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NOTES AND COMMENTS

Agency—Criminal Liability of Corporation—Imputation of Agents' Knowledge

Defendant trucking corporation was convicted of knowingly and willfully keeping false driver's logs in violation of a federal statute. The evidence indicated wide discrepancies between the false logs and the trip reports, both of which records were prepared by defendant's driver.[1] No single agent of the corporation other than the driver knew of these discrepancies, but one agent had knowledge of the information in the logs, and another knew the contents of the trip reports. Although reversing the conviction on other grounds, the court of appeals ruled that the partial information possessed by both agents could be attributed to the corporation to give it knowledge of the falsity of the logs.[2]

It was once held that a corporation could not commit a crime,[3] but now corporate bodies can be convicted for acts of misfeasance,[4] violations of statutes,[5] and crimes involving general and specific criminal intent,[6] although some writers have criticized the last extension of criminal responsibility.[7] Because a corporation can act only through its agents or employees, rules of agency have been used in varying degree to attribute the *mens rea* or guilty knowledge to the corporation in crimes involving intent.[8] Generally, a sweeping application of the doctrine of *respondeat*

[1] Whether the driver in falsifying the logs was attempting to further the interests of his employer or to perpetrate a scheme to defraud them was not indicated by the facts or discussed in the opinion.

[2] Inland Freight Lines v. United States, 191 F. 2d 313 (10th Cir. 1951).

[3] McDaniel v. Gates City Gas Light Co., 79 Ga. 58, 61 (1887); State v. Great Works Milling & Mfg. Co., 20 Me. 41 (1841); Anonymous, 12 Mod. 559, 88 Eng. Rep. 1518 (K. B. 1701).

[4] *E.g.*, Stewart v. Waterloo Turn Verein, 71 Iowa 226, 32 N. W. 275 (1887); State v. Western North Carolina R. R., 95 N. C. 602 (1886).

[5] *E.g.*, Groff v. State, 171 Ind. 547, 85 N. E. 769 (1908); Commonwealth v. Sacks, 214 Mass. 72, 100 N. E. 1019 (1913).

[6] *E.g.*, Joplin Mercantile Co. v. United States, 213 Fed. 926 (8th Cir. 1914), *aff'd*, 236 U. S. 531 (1915) (conspiracy to bring liquor into Indian territory); Telegram Newspaper Co. v. Commonwealth, 172 Mass. 294, 52 N. E. 445 (1899) (criminal contempt); State v. Lehigh Valley R. R., 90 N. J. L. 372, 103 Atl. 695 (1917), *aff'd*, 94 N. J. L. 171, 111 Atl. 257 (1920) (manslaughter); People v. Canadian Fur Trappers Corp., 248 N. Y. 159, 161 N. E. 455 (1928) (larceny); State v. Salisbury Ice & Fuel Co., 166 N. C. 366, 81 S. E. 737 (1914) (false pretenses); State v. Rowland Lumber Co., 153 N. C. 610, 69 S. E. 58 (1910) (willful destruction of property). *See* Hildebrand, *Corporate Liability for Torts and Crimes*, 13 TEXAS L. REV. 253, 272 (1935).

[7] BALLENTINE, CORPORATIONS §114 (Rev. ed. 1946); Francis, *Criminal Responsibility of the Corporation*, 18 ILL. L. REV. 305 (1924); Canfield, *Corporate Responsibility for Crime*, 14 COL. L. REV. 469 (1914).

[8] *See* New York Central & H. R. R. R. v. United States, 212 U. S. 481 (1909); Mininsohn v. United States, 101 F. 2d 477 (3d Cir. 1939); Overland Cotton Mill Co. v. People, 32 Colo. 263, 75 Pac. 924 (1904); State v. Salisbury Ice & Fuel Co., 166 N. C. 366, 81 S. E. 737 (1914).

superior has been withheld.[9] Courts will impute to the corporation the knowledge and intent of its officers,[10] and, in some cases, that of its superior agents acting within the scope of their employment;[11] but they generally do not impute the intent of an ordinary employee unless his superior had knowledge of such intent[12] or acquiesced in it.[13] Lack of consent is a defense in almost all cases.[14]

There has been a growing tendency, however, to broaden the area of corporate criminal liability, and to hold the company for deeds which were done by any of its agents acting within the scope of their employment,[15] especially in cases where the public welfare is involved.[16] It is said that public necessity requires that the corporation have a non-delegable duty to prevent violations of the law by its agents.[17] Conse-

[9] People v. Jarvis, 135 Cal. App. 288, 27 P. 2d 77 (1933), *cert. denied*, 291 U. S. 648 (1934); Commonwealth v. Stevens, 153 Mass. 421, 26 N. E. 992 (1891); People v. Raphael, 190 Misc. 584, 72 N. Y. S. 2d 748 (N. Y. City Ct. 1947). This restraint on the part of the courts comes from the feeling that ". . . it is of the very essence of our deep-rooted notions of criminal liability that guilt be personal and individual. . . ." Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689, 717 (1930).

[10] United States v. Empire Packing Co., 174 F. 2d 16 (7th Cir. 1949); Mininsohn v. United States, 101 F. 2d 477 (3d Cir. 1939).

[11] United States v. Armour & Co., 168 F. 2d 342 (3d Cir. 1948); C. I. T. Corp. v. United States, 150 F. 2d 85 (9th Cir. 1945). "The federal courts seem to emphasize the relative position of the agent in the fact pattern without regard to his rank in the corporate hierarchy." Gallin, *Corporate Criminal Liability*, 4 LAW AND L. N. 3, 5 (fall, 1950).

[12] People v. Raphael, 190 Misc. 584, 72 N. Y. S. 2d 748 (N. Y. City Ct. 1947). The courts, however, will often readily infer such knowledge from the general circumstances of the case. *E.g.*, Paschen v. United States, 70 F. 2d 491, 503 (7th Cir. 1934); Zito v. United States, 64 F. 2d 772 (7th Cir. 1933); United States v. Wilson, 59 F. 2d 97 (W. D. Wash. 1932); United States v. Houghton, 14 Fed. 544 (D. N. J. 1882).

[13] Grant Bros. Const. Co. v. United States, 13 Ariz. 388, 144 Pac. 955 (1911), *aff'd*, 232 U. S. 647 (1913); 19 C. J. S. 1075 (1940).

[14] Holland Furnace Co. v. United States, 158 F. 2d 2 (2d Cir. 1946); John Gund Brewing Co. v. United States, 204 Fed. 17 (8th Cir. 1913). But orders forbidding such acts must have been given in good faith, United States v. Wilson, 59 F. 2d 97 (W. D. Wash. 1932); THOMPSON, LAW OF CORPORATIONS §5645 (3d ed. 1927).

[15] United States v. Parfait Powder Puff Co., 163 F. 2d 1008 (7th Cir. 1947); United States v. George Fish, Inc., 154 F. 2d 798 (2d Cir.), *cert. denied*, 328 U. S. 869 (1946); Egan v. United States, 13 F. 2d 369 (8th Cir.), *cert. denied*, 320 U. S. 788 (1943); Regan v. Kroger Groccry and Baking Co., 386 Ill. 284, 54 N. E. 2d 210 (1944); State v. Louisville and N. R. R., 91 Tenn. 445, 19 S. W. 229 (1892); Vulcan Last Co. v. State, 194 Wis. 636, 217 N. W. 412 (1928). This approach is urged in Edgerton, *Corporate Criminal Responsibility*, 36 YALE L. J. 827, 835 (1927.)

[16] "Within this field the machinery of criminal administration is utilized as an enforcing agency because the social interest far outweighs the individual's interest." Note, 60 HARV. L. REV. 283, 285 (1946). *See* Dotterweich v. United States, 320 U. S. 277 (1943); Zito v. United States, 64 F. 2d 772 (7th Cir. 1933); Golden Guernsey Farms, Inc. v. State, 223 Ind. 606, 63 N. E. 2d 699 (1945).

[17] Actually, the non-delegable duty concept seems to create a type of absolute liability closely akin to that imposed by the "dangerous instrumentality" rule in agency cases in the tort field. *Compare* United States v. Illinois Central R. R., 303 U. S. 239 (1938); United States v. Wilson, 59 F. 2d 97 (W. D. Wash. 1932); People v. Sheffield Farms-Slawson-Decker Co., 225 N. Y. 25, 121 N. E. 474 (1918),

quently, companies have been convicted where their agents acted without the knowledge[18] or, in a few cases, consent[19] of their superiors, and even against express orders and instructions.[20] In a few instances it has been ruled that criminal liability can be imposed even when the agent has deliberately acted adversely to the interests of the principal.[21]

Into this confused area of law, the instant case[22] injects a new fiction: where knowledge is an ingredient of the crime, it can be found by imputing the sum total of the bits of information possessed by several agents to the "mind" of the corporation, and if such information, by fiction of the law integrated by the "corporate mind," gives notice of the criminal act of an agent, the corporation has the necessary guilty knowledge.

This theory is completely new to the field of criminal law. It is unsupported by the language of *New York Central & H. R. R. R. v. United States,*[23] cited by the court to support the present decision. In that case, the imputation of *partial* [italics added] knowledge was never considered, the court merely holding the defendant railroad responsible for the knowledge of two of its agents where both agents had complete knowledge of the crime.

Examples of the use of the "corporate mind" fiction do appear, however, in some civil cases. In *United States v. National Exchange Bank,*[24] the knowledge of a disbursing clerk as to the amount of a check drawn by him was imputed to his principal and when the check (which had been raised afterwards by a third party) was paid by a different agent, the claim by the principal of payment under a mistake of fact was denied, the court holding that the drawer and drawee were the same.[25] There have been similar holdings,[26] based upon the legal iden-

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with Richman Brothers Co. v. Miller, 131 Ohio St. 424, 3 N. E. 2d 360 (1936) (tort case).

[18] Commonwealth v. Jackson, 146 Pa. Super. 328, 22 A. 2d 299 (1941), *aff'd,* 345 Pa. 456, 28 A. 2d 894 (1942). But see Comment, 95 U. OF PA. L. REV. 557 (1947).

[19] Regan v. Kroger Grocery and Baking Co., 386 Ill. 284, 54 N. E. 2d 210 (1944).

[20] United States v. Armour & Co., 168 F. 2d 342 (3d Cir. 1948); Overland Cotton Mill Co. v. People, 32 Colo. 263, 75 Pac. 924 (1904); State Bank v. Potosi Tie and Lumber Co., 299 Ill. App. 524, 20 N. E. 2d 893 (1939).

[21] Old Monastery Co. v. United States, 147 F. 2d 905 (4th Cir.), *cert. denied,* 326 U. S. 734 (1945); *accord,* United States v. Empire Packing Co., 174 F. 2d 16 (7th Cir. 1949). But see 13 AM. JUR. §1113 (1938).

[22] Inland Freight Lines v. United States, 191 F. 2d 313 (10th Cir. 1951).

[23] 212 U. S. 481 (1909).

[24] 270 U. S. 527 (1926).

[25] *Id.* at 534.

[26] Northwestern Nat. Bank v. Madison and Kedzie State Bank, 242 Ill. App. 22 (1926); German-American National Bank v. Kelley, 183 Iowa 269, 166 N. W. 1053 (1918); New England Trust Co. v. Bright, 274 Mass. 407, 17 N. E. 469 (1931); Neal v. Cincinnati Union Stockyards Co., 1 O. C. C. (N. S.) 13 (1903); London County Freehold and Leasehold Properties, Ltd. v. Berkeley Property and Investment Co., 2 All E. R. 1039 (1936).

tity of principal and agent,[27] but the theory has been sharply criticized as one which adds innocent knowledge to innocent knowledge to get guilty knowledge.[28] As a result, most of the courts that espouse this approach do so with reservations, stating that before it will be imputed, the information must be obtained by the agent acting within the scope of his employment,[29] that the agent must be involved in the transaction in connection with which the information is to be imputed,[30] that the information must appear important to the agent in regard to his duties,[31] or that the agent must have reason to believe the information should be reported or a duty to report it.[32] Some decisions reject the "corporate mind" fiction entirely, and impute partial knowledge of an agent only to create estoppel against a principal seeking to obtain the benefits of a transaction which he has consummated in whole or in part by means of such agent.[33]

The conflict and complications which have been created by the use of the "corporate mind" approach in civil cases would indicate that its importation into criminal law is not advisable. If it is deemed beneficial to broaden the criminal liability of corporations, a point of policy on which there is considerable doubt,[34] it would appear wiser to achieve this end by increased application of the "non-delegable" duty concept, with its standard of absolute liability for acts of an agent, than to follow the circuitous route of conjuring up knowledge in the "mind" of the corporation, when it is clear that in actuality no such knowledge and no such "mind" exist.

JOHN G. GOLDING.

[27] For an explanation of the rule and the policies upon which it is based, *see* Neal v. Cincinnati Union Stockyards Co., *supra* note 25.

[28] Devlin, *Fraudulent Misrepresentation: Division of Responsibility between Principal and Agent,* 53 L. Q. REV. 344, 362 (1937); Comment, 15 CAN. B. REV. 716 (1937).

[29] Solow v. General Motors Truck Co., 64 F. 2d 105 (2d Cir. 1933).

[30] Congar v. Chicago & N. W. R. R., 24 Wis. 157 (1869).

[31] RESTATEMENT, AGENCY, §275, comment *d* (1934).

[32] Elgin, J. & E. R. R. v. United States, 253 Fed. 907 (7th Cir. 1918).

[33] Peebles v. Patapsco Guano Co., 77 N. C. 233 (1877); Irvine v. Grady, 85 Tex. 120, 19 S. W. 1028 (1892).

[34] Punishment of the corporation itself by fine would not seem to be particularly effective in deterring an employee from committing criminal acts (especially in cases where the employee is deliberately acting adversely to the interests of his employer) unless the threat of fine causes the company to exercise stricter control over its employee. In addition, the reason for a broad application of *respondeat superior* in the tort field, *i.e.,* the need to compensate an innocent third party for his losses, does not exist in the area of criminal responsibility. After all, any fine levied on the corporation is ultimately passed on to its stockholders in the form of lower profits or to the public in the form of higher prices. For further discussion of this point, see BALLANTINE, CORPORATIONS §114 (Rev. ed. 1946); Edgerton, *supra* note 15; Francis, *supra* note 7, at 322; Sayre, *supra* note 9, at 717.

Conditional Sales—Liability in Self-Help Repossessions

Plaintiff, a subscriber to defendant's telephone service, was delinquent in his payments. An agent of the defendant obtained unauthorized entrance to plaintiff's apartment from one of the apartment employees and removed the telephone. Plaintiff sued for wilful trespass. The South Carolina federal district court, following cases involving repossession of chattels sold under a conditional sales contract or chattel mortgage, found for the defendant.[1]

The prevailing view as to rights and liabilities in actions for repossession of chattels is that the vendor has the right to repossess in the event of default.[2] The right is an irrevocable license to do whatever is necessary to accomplish the repossession, including entry upon the premises of the vendee. However, the retaking must be effected without a breach of the peace. If it cannot be executed without breaching the peace, the vendor must resort to the courts.[3] The question in each case, then, is, did the repossessing vendor commit a trespass or breach of the peace? Because of the varied fact situations it is difficult to formulate a set of rules; but by examining the holdings, it is possible to define a guiding line in certain types of cases.

In cases involving trespass against land the vendor may enter the vendee's land to repossess a conditionally sold chattel even in the absence of a contractual stipulation to that effect.[4] Where there is a contractual provision, the privilege to enter is deemed irrevocable on the grounds that it is a part of the consideration.[5] However, the vendor will be held liable for any act constituting a trespass or a breach of the peace.[6] Where

[1] Plate v. Southern Bell Tel. & Tel. Co., 98 F. Supp. 355 (E. D. S. C. 1951).

[2] Willis v. Whittle, 82 S. C. 500, 64 S. E. 410 (1909). Quoted with approval in Day v. Nat. Bond & Investment Co., 99 S. W. 2d 117 (Mo. 1936); Lange v. Midwest Motor Securities, 231 S. W. 272 (Mo. 1921); Bear v. Colonial Finance Co., 42 Ohio App. 482, 182 N. E. 521 (1932); Westerman v. Oregon Automobile Credit Corp., 168 Ore. 216, 122 P. 2d 435 (1942); Soulias v. Mills Novelty Co. 198 S. C. 355, 17 S. E. 2d 869 (1941); Hutchinson v. A. K. Brown Motors Inc., 191 S. C. 319, 4 S. E. 2d 268 (1939); Justus v. Universal Credit Co., 189 S. C. 487, 15 S. E. 2d 508 (1939).

[3] See RESTATEMENT, TORTS §272-b (1934); 14 C. J. S., CHATTEL MORTGAGES §185; UNIFORM CONDITIONAL SALES ACT §16.

[4] Flaherty v. Ginsberg, 135 Iowa 743, 110 N. W. 1050 (1907); Lange v. Midwest Motor Securities, 231 S. W. 272 (Mo. 1921); Westerman v. Oregon Automobile Credit Corp. 168 Ore. 216, 122 P. 2d 435 (1942); Justus v. Universal Credit Co., 189 S. C. 487, 1 S. E. 2d 508 (1939). *Contra:* Van Wrenn v. Flynn, 34 La. Ann. 1158 (1882) (The right to retake the property did not confer upon the vendor the right to enter the house of the vendee in his absence, without his consent or notice, and carry off the property). Carter v. Mintz & Goldblum, 8 So. 2d 709 (La. 1942); Luthy v. Philip Werlein Co., 163 La. 752, 112 So. 709 (1927).

[5] Walsh v. Taylor, 39 Md. 592 (1874); Lambert v. Robinson, 162 Mass. 34 (1894); First Nat. Bank & Trust Co. v. Winter; 176 Okl. 400, 55 P. 2d 1029 (1936); Soulias v. Mills Novelty Co., 198 S. C. 355, 17 S. E. 2d 869 (1941); Justus v. Universal Credit Co., 189 S. C. 487, 1 S. E. 2d 508 (1939).

[6] American Discount Co. v. Wychroff, 29 Ala. App. 82, 191 So. 70 (1939); Dooley v. West American Commercial Insurance Co., 133 Cal. App. 58, 23 P. 2d

there is an actual forceful breaking-in, liability ensues,[7] including liability for damages suffered as a consequence of the act.[8] This is so even where the contract of sale permits the use of force or where the vendee waives his rights; the courts holding such stipulations as against public policy.[9] However, at least one court has allowed forceful retaking without liability.[10]

North Carolina is in accord with the general rule in allowing the vendor to repossess,[11] but does not hold that the seller has the right to enter the buyer's premises. In the only case found which is squarely in point,[12] nominal damages were awarded where defendant's agent entered plaintiff's office in his home while plaintiff was away and removed a machine used in his medical practice.

In cases where the retaking threatens a trespass against the person, the vendor proceeds with the undertaking at his peril.[13] Where defendant's agent took a conditionally sold horse in the presence of plaintiff's mother and over her protests, there was no liability,[14] but where the agent was rude, harsh, and high-handed the court awarded dam-

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766 (1933); Nat. Bond & Investment Co. v. Whithorn, 276 Ky. 204, 123 S. W. 2d 263 (1939); McLean v. Underdal, 73 N. D. 74, 11 N. W. 2d 102 (1943); Lamb v. Woodry, 154 Ore. 30, 58 P. 2d 1257 (1936); Childress v. Judson Mills Store Co., 189 S. C. 224, 200 S. E. 770 (1939). *Compare* R. C. A. Photophone v. Shanum, 189 Ark. 797, 75 S.W. 2d 59 (1934) (Court held that there was no basis for damages where defendant's agent surreptitiously entered plaintiff's motion picture theatre and removed part of the sound equipment), *with* Girard v. Anderson, 219 Iowa 142, 257 N. W. 450 (1934) (Defendant was liable when his agent, in plaintiff's absence, entered his unlocked house and removed his piano), *and* Singer Sewing Machine Co. v. Hayes, 22 Ala. App. 254, 114 So. 420 (1927) (If defendant went through an open door there was no liability, but if he broke into the house he was guilty of trespass).

[7] Dominick v. Rea, 226 Mich. 594, 198 N. W. 184 (1924); Wilson Motor Co. v. Dunn, 129 Okl. 211, 264 Pac. 194 (1928); Soulias v. Mills Novelty Co., 198 S. C. 355, 17 S. E. 2d 869 (1941) (Actual and punitive damages were awarded where the vendor ripped the padlock and staple off plaintiff's door to repossess a commercial ice cream machine); Childress v. Judson Mills Store Co., 189 S. C. 224, 200 S. E. 770 (1939); Lyda v. Cooper, 169 S. C. 451, 169, S. E. 236 (1933).

[8] General Motors Acceptance Corp. v. Hicks, 189 Ark. 62, 70 S. W. 2d 509 (1934) (Defendant's agent, in repossessing a refrigerator, broke into plaintiff's storehouse leaving the storehouse open. In addition to being held liable for trespass, defendant was assessed damages for other property subsequently removed by thieves).

[9] Girard v. Anderson, 219 Iowa 42, 257 N. W. 400 (1934); Sturman v. Polito, 161 Misc. 536, 291 N. Y. Supp. 621 (1936); Stewart v. F. A. North Co., 65 Pa. Super. 195 (1916).

[10] Fulton Investment Co. v. Fraser, 76 Colo. 125, 230 Pac. 600 (1924) (Defendant was not liable for entering and taking possession of wheat held under a chattel mortgage even though he broke the lock on the gate to plaintiff's farm in the process).

[11] Freeman v. General Motors Acceptance Corp., 205 N. C. 257, 171 S. E. 63 (1933).

[12] Parris v. Fischer & Co., 221 N. C. 110, 19 S. E. 2d 128 (1942).

[13] Girard v. Anderson 219 Iowa 142, 257 N. W. 400 (1934) (and cases there cited).

[14] Willis v. Whittle, 82 S. C. 500, 64 S. E. 410 (1909).

ages.[15] If actual physical force is used, liability almost always results. Thus, defendant was held liable when his agent pushed a front door against plaintiff who was barring his entrance;[16] where plaintiff was pushed aside when she attempted to block defendant's exit;[17] where plaintiff, plaintiff's companion and defendant engaged in a "tug-of-war" over a stove;[18] and where defendant's agent tipped a sewing machine so that plaintiff, who was sitting on it to prevent its removal, slid to the floor.[19] Liability was also found where defendant and two policemen pulled plaintiff's wife out of an automobile;[20] and where defendant, in repossessing a car, pushed and pinched plaintiff to get him out of the vehicle and then drove around at a dangerous speed in an endeavor to get plaintiff off the running board.[21] In some cases, where the contract authorizes the use of force, the courts have held that the vendor may use a reasonable and necessary force in retaking.[22] However, most courts refuse to recognize such contractual authority.[23]

North Carolina adopted a strict view in *Freeman v. General Motors Acceptance Corp.*,[24] where defendant was held liable for his agent's harsh manners and raised voice. The court held: "Where there is such a show of force as to create a reasonable apprehension in the mind of the one in possession of premises that he must yield to avoid a breach of the peace, . . . , this is a yielding upon force and constitutes a forcible trespass."

If the seller resorts to trick or fraud to effect repossession, the court will generally find for the vendee.[25] The same is true where the goods

[15] Crews & Green v. Parker, 192 Ala. 383, 68 So. 287 (1915); Bordeaux v. Hartman Furniture and Carpet Co., 115 Mo. App. 556, 91 S. W. 1020 (1905); Webber v. Farmers Chevrolet Co., 186 S. C. 111, 195 S. E. 139 (1938); Cecil Baber Electric Co. v. Greer, 183 Okl. 541, 83 P. 2d 598 (1938) (Defendant's agent acted in a high-handed manner, told plaintiff to "go to hell." Plaintiff left to get a weapon with which to protect himself. The court found that the agent's acts tended to breach the peace).

[16] Spangler-Bowers v. Benton, 229 Mo. App. 919, 83 S. W. 2d 170 (1935).

[17] Culver v. State, 42 Tex. Cr. 645, 62 S. W. 922 (1901).

[18] Deevy v. Tassi, 21 Cal. 2d 109, 130 P. 2d 389 (1942); Lamb v. Woodry, 154 Ore. 30, 58 P. 2d 1257 (1936).

[19] Singer Sewing Machine Co. v. Phipps, 49 Ind. App. 116, 94 N. E. 793 (1911). *But cf.* Biggs v. Seufferlein, 164 Iowa 241, 145 N. W. 507 (1914) (Defendant was held without liability for removing plaintiff from atop a stove).

[20] Roberts v. Speck, 169 Wash. 613, 14 P. 2d 33 (1932).

[21] Dooley v. West American Commercial Insurance Co., 133 Cal. App. 58, 23 P. 2d 766 (1933).

[22] Walsh v. Taylor, 39 Md. 592 (1873); Lambert v. Robinson, 162 Mass. 34 (1894).

[23] Singer Sewing Machine Co. v. Hayes, 22 Ala. App. 250, 114 So. 420 (1927); Singer Sewing Machine Co. v. Methuin, 184 Ala. 554, 63 So. 987 (1913); Motor Equipment Co. v. McLaughlin, 156 Kan. 258, 133 P. 2d 149 (1943); Frederickson v. Singer Mfg. Co., 38 Minn. 356, 37 N. W. 453 (1888); Abel v. M. H. Pickering Co., 58 Pa. Super. 439 (1914).

[24] 205 N. C. 257, 171 S. E. 63 (1933), 47 HARV. L. REV. 884 (1934); *Accord*, Binder v. Acceptance Corporation, 222 N. C. 512, 23 S. E. 2d 894 (1943).

[25] Burham v. Standridge, 201 Ark. 1143, 148 S. W. 2d 648 (1941); W. Cleve Stokes Co. v. Rushton, 238 Ala. 458, 191 So. 614 (1939); McCarty-Greene Motor

are returned to the vendor for repairs and he repossesses them.[26] However, if the vendor's claim to possession is based *solely* on a repair lien, he is entitled to retain the chattel until the lien is satisfied.[27] Where the repossession is accomplished under color of legal authority, the taking is regarded as coercive and intimidating, amounting to force,[28] although in one instance it was held that the fraud did no more than make plaintiff do what he ought to do.[29] If the vendor resorts to legal process which is subsequently declared void, he may still act on his own behalf.[30]

Cases sometime arise involving trespass against the property sought to be repossessed. Contracts for the conditional sale of automobiles often provide that the seller may repossess the automobile wherever found. Under such a contract if the vendor finds the car parked on the streets unattended and takes it into his possession he will not be held liable.[31] In an Oregon case,[32] plaintiff and defendant's agent got into a scuffle over an automobile repossessed by defendant's agent *after* the agent had gotten into the car and had taken possession. The court held for defendant finding that the repossession was peaceful and that plaintiff breached the peace in an effort to retake the car wrongfully. The only case found in which the seller was held liable under such circumstances based liability upon damage done to the car when defendant's agent broke the window to obtain entrance.[33] Even in the absence of a contractual provision that the car may be repossessed wherever found, North Carolina has not found liability where the vendor repossessed the car when found parked on the street.[34]

Co. v. House, 216 Ala. 666, 114 So. 60 (1927). *Contra:* North v. Williams, 120 Pa. 109, 13 Atl. 723 (1888) (Defendant's agent obtained entrance to plaintiff's house by telling her that they had come to tune her piano. Instead of tuning, he removed and repossessed the instrument).

[26] Walker v. Ayers, 47 Ga. App. 113, 169 S. E. 784 (1933); Kaufman v. Simons Motor Sales, Inc., 236 App. Div. 98, 258 N. Y. Supp. 370 (1st Dep't 1932); Murray v. Federal Motor Truck Sales Corp., 160 Tenn. 140, 22 S. W. 2d 227 (1929).

[27] N. C. GEN. STAT. §44-2 (1951).

[28] McClure v. Hill, 36 Ark. 268 (1881); See v. Automobile Discount Corp., 330 Mo. 906, 50 S. W. 2d 993 (1932); Firebaugh v. Gunther, 106 Okl. 131, 233 Pac. 460 (1925).

[29] Day v. Nat. Bond & Investment Co., 99 S. W. 2d 117 (Mo. 1936).

[30] Ellis v. Smathers, 206 Ark. 247, 174 S. W. 2d 568 (1943); Hartford Acceptance Corp. v. Kirchheimer, 166 Misc. 219, 2 N. Y. S. 2d 224 (N. Y. Munic. Ct. 1938); Grossman v. Weiss, 129 Misc. Rep. 234, 221 N. Y. Supp. 266 (Sup. Ct. 1927); Mendelson v. Irving, 155 App. Div. 114, 139 N. Y. Supp. 1065 (1st Dep't 1913); Kismer v. Commercial Credit Co., 114 W. Va. 811, 174 S. E. 330 (1934).

[31] Lange v. Midwest Motor Securities, 231 S. W. 272 (Mo. 1921); Morris v. Commercial Credit Co., 55 Ohio App. 391, 9 N. E. 2d 880 (1937); Lepley v. State 69 Okl. Cr. 379, 103 P. 2d 568 (1940); First Nat. Bank and Trust Co. v. Winter, 176 Okl. 400, 55 P. 2d 1029 (1936); Leedy v. General Motors Acceptance Corp., 173 Okl. 445, 48 P. 2d 1074 (1935).

[32] Westerman v. Oregon Credit Corp., 168 Ore. 216, 122 P. 2d 435 (1942).

[33] Commercial Credit Co. v. Spence, 185 Miss. 293, 184 So. 439 (1938).

[34] State v. Stinnett, 203 N. C. 829, 167 S. E. 63 (1932); *accord,* Jackson v. Hall, 84 N. C. 489 (1881). (Mortagee seized a mule, harness and carryall on the public streets).

Where a chattel not covered by the conditional sales contract is repossessed along with an automobile, the North Carolina court has found liability.[35] And, in South Carolina where the contract authorized the taking of any property in the automobile the court held that that privilege only applied to property not visible and found liability for property that could have been seen.[36]

The principal case in denying liability in spite of the technical trespass on plaintiff's premises is clearly in accord with the general rule. However, if the same facts arose in North Carolina, the court would probably grant at least nominal damages since a repossessing seller has no right to enter the buyer's premises.[37]

JAMES R. TROTTER.

Constitutional Law—"Separate but Equal" Test in Graduate Education

In *McKissick v. Carmichael*[1] the court decided that the separate law school furnished Negroes by the State of North Carolina was not substantially equal, as required by the Fourteenth Amendment, to the law school furnished white students at the University of North Carolina. The University law school was ordered to admit qualified Negro applicants. The decision followed by less than a year *Sweatt v. Painter*[2] and applied the principles first enunciated in that case to a situation approaching much nearer equality between the white and Negro schools.

The constitutions and statutes of the southern states require the segregation of the white and colored races in the public educational system.[3] Educational segregation affording equal facilities has been authorized by the federal courts as a proper exercise of state police power since *Plessy v. Ferguson*[4] in 1896, a case actually involving segregation in interstate carriers. Segregation in public education was specifically held to be constitutional in the later case of *Gong Lum v. Rice*.[5] While segregation *per se* does not violate the Fourteenth Amendment,

[35] Narron v. Chevrolet Co., 205 N. C. 307, 171 S. E. 93 (1933) (Personal belongings left in the glove compartment and on the back seat).
[36] Sanders v. General Motors Acceptance Corp., 180 S. C. 38, 185 S. E. 180 (1936).
[37] Parris v. Fischer & Co., 221 N. C. 110, 19 S. E. 2d 128 (1942).

[1] 187 F. 2d 949 (4th Cir. 1951), *cert. denied*, 341 U. S. 951 (1951).
[2] 339 U. S. 629 (1950).
[3] "The children of the white race and the colored race shall be taught in separate schools, but there shall be no discrimination in favor of, or to the prejudice of, either race." N. C. Constitution, Art. IX, §2; N. C. GEN. STAT. §115-3 (1943). For provisions in other states see MANGUM, THE LEGAL STATUS OF THE NEGRO, 79 *et seq.* (1940).
[4] 163 U. S. 537 (1896).
[5] 275 U. S. 78 (1927). The state may impose segregation in private schools. Berea College v. Kentucky, 211 U. S. 45 (1908).

the equal protection clause requires that the separate facilities furnished must be equal.[6]

For many years the federal courts ruled that this "separate but equal" rule was satisfied by "substantial" equality.[7] But with increasing litigation in the field of segregation in education since the 1930's, the federal courts have moved toward a stricter requirement of real equality in fact. In *Missouri ex rel Gaines v. Canada*[8] it was held that the practice of sending Negro college students out of state for courses not available within the state was a denial of equal protection: the required equal facilities must be furnished within the state. Then, in *Sipuel v. Board of Regents*[9] it was emphasized that the right to equal facilities is personal and present: the facilities must be furnished regardless of the number of applicants and "as soon as for any other group." *Johnson v. Board of Trustees*[10] held that provision for a white faculty to commute to classes at a Negro college did not afford Negro students equal protection. Further cases brought into question equality in the lower public schools.[11]

In 1950, *Sweatt v. Painter* threw an entirely new light on the application of the "separate but equal" rule in the field of higher education. The filing of a suit to gain admission for Negroes to the University of Texas law school had prompted Texas to establish, for the first time, a Negro law school. The Supreme Court, in examining the physical facilities of the two schools, found the Negro school unequal to the white school. But more important, the Court compared the "intangible factors" of reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, and traditions and prestige of the two schools. The Court stated that a legal education "cannot be effective in isolation from the individuals and institutions with which the law interacts. The law school to which

[6] Gong Lum v. Rice, 275 U. S. 78 (1927); McCabe v. Atchison, T. & S. F. Ry., 235 U. S. 151 (1914); McMillan v. School District, 107 N. C. 609, 12 S. E. 330 (1890). See cases collected in Briggs v. Elliot, 98 F. Supp. 521, 531 (E. D. S. C. 1951).

[7] For example in United States v. Buntin, 10 Fed. 730 (C. C., Ohio, 1882), there was held to be no denial of equal protection to Negroes within a school district though no Negro school was provided within the district and Negroes had to go 5 miles to a school outside the district. In Cummings v. Board of Education, 175 U. S. 528 (1899), discontinuance of a Negro high school in order to maintain lower Negro schools was allowed "in the interest of the greater number of colored children," though a white high school continued to be maintained. The Court used the language that "Any interference on the part of the Federal authority with the management of state schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land." Cummings v. Board of Education, 175 U. S. 528, 545 (1899).

[8] 305 U. S. 337 (1938); Note, 17 N. C. L. REV. 280 (1939).

[9] 332 U. S. 631 (1948).

[10] Johnson v. Board of Trustees of Univ. of Kentucky, 83 F. Supp. 707 (E. D. Ky. 1949).

[11] See p. 158, *infra*, on public schools.

Texas is willing to admit petitioner excludes from its student body members of the racial groups which number 85 per cent of the population of the State and include most of the lawyers, witnesses, jurors, judges, and other officials. . . . With such a significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal."[12]

Against this background the case of *McKissick v. Carmichael*[13] arose to test the equality of the separate legal education given by the State of North Carolina. The fact that the law school for Negroes was not at the time of the suit a hastily set-up school, but one which had been in operation for ten years with a student body of twenty-eight, a faculty of seven, and an annual budget of $52,000[14] differentiated the case from *Sweatt v. Painter.*

The Court of Appeals found that the case "differed in circumstance but not in principle" from *Sweatt v. Painter.* The court said there were inequalities in those facilities capable of objective measurement—building,[15] libraries,[16] the number of subjects offered,[17] activities such as law review work,[18] and the existence of a summer school at the white law school. The size of classes at the Negro law school was found to permit more personal instruction than at the white school but to be too small for full discussion.[19]

Turning to a consideration of the intangible qualities of the two schools, the court found that the faculty of the white law school was superior in teaching experience, scholarly research, reputation, and in work with legislative bodies. With fewer courses to teach, there was

[12] Sweatt v. Painter, 339 U. S. 629, 634 (1950). In McLaurin v. Oklahoma State Regents, 339 U. S. 637 (1950), decided at the same time as *Sweatt v. Painter,* the Court held that the action of the University of Oklahoma in setting apart a Negro graduate student, once admitted, in the classroom, dining hall, and library, was a denial of equal protection. The Court will not allow embarrassing restrictions to be placed on the use of educational facilities after admission. The Negro student must be free "to study, engage in discussion, to secure acceptance by his fellow students on his own merits, and, in general, to learn his profession." Does this holding apply only to facilities immediately necessary for study, or to any services furnished by the school? For example, see Time, Oct. 8, 1951, p. 85, col. 1, and Oct. 22, 1951, p. 92, col. 3, on the problem of student admission to football games.

[13] 187 F. 2d 949 (4th Cir.), *cert. denied,* 341 U. S. 951 (1951), *reversing* 93 F. Supp. 327 (M. D. N. C. 1950).

[14] 73 SCHOOL AND SOCIETY 326 (1951).

[15] The white law school building was described as "superior," and at the time was in the process of enlargement. The Negro school was being moved to a remodeled building described as "ample."

[16] The white law library had 64,000 volumes; the Negro law library had 30,000.

[17] The white law school listed 40 courses; the Negro school, 27 courses.

[18] The white law school has a law review which has been published since 1922 and a Chapter of the Order of the Coif; the Negro law school has neither.

[19] Classes at the white school were as large as 80 to 100; those at the Negro school were 8 or 9. Expert opinion gave the ideal number as 25 students.

a greater opportunity for specialization.[20] The absence of white students at the Negro school was said to deprive the Negro students of the benefit of a full range of discussion and of an opportunity "to form acquaintances with the persons who will later occupy positions of influence in the profession." "It is a definite handicap to the colored student to confine his association in the law school to people of his own class."[21] The court concluded that the circumstances at the Negro school of greater personal attention and association with the race from which future clients of the Negro students would come, which the District Court had balanced in finding equality, "do not overcome the deficiencies disclosed."[22]

The grounds upon which the *Sweatt* and *McKissick* cases are decided seem to lead to the conclusion that it is not possible for a state to establish a separate law school for Negroes which will be found to afford equal facilities. To attain equality in faculty reputation, administrative experience, alumni, and prestige of the school would appear to be almost impossible for a recently established school (which most of the separate graduate schools are).[23] Beyond these factors lies the requirement of the opportunity to associate and exchange ideas with the white segment of the population. In the *Sweatt* case the court stated that with white students excluded legal education *"cannot be effective"* and *"we cannot conclude"* [italics added] it to be equal.[24] By the use of these phrases the court seems to be saying that segregation is *per se* unconstitutional in legal education.[25]

To what extent will other graduate schools be affected? By analogy, the "intangible factors" of faculty reputation, administrative experience,

[20] "Most of the witnesses did not venture the opinion that the faculties were of equal quality." "The University Law School, its faculty and its Law Review enjoy a fine reputation in legal circles." McKissick v. Carmichael, 187 F. 2d 949, 951 (4th Cir. 1951). The District Court had found "ample testimony that the [Negro] faculty is capable and . . . keeps pace with that at the [white] University." Epps v. Carmichael, 93 F. Supp. 327, 330 (M.D. N. C. 1950). The District Court did not discuss as such the reputation of the faculty nor the reputation of the school, which the *Sweatt* case had listed as material factors.

[21] McKissick v. Carmichael, 187 F. 2d 949, 952 (4th Cir. 1951). The District Court had recognized that 74% of the population of the state is white; but said there was no evidence to show that any Negro lawyer ever represented a white client, and that therefore advantages of contacts with members of their own race would exceed any advantages of going to the white University. Neither decision makes direct reference to the alumni of the two schools, another factor which the *Sweatt* case held material.

[22] McKissick v. Carmichael, 187 F. 2d 949, 953 (4th Cir. 1951).

[23] For example, all five of the state-supported Negro law schools in the South were established since 1939: Lincoln University, Missouri, 1939; North Carolina College, 1939; Texas State University, 1947; Southern University (Louisiana), 1947; and South Carolina State College, 1947. 73 SCHOOL AND SOCIETY, 326 (1951).

[24] Sweatt v. Painter, 339 U. S. 629, 634 (1950).

[25] See Roche, *Education, Segregation, and the Supreme Court*, 99 U. OF PA. L. REV. 949 (1951); Note, 39 KY. L. J. 492 (1951); Note, 36 VA. L. REV. 797 (1950).

and standing of the school would probably be held to be material. As a practical matter, this would often determine the question. But would association with white students necessarily be a factor in other graduate education? In fields concerned with some degree of social work, such as education, sociology, and possibly medicine, opportunity to associate with the white population would probably be found to be a necessary part of the education. In other fields more removed from the "human" element, such as most scientific, engineering, and technical studies, there would seem to be less basis for emphasizing this factor of association. At any rate, the high cost of segregation itself[26] and the uncertainty of success in attempting to provide separate graduate schools for a small number of students[27] has brought about admission of Negroes into graduate schools of white universites, where not otherwise provided, in all but five southern states.[28] While the new project of regional

[26] For example, the average annual expenditure in 1949-1950 by the state for each white student in the University of North Carolina Law School was $416; for each Negro student in the North Carolina College school it was $1460. McKissick v. Carmichael, 187 F. 2d 949, 953 (1951). In other Southern state-supported Negro law schools, operational expenses in 1949-50 for each Negro student were: Lincoln University (Mo.), $1,728; Texas State University, $2,390; Southern University (La.), $1,990; and South Carolina State, $2,775. 73 SCHOOL AND SOCIETY 326 (1951). From 1941 to 1943, Missouri spent $229 per student for 17,010 whites at the University of Missouri and $697 per student for 1,228 Negroes at Lincoln University. FRAZIER, THE NEGRO IN THE UNITED STATES 487 (1949).

[27] Cases testing the equality of separate graduate education actually provided, as distinguished from a failure to provide any facilities at all, have all found the separate facilities unequal. Sweatt v. Painter, 339 U. S. 629 (1950); Missouri ex rel Gaines v. Canada, 305 U. S. 337 (1938); McKissick v. Carmichael, 187 F. 2d 949 (4th Cir. 1951); Wilson v. Board of Supervisors of L. S. U., 92 F. Supp. 986 (E. D. La. 1950); Johnson v. Board of Trustees of U. of Ky., 83 F. Supp. 707 (E. D. Ky. 1949); McReady v. Byrd, 73 A. 2d 8 (Md. 1950); Pearson v. Murray, 169 Md. 478, 182 Atl. 590 (1936).

[28] For the school year 1950-51 the estimate is that 300 Negroes attended state-supported Southern white colleges. Including private schools and summer sessions, the figure comes to about 2,000. The Crisis, June, 1951, p. 400. Some of the figures for individual schools are: University of Oklahoma, 60; University of Kentucky, 85; University of Louisville, 20; University of Arkansas, 15; University of Texas, 19; University of Missouri, 15; University of Delaware, 3; University of West Virginia, 75; University of Virginia, 1; Louisiana State, 1; Union Theological Seminary, 22; and Berea College, 3. The Crisis, August, 1951, p. 458; The Southern Patriot, Nov. 1950, p. 2. Baptist schools of theology, and Catholic colleges in the South are now accepting Negroes. The New Leader, Sept. 3, 1951, p. 2. On April 4, 1951, the Board of Trustees at the University of North Carolina passed a resolution providing for the admission of Negroes into graduate schools at the University when such schools are not otherwise provided in the state. Raleigh News and Observer, April 5, 1951, p. 1, col. 6. As a result of this resolution, there is at present one Negro attending the Medical School at the University, in addition to five in the Law School. On March 9, 1950, Kentucky repealed segregation laws so far as they applied to institutions of higher education, both graduate and undergraduate, private and public. Konnite, *Extent and Character of Segregation*, 20 JOURNAL OF NEGRO EDUCATION 425 (1951). Among the five states not admitting Negroes—Alabama, Florida, Georgia, Mississippi, and South Carolina—action is pending against the University of Georgia Law School, Southern Patriot, Sept., 1951, p. 1. A Florida decision allowing admission of Negroes on a temporary basis while other separate facilities are provided has been appealed to the Supreme Court. State v. Board of Control, 47 So. 2d 608 (Fla. 1951); petition for cert. filed, 20 *Law Week* 3112 (1951).

graduate schools in the South[29] points to an improvement in graduate education, it does not seem to be a solution to the desire in the South for segregation. The *Gaines* case requires that equal education be furnished within the state. Consequently, a recent Maryland case[30] holds that the offer of graduate education at a regional school outside the state does not meet the equal protection standard.

In undergraduate education, the intangible qualities of faculty, administration, and school standing would probably be held material; though perhaps there would be no definitely ascertainable need for professional contacts. Nor, in most courses, would the opportunity to exchange ideas with white students be so essential as in graduate fields such as law. So far, undergraduate education has come in for little litigation.[31]

Decisions determining the equality of segregated public lower schools have so far not been based on "intangible factors."[32] Recent comparisons in high schools have been based on physical plant, location of the school with regard to the students, transportation facilities, recreational facilities, range of courses, teacher salaries, extracurricular activities, and, in one case, the quality of instruction.[33] Comparisons in graded

[29] The regional plan was set forth in a compact by the governors of eight Southern states with the purpose of providing regional graduate schools, with enrollment allowed students from any state in the compact. N. Y. Times, Feb. 8, 1948, p. 15, col. 1. The plan envisaged the use of four institutions for veterinary medicine, seven for medicine, and six for dentistry. In 1949-50, education under the plan was given 231 Negroes and 233 whites, and expenditures were $1,736,000. Survey, Sept., 1949, p. 476. See Note, 1 VAND. L. REV. 403 (1948) for the compact of the Southern states and a discussion of its relationship to the equal protection clause.

[30] McReady v. Byrd, 73 A. 2d 8 (Md. 1950), *cert. denied*, 340 U. S. 827 (1950). Maryland offered a nursing course at Meharry Medical College in Tennessee, under the regional school project, at a cost, including traveling and living expenses, equal to that in Maryland.

[31] A recent Deleware case which decided that the state Negro undergraduate college was not the equal of the white university relied chiefly upon a comparison of the physical plant, the range of courses available, and the faculty salary scales. Mentioned but not emphasized were the quality of the two administrations and the lack of distinctions and publications on the part of the Negro faculty. Parker v. Univ. of Delaware, 75 A. 2d 230 (Del. Ch. 1950).

[32] Briggs v. Elliot, 98 F. Supp. 529 (E. D. S. C. 1951), suggests the problem is different at lower school levels for three reasons. First, there is no problem of professional contacts. Second, at the graduate level, mature and less excitable persons are being dealt with. Third, children are taken from parents by compulsion, and therefore more consideration must be given to the wishes of the parent.

[33] Carter v. School Board of Arlington County, Va., 182 F. 2d 531 (4th Cir. 1950) (physical plant, range of courses, extracurricular activities); Brown v. Ramsey, 185 F. 2d 225 (8th Cir. 1950) (teacher salaries, quality of instruction); Corbin v. County School Board of Pulaski County, 177 F. 2d 924 (4th Cir. 1949) (physical plant, location of school, transportation facilities, range of courses, extra curricular activities); Brown v. Board of Education of Topeka, 98 F. Supp. 797 (D. Kan. 1951) (physical plant, location of school, range of courses); Blue v. Durham Public School District, 95 F. Supp. 441 (M. D. N. C. 1951) (physical plant, recreational facilities, extra curricular activities); State v. Board of Education, 233 S. W. 2d 698 (Mo. 1950) (range of courses).

schools have been principally based on physical facilities[34] and teacher salaries and training.[35]

Some quarters have long contended that any segregation at all in education is unconstitutional.[36] Basically, this contention takes the form that the authority supporting segregation in education is based on dicta in *Plessy v. Ferguson* and should not be controlling; and that as psychology shows harmful effects to result upon segregated children, any segregation at all is discrimination. In *Briggs v. Elliot*,[37] a case arising from South Carolina, this issue was squarely raised. The majority of the special three-judge federal court recognizes the statements on education in *Plessy v. Ferguson* as dicta, but declares that "directly in point and absolutely controlling upon us so long as it stands unreversed by the Supreme Court is *Gong Lum v. Rice* [which] cannot be distinguished."[38] The court quotes from the *Gong Lum* decision:[39] "The question [of segregation] has been many times decided to be within the constitutional power of the state legislature to settle. The decision is within the discretion of the state in regulating its public schools, and does not conflict with the Fourteenth Amendment." Final decision in the *Briggs* case,[40] plus future litigation, will disclose whether the Supreme Court is to maintain the "separate but equal" doctrine in the field of education, abandon it completely, or continue to cut away at its substance by further limitations as in *Sweatt v. Painter*.

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[34] Carr v. Corning, 182 F. 2d 14 (D. C. Cir. 1950); Brown v. Board of Education of Topeka, 98 F. Supp. 797 (D. C. Kan. 1951); Freeman v. County School Board, 82 F. Supp. 167 (E. D. Va. 1948).

[35] Brown v. Board of Education of Topeka, 98 F. Supp. 797 (D. Kan. 1951); Freeman v. County School Board, 82 F. Supp. 167 (E. D. Va. 1948).

[36] See *amicus curiae* brief for the Committee of Law Teachers against Segregation in Legal Education, filed in Sweatt v. Painter, 339 U. S. 629 (1950), reprinted in 34 MINN. L. REV. 289 (1950); Waite, *The Negro in the Supreme Court*, 30 MINN. L. REV. 219 (1946); Note, 56 YALE L. J. 1059 (1947). *Plessy v. Ferguson* itself contained a vigorous dissent by Justice Harlan on the grounds that the purpose and intent of the Fourteenth Amendment was to invalidate segregation laws and that classification by race was unreasonable. Plessy v. Ferguson, 163 U. S. 537, 552 (1896); Note, 49 COL. L. REV. 629 (1949). These views were reiterated in a dissenting opinion in Briggs v. Elliot, 98 F. Supp. 529, 538 (E. D. S. C. 1951) by Waring, J.

[37] 98 F. Supp. 529 (E. D. S. C. 1951).

[38] Briggs v. Elliot, 98 F. Supp. 529, 532 (E. D. S. C. 1951). "A decision which the Supreme court has not seen fit to overrule and which it expressly refrained from re-examining, although urged to do so in the very recent case of *Sweatt v. Painter*, may not be disregarded." Boyer v. Garrett, 183 F. 2d 582 (4th Cir. 1950).

[39] Gong Lum v. Rice, 275 U. S. 78, 87 (1927).

[40] The Supreme Court on appeal has ordered that the case be remanded to the District Court for further action upon the progress report which had been required of the school officials. The Court said it would like to have the "benefit of the views of the District Court" on the report before making final decision. Raleigh News and Observer, Jan. 29, 1952, p. 1, col. 4. Appeal has also been filed to test the constitutionality of the Kansas educational segregation statute involved in Brown v. Board of Education of Topeka, 98 F. Supp. 797 (D. Kan. 1951), 20 *Law Week* 3136 (1951).

Deeds—Priority of Description—Practical Location

In the recent North Carolina case of *Brown v. Hodges*,[1] plaintiff and defendant were adjoining landowners, deriving their respective titles from a common source. A dispute arose as to the boundary line between them.[2] The pertinent call in the deed under which defendant claims was, "thence . . . west with the highway 50 poles to a stake at the highway." The pertinent call in plaintiff's deed was the reverse of this call, but identical with it. Plaintiff alleged that the true line ran with the original *survey* of the highway, and not with the *highway* as it existed at the time of the execution of the deeds, and as it now exists. He was permitted to show by parol evidence, over defendant's objection, that a surveyor for plaintiff's predecessors in title had found "stakes for a road" along the line as contended for by plaintiff. There was no evidence that this surveyor marked the line or marked a corner at the end of the line as run by him. No road was ever constructed on the site of the original survey.

At trial defendant requested peremptory instruction in his favor; the request was denied, and verdict was rendered for plaintiff. On appeal the court held that the trial court erred in admitting parol testimony tending to vary the calls in the deeds, and granted a new trial.

The volume of litigation involving questions relative to boundaries of land has resulted in some well established principles as to priority of descriptions in deeds.

Practical location by the parties.[3] When it can be proved that the parties grantor and grantee went upon the land and made a physical survey thereof, giving it a boundary that was actually run and marked, and a corner made,[4] the party claiming under the deed shall hold accordingly, notwithstanding a variant description on the face of the instrument.[5] The act of practical location, however, does not, *ipso facto*, admit parol testimony. It must be shown that the boundary monuments were erected prior to, or contemporaneously with, the execution of the deed, before such evidence is admissible.[6] A definite minority of juris-

[1] 232 N. C. 537, 61 S. E. 2d 603 (1950), rehearing denied, 233 N. C. 617, 65 S. E. 2d 144 (1951). The case was heard on a prior occasion and reported in 230 N. C. 746, 55 S. E. 2d 498 (1949).

[2] Title to the respective tracts was not in dispute.

[3] "Practical location" as here treated involves grantor and grantee. For discussion of "practical location," *i.e.*, settlement of boundary dispute between adjoining land owners by location and acquiescence, see Comment, 21 YALE L. J. 509 (1912).

[4] Brown v. Hodges, 233 N. C. 617, 65 S. E. 2d 144 (1951) (Giving to a line a permanent location and to a corner a permanent position).

[5] The practical location rule in North Carolina is treated as an exception to the general rule that monuments mentioned in a deed are to be accorded first preference. Yopp v. Aman, 212 N. C. 479, 193 S. E. 822 (1937); Dudley v. Jeffress, 178 N. C. 111, 100 S. E. 253 (1919); Clarke v. Aldridge, 162 N. C. 326, 78 S. E. 216 (1913); Cherry v. Slade, 7 N. C. 82 (1819).

[6] Yopp v. Aman, 212 N. C. 479, 193 S. E. 822 (1937); Watford v. Pierce, 188

dictions give effect to monuments designated *after* execution of the deed.[7]

It is a patent violation of the parol evidence rule to allow oral testimony of practical location to contradict and control the written description in a deed. The North Carolina court has recognized it as such, and has on occasion lamented the fact as leading to fraud and to insecurity of titles;[8] its application continues, nevertheless.

Monuments. Calls in a deed for monuments, natural[9] or artificial,[10] control calls for course and distance, and the lines terminate at the former, regardless of the distance specified.[11] The rationale for this is that for any number of reasons course and distance may be incorrect, but monuments, being objects of immutability, are more likely to conform to grantor's intention. A *stake* has never been accorded the dignity of a monument in North Carolina, and consequently, for purposes of practical location, has never been the basis for varying the construction of a written deed.[12] Justice Hall, concurring in *Reed v. Shenck,*[13] speaking of stakes, said, "they bespeak more of locality, to be sure, than floating feathers on the water, but they are as unfit to be boundaries of

N. C. 430, 124 S. E. 838 (1924); Ritter Lumber Co. v. Montvale Lumber Co., 169 N. C. 80, 85 S. E. 438 (1915); Clarke v. Aldridge, 162 N. C. 326, 78 S. E. 216 (1913); Higdon v. Rice, 119 N. C. 623, 26 S. E. 256 (1896); Reed v. Shenck, 13 N. C. 415 (1830); Bradford v. Hill, 2 N. C. 22 (1793).

[7] Bemis v. Bradley, 126 Me. 462, 139 Atl. 593 (1927); In Manchester v. Hodge, 74 N. H. 468, 69 Atl. 527 (1908), the court followed the minority view, but intimated it believed the monument had been erected prior to the execution of the deed.

[8] "But it must be confessed, however much to be lamented, that our courts have permitted parol evidence to contradict a deed. . . ." Slade v. Green, 9 N. C. 218, 224 (1822); Potter v. Bonner, 174 N. C. 20, 93 S. E. 370 (1917); Allison v. Kenion, 163 N. C. 582, 79 S. E. 1110 (1913).

[9] The following, but not by way of limitation, have been held to be natural monuments: Byrd v. Spruce Co., 170 N. C. 429, 87 S. E. 241 (1915) (creek); Lumber Co. v. Bernhardt, 162 N. C. 460, 78 S. E. 485 (1913) (established line of adjacent tract); Plemmons v. Cutshell, 234 N. C. 506, —— S. E. 2d —— (1951) (same); Sherrod v. Battle, 154 N. C. 345, 70 S. E. 834 (1911) (ditch, drain and water course); McNeely v. Laxton, 149 N. C. 327, 63 S. E. 278 (1908) (tree); Clark v. Moore, 126 N. C. 1, 35 S. E. 125 (1900) (fort entrenchment and marl pit); Clarke v. Wagner, 76 N. C. 463 (1877) (island); Literary Fund v. Clark, 31 N. C. 58 (1848) (lake and mountains); Hough v. Horne, 20 N. C. 369 (1839) (highway); Reed v. Shenck, 13 N. C. 415 (1830) (rocks); Pollock v. Harris, 2 N. C. 252 (1796) (marsh, pocosin and swamp); Sandifer v. Foster, 2 N. C. 237 (1795) (river).

[10] Reed v. Shenck, 14 N. C. 65 (1831) (Some permanent monument, which will endure for years, placed by the hand of man).

[11] Tice v. Winchester, 225 N. C. 673, 36 S. E. 2d 257 (1945); Nelson v. Lineker, 172 N. C. 279, 90 S. E. 251 (1916); Cherry v. Slade, 7 N. C. 82 (1819); *accord,* Schultz v. Maxey, 307 Ky. 325, 210 S. W. 2d 950 (1948); TIFFANY, THE MODERN LAW OF REAL PROPERTY, §673 (1940). *But cf.* White v. Luning, 93 U. S. 514 (1876), for "absurdity theory," holding that monuments may yield to course and distance if to follow the former would defeat the conveyance, whereby adherence to the latter would effectuate all other parts of the description.

[12] Tice v. Winchester, 225 N. C. 673, 36 S. E. 2d 257 (1945); Tate v. Johnson, 148 N. C. 267, 61 S. E. 741 (1908); Clark v. Moore, 126 N. C. 1, 35 S. E. 125 (1900); Reed v. Shenck, 14 N. C. 65 (1831).

[13] 14 N. C. 65, 75 (1831).

land." A few states, however, with regard to the sufficiency of a stake for such purposes, have held otherwise.[14]

Course and distance. Where there has been no practical location by the parties to the instrument, or no monuments are called for in the deed nor can be ascertained by evidence, then course and distance will prevail over less certain descriptive elements.[15] Between the two, course is given priority.[16]

Area. The courts are almost unanimous in holding that area or quantity as an element of description could be significant, but they likewise infer that the possibility is a remote one since area or contents called for is usually only an approximation.[17] Consequently, for all practical purposes, area is virtually disregarded.

In the principal case, then, it is readily apparent that the North Carolina court reached a decision in accord, not only with prior rulings in this jurisdiction, but with the decided weight of authority. Plaintiff's argument, based on the application of the practical location rule, failed when the court declared that *stakes* were not such monuments as to satisfy the requisites of practical location, and therefore oral evidence as to their erection was inadmissible. Defendant's contention, on the other hand, that the highway as it existed at the time the deeds were executed was the true boundary, found support in the fact that the highway, *i.e.,* monument, was called for in the deeds. No call for the "survey of the highway," as contended for by plaintiff, was mentioned.

In light of the fact that application of the practical location doctrine violates the parol evidence rule, it is well that the North Carolina Supreme Court did not permit further laxity in its scope.

HAL W. BROADFOOT.

Evidence—Automobiles—Identification of Driver

In ruling on a motion for judgment of non suit in a criminal case,[1]

[14] Winbourne v. Russell, 50 So. 2d 721 (Ala. 1951) (iron stakes recognized by the parties for 20 years); Arnold v. Hanson, 91 Cal. App. 2d 15, 204 P. 2d 97 (1949) (wood stakes driven by surveyor replaced with iron ones by subdivider); Dean v. Thompson, 213 S. W. 2d 327 (Tex. Civ. App. 1948).

[15] Tice v. Winchester, 225 N. C. 673, 36 S. E. 2d 257 (1945); Cherry v. Slade, 7 N. C. 82 (1819); *accord,* Wagers v. Wagers, 238 S. W. 2d 125 (Ky. 1951); TIFFANY, *op. cit. supra* note 11, §673.

[16] Tice v. Winchester, 225 N. C. 673, 36 S. E. 2d 257 (1945); *accord,* Forest Preserve District v. Lehmann Estate, 388 Ill. 416, 58 N. E. 2d 538 (1944). See TIFFANY, *op. cit. supra* note 11, §673, where it is stated that between course and distance there is no preference, citing Hall v. Eaton, 139 Mass. 217, 29 N. E. 660 (1885).

[17] Tice v. Winchester, 225 N. C. 673, 36 S. E. 2d 257 (1945); *accord,* Hollars v. Stephenson, 99 N. E. 2d 258 (Ind. 1951); Askins v. Oil Producing Co., 201 Okla. 209, 203 P. 2d 877 (1949); Parrow v. Proulx, 111 Vt. 274, 15 A. 2d 835 (1940); TIFFANY, *op. cit. supra* note 11, §673.

[1] N. C. GEN. STAT. §15-173 (Supp. 1951) provides for criminal law non suit and serves the same purpose in criminal prosecutions as is accomplished by N. C. GEN. STAT. §1-183 (Supp. 1951) in civil actions. State v. Ormond, 211 N. C. 437,

the court considers only incriminating evidence[2] and the state is entitled to the most favorable interpretation of the circumstances and of all inferences that may fairly be drawn therefrom.[3] The court does not pass upon weight or credibility,[4] but merely determines if there is "more than a scintilla of evidence" to sustain the allegations of the bill of indictment.[5] Evidence which raises a mere conjecture or suspicion of guilt, or a mere possibility of the existence of an essential element of the offense is not sufficient to be submitted to the jury.[6]

In a recent prosecution for reckless driving[7] the officers identified a speeding automobile as belonging to the defendant,[8] but were unable to overtake it, or to identify the driver. Later the defendant stated that he was the only driver of his car on the night in question, but at the same time denied having been at the place in question. On this evidence, defendant's motion for non suit was denied. The North Carolina Supreme Court reversed, holding that the evidence was insufficient to identify defendant as the driver of the vehicle.

Identification of defendant's vehicle is often used to corroborate physical identification of the defendant as the perpetrator of a crime.[9]

191 S. E. 22 (1937); State v. Fulcher, 184 N. C. 663, 113 S. E. 769 (1922). See Note, 23 N. C. L. REV. 223 (1945).

[2] State v. Moses, 207 N. C. 139, 176 S. E. 276 (1934); State v. Martin, 182 N. C. 846, 109 S. E. 74 (1921). The rule is often expressed that the court is not confined to evidence offered by the State but can consider all the evidence before the court. State v. Norton, 222 N. C. 418, 23 S. E. 2d 301 (1942); State v. Killian, 173 N. C. 792, 92 S. E. 499 (1917).

[3] State v. Hendrick, 232 N. C. 447, 61 S. E. 2d 349 (1950); State v. Mann, 219 N. C. 213, 13 S. E. 2d 541 (1941); State v. Rountree, 181 N. C. 535, 106 S. E. 669 (1921).

[4] State v. Hammond, 216 N. C. 67, 3 S. E. 2d 439 (1939); State v. Cooke, 176 N. C. 731, 97 S. E. 171 (1918). Deciding the weight and credibility of the evidence is the province of the jury, and when reasonable inferences may be drawn from the circumstances in evidence pointing to the defendant's guilt, it is a matter for the jury to decide whether the facts taken singly or in combination produce in their minds the requisite moral conviction beyond a reasonable doubt. State v. Ewing, 227 N. C. 535, 42 S. E. 2d 676 (1947); State v. Lawrence, 196 N. C. 562, 146 S. E. 335 (1929) (excellent summary of the North Carolina law of nonsuit).

[5] State v. Weinstein, 224 N. C. 645, 31 S. E. 2d 920 (1944); State v. Shermer, 216 N. C. 719, 6 S. E. 2d 529 (1940); State v. Landin, 209 N. C. 20, 182 S. E. 689 (1935).

[6] State v. Webb, 233 N. C. 382, 64 S. E. 2d 268 (1951); State v. Prince, 182 N. C. 788, 108 S. E. 330 (1921); State v. Vinson, 63 N. C. 335 (1869).

[7] State v. Lloyd, 233 N. C. 227, 63 S. E. 2d 151 (1951).

[8] Identification was based upon color and equipment; spotlights, mirror, venetian blinds on back window, and tires.

[9] State v. Bovender, 233 N. C. 683, 65 S. E. 2d 323 (1951) (microscopic and spectrographic examination of paint particles from defendant's vehicle as circumstantial evidence); State v. Merritt, 231 N. C. 59, 55 S. E. 2d 804 (1949) (identity of defendant's abandoned vehicle used to corroborate physical identification); State v. Fogleman, 204 N. C. 401, 168 S. E. 536 (1933) (defendant's automobile resembled car stopped at deceased's store on the evening of the homicide); State v. Leonard, 195 N. C. 242, 141 S. E. 736 (1928) (automobile like one involved in collision passed witness at high speed; circumstantial evidence of identity in manslaughter case). *Cf.* State v. Cain, 175 N. C. 825, 95 S. E. 930 (1918) (presence of man on a mule similar to one owned by defendant used to substantiate physical identification).

But identification of the defendant's automobile by license plate or by physical appearance alone is not sufficient in North Carolina to identify the owner of the vehicle as the driver at the time the offense was committed.[10] Some states, by statute, have made identification of the license plate prima facie evidence in certain types of criminal cases that the owner of the vehicle is the driver. However provisions are made for rebutting this presumption.[11] North Carolina has a similar statute, but its application is limited to restricted types of civil suits and has no application in criminal actions.[12]

Where defendant's vehicle is identified by license or by physical appearance at the scene of the offense, and shortly thereafter the car is found nearby and the defendant is found near the car,[13] or is seen leaving the car,[14] this is sufficient to identify the defendant as the driver of the vehicle at the place in question. This is true even though there was no personal identification of the defendant at the scene of the offense. Also where defendant's vehicle is identified at the scene and his footprints are found there,[15] or where the defendant is seen driving

[10] Although such evidence would be sufficient to establish that the crime was committed by whoever was in defendant's vehicle, there is nothing to link defendant to the automobile at the time and place of the offense. State v. Simms, 208 N. C. 459, 181 S. E. 269 (1935), And it is fundamental that in a criminal case the state must prove, not only that the crime was committed, but also that it was done by the person or persons charged. State v. Norggins, 215 N. C. 220, 1 S. E. 2d 88 (1939).

[11] PA. STAT. ANN. tit. 75, §739 (Supp. 1950) "in any proceeding for a violation of the provisions of this act [Vehicle Code], or any local ordinance, rule or regulation, the registration plate displayed on such vehicle shall be prima facie evidence that the owner of such vehicle was operating the same. If at any hearing or proceeding, the owner shall testify under oath that he was not operating the said vehicle at the time of the alleged violation and shall submit himself to an examination as to who at that time was operating such vehicle, and reveal the name if known to him, then the prima facie evidence arising from the registration plate shall be overcome and the burden of the proof shifted." Also, CONN. GEN. STAT. §2542 (1949) makes basically the same provision in cases of speeding, reckless driving, racing, and passing railway cars or school busses. See Notes, 33 MICH. L. REV. 1231 (1935); 33 MICH. L. REV. 443 (1935). *Cf.* Commonwealth v. Ober, 285 Mass. 310, 189 N. E. 601 (1934) (registered owner of vehicle convicted of parking in violation of ordinance although there was no evidence that the owner parked the vehicle himself).

[12] N. C. GEN. STAT. §20-71.1 (Supp. 1951) makes proof of the registration of a motor vehicle in the name of any person or firm "prima facie evidence of ownership and that such vehicle was being operated by or under control of a person for whose conduct the owner was legally responsible, for the owner's benefit, and within the course and scope of his employment. . . ." in actions "to recover damages for injury to person or property, or for the death of a person, arising out of an accident or collision involving a motor vehicle."

[13] State v. Newton, 207 N. C. 323, 177 S. E. 184 (1934).

[14] State v. Dooley, 232 N. C. 31, 59 S. E. 2d 808 (1950) (defendant left his car shouting, "scatter, scatter, I wasn't driving").

[15] State v. Young, 187 N. C. 698, 122 S. E. 667 (1924). Note that the footprints and tiretracks alone would not have been sufficient to identify defendant as the perpetrator of the crime unless it is shown that they were made at the time of the crime, and correspond respectively with the shoes worn by the accused at the time of the crime and the car driven by the accused at the time, as well as having been found at or near the place of the crime. State v. Palmer, 230 N. C. 205, 52 S. E. 2d 908 (1949) (collects principal cases on footprints and tiretracks).

near the scene and a piece of metal corresponding to that missing from his car is found at the scene[16] this has been held sufficient to link defendant to the vehicle as the driver.

Thus, the evidence of identification in the instant case seems *at least* as strong as was present in those cases. For, in addition to identification of the automobile, the defendant admitted that he was the only person driving his car on the night in question. If no one but the defendant drove the car on the night in question, then the conclusion is inescapable that he was driving it when it was observed by the officers. While it is true that defendant's admission was coupled with a denial that he was at the place in question the State can offer such distinct and severable parts of the statement as tend to establish its own position[17] and the jury may believe the whole or any part thereof.[18] Thus, in *State v. King*,[19] such an admission, coupled with a similar denial, was held to be sufficient to identify the defendant as being the driver of the automobile.

The evidence offered in the principal case seems to have been sufficient for the court to have affirmed the trial court in overruling the defendant's motion of non suit.[20]

HURSHELL H. KEENER.

Executors and Administrators—Status of Back Pay Owed Deceased Military Personnel

Title 10 of The United States Code, Section 868,[1] provides in part:

"In the settlement of the accounts of deceased officers or enlisted persons of the Army, where no demand is presented by a

[16] State v. Durham, 201 N. C. 724, 161 S. E. 398 (1931). See Note, 99 A. L. R. 799 (1935).

Merely being seen near the scene is not sufficient to identify defendant as the driver at the scene. State v. Ray, 229 N. C. 40, 47 S. E. 2d (1948) (defendant, near scene of accident, driving truck which bore scratches and paint smears).

[17] State v. Corpening, 157 N. C. 621, 73 S. E. 2d 214 (1911). But the defendant is entitled to bring out those parts which tend to discharge him as well as those which tend to charge him. State v. Watts, 224 N. C. 771, 32 S. E. 2d 348 (1944).

[18] STANSBURY, NORTH CAROLINA EVIDENCE §181 (1946).

[19] 219 N. C. 667, 14 S. E. 2d 803 (1941). Marks led from the scene of the accident to the defendant's damaged automobile. The defendant's admission that no one else had driven his car on the night in question was held sufficient to identify defendant as the driver of the vehicle, even though neither defendant nor his vehicle were seen at or near the accident.

[20] The apparent conflict between the instant case and prior decisions on this point could be reconciled by a statute creating a presumption that the owner of an automobile is the driver. Such a presumption could be created by expanding N. C. GEN. STAT. §20-71.1 (Supp. 1951), which creates such a presumption in certain types of civil actions (see note 12 *supra*), to include violations of the motor vehicle law. Such a statute undoubtedly has objectionable features (*e.g.*, shifting the burden of proof in a criminal action) which should be considered before any changes are adopted. The legislature must weigh these objections against the need for efficient law enforcement before determining the future policy of the State.

[1] 34 STAT. 1094 (1906), as amended, 10 U. S. C. §868 (1946).

duly appointed legal representative of the estate, the accounting officer may allow the amount found due to the decedent's widow, widower, or legal heirs in the following order of precedence: First, to the widow or widower; Second, etc. . . ."

In a recent federal case,[2] the plaintiff, mother of a deceased soldier to whom the Government owed arrears in pay, was the sole beneficiary under his will and was named as executrix. She had notified the General Accounting Office that as soon as she could legally qualify, she would claim the amount due the decedent; and requested that the money not be paid to anyone until she had been appointed executrix; particularly, she requested that no money be paid to the deceased's estranged wife. Nevertheless, before the mother could legally qualify as executrix, the money was paid to the widow. The plaintiff brought this suit against the Government, and the question before the court was whether the liability of the Government had been discharged under Section 868.

The court held that the mother did not, and could not, under the Iowa law occupy the status of a "duly appointed legal representative of the estate" at the time the request was made and at the time payment was made; therefore, she had no capacity to claim or receive the money owed the decedent, and the Government was discharged of liability for the debt by payment to the widow.

Although Section 868 does not mention whether or not the money paid under its provisions are a part of the estate, the court, in rejecting the plaintiff's contention that the relation back of letters testamentary or of administration should apply, said that the funds are not a part of the estate except as Congress allowed them to become such; and that the funds were allowed to be a part of the estate only if a duly appointed representative claimed the funds before they had been paid out.[3]

If the full implication of this portion of the decision were carried out, it would mean that unless the executor or administrator could legally qualify and file claim before the funds were paid out, he would have no claim against anyone for the amount allowed and could not secure these funds for the purposes of administration.

The Ohio Court of Common Pleas,[4] however, in a suit by an executrix against a widow who had received pay under the same statute, held that the pay due the decedent was contractual in its nature; that it

[2] Keown v. United States, 191 F. 2d 438 (8th Cir. 1951).

[3] "But the difficulty in the present situation with this argument is that the funds involved did not constitute a part of the decedent's estate for the purpose of administration, except as Congress had allowed them to become such, and Congress did not allow them to become a part of the decedent's estate for the purposes of administration from the fact of his death, but only from the fact that a duly appointed representative existed and had made demand before the money had been otherwise paid out." *Id.* at 441-442.

[4] Scammon v. Scammon, 90 N. E. 2d 617 (Ohio C. P. 1950).

constituted a part of the estate; and that the payment was received by the wife in trust for the estate. The court stated that this section of the code was not determinative of the right to take as between adverse claimants; and compared it to the facility of payment clauses in insurance policies.[5] This decision seems to be in harmony with the Congressional intent and purpose.[6]

A Tennessee decision[7] held that a similar debt was a contractual obligation of the Government, not a gratuity; that it was a vested right and thus was a part of the estate; and that the father of the decedent could not maintain an action against the executor of the estate for the funds received.

In both the Ohio case and the Tennessee case, the courts met the issue squarely and decided that payments made under the provisions of this statute were a part of the estate of the decedent, and as such correctly go to the executor or administrator. It has also been held that retroactive pay raises,[8] debts due decedent by an employer,[9] debts due from relatives,[10] or due on account,[11] right to unpaid minimum compensation,[12] right to reimbursement under special acts,[13] and generally, all debts, rights, and choses in action, vest as assets in the administrator, whose duty it is to collect them.[14] Thus, it seems, in spite of the statement to the contrary in the principal case, that the money due the decedent could constitute an asset of the estate.

Even though the Government's liability has been discharged, if the money received by the widow is a part of the estate, the executrix might then attempt to recover from the widow; and, as was done in the Ohio case, the court could apply the principle used in controversies arising under the facility of payment clauses of insurance policies[15] and allow the executrix to recover from the widow.[16]

Since the object of the federal statute in question is to eliminate the necessity of legal proceedings in settling accounts of deceased personnel,

[5] For the purpose of facility of payment clauses, see Rhode v. Metropolitan Life Ins. Co., 233 Mo. App. 865, 111 S. W. 2d 1006 (1937) and Uptegrove v. Metropolitan Life Ins. Co., 145 Neb. 51, 15 N. W. 2d 220 (1944). See also cases gathered in Note 166 A. L. R. 15 (1947).

[6] U. S. CODE CONGRESSIONAL SERVICE p. 1323 (1944).

[7] Campbell v. Oliphant, 185 Tenn. 415, 206 S. W. 2d 406 (1947).

[8] Joslyn v. Joslyn, 117 Mich. 442, 75 N. W. 930 (1898).

[9] Hawkins v. McCalla, 95 Ga. 192, 22 S. E. 141 (1894).

[10] Penland v. Wells, 201 N. C. 173, 199 S. E. 423 (1931).

[11] Mayo v. Dawson, 160 N. C. 76, 76 S. E. 241 (1912).

[12] Fletcher v. Grinnel Bros., 64 F. Supp. 778 (E. D. Mich. 1943).

[13] Briggs v. Walker, 171 U. S. 466 (1898).

[14] Howe v. Mohl, 168 Kan. 445, 214 P. 2d 298 (1950); Sullivan v. Doyle, 67 A. 2d 246 (Md. 1949).

[15] Lutostanski v. Lutostanski, 120 Conn. 471, 181 Atl. 533 (1935); Smith v. Massie, Inc., 93 Ind. App. 582, 179 N. E. 20 (1931). *Contra, In re* Pierug's Estate, 196 Misc. 1062, 94 N. Y. S. 2d 66 (1950).

[16] See cases collected in Note, 75 A. L. R. 1435 (1931) for rights of adverse claimants of proceeds of policies paid under facility of payment clause.

and thus relieve their families from added expense and trouble, it seems that some modification of this statute is to be desired. Such a modification should probably be in the nature of a prohibition against paying such disputed claims before the legal representative can qualify and claim the funds, particularly when the Government has notice of the dispute.

BERNARD CROWELL.

FELA Suits in Inconvenient State Courts—the Mayfield Case

The venue section of the Federal Employers' Liability Act[1] gives a plaintiff a wide choice in the selection of a forum,[2] but this privilege has been abused[3] to the extent that a huge interstate commerce in actions brought under the FELA has developed through the efforts of certain law firms in several metropolitan centers.[4]

Since 1910[5] the FELA has expressly provided that a suit may be brought in a state court, or in a United States district court, (1) in the district of the residence of the defendant, or (2) in the district where the cause of action arose, or (3) in any district in which the defendant shall be doing business at the time.[6]

Efforts by some railroads to avoid being sued in forums inconvenient to them, by the use of injunctions, were unsuccessful. The United States Supreme Court, in *Baltimore & Ohio R. R. v. Kepner,*[7] held that a state court could not restrain a resident from continuing the prosecution of a suit under the FELA in a distant *federal district court,* or interfere with the privileges of federal venue.[8] The following year,

[1] 35 STAT. 65 (1908), as amended, 45 U. S. C. §§51-59 (1946).
[2] 35 STAT. 66 (1908), as amended, 45 U. S. C. §56 (1946).
[3] "The open door may admit those who seek not simply justice but perhaps justice blended with some harassment. A plaintiff sometimes is under temptation to resort to a strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself." Gulf Oil Corp. v. Gilbert, 330 U. S. 501, 507 (1947).
[4] Winters, *Interstate Commerce in Damage Suits,* 29 JOUR. AM. JUD. SOC. 135 (1946). The chief centers are New York, Chicago, Baltimore, St. Louis, Minneapolis and Los Angeles. Many of these cases are brought from great distances, some from California to Chicago. See Winters *supra* at 137, and Note, 25 N. C. L. REV. 379 (1947).
[5] The original FELA, adopted in 1908, made no provision for venue. Following Mondou v. New York, N. H. & H. R. R., 82 Conn. 373, 73 Atl. 762 (1909), holding that courts of Connecticut did not have jurisdiction to entertain an action based on the FELA, Congress amended the Act in 1910 to provide that "the jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several states. . . ." 36 STAT. 291, as amended, 45 U. S. C. §56 (1946). The United States Supreme Court later commented that "the amendment, as appears by its language, instead of granting jurisdiction to the state courts, presupposes that they already possessed it." Mondou v. New York, N. H. & H. R. R., 223 U. S. 1, 56 (1912).
[6] See note 2 *supra.*
[7] 314 U. S. 44 (1941).
[8] The injunction could not be used "for the benefit of the carrier or the national transportation system, on the ground of cost, inconvenience or harassment." Balti-

the same court, in *Miles v. Illinois Cent. R. R.*,[9] held that a state court could not restrain the prosecution of an action under the FELA in *another state court* on account of inconvenience or harassment to the defendant.[10]

In 1948, Congress, with knowledge of the *Kepner* and *Miles* decisions, enacted section 1404(a) of the Judicial Code.[11] This section provides that "for the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought," which in effect gives the federal courts the power to use the doctrine of *forum non conveniens*.[12] In 1949, the United States Supreme Court held that section 1404(a) not only applied to the general venue provisions applicable to the federal courts, but also the *special* venue provisions of the FELA.[13]

This development in the federal courts caused plaintiffs to resort to the state courts—inasmuch as these courts were not subject to the provisions of section 1404(a) of the Judicial Code. Attempts made by railroads to apply the doctrine of *forum non conveniens* to these suits in state courts have had some interesting consequences.

The case of *Missouri* ex rel. *Southern Ry. v. Mayfield*[14] was an original proceeding in mandamus to compel a trial judge in Missouri to use his discretion in passing on a motion, grounded solely on *forum non*

more & Ohio R. R. v. Kepner, 314 U. S. 44, 54 (1941). Inequity based on cost, inconvenience or harassment is the argument most often presented in favor of granting dismissal under the doctrine of *forum non coveniens*.

[9] 315 U. S. 698 (1942).

[10] However, it had been held in Cole v. Cunningham, 133 U. S. 107 (1890), that the right of a state court to prevent unjust resort to the courts of another state was well established. The decision in the *Miles* case seems to be limited to the situation where a federal right is sought to be litigated in the other state court, insasmuch as ". . . the Federal Constitution makes the laws of the United States the supreme law of the land, binding on every citizen and every court and enforceable wherever jurisdiction is adequate for the purpose . . . We are considering another state's power to so control its own citizens that they cannot exercise the federal privilege of litigating a federal right in the court of another state." Miles v. Illinois Cent. R. R., 315 U. S. 698, 703, 704 (1942).

[11] 62 STAT. 937 (1948), 28 U. S. C. A. §1404(a) (1950). Note, 29 N. C. L. REV. 61 (1950) (concerned chiefly with the interpretation to be given section 1404(a)).

[12] The doctrine of *forum non conveniens* "deals with the discretionary power of a court to decline to exercise a possessed jurisdiction whenever it appears that the cause before it may be more appropriately tried elsewhere." Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COL. L. REV. 1 (1929). See Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380 (1947).

[13] *Ex parte* Collett, 337 U. S. 55 (1949). Section 1404(a) was also held to apply to the special venue provisions in the Sherman Anti-Trust Law, 26 STAT. 209 (1890), as amended, 15 U. S. C. §§4, 5 (1946). United States v. National City Lines, 337 U. S. 78 (1949). Justices Black and Douglas dissented in this case and in *Ex parte* Collett, *supra*, on the ground that Congress has not made it sufficiently clear that "any civil action" as used in section 1404(a) extended to special venue statutes not found in the Judicial Code, Title 28, U. S. C.

[14] 359 Mo. 827, 224 S. W. 2d 105 (1949).

conveniens, to dismiss an action brought by a non-resident under the FELA.[15] The Missouri Supreme Court held that the judge could not in the exercise of discretion grant a dismissal. The case involved one accident which occurred in Tennessee, 700 miles distant from the forum, and another which occurred in Oklahoma, 647 miles distant.[16] This decision seems to be grounded on two principles: (1) That "under the *Kepner* and *Miles* cases, a state court cannot dismiss a Federal Employers' Liability case solely under the *forum non conveniens* doctrine,"[17] and (2) that a dismissal would violate the Privileges and Immunities Clause of the United States Constitution.[18] Upon certiorari, the United States Supreme Court reversed this decision,[19] saying that "if the Supreme Court of Missouri held as it did because it felt under compulsion of federal law as enunciated by this Court[20] so to hold, it should be relieved of that compulsion. It should be freed to decide the availability of the principle of *forum non conveniens* in these suits *according to its own local law.*"[21] [Italics added.]

The United States Supreme Court further stated in the *Mayfield* case[22] that a state court decision to the effect that the doctrine of *forum non conveniens* cannot bar an action brought under the FELA, might be based on one of three possible theories: (1) That according to its own notions of procedural policy, the doctrine is not part of its law (where no federal issue is involved), or (2) that by reason of the Privileges and Immunities Clause, a state may not discriminate against citizens of sister states, or (3) that previously announced federal law compelled such a decision (which compulsion the court held not to exist).

In relation to theory (2), the Court stated:

> "Therefore Missouri cannot allow suits by non-resident Missourians for liability under the Federal Employers' Liability Act arising out of conduct outside that state and *discriminatorily deny access* to its courts to a non-resident who is a citizen of another state."[23] [Italics added.]

[15] Undoubtedly, the only thing the railroad had to gain in *compelling* the use of discretion in passing on the motion to dismiss on the theory of *forum non conveniens* was the bare chance that the court would have decided that the motion should have been granted due to the hardship on the defendant in defending in that forum.

[16] State *ex rel.* Atchison, T. & S. F. Ry. v. Murphy, 359 Mo. 827, 224 S. W. 2d 105 (1949), was a case on precisely the same question and was consolidated with the *Mayfield* case.

[17] *Id.* at 837, 224 S. W. 2d at 107.

[18] "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." U. S. CONST. ART. IV, §2.

[19] Missouri *ex rel.* Southern Ry. v. Mayfield, 340 U. S. 1 (1950).

[20] The Court here was referring to the *Kepner* and *Miles* decisions. Justice Jackson in a concurring opinion, *Id.* at 5, stated: "The Missouri Court appears to have acted under the supposed compulsion of Miles v. Illinois Cent. R. R., 315 U. S. 698. . . ."

[21] Missouri *ex rel.* Southern Ry. v. Mayfield, 340 U. S. 1, 5 (1950).

[22] See note 20 *supra.*

[23] Missouri *ex rel.* Southern Ry. v. Mayfield, 340 U. S. 1, 5 (1950). There is

This raises an important constitutional question. The Court has held that the Privileges and Immunities Clause secures to citizens of one state the right to resort to the courts of another state.[24] Although this guarantee has certain qualifications, the Clause does not require a state to supply its courts with such jurisdiction that citizens of other states may litigate certain classes of cases, unless it affords jurisdiction to the same classes of cases brought by its own citizens,[25] even when rights under the Constitution are sought to be adjudged. The Clause only "requires a state to accord to citizens of other states substantially the same right of access to its courts as it accords to its own citizens."[26] The right to resort to the courts of another state is conditioned upon that court's jurisdiction as determined by local law[27] and its own notions of procedural rules.[28] One of these rules is the doctrine of *forum non conveniens*,[29] but like other procedural rules, it must apply alike to citizens of the state as well as to citizens of sister states.[30]

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some feeling that Justice Frankfurter here might have been thinking of the *availability of the courts* rather than the availability of *forum non conveniens*, since the Privileges and Immunities Clause could not prevent the use of *forum non conveniens* except in a situation where the state had a policy of applying the doctrine to one class of citizens and not to another.

[24] Missouri Pac. R. R. v. Clarendon Boat Oar Co., 257 U. S. 533 (1922). "The right of a citizen of one state to pass through, or to reside in any other state, for the purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of habeas corpus; to institute actions of any kind in the courts of the state; . . . may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental. . . ." Corfield v. Coryell, 6 Fed. Cas. 546, 552, No. 3, 230 (E. D. Pa. 1823). Under a state statute which provided that a foreign corporation could be sued by a non-resident in the state courts only when the foreign corporation was doing business in that state, no violation of the Privileges and Immunities Clause occurred since the discrimination was made on the basis of residence and not citizenship. Douglas v. New York, N. H. & H. R. R., 279 U. S. 377 (1929). A statute which prohibited the bringing of an action for wrongful death in the state unless the deceased was a citizen of that state was held valid, because the discrimination was not based on the citizenship of the person bringing the suit. Chambers v. Baltimore & Ohio R. R., 207 U. S. 142 (1907).

[25] Anglo-American Provision Co. v. Davis Provision Co., 191 U. S. 373 (1903).

[26] McKnett v. St. Louis & S. F. R. R., 292 U. S. 230, 233 (1934).

[27] "But, subject to the restrictions of the Federal Constitution, the state may determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them. The State policy decides whether and to what extent the state will entertain in its courts transitory actions, where the causes of action have arisen in other jurisdictions." Chambers v. Baltimore & Ohio R. R., 207 U. S. 142, 148 (1907).

[28] "It [venue section of the FELA] does not preclude any procedural requirement of the forum which plaintiff selects for the trial of the case. Plaintiff's attempt to stretch the decisions to preclude the power to enforce local rules, or local methods of procedure, or any of the usual practice regulations, other than those relating to venue, seems contrary to the very terms of the section itself. . . ." Grant v. Pennsylvania R. R., 8 F. R. D. 40, 41 (1948).

[29] Koster v. (American) Lumbermen's Mut. Cas. Co., 330 U. S. 518 (1947); Williams v. Green Bay & W. R. R., 326 U. S. 549 (1946).

[30] "But any policy the state may choose to adopt must operate in the same way on its own citizens and those of other states. The privileges which it affords to one class it must afford to the other." Chambers v. Baltimore & Ohio R. R., 207 U. S. 142, 148 (1907).

Since the decisions in the *Kepner* and *Miles* cases have been clarified by the *Mayfield* decision,[31] there seems to be nothing in the FELA to compel state courts to entertain cases brought under it, and this has been frequently stated.[32] It follows that an action brought in a state court under the FELA would be subject to the doctrine of *forum non conveniens,* if the state court permitted the doctrine to be used when an action under the FELA is brought by a citizen of the forum. Conversely, if the forum did not allow the doctrine in FELA suits by its own citizens, a policy allowing it when the action is by a non-resident citizen[33] of a sister state would violate the Privileges and Immunities Clause.[34] Thus, if state *A* does not allow the doctrine to be used by defendant *X,* citizen of state *Y,* when *X* is sued by citizens of state *A,* then to allow the doctrine to be used by *X* when sued by citizens of state *B* would result in unconstitutional discrimination against citizens of state *B.*

Faced with the mandate of the United States Supreme Court, the Missouri Supreme Court, dealing with the case for the second time,[35] merely reiterated that since it was the policy of that state to allow citizens of Missouri (resident and non-resident) to bring and maintain suits under the FELA in Missouri courts, that to bar citizens of other states from doing likewise would violate the Privileges and Immunities Clause. This leaves something to be desired, in that it seems to contemplate mere jurisdiction, for the court nowhere said that it had a policy rejecting *forum non conveniens* in FELA suits brought by its own citizens. Before a motion to dismiss based on the doctrine can be enter-

[31] "But neither of these cases limited the power of a State to deny access to its courts to persons seeking recovery under the Federal Employers' Liability Act if in similar cases the State for reasons of local policy denies resort to its courts and enforces its policy impartially . . . so as not to involve a discrimination against Employers' Liability Act suits and not to offend against the Privileges-and-Immunities Clause of the Constitution. No such restriction is imposed upon the States merely because the Employers' Liability Act empowers their courts to entertain suits arising under it." 340 U. S. 1, 4 (1950).

[32] Mondou v. New York, N. H. & H. R. R., 223 U. S. 1, 56 (1912). "As to the grant of jurisdiction in the Employers' Liability Act, that statute does not purport to require State courts to entertain suits arising under it but only to empower them to do so, so far as the authority of the United States is concerned . . . but there is nothing in the Act of Congress that purports to force a duty upon such Courts as against an otherwise valid excuse." Douglas v. New York, N. H. & H. R. R., 279 U. S. 377, 387 (1929). See Herb v. Pitcairn, 324 U. S. 117, 120 (1945).

[33] It seems that few, if any, situations would arise where a court would dismiss an action brought by a *resident* citizen of a sister state, since in that situation, it would be imposing an obvious hardship on the plaintiff to force him to bring his action in a court outside the state of his residence.

[34] If the discrimination is based on the residence of the litigant rather than on his citizenship, the discrimination is valid under the Privileges and Immunities Clause. "But if a state chooses to (prefer) residents in access to often overcrowded courts and to deny such access to all non-residents, whether its own citizens or those of other States, it is a choice within its own control." Missouri *ex rel.* Southern Ry. v. Mayfield, 340 U. S. 1, 4 (1950).

[35] State *ex rel.* Southern Ry. v. Mayfield, 240 S. W. 2d 106 (Mo. 1951), *certiorari denied,* 72 S. Ct. 107 (U. S. 1951).

tained, the court must have jurisdiction,[36] and then consideration of the motion is in the discretion of the court. Since Missouri accepts *jurisdiction,* in order to discriminatorily deny access to its courts to citizens of sister states, it would have to formulate a policy whereby the doctrine of *forum non conveniens* was available to defendants sued by citizens of sister states, but not to defendants sued by citizens of Missouri. The only Missouri case cited by the Missouri court[37] in the last decision to substantiate its position was a case dealing with the *jurisdiction* of the court and not the availability of *forum non conveniens.* However, there is some indication that this doctrine is not part of the law of Missouri, for in at least one previous case[38] involving a motion to dismiss an FELA suit, on the ground that the cause of action arose in the state of Illinois, that all parties were residents and citizens of Illinois, and that the plaintiff could have brought his suit in Illinois, the court held that the interpretation given its statutes did not give it discretion to decline jurisdiction.

New York and Utah have held that an action brought under the FELA may be dismissed without the benefit of a controlling statute.[39] Illinois and Ohio have held that because of certain venue statutes, an FELA suit may not be maintained there as a matter of right;[40] while Missouri and California have held that their courts are not invested with the discretion to deny jurisdiction when the action is brought in the inconvenient forum.[41] Florida, Louisiana, Massachusetts, New Hampshire and New Jersey have indicated that their courts have the discretion to deny jurisdiction of a transitory cause of action between two non-residents.[42] Other jurisdictions have either failed to decide the

[36] "Indeed, the doctrine of *forum non conveniens* can never apply if there is an absence of jurisdiction or mistake of venue." Gulf Oil Corp. v. Gilbert, 330 U. S. 501, 504 (1947).

[37] State *ex rel.* Pacific Mutual Life Ins. Co. v. Grimm, 239 Mo. 135, 143 S. W. 483 (1911).

[38] Bright v. Wheelock, 323 Mo. 840, 20 S. W. 2d 684 (1929).

[39] *New York.* Murnan v. Wabash Ry., 246 N. Y. 244, 158 N. E. 508 (1927); *Utah.* Mooney v. Denver & R. G. W. R. R., 221 P. 2d 628 (Utah 1950) (motion for dismissal denied on other grounds).

[40] *Illinois.* Walton v. Pryor, 276 Ill. 563, 115 N. E. 2 (1917) (wrongful death action under FELA, statute prohibited wrongful death action for death occurring in another state). *Ohio.* Loftus v. Pennsylvania R. R., 107 Ohio St. 352, 140 N. E. 94 (1923) (state statute excluded from jurisdiction of state courts all actions for wrongful death occurring without the state unless the claimant is a resident of the state).

[41] *Missouri.* See note 34 *supra. California.* Leet v. Union Pac. R. R., 25 Cal. 2d 605, 155 P. 2d 42 (1944). In this case, the *Kepner* and *Miles* decisions were cited as controlling authority that California *had* to grant jurisdiction. *Query:* Would California so hold after the *Mayfield* decision?

[42] *Florida.* Hagen v. Viney, 124 Fla. 247, 169 So. 391 (1936) (suit for specific performance of separation agreement where both parties were non-residents of the forum). *Louisiana.* Union City Transfer v. Fields, 199 So. 206 (La. App. 1940) (action on a promissory note made and payable in Texas, both parties being residents of Texas). *Massachusetts.* Universal Adjustment Corp. v. Midland Bank, 281 Mass. 303, 184 N. E. 152 (1933) (action by domestic corporation, as assignee

question or have indicated that their courts do not have the discretion to decline jurisdiction.[43]

Looking at the effect of the Mayfield decision upon the overall problem faced by the railroads in coping with the inconvenient FELA suit, little if anything has been achieved. The most that can be said is that the compulsion previously thought to exist under the *Kepner* and *Miles* decisions is now removed, as well as any compulsion thought to exist in the Act itself. Only the litigant's rights under the Privileges and Immunities Clause remain mandatory upon the state court. Accordingly, some additional remedy is necessary to eliminate the unethical practices of "ambulance chasing" firms, and the consequent inequitable burden placed upon the railroads in defending the inconvenient suit.

In 1947, the House of Representatives passed the *Jennings Bill*,[44] which would have amended Section 6 of the FELA to authorize the bringing of an action under the Act only in the district or state where the accident occurred or where the injured party resided, and only when the railroad could not be served in either place could an action be brought wherever the railroad was doing business.[45] It seems clear that by so

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of bank deposit by Russian bank, brought against English bank of deposit not doing business in United States; refusal to retain jurisdiction under rules of comity and under doctrine of *forum non conveniens*). *New Hampshire.* Jackson & Sons v. Lumbermens' Mut. Cas. Co., 86 N. H. 341, 168 Atl. 895 (1933) (action by insured against its liability insurer for negligently conducting the defense of a suit against the insured where both parties were residents of other states). *New Jersey.* Anderson v. Delaware, L. & W. R. R., 18 N. J. Misc. 153, 11 A. 2d 607 (1940) (action by residents of Pennsylvania against a Pennsylvania corporation for wrongful death occurring in Pennsylvania).

[43] North Carolina is typical of these states. See McDonald v. MacArthur Bros. Co., 154 N. C. 122, 69 S. E. 832 (1910). The majority of the states which have denied their courts this discretion have so held because they have felt that the Privileges and Immunities Clause of the Constitution prohibited it.

[44] "A civil suit for damages for wrongful death or personal injuries against any interstate common carrier by railroad may be brought only in a district court of the United States or in a State court of competent jurisdiction, in the district or county (parish), respectively, in which the cause of action arose, or where the person suffering death or injury resided at the time it arose: Provided; That if the defendant cannot be served with process issuing out of any of the courts aforementioned, then and only then, the action may be brought in a district court of the United States, or in a State court of competent jurisdiction, at any place where the defendant shall be doing business at the time of the institution of said action." H. R. 1639, 80th Cong., 1st Sess. (1947).

[45] The opponents of the Bill argued that the solution to the problem was in the prevention of solicitation rather than in curbing the wide venue privileges. Pascarella v. New York Cent. R. R., 81 F. Supp. 95 (E. D. N. Y. 1948). Labor argues that these FELA suits should be brought in industrial centers where juries are more capable of assessing damages, due to their own peculiar knowledge of the needs of the working class. But this seems to amount to little more than an argument that plaintiffs under the FELA should be allowed to go "shopping" for a favorable court and jury. On the other side the argument exists that something must be done to curb the unethical practices of the handful of "ambulance chasing" lawyers. It is apparent that state laws and local bar associations are not effectively controlling this matter. A balancing of these arguments seems to weigh in favor of curbing the venue privileges.

narrowing the venue, the solicitation of suits[46] would be greatly reduced. The Bill died in a Senate committee.

Another possible solution would be the creation of a workmen's compensation act applicable to employees of interstate railroads.[47] A reasonable compensation for all injuries sustained, regardless of negligence, might prove to be more desirable than a few cases of very large recoveries where the injury is a major one and where the railroad is clearly negligent. However, the adoption of a federal act in this field seems unlikely.[48]

The evils surrounding the misuse of the venue privileges given by the Act could be greatly diminished by each state adopting the doctrine of *forum non conveniens* as part of its law, but at best this result would be slow and decidedly uncertain. Due to the inability of Congress or the federal courts, as displayed by the *Mayfield* case, to make the doctrine of *forum non conveniens* available as a procedural rule in the state courts,[49] serious reconsideration should be given to the *Jennings Bill* as offering the better solution to a proper administration of the federal act. Certainly, such flaunting of legal ethics and principles of justice[50] demands immediate and well considered attention.

WILLIAM C. MORRIS, JR.

Life Insurance—Killing of Insured by Primary Beneficiary—Recovery by Contingent Beneficiary

It has been almost universally held, based on broad grounds of public policy, that the beneficiary of a life insurance contract who intentionally and wrongfully kills the insured cannot recover the policy proceeds. This does not absolve the insurer from liability under the usual insurance contract, but only denies the beneficiary's right to recover. Under such circumstances the benefits may be recovered by the estate of the deceased insured on a constructive trust theory. However, the insurer has been held absolutely relieved of all liability under the policy where the beneficiary at the time of obtaining the policy of insurance intended to mur-

[46] An example of a state statute authorizing injunction against solicitation in this field is N. C. GEN. STAT. §84-38 (1950). This statute is discussed in 25 N. C. L. REV. 379 (1947).

[47] Winters, *Interstate Commerce in Damage Suits,* 29 JOUR. AM. JUD. SOC. 135, 144 (1946).

[48] *Ibid.* Labor generally regards the maximum benefits obtainable under existing state acts as far too small.

[49] Due to the fact that Congress cannot make procedural rules for the courts which it does not create, it is generally conceded that Congress may not make the *forum non conveniens* doctrine available as a procedural rule in state courts. This seems to be borne out by the fact that Congress, in enacting section 1404(a) of the Judicial Code (28 U. S. C.), made no attempt to apply that section to state courts in which actions under the FELA might be brought.

[50] For an example, see Chicago, M., St. P. & P. R. R. v. Wolf, 199 Wis. 278, 226 N. W. 297 (1929).

der the insured, or where the policy contained a clause specifically making the contract void upon the happening of such an occurence.[1]

While there is abundant authority to support the foregoing principles, the recent case of *Bullock v. Expressmen's Mut. Life Ins. Co.*[2] presented the North Carolina Supreme Court with a somewhat similar fact situation on which there is scant authority.[3] The deceased insured had procured a life insurance policy naming his wife as primary beneficiary and a foster son as contingent beneficiary.[4] Insured was killed by his wife who was convicted of manslaughter, sentenced to five years imprisonment, and was thereby disqualified from taking either as primary beneficiary under the policy[5] or from the deceased's personal estate.[6] The court, applying a strict construction to the insurance contract, held that the contingent provision necessary to qualify the foster son to take as beneficiary had not been fulfilled as the primary beneficiary had not predeceased the insured; therefore, the administrator of the insured's estate was allowed to recover.

The precise issue raised in the instant case was presented to an Ohio lower court in *Neff v. Massachusetts Mut. Life Ins. Co.*[7] and a contrary result was reached. That court allowed the contingent beneficiary to recover, holding that when the contract of insurance named secondary or contingent beneficiaries, the insured had clearly indicated how the proceeds of the policy were to be paid; therefore, the contingent provisions of the contract should be carried out. It was noted that in those cases where the estate of the insured had been awarded the proceeds of

[1] APPLEMAN, INSURANCE LAW AND PRACTICE §§381-385 (1941); 6 COOLEY'S BRIEFS ON INSURANCE 5227 (2d ed. 1927); RICHARDS, LAW OF INSURANCE §335 (4th ed., Long, 1932); VANCE, INSURANCE §117 (3d ed., Anderson, 1951); Grossman, *Liability and Rights of the Insurer When the Death of the Insured Is Caused by the Beneficiary or by an Assignee*, 10 B. U. L. REV. 281 (1930); Notes, 7 A. L. R. 828 (1920), 27 A. L. R. 1521 (1923), 70 A. L. R. 1539 (1931), 91 A. L. R. 1488 (1934); 29 AM. JUR. §1310 (1940); 46 C. J. S. §1171 (1946).

[2] 234 N. C. 254, 67 S. E. 2d 71 (1951).

[3] The writer found three cases with comparable fact situations. Metropolitan Life Ins. Co. v. McDavid, 39 F. Supp. 228 (E. D. Mich. 1941) (group insurance policy wherein the order of contingent beneficiaries was set forth); Welch v. Travelers' Ins. Co., 178 N. Y. Supp. 748 (Sup. Ct. 1919) (insured's estate named as contingent beneficiary); Beck v. West Coast Life Ins. Co., 228 P. 2d 832 (Cal. Dist. Ct. App. 1951) (beneficiary sentenced to life imprisonment which, under California statute, is treated as civil death and has the same legal effect as physical death). However, only one case was discovered which was on "all fours" with the principal case. Neff v. Massachusetts Mut. Life Ins. Co., 96 N. E. 2d 53 (Ohio C. P. 1951). None of these cases was decided by a court of final jurisdiction.

[4] Beneficiary provision was ". . . to [M], wife of the insured if living or if not living to [R], son of the insured. . . ." Transcript of Record, p. 8, Bullock v. Expressmen's Mut. Life Ins. Co., 234 N. C. 254, 67 S. E. 2d 71 (1951).

[5] Anderson v. Life Ins. Co. of Virginia, 152 N. C. 1, 67 S. E. 53 (1910).

[6] Garner v. Phillips, 229 N. C. 160, 47 S. E. 2d 845 (1948); Bryant v. Bryant, 193 N. C. 372, 137 S. E. 188 (1927); N. C. GEN. STAT. §§28-10, 30-4, 52-19 (1950).

[7] 96 N. E. 2d 53 (Ohio C. P. 1951) The court stated the issue to be ". . . when an insured has been murdered by the primary beneficiary, should the proceeds of the life insurance policy be paid to the insured's estate or to the persons named in the insurance policy as contingent or secondary beneficiaries?"

an insurance policy, there had been a complete failure of beneficiaries. Thus the court appears to have reached an equitable result effectuating the intent of the insured without changing the terms of the contract.[8]

The North Carolina court's construction of the contract may well be questioned. It has been said that the intention of the parties is the "polar star" of construction of an insurance contract,[9] and that it is a practical rather than a literal or technical construction which is deemed desirable.[10] The intention of the insured is the controlling element,[11] and a provision for disposition of the proceeds on the insured's death must be construed as the insured intended.[12] The mere fact that the insured named a contingent beneficiary seems clearly to express his intention as to whom should be the recipient of the policy proceeds in lieu of the primary beneficiary. Had the primary beneficiary predeceased the insured, undoubtedly the contingent beneficiary would have taken under the policy. What, then, is the distinction between disqualification by death and disqualification by law? Permitting recovery by the contingent beneficiary in the *Bullock* case would seem to have been both a reasonable and logical interpretation of the contract without reading anything into it.

A line of argument, not advanced to the court in the *Bullock* case, would allow the contingent beneficiary to recover under the precise terms of the insurance contract. On the death of the insured, the primary beneficiary's rights become vested and he holds the legal claim to the proceeds of the policy.[13] However, on well established principles of public policy, the beneficiary may not receive and enjoy the benefits of this claim.[14] Therefore, a constructive trust could be imposed upon this interest in the hands of the primary beneficiary.[15] Once this constructive trust is established, the next step to be taken is the determination of the beneficiary of this trust. It would seem that such a determination should be based upon the intention of the insured, if ascertainable. Where the insured has clearly expressed his intent by naming a contingent beneficiary, even though the contingency has not occurred, the court should recognize this intention by designating the contingent

[8] The North Carolina court stated that to reach such a result would be changing the terms of the contract which it had no power to do. Bullock v. Expressmen's Mut. Life Ins. Co., 234 N. C. 254, 258, 67 S. E. 2d 71, 74 (1951).

[9] 13 APPLEMAN, INSURANCE LAW AND PRACTICE §7385 (1940).

[10] 13 *id.* §7386. [11] 2 *id.* §781. [12] 13 *id.* §7424. [13] 2 *id.* §921.

[14] Mutual Life Ins. Co. v. Armstrong, 117 U. S. 591 (1886); Anderson v. Life Ins. Co. of Virginia, 152 N. C. 1, 67 S. E. 53 (1910); VANCE, INSURANCE §117 (3d ed., Anderson, 1951).

[15] RESTATEMENT, RESTITUTION §189 (1937); 3 SCOTT, TRUSTS §494.1 (1939). Although the North Carolina court did not infer that it was using the constructive trust theory in the *Bullock* case, note 2 *supra*, or in the *Anderson* case, *supra* note 14, it has employed that device to prevent a murderer from acquiring property by his own wrongful act. Garner v. Phillips, 229 N. C. 160, 47 S. E. 2d 845 (1948); Note, 26 N. C. L. REV. 232 (1948).

beneficiary as the recipient of the trust.[16] In reaching such a result, the court would have (1) carried out the express terms of the contract, (2) applied the constructive trust theory to prevent a party from profiting by his own wrongdoing, and (3) reached an equitable result effectuating the intent of the insured.

While some jurisdictions have passed statutes allowing the contingent beneficiary to receive the proceeds of the policy in such a situation,[17] other jurisdictions have reached the same result[18] without statutory aid and with the approval of those writers[19] who have commented on the subject. A similar result has also been reached by courts confronted

[16] It should be noted that both the RESTATEMENT and SCOTT, *id.*, state that the beneficiary holds his interest under the policy upon a constructive trust for the estate of the insured. Apparently, however, this result is meant to apply only when there is no contingent beneficiary named in the contract for it is Scott's contention that in such a situation the contingent beneficiary should receive the policy proceeds and not the estate of the insured.

[17] NEB. REV. STAT. §30-120 (1943): "No person who has been convicted of unlawfully killing another, or conspiring unlawfully to kill another, shall be entitled to any insurance on the life of the deceased. If the person so convicted is the beneficiary under any policy or policies of life insurance, or beneficial certificate or certificates, such insurance shall go to the person or persons who would have been entitled thereto if the person so convicted had been dead at the date of the death of the deceased."

S. D. CODE §56.0510 (1939): "Insurance proceeds payable to the slayer as the beneficiary or assignee of any policy or certificate of insurance on the life of the decedent, or as the survivor of a joint life policy, shall be paid to the estate of the decedent, unless the policy or certificate designates some person not claiming through the slayer as alternative beneficiary to him. . . ."

Other states have statutes directing that the insurance proceeds shall be disbursed by the laws of descent and distribution:

IOWA CODE ANN. §636.49 (1950): "In every instance mentioned in section . . . 636.48 [that section bars a beneficiary, who has taken the life of the insured, from receiving the policy proceeds], all benefits that would accrue to any such person upon the death . . . of the person whose life is thus taken . . . shall become subject to distribution among the other heirs of such deceased person, according to the foregoing rules of descent and distribution in case of death. . . ."

Of like effect: OKLA. STAT. ANN. tit. 84, §231 (1938); ORE. COMP. LAWS ANN. §16-203 (1940).

See McDade v. Mystic Workers of the World, 196 Ia. 857, 860, 195 N. W. 603, 604 (1923). The court in construing the Iowa statute stated that "The statute was evidently meant to meet a situation where a policy of insurance is made payable to a beneficiary who takes the life of the insured, and where there is no provision whatever in the policy as to the disposition of the proceeds of the insurance."

[18] Metropolitan Life Ins. Co. v. McDavid, 39 F. Supp. 228 (E. D. Mich. 1941); Welch v. Travelers' Ins. Co., 178 N. Y. Supp. 748 (Sup. Ct. 1919); Neff v. Massachusetts Mut. Life Ins. Co., 96 N. E. 2d 53 (Ohio C. P. 1951); *accord*, Beck v. West Coast Life Ins. Co., 228 P. 2d 832 (Cal. Dist. Ct. App. 1951); *see*, Equitable Life Assur. Soc. v. Weightman, 61 Okla. 106, 111, 160 Pac. 629, 634 (1916).

[19] 3 SCOTT, TRUSTS §494.1 (1939): "If by the terms of the policy, or in the case of a fraternal organization by the by-laws of the organization, an alternative beneficiary is designated, and the principal beneficiary murders the insured, the alternative beneficiary is entitled to the proceeds of the policy." See Wade, *Acquisition of Property by Wilfully Killing Another—A Statutory Solution*, 49 HARV. L. REV. 715, 742 (1936).

It is interesting to note that both authors and the Ohio court in the *Neff* case, note 7 *supra*, cited Parker v. Potter, 200 N. C. 348, 157 S. E. 68 (1931), to support their conclusions. The North Carolina court in the *Bullock* case, note 2 *supra*, did likewise!

with this problem when mutual benefit association certificates were involved.[20] Concededly, these cases are distinguishable in that the association's charter or by-laws contained a provision for alternative or contingent beneficiaries if the original designation failed; yet, any distinction appears unreal when an old line insurance policy contains a contingent beneficiary provision.

As the precise issue presented by the *Bullock* case was one of first impression before any court of final jurisdiction in the United States,[21] it is regrettable that the decision reached was contrary to the existing authority on the subject. Furthermore, as the result was patently contrary to the intention of the insured[22] and will probably be binding on the court under the doctrine of stare decisis, the following statutory proposal is offered for consideration:

> Where the beneficiary of a life insurance policy or certificate, or the assignee of such policy or certificate, or the survivor of a joint life policy or certificate, has feloniously taken, or procured to be taken, the life of the insured, any proceeds payable under the terms of such policy or certificate shall be paid to any alternative or contingent beneficiary named in the policy or certificate who does not claim through the slayer; provided, if no alternative or contingent beneficiary is designated in the policy or certificate, such proceeds shall be paid to the estate of the insured decedent.[23]

DAVID L. STRAIN, JR.

Negligence—Automobiles—Joint Enterprise

In cases involving automobile accidents, North Carolina has recognized and followed the joint enterprise doctrine since 1921.[1] In a recent decision, *James v. Atlantic & E. C. R. R.*,[2] the court stated that

[20] Supreme Lodge v. Menkhausen, 209 Ill. 277, 70 N. E. 567 (1904); Schmidt v. Northern Life Ass'n., 112 Ia. 41, 83 N. W. 800 (1900); Sharpless v. Grand Lodge, 135 Minn. 35, 159 N. W. 1086 (1916).

[21] See note 3 *supra.*

[22] Bullock v. Expressmen's Mut. Life Ins. Co., 234 N. C. 254, 258, 67 S. E. 2d 71, 74 (1951) (". . . in the case at bar it may be presumed in the light of subsequent happenings the insured would have wished his foster son to have the insurance money. . . .").

[23] See Wade, *Acquisition of Property by Wilfully Killing Another—A Statutory Solution,* 49 HARV. L. REV. 715, 741 (1936), for an extensive discussion of the intent and purpose of such a statute.

[1] Pusey v. Atlantic Coast Line R. R., 181 N. C. 137, 106 S. E. 452 (1921). In the *Pusey* case the court seemingly states that the doctrine of joint enterprise was adopted by North Carolina in Hunt v. Railroad, 170 N. C. 442, 87 S. E. 210 (1915), but the court in the *Hunt* case does not mention the doctrine. It merely reiterates the rule that the negligence of the driver will not be imputed to a passenger unless he is the owner of the car or controls the driver in some way.

[2] 233 N. C. 591, 65 S. E. 2d 214 (1951). Other N. C. cases dealing with the doctrine are: Matheny v. Central Motor Lines, 233 N. C. 681, 65 S. E. 2d 368 (1951); Rollison v. Hicks, 233 N. C. 99, 63 S. E. 2d 190 (1951); Pike v. Seymour, 222 N. C. 42, 21 S. E. 2d 884 (1942); Harper v. Seaboard Air Line Ry. Co., 211 N. C. 398, 190 S. E. 750 (1937); Exum v. Poole, 207 N. C. 244, 176 S. E. 556

when two or more persons are engaged in a joint enterprise, the contributory negligence of one of them will be imputed to the others so as to bar their recovery against a negligent defendant.[3]

In the *James* case, the plaintiff and the driver of the automobile were police officers, fellow employees of the city of Goldsboro, and were of equal rank. While engaged in their duty of patrolling the city, they were involved in an accident with a switch engine belonging to the defendant railroad. The court concluded that there was sufficient evidence to support a finding that the officers were engaged in a joint enterprise; that they were mutually engaged in a joint undertaking for a common purpose; and each had an equal right of control in the management of the automobile. Therefore, any contributory negligence on the part of the driver would be imputed to the plaintiff so as to bar his recovery from the defendant.

In the famous case of *Thorogood v. Bryan*,[4] the court held that the negligence of the driver of a conveyance would be imputed to a passenger therein. But the English court later repudiated this unreasonable rule in the case of *Mills v. Armstrong*[5] insofar as it was applied to passengers having no control over the driver. Though some American courts followed the rule of the *Thorogood* decision, most of them have likewise repudiated its original broad application and now hold that the negligence of the driver will not be imputed to a *mere* passenger or guest.[6] North Carolina has never adopted the broad rule of the *Thorogood* case.[7]

One of the exceptions to the general proposition that the negligence of a driver will not be imputed to a passenger is the doctrine of imputed negligence as applied in the case of a joint enterprise.[8] The scope of

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(1934); Newman v. Queen City Coach Co., 205 N. C. 26, 169 S. E. 808 (1933); Butner v. Whitlow, 201 N. C. 749, 161 S. E. 389 (1931); Albritton v. Hill, 190 N. C. 429, 130 S. E. 5 (1925); Pusey v. Atlantic Coast Line R. R., 181 N. C. 137, 106 S. E. 452 (1921).

[3] However, the case was sent back for a new trial because of erroneous instructions given by the trial judge with respect to the burden of proof on the issue of contributory negligence.

The terms *joint enterprise* and *imputed negligence*, should not be confused. Imputed negligence is used to hold one person liable for the negligence of another in certain situations. Joint enterprise is *one* of those situations where negligence will be imputed.

[4] 8 C. B. 115 (1849).

[5] 13 App. Cas. 1, 58 L. T. 425 (1887).

[6] Bessey v. Salemme, 302 Mass. 188, 19 N. E. 2d 75 (1939); Bunting v. Hogsett, 139 Pa. 363, 21 Atl. 31 (1890); Reiter v. Grober, 173 Wisc. 493, 181 N. W. 739 (1921); See collection of cases in 38 AM. JUR. p. 936 n. 20 (1941).

[7] Duval v. Atlantic Coast Line R. R., 134 N. C. 331, 46 S. E. 750 (1904); Crampton v. Ivie, 124 N. C. 591, 32 S. E. 968 (1889).

[8] 2 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW, §28 (1927); Negligence may, of course be imputed in master-servant relationships, Rollison v. Hicks, 233 N. C. 99, 65 S. E. 2d 190 (1951), and principal-agent relationships, Snow v. DeButts, 212 N. C. 120, 193 S. E. 224 (1937), and when the doctrine of joint enterprise can be applied.

this note is primarily concerned with the application of the doctrine of imputed negligence in automobile accident cases where the occupants of one of the vehicles were engaged in a joint enterprise at the time of the accident.

As the court states in the principal case, "much has been written on what is not a joint enterprise, rather than what is."[9] In the *James* case however, the court quotes the following excellent statement of the rule from Blashfield.[10]

> "An essential and perhaps the central element which must be shown in order to establish a joint enterprise is the existence of joint control over the management and operation of the vehicle and the course and conduct of the trip . . . in order that two persons riding in an automobile, one of them driving, may be deemed engaged in a joint enterprise for the purpose of imputing the negligence of the driver to the other, [there must] exist concurrently two fundamental and primary requisites, to wit, a community of interest in the object and purpose of the undertaking in which the automobile is being driven, and an equal right to direct and govern the movements and conduct of each other in respect thereto. The mere fact that the occupant has no opportunity to exercise physical control is immaterial."[11]

Some states have held that a joint enterprise may exist without the element of the legal right of joint control.[12] But apparently North Carolina has, from the first case dealing with the subject, required the presence of the legal right to control, or actual control of the operation of the vehicle before invoking the doctrine of imputed negligence.[13]

The doctrine can also be applied when a third person is trying to hold the passenger liable to him because of the negligence of the driver. So far this situation has not arisen in North Carolina, but when and if it does, the court might well follow the Restatement of Torts rule[14] and

[9] James v. Atlantic & E. C. R. R., *supra* note 2 at 598.

[10] 4 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW, §2372 (Perm. Ed.).

[11] *Id.*, cited in James v. Railroad, 233 N. C. 591, 598, 65 S. E. 2d 214, 219 (1951).

[12] Otis v. Kolsky, 94 Pa. Super. 548 (1929); Lawrence v. Denver & R. G. Ry. Co., 52 Utah 414, 174 Pac. 817 (1918); Washington & O. D. Railroad v. Zell, 118 Va. 755; 88 S. E. 309 (1916); Wentworth v. Town of Waterbury, 90 Vt. 60, 96 Atl. 334 (1916); Hurley v. City of Spokane, 126 Wash. 213, 217 Pac. 1004 (1923).

[13] Pusey v. Atlantic Coast Line R. R., *supra* note 1 at 142. Without evidence of joint control in the operation of the automobile, there can be no joint enterprise.

For other cases on this point, see Johnson v. Atlantic Coast Line R. R., 205 N. C. 127, 170 S. E. 120 (1933); Williams v. Seaboard A. L. R. R., 187 N. C. 348, 121 S. E. 608 (1924); White v. Carolina Realty Co., 182 N. C. 536, 109 S. E. 564 (1921); and cases cited therein.

For cases holding that there was no joint enterprise even though the element of community of interest was present, see Jernigan v. Jernigan, 207 N. C. 831, 178 S. E. 587 (1935) and Newman v. Queen City Coach Co., 205 N. C. 26, 169 S. E. 808 (1933).

[14] RESTATEMENT, TORTS, §491 (1938), Any one of several persons engaged in an enterprise is barred from recovery against a negligent defendant by the con-

hold the passenger liable for the negligence of the driver in an action by an injured third party.

However, the joint enterprise doctrine has no application in an action by the injured participant in the enterprise against the driver of the automobile. The reason for this is that the driver of an automobile is always under a duty to exercise due care for the safety of his passengers.[15] The position of the North Carolina court on this point was not clearly stated until the recent decision of *Rollison v. Hicks*,[16] in which the court stated that the driver cannot invoke the doctrine of joint enterprise as a defense in an action brought by his co-adventurer. But apparently the negligence of the driver should be imputed to the plaintiff in a suit against another passenger in the vehicle, all three of them being engaged in a joint enterprise.[17]

The joint enterprise doctrine as applied to automobile accident cases is based on an analogy with joint enterprises in business ventures, such as partnerships.[18] There, all of the partners have a common interest, the pooling of resources for the purpose of making a profit. One partner can, by his negligence, bind his associates, and this is a sound rule so far as business is concerned. The public is dealing with an organization and has a right to be protected to the fullest extent. It is the property aspect of the organization with which the doctrine is concerned. However, in automobile accidents, the defendant is not deceived by appearances, and he should not be permitted to escape liability merely because the plaintiff and the driver were engaged in an activity for mutual benefit and pleasure. The doctrine as applied to non-business ventures has been criticized a good deal[19] but it seems to be too thoroughly imbedded to be overruled by court decision.

It is often said that the doctrine is founded on the law of principal

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tributory negligence of any other of them if the enterprise is so far joint that each member of the group is responsible to third persons injured by the negligence of a fellow member.

[15] See collection of cases 65 C. J. S. p. 799 n. 38 (1950).

[16] Rollison v. Hicks, 233 N. C. 99, 63 S. E. 2d 190 (1951).

[17] PROSSER, LAW OF TORTS, §65 (1941): "Upon the analogy to the agency rule that where two principals employ the same agent to deal with their common interest, one cannot charge the other with misconduct of their mutual agent, unless the other is personally at fault."

[18] 65 C. J. S. NEGLIGENCE, §168 (1950).

[19] Gilmore v. Gross, 68 F. 2d 150, 153 (10th Cir. 1933); 4 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW, §176 (1927); PROSSER, LAW OF TORTS, §65 (1941); Note, 12 N. C. L. REV. 385 (1934).

"The doctrine of joint enterprise has, in rare instances, been applied in cases dealing with other than automobile accidents and business ventures. One such case is Cullinan v. Tetrault, 123 Me. 302, 122 Atl. 770 (1923), where the negligence of one boy purchasing liquor for a drinking party was imputed to his companion. Compare the refusal to apply the doctrine to pedestrians walking together, in Barnes v. Town of Marcus, 96 Iowa 675, 65 N. W. 984 (1896) . . . With these few exceptions, all joint enterprise cases found have involved vehicles or business ventures." PROSSER, LAW OF TORTS, p. 492, n. 26 (1941).

and agent.[20] But it is hard to conceive that people engaged in a joint enterprise for mutual pleasure consider themselves as agents of each other. Another point which illustrates that the rule is a pure fiction, with little if any basis in reality, is the fact that a member of a joint enterprise is deemed by law to have a legal right to control the operation of the vehicle without having any actual control. A theoretical right of control is thus a sufficient basis for imputing the negligence of the driver to the passenger. Of course, if the passenger knows of approaching danger and fails to warn the driver, he himself may be liable on the theory of actual negligence.[21]

One argument in favor of enforcing the joint enterprise rule is the fact that the parties enter into the transaction or enterprise of their own free will. Likewise they have the choice of withdrawing at their pleasure. One striking point about the present case is the fact that the occupants of the patrol car were fellow employees. They were working for a common employer. The plaintiff had no choice in the selection of the person with whom he would be associated during the patrol job. He either had to ride with the man assigned with him or stand the risk of losing his job. In view of this situation the court might have ruled that an important element—the privilege of quitting the venture at will—was lacking, and therefore it was not a true joint enterprise.[22]

ROBERT L. WHITMIRE, JR.

Negligence—Automobiles—Sudden Appearance Doctrine

In a recent action for the wrongful death of a child,[1] the North Carolina Supreme Court applied, for the first time, the descriptive phrase "sudden appearance" to a doctrine long recognized in automobile negligence cases.[2] This doctrine is applied in those cases where a motorist strikes a theretofore unseen child who darts in front of his automobile. Such an accident is regarded as unavoidable, thereby relieving the motorist of liability.[3] Generally, North Carolina has applied this doctrine to cases where the child has run from behind another vehicle or has

[20] Albritton v. Hill, 190 N. C. 429, 130 S. E. 5 (1925); 1 VARTANIAN, THE LAW OF AUTOMOBILES, §59 (1947).
[21] Central of Georgia R. R. v. Watkins, 37 F. 2d 710 (5th Cir. 1930).
[22] For a case exactly in point, with the same result as the principal case, see Collins v. Graves, 17 Cal. App. 2d 288, 61 P. 2d 1198 (1936).

[1] Register v. Gibbs, 233 N. C. 456, 64 S. E. 2d 280 (1951).
[2] In Butler v. Allen, 233 N. C. 484, 64 S. E. 2d 561 (1951), decided one week later, this phrase appears in the headnote but not in the opinion. This phrase has been used by other courts, however. Christian v. Smith, 78 Ga. App. 603, 51 S. E. 2d 857 (1949); Fultz' Adm'r. v. Williams, 266 Ky. 651, 99 S. W. 2d 803 (1936).
[3] See Notes, 113 A. L. R. 528, 536 (1938); 65 A. L. R. 192, 197 (1930). This note does not deal with those cases involving the question of contributory negligence on the part of the child. See generally, Note, 107 A. L. R. 5 (1937).

broken away from the control of an adult.[4]

When the child has been visible for some distance, however, the defendant is not relieved of liability, because such action should have been anticipated.[5] This is true if the child *was* seen or *could have been* seen by a proper lookout. The reasoning of the cases differs as to the degree of care required. Some hold that more than ordinary care is required.[6] Others only require ordinary care but recognize that the vigilance of the operator varies with the age, physical condition, and circumstances under which the child is seen.[7] Thus, the standard of care remains the same, but the amount of diligence, attention, or effort required varies. The expectation that children act heedlessly[8] is merely one circumstance to be considered. This, of course, means that "the greater the danger, the greater the care which must be exercised."[9] While a motorist may reasonably presume that an adult will remain in a place of safety,[10] the prevailing view today requires an assumption that a child may move into danger.[11]

[4] Fox v. Barlow, 206 N. C. 66, 173 S. E. 43 (1934); Kennedy v. Lookadoo, 203 N. C. 640, 166 S. E. 752 (1932); Fisher v. Deaton, 196 N. C. 461, 146 S. E. 66 (1928). *But cf.* Mills v. Moore, 219 N. C. 25, 12 S. E. 2d 661 (1940) (eighteen-month-old whose presence in the road could not be explained was struck by defendant's truck; nonsuit was allowed because it was highly speculative as to whether defendant could have seen the child; four-to-three decision with vigorous dissent by Justice Seawell.).

In Green v. Bowers, 230 N. C. 651, 55 S. E. 2d 651 (1949), and Bass v. Hocutt, 221 N. C. 218, 19 S. E. 2d 871 (1942), new trials were granted because of the failure of the trial court to charge the jury concerning the possibility that the act of the child was the proximate cause of the injury.

[5] Butler v. Allen, 233 N. C. 484, 64 S. E. 2d 561 (1951); Register v. Gibbs, 233 N. C. 456, 64 S. E. 2d 280 (1951); Yokeley v. Kearns, 223 N. C. 196, 25 S. E. 2d 602 (1943); Caulder v. Motor Sales, Inc., 221 N. C. 437, 20 S. E. 2d 338 (1942); Smith v. Miller, 209 N. C. 170, 183 S. E. 370 (1935); Moore v. Powell, 205 N. C. 636, 172 S. E. 327 (1934); Goss v. Williams, 196 N. C. 213, 145 S. E. 169 (1928). *But cf.* Parks v. Willis, 228 N. C. 25, 44 S. E. 2d 343 (1947) (nonsuit reversed where six-year-old evidently ran out from a garage across street and fell under the rear wheels of a truck which had turned to avoid hitting her; the truck was exceeding the speed limit by five miles per hour); Hughes v. Thayer, 229 N. C. 773, 51 S. E. 2d 488 (1949) (two children alighted from a school bus; one ran across safely in front of the bus, but the other, an eight-year-old, waited for the bus and two cars following to pass, then ran across the road in front of defendant's car approaching from the other direction.).

[6] Yokeley v. Kearns, *supra* note 5; Kelly v. Hunsucker, 211 N. C. 153, 189 S. E. 664 (1936); Smith v. Miller, *supra* note 5; Fox v. Barlow, 206 N. C. 66, 173 S. E. 43 (1934); Moore v. Powell, *supra* note 5; Goss v. Williams, 196 N. C. 213, 145 S. E. 169 (1928); State v. Gray, 180 N. C. 697, 104 S. E. 647 (1920).

[7] In Rea v. Simowitz, 225 N. C. 575, 35 S. E. 2d 871 (1945), Justice Barnhill attempted to clarify the misconception that a higher standard of care is required, stating that there are no degrees of care in fixing responsibility for negligence. The motorist is only held to the standard of care which a prudent man would have used under the circumstances.

[8] Hughes v. Thayer, 229 N. C. 773, 51 S. E. 2d 488 (1949); Yokeley v. Kearns, 223 N. C. 196, 25 S. E. 2d 602 (1943); Smith v. Miller, 209 N. C. 170, 183 S. E. 370 (1935); Fox v. Barlow, 206 N. C. 66, 173 S. E. 43 (1934).

[9] RESTATEMENT, TORTS, §298 (1947).

[10] Fox v. Barlow, 206 N. C. 66, 173 S. E. 43 (1934); Bryan v. Fewell, 191 Va. 647, 62 S. E. 2d 39 (1950).

[11] Webster v. Luckow, 219 Iowa 1048, 258 N. W. 685 (1935); Hughes v.

Another situation where the doctrine of "sudden appearance" is inapplicable is where the driver has been guilty of some negligent act which made it impossible to see the child or to avoid the accident after seeing the child.[12] So, where a child darts out from beside the road, and the driver is going at such an excessive rate of speed that he is unable to stop before striking the child, he cannot escape liability under this doctrine.[13]

Whether the driver saw, or could have seen, the child in time to avoid a collision, and whether, once seen, he exercised the care of a reasonable, prudent man to avoid a collision, is always a question of fact. But once it is established that the child was or should have been seen, the doctrine of "sudden appearance" becomes inapplicable, and the tendency of most courts is to hold the driver to an almost absolute liability.[14]

MARGARET P. WINSLOW.

Negligence—Railroads—Custom as Evidence

Defendant's train was blocking a city street for longer than five minutes, in violation of a municipal ordinance, when plaintiff attempted to climb between the cars in order to return to his place of employment. The train was suddenly moved without signal injuring plaintiff. The district court excluded evidence of a long standing custom for persons to climb between railroads cars which blocked the crossing, and dismissed on the ground that plaintiff was guilty of contributory negligence. In *Stratton v. Southern Ry.*,[1] the Court of Appeals for the Fourth Circuit

Thayer, 229 N. C. 773, 51 S. E. 2d 488 (1949); Price v. Burton, 155 Va. 229, 154 S. E. 499 (1930).

But see Brown v. Wade, 145 So. 790 (La. App. 1933), where the court stated that a driver could assume that a child would stay on an urban sidewalk, but could not so assume as to a child on a county road; Faatz v. Sullivan, 199 Iowa 875, 200 N. W. 321 (1924), where a boy was struck by defendant after he had passed pathway of car when he retraced his steps, the Supreme Court held the jury should have been told that driver of automobile had right to assume that the boy having reached a place of safety would either remain there or continue on his journey; Moeller v. Packard, 86 Cal. App. 459, 261 Pac. 135 (1927); Hutcheson v. Misenheimer, 169 Va. 511, 194 S. E. 665 (1938).

[12] Butler v. Allen, 233 N. C. 484, 64 S. E. 2d 561 (1951); Kelly v. Hunsucker, 211 N. C. 153, 189 S. E. 664 (1936); Goss v. Williams, 196 N. C. 213, 145 S. E. 169 (1928); Harper v. Crislip, 103 Va. 514, 138 S. E. 93 (1927).

[13] Butler v. Allen, 233 N. C. 484, 487, 64 S. E. 2d 561, 563 (1951), ". . . where one is driving an automobile at a speed in excess of the statutory limit, or at a greater speed than is reasonable and prudent under the conditions then existing, the mere fact that a child suddenly runs in front of the moving vehicle, does not necessarily relieve the driver from liability. There still remains the question whether the negligent driving of the automobile made it impossible for the driver of the car, under the circumstances, to avoid the accident after seeing the child, or whether by the exercise of reasonable care, such driver could have seen the child in time to avoid the injury."

[14] See note 3 *supra*.

[1] 190 F. 2d 917 (4th Cir. 1951).

reversed, holding that under North Carolina law the evidence of custom should have been admitted, and that the negligence of defendant and contributory negligence of plaintiff were questions for the jury.[2]

It is well settled in North Carolina that violation of a municipal ordinance is negligence per se.[3] However, such violation, in order to be actionable, must be the proximate cause of plaintiff's injury.[4] Absent contributory negligence as a matter of law, the question of defendant's negligence is submitted to the jury if the violation of the ordinance can reasonably be found to be the proximate cause of plaintiff's injury.[5] The North Carolina Supreme Court makes no mention of the general rule requiring plaintiff to be a member of a class for whose benefit the ordinance was enacted, or requiring the injury to be of a type which the ordinance was designed to prevent.[6] It is likely that the court considers these items of statutory construction under its broad treatment of proximate cause.

The general rule in North Carolina is that evidence as to custom is admissible.[7] Where such evidence can be shown to impose a duty or

[2] In Texas & New Orleans R. R. v. Owens, 54 S. W. 2d 848 (Tex. Civ. App. 1932), under exactly the same fact situation, it was held that evidence of custom was properly admitted for the determination of the jury in deciding both defendant's negligence and plaintiff's contributory negligence since the custom of long standing imposed upon defendant the duty to be on the lookout for such persons and to use due care to avoid injury to them.

[3] Hendrix v. Southern Ry., 198 N. C. 142, 150 S. E. 873 (1929); Dickey v. Atlantic Coast Line R. R., 196 N. C. 726, 147 S. E. 15 (1929); Cherry v. Atlantic Coast Line R. R., 186 N. C. 263, 119 S. E. 361 (1923); Newton v. Texas Co., 180 N. C. 561, 105 S. E. 433 (1920); Ledbetter v. English, 166 N. C. 125, 81 S. E. 1066 (1914).

[4] Arnold v. Owens, 78 F. 2d 495 (4th Cir. 1935); Holderfield v. Rummage Bros., 232 N. C. 623, 61 S. E. 2d 904 (1950); White v. North Carolina R. R., 216 N. C. 79, 3 S. E. 2d 310 (1939); Hendrix v. Southern Ry., 198 N. C. 142, 150 S. E. 873 (1929).

"When more than one inference may be drawn, proximate cause is a question for the jury. But where there is no dispute as to the facts, and such facts are not reasonably capable of more than one inference, it is the duty of the judge to instruct, as a matter of law, whether the injury was the proximate result of the negligence of defendant." Note, 7 N. C. L. REV. 482 (1929).

[5] Norfolk & Western Ry. v. Hauser, 211 Fed. 567 (4th Cir. 1913); Boles v. Hegler, 232 N. C. 327, 59 S. E. 2d 796 (1950); Humphries v. Queen City Coach Co., 228 N. C. 399, 45 S. E. 2d 546 (1947); Rea v. Simowitz, 225 N. C. 575, 35 S. E. 2d 871 (1945); Anderson v. Atlantic Coast Line R. R., 161 N. C. 462, 77 S. E. 402 (1911). See cases cited in note 4 *supra*.

[6] PROSSER, TORTS 274 (1941); RESTATEMENT, TORTS §286 (1934); Notes, 15 BROOKLYN L. REV. 246 (1946); 37 KY. L. J. 358 (1949); 7 N. C. L. REV. 482 (1929).

[7] Custom for railroad tracks to be used by pedestrians as walkway, Powers v. Norfolk Southern R. R., 166 N. C. 599, 82 S. E. 972 (1914), Thompson v. Aberdeen & A. R. R., 149 N. C. 155, 62 S. E. 883 (1908), McCall v. Southern Ry., 129 N. C. 298, 40 S. E. 67 (1901); Beck v. Southern Ry., 146 N. C. 455, 59 S. E. 1015 (1907) (custom of employees to cross between railroad cars standing on yard); Ray v. Aberdeen & R. R.R., 141 N. C. 84, 53 S. E. 622 (1906) (persons accustomed to stand or move about in railroad yard); Bradley v. Ohio River & C. Ry., 126 N. C. 735, 36 S. E. 181 (1900) (custom of defendant never to back train over crossing after passing it); Hamilton v. Southern Ry., 200 N. C. 543, 158 S. E. 75, *cert. denied*, 284 U. S. 636 (1931) (custom of making light repairs to freight cars on "exchange tracks"); McClellan v. North Carolina R.R., 155 N. C. 1, 70

obligation upon defendant, it is a factor in determining defendant's negligence in an alleged breach or omission of such duty.[8] Since persons at public railroad crossings are not trespassers,[9] the railroad owes more than a duty not to willfully or wantonly injure them; it must exercise due care for their safety.[10]

Assuming that in the *Stratton* case plaintiff was negligent in climbing between the cars, it seems that the doctrine of last clear chance[11] might have been applied since defendant, in view of the long standing custom, owed a duty to warn plaintiff before starting the train. In North Carolina, it is not essential that defendant have actual knowledge of the danger to plaintiff, if, by the exercise of reasonable care, the peril could have been discovered.[12]

EDWIN B. HATCH, JR.

Parole—Gain Time Credits Forfeited Upon Revocation

In a recent *habeas corpus* proceeding in Florida, the petitioner sought release from confinement on the theory that his sentence had expired. At an earlier date he had been released on parole, and upon violation of the conditions of his parole he had been returned to prison to serve the unexpired portion of his sentence. He now contended that his sentence had been served, by computing for credit, in addition to the time actually served in prison, (1) the period he was at large on parole, and (2) gain time for good conduct granted prior to date of parole. *Held,* in reversing the trial court which granted the petition, neither the time spent on parole nor the gain time for good conduct granted prior to parole serve to reduce the time imposed by the original sentence.[1]

S. E. 1066, 33 L. R. A. (N. S.) 988 (1911) (custom of sounding gong as warning to persons between gates on railroad track before lowering gates).

Cf. Virginia Electric & Power Co. v. Carolina Peanut Co., 186 F. 2d 816 (4th Cir. 1950), where evidence of custom was held for determination of the jury only where there is other evidence from which jury could properly conclude that defendant used ordinary care.

[8] Hamilton v. Southern Ry., 200 N. C. 543, 158 S. E. 75, *cert. denied,* 284 U. S. 636 (1931); STANSBURY, NORTH CAROLINA EVIDENCE §95 (1946).

[9] "Where a railroad track crosses a public highway, both a traveler and the railroad have equal rights to cross. . . ." Johnson v. Seaboard Airline Ry., 163 N. C. 431, 79 S. E. 690 (1913). Missouri *ex rel.* Bush v. Sturgis, 281 Mo. 598, 221 S. W. 91 (1920).

[10] Johnson v. Seaboard Airline Ry., 163 N. C. 431, 79 S. E. 690 (1913). "A railroad company which blocks a crossing . . . for a longer time than the law permits has been held to become itself a trespasser, and to be estopped to say that one who attempts to climb over its cars is a trespasser. . . ." 44 AM. JUR. 743-744 (1942).

[11] Bogan v. Carolina Central R. R., 129 N. C. 154, 39 S. E. 808 (1901).

[12] Mount Olive Mfg. Co. v. Atlantic Coast Line R. R., 233 N. C. 661, 65 S. E. 2d 379 (1951); Aydlett v. Keim, 232 N. C. 367, 61 S. E. 2d 109 (1950); Ingram v. Smoky Mountain Stages, Inc., 225 N. C. 444, 35 S. E. 2d 337 (1945); West Const. Co. v. Atlantic Coast Line R. R., 185 N. C. 43, 116 S. E. 3 (1923); Ray v. Aberdeen & R. R. R., 141 N. C. 84, 53 S. E. 622 (1906).

[1] Mayo v. Lukers, 53 So. 2d 916 (Fla. 1951).

A Florida statute specifically provided that in event of revocation of parole, time spent at large on parole "would in no manner decrease or diminish the time imposed by the original sentence."[2] Hence, the ruling of the court on this point seems clearly correct. However, there was no express statutory provision dealing with the status of gain time for good conduct earned prior to parole. The court cited a statute providing for forfeiture of gain time credits in the case of certain serious misconduct of those actually *in* prison,[3] but the statute clearly was not applicable, as was apparently recognized, to misconduct of parolees. However, it was reasoned from this statute that since the gain time allowance may be forfeited by misconduct during the life of the sentence, that "the time allowance is an act of grace rather than a vested right which may be withdrawn, modified or denied. . . ."[4] Hence, the administrative agency (the Florida Paroles Commission) had the authority to disallow these previously earned credits upon revocation of parole. An earlier Florida case, not cited in the principal case, had reached the same result.[5] However, in neither of these cases did the court expressly deal with what seems to be an important question; *i.e.,* should an administrative agency have the authority in the absence of an express legislative grant to disallow gain time credits previously earned, upon revocation of parole? Although the granting of gain time credits may be labelled an "act of grace," it is nevertheless an act of *legislative* grace. It could thus be reasoned that the Florida legislature had apparently intended that a prisoner should be deprived of that "grace" only when authorized by express statutory provision. On this basis, it would seem that the decision of the Florida court upholding the "administrative forfeiture" of gain time credits is not well-founded.[6]

Parole statutes may be generally classified into three categories: First, those that expressly provide that upon revocation of parole, all gain time credits shall be forfeited.[7] Second, those that provide, in

[2] FLA. STAT. ANN. §947.21 (1940). The similar statute in North Carolina is N. C. GEN. STAT. §148-61.1 (Supp. 1951).

[3] FLA. STAT. ANN. §954.04 (1940). This statute provides that all commutations which shall have accrued in favor of the prisoner shall be forfeited for each sustained charge of escape or attempted escape, mutinous conduct or other serious misconduct.

[4] Mayo v. Lukers, 53 So. 2d 916,917 (Fla. 1951).

[5] Dear v. Mayo, 153 Fla. 164, 14 So. 2d 267 (1943).

[6] Apparently the court is of the opinion that a result is automatically derived by placing a label on the gain time credits. Whether gain time credits are, or are not, "vested rights," is irrelevant. If the test of "vested" is "the certainty of the future right of enjoyment," clearly they are not "vested rights" for a statute specifically provides for forfeiture under certain circumstances. Even if they could be labelled vested rights," they may be divested by legislative authority, as indicated by statutes, note 7 *infra.* Therefore, the Florida court would not seem to be justified in concluding that the gain time credits may be disallowed simply because they are not "vested rights," but instead are "acts of grace."

[7] COLO. STAT. ANN. c. 48 §§549, 557 (1935); DEL. REV. CODE c. 101, 4155 §38 (1935); LA. REV. STAT. §15:574.9 (West 1950); ME. REV. STAT. c. 136 §22 (1944); OKLA. STAT. ANN. tit. 57 §332.14 (1949); WIS. STAT. §57.11 (3) (1947).

effect, that forfeiture of gain time credits shall lie in the discretion of the administrative agency responsible for parole matters.[8] Third, those statutes which do not expressly deal with the status of gain time credits upon revocation of parole.[9]

Jurisdictions in the third category are split as to the status of gain time credits on revocation of parole. Where one statute provided that upon revocation of parole the prisoner may be required to "serve in prison the whole or any part of the maximum period for which at the time of his release, he was subject to imprisonment under his sentence . . . ,"[10] it was held that emphasis was to be placed on the words, "at the time of his release"[11] on parole; *i.e.*, that the exact status of his

[8] CAL. GEN. STAT. c. 429 §883 (1949); N. Y. CORRECTION LAW §218; UTAH CODE ANN. §85-9-78 (1943); 18 U. S. C. §4165 (1948). Courts would not review the action of the particular agency unless it clearly appears that it has exceeded its powers or that substantial injustice has been done. See People *ex rel.* Threadcraft v. Brophy, 7 N. Y. S. 2d 75, 255 App. Div. 823 (1938); *Ex Parte* Taylor, 216 Cal. 274, 13 P. 2d 906 (1932). *But cf.* People *ex rel.* Fershing v. Wilson, 20 N. Y. S. 2d 895, 174 Misc. 191 (Sup. Ct. 1939), *reversed*, 20 N. Y. S. 2d 897, 259 App. Div. 957 (3d Dep't 1939). Federal courts construe 18 U. S. C. §4165, which provides for discretionary forfeiture of gain time for good conduct for violation of the rules of the institution, as being applicable to forfeiture upon revocation of parole. Such construction rests on the theory that while on parole a parolee is "still in contemplation of law a prisoner, his parole privilege being merely an extension of the prison walls. Jarman v. U. S., 92 F. 2d 309, 310 (4th Cir. 1937). Federal cases seem to indicate that forfeiture is an almost automatic procedure upon revocation of parole. See Hedrick v. Steele, 187 F. 2d 261 (8th Cir. 1951); Taylor v. Squier, 142 F. 2d 737 (9th Cir. 1944); Sanford v. Runyon, 136 F. 2d 54 (5th Cir. 1943); Christianson v. Zerbst, 89 F. 2d 40 (10th Cir. 1937); Phipps v. Pescor, 68 F. Supp. 242 (W. D. Mo. 1946). WASH. REV. STAT. ANN. §10249-4 (Supp. 1940) allows the discretionary imposition, as a condition of parole, that credits shall be forfeited upon violation of parole.

[9] Some provide that the prisoner shall be remanded and confined for the unexpired term of his sentence, which is calculated from the date of delinquency: ALA. CODE ANN. tit. 42 §12 (1940); ILL. ANN. STAT. c. 38 §808 (1949); IND. STAT. ANN. §13-249, *et seq.* (Burns 1933); MASS. ANN. LAWS c. 127 §149 (1949); MICH. STAT. ANN. §28.1316 (1938); N. M. STAT. ANN. §42-1709 (1941); OHIO GEN. CODE ANN. §2209-20 (Supp. 1950) (however, parolee may be re-paroled on different conditions, or sent to another institution); TENN. CODE ANN. §11843.12 (Supp. 1951). Others provide that the prisoner shall be remanded and confined for the unexpired term of his sentence, which is calculated from the date of release on parole: ARIZ. CODE ANN. §47-116 (1939); FLA. STAT. ANN. §947.21 (1940); GA. CODE ANN. §77-505 (1937) (discretionary whether time on parole shall be included as part of the original sentence); MD. ANN. CODE GEN. LAWS art. 41, §84 (1939) (discretionary whether time on parole shall be included as part of the original sentence); MO. REV. STAT. §§4202, 9160 (1939); N. C. GEN. STAT. §148.61.1 (Supp. 1951); N. H. REV. LAWS c. 429, §36 (1942); N. J. STAT. ANN. §2:198-4 (1939); ORE. COMP. LAWS ANN. §26-2308 (1940); R. I. GEN. LAWS c. 38, §5 (1938); VT. STAT. REV. §8045 (1947); W. VA. CODE ANN. §6291 (26) (1949). Some, however, remain silent as to the date from which calculated, or as to the status of his sentence upon revocation of parole: ARK. STAT. ANN. §§43-2803-2808 (1947); KY. REV. STAT. §439.190 (1948); MINN. STAT. ANN. §637.06; MISS. CODE ANN. §2543 (1942); MONT. REV. CODES ANN. 94-9819 (1947); NEB. REV. STAT. §29-2628 (1943); NEV. COMP. LAWS ANN. 11579 (Supp. 1949); N. D. REV. CODE §12-5525 (1943); PA. STAT. ANN. tit. 61 §298 (1930); S. C. CODE ANN. §1038-11 (Supp. 1948); S. D. CODE §13.5307 (1939); TEX. CODE CRIM. PROC. ANN. art. 781b §19 (1950); WYO. COMP. STAT. ANN. §11-406 (1945).

[10] W. VA. CODE ANN. §6291 (26) (1949).

[11] Watts v. Skeen, 54 S. E. 2d 563, 566 (W. Va. 1949).

sentence was to be determined as of the time of his release on parole. "In the absence of statutory authorization," the court continued, "the revocation of a parole does not operate as a forfeiture of any 'good time' earned prior to the granting of the parole. . . ."[12] Others, in refusing to forfeit the gain time, hold that statutes or rules providing for gain time are to be read into the judgment and form a part thereof;[13] that the "diminution of imprisonment provided for by statute is a privilege of which the prisoner can be deprived only in accordance with the provisions of the statute,"[14] and if no provision is made for forfeiture upon violation of parole, then the prisoner stands entitled to the time.[15] On the other hand, courts have casually disallowed the gain time for good conduct upon revocation of parole,[16] or have held that the statutory provisions allowing gain time for good conduct "cannot enter into the sentence or form a part of it, for the reward must first be earned before the prisoner is entitled to it."[17] The theory is that continued good conduct is a condition precedent to the prisoner's rights to any credits, and that the condition is not satisfied by misconduct on parole.

The relative dearth of decisions on this point in jurisdictions in the third category would seem to be indicative at least of a policy to allow a parolee to retain his gain time credits upon revocation of parole. An overwhelming majority of the states do not have statutes expressly dealing with the problem, and a majority of these states that have ruled on the point have held that the prisoner stands entitled to the time upon revocation of parole. Therefore, it would seem in line with the weight of authority that in the absence of express statutory authorization there should be no forfeiture of the credits upon revocation of parole.

In North Carolina the question has never been before the court.[18]

[12] *Ibid.*

[13] Woodward v. Murdock, 124 Ind. 439, 24 N. E. 1047 (1890). Indiana adopted its present statute in 1897, hence subsequent to the above decision. See note 9 *supra.* Apparently, however, a parolee is still allowed to retain his gain time upon revocation of parole. See Boyd v. Howard 224 Ind. 439, 68 N. E. 2d 652 (1946).

[14] State *ex rel.* Davis v. Hunter, 124 Iowa 569, 571, 100 N. W. 510, 512 (1904). Iowa's present statute, IOWA CODE ANN. §247.28 (1950), is unusual in that it provides that one violating a condition of parole shall be deemed guilty of a felony, and shall be imprisoned to serve five years, upon the completion of the previous sentence.

[15] *Ibid.* See also *Ex Parte* McKenna, 79 Vt. 34, 64 Atl. 77 (1906).

[16] *Ex Parte* Holton, 304 Mich. 534, 8 N. W. 2d 628 (1943).

[17] Stephens v. Conley, 48 Mont. 352, 355, 138 Pac. 189, 192 (1914).

[18] State v. Yates, 183 N. C. 753, 11 S. E. 337 (1927). The facts in this case indicate that the order of revocation from the governor stated that "no time [shall be] allowed for previous good behavior, if any such time was entered to his credit." The point was not raised, the issue being the authority to revoke a parole after the time fixed in the original sentence had expired. It is doubtful that any gain time had been granted; he had been paroled after serving only 42 days. However, it has been held in other jurisdictions that a provision in an order of revocation for forfeiture of gain time for good conduct is illegal and outside the authority of the governor. See State *ex rel.* Davis v. Hunter, 124 Iowa 569, 100 N. W. 510 (1904). See also, *Ex parte* Ridley, 3 Okl. Cr. 350, 106 Pac. 549 (1910). Since the *Ridley* case Oklahoma has amended its statute to provide for automatic cancellation of gain time credits upon revocation of parole.

While a prisoner in North Carolina may earn gain time credits for good conduct,[19] there is no express provision for forfeiture of this time except by escape or attempted escape,[20] or participation in mutiny, riot, insurrection, destruction of state property, or attack upon any officer or inmate.[21] North Carolina, being in the third category, is therefore similar to most jurisdictions in that the statute remains silent as to the status of gain time credits upon revocation of parole.

It has been the administrative policy in North Carolina to allow an ex-parolee to retain his acquired gain time credits, and this policy is founded on the belief that the administrative agency is without authority, under the present statutes, to deprive him of that time.[22] In the light of what has been said before, this view seems entirely proper from both a legal and a policy standpoint.

ROGER B. HENDRIX.

Sales—Implied Warranty of Wholesomeness—Requirement of Privity

A wrongful death action was brought in North Carolina against a retail druggist for breach of an implied warranty of wholesomeness of a salt substitute, sold in its original package to plaintiff's intestate. The defendant retailer joined his wholesaler as third-party defendant, on the allegation that the wholesaler was primarily liable on the same implied warranty. The wholesaler demurred for failure to state a cause of action and for misjoinder of parties and causes of action. The overruling of the demurrer was affirmed and the joinder held proper because the retailer, if held liable, would be able to recover the loss from the wholesaler.[1]

Most jurisdictions recognize the implied warranty of fitness for human consumption in the sale of food.[2] A majority of jurisdictions,

[19] *Rules and Regulations Governing the Management of Prisoners under the Control of the State Highway and Public Works Commission.* §2 (1949), as authorized by N. C. GEN. STAT. §148-12, 13 (1943). Time earned is dependent on the grade of the prisoner. Additional time may be earned if the prisoner is of a certain grade and on continuous good behavior for twelve months; credit may also be earned for Sunday, holiday or emergency work.

[20] N. C. GEN. STAT. §148-41 (1943).

[21] *Rules, op. cit. supra* note 19, §6(o).

[22] Informal opinion, State Highway and Public Works Commission. But see note 18 *supra.*

[1] Davis v. Radford, 233 N. C. 283, 63 S. E. 2d 822 (1951).

[2] Under the common law: Stanfield v. F. W. Woolworth Co., 143 Kan. 117, 53 P. 2d 878 (1936); Degouveia v. H. D. Lee Mercantile Co., 231 Mo. App. 447, 100 S.W. 2d 336 (1936); Walker v. Packing Co., 220 N.C. 158, 16 S. E. 2d 668 (1941); Williams v. Elson, 218 N. C. 157, 10 S. E. 2d 668 (1940); Rabb v. Covington, 215 N. C. 572, 2 S. E. 2d 705 (1939); Jacob E. Decker & Sons v. Capps, 139 Tex. 609, 164 S. W. 2d 828 (1942); Colonna v. Rosedale Dairy Co., 166 Va. 314, 186 S. E. 94 (1936); Burgess v. Sanitary Meat Market, 121 W. Va. 605, 5 S. E. 2d 785 (1939); 1 WILLISTON, SALES §242 (Rev. ed. 1948). The Uniform Sales Act has been adopted in 34 states. See 1 UNIFORM LAWS ANNOTATED, SALES, p. xv, (1950), Table III, for a list of the states which have adopted it, the dates of adoption, and the respective state statutes. The implied warranty of fitness under the Uniform

including North Carolina, require privity between the parties for a recovery for its breach.[3] This limitation rests on the ground that the warranty is contractual in its nature; therefore any party to an action for its breach must also have been a party to the sale contract.[4] Thus, the privity rule imposes two limitations: (1) It prevents a person who is not the purchaser of the deleterious food from recovering for a breach of the implied warranty of fitness, and (2) it prevents an injured purchaser from maintaining a breach of warranty action against any but his immediate vendor.[5] However, a vendor against whom a judgment

Sales Act is found in Section 15 (1): "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose." Making known the purpose and reliance on the seller's skill are both required under the common law and the Uniform Sales Act. The courts have generally been lenient in finding both requirements in food cases. A purchaser of food is recognized as wanting the food to eat, and the mere fact of purchase has been regarded as giving rise to a presumption of reliance or as being sufficient evidence of reliance. See 1 WILLISTON, SALES §242 (Rev. ed. 1948); DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER, 32, 44-48 (1951).

Consideration of the liability of the restaurateur is excluded from this note. The weight of authority holds him liable for breach of implied warranty. See DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER, 159-180 (1951); Wasserman, *Commentary on Diners' Protection,* 61 N. J. L. J. 57 (1938); Note, 14 NOTRE DAME *Law.* 318 (1939).

[3] *E.g.,* Borucki v. MacKenzie Bros. Co., 125 Conn. 92, 3 A. 2d 224 (1938); Vaccarino v. Cozzubo, 181 Md. 614, 31 A. 2d 316 (1943); Newhall v. Ward Baking Co., 240 Mass. 434, 134 N. E. 625 (1922); Hazelton v. First National Stores, 88 N. H. 409, 190 Atl. 280 (1937); Stave v. Giant Food Arcade, 125 N. J. L. 512, 16 A. 2d 460 (1940); Hopkins v. Amtorg Trading Corp., 265 App. Div. 278, 38 N. Y. S. 2d 788 (1943); Thomason v. Ballard & Ballard Co., 208 N. C. 1, 179 S. E. 30 (1935); Colonna v. Rosedale Dairy Co., 166 Va. 314, 186 S. E. 94 (1936); Prinsen v. Russos, 194 Wis. 142, 215 N. W. 905 (1927); 1 WILLISTON, SALES §244 (Rev. ed. 1948).

[4] The action of express warranty originally sounded in tort. In Stuart v. Wilkins, 1 Dougl. 18, 99 Eng. Rep. 15 (1778), Lord Mansfield held that the proper action was one in assumpsit. When implied warranties came to be recognized, the action of assumpsit was accepted as correct. See DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER, 34-37 (1951); 1 WILLISTON, SALES §§195-197 (Rev. ed. 1948).

[5] See note 3 *supra.*

Some states will not allow suit for breach of the implied warranty of fitness against the retailer of deleterious food sold by him in its original sealed container. The theory is that the retailer can have no greater knowledge of possible defects than the buyer, and since the buyer knows it, there can be no reliance on the retailer's skill in selection. Common law states: Davis v. Williams, 58 Ga. App. 274, 198 S. E. 357 (1938); Kroger Grocery Co. v. Llewelling, 165 Miss. 71, 145 So. 726 (1933); Pennington v. Cranberry Fuel Co., 117 W. Va. 680, 186 S. E. 610 (1936). Uniform Sales Act states: Kirkland v. Great Atlantic & Pacific Tea Co., 233 Ala. 404, 171 So. 735 (1937); Coca-Cola Bottling Co. v. Swilling, 186 Ark. 1149, 57 S. W. 2d 1029 (1933); Bigelow v. Maine Central R. R., 110 Me. 105, 85 Atl. 396 (1912); Wilkes v. Memphis Grocery Co., 23 Tenn. App. 550, 134 S. W. 2d 929 (1939). Quite a few states have expressly repudiated this doctrine under both the common law and the Uniform Sales Act, and it does not appear to be gaining in popularity. Burkhardt v. Armour & Co., 115 Conn. 249, 161 Atl. 385 (1932); Ward v. Great Atlantic & Pacific Tea Co., 231 Mass. 90, 120 N. E. 225 (1918); Griffin v. James Butler Grocery Co., 108 N. J. L. 92, 156 Atl. 636 (1931); Rabb v. Covington, 215 N. C. 572, 2 S. E. 2d 705 (1939); Bonenberger

has been obtained by an injured consumer or intermediate vendee may generally recover over against his vendor on the same warranty until the party ultimately responsible for the breach is held liable in damages.[6] Where there is an express warranty by the manufacturer on the outside of the package, North Carolina allows the injured purchaser to sue directly for a breach, free of the privity requirement.[7]

The joinder of the wholesaler in the principal case has the practical effect of avoiding the immediate vendor-vendee limitation of the privity rule.[8] Since there was no allegation of a separate breach of the warranty by the retailer, he could recover over from the wholesaler the amount of his liability in the same action.[9] However, this effect is limited by the fact that the defendant and not the plaintiff had control of the joinder. But practically, a defendant would hardly resist joining his vendor if he could thereby escape liability. In addition to any doubt that might be cast upon the validity of the requirement of privity by this decision, there was a dictum in the opinion that: "Under the decision in Simpson v. Oil Co.[10] . . . it would seem that the plaintiff here [consumer] could have maintained an action against . . . the distributor for

v. Pittsburgh Mercantile Co., 345 Pa. 559, 28 A. 2d 913 (1942). A debate on the question of imposing absolute liability on the retailer is found in the following: Waite, *Retail Responsibility and Judicial Law Making,* 34 MICH. L. REV. 494 (1936); Brown, *The liability of Retail Dealers for Defective Food Products,* 23 MINN. L. REV. 585 (1939); Waite, *Retail Responsibility—A Reply,* 23 MINN. L. REV. 612 (1939).

[6] Royal Paper Box Co. v. Munro & Church Co., 284 Mass. 446, 188 N. E. 223 (1933); Carleton v. Lombard, 19 App. Div. 297, 46 N. Y. Supp. 120 (1897); Aldridge Motor Co. v. Alexander, 217 N. C. 750, 9 S. E. 2d 469 (1940); Williams v. Chevrolet Co., 209 N. C. 29, 182 S. E. 719 (1935); Wolstenholme v. Randall & Bro., Inc., 295 Pa. 131, 144 Atl. 909 (1929); 3 WILLISTON, SALES §614a (Rev. ed. 1948); 22 AM. JUR., Food §110 (1938).

[7] Simpson v. American Oil Co., 217 N. C. 542, 8 S. E. 2d 813 (1940). Here plaintiff-purchaser suffered violent skin irritations from the use of an insecticide, the package of which carried the words, ". . . non-poisonous to human beings, but . . . not suited for internal use." The court stated, "We know of no reason why the original manufacturer and distributor should not, for his own benefit and that, of course, of the ultimate consumer, make such assurances, nor why they should not be relied upon in good faith, nor why they should not constitute a warranty on the part of the original seller and distributor running with the product into the hands of the consumer, for whom it was intended." *But cf.* Pelletier v. Dupont, 124 Me. 269, 128 Atl. 186 (1925), where the court failed to find an express warranty as to the wholesomeness of bread from the words on the label, "Purity Nutrition Cleanliness absolutely applies to Edgeworth Bread.", and also stated that there must be privity between the parties for an action on express warranty. Also see Alpine v. Friend Bros., Inc., 244 Mass. 164, 138 N. E. 553 (1923) and Newhall v. Ward Baking Co., 240 Mass. 434, 134 N. E. 625 (1922), where the actions were for deceit rather than for breach of express warranty.

[9] See note 6 *supra.*

[8] The following cases allowed similar joinders: Occhipinti v. Buscemi, 267 App. Div. 874, 46 N. Y. S. 2d 292 (1944); Linn v. Radio Center Delicatessen, 169 Misc. 879, 9 N. Y. S. 2d 110 (N. Y. Munic. Ct. 1939); Weiner v. Mager & Throne, 167 Misc. 338, 3 N. Y. S. 2d 918 (N. Y. Munic. Ct. 1938); McSpedon v. Kunz, 271 N. Y. 131, 2 N. E. 2d 513 (1936); Barker v. Weingarten Riverside Co., 232 S. W. 2d 692 (Tex. Civ. App. 1950).

[10] Simpson v. American Oil Co., 217 N. C. 542, 8 S. E. 2d 813 (1940) (footnote ours).

the cause set out in his complaint, though he has elected to sue only the retail dealer."[11] The case here relied upon is distinguishable from the principal case, since it involved an express warranty by the manufacturer to the consumer through the medium of the product's package, rather than an implied warranty.[12] Nevertheless, such language may indicate a feeling that the privity limitation is no longer proper as a matter of policy.[13]

Recent decisions in other jurisdictions have allowed recovery by the ultimate consumer where no contractual relationship existed between the parties. This may indicate a general trend toward the elimination of the requirement of privity in sale-of-food actions. Various theories have been advanced to sustain this result. Some cases have avoided the result of the privity requirement where the purchaser and the consumer are different, but related, parties by holding that the right to sue a retailer is actually based on an agency-principal relationship between the plaintiff-consumer and the purchaser.[14] Others, recognizing the requirement of privity, have found that the implied warranty runs with the goods so that ownership is the basis of recovery,[15] or that the consumer is a third party beneficiary of the contract between the manufacturer and the retailer and as such can sue.[16] A third class of cases allows recovery by doing away with the requirement of privity on the specific ground of public policy[17] or upon general policy considerations.[18]

[11] Davis v. Radford, 233 N. C. 283, 286, 63 S. E. 2d 822, 825 (1951).

[12] See note 7 *supra.*

[13] For certain policy considerations, *see* Thomason v. Ballard & Ballard Co., 208 N. C. 1, 5, 179 S. E. 30, 32 (1935) (dissenting opinion); Condon, *The Practical Impact of the Proposed Uniform Commercial Code on Food Poisoning Cases,* 5 FOOD DRUG COSMETIC L. J. 213 (1950); Jeanblanc, *Manufacturers' Liability to Persons Other Than Their Immediate Vendees,* 24 VA. L. REV. 134 (1937); Perkins, *Unwholesome Food as a Source of Liability,* 5 IOWA L. BULL. 86 (1920); Note, 7 WASH. L. REV. 351 (1932).

[14] Welter v. Bowman Dairy Co., 318 Ill. App. 305, 47 N. E. 2d 739 (1943); Vaccarino v. Cozzubo, 181 Md. 614, 31 A. 2d 316 (1943); Colby v. First National Stores, 307 Mass. 252, 29 N. E. 2d 920 (1940); Wadleigh v. Howson, 88 N. H. 365, 189 Atl. 865 (1937); Ryan v. Progressive Grocery Stores, 255 N. Y. 388, 175 N. E. 105 (1931).

[15] *E.g.,* Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927) (donee of purchaser allowed to sue); Coca-Cola Bottling Co. v. Smith, 97 S. W. 2d 761, 767 (Tex. Civ. App. 1936) (suit by injured purchaser against the manufacturer of a bottled coca-cola: ". . . the defendant's implied warranty to the retailer who purchased from it with knowledge and intention on the part of the defendant that the beverage would be sold and consumed by a purchaser from the retailer ran with the article and inured to the benefit of the plaintiff who purchased from the dealer.").

[16] Dryden v. Continental Baking Co., 11 Cal. 2d 33, 77 P. 2d 833 (1938); Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 478, 161 N. E. 557, 559 (1928) (Suit by injured consumer against manufacturer of cake containing needle which was purchased from retail groceryman: "Whatever implied warranty arises in favor of the groceryman, who established the contractual relationship with the Baking Company, is for the benefit of this third party, namely, the ultimate consumer.").

[17] *E.g.,* Blanton v. Cudahy Packing Co., 154 Fla. 872, 19 So. 2d 313 (1944); Patargias v. Coca-Cola Bottling Co., 332 Ill. App. 117, 74 N. E. 2d 162 (1947);

One court interpreted the Uniform Sales Act as expressing legislative intent to do away with the privity limitation.[19]

An injured purchaser of deleterious food in its original package may generally bring a negligence action directly against the manufacturer, privity not being required.[20] He is aided in many jurisdictions by the application of the doctrine of *res ipsa loquitur*,[21] or the principle that the violation of pure food and drug acts by the manufacture of unwholesome food constitutes negligence per se.[22] But in North Carolina, if the plaintiff is unable to show actual negligence, the only other way that he may prove his cause of action is by evidence that products manufactured under substantially similar conditions, and sold by the defendant "about the same time," contained foreign or deleterious sub-

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Welter v. Bowman Dairy Co., 318 Ill. App. 305, 47 N. E. 2d 739 (1943); Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N. W. 382 (1920); Helms v. General Baking Co., 164 S. W. 2d 150 (Mo. App. 1942); Madouros v. Kansas City Coca-Cola Bottling Co., 230 Mo. App. 275, 90 S. W. 2d 445 (1936); Sincavage v. Armour & Co., 41 Luz. Leg. Reg. 183 (Pa. C. P. 1950); Amarillo Coca-Cola Bottling Co. v. Loudder, 207 S. W. 2d 632 (Tex. Civ. App. 1948); Jacob E. Decker & Sons v. Capps, 139 Tex. 609, 164 S. W. 2d 828 (1942); Nelson v. West Coast Dairy Co., 5 Wash. 2d 284, 105 P. 2d 76 (1940); Mazetti v. Armour & Co., 75 Wash. 622, 135 Pac. 633 (1913).

[18] Swengel v. F. & E. Wholesale Grocery Co., 147 Kan. 555, 77 P. 2d 930 (1938); Cudahy Packing Co. v. Baskin, 170 Miss. 834, 155 So. 217 (1934); Rainwater v. Hattiesburg Coca-Cola Bottling Co., 131 Miss. 315, 95 So. 444 (1923); Griffin v. Asbury, 196 Okla. 484, 165 P. 2d 822 (1945).

Louisiana does not require privity under the civil law. Arndt v. D. H. Holmes Co., 9 La. App. 36, 119 So. 91 (1928); Doyle v. Fuerst & Kraemer, 129 La. 838, 56 So. 906 (1911); DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER, 65, n. 3 (1951).

It seems that Montana has reached the same result. Bolitho v. Safeway Stores, 109 Mont. 213, 95 P. 2d 443 (1939) (recovery on implied warranty theory by daughter of purchaser).

[19] Klein v. Dutchess Sandwich Co., 14 Cal. 2d 272, 279, 93 P. 2d 799, 804 (1939). The California statute is identical with Section 15(1) of the Uniform Sales Act. The opinion stated, "In adopting the statute here concerned as a part of the Uniform Sales Act, it was the clear intent of the legislature that, with respect to foodstuffs, the implied warranty provision therein contained should inure to the benefit of any ultimate purchaser or consumer of food; and it was not intended that a strict 'privity of contract' would be essential for the bringing of an action by such ultimate consumer for an asserted breach of the implied warranty."

[20] Pillars v. R. J. Reynolds Tobacco Co., 117 Miss. 490, 78 So. 365 (1918); Tomlinson v. Armour & Co., 75 N. J. L. 748, 70 Atl. 314 (1908); Freeman v. Schultz Bread Co., 100 Misc. 528, 163 N. Y. Supp. 396 (N. Y. Munic. Ct. 1916); Minutilla v. Providence Ice Cream Co., 50 R. I. 43, 144 Atl. 884 (1929); PROSSER, TORTS, 673-678 (1941).

[21] *E.g.*, Reichert Milling Co. v. George, 230 Ala. 3, 162 So. 393 (1934); Eisengeiss v. Payne, 42 Ariz. 262, 25 P. 2d 162 (1933); Paolinelli v. Dainty Foods Manufacturers, 322 Ill. App. 586, 54 N. E. 2d 759 (1944); Nehi Bottling Co. v. Thomas, 236 Ky. 684, 33 S. W. 2d 701 (1930); Doyle v. Continental Baking Co., 262 Mass. 516, 160 N. E. 325 (1928); Coca-Cola Bottling Works v. Sullivan, 178 Tenn. 405, 158 S. W. 2d 721 (1942); Campbell Soup Co. v. Davis, 163 Va. 89, 175 S. E. 743 (1934).

[22] *E.g.*, Donaldson v. Great Atlantic & Pacific Tea Co., 186 Ga. 870, 199 S. E. 213 (1938); Salzano v. First National Stores, 268 App. Div. 993, 51 N. Y. S. 2d 645 (1944); Portage Markets Co. v. George, 111 Ohio St. 775, 146 N. E. 283 (1924); Doherty v. S. S. Kresge Co., 227 Wis. 661, 278 N. W. 437 (1938).

stances.[23] The latter rule has been strictly applied,[24] and the evidence required under either theory is often impossible to secure.[25]

Thus, in the vast majority of North Carolina cases the plaintiff is able to establish his cause of action only on the implied warranty, and only against the retailer. If the retailer cannot or does not join his vendor, and is himself judgment proof, as frequently may be the case, there is no practical remedy left to the plaintiff. However, the abandonment of the requirement of privity,[26] indicated by the dictum in the principal case, will make the manufacturer, all middlemen, and the retailer liable for injuries resulting from unwholesome products sold by them.[27] This will give the injured plaintiff an opportunity to select as

[23] Coca-Cola Bottling Co. of Henderson v. Munn, 99 F. 2d 190 (4th Cir. 1938); Enloe v. Coca-Cola Bottling Co., 208 N. C. 305, 180 S. E. 582 (1935) (Contains a summary of the North Carolina rules in negligence actions of this type.); Davis v. Coca-Cola Bottling Co., 228 N. C. 32, 44 S. E. 2d 337 (1947) (bursting bottle); Woody v. Coca-Cola Bottling Co., 218 N. C. 217, 10 S. E. 2d 706 (1940) (oily substance in bottle); Tickle v. Hobgood, 216 N. C. 221, 4 S. E. 2d 444 (1939) (decomposed animal flesh in bottle); Smith v. Coca-Cola Bottling Co., 213 N. C. 544, 196 S. E. 822 (1938) (shattered glass in bottle); Hampton v. Bottling Co., 208 N. C. 331, 180 S. E. 584 (1935) (substance in bottle resembling paint); Corum v. R. J. Reynolds Tobacco Co., 205 N. C. 213, 171 S. E. 78 (1933) (fish-hook in tobacco plug); Perry v. Bottling Co., 196 N. C. 175, 145 S. E. 14 (1928) (shattered glass in bottle); Lamb v. Boyles, 192 N. C. 542, 135 S. E. 464 (1926); Note, 15 N. C. L. Rev. 430 (1937).

[24] *See, e.g.*, Evans v. Pepsi-Cola Bottling Co., 216 N. C. 716, 6 S. E. 2d 510 (1940) (Where plaintiff was injured by drinking a soft drink containing a lethal portion of arsenic, evidence that the bottle was "crooked" so that proper cleansing was impossible was *held* improperly admitted); McCarn v. 3-Centa Bottling Company, 213 N. C. 543, 196 S. E. 837 (1938) (Nonsuit held proper where plaintiff's only evidence was that he became ill from soft drink containing sediment and "slimy-appearing" substance); Collins v. Coca-Cola Bottling Co., 209 N. C. 821, 184 S. E. 834 (1936) (Admission of evidence as to other deleterious substances in soft drinks manufactured by defendant was held error since there was no evidence of the time when the manufacturer sold the other bottles to dealers); Enloe v. Bottling Co., 208 N. C. 305, 180 S. E. 582 (1935) (where plaintiff was injured by drinking a coca-cola containing a rat; evidence of glass in another coca-cola manufactured by defendant was held improperly admitted).

[25] Dickerson, Products Liability and the Food Consumer, 70-72 (1951), where it is pointed out that in negligence actions, the successful plaintiff is comparatively rare, either because there was no negligence, or no proof of negligence, or the food was in its original sealed container thereby releasing the retailer.

[26] The abandonment spoken of would, in all probability, be a complete abandonment, thus allowing the injured *consumer*, although not the purchaser of the food, to sue any or all of the prior vendors. *But cf.* the new Uniform Commercial Code, final draft of 1951, section 2-318, which contains the provision: "A warranty whether express or implied extends to any natural person whose relationship to the buyer is such as to make it reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section." Comment 4 under this section indicates that the warranty would extend directly from the manufacturer to the consumer. However, the language of the section is susceptible of the interpretation that its only effect is to allow the warranty to extend from the purchaser's vendor, usually a retailer, to such reasonably anticipated consumers. The latter interpretation is perhaps the intent of the drafters since the final proposed draft of 1951 omitted sections 2-718 and 2-719 of the 1950 proposed draft which together would have expressly authorized suit by the injured consumer against any vendor in the line of distribution. See note, 26 N. Y. U. L. Rev. 352 (1951).

[27] Prosser, Torts, 669-673, 688-691 (1941).

a defendant the one most responsible financially, or to bring action against all as joint defendants, thus increasing the probability of collection of any damages, and in many cases preventing circuity of actions.[28] Such a principle is recognized in negotiable instruments law in actions by a holder against prior parties,[29] and in real property law in actions by a grantee against all prior grantors for breach of certain covenants contained in the prior deeds.[30]

The abandonment of the privity requirement, in addition to greatly aiding an injured plaintiff, might have the incidental but desirable effect of forcing greater care by the manufacturer, and greater discrimination and inspection in selection of the product by the middleman and retailer.

WALKER Y. WORTH, JR.

Wills—Per Stirpes or Per Capita Division

The difficult problem of determining the dispositive intent expressed in an ambiguous will has reappeared in North Carolina. The testator, in a will prepared by a layman, directed that "the remainder of my estate is to be equally divided among my legal heirs, including said Myrtle Coppedge Bunn, equally, share and share alike as provided by laws of North Carolina." A brother, a half brother, eleven children of a deceased brother and a deceased sister, and two children of a deceased nephew were involved in the action to determine if the estate was to be divided *per capita* or *per stirpes*. *Held* (one justice dissenting) that the estate should be divided into fifteen equal shares, a *per capita* distribution.[1]

Courts have been called on many times to interpret wills using similar language. As a result, certain phrases have been singled out as being indicative of the testator's intention. As a general rule, a per capita division is favored unless the will shows a contrary intent.[2] When

[28] If action is brought against the manufacturer in the first instance circuity is prevented since there will be no possibility of a purchaser-retailer action, retailer-wholesaler action, and wholesaler-manufacturer action. Or if all are joined, circuity may be avoided by the retailer or wholesaler obtaining a judgment over against the manufacturer in the same suit.

[29] 8 AM. JUR., Bills and Notes §942 (1938).

[30] Wiggins v. Pender, 132 N. C. 628, 634, 44 S. E. 362, 364 (1903) quoting with approval from Spencer's Case, 1 Smith, L. C. (9th ed.) 174: ". . . [the] covenant of warranty binds the original grantor and his personal representatives to the owner of the land, and any owner during whose possession a breach occurs can sue any or all previous covenantors . . ."; 14 AM. JUR., Covenants, Conditions and Restrictions §50 (1938).

[1] Coppedge v. Coppedge, 234 N. C. 173, 66 S. E. 2d 777 (1951) Justice Johnson, dissenting, was of the opinion that the will should be construed to require a *per stirpes* distribution. *Id* at 178, 66 S. E. 2d at 781.

[2] Burton v. Cahill, 192 N. C. 505, 135 S. E. 332 (1926); *Ex parte* Brogden, 180 N. C. 157, 104 S. E. 177 (1920); Howell v. Tyler, 91 N. C. 213 (1884); Britton v. Miller, 63 N. C. 268 (1869); Bryant v. Scott, 21 N. C. 155 (1835); 69 C. J. §1312 (1951).

such phrases as "to be equally divided," "share and share alike," etc., are the only indications in the will as to how the estate is to be apportioned, they normally import a desire that each individual take an equal share.[3] However, they can just as easily be interpreted to mean an equal division among classes[4] particularly where the beneficiaries stand in unequal degrees of relationship.[5] Use of the words "legal heirs" points to a *per stirpes* distribution according to the intestate succession laws;[6] but, the coupling of expressions of equality with these words changes the presumption to favor giving each individual the same share.[7]

A general reference in the will to the intestacy statutes, for example, "according to the laws of the state," in the situation where those claiming are of unequal degrees of kinship to the testator, indicates a desire to have the beneficiaries take by classes.[8] Here again, expressions of equality change this presumption to support a *per capita* apportionment.[9] Irrespective of the use of such phrases, that desire which seems to predominate throughout the entire instrument,[10] as related to the surrounding circumstances which may have influenced the testator at the time it was written,[11] will be the decisive factor.

The problem of construing wills containing various combinations of the foregoing phrases has been faced many times in North Carolina. As might be expected, there has never been any one will presented to our court which contained all of the prominent features of the instrument in the instant case. At first glance, the decision allowing each of the interested parties to take the same portion seems to be a reiteration of

[3] Re Rauschenplaut, 212 Cal. 33, 297 Pac. 882 (1931); Dollander v. Dhaemers, 297 Ill. 274, 130 N. E. 705 (1921); Tillman v. O'Briant, 220 N. C. 714, 18 S. E. 2d 131 (1942); Burton v. Cahill, 192 N. C. 505, 135 S. E. 332 (1926); *In re* Asby, 232 Wis. 481, 287 N. W. 734 (1939).

[4] Raymond v. Hillhouse, 45 Conn. 467, 29 Am. Rep. 688 (1878); Runyan v. Rivers, 99 Ind. App. 680, 192 N. E. 327 (1934); Freund v. Schilling, 222 Mo. App. 901, 6 S. W. 2d 678 (1928); Burgin v. Patton, 58 N. C. 425 (1860); Rogers v. Brickhouse, 58 N. C. 301 (1860).

[5] Murphy v. Fox, 334 Ill. App. 7, 78 N. E. 2d 337 (1948); Bear v. Pitzer, 131 W. Va. 374, 47 S. E. 2d 219 (1948).

[6] Stephens v. Clark, 211 N. C. 84, 189 S. E. 191 (1936); 69 C. J. §1316.

[7] Dennis v. Shirley, 212 Ky. 114, 278 S. W. 691 (1925); Doherty v. Grady, 105 Me. 36, 52 A 869 (1908); Wooten v. Outland, 226 N. C. 245, 37 S. E. 2d 682 (1946).

[8] Old Colony Trust Co. v. Lothrop, 276 Mass. 469, 177 N. E. 675 (1931); In re Ware, 173 Misc. 316, 17 N. Y. S. 2d 693 (1940); Croom v. Herring, 11 N. C. 393 (1826).

[9] Proctor v. Lacy, 263 Mass. 1, 160 N. E. 441 (1928); 57 AM. JUR. §1229 (1948).

[10] In re Carrol, 62 Cal. App. 2d 798, 45 P. 2d 644 (1944); MacGregor v. Roux, 198 Ga. 520, 32 S. E. 2d 289 (1944); Patchell v. Groom, 158 Md. 10, 43 A. 2d 32 (1945); House v. House, 231 N. C. 218, 56 S. E. 2d 695 (1949); Schaeffer v. Haseltine, 228 N. C. 484, 46 S. E. 2d 463 (1948).

[11] Shackelford v. Kauffman, 263 Ky. 676, 93 S. W. 2d 15 (1936); In re Thompson, 202 Minn. 648, 279 N. W. 574 (1938); House v. House, 231 N. C. 218, 56 S. E. 2d 695 (1949); Schaeffer v. Haseltine, 228 N. C. 484, 46 S. E. 2d 463 (1948); Ward v. Ottley, 166 Va. 639, 186 S. E. 25 (1936).

the prevailing rule in this jurisdiction.[12] Perhaps, however, a more detailed survey is necessary.

In nearly all of the cases cited as applying the general rule, an equal division was indicated among those who were specifically named in the will,[13] and in two instances all the beneficiaries who were to take equally stood in the same degree of relationship to the testator.[14] These cases required no outside reference to the statute of distributions or canons of descent to determine who was to share the estate. It was obvious who the testator intended should take equal shares; whereas, in the present case, the beneficiaries were referred to only as "legal heirs."

There have been occasions when an outside reference was necessary. The first time this situation arose, the phrase "equally divided between my legal heirs" was construed as directing a *per capita* distribution among those standing in unequal degrees of relationship to the testator.[15] It might be noted that two subsequent cases involving similar language and circumstances held directly contra to this decision.[16] Then, in the

[12] "The general rule in this jurisdiction is to the effect that where an equal division is directed among heirs, or a class of beneficiaries, even though such class of beneficiaries may be described as *heirs* of deceased persons, *heirs* or *children* of living persons, the beneficiaries take *per capita* and not *per stirpes*." Wooten v. Outland, 226 N. C. 245, 37 S. E. 2d 682 (1946).

[13] Stowe v. Ward, 10 N. C. 604 (1824) ("be as equally divided amongst the heirs of my brother, John Ford, the heirs of my sister, Nanny Stowe, the heirs of my sister, Sally Ward, deceased, and nephew, Levi Ward"); Bryant v. Scott, 21 N. C. 155 (1835) ("to be equally divided among the persons hereafter named" and then went on to name them); Hastings v. Earp, 62 N. C. 5 (1866) ("to be equally divided amongst all of the legatees named in the will, except the Masons," where the legatees had been previously named); Waller v. Forsyth, 62 N. C. 353 (1866) ("to be equally divided between the children of the said Nancy Waller and my sons, William and John"); Britton v. Miller, 63 N. C. 268 (1869) ("to the children of my brother, Stephen W. Britton, and of my sister, Mary Miller . . . to them and their heirs forever"); Culp v. Lee, 109 N. C. 675, 14 S. E. 74 (1891) (the "surplus shall be equally divided and paid over to Phillip J. Russell, Miss Mary Russell and the children of my niece, Martha . . . in equal portion, share and share alike"); Everett v. Griffin, 174 N. C. 106, 93 S. E. 474 (1917) ("the proceeds . . . shall be equally divided between all my children"); Legett v. Simpson, 176 N. C. 3, 96 S. E. 638 (1918) ("to the lawful children of my nieces, Elizabeth Bateman and Charlotte Baxter"); *Ex parte* Brogden, 180 N. C. 157, 104 S. E. 177 (1920) ("to be equally divided between my two sisters' children" and then specifically named those children); Burton v. Cahill, 192 N. C. 505, 135 S. E. 332 (1926) ("to said Annie L. Burton and Katie L. Cahill and their children"); Tillman v. O'Briant, 220 N. C. 714, 18 S. E. 2d 131 (1941) ("the proceeds divided equally between Maggie Rhew's children and Lou Bettie O'Briant and Dewey Yarboro"); Wooten v. Outland, 226 N. C. 245, 27 S. E. 2d 682 (1946) ("to be equally divided among the heirs of Uncle Gus Moseley, Uncle Lam Moseley, Aunt Florence Patrick, Aunt Laune Jackson and Aunt Darlie Kilpatrick").

[14] Shull v. Johnson, 55 N. C. 202 (1855); Hill v. Spruill, 39 N. C. 244 (1846).

[15] "It is also my will . . . [that] the proceeds [be] equally divided between my legal heirs." The statute of distributions was used as a guide for the sole purpose of determining who were the "legal heirs." The phrase "equally divided" was held to direct the manner of apportionment of the estate. Freeman v. Knight, 37 N. C. 72 (1841).

[16] In Rogers v. Brickhouse, 58 N. C. 301 (1860) ("to be equally divided among his heirs at law"); and in Burgin v. Patton, 58 N. C. 425 (1860) ("to be equally divided amongst my heirs except John Burgin"), a *per stirpes* distribution was ordered.

next opinion on this exact problem, these two cases were completely ignored and once again a *per capita* apportionment was ordered.[17] Only one early case involved a direct reference to the intestate succession laws,[18] but the phrasing so clearly indicated that statutory apportionment was to be followed that it can hardly be considered as in point here.

Purely as a matter of grammatical construction, the correct interpretation of the clause involved in the principal case[19] would seem to be that urged by the dissenting opinion.[20] This is emphasized by the fact that the clause, read as it is written, seems to demand that reference be made to the intestate succession laws to determine both the question of *who* takes (i.e., who are the "legal heirs") and the question of *what share* is to be taken. The majority opinion reads the clause to mean that reference is to be made to the intestate succession laws to determine only the question of who are the "legal heirs," which seems to take the phrase, "as provided by laws of North Carolina," out of context. This is particularly so in view of the fact that our court has previously held that the words "legal heirs" standing alone mean the same thing as "legal heirs as provided by the laws of North Carolina." From this technical standpoint, the better view would probably be that the intestate succession laws should be controlling to demand a *per stirpes* distribution in this situation.

Perhaps the obvious answer to all of this is that these technicalities just do not apply. More than likely, the layman drawing this will utilized the phrase "as provided by laws of North Carolina" only to give the will what he might think of as "legal dignity." After all, here was a man who probably knew nothing whatsoever about the legal distinctions set forth in our intestate succession laws. He probably never heard the words *per capita* or *per stirpes*. If it can be said that the technical construction given this will by both the majority and dissenting opinions is not the controlling factor, then one more important consideration favoring a stirpital distribution remains.

Under ordinary circumstances, it would not be probable that the average person would intend that his grandnephew should have the same

[17] In Hackney v. Griffin, 59 N. C. 381 (1863) the court agreed with Freeman v. Knight 37 N. C. 72 (1841) and held that "to be equally divided between all my legal heirs" directed a *per capita* division of the estate. It is interesting to note that Justice Battle, who wrote the opinions in Rogers v. Brickhouse, 58 N. C. 301 (1860) and Burgin v. Patton 58 N. C. 425 (1860), and who was still a member of the court, did not dissent in Hackney v. Griffin. For a more complete discussion, see Long, *Class Gifts in North Carolina*, 22 N. C. L. REV. 297, 320 (1944).

[18] ". . . to be divided among all my legal heirs, agreeable to the statute of distributions of intestates' estates," Croom v. Herring, 11 N. C. 393, 394 (1826).

[19] ". . . to be equally divided among my legal heirs . . . equally, share and share alike as provided by laws of North Carolina." Coppedge v. Coppedge, 234 N. C. 173, 176, 66 S. E. 2d 777, 781 (1951).

[20] Coppedge v. Coppedge, 234 N. C. 173, 178, 66 S. E. 2d 777, 781 (1951).

share of his estate as his brother.[21] Yet, that is the result reached by the majority. It would seem more probable, in view of "the degree of consanguinity to the testator," that each class of beneficiaries instead of each individual was to have an equal share. In the case of an ambiguous will where sufficient evidence was not available as to the testator's true intention, would it not be better to allow this objective standard to prevail?

Because of the many factors which can influence the drawing of a will of this character, and the resulting difficulty in construing it, perhaps both the majority and dissenting view can be justified. By this decision, it would seem that where the phrase in question contains expressions of equality, a *per stirpes* distribution will be reached only if there is explicit language indicating such an intent.

MORTON L. UNION.

Wills—Requirement of Signatory Intent

Testator's attested will, written entirely in the hand of one of the witnesses thereto, was offered for probate. Her name appeared only twice in the instrument, thus:

"Will of Hannah Williams, Sr.
Garysburg, North Carolina.
". . . [Provisions of Will].
"We certify that Hannah Williams, Sr., was in her sound mind.
". . . [date].
[Signatures of Witnesses]"

The scrivener-witness testified that he "put it [the name at the top] in there to identify who she [testator] was and where she lived." The court held the name appearing at the top to be a sufficient "signing," and declared the instrument a valid will.[1]

The original Wills Act[2] in England did not require that the will be signed by the testator if it was properly reduced to writing.[3] Later, the Statute of Frauds[4] provided that the will be "signed by the party so devising the same or by some other person in his presence and by his express directions." *Lemayne v. Stanley*[5] interpreted this to mean that

[21] "Where the question is in the balance of doubt, the doubt is to be resolved in favor of a taking *per stirpes* rather than *per capita*. One reason for this preference is that such a taking is in accord with the laws of descent and in accord with the natural instinct of testators." Claude v. Schutt, 211 Iowa 117, 233 N. W. 41 (1930), cited in dissenting opinion in Coppedge v. Coppedge, 234 N. C. 173, 179, 66 S. E. 2d 777, 781 (1951).

[1] In re Will of Hannah Williams, 234 N. C. 228, 66 S. E. 2d 902 (1951).
[2] 32 Hen. VIII c. 1 (1540).
[3] Brown v. Sackville, 1 Dyer 72a (1553).
[4] 29 Car. II c. 3 §5 (1677).
[5] 3 Lev. 1 (1681).

when the testator's name appeared in the body of the will, in his own handwriting, it was sufficiently "signed." The present English statute,[6] passed as a result of this case,[7] requires that a will be signed at the end.

In this country the statutory requirements of different states vary. Where the statute merely requires that the will be in writing and signed, it is uniformly held that it is immaterial where the signature is placed, provided it can be established that it was attached with the intent to authenticate the instrument. As to the type of evidence necessary to prove the intent of the testator the courts are sharply divided. One line of cases holds that intent may be inferred from the declarations of the testator and circumstances attendant upon the execution of the document.[8] A second group of cases rests on the theory that the intent of the testator to adopt his name as his signature must be manifest upon the face of the will if the name appears elsewhere than at the end.[9] Under the latter theory the mere fact that the testator's name appears at the top or beginning of the will,[10] on the back,[11] or on the envelope in which the will is contained,[12] is not a sufficient signing to validate the will.

Several states, in order to prevent fraudulent additions to wills and to make the testators intent more apparent, require that the testator "sign at the end" or "subscribe" his name. These statutes have not eliminated the problem, since difficult questions of fact as to the intent of the testator have been replaced by equally difficult questions of law as to the legal effect of the word "end."[13] Because of the large

[6] 7 Wm. IV and 1 Vict. c. 26 (1837).

[7] ROLLISON ON WILLS §97 (1939); ROOD ON WILLS §257 (2d ed. 1926).

[8] Armstrong v. Armstrong, 29 Ala. 538 (1857); Meads v. Earle, 205 Mass. 553, 91 N. E. 916 (1910); In re Thomas' Estate, 243 Mich. 566, 220 N. W. 764 (1928); Stone v. Holden, 221 Mich. 430, 191 N. W. 238 (1922); In re Phelan, 82 N. J. Eq. 316, 87 Atl. 625 (1913).

[9] In re Manchester, 174 Cal. 417, 163 Pac. 358 (1917); Timoney v. Booth, 127 N. Y. 109, 27 N. E. 826 (1891).

[10] Meany v. Priddy, 127 Va. 84, 102 S. E. 470 (1920); Ramsey v. Ramsey, 54 Va. (13 Gratt.) 664 (1857).

[11] Roy v. Roy, 57 Va. (16 Gratt.) 418 (1863).

[12] Warwick v. Warwick, 86 Va. 596, 10 S. E. 843 (1890). *But cf.* Alexander v. Johnson, 171 N. C. 468, 88 S. E. 785 (1916).

[13] See, Bond, *When Is a Will Signed "At the End"?*, 9 MICH. L. REV. 342 (1910). The authorities are in accord that it is not necessary that one signing a will affix his legal or true name, In re Southerlands Will, 188 N. C. 325, 124 S. E. 632 (1924), and, where it is established that the signature is really that of the testator, Cartwright v. Cartwright, 158 Ark. 278, 250 S. W. 11 (1923), and it appears that he intended it to be a token of complete execution, the fact that he signs his first name, Knox's Estate, 131 Pa. 220, 18 Atl. 1021 (1890), an abbreviation of his name, Cartwright v. Cartwright, *supra*, or merely his initials, Barnes v. Horne, 233 S. W. 859 (Tex. Civ. App. 1921); Pilcher v. Pilcher, 117 Va. 356, 84 S. E. 667 (1915), will not render it invalid. Nor will it be invalid if it be signed "father," In re Kimmel's Estate, 278 Pa. 435, 123 Atl. 405 (1924), or "mother," In re Henderson's Estate, 196 Cal. 623, 238 Pac. 938 (1925); In re Southerlands Will, *supra;* "Brother Alex," Wise v. Short, 181 N. C. 320, 107 S. E. 134 (1921), or by an affectionate name, In re Button's Estate, 209 Cal. 325, 287 Pac. 964 (1930).

number of wills that have been held invalid on this point, although no question of their genuineness was raised, it has been said that "the remedy has proved in practice far worse than the disease."[14]

In North Carolina attested wills must be *"signed"* by the testator and *"subscribed"* by the witnesses; holographic wills must be *"subscribed"* by the testator or the testator's name *"inserted in some part of"* the will.[15] The Supreme Court has consistently held that the signature of the testator to a holographic or attested will may appear at any place on the instrument, but the subscription of a witness must appear at the end.[16]

For many years the North Carolina Court required a showing of signatory intent on the part of a testator.[17] But, in 1934, the case of *In re Will of Rowland*[18] apparently abrogated this requirement, at least as to holographic wills. There, an otherwise unsigned paper writing, entirely in the hand of the testator, contained the following clause: "I do hrby give W A Rowlal on the North west forner oo *sad land of H L Rowled* this being my will. . . ." [Emphasis added.] The court held that the statute only required that the name be "inserted in" some part of the will and that this writing fully satisfied such requirement. It

[14] Matter of Andrews, 43 App. Div. (N. Y.) 394 at 401 (1857).

[15] N. C. GEN. STAT. §31-3 (1943): "No last will or testament shall be good or sufficient, . . . unless [it] . . . shall have been written in the testator's lifetime, *and signed by him, or by some other person in his presence and by his direction,* and subscribed in his presence by two witnesses at least, . . . or unless such last will and testament be found among the valuable papers and effects of any deceased person, or shall have been lodged in the hands of any person for safekeeping, *and the same shall be in the handwriting of such deceased person, with his name subscribed thereto or inserted in some part of such will. . . .*"

[16] Alexander v. Johnston, 171 N. C. 468, 88 S. E. 785 (1916); Peace v. Edwards, 170 N. C. 64, 86 S. E. 807 (1915); Burriss v. Starr, 165 N. C. 657, 81 S. E. 929 (1914); Boger v. Cedar Cove Lumber Co., 165 N. C. 557, 81 S. E. 784 (1914); Richards v. W. M. Ritter Lumber Co., 158 N. C. 54, 73 S. E. 485 (1911); Hall v. Misenheimer, 137 N. C. 184, 49 S. E. 104 (1904); Devereux v. McMahan, 108 N. C. 134, 12 S. E. 902 (1891). Where the testator signs the will subsequent to the signing of the witnesses there is a split of authority as to the validity of the will. One line of cases holds that to witness a future event is equally impossible whether it occur the next moment or the next week. Brooks v. Woodson, 87 Ga. 379, 13 S. E. 712 (1891); In re Kahl's Estate, 278 Mich. 561, 270 N. W. 787 (1936). Another view is that the witnessing of a will constitutes two separate acts, the subscribing of the name being manual and the attesting being a mental process; there is no need that they be simultaneous. Therefore, when the testator signs after the witness has subscribed and the witness sees him sign, then the attestation is complete. Bloechle v. Davis, 132 Ohio 415, 8 N. E. 2d 247 (1937), 11 U. OF CIN. L. REV. 390 (testator signed four days after witness). A third theory, which seems to be the one followed in North Carolina, is that where the parties sign in the presence of each other, so close together in point of time as to constitute the same transaction, it is immaterial which one signed first. Cutler v. Cutler, 130 N. C. 1, 40 S. E. 689 (1902). *But see,* In re Will of Pope, 139 N. C. 484, 486, 52 S. E. 235, 236 (1905); In re Will of Franks, 231 N. C. 252, 256, 56 S. E. 2d 668, 670 (1949).

[17] Burriss v. Starr, 165 N. C. 657, 81 S. E. 929 (1914); Boger v. Cedar Cove Lumber Co., 165 N. C. 557, 81 S. E. 784 (1914); Richards v. W. M. Ritter Lumber Co., 158 N. C. 54, 73 S. E. 485 (1911).

[18] 206 N. C. 456, 174 S. E. 284 (1934), appearing also in 202 N. C. 373, 162 S. E. 897 (1932).

would seem to follow from this that if by chance the testator's name appears at any place in the will, it may be probated.

The instant case, in holding that the name of testator written by the scrivener-witness was sufficiently signed, seems to have accomplished the same result as to attested wills. Basing its decision upon a twofold line of reasoning, the court first looked to the long line of cases holding that the signature of a testator may appear at any place on the instrument.[19] Then, by applying the statute,[20] which provides that the signing may be by another if made in the testator's presence and at his direction, the court concluded that the signature by another could also appear at any place on the instrument. This reasoning is sound only if the placing of the name by the other is intended by the testator to be his signature. For, in all the cases cited in support of the court's reasoning, the name was placed on the instrument in the *handwriting of the testator with apparent signatory intent.*[21] As the decision was not based upon any theory of the testator's intent, and as the cases cited do not necessarily support the reasoning, the requirement of such intent in attested wills is apparently abolished.

If the name is so placed on the instrument as to make it uncertain whether the testator intended the signature to be his final and conclusive act, then further and satisfactory evidence of such intent should perhaps be required. This could be accomplished by a provision in the Wills Act requiring that the name appear in a holographic or attested will "in such a manner as to make it manifest that the name was intended as a signature."[22]

J. KNOX WALKER.

[19] In re Will of Goodman, 229 N. C. 444, 50 S. E. 2d 34 (1948); Paul v. Davenport, 217 N. C. 154, 7 S. E. 2d 352 (1940); Corp. Comm. v. Wilkerson, 201 N. C. 344, 160 S. E. 292 (1931); cases cited note 16 *supra.*

[20] See note 15 *supra.*

[21] See note 19 *supra.*

[22] See Code of Va. §64-51 (1950).