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Notes and Comments

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Bills and Notes—Garnishment—Check as Assignment

In a recent federal[1] case the holder for value of certain checks was not allowed a preferred claim as against a creditor of the drawer who garnished the deposit before presentment. The court held that a check of itself did not work as an assignment of the deposit and that there were not sufficient facts outside of the actual drawing and delivery of the checks to constitute one, although the drawer made a deposit the next day, seemingly to cover the checks. The drawer was a cotton broker; the checks were issued to purchase cotton; and the deposit garnished was largely, if not entirely, made up from the proceeds of the re-sale of the cotton.

Before the Uniform Negotiable Instruments Law a minority of the courts held that a check of itself constituted an assignment,[2] but the majority ruled otherwise.[3] Some cases held that even though the check was no assignment as against the drawee, it was as between the drawer and holder.[4] North Carolina was of this class according to *Hawes v. Blackwell*.[5]

Section 189 of the N. I. L.[6] incorporated the majority view, although for a short time after passage of the statute a few courts took the posi-

[1] Marx v. Maddrey, 106 F. Supp. 535 (E. D. N. C. 1952).

[2] Munn v. Burch, 25 Ill. 35 (1860) (leading case); Rogers v. Durant, 140 U. S. 298 (1890); Industrial Trust v. Weakley, 103 Ala. 458, 15 So. 854 (1894); Commonwealth v. Kentucky Distilleries, 132 Ky. 521, 116 S. W. 766 (1909); Whitehouse v. Whitehouse, 90 Me. 468, 38 Atl. 374 (1897). See citations collected in 7 AM. JUR., Banks § 532, p. 384 (1937); NORTON, BILLS AND NOTES 584 (4th ed. 1914); 2 MORSE, BANKS AND BANKING § 494 n. 1 (6th ed. 1928). Munn v. Burch, *supra*, referred to check as assignment and/or contract for the benefit of payee. Under this minority view the holder was preferred to the garnishing creditor. Dillman v. Carlen, 105 Wis. 14, 80 N. W. 932 (1899).

[3] National Bank v. Millard, 10 Wall. 152 (U. S. 1870) (leading case); Exchange Bank v. Sutton Bank, 78 Md. 577, 28 Atl. 563 (1894); Gramel v. Carmer, 55 Mich. 201, 21 N. W. 418 (1884). For extensive collection of citations see 2 MORSE, BANKS AND BANKING § 493 n. 1 (6th ed. 1928); NORTON, BILLS AND NOTES 584, 585 (4th ed. 1914).

[4] Moore v. Lowery, 25 Iowa 336 (1868); Nat. Exchange Bank v. McLoon, 73 Me. 498 (1882); Coates v. First Nat. Bank, 91 N. Y. 20 (1883). See citations in 2 MORSE, BANKS AND BANKING § 495 n. 1 (6th ed. 1928). Mr. Morse is violently opposed to the old majority rule and that of the N. I. L.

[5] 107 N. C. 196, 12 S. E. 245 (1890). This decision held that a check, although no assignment as between drawee and payee, was an equitable assignment *pro tanto* as between drawer and payee or holder as soon as drawn and delivered.

[6] N. C. Gen. Stat. § 25-197 (1943). "A check *of itself* does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check." (Italics added.)

tion that it was intended to protect only the drawee bank.[7] Thus in *McClain and Norvet v. Torkelson*[8] the Iowa court held that the holder of a check acquired a right to the drawn-on deposit superior to that of a garnishing creditor. However, this holding has been expressly overruled in Iowa.[9] The clear weight of authority now supports the view that under the N. I. L. a check, *of itself*, does not have the character of an assignment, not only as between the holder and drawee, but also as between the holder and drawer;[10] an attaching creditor is preferred to the holder,[11] unless all of the circumstances surrounding the writing of the check are such that the court can declare it an equitable assignment or can otherwise find exceptions to the provisions of the N. I. L.[12]

Where there has been a deposit for the specific purpose of meeting a check, or class of checks, with clear notice or directions to the bank that the deposit is to be held for this end, some courts have ruled that the bank holds the deposit in trust,[13] others that there is a specific deposit and that therefore the restrictions of the N. I. L. concerning a check *of itself* would not apply and the holder would have a right against the bank.[14] The Supreme Court of North Carolina has held that in such a case there is a trust, and the depositor has a preference to the amount of the check as against receivers of the insolvent bank and may recover for the use of the holder.[15] The court has stated as dictum that the

[7] Farrington v. Flemming, 94 Neb. 108, 142 N. W. 297 (1913); Elgin v. Gross-Kelly, 20 N. M. 450, 150 Pac. 922 (1915); Glennan v. Rochester Trust, 209 N. Y. 12, 102 N. E. 537 (1913); Federal Reserve Bank v. Peters, 139 Va. 45, 123 S. E. 379 (1924); Raesser v. Nat. Exchange Bank, 112 Wis. 591, 88 N. W. 618 (1902).

[8] 187 Iowa 202, 174 N. W. 42 (1919).

[9] Leach v. Mechanics Savings Bank, 202 Iowa 899, 211 N. W. 506 (1926).

[10] Kaesemeyer v. Smith, 22 Idaho 1, 123 Pac. 943 (1912); Leach v. Mechanics Savings Bank, 202 Iowa 899, 211 N. W. 506 (1926); Perry v. Bank of Smithfield, 131 N. C. 117, 42 S. E. 551 (1902). See 7 AM. JUR., BANKS § 534, pp. 396, 7 (1937).

[11] Fulton v. Gesterding, 47 Fla. 150, 36 So. 56 (1904); Kaesemeyer v. Smith, 22 Idaho 1, 123 Pac. 943 (1912); Boswell v. Citizens Savings Bank, 123 Ky. 485, 96 S. W. 797 (1906); Livestock State Bank v. Hise, 150 Minn. 301, 185 N. W. 498 (1921); Wileman v. King, 120 Miss. 392, 82 So. 265 (1919); Jones v. Crumpler, 119 Va. 143, 89 S. E. 232 (1916).

[12] First Nat. Bank v. Propp, 198 Iowa 809, 200 N. W. 428 (1924); Dolph v. Cross, 153 Iowa 289, 133 N. W. 669 (1911); Slaughter v. First Nat. Bank, 18 S. W. 2d 754 (Tex. 1929); Hatley v. West Texas Bank, 284 S. W. 540 (Tex. 1926). See Comment, 37 YALE L. J. 626 (1928); Notes, 5 A. L. R. 1667 (1920), 50 A. L. R. 403 (1927).

[13] Eshbach v. Byers, 164 Ill. App. 449 (1911); Foss v. Hume, 130 Me. 32, 153 Atl. 181 (1931); Corporation Commission v. Merchants Bank & Trust Co., 194 N. C. 125, 138 S. E. 530 (1927); Morton v. Woolery, 48 N. D. 1132, 189 N. W. 232 (1922); Straus v. Tradesmens Nat. Bank, 36 Hun 451 (N. Y. 1885); Payne Bros. v. Burnett, 151 Tenn. 496, 269 S. W. 27 (1925); Cotulla State Bank v. Herron, 191 S. W. 154 (Tex. Civ. App. 1917); *cf.* Walker Co. v. Alden, 6 F. Supp. 262 (E. D. Ill. 1934) (with extensive list of citations p. 264 n. 1). *But cf.* Andrew v. Waterville Savings Bank, 205 Iowa 888, 219 N. W. 52 (1928).

[14] Decatur Creamery v. West Side Bank, 213 Ill. App. 220 (1919); First Nat. Bank v. Barger, 115 S. W. 726 (Ky. 1909); Hitt Fireworks v. Scandinavian Am. Bank, 114 Wash. 167, 195 Pac. 13 (1922).

[15] Corporation Commission v. Merchants Bank & Trust Co., 194 N. C. 125, 138

cestui que trust may recover in equity.[16] But in *General American Life Insurance Co. v. Stadiem*,[17] where the holder sought recovery, the court did not apply the trust theory, although the drawer had deposited $21.38 for the specific and sole purpose of meeting the check for $21.38 and had instructed the agents and employees of the bank that the deposit was to be held for that sole purpose. The decision stated only that a holder of an unaccepted check has no action against the bank.[18]

Where there is an oral promise to the drawer from the bank that certain checks will be paid, the courts have often allowed the holder recovery against the bank on the theory that he is beneficiary of a contract for the benefit of a third party.[19] The North Carolina court refused to apply this theory in *Brantley v. Collie*.[20] Although a valid contract between the drawer and the drawee for the benefit of the payee was conceded, the court held that such a contract gave the payee no action against the bank.[21] The court apparently decided that the N. I. L. did not allow the payee of an unaccepted check rights against the bank no matter what the circumstances surrounding the issuance of the check.

S. E. 530 (1927). The case leads a collection of authorities in Note, 57 A. L. R. 386 (1927). See also Notes, 10 N. C. L. REV. 381 (1932), 13 N. C. L. REV. 209 (1935).

[16] Corporation Commission v. Merchants Bank & Trust Co., 193 N. C. 696, 700, 138 S. E. 22, 24 (1927). This is based on the doctrine set out in Morton v. Woolery, 48 N. D. 1132, 189 N. W. 232 (1922). See note 13 *supra*.

[17] 223 N. C. 49, 25 S. E. 2d 202 (1943).

[18] The court relies for authority on the rule (now uniform) in Cincinnati H. & D. R. R. v. Metropolitan Nat. Bank, 54 Ohio St. 60 (1896) that a check *of itself* is no assignment of drawer's funds in drawee bank, and that the bank is not liable to the holder until acceptance. This rule should not be controlling, if indeed it is at all applicable, here where we have circumstances outside of the check itself to consider. The court did not mention specific deposit.

[19] Ballard v. Home Nat. Bank, 91 Kan. 91, 136 Pac. 935 (1913) is the case most cited for this doctrine, although it is not clear that the court did not base its decision on equitable assignment. The drawer was a livestock dealer. The bank agreed he could draw checks on it to buy livestock, provided he would deposit the re-sale proceeds in time to cover the checks. The bank applied these deposits to a pre-existing debt of the drawer. The payee of one of these checks sued the bank and recovered. The court ruled that the holder recovered on the basis of the entire transaction, rather than the promise alone. It was not required that the payee know of the contract for his benefit. In Saylors v. State Bank, 99 Kan. 515, 163 Pac. 454 (1917) the facts were almost the same, except that the bank got 8% interest on the resale proceeds and $3 per car-load of livestock bought and sold. It was held that the payee, as beneficiary of the agreement, could recover from the bank. See also Goeken v. Bank, 100 Kan. 177, 163 Pac. 636 (1917), *connected case*, 104 Kan. 370, 179 Pac. 321 (1919); Singer v. Citizens Bank, 79 Okla. 267, 193 Pac. 41 (1920); Webster v. First State Bank, 46 S. D. 460, 193 N. W. 675 (1923). These cases were applications of the third party beneficiary doctrine announced in Lawrence v. Fox, 20 N. Y. 268 (1859).

[20] 205 N. C. 229, 171 S. E. 88 (1933).

[21] The court distinguished the *Ballard* and *Saylors* cases, note 20 *supra*, saying that there the bank was interested in the livestock purchased by the drawer from the holder. Though there was specified consideration of extra commission to the bank in the *Saylors* case, the bank appears to have had no greater interest in the *Ballard* case or most of the other cases decided on the same theory than did the bank in the instant case. See Comment, 46 YALE L. J. 483 (1937). The distinction does not seem a real one.

In either of the situations previously discussed, or where there is a combination of the two,[22] courts have sometimes labeled the legal result an "equitable assignment."[23] This term is also applied to the relationship of rights that results from an understanding, express or implied, between the drawer and payee which shows an intent to assign the debt of the drawee bank (the deposit).[24] However, this is only an assignment as between drawer and payee and does not necessarily give the holder a right against the bank unless the bank is a mere stakeholder and has had notice of the agreement.[25]

Even if a court allows a holder a right against the bank or its receivers, it is not settled whether he will be preferred to a garnishing creditor. *Dolph v. Cross*[26] held that since the drawee could not apply

[22] The combination seems to be the most common situation. First Nat. Bank v. Prikett, 19 Ala. App. 204, 95 So. 920 (1923) (special deposit); Wilson v. Dawson, 52 Ind. 513 (1876) (must use for specific purpose); Moravek v. First Nat. Bank, 119 Kan. 84, 237 Pac. 921 (1925) (bank cannot appropriate deposit to its own claim); Joy v. Grasse, 173 Minn. 289, 217 N. W. 365 (1927); York v. Farmers Bank, 105 Mo. App. 127, 79 S. W. 968 (1904) (privity between bank and holder); Central Coal & Coke v. State Bank, 226 Mo. App. 594, 44 S. W. 2d 188 (1931) (bank's carrying account in general ledger mere matter of bookkeeping); Paige v. Springfield Nat. Bank, 12 Ohio App. 196 (1919) (specific deposit, cannot use to pay other checks); *Re* Warren's Bank, 209 Wis. 121, 244 N. W. 594 (1932) (bank held agent of depositor, had no title).

These cases (this footnote and note 20 *supra*) almost all arise out of agreements to finance agricultural marketing. They are generally referred to as "The Livestock Cases." See Comment, 46 YALE L. J. 483 (1937).

[23] Few v. First Nat. Bank, 40 Ga. App. 791, 151 S. E. 456 (1930) (specific deposit); Manget v. Nat. City Bank, 168 Ga. 876, 149 S. E. 213 (1929) (specific deposit); Guaranty State Bank v. Summer, 278 S. W. 459 (Tex. Civ. App. 1925) (specific deposit and agreement); Boyle v. Vivian State Bank, 55 S. D. 441, 226 N. W. 579 (1929) *semble;* Ballard v. Home Nat. Bank, 91 Kan. 91, 136 Pac. 935 (1913) *semble.*

[24] Fourth Street Nat. Bank v. Yardley, 165 U. S. 634 (1897) (leading case). Here the drawer, having insufficient funds to settle a clearing house debt, told payee that it had $25,000 on deposit with its New York correspondent, the drawee, showing a statement in proof. The court held this sufficient for an equitable assignment *pro tanto,* so payee was entitled to a preference as against receiver of the drawer, which had gone insolvent. Dunlap v. Commercial Bank, 50 Cal. 476, 195 Pac. 688 (1920); First Nat. Bank v. O'Byrne, 117 Ill. App. 473 (1913); Hove v. Stanhope Bank, 138 Iowa 39, 115 N. W. 476 (1908); First Nat. Bank v. Rogers-Admundson-Flynn, 151 Minn. 243, 186 N. W. 575 (1922); Merchants Nat. Bank v. State Bank, 172 Minn. 24, 214 N. W. 750 (1927); Muller v. King, 209 N. Y. 239, 103 N. E. 138 (1913); Boyle v. Vivian State Bank, 55 S. D. 441, 226 N. W. 579 (1929); Austin v. Public Nat. Bank, 2 S. W. 2d 463 (Tex 1928).

[25] In Fourth Street Nat. Bank v. Yardley, 165 U. S. 634 (1897) the court held that it is an equitable assignment *pro tanto* as against the drawer, any mere volunteers, and persons charged with notice. In First Nat. Bank v. Rogers-Admundson-Flynn, 151 Minn. 243, 186 N. W. 575 (1922) it was held that there was an assignment as between drawer and payee and payee was allowed recovery against drawee who had ample notice of the assignment. In Merchants Nat. Bank v. State Bank, 172 Minn. 24, 28, 214 N. W. 750, 752 (1927) the court states that "as between drawer and payee the check (in question) operates as an equitable assignment, and, after receiving notice of the intention and purpose of the parties, the bank must comply with the directions of the drawer, if it can do so without prejudice to its own rights . . . ."

[26] 153 Iowa 289, 133 N. W. 669 (1911); *cf.* First Nat. Bank v. Propp, 198 Iowa 809, 200 N. W. 428 (1924) (specific deposit). *Contra:* Mayer v. Chattahoochee Bank, 51 Ga. 325 (1874).

a specific deposit to its own claim against the drawer, creditors garnishing the deposit would be excluded as they could rise no higher than the bank itself were it a creditor.[27] If it is decided that the facts constitute an equitable assignment, then it is probable the holder, as "owner" of part of the deposit, will be preferred to garnishing creditors before presentment, even though there has been no notice to the bank before the garnishment proceedings.[28] In the recent case of *Lipe v. Bank*,[29] the North Carolina court held there was an assignment as between the depositor and his assignee, and title passed without notice to the debtor bank. But no check was involved, and there was an express assignment. Whether the court would apply this reasoning where the facts attending the drawing and delivery of a check showed an intent to assign is yet to be seen.

The non-assignment rule of the N. I. L. has resulted in many injustices to check holders, not only in the cases of the bank's insolvency or garnishment of the drawer's account, but also where the drawer dies or himself goes insolvent before presentment.[30] Most courts have recognized this and have tried to qualify the N. I. L. whenever the facts allow, but the law on this point is confused since the situations naturally overlap and the courts are not precise in the use of theories they employ. However, the North Carolina court seems to regard it as good policy to protect the drawee bank at all costs. Otherwise it is difficult to explain why it did not apply the trust theory in the *Stadiem* case or the third party beneficiary theory in the *Brantley* case. The court seems to take the position that the N. I. L. precludes their considering special circum-

[27] Where the court holds a trust, in theory the garnishing creditor would again be excluded since the garnishee bank would no longer be the debtor of the depositor. But a court might not be willing to extend the trust theory this far.

[28] A great majority of the courts hold that an assignment of the debt, before garnishment proceedings, even where no notice is given to the debtor before the garnishment, gives a preference to the assignee. Walters & Walker v. Whitlock, 9 Fla. 89 (1860); Walton v. Horkan, 112 Ga. 814, 38 S. E. 105 (1901); McDowell v. Hopfield, 148 Md. 84, 128 Atl. 742 (1925); Schoolfield v. Hirsh, 71 Miss. 55, 14 So. 528 (1893); Market Nat. Bank v. Raspberry, 34 Okla. 243, 124 Pac. 758 (1912). Intervention in the garnishment proceedings is all the notice necessary. Hall v. Kansas City Terra Cotta Co., 97 Kan. 103, 154 Pac. 210 (1916). In Slaughter v. First Nat. Bank, 18 S. W. 2d 754 (Tex. 1929) there was a clear agreement between the drawer and payee that proceeds of the re-sale of the livestock (paid for with the check in question) would be deposited with the drawee to meet the check. The court held that the check, when given under such circumstances, was an equitable assignment of the amount of the deposit necessary to meet it. Hence payee had rights to the deposit superior to those of a garnishing creditor. The court also held that notice of the agreement to the bank was unnecessary since the decision was based on equitable assignment and not on deposit for a specific purpose.

[29] 236 N. C. 328, 72 S. E. 2d 759 (1952).

[30] This should be particularly apparent in North Carolina, where a tobacco grower, for instance, could lose the proceeds of a large part or even all of his year's crop. See excellent discussion of the injustices and inequities of the non-assignment rule in Comment, 60 YALE L. J. 1007 (1951); also Feezer, *Death of a Drawer of a Check*, 14 MINN. L. REV. 124 (1929).

stances outside the actual drawing and delivery of a check, apparently attaching no significance whatever to the words "check *of itself*" in the statute.[31] The new Uniform Commercial Code has dealt directly with this problem and, if adopted in North Carolina, will expressly overrule this position of the court.[32] It does not appear that a case has arisen in this state wherein a holder sought preference over a garnishing creditor where the surrounding facts show an intent to appropriate the deposit to the payment of the outstanding check. When such a case is presented, it is hoped the court will be less reluctant to allow the action since the drawee bank would be actually a mere stakeholder.

J. ALLEN ADAMS, JR.

Criminal Law—Suspension of Sentence

Although early decisions of the North Carolina Supreme Court held the suspended sentence illegal,[1] in 1894 the Court gave its complete approval to this type of judgment.[2] Subsequent decisions have held that the power to suspend the imposition (the pronouncing of the terms of punishment) or execution (the putting into effect of the punishment as pronounced) of sentence in a criminal case is within the inherent powers of a court.[3] In addition, the use of the suspended sentence has been ex-

[31] See note 6 *supra*. Notes, 6 N. C. L. REV. 325 (1928) and 8 N. C. L. REV. 201 (1930) take the same attitude.

[32] UNIFORM COMMERCIAL CODE § 3-409 (Official Draft 1952).
"DRAFT NOT AN ASSIGNMENT.
(1) A check or other draft does not of itself operate as an assignment of any funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until he accepts it.
(2) Nothing in this section shall affect any liability in contract, tort or otherwise arising from any letter of credit or other obligation or representation which is not an acceptance."
The comment states:
"1. . . . The assignment may, however, appear from other facts, and particularly from other agreements, express or implied; and when the intent to assign is clear the check may be the means by which the assignment is effected."
"2. The language of the original section 189 that the drawee is not liable 'to the holder,' is changed as inaccurate and not intended. . . ."
"3. Subsection (2) is new. It is intended to make it clear that this section does not in any way affect any liability which may arise apart from the instrument itself. The drawee who fails to accept may be liable . . . to the holder for breach of the terms . . . of any . . . agreement by which he is obligated to accept. He may be liable in tort or upon any other basis because of his representation that he has accepted, or that he intends to accept. The section leaves unaffected any liability of any kind apart from the instrument."
It is understood that this new act has been introduced for the first time, in the current session of the Massachusetts Legislature.

[1] State v. Hatley, 110 N. C. 522, 14 S. E. 751 (1892); State v. Bennett, 20 N. C. 170 (1838).

[2] State v. Crook, 115 N. C. 760, 20 S. E. 513 (1894). See Coates, *Punishment for Crime in North Carolina*, 17 N. C. L. REV. 205, 215 (1939); *A Survey of of Statutory Changes in North Carolina in 1937*, 15 N. C. L. REV 345 (1937).

[3] The phraseology most often used by our court is "inherent power . . . to suspend judgment or stay execution." State v. Gibson, 233 N. C. 691, 698, 65 S. E. 2d 508, 513 (1951); State v. Stallings, 234 N. C. 265, 66 S. E. 2d 822 (1951);

pressly authorized by statute in all cases except those where the crime of which the defendant was convicted is punishable by life imprisonment or death.[4] Consequently the suspended sentence is now very frequently employed by the courts of this state as a method of introducing greater flexibility into the administration of the criminal law and reforming a defendant without actually imprisoning him.[5]

Normally the judge must have the defendant's consent, either express or implied, before he can order a suspended sentence.[6] Even without consent, however, imposition of sentence may be set aside until the next term if no conditions are attached.[7] Where an objection is raised to the suspension and the imposition of conditions, the court should proceed to give final judgment and allow an appeal if one is desired.[8] If the defendant accepts the terms of suspension, he waives his right of appeal on the issue of his guilt or innocence.[9]

State v. Lewis, 226 N. C. 249, 37 S. E. 2d 691 (1946); State v. Jackson, 226 N. C. 66, 36 S. E. 2d 706 (1945); State v. Graham, 225 N. C. 217, 34 S. E. 2d 146 (1945). Justice Barnhill pointed out in State v. Miller, 225 N. C. 213, 215, 34 S. E. 2d 143, 144 (1945); "When either judgment or sentence is suspended on condition, the ultimate purpose is the same."

[4] N. C. GEN. STAT. § 15-197 (1943). "After conviction or plea of guilty or nolo contendere for any offense, except a crime punishable by death or life imprisonment, the judge of any court of record with criminal jurisdiction may suspend the imposition or execution of a sentence and place the defendant on probation or may impose a fine and also place the defendant on probation." Our court has exercised this power under two other statutory provisions. Suspension is authorized under N. C. GEN. STAT. § 14-132 (1943) when the defendant has been convicted for abandoning his wife or child or both. The purpose of such a suspension is to provide support for the wife and/or child or children. State v. Johnson, 230 N. C. 743, 55 S. E. 2d 690 (1949); State v. Henderson, 207 N. C. 258, 176 S. E. 758 (1934); State v. Vickers, 197 N. C. 62, 147 S. E. 673 (1929). N. C. GEN. STAT. §§ 49-7, 8 permit a suspension if the defendant has been convicted for failing to support his illegitimate child. In State v. Bowser, 232 N. C. 414, 416, 61 S. E. 2d 98, 99 (1950) the court held that these two statutes empower the suspension "of sentences upon condition that offending parents make contributions of money for the maintenance of such children."

[5] State v. Stallings, 234 N. C. 265, 66 S. E. 2d 822 (1951) ("the more humane concept . . . of punishment"); State v. Smith, 233 N. C. 68, 62 S. E. 2d 495 (1950); State v. Tripp, 168 N. C. 150, 83 S. E. 630 (1914) (to ameliorate the condition of the defendant); State v. Everitt, 164 N. C. 399, 79 S. E. 274 (1913). "At common law the court could suspend judgment temporarily for some special purpose such as to allow the defendant time in which to move for a new trial or to show that he was entitled to the benefit of clergy or to apply for a pardon or to take some other step in the ordinary procedure of the case." State v. Jackson, 226 N. C. 66, 68, 36 S. E. 2d 706, 707 (1945). For a brief history of suspended sentences see State v. Everitt, 164 N. C. 399, 402-407, 79 S. E. 274, 275-277 (1913).

[6] State v. Jackson, 226 N. C. 66, 36 S. E. 2d 706 (1945); State v. Miller, 225 N. C. 213, 34 S. E. 2d 143 (1945); State v. Jaynes, 198 N. C. 728, 153 S. E. 410 (1930); State v. Burgess, 192 N. C. 668, 135 S. E. 771 (1926).

[7] State v. Graham, 225 N. C. 217, 34 S. E. 2d 146 (1945); State v. Burgess, 192 N. C. 668, 135 S. E. 771 (1926); State v. Griffis, 117 N. C. 709, 23 S. E. 164 (1895).

[8] State v. Jackson, 226 N. C. 66, 36 S. E. 2d 706 (1945); State v. Webb, 209 N. C. 302, 183 S. E. 367 (1935); State v. Jaynes, 198 N. C. 728, 153 S. E. 410 (1930); State v. Burgess, 192 N. C. 669, 135 S. E. 771 (1926).

[9] State v. Barnhardt, 230 N. C. 223, 52 S. E. 2d 904 (1949); State v. Miller, 225 N. C. 213, 34 S. E. 2d 143 (1945); State v. Pelley, 221 N. C. 487, 20 S. E. 2d 850 (1942); State v. Ray, 212 N. C. 487, 194 S. E. 472 (1938); State v. Henderson, 207 N. C. 258, 176 S. E. 758 (1934).

During the term at which the defendant was convicted his status may remain somewhat uncertain. Apparently the trial judge may revoke his decision to suspend and immediately impose punishment; or he may substitute new or additional terms; it would seem that he may even decide to release an imprisoned defendant under a suspended execution of sentence.[10] Once the term has ended, however, the court can make no further changes in the judgment, nor can it levy any punishment so long as there is adherence to the condition.[11]

Where a defendant has been released under suspended sentence, the trial judge has discretionary authority to compel him to appear so that it can be determined whether the terms of the sentence have been violated.[12] No other officer can exercise this power.[13] Whether or not

[10] The original rule was that if the defendant had undergone part of his punishment, then only a sentence in mitigation could be substituted, since it was considered that any other change would have been subjecting the defendant to punishment twice for the same offense. State v. Warren, 92 N. C. 825 (1885); *In re* Brittain, 93 N. C. 587 (1885); State v. Manly, 95 N. C. 661 (1886); State v. Crook, 115 N. C. 760, 20 S. E. 513 (1894). In State v. Whitt, 117 N. C. 804, 23 S. E. 452 (1895), however, the supreme court ostensibly distinguished the *Warren* case, as holding merely that a different sentence could not therein be subsequently imposed because the court had *revoked* the prior sentence. The supreme court then held that even though the defendant in the case before it had served six days of the punishment levied, he could be brought before the trial judge and the sentence could be changed as long as such change was made *during the term* at which the defendant was convicted. Subsequent cases have followed this general rule. State v. Stevens, 146 N. C. 679, 61 S. E. 629 (1908) (although defendant was in jail, change of sentence during term at which he was convicted was proper, since counsel for defendant had *requested* that the matter of punishment be kept *in fieri*); State v. McLamb, 203 N. C. 442, 166 S. E. 507 (1932) (defendant was in jail with appeal pending, and sentence was raised during term. Court held that sentence could not be changed if defendant had undergone even an inconsiderable part of sentence, but determined that he had not yet undergone any punishment); State v. Godwin, 210 N. C. 449, 187 S. E. 584 (1936) (proper to increase the amount of imprisonment during term, where no part of imprisonment had been served). Justice Seawell, in State v. Lewis, 226 N. C. 294, 251, 37 S. E. 2d 691, 693 (1946), declared: "After a defendant has begun the service of his term, or at least when that takes place after the adjournment of the court, it is beyond the jurisdiction of the judge to alter it or interfere with it in any way." The following statement is found in State v. Gross, 230 N. C. 734, 739, 55 S. E. 2d 517, 521 (1949): "Whether the latter [sentence] was intended to clarify and render certain the sentence previously given or whether it was intended to operate independently or supplant the former sentence, we need not inquire. As the term had not expired the whole matter was *in fieri* and the right of the judge to modify, change, alter or amend the prior judgment, or to substitute another judgment for it, cannot be challenged."

[11] State v. Lewis, 226 N. C. 249, 37 S. E. 2d 691 (1946); State v. Miller, 225 N. C. 213, 34 S. E. 2d 143 (1945); State v. McLeod, 222 N. C. 142, 22 S. E. 223 (1942); State v. Rogers, 221 N. C. 462, 20 S. E. 2d 297 (1938); State v. Phillips, 185 N. C. 614, 115 S. E. 893 (1923); State v. Hilton, 151 N. C. 687, 65 S. E. 1011 (1901).

[12] N. C. GEN. STAT. § 15-200 (1943), State v. Pelley, 221 N. C. 487, 20 S. E. 2d 850 (1942); State v. Shepherd, 187 N. C. 609, 122 S. E. 467 (1924); State v. Phillips, 185 N. C. 614, 115 S. E. 893 (1923); State v. Greer, 173 N. C. 759, 92 S. E. 149 (1917). The defendant must appear, and if he fails to do so the five year statute of limitations of the effective duration of conditions imposed stops running. Thus a defendant who fails to appear cannot later claim that the five year period has run and that therefore the conditions are void. State v. Pelley, *supra*.

[13] Upon finding the defendant guilty of the offense charged and fixing the terms

there has been a breach is a question of fact for the judge alone to determine, not an issue of fact for the jury.[14] This finding must be made in open court,[15] and the state has the burden of showing violation.[16] Such evidence as the state may introduce is not used to punish for any subsequent offense but rather to determine what punishment to impose under the original suspension.[17] Unless there is proof showing otherwise, the finding of the judge is presumed correct.[18]

The means of securing review of a court's decision to reimpose sentence for violation of conditions varies with the position which such court occupies in the judicial hierarchy. By virtue of a 1951 amendment, where the sentence is ordered into effect by an inferior court, a defendant is guaranteed a right of appeal to the superior court for a hearing *de novo* "only upon the issue of whether or not there has been a violation of the terms of the suspended sentence."[19] Where the decree was handed down by the superior court, the defendant's remedy is limited to applying for a writ of certiorari from the supreme court,[20] al-

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of imprisonment, some judges have directed that *capias* issue on motion of the solicitor, or the clerk or the sheriff. This delegation of authority to execute sentence is a procedural error and void. However, this is held to amount to no more than a delay in the execution of the sentence. Since the time at which execution is to be imposed is not an essential part of the sentence, such a delegation is considered to be no part of the judgment of the court. Thus the validity of the sentence is not affected. *In re* Smith, 218 N. C. 462, 11 S. E. 2d 317 (1940); State v. McAfee, 189 N. C. 320, 127 S. E. 204 (1925); State v. Phillips, 185 N. C. 614, 115 S. E. 893 (1923); State v. Vickers, 184 N. C. 676, 114 S. E. 168 (1922).

[14] State v. Marsh, 225 N. C. 648, 36 S. E. 2d 244 (1945); State v. Miller, 225 N. C. 213, 34 S. E. 2d 143 (1945); State v. Pelley, 221 N. C. 487, 20 S. E. 2d 850 (1942); State v. Smith, 196 N. C. 438, 146 S. E. 73 (1928).

[15] State v. Rhodes, 208 N. C. 241, 180 S. E. 84 (1935); State v. Smith, 196 N. C. 438, 146 S. E. 73 (1928); State v. Phillips, 185 N. C. 614, 115 S. E. 893 (1923) (private determination in chambers is invalid); State v. Greer, 173 N. C. 759, 92 S. E. 147 (1917) (finding of breach in private office is void). See State v. Bowser, 232 N. C. 414, 416, 61 S. E. 2d 98, 99 (1950).

[16] State v. Sullivan, 227 N. C. 680, 44 S. E. 2d 81 (1947).

[17] State v. Pelley, 221 N. C. 487, 20 S. E. 2d 850 (1942); State v. Hardin, 183 N. C. 815, 112 S. E. 593 (1922); State v. Everitt, 164 N. C. 399, 79 S. E. 274 (1913).

[18] State v. Smith, 233 N. C. 68, 62 S. E. 2d 495 (1950); State v. Johnson, 230 N. C. 743, 55 S. E. 2d 690 (1949); State v. Everitt, 164 N. C. 399, 79 S. E. 274 (1913); State v. Hilton, 151 N. C. 687, 65 S. E. 1011 (1901).

[19] N. C. GEN. STAT. § 15-200.1 (Supp. 1951). The statute, as read literally, appears to limit the grounds upon which the defendant can contest reimposition of punishment to the issue of whether there has been a breach of the conditions. Prior to this amendment, the defendant had to seek recordari to get a review of the decision of the inferior court and, if this was granted, he could contest the reimposition by attacking the reasonableness of the conditions and sufficiency of the evidence to support a finding of breach. State v. Stallings, 234 N. C. 265, 66 S. E. 2d 822 (1951). It would seem, in spite of the literal meaning of the amendment, that those defenses available under recordari could still be urged on appeal from an inferior court.

[20] State v. Stallings, 234 N. C. 265, 66 S. E. 2d 822 (1951); State v. Maples, 232 N. C. 732, 62 S. E. 2d 52 (1950); State v. Peterson, 228 N. C. 736, 46 S. E. 2d 852 (1948); State v. Farrar, 226 N. C. 478, 38 S. E. 2d 193 (1946); State v. King, 222 N. C. 137, 22 S. E. 2d 241 (1942).

though the latter body occasionally deviates from this procedure to hear cases, though improperly presented by appeal, which it feels might result in a serious denial of rights.[21]

In seeking certiorari from the supreme court to review the superior court action there are two grounds upon which a review of the decision to reimpose punishment may be obtained. The defendant may contest the decision on the ground that "there is no evidence to support a finding that the conditions have been breached,"[22] or that "the conditions are unreasonable and unenforceable, or are for an unreasonable length of time."[23]

In reality the defendant has little chance of success in attacking the reasonableness of the conditions, since the trial judge has almost unlimited discretion. Perhaps the only definite limitation on this discretion is that a suspension can be for no longer than five years.[24] G. S. 15-199 specifically authorizes definite terms of suspension to which the obedience of the defendant may be commanded,[25] and, in addition, the

[21] The authority for this action is found in N C. CONST. Art. IV, § 8, State v. Phillips, 185 N. C. 609, 115 S. E. 893 (1923); State v. Tripp, 168 N. C. 150, 83 S. E. 630 (1914).

[22] State v. Stallings, 234 N. C. 265, 66 S. E. 2d 822 (1951); State v. Smith, 233 N. C. 68, 62 S. E. 2d 495 (1950); State v. Robinson, 232 N. C. 418, 61 S. E. 2d 106 (1950); State v. Miller, 225 N. C. 213, 34 S. E. 2d 143 (1945); State v. Johnson, 169 N. C. 311, 84 S. E. 2d 767 (1915). See also State v. Sullivan, 227 N. C. 680, 44 S. E. 2d 81 (1947) (facts not sufficient to show that defendant left training school without permission, that he escaped, broke rules or was not of good behavior); State v. Rogers, 221 N. C. 462, 464, 20 S. E. 2d 297, 298 (1942) (finding insufficient to show that condition requiring that no woman be allowed to work at any business place owned or operated by defendant, or at which defendant is employed, or live on any farm defendant controls unless she resides "with mentally competent male members of her family" was violated); State v. Hardin, 183 N. C. 815, 112 S. E. 593 (1922) (possession of 150 gallons of wine is only prima facie evidence of guilt and not a sufficient finding of breach—finding insufficient if it only permits an inference of breach).

[23] State v. Stallings, 234 N. C. 265, 66 S. E. 2d 822 (1951); State v. Smith, 233 N. C. 68, 62 S. E. 2d 495 (1950); State v. Robinson, 232 N. C. 418, 61 S. E. 2d 106 (1950); State v. Miller, 225 N. C. 213, 34 S. E. 2d 143 (1945); State v. Shepherd, 187 N. C. 609, 122 S. E. 467 (1924).

[24] N. C. GEN. STAT. § 15-200 (1943); State v. Gibson, 233 N. C. 691, 65 S. E. 2d 508 (1951) (suspension for ten years is invalid). The terms of suspension may run for five years even though punishment for the offense is less. State v. Stallings, 234 N. C. 265, 66 S. E. 2d 822 (1951); State v. Miller, 225 N. C. 213, 34 S. E. 2d 143 (1945). However, five years is the maximum no matter what the authorized term of imprisonment may be. State v. Wilson, 216 N. C. 130, 4 S. E. 2d 440 (1939). Prior to 1937, the only restriction on the effective duration of conditions imposed was that they be "for a determinate period and for a reasonable length of time." State v. Gibson, 233 N. C. 691, 698, 65 S. E. 2d 508, 513 (1951); State v. Miller, 225 N. C. 213, 215, 34 S. E. 2d 143, 145 (1945). An indefinite suspension was illegal. State v. Hilton, 151 N. C. 687, 65 S. E. 1011 (1909).

[25] "(a) Avoid injurious or vicious habits; (b) Avoid persons or places of disreputable or harmful character; (c) Report to the probation officer as directed; (d) Permit the probation officer to visit at his home or elsewhere; (e) Work faithfully at suitable employment as far as possible; (f) Remain within a specified area; (g) Pay a fine in one or several sums as directed by the court; (h) Make reparation or restitution to the aggrieved party for the damage or loss caused by his offense, in an amount to be determined by the court; (i) Support his dependants." N. C. GEN. STAT. § 15-199 (1943).

statute permits "any other."[26] Some of the conditions to which the court has required obedience are: "not to violate [the] prohibition laws for two years,"[27] not to drive a car for one year and to drive during the next year only if the probation officer so recommends,[28] "not to talk about young girls in any way except complimentary remarks,"[29] to pay a worthless check and the costs of the action,[30] to be committed to a training school and remain of good behavior and obedient to the rules,[31] to "apply himself to [a] legitimate, gainful occupation" and "support and maintain his wife and minor child or children according to his reasonable ability,"[32] to pay $10.00 per week to support a minor child,[33] to cease publication of material pertaining to stock sales,[34] to appear for twelve months on the first Tuesday of each month and show good behavior,[35] to appear for two years at every term of criminal court and prove that he has been law abiding,[36] to "avoid persons and places of disreputable or harmful character,"[37] and to refrain from libel or slander.[38] If, however, the conditions attached conflict with the defendent's right of appeal as to the validity of the conditions, the entire judgment is void.[39]

Perhaps the condition most commonly attached is that of "good behavior,"[40] which has been defined as "conduct conforming to law."[41] One writer suggests that this presents the question whether a violation of the federal penal code is just as much a breach of this stipulation as is an infraction of the North Carolina criminal law.[42] Some cases have held that only local law is contemplated,[43] but it seems that it would

[26] N. C. GEN. STAT. § 15-199 (1943).
[27] State v. Stallings, 234 N. C. 265, 266, 66 S. E. 2d 822, 823 (1951).
[28] State v. Smith, 233 N. C. 68, 62 S. E. 2d 495 (1950).
[29] State v. Smith, 196 N. C. 438, 146 S. E. 73, 74 (1929).
[30] State v. White, 230 N. C. 513, 53 S. E. 2d 436 (1949).
[31] State v. Sullivan, 227 N. C. 680, 44 S. E. 2d 81 (1947).
[32] State v. Lewis, 226 N. C. 249, 251, 37 S. E. 2d 691, 693 (1946).
[33] State v. Johnson, 231 N. C. 743, 55 S. E. 2d 690 (1949).
[34] State v. Pelley, 221 N. C. 487, 20 S. E. 2d 850 (1942).
[35] State v. Tripp, 168 N. C. 150, 83 S. E. 630 (1914).
[36] State v. Everitt, 164 N. C. 399, 79 S. E. 274 (1913).
[37] State v. Cagle, 221 N. C. 131, 19 S. E. 2d 134 (1942).
[38] State v. Sanders, 153 N. C. 624, 69 S. E. 272 (1910).
[39] State v. Calcutt, 219 N. C. 545, 15 S. E. 2d 9 (1941). The conditions, as read literally, were such that if the defendant wished to appeal the judgment he could not comply with two of the terms because they contained a time element requiring immediate performance. Two justices, in dissent, argued that, pending appeal, the conditions of suspension were stayed, the time element was in abeyance, and thus there was no conflict.
[40] See *e.g.*, State v. Gibson, 233 N. C. 691, 65 S. E. 2d 508 (1951); State v. Peterson, 228 N. C. 736, 46 S. E. 2d 852 (1948); State v. Sullivan, 227 N. C. 680, 44 S. E. 2d 81 (1947); State v. Lewis, 226 N. C. 249, 37 S. E. 2d 691 (1946); State v. Marsh, 225 N. C. 648, 36 S. E. 2d 244 (1945).
[41] State v. Pelley, 221 N. C. 487, 499, 20 S. E. 2d 850, 858 (1942); State v. Gooding, 194 N. C. 271, 272, 139 S. E. 436, 437 (1927); State v. Hardin, 183 N. C. 815, 818, 112 S. E. 593, 594 (1922).
[42] Note, 1 N. C. L. REV. 116 (1922).
[43] State v. Gooding, 194 N. C. 271, 139 S. E. 436 (1927); State v. Hardin, 183 N. C. 815, 112 S. E. 593 (1922).

be better to include both the federal and state laws.[44] Of course the obvious way to avoid this problem is for the judge to expressly state that "no State or Federal penal laws" shall be violated.[45]

Because the defendant must consent to a suspended sentence, the court may require some conditions which would be of doubtful legality if enforced in a direct sentence. Thus, although alternative judgments are void,[46] a suspended sentence (the practical effect of which is to give the defendant a choice between freedom or jail) is not alternative albeit the suspension requires payment of a fine and adherence to certain stipulations.[47]

Enforcement of the punishment which has been suspended after the defendant has agreed to reimburse and has reimbursed private prosecutors for attorney's fees is not double punishment,[48] nor is imposition of sentence after payment of costs.[49] A sentence suspended on condition that defendant leave the county or state and remain away is not a void sentence of banishment, but rather a matter of voluntary exile.[50]

It is not uncommon for the court to require as a term of suspension that the defendant pay damages to the party he has injured.[51] This, in effect, results in the settlement of a potential civil action in a criminal proceeding.[52] In a recent case, just such a compensation provision caused the defendant to raise the question of imprisonment for debt.[53]

[44] Note, 1 N. C. L. REV. 116 (1922) (the federal law is equally effective in governing a citizen in North Carolina).

[45] See State v. Cagle, 221 N. C. 131, 19 S. E. 2d 134 (1942).

[46] A judgment "for one thing or another" which makes its enforcement a matter of the discretion of the court is void. The judgment must be such that it can be enforced by ministerial action. State v. Wilson, 216 N. C. 130, 133, 4 S. E. 2d 440, 443 (1939). See also State v. Hatley, 110 N. C. 522, 14 S. E. 751; *In re* Deaton, 105 N. C. 59, 11 S. E. 244 (1890); Strickland v. Cox, 102 N. C. 410, 9 S. E. 414 (1889).

[47] This type suspension is specifically sanctioned by N. C. GEN. STAT. § 15-197 (1943), State v. Pelley, 221 N. C. 487, 20 S. E. 2d 850 (1942) (fine and suspension on terms not alternative); State v. Wilson, 216 N. C. 130, 4 S. E. 2d 440 (1939) (fine and suspension on condition that defendant remain law abiding not alternative).

[48] State v. Hardin, 183 N. C. 815, 112 S. E. 593 (1922) (this was held to be defendant's own agreement and therefore no part of the judgment).

[49] State v. Cornett, 197 N. C. 627, 150 S. E. 113 (1929) (costs constitute no part of the punishment); State v. Smith, 196 N. C. 438, 146 S. E. 73 (1928); State v. Crook, 115 N. C. 760, 21 S. E. 513 (1894). See Note, 1 N. C. L. REV. 116 (1922).

[50] *In re* Hinson, 156 N. C. 250, 72 S. E. 320 (1911) (leave the county); State v. Hatley, 110 N. C. 522, 14 S. E. 751 (1892) (leave the state). The reasoning is that the defendant is not being forced to leave; he may stay if he wishes, but if he does it means going to jail. For further discussion see Note, 8 N. C. L. REV. 465 (1930).

[51] This practice is authorized by N. C. GEN. STAT. § 15-199 (1943), State v. Marsh, 225 N. C. 648, 36 S. E. 2d 244 (1945); State v. Ray, 212 N. C. 748, 191 S. E. 840 (1937).

[52] See Note, 10 N. C. L. REV. 389 (1932) upholding this result.

[53] State v. Simmington, 235 N. C. 612, 70 S. E. 2d 842, 843 (1952) ("Execution was suspended . . . upon condition that he pay . . . $711.50 for the use of named persons, said sum to be paid $60 cash and the balance at the rate of $20 per month").

The supreme court agreed that there could not be confinement for *failing to pay* the damages,[54] but then pointed out that this was imprisonment for *failing to comply* with the conditions of suspension, a criminal offense.[55]

With the broad discretion allowed him by the supreme court, both in his decision as to whether suspension should be allowed, and in his determination of proper conditions for suspension, the trial judge has a valuable corrective device at his disposal. Care should be exercised in granting suspension, however, only in cases where there is reasonable likelihood that the defendant will reform; otherwise the release of the defendant merely offers him another opportunity to endanger society.

MORTON L. UNION

Dedication—Prerequisites of Private Rights Arising Therefrom

In the case of a sale of lots by reference to a map or plat upon which streets, alleys, parks, or other areas are indicated apparently for public use, two distinct rights may arise in such areas. They are: (1) a public right in the general public to have the areas kept open, and (2) a private right in the individual purchasers of lots to enforce the obligation.[1] The North Carolina Supreme Court refers to each right as a dedication, although the latter is more properly termed an easement.[2] Prerequisites for the arising of the two rights are different.[3] The in-

[54] This rule has been established in Myers v. Barnhardt, 202 N. C. 49, 161 S. E. 715 (1931); State v. Whitt, 117 N. C. 804, 23 S. E. 452 (1895); State v. Warren, 92 N. C. 825 (1885).

[55] State v. Simmington, 235 N. C. 612, 614, 70 S. E. 2d 842, 844 (1952). The court ruled that if the condition had been that the defendant post a bond to insure payment of damages, the condition would have been satisfied when the bond was posted. Thereafter, the defendant could not be forced to pay the bond by criminal action since that would be tantamount to imprisonment for debt. The only remedy would be a civil action to collect on the bond. See Myers v. Barnhardt, 202 N. C. 49, 161 S. E. 715 (1931).

[1] The existence of the two rights is recognized in the following cases: Barnes v. Cheek, 84 Ga. App. 653, 67 S. E. 2d 145 (1951); Kelsoe v. Mayor and Town Council of Oglethorpe, 120 Ga. 951, 48 S. E. 366 (1904); Smith v. City of Hollister, 238 S. W. 2d 457 (Mo. App. 1951); Rowe v. City of Durham, 235 N. C. 158, 69 S. E. 2d 171 (1952); Lee v. Walker, 234 N. C. 687, 68 S. E. 2d 664 (1951); Broocks v. Muirhead, 223 N. C. 227, 25 S. E. 2d 889 (1943); Gault v. Town of Waccamaw, 200 N. C. 593, 158 S. E. 104 (1931); Irwin v. City of Charlotte, 193 N. C. 109, 136 S. E. 368 (1927); Wittson v. Dowling, 179 N. C. 542, 103 S. E. 18 (1920); Hughes v. Clark, 134 N. C. 457, 46 S. E. 956 (1904).

[2] "There is no such thing as the dedication of property to private use." A. F. Hutchinson Land Co. v. Whitehead Bros. Co., 127 Misc. 558, 217 N. Y. S. 413, 417 (Sup. Ct. 1926), *aff'd* 218 App. Div. 682, 219 N. Y. S. 413 (3d Dep't 1926). See also 16 AM. JUR., DEDICATION § 2.

[3] To effect a common law dedication to *public* uses, there must exist: (1) intention of the donor to dedicate, and (2) acceptance by the public. People v. Sayig, 101 Cal. App. 2d 890, 226 P. 2d 702 (1951); Atlantic Ry. v. Sweatman, 81 Ga. App. 269, 58 S. E. 2d 553 (1950); Egner v. Livingston County Board of Education, 313 Ky. 168, 230 S. W. 2d 448 (1950); Chene v. City of Detroit, 262

quiry here will be confined to the prerequisites giving rise to the private right.

The general rule is that "where streets and roads are marked on a plat and lots are bought and sold with reference to the map or plat, all who buy with reference to the general scheme disclosed by the plat or map acquire a right to all the public ways designated thereon and may enforce the dedication."[4]

The rule is based on the doctrine of equitable estoppel. The theory is that the grantor, in making a sale of land[5] by reference to a plat on which are marked public ways, *induces* purchasers to believe that the ways will be kept open for their benefit, and it would be unjust for the grantor to thereafter deny the right to privileges implied from his own conduct.[6] While the requirements of the rule seem to be set out clearly as, (1) a sale with reference to a map or plat, (2) on which are marked

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Mich. 253, 247 N. W. 172 (1933); Smith v. City of Hollister, 238 S. W. 2d 457 (Mo. App. 1951); Dowd v. City of Cincinnati, 152 Ohio St. 152, 87 N. E. 2d 243 (1949).

To effect an easement under the rule here discussed there is no need for an acceptance. Broocks v. Muirhead, 223 N. C. 227, 25 S. E. 2d 889 (1943); Home Real Estate Loan and Ins. Co. v. Town of Carolina Beach, 216 N. C. 778, 7 S. E. 2d 13 (1939); Wheeler v. Consolidated Construction Co., 170 N. C. 427, 87 S. E. 221 (1915); Hughes v. Clark, 134 N. C. 457, 46 S. E. 956 (1904).

It would seem, also, that an actual intent on the part of the grantor to make a dedication is not necessary to effect the private right when it is considered that the rule is applied, as will later appear, as an equitable estoppel. The elements of an equitable estoppel are conduct, acts, language, or silence amounting to a representation or a concealment of material facts, and the party claiming the estoppel must have so acted on it that he would be prejudiced if the first party be permitted to deny the facts to be as represented. Boddie v. Bond, 154 N. C. 359, 70 S. E. 824 (1911).

Thus it appears that an intent on behalf of the first party that the facts be as represented is not an element of equitable estoppel. In fact, it would be more accurate to say that in most cases of equitable estoppel, the party against whom it is held to operate did *not* intend the facts to be as represented by him.

[4] ELLIOTT, ROADS AND STREETS, § 132, (4th ed. 1926); Gaither v. Albermarle Hospital, Inc., 235 N. C. 431, 443, 70 S. E. 2d 680, 690 (1952); Home Real Estate Loan & Ins. Co. v. Town of Carolina Beach, 216 N. C. 778, 786, 7 S. E. 2d 13, 19 (1939); Stephens Co. v. Myers Park Homes Co., 181 N. C. 335, 340, 107 S. E. 233, 236 (1921); Elizabeth City v. Commander, 176 N. C. 26, 30, 96 S. E. 736 (1918); Hughes v. Clark, 134 N. C. 457, 462, 46 S E. 956, 958 (1904); Collins v. Asheville Land Co., 128 N. C. 563, 566, 39 S E. 21, 22 (1901).

Although not quoting directly from ELLIOTT, *op. cit. supra,* other North Carolina cases have stated the rule in substantially the same way. See Rowe v. City of Durham, 235 N. C. 158, 69 S. E. 2d 171 (1952); Lee v. Walker, 234 N. C. 687, 68 S. E. 2d 664 (1951); Russell v. Coggin, 232 N. C. 674, 62 S. E. 2d 70 (1950); Evans v. Horne, 226 N. C. 581, 39 S. E. 2d 612 (1946); Foster v. Atwater, 226 N. C. 472, 38 S. E. 2d 316 (1946).

[5] The sale of a single lot in reference to the plat is sufficient to invoke the rule. *See* Wittson v. Dowling, 179 N. C. 542, 545, 103 S. E. 18, 19 (1920).

[6] Gaither v. Albermarle Hospital, Inc., 235 N. C. 431, 70 S. E. 2d 680 (1952); Broocks v. Muirhead, 223 N. C. 227, 25 S. E. 2d 889 (1943); Home Real Estate Loan & Ins. Co. v. Town of Carolina Beach, 216 N. C. 778, 7 S. E. 2d 13 (1940); Irwin v. City of Charlotte, 193 N. C. 109, 136 S. E. 368 (1926); Stephens Co. v. Myers Park Homes Co., 181 N. C. 335, 107 S. E. 233 (1921); Wittson v. Dowling, 179 N. C. 542, 103 S. E. 18 (1920).

public ways;[7] still, a proper appraisal of these requirements can only be made in the light of this reason behind the rule.

As to the first requirement, it seems indisputable that unless the grantor at some time, in some way, calls the map to the attention of the grantee, *nothing* on the map can be said to have been used as an inducement for the purchase. However, must the reference to the map be made in the instrument of conveyance, or is it sufficient that a reference to it be made in the negotiations? Some writers seem to think that the courts, in referring to a "sale" by reference to a map or plat, mean a sale followed by a conveyance which also makes reference to the plat;[8] but North Carolina does not require a reference to the plat in the deed if there is reference to the plat in the negotiations for the sale.[9] Nor is it necessary that the plat to which reference is made be recorded.[10] However, if the reference to the map is not incorporated in the purchaser's deed, the grantee may lose his rights thereunder in the event his grantor later sells land embracing the dedicated areas to a third person who has no notice, either actual or constructive, of the unrecorded plat.[11]

The second requirement of the rule concerns the plat itself; that is, what it must contain before purchasers are allowed an easement in areas shown thereon. The rule speaks of purchasers acquiring a right in public ways which are "marked" or "designated" on the map or plat. All of the North Carolina cases, prior to the recent one of *Gaither v. Albermarle Hospital, Inc.*,[12] have involved plats on which the areas in dispute are actually marked "court," "street," "alleyway," etc.[13]

[7] The quotation from ELLIOTT, *op. cit. supra* note 4, § 132 is, of course, mainly concerned with public *ways*, but there is no reason to make any distinction, for the purposes of the rule, between cases where the benefit is obtained from using the areas as means of passing to other enjoyments and where the benefit is the enjoyment of the areas themselves.

The same rule applies to pieces of land marked on the plat or map as squares, courts, parks. Conrad v. West End Hotel & Land Co., 126 N. C. 776, 36 S. E. 282 (1900). *See* Foster v. Atwater, 226 N. C. 472, 473, 38 S. E. 2d 316, 318 (1946); Wittson v. Dowling, 179 N. C. 542, 544, 103 S. E. 18, 19 (1920); Sexton v. Elizabeth City, 169 N. C. 385, 390, 86 S. E. 344, 346 (1915); Green v. Miller 161 N. C. 24, 30, 76 S. E. 505, 507 (1912); Hughes v. Clark, 134 N. C. 457, 460, 46 S. E. 956, 957 (1904).

[8] See 3 TIFFANY, REAL PROPERTY § 800 (3rd ed. 1939); Note, 7 A. L. R. 2d 612 (1949).

[9] Green v. Miller, 161 N. C. 24, 76 S. E. 505. *See* Milliken v. Denny, 135 N. C. 19, 22, 47 S. E. 132, 133 (1904) where the court said that "the references . . ., either in the deed *or in the negotiations* estops the party" [italics added].

[10] Somersette v. Stanaland, 202 N. C. 685, 163 S. E. 804 (1932); Collins v. Asheville Land Co., 128 N. C. 563, 39 S. E. 21 (1901).

[11] Green v. Miller, 161, N. C. 24, 76 S. E. 505 (1912).

[12] 235 N. C. 431, 70 S. E. 2d 680 (1952).

[13] Evans v. Horne, 226 N. C. 581, 39 S. E. 2d 612 (1946) ("Carolina Street"); Broocks v. Muirhead, 223 N. C. 227, 25 S. E. 2d 889 (1943) ("16-foot strip . . . designated '11 ft. alley'"); Home Real Estate Loan and Ins. Co. v. Town of Carolina Beach, 216 N. C. 778, 7 S. E. 2d 13 (1939) ("Lake Park Boulevard, . . . shown to be of the width of ninty-nine feet, including the strip of land in question"); Wittson v. Dowling, 179 N. C. 542, 103 S. E. 18 (1920) ("certain open spaces between the lots, marked 'alleyways,' and another open space 50 feet

In the *Gaither* case, the owner of lands along a navigable stream had the property surveyed and a plat thereof made and recorded. The plat indicated numerous lots, laid off and numbered, and a street running along the river with a strip of land, unnumbered and undivided, and never wider than six feet, lying between the river and the street. Lots were then sold by reference to the plat and lot numbers. It was held that the grantor dedicated to the purchasers of such lots access over the strip of land to the waters of the navigable stream.

It appears, then, that there was no designation whatever on the strip of land in question; that it was not a part of the public street by which it lay, nor was itself drawn in the form of a street or alley. But the conclusion of law in connection therewith was that the *failure* to indicate that the strip of land had been subdivided for sale amounted to a designation of it for use by the general public. Though not expressly saying so, the court seems to have determined the question to be: From a reading of the plat as a whole would a purchaser reasonably be led to believe that the areas in dispute were to be left open for use by the public? And for the question to be answered in the affirmative, it is not necessary, according to this decision, that there be an actual marking on the plat.

The court thus extends the application of a rule, already applied more strictly against the plattor in this state,[14] to facts not heretofore

in width, . . . marked 'Meadow Street' "); Wheeler v. Consolidated Construction Co., 170 N. C. 427, 87 S. E. 221 (1915) ("There can be no doubt, from an inspection of the map, that the street . . . is clearly defined as a street on said map."); Green v. Miller, 161 N. C. 24, 76 S. E. 505 (1912) (This issue was submitted to the jury and answered by them in the affirmative: "If this tract or any part of it was surveyed and platted into lots and street, did any of the streets so surveyed and platted correspond to what is now known as Pungo Street?"); Collins v. Asheville Land Co., 128 N. C. 563, 39 S. E. 21 (1901) ("certain portions were platted and distinguished as streets, and others as lots."); Conrad v. West End Hotel & Land Co., 126 N. C. 776, 36 S. E. 282 (1900) ("streets and public squares, known as Grace Court").

[14] As already noted, North Carolina allows the rule to operate where reference is made only in the negotiations for the sale, and does not require that the plat be recorded. In addition, in this jurisdiction, the easement may be enforced by *all* purchasers under the plat, and it extends to all public ways thereon, even though remotely located from the lot of the party seeking enforcement. Gaither v. Albermarle Hospital, Inc., 235 N. C. 431, 70 S. E. 2d 680 (1952); Broocks v. Muirhead, 223 N. C. 227, 25 S. E. 2d 889 (1943); Home Real Estate Loan & Ins. Co. v. Town of Carolina Beach, 216 N. C. 778, 7 S. E. 2d 13 (1939); Hughes v. Clark, 134 N. C. 457, 46 S. E. 956 (1904); Collins v. Asheville Land Co., 128 N. C. 563, 39 S. E. 21 (1901); Conrad v. West End Hotel & Land Co., 126 N. C. 776, 36 S. E. 282 (1900).

Some other jurisdictions limit the extent of such easements to the streets and alleys shown on the plat as are reasonably beneficial to the purchaser, and a deprivation of which would reduce the value of his lot. Bradley v. Frazier Park Playgrounds, Inc., 242 P. 2d 958 (Cal. 1952); Danielson v. Sykes, 157 Cal. 686, 109 P. 87 (1910); Gerald Park Improvement Assn. v. Bini, 138 Conn. 232, 83 A. 2d 195 (1951); Lake Garda Co. v. D'Arche, 135 Conn. 449, 66 A. 2d 120 (1949); Douglas v. Belknap Springs Land Co., 76 N. H. 254, 81 Atl. 1086 (1911); Byington v. Bass, 11 Tenn. App. 569 (1930); Lindsay v. James, 188 Va. 646, 51 S. E. 326 (1949).

determined to be within its scope.[15] In doing so, are the principles of the rule violated? It would seem not. Rather, it would seem to be in keeping with the principles of the rule to estop a grantor from denying the use of land, which, because it is unmarked on a plat, taken in conjunction with its peculiar location, would appear to all to have been left in an open state for the benefit of nearby lot owners. The element of inducement is present and the consequent results in such a case are the same as in the case where the land is marked affirmatively on the plat. Further, it is believed that the holding in this case is confined to the particular facts with which it is concerned, and the decision is not authority for saying that all areas shown on a map as not divided or not numbered will have an easement imposed upon them. Much stress was laid on the point that this was a very narrow strip of land, lying between two public ways, a highway and a navigable stream, and was the only means of access to the latter.[16]

However, on authority of this case, the door is open for courts to be very liberal in finding inducement by a plattor to support a holding that an easement exists in his lands in favor of purchasers of lots in a subdivision. Such practice could lead to abuse in particular instances if not applied with caution. It is submitted that a court should always be cautious in holding an adverse interest to exist in lands of an owner when the case involves a balancing of *private* rights only.

ARNED L. HINSHAW

Still other jurisdictions hold that the easement is limited to the adjoining streets and such other streets as are necessary to give the purchaser access to a public highway. Mullan v. Hochman, 157 Md. 213, 145 Atl. 554 (1929); Howley v. Baltimore, 33 Md. 270 (1870); Drew v. Wiswall, 183 Mass. 554, 67 N. E. 666 (1903); Pearson v. Allen, 151 Mass. 79, 23 N. E. 731 (1890).

[15] In Town of Lumberton v. Branch, 180 N. C. 249, 104 S. E. 460 (1920), our court refused to find a public dedication of a street where the area in dispute was not designated as a street on the plat though there was part of a line which might have been a street boundary, but which was incomplete because of the frayed edges of the paper.

No instances from other jurisdictions have been found where a private easement was allowed when there was no specific delineation on the plat. The following are cases holding a public dedication to have been made even though the space in question contained no marking indicating that it was for public uses: Davis v. Epstein, 77 Ark. 221, 92 S. W. 19 (1905) (finding that grantee intended to dedicate lake shore where no intervening space was shown on the plat between the lake and a street parallel to it); City and County of San Francisco v. Burr, 4 Cal. 634, 36 P. 771 (1894) (disputed area not named as street, but its boundaries "clearly indicate that they were intended to represent the lines of a street."); Coe College v. City of Cedar Rapids, 87 N. W. 444 (Iowa, 1901) (holding that failure to name as a street a strip marked off like other streets on a plat did not negative the intention to dedicate").

In these cases, however, an intent to dedicate was shown by the accompanying circumstances; thus, they are of little help in determining the propriety of allowing a private easement in areas left blank since here the intent of the grantor is not controlling. See note 3, *supra*.

[16] See Gaither v. Albermarle Hospital, Inc., 235 N. C. 431, 70 S. E. 2d 680 (1952).

Descent and Distribution—Advancements

An advancement is a gift by a parent to a child, or to one to whom he stands in loco parentis, which is intended as an anticipation of the share which such child would take if the parent were to die intestate.[1] In North Carolina, if an intestate gives realty or personalty to any of his children, the value of the property so given will be deducted from the child's share upon distribution of the estate in order to equalize the shares of the children or their descendents.[2] If a child refuses to account for his advancements, he shall be considered to have received his share of the parent's estate and shall not be entitled to receive any further part.[3]

In order to constitute an advancement, there must be an actual delivery and change of possession.[4]

Whether there was an absolute gift, loan, or advancement depends upon the intention of the grantor at the time of the transaction, taking into consideration the circumstances surrounding the parties at the time; and the intention existing at a prior or subsequent date will not so determine.[5] Thus, a gift absolute when it is made, cannot be conconverted into an advancement by an subsequent statement of a wish to that effect by the parent, short of a legally executed will.[6] The fact that the donee of a grant regarded it as an advancement will not of itself determine the character of the transaction.[7]

Unless there is something in the circumstances tending to raise the inference of a different purpose, a substantial gift of money or property from a parent to a child will ordinarily be presumed to be an advancement.[8] But money expended for the education and maintenance of a

[1] King v. Neese, 233 N. C. 132, 63 S. E. 2d 123 (1950); Harrelson v. Gooden, 229 N. C. 654, 50 S. E. 2d 901 (1948); Lunsford v. Yarborough, 189 N. C. 476, 127 S. E. 426 (1925); Headen v. Headen, 42 N. C. 159 (1850).

[2] N. C. GEN. STAT. § 29-1 (2) (1943, recompiled 1950); N. C. GEN. STAT. § 28-150 (1943, recompiled 1950).

To illustrate: if a parent advanced $1,000 to his son A, $2,000 to his son B, and nothing to his son C, and then died intestate possessed of an estate of $12,000 with the three sons as his sole heirs, to compute the share of each son, they must add to the estate left by the decendent the sums which he had given by way of advancements. This would be $15,000. The share of each son would be $5,000, and this is the amount to which C is entitled; but as A and B received $1,000 and $2,000 respectively, their shares will be $4,000 and $3,000.

[3] N. C. GEN. STAT. § 28-151 (1943, recompiled 1950); Wolfe v. Galloway, 211 N. C. 361, 190 S. E. 213 (1937).

[4] Meadows v. Meadows, 33 N. C. 148 (1850).

[5] Harrelson v. Gooden, 229 N. C. 654, 50 S. E. 2d 901 (1948); Paschel v. Paschel, 197 N. C. 40, 147 S. E. 680 (1929); Nobles v. Davenport, 183 N. C. 207, 111 S. E. 180 (1922), See Note 26 A. L. R. 1086 (1923); Thompson v. Smith, 160 N. C. 256, 75 S. E. 1010 (1912); Kiger v. Terry, 119 N. C. 456, 26 S. E. 38 (1896); Bradsher v. Cannady, 76 N. C. 445 (1877); James v. James, 76 N. C. 331 (1877).

[6] Bradsher v. Cannady, 76 N. C. 445 (1877).

[7] Prevette v. Prevette, 203 N. C. 89, 164 S. E. 623 (1932).

[8] Harrelson v. Gooden, 229 N. C. 654, 50 S. E. 2d 901 (1948); Creech v.

child is not presumed to be an advancement, because they are the natural duties which parents are required to perform.[9] However, the presumption applies when property given is intended to help the child in a business or profession,[10] or the settling of a child in life.[11] These presumptions are not conclusive, but are rebuttable by parol evidence.[12]

When the parent is indebted to a child and gives the latter property or money, the presumption is that this is a payment of debt and not an advancement.[13] A conveyance for a nominal consideration[14] or the purchase by a parent who takes title in name of the child[15] are presumed to be advancements to the child. Parol evidence is competent to rebut the presumption arising on the face of the deed and show the real intention of the parent.[16] The presumption of advancement is not affected by the reservation of a life estate.[17]

If an advancement is presumed from the conveyance, the burden of proof rests upon the party claiming that an advancement was not intended; but when the presumption is that there is no advancement, the burden of proof shifts to the party claiming an advancement.[18] Thus where a deed from a parent to a child recites a consideration near the value of the property conveyed, the presumption is that the conveyance was not intended as an advancement, and the burden of proving it to be an advancement is upon him who alleges it to be such.[19]

Evidence of the parent's declarations, which are not so close in point of time to the transaction as to form in fact a part of it and not in the presence of the child, that a conveyance from the parent to the child was intended as an advancement, or otherwise, is inadmissible.[20]

Since the law of representation always applies to the descent of real property in North Carolina, grandchildren must always account, in

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Creech, 222 N. C. 656, 24 S. E. 2d 642 (1943); Nobles v. Davenport, 183 N. C. 207, 111 S. E. 180 (1922), See Note 26 A. L. R. 1086 (1923); Thompson v. Smith, 160 N. C. 256, 75 S. E. 1010 (1912); Ex-Parte Griffin, 142 N. C. 116, 54 S. E. 1007 (1906); Harper v. Harper, 92 N. C. 300 (1885).

[9] Kiger v. Terry, 119 N. C. 456, 26 S. E. 38 (1896); Bradsher v. Cannady, 76 N. C. 445 (1877). But also see Wolfe v. Galloway, 211 N. C. 361, 190 S. E. 213 (1937), where the heirs agreed that the referee's finding would be binding, and the expenses of schooling a grandchild included in his report as advancements were held as such by the court.

[10] Meadows v. Meadows, 33 N. C. 148 (1850).

[11] Kiger v. Terry, 119 N. C. 456, 26 S. E. 38 (1896).

[12] Thompson v. Smith, 160 N. C. 256, 75 S. E. 1010 (1912).

[13] Hagler v. McCombs, 66 N. C. 346 (1872).

[14] Harrelson v. Gooden, 229 N. C. 654, 50 S. E. 2d 901 (1948); Harper v. Harper, 92 N. C. 300 (1885).

[15] Creech v. Creech, 222 N. C. 656, 24 S. E. 2d 642 (1943).

[16] Ex-Parte Griffin, 142 N. C. 116, 54 S. E. 1007 (1906).

[17] Nobles v. Davenport, 183 N. C. 207, 111 S. E. 180 (1922). See note 26 A. L. R. 1086 (1923).

[18] Kiger v. Terry, 119 N. C. 456, 26 S. E. 38 (1896).

[19] Kiger v. Terry, 119 N. C. 456, 26 S. E. 38 (1896).

[20] Hicks v. Forrest, 41 N. C. 528 (1850); Cowan v. Tucker, 30 N. C. 426 (1848).

dividing land lineally descended, for advancements made to their ancestors.[21] If personalty is given by an intestate to one of his children, who died, leaving issue, in the lifetime of the intestate, such grandchildren take per stirpes and will be required to bring the advancements into hotchpot.[22] But if personalty is transferred to children, all of whom die, leaving issue, during intestate's life time, such grandchildren take per capita and do not account for advancements made to their respective parents.[23] When an intestate gives property directly to the grandchildren, they do not have to account for the property, regardless of whether they take per capita or per stirpes.[24]

North Carolina is contra to the majority of jurisdictions with its rule that advancements of personal property made by an intestate in his own life time to his children are to be brought into distribution for the benefit of the widow.[25] Where the widow dissents from her husband's will, she is entitled, in ascertaining her distributive share, to have advancements of personalty made to legatees (children) under the will estimated as part of her husband's estate, though as between themselves, there being but a partial intestacy, such advancements are not subject to be brought into hotchpot.[26]

An agreement by an heir of the intestate that he will take no part in the distribution of the intestate's estate does not operate as an estoppel against a subsequent assertion of his right.[27]

The doctrine of advancements is based on the idea that parents are presumed to intend, in the absence of a will, an equality of division among the children;[28] therefore, in a case of partial intestacy, the doctrine of advancements does not exist. There must be entire intestacy.[29] So where a father died intestate as to his real property, but testate as to his personal property, such of the children who had been advanced lands before the father's death were not compelled to account

[21] Crump v. Faucett, 70 N. C. 345 (1874); Cromartie v. Kemp, 66 N. C. 382 (1872).

[22] Parker v. Eason, 213 N. C. 115, 195 S. E. 360 (1938); Headen v. Headen, 42 N. C. 159 (1850).

[23] Skinner v. Wynne, 55 N. C. 41 (1854); II MORDECAI'S LAW LECTURES 1345 (2d ed. 1916).

[24] Parker v. Eason, 213 N. C. 115, 195 S. E. 360 (1938); Headen v. Headen, 42 N. C. 159 (1850). But see Wolfe v. Galloway, footnote 9 *supra*.

[25] Eller v. Lillard, 107 N. C. 486, 12 S. E. 462 (1890); Headen v. Headen, 42 N. C. 159 (1850); Duke v. Duke, 1 N. C. 526 (1801); see note 76 A. L. R. 1420 (1932). The question of whether a child advanced more than his total share of the estate must account to the widow in computing her share has not been decided by the North Carolina Supreme Court.

[26] Arrington v. Dortch, 77 N. C. 367 (1877); Worth v. McNeil, 57 N. C. 272 (1858).

[27] Melvin v. Bullard, 82 N. C. 34 (1880); Cannon v. Nowell, 51 N. C. 436 (1859).

[28] Thompson v. Smith, 160 N. C. 256, 75 S. E. 1010 (1912).

[29] Jenkins v. Mitchell, 57 N. C. 207 (1858); Donnell v. Mateer, 40 N. C. 7 (1847); Richmond v. Vanhook, 38 N. C. 581 (1845).

for them in the division among all his children of his real estate.[30] It is frequently necessary to use parol evidence to construe advancements or equivalent terms used in the will itself, but extrinsic evidence is not admissible to contradict terms of the will as to the fact or amounts of advancements, where such sums are absolutely charged against such legatees.[31] Thus where there is an express declaration on the part of the testator that before a daughter is permitted to share in the distribution of his estate she shall account for an advancement, it is not open to her to show that she received more than the sum or less, or that she received nothing at all.[32]

The amount which should be charged as an advancement is the value of the property as of the date that it is made, and not as of any subsequent time.[33] If the value of the advancement increases, the child has the benefit; if it decreases, it falls on the child.[34] So where the value of the property advanced to a son was completely diminished, the son was still charged with the value at the time of delivery.[35]

Even if value of some sort is paid by the grantee, a conveyance may be an advancement as to its value in excess of such consideration.[36] Where a father conveyed to his son a tract of land worth $1,200 for which the son paid $400, the $800 excess of value over the price paid was charged as an advancement.[37]

No interest should be charged against an advancement on accounting, provided the accounting is had within two years allowed by law for the settlement of the estate.[38]

The personalty of the estate is made the primary fund for the equalization of advancements of personalty, and the realty is made the primary fund for the equalization of advancements of realty, and it is only when and to the extent that there is an excessive advancement in either category of property over and above the share which may come to the other beneficiaries that such excess may be considered in the distribution of the other category.[39] So where an advancement in real estate to a son was

[30] Jenkins v. Mitchell, 57 N. C. 207 (1858).
[31] Dodson v. Fulk, 147 N. C. 530, 61 S. E. 196 (1908).
[32] Dodson v. Fulk, 147 N. C. 530, 61 S. E. 196 (1908).
[33] Langsford v. Yarborough, 189 N. C. 476, 127 S. E. 426 (1925); Tart v. Tart, 154 N. C. 502, 70 S. E. 929 (1911); Ward v. Riddick, 57 N. C. 22 (1858); Raiford v. Raiford, 41 N. C. 490 (1849); Meadows v. Meadows, 33 N. C. 148 (1850); Lamb v. Carroll, 28 N. C. 4 (1845).
[34] Banks v. Shannonhouse, 61 N. C. 284 (1867); Walton v. Walton, 42 N. C. 138 (1850); Hicks v. Forrest, 41 N. C. 528 (1850).
[35] Banks v. Shannonhouse, 61 N. C. 284 (1867); Walton v. Walton, 42 N. C. 138 (1850); Hicks v. Forrest, 41 N. C. 528 (1850).
[36] Harrelson v. Gooden, 229 N. C. 654, 50 S. E. 2d 901 (1948); Barbee v. Barbee, 109 N. C. 299, 13 S. E. 792 (1891).
[37] Barbee v. Barbee, 109 N. C. 229, 13 S. E. 792 (1891).
[38] Lansford v. Yarborough, 189 N. C. 476, 127 S. E. 426 (1925); Tart v. Tart, 154 N. C. 502, 70 S. E. 929 (1911); Hanner v. Winburn, 42 N. C. 142 (1850).
[39] N. C. GEN. STAT. § 29-1 (2) (1943, recompiled 1950); N. C. GEN. STAT. § 28-150 (1943, recompiled 1950); King v. Neese, 233 N. C. 132, 63 S. E. 2d

of greater value than an equal share descending to the other children, the one so advanced was charged in the distribution of the personal estate of the parent with the excess in value over an equal share.[40]

The Legislature has passed statutes which permit the clerk of the Superior Court to advance portions of a nonsane person's estate to certain of the latter's relatives, which must be accounted for at death.[41]

WM. WHITFIELD SMITH

Federal Jurisdiction—Diversity of Citizenship—Multiple Corporations

Plaintiff, a citizen of Massachusetts, brought a personal injury action in the federal district court for Massachusetts against defendant railroad corporation, alleging it to be incorporated under the laws of New York. Defendant was in fact a multiple corporation existing under the laws of New York, New Hampshire, and Massachusetts. The court of appeals, in affirming the dismissal of the action for lack of jurisdiction, held that for purposes of federal jurisdiction a multiple corporation must be regarded in each state of its incorporation as solely domesticated therein, and that there is no diversity of citizenship jurisdiction where such corporation is sued in one of the states of its incorporation by a citizen of that same state.[1]

The district courts of the United States have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3000 and is between citizens of different states.[2] When the Supreme Court first considered the status of corporations in connection with the jurisdiction of the federal courts, it held that a corporation was not a citizen and that the citizenship of the stockholders would control.[3] The Court later adopted the fiction that there is a conclusive presumption that all the stockholders of a corporation are citizens of the state of incorporation.[4] Under this fiction,[5] a corporation created under the laws

123 (1950). No North Carolina case has passed on the question of recovery from an heir of an excess of advancements over his whole distributive share in the estate. But cases outside of North Carolina are in accord in ruling that the heir cannot be required to refund the excess, but can only be excluded from participating in the division of the estate. See note, 46 A. L. R. 1428 (1927).

[40] Harrelson v. Gooden, 229 N. C. 654, 50 S. E. 2d 901 (1948).

[41] N. C. GEN. STAT. § 35-19 through § 35-29 (1943, recompiled 1950); Patrick v. Trust Co., 216 N. C. 525, 5 S. E. 2d 724 (1939).

[1] Seavey v. Boston & Maine R. R., 197 F. 2d 485 (1st Cir. 1952).

[2] 62 STAT. 930 (1948), 28 U. S. C. A. § 1332 (1949).

[3] Bank of United States v. Deveaux, 5 Cranch 61 (U. S. 1809).

[4] This doctrine was first announced in Louisville, C. & C. R. R. v. Letson, 2 How. 497 (U. S. 1844). It is forcefully stated in Muller v. Dows, 94 U. S. 444, 445 (1876), as follows: "For the purposes of jurisdiction it is conclusively presumed that all stockholders are citizens of the state which by its laws created the corporation."

[5] The fiction has been severely criticized as judicial usurpation. McGovney, *A Supreme Court Fiction*, 56 HARV. L. REV. 853, 1090, 1225 (1943).

of one state is, for jurisdictional purposes, deemed a citizen of that state. Where, however, a corporation is actually incorporated in two or more states,[6] there is a separate corporation in each such state despite the identity of officers, directors, and stockholders,[7] and difficult problems of federal jurisdiction arise. Multiple incorporation should not be confused, however, with the mere licensing of a foreign corporation or the conferment of certain powers upon it by a second state.[8] Under such circumstances, the corporation remains a citizen of the state of "original" incorporation, since, for purposes of federal jurisdiction, no new corporation is created in the licensing state.[9]

The problem to be considered here is: Where a multiple corporation incorporated in States *A* and *B* is suing or being sued in one of these states *by a citizen of one of these same states*,[10] what citizenship is to be attributed to the multiple corporation, that of State *A* or of State *B*? This determination is a necessary factor in deciding (1) whether or not there is diversity of citizenship between the parties in a suit originally instituted in a federal court, and (2) whether or not a multiple corporation which is defendant in a suit commenced in a state court may remove the suit to federal court on the ground of diverse citizenship. This latter question is complicated by the existence of a federal statute[11] which grants the right of removal on the ground of diversity of citizenship only if none of the defendants is a citizen of the state in which suit is

[6] Railroad corporations are almost the only companies which employ multiple incorporation. The reasons for the use of the device and the extent of its use in this field are discussed in *Multiple Incorporation as a Form of Railroad Organization*, 46 YALE L. J. 1370, 1371-76, 1382 (1937).

[7] ". . . it is evident that by the general law railroad corporations created by two or more States, though joined in their interests, in the operation of their roads, in the issue of their stock, and in the division of their profits, so as practically to be a single corporation, do not lose their identity; and that each one has its existence and its standing in the courts of the country, only by virtue of the legislation of the State by which it is created. The union of name, of officers, of business and of property does not change their distinctive character as separate corporations." Nashua & Lowell Ry. v. Boston & Lowell Ry., 136 U. S. 356, 382 (1890).

[8] For a discussion of the problem of distinguishing between actual multiple incorporation and the mere recognition of or conferment of powers on the existing corporation (commonly called "domestication"), see DOBIE, FEDERAL PROCEDURE § 65 (1928); Patch v. Wabash R. R., 207 U. S. 277 (1907); Southern Ry. v. Allison, 190 U. S. 326 (1903); St. Louis & S. F. Ry. v. James, 161 U. S. 545 (1896); Pennsylvania R. R. v. St. Louis, A. & T. H. R. R., 118 U. S. 290 (1886); Memphis & C. Ry. v. Alabama, 107 U. S. 581 (1882).

[9] In Southern Ry. v. Allison, 190 U. S. 326, 337 (1903) it is stated, "so it seems that a corporation may be made what is termed a domestic corporation, or in form a domestic corporation of a State in compliance with the legislation thereof, by filing a copy of its charter and by-laws with the Secretary of State, yet such fact does not affect the character of the original corporation. It does not thereby become a citizen of the State in which a copy of its charter is filed, so far as to affect the jurisdiction of the Federal courts upon a question of diverse citizenship."

[10] The peculiar problems considered in this note arise *only* under the fact situation outlined above.

[11] 62 STAT. 937 (1948), 28 U. S. C. A. § 1441 (1950).

brought. Apparently, however, this non-citizen requirement may be waived.[12]

Several Supreme Court cases have laid down the rule that where a multiple corporation is *defendant* in an action brought by a citizen of one of its states of incorporation such corporation is considered to be a citizen of the state where suit is brought when it is incorporated in that state.[13] So, where suit is originally commenced in *federal court* in State *B* by a citizen of State *B* against a multiple corporation incorporated in State *A* and *B*, it citizenship under this rule is that of State *B*, and no diversity is present. The opposite result would follow if a suit involving the same parties had been commenced in federal court in State *A*. It would seem that under this rule, the defendant multiple corporation should never have removal on the ground of diversity (unless there is a waiver by plaintiff of the non-citizen requirement) of a suit commenced *in state court* in any of the states in which the corporation is incorporated. This conclusion follows from the fact that the corporation will always be a citizen of the state of suit;[14] and, as pointed out above, there may be no diversity of citizenship in the first place.[15] Five of the six circuits that have reviewed the problem have approved this "state of suit" rule.[16] One of these, the fourth circuit, applied the

[12] Monroe v. United Carbon Co., 196 F. 2d 455 (5th Cir. 1952), relying on Baggs v. Martin, 179 U. S. 206 (1900), holds that there is a waiver of the non-citizen requirement for removal [28 U. S. C. A. § 1441 (b)] if the plaintiff in the suit fails to make a motion to remand the case, and that the federal court to which it is removed may then treat the action as one originally brought in federal court.

[13] Muller v. Dows, 94 U. S. 444 (1876), and Chicago & N. W. R. R. v. Whitton, 13 Wall. 270 (U. S. 1871), used this rule in determining the citizenship of the corporations there involved. Patch v. Wabash R. R., 207 U. S. 277, 283 (1907), seems to have relied at least in part on this principle: "It [defendant multiple corporation] is alleged to have incurred a liability under the laws of the same state, *and is sued in that state*. It cannot escape the jurisdiction by the fact that it is incorporated elsewhere."

[14] Although no case was found which clearly denied removal to a multiple corporation because of the non-citizen requirement of the removal statute, it is probable that Patch v. Wabash R. R., 207 U. S. 277 (1907) reached this result. It would certainly seem that if a corporation is considered a citizen of the state of suit for diversity purposes, it will also be considered a citizen of that same state for purposes of removal and hence barred from removing in the above situation. *But cf.* Lucas v. New York Central R. R., 88 F. Supp. 536 (S. D. N. Y. 1950), which did not concern removal as such, but in which the court incidentally mentioned that removal had been allowed from a state court to it in a situation where, for diversity purposes, the multiple corporation was considered a citizen of the state of suit. Perhaps the removal may be explained by waiver or even mistake.

[15] See *e.g.*, Memphis & Charleston Ry. v. Alabama, 107 U. S. 581 (1883); Case v. Atlantic & C. A. L. Ry., 225 Fed. 862 (W. D. S. C. 1915).

[16] Starke v. New York, C. & S. L. R. R., 180 F. 2d 569 (7th Cir. 1950); Town of Bethel v. Atlantic Coast Line R. R., 81 F. 2d 60 (4th Cir. 1936); Peterborough R. R. v. Boston & M. R. R., 239 Fed. 97 (1st Cir. 1917); Lake Shore & M. S. Ry. v. Eder, 174 Fed. 944 (6th Cir. 1909); Missouri Pacific Ry. v. Meeh, 69 Fed. 753 (8th Cir. 1895).

For other cases approving this rule, see Murphy v. Hudson & M. R. R., 45 F. Supp. 720 (E. D. N. Y. 1942); Muller v. Boston & M. R. R., 9 F. Supp. 802 (D. N. H. 1935); Goodwin v. New York, N. H. & H. R. R., 124 Fed. 358 (D.

rule to the situation where the multiple corporation was plaintiff, and the Supreme Court denied certiorari.[17]

One Supreme Court case seemingly announced a second rule applicable when the multiple corporation is *plaintiff* in an action. Although the case has been differently interpreted,[18] it seems to hold that a multiple corporation in a suit against a citizen of one of its states of incorporation may assume the citizenship of any of its charter states by alleging in its complaint the character in which it is suing.[19] A recent decision from the third circuit held that where a multiple corporation is defendant in this type of suit, the plaintiff may, by allegation in the complaint, fix the citizenship of the defendant as that of any chosen state of incorporation.[20] The latter decision seems to be an outcry against the formality of the "state of suit" rule, which requires the plaintiff in a suit against a multiple corporation to go into a foreign state in order to maintain the suit in federal court.[21] Assuming there is diversity, it would seem that under this rule removal should be allowed to the defendant multiple corporation (so far as the statutory noncitizen requirement is concerned) if the suit is brought in a state different from one in which citizenship is given defendant corporation by allegation of the plaintiff.[22] Conversely, unless there is a waiver by plain-

Mass. 1903); Baldwin v. Chicago & N. W. Ry., 86 Fed. 167 (W. D. Mich. 1898); Paul v. Baltimore & O. & C. R. R., 44 Fed. 513 (C. C. D. Ind. 1890); Stout v. Sioux City & Pac. R. R., 8 Fed. 794 (C. C. D. Neb. 1881).

[17] Town of Bethel v. Atlantic Coast Line R. R., 81 F. 2d 60 (4th Cir. 1936), *cert. denied*, 298 U. S. 682 (1936).

[18] Town of Bethel v. Atlantic Coast Line R. R., 81 F. 2d 60 (4th Cir. 1936) interpreted the *Nashua* case as holding that a plaintiff multiple corporation may fix its citizenship for purposes of federal jurisdiction by its allegation as to which entity is suing. This is believed to be the correct interpretation. In Missouri Pacific Ry. v. Meeh, 69 Fed. 753 (8th Cir. 1895), the court took the view that the case involved a suit by one entity (incorporated in New Hampshire) of the multiple corporation against the other entity (incorporated in Massachusetts), and that the decision is distinguishable on that ground. Goodwin v. New York, N. H. & H. R. R., 124 Fed. 358 (C. C. D. Mass. 1903) disapproved the *Missouri Pacific* case and stated that the *Nashua* case did not even involve a multiple corporation, but rather a single corporation whose citizenship was diverse from the defendant's citizenship.

[19] Nashua & Lowell Ry. v. Boston & Lowell Ry., 136 U. S. 356 (1890).

[20] Gavin v. Hudson & Manhattan R. R., 185 F. 2d 104 (3d Cir. 1950). Commented on in Notes, 3 ALA. L. REV. 397 (1951), 4 BAYLOR L. REV. 227 (1952), 20 FORD. L. REV. 203 (1951), 64 HARV. L. REV. 1009 (1951).

[21] "Defendant [multiple corporation] says that these plaintiffs from New Jersey could sue the New York defendant corporation in New York or that a New Yorker could come over to New Jersey and sue the defendant as a New Jersey corporation. But, says defendant, it cannot be sued in a federal court in New York by a New Yorker or in New Jersey by a New Jerseyite. Such a rule if adopted may be an effective means of promoting additional passenger business for the Hudson & Manhattan [defendant railroad], but we think it would be pretty hard to explain its reasons to a layman." Gavin v. Hudson & Manhattan R. R., 185 F. 2d 104, 105 (3d Cir. 1950).

[22] If the multiple corporation is to be regarded as a citizen of a particular state under the "allegation" rule for purposes of the diversity issue, it seems that logical consistency would require the same citizenship (and that one alone) to be

tiff, it would seem that removal is not possible if the citizenship alleged is that of the state in which suit is brought.

Other cases have at least mentioned, and perhaps relied upon, a third possible rule applicable when the multiple corporation is defendant.[23] This rule is that the multiple corporation is considered a citizen of the state in which the cause of action arose when it is incorporated in that state. It can be inferred from these cases that the courts felt that the particular entity of the multiple corporation incorporated in the state where the cause of action arises is responsible therefor and is the proper defendant in the action. Considerable doubt as to whether this is a valid rule stems from the fact that none of these cases were decided solely on this factor, since in each case the suit was brought in the state of incorporation where the cause of action arose.[24] In addition, quite a few cases have expressly repudiated the rule.[25]

As has probably been noted, the law dealing with the citizenship of multiple corporations is very uncertain. Although two Supreme Court cases applied the "state of suit" rule when the multiple corporation was

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used in determining the removal issue. Thus, in the above hypothetical situation, the fact that the corporation is incorporated in the state of suit should not bar removal; instead, the corporation should be considered a citizen of the alleged state of incorporation (different from the state of suit), and hence removal should be allowed to it as a non-citizen of the state of suit.

[23] In Memphis & Charleston Ry. v. Alabama, 107 U. S. 581, 585 (1883), it is stated: "The defendant, being a corporation of the State of Alabama, has no existence in this State as a legal entity or person, except under and by force of its incorporation by this State; and, although also incorporatetd in the State of Tennessee, must, *as to all its doings within the State of Alabama,* be considered a citizen of Alabama . . ." [italics added]. In Patch v. Wabash R. R., 207 U. S. 277, 283 (1907), the following language was used: "It [defendant corporation] *is alleged to have incurred a liability under the laws of* . . . [Illinois], and is sued in that state. It cannot escape the jurisdiction by the fact that it is incorporated elsewhere." [italics added]. This latter case seems to combine both the "state of suit" theory and the "state of cause of action" theory in its decision. See also Missouri Pacific Ry. v. Meeh, 69 Fed. 753 (8th Cir. 1895); Winn v. Wabash R. R., 118 Fed. 55 (W. D. Mo. 1902).

[24] These decisions fail to express any view whatsoever on the situation where the cause of action arises in one state of incorporation and the suit is brought in another state.

[25] See Smith v. New York, N. H. & H. R. R., 96 Fed. 504 (C. C. D. Mass. 1899), where it was held that the entities of a multiple corporation are jointly liable for a tort arising from any operation of the multiple corporation, wherever committed. In Gavin v. Hudson & Manhattan R. R., 185 F. 2d 104, 106 (3d Cir. 1950), the court stated: "We think it does not matter in determining the place where the plaintiff may sue whether he was hurt by the defendant [multiple corporation] in New York or New Jersey. It is perfectly obvious that there is only one operating group and its employees work just as fully for one corporation as the other. It is little short of absurd to say that the New York corporation commits the New York torts, if any, and the New Jersey corporation the torts in New Jersey, if any." See also Seavey v. Boston & Maine R. R., 197 F. 2d 485 (1st Cir. 1952) (instant case); Lake Shore & M. S. Ry. v. Eder, 174 Fed. 944 (6th Cir. 1909); Murphey v. Hudson & Manhattan R. R., 45 F. Supp. 720 (E. D. N. Y. 1942); Muller v. Boston and M. R. R., 9 F. Supp. 802 (D. N. H. 1935); Case v. Atlantic & C. A. L. Ry., 225 Fed. 862 (W. D. S. C. 1915); Horne v. Boston & M. R. R., 18 Fed. 50 (D. N. H. 1883).

defendant,[26] the last Supreme Court consideration of this problem, *Patch v. Wabash R. R.*,[27] interjected uncertainty into the law. In holding the defendant multiple corporation to be a citizen of Illinois, the Court placed its decision on the dual factors that the cause of action arose in Illinois and that the suit was brought in that same state. In the situation where the multiple corporation is plaintiff, definitive Supreme Court authority is lacking, even though, as pointed out above, there is one case which apparently held the "allegation" rule proper in that situation.[28] Although several distinctions exist between the two rules which may differently affect the rights of the parties or the numbers of cases of this peculiar kind which will get into federal courts,[29] the preferability of one rule over the other does not seem to be the most pressing problem in this area of confused law. What is most needed is a clear set of rules from the Supreme Court so that party litigants may advisedly chart the course of the suit.

WALKER Y. WORTH, JR.

Negligence—FELA—Proximate Cause—Function of Jury

When an airhose on defendant's train burst, locking the brakes and stopping the train, plaintiff brakeman attempted to make repairs. He tapped on the coupling of the airhose with a wrench, knocking loose particles of dust and rust, some of which lodged in his left eye, causing loss of vision. Suit was brought under the Federal Employers' Liability Act[1] and the Federal Safety Appliance Act.[2] The jury found

[26] See n. 13 *supra*.
[27] 207 U. S. 277 (1907).
[28] See n. 19 *supra*.
[29] The differences noted are the following:
(1) The inability of the defendant multiple corporation to remove from a state court under the "state of suit" rule, absent any waiver by the plaintiff, as contrasted with the possibility of removal under the "allegation" rule in the particular situation where the citizenship given the multiple corporation by allegation of the plaintiff is different from the state of suit. It should be noted that this limitation is in no way harsh, since, under the assumed fact situation, the suit will always be in one of the states of incorporation of the defendant multiple corporation, and any claim of local prejudice would be without merit.
(2) The ritual of the "state of suit" rule which requires the plaintiff (who is a citizen of one of the states of incorporation of defendant multiple corporation) in a suit against a multiple corporation to go into a foreign state in order to maintain the suit in federal court on the ground of diversity of citizenship. This limitation and the former one illustrate the fact that the "state of suit" rule is less liberal than the "allegation" rule in allowing access to the federal courts in suits of this kind.
(3) The limitation of the "state of suit" rule which prevents the transfer of a suit from a federal court in one state of incorporation of the multiple corporation where there is diversity of citizenship to another charter state of which the adverse party is a citizen. The transfer is improper since it would cause diversity to cease and hence oust the jurisdiction of the federal courts. See Lucas v. New York Central R. R., 88 F. Supp. 536 (S. D. N. Y. 1950).

[1] 35 STAT. 65 (1908), as amended; 45 U. S. C. § 51 *et seq.* (1946), which provides

that the plaintiff's injury was the proximate result of (1) defendant's negligence in allowing rust and dust to accumulate on the airhose and (2) defendant's violation of the Safety Appliance Act in having defective air brakes. The Supreme Court of Texas, in a four to three decision, affirmed jury findings.[3]

This case presents three interesting problems in a highly specialized field of tort law. These are: (1) What constitutes negligence in cases under FELA? (2) Assuming that there is negligence or a violation of the Safety Appliance Act, when is an injury proximately caused by such negligence or violation? (3) What part does the jury play in answering these questions?

The orthodox conception of negligence in employer-employee relationships is that an employer is negligent when he fails to use reasonable care and prudence in providing for the safety of employees.[4] Under recent Supreme Court rulings, almost any act or ommission by an agent of a railroad which precedes injury to an employee might be declared to be negligence,[5] or the mere occurrence of an accident might be the basis for liability.[6] For example, where plaintiff's intestate, unload-

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that "Every common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engine, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." See Richter and Forer, *Federal Employers' Liability Act,* 12 F. R. D. 13 (1951); Note, 22 So. CALIF. L. REV. 63 (1948).

[2] 27 STAT. 531 (1893), as amended, 45 U. S. C. §§ 1-16 (1946). The Act imposes a duty on railroads engaged in interstate commerce to provide certain safety appliances and creates absolute liability for injuries which are proximately caused by the absence of these appliances or any defect in them. Application of the Act is explained in *Note,* 16 A. L. R. 2d 654 and in 3 NACCA L. J. 200 (1949). The Safety Appliance Act and the Federal Employers' Liability Act, note 1 *supra,* are in *pari materia,* and the former is treated as an amendment to the latter. The Safety Appliance Act merely dispenses with the necessity of showing that a violation of the appliance statute is negligence and makes such violation negligence as a matter of law. Urie v. Thompson, 337 U. S. 163 (1949).

[3] Missouri-Kansas-Texas Ry. v. Evans, 250 S. W. 2d 385 (Tex. 1952) (case reversed and remanded to consider new evidence of discovery of cancer in plaintiff's eye).

[4] Patton v. Texas & Pacific Ry., 179 U. S. 658, 662 (1901), where the Court said, "The fact of accident carries with it no presumption of negligence on the part of the employer; and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence." The Court went on to state that the employer must use reasonable care and prudence in providing for employees and that, beyond such reasonable provision, the employer owes no duty.

[5] Lillie v. Thompson, 332 U. S. 459 (1947) (assigning female plaintiff to night duty as telegraph operator, where she was criminally attacked); Ellis v. Union Pacific R. R., 329 U. S. 649 (1947) (not giving plaintiff oral warning of an impaired clearance already marked by a sign); Seago v. New York Central R. R., 315 U. S. 781 (1942) (engineer's moving train as usual without ascertaining a crewman's location); Owens v. Union Pacific R. R., 319 U. S. 715 (1942) (similar facts).

[6] Wilkerson v. McCarthy, 336 U. S. 53 (1949) (railroad had grease-pit surrounded by guard chains; plaintiff went around barriers and accidentally fell into

ing ashes from a hopper car on a bridge, lost his footing on the twelve-inch ledge, fell and was fatally injured, the Supreme Court approved a jury verdict based on negligence in failing to provide deceased with a safe place to work.[7] In another case, the Court held that a jury might properly "infer" negligence and find that the railroad had failed to furnish a brakeman with a "safe place to work" where he stepped on a coal clinker lying in the railway yard, fell and was injured.[8] The Texas court follows this trend of holding railroads to an economically impractical, if not impossible, standard of care, by imposing on the defendant railroad the duty to keep exposed parts of the train absolutely free of "particles foreign to a human eye."[9]

In determining when a violation of duty is the proximate cause of an injury,[10] the best test, appears to be the "substantial factor" test,[11] or the "appreciable factor" test[12] as it is sometimes stated, but in FELA cases the test now used seems to be the very liberal "but for" or *sine qua non* test.[13] It cannot be denied that the wording of the statute partially

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pit); Jesionowski v. Boston & Maine R. R., 329 U. S. 452 (1946) (cars jumped track which was apparently in proper order and switchman was killed); Lavender v. Kurn, 327 U. S. 645 (1946) (switchman found dead near tracks from blow on head). *But see* Prosser, Law of Torts § 49, p. 358 (1941) ("Railway . . . not liable for . . . accident unless its negligence has increased the danger . . ."). In industry generally, employee assumes risk of such incidents of the employment against which he can protect himself equally as well as the master. *Id.* § 67.

[7] Bailey v. Central Vermont Ry., 319 U. S. 350 (1943); *cf.* Tiller v. Atlantic C. L. R. R., 318 U. S. 54 (1943) (clearance of three feet and seven inches between tracks could be found by jury to be an unsafe place to work). The Court makes no suggestion as to what *is* a safe place to work. *Contra:* Toledo, St. L. & W. Ry. v. Allen, 276 U. S. 165 (1928) (Supreme Court held that two feet and nine inches clearance between trains was not an unsafe place to work).

[8] Brown v. Western Ry., 338 U. S. 294 (1949), *reversing* 77 Ga. App. 780, 49 S. E. 2d 833 (1948). The Georgia court found no negligence as a matter of law. See a later Georgia case: Atlantic C. L. R. R. v. Chapman, 84 Ga. App. 94, 65 S. E. 2d 629 (1951) (defendant railroad guilty of negligence in allowing clinkers to lie in yard). *Contra:* Gulf, M. & N. R. R. v. Wells, 275 U. S. 455 (1928), *reversing and remanding* 107 So. 27 (Miss. 1926) (where jury had found for a brakeman who alleged that an unusual jerk of a train which he was boarding and a coal clinker underfoot combined to cause him to fall and be injured); Frizell v. Wabash R. R., 199 F. 2d 153 (8th Cir. 1952) (railroad not negligent where plaintiff slipped on cinders alongside track).

[9] Missouri-Kansas-Texas R. R. v. Evans, 250 S. W. 2d 385, 393 (Tex. 1952) (three dissenting judges argued that there was no negligence as a matter of law, that to hold otherwise would be to burden railroads with an "unreasonable and impossible" standard of conduct). The standard suggested would require railroad companies to incessantly wash freight cars and then chip off the rust that the moisture caused.

[10] Atchison, T. & S. F. Ry. v. Toops, 281 U. S. 351 (1930) (plaintiff must establish a causal relation between carrier's violation of some duty owed and his injury to impose liability on employer); Lang v. New York Central R. R., 255 U. S. 455 (1921); St. Louis & S. F. Ry. v. Conarty, 238 U. S. 243 (1914).

[11] Mitchell v. Friedman, 11 N. J. Super. 344, 78 A. 2d 417 (1951). See Prosser, Law of Torts § 46 (1941); Restatement, Torts § 431 (1934) (Was actor's wrong a substantial cause in bringing about the injury? One must use care to distinguish the legal from the philosophic cause).

[12] Prosser, Law of Torts § 46 (1941).

[13] Heiting v. Chicago, R. I. & P. R. R., 352 Ill. 466, 96 N. E. 842 (1911);

justifies the use of such a test.[14] Thus, ". . . so long as the negligence of the carrier partly contributes to cause the injury or death of an employee, then the carrier is responsible for the full amount of that injury and death."[15] It seems clear from recent Supreme Court rulings that liability of a railroad for injuries or death to employees may be predicated on any obscure or remote connection between the defendant's carelessness and the plaintiff's injury.[16] For example, the Court held that a railroad might be found to be negligent in assigning female plaintiff to night duty as telegraph operator and that this proximately caused her injury when she unlocked the door and admitted a strange man, who criminally attacked her.[17] In another case, the Court said that the failure of couplers to connect automatically on the first attempt could be found to have been the proximate cause of injuries to a crewman who climbed aboard the car, stopped it from rolling, signalled the engineer to make a second attempt, and was thrown to the floor of the car and injured by the force of the impact when the coupling was effected on the second try.[18] Another opinion declared that where a signalman was riding on a motorcar several hundred feet behind a train, which stopped suddenly due to the defective brakes "setting," and he crashed into the rear of the train, the unsafe brakes could be found to be the proximate cause of his death even though the deceased would have had ample time to stop his car, had he been looking ahead.[19]

Camp v. Wilson, 258 Mich. 38, 241 N. W. 844 (1932); HARPER, LAW OF TORTS § 100 (1933) (if consequences would not have occurred but for defendant's conduct, his acts are causal in fact).

[14] 35 STAT. 65 (1908), as amended, 45 U. S. C., § 51 (1946) ("railroad . . . liable . . . for such injury . . . resulting in whole or in part from the negligence of . . . carrier"); Spokane & I. E. R. R. v. Campbell, 241 U. S. 497 (1916). The Supreme Court seems to interpret "in whole or in part" as allowing liability where the violation of duty is merely a contributing cause in a philosophic sense, but it is submitted that the phrase should be construed as requiring that such negligence be a substantial, contributory cause in a legal sense. See note 11, *supra*.

[15] Dooley, *The Meaning of FELA to the Railroad Worker,* OKLA. B. A. J. 67, 68 (1951).

[16] Tennant v. Peoria & P. U. Ry., 321 U. S. 29 (1944), *reversing* 134 F. 2d 860 (7th Cir. 1943) (failure of engineer to ring bell and unexplained death of switchman who was run over). This case was unwillingly followed and severely criticized in Griswold v. Gardner, 155 F. 2d 333 (7th Cir. 1946); Tiller v. Atlantic C. L. R. R., 318 U. S. 54 (1943), *reversing* 128 F. 2d 420 (4th Cir. 1942); *after retrial and on second appeal,* 323 U. S. 574 (1945), *reversing* 142 F. 2d 718 (4th Cir. 1944) (insufficient light on backing freight train and death of night policeman by being run over in unexplained accident). *Contra:* Pennsylvania R. R. v. Chamberlain, 288 U. S. 333 (1933), *reversing* 59 F. 2d 986 (2d Cir. 1932); Atchison, T. & S. F. Ry. v. Toops, 281 U. S. 351 (1930).

[17] Lillie v. Thompson, 332 U. S. 459 (1947), *reversing* 162 F. 2d 716 (1947).

[18] Carter v. Atlanta & St. A. B. Ry., 338 U. S. 430 (1949), *reversing* 170 F. 2d 719 (1948).

[19] Coray v. Southern Pacific Co., 335 U. S. 520 (1948), *reversing* 112 Utah 166, 185 P. 2d 963 (1947). State court argued that violation of Safety Appliance Act in having defective air brakes was not the legal cause of the death, but it merely created a *condition* after which intestate, by his own negligence, caused his own death. See PROSSER, LAW OF TORTS, § 45 (1941); Beale, *The Proximate Con-*

The majority of the Texas court followed the Supreme Court's attitude in holding that plaintiff's *eye injury* was proximately caused by defendant's violation of a statute requiring trains to have *effective power brakes*.[20] The three dissenting judges argued that "As a matter of law the bursting of the airhose was not the proximate cause of plaintiff's injuries."[21] They asserted that the "force" of the violation of the Safety Appliance Act came to rest when the train stopped, that the violation merely created a set of circumstances or conditions from which the injury to the plaintiff occurred,[22] and that it was a "remote" cause of plaintiff's injuries.[23]

Generally, a personal injury case will not go to the jury unless there is sufficient evidence of facts from which it might reasonably be found that the defendant was guilty of a breach of duty proximately causing the injury to the plaintiff.[24] In the past ten years, with only

sequences of an Act, 33 HARV. L. REV. 633, 651 (1920).

"Causal relationship between negligence or violation of a Safety Appliance regulation, and injury, has been markedly reduced as a hurdle and has been uniformly held to be a question of fact for the jury." Richter and Forer, *Federal Employers' Liability Act—A Real Compensatory Law for Railroad Workers*, 36 CORNELL L. Q. 203, 231 (1951).

[20] "Injuries received by railroad employees *in repairing the brake system* are within the protection of the Act." (italics added). Missouri-Kansas-Texas R. R. v. Evans, 250 S. W. 2d 385, 388 (Texas 1952); *cf.* Minneapolis, St. P., & S. S. M. Ry. v. Goneau, 269 U. S. 406 (1926). In this case, the principal decision relied on by the Texas court, a brakeman lost his balance, fell from a bridge, and was seriously injured while trying *to effect a coupling* between cars with a defective coupler. *Contra:* Bohm v. Chicago, M. & St. P. Ry., 161 Minn. 74, 200 N. W. 804 (1924), *cert. denied*, 267 U. S. 600 (1925) (brakeman going to inspect a defect in air brakes fell off bridge); Reetz v. Chicago & E. R. R., 46 F. 2d 50 (6th Cir. 1931) (similar facts); McCalmont v. Pennsylvania R. R., 283 Fed. 736 (6th Cir. 1922).

[21] Missouri-Kansas-Texas R. R. v. Evans, 250 S. W. 2d 385, 393 (Texas 1952); See Beale, *The Proximate Consequences of an Act*, 33 HARV. L. REV. 633, 640 (1920). "The rule that requires exclusion of remote consequences is . . . a fundamental principle of law, based on the necessity of doing justice to all, and the question in any particular case, whether a given result is remote, is *purely a question of law.*" (italics added).

[22] The position of the dissent resembles that of the court in Coray v. Southern Pacific Co., 112 Utah 166, 185 P. 2d 963 (1947), *reversed in* 335 U. S. 520 (1948); *accord*, Lang v. New York C. R. R., 255 U. S. 455 (1921) (absence of an automatic coupler required by statute was not proximate cause of intestate's death but merely a condition which made it possible for intestate to be crushed between two cars without couplers, although he would not have been injured had the cars had couplers); St. Louis & S. F. Ry. v. Conarty, 238 U. S. 243 (1914) (similar facts and holding); Phillips v. Pennsylvania R. R., 283 Fed. 381 (1922).

[23] "We are of the opinion that an injury sustained while repairing a piece of machinery is not proximately caused by the defect in the machinery making necessary the repairs. Such a defect is in law a remote cause." Missouri-Kansas-Texas R. R. v. Evans, 250 S. W. 2d 385, 394 (Texas 1952); *accord*, Schoultz v. Eckardt Mfg. Co., 112 La. 658, 36 So. 593 (1904) (employee injured by his own negligence while repairing a machine belt was not injured by the breaking of the belt). See HARPER, LAW OF TORTS § 110 (1933) (where violation of duty is a cause in fact in a philosophical sense, it is not necessarily a legal or culpable cause); See also note 11 *supra*.

[24] Texas & N. O. R. R. v. Warden, 78 S. W. 2d 164 (Tex. 1935); Austin v. Southern Ry., 197 N. C. 319, 148 S. E. 446 (1929); Gulf, M. & N. R. R. v. Wells,

rare exceptions,[25] the Supreme Court has been adamant in its insistence that FELA cases should go to the jury, even where circuit and state supreme courts had held that the evidence was insufficient as a matter of law.[26] For instance, where a switch tender was found lying beside a track after a train had passed, fatally injured from a blow on the head, and plaintiff argued that the deceased had probably been struck by a mail hook which could have swung out twelve inches from the passing train and dealt the fatal blow, the Court held that a jury might be justified in so finding from the "probative facts" present, although the only conclusive evidence was that the deceased had been found dying from a blow on the head, on a dark night in an outlying railway yard.[27]

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275 U. S. 455 (1928), *reversing* 107 So. 27 (Miss. 1926); Bohm v. Chicago, M. & St. P. Ry., 161 Minn. 74, 200 N. W. 804 (1924), *cert. denied*, 267 U. S. 600 (1925). See also PROSSER, LAW OF TORTS § 50 (1941) (questions of fact regarding negligence and proximate cause are for jury, but standard of care and legal limits on proximate cause doctrine are questions of law to be settled by the court); WIGMORE, EVIDENCE § 2552 (3d ed. 1940) (judge declares, as a matter of law, the outside limits within which jury serves as finders of fact); James, *Functions of Judge and Jury in Negligence Cases*, 58 YALE L. JOUR. 667 (1949).

[25] Brady v. Southern Ry., 320 U. S. 476 (1943), *affirming* 222 N. C. 367, 23 S. E. 2d 334 (1942) (strong dissent by Justices Black, Murphy, Douglas, and Rutledge expressing view that the jury verdict should be sustained); Reynolds v. Atlantic C. L. R. R., 336 U. S. 207 (1949), *affirming* 251 Ala. 27, 36 So. 2d 102 (1948) (same four judges dissent and uphold jury providence of the case); Moore v. Chesapeake & O. Ry., 340 U. S. 573 (1951), *affirming* 184 F. 2d 176 (4th Cir. 1950). Justice Black, with Douglas concurring in the dissent, says that the majority of the court is upholding "a totally unwarranted substitution of a court's view of the evidence for that of a jury." *Id.* at 431. All of these exceptions and others are of little significance in view of the dissents and the great number of cases *contra*. See note 26, *infra*.

[26] Carter v. Atlanta & St. A. B. Ry., 338 U. S. 430 (1949), *reversing* 170 F. 2d 719 (5th Cir. 1948); O'Donnell v. Elgin, J. & E. Ry., 338 U. S. 384 (1949), *reversing* 171 F. 2d 973 (7th Cir. 1948); Brown v. Western Ry., 338 U. S. 294 (1949), *reversing* 77 Ga. App. 780, 49 S. E. 2d 833 (1948); Urie v. Thompson, 337 U. S. 163 (1949), *reversing* 357 Mo. 738, 210 S. W. 2d 98 (1948); Wilkerson v. McCarthy, 336 U. S. 53 (1949), *reversing* 112 Utah 300, 187 P. 2d 188 (1947); Coray v. Southern Pacific Co., 335 U. S. 520 (1948), *reversing* 112 Utah 166, 185 P. 2d 963 (1947); Anderson v. Atchison, T. & S. F. Ry., 333 U. S. 821 (1948); *reversing* 13 Cal. 2d 117, 187 P. 2d 729 (1947); Lillie v. Thompson, 332 U. S. 459 (1947), *reversing* 162 F. 2d 716 (6th Cir. 1947); Myers v. Reading Co., 331 U. S. 477 (1947), *reversing* 155 F. 2d 523 (3d. Cir. 1946); Ellis v. Union Pacific R. R., 329 U. S. 452 (1947), *reversing* 146 Neb. 397, 19 N. W. 2d 641 (1945); Jesionowski v. Boston & M. R. R., 329 U. S. 452 (1946), *reversing* 154 F. 2d 703 (1st Cir. 1946); Blair v. Baltimore & O. R. R., 323 U. S. 600 (1945), *reversing* 349 Pa. 436, 37 A. 2d 736 (1944); Tennant v. Peoria & P. U. Ry., 321 U. S. 29 (1944), *reversing* 134 F. 2d 860 (7th Cir. 1943); Owens v. Union Pacific R. R., 319 U. S. 715 (1943), *reversing* 129 F. 2d 1013 (9th Cir. 1942); Bailey v. Central Vermont Ry., 319 U. S. 350 (1943), *reversing* 113 Vt. 8, 28 A. 2d 639 (1942); Tiller v. Atlantic C. L. R. R., 318 U. S. 54 (1943), *reversing* 128 F. 2d 420 (4th Cir. 1942), and 323 U. S. 574 (1945), *reversing* 142 F. 2d 718 (4th Cir. 1944); Lilly v. Grand Trunk Ry., 317 U. S. 481 (1943), *reversing* 312 Ill. App. 73, 37 N. E. 2d 888 (1941); Seago v. New York C. R. R., 315 U. S. 781 (1942), *reversing* 155 S. W. 2d 126 (Mo. 1941).

[27] Lavender v. Kurn, 327 U. S. 645 (1946), *reversing* 354 Mo. 582, 189 S. W. 2d 253 (1945). Justice Murphy, writing the opinion of the court, said, "It is no answer to say that the jury's verdict involved speculation and conjecture . . ." *Id.* at 653.

The Court has repeatedly justified its attitude with the quotation: "We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these . . ."[28] As an consequence of this entrenched view, juries have, over the last decade, in effect written the law with regard to FELA actions.[29] An injured railroad employee may almost always be assured of having his case reach the jury[30] and may be fairly certain of a favorable verdict.[31] It was against this background that the Texas court approved a jury trial rather than deciding the case as a matter of law as the dissenting judges would have done.[32]

It appears that the Supreme Court will continue to lead lower courts[33] by its own reluctance to preclude any railroad employee from recovery.[34] In view of this and other apparent discontent with FELA as

[28] Jones v. East Tennessee, V. & G. R. R., 128 U. S. 443, 445 (1888) (case involved negligence and contributory negligence). This reasoning is adopted by the Texas court in Missouri-Kansas-Texas R. R. v. Evans, 250 S. W. 2d 385, 392 (Texas 1952).

[29] ". . . it is not judicial legislation which has amended the bases of the FELA action, but judicial alteration of its own procedure, wherein the judge-jury relation has been modified to conform to the philosophy of the majority of the Court. The net result of the procedural alteration has been a change in the substantive law." Note, 44 ILL. L. REV. 854 (1950).

[30] See note 23 *supra*. "The jury is the tribunal under our federal system of jurisprudence which determines whether the evidence in railroad cases produces probative facts from which negligence and the causal relation may reasonably be inferred." Moore, *Recent Trends in Judicial Interpretation in Railroad Cases Under the Federal Employers' Liability Act*, 29 MARQ. L. REV. 73, 94 (1946). See also Richter and Forer, *Federal Employers' Liability Act—A Real Compensatory Law for Railroad Workers*, 36 CORNELL L. Q. 203, 231 (1951); Note, 26 NOTRE DAME LAW. 694 (1951).

[31] James, *Functions of Judge and Jury in Negligence Cases*, 58 YALE L. REV. 667 (1949). The author takes cognizance of the fact that juries, in majority of accident cases, return verdicts for plaintiffs. James suggests that this fact has added significance when one remembers that most defendant's lawyers will try to settle unfavorable claims out of court and take only *doubtful* cases to court.

[32] Missouri-Kansas-Texas R. R., 250 S. W. 2d 385, 393 (Texas 1952). See Griswold v. Gardner, 155 F. 2d 333, 334 (7th Cir. 1946). The court affirmed a jury verdict for plaintiff, but said "That the Supreme Court treats the question of negligence and proximate cause as a jury question in this class of cases is clearly shown by a study of these cases. Moreover, not only are the issues to be decided by the jury but its decision is unassailable. In fact, it is difficult to conceive of a case brought under this act where a trial court would be justified in directing a verdict."

". . . regardless of what we might think of the sufficiency of the evidence. . . . The fact is . . . that the Supreme Court has in effect converted this negligence statute into a compensation law thereby making, for all practical purposes, a railroad an insurer of its employees." *Id.* at 333.

[33] See note 8 *supra*. "Our Supreme Court will not hesitate to spank a trial judge or a court of appeals who has failed to heed its strong and oft-repeated admonitions concerning the functions of the court and that of the jury. As a result, trial judges and courts have become fearful of directing verdicts or of entering judgments, notwithstanding the verdicts of juries." Dooley, *The Meaning of FELA to the Railroad Worker*, 22 OKLA. B. A. J. 66, 67 (1951).

[34] Justice Frankfurter criticizes the need for showing negligence in industrial accident cases as being outmoded and suggests absolute liability should be imposed on railroads and other large industries in a concurring opinion in Tiller

it stands today,[35] perhaps Congress should replace the Act with a comprehensive plan which would not require railroad workers to show that their injury was proximately caused by negligence or violation of a safety statute by the carrier but which would allow reasonable compensation[36] to railroad workers for all accidental injuries arising out of their employment.[37] Such legislation would eliminate the necessity of mold-

v. Atlantic C. L. R. R., 318 U. S. 54, 73 (1943). Justices Black and Frankfurter express similar concurring opinions in Wilkerson v. McCarthy, 336 U. S. 53 (1949).

Justice Douglas, in Bailey v. Central Vermont Ry., 319 U. S. 350, 354 (1943), refers to the use of the doctrine of negligence and the jury trial as ". . . crude, archaic, and expensive as compared with the more modern systems of workmen's compensation." Dissenting, Justice Roberts, with whom Justice Frankfurter concurred, said, "I yield to none in my belief in the wisdom and equity of workmen's compensation laws, but I do not conceive it to be within our judicial function to write the policy which underlies compensation laws into acts of Congress (FELA) when Congress has not chosen that policy but, instead, has adopted the common law doctrine of negligence." *Id.* at 358.

[35] PROSSER, LAW OF TORTS § 70, p. 547 (1941). With pertinent quotations and citations, the author points to the increasing agitation for some sort of workmen's compensation act to supplant FELA. See 74 A. B. A. REP. 108 (1949). A resolution was adopted by the House of Delegates of the American Bar Association to offer and support an amendment to FELA to the effect that an injured employee be compelled to bring his cause of action under the Workmen's Compensation Act of the jurisdiction wherein the injury occurred, if such jurisdiction has such an act, and that the employee not have an election of remedies. It further provided that such action would be a bar to any proceeding on the claim under the act of any other jurisdiction. See also Pollack, *Workmen's Compensation For Railroad Work Injuries and Diseases,* 36 CORNELL L. Q. 236 (1951). The author urges enactment of a federal workmen's compensation act for railroad employees and notes that approximately thirty bills have been before congress for such a law. He also states the belief that a majority of railroad workers favor such action, but indicates that some of the strongest opposition comes from employees. *See e.g.,* Lush, *Importance of Legal Aid,* The Railroad Trainman, Jan. 1947, p. 8. The speaker, former manager of the legal aid department of the Brotherhood of Railroad Trainmen, expresses aversion for compensation acts because of the ceilings on recovery and upholds FELA as being the better plan to compensate workers for injuries.

[36] Affolder v. New York C. & St. L. R. R., 339 U. S. 96 (1950) (jury awarded $95,000 for loss of a leg; court reduced the sum to $80,000); Lavender v. Kurn, 327 U. S. 645 (1946) ($30,000 for death); Missouri, K. & T. R. R. v. Evans, 250 S. W. 2d 383 (Tex. 1952) (jury gave $40,000 for an eye; reduced by court to $20,000); Missouri, K. & T. R. R. v. Ridgeway, 191 F. 2d 363 (8th Cir. 1951) (jury awarded damages fifty-five times greater than plaintiff's annual earning capacity and nearly twice as much as plaintiff could earn in a normal lifetime if he had not been partially crippled). In all of the preceding cases, it is doubtful that the plaintiffs should have been sustained in their suits under FELA. Moreover, the damages awarded are illogical and incongruous.

Maximum recovery under the North Carolina Workmen's Compensation Act for the four cases above would have been: (1) $6,000 for loss of leg, (2) $8,000 compensation plus $200 burial expenses for death, (3) $3,600 for loss of eye, and (4) approximately $5,000 for partial loss of use of a hand and foot in the *Ridgeway* case. See N. C. GEN. STAT. §§ 97-29 through 31 (1943, recompiled 1950, Supp. 1951).

[37] FELA contemplates compensation only for injuries caused by the violation of some duty which employer, by statute, owes employee. See note 24 *supra.* Theoretically, the Act does not cover purely accidental injuries as would a workmen's compensation act. See, *e. g.,* N. C. GEN. STAT. § 97-2 (f) (1943, recompiled 1950) (covers "injury by accident arising out of and in the course of employment, and . . . disease . . . where it results unavoidably from accident").

ing time-honored legal concepts of negligence, proximate cause, and jury function to meet special needs in FELA cases.

LUCIUS W. PULLEN

Parties—Joinder—Partially Subrogated Insurance Companies

The ultimate question decided in the principal case[1] was, "Where the owner of an insured automobile brings an action for damages to his automobile and for injury to his person against the supposed tort-feasor whose negligence allegedly caused the damage and injury, may the court, on motion of the supposed tort-feasor, bring into the case as an additional party an insurance company which has indemnified the owner for *only a part*[2] of the damage to the automobile?"[3] It was answered in the affirmative.

The court had never faced that precise question squarely. This is, at least, partially understood when it is remembered that: "It can very rarely happen that making an additional party will be a serious prejudice, and hence such orders are usually discretionary and not reviewable.";[4] unless the exercises of discretion by the court is refused upon the ground that it has no power to grant the motion, in which case the refusal is reviewable.[5] Any understanding thus gained fades, however, with the realization that the party question may properly be included in

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Thus, the workmen's compensation acts cover *all* accidental injuries connnected with the employment, but with an unreasonably low ceiling on the amount recoverable, while FELA has no ceiling but does not cover all work-incurred injuries. See Baker v. Atlantic C. L. R. R., 232 N. C. 523, 61 S. E. 2d 621 (1950), *cert. denied,* 340 U. S. 939 (1951) (railroad not liable for death of repairman where the motor car on which he was riding hit a dog and was wrecked); Moore v. Chesapeake & O. Ry., 184 F. 2d 176 (4th Cir. 1950), *affirmed,* 340 U. S. 573 (1951) (railroad not liable where brakeman fell from engine and was killed in an unexplained accident); *A Survey of Statutory Changes in North Carolina in 1951,* 29 N. C. L. REV. 351, 428 (1951). The suggested federal workmen's compensation act should arise at the equitable point of convergence of the Federal Employer's Act and the state workmen's compensation acts.

[1] Burgess v. Trevathan, 236 N. C. 157, —S. E. 2d— (1952).

[2] Italics author's.

[3] Burgess v. Trevathan, 236 N. C. 157, 159, —S. E. 2d— (1952).

[4] Bernard v. Shemwell, 139 N. C. 446, 447, 52 S. E. 64 (1905). The inference is that the court did not consider premature and fragmentary an appeal from an order making a new party where such order was on its face prejudicial. See also: Raleigh v. Edwards, 234 N. C. 528, 67 S. E. 2d 349 (1951); Service Fire Ins. Co. v. Horton Motor Lines Inc., 225 N. C. 588, 35 S. E. 2d 879 (1945); Home Loan and Ins. Co. v. Locker, 214 N. C. 1, 197 S. E. 555 (1938); Morgan v. Turnage Co., Inc., 213 N. C. 425, 196 S. E. 307 (1938); Choate Rental Co. v. Justice, 212 N. C. 523, 193 S. E. 817 (1937); Wilmington v. Board of Education, 210 N. C. 197, 185 S. E. 767 (1936); Goins v. Sargent, 196 N. C. 478, 146 S. E. 131 (1929); N. C. GEN. STAT. §§ 1-163, 173 (1943).

[5] Gilchrist v. Kitchen, 86 N. C. 20 (1882). See also: Guy v. Baer, 234 N. C. 276, 67 S. E. 2d 47 (1951); Smith v. New York Life Insurance Co., 208 N. C. 99, 179 S. E. 457 (1935); Life Ins. Co of Va. v. Edgerton, 206 N. C. 402, 174 S. E. 96 (1934).

an appeal after judgment.[6] In the principal case the court dismissed the appeal from an order making the insurer a party, but, nevertheless, exercised its discretionary power to express an opinion[7] on the question of substance.[8] In its simplest form that question becomes, is an insurer, in such a case, a proper party? Perhaps by analogy to our court's view of the liability insurance cases, in which "evidence that a defendant carried indemnity insurance is incompetent,"[9] some attorneys and, perhaps, some trial judges have reasoned or assumed a negative answer.

This concept could not have stemmed from statutory construction. On the contrary, our statutes provide in express terms that "all persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs, either jointly, severally, or in the alternative,"[10] and that "all persons may be made defendants, jointly, severally, or in the alternative, who have, or claim, an interest in the controversy adverse to the plaintiff, or who are necessary parties to a complete determination or settlement of the question involved."[11]

Our statute which specifies that "every action must be prosecuted in the name of the real party in interest"[12] is, by its language, pertinent only in that it requires the presence of an insurer where subrogation is complete[13] or where the insured has relinquished all his beneficial interest.[14] It does not, on its face, preclude joinder of an insurer as a proper party.

Nor do the cases support this apparent misconception of the law.

In *Powell v. Water Co.*[15] the following principles were said to be established: (1) The right of action to recover damages from the tort-feasor is in the insured, and this action is indivisible. (2) Upon payment of the insurance the insurer is subrogated[16] to the rights of the insured as against the tort-feasor to the extent of such payment. (3) Full payment of the loss by the insurer results in an equitable assignment of the

[6] Raleigh v. Edwards, 234 N. C. 529, 67 S. E. 2d 349 (1951); Service Fire Ins. Co. v. Horton Motor Lines, Inc., 225 N. C. 588, 35 S. E. 2d 879 (1945); Wilmington v. Board of Education, 210 N. C. 197, 185 S. E. 767 (1936); Bernard v. Shemwell, 139 N. C. 446, 52 S. E. 2d 64 (1905).

[7] Cement Co. v. Phillips, 182 N. C. 437, 109 S. E. 257 (1921); Milling Co. v. Finlay, 110 N. C. 412, 15 S. E. 4 (1892).

[8] See text at note 3.

[9] Bell v. Panel Co., 210 N. C. 813, 814, 188 S. E. 621 (1936). For an interesting discussion of the underlying rational of this view see, Baer, *The Relative Roles of Legal Rules and Non-Legal Factors in Accident Litigation*, 31 N. C. L. REV. 46, 55 (1952).

[10] N. C. GEN. STAT. § 1-68 (1943).

[11] N. C. GEN. STAT. § 1-69 (1943).

[12] N. C. GEN. STAT. § 1-57 (1943).

[13] Cunningham v. Seaboard R. R., 139 N. C. 437, 51 S. E. 1029 (1905).

[14] Powell v. Water Co., 171 N. C. 290, 88 S. E. 426 (1916); Underwood v. Dooley, 197 N. C. 100, 147 S. E. 646 (1929).

[15] 171 N. C. 290, 88 S. E. 426 (1916).

[16] *Id.* at 296, 88 S. E. at 429, for a discussion of the rationale underlying subrogation in regard to insurance contracts. See also Lumberman's Ins. Co. v. Southern Ry., 179 N. C. 255, 102 S. E. 417 (1920).

whole claim, which may thereafter be prosecuted in the name of the insurer. (4) Partial payment of the loss by the insurer results in a partial assignment only, and as the action is indivisible, it must be brought in the name of the insured. (5) A release by the insured does not extinguish the right of subrogation.

From these principles the court concluded that where the insured settles with the tort-feasor for that portion of the loss not paid him by the insurer, the cause of action would be in the insurer, for the reason that the insured has parted with all his beneficial interest in the right of action. Thus, the insurer became the real party in interest, a necessary party to the action.

In *Underwood v. Dooley*,[17] the plaintiff sued for personal injuries substained in an automobile accident. The defendant moved for dismissal on the grounds (1) that there was, at the date of the commencement of this suit, pending against him in another court of competent jurisdiction a suit for damages occasioned by the same accident and to an automobile belonging to the plaintiff, said suit having been brought by an insurer who had paid the plaintiff in full for damages to his automobile, and (2) that, since the commencement of this action, a final judgment had been rendered in said action against the defendant, which he has paid and fully satisfied. The motion was denied, and on appeal, the court, recognizing the principle that two actions on the same cause and between the same parties will not lie,[18] affirmed the order denying the motion. The court necessarily adopted the rule that an indivisible cause of action may be divided by acts of the parties.[19]

In *Service Fire Ins. Co. v. Horton Motor Lines, Inc.*,[20] an insurer which had paid the insured in part only for damages to his automobile,[21] without alleging affirmatively that it had fully paid the insured's claim, brought suit to recover from the wrong-doer. The defendant demurred on the ground that the action was indivisible and could not be brought by the

[17] 197 N. C. 100, 147 S. E. (1929).

[18] "Where an action is instituted, and it appears to the court by plea, answer or demurrer that there is another action pending between the same parties, and substantially on the same subject matter, and that all material questions and rights can be determined therein, such action will be dismissed." Alexander v. Norwood, 118 N. C. 381, 382, 24 S. E. 119 (1896). See also: Cameron v. Cameron, 235 N. C. 82, 68 S. E. 2d 796 (1951); Dwiggins v. Bus Co., 230 N. C. 234, 52 S. E. 2d 892 (1949).

[19] In cases not involving insurance, personal injuries and property damages sustained by the same individual in the same accident give rise to a single and indivisible cause of action. Underwood v. Dooley, 197 N. C. 100, 147 S. E. 646 (1929); Barcliff v. Southern R. R., 176 N. C. 39, 96 S. E. 644 (1918); Eller v. Norfolk C. and N. W. R. R., 140 N. C. 140, 52 S. E. 305 (1905).

[20] 225 N. C. 588, 35 S. E. 2d 879 (1945).

[21] The complaint alleged that before and after the collision the automobile was worth $600 and $136.50 respectively. It follows that the damage was $463.50. The insurer paid the owner $413.50, thereby indicating a "$50 deductable" situation; however, the court did not recognize this as conclusive that the cause had been split and, therefore, not maintainable.

insurer, whereupon, and before a ruling on the demurrer, the insurer moved that the insured be made a party. On appeal from an order allowing the motion, the court affirmed. Here, by implication at least, the court sanctions the joinder of insurer and insured in a *partial subrogation* situation.[22]

From these cases[23] and the pertinent statutes[24] it becomes apparent that there has been no valid basis for doubting a trial judge's discretionary power to grant a motion to join insurer an insured in cases of the nature presented by the principal case. It should be noted that such joinder is still within the discretion of the trial judge. The insurer is a proper party, but not a necessary party. However, in the principal case the court seems to recommend, as well as authorize, such joinders.[25]

While apparently holding that a partially subrogated insurer may be joined as either plaintiff or defendant at the instance of either the wrongdoer or the insured, the court observed that the most effective procedure in such a situation would be to move that the insurer "be made an additional party defendant and required to answer, setting up its claim arising through subrogation."[26]

Also, the court said that "the insured may be properly joined as a party defendant under G. S. 1-69 even in an action where the insurance company sues the tort-feasor to enforce subrogation on the theory that the insured has been indemnified by it for the full amount of the loss."[27] Quoting from a Wisconsin case,[28] the court said this was true because "it frequently is not ascertainable until the verdict establishes the amount of the damages whether insurer is sole or partial owner of the cause of action, since, if the amount of damages set by the jury is less than the insurance paid, insurer is the sole owner, whereas, if the amount is greater, insurer is only a partial owner."[29] Such joinder will, no doubt, expedite the trial and final settlement; however, if the insured has, in fact, accepted settlement in full, the reason adopted by the court is, in the opinion of the author, unsound. It is inconsistent with the theory upon which such a suit is brought, that is, that the insurer has paid the in-

[22] For an identical result see Lumberman's Ins. Co. v. Southern Ry., 179 N. C. 255, 102 S. E. 417 (1920). For comment approving such joinder see McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE IN CIVIL CASES § 218 (1929).

[23] *Supra* at notes 15, 17 and 20.

[24] *Supra* at notes 10, 11 and 12.

[25] The court cited Equitable Life Assurance Society v. Basnight, 234 N. C. 347, 67 S. E. 2d 390 (1951) as authority for the proposition that the insurer had a direct and appreciable interest in the subject matter of the action, and by reason thereof was a proper party to the action. In that case the court sttrongly recommended the joinder of parties who were not necessary parties but who had an ascertainable interest in the subject matter of the controversy.

[26] Burgess v. Trevathan, 236 N. C. 157, 162, —S. E. 2d— (1952).

[27] *Id.*

[28] Patitucci v. Gerhardt, 206 Wis. 358, 240 N. W. 385 (1932).

[29] *Id.* at 363, 240 N. W. at 386.

sured *in full* for the amount of the loss. Furthermore, the probability is remote that the insurer, in such a case, would pray for damages in excess of the amount paid the insured. To do so would, it seems, admit partial subrogation only. And, it is even harder to conceive a jury verdict in excess of the amount the insured had accepted as full payment of his claim against the wrong-doer. The verdict is more likely to be less.[30]

The question remains whether a partially subrogated insurer can avoid joinder in a suit by the insured simply by failing, under agreement with the insured or otherwise, to indemnify the insured to any degree. The general language of the cases indicates that it can do so. *Actual payment*[31] is regarded by our court as the necessary basis for subrogation. It would seem, then, that a mere obligation to pay would not give rise to a claim in the insurer, and that, consequently, joinder of an insurer who had made no payment to the insured is at odds with the principles of subrogation.

It is submitted, however, that, other things being equal, there is little practical difference in a paid and non-paid situation. In either case the insurer has a very distinct interest in the subject matter of the suit.

It seems entirely possible that if an insurer makes partial settlement after the insured has brought the action, but before trial, the insurer could at that time properly be made a party.

D. STEPHEN JONES

Real Property—Powers of Attorney—Wife's Conveyance of Her Realty By Virtue of Husband's Power of Attorney

W, a married woman, owns real estate in North Carolina. Her husband, *H*, is in the armed forces. Before departing for a tour of duty in Korea *H* executes, in proper form, a power of attorney[1] authorizing *W* to assent in his behalf to conveyances of her separate realty. Three months later, while *H* is overseas, *W* conveys a house and lot to *X*, executing the deed both for herself and on behalf of *H* by virtue of his power of attorney. Shortly thereafter *W* dies and *H* is killed in action.

[30] Baer, *The Relative Roles of Legal Rules And Non-Legal Factors In Accident Litigation*, 31 N. C. L. REV. 46, 55 (1952).

[31] An advancement by the insurer to the insured "pending collection from the carrier or other bailee" was said to be actual payment. Cunningham v. Seaboard R. R., 139 N. C. 427, 433, 51 S. E. 1029, 1030 (1905).

[1] It should be noted at the outset that the power under discussion here is not the general type whereby *H* authorizes *W* to convey *his* land, but is a special power granted to *W* by *H* to join on his behalf in conveyances of *her separate* realty. See Toulmin v. Heidelberg, 32 Miss. 268 (1856) where it was held that a power to execute conveyances of *H's* land was not the same as a power to join with the wife in a conveyance of her land. For a general discussion with respect to scope of powers of attorney, see 2 C. J. S. Agency §§ 98 and 99 (1936).

W's only heir at law brings an action against *X* to recover the property. Who will succeed?

While at common law the wife was permitted to retain the fee to her lands, she could not convey the same.[2] At an early date, however, a married woman in the Colonies was allowed by local custom or statute to convey her real estate by deed in which the husband joined and which she acknowledge by privy examination.[3] That joinder requirement was incorporated in the North Carolina Constitution by a provision[4] which states, in effect, that a married woman may convey her real[5] and personal[6] property as though unmarried *if she gets the written assent of her husband.*[7] This constitutional provision has been implemented by a statute[8] declaring that the wife's conveyance *must be executed by herself and her husband.* Since no case has yet been decided by the North Carolina Supreme Court construing the constitutional provision and statutes as they concern the validity of a married woman's conveyance of her separate real estate, executed by her both on her own behalf and on behalf of her husband by virtue of his power of attorney, it is appropriate to examine the manner in which this problem has been dealt with in other jurisdictions.[9]

[2] 1 POWELL ON REAL PROPERTY 430 (1949); 3 VERNIER, AMERICAN FAMILY LAWS 293 (1935).

[3] 3 VERNIER, AMERICAN FAMILY LAWS 293 (1935).

[4] N. C. CONST. Art. X, § 6. "The real and personal property of any female in this state acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, should be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations, or engagements of her husband, and may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried."

[5] This provision applies to equitable as well as legal estates in land owned by the wife. Clayton v. Rose, 87 N. C. 106 (1882). It applies also to the release by the wife of her dower. Slocumb v. Ray, 123 N. C. 571, 31 S. E. 829 (1898).

[6] In Vann v. Edwards, 135 N. C. 661, 47 S. E. 784 (1904), *overruling* Walton v. Bristol, 125 N. C. 419, 34 S. E. 544 (1899), it was held that the wife could dispose of her separate property without the consent of her husband, unless the law requires its disposition to be evidenced by a conveyance or writing. Later, in Rea v. Rea, 156 N. C. 529, 72 S. E. 873 (1911), the constitutional provision was virtually nullified as to personalty, it being held that the wife has an unrestricted power to convey her personal property.

[7] Exceptions to the general rule exist in the following instances: A woman living separate from her husband under a divorce or deed of separation executed by husband and wife, or whose husband has been declared an idiot or lunatic, may convey without her husband's consent. N. C. GEN. STAT. § 52-5 (1943, recompiled 1950). A woman whose husband abandons her may convey without her husband's consent. N. C. GEN. STAT. § 52-6 (1943, recompiled 1950).

[8] "Every conveyance, power of attorney, or other instrument affecting the estate, right or title of any married woman in lands, tenements or hereditaments must be executed by such married woman and her husband . . ." N. C. GEN. STAT. § 39-7 (1943, recompiled 1950).

[9] At the present time only six states—Alabama, Florida, Indiana, Pennsylvania, North Carolina, and Texas—require the husband's joinder in order that the wife may make an effective conveyance of her interest in realty. In three of these—Florida, Indiana, and Pennsylvania—a statute provides that the husband may give

Such a conveyance was held invalid in a California case[10] decided under a joinder statute[11] similar to that in North Carolina. The California court held that the purpose of the joinder requirement was to insure the wife the protection of her husband against wily third parties who might seek to profit by taking advantage of her inexperience in real estate transactions. To make this protection effectual the husband should exercise his judgment in respect to each transaction of the wife with respect to her real estate. Exercise of this discretion through the medium of a power of attorney granted the wife in advance would, in effect, operate as an abdication by the husband of that discretionary function. The husband should exercise that discretion by signing each deed himself.

Conversely, in a Texas case[12] decided under a statute[13] requiring that there be a joint conveyance from the husband and wife for the wife's separate realty, a conveyance of her property executed by the wife on behalf of her husband by virtue of his power of attorney was held valid. This court found nothing in its previous decisions declaring it essential for the husband to counsel the wife in respect to her real estate transfers. Furthermore, the statute did not specifically indicate in what way the husband should effect his joinder, whether in person or by an attorney in fact. Since in Texas the husband and wife could convey the wife's separate property through an agent by their joint power of attorney, the court thought that the husband could, by his separate power of attorney, authorize another to execute for him, jointly with his wife, a conveyance of her property.[14] If this power could be delegated to a stranger, why not to the wife? The court saw no harm in leaving the manner in which the joint conveyance was to be effected to the discretion of the parties.

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the wife his power of attorney authorizing her to execute for him, and in his name, jointly with herself, a deed of conveyance of her separate property. FLA. STAT. ANN. 708.09 (1944); IND. STAT. ANN. 56-10 (Burns supp. 1951); PA. STAT. ANN. tit. 48 § 32 (1931). In a fourth, Texas, the conveyance in question has been upheld by judicial decision. Rogers v. Roberts, 13 Tex. Civ. App. 140, 35 S. W. 76 (1896). In Alabama and North Carolina there appears to be neither statute nor reported decision with respect to this particular matter.

[10] Meagher v. Thompson, 49 Calif. 189 (1874).

[11] ". . . no alienation, sale or conveyance of the real property of the wife . . . shall be valid for any purpose unless the same be made by an instrument in writing, executed by the husband and wife . . ." CAL. STAT. p. 518 (1862). It should be noted, however, that the joinder requirement was abolished in California in 1872. CAL. CIV. CODE § 162 (1949).

[12] Rogers v. Roberts, 13 Tex. Civ. App. 190, 35 S. W. 76 (1896).

[13] "The husband and wife shall join in the conveyance of real estate, the separate property of the wife . . ." TEX. REV. CIV. STAT. ANN. art. 1299 (Supp. 1945).

[14] *See* Toulmin v. Heidelberg, 32 Miss. 268 (1856), decided when Mississippi had a joinder requirement, where it was stated that the husband's power authorizing his attorney to join with the wife in a conveyance of her realty would suffice to permit the wife and the husband's attorney to convey the wife's property.

If called upon to resolve the problem, it is not unlikely that the North Carolina court would look to other jurisdictions. Thus it is significant that each of the solutions indicated above is based to some extent on factors which also exist in North Carolina. For instance, as did the California court, the North Carolina court has emphasized that the purpose of the husband's joinder is not to convey an interest in the property, because he has none, but to protect the wife.[15] In order that the wife obtain this protection the North Carolina court, like the court in California, has held it necessary that the husband sign the same deed as the wife.[16] Viewed solely in the light of these considerations, in North Carolina a deed of the wife's separate property wherein she signs both for herself and on behalf of her husband would be invalid.

On the other hand, as in Texas, the North Carolina statute[17] does not indicate in what way the husband should effect his joinder, whether in person or by an attorney in fact. The North Carolina Constitution[18] requires only the written assent of the husband, and does not state whether this written assent must appear on the deed itself. Furthermore, since in North Carolina, as in Texas, the husband and wife can convey the wife's separate property through an agent by their joint power of attorney,[19] there is little doubt that the husband can, by his separate power of attorney, authorize another person, such as his real estate broker, to execute for him, jointly with his wife, a conveyance of

[15] Joiner v. Firemens Insurance Company, 6 F. Supp. 103 (M. D. N. C. 1932); Buford v. Mochy, 224 N. C. 235, 29 S. E. 2d 729 (1944); Stallings v. Walker, 176 N. C. 321, 97 S. E. 25 (1918); Ferguson v. Kinsland, 93 N. C. 337 (1885). *But see* Smith v. Bruton, 137 N. C. 79, 87, 49 S. E. 64, 67 (1904) (Dissenting opinion).

The assertion that the purpose of the husband's joinder is not to convey an interest in property does not apply to property owned by the husband and wife by the entireties, since in such a case the husband does have an interest to convey. Technically speaking, since *H* and *W* both own an interest, in order that *W* convey property owned by the entireties she needs both the power to convey *H's* interest in land and the power to join on his behalf in conveyances of her interest. Although it is true that the power to convey *H's* land does not include the power to join in conveyances of *W's* land (note 1, *supra*), it seems logical that in the case of an estate owned by the entireties, since both *H* and *W* own the same interest, *H's* grant of the power to sell that interest would necessarily include his assent to the alienation by *W*.

[16] Council v. Pridgen, 153 N. C. 444, 69 S. E. 404 (1910); Slocumb v. Ray, 123 N. C. 571, 31 S. E. 829 (1898); Green v. Bennett, 120 N. C. 394, 27 S. E. 142 (1897); Ferguson v. Kinsland, 93 N. C. 337 (1885).

In Joiner v. Firemens Insurance Company, 6 F. Supp. 103 (M. D. N. C. 1932), *overruling* Gray v. Mathis, 52 N. C. 503 (1860), it was held that it is not necessary that the husband's name be in the body of the deed.

In Bates v. Sultan, 117 N. C. 95, 23 S. E. 261 (1895) and Brinkley v. Ballance, 126 N. C. 393, 35 S. E. 631 (1900) judgments against a married woman were declared charges against her separate estate, which included land, although the husband had assented in a separate writing to the wife's charging her separate estate as security for payment of debts, non-payment of which gave rise to the judgments. The value of these cases as precedent is limited, since in neither was an actual conveyance involved.

[17] See note 8, *supra*.

[18] See note 4, *supra*.

[19] N. C. GEN. STAT. § 39-12 (1943, recompiled 1950).

her property. Why should he not be able to grant this authority to his wife?

It is submitted that North Carolina should follow the Texas rather than the California decision, which is seventy-five years old and no longer law in that jurisdiction.[20] Although the reasoning advanced as a basis for that decision, as well as for numerous North Carolina decisions requiring the husband to manifest his assent by signing each deed, has not been refuted by the North Carolina court, it could hardly be argued that it has any force today. If it is recognized that married women as a group are no longer ignorant and inexperienced, and that they are as capable as their single sisters of profitably disposing of their real estate, what justification is there for requiring them to obtain their husbands' advice with respect to their transfer of such property?

There are other considerations, not mentioned in the Texas decision, which indicate that the husband should be permitted to accomplish his joinder through a power of attorney authorizing the wife to assent to conveyances of her property on his behalf, some of which are:

(1) As hereinabove indicated,[21] such a holding would be in accord with the law in at least 46 other states.

(2) In North Carolina a married woman is free to devise[22] her property as she sees fit without consulting anyone. Likewise, she has complete freedom of disposition in respect to her personal property,[23] the value of which frequently is greater than that of her real estate. This being so, there should be no objection to her conveying her separate real estate *with the consent* of her husband, voluntarily granted in his power of attorney.

(3) Although not mentioned in the decisions[24] or statutes, it may be that one reason for retaining the joinder requirement in North Carolina is to protect the husband's curtesy consummate, or life estate in the lands of the wife in the event of her death, issue of the marriage having been born alive.[25] If this be so, the husband should be permitted to release this right if he wishes by authorizing his wife to assent to conveyances of her realty on his behalf.

(4) A policy in North Carolina is to make land freely alienable.[26]

[20] See note 11, *supra*.

[21] See note 9, *supra*.

[22] N. C. GEN. STAT. § 31-2 (1943, recompiled 1950).

[23] See note 6, *supra*.

[24] *But see* Smith v. Bruton, 137 N. C. 137 N. C. 79, 87, 49 S. E. 64, 67 (1904) (Dissenting opinion) where Chief Justice Clark declared that the constitutional provision requiring the husband's assent was intended to protect the husband's curtesy and was merely a correlative of the wife's joining in the husband's conveyances to bar her dower.

[25] For a detailed discussion of curtesy in North Carolina see McCall and Langston, *A New Intestate Succession Statute for North Carolina*. 11 N. C. L. REV. 266, 273-294 (1933).

[26] Combs v. Paul, 191 N. C. 789, 133 S. E. 93 (1926); Pritchard v. Bailey, 113 N. C. 521, 18 S. E. 668 (1893).

Since so many married men are out of the continental United States, due primarily to service in the armed forces, a procedure is needed whereby a serviceman's wife owning an interest in real estate may convey the same without it being necessary that the husband assent in person.[27] The method under discussion fills that need.

A positive decision on this matter is needed in North Carolina, both in order to cure the possible defect in titles already transferred in this manner and so that attorneys may confidently recommend this procedure to clients. Since it may take some time for a test case to reach the Supreme Court, it remains for the legislature to fill the gap by enacting legislation authorizing the wife to join on behalf of her husband by his power of attorney, as was done in Florida, Indiana, and Pennsylvania.[28] This would enable a married woman, whose husband is unavailable, to exercise the freedom of transfer which she needs should circumstances arise which make it necessary for her to dispose of her separate interest in real estate.[29]

TENCH C. COXE, III

Torts—Emotional Distress—Negligent Infliction of Fear For Safety of Another

The evolution of recovery for emotional disturbance has been a slow and often illogical process. In order to observe briefly this development, the following categories of cases involving emotional disturbance should be considered: (1) assault on P; (2) intentional infliction of mental disturbance on P; (3) negligence toward P; (4) intentional tort toward another which is treated as negligence toward P; (5) negligence toward another which also is negligence toward P. Assault, as the first stage in this development, recognized a freedom from fear of immediate bodily harm.[1] Today there is a growing recognition of the intentional infliction of emotional distress as a tort in itself; and unlike assault, there is no

[27] It should be noted that N. C. GEN. STAT. § 39-8 (1943, recompiled 1950) permits the husband to join in the deed at a different time and place from the wife, so she may mail him the deed, requesting that he sign and mail it back. This, however, is at best a cumbersome and time-consuming procedure.

[28] See note 9, *supra.*

[29] The practice of permitting the husband to manifest his written assent to his wife's conveyances through his power of attorney provides a method which gives the wife complete freedom of transfer, *if she secures her husband's power of attorney.* A more direct method, and one which would give a married woman *absolute* freedom of transfer, would be provided by eliminating the joinder requirement altogether. In an era of substantially equal rights as between men and women in almost every respect, such a requirement is admittedly outmoded. It is to be hoped that the legislature will soon take the action necessary in order that the constitutional provision which makes the husband's written assent mandatory be submitted to the voters for possible amendment.

[1] I. de S. et ux. v. W. de S., Y. B. Lib. Ass., f. 99, pl. 60 (1348). This "hatchet" case is considered the historical origin of assault.

limitation to fear of immediate bodily harm.[2] In these two categories defendant's conduct is intentional, and the absence of physical consequences does not preclude the recovery of damages. However, generally, in the field of negligent infliction of mental anguish, in the absence of some impact, there must be resulting physical consequences to warrant recovery of damages.[3] A majority of jurisdictions allow P to recover for negligence which causes him mental anguish resulting in illness.[4] D's intentional tort toward another has been treated as negligence toward P where illness followed the shock.[5] As to the fifth category, where D's negligence imperils another for whose safety P fears and suffers mental anguish resulting in physical consequences, American courts are hesitant to award damages.

This hesitancy is illustrated in *Resavage v. Davies*,[6] a recent Maryland decision which affirmed a demurrer to plaintiff's complaint. It was alleged that plaintiff was on her front porch when she saw defendant motorist negligently kill her two children down on the street corner. She suffered mental anguish resulting in physical consequences. The

[2] RESTATEMENT, TORTS § 46 (Supp. 1948). The following cases appear to hold that mental anguish is sufficient in itself without a showing of physical illness: Barnett v. Collection Service Co., 214 Iowa 1303, 242 N. W. 25 (1932); Quina v. Roberts, 16 So. 2d 558 (La. App. 1944); La Salle Extension University v. Fagarty, 126 Neb. 457, 253 N. W. 424 (1934).

Other cases seem to regard physical illness as essential to the cause of action. See Clark v. Associated Retail Credit Men, 70 App. D. C. 183, 105 F. 2d 62 (1939); Kirby v. Jules Chain Stores Corp., 210 N. C. 808, 188 S. E. 825 (1936); Carrigan v. Henderson, 192 Okla. 254, 135 P. 2d 330 (1943).

In other cases illness resulted. See State Rubbish Collectors Assn. v. Siliznoff, 240 P. 2d 282 (Cal. 1952); Bowden v. Spiegel, Inc., 96 Cal. App. 2d 313, 216 P. 2d 571 (1950); Emden v. Vitz, 88 Cal. App. 2d 313, 198 P. 2d 696 (1948); Nickerson v. Hodges, 146 La. 735, 84 So. 37 (1920); Wilkinson v. Downton, 2 Q. B. 57 (1897).

[3] Rasmussen v. Benson, 135 Neb. 232, 280 N. W. 890 (1938); Chiuchiluo v. New England Wholesale Tailors, 84 N. H. 329, 150 Atl. 540 (1930); Lambert v. Brewster, 97 W. Va. 124, 125 S. E. 244 (1924). Exceptions to the general rule are: (1) *Telegraph Cases*, that is, the negligent transmission of death messages which indicate on their face that mental anguish may result. See Telegraph Co. v. Redding, 100 Fla. 495, 129 So. 743 (1930); Mentzer v. Telegraph Co., 93 Iowa 752, 62 N. W. 1 (1895); Russ v. Telegraph Co., 222 N. C. 504, 23 S. E. 2d 681 (1942). (2) *Negligent Mishandling of Corpses*. Recovery in these cases is based on a quasi-property right in the body of a dead person. See Klumbach v. Silver Mount Cemetery Assn., 242 App. Div. 843, 275 N. Y. Supp. 180 (1934); Morrow v. Cline, 211 N. C. 254, 190 S. E. 207 (1937). See also, for discussion of quasi-property right, Note, 30 N. C. L. REV. 299 (1952).

[4] Netusil v. Novak, 120 Neb. 751, 235 N. W. 335 (1931); Chiuchiolo v. New England Wholesale Tailors, 84 N. H. 329, 150 Atl. 540 (1930); Kimberly v. Howland, 143 N. C. 398, 55 S. E. 778 (1906); Watkins v. Kaolin Mfg. Co., 131 N. C. 536, 42 S. E. 983 (1902); RESTATEMENT, TORTS §§ 313, 436 (1934).

[5] Hill v. Kimball, 76 Tex. 210, 13 S. W. 59 (1890), Hallen, *Hill v. Kimball—A Milepost in the Law*, 12 TEX. L. REV. 1 (1933); Martin v. Spencer, 221 N. C. 28, 18 S. E. 2d 703 (1942); Duncan v. Donnell, 12 S. W. 2d 811 (Tex. Civ. App. 1929); Lambert v. Brewster, 97 W. Va. 124, 125 S. E. 244 (1924). See also Jeppsen v. Jensen, 47 Utah 536, 155 Pac. 429 (1916), which presents the theory of "transferred intent" rather than negligence.

[6] 86 A. 2d 879 (Md. 1952).

court declared there was no duty to plaintiff and consequently no negligence since she herself was in no immediate peril.

Those courts allowing recovery for the physical consequences of "fear for the safety of another" negligently imperiled, do so on the theory of negligence toward the plaintiff. Another Maryland case[7] allowed damages for a father's fear for his children and fear for himself. However, the fact that he himself was imperiled was the basis for the duty to him. Therefore, damages may be awarded against a negligent defendant for "fear for the safety of another" when there is "fear for self" at the same time.[8] "There is neither logic nor reason to hold . . . that a distinction is to be taken so that, if a party suffer an injury, as loss of health, of mind, or of life, through fear of safety for self, a recovery may be had for the negligent act of another; but may not recover under similar circumstances, if the fear be of safety for another.[9]

In the above cases "fear for self" might be regarded as a peg for recovery for "fear for the safety of another", that is, a basis for establishing negligence toward the plaintiff.[10] "It is predicted that if we require the plaintiff to be in danger of . . . fear for his own safety, many courts will be equally quick to find these elements."[11] It seems that this element of constructive peril for self was found in *Webb v. Lewald Coal Co.*,[12] where plaintiff was on the second floor of a building when defendant's vehicle ran into the ground floor underneath her. She suffered mental anguish and testified that she "felt sure he [the driver] would be killed." The court inferred a "fear for oneself" and allowed recovery rather than order a new trial so that upon cross examination, the jury might determine whether she actually feared for herself.

Hambrook v. Stokes Bros.[13] is the leading case for the proposition that one might recover purely on the grounds of "fear for the safety of another". A mother on the sidewalk saw a driverless truck running away due to defendant's negligence. Realizing it had come from the direction her children were traveling, she turned back and ran uphill to the scene of the accident. From there she went to the hospital, and the shock of seeing her child in a critical condition caused her subsequent

[7] Bowman v. Williams, 164 Md. 397, 165 Atl. 182 (1933). (". . . the nervous shock or fright sustained by the plaintiff was based on reasonable grounds for apprehension of an injury to the plaintiff and his children.").

[8] *Id., accord,* Webb v. Lewald Coal Co., 214 Cal. 182, 4 P. 2d 532 (1931); Lindley v. Knowlton, 179 Cal. 298, 176 Pac. 440 (1918).

[9] Bowman v. Williams, 164 Md. 397, 401, 165 Atl. 182, 183 (1933).

[10] An analogy may be drawn between this peg and the outmoded and forsaken peg of impact, which in the past served as a basis for allowing recovery for "fear for self".

[11] Hallen, *Damages For Physical Injuries Resulting From Fright or Shock,* 19 VA. L. REV. 253, 271 (1933), quoted in, Rasmussen v. Benson, 135 Neb. 232, 240, 280 N. W. 890, 893 (1938).

[12] 214 Cal. 182, 4 P. 2d 532 (1931).

[13] 1 K. B. 141 (1925).

miscarriage and death. The King's Bench Division ordered a new trial on the grounds that it was not necessary for the jury to determine that the mother's shock was produced by fear for herself. Thereby a cause of action was established against a negligent defendant for "fear for another's safety". Although it may be argued that the plaintiff in this case was in possible danger to herself, this was not the opinion of the dissent nor was there any mention of "fear for one's own safety" except to say that it was unnecessary. Also, in other cases in accord,[14] plaintiff could not possibly have been subjected to the same danger as the one for whom she feared.

The courts which allow recovery for "fear for the safety of another" impose certain limitations. Who may recover—a parent, child, spouse, or total stranger? In all the cases cited with the exception of two,[15] the plaintiff was a parent. The *Restatement of Torts* seemingly would limit recovery to parents and spouses.[16] Recovery beyond immediate relatives would be an unreasonable extension of duty.[17] When may one recover—when he hears about the accident from others or hears or sees it himself? The cases cited limit recovery to seeing the peril or, as *Hambrook v. Stokes Bros.* put it, ". . . that the shock resulted from what the plaintiff's wife either saw or realized by her own unaided senses, and not from something which some one told her. . . ".[18] Such witnessing or seeing must be simultaneous with the accident or peril and not several hours later. As to how serious the peril or accident must be there is no judicial authority.[19] Clearly it should be such that plaintiff as a reasonable person would suffer mental anguish.

North Carolina has yet to decide whether there is a cause of action for "fear for the safety of another" based on defendant's negligent conduct. It is hoped that once confronted with the situation of the principal

[14] Rasmussen v. Benson, 135 Neb. 232, 280 N. W. 890 (1938); Cohn v. Ansonia Realty Co., 162 App. Div. 791, 148 N. Y. Supp. 39 (1914). In these cases since there was no mention of "fear for self" and there was no apparent danger of direct physical harm, there is an inference that the duty to plaintiff was not to subject her to the mental anguish and resulting illness which she suffered. *Compare Hambrook v. Stokes Bros.* with Spearman v. McCrary, 4 Ala. App. 473, 58 So. 927 (1912); Alabama Fuel Co. v. Baladoni, 15 Ala. App. 316, 73 So. 205 (1916), although D's conduct was intentional, it was negligent toward the one for whom P feared.

[15] Webb v. Lewald Coal Co., 214 Cal. 182, 4 P. 2d 532 (1931) (Fear for a stranger. The case was decided on the basis of "fear for self".); Rasmussen v. Benson, 135 Neb. 232, 280 N. W. 890 (1938) (A business man's fear for safety of customers.).

[16] RESTATEMENT, TORTS § 313, Caveat (1934).

[17] Several states, by statute in wrongful death actions, allow recovery to a close relative for the relative's own mental anguish as distinguished from that possibly suffered by the deceased. FLA. STAT. ANN. § 768.03 (1941); LA. REV. STAT. art. 2315 (West 1952) (note 324); S. C. CODE ANN. § 412 (1942); VA. CODE ANN. § 8-636 (1950); W. VA. CODE ANN. § 5475 (1949).

[18] 1 K. B. 141, 152 (1925).

[19] See note 17 *supra.*

case involving a parent seeing the negligent killing of her children, our court will allow recovery for such mental anguish and resulting illness of the parent.

JOHN RANDOLPH INGRAM

Torts—Independent Tort Feasors—Joint and Several Liability

A recent Texas decision[1] has evidenced once again the difficulty which has faced the court over the years in deciding whether the acts of two or more wrongdoers are such as to make them jointly and severally liable for the damages resulting from their combined acts. There *A,* an oil company, and *B,* a salt water disposal company, negligently permitted their respective pipe lines, running adjacent to plaintiff's land, to break on or about the same day. Salt water from *B's* pipes and a salt water-oil mixture from *A's* pipes flowed into a stream, thence emptying into plaintiff's fishing lake, killing the fish and causing other damage. The court held the two companies liable jointly and severally as joint tort feasors although there had been no unity of purpose or design, and each had acted independently in conducting its business.

[1] Landers v. East Texas Salt Water Disposal Co., 248 S. W. 2d 731 (Tex. 1952).

The cases presenting the problem of joint and several liability may be analyzed into two major categories: (1) Where the acts of two or more wrongdoers combine to produce a single harmful result, the act of one being in itself insufficient to produce the injury, and (2) Where the acts of two or more wrongdoers combine to produce a single harmful result, the act of one alone being sufficient to produce the injury.

The general rule applied to factual situations typifying the first category is that causes of action arising from the acts of independent tort feasors each of which inflicts some damage, absent concert of action and common intent, create no joint and several liability but each is responsible only for that portion of the injuries due to his negligence.[2]

[2] Glenn v. Chenowth, 71 Ariz. 271, 226 P. 2d 165 (1952); Miller v. Highland Ditch Co., 87 Cal. 430, 25 Pac. 550 (1891); Symmes v. Pebble Phosphate Co., 66 Fla. 27, 63 So. 1 (1913); Harley v. Merrill Brick Co., 83 Iowa 73, 48 N. W. 1000 (1891); Garret v. Garret, 228 N. C. 530, 46 S. E. 2d 302 (1948); Rice v. McAdams, 149 N. C. 29, 62 S. E. 774 (1908); Sun Co. v. Wyatt, 48 Tex. Civ. App. 349 (1908).

With the exception of Kansas[3] and Oklahoma,[4] this rule has been most frequently applied by all jurisdictions in the pollution, diversion, obstruction, or flooding of a stream by various independent proprietors,[5]

[3] Mosby v. Manhattan Oil Co., 52 F. 2d 364 (8th Cir.), *cert. denied,* 284 U. S. 667 (1931). McDaniel v. Cherryvale, 91 Kan. 40, 136 Pac. 899 (1913).

[4] Tidal Oil Co. v. Pease, 153 Okla. 137, 5 P. 2d 389 (1931) (and cases cited therein).

[5] Veryheyen v. Dewey, 27 Idaho 1, 146 Pac. 1116 (1915) (flooding of property); Watson v. Pyramid Oil Co., 198 Ky. 135, 248 S. W. 227 (1923); Simmons v. Everson, 124 N. Y. 319, 26 N. E. 911 (1891); Boulger v. Northern Pac. Ry., 41 N. D. 316, 171 N. W. 632 (1918); Sun Co. v. Wyatt, 48 Tex. Civ. App. 349

of which the principle case is an example. The fact that it may be difficult to ascertain the damages caused by the wrongful act of each to the aggregate result does not affect the rule, or make anyone liable for the acts of others,[6] the theory being that the uniting and mingling of the separate torts do not make them joint.[7] However, the courts have, in this species of litigation, generally allowed such independent tort feasors to be joined in an equitable action for injunction although not for damages.[8]

Some jurisdictions have made an exception to the general rule when the acts of the defendants, although separate and distinct as to time and place, culminate in producing a public nuisance which injures the person or property of another. Here tort feasors are held jointly and severally liable although they are not considered joint tort feasors.[9] North Carolina has gone to liberal limits in applying this exception through an application of an implied concert of design doctrine whereby such independent tort feasors are held jointly and severally liable if they knew

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(1908); Panther Coal Co. v. Looney, 185 Va. 758, 40 S. E. 2d 298 (1946) (pollution of stream); Farley v. Crystal Coal & Coke Co., 85 W. Va. 595, 102 S. E. 265 (1920), *reversing* Day v. Louisville Coal & Coke Co., 60 W. Va. 27, 53 S. E. 776 (1906) (pollution of stream). See also Gendel, *Torts: Concurrent But Independent Wrongdoers: Joint Liability for Entire Damages*, 19 CAL. L. REV. 630 (1931); Wigmore, *Joint Tort Feasors and Severence of Damages; Making the Innocent Party Suffer Without Redress*, 17 ILL. L. REV. 458 (1923); RESTATEMENT, TORTS § 881 (1938).

[6] Warren v. Parkhurst, 186 N. Y. 45, 78 N. E. 579 (1906). See note 3 *supra*.

[7] On the theory that it is not the injury but the wrongful act which creates liability see Dickens v. Yates, 194 Iowa 910, 188 N. E. 948 (1922); Johnson v. Fairmont, 188 Minn. 451, 247 N. W. 572 (1933).

[8] Miller v. Highland Ditch Co., 87 Cal. 430, 25 Pac. 550 (1891); Hillman v. Newington, 57 Cal. 56 (1880); Johnson v. Fairmont, 188 Minn. 451, 247 N. W. 572 (1933). Warren v. Parkhurst, 186 N. Y. 45, 78 N. E. 579 (1906); Evans v. W. & W. Ry., 96 N. C. 45, 1 S. E. 529 (1886); Pittsburgh v. Pittsburgh & L. E. R. Co., 263 Pa. 294, 106 Atl. 724 (1919); Snavely v. Goldendale, 10 Wash. 2d 453, 117 P. 2d 221 (1941); Farley v. Crystal Coal & Coke Co., 85 W. Va. 595, 102 S. E. 265 (1920).

[9] West Muncie Strawboard Co. v. Slack, 164 Ind. 21, 72 N. E. 879 (1904) (decided on the theory that if one places himself in opposition to the entire community by performing acts which in combination with the independent wrongful acts of others creates a public nuisance, he is in no position to assert he should not be held responsible except for the actual loss his acts have occasioned); Valparaiso v. Moffitt, 12 Ind. App. 250, 39 N. E. 909 (1895); Simmons v. Everson, 124 N. Y. 319, 26 N. E. 911 (1891). *Contra:* Tackaberry Co v. Sioux City Service Co., 154 Iowa 358, 132 N. W. 945 (1911) (holding such a distinction too fine to be made); Mansfield v. Brister, 76 Ohio St. Rep. 270, 81 N. E. 631 (1906); Mitchell Realty Co. v. West Allis, 184 Wisc. 352, 199 N. W. 390 (1924).

However, where the negligence of a municipality and an individual combine to produce a danger to travelers on a public street, highway or sidewalk, there is generally joint and several liability. Hill v. Way, 117 Conn. 359, 168 Atl. 1 (1933); Waller v. Ross, 100 Minn. 7, 110 N. W. 252 (1907); Bowman v. Greensboro, 190 N. C. 611, 130 S. E. 502 (1925); Dillon v. Raleigh, 124 N. C. 184, 32 S. E. 548 (1899); Starcher v. South Penn. Co., 81 W. Va. 587, 95 S. E. 28 (1918). *But see* Brown v. Louisburg and Ponton, 126 N. C. 701, 36 S. E. 166 (1900).

or should have known that their independent acts would create a nuisance.[10]

The courts have also alleviated some of the harshness of the general rule by finding joint and several liability where the independent negligent acts of two or more persons combine to produce a single injury if it is impossible to apportion the amount of damage resulting from the individual acts.[11] Likewise, the courts have generally held tort feasors jointly liable for libel,[12] slander,[13] assault and battery,[14] and alienation of affections,[15] *provided that* conspiracy or unity of purpose is alleged and proved.

In recent years a vast number of cases have arisen which involved injury to third persons or damage to their property due to the concurring negligence of drivers of automobiles—another instance where the negligence of one is not sufficient to produce the entire injury.[16] Here also, the weight of authority has departed from the general rule by hold-

[10] This point was discussed but not applied in Symmes v. Prairie Pebble Phosphate Co., 66 Fla. 27, 63 So. 1 (1913); In Lineberger v. Gastonia, 196 N. C. 445, 146 S. E. 79 (1929), the leading case on this point in North Carolina, each defendant emptied sewage into a stream above plaintiff's land. *See also* Moses v. Morganton, 192 N. C. 102, 133 S. E. 421 (1926).

[11] Covello v. Baumsteiger, 66 Cal. App. Dec. 54, 1 P. 2d 484 (1931). Truitner v. Knight, 83 Cal. App. 655, 257 Pac. 447 (1927) (collision between two automobiles); Merrill v. Los Angeles Gas & Electric Co., 158 Cal. 499, 111 Pac. 534 (1910) (plaintiff was injured as a result of the gas company's negligence in repairing a leak, and another's negligence in lighting a stove).

[12] Howe v. Bradstreet Co., 135 Ga. 564, 69 S. E. 1082 (1911) (no joint liability where the libel of one is republished by another); Sourbien v. Brown, 188 Ind. 554, 123 N. E. 802 (1919) (person who composes and reduces to writing a libelous article and publishes it or if another gets possession of it, either with or without his consent, and publishes it, such publication makes the original composer liable for all damages occasioned by the publication, the two being jointly and severally liable); Montgomery v. Dennison, 363 Pa. 255, 69 A. 2d 520 (1949).

[13] Horn v. Ruess, 72 Ariz. 132, 231 P. 2d 756 (1951); Yocum v. Husted, 185 Iowa 119, 167 N. W. 663 (1918); Duquesne Distributing Co. v. Greenbaum, 135 Ky. 182, 121 S. W. 1026 (1909); Rice v. McAdams, 149 N. C. 29, 62 S. E. 774 (1908); Blake v. Smith, 19 R. I. 476, 34 Atl. 995 (1896); Standsberry v. McKenzie, 192 Tenn. 638, 241 S. W. 2d 600 (1951); Kellar v. Jones, 63 W. Va. 139, 59 S. E. 939 (1907).

[14] Glenn v. Chenowth, 71 Ariz. 271, 226 P. 2d 165 (1952): Dickson v. Yates, 194 Iowa 910, 188 N. W. 948 (1922) (distinguishes between the terms "concurrent" acts and joint" acts, the latter implying the idea of an intent uniting the parties in a common act or purpose). Acts may be concurrent with those of another, but with no unity of intent. Wrabek v. Suchomel, 145 Minn. 468, 177 N. W. 764 (1920); Schafer v. Ostmann, 148 Mo. App. 644, 129 S. W. 63 (1910) (based on the theory that assault and battery is a wilful tort); Garret v. Garret, 228 N. C. 530, 46 S. E. 2d 302 (1948).

[15] Heisler v. Heisler, 151 Iowa 502, 131 N. W. 676 (1911); Barton v. Barton, 119 Mo. App. 507, 94 S. W. 574 (1906). These courts distinguish between intentional and negligent torts.

[16] These cases usually arise from two factual situations—a person is struck and injured as a result of the negligence of one driver and immediately thereafter is injured through the negligence of a second driver before he can be removed to a place of safety; or a passenger is injured in a collision between the car in which he is riding and a second vehicle—both drivers being negligent.

ing joint liability.[17] It is immaterial that the conduct of one driver was seriously wrongful while that of the other was mere negligence if the negligence of each was the proximate, concurring cause of the injury; for the negligence of one will not be allowed to exonerate the negligence of the other.[18]

Unique fact situations have arisen in the second category of cases presenting the problem of joint and several liability, *viz,* where the acts of two or more wrongdoers combine to produce a single injury, the act of one alone being sufficient to produce the entire injury. The general rule, however, appears to be that the tort feasors are jointly and severally liable since apportionment is usually impossible.[19] The theory is that none of the wrongdoers should complain since he would have caused the same damage had the other defendants not been involved.[20]

For example, the general rule has been applied in the few cases litigated involving the spread of fires originating through the separate negligent acts of two or more wrongdoers, the fires in the course of their spread combining to cause injury to the plaintiff's property.[21] Here the parties have been held jointly and severally liable on the theory that if the defendant's negligence is a substantial and material factor in causing injury, then he is liable notwithstanding the fact that the negligence of the other with which his negligence combined would have caused the injury anyway.[22]

[17] Reed v. Mai, 171 Kan. 169, 231 P. 2d 227 (1951); Kapla v. Lehti, 225 Minn. 325, 30 N. W. 2d 685 (1948); Stark v. Turner 154 Neb. 268, 47 N. W. 2d 569 (1951) (passenger injured in a collision); Gelsmine v. Vignale, 11 N. J. Super. 481, 178 A. 2d 602 (1951); Downing v. Dillard, 55 N. Mex. 267, 232 P. 2d 140 (1951) (passenger injured in a collision); Bechtler v. Bracken, 218 N. C. 515, 11 S. E. 2d 721 (1940) (passenger killed in a collision); Myers v. Southern Public Utilities Co., 208 N. C. 293, 180 S. E. 694 (1935) (pedestrian injured when two vehicles collided); West v. Collins Baking Co., 208 N. C. 526, 181 S. E. 551 (1935) (plaintiff's intestate struck and injured as a result of the negligence of the driver of a car, and while attempting to arise was struck and further injured by a truck driven by the co-defendant). *See also* White v. Carolina Realty Co., 182 N. C. 536, 109 S. E. 564 (1921).

[18] See note 17 *supra.*

[19] Oulighan v. Butler, 189 Mass. 287, 75 N. E. 726 (1905) (nitroglycerin soaked into a floor causing an explosion, and at the same time a nearby wagon loaded with gunpowder exploded); Corey v. Havener, 182 Mass. 250, 65 N. E. 69 (1903) (two motorcyclists passed simultaneously on either side of a wagon, the noise frightening plaintiff's horses). See also Gendel, *Torts: Concurrent But Independent Wrongdoers: Joint Liability for Entire Damages,* 19 CAL. L. REV. 630 (1931).

[20] Corey v. Havener, 182 Mass. 250, 65 N. E. 69 (1903).

[21] Anderson v. Minneapolis, 146 Minn. 450, 179 N. W. 45 (1920) (defendant's fire combined with a fire of unknown origin); McClellan v. St. Paul Ry., 58 Minn. 104, 59 N. W. 978 (1894) (defendant's fire combined with that set by another); Seckerson v. Sinclair, 24 N. D. 625, 140 N. W. 239 (1913) (defendant's fire combined with that originating on property of third person); Cook v. Minneapolis, 98 Wis. 624, 74 N. W. 561 (1898) (defendant's fire combined with a fire having no responsible origin).

[22] Anderson v. Minneapolis, 146 Minn. 450, 179 N. W. 45 (1920); McClellan v. St. Paul Ry., 58 Minn. 104, 59 N. W. 978 (1894).

In line with the general rule in this category the courts have generally found joint and several liability, in the absence of showing whose act caused the injury, where two or more persons are guilty of similar acts of misconduct one of which alone causes the injury. This question has arisen most frequently in instances where the wrongdoers were using firearms in the course of a hunting expedition or while otherwise engaged in the negligent use of the weapons.[23] The theory of the holdings is not that they were acting in concert, but that to hold otherwise would be to exonerate both from liability although each is negligent and the injury resulted from such negligence.[24]

An attempt has been made to extend the rule applied in the firearms cases in order to impose joint and several liability where there is but one single injury and one single act of negligence committed by the defendants, and the proof is not clear as to which is guilty of the single negligent act. In the few cases giving rise to this question the courts have held that there can be no joint and several liability but that it must be determined whose was the negligent act.[25]

In conclusion, with regard to the positions which the courts have taken in the more common joint tort feasor situations, it seems that the area in which a more liberal attitude towards holding joint and several liability is most needed is in that class of cases illustrated by the Texas case,[26] where the majority hold "separate liability" and thus impose the almost impossible task upon the injured party of proving the proportionate damage chargable to each defendant's act.[27] Realizing that to place such a burden on the injured party is to leave him remediless, the Texas court has seen fit to break away from the majority in an attempt to substitute greater justice for precedent,[28] and directly overrules the prior

[23] Summers v. Tice, 33 Cal. 2d 80, 199 P. 2d 1 (1948) (plaintiff and two defendants were hunting when the defendants shot at the same time in the plaintiff's direction); Brown v. Thayer, 212 Mass. 392, 99 N. E. 237 (1912) (the defendantts were engaged in racing their automobiles and passed one on each side of a wagon); Benson v. Ross, 143 Mich. 452, 106 N. W. 1120 (1906); Moore v. Foster, 182 Miss. 15, 180 So. 73 (1938) (action against one constable for shooting the plaintiff while he was fleeing where it was admitted that another constable also shot). Oliver v. Miles, 144 Miss. 852, 110 So. 666 (1926) (two hunters fired across the highway hitting a traveler).

[24] See note 23 *supra.*

[25] Louisville Gas & Electric Co. v. Nall, 178 Ky. 33, 198 S. W. 745 (1917) (question as to which defendant's employees left a floor in a dangerous condition); Haley v. Calef, 28 R. I. 332, 67 Atl. 323 (1907) (a bridge connecting two towns, each town responsible for keeping its side in safe condition, was defective and caused plaintiff's injury).

[26] Landers v. East Texas Salt Water Disposal Co., 248 S. W. 2d 731 (Tex. 1952).

[27] See note 5 *supra.*

[28] "Our courts seem to have embraced the philosophy, inherent in this class of decisions, that it is better that the injured party lose all his damages than that any of several wrongdoers should pay more of the damages than he individually and separately caused. If such has been the law, from the standpoint of justice it should not have been; if it is the law now, it will not be hereafter." Landers v. East Texas Salt Water Disposal Co., 248 S. W. 2d 731, 734 (Tex. 1952).

leading Texas case on this point.[29] It is submitted that if the acts result in separate and distinct injuries, then each wrongdoer should be liable only to the extent of the damage caused by his acts. But if the combined results, though absent concert of design, result in a single and indivisible injury, the liability should be entire. The true distinction should be made between injuries which are divisible and those which are indivisible.[30]

R. DAPHENE LEDFORD

Trusts—Constructive Trust—Breach of Oral Agreement Between Persons in Confidential Relationship

In the majority of those American jurisdictions requiring trusts of land to be in writing to be enforceable,[1] mere refusal or failure of a grantee of land upon an oral trust to carry out the terms of the trust is not a sufficient basis for a constructive trust to prevent unjust enrichment.[2]

Where, however, it is found that such a refusal or failure constitutes the breach of a confidential relationship between the grantee and the grantor, these courts have not hesitated to declare the grantee a constructive trustee.[3] In an *A*-to-*B*-for-*A* situation, *B* is said to hold on

[29] Sun Oil Co. v. Robicheaux, 23 S. W. 2d (Tex. 1930).
[30] Jackson, *Joint Torts and Several Liability*, 17 TEX. L. REV. 399, 420 (1939).

[1] About two-thirds of the American states have statutes similar to the seventh section of the early English Statute of Frauds. In at least two others, the trust section is assumed to be a part of the common law. The parol evidence rule or the contracts section has prevented enforcement of oral trusts in some of the remaining jurisdictions.

[2] "However inequitable and morally apprehensible it may be that property conveyed upon an express oral trust should be retained in violation of the agreement, a trust may not, under those circumstances, be ingrafted upon a deed absolute in its terms, because if that were the rule deeds would no longer be valuable as muniments of title." Silvers v. Howard, 106 Kan. 762, 768, 190 Pac. 1, 4 (1920).

The leading case in the *A*-to-*B*-for-*A* situations is Patton v. Beecher, 62 Ala. 579, 593 (1878), in which the court said, "In any and every case, in which the court is called to enforce a trust, there must be a repudiation of it, or an inability from accident to perform it. If the repudiation is a fraud, which justifies interference in opposition to the words and spirit of the statute, the sphere of operation of the statute is practically limited to breaches from accident, and no reason can be assigned for the limitation." For similar view, see Reynolds v. Reynolds, 121 Conn. 153, 183 Atl. 394 (1936); Goff v. Goff, 98 Kan. 201, 158 Pac. 26 (1916); Henderson v. Murray, 108 Minn. 76, 121 N. W. 214 (1908); Brown v. Murray, 94 N. J. Eq. 125, 118 Atl. 534 (Ch. 1922); Kane v. Kane, 134 Ore. 79, 291 Pac. 785 (1930); Broadway Building Co. v. Salafia, 47 R. I. 263, 132 Atl. 527 (1926); Pacheco v. Mello, 139 Wash. 566, 247 Pac. 927 (1927).

The same, of course, is true in the *A*-to-*B*-for-*C* cases. *E.g.*, Bartlett v. Bartlett, 221 Ala. 578, 130 So. 194 (1930); Ampeuro v. Luce, 68 Cal. App. 811, 157 P. 2d 899 (1945); Keller v. Joseph, 329 Ill. 148, 160 N. E. 117 (1928); Westphal v. Heckman, 185 Ind. 88, 113 N. E. 299 (1916).

In some jurisdictions, the rule that equity will raise a constructive trust upon the mere refusal of a grantee to perform an oral trust for the benefit of the grantor or a third person has been adopted by statute. See Uniform Trusts Act, § 16; N. C. GEN. STAT. § 36-39 (1950).

[3] "The reason for the rule is that, when a person assumes a confidential relation-

constructive trust for *A*, the grantor.[4] And in the *A*-to-*B*-for-*C* cases, the courts have decreed a constructive trust in favor of *C*.[5] In so decreeing, the courts are not seeking to carry out the original express intentions of the parties. Rather, they are attempting to prevent the grantee's enrichment through misconduct more sinister than mere breach of contract.

But the courts have, in general, refused to set down any specifications as to just what constitutes a "confidential relationship" for this purpose. This lack of definiteness may well be intentional since it permits a flexibility which equity needs to meet variant situations. As a result, the meaning of the term "confidential relationship" in these cases is very nebulous.

In the conventional confidential relationship where there exists a client-attorney, principal-agent, partner-partner or other fiduciary status between the grantor and the grantee, the grantee is usually more than morally bound to act in the best interest of the grantor and the grantor is justified in imposing special trust and confidence in the grantee's fidelity.[6] Where only a family or other close personal rela-

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ship to another, it would be a flagrant injustice to permit the confidence to be betrayed and equity will not allow the betrayer to invoke the Statute of Frauds to sustain a transaction tainted with such bad faith." Grimes v. Grimes, 184 Md. 59, 63, 40 Atl. 2d 58, 61 (1944). "The absence of a formal writing grew out of the very confidence and trust, and was occasioned by it." Goldsmith v. Goldsmith, 145 N. Y. 313, 318, 39 N. E. 1067, 1068 (1895).

The eighth section of the English Statute of Frauds expressly excludes from the application of the seventh section the cases of trusts of land which "arise or result by the implication or construction of law." 29 Chas. II, c. 3 § VIII (1677).

[4] Bradley Company v. Bradley, 37 Cal. App. 263, 173 Pac. 1011 (1918); Silvers v. Howard, 106 Kan. 762, 190 Pac. 1 (1920) (constructive trust for the heirs of *A*); Hatcher v. Hatcher, 264 Pa. 105, 107 Atl. 660 (1919) (for *A's* residuary legatees).

[5] A decree in favor of the beneficiary would seem to be taking the constructive trust doctrines too far. The majority of the courts, however, "wink" at the Statute of Frauds even here and grant a judgment for the beneficiary on the ground that in breaching the confidential relationship with his grantor, the grantee has committed a tort on the beneficiary. Newton v. Newton, 214 Ky. 278, 283 S. W. 83 (1926) (father to son for his brothers and sisters, they were allowed to benefit from the constructive trust); Wright v. Logan, 179 Okla. 350, 65 P. 2d 1217 (1937) (father and mother to son for brothers and sisters); Reigel v. Wood, 110 Okla. 279, 229 Pac. 556 (1924) (father to son for son, sisters and brothers); Boggs v. Yates, 101 W. Va. 407, 132 S. E. 876 (1926) (father to daughter for mother, trust for mother). *But cf.* Harney v. Harney, 170 Minn. 479, 213 N. W. 38 (1927) (fiduciary relationship can be taken advantage of only by grantor). For the North Carolina situation, see note 12 *infra*.

[6] Stromerson v. Averill, —Cal.—, 133 P. 2d 617 (1943) (principal to agent); Kimball v. Tripp, 136 Cal. 631, 69 Pac. 428 (1902) (considered partners); Wood v. White, 123 Me. 139, 122 Atl. 177 (1923) (partners); O'Day v. Annex Realty Company, 269 Mo. 248, 191 S. W. 41 (1916) (principal to agent); Koeford v. Thompson, 73 Neb. 128, 102 N. W. 208 (1905) (partner to partner); Schwartzle v. Dale, 54 N. W. 2d 361 (N. D. 1952) (principal to agent). In the client to attorney case, a trust has been decreed without an oral trust or promise to reconvey. Davis v. Hendrix, 192 Ala. 215, 68 So. 863 (1915); Bartholomew v. Guthrie, 71 Kan. 705, 81 Pac. 491 (1905). See Noble v. Noble,

tionship exists, no confidential relationship is necessarily involved. While some courts have taken this view and have refused to find that such a closeness alone warrants grantor confidence,[7] most of the decisions have deemed the existence of such a family or close personal relationship to be a determinative factor.[8]

In many cases, a transferee's dominance or superiority of position whether the result of disparity of age, education, business acumen, or physical or mental condition, may be emphasized.[9] In others, the fact

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255 Ill. 629, 99 N. E. 631 (1912) where a sister conveyed to her brother who was a lawyer.

[7] Jones v. Gachot, 217 Ark. 462, 230 S. W. 2d 937 (1950) (aunt to nephew); Smith v. Mason, 122 Cal. 426, 55 Pac. 143 (1898) (father to daughter); Winkelman v. Winkelman, 307 Ill. 249, 138 N. E. 637 (1923) (parent to child); Biggins v. Biggins, 133 Ill. 211, 24 N. E. 516 (1890) (brother to sister); Gregory v. Bowlsky, 115 Iowa 327, 88 N. W. 822 (1902) (parent to child); Bolin v. Krengel, 116 Kan. 459, 227 Pac. 266 (1924) (father to foster son); Silvers v. Howard, 106 Kan. 762, 190 Pac. 1 (1920) (son to mother); Goff v. Goff, 98 Kan. 201, 158 Pac. 26 (1916) (father to son); Sloan v. McCartney, 58 Misc. 75, 108 N. Y. Supp. 840 (Sup. Ct. 1908) (parent to child); Wolfskill v. Wells, 154 Mo. App. 302, 134 S. W. 51 (1911) (father to son); Kiser v. Sullivan, 106 Neb. 454, 184 N. W. 93 (1921) (daughter to father). For additional cases, see 1 SCOTT, TRUSTS §§ 44.2, 45.2 (1st ed. 1939).

[8] Steinberger v. Steinberger, 60 Cal. App. 2d 116, 140 P. 2d 31 (1943) (nephew to uncle); Robertson v. Summeril, 39 Cal. App. 2d 62, 102 P. 2d 347 (1940) (son to mother); Cole v. Manning, 79 Cal. App. 55, 248 Pac. 1065 (1926) (confidential relationship arose out of exchange of promises to marry, meritricious relationship was ignored); Logan v. Logan, 68 Cal. App. 448, 229 Pac. 993 (1924) (brother to brother); Bradley Co. v. Bradley, 165 Cal. 237, 131 Pac. 750 (1913) (parties betrothed); Lauricella v. Lauricella, 161 Cal. 61, 118 Pac. 430 (1911) (husband to wife); Jones v. Jones, 140 Cal. 587, 74 Pac. 143 (1903) (mother to daughter); Brison v. Brison, 75 Cal. 525, 17 Pac. 689 (1888) (husband to wife); Wilder v. Wilder, 138 Ga. 573, 75 S. E. 654 (1912) (mother to son); Hanger v. Hess, 49 Idaho 325, 288 Pac. 160 (1930) (grantor to housekeeper); Shortridge v. Shortridge, 207 Ky. 790, 270 S. W. 47 (1925) (husband to wife); Rice v. Rice, 184 Md. 403, 41 Atl. 2d 371 (1945) (father to son); Levine v. Schafer, 184 Md. 205, 40 A. 2d 324 (1944) (father to son); Lipp v. Lipp, 158 Md. 207, 148 Atl. 531 (1930) (mother to son); Dielfelder v. Winterling, 150 Md. 626, 133 Atl. 825 (1926) (mother to daughter); Wilmer v. Dunn, 133 Md. 354, 105 Atl. 319 (1918) (wife to husband for children); O'Shea v. O'Shea, 143 Neb. 843, 11 N. W. 2d 540 (1943) (brother to sister); Nelson v. Seevers, 143 Neb. 522, 10 N. W. 2d 349 (1943) (father to son-in-law); Bowler v. Curler, 21 Nev. 158, 26 Pac. 226 (1891) (son to father-in-law); Frick v. Cone, 160 Misc. 450, 290 N. Y. Supp. 592 (Sup. Ct. 1936) (husband to wife); Foreman v. Foreman, 251 N. Y. 237, 167 N. E. 428 (1929) (husband to wife); Aherns v. Jones, 169 N. Y. 555, 62 N. E. 666 (1902) (husband to wife); Hauson v. Svarerud, 18 N. D. 556, 120 N. W. 550 (1909); Trimble v. Bales, 169 Okla. 228, 36 P. 2d 861 (1934) (sister-in-law to brother-in-law); Bryant v. Mahon, 130 Okla. 67, 264 Pac. 811 (1927) (friend to friend); Lalich v. Bankovsky, 350 Pa. 441, 39 A. 2d 514 (1944) (brother to sister); Landrum v. Landrum, 62 Tex. Civ. App. 43, 175 N. W. 366 (1919) (father to son). For additional cases, see 1 SCOTT, TRUSTS §§ 44.2, 45.2 (1st ed. 1939).

[9] Mead v. Mead, 41 Cal. App. 280, 182 Pac. 761 (1919) (grantee was skilled in business transactions); Willats v. Bosworth, 33 Cal. App. 710, 166 Pac. 357 (1917) (mother to son who was skilled in business affairs); Cooney v. Glynn, 157 Cal. 583, 108 Pac. 506 (1910) (mother to son, mother on deathbed); Nervis v. Topker, 121 Iowa 433, 96 N. W. 905 (1903); Staab v. Staab, 158 Kan. 69, 145 P. 2d 447 (1944) (aged and uneducated father to his son); Henderson v. Murray, 108 Minn. 76, 121 N. W. 214 (1909) (grantor was 70 years old, grantee was priest of grantor's church); Harrington v. Schiller, 231 N. Y. 278, 132 N. E. 89 (1921) (mother to daughter, who was skilled in business affairs); Reigel v. Wood, 110

that the grantee even in good faith at the time of the conveyance had actually induced it has been a contributory circumstance.[10]

On the other hand, an improper motive on the part of the grantor in making the transfer has prevented the intervention of equity.[11]

North Carolina has no trust section of the Statute of Frauds. While an oral trust for a third party is therefore enforceable,[12] our court has refused to engraft an oral trust for the grantor upon an absolute deed because of the parol evidence rule.[13] However, in *Sorrell* v. *Sorrell*,[14] the constructive trust device was employed in this *A*-to-*B*-for-*A* situation when the court found that a fiduciary relationship had been abused.[15] In that leading case, the grantee was both nephew and busi-

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Okla. 279, 229 Pac. 556 (1924) (grantor was mentally sick); Parrish v. Parrish, 33 Ore. 486, 54 Pac. 352 (1898) (grantor was feeble and old); Rozell v. Vansyckle, 11 Wash. 79, 39 Pac. 270 (1895) (grantor was old, ignorant, illiterate, mentally weak, easily alarmed, easily imposed upon).

[10] Linahan v. Linahan, 131 Conn. 307, 39 A. 2d 895 (1944); *In re* Fisk 81 Conn. 433, 71 Atl. 559 (1908); Miller v. Miller, 266 Ill. 522, 107 N. E. 821 (1915); Larmon v. Knight, 140 Ill. 232, 29 N. E. 1116 (1892); Fischbeck v. Gross, 112 Ill. 208 (1884); Jasinski v. Stanhowski, 145 Md. 58, 125 Atl. 684 (1924); Huffine v. Lincoln, 52 Mont. 585, 160 Pac. 820 (1916); Hartman v. Loverick, 227 Wisc. 6, 277 N. W. 641 (1938).

[11] Drake v. Thompson, 14 F. 2d 933 (8th Cir. 1926), *cert. denied* 273 U. S. 744 (1927) (transfer to defraud creditors); MacRae v. MacRae, 37 Ariz. 307, 294 Pac. 280 (1930) (parties in pari delicto, no constructive trust when transfer admittedly made to defraud creditors); Blaine v. Krysowaty, 135 N. J. Eq. 355, 38 A. 2d 859 (Ch. 1944) (grantor seeking to avoid debt); Robertson v. Sayre, 134 N. Y. 97, 31 N. E. 250 (1892) (title in name of grantee in order to defraud creditors); Kalinowski v. McLeny, 68 Wash. 681, 123 Pac. 1074 (1902) (allowed recovery to creditors of grantee of admittedly fraudulent conveyance). See Bartos v. Bartos, 138 Misc. 117, 244 N. Y. Supp. 713 (Sup. Ct. 1930) (evidence insufficient to prove that conveyance in defraud of creditors); Tiedemann v. Tiedemann, 115 Misc. 462, 189 N. Y. Supp. 931 (Sup. Ct. 1921) (where conveyance to wife upon threat of suit, motive not considered important).

[12] Taylor v. Addington, 222 N. C. 393, 23 S. E. 2d 318 (1942); Reynolds v. Morton, 205 N. C. 491, 171 S. E. 781 (1933); Rush v. McPherson, 176 N. C. 562, 97 S. E. 613 (1918); Boone v. Lee, 175 N. C. 383, 95 S. E. 659 (1918); Lutz v. Hoyle, 167 N. C. 632, 83 S. E. 749 (1914); Ricks v. Wilson, 154 N. C. 282, 70 S. E. 476 (1911); Taylor v. Wahab, 154 N. C. 219, 70 S. E. 173 (1911); Avery v. Stewart, 136 N. C. 426, 48 S. E. 775 (1904); Sykes v. Boone, 132 N. C. 199, 43 S. E. 645 (1903); Owens v. Williams, 130 N. C. 165, 41 S. E. 93 (1902).

[13] While in the leading case of Gaylord v. Gaylord, 150 N. C. 222, 63 S. E. 1028 (1909) the grantor was seeking to defraud his wife, the question of motive apparently does not enter into the court's decisions in this situation. See, *e. g.*, Bass v. Bass, 229 N. C. 171, 48 S. E. 2d 48 (1948); Poston v. Poston, 228 N. C. 202, 44 S. E. 2d 881 (1947); Carlisle v. Carlisle, 225 N. C. 462, 35 S. E. 2d 418 (1945); Loftin v. Kornegay, 225 N. C. 490, 35 S. E. 2d 607 (1945); Atkinson v. Atkinson, 225 N. C. 120, 33 S. E. 2d 666 (1945); Winner v. Winner, 222 N. C. 414, 23 S. E. 2d 251 (1942); Penland v. Wells, 201 N. C. 173, 159 S. E. 423 (1931).

[14] 198 N. C. 460, 152 S. E. 157 (1930).

[15] *Id.* at 464, 152 S. E. 157, 160, the court said, "The evidence tended to show an active trust relationship existing between the parties, and that the conveyance of the land on 24 December, 1915, by the plaintiff to the defendant was in pursuance of a general scheme or agreement between the parties for working out and liquidating the indebtedness owed by the plaintiff. Hence, a fiduciary relationship existed between the parties, and while there was neither allegation nor evidence of actual fraud, the law presumes fraud in transactions where confidential relationships existed between the parties."

ness manager of the plaintiff grantor. The North Carolina court has recently held that the question of whether a confidential relationship existed is one for the jury.[16] No criteria for a finding of such a relationship was laid down. Whether or not our court will now require the conventional fiduciary basis for a confidential relationship which was present in the *Sorrell* case is an open question.[17]

There might be two solutions to the uncertainties arising in confidential relationship cases. In the first place, the courts could be more specific in their concept of what is considered such a relationship. A technical fiduciary relationship might be insisted upon.[18] One authority would have the courts require a clear showing of a pre-existing relation of trust and confidence.[19] Any such requirements would undoubtedly clarify the present situation and in addition bolster the significance of the Statute of Frauds provisions. On the other hand, the "confidential relationship" exception was developed by the courts to relieve a trusting grantor or beneficiary from the harsh consequences of the majority rule. It would seem that, if the criteria for such a relationship were predetermined and fixed, the effectiveness of the exception in accomplishing the result sought by the courts would be greatly limited.

The second answer has been recommended by authorities for many years.[20] They argue that the fundamental question involved is one of balancing the policy of the Statute of Frauds against the prevention of unjust enrichment, and that, if the court is adequately convinced of the existence of an agreement between the parties as the substantial price for the land, the prevention of unjust enrichment should prevail. The English courts and a minority of the Amercan jurisdictions have permitted

[16] Crews v. Crews, 236 N. C. 528, —S. E. 2d— (1952).

[17] In Atkins v. Withers, 94 N. C. 581, 590 (1885), the court stated, "The cases in which the law will presume fraud, arising from the confidential relations of the parties to a contract, are, executors and administrators, guardian and ward, trustees and *cestui que trust,* principal and agent, brokers, factors, etc., mortgagor and mortgagee, attorneys and clients, and to those have been added, we think very appropriately, husband and wife." This sentence was cited in the *Sorrell* case and is indicative of the instances where our court will find a confidential relationship. *But cf.* Winner v. Winner, 222 N. C. 414, 23 S. E. 2d 251 (1942), where a father-to-son transfer was held not sufficient to raise a constructive trust.

[18] As will be seen upon an examination of the cases, the courts have used the words "fiduciary" and "confidential" interchangeably. However, that relationship wherein one party is the legal representative of the other whether by agreement between the parties or otherwise could be termed "fiduciary" in contrast to those circumstances where only a moral duty exists.

[19] 3 BOGERT, TRUSTS AND TRUSTEES §§ 482, 496 (2nd ed. 1935); *Bogert, Confidential Relations and Unenforceable Express Trusts,* 13 CORNELL L. Q. 237 (1927).

[20] 3 BOGERT, TRUSTS AND TRUSTEES § 497 (2nd ed. 1935); 1 SCOTT, TRUSTS §§ 44.2, 45.2, 55.9 (1st ed. 1939); Ames, *Constructive Trusts Based Upon the Breach of an Express Oral Trust of Land,* 20 HARV. L. REV. 549 (1907); Costigan, *Trusts Based on Oral Promises,* 12 MICH. L. REV. 423, 515 (1914); Stone, *Resulting Trusts and the Statute of Frauds,* 6 COL. L. REV. 327 (1906).

the grantor a right to restitution on this basis alone.[21] Such a view seems to get to the crux of the problem without resorting to the "confidential relationship" exception.

WALLACE ASHLEY, JR.

[21] But the English rule as pronounced in Davies v. Otty, 35 Beav. 208, 55 Eng. Rep. 875 (1865), and Haigh v. Kaye, L. R. 7 Ch. App. 409 (1872), has not been given its full sweep in America even in those jurisdictions which profess to stress the unjust enrichment through breach of agreement. Examination of those American decisions supporting the English view reveals, that there is usually present a confidential relationship which could itself have justified the constructive trust. In effect then, our "liberal" courts seem to be extending the "constructive fraud" doctrine to include mere breach of an oral agreement when they are partly motivated by the confidential relation factor. *E. g.*, Mandley v. Bacher, 73 App. D. C. 412, 121 F. 2d 875 (1941); Steinberger v. Steinberger, 60 Cal. App. 2d 116, 140 P. 2d 31 (1933); Robertson v. Summeril, 39 Cal. App. 2d 62, 102 P. 2d 347 (1940); Gilbert v. Cohn, 374 Ill. 452, 30 N. E. 2d 19 (1940); Becker v. Neurath, 149 Ky. 421, 149 S. W. 857 (1912); Ruhe v. Ruhe, 113 Md. 595, 77 Atl. 797 (1910); Androscoggin Co. Savings Bank v. Tracy, 115 Me. 433, 99 Atl. 257 (1916); Eastmond v. Eastmond, 2 N. J. Super. 529, 64 A. 2d 901 (1949); Moses v. Moses, 140 N. J. Eq. 575, 53 A. 2d 805 (Ct. Err. & App. 1947).

Cf. Justice Seawell's statements in Atkinson v. Atkinson, 225 N. C. 120, 126, 33 S. E. 2d 666, 671 (1945), where he makes it clear that any approach to the theory of constructive trust via unjust enrichment should be made with caution, and that such cannot be invoked "to broaden the basis of equity jurisdiction or to bring within its cognizance situations which have heretofore escaped the comprehension of its long recognized rules."