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Notes and Comments

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NOTES AND COMMENTS

Agency—Assault by Employee of Public Utility

The liability of the master for the torts of his servant is usually based upon the doctrine of respondeat superior. No recovery is allowed on this ground unless the servant was acting within the scope of his employment,[1] even though at the time the act complained of was committed, he was in the master's general employment and pay.[2]

In *Hoppe v. Deese and Southern Bell Telephone & Telegraph Company*,[3] the trial court sustained the company's demurrer to a complaint which alleged that an employee of the company was sent into plaintiff's home on a business mission; that while there he willfully and maliciously committed an assault and battery upon the plaintiff by placing her upon a bed; and that this was done with licentious intent and purpose. On appeal, the ruling on the demurrer was held to be correct as it appeared on the face of the complaint that the wrongful act of the employee was outside the scope of his employment.[4]

This decision is sound if the liability of the telephone company is to be based solely upon respondeat superior. However, since the defendant is a public utility,[5] liability might have been predicated on another ground. A public utility is clearly distinguishable from a private business.[6] For instance, it enjoys special franchise rights which subjects it to a greater degree of control and regulation than ordinary businesses are subjected to, but which gives it a field relatively free from competition.[7] It has the right in carrying out its duties to take property through eminent domain proceedings upon paying a reasonable com-

[1] Parrish v. Boysell Mfg. Co., 211 N. C. 7, 188 S. E. 818 (1937) (evidence showed assault on plaintiff outside scope of employment); Linville v. Nissen, 162 N. C. 95, 77 S. E. 1096 (1913) (chauffeur took personal pleasure trip with family car, employer not liable); Bucken v. South and Western R.R., 157 N. C. 443, 73 S. E. 137 (1911) (assault by servant for own purpose and in pursuit of own personal desires, master not liable).

[2] Wyllie v. Palmer, 137 N. Y. 248, 33 N. E. 381 (1893) (employee of seller acting under control of buyer injured plaintiff; held: buyer, not seller, liable).

[3] 232 N. C. 698, 61 S. E. 2d 903 (1950).

[4] Hill v. Western Union Tel. Co., 67 Fed. 487 (5th Cir. 1933) (similar holding). N. C. GEN. STAT. §62-93 (1943), which provides that the willful act of any agent of a utility, acting within the scope of his employment, shall be deemed to be the willful act of the utility, has never been referred to by the North Carolina court.

[5] State v. Holm, 138 Minn. 281, 164 N. W. 989 (1917); Hildebrand v. Southern Bell Tel. Co., 219 N. C. 402, 14 S. E. 2d 252 (1941); Western Union Tel. Co. v. Lamb, 140 Tenn. 107, 203 S. W. 752 (1918).

[6] Dunn v. Western Union Tel. Co., 2 Ga. App. 845, 59 S. E. 189 (1907).

[7] New Decatur v. American Tel. and Tel. Co., 176 Ala. 492, 58 So. 613 (1912); State *ex rel.* Shaver v. Iowa Tel. Co., 175 Iowa 607, 154 N. W. 678 (1915).

pensation to the owner.[8] As a result of these differences, a public utility owes a greater obligation to the public than do private businesses.[9] Included in this obligation is the duty to render its services impartially and indiscriminately to members of the public.[10] The right to enjoy utility services without being subjected to assaults or abuses is a corollary of this duty to serve all comers.[11] This peculiar nature of the business of a public utility, with its privileges and obligations, together with the right of the public to demand its services, creates a special relationship between the two.[12] This relationship is not based on contractual or quasi-contractual rights between the parties.

It is well established that certain utilities are liable for assaults committed upon customers by employees and by strangers. For example, railroads owe an absolute duty to protect passengers from assaults by employees,[13] and owe a duty to exercise a high degree of care to prevent assaults by co-passengers[14] and by strangers.[15] A railroad has been held liable for an assault committed upon a plaintiff while he was in the railroad station checking out freight.[16] The court in that case

[8] Richmond v. Southern Bell Tel. and Tel. Co., 174 U. S. 761 (1899); Louisville Company v. Western Union Tel. Co., 195 Ala. 124, 71 So. 118 (1915); Union Pacific R.R. v. Colorado Postal Tel. Co., 30 Colo. 133, 69 Pac. 564 (1902); State *ex rel.* National Subway Co. v. St. Louis, 145 Mo. 551, 46 S. W. 981 (1898); Postal Tel. Cable Co. v. Oregon Short Line R.R., 23 Utah 474, 65 Pac. 735 (1901).

[9] Buder v. First National Bank, 16 F. 2d 990 (8th Cir. 1927) (public utility charged with duty to supply public with use of all property and facilities owned or furnished by them); Richardson v. Railroad Commission of California, 191 Cal. 716, 218 Pac. 418 (1923); State v. Holm, 138 Minn. 281, 164 N. W. 989 (1917) (telephone company is public utility owing special duty to public); Hildebrand v. Southern Bell Tel. Co., 219 N. C. 402, 14 S. E. 2d 252 (1914) (telephone company as a public service company owes special duty to public); Southern Ohio Power Co. v. Pacific Utilities Commission of Ohio, 110 Ohio St. 246, 143 N. E. 700 (1924) (Public utilities are devoted to the public use.).

[10] State *ex rel.* Goodwine v. Cadwallader, 172 Ind. 619, 87 N. E. 644 (1909) (Telephone exchanges are impressed with a public use and must furnish impartial service without discrimination to all persons in the same or a similar class.); Clay County Co-op Tel. Co. v. Southwestern Bell Tel. Co., 107 Kan. 169, 109 Pac. 747 (1920) (Telephone companies are obligated to serve without discrimination all applicants for services within the field they occupy.).

[11] Dunn v. Western Union Tel. Co., 2 Ga. App. 845, 59 S. E. 189 (1907) (Public utilities should provide safe access to the place opened for the transaction of business in question.); Buchanan v. Western Union Tel. Co., 115 S. C. 433, 106 S. E. 159 (1920).

[12] Chesapeake and Ohio Tel. Co. v. Baltimore and Ohio Tel. Co., 66 Md. 339, 7 Atl. 809 (1887).

[13] Bledso v. West, 186 Mo. App. 460, 171 S. W. 622 (1914); William v. Gill, 122 N. C. 967, 29 S. E. 879 (1898); Jones v. Atlantic Coast Line R.R., 108 S. C. 217, 94 S. E. 49 (1917); Neville v. Southern Ry., 126 Tenn. 96, 146 S. W. 846 (1912); Whitlock v. Northern Pacific Ry., 59 Wash. 15, 109 Pac. 188 (1910).

[14] Hines v. Miniard, 208 Ala. 174, 94 So. 302 (1922); New Orleans, St. L. and C. R.R. v. Burke, 53 Miss. 200 (1876).

[15] Southern Ry. v. Haynes, 186 Ala. 60, 65 So. 339 (1914); Seawell v. Carolina Central R.R., 132 N. C. 856, 44 S. E. 620 (1903).

[16] Georgia R.R. v. Richmond, 98 Ga. 495, 25 S. E. 565 (1896).

called attention to the fact that the relationship of carrier and passenger did not exist. A pullman company has been held responsible for an indecent assault made upon a female passenger by a porter of the company.[17] A like result was reached where the porter was not even employed by the company at the time.[18] A cab company has been held liable for an assault committed upon a passenger by its driver;[19] also when the assault was committed by a person having no connection with the company.[20] A telegraph company has been held liable for an indecent proposal made by a messenger boy to the recipient of a telegram.[21] A bus company has been held liable for an assault committed upon a passenger by a stranger.[22] A city-owned public utility was held liable for an assault committed by its superintendent on a customer while he was trying to pay his gas bill.[23] Hotels and inns, even though they are not public utilities, have been held liable for assaults committed upon guests by their employees[24] and by strangers.[25] Since some public utilities, and other companies owing a special duty to serve, are held liable for torts committed upon patrons by employees acting without the scope of their employment and even by strangers, it is obvious that the basis for liability in this type of case is not confined to respondeat superior. The basis for liability includes the breach of the special duty owed to the injured party.

There are other reasons for holding the utility liable in a situation such as that presented in the instant case. Members of the public should not be discouraged from cooperating with public utilities in their rendering of services. For example, owners should allow utility employees to have free access to utility installations on their property. Furthermore, members of the public should not be handicapped in obtaining the services rendered by public utilities by having to take the risk of being subjected to physical injury or abusive language. The

[17] Campbell v. Pullman Palace Car Co., 42 Fed. 484 (C. C. N. D. Iowa 1890).

[18] Dwinelle v. New York Central & H. R.R., 120 N. Y. 117, 24 N. E. 319 (1890).

[19] Korner v. Cosgrove, 108 Ohio 484, 141 N. E. 267 (1923).

[20] Yellow Cab Company of Atlanta v. Carmichal, 33 Ga. App. 364, 126 S. E. 269 (1925).

[21] Buchanan v. Western Union Tel. Co., 115 S. C. 433, 106 S. E. 159 (1920).

[22] Wilson v. Pan-American Bus Lines, Inc., 217 N. C. 586, 9 S. E. 2d 1 (1940); Southern Plains Coaches, Inc. v. Box, 111 S. W. 2d 1151 (Tex. Civ. App. 1937).

[23] Munick v. City of Durham, 181 N. C. 188, 106 S. E. 665 (1921).

[24] Duckworth v. Appostalis, 208 Fed. 936 (E. D. Tenn. 1913); Clancy v. Barker, 71 Neb. 83, 98 N. W. 440 (1904); Rommel v. Schambacker, 120 Pa. 579, 11 Atl. 779 (1887).

[25] Curran v. Olson, 88 Minn. 307, 92 N. W. 1124 (1903); Molloy v. Coletti, 114 Misc. 177, 186 N. Y. Supp. 730 (1921); Furren v. Casperson, 147 Wash. 257, 265 Pac. 472 (1928).

employee's presence in the plaintiff's home in the instant case was in the exercise of a privilege necessarily extended to him as an employee of a telephone company. The employee's action was clearly an abuse of this privilege.

It would seem, therefore, that the defendant company should be liable since the commission of the tort constituted a breach of a special duty owed to the plaintiff by the company. If this reasoning is followed members of the public will be given protection from such incidents when taking advantage of the conveniences which public utilities were created to provide and in which its patrons have a right to share.

ROLAND C. BRASWELL.

Conflict of Laws—Divorce—Collateral Attack Barred by Laches

The jurisdiction of a state to grant a divorce is based upon the domicile of one or both of the parties within the state at the commencement of the action. Accordingly, a divorce decree rendered by a court without such jurisdiction is not entitled to full faith and credit in other states.[1] The finding of domicile by the divorce court is not conclusive and is subject to collateral attack in other states by a party not personally before the court when the decree was granted.[2]

In a recent case[3] H obtained a Nevada divorce decree from W-1, a resident of the District of Columbia, who did not appear in the divorce action. H, subsequent to the decree, married W-2. In a proceeding before the Federal District Court in Florida, W-1 contended that the decree was void as H was never domiciled in Nevada. The court held that W-1, knowing of the divorce decree and delaying, without excuse, for nearly twenty years, was now guilty of laches and estopped from attacking its validity.

In theory the Nevada divorce decree was void and could not be vitalized by delay or non-action of the deserted spouse. Some cases have so held.[4] Others have held that laches will attach by reason of

[1] Williams v. North Carolina, 325 U. S. 326, 229 (1944); Crouch v. Crouch, 28 Cal. 2d 243, 169 P. 2d 897, 900 (1946); Coe v. Coe, 136 Mass. 423, 55 N. E. 2d 702 (1944). For a complete list of cases see Note, 157 A. L. R. 1399 supplementing annotation in 143 A. L. R. 1294; GOODRICH, CONFLICTS OF LAWS §127 (3d ed. 1949).

[2] Rice v. Rice, 336 U. S. 674 (1949); RESTATEMENT, CONFLICTS OF LAWS §111, comment *a* (1934).

[3] Carpenter v. Carpenter, 93 F. Supp. 225 (S. D. Fla. 1950) (The court also found that the evidence offered by W-I was insufficient to rebut the presumption of H's domicile in Nevada.).

[4] McNutt v. McNutt, 366 Cal. App. 652, 98 P. 2d 253 (1940); Mills v. Mills, 119 Conn. 612, 179 Atl. 5 (1935); Field v. Field, 215 Ill. 496, 74 N. E. 443 (1905); Sammons v. Pike, 108 Minn. 291, 122 N. W. 168 (1903); Lawler v. Lawler, 2 N. J. 527, 66 A. 2d 855 (Sup. Ct. 1949); Baumann v. Baumann, 250 N. Y. 382, 165 N. E. 819 (1929); Melnick v. Melnick, 147 Pa. Super. 564, 25 A. 2d 111 (1942); Richmond v. Sangster, 217 S. W. 723 (Tex. Civ. App. 1920).

delay that works disavantage or injury to another.[5] Under this latter view, the application of laches must depend upon the circumstances of each case.

In determining if laches should be applied, courts have considered numerous factors. Whether the defendant had knowledge the divorce was void has been given weight by some courts.[6] Lapse of time causing prejudice due to the loss of material evidence by death of parties or witnesses has also been thought to be of significance.[7] It has been held that remarriage of the divorce plaintiff has no effect on the application of laches.[8] Yet, other cases have held that upon remarriage of the divorce plaintiff the rights of innocent third parties have intervened and may render it inequitable for the defendant to attack the validity of the divorce.[9] But, where the second spouse of the divorce plaintiff encouraged the divorce or knew of the circumstances under which it was obtained, the second marriage of the plaintiff has not been given consideration in determining the applicability of laches.[10] Affirmative acts of the defendant such as asserting the validity of the decree[11] or remarriage[12] will constitute acquiescence and bar collateral attack. However, delay in attacking the foreign decree may be justified on the ground that it was impossible to obtain personal service of process on the plaintiff within the state of the original domicile.[13]

Assuming that a non-appearing defendant in a foreign divorce action may be barred by laches due to an unreasonable delay in contesting the

[5] Bliss v. Bliss, 50 F. 2d 1002 (D. C. Cir. 1931); McNeil v. McNeil, 170 Fed. 289 (9th Cir. 1909); Pawley v. Pawley. 46 So. 2d 464 (Fla. 1950); Reed v. Reed, 52 Mich. 117, 17 N. W. 720 (1883); Sleeper v. Sleeper, 129 N. J. Eq. 94, 18 A. 2d 1 (Ct. Err. & App. 1941); Cope v. Cope, 123 N. J. Eq. 190, 196 Atl. 422 (Ct. Err. & App. 1938); Robinson v. Robinson, 94 N. Y. S. 2d 806 (Sup. Ct. 1946); Finan v. Finan, 47 N. Y. S. 2d 429 (Sup. Ct. 1944); McNeir v. McNeir, 178 Va. 285, 16 S. E. 2d 632 (1941); Dry v. Rice, 147 Va. 331, 137 S. E. 473 (1927); Wright Lumber Co. v. McCord, 145 Wis. 93, 128 N. W. 873 (1910); see Note, 34 MINN. L. REV. 514 (1950).

[6] Field v. Field, 215 Ill. 496, 74 N. E. 443 (1905); Wright Lumber Co. v. McCord, 145 Wis. 93, 128 N. W. 873 (1910).

[7] Reed v. Reed, 52 Mich. 117, 17 N. W. 720 (1883); Dry v. Rice, 147 Va. 331, 137 S. E. 473 (1927).

[8] Bethune v. Bethune, 192 Ark. 811, 94 S. W. 2d 1043 (1936); Mills v. Mills, 119 Conn. 612, 179 Atl. 5 (1935); Baumann v. Baumann, 250 N. Y. 382, 165 N. E. 819 (1929); Sitterly v. Sitterly, 186 Misc. 31, 58 N. Y. S. 2d 424 (Sup. Ct. 1945); Melnick v. Melnick, 147 Pa. Super. 564, 25 A. 2d 111 (1942); Richmond v. Sangster, 217 S. W. 723 (Tex. Civ. App. 1920).

[9] McNeil v. McNeil, 170 Fed. 289 (9th Cir. 1909); Sammons v. Pike, 108 Minn. 291, 122 N. W. 168 (1903); Sleeper v. Sleeper, 129 N. J. Eq. 94, 18 A. 2d 1 (Ct. Err. & App. 1941); Cope v. Cope, 123 N. J. Eq. 190, 196 Atl. 422 (Err. & App. 1938); McNeir v. McNeir, 178 Va. 285, 16 S. E. 2d 632 (1941); Dry v. Rice, 147 Va. 331, 137 S. E. 473 (1927).

[10] Lawler v. Lawler, 2 N. J. 527, 66 A. 2d 855 (Sup. Ct. 1949); Pomerance v. Pomerance, 187 Misc. 20, 61 N. Y. S. 2d 227 (Sup. Ct. 1946).

[11] Marcus v. Marcus, 194 Misc. 464, 90 N. Y. S. 2d 830 (Sup. Ct. 1949).

[12] RESTATEMENT, CONFLICTS OF LAWS §112 (1934).

[13] Melnick v. Melnick, 147 Pa. Super. 564, 25 A. 2d 111 (1942).

validity of the divorce decree, what remedies are available to the defendant if sought within a reasonable time?

A court of equity may enjoin the prosecution of an action in another state by a citizen of its own state. Such an injunction is not a violation of the Full Faith and Credit Clause or the Privileges and Immunities Clause of the Federal Constitution; nor does it violate the comity relations that exist between the several states.[14] In such cases the decree of the court is based on personal jurisdiction and directed to the party and not the tribunal where the suit or proceeding is pending. Where both parties are domiciled in the same state, the deserted party may obtain an injunction, restraining his spouse from further prosecuting divorce proceedings commenced by him in a court of another state.[15] Injunction would seem proper in such a case to prevent evasion of the laws of the domicile, great expense and hardship in defending in another state, uncertainty of the marital status, and embarrassment of the deserted party. If the foreign divorce has not been commenced but merely threatened, there is conflicting authority whether an injunction will issue.[16] In any event injunction will only lie where the deserting spouse has not established a bona fide domicile in the state in which the divorce is sought.[17]

The Full Faith and Credit Clause of the Federal Constitution does not prevent a collateral attack in one state on a divorce decree rendered in another state upon the ground that neither party was domiciled at the divorce forum.[18] Such an attack may arise out of a separate action for divorce brought by the non-appearing defendant.[19] Should the deserted spouse be the wife, the validity of the decree may be questioned

[14] 28 AM. JUR. 389, INJUNCTION §204; Jacobs, *The Utility of Injunctions and Declaratory Judgments in Migratory Divorce*, 2 LAW & CONTEMP. PROB. 370, 374 (1935).

[15] Usen v. Usen, 136 Me. 480, 13 A. 2d 738 (1940); Ippolito v. Ippolito, 3 N. J. 561, 71 A. 2d 196 (Sup. Ct. 1950); Ward v. Ward, 6 N. J. Super. 130, 70 A. 2d 502 (1950); Gross v. Gross, 13 N. J. Misc. 449, 180 Atl. 204 (Ch. 1935); Knapp v. Knapp, 12 N. J. Misc. 599, 173 Atl. 343 (Ch. 1934); Barzilay v. Barzilay, 75 N. Y. S. 2d 428 (Sup. Ct. 1947); Pereira v. Pereira, 272 App. Div. 281, 70 N. Y. S. 2d 763 (1st Dep't 1947); Borda v. Borda, 44 R. I. 337, 117 Atl. 362 (1922). *But cf.* Gaskell v. Gaskell, 189 Misc. 504, 72 N. Y. S. 2d 440 (Sup. Ct. 1947) (injunction against the prosecution of a divorce action in a foreign country was denied).

[16] Kahn v. Kahn, 325 Ill. App. 137, 59 N. E. 2d 874 (1945) (injunction issued restraining the commencement of a foreign divorce); Carr v. Carr, 52 N. Y. S. 2d 386 (Sup. Ct. 1944) (injunction denied); *accord*, DeRaay v. DeRaay, 255 App. Div. 544, 8 N. Y. S. 2d 361 (1st Dep't 1938), *aff'd*, 280 N. Y. 822, 21 N. E. 2d 879 (1939).

[17] Smith v. Smith, 364 Pa. 81, 70 A. 2d 630 (1950).

[18] Rice v. Rice, 336 U. S. 674 (1949); BEALE, THE CONFLICTS OF LAWS §111.2 (1935).

[19] Crouch v. Crouch, 28 Cal. 2d 243, 169 P. 2d 897 (1946); Bobala v. Bobala, 68 Ohio App. 63, 33 N. E. 2d 845 (1940); Sitterly v. Sitterly, 186 Misc. 31, 58 N. Y. S. 2d 424 (Sup. Ct. 1945).

in an action for support.[20] In both actions, if the foreign decree is pleaded as a defense, the court may inquire into the jurisdiction of the foreign court.[21]

The deserted spouse may also resort to the declaratory judgment, requesting the court to determine the marital status of the parties. If it is successfully proved that the plaintiff in the divorce action was not domiciled at the divorce forum the court will adjudge the foreign divorce decree null and void.[22] That a declaratory judgment is an appropriate remedy seems well settled today[23] In such a case there is an actual controversy as one spouse asserts that the foreign divorce is valid and the other contends that it is not.[24] Both have an interest in the marital status; and if the deserted spouse does not wish a divorce or support, there is no adequate remedy at law.[25] Thus, the action will settle the status and terminate the controversy.[26]

These remedies seem to afford the non-appearing defendant in a foreign divorce suit adequate protection of his or her marital status and property rights. Reasonably prompt action would prevent the result of the principal case.

ROBERT M. WILEY.

Federal Courts—Civil Rights Act—Stay of State Criminal Proceedings

In 1793, Congress, apprehending the danger of encroachment by federal courts upon the jurisdiction of state courts, passed a statute prohibiting the enjoining of proceedings in state courts by courts of the United States.[1] This statute, with but one amendment,[2] remained

[20] White v. White, 150 F. 2d 157 (D. C. Cir. 1945); Evans v. Evans, 149 F. 2d 831 (D. C. Cir. 1945); Atkins v. Atkins, 386 Ill. 345, 54 N. E. 2d 488 (1945); Phelps v. Phelps, 154 Pa. Super. 270, 35 A. 2d 530 (1944).

[21] Note, 157 A. L. R. 1399 (1945).

[22] Mills v. Mills, 119 Conn. 612, 179 Atl. 5 (1935); Hogan v. Hogan, 320 Mass. 658, 70 N. E. 2d 821 (1947); Lawler v. Lawler, 2 N. J. 527, 66 A. 2d 855 (Sup. Ct. 1949); Henry v. Henry, 140 N. J. Eq. 21, 144 Atl. 18 (Ch. 1928); Lowe v. Lowe, 265 N. Y. 197, 192 N. E. 291 (1934); Baumann v. Baumann, 250 N. Y. 382, 165 N. E. 819 (1929); Altholy v. Altholy, 72 N. Y. S. 2d 143 (Sup. Ct. 1947); Smerda v. Smerda, 74 N. E. 2d 751 (Ohio 1947); Melnick v. Melnick, 147 Pa. Super. 564, 25 A. 2d 111 (1942); BORCHARD, DECLARATORY JUDGMENTS 478 (2d ed. 1941); see Jacobs, *The Utility of Injunctions and Declaratory Judgments in Migratory Divorce*, 2 LAW & CONTEMP. PROB. 370, 391 (1935).

[23] BORCHARD, DECLARATORY JUDGMENTS 479 (2d ed. 1941).

[24] Melnick v. Melnick, 147 Pa. Super. 564, 25 A. 2d 111 (1942).

[25] Henry v. Henry, 140 N. J. Eq. 21, 144 Atl. 18 (Ch. 1928); Melnick v. Melnick, 147 Pa. Super. 564, 25 A. 2d 111 (1942).

[26] Hogan v. Hogan, 320 Mass. 658, 70 N. E. 2d 821 (1947).

[1] ". . . nor shall a writ of injunction be granted to stay proceedings in any court of a state." Act of March 2, 1793, c. 22, §5, 1 STAT. 334 (1793), as amended, REV. STAT. §720 (1875), 28 U. S. C. §379 (1926), 62 STAT. 968, 28 U. S. C. §2283 (1948). This statute has been held not to be jurisdictional, but

basically unchanged until 1948. In the intervening period, however, many judicial exceptions were made as to its applicability.[3] In 1941, the case of *Toucey v. New York Life Ins. Co.*[4] disapproved several of these court made exceptions and expressly overruled one of them.[5] Also, Congress has enacted exceptions to the "anti-injunction" statute, by other acts which expressly provide in specific instances, for stay of state court proceedings.[6] These Congressional exceptions were recognized and approved in the *Toucey* case.

As a result of the *Toucey* case, Congress amended the "anti-injunction" statute when the new Judicial Code was enacted in 1948. The new Act reads:

> "A court of the United States may not grant an injunction to stay proceedings in a state court except (1) as expressly authorized by Act of Congress, or (2) where necessary in aid of its jurisdiction, or (3) to protect or effectuate its judgments."[7]

The first exception is merely Congressional recognition of the long standing, unquestioned, legislative exceptions and had no real effect on the existing law; but the latter two exceptions were inserted to reinstate the judicial exceptions questioned or overruled by the *Toucey* case.[8]

In the recent case of *Cooper v. Hutchinson*,[9] a novel question dealing with the application of the "anti-injunction" statute was presented. Cooper was tried and convicted of murder by a county court in New Jersey, being represented at trial by court appointed counsel. Between

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merely as going to the question of whether there is equity in a particular bill. Smith v. Apple, 264 U. S. 274, 279 (1924).

[2] ". . . except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." REV. STAT. §720 (1875).

[3] The authorities are not all in accord as to the classification of these exceptions, but generally they are: (1) The res cases, where the jurisdiction of a federal court has attached to the subject matter of a particular action, an injunction will lie to prevent any other court from taking jurisdiction over the same subject matter. (2) The ancillary cases, where the injunction would be granted as ancillary to other relief being sought. (3) The cases in which federal courts have enjoined the enforcement of void or fraudulent judgments obtained in a state court. (4) The relitigation cases, where injunctions are granted against state court actions which seek to relitigate the same issue decided in the federal court. See generally Toucey v. New York Life Ins. Co., 314 U. S. 118 (1941); Barrett, *Federal Injunction Against Proceedings in State Courts*, 35 CALIF. L. REV. 545 (1947).

[4] 314 U. S. 118 (1941). Notes, 27 CORNELL L. Q. 270 (1942), 27 IOWA L. REV. 652 (1942), 26 MINN. L. REV. 558 (1942).

[5] The relitigation cases were overruled and doubt was cast on all other exceptions to the "anti-injunction" statute except the res cases.

[6] See notes 19, 20, and 21 *infra*; MOORE, COMMENTARY ON THE U. S. JUDICIAL CODE ¶0.03(49) p. 396 (1949).

[7] 62 STAT. 968, 28 U. S. C. §2283 (1948) (numbers supplied).

[8] See 28 U. S. C. A. §2283, Reviser's notes (1948); Mangan, *Federal Legislation, The Judicial Code of 1948*, 37 GEO. LAW J. 394, 396 (1949); MOORE, COMMENTARY ON THE U. S. JUDICIAL CODE ¶0.03(49) p. 410 (1949).

[9] 184 F. 2d 119 (3rd Cir. 1950).

trial and appeal he secured the services of two New Jersey attorneys and three New York attorneys. The latter were admitted *pro hac vice* in the Supreme Court of New Jersey and later in the county court. Upon reversal of the conviction, the attorneys proceeded in the county court with various preliminary matters incident to the new trial. Before the new trial commenced, the trial judge, without a hearing, entered an order depriving the New York attorneys of further authority to appear in the case. There was no charge of misconduct. Cooper, the accused, then filed this action in the federal district court seeking to enjoin the trial judge from proceeding further with the case until the New York attorneys were recognized. The accused charged that he had been deprived of rights guaranteed by the fifth,[10] sixth,[11] and fourteenth[12] amendments of the Constitution, and that such was a violation of the Civil Rights Act.[13] Upon dismissal of the complaint,[14] appeal was taken to the Court of Appeals.

The court refused to pass upon the constitutional questions raised, deferring them until the New Jersey Supreme Court had an opportunity to act. However, the court did pass upon the problem raised by the plaintiff as to the Civil Rights Act and held the Act to be an express exception to the "anti-injunction" statute, thus implying that injunction would be proper if the court found it necessary.

Assuming the action of the trial judge violated the aforementioned constitutional rights, which would necessarily violate the Civil Rights Act, the case raises two interesting questions.

(1) *Does the Civil Rights Act authorize stay of state court proceedings in case of violation of its provisions?*

The decision in the instant case cites no authority in support of its position on this point, and a diligent search indicates that this is the only federal appellate court which has so held. In several cases decided in the old circuit courts, this issue was raised and in each case the court held the Civil Rights Act *did not* in any way modify the "anti-injunction"

[10] U. S. CONST. AMEND. V, "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

[11] U. S. CONST. AMEND. VI, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

[12] U. S. CONST. AMEND. XIV §1, ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

[13] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." REV. STAT. §1979 (1875), 8 U. S. C. §43 (1942).

[14] Cooper v. Hutchinson, 88 F. Supp. 774 (D. N. J. 1950).

statute.[15] Further, in the *Toucey* case, Justice Frankfurter listed the statutes which were express authorizations for stay of state court proceedings, and no mention was made of the Civil Rights Act.[16]

The Act was passed to provide a method of enforcing the provisions of the Constitution, mainly the rights guaranteed by the fourteenth amendment.[17] It would seem that if the Act had been considered an express exception to the "anti-injunction" statute, it would have been raised in those cases where the court refused to enjoin unconstitutional proceedings in a state court because of the "anti-injunction" statute. It has never been so used.[18]

The Civil Rights Act provides that a violator ". . . shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." Comparing this with the terms of the other acts declared to be express exceptions to the "anti-injunction" statute, it becomes obvious that no such construction was intended of the Civil Rights Act. For instance, the original Interpleader Act provided that "notwithstanding any provisions of the Judicial Code to the contrary, said . . . court shall have the power . . . to issue an order . . . enjoining them from instituting or prosecuting any suit or prosecuting any suit or proceeding in any state court."[19] Another reads: ". . . all claims

[15] Aultman & Taylor Co. v. Brumfield, 102 Fed. 7 (C. C. N. D. Ohio 1900), *appeal dismissed*, 22 Sup. Ct. 938 (1901). This case also disapproved a dictum in Touchman v. Welch, 42 Fed. 548, 557 (C. C. D. Kan. 1890) which expressed the opinion that the Civil Rights Act was an exception to the "anti-injunction" statute. Hemsley v. Meyers, 45 Fed. 283 (C. C. D. Kan. 1891). *Cf.* International Longshoremen's & Ware. Union v. Ackerman, 82 F. Supp. 65 (D. Hawaii 1948), where an injunction against pending criminal proceedings in the territorial court was issued, based upon, among other things, the Civil Rights Act. Evidently there was no appeal from this decision. In a later case decided by the Court of Appeals, Alesna v. Rice, 172 F. 2d 176 (9th Cir. 1949), in which an injunction was sought against a territorial court of Hawaii, the injunction was refused, the court stating "Nor does the complaint allege any of the facts which the decision of the District Court found in (the *Ackerman* case)." This seems to be a "back handed" approval of the *Ackerman* decision.

[16] Also, no leading article on the subject has mentioned the Civil Rights Act when listing the Congressional exceptions. See MOORE, COMMENTARY ON THE U. S. JUDICIAL CODE ¶0.03(49) p. 410; Barrett, *Federal Injunction Against Proceedings in State Courts*, 35 CALIF. L. REV. 545, 559 (1947).

[17] See Hague v. C.I.O., 307 U. S. 496, 510 (1938).

[18] *In re* Sawyer, 124 U. S. 200 (1888); *cf.* Douglass v. City of Jeanette, 319 U. S. 157, *rehearing denied*, 319 U. S. 782 (1943); Hague v. C.I.O., 307 U. S. 496 (1938).

[19] Interpleader Act of 1926, 44 STAT. 416 (1926), amending the Interpleader Act of 1917, 39 STAT. 927 (1917). This provision was retained in the Interpleader Act of 1936, 49 STAT. 1096, 28 U. S. C. §41(26) (1936). See Treinies v. Sunshine Mining Co., 308 U. S. 66, 74 (1939). In the new Judicial Code the wording was changed. Since the "anti-injunction" statute had been amended, there was no "provision of the Judicial Code to the contrary." The Act now reads: ". . . a district court may issue its . . . order restraining (the claimants) from instituting or prosecuting any proceeding in any State . . . court. . . ." 62 STAT. 970, 28 U. S. C. §2361 (1949); see 28 U. S. C. A. §2361, Reviser's note (1949).

and proceedings . . . shall cease";[20] and others have similar wording clearly indicating than an exception was intended.[21]

It is true that injunction has been used in many cases to prevent *enforcement* of unconstitutional state statutes or city ordinances, or to restrain the *enforcement* of valid acts in an unconstitutional manner. The Civil Rights Act has formed the basis for such action.[22] But, it is to be noted that in these cases *no proceedings* had been instituted and therefore such action did not come within the purview of the "anti-injunction" statute.[23]

It thus seems that the court's position is rather tenuous in holding that the Civil Rights Act constitutes an express exception to the "anti-injunction" statute.

(2) *Is it ever proper for a federal court to enjoin criminal proceedings in a state court, once the proceedings have been instituted?*

This question has presented itself almost exclusively in cases where injunction was sought to restrain prosecution under an alleged unconstitutional state statute or city ordinance,[24] or, as in the principal case, where acts of state officers are alleged to be unconstitutional.[25] Few of these cases have mentioned the "anti-injunction" statute,[26] most being decided upon general rules of equity practice.

The equitable rule, as often stated, is that courts of equity do not ordinarily restrain criminal prosecutions. This rule is limited by two exceptions: first, criminal proceedings will be enjoined when irreparable injury to property is threatened; and second, criminal proceedings will

[20] Limitation on shipowners liability, based on the Act of 1851, 9 STAT. 635 (1851). See Providence & N. Y. S. S. Co. v. Hill Mfg. Co., 109 U. S. 578, 599 (1883).

[21] Frazier-Lemke Act, 47 STAT. 1473 (1933), 11 U. S. C. §203 (1940) ". . . the following proceedings shall not be instituted, or if instituted . . . , shall not be maintained, in any court. . . ."; Emergency Price Control Act, 56 STAT. 23 (1942), 50 U. S. C. App. §925 (1944) ". . . he may make application to the appropriate court for an order enjoining such acts or practices. . . ."

[22] See Douglas v. City of Jeanette, 319 U. S. 157, *rehearing denied*, 319 U. S. 782 (1943); Hague v. C.I.O., 307 U. S. 496 (1938).

[23] See note 26 *infra*. 13 CYCLOPEDIA OF FEDERAL PROCEDURE §6676 (2d ed. 1944).

[24] *Ex parte* Young, 209 U. S. 123 (1908); Watson v. Buck, 313 U. S. 387 (1940); Beal v. Missouri Pac. R.R., 312 U.S. 45 (1940); Spielman Motor Sales Co. v. Dodge, 295 U. S. 89 (1934); Hygrade Provision Co. v. Sherman, 266 U. S. 497 (1924).

[25] Essanay Film Mfg. Co. v. Kane, 258 U. S. 358 (1922); Reagan v. Farmers Loan & Trust Co., 154 U. S. 362 (1894).

[26] The issue has been raised in the following cases, and in each case the court held that the statute applied to criminal proceedings which were actually *pending* in the state courts, but not to those which were *threatened*. Jewel Tea Co. v. Lee's Summit, Mo., 198 Fed. 532, 539 (D. C. Mo. 1912), *aff'd*, 217 Fed. 965 (8th Cir. 1914); Kansas City Gas Co. v. Kansas City, 198 Fed. 500, 525 (D. C. Mo. 1912); St. Louis & S. F. R.R. v. Allen, 181 Fed. 710, 722 (C. C. D. Ark. 1910).

be enjoined when an equity action is pending, and the criminal action is commenced by one of the parties to the equity action to determine the same right that is in issue in the equity action.[27] Both appear, on the surface, to be exceptions to the "anti-injunction" statute as well as to the equitable rule, and such is the opinion of at least one writer.[28] However, a close examination of the cases will reveal that only the second can accurately be so classified.

The first exception concerns, in reality, a question of what constitutes a proceeding in a state court. In stating this exception to the rule, the courts have failed, in most cases, to differentiate between *threatened proceedings* and *pending proceedings*. As a practical matter, however, the word "'proceeding" as used in this connection contemplates threatened proceedings. Thus, courts have scrupulously avoided enjoining criminal proceedings which were actually pending in a state court, unless the case came within the second exception.[29] Strict adherence to this equitable policy has made unnecessary resort to the "anti-injunction" statute.[30]

The second exception to the equitable rule is not inconsistent with the provisions of the "anti-injunction" statute. Prior to the passage of the amended statute, federal courts could enjoin state court proceedings which sought to exercise jurisdiction over persons or things, over which the federal court had already acquired jurisdiction.[31] This rule,

[27] Packard v. Banton, 264 U. S. 140, 143 (1923).

[28] Barrett, *Federal Injunction Against Proceedings in State Courts*, 35 CALIF. L. REV. 545, 551 (1947). The author does, however, make a distinction between pending actions and threatened actions, treating only the latter as an exception to the "anti-injunction" statute. See also Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345, 375 (1930).

[29] Looney v. Eastern Texas R.R., 247 U. S. 214, 221 (1917); Prout v. Starr, 188 U. S. 537, 544 (1902).

[30] In Cline v. Frink Dairy Co., 274 U. S. 445 (1927), injunction was granted against threatened prosecutions under an unconstitutional state statute, but the court refused to enjoin a proceeding which had been instituted. The court quoted *Ex parte* Young 209 U. S. 123 (1908) in support ("But the federal court cannot, of course, interfere in a case where the proceedings were already pending in a state court."), and disapproved a dictum in Davis & Farnum Co. v. Los Angeles, 189 U. S. 207 (1903) which stated a contrary view. *Accord*, Caldwell v. Sioux Falls Stock Yards Co., 242 U. S. 559 (1917). See Note, 10 MINN. L. REV. 153 (1926). *Contra*, International Longshoremen's & Ware. Union v. Ackerman, 82 F. Supp. 65 (D. C. Hawaii 1948).

[31] As to "things" there has never been any controversy, this being the so-called res exception, recognized as valid by the *Toucey* case; but as to "persons" there has been a divergence of authority. If the "person" is under the *authority* of a court of another jurisdiction, then this is also an exception. Ponzi v. Fessenden, 258 U. S. 254 (1922). But if a mere *right or liability* between persons is concerned, a different question is presented. In the *Toucey* case it was said that the "first come, first served" doctrine of cases similar to Prout v. Starr, 188 U. S. 537 (1902) was discarded by Kline v. Burke Const. Co., 260 U. S. 226 (1922) where it was held that mere in personam actions did not come within this exception. These cases are the "ancilliary" cases which were questioned by the Toucey case, and later incorporated into the amended act. See note 32 *infra*.

expressly incorporated in the amended act,[32] thus includes the second exception to the equitable rule.

Since the instant case is not of the latter type, and as the criminal proceedings had already been instituted, the inference of the court that it could enjoin the proceedings violates the provisions of the "anti-injunction" statute as well as the long standing equitable doctrine.

Nevertheless, the court's action in *Cooper v. Hutchinson*, in refusing to grant injunction, and in remanding to the district court pending a ruling by the state court on the constitutional issues was not detrimental to either party. It did not delay the state's administration of criminal justice, and resulted in disposition of the case without necessity of appeal to the New Jersey Supreme Court.[33] This is not the first time such relief has been employed,[34] and it appears that it is to be preferred to dismissal or an order enjoining the court proceedings where the propriety of injunction is questionable.

RICHARD DEY. MANNING.

Liens—Priority of Federal Claims Over Attachments

A creditor brought an action on an unsecured promissory note and on the same day attached four parcels of real estate belonging to the debtor to secure payment of any judgment recovered in the action. After levy of the attachment, which was duly recorded, a federal tax lien[1] on all of the debtor's property, including the previously attached real estate, was recorded. Subsequently, the creditor recovered judgment in his action on the promissory note. In a suit to determine priority of liens on the real property, a California district appellate court found that the attachment was a *specific* and *perfected* lien, and following the general rule of "first in time of recordation, first in priority," the attachment was superior to the federal tax lien.[2] The California Supreme Court declined to hear the case and the United State Supreme Court granted certiorari. By a unanimous vote, the Supreme Court held that the federal tax lien was superior to the *contingent* or *inchoate* attach-

[32] ". . . except . . . where necessary in aid of its jurisdiction. . . ." 62 STAT. 968, 28 U. S. C. §2283 (1948).

[33] Following the decision of the instant case, the trial judge issued a rule to show cause to the parties involved. This was never heard, as the three New York attorneys voluntarily requested permission to withdraw from the case, which permission was granted.

[34] Railroad Comm. of Texas v. Pullman Co., 312 U. S. 496 (1941) (first case in which this type of relief used); A. F. of L. v. Watson, 327 U. S. 582 (1946); Specter Motor Service, Inc. v. McLaughlin, 323 U. S. 101 (1944).

[1] INT. REV. CODE §§3670-3672.

[2] Winther v. Morrison, 93 Cal. App. 2d 608, 209 P. 2d 657 (1949).

ment lien, reversing the judgment of the state court.[3]

It is generally stated that the law of attachment as it exists in the United States is in derogation of the common law, and there is no right of attachment unless provided by statute.[4] Although the precise details of attachment statutes vary among the states, the underlying purpose of attachment remains the same; ". . . the word 'attachment,' as ordinarily understood in American law, has reference to a writ the object of which is to hold property to abide the order of the court for the payment of a judgment in the event the debt shall be established. . . ."[5] The usual and practical theory is that an attachment creates a lien on the property attached,[6] which is a vested interest of the creditor.[7]

Inasmuch as the basic purpose of an attachment is to hold the property of the debtor to secure any judgment which may be recovered, the courts have under certain fact situations described the attachment lien as inchoate or contingent. For example, if the attachment was never followed by a judgment it would not prevail over an intervening recorded mortgage.[8] And makers of a note who pay installments to payee's attaching creditor, who thereafter does not pursue his right to execution of judgment, are still liable for such payments to payee's other lien creditor.[9] On the other hand, where the attachment lien is not permitted to lapse by failure to proceed to judgment in due time, the language of the decisions with reference to the type of lien created by attachment, before judgment, is quite different.[10] When the attachment

[3] United States v. Security Trust & Savings Bank, 71 Sup. Ct. 111 (1950) (Justice Jackson has a concurring opinion, p. 114). The creditor had died and the Security Trust and Savings Bank as executor of his will was substituted.

[4] Harris v. Balk, 198 U. S. 215, 222 (1904); Mitchell v. St. Maxent's Lessee, 4 Wall. 237, 243 (U. S. 1823); Bethel v. Lee, 200 N. C. 755, 758, 158 S. E. 493, 494 (1931). For comments on attachment law in the colonies see Peck v. Jenness, 7 How. 612, 620 (U. S. 1848).

[5] Wilder v. Inter-Island Steam Nav. Co., 211 U. S. 239, 245 (1908). See also CAL. CODE CIV. PROC. §537 (1949) and N. C. GEN. STAT. §1-440.1(a) (1949 Supp.).

[6] Peck v. Jenness, 7 How. 612 (U. S. 1848).

[7] McGaffey Canning Co. v. Bank of America, 109 Cal. App. 415, 294 Pac. 45 (1930) (creditor has tort action against one wrongfully interfering with his attachment lien).

[8] Pratt v. Law, 9 Cranch 456, 497 (U. S. 1815).

[9] "The attaching creditor obtains only a potential right or a contingent lien and in order to discharge their liability, defendants should have made all payments to the sheriff in accordance with . . . the Code . . ." (instead of to attaching creditor). Puissegur v. Yarbrough, 29 Cal. 2d 409, 412, 175 P. 2d 830, 831 (1946).

[10] Horan v. Varian, 204 Cal. 391, 268 Pac. 637 (1928) (attachment has priority over a secret existing but unrecorded deed); Thomas v. Burnett, 128 Ill. 37, 21 N. E. 352 (1889) (attaching creditor has priority over existing unrecorded deed although he received notice of deed prior to judgment); Sanborn, McDuffee Co. v. Keefe, 88 N. H. 236, 187 Atl. 97 (1936) (attachment is good as against encumbrances intervening between attachment and execution); United States v. Yates, 204 S. W. 2d 399 (1947) (Texas Court of Civil Appeals held an attachment lien was specific and perfected and superior to a federal tax lien though not reduced to judgment).

is followed by a judgment, the rationale of the decisions is that the attachment lien merges in the lien of judgment to preserve the priority,[11] or the judgment lien relates back to the date of the attachment lien and is effective from that date.[12] A study of the cases emphasizes the necessity of viewing expositions concerning the *general* nature of the attachment lien with considerable caution. The descriptive excerpts, as such, are irreconcilable and are made meaningful only when interpreted in the light of the fact setting involved. For example, the California courts have, in separate decisions, what purport to be general descriptions of an attachment lien in precisely contradictory terms.[13] While the courts have justifiably held an attachment lien inferior to another lien under one set of facts, and superior in another fact setting, there unfortunately and unnecessarily have been too many attempts to describe the general nature and effect of an attachment lien in terms of the immediate set of facts then confronting the court.[14] The consequence of this has been an accumulation of inconsistent reasoning more than inconsistent results. So long as the trite but still pertinent exhortation, "Interpret the language of the case in terms of the facts therein," is obeyed, the lack of clear and consistent explanations is not as likely to be a substantial impediment in reaching desirable and correct results. Courts, however, sometimes fail to heed the admonition. And in the principal case, this indiscriminate use of descriptive language by Cali-

[11] Balzano v. Traeger, 93 Cal. App. 640, 270 Pac. 249 (1928); Brun v. Evans, 197 Cal. 439, 241 Pac. 86 (1925); *cf.* Hambley Co. v. White Co., 192 N. C. 31, 133 S. E. 399 (1926); Cook v. N. Y. Corundrum Mining Co., 114 N. C. 617, 19 S. E. 664 (1894).

[12] Martinovich v. Marsicano, 150 Cal. 597, 89 Pac. 333 (1907); Board of Supervisors v. Hart, 210 La. 78, 26 So. 2d 361 (1946); Campbell v. Keys, 130 Mich. 127, 89 N. W. 720 (1902); Smart v. Burgess, 35 R. I. 149, 85 Atl. 742 (1913). The relation back idea has been used in various lien situations to establish a priority over a federal tax lien: *In re* Taylorcraft Aviation Corp., 168 F. 2d 808 (6th Cir. 1948) (mechanic's lien relates back to time of performance of work); United States v. Winnett, 165 F. 2d 149 (9th Cir. 1947) (right to set-off related back to date of agreement and set-off right was superior to intervening tax lien); New York Casualty Co. v. Zwerner, 58 F. Supp. 473 (N. D. Ill. 1944) (surety company's equitable lien relates back to date of suretyship contract). *Contra:* Miller v. Bank of America, 166 F. 2d 415 (9th Cir. 1948); Seaboard Surety Co. v. United States, 67 F. Supp. 969 (Ct. Cl. 1946).

[13] "The attaching creditor obtains only a potential right or a contingent lien. . . ." Puissegur v. Yarbrough, 29 Cal. 2d 409, 412, 175 P. 2d 830, 831 (1946). "Since . . . the attachment herein was properly . . . levied . . . it is evident that Morrison *perfected* a lien thereon. . . ." Winther v. Morrison, 93 Cal. App. 2d 608, 209 P. 2d 657, 659 (1949) (italics added). The contradictory descriptions of the nature of the attachment lien are found elsewhere. Compare 5 AM. JUR. ATTACHMENT §815 with §827 of the same reference. See 7 C. J. S. ATTACHMENT §256.

[14] Although criticism at this juncture may seem "hindsight more omniscient than foresight" it appears to this writer that the language ("contingent lien") was unnecessary to the decision in Puissegur v. Yarbrough, *supra* note 13. It would have been sufficient to have asserted against the defendants that they had failed to observe the requirements of the California statutes.

fornia courts concerning the nature of an attachment lien (contingent and inchoate on one occasion, and specific and perfected on another) acted somewhat as a boomerang on a decision by courts of that state.[15]

Nevertheless, when the issue is the relative priority of a recorded attachment lien and a subsequently recorded *private*[16] creditor's lien, the courts will usually apply the rule of "first in time of recordation, first in priority."[17]

Section 3466 of the Revised Statutes,[18] the basic provisions of which were enacted in 1797,[19] provides for a priority of payment of federal debts under specified circumstances but does not create any lien.[20] The interpretation of Section 3466 has had a long and tortuous history.[21] Although the language of the statute appeared to give the federal claim priority over all other creditors without exception, a dictum in the early case of *Thelusson v. Smith*[22] indicated that a "specific and perfected"

[15] The United States Supreme Court used this language in reversing the California court: ". . . if the state court itself describes the lien as inchoate, this classification is 'practically conclusive. . . .' The Supreme Court of California has so described its attachment lien in the case of Puissegur v. Yarbrough. . . ." United States v. Security Trust & Savings Bank, 71 Sup. Ct. 111, 113 (1950). The Court clearly did not interpret the language of the California court "in the light of the facts of the case" and it ignored the effect of other California decisions concerning the nature of an attachment lien, including the state decision it overruled.

[16] As developed in this comment *infra*, if the competing claim is held by the federal government, the result will be different under the rule of the principal case, United States v. Security Trust & Savings Bank, 71 Sup. Ct. 111 (1950).

[17] See notes 10, 11 and 12 *supra*.

[18] 31 U. S. C. §191 (1946): "Whenever any person indebted to the United States is insolvent or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

[19] 1 STAT. 515 (1797). Under the English common law the priority of payment of debts due to the government was a prerogative of the crown, but in the United States this right of priority has been held to be entirely dependent upon the acts of Congress. Mellon v. Michigan Trust Co., 271 U. S. 236, 239 (1926); United States v. State Bank, 6 Pet. 29, 35 (U. S. 1832). *But cf.* the language of United States v. Snyder, 149 U. S. 210, 214 (1892).

[20] "Under this act these rules have been clearly established: First, no lien is created; second, the priority established can never attach while the debtor continues the owner and in possession of the property, though he may be unable to pay all his debts; third, no evidence can be received of the insolvency of the debtor until he has been divested of his property in one of the modes stated; and fourth, whenever the debtor is thus divested of his property, the person who becomes invested with the title is thereby made a trustee for the United States. . . ." Beaston v. Farmers' Bank, 12 Pet. 102, 132 (U. S. 1838).

[21] See Rogge, *The Differences in the Priority of the United States in Bankruptcy and in Equity Receiverships*, 43 HARV. L. REV. 251 (1929); Note, 56 YALE L. J. 1258 (1947).

[22] 2 Wheat. 396, 426 (U. S. 1817) (a judgment not yet levied was not a sufficiently perfected lien). See the surprising reference to this case in Conard v. Atlantic Insurance Co., 1 Pet. 386, 451 (U. S. 1828), concurring opinion by

lien would prevail over Section 3466 priority. Though repeated with varying degrees of assurance in later cases,[23] and urged upon the Court many times,[24] the Court has assiduously avoided a direct answer by finding that the lien competing with the federal priority was not sufficiently "specific and perfected."[25] Again, this was true in the recent case of *Illinois v. Campbell*.[26] In this case the Court stated that a lien must be definite in "at least three respects"[27] in order to overcome the priority of Section 3466: (1) the identity of the lienor;[28] (2) the amount of the lien;[29] (3) the property to which the lien attaches.[30]

A general statutory lien is provided for in Section 3670 of the Internal Revenue Code,[31] which arises at the time the assessment list is received by the internal revenue collector,[32] and which attaches to after-acquired property as well as present property rights of the debtor.[33] Originally Congress made no provision for recordation of federal tax liens arising under Section 3670. Perhaps influenced by the decision of the Court in *United States v. Snyder*,[34] which brought out the menace of this secret, unrecorded lien to the security of land titles and to all lien creditors' rights, Congress in 1913 provided that the tax lien

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Justice Johnson: ". . . I have long wished for an opportunity to put on record some remarks upon the report of the case of *Thelusson v. Smith*. I have never acknowledged its authority in my circuit . . . the question there supposed to be decided really never was raised. . . . The reporter has omitted one very material fact . . . which was, that the United States had no interest in the issue, since their judgment had been voluntarily paid off by the assignees of . . . the bankrupt."

[23] *See* Savings and Loan Society v. Multnomah County, 169 U. S. 421, 428 (1898): "This court has always held that a mortgage of real estate, made in good faith by a debtor to secure a private debt, is a conveyance of such an interest in the land, as will defeat the priority given to the United States. . . ." See Illinois v. Campbell, 329 U. S. 362, 378 (1946) (dissenting opinion).

[24] Illinois v. Campbell, 329 U. S. 362 (1946); United States v. Waddill, 323 U. S. 353 (1945); United States v. Texas, 314 U. S. 480 (1941); United States v. Knott, 298 U. S. 544 (1936); New York v. Maclay, 288 U. S. 290 (1933); Spokone County v. United States, 279 U. S. 80 (1921); Thelusson v. Smith, 2 Wheat. 396 (U. S. 1817).

[25] See 33 VA. L. REV. 353 (1947); cases cited note 24 *supra*.

[26] 329 U. S. 362 (1946) (Illinois had recorded notice of unemployment compensation taxes due and asserted a lien upon *all* the personal property owned and used by lienee in connection with its business. The court ruled that the Illinois claim was not definite and certain as to the property).

[27] Illinois v. Campbell, 329 U. S. 362, 375 (1946).

[28] Lien on securities deposited with state official for benefit of possible future creditors of surety company was inchoate for lack of ascertained lien creditor. United States v. Knott, 298 U. S. 544, 550 (1936).

[29] Landlord's lien for rents accruing in the future not certain in amount when federal priority arose. United States v. Waddill, 323 U. S. 353 (1945).

[30] See note 26 *supra*.

[31] 26 U. S. C. §3670 (1946).

[32] INT. REV. CODE §§3670 and 3671. See *In re* Victor Brewing Co., 54 F. Supp. 11 (W. D. Pa. 1944), *aff'd*, 146 F. 2d 831 (3d Cir.).

[33] Glass City Bank v. United States, 326 U. S. 265 (1945). See Clark, *Federal Tax Liens and Their Enforcement*, 33 VA. L. REV. 13 (1947).

[34] 149 U. S. 210 (1892). See Note 33 *supra*.

should not be valid against a purchaser, mortgagee, or judgment creditor until the lien was recorded.[35] In 1939 this protection was extended to a pledgee, and another amendment provided that the lien, even if recorded, should not be valid as against a mortgagee, pledgee, or purchaser of *securities* who gave full consideration for such securities without actual knowledge of the tax lien.[36] As the present law requires recordation of the of the tax lien as against *subsequent* purchasers, judgment creditors, mortgagees and pledgees, it logically follows that a lien under Section 3670 would not be superior to *prior* recorded claims of a purchaser, judgment creditor, mortgagee or pledgee.[37] But the standing of the claimant who does not fall into one of these categories,[38] and who has recorded his claim *prior* to the time the tax lien arose, is not expressly dealt with by statute. Prior to the principal case the decisions on this point were in conflict. For example, in *Board of Supervisors v. Hart*,[39] the federal tax lien was recorded subsequent to an attachment but prior to judgment. The tax lien was held subordinate on the theory that the judgment related back to the date of attachment and was superior to any intervening liens.[40] On the other hand, in the similar case of *Miller v. Bank of America*,[41] it was held that a tax lien was superior to an attachment pursued to judgment on the ground that, under the California law, no lien was acquired on personalty by a judgment until levy of execution.[42]

In the principal case, the Supreme Court did not find the relation-back theory acceptable.[43] Neither did it think that the attachment lien was specific and perfected. The Court relied on language from a previous California decision,[44] and saw an analogy in cases arising under

[35] INT. REV. CODE §3672(a).
[36] INT. REV. CODE §3672(b).
[37] In the principal case, the Government did not contest the priority of a mortgage recorded prior to the time the tax lien arose.
[38] For example, an attachment creditor.
[39] 210 La. 78, 26 So. 2d 361 (1946). This case was not appealed.
[40] *Accord*, United States v. Winnett, 165 F. 2d 149 (9th Cir. 1947) (right of set-off related back to date of contract, taking priority over intervening tax lien); United States v. Sampsell, 153 F. 2d 731 (9th Cir. 1946); New York Casualty Co. v. Zwerner, 58 F. Supp. 473 (N. D. Ill. 1944); *In re* Van Winkle, 49 F. Supp. 711 (W. D. Ky. 1943); United States v. 52.11 Acres of Land, 73 F. Supp. 820 (E. D. Mo. 1947); United States v. Yates, 204 S. W. 2d 399 (1947). *But cf.* MacKenzie v. United States, 109 F. 2d 450 (9th Cir. 1940) (tax lien arose before attachment but was not recorded and tax lien held superior).
[41] 166 F. 2d 415 (9th Cir. 1948) (no discussion of the effect of the attachment).
[42] But see Balzano v. Traeger, 93 Cal. App. 640, 270 Pac. 249 (1928) (lien of attachment on personalty continues after judgment to preserve the lien and its priority); Bank of America v. United States, 73 F. Supp. 303 (N. D. Cal. 1946); United States v. Record Pub. Co., 60 F. Supp. 194 (N. D. Cal. 1945).
[43] "Nor can the doctrine of relation back . . . operate to destroy the realities of the situation." United States v. Security Trust & Savings Bank, 71 Sup. Ct. 111, 113 (1950).
[44] See note 15 *supra*.

Section 3466.[45] The refusal of the Court to adopt the relation-back doctrine could be justified under a strict reading of the statute.[46] However, the persistence of the Court in finding as inchoate and contingent any lien which is competing against a federal tax lien or priority under Section 3466 seems less justifiable.[47] Such language with respect to an attachment lien seems to ignore the fundamental purpose of an attachment. Although it is quite true that the *right* to realize upon the attached property is contingent upon a subsequent judgment,[48] if the attachment is to be effective as a lien, it must fill the office of a valid lien prior to any judgment in the action.[49] Otherwise, the creditor would just as well save his efforts and abide his time until he has a judgment to record.[50]

[45] See notes 24 and 28-30 *supra*.

[46] INT. REV. CODE §3672(a): "Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed. . . ." It could be reasoned that to adopt the relation-back doctrine would in substance be inserting into the statute the additional words, "attachment creditor."

[47] Mr. Justice Jackson in a concurring opinion thought that the history of the statute required giving the tax lien priority over the attachment lien, as more in keeping with the intention of Congress. What seems to be a significant sentence in H. R. REP. No. 1018, 62d Cong., 2d Sess. (1912), which Justice Jackson cited, was not quoted: *"There is no reason why the Government should not occupy the same position with reference to liens on property as does the individual"* (italics added). While this sentence could not, of course, be interpreted as an express statement of the Committee concerning an *attachment lien*, it does perhaps argue for more lenient treatment of private creditor's liens on an occasion when the statute is silent.

[48] It should be remembered that short of payment, something usually remains to be done with any lien. A mortgage, whether in a lien or title jurisdiction, must be foreclosed. See Meyer's Estate, 159 Pa. Super. 296, 48 A. 2d 210 (1946).

[49] It might be argued that the attaching creditor does not lose anything if his attachment is overreached by other lien creditors, as he did not have any security to begin with, and did not expect any. But this would be an argument to do away with the whole body of attachment law. Furthermore, the attachment lien does protect the creditor against a fruitless suit and the expense of litigation, and the peril of having a judgment with nothing to levy upon. The reasons for giving the attaching creditor a lien on the debtor's property are indeed quite similar to those applicable for the judgment creditor's lien.

[50] The statutory provisions on attachments in North Carolina are set out in N. C. GEN. STAT. §§1-440.1 through 1-440.57 (1949 Supp.). The North Carolina statute is less extensive than the California statute, CAL. CODE CIV. PROC. ANN. §537 (1946), in that in North Carolina an attachment may be issued against a resident only when he (the debtor) with intent to defraud his creditors, is about to or has removed, assigned or otherwise disposed of his property. N. C. GEN. STAT. §1-440.3(5) (1949 Supp.). It would therefore seem that the situation which permits the creditor to attach the resident debtor's property is the situation which invokes the priority statute, R. S. §3466. See note 18 *supra*. But this assumes that the debtor is not thrown into bankruptcy. Since acts which call R. S. §3466 into play may also justify an involuntary petition in bankruptcy, if this results, the order of distribution under Sec. 64(a) of the Bankruptcy Act, 11 U. S. C. §104 (1946) gives the United States a fifth priority. Furthermore, under the Bankruptcy Act, Sec. 67, inchoate liens are specifically protected so that if an attachment lien is so denominated, it would have priority over the federal tax claim. See Sarner, *Correlation of Priority and Lien Rights in the Collection of Federal Taxes*, 95 UNIV. PA. L. REV. 739, 743 (1947). Where the attachment

The fact that a federal tax lien is in the race for priority should not serve to change the fundamental nature and purpose of competing liens.[51] The desirability as well as the Constitutional requirement[52] of a uniform tax policy throughout the country need not be argued, nor the necessity that the federal government secure needed revenue for the public benefit. What may be doubted is the contention of some that the public benefit is or would be served by subordinating all lien holders to the tax claims of the United States.[53] When this would not result in an appreciable amount of revenue in the aggregate,[54] and would often operate quite unjustly by imposing relatively heavy losses upon individual private creditors, the public benefit involved would seem highly dubious.

Congress has by successive amendments since 1913[55] greatly restricted the scope of the original secret, unrecorded federal tax lien. This fact plus a House Committee declaration that "There is no reason why the Government should not occupy the same position with reference to liens on property as does the individual"[56] would seem to make out a good case why the federal courts should not give effect to a secret, unrecorded tax lien by the judicial process of defining a competing lien as "contingent and inchoate."[57] Yet, the reluctance of the Supreme

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is on property of a nonresident (N. C. GEN. STAT. §1-440.3(1) (1949 Supp.) or a foreign corporation (N. C. GEN. STAT. §1-440.3(2) (1949 Supp.) without regard to any attempt to defraud creditors, R. S. §3466 would not necessarily be invoked. In this case, the North Carolina attachment creditor would likely still find his attachment lien inferior to a federal tax lien under INT. REV. CODE §3670 which intervened between attachment and judgment, under the rule of the principal case.

[51] *E.g.*, see Doe v. Childress, 24 Wall. 642 (U. S. 1874) as to the effect of an attachment where no tax lien was involved.

[52] U. S. CONST. Art. I §8.

[53] "In insolvency proceedings some claimants are certain to suffer. There is no reason why lien holders should be preferred over the United States. Since the priority accorded claims of the United States is for the purpose of securing revenue for the public benefit, the United States has a stronger argument for prior payment of its claims against an insolvent estate than does a lien holder whose interest is purely private." Sarner *supra* note 51, at 746-747. This author assumes without discussion what seems to be a debatable proposition: Would the public welfare *in fact* be served by giving the United States preference over *all* lien holders?

[54] See H. R. REP. No. 1018, 62d Cong., 2d Sess. 1912 and H. R. REP. No. 855, 76th Cong., 1st Sess. 1939.

[55] INT. REV. CODE §3672.

[56] H. R. REP. No. 1018, 62d Cong., 2d Sess. 1912.

[57] From the view of strict statutory construction, the interpretations of the Supreme Court are probably unassailable. But the Court has not limited itself to such construction through the years, inasmuch as it has kept alive, by dicta, the idea that a "specific and perfected" lien would not be overreached by federal priority under R. S. §3466. See notes 23 and 24 *supra*. The number of cases heard on the point is evidence of the reliance which litigants have put on the often repeated dicta, as well as of great differences of opinion as to what constitutes a "specific and perfected" lien. In an area of the law where certainty is an unusually desirable factor, the Supreme Court has often contributed to uncer-

Court to find a sufficiently "specific and perfected" lien under Revised Statutes, Section 3466, and now under Section 3670 of the Internal Revenue Code, indicates that amendments to these two sections are highly desirable. Such amendments should bring these sections into conformity with the federal priority philosophy Congress has expressed elsewhere,[58] thereby eliminating the remaining vestiges of the secret, unrecorded federal claim and achieving a greater degree of certainty as to creditors' rights. These goals appear impossible of attainment under the present state of the law.

ROBERT E. GILES.

Negligence—Contributory—Obstructions of View at Railroad Crossings

The failure of a traveler crossing a railroad to obtain a clear view of the track from any point, when he may do so in safety, renders him contributorily negligent as a matter of law in North Carolina, and his case will not be allowed to go to the jury.[1] This rule was recently illustrated by the case of *Parker v. Atlantic Coast Line R.R.*[2] Plaintiff stopped at a farm crossing with the front of his truck eight or ten feet from the near rail, at a point where an embankment prevented his seeing more than seventy-five to eighty yards up the track. He then entered the crossing and collided with a train. The court held motion for nonsuit should have been granted since plaintiff's evidence disclosed that he could have stopped in safety at a point which afforded him clear vision. This rule has had sustained approval since *Harrison v. North Carolina R.R.*,[3] but its application has not always been certain.

The general principles of the duty of a traveler in crossing a railroad track have been many times repeated.[4] It is generally held that

tainty. For an excellent example of the effect on lower federal courts, see Bank of Wrangell v. Alaska Lumber Mills, 84 F. Supp. 1 (D. C. Alaska 1949) (admitting the impossibility of reconciling the decisions, and the dicta, the court held that a mortgage, in a lien jurisdiction, was superior to federal priority under Section 3466).

[58] The Bankruptcy Act §§64 and 67, 30 STAT. 563 (1898), as amended, 11 U. S. C. §104 (1946) and 30 STAT. 564 (1898), as amended, 11 U. S. C. §107 (1946).

[1] This rule, of course, assumes the existence of some negligence on the part of the defendant railroad, which will generally be a failure to give proper warning. This note does not attempt to deal with the problem of what constitutes negligence on the part of the railroad. For a general discussion of the problem of crossing accidents see Blair, *Automobile Accidents at Railroad Crossings in North Carolina*, 23 N. C. L. REV. 223 (1945).

[2] 232 N. C. 472, 61 S. E. 2d 370 (1950).

[3] 194 N. C. 656, 140 S. E. 598 (1927).

[4] The basic North Carolina cases on duties of both parties at a railroad crossing are probably Johnson v. Seaboard Air Line Ry., 163 N. C. 431, 79 S. E. 690 (1913); Coleman v. A. C. L. R.R., 153 N. C. 322, 69 S. E. 251 (1910); Cooper v. N. C. R.R., 140 N. C. 209, 52 S. E. 932 (1905).

the duty to stop, look, and listen is relative, depending on the situation in the particular case. A failure to exercise these precautions is a circumstance for the consideration of the jury in determining contributory negligence,[5] though in some states a failure to stop is contributory negligence as a matter of law.[6]

The duty to stop arises most frequently in cases where there is some obstruction to the view of the track immediately adjacent to the crossing. The greater the danger at a crossing, the greater is the care required of both the traveler and the railroad.[7] The increased duty of the railroad to give warning may be taken into account by the traveler in crossing and by the court in establishing the standard of care required of him.[8] The duty to look and listen is continuing and should be performed at a time and place when looking and listening will be effective.[9] The traveler must select a vantage point from which he can see the track, even though he may have stopped once already where the view was obstructed.[10] The precise number of feet from the track where observation should be made cannot be set down as a rule,[11] but the duty does not require that a traveler go beyond a place of safety into the zone of danger itself.[12]

If vision is completely obstructed by obstacles or obscured by weather conditions, or if a clear view may be obtained only in the area of danger itself, the traveler in going forward may ordinarily rely on his sense of hearing and on the increased duty of the railroad to give warning.[13] There is no absolute duty for the driver of a vehicle to alight and look up and down the track before proceeding across.[14]

[5] Pokora v. Wabash R.R., 292 U. S. 98 (1933); Elliot v. Chicago, M. & St. P. Ry., 150 U. S. 245 (1893); Harris v. Black Mountain Ry., 199 N. C. 798, 156 S. E. 102 (1930). N. C. GEN. STAT. §20-143 (1943) specifies that a failure to stop shall not be contributory negligence *per se*, and this is interpreted to mean that a failure to stop is a circumstance to be considered in determining contributory negligence, whether by the court or the jury. Conn v. Seaboard Air Line Ry., 201 N. C. 157, 159 S. E. 331 (1931).

[6] This is known as the "Pennsylvania Rule." Benner v. Philadelphia & R. R.R., 262 Pa. 307, 105 Atl. 283 (1918).

[7] Johnson v. Seaboard Air Line Ry., 163 N. C. 431, 79 S. E. 690 (1913).

[8] Pokora v. Wabash R.R., 292 U. S. 98 (1933).

[9] Kilmer v. Norfolk & Western R.R., 45 F. 2d 532 (5th Cir. 1930); Godwin v. A. C. L. R.R., 202 N. C. 1, 161 S. E. 541 (1941); Johnson v. Seaboard Air Line Ry., 163 N. C. 431, 79 S. E. 690 (1913).

[10] Pennsylvania Ry. v. Yingling, 158 Md. 169, 129 Atl. 36 (1925); Parker v. A. C. L. R.R., 232 N. C. 472, 61 S.E. 2d 370 (1950).

[11] N. C. GEN. STAT. §20-143 (1943) requires motorists to stop within 50 feet of the tracks.

[12] Parker v. A. C. L. R.R., 232 N. C. 472, 61 S. E. 2d 370 (1950); Pokora v. Wabash R.R., 292 U. S. 98 (1933).

[13] Pokora v. Wabash Ry., 292 U. S. 98 (1933); Cooper v. N. C. R.R., 140 N. C. 209, 52 S. E. 932 (1905).

[14] In a famous dictum, Justice Holmes once laid down the rule that the driver must get out if necessary in order to see the track. B. & O. R.R. v. Goodman,

The above-mentioned principles have fairly general acceptance. It is primarily in their application as a question of law for the court or of fact for the jury that the differences among the various jurisdictions appear. It is the general rule that where the view at a crossing is not obstructed or obscured in any way, and the traveler enters upon the crossing oblivious to his danger and is injured, he is guilty of contributory negligence which bars his recovery as a matter of law.[15] Of course, if the plaintiff saw the train coming and still attempted unsuccessfully to get across, nonsuit is proper.[16]

If the view of the tracks is in some way obstructed, the prevailing rule seems to be that whether the traveler selected the proper place for looking and listening is a question of fact for the jury, and the plaintiff will not be denied recovery as a matter of law.[17] Another line of authority has developed since the much-discussed case of *Baltimore & Ohio Ry. v. Goodman*,[18] in which the United States Supreme Court found contributory negligence as a matter of law where a motorist failed to obtain a clear view in safety after passing obstructions close to the track. As a part of this development, North Carolina, in the case of *Harrison v. North Carolina R.R.* (in which the court quoted extensively from the *Goodman* opinion), switched over from its earlier adherence to the general rule and held nonsuit proper in this situation.[19] Since the *Harrison* case, North Carolina has applied its rule in numerous other cases.

The practical application of the rule leaves questions in need of clarification. At what point does it become unsafe to approach closer to a crossing in order to look, and at what point does it become permissible to rely upon the sense of hearing and upon warnings by the railroad? The answer, of course, depends in large part upon the manner

275 U. S. 66 (1927). This rule was disavowed in Pokora v. Wabash Ry., 292 U. S. 98 (1933), in which the court said that "a driver may learn nothing by getting out about the perils which lurk beyond. By the time he regains his seat and sets the car in motion, the hidden train may be upon him."

[15] Pokora v. Wabash Ry., 292 U. S. 98 (1933); Bailey v. N. C. R.R., 223 N. C. 244, 25 S. E. 2d 833 (1943).

[16] McCrimmon v. Powell, 221 N. C. 216, 19 S. E. 2d 880 (1942); Lamm v. A. C. L. R.R., 213 N. C. 216, 195 S. E. 381 (1938).

[17] Morgan v. Detroit, J. & C. R.R., 234 Mich. 497, 208 N. W. 434 (1926); Newhard v. Pennsylvania R.R., 153 Pa. 417, 26 Atl. 106 (1893); Morrissey v. Chicago, M. & St. P. Ry., 55 S. D. 497, 226 N. W. 731 (1920). *Contra:* Pokora v. Wabash Ry., 292 U. S. 98 (1933); Pennsylvania R.R. v. Yingling, 148 Md. 169, 129 Atl. 136 (1925).

[18] 275 U. S. 66 (1927), where the obstructions were 18 feet from the track. Comment 6 N. C. L. REV. 212.

[19] 194 N. C. 656, 140 S. E. 598 (1927). The earlier North Carolina rule is expressed in Shepard v. Norfolk & Southern R.R., 166 N. C. 539, 82 S. E. 872 (1914), and Johnson v. Seaboard Air Line Ry., 163 N. C. 431, 79 S. E. 690 (1913).

of transportation and the degree of mobility which the traveler possesses.[20] In reckoning the limit of distance from the track to which a safe approach may be made with a vehicle, the overhang of the locomotive beyond the side of the track and the projection of the vehicle forward of the driver have to be considered.[21] Secondly, how far must the view of the track extend to be considered "clear"? In most of the cases where nonsuit is granted, the track is "straight," or clear as "far as you can see."[22] Where witnesses have given estimates of the distance for which the view was clear, nonsuit has been granted when the estimate was as low as seventy-five or eighty yards, but for the most part the estimates have been several hundred yards or more.[23] If the view is not completely obstructed by virtue of some obstacle immediately beside the crossing, but the lay of the track itself is such that an approaching train is hidden until it is almost upon the crossing, the chances of getting to the jury increase. This may occur where the track curves sharply[24] or is hidden from view by a deep cut or hollow.[25]

[20] Wehe v. Atchison, T. & S. F. R.R., 97 Kan. 794, 156 P. 742 (1916).

[21] Thus it would seem that the closest safe distance for a motor vehicle would be at a point where the driver would be in the neighborhood of 10 feet from the track, allowing 2 to 3 feet for the locomotive overhang, 6 or 7 feet for the projection of the vehicle in front of the driver, and clearance. Thus, where obstructions come to within 3 or 4 feet of the near rail, nonsuit is not granted. Lincoln v. A. C. L. R.R., 207 N. C. 787, 178 S. E. 601 (1935); Collett v. Southern Ry., 198 N. C. 760, 153 S. E. 405 (1930). The same decision was reached where the obstruction was 8 to 10 feet from the near rail. White v. N. C. R.R., 216 N. C. 79, 3 S. E. 2d 310 (1939). A survey of the cases shows that the closest point to which obstructions have extended with nonsuit resulting was 10 to 15 feet from the track. Godwin v. A. C. L. R.R., 202 N. C. 1, 161 S. E. 541 (1931); Harrison v. N. C. R.R., 194 N. C. 656, 140 S. E. 598 (1927). In Parker v. A. C. L. R.R., the driver stopped with the front end of his truck 8 to 10 feet from the track, and this placed him about 15 feet away. For obstructions occurring beyond this range, there have been numerous instances of nonsuit. Caruthers v. Southern Ry., 232 N. C. 183, 59 S. E. 2d 782 (1950) (24 feet); Hampton v. Hawkins, 219 N. C. 205, 13 S. E. 2d 227 (1941) (30 feet). Horsedrawn vehicles have a long projection forward of the driver and, in addition, probably would be allowed a greater area of danger because of the excitability of the animals. Bicyclists and pedestrians have a much greater degree of mobility and a shorter distance of danger, but even so, if a pedestrian has to look around a box car immediately beside the track to see, the case may be allowed to go to the jury. Riggsbee v. A. C. L. R.R., 190 N. C. 231, 129 S. E. 580 (1930). As a practical matter, it would seem unlikely that obstructions would come to within 10 feet of the tracks except in the case of other railway cars standing on a parallel track.

[22] Boyd v. A. C. L. R.R., 232 N. C. 171, 59 S. E. 2d 789 (1950); McCrimmon v. Powell, 221 N. C. 216, 19 S. E. 2d 880 (1942); Godwin v. A. C. L. R.R., 220 N. C. 281, 17 S. E. 2d 137 (1941).

[23] Parker v. A. C. L. R.R., 232 N. C. 472, 61 S. E. 2d 370 (1950); Penland v. Southern Ry., 228 N. C. 528, 46 S. E. 2d 303 (1948); Eller v. N. C. R.R., 200 N. C. 527, 157 S. E. 800 (1931). In Tart v. Southern Ry., 202 N. C. 52, 161 S. E. 720 (1931) the view was straight for three-quarters of a mile.

[24] Loflin v. N. C. R.R., 210 N. C. 404, 186 S. E. 493 (1936); Baker v. High Point, T. & D. R.R., 202 N. C. 478, 163 S. E. 452 (1932); Moseley v. A. C. L. R.R., 197 N. C. 628, 150 S. E. 184 (1929).

[25] Bundy v. Powell, 229 N. C. 707, 51 S. E. 2d 307 (1948).

The factors of decision are not so limited, however, as the foregoing discussion might seem to indicate. In determining whether a case of negligence and contributory negligence is one for the jury or one exclusively for the court, "the factors of decision are numerous and complicated, and practically every case must stand on its own bottom."[26] The fact that the traveler was familiar with the crossing or with the train schedule is an additional factor in establishing negligence; conversely, unfamiliarity with either is an aid in getting to the jury.[27] The type of road crossing the track is also important, as obviously the traveler has less reason to expect a warning and should use more care at a farm crossing than at a major highway.[28] Other factors which may have weight in carrying the case to the jury are fault of the railroad in causing the obstruction,[29] presence of weather or heavy traffic conditions increasing the difficulty of seeing,[30] and some degree of reliance by the traveler on the presence of a watchman or warning signals.[31] Although for some time after the *Harrison* case the application of its rule was somewhat uncertain, and although one case has suggested that there are two lines of cases on the subject,[32] it seems that the contradictions may be explained in part by the presence of some of the above factors and in part by an increasing tendency of the Court to decide more railroad crossing cases as questions of law.

Where the obstruction to the view is of a temporary or transient character the traveler must wait for it to cease or pass on, in order effectively to fulfill his duty to look and listen.[33] The prevailing rule is that failure to wait until the view clears is contributory negligence as a matter of law.[34] North Carolina in following this rule grants nonsuit where the traveler fails to wait long enough to get a clear view after

[26] Cole v. Koonce, 214 N. C. 188, 198 S. E. 637 (1938).

[27] Nonsuit was given in Riddle v. Southern Ry., 114 F. 2d 259 (M. D. N. C. 1940); Parker v. A. C. L. R.R., 232 N. C. 472, 61 S. E. 2d 370 (1950); Caruthers v. Southern Ry., 232 N. C. 183, 59 S. E. 2d 782 (1950); and several other cases in which familiarity was emphasized, and denied in Harper v. Seaboard Air Line Ry., 211 N. C. 398, 190 S. E. 750 (1937), where the driver was unfamiliar with the crossing.

[28] Parker v. A. C. L. R.R., 232 N. C. 472, 61 S. E. 2d 370 (1950).

[29] Hill v. Norfolk & Southern R.R., 195 N. C. 605, 143 S. E. 129 (1929); Blum v. Southern Ry., 187 N. C. 640, 122 S. E. 562 (1924).

[30] Harper v. Seaboard Air Line Ry., 211 N. C. 398, 190 S. E. 750 (1937).

[31] Finch v. N. C. R.R., 195 N. C. 190, 141 S. E. 550 (1928).

[32] Eller v. N. C. R.R., 200 N. C. 527, 157 S. E. 800 (1931).

[33] Pennsylvania R.R. v. Yingling, 148 Md. 169, 129 Atl. 36 (1925); Dickinson v. Erie R.R., 81 N. J. L. 464, 81 Atl. 104 (1911); Eller v. N. C. R.R., 200 N. C. 527, 157 S. E. 800 (1931)

[34] Fletcher v. Fitchburg R.R., 149 Mass. 127, 21 N. E. 302 (1889); Pennsylvania R.R. v. Rusynik, 117 Ohio St. 530, 159 N. E. 826 (1927). *Contra:* Cook v. A. C. L. R.R., 196 S. C. 230, 13 S. E. 2d 1 (1941).

another train[35] or automobile[36] passes, or until smoke and steam from another train lifts from the crossing.[37]

Where the view is obscured by adverse weather conditions, the traveler may rely on warnings by the railroad and on greater use of hearing. Thus, if there is fog[38] or snow,[39] or the night is dark and rainy,[40] the jury is allowed to pass on the question of whether plaintiff maintained a proper lookout. But the weather conditions must be such as to cut down visibility substantially: a cold and foggy morning with hazy atmosphere has been called a borderline case,[41] and a drizzling rain in the daytime has been held not enough to prevent nonsuit.[42]

Ordinarily the negligence of the driver of a vehicle will not be imputed to a passenger, but where the driver's negligence is so palpable and gross as to be the proximate cause of the accident, it "insulates" the first occurring negligence as a matter of law.[43] Negligence of the driver under the rule *Harrison* case in failing to obtain a clear view after passing obstructions may have this result. But because the negligence of the driver must be palpable and gross, the Court would probably be more reluctant to declare that the railroad's negligence was insulated as a matter of law in a suit by a guest, on the same showing of negligence. This relaxation of the rule would allow his case to go to the jury where the obstruction to view was farther from the track than would be allowed where the driver was suing.[44]

The doctrine of "last clear chance" has not been applied in the cases where the driver's failure to obtain a clear view before entering a railroad crossing has resulted in nonsuit. The Court gives the reason that "the doctrine of last clear chance does not apply where the contributory negligence of the injured party bars recovery as a matter of law."[45] It would seem, however, that the real reason for not applying

[35] Moore v. A. C. L. R.R., 203 N. C. 275, 165 S. E. 708 (1932).
[36] Eller v. N. C. R.R., 200 N. C. 527, 157 S. E. 800 (1931).
[37] Lee v. Southern Ry., 180 N. C. 413, 105 S. E. 15 (1920).
[38] Meacham v. Southern Ry., 213 N. C. 609, 197 S. E. 189 (1938); Dancy v. A. C. L. R.R., 204 N. C. 303, 168 S. E. 200 (1933).
[39] King v. Seaboard Air Line Ry., 200 N. C. 398, 157 S. E. 28 (1931).
[40] Collett v. Southern Ry., 198 N. C. 760, 153 S. E. 405 (1930).
[41] Harper v. Norfolk & Western R.R., 230 N. C. 179, 52 S. E. 2d 717 (1949).
[42] Rimmer v. Southern Ry., 208 N. C. 198, 179 S. E. 753 (1935).
[43] Hinnant v. A. C. L. R.R., 202 N. C. 489, 163 S. E. 555 (1932); Blair, *Automobile Accidents at Railroad Crossings in North Carolina*, 23 N. C. L. REV. 223 (1945). On the subject of the duty of an automobile passenger generally, see Note, 28 N. C. L. REV. 302 (1950).
[44] George v. Atlantic & C. R.R., 207 N. C. 457, 177 S. E. 324 (1934). In Jeffries v. Powell, 221 N. C. 415, 20 S. E. 2d 561 (1942), a nonsuit was granted against the passenger when there was nothing to obstruct the view of the driver past bushes 30 to 40 feet from the track.
[45] Rimmer v. Southern Ry., 208 N. C. 198, 179 S. E. 753 (1935); Redmon v. Southern Ry., 195 N. C. 764, 143 S. E. 829 (1928).

the doctrine in these cases is that the engineer does not have opportunity to stop in time to prevent the collision after the plaintiff comes from behind obstructions onto the track in front of the train.[46]

The present strict application of the rule that a traveler must, if possible, get a clear view of a railroad track which he is crossing may be a part of an increasing trend by the North Carolina Court to decide contributory negligence cases as questions of law.[47] At any rate, the acceptance of this rule is now settled. The conflicting cases on its application can probably be explained by the presence of modifying factors, rather than by reason of any doubt as to its acceptance.

DICKSON MCLEAN, JR.

Negotiable Instruments—Discharge of Prior Party by Statute of Limitations—Effect on Guarantor and Surety

If the statute of limitations has run in favor of the maker of a negotiable instrument, is a guarantor or surety on the instrument discharged under Negotiable Instruments Law §120(3),[1] which provides that "A person secondarily liable on the instrument is discharged by the discharge of a prior party?" This question gives rise to two fundamental problems: first, is a surety or guarantor secondarily liable under the Negotiable Instruments Law; second, does §120(3) include a discharge of a prior party by the statute of limitations?

Negotiable Instruments Law §192[2] stipulates that "The person primarily liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are secondarily liable." Obviously, under this section, the liability of a guarantor of collection is secondary, as it is dependent upon the creditor pursuing the principal debtor with due diligence. Whether the liability of a guarantor of payment is primary or secondary, however, is subject to some dispute. One court has held that a guarantor of payment is primarily liable, but only after the maturity of the note, since after

[46] The rule of "last clear chance" is applied in some cases in which the plaintiff is guilty of contributory negligence as a matter of law, as where he goes to sleep on the tracks. Note, 16 N. C. L. REV. 50 (1938). In Miller v. Southern Ry., 205 N. C. 17, 169 S. E. 711 (1933), where the view was obstructed, the court said the doctrine would not be applied because there was no evidence that the engineer could have stopped after he discovered the driver was in a position of peril, and this seems the better justification for refusing the application of the rule in this situation.

[47] This trend may be reflected in the "insulation" of the railroad's negligence by the driver's negligence depriving a passenger of his right to recover, and finding contributory negligence as a matter of law where an automobile driver "outruns his headlights." Note, 27 N. C. L. REV. 153 (1948).

[1] N. C. GEN. STAT. §25-127(3) (1943).
[2] N. C. GEN. STAT. §25-2 (1943).

maturity he is absolutely liable for the payment of the debt.[3] Apparently, this result is reached by construing §192 to mean that any person who is immediately obligated to pay the instrument is a primary party. Thus, where a party's obligation is not dependent upon demand, presentment, and notice nor upon the creditor first suing the principal, his liability has been said to be primary.[4] Conversely, other courts treat the guarantor of payment as secondarily liable, even though he waives demand, presentment, and notice.[5] The reasoning used to reach this result is that the liability of a guarantor is not predicated upon the *terms of the instrument*, but upon the contract of guaranty, which is treated as a separate and distinct contract.

Practically all courts which have passed on the matter have held the surety to be primarily liable regardless of whether or not he indicates his suretyship on the face of the instrument.[6] In so holding, it is often stated that the surety is bound by the terms of the instrument, and that his liability is coextensive with that of the maker. This result seems justified when the suretyship is not indicated on the face of the instrument, for then the surety appears to be a person who by the terms of the instrument is absolutely required to pay. However, when the suretyship is indicated on the face of the instrument, it seems that a different result should be reached. When the surety expresses his suretyship on the face of the instrument, he qualifies his liability; and although the creditor may immediately proceed against the surety, the relationship between the two is significantly changed by this express manifestation. Under the old doctrine of *Pain v. Packard*,[7] for example, the surety may give the creditor notice to sue the maker; and if suit is not brought within a reasonable time, the surety is discharged to the extent of his prejudice. This doctrine has been adopted by statute in many states with some variations.[8] Even in those states where no such rule

[3] Frost v. Harbert, 20 Idaho 336, 118 Pac. 1095 (1911); *cf.* Beebe v. Kirkpatrick, 321 Ill. 612, 152 N. E. 539 (1926); *In re* Menzer's Estate, 189 Wis. 340, 20 N. W. 703 (1926).

[4] Night & Day Bank v. Rosenbaum, 191 Mo. App. 559, 177 S. W. 393 (1915) (accommodation indorser who waived demand, protest, and notice held primarily liable).

[5] First Nat'l Bank of Shenandoah v. Drake, 185 Iowa 879, 171 N. W. 115 (1919); Merchants Nat'l Bank v. Lewis, 86 N. H. 144, 164 Atl. 773 (1933); Northern State Bank v. Bellamy, 19 N. D. 509, 125 N. W. 888 (1910).

[6] Hardesty v. Young, 34 F. 2d 310 (D. Minn. 1929) (suretyship indicated on face of instrument); Vanderford v. Farmers & Mechanics Nat'l Bank, 105 Md. 164, 66 Atl. 47 (1907) (suretyship not indicated); Rouse v. Wooten, 140 N. C. 557, 53 S. E. 430 (1906) (not clear whether suretyship indicated on face of instrument); Cellars v. Meachem, 49 Ore. 186, 89 Pac. 426 (1907) (suretyship indicated on face of instrument).

[7] 13 Johns. 174 (N. Y. 1816).

[8] ARIZ. CODE ANN. §27-1701 (1939); KY. REV. STAT. §412.110 (1948); MISS. CODE ANN. §253 (1942); MO. REV. STAT. ANN. §3318 (1939); N. C. GEN. STAT. §26-7 (1943).

obtains, the surety, under certain circumstances, may bring an action in equity to compel the creditor to proceed against the debtor before resorting to the surety.[9] Also, where property of both the principal and the surety has been hypothecated, the surety can insist that the principal's property be resorted to before that of the surety,[10] and if the surety and principal are sued jointly, then on execution the property of the maker is to be exhausted before resorting to that of the surety.[11] To say that the surety who indicates his suretyship on the face of the instrument is *by the terms of the instrument* absolutely required to pay the same ignores these qualifications of the absolute obligation to pay which the existence of a suretyship carries with it. When the suretyship is indicated on the face of the instrument it seems a more logical and equitable result would be reached by holding that the obligation to pay has been expressly qualified. As stated by one court,[12] "When a party on signing clearly indicates upon the instrument the capacity in which he is willing to be bound, the holder in accepting it cannot misapprehend its true quality, for he then knows that the party may be held in that capacity and no other." If the surety is not treated as a secondary party, it seems he will be deprived of many of his common law defenses.[13]

[9] Bingham v. Mears, 4 N. D. 437, 61 N. W. 808 (1894). In Davis v. Patrick, 57 Fed. 909 (8th Cir. 1893) it is stated that where the surety is likely to sustain loss by the delay and forbearance of the creditor, or where the creditor has access to a fund for the payment of his debt which the sureties cannot make available, a court of equity, at the instance of the surety, will coerce the creditor to proceed with the collection of his claim against the principal debtor.

[10] Weil v. Thomas, 114 N. C. 197, 19 S. E. 103 (1894).

[11] N. C. GEN. STAT. §26-2 (1943).

[12] Northern State Bank v. Bellamy, 19 N. D. 509, 125 N. W. 888, 890 (1910). The UNIFORM COMMERCIAL CODE §3-606(1) (Proposed Final Draft, Text and Comments Ed., 1950), suggested by its drafters as a replacement of NEGOTIABLE INSTRUMENTS LAW §120, provides in part that "The holder discharges any party to the instrument to the extent that without such party's consent the holder (a) without express reservation of rights releases or agrees not to sue any person against whom the party has to the knowledge of the holder a right of recourse on the instrument, or agrees to suspend the right to enforce against such person the instrument or collateral." In Comment 1 it is said "The words 'any party to the instrument' remove an uncertainty arising under the original section. The suretyship defenses here provided are not limited to parties who are 'secondarily liable,' but are available to any party who is in the position of a surety, including an accommodation maker or acceptor." And in Comment 4 it is stated "The words 'to the knowledge of the holder' exclude the latent surety, as for example the accommodation maker where there is nothing on the instrument to show that he has signed for accommodation and the holder is ignorant of that fact. In such a case the holder is entitled to proceed according to what is shown by the face of the paper or what he otherwise knows, and does not discharge the surety when he acts in ignorance of the relation."

[13] Negotiable Instruments Law §120 includes several defenses which were available to the surety at the law merchant. Since §120 applies only to secondary parties, it would seem that these defenses would no longer be available to a surety where he is treated as a primary party. However, in Prudential Insurance Co. of America v. Bass, 357 Ill. 72, 191 N. E. 284 (1934) the court avoided this

Even if the guarantor or surety be considered secondary parties, it is still necessary to determine whether a discharge of a prior party by the statute of limitations is sufficient to discharge secondary parties under §120(3).[14] Before the Negotiable Instruments Law there was some conflict as to what constituted such a discharge of a prior party as would discharge a surety or guarantor. One view was that only a discharge created by some *affirmative act* of the creditor was sufficient to discharge secondary parties.[15] In contrast to this was the view that a discharge initiated by some *affirmative act or neglect* of the holder was sufficient.[16]

This conflict has not been settled by the Negotiable Instruments Law. Professor Brewster, in his interpretation of §120(3), indicated that it contemplates a discharge by the holder and not a discharge by operation of law.[17] On the other hand, Dean Ames contended[18] ". . . that if the maker is discharged by the statute of limitations, all the indorsers are *ipso facto* discharged." Most of the courts have adopted Professor Brewster's view.[19] Yet, there is at least one decision holding that a guarantor of payment is discharged by the discharge of the maker by the statute of limitations.[20] Strong arguments can be advanced for the result reached in the above case. Generally, the guarantor is permitted to set up any defense which the maker of the note has against the holder, and there is no reason why the statute of limitations should be an exception to this rule.[21] The discharge of the debtor by the statute of limitations, though not caused by some affirmative act of the holder, is

result by holding that the Negotiable Instruments Law did not apply to sureties or guarantors and therefore the law merchant was resorted to in order to determine the rights of such parties. See, NEGOTIABLE INSTRUMENTS LAW §196.

[14] Generally, the statute of limitations will discharge both the surety and the maker at the same time; however, where the surety has been out of state long enough to toll the statute as to him, this question is likely to arise. See, N. C. GEN. STAT. §1-21 (1943).

[15] Nelson v. First Nat'l Bank, 69 Fed. 798 (8th Cir. 1895); Eickhoff v. Eikenbary, 52 Neb. 332, 72 N. W. 308 (1897); *cf.* Bull v. Coe, 77 Cal. 54, 18 Pac. 808 (1888).

[16] Auchampaugh v. Schmidt, 70 Iowa 642, 27 N. W. 805 (1886); Shutts v. Fingar, 100 N. Y. 539, 3 N. E. 588 (1885).

[17] Brewster, *A Defense of the Negotiable Instruments Law*, 10 YALE L. J. 84, 94 (1901).

[18] Ames, *The Negotiable Instruments Law*, 14 HARV. L. REV. 241, 253 (1900).

[19] Finance Corp. of New England v. Parker, 251 Mass. 372, 146 N. E. 696 (1925) (discharge of a prior indorser by statute of limitations did not discharge subsequent indorsers); Romero v. Hopewell, 28 N. M. 259, 210 Pac. 231 (1922) (discharge of a prior party by the statute of limitations did not discharge secondary parties).

[20] First Nat'l Bank of Shenandoah v. Drake, 185 Iowa 879, 171 N. W. 115 (1919).

[21] First Nat'l Bank of Shenandoah v. Drake, 185 Iowa 879, 171 N. W. 115 (1919); Auchampaugh v. Schmidt, 70 Iowa 642, 27 N. W. 805 (1886); Skoggs v. Marcum, 247 Ky. 712, 57 S. W. 2d 670 (1933).

due directly to the laches of the holder.[22] If the secondary party is not discharged, the statute of limitations is circumvented; for the holder, by collecting from the guarantor or surety, permits the surety or guarantor to pursue the debtor.[23] If the surety or guarantor is permitted to take advantage of the debtor's defense, the diligent creditor can still protect himself against the discharge of the surety or guarantor due to the running of the statute against the debtor, by obtaining a judgment against the debtor prior to the running of the statute.

No definitive answer to all the questions raised herein is discernible from the few North Carolina cases available. The court has held that the liability of a guarantor of collection is conditional.[24] Thus it seems that he will be considered a secondary party under the Negotiable Instruments Law. Also, it has been held that a guaranty of payment is an absolute promise to pay the debt.[25] But this does not necessitate the holding that a guarantor of payment is primarily liable, since it has been stated by the court that a contract of guaranty is separate and distinct from that of the debtor and that a guarantor's liability is not the same as that of a surety.[26] Further, it has been held that a surety is primarily liable notwithstanding the fact that the suretyship was expressed on the face of the instrument.[27] There appear to be no North Carolina cases indicating what kind of discharge is intended within the meaning of §120(3).[28]

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[22] In Shutts v. Fingar, 100 N. Y. 539, 3 N. E. 588, 590 (1885) the court remarks, "Where such consequences are produced by the direct action of the creditor all authorities concur in holding that it constitutes a good defense to the indorser, and it is difficult to see why the same consequences produced by the deliberate laches and inaction of the creditor should not lead to the same result."

[23] As a general rule the statute of limitations does not begin to run against the surety until the time of payment by the surety, since the cause of action is not upon the note itself but upon the implied promise of reimbursement arising from the payment of the note. Blanchard v. Blanchard, 201 N. Y. 134, 94 N. E. 630 (1911); Bishoff v. Fehl, 345 Pa. 539, 29 Atl. 2d 58 (1942); Holland v. Tjosevig, 109 Wash. 142, 186 Pac. 317 (1919).

[24] Sykes v. Everett, 167 N. C. 600, 83 S. E. 585 (1914); Jones v. Ashford, 79 N. C. 172 (1878).

[25] Cowan v. Roberts, 134 N. C. 415, 46 S. E. 979 (1904); *see* Chemical Co. v. Griffin, 202 N. C. 812, 813, 164 S. E. 577 (1932).

[26] Coleman v. Fuller, 105 N. C. 328, 11 S. E. 175 (1890).

[27] Dry v. Reynolds, 205 N. C. 571, 172 S. E. 351 (1934). In Raleigh Banking & Trust Co. v. York, 199 N. C. 624, 155 S. E. 263 (1930) and Horton v. Wilson, 175 N. C. 533, 95 S. E. 904 (1918) the surety was held primarily liable but the suretyship was not expressed on the instrument. In Rouse v. Wooten, 140 N. C. 557, 53 S. E. 430 (1906) it is not clear whether or not the suretyship was expressed on the instrument. *But see* Roberson v. Spain, 173 N. C. 23, 25, 91 S. E. 361, 362 (1917) where the court remarks, "On the face of the notes the defendant Bullock was primarily liable, and an extension of time to Spain would not release him, in the absence of proof that he was a surety.

[28] *See* Carter v. Jones, 40 N. C. 196, 199 (1848) where the court recites the proposition that mere delay by the creditor will not discharge the surety.

Railroads—Misuse of Right of Way

Land acquired for a railroad right of way, whether by condemnation, prescription, statutory presumption,[1] or by grant for railroad purposes from the owner of the fee,[2] gives to the railroad only an easement in such land.[3] Unless there is an express grant of a fee title,[4] the right of way can be used for railroad purposes and no others. The same principle is applicable to all public or quasi-public corporations which have the power of eminent domain, i.e., the land can be used only for the purposes for which it was taken.[5] The reasons for such a limitation are twofold: (1) The right to acquire land by condemnation is based on the presumption that the property so acquired will be used for the benefit of the public. (2) A use for other purposes imposes an additional burden upon the land for which the owner has not been compensated. A railroad is not entitled to the exclusive use of the entire right of way, and the owner of the fee is permitted to use so much of it as is not actually required for railroad purposes.[6] But the railroad may later secure an injunction to have any obstruction removed when it is shown that the use interferes with the operation of the railroad.[7]

[1] Several states have statutes which provide that if an action to recover compensation for land taken for a railroad right of way is not brought within a fixed period, the railroad is presumed to have acquired the land for railroad purposes. N. C. GEN. STAT. §1-51 (1943) provides that no action for compensation for land taken for a right of way by a railroad shall be brought unless commenced within five years after the land has been entered, or within two years after the railroad has started operations.

[2] For aid in distinguishing whether a deed to the railroad conveys a fee or an easement, see Note, 132 A. L. R. 142 (1941).

[3] Grand Trunk R.R. v. Richardson, 91 U. S. 454 (1875); Norfolk So. R.R. v. Strickland, 264 Fed. 546 (E. D. N. C. 1920); Hodges v. A. C. L. R.R., 196 N. C. 66, 144 S. E. 528 (1928); McCullock v. N. C. R.R., 146 N. C. 316, 59 S. E. 882 (1907); Seaboard A. L. Ry. v. Olive, 142 N. C. 257, 55 S. E. 263 (1906); Raleigh and Augusta R.R. v. Sturgeon, 120 N. C. 225, 26 S. E. 797 (1896). TIFFANY, REAL PROPERTY §1253 (3d ed. 1939). See Notes, 94 A. L. R. 525 (1935); 149 A. L. R. 380 (1944).

[4] Both the statutes of the state and the charter of the railroad company must be examined to ascertain if the company has power to acquire a fee title to land. N. C. GEN. STAT. §60-37(3) (1943) provides that railroads may acquire land by voluntary grant, but land so acquired may be used only for railroad purposes. N. C. GEN. STAT. §60-37(4) (1943) allows railroads to acquire necessary land by purchase with no qualifications as to use.

[5] This is the general rule unless there is a statute explicitly authorizing the taking of the fee by condemnation. Hudson & M. R.R. v. Wendel, 193 N. Y. 166, 85 N. E. 1023 (1908); Neitzel v. Spokane International R.R., 65 Wash. 100, 117 Pac. 864 (1911). 4 TIFFANY, REAL PROPERTY §1253 (3d ed. 1939); 2 LEWIS, EMINENT DOMAIN §§449-451 (1900).

[6] Carolina & N. W. R.R. v. Piedmont Wagon and Mfg. Co., 229 N. C. 695, 51 S. E. 2d 301 (1949); A. C. L. R.R. v. Bunting, 168 N. C. 579, 84 S. E. 1009 (1915); Raleigh and Augusta R.R. v. Olive, 142 N. C. 257, 55 S. E. 263 (1906); Shields v. Norfolk and Carolina R.R., 129 N. C. 1, 39 S. E. 582 (1901).

[7] Norfolk So. R.R. v. Strickland, 264 Fed. 546 (E. D. N. C. 1920); Carolina & N. W. R.R. v. Piedmont Wagon and Mfg. Co., 229 N. C. 695, 51 S. E. 2d 301 (1949); Southern Ry. v. Lissenbee, 219 N. C. 318, 13 S. E. 2d 561 (1941);

Several cases in which the use has been held proper have indicated that the manner in which the right of way may be used is within the sole discretion of the railroad,[8] but a later decision makes it clear that the use must be for railroad purposes only.[9] It is generally recognized that the railroad may license third persons to use the right of way in any manner in which the railroad itself might use it.[10] If the easement is used primarily for railroad purposes, the fact that incidental benefits flow to private parties does not constitute a misuse of the easement.

It is difficult to define a "railroad purpose" with any degree of certainty, but in practically all instances a proper use will be for one or several of the following purposes: (1) The operation and maintenance of the railroad. This includes passenger and freight depots,[11] shanties for the railroad employees,[12] telegraph lines,[13] and warning signals.[14] (2) Promotion of the enjoyment and convenience of the passengers and employees. The maintenance of hotels,[15] restaurants,[16] and parks[17] are proper if used primarily by passengers and employees. (3) The erection of facilities for receiving, storing, and shipping freight. This includes use for a lumber yard,[18] grain elevator,[19] or warehouse[20] where shipment of material is directly from these points rather than from the regular freight depots. The impracticality of re-

McCullock v. N. C. R.R., 146 N. C. 316, 59 S. E. 882 (1907); Raleigh and Augusta R.R. v. Olive, 142 N. C. 257, 55 S. E. 263 (1906). N. C. GEN. STAT §1-44 (1943) provides that a railroad cannot be barred from its right of way by the adverse possession of another.

[8] Carolina & N. W. Ry. v. Piedmont Wagon & Mfg. Co., 229 N. C. 695, 51 S. E. 2d 301 (1949); Southern Ry. v. Lissenbee, 219 N. C. 318, 13 S. E. 2d 561 (1941); Hodges v. A. C. L. R.R., 196 N. C. 66, 144 S. E. 528 (1928); Coit v. Owenby-Wofford Co., 166 N. C. 136, 81 S. E. 1067 (1914); Raleigh and Augusta R.R. v. Olive, 142 N. C. 257, 55 S. E. 263 (1906).

[9] Sparrow v. Dixie Leaf Tobacco Co., 232 N. C. 589, 61 S. E. 2d 700 (1950).

[10] Grand Trunk R.R. v. Richardson, 91 U. S. 454 (1875); Mitchell v. Illinois C. R.R., 384 Ill. 258, 51 N. E. 2d 271 (1943); Weir v. Standard Oil Co., 136 Miss. 205, 101 So. 290 (1924); Coit v. Owenby-Wofford Co., 166 N. C. 136, 81 S. E. 1067 (1914).

[11] Elyton Land Co. v. South & North Ala. R.R., 95 Ala. 631, 10 So. 270 (1891).

[12] Hodges v. A. C. L. Ry., 196 N. C. 66, 144 S. E. 528 (1928).

[13] Hodges v. Western Union Tel. Co., 133 N. C. 225, 45 S. E. 572 (1903). The telegraph line was held to be a misuse of the easement because it was primarily for commercial purposes, but the court stated that had the line been erected primarily for use in operation of the railroad it would have been proper.

[14] Southern Ry. v. Lissenbee, 219 N. C. 318, 13 S. E. 2d 561 (1941).

[15] Abraham v. Oregon & C. R.R., 370 Ore. 495, 60 Pac. 899 (1900) (But not proper if used primarily by the general public.).

[16] Grudger v. Richmond and Danville R.R., 106 N. C. 481, 11 S. E. 515 (1889). N. C. GEN. STAT. §60-37(12) (1943) provides that a railroad may operate hotels and restaurants along its right of way for the convenience of the traveling public.

[17] Louisville Property Co. v. Commonwealth, 146 Ky. 827, 143 S. W. 412 (1912).

[18] Grand Truck R.R. v. Richardson, 91 U. S. 454 (1875).

[19] Illinois Central R.R. v. Wathen, 17 Ill. App. 582 (1857).

[20] Anderson v. Interstate Mfg. Co., 152 Iowa 455, 132 N. W. 812 (1911); Coit v. Owenby-Wofford Co., 166 N. C. 136, 81 S. E. 1067 (1914).

quiring railroads to receive and ship all freight from its regular terminals is apparent, and such a use seems justified. The use of these facilities, however, should be of a substantial nature. A use of the easement where gasoline was received for sales by a filling station was a misuse,[21] whereas a use for bulk oil storage for distribution to retail dealers was help proper.[22] (4) Lease of the right of way to private parties to secure their freight business. Several courts have stated that such a use is for a railroad purpose, particularly where the lease provides that the lessee give preference in shipment of freight to the railroads.[23] It should be noted, however, that in practically all cases where a lease of the right of way to procure business has been held proper, facilities for receiving and shipping freight have existed upon the leased property and have been a prime factor in determining the propriety of the use.

In a recent case, the defendant tobacco company leased from a railroad for a nominal rent a portion of its right of way upon which the tobacco company erected two warehouses. The lease contained no provision compelling the tobacco company to ship over the railroad, but the company did so in all but a few instances. A spur track had originally been extended to the warehouses to facilitate shipment, but it was removed prior to this action. The tobacco company thereafter shipped all its freight from the regular freight depot. The owner of the fee, subject to the railroad right of way, was allowed to recover the land upon which the warehouses were located in an action of ejectment on the ground that the leased property was not being used for railroad purposes.[24]

Due to the absence of any shipping facilities on the right of way, the decision appears to be in accordance with authority. The court emphasized the lack of an express provision to ship over the railroad, but under the circumstances, such a provision appears unnecessary.[25] That the rent was nominal and that the tobacco company shipped almost

[21] *In re* Chicago & N. W. R.R., 127 F. 2d 1001 (7th Cir. 1942).

[22] Mitchell v. Illinois C. R.R., 384 Ill. 258, 51 N. E. 2d 271 (1943); Weir v. Standard Oil Co., 136 Miss. 205, 101 So. 290 (1924).

[23] Anderson v. Interstate Mfg. Co., 152 Iowa 455, 132 N. W. 812 (1911) (shipping a part of its goods over a competitor railroad not sufficient to work a forfetiture); Griswold v. Ill. C. R.R., 90 Iowa 265, 57 N. W. 843 (1894); City of Detroit v. C. H. Little Co., 146 Mich. 384, 109 N. W. 671 (1906); Hall v. Bowers, 117 Neb. 619, 222 N. W. 40 (1928) (use of right of way to drive cattle to shipping terminal); Coit v. Owenby-Wofford Co., 166 N. C. 136, 81 S. E. 1067 (1914).

[24] Sparrow v. Dixie Leaf Tobacco Co., 232 N. C. 589, 61 S. E. 2d 700 (1950).

[25] The lack of a provision to give the railroad preference in shipment was the principal distinction made between the present case and a previous case in which the use of a right of way for a wholesale grocery warehouse was held proper. However, the decision there rested primarily on the fact that the use of the land was to facilitate shipment over the railroad. Coit v. Owenby-Wofford Co., 166 N. C. 136, 81 S. E. 1067 (1914), 28 HARV. L. REV. 208 (1914).

exclusively over the lessor railroad clearly indicate that the procurement of business was the real consideration for the execution of the lease. In the absence of shipping facilities, it is questionable if a lease of a portion of the right of way solely to promote business would be held proper, even where there is a provision to give the railroad preference in shipping.[26]

Where there is a misuse of the easement, several remedies are available to the owner of the fee. If the railroad abandons operation of the road altogether, it has forfeited all rights to the easement, and the owner may reenter the land.[27] But when the railroad continues in operation, and only a portion of the right of way has been subjected to a misuse, the owner of the fee may obtain an injunction to prevent further misuse,[28] or bring an action for damages against the party so misusing the land,[29] or, as in the principal case, bring ejectment for recovery of that portion of the easement so misused.[30] Where the additional burden placed upon the land is itself for a public purpose, damages are as a general rule the only remedy available.[31] If permanent damages are recovered, the effect is to give an easement to the party paying the damages.[32] It should be noted that an action for damages in such cases

[26] "The fact that a business receives its goods by rail is not a conclusive determination that the use of easement land by the business is a proper one and not a burden." *In re* Chicago & N. W. R.R., 127 F. 2d 1001 (7th Cir. 1942); Bond v. Tex. & P. R.R., 181 La. 763, 160 So. 406 (1935); Proprietors of the Locks and Canals v. Nashua & L. R.R., 104 Mass. 1 (1870).

[27] Norton v. Duluth Transfer R.R., 129 Minn. 126, 151 N. W. 907 (1915). 4 TIFFANY, REAL PROPERTY §1256 (3d ed. 1939). But where buildings and other improvements are placed upon the right of way for the operation of the railroad, they may be removed in the same manner as personal property. Western N. C. R.R. v. Deal, 90 N. C. 110 (1884).

[28] Hodges v. A. C. L. Ry., 196 N. C. 66, 144 S. S. 528 (1928). Note, 7 N. C. L. REV. 197 (1929) (Injunction was refused, but the court states that injunction was the proper remedy had there been a misuse of the right of way.); Hales v. A. C. L. Ry., 172 N. C. 104, 90 S. E. 11 (1916); Ragsdale v. Southern Ry. Co., 60 S. C. 381, 38 S. E. 609 (1901).

[29] McCullock v. N. C. R.R., 146 N. C. 316, 59 S. E. 882 (1907); Beasley v. Aberdeen & Rockfish R.R., 145 N. C. 272, 59 S. E. 60 (1907); Hodges v. Western Union Telegraph Co., 133 N. C. 225, 45 S. E. 572 (1903).

[30] Mitchell v. Illinois Cent. R.R., 384 Ill. 258, 51 N. E. 2d 271 (1943); Neitzel v. Spokane International R.R., 65 Wash. 100, 117 Pac. 864 (1911).

[31] In McCullock v. N. C. R.R., 146 N. C. 316, 59 S. E. 882 (1907) the railroad leased its right of way to a larger line, which used it to a much greater extent. The holder of the fee sought ejectment because of the additional burden, but was awarded damages, the measure being the difference in the extent which the lessor road would have used the land and the extent which the larger railroad did use the land. Hodges v. Western Union Tel. Co., 133 N. C. 225, 45 S. E. 572 (1903). But several cases have held that even where the misuse was not for other public purposes, there could be no ejectment. Proprietors of the Locks and Canals v. Nashua & L. R.R., 104 Mass. 1 (1870) (mesne profits recovered); Lyon v. McDonald, 78 Tex. 71, 14 S. W. 261 (1890) (reasonable rental value recovered).

[32] McCullock v. N. C. R.R., 146 N. C. 316, 59 S. E. 882 (1907); Phillips v. Postal Telegraph Cable Co., 130 N. C. 513, 41 S. E. 1022 (1902).

is subject to the three-year statute of limitations,[33] whereas ejectment is apparently available for at least twenty years from the date of entry.[34] Although the remedies available to the owner of the fee in case of a misuse of a right of way may appear to be in the nature of a windfall, the inherent right of a landowner to have land which is taken for the public use restricted to that use seems to justify his right to relief.

S. DEAN HAMRICK.

Restraint of Trade—Requirements Contracts—Violation of North Carolina Anti-Trust Statute

A North Carolina anti-trust statute[1] makes it unlawful for any person to make a sale, or to contract to make a sale "of any goods . . . in North Carolina, whether directly or indirectly . . . upon the condition that the purchaser thereof shall not deal in the goods . . . of a competitor or rival in the business of the person . . . making such sales."

In *Grubb Oil Co. v. Garner*,[2] the court held that a filling station lessor's covenant not to sell any petroleum products other than those of the lessee from the demised premises or from any other premises within a radius of two thousand feet constituted a "permissible restriction in a lease rather than a forbidden condition in a sales contract."[3] The court said the lessor apparently had no right to sell or deal with anything on the premises while under demise but, however this might be,[4] there was no allegation that the lessor agreed to purchase petroleum products from anyone—"a necessary averment to attract the provisions

[33] N. C. GEN. STAT. §1-52(3) (1943) provides that when there is a continuing trespass upon real property, the action shall be commenced within three years from the original trespass, and not thereafter. Teeter v. Postal Telegraph Cable Co., 172 N. C. 783, 90 S. E. 941 (1916).

[34] Sparrow v. Dixie Leaf Tobacco Co., 232 N. C. 589, 61 S. E. 2d 700 (1950).

[1] N. C. GEN. STAT. §75-5 (1943): "In addition to the matters and things hereinbefore declared to be illegal, the following acts are declared to be unlawful, that is, for any person, firm, corporation, or association directly or indirectly to do or to have any contract, express or knowingly implied, to do any of the acts or things specified in any of the subsections of this section. (2) To make a sale of any goods, wares, merchandise, articles or things of value whatsoever in North Carolina, whether directly or indirectly, or through any agent or employee, upon the condition that the purchaser thereof shall not deal in the goods, wares, merchandise, articles or things of value of a competitor or rival in the business of the person, firm, corporation or association making such sales." For the original enactment of the North Carolina statute to this effect see N. C. Pub. Laws 1907, c. 218, §1(a).

[2] 230 N. C. 499, 53 S. E. 2d 441 (1949).

[3] *Id.* at 501, 53 S. E. 2d at 443.

[4] Because of confusion in pleading it did not clearly appear by what arrangement the lessor was in possession of the premises. Although a lease-sublease arrangement was referred to, it was not properly alleged and therefore not considered by the court. *Id.* at 501, 53 S. E. 2d at 442.

of"[5] the statute set out above. However, by way of dictum the court added, "of course, if it should appear . . . that the demise of the premises to the lessee and its immediate subletting to the lessor, for purposes of operation, were but parts of a single transaction, though separately stated, a different situation might arise. . . ."[6]

Such a situation was presented to the court in the recent case of *Arey v. Lemons*.[7] There the parties executed a single instrument whereby the owners of lands leased to an oil company rent free, and the oil company subleased the property back to the owner for the same term rent free, upon the agreement that the owners operate a filling station thereon for the duration of the lease and that only the petroleum products of the oil company be sold at the station. The court held the instrument void. It said that the only consideration, if any, to support the provisions of the writing was the mutual promises of the parties, and that "any condsideration inherent in these mutual promises is necessarily illegal; for the agreement has as its object the violation of"[8] the anti-trust statute.

In only two decisions[9] prior to the *Arey* case has the court found such a violation. In each instance a contract of sale of merchandise for resale by the buyer which provided that the buyer would not sell or permit to be sold on his premises similar merchandise of competitors was held illegal.

The court refused to apply the statute in *Lewis v. Archbell*[10] where it did not clearly appear that the sale was "upon the condition" that the purchaser was not to buy from a competitor. The court stressed the fact that a seller would have the right to contract to sell his entire output to any single purchaser, and that such purchaser would have the right to purchase from only one seller if he chose, pointing out the fact that the statute condemns the contract of sale only if the sale is made on the prohibited condition. In *Mar-Hof v. Rosenbacker*,[11] the court distinguished between requirements contracts and contracts of exclusive representation, holding in effect that while the statute forbids the buyer to contract exclusively with the seller, this prohibition does not extend to contracts in which the seller binds himself to sell exclusively to the buyer.

In spite of the fact that these earlier cases dealt only with contracts

[5] *Id.* at 500, 53 S. E. 2d at 442.
[6] *Id.* at 501, 53 S. E. 2d at 443.
[7] 232 N. C. 531, 61 S. E. 2d 596 (1950).
[8] *Id.* at 536, 61 S. E. 2d at 600.
[9] Florsheim Shoe Co. v. Leader Dept. Store, 212 N. C. 75, 193 S. E. 9 (1937); Standard Fashion Co. v. Grant, 165 N. C. 463, 81 S. E. 606 (1914).
[10] 199 N. C. 205, 154 S. E. 11 (1930).
[11] 176 N. C. 330, 97 S. E. 169 (1918).

of sale, the court by its dictum in the *Grubb* case, had clearly indicated that it would extend the application to lease-sublease arrangements; and although in the *Arey* case, there was talk of the absence, or illegality, of consideration to support the provisions of the lease, the opinion also states that the statute would apply even where such leases are founded on legal consideration.[12]

As a practical matter this type of lease-sublease arrangement is nothing more than a requirements contract. Thus if the statute outlawing requirements contracts is actually beneficial, it seems that the court is justified in extending its application to other arrangements by which the same result is effected. Such an extension seems to be in line with the view taken by the United States Supreme Court in the recent case of *Standard Oil Co. of California v. United States.*[13] There, in construing Section 3 of the Clayton Act[14] which prohibits requirements contracts, but only in the event that their effect "may be to substantially lessen competition or tend to create a monopoly," the court declared these contracts illegal if used by a defendant-seller doing a quantitatively substantial volume of business.[15]

Although this decision may be justified it is generally agreed that requirements contracts may well be of economic advantage to buyers as well as to sellers.[16] Probably the principal objective inducing a buyer to enter into such a contract is the desire to obtain an assured, reliable source of supply and thereby relieve himself of the expense and risk of storage in the quantity necessary for a commodity having a fluctuating demand. Requirements contracts benefit the seller in that they assure him of an exclusive outlet in so far as the particular retailer is concerned. At the same time they effectively limit the field in which he must meet the competition of his rivals, thereby enabling him to reduce

[12] Arey v. Lemons, 232 N. C. 531, 536, 61 S. E. 2d 596, 600 (1950).

[13] 337 U. S. 293 (1949).

[14] 38 STAT. 731 (1914), 15 U. S. C. §14 (1946). This section declares, *inter alia,* that "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods . . . on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor . . . of the lessor or seller, where the effect of such lease, sale, or contract for sale . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

[15] Prior to this decision nothing less than the inference of a substantial lessening of competition, arising out of the employment of such contracts by companies dominant in their industry would satisfy the requirement of section 3 of the Clayton Act. Fashion Originators Guild of America v. Federal Trade Commission, 312 U. S. 457 (1940); Standard Fashion Co. v. Magrane-Houston Co., 258 U. S. 346 (1922). For a brief discussion of requirements contracts under section 3 of the Clayton Act see Note, 28 N. C. L. REV. 188 (1950).

[16] Stockhausen, *The Commercial and Anti-Trust Aspects of Term Requirements Contracts,* 23 N. Y. U. L. Q. REV. 412 (1948).

selling expenses to a minimum. To the newcomer in the field, such contracts offer the possibility of a predictable market on the basis of which he may estimate what capital expenditures are necessary. Still more important to the newcomer is the opportunity these contracts may provide to establish a foothold against the counter-attacks of entrenched competitors. However, requirements contracts deny retailers the opportunity to deal in the products of competing suppliers. Since these suppliers are excluded from access to the outlets subject to such contracts, the new supplier may find himself foreclosed from any substantial market.

Whatever the commercial merits and demerits of the contract involved, the North Carolina statute in making requirements contracts illegal, *per se*, precludes any rule of reason which might otherwise be applied. The statute leaves no room for evidence as to a defendant's competitive position in the industry nor for testimony as to commercial justification of the contract in the particular case. While such a situation may seem undesirable, it must be remembered that the test of reasonableness places a tremendous burden on the courts to interpret complicated economic data—an undertaking for which courts are not particularly well suited.[17]

If all lease-sublease arrangements are held within the purview of the statute, suppliers might turn to the use of ordinary long-term contracts in which the purchaser agrees to buy a denominated amount of goods rather than his specific requirements.[18] Or, the supplier might simply refuse to deal with any retailer who has not shown a willingness to deal exclusively in the supplier's product.

On the other hand, there is a strong possibility that in so far as oil companies are concerned, prohibition of the lease-sublease arrangement would force them to resort to agency arrangements or to the outright acquisition of filling stations, either of which means increasing control over the retail field and forcing the independent owner to exchange his status for that of employee. Regardless of the possible consequences, this most recent decision on the point by the North Carolina court indicates that such lease-sublease contracts will be held illegal.

JOSEPH F. BOWEN, JR.

Taxation—Alimony Payments—State and Federal Income Tax Consequences

No attorney can properly settle a separation or divorce case involving alimony or payments under a separation agreement, without con-

[17] See Standard Oil Co. of Calif. v. United States, 337 U. S. 293, 310 (1949).
[18] Some courts find this method less objectionable than requirements contracts. *Ibid.*

sidering the income tax consequences. This necessarily entails close scrutiny of both state and federal statutes.

The North Carolina income tax statutes provide that effective January 1, 1949, payments for the separate support and maintenance of a divorced or estranged spouse, who is living apart from the spouse making such payments, will be an allowable deduction. The payment may be made pursuant to a court order or under terms of a written or oral agreement of the parties. The deduction is limited, however, to the amount of the payment or one thousand dollars, whichever is smaller. Where payments are made to more than one spouse, then a similar limited deduction may be taken for each spouse. Support payments to a dependent or to a spouse for a dependent cannot be included in this deduction.[1] It appears that alimony or separation payments received are not taxable as income.[2] Since the state statute is applicable to all types of alimony payments, problems seldom arise in this area.

The Revenue Act of 1942 completely revised the federal tax treatment of alimony.[3] This changed the earlier rule under *Gould v. Gould*[4] that alimony was not taxable income to the wife nor deductible by the husband. An examination of the legislative history of the alimony sections reveals that Congress hoped to achieve a uniform treatment of amounts paid in the nature of or in lieu of alimony regardless of variance in the laws of the several states.[5]

With one exception, Section 23(u) of the Internal Revenue Code provides if a payment is includible in the income of the wife under Section 23(k) it is deductible from adjusted gross income of the husband.[6] Also where the husband is allowed a deduction, *a fortiori*, it is taxable income to the wife. However, in order for the payments to be deductible by the husband and taxable as income to the wife, they must meet the conditions of Section 22(k) and 23(u) of the Code. These

[1] N. C. GEN. STAT. §105-147(14) (Supp. 1949); P-H N. C. INC. TAX SERV. ¶10,750 (1950).

[2] P-H N. C. INC. TAX SERV. ¶10,485 (1950). Administrative boards have recommended to the present legislature that alimony payments be returned for taxation in the same amount as they are allowed for deductions.

[3] See generally, Kramer, *Alimony and the Tax Law*, 26 TAXES 1105 (1948); Starr, *Alimony as an Income Tax Deduction*, 27 TAXES 975 (1949); Wall, *Alimony and the Income Tax*, 3 MIAMI L. REV. 564 (1949); 34 MINN. L. REV. 280 (1950).

[4] 245 U. S. 151 (1917).

[5] H. R. REP. No. 2333, 77th Cong., 2d Sess. 72 (1942); SEN. REP. No. 1631, 77th Cong., 2d Sess. 83 (1943); Stanley v. Stanley, 226 N. C. 129, 37 S. E. 2d 118 (1946) ("Alimony . . . is an allowance made for the support of the wife out of the estate of the husband by order of court in an appropriate proceeding and is either temporary or permanent."); KEEZER, MARRIAGE AND DIVORCE §560 (3rd ed. 1946) (It is that obligation for support which arises in favor of the wife upon the disruption of the marriage relation.).

[6] Taxation of trusts, set up for the wife in lieu of alimony, is not covered in this note.

statutory conditions will be examined in the light of the law of alimony in North Carolina.

(1) *The parties must be divorced or legally separated under a decree of divorce or of separate maintenance.*[7] If the wife applies for divorce from bed and board, divorce *a vinculo*, or alimony without divorce, alimony *pendente lite* is provided for by statute in North Carolina.[8] Alimony payments *pendente lite*, however, are not deductible by the husband nor taxable to the wife because ordered prior to rather than pursuant to a decree by the court.[9]

An alimony without divorce decree, as provided for in North Carolina, seems to be neither a decree of legal separation nor a decree of divorce;[10] therefore, payments made pursuant to a decree of alimony without divorce are not deductible under Section 23(u) nor taxable under Section 22(k).[11]

Since in North Carolina a divorce *a vinculo* cannot provide for permanent alimony, ordinarily no tax problem arises.[12] If, however, a decree of absolute divorce is obtained upon the grounds of two years separation, as provided for in N. C. GEN. STAT. §50-5 or §50-6, such decree does not destroy the right of the wife to receive alimony under

[7] INT. REV. CODE §22(k): "In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written separation instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. . . ." INT. REV. CODE §23(u) provides for a deduction "In the case of a husband described in section 22(k), amounts includible under section 22(k), in the gross income of his wife, payment of which is made within the husband's taxable year. If the amount of any such payment is, under section 22(k) or section 171, stated to be not includible in such husband's gross income, no deduction shall be allowed with respect to such payment under this subsection."

[8] N. C. GEN. STAT. §50-15 (1943) (*a vinculo* and *a mensa* actions); N. C. GEN. STAT. §50-16 (1943) (alimony without divorce actions); Peele v. Peele, 216 N. C. 298, 4 S. E. 2d 616 (1939); Medlin v. Medlin, 175 N. C. 529, 95 S. E. 857 (1918) (*a vinculo* action by husband, court allowed alimony *pendente lite* to wife).

[9] George D. Wick, 7 T. C. 723 (1946), *aff'd*, 161 F. 2d 732 (3rd Cir. 1947). The Pennsylvania statute providing for alimony *pendente lite*, PA. STAT. ANN. tit. 23 §46 (1930) as amended (1933), is very similar to N. C. GEN. STAT. §50-15 (1943). See U. S. Treas. Reg. 111, §29.22(k)-1(a) (1948).

[10] N. C. GEN. STAT. §50-16 (1943) provides for a decree if the husband deserts and fails to provide, or is a drunkard or spendthrift (which would not seem to call necessarily for separate living), or gives cause for divorce, absolute or limited). *See*, Shore v. Shore, 220 N. C. 802, 804, 18 S. E. 2d 353, 354 (1942) (the statute is one solely for support).

[11] Frank J. Kalchthaler, 7 T. C. 625 (1946) (status under Pennsylvania law was that he was living apart from his wife, but not legally separated).

[12] N. C. GEN. STAT. §50-11 (1943), Stanley v. Stanley, 226 N. C. 129, 37 S. E. 118 (1946).

any judgment or decree of the court rendered before the commencement of the proceeding for absolute divorce.[13] This exception seems to include awards under an *a mensa* divorce,[14] alimony without divorce awards,[15] and separation agreements,[16] entered into prior to the divorce *a vinculo*. As noted above, alimony without divorce awards are not considered taxable under Section 22(k) because the parties have neither a legal separation nor a divorce.[17] On the other hand, if a prior alimony without divorce decree is incorporated into, or is referred to in the *a vinculo* divorce decree, it would seem to meet the requirement that the provision for payment be made in the divorce decree or by a written instrument incident to the divorce or separation. Further, separation agreements entered into prior to a decree of absolute divorce are not invalidated by a divorce *a vinculo*.[18] Thus, if the separation agreement is prepared with the understanding that the parties will be legally separated under a decree of divorce or of separate maintenance, then the payments received after the divorce *a vinculo* are taxable to the wife.[19]

On divorce from bed and board in North Carolina, the court may decree alimony to the wife.[20] Alimony paid pursuant to a decree of divorce from bed and board is deductible by the husband,[21] and such decree may be modified at a later date.[22] But if an agreement is entered into after the divorce, increasing the payments, the increase will not be deductible unless the new agreement is incorporated into the decree.[23] The agreement would not be "incident to the divorce" unless so incorporated. The same grounds which entitle the wife to a divorce *a mensa* entitle the wife to separate maintenance.[24] Therefore, it may be to her financial advantage to refuse to obtain a divorce *a mensa*, payments

[13] N. C. GEN. STAT. §50-11 (1943), Simmons v. Simmons, 223 N. C. 841, 28 S. E. 2d 489 (1944) (alimony without divorce); Dyer v. Dyer, 212 N. C. 620, 194 S. E. 278 (1937) (action for subsistence).

[14] *See*, Stanley v. Stanley, 226 N. C. 129, 134, 37 S. E. 2d 118, 121 (1946) (a prior award of alimony is protected from annulment by a decree in absolute divorce).

[15] Simmons v. Simmons, 223 N. C. 841, 28 S. E. 2d 439 (1944).

[16] Jenkins v. Jenkins, 225 N. C. 681, 36 S. E. 2d 233 (1945); Lentz v. Lentz, 193 N. C. 742, 138 S. E. 12 (1927) (consent judgment not affected by a subsequent absolute divorce).

[17] See note 11, *supra*.

[18] Jenkins v. Jenkins, 225 N. C. 681, 36 S. E. 2d 233 (1945); Lentz v. Lentz, 193 N. C. 742, 138 S. E. 12 (1927).

[19] Tuckee G. Hesse, 7 T. C. 700 (1946) (Pennsylvania divorce *a vinculo* statute involved, and similar to N. C. GEN. STAT. §50-11 (1943)).

[20] N. C. GEN. STAT. §50-14 (1943), Silver v. Silver, 220 N. C. 191, 16 S. E. 2d 834 (1941).

[21] *Accord*, George D. Wick, 7 T. C. 723, 728 (1946), *aff'd*, 161 F. 2d 732 (3d Cir. 1947).

[22] Crews v. Crews, 175 N. C. 168, 95 S. E. 149 (1918).

[23] Natalia Danesi Murray, P-H 1948 TC MEM. DEC. ¶48,097 (1948).

[24] N. C. GEN. STAT. §50-16 (1943).

under it being taxable, and receive tax free alimony under a separate maintenance award.

(2) *The provision for payment of alimony must be made specifically by the divorce decree or by a written instrument incident to the divorce or separation.*[25] When the provision for payment is expressly set out in the decree of divorce, there is no problem. Most of the cases under this section involve the problem of whether the separation agreement is incident to the divorce or separation. If a separation agreement meets certain requirements, it will be enforced in North Carolina.[26] Unless the separation agreement is entered into with a future divorce or legal separation in mind, however, payments received after the divorce are not taxable to the wife under Section 22(k) as not incident to the divorce.[27] A formal agreement of separation providing for payments, drafted after a decree of divorce *a vinculo* or *a mensa*, reducing to writing an oral agreement entered into prior to the decree, is not an agreement incident to the divorce.[28] If the agreement refers to an impending divorce, it might be construed as facilitating the divorce and will not be enforced.[29] Recognizing this, the Tax Court has held that to be incident to the divorce or legal separation, the agreement itself does not have to refer to the divorce or separation because the whole record will be considered.[30] Even payments made by taxpayer-

[25] INT. REV. CODE §22(k); Charles Campbell, 15 T. C. (No. 52) (1950) (letter written by husband stating he would pay a certain amount monthly to his wife if she obtained a divorce met the requirement of a written instrument).

[26] Archbell v. Archbell, 158 N. C. 408, 74 S. E. 327 (1912) (requisites of separation agreement: (1) there must be a separation already existing or immediately to follow the execution of the deed; (2) the separation deed must be made for an adequate reason, of such kind that it is necessary for the health or happiness of one or the other; (3) it must be reasonable and fair to the wife, considering the condition of the parties); N. C. GEN. STAT. §52-12 (Supp. 1947) (statutory requirements of valid agreement).

[27] Charles G. Brown, P-H 1949 TC MEM. DEC. ¶49,195 (1949) (agreement in form of support of wife and children under Pennsylvania law rather than for alimony); Benjamin B. Cox, 10 T. C. 955 (1948), *aff'd*, 176 F. 2d 226 (3rd Cir. 1949) (support agreement seven months after divorce not incident to divorce); Frederick S. Dauwalter, 9 T. C. 580 (1947) (after divorce decree entered, agreed with wife to increase alimony; held not deductible because husband's compliance with the request was gratuitous and without compulsion of any legal obligation arising out of a marital relationship imposed on him under a written instrument incident to such divorce).

[28] Frederick S. Dauwalter, 9 T. C. 580 (1947); U. S. Treas. Reg. 111 §29.22(k)-1 (1948) (Example (3): H and W enter into antenuptial agreement in which H agrees to pay wife $200 a month for life for release of all dower rights. A divorce is later obtained, but silent as to such agreement and H's obligation to support W. Section 22(k) does not apply. But if the decree is modified to refer to the agreement, or if at time of the divorce, reference had been made to the agreement in the court's decree or in a written instrument incident to the divorce, Section 22(k) would require the inclusion in the income of the wife).

[29] Archbell v. Archbell, 158 N. C. 408, 74 S. E. 327 (1912).

[30] Estate of Daniel G. Reid, 15 T. C. (No. 78) (1950); Robert Wood Johnson, 10 T. C. 647 (1948).

husband to his estranged wife under orders of a New York court, in an attempt to enforce a voluntary separation agreement, were disallowed as a deduction because there was no "decree" as required by Section 22(k).[31]

(3) *The alimony payments must be periodic.*[32] Periodic payments normally state the amount to be paid each period, but neither the total period nor the total amount; whereas lump sum payments generally set forth the total amount that is to be paid. In general, installment payments discharging a part of an obligation, the principal sum of which is specified in the decree of divorce or legal separation or an instrument incident thereto, are not considered periodic payments and are therefore not includible in the wife's gross income under Section 22(k). Installment payments under a lump sum award or agreement may be deductible if the lump sum, by the terms of the decree or written instrument thereto, may be or is to be paid within a period ending more than ten years from the date of the decree or instrument. In such cases, the installment payment is considered periodic payment but only to the extent that such installment payments received during the wife's taxable year do not exceed ten percent of the principal sum.[33] The ten year period commences with the date the legal obligation to make the payments in question was imposed on the husband for the first time.[34] If the payments are contingent on earnings, the payments are considered periodic even though to be paid for a specific number of months.[35]

(4) *The payments must be made solely in settlement of the legal obligation imposed on the husband because of the marital relationship.* In *Frank J. Dubane v. Comm'r.*,[36] the parties orally agreed for alimony payments of twenty dollars a week, but the subsequent written agreement was so phrased that it indicated that the twenty dollar payments were for property that the wife had previously transferred to the husband. The written agreement controlled, and the payments under it were held not to be made solely in discharge of alimony and consequently non-deductible.

[31] Alfred Terrell, P-H 1948 TC MEM. DEC. ¶48,169 (1948), *aff'd*, 179 F. 2d 838 (7th Cir. 1950).

[32] Frank R. Casey, 12 T. C. 224 (1949) (payments in sum of $100 per month for fifty months not periodic); J. B. Steinel, 10 T. C. 409 (1948) (sum of $100 per month until the sum of $9,500 is paid not periodic); INT. REV. CODE §22(k) (though required to be periodic, the payments need not be regular).

[33] U. S. Treas. Reg. 111 §29.22(k)-1(c) (1948).

[34] Tillie Blum, 10 T. C. 1131 (1948).

[35] Roland Keith Young, 10 T. C. 724 (1948) (fixed period of 50 months, but amount contingent on earnings held periodic.)

[36] 10 T. C. 992, 995 (1948) ("The result might be different had Congress chosen to recognize oral agreements or had the petitioner put his oral agreement in writing in a forthright manner.").

Many awards of alimony contain provisions for support of minor children. If a portion of a periodic payment is specifically designated for support of minor children, such portion is neither deductible by the husband nor taxable to the wife.[37] If the decree or separation agreement fails to earmark part of the periodic payment as support of the minor children, the total amount will be taxed to the wife irrespective of how the money was expended.[38] The whole decree or agreement will be examined to see if it furnishes by implication a basis for determining whether a portion is for the childrens' support.[39] If any periodic payment is less than the amount provided in a decree or written instrument which specified an amount for minor children's support, Section 22(k) provides that the amount paid will be considered first as a payment for support of the minor children and only the remainder is to be included as income of the wife.[40]

When a legal obligation to support a divorced or estranged spouse, living separate from his or her spouse, is satisfied by the transfer of property or payment of a lump sum, under the North Carolina law, the amount of such lump sum payment or the market value of the property at the time of conveyance, or one thousand dollars, whichever is smaller, may be taken as a deduction.[41] Under federal provisions, the rental value of real estate transferred in lieu of alimony is not deductible by the husband because it was never included in the husband's gross income.[42]

Section 22(k) provides that periodic payments received by the wife are includible in her income in the year received, regardless of what system of accounting she normally uses.[43] For the corresponding deduction, the husband is treated as if he makes his income tax return on the cash receipt and disbursement basis.[44] Under North Carolina statutes,[45] any individual who reports his income on an accrual basis may claim the

[37] U. S. Treas. Reg. 111 §29.22(k)-1(d) (1948).
[38] Dora H. Moitoret, 7 T. C. 640 (1946).
[39] Warren Leslie, Jr., 10 T. C. 807 (1948).
[40] U. S. Treas. Reg. 111 §29.22(k)-1(d) (1948). For example, if the husband is required by terms of the decree to pay $200 a month to his divorced wife, $100 of which is designated by the decree to be for the support of their minor children, and the husband pays only $150 to his wife, $100 is nevertheless considered to be a payment by the husband for the support of the children.
[41] N. C. GEN. STAT. §105-147(14) (Supp. 1949); N. C. GEN. STAT. §50-17 (1943) (provision for writ of possession in all cases where the court grants alimony by the assignment of real estate).
[42] Pappenheimer v. Allen, 71 F. Supp. 788 (M. D. Ga. 1947); *aff'd*, 164 F. 2d 428 (5th Cir. 1947) (By agreement wife lived in home of husband, under prescribed conditions, as part of the alimony settlement. The court indicated that rental value of the house was not taxable to the wife, because such a payment would not be considered periodic as required by Section 22(k).).
[43] U. S. Treas. Reg. 111 §29.22(k)-1(a) (1948).
[44] U. S. Treas. Reg. 111 §29.23(u)-1 (1948).
[45] N. C. GEN. STAT. §105-147(14) (Supp. 1949).

deduction for alimony if the payments claimed as a deduction are actually made within seventy-five days of the close of the taxpayer's fiscal or calendar year, whichever is used. A deduction claimed by a cash basis taxpayer for the transfer of property or lump sum payment must be taken in the income year in which the transfer of property or lump sum payment is effected. No deduction may later be claimed if not taken in that year. But if the taxpayer uses the accrual basis for reporting income the deduction for lump sum payments or transfer of property may be claimed on the accrual basis and no subsequent deduction shall be allowed.

HUNTER DALTON HEGGIE.

Taxation—Income—Gain from Sale of Land with Growing Crops

Cases involving taxation of gain from the sale of land upon which there are growing crops are recent and in conflict. It seems odd that the tax consequences of such a sale have not been previously settled with finality. The basic facts are simple. Taxpayer is a farmer engaged in growing crops for sale at maturity. He sells land which he has owned for more than six months upon which there is an immature crop. Taxpayer reports his gain as a capital one within §117(j) of the Internal Revenue Code.[1]

Section 117(j) is a relief provision which allows gain from the sale of certain business property, not otherwise considered as a capital asset, to be taxed as a capital gain. To come within this section, the taxpayer must establish that the property sold was (1) used in his trade or business; (2) real estate or property subject to an allowance for depreciation; (3) held for more than six months; (4) not property includible in inventory; and (5) not held primarily for sale to customers in the ordinary course of trade or business.

The Bureau ruled in 1946[2] that upon the sale of a citrus grove having immature fruit on the trees, a portion of the sale price must be allocated to the growing fruit and the gain therefrom taxed as ordinary income. The balance, attributable to the land and trees, was ruled to be a capital gain within §117(j). A majority of the Tax Court has followed this ruling, holding that upon the sale of either an orange grove[3] or land containing an immature wheat crop,[4] an allocation must be made on the basis of the fair market value of the growing crop at

[1] See Hill, *Ordinary Income or Capital Gain on the Sale of an Orange Grove*, 4 MIAMI L. Q. 145 (1950), written prior to the cases commented upon here.
[2] I. T. 3815, 1946-2 CUM. BULL. 30.
[3] Earnest A. Watson, 15 T. C. 104 (1950).
[4] Thomas J. McCoy, 15 T. C. 106 (1950).

the time of the sale. A federal district court has held to the contrary that the entire gain from sale of a citrus grove is one within the purview of §117(j).[5]

The district court followed §117(j) closely, finding compliance with each of the statutory requisites.[6] The Tax Court, however, held (2) and (5) listed above were not established. Thus the conflict between the two courts may be reduced to two issues: (1) Are the growing crops to be considered part of the real estate? (2) Are such crops held primarily for sale in the ordinary course of taxpayer's business?

In holding for taxpayer, the district court ruled the unripe fruit on the trees to be part of taxpayer's realty, since under applicable state law it was considered as such. The Tax Court, however, held the status of growing crops under state law immaterial, as the character of income must be determined solely by reference to the taxing act.

Growing crops are treated variously in the several states as realty and personalty, depending on the nature of the transaction and character of the crops.[7] The courts tend to treat unsevered annual crops as personalty, and perennials, such as growing fruit, as part of the realty. It is well established that the federal tax laws are intended to be uniform throughout the nation.[8] The federal statute should be the criterion; technical concepts of state property law should not control in this situation. Such a sale should have the same consequences taxwise in all states.[9]

The question remains as to the status of the growing crops. The Internal Revenue Code does not define the term "real estate." Thus the words of the statute should be interpreted in their ordinary everyday sense,[10] keeping in mind the purposes of the statute. In common parlance, real estate does not mean growing crops. Practically speaking such crops are a factor apart from the land in determining the sale price, and should be considered separately for tax purposes. Although there are differences under state law, whether the growing crop is of the annual or perennial type should not be of significance taxwise. In either case, had the crop been harvested, the gain would have been ordinary income.

[5] Irrgang v. Fahs, 94 F. Supp. 206 (S. D. Fla. 1950). This case has been appealed by the Government to the U. S. Court of Appeals, 5th Circuit.

[6] In Irrgang v. Fahs, *supra* note 5, the court referred incidentally to the fact that the immature fruit had its beginning more than six months prior to the date of sale. This was held immaterial, as the fruit is part of the tree; the holding period of the trees was said to be controlling.

[7] See Note, 23 L. R. A. (N. S.) 1219 (1910); 25 C. J. S. §1; 8 R. C. L. 356.

[8] *See* Lyeth v. Hoey, 305 U. S. 188, 194 (1938); Burnet v. Harmel, 287 U. S. 103, 110 (1932).

[9] If it is not so held, a farmer having portions of his farm in two states obtains a tax saving by selling land with crops thereon in one state rather than the other, because of differences in local law.

[10] *See* Crane v. Commissioner, 331 U. S. 1, 6 (1946).

The district court reasoned the unripe fruit was not being held by taxpayer for sale in the ordinary course of his business, as his business was the selling of *mature fruit*. To the contrary, the Tax Court held that, although the fruit was sold prior to maturity along with the land, the form of the transaction does not change the fact that the fruit was being held by taxpayer for sale in the ordinary course of his business.

It is difficult to see how it can be reasoned that the crops were not held primarily for sale in the ordinary course of business. It is true taxpayer was in the business of selling mature fruit. But are crops any less "held" by him primarily for sale because sold prior to maturity? Common sense and reason would suggest they are not. The mere form and time of the transaction should not control.[11] The crops are the only thing taxpayer is holding for sale in the ordinary course of his business. Effecting their sale prior to maturity along with the land should not change the nature of his holding.

One might argue that the words of the statute do not authorize allocation of the sale price for purposes of taxation. This is literally true, as the statute speaks in terms of business property as a unit. However, when the statute was drafted, it is doubtful whether this situation was contemplated. Keeping in mind the economic realities of the situation, it seems a reasonable construction of the statute to require allocation. Generally a farmer deducts the costs of raising his crops as ordinary business expenses. He should not be allowed to convert his profit into a capital gain by effecting their sale immediately prior to maturity along with the land.

MASON P. THOMAS, JR.

Torts—Misrepresentation—Requisite of Scienter

Defendant's agent, admittedly acting within the scope of his employment, falsely represented to plaintiff that the house which plaintiff was buying from defendant was constructed of brick veneer. Plaintiff relied on this representation and was thereby induced to make the purchase. The house in fact was built of "speed brick," an inferior type of construction. At the close of plaintiff's evidence the court granted a nonsuit on the ground that there was no proof of scienter. Held, new trial granted. ". . . a false representation positively made by one who ought in the discharge of his duty to have known the truth and who is consciously and recklessly ignorant whether it be true or false, may be regarded as fraudulent when made to induce a sale and reasonably relied on by the vendee."[1]

[11] Helvering v. Hammel, 311 U. S. 504 (1948).

[1] Atkinson v. Charlotte Builders, Inc., 232 N. C. 67, 68, 59 S. E. 2d 1 (1950).

The long recognized elements of fraud and deceit adopted by the North Carolina court from a textwriter[2] are: (1) a representation, (2) untrue in fact, (3) the person making it or the person responsible for it, knows it to be untrue, or is culpably ignorant (that is, recklessly and consciously ignorant) whether it be true or not, (4) made with the intent that it be acted upon, or in a manner fitted to induce action upon it, (5) plaintiff acts in reliance to his damage.[3]

As early as 1799, the court recognized that scienter was a necessary element of fraud and deceit;[4] the defendant must know that he is telling a falsehood or that he is practicing a concealment. This was modified somewhat in the case of *Hamrick v. Hogg*[5] where the rule was laid down that a representation must be false in fact; defendant must be guilty of a moral falsehood; and the party making the representation must know or believe it to be false, or what is the same thing, have no reason to believe it to be true. This modification gelled in *Whitehurst v. Life Ins. Co. of Va.*[6] into what is modern-day law. It was there said, ". . . if a party to a bargain avers the existence of a material fact recklessly, or affirms its existence positively, when he is consciously ignorant whether it be true or false, he may be held responsible for a falsehood; and this doctrine is especially applicable when the parties to a bargain are not upon equal terms with reference to the representation. . . ."[7] It

[2] POLLOCK, TORTS 283 (12th ed. 1923).

[3] Small v. Dorsett, 223 N. C. 754, 28 S. E. 2d 514 (1943); Ward v. Heath, 222 N. C. 470, 24 S. E. 2d 5 (1943); Harding v. Southern Loan & Ins. Co., 218 N. C. 129, 10 S. E. 2d 599 (1940); Whitehurst v. Life Ins. Co. of Va., 149 N. C. 273, 62 S. E. 1067 (1908). It is generally considered that the representation must be of a material fact. The North Carolina court also has held that the representation can be a concealment as well as a statement of fact. Isler v. Brown, 196 N. C. 685, 146 S. E. 803 (1929); Cash Register Co. v. Townsend, 137 N. C. 652, 50 S. E. 306 (1905); Saunderson v. Ballance, 55 N. C. 322 (1856); Brown v. Gray, 51 N. C. 103 (1858); Gerkins v. Williams, 48 N. C. 11 (1855); Case v. Edney, 26 N. C. 93 (1843).

[4] Irwin v. Sherril, 1 N. C. (Taylor) 1 (1799). If bare naked lie the truth or falsity of which is unknown, no action maintainable; if known falsehood and loss suffered, action will lie.

[5] 12 N. C. 350 (1827).

[6] Whitehurst v. Life Ins. Co. of Va., 149 N. C. 273, 62 S. E. 1067 (1908) (Agent misrepresented to blind plaintiff that insurance policy provision allowed plaintiff to collect the total premiums paid plus 4% interest at the end of ten years.).

[7] For cases involving this doctrine prior to the *Whitehurst* case: *e.g.*, Modlin v. Roanoke R.R. & Nav. Co., 145 N. C. 218, 58 S. E. 1075 (1907); Cash Register Co. v. Townsend, 137 N. C. 652, 50 S. E. 306 (1905); Ramsey v. Wallace, 100 N. C. 75, 6 S. E. 638 (1888); Cobb v. Fogalman, 23 N. C. 440 (1841). Subsequent to the *Whitehurst* case: *e.g.*, Vail v. Vail, 233 N. C. 109, 63 S. E. 2d 202 (1951); Brooks Equipment & Mfg. Co. v. Taylor, 230 N. C. 680, 55 S. E. 2d 311 (1949); Small v. Dorsett, 223 N. C. 754, 28 S. E. 2d 514 (1943); Harding v. Southern Loan & Ins. Co., 218 N. C. 129, 10 S. E. 2d 599 (1940); Silver v. Skidmore, 213 N. C. 231, 195 S. E. 775 (1938); Stone v. Doctors' Lake Milling Co., 192 N. C. 585, 135 S. E. 449 (1926); Bell v. Harrison, 179 N. C. 190, 102 S. E. 200 (1920); Pate v. Blades, 163 N. C. 267, 79 S. E. 608 (1913); Tarault v.

can be gathered from this that scienter and its equivalent, reckless disregard of the truth, are not present where there is innocence. The party making the misrepresentation must be conscious that it is false, or, what is in the eyes of the court the same thing, he must be conscious that he knows neither the truth nor falsity of the misrepresentation.

There are several exceptions to this general requirement of scienter in an action for fraud and deceit. A director of a corporation has the duty to know the financial condition of his corporation, and where he misrepresents such condition he will be held liable for fraud and deceit without a showing of scienter.[8] The president of a corporation is deemed to have knowledge of an inventory made five days prior to the misrepresentation.[9] Scienter was presumed where the seller who made the misrepresentation was the inventor;[10] the same presumption is made where the seller was the manufacturer;[11] and in a strong dictum the court said that a vendor or lessor may be held guilty of fraud and deceit by reason of material, untrue representations in respect to his own business or property, the truth of which representation the vendor or lessor is bound and must be presumed to know.[12] Where a relationship of trust and confidence exists between parties, the failure to disclose all material facts, is a breach of the duty owed and constitutes fraud.[13]

In most jurisdictions, if fraud is alleged as the basis for rescission and at trial only innocent misrepresentations are proved, the court will nevertheless grant the requested relief.[14] North Carolina in *Ebbs v. St. Louis Union Trust Co.* adopted a different view: in order to obtain rescission on the ground of fraud, all the essential elements of fraud must be proved.[15] In other words, whether the relief of damages or the

Seip, 158 N. C. 363, 74 S. E. 3 (1912); Hodges v. Smith, 158 N. C. 256, 73 S. E. 807 (1912); Case Threshing Machine Co. v. Feezer, 152 N. C. 516, 67 S. E. 1004 (1910).

[8] Harper v. Oak Ridge Supply Co., 184 N. C. 204, 144 S. E. 173 (1922); Houston v. Thornton, 122 N. C. 365, 295 S. E. 827 (1898); Solomon v. Bates, 118 N. C. 311, 24 S. E. 478 (1896); Tate v. Bates, 118 N. C. 287, 24 S. E. 482 (1896).

[9] Palomino Mills, Inc. v. Davidson Mills Corp., 230 N. C. 286, 52 S. E. 2d 915 (1949).

[10] Unitype Company v. Ashcroft Bros., 155 N. C. 63, 71 S. E. 61 (1911) (type setting machine).

[11] Peebles v. Patapsco Guano Co., 77 N. C. 233 (1877) (commercial fertilizer).

[12] *See* Corley Co. v. Griggs, 192 N. C. 171, 174, 134 S. E. 406, 407 (1926); citing Lehigh Zinc & Iron Co. v. Bamford, 150 U. S. 665, 673 (1893).

[13] Vail v. Vail, 233 N. C. 109, 63 S. E. 2d 202 (1951) (Evidence showed a 72 year-old mother to have been induced by son to sign a deed conveying to him a tract of land other than one agreed upon. On appeal from non-suit the court held that the fiduciary relationship, added to this evidence, constituted a prima facie case of fraud.).

[14] 5 WILLISTON, CONTRACTS §1500 (Rev. ed. 1937).

[15] 199 N. C. 242, 153 S. E. 858 (1930). There was also some indication in this case that rescission might be granted on a unilateral mistake relying on a dictum in Long v. Fidelity and Guaranty Co., 178 N. C. 503, 101 S. E. 11 (1919).

relief of rescission is sought on the ground of fraud, the elements of fraud which must be proved are identical. This includes of course the necessity of proving scienter in an action for either relief.

Although the court in the principal case chose to ignore *Ebbs v. St. Louis Union Trust Co.*, the two cases are almost identical on their facts.[16] The *Ebbs* case was an action for rescission and damages on the basis of fraud, and the principal case was an action for damages based on fraud. It is rather evident from the two cases, that the misrepresentations were either made with knowledge of their falsity, or in conscious ignorance as to their truth or falsity. The one making the false representation in each case was a real estate agent, who was or should have been experienced in the fundamentals of house construction. Since the facts of both cases show only a lack of knowledge of truth or falsity, with relief being granted in one and denied in the other, the necessary conclusion follows that the two cases are in substance inconsistent.

It would seem that the court in the *Ebbs* case completely overlooked the long line of decisions in North Carolina which support the holding of the principal case that actual knowledge of the falsity of a misrepresentation is not necessary to a finding of fraud. On the basis of the instant case as supported by the chain of decisions, the *Ebbs* case (which was never sound law) is no longer the law in North Carolina, in spite of the failure of the court in the principal case expressly to overrule the decision there.

EDWIN B. ROBBINS.

Wills—Caveat by Proponent

One B died, apparently intestate. His heirs at law and next of kin recovered all of his personal papers and turned them over to the Clerk

But in Cheek v. Southern R.R., 214 N. C. 152, 156, 198 S. E. 626, 628 (1938) the court said, "The court has not adopted the doctrine that an unilateral mistake—or mistake alone of the party seeking to avoid the contract—unaccompanied by fraud, imposition, undue influence, or like circumstance of oppression, is sufficient to avoid a contract." It was indicated in this latter case, however, that it would be difficult to imagine a case, in which there were innocent misrepresentations on the one side and a mistake on the other induced by such innocent misrepresentations, that could not be resolved into mutual mistake. *E.g.*, Vail v. Vail, 233 N. C. 109, 63 S. E. 2d 202 (1951); Breece v. Standard Oil Co. of N. J., 209 N. C. 527, 184 S. E. 86 (1936); Hinsdale v. W. I. Phillips Co., 199 N. C. 563, 155 S. E. 238 (1930); Bell v. Harrison, 179 N. C. 190, 102 S. E. 200 (1920); Oltman v. Williams, 167 N. C. 312, 83 S. E. 348 (1914).

[16] 199 N. C. 242, 153 S. E. 858 (1930); Note, 9 N. C. L. REV. 86 (1930) (real estate broker represented house to be perfectly constructed and made of stone, when in fact, it was stone veneer; *held*, representations made without knowledge of their falsity, and consequently without intent to deceive). This case was cited in the Brief for Appellees, pp. 4, 11, Atkinson v. Charlotte Builders, Inc., 232 N. C. 67, 59 S. E. 2d 1 (1950).

of the Superior Court of Mecklenburg County. Included among the papers was an instrument which in form appeared to be a holographic will, dividing his property among the relatives of his deceased wife as well as some of his own kin. The Clerk appointed a collector. No probate in common form was had.

The heirs at law and next of kin brought an action to remove cloud on title under N. C. GEN. STAT. §41-10 (1943) which prayed (1) that the instrument be declared not to be the will of the deceased and (2) ownership of the property of their kinsman free of any claim of the defendants, who were the beneficiaries under the unprobated instrument. The defendants contended the paper writing constituted a valid holographic will and should be probated as the last will of B. The issues submitted by the trial court were as follows: (1) Was the said paper writing found among the valuable papers and effects of the said B after his death? (2) Is the said paper writing the last will and testament of B? The trial judge instructed the jury to answer the first issue, No. On appeal the defendant's demurrer ore tenus for want of jurisdiction in the Superior Court, was sustained by the Supreme Court which held that an attack on a will must originate by probate, which is exclusively within the jurisdiction of the Clerk of the Superior Court, and that a caveat is the proper proceeding to try the issue of *devisavit vel non*.[1]

The plaintiffs, believing they had a valid defense to the instrument, faced a dilemma as to the procedure they should follow in order to initiate an action to contest the validity of the will. The statutes provided a means whereby they could get the instrument into the hands of the Clerk of the Superior Court but no means to compel anyone to offer it for probate.[2] Since there is no limitation on the period in which a will may be offered for probate the heirs at law held a title of questionable value.[3]

An unprobated will does not pass any title,[4] and mere assertions of an adverse claim standing alone are not sufficient to constitute a cloud.[5]

[1] Brissie v. Craig, 232 N. C. 701, 62 S. E. 2d 330 (1950).

[2] N. C. GEN. STAT. §31-5 (1943).

[3] Cooley v. Lee, 170 N. C. 18, 86 S. E. 720 (1915); Steadman v. Steadman, 143 N. C. 345, 55 S. E. 784 (1906); N. C. GEN. STAT. §31-12 (1943) provides in part ". . . Such will shall not be valid or effective to pass real estate or personal property as against innocent purchasers for value and without notice, unless it is probated or offered for probate within two years after the death of the testator or devisor. . . ." While this might protect subsequent purchasers from the heirs at law it offers no protection to the heirs at law.

[4] N. C. GEN. STAT. §31-39 (1943): "No will shall be effectual to pass real or personal estate unless it shall have been duly proved and allowed in the probate court of the proper county. . . ." Paul v. Davenport, 217 N. C. 154, 7 S. E. 2d 352 (1940); Osborne v. Leak, 89 N. C. 433 (1883).

[5] Welles v. Rhodes, 59 Conn. 498, 22 Atl. 286 (1890); Israel v. Wolf, 100 Ga. 339, 28 S. E. 109 (1897); Trustees of Schools v. Wilson, 334 Ill. 347, 166 N. E. 55 (1929); Lovell v. Marshall, 162 Minn. 18, 202 N. W. 64 (1925); Sulphur Mines Co. v. Boswell, 94 Va. 480, 27 S. E. 24 (1897).

Cloud on title as it developed in equity is not broad enough to cover the above situation.[6] The action to remove cloud on title in North Carolina is statutory[7] and has been given a liberal construction, thereby broadening this equitable remedy.[8] Accordingly a probated will can be construed in this type of action, the question being what interest or title passes and not the validity of the will.[9] The aim of the principal case, as disclosed by the prayer for judgment and the issues submitted, was to contest the validity of the will and since this can only be done by a will contest the plaintiff's action under this statute was improper.

Similar difficulties would have confronted the plaintiffs had they tried to proceed under the declaratory judgment act.[10] Only the construction of a probated will could be tested in this type of proceeding.[11] There could not be an attack on the validity of the will nor could the construction of an unprobated will be obtained.[12] Also, the equitable relief of injunction is not available to enjoin the probate of a will where exclusive probate jurisdiction is conferred upon one court.[13]

By dictum the court pointed out the only relief available to the plain-

[6] "Cloud on title is something which constitutes an apparent incumbrance upon it or an apparent defect in it; something that shows prima facie some right of a third party, either to the whole or some interest in it." Detroit v. Martin, 34 Mich. 170 (1876); McArthur v. Griffith, 147 N. C. 545, 61 S. E. 519 (1908).

[7] N. C. GEN. STAT. §41-10 (1943).

[8] "And it should and does extend to such adverse and wrongful claims, whether in writing or parol, whenever a claim by parol, if established, could create an interest or estate in the property. . . . And it should be allowed, too, when existent records or written instruments reasonably present such a claim. . . ." Satterwhite v. Gallagher, 173 N. C. 525, 528, 92 S. E. 369, 370 (1917); see also, Platkin v. Merchants Bank, 188 N. C. 711, 125 S. E. 541 (1924); Southern State Bank v. Summer, 187 N. C. 762, 122 S. E. 848 (1924); Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 175 N. C. 668, 96 S. E. 99 (1918).

[9] Lewis v. McConchie, 151 Kan. 778, 100 P. 2d 752 (1940); Hahn v. Verret, 143 Neb. 820, 11 N. W. 2d 551 (1943); Johnston v. Johnston, 218 N. C. 706, 12 S. E. 2d 248 (1940); Nobles v. Nobles, 177 N. C. 243, 98 S. E. 715 (1919); Franklin v. Margay Oil Co., 194 Okla. 519, 153 P. 2d 486 (1944).

[10] N. C. GEN. STAT. §1-253 to §1-267 (1943).

[11] Smith v. Nelson, 249 Ala. 51, 29 So. 2d 335 (1949); Fillmore v. Yarborough, 246 Ala. 375, 20 So. 2d 792 (1945); Howard v. Bennett, 53 Cal. App. 2d 546, 127 P. 2d 1012 (1942); Colden v. Costello, 50 Cal. App. 2d 363, 122 P. 2d 959 (1942); Lloyd v. Weir, 116 Conn. 201, 164 Atl. 386 (1933); Sample v. Ward, 156 Fla. 210, 23 So. 2d 81 (1945); Weppler v. Hoffine, 218 Ind. 31, 29 N. E. 2d 204 (1940); Sharpe v. Sharpe, 164 Kan. 484, 190 P. 2d 344 (1949); Brown v. Trustees, 181 Md. 80, 28 A. 2d 582 (1942); Bank v. Morey, 320 Mass. 492, 70 N. E. 2d 316 (1946); Wachovia Bank & Trust Co. v. Lambeth, 213 N. C. 576, 197 S. E. 179 (1938); Roundtree v. Roundtree, 213 N. C. 252, 195 S. E. 784 (1938); Anderson v. Anderson, 150 Ore. 476, 46 P. 2d 98 (1935); Chapin v. Collard, 29 Wash. 2d 788, 189 P. 2d 642 (1948). For example of restrictions on this point see Note, 26 N. C. L. REV. 69 (1947).

[12] Pennington v. Green, 152 Kan. 739, 107 P. 2d 766 (1941); Poore v. Poore, 201 N. C. 791, 161 S. E. 532 (1931); *cf.* Roundtree v. Roundtree, 213 N. C. 252, 195 S. E. 784 (1938).

[13] Furr v. Jordan, 196 Ga. 862, 27 S. E. 2d 861 (1943); Ragan v. Bank of Rome, 177 Ga. 686, 170 S. E. 889 (1933); Israel v. Wolf, 100 Ga. 339, 28 S. E. 109 (1897); Feamster v. Feamster, 123 W. Va. 353, 15 S. E. 2d 159 (1941).

tiffs. "He may invoke such remedy by the simple expedient of simultaneously applying to the Clerk of the Superior Court having jurisdiction to have the script probated or proved, i.e., tested, and filing a caveat asking that it be declared invalid as a testamentary instrument."[14] This result is made possible by the construction placed upon the phrase "any person interested in the estate" as found in the statute for probate[15] and caveat to a will.[16] Since the heirs at law would take the property had the owner died intestate, they are recognized as parties interested in the estate.[17] While this relationship might justify proceeding under either one of the statutes, to permit the heirs at law to combine the above statutes and be both proponents and caveators produces an unusual situation. Indeed one court said, "He is both proponent and defendant. His positions are incongruous. As a matter of procedure, he cannot be a party of record on opposite sides of the same proposition."[18] A proponent, however, is by definition a party who offers an instrument for legal adjudication.[19] It does not seem that this would require him to be interested in having the validity sustained no matter how often such interests coincide. This objection to caveat by a proponent is met also by the fact that a will contest is a proceeding in rem and not between the parties.[20] The sole issue is whether or not the instrument is a valid will. Accordingly most of the courts which have passed upon this point have held that no estoppel operates to prevent a proponent from caveating the will, and especially is this true where the caveator was under a duty to produce the will for probate.[21]

[14] Brissie v. Craig, 232 N. C. 701, 706, 62 S. E. 2d 330, 334 (1950).

[15] N. C. GEN. STAT. §31-13 (1943): "If no executor apply to have will proved within sixty days after the death of the testator, any devisee or legatee named in the will, or any other person interested in the estate, may make such application. . . ."

[16] N. C. GEN. STAT. §31-32 (1943) ". . . any person entitled under such will, or interested in the estate, may . . . enter a caveat to the probate of such will. . . ."

[17] Hall v. Proctor, 242 Ala. 636, 7 So. 2d 764 (1942); *In re* Stoiber's Estate, 101 Colo. 192, 72 P. 2d 276 (1937); *In re* Kinney's Estate, 233 Iowa 600, 10 N. W. 2d 73 (1943); Hemonas v. Orphan, 191 S. W. 2d 352 (Mo. 1946); *In re* Morrow's Will, 41 N. M. 723, 73 P. 2d 1360 (1937); Bailey v. McLain, 215 N. C. 150, 1 S. E. 2d 372 (1939); Weis v. Weis, 147 Ohio St. 416, 72 N. E. 2d 245 (1947); *In re* Harjoche's Estate, 193 Okla. 631, 146 P. 2d 130 (1944).

[18] Appeal of Thompson, *In re* Nichol's Estate, 114 Me. 338, 96 Atl. 238 (1915).

[19] BLACK, LAW DICTIONARY (3rd Ed.) 1449.

[20] *In re* Cassada's Will, 228 N. C. 548, 46 S. E. 2d 468 (1948); *In re* Lomax' Will, 226 N. C. 498, 39 S. E. 2d 388 (1946); Burney v. Holloway, 225 N. C. 633, 36 S. E. 2d 5 (1945); Bailey v. McClain, 215 N. C. 150, 1 S. E. 2d 372 (1939); *In re* Brown's Will, 194 N. C. 583, 140 S. E. 192 (1927); *In re* Young, 123 N. C. 358, 31 S. E. 626 (1898); Hutson v. Sawyer, 104 N. C. 1, 10 S. E. 85 (1889).

[21] *In re* Biehn's Estate, 41 Ariz. 403, 18 P. 2d 1112 (1933); Blatt v. Blatt, 79 Colo. 57, 243 Pac. 1099 (1926); Abercrombie v. Hair, 185 Ga. 728, 196 S. E. 447 (1938); Howard v. Howard, 268 Ky. 552, 105 S. W. 2d 630 (1937); Scott v. Dawson, 177 Okla. 213, 58 P. 2d 538 (1936); Letts v. Letts, 73 Okla. 313, 176 Pac. 234 (1918). As to statutory duty to produce will for probate see Blatt v. Blatt, *supra.*

The court's denial of the requested equitable relief because a remedy existed at law is not objectionable in the principal case as a blind adherance to procedure which postpones adjudication on the merits. Rather, it is a question of fundamental power to hear and determine probate matters. The right to dispose of one's property by will is not an inherent or guaranteed one, but rather one granted by the legislature.[22] Nor is is an unrestricted right. The Clerk of the Superior Court is given exclusive original jurisdiction in probate matters under the statutes.[23] The court had no alternative but to dismiss the action and the suggested course of action, while unusual, represents no more than a liberal interpretation of the statutes to meet an unanticipated situation.

KENNETH R. HOYLE.

Unincorporated Associations—Capacity to Sue and Be Sued

In a recent case[1] the Supreme Court of North Carolina held that under N. C. GEN. STAT. §1-97(6) (1943)[2] an unincorporated association could sue or be sued in its common name. Although the statute in question does not expressly authorize this departure from the common

[22] Wescott v. Bank, 227 N. C. 39, 40 S. E. 2d 461 (1946); Peace v. Edwards, 170 N. C. 64, 86 S. E. 807 (1915); Pullen v. Commissioners, 66 N. C. 361 (1872).
[23] N. C. GEN. STAT. §2-16 (1943); N. C. GEN. STAT. §28-1 (1943); N. C. GEN. STAT. §§31-12 to 31-27 (1943).

[1] Ionic Lodge No. 72 F.A. & A.M. v. Ionic Lodge Free Ancient & Accepted Masons No. 72 Company, 232 N. C. 252, 59 S. E. 2d 829 (1950).

[2] "Any unincorporated association or organization, whether resident or nonresident, desiring to do business in this state by performing any of the acts for which it was formed, shall, before any such acts are performed, appoint an agent in this state upon whom all processes and precepts may be served, and certify to the clerk of the superior court of each county in which said association or organization desires to perform any of the acts for which it was organized the name and address of such process agent. If said unincorporated association or organization shall fail to appoint the process agent pursuant to this subsection, all precepts, and processes may be served upon the secretary of state of the state of North Carolina. Upon such service, the secretary of state shall forward a copy of the process or precept to the last known address of such unincorporated association or organization. Service upon the process agent appointed pursuant to this subsection or upon the secretary of state, if no process agent is appointed, shall be legal and binding on said association or organization, and any judgment recovered in any action commenced by service of process, as provided in this subsection shall be valid and may be collected out of any real or personal property belonging to the association or organization.

"Any such unincorporated association or organization, now performing any of the acts for which it was formed, shall within thirty days from the ratification of this subsection, appoint an agent upon whom processes and precepts may be served, as provided in this subsection, and in the absence of such appointment, such processes and precepts may be served upon the secretary of state, as provided in this subsection. Upon such service, the secretary of state shall forward a copy of the process or precept to the last known address of such unincorporated association or organization."

law,[3] the court felt that when construed with N. C. GEN. STAT. §39-24 (1943)[4] and N. C. GEN. STAT. §39-25 (1943)[5] this was a sufficient expression of the legislative intent to change the common law rule.[6] However, upon rehearing of the same case the court reversed itself,[7] stating that N. C. GEN. STAT. §1-70 (1943)[8] precluded the former interpretation of N. C. GEN. STAT. §1-97(6) (1943) and that the common law rule still prevailed except as modified by N. C. GEN. STAT. §1-70 (1943). This decision does not settle the question as to whether N. C. GEN. STAT. §1-97(6) (1943) authorizes suit *against* an unincorporated association in its common name, since the only question before the court in the present case was whether an unincorporated association could sue.

If it were held that N. C. GEN. STAT. §1-97(6) (1943) authorizes suit against all unincorporated associations, but that only certain unincorporated associations could in turn *sue*, there might be a question as to the constitutionality of the statute. This question has not been presented to the North Carolina court, but in view of the fact that the substantive rights of these associations are not affected and they still retain their common law right of action through the members, it would

[3] At common law an unincorporated association could not sue or be sued in the association name on the theory that it was not a legal entity. Tucker v. Eatough, 186 N. C. 505, 120 S. E. 57 (1923), Note, 10 N. C. L. REV. 313 (1932).

[4] "Voluntary organizations and associations of individuals organized for charitable, fraternal, religious, or patriotic purposes, when organized for the purposes which are not prohibited by law, are hereby authorized and empowered to acquire real estate and to hold the same in their common or corporate names: Provided, that voluntary organizations and associations of individuals, within the meaning of this article, shall not include associations, partnerships or copartnerships which are organized to engage in any business, trade or profession."

[5] "Where real estate has been or may be hereafter conveyed to such orzanizations or associations in their common or corporate name the said title shall vest in said organizations, and may be conveyed by said organization in its common name, when such conveyance is authorized by resolution of the body duly constituted and held, by a deed signed by its chairman or president, and its secretary or treasurer, or such officer as is the custodian of its common seal with its official seal affixed, the said conveyance to be proven and probated in the same manner as provided by law for deeds by corporations, and conveyance thus made by such organizations, and associations shall convey good and fee simple title to said land."

[6] Ionic Lodge No. 72 F.A. & A.M. v. Ionic Lodge Free Ancient & Accepted Masons No. 72 Company, 232 N. C. 252, 258, 59 S. E. 2d 829, 833 (1950). The position the court took was advocated by a recent note, 25 N. C. L. REV. 319 (1947).

[7] Ionic Lodge No. 72 F.A. & A.M. v. Ionic Lodge Free Ancient & Accepted Masons No. 72 Company, 232 N. C. 648, 62 S. E. 2d 73 (1950).

[8] ". . . Any and/or all unincorporated, beneficial organizations, fraternal benefit orders, associations and/or societies, or voluntary fraternal beneficial organizations, orders, associations and/or societies issuing certificates and/or policies of insurance, foreign or domestic, now or hereafter doing business in this state, shall have the power to sue and/or be sued in the name commonly known and/or used by them in the conduct of their business to the same extent as any other legal entity established by law, and without naming any of the individual members composing it: Provided, however, this section shall apply only in actions concerning such certificates and/or policies of insurance."

seem that the states are within their authority in enacting such a statute.[9]

The principal case does make it clear that the capacity of unincorporated associations to sue and be sued must rest on a specific legislative enactment. Since the final decision in the principal case, the North Carolina General Assembly has enacted an amendment[10] to N. C. GEN. STAT. §39-24 (1943) which allows unincorporated associations holding real estate under that section to sue and be sued in their common names in actions concerning real estate so held. The effect of this amendment is to overrule the principal case, but it still leaves the majority of unincorporated associations without a simple method of litigating their rights.

The inconvenience, brought about by the application of the common law doctrine under modern business conditions has led to much legislation, altering more or less, the common law procedure.[11] Some statutes provide for suits against associations (or partnerships) in the name of the associations with service of process on the officers or other associates. Judgments under such statutes bind the association property, but the individual property of those members who have not been personally served is not bound.[12] These statutes usually provide for execution on the association property before proceeding against the individual property of the members.[13] Their validity appears unquestionable.[14]

A few states, however, have statutes which though somewhat similar, provide for judgments binding individually even those members not personally served.[15] The validity of these statutes is doubtful. Under the authority of two United States Supreme Court decisions[16] it would seem to be a violation of the Due Process Clause of the Fourteenth Amendment as to any person not a resident of the forum state; but

[9] See 160 U. S. 389, 393 (1895) where the court said, "But it is clear that the Fourteenth Amendment in no way undertakes to control the power of a State to determine by what process legal rights may be asserted or legal obligation be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided."

[10] N. C. Sess. Laws 1951 c. 86.

[11] The various state acts are classified and discussed in detail in WARREN, CORPORATE ADVANTAGES WITHOUT INCORPORATION 542 *et seq* (1929).

[12] TEX. REV. CIV. STAT. ANN. art. 6133-8 (1949).

[13] TEX. REV. CIV. STAT. ANN. art. 6137 (1949): "Every member who is personally served is individually liable for any amount of judgment not satisfied by levy on association property."

[14] Sugg v. Thornton, 132 U. S. 524 (1889); Jardine v. Superior Court in and for Los Angeles County, 213 Cal. 301, 2 P. 2d 756 (1931); United States Heater Co. v. Iron Moulders Union, 129 Mich. 354, 88 N. W. 889 (1902).

[15] S. C. CODE ANN. §§7796-7798 (1942); VT. PUB. LAWS §5720 (1933).

[16] D'Arcy v. Ketchum, 11 How. 165 (U. S. 1851); Pennoyer v. Neff, 95 U. S. 714 (1877).

in a case in which residence of parties was not mentioned, the South Carolina Supreme Court held that such a judgment was valid.[17]

The several states are not in accord as to whether these enabling statutes apply to ordinary partnerships. Some of the statutes expressly exclude their application to common law partnerships,[18] and other states have reached the same result by judicial decision.[19] Still others treat a partnership like any other association and allow suits in the common name.[20]

A few of the state statutes have been held not to extend to non-profit associations.[21] It would seem that the need for allowing suits in the common name against associations such as labor unions and fraternal organizations, would be as great, or greater, than the need as to business organizations. Some states take this view and extend their statutes to cover any unincorporated association, whether organized for profit or not.[22]

In view of the great need for a simple method of suit by and against the many unincorporated associations that exist today,[23] it is suggested that the legislature enact a specific statute allowing suits by and against such associations in their common names. The following statute is respectfully submitted:

> All unincorporated associations or orders, whether organized for profit or not, may hereafter sue or be sued under the name by which they are commonly known and called, or under which they do business, and judgments and executions against any such association or order shall bind its real and personal property in like manner as if it were incorporated: Provided, however, this section shall not apply to ordinary partnerships as defined in G. S. 59-1[24] and G. S. 59-36.[25]

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[17] *Ex parte* Baylor, 93 S. C. 414, 77 S. E. 59 (1913). Professor Warren in his treatise, CORPORATE ADVANTAGES WITHOUT INCORPORATION at p. 554 expresses the opinion that the decision in *Ex parte* Baylor would not have been sustained by the Supreme Court of the United States if the case had been carried to that Court.

[18] DEL. REV. CODE §4676 (1935).

[19] Texas Land & Cattle Co. v. Molina, 258 S. W. 216 (Tex. Civ. App. 1924).

[20] CAL. CIV. CODE §388 (1941), Craig v. San Fernando Furn. Co., 89 Cal. App. 167, 264 Pac. 784 (1928) (applies to partnerships).

[21] Realty Trust Co. v. First Baptist Church of Haskell, 46 S. W. 2d 1009 (Tex. Civ. App. 1932).

[22] Deeney v. Hotel and Apartment Clerks' Union, 57 Cal. App. 2d 1023, 134 P. 2d 328 (1943); Herald v. Glendale Lodge, 46 Cal. App. 325, 189 Pac. 329 (1920).

[23] And to avoid further piecemeal legislation exemplified by the latest North Carolina statute on the problem. See note 10 *supra*.

[24] UNIFORM LIMITED PARTNERSHIP ACT §1.

[25] UNIFORM PARTNERSHIP ACT §6.