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NOTES AND COMMENTS

Bills and Notes—Release Clauses in Stop Payment Orders

A depositor wanted to stop payment on a check drawn by him and not yet presented to the drawee bank for payment. He signed a "Request to Stop Payment" on a printed form given him by the bank's clerk. The "request" contained the following release under seal: "Should the check be paid through inadvertence, accident, or oversight, it is expressly agreed that the bank will in no way be held responsible. The bank receives this request upon the express condition that it shall not be in any way liable for its act should the check be paid by it in the course of its business. The undersigned agrees to be legally bound hereby." Three days later the check was paid by the drawee bank "through inadvertence, accident, or oversight" and charged against the drawer's account. The Pennsylvania Supreme Court, reversing a Superior Court decision,[1] held the release clause void as against public policy.[2]

The effectiveness or validity of release clauses has been decided so far in eight states and in one federal district court.[3] Until the recent Pennsylvania decision, the majority of jurisdictions had held such clauses to be enforceable.[4] It is, of course, well established that "at common law a bank is liable to the drawer of a check for payment after receipt of a proper non-payment notice."[5] The two points on which the courts are obliged to examine such clauses have been (1) the consideration question and (2) the public policy question.

As to the first, some courts have held that the consideration to the bank for the express agreement not to pay the check grows out of the "mercantile relation of the parties and the reciprocal rights and obligations which the law attaches to that relation."[6] The common law liability

[1] Thomas v. First National Bank of Scranton, 173 Pa. Super. 205, 96 A. 2d 196 (1953).

[2] Thomas v. First National Bank of Scranton, 376 Pa. 181, 101 A. 2d 910 (1954).

[3] California, Connecticut, Indiana, Massachusetts, New Jersey, New York, Ohio, Pennsylvania, Federal District Court of Puerto Rico.

[4] New York, Massachusetts, Indiana, Federal District Court of Puerto Rico, and Pennsylvania had held such release clauses enforceable. The principal case reversed a decision in 173 Pa. Super. 205, 96 A. 2d 196 (1953). This case had itself overruled two decisions of the Pennsylvania District and County Court, Michaels v. First National Bank of Scranton, 73 Pa. D. & C. 557 (1951); and Adams v. Homewood Bank at Pittsburgh, 76 Pa. D. & C. 557 (1951). The principal case also distinguished an early Pennsylvania case, Cohen v. State Bank of Philadelphia, 69 Pa. Super. 40 (1917), holding such agreements enforceable.

[5] Stearne, J. in Thomas v. First National Bank of Scranton, 376 Pa. 181, 184, 101 A. 2d 910, 911 (1954).

[6] Tremont Trust Co. v. Burack, 235 Mass. 398, 401, 126 N. E. 782, 784 (1920).

of the bank may be limited provided the limitation has the consent of the depositor.[7] This result is based on the theory that freedom of contract must be upheld. On the other hand, it has been found by other courts that while the reciprocal rights and obligations inherent in the depositor-bank relation are sufficient to supply consideration for the bank's liability to stop payment, the release agreement is something new and requires additional consideration moving from the bank to the depositor. Absent such additional consideration the bank receives benefit but suffers no detriment.[8] To the argument that the consideration for the depositor's release was the bank's not cancelling his account but allowing him to continue as a depositor with the bank, it has been answered that such consideration was not bargained for in exchange for the release agreement and therefore could not constitute a valid consideration.[9] It has been suggested that promissory estoppel might supply the missing element of bargaining.[10] The importance of consideration as a question for the court has, however, declined in recent years due to the rise of the public policy question.

As to the question of public policy, the courts favoring the validity of such clauses take the attitude that "inadvertence" includes negligence[11] and is intended to exonerate the bank from the negligence of its employees, and further hold that this exoneration is not against public policy.[12] The rationale is that, before it can be said that public policy has been contravened, it must be shown that the contract has a tendency to injure the public, is against public good, or is inconsistent with sound

[7] Gaita v. Windsor Bank, 251 N. Y. 152, 167 N. E. 203 (1929). The court went further to say that a stop payment order, if it is not wished that the bank's liability be limited, should be positive and unqualified. A Bank not wishing to assume such liability may cancel the depositor's account and thus cancel the relationship. *See* Chase National Bank of New York v. Battat *et al.*, 297 N. Y. 185, 190, 78 N. E. 2d 465, 467 (1948).

[8] Speroff v. First Century Trust Co., 149 Ohio St. 415, 79 N. E. 2d 119 (1948). The court held (1) that an oral order to stop payment was sufficient and (2) that a subsequent written agreement containing the release clause was without consideration. There is an excellent annotation in 1 A. L. R. 2d 1155 (1948).

[9] Calamita v. Tradesman's National Bank, 135 Conn. 326, 64 A. 2d 46 (1949); Reinhardt v. Passaic-Clifton National Bank and Trust Co., 16 N. J. Super. 430, 84 A. 2d 741 (1951), *aff'd mem.*, 9 N. J. 607, 89 A. 2d 242 (1952); RESTATEMENT, CONTRACTS § 75(1) (1932). However, had there been a recital that the continuance of the relation was bargained for as consideration, the clause would have been enforceable as far as the consideration is concerned, and the courts might have been forced into the public policy field. Such was the situation in the principal case.

[10] 25 N. Y. U. L. REV., 419, 421 (1950); RESTATEMENT, CONTRACTS § 90 (1932); 1 WILLISTON, CONTRACTS § 139 (rev. ed. 1936).

[11] South Carolina, in Carroll v. South Carolina Nat. Bank, 211 S. C. 406, 45 S. E. 2d 729 (1947) held that the burden of proof was on the bank to show inadvertence or oversight in payment. In Martinez v. National City Bank of N. Y., 80 F. Supp. 545 (D. Puerto Rico 1948) (the only federal case concerning release agreements in stop payment orders) it was held that the bank is not liable for negligent payment under such an agreement as long as there is no *wilful* disregard of the order.

[12] Tremont Trust Co. v. Burack, 235 Mass. 398, 126 N. E. 782 (1920).

policy and good morals, either as to consideration or as to things to be done or not done. Further, goes the reasoning, it is actually to the best interest of the public that there be freedom of contract. Therefore such agreements should not be held void as against public policy unless they contravene what the legislature or judiciary has clearly established as public policy.[13]

In two states the public policy question is a cut and dried matter. California and Pennsylvania have declared by statute that such agreements are not enforceable.[14] But where there is no statute, the courts have not been backward about making themselves the source of public policy based on well recognized common law principles. For example, in Ohio the supreme court held that a contract to relieve a bank of liability on account of inadvertence or oversight was against public policy and did not relieve the bank of its duty to act in good faith and exercise reasonable care.[15] The New Jersey court did not have to decide the public policy question since it found a lack of consideration; however, the court suggested that banks be treated in the same way as quasi-public enterprises such as utilities, common carriers and the like, which are deprived of power to enforce release clauses of the type here involved.[16] This was the theory on which the Pennsylvania Supreme Court declared the release in the principal case to be against public policy. Since the consideration question was answered by the Uniform Written Obligations Act[17] and further by the release being under seal, the court likened banks to common carriers and public utilities, reasoning that all banks are subject to rigid state and federal controls and that every person must use such controlled banks if they are to use a bank at all. Since in Pennsylvania it is against public policy to allow a common carrier to limit its liability,[18] the court held it also against public

[13] Hodnick v. Fidelity Trust Co., 96 Ind. App. 342, 183 N. E. 488 (1932).

[14] California was the first to have such a statute, CALIF. CIV. CODE § 1668 (Deering, 1949): "Certain contracts unlawful. All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of the law, whether willful or negligent, are against the policy of the law." Such release agreements were held to be in violation of this statute in Hiroshima v. Bank of Italy, 78 Cal. App. 362, 248 P. 947 (1926); Grisinger v. Golden State Bank, 92 Cal. App. 433, 268 P. 425 (1928). The Pennsylvania Statute, a part of the Uniform Commercial Code, PA. STAT. ANN. tit. 12A § 4-103(1) (Purdon, 1954), was put into effect on 1 July 1954, too late to be applied by the court in the principal case. It reads as follows: "The effect of the provisions of this article may be varied by agreement, except that no agreement can disclaim a bank's responsibility to limit the measure of damages for its own lack of good faith or failure to exercise ordinary care."

[15] Speroff v. First Century Trust Co., 194 Ohio St. 415, 79 N. E. 2d 119 (1948).

[16] Reinhardt v. Passaic-Clifton National Bank and Trust Co., 16 N. J. Super. 430, 84 A. 2d 741 (1951), *aff'd mem.*, 9 N. J. 607, 89 A. 2d 242 (1952).

[17] PA. STAT. ANN. tit. 33 § 6 (Purdon, 1949) (the words "The undersigned agrees to be legally bound hereby." eliminate the necessity for consideration.).

[18] Turek v. Pennsylvania Railroad Co., 361 Pa. 512, 64 A. 2d 779 (1949); Coleman v. Pennsylvania Railroad Co., 242 Pa. 304, 89 Atl. 87 (1913).

policy to allow a bank to do so. While these two areas are not completely analogous, since banks are not required to accept all persons who apply for their services as are utilities and common carriers, still there is enough similarity to enable the Pennsylvania court to reach its desired result.

Another point to consider is that although, theoretically, the bank and depositor have equal bargaining power, in actuality they do not. The depositor, not being so well versed in his rights as the bank, is usually made to feel that the bank is doing him a favor and thinks that he is obligated to sign whatever release he is given.[19] Also the bank has the deeper pocket, is better protected by insurance, and is therefore better able to absorb the loss.[20] Then too, the loss may be distributed through service charges on stop payment notices.[21] These are not legal considerations, but they are some of the things which go into making up public policy.

No North Carolina decision has yet passed on the validity of release clauses or agreements in stop payment orders. However, in *Miller's Mutual Fire Insurance Ass'n v. Parker*[22] the court has held that a parking lot owner, "a professional bailee," could not, by giving notice orally, on signs or printed on the claim check, relieve himself of liability for loss by fire or theft of the cars placed under his care. And from the common carrier angle, the court recently held in *Crowell v. Eastern Air Lines*[23] that an airline could not limit its liability for accidents by an agreement on the ticket requiring, as a prerequisite to action predicated thereon, that all accident claims be filed within ninety days, since such a limitation is void as against public policy. In view of these two cases it does not seem that the North Carolina Supreme Court would look with much favor on a release agreement in a stop payment order.

Only time and litigation can tell what the courts will do in the future with respect to such release agreements. However, with the adoption of the Uniform Commercial Code[24] by more and more states, it would seem that release agreements are doomed to be held against public policy even more frequently in the future than they have been in the past.

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[19] See Note, 29 COL. L. REV. 1150 (1929).
[20] See Comment, 25 TEMP. L. Q. 486 (1952).
[21] See Note, 27 N. Y. U. L. REV. 345, 348 (1952).
[22] 234 N. C. 20, 65 S. E. 2d 341 (1951).
[23] 240 N. C. 20, 81 S. E. 2d 178 (1954).
[24] *Supra* note 14.

Constitutional Law—Due Process—Use of Illegally Obtained Evidence in State Courts

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated. . . .[1]

Fresh in the minds of the framers of the Fourth Amendment was the bitter controversy over issuance of "writs of assistance" in the colonies, prior to the American Revolutionary War. Promulgated by England, in an effort to restrain colonial trading with her enemies, these writs were general search warrants, bearing no particularized description of places, persons, or things to be searched or seized. Expressions of opposition to the writs perhaps achieved maximal intensity when James Otis declared that the writs were " 'the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book;' since they placed the liberty of every man in the hands of every petty officer."[2]

Almost two hundred years later, an incident occurred which could revive echoes of the impassioned sentiments of James Otis. Municipal police officers, suspecting that one Irvine was engaged in illegal horse-race bookmaking and related offenses, procured a locksmith to fashion a key that would fit the front door of Irvine's house, and used that key to gain entrance into Irvine's home while he and his wife were away. The officers then concealed a microphone in the hallway, bored a hole in the roof of the house, and strung connecting wires through the hole from the microphone to a listening post in a nearby garage. Officers were stationed in relays at the listening post for approximately thirty days. Twice during that time they re-entered the home to relocate the microphone, first into the bedroom of Irvine and his wife, and then into the bedroom closet. After obtaining evidence to their satisfaction, the officers, using the same key, re-entered Irvine's home and arrested him. During the arrest the officers made a search of the house, for which no warrant had been issued. Irvine's conviction for violating anti-

[1] U. S. CONST. AMEND. IV.

[2] Boyd v. United States, 116 U. S. 616, 625 (1886). "This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. 'Then and there,' said John Adams, 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.' " *Ibid.*

For more detailed historical discussions of the search and seizure clause, see: Harno, *Evidence Obtained by Illegal Search and Seizure,* 19 ILL. L. REV. 303 (1925), in which it is stated, at p. 307: "Thus viewed historically the purpose of the search and seizure clause was to restrain the legalization of unreasonable searches and seizures;" and Fraenkel, *Concerning Searches and Seizures,* 34 HARV. L. REV. 361 (1921).

gambling laws[3] was affirmed on appeal in California,[4] and again in the United States Supreme Court by a divided Court.[5]

The petitioner, Irvine, argued on appeal that the police officers' testimony admitted during the trial should have been excluded, on the basis that it was obtained by methods which violated the Fourteenth Amendment.[6] The Court held, however, that in a state prosecution for a state crime, the Fourteenth Amendment does not forbid admission of evidence so obtained.[7]

The manner in which the Court reached this holding does not, by its own choice, follow a logical sequence of reasoning. The Court admitted that " 'security of one's privacy against arbitrary intrusion by the police' is embodied in the concept of due process as found in the Fourteenth Amendment."[8] This is saying, in effect, that the protection of the Fourth Amendment (the right to be secure against unreasonable searches and seizures) is embodied in the concept of due process as found in the Fourteenth Amendment. Though the protections of the Fourth Amendment are not directly applicable to the states,[9] the protections of the Fourteenth Amendment are.[10] In federal courts, evidence obtained in violation of the Fourth Amendment is excluded.[11] Therefore, it would seem to follow that such evidence should also be excluded in state courts. The major premise and the minor premise are both present in the Court's reasoning, but it refuses to be bound by this strictly logical conclusion.

Thus, the primary question posed by the *Irvine* case is: Why will the Supreme Court not apply to the states a rule of evidence similar to that applied in the federal courts?

The Court has answered this question in *Wolf v. Colorado*[12] and

[3] CAL. PENAL CODE ANN. §§ 337a (1), (2), (3) and (4) (Deering, 1949).

[4] People v. Irvine, 113 Cal. App. 2d 460, 248 P. 2d 502 (1952).

[5] Irvine v. California, 72 Sup. Ct. 381 (1954). A 5-4 decision, Justice Jackson wrote the majority opinion, in which Chief Justice Warren and Justices Minton and Reed joined; Justice Clark wrote a concurring opinion; and, Justices Black, Douglas, and Frankfurter wrote dissenting opinions. Justice Burton joined in Justice Frankfurter's dissent; and Justice Douglas concurred with Justice Black's dissent.

[6] "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. CONST. AMEND. XIV, § 1.

[7] For its holding in the *Irvine* case, the Court quoted verbatim the holding in Wolf v. Colorado, 338 U. S. 25 (1949): "We hold, therefore, that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure." *Id.* at 33. The principle of the *Wolf* case was restated also in Stefanelli v. Minard, 342 U. S. 117 (1951). See also Schwartz v. Texas, 344 U. S. 199 (1952).

[8] Irvine v. California, 74 Sup. Ct. 381, 383 (1954).

[9] Wolf v. Colorado, 338 U. S. 25 (1949).

[10] U. S. CONST. AMEND. XIV.

[11] Weeks v. United States, 232 U. S. 383 (1914).

[12] 338 U. S. 25 (1949).

again in the *Irvine* case. It is not denied that the right to be secure in one's privacy against arbitrary intrusion by police is a right to be protected.[13] This right is embodied in the Fourth Amendment and in the Due Process Clause.[14] However, in determining means of protecting the right, it becomes evident that exclusion of illegally obtained evidence is only one of several means,[15] and even though the Supreme Court has enforced this evidentiary rule in the federal courts, it is unwilling to condemn as falling below minimal standards of "due process of law" states' reliance on other means to protect the right.[16] For these reasons, therefore, the Court, in interpreting its role in supervising administration of criminal justice in state courts, has concluded that "due process of law" does not command the Court or the states to exclude illegally obtained evidence in state prosecutions for state crimes.

Four factors which have influenced the Court in this determination are: (1) the questionable validity of the evidentiary rule of exclusion; (2) the reluctance of states to adopt similar rules of evidence; (3) the questionable effectiveness of the rule as a deterrent against illegal searches and seizures; and (4) the historical interpretation of the Due Process Clause of the Fourteenth Amendment. Each of these factors will be discussed.

The questionable validity of the evidentiary rule of exclusion. Originating in *Boyd v. United States*[17] and *Weeks v. United States*,[18] the

[13] *Id.* at 27. Irvine v. California, 74 Sup. Ct. 381, 383 (1954).

[14] Wolf v. Colorado, 338 U. S. 25, 27-28 (1949).

[15] For example, the victim of an illegal search may have an action for damages in tort against the searching officer, the state may dismiss the offending officer or prosecute him in a criminal proceeding, and the federal government may prosecute the offending officer under Civil Rights Sections of the U. S. Criminal Code. In this respect, see: Appendix to Irvine v. California, 74 Sup. Ct. 381 (1954); Wolf v. Colorado, 338 U. S. 25, 30-32, note 1 (1949); 18 U. S. C. §§ 241 and 242 (1952).

[16] Wolf v. Colorado, 338 U. S. 25, 31 (1949).

[17] 116 U. S. 616 (1886). The rule had its inception in this case, wherein the Court declared that compulsory production of private books and papers is "compelling [the accused] to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment." *Id.* at 634-635. The Court held therefore that the admission of the evidence was unconstitutional. *Id.* at 638.

Thus, the *Boyd* case upset the long established common law principle previously followed by the Supreme Court, that the "admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence." VIII WIGMORE, EVIDENCE, § 2183, p. 5 (3d ed. 1940).

For discussions of the *Boyd* case, see: VIII WIGMORE, EVIDENCE, § 2184 (3d ed. 1940); Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361 (1921); Ramsey, *Acquisiton of Evidence by Search and Seizure*, 47 MICH. L. REV. 1137 (1949).

[18] 232 U. S. 383 (1914). Though first stated in the *Boyd* case, the rule did not become finalized until the *Weeks* decision, for in 1904, eighteen years after the *Boyd* case, the Supreme Court returned to the old rule, when it held in Adams v. New York, 192 U. S. 585 (1904), that private papers were not rendered inadmissible though seized illegally. Ten years later, the *Weeks* case reaffirmed the doctrine stated in *Boyd*, by holding that, in a federal prosecution, where federal officers

federal rule briefly stated is: In a federal prosecution, the Fourth Amendment bars admission of evidence obtained through illegal search and seizure.[19]

Authorities have criticized this rule since its inception as being in direct conflict with a long established rule that "the admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence."[20] It is said that rather than exclude the evidence, other legal remedies should be sought for correction of illegal methods employed by police, since the question of the means by which the evidence was obtained is a collateral issue, having no bearing on the immediate question of the guilt or innocence of the accused.[21]

The rule has also been criticized on constitutional grounds, the main argument being that since the Fourth Amendment does not explicitly prohibit admission of evidence obtained in its violation, there is no justification in the argument that the rule is a mandate by implication.[22]

Many modifications of the rule have developed,[23] and though the Supreme Court has never expressly embraced opinions of critics, it has applied the rule with care and divided opinion.[24]

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have obtained private documents by illegal search and seizure, it is a violation of the constitutional rights of the defendant not to grant his pre-trial petition for return of the documents, and that to permit their being held and later admitted as evidence in the trial is prejudicial error.

For a criticism of the *Weeks* case, see VIII WIGMORE, EVIDENCE, § 2184 (3d ed. 1940).

[19] For discussions of the federal evidentiary rule of exclusion, see: VIII WIGMORE, EVIDENCE, §§ 2184 and 2184a (3d ed. 1940); Grant, *Constitutional Basis of the Rule Forbidding the Use of Illegally Seized Evidence,* 15 So. CALIF. L. REV. 60 (1941); Note, 50 COL. L. REV. 364 (1950); Comment, 42 MICH. L. REV. 679 (1944); Comment, 36 YALE L. J. 536 (1927).

[20] VIII WIGMORE, EVIDENCE, § 2183, p. 5 (3d ed. 1940).

[21] VIII *id.* § 2184 at p. 35.

[22] VIII *id.* at 35-40.

[23] The rule applies only to federal officers, and a federal prosecutor may make use of evidence seized illegally by a private detective, Burdeau v. McDowell, 256 U. S. 465 (1921), and by state officers. Feldman v. United States, 322 U. S. 487 (1944); Weeks v. United States, 232 U. S. 383 (1914). Lower federal courts have held that one objecting to the evidence must have a proprietary or possessory interest in the seized articles, Steeber v. United States, 198 F. 2d 615, 617 (10th Cir. 1952); Connolly v. Medalie, 58 F. 2d 629 (C. C. A. 2d, 1932); and the Supreme Court has gone as far as to exclude contraband evidence. United States v. Jeffers, 342 U. S. 48 (1951); Agnello v. United States, 269 U. S. 20 (1925). In addition, the pre-trial petition or motion for return of the seized articles, an attached condition in the *Weeks* holding, is no longer required in order for evidence to be excluded. *Ibid.;* Amos v. United States, 255 U. S. 313 (1921). Corporations cannot be compelled to produce originals of corporate records when an indictment is framed from copies of the original records made illegally by federal officers, Silverthorne Lumber Co. v. United States, 251 U. S. 385 (1920); however, a corporation can be compelled to produce for examination records whose maintenance is required by federal law. Oklahoma Press Pub. Co. v. Walling, 327 U. S. 186 (1946). In noting these modifications, no attempt was made to be exhaustive. For a complete collection of state and federal cases, see VIII WIGMORE, EVIDENCE, §§ 2183 and 2184 (3d ed. 1940).

[24] For an analysis of search and seizure cases involving application of the federal

Reluctance of states to adopt similar rules of evidence. States have been most reluctant to formulate rules of evidence similar to that propounded in the *Weeks* case.[25] Only one state had formulated a similar rule prior to the *Weeks* decision, and that state later repudiated its prior formulation of the rule. Before the *Weeks* case had been decided, twenty-six states had expressly opposed such a rule, and today, approximately two-thirds of the states still reject it. The influence of this reluctance on the part of the states is evidenced by the words of Justice Frankfurter, in the *Wolf* case: "We cannot brush aside the experience of States which deem the incidence of such conduct by the police too slight to call for a deterrent remedy . . . by way of . . . overriding the relevant rules of evidence."[26]

The questionable effectiveness of the rule.[27] There is no way of determining whether or not enforcement of the rule acts as a deterrent against illegal searches and seizures. Surely, many officers conduct

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evidentiary rule of exclusion, from 1914 to 1946, see Appendix to Harris v. United States, 331 U. S. 145 (1946).

Since 1946, the Court has applied the evidentiary rule in these search and seizure cases: Johnson v. United States, 333 U. S. 10 (1948) (seizure of narcotics); Trupiano v. United States, 334 U. S. 699 (1948) (seizure of illegal distillery); McDonald v. United States, 335 U. S. 451 (1948) (seizure of "numbers game" paraphernalia); United States v. Jeffers, 342 U. S. 48 (1951) (seizure of contraband narcotics).

Since 1946, the Court has refused to apply the evidentiary rule in these search and seizure cases: Oklahoma Press Pub. Co. v. Walling, 327 U. S. 186 (1946) (corporation compelled to produce for examination records required by federal law to be maintained); Davis v. United States, 328 U. S. 582 (1946) (seizure of public documents); Brinegar v. United States, 338 U. S. 160 (1949) (search of automobile); United States v. Rabinowitz, 339 U. S. 56 (1950) (seizure of forged overprints on cancelled postage stamps); On Lee v. United States, 343 U. S. 747 (1952) (use of concealed chest microphone while engaging suspect in incriminating conversation).

For a discussion of early modifications of the evidentiary rule made by lower federal courts, see Comment, 36 YALE L. J. 536 (1927).

[25] For a complete analysis of the history of the evidentiary rule of exclusion among the states, see Appendix to Wolf v. Colorado, 338 U. S. 25 (1949). North Carolina is listed in this Appendix as rejecting the rule. At that time, N. C. GEN. STAT. § 15-27 (1943) read: "and no facts discovered by reason of the issuance of such illegal search warrant shall be competent as evidence in the trial of any action." The North Carolina Supreme Court, in State v. McGee, 214 N. C. 184, 198 S. E. 616 (1938), construed that portion of the statute as meaning that evidence obtained by illegal search without any warrant was still admissible. Therefore, in 1951, the North Carolina General Assembly added the following provision to the statute: "Provided, no facts discovered or evidence obtained without a legal search warrant in the course of any search, made under conditions requiring the issuance of a search warrant, shall be competent as evidence in the trial of any action." N. C. GEN. STAT. § 15-27 (1953). It seems, therefore, that North Carolina has statutorily adopted the evidentiary rule of exclusion. For discussion of the new provision, see: Note, 32 N. C. L. REV. 114 (1953); Note, 30 N. C. L. REV. 421 (1952); *A Survey of Statutory Changes in North Carolina in 1951*, 29 N. C. L. REV. 396 (1951).

[26] Wolf v. Colorado, 338 U. S. 25, 31-32 (1949).

[27] For discussions of this factor influencing the Court, see: Irvine v. California, 74 Sup. Ct. 381, 385-386 (1954); *Id.* at 393-394 (dissenting opinion); Wolf v. Colorado, 338 U. S. 25, 41-46 (1949) (dissenting opinion).

investigations without knowledge of the illegality of their methods, and often, too, the question of illegality is for the courts to decide, for the law of search and seizure is not static. Posed also by the rule is the problem of whether or not it is wise to free one lawbreaker because he has been pursued by another. The complexity of this problem is attested to by the fact that the federal courts distinguish among the pursuing lawbreakers, to wit: evidence obtained illegally by private persons[28] or state officers[29] is admissible, whereas the same evidence is inadmissible if procured by a federal officer.[30] This latter practice strikes at the very core of arguments favoring the rule, for if the rule is really to serve as a protection of the constitutional right to be secure against illegal searches and seizures, why should the courts distinguish among persons obtaining the evidence? Furthermore, the only person protected by the rule is the lawbreaker, as it is impossible for the rule to reach the situation of the innocent victim of illegal searches and seizures.

That these and other evidences of the questionable effectiveness of the rule have influenced the reasoning of the Court is most apparent in both the *Irvine* and *Wolf* decisions, particularly in its condoning states' reliance on remedies other than an evidentiary rule of exclusion, in their efforts to protect constitutional rights.

The historical interpretation of the Due Process Clause. Embedded in the historical interpretation of the Due Process Clause are two basic propositions: (1) that fundamental to a federal system is the right of the states to determine the course of procedure to be followed by their courts in administering justice;[31] and (2) that the Bill of Rights (first eight Amendments) as such is not applicable to the states through the Fourteenth Amendment.[32] The states are not absolutely free, but they

[28] See note 23 *supra* [29] See note 23 *supra.* [30] See note 23 *supra.*

[31] Irvine v. California, 74 Sup. Ct. 381, 384 (1954); Rochin v. California, 342 U. S. 165, 168 (1952); Wolf v. Colorado, 338 U. S. 25 (1949); Adamson v. California, 332 U. S. 46, 52-53 (1947); Palko v. Connecticut, 302 U. S. 319 (1937); Twining v. New Jersey, 211 U. S. 78 (1908); Hurtado v. California, 110 U. S. 516 (1884); Davidson v. New Orleans, 96 U. S. 97 (1877).

[32] Wolf v. Colorado, 338 U. S. 25, 26 (1949); Adamson v. California, 332 U. S. 46 (1947); Betts v. Brady, 316 U. S. 455 (1942); Palko v. Connecticut, 302 U. S. 319 (1937); Twining v. New Jersey, 211 U. S. 78 (1908); Hurtado v. California, 110 U. S. 516 (1884); Barron v. Baltimore, 7 Pet. 243 (U. S. 1833).

Justice Black is a strong proponent of the argument that the Fourteenth Amendment was adopted for the purpose of making the Bill of Rights applicable to the states. For an extensive outline of the legislative history of the Fourteenth Amendment, see his dissenting opinion in Adamson v. California, 332 U. S. 46, 68 (1947) and Appendix thereto, in which he states: "In my judgment that history conclusively demonstrates that the language of the first section of the Fourteenth Amendment, taken as a whole, was thought by those responsible for its submission to the people, and by those who opposed its submission, sufficiently explicit to guarantee that thereafter no state could deprive its citizens of the privileges and protections of the Bill of Rights." *Id.* at 74-75. For other discussions of this position, see: Twining v. New Jersey, 211 U. S. 78, 114 (1908) (dissenting opinion); Hurtado v. California, 110 U. S. 516, 538 (1884) (dissenting opinion); FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 94 (1908).

may abridge any privilege or immunity not deemed inherent in national citizenship.[33] And the Supreme Court has been hesitant in delineating such privileges and immunities, preserving from state encroachment only those regarded as the life-blood of liberty and justice—those without which neither liberty nor justice would exist.[34] When the Court has ruled that constitutional rights have been abridged by states in denial of due process,[35] it has so ruled not because the rights may have been enumerated in the Bill of Rights, but because the rights have been interpreted to be implicit in the concept of "due process of law."[36]

Starting with a proposition that the Due Process Clause exacts from the states all that is "implicit in the concept of ordered liberty,"[37] the Court's method of interpreting the clause has been a "gradual process of inclusion and exclusion,"[38] predicated not upon a mechanical standard, but upon a philosophy of empiricism—judging each case as it is presented for decision in view of what has preceded it and what can be anticipated to follow it.[39]

Thus, the Due Process Clause has not been interpreted to demand of the states the same that the Constitution and Bill of Rights have been interpreted to demand of the federal government; but, rather, has been interpreted as a functional element in determining a proper balance between national and state power. Cognizant of this background, the present Court is naturally reluctant to enforce a judicially created federal rule of evidence upon the states.

The four factors discussed are steeped in over a century of judicial history, and their study is essential to an understanding of the conclusion reached by the Court in the *Irvine* case—that "due process of law" does not command exclusion of illegally obtained evidence in state prosecutions for state crimes.

Important in determining the significance of the *Irvine* case is a consideration of its relation to two preceding search-and-seizure cases arising from state courts, namely: *Rochin v. California*[40] and *Wolf v.*

[33] Adamson v. California, 332 U. S. 46, 52-53 (1947).
[34] Palko v. Connecticut, 302 U. S. 319, 326 (1937).
[35] Right of peaceable assembly—Herndon v. Lowry, 301 U. S. 242 (1937); freedom of speech—De Jonge v. Oregon, 299 U. S. 353 (1937); freedom of press—Grosjean v. American Press Co., 297 U. S. 233 (1936); freedom of religion—Hamilton v. Regents of University of California, 293 U. S. 245 (1934); right of accused to benefit of counsel—Powell v. Alabama, 287 U. S. 45 (1932).
[36] Twining v. New Jersey, 211 U. S. 78, 99 (1908).
[37] Palko v. Connecticut, 302 U. S. 319, 325 (1937).
[38] Davidson v. New Orleans, 96 U. S. 97, 104 (1877).
[39] Irvine v. California, 74 Sup. Ct. 381, 391 (1954) (dissenting opinion).
[40] 342 U. S. 165 (1952). Rochin was convicted for violating state laws forbidding possession of morphine. Three deputy sheriffs, having received information that Rochin was selling narcotics, entered Rochin's home and forced their way into his bedroom, where Rochin was sitting on a bed. Two capsules of morphine were lying on a table beside the bed; upon seeing the officers, Rochin swallowed the capsules. The officers jumped him and tried unavailingly to extract them. Rochin

Colorado.[41]

Each of the three cases, *Irvine, Rochin,* and *Wolf,* involved two fact situations relating to actions of police officers: (1) unlawful breaking and entering, and (2) illegal search and seizure. Additional in the *Rochin* case was the element of unlawful assault and battery upon the accused. Whereas the *Rochin* conviction was reversed, the *Irvine* and *Wolf* convictions were affirmed. Thus, the distinguishing feature among the three cases, which led to a decision in *Rochin* contrary to that in *Irvine* and *Wolf* was the element of coercion in the *Rochin* case—"coercion . . . applied by a physical assault . . . to compel submission to the use of a stomach pump."[42] The *Rochin* case held, not that the conviction should be reversed because the court below admitted evidence obtained by illegal search and seizure (the Court never discussed this aspect of the case), but rather that Rochin's conviction had "been obtained by methods that offend the Due Process Clause."[43] The *Irvine* and *Wolf* cases held, however, that the Due Process Clause (the actual language of the Court was "Fourteenth Amendment") does not forbid admission of illegally obtained evidence in state prosecutions for state crimes. Thus, in the three illegal search-and-seizure cases, the Court, under the Fourteenth Amendment, has reached the same result in *Irvine* and *Wolf* and a contrary result in *Rochin.*

An interesting statement in the *Irvine* case is: "We adere to Wolf as stating the law of search-and-seizure cases and decline to introduce vague and subjective distinctions."[44] One page earlier in the same

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was handcuffed and taken to a hospital, where a doctor forced an emetic solution through a tube into his stomach, causing him to vomit. In the vomited matter were found the two capsules, which were admitted in evidence at Rochin's trial, over his objection. The Supreme Court reversed the conviction, holding that it was obtained by methods that offend the Due Process Clause.

In the present case, Irvine urged the Court to adopt the holding in the *Rochin* case. But the Court refused, on the ground that the *Irvine* case lacked the element of physical assault, found in the *Rochin* case. Irvine v. California, 74 Sup. Ct. 381, 383 (1954). For discussions of the *Rochin* case, see Note, 30 N. C. L. REV. 287 (1952), and Comment, 50 MICH. L. REV. 1367 (1952).

[41] 338 U. S. 25 (1949). Wolf, a doctor, was convicted of conspiring with others to commit abortions. A deputy sheriff and other police officers went to Wolf's office, searched his appointment book for names of patients, and interrogated these patients to obtain evidence sufficient to bring him to trial. Wolf objected to the admission of the books and testimony in evidence as a violation of his rights under the Fourteenth Amendment. The Supreme Court affirmed his conviction.

Petitioner Irvine argued that, although the Court had upheld Wolf's conviction, his conviction should be reversed, on the ground that the invasion of privacy was more offensive than that involved in the *Wolf* case. The gist of such an argument is this: Where a case involves invasion of privacy producing only mild shock, the Court should affirm the conviction; but where the invasion is more serious, the Court should reverse. In answer to this argument, the Court stated that the *Wolf* case and the *Irvine* case involved personal invasion of approximately the same degree, and refused to adopt that criterion for delineation. Irvine v. California, 74 Sup. Ct. 381, 383-384 (1954).

[42] *Id.* at 383. [43] Rochin v. California, 342 U. S. 165, 174 (1952).

[44] Irvine v. California, 74 Sup. Ct. 381, 384 (1954).

decision it is stated: "Although Rochin raised the search-and-seizure question, this Court studiously avoided it and never once mentioned the Wolf case. Obviously, it thought that illegal search and seizure alone did not call for reversal."[45] What distinctions are being made in deciding search-and-seizure cases, if not subjective?

That question is answered by the speculation that the Court is caught in obvious contradiction, for it appears that, despite its statements to the contrary, the Court has introduced subjective distinctions, as evidenced by the fact that degree of offensiveness of police misconduct would seem to be the only criterion upon which the three cases turned. If this be true, then the *Irvine* case indicates two conclusions as regards future illegal search-and-seizure cases: (1) if police misconduct involves physical assault or worse, the Court will follow the *Rochin* approach; whereas (2), if police misconduct involves less than physical assault, the Court will follow the *Irvine* and *Wolf* approach.[46] Perhaps the *Irvine* case indicates a trend back to the *Wolf* line of reasoning in all search-and-seizure cases, but this cannot be certain, for the Court did not overrule or even criticize *Rochin* in the *Irvine* case. Whether the Court admits it, a line appears to have been drawn, but it remains to be seen if the Court will follow it.

It seems that the Court has not satisfactorily determined its role in supervising administration of criminal justice in the states. It has not been successful in avoiding introduction of subjective distinctions into the illegal search-and-seizure cases, despite its claims to the contrary. State courts can know only two things: (1) that the Supreme Court will not reverse a conviction simply because illegally obtained evidence was admitted in a state prosecution for a state crime; and (2) that the Supreme Court probably will reverse a conviction parallelling the *Rochin*

[45] *Id.* at 383.

[46] This conclusion is substantiated by the views of the majority of the Court only (Chief Justice Warren and Justices Clark, Jackson, Minton and Reed). Justice Douglas, however, would reverse all convictions where constitutional rights have been violated, on the basis of his beliefs that the Bill of Rights should be a limitation upon the states through the Fourteenth Amendment, and that the federal evidentiary rule should be enforced upon the states. Justice Black agrees with Justice Douglas, except that he would not enforce the evidentiary rule upon the states (thus his dissent in *Irvine* on Fifth Amendment grounds, but his concurrence with the majority in *Wolf* where there were no Fifth Amendment overtones).

It could be said that Justice Frankfurter will reverse a conviction that offends his concept of "due process of law." (He wrote the majority opinion in *Rochin* and a dissent in *Irvine*, on the basis that the convictions had been obtained by methods which offend "due process of law.") Thus it is difficult to determine upon what basis he distinguishes the *Irvine* case from the *Wolf* case (he wrote the majority opinion in *Wolf*), for it was the opinion of the majority in *Irvine* that those two cases involved police misconduct offensive in the same respect, if not in the same degree. *Quaere:* Has Justice Frankfurter changed his position in cases paralleling *Wolf*? He answered negatively in *Irvine*, but his explanation did not satisfactorily dispose of the question. Justice Burton joined with Justice Frankfurter in all three cases.

case. The greatest difficulty presented by the cases, however, is in justifying the subjective distinctions to the citizens of the United States. Why is physical assault any more violative of "due process of law," *or* antithetical to a concept of ordered liberty, *or* shocking to the conscience, *or* offensive of canons of decency and fairness, *or* restrictive of fundamental principles of liberty and justice, *or* offensive to human dignity, *or* brutal, *than* surreptitiously breaking and entering a private home, installing a microphone in a bedroom, boring a hole through the roof, connecting the microphone with a receiver, and listening to private conversations for approximately thirty days? That question the Supreme Court has not answered.

In place of "writs of assistance," or general search warrants, today we frequently have no warrants at all. Certainly the liberty of every man is not "in the hands of every petty officer," but it could be said that the liberty of Irvine was in the hands of the California police. True, Irvine was a criminal. But he was also a citizen of the United States. At his trial, "due process of law" could not command exclusion of incriminating evidence obtained by an unscrupulous intrusion of his privacy.

It seems that distant echoes of the words of James Otis can still be heard.

J. THOMAS MANN

Constitutional Law—Special Privileges and Emoluments—Race Track Franchise

In *State v. Felton*[1] the accused consented to become the test defendant, was arrested on August 29, 1953, and tried on a bill of information alleging that he "did unlawfully and wilfully place wagers and bets on a game of chance, to-wit: dog races conducted by the Carolina-Virginia Racing Association, Inc."[2] Judge Hubbard allowed defendant's motion to quash the bill of information for that by reason of the Currituck Act of 1949,[3] the bill failed to charge the commission of any crime. In so doing, the judge held the Act constitutional. That Act provided for a County Racing Commission which was authorized to grant a franchise to a person for the purpose of racing horses, dogs, or both horses and dogs.[4] "Pari-Mutuel Machines or Appliances"[5] were permitted, provided the qualified voters of Currituck County ratified the

[1] 239 N. C. 575, 80 S. E. 2d 625 (1954).
[2] State v. Felton, 239 N. C. 575, 577, 80 S. E. 2d 625, 627 (1954).
[3] N. C. SESS. LAWS 1949, c. 541.
[4] N. C. SESS. LAWS 1949, c. 541, § 2.
[5] ". . . a pari-mutuel system is well recognized as a system having no other purpose that that of providing the facilities . . . for placing bets, . . . whereby participants bet on the outcome of the races." State v. Felton, 239 N. C. 575, 582, 80 S. E. 2d 625, 630 (1954).

Act.[6] This Act was ratified, the franchise was given to the Carolina-Virginia Racing Association, and the track began operations a few miles from the Virigina line in the town of Moyock. Obviously, if the Act was constitutional and valid, no crime had been committed, and the lower court was correct in granting the motion to quash regardless of the fact that gambling has been held to be a crime.[7]

In reversing the lower court, the supreme court declared the Act unconstitutional as violative of Article I, Sections 7 and 31 of the North Carolina Constitution. Section 31 reads: "Perpetuities and monopolies are contrary to the genius of a free state and ought not to be allowed."[8]

It is interesting to note, in passing, that failure to provide for successors to office in *Freeman v. Board of Commissioners,*[9] was held not a violation of Section 31, since the General Assembly was presumed to have power to terminate, change, or continue the appointment. In the principal case however, the mode of succession, even though clearly stipulated, was held incompatible with the constitutional section.[10]

The court placed more emphasis on the violation of Section 7, which provides: "No person or set of persons are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services."[11] Relying on the axiom that "the fundamental principle of constitutional construction is to give effect to the intent of the framers of the organic law and of the people adopting it,"[12] counsel for the Carolina-Virginia Racing Association, as *amici curiae,* sought to persuade the court that this section of the constitution was never intended to apply to situations of this type.[13] An examination of the historical origin of this section to ascertain just what type of abuses were contemplated would seem to be appropriate.

Such a project is as difficult as it is interesting, since both the North Carolina Constitution and its bill of rights "were read paragraph by paragraph and discussed (in the convention of 1776) but no record was made of the discussion."[14] We are told, however, that "Article three

[6] N. C. SESS. LAWS 1949, c. 541, § 6.

[7] State v. Brown, 221 N. C. 301, 20 S. E. 2d 286 (1942); N. C. GEN. STAT. § 14-292 (1952).

[8] N. C. CONST. Art. I, § 31. This section was held to have been violated because: (1) the method of filling vacancies in the Racing Commission made possible a self-perpetuating membership on the Commission; (2) there was ample provision for voting the Act in, but no provision for voting it out; (3) the franchise was irrevocable except for failure to comply with rules not spelled out in the statute. State v. Felton, 239 N. C. 575, 586, 80 S. E. 2d 625, 633 (1954).

[9] 217 N. C. 209, 7 S. E. 2d 354 (1940).

[10] See note 8 *supra.*

[11] N. C. CONST. Art. I, § 7.

[12] Perry v. Stancil, 237 N. C. 442, 444, 75 S. E. 2d 512, 514 (1953).

[13] Brief for Carolina-Virginia Racing Association as *Amicus Curiae;* State v. Felton, 239 N. C. 575, 80 S. E. 2d 625 (1954).

[14] SIKES, TRANSITION OF NORTH CAROLINA FROM COLONY TO COMMONWEALTH 68 (1898).

of the North Carolina Declaration (now Art. I, Section 7, quoted *supra*) was copied verbatim from the 4th Article of the Virginia Declaration, with the ommission of the clause in the Virginia statement which denounced hereditary officers,"[15] an omission which would seem to be highly significant later in this discussion. Apparently, the "men were too busy to hesitate to copy verbatim what served their ends."[16] It is generally conceded that the Virginia Declaration of Rights was conceived and written by George Mason either in Raleigh Tavern, Williamsburg, without the aid of any reference materials, or in his own library utilizing Magna Charta, the English Petition of Rights, and various philosophical works.[17] Counsel, as *amici curiae,* contended in the principal case that Mason had in mind, "the abuse of absenteeism, the receipt of fees without the performance of services by public officers, hereditary office holding and the like," including "the establishing of a hereditary nobility or aristocracy possessing special privileges such as existed in England."[18] Thus such a grant of a franchise to operate pari-mutuel betting machines would not be within the purview of the section. Various biographers seem to substantiate this position. Brant says, "Mason's original draft covers the following topics:

". . . .

"4. no hereditary offices. . . ."[19]

Rowland contends: "The fourth article declares public service to be the title to public office and since the former is not descendible, neither should the latter be hereditary."[20]

But Hill summarizes the section so that it has a two-fold meaning: "Except in recognition of public service none shall have a privileged position in or emoluments from, the community, and no honors are to be hereditary."[21] Furthermore, if Mason intended to guard against only the specific evils of hereditary offices, titles of nobility, and public office malpractices, his composition of that idea into words certainly misled his colleague, Henry Lee, who observed upon reading the section: "If a deluge of despotism should sweep over the world and destroy those

[15] Ketcham, *The Sources of the North Carolina Constitution of 1776,* 31 NORTH CAROLINA HISTORICAL REVIEW 220 (1929). Section 4 of the Virginia Declaration of Rights reads: "That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; which, not being descendible, neither ought the offices of magistrate, legislator, or judge to be hereditary." II POORE, FEDERAL AND STATE CONSTITUTIONS 1909 (1878).

[16] SIKES, *op. cit. supra* note 14, at 69-70.

[17] I ROWLAND, LIFE, CORRESPONDENCE, AND SPEECHES OF GEORGE MASON, c. 7 (1892).

[18] Brief for Carolina-Virginia Racing Association as *Amicus Curiae,* p. 18; State v. Felton, 239 N. C. 575, 80 S. E. 2d 625 (1954).

[19] I BRANT, JAMES MADISON, THE VIRGINIA REVOLUTIONIST, n. 3, p. 427 (1941).

[20] ROWLAND, *op. cit. supra* note 17, at 245.

[21] HILL, GEORGE MASON 141 (1938).

institutions under which freedom is yet protected . . . could this single sentence of Mason's be preserved it should be sufficient to rekindle the flame of liberty and revive the race of freemen."[22] Such a high tribute would hardly be paid to a section directed at prohibiting specific abuses only. That the section is more of a general statement of the fundamental inalienable rights of man—equal rights to all, special privileges to none—is particularly clear when the equivalent section of the Pennsylvania Constitution, likewise modeled upon the Virginia Declaration,[23] is observed to read: "Government is . . . instituted for the common benefit, protection, and security of the people, nation or community; and not for the particular emolument or advantage of a single man, family or set of men, who are part only of that community."[24] Regardless of exactly what Mason had in mind when he separated his section into two parts by means of a semicolon,[25] the section must have conveyed a two-fold meaning to its adopters: (1) no special privileges except in consideration of public service, and (2) no hereditary offices.

It is then significant to notice that in copying the Virginia Declaration, North Carolina chose to separate Mason's Section 4 into two sections: Section 7 quoted *supra,* which is violated in the principal case; and Section 30 pertaining to hereditary emoluments, which is not involved or invoked in this case. The only information bearing on the intention of the North Carolina framers of this section which has been observed reveals that "Section 7 is in harmony with the 3rd Article of the Mecklenburg Instructions which advised the representatives to 'oppose everything that leans to aristocracy or power in the hands of rich and chief men exercised to the oppression of the poor.' "[26]

If there ever was any doubt concerning the construction and applicability of this section, such uncertainty is not apparent in *Bank of New Bern v. Taylor,*[27] decided some thirty-seven years after the adoption of the State Constitution. In that case the contention was that the legislative act giving a bank a summary mode of collecting debts, *i.e.,* a special privilege, was violative of this section. In disposing of the argument, the court said that such an "objection will vanish when we reflect that this privilege is not a gift but the consideration for it is public good to be derived to the citizens at large from the establishment of the bank."[28]

[22] ROWLAND, *op. cit. supra* note 17, as quoted from LEE'S, REMARKS ON JEFFERSON 127 (1839).

[23] "The Massachusetts Bill of Rights and all succeeding instruments of the kind adopted by the different colonies were modeled upon the Virginia Charter and its principles were engrafted in the amendments of the Federal Constitution." ROWLAND, *op. cit. supra* note 17, at 250.

[24] II POORE, FEDERAL AND STATE CONSTITUTIONS 1541 (1878).

[25] See note 15 *supra.*

[26] KETCHAM, *op. cit. supra* note 15, as quoted from the Mecklenburg Instructions as found in 10 NORTH CAROLINA COLONIAL RECORDS 870a-870f (1890).

[27] 6 N. C. 266 (1813). [28] *Id.* at 267.

Although Section 7 was applicable, the particular legislation came within the exception clause, "in consideration of public service."

Subsequently, the court has relied on Section 7 to declare unconstitutional the following: charter provision exempting one tobacco warehouse corporation from liability for negligence when other warehouses did not enjoy such a privilege;[29] charter provision allowing a bank to charge excessive rates;[30] statute authorizing the depositors of certain defunct banks to sell their claims to debtors of the same bank;[31] statute imposing a license tax on some dry cleaners and allowing other dry cleaners to operate without this additional charge;[32] statute increasing the liability of sureties on contractor's bonds in Buncombe County only;[33] statute lessening the punishment for violating the prohibition laws in only five of the 100 counties;[34] and others.[35]

The court has refused to apply Section 7 to declare unconstitutional a grant of power of eminent domain to public service corporations because such is deemed within the exception, "but in consideration of public service";[36] a pension plan for school teachers because of the exception;[37] workman's compensation benefits for deputy sheriffs because of the exception;[38] and legislation to aid the veterans.[39]

The cases cited and others seem to indicate that special privileges will not be given to an individual corporation or person except "in consideration of public service." Such construction would not seem to be incompatible with the intention of the framers of that Section. The Currituck Act, which grants a single organization the privilege of violating a general law against gambling[40] while denying this privilege to others, legalizes gambling only on the premises of the franchise holder, and permits only the franchise holder and its patrons to violate the general law, is clearly granting a special privilege to a person[41] and is, therefore, unconstitutional.

[29] Motley & Co. v. Southern Finishing and Warehouse Co., 122 N. C. 347, 30 S. E. 3 (1898); Note, 27 N. C. L. REV. 528 (1949).
[30] Simonton v. Lanier, 71 N. C. 498 (1874).
[31] Edgerton v. Hood, 205 N. C. 816, 172 S. E. 481 (1934).
[32] State v. Harris, 216 N. C. 746, 6 S. E. 2d 854 (1940).
[33] Plott Co. v. Ferguson Co., 202 N. C. 446, 163 S. E. 688 (1932).
[34] State v. Fowler, 193 N. C. 290, 136 S. E. 709 (1927).
[35] *E. g.*, Duncan v. City of Charlotte, 234 N. C. 86, 66 S. E. 2d 22 (1951); State v. Glidden Co., 228 N. C. 664, 46 S. E. 2d 860 (1948); and see NORTH CAROLINA MANUAL 1929 (Newsom ed.); and CONNOR AND CHESHIRE, THE CONSTITUTION OF THE STATE OF NORTH CAROLINA ANNOTATED (1911).
[36] Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 175 N. C. 668, 96 S. E. 99 (1918).
[37] Bridges v. City of Charlotte, 221 N. C. 472, 20 S. E. 2d 825 (1942).
[38] Towe v. Yancey County, 224 N. C. 579, 31 S. E. 2d 754 (1944).
[39] Brumley v. Baxter, 225 N. C. 691, 36 S. E. 2d 281 (1945).
[40] N. C. GEN STAT. § 14-292 (1952): "If any person play at any game of chance at which any money, property or other thing is bet, whether the same be in stake or not, both those who play and those who bet thereon shall be guilty of a misdemeanor."
[41] State v. Felton, 239 N. C. 575, 80 S. E. 2d 625 (1954).

On the other hand, counties as political subdivisions have been the recipients of privileges not enjoyed by other counties.[42] Apparently, "no person or set of persons" refers to persons who are under the same circumstances or conditions and does not refer to areas as such.[43] In *Salsburg v. Maryland,* Justice Burton said: "The equal protection clause relates to equality between persons as such rather than between areas."[44] That case would seem to be an acceptable summation of the law on equal protection sections of the state constitutions as well as that of the Federal Constitution. If the phrase, "no person or set of persons" is construed to include counties, then such familiar acts as those creating Alcoholic Beverage Control are also unconstitutional. These acts have not been declared so, although the attempt was made by a group of prominent citizens[45] when the ABC Acts were first enacted by the General Assembly.[46] It is true that in that case the court refused to rule on the constitutionality of the ABC Acts, saying that the question was not properly before the court,[47] but Alcoholic Beverage Control is still available on the county option plan in spite of the general prohibition law. Obviously, these Acts confer special privileges, but these privileges are directed to the county while the gambling Acts ultimately channel special benefits to individual persons or corporations,[48] and therein lies the important distinction. The court in the principal case anticipated the problem that would be created if a county itself or a private individual or corporation serving as an agency of the county operated racing enterprises, but the court found other ways to decide the issue without answering this more important question.[49]

In view of the fact that counties as political subdivisions of the state do not seem to be within the purview of Section 7, and considering the vast number of local legislative acts, including those creating Alcoholic Beverage Control, which are passed each session by the General Assembly, it would seem that a careful draft of legislation permitting counties

[42] *E.g.,* N. C. SESS. LAWS 1953, c. 135, An Act to Establish a Law Library for the Public Officials and Courts in New Hanover County; c. 715, An Act Authorizing Wilson County to Establish a Law Library; c. 1158, An Act to Establish a County Court Library in Cumberland County.

[43] N. C. CONST. Art. I, § 7; State v. Fowler, 193 N. C. 290, 135 S. E. 709 (1927), in which the court said: "This provision, we think, is a guaranty that every valid enactment of a general law applicable to the whole state shall operate uniformly upon persons and property, giving to all under like circumstances equal protection and security and neither laying burdens nor conferring privileges upon any person that are not laid or conferred upon others under the same circumstances or conditions."

[44] Salsburg v. State of Maryland, 346 U. S. 545 (1954).

[45] Newman v. Commissioners of Vance, 208 N. C. 675, 182 S. E. 453 (1935).

[46] N. C. PUB. LAWS 1935, cc. 418, 493.

[47] Newman v. Commissioners of Vance, 208 N. C. 675, 182 S. E. 453 (1935).

[48] State v. Felton, 239 N. C. 575, 588, 80 S. E. 2d 625, 635 (1954); N. C. PUB.-LOC. LAWS 1939, c. 540; N. C. SESS. LAWS 1949, c. 541.

[49] State v. Felton, 239 N. C. 575, 587, 80 S. E. 2d 625, 634 (1954).

to own and operate racing establishments wherein pari-mutuel betting is permitted could not be declared unconstitutional as violative of Section 7, Section 31, or any other section of the North Carolina Constitution. If this contention is accepted, then the responsibility for permitting dog and horse racing with its counterpart, pari-mutuel betting, to infiltrate the North Carolina scene rests solely upon the General Assembly.[50]

ROBERT D. LEWIS.

Credit Transactions—Conditional Sale Contracts—Default—Remedies of Buyer and Seller—Liability of Buyer on Check or Note Given as Down Payment or Installment Payment

In 1893 the North Carolina Supreme Court remarked that conditional sale contracts "are becoming greater in frequency and general interest. They are principally used in connection with the sale of sewing-machines, pianos, furniture, soda-fountains, rolling stock on railroads, and the like."[1] Today the frequency of such contracts is still increasing, and the list of products sold under them must be enlarged to include a variety of recently developed chattels, such as automobiles, television sets, home appliances, adding machines, and factory equipment.

A typical form of conditional sale contract involves the credit sale of personal property, where the buyer usually makes a down payment and undertakes, often by a promissory note, to pay the balance of the price in installments. Under the contract the buyer receives immediate possession of the property, and the seller retains title as security together with the accompanying right to repossession and resale in case of default,[2] but the buyer has the power to gain complete title by making full payment. It is explained that the seller's *retention* of title distinguishes this contract from a purchase money chattel mortgage where complete title is vested in the buyer who immediately *reconveys* security title to the seller.[3]

[50] For an excellent résumé of racetrack operations in North Carolina, see *Raleigh News and Observer,* February 14 through 18, 1951, a feature story in five chapters by Jim Chaney.

[1] Puffer & Sons Mfg. Co. v. Lucas, 112 N. C. 378, 383, 17 S. E. 174, 175 (1893). The instrument that caused this comment was entitled a "lease," requiring periodic "rentals" until title to a "soda water machine" was conveyed upon full payment, but the court held it was a conditional sale contract.

[2] Earlier notes have stated that in North Carolina the secured party under a conditional sale contract has the right to repossession *before* default, unless the parties manifest a contrary intention by agreement or conduct, and all the writers suggest that this is undesirable. Notes, 21 N. C. L. REV. 387 (1943); 12 N. C. L. REV. 254 (1934); 11 N. C. L. REV. 321 (1933).

[3] Frick & Co. v. Hilliard, 94 N. C. 117, 119 (1886); Gaul v. Goldburg Furniture & Carpet Co., 85 Misc. 426, ———, 147 N. Y. Supp. 516, 518 (Sup. Ct. 1914); Bogert, *The Evolution of the Conditional Sales Law in New York,* 8 CORNELL L. Q. 303, 304 (1923).

However, the North Carolina court, in construing N. C. LAWS 1883, c. 342,

After default, the conditional sale contract gives rise to legal questions (1) as to the buyer's right to recover down payments or installment payments, (2) as to the seller's liability for a wrongful repossession or wrongful conduct while retaking the property sold, and (3) as to the seller's remedies: suit on the contract; repossession and disposition of the security; and suit for a deficiency judgment after repossession and a resale of the property.

According to the weight of authority, the defaulting buyer cannot recover any of the payments made prior to a proper repossession,[4] unless the seller has rescinded the agreement.[5] Otherwise, "it would be offering

later N. C. GEN. STAT. § 47-23 (1950), which provided for the registration of conditional sale contracts "with the same legal effect as . . . chattel mortgages," has stripped this analytical distinction of significance, indicating that conditional sale contracts and chattel mortgages are of identical legal effect. Observer Mfg. Co. v. Little, 175 N. C. 42, 43, 94 S. E. 526, 527 (1917). For a recent restatement, see Mitchell v. Battle, 231 N. C. 68, 69, 55 S. E. 2d 803 (1949): "Conditional sales contracts in which title is retained as security for the debt are treated here as chattel mortgages . . . and statutes relating to chattel mortgage foreclosures and incidents have more than analogical force." The 1883 statute was repealed at the last session of the North Carolina General Assembly. N. C. SESS. LAWS 1953, c. 1190, § 3. For comment on this statutory change see *A Survey of Statutory Changes in North Carolina in 1953,* 31 N. C. L. REV. 375, 429 (1953).

See Sneeden v. Nurnberger's Market, 192 N. C. 439, 440, 135 S. E. 328, 330 (1926), distinguishing a chattel mortgage where title but not necessarily possession is transferred to the secured party, from a pledge where the secured party takes possession immediately "with a right of retainer until the debt is paid," but no title. 2 WILLISTON, SALES § 337 (Rev. ed. 1948) explains that the conditional sale discussed herein does not involve land.

[4] 3 WILLISTON, SALES § 579c (Rev. ed. 1948); Note, 17 MINN. L. REV. 66, 70 (1932); Note, 37 A. L. R. 91, 100 (1925), and cases cited therein. *Contra:* Mo. REV. STAT. § 428.110 (1949), and OHIO REV. CODE § 1319.14 (1953), requiring a refund by the seller.

[5] Courts following the "election doctrine," as described below in the text, have used the term "rescission" in describing the seller's election to repossess the security rather than attempt a collection of the contract price. This is improper, because a true rescission obliterates the contract, requiring the seller to return any payments he has received. Daughley v. Peterson, 110 F. Supp. 885, 887 (D. Ala. 1953).

Decisions cited contrary to the rule allowing the seller to retain the defaulting buyer's payments under a conditional sale contract often involve recovery of payments following a true rescission of the conditional sale contract, and are therefore in accord with the majority view. See Weldon v. Witt, 145 Ala. 605, 40 So. 126 (1905), where there was a mutual rescission of the contract, and Moye v. Stobaugh, 199 Ark. 453, 135 S. W. 2d 334 (1940), where the security, a refrigerator, was found defective and the contract rescinded.

In the following cases the contract was rescinded by the seller's conduct, and the buyer was allowed to recover payments made less compensation for the use of the property sold: Southern Finance Co. v. Chambers, 65 Ga. App. 259, 15 S. E. 2d 903 (1941) (Seller received possession of car to repair and retained it, selling it after default made subsequent to the time he gained possession.); Carmichael v. Guenette, 61 Ga. App. 460, 6 S. E. 2d 365 (1939) (Seller rescinded by repossessing car after agreeing to extend time for payments.); Dickerson v. Universal Credit Co., 47 Ga. App. 512, 170 S. E. 822 (1933) (rescission by bringing trover suit). *Cf.* Burge v. Crown Finance Co., Inc., 81 Ga. App. 582, 59 S. E. 2d 541 (1950). Here the seller who had repossessed the security conducted a resale after promising the buyer that he would extend the payment date, and the court reasoned that the promise was without consideration, concluding that the buyer had no cause of action against the seller. The court failed to distinguish the case from *Carmichael v. Guenette,* and cited no authority.

a bounty for the violation of contracts," because the buyer could purchase a chattel for speculative resale and default without reason, yet his liability would be limited to compensation for the use of the property.[6]

The seller's right to sue for a breach of contract[7] or for the contract price[8] is recognized in North Carolina, but his most satisfactory remedy is to retake the property sold, resell it and recover any deficiency found by subtracting the down payment, installment payments and proceeds realized by the resale from the price due the seller and the costs of the sale.[9] After repossession of the property sold, the buyer retains an equity in it,[10] and has been given the opportunity to redeem the property before resale by paying the balance due under the contract.[11] If the payments and the proceeds of a resale exceed the total obligation, the buyer is entitled to this "surplus."[12] Although repossession and resale are ordi-

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Another manner of rescission by conduct applicable in jurisdictions that require a resale is explained in Blevins Aircraft Corp. v. Gardner, 66 Ga. App. 843, 845, 19 S. E. 2d 350, 352 (1942): "the mere retaking of the property by the seller would not constitute a rescission of the contract of sale, yet where the seller, after retaking the property, refrains for an unreasonable length of time from selling it . . . and devotes the property to a use inconsistent with an intention on his part to resell it . . . , the inference is authorized that the seller has elected to treat the property as his own, thereby rescinding the contract of sale."

The North Carolina Supreme Court has accurately stated that "repossession of the title-retained property is not to be referred to the principle of rescission, but to the power of sale given by statute [or contract]. . . ." Mitchell v. Battle, 231 N. C. 68, 69, 55 S. E. 2d 803 (1949). The statute referred to is N. C. GEN. STAT. § 45-21.13 (1950), conferring a power of sale upon the seller where the conditional sale contract does not contain an express power of sale.

[6] Pfeiffer v. Norman, 22 N. D. 168, 174, 133 N. W. 97, 99 (1911).

[7] *See* National Cash Register Co. v. Hill, 136 N. C. 272, 276, 48 S. E. 637, 639 (1904).

[8] *Ibid.*

[9] Mitchell v. Battle, 231 N. C. 68, 55 S. E. 2d 803 (1949); Hall v. Tillman, 103 N. C. 276, 9 S. E. 194 (1889); second appeal, 110 N. C. 220, 14 S. E. 745 (1892); third appeal, 115 N. C. 500, 20 S. E. 726 (1894).

Such procedure is specifically authorized in N. C. GEN. STAT. § 45-21.38 (1950): "Whenever a power of sale contained in a conditional sale contract, or granted by statute with respect thereto, is exercised, and the proceeds of such sale are not sufficient to defray the expenses thereof, and also the balance of retaking, keeping and storing the goods and the balance due upon the purchase price, the seller may recover the deficiency from the buyer, or from anyone who has succeeded to the obligations of the buyer."

Accord: Federal Credit Co. v. Boleware, 163 Miss. 830, 142 So. 1 (1932); Caraway v. Jean, 97 N. H. 506, 92 A. 2d 660 (1952); Knudson Music Co. v. Masterson, 240 P. 2d 973 (Utah 1952); *see* General Motors Acceptance Corp. v. Dickinson, 249 Ky. 422, 425, 60 S. W. 2d 967, 968 (1933).

N. C. GEN. STAT. § 45-21.36 (1950) limits deficiency judgments "When any sale of real estate or personal property has been made by a mortgagor, trustee, or other person authorized to make the same, at which the mortgagee, payee or other holder of the obligation thereby secured becomes the purchaser. . . ." Although this language is quite broad, *quaere* whether the statute is applicable to conditional sales, in light of N. C. GEN. STAT. § 45-21.38 (1950) *supra.*

[10] *See* Puffer & Sons Mfg. Co. v. Lucas, 112 N. C. 377, 384, 17 S. E. 174, 175 (1893).

[11] Puffer & Sons Mfg. Co. v. Lucas, 112 N. C. 377, 17 S. E. 174 (1893); *see* Hamilton v. Highlands, 144 N. C. 279, 284, 56 S. E. 929, 931 (1907).

[12] Hamilton v. Highlands, 144 N. C. 279, 56 S. E. 929 (1907); Puffer & Sons

narily carried out without judicial supervision, where the seller brings a well founded suit on the conditional sale contract after a default, the trial court may order that the property be resold and the proceeds applied to payment of the debt, and then enter a deficiency judgment or give a surplus to the buyer, depending upon whether the obligation is satisfied by the proceeds.[13]

Some jurisdictions are in accord with North Carolina,[14] but by what has been called the general holding apart from statute,[15] the seller must elect whether he will sue on the contract and relinquish his rights in the security, or repossess the property, thereby terminating both the buyer's liability under the contract and the buyer's equity in the property.[16] Since the use of one remedy is considered a bar to recovery under the other, and there is never a deficiency judgment, this rule may at first appear to protect the buyer. Actually, it works a great hardship on the individual who has purchased property and paid a large amount of the price, by allowing the seller to retain all these payments and repossess the security without accounting for its value, which may be far greater than the sum due under the contract. It may also be unfair to the seller who chooses to sue on the contract because the property is depreciated, only to find that the buyer is insolvent.[17] Still other states follow this

Mfg. Co. v. Lucas, 112 N. C. 377, 17 S. E. 174 (1893); *see* Universal C. I. T. Credit Corp. v. Saunders, 235 N. C. 369, 371, 70 S. E. 2d 176, 178 (1952), where the court said a repossessing seller must account to the defaulting buyer for the value of the property repossessed.

Accord: Epps v. Howard, 87 Ga. App. 277, 73 S. E. 2d 342 (1952); Cutting v. Whittmore, 72 N. H. 107, 54 Atl. 1098 (1903); *see* General Motors Acceptance Corp. v. Dickinson, 249 Ky. 422, 425, 60 S. W. 2d 967, 968 (1933); Ross-Meehan Brake Shoe Foundry Co. v. Pascagoula Ice Co., 72 Miss. 608, 615, 18 So. 364, 365 (1895).

[13] Hamilton v. Highlands, 144 N. C. 279, 56 S. E. 929 (1907); Puffer & Sons Mfg. Co. v. Lucas, 112 N. C. 377, 17 S. E. 174 (1893).

[14] See footnotes 9 and 12 *supra.*

The New Hampshire court has stated the rule, "Resort to repossession and suit for the price should not bar each other, and the remedies may well and properly be concurrent to the point of satisfaction," in Mercier v. Nashua, 84 N. H. 59, 62, 146 Atl. 165, 167 (1929).

Virginia gives the seller five remedies against a defaulting buyer: "(1) To seek the peaceable possession of the trucks (in the event redelivery was denied by the defendant); (2) to institute an action at law for the recovery of the unpaid purchase price; (3) to institute a suit in equity to foreclose the lien; (4) to proceed under the . . . Code for the sale or possession of the property and for a deficiency judgment; or (5) by action of detinue under . . ." statute; and the first three are said to be cumulative. Lloyd v. Federal Motor Truck Co., 168 Va. 72, 77, 190 S. E. 257, 259 (1937).

As discussed below in the text, the Uniform Conditional Sales Act and Uniform Commercial Code bear some similarity to the North Carolina view.

[15] 3 WILLISTON, SALES § 579b (Rev. ed. 1948).

[16] Thomas Auto Co. v. Moody, 206 Ark. XIX, 177 S. W. 2d 754 (1944); Igleheart Bros., Inc. v. John Deere Plow Co., 114 Ind. App. 182, 51 N. E. 2d 498 (1943) (Indiana court presumed the Illinois common law was identical to its own, that seller after default must make an election.); C. I. T. Corporation v. Fisher, 187 Okla. 314, 102 P. 2d 848 (1940).

[17] The uniform acts on this subject are designed to eliminate the possibility of either of these results, as shown below in the text.

election doctrine, but add a remedy called a "conditional sale contract vendor's lien,"[18] which enables the seller to bring a court action on the security, sell it and if the price is still unsatisfied, obtain a deficiency judgment[19]—the same process as that used in North Carolina when the seller seeks judicial enforcement of the conditional sale contract after default.

The seller is always penalized for an unauthorized retaking of the property sold,[20] and most jurisdictions condemn the use of actual[21] or "implied"[22] force in making an authorized repossession. Further, the seller has been held liable for conversion: where he gained possession of the security through an authorized retaking, extended the time in which payments could be made, but conducted a resale prior to the extended date of payment;[23] also, where the seller held the security under an agreement to repair it until a default was made under the conditional sale contract, and then resold the property without notifying the buyer of his intention to resell.[24] Although most of these cases contemplate an award of actual damages,[25] punitive damages are not unknown.[26]

[18] Explained in National Cash Register Co. v. Ness, 204 Minn. 148, 151, 282 N. W. 827, 829 (1938). See Note, 23 MINN. L. REV. 699 (1939).

[19] Smith v. Russell, 223 Iowa 123, 272 N. W. 121 (1937); National Cash Register Co. v. Ness, 204 Minn. 148, 282 N. W. 827 (1938); *see* Lloyd v. Federal Motor Truck Co., 168 Va. 72, 77, 190 S. E. 257, 259 (1937).

[20] Luke v. Mercantile Acceptance Corp. of Calif., 111 Cal. App. 2d 431, 244 P. 2d 764 (1952) (Seller tried to enforce a note that was not a part of the conditional sale contract, by repossessing the security.).

[21] Lamb v. Woodry, 154 Ore. 30, 58 P. 2d 1257 (1936). The courts of Louisiana are most strict in this regard, having held a seller liable where he peaceably entered the defaulting buyer's home and removed furniture that was security under his conditional sale contract, with the consent of the buyer's mother and minor son but without lawful process authorizing such action. Strahan v. Simmon, 15 So. 2d 164 (La. App. 1943).

[22] In American Discount Co. v. Wyckroff, 29 Ala. App. 82, ———, 191 So. 790, 794 (1939), implied force was defined as an act revealing an intention to take the security in any event, with force if necessary. North Carolina is in accord, applying this definition where the seller's agents emphatically replied to the buyer's objection to their retaking of the property that they would "take the car or have the money." Binder v. General Motors Acceptance Corp., 222 N. C. 512, 23 S. E. 2d 894, 896 (1942).

[23] Brewer v. Universal Credit Co., 191 Miss. 183, 192 So. 902 (1940); Central Ins. Co. of Baltimore v. Ehr, 18 Wash. 2d 489, 139 P. 2d 701 (1943). The agreement to extend the time for payments is effective, not because of any legal consideration, but "may be rested upon the ground of estoppel or of waiver." Reinkey v. Findley Electric Co., 147 Minn. 161, 163, 180 N. W. 236, 237 (1920).

Cf. Carmichael v. Guenette, 61 Ga. App. 460, 6 S. E. 2d 365 (1939). *Contra:* Burge v. Crown Finance Co., Inc., 81 Ga. App. 582, 59 S. E. 2d 541 (1950); see footnote 5 *supra.*

[24] Patton v. Alexander, 202 Ark. 883, 154 S. W. 2d 1 (1941); *cf.* Southern Finance Co. v. Chambers, 65 Ga. App. 259, 15 S. E. 2d 903 (1941); see footnote 5 *supra.*

[25] Quick v. Woodward Motor Co., 23 Tenn. App. 254, 130 S. W. 2d 147 (1938); Ashworth v. Fleenor, 178 Va. 104, 16 S. E. 2d 309 (1941).

[26] Binder v. General Motors Acceptance Corp., 222 N. C. 512, 23 S. E. 2d 894 (1942) (Seller was guilty of forcible trespass because he used implied force in retaking a car.); Commercial Credit Co. v. Spence, 185 Miss. 293, 184 So. 439 (1938) (Seller's assignee repossessed car knowing the buyer had failed to make

There are two uniform acts providing the seller with statutory remedies after default—the Uniform Conditional Sales Act[27] and the Uniform Commercial Code.[28] They provide for a redemption period following default and repossession,[29] during which the buyer may reclaim the security by paying the amount due under the contract. If there is no redemption, the buyer may demand a resale;[30] and resale is also compulsory under the Uniform Conditional Sales Act if the buyer has paid one-half the purchase price,[31] and under the Uniform Commercial Code if the security is "consumer goods"[32] and sixty per cent of the price is paid.[33] If there be a resale both acts hold the buyer liable for a deficiency[34] but grant him any surplus[35] realized from the resale, as in North Carolina. When resale is not compulsory, the seller may chose to resell or keep the property,[36] but the buyer is discharged from the contract

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final payments only because assignee refused to hand over the note that evidenced his indebtedness.).

[27] This act, prepared by Professor Bogert and recommended by the National Conference of Commissioners on Uniform State Laws, is now in force in Arizona, Delaware, Indiana, New Hampshire, New Jersey, New York, South Dakota, West Virginia, Wisconsin, and Alaska and Hawaii. 2 UNIFORM LAWS ANNOTATED 6 (Supp. 1954).

[28] A product of the American Law Institute and the National Conference of Commissioners on Uniform State Laws, considered in many states and enacted last year in Pennsylvania. Schnader, *Pennsylvania Leads the Way: The First State to Enact the Uniform Commercial Code,* 7 CONFERENCE ON PERSONAL FINANCE LAW QUARTERLY REPORT 72 (1953).

[29] Pursuant to the UNIFORM CONDITIONAL SALES ACT §§ 17, 18, if notice of the seller's intention to repossess is given the defaulting buyer forty to twenty days before repossession, the buyer may redeem his interest in the security by paying the amount due at any time before repossession; if there is repossession without this notice, the buyer has a ten day period for redemption. Under the UNIFORM COMMERCIAL CODE § 9-506, the buyer may redeem the security at any time before resale or the seller's election to retain the security.

[30] UNIFORM CONDITIONAL SALES ACT § 20 (within ten days after the retaking); UNIFORM COMMERCIAL CODE § 9-505 (2) (within thirty days after receiving a required notice from the seller revealing his intention to retain the property).

[31] UNIFORM CONDITIONAL SALES ACT § 19 (Sale must be conducted within thirty days following repossession.).

[32] "Goods are consumer goods if they are used or bought for use primarily for personal, family or household purposes. . . ." UNIFORM COMMERCIAL CODE § 9-109(1).

[33] UNIFORM COMMERCIAL CODE § 9-505(1) (sale conducted within ninety days after repossession). Absent a request for it, resale is not compulsory if the buyer has signed away his right to it, or when the contract does not cover a "purchase money security interest." As defined in § 9-107, such an interest includes the type of conditional sale contract discussed herein.

[34] UNIFORM CONDITIONAL SALES ACT § 22; UNIFORM COMMERCIAL CODE § 9-504(1). The latter applies only where a "security agreement secures an indebtedness . . . ," which includes the type of conditional sale contract discussed herein.

[35] UNIFORM CONDITIONAL SALES ACT § 21; UNIFORM COMMERCIAL CODE § 9-504(1) (under the circumstances explained in footnote 33 *supra*).

[36] UNIFORM CONDITIONAL SALES ACT § 20; UNIFORM COMMERCIAL CODE §9-505(2). Under the former act, the seller must give the buyer notice of his intention to resell within ten days after repossession but no notice of a retention of the property is required of the seller; the Commercial Code is similar, but the seller must give notice of his intention to retain the security, and there is no strict time limit requiring a decision to retain or resell.

if there is no resale.[37] To compel the seller to abide by the acts, the buyer is given a cause of action against him for failure to meet the statutory requirements.[38] These uniform acts attempt to reconcile the interests of buyer and seller by giving each party the right to have a resale, providing for a redemption period and other more mechanical requirements, such as time limitations and notices of resale.[39] The buyer who has paid a certain large portion of the price is given additional protection by the mandatory resale. Although the acts are basically quite similar, the Uniform Commercial Code encourages private resales[40] and is drawn in broad terms to cover other types of security transactions in addition to conditional sales.[41]

An additional problem is posed by a 1954 decision of the West Virginia Supreme Court.[42] This case involved a check, given as a cash down payment by the buyer of a truck under a conditional sale contract, that remained unpaid after proceeds from a resale failed to satisfy the price, and the buyer was held liable on the check, although the seller's conduct discharged the buyer of "all obligation" under Section 23 of the Uniform Conditional Sales Act in force in West Virginia.[43] A dissent argued that the down payment, and the written undertaking for the balance of the price that described the rights of the parties, should be treated as one "obligation" under Section 23, and any discharge of the "obligation" would include an unpaid check given as down payment.[44]

Under the same fact situation, absent the Uniform Conditional Sales Act, the buyer would be liable on this check in jurisdictions holding the North Carolina view, for the seller is entitled to an amount equal to the

[37] UNIFORM CONDITIONAL SALES ACT § 23; UNIFORM COMMERCIAL CODE §9-505(2).

[38] UNIFORM CONDITIONAL SALES ACT § 25 (actual damages and in no event less than one-fourth of all payments made); UNIFORM COMMERCIAL CODE § 9-507(1) (actual damages and if security is "consumer goods," at least the amount of the "service charge" and ten per cent of the cash price).

[39] Also, requirement of a seller's statement of the balance due under the contract, UNIFORM CONDITIONAL SALES ACT § 18; seller's notice of resale where it is not compulsory, *Id.* at § 20, and UNIFORM COMMERCIAL CODE § 9-504(2); advertisement before a required public sale, UNIFORM CONDITIONAL SALES ACT § 19.

[40] See draftsmen's comment following UNIFORM COMMERCIAL CODE §9-504 (Text and comments ed. 1952): "Although public sale is recognized, it is hoped that private sale will be encouraged where, as is frequently the case, private sale through commercial channels will result in higher realization on collateral for the benefit of all parties. The only restriction on the secured party's method of disposition is that it must be commercially reasonable."

[41] Compare the stricter time limits of the Uniform Conditional Sales Act with the requirements of "good faith" and "commercially reasonable" action that are set up in the Uniform Commercial Code. Draftsmen's comment, UNIFORM COMMERCIAL CODE § 9-507 (Text and comments ed. 1952).

[42] West Virginia Mack Sales Co. v. Henderson, 81 S.E. 2d 103 (W. Va. 1954).

[43] The seller had retained the truck over the resale period without giving notice of his intention to resell, which constituted an election to retain it and discharged the buyer, who had paid less than one-half the contract price, under § 23 of the Uniform Conditional Sales Act.

[44] West Virginia Mack Sales Co. v. Brown, 81 S. E. 2d 103, 111 (W. Va. 1954).

contract price in any event. Where the election doctrine prevails the buyer's liability turns on whether the check or note given as cash down payment was a part of the conditional sale contract.[45] However, the courts seem to differ on whether the term "conditional sale contract" includes only the written undertaking making the conditional transfer of the property, or encompasses paper given as down payment also.[46] If it is determined that the check or note given as cash down payment was a part of the conditional sale contract, an election to repossess the security is regarded as a bar to suit on it, as well as the undertaking for the balance;[47] and presumably, when the seller elects to sue on the contract rather than repossess, the paper given as cash down payment and the undertaking will stand together again, and the seller may recover on both. A check or note given as cash down payment that is not a part of the conditional sale contract is treated as consideration for the "use and wear of the property," and the buyer is liable thereon, even after repossession.[48]

An equitable treatment of the parties to a check or note given either as down payment or installment payment would: (1) adopt the North Carolina view on the remedies of buyer and seller after default; (2) disregard whether the paper is part of the conditional sale contract; and (3) hold the buyer liable unless he could recover the amount of the check or note had it been paid. Applying this treatment, the seller would recover if there were a suit for the price without repossession, or in case of a resale, to the extent of any deficiency apart from the check or note; but the buyer would not be liable where there was no deficiency or the seller rescinded the contract. This would not penalize the conscientious

[45] In Crute v. La Porte Discount Corp., 89 Ind. App. 573, ———, 167 N. E. 542, 543 (1929), after observing that the buyer's note given as a down payment was "a part of the original conditional agreement," the court held that the buyer was released by the seller's election to recover the security and distinguished Norman v. Meeker, 91 Wash. 534, 158 Pac. 78 (1916), where a buyer was liable on his note given as down payment, as follows: "In that case, the note sued on, and alleged to have been given in lieu of a cash payment for property purchased, was a plain promissory note, and was no part of the conditional sale contract."

[46] *Compare* Beene Motor Co., Inc. v. Dison, 180 Ark. 1064, 23 S. W. 2d 971 (1930), concerning a conditional sale contract that recited, "'The buyer has this day paid to the seller two hundred and eighty-six ($286.00) dollars . . . ,'" which the court interpreted as including the buyer's note for that amount given as down payment *with* Franz v. Hair, 76 Utah 281, 283, 289 Pac. 130, 131 (1930), where the conditional sale contract read, "'the purchaser has this day paid to the seller two thousand five hundred sixty-seven and No/100 dollars ($2,567.00) . . . ,'" and the court held the buyer's note given in down payment for a part of this sum was not included in the conditional sale contract.

[47] Beene Motor Co., Inc. v. Dison, 180 Ark. 1064, 1067, 23 S. W. 2d 971, 972 (1930): "Since the $286 note . . . was included in the conditional sale agreement for the sale of the truck, was a part of the purchase price recited therein, and title to the property was retained until the whole purchase price was paid, it necessarily follows . . . that when appellant [seller] elected to retake the truck, it also elected to cancel the balance of the indebtedness due against the car, which had the effect of relieving appellee [buyer]. . . ."

[48] Norman v. Meeker, 91 Wash. 534, 538, 158 Pac. 78, 80 (1916).

buyer who pays in cash or whose check or note is paid before repossession by allowing a tardy buyer to escape liability, and it would conform with the intention of the parties that the amount of a check or note given as cash down payment would be paid. In the final analysis, the seller and buyer would be neither better nor worse off than they would have been if cash had been paid in the place of the check or note.

ROY W. DAVIS, JR.

Labor Law—Fair Labor Standards Act—Nonexempt Work Tolerance for Executives

A great many decisions determining whether, under the Fair Labor Standards Act, a particular employee is a "bona fide executive," have turned on the sections of the regulations issued by the Administrator of the Wage and Hour Division of the Department of Labor relating to nonexempt work tolerance. One writer has estimated that at least half of the overtime violations of the Act emanate from misinterpretations of the executive exemption.[1] The various administrative regulations dealing with this exemption have therefore been chosen for comment in this note.

Section 13 (a) (1) of the Fair Labor Standards Act exempts from the provisions of Section 6 (minimum wage) and Section 7 (maximum hours) of the Act, any employee who is employed in a bona fide executive capacity, as such term is defined and delimited by the regulations of the Administrator.[2] The reason for this exemption is that a bona fide executive is not ordinarily in the group that requires the protection of the Act.[3]

It is to be noted at the outset that the Administrator's definition of a "bona fide executive" is given Congressional sanction and is controlling in determining who shall be exempt from the Act.[4] The North Carolina Supreme Court, in applying the Administrator's definition, has said: "Valid definitions within the delegated power speak with authority and become the dictionary of the law."[5]

Since 1938, when the Fair Labor Standards Act became effective, the Administrator has acted three times to define the term "bona fide

[1] Bookstabler, *Exemption of the "Boss Man" Under Section 13 (a) (1) of the Fair Labor Standards Act*, 69 N. J. L. J. 81 (1946). It is to be noted that since all of the requirements of the definition must be met and since Section (f) of the present definition requires that the employee be compensated on a salary basis at a rate of not less than $55 per week, except in Puerto Rico or the Virgin Islands where the minimum salary is $30, there are few cases where the general minimum wage requirements of the act have been involved; most of the cases involve compensation for overtime.

[2] 52 STAT. 1067 (1938), 29 U. S. C. § 213 (1952). The Act's original provision has remained unchanged since 1938.

[3] Bookstabler, *supra* note 1.

[4] Zaetz v. General Instrument Corp., 21 N. J. Misc. 76, 30 A. 2d 504 (1943).

[5] Pye v. Atlantic Co., 223 N. C. 92, 96, 25 S. E. 2d 401, 404 (1943).

executive capacity." In each of these definitions there has been some limit placed on the amount of nonexempt work which may be performed by an executive employee without losing his exemption. In the definition which went into effect simultaneously with the Act itself, the term "employee employed in a bona fide executive capacity" was defined in relation to nonexempt work tolerance as "one who does no substantial amount of work of the same nature as that performed by nonexempt employees of the employer."[6] While this original "white-collar" regulation defined both executive and administrative employees together, both the later regulations contain a separate definition for exempt administrative and executive employees.[7]

Section (f) of the Administrator's definition of an executive employee, which was in effect from 1940 to 1950, relating to nonexempt work, required that the employee's work of the same nature as that performed by nonexempt employees not exceed 20 per cent of the number of hours worked in any workweek by nonexempt employees under his direction, except where the employee was in sole charge of an independent establishment or a physically separated branch establishment.[8] During this same period there was no similar 20 per cent limitation in the Administrator's definition of an "administrative employee." Since there was no similar requirement at least one court held a factory superintendent to be exempt as an administrative employee even though the time he spent on nonexempt activities exceeded 20 per cent of the workweek of the nonexempt employees under his direction, on the ground that the nonexempt activities were not wholly without relation to his primary responsibility.[9] This ruling illustrates the distinction which still exists between executive and administratve employees.

The present defintion of "bona fide executive," which became effective on January 25, 1950, lists six requirements which must be met before the employee is exempt from the coverage of the Act.[10] If an

[6] George Lawley & Sons Corp. v. South, 140 F. 2d 439 (1st Cir. 1944), *cert. denied*, 322 U. S. 746 (1944); Roberts v. John Sperry Co., 7 W. H. Cases (BNA) 349 (D. Mass. 1947).

[7] WAGE AND HOUR MANUAL (BNA) 20:615 (1948).

[8] 29 CODE FED. REGS. § 541.1 (Cum. Supp. 1949).

[9] Sparks v. Pedersen, 9 W. H. Cases (BNA) 156 (D. Conn. 1949).

[10] "The term 'employee employed in a bona fide executive . . . capacity' in section 13 (a) (1) of the act shall mean any employee—

(a) whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof; *and*

(b) who customarily and regularly directs the work of two or more other employees therein; *and*

(c) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; *and*

(d) who customarily and regularly exercises discretionary powers; *and*

(e) who does not devote more than 20 per cent of his hours worked in the

employee fails to meet any one of the requirements, he is not exempt.[11]

Section (e) of the present regulations takes the place of Section (f) of the regulations in effect until 1950 and requires that the employee shall not devote more than 20 per cent of his hours worked in the workweek to activities which are not directly and closely related to the performance of his managerial functions.[12]

As has been noted, prior to 1940 the definition of a "bona fide executive" used the words "substantial amount" in referring to the quantity of nonexempt work which the executive might perform without loss of his exemption.[13] Much criticism was directed to the vagueness and ambiguity of this wording.[14] The Stein Report, which was later adopted as the official explanation of the new definitions in 1940,[15] suggested that instead of deletion, an arithmetical equivalent be substituted.[16] The result was the old Section (f) requirement that an employee not spend more than 20 per cent of the time spent by his subordinates doing nonexempt work. These requirements were obviously inserted to prevent merely nominal classification of employees for the purpose of evading the coverage of the act.[17] A typical and unsuccessful attempt at evasion was an employer's affixation of the label "building superintendent" to an employee whose duties would generally be performed by a janitor and who exercised only slight supervision over other employees.[18]

Under old Section (f) it was possible for an employee to spend more than 20 per cent of his own time in nonexempt activities, at purely physical tasks of the same general nature as those of the employees working under him, and still be exempt as an executive. The Stein Report said that the base upon which the percentage was to be taken was not the workweek of the employee himself, since on that basis he could obtain exemption merely by increasing his hours of exempt work.[19] Two

workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section: *Provided,* That this paragraph (e) shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment, or who owns at least a 20 per cent interest in the enterprise in which he is employed; *and*

(f) who is compensated for his services on a salary basis at a rate of not less than $55 per week. (or $30 per week if employed in Puerto Rico or the Virgin Islands) exclusive of board, lodging, or other facilities. . . ." 29 CODE FED. REGS. § 541.1 (Cum. Supp. 1953).

[11] 29 CODE FED. REGS. § 541.99 (c) (Cum. Supp. 1953); Fanelli v. United States Gypsum Co., 141 F. 2d 216 (2d Cir. 1944); Rankin v. Jonathan Logan, Inc., 98 F. Supp. 1 (D. N. J. 1951); Kreeft v. R. W. Bates-Price Dye Works, Inc., 63 F. Supp. 881 (S. D. N. Y. 1945).

[12] 29 CODE FED. REGS. § 541.1 (Cum. Supp. 1953).

[13] 29 CODE FED. REGS. § 541.1 (Supp. 1938).

[14] WAGE AND HOUR MANUAL (BNA) 20:93 (1948).

[15] WAGE AND HOUR MANUAL (BNA) 20:83 (1948).

[16] WAGE AND HOUR MANUAL (BNA) 20:93 (1948).

[17] Jones v. Bethlehem-Fairfield Shipyard, 75 F. Supp. 86 (D. Md. 1947).

[18] Schmidt v. Emigrant Indus. Sav. Bank, 148 F. 2d 294 (2d Cir. 1945).

[19] WAGE AND HOUR MANUAL (BNA) 20:94 (1948).

cases show the problems that arose from this point of view. In *Walling v. Morris*,[20] the United States Supreme Court said that if the suit had been brought by the employee to collect for overtime rather than by the Administrator to enjoin violation of the Act, the employee would not be exempt in the absence of a showing in the record of the extent to which the laborers under his direction devoted themselves to the type of work performed by the employee in question. In this case, the record did show that the employee devoted 25 per cent of his own time to nonexempt activities. In *Grant v. Bergdorf and Goodman Company*,[21] it was held that the trial court erred in instructing the jury that the nonexempt hours were to be measured by a percentage of the particular employee's workweek rather than by the workweek of those under his direction.

Another holding under old Section (f) was that the nature of the work, and not necessarily performance of the same type work as the subordinates, controlled in determining exemption. Thus the work of editors of a newspaper, although not of the same type as that of the reporters under their supervision, in that it consisted mainly of copy-reading, was of a general nonexempt nature and therefore the editors were not exempt.[22]

It is to be remembered that the present regulations require that the employee shall not devote more than 20 per cent of his own hours worked in a workweek to nonexempt activities. It is also to be remembered that exemptions from the coverage of the Act are to be strictly interpreted,[23] and that the employer seeking to avoid payment of overtime has the burden of proving that the employee is exempt.[24] This burden must be met by establishing the exemption by a clear preponderance of the evidence.[25] Of course, the burden of establishing the existence and extent of overtime is on the employee.[26]

The real problem is in determining whether particular work of the employee is exempt. As one court expressed it, the application is "troublesome because actual experience teaches that the effective, thorough, conscientious executive or administrator frequently lends his own hands, in addition to the words of advice . . . , as he teaches and instructs those for whose work he is responsible, and whose work he desires to press to a speedy and accurate conclusion."[27] Granting that this is an

[20] 332 U. S. 422 (1947). [21] 172 F. 2d 109 (2d Cir. 1949).

[22] American Newspaper Guild v. Republican Publishing Co., 271 App. Div. 1026, 68 N. Y. S. 2d 906 (2d Dep't 1947).

[23] A. H. Phillips, Inc., v. Walling, 324 U. S. 490 (1945).

[24] Woods Lumber Co. v. Tobin, 199 F. 2d 455 (6th Cir. 1952); Richter v. Barrett, 173 F. 2d 320 (3d Cir. 1949); Abram v. San Joaquin Cotton Oil Co., 49 F. Supp. 393 (S. D. Cal. 1943). *Contra:* Zaetz v. General Instrument Corp., 21 N. J. Misc. 76, 30 A. 2d 504 (1943).

[25] Walling v. Newman, 61 F. Supp. 971 (D. Iowa 1945).

[26] Rankin v. Jonathan Logan, Inc., 98 F. Supp. 1 (D. N. J. 1951).

[27] Marian v. Lockheed Aircraft Corp., 65 F. Supp. 18, 19 (N. D. Tex. 1946).

accurate statement of the general situation, the courts are nevertheless in disagreement as to whether the exemption should be whittled away where the executive employee steps in to help. Another court noted, "It is an American characteristic of the relationship of executive and those under him that the foreman might 'pitch in' almost any time to help. He would be the exception if he didn't."[28] The court then held such an employee to be an executive. However, still another court said of an employee that "he is a good employee and pitches in and helps whenever and wherever he is needed. The Administrator in adopting his regulations intended to make an employee of this class subject to the Act."[29]

At any rate, the regulations and cases have established as exempt work certain types of manual work performed by executives. The present regulations, in addition to exempting manual work which is directly and closely related to the executive's managerial function,[30] specify two situations in which normally nonexempt work will be considered exempt because of its over-all relation to the executive duties of the employee: (1) work done because of the existence of a real emergency,[31] and (2) infrequent or occasional tasks performed as a means of properly carrying out management functions.[32] These regulations follow closely the rules set out by the Kentucky court in the leading case, *Mafizola v. Hardy-Burlingham Mining Company*.[33]

In that case, the employee claimed certain time was nonexempt. In this was included time he spent checking his men in and out of the mine and getting together supplies such as time and report books, first aid equipment, and safety devices. The court said it was apparent that those duties were such as are performed by an executive employee and are not manual labor or nonexempt work. The court further held that the "executive's" teaching of first aid to his men was exempt work. More important for our purposes, perhaps, was the court's holding that time spent by the employee acting as a watchman during a strike was exempt. The court said that "ordinarily a watchman's job is nonexempt work, yet when a strike is in progress and a foreman undertakes a watchman's duties, he is performing such services in an executive capacity. In such circumstances, it is only an executive employee who is not a member of the union on strike who can be depended on to perform such duties."[34]

[28] Clougherty v. James Vernon Co., 74 F. Supp. 364, 369 (E. D. Mich. 1947).
[29] Walling v. Jacksonville Paper Co., 69 F. Supp. 599, 606 (S. D. Fla. 1947), *rev'd on other grounds*, 336 U. S. 187 (1949).
[30] 29 CODE FED. REGS. § 541.108 (Cum. Supp. 1953).
[31] 29 CODE FED. REGS. § 541.109 (Cum. Supp. 1953).
[32] 29 CODE FED. REGS. § 541.110 (Cum. Supp. 1953).
[33] 306 Ky. 492, 207 S. W. 2d 769 (1947).
[34] *Id.* at 497, 207 S. W. 2d at 771; *accord*, McReynolds v. Pocahontas, 192 F. 2d 301 (4th Cir. 1951).

Another court observed before the present regulations were adopted that "there are times when the executive will appear to the observer as doing manual work, when, as a matter of fact, he is merely making an investigation or exercising his discretion in laying out work for his subordinates."[35] Work in keeping production and personnel records, inspecting and testing work of the employees and making recommendations following such inspections, and manual labor in demonstrations or emergencies,[36] is not work which is to be counted against the nonexempt work tolerance.

In an interesting case which may mark the outer limits of exemption, engineers, whose duties included making necessary repairs and spending a small amount of their time cleaning and oiling machinery, in addition to making constant observation and regular inspections, were held to be exempt by the United States Supreme Court.[37] Here, however, the employees under their direction were firemen and coal passers and the supervisory work was not of the same type as that of the subordinates. The dissent attacked the sufficiency of the amount of discretion which the engineers exercised rather than the type of work which they performed.

Several other circumstances have been considered by the courts in determining whether the employee's work was exempt. One consideration is whether the work which is claimed to be nonexempt was performed as a part of the employee's duty, something which he was at least expected to do, or whether it was done of the employee's own volition.[38] Thus, the fact that the plaintiff's mechanical tasks were performed on a voluntary basis was accorded some weight in one case.[39] And where the supervision and management of a department was the employee's primary duty, the North Carolina Supreme Court said that the duty was uninterrupted "except where, as a matter of convenience, plaintiff assisted in some work which was regularly in the routine of other employees."[40] However, where an employee owed his job to his ability to make necessary adjustments and keep machinery in operation, his work was nonexempt.[41]

Another circumstance which has been considered is whether the employee in a union plant is or is not a member of the union. In one case, the Supreme Court took cognizance of the fact that the union had abandoned a long contested claim of the right to represent engineers at

[35] Corey v. Detroit Steel Corp., 52 F. Supp. 138 (E. D. Mich. 1943).
[36] Evans v. Continental Motors Corp., 105 F. Supp. 784 (E. D. Mich. 1952).
[37] Walling v. General Industries Co., 330 U. S. 545 (1947).
[38] Evans v. Continental Motors Corp., 105 F. Supp. 784 (E. D. Mich. 1952). See 29 CODE FED. REGS. § 541.110 (Cum. Supp. 1953).
[39] Pugh v. Lindsay, 206 F. 2d 43 (4th Cir. 1953).
[40] Pye v. Atlantic Co., 223 N. C. 92, 96, 25 S. E. 2d 401, 403 (1943).
[41] Walling v. Jacksonville Paper Co., 69 F. Supp. 599, 606 (S. D. Fla. 1947), *rev'd on other grounds*, 336 U. S. 187 (1949).

the plant, thereby recognizing their supervisory status.[42] Again, another court said, in speaking of the nonunion head of the materials division of a plant, that "under the ever watchful eyes of the shop stewards there was little opportunity for [the employee] to carry parts by hand without detection."[43] The court then held that the employee's nonexempt work did not exceed the 20 per cent tolerance. It is not, however, reversible error to refuse to receive testimony of union officials intended to show labor's point of view with respect to classification in the industry generally, since it is the work of the particular employee that governs in each individual case.[44]

A third circumstance that the cases establish as important is whether the employee claims to be an executive, or conversely, whether the employer recognizes the employee as nonexempt. One court was impressed with the fact that both employee and employer told a union official that the employee was a foreman when the official complained because the employee had cut some hoods for parkas.[45] In another case, the employee was paid overtime for continuing to do the same type work after the disputed period in which no overtime was paid. The court said that this was consistent with a recognition by the employer that the employee was not an executive.[46]

The courts have generally had little trouble in deciding whether the 20 per cent tolerance has been exceeded, once they have decided which work is exempt and which is not. Perhaps the extreme case segregating exempt from nonexempt working time is *Kaczanowski v. Home State Bank*.[47] There the plaintiff-employee of the bank spent part of her time in the teller's cage, in addition to carrying out her primary duty of approving mortgages and loans. If the entire time that the employee was supposed to be in the teller's cage had been considered, this time would have exceeded the 20 per cent limitation in the Administrator's regulations. The court said that the frequent interruptions which took the plaintiff away from the cage to carry out her supervisory functions made her total non-executive hours much less than 20 per cent.

Both the regulations in effect from 1940 to 1950 and those in effect at the present time have made specific exceptions to the limit on nonexempt work. The present regulations except from Section (e) two classes of workers: (1) employees who are in sole charge of an independent branch establishment, or a physically separated branch establishment, and, (2) employees who own at least a 20 per cent interest in the

[42] Walling v. General Industries Co., 330 U. S. 545 (1947).
[43] Evans v. Continental Motors Corp., 105 F. Supp. 784, 788 (E. D. Mich. 1952).
[44] Gill v. Mesta Machine Co., 165 F. 2d 785 (3d Cir. 1948), *cert. denied*, 334 U. S. 832 (1948).
[45] Kupperman v. M. & J. Becker, Inc., 198 F. 2d 765 (2d Cir. 1952).
[46] Sawyer v. Selig Mfg. Co., 74 F. Supp. 319 (D. Mass. 1947).
[47] 77 F. Supp. 602 (E. D. Wisc. 1948).

enterprise by which they are employed.[48] The exception which relates to part owners was not included in the old regulations.[49] There seems to have been little litigation involving these exceptions.

The new requirement relating to nonexempt work differs from that in the 1940-1950 regulations in the following ways:

1. The ceiling on the time which may be devoted to nonexempt work is now measured by 20 per cent of the employee's own time rather than by the weekly hours of the employees under his direction.
2. Nonexempt work is now defined as work which is not "directly and closely related" to the exempt duties, rather than "work of the same nature" as that performed by the subordinates.[50]

While these changes may permit an employee to keep himself from becoming an "executive" by performance of more nonexempt duties, as was feared in the Stein Report of 1940,[51] the scope of exempt work has probably been broadened in that an employee may now perform certain menial tasks which, because of their relation to his entire employment, will not be counted against the nonexempt work tolerance.[52]

The Administrator's new definition includes a "streamlined" exemption for employees who are paid $100 weekly or more.[53] Of these employees, the Administrator, after setting down certain requirements which do not mention nonexempt work at all, says that they "shall be deemed to meet all of the requirements"[54] of the definition of an executive. This would seem to indicate that as to these employees there is no limit, except perhaps reasonableness, on the amount of nonexempt work they may perform without losing their exempt status.

It must be remembered that the problem of whether a particular employee is a "bona fide executive" does not arise until it has first been determined that he is an employee. In one recent case, the plaintiff was held not to be an employee within the meaning of the act when it appeared that while he worked for the defendant corporation as a pattern maker, or as a machinist at a specified hourly rate, he was also an officer, a stockholder, and a director of the corporation.[55] Of course, the court

[48] 29 CODE FED. REGS. § 541.1 (Cum. Supp. 1953).
[49] Editorial Analysis, WAGE AND HOUR MANUAL (BNA) 20:403 (1950). For examples of employees in sole charge of physically separated branch, see Gruenstein v. Brust Footwear Corp., 72 F. Supp. 485 (E. D. Pa. 1947); Antis v. Montgomery-Ward Co., 63 F. Supp. 669 (E. D. Mich. 1946).
[50] Editorial Analysis, WAGE AND HOUR MANUAL (BNA) 20:402 (1950).
[51] WAGE AND HOUR MANUAL (BNA) 20:83 (1948).
[52] WAGE AND HOUR MANUAL (BNA) 20:402 (1950).
[53] Levitt, *The "New" Wage and Hour Law*, N. Y. U. THIRD ANNUAL CONFERENCE ON LABOR 269 (1950).
[54] 29 CODE FED. REGS. § 541.100 (Cum. Supp. 1953).
[55] Hoy v. Progress Pattern Co., 121 F. Supp. 371 (E. D. Mich. 1953).

did not discuss the exception relating to part owners provided in Section (e) of the regulations since the plaintiff was not even an employee.

In spite of the clear and helpful regulations supplementing the definition of a "bona fide executive" employee, it remains difficult to draw a line with all true executives falling on one side and all remaining employees falling on the other. All of the requirements of the Administrator's definition must be met. The requirement that will probably continue to be most troublesome deals with nonexempt work tolerance. The courts must still decide on the particular facts of each case whether work is "directly and closely related," and, if it is not, then whether the amount of that work exceeds the tolerance.

F. KENT BURNS

Real Property—Personal Restrictive Building Covenants

Although the case of *Julian v. Lawton*[1] presented for decision a very narrow question on the matter of restrictive building covenants and perhaps turned on an agency question as much as on the construction of the covenant involved, the case is of interest because of the growth of residential subdivisions in the last two decades and the almost universal inclusion of certain restrictions imposed by means of covenants in the deeds given for the lots in these developments.[2] In this case the use of the term "personal" as applied to a valid restrictive building covenant is believed to be unique.

In the principal case, the grantor, in conveying certain lands in a real estate subdivision which he was promoting, inserted in the deeds certain restrictive covenants one of which stated "that no dwelling house or other building shall be erected on the tract until the type and exterior lines of the building to be erected shall have been approved by [the grantor] or by an architect selected by him. . . ."[3] The court held that the covenant was personal to the grantor and that both the restriction and the agency of the architect ceased to be effective at the death of the grantor.

By definition, "a real covenant is one having for its object something annexed to, inherent in or connected with land or other real property";[4] it is a covenant that is said to "touch and concern" the land.[5] These

[1] 240 N. C. 436, 82 S. E. 2d 210 (1954).

[2] "The number of decisions in comparatively recent years involving the validity, construction and effect of agreements restricting the use of real property indicate the increasing use being made of them. This reflects, it has been aptly commented, the expansion of the law to meet the demands of home owners for a protection adequate to the more crowded conditions of modern life." TIFFANY, LAW OF REAL PROPERTY § 858 (3rd ed. 1939).

[3] Julian v. Lawton, 240 N. C. 436, 437; 82 S. E. 2d 210, 211 (1954).

[4] 14 AM. JUR., *Covenants* § 19, at p. 495 (1938); 21 C. J. S., *Covenants* § 22 (1940).

[5] TIFFANY, LAW OF REAL PROPERTY § 854, at p. 455 (3rd ed. 1939).

covenants "run with the land" and are enforceable for the duration of the estate without regard to the personalities involved in any specific transfer or sale.[6] Personal covenants are between individuals, binding only the covenantor and enforceable by the covenantee; their duration is said to be only the life of the covenantee.[7]

The North Carolina Supreme Court has denominated as real covenants the following: covenant of quiet enjoyment, covenant of warranty,[8] covenant securing a right of way with an annual payment,[9] covenant that an existing canal shall be maintained,[10] covenant to build and maintain a stairway,[11] and a covenant for a railroad to maintain a flag station.[12] The court has also included in this category covenants containing building and occupancy restrictions such as: those limiting the number of residences per tract; limiting ownership to members of the "white race"; forbidding factories, manufacturing establishments, commercial endeavors, tenements, apartment houses, saloons, sanatoriums, hospitals; requiring a certain minimum cost per dwelling; requiring houses a certain distance from a road or street; prohibiting the keeping of certain animals, and other like restrictions.[13]

Personal covenants in North Carolina cover such agreements as covenants of seisin,[14] covenants against encumbrances,[15] and, where no

[6] 14 AM. JUR., *Covenants* § 19 (1938); 21 C. J. S., *Covenants* §§ 54, 74 (1940).

[7] 14 AM. JUR., *Covenants* § 27 (1938); TIFFANY, LAW OF REAL PROPERTY § 854 (3rd ed., 1939).

[8] "The covenant for quiet enjoyment and the covenant for warranty are in their effect the same . . . in some cases the courts have noted minor distinctions between them . . . they are generally regarded as substantially equivalent or identical in operation and effect." AMERICAN LAW OF REAL PROPERTY § 12.129 (1952); quiet enjoyment: Wiggins v. Pender, 132 N. C. 628, 44 S. E. 362 (1903); Markland v. Crump, 18 N. C. 94, 27 Am. Dec. 320 (1834); warranty; Wiggins v. Pender, *supra;* Ravenel v. Ingram, 131 N. C. 549, 42 S. E. 967 (1902); RAWLE, COVENANTS FOR TITLE § 213 (5th ed. 1887); TIFFANY, REAL PROPERTY § 1022 (3rd ed. 1939). *Cf.*, Smith v. Ingram, 130 N. C. 100, 40 S. E. 984 (1902).

[9] Raby v. Reeves, 112 N. C. 688, 16 S. E. 760 (1893).

[10] Norfleet v. Cromwell, 64 N. C. 1 (1870).

[11] Ring v. Mayberry, 168 N. C. 563, 84 S. E. 846 (1915).

[12] Parrott v. Railroad, 165 N. C. 295, 81 S. E. 348 (1914).

[13] These citations are representative only and do not in each specific case hold the covenant to be real: residences per tract: Stroupe v. Medernach, 196 N. C. 305, 145 S. E. 925 (1928); Charlotte Consol. Construction Co. v. Cobb, 195 N. C. 690, 143 S. E. 522 (1928); "white race": Vernon v. R. J. Reynolds Realty Co., 226 N. C. 58, 36 S. E. 2d 710 (1945); Stroupe v. Medernach, *supra;* factories, tenements, hospitals, etc.: Huffman v. Johnson, 236 N. C. 225, 72 S. E. 2d 236 (1952); Bailey v. Jackson, 191 N. C. 61, 131 S. E. 567 (1925); minimum cost: Pepper v. West End Development Co., 211 N. C. 166, 189 S. E. 628 (1936); Huntington v. Dennis, 195 N. C. 759, 143 S. E. 521 (1928). These and other restrictions received approval by reference in Johnson v. Garrett, 190 N. C. 835, 130 S. E. 835 (1925), one of the "Myers Park cases." For earlier cases on this planned development, see: Myers Park Homes Co. v. Falls, 184 N. C. 426, 115 S. E. 184 (1922); and Stephens Co., v. Myers Park Homes Co., 181 N. C. 335, 107 S. E. 233 (1921). See TIFFANY, *op. cit. supra* note 4, § 859.

[14] Newbern v. Hinton, 190 N. C. 108, 129 S. E. 181 (1925); Eames v. Armstrong, 146 N. C. 1, 59 S. E. 165 (1907); Ravenal v. Ingram, 131 N. C. 549, 42 S. E. 967 (1902); AMERICAN LAW OF REAL PROPERTY, § 12.127 (1952); RAWLE,

scheme or plan for development was present, certain other covenants concerning the use of land[16] and Negro occupation.[17]

In other jurisdictions, the search for unenforced covenants similar to the principal case has revealed covenants requiring a lightwell to be left between buildings,[18] prohibiting a grocery business on the land,[19] forbidding manufacturing on the premises,[20] restricting location and character of improvements to be made,[21] and requiring a certain set back distance for all buildings.[22] All of these were considered personal and each lacked either *similar restrictions* in the deeds for other lots in the development or a *scheme of development,* both of which were present in the principal case.

Still another case[23] reveals a covenant prohibiting a mercantile business from being conducted on the property. The court here refused to enforce the covenant after the grantors had disposed of their nearby mercantile business. The restriction was considered personal to protect the grantor's business and served no purpose after the sale.

The combination of (1) a building restriction, (2) an area developed according to a "scheme," and (3) a refusal to enforce because the covenant was personal has not been found outside the principal case. As seen above, cases may have all but one of the features of *Julian v. Lawton.*

The case would seem to be well decided and in line with the prevailing American law on personal covenants.[24] Certainly little argument can be given the court on its decision that the covenant was personal, principally because of the use of words in the deed indicating that the grantor as an individual was to be satisfied. Such phrases used by the court as "without existence or meaning apart from the brain of" the grantor, and "his aesthetic sense," would seem a fair interpretation of the language of the deeds. However, in view of the defense advancd by the grantor's personal representative and heirs, it would seem safe to assume that the covenant was expected to run after the grantor's death. The

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op. cit. supra note 4, § 205; TIFFANY, *op. cit. supra* note 4, § 205.

[15] Thompson v. Avery County, 216 N. C. 405, 5 S. E. 2d 146 (1939); Lockhart v. Parker, 189 N. C. 138, 126 S. E. 313 (1924); AMERICAN LAW OF REAL PROPERTY, § 12.128 (1952); RAWLE, *op. cit. supra* note 4, § 212; TIFFANY, *op. cit. supra* note 4, § 1022.

[16] Craven County v. First Citizens Bank & Trust Co., 237 N. C. 502, 75 S. E. 2d 620 (1953); Sheets v. Dillon, 221 N. C. 426, 20 S. E. 2d 344 (1942).

[17] Eason v. Buffaloe, 198 N. C. 520, 152 S. E. 496 (1930).

[18] Heimburge v. State Guaranty Corp., 116 Cal. App. 380, 2 P. 2d 998 (1931).

[19] Shade v. O'Keeffe, 260 Mass. 180, 156 N. E. 867 (1927).

[20] Harrington v. Joyce, 316 Mass. 187, 55 N. E. 2d 30 (1944).

[21] Jennings v. Baroff, 104 N. J. Eq. 132, 144 Atl. 717 (1929).

[22] Baker v. Henderson, 137 Tex. 266, 153 S. W. 2d 465 (1941).

[23] Allison v. Greear, 188 Va. 64, 49 S. E. 2d 279 (1948).

[24] 21 C. J. S. *Covenants* § 33 (1940).

court has thus removed one of the restrictions found in every deed in that particular real estate development.

Since more specific or definite language in the deeds[25] and the use of certain legal devices[26] can do much to clear up any doubt as to the real or personal nature of a restrictive building covenant, it is possible that in the future the careful draftsman can obviate the necessity for the court's having to designate such a covenant as personal.

WILLIAM P. SKINNER, JR.

Torts—Animals—Liability of Owner for Trespass of Dogs While Hunting

In a recent North Carolina decision,[1] the court held that the owner of dogs which had damaged crops, fences, and cattle of plaintiff in the course of fox hunts, was liable in trespass for damage done, although the hunter himself did not enter the plaintiff's property.

Plaintiff and defendant owned adjoining farms in Guilford County. The defendant, during a period of three years preceding the action, kept a pack of seven to ten foxhounds that he hunted across plaintiff's land at frequent intervals, in spite of plaintiff's repeated protests. Plaintiff's pasture lay between two creeks. The fox was wont to dash between the creeks during the hunt, and when fatigued by this exercise would dash in among the herd of cattle with the yelping pack in hot pursuit. Whereupon, the cattle would stampede, tearing down partition fences, cutting themselves on the barbed wire, and generally working themselves into whatever is the bovine equivalent of advanced neurosis.

Generally, the owner of domestic animals which stray onto property of another is liable in damages for their trespass.[2]

[25] It is suggested that the following might be sufficient: ". . . shall have been approved by the grantor *or his successors in interest,* or by an architect selected by him *or his successors in interest.*" Also, the subjective nature of the restriction could be made objective by listing architectural types not desired, *i.e.,* ranch, modern, colonial, etc.

[26] See Huntington Palisades P. O. Corp. v. Metropolitan Finance Corp., 180 F. 2d 132 (9th Cir. 1950), wherein the covenant read: "No building or other structure shall be erected or the erection thereof begun on said premises until the plans and specifications thereof shall have been first presented to and approved in writing by the Seller or by the property owners corporation, herein referred to, as to outward appearance and design." The result desired by the grantor in the principal case was accomplished here by means of the property owners' corporation which each grantee joined by acceptance of the deed.

[1] Pegg v. Gray, 240 N. C. 548, 82 S. E. 2d, 757 (1954).

[2] *E.g.,* Fox v. Koehnig, 190 Wis. 528, 209 N. W. 708 (1926); RESTATEMENT, TORTS § 504 (1934); HALSBURY'S LAWS, *Animals* § 935 (2d ed. 1931); 3 C. J. S., *Animals* § 185 (1936); Accordingly, owners have been held strictly liable for the trespasses of their turkeys: McPherson v. James, 69 Ill. App. 337 (1896); Tate v. Ogg, 170 Va. 95, 195 S. E. 496 (1938). And their chickens: Adams Bros. v. Clark, 189 Ky. 279, 224 S. W. 1046 (1920). Trespassing cattle, sheep, goats, horses, mules, oxen, and swine are governed in practically all jurisdictions by detailed statutes, which determine "legal fences," liability for trespass, local option as to

The dog however is *sui generis* at law.[3] And often "dog law is as hard to define as dog latin."[4] At early common law it was said: "there is a difference between a dog and other animals: if a dog comes on your land, you have no action."[5] This has evolved into the doctrine at common law that the owner is not liable for his dog's trespass of its own "volition."[6] This seems to have developed in recognition of: (1) the fact that the dog is generally well disposed toward man; (2) the unlikelihood of a dog's causing serious damage to another's property as would, for example, cows or sheep; and (3) the status of the dog at common law as a base animal in which the owner had only a qualified, or according to some commentators, no property right.[7]

This rule of non-liability for trespasses of the dog's own volition has been criticized,[8] and modified by statute in some jurisdictions.[9] But in North Carolina and the majority of American jurisdictions the rule still largely obtains.[10]

The dog owner may be held liable, however, if: (1) the dog has a propensity toward committing the trespass complained of; *and,* (2) the dog owner has or should have knowledge of that propensity. This requirement of "scienter" is rather general in Anglo-American jurisdictions at common law,[11] but has been modified or abolished by statute in

"stock laws," etc.: *e.g.,* GA. CODE § 62-5 (1949); N. C. GEN. STAT. § 68-1 *et seq.* (1950); UTAH CODE ANN. §3-5-79 (1949); VA. CODE § 8-874 (1950).

[3] Sabin v. Smith, 26 Cal. App. 676, 147 Pac. 1180 (1915); Meekin v. Simpson, 176 N. C. 130, 96 S. E. 894 (1918); Dog Owner's Ass'n, Inc. v. Hilleboe, 124 N. Y. S. 2d 835, 839 (Sup. Ct. 1953); 2 AM. JUR., *Animals* § 105 (1936).

[4] Citizen's Rapid-Transit Co. v. Dew, 100 Tenn. 317, 324, 45 S. W. 790, 791 (1890).

[5] Littleton, J., in Mitten v. Faudrye, 1 Poph. 161, 79 Eng. Rep. 1259 (1626), *"et est un difference inter unchien et auters avers: si un chien vaer en votre terre navares action." Accord,* Anon. 1 Dyer 29a, 73 Eng. Rep. 64 (1537).

[6] Mitten v. Faudrye, *supra* note 5; *See* Pegg v. Gray, 240 N. C. 548, 82 S. E. 2d 757 (1954); Baker v. Howard County Hunt, 171 Md. 159, 188 Atl. 223 (1936); Manton v. Brocklebank, [1921] 2 K. B. 212 (C. A.); see HALSBURY'S LAWS, *Animals* § 1313 (1931); *cf.* Buckle v. Holmes, [1926] 2 K. B. 125, 54 A. L. R. 89 (cats).

[7] "Base" animals are those in which a right of property can be acquired by reclaiming them from wildness. Once so "reclaimed," the common law recognized them as possible subjects of larceny. O'Connell v. Jarvis, 13 App. Div. 3, 43 N. Y. Supp. 129 (Sup. Ct. 1897); Pegg v. Gray, 240 N. C. 548, 82 S. E. 2d 757 (1954); Bruch v. Rissmiller, 18 Pa. Dist. 732 (1909); Mason v. Keeling, 12 Mod. 332, 1 Ld. Raym. 606 (1691).

[8] *E.g.,* McClain v. Lewiston Interstate Fair and Racing Ass'n, 17 Idaho 63, 104 Pac. 1015 (1909).

[9] MASS. ANN. LAWS c. 140, § 155 (1949); OHIO GEN. CODE ANN. § 5838 (1945); See Note, 142 A.L.R. 436 (1943).

[10] *E.g.,* Pegg v. Gray, *supra* note 7; Banks v. Maxwell, 205 N. C. 233, 171 S. E. 70 (1933); *cf.* State v. Smith, 156 N. C. 628, 72 S. E. 321 (1911). *But cf.* N. C. GEN. STAT. § 67-12 (1950) (liability of owner for dogs running free at nighttime).

[11] See, *e.g.,* Owen v. Hampson, 258 Ala. 228, 62 So. 2d 245 (1952); Hagen v. Laursen, 263 P. 2d 489 (Calif. Dist. Ct. App., 3d Dist. 1953); True v. Shelton, 314 Ky. 446, 235 S. W. 2d 1009 (1951); Perkins v. Drury, 57 N. M. 269, 258 P. 2d 379 (1953); Hill v. Palms, 237 S. W. 2d 455 (Tex. Civ. App. 1950); See Note, 107 A. L. R. 1323 (1936).

England[12] and in some states.[13]

So also may the owner of the dog be held liable if he himself is a trespasser at the time of the dog's depredations.[14]

The instant case however poses problems in some respects unique in this jurisdiction, and possibly in the body of the law. The owner of the dogs did not himself trespass on plaintiff's land, as in some cases cited by the court in its decision.[15] However, the owner did have knowledge of his dogs' trespasses and was advertent to their tendency to follow the fox, and the fox's tendency to lead the pack across plaintiff's land. This fact would have fulfilled the general rule of liability-if-there-is-scienter (*i.e.*, that the owner is liable if he has foreknowledge, actual or imputed, of his dog's tendency toward a particular depredation), had the court chosen to base its decision thereon.[16]

But the court in this case declared that the rule is different where

[12] Dogs Act 1906, 6 EDW. VII, c. 32, § 1; Dogs Act Amendment 1928, 18 AND 19 GEO. V, c. 21, § 1. (1).

[13] *E.g.*, CONN. GEN. STAT. § 3404 (1949); FLA. STAT. ANN. § 767.01 (1943); MINN. STAT. ANN. § 347.22 (West 1947); N. J. STAT. ANN. § 4:19-7 (1939); OHIO GEN. CODE ANN. § 5838 (1945); PA. STAT. ANN. tit. 3 §§ 478, 481, 484, 485-491 (1930); WIS. STAT. § 174.02 (1949). See dissent by Ryan, C. J., in Chunot v. Larson, 43 Wis. 536 (1878). See Notes, 1 A. L. R. 1113 (1919) and 142 A. L. R. 436 (1943). Compare N. C. GEN. STAT. § 67-1 (1950) (Liability of dog owner for injury to livestock or fowl. Although enacted in 1911, this statute has not yet come before the North Carolina Supreme Court.); N. C. GEN. STAT. § 67-12 (1950) (liability for dogs running free at night).

[14] Green v. Doyle, 21 Ill. App. 205 (1886); Beckwith v. Shordike, 4 Burr. 2092, 98 Eng. Rep. 91 (1767); Regina v. Pratt, 4 E. & B. 860, 119 Eng. Rep. 319 (1855) (Where owner sent dog into cover, himself remaining on highway. Lord Campbell, C. J., found owner a trespasser with his dog and therefore liable since "the soil and freehold of the highway must be considered to be in the owner of the adjoining land. The public have only an easement over it—a right to use it as a highway—but the grass which grows on it is his."). WILLIAMS, LIABILITY FOR ANIMALS 135 (Cambridge, 1939).

[15] Baker v. Howard County Hunt, 171 Md. 159, 188 Atl. 223 (1936). From the facts here the court would have been warranted in finding that the horses and riders as well as the dogs trespassed. The theory of the Baker case also differs from the instant case. The Baker case was an injunction proceeding on a nuisance theory. Paul v. Summerhayes, 4 Q. B. D. 9, 39 L. T. 574 (1878). Here, defendants in hot pursuit of fox *rode onto* plaintiff's land. Plaintiff in trying to put them off was assaulted by defendants. The presence of dogs had no bearing on the outcome of this case. Earl of Essex v. Capel, CHITTY ON GAME LAWS, 31 n. (2nd ed. 1826). In this case, reported at Hertford Summer Assizes, 1809, defendant admitted breaking and entering the close with other hunters, but stated that this was the only way to kill the fox. As authority for the right to enter the close in hot pursuit, he posited Gundry v. Felton, 1 T. R. 334, Y. B. 12 Hen. VIII, pl. 9 (1521). Lord Ellenborough stated, "Even if an animal may be pursued with dogs, it does not follow that fifty or sixty people have, therefore, a right to follow the dogs and trespass on other people's lands. . . ." (Do these words indicate that he assumed that dogs *may* trespass in the course of a hunt?) Beckwith v. Shordike, 4 Burr. 2092, 98 Eng. Rep. 91 (1767). Here defendant trespassed with his dogs on plaintiff's close. In spite of defendant's efforts to restrain them, the dogs killed plaintiff's deer. Defendant was found liable since he himself trespassed.

[16] The evidence disclosed that on one occasion when plaintiff protested that the dogs were disturbing and injuring his cattle, the defendant replied, "They (the dogs) are not damaging your cattle. If they kill one of them, I'll pay for it." Pegg v. Gray, 240 N. C. 548, 550, 82 S. E. 2d 757, 758 (1954).

the owner or keeper releases a dog or dogs for the purpose of sport, knowing that they are likely to go on lands of others in pursuit of game. The court's rule is stated thus: "In such cases . . . the owner or keeper, in the absence of permission to hunt previously obtained, is liable for trespass, and this is so although the master does not himself go upon the lands, but instead sends or *allows* his dog or dogs to go thereon in pursuit of game" (italics added).[17] Although this rule is often stated, there seem to be no direct holdings to that effect.[18]

This case, then, seems to be the first in which the question of an owner's liability for the trespass of dogs in the course of a hunt unaccompanied by their owner is presented squarely to a court.

There can hardly be any dispute over the essential justice of the North Carolina court's decision in this case, succinctly stated by Johnson, J., that: "fox hunting as ordinarily pursued . . . is pure sport to be followed in subordination to established property rights and subject to the principles governing the law of trespass."[19]

Sed quaere whether this same end might have been reached with better authority[20] by deciding that, the requirement of scienter of the dogs' depredations having been fulfilled,[21] the owner was liable for their

[17] *Id.* at 551, 82 S. E. 2d at 759.

[18] See HALSBURY'S LAWS, *Game* § 800 (1934), which states, "The entry need not be personal in order to be actionable . . . the sending of a dog onto . . . land in pursuit of game [is actionable]," and cites the following cases: Read v. Edwards, 17 C. B. N. S. 245, 144 Eng. Rep. 99 (1864), (where the court decided on basis of owner's *scienter* of dog's propensity to chase and destroy game, and specifically refused to decide question of owner's liability for *every* trespass); Regina v. Pratt, 4 E. & B. 860, 119 Eng. Rep. 319 (1855) (see statement of facts in note 14 *supra*); Brown v. Giles, 1 Car. & P. 118, 171 Eng. Rep. 1127 (1823) (Defendant's dog jumped voluntarily into plaintiff's field. Court found this not only not a wilful trespass, but no trespass at all. Damages of one farthing awarded against defendant because of subsequent *personal* trespass.); Dimmock v. Allenby, 2 Marsh. 852 (1810) (where defendant had permission to hunt on righthand side of the road, but his dog crossed over onto lefthand side; court directed jury to find for defendant if the dog escaped against his will, and defendant had no intention of hunting on the other side; WILLIAMS, LIABILITY FOR ANIMALS 340 (Cambridge 1939), which states, "it is a trespass to land to send a dog into a cover to drive out game," and cites as authority Regina v. Pratt, 4 E. & B. 860, 119 Eng. Rep. 319 (1855), where in fact the owner as well as his dog was trespassing—see note 14 *supra*.

[19] Pegg v. Gray, 240 N. C. 548, 555, 82 S. E. 2d 759, 762 (1954).

[20] *E.g.*, Owen v. Hampson, 258 Ala. 228, 62 So. 2d 245 (1952); Hagen v. Laursen, 263 P. 2d 489 (Calif. Dist. Ct. App., 3d Dist. 1953); True v. Shelton, 314 Ky. 446, 235 S. W. 2d 1009 (1951); Bachman v. Clark, 128 Md. 245, 97 Atl. 440 (1916); Statter v. McArthur, 33 Mo. App. 218 (1888); Banks v. Maxwell, 205 N. C. 233, 171 S. E. 70 (1933); State v. Smith, 156 N. C. 628, 72 S. E. 321, 36 L. R. A. (N. S.) 910 (1911); Bruch v. Rissmiller, 18 Pa. Dist. 732 (1909); Hill v. Palms, 237 S. W. 2d 455 (Tex. Civ. App. 1950); see cases cited Note 14 *supra;* Manton v. Brocklebank, [1923] 2 K. B. 212 (C. A.); Read v. Edwards, 17 C. B. N. S. 245, 14 Eng. Rep. 99 (1864); *see* Saunders v. Teape, 51 L. T. N. S. 263, 264 (1884); PROSSER, TORTS, § 57 at p. 438 (1941). But see 17 TULANE L. REV. 138 (1942) (contrasting development of Louisiana statute with common law doctrine of scienter.).

[21] See Note 16 *supra*.

damages, rather than basing the decision on a trespass theory, which may later prove troublesome.

The court's rule, finally, seems to contemplate the pink-coated, mounted foxhunt of the English squire rather than the nocturnal and sedentary hunt of his North Carolina cousin. It appears, as many of the English decisions, to be based on the probability of the hunter being near enough to his hounds to control their trespasses during the hunt.[22] *Quaere* whether this rule will in effect harness the fox, 'possum, or 'coon hunter to a strict liability for trespasses of dogs, while hunting, which in actuality are quite as beyond his control as when ranging "on their own volition."[23]

HAMILTON C. HORTON, JR.

Torts—Last Clear Chance—Contributory Negligence as a Matter of Law

In a recent wrongful death action[1] plaintiff's intestate was adjudged contributorily negligent as a matter of law when he failed to notice the approach of a detached coal car which he could have seen for a quarter of a mile, had he but looked. The court nonsuited the plaintiff, refusing to submit the issue of last clear chance to the jury. On appeal Justice Parker first pointed out that the doctrine had not been pleaded, nor had any evidence been advanced in support of the doctrine. He then added that "this doctrine [of last clear chance] does not apply when the contributory negligence of the party injured, as a matter of law, bars recovery."[2]

This last statement has begun to make frequent appearances in the North Carolina law of negligence. What then is the legal meaning of this phrase, as used in this context?

The doctrine of last clear chance supposedly sprang from the famous "hobbled ass" case of *Davies v. Mann*.[3] It was a reaction against the

[22] For an excellent introduction to English fox hunting, see 11 ENCY. BRITTANICA, *Hunting* (14th ed., 1932). Here the factor of control is real, being accomplished by horn and "whipper in." In North Carolina, however, in the typical foxhunt, of which the instant case is an example, (see complaint, Record on Appeal, p. 2) the hounds are released at night and generally run at will, the "huntsmen" often seating themselves beside jug and fire, enjoying with liquid conviviality the cry of the hounds. Often the hunt takes all night—until either fox or hounds are too exhausted to continue. Tar Heels still tell of an all night hunt when the first rays of dawn saw five of the hounds walking painfully down the road—with the fox, equally tired, just a few feet ahead—also walking.

[23] The actualities of the average Southern foxhunt seem to have been recognized by Virginia in VA. CODE § 29-213 (1950), which allows permits to be issued to allow foxhounds to run at large and without their master.

[1] Wagoner v. N. C. R. R. and Southern R. R., 238 N. C. 162, 77 S. E. 2d 701 (1953).

[2] *Id.* at 174, 77 S. E. 2d at 710.

[3] 152 Eng. Rep. 588 (1842).

harshness of the contributory negligence rule,[4] and began to show up clearly in North Carolina law about 1881.[5] Perhaps the best modern statement of the North Carolina doctrine can be found in *Ingram v. Smoky Mtn. Stages, Inc.:*

> "The contributory negligence of the plaintiff does not preclude a recovery where it is made to appear that defendant, by exercising reasonable care and prudence, might have avoided the injurious consequences to plaintiff, notwithstanding plaintiff's negligence; that is, that by the exercise of reasonable care defendant might have discovered the perilous position of the party injured or killed and have avoided the injury, but failed to do so."[6]

Thus stated, the North Carolina doctrine seems as sound and understandable as that of any other jurisdiction, but in its recent tendency to rely on "contributory negligence as a matter of law" as grounds for refusing to submit the last clear chance issue to the jury, the North Carolina court's position is as unique as it is baffling.

Apparently this idea was first expressed in the case of *Redmon v. Southern R. R.*[7] In listing certain "principles" applicable to last clear chance cases, the court (per Justice Brogden) first pointed out that contributory negligence on the plaintiff's part was a prerequisite to any consideration of the last clear chance doctrine,[8] and then, in the same breath, said that a certain kind of contributory negligence—contributory negligence "as a matter of law"—would preclude the application of the doctrine.

However confusing and contradictory this may seem, it now appears to be the law in North Carolina. The question which immediately arises in the mind of the practicing attorney is, at what point does *mere* contributory negligence become contributory negligence *as a matter of law,* which bars the submission to the jury of the issue of last clear chance?

Justice Brogden, in the *Redmon* opinion, cited many cases in support of this surprising theory.[9] Yet they hardly seem to be in point, for in

[4] PROSSER, TORTS § 54 (1941).
[5] Gunter v. Wicker, 85 N. C. 310 (1881).
[6] 225 N. C. 444, 447, 35 S. E. 2d 337, 339 (1945).
[7] 195 N. C. 764, 143 S. E. 829 (1928).
[8] For a recent reiteration of this position see Graham v. Atl. Coast Line R. R., 240 N. C. 338, 82 S. E. 2d 346 (1954), in which reference is made to the "doctrine of last clear chance, which presupposes both negligence and contributory negligence. . . ."
[9] Cooper v. N. C. R. R., 140 N. C. 209, 52 S. E. 932 (1905); Mitchell v. Seaboard Airline Ry., 153 N. C. 116, 68 S. E. 1059 (1910); Coleman v. Atl. Coast Line R. R., 153 N. C. 322, 69 S. E. 129 (1910); Davidson v. Seaboard Airline Ry., 171 N. C. 634, 88 S. E. 759 (1916); Holton v. Kinston-Carolina R. R., 188 N. C. 277, 124 S. E. 307 (1924); McCulloch v. N. C. R. R., 188 N. C. 797, 125 S. E. 529 (1924); Elder v. Plaza R. R., 194 N. C. 617, 140 S. E. 298 (1927); Harrison v. N. C. R. R., 194 N. C. 656, 140 S. E. 598 (1927); Pope v. Atl. Coast Line R. R., 195 N. C. 67, 141 S. E. 350 (1928).

only two of them was the issue of last clear chance even raised,[10] and in not a single one does it appear that the court refused to allow application of last clear chance because plaintiff had been guilty of "contributory negligence as a matter of law."[11] But if there was no precedent for the court's decision, there certainly have been a number of cases following it with approval.[12]

The court has never offered to define "contributory negligence as a matter of law" when using it in this sense.[13] But an examination of the cases in which last clear chance has been ruled inapplicable on those grounds may afford some clue as to the kind of conduct which the court will call "contributory negligence as a matter of law."

In all of these cases plaintiff was guilty of what the court calls continuing negligence, that is, negligence which, if it did not come after that of defendant, at least concurred with it in causing the accident. In *Rives v. Atl. Coastline R. R.* the court said: "In the daytime on a clear day he (plaintiff's intestate) was standing on a live track without looking or taking any precautions for his own safety, and he stood there until a fast passenger train snuffed out his life. Consequently he was guilty of contributory negligence which continued to the moment of the impact."[14] In *Rimmer v. Southern R. R.*[15] the intestate was crossing a track holding a cloak over her head for protection from the rain. Her attention was centered on the traffic in the highway, and she was struck by a train and killed. In *Sherlin v. Southern R. R.*[16] plaintiff attempted to run across a railroad trestle ahead of a speeding train when he could have stood in safety on a "chat" jutting out from the trestle. In the *Redmon*

[10] Davidson v. Seaboard Airline Ry., 171 N. C. 634, 88 S. E. 759 (1916); Elder v. Plaza R. R., 194 N. C. 617, 140 S. E. 298 (1927).

[11] The following fact situation is typical of those in the cases cited in the *Redmon* decision: The injured party, apparently under no disability, walks or drives directly into the path of an oncoming train. Without mentioning the doctrine of last clear chance, the court nonsuits the plaintiff on the grounds that the injured party was guilty of contributory negligence as a matter of law. It is difficult to understand how the court could cite these as involving last clear chance.

[12] Rives v. Atl. Coast Line R. R., 203 N. C. 227, 165 S. E. 709 (1932); Rimmer v. Southern R. R., 208 N. C. 198, 179 S. E. 753 (1935); Sherlin v. Southern R. R., 214 N. C. 222, 198 S. E. 640 (1938); Ingram v. Smoky Mtn. Stages, Inc., 225 N. C. 444, 35 S. E. 2d 337 (1945); Dowdy v. Southern R. R., 237 N. C. 519, 75 S. E. 2d 639 (1953).

[13] Violation of statute by the plaintiff is usually referred to by the court as contributory negligence *per se*, or as a matter of law, but obviously this is not what the court has reference to in these cases, for mere violation of statute would not preclude the application of last clear chance where the defendant could, in the exercise of due care, have avoided the accident.

[14] 203 N. C. 227, 229, 165 S. E. 709, 710 (1932).

[15] 208 N. C. 198, 179 S. E. 753 (1935).

[16] 214 N. C. 222, 198 S. E. 640 (1938). As supporting cases the court in this decision, cites (among others) Stover v. Southern R. R., 208 N. C. 495, 181 S. E. 336 (1935) and Lemmings v. Southern R. R., 211 N. C. 499, 191 S. E. 39 (1937). No mention is made of "contributory negligence as a matter of law" in these cases, but in both cases the court makes it clear that it is the continuing negligence of the plaintiff, up to the moment of impact, which bars the application of last clear chance.

case itself,[17] and in cases cited there,[18] it appears that the injured party was guilty of negligence which continued up to the time of the accident.

It is also true that in these cases, starting with the *Redmon* case, which have relied on a doctrine of contributory negligence as a matter of law in refusing to apply the last clear chance doctrine, the injured party was never in any *apparent* peril. Defendant (usually the train engineer) had no reason to believe that plaintiff was not in full possession of all his faculties.

The court, in *Sherlin v. Southern R. R.* said: "It appears that the intestate was in the apparent possession of all his faculties, and there was nothing to put the engineer on notice of any impairment in his hearing, or that he would not step off the track to an existent place of safety before the train hit him."[19] In *Ingram v. Smoky Mtn. Stages, Inc.*, it was said: "There was nothing in the conduct of the deceased to indicate to the bus driver that he was in a position of peril."[20] And in *Dowdy v. Southern R. R.*: "There is no evidence that the engineer knew, or by the exercise of due care, could have known, that Dowdy was helpless upon the track—if, indeed, Dowdy was helpless. The defendant had a right to assume up to the very moment of the collision that Dowdy would extricate himself from danger."[21]

Often, of course, there have been other factors in these cases which have influenced the court in nonsuiting the plaintiff.[22] But the conclusion is irresistible that where the court denies plaintiff access to the doctrine of last clear chance, saying, in explanation, that the injured party has been guilty of contributory negligence as a matter of law, either the injured party was guilty of (1) active, continuing contributory

[17] 195 N. C. 764, 143 S. E. 829 (1928). Here plaintiff's intestate drove a truck onto the railroad tracks, in full view of an oncoming train.

[18] See note 7 for the cases cited in support of the *Redmon* decision. In one of these, McCulloch v. N. C. R. R., 188 N. C. 797, 799, 125 S. E. 529, 530 (1924), it was said: "Recovery is denied . . . upon the ground that plaintiff's intestate was guilty of contributory negligence, continuing up to and necessarily proximately producing the injury."

[19] 214 N. C. 222, 224, 198 S. E. 640, 641 (1938). Cited in this case was Reep v. Southern R. R., 210 N. C. 285, 286, 186 S. E. 318 (1936), in which the court said: "There is no evidence that any disability of the intestate was known or was apparent to the engineer. The engineer therefore had a right to assume up to the last moment that the intestate would get off the track."

[20] 225 N. C. 444, 449, 35 S. E. 2d 337, 340 (1945).

[21] 237 N. C. 519, 527, 75 S. E. 2d 639, 644 (1953). In dissenting in this decision, Johnson, J. pointed out the fallacy of the position that "contributory negligence as a matter of law" will bar application of last clear chance. He said: "It is stated in the majority opinion that the doctrine of last clear chance 'does not apply when plaintiff is guilty of contributory negligence as a matter of law.' Conversely, may it not be said with equal force that one may not be adjudged contributorily negligent as a matter of law when the doctrine of last clear chance applies?" *Id.* at 528, 75 S. E. 2d at 645.

[22] As, for instance the probability that defendant was too close to stop even if he had discovered plaintiff's peril in time. See Ingram v. Smoky Mtn. Stages, Inc., 225 N. C. 444, 35 S. E. 2d 337 (1945).

negligence, or (2) he was never in any "apparent peril" or (3) both.

One may or may not agree with the wisdom and ultimate justice of refusing to apply the last clear chance doctrine in these situations, but one cannot deny that these rules are clearer and more tangible than the blank statement that plaintiff as been guilty of contributory negligence as a matter of law. Why, then, does the court insist upon using this phrase, which explains nothing and succeeds only in creating an aura of mystery about the entire decision?

This note does not purport to analyze trends in the North Carolina law of negligence, but more exhaustive and general research might well reveal that the confusion in this area heralds a general reaction against the doctrine of last clear chance and a tendency on the part of the North Carolina court to apply it more sparingly.

DAVID M. CLINARD

Torts—Liability of Golf Courses to Invitees

In a recent North Carolina case, the court moved a step closer to defining the liability of a golf course for accidents which occur on its premises.[1] In affirming the non suit granted by the lower court, the court held that the defendant golf course was under no duty to guard against possible injury to patrons by reason of the maintenance of the water hole which caused the plaintiff's injury and that the plaintiff's evidence clearly indicated that he was contributorily negligent, which barred his recovery as a matter of law.[2]

In its discussion of the situation, the court placed the golf course in the general category of places of amusement and the golfer in the general category of invitee. As was correctly stated in the principal case, the general rule is that the owner of a place of amusement "is not an insurer of the safety of patrons, but owes them only what, under particular circumstances, is 'ordinary' or 'reasonable' care."[3]

[1] Farfour v. Mimosa Golf Club *et al.*, 240 N. C. 159, 81 S. E. 2d 375 (1954). Plaintiff was playing golf on a course owned by defendants. After finishing the ninth hole, he placed his caddie cart several feet away from a path leading to the tenth tee. He drove his ball from the tee and returned to get his cart. After getting the cart, he was injured when he stepped into an open terra cotta hole which was used by the defendants in connection with watering the greens. The hole was normally covered, and there was evidence to show that it had been uncovered for 30 to 50 days prior to the accident. The court granted the defendant's motion for non-suit.

[2] Other jurisdictions have reached a similar result in similar situations by application of the doctrine of assumption of risk. See: Young v. Roass, 127 N. J. L. 211, 21 A. 2d 762 (1941); Schlenger v. Weinberg, 107 N. J. L. 130, 150 Atl. 434 (1930); Kavafian v. Seattle Baseball Club, 105 Wash. 215, 181 Pac. 679 (1919); Note, 32 N. C. L. REV. 366 (1954).

[3] Farfour v. Mimosa Golf Club *et al.*, 240 N. C. 159, 163, 81 S. E. 2d 375, 378 (1954). See also: Boucher v. Paramount-Richards Theaters, 30 So. 2d 211 (La. Ct. App. 1947); Modec v. City of Eveleth, 224 Minn. 556, 29 N. W. 2d 453 (1947); Revis v. Orr, 234 N. C. 158, 66 S. E. 2d 652 (1952); Patterson v. City of Lexing-

In quoting from an earlier case,[4] the court gave this rule of liability: "The owner of a place of entertainment is charged with an affirmative, positive obligation to know that the premises are safe for the public use, and to furnish adequate appliances for the prevention of injuries to be anticipated from the nature of the performance, and he impliedly warrants the premises to be reasonably safe for the purpose for which they are designed."[5] This seems to be the accepted rule in North Carolina[6] as well as in other states.[7]

Although there have been several decided cases in North Carolina dealing with injuries to golfers, there has been no definite statement by the court as to what the legal rights of a golfer are in relation to the golf course owner. According to this case and the Restatement of Torts,[8] it would seem that a fee-paying golfer playing on a golf course would be a "business invitee" of the golf course. In relation to the distinction between an "invitee" and a mere "licensee," it has been held that in North Carolina, in order "to constitute one an invitee of the other, there must be some mutuality of interest. Usually an invitation will be inferred where the visit is of interest or mutual advantage to the parties, while a license will be inferred where the object is the mere pleasure or benefit of the visitor."[9]

In view of the fact that the business of a golf course is the playing of golf and its chief source of revenue is derived from fees paid by playing golfers, it is natural to conclude that the fee-paying golfer on the premises is a "business invitee" of the golf course. His rights then would be those normally due an invitee on the premises.[10]

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ton, 229 N. C. 637, 50 S. E. 2d 900 (1949); Schentzel v. Philadelphia Nat. League Club, 173 Pa. Super. 179, 96 A. 2d 181 (1953); Peck v. Stanley Co., 335 Pa. 608, 50 A. 2d 306 (1947); Whitfield v. Cox, 189 Va. 219, 52 S. E. 2d 72 (1949).

[4] Smith v. Cumberland Agricultural Society, 163 N. C. 346, 79 S. E. 632 (1913).

[5] Farfour v. Golf Club, 240 N. C. 159, 163, 81 S. E. 2d 375, 378 (1954).

[6] Drumwright v. North Carolina Theaters, 228 N. C. 325, 45 S. E. 2d 379 (1947); Ross v. Sterling Drug Store *et al.*, 225 N. C. 226, 34 S. E. 2d 64 (1945); Hiatt v. Ritter, 223 N. C. 262, 25 S. E. 2d 756 (1943); Bowden v. Kress, 198 N. C. 559, 152 S. E. 625 (1930); Smith v. Cumberland Agricultural Society, 163 N. C. 346, 79 S. E. 632 (1913).

[7] Boucher v. Paramount-Richards Theaters, 30 So. 2d 211 (La. Ct. App. 1947); Rouillard v. Canadian Klondike Club, 316 Mass. 11, 54 N. E. 2d 680 (1944); Shanney v. Boston Madison Square Garden Corp., 296 Mass. 168, 5 N. E. 2d 1 (1936); Modec v. City of Eveleth, 224 Minn. 556, 29 N. W. 2d 453 (1947); McCullough v. Omaha Coliseum Corp., 144 Neb. 92, 12 N. W. 2d 639 (1944); Henry v. Segal, 174 Pa. Super. 313, 101 A. 2d 149 (1953); Denton v. Third Avenue Theater Co., 126 W. Va. 607, 29 S. E. 2d 353 (1944).

[8] RESTATEMENT, TORTS § 32 (1934): "A business visitor is a person who is invited or permitted to enter or remain on land in the possession of another for a purpose directly or indirectly connected with business dealings between them."

[9] Pafford v. Jones Construction Co., 217 N. C. 730, 735, 9 S. E. 2d 408, 411 (1940); *accord,* Atlantic Greyhound Corp. v. Newton, 131 F. 2d 845 (4th Cir. 1942).

[10] Anderson v. Reidsville Amusement Co., 213 N. C. 130, 195 S. E. 386 (1938). *Cf.*, Brooks v. United States, 98 F. Supp. 679 (E. D. N. C. 1951), *affirmed,* 194 F. 2d 185 (4th Cir. 1952); McDonald v. Woolworth Co., 177 F. 2d 401 (4th Cir.

However, the recorded cases where a golf course has been held responsible for accidents occurring on or about its land are few. In one of these cases, the course was held liable for not enforcing safety regulations on its premises, which negligence resulted in a player's being hit by a ball driven by another player.[11] In another situation, a motorist on an adjoining road was injured as a result of a ball's being hit from the golf course.[12] This case was decided against the course because the layout of the premises was such that it was a natural hazard of the game that balls would be hit into the road. In two other cases which involved defects in the premises, the courses were held liable because of these defects. They involved a caddie suffering injuries when a small bridge on which he was standing collapsed,[13] and a boy receiving injuries when he accidentally touched a guy wire leading to an electric power line.[14]

The principal case seems to be the first case on record, certainly the first one in North Carolina, "where a patron of a golf course has sued to recover damages as a result of stepping into any kind of hole on or about a golf course."[15]

However, in one Missouri case, the court held that a spectator at a golf tournament could not recover for injuries sustained when she tripped over a rock concealed by tall grass, in the absence of any showing that the golf course had any previous knowledge of the protruding rock.[16]

1949); Hall v. Holland, 47 So. 2d 889 (Fla. 1950); Price v. Taylor, 302 Ky. 736, 196 S. W. 2d 312 (1946); Revis v. Orr, 234 N. C. 158, 66 S. E. 2d 652 (1952); Barron v. Fuel Co., 159 Pa. Super. 35, 46 A. 2d 506 (1946).

[11] Everett v. Goodwin and Starmount Golf Club Inc., 201 N. C. 734, 161 S. E. 316 (1931). Plaintiff was playing golf on the course owned by the defendant golf course when he was struck by a ball driven by the defendant golfer who had failed to give the customary warning of "fore." The Court held that the defendants were jointly liable. *Contra:* Schlenger v. Weinberg, 107 N. J. L. 130, 150 Atl. 434 (1930).

[12] Gleason v. Hillcrest Golf Course, Inc., 148 N. Y. Misc. 246, 265 N. Y. Supp. 886 (N. Y. Munic. Ct. 1933). Plaintiff was riding in an automobile on a highway adjoining the course operated by the defendant when a ball driven from the course struck and shattered the windshield of the car, injuring the plaintiff. The golf course was held liable. See also: Castle v. St. Augustine's Links, 38 T. L. R. (K. B. 1922) 615.

[13] Claremont County Club v. Industrial Accident Commission, 174 Cal. 395, 163 Pac. 209 (1917). A caddie leaned against the handrail of a bridge spanning a small creek on the golf course owned by the country club. The rail gave away, and the boy fell, sustaining a permanent injury to one of his elbows. The court held the country club liable; *accord,* Low v. City of Gastonia, 211 N. C. 564, 191 S. E. 7 (1937).

[14] Texaco Country Club v. Wade, 163 S. W. 2d 219 (Tex. Civ. App. 1942). The court held that a caddie who went to the defendant country club to seek employment in response to an invitation from the club manager and who placed his hand on a guy wire extending from a light pole and received an electric shock was an "invitee" and that the club was liable for his injuries.

[15] Farfour v. Mimosa Golf Club *et al.,* 240 N. C. 159, 162, 81 S. E. 2d 375, 378 (1954).

[16] Thompson v. Sunset Country Club, 227 S. W. 2d 523 (St. Louis Ct. App., Mo. 1950).

The court seemed to feel that the spectator here was not injured as a result of any unusual danger on the golf course which she could not have anticipated and for which she did not assume the risk. Also, there has been one case in which a patron of an "obstacle" golf course sued for injuries resulting from a fall on a sloping fairway.[17] The owner in this case was not held liable, because this was the type of risk assumed by the patron when he played the game. The Massachusetts court seemed to rule that a patron assumed the risk in a case where the patron, who had used a golf driving range five times previously, was struck by a ball driven by a third person.[18] All three of these situations are easily distinguishable from the principal case in that they do not involve accidents to golfers playing on a regular golf course.

According to the general rules of law in regard to the liability of occupiers of land to invitees on the premises, it would seem that the occupier (in this situation the golf course) could be held liable for injuries sustained by the invitee (golfer) so long as the invitee is reasonably engaged in the furtherance of the business at hand—in this case, playing golf.

The court found in the principal case that the place where the water hole was located was "no part of the terrain designed for playing the game of golf";[19] therefore the defendants were under "no duty to anticipate that patrons would travel in the area of the water hole and to guard against possible injury to them by reason of the hole."[20] By so finding, the court, in effect, ruled that the invitee had gone beyond the range of invitation and had become a mere licensee who had to take the premises as he found them. Had not the court held that the plaintiff had gone beyond the area of the invitation, it appears that the court would have held that the golf course was under a duty to guard against possible injury and, except for the element of contributory negligence, would have been liable for the injuries sustained. This is certainly in accord with the majority of the cases which deal with this problem.

However, this writer feels that the court's limitations of the playing area were too restrictive in view of the nature of the game. Whether a slight deviation for the purpose of placing a caddie cart out of the golfer's way could be considered an act in the furtherance of the game

[17] Young v. Roass, 127 N. J. L. 211, 21 A. 2d 762 (1941). Plaintiff went to an "obstacle" golf course, paid admission fee and began playing. He was subsequently injured when he fell on the seventh fairway on which there was a slope of six inches descending at a 45-degree angle. The court held that there was an "assumption of risk" by the plaintiff and refused recovery for the injuries sustained.

[18] Katz v. Gow, 321 Mass. 666, 75 N. E. 2d 438 (1947).

[19] Farfour v. Mimosa Golf Club *et al.*, 240 N. C. 159, 165, 81 S. E. 2d 375, 380 (1954).

[20] *Id.* at 165, 81 S. E. 2d at 380.

seems to be a question over which reasonable men might differ and rightly a question for the jury.[21]

DONALD LEON MOORE

Torts—Libel in Will—Publication—Liability of Estate

Where a testator left ten dollars to his grandson and in the will accused him of squandering one thousand dollars, of deserting his mother and the testator by taking sides against him in a lawsuit, and of shirking his duty in World War II, the Oregon Supreme Court held that "an action will lie against the testator's estate for libelous matter contained in a will published after the death of the testator."[1] This decision, because of its rather clear logic, should help to swing the balance toward some degree of certainty in a field which, at the present time, shows little uniformity of result. There are three other decisions in this country in which the same result was reached as in the instant case[2] and three in which liability was denied.[3]

Two of the cases denying recovery do so on the theory that the common law maxim *actio personalis moritur cum persona* applies in these

[21] In affirming the granting of the motion for non suit, the court felt that the evidence was so clear that no other reasonable inference was deducible. Donlop v. Snyder, 234 N. C. 627, 630, 68 S. E. 2d 316, 319 (1951). *Cf.*, Cox v. Railroad, 123 N. C. 604, 607, 31 S. E. 848, 850 (1898): "The plaintiff's evidence must . . . be accepted as true, and construed in the light most favorable for him. . . . It is well settled that if there is more than a scintilla of evidence tending to prove the plaintiff's contention, it must be submitted to the jury, who alone can pass upon the weight of the evidence." See also: Texaco Country Club v. Wade, 163 S. W. 2d 219, 221 (Tex. Civ. App. 1942): "The test of whether one on premises used for public purposes is an invitee at the exact place of injury seems to be whether the owner of the premises ought to have anticipated the member of the public at this point on the premises devoted to public use. It is not essential that the owner should have foreseen the precise injury to any particular individual, but merely that some like injury might, and probably would, result to someone lawfully on the premises. . . . The duty to keep premises safe for invitees does not necessarily apply to the entire premises. It extends to all portions of the premises which are included within the invitation, and which are necessary or convenient for the invitee to use in the course of the business for which the invitation was extended, and at which his presence should therefore reasonably be anticipated, or which he is allowed to go." *See, e.g.*, Heller v. Select Lake City Operating Co., 187 F. 2d 649 (7th Cir. 1951); Mulford v. Hotel Co., 213 N. C. 603, 197 S. E. 169 (1938); Texas Public Service Co. v. Armstrong, 37 S. W. 2d 294 (Tex. Civ. App. 1931).

[1] Kleinschmidt v. Matthieu, 266 P. 2d 686, 690 (Ore. 1954).

[2] Brown v. Mack, 185 Misc. 368, 56 N. Y. S. 2d 910 (Sup. Ct. 1945); In Matter of Gallagher's Estate, 10 Pa. Dist. 733 (Orphan's Ct. 1901); Harris v. Nashville Trust Co., 128 Tenn. 573, 162 S. W. 584 (1913).

[3] Citizens' and Southern Nat. Bank v. Hendricks, 176 Ga. 692, 168 S. E. 313 (1933), *reversing* Hendricks v. Citizens' and Southern Nat. Bank, 43 Ga. App. 408, 158 S. E. 915 (1931); Nagle v. Nagle, 316 Pa. 507, 175 Atl. 487 (1934); Carver v. Morrow, 213 S. C. 199, 48 S. E. 2d 814 (1948). The *Nagle* case would seem to overrule the decision allowing recovery in Gallagher's Estate, *supra* note 2, not by repudiating the basic theory of the lower court but by carrying the case into the field of privilege.

situations,[4] but those finding liability hold that since the publication complained of occurs after the testator's death, the right of action does not arise until after his death, and, therefore, could not have expired at the time the testator died, as contemplated by the maxim.[5] But, the finding that the maxim does not apply does not end the question, for there are other problems which must be considered before the estate can be held liable.

The question of whether the executor is the agent of the testator sometimes causes trouble. The Oregon court held in the principal case that there was no agency relationship before the death of the testator between the testator and the executor and that, consequently, in offering the will for probate the executor could not be acting as the agent of the testator.[6] Even under the agency theory different results are possible. The Tennessee court holds that the executor *is* the agent of the testator and the estate should be held liable,[7] while the South Carolina court, applying the rule that "agency terminates upon the death of the principal," holds that the estate is not liable.[8]

The best reasoning seems to be that of the Oregon court, which says that the person publishing the will "is an instrumentality through which the will is published, and when he does thus act he in effect publishes the

[4] Citizens' and Southern Nat. Bank v. Hendricks, *supra* note 3; Carver v. Morrow, *supra* note 3.

[5] Kleinschmidt v. Matthieu, 266 P. 2d 686 (Ore. 1954); In Matter of Gallagher's Estate, 10 Pa. Dist. 733, 736 (Orphan's Ct. 1901): "No right of action existed for the wrong alleged to have been done this claimant when Father Gallagher died; for the will had not and could not have been published, and was, therefore, obviously not within the letter of the rule."; Harris v. Nashville Trust Co., 128 Tenn. 573, 580, 162 S. W. 584, 586 (1913): "So the tort upon which this suit is based was not committed until after the death of Woodfin. This right of action arose after Woodfin's death, and could not have been buried with him. The case therefore falls without the letter of the old rule."

But see Note, *Right of Recovery for Testamentary Libel,* 27 HARV. L. REV. 666, 668 (1914), where the proposition is put forth that "if no tort is committed till after death, there is then no tortfeasor to punish"—a legalistic bit of thought which contemplates putting an end to the matter without contributing too much to a sound analysis of the problem. See also Hegel v. George, 218 Wis. 327, 259 N. W. 862, 864 (1935), for an example of the type of case in which the logic used in the principal case is employed to deny recovery in a wrongful death action. Howe, plaintiff's intestate, was the driver of a car involved in a collision with a car driven by George. George died a few hours before Howe. George was found negligent. The statute declared that "actions for wrongful death survive the death of the wrongdoer." The court held that, since the death of the wrongdoer preceded the death of the plaintiff-decedent, "there was and is no cause of action." A similar case is Martinelli v. Burke, 298 Mass. 390, 10 N. E. 2d (1937); this case is the subject of annotation in 112 A. L. R. 341 (1938).

[6] Kleinschmidt v. Matthieu, *supra* note 5.

[7] Harris v. Nashville Trust Co., 128 Tenn. 573, 578-9, 162 S. W. 584, 585-6 (1913): "It is well settled that a principal is responsible when authority is given to an agent to publish libelous words and a publication is made by the agent in substantial accord with his authority. . . . The publication of this libel was made by the agent, the executor. . . . if liability exists the principal should be responsible."

[8] Carver v. Morrow, 213 S. C. 199, 204, 48 S. E. 2d 814, 817 (1948). That this is the prevalent doctrine in agency law can hardly be contested. RESTATEMENT, AGENCY § 120 (1933).

will at the behest of the testator."[9] Indeed it is difficult to see that a strict agency theory is necessary, for one who is the author of libelous material and places it in such circumstances that publication will necessarily result, is liable for the eventual publication.[10] Thus there will be publication of the libel in the will, not only by filing the will for probate, but also during the probate proceedings, and after probate when the will is on file as a public record. "No more effective means of publishing and perpetuating a libel can be conceived than to secure the inscription of such matter in court records, as by probate of a will."[11] When one executes a will he does so with the knowledge and expectation that such will is to be published after his death; this is the natural course of events, and at any rate it is probably the common law duty of one in possession of a will to file it with the proper court after the death of the testator.[12] Further, many states by statute have made provisions to force one having possession of a will to present the same for probate.[13] The better reasoning would therefore seem to be that the testator, and not the person who physically publishes the will, is the party responsible for the publication.

Having established that there was no agency, the court in the instant case then reasoned that the executor "is not an officer or agent of the court until he is appointed and letters testamentary issued to him";[14] therefore, there is a "hiatus between the testator's death and the court appointment of the executor," and when the executor "or the custodian of the will, files the same with the clerk, he is not acting for the court but necessarily for the deceased. . . ."[15] In this manner the court com-

[9] Kleinschmidt v. Matthieu, 266 P. 2d 686, 689 (Ore. 1954).

[10] Some examples are: (1) sending libelous matter to a blind person, Lane v. Schilling, 130 Ore. 119, 279 Pac. 267 (1929); (2) sending letter to fourteen-year-old boy accusing him of theft, Hedgepeth v. Coleman, 183 N. C. 309, 111 S. E. 517 (1922); (3) sending libelous matter with good reason to believe that it will be opened by authorized person other than addressee, Riley v. Askin and Marine Co., 134 S. C. 198, 132 S. E. 584 (1926); (4) sending letter to known illiterate, Wilcox v. Moon, 64 Vt. 450, 24 Atl. 244 (1892); Allen v. Worthan, 89 Ky. 485, 13 S. W. 73 (1890).

[11] Harris v. Nashville Trust Co., 128 Tenn. 573, 578, 162 S. E. 584, 585 (1913).

[12] 2 PAGE, WILLS § 585 (3rd ed. 1941).

[13] *E.g.*, N. C. GEN. STAT. § 31-15 (1950). See also 2 PAGE, WILLS § 586 (3rd ed. 1941).

[14] Kleinschmidt v. Matthieu, 266 P. 2d 686, 688 (Ore. 1954); *Cf.* Lindley v. United States, 59 F. 2d 336 (9th Cir. 1932); Fistel v. Beaver Trust Co., 94 F. Supp. 974 (S. D. N. Y. 1950); *In re* Estate of Doefler, 348 Ill. App. 347, 109 N. E. 230 (1952); Davenport v. Sandeman, 204 Iowa 927, 216 N. W. 55 (1927); *In re* Ballard's Estate, 362 Mo. 1150, 247 S. W. 2d 683 (1952); *In re* Garris's Estate, 46 A. 2d 76 (Orphan's Ct. N. J. 1946); Dodd v. Anderson, 179 N. Y. 466, 90 N. E. 1137 (1910). But at common law the executor derived his authority from the will and did not have to wait for probate. Grant v. Spann, 34 Miss. 294 (1857); State v. Tazewell, 132 Ore. 122, 283 Pac. 745 (1930). *See* Harris v. Citizens' Bank and Trust Co., 172 Va. 111, 200 S. E. 652 (1939).

[15] Kleinschmidt v. Matthieu, 266 P. 2d 686, 688 (Ore. 1954). It would also appear to this writer that there should be ample opportunity for a libelous publication other than by the filing of the will for probate, since it seems quite likely that

pletely renders irrelevant the matter of whether the probate was a pleading in a court action and therefore privileged.

The instant case held that the publication "is not privileged because publication antedates the probation."[16] If, however, it is held that the mere filing of the will with the probate court is a part of the judicial proceeding, then the question of privilege becomes a much more difficult problem, for when this reasoning is used the publication is frequently held to be privileged on the ground that it is much the same as a party's pleading in a civil action.[17] One answer to such an argument is that, even though this may be a pleading, it is not privileged because the injured party cannot answer in a statement that will be included in the record.[18] It should be noted that the matter must be relevant for this privilege to apply.[19]

One method of providing a partial answer to the problem has been to allow the petitioner for probate to call possible libelous passages to the court's attention and to petition for their omission from the will. This procedure has been allowed in a few New York and English cases where the matter omitted from the will was not material to the disposition of the property.[20] Such a procedure is of questionable value,[21] for

someone other than the libeled party will read the will prior to the probate thereof and such communication, even to one person, would constitute publication. Simms v. Clark, 194 So. 123 (La. Ct. App. 1946); Josa v. Maroney, 125 La. 813, 51 So. 908 (1910); Hedgepeth v. Coleman, 183 N. C. 309, 111 S. E. 517 (1922); Ostrowe v. Lee, 256 N. Y. 36, 175 N. E. 505 (1931); Bradley v. Conners, 169 Misc. 442, 7 N. Y. S. 2d 294 (Sup. Ct. 1938). *See* Mims v. Metropolitan Life Ins. Co., 200 F. 2d 800 (5th Cir. 1952), *cert. denied* 345 U. S. 940 (1953).

[16] Kleinschmidt v. Matthieu, 266 P. 2d 686, 689 (Ore. 1954).

[17] It has been held that the filing of a will for probate is clearly analogous to a plaintiff's pleading in a civil action in that it is the beginning of a judicial proceeding. "We believe that the rule which makes the pleading in a judicial proceeding absolutely privileged may properly be applied to a will in which there is no apparent purpose to injure the reputation of any one but merely a purpose to insure distribution of the testator's estate to his intended beneficiaries and to protect it from possible claims of persons whom he does not desire to share in the distribution." Nagle v. Nagle, 316 Pa. 507, 510, 175 Atl. 487, 488 (1934).

[18] *In re* Gallagher's Estate, 10 Pa. Dist. 733, 737 (Orphan's Ct. 1900). It would appear that the view of the *Gallagher* case is not without merit, but the value of this particular part of the opinion as a precedent is doubtful, for the Pennsylvania Supreme Court has held that such a filing is part of the judicial proceeding and is privileged. Nagle v. Nagle, 316 Pa. 507, 175 Atl. 487 (1934). However, a lower court of New York seems to approve of the language used in the *Gallagher* case. Brown v. Mack, 185 Misc. 368, 56 N. Y. S. 2d 910 (Sup. Ct. 1945).

[19] North Carolina has held that pleadings are privileged when pertinent and relevant even if false and malicious, but where the defamatory matter is not relevant the party is stripped of the privilege. Harshaw v. Harshaw, 220 N. C. 145, 16 S. E. 2d 666 (1941). This view is also adopted in Scott v. Statesville Plywood and Veneer Co., 240 N. C. 73, 81 S. E. 2d 146 (1954); PROSSER, TORTS § 94 (1941). See also Note 48 HARV. L. REV. 1027, 1028 (1935) for a discussion in which the writer concludes: "although redress should be allowed where libelous material is irrelevant and engendered by malice, recovery should be limited to compensatory damages since it is the estate rather than the guilty testator which must suffer."

[20] *In re* Draske's Will, 160 Misc. 587, 290 N. Y. S. 581 (Surr. Ct. 1936); *In re* Payne's Estate, 160 Misc. 224, 290 N. Y. S. 407 (Surr. Ct. 1936); *In re* Speiden's Estate, 128 Misc. 899, 221 N. Y. S. 223 (Surr. Ct. 1926); *In re* Bomar's Will, 27

a publication occurs between the time the will is offered for probate and the decision is reached as to what portions should be omitted. Therefore, the harm is done even though the libelous portions are stricken from the will.[22] Where the libelous material is omitted, the determination of what is actually dispositive must be liberally made in order to guard against the omission of possible explanations as to the reasons for the disposition of the property. The omitted matter may prove to be of value if the will is contested.[23]

There does not seem to be a North Carolina case dealing with libel by will. This naturally poses the question as to what action the North Carolina courts will take when faced with this situation. North Carolina General Statute § 28-175 provides in part: "The following rights of action do not survive: 1. Causes of action for libel and slander." It would seem that the same reasoning would apply to this statute as the courts have applied to the common law maxim that a personal right of action dies with the person, and that it should be held that the statute does not apply to the fact situation that exists in the principal case.[24] However, this would still leave the court free to decide the case either for or against allowing the action to be brought, and a combination of the reasons given in the decided cases could be used to allow or deny recovery. It would seem that even if the court ignored the fact that the libeled party may not answer and considered the probate of the will as a pleading in a civil case (and consequently privileged) there would still

Abb. N. C. 425, 44 N. Y. S. R. 304, 18 N. Y. S. 214 (Ct. Com. Pl. 1892); In the Estate of Caie, 43 T. L. R. 697 (1927); Marsh v. Marsh, 1 Swa. and Tr. 528, 164 Eng. Rep. 845 (1860).

[21] This conclusion is contrary to the conclusion reached by the author of a note in 10 N. C. L. REV. 88, 90 (1931), which was written on the case of Hendricks v. Citizens' and Southern Nat. Bank, 43 Ga. App. 408, 158 S. E. 915 (1931), *rev'd*, Citizens' and Southern Nat. Bank v. Hendricks, 176 Ga. 692, 168 S. E. 313 (1933). There the author states: "In view of the American holdings it seems desirable for the legislature to give to the probate court authority to expunge from a will libelous matter which is not strictly dispositive."

[22] *See* Brown v. Mack, 185 Misc. 368, 56 N. Y. S. 2d 910, 922 (Sup. Ct. 1945) where the court discusses the probable value of a petition for expungement at the time the will was presented for probate and concludes that even if the matter were expunged there would only have been "a reduction in the extent of the publication of the libel; it would not have prevented the publication." See also 4 PAGE, WILLS § 1768 (3d ed. 1941).

[23] But in some cases the expungement is from the probate copies only, and it would seem that some of the disadvantages of expungement are avoided in this manner. *In re* Croker's Will, 105 N. Y. S. 2d 190 (Surr. Ct. 1951); In the Estate of Heywood, [1916] P. 47; In the Estate of White, [1914] P. 153; *In re* Goods of Wartnaby, 1 Rob. Ecc. 423, 163 Eng. Rep. 1088 (1846).

But see the following where expungement was denied on the grounds: (1) that the testator's wishes as to publication must be allowed, Hagen v. Yates, 1 Dem. 584 (N. Y. Surr. 1893); (2) that the court did not have the authority to order expungement, Curtis v. Curtis, 3 Add. Ecc. 33, 162 Eng. Rep. 33 (1825).

[24] One must keep in mind that a holding by the court that the party has a cause of action does not settle the question, for the defendant still has the defense of truth. Hamilton v. Nance, 159 N. C. 56, 74 S. E. 627 (1912); PROSSER, TORTS § 95 (1941).

be cases, at least where the matter is clearly irrelevant, in which the plaintiff should be allowed to prosecute his case.[25]

The result reached in the principal case seems to be more in line with modern concepts of justice than does the proposition that one may defame his fellow man and escape liability for the act. It is true that it is the heirs who must suffer because of his indiscretion, since the estate must pay the judgment, but this fact alone will exert a strong influence on the maker of a will and cause him to be a bit more careful of the reputations of those who might survive him.[26]

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[25] It is suggested that the legislature should amend the present statute so as to specifically provide recovery for libelous material in a will, particularly where this material is not relevant.

[26] Some of the reasons advanced for allowing recovery are: that the testator composed the libel and selected a means of publication that was almost certain to attain the desired results, Brown v. Mack, 185 Misc. 368, 56 N. Y. S. 2d 910 (Sup. Ct. 1945); the alleged libel is written with premeditation and the writer intends to escape liability by a publication of the item when he will not be subject to an action and further with the knowledge that the libel will be a part of a public record to be a "perpetual reminder of the charge," In Matter of Gallagher's Estate, 10 Pa. Dist. 733, 736 (Orphan's Ct. 1901); "If relief be denied this plaintiff in this suit, she is indeed in a bad plight. There is no other way in which she may vindicate the virtue and integrity of her mother and establish for herself the position in society which she is entitled to occupy. . . . It cannot be said that the law affords no remedy for a wrong such as the one perpetuated by this testator." Harris v. Nashville Trust Co., 128 Tenn. 573, 585, 162 S. W. 584, 587 (1913).