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Notes and Comments

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NOTES AND COMMENTS

Constitutional Law—Equal Protection—Use of Fee Simple Determinable to Enforce Racial Restrictive Provisions

In *Charlotte Park and Recreation Commission v. Barringer*,[1] the North Carolina Supreme Court recently held that land deeded in fee simple determinable would revert to the grantor if certain racial restrictions were not complied with, without violating the Equal Protection clause of the Fourteenth Amendment.[2] This holding deserves close scrutiny by layman and lawyer.

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[3] This applies to any agency whereby the state exercises its powers, whether legislative, administrative, or judicial.[4] Since the passage of the Fourteenth Amendment the courts have applied the Equal Protection Clause to determine the legality of state action in a number of racial segregation cases. Thus, provisions for racial segregation in municipal housing ordinances,[5] statutes denying Negroes the right to vote in primary elections,[6] statutes discriminating against Negroes in the selection of jurors,[7] and the refusal by a board of trustees of a library supplied with state funds to admit a Negress to a library training course[8] were held to be unwarranted extensions of state power and, therefore, in violation of the Equal Protection Clause.

Court action, as violative state action, formed the basis for the Supreme Court's decision in *Shelley v. Kraemer*.[9] Several property owners in St. Louis sought to enjoin a Negro purchaser of real estate encumbered with a racial restrictive covenant from moving into their

[1] 242 N. C. 311, 88 S. E. 2d 114 (1955).
[2] U. S. CONST. amend. XIV, § 1.
[3] *Ibid.*
[4] Virginia v. Rives, 100 U. S. 313 (1880); Ex Parte Virginia, 100 U. S. 339 (1880).
[5] Buchanan v. Warley, 245 U. S. 60 (1917); Richmond v. Deans, 281 U. S. 704 (1930). State courts have held similar ordinances invalid: Glover v. Atlanta, 148 Ga. 285, 96 S. E. 562 (1918); Jackson v. State, 132 Md. 311, 103 Atl. 910 (1918); Clinard v. Winston-Salem, 217 N. C. 119, 65 S. E. 2d 867 (1940); Allen v. Oklahoma City, 175 Okla. 42, 52 P. 2d 1054 (1936); Liberty Annex Corp. v. Dallas, — Tex. Civ. App. —, 289 S. W. 1067 (1927); Irvine v. Clifton Forge, 124 Va. 781, 97 S. E. 310 (1918).
[6] Nixon v. Herndon, 273 U. S. 536 (1927).
[7] Strauder v. West Virginia, 100 U. S. 303 (1879).
[8] Kerr v. Enoch Pratt Free Library of Baltimore City, 149 F. 2d 212 (4th Cir. 1945).
[9] 334 U. S. 1 (1948).

residential district. The residents had previously signed an agreement mutually promising to restrict the use and occupancy of their land to Caucasians. The lower court granted the injunction.[10] The Supreme Court, however, held that the injunction granted by the Missouri court was such state action as contemplated by the Fourteenth Amendment to constitute a denial of equal protection to members of the excluded race.[11] Without the state court's action, the restrictive covenant could not have been enforced. The Supreme Court recognized that while the Fourteenth Amendment prohibited state action, it did not reach private agreements, however discriminatory. Their "enforcement," however, was limited to voluntary adherence to the covenant by the contracting parties.[12]

Following this decision, the Supreme Court carried the "state action" concept one step further in a damage suit brought by one co-covenantor against another for breach of a racial restrictive covenant.[13] The Supreme Court, basing its decision on the *Shelley* case,[14] held that, although the covenant was valid, and no constitutional rights had been violated, a judgment awarding damages would be prohibited by the Amendment.[15]

Since the above decisions dealt primarily with attempted court enforcement of racial restrictive provisions in deeds conveying land, the

[10] Kraemer v. Shelley, 355 Mo. 814, 198 S. W. 2d 679 (1946).

[11] See also Hurd v. Hodge, 334 U. S. 24 (1948), announcing the same rule for the District of Columbia. Prior to this decision the courts consistently enforced racial restrictive covenants. Corrigan v. Buckley, 271 U. S. 323 (1926); Koehler v. Rowland, 275 Mo. 573, 205 S. W. 217 (1918); Burkhardt v. Lofton, 63 Cal. App. 2d 230, 146 P. 2d 720 (1944). For North Carolina decisions see Vernon v. R. J. Reynolds Realty Co., 226 N. C. 58, 36 S. E. 2d 710 (1946) (validity of covenants conceded); Eason v. Buffaloe, 198 N. C. 520, 152 S. E. 496 (1930) (damages awarded).

[12] Following the *Shelley* decision, four actions seeking damages for breach of covenant were brought in state courts. Weiss v. Leaon, 359 Mo. 1054, 225 S. W. 2d 127 (1949) and Correll v. Earley, 205 Okla. 366, 237 P. 2d 1017 (1951) limited the *Shelley* rule to remedy by injunction, but Robert v. Curtis, 93 F. Supp. 604 (D. C. D. C. 1950) and Phillips v. Naff, 332 Mich. 389, 52 N. W. 2d 158 (1952) interpreted Shelley v. Kraemer to hold that enforcement of covenants in judicial proceedings was unconstitutional whether action was brought at law or in equity.

[13] Jackson v. Barrows, 346 U. S. 249 (1953).

[14] "The [*Shelley*] decision sounds the death knell for all racial restrictive covenants and related superficially legal schemes as effective weapons in enforcing racial discrimination." Scanlan, *Racial Restrictions in Real Estate—Property Values v. Human Values,* 24 NOTRE DAME LAW. 157, 190 (1948).

[15] In a similar action, the Texas court rejected an attempt to indirectly enforce a racial restrictive covenant. Clifton v. Puente, — Tex. Civ. App. —, 218 S. W 2d 272 (1948). There, the purchaser, a Mexican, brought an action in ejectment against a prior grantee who defended his refusal to vacate on the ground that the deed under which the Mexican claimed contained a restrictive covenant providing for forfeiture upon sale to Mexicans. The court held that to allow this defense would in effect constitute a judicial determination that the terms of the racial restrictive covenant be carried out and thus be violative of the Fourteenth Amendment.

reported North Carolina decision is of particular importance. In this case, the grantor deeded land to the City of Charlotte Park and Recreation Commission to be used as a public recreation park, but limited his gift with the requirement that:

> ". . . [I]n the event that the said land . . . shall not be kept, used and maintained for park, playground, and/or recreational purposes, *for use by the white race only,* and if such disuse or non-maintenance continue for any period as long as one year, . . . then . . . the lands hereby conveyed shall revert in fee simple to the [grantor]. . . ." (Emphasis added.)[16]

The court held that if Negroes should use the land, "the determinable fee[17] . . . automatically will cease and terminate by its own limitation expressed in the deed, and the estate granted automatically will revert [to the grantor], by virtue of the limitation in the deed. . . . The operation of this reversion provision is not by any judicial enforcement by the State Courts of North Carolina, and *Shelley v. Kraemer* has no application."[18]

The court noted that the racial restrictive provision was included as a part of the original limitation of a grant in fee simple determinable. Since this device is seldom used, it may deserve closer examination. An

[16] 242 N. C. at 313, 88 S. E. 2d at 117.

[17] The court held that the grantor conveyed a "fee determinable upon special limitations." 242 N. C. at 321, 88 S. E. 2d at 122. The writer believes that this is the first North Carolina case which makes this determination in connection with a full fee interest in the land itself. Prior cases were decided on the basis of a determinable life estate or determinable easements.

For a collection of state court decisions which have recognized the validity of determinable fees, see 1 SIMES, FUTURE INTERESTS § 178 n. 10 (1936).

[18] 242 N. C. at 322, 88 S. E. 2d at 123.

For the purpose of this Note, the author will proceed on the assumption that the court properly construed the grant to have been in fee simple determinable. However, some observations must be made in this respect.

The deed provided that ". . . as a *condition precedent* to the reversion of the said lands in any such event, the [grantor] shall pay unto the [grantee] . . . the sum of thirty-five hundred dollars ($3500)." (Emphasis added.) 242 N. C. at 313, 88 S. E. 2d at 117. This condition seems to have been disregarded by both counsel and court. It raises the question whether the reversion provision might actually operate *automatically* upon termination of the estate through use by Negroes of the recreation park. Assuming that the grantor has a possibility of reverter until the estate is determined, the provision in the deed requires an affirmative act on his part to re-vest the title in him. Professor Simes believes that the event upon which a possibility of reverter is to vest in possession cannot be at the exercise of an option by the grantor. 1 SIMES, FUTURE INTERESTS § 180 (1936). The effect of the provision for payment contained in the deed would be difficult to distinguish from a power of termination upon breach of condition subsequent.

Also, the North Carolina court has consistently held that conditions subsequent which result in the forfeiture of an estate will be strictly construed against the grantor. Unless the court finds clear and express words of re-entry or forfeiture, the condition will be considered a covenant. For a thorough discussion of defeasible estates, see McCall, *Estates on Condition and on Special Limitation in North Carolina,* 19 N. C. L. REV. 334 (1941).

estate in fee simple determinable is created to revest title in the grantor upon the occurrence of a named event.[19] The intent of the grantor that the estate shall then expire automatically[20] may be expressed by appropriate words[21] which provide that upon the happening of the event the land is to revert[22] to the conveyor.[23] The estate thus granted is of defeasible quality while the grantor retains a possibility of reverter.[24] When the contingency arises, the estate *ipso facto* reverts in accordance with its terms.[25]

The conveyor's manifest intention that the estate be limited to certain uses led the court to reason that he had the right to give away what he chose and to provide that his bounty should be enjoyed only by those whom he intended to enjoy it. "We know of no law that prohibits a white man from conveying a fee determinable upon the limitation that it shall not be used by members of any race except his own, nor of any law that prohibits a negro from conveying a fee determinable upon the limitation that it shall not be used by members of any race, except his own."[26]

The court also stated that the reverter provision must be given full force and effect lest the grantor be deprived of his property without due process of law.[27] Conceding that the determinable fee is valid, if the court decided that the estate could not revert in case Negroes used the property, a determination of the grantor's rights under the Due Process Clause would necessarily follow. However, if the limitation were for any reason void, the reverter would become inoperative, and the grantor's constitutional rights would not seem to be affected.[28]

[19] A fee on limitation results if the prevailing purpose is to limit the land for a stated use. 1 AMERICAN LAW OF PROPERTY § 2.6 (1952).

[20] It is a basic requirement that the estate shall automatically expire upon the occurrence of a stated event. 1 RESTATEMENT, PROPERTY § 44 (1936).

[21] "While," "until," "so long as" are typical words to denote the special limitation. 1 TIFFANY, REAL PROPERTY § 91 (2d ed. 1920).

[22] However, no express words of reverter are necessary. 1 SIMES, FUTURE INTERESTS § 181 (1936).

[23] 1 RESTATEMENT, PROPERTY § 44, comment *l, Illustration* 17 (1936).

[24] Notwithstanding the qualifications annexed to it, a fee simple determinable estate constitutes the entire estate throughout its continuance. Church in Brattle Square v. Grant, 3 Gray 142 (Mass. 1855).

[25] Elmore v. Austin, 232 N. C. 12, 59 S. E. 2d 205 (1950). A fee simple on special limitation is generally considered not to be within the Rule Against Perpetuities. First Universalist Society of North Adams v. Boland, 155 Mass. 171, 29 N. E. 524 (1892). A provision designed to prevent use or occupancy of property by members of the excluded group is not a restraint of alienation. 4 RESTATEMENT, PROPERTY § 406, comment *m* (1936).

[26] 242 N. C. at 322, 88 S. E. 2d at 123.

[27] The Court here spoke of the Fifth Amendment to the United States Constitution. The writer assumes that the Court intended to refer to the Due Process Clause of the Fourteenth Amendment.

[28] Where an estate in fee simple determinable is created with a special limitation which is void, the gift is good and is no longer subject to the limitation. 2 SIMES, FUTURE INTERESTS § 611 (1936).

The effect of this decision, in view of what has been stated, is that restrictive provisions annexed to a grant of land may now be "enforced" by resort to the fee simple determinable. The court's abrupt dismissal of *Shelley v. Kraemer* was no doubt prompted by a refusal to read "state action" into the case, relying heavily upon the automatic nature of the reverter. The decision carefully explained that no court action is ever necessary to terminate the estate and put the reversion into operation when the stated event occurs.

However, the court did not purport to adjudicate finally all "state action" aspects as its sole duty was to render construction of the deed. Although the reversion provision would take effect automatically upon prohibited use of the land, the grantee might refuse to relinquish possession voluntarily. The grantor would be forced to bring an action in ejectment,[29] seeking to obtain a judgment declaring the conveyance forfeited and awarding him possession. Would a judgment in his favor be "state action" in violation of the grantee's constitutional rights? It may be contended that a court decree in favor of the grantor would, under these circumstances, relate back to the time prior to which the reverter took effect and indirectly enforce the restrictive provisions. If this construction is accepted, the decree would probably be unenforceable as contra to the *Shelley* rule. However, looking at the reality of the situation, this action in ejectment would be analogous to an action by the owner of property against an adverse possessor, and no violation of the latter's constitutional rights would seem to be involved.

The courts, however, are not the only agency by which the state acts. In the instant case the title vested in the grantor by "operation of law," *i.e.,* by operation of the common law of the state. *Quaere,* would the operation of the common law of the state be "state action" within the *Shelley v. Kraemer* rule and thus be violative of the Fourteenth Amendment?[30]

Also, the grantee may contend that the state's failure to interfere with the operation of the reversion in essence tolerated its dispossessory effect, giving force to the restrictions, since timely interference might have avoided the termination of the grantee's estate.[31] However, it

[29] 18 AM. JUR., *Ejectment* § 40 (1939). The party who claims the better title must, if the actual possession of the land is refused, make a lawful demand for possession and resort to process of law to recover his property. Mosseller v. Deaver, 106 N. C. 494, 11 S. E. 529 (1890).

[30] "[L]aw in the sense in which the courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State . . . [is] the law of that State existing by the authority of that State." Erie R. Co. v. Tompkins, 304 U. S. 64, 79 (1938), citing Justice Holmes' dissent in Black & White T. & T. Co. v. Brown & Yellow T. & T. Co., 226 U. S. 518, 533 (1928).

[31] In Terry v. Adams, 345 U. S. 461, 469 (1953) Justice Black, writing for the majority, presented a similar viewpoint in a case which involved the appli-

would seem that since *Shelley v. Kraemer* expressly upheld *voluntary* action in "enforcement" of restrictive provisions, the unhindered operation of the grant, like the voluntary execution of a contract, would not constitute "state action" in violation of the Fourteenth Amendment.[32]

Assuming, then, the legal validity of the conveyance, would considerations of public interest tend to override its efficacy? In the *Racial Restrictive Covenant Cases*[33] the Supreme Court emphasized that "[the Fourteenth] Amendment erects no shield against merely private conduct";[34] that the legal devices containing such restrictions are not against public policy. A distinction between those cases and the principal case may be drawn at this point. *Shelley v. Kraemer* and *Jackson v. Barrows* dealt with conveyances of property between *private* parties for *private* use. The instant case, on the other hand, contains certain restrictive requirements imposed on the City of Charlotte and the Charlotte Park and Recreation Commission, a *municipal* corporation, for *public* use. Have the courts established a different policy as to *public* use, as distinguished from *private* use?

In 1896 the Supreme Court recognized that equal protection was accorded where substantially equal but separate facilities were provided by a public transportation system.[35] The same principle was consistently applied in subsequent state and federal cases on the use of public recreational facilities,[36] golf courses,[37] swimming pools,[38] tenement hous-

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cation of the Fifteenth Amendment to test the Texas pre-primary. He declared that the state's condonation of the use of the Jaybird pre-primary as an electoral device violated the provisions of the Fifteenth Amendment and took the position that mere failure to suppress a practice not even unlawful under state law, but affecting the rights of its Negro citizens, was such state action as prohibited by the Amendment. "A state may not permit within its borders the use of any device that produces an equivalent of [a violation]."

[32] However, in the absence of state action, voluntary discriminatory practices may nevertheless be unlawful *per se* since they may act as a general restraint on mortgage lending and similar activities affecting interstate commerce. Comment, *Application of the Sherman Act to Housing Segregation*, 63 YALE L. J. 1124 (1954).

[33] Shelley v. Kraemer, 334 U. S. 1 (1948); Hurd v. Hodge, 334 U. S. 24 (1948); Barrows v. Jackson, 346 U. S. 249 (1953).

[34] Shelley v. Kraemer, *supra* at 13 (1948).

[35] The "Separate but Equal" doctrine apparently originated in Massachusetts where a school board resolution to provide separate facilities for Negro children in Boston was upheld in Roberts v. Boston, 5 Cush. 198 (Mass. 1849). It was formally announced in Plessy v. Ferguson, 163 U. S. 537 (1896) which established a test of reasonableness based on usage, customs and traditions of the people and the preservation of the public peace and good order.

[36] There seem to be no *affirmative* decisions in the Supreme Court on the validity of the "Separate but Equal" doctrine in the field of public recreation. The Supreme Court denied certiorari in Holcombe v. Beal, 347 U. S. 974 (1954) ("Separate but Equal" sustained in lower court); Williams v. Kansas City, Mo., 346 U. S. 826 (1953) (injunctive relief granted below); Rice v. Arnold, 342 U. S. 946 (1952) (Florida court had held that proper procedure to test the issue was by bill for declaratory judgment or in mandamus); Boyer v. Garrett, 340 U. S. 912 (1951) (application for certiorari not filed within time limits). Conversely, the North Carolina Supreme Court stated in Berry v. Durham, 186

ing[39] and places of entertainment.[40] It endured until the Court in *Brown v. Board of Education*[41] examined its applicability in the light of current knowledge of human relations.[42] The Supreme Court found in that case that "separate educational facilities are inherently unequal,"[43] though physical facilities and other "tangible" factors were substantially equal. In a technical sense, the *School Cases* do not invalidate separate but equal facilities as a matter of public policy except in the use of grade-school buildings. Yet, it seems to be certain that they do have a bearing on decisions in other fields.[44]

One week after the *Brown* decision, the Supreme Court handed

N. C. 421, 119 S. E. 748 (1923) that restrictive covenants were in accord with practice and policy and that reasonable regulations may be made to separate the races.

[37] Beal v. Holcombe, 193 F. 2d 384 (5th Cir. 1951), *cert. den.* 347 U. S. 974 (1954).

[38] Kansas City, Mo. v. Williams, 205 F. 2d 47 (8th Cir. 1953), *cert. den.* 346 U. S. 826 (1953). *Cf.* Lopez v. Seccombe, 71 F. Supp. 769 (S. D. Cal. 1944) (citizens of Mexican descent are entitled to equal rights and privileges).

[39] Dorsey v. Stuyvesant Town Corp., 299 N. Y. 512, 87 N. E. 2d 541 (1949), *cert. den.* 339 U. S. 981 (1950), held that a private corporation organized to provide low-cost housing is not an agency of the state and as such not prohibited by the Fourteenth Amendment from discriminating against tenants because of race or color, although it derived public aid through partial tax exemption and permission to buy land, acquired by the exercise of the state's power of eminent domain, at cost.

[40] Harris v. Daytona Beach, 105 F. Supp. 572 (S. D. Fla. 1952).

[41] 347 U. S. 483 (1954). Prior to this decision, the Supreme Court found it neither necessary nor desirable to re-examine the principle of "separate but equal" facilities in the field of education, though it had several opportunities to do so. Missouri ex. rel Gaines v. Canada, 305 U. S. 337 (1938); Sipuel v. University of Oklahoma, 332 U. S. 631 (1948); McLaurin v. Oklahoma State Regents, 339 U. S. 637 (1950). In Sweatt v. Painter, 339 U. S. 629 (1950), the Supreme Court stated that it was unnecessary to deal with that doctrine in the light of contemporary knowledge respecting the purpose of the Fourteenth Amendment and the effect on racial segregation.

[42] Compare the language used in the Brown case: "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of law, for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of the child to learn," 347 U. S. at 494, with the following statement from Plessy v. Ferguson, 165 U. S. 537, 551 (1896): "Laws permitting and even requiring separation . . . do not necessarily imply the inferiority of either race to the other. . . . We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority."

The juxtaposition of the two statements clearly indicates the change in the Supreme Court's attitude toward this basic problem.

(The quoted passage from the *Brown* case, *supra,* was cited by the Supreme Court as a "finding in the Kansas case" [referring to the District Court's decision in Brown v. Board of Education, 98 F. Supp. 797 (D. Kansas 1951)]. However, the quotation is not contained in the published opinion of the Kansas District Court.)

[43] 347 U. S. at 495.

[44] "What the [Equal Protection] clause appears to require today is . . . that there shall be *no* distinction made on the sole basis of race or alienage as to certain rights." CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 204 (9th ed. 1947).

down six memorandum decisions,[45] one of which involved the refusal of admission of Negroes to an amphitheater leased by a private theatrical company in a public park.[46] The trial court had held the company not guilty of unlawful discrimination in excluding the Negroes from its performances. The Supreme Court vacated the ruling and remanded for consideration in the light of the *Brown* case.[47] This is a strong indication that the policy announced in the *School Cases* would be applied to recreational facilities.

A recent circuit court decision makes it even more apparent that an extension of the *School Cases* doctrine is being made in other fields. In an action brought to abolish separate facilities for the races on city busses, the South Carolina District Court observed that ". . . to hold that the *Brown* decision extends to the field of public transportation would be an unwarranted enlargement of the doctrine . . . . One's education and personality is (*sic*) not developed on a city bus."[48] However, the Fourth Circuit Court of Appeals, reversing the lower court, stated that ". . . the recent decisions in *Brown v. Board of Education* and *Bolling v. Sharpe* which relate to public schools, leave no doubt that the separate but equal doctrine approved in *Plessy v. Ferguson* has been repudiated. That the principle applied in the school cases should be applied in cases involving transportation, appears quite clearly from the recent case of *Henderson v. United States* where segregation in dining cars was held violative of a section of the interstate commerce act providing against discrimination."[49]

[45] Three of the six decisions were concerned with education. The Court vacated judgments against Negro applicants to the University of Florida in State of Florida ex rel. Hawkins v. Board of Control of Florida, 347 U. S. 971 (1954) and Louisiana State University in Tureaud v. Board of Supervisors of Louisiana State University, 347 U. S. 971 (1954). These two cases were remanded for consideration in the light of the *Brown* decision. In the third case, the Supreme Court denied certiorari and refused to review a ruling by the Fifth Circuit Court of Appeals that denial of admission to a Texas junior college based on proof of equal facilities in Negro schools was violative of the Equal Protection Clause. Wichita Falls Junior College District v. Battle, 347 U. S. 974 (1954). In Holcombe v. Beal, 347 U. S. 974 (1954), the court below was directed to enter judgment which required a municipality to admit Negroes on a substantially equal basis with white citizens to a public golf course, and in Housing Authority of the City and County of San Francisco v. Banks, 347 U. S. 974 (1954) the Supreme Court denied certiorari to the California court to review a judgment requiring a local housing board to admit Negroes on an equal basis with other residents. However, none of these cases involved a direct ruling on the issue of segregation.

[46] Muir v. Louisville Park Theatrical Assn., 347 U. S. 971 (1954).

[47] Sweeney v. Louisville, 102 F. Supp. 525 (W. D. Ky. 1951), *aff'd sub nom.* Muir v. Louisville Park Theatrical Assn., 202 F. 2d 275 (6th Cir. 1953), *vacated* 347 U. S. 971 (1954).

[48] Flemming v. South Carolina Electric and Gas Co., 128 F. Supp. 469, 470 (E.D.S.C. 1955).

[49] Flemming v. South Carolina Electric and Gas Co., 224 F. 2d 752 (4th Cir. 1955), *appeal docketed*, 24 U. S. L. WEEK 3138 (U.S. Nov. 7, 1955) (No. 511).

The *School Segregation Cases* also influenced a recent Interstate Commerce

Perhaps of greatest significance is a recent decision of the Supreme Court itself. In an action[50] brought by Negroes to obtain a declaratory judgment and injunctive relief against the enforcement of racial segregation on public bathing beaches, the Fourth Circuit Court of Appeals held that the combined effect of the Supreme Court's decisions[51] was to deny segregation in public places.[52] Evidently this court felt that a public policy had been established by the Supreme Court which would apply to cases of this character.[53] The Supreme Court affirmed the circuit court's decision.[54]

Thus, there is reason to believe that the principles underlying these decisions may be extended to the North Carolina case.[55] A consideration of the instant controversy[56] may give the United States Supreme Court an opportunity to make that decision.

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Commission decision banning segregation of white and Negro passengers in interstate transportation. The Commission held that segregation of interstate passengers violated the Interstate Commerce Act's provisions against undue preferences and prejudices. Keys v. Carolina Coach Co., 24 U. S. L. WEEK 2234 (I.C.C. Nov. 7, 1955) (busses); National Assn. for Advancement of Colored People v. St. Louis-San Francisco Ry. Co., 24 U. S. L. WEEK 2234 (I.C.C. Nov. 7, 1955) (railroads).

[50] Dawson v. Mayor and City Council of Baltimore City, 220 F. 2d 386 (4th Cir. 1955).

[51] The Court referred to McLaurin v. Oklahoma State Regents, 339 U. S. 637 (1950); Henderson v. U. S., 339 U. S. 816 (1950); Brown v. Board of Education, 347 U. S. 483 (1954); Bolling v. Sharpe, 347 U. S. 497 (1954). In the *McLaurin* case, the Supreme Court stated that a Negro, admitted to the same school as whites, need not sit in a special part of the class room, library, and cafeteria, so as to be apart from white students. His education and mental growth would suffer by the inequalities imposed upon him. In the *Henderson* case, the court denounced the artificiality of treatment to which Negroes on railroad dining cars were subjected.

[52] "[If the state's] power cannot be invoked to sustain racial segregation in the schools, where attendance is compulsory and racial friction may be apprehended from the enforced commingling of the races, it cannot be sustained with respect to public beach and bathhouse facilities, the use of which is entirely optional." 220 F. 2d at 387.

[53] Some writers repeatedly have suggested that the Fourteenth Amendment intended to protect the rights of the individuals from individual action as well as from action by the states. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 277 (1908); Hale, *Rights under the Fourteenth and Fifteenth Amendments against Injuries Inflicted by Private Individuals*, 6 LAW GUILD REV. 627 (1946). Also note Justice Harlan's dissent in Plessy v. Ferguson, 163 U. S. 537, 559 (1896): "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."

[54] Mayor and City Council of Baltimore v. Dawson, 350 U. S. —, 100 L. Ed. (Advance p. 75) (1955).

[55] "The protection of the Constitution extends to sophisticated as well as simple-minded modes of discrimination." Lane v. Wilson, 307 U. S. 268, 275 (1939).

[56] The instant case is pending on a petition for re-hearing in the Supreme Court of North Carolina and may be the subject of an application for a writ of certiorari to the Supreme Court of the United States. Letter from Spottswood W. Robinson, III, Attorney for co-Defendants Leeper et al. to the author, Sept. 28, 1955.

Criminal Law—Use of Deadly Force in Preventing Escape of Fleeing Minor Felon

Under a new statute[1] any misdemeanant confined in the North Carolina State Prison upon a second conviction of an escape or an attempt to escape is guilty of a felony. North Carolina prison directives provide that fleeing felons may be shot only if clearly necessary to prevent escape.[2]

Interpreting N. C. Gen Stat. § 148-46 (1952), which provides that when a convict shall attempt to escape, the prison guard shall use any means necessary to prevent the escape, the North Carolina Supreme Court has held that the legislature did not intend to change the common law rule that a prison guard is not justified in killing a fleeing misdemeanant merely to prevent escape.[3] However, in the case of the fleeing felon the common law authorities are unanimous in their opinion that deadly force may, if necessary, be used to prevent escape.[4]

There can be little criticism of the rule as it operated under the common law. In the first place, felonies were punishable by death.[5] Secondly, at a time when officers did not possess our deadly and accurate firearms, it would be difficult to imagine a situation where an officer would have an opportunity to kill a fleeing felon who was not resisting arrest on the spot.[6] Thirdly, it would be unusual for the arresting officer at common law to find it necessary to kill to prevent the escape of a felon, since the criminal did not have modern means of transportation, nor could he find concealment and anonymity so easily.

It would seem, however, that the common law rule can be justly criticized as it operates on fleeing felons who have committed some statutory felony, such as the escape offense set out in N. C. Gen. Stat. § 14-256, or some felony not dangerous to life. The question is what justification can there be for the use of deadly force in preventing the escape of the minor felon.[7] Is it punishment for the original offense or the offense of escaping, for neither of which the statutory penalty is death? Is it to uphold the lawful authority in the arresting person or the one preventing escape? If so, the rule should logically be the

[1] N. C. GEN. STAT. § 14-256 (1955).

[2] N. C. PRISON RULES AND REGULATIONS, c. 41, Directive 21 (Oct. 1953).

[3] Holloway v. Moser, 193 N. C. 185, 136 S. E. 375, 50 A. L. R. 262 (1927). The common law authorities made no distinction between a misdeanant fleeing from arrest and one breaking away after arrest.

[4] 1 EAST P. C. 298 (1806); 2 HALE P. C. 76-77 (1847); 1 HAWK. P. C. 106 (1788).

[5] 4 BLACKSTONE, COMMENTARIES 98 (1818).

[6] The case of an offender who is merely fleeing must, of course, be distinguished from the case where the offender is resisting (State v. Dunning, 177 N. C. 559, 98 S. E. 530 (1919)), or is both resisting and fleeing (State v. Garrett, 60 N. C. 144 (1863)).

[7] Arguments *pro* and *con* are contained in 9 ALI PROCEEDINGS 179 (1931).

same as regards both felon and misdemeanant. Is it to prevent a more probable danger to life? Statutory felonies include a multitude of non-violent crimes and some misdemeanors are much more dangerous to life; for example, contrast the fleeing drunken driver with the fleeing thief. Is it because the minor felon is considered more dangerous to property? The better reasoned cases hold that deadly force is not justified in preventing a felony where property loss alone is involved.[8]

> "The reason why the use of such means was allowed to prevent crimes of that kind in England was that they were there punishable by death. This being so, there was reason for the rule. If one was about to perpetrate a crime for which under the law his life would be forfeited there was reason in holding that his life might be taken if necessary to prevent his committing it. But in this country few crimes subject the ones who have committed them to the death penalty, and it is only as to those which do that the reason of the rule has any force. What were felonies at common law usually subject the offender here to comparatively light punishment, and upon principle it should be here held that one could only properly make use of means which might be expected to cause death to prevent the commission of a capital offense."[9]

It would seem, therefore, that the reason for the rule has changed also in the arresting or escaping situation;[10] for if one cannot kill to prevent a felony dangerous to property only, should he be permitted to kill in attempting an arrest after the offense has been completed?

Writers generally criticize the arbitrary distinctions made between the misdemeanant and the felon.[11]

> "To attach such importance to a term so loosely used is to make legal rights and duties dependent upon words, not upon facts or public policy. It is as vicious an exhibition of the jurisprudence of conceptions as can well be imagined. The word is the thing. It is of itself a magic quality which compels legal re-

[8] Storey v. State, 71 Ala. 329 (1881); Starkey v. Dameron, 92 Colo. 420, 21 P. 2d 1112 (1933); Grigsby v. Commonwealth, 151 Ky. 496, 152 S. W. 580 (1913); Commonwealth v. Emmons, 57 Pa. Super. 445, 43 A.2d 568 (1945); Pierce v. Commonwealth, 135 Va. 635, 115 S. E. 686 (1923).

[9] Hoyt, C. J., in State v. Barr, 11 Wash. 481, 487, 39 Pac. 1080, 1082 (1895).

[10] As in the case of a misdemeanant, the common law authorities made no distinction between a felon fleeing from arrest and one breaking away after arrest. Thomas v. Kinkead, 55 Ark. 502, 508, 18 S. W. 854, 855 (1892).

[11] Bohlen and Burns, *The Privilege to Protect Property by Dangerous Barriers and Mechanical Devices*, 35 YALE L. J. 525, 540 (1926); Pearson, *The Right to Kill in Making Arrests*, 28 MICH. L. REV. 957, 974 (1930); Rogers, *Right of Officer to Shoot and Kill Fleeing Felon*, 34 LAW NOTES 66, 70 (1930); *Contra*, Waite, *Some Inadequacies in the Law of Arrest*, 29 MICH. L. REV. 448, 466 (1931).

> sults regardless of the facts or of the interest at stake. Is it not ridiculous to make matters of life and death depend upon the mere whim of the legislative draftsman and to subject a man to the risk of death merely because the crime which he has committed is arbitrarily labelled a 'felony' rather than a misdemeanor?"[12]

It is significant that the *Restatement of Torts* has recognized that the proper distinction is between offenses which normally cause or threaten death and those which do not.[13]

Although criticized by many courts,[14] the applicability of the rule in regard to the minor felon seems to be largely untested by actual court holding.[15] In *Ex parte Warner*,[16] however, a federal revenue agent who claimed he shot a fleeing "moonshiner" by accident was discharged from state custody on writ of habeas corpus. From the evidence presented, the court, relying on the common law rule, said that the petitioner should be discharged "whether the view taken of the evidence be that the officer deliberately shot at the deceased while he was fleeing and escaping from arrest or that in the pursuit the pistol was accidentally discharged."[17] Although it would seem that the illegal manufacture of whiskey is not *per se* a felony dangerous to life, it cannot be denied that an aura of violence surrounds the profession.[18]

Since an arresting person can only kill if necessary to prevent the escape of a fleeing felon, many cases are decided on the ground that the killing was unnecessary. Consequently, if the killing is unnecessary, there is no need for the court to try to make any distinction between types of felonies. In justifying the use of deadly force, the burden is on defendant to the extent of showing authority and probable cause to overcome a prima facie presumption for the protection of life unless

[12] Bohlen and Burns, *The Privilege to Protect Property by Dangerous Barriers and Mechanical Devices*, 35 YALE L. J. 525, 540 (1926).

[13] RESTATEMENT, TORTS § 131 (1934).

[14] U. S. v. Clark, 31 Fed. 710, 713 (8th Cir. 1881); State v. Bryant, 65 N. C. 327, 328 (1871); Reneau v. State, 70 Tenn. 720 (1879); Hendricks v. Commonwealth, 163 Va. 1102, 1110, 178 S. E. 8, 11 (1935).

[15] In the following cases the court made no distinction between types of felonies in the escaping situation: Commonwealth v. Stinnet, 55 F. 2d 644 (4th Cir. 1932) (illegal manufacture of whiskey); U. S. v. Clark, 31 Fed. 710 (8th Cir. 1881) (attempted escape from military custody of soldier convicted of malicious falsehood which carried two year sentence in military prison); Johnson v. Chesapeake Ry., 259 Ky. 789, 83 S. W. 2d 521 (1935) (larceny); Thompson v. Norfolk and W. Ry. Co., 116 W. Va. 705, 182 S. E. 880 (1935) (illegal manufacture of whiskey).

[16] 21 F. 2d 542 (N. D. Okla. 1927).

[17] *Id.* at 542.

[18] "It is a matter of common knowledge that throughout the years men who secrete themselves in the fastness of the mountains for the purpose of illicit distillation of spiritous liquors have not been hesitant to take the lives of officers attempting to bring them to justice." Maxwell, J. in Thompson v. Norfolk and W. Ry. Co., 116 W. Va. 705, 712, 182 S. E. 880, 884 (1935).

the circumstances of the killing rebut the presumption.[19] Necessity is a question for the jury and it may be that both jury and appellate judge[20] take into account the character of the felony and perhaps the character of the felon himself.[21]

In *State v. Bryant*,[22] a hog was stolen from defendant's employer and the defendant, a private person, suspecting that Cogdell was the thief went to Cogdell's house, called him out and told him to give up the hog. Cogdell said that the hog was not there and fled. The defendant ordered him four times to stop and then shot him. The stolen hog was found in Cogdell's house cut up and cleaned. The defendant urged that he knew a felony had been committed and thus he had a right to arrest the felon without a warrant and to prevent the felon's escape. On these facts, the trial judge held that the defendant was guilty of assault and battery and so charged the jury. On appeal, in a per curiam opinion, the North Carolina Supreme Court said that it was the privilege of every private person to arrest the felon when a felony has been committed but held that here there was no necessity to kill. Justice Reade, speaking for the court, said: "It must be however, that the powers of arresting and the means used must be enlarged or modified by the characted of the felony. The importance to society of having felons arrested in cases of capital felonies such as murder and rape must be much greater than in cases of inferior felonies."[23]

On the question of necessity, although the rule is not settled,[24] some courts follow the view that mere suspicion that a felony has been committed is not enough to justify the use of deadly force in preventing the escape of a suspected felon if in fact no felony has been committed.[25] Even where a felony has been committed, killing can only be justified as a last resort.[26] Although it has been said that the officer, in case of resistance, is not bound to put off the arrest until a more favorable time,[27] ordinarily there is not the same urgency in case of flght.[28] In *Castle v. Lewis*[29] the Eighth Circuit Court of Appeals affirmed the judgment of a district court in dismissing an application for habeas

[19] Union Indemnity Co. v. Webster, 218 Ala. 468, 477, 118 So. 794, 802 (1928).
[20] Hendricks v. Comonwealth, 163 Va. 1102, 1110, 78 S. E. 8, 11 (1935).
[21] Dredd v. State, 26 Ala. App. 594, 164 So. 309, 311 (1935).
[22] 65 N. C. 327 (1871).
[23] State v. Bryant, 65 N. C. 327, 328 (1871).
[24] See Notes, 38 Ky L. J. 609 and 618.
[25] Petrie v. Cartwright, 114 Ky. 103, 70 S. W. 297 (1902); People v. Conraddy, 5 Parker Cr. Rep. 234 (N. Y. 1860); Commonwealth v. Duerr, 158 Pa. Super. 484, 45 A. 2d 235 (1946).
[26] Castle v. Lewis, 254 Fed. 917 (8th Cir. 1918); Scarborough v. State, 168 Tenn. 106, 76 S. W. 2d 106 (1934); Love v. Bass, 145 Tenn. 522, 238 S. W. 94 (1921).
[27] Holloway v. Moser, 193 N. C. 185, 188, 136 S. E. 375, 377 (1927).
[28] State v. Bryant, 65 N. C. 328, 329 (1871).
[29] 254 Fed. 917 (8th Cir. 1918).

corpus by two petitioners in state custody who had tried to arrest certain persons whom they suspected were introducing liquor into Osage County, Oklahoma (a felony). The suspected ones had fled in an automobile and the petitioners had fired their guns at the automobile and killed one Mosier. The court felt that the fact that all the occupants of the car except one were known by the officers to be settled residents of a nearby town only five miles away and the fact that the suspected ones were heading toward their homes at the time rendered it difficult to conclude that a person of ordinary prudence could have believed that it was necessary to fire into the automobile to prevent escape.

Concluding, it seems that even if the North Carolina Supreme Court does not follow the strong dicta enounced in *State v. Bryant* which distinguished between types of felonies, an arresting or custodial officer may find it difficult to show necessity for the use of deadly force in preventing the escape of the minor felon.

I. B. HUDSON, JR.

Domestic Relations—Conflict of Laws—Uniform Reciprocal Enforcement of Support Act

In a suit brought in Arkansas under the Uniform Reciprocal Enforcement of Support Act[1] the petitioner filed the necessary papers,[2] which were certified and sent to the Superior Court of Edgecombe County[3] and which charged her husband with non-support of their children. After concluding that responsibility to support the children had "'. . . already been found to exist by a court of competent jurisdiction . . . in the State of Arkansas,'"[4] the superior court entered judgment, requiring the husband to pay into the Edgecombe County Welfare Department the money for support, which was to be forwarded to Arkansas, to be transmitted to petitioner, then residing in Virginia.[5]

On appeal the judgment of the lower court was reversed, the reason being the three-state nature of the proceedings in this case. In the opinion it was said:

> "We do not think the act should be interpreted so as to apply to a situation other than one where the obligee is present in the Initiating State.... To interpret the act so as to permit an

[1] 9A UNIFORM LAWS ANN. 58 (Supp. 1954); ARK. STAT. ANN. §§ 34-2401 to 34-2427 (Supp. 1953); N. C. GEN. STAT. §§ 52A-1 to 52A-19 (Supp. 1953). Arkansas had repealed the 1950 Uniform Act, 9A ULA 58, 66 (Supp. 1954), and adopted it as amended in 1952, 9A ULA 58, 92 (Supp. 1954). North Carolina had adopted substantially the Uniform Act of 1950. For a discussion of the North Carolina Act see Note, 29 N. C. L. REV. 351, 423 (1951).

[2] ARK. STAT. ANN. § 34-2410 (Supp. 1953).

[3] ARK. STAT. ANN. § 34-2413 (Supp. 1953).

[4] Mahan v. Read, 240 N. C. 641, 643, 83 S. E. 2d 706, 708 (1954).

[5] Mahan v. Read, 240 N. C. 641, 83 S. E. 2d 706 (1954).

> obligee to pursue a remedy through the courts of two states when the obligee is not present in either one of them and perhaps on the move from place to place would so complicate and confuse the procedure thereunder as to impair seriously its manifest purpose and its usefulness in proper cases."[6]

For this reason it was held that the lower court had no authority to make an award for transmittal to the Arkansas court, to be transmitted in turn to the petitioner in Virginia.

The Uniform Reciprocal Enforcement of Support Act[7] (hereinafter referred to as the Act) was designed to cope with a problem that had for many years been a thorn in the flesh of welfare departments all over the United States.[8] When a husband or father deserted his family and fled to another state, little could be done to force him to provide for his dependents. Civil proceedings in another jurisdiction were usually beyond the means of those left destitute, and criminal prosecution was futile as a means of obtaining support.[9] Those left without maintenance became an increasing burden on charitable organizations and welfare departments.[10] This was the state of affairs considered by its sponsors when reciprocal legislation on the question was proposed.

The present case does not exemplify the typical situation as envisioned by the framers of the Act in that it ". . . presents the problem of the *roving obligee* rather than the *fugitive obligor*."[11] The husband and wife resided in North Carolina until the wife left their place of abode and removed to Arkansas, taking their children with her and obtaining a divorce from the husband, who remained in North Carolina. Desertion by the wife does not affect the duty of the husband to support his children, nor is it necessary that the husband or father be a *fugitive* before support is imposed under the Act.[12]

[6] *Id.* at 647, 83 S. E. 2d at 711 (1954).

[7] As of Dec. 1, 1954, of 48 states and 4 territories all but Nevada and District of Columbia had enacted some form of reciprocal legislation on this question, 5 states having adopted the Council of State Governments' form of Support of Dependents Act, which is similar to the Uniform Reciprocal Enforcement of Support Act. 1954 HANDBOOK OF NATIONAL COMMISSIONERS ON UNIFORM STATE LAWS 227.

[8] See Notes, 25 TEMP. L. Q. 336 (1952) and 45 ILL. L. REV. 252 (1951).

[9] See Brockelbank, *The Problem of Family Support: A New Uniform Act Offers a Solution*, 37 A. B. A. J. 93 (1951).

[10] *Ibid.*

[11] Mahan v. Read, 240 N. C. 641, 647, 83 S. E. 2d 706, 711 (1954).

[12] See Freeman v. Freeman, 226 La. 410, 76 So. 2d 414 (1954), where, after divorce was granted in Mississippi, husband went to Louisiana, and wife returned to Arkansas, where she instituted the action for support of their children. In Landres v. Landres, 207 Misc. 460, 138 N. Y. S. 2d 442 (N. Y. Dom. Rel. Ct. 1955), wife left husband in New York and went to California, where she initiated the action for support of their children. In Smith v. Smith, 281 P. 2d 274, 278 (Cal. Dist. Ct. of App. 1955), it was said: "They (the Acts) are based upon the failure to provide needed support for dependents, and the flight of the obligor is in no way made the controlling fact."

In respect to the *roving obligee,* however, the circumstances are different. This case is the only decision of an appellate court under the Act involving a three-state situation. Thus there was no precedent for this interpretation of the North Carolina Act,[13] restricting its application to cases where the obligee is residing in the initiating state at the time of the proceedings in the responding state.[14] A literal interpretation of a phrase of the Acts, ". . . regardless of the presence or residence of the obligee,"[15] might lead to a different conclusion, but the drafters of the original act indicated[16] that the quoted words were used as if to say, "regardless of whether the obligee is in this state," rather than, "regardless of which foreign state the obligee is in." As the court points out, the object of the Act was not only to enable obligees to acquire support more easily, but also to relieve the state of their residence of the burden of supporting them. Since Virginia had become the residence of the obligee, it seems logical that that state should have been the one in which proceedings were initiated.

The court also said that the superior court ". . . was in error in reaching the conclusion that the respondent's '. . . responsibility to support said children *has already been found to exist* by a court of *competent jurisdiction* . . . in the State of Arkansas.' "[17] (Emphasis added.) The findings of the court in the initiating state are not for the purpose of determining the rights between the parties but are to determine whether the complaint ". . . sets forth facts from which it may be determined that the defendant owes a duty of support and that a court of the responding state may obtain jurisdiction of the defendant or his property. . . ."[18] Under the Acts of the two states it was not intended

[13] *Cf.* Vincenza v. Vincenza, 197 Misc. 1027, 98 N. Y. S. 2d 470 (N. Y. Dom. Rel. Ct. 1950), where the court of the initiating state refused to certify the petition as a matter of judicial discretion in deciding against extending the Support of Dependents Act.

[14] This case does not decide, of course, what is to happen if, at some time *after* the final judgment for support has been rendered, obligee moves from the initiating state, but at least the initiating state under this decision is not to be burdened with distribution of support payments to the obligee who removes from that state *prior* to any judgment in the responding state.

[15] ARK. STAT. ANN. § 34-2404 (Supp. 1953); N. C. GEN. STAT. § 52A-5 (Supp. 1953), which say in part: "The duty of support . . . bind(s) the obligor regardless of the presence or residence of the obligee."

[16] "The purpose here is to overcome the rule in some states that the duty of support runs only in favor of obligees within the state, and to overcome the indifference of many states which would refuse or neglect to support in favor of out-of-state dependents on the theory often only tacitly admitted, that one state has no interest in helping another state rid itself of the burden of supporting destitute families." 1952 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 292.

[17] Mahan v. Read, 240 N. C. 641, 646, 83 S. E. 2d 706, 710 (1954).

[18] ARK. STAT. ANN. § 34-2413 (Supp. 1953); N. C. GEN. STAT. § 52A-11 (Supp. 1953). (Arkansas statute uses "respondent" instead of "defendant").

A 1955 amendment to N. C. GEN. STAT. § 52A-19, N. C. Sess. Laws 1955, c. 699, § 10, makes the verified complaint from the initiating state prima facie

that substantive rights should be determined by the court of the initiating state.[19] Obviously the court in Arkansas did not have jurisdiction to find that respondent owed a duty of support to his children, for respondent was not before that court and had, in fact, never been in Arkansas. The action taken by the Arkansas court was merely part of the procedure[20] by which the petitioner was able to present herself before the North Carolina court without necessity of personal appearance.[21]

The question of the real party in interest was another feature of this case. The Arkansas Act allows a person having legal custody of a minor obligee to bring suit,[22] but North Carolina law required that suit be brought in the name of the infant by general or testamentary guardian or duly appointed next friend.[23] For this reason, since petitioner had instituted the action for the support of her children in her own name, it was said that there was a defect of parties plaintiff. Since it is generally recognized that the law of the place of trial determines who may sue,[24] it is only in the Acts themselves that a different answer can be sought. The only section of the North Carolina Act which allowed election of laws[25] does not seem to apply unless the real party in interest requirement can be tortured into becoming a "remedy."[26] This question has become largely academic as far as North Carolina is concerned because of the amendments to the North Caro-

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evidence of the facts contained in it so long as defendant has been served with notice and summons; and, if after service defendant does not appear, the court may enter an order for support anyway.

[19] See Brockelbank, *Is the Uniform Reciprocal Enforcement of Support Act Constitutional?* 31 ORE. L. REV. 97, 107 (1952); appearing simultaneously in 17 Mo. L. REV. 1, 12 (1952). Professor Brockelbank was chairman of the committee which prepared the Uniform Reciprocal Enforcement of Support Act for the National Conference of Commissioners on Uniform State Laws.

[20] For decisions upholding the constitutionality of this procedure, see Duncan v. Smith, 262 S. W. 2d 373 (Ky. 1953); Smith v. Smith, 125 Cal. App. 2d 154, 270 P. 2d 613 (1954).

[21] In this case, however, petitioner was present at the hearing.

[22] ARK. STAT. ANN. § 34-2412 (Supp. 1953).

[23] N. C. GEN. STAT. § 1-64 (1953) and annotations thereunder.

[24] RESTATEMENT, CONFLICT OF LAWS § 588 (1934).

[25] "The duty of support imposed by the laws of this State *or by the laws of the state where the obligee was present when the failure to support commenced* . . . and the remedies provided for enforcement thereof . . . bind the obligor . . ." N. C. GEN. STAT. § 52A-5. (Emphasis added.)

Because of the election of laws given under an identically worded statute an Ohio respondent was held to have been denied equal protection of the laws of Ohio when Pennsylvania petitioner elected the support laws of Pennsylvania. Pennsylvania *ex rel.* Dep't of Public Assistance v. Mong, 160 Ohio St. 455, 117 N. E. 2d 32 (1954), 29 N. Y. U. L. REV. 1480, 102 U. PA. L. REV. 938.

[26] Certainly, what is meant by the phrase in N. C. GEN. STAT. § 52A-5, "remedies provided for the enforcement thereof," are the "terms and conditions" to which the court of the responding state may subject defendant as set forth in N. C. GEN. STAT. § 52A-15 (Supp. 1953).

lina Act passed by the 1955 General Assembly.[27] These amendments, among other things, take away the obligee's privilege of a questionable election of laws[28] and provide that the person having legal custody of a minor may bring suit.[29] In the instant case the court said that the complete answer to the essentially identically worded Arkansas statute was that ". . . this provision is not in the North Carolina Act."[30] The 1955 amendment places the provision in the North Carolina Act and apparently authorizes suit in the name of the legal custodian or guardian.

With the real party in interest question fairly well settled by statute and with the finding of a duty to support clearly the concern of the court in the responding state, the importance of the instant decision lies in the interpretation of the Act as requiring an obligee to be residing in the initiating state during the proceedings in the responding state. To avoid undue complication in the administration of the support funds, to remove a burden on a state no longer interested in the matter, and to aid in the uniformity of application of the Uniform Reciprocal Enforcement of Support Act, it is hoped that other jurisdictions will adopt this interpretation.

JAMES P. CREWS

Eminent Domain—Limited Access Highways

". . . I can go no further, Sir; my
old bones ache. Here's a maze trod
indeed through forth-rights and meanders!"
The Tempest, Act III, Sc. III.

Which lament might well be echoed by the puzzled motorist confronted by the clover-leafs, under and overpasses, traffic circles and other highway engineering stunts that seem to have mushroomed since the last war. These and other measures have been required by the great increase of traffic on our highways, which has made necessary a basic reconsideration of our highway systems.

The desire for increased safety plus a need for more efficient com-

[27] N. C. Sess. Laws 1955, c. 699. See Note, 33 N. C. L. REV. 513, 550 (1955). The changes made by this act place North Carolina in the group of states which have adopted the 1952 Uniform Reciprocal Enforcement of Support Act. Since a majority of the states and territories have adopted the 1952 Act, reciprocity will be augmented for North Carolina.

[28] N. C. Sess. Laws 1955, c. 699, § 4. "Duties of support applicable under this Act are those imposed or imposable under the laws of any state where the obligor was present during the period or any part of the period for which support is sought. The obligor is presumed to have been present in the responding state during the period for which support is sought until otherwise shown."

[29] N. C. Sess. Laws 1955, c. 699, § 6(d). "A complaint on behalf of a minor obligee may be brought by a person having legal custody of the minor without appointment as next friend."

[30] Mahan v. Read, 240 N. C. 641, 648, 83 S. E. 2d 706, 712 (1954).

munication between urban areas has given rise to the construction of what are called variously "Limited Access Highways," or "Freeways." Basically these are highways to which abutting property owners do not have their usual "right of egress and ingress,"[1] but rather are permitted to have access to the highway at designated intersections only, or to retain their present access, but only at the pleasure of the highway department. Obviously, such highways are designed primarily for through traffic. It will be the purpose of this note to discuss some of the various problems that have already arisen and promise to reappear to plague our courts.

When the state condemns land for highways under its power of eminent domain, the state obtains only an easement of passage,[2] the owner of the land taken for the public use reserving the fee.[3] Upon vacation of the highway by the state, the land normally reverts to the owner, discharged of the easement.[4]

Landowners whose tracts abut on the highway have a universally recognized common law easement of access to the abutting highway[5]

[1] *E.g.*, Calumet Federal Savings & Loan Ass'n of Chicago et al. v. City of Chicago et al., 306 Ill. App. 524, 29 N. E. 2d 292 (1940); County Park Commission of Camden Co. v. Kimble, 24 N. J. Super. 221, 93 A. 2d 647 (1952); Davis v. Alexander, 202 N. C. 130, 162 S. E. 372 (1932); *In re* Appropriation of Easement for Highway Purposes, — Ohio —, 112 N. E. 2d 411, 415 (1952); City of Norman v. Safeway Stores, 193 Okla. 534, 145 P. 2d 765 (1944); Highway Commission v. Burk et al., 200 Ore. 211, 265 P. 2d 783 (1954); 2 AM. LAW OF PROPERTY 494 (1952); see Notes, 100 A. L. R. 491; 47 A. L. R. 902; 22 A. L. R. 942; 36 IOWA L. REV. 150 (1950).

[2] Absent an express statutory sanction the state may acquire land for highways by two methods: (1) by voluntary act of owner, and (2) by condemnation. By the former method the state *may* obtain the fee. By the latter, only an easement. Barclay v. Howell, 6 Pet. 498 (U. S. 1832); Lindel Realty Co. v. Miller, 2 N. J. Super. 204, 62 A. 2d 817 (1948).

[3] Purvis v. Busey, 260 Ala. 373, 71 So. 2d 18 (1954); People v. Thompson, 43 Cal. 2d 13, 271 P. 2d 507 (1954); Hildebrand v. Telegraph Co., 219 N. C. 402, 14 S. E. 2d 252 (1941) (Telephone Co. not allowed to use highway easement without compensating owner of fee.); Davis v. Alexander, 202 N. C. 130, 162 S. E. 372 (1932); Brown v. Electric Co., 138 N. C. 533, 51 S. E. 62 (1905); State v. Jesse Hewell, 90 N. C. 705, 706 (1884) (Jesse was released from an indictment for carrying a concealed weapon in public when it was shown he was carrying it on a public highway passing over his father's land. Ashe, J., found him to be on his own property since the fact that a public road is over the land does not deprive a man of his freehold in the soil: "his title continues in the soil, and the public acquires only an easement, that is, a right of passing and repassing."); Raleigh and Gaston Ry. v. Richard Davis, 19 N. C. 451 (1837); Breinig et ux. v. County of Allegheny et al., 332 Pa. 474, 2 A. 2d 842 (1938) (Owner of fee may control use of highway inconsistent with the easement of passage, i.e. continuous parking.); Bond v. Green et al., 189 Va. 23, 52 S. E. 2d 169 (1949); Dovaston v. Payne, 2 H. Bl. 526, 126 E. R. 684 (1795); 2 AM. LAW OF PROPERTY 482 (1952).

[4] Bond v. Green et al, *supra* note 3.

[5] Cases cited note 1 *supra*. *But cf.* Calumet Federal Savings & Loan Ass'n of Chicago et al. v. City of Chicago et al., 306 Ill. App. 524, 29 N. E. 2d 292 (1940). (Where abutting landowner attempted to *enjoin* construction of a curb by the city which would necessitate the abutter's customers traveling a circuitous route to obtain access. The abutter was thrown on his remedy at law, the court holding the abutter's rights are subservient to reasonable use of police power in the interest of public safety.)

at any and all points. And when the state deprives the owner of abutting land of his access to the highway, extinguishing the easement,[6] he is entitled to compensation[7] even if the state has acquired the land in fee.[8] This is explained on the basis that the right of access to a public highway is an *incident of ownership* of abutting property,[9] and the taking thereof is, consequently, a "taking of property."[10] Thus, where a municipality vacated a street and conveyed it in fee to a private individual, and "the street . . . [was] necessary to free and convenient access to the premises of a particular owner, his right to such use is appurtenant to his premises and cannot be taken without payment of damages."[11] The courts, while they require damages when the abutting owner's right of access is harmed by a re-routing or vacation of the highway,[12] recognize no vested right in any particular flow of traffic over the highway, leaving regulation of traffic to the proper authorities in the exercise of their police power.[13] Even when the

[6] *E.g., In re* Appropriation of Easement for Highway Purposes, — Ohio —, 112 N. E. 2d 411, 415 (1952) and cases cited therein.

[7] Schiefelbein v. U. S., 124 F. 2d 945 (1942); Ridgway v. City of Osceola, 139 Iowa 590, 117 N. W. 974 (1908); Petition of Burnquist, 220 Minn. 48, 19 N. W. 2d 394 (1945); Davis v. Alexander, 202 N. C. 130, 162 S. E. 372 (1932); Thomas v. Farrier, 179 Okla. 263, 65 P. 2d 526 (1937); Note 36 IOWA L. REV. 150 (1950).

[8] County Park Comm. of Camden Co. v. Kimble, 24 N. J. Super. 221, 93 A. 2d 647 (1952); Highway Commission v. Burk, 200 Ore. 211, 265 P. 2d 783 (1954).

[9] Lindel Realty Co. v. Miller, 2 N. J. Super. 204, 62 A. 2d 817 (1948) (And exist whether the fee is in the public or in private owner subject to public easement); 39 C. J. S., *Highways* § 141.

[10] Schiefelbein v. U. S., 124 F. 2d 945 (1942) (*P* owned triangle of 700 acres, bounded on two sides by a river. The government straightened the river, thus completely isolating *P's* tract, although not trespassing on the tract itself. *P's* theory of recovery is in the destruction of the highway *leading to* his land. Held: The owner of land has a private property right in a public highway if the only access to his land is over that highway. A vacation of the highway is a taking of his property for which he is entitled to compensation. N. B.; The property taken here is not the land, but the private property of condemnee *in the highway.*); Petition of Burnquist, 220 Minn. 48, 19 N. W. 2d 394 (1945).

[11] Ridgway v. City of Osceola, 139 Iowa 590, 593, 117 N. W. 974, 975 (1908) ("Where [a] street or alley is necessary to free and convenient access to the premises of a particular owner, his right to such use is appurtenant to his premises and cannot be taken away without payment of damages.").

[12] People v. Ricciardi, 23 Cal. 2d 390, 144 P. 2d 799 (1943) (Poor Mr. Ricciardi was happy enough until the state chose his locale to create a veritable nightmare of cloverleafs, under and overpasses, and express, local, and service lanes. Even his abutter's right to visibility was affected, one state's witness admitting, "it is my opinion that the view will be sufficiently interfered with so that anyone desiring to reach Mr. Ricciardi's property will be inclined to lose his way on account of the circuitous route and fail to reach the property for that reason." *Held:* Here there is more than a mere diversion of traffic. There is a diversion of the highway itself, taking, in effect, his property rights in the highway.)

[13] People v. Sayig, 101 Cal. App. 2d 890, 226 P. 2d 702 (1951) (Construction of strip dividing highway on which *P* abuts not compensable although inconvenient.); Jones Beach Boulevard Estate v. Robert Moses, 268 N. Y. 362, 197 N. E. 313 (1935) (Reductio ad absurdum: *P* was abutter on a parkway where no one was allowed to make a left turn on entering except around "plazas" pro-

state, having abandoned or vacated a public highway *deeds* it to a private owner, there is authority holding that such owner may not obstruct the road if to do so will substantially hinder other owners' access to their property.[14] And the same proposition seems to apply when the state's highway easement is vacated and the land reverts to the abutting owners. Even when the state, under its powers of eminent domain, takes an abutter's *right of access,* the abutter has a cause of action for compensation for the loss of this vested right whether the state actually takes his *land* or not.[15]

Suppose, however, a highway is *newly* located as a *Limited Access* highway. Do abutters have any vested rights of access such as would entitle them to compensation? The few cases that have involved this question seem to answer it in the negative,[16] reasoning that there can be no detriment to a right of easement which never existed and no compensation for a loss never sustained.

A recent Ohio case[17] involves the more intricate problem of the designation of an *existing* highway[18] as a limited access highway under the fairly typical Ohio statute.[19]

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vided for that purpose. Nearest "plaza" to *P* is five miles away, therefore, in order to go to town *P* had to drive five miles on one side of road to the plaza, then turn around and come back. *Held:* Proper and uniform application of police powers. Once access is given, and abutter is on the highway, he is treated just as other traveler thereon.)

[14] Long et al v. Melton, 218 N. C. 94, 10 S. E. 2d 699 (1940); Davis v. Alexander, 202 N. C. 130, 162 S. E. 472 (1932). While the North Carolina court speaks of a maxim, "Once a highway always a highway," in all-inclusive terms, the decided cases all deal with hardship situations. In Long v. Melton, *supra,* however, three justices dissented, feeling that the majority's view should be restricted to cases where access is cut off completely. Lindauer v. Hill, — Okla. —, 262 P. 2d 697 (1953).

[15] Department of Public Works v. Lanter, 413 Ill. 581, 110 N. E. 2d 179 (1953); Nichols v. Commonwealth, 331 Mass. 581, 121 N. E. 2d 56 (1954); City of Norman v. Safeway Stores, 193 Okla. 534, 145 P. 2d 765 (1944); Shapera v. Allegheny County, 344 Pa. 473, 25 A. 2d 566 (1942).

[16] Thus where *P* was originally separated from a certain street by an intervening lot, and that lot was condemned by highway commission for use as "freeway," *P* was held to have acquired no compensable right of access by virtue of construction of the freeway. Since he had no right of access *before* the conversion of the street into a freeway, nothing was taken from him by the failure to give him access when the conversion took place. Compensation in such a case, said Gibson, C. J., would be a gift rather than damages. Schnider v. State, 38 Cal. 2d 439, 241 (1952). The *Schnider* case, *supra,* was cited by the California court when a limited access highway was constructed where no road had before existed. Brand, J., stated that the California and United States constitutions require compensation for the taking of easements only if there are easements to take. Highway Comm. v. Burk, 200 Ore. 211, 265 P. 2d 783 (1954). *See* Rothwell v. Linzell, 163 Ohio St. 517, 127 N. E. 2d 524 (1955).

[17] Rothwell v. Linzell, 163 Ohio St. 517, 127 N. E. 2d 524 (1955).

[18] The case involved a 13.58 mile section of Route 40, also known as the National Road, which was originally constructed by the War Department with funds appropriated by Congress. Construction was begun in 1825 and completed in 1837. [Record, p. 12.]

[19] OHIO GENERAL CODE § 1178-21 (Page, 1946): Which authorizes the director of highways to "lay out, establish . . . regulate . . . 'Limited Access High-

Petitioners were abutting property owners and brought action to enjoin the state highway director from designating a 13.58 mile portion of route 40 as a limited access highway. Petitioners urged that the state and federal constitutional guarantees of equal protection[20] would be violated in that the state highway director had treated abutters along this one stretch of highway in six different manners.[21] They contended also that the words of § 1178-21 Ohio Gen. Code (1946), "access to which [limited access highway] may be allowed only at highway intersections designated by the director," mean "access is allowable *only* at highway intersections designated by the director." And, finally, that the highway in question was not "especially designed for through traffic" and therefore did not come within the statutory definition of "Limited Access Highway."[22]

The court of common pleas and the court of appeals held the director had exceeded his authority in that the 13.58 mile portion was not "especially designed for through traffic" as the statute required, but rather "was designed to serve all comers"[23] when it was rebuilt in 1949. The lower courts also held that the equal protection clauses of the Ohio and federal constitutions were violated in that "persons similarly situated [were not] . . . accorded equal treatment."[24] These courts found that while the constitution permits classification,[25] such classification

ways' . . . within this state" in the same manner as he might lay out etc. ordinary highways, and authorizes him to extinguish by purchase, gift, agreement or condemnation existing easements of access thereto. The director was further "authorized" to lay out and construct "service highways" to provide access from areas adjacent to the Limited Access highways. A Limited Access Highway is defined by the Ohio statute as "a highway especially designed for through traffic and over which abutting property owners have no easement or right of access by reason of the fact that their property abuts upon such highway, and access to which may be allowed only at highway intersections designated by the director."

[20] U. S. CONST. Art. XIV, § 1; OHIO CONST. Art. I, § 2.

[21] The court of common pleas found that in two cases no restriction of access was sought by the Highway Department; in four cases access was restricted only from part of abutter's property; in five cases all access was excluded, but eight driveways were constructed onto the highway from these parcels; in five cases all access was excluded except for one driveway directly onto the highway in each deed; in four cases all right of access was excluded and no access provided; and in four cases no restriction of access was imposed. Brief for Appellant, app. II, p. 3, Rothwell v. Linzell, *supra* note 17.

[22] See note 19 *supra.*

[23] Brief for Appellant, app. II, p. 5, Rothwell v. Linzell, note 17, *supra.*

[24] Brief for Appellant, app. II, p. 6, Rothwell v. Linzell, note 17 *supra;* see note 21 *supra.*

[25] Thus, an ordinance forbidding trucks from displaying other than their own advertising because of an alleged tendency to distract other drivers, was held not violative of equal protection clause because the classification had reference to the purpose of the regulation. Railway Express Co. v. New York, 336 U. S. 106 (1949). Where the statute permitted retention of already established access, but forbade new access. Held, not an unjust discrimination; "classification by which unsuitable conditions are restrained within their existing extent is not unreasonable." Opinion of the Justices, — N. H. —, 105 A. 2d 924, 926 (1954); cited in Wiseman v. Merrill, — N. H. —, 109 A. 2d 42 (1954) (established

must have some reasonable basis.[26] Nor did they concur with the director's contention that he was given the authority to restrict access in this case under the police power.[27]

On appeal the Ohio Supreme Court, Taft, J., reversed. Taking as his text the words of the statute, he held the words in the definition of a limited access highway, "access to which may be allowed only at highway intersections designated by the director," to be permissive,[28] simply showing "the extent to which rights of access to a limited access highway might be curtailed or eliminated." Continuing, Justice Taft paused to observe "considerable weight" should be given an administrative determination by the highway director that a highway was "especially designed"[29] as a limited access highway, and clinched his rationale for holding the director to be within his statutory authority by noting, "It is obviously not necessary that a highway be designed 'exclusively' for through traffic in order to be 'especially' designed for through traffic."

Nor did the supreme court find that the director was required to construct "service highways" to provide access at the designated intersections for abutters whose access to the highway had been acquired or condemned. They left these decisions, as well as the deciding of whose access rights are to be acquired, to the discretion of the director.

The question of equal protection received short shrift: the court stated that such a question can obviously be raised only where the extinguishment of access is by condemnation. For such a loss, the owner is entitled to compensation for decrease in value of his property.[30]

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businesses allowed to retain access.); Jones Beach Blvd. Estate v. Moses, 268 N. Y. 362, 197 N. E. 313 (1935); Suddreth v. Charlotte, 223 N. C. 630, 633, 27 S. E. 2d 650, 653 (1943) (Barnhill, J.: "The discriminations which invalidate an ordinance are those where persons [in the same class] are subjected to different restrictions or are held entitled to different privileges under the same conditions.").

[26] And here there was nothing *on the record* indicating a reasonable basis for discrimination. Brief of Appellant, app. II, p. 7.

[27] Breinig v. County of Allegheny, 32 Pa. 474, 2 A. 2d 842 (1938) (Use of police power by public authority must be reasonable and not capricious or arbitrary.); *but see* Department of Public Works v. Lanter, 413 Ill. 581, 110 N. E. 2d 179, 183 (1953); Note 60 HARV. L. REV. 464 (1947).

[28] Compare this construction with that in Supervisors v. U. S. ex relatione, 71 U. S. 435, 446, 18 L. Ed. 419, 423 (1866); where Swayne, J., states, "Where power is given to public officers, in the language of the act before us ["may"] or in equivalent language—whenever the public interest or individual rights call for its exercise—the language used, though permissive in form, is in fact peremptory." Which view seems rather general; BLACK'S LAW DICTIONARY, p. 1131 (4th ed. 1951). Compare also ORE. LAWS 1947, c. 226 § 14 ("the commission *shall* provide access . . ." [Emphasis supplied.]).

[29] See note 19 *supra*.

[30] U. S. v. Miller, 317 U. S. 329 (1942). (In ascertaining damages it is not proper to take into account an enhancement in value.); Department of Public Works v. Thompson, 43 Cal. 2d 13, 271 P. 2d 507 (1954) (compensation for severance.); In Re Appropriation of Easement for Highway Purposes, 93 Ohio App. 179, 112 N. E. 2d 411 (1952) (Court here lists elements of establishing

Thus, in such cases, petitioners are not in the position of parties whose property rights have been interfered with under the exercise of the power of taxation or the police power, in which cases there would be no compensation. Finally, to the petitioners' contentions that the director did not treat similarly abutters similarly located, the Ohio court laconically announced that "the mere fact, if it is a fact, that the director has failed to perform some duties, is no reason for enjoining him from performing other duties that he is undertaking to perform."

This writer submits that the Ohio court by permitting this public officer to decide for himself what duties to perform and what duties not to perform, when coupled with his discretion in selecting sites and otherwise, may well allow him, subject only to expensive and tedious litigation, to designate by a simple entry in his journal long-established highways as limited access highways, and then by a majestic stroke of his pen to strike off the access of the abutting landowners at will; perhaps because the color of their hair is not pleasing to him, perhaps because their politics are not pleasing to him. Such is not yet the prevailing view of "equal protection."

If North Carolina ever sees fit to enact a limited access highway statute, we would be well advised to avoid such a wholesale grant of power to the highway department. Peterson, J., dissenting in the *Burnquist* case[31] stated the danger succinctly: "the . . . object of the trunk highway system . . . was to get the farmers out of the mud. To the extent that the commissioner can exercise the power here asserted he not only can keep them in the mud, but off the highways altogether."

But if the statutory discretion which the Ohio court seems to have vested in their highway director appears to be overly broad, the North Carolina situation is even more unwarranted. This writer can find no authority whatever for the North Carolina highway commissioner to designate public highways as limited access ways. In fact, the highway department received a negative mandate in 1951 when that legislature expressly refused to pass legislation[32] authorizing limited access highways. Yet, offering no explanation,[33] the North Carolina highway

severance damages as; 1. The fair market value of the property taken, 2. The reduced value of the residue, to be determined after severance and without deduction for benefits.); Highway Commission v. Burk, 200 Ore. 211, 265 P. 2d 783 (1954) (Methods of apportionment of award for loss of access between lessor and lessee.); WIS L. REV. 458 (1953); See note 7 and 8 *supra*.

[31] Petition of Burnquist, 220 Minn. 48, 19 N. W. 2d 394, 413 (1945).

[32] H. B. 569, "...an act to provide for the...establishment...of limited-access facilities...," was introduced in the 1951 North Carolina Legislature, but reported unfavorably in the Senate.

[33] Or, at least, has offered no explanation to this reviewer, who sent to their General Counsel by registered mail (September 26, 1955; registered no 729,

department is busily putting limited access signs on many of our newer highways.[34] Either the highway department is proceeding under a conviction that power to designate limited access highways is implied in the general grant of powers to that department, a conviction which hardly seems tenable, when we consider our court's traditional solicitude for individual rights,[35] or the North Carolina highway department is making an attempt to bluff abutters into a belief that they have lost rights which have, in fact, always been theirs. Let us hope that if these acts are tested in the courts, as they should be, the commission will be able to offer convincing evidence of its authority to designate Limited Access Highways in North Carolina.

HAMILTON C. HORTON, JR.

Torts—Contributory Negligence as a Matter of Law—A Threat to Stare Decisis

In broad daylight the plaintiff-pedestrian, who had looked both ways and had seen no vehicle approaching, started across the open highway and was struck by defendant-motorist eighteen inches from the other side; the motorist was traveling only twenty to twenty-five miles per hour and the plaintiff had clear visibility for 700 feet. The Supreme Court reversed the judgment for the plaintiff on the ground that he was contributorily negligent as a matter of law.[1] Judge Bobbitt, dissenting,[2] thought that there was more reason for submitting this case to the jury than there was in the similar case of *Williams v. Henderson*,[3] because more evidence of due care was shown here. The principal case attempted to distinguish the *Williams* case,[4] but did not seem to

Chapel Hill.) an inquiry as to the authority under which the Commission was constructing Limited Access Highways.

[34] Typical are those erected on the Durham-Chapel Hill highway: "Limited Access Highway. Entrance by permit only. S. H. & P. W. C."

[35] The Minnesota Court, in Petition of Burnquist, 220 Minn. 48, 19 N. W. 2d 394 (1945), reviews the question of whether statutory authority is necessary and tabulates those states which are with and those without statutes. That court found a statute unnecessary, construing the general grant of power to determine what "land" to acquire, to include all interests growing out of land, including easements of access. The great majority of states, however, obviously felt a specific statute necessary: *e.g.*, ILLINOIS ANNO. STAT. c. 121 § 334 *et seq.* (Supp. 1954); ANNO. LAWS OF MASS. c. 81 § 7c (1953); N. Y. CODE ANNO. c. 248 § 30.4 (1937); OHIO GEN. CODE § 1178-21 (Page 1946); ORE. LAWS c. 226 § 14 (1947).

[1] Garmon v. Thomas, 241 N. C. 412, 85 S. E. 2d 589 (1954).

[2] *Id.* at 418, 85 S. E. 2d at 593.

[3] 230 N. C. 707, 55 S. E. 2d 462 (1949). Plaintiff's intestate crossed the open highway to go to her mail box. As she was standing at the box with her back to the road two trucks were approaching, the second following the first at a short distance. The first truck passed and she turned suddenly and walked in front of the second truck. The court held that intestate was not contributorily negligent as a matter of law.

[4] Garmon v. Thomas, 241 N. C. 412, 416, 85 S. E. 2d 589, 592: "'Here the

succeed. In effect, it seems that the *Williams* case was overruled, or at least restricted to its own peculiar facts.

In looking at other cases in this area disharmony is also found.[5] It seems that the phrase "contributory negligence as a matter of law" is readily applied to justify opposite results in cases with similar facts. According to a recent writer, the phrase "explains nothing and succeeds only in creating an aura of mystery about the entire decision."[6]

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defendant was operating his heavily loaded truck at 45 to 50 miles per hour within 150 feet of the vehicle just ahead. As the road was straight he saw or should have seen the deceased on the shoulder of the highway, standing at the mail box before the first truck passed her. She had her back to him and was apparently oblivious to his approach. Yet he did not slacken his speed or apply his brakes or sound his horn. These circumstances present a case for the jury.'" One would think that being "oblivious" while crossing a highway would be contributory negligence as a matter of law; here deceased's oblivion was the very thing that got plaintiff's case to the jury. It seems, therefore, that the only way to reconcile the *Garmon* and *Williams* cases is to think in terms of last clear chance for the *Williams* case.

[5] The following cases held that plaintiff was contributorily negligent as a matter of law: Garmon v. Thomas, 241 N. C. 412, 85 S. E. 2d 589 (1954). Badders v. Lassiter, 240 N. C. 413, 82 S. E. 2d 357 (1954). Wife of plaintiff stopped at the intersection as she was coming out of a servient road and after seeing defendant-motorist approaching from her right about a block away she changed to low gear and went across the intersection at a speed of five miles per hour and did not again look to her right or hear anything until the impact. Singletary v. Nixon, 239 N. C. 634, 80 S. E. 2d 676 (1954). Plaintiff's lights and brakes were adequate when he ran into the defendant truck-trailer as it was backing off the road into a terminus. Johnson v. Heath, 240 N. C. 255, 81 S. E. 2d 657 (1954). Plaintiff who had allegedly never seen the mule drove his automobile into same on a bright moonlight night without slackening his pace or turning to the left when there was nothing in the left lane to prevent such. Sheldon v. Childers, 240 N. C. 449, 82 S. E. 2d 396 (1954). Plaintiff's evidence tended to show that he was driving his automobile about 50 miles per hour, following defendant's tractor-trailer, and when he was about 400 feet to the rear of defendant's vehicle, with a clear view ahead, he blew his horn and turned into the left lane to pass, and when he was about 200 feet behind the tractor-trailer, it pulled into the left lane to enter a dirt road on its left and stopped, blocking all but about two and one-half feet of hard surface on plaintiff's left and about five feet of hard surface and six feet of shoulder level with the pavement on plaintiff's right over which he could have passed. Plaintiff applied his brakes, and there were skid marks for 157 feet before his automobile hit the trailer and stopped.

The following cases held that plaintiff was not contributorily negligent as a matter of law: Williams v. Henderson, 230 N. C. 707, 55 S. E. 2d 462 (1949). Hamilton v. Henry, 239 N. C. 664, 80 S. E. 2d 485 (1954). Plaintiff-motorist, after looking and seeing no other vehicles, slowed down to twenty miles per hour as he entered an intersection. After getting inside the intersection he saw defendant-motorist coming at him to his left about 100 feet away at the rate of about 50 miles per hour, and the left front of defendant's vehicle crashed into the left rear of plaintiff's vehicle as plaintiff's vehicle was two-thirds of the way across the intersection. There was some evidence that just prior to the collision defendant had been looking out of his side window. (Note the similarity between this case and the *Garmon* case, and the fact that the plaintiff in the *Garmon* case was almost across the highway.) Goodson v. Williams, 237 N. C. 291, 74 S. E. 2d 762 (1953). Defendant-motorist struck deceased pedestrian just before deceased had cleared the hard surface on defendant's right. Just before the collision defendant had met another car whose headlights had blinded him, and defendant did not see deceased until he was about five feet away. Bryant v. Watford, 240 N. C. 333, 81 S. E. 2d 926 (1954). Defendant stopped his truck on the highway at night witnout lights and plaintiff-motorist ran into back of the truck.

[6] Note, 33 N. C. L. REV. 138, 142 (1954).

Courts have no trouble with the general rule, for that is established beyond doubt.[7] The real problem of the court is determined whether or not more than one reasonable inference as to negligence may be drawn from the facts. Courts in any jurisdiction that still retains contributory negligence as a defense have trouble at this point;[8] whereas, jurisdictions that have comparative negligence have no such problem.[9] The "reasonable deductions" or "reasonable inferences" that may be drawn from a given set of facts will naturally vary, for such reasoning is subjective in nature—although the objective "reasonable man" is the ultimate criterion. It would take one with divine omniscience to explain why a certain inference is the only permissible one the "reasonable man" would draw in a given case. Split decisions in this area indicate that judges disagree as to when only one inference may be drawn.[10]

[7] 65 C. J. S. § 251 (3) at 1126; DEERING, LAW OF NEGLIGENCE § 12 (1886); BARROWS, HANDBOOK ON THE LAW OF NEGLIGENCE, 35 (1900): "Nor should the court withdraw the case from the jury for the reason that to its mind the facts were so weak as to give no support to the proposition of negligence, either of plaintiff or defendant. The question is, rather, are the facts so weak in the estimate of fair, sound minds, that the law would not tolerate a verdict founded upon them. If but one inference can be drawn from the evidence, it, is, of course, purely a question of law for the decision of the court." SALMOND, THE LAW OF TORTS 38 (1924). Garmon v. Thomas, 241 N. C. 412, 85 S. E. 2d 589 (1954). Bartek v. Grossman, 365 Pa. 522, 52 A. 2d 209 (1947). Sargent v. Williams, 152 Tex. 413, 258 S. W. 2d 787 (1953).

[8] Bartek v. Grossman, 365 Pa. 522, 52 A. 2d 209 (1947), commented on in Note, 21 TEMP. L. Q. 66 (1947). Prospective lessee followed defendant's agent into a dark room to inspect the house he was thinking about renting and fell into a trap door, *held,* contributory negligence as a matter of law. Gills v. New York, C. & St. L. R. Co., 342 Ill. 455, 174 N. E. 523 (1930), commented on in Note, 26 ILL. L. REV. 453 (1931). Plaintiff-motorist waited for the eastward train to pass, and then proceeded across the tracks where he was struck by a westward train along the outer track which train had given no warning, *held,* no contributory negligence as a matter of law: since where there is any evidence which tends to show the use of due care, the question of contributory ngligence is one for the jury. Sargent v. Williams, 152 Tex. 413, 258 S. W. 2d 787 (1953), commented on in Notes, 5 BAYLOR L. REV. 391 (1954) and 32 TEX. L. REV. 469 (1954). Two girls, aged 13 and 14, voluntarily rode with a 13 year old boy, who drove 110 miles per hour, and who had a reputation for recklessness, *held,* the girls were contributorily negligent as a matter of law. See strong dissent. 152 Tex. 413, 422, 258 S. W. 2d 787, 791.

[9] Jurisdictions that have abolished contributory negligence as a defense and now have comparative negligence simply submit the case to the jury, in every instance, and let the jury determine what percentage of the total damage was attributable to the negligence of the respective litigants. See Note, 24 N. Z. L. J. 300 (1948). For a suggested comparative negligence law for North Carolina see: *Proposals for Legislation in North Carolina* 11 N. C. L. REV. 51, 52, 59 (1932). Such a statute has been introduced a number of times before the North Carolina General Assembly, the last time being in 1953, and has always been defeated.

[10] The following are some of the recent split-decisions: Garmon v. Thomas, 241 N. C. 412, 85 S. E. 589 (1954); Winfield v. Smith, 230 N. C. 392, 53 S. E. 2d 251 (1949); McIntyre v. Monarch Elevator Co., 230 N. C. 539, 54 S. E. 2d 45 (1949); Powell v. Lloyd, 234 N. C. 481, 67 S. E. 2d 664 (1951); Badders v. Lassiter, 240 N. C. 413, 82 S. E. 2d 357 (1954); Singletary v. Nixon, 239 N. C. 634, 80 S. E. 2d 676 (1954); Beck v. Hooks, 218 N. C. 105, 10 S. E. 2d 608 (1940); Bartek v. Grossman, 365 Pa. 522, 52 A. 2d 209 (1947); Sargent v. Williams, 152 Tex. 413, 258 S. W. 2d 787 (1953).

At one time the court would automatically declare plaintiff contributorily negligent as a matter of law when he "outran his headlights."[11] This was called the "mathematical rule" or "mathematical formula."[12] In effect, the "mathematical rule" said that contributory negligence is the only inference that may be drawn where plaintiff "outran his headlights." There was opposition to the "rule" in the courts,[13] and writers were critical of it.[14] In 1953 the General Assembly saw fit to abolish the "mathematical rule" by amending G. S. § 20-141.[15]

The "mathematical rule" as applied to "outrunning headlights" cases was commendable in that litigants would know what the court would hold once it was established that plaintiff had been "outrunning his headlights." But the obvious fallacy to such a rule is that there may be "outrunning headlights" situations in which the plaintiff is not guilty of contributory negligence. Such being true, the "rule" clearly violates the single inference idea. By nature, then, it seems that the rule of "contributory negligence as a matter of law" defies any such restrictions as the "mathematical formula."

Failure to yield the right of way on the open highway has been held not to be contributory negligence per se,[16] and contributory negligence of the pedestrian is not presumed from the mere fact that he is killed.[17] Therefore, it seems that anything like the "mathematical rule" is excluded from this area.

Rules such as the "mathematical formula" have been applied to other areas. In the famous case of *Baltimore & Ohio R. R. v. Good-*

[11] Beck v. Hooks, 218 N. C. 105, 10 S. E. 2d 608 (1940). See also Tyson v. Ford, 228 N. C. 778, 47 S. E. 2d 251 (1948); Cox v. Lee, 230 N. C. 155, 52 S. E. 2d 355 (1949); and Chaffin v. Brame, 233 N. C. 377, 64 S. E. 2d 276 (1951).

[12] Notes, 27 N. C. L. REV. 153 (1948) and 31 N. C. L. REV. 412, 415 (1953).

[13] Beck v. Hooks, 218 N. C. 105, 115, 116, 10 S. E. 2d 608, 614 (1940). Clarkson, J. (dissenting), joined by Seawell and Devin, J. J., said: "It was not the intention of the court that this case should depart from the rule of reasonable prudence and substitute for it a mathematical form. . . . The practice of making out a case against the plaintiff on his evidence taken as a whole is unwarranted in an appellate court, necessarily involving a consideration of the weight of testimony. For the same reason it is even worse to make out a case against him upon the defendant's evidence, however uncontradicted."

[14] See note 12 *supra*.

[15] N. C. GEN. STAT. § 20-141 subsection (e) was amended to provide, "that the failure or inability of a motor vehicle operator who is operating such vehicle within the maximum speed limits prescribed by G. S. § 20-141 (b) to stop such vehicle within the radius of the lights thereof or within the range of his vision shall not be considered negligence per se or contributory negligence per se in any civil action, but the facts relating thereto may be considered with other facts in determining the negligence or contributory negligence of such operator." See Gantt v. Hobson, 240 N. C. 426, 82 S. E. 2d 384 (1954) where inability of motorist to stop within the radius of his lights was held not to be insulating negligence.

[16] Simpson v. Curry, 237 N. C. 260, 74 S. E. 2d 649 (1953).

[17] Goodson v. Williams, 237 N. C. 291, 74 S. E. 2d 485 (1953).

man,[18] Justice Holmes delivering the opinion, it was decided that before crossing a railroad track the motorist must stop, look, listen and get out of vehicle if necessary. Six years later *Pokora v. Wabash Ry* overruled the Goodman case, Justice Cardozo saying:

> "If the driver leaves his vehicle when he nears a cut or curve, he will learn nothing by getting out about the perils that lurk beyond. By the time he regains his seat and sets his car in motion, the hidden train may be upon him."[19]

The opinion criticized "rules artificially developed, and imposed from without."[20] The 1937 General Assembly of North Carolina—no doubt with the *Pokora* case in mind—passed two statutes which provided that failure of the motorist to stop at railroad crossings[21] or to stop before entering a main highway from a servient road[22] is not to be considered contributory negligence per se.[23] In view of those two statutes and the recent amendment to G. S. § 20-141, the North Carolina courts should be less prone to nonsuit plaintiffs on the ground of contributory negligence as a matter of law.

There is no simple solution to the problem. As long as we retain the rule that certain cases are to be resolved by the court pursuant to the single inference idea we are going to have close decisions, frustrated litigants, and sometimes actual violations of the jury's prerogative—not to mention irreconcilable cases. One solution might be the General Assembly's passage of a comparative negligence law, in which event negligence would always be a jury question.[24] At least we would have stare decisis unencumbered in that every case would go to the jury.

As the rule of contributory negligence as a matter of law remains in use we may as well reconcile ourselves to inconsistent and irreconcilable cases.[25] At present it seems that the only thing that we can

[18] 275 U. S. 66 (1927). See Note, 43 HARV. L. REV. 926 (1930).
[19] 292 U. S. 98, 104 (1933).
[20] *Id.* at 105 (after giving illustrations of hazards involved in leaving the vehicle to observe the track): "Illustrations such as these bear witness to the need for caution in framing standards of behavior that amount to rules of law. The need is more urgent when there is no background of experience out of which the standards have emerged. They are then, not the natural flowerings of behavior in its customary forms, but rules artificially developed, and imposed from without."
[21] N. C. GEN. STAT. § 20-143.
[22] N. C. GEN. STAT. § 20-158.
[23] Nonsuit of the plaintiff for failure to stop before entering a main road is proper if plaintiff is contributorily negligent as a matter of law. Badders v. Lassiter, 240 N. C. 413, 82 S. E. 2d 357 (1954).
[24] Note, 24 N. Z. L. J. 300 (1948) and *Proposals for Legislation in North Carolina* 11 N. C. L. REV. 51, 52 (1932).
[25] Those who dislike the confinement of consistency may find consoling this quotation from Ralph Waldo Emerson: "A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines. With

do is rest each case upon its own peculiar facts and hope that a more consistent policy will develop.[26]

GERALD CORBETT PARKER

Torts—Contributory Negligence—Standard of Care Required of Persons under Physical Disability

In the principal case[1] the plaintiff, a 76-year-old blind man, was suing for injuries sustained when he slipped and fell on the unfinished curbing of a street being repaired in the city of Winston-Salem. The trial court granted a nonsuit on the ground of contributory negligence because the plaintiff knew that the road was being repaired and was thus under notice of its dangerous condition. On appeal before the supreme court the nonsuit was affirmed.

The plaintiff in this case was nonsuited because he failed to use due care. Just what the words due care mean in regard to any given set of circumstances is often difficult to determine. The interpretation becomes even more difficult when applied to circumstances involving a person under physical disability. However, the court states in its opinion that due care is "that standard of care which the law has established for everybody."[2]

In regard to standard of care the *Restatement of Torts* has this to say:

> "Unless the plaintiff is a child or an insane person, the standard of conduct to which he should conform is the standard to which a reasonable man would conform under like circumstances."[3]

One widely accepted authority in the field of torts gives this insight into the problem:

> "The standard required of an individual is that of the supposed conduct, under similar circumstances, of a hypothetical person, the reasonable man of ordinary prudence, who repre-

consistency a great soul has simply nothing to do. He may as well concern himself with his shadow on the wall." THE WORKS OF RALPH WALDO EMERSON 58 (E. E. Emerson ed. 1883).

[26] Decisions, 14 BROOKLYN L. REV. 137, 140 (1947). Cole v. Koonce, 214 N. C. 188, 191, 198 S. E. 637, 638 (1938), cited in Note, 29 N. C. L. REV. 301, 305 (1951) in passing upon the conduct of the plaintiff and his ability, by the exercise of due care, to avoid the consequences of defendant's negligence, the court said: "where the factors of decisions are numerous and complicated ... and estimates of witnesses play a prominent part ... practically every case must 'stand on its own bottom.'"

[1] Cook v. Winston-Salem, 241 N. C. 422, 85 S. E. 2d 696 (1954).

[2] *Id.* at 431, 85 S. E. 2d at 702.

[3] RESTATEMENT, TORTS, § 464 (1) (1934).

sents the community ideal of reasonable behavior. The characteristics of this imaginary person include:

a. The physical attributes of the actor himself.
b. Normal intelligence and mental capacity.
c. Normal perception and memory, and a minimum of experience and information, common to all in the community.
d. Such superior skill and knowledge as the actor has, or holds himself out as having, when he undertakes to act."[4]

Corpus Juris Secundum summarizes the situation in the following language:

> "A person under any physical disability is required to exercise ordinary care to avoid injury, and, if he fails to do so and such failure contributes proximately to the injury, he is guilty of contributory negligence. . . . Ordinary care in the case of such a person is such care as an ordinarily prudent person with a like infirmity would have exercised under the same or similar circumstances."[5]

American Jurisprudence states:

> "There is no higher or different standard of care for one who is aged, feeble, blind, halt, deaf, or otherwise than for one in perfect physical condition."[6]

The few authorities quoted above serve only to show the wide divergence of legal thought in regard to the standard of care required of a person under a physical disability. The terms due care, ordinary care, the standard of a reasonable man under similar circumstances, and a standard of care no different from that of one in perfect physical condition are attempts to formulate an objective standard for instructions to juries by which they may be guided; however, the differences in the use of language may tend to confuse rather than to clarify any attempt at an understanding of the standard required.

However, a brief look at some of the decided cases may shed further light upon the problem. The problem has arisen in regard to the blind,[7] the deaf,[8] the lame,[9] the intoxicated,[10] and others.[11]

[4] PROSSER, TORTS, § 31, p. 124 (1955). See also RESTATEMENT, TORTS, § 289 and comments (1934).
[5] 65 C. J. S. § 142, p. 782.
[6] 38 AM. JUR. § 210, p. 895.
[7] Balcom v. City of Independence, 178 Iowa 685, 160 N. W. 305 (1916); Hill v. City of Glenwood, 124 Iowa 479, 100 N. W. 522 (1904); Keith v. Worcester R. R., 196 Mass. 478, 82 N. E. 680 (1907); Weinstein v. Wheeler, 127 Ore. 406, 257 Pac. 20 (1928); Smith v. Sneller, 345 Pa. 68, 26 A. 2d 452 (1942); Flynn v. Pittsburgh R. R., 234 Pa. 335, 83 Atl. 207 (1912). See note: 141 A. L. R. 718.
[8] Smith's Administrator v. Railway Co., 146 Ky. 568, 142 S. W. 1047 (1912); Jadubiec v. Hasty, 337 Mich. 205, 59 N. W. 2d 385 (1953); Mitchell v. Seaboard

First of all, the fact that a person is blind, deaf, or otherwise disabled does not make it negligence for him to be upon the public streets. This seems to be the law generally[12] as well as in North Carolina.[13]

In many cases the standard of care applied by the courts has been the care of an ordinarily careful and prudent person having a like defect.[14] For example, in a Georgia case involving a deaf plaintiff who was struck by a streetcar, the court stated that the fact that the plaintiff was deaf "did not imply that he was required to exercise only that care which a prudent man who could hear would use, but which a prudent man in the same condition as to impairment of his hearing would exercise."[15] It may be pointed out that the above standard was that of the ordinary deaf person (or of the ordinary blind person, or of the ordinary lame person).

Ordinary care has been the standard applied by many courts, probably on the basis that they feel that the test should be the same for all sane adults. In *Toledo, P. & W. R. R. v. Hammett,* the trial court's instruction that the plaintiff was "bound to use that degree of care which an ordinarily prudent person whose hearing was so defective should have used under the circumstances . . ." was reversed by the appellate court.[16] The Illinois court said: "That degree or kind of care required to be used must be the same in the case of all adult persons in possession of their natural senses,—that is, that it should be reasonable and ordinary care. It cannot rest upon a sliding scale, depending upon the acuteness of or defects in the senses of sight, hearing, or feeling."[17]

However, many courts have held that a defect in one of the senses imposes the necessity of greater care upon the use of the remaining

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Airline R. R., 153 N. C. 116, 68 S. E. 1059 (1910); McCann v. Sadowski, 287 Pa. 294, 135 Atl. 207 (1927). See Note, 17 U. OF DETROIT L. J. 105 (1953).

[9] Denver v. Willson, 81 Colo. 134, 254 Pac. 153 (1927); Bianchetti v. Luce, 222 Mo. App. 282, 2 S. W. 2d 129 (1928); Payne v. West Chester, 273 Pa. 570, 117 Atl. 335 (1922).

[10] Straughn's Adm'r v. Fendly, 301 Ky. 209, 191 S. W. 2d 391 (1945); Epellett v. Sault Ste. Marie, 144 Mich. 392, 108 N. W. 360 (1906); McMichael v. Pennsylvania R. R., 331 Pa. 584, 1 A. 2d 242 (1938).

[11] Wray v. Fairfield Amusement Co., 126 Conn. 221, 10 A. 2d 600 (1940) (bone condition); Mahan v. State to Use of Carr, 172 Md. 373, 191 Atl. 575 (1937) (short stature); Edwards v. Three River, 102 Mich. 153; 60 N. W. 454 (1894) (deceased condition); Singletary v. A. C. L. R. R., 217 S. C. 212, 60 S. E. 2d 305 (1950) (dwarf); Eleason v. N. Y. Ry., 254 Wis. 134, 35 N. W. 2d 301 (1948) (epileptic fits).

[12] Neff v. Wellesley, 148 Mass. 487, 20 N. E. 111 (1889); Weinstein v. Wheeler, 127 Ore. 406, 257 Pac. 20 (1928).

[13] Cook v. Winston-Salem, 241 N. C. 422, 85 S. E. 2d 696 (1954); Foy v. Winston, 126 N. C. 381, 35 S. E. 609 (1900).

[14] Jones v. Bayley, 49 Cal. App. 2d 567, 122 P. 2d 293 (1942); Kerr v. Connecticut Co., 107 Conn. 304, 104 Atl. 751 (1928); Trumbley v. Moore, 151 Neb. 780, 39 N. W. 2d 613 (1949).

[15] Atlanta Consol. Street Ry. v. Bates, 103 Ga. 333, 350, 30 S. E. 41, 49 (1897).

[16] 220 Ill. 9, 13, 77 N. E. 72, 74 (1906).

[17] *Id.* at 13, 77 N. E. at 74.

senses.[18] In an early Massachusetts decision, the court said that "if the plaintiff was a person of poor sight, common prudence required of her greater care in walking upon the streets, and avoiding obstructions, than is required of persons of good sight."[19]

The North Carolina court in the principal case, following *Foy v. Winston*,[20] seemed to agree with this theory. It is clear that the word "care" as used by the Massachusetts and North Carolina courts refers to the particular plaintiff's effort or diligence or care and not to the standard of care. In the *Cook* case the court avoids any possible confusion by using the word "effort" as follows: "Plaintiff's evidence compels the conclusion that he, a blind man, failed to put forth a greater degree of effort than one not acting under any disabilities to attain due care for his own safety: that standard of care which the law has established for everybody. . . . Such a failure to use due care for his own safety was a proximate contributing cause of his injuries."[21]

It is submitted that this statement of the North Carolina Supreme Court leads to a clearer understanding of the standard of care required of persons under physical disability and, if followed generally, would remove much of the existing confusion.

DONALD LEON MOORE

Torts—Negligence—Injuries to Elevator Passengers

In a recent case the Supreme Court of North Carolina upheld a nonsuit on the ground that the plaintiff, an elevator passenger, was guilty of contributory negligence.[1] In this case the court, by implication, followed the rulings of previous North Carolina decisions that the owner of an elevator owes a passenger riding thereon that degree of care exercised by the ordinary prudent man under the circumstances.[2] Various jurisdictions have used different approaches in determining the protection to be afforded passengers on elevators in terms of the duties owed by manufacturers and those under contracts to maintain, as well as owners.

[18] Hill v. City of Glenwood, 14 Iowa 479, 100 N. W. 522 (1904); Winn v. Lowell, 1 Allen 177 (Mass., 1861); Fann v. North Carolina R. R., 155 N. C. 136, 71 S. E. 81 (1911).
[19] Winn v. Lowell, 1 Allen 177, 180 (Mass., 1861).
[20] 126 N. C. 381, 35 S. E. 609 (1900).
[21] Cook v. Winston-Salem, 241 N. C. 422, 431, 85 S. E. 2d 696, 702 (1954).

[1] Waldrup v. Garver, 240 N. C. 649, 83 S. E. 2d 663 (1954). The North Carolina court held that where the plaintiff's evidence showed that the tenant of a building failed to use lighting facilities provided by the owner of the building, opened an elevator, and stepped into an open shaft, a nonsuit was proper as contributory negligence was shown in the plaintiff's evidence. The court implied, however, that the defendant building owner owed his tenant the ordinary degree of care.
[2] Ramsey v. Nash Furniture Co., 209 N. C. 165, 183 S. E. 536 (1936); Hood v. Mitchell, 206 N. C. 156, 173 S. E. 61 (1934); Scott v. Western Union Telegraph Co., 198 N. C. 795, 153 S. E. 413 (1930).

Some courts have ruled with North Carolina in refusing to afford special protection to elevator passengers with respect to the duty owed by elevator owners.[3] On the other hand, others have felt that passengers on elevators should be afforded special protection in terms of the liability of owners and have held owners to the highest degree of care.[4] Those jurisdictions, including North Carolina, which hold the duty of owners to be that of ordinary care, base their decisions on the propositions that (1) elevator owners are not servants of the public[5] and (2) they are not under enforceable obligations to receive passengers.[6] As practical matters, these reasons are not too cogent, for elevator owners, especially department stores and hotels, do offer their facili-

[3] *District of Columbia:* Woodward and Lothrop v. Lineberry, 60 App. D. C. 164, 50 Fed. 2d 314 (1913); *Iowa:* Johnson v. Lincoln Hotel Co., 189 Iowa 29, 177 N. W. 550 (1920); *Massachusetts:* Seaver v. Bradley, 179 Mass. 39, 60 N. E. 795 (1901); *Michigan:* Burgess v. Stowe, 134 Mich. 204, 96 N. W. 29 (1903); *Missouri:* Phegley v. Graham, 358 Mo. 551, 215 S. W. 2d 499 (1948). In this case the court stated that the defendant building owner owed the ordinary degree of care, and that he could not delegate this duty. Kennedy v. Phillips, 319 Mo. 573, 5 S. W. 2d 33 (1928); Cox v. Bondurant, 220 Mo. App. 948, 7 S. W. 2d 403 (1925); *Montana:* Chicas v. Foley Bros. Grocery Co., 73 Mont. 575, 236 Pac. 361 (1925); *New Jersey:* McCracken v. Myers, 75 N. J. L. 935, 68 Atl. 805 (1908); *New York:* Cohen v. Sun Ins. Office, 198 N. Y. 177, 91 N. E. 263 (1910). The court in this case stated that a landlord cannot delegate his duty to use reasonable care in the operation of his elevator so as to relieve himself of liability. *Rhode Island:* Edward v. Manufacturer's Building Co., 27 R. I. 428, 61 Atl. 646 (1905); *Texas:* Martin Inc. Co. v. Trevey, 8 S. W. 2d 527 (Tex. Civ. App. 1928); *Washington:* Myers v. Little Church by the Side of the Road, 37 Wash. 2d 897, 227 P. 2d 165 (1951). Here the court ruled that a master owes his servant the duty of supplying a reasonably safe place of work, and that this duty is non-delegable. *West Virginia:* Brown v. De Marie, 131 W. Va. 264, 46 S. E. 2d 797 (1948).

[4] *Alabama:* Ensley Holding Co. v. Kelly, 229 Ala. 650, 158 So. 896 (1934); Morgan v. Saks, 43 Ala. 139, 38 So. 848 (1905). In this case the court held that the defendant was bound to use the highest degree of care while the plaintiff was entering the elevator as well as while he was in it. *California:* Champagne v. A. Hamburger and Sons, Inc., 169 Cal. 683, 147 Pac. 954 (1915); Treadwell v. Whitier, 80 Cal. 574, 22 Pac. 266 (1889); *Illinois:* Carson v. Weston Hotel Corp., 351 Ill. App. 53, 115 N. E. 2d 800 (1953). Here the court stated the rule as requiring extraordinary care and diligence on the part of the owner. Hefferman v. Mandel Bros., 297 Ill. App. 272, 17 N. E. 2d 523 (1938); *Indiana:* Tippecanoe Loan and Trust Co. v. Jester, 180 Ind. 357, 101 N. E. 915 (1913); *Kentucky:* Kentucky Hotel Corp. v. Camp, 97 Ky. 424, 30 S. W. 1010 (1895); *Minnesota:* Goodsell v. Taylor, 41 Minn. 207, 42 N. W. 873 (1889); *Missouri:* Hensler v. Stix, 113 Mo. App. 566, 88 S. W. 108 (1905); *Nebraska:* Grimmel v. Boyd, 94 Neb. 240, 142 N. W. 893 (1913); *Nevada:* Smith v. Odd Fellows Bldg. Ass'n, 46 Nev. 48, 205 Pac. 796 (1922); *Pennsylvania:* McKnight v. S. S. Kresge Co., 285 Pa. 489, 135 Atl. 575 (1926); Fox v. Philadelphia, 208 Pa. 127, 57 Atl. 356 (1904); *Virginia:* Murphy's Hotel, Inc. v. Cuddy's Adm'r, 124 Va. 207, 97 S. E. 794 (1919); *Wisconsin:* Dibbert v. Metropolitan Inv. Co., 158 Wis. 69, 147 N. W. 3 (1914). In all of the above cases the owners of elevators were characterized as common carriers. *Oregon:* Kelly v. Lewis Inv. Co., 66 Ore 1, 133 Pac. 826 (1913). In this case elevator owners were classified as carriers for hire rather than common carriers. *Texas:* O'Connor v. Dallas Cotton Exchange, 153 S. W. 2d 266 (Tex. Civ. App. 1941). Here the defendant was held to the highest degree of care, even though the court refused to hold that he was a common carrier.

[5] Edwards v. Manufacturers Bldg. Co., 27 R. I. 248, 61 Atl. 646 (1905).

[6] Seaver v. Bradley, 179 Mass. 329, 60 N. E. 795 (1901).

ties for use by the general public. On the other hand, courts affording passengers special protection put forward excellent reasons for their decisions. They point to the fact that an elevator passenger is in a completely helpless condition—moving either up or down in a machine over which he has no control, and in which he is unable to protect himself from serious injury or death.[7] Other factors alluded to as good reasons for affording passengers special protection are the owner's knowledge that his facilities will be used by the public, and his derivation of profit from the maintenance of elevators.[8]

Although North Carolina has refused to grant passengers special protection in terms of owners' liability, it has afforded them some aid in suits against one under a contract to maintain the elevators in a safe condition by labeling elevators "dangerous instrumentalities."[9] This label enables persons injured in elevator accidents to recover in actions against persons contracting to maintain elevators, even though plaintiffs in such actions are not parties to the contracts. Several other jurisdictions are in accord with North Carolina on this point.[10] Still others have reached the same result without describing elevators as "dangerous instrumentalities."[11] Those courts finding such a duty point out that where elevators are defective, serious injuries or death is likely to result, and that such results are traceable to failures on the part of the contractor to fulfill his contractual obligation to keep in repair. A few jurisdictions have held that one under a contract to maintain owes no duty to passengers because they are not parties to the contract. However, these cases are either old ones,[12] or ones in which the defect is chargeable to someone other than the contractor.[13]

The Supreme Court of North Carolina has not directly passed upon the protection to be afforded passengers in terms of the duty owed by

[7] Treadwell v. Whitier, 80 Cal. 574, 22 Pac. 66 (1889).

[8] Champagne v. A. Hamburger and Sons, Inc., 169 Cal. 683, 147 Pac. 954 (1915); Hefferman v. Mandel Bros., 297 Ill. App. 272, 17 N. E. 2d 523 (1938). In these cases the courts pointed out that elevator owners, especially department stores and hotels, provide their facilities in order to increase patronage.

[9] Jones v. Otis Elevator Co., 231 N. C. 285, 56 S. E. 2d 684 (1949). Here the court was applying Virginia substantive law. Actually the court stated that an elevator is not an inherently dangerous instrumentality, but that it may become one by the defendant's work on it.

[10] Dahms v. General Elevator Co., 214 Cal. 733, 7 P. 2d 1013 (1932); Berg v. Otis Elevator Co., 64 Utah 318, 231 Pac. 832 (1924).

[11] Carson v. Weston Hotel Corp., 342 Ill. App. 602, 97 N. E. 2d 620 (1951); Dobson v. Otis Elevator Co., 324 Mo. 1147, 26 S. W. 2d 942 (1930). In these cases the courts held the defendants liable on the ground that one who supplies a thing for such use by others where it is obvious that any defect will be likely to result in injury to those so using it, is liable to any person who, using it properly for the purpose for which it was intended, is injured by its defective condition.

[12] Simmons v. Gregory, 27 Ky. L. Rep. 509, 85 S. E. 751 (1905).

[13] McDonald v. Haughton Elevator and Machine Co., 60 Ohio App. 185, 20 N. E. 2d 253 (1938).

elevator manufacturers. In most cases the manufacturers contract with the owners to maintain the elevator in a safe condition, and suits are brought against manufacturers for failure to maintain and not on the grounds of negligent manufacturing. Most jurisdictions that have determined the duty of manufacturers have preferred to protect the passenger by finding a duty of ordinary care owed to members of the public although there is no privity of contract between the defendant manufacturer and the complaining passenger.[14] Only one case has flatly refused to find such an obligation,[15] and the court deciding it failed to give any reasons for so holding.

Regardless of their approach with regard to the duty owed, whether by manufacturers, contractors to maintain or owners, a number of the courts have enabled complaining passengers to withstand nonsuits, even though they fail to prove any specific negligence on the part of the defendants, by the use of the res ipsa loquitur doctrine.[16] One court has disagreed with this view for technical reasons,[17] but policy, at least, seems to be on the side of the courts accepting this view. As a practical matter, it is almost impossible to prove what specific negligence was the cause of an elevator accident, even though such accidents are not likely to occur without negligence on someone's part.

Some courts have further aided injured elevator passengers by stating that passengers can rely on the safety devices with which elevators are equipped,[18] thus limiting the availability of the defense of contributory negligence as a bar to their action.

Throughout the cases affording passengers protection runs a cogent line of reasoning, as follows:

1. Elevator passengers are in a completely helpless position.

[14] Buteman v. Doughnut Corp., 63 Cal. App. 2d 711, 147 P. 2d 404 (1944). In this case the court ruled that, as the defendant was the manufacturer of an inherently dangerous instrumentality, he owed a duty to the plaintiff even though there was no privity of contract between the defendant and the plaintiff. Dahms v. General Elevator Co., 214 Cal. 733, 7 P. 2d 1013 (1932).

[15] McDonald v. Haughton Elevator and Machine Co., 60 Ohio App. 185, 20 N. E. 2d 253 (1938).

[16] *Illinois:* Carson v. Weston Hotel Corp., 351 Ill. App. 523, 115 N. E. 2d 800 (1953); Hefferman v. Mandel Bros., Inc., 297 Ill. App. 272, 17 N. E. 2d 523 (1938); *North Carolina:* McIntyre v. Monarch Elevator and Machine Co., 230 N. C. 539, 53 S. E. 2d 528 (1949); Stewart v. Carpet Co., 138 N. C. 60, 50 S. E. 562 (1905); *Pennsylvania:* McKnight v. S. S. Kresge Co., 285 Pa. 489, 132 Atl. 575 (1926); Fox v. Philadelphia, 208 Pa. 127, 57 Atl. 356 (1904); *Wisconsin:* Dibbert v. Metropolitan Inv. Co., 158 Wis. 69, 147 N. W. 3 (1914).

[17] Feinberg v. Hotel Olmsted Co., 152 Ohio St. 417, 89 N. E. 2d 569 (1949). The court here refused to apply the res ipsa loquitur doctrine to an elevator injury where the machine was a self-service elevator on the grounds that it was not within the exclusive control of the defendant.

[18] Morgan v. Saks, 43 Ala. 139, 38 So. 848 (1905); Hood v. Mitchell, 206 N. C. 156, 173 S. E. 61 (1934); Garret v. Eugene Medical Center, 190 Ore. 117, 224 P. 2d 563 (1950).

2. Owners, contractors to maintain, and manufacturers provide their services for profit.

3. The defects which result in injury are traceable to some dereliction in duty on the part of either the owner, the one under a contract to maintain or the manufacturer.

4. The specific negligence causing the accident is hard to determine and prove.

5. Where one of two parties has to suffer, the law will cast liability on the one who made the injury possible who, in these cases, happens to be either the owner, the contractor, or the manufacturer.

HENRY L. FOWLER, JR.

Torts—Nuisance—Wild Animals

The North Carolina Supreme Court was recently faced with a most interesting and unique case arising out of a dispute between adjoining landowners culminating in an action founded on a theory of nuisance.[1] The defendant in this case constructed on his farm in Richmond County an artificial pond of about three and one half acres at a point within 400 feet of the neighboring plaintiff's farm. During the winter of 1951-52 the defendant placed lame wild geese on his pond and baited the surrounding area of the pond with food, thus attracting large numbers of migrating geese, southward bound in search of comfortable winter quarters. Between the months of October 1951 and June 1952 approximately 200 wild geese nestled by the defendant's pond and from there foraged on the plaintiff's corn field destroying about one and one half acres of corn with a market value of $48.00. The next winter the migrating flock returned, but increased in numbers, and 1200 geese fed on $105.00 worth of the plaintiff's corn. During the winter of 1953-54 the geese returned for the third time, 3000 strong, and consumed 400 bushels of the plaintiff's wheat ($1,036), seven acres of pasture grass ($100), 140 bushels of barley ($154), and 75 bushels of oats ($52), causing the plaintiff damages totalling some $1,343.00 for the year.

The defendant, demurring, answered that the complaint failed to allege any duty owed the plaintiff to protect his property from wild geese, or that the defendant was negligent in this respect, or in any respect proximately causing the plaintiff's injury; and that since plaintiff failed to allege that the defendant in any way owned, possessed or controlled the wild geese, he could not be liable for the trespasses of animals which are *ferae naturae*.

The supreme court, overruling the trial court, held that the plaintiff had stated a good cause of action. The court pointed to the fact

[1] Andrews v. Andrews, 242 N. C. 382, 88 S. E. 2d 88, (1955).

that the complaint alleged that the defendant knew that it was the nature of wild geese to collect during the winter season at such favorable havens as the defendant's pond, to feed on the surrounding countryside, and to return to the same location in succeeding years accompanied by their offspring and other geese so long as the shelter and lame decoys were maintained by the defendant.

The court had difficulty finding North Carolina precedent, or for that matter any cases in point, and relied on garden-variety nuisance decisions grounded on facts showing interference with the enjoyment of land by neighboring commercial or industrial enterprises.[2] In this connection, the court noted that negligence was not an indispensable element of nuisance, and recited the often repeated Latin maxim which seems to lurk in the background of nuisance actions: *"Sic utere tuo ut alienum non laedas* (to use your own so that you do not injure another)."[3]

The majority opinion, written by Justice Higgins, characterized the plaintiff's cause of action as a private nuisance *per accidens* (depending on the circumstances of the interference in relation to the surrounding conditions) as distinguished from a private nuisance *per se* (unlawful interference regardless of location or surroundings). The court evidently found the circumstances of the interference sufficiently compelling to warrant plaintiff's cause of action, even without clear legal precedent to guide it. Noting the perilous position of the plaintiff, they suggested that, "at the same rate of increase 7,500 will be there this year and 20,000 next. If there is no relief for the plaintiff as of the date suit was brought, there will be none next year. Surely the arm of the law is neither too short nor too weak to reach out to the pond and take away the wild geese maintained as prisoners there to attract their kind in ever increasing numbers."[4]

Justice Parker, in a dissenting opinion, concurred completely with defendant's contention that there can be no liability for the trespass of wild geese which are not owned or reduced to possession by the defendant. On this point the dissent cited a Federal Tort Claims action by private landowners against the United States for the negligence of its employees in the operation of its game reserve for migratory waterfowl, Canadian geese. The court there denied recovery, holding that a person cannot be held liable on a theory of negligence for the trespasses of animals *ferae naturae* which exist free in nature.[5]

[2] Morgan v. High Penn Oil Co., 238 N. C. 185, 77 S. E. 2d 682 (1953); Holton v. Northwestern Oil Co., 201 N. C. 744, 161 S. E. 391 (1931).
[3] Andrews v. Andrews, 242 N. C. 382, 389, 88 S. E. 2d 88, 92 (1955).
[4] *Id.* at 388, 88 S. E. 2d at 92.
[5] Sickman v. United States, 184 F. 2d 616 (1950), *cert. denied* 341 U. S. 939 (1951).

The purpose here is to determine the legal rationale on which the majority of the court based its conclusion in support of the plaintiff's cause, apart from the general maxims of tort liability in nuisance, and to explain, if possible, the diametrically opposed theory of the dissent. Without a case in point, law by analogy is particularly difficult in the area of private nuisance for the reason suggested by Professor Prosser that "there is no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance'. . . . [It] is incapable of any exact or comprehensive definition."[6] He attributes the causes for the uncertainty and confusion to the fact that "nuisance is a field of tortious conduct. It has reference to the interests invaded, and not to any particular kind of conduct which has led to the invasion. The attempt frequently made to distinguish between nuisance and negligence, for example, is based on a mistaken emphasis upon what the defendant has done rather than the result which has followed, and overlooks the well established fact that negligence is merely one type of conduct which may give rise to a nuisance. The same is true as to the attempted distinction between nuisance and strict liability for abnormal activities, which has plagued the English as well as the American courts."[7] Caught in the very middle of the "muddied waters" of the law of nuisance is the question of liability that might be imposed on landowners for the damage caused by wild animals naturally found on the land or introduced and nurtured there by the owner.

Since there seems to be little American case authority on this problem, reference must necessarily be made to the reported English decisions and the editorial comments thereon. In the very early case of *Boulston v. Hardy*,[8] the defendant made coney-boroughs (rabbit nests or pens) on his land to protect the conies which he placed in the boroughs. They increased bountifully under the landowner's care and then devastated his neighbor's crops. The court held that the neighbors could not have an action on the case against him because as soon as the conies came on the plaintiff's land he might kill them, for they were *ferae naturae* since merely placing the conies in boroughs did not bring them into possession, so to create a property right. "This cause is not like to the cases put, on the other side, of erecting a lime-kiln, dye-house, or the like; for there the annoyance is by the act of the parties who make them; but it is not so here, for the conies of themselves went into the plaintiff's land, and he might take them when they came upon his land, and make profit of them."[9] The court was

[6] PROSSER, TORTS § 70, p. 389 (2d ed. 1955).
[7] *Id.* at § 70 at p. 391.
[8] 5 Co. Rep. 104 b. Also reported as Bowlston v. Hardy, Cro. Eliz. 547, 78 Eng. Rep. 794 (Q. B. 1597).
[9] *Ibid.*

clearly grappling with the very issues discussed in the majority and dissenting opinions of our present case.

In *Farrer v. Nelson,*[10] the defendants were lessees of the shooting rights over the estate of which the plaintiff's farm formed a part. Plaintiff sued for damages to his crops by wild pheasants, 450 of which the defendant had placed as game stock in a thicket adjoining the plaintiff's farm. The defendant answered that he was a reasonable user of the land, and since the birds lived and propagated naturally on the land, being *ferae naturae,* their trespass could not be imputed to the defendant, citing to the court *Boulston v. Hardy.* Pollack B. chose not to follow the *Boulston* case, holding that, "It is not merely the case of a man collecting noxious animals upon his land so as to injure his neighbor, but the case of a man entitled to keep game upon the land, and the tenant complaining of injury to his crops from this game being unduly multiplied. . . . [The] moment he brings on game to an unreasonable amount or causes it to increase to an unreasonable extent, he is doing that which is unlawful. . . ."[11]

The English court in *Bland v. Yates,*[12] allowed an injunction to the plaintiff who occupied a dwelling house next to the defendant's market garden, an enterprise common to the community but where was heaped a large amount of manure which attracted flies to the annoyance of the plaintiff. The court restrained the defendant from maintaining the supply of manure which it found he was keeping in amounts excess for that locality.

A different result was reached in the relatively recent case of *Stearn v. Prentice Bros., Ltd.,*[13] where the plaintiff was suing for damages to his crops from rats which passed back and forth between his fields and a fertilizer factory where the defendant stored large heaps of animal bones. The court distinguished the *Bland* case on the theory that the lower court had not found that the amount of bones stored had been excessive. It denied recovery to the plaintiff holding that the *Boulston* case was controlling on the point, and by way of analysis of the equities involved, stated that, "Bone manure manufactories have existed for a very great number of years. Bones are a natural and valuable waste product. . . . Rats have been the enemies of farmers ever since land was cultivated. If proper measures are not taken by occupiers of land to destroy them they quickly increase. They are *ferae naturae.*"[14] The industry-minded court was evidently impressed by the plaintiff's failure to prove that the rats were increasing

[10] 15 Q. B. D. 258 (1885).
[11] *Id.* at 260.
[12] 58 Sol. J. 612 (1914).
[13] [1919] 1 K. B. 394.
[14] *Id.* at 396.

because of anything done on the defendant's premises since his pile of bones was no larger then than it had been for the past thirty years.

If there exists a definite field of liability for the depredations of animals naturally on the land, some commentators[15] on the subject tend to imply that the rationale used in the few decisions available lies somewhere between the traditional law of nuisance and the doctrine of *Rylands v. Fletcher*.[16] Under either theory of recovery liability attaches to certain conduct on the actor's own premises which results in harm to the property rights of an adjoining landowner. The *Rylands* case could not be decided on the grounds of ordinary trespass since the damage to the plaintiff's land was neither intentional nor direct. It didn't seem to fit the orthodox pattern of private nuisance since it was more than a mere noxious interference with the enjoyment of land, but yet was not continuous nor recurring so that the defendant was put on notice.[17] The *Restatement of Torts* limits the *Rylands* doctrine to ultrahazardous activity and allowing liability without consideration of fault for the "non-natural" use of land which "necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care."[18] A kindred type of liability without regard to the degree of care used applies to the keeping of wild and ferocious animals.[19]

Private nuisance, on the other hand, had been defined merely as the "unreasonable interference with the interest of an individual in the use or enjoyment of land. Such a nuisance requires substantial harm, as distinguished from a trespass, which may consist of a mere technical invasion."[20]

Professor Prosser in discussing the apparent blending of the two theories comes up with a solution which seems to fit our present case: "There are relatively few situations in which it makes very much difference which basis of liability is to be relied on. For this reason, and because the action on the case for nuisance was adequate to cover any of three [i. e. theories of recovery based on intentional invasion, negligence, and strict liability], the courts seldom have made the distinction, and have been content to say merely that a nuisance exists. Another reason for this has been the fact that the great majority of nuisance suits have been in equity, and concerned primarily with the prevention of future damages. Under such circumstances the original nature of

[15] Noel, *Nuisance From Land in Its Natural Condition*, 56 HARV. L. REV. 772 (1943). Notes, 19 COLUM. L. REV. 251 (1919); 18 MICH. L. REV. 70 (1919); *cf.* 23 CALIF. L. REV. 427, 433 (1935).
[16] L. R. 1 Ex. 265 (1866), *aff'd* 3 H. L. 330 (1868).
[17] PROSSER, TORTS § 59 (2d ed. 1955).
[18] RESTATEMENT, TORTS § 519 (1938).
[19] PROSSER, TORTS § 57 (2d ed. 1955).
[20] *Id.* § 70 at p. 389.

the defendant's conduct frequently loses its importance, since his persistence, over the plaintiff's protest, in continuing conduct which may have been merely negligent or abnormal in its inception, is sufficient to establish its character as an intentional wrong."[21]

Breaking down the elements involved in the present North Carolina decision, it would be fair to conclude that by a general application of facts to theory, the defendant's conduct, as alleged by the plaintiff, in unreasonably using a pond on his own land, has interfered with the plaintiff's enjoyment of the plaintiff's land. Defendant's purposes evidence no great social or economic utility which would outweigh the value of plaintiff's farming enterprise, and he had been placed on notice of the damage caused by his conduct but yet refused to abate the nuisance even though the expense or effort required on his part would be nominal. The remaining question, however, is whether as a matter of law holding the defendant liable for the trespasses of wild geese, living free from the control, possession or restraint of the defendant, is so fundamentally a violation of personal freedom to enjoy one's own land as in all justice to require a finding for the defendant.

In addition to the conflicting English decisions on point, and one American case following the *Farrer* lead,[22] there have been a number of cases holding liability for private nuisance against landowners for maintaining stagnant ponds which breed malarial mosquitoes.[23] This would certainly seem to demonstrate that no ironclad rule governs liability for animals *ferae naturae*.[24]

The dissenting opinion of the principal case in citing *Sickman v. United States*[25] is weakened by the fact that that case was brought under the Federal Tort Claims Act on the theory that the United States had ownership rights in the wild geese and was negligent, through its employees and agents, in allowing its animals to trespass on the plaintiffs' land, destroying their crops. It is doubtful whether either the American or English authorities would find an employer liable for injuries by a wild animal on a theory that his employees were negligent in allowing wildbirds to fly on plaintiffs' land, when the birds had never been reduced to possession or control in the defendant's game preserve,

[21] PROSSER, TORTS § 70, p. 393 (2d ed. 1955).

[22] Taylor v. Granger, 19 R. I. 410, 34 Atl. 153 (1896), where the court said of an action for negligently permitting pigeons to disturb the plaintiff's premises, that though the cause of action on the case was the proper remedy, the principle really embodied in the facts was based on nuisance; *Sic utere tuo ut alienum non laedus.*

[23] Yaffe v. City of Fort Smith, 178 Ark. 406, 10 S. W. 886, 61 A. L. R. 1138 (1928); Towaliga Falls Power Co. v. Sims, 6 Ga. App. 649, 65 S. E. 844 (1909); Mills v. Hall, 9 Wend. 315, 24 Am. Dec. 160 (N. Y. 1832).

[24] For a general criticism of the judicial use of the term *ferae naturae*, see Beven, *The Responsibility at Common Law for the Keeping of Animals*, 22 HARV. L. REV. 465 (1909).

[25] 184 F. 2d 616 (1950), *cert. denied* 341 U. S. 939 (1951).

established pursuant to statute. A possible alternative theory might have been based on a taking or partial confiscation of the plaintiffs' property without just compensation with suit brought instead in the U. S. Court of Claims.[26]

The North Carolina decision can be supported as a proper and just one in view of both the historical development of the rights of landowners and the current interpretations and conclusions reached by students of that "impenetrable jungle" of the law called nuisance.

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Wills and Contracts—Degree of Mental Capacity Requisite for Each

The problem of whether the degree of mental capacity necessary for making a valid will is in any way related to or measurable by that degree of mental capacity requisite to entering into a valid contractual obligation has been the source of frequent disagreement among courts. In North Carolina, as in most jurisdictions, a person is in law deemed to have sufficient mental capacity to make a will when he has a clear understanding of the nature and extent of his act, the kind and value of the property devised, the persons who are the natural objects of his bounty, and the manner in which he desires to dispose of it.[1] The problem is in determining when these requirements are met. Courts have repeatedly attempted to compare contractual capacity with testamentary capacity, and for the most part the result has been unsatisfactory.

It has been said that a lesser degree of mental capacity is required for a will than for the execution of a valid contract or the transaction of ordinary business.[2] In an Illinois case,[3] the testatrix had been adjudged incapable of managing her business affairs and a conservator was appointed one month before the execution of her will. The court held that this was not enough to invalidate a will,[4] stating:

> "Mental strength to compete with an antagonist and understanding to protect his own interest are essential in the transaction of ordinary business, while it is sufficient for the making of a will that the testator understands the business in which he is engaged, his property, the natural objects of his bounty, and the disposition he desires to make of his property."[5]

[26] See, *e.g.*, United States v. Causby, 328 U. S. 256 (1946); U. S. CONST. amend. V.

[1] *In re* Will of Brown, 194 N. C. 583, 140 S. E. 192 (1927).

[2] Converse v. Converse, 2 Vt. 168 (1849).

[3] *In re* Weedman's Estate, 254 Ill. 504, 98 N. E. 956 (1912).

[4] 86 Ill. Rev. Stat. 14 (1874) provides that an inquest of lunacy once proven will void subsequent contracts. It is significant that no such declaration is made in regard to wills.

[5] *In re* Weedman's Estate, 254 Ill. 504, 508, 98 N. E. 956, 957 (1912). See also:

It has also been held in Illinois that the mental capacity required for making a will is less than that which is required for making a deed.[6]

A number of other courts have held that less mental faculty is required for making a will than for executing any other instrument.[7] A recent Georgia case, holding that the capacity required to contract is greater, declared: "The weak have the same rights as the strong to dispose of their property by will, and anything less than a total absence of mind will not destroy that capacity."[8]

North Carolina recognizes the same standard of mental capacity for testing the validity of both deeds and wills, although it has been suggested that, perhaps, the court would scrutinize a deed more closely.[9] In an Alabama case[10] the court held that the same degree of mental capacity is required to make a will as is requisite to entering into a valid contract, that there is no middle ground, and that both must stand as to the question of capacity on precisely the same footing. A Maryland statute in its definition of testamentary capacity adds to the usual "sound and disposing mind and memory" clause the requirement that one must be capable of making a valid deed or contract.[11]

A few courts seem to be of the opinion that the mental capacity should be greater for making a will. In *Aubert v. Augert*[12] a Louisiana court stated:

> "Testaments are more easily avoided than contracts on the ground of unsoundness of mind. . . . The difference has its source in the consideration that laws regulating the capacity to contract are in furtherance of the natural rights of man, and that all restraints upon that capacity are abridgements of his liberty. . . . Society cannot exist without the capacity to contract, but the power to dispose of property by will is not necessary to its well being."

King v. Lawless, 190 Ill. 520, 60 N. E. 881 (1901); Greene v. Maxwell, 251 Ill. 335, 6 N. E. 227, 36 L. R. A. (N. S.) 418 (1911).

[6] Waugh v. Moan, 200 Ill. 298, 65 N. E. 713 (1902).

[7] *In re* Moyer's Will, 97 Misc. Rep. 512, 163 N. Y. S. 296 (Surr. Ct. 1916); see also, *In re* Barney's Will, 187 Mich. 157, 153 N. W. 730 (1915), declaring that it is elementary that less mental capacity is required to make a will than to make a contract.

[8] Beman et al. v. Stembridge, 211 Ga. 274, 85 S. E. 2d 434, 440 (1955).

[9] Gilliken v. Norcom, 197 N. C. 8, 147 S. E. 433 (1929); In McDevitt v. Chandler, 241 N. C. 677, 86 S. E. 2d 438 (1955) the court declared that in order to execute a valid deed, the grantor must have sufficient mental capacity to understand the nature and consequences of his act, what he is disposing of, and to whom.

[10] McElroy v. McElroy, 5 Ala. 81 (1843); see also Coleman v. Robertson's Ex'rs., 17 Ala. 84 (1849), stating that the capacity to make a valid will or contract is precisely the same.

[11] Applied in Lyon v. Townsend, 124 Md. 163, 91 A. 704 (1914); Davis v. Calvert, 5 Gill & J. 269, 25 Am. Dec. 282 (1833).

[12] 6 La. Ann. 104, 106 (1851).

The logical inference from this divergence of judicial opinion is that the two are so different in their nature that they cannot be compared. This is the view which has been taken by the majority of the courts. In determining the capacity of a person to execute a will, attention should be given to the character of the instrument.[13] It seems quite possible that one may lack the capacity to transact complicated,[14] important,[15] or ordinary business[16] and still be capable of making a simple disposition of his property by will. Conversely, it would seem than one may have contractual capacity and yet lack testamentary capacity.[17] However, it is generally held that, in the absence of an insane delusion, one who has contractual capacity has the capacity to make a will.[18]

In *Murphy v. Nett*[19] the court refused to charge the jury that a "less degree of mind" is required to execute a will than a contract, saying:

> ". . . [W]e think in such matters comparisons are odious and for purposes of instructing the jury wholly unnecessary. To make a will implies more than merely signing it, and it contravenes human experience to say that the conception, ordering, and comprehension of a will dispensing, with care and precision, extensive property, involving, it may be, charities and trusts of various kinds, requires less capacity than the purchase of a bar of soap; or that the same intellectual capacity is required for the simple holograph 'I leave all of my property to my wife' and for the elaboration of a complex trade agreement designed to accomplish far reaching results. The conclusion of common sense is that it takes more mind to make some wills than to make some contracts, and vice versa. . . ."[20]

A South Carolina decision,[21] however, held that where testamentary capacity was otherwise correctly defined and the court added that it required less mental capacity to execute a will than a contract, it was not sufficiently prejudicial to be reversible error.

[13] *In re* Weber's Estate, 201 Mich. 447, 167 N. W. 937 (1918).
[14] Barnhill v. Miller, 114 Kan. 73, 217 Pac. 274 (1923).
[15] Neimes v. Neimes, 97 Ohio St. 145, 119 N. E. 503 (1917).
[16] Mileham v. Montagne, 148 Iowa 476, 125 N. W. 664 (1910).
[17] American Bible Society v. Price, 115 Ill. 623, 5 N. E. 126 (1886).
[18] *In re* Wax's Estate, 106 Cal. 343, 39 Pac. 624 (1895).
[19] 47 Mont. 38, 57, 130 Pac. 451, 455 (1913).
[20] See also: Turner's Appeal, 72 Conn. 305, 44 A. 310 (1899); Brown v. Mitchell, 88 Tex. 350, 31 S. W. 621, 36 L. R. A. 64 (1895); Segur's Will, 71 Vt. 224, 44 A. 342 (1898); Greene v. Greene, 145 Ill. 264, 33 N. E. 941 (1893), holding that while contractual capacity implies prima facie the capacity to make a will, yet neither is a test for the other and the presence or absence of one does not conclusively establish the presence or absence of the other.
[21] Goble v. Rauch, 50 S. C. 95, 27 S. E. 555 (1897).

While the great weight of authority is against the comparison of business capacity and testamentary capacity, the courts have by no means been unanimous in so holding. It seems that some courts have altered standards set by their own previous decisions. A Missouri court[22] once decided that a person may have testamentary capacity even though he cannot transact complicated business, and in a later case[23] held that it was proper to instruct the jury that a person had testamentary capacity if he had sufficient understanding to transact business affairs.

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[22] Rose v. Rose, 249 S. W. 605 (Mo. 1923).
[23] Rex v. Masonic Home of Missouri, 341 Mo. 589, 108 S. W. 2d 897 (1937).