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Notes and Comments

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NOTES AND COMMENTS

Anti-trust Laws—Borah-Van Nuys Act—Damages

In 1936, Congress undertook to strengthen Section 2 of the Clayton Act, a federal anti-trust law designed to prohibit certain types of price discrimination. Besides the Robinson-Patman Act, which divided Section 2 into several amendments,[1] the revision resulted in the addition of another section known as the Borah-Van Nuys Act.[2] This latter amendment has been described as a "grotesque manifestation of the scissors and paste pot method of drafting a potentially drastic criminal statute."[3] Like Section 2 of the Robinson-Patman Act, it prohibits price and service discriminations. Because of the difference in the language of the statutes, however, conduct which is allowed under Section 2 of the Robinson-Patman Act may be prohibited under the Borah-Van Nuys Act. To illustrate, under the former Act a prerequisite to illegality is two sales involving price discriminations,[4] whereas under the latter Act a mere contract to make one sale is a violation.[5]

Perhaps it is because the Borah-Van Nuys Act expressly provides criminal penalties for violations that early critics concluded that this section imposed only a criminal liability on the violator.[6] To date, however,

[1] 38 STAT. 730, 15 U. S. C. § 13 (1914), as amended, 15 U. S. C. § 13 (1946).

[2] 15 U. S. C. § 13a (1946). It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both.

[3] Oppenheim, *Should the Robinson-Patman Act Be Amended?* Robinson-Patman Act Symposium, C. C. H. 141, 153 (1948).

It has been recommended that this Act be repealed. Oppenheim, *Federal Antitrust Legislation: Guideposts To A Revised National Antitrust Policy,* 50 MICH. L. REV. 1139, 1209 (1952).

[4] Shaw's, Inc. v. Wilson-Jones Co., 105 F. 2d 331 (3d Cir. 1939).

[5] A. J. Goodman and Son, Inc. v. United Lacquer Mfg. Corp., 81 F. Supp. 890 (D. Mass. 1949).

[6] "If section 3 were open to enforcement by private litigants, it would certainly give rise to an enormous amount of harassing litigation. Fortunately section 3 seems to be drawn so that only the Government authorities can enforce it. . . . No means of enforcing Section 3 is expressly provided in the Robinson-Patman Act except criminal actions by the Attorney-General. Except where such rights

the Department of Justice has made little, if any, effort to enforce this law, and, as yet, no alleged offender has suffered the authorized fine or imprisonment.

By 1942, however, injured parties began seeking civil relief under the Act, and in that year two suits involving damages were decided. The Federal District Court of Texas, applying the damages provision of the anti-trust laws to the Borah-Van Nuys Act, stated that damages could be recovered,[7] and in the same year, the Court of Appeals for the Eighth Circuit indicated that it would decide the same way if faced squarely with the issue.[8]

In 1947, the Supreme Court of the United States, referring to the Act, stated:

> ". . . any person who is injured in his business or property by reason of anything forbidden therein may sue and recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee."[9]

Subsequent to this dictum, there has been a noticeable increase in litigation involving this section of the anti-trust laws.

In 1949, the federal courts decided favorably for the plaintiffs in three cases on the question of whether damages would be recovered under the Act, although no awards were actually made.[10] In the following year, three courts again stated that damages were recoverable

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are expressly given no private litigant can enforce laws of this character." 22 A. B. A. J. 593, 649 (1936). See also Hamilton and Loevinger, *The Second Attack On Price Discrimination: The Robinson-Patman Act*, 22 WASH. U. L. Q. 153, 182 (1937); Legislation, 50 HARV. L. REV. 106, 121 (1936); Legislation, 85 U. PA. L. REV. 306, 312 (1937).

[7] Atlanta Brick Co. v. O'Neal, 44 F. Supp. 39, 43 (E. D. Tex. 1942). "It (section 13a) does not provide in express terms that persons injured by things forbidden shall have a cause of action but by declaring them unlawful, the person so injured, I think is entitled to invoke its provisions, if he can allege and prove injury approximately caused by such violations."

[8] Louisiana Farmers' Protective Union, Inc. v. Great Atlantic and Pacific Tea Co., 131 F. 2d 419, 422 (8th Cir. 1942). "Appellees also argue that section 3 of the Robinson-Patman Act, 15 USCA 13a, on which the third count of the complaint is based, is a criminal act and not a part of the anti-trust laws within the meaning of Section 7 of the Sherman Act, giving the right of action for damages in a civil suit. . . . There is authority to the contrary. Midland Oil Co. v. Southern Refining Co., D. C., 41 F. Supp. 436; Kentucky-Tennessee L. & P. Co. v. Nashville Coal Co., 37 F. Supp. 728. But the question raised is not necessary to this case, and we do not decide it."

Apparently, when the court cited the two cases above, it made the understandable mistake of confusing section 13(a) of Title 15, U. S. C. (Robinson-Patman Act) with section 13a of Title 15, U. S. C. (Borah-Van Nuys Act).

[9] Bruce's Juices, Inc. v. American Can Co., 330 U. S. 743, 750 (1947).

[10] Two of these cases were dismissed because certain prerequisites to defendants' liability were not shown. A. J. Goodman and Son, Inc. v. United Lacquer Mfg. Corp., 81 F. Supp. 890 (D. Mass. 1949); Atlantic Co. v. Citizens Ice and Cold Storage Co., 178 F. 2d 453 (5th Cir. 1949). In the third case, the defendant's motion to dismiss was denied. Gordon, Wolf, Cowen Co. v. Independent Halvah and Candies, Inc., 9 F. R. D. 700 (S. D. N. Y. 1949).

under the Act by the injured party.[11] One court reasoned that inasmuch as the Borah-Van Nuys Act attacked problems of monopoly and competition in interstate commerce, it was therefore an anti-trust law to which the treble damages provision of the anti-trust law applied.[12] In *Balian Ice Cream Co. v. Arden Farms Co.*,[13] defendants, who sold dairy products in the Pacific coast states, allegedly acted in concert to reduce the wholesale price of their ice cream in the Los Angeles area to an unreasonably low figure. Their motion to dismiss a suit for damages brought by local competitors was denied, the court stating that "*. . . absent a specifically expressed contrary legislative intent . . .*" a *civil* action would lie for violation of the Borah-Van Nuys Amendment.[14]

Similar conclusions were reached by the federal courts sitting in California and Illinois in 1951.[15]

Despite the trend in favor of civil liability under the Act at least one tribunal has recently taken a contrary view. The District Court of the District of Columbia, without passing on the question, stated, "The court is inclined to the view that no action for damages or for an injunction is maintainable under the section in question."[16]

The majority appear to have construed the Borah-Van Nuys Act correctly. The fact that it provides its own penalties does not of itself preclude civil liability pursuant to other sections of the anti-trust laws. The Sherman Act is also a criminal statute, imposing like penalties,[17] yet there is no doubt that treble damages can be recovered by parties injured under it.[18] Section 4 of the Clayton Act,[19] which provides for treble damages, does not limit such awards to injuries resulting from violations of the Clayton Act, but instead allows them for harm caused by breaches of the "antitrust laws." Thus it is broad enough to include the Borah-Van Nuys Act. The legislative history of the Act supports

[11] Moore v. Mead Service Co., 184 F. 2d 338 (10th Cir. 1950); Balian Ice Cream Co. v. Arden Farms Co., 94 F. Supp. 796 (S. D. Cal. 1950); Spence v. Sun Oil Co., 94 F. Supp. 408 (D. Conn. 1950).

[12] Spence v. Sun Oil Co., 94 F. Supp. 408 (D. Conn. 1950).

[13] 94 F. Supp. 796 (S. D. Cal. 1950).

[14] *Id.* at 802.

[15] Myers v. Shell Oil Co., 96 F. Supp. 670 (S. D. Cal. 1951); Hipps v. Bowman Dairy Co., C. C. H. TRADE CASES REP. ¶ 62,859 (1950-51); F. and A. Ice Cream Co. v. Arden Farms, C. C. H. TRADE CASES REP. ¶ 62,848 (1950-51).

[16] National Used Car Market Report, Inc. v. National Auto Dealers Ass'n., 108 F. Supp. 692, 694 (D. C. Cir. 1953).

[17] 15 U. S. C. §§ 1 and 2 (1946).

[18] Donovan and Irvine, *Proof of Damages Under the Anti-trust Law*, 63 N. J. L. J. 297 (1940).

[19] 15 U. S. C. § 15 (1946). "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

the conclusion that an action for damages can be maintained under it.[20] Although the Borah-Van Nuys Act was undoubtedly intended to be used primarily as a criminal statute, indications are that it will not be used at all for this purpose but will probably be employed occasionally in civil litigation.

VIRGINIA D. QUINLIVAN

Bankruptcy—Partnerships—Partnerships in Bankruptcy

Approximately fifteen years have elapsed since the Chandler Act became law and amended the Bankruptcy Act. That Act, in making substantial changes to the partnership section, seems to have produced a relative tranquility over the years in that area of the law. But while the amended partnership section reconciled some earlier conflicts, it left others to be decided by the courts. This would appear, therefore, to be an appropriate occasion to take cognizance of the existing law, its development, and its conflicts.

Since a partnersip is not defined in the Bankruptcy Act,[1] its existence in fact[2] must depend upon the applicable state laws. A partnership is generally looked upon as "an association of two or more persons to carry on as co-owners a business for profit."[3] In fact, this is the precise definition under the Uniform Partnership Act.[4] Every partner is an agent of the partnership for the purpose of its business and the acts of a partner in the ordinary course of the business binds the partnership and the partners. Also, partners are liable jointly for the debts and obligations of the partnership, and liable jointly and severally for a tort or breach of trust of another partner in the course of the partnership business. Because of these ordinary principles of partnership law, the "aggregate theory" is usually applied in describing the legal significance of a partnership.

The Bankruptcy Act, however, does not strictly adhere to the

[20] 80 CONG. REC. 9420 (1936). "Mr. Hancock of New York: 'If a vendor is found guilty of discrimination as provided in this bill (Borah-Van Nuys) is he subject to the aggrieved party for damages or has he committed a crime and subjected himself to penalty?' Mr. Celler: 'If he violates the Borah-Van Nuys provision or other provision of the bill, he is subject to penalties of a criminal nature and has committed an offense.' Mr. Hancock: 'Would he also be liable for triple damages?' Mr. Celler: 'And he would also have to respond in triple damages under the provisions of the Clayton Act. Anyone aggrieved can sue.'"

[1] A partnership is included within the meaning of the term "person" in the Bankruptcy Act. 11 U. S. C. § 1(23) (1947).

[2] It must be proved that there is a partnership in fact and not a mere partnership by estoppel, and the burden of such proof falls upon the petitioner. Buckingham v. First Nat. Bank, 131 Fed. 192 (6th Cir. 1904).

[3] N. C. GEN. STAT. § 59-36 (1943 Recomp. 1950).

[4] *Id.* See also N. C. GEN. STAT. § 59-37 (1943 Recomp. 1950) for rules in determining the existence of a partnership.

"aggregate theory." In the famous case of *Francis v. NcNeal*,[5] Mr. Justice Holmes, by strong dicta, is said to have committed the United States Supreme Court to the "aggregate theory." However, in the later case of *Liberty National Bank v. Bear*,[6] the court recognized the "entity theory," and is said by some commentators to have adopted it,[7] even though the Supreme Court, in the latter case, explicitly stated that "the conclusion stated is not in conflict with the decision in *Francis v. McNeal* . . . ."[8] Instead of the constant haggling over the question of which theory the Supreme Court has adopted, it would be better to reconcile the cases by limiting their application to the narrow issues of each case, for the result in each is well recognized today.

By the "entity theory" it is meant that a partnership owns its property, and owes its own debts, apart from the individual property of the members which it does not own and apart from the individual debts of its members which it does not owe. The Bankruptcy Acts of 1898 and 1938 are recognized as generally following the "entity theory," but the Act of 1938 follows the "entity theory" only on certain particulars, and not in all phases of partnership bankruptcy. An adequate system of bankruptcy involves an adoption of both theories for different purposes.

Adjudication as a Bankrupt. The first instance in which the Act follows the "entity theory" is in providing that a partnership may be adjudged a bankrupt, as a legal entity separate and distinct from its partners, either during its continuation or after its dissolution, but before winding up.[9] The "dissolution" of a partnership is the change in

[5] 228 U. S. 695 (1913). The question involved in the case was whether the trustee of the adjudged partnership could administer the individual estate of a non-adjudicated partner. In deciding in the affirmative it was stated by way of dicta that "the notion that the firm is an entity disinct from its members has grown in popularity, and the notion has been confirmed by recent speculations as to the nature of corporations and the owners of any somewhat permanently combined group without the aid of law. But the fact remains as true as ever that partnership debts are debts of the members of the firm, and that the individual liability of the members is not collateral like that of a surety, but primary and direct, whatever priorities there may be in the marshalling of assets. The nature of the liability is determined by the common law, not by the possible intervention of the bankruptcy act." *Id.* at 696.

[6] 276 U. S. 215 (1928). The question here was whether a judgment against the partnership and the individual partners, which was acquired within four months of adjudication of the firm, but not within four months of the adjudication of the individual partner, could be annulled as against the partners. Holding in the negative, the Court emphasized that the partnership is a separate entity under the Act and that the adjudication of the firm could not involve the adjudication of a partner as an individual.

[7] See McLaughlin, *Aspects of the Chandler Bill to Amend the Bankruptcy Act*, 4 U. OF CHI. L. REV. 369, 378 (1937).

[8] Liberty Nat. Bank v. Bear, 276 U. S. 215, 218 (1928).

[9] 11 U. S. C. § 23(a) (1947). The section provides in full: "A partnership, including a limited partnership containing one or more general partners, during the continuation of the partnership business or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt either separately or jointly with one or more of its general partners."

the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.[10] There are many causes of dissolution, all of which are brought out in the Uniform Partnership Act, which has been adopted in North Carolina.[11] Suffice it to say that the bankruptcy of a partner causes a dissolution of the firm. An adjudication of the firm is allowed up to the time of winding up because until then the partnership is not terminated.[12]

In order to have a partnership involuntarily adjudged bankrupt, it must be shown that the partnership has committed one of the acts of bankruptcy.[13] While, of course, every partner is an agent of the partnership for the purpose of its business, he cannot bind the partnership where he is not apparently carrying on in the usual manner the business of the partnership, or where he has in fact no authority to act for the partnership and the third party has knowledge that he has no authority.[14] Rarely, therefore, will a partner, without the consent of the other partners, be able to commit an act which will constitute an act of bankruptcy by the firm. Thus, the fact that one partner of a copartnership embezzles the funds of the firm, and absconds and conceals himself, constitutes no act of bankruptcy of the firm.[15] Nor is it an act of bankruptcy for which a firm may be adjudged bankrupt if one of its members, out of his individual estate, prefers one of his own or one of the firm creditors.[16] A partner, without the consent of all partners, cannot make as assignment of partnership property for the benefit of creditors,[17] nor appoint a receiver,[18] nor admit in writing the inability of the firm to pay its debts and its willingness to be adjudged a bankrupt.[19]

Directly related with the problem of adjudicating the separate firm

[10] N. C. GEN. STAT. § 59-59 (1943 Recomp. 1950).

[11] See N. C. GEN. STAT. § 59-61 (1943 Recomp. 1950).

[12] N. C. GEN. STAT. § 59-60 (1943 Recomp. 1950). As to when there has been a "winding up," see *In re* Pinson, 180 Fed. 787 (N. D. Ala. 1910); Holmes v. Baker & Hamilton, 160 Fed. 922 (9th Cir. 1908).

[13] The acts of bankruptcy are enumerated in 11 U. S. C. § 21(a) (1947).

[14] N. C. GEN. STAT. § 59-39 (1943 Recomp. 1950).

[15] Davis v. Davis, 104 Fed. 235 (S. D. S. D. 1900).

[16] Mills v. J. H. Fisher Co., 159 Fed. 897 (6th Cir. 1908). Where the partner applies his separate estate to the payment of a creditor of the insolvent firm, he thereby gives such creditor a preference over others of the same class, and commits an act of bankruptcy, which may be made the basis of a petition by other firm creditors to have him individually adjudged bankrupt.

If a partner commits a firm act of bankruptcy with firm assets, this will also be considered an individual act of bankruptcy by the partner. *In re* Meyer, 98 Fed. 976 (2d Cir. 1899).

[17] N. C. GEN. STAT. § 59-39 (1943 Recomp. 1950).

[18] N. C. GEN. STAT. §§ 59-39(2), (3)(a) (1943 Recomp. 1950).

[19] *In re* Wellesley, 252 Fed. 854 (N. D. Cal. 1917). *Cf.* N. C. GEN. STAT. § 59-41 (1943 Recomp. 1950) ("An admission or representation made by any partner concerning partnership affairs within the scope of his authority as conferred by this article is evidence against the partnership.")

an involuntary bankrupt is the question of the effect of one of the partners being an exempt party under the Act. That is, under the Act neither a wage earner nor a farmer may be involuntarily adjudged bankrupt.[20] Although, however, one of the partners may be a wage earner or a farmer, it is settled that the partnership may be adjudged an involuntary bankrupt.[21] "One who combines with others in a partnership enterprise becomes bound for the payment of the partnership debts, and his assets will be drawn in to satisfy the partnership debts even though he may not be a subject of involuntary bankruptcy."[22] The result of adjudicating the firm despite the exempt status of a partner is a natural consequence of adherence to the "entity theory." If, however, the firm itself is engaged in farming, it is not "wholly free from doubt"[23] whether the firm can or cannot be involuntarily adjudged.[24] It would seem that the policy which exempts farmers should be extended to exempt a partnership engaged in farming, despite the strict logic that may be applied to the literal terms of the Act.

Additional questions are whether the partnership can be adjudged bankrupt as a firm if one of the partners has died; if one of the partners is insane; or if one of the partners is an infant. It is understood that individually, the estate of a deceased person cannot be adjudged a bankrupt.[25] It is questionable, because of a conflict of authority, whether a partnership, one of whose members has died, can be so adjudged.[26] There would seem to be no objection to it other than a possible interference with the state court's administration of the estate of the deceased partner. It has been suggested that even though it be held that there can be no adjudication, that the rights of firm creditors are not jeopardized. That is, even if the firm cannot be adjudged bankrupt, the surviving partner might be individually adjudged bankrupt, thereby obtaining jurisdiction of the firm property.[27] As to an insane person, it has been held that his insanity does not preclude the partnership, of which he is a member, from being adjudged bankrupt, even

[20] 11 U. S. C. § 22(b) (1947).
[21] *In re* Disney, 219 Fed. 294 (D. Md. 1915); Dickas v. Barnes, 140 Fed. 849 (6th Cir. 1905).
[22] Dickas v. Barnes, *supra* note 21 at 453.
[23] 1 COLLIER, BANKRUPTCY ¶ 5.10 (14th ed. 1940).
[24] H. D. Still's Sons v. American Nat. Bank, 209 Fed. 749 (4th Cir. 1914) held that a partnership engaged in farming is exempt. This decision is criticized in Note, 12 MICH. L. REV. 483 (1914) on the theory that the exemption in the Act extends only to a "natural person" engaged in farming, and that a partnership could hardly be construed to be a "natural person."
[25] See 1 COLLIER, BANKRUPTCY ¶ 5.07 (14th ed. 1940). The Act has no express provision to this effect. Section 8 of the Act, however, provides that the death or insanity of a bankrupt shall not abate proceedings that have already begun.
[26] *Compare In re* Fackelman, 248 Fed. 565 (S. D. Cal. 1918) *with In re* Wells, 298 Fed. 109 (S. D. Ohio 1924).
[27] 1 COLLIER, BANKRUPTCY ¶ 5.07 (14th ed. 1940).

though his insanity affects his adjudication as an individual.[28] The same is true where one of the partners is an infant.[29] Generally speaking, therefore, a partnership may be adjudged bankrupt regardless of the status of a particular partner. This practice is in line with the "entity theory" of a partnership.

As to who may file a petition in bankruptcy, there is no authorization to be found in the Bankruptcy Act for the involuntary adjudication as bankrupt of a partnership save upon the petition of qualified creditors."[30] However, as to a voluntary adjudication, it is settled by statute that all or less than all the partners, without the joinder or consent of the remaining partners, may file, and the petition is deemed voluntary insofar as it is filed on behalf of the partnership.[31] No act of bankruptcy is required upon the filing of a voluntary petition, but there exists the requirement "that where a petition is filed in behalf of a partnership by less than all of the general partners, the petition shall allege that the partnership is insolvent."[32] The term "insolvent" has caused some difficulty in the partnership field. While its definition is set out in the Bankruptcy Act,[33] its application to a partnership has been left to judicial determination. It is now the weight of authority that "in determining the question of insolvency, the individual property of the partners should be considered. Where the assets of a partnership, together with the individual properties of each partner exceed the liabilities, the partnership is not insolvent."[34] Hence, under a voluntary petition by less than all the partners,[35] or under an involuntary petition

[28] *In re* Stein & Co., 127 Fed. 547 (7th Cir. 1904).

[29] *In re* Duiguid, 100 Fed. 274 (E. D. N. C. 1900) (". . . it would be idle, however, for creditors to prove their debts against the infant during his minority for he could disaffirm them upon reaching his majority.") The case presents a *quaere* as to whether a debt for necessities would support a petition of bankruptcy against the infant.

[30] Kaufman-Brown Potato Co. v. Long, 182 F. 2d 594 (9th Cir. 1950). It is doubtful if a partner *qua* creditor can file or join in filing an involuntary petition against his partnership. *Cf.* Meek v. Centre Banking Co., 268 U. S. 426 (1925), noted in 25 COL. L. REV. 963 (1925).

[31] 11 U. S. C. §23(b) (1947), Kaufman-Brown Potato Co. v. Long, 182 F. 2d 594 (9th Cir. 1950).

The Act provides for service of the petition and writ of subpoena upon the non-joining partners. 11 U. S. C. § 41(a) (1947).

[32] 11 U. S. C. § 23(b) (1947).

[33] "A person shall be deemed insolvent within the provision of this title whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts." 11 U. S. C. § 1(19) (1947).

[34] Note, 14 ST. L. L. REV. 179, 183 (1929). Strangely enough, exempt assets will be included in determining partnership insolvency. See McLaughlin, *Aspects of the Chandler Bill to Amend the Bankruptcy Act*, 4 U. OF CHI. L. REV. 369, 373 (1937).

[35] Mason v. Mitchell, 135 F. 2d 599 (9th Cir. 1943), noted in 29 CORN. L. REV. 244 (1943). This is the leading recent case on this proposition.

alleging an act of bankruptcy where insolvency is a requirement,[36] it must be shown that none of the partners are solvent in the sense of being able to pay both his own and the firm debts. Clearly this view applies the "aggregate theory" and indicates that the Act does not purport to follow any one theory in a strict sense.

Since a partnership can be adjudged bankrupt as a separate entity, it naturally follows that the partners as individuals can be adjudged under either an involuntary or a voluntary petition. The Act has taken the procedure one step further, and thereby settled a conflict of authority,[37] by expressly providing that a partnership may be adjudged bankrupt either separately or jointly with one or more or all of its general partners.[38] A more workable practice is thus allowed by giving the option of a separate or a joint peition. If a separate petition is filed against the partnership, this may be made into a joint petition against the partnership and the individuals by amendment.[39]

There is one instance, however, under the Act when a firm will be adjudged bankrupt without a specific petition against the partnership. If *all* the general partners are adjudged bankrupt as individuals, this will automatically cause an adjudication of the firm.[40] It is logical and proper that this result should follow. By the adjudication of the individuals, the total of the interests of the partnership has been drawn into the administration of the bankruptcy court, hence the practical consequences take on a formal recognition under the Act. Note that under this rule "it is possible, in effect, for a partnership to be an involuntary bankrupt even though it has not committed an act of bankruptcy. This result follows where each of the partners has committed an individual act of bankruptcy, as distinguished from a firm act of bankruptcy, and has in consequence been the subject of an involuntary petition and adjudication. In such a situation the firm also would be adjudged a bankrupt."[41] Again it is evident that the Act does not strictly adhere to the "entity theory" for this rule is a wholesome application of the "aggregate theory."

Administration of Estates in the Bankruptcy Court. Adjudication

[36] Acts of bankruptcy Nos. 2, 3 and 5 require that the partnership be insolvent at the time the act is committed. 11 U. S. C. § 21(a) (1947). Note that act No. 5 uses "insolvency" in both the bankruptcy and the equity sense.

[37] See Comment, 87 U. PA. L. REV. 105 (1938).

[38] 11 U. S. C. § 23(a) (1947) (involuntary petition); 11 U. S. C. § 23(b) (1947) (voluntary petition).

Where a joint involuntary petition is filed, it would seem that the requirements as to the number of creditors and the amount of debts would be satisfied where the allegations are adequate as to the firm itself. *See* Mills v. J. H. Fisher Co., 159 Fed. 897 (6th Cir. 1908).

[39] *In re* Russell, 7 F. 2d 508 (D. Del. 1925). For details as to the form of the petition, see 1 COLLIER, BANKRUPTCY ¶ 5.12 (14th ed. 1940).

[40] 11 U. S. C. § 23(i) (1947).

[41] 1 COLLIER, BANKRUPTCY ¶ 5.13 (14th ed. 1940).

as a bankrupt is not always a prerequisite to the administration of an estate in the bankruptcy court. In other words, it is settled that the trustee of a bankrupt partnership may administer the estate of a non-adjudicated partner.[42] It has been suggested that the administration of the non-adjudicated partner's estate is compulsory upon the firm trustee.[43] To date this point has not been decided, but it would seem that in the usual instance it would be highly desirable to so administer the estate. Only in this manner can the firm trustee effectively determine what assets are available for the firm debts and what assets must be returned to the partner for distribution to his separate creditors.

Where, however, an individual partner or less than all the partners are adjudicated bankrupt, the trustee of the individual estates may not administer the estate of other partners,[44] nor may he administer the partnership property in bankruptcy.[45] There is this exception: Where there is consent on the part of the non-bankrupt partner or partners, the partnership property may be administered in the bankruptcy court even without its adjudication.[46] That is, where one or more, but not all of the partners are adjudged bankrupt and the other partner or partners are solvent, the firm remains out of bankruptcy and its property does not come in except by express or implied consent of the solvent member or members.[47] Whether there has been consent will depend upon the facts of each case, but where the solvent partner allows the trustee to take possession of the partnership property without asserting his claim, he will be held to have consented to the administration in the bankruptcy court.[48] Even though there is no consent, and consequently no administration of the firm assets in the bankruptcy court, the non-bankrupt partners are directed to "settle the partnership business as expeditiously as its nature will permit and account for the interest of the general partner or partners adjudged bankrupt."[49] This naturally follows since the bankruptcy of a partner dissolves the partnership and gives the non-bankrupt partners the right to wind up the

[42] Francis v. McNeal, 228 U. S. 695 (1913).
[43] Note, 29 COL. L. REV. 1134 (1929).
[44] Marnet Oil & Gas Co. v. Staley, 218 Fed. 45 (5th Cir. 1914).
[45] 11 U. S. C. § 23(i) (1947). This provision does not conflict with other statutory allowances that a partnership may be adjudged bankrupt either separately or jointly with one or more or all of its general partners. This provision deals with the problem where a partner but not the firm is in bankruptcy. In this situation the problem facing the court is getting jurisdiction, not of the firm, but of the partner's interest in the firm.
Nor does subsection (i) conflict with subsection (d) for the latter is merely permissive in nature.
[46] *Id.*
[47] Sturn v. Ulrich, 10 F. 2d 9 (8th Cir. 1925); *In re* Filman, 177 Fed. 170 (7th Cir. 1910).
[48] Kaufman-Brown Potato Co. v. Long, 182 F. 2d 594 (9th Cir. 1950).
[49] 11 U. S. C. § 23(i) (1947).

partnership affairs in a state court without the interference of the bankruptcy court.[50]

There is no problem concerning the administration of estates where all partners are adjudged bankrupt for it has been previously indicated that in that instance the firm is also adjudged bankrupt.

Trustees. The provision in the Act pertaining to the appointment of trustees underwent a substantial overhauling under the Chandler Act in 1938. The amended section provides:

> The creditors of the bankrupt partnership shall appoint the trustee, who shall be the trustee of the individual estate of a general partner being administered in the proceeding: *Provided,* however, that the creditors of a general partner adjudged a bankrupt may, upon cause shown, be permitted to appoint their separate trustee for his estate. . . .[51]

It is to be noted that before the firm creditors can exercise the prerogative which is granted them, the partnership must have been adjudged bankrupt. Also, even where special circumstances are shown for the appointment of a separate trustee for an individual bankrupt, a prior adjudication of the individual partner is a condition precedent to the authorization of a separate trustee. On the other hand, the non-adjudication of the individual partner is ineffective to prevent an administration of his estate by a trustee appointed by the firm.[52] Unless an unusual circumstance is shown, it would ordinarily be in the interest of an orderly and unified administration that only one trustee be appointed. It has been held, however, that if the interests of the partnership and partner estates are in substantial conflict,[53] or if the assets of the separate estate have so far been depleted that firm creditors have no possible concern therein,[54] a separate trustee may be allowed.

It is apparent that whenever both the partnership assets and individual assets are being administered together, the trustee or trustees should keep separate accounts of the different properties. The Act so provides.[55] The real purpose of such a rule is to enable the determination of what amount of the assets of each type of property will be available for firm or individual debts.

Marshalling and Distribution of Assets. The Act provides that the bankruptcy court "may marshal the assets of the partnership estate

[50] N. C. GEN. STAT. § 59-67 (1943 Recomp. 1950).
[51] 11 U. S. C. § 23 (c) (1947).
[52] See note 42 *supra.*
[53] *In re* Currie, 197 Fed. 1012 (E. D. Mich. 1910) (allowed under the equitable powers of the court prior to the amended subsection).
[54] *In re* Wood, 248 Fed. 246 (6th Cir. 1918) (allowed under the equitable powers of the court prior to the amended subsection.).
[55] 11 U. S. C. § 23(e) (1947).

and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates."[56] This provision is procedural and is applicable only to estates that are being administered.[57] The substantive rules of distribution under the Bankruptcy Act[58] are in line with the rules in the Uniform Partnership Act,[59] which follow the theory that partnership creditors shall have priority on partnership property and separate creditors on individual property. Prior to adoption of the Uniform Partnership Act the North Carolina Supreme Court held that firm creditors could share equally with individual creditors in the partners' estates,[60] the theory being that since the statute at the time made the general partners jointly and severally liable for he debts of the partnership,[61] the effect was "to convert the creditors of the firm into individual creditors of each member of the partnership."[62] The clear and uneqivocal language of the present statutes would surely warrant an opposite result today. At least there is no indication that a bankruptcy court in North Carolina would follow any rule other than that provided in the Bankruptcy Act.

In each instance of the marshalling of assets there naturally arises the problem of differentiating firm assets from individual assets, and firm debts from individual debts. No concrete rule can be set forth for every situation but it is true that "all property originally brought into the partnership stock or subsequently acquired by purchase or otherwise, on account of the partnership, is partnership property";[63] and "unless the contrary intent appears, property acquired with partnership funds is partnership property."[64] As to the differentiation of the debts, much will depend upon the use of the benefits derived from a debt and the determination of whether credit was given to the firm or the individual. The problem of distinguishing the debts is naturally made more complex by the retirement of a partner, the sale of an interest by a partner, and the death of a partner.[65]

[56] 11 U. S. C. § 23(h) (1947). The term "preference" undoubtedly has the same meaning as that term in § 60(a) of the Act.

[57] *In re* McConnell v. Williams, 32 A. B. R. 589 (1914).

[58] 11 U. S. C. § 23(g) (1947).

[59] N. C. GEN. STAT. § 59-70 (1943 Recomp. 1950).

[60] Virginia-Carolina Chemical Co. v. Walston, 187 N. C. 817, 123 S. E. 89 (1924); Rankin v. Jones, 55 N. C. 169 (1855); Hassell v. Griffin, 55 N. C. 119 (1855).

[61] Under the present statutes the partners are liable jointly and severally for the torts and breaches of trust of a partner, and liable jointly for all other debts and obligations of the partnership. See N. C. GEN. STAT. § 59-45 (1943 Recomp. 1950).

[62] Virginia-Carolina Chemical Co. v. Walston, 187 N. C. 817, 821, 123 S. E. 89, 92 (1924).

[63] N. C. GEN. STAT. § 59-38 (1943 Recomp. 1950).

[64] *Id.* For a discussion of the problem of differentiating the assets, see 1 COLLIER, BANKRUPTCY ¶ 5.29 (14th ed. 1940). For a related problem and its remedies, see Note, 49 YALE L. J. 686 (1940).

[65] For pertinent statutory provisions see N. C. GEN. STAT. § 59-71 *et seq.* (1943 Recomp. 1950).

It is recognized that in some cases there may be a joint and several liability on the part of the partners so that a creditor may file proof against both the partnership assets and individual assets. Thus, where notes are made by the bankrupt firm and indorsed by an individual partner, also a bankrupt, they are debts provable against both firm and individual estates.[66] The same is true where the individual partner is joint maker with, or surety for, the partnership;[67] or where all the partners signed in their individual names an obligation executed in connection with a partnership transaction.[68] Where there eixsts this joint liability, the creditor may share in the individual estates of the several partners on an equality with exclusively individual creditors,[69] and the creditors, after the receipt of a dividend from the partnership estate, might prove for the balance of his claim against the bankrupt estate of the individual partners that were individually liable.[70]

The reduction of a partnership debt to judgment against the partnership and the individual members does not change the inherent character of the debt, nor make it "joint and several" so as to enable the creditor to share on an equality with the individual creditors in the individual estates.[71]

Effect of Discharge of the Partnership on Unadjudicated Partners. "[T]he discharge of a partnership shall not discharge the individual general partners thereof from the partnership debts."[72] This rule is justly the subject of severe criticism.[73] "A discharge of the firm 'entity,' leaving the partners fully liable at law is a plain absurdity; and under the doctrine of administration of all separate estates, there is no reason why the unadjudicated partners should not be granted a discharge."[74] Since the partners' estates are considered in measuring firm solvency, and the partners themselves submitted to most of the burdens of bankruptcy through the administration of their estates in the firm proceedings, it does seem incongruous to deny the discharge of a non-adjudicated partner from the firm debts after all creditors' rights have been satisfied. The existing rule "will have the practical effect of forcing the individual member to seek protection in the less desired form of adjudication under voluntary proceedings."[75]

[66] Robinson v. Seaboard Nat. Bank, 247 Fed. 667 (3rd Cir. 1918).
[67] Bank of Reidsville v. Burton, 259 Fed. 218 (4th Cir. 1919).
[68] Robinson v. Seaboard Nat. Bank, 247 Fed. 667 (3rd Cir. 1918).
[69] Globe Indemnity Co. v. Keeble, 20 F. 2d 84 (4th Cir. 1927).
[70] *In re* McCoy, 150 Fed. 106 (7th Cir. 1906). This method is disapproved of in 6 REMINGTON, BANKRUPTCY § 2917 (4th ed. 1937).
[71] Cutler Hardware Co. v. Hacker, 238 Fed. 146 (8th Cir. 1916).
[72] 11 U. S. C. § 23(j) (1947).
[73] See Comments, 87 U. PA. L. REV. 105, 112 (1938); 49 YALE L. J. 908, 924 (1940).
[74] Comment, 49 YALE L. J. 908, 924-5 (1940).
[75] Comment, 87 U. PA. L. REV. 104, 114 (1938).

Where a partner is *adjudged* bankrupt there is specific statutory authority enabling him to get a discharge from both his individual *and* partnership debts.[76] Adjudication is therefore a condition precedent to discharge. An important objective of the Act is achieved under this rule, *viz.*, to enable the debtor to start anew unhampered by old obligations.

ROGER B. HENDRIX

Constitutional Law—Taxation—Federal Excise and Occupational Tax on Wagering

The occupational tax provisions of the Revenue Act of 1951[1] which levy a tax on persons engaged in the business of accepting wagers and require such persons to register with the collector of internal revenue were recently upheld by the United States Supreme Court as a valid

[76] 11 U. S. C. § 23(j) (1947).

[1] INT. REV. CODE § 3285:
"(a) Wagers. There shall be imposed on wagers, as defined in subsection (b), an excise tax equal to 10 per centum of the amount thereof.
"...
"(d) Persons liable for tax. Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.
"(e) Exclusions for tax. No tax shall be imposed by this subchapter (1) on any wager placed with, or on any wager placed in a wagering pool conducted by, a parimutuel wagering enterprise licensed under State law, and (2) on any wager placed in a coin-operated device with respect to which an occupational tax is imposed by section 3267."
INT. REV. CODE § 3290:
"A special tax of $50 per year shall be paid by each person who is liable for tax under subchapter A or who is engaged in receiving wagers for or on behalf of any person so liable."
INT. REV. CODE § 3291:
"(a) Each person required to pay a special tax under this subchapter shall register with the collector of the district—
(1) his name and place of residence;
(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and
(3) if he is engaged in receiving wagers for or on behalf of any person liable under subchapter A, the name and place of residence of each such person."
INT. REV. CODE § 3294:
"(a) Failure to pay tax. Any person who does any act which makes him liable for special tax under this subchapter, without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.
"...
"(c) Willful violations. The penalties prescribed by section 2707 with respect to the tax imposed by section 2700 shall apply with respect to the tax imposed by this subchapter."
INT. REV. CODE § 2707 provides that willful violations such as failure to give the information required by law, shall subject such person to a fine of $10,000 or imprisonment of from one to five years or both.

exercise of federal taxing power.[2] The decision arose on appeal from a district court's ruling[3] that the provisions contravened the Tenth Amendment[4] in that Congress was attempting to regulate the purely state matter of gambling under the guise of a taxing statute. In reversing this decision the Supreme Court held that the occupational tax was a valid revenue measure;[5] that its ancillary registration requirements were reasonable provisions to facilitate the collection of the tax; and that the information required in registering was not a denial of the privilege against self-incrimination as guaranteed by the Fifth Amendment.[6]

The difficulty in determining when the power to tax should be curtailed because its use results in regulatory effects beyond the direct legislative power of Congress is brought about by the inherent nature of a tax itself as well as Constitutional requirements.[7] It is obvious

[2] United States v. Kahriger, 73 Sup. Ct. 510 (1953).

[3] United States v. Kahriger, 105 F. Supp. 322 (E. D. Pa. 1952). Six other district courts sustained the validity of Subchapter B (occupational tax) of the Act. United States v. Smith, 106 F. Supp. 9 (S. D. Cal. 1952); United States v. Nadler, 105 F. Supp. 918 (N. D. Cal. 1952); United States v. Robinson, 107 F. Supp. 38 (E. D. Mich. 1952); United States v. Arnold, Jordan, and Wingate, No. 478, E. D. Va., Sept. 18, 1952; United States v. Penn, No. 2021, M. D. N. C., May 1952; Combs v. Snyder, 101 F. Supp. 531 (D. C. D. C. 1952); United States v. Forrester, 105 F. Supp. 136 (N. D. Ga. 1952). Combs v. Snyder, *supra*, was affirmed in 342 U. S. 939 (1952) on the doctrine of unclean hands; the constitutional question was not raised.

[4] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U. S. CONST. AMEND. X.

[5] The district court did not contend that the occupational tax as such was invalid. "A careful consideration . . . convinces this Court that the subject matter of this legislation so far as revenue purposes is concerned is within the scope of Federal authorities." United States v. Kahriger, 105 F. Supp. 322 (E. D. Penn. 1952). It has long been settled that a federal tax is not invalid because it may be levied on an occupation or transaction unlawful under state laws. United States v. Sanchez, 340 U. S. 42 (1950) (marihuana); Sonzinsky v. United States, 300 U. S. 506 (1932) (certain classes of firearms); Nigro v. United States, 276 U. S. 332 (1928) (narcotics); United States v. Doremus, 249 U. S. 86 (1919) (same); License Tax Cases, 5 Wall. 462 (U. S. 1866) (dealers in liquor and lottery tickets).

[6] "No person shall . . . be compelled in any criminal case to be a witness against himself." U. S. CONST. AMEND. V. The Court pointed out that the privilege has relation only to past acts, not to future acts that may or may not be committed. If the defendant wished to take wagers subject to excise taxes he must pay the tax and register and in doing so he is not compelled to confess to acts already committed, but is merely informed by statute that in order to engage in the business of wagering in the future he must fulfill certain conditions. A detailed discussion of self-incrimination is beyond the scope of this note, but it must be emphasized that regardless of their constitutionality the registration provisions do afford harmful evidence to state law enforcement officers. See note 24, *infra*.

[7] The federal taxing power is granted in U. S. CONST. ART. I, § 8: "The Congress shall have Power . . . to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States. . . ." In addition to the uniformity requirement for excise taxes the only other express limitations are that direct taxes must be imposed by rules of apportionment and that there can be no tax on imports from

that it would be impossible to levy taxes which do not have social and economic consequences of a non-fiscal character. Therefore, in its selection of persons, objects, or transactions which are to bear the incidence of taxation Congress must necessarily consider policies of a nature other than revenue.[8] The Court has recognized that these collateral results will inevitably follow taxation and has not interfered with revenue legislation merely because Congress has been motivated in part by non-fiscal policies in deciding just what segment of the nation's economy or society should be effected by such results.[9]

This refusal to inquire into the ultimate effects of the taxing laws, or into the ulterior motives or purposes of Congress in enacting them arises also from the Court's fear of allowing its judicial power to encroach upon legislative domain.[10]

On the other hand, the ostensible taxing power to create results and control in matters not within the direct control of Congress has not been allowed to go unchecked. The Tenth Amendment has been invoked to invalidate revenue measures when the Court felt that it was necessary

any state. U. S. CONST. ART. I § 9. Further limitations have been implied from the due process clause of U. S. CONST. AMEND. V. Thus defective methods of valuation, assessment, collection or remission may amount to lack of procedural due process. Anniston Mfg. Co. v. Davis, 301 U. S. 337 (1937). Substantial due process may be violated where there is an attempt to make a tax law unreasonably retroactive. Nichols v. Coolidge, 274 U. S. 531 (1927); Blodgett v. Holden, 275 U. S. 142 (1927). The most difficult limitation to define, however, is the one implied by the Tenth Amendment which is the topic of this note.

[8] That the framers of the Constitution clearly realized this aspect of the taxing power, and assumed that Congress should and would consider such effects, is evident from Alexander Hamilton's statement in *The Federalist,* No. 12. After pointing out the revenues which could be derived from a national tax on liquor, he added: "That article would well bear this rate of duty; and if it should tend to diminish the consumption of it, such an effect would be equally favorable to the agriculture, to the economy, to the morals, and to the health of society." See Cushman, *Social and Economic Control Through Federal Taxation,* 18 MINN. L. REV. 759 (1934).

[9] "From the beginning of our government, the courts have sustained taxes although imposed with the collateral intent of effecting ulterior ends which, considered apart, were beyond the constitutional power of the lawmakers to realize by legislation directly addressed to their accomplishment." Magnano v. Hamilton, 292 U. S. 40 (1934). United States v. Sanchez, 340 U. S. 42 (1950); Sonzinsky v. United States, 300 U. S. 506 (1937); Nigro v. United States, 276 U. S. 332 (1928); Hampton v. United States, 276 U. S. 394 (1928); United States v. Doremus, 249 U. S. 86 (1919); McCray v. United States, 195 U. S. 27 (1903); Veazie Bank v. Fenno, 8 Wall. 533 (U. S. 1869); License Tax Cases, 5 Wall. 462 (U. S. 1866).

[10] In answer to the contention that it is the duty of the judiciary to invalidate the exercise of the taxing power whenever it seems to the Court that the power has been abused the Court in McCray v. United States, 195 U. S. 27 (1903) replied: "But this reduces itself to the contention that, under our constitutional system, the abuse by one departement of the government of its lawful powers is to be corrected by the abuse of its powers by another department." Much earlier the Court in Veazie Bank v. Fenno, 8 Wall. 533 (U. S. 1869) had said: "The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but the people by whom its members are elected." See also McCulloch v. Maryland, 4 Wheat. 316 (U. S. 1869) and cases cited note 9 *supra.*

to exercise its quasi-political duty of preserving the traditional separation of state and federal powers.[11]

The test to determine whether a particular exercise of power purporting to be a revenue measure[12] falls within federal or state boundaries seemingly involves an objective examination of the statute to decide whether or not it is actually a tax.[13] Thus, if the act can be fairly said to be for the purpose of collecting revenue[14] and its penal or regulatory features are reasonably incidental to fiscal purposes the enactment is deemed a tax and upheld.[15] The fact that Congress had ulterior mo-

[11] Carter v. Carter Coal Co., 298 U. S. 238 (1936); United States v. Butler, 267 U. S. 1 (1936); United States v. Constantine, 297 U. S. 287 (1935); Trusler v. Crooks, 269 U. S. 475 (1926); Linder v. United States, 268 U. S. 5 (1925); Bailey v. Drexel Furniture Co. (Child Labor Tax Case), 259 U. S. 20 (1922); Hill v. Wallace, 259 U. S. 44 (1922).

[12] Congress has in several instances used its taxing power as an alternative method of regulation in fields where it has the plenary power to regulate directly. The authority of such cases to sustain the general use of federal taxing power to effect results in matters beyond the delegated power of Congress is, therefore substantially weakened. However, because of their sweeping and emphatic language as to the scope of revenue power two of such cases are often relied on without distinction. Veazie Bank v. Fenno, 8 Wall. 533 (U. S. 1869) (tax on state bank notes—power to regulate currency); Hampton v. United States, 276 U. S. 394 (1928) (protective tariff—power to regulate foreign commerce).

[13] The test of "objective constitutionality" is clearly set out in McCray v. United States, 195 U. S. 27 (1906): "Undoubtedly, in determining whether a particular act is within a granted power, its scope and effect are to be considered. Applying this rule to the acts assailed, it is self-evident that on their face they convey a tax. That being their necessary scope and operation, it follows that the acts are within the grant of power." And in Sonzinsky v. United States, 300 U. S. 506 (1937) the Court said: "On its face it is only a taxing measure . . . it has long been established that an Act of Congress which on its face purports to be an exercise of the taxing powers is not the less invalid because the tax is burdensome or tends to restrict or suppress the thing taxed." *But cf.* United States v. Constantine, 296 U. S. 287 (1935); Bailey v. Drexel Furniture Co. (Child Labor Tax Case), 259 U. S. 20 (1922).

[14] It is obvious that from a practical standpoint a tax which is designed to end the activity with respect to which it is imposed cannot be said to be for the purpose of collecting revenue. This contention was raised in connection with the validity of a ten cent per pound tax on yellow oleomargarine which would in effect end its production. However, McCray v. United States, 195 U. S. 27 (1906) upheld the tax saying that *on its face* it was clearly a revenue measure. *Cf.* Veazie Bank v. Fenno, 8 Wall. 533 (U. S. 1869). A similar problem arises when the tax is not prohibitive, but purely nominal. In United States v. Doremus, 249 U. S. 86 (1919) the Court upheld a one dollar per year tax upon narcotic dealers though there were elaborate ancillary provisions as to registration requirements and records. After the same act was amended so as to increase rates the Court in Nigro v. United States, 276 U. S. 332 (1928) stated that any doubt as to the invalidity of the tax as it originally stood had been removed by the change from a norminal to a substantial tax. See Brown, *When Is a Tax Not a Tax*, 11 IND. L. J. 399 (1936).

[15] Examples of regulatory provisions held reasonable: United States v. Sanchez, 340 U. S. 42 (1950) (tax on transfer of marihuana—regulations imposed much heavier tax on transfers to persons not registered in compliance with the act); Sonzinsky v. United States, 300 U. S. 506 (1934) (tax on firearms with ancillary registration requirements); Doremus v. United States, 249 U. S. 86 (1919) (tax on narcotics—all dealers in drugs required to register; sales to be made on prescribed forms issued by the Treasury Department); Alston v. United States, 274 U. S. 209 (1927) (same); Felsenberg v. United States, 186 U. S. 126

tives other than revenue and that the tax actually results in regulation or discouragement of the activities taxed does not impair its validity.[16]

But if the Court from an on-the-face examination of a particular statute determines that the tax or its ancillary regulations constitute primarily an effort to regulate or destroy matters beyond Congressional control it will classify the enactment an imposition of a penalty rather than an exercise of the power to tax.[17] In such case legislative motives are considered but only as they are evident in the express language of the statute itself.[18]

The net result seems to be that if the act is actually a tax the power of Congress cannot be denied except for the limitations placed upon the

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(1901) (tax on tobacco—coupons, premiums or gift certificates could not be attached to packages); *In re* Kollock, 165 U. S. 536 (1899) (tax on sales on boards of trade—regulation required written memorandum of sale with names of parties, etc.).

[16] Cases cited notes 9 and 15, *supra.*

[17] Carter v. Carter Coal Co., 298 U. S. 238 (1936) held invalid a 15% excise tax on bituminous coal which provided for an exemption for operators who accepted codes of fair competition prescribed by the act. The Court said this was clearly a penalty for non-compliance with regulations rather than a revenue measure. United States v. Butler, 267 U. S. 1 (1936) involved a tax levied on processors of cotton with a provision that the proceeds could be employed for the purpose of removing surplus agricultural products from the market. Held: invalid because the expenditure clause showed the immediate purpose of the act to be regulation of agriculture. United States v. Constantine, 296 U. S. 287 (1935) dealt with a federal tax of $25 on the business of a retail dealer in malt liquor which stipulated that there was to be a tax of $1000 if the business was conducted in violation of state law. The Court held that the larger tax was clearly a penalty to enforce state laws. Linder v. United States, 268 U. S. 5 (1925) held that a doctor could not be convicted under the narcotics tax law for having prescribed in the ordinary course of professional service doses of drugs to an addict without written application as required. The specific requirement was held to have no reasonable relation to the collection of revenue. Bailey v. Drexel Furniture Co. (Child Labor Tax Case), 259 U. S. 20 (1922) held invalid a 10% tax upon the net income of those who knowingly employed children below certain ages. Pointing out the element of scienter and the fact that the tax did not vary with the amount of the thing taxed the court held that the purpose of the enactment was clearly to impose a burden on those who did not comply with an elaborate code of regulations set forth in the act. Hill v. Wallace, 259 U. S. 44 (1922) invalidated a tax of 20 cents a bushel placed on grain sold on future contracts except when sold on boards of trade operating under regulations provided for in the act. See also Trusler v. Crooks, 269 U. S. 475 (1926). Where Congress has used its taxing power to regulate matters in which it has expressly delegated powers to deal directly, the "taxes" have often been deemed penalties, thus greatly changing the type of procedure permissible in enforcement. See, e.g. United States v. La France, 282 U. S. 568 (1930); Lepke v. Lederer, 259 U. S. 557 (1922).

[18] United States v. Kahriger, 105 F. Supp. 322 (E. D. Pa. 1952) relied solely on United States v. Constantine, 296 U. S. 287 (1935), in holding that the occupational tax on wagerers was an attempt to punish violation of state law. The obvious distinction as pointed out by the Supreme Court in United States v. Kahriger, 73 S. Ct. 510 (1953) is that the penalty provisions of the wagering tax applies to those who do not comply with the tax, irrespective of whether his state laws permit wagering or not. The penalty exaction in the Constantine case, *supra,* was on its face imposed only on persons who were dealing in liquor contrary to state law. *But cf.* United States v. Smith, 106 F. Supp. 9 (S. D. Cal. 1952). See Note, 14 U. OF PITT. L. REV. 71 (1952).

taxing power by the Constitution in express terms.[19] Although this doctrine of "objective constitutionality" does not afford a completely satisfactory explanation of the Court's decisions on the extent of federal taxing power it appears to be a rational classification for the most part.[20]

From a strictly objective viewpoint of the occupational tax on wagerers it is not surprising that the Supreme Court had no difficulty in deciding that it is a valid exercise of the taxing power. On its face the act appears to be designed primarily for the production of revenue.[21] The registration provisions of the statute can certainly be declared as essential aids in the collection of the tax on wagering as well as for necessary identification of the taxpayer.[22] The penalty provisions can be classified as permissible measures adopted for the enforcement of the tax and its provisions.[23]

On the other hand, one would have to ignore reality in order to fail to recognize that Congress has devised a means to regulate and prohibit wagering in all the states where it is illegal. The gamblers are faced with the choice of subjecting themselves to prosecution under the state criminal laws by complying with the act or going to federal prison for willfully violating it.[24] That such an inevitable result was a primary

[19] See note 7 *supra.*

[20] Some authorities have found the distinctions drawn by the Court between a tax and a penalty untenable. Corwin, *Constitutional Law in 1921 and 1922,* 16 AM. POL. SCI. REV. 613 (1922); Cushman, *Social and Economic Control Through Taxation,* 18 MINN. L. REV. 757 (1934). See, however, Brown, *The Excise Tax As a Regulatory Device,* 23 Cornell L. Q. 45 (1937); Powell, *Child Labor, Congress and the Constitution,* 1 N. C. L. Rev. 61 (1922).

[21] See note 1 *supra.* It had been estimated that the annual revenue to be derived from the wagering and occupational taxes would be $400,000,000. H. R. REP. No. 586, 82nd Cong., 1st Sess. 112 (1951).

[22] See note 1 *supra.* The registration provisions of the tax were explained by the Committee Reports as follows: "The committee conceives of the occupational tax as an integral part of any plan for the taxation of wagers and as essential to the collection and enforcement of such a tax. Enforcement of a tax on wagers frequently will necessitate the tracing of transactions through complex business relationships, thus requiring the identification of the various steps involved. For this reason, the bill provides that a person who pays the occupational tax must, as part of his registration, identify those persons who are engaged in receiving wagers for or on his behalf, and, in addition, identify the persons on whose behalf he is engaged in receiving wagers." H. R. REP. No. 586, 82nd Cong., 1st Sess. 60 (1951); SEN. REP. No. 781, 82nd Cong., 1st Sess. 118 (1951).

[23] See note 1 *supra.*

[24] "Each collector shall . . . place and keep conspicuously in his office, for public inspection, an alphabetical list of the names of all persons who shall have paid special taxes within his district, and shall state thereon the time, place, and business for which such special taxes have been paid, and upon application of any prosecuting officer of any State, county, or municipality, he shall furnish a certified copy there of . . ." INT. REV. CODE, § 3275; made applicable to occupational tax on wagerers by INT. REV. CODE, § 3292. Justice Frankfurter in his dissent in United States v. Kahriger, 73 Sup. Ct. 510 (1953) says: "In addition to the fact that Congress was concerned with activity beyond the authority of the Federal Government, the enforcing provision of this enactment is designed for the systematic confession of crimes with a view to prosecution for such crimes

purpose and motive of Congress in passing the enactment is too obvious to be denied.[25]

Conceding that the suppression of professional gambling would be of great moral benefit to our society it is still difficult to regard an attempt at such accomplishment under the guise of a revenue measure to be in the best interests of public policy.[26] An enactment which in return for the payment of an occupational tax purports to grant to the taxpayer the privilege of performing certain acts but which actually and designedly subjects him to punishment for their performance cannot be viewed as a rational or good-faith use of the federal taxing power. And yet in view of the fact that all taxation inevitably results in economic and social regulation to some extent and that extreme deference is due Congressional use of its delegated power to tax it is submitted that the United States Supreme Court has adopted the better policy in upholding the Wagering Tax Act. The real solution lies in the hope that in the future Congress will make a more reasonable use of its delegated powers and that the states will make a more effective use of their police powers.

THOMAS W. STEED, JR.

Damages—Fraud and Deceit—Recovery of Punitive Damages for Fraud and Deceit

One segment of the law of damages not frequently discussed is the question of assessing punitive damages in an action of fraud and deceit. North Carolina has recently considered this question in a case of first impression.[1]

There the plaintiffs, aged Negroes without education, were induced to buy a tract of land from the defendant as a result of false and

under State law." Justice Black, also dissenting, calls the act "a squeezing device contrived to put a man in federal prison if he refuses to confess himself into a state prison as a violator of state gambling laws." United States v. Kahriger, *supra*.

[25] There are many instances in the Congressional debates prior to the passage of the tax where the suppression of gambling was discussed. For instance see 97 CONG. REC. 6892 (1951):

"Mr. Hoffman of Michigan. Then I will renew my observation that it might if properly construed be considered an additional penalty on the illegal activities."

"Mr. Cooper. Certainly, and we might indulge the hope that the imposition of this type of tax would eliminate that kind of activity."

[26] Although concurring in the majority opinion upholding the wagering taxes Justice Jackson said: "But here is a purported tax law which requires no reports and lays no tax except from specified gamblers whose calling in most states is illegal. It requires this group to step forward and identify themselves, not because they like others have income, but because of its source. . . . It will be a sad day for the revenues if the good will of the people toward their taxing system is frittered away in efforts to accomplish by taxation moral reform that cannot be accomplished by direct legislation." United States v. Kahriger, 73 Sup. Ct. 510 (1953).

[1] Swinton v. Savoy Realty Co., 236 N. C. 723, 73 S. E. 2d 785 (1953).

fraudulent representations by defendant's agent that the lot was 268 feet wide and 160 yards deep and worth $2,000, when in fact it was only 80 by 150 feet and worth no more than $500. After having paid the purchase price, the plaintiffs learned the truth, and sought in this action to recover $1,500 actual damages, and an additional amount as punitive damages. The jury awarded the actual damages prayed for and also $1,500 punitive damages. The Supreme Court affirmed the judgment as to actual damages but reversed that portion which allowed punitive damages. It held that before punitive damages could be awarded "there must be an element of aggravation accompanying the tortious conduct which causes the injury."[2] After finding that facts were not sufficient to warrant the allowance of punitive damages, the Court further stated that "there was no evidence of insult, indignity, malice, oppression or bad motive other than the same false representations for which they have received the amount demanded. Here fraud is not an accompanying element of an independent tort but the particular tort alleged."[3]

The North Carolina Court has previously adopted this "element of aggravation" criterion for the assessment of punitive damages in virtually all classes of tort actions without discrimination.[4] And in many cases the word "fraud" has been used as one of these elements upon which punitive damages may be predicated.[5] The Court in the principal

[2] *Id.* at 725, 73 S. E. 2d at 787.

[3] *Id.* at 727, 73 S. E. 2d at 788.

[4] Binder v. General Motors Acceptance Corporation, 222 N. C. 512, 23 S. E. 2d 894 (1943) (wrongful conversion of automobile); Lay v. Gazette Publishing Co., 209 N. C. 134, 183 S. E. 416 (1936) (libel); Baker v. Winslow, 184 N. C. 1, 113 S. E. 570 (1922) (slander); Ford v. McAnally, 182 N. C. 419, 109 S. E. 91 (1921) (malicious prosecution); Hodges v. Hall, 172 N. C. 29, 89 S. E. 802 (1916) (assault and battery); Carmichael v. Southern Bell Tel. and Tel. Co., 157 N. C. 21, 72 S. E. 619 (1911) (wrongfully removing the telephone from plaintiff's premises); Arthur v. Henry, 157 N. C. 393, 73 S. E. 206 (1911) (blasting); Williams v. Carolina & Northwestern Railroad Company, 144 N. C. 498, 57 S. E. 216 (1907) (negligence); Ammons v. Railroad, 140 N. C. 196, 52 S. E. 731 (1905) (wrongfully ejecting plaintiff from defendant's train).

These cases all state in effect the general rule applicable in actions of tort as announced in Lake Shore & M. S. Ry. Co. v. Prentice, 147 U. S. 101, 107, 13 S. Ct. 261, 263, 37 L.Ed 97, 101 (1893) where the court said that punitive damages are recoverable in tort actions, ". . . if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations; but such guilty intention on the part of the defendant is required in order to charge him with exemplary or punitive damages." It should be noted that this general rule is the one applied by the court in the principal case. *Cf.* Smith v. Morganton Ice Co., 159 N. C. 151, 156, 74 S. E. 961, 964 (1912).

[5] Typical of the language used is, "Punitive damages are never awarded, except in cases 'when there is an element either of fraud, malice, . . . or other causes of aggravation in the act or omission causing the injury,'" Holmes v. Central Carolina Railroad Co., 94 N. C. 318, 323 (1886). The following cases use either the same or substantially the same language quoted: Hairston v. Atlantic Greyhound Corporation, 220 N. C. 642, 645, 18 S. E. 2d 166, 168 (1942); Harris v. Queen City Coach Co., 220 N. C. 67, 69, 16 S. E. 2d 464, 465 (1941); Robinson v. McAlhaney, 214 N. C. 180, 184, 198 S. E. 647, 650 (1938); Tripp v. American Tobacco Co., 193 N. C. 614, 616, 137 S. E. 871, 872 (1927).

case relies upon only two North Carolina decisions as the bases of its holding regarding punitive damages,[6] and both of these cases were decided on the issue of slander. Since punitive damages are assessed for the purpose of punishing the defendant for his "outrageous conduct,"[7] *i.e.*, willful and wanton, etc., the requirement of some aggravation seems to be well founded where the action is grounded upon libel and slander.[8] However, where the action is brought on the theory of fraud and deceit, some doubt arises as to the soundness of requiring this element of aggravation in addition to establishing the cause of action. Before a plaintiff can prevail in an action of fraud and deceit, he must have shown that the defendant, or his agent, has made an untrue statement, knowing it to be untrue, and intending that the plaintiff shall act upon it.[9] That the ill-will, malice, or bad motive necessary to subject a defendant to an assessment of punitive damages may appear either by direct evidence or from the inherent character of the tort itself, would seem to follow without dispute.[10] Is not then fraud and deceit such a tort that by its very nature should expose the perpetrator to the possibility[11] of having to pay punitive damages?

Other jurisdictions are not in harmony on this question. In the absence of a controlling statute, it appears that a majority of the courts

[6] Baker v. Winslow, 184 N. C. 1, 113 S. E. 570 (1922); and Cotton v. Fisheries Products Co., 181 N. C. 151, 106 S. E. 487 (1921).

[7] Swinton v. Savoy Realty Co., 236 N. C. 723, 726, 73 S. E. 2d 785, 787 (1953). See McCormick, *Some Phases of the Doctrine of Exemplary Damages,* 8 N. C. L. REV. 129 (1930). *Cf.* Binder v. General Motors Acceptance Corporation, 222 N. C. 512, 23 S. E. 2d 894 (1943); Cotton v. Fisheries Products Co., 181 N. C. 151, 106 S. E. 487 (1921).

It would appear from the two cases last cited, that the injury caused the plaintiff by way of humiliation, etc., furnishes some motivation for the court to allow punitive damages.

[8] It is quite clear that one may act in complete good faith, and still be liable in such an action for actual damages. See Lay v. Gazette Publishing Company, 209 N. C. 134, 183 S. E. 416 (1936).

[9] The elements necessary for a right of action in fraud and deceit are well established. There must be a statement made by the defendant; that statement must be untrue in fact; the defendant must either know that it is untrue, or be culpably ignorant (that is, recklessly and consciously ignorant) of whether it is true or not; it must be made with the intent that plaintiff shall act upon it; and the plaintiff must act in reliance on the statement in the manner contemplated and thereby suffer damage. Small v. Dorsett, 223 N. C. 754, 28 S. E. 2d 514 (1944) and cases cited therein.

Thus it is apparent that the action of fraud and deceit is inherently different from that of libel and slander. The former requiring a conscious and intentional wrongdoing.

[10] "It must be shown either that the defendant was actuated by ill-will, malice, or evil motive (which may appear by direct evidence of such motive, or from the inherent character of the tort itself, or from the defendant's oppressive or insolent demeanor, sometimes called 'circumstances of aggravation'). . . . " McCormick, *Some Phases of the Doctrine of Exemplary Damages,* 8 N. C. L. REV. 129, 134 (1930).

[11] Punitive damages are not awarded as a matter of right. This determination rests exclusively within the sound discretion of the jury. Tripp v. American Tobacco Co., 193 N. C. 614, 618, 137 S. E. 871, 873 (1927) and cases cited therein.

deciding the point have applied the same general rule as that adopted by the North Carolina Court in the principal case.[12] However, a minority of the jurisdictions allow the jury to assess punitive damages without requiring the additional element of aggravation.[13] California, Colorado, Montana, North Dakota, Oklahoma, and Texas have seen fit to modify the general rule applied in torts cases regarding punitive damages, and have, by statute and judicial interpretation, authorized their assessment upon a showing of actionable fraud.[14]

[12] Hollins v. Nalls, 58 So. 2d 112 (Ala. 1952); Lutfy v. R. D. Roper and Sons Motor Co., 57 Ariz. 495, 115 P. 2d 161 (1941); Laughlin v. Hopkinson, 292 Ill. 80, 126 N. E. 591 (1920); Kluge v. Ries, 66 Ind. App. 610, 117 N. E. 262 (1917); Russell v. Stoops, 106 Md. 138, 66 Atl. 698 (1907); Sovereign Camp, W.O.W. v. Boykin, 182 Miss. 605, 181 So. 741 (1938); Oehlhof v. Solomon, 73 App. Div. 329, 76 N. Y. Supp. 716 (1st Dep't 1902); Long v. McAllister, 275 Pa. 34, 118 Atl. 506 (1922); Nye v. Merriam, 35 Vt. 438 (1862).

It should be noted that a number of the courts adhering to this "majority view" have stated that *gross fraud* is an aggravating circumstance upon which punitive damages may be predicated. Hollins v. Nalls, *supra;* Laughlin v. Hopkinson, *supra;* Russell v. Stoops, *supra;* Soverign Camp, W.O.W. v. Boykin, *supra.* This term has been defined as, "representations made with a knowledge of their falseness (or so recklessly made as to amount to the same thing), and with the purpose of injuring the plaintiff." Southern Building & Loan Ass'n v. Dinsmore, 225 Ala. 550, 552, 144 So. 21, 23 (1932). Thus it would appear that a jury would be justified in finding that gross fraud was present, where the plaintiff has done no more than establish mere actionable fraud.

[13] Bower v. Perkins, 135 Conn. 675, 68 A. 2d 146 (1949); District Motor Co. v. Rodill, 88 A. 2d 489 (D. C. Munic. Ct. App. 1952); Jones v. West Side Buick Auto Co., 231 Mo. App. 187, 93 S. W. 2d 1083 (1936); Saberton v. Greenwald, 146 Ohio St. 414, 66 N. E. 2d 224 (1946).

[14] *California:* "In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." CAL. CIV. CODE § 3294 (1949), Thompson v. Modern School of Business and Correspondence, 183 Cal. 112, 190 Pac. 451 (1920).

Colorado: "In all civil actions in which damages shall be assessed by a jury for a wrong done to the person, or to personal or real property, and the injury complained of shall have been attended by circumstances of fraud, malice, or insult, or a wanton and reckless disregard of the injured party's rights and feelings, such jury may, in addition to the actual damages sustained by such party, award him reasonable exemplary damages." COLO. STAT. ANN. c. 50 § 6 (1935). While the Colorado Court has yet to decide the direct issue, it has held that implied malice is sufficient to allow punitive damages under this statute. McAllister v. McAllister, 72 Colo. 28, 209 Pac. 788 (1922) (suit for alienation of affections). Thus it appears that when the issue presents itself, the Colorado Court will reach the same result as those states following the "minority rule."

Montana: The language of the statute here is substantially that of the California statute set out above. MONT. REV. CODES ANN. § 17-208 (1947). The exact issue has likewise failed to present itself to the Montana Court. However, from the wording of the statute and the decision in Moelleur v. Moelleur, 55 Mont. 30, 173 Pac. 419 (1918), it is likely that this court too will authorize punitive damages where actionable fraud is shown.

North Dakota and *Oklahoma:* The statutes in both these states employ essentially the same wording as does the California statute, *supra.* N. D. REV. CODE § 32-0307 (1943); OKLA. STAT. ANN. tit. 23, § 9 (1937). Wuest v. Richmond, 48 N. D. 1081, 188 N. W. 573 (1922); Garrett v. Myers, 190 Okla. 273, 123 P. 2d 965 (1942).

Texas: After defining actionable fraud, and stating the measure of damages, the statute continues ". . . all persons wilfully making such false representations or promises or knowingly taking the advantage of said fraud shall be liable in ex-

As to the measure of damages in actions for fraud and deceit, there are two rules that the courts have basically followed: (1) the "benefit of bargain" rule, and (2) the "out of pocket" rule.[15]

Under the "benefit of bargain" rule, the plaintiff is entitled to recover the difference in the value of what he received and the value which it would have had had the representations been true.[16] Therefore, in those jurisdictions following this doctrine, as well as the proposition that punitive damages are not allowable except under circumstances of aggravation, where the plaintiff prevails in his cause of action the defendant will be required to pay the plaintiff more than his actual loss in situations where the price paid is less than the falsely represented value, even though no punitive damages are assessed.[17] However, where the price paid is the same as the falsely represented value, the plaintiff recovers only the amount he paid above the true value, and the defendant goes unpunished. Consequently, when this measure of damages is combined with the principle that punitive damages are allowed by simply showing actionable fraud, it becomes obvious that the defendant in the former situation will be punished twice for one wrongful act.

Conversely, in those jurisdictions where the "out of pocket" rule is accepted (by which the plaintiff is entitled to the difference between the amount paid and the actual value of that which he received)[18] along with the theory of requiring additional aggravation for the allowance of punitive damages, an equally undesirable consequence will result in many situations. Thus where the court finds that the element of aggravation is wanting, the plaintiff is not made entirely whole; for he must

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emplary damages to the person defrauded in such amount as shall be assessed by the jury, not to exceed double the amount of the actual damages suffered." TEX. REV. CIV. STAT. ANN. art. 4004 (1925), J. S. Curtiss & Co. v. White, 90 S. W. 2d 1095 (Tex. 1935).

[15] The first rule is applied by the following courts: Lutfy v. R. D. Roper & Sons Motor Co., 57 Ariz. 495, 115 P. 2d 161 (1941); Morrell v. Wiley, 119 Conn. 578, 178 Atl. 121 (1935); Menke v. Rovin, 352 Mo. 826, 108 S. W. 2d 24 (1944); Kennedy v. High Point Savings & Trust Co., 213 N. C. 620, 197 S. E. 130 (1938).

The second rule has been adopted in California by statute. CAL. CIV. CODE § 3343 (1949) (see note 21, *infra*). And by the courts in the following jurisdictions: Horning v. Ferguson, 52 A. 2d 116 (D. C. Munic. Ct. App. 1947); Peters v. Stroudsburg Trust Co., 348 Pa. 451, 35 A. 2d 341 (1944).

For a collection of cases as to both rules, see 37 C. J. S., *Fraud* §143b.

[16] Kennedy v. High Point Savings & Trust Co., 213 N. C. 620, 623, 197 S. E. 130, 131 (1938).

[17] This inevitable result is undoubtedly the reason for the Arizona Court holding that while legal malice, *i.e.* the intentional doing of a wrongful act without justification or excuse—is a sufficient basis for the awarding of punitive damages,—such damages should not be allowed where the "benefit of bargain" rule applies, in the absence of the defendant acting wantonly and recklessly, etc. the court apparently feeling that the result in this situation would make the plaintiff whole, and at the same time punish the defendant. Lutfy v. R. D. Roper & Sons Motor Co., 57 Ariz. 495, 504, 115 P. 2d 161, 165 (1941).

[18] Horning v. Ferguson, 52 A. 2d 116, 119 (D. C. Munic. Ct. App. 1947).

pay the expenses of litigation in order to recover that amount fraudulently taken from him, while a cheat is permitted to go unpunished.

In view of the purpose for which punitive damages are assessed, and the fact that the plaintiff has a right to be made whole, it appears that the courts of California and the District of Columbia have adopted the best view, which more nearly meets the purposes of damages in tort actions. These jurisdictions apply the "out of pocket" rule for the measure of damages,[19] and authorize the submission of the issue of punitive damages to the jury where the plaintiff's evidence tends to show actionable fraud.[20] By applying this rule the sum wrongfully obtained will be returned to the plaintiff, and the jury may, in its discretion, punish the defendant to the degree that the facts of each case warrant. And by virtue of this punishment, the plaintiff may receive the expenses he incurred in litigation.

From the propositions discussed above, it is concluded that where the "out of pocket" rule is not applied and punitive damages are not allowable upon showing actionable fraud, the perpetrator in too many cases has nothing to lose by his fraud. He stands the chance of making a dishonest profit if his scheme is successful, but in no event can he lose by his misconduct. The unfairness of such a result is vividly illustrated by the principal case. Would it not, then, be advisable for every state to adopt statutes similar to those in California?[21]

DURWARD S. JONES

Deeds—Adverse Possession—Tacking—Strip of Land not Included in Deed

For twenty years or more the successive occupants of two adjoining tracts of land have been satisfied that the correct boundary between their lands is a certain ditch, line, fence or hedgerow. Then deeds are consulted, a physical survey is run, and one landowner realizes that he is in possession of a strip of land not included in his deed, nor in the deeds of his predecessors. Convinced that the land is rightfully his, he claims title by adverse possession, only to be told that he has not held

[19] CAL. CIV. CODE § 3343 (1949), Jacobs v. Levin, 58 Cal. App. 2d 913, 137 P. 2d 500 (1943); Horning v. Ferguson, 52 A. 2d 116 (D. C. Munic. Ct. App. 1947).

[20] CAL. CIV. CODE § 3294 (1949), Thompson v. Modern School of Business & Correspondence, 183 Cal. 112, 190 Pac. 451 (1920); District Motor Co. v. Rodill, 88 A. 2d 489 (D. C. Munic. Ct. App. 1952).

[21] The California Statute providing for the use of the "out of pocket" rule states, "One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction." CAL. CIV. CODE § 3343 (1949). The California Statute authorizing the assessment of punitive damages is set out in note 14 *supra*. CAL. CIV. CODE § 3294 (1949).

the land long enough in his own right to satisfy the twenty year statutory period in effect where land is held adversely without a deed.[1] He must therefore attempt to show the requisite twenty years of adverse possession by tacking to his own the adverse possession of his predecessors. The leading case on this point in North Carolina is *Jennings v. White*,[2] where plaintiff and his two predecessors in possession, *A* and *B*, occupied an entire lot, but under deeds in which the description omitted the southwest corner. Plaintiff sought to establish title to this corner by adverse possession, but in order to show the twenty years of adverse possession required to ripen title where the land is held without color of title, plaintiff had to tack to his own the adverse possession of *A* and *B*. Plaintiff lost, the court holding that as a general rule possession could not be tacked to make out title by adverse possession when the deed under which the last occupant claims title does not include the land in dispute. This holding was based on plaintiff's failure to show any privity in respect to the disputed corner between himself and his predecessors in possession, the court declaring that in order to create such privity there must have existed as between each successive holder a relation such as ancestor and heir, grantor and grantee, or devisor and devisee. Here the court found no such relationship in respect to the controverted corner, but indicated instead that *A*, who took from the plaintiff's remote grantor, was a tenant at will of the remote grantor. Since *A* was only a tenant at will, his successors, *B* and the plaintiff, presumably could hold no greater estate in the omitted strip of land than a tenancy at will.[3]

In keeping with the rule as laid down in *Jennings v. White*,[4] the North Carolina court in succeeding cases[5] has consistently refused to allow a grantee to tack to his own the adverse possession of his grantor of a strip of land not within the description of the deed. A slight modification occurred in the recent case of *Newkirk v. Porter*,[6] where it was stated by way of dictum that a grantee who went into physical possession of the strip not covered in the deed would become an adverse possessor in his own right[7] and not a tenant at will of his grantor,

[1] N. C. GEN. STAT. § 1-40 (1943).
[2] 139 N. C. 23, 51 S. E. 799 (1905).
[3] In labeling *A's* possession a tenancy at will, the court apparently was interpreting the statute of frauds as allowing only a tenancy at will in this type of situation.
[4] 139 N. C. 23, 51 S. E. 799 (1905).
[5] Newkirk v. Porter, 237 N. C. 115, 74 S. E. 2d 235 (1953); Locklear v. Oxendine, 233 N. C. 710, 65 S. E. 2d 673 (1951); Simmons v. Lee, 230 N. C. 216, 53 S. E. 2d 79 (1949); Ramsey v. Ramsey, 229 N. C. 270, 49 S. E. 2d 476 (1948); Boyce v. White, 227 N. C. 640, 44 S. E. 2d 49 (1947).
[6] 237 N. C. 115, 74 S. E. 2d 235 (1953).
[7] This dictum is in accord with the holding in Blackstock v. Cole, 51 N. C. 560 (1859), the only North Carolina case in point prior to Jennings v. White, 139 N. C. 23, 51 S. E. 799 (1905).

but tacking of the preceding adverse possessions of the non-included strip nevertheless would not be allowed.

Unlike North Carolina, most jurisdictions[8] hold that, while the deed alone will not constitute the necessary privity as to the strip not included in the deed, an express transfer of possession, or of possession and claim, by grantor to grantee, is sufficient privity to ground the tacking of their adverse possessions as to the strip not covered in the deed.[9] These courts apparently find that an express transfer of possession exists when the grantor indicates to the grantee boundaries which include both the land described in the deed and the omitted strip and then puts him in possession of both.[10] The North Carolina court, on the other hand, by not commenting on the circumstances surrounding the transfer,[11] has indicated that it gives no weight to the words and actions of the parties at the time of the transfer. In none of the cases where tacking of a strip not included in the deed was attempted has our court determined that an express oral transfer of possession would constitute sufficient privity.

The court in its decisions[12] has continually emphasized that in North Carolina the privity sufficient to permit tacking of the non-

[8] Note, 17 A. L. R. 2d 1131 (1951).

[9] St. Louis S. W. R. R. v. Mulhey, 100 Ark. 71, 139 S. W. 643 (1911); Smith v. Chapin, 31 Conn. 530 (1863); Dubois v. Karazin, 315 Mich. 598, 24 N. W. 2d 414 (1946); Vandell v. St. Martin, 42 Minn. 163, 44 N. W. 525 (1889); Crowder v. Neal, 100 Miss. 730, 57 So. 1 (1911); Alukenis v. Kashulines, 96 N. H. 107, 70 A 2d 202 (1950); Helmich v. Davenport, 174 Iowa 558, 156 N. W. 736 (1916).

In these cases the transfer of possession was made by an express declaration of transfer, or the practical equivalent thereof. In the last case tacking was allowed even though successive deeds expressly excluded the controversial strip.

[10] St. Louis S. W. R. R. v. Mulhey, 100 Ark. 71, 139 S. W. 643 (1911), where grantor represented as his own all the land within an inclosure and put grantee into possession thereof; Gregory v. Thorrez, 277 Mich. 197, 269 N. W. 142 (1936), where grantor put grantee into possession of entire tract, indicating hedge as correct southern boundary, and hedge later turned out to be seven feet south of correct boundary; Rembert v. Edmondson, 99 Tenn. 15, 41 S. W. 935 (1897), when grantor conveyed to grantee all her interest in an adjacent strip which both parties knew was not included in the description in the deed. Shuttles v. Butcher, 1 S. W. 2d 661 (Tex. 1927), here fences on one side of tract were located a few feet over onto the adjoining lot, and grantor represented as his own everything that was under fence.

[11] The only instance where the court might be construed as having commented on such circumstances appears in Jennings v. White, 139 N. C. 23, 51 S. E. 799 (1905), when it was stated that if the grantor put the grantee into possession of the entire lot, including the portion not covered in the deed, the grantee in respect to that portion became the grantor's tenant at will. The court might have been speaking hypothetically for the facts as reported do not affirmatively indicate an express transfer.

[12] Newkirk v. Porter 237 N. C. 115, 74 S. E. 2d 235 (1953); Locklear v. Oxendine, 233 N. C. 710, 65 S. E. 2d 673 (1951); Simmons v. Lee, 230 N. C. 216, 53 S. E. 2d 79 (1949); Ramsey v. Ramsey, 229 N. C. 270, 49 S. E. 2d 476 (1948); Boyce v. White, 227 N. C. 640, 44 S. E. 2d 49 (1947); Jennings v. White, 139 N. C. 23, 51 S. E. 799 (1905); Blackstock v. Cole, 51 N. C. 560 (1859).

included strip can be created only through a paper writing describing the strip or by descent.

That an anomalous situation exists under the North Carolina rule of *Jennings v. White*[13] can be illustrated as follows: Suppose *X*, owning no other land in the vicinity, adversely holds Blackacre, a small strip, without any deed. In order to establish title to Blackacre by adverse possession, *X* can tack to his own the prior adverse possession of his predecessor in possession, since an express parol transfer by his predecessor creates sufficient privity.[14] Conversely, suppose *X* has purchased a tract consisting of Whiteacre plus Blackacre, but he and his grantor claim under a deed which does not include Blackacre in its description. *X* cannot tack in order to establish ownership to Blackacre by adverse possession, even though he and his grantor hold under a deed which at the time of purchase they both thought included Blackacre in its description; for in this case apparently the express oral transfer of possession does not create sufficient privity.[15] It would appear, then, that while a grantee who in good faith purchases a tract of land, a strip of which is not covered by his deed, cannot tack to his own the adverse possession of his grantor to that strip, one who has purchased nothing and has no deed but who has been put into adverse possession of this same strip can tack to his own the adverse possession of his predecessor and establish his title to the strip.

Since, in the very recent decision of *Newkirk v. Porter*,[16] the court has reiterated the harsh rule laid down in *Jennings v. White*,[17] it would seem futile to try to establish title by adverse possession to a strip of land not included in the deed when it is necessary to tack in order to show an adverse holding for the twenty years statutory period. It should be noted, however, that in a Michigan case[18] involving title to a strip of land not included in his deed, while the court did not allow the defendant to tack successive adverse possessions to the strip, he prevailed on the theory of acquiescence. The court declared that where successive parties had accepted a line as the correct boundary and on both sides had used up to the line and no further for a long period of years, each party is estopped to deny the accepted line as the true line. This theory of acquiescence might be tried in North Carolina, for our

[13] 139 N. C. 23, 51 S. E. 799 (1905).

[14] Vanderbilt v. Chapman, 172 N. C. 809, 812, 90 S. E. 993, 995 (1916) where Justice Hoke stated, "In order to establish title by adverse occupation there must be continuity of possession for the requisite statutory period, and, in case of successive occupants, there must be some recognized connection between them. This connection may be effected by deed or will or other writing, or it may be shown by parol."

[15] See cases listed in note 11, *supra*.

[16] 237 N. C. 115, 74 S. E. 2d 235 (1953).

[17] 139 N. C. 23, 51 S. E. 799 (1905).

[18] Hanlon v. Ten Hove, 235 Mich. 227, 209 N. W. 169 (1926).

Court approved the doctrine in a previous case where a strip of land not covered in the deed was the subject of the controversy.[19]

EARLE GENE RAMSEY

Divorce—Alimony—Permanent Alimony Incident to Absolute Divorce

The recent case of *Feldman v. Feldman*,[1] following close on the heels of *Livingston v. Livingston*[2] and involving the same procedural question, once again explains the status of North Carolina law on the subject of permanent alimony as an incident to an absolute divorce decree. The plaintiff, husband, instituted an action for absolute divorce on the grounds of two years' separation. Subsequent to the filing of the complaint but prior to the decree for absolute divorce, the parties made an agreement whereby the plaintiff was to pay the defendant a monthly sum for the support of herself and the child of the marriage. This agreement was entered as a consent order. Thereafter a decree for absolute divorce was granted. Some years later the plaintiff ceased to make the monthly payments. The defendant, after notice, moved that the plaintiff be adjudged in contempt of court and the plaintiff moved to strike the consent order. Upon hearing the plaintiff's motion, the lower court relying on *Livingston v. Livingston, supra,* ruled that the consent order was inoperative as an order of the court. The Supreme Court in affirming the decision points out that the consent order (permanent alimony) was not reduced to a court judgment or decree before the commencement of the suit for absolute divorce and consequently did not come within the protective provision of G. S. 50-11.[3]

"In Roman Catholic times, that is, until the reign of Henry VIII, marriage was regarded by the church as a sacrament, and as therefore indissoluble. This being the view of the canon law, it was applied by the ecclesiastical court in England, which had jurisdiction over matri-

[19] In Hanstein v. Ferrell, 149 N. C. 240, 62 S. E. 1070 (1908), ownership of a narrow strip between two city lots was in question. The plaintiff and his predecessors in title and the defendant had both acquiesced in a boundary line formed by a common trench caused by water dripping from the eaves of two wooden buildings formerly on the premises. The court held that recognition of, and acquiescence in a line as the true boundary line of one's land, not induced by mistake, and contained through a considerable period of time, affords strong, if not conclusive, evidence that the line so recognized is the true line.

[1] 236 N. C. 731, 73 S. E. 2d 865 (1952). In the even later case of Merritt v. Merritt, 237 N. C. 271, 74 S. E. 2d 529 (1953), the same procedural point was raised. There the husband and wife had consented to the continuance of a separation agreement for alimony after the absolute divorce which was then in suit. The court *citing* the principal case held the alimony liability was contractual only and could not be enforced by contempt as it had been decreed incident to the absolute divorce rather than prior to the commencement of the said suit.

[2] 235 N. C. 515, 70 S. E. 2d 480 (1952).

[3] N. C. GEN. STAT. § 50-11 (1949, recompiled 1950).

monial causes."[4] These courts did, however, grant a divorce *a mensa et thoro*,[5] which legally authorized the separation of the parties without disturbing the bonds of matrimony.[6] As the marital status was not thereby destroyed, neither were the common law incidents of marriage.[7] Accordingly, after a divorce *a mensa* the husband continued to enjoy the usual rights to the various property interests of his wife,[8] while she, in turn, continued to hold her inchoate right to dower and, if without fault, was awarded a reasonable amount of alimony.[9]

Although the ecclesiastical courts could not dissolve a valid marriage, they could, in an action then called divorce *a vinculo matrimonii*[10] declare the marriage void *ab initio*[11] where, due to certain impediments,[12] a valid marriage never existed. Accordingly, the common law duty of a man to support his wife was decreed to have never existed and consequently the court was without a basis upon which to award alimony.[13] In contradistinction to these courts, Parliament could, by special act, grant an absolute divorce dissolving a valid marriage, but due to the expense involved in obtaining such a divorce, it was a privilege of the wealthy.[14] Few divorce bills were passed at the instance of the wife; therefore, no definite practice was set as to alimony awards incident to an absolute divorce.[15] However, there were several cases

[4] MADDEN, PERSONS AND DOMESTIC RELATIONS § 81 (1931).

[5] *Ibid.*

[6] Vernier and Hurlbut, *The Historical Background of Alimony Law and Its Present Stautory Structure*, 6 LAW AND CONTEMP. PROB. 197 (1939).

[7] MADDEN, *op. cit. supra* note 4, at 257.

[8] 2 POLLOCK AND MAITLAND, THE HISTORY OF ENGLISH LAW 409 (2 ed. 1923) (". . . the husband can deprive his wife of the enjoyment of her land by alienating it, and . . . it will be valid at least so long as the marriage lasts."). See also Bird v. Bird, 1 Lee 209, 212, 161 Eng. Rep. 78, 79 (1753), where Sir George Lee in granting the wife alimony *pendente lite* said, ". . . under that marriage he had a right *jure mariti* to possess himself of whatever she had . . .").

[9] Otway v. Otway, 2 Phill. Ecc. 109, 161 Eng. Rep. 1092, 1093 (1813) (". . . the wife is the injured party; she is separated from the comfort of matrimonial society, from the society of her family, not by act of Providence, but by the misconduct of her husband; she must be liberally supported. . . . The law has laid down no exact proportion; it gives sometimes a third, sometimes a moiety; according to circumstances."). The alimony was based on the common law duty of the man to support his wife. Emerson v. Emerson, 120 Md. 584, 87 Atl. 1033 (1913).

[10] 1 HOLDSWORTH, A HISTORY OF ENGLISH LAW 623 (3d ed. 1922); MADDEN, *op. cit. supra* note 4 at 257; 2 POLLOCK AND MAITLAND, *op. cit. supra* note 8 at 396.

[11] 1 HOLDSWORTH, *op. cit. supra* note 10.

[12] 12 HOLDSWORTH, A HISTORY OF ENGLISH LAW 686 (1938) ("consaguinity or the fact that one of the parties was already married . . . physical incapacity to consummate; . . .").

[13] See Bird v. Bird, 1 Lee 621, 622, 161 Eng. Rep. 227, 228 (1754), which involved nullity of a marriage because of prior marriage. Eight children were born to the second marriage. Sir George Lee after pronouncing the marriage void *ab initio* said, "As to allowing her a sum of money (though I thought her case a very compassionate one), I was of the opinion I had no warrant to do it by law or practice."

[14] 1 HOLDSWORTH, *op. cit. supra* note 10.

[15] See Fisher v. Fisher, 2 Swa. & Tr. 410, 413, 164 Eng. Rep. 1055, 1056 (1861).

where a divorce bill was sought by the husband and Parliament provided for the maintenance of the delinquent wife.[16]

In 1857 the jurisdiction over divorce proceedings in England was by statute removed from the ecclesiastical courts and placed in the Court for Matrimonial Causes.[17] The right to an absolute divorce upon certain grounds was made available[18] and alimony incident thereto was left to the discretion of the court.[19]

North Carolina's statutory development of divorce and alimony was begun some forty-three years prior to England's by the Public Laws of 1814.[20] Respecting but not adhering to the doctrine of marriage as a sacrament, the law provided for an absolute divorce decree[21] as well as a divorce *a mensa et thoro*[22] and an action for alimony without divorce.[23] In order, however, that dissolution of the marriage should not be too readily available, the law produced various obstacles.[24] Alimony for the wife upon a decree for absolute divorce, or a divorce *a mensa,* was provided for in the discretion of the court.[25] This state of the law as to alimony incident to absolute divorce obtained for over fifty-five

[16] *Id.* at 412, 164 Eng. Rep. at 1056.
[17] 20 & 21 Vict., c. 85 (1857).
[18] *Ibid.* Vict., c. 85, § 27.
[19] *Ibid.* See also Fisher v. Fisher, 2 Swa. & Tr. 410, 413, 164 Eng. Rep. 1055, 1056 (1861) (Suit for absolute divorce at the instance of the wife where the judge ordinary said; "In the present case the wife elects to have the marriage dissolved, ... She might have been relieved from the necessity of living with her husband and have remained his wife, but her election was not to do so. Still, although she did so elect, having good grounds for complaint, the respondant may be considered as in some sort depriving her of her position, and the Legislature no doubt intended that she should not seek a remedy at the expense of being left destitute. . . . I must take upon myself the arduous duty of deciding what is reasonable in this case.").
[20] N. C. Sess. Laws 1814, c. 869; Dickinson v. Dickinson, 7 N. C. 327 (1819); Reeves v. Reeves, 82 N. C. 348 (1880).
[21] N. C. Sess. Laws 1814, c. 869, § 1.
[22] N. C. Sess. Laws 1814, c. 869, §§ 1, 5.
[23] N. C. Sess. Laws 1814, c. 869, § 3.
[24] Some of these impediments were: a ten pound tax on filing the complaint; security for the cost of the action by the complainant; no absolute divorce decree valid until ratified by the General Assembly. N. C. Sess. Laws 1814, c. 869. No provision for alimony *pendente lite* or suit money to the wife. Wilson v. Wilson, 19 N. C. 377 (1837). Strict grounds and meticulous pleading requirement. N. C. Sess. Laws 1814, c. 869, § 2; Whittington v. Whittington, 19 N. C. 64, 77 (1836) ("In the ecclesiastical courts of England, the course is to require the libel to state a perfect case for a divorce, before it is admitted to proof; so that it can never be helped out by the evidence. This is probably the true meaning of the provision in our statute . . ."). Defenses of connivance, collusion, condonation or recrimination closely watched for. N. C. Sess. Laws 1814, c. 869, § 3; Hansley v. Hansley, 32 N. C. 505 (1849); Little v. Little, 63 N. C. 22 (1868); Horne v. Horne, 72 N. C. 530 (1875). Right to remarry expressly given only to the innocent party. N. C. Sess. Laws 1814, c. 869 § 4. Right of offending party to remarry expressly denied subject to bigamy punishment for violation. N. C. Sess. Laws 1827, c. 19, § 5.
[25] N. C. Sess. Laws 1814, c. 869, § 4, Wilson v. Wilson, 19 N. C. 377, 378, 379 (1837); N. C. Rev. Code c. 39, § 9 (1837); N. C. Rev. Code c. 39, § 11 (1854).

years[26] and the express power to grant alimony, *inter alia,* appeared in N. C. REV. CODE c. 39, § 11 (1854) as follows: ". . . and the court *shall have power* also to decree alimony to the wife in the case of absolute divorce upon the petition of the wife; and after a sentence nullifying or dissolving the marriage, all and every the duties, rights, and claims of the parties, in virtue of said marriage, shall cease and determine; and the plaintiff, or innocent person, shall be at liberty to marry again. . . ." [Italics added.] In the session of 1871-1872 the General Assembly revised the above section and without expressly repealing the power to grant alimony incident to absolute divorce they simply omitted it and adopted in lieu of the above quoted language the following: "After a judgment of divorce from the bonds of matrimony, all rights arising out of the marriage shall cease and determine, and either party may marry again: . . . ."[27] This section has been re-enacted down to the present and is now part of G. S. 50-11. In construing this statute our court has held that since one incident of the marriage is the duty of the man to support his wife, this section by failing to preserve that duty denies a basis for alimony as an outcome of an absolute divorce proceeding.[28] In 1919 a modification of the law in respect to alimony was enacted as follows: "That in all cases where an absolute divorce is *granted upon the grounds of separation of husband and wife for ten (now two)* successive years as provided by law, such decree granting such divorce shall not have the effect of impairing or destroying the

[26] See Davis v. Davis, 68 N. C. 180 (1873) (Case of absolute divorce on appeal as to amount of alimony).

[27] "Provided . . ." (Proviso relates to children) N. C. Sess. Laws 1871-72, c. 193 § 43; N. C. REV. STAT. c. 37, § 15 (Battle 1873). As chapter 193 made no express statement repealing the power to grant alimony incident to absolute divorce nor did the title of the act mention alimony (An Act Concerning Marriages, Marriage Settlements and The Contracts of Married Women), the policy of the Legislature in 1872 as to alimony incident to absolute divorce was not made clear. However, their attitude as to alimony incident to divorce *a mensa* seems to be somewhat modern as they provided a basis for alimony awards to the innocent hubsand as well as the innocent wife, which, in effect, gave the court the power to recognize not only the common law duty of the man to support his wife but in addition a new statutory duty of the wife to support her husband if the circumstances of the case warranted such a decision. Compare language of N. C. Sess. Laws 1871-72, c. 193 § 37 with that of N. C. REV. CODE c. 39, § 3 (1854). Also, alimony *pendente lite* and alimony without divorce was provided for the wife. N. C. Sess. Laws 1871-72, c. 193, §§ 38, 39; Webber v. Webber, 79 N. C. 572 (1878); approved in Medlin v. Medlin, 175 N. C. 529, 95 S. E. 857 (1918). Thus, there seemed to be no legislative policy against alimony in general and if this act did contemplate repealing the power to grant alimony incident to absolute divorce the logic behind the preservation of dower, year's provision and share in the personal estate to the innocent wife after absolute divorce (as was done by N. C. Sess. Laws 1871-72, c. 193 § 42) seems to impeach whatever logic was behind the denial of alimony incident to absolute divorce, as both are for the purpose of giving support and maintenance to the wife.

[28] Merritt v. Merritt, 237 N. C. 271, 74 S. E. 2d 529 (1953); Feldman v. Feldman, 236 N. C. 731, 73 S. E. 2d 865 (1952); Livingston v. Livingston, 235 N. C. 515, 70 S. E. 2d 480 (1952); Stanley v. Stanley, 226 N. C. 129, 37 S. E. 2d 118 (1946); Duffy v. Duffy, 120 N. C. 346, 27 S. E. 28 (1897).

right of the wife to receive alimony under any *judgment or decree of the court rendered before the commencement* of such proceeding for absolute divorce."[29] [Italics added.] This section of the 1919 act, as amended from ten to two years, appeared as a second proviso to G. S. 50-11 at the time of the decision in the principal case.[30] In effect this modification was a partial restoration of the law as it existed prior to 1872[31] in that it permitted some court directed alimony payments to be continued subsequent to an absolute divorce. However, this law required two separate judicial proceedings (the first for alimony, the second for absolute divorce) in order to obtain the same result which was reached in one proceeding under the old law. And, further, this provision only protected the prior alimony award from being destroyed by the absolute divorce if it was based on two years' separation; thereby leaving the absolute divorce based on the other various grounds free to destroy the alimony decree entered prior to the commencement of the action for absolute divorce.[32] Conseqently, a wife subsisting on a prior award of alimony could not obtain an absolute divorce grounded, for example, on her husband's adulterous conduct without destroying her court decree for alimony but she could seek her remedy based on two years' separation without disturbing that decree.[33] Although this modification afforded in some degree a legislative recognition of the need for extending the husband's duty to support past the decree for absolute divorce, its restrictive coverage to only one of the several grounds for absolute divorce and its procedural requirement involving a multiplicity of suits made it an inadequate protection of the wife.

In the case of *Livingston v. Livingston*,[34] where a consent order for alimony was, as in the principal case, entered subsequent to the commencement of the absolute divorce grounded on two years' separation, the court invalidated the consent order as an alimony judgment because it *"was not rendered before the commencement of the present action, ..."*[35] (as required by the language of the 1919 act above quoted). The court further stated, "The defendant did not pursue the statutory

[29] N. C. Sess. Laws 1919, c. 204, § 1.
[30] Feldman v. Feldman, 236 N. C. 731, 73 S. E. 2d 865 (1952).
[31] N. C. Rev. Code c. 39, § 11 (1854).
[32] See Stanley v. Stanley, 226 N. C. 129, 134, 37 S. E. 2d 118, 121 (1946) where the court interpreting the saving proviso of G. S. 50-11 said: ". . . a prior award of alimony is protected from annulment by a decree in absolute divorce, *based on two years' separation,* which would otherwise probably have resulted." [Italics added.]
[33] It has been argued that the Legislature only intended this section to protect the prior alimony decree from the destructive effect of an absolute divorce *at the instance of the husband.* But the court has held this erroneous and allowed the wife to pursue her right to an absolute divorce without prejudice to her formerly decreed right to alimony. Deaton v. Deaton, 237 N. C. 487,—S. E. 2d—(1953). See also Lentz v. Lentz, 193 N. C. 742, 138 S. E. 12 (1927).
[34] 235 N. C. 515, 70 S. E. 2d 480 (1952).
[35] Livingston v. Livingston, 235 N. C. 515, 517, 70 S. E. 2d 480, 482 (1952).

authority for the establishment of her rights to collect alimony from her husband, but attempted to secure the same results by the filing of a consent order in her husband's pending suit for absolute divorce. A decree providing for permanent alimony as an outcome of an action for absolute divorce is in violation of public policy and contrary to the statutory laws of North Carolina."[36] Clearly an alimony decree, with its contempt procedure advantage, cannot be upheld when obtained outside the necessary procedural steps required by statute[37] as it would run counter to the constitutional protection[38] against imprisonment for debt and thereby violate public policy.[39] But in support of an equally sound public policy, that a person shall not profit by his own wrong, it seems that the statute[40] itself violated public policy[41] by not making express provision for alimony in absolute divorce proceedings. For the ultimate outcome of an absolute divorce at the instance of the injured wife is the destruction of the marriage because of the husband's misconduct[42] which in turn destroys all the incidents of the marriage including the wife's right to maintenance. Thus it would seem that the law, which regards the husband unfit to enjoy the marital relation, not only destroys the marriage but also, Janus-like, turns its face to the opposite direction and rewards the husband for his misconduct by destroying his previously imposed duty to support. The ecclesiastical

[36] *Ibid; citing* Stanley v. Stanley, 226 N. C. 129, 37 S. E. 2d 118 (1946).
[37] N. C. GEN. STAT. § 50-11 (1949). [38] N. C. CONST. Art. I § 16.
[39] Stanley v. Stanley, 226 N. C. 129, 37 S. E. 2d 118 (1496).
[40] See note 37 *supra.*
[41] Parmly v. Parmly, 5 A. 2d 789, 790 (N. J. 1939), where, after stating that the New Jersey law imposes a continuing duty on the husband to support his divorced wife, the court said: "The continuing duty of support thus imposed is grounded in a public policy designed to make for permanence in the marriage relation, as well as to accord a measure of protection to the innocent wife. The Legislature has deemed it to be contrary to the public interest to permit the guilty husband, whose wilful misconduct had brought about a dissolution of the marriage, to also cast off the duty of support arising from the marriage status." See also Alexander v. Alexander, 13 App. D. C. 334, 347 (1898) where in referring to a statue which imposed a continuing duty, the court said: "But the statute, for obvious reasons of public policy and upon equitable grounds, authorizes the allowance of alimony . . ."; Fickel et. al. v. Granger 83 O. 101, 106, 93 N. E. 527, 528 (1910) ("Alimony is an allowance for support, which is made upon considerations of equity and public policy.") Likewise in Stearns v. Stearns, 66 Vt. 187, 189, 28 Atl. 875 (1894) the court stated: "It is apparent that such allowance is given for the support to which she was entitled by the marriage, and which she has been compelled to forego and been deprived of through his default in failing to perform the marriage contract and covenant."
[42] Misconduct of the defendant resulting in injury to the plaintiff is not required in the divorce based to two years' separation. See Taylor v. Taylor, 225 N. C. 80, 33 S. E. 2d 492 (1945) and cases there cited. However, the plaintiff cannot obtain a divorce on this ground if the separation was caused by the plaintiff's own wrong. Brown v. Brown, 213 N. C. 347, 193 S. E. 333 (1938); Byers v. Byers, 222 N. C. 298, 22 S. E. 2d 902 (1942); Reynolds v. Reynolds, 208 N. C. 428, 181 S. E. 338 (1935); Same case 223 N. C. 85, 25 S. E. 2d 466 (1943). Therefore it would seem that the judgment for divorce given the plaintiff would show innocence on the part of the plaintiff and in some degree may imply misconduct on the part of the defendant even in this type of divorce.

law, or common law,[43] offers no precedent for this result as the early courts, in respect to the sacrament of marriage, were obliged to use the legal fiction of voidance *ab initio* in order not to transgress a valid marriage.[44] Consequently, if the ecclesiastical court had awarded alimony incident to its divorce *a vinculo* the decree would have *created* a duty to support without a valid marriage to serve as a basis. In North Carolina the first issue to the jury in an absolute divorce proceeding is the determination of a valid marriage.[45] Accordingly, absolute divorce under our law does dissolve a marriage and incident thereto does destroy an existing duty to support, without substituting alimony.[46]

The General Assembly recently revised the second proviso of G. S. 50-11 to read as follows: ". . . . *provided further,* that except in the case of divorce obtained with personal service on the wife, either within or without the State, upon the grounds of the wife's adultery *a decree of absolute divorce* shall not impair or destroy the right of the wife to receive alimony and other rights provided for her under any judgment or decree of a court *rendered before the rendering* of the judgment for absolute divorce."[47] [Italics added.] This new provision has extended the scope of the old provision so that the prior alimony award cannot be destroyed by an absolute divorce on any ground, save the wife's adultery. However, it is submitted that this is not a complete solution, in that the statute still requires two separate judicial proceedings. If the wife has a just claim to alimony and also a ground for absolute divorce there does not appear to be any logical reason why she should not be permitted to have both claims adjudicated in one proceeding. In the case of *Cameron v. Cameron*[48] the court in recognizing the husband's right to a cross demand for absolute divorce in his wife's pending action for divorce *a mensa* with alimony[49] said, ". . . . right and justice require that an amendment be allowed which will enable the parties to end the . . . controversy in one and the same litigation. . . ."[50]

As the 1953 change of G. S. 50-11 now requires the alimony decree to be rendered prior to the rendering of the judgment for the absolute divorce rather than prior to the commencement of the action for it, fact situations like those in the *Feldman* and *Livingston* cases would apparently still be decided the same way because the alimony awards in

[43] The ecclesiastical law, which has not been abrogated or modified by statute, is now considered as part of the common law by our court. Medlin v. Medlin, 175 N. C. 529, 95 S. E. 857 (1918).

[44] See note 10 *supra.*

[45] Long v. Long, 206 N. C. 706, 175 S. E. 85 (1934).

[46] See note 28 *supra.*

[47] Senate Bill No. 348 Ratified April 30, 1953.

[48] 235 N. C. 82, 68 S. E. 2d 796 (1951).

[49] Cameron v. Cameron, 232 N. C. 686, 61 S. E. 2d 913 (1950), and 231 N. C. 123, 56 S. E. 2d 384 (1949).

[50] Cameron v. Cameron, 235 N. C. 82, 88, 68 S. E. 2d 796, 800 (1951) *citing* Smith v. French, 141 N. C. 1, 53 S. E. 438 (1906).

both cases were not rendered prior to, but at the same time as, the rendering of the judgment for absolute divorce. However, if the parties consent to a judgment for alimony and it is rendered prior to the dissolution of the marriage[51] (even after the commencement of the suit for absolute divorce) it seems clear that the alimony decree thus obtained would be protected.[52]

Within fifty judicial jurisdictions, including the forty-eight states,[53] the District of Columbia[54] and England[55] only North Carolina and Pennsylvania[56] have failed to provide a statutory basis for the allowance of alimony *incident* to an absolute divorce. Most of the courts in this overwhelming majority of jurisdictions have explained the purpose of this legislation on the basis that it would be contrary to public policy and against justice and equity to permit the guilty husband whose wilful misconduct had brought about the dissolution of the marriage to cast off the duty of support arising out of the marital status.[57]

[51] Generally ". . . a judgment by consent may be entered at the time specified in the stipulation or agreement. . . ." 49 C. J. S., *Judgments* § 176 at 313 (1947); Osborn et. al. v. Rogers, 112 N. Y. 573, 20 N. E. 365 (1889).

[52] "Second: 'Can alimony against the husband be awarded when there is no allegation, evidence or finding that he was the party at fault?' In an adversary proceeding . . . 'No,' but where, as here, the parties acted in agreement and the judgment was entered by consent, the answer is 'yes.' . . ." "Fourth: 'Can the consent judgment in this case be enforced against plaintiff by attachment for contempt?' Yes, it may be." Edmundson v. Edmundson, 222 N. C. 181, 186, 187, 22 S. E. 2d 576, 580, 581 (1942).

[53] ALA. CODE tit. 34 § 31 (1940); ARIZ. CODE ANN. § 27-810 (1939); ARK. STAT. ANN. § 34-1211 (Supp. 1951); CAL. CIV. CODE § 139 (1949); COLO. STAT. ANN. c. 56, § 8 (1935); CONN. GEN. STAT. § 7335 (1949); DEL. REV. CODE c. 86, §§ 3511, 3512 (1935), Brown v. Brown, 3 Terry 157, 29 A. 2d 149 (Del. 1942); FLA. STAT. ANN. § 65.08 (Supp. 1952); GA. CODE ANN. § 30-209 (1952); IDAHO CODE ANN. § 32.706 (1948); ILL. ANN. STAT. c. 40, § 19 (Supp. 1952); IND. ANN. STAT. § 3-1217 (Burns 1933); IOWA CODE ANN. c. 598, § 14 (1950); KAN. GEN. STAT. § 60-1511 (1949); KY. REV. STAT. § 403.060 (1948); LA. REV. STAT. ANN. § 9:302 (1950), Russo v. Russo, 210 La. 853, 28 So. 2d 455 (1947); ME. REV. STAT. c. 153, § 62 (1944); MD. ANN. CODE GEN. LAWS art. 16, § 15 (1951); MASS. ANN. LAWS c. 208, § 34 (1933); MICH. STAT. ANN. § 25.103 (Supp. 1951); MINN. STAT. ANN. § 518.22 (West 1947); MISS. CODE ANN. § 2743 (1942); MO. ANN. STAT. §452.070 (Vernon 1952); MONT. REV. CODES ANN. § 21-139 (1947); NEB. REV. STAT. § 42-318 (Supp. 1951); NEV. COMP. LAWS § 9463 (Supp. 1949); N. H. REV. LAWS c. 339 § 16 (1942); N. J. STAT. ANN. § 2:50-37 (Supp. 1951); N. M. STAT. ANN. § 25-706 (Supp. 1951); N. Y. CIV. PRAC. ACT. § 1155 (Clevinger 1951); N. D. REV. CODE § 14-0524 (1943); OHIO GEN. CODE ANN. §8003.17 (Supp. 1952); OKLA. STAT. ANN. tit. 12, § 1278 (1937); ORE. COMP. LAWS ANN. § 9-914 (1940); R. I. GEN. LAWS c. 416, § 5 (1938); S. C. CODE §20-113 (1952); S. D. CODE § 14.0726 (1939); TENN. CODE ANN. § 8446 (Williams 1934); TEX. REV. CIV. STAT. ANN. art. 4638 (1925), Keton v. Clark, 67 S. W. 2d 437 (Tex. 1933); UTAH CODE ANN. § 30-3-5 (1953); VT. REV. STAT. § 3244 (1947); VA. CODE § 20-107 (1950); WASH. REV. CODE § 26.08.110 (1951); W. VA. CODE ANN. § 4715 (1949); WIS. STAT. § 247.26 (1951); WYO. COMP. STAT. ANN. § 3-5916 (1945).

[54] D. C. CODE ANN. § 16-411 (1951).

[55] HALS. STAT. ENG. Vol. II, c. 190 (2d ed. 1949); Bennett v. Bennett, 2 K. B. 572 (1951).

[56] Hooks v. Hooks, 123 Pa. Super 507, 187 Atl. 245 (1936). (Except alimony provision for the insane husband or wife).

[57] Alexander v. Alexander, 13 App. D. C. 334 (1898); Bialy v. Bialy, 167

Thus in the light of historical background and legislation elsewhere, it seems that the North Carolina legislation on the matter is inadequate and stands almost alone. Our courts cannot deal fully with the problems of marital relations until the law permits the adjudication of both the economic and personal relations of the parties; for neither the wife nor society is served when she seeks her legal right to divorce at the expense of being left destitute.[58]

Furthermore, there obviously is no legislative policy against allowing alimony to continue after absolute divorce; for G. S. 50-11 does preserve to the wife alimony acquired previous to the absolute divorce decree. But this law compels her to pursue roundabout procedure, and also results in technical pitfalls such as the one involved in the *Feldman* case. It may also induce her to settle her economic future by consent or contract without the impartial supervision of the court.

Therefore, as the court has intimated that the solution to this complexity lies within the ambit of legislation rather than judicial decision,[59] it is submitted that our statute should be revised so as to provide the courts with the discretionary power[60] to award alimony *incident* to absolute divorce.

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Mich. 559, 133 N. W. 496 (1911); Swanson v. Swanson 223 Minn. 354, 46 N. W. 2d 878 (1951); Parmly v. Parmly, 125 N. J. Eq. 545, 5 A. 2d 789 (1939) cited in 27 C. J. S., *Divorce* § 229 (1941) and cases there cited; Hill v. Hill, 197 Okla. 697, 174 P. 2d 232 (1946); Warren v. Warren, 36 R. I. 167, 89 Atl. 651 (1914); Brown v. Brown, 156 Tenn. 619, 4 S. W. 2d 345 (1928); Stearns v. Stearns, 66 Vt. 187, 28 Atl. 875 (1894).

[58] Darsie v. Darsie, 118 P. 2d 898, 900 (Cal. 1941) ("In its sovereign capacity the state is interested not only in maintaining the marriage unless good cause for its dissolution exists, but that there shall be a proper division of the community property of the parties and provision for reasonable future support of the spouse not at fault, so that the burden therefor shall rest on the husband, where it belongs, and not on the state.").

[59] "Whether further remedies are to be provided so that a man may be required to support his life after the marriage has been dissolved is for the General Assembly to decide." Feldman v. Feldman, 236 N. C. 731, 734, 73 S. E. 2d 865, 868 (1952). See also Deaton v. Deaton, 237 N. C. 487, 489, 490, — S. E. 2d — (1953), where the court in applying G. S. 50-11 ruled that an absolute divorce obtained by *either* party on two years' separation did not destroy an alimony decree rendered prior to the commencement of the divorce proceeding and said: "Whether a statute produces a just or an unjust result is a matter for legislators and not for judges. We are nevertheless constrained to observe that justice does not necessarily require that a faithless husband shall be relieved of all responsibility for the support of an innocent wife who has spent her youth in his service merely because the wife sees fit to put an end in law to a marriage long since ended in fact by his broken vows."

[60] See 27 C. J. S., *Divorce* § 232 (1941) and cases there cited; See also Bialy v. Bialy, 167 Mich. 559, 566, 133 N. W. 496, 499 (1911), where in discussing the discretion to be exercised, the court stated, "The Court should take into consideration the past relations and conduct of both parties, the health and age of each, whether or not either is responsible for the support of others, the amount and source of the husband's property, their station in life and manner of living, and especially, in view of all the testimony in the case, what sum will leave the financial condition of the wife during her life not inferior to what it would be if the husband's conduct had been correct and the marriage undissolved."

Federal Estate Tax—Marital Deduction—Apportionment

Death taxes are levied either on the privilege of transmitting or receiving property.[1] The federal estate tax is of the former type[2] and is imposed on the net estate of decedents[3] "to the extent of the interest of the decedent at the time of his death."[4] The ultimate burden of the tax may vary depending upon (1) the jurisdiction administering the estate, (2) the type of property involved, and (3) the presence or absence of direction of the burden by the testator or settlor.[5] The burden of the tax is a matter of state law[6] and in the majority of common law states the tax is payable from the residue of the estate[7] unless a contrary intention is shown by the decedent.[8] An analysis of the cases requiring payment of the tax from the residue of the estate shows the following theories relied upon for the result: (1) the tax is levied on the whole estate and not the individual shares, thus there is a presumption against requiring individuals to contribute to the tax;[9] (2) the Internal Rev-

[1] MONTGOMERY, FEDERAL TAXES 462 (1952).
[2] INT. REV. CODE § 810, New York Trust Co. v. Eisner, 256 U. S. 345 (1921).
[3] INT. REV. CODE § 810, Reg. 105 § 81.4.
[4] INT. REV. CODE § 811 (a), Reg. 105 §81.13
[5] All three factors are usually present in every case. The factors may further be classified as follows: (1) "jurisdiction," (a) common law states, (b) equitable apportionment states, (c) statutory apportionment states; (2) the "property," (a) testamentary property, (b) intestate property and transfers of property included in decedent's estate under certain provisions of the Internal Revenue Code, *e.g.*, § 811 (c) and (d); (3) this material does not contemplate covering the cases on the specific language of testator necessary to direct the burden of taxes, but only the result obtained in certain cases after the court has ruled on the meaning of the words.
[6] "We are of opinion that Congress intended the federal estate tax should be paid out of the estate as a whole and that the applicable state law as to the devolution of property at death should govern the distribution of the remainder and the ultimate impact of the federal tax. . . ." Riggs v. Del Drago, 317 U. S. 95, 97 (1942).
"Considering the problem as an open question, we begin with the principle . . . that the federal estate tax statute leaves it to the states to detrmine how the tax burden shall be distributed among those who share in the taxed estate." *In re* Heringer's Estate, 38 Wash. 2d 399, 403, 230 P. 2d 297, 300 (1951).
[7] Y.M.C.A. v. Davis, 106 Ohio St. 366, 140 N. E. 114 (1922), *aff'd*, 264 U. S. 47 (1924); Central Trust Co. v. Burrow, 144 Kan. 79, 58 P. 2d 469 (1924); Bemis v. Converse, 246 Mass. 131, 140 N. E. 686 (1923); Gelin v. Gelin, 296 Minn. 516, 40 N. W. 2d 342 (1949); Farmers Loan & Trust Co. v. Wintrop, 238 N. Y. 477, 144 N. W. 686 (1924); Craig v. Craig, 232 N. C. 729, 62 S. E. 2d 336 (1951); Seattle-First National Bank v. Macomber, 32 Wash. 2d 696, 203 P. 2d 1078 (1949).
"The unfortunate nature of this situation was pointed out in 1930, by the New York State Commission to Report Defects in the Law of Estates in the finding that 'experience has demonstrated that in most estates, the residuary legatees are the widow, children or nearer and more dependent relatives.'" Mitnick, *State Legislative Apportionment of the Federal Estate Tax*, 10 MD. L. REV. 289 (1949).
[8] "A careful reading of decedent's will fails to find any expression of decedent's intention insofar as payment of federal estate tax is concerned." Gelin v. Gelin, 229 Minn. 516, 520, 40 N. W. 2d 342, 345 (1949). "In other jurisdictions, the majority of courts have held that the federal estate tax burden is a charge against and payable from the residue of an estate. . . ." *Id.* at 522, 40 N. W. 2d at 346.
[9] This argument is based on the nature of the tax and not on testator's silence

enue Code requires the personal representative to pay the tax, therefore it must be taken from the residuary estate in the same manner as debts and expenses of administration;[10] and (3) "the courts can not speculate concerning the intention of settlors and testators as to where they intend the burden of taxes to rest."[11] Some states have enacted apportionment statutes distributing the tax burden[12] and in two situations the Internal Revenue Code allows the personal representative limited rights of recovery where there has been no direction as to payment of the tax.[13]

In 1948 Congress enacted a complicated marital deduction provision in order to put non-community states on a substantial footing with those states having community property rights.[14] In substance, it allows a deduction up to 50% of the adjusted gross estate for property passing to the surviving spouse if certain requirements are fulfilled.[15]

In *Wachovia Bank & Trust Co. v. Green*,[16] a case of first impression in North Carolina, the widow dissented from decedent's will and elected to take her statutory share.[17] In an action by the executor for direction

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as to the burden of the tax. Plunkett v. Old Colony Trust Co., 233 Mass. 471, 124 N. E. 265 (1919).

Perhaps the leading decision on this point is Y.M.C.A. v. Davis, 264 U. S. 47, 50 (1924) where the court held: "What was being imposed here was an excise upon the transfer of an estate upon death of the owner. It was not a tax upon death of the owner. . . . What this law taxes is not the interest to which the legatees and devisees succeeded on death, but the interest which ceased by reason of the death."

[10] In Amoskeag Trust Co. v. Trustees of Dartmouth College, 89 N. H. 471, 200 Atl. 786 (1938), the court held as the executor was required to pay the tax before distribution, the tax was a charge against the estate, and like other debts of administration, must be paid from the residue. Hughes v. Sun Life Assur. Co. 159 F. 2d 110 (9th Cir. 1946); First Nat. Bank v. Hart, 383 Ill. 489, 50 N. E. 2d 461 (1943); Gelin v. Gelin, 229 Minn. 516, 40 N. W. 2d 342 (1949). *Cf.* Bigoness v. Anderson, 106 F. Supp. 986 (D. D. C. 1952), holding that there was no reason to distinguish between the federal estate tax and debts of the decedent and that if personalty in the residuary estate was not sufficient to pay the tax then resort to the realty in the residuary estate could be made.

[11] Bemis v. Converse, 246 Mass. 131, 149 N. E. 686 (1923) (Testator was silent on the subject of taxes.) For collection of cases involving testamentary direction see Notes, 115 A. L. R. 916; 117 A. L. R. 1186; 15 A. L. R. 2d 1216.

[12] ARK. STAT. ANN. § 63-150 (1947); CAL. PROB. CODE §§ 970-977 (Ann. 1944); CONN. GEN STAT. §§ 2075-2081 (1949), CONN. GEN. STAT. § 227a (Supp. 1949), CONN. GEN. STAT. § 449b (Supp. 1951); DEL. REV. CODE 1949 c. 405 (1935); FLA. STAT. ANN. § 734.041 (Supp. 1952); MASS. ANN. LAWS c. 65A, § 5 (Supp. 1952); MD. ANN. CODE GEN. LAWS art. 81, § 160 (1951); NEB. REV. STAT. §§ 77-2108 through 77-2112 (1943, reissue 1950); N. H. REV. LAWS c. 88-A, § 1 (as added by L. 1943 c. 75 and L. 1947 c. 102); N. J. STAT. ANN. §§ 3:26-45-3:26-53 (Supp. 1951); N. Y. DEC. EST. LAW § 124; PA. STAT. ANN. tit. 20 §§ 881-887 (Supp. 1952); TENN. CODE ANN. § 8350.7 (Williams, Supp. 1952); TEX. REV. CIV. STAT. ANN. art. 3883a. (1952); VA. CODE §§ 64-150-64-155 (1950).

[13] INT. REV. CODE § 826 (c) (insurance proceeds); INT. REV. CODE § 826 (d) (property over which decedent had a power of appointment).

[14] INT. REV. CODE § 812 (e), Reg. 105 § 81.47, 81.48.

[15] *Id.*

[16] 236 N. C. 654, 73 S. E. 2d 879 (1953).

[17] N. C. GEN. STAT. § 30-1 (1943 Recomp. 1950) (time and manner of dissent); N. C. GEN. STAT. § 30-2 (1943, Recomp. 1950) "Upon such dissent the widow shall have the same rights and estates in the real and personal property of her husband as if he had died intestate."

as to the allocation of the federal estate tax liability the court held that the widow's one-half interest in the personalty of the estate[18] would be computed after the payment of the federal estate tax. The decision reduced the share passing to the widow which lowered the marital deduction[19] and resulted in a higher federal tax on the estate. However, the decision in this particular case was not inequitable because had the decision been otherwise the bequests to the principal beneficiaries would have been wiped out. The court rejected the argument advanced concerning the purpose of the marital deduction,[20] and held that pertinent statutes[21] requiring distribution be made after the payment of debts. The federal estate tax was held to come within the meaning of G. S. § 28-105:[22]

> "The debts of the decedent must be paid in the following order:
>
> ". . .
>
> "Fourth Class. Dues to the United States and to the State of North Carolina."[23]

The court relied on *Craig v. Craig*[24] where it was held that the estate tax was chargeable to the residuary estate thus indicating the tax "should be regarded as a charge against the whole estate, to be paid

[18] N. C. GEN. STAT. § 28-149 (3) (1943, Recomp. 1950). The statute has recently been amended, See note 27, *infra*. (Realty was not involved in the litigation).

[19] INT. REV. CODE § 812 (e) (1) (E) (i). This section requires the marital deduction to be reduced by the amount of the tax payable on the interest of the spouse. Thus, in the instant case had the tax been computed after the share was allotted to the widow the reduction clause of the Code would not apply.

[20] "To place the property of married persons in common-law states on a more nearly equal estate tax basis with the now reinstated "splitting" principle of community property, the 1948 Act also amended the law to permit a married person holding separate property to achieve substantially the same "splitting" advantage, provided that he also accepted some of the community property disadvantages. This had been accomplished by the addition . . . of a "marital deduction" in computing the net estate subject to tax." MONTGOMERY, FEDERAL TAXES 784 (1952).

[21] "The statute now in force in this state prescribes that the dissenting widow shall recive one-half the personal state . . . and directs the personal representative, in case of intestacy, after payment of debts in the order prescribed by G. S. 28-105; to distribute the surplus in the manner set out in G. S. § 28-149. The word surplus means the personal property left after payment of the debts of the deceased and costs of administration." Wachovia Bank & Trust Co. v. Green, 236 N. C. 654, 659, 73 S. E. 2d 879, 883 (1953).

[22] N. C. GEN. STAT. § 28-105 (1943, Recomp. 1950).

[23] "It will be noted that there are no citations in the General Statutes under this subsection. Governmental claims against the individual have much increased both in number and complexity since this law was written, and it is difficult to know just what the rule means. It would certainly seem to include upaid income taxes, both state and federal, if such taxes are not included in class three. It would also seem to include any other form of tax, assessment or penalty imposed by state or federal law which the United States or the State of North Carolina could collect by legal process of any nature." DOUGLAS, ADMINISTRATION OF ESTATES IN NORTH CAROLINA § 218 at p. 166 (1948).

[24] 232 N. C. 729, 62 S. E. 2d 336 (1950).

from the residuary estate in the same manner as debts and expenses of administration."[25] Thus, North Carolina followed the majority rule by refusing to apportion taxes without legislative guidance. Subsequent tax legislation which would have nullified the effect of the instant case failed.[26]

However, an amendment to the North Carolina distribution statute[27] has been enacted which will allow the dissenting widow her statutory share in personal property free of the federal estate tax in a situation comparable to the facts of the *Green* case.

The distribution provision before the recent amendment provided[28] that if a man died intestate leaving a wife but no children the widow would get all of the personal property up to $10,000 with the remainder distributed one-half to the widow and one-half to the decedent's next of kin who are in equal degree of kinship, or their legal representative. In case the decedent died testate, and the widow dissented from the will, she would take one-half the personal estate and the remainder would be distributed according to the terms of the will.

Chapter 1325 (amendment to G. S. § 28-149 (3)) does not change the basic distributions of personalty in form, but far different monetary results may be obtained because of the addition of provisions relating to the federal estate tax.

Chapter 1325 provides that in the situation where the widow is to receive one-half the estate of the intestate which exceeds $10,000, the one-half will be computed before any deduction for the federal tax. The remaining one-half which goes to the husband's next of kin is subject to the federal tax. Apparently the $10,000 to be allotted the widow in this situation (where the estate exceeds $10,000) is subject to the federal tax for it is not expressly exempted. However, it would seem that because the share allotted to the next of kin is expressly made subject to the federal tax that the $10,000 to the widow is exempt from the tax in the same manner as her one-half share in the estate which exceeds $10,000. If the husband dies testate and the widow dissents from the will her one-half share in the personalty is exempt from the tax. The remaining one-half which is distributed according to the decedent's will bears the burden of the federal estate tax. Chapter 1325 further provides that nothing in the act will be construed to deprive a widow of her right to a year's support.

[25] Wachovia Bank & Trust Co. v. Green, 236 N. C. 654, 662, 72 S. E. 2d 879, 885 (1953). In Northern Trust Co. v. Wilson, 344 Ill. App. 556, 101 N. E. 2d 604 (1951) the distribution statute provided that the dissenting spouse would be entitled to a certain share "after the payment of all just claims." The federal estate tax was held to be a "just claim" and the widow received her share after deduction for the estate tax as in the principal case.

[26] S. B. 357, N. C. General Assembly 1953. Reported unfavorably April, 1953.

[27] H. B. 851, c. 1325 N. C. General Assembly 1953.

[28] N. C. Gen. Stat. § 28-149 (3) (1943, Recomp. 1950).

Ohio, in *Miller v. Hammond*,[29] reached a decision contra to the principal case on similar facts. The dissenting widow was allowed her statutory share free of the federal tax. The Ohio statutes involved are comparable to those of North Carolina[30] (but before c. 1325 was enacted in North Carolina). The Ohio court had to distinguish the often-quoted decision of *Y.M.C.A. v. Davis*,[31] where residuary charitable institutions were burdened with the federal estate tax notwithstanding the federal charitable deduction provisions. The court held that *Y.M.C.A. v. Davis* was decided before the federal marital deduction provision and it involved testamentary property whereas the *Miller* case involved the dissenting share of a widow, *i.e.*, intestate property. This decision was followed by *McDougall v. Central National Bank*[32] where the court apportioned the tax between an intestate estate and an inter vivos trust. However, in *Vandervort v. Hodge*,[33] where the estate consisted entirely of *testate property*, any trend toward a full apportionment rule in Ohio was reversed and the residuary estate was charged with the full burden of the federal estate tax. The court reiterated the doctrine of *Y.M.C.A. v. Davis* and held it had been approved and distinguished in the *Miller* and *McDougall* cases.

Kentucky has long recognized the equitable rule of apportionment where non-probate property was involved[34] and recently allowed the dissenting spouse to take her share tax free[35] on the premise that equitable apportionment is within the inherent power of the courts. The court reasoned that the marital deduction was enacted to equalize tax rights between community and non-community property states, and as the spouse's share would not add to the tax by virtue of the marital deduction she would not be liable for payment of any of the tax. Rhode Island has apportioned the tax between testamentary and non-testamentary property. In *Industrial Trust Co. v. Budlog*[36] this court required contribution from six inter-vivos trusts where testator had directed that taxes be paid from the residuary estate but neglected to mention "any taxes which might be imposed by reason of the inter-vivos

[29] 156 Ohio St. 475, 104 N. E. 2d 9 (1952).
[30] OHIO GEN. CODE ANN. § 10509-121 (Supp. 1951).
[31] See note 7 *supra*.
[32] 157 Ohio St. 45, 104 N. E. 2d 441 (1952). The theory of this case seemed to be that there was a "common obligation" resting on the intestate estate and the trust property to pay the estate tax, thus, it was apportioned between the two types of property. Query as to whether there is any more of a common obligation in this situation than there is in a case involving only probate assets, or the dissenting share of a spouse.
[33] CCH INH. EST. & GIFT TAX REP. ¶ 17,706 (1950), Ohio Ct. App. (1st. App. D. 1953).
[34] Hampton's Admr. v. Hampton, 188 Ky. 199, 221 S. W. 496 (1920); Martin v. Martin's Admr., 283 Ky. 513, 142 S. W. 2d 164 (1940); Trimble v. Hatcher's Ex'rs., 295 Ky. 178, 173 S. W. 2d 985 (1943).
[35] Lincoln Bank and Trust Co. v. Huber, 240 S. W. 2d 89 (Ky. 1951).
[36] 77 R. I. 428, 76 A. 2d 600 (1951).

gifts in question."[37] Georgia[38] and Louisiana[39] have applied the equitable rule and recently Indiana joined the ranks of the minority with a strong denunciation of the common law rule. The latter court in *Pearcy v. The Citizens Bank and Trust Co.*[40] said:

> We believe the cases from the states holding against the right of apportionment except where there is specific statutory authority therefore, or a specific provision therefor, in the will of the decedent, are based upon an erroneous concept of the Federal Estate Tax Act and a misinterpretation of provisions thereof.

The court applied the apportionment rule to survivorship property.

The apportionment rule has merit especially where intestate shares or non-testamentary property, such as inter-vivos trusts, gifts, and survivorship rights are involved because of the weakness of the residue argument in situations such as these. It is well settled that the ultimate burden of the tax is a matter of state law, thus, why is it necessary to hold that because the federal estate tax is a charge on the whole estate, the tax is in the position of debts of the estate and accordingly its payment falls on the residuary estate? It would seem that the non-testamentary estate could be distinguished from the testamentary estate of the decedent and be made to bear its own burden of the tax, if any.

[37] The testator's meaning was held to be a matter of conjecture. Two previous Rhode Island cases apportioning the federal estate tax were relied on by the court. Trust Co. v. Watson, 76 R. I. 223, 68 A. 2d 916 (1949) (insurance proceeds); Hooker v. Drayton, 69 R. I. 290, 33 A. 2d 206 (1942) (property passing under power of appointment). Contribution in both cases were allowed pursuant to the provisions of the Int. Rev. Code, note 13 *supra*. However, in the *Industrial Trust Co.* case the court reasoned there was no distinction between property passing under a power of appointment and property which a decedent had placed in trust. Both types were out of a decedent's control, and neither type of property constitutes part of a decedent's true estate. The Rhode Island court was not deterred by the fact that the state did not have an apportionment statute.

The Rhode Island court did not invoke the doctrine of "implied direction," *i.e.*, allowing contribution from the trust property because the testator did not mention it in his direction, but held the distinguishing factor was between testamentary and non-testamentary property. See Note, 31 B. U. L. Rev. 233, 235 (1951).

[38] Regents of University System of Georgia v. Trust Co. of Georgia, 194 Ga. 255, 21 S. E. 2d 691 (1942). The federal estate tax was apportioned between the individual estate of testatrix and property passing under power of appointment notwithstanding a statute which provided the tax would be a charge against the estate and not against the individual shares. The court held the property passing under the appointment was separate and distinct from the donee's own estate thus both classes of property should bear the burden of the tax. Section 826 (d) of the Code was not in effect at the decedent's death, thus, the court had to rely solely on its equitable powers to apportion the tax.

[39] Succession of Ratcliff, 212 La. 563, 33 So. 2d 114 (1947) (survivorship property). ". . . equitable principles demand that the burden be divided between all persons sharing in the estate in accordance with their respective interests." *Id.*, 33 So. 2d at 117.

[40] 121 Ind. App. 136, 96 N. E. 2d 918 (1951). In this case the court relied on equitable apportionment for survivorship property but required contribution from beneficiaries of insurance proceeds pusuant to the Int. Rev. Code provision, note 13 *supra*.

This reasoning is even stronger in a situation where decedent has directed the burden of the tax on the residuary without mentioning inter-vivos transfers or survivorship property.

Those jurisdictions having apportionment statutes[41] reach all of the assets by typically providing that the tax will be apportioned among those interested in the estate[42] but those interests will be allowed any deductions granted under the act imposing the tax.[43] The latter phrase allows the parties who qualify to take the deductions offered in the Internal Revenue Code.[44] However, apportionment states are faced with a conflict between their proration laws and their distribution statutes as to the method of computation of the share. The widow's share has been computed tax free[45] notwithstanding a distribution statute declaring her interest to share ratably in the tax, because the apportionment act indicated a legislative policy not to tax any interest that did not add to the tax burden. The same result has been reached on the theory that the distribution statute did not provide a method of computation of the widow's share but only set an upper limit to which the taker was entitled.[46]

Connecticut allowed the widow's share to pass tax free despite a direction by testator to the executor "to pay . . . all my just and lawful debts, funeral and testamentary expenses."[47] The words did not cover the payment of federal estate taxes, said the court, and if the marital deduction was not allowed it would substantially increase the tax. In *Estate of Donald Bayne,*[48] testator gave one-half of the residuary estate in trust to his wife for life, and created two trusts of one-fourth each from the other half. Testator directed "all . . . taxes which may accrue hereunder . . . be paid out of my general estate." It was held that the

[41] See note 12 *supra.*

[42] CAL. PROB. CODE § 970 (Ann. 1944) ("shall be equitably prorated among persons interested in the estate to whom such property is or may be transferred or to whom any benefit accrues.")

[43] CAL. PROB. CODE (Ann. 1944) ("In making a proration allowances shall be made for any exemptions granted by the act imposing the tax and for any deductions allowed by such act for the purpose of arriving at the value of the net estate.")

[44] INT. REV. CODE § 812.

[45] *In re* Fuch's Estate, 60 So. 2d 536 (Fla. 1952).

[46] *In re* Peter's Will, 88 N. Y. S. 2d 651 (1949), *affd.* 89 N. Y. S. 2d 651 (1949); Estate of Frank Wolf, CCH INH. EST. & GIFT TAX REP. ¶ 17,705 (1950), N. Y. Surr. Ct., N. Y. Co. (1953). The "upper limit" doctrine originated in *In re* Goldsmith's Estate, 177 Misc. 298, 30 N. Y. S. 2d 474 (1941) where the court distinguished between the words "intestate share" and "share in intestacy." The New York distribution statute limited the "intestate share" to no more than one-half the net estate of decedent. The court held that this was a "term of art" setting an upper limit to the "share in intestacy" but not providing a method of computation of the "share in intestacy."

[47] Jerome v. Jerome, CCH INH. EST. & GIFT TAX REP. ¶ 17,666 (1950), Conn. Sup. Ct. Err. (1952).

[48] CCH INH. EST. & GIFT TAX REP. ¶ 17,321 (1950), N. Y. Surr. Ct., Westch. Co. (1950).

words "general estate" were equivalent to "residuary estate" and amounted to an implied direction against apportionment but there was no direction for or against apportionment of such taxes imposed on the residuary gifts within the respective shares comprising the residuary estate.

The foregoing material has pointed up some of the highly technical difficulties encountered in arriving at an individual's estate tax burden. The trend is towards equitable apportionment and some states have bills in the current legislative sessions to provide for statutory apportionment.[49] In the principal case, North Carolina seems to have decided to stay inexorably with the common law view of pressing the entire estate tax burden on the residuary estate. The court distinguished a Kentucky case as applying an equitable apportionment rule[50] which indicates it will not adopt any. The recent amendment to the North Carolina distribution statute, c. 1325, will allow the widow a full marital deduction where there are no children, but it is submitted that a complete apportionment statute would be more equitable and it would give monetary relief to those unlucky enough to "reside in the residue."

JACK D. YARBROUGH.

Landlord and Tenant—Leases—Rights of Lessees under Oral Leases

In decisions growing out of a recent litigation, involving three appeals,[1] the Supreme Court has clarified considerably the North Carolina position on some of the rights of oral lessees, but at the same time has cast some doubt as to other rights under such oral leases.[2]

The litigation involved a situation wherein the plaintiff had, by oral agreement, leased two tobacco warehouses for three tobacco marketing

[49] Arizona—H. 45. Amends estate tax code to conform to federal provisions governing marital deduction. (Approved, March 13, 1953).
Connecticut—S. 203. Provides a more equitable apportionment of the federal estate tax within a fund consisting of the proceeds of life insurance. (Conn. has an apportionment statute, see note 12, *supra*).
Iowa—S. 345. Provides for equitable apportionment of estate tax among those interested in the estate.
Nebraska—LB. 578. Provides that the interest of any surviving spouse shall be determined prior to the payment of any federal estate tax or state inheritance tax. (Neb. has an apportionment statute. See note 12, *supra*).
Tennessee—S. 597. Permits marital deduction on inheritance tax. (Tenn. has an apportionment statute. See note 12, *supra*).
Vermont—H. 509. Relates to apportionment of federal estate tax in certain cases.
West Virginia—H. 24. Relates to the apportionment of death taxes among persons interested in the estate of decedent. CCH INH. EST. & GIFT TAX REP. (1950), 1953 Pending Legislation, ¶ 86,501, 509.

[50] Note 35 *supra*.

[1] Perkins v. Langdon, 231 N. C. 386, 57 S. E. 2d 407 (1950); Perkins v. Langdon, 233 N. C. 240, 63 S. E. 2d 565 (1951); Perkins v. Langdon, 237 N. C. 159, 74 S. E. 2d 634 (1953).

[2] It will be the object of this note to point up both results.

seasons. While the plaintiff was out of possession at the end of the first season, the lessor conveyed the property to a third party, and the plaintiff brought suit against the lessor for damages.[3]

After two appeals of the case to the Supreme Court on procedural matters,[4] in the trial on the merits, the jury found the facts as alleged in the amended complaint to the effect that the defendant-lessor had, while the plaintiff-lessees were out of possession, conveyed the orally leased property to good faith purchasers for value and without notice in violation of an agreement that "during said term, the defendant would retain ownership . . . and not sell the same."[5] The trial court rendered judgment for damages accordingly and the Supreme Court affirmed on appeal, primarily on the basis of the express covenant not to sell.[6] The Court further held that even though the purchasers had knowledge of the existence of a lease on the property, they were none the less justified in relying on representations by the vendor that the outstanding lease was terminable on sale of the reversion at the end of one year.[7]

In reaching its conclusions, the court reaffirmed its position[8] and clearly aligned itself with the almost universal rule that a landowner can sell the reversionary interest in the land, subject to a lease, in the

[3] Perkins v. Langdon, 237 N. C. 159, 74 S. E. 2d 634 (1953).

[4] On the first appeal in 231 N. C. 386, 57 S. E. 2d 407 (1950), upon demurrer ore tenus in the Supreme Court, the court held that mere allegations that the lessor had sold the premises during the term of the lease and that the lessees had been damaged as a result thereof, failed to state a cause of action, and remanded with leave to amend. In so holding the court said, "The gravaman of plaintiffs' cause of action is the sale of the leased warehouses before the expiration of the lease. But the weakness of the plaintiffs' position lies in the fact that the lease contains no stipulation against a sale of the leased properties during its existence . . ." *Id.* at 389, 390, 57 S. E. 2d at 409, 410.

Thereupon the complaint was amended to allege an agreement that the defendant covenanted not to sell for the term of the lease, and that while the plaintiffs were not in possession, the defendants conveyed to persons who purchased for value, in good faith and without notice. Perkins v. Langdon, 233 N. C. 240, 241, 63 S. E. 2d 565, 567 (1951). The case was again appealed by the defendant upon denial of motion to strike; whereupon the Court modified and affirmed. Perkins v. Landon, 233 N. C. 240, 63 S. E. 2d 565 (1951).

[5] Perkins v. Langdon, 233 N. C. 240, 241, 63 S. E. 2d 565, 567 (1951).

[6] Perkins v. Langdon, 237 N. C. 159, 74 S. E. 2d 634 (1953).

[7] ". . . the question here presented is . . . whether, acting as ordinary prudent persons would have done, the purchasers were called upon, under the circumstances, to make inquiry of the lessees." Perkins v. Langdon, 237 N. C. 159, 169, 74 S. E. 2d 634, 642 (1953).

As to whether reliance of the grantee on statements made by the grantor in reference to reports regarding his title may or may not be relied on, the majority of the courts, as does North Carolina in this case, hold that justifiable reliance depends on the circumstances of the case. U. S. v. Detroit Timber & Lumber Co., 200 U. S. 321 (1906); Chicago v. Witt, 75 Ill. 211 (1874); Skeel v. Spraker, 8 Paige 182 (N. Y. 1840); Ohio River Junction R. R. v. Pennsylvania Co., 222 Pa. 573, 72 Atl. 271 (1909). *Cf.* Note, 38 L.R.A. (N.S.) 307 (1912).

[8] Perkins v. Langdon, 231 N. C. 386, 57 S. E. 2d 407 (1950); Wilcoxon v. Donelly, 90 N. C. 245 (1884); Bullard v. Johnson, 65 N. C. 436 (1871); Kornegay v. Collier, 65 N. C. 69 (1871); N. C. GEN. STAT. §§ 42-2, 8 (1943, recompiled 1950); 1 MORDECAI'S LAW LECTURES, 2d Ed., pp. 596, 597 (1916).

absence of a covenant to the contrary,[9] and that the tenant cannot resist the transfer or ground a cause of action on the transfer or resultant change of landlords.[10] It is further recognized, both in North Carolina and elsewhere, that a bona fide purchaser without notice of outstanding equities in the land, as in the case of a leasehold right, takes title free from such encumbrances.[11] This gives rise to the question of what constitutes notice to purchasers in North Carolina.

In the case of written leases, capable of registration, the answer is clear, inasmuch as under our Registration Act,[12] notice arises from registration only,[13] and even actual notice will not suffice in the absence

[9] Garetson v. Hester, 57 Cal. App. 2d 39, 133 P. 2d 863 (1943); Achtar v. Posner, 56 A. 2d 797 (Md. 1948); Curry v. Engle, 91 N. E. 2d 41 (Ohio App. 1949); Brown v. Brown, 164 Pa. Super. 350, 64 A. 2d 506 (1949); Peterman v. Kingsley, 140 Wis. 666, 123 N. W. 137 (1909); 2 McADAMS, LANDLORD AND TENANT § 233 (5th Ed., Ambert, 1934); 3 THOMPSON, REAL PROPERTY § 1380 (Perm. Ed. 1940); 1 TIFFANY, LANDLORD AND TENANT § 146 (3rd Ed. 1910); 1 AMERICAN LAW OF PROPERTY, §§ 3.59, 4.67 (1952) and cases cited therein; 51 C. J. S., *Landlord and Tenant*, § 258(a), p. 895 (1947) and cases cited therein.

[10] Garetson v. Hester, 57 Cal. App. 2d 39, 133 P. 2d 863 (1943); Peterman v. Kingsley, 140 Wis. 666, 123 N. W. 137 (1909). Perkins v. Langdon, 237 N. C. 159, 164, 74 S. E. 2d 634, 639 (1953) ("This is so because such transfer of the reversion, subject to the lease, neither terminates the leasehold estate nor deprives the tenant of any of his rights to land."). N. C. GEN. STAT. § 42-8 (1943, recompiled 1950) ("The grantee in every conveyance of reversion in lands . . . has the like advantages and remedies . . . as the grantor or lessor or his heirs might have; and the holders of such estates . . . have the like advantages and remedies against the grantee of the reversion. . . .").

See also, as to the general proposition that the lessee loses no rights by transfer of the reversion, Miller v. Compton, 185 S. W. 2d 754, 756 (Tex. Civ. App. 1945).

[11] Chandler v. Cameron, 229 N. C. 62, 47 S. E. 2d 528 (1948); Lynch v. Johnson, 171 N. C. 611, 89 S. E. 61 (1916) (dissent); Beeson v. Smith, 149 N. C. 142, 62 S. E. 879 (1908); Derr v. Dellinger, 75 N. C. 300 (1876); Winborn v. Gorrell, 38 N. C. (3 Ired. Eq.) 117 (1843) ("It is only the purchaser of the legal title without notice of a prior equity who can hold against . . . notice."); Polk v. Gallant, 22 N. C. 395 (1839); Smith v. U. S., 153 F. 2d 655 (5th Cir. 1946); Clemens v. Fuller, 209 Ark. 849, 192 S. W. 2d 762 (1946); Prince Surf Hotel v. McLendon, 74 Ga. App. 805, 41 S. E. 2d 556 (1947); Gulf Refining Co. v. Travis, 201 Miss. 336, 29 So. 2d 100 (1946); Eckman v. Buhl, 116 N. J. 308, 184 Atl. 430 (1936); Raisin v. Shoemaker, 200 N. Y. Supp. 615, 206 App. Div. 122, *aff'd.* 238 N. Y. 603, 144 N. E. 921 (1923); Wade v. Burkhart, 196 Okla. 615, 167 P. 2d 357 (1946); American Refining Co. v. Bank, 356 Pa. 226, 51 A. 2d 719 (1947). See also, 1 McADAM, LANDLORD AND TENANT § 112 (5th Ed., Ambert, 1934); 2 POMEROY, EQUITY JURISPRUDENCE § 688 (5th Ed., Symons, 1941); 3 POMEROY, EQUITY JURISPRUDENCE § 753 (5th Ed., Symons, 1941); 1 AMERICAN LAW OF PROPERTY, § 3.59 (1952). *But cf.*, Toupin v. Peabody, 162 Mass. 495, 39 N. E. 280 (1895); Bramhall v. Hutchinson, 42 N. J. Eq. 372, 7 Atl. 873 (1886); 1 TIFFANY, REAL PROPERTY § 110 p. 175 (3rd Ed., Jones, 1939) ("If, on the other hand, the lease is not within the recording laws, the grantee, although a purchaser for value and without notice thereof, will, it seems, take subject thereto.")

[12] N. C. GEN. STAT. § 47-18 (1943, recompiled 1950), reading in part: "No conveyance of land, or contract to convey, or lease *for more than three years* shall be valid to pass any property, as against creditors or purchasers for a valuable consideration, from the donor, bargainor or lessor, but from the registration thereof . . ." [emphasis added].

[13] Spence v. Pottery Co., 185 N. C. 218, 117 S. E. 494 (1925).

of such.[14] But in the case of oral leases for terms not exceeding three years, the question is not so simple. Such oral leases are, by necessary implication, excepted from the Statute of Frauds;[15] nor are they required to be registered under the North Carolina Registration Act.[16] Furthermore, it has been held that the record of an instrument of a class not authorized or required by law to be recorded, such as an oral lease for less than three years, does not constitute notice.[17]

North Carolina does, however, subscribe to the general, if not universal principle,[18] that possession under equities not required to be registered constitutes notice to purchasers.[19] The notice conveyed by such possession is of whatever claim the possessor asserts,[20] or which could have been ascertained by reasonable inquiry.[21] Further, it has been held that any information, reasonably calculated to stimulate inquiry,[22] constitutes notice of the possessors' claims whether or not the

[14] Eller v. Arnold, 230 N. C. 418, 53 S. E. 2d 266 (1949); Chandler v. Cameron, 229 N. C. 62, 47 S. E. 2d 528 (1948); State Trust Co. v. Braznell, 227 N. C. 211, 41 S. E. 2d 744 (1947).

[15] N. C. GEN. STAT. § 22-2 (1943), reading in part: "All contracts to sell or convey any lands . . . and all other leases and contracts for leasing lands *exceeding in duration three years* from the making thereof, shall be void unless said contract or some memorandum thereof, be put in writing. . . . [Emphasis added.]

[16] N. C. GEN. STAT. § 47-18 (1943, recompiled 1950). The section, by implication of terms, applies only to those instruments capable of registration which includes only those instruments required by the Statute of Frauds (N. C. GEN. STAT. § 22-2 (1943)) to be in writing. *E.g.*, Sansom v. Warren, 215 N. C. 432, 2 S. E. 2d 459 (1939); Eaton v. Doub, 190 N. C. 14, 128 S. E. 32 (1932) (discussion of question per Stacy, J.); Prichard v. Williams, 175 N. C. 319, 97 S. E. 570 (1918) (*But see* dissent by Clark, C. J.); Wood v. Tinsley, 138 N. C. 507, 51 S. E. 59 (1905); Boyd, *Some Phases of Title Examination and Real Estate Practice,* 20 N. C. L. REV. 168, 193 (1941-42).

[17] Chandler v. Cameron, 229 N. C. 62, 47 S. E. 2d 528 (1948). Thus it can be seen that the law as it stood prior to the Connor Act (N. C. GEN. STAT. § 47-18 (1943, recompiled 1950)), and where the Connor Act is not applicable, must be looked to as controlling. Perkins v. Langdon, 237 N. C. 159, 165, 74 S. E. 2d 634, 640 (1953).

[18] For general text discussions and citation of cases from without North Carolina, concerning possession and implied notice, see 1 MERRILL, NOTICE, §§ 102, 103 (1952); 4 AMERICAN LAW OF PROPERTY, § 17.11 (1952); 66 C. J. S., *Notice,* § 11 (1950).

[19] Bost v. Setzer, 87 N. C. 187 (1882); Tankard v. Tankard, 79 N. C. 54 (1878). Possession to constitute notice must be open, notorious and exclusive and presently existing. Smith v. Fuller, 152 N. C. 7, 67 S. E. 41 (1910); Mayo v. Leggett, 96 N. C. 237, 1 S. E. 622 (1887); Johnson v. Hauser, 88 N. C. 388 (1883); Edwards v. Thompson, 71 N. C. 177 (1874); Webber v. Taylor, 55 N. C. (2 Jones Eq.) 9 (1854).

[20] Avent v. Arrington, 105 N. C. 377, 10 S. E. 991 (1890); Heyer v. Beatty, 83 N. C. 285 (1880).

[21] Tankard v. Tankard, 79 N. C. 54 (1878); Edwards v. Thompson, 71 N. C. 177 (1874) (though the purchaser does not know or have any means of knowing the interest).

[22] Blankeship v. English, 222 N. C. 91, 21 S. E. 2d 891 (1942); Austin v. George, 201 N. C. 380, 160 S. E. 364 (1931); Truitt v. Grandy, 115 N. C. 54, 20 S. E. 293 (1894) (the circumstances must be such as to impose a duty on the person sought to be charged with a duty to make inquiry); Loan Association v. Merritt, 112 N. C. 243, 17 S. E. 296 (1893); Ijames v. Gaither, 93 N. C. 358

purchaser in fact makes an inquiry.[23]

Just what information will be held sufficient to stimulate inquiry such as will constitute notice is a question on which the decisions are not very illuminating. However, it has been held that, while information demanding inquiry must be definite,[24] it is sufficient if it is such as men ordinarily act upon,[25] and comes from a reliable source.[26] Thus, it has been held that newspaper reports actually read are a source of information that imposes a duty of inquiry.[27] But in a situation, such as the principal case, would the name of the lessees, denominated as such, painted on the building or printed on a card, prominently displayed on the building, constitute notice from inquiry inducement?[28]

The logic of protecting the bona fide purchaser without *possession-or-inquiry* notice is inescapable; otherwise, every purchaser of realty would buy with the possibility that he takes subject to an oral lease, and no amount of inquiry would protect him as a matter of law against such hidden equities.[29] But from the point of view of the lessee out of possession, the rule may be harsh, unless he is entitled to an action at law for damages against the lessor for the loss of his estate in the leasehold.[30]

Although no prior North Carolina case has been found so holding, it is generally accepted in jurisdictions where the question has arisen

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(1885) (where party has information reasonably calculated to excite attention and stimulate inquiry, he is charged with constructive notice of all that reasonable inquiry would have disclosed, the theory being that knowledge which one ought to have is imputed to him); Blackwood v. Jones, 57 N. C. (4 Jones Eq.) 54 (1858).

[23] Ijames v. Gaither, 93 N. C. 358 (1885).

[24] Republic Steel Corp. v. Willis, 243 Ala. 127, 9 So. 2d 297 (1942); Goddard Grocer Co. v. Freedman, 127 S. W. 2d 759 (Mo. App. 1939); Evans v. Century Ins. Co., 201 S. C. 273, 22 S. E. 2d 877 (1942).

[25] Curtis v. Mundy, 44 Mass. 405 (1841).

[26] Person v. Daniel, 22 N. C. 360 (1833) (neighbor); Kenniff v. Caulfield, 140 Cal. 34, 73 Pac. 803 (1903) (responsible third party); Johns v. Gilliam, 134 Fla. 575, 184 So. 140 (1938) (tax collector); Huges v. Williams, 218 Mass. 448, 105 N. E. 1056 (1914) (lawyer); St. Helen Shooting Club v. Barber, 150 Mich. 571, 114 N. W. 399 (1908).

[27] Cunningham v. Brown, 265 U. S. 1 (1924).

[28] The question has apparently not been answered, though in one case, it has been that the name and address of the equitable owner, on a "for sale" sign on a vacant lot was not such possession as to constitute notice. Ballona v. Petex, 234 Mich. 273, 207 N. W. 836 (1926).

[29] Perkins v. Langdon, 237 N. C. 159, 166, 74 S. E. 2d 634, 640 (1953).

[30] A number of cases have so held. Williams v. Young, 78 N. J. Eq. 293, 81 Atl. 1118, 1119 (1910) (the court on facts closely analogous to the principal case, said: "When defendant wrongfully conveyed the land in question to an innocent purchaser for value without notice of complainant's leasehold estate, the leasehold estate in the land was necessarily destroyed . . . The conveyance to the innocent purchaser was, in effect, a conveyance of the term and the reversion. Complainant thereby became entitled to recover from defendant in an action at law. . . ."); Raisin v. Shoemaker, 200 N. Y. Supp. 615, 206 App. Div. 122, *aff'd.* 238 N. Y. 603, 144 N. E. 921 (1923); Grover v. Norton, 183 N. Y. Supp. 731, 113 Misc. 3 (1920).

that a sale of the reversion to a bona fide purchaser which cuts off the lease rights of a lessee out of possession constitutes a wrong to the lessee for which he may have redress against his lessor,[31] on the theory of breach of express or implied covenant of quiet enjoyment.[32] This was one of the theories upon which the action in the principal case was brought.[33] However, by implication from the principal litigation, the North Carolina Court may be departing from this view, to the extent that such redress may not be had on the ground of breach of *implied,* as distinguished from *express,* covenant of quiet enjoyment. In the first appeal, the cause was remanded for further pleadings as to whether or not there was an express covenant not to sell for the period of the lease,[34] and it was the express covenant so found upon which the decision in the third appeal was predicated.[35] Consequently, notwithstanding the fact that further allegations and proof on the question of whether the purchaser took bona fide and without notice were also necessary, the principal litigation would seem, nevertheless, to imply a necessity of an express covenant in order to ground such an action. This in turn, may well indicate a restriction on North Carolina's implied covenant of quiet enjoyment in leases of realty.[36]

In view of the finding that the lease contained such an express cove-

[31] Actually, the theory on which the lessee is allowed to recover in many of the cases seems difficult of ascertainment, although the courts seldom refuse to grant relief. 3 Mo. L. Rev. 299 (1938).

At lease three theories are possible on which to predicate an action for destruction of the leasehold estate: implied covenant to pay to lessee money had and received to his use, such amount as was received for the term; breach of engagement in the lease (covenant of quiet enjoyment); and in tort for wrongful destruction of the term. Williams v. Young, 78 N. J. Eq. 293, 81 Atl. 1118 (1910).

"In the usual case, however, the lessee seeks relief upon the ground that the lessor's conduct amounts to a breach of the implied covenant of quiet enjoyment." 1 American Law of Property, § 3.50, p. 277 (1952).

[32] By the weight of authority, including North Carolina, the ordinary lease raises an implied covenant that the lessee shall have the quiet enjoyment and peaceful possession of the premises, as regards the lessor or anyone claiming through or under him or anyone asserting paramount title. Brewington v. Loughran, 183 N. C. 558, 112 S. E. 257 (1922); Improvement Co. v. Coley-Bardin, 156 N. C. 256, 72 S. E. 312 (1911); Huggins v. Waters, 154 N. C. 443, 70 S. E. 842 (1911); Conrad v. Morehead, 89 N. C. 31 (1883); McKesson v. Mendenhall, 64 N. C. 502 (1870) [*But cf.* Barneycastle v. Walker, 92 N. C. 198 (1885)]; Gulf Refining Co. v. Fetscham, 130 F. 2d 129 (6th Cir. 1942), *cert. denied,* 318 U. S. 764 (1943); Rulf v. Von Schoeler, 52 So. 2d 82 (La. App. 1951); Carpet Co. v. Fletcher, 315 Mass. 350, 52 N. E. 2d 681 (1943); Manufacturing Co. v. Buntin, 27 Tenn. App. 411, 181 S. W. 2d 634 (1944); L-M-S, Inc. v. Blackwell, 149 Tex. 348, 233 S. W. 2d 286 (1950); Sandall v. Haskins, 104 Utah 50, 137 P. 2d 819 (1943); 1 American Law of Property, § 3.47, n. 4 (1952).

[33] Brief for Appellees, p. 15, Perkins v. Langdon, 237 N. C. 159, 74 S. E. 2d 634 (1953).

[34] Perkins v. Langdon, 231 N. C. 386, 389, 57 S. E. 2d 407, 409 (1950).

[35] Perkins v. Langdon, 237 N. C. 159, 166, 74 S. E. 2d 634, 641 (1953).

[36] See note 31, *supra.*

nant, the decision is foregone, and the liability of the lessor is clear, but *Quaere:* what result if no such covenant had been found?

In view of the implications of the present decision requiring a breach of *express* covenant to render the landlord liable for destruction of the leasehold right by sale to a bona fide purchaser, the difficulty of giving constructive notice when continued possession is impossible or contrary to the actual terms of the lease, it would seem that legislation is necessary to better protect the rights of the lessee. It is submitted that such protection could be adequately afforded by: (1) amending the Statute of Frauds[37] to require all leases of whatever duration to be evidenced by some writing; and (2) requiring all leases of whatever duration to be registered under our Registration Act.[38] Such registration would constitute constructive notice[39] to all purchasers of the reversion that there is an equity outstanding in the land,[40] and would thereby protect present lessees from loss of their estate without redress by the lessor's sale of it to a bona fide purchaser without notice of such interests.[41]

THOMAS L. YOUNG

Mortgages—Mortgages to Secure Future Advances

In the absence of a statute providing otherwise,[1] the validity of a mortgage or deed of trust to secure future advances is fully recognized today.[2] The common law sanctioned this type of mortgage as a useful

[37] N. C. GEN. STAT. § 22-2 (1943).
[38] N. C. GEN. STAT. § 47-18 (1943, recompiled 1950).
[39] Spence v. Pottery Co., 185 N. C. 218, 117 S. E. 494 (1925).
[40] The requirement that all leases be registered would not be harsh, in view of the high literacy rate in our population today, and would have the positive effect of making land titles more certain, and would obviate the necessity of inspecting the property as to possession since registration alone would constitute notice of equitable claims in the form of leases outstanding.
[41] It should be noted that a somewhat analogous problem has been resolved by the courts without the aid of legislation, where the record owner of land, title to which has been perfected in another by adverse possession, conveys when the owner by adverse possession is out of the land. The courts, while recognizing the impossibility of recordation of titles by adverse possession, generally hold that adverse title, once obtained is good even as against bona fide purchasers without notice.
The North Carolina Court has, in at least one case, aligned itself with this position. Morse v. Freeman, 157 N. C. 385, 72 S. E. 1056 (1911). *But cf.*, Ricks v. Batchelor, 225 N. C. 8, 33 S. E. 2d 68 (1945). For cases to the same effect from other jurisdictions, see, Note, 9 A. L. R. 2d 850 (1950).

[1] "No estate conveyed in mortgage shall be holden by the mortgagee for the payment of any sum of money or the performance of any other thing the obligation or liability to the payment or performance of which arises, is made or contracted after the execution and delivery of the mortgage, except as herein provided." N. H. REV. LAWS c. 261, § 3 (1942).
[2] Lawrence v. Tucker, 23 How. 14 (U. S. 1859); Everist v. Carter, 202 Iowa 498, 210 N. W. 559 (1926); Toulbee v. First Nat. Bank of Jackson, 279 Ky. 153, 130 S. W. 2d 48 (1939); Hortman-Salmon Co. v. White, 169 La. 1057, 123 So.

method of providing for continuous dealings and security for obligations to arise at future times. Such have been thought particularly desirable, for example, in construction loans where advances are made as the work progresses.[3] They have been used as indemnities for prospective indorsements, guaranties and accommodations of commercial paper to be made by the mortgagee, and in maintaining lines of credit with the mortgagee.[4]

The device has distinct advantages to both the mortgagor and the mortgagee. It eliminates the expense to the borrower of executing later mortgages for each new advance. In addition the borrower saves in-

711 (1929); Taft v. Stoddard, 142 Mass. 545, 8 N. E. 586 (1886). *Cf.* Berger v. Fuller, 180 Ark. 372, 377, 21 S. W. 2d 419, 421 (1929) ("Mortgages of this character have been denominated 'Anaconda mortgages' and are well named thus, as by their broad and general terms they enwrap the unsuspecting debtor in the folds of indebtednss embraced and secured in the mortgage which he did not contemplate, and to extend them further than has already been done would, in our opinion, be dangerous and unwise.")

Whether or not a particular loan or advance comes within the coverage of a mortgage to secure future advances will depend on the court's interpretation of the contract between the parties. *E.g.*, in Cotton v. First Nat. Bank, 228 Ala. 311, 153 So. 225 (1934), debts for advances to third persons for which mortgagor was liable as surety were held not within the blanket provision of the mortgage covering additional amounts "furnished me by [mortgagee] on any account." In Strong Hardware Co. v. Gonyow, 105 Vt. 415, 168 Atl. 547 (1933), a note given by the mortgagor to a third person and indorsed to the mortgagee was held not to be covered by the mortgage covering "any and all other indebtedness of the said [mortgagor] to the said [mortgagees], their heirs and assigns, heretofore or hereafter contracted and represented by promissory notes or otherwise." Again, in Lashbooks v. Hatheway, 52 Mich. 124, 17 N. W. 723 (1883), the court construed the language of the mortgage to mean that it covered indebtednesses of the mortgagor to the assignees of the mortgagee. See also First Bank and Trust Co. of Ottumwa v. Welch, 219 Iowa 318, 258 N. W. 96 (1935). In that case, a husband and wife executed a promissory note to a bank and then gave a mortgage to secure it and additional sums "whether now due or hereafter accruing to said mortgagee, and all advances of money or interest or prior liens." The court held that the husband and wife had not made their interests in the real estate subject to the individual indebtednesses of either.

A recent Ohio decision has held that in order to contend that an advance is covered by a mortgage to secure future advances, the mortgagee must manifest a reliance on the mortgage. Second Nat. Bank of Warren v. Boyle, 155 Ohio St. 482, 99 N. E. 2d 474 (1951) (mortgagee held to rely only on a subsequent chattel mortgage). The general rule seems to be otherwise. Northhampton Nat. Bank v. Holland, 126 Pa. Super. 597, 190 Atl. 483 (1937). In view of the conflict, mortgagees are well-advised to make known their reliance on the mortgage.

[3] Stephens v. Ahrens, 179 Cal. 743, 178 Pac. 863 (1919); Nussenfeld v. Smith, 110 Conn. 438, 148 Atl. 388 (1930); Kentucky Lumber and Mill Work Co. v. Kentucky Title Savings Bank & Trust Co., 182 Ky. 244, 211 S. W. 765 (1919); New Baltimore Loan and Savings Assoc. v. Tracey, 142 Md. 211, 120 Atl. 441 (1923); Whelan v. Exchange Trust Co., 214 Mass. 121, 100 N. E. 1095 (1913); Creigh Sons & Co. v. Jones, 103 Neb. 706, 173 N. W. 687 (1919).

[4] Ackerman v. Hunsicker, 85 N. Y. 43 (1881); McDaniels v. Colvin, 16 Vt. 300 (1844); Ladd v. Lookout Distilling Co., 147 Ala. 173, 40 So. 610 (1906); Hollan v. American Bank of Commerce & Trust Co., 168 Ark. 939, 272 S. W. 654 (1925); Brown v. Los Angeles County, 77 Cal. App. 2d 814, 176 P. 2d 753 (1947); Weiser Loan and Trust Co. v. Comerford, 41 Idaho 172, 238 Pac. 515 (1925). *Cf.* Bagley v. Page, 57 R. I. 186, 189 Atl. 39 (1937) (note and mortgage given by father to his daughter as security for reimbursement of expenditures made by her for his benefit during his lifetime).

terest on that part of a loan not put to immediate use. In building loans, the lender-mortgagee avoids the risk involved in handing over the full amount of the loan at a time when the property is insufficient security.

Mortgages to secure future advances usually take one of two forms:

1) The mortgage may state that it secures a present loan definite in amount, when actually no part or only a portion of the loan was advanced at the time of execution.[5] Parol evidence is admissible to show that it was, in fact, given to secure future advances and their amounts.[6] This overstatement of the obligation is, of course, deceptive. At least one court has found such overstatement constructively fraudulent as to subsequent encumbrancers and limited the coverage to the amount of the original outlay.[7] In the majority of jurisdictions, however, the instrument is held valid for advances not exceeding the sum specified in the mortgage.[8]

2) The mortgage may expressly provide that it secures future advances alone or in addition to a present obligation.[9] The amount of the advances to be made need not be limited.[10] The indefiniteness as to the ultimate debt in these cases is not deemed sufficient to invalidate the instrument, although a few state statutes do require more certainty.[11]

[5] Herndon v. Morris, 110 Ala. 106, 20 So. 27 (1895); Temple v. Hamilton, 178 Ark. 355, 11 S. W. 2d 465 (1929); Glenn v. Bailey, 25 Tex. Civ. App. 523, 61 S. W. 959 (1901).

[6] Bynon v. Citizen's Bank of Carbon Hill, 221 Ala. 626, 130 So. 391 (1930); Glassman v. Ficksman, 238 Mass. 580, 131 N. E. 316 (1921); Morton v. Jones, 136 Ky. 797, 125 S. W. 247 (1910); First National Bank of Raymond v. Robke, 72 Mont. 527, 235 Pac. 327 (1925). *Cf.* Weatherwax v. Heflin, 244 Ala. 210, 12 So. 2d 554 (1943) where the court held that an oral agreement for the *extension* of the security of a mortgage to cover additional indebtedness was not enforceable because it was a violation of the Statute of Frauds.

[7] Matz v. Arick, 76 Conn. 388, 56 Atl. 630 (1904).

[8] See note 5 *supra*.

[9] Thomas v. Blair, 208 Ala. 48, 93 So. 704 (1922); State Nat. Bank v. Temple Cotton Oil Co., 185 Ark. 1011, 51 S. W. 2d 980 (1932); Hamilton v. Rhodes, 72 Ark. 625, 83 S. W. 351 (1904); Buck v. Buck, 162 Cal. 300, 122 Pac. 466 (1912); Davidson v. Iwanowski, 341 Ill. App. 152, 93 N. E. 2d 139 (1950); Carey v. Herrick, 146 Wash. 283, 263 Pac. 190 (1928).

[10] In Batten v. Jurist, 306 Pa. 64, 158 Atl. 557 (1932), the mortgage to secure future advances was unlimited as to time and amount. The court held it valid as against a judgment creditor whose judgment attached after the advances were made. The minority view is represented by Balch v. Chafee, 73 Conn. 318, 47 Atl. 327 (1900). The court there stated that as against subsequent encumbrancers, who may take title without other notice than that given by the land records, future advances cannot be secured by a mortgage deed which does not show any agreement to make them nor name the amount to which they may be made.

[11] "No particular form is necessary to constitute a mortgage. It must clearly indicate the creation of a lien, specify the debt to which it is given, and the property upon which it is to take effect." GA. CODE ANN. § 67-102 (1937). Under this statute, future advances can be made if a maximum amount is stated in the instrument. In re Corbett, 248 Fed. 988 (Ga. D. C. 1918). Otherwise, no mortgage to secure future advances will be valid. Benton-Shingler Company v. Mills, 13 Ga. App. 632, 79 S. E. 755 (1913). See also MD. ANN. CODE, art. 66, § 2 (1951), Welsh v. Kuntz, 75 A. 2d 343 (Md. 1950); Baltimore High Grade Brick Co. v. Heath, 95 Md. 571, 52 Atl. 582 (1902); VT. REV. STAT. tit. 11, c. 128 § 2712 (1949).

The character of an advance, made pursuant to a mortgage to secure future advances, usually controls in determining its priority as to the intervening claim of a creditor of the mortgagor or other third party claiming under the mortgagor. If from the agreement the advances are found to be obligatory, *i.e.,* the mortgagee binds himself to make them, the mortgage will prevail over all subsequent encumbrances to the extent of all advances irrespective of whether they were made before or after the later encumbrance.[12] The courts hold that these advances constitute but a fulfillment of the contract and that each advance relates back to the date of the execution or recordation of the mortgage.[13]

It has been held that advances made by the mortgagee in order to protect his previous loans, *i.e.,* advances essential to the mortgagee's security, other than those expressly provided for in the contract, should have priority similar to that of obligatory advances.[14] Since an application of this rule involves but an evaluation of a fact situation, it should not be difficult to apply.

If, on the other hand, the advances are only optional, *i.e.,* to be made in the discretion of the mortgagee, the priority problem becomes largely one of notice.[15] Assuming that the subsequent encumbrancer has such notice of the prior mortgage to secure future advances as the law of the particular jurisdiction requires,[16] the decisive question be-

[12] Hance Hardware Co. v. Denbigh Hall Inc., 17 Del. Ch. 234, 152 Atl. 130 (1930); Bullard v. Fender, 140 Fla. 448, 192 So. 167 (1929); Creigh Sons and Co. v. Jones, 103 Neb. 706, 173 N. W. 687 (1919); Land Title and Trust Co. v. Shoemaker, 257 Pa. 213, 101 Atl. 335 (1917); Blackman v. Sharp, 23 R. I. 412, 50 Atl. 852 (1901); Eltopia Finance Co. v. Collerby, 126 Wash. 554, 219 Pac. 24 (1923).

[13] Machado v. Bank of Italy, 67 Cal. App. 769, 228 Pac. 369 (1924) (advances binding though definite statement of the amount to be loaned was not set forth); Chartz v. Cardelli, 52 Nev. 1, 279 Pac. 761 (1929) (advances were both optional and obligatory); Jolly v. Fidelity Union Trust Co., 15 S. W. 2d 68 (Tex. Civ. App. 1929); Poole v. Cage, 214 S. W. 500 (Tex. Civ. App. 1919). *Cf.* Williams v. Whitinerville Savings Bank, 283 Mass. 297, 186 N. E. 502 (1933) (lender-mortgagee was found to be under no obligation to continue building loan advances after default by mortgagor by failure to complete the building); People's Nat. Bank & Trust Co. of Lynbrook v. Harkay Realty Co., 258 App. Div. 964, 16 N. Y. S. 2d 779 (1940) (court held a mechanic's lienor could not compel advances by the mortagee after mortgagor in default under terms of the agreement and mortgage).

[14] Hamilton v. Rhodes, 72 Ark. 625, 83 S. W. 351 (1904) (court stated that a mortgagee will be protected for advances on a growing crop necessary to protect his security against waste or destruction); Cedar v. W. E. Roche Fruit Co., 16 Wash. 2d 652, 134 P. 2d 437 (1943) (advances were given priority even where mortgagee had actual notice of the junior mortgage).

[15] Some courts have indicated that any advance, whether optional or obligatory, made pursuant to a mortgage to secure future advances is superior to all subsequent encumbrances and the notice question does not arise. *See* Witczinski v. Everman, 51 Miss. 841, 846 (1876).

[16] Without such notice the mortgage would not prevail over subsequent parties protected by the requirement of notice. This would be true whether or not the mortgage was for future advances. Griffith v. State Mutual Building and Loan Ass'n., 46 Ariz. 359, 51 P. 2d 246 (1935); Oaks v. Weingartner, 105 Cal. App. 2d 598, 234 P. 2d 194 (1951) (materialman's lien here inferior; with record

comes whether the mortgagee himself at the time of the making of an advance had notice of the intervening encumbrance. The majority of courts hold that intervening encumbrances of which the mortgagee has actual notice take priority over the mortgage to the extent that it secures optional advances made by the mortgagee after the notice.[17] Where the notice to the mortgagee is mere record or constructive notice, only a minority defeat the mortgagee's priority with regard to advances made by him thereafter.[18]

An early North Carolina case seems to indicate that our court will uphold mortgages to secure future advances.[19] The court, however, has had no occasion to state its attitude with regard to the form such a mortgage should take and its priority with respect to other liens.

The General Statutes Commission recently proposed that Chapter 45 relating to mortgages be amended to include a provision covering these mortgages.[20] While the legislation offered was not to be deemed exclusive and instruments securing future advances not conforming to the statute were left to be governed by other applicable law, the Commission did seek to establish a guide in the drafting of such instruments and, in the case of those drawn and carried out pursuant to the statute, determine their priority with regard to subsequent encumbrances. In view of the widespread use of this type of mortgage and the need for an affirmative statement of North Carolina law on the subject, the effort seemed opportune. Unfortunately, the statute was rejected by the North Carolina legislature at its last session.[21] Similar legislation might well be considered at a future time.

WALLACE ASHLEY, JR.

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notice and examination of the deed of trust for future advances, lienor failed to inquire about advances); Berry-Beall Dry Goods Co. v. Francis, 104 Okla. 81, 230 Pac. 496 (1924).

[17] Ackerman v. Hunsicker, 85 N. Y. 43 (1881); Everist v. Carter, 202 Iowa 498, 210 N. W. 559 (1926); Bunker v. Barron, 93 Me. 87, 44 Atl. 372 (1899); Union Nat. Bank v. Melburn and Stoddard Co., 7 N. D. 201, 73 N. W. 527 (1897); Elmendorf-Anthony Co. v. Dunn, 10 Wash. 2d 29, 116 P. 2d 253 (1941). *Cf.* Atkinson v. Foote, 44 Cal. App. 149, 186 Pac. 831 (1919).

[18] Ladue v. Detroit and M. R. Co., 13 Mich 380 (1865); Kuhn v. Southern Ohio Loan & Trust Co., 101 Ohio St. 34, 126 N. E. 820 (1920). For majority view which requires actual notice, see cases, note 17 *supra*.

[19] In Moore v. Ragland, 74 N. C. 343, 346 (1876), the court said, "It is clear that a man may lawfully mortgage his property to secure future and contingent debts, and that he does so is not of itself proof of a fraudulent intent." The mortgage in his case placed no limit on the amount of the future debts secured, but did have a time limit in which the debts were to be contracted. In McAdams v. Piedmont Trust Co., 167 N. C. 494, 83 S. E. 623 (1914), the court cited with approval a case involving a mortgage to secure future advances.

[20] S. B. 27, 1953 General Assembly. Liens on crops for advances were expressly excluded by the Commission. They are covered by N. C. GEN. STAT. § 44-52 *et seq.* (1943 Recomp. 1950).

[21] The bill was passed by the Senate, but was voted down on the floor of the House of Representatives during the closing weeks of the 1953 session.

Restraint of Trade—Fair Trade Acts—Constitutionality

Fair Trade Acts[1] authorize resale price maintenance—a form of price fixing. These Acts intitially were received favorably by most courts[2] but recently some have encountered judicial snags.

In 1937, Congress, in passing the Miller-Tydings Amendment[3] to the Sherman Anti-Trust Act[4] sanctioned resale price maintenance agreements in the "fair trade" states in transactions involving interstate commerce. In 1951 the United States Supreme Court in *Schwegmann Bros. v. Calvert Distillers Corp.*[5] dealt "fair trade" a severe blow by holding that the Miller-Tydings Amendment did not authorize the enforcement of fair trade agreements against non-signers in *interstate* transactions.[6] In addition the Court held that this Act authorized only minimum prices and did not sanction absolute prices.[7] This decision, coupled with *Sunbeam v. Wentling*[8] which concluded that out of state mail order sales when made by a non-signing Pennsylvania retailer were not subject to the Pennsylvania Fair Trade Act, drained the Acts of most of their vitality.[9]

In 1952 Congress passed the McGuire Act[10] which expressly overruled the *Schwegmann* and *Wentling* decisions by validating the non-signers clause, authorizing both minimum and absolute prices, and declaring regulation of out of state retail sales was not an undue burden on commerce.

[1] Between 1931 and 1941 Fair Trade Acts were passed in 45 states. These Acts uniformly purported to validate agreements between manufacturers and wholesalers or retailers whereby the manufacturer protected his trade mark, brand or name by stipulating the price at which the retailer was to sell the article. 2 CCH TRADE REG. REP. ¶7056 (1953). The North Carolina statute is N. C. GEN. STAT. §§ 66-50 through 66-57 (1943, recompiled 1950); 15 N. C. L. REV. 367 (1937).

[2] Old Dearborn Distributing Co. v. Seagrams-Distillers Corp., 299 U. S. 183 (1936); Pepsodent Co. v. Krauss Co., 200 La. 959, 9 So. 2d 303 (1942); Ely Lilly & Co. v. Saunders, 216 N. C. 163, 4 S. E. 2d 428 (1939).

[3] 15 U. S. C. § 1 (1946).

[4] *Ibid.*

[5] 341 U. S. 384, 388 (1951). The majority opinion in this case states, "The omission of the non-signers provision from the federal law (Miller-Tydings) is fatal to respondent's position unless we are to perform a distinct legislative function by reading into the Act a provision that was meticulously omitted from it." Three justices dissented.

[6] A typical non-signers clause is: "Willfully and knowingly advertising . . . or selling any commodity at less than the price stipulated in any contract entered into pursuant to this article, whether the person so . . . selling *is or is not a party* to such a contract is unfair competition and is actionable at the suit of any person damaged thereby." N. C. GEN. STAT. § 66-56 (1943, recompiled 1950). (Italics added).

[7] In the 45 states that passed Fair Trade Acts minimum prices were authorized in thirty states while fifteen authorized absolute prices. 2 CCH TRADE REG. REP. ¶7001 (1953).

[8] 341 U. S. 944 (1951).

[9] H. R. REP. No. 1437, 82d Cong., 2d Sess. (1952).

[10] 15 U. S. C. A. § 45 (Supp. 1953).

Although several state courts, including North Carolina,[11] had upheld the constitutionality of their Fair Trade Acts, the Florida Supreme Court refused to follow the well established pattern. Instead, in 1949 it declared the Florida Act violative of the state constitution in that it was an excessive exercise of the police power.[12] However a subsequent re-enactment intended to remedy the constitutional objection has yet to be passed on by the Florida Court.[13] Subsequently, Michigan, in a decision rendered after the *Schwegmann* case and prior to the McGuire Act, announced that the Michigan Fair Trade Act was violative of the due process clause of the state constitution and further that the authorization of resale price maintenance agreements exceeded the police power of the state.[14]

More recently, the Supreme Court of Georgia has joined the dissenting group. In *Grayson-Robinson Stores, Inc. v. Oneida, Limited,*[15] a case in which the defendant was a non-signing retailer who sold the plaintiff-manufacturer's silverware at a price less than that expressed in contracts between the plaintiff and other retailers, the Georgia Supreme Court declared that the Georgia Fair Trade Act[16] contravened both the due process clause of the state constitution[17] and the supremacy clause of the Federal Constitution.[18] On the federal issue the Court utilized a novel twist in "fair trade" litigation by reasoning that when the Georgia Act was passed in 1937[19] it violated the Sherman Act as it then stood[20] and the subsequent enactment of the Miller-Tydings and McGuire Acts did not operate to validate the Georgia Act inasmuch as it was void *ab initio*.

[11] Pyroil Sales Co. v. The Pep Boys, 5 Cal. 2d 446, 55 P. 2d 194 (1936); Burroughs Welcome & Co. v. Johnson Wholesale Perfume Co., 128 Conn. 596, 24 A. 2d 841 (1942); Seagrams-Distillers Corp. v. Old Dearborn Distributing Co., 363 Ill. 610, 2 N. E. 2d 940 (1936); International Cellucotton Products v. Kraus Co., 200 La. 959, 9 So. 2d 303 (1942); Goldsmith v. Mead Johnson & Co., 176 Md. 682, 7 A. 2d 176 (1939); Johnson & Johnson v. Weissbard Brothers, 121 N. J. Eq. 585, 191 Atl. 873 (1937); Bourjois Sales Corp. v. Dorfman, 273 N. Y. 167, 7 N. E. 2d 30 (1937); Ely Lilly & Co. v. Saunders, 216 N. C. 163, 4 S. E. 2d 228 (1939); Miles Laboratories, Inc. v. Owl Drug Co., 67 S. D. 523, 295 N. W. 292 (1940); Sears v. Western Thrift Stores of Olympia, Inc., 10 Wash. 2d 372, 116 P. 2d 756 (1941); Weco Products Co. v. Reed Drug Co., 225 Wis. 474, 274 N. W. 426 (1937) (except a provision exempting non-profit cooperatives).

[12] Liquor Store, Inc. v. Continental Distilling Corp, 40 So. 2d 371 (Fla. 1949); 28 N. C. L. REV. 336 (1950).

[13] Seagram Distillers Corp. v. Ben Greene, Inc., 54 So. 2d 235 (Fla. 1951).

[14] Shakespeare Co. v. Lippman's Tool Shop Sporting Goods Co., 334 Mich. 109, 54 N. W. 2d 268 (1952).

[15] 75 S. E. 2d 161 (Ga. 1953).

[16] GA. CODE ANN. §§ 106-401 through 106-408 (1937).

[17] GA. CONST., Art. I, Sect. 1, ¶ II. [18] U. S. CONST. Art. VI, cl. 2.

[19] Georgia participated in the legislative "avalanche" that saw 28 states pass Fair Trade Acts in 1937. 2 CCH TRADE REG. REP. ¶ 7056 (1953).

[20] 15 U. S. C. § 1 (1946). ". . . every contract, combination . . . or conspiracy in restraint of trade or commerce among the several states, or with foreign nations" was illegal.

In reaching this conclusion the Supreme Court of Georgia ignored the decision of the United States Supreme Court in *Old Dearborn Distributing Co. v. Seagrams-Distillers Corp.*[21] which specifically upheld the right of Illinois to authorize resale price maintenance agreements in *intrastate* commerce. At the time of the *Old Dearborn* decision the law was well established that such practices in *interstate* commerce were illegal[22] and the twenty-eight states, including Georgia, which passed Fair Trade Acts in the year *after* the *Old Dearborn* case could have intended to validate *only* such agreements as involved *intrastate* transactions. For this reason the application of the void ab initio doctrine in this situation seems questionable.

The courts of twenty-nine states have yet to pass on the constitutionality of their Fair Trade Acts.[23] Of the twenty-nine all but four were passed prior to the Miller-Tydings Amendment, and all twenty-nine were enacted prior to the McGuire Act. If the reasoning of the Georgia Court on the federal issue should be followed by these states the Acts passed prior to Miller-Tydings are totally void. The other four would become practically impotent for without the benefit of the McGuire Act the non-signers clauses—the heart of the Acts—would be inapplicable in interstate commerce. However, it is unlikely that these twenty-nine states will follow the reasoning of the Georgia Supreme Court and thereby declare their Acts void ab initio in whole or in part.

The alternate ground on which the Georgia opinion is based is less controversial. In holding that the Georgia Fair Trade Act violated the Georgia Constitution the Supreme Court of Georgia employed the same technique as had previously been applied by the highest courts of Florida and Michigan. Opponents of "fair trade," encouraged by these decisions may seek expeditious consideration of the Fair Trade Acts in those states yet to pass on the question. There is little, if any, indication that states which previously have upheld the constitutionality of their Acts are ready to take a contrary view. Recently, the Supreme Court of New York[24] and a Federal District Court in Louisiana[25] reiterated that the Acts of those states were constitutional. In addition the highest courts of New Jersey[26] and California[27] have restated the validity of the non-signers clauses in the Acts of those states.

The McGuire Act also has been under attack in both state and

[21] 299 U. S. 183 (1936).
[22] Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U. S. 373 (1911).
[23] 2 CCH TRADE REG. REP. ¶ 8004 through ¶ 8964 (1953).
[24] General Electric Co. v. Klein on the Square, Inc., TRADE REG. REP. CURRENT DECISIONS, ¶ 67,443 (1953).
[25] Ely Lilly & Co. v. Schwegmann Bros., 109 F. Supp. 269 (1953).
[26] Johnson & Johnson v. Charmley Drug Co., 95 Atl. 2d 391 (N. J. 1953).
[27] The Cal-Dak Co. v. Sav-On Drugs, Inc., 254 Pac. 2d 497 (Calif. 1953).

federal courts. Schwegmann Brothers, Louisiana retailers and long time foe of "fair trade," challenged this Act on grounds that it violates the due process clause of the Federal Constitution and constitutes an unlawful delegation of legislative power to private individuals. The Louisiana Federal District Court in *Ely Lilly Co. v. Schwegmann Bros.*[28] upheld the constitutionality of the Act. In *General Electric v. Klein on the Square*[29] the New York Supreme Court declared the McGuire Act constitutional as not being in contravention of the due process or equal protection clauses and not an unlawful delegation of legislative power. Ultimately the United States Supreme Court may rule on the constitutionality of the McGuire Act and its sanction of the controversial non-signers clause.[30] Since the Supreme Court of the United States has already held that the Fair Trade Acts do not contravene the Fourteenth Admendment in intrastate commerce[31] it is quite unlikely that it will now hold the McGuire Act as applied to interstate transactions is violative of the Fifth Amendment.

Although most states will leave the economic wisdom of Fair Trade Acts to the Legislature and hence those declaring such Acts to be unconstitutional will remain in the minority, it is evident that the courts will give more careful scrutiny to this legislation in the future than has been true in the past.

JOHN RALPH CAMBRON

Unfair Competition—Export Trade Act—Unfair Methods of Competition under Section Four

The Sherman Act of 1890 prohibited concerted action by independent exporters including the formation of trade associations for the purpose of eliminating competition among themselves in foreign trade.[1] The importance of allowing American exporters to combine into such an association was stressed in a report submitted to Congress by the Federal Trade Commission in 1916.[2] Spurred by this report,

[28] TRADE REG. REP., CURRENT COURT DECISIONS, ¶ 67,443 (1953).
[29] 109 F. Supp. 269 (1953).
[30] The Supreme Court of the United States has never passed directly on the constitutionality of the Miller-Tydings Act.
[31] Old Dearborn Distributing Co. v. Seagrams-Distillers, Corp., 299 U. S. 183 (1936).

[1] The Sherman Act prohibits: "Every contract, combination . . . or conspiracy, in restraint of trade. . . ." 26 STAT. 209 (1890), as amended by 50 STAT. 693 (1937), 15 U. S. C. §§ 1-7 (1946).

[2] Public hearings were conducted in 16 cities; several thousand questionnaires were sent out to interested individuals and firms; American consuls and commercial attachés sent in reports; a study of the ramifications of foreign cartel arrangements was made. On June 30, 1916, this report on *Cooperation in American Export Trade* was submitted to Congress. This report may be found in EXPORT PRICES AND EXPORT CARTELS (WEBB-POMERENE ASSOCIATIONS) 113-118 (TNEC Monograph 6, 1941). See also Love, The Export Trade Act, 8 GEO. WASH. L. REV. 608 (1940).

Congress enacted the Export Trade Act (otherwise known as the Webb-Pomerene Act) on April 10, 1918.[3] The terms of the Webb-Pomerene Act specifically enable independent exporters to combine into an association and set forth the conditions under which such an association may be organized. Congress, however, was aware of the dangers inherent in permitting such a combination, and therefore included certain restrictive provisions in the Webb-Pomerene Act to govern the activities of these associations.[4] Section 4,[5] one of the restrictive provisions, prohibits unfair methods of competition in export trade. Unlike the other sections of the Act, it embraces not only the conduct of export associations but also the acivities of any individual businessman engaged in export trade.

Section 4 reads:

> "The prohibition against 'unfair methods of competition' and the remedies provided for enforcing said prohibition contained in the Federal Trade Commission Act shall be construed as extending to unfair methods of competition in export trade, even though the acts constituting such unfair methods are done without the territorial jurisdiction of the United States."[6]

Both the 1916 Report[7] to Congress by the Federal Trade Commission and the ensuing legislative history[8] of the Act lend weight to the conclusion that the conduct of single firms as well as export associations are within the purview of Section 4. In *United States v. United States Alkali Export Ass'n., Inc., et al.*,[9] it was stated that "The effect of Section 4 . . . was to condemn such 'unfair methods of competition' wherever committed . . . this section [does not] draw any distinction between organizations organized under previous sections of the Webb

[3] 40 STAT. 516 (1918), 15 U. S. C. §§ 61-65 (1946). For two years Congress gave the provisions of this act a thorough examination. In 1916, Representative Edwin Y. Webb from North Carolina introduced H. R. 16707, 64th Cong., 1st Sess. (1916) and H. R. 17350, 64th Cong., 2d Sess. (1916). Again in 1917 Representative Webb introduced H. R. 2316, 65th Cong., 1st Sess. (1917) (this bill was eventually passed by both houses), and Senator Atlee Pomerene from Ohio introduced S. 634, 65th Cong., 1st Sess. (1917).

[4] 40 STAT. 517 (1918), 15 U. S. C. § 62 (1946); 40 STAT. 517 (1918), 15 U. S. C. § 63 (1946); 40 STAT. 517 (1918), 15 U. S. C. § 64 (1946); 40 STAT. 517 (1918), 15 U. S. C. § 65 (1946).

[5] 40 STAT. 517 (1918), 15 U. S. C. § 64 (1946).

[6] *Id.*

[7] Report on *Cooperation in American Export Trade* as reported in EXPORT PRICES AND EXPORT CARTELS (WEBB-POMERENE ASSOCIATIONS) 117-118 (TNEC Monograph 6, 1941).

[8] See 55 CONG. REC. 2786 (1917); 55 CONG. REC. 3577 (1917); 56 CONG. REC. 69 (1917); 56 CONG. REC. 111 (1917); 56 CONG. REC. 171 (1917); 56 CONG. REC. 173 (1917).

[9] United States v. United States Alkali Export Ass'n., Inc., et al., 86 F. Supp. 59 (S. D. N. Y. 1949).

Act and other corporations engaging in export trade."[10] Although the Federal Trade Commission has brought several proceedings under Section 4, none have been directed against an export association.[11]

It is interesting to note that the authority of the Federal Trade Commission is confined to investigatory functions under all the provisions of the Webb-Pomerene Act except Section 4.[12] Under Section 4 the Commission is empowered to determine that unfair methods of competition have been employed and then to command the violator to cease and desist.[13]

Since 1918 the Federal Trade Commission has proceeded against individual respondents only twelve times under this Section. Six complaints resulted in cease and desist orders and six complaints were dismissed. The following practices have been attacked as "unfair methods of competition" in export trade: labeling condensed milk cans so that they mislead the consumer as to the place of manufacture;[14] misrepresenting the quality of apples;[15] misrepresenting products as to certain iron and steel specialities;[16] selling inferior or worthless automobiles and automobile parts as new;[17] filling orders for wheat with grades inferior to that specified;[18] representing and selling as new, certain trucks, automobiles, and parts which were unusable;[19] failing to adhere to contract obligations in the exportation of coal;[20] employing threats of an infringe-

[10] *Id.* at 67.

[11] Branch v. Federal Trade Commission, 141 F. 2d 31 (7th Cir. 1944); Nestle Food Co., Inc., 2 F. T. C. 171 (1919); Caravel Co., Inc., 6 F. T. C. 198 (1923); Carnick Bros. Co., 6 F. T. C. 515 (1923); Pacific Commercial Co., et al., 10 F. T. C. 458 (1926); Barnes-Ames Co., et al., 10 F. T. C. 460 (1926); M. Rea Gano, 11 F. T. C. 492 (1928); Robert M. Lease Co., Inc., et al., 12 F. T. C. 85 (1928); Edmond Waterman et al., 12 F. T. C. 509 (1928); Bond Bros. & Co., Inc., 15 F. T. C. 445 (1931); Export Petroleum Co. of Calif., Ltd., 17 F. T. C. 119 (1932); Lake Erie Chemical Co., et al., 29 F. T. C. 67 (1939).

[12] Section 5 of the Webb-Pomerene Act gives the Federal Trade Commission authority to investigate any conduct by an export association which may restrain domestic or export trade, to make recommendations for correction of this conduct, and to refer its recommendations and findings to the Attorney General. 40 STAT. 517 (1918), 15 U. S. C. § 65 (1946). In United States Alkali Export Ass'n., Inc., et al., 325 U. S. 196, 210 (1945) the Supreme Court stated "that the only function of the Federal Trade Commission under § 5 of the Webb-Pomerene Act is to investigate, recommend and report. It can give no remedy. It can make no controlling finding of law or fact. Its recommendation need not be followed by any court or administrative or executive officer."

[13] In Branch v. Federal Trade Commission, 141 F. 2d 31 (7th Cir. 1944) the respondent appealed from a cease and desist order by the Federal Trade Commission, Joseph G. Branch, 36 F. T. C. 1 (1943), and the Court of Appeals for the seventh circuit affirmed the order.

[14] Nestle Food Co., Inc., 2 F. T. C. 171 (1919) (cease and desist order issued).

[15] Caravel Co., Inc., 6 F. T. C. 198 (1923) (cease and desist order issued).

[16] Carnick Bros. Co., 6 F. T. C. 515 (1923) (complaint dismissed).

[17] Pacific Commercial Co., et al., 10 F. T. C. 458 (1926) (complaint dismissed).

[18] Barnes-Ames Co., et al., 10 F. T. C. 460 (1926) (complaint dismissed).

[19] M. Rea Gano, 11 F. T. C. 492 (1928) (complaint dismissed).

[20] Robert M. Lease Co., Inc., et al., 12 F. T. C. 85 (1928) (cease and desist order issued).

ment suit against competitors in the sale of certain fruits;[21] misrepresenting the quality and sale terms of bailed newspapers;[22] failing to fill gasoline containers to capacity and thus allowing respondent's vendees, in selling to the ultimate consumer, to misrepresent the quantity of gasoline being sold;[23] and misrepresenting the quality and source of certain chemicals and other material used in warfare.[24]

Of the twelve proceedings, only one, *Branch v. Federal Trade Commission*,[25] reached the federal courts. In this case the charge was advertising falsely the qualifications and academic standards of a correspondence school which extended its services into Latin America. The petitioner claimed that the Commission did not have jurisdiction because he was not engaged in commerce and because the acts in question took place in Latin America. The court repudiated these arguments by ruling that (1) sending "books, instructions, and written examinations . . . is 'commerce' within the meaning of the Constitution and the Federal Trade Commission Act"[26] and, (2) the Federal Trade Commission has the power "to protect the petitioner's competitors from . . . unfair practices, begun in the United States and consummated in Latin America."[27] In finding a violation of Section 4, the Court of Appeals for the seventh circuit had to determine that export trade, as defined in the Webb-Pomerene Act, was involved.[28]

Another significant feature of the *Branch* case is the fact that the court made it clear that Section 5 of the Federal Trade Commission Act had also been violated.[29] If acts committed in foreign commerce are condemned by Section 5 of the Federal Trade Commission Act as well as Section 4 of the Webb-Pomerene Act, is there any necessity for resorting to Section 4? The legislative history of the Webb-Pomerene Act indicates that Section 4 was probably inserted primarily to allay the fears of those who opposed combinations in export trade, to prevent export associations from using their position unfairly against individual exporters.[30] However, as previously indicated, the Commission has yet to direct Section 4 against an export association. Inconsistent as it may seem, Section 5 of the Federal Trade Commission Act is broader than Section 4 of the Webb-Pomerene Act. While Section

[21] Edmond Waterman et al., 12 F. T. C. 509 (1928) (complaint dismissed).
[22] Bond Bros. & Co., Inc. 15 F. T. C. 445 (1931) (complaint dismissed).
[23] Export Petroleum Co. of Calif., Ltd., 17 F. T. C. 119 (1932) (cease and desist order issued).
[24] Lake Erie Chemical Co., et al., 29 F.T.C. 67 (1939) (cease and desist order issued).
[25] Branch v. Federal Trade Commission, 141 F. 2d 31 (7th Cir. 1944). The cease and desist order in the case was obtained under Section 5 of the Federal Trade Commission Act. Joseph G. Branch, 36 F. T. C. 1 (1943). Section 4 of the Webb-Pomerene Act was introduced into the proceeding when the case was appealed to the Court of Appeals for the seventh circuit.
[26] Branch v. Federal Trade Commission, 141 F. 2d 31, 34 (7th Cir. 1944).
[27] *Id.* at 35.
[28] *Id.* at 36.
[29] *Id.* at 35.
[30] See note 8 *supra*.

4 contains the language "unfair *methods of competition*,"[31] thus requiring that the act complained of not only being *unfair* but also a *method of competition* in export trade.[32] Section 5 now reads "unfair methods of competition in commerce and *unfair or deceptive acts or practices in commerce*."[33] This latter addition to Section 5 of the Federal Trade Commission Act has been interpreted to mean that it is only necessary to show an *unfair act* in commerce.[34] It appears that the Federal Trade Commission can rely on Section 5 of the Federal Trade Commission Act entirely in assailing inequitable practices in export trade. However, it is the Commission's opinon that without Section 4 of the Webb-Pomerene Act there would be doubt as to their jurisdiction over acts *committed* in foreign countries.[35]

Whether the Commission will rely on Section 4 of the Webb-Pomerene Act of Section 5 of the Federal Trade Commission Act, it is apparent that the enforcement of the anti-trust laws in the area of international trade is definitely increasing. Two recent cases prosecuted by the Attorney General under the Sherman Act clearly indicate that export associations organized under the Webb-Pomerene Act are not exempted from the Sherman Act for all purposes.[36] If the acts complained of amount to a restraint of trade, the association is still subject to prosecution by the Attorney General.[37] Thus it must be noted that the fact that the Federal Trade Commission may proceed under Section 4 of the Webb-Pomerene Act or Section 5 of the Federal Trade Commission Act does not necessarily preclude the Attorney General from proceeding under the Sherman Act. Although it is difficult to predict the extent to which Section 5 will be employed, it may be

[31] 40 STAT. 517 (1918), 15 U. S. C. § 65 (1946) [emphasis added].

[32] The terms "unfair methods of competition" in Section 4 of the Webb-Pomerene Act are the same terms that were found in Section 5 of the Federal Trade Commission Act prior to the Wheeler-Lea amendment to the Federal Trade Commission Act in 1938. The meaning of "unfair methods of competition" was determined in Federal Trade Commission v. Raladam Co., 283 U. S. 643 (1931).

[33] 38 STAT. 719 (1914), as amended by 52 STAT. 111 (1938), 15 U. S. C. § 45 (1946) [emphasis added].

[34] The terms "unfair or deceptive acts or practices in commerce," as added to Section 5 of the Federal Trade Commission Act by the Wheeler-Lea Act in 1938, have been interpreted in Pep Boys-Manny, Moe & Jack v. Federal Trade Commission, 122 F. 2d 158 (3d Cir. 1941); Chas. A. Brewer & Sons v. Federal Trade Commission, 158 F. 2d 74 (6th Cir. 1946) and many other cases.

[35] In correspondence to the writer of this note, dated April 24, 1953, the Federal Trade Commission stated: "Section 4 of the Export Trade Act was passed because there was some doubt as to whether the Commission had jurisdiction under the Federal Trade Commission Act over acts committed in foreign countries. There was no doubt, however, of the Commission's jurisdiction in cases involving imports or exports because the law has always applied to 'commerce' which includes both interstate and foreign."

[36] United States v. United States Alkali Export Ass'n., Inc., et al., 86 F. Supp. 59 (S. D. N. Y. 1949); United States v. Minnesota Mining & Manufacturing Co., et al., 92 F. Supp. 947 (D. C. Mass. 1950).

[37] *Id.*

used to protect competitors and foreign consumers from American exporters who engage in unethical and dishonest business practice in foreign commerce.[38]

MORTON L. UNION

Wills—Ademption—Insurance—Right to Proceeds

The specific legatee of an automobile sought to collect the proceeds of an insurance policy on the automobile after an accident in which it was damaged. The testatrix sustained injuries in the accident which resulted in her subsequent death. The insurance company paid to the executor the value of the automobile after the accident and took possession of it as salvage. The court held that the executor was entitled to the proceeds of the policy and that the legatee was entitled only to the value of the automobile as of the death of the testatrix. The insurance policy was held to be a personal contract between the testatrix and the insurer, hence the legatee had no interest therein.[1]

The case clearly illustrates how the relationship of the death of a testator and the damage or destruction of a specific legacy may produce varied results. That is, since the rights of the legatee are ordinarily determined as of the death of the testator,[2] it will be important whether the damage or destruction of the legacy or devise occurred prior to or subsequent to the testator's death.

In the first instance, *i.e.*, where the damage or destruction occurred prior to the death, the law of ademption controls.[3] Without elaborating on the intricacies of ademption, suffice it to say that ordinarily ademption is defined as the taking away of the subject matter of a specific legacy[4] or devise by its destruction, or its disposition by the testator in his lifetime.[5] Therefore, if the specific legacy or devise is damaged or

[38] This would certainly seem to be the conclusion to be drawn from Branch v. Federal Trade Commission, 141 F. 2d 31 (7th Cir. 1944); Nestle Food Co., Inc., 2 F. T. C. 171 (1919); Caravel Co., Inc., 6 F. T. C. 198 (1923); Robert M. Lease Co., Inc., et al., 12 F. T. C. 85 (1928); Export Petroleum Co. of Calif., Ltd., 17 F. T. C. 119 (1932); Lake Erie Chemical Co., et al., 29 F. T. C. 67 (1939)

[1] *In re* Barry's Estate, 252 P. 2d 437 (Okla., 1952). *Accord,* Ind. Mutual Cyclone Ins. Co. v. Rinard, 102 Ind. App. 546, 200 N. E. 452 (1936); Converse v. Boston Safe Deposit and Trust Co., 315 Mass. 544, 53 N. E. 2d 841 (1944); *In re* Hilpert's Estate, 165 Misc. 430, 300 N. Y. Supp. 886 (Sur. 1937); III AMERICAN LAW OF PROPERTY § 14.32 (1952).

[2] N. C. GEN. STAT. § 31-41 (1943 Recomp. 1950).

[3] *In re* Hilpert's Estate, 165 Misc. 430, 300 N. Y. Supp. 886 (Sur. 1937); III AMERICAN LAW OF PROPERTY § 14.32 (1952) where it is stated: "The right to recover on a fire insurance policy when the loss occurred in the lifetime of decedent passes to his personal representatives, as in case of any other chose in action; this recovery is for the general benefit of the estate and not for the devisee or others entitled to the land."

[4] 28 R. C. L. WILLS § 341 (1921).

[5] Green v. Green, 231 N. C. 707, 58 S. E. 2d 722 (1950); Tyner v. Meadows, 215 N. C. 733, 3 S. E. 2d 264 (1939); King v. Sellars, 194 N. C. 533, 140 S. E.

destroyed prior to the testator's death, the rules of ademption will operate to extinguish or limit what the legatee takes under the will. It logically follows also that in this instance the legatee will not be entitled to the proceeds of insurance on the specific legacy, since he has sustained no loss.

Where the damage or destruction to the specific legacy occurs after the death of the testator, there is, of course, no ademption, and the insurance collected by the executor will be held in trust for the legatee who has sustained the loss.[6] In this situation, the legacy existed in its normal condition at the time of the testator's death, hence the legatee is entitled to its fair value at that time.

The most perplexing problems arise when the available facts indicate that the death of the testator and the damage or destruction of the legacy were apparently simultaneous. In one New York case,[7] the testatrix died in the sinking of a ship and the specific legacy was lost in the same sinking. The court, in awarding to the legatee certain proceeds to cover the value of the chattel, briefly held that "there was no destruction, selling or disposition of the articles in question during the lifetime of the testatrix." An English case,[8] decided on somewhat the same facts, reached a result contrary to the New York case. The testator and the specific legacy were lost at sea and the court held that there was an ademption of the legacy, hence the insurance proceeds belonged to the estate. The reasons given for the decisions in both cases were brief and no basis for the contrary results can be determined from either case. It is possible that the New York court could have considered the fact that the property was insoluble and still in existence at the time of the testarix' death, thus preventing ademption. If such was the case, the court would probably have reached a contrary decision if the specific legacy and the testator had perished in a conflagration resulting in the complete destruction of the legacy. It is submitted that the New York court arrived at the more equitable decision in the matter. However, due to the varied circumstances that may surround an apparently simultaneous death of the testator and destruction of the legacy, the court would probably refuse to indulge in any presumptions and the burden would fall on the legatee, in claiming the proceeds from the legacy, to prove that there has been no ademption.[9] On the other

91 (1927); Starbuck v. Starbuck, 93 N. C. 183 (1885); Taylor v. Bond, 45 N. C. 5 (1851); 4 PAGE, WILLS § 1513 *et seq.* (1941).

[6] Culbertson v. Cox, 29 Minn. 309, 13 N. W. 177 (1882); Millard v. Beaumont, 194 Mo. App. 69, 185 S. W. 547 (1916); Wyman v. Wyman, 26 N. Y. 253 (1863); Graham v. Roberts, 43 N. C. 99 (1851); VANCE, INSURANCE § 133 (3d. ed. 1951).

[7] *In re* Shymer's Estate, 136 Misc. 334, 242 N. Y. Supp. 234 (Sur. 1930).

[8] Durant v. Friend, 5 De G & S 343, 64 Eng. Rep. 1145 (1852).

[9] Note, 43 HARV. L. REV. 1311 (1930).

hand, the courts seem to favor the construction of a will which prevents the failure of a bequest or legacy.[10] Certainly that construction should have some weight when there has been no intent or voluntary act on the part of the testator to cause an ademption, as where the testator and specific legacy perish simultaneously.

The testator by making a specific legacy intends a real benefit to the legatee, and if the legacy is defeated through operation of law rather than by his own act, his intent may be said to have been defeated. Even if the legacy is defeated by his own act, there is no conclusive intent on his part that the legacy be adeemed. Of course, this undesirable result has been alleviated somewhat by the courts in construing the legacy as a general or demonstrative legacy if at all possible.[11] Even though the legacy is clearly a specific one which has been destroyed, it would seem that in some instances the legatee would be entitled to the proceeds therefrom on the basis of the testator's implied intention. That is, if it can be implied from the "four corners" of the will that the testator intended some fixed pattern of distribution among the natural subjects of his bounty, there would appear to be no objection to allowing the proceeds of adeemed property to be paid to a legatee or devisee.[12] Hence, by construction, the apparent intent of the testator may be served and ademption prevented.

Further, attempts have been made in some jurisdictions to remedy the situation by statute.[13] Kentucky's statute[14] seems to be the most liberal of the statutes on the subject, but it operates to prevent ademption only where the heirs of the testator are concerned. In one case decided under the statute,[15] it was held that a specific devise of a farm to the testator's heirs was not adeemed by a sale of it during the testator's lifetime and the devisee-heirs were entitled to the proceeds. It

[10] Willis v. Barrow, 218 Ala. 549, 119 So. 678 (1929); Palmer v. French, 326 Mo. 710, 32 S. W. 2d 591 (1930); *In re* Strasenburgh's Will, 136 Misc. 91, 242 N. Y. Supp. 453 (Sur. 1930); *In re* Levas Estate, 33 Wash. 2d 530, 206 P. 2d 482 (1949).

[11] Vogel v. Saunders, 92 F. 2d 984 (D. C. 1938); Conway v. Shea, 282 Mass. 25, 183 N. E. 771 (1933); Methodist Church v. Thomas, 235 Mo. App. 671, 145 S. W. 2d 157 (1941); *In re* Liell's Will, 139 Misc. 513, 247 N. Y. Supp. 386 (Sur. 1931); Smith v. Smith, 192 N. C. 687, 690, 135 S. E. 855, 857 (1927) ("If the words will be satisfied by anything of the same kind, not owned by the testator, the legacy is general.").

[12] *See* Trust Co. v. Miller, 223 N. C. 1, 4, 25 S. E. 2d 177, 178 (1943); Nooe v. Vannoy, 59 N. C. 185, 189 (1860).

[13] ALA. CODE ANN. § 61-15 (1940) (if the testator conveys his interest in the devised property and later acquires a new interest, the new interest passes unless it appears from the will or other instruments that the testator intended a revocation of the will); GA. CODE ANN. § 113-818 (1937) (no ademption if the testator exchanges property devised for other of like character); KY. REV. STAT. § 394.360 (1948) (when property devised to an heir is thereafter converted, the devisee shall receive the value of the devise unless a contrary intent appear from the will or other evidence).

[14] KY. REV. STAT. § 394.360 (1948).

[15] Westover's Ex'rx v. Westover, 313 Ky. 545, 233 S. W. 2d 105 (1950).

has been suggested that "anti-ademption statutes" could be passed, as we now have "anti-lapse statutes," to prevent the legacy's failing;[16] but apparently no state has been willing to go so far to remedy the situation. Even if it were found under the above remedies that the legatee or devisee were entitled to the proceeds of the legacy, query as to whether insurance proceeds would be considered proceeds of the legacy or of a separate contract.

It would seem that the most practical remedy is to be found in the will itself. Thus, if the testator were to provide in his will that if the specific legacy is not a part of his estate at his death, the legatee is to take other rights, such as the proceeds of the property, the property purchased with the proceeds of the property, or the insurance derived from its damage or destruction in lieu of the property specifically bequeathed, the problem would be practically extinct except for the matter of tracing proceeds. The intent of the testator can best be served when drafting his will by informing him of the possibility of ademption and the remedies available.

ELTON C. PRIDGEN

Witnesses—Competency of Husband and Wife—Effect of Validity and Purpose of Marriage

Defendant was on trial for violation of the immigration laws. He had entered into a marriage in France with an honorably discharged veteran for the purpose of bringing himself within the language of the War Brides Act[1] so as to gain entrance to the United States. At the time of the marriage both parties understood its limited purpose; it was agreed that a divorce would be obtained after the marriage had served this purpose; and the wife received a sum of money for participating in the plan. At the trial the government offered the wife as a witness against the defendant. He objected on the ground that she was his wife pursuant to a French marriage and therefore incompetent to testify against him. *Held:* The validity or invalidity of the French marriage is immaterial. The relationship was entered into with no intention of the parties to live together as husband and wife, but only for the purpose of using the ceremony in a scheme to defraud. The marriage was a sham, empty, phony affair, and the ostensible spouse was competent to testify against the defendant.[2]

[16] Mecham, *Why Not a Modern Wills Act?*, 33 IOWA L. REV. 501, 514 (1948); III AMERICAN LAW OF PROPERTY § 14.13 (1952).

[1] See 59 STAT. 659 (1945), 8 U. S. C. § 232 (1947) which provides in effect that alien spouses of United States citizens serving in, or having an honorable discharge certificate from the armed forces of the United States during the Second World War, shall be admitted to the United States.

[2] Lutwak v. U. S., 73 Sup. Ct. 481 (1953).

The federal courts have generally[3] followed the rule that spouses are incompetent as witnesses against each other in criminal actions unless the defendant is being tried for violence upon the person of the offered witness spouse.[4] The principal decision recognized this rule to be the existing law, but refused to apply it because the marriage was a sham. The language of the decision—*so-called marriage, ostensible spouse,* and *sham marriage*[5]—indicates that the refusal to declare the witness incompetent was based on the conclusion that the marriage was in fact invalid; however, in reaching this conclusion the Court refused to consider the appropriate law governing the marriage by stating that the legal marital status of the parties was immaterial.

In jurisdictions which adhere to the rule that spouses are incompetent as witnesses against each other in criminal actions, incompetency is treated as an incident of a valid marriage.[6] The question of whether an offered witness is the wife of an accused so as to be incompetent is determined by the trial judge.[7] However, the controlling factor in his determination of competency is the marital status of the parties at the time of the trial.[8] If the marriage, when tested by the applicable law

[3] See 28 U. S. C. § 664 (1947) which provides in effect that in any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States, the lawful husband or wife of the accused shall be a competent witness.

[4] U. S. v. Walker, 176 F. 2d 564 (2d Cir. 1949); Shore v. U. S., 174 F. 2d 838 (8th Cir. 1949); Hays v. U. S., 168 F. 2d 996 (10th Cir. 1948); Brunner v. U. S., 168 F. 2d 281 (6th Cir. 1948); U. S. v. Mitchell, 137 F. 2d 1006 (2d Cir. 1943); Paul v. U. S., 79 F. 2d 561 (3d Cir. 1935). *But cf.* Yoder v. U. S., 80 F. 2d 665 (10th Cir. 1935).

[5] Lutwak v. U. S., 73 Sup. Ct. 481, 488 (1953).

[6] Miles v. U. S., 103 U. S. 304 (1880); U. S. v. Walker, 176 F. 2d 564 (2d Cir. 1949); Matz v. U. S., 158 F. 2d 190 (D. C. 1946); Elmore v. State, 140 Ala. 199, 37 So. 156 (1904); State v. Pass, 59 Ariz. 16, 121 P. 2d 882 (1942); People v. Thornton, 235 P. 2d 227 (Cal. App. 1951); People v. McIntire, 213 Cal. 50, 1 P. 2d 443 (1931); State v. Chrismore, 223 Iowa 957, 247 N. W. 3 (1937); Wilson v. State, 204 Miss. 111, 37 So. 2d 19 (1948); Rowland v. State, 75 Okla. Cr. Rep. 164, 129 P. 2d 609 (1942); Scott v. State, 59 Okla. Cr. Rep. 231, 57 P. 2d 639 (1936); Commonwealth v. Carey, 105 Penn. Super. Ct. Rep. 362, 161 A. 410 (1932); Norvell v. State, 149 Tex. Cr. Rep. 213, 193 S. W. 2d 200 (1946).

[7] When an accused objects to the competency of an offered witness on the grounds that she is his spouse and the prosecution challenges the validity of the marriage, the judge holds a special preliminary examination to determine the issue. Dickerson v. State, 30 Ga. App. 352, 118 S. E. 67 (1923); State v. Chrismore, 223 Iowa 957, 274 N. W. 3 (1947); Wilson v. State, 204 Miss. 111, 37 So. 2d 19 (1948); Commonwealth v. Carey, 105 Penn. Super. Ct. Rep. 362, 161 A. 410 (1932); State v. McGinty, 14 Wash. 2d 71, 126 P. 2d 1086 (1942); State v. Frye, 45 Wash. 645, 80 Pac. 170 (1907). *See also,* U. S. v. Walker, 176 F. 2d 564, 568 (2d Cir. 1949); See Shores v. U. S., 174 F. 2d 838 (8th Cir. 1949) (followed procedure); Brunner v. U. S., 168 F. 2d 281 (6th Cir. 1948) (followed procedure). *Contra:* Goodson v. State, 162 Ga. 178, 132 S. E. 899 (1926) (issue left to jury). When the validity of the marriage is also an issue which is material in the case being tried, the judge still rules on the issue for the purpose of competency; however, his ruling can come only after enough evidence on the issue has been presented during the course of the trial to convince him of the validity or invalidity of the marriage. Miles v. U. S., 103 U. S. 304 (1880); Matz v. U. S., 158 F. 2d 190 (D. C. 1946).

[8] Elmore v. State, 140 Ala. 199, 37 So. 156 (1904); State v. Chrismore, 223

governing the relationship,[9] is valid, the witness thenceforth becomes the lawful wife of the defendant, and thus is incompetent.[10]

The general rule is that marriages will, if valid by the laws of the place where entered into, be recognized as valid in every other jurisdiction.[11] Once the validity of the marriage is determined according to the law at the *lex loci contractus,* its incidents are automatic elsewhere[12] unless recognition of the marriage would contravene some public policy of the forum.[13]

Hence, in the instant case, the Court's disregard of French marriage law and local public policy controlling recognition of the marriage seems to have been inconsistent with its recognition of the rule that spouses are incompetent to testify against each other.[14] The Court could have used the power conferred upon if by the Federal Rules of Criminal Procedure[15] to effectuate the suggestion made by several preceding decisions[16] that the rule disqualifying spouses as witnesses against each other in criminal action be abrogated. However, once the Court chose not to take this step, it is difficult to comprehend how it could recognize the rule and at the same time completely ignore the marital status—the controlling factor in determining whether the rule should be applied.[17]

As a practical matter, the same result probably could have been reached by the Court if the marital status had been considered. A persuasive indication that the so-called sham marriage here did not

Iowa 957, 274 N. W. 3 (1937); Wilson v. State, 204 Miss. 111, 37 So. 2d 19 (1948); Scott v. State, 59 Okla. Cr. Rep. 231, 57 P. 2d 639 (1936); Norvell v. State, 149 Tex. Cr. Rep. 213, 193 S. W. 2d 200 (1946); State v. McGinty, 14 Wash. 2d 71, 126 P. 2d 1086 (1942). *See also,* U. S. v. Walker, 176 F. 2d 564, 568 (2d Cir. 1949).

[9] State v. Pass, 59 Ariz. 16, 121 P. 2d 882 (1942).

[10] See note 6 *supra.*

[11] Loughram v. Loughram, 292 U. S. 216 (1934); Baron v. U. S., 191 F. 2d 837 (9th Cir. 1951); Frozen v. Du Pont, 146 F. 2d 837 (3d Cir. 1944); Toshcko Inaba v. Noyle, 36 F. 2d 481 (9th Cir. 1929); Modianos v. Tuttle, 12 F. 2d 927 (E. D. La. 1925); *Ex parte* Suzanna, 295 F. 713 (D. Ct. D Mass. 1924); Great Northern Ry. v. Johnson, 254 F. 683 (8th Cir. 1918); *In re* Miller's Estate, 239 Mich. 455, 214 N. W. 428 (1927).

[12] Loughram v. Loughram, 292 U. S. 216 (1934) (dower award); Frozen v. Du Pont, 146 F. 2d 837 (3d Cir. 1944) (workmen's compensation award); Modianos v. Tuttle, 12 F. 2d 927 (E. D. La. 1925) (immigration privilege); *Ex parte* Suzanna, 295 F. 713 (D. Ct. D Mass. 1924) (immigration privilege); Great Northern Ry. v. Johnson, 254 F. 683 (8th Cir. 1918) (death claim of surviving spouse).

[13] *Ex parte* Soucek, 101 F. 2d 405 (7th Cir. 1939); Osoinach v. Watkins, 235 Ala. 564, 180 So. 577 (1938); Takahashi's Estate v. Jorgensen, 113 Mont. 490, 129 P. 2d 217 (1942); Lederkremer v. Lederkremer, 18 N. Y. S. 2d 725 (1940).

[14] See note 6 *supra.*

[15] See FED. R. CRIM. P. 26 which provides as follows: ". . . The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States *in the light of reason and experience.*" (Italics added.)

[16] See Funk v. U. S., 290 U. S. 371 (1934); U. S. v. Walker, 176 F. 2d 564 (2d Cir. 1949); Yoder v. U. S., 80 F. 2d 665 (10th Cir. 1935).

[17] See note 8 *supra.*

contravene any public policy in American jurisdictions is the fact that such marriages have been held valid in many of the states.[18] However, under French law, where the marriage ceremony was performed, when parties go through a ceremony of marriage for some purpose other than that of creating a true relationship of husband and wife, the marriage is treated as void.[19]

Aside from the means used by the Court in the instant case, there is no particular quarrel with the ultimate result of the decision. The reason usually given for the disqualification of spouses as witnesses against each other is to protect the sanctity of the marital relationship.[20] When two people marry with no intention by either to enter the relationship for the purposes commonly understood, the reason for the rule obviously disappears. The Court here attempted to alleviate such a situation by basing competency on the purpose of the marriage rather than on its validity. This approach would undoubtedly be desirable in that it would prevent the application of the rule for the sake of the rule[21] rather than for the sake of the reason underlying the rule. However, as pointed out above,[22] such a departure would be inconsistent with the rule itself since the rule applies to married persons as such. To effectuate this approach, it would seem necessary to abandon the rule of incompetency as to married persons and substitute therefor a rule declaring a witness incompetent where it appears that the sanctity of the witness's marital relationship would be affected by allowing her to testify. The dissenting opinion in the principal case[23] recognized the necessity of determining the invalidity of the marriage according to the proper law governing the relationship in order to be consistent with the rule of incompetency and summed the situation up as follows: "Whenever a court has a case where behavior that obviously is sordid can be proved to be criminal only with great difficulty, the effort to bridge the gap is apt to produce bad law."[24]

ERVIN I. BAER

[18] See Schilbi v. Schilbi, 136 Conn. 196, 69 A. 2d 831 (1949) (legitimizing child); De Vries v. De Vries, 195 Ill. App. 4 (1915) (nullification of employment contract); Hansen v. Hansen, 287 Mass. 154, 191 N. E. 673 (1934) (retention of position and salary increase); Delfino v. Delfino, 35 N. Y. S. 2d 693 (1942) (protection of reputation); Erickson v. Erickson, 38 N. Y. S. 2d 588 (1942) (legitimizing child); Campbell v. Moore, 189 S. C. 497, 1 S. E. 2d 784 (1939) (legitimizing child). For a compilation of cases involving limited purpose marriages see 14 A. L. R. 2d 624 (1950).

[19] 1 RABEL, CONFLICT OF LAWS 272 (Draper-Yntema, ed. 1945).

[20] 8 Wigmore, Evidence § 2228 (3d ed. 1940).

[21] See U. S. v. Walker, 176 F. 2d 564 (2d Cir. 1949) (accused had married witness solely for the purpose of defrauding her of money; the parties had separated; and reconciliation seemed highly unlikely); Norvell v. State, 149 Tex. Cr. Rep. 213, 193 S. W. 2d 200 (1946) (accused married witness for the exclusive purpose of rendering her incompetent to testify against him).

[22] See note 14 *supra*.

[23] See Lutwak v. U. S., 73 Sup. Ct. 481, 490 (1953) (dissenting opinion).

[24] *Ibid.*