plaintiff); Gill v. Northwest Airline, Inc., 228 Minn. 164, 36 N. W. 2d 785 (1949) (air carrier crashed 40 miles off course; no survivors or witnesses; court ruled that it was unnecessary to decide applicability of *res ipsa loquitur* because possible for jury to infer negligence from fact that plane left established course and radio beam without apparent cause).

ceased passenger alleged specific acts of negligence and sought to invoke *res ipsa loquitur*. The court held the doctrine applicable to crashes of common carriers despite the allegations of specific negligence. In but one case of this type has the court expressly repudiated it.[11]

It would seem that the doctrine has been invoked more frequently in public carrier cases because of the requirement that an air carrier "is bound to exercise the highest degree of practical care and diligence and is liable for all matters against which human providence and foresight might guard . . ." ;[12] the slightest deviation from this standard will raise an inference of negligence.[13] Some jurisdictions hold that an accident involving injury to a passenger will immediately raise a rebuttable presumption of negligence on the part of the carrier.[14] However, the plaintiff injured in a private airplane crash benefits from no such presumption, and non-carrier operators and owners must exercise only ". . . the degree of care that men of reasonable vigilance and foresight exercise in the practical conduct of their affairs."[15]

The confusion in this field of the law has brought into sharp conflict a governmental policy to encourage the development of commercial air transportation, and the right of the passenger to redress for individual injuries. Conceivably, a single crash of an air carrier could result in judgments in favor of all of the passengers aboard, and thus produce financial disaster for the defendant airline.[16] Hence, concern over the role which could be played by *res ipsa loquitur* in effecting these paralyzing recoveries from an industry which has been promoted by direct federal aid[17] and by the establishment of auxiliary services[18] has fostered efforts to limit carrier liability.

[11] Ortiz v. Eastern Air Lines [1948] U. S. Av. R. 623 (D. C. Md.) (Defendant's air liner suddenly plunged earthward in clear, quiet weather, carrying all passengers to deaths. Plaintiff alleged negligence generally and endeavored to invoke *res ipsa loquitur*. Court dismissed the action, holding that the doctrine was inapplicable because controlling state law repudiated it "in relation to a case of this kind." The court cited Morrison v. Le Tourneau, note 6 *supra*, and approved the reasoning therein, but it would appear that the cases are distinguishable on their facts.).

[12] Law v. Transcontinental Air Transport, Inc. [1931] U. S. Av. R. 205 (E. D. Pa.).

[13] Kamienski v. Bluebird Air Service, 321 Ill. App. 340, 53 N. E. 2d 131 (1944), *aff'd*, 389 Ill. 462, 59 N. E. 2d 853 (1945); DYKSTRA AND DYKSTRA, BUSINESS LAW OF AVIATION 314 (1946); FIXEL, LAW OF AVIATION 182 (2d ed. 1945); RHYNE, AVIATION ACCIDENT LAW 44, 55 (1947).

[14] Johnson v. Eastern Air Lines, 177 F. 2d 713 (2d Cir. 1949) (in refusing to set aside verdict for defendant, held, in South Carolina and New York presumption of negligence rebuttable).

[15] Greunke v. North Am. Airways Co., 201 Wis. 565, 230 N. W. 618 (1930); DYKSTRA AND DYKSTRA, *op. cit. supra* note 13 at 243; RHYNE, *op. cit. supra* note 13, at 57.

[16] Rieber, *Some Aspects of Air Carriers' Liability*, 11 LAW AND CONTEMP. PROB. 524 (1946); Note, U. CHI. L. REV. 365 (1948).

[17] 52 STAT. 998 (1938), 49 U. S. C. §486(b) (1946).

[18] 52 STAT. 985, 986 (1938), 49 U. S. C. §452-457 (1946).

Paramount among these efforts, and the most successful, has been the Warsaw Convention of 1929.[19] This agreement among the principal nations of the world, applying to international air transportation, makes proof of negligence unnecessary[20] but relieves from liability the carrier which proves that all necessary measures to avoid damage were taken or that it was impossible to take them,[21] and in the absence of a showing of willful misconduct by the carrier, limits recovery to $8,291.87[22]

The adoption of similar federal legislation designed to protect the interests of the passenger, carrier and public has been recommended.[23] While the suggested plans for limiting liability on domestic airlines have varied, generally they have in effect called for a statutory declaration of *res ipsa loquitur*, at least insofar as plaintiffs are relieved from proving specific negligence, and have established a fixed maximum on recoveries, absent proof of willful misconduct. These proposals are an adoption of the pattern and spirit of the Warsaw Convention for domestic purposes.

Air carriers, too, have instituted practices designed to curtail liability. It has become a universal practice for airlines, in contracting with their passengers, to issue tickets stamped "Subject to tariff regulations." This apparently innocuous phrase, probably unnoticed by the passenger, has the legal effect of advising him of the provisions and requirements of the airline's tariffs and regulations on file with the Civil Aeronautics Board, pursuant to statute,[24] as for example a requirement that notice of claim be filed or suit brought within a fixed period.[25] These provisions of the contract of carriage embodied in the tariff regulations are binding although rarely known to the passenger and virtually never to his personal representative.

The North Carolina Supreme Court has not yet been presented with an air carrier situation in which it would be compelled to decide the applicability of *res ipsa loquitur* and deal with the concomitant problem of policy and the limiting of airline liability. It may be expected, however, that the unparalleled liberality manifested in the *Bruce* decision, in al-

[19] 49 STAT. 3000, U. S. TREATY SER. No. 876 (Dep't State 1929).

[20] *Ibid.* Article 26. One seeking damages for death or injury to passengers makes out a prima facie case upon showing a contract of carriage under the Convention, that damage was suffered, and the amount of such damage.

[21] *Ibid.* Article 20.

[22] *Ibid.* Article 22.

[23] Reiber, *op. cit. supra* note 16, at 535.

[24] 52 STAT. 992 (1938), 49 U. S. C. §483 (1946).

[25] Brandt v. Eastern Air Lines, Inc. [1948] U. S. Av. R. 637 (S. D. N. Y.) (in wrongful death action court denied plaintiff's motion to strike airline's defense that notice of claim not filed within 90 days of accident, or suit brought within one year, as required by tariff regulations filed by carrier with CAB); *accord*, Wilhelmy v. Northwest Airlines Inc., 2 Avi. 15,023 (W. D. Wash. 1949) (upheld validity of 30-day notice of claim provision as reasonable).

lowing an inference of negligence to go to the jury, will be duplicated *a fortiorari* in air carrier cases, where reasons of policy reinforce the result.

The refusal of some courts to apply *res ipsa loquitur* has resulted from a feeling of uncertainty over the cause of the accident; Justice Barnhill, dissenting in the *Bruce* case, quoted from the *Smith* decision that "airplanes do fall without fault of the pilot," a statement originating in 1933.[26] While this statement still may be valid, though to a lesser extent, it should not be concluded that the causes of airplane accidents are so obscure as to defy determination.[27] Recent reports of the Civil Aeronautics Board indicate that less than .7% of all aircraft accidents are of undetermined cause.[28] This would seem to demonstrate that when airplanes collide or crash today, there is a determinable cause which, when ascertained, may raise an inference of negligence, unavoidable accident, or act of God,[29] and hence is a proper matter for jury consideration.

It may be plausibly argued that the *Smith* case insofar as it refused to apply *res ipsa loquitur* conflicts with the approach of the Court in the *Bruce* decision since the Court in the latter case reached a result which other courts, even those expressly applying the doctrine, have been unable to reach in dual control situations. The finding in the *Bruce* decision that there was an inference of negligence is subject to question in view of the existence of dual controls and the absence of proof that the pilot continued to control the airplane throughout the maneuver. In any event, the submission of the inference of negligence to the jury allowed to plaintiff the exact procedural relief which *res ipsa loquitur* is designed to afford, and renders the *Smith* case of dubious value as a precedent.

R. VINCENT SPRACKLIN.

[26] Rochester Gas & Elec. Corp. v. Dunlop, 148 Misc. 849, 266 N. Y. Supp. 469 (County Ct. 1933).

[27] RHYNE, *op. cit. supra* note 13, at 137.

[28] *Annual Report of CAB-Fiscal Year 1949.* Of 7,465 non-air-carrier accidents, only 47 (.6%) were found to be of undetermined cause, the major causes being pilot error (76%), structural or engine failure (12%), and weather (5%); of 132 air carrier accidents the causes of only 2 (1.5%) were undetermined, the major causes being pilot error (39%), structural or engine failure (28%), and inadequate maintenance (9%).

[29] While testimony and findings of the CAB concerning the causes of accidents are not admissible in the courts, they are available to the public, and may advise plaintiff of the most effective manner in which to present his case. 52 STAT. 1012 (1938), 49 U. S. C. §581 (1946).

Negotiable Instruments—Forgery or False Pretense—Insurance Coverage

Illogical, the laity would say, to hold that Dick Drawer of S Street had committed a forgery by signing his own name in the presence of T. Teller to a series of checks, thereby procuring all the funds deposited in Drawee Bank by Dick Drawer of I Street. Logical, they would say, to find that he had obtained the money by false pretenses. But the first result would not be too surprising in legalistic circles, since it is a generally accepted principle that "one may commit a forgery by the use of his own name if that name is used with intent to receive."[1]

At common law offenses analogous to these were classified under the general denomination of "cheat," which was a fraud effectuated by some false symbol or token.[2] Forgery, dependent upon a "writing," was called by a separate name because of its special heinousness.[3] With the enactment of statutes, beginning with 30 Geo. II, c. 24, sect. 1, it was realized that committing a fraud by false pretense was hardly less an evil.[4] Ensuing statutes defined and punished forgery[5] and obtaining money by false pretense[6] as separate offenses.

The popular conception of committing the act of forgery is by the attempted imitation in writing of another's personal act with the intent to deceive[7] while the committing of an offense by false pretense may be

[1] White v. Van Horn, 159 U. S. 3 (1895); United States v. Long, 30 Fed. 678 (C. C. S. D. Ga. 1887); *Ex parte* State *ex rel.* Atty. Gen. Williams v. State, 213 Ala. 1, 104 So. 40 (1924); People v. Rushing, 130 Cal. 449, 62 Pac. 742 (1900); Barfield v. State, 29 Ga. 127, 74 Am. Dec. 49 (1895); Thomas v. First Nat. Bank, 101 Miss. 783, 58 So. 478 (1912); Segal v. Nat. City Bank, 52 N. Y. S. 2d 727 (1944), *rev'd on other grounds*, 58 N. Y. S. 2d 261 (1945); Int'l Union Bank v. Nat. Surety Co., 245 N. Y. 368, 157 N. E. 269 (1927); People v. Peacock, 6 Cow. 72 (N. Y. 1826); Edwards v. State, 53 Tex. Cr. R. 50, 108 S. W. 673 (1908); 23 AM. JUR., FORGERY §9 (1939); 37 C. J. S., FORGERY §9 (1943). *See* Stanley v. Beavers, 164 Ga. 656, 139 S. E. 345 (1927), 12 MINN. L. REV. 180 (1928) (Defendant, found guilty of forgery, asked for discharge on habeas corpus because the name he signed to the instrument was his own. The court affirmed the conviction, saying that was a matter of defense, which should have been set up on trial. One dissenting judge said: "In view of the proof that the name signed by the accused was his own proper name . . . , I cannot reach the conclusion that he was guilty of forgery.")

This principle tends to shock even lawyers when it is extended to such a case as United States v. Nat. City Bank of New York, 28 F. Supp. 144 (S. D. N. Y. 1939). There the Veterans Administration sent by registered mail an adjusted service certificate to a veteran, but it was delivered to another person of the same name who indorsed as payee a check representing a loan secured on the strength of the certificate, and it was held forgery ". . . though he indorsed without fraudulent intent, and in the belief that he was the payee named in the check."

[2] Williams v. Territory, 13 Ariz. 27, 108 Pac. 243 (1910); 2 BISHOP'S CRIMINAL LAW §141 (9th Ed. 1923).

[3] Williams v. Territory, *supra* note 2; 2 BISHOP, *op. cit. supra* note 2, §521.

[4] Williams v. Territory, *supra* note 2; 2 BISHOP, *op. cit. supra* note 2, §411.

[5] N. C. GEN. STAT. §14-119 (1943).

[6] N. C. GEN. STAT. §14-100 (1943).

[7] Mann v. People, 15 Hun. 155, *aff'd*, 75 N. Y. 484, 31 Am. Rep. 483 (1878); State v. Lamb, 198 N. C. 423, 152 S. E. 154 (1930).

by a false writing, which may or may not be forged,[8] by acts or conduct,[9] by spoken words,[10] or by failing to speak when there is a duty to do so.[11] The distinction between these two crimes is that the essence of forgery is the *making* of a false writing with the intent that it shall be received as the act of another than the party signing it;[12] whereas, the essence of obtaining money by false pretense is the *acquisition* of the money[13] by reason of false representations made with the intent to cheat and defraud.

This distinction, however, becomes a subtle one when the ultimate fraudulent act is predicated on a written instrument, and some cases hold that when both offenses are of the same grade of crime,[14] the guilty person may be proceeded against for either of them at the election of the solicitor,[15] and a conviction or acquittal of one is a bar to a prosecution of the other.[16] But if a distinction is not maintained, in addition to the legislature being subjected to the imputation of having twice provided for the same crime,[17] an anomaly would result in a situation which expressly included one and not the other.[18] A construction can be given to each which will be in harmony with the statute provisions, and which will preserve the well-known and understood difference between them[19] if each situation is completely analyzed.

Though early cases pronounced this tangible distinction, and many cases have since recognized it, such distinction has not always been followed. So it was easy enough for the North Carolina Supreme Court to find ample authority for a holding that Drawee Bank sustained losses through forgery in a "first impression" case[20] involving the supposititious facts stated above. Drawee Bank had sued Insurance Co. on a

[8] State v. Hobl, 108 Kan. 261, 194 Pac. 921 (1921).
[9] Stecher v. State, 168 Wis. 183, 169 N. W. 287 (1918).
[10] *Ibid.*
[11] People v. Etzler, 292 Mich. 489, 290 N. W. 879 (1940), 25 MARQ. L. REV. 48 (1940).
[12] Goucher v. State, 113 Neb. 352, 204 N. W. 967 (1925).
[13] State v. Stewart, 9 N.D. 409, 83 N. W. 869 (1900).
[14] Persons committing an offense under N. C. GEN. STAT. §14-100 (1943) or N. C. GEN. STAT. §14-119 (1943) ". . . shall be guilty of a felony, and shall be imprisoned in the state's prison not less than four months nor more than ten years, or fined, in the discretion of the court. . . ."
[15] Harris v. State, 27 Okla. 331, 227 Pac. 845 (Cr. Ct. 1924). Loughridge v. State, 63 Okla. 33, 72 P. 2d 513 (Cr. Ct. 1937) (". . . the fact that the defendant might have been charged with forgery is no reason for his not being charged under the false pretense statute."); 2 BISHOP'S CRIMINAL LAW §612 (9th Ed. 1923).
[16] State v. Cross & White, 101 N. C. 770, 7 S. E. 715 (1888), *aff'd*, 132 U. S. 131 (1889).
[17] Mann v. People, 15 Hun. 155, *aff'd*, 75 N. Y. 484, 31 Am. Rep. 483 (1878).
[18] See Peoples Bank & Trust Co. v. Fidelity & Casualty Co. 231 N. C. 510, 57 S. E. 2d 809 (1950) where an indemnity bond was involved covering losses effected by false pretense, but expressly not covering losses effected directly or indirectly by forgery.
[19] Mann v. People, 15 Hun. 155, *aff'd*, 75 N. Y. 484, 31 Am. Rep. 483 (1878).
[20] Peoples Bank & Trust Co. v. Fidelity & Casualty Co., 231 N. C. 510, 57 S. E. 2d 809 (1950).

policy issued by the latter to recover for losses resulting from paying out the funds of Dick Drawer of I Street on checks signed by Dick Drawer of S Street, who had no account in the Bank. The indemnity bond expressly rejected coverage for losses caused directly or indirectly by forgery, but did provide insurance against losses through false pretense. By disallowing recovery, it seems there were many blocks that went to build S Street Dick Drawer's playhouse which the Court considered more as trimmings than foundation, and as a consequence disregarded many authorities, which would have warranted a contrary result.

The cornerstone of this construction was laid when Dick Drawer of S Street went with Paul Payee, who possessed a check previously drawn by said Drawer, to Drawee Bank to have it cashed. Dick Drawer knew he had no funds on deposit, and there is no evidence at this time that he had ever heard of another Dick Drawer having an account there. He had signed his own name, which happened also to be the name of another, with the intent to cheat and defraud the Bank by falsely representing that he had funds to pay the check—but certainly at that point there was no forgery.[21] He stood by silently when Paul Payee was inquiring of the teller as to whether or not the check of Dick Drawer, the very person beside him, was good. And when the teller cashed the check, after verification by the bookeeping office, Dick Drawer's continued silence clearly constituted a false pretense.[22] He added another block by immediately asking about "my balence," to which query the teller informed him of the exact amount in "his" deposit. After this one visit, and as a result of the presentation of the check, his acts and conduct, his spoken words, and his failure to speak, the Bank believed that Dick Drawer of S Street was its depositor. During the next four months, this Dick Drawer came personally to the Bank many times, inquired as to "my balance," had the teller or a companion write out checks for him, signed them in the presence of the teller (never attempting to imitate the personal writing of Dick Drawer of I Street), and the Bank cashed his checks. He never pretended to be anyone other than the person living at S Street, and known as Dick Drawer; in fact, he even had the address of the account changed from I Street to S Street so as to get the bank statements himself. Finally the house toppled when Dick Drawer of I Street wanted to know why he had not been receiving his bank statements,[23] and upon investigation it was discovered that his

[21] State v. Adcox, 171 Ark. 510, 286 S. W. 880 (1926); Goucher v. State, 113 Neb. 352, 204 N. W. 967 (1925).

[22] 22 AM. JUR., FALSE PRETENSE §455 (1939).

[23] A remote question presents itself from this situation as to whether the real depositor might have been considered negligent in not communicating to the Bank his failure to receive bank statements for over three months. No case turning on that point has been found, though there is some authority that the depositor is not

account had been depleted by the well-laid plan of one with his same name. All these events, when taken together, constitute a representation that Dick Drawer of S Street owned the house he had built, and when the Bank in reliance thereon paid him money on his checks, he had committed the offense of obtaining money by false pretense,[24] and not the offense of forgery.[25]

In the instant case, the Court said it was not concerned "with the niceties which might be observed by the solicitor in choosing the subject of prosecution—whether false pretense or forgery."[26] It seems that niceties are of extreme importance since the insurance policy, under which the Bank was claiming, covered losses resulting from false pretense and did not cover losses sustained by forgery. The contract involved was a standard Bankers Blanket Bond, and the pertinent coverage sections are as follows: "(B) Any loss . . . through . . . false pretenses. (D) Any loss through accepting, cashing or paying forged or altered checks. . . . Sect. 1. This bond does not cover: (a) any loss effected directly or indirectly by means of forgery, except when covered by Insuring Clause . . . (D). . . ." A rider was attached when amended the bond: "(a) By deleting Insuring Clause (D) . . . . (c) By deleting from Sect. 1 the following: Under subsect. (a), '(D)' . . . ."[27] The effect of this rider was to withdraw the insurance on any loss effected directly or indirectly by forgery. The fact that the policy coverage included loss through false pretense and excluded loss through forgery is an indication that the parties to the policy intended a distinction between the offenses. And since the words were not defined in the policy, is it not presumable that the parties intended they should have

bound to call for his statement or initiate an inquiry as to whether or not there are irregularities in his account. McCarty v. First Nat. Bank, 204 Ala. 424, 85 So. 754 (1920).

[24] Williams v. State, 33 Ala. App. 119, 31 So. 2d 590, *aff'd*, 249 Ala. 432, 31 So. 2d 592 (1947) (two justices dissenting); 9 ALA. LAW. 199 (1948); Hoge v. First Nat. Bank, 15 Ill. App. 501 (1886); Murphy v. Hollowell, 204 Iowa 64, 214 N. W. 734 (1927); State v. Marshall, 77 Vt. 262, 59 Atl. 916 (1905); Martins v. State, 17 Wyo. 319, 98 Pac. 709 (1908).

[25] The Court cited Nat. Bank v. Marshburn & Cobb, 229 N. C. 104, 47 S. E. 2d 793 (1948), in its opinion in the case under discussion, and said: "We think with reason, . . . [this case] . . . commits the Court to this view," *i.e.*, that the loss was sustained by forgery. That case was decided on the principle that if one of two innocent parties must suffer a loss occasioned by some third person, the negligent one must sustain it. The court, by analogy, said the same principle would apply if the check involved had been forged, but it excluded forgery as a ground of the decision.

[26] It is of interest to know that Dick Drawer of S St. was indicted and convicted of obtaining money by means of false representations and false pretenses at the January Term 1947, in the Superior Court of Edgecombe County, North Carolina, and sentenced to prison for a term of three to five years. On April 24, 1947, he was ordered released on findings of the State Hospital that he had the mental age of four years. This all occurred prior to the institution of the action under discussion.

[27] Transcript of Record, pp. 16-18, Peoples Bank & Trust Co. v. Fidelity & Casualty Co. 231 N. C. 510, 57 S. E. 2d 809 (1950).

their popular meanings?[28] Furthermore, the settled law in this and other jurisdictions is that an indemnity bond is construed strictly against the party issuing it and in favor of the party purchasing it.[29] Therefore, by giving proportionate importance to all the facts, by recognizing the clear distinction between false pretense and forgery, by looking more closely to the intent of the contracting parties, and by applying the rule of construction in regard to contracts of this nature, the Court might well have allowed a recovery by the Bank on its indemnity bond because of a loss effected by false pretense. It seems that the Court fell a little short of the mark when it found a "falsely written" instrument, immediately labelled the loss as the result of forgery, and concluded that it was outside the coverage of the policy. It is conjectured that the Court had a feeling that the Bank was grossly negligent[30] in becoming ensnared in the framework of S Street Dick Drawer's playhouse, and thus it should not be allowed to recover.

The Court's decision denying recovery to Drawee Bank is inevitable conceding that its finding of forgery is correct. But this finding is questioned; for while it is true that one may be guilty of forgery if he signs an instrument and passes it as the instrument of another whose name is identical, here the essence of forgery is not present because the case is devoid of evidence that the checks were represented or purported as being made by any other than Dick Drawer of S Street. However, this Dick Drawer by false pretenses obtained money from the insured Bank, and it should be allowed to recover on its indemnity bond.

BARBARA M. STOCKTON.

Racial Restrictive Covenants—Damage Recovery for Breach—Shelley v. Kraemer Held Inapplicable

Since the United States Supreme Court ruled in *Shelley v. Kraemer*[1] that state courts could not enforce racial restrictive covenants by injunction, there has been widespread speculation as to other methods whereby

[28] In giving a construction to the terms in the policy, the court should seek the usual meaning as it is employed in its common usage. Laird v. Employers Liability Assurance Corp., 2 Del. 216, 18 A. 2d 86 (Ct. Oyer & Ter. 1941); Royal Ins. Co. v. Jack, 113 Ohio St. 153, 148 N. E. 923 (1925). In the latter case, the court said: "We are constrained to give that construction to the word 'theft' that is understood by persons in the ordinary walks of life, and not the definition given it by the Kansas Court—one unknown to the laity." VANCE ON INSURANCE §279 (2d Ed. 1930); 13 APPLEMAN INSURANCE LAW & PRACTICE §7384 n. 56 & n. 62 (1943).

[29] 13 APPLEMAN, *op. cit. supra* note 28, §7401 n. 1 (1943); 44 C. J. S. INSURANCE, §297(c)(1) *et seq.*, and citations (1943).

[30] It is elementary that liability attaches if the drawee bank disburses the depositor's money other than on the depositor's order, however carefully the bank acted. 7 AM. JUR., BANKS §506 n. 10 (1937).

[1] 334 U. S. 1 (1948).

the effectiveness of the covenants could be maintained.[2] One suggested sanction received judicial support when the Supreme Court of Missouri held in *Weiss v. Leaon*[3] that *Shelley v. Kraemer* did not preclude the award of damages for breach of racial restrictive agreements, and remanded the case for trial on that issue.

Shelley v. Kraemer held that state court enforcement of a racial restrictive covenant constitutes a violation of the equal protection of the laws clause of the Fourteenth Amendment, but nevertheless held that such covenants are valid.[4] Commentators have been of the almost unanimous opinion that it also forbids a state court award of damages for breach of such covenants.[5] The court in *Weiss v. Leaon* argued that "the general rule of the law of contracts is well settled that in certain cases a breach of contract will give rise to two remedies, one an action at law for damages, the other a suit in equity for specific performance."[6] They viewed *Shelley v. Kraemer* as merely prohibiting

[2] For discussions of possible methods of avoiding or mitigating the effects of the case, see Ming, *Racial Restrictions and the 14th Amendment*, 16 U. OF CHI. L. REV. 203 (1948); Scanlan, *Racial Restrictions in Real Estate*, 24 NOTRE DAME LAW. 157 (1948); Note, 27 N. C. L. REV. 224 (1949).

[3] 225 S. W. 2d 127 (Mo. 1949).

[4] A valid contract is generally thought of as one which can be enforced in the courts. Nevertheless, valid but unenforceable contracts are familiar in other fields of law, *e.g.*, where a suit for breach is barred by a Statute of Limitation because of undue delay, and where an oral contract violates a Statute of Frauds which requires certain types of contracts to be in writing to be enforceable. But there the objectives causing their unenforceability are far different from the reasons which make it *unconstitutional* to enforce racial restrictive agreements.

The propriety of holding a contract valid when it would be unconstitutional to enforce that contract seems at least questionable. Certainly the precedents created by the cases involving the above-mentioned statutes do not necessarily support such a holding. Consider the following language from the decision of *Von Hoffman v. Quincy*, 4 Wall. 535, 552 (U. S. 1867), a case involving the impairment of the obligation of contract section of the Constitution: "Nothing can be more material to the obligation than the means of enforcement. . . . The ideas of validity and remedy are inseparable, and both are part of the obligation. . . ."

[5] See the following: Note, 27 N. C. L. REV. 224, 230 (1949); Crooks, *The Racial Covenant Cases*, 37 GEO. L. J. 514, 524-525 (1949); Lathrop, *The Racial Covenant Cases*, 1948 WIS. L. REV. 508, 525, 527 ("Most certainly he [Mr. Chief Justice Vinson] did not mean to say that the covenant could be enforced by the obtaining of damages."); Ming, *op. cit. supra* note 2, at 235; Scanlan, *op. cit. supra* note 2, at 182-183; Note, 48 COL. L. REV. 1241, 1244 (1948) ("A narrow view of the doctrine of the case might limit it to contract cases and even there to cases in which injunctive relief rather than damages were sought. . . . But such an argument would be hardly tenable."); Note, 17 U. OF CIN. L. REV. 277, 282 (1948).

[6] Weiss v. Leaon, 225 S. W. 2d 127, 139 (Mo. 1949).

The following are cases which denied injunction but did award damages for breach of the agreements involved: Jackson v. Stevenson, 156 Mass. 496, 31 N. E. 691 (1892); Bull v. Burton, 227 N. Y. 101, 124 N. E. 111 (1919); McClure v. Leaycraft, 183 N. Y. 36, 75 N. E. 961 (1905); RESTATEMENT, PROPERTY §528 (1944). See the critical discussion by Dean Pound in *The Progress of the Law*, 33 HARV. L. REV. 813, 820-821 (1920). It should be noted that in none of the cases denying specific performance or injunction and awarding damages in lieu thereof was the reason for denying the affirmative equitable relief sought the fact that it would be unconstitutional for the court to enforce the contract.

Compare the following language from the concurring opinion of Mr. Justice Frankfurter in *Hurd v. Hodge*, 334 U. S. 24, 36 (1948) (companion case to

the suit in equity, but as not affecting the action at law for damages.[7]

It is clear that when the covenants are effectuated through voluntary aderence to their terms by the parties involved there is no state action. Questions of what is forbidden state action and its exact scope must await further Supreme Court decisions for complete demarcation. But, to hold that the state enforces through injunction and does not enforce by awarding damages is to create a distinction valid only in the sense that the former may be more effective in accomplishing the unconstitutional objective than the latter. *Weiss v. Leaon* operates to discourage a breach of the covenant's terms by threatening a prospective vendor with a pecuniary loss if he sells to one whom the covenant sought to exclude. And this threat may be so deterring in effect that, for all practical purposes, the result *Shelley v. Kraemer* sought to obviate will remain a reality.[8]

When the state court awards damages for the breach of such a covenant, the court lends its aid and authority to the consummation of an otherwise incomplete individual act of discrimination. This constitutes that intervention of the state court, supported by the "full panoply of state power,"[9] which lies within the proscription of the Fourteenth Amendment. The following language of Chief Justice Vinson, uttered over a year before the *Weiss* case, presents an apt answer to the problem which that case considered: "The Constitution confers upon no individual the right to demand action by the state which results in the denial of equal protection of the laws to other individuals."[10]

There is no reason to believe that *Shelley v. Kraemer* was bottomed on legal theory alone. Pressing social problems, especially those involving overcrowded housing and its many harmful consequences,[11] as

---

Shelley v. Kraemer, barring Federal court injunction): "An injunction is, as it always has been, 'an extraordinary remedial process, which is granted, not as a matter of right, but in the exercise of a sound judicial discretion.' Morrison v. Work, 266 U. S. 481, 490 (1924). In good conscience, it cannot be the 'exercise of a sound judicial discretion' by a federal court to grant the relief here asked for when the authorization of such an injunction by the States of the Union violates the Constitution . . . and violates it, not for any narrow technical reason, but for considerations that touch rights so basic to our society, that, after the Civil War, their protection against invasion by the States was safeguarded by the Constitution."

[7] Had the Supreme Court acceded to pressure urging them to declare the covenants void rather than merely unenforceable, the damage question never would have arisen. A void instrument obviously cannot form the basis for any judicial relief.

[8] Even conceding that the "valid but unenforceable" label pinned on the racial covenants is tenable (see note 4 *supra*), both the reasons for their unenforceability and the general tenor of Mr. Chief Justice Vinson's opinion urge the conclusion that anything other than purely voluntary adherence to their terms is not permissible. "You do not act voluntarily when to act otherwise your property would be diminished by an execution issued by a court." Lathrop, *op. cit. supra* note 5, at 525. Also see Ming, *op. cit. supra* note 2, at 217.

[9] Shelley v. Kraemer, 334 U. S. 1, 19 (1948).

[10] *Id.* at 22.

[11] Numerous studies have demonstrated beyond cavil the menace to health and

well as state court denial to Negroes of the privilege of ownership and use of land, influenced the decision of the Court.[12]

Hinging decisions on subtle casuistries will not produce a satisfactory solution to problems in a field where experience more than adequately demonstrates the necessity for measuring methods aimed at discrimination by their consequences rather than by their form. Disregarding the social and constitutional consideration which prompted *Shelley v. Kraemer*, the Missouri court in *Weiss v. Leaon* has sought to evade its responsibility with a distinction that is merely formal.

CHARLES L. FULTON.

Vendor and Purchaser—Duty of Vendor to Accept Assignee's Notes and Mortgage

The defendant contracted to sell real property to the plaintiff's assignor. The contract stipulated that one-half of the purchase price should be paid in cash and the remainder by notes secured by a deed of trust, and that the seller would convey "to the purchaser, or assignee," upon the payment of the purchase price. The original purchaser assigned all of his rights under the contract to the plaintiff corporation, of which he was president, and which tendered the cash and its own notes and deed of trust. The defendant refused to accept the tender. In an action for specific performance, held, nonsuit of plaintiff reversed. The contention that such a contract necessarily imports that credit is given alone to the person with whom the transaction is personally carried out, thereby making it unassignable, is untenable in the absence of adequate expression in the instrument against assignment or some circumstances judicially recognizable *dehors* the agreement.[1]

Contracts for the sale of land or for the sale of merchandise are generally assignable and entitle the assignee to specific performance.[2] However, the undisputed rule is that the vendee cannot by an assignment of the contract compel the vendor to accept the credit of the assignee.[3] Hence if the performance of the assignor is construed as being

morals, media for crime, delinquency, etc., which a policy of legalized ghetto housing has caused. See, *e.g.*, DRAKE AND CLAYTON, BLACK METROPOLIS (1945); WOOFTER, NEGRO PROBLEMS IN CITIES (1928).

[12] While the opinion of the Court does not refer to the sociological reasons urged by many who filed briefs as *amici curiae*, opposing the covenants, the decision must be analyzed with regard to these pressures. The cases were not decided by a court unaware of the results which racial residential segregation produce. See Crooks, *op. cit. supra* note 5, at 519.

[1] Cadillac-Pontiac Co. v. Norburn, 230 N. C. 23, 51, S. E. 2d 916 (1949).

[2] N. C. GEN. STAT. §1-57 (1943); 5 WILLISTON, CONTRACTS §1439A (Rev. ed. 1937).

[3] Nelson v. Reidelback, 68 Ind. App. 19, 119 N. E. 804 (1918); Rice v. Gibbs, 40 Neb. 264, 58 N. W. 724 (1894); Atlantic & N. C. R. R. v. Atlantic & N. C. R. R., 147 N. C. 368, 61 S. E. 185 (1908); Golden v. Tentzen & Schneyer, 92 Pa. Super. 202 (1927); 2 WILLISTON, CONTRACTS §419 (Rev. ed. 1937).

personal, the assignee cannot maintain an action for specific performance without tendering performance of his assignor. The proper standard for determining this would seem to be the intention of the parties as revealed by the terms of the contract and by the surrounding circumstances.[4]

In cases involving contracts similar to the one in the principal case, one line of decisions has held that the vendor may not be forced to accept the notes and mortgage of the assignee. This result has been reached even in contracts containing a provision that the agreement would be binding on the assigns of the parties,[5] as well as those without such an assignability clause.[6] In the only previous North Carolina case discovered, an option called for notes and a deed of trust signed by two optionees, one of whom assigned to the other. The court held that the optionor was entitled to the notes and deed of trust specified unless the assignee tendered cash.[7] These decisions are based on an interpretation of the contract to the effect that the vendor relied on the character and financial responsibility of the original vendee as his security. "To hold otherwise would render it possible for a vendor to have foisted upon him a vendee whose financial responsibility in the case of deficiency judgment upon foreclosure he would not have accepted."[8] The financial responsibility and character of the vendee being a substantial inducement to enter the contract, to allow the assignee to compel the vendor to accept his obligation would be to change the terms of the contract.

A contrary view has been taken in at least two decisions which have held that the vendor may be compelled to accept the notes and mortgages of the assignee in place of those of the vendee.[9] In these two cases the courts interpreted the contract to mean that the mortgage rather than the personal responsibility of the vendee was the material

[4] North Carolina Bank & Trust Co. v. Williams, 201 N. C. 464, 160 S. E. 484 (1931).

[5] Muller v. Raskind, 100 N. J. Eq. 258, 135 Atl. 682 (Ch. 1927), *aff'd*, 103 N. J. Eq. 20, 142 Atl. 918 (Ct. Err. & App. 1928); Lojo Realty Co. v. Johnson's Estate, 227 App. Div. 292, 237 N. Y. Supp. 460 (1st Dep't 1929), *aff'd*, 253 N. Y. 579, 171 N. E. 791 (1930); Golden v. Tenzen & Schney, 92 Pa. Super. 202 (1927).

[6] Nelson v. Reidelback, 68 Ind. App. 19, 119 N. E. 804 (1918); Houncher v. Salyards, 155 Iowa 509, 133 N. W. 48 (1911); Kutachenski v. Thompson, 101 N. J. Eq. 649, 138 Atl. 569 (Ch. 1927), 28 COL. L. REV. 384 (1928); Adams v. Samuel, 82 Ohio App. 305, 75 N. E. 2d 493 (1947).

[7] Pearson v. Millard, 150 N. C. 303, 63 S. E. 1053 (1909). The court said that the optionor had the right to have the contract accepted and executed according to its terms, but she made no such claim or demand at the time of tender by assignee and thereby waived this right.

[8] Lojo Realty Co. v. Johnson's Estate, 227 App. Div. 292, 237 N. Y. Supp. 460 (1st Dep't 1929), *aff'd*, 253 N. Y. 579, 17 N. E. 791 (1930), 30 COL. L. REV. 420 (1930), 39 YALE L. J. 913 (1930).

[9] Montgomery v. DePicot, 153 Cal. 509, 96 Pac. 305 (1908); Moran v. Borrello, 4 N. J. Misc. 344, 132 Atl. 510 (Sup. Ct. 1926). Both of the contracts involved in these cases contained an assignability clause.

inducement for its execution, and tender by the assignee of his own notes and mortgage would suffice.

If the vendee intends to be free from further liability and the vendor understanding this accepts performance by the assignee, the vendee is discharged from further liability under the contract. Williston views such a transaction as a proposed novation, which the vendor may always refuse, rather than as an assignment.[10]

It seems manifest that the insertion of the assignability clause in a contract indicates an acquiescence on the part of the vendor to the assignment of the rights and duties under the contract by the original vendee, but it is merely a contributing factor, never conclusive.[11] On the other hand in a case involving a contract with a clause expressly denying the right to assign, the North Carolina Court said that restrictions on assignment do not apply when the contract is clearly objective and gives clear indication that the personality of the parties is in no way considered.[12]

The circumstances under which the agreement was made may also be considered. It has been said that the vendor did not negotiate or contract for the personal liability of the vendee where it appeared from the evidence that the vendor did not know the vendee.[13] In the principal case the holding of the court was reinforced by evidence that the vendee was acting as the agent of the corporate assignee in the transaction.[14]

In case there is a foreclosure of the mortgage, the decree generally provides that if the sale produces less than the amount due on the mortgage, the mortgagor or other person liable shall pay the deficiency.[15] Here, clearly, the financial responsibility of the vendee might have been a vital inducement for the contract, and the vendor should not be compelled to take the credit status of the assignee in the place of the vendee for the deficiency. But in North Carolina, by statute,[16] the deficiency

[10] 2 WILLISTON, CONTRACTS §420 (Rev. ed. 1937).

[11] Greenberg v. Schanger, 229 N. Y. 114, 127 N. E. 889 (1920); Swarts v. Monagamult Electric Lighting Co., 26 R. I. 436, 59 Atl. 111 (1904); *cf.* Montgomery v. DePicot, 153 Cal. 509, 96 Pac. 305 (1908); 2 WILLISTON, CONTRACTS §423 (Rev. ed. 1937).

[12] Atlantic & N. C. R. R. v. Atlantic & N. C. R. R., 147 N. C. 368, 61 S. E. 185 (1908).

[13] Carluccio v. Hudson St. Holding Co., 142 N. J. Eq. 449, 57 A. 2d 452 (Ct. Err. & App. 1948). Specific performance denied on the ground that the contract was obtained by fraud.

[14] Cadillac-Pontiac Co. v. Norburn, 230 N. C. 23, 28, 51 S. E. 2d 916, 920 (1949). It is uncertain from the opinion whether the fact of the agency and the intended use of the land by the corporation was disclosed to the vendor. It would seem to have bearing only if the agency were known.

[15] TIFFANY, THE MODERN LAW OF REAL PROPERTY §942 (Zollmann's ed. 1940).

[16] N. C. GEN. STAT. §45-36 (1943). In order to invoke the provisions of this statute there must be a foreclosure sale of real property and it must be apparent on the face of the evidence of indebtedness that it is for the balance of purchase money for real estate.

judgment on a note secured by a purchase money mortgage, or deed of trust, has been in effect abolished. It might be said that the vendor, being unable to obtain a deficiency judgment against the vendee, relies on the mortgage, or deed of trust, for his security and not on the financial responsibility of the vendee. Therefore the duty to tender the mortgage, or deed of trust, and notes evidencing indebtedness, may be assigned and the vendor will be compelled to accept the assignee's performance. Two considerations, however, argue against compelling the vendor to rely on a person other than the original vendee. The vendor may have considered the financial ability of the vendee to pay the installments as they become due in order to avoid the necessity of a foreclosure sale. In addition, the character and reputation of fair dealing of the vendee may have been bargained for, since if the value of the land falls below the debt secured by the mortgage, or deed of trust, the debtor, though financially responsible, may escape liability by an intentional default in payment.

The North Carolina Court holds that the note is the personal obligation of the debtor and the mortgage is a direct appropriation of property to its security and payment.[17]. These remedies against the person and property are entirely different and while subsisting and concurrent, resort may be had to either.[18] Although there is no case in point, it is conceivable that the vendor might avoid the effect of the deficiency judgment statute by disregarding the mortgage and suing on the note alone. Here, clearly, the vendor looks solely to the financial responsibility of the vendee for recovery.

ROBERT M. WILEY.

[17] Morrison v. Chambers, 122 N. C. 689, 30 S. E. 141 (1898); Bobbitt v. Stanton, 120 N. C. 253, 26 S. E. 817 (1897); Capehart v. Dettrick, 91 N. C. 344, 353 (1884).

[18] Capehart v. Dettrick, 91 N. C. 344, 353 (1884).