UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 14 | Number 4 Article 4

6-1-1936

Notes and Comments

North Carolina Law Review

Edwin Marvin Perkins, who for the last two years has been Lecturer in Taxation in the Law School, has been awarded a graduate fellowship for the year 1936-1937 at the Harvard Law School.

James Harmon Chadbourn, who has been Assistant Professor in the Law School for the past four years, has been awarded a graduate fellowship next year at the Columbia Law School. Mr. Chadbourn's courses will be taught during his absence by Donald William Markham. Mr. Markham completed his work for the J. D. degree in January, after serving as Student Editor-in-Chief of the LAW REVIEW, and is now associated with the General Counsel to the United States Treasury in Washington. As faculty editor of the LAW REVIEW, Mr. Chadbourn has been succeeded by Frank William Hanft, Associate Professor of Law.

NOTES AND COMMENTS

Conflict of Laws—Nonresident Motorists' Statute—Applicability to Executor of Deceased Nonresident Motorist.

Plaintiff was injured in North Carolina through the alleged negligence of defendant's intestate with whom she was riding as a guest. All the parties were residents of New Jersey. In the suit brought in North Carolina service of process was had on defendant through the Commissioner of Revenue.[1] A motion to quash the summons was allowed. *Held,* judgment affirmed. Since the statute makes no provision for service on a deceased nonresident motorist's personal representative and since the agency created by the statute is not one coupled with an interest so as to make it irrevocable, there could be no valid service under the statute in the present case.[2]

[1] N. C. CODE ANN. (Michie, 1935) §491 (a) provides in substance that the acceptance by a nonresident of the rights and privileges conferred by the laws permitting operation of motor vehicles, as evidenced by the operation of a motor vehicle by such nonresident on the highways of this state, shall be deemed equivalent to the appointment by such nonresident of the Commissioner of Revenue to be his attorney upon whom may be served process in any action against him growing out of any accident in which such nonresident may be involved by reason of the operation by him, for him, or under his control or direction, express or implied, of a motor vehicle on any public highway of this state. The statute has been held constitutional. Ashley v. Brown, 198 N. C. 369, 151 S. E. 725 (1930); *cf.* Hess v. Pawloski, 274 U. S. 352, 47 Sup. Ct. 632, 71 L. ed. 1091 (1927). The statute contains a provision for mailing a copy of the summons to the defendant by registered mail as required in Wuchter v. Pizzutti, 276 U. S. 13, 48 Sup. Ct. 259, 72 L. ed. 446 (1928).

[2] Dowling v. Winters, 208 N. C. 521, 181 S. E. 751 (1935); see Note (1936) 36 COL. L. REV. 681. No mention is made of the fact that the plaintiff in this case is also a nonresident. It is uniformly held, however, that nonresident plaintiffs may avail themselves of the statute. Fine v. Wincke, 117 Conn. 683, 169 Atl. 58 (1933); Sobeck v. Koellmer, 240 App. Div. 736, 265 N. Y. Supp. 778 (1933); State *ex rel.* Rush v. Circuit Court, 209 Wis. 246, 244 N. W. 766 (1932). Three states have statutes which by their terms exclude suits by nonresidents. FLA.

Although thirty-five states have enacted statutes similar to the one involved in the present case, no statute has made provision for service on the personal representative of a deceased nonresident motorist. The question of whether or not the statutes can be construed to permit such service has arisen in only three jurisdictions, and in each instance the statute has been held not to permit service on a nonresident personal representative.[3] The arguments advanced in support of this conclusion are: (1) that the statute contains no provision for such service, and since it is in derogation of the common law it must be strictly construed; (2) that the agency relationship created by the statute is terminated by the death of the principal; and (3) that in the absence of an enabling statutory provision a foreign personal representative may not be sued outside the state in which he is appointed.[4]

That the statute is in derogation of the common law and therefore must be strictly construed has been held in several cases.[5] Thus it is said that in the absence of words showing an intention that the statute should apply to personal representatives, it should not be so construed.[6] On the other hand, since there are statutes providing for the survival of actions generally,[7] would it not be just as reasonable to assume that

---

COMP. GEN. LAWS (Supp. 1934) §1300 (1); N. J. COMP. STAT (Supp. 1930) tit. 135, §96a (1) as amended N. J. Laws 1933, c. 69; TENN. CODE (Will. Shan. & Harsh, 1932) §8671.

[3] Young v. Potter Title & Trust Co., 114 N. J. L. 561, 178 Atl. 177 (1935), *aff'd without opinion*, 115 N. J. L. 58, 181 Atl. 44 (1935); Dowling v. Winters, 208 N. C. 521, 181 S. E. 751 (1935); State *ex rel.* Ledin v. Davison, 216 Wis. 216, 256 N. W. 718 (1934); *cf.* Boyd v. Lemmerman, 11 N. J. Misc. 701, 168 Atl. 47 (1933); Lepre v. Real Estate-Land Title Trust Co., 11 N. J. Misc. 887, 168 Atl. 858 (1933).

[4] An argument which has not been made in the cases is that in many instances it may be impossible to enforce the judgment obtained against the foreign personal representative against the estate of the deceased motorist at his domicile. Such action will often be necessary, for in most cases the nonresident will not have assets at the forum. It is generally held that a foreign judgment against a resident personal representative may not be sued on at his domicile. *In re* Cowham's Estate, 220 Mich. 560, 190 N. W. 680 (1922); 3 BEALE, CONFLICT OF LAWS (1935) §514.1. For a collection of cases see Note (1923) 27 L. R. A. 101. This holding does not violate the full faith and credit clause. 3 FREEMAN, JUDGMENTS (5th ed. 1925) §1419. There is an indication that North Carolina would allow such a suit. Moore v. Smith, 116 N. C. 667, 21 S. E. 506 (1895). It was held in an early Pennsylvania case that judgments taken against a resident executor in a foreign state would be enforced by comity. Evans v. Tatem, 9 S. & R. 352 (Pa. 1823), but the effect of this ruling seems to have been nullified by a later case, Magraw v. Irwin, 87 Pa. 139 (1878). It has been suggested, however, that the possibility of an ineffective judgment is a matter of concern for the plaintiff rather than a defense for the defendant. Dewey v. Barnhouse, 75 Kan. 214, 88 Pac. 877 (1907).

[5] Morrow v. Asher, 55 F. (2d) 365 (N. D. Tex. 1932); Day v. Bush, 18 La. App. 682, 139 So. 42 (1932); Brown v. Cleveland Tractor Co., 265 Mich. 475, 251 N. W. 557 (1933).

[6] State *ex rel.* Ledin v. Davison, 216 Wis. 216, 256 N. W. 718 (1934).

[7] N. C. CODE ANN. (Michie, 1935) §§162-3. The wrongful death statute by its terms provided for survival against the defendant's personal representative. *Id.* §160.

the legislature did not think it necessary to specifically mention personal representatives in the nonresident motorist statute?[8]

The argument that the agency relationship created by the statute ceases with the death of the principal is likewise faulty. It has been suggested that the true basis of jurisdiction in these cases is not the fictional contract of agency but the power of the state to regulate the use of the highways.[9] But at any rate, may it not be argued that since the legislature created the agency, it must have intended to create one that would be most effective, and that therefore it intended it to be irrevocable?

Perhaps the best argument in favor of the court's construction of the statute is the fact that generally no suit may be brought against a foreign administrator or executor in the absence of an enabling statute,[10] and there is some doubt as to the constitutionality of such enabling statutes.[11] In North Carolina, however, while a nonresident administrator has no standing in the courts,[12] a nonresident executor may sue or be sued when a copy of the will has been filed and he has received an appointment in this state.[13] These two prerequisites are for the protection of local creditors, but when, as in the instant case, there are no local creditors or assets, it is believed that a compliance with them should not be necessary.

It would seem, therefore, that the objections raised by the court are more apparent than real and that the policy behind the statute is sufficient to warrant its being construed to apply to the personal representatives of nonresident motorists. As the law now stands the plaintiff may be without remedy in this state if the nonresident motorist is himself killed in the accident. Thus the more serious the accident, the less chance there is of the plaintiff's being able to use the statute. It is submitted, therefore, that we should enact an amendment to our statute to

[8] The statute providing for service of process by publication does not refer to service on nonresident executors and administrators. N. C. CODE ANN. (Michie, 1935) §474. Yet it has never been suggested that they were exempt from the operation of the statute.

[9] Culp, *Process in Actions Against Nonresident Motorists* (1933) 32 MICH. L. REV. 325; *cf.* Hess v. Pawloski, 274 U. S. 362, 47 Sup. Ct. 632, 71 L. ed. 1091 (1927).

[10] 3 BEALE, CONFLICT OF LAWS (1935) §§510.1-514.1.

[11] New York had such a statute, but it was held to give a nonresident representative only the right to sue and not to remove his immunity from suit. Helme v. Buckelew, 229 N. Y. 363, 128 N. E. 216 (1916). An amendment to the statute providing for substitution of the personal representative in case of death of a nonresident defendant was held unconstitutional. McMaster v. Gould, 240 N. Y. 379, 148 N. E. 556 (1925).

[12] N. C. CODE ANN. (Michie, 1935) §8.

[13] *Id.* §§8, 34; First National Bank v. Pancake, 172 N. C. 513, 90 S. E. 516 (1916).

make it apply to executors and administrators of deceased nonresident motorists.[14]

F. T. DUPREE, JR.

Contracts—Effect of Duress Exerted Against Guilty Person and Against Third Parties.

To complainant's action for separate maintenance and support of herself and minor child, defendant claimed that the marriage was void as being induced by duress. The facts indicate that prior to the marriage, defendant, about to leave the state, was arrested and jailed upon a charge of statutory rape, said arrest being caused by complainant's father. The warrant falsely stated that complainant was below the age of consent. To avoid prosecution, defendant married complainant, as a result of advice given to him by friends of complainant's father to the effect that the criminal prosecution would be "pushed to the fullest extent." The license was procured by complainant's and defendant's brother-in-law. There was no subsequent cohabitation. However, a child, of which the defendant was the admitted father, was born about a month after the marriage. Held for the plaintiff; the duress, if any, was insufficient to invalidate the marriage.[1]

The degree of coercion requisite to constitute duress has undergone three stages of development: (1) The early common law required such undue pressure as would intimidate a courageous man.[2] (2) A later group of cases used the test that the will of a man of ordinary firmness be overcome.[3] (3) The modern trend, in words at least, takes the view that duress exists if the threats overcame the will of the particular promisor.[4] By inference, the court in the principal case would apply the last named test.

[14] Since no statute at present makes such provision, the question of its constitutionality has not come before the courts. It is believed, however, that there should be no constitutional difficulty. Most statutes provide for service on the nonresident owner though he was not operating the car at the time of the accident, and these provisions are held constitutional. It has been suggested that by analogy a provision for service on the personal representative would be constitutional. Legis. (1935) 20 IOWA L. REV. 654, 664; *cf.* Note (1936) 36 COL. L. REV. 681.

[1] Zeigler v. Zeigler, 164 So. 768 (Miss. 1935).

[2] 1 BL. COMM. 131; 3 WILLISTON, CONTRACTS (1st ed. 1920) §1605.

[3] Fonville v. State Bank, 161 Ark. 93, 255 S. W. 561 (1923); Flannagan v. Minneapolis, 36 Minn. 406, 31 N. W. 359 (1887); Edwards v. Bowden, 107 N. C. 58, 12 S. E. 58 (1890) (adopts the ordinary firmness test, saying further, that a mere threat of unlawful imprisonment is not enough to constitute duress); Ford v. Englemen, 118 Va. 89, 86 S. E. 852 (1915); *cf.* Bond State Bank v. Vaughan, 241 Ky. 524, 44 S. W. (2d) 527 (1931); see United States v. Huckabee, 83 U. S. 414, 21 L. ed. 457 (1873); 1 PAGE, CONTRACTS (2nd ed. 1922) §482; 3 WILLISTON, *loc. cit. supra* note 2.

[4] Guardian Trust Co. v. Meyer, 19 F. (2d) 186 (C. C. A. 8th, 1927); Williamson-Halzell-Frazier Co. v. Ackerman, 77 Kan. 502, 94 Pac. 807 (1908); Riney v.

The purpose of these tests is to ascertain whether the improper pressure exerted is sufficient to overcome that exercise of free will which is ordinarily deemed a prerequisite of a valid contract. The specific acts or threats, sufficient to constitute duress under the above standards, vary. A threat of criminal prosecution against an innocent party usually is sufficient.[5] But if the threatened party is guilty, and restitution is made, there is good authority refusing to overthrow the contract.[6] The latter courts reason that the promisor has done no more than he was legally bound to do, and that the debt owed constitutes sufficient consideration.

A more difficult problem is presented where the improper pressure induces a third party to enter into a contract to reimburse the promisee for the losses supposedly inflicted upon him by the defaulting party. The hope is that the latter will thereby be saved from criminal prosecution. In such instances, where duress is found, the promisee is usually intimately related to the defaulter by blood or marriage and is therefore himself said to be the target of undue pressure.[7] While there is some indication that such relationship between the promisor and the defaulter is a requisite for duress,[8] the result seems questionable.[9] Regardless of

Doll, 116 Kan. 26, 225 Pac. 1059 (1924); Rice v. Victor, 97 Okla. 106, 222 Pac. 979 (1924); see 1 PAGE, *loc. cit. supra* note 3; 3 WILLISTON, *loc. cit. supra* note 2; Note (1924) 3 WIS. L. REV. 59. This development is characteristic of the changing ideas of the times. In the earlier days, a man who lacked courage was frowned upon by the community. Society gradually began to see the need of protecting the weak.

[5] Kronmeyer v. Buck, 258 Ill. 586, 101 N. E. 935 (1913); Kaus v. Gracey, 162 Iowa 671, 144 N. W. 625 (1913); Nelson v. Leszczynski-Clark Co., 117 Mich. 517, 143 N. W. 606 (1913); *cf.* Sabinal State Bank v. Ebell, 294 S. W. 226 (Tex. Civ. App. 1927) (inference that guilty person also subject to duress). *Contra:* Rendleman v. Rendleman, 156 Ill. 568, 41 N. E. 223 (1895) (holding that there could be no duress of an innocent person as he could not be put in fear thereby).

[6] Thorn v. Pinkham, 84 Me. 101, 24 Atl. 718 (1891); American Nat. Bank v. Helling, 161 Minn. 503, 202 N. W. 20 (1925); see 3 WILLISTON, *op. cit. supra* note 2, §1615; *cf.* Wilbur v. Blanchard, 22 Idaho 517, 126 Pac. 1069 (1912) (said duress had been practiced, but allowed the plaintiff to recover back only that amount over and above the embezzlement); Beath v. Chapoton, 115 Mich. 506, 73 N. W. 806 (1890) (duress was exerted, but the defendant was held only for the amount actually converted). *Contra:* Morse v. Woodworth, 155 Mass. 233, 27 N. E. 1010 (1891); *cf.* Portland Cattle Co. v. Featherly, 74 Mont. 531, 241 Pac. 322 (1925) (rights of relatives additionally involved). Note (1924) 32 A. L. R. 422.

[7] Commercial Credit Co. v. Davis, 103 Fla. 148, 137 So. 688 (1931); Trust Co. v. Begley, 298 Mo. 684, 252 S. W. 76 (1923) (under threat to bring felony to the attention of authorities, the defaulter's father and mother-in-law signed notes); Farmer's State Bank v. Overton, 112 Neb. 262, 199 N. W. 528 (1924).

[8] American Nat. Bank v. Helling, 161 Minn. 504, 202 N. W. 20 (1925), cited note 6, *supra* (holding that if there is a relationship, it makes no difference whether the claimed defaulter is innocent or guilty; but deliberation and advice from an attorney, before the transfer, prevents the setting up of a claim of duress); Port of Nebalem v. Nicholson, 122 Ore. 523, 259 Pac. 900 (1927) (family relationship is merely an exception to the general rule); Fountain v. Bigham, 235 Pa. 35, 84 Atl. 131 (1912); *cf.* Travis v. Unkart, 89 N. J. L. 571, 99 Atl. 320 (1916); Note (1927) 12 MINN. L. REV. 409.

[9] "It is obvious that under the modern definition of duress, there can be no

the relationship, there would seem to be more reason for releasing the third party, who is not liable, legally or morally, for the debt of the defaulter than there would be for releasing the defaulter himself.[10] In both types of cases courts sometime avoid the question of duress by holding the agreement invalid upon the ground that the parties are frustrating the purpose of the criminal law.[11]

In annulment suits, courts rarely find duress, as the problem usually arises where the promisor has been guilty of improper sexual relations.[12] Such decisions are really dictated by the consideration that the marriage, in spite of the coercion, operated to right the wrong inflicted by the promisor.[13]

Whether the courts will say duress has been practiced in a particular case seems to be determined by considerations of policy. If, in the "marriage cases," the promisor was morally bound, it is said that no improper pressure has been exercised. In the "embezzling cases," if the

---

question of the nearness of relationship; the question becomes merely one of whether the party induced to act was coerced by wrongful pressure, and the threat to kill or seriously assault a companion who is in no way related to the actor may evidently operate as such coercion." 3 WILLISTON, *op. cit. supra* note 2, §1621.

[10] Port of Nebalem v. Nicholson, 122 Ore. 523, 259 Pac. 900 (1927), cited note 8, *supra; cf.* Lewis v. Doyle, 182 Mich. 141, 148 N. W. 407 (1914) (holding that payment by wife of husband's debts, is supported by sufficient consideration, and claim of duress is of no avail).

[11] Koons v. Vauconsant, 129 Mich. 260, 88 N. W. 630 (1902); Heath v. Cobb, 17 N. C. 187 (1831) (plaintiff was not in a position to be bargained with while under arrest); Meadows v. Smith, 42 N. C. 7 (1850) (plaintiff was innocent); Corbett v. Clute, 137 N. C. 546, 50 S. E. 216 (1905) (the question of duress was not before the court). The weight of authority says that a contract to suppress a felony is void, and the question of whether the party was innocent or guilty is not in issue. Shaulis v. Buxton, 109 Iowa 355, 80 N. W. 397 (1899); Garner v. Qualls, 49 N. C. 223 (1856). *Contra:* Woodham v. Allen, 130 Cal. 194, 62 Pac. 398 (1900) (there can be no felony compounded, as no felony in fact existed). The New York courts reach the result that any agreement that has a tendency to suppress a crime is illegal. It makes no difference whether duress has been practiced or not, as the parties stand in *pari delicto*. Thus in all these types of cases the New York Court leaves the parties where it finds them. Such a rule has the unhappy effect of protecting the party exerting duress if he is successful in extorting the money. Union Exchange Bank v. Joseph, 231 N. Y. 250, 131 N. E. 905 (1921).

[12] Kibler v. Kibler, 180 Ark. 1152, 24 S. W. (2d) 867 (1930); Sickles v. Carson, 26 N. J. Eq. 440 (1875); Copeland v. Copeland, 2 Va. Dec. 81, 21 S. E. 241 (1895); Note (1935) 10 IND. L. REV. 473.

[13] Kelley v. Kelley, 206 Ala. 304, 89 So. 508 (1921); Shepherd v. Shepherd, 174 Ky. 615, 192 S. W. 658 (1917) (holding that equity will not bastardize a child in annulment proceedings, except upon the strongest proof of duress); Rogers v. Rogers, 151 Miss. 644, 118 So. 619 (1928) (cited by the principal case for the result reached); Bryant v. Bryant, 171 N. C. 746, 88 S. E. 147 (1916) (that the best reparation the plaintiff could make was to marry the defendant); see 9 R. C. L. 305 (1915). The majority rule requires that the other contracting party (usually the woman) either caused the duress or knowingly used or availed herself of it. Sherman v. Sherman, 20 N. Y. Supp. 414 (1892). *Contra:* Lee v. Lee, 176 Ark. 636, 3 S. W. (2d) 672 (1928) (although the defendant had no knowledge that any coercion had been practiced, the marriage was avoided for duress).

promisor was under a duty to pay, regardless of the coercion, it is stated that the pressure exerted is insufficient to constitute duress. Thus, the rationale in terms of duress would seem to be *ex post facto.*

The principal case appears to have been decided upon like considerations and to have been rationalized in a similar manner. Since such considerations of policy seem to be basic, opinions would be clarified if rationalized in terms of such fundamental factors. Discussion of duress would then be rendered unnecessary.

J. WILLIAM COPELAND.

Disbarment—Acts Not in Capacity of Attorney Antedating Incorporated Bar—Constitutionality.

The defendant was disbarred by the Council of the North Carolina State Bar, for collecting and wrongfully retaining funds belonging to an estate for which he was acting as trustee, executor and attorney, under a clause of the State Bar Act, Ch. 210, *Public Laws 1933,* authorizing disbarment for "detention without a *bona fide* claim thereto of property received or money converted in the capacity of attorney." Upon appeal, the disbarment was sustained by the Superior Court and a jury. On appeal to the Supreme Court, *held,* reversed on the grounds (1) that the acts complained of were committed while the defendant was acting in the capacity of an executor and not as an attorney; (2) all the matters complained of took place prior to the enactment of the State Bar Act in 1933; and (3) "It must be conceded that the plea to the jurisdiction presents a grave and serious constitutional question."[1]

Unless specified by statute, it is not necessary that an attorney be acting only in his professional capacity when the acts complained of are committed. Any showing of lack of the good moral character necessary for an officer of the court is a sufficient basis for the revocation of an attorney's license.[2] Disbarments have been sustained where the offense complained of was participation in a lynching,[3] participation in an unlawful assembly and jailbreak,[4] conviction of adultery,[5] violation of prohibition laws,[6] receiving stolen goods while acting in the capacity of

[1] *In re* Parker, 209 N. C. 693, 184 S. E. 532 (1936).

[2] Bar Assoc. v. Meyerovitz, 278 Ill. 356, 116 N. E. 189 (1917); Bar Assoc. v. Fulton, 284 Ill. 385, 120 N. E. 252 (1918) (where there was a failure to account for moneys entrusted to an attorney as trustee or where there was a misappropriation, the court held that lack of good moral character was sufficient to warrant disbarment).

[3] *Ex parte* Wall, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. ed. 552 (1882).

[4] State v. Graves, 73 Ore. 331, 144 Pac. 484 (1914).

[5] Grievance Committee v. Borden, 112 Conn. 269, 152 Atl. 292 (1930); Note (1931) 79 U. OF PA. L. REV. 506.

[6] *In re* Callicate, 57 Mont. 297, 187 Pac. 1019 (1920); State v. Johnson, 174 N. C. 345, 93 S. E. 847 (1916) (where the defendant habitually violated prohibition laws).

pawn broker,[7] keeping a disorderly house and selling opium,[8] making exorbitant charges for a legislative appearance,[9] using the mails to defraud,[10] false representations knowingly made about property which the attorney was selling,[11] and where a district attorney accepted a campaign fund for his reëlection from an indicted person.[12] In cases where the attorney was acting as a financial fiduciary disbarments have been sustained where the funds of an employer were misappropriated,[13] where the attorney was acting as guardian,[14] as a receiver in bankruptcy,[15] as administrator,[16] where property entrusted to him was misappropriated,[17] because of conversion of moneys entrusted to him by another lawyer to pay incidental costs of litigation,[18] and because of a refusal to turn over moneys received in satisfaction of a judgment.[19] For these reasons the findings of the Council and of the Superior Court that the defendant converted the funds while acting in the capacity of attorney for the estate should not have been upset merely because the earlier civil judgment for restitution against him and his surety, upon which the findings largely rested, was grounded upon his misconduct as executor.

Nor should it have been fatal that the offense occurred prior to the enactment of the State Bar Act.[20] The clause quoted from that act under which the proceeding in question was started is a re-enactment of the substance of a cause for disbarment which was in force at the time of the misconduct as a part of the old disbarment statute.[21] The main effect of the new legislation is to change the machinery for this type of proceeding, although it also creates additional grounds as a basis

[7] Petition of Law Association of Phila., 228 Pa. 331, 135 Atl. 732 (1927).
[8] *In re* Marsh, 42 Utah 186, 129 Pac. 411 (1913).
[9] *In re* Carey, 146 Minn. 80, 177 N. W. 801 (1920).
[10] *In re* Crane, 182 Cal. 707, 189 Pac. 1072 (1920).
[11] *In re* Stimer, 171 Minn. 437, 214 N. W. 652 (1927).
[12] *In re* Crum, 55 N. D. 945, 215 N. W. 682 (1927).
[13] *In re* Wilson, 79 Kan. 674, 100 Pac. 635 (1909); *In re* Washington, 82 Kan. 829, 109 Pac. 700 (1910); Assoc. of Bar v. Chappe, 131 App. Div. 328, 115 N. Y. Supp. 868 (1909).
[14] *Re* Swaender, 5 Ohio Dec. 598, 7 Ohio N. P. 446 (1895).
[15] *In re* Litchenberg, 169 App. Div. 505, 155 N. Y. Supp. 482 (1915).
[16] *In re* Ward, 106 Wash. 147, 179 Pac. 76 (1919).
[17] *In re* Condon, 157 Minn. 24, 195 N. W. 492 (1923).
[18] *In re* Casey, 208 App. Div. 24, 203 N. Y. Supp. 61 (1924).
[19] State v. Kaufman, 202 Iowa 157, 205 N. W. 321 (1926). For a case allowing disbarment because of exorbitant charges, see *In re* Sanitary District Attorneys, 351 Ill. 206, 186 N. E. 332 (1933); Note (1934) 18 MINN. L. REV. 217. For an article on acts involving moral turpitude which gives rise to disbarment, see Bradway, *Moral Turpitude as the Criterion of Offenses that Justify Disbarment* (1935) 24 CALIF. L. REV. 9.
[20] *In re* Winne, 208 Cal. 35, 280 Pac. 113 (1929) (where the state bar investigated and took action on matters which happened before the enactment of the statute incorporating the bar).
[21] C. S. (1919) §206.

for disbarment.[22] Even in cases where a statute is criminal, its subsequent incorporation into a new act does not suspend the effect of the law as originally enacted.[23] Consequently, there is no opportunity for invoking any *ex post facto* doctrine.

The character of disbarment proceedings is not criminal, but on the contrary is essentially civil, or even *sui generis,* in the majority of jurisdictions.[24] The primary purpose is not to punish the offender, but to protect the courts, the public, and the profession from persons unfit to practice.[25] In cases where the statute of limitations would prevent a criminal prosecution for acts that amount to a crime, disbarment proceedings, because of their civil nature, based on the same acts, may be instituted.[26] Even where a person has been pardoned for an act, the same act may later be the basis of disbarment proceedings.[27] This is based either on the theory that the attorney has ceased to possess that degree of good character that was necessary for his admission to practise, or on the theory that the lack of integrity makes him unfit to be entrusted with legal matters.[28] No matter what the purpose or nature

[22] *A Survey of Statutory Changes in North Carolina in 1933* (1933) 11 N. C. L. REV. 191, commenting on the changes in the statute.

[23] State v. Williams, 117 N. C. 753, 23 S. E. 250 (1895); Wood v. Bellamy, 120 N. C. 212, 27 S. E. 113 (1897); State v. R. R., 125 N. C. 65, 34 S. E. 106 (1899); State v. Hollingsworth, 206 N. C. 739, 175 S. E. 99 (1934).

[24] Philbrook v. Newman, 85 Fed. 139 (C. C. D. Colo. 1898); Maloney v. State, 182 Ark. 510, 32 S. W. (2d) 423 (1930); *In re* Vaughn, 189 Cal. 491, 209 Pac. 353 (1920); State v. Peck, 88 Conn. 447, 91 Atl. 274 (1914); Gould v. State, 99 Fla. 662, 127 So. 309 (1930); People v. Stonecipher, 171 Ill. 506, 111 N. E. 496 (1916); *In re* Smith, 73 Kan. 743, 85 Pac. 584 (1906); Bar. Assoc. v. Scott, 209 Mass. 200, 95 N. E. 402 (1911); *In re* Ebbs, 150 N. C. 44, 63 S. E. 190 (1908); *In re* Breidt, 84 N. J. Eq. 222, 94 Atl. 214 (1915); Notes (1931) 10 N. C. L. REV. 58; (1921) 9 CALIF. L. REV. 484; 6 C. J. 602; 2 R. C. L. 1109.

[25] *Ex parte* Wall, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. ed. 552 (1882); McIntosh v. State Bar, 211 Cal. 261, 294 Pac. 1067 (1930); *In re* Vaughn, 189 Cal. 491, 209 Pac. 353 (1922); Gould v. State, 99 Fla. 662, 127 So. 309 (1930); *In re* Kerl, 32 Idaho 737, 188 Pac. 40 (1920); Bar. Assoc. v. Greenhood, 168 Mass. 169, 46 N. E. 568 (1897); *In re* Breidt, 84 N. J. Eq. 222, 94 Atl. 244 (1905); *In re* Rous, 221 N. Y. 81, 116 N. E. 782 (1917); *In re* Egan, 52 S. D. 394, 218 N. W. 1 (1928); *In re* Stalen, 193 Wis. 602, 214 N. W. 379 (1927); State v. Kearn, 203 Wis. 178, 223 N. W. 629 (1930); Note (1921) 5 MINN. L. REV. 14; 2 R. C. L. 1088; 8 C. J. 602.

[26] *In re* Danforth, 157 Cal. 425, 108 Pac. 332 (1910); *cf. In re* Ulmer, 268 Mass. 373, 167 N. E. 749 (1929); Joseph v. Manrix, 133 Ore. 329, 288 Pac. 407 (1930). For a note discussing the applicability of the Statute of Limitations to disbarment proceedings, see (1920) 7 A. L. R. 93.

[27] Nelson v. Comm., 128 Ky. 779, 109 S. W. 337 (1908); *In re* Sutton, 50 Mont. 88, 145 Pac. 6 (1914); *In re* E, 65 How. Pr. 171 (N. Y. 1879); *In re* Attorney, 86 N. Y. 563 (1881); Johnston v. State, 174 N. C. 345, 93 S. E. 847 (1917) (where a conditional pardon was no bar); Petition of Law Assoc. of Phila., 288 Pa. 331, 135 Atl. 732 (1927) (leading case).

[28] *In re* Haymond, 121 Cal. 385, 53 Pac. 899 (1898); Bar Assoc. v. Cantrell, 49 Cal. App. 468, 193 Pac. 598 (1920); Iowa v. Mosher, 128 Iowa 82, 103 N. W. 105 (1905) (cases where the attorney had ceased to have the same degree character essential to admission); State v. Johnson, 142 Iowa 462, 128 N. W. 837 (1910) (where the test was whether the defendant still possessed sufficient integrity to

of the proceedings is, it is of course necessary to give effect to the fundamental essentials and requirements of due process.[29] Therefore, unless the act was committed in the presence of the court,[30] sufficient notice and opportunity to be heard and explain or defend the charges must be granted,[31] plus the right of appeal to a court of last resort.[32] As balanced against these fundamentals it is not a denial of due process in these proceedings to comment on the refusal of the accused to take the stand and testify in his own behalf by saying it raises an inference of guilt,[33] although a presumption of innocence in favor of the defendant exists when the proceedings start.[34] There is no vested right whereby the accused is entitled to be faced by witnesses, and depositions may be used wherever proper in civil cases.[35]

The objection to the constitutionality of the State Bar Act on the ground that in effect it denies the jury trial that it professes to grant by providing that the procedure on appeal to the Superior Court must conform to that followed in consent references, seems without foundation.[35a] There are some states, including North Carolina, which specifically provide by statute for a jury during some phase of the proceedings;[36] but

handle legal matters); Iowa v. Rohrig, 59 Iowa 725, 139 N. W. 908 (1913); Cowley v. O'Connell, 174 Mass. 253, 53 N. E. 1001 (1899); *In re* Mills, 1 Mich. 392 (1850).

[29] People v. Love, 298 Ill. 304, 131 N. E. 809 (1921); Bar Assoc. v. Sleeper, 251 Mass. 6, 146 N. E. 269 (1925); *In re* Bruen, 102 Wash. 472, 172 Pac. 1152 (1918). See also State v. Winburn, 206 N. C. 923, 175 S. E. 498 (1934) which holds that the privilege of practicing is a right which may only be deprived by a judgment of the court.

[30] People v. Turner, 1 Cal. 143 (1850); *In re* Durant, 80 Conn. 140, 67 Atl. 497 (1907); Warren v. Connolly, 165 Mich. 274, 130 N. W. 637 (1911); *In re* Eldridge, 82 N. Y. 161 (1880); State v. Root, 5 N. D. 487, 67 N. W. 590 (1896).

[31] *In re* Day, 181 Ill. 73, 54 N. E. 646 (1899); People v. Kavanaugh, 220 Ill. 49, 77 N. E. 107 (1906); Hanson v. Grattan, 84 Kan. 843, 115 Pac. 646 (1911); *In re* Davies, 93 Pa. St. 121 (1880); *Ex parte* Steinman, 95 Pa. St. 220 (1880).

[32] McIntosh v. State Bar, 211 Cal. 261, 294 Pac. 1067 (1930); Herron v. State Bar, 212 Cal. 196, 298 Pac. 474 (1931); Burns v. State, 213 Cal. 151, 1 P. (2d) 989 (1931). See also State Board of Milk Control v. Newark Milk Co., 118 N. J. Eq. 504, 179 Atl. 116 (1935) (where it was stated that in the absence of constitutional or statutory requirements a notice or hearing before an administrative body was not necessary to due process, because the guaranty of judicial review was sufficient).

[33] McIntosh v. State Bar, 211 Cal. 261, 294 Pac. 1067 (1930); Fish v. State Bar, 214 Cal. 215, 4 P. (2d) 937 (1931); Notes (1923) 11 CALIF. L. REV. 137; (1923) 24 A. L. R. 863, discussing applicability in disbarment proceedings of the constitutional privilege of not testifying against oneself.

[34] *In re* Haymond, 121 Cal. 385, 53 Pac. 899 (1898); *In re* Parsons, 35 Mont. 478, 90 Pac. 163 (1907); *In re* Nenby, 82 Neb. 235, 117 N. W. 691 (1908); *In re* Attorney, 175 App. Div. 653, 161 N. Y. Supp. 504 (1916); *In re* Riley, 75 Okla. 192, 183 Pac. 728 (1919); Note (1920) 7 A. L. R. 93.

[35] *In re* Vaughn, 189 Cal. 491, 209 Pac. 353 (1922); Fish v. State Bar, Cal., 214 Cal. 215, 4 P. (2d) 937 (1931); People v. Stonesipher, 271 Ill. 506, 111 N. E. 496 (1916) (emphasizing not criminal proceedings).

[35a] *Ex parte* Thompson, 228 Ala. 118, 152 So. 229 (1933) (Ala. State Bar Act not invalid for authorizing disbarment by board without jury).

[36] *Ibid.* These include Ark., Ga., Ind., La., Tex., and Wyo.

in the absence of such a statute no such right exists at common law.[37] Congress has never attempted to enact any legislation on this point, and the federal courts, feeling it was not necessary to due process, have never allowed the use of a jury in this type of proceeding.[38] Where such statutes exist, they are constitutional, as they do not infringe on any inherent power of the court.[39] The verdict of the jury is not merely advisory, but it has the same effect as in any other civil case.[40] However, where such statutes exist, they are followed only as a matter of courtesy in a great many instances.[41] This is undoubtedly due to some extent to the fact that a jury is not always a feasible unit in this type of proceeding, because the ideas of laymen regarding the standards of ethics are often, due to business practises, as in cases of solicitation, at a wide variance with those of the legal profession.[42] It has been suggested that in order to circumvent this difficulty, the jury should be limited to making special findings of fact.[43]

Within the last few years there has been a marked increase in the number of bar associations that have incorporated for the purpose of regulating admission and disbarment as well as to function as a unit in otherwise protecting the public and the profession.[44] Such corporations because of their functions and titles are necessarily public ones within

---

[37] *Ex parte* Wall, 107 U. S. 265, 2 Sup. Ct. 562, 27 L. ed. 552 (1882); *In re* Adair, 34 F. (2d) 663 (D. C. Del. 1929); *Ex parte* Robinson, 3 Ind. 52 (1851); *In re* Norris, 60 Kan. 649, 57 Pac. 528 (1899); State v. Fouchey, 106 La. 743, 31 So. 325 (1901); *In re* Carver, 224 Mass. 169, 112 N. E. 877 (1916); *In re* Shephard, 109 Mich. 631, 67 N. W. 971 (1896); Burnes Case, 1 Wheel. Crim. 503 (N. Y.); Dean v. Stone, 2 Okla. 13, 35 Pac. 578 (1894); State Bar Comm. v. Sullivan, 38 Okla. 26, 131 Pac. 703 (1912); State v. Rossman, 53 Wash. 1, 101 Pac. 357 (1909); Note, Ann. Cas. 1913 D 1162.

[38] *Ex parte* Burr, 22 U. S. 529, 6 L. ed. 152 (1824); *Ex parte* Secombe, 60 U. S. 9, 15 L. ed. 565 (1856); *Ex parte* Wall, 107 U. S. 265, 2 Sup. Ct. 562, 27 L. ed. 552 (1882); *In re* Boone, 83 Fed. 944 (C. C. N. D. Cal. 1897); Potts, *Trial by Jury in Disbarment Proceedings* (1933) 11 TEX. L. REV. 28.

[39] State Law Examiners v. Phelan, 43 Wyo. 481, 5 P. (2d) 263 (1931); Note (1932) 78 A. L. R. 1323.

[40] State Law Examiners v. Phelan, 43 Wyo. 481, 5 P. (2d) 263 (1931).

[41] COSTIGAN, CASES ON LEGAL ETHICS (2nd ed. 1933) 163.

[42] Potts, *Jury Trial in Disbarment Proceedings* (1933) 11 TEX. L. REV. 28.

[43] Note (1932) 45 HARV. L. REV. 738. In case the evidence is uncontroverted, the judge may direct a verdict as in any other civil case tried by a jury. Weirnmont v. State, 101 Ark. 210, 142 S. W. 194 (1911).

[44] Statutes incorporating the bar. ALA. CODE (Michie, 1928) §§6220-6239; Ariz. Session Laws 1933, c. 66; CAL. GEN. LAWS (Deering, 1931) act 591; IDAHO CODE ANN. (1932) §§3-401 to 3-417; KY. REV. STAT. (Baldwin Supp. 1934) §101-1; La. Acts (2nd Ext. Sess.) 1934, no. 10, p. 70; MICH. COMP. LAWS (Mason Supp. 1935) §13603-1; MISS. GEN. LAW 1932 c. 121; NEVADA COMP. LAW (Hillyer, 1929) §§540-590; N. M. ST. ANN. §§9-201-9-212; N. C. CODE ANN. (Michie, 1935) §§215 (1)-215 (18); N. D. COMP. LAWS ANN. (Supp. 1925) §§81341-81345; Okla. Laws 1929 c. 264; Oregon Laws 1935 c. 28; S. D. Laws 1931 c. 84; UTAH REV. ST. (1933) §§6-0-1 to 6-0-23; WASH. REV. ST. (Remington Sup. 1934) §§138-1 to 138-17.

the meaning of the constitutional provisions against creating private corporations by special act of the legislature.[45] The constitutionality of the North Carolina organization was not passed on in the instant case, although the question was raised. The previous North Carolina decisions, however, are in line with those in the majority of jurisdictions in holding that the legislature may prescribe reasonable rules and regulations applicable to the admission and disbarment of attorneys, so long as they do not infringe on any inherent power of the court.[46] They have emphasized the fact that the judiciary is not shorn of all its power over disbarment by virtue of the statutes, but to the contrary there is recognition that two separate methods exist, to wit: (1) the legislative and (2) the judicial.[47] Prior to the State Bar Act, the legislative method provided for disbarment by the Superior Court and a jury, on evidence furnished by the Bar Association and on charges prosecuted by the solicitor, with an appeal to the Supreme Court. Today, under the new act, with the old statutory grounds only slightly revised, the Council disbars, with an appeal to the Superior Court and thence to the Supreme Court. In two recent cases the Supreme Court has exercised its inherent right to disbar on its own initiative—the judicial method—the charges usually being made by the Attorney General.[48] Thus there is no basis for fearing that the State Bar Act has deprived the courts of any of their original or supervisory control over disbarment proceedings. In recognizing the validity of legislative regulations in this field, the courts hold that a coördinate authority exists between the legislative and judicial branches of the government.[49] It has been sug-

[45] State Bar v. Superior Court, 207 Cal. 323, 278 Pac. 342 (1929); *In re* Scott, 53 Nev. 24, 292 Pac. 291 (1930). For a case showing there is no unconstitutional delegation of either legislative or judicial power, see Brydonjack v. State Bar, 208 Cal. 439, 281 Pac. 1018 (1929).

[46] *In re* Bailey, 30 Ariz. 407, 248 Pac. 29 (1926); *In re* Spriggs, 36 Ariz. 262, 248 Pac. 1521 (1930); *In re* Lavine, 2 Cal. (2d) 324, 41 P. (2d) 161 (1935); *In re* Day, 181 Ill. 73, 53 N. E. 646 (1899); *In re* Opinion of Justice, 279 Mass. 607, 180 N. E. 725 (1932); *In re* Humphrey, 178 Minn. 331, 227 N. W. 179 (1929); *In re* Richards, 339 Mo. 907, 63 S. W. (2d) 672 (1933); *Ex parte* Schenck, 65 N. C. 354 (1871); *In re* Applicants for License, 143 N. C. 1, 55 S. E. 635 (1906); *Ex parte* Ebbs, 150 N. C. 44, 63 S. E. 190 (1916) semble; *In re* Branch, 70 N. J. L. 537, 57 Atl. 431 (1904) *In re* Bruen, 102 Wash. 472, 172 Pac. 1152 (1918).

[47] Committee v. Strickland, 200 N. C. 630, 158 S. E. 110 (1931); *In re* Stiers, 204 N. C. 48, 167 S. E. 382 (1932).

[48] Attorney General v. Gorson, 209 N. C. 320, 183 S. E. 392 (1935); Brummitt v. Winborn, 206 N. C. 923, 175 S. E. 498 (1935).

[49] *Ex parte* Secombe, 60 U. S. 9, 15 L. ed. 565 (1856); *Ex parte* Garland, 71 U. S. 333, 379, 18 L. ed. 366 (1866); *Ex parte* Coleman, 54 Ark. 235, 15 S. W. 470 (1891); Brydonjack v. State Bar, 208 Cal. 439, 281 Pac. 1018 (1929); Carpenter v. State Bar, 211 Cal. 358, 295 Pac. 23 (1931); *In re* Taylor, 48 Md. 28 (1877); *In re* Opinion of Justices, 279 Mass. 607, 180 N. E. 725 (1932); State v. Johnson, 171 N. C. 799, 88 S. E. 437 (1916); Committee v. Strickland, 200 N. C. 630, 158 S. E. 110 (1931); *In re* Olmstead, 292 Pa. 96, 140 Atl. 634 (1928); *In re* Barclay, 82 Utah, 288, 24 P. (2d) 302 (1933); Board v. Phelan, 43 Wyo. 481, 5 P. (2d) 263 (1931).

gested that this co-authority exists as a matter of comity between the two branches of the government, and that it is a recognition by the court that both departments should function because it is not clear that either should have exclusive control.[50]

Incidentally, the State Bar Act was not constitutionally weakened by the provision that[51] "neither a councillor nor any officer . . . of the State Bar shall be deemed as such to be a public officer as that phrase is used in the Constitution or laws of the State of North Carolina." That was merely an ineffectual[52] attempt to prevent an attorney from being ineligible to serve as an officer or councillor under the dual office-holding ban of the state constitution,[53] in case he also happened to be a notary public[54] or county commissioner.

With respectful deference, it is submitted that the Council and Superior Court in the principal case could have been affirmed on all three grounds. Such a ruling would have been equally fair to the defendant and more in the public interest.

B. IRVIN BOYLE,
M. T. VAN HECKE.

Evidence—Dying Declarations in North Carolina.

The North Carolina courts have recognized dying declarations as competent evidence since 1815.[1] The bases of this exception to the general rule that all testimony must be given under oath and subject to cross examination are that this kind of evidence is necessary and especially trustworthy. Even though other witnesses are available, still if the deceased's information is to be availed of, his hearsay utterances must be received. Moreover, in many cases the deceased was the only witness, and a refusal to admit his statements would permit his assailant to escape. Further, this type of declaration is especially trustworthy

[50] Cheadle, *Inherent Power of Judiciary Over Admittance to the Bar* (1932) 7 WASH. L. REV. 320; Green, *The Court's Power over Admission and Disbarment* (1925) 4 TEX. L. REV. 1; Lee, *Constitutional Power of Courts over Admission to Bar* (1899) 13 HARV. L. REV. 233, 251; Bradway, *Moral Turpitude as the Criterion of Offenses that Justify Disbarment* (1935) 24 CALIF. L. REV. 9. See also STATE BAR ACTS ANN. (1934 ed.); Note (1932) 16 MINN. L. REV. 857.

[51] N. C. CODE ANN. (Michie, 1935) §255 (3).

[52] Attorney-General v. Knight 169 N. C. 335, 85 S. E. 418 (1915) (General Assembly is without power to declare a public office is not such an office).

[53] Art. XIV, §7.

[54] Harris v. Watson, 201 N. C. 661, 161 S. E. 215 (1931).

[1] The earliest case in which a dying declaration was admitted in evidence was McFarland v. Shaw, 4 N. C. 200 (1815). In an earlier case, State v. Moody, 3 N. C. 31 (1798), the court refused to admit a dying declaration. Stone, J., said, "How is it possible that a man can be a witness to prove his own death?" Another early case in which a dying declaration was held to be competent is State v. Poll, 8 N. C. 442 (1821).

because the conscious apprehension of the nearness of death is just as strong an incentive to tell the truth as an oath.[2]

The early case of *McFarland v. Shaw*[3] admitted a dying declaration in a civil action for seduction, but this was overruled in *Barfield v. Britt*[4] where it was held that such declarations were only competent in criminal prosecutions for homicide. A statute authorizing their introduction in civil actions for wrongful death was passed in 1919.[5] There seems to be no reason why the use of dying declarations should be so restricted for if they are necessary and trustworthy in homicide and wrongful death cases, why are they not equally necessary and trustworthy in other cases?

The trial judge must decide all preliminary questions upon which the admissibility of the dying declaration depends. His determination of the circumstances attendant upon the declaration is a finding of fact which is conclusive, but his decision as to whether the declaration is admissible in view of these facts is reviewable on appeal.[6] In order for the statement to be competent the declarant must be dead, and the declaration must have been made while he was aware that he was in actual danger of death.[7] It is not necessary that he should have been in the very act of dying,[8] and in one case the declaration was admitted even though it was made five months before the declarant's death.[9] Neither

[2] Barfield v. Britt, 47 N. C. 41 (1854); State v. Jefferson, 125 N. C. 712, 34 S. E. 648 (1899); 3 WIGMORE, EVIDENCE (2nd ed. 1923) §1431.

A typical argument against the admission of dying declarations is found in the following language of Mr. Justice Green taken from his opinion in Railing v. Commonwealth, 110 Pa. 100, 105 (1885): "Nor is the reason ordinarily given for their admission at all satisfactory. It is that the declarant in the immediate presence of death is so conscious of the great responsibility awaiting him in the near future if he utters falsehood, that he will in all human probability utter only the truth. The fallacy of this reasoning has been many times demonstrated. It leaves entirely out of account the influence of the passions of hatred and revenge which almost all human beings naturally feel against their murderers, and it ignores the well known fact that persons guilty of murder, beyond all question, very frequently deny their guilt up to the last moment upon the scaffold."

[3] 4 N. C. 200 (1815). [4] 47 N. C. 41 (1854).

[5] N. C. CODE ANN. (Michie, 1935) §160. The constitutionality of this statute was upheld in Tatham v. Andrews Mfg. Co., 180 N. C. 627, 105 S. E. 423 (1920). Other wrongful death cases involving the admissibility of dying declarations under this statute are: Williams v. R. & C. Ry. Co., 182 N. C. 267, 108 S. E. 915 (1921); Dellinger v. Elliott Building Co., 187 N. C. 845, 123 S. E. 78 (1924); Southwell v. A. C. L. Ry. Co., 189 N. C. 417, 127 S. E. 361 (1925); Holmes v. Wharton, 194 N. C. 470, 140 S. E. 93 (1927).

[6] State v. Williams, 67 N. C. 12 (1872).

[7] State v. Mills, 91 N. C. 581 (1884); State v. Laughter, 159 N. C. 488, 74 S. E. 913 (1912). The dying declaration is not rendered incompetent because the declarant did not say that he knew he was dying until after he had related the facts about the affray. State v. Peace, 46 N. C. 251 (1854); State v. Quick, 150 N. C. 820, 64 S. E. 168 (1909).

[8] State v. Watkins, 159 N. C. 480, 75 S. E. 22 (1912).

[9] State v. Craine, 120 N. C. 601, 27 S. E. 72 (1897). See also State v. Blackburn, 80 N. C. 478 (1879) (19 days elapsed between the two dates); State v. Dalton, 206 N. C. 507, 174 S. E. 422 (1934) (7 days).

is it necessary that he should state that he knows that he is dying. His apprehension of his critical condition may be inferred from the surrounding circumstances.[10] If he actually believed that he was going to die when he spoke, the statement is not rendered incompetent because the declarant's hope of recovery was later revived.[11] The declaration will be incompetent, however, if the declarant, were he living, would be disqualified to testify because of his insanity or infancy.[12] In all cases the declarations of the deceased victim are admissible in favor of the defendant as well as against him.[13]

The contents of a competent dying declaration must relate solely to the facts and circumstances directly attending the act which caused the declarant's death.[14] This restriction, like that which confines the use of dying declarations to homicide and wrongful death cases, seems unjustified because the statement is rendered no less trustworthy or necessary because it relates to facts and circumstances antecedent to the factor causing the declarant's death.

A dying declaration is not conclusive, its weight and credibility being a matter for the jury to determine.[15] It may be impeached in the same manner as any other sworn statement,[16] and if impeached it is proper for the offeror to corroborate it by evidence of prior consistent

[10] State v. Finley, 118 N. C. 1161, 24 S. E. 495 (1896) (a doctor told declarant that he was going to die); State v. Bagby, 158 N. C. 608, 73 S. E. 995 (1912) (doctor told declarant that he would die); State v. Watkins, 159 N. C. 480, 75 S. E. 22 (1912) (declarant stated that he did not want his people to know about his condition unless he was going to die; he immediately sent them a telegram when the doctor told him he only had one chance in a hundred of getting well). The opinion of the witness as to whether the declarant thought he would or would not die is not competent testimony. State v. Tilghman, 33 N. C. 513 (1850); State v. Layton, 204 N. C. 704, 169 S. E. 650 (1933) (doctor stated that declarant knew that she was dying, *held* immaterial error because declarant also stated her apprehension of approaching death); see State v. Franklin, 192 N. C. 723, 135 S. E. 859 (1926); State v. Ham, 205 N. C. 749, 172 S. E. 365 (1933) (testimony of nurse that declarant knew that she was dying apparently received without objection).

[11] State v. Tilgham, 33 N. C. 513 (1850); State v. Mills, 91 N. C. 581 (1884).

[12] See State v. Williams, 67 N. C. 12, 14 (1872).

[13] State v. Blackwell, 193 N. C. 313, 136 S. E. 868 (1927); State v. Mitchell, 209 N. C. 1, 182 S. E. 695 (1936).

[14] State v. Shelton, 47 N. C. 360 (1855); State v. Dula, 61 N. C. 211 (1867); State v. Jefferson, 125 N. C. 712, 34 S. E. 648 (1899); Dellinger v. Elliott Bldg. Co., 187 N. C. 845, 123 S. E. 78 (1924); State v. Beal, 199 N. C. 278, 154 S. E. 604 (1930).

[15] State v. Tilghman, 33 N. C. 513 (1850); State v. Davis, 134 N. C. 633, 46 S. E. 722 (1904); State v. Watkins, 159 N. C. 480, 75 S. E. 22 (1912).

[16] State v. Thomason, 46 N. C. 274 (1854) (evidence that declarant had a bad character for truth and veracity); State v. Blackburn, 80 N. C. 478 (1879) (contradicted on the facts by the testimony of other witnesses); State v. Davis, 134 N. C. 633, 46 S. E. 722 (1904) (doctor testified that declarant was in such bad condition that his memory had been impaired); State v. Williams, 168 N. C. 191, 83 S. E. 714 (1914) (contradicted on the facts); State v. Ham, 205 N. C. 749, 172 S. E. 365 (1933) (evidence that declarant was drunk when she made the dying declaration).

statements or by evidence of the declarant's good character.[17] This rule provides the opening for a logical inconsistency because where the deceased's testimony has been impeached by the introduction of prior contradictory statements, corroborative evidence of good character for truth and veracity is not strictly relevant. The fact that the declaration is fragmentary and incomplete does not render it incompetent but only affects its credibility before the jury.[18] At the request of the opposing party the judge must instruct the jury to receive the dying declaration with caution and without superstition,[19] but in the absence of a specific request it is not a reversible error for him to omit to make such a charge.[20]

In *State v. Williams*[21] the court held that a dying declaration is in-

[17] State v. Thomason, 46 N. C. 274 (1854) (prior consistent oral statement which was inadmissible by itself); State v. Blackburn, 80 N. C. 478 (1879); State v. Craine, 120 S. E. 601, 27 S. E. 72 (1897) (corroborative evidence was affidavit taken immediately after the affray); State v. Williams, 168 N. C. 191, 83 S. E. 714 (1914) (prior consistent oral statements and evidence of declarant's good character).

The witness who testifies to the dying declarations may refer to some memoranda to refresh his memory. State v. Whitson, 111 N. C. 695, 16 S. E. 332 (1892); State v. Finley, 118 N. C. 1161, 24 S. E. 495 (1896); State v. Teachey, 138 N. C. 587, 50 S. E. 232 (1905).

[18] State v. Brinkley, 183 N. C. 720, 110 S. E. 783 (1922); State v. Collins, 189 N. C. 15, 126 S. E. 98 (1924).

The declaration is not rendered inadmissible against a particular defendant because the declarant was unable to identify his assailant by name. State v. Wallace, 203 N. C. 284, 165 S. E. 716 (1932) ("A yellow negro shot me."); State v. Layton, 204 N. C. 704, 169 S. E. 650 (1933); State v. Beard, 207 N. C. 673, 178 S. E. 242 (1934) (declarant stated that the man who shot him didn't live in Valdese but had been hanging around town for several weeks).

[19] State v. Whitson, 111 N. C. 695, 16 S. E. 332 (1892); State v. Kennedy, 169 N. C. 326, 85 S. E. 42 (1915); State v. Williams, 185 N. C. 643, 116 S. E. 570 (1923).

[20] State v. Collins, 189 N. C. 15, 126 S. E. 98 (1924).

[21] 67 N. C. 12 (1872). There has naturally been some diversity of opinion as to what statements constitute opinion and what constitute fact. State v. Williams, 67 N. C. 12 (1872) (statement: "It was E. W. who shot me though I didn't see him." *Held:* opinion); State v. Mace, 118 N. C. 1244, 24 S. E. 798 (1896) ("They have murdered me for nothing in the world." *Held:* not a statement of opinion as to the degree of the homicide); State v. Jefferson, 125 N. C. 712, 34 S. E. 648 (1899) (". . . have J. arrested . . . we had an argument . . . later I was shot from ambush . . . saw a man running out of bushes but it was too dark for me to recognize him." *Held:* opinion); State v. Dixon, 131 N. C. 808, 42 S. E. 944 (1902) (declarant stated that his assailant was a small white man, that he looked like Dixon, and when he ran off, he ran like him. *Held:* fact); State v. Watkins, 159 N. C. 480, 75 S. E. 22 (1912) ("Why did he shoot me? I have done nothing to be shot for." *Held:* fact); State v. Williams, 168 N. C. 191, 83 S. E. 714 (1914) (declarant stated that W. shot him "without cause." *Held:* fact); State v. Beal, 199 N. C. 278, 154 S. E. 604 (1930) ("I do not know why they shot me in the back and killed me. I didn't do anything." *Held:* fact); State v. Stone, 204 N. C. 666, 169 S. E. 277 (1933) (declarant stated that he didn't know who shot him, but that he thought S did it. *Held:* this evidence might well have been excluded but defendant can't complain because he did not object at the trial). *Cf.* State v. Arnold, 35 N. C. 184 (1851) ("Great God! A has killed me." *Held:* statement of fact even though the facts showed that declarant could not have seen his assailant); State v. Franklin, 192 N. C. 723, 135 S. E. 859 (1926) (declarant's statement that defendant's motive was an old grudge was admitted).

admissible if it is a statement of opinion. The theory behind the opinion rule is that wherever the witness can state the facts on which he bases his opinion, the jury is equally competent to draw the inferences and the witness' conclusion is superfluous.[22] Wigmore in his treatise on Evidence argues that the rule should not be applied to dying declarations because the declarant is dead and it is not possible to obtain from him the data on which he based his inference.[23] In *State v. Watkins*[24] the North Carolina Supreme Court, in effect, reached such a result by holding that if there were any doubt as to whether the declaration was opinion or fact the judge should submit it to the jury with instructions to disregard it if they should find that it was intended to be a statement of opinion. The opinion rule is thus obviated because once the evidence is submitted to the jury it is, practically speaking, impossible for them to disregard it altogether even though they do decide that it is a statement of opinion.

N. A. TOWNSEND, JR.

Evidence—Rules of Evidence in Preliminary Controversies As to Admissibility of Testimony.

H was charged with the murder of his wife, *W*, and his defense was that the shot was fired accidentally. Over his objection the trial court permitted a witness for the state to testify that immediately after the shooting *W* had said that she was not going to live, that she wouldn't live to get to the hospital if they didn't hurry, and that *H* had shot her. *W* died three days after these statements were made. On appeal the North Carolina Supreme Court held that the evidence had been properly admitted as a dying declaration.[1]

As a general rule the unsworn declarations of a deceased person are admissible as an exception to the "hearsay rule" if made while the declarant was fully aware of his impending death.[2] In determining whether a certain declaration falls within the exception the trial judge must first make a finding of fact on which to base his decision.[3] In the instant case the only facts upon which he ruled that the declarant was under an apprehension of death were those contained in the hearsay

[22] 3 WIGMORE, EVIDENCE (2nd ed. 1923) §1447.
[23] 3 WIGMORE, *loc. cit. supra*, note 22.
[24] 159 N. C. 480, 75 S. E. 22 (1912). This rule was followed in: State v. Williams, 168 N. C. 191, 83 S. E. 714 (1914); State v. Beal, 199 N. C. 278, 154 S. E. 604 (1930).
Another peculiarity of this rule is that the jury is applying a rule of evidence. Ordinarily the application of the rules of evidence is left to the trial judge. State v. Williams, 67 N. C. 12 (1872).

[1] State v. Carden, 209 N. C. 404, 183 S. E. 898 (1936).
[2] State v. Mills, 91 N. C. 581 (1884); Note (1936) 14 N. C. L. REV. 380.
[3] State v. Williams, 67 N. C. 12 (1872).

declaration itself, and the decision is thus open to the objection that the finding of fact was predicated upon incompetent evidence. It may be argued that there can be no better evidence to show that the declarant was conscious of the nearness of death than the very fact that he did die. However, the court did not seem to rely upon that evidence, and it is rendered impotent by the fact that three days elapsed between the making of the statement and the declarant's death.

If, as Professor Wigmore contends,[4] the rules of evidence are not employed in preliminary hearings before the court this objection is obviated. The basis of the Wigmorean theory is that the rules of evidence were formulated for the protection of the jurors and that there is no comparable necessity for protecting the judge when he sits as the trior of the facts. However, certain commentators have indicated that Wigmore is not in accord with the weight of authority and that the foundation of his theory is questionable.[5] But what of the North Carolina situation? Are the rules of evidence applicable in the North Carolina courts when the judge is receiving testimony on which to make a finding of fact preliminary to determining the competency of certain evidence for the jury?

Apparently the North Carolina courts do apply the rules of evidence in preliminary hearings of this nature. Although no direct authority could be found a study of the procedure followed in certain cases indicates that such is the practice. For example, in *State v. Tilghman*[6] the "opinion rule" was applied in a preliminary hearing held to determine the admissibility of a dying declaration. The "hearsay rule" was employed in *Justice v. Luther*[7] to reject parol proof of the contents of a writing when the only evidence that it had been lost was the unsworn declaration of the person in whose hands the writing had been deposited for safekeeping. The rule that the declarations of an agent cannot be

[4] 1 WIGMORE, EVIDENCE (2nd ed. 1923) §4b; 3 WIGMORE, EVIDENCE (2nd ed. 1923) §1385.

[5] Maguire and Epstein, *Rules of Evidence in Preliminary Controversies as to Admissibility* (1927) 36 YALE L. J. 1101; Note (1928) 42 HARV. L. REV. 258.

[6] 33 N. C. 513 (1850). In deciding whether the declarant was under an apprehension of death the court refused to consider the testimony of the declarant's wife to the effect that in her opinion he did not think he was going to die. On appeal this action was approved.

See State v. Layton, 204 N. C. 704, 169 S. E. 650 (1933). In the preliminary hearing the court allowed a doctor to testify that in his opinion the declarant thought she was going to die. On appeal this testimony was held to be an immaterial error because the declarant had also stated her belief that she was dying.

The "opinion rule" was likewise employed in Avery v. Stewart, 134 N. C. 287, 46 S. E. 519 (1904) where the plaintiff was trying to establish the loss of a written instrument so that he could prove its contents by oral testimony.

[7] 94 N. C. 793 (1886). Smith, C. J., said, "The loss of the paper, traced to the hands of a depository, cannot be proved by his unsworn declaration of the fact. The evidence addressed to the court, must be reasonably sufficient to account for the absence of the original, and this must be under oath, not hearsay."

used to establish the fact of the agency was applied in *Jennings v. Hinton*[8] as the basis for the exclusion of certain preliminary testimony. It was argued in *Johnson v. Prairie*[9] that the admission of certain declarations of an alleged agent was not error because they were offered, not to the jury, but for the consideration of the court. The court held that if the evidence was not competent for the jury, it would not be proper for the court in deciding the competency of other testimony to act upon it. In *State v. Whitener*[10] the court held that in a preliminary hearing to determine the admissibility of a confession the defendant has a right to introduce evidence to show that it was not made voluntarily, and by way of *dicta* said, "It is the duty of the judge to hear all such *competent* evidence on this preliminary question as the defendant may see fit to offer." In certain other cases there is language to the effect that the judge's finding of fact preliminary to the admission of evidence is conclusive on appeal but what evidence he allows to establish those facts is a question of law subject to review.[11] What measuring rod will the appellate court use other than the common law rules of evidence?

[8] 128 N. C. 214, 38 S. E. 863 (1901). The wife assigned her interest as beneficiary in a life insurance policy upon her husband's life to the defendant, mortgagee of the husband's property. Later there was an absolute sale of the interest in the policy, and the wife now seeks to have the sale cancelled for fraud. While on the stand the wife was asked whose agent her husband was on the day the sale was made, and she answered that he was the defendant's agent. She was then asked what he said on that occasion. The defendant objected, and the court ruled that the question was improper. The ruling was based upon the reasoning that the second question was not proper if the first was incompetent, and the first was incompetent because the only information upon which the wife could have based her answer was what her husband, the alleged agent, had told her.

[9] 91 N. C. 159 (1884).

[10] 191 N. C. 659, 132 S. E. 603 (1926). The result of this case was approved and followed in State v. Blake, 198 N. C. 547, 152 S. E. 632 (1930).

It should be noted that the language quoted from this case was a portion of a longer excerpt quoted with approval by the North Carolina Supreme Court from State v. Kinder, 96 Mo. 548, 10 S. W. 77 (1888). The italics were inserted by the author of this note.

A similar case is State v. McRae, 200 N. C. 149, 156 S. E. 800 (1931) where the defendant was charged with murder. In the preliminary hearing to determine the competency of the defendant's alleged confession an officer testified that the prisoner made the confession voluntarily after his wife had related the entire story to the officers in the prisoner's presence. The court ruled that the confession was properly admitted and that this procedure did not violate the rule that a wife cannot testify against her husband.

[11] State v. Andrew, 61 N. C. 205, 206 (1867). Pearson, C. J., said, "What facts amount to such threats or promises as make confessions not voluntary and admissible in evidence is a question of law, and the decision of the judge in the court below can be reviewed by this Court; *so what evidence the judge should allow to be offered to him to establish those facts is a question of law.* So whether there be any evidence tending to show that the confession was not made voluntarily is a question of law. But whether the evidence is true and proves these facts, and whether the witnesses giving testimony to the court touching these facts are entitled to credit or not, and in case of conflict of testimony which witness should be believed by the court, are questions of fact to be decided by the judge, and his

In view of these authorities which indicate that the North Carolina courts do apply the rules of evidence in preliminary hearings the ruling in the instant case appears subject to a "legal criticism." That ruling, however, is supported by numerous decisions involving both dying declarations and other exceptions to the hearsay rule in which the facts upon which the judge ruled the evidence admissible were established by the hearsay declaration itself.[12] It is anomalous that in these cases the opportunity to apply the rules of evidence has been consistently refused, but this can probably be explained by the fact that the dying declarant's own statement is the best and often the only evidence of his knowledge of his condition. If the rules of evidence were applied in the preliminary hearing to exclude such statements the number of cases in which dying declarations could be successfully introduced would be materially decreased. Now, in the first place, the reasons for allowing the jury to consider the unsworn and uncrossexamined statements of a dead man were necessity and public policy,[13] and in view of these motives the court's inconsistency can be justified.

N. A. TOWNSEND, JR.

---

decision cannot be reviewed in this Court, which is confined to questions of law." (Italics by the author of this note.)

Similar language can be found in the opinion written by Walker, J., in Avery v. Stewart, 134 N. C. 287, 292, 46 S. E. 519, 521 (1904).

Support for the contention that the rules of evidence do apply in preliminary hearings before the judge may be found in the language used in the following cases: Smith v. Kron, 96 N. C. 392, 396, 2 S. E. 533, 535 (1887); Gillis v. Wilmington, Onslow, and Eastern Carolina Ry. Co., 108 N. C. 441, 443, 13 S. E. 11, 12 (1891).

[12] (a) Dying declarations: Dellinger v. Elliott Building Co., 187 N. C. 845, 123 S. E. 78 (1924); State v. Wallace, 203 N. C. 284, 165 S. E. 716 (1932); State v. Deal, 207 N. C. 448, 177 S. E. 332 (1934).

(b) Declarations evidencing present pain: Howard v. Wright, 173 N. C. 339, 91 S. E. 1032 (1917); Martin v. Hanes Co., 189 N. C. 644, 127 S. E. 688 (1925). It should be pointed out that the North Carolina Supreme Court has apparently abandoned the requirement that the declaration must relate solely to present pain. See Moore v. Summers Drug Co., 206 N. C. 711, 175 S. E. 96 (1934); Comment (1935) 13 N. C. L. REV. 228.

(c) Declaration against interest: Patton v. Dyke, 33 N. C. 237 (1850); Whitford v. North State Life Ins. Co., 163 N. C. 223, 79 S. E. 501 (1913).

(d) Declarations as a part of the *res gestae:* (1) Statement of present perception—Harrill v. S. C. and Ga. Extension Ry. of N. C., 132 N. C. 655, 44 S. E. 109 (1903). (2) Spontaneous declaration—State v. Spivey, 151 N. C. 676, 65 S. E. 995 (1909); Harrington v. Commissioners of Wadesboro, 153 N. C. 437, 69 S. E. 399 (1910); Young v. Stewart, 191 N. C. 297, 131 S. E. 735 (1926).

(e) Confessions (although confessions are not really among the *bona fide* exceptions to the hearsay rule they are included here because the problem discussed in this note is sometimes present in cases involving them): State v. Cruse, 74 N. C. 491 (1876); State v. Sanders, 84 N. C. 729 (1881); State v. Page, 127 N. C. 512, 37 S. E. 66 (1900).

[13] Barfield v. Britt, 47 N. C. 41 (1854); State v. Jefferson, 125 N. C. 712, 34 S. E. 648 (1899).

Municipal Corporations—Tort Liability—Parks and Playgrounds.

Plaintiff's intestate, a small child, died of injuries received while using a swing in the City of Charlotte's municipal park, and this action for damages was brought against the city for failure to exercise reasonable care in the maintenance of the park. The Supreme Court of North Carolina *held* the facts alleged in the complaint were insufficient to determine as a matter of law whether or not the maintenance of the park was in the exercise of a governmental function, and as a result the overruling of the defendant's demurrer was proper, since it was based on the contention that the maintenance of a public park was a governmental function for which the city would have no tort liability.[1] As the question of a city's liability for negligence in the operation of a park was here presented to the Supreme Court of North Carolina for the first time, it still remains unanswered.

The legal proposition that a municipal corporation is not liable for its torts in the exercise of a governmental function[2] but is liable for its torts in the exercise of a proprietary function[3] is firmly established. Pursuant to this doctrine the Supreme Court of North Carolina has held as *governmental* functions: the enactment[4] or enforcement[5] of laws or ordinances, the maintenance and acts of the fire[6] and police[7] departments, the fire and police alarm systems,[8] the collection of trash[9] and garbage,[10] the operation of incinerators,[11] and the maintenance of pub-

[1] White v. City of Charlotte, 209 N. C. 573, 183 S. E. 730 (1936).

[2] This was first stated in Russell v. Men of Devon, 2 Term Rep. 667, 100 Eng. Repr. 359 (1798); James v. City of Charlotte, 183 N. C. 630, 112 S. E. 423 (1922); Broome v. City of Charlotte, 208 N. C. 729, 182 S. E. 325 (1935); 6 McQUILLIN, MUNICIPAL CORPORATIONS (2nd ed. 1928) §2793. This rule of non-liability for torts in exercise of governmental functions does not apply to admiralty courts. Workman v. New York City, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. ed. 314 (1899).

[3] Meares v. City of Wilmington, 31 N. C. 74 (1848); Munich v. City of Durham, 181 N. C. 188, 106 S. E. 665 (1921); 6 McQUILLIN, MUNICIPAL CORPORATIONS (2nd ed. 1928) §2792.

[4] Harrington v. Town of Greenville, 159 N. C. 632, 75 S. E. 849 (1912).

[5] Hull v. Roxboro, 142 N. C. 453, 55 S. E. 351 (1906) (city did not enforce health ordinance); Goodwin v. City of Reidsville, 160 N. C. 411, 76 S. E. 232 (1912).

[6] Peterson v. City of Wilmington, 130 N. C. 76, 40 S. E. 853 (1902); Harrington v. Town of Greenville, 159 N. C. 632, 75 S. E. 849 (1912) (not liable for negligent acts or omissions of fire department).

[7] Moffitt v. Asheville, 103 N. C. 237, 9 S. E. 695 (1889) (not liable for injury to prisoner by negligence of jailer); McIlhenney v. City of Wilmington, 127 N. C. 146, 37 S. E. 187 (1900) (plaintiff was brutally arrested by a policeman for no offence, and court ruled policeman was an agent of the state); Hobbs v. City of Washington, 168 N. C. 293, 84 S. E. 391 (1915).

[8] Cathey v. City of Charlotte, 197 N. C. 309, 148 S. E. 426 (1929).

[9] Snider v. City of High Point, 168 N. C. 608, 85 S. E. 15 (1915).

[10] James v. City of Charlotte, 183 N. C. 630, 112 S. E. 423 (1922) (a small charge was made for service, and truck exceeded speed limit).

[11] Scales v. City of Winston-Salem, 189 N. C. 469, 127 S. E. 543 (1925).

lic buildings.[12] The Supreme Court has classified as *proprietary functions* to which liability attaches, the maintenance and operation of water[13] and light companies,[14] streets[15] and highways,[16] sidewalks,[17] bridges,[18] and jails.[19]

Difficulty and confusion arise when the court must decide the character of a new function assumed by municipalities.[20] The two tests

[12] See Pleasants v. City of Greensboro, 192 N. C. 820, 135 S. E. 321 (1926) (court assumed the maintenance of city hall was a governmental function).

[13] Woodie v. Town of North Wilkesboro, 159 N. C. 353, 74 S. E. 924 (1921) (city owes to its servants and the public the same duty as would a private corporation under like circumstances); Munich v. City of Durham, 181 N. C. 188, 106 S. E. 665 (1921) (superintendent of waterworks unjustifiably assaulted plaintiff). A city in no case is liable for failure to furnish a sufficient supply of either water or light. N. C. CODE ANN. (Michie, 1935) §2807; Howland v. City of Asheville, 174 N. C. 749, 94 S. E. 524 (1917); Mack v. Charlotte City Waterworks, 181 N. C. 383, 107 S. E. 244 (1921).

[14] Fisher v. New Bern, 140 N. C. 506, 53 S. E. 342 (1906); Harrington v. Commissioners of Wadesboro, 153 N. C. 437, 69 S. E. 399 (1910); Terrell v. City of Washington, 158 N. C. 282, 73 S. E. 888 (1912); Smith v. Commissioners of Lexington, 176 N. C. 467, 97 S. E. 378 (1918).

[15] Judge Pearson, in Meares v. Commissioners of Wilmington, 31 N. C. 74, 80 (1848) in imposing liability upon the city, stated ". . . When the sovereign grants power to a municipal corporation to grade the streets, the grant is made for the public benefit, and is accepted because of the benefit which the corporation expects to derive, not by making money directly, but by making it more convenient for the individuals composing the corporation or town to pass and repass in the transaction of business and to benefit them by holding out greater inducements for others to frequent the town and thereby add to its business . . . the citizens of the town derive special benefit from the work, which is not shared by the citizens of the State. . . ." Johnson v. City of Raleigh, 156 N. C. 269, 72 S. E. 368 (1911); Seborn v. City of Charlotte, 171 N. C. 540, 88 S. E. 782 (1916) (city does not warrant streets to be absolutely safe); Duke v. Town of Belhaven, 174 N. C. 95, 93 S. E. 472 (1917); Willis v. City of New Bern, 191 N. C. 507, 132 S. E. 286 (1926); Speas v. City of Greensboro, 204 N. C. 239, 167 S. E. 807 (1933) (unlighted "silent policeman").

[16] Gunter v. Town of Sanford, 186 N. C. 452, 120 S. E. 41 (1923); Pickett v. Carolina and Northwestern Railway, 200 N. C. 750, 158 S. E. 398 (1931); N. C. CODE ANN. (Michie, 1935) §3846 (j).

[17] Russell v. Town of Monroe, 116 N. C. 721, 21 S. E. 550 (1895); Revis v. City of Raleigh, 150 N. C. 349, 63 S. E. 1049 (1909) (hole in sidewalk); Seagraves v. City of Winston, 170 N. C. 618, 87 S. E. 507 (1916); Rollins v. Winston-Salem, 176 N. C. 411, 97 S. E. 211 (1918) (no legal duty to light streets); Bailey v. City of Asheville, 180 N. C. 645, 105 S. E. 326 (1920); Tinsley v. Winston-Salem, 192 N. C. 597, 135 S. E. 610 (1926); Gasque v. City of Asheville, 207 N. C. 821, 178 S. E. 848 (1935) (city not insurer of safety).

[18] Bell v. City of Greensboro, 170 N. C. 179, 86 S. E. 1041 (1915); Carter v. Town of Leaksville, 174 N. C. 561, 94 S. E. 6 (1917); Graham v. City of Charlotte, 186 N. C. 649, 120 S. E. 466 (1923); Michaux v. City of Rocky Mount, 193 N. C. 550, 137 S. E. 663 (1927).

[19] While a municipal corporation is not liable for the negligence of its jailers, policemen or guards, it is liable for failure to furnish reasonably comfortable jails. Shields v. Town of Durham, 118 N. C. 450, 24 S. E. 794 (1896) (jail for months had been in a very filthy, wet, and frozen condition); Coley v. City of Statesville, 121 N. C. 301, 28 S. E. 482 (1897); see Moffitt v. City of Asheville, 103 N. C. 237, 9 S. E. 695 (1889); Nichols v. Town of Fountain, 165 N. C. 166, 80 S. E. 1059 (1914).

[20] "Powers held to be governmental or public in one jurisdiction are held to be corporate or private in another, and it has often been said that it is impossible to state a rule sufficiently exact to be of much practical value in deciding when a

most frequently used to distinguish governmental from proprietary functions are: the function is proprietary if it is maintained for revenues and profit[21] of for the private advantage and benefit of the locality and its inhabitants as contrasted with a benefit which enures to the state.[22] Often the profit test is clear and its application easy, but it is too indefinite to suffice in a number of situations. While an incidental profit does not ordinarily change the character of a governmental function,[23] there is a conflict among the cases where the function is conducted in part for profit and in part for public purposes.[24] In *Pleasants v. City of Greensboro*[25] the North Carolina Supreme Court held the fact that a portion of the city hall was rented for a profit did not change the maintenance of the building from a governmental to a proprietary function. But what would the North Carolina court rule when a city gratuitously collects ashes from its citizens but charges business establishments for the same service, and a person is injured by a truck making collection from both sources? Would the court deny recovery when an electrician is electrocuted from a wire to a street light and at the same time allow recovery if he comes in contact with a house line on the same pole? What would be the result were he killed by the main trunk line carrying current for both purposes? This profit test when carried to its logical conclusion is hardly satisfactory.

The application of the test of private advantage and benefit to the

---

power is public and when private." Ramirez v. City of Cheyenne, 34 Wyo. 67, 241 Pac. 710 (1925); see Johnston v. City of Chicago, 258 Ill. 494, 101 N. E. 960, 962 (1913); Mayne v. Curtis, 73 Ind. App. 640, 126 N. E. 699, 701 (1920); Hattiesburg v. Greigor, 118 Miss. 676, 79 So. 846, 847 (1918). For a discussion of the confusion see, Borchard, *Government Liability in Tort* (1925) 34 YALE L. J. 129; 4 DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911) §1643. In South Carolina the court will not undertake to determine whether a function is governmental or private but imposes liability for all functions in the absence of statutes. Irvine v. Town of Greenwood, 89 S. C. 511, 72 S. E. 228 (1911).

[21] See Fisher v. City of New Bern, 140 N. C. 506, 512, 53 S. E. 342, 344 (1906); Munich v. City of Durham, 181 N. C. 188, 195, 106 S. E. 665, 668 (1921). 6 MCQUILLIN, MUNICIPAL CORPORATIONS (2nd ed. 1928) §2795; ELLIOTT, MUNICIPAL CORPORATIONS (3rd ed. 1925) §339.

[22] See Meares v. Commissioners of Wilmington, 31 N. C. 74, 80 (1848); Hull v. Town of Roxboro, 142 N. C. 454, 456, 55 S. E. 351, 352 (1906). 6 MCQUILLIN, MUNICIPAL CORPORATIONS (2nd ed. 1928) §2795; ELLIOTT, MUNICIPAL CORPORATIONS (3rd ed. 1925) §333.

[23] Manning v. City of Pasadena, 58 Cal. 666, 209 Pac. 253 (1922); Taggart v. City of Fall River, 170 Mass. 325, 49 N. E. 622 (1898); Bell v. City of Cincinnati, 80 Ohio St. 1, 88 N. E. 128 (1909); see Bolster v. City of Lawrence, 225 Mass. 387, 114 N. E. 722, 724 (1917); Scibilia v. City of Philadelphia, 279 Pa. 549, 124 Atl. 273, 276 (1924).

[24] Liability was imposed in the following cases: Judson v. Borough of Winstead, 80 Conn. 384, 68 Atl. 999 (1908); Moulton v. Town of Scarborough, 71 Me. 267 (1880); Oliver v. City of Worchester, 102 Mass. 489 (1869); Bell v. City of Pittsburgh, 297 Pa. 185, 146 Atl. 567 (1929). *Contra:* Edgerly v. Concord, 62 N. H. 8 (1882); Buchanan v. Town of Barre, 66 Vt. 129, 28 Atl. 878 (1894).

[25] 192 N. C. 820, 135 S. E. 321 (1926).

locality rather than to the state has led to many conflicting decisions and many distinctions which appear groundless. To hold as of benefit to the state, and thus a governmental function, the building or operation of a drawbridge,[26] the maintenance of a city hall and other municipal buildings,[27] flushing the streets,[28] driving an ambulance,[29] maintaining a city hospital,[30] seems irreconcilable with holding as a benefit to the locality the construction of sewers,[31] maintaining a city prison,[32] sprinkling the streets[33] and the driving of an ash cart.[34] Accepting the test at its face value, it seems that that which is beneficial to a city must necessarily in part be beneficial to the state.

The inconsistencies of the courts can partially be explained by the fact that the tests, while sufficient a century ago when first applied, are today inadequate because of the ever increasing activity by both the municipalities and the states and the complexities and demands of advancing civilization. Also, there has been much unfavorable comment as to the equity of the immunity doctrine for governmental functions,[35] and the courts whenever possible have tended to impose liability so as to reach a just result.[36]

[26] Evans v. City of Sheboygan, 153 Wis. 287, 141 N. W. 265 (1913).
[27] Schwalk's Adm. v. City of Louisville, 135 Ky. 570, 122 S. W. 860 (1909).
[28] Harris v. District of Columbia, 256 U. S. 650, 41 S. Ct. 610, 65 L. ed. 1146 (1921).
[29] Maximilian v. Mayor of New York, 62 N. Y. 160 (1875).
[30] Tallefson v. City of Ottawa, 228 Ill. 134, 81 N. E. 823 (1907).
[31] Ely v. City of St. Louis, 181 Mo. 723, 81 S. W. 168 (1904).
[32] Edwards v. Town of Pocahontas, 47 Fed. 268 (C. C. W. D. Va. 1891).
[33] McLeod v. City of Duluth, 53 S. D. 34, 218 N. W. 892 (1928).
[34] Missano v. Mayor of New York, 160 N. Y. 123, 54 N. E. 744 (1899).
[35] E. M. Borchard, *Government Liability in Tort* (1924-1925) 34 YALE L. J. 1, 129, 229; Borchard, *Theories of Governmental Responsibility in Tort* (1926-1927) 36 YALE L. J. 1, 757, 1039; Borchard, *Theories of Governmental Responsibility in Tort* (1928) 28 COL. L. REV. 577, 734; L. W. Feezer, *Capacity to Bear Loss as a Factor in the Decision of Certain Types of Tort Cases* (1930) 78 U. OF PA. L. REV. 805, (1931) 79 U. OF PA. L. REV. 742; E. B. Schulz, *The Liability of Municipal Corporations for Torts in Pennsylvania* (1936) 40 DICK. L. REV. 1. Many states have officially recognized the unfairness of the immunity doctrine and have extended municipal liability by statutory enactment. C. W. Tooke, *Extension of Municipal Liability in Tort* (1932) 19 VA. L. REV. 97.
[36] "The cities, more and more, are entering into the economic life of their citizens, and are now undertaking private enterprises formerly conducted by private corporations, often enterprises not essential to good government, but which are more in the nature of convenience and places of amusement, and further since the rule of non-liability of municipal corporations for torts is based on an analogy to non-liability of the state for torts, the rule ought to be applied only when their functions are similar to those of the state . . . there is to be observed a distinct movement toward the doctrine that municipal corporations are under a duty of exercising reasonable care in the maintenance of parks and other public enterprises of like character, which we think is the more wholesome and equitable rule." Warden v. City of Grafton, 99 W. Va. 249, 128 S. E. 375, 376, 378 (1925); in Fowler v. City of Cleveland, 100 Ohio St. 158, 126 N. E. 72, 77 (1919) (city was held liable for negligence of fire engine returning from a fire, and Judge Wanamaker, concurring, stated, "The whole doctrine of immunity given to a sovereign state was based upon the assumption of the divine right of kings—a king

For classification as either governmental or proprietary, municipal maintenance of parks and playgrounds has fallen midway, and is commonly said to be in the "twilight zone." Early cases and the greater weight of authority hold their maintenance to be a governmental function,[37] justifying such position by saying that their essential value is the promotion of health, education, and social improvement, since they afford recreation, exercise, pleasure, and diversion; further, that their beneficial nature is not confined to the limits of the municipality. The minority view, as set out in more recent decisions, looking to the hardships which result from the denial of a recovery to the injured persons, rules that parks and playgrounds are a proprietary function and imposes liability on the following grounds: (1) that the benefits of such activities are limited to the particular locality;[38] (2) that parks are private and exclusive property of the city, the city having absolute management and control thereof;[39] (3) that the laws fixing municipal liability as to streets and highways are applicable to parks and playgrounds;[40] (4) that as park establishment is permissive, rather than mandatory, the municipality is not an agent of the state when it exercises this permissive power.[41]

---

can do no wrong; he is infallible; or if he do wrong no subject has any right to complain. This doctrine has been shot to death on so many different battlefields that it would seem utter folly now to resurrect it."

[37] Meyer v. City and County of San Francisco, 49 P. (2d) 893 (Cal. 1935) (miniature train); Cornelisen v. City of Atlanta, 146 Ga. 416, 91 S. E. 415 (1917); Hendricks v. Urbana Park Dist., 265 Ill. App. 102 (1932) (swimming pool); Warren v. City of Topeka, 125 Kan. 524, 265 Pac. 78 (1928) (swimming pool); Board of Park Commissioners v. Prinz, 127 Ky. 468, 105 S. W. 948 (1907); Bolster v. City of Lawrence, 225 Mass. 837, 114 N. E. 722 (1917) (swimming pool); Heino v. City of Grand Rapids, 202 Mich. 363, 168 N. W. 512 (1918) (swimming pool); St. John v. City of St. Paul, 179 Minn. 12, 228 N. W. 170 (1929) (bathing beach); Toft v. City of Lincoln, 125 Neb. 497, 250 N. W. 748 (1933) (artificial lake); Bisbing v. Asbury Park, 80 N. J. L. 416, 78 Atl. 196 (1910); Blair v. Granger, 24 R. I. 17, 51 Atl. 1042 (1902); Mayor and City Council of Nashville v. Burns, 131 Tenn. 281, 174 S. W. 1111 (1915) (swing); Vanderford v. City of Houston, 286 S. W. 568 (Tex. 1926) (wading pool); Adler v. Salt Lake City, 64 Utah, 568, 231 Pac. 1102 (1924) (collapse of a tier of seats); Stuver v. City of Auburn, 171 Wash. 76, 17 P. (2d) 614 (1932) (merry-go-round); Virovatz v. City of Cudahy, 211 Wis. 357, 247 N. W. 341 (1933) (lake); see City of Hartford v. Maslen, 76 Conn. 599, 57 Atl. 740 (1904).

[38] Augustine v. Town of Brant, 249 N. Y. 198, 163 N. E. 732 (1928); Paraska v. City of Scranton, 313 Pa. 227, 169 Atl. 434 (1933) (swing); Warden v. City of Grafton, 99 W. Va. 249, 128 S. E. 375 (1925) (slide).

[39] Canon City v. Cox, 55 Colo. 264, 133 Pac. 1040 (1913) (merry-go-round); Sarber v. City of Indianapolis, 72 Ind. App. 594, 126 N. E. 330 (1920); Ramirez v. City of Cheyenne, 34 Wyo. 67, 241 Pac. 710 (1925) (swing).

[40] Pennell v. City of Wilmington, 23 Del. 229, 78 Atl. 915 (1906); Thayer v. City of St. Joseph, 54 S. W. (2d) 442 (Mo. 1932); Narberg v. Hagna, 46 S. D. 568, 195 N. W. 438 (1923) (swimming pool); Hain v. City of Lynchburg, 181 S. E. 285 (Va. 1935) (swimming pool).

[41] Boise Development Co. v. Boise City, 30 Idaho 675, 167 Pac. 1032 (1917); Capps v. City of St. Louis, 252 Mo. 345, 158 S. W. 616 (1913). South Carolina imposes liability by statute. Haithcock v. City of Columbia, 115 S. C. 29, 104 S. E. 335 (1920).

Logically, and considering the similarity between park maintenance and the maintenance of health and schools, which are practically unanimously held to be governmental functions, the governmental classification seems to be the sounder of the two views if the distinction between governmental and proprietary function is to be strictly followed. However, as the immunity doctrine is apparently inequitable, as shown by the tendency of the courts to impose liability wherever possible, the imposition of liability by statutory enactment, and the opinions of writers on the subject, it appears that substantial justice will be more satisfactorily served if the Supreme Court of North Carolina rules the maintenance of a park a proprietary function.

S. J. STERN, JR.

Negotiable Instruments—Payment—Cashier's Check.

Defendant, manufacturer of motor cars, notified plaintiff-distributor that "driveaways" must be settled for by cashier's check before the cars would be delivered. Dealer, ordering through plaintiff, procured cashier's check payable to defendant and delivered same to defendant coincident with delivery of cars. The account of distributor was credited with the amount of the check which was deposited with promptness in a Wisconsin bank for collection; thence it was sent to a Federal Reserve Bank and then to drawee bank. Drawee stamped check paid, charged the amount on its own books against its deposit with the Reserve Bank, and sent a credit memorandum to the latter bank which failed to credit same to drawee's account. Drawee became insolvent, and after successive charges back by the banks to its account, defendant charged the amount of the cashier's check back to plaintiff. *Held,* the check constituted payment.[1]

With the exception of a few jurisdictions[2] the authorities are unanimous in support of the rule that the giving of a bank check by a debtor for the payment of his indebtedness to the payee is not, in the absence of an express or implied agreement to that effect, a payment or discharge of the debt. There is a presumption that the check is accepted on condition that it be paid, and the debt is not discharged until the check is paid or until it is accepted at the bank at which it is made payable.[3] The reason sometimes assigned is that the paper is given and

[1] Nash Motors Co. v. J. M. Harrison and Co., 183 S. E. 202 (Ga. 1935).

[2] Dille v. White, 132 Iowa, 327, 109 N. W. 909 (1906) (a contrary rule has been announced in Massachusetts, Maine, and Indiana where the giving of a check, note, or draft for a debt or obligation to pay money is held to operate as a payment or extinguishment of the obligation).

[3] Ketcham v. Hines, 29 Ga. App. 627, 116 S. E. 225 (1923) (bank checks are not payment until themselves paid, without an express agreement that they are to be accepted as such); Dille v. White, 132 Iowa 327, 109 N. W. 909 (1906);

received upon the mutual understanding of the parties that it represents actual value to its full nominal amount and that on due presentation to the drawee it will be honored. It is only upon its being thus honored that the payment become effective and absolute.[4] Even in the jurisdictions first referred to above it is held to be a rule of presumption only, and the intention of the parties when expressly declared or when shown by collateral facts and circumstances will be allowed to prevail.[5] Whether there is such an agreement is to be determined by the intent of the parties,[6] and it is a question of fact for the jury[7] to ascertain from the circumstances.[8] Thus the majority of courts seem to be in accord with the general rule, but a divergence occurs when they attempt to ascertain, in the light of the facts of each individual case, whether there is an express or implied agreement to accept a negotiable instrument as payment. Some courts follow the view that the mere expression of a preference or request for a certain medium of payment and compliance with such request or preference does not of itself constitute payment[9] because the creditor is said to have elected to take a security instead of cash, and when the check is dishonored the vendor may resort to his

---

Andrews-Cooper Lumber Co. v. Hayworth, 205 N. C. 585, 172 S. E. 183 (1934); South v. Sisk, 205 N. C. 655, 172 S. E. 193 (1934) (delivery and acceptance of check not payment in absence of agreement to that effect); Lloyd Mortgage Co. v. Davis, 51 N. D. 336, 199 N. W. 869 (1924); Baker v. State Highway Dept., 166 S. C. 481, 165 S. E. 197 (1932); 3 DANIEL, NEGOTIABLE INSTRUMENTS (7th ed. 1933) §1448.

[4] Dille v. White, 132 Iowa 327, 109 N. W. 909 (1906).

[5] Duncan v. Kimball, 70 U. S. 37, 18 L. ed. 50 (1865); Cheltenham Stone and Gravel Co. v. Gates Iron Co., 124 Ill. 623, 16 N. E. 923 (1888); Dille v. White, 132 Iowa 327, 109 N. W. 909 (1906).

[6] Kinard v. First National Bank of Sylvester, 125 Ga. 228, 53 S. E. 1018 (1906) (whether there is payment depends upon intention of parties).

[7] Downey v. Hicks, 55 U. S. 240, 14 L. ed. 404 (1852); Cochran v. Zahos, 286 Mass. 173, 189 N. E. 831 (1934).

[8] Kinard v. First National Bank of Sylvester, 125 Ga. 228, 53 S. E. 1018 (1906).

[9] Dille v. White, 132 Iowa 327, 109 N. W. 909 (1906) (general rule applied even where the person entitled to receive the money expresses a preference for its payment by check, but does not agree to assume the risk of its being honored); Weddington v. Boston Elastic Fabric Co., 100 Mass. 422 (1868) (as part of original contract of sale seller was to receive bills of exchange and on failure of drawee, seller was permitted to recover price of goods from purchaser); Baumgardner v. Henry, 131 Mich. 240, 91 N. W. 169 (1902) (see cases cited in opinion); National Life Ins. Co. v. Goble, 51 Neb. 5, 70 N. W. 503 (1897) (insurance company notified insured that premium due and requested remittance by bank draft, registered letter or post office money order. *Held,* sending and accepting of draft and giving of receipt did not constitute payment when draft not paid); Syracuse, B. & N. Ry. Co. v. Collins, 1 Abb. N. C. 47 (N. Y. 1874), *aff'd,* 57 N. Y. 641 (1874) (Agent of carrier expressed preference for check. *Held,* no agreement being shown that the check was intended to be received as absolute payment, the carrier was entitled to recover on the original consideration). A statement on the bill to "Please remit by check at once," should not be construed to mean that a check is necessarily desired. This is merely a matter of form and both parties probably understand it as such. The statement means that some form of payment is wanted at once.

original claim on the ground that there has been a defeasance on which it was taken.[10] Other courts take the position that it is payment when the creditor's proposal to use a particular medium is accepted[11] since debtor, accepting such proposal, puts himself to the inconvenience, and, perhaps adds expense, of affirmatively procuring a cashier's check.[12] An unreasonably delay in presenting the check will operate as an absolute payment,[13] but this question was not presented in the principal case.

The court in the principal case placed little weight upon the fact that the check was stamped "paid" and the bank's books debited with the amount of the check. It has been held that marking a check paid and making an entry on books is not conclusive but is only evidence of payment for debts and obligations are not discharged by mere entries upon books.[14] At least one court, however, has said that a check is paid when the drawee bank has merely marked it paid,[15] and if the court in the principal case had followed such rule then the check might well have been considered paid.

At first sight, it would seem to be a harsh rule that places the burden

[10] Hodgson v. Barrett, 33 Ohio St. 63, 68 (1877).

[11] Corbit v. Bank of Smyra, 2 Harr. 235, 30 Am. Dec. 635 (Del. 1837) (in case of contemporaneous debts the notes operate as payment, and are held to be the same as money, and the risk of the solvency of the maker of the note is upon the person receiving, for no debt strictly is created; no credit is given to the person, but it is given to the note accepted; it is a sale or exchange); Cowen v. Indianapolis Life Ins. Co., 116 Fla. 814, 157 So. 180 (1934) (request for medium of payment followed by acceptance constitutes payment); Martin v. N. Y. Life Ins. Co., 30 N. M. 400, 234 Pac. 673 (1923) (insurance company notifying debtor that premium due and requesting payment by draft or check is held to have agreed to accept such commercial paper as payment and settlement of the premium due); Federal Land Bank of Columbia v. Barrow, 189 N. C. 303, 127 S. E. 3 (1925) (jury found upon competent evidence that plaintiff instructed defendants to send cashier's check in payment of debt and defendants having complied with the instructions are no longer liable).

[12] Cowen v. Indianapolis Life Ins. Co., 116 Fla. 814, 157 So. 180 (1934).

[13] Kraetsch v. City of Chicago, 198 Ill. App. 395 (1916) (a reasonable time or due diligence requires presentment of cashier's check for payment on the same day, or at the furthest, within banking hours on the next day after the check is delivered to it); Federal Land Bank of Columbia v. Barrow, 189 N. C. 303, 127 S. E. 3 (1925); Lloyd Mortgage Co. v. Davis, 51 N. D. 336, 199 N. W. 869 (1924) (acceptance of check implies understanding to present it for payment within a reasonable time, which depends upon the circumstances of each case, in determining which the time, mode, and place of receiving the check and the relation of the parties should be considered); Notes (1928) 26 MICH. L. REV. 930; (1930) 29 MICH. L. REV. 244; (1930) 8 N. C. L. REV. 444.

[14] Kinard v. First National Bank of Sylvester, 125 Ga. 228, 53 S. E. 1018 (1906) (marking of not paid is not sufficient; whether there is payment depends upon intention of parties); Interstate Nat. Bank v. Ringo, 72 Kan. 116, 83 Pac. 119 (1905) (credits given on account do not show absolute payment); Graham v. Procterville Warehouse, 189 N. C. 533, 127 S. E. 540 (1925); Dewey Bros. v. Margolis & Brooks, 195 N. C. 307, 142 S. E. 22 (1928); Raines v. Grantham, 205 N. C. 340, 171 S. E. 360 (1933).

[15] Nineteenth Ward Bank v. First National Bank of So. Weymouth, 184 Mass. 49, 69 N. E. 670 (1903); (1932) 30 MICH. L. REV. 962 (see on problem of payment generally).

of risk on creditor requesting a certain form of payment; especially so, when it is certainly not his intent to accept such medium as absolute payment but only as payment conditional upon actual payment of the check or other medium of payment. This is even more true when in most cases the trend of the law governing checks and bank collections is found to be in the direction of giving adequate protection to payees, either by continuing the drawer's liability or allowing a preference in the insolvent's assets.[16] It may well be said, however, that by such a request the creditor imposes the risk upon himself and is estopped to deny that drawer is discharged by compliance with the request. Where a way of payment is prescribed it must be followed,[17] and since this may cause the debtor to go to added trouble and expense he should not be further liable. In the present case the reason given for holding that payment was intended was the fact that defendant-manufacturer stated that every "driveaway" must be *settled for* by cashier's check before cars would be delivered, this language seeming to state more than a mere request.

In view of the uncertainty of a jury finding the creditor should stipulate in his contract that check or other requested medium of payment is taken subject to collection as is done by banks in their deposit slips[18] and by some insurance companies in their policies[19] and notification forms.

J. D. MALLONEE, JR.

Practice and Procedure—Raising Affirmative Defenses by Demurrer.

In an action to recover damages sustained by plaintiff when he entered defendant's store as an invitee and fell down an elevator shaft at the rear entrance of defendant's building, plaintiff alleged that defendant had maintained an elevator to the right of the entrance, and that without knowledge of plaintiff moved the entrance so as to place it in front of the elevator and that plaintiff upon entering pulled open and

[16] N. C. CODE ANN. (Michie, 1935) §218 (c) (14) (order and preference in distribution of insolvent bank's assets: (4) certified checks and cashier's checks in the hands of a third party as a holder for value). Old Company's Lehigh, Inc. v. Meeker *et al.*, 294 U. S. 227, 55 Sup. Ct. 392, 79 L. ed. 876 (1935) (statute allowing preferred claim does not apply to National banks); (1930) 8 N. C. L. REV. 197, 198; (1933) 19 IOWA L. REV. 90 (preference given).

[17] Swift v. New York, 83 N. Y. 528, 533 (1881).

[18] Quarles v. Taylor and Co., 195 N. C. 313, 142 S. E. 25 (1928) (stipulation read all items accepted at depositor's risk, until we have received final actual payment).

[19] Philadelphia Life Ins. Co. v. Hayworth, 296 Fed. 339 (C. C. A. 4th, 1924); Hoar v. Union Mutual Life Ins. Co., 118 App. Div. 416, 103 N. Y. Supp. 1059 (1907) (policy forfeited if note or check previously given was not paid).

fell into the shaft. Defendant filed an answer denying negligence and setting up plea of contributory negligence. At trial defendant demurred *ore tenus* to the complaint; the demurrer was sustained, on the ground that the complaint alleged negligence on the part of the plaintiff which barred his recovery. *Held:* since the complaint did not show upon its face patent and unquestionable contributory negligence, defendant's demurrer should be overruled.[1]

Prior to 1887 there was doubt in North Carolina as to whether the plaintiff had to negative contributory negligence to state a cause of action or whether contributory negligence was an affirmative defense. This doubt as to who had the burden of pleading was settled by C. S. §523, which provided that "in all actions to recover damages by reason of negligence of the defendant, where contributory negligence is relied upon as a defense, it must be set up in the answer and proved on the trial." Nevertheless, the instant case allows the defense to be raised by demurrer. To what extent is and has this been true of other affirmative defenses? Under the common law[2] system of pleading a party in actions at law was precluded from availing himself of the Statute of Limitations, by demurrer, as a bar to the plaintiff's demand even when it was patent upon the face of the complaint that the limitation prescribed by the statute had expired. The reason upon which this conclusion was based was that to permit the question to be so raised would deny the plaintiff an opportunity to show some exceptions which might prevent the bar from operating.[3] It may be answered that the plaintiff might be allowed to amend his complaint to show such exception. The practice in the English Chancery Court was not so well established. The early cases permitted the statute to be raised by demurrer to the bill.[4] Yet, at one time, the common law rule against the use of the demurrer to raise the point threatened to prevail in the Chancery Court.[5] The

[1] Ramsey v. Nash Furniture Co., 209 N. C. 165, 183 S. E. 536 (1936).

[2] Thursly v. Warren, Cro. Car. 159 (K. B. 1630); Hawkings v. Billhead, Cro. Car. 404 (K. B. 1636); Gould v. Johnson, 2 Ld. Raym. 838 (K. B. 1702); BLISS, CODE PLEADING (3rd ed., 1894) §205.

[3] Frankersley v. Robinson, Cro. Car. 163 (K. B. 1631); Stile v. Finch, Cro. Car. 381 (K. B. 1635); Hawkings v. Billhead, Cro. Car. 404 (K. B. 1636); Gunton v. Hughes, 181 Ill., 132, 54 N. E. 895 (1899); Lesher v. U. S. Fidelity Guaranty Co., 239 Ill. 502, 88 N. E. 208 (1909); Charters v. Citizens Nat'l Bank, 84 Ind. App. 15, 145 N. E. 517 (1925); Callan v. Bodine, 81 N. J. L. 240, 79 Atl. 1057 (1911); Murdock v. Herndon's Ex'r., 4 Hen. and M. 200 (Va., 1809); Screck v. Virginia Hot Springs Co., 140 Va. 429, 125 S. E. 316 (1924); Vencill v. Flynn, 94 W. Va. 396, 119 S. E. 164 (1923). *Contra:* Kirkpatrick v. Monroe, 234 Ill. App. 213 (1924), criticized in (1925) 20 ILL. L. REV. 391.

[4] Saunders v. Hord, 1 Chan. Rep. 184 (1660); see Pearson v. Pulley, 1 Chan. Cases 102 (1668).

[5] Aggas v. Pickerell, 3 Atk. 225 (Ch. 1745); Gregor v. Malesworth, 2 Ves. Sr. 109 (Ch. 1750); Dildraine v. Browne, 3 Bro. C. C. 633 (Ch. 1792); see Prince v. Heylin, 1 Atk. 493 (Ch. 1737). These cases held that a demurrer would not be permitted to raise the point as the complainant would be prevented from re-

later cases in equity, however, in absence of the complainant's showing that the case was within one of the exceptions, sanctioned the use of the demurrer if the statute had apparently run,[6] and it was these cases that afforded the common statements of text writers that the equity rule allowed the point to be raised by demurrer.[7] This was probably the general rule in the United States,[8] although there was some authority to the contrary.[9] Under the present code system, many diverse rules have evolved. A majority of the courts hold that if the complaint on its face shows that the action is barred, then it is demurrable;[10] but there is some authority to the effect that the defense cannot be so raised in any instance, but it must be set up by answer.[11] North Carolina ad-

---

plying or amending his bill to show that the case came within an exception to the statute.

[6] Muttoe v. Smith, 3 Anst. 709 (Ex. Ch. 1796); Foster v. Hodgson, 19 Ves. Jr. 180 (Ch. 1812); Hoore v. Peck, 6 Sim. 51 (Ch. 1833); Smith v. Fox, 6 Hare 386 (Ch. 1848); see Honenden v. Annesley, 2 Sch. and Lef. 607, 637 (Ch. 1806).

[7] STORY, EQUITY PLEADING (8th ed. 1870) §§751-756; LANGDELL, SUMMARY OF EQUITY PLEADING (1883) §110; HEARD, EQUITY PLEADING (1889) 88, 89; SHIPMAN, EQUITY PLEADING (1897) 465; PHILLIPS, CODE PLEADING, §295; LUBE, EQUITY PLEADING (1840) 43.

[8] Wisner v. Ogden, Fed. Cas. No. 17,914 (C. C. D. C. 1827); Erickson v. Insurance Co., 66 Fla. 154, 63 So. 716 (1913); Henry County v. Winnebago Drainage Co., 52 Ill. 456 (1869); City of Fulton v. Northern Ill. College, 158 Ill. 333, 42 N. E. 138 (1895); Gephart v. Sprigg, 124 Md. 11, 91 Atl. 792 (1914); Fogg v. Price, 145 Mass. 513, 14 N. E. 741 (1888); McLean v. Barton, Harr. Ch. 279 (Mich. 1841); Champan v. Chene, 1 Mich. 400 (1850); Humbert v. Trinity Church, 7 Paige 195 (N. Y. Ch. 1838); Crawford Adm'rs v. Turner's Adm'rs, 67 W. Va. 564, 68 S. E. 179 (1910).

[9] Hubble v. Poff, 98 Va. 646, 37 S. E. 277 (1900); see Vyse v. Richards, 208 Mich. 383, 175 N. W. 392 (1919); LANGDELL, SUMMARY OF EQUITY PLEADING (1883) §109.

[10] Ready v. Ozan Inv. Co., 190 Ark. 506, 79 S. W. (2d) 433 (1935) (Statute of Limitations demurrable where bar shown on face); Hyder v. Shamy, 40 P. (2d) 974 (Ariz. 1935) (demurrable by statute where complaint shows a bar); Chandler v. Runnels, 138 Kan. 673, 27 P. (2d) 232 (1933) (not demurrable where petition does not disclose on its face that action is barred); Ferrier v. McCabe, 129 Minn. 342, 152 N. W. 734 (1915) (where complaint shows bar); Ludwig v. Scott, 65 S. W. (2d) 1034 (Mo. 1933) (action in equity to cancel deeds and notes for fraud. *Held:* Statute of limitations in equity or at law can only be raised by pleading, not demurrer, unless bar shown on its face); Liberty National Bank of Weatherford v. Broomer, 172 Okla. 244, 45 P. (2d) 85 (1935) (in actions for recovery of money, statute cannot be raised by demurrer where petition does not on its face show cause of action is barred); Johnston v. State, 49 P. (2d) 141 (Okla. 1935); Howell v. Howell, 15 Wis. 55 (1862); Eiche v. Wallrabenstein, 215 Wis. 311, 254 N. W. 534 (1934). For an elaborate discussion of the statute of limitations see the article of Professor T. E. Atkinson, *Pleading the Statute of Limitations* (1926) 36 YALE L. J. 914. See also for further information (1925) 35 YALE L. J. 487, and (1927) 27 COL. L. REV. 157.

[11] Sibley Grading and Teaming Co. v. Crary, 49 P. (2d) 823 (Cal. 1935) (not available on general demurrer); Cage v. Young, 95 Colo. 130, 33 P. (2d) 389 (1934) (general demurrer will not raise the statute); Lyttle v. Johnson, 213 Ky. 274, 280 S. W. 1102 (1926); Vance v. Atherton, 252 Ky. 591, 67 S. W. (2d) 968 (1934) (statute cannot be raised by demurrer, but must be pleaded); Leffek v. Luedeman, 95 Mont. 457, 27 P. (2d) 511 (1933) (Statute of Limitations can only be raised by answer regardless of bar shown on face of complaint); Robinson v. Lewis, 45 N. C. 58 (1852); Guthrie v. Bacon, 107 N. C. 337, 12 S. E. 204 (1890)

heres to the latter view. Some courts permit the demurrer only in equity cases, but not in actions at law.[12] A further variation of the authorities is found in those cases allowing the right to demur if no exception can be applicable[13] but disallowing the demurrer if an exception might be applicable.[14] Some states provide by statute that a demurrer may be interposed.[15] A distinction has been drawn between the general Statute of Limitations and time limitations applicable to special statutory actions, in which case compliance with the statute must be pleaded by the plaintiff else his complaint is demurrable, and presumably if the complaint on its face shows a bar it is also demurrable. The better rule, it is suggested, is to permit the demurrer to raise the issue so as to dispose of the case finally because of the bar of the statute. To overrule the defendant's demurrer and require him to plead the statute in his answer, merely protracts litigation, as the defendant will then ask for a judgment on the pleadings.

In regard to the Statute of Frauds, in England, in actions of equity[16] the plaintiff had the burden of allegation; however, in actions at law[17] the defendant had the burden of allegation. This distinction was abolished by the Judicature Acts, which placed the burden of allegation

---

(Statute of Limitations not raised by demurrer even when complaint shows bar, either in equity or at law. Statute must be pleaded in both instances); Logan v. Griffith, 205 N. C. 580, 172 N. E. 348 (1934) (limitation on tax foreclosure sale not demurrable though bar is apparent on face). Otherwise before the Code, Phillips v. Grand Trunk Ry. Co., 236 U. S. 662, 35 Sup. Ct. 444, 59 L. ed. 774 (1914); King v. Powell, 127 N. C. 10, 37 S. E. 62 (1900) (Statute of Limitations cannot be set up by demurrer but must be specifically pleaded in the answer).

[12] Green v. Proctor and Gamble Distributing Co., 92 Fla. 396, 109 So. 471 (1926) (Statute of Limitations in an action at law is not demurrable though bar is shown on its face); Henry County v. Winnebago Drainage Co., 52 Ill. 456 (1869); Quinn v. Quinn, 260 Mass. 494, 157 N. E. 641 (1927) (must be set up in answer in action at law); Aisenberg v. Royal Ins. Co., Ltd., 266 Mass. 543, 165 N. E. 682 (1929); Gallagher v. Wheeler, 198 N. E. 891 (Mass. 1935) (Statute of Limitations is good for demurrer in equity); Doss v. O'Toole, 80 W. Va. 46, 92 S. E. 134 (1917); Cameron v. Cameron, 111 W. Va. 375, 162 S. E. 173 (1931) (defense that cause of action is barred by limitation is available on demurrer in law cases).

[13] Leard v. Leard, 30 Ind. 171 (1868); Hanna v. Jeffersonville Ry., 32 Ind. 113 (1869); Law v. Ramsey, 135 Ky. 333, 122 S. W. 167 (1909); Missouri, K. and T. Ry. v. Wilcox, 32 Okla. 51, 121 Pac. 656 (1912).

[14] 128 Ind. 110, 26 N. E. 794 (1891); Brashears' Heirs v. Brashears, 144 Ky. 451, 139 S. W. 738 (1911); Groziani v. Ernst, 169 Ky. 751, 185 S. W. 99 (1916); Klinekline v. Head, 205 Ky. 644, 266 S. W. 370 (1924); Polson v. Revard, 104 Okla. 279, 232 Pac. 435 (1924).

[15] ARIZ. REV. STAT. (1913) §468; IOWA CODE (1924) §11141; OHIO GEN. CODE (Page, 1920) §11309; ORE. LAWS (Olsen, 1920) §68; WASH. COMP. STAT. (Remington, 1922) §259; WIS. STAT. (1921) §2649.

[16] Wood v. Midgley, 5 De. G. M. & G. 41 (Ch. 1854).

[17] Anonymous, 2 Salk. 519 (Eng. 1708); Pascal v. Richards, 50 Law J. Ch. Div. 337 (1881); Price v. Weaver, 13 Gray 273 (Mass. 1859); Mullaly v. Holden, 123 Mass. 583 (1878); Walker v. Richards, 39 N. H. 259 (1859); STEPHEN, PLEADING (9th Am. ed. 1867); BLISS, CODE PLEADING (1894) §354.

upon the defendant in all instances.[18] A few American jurisdictions still give the burden of allegation to the plaintiff;[19] however, a majority of the courts[20] make the Statute of Frauds an affirmative defense, but allow the defendant to raise it by demurrer. A few courts[21] follow the old English practice. North Carolina is *contra* to the majority view.[22] It is submitted that the same reason given agove for permitting the Statute of Limitations to be raised by demurrer is applicable to the Statute of Frauds.

As to the defense of payment, the rule of *Hilary Term 4 W. 4* specifically stipulated that payment was to be specially pleaded,[23] but under this rule it was held that payment which did not amount to a complete discharge, but operated merely in reduction of damages, need not be pleaded specially, in assumpsit,[24] although it was otherwise in debt.[25] But a later rule was promulgated ordering that payment should not in any case be allowed to be given in evidence in reduction of damages or debt, but that it should be pleaded in bar,[26] which seems to have been the early rule in this country.[27] Under our present systems of pleading, a majority of the courts hold that payment is an affirmative defense which the defendant must plead and prove.[28] There are two

[18] Fuctcher v. Fuctcher, 50 L. J. Ch. Div. (N. s.) 735 (1881) (this case clearly states the practice before and after the Judicature Acts); Morgan v. Worthington, 38 L. T. Ch. Div. (N. s.) 443 (1878).

[19] McCoy v. McCoy, 32 Ind. App. 38, 69 N. E. 193 (1903); Boone v. Coe, 153 Ky. 233, 154 S. W. 900 (1913); Candill v. Gorman Coal Co., 242 Ky. 294, 46 S. W. (2d) 93 (1932).

[20] Randall v. Howard, 67 U. S. 585, 17 L. ed. 269 (1862); Norton v. Slegmeyer, 175 Fed. 756 (C. C. A. 8th, 1910); Rabe v. Danaker, 56 F. (2d) 758 (C. C. A. 2nd, 1932); Thompson v. N. S. Coal Co., 135 Ala. 630, 34 So. 31 (1903); Pasten v. Cleve, 201 Ala. 529, 78 So. 883 (1918); Dickey v. McKinlay, 163 Ill. 318, 45 N. E. 134 (1896); Koenig v. Dohm, 209 Ill. 468, 70 N. E. 1061 (1904); Ropachi v. Ropachi, 354 Ill. 502, 188 N. E. 401 (1933); Ahrend v. Ordiorne, 118 Mass. 261 (1875); Denvir v. North Avenue Savings Bank, 194 N. E. 836 (Mass. 1935); Seamens v. Barentsen, 180 N. Y. 333, 73 N. E. 42 (1905); Collins v. Philadelphia Oil Co., 97 W. Va. 464, 125 S. E. 223 (1924).

[21] McDonald v. McDonald, 215 Ala. 179, 110 So. 291 (1926); Firemen's Fund Ins. Co. v. Williams, 170 Miss. 199, 154 So. 545 (1934).

[22] Ingram v. Corbit, 177 N. C. 318, 99 S. E. 18 (1919); Pilot Real Estate Co. v. Fowler, 191 N. C. 616, 132 S. E. 575 (1926), cited and followed in Ollis v. Ricker, 203 N. C. 671, 672, 166 S. E. 801 (1932).

[23] Hil. T. 4 W. 4 (1833).

[24] Shirley v. Jacobs, 2 Bing. N. C. 88 (C. P. 1835).

[25] Belbin v. Butt, 2 M. and W. 422 (Ex. 1837).

[26] T. T. I. Vict.

[27] Unless the proceedings contained an averment of payment, the presumption of payment could not be raised. Fellers v. Lee, 2 Barb. 488 (N. Y. 1848); Martin v. Gage, 9 N. Y. 398 (1853); Martin v. Pugh, 23 Wis. 184 (1868).

[28] Rawleigh Co. v. Snider, 194 N. E. 356 (Ind. 1935) (statute makes payment an affirmative defense); Manglares v. Passiales, 244 Mich. 188, 221 N. W. 149 (1928) (by rule of circuit court); Smith v. Smith, 262 Mich. 60, 247 N. W. 106 (1933); Dickensheets v. Patrick, 217 Mo. App. 171, 274 S. W. 89 (1925); Omaha Alfalfa Milling Co. v. Hallen, 105 Neb. 193, 179 N. W. 1010 (1920); McKyring v. Bull, 16 N. Y. 297 (1857); Bernham Corp. v. Ship Ahoy, 200 App. Div. 399, 193 N. Y. S. 372 (1922); Ellison v. Ricks, 85 N. C. 77 (1881); Reserve Loan

reasons given in support of this view. First, it avoids surprise on the plaintiff and apprises him of the exact issue to be proved by the defendant.[29] Second, the defendant can more easily show affirmatively a payment, if any, than the plaintiff can prove a general negative.[30] The only case found in North Carolina is in accord with the majority view.[31] But even though the plaintiff need not prove non-payment, it is still thought that he must allege it to state a cause of action. Thus, if the complaint shows payment, the plaintiff is alleging just the opposite of the averment necessary for stating a cause of action. Logically, therefore, a demurrer to such a complaint should be sustained. No cases directly presenting the question have been found. One dictum[32] is explicitly *contra,* and one holding[33] leaves the implication of a contrary result.

No common law cases were found in which the issue of contributory negligence was presented upon demurrer. Whatever may have been the situation at common law, the present English rule[34] and that of a majority of American jurisdictions,[35] generally speaking, support the conclusion that contributory negligence is an affirmative defense to be

---

Life Ins. Co. v. Simmons, 140 Okla. 212, 282 Pac. 279 (1928); Washington v. Mechanics and Traders Ins. Co., 50 P. (2d) 621 (Okla. 1935); Palmer v. Parker, 91 Wash. 683, 158 Pac. 1017 (1916); Gardner v. Avery Mfg. Co., 117 Wis. 487, 94 N. W. 292 (1903). See also CLARK, CODE PLEADING (1928) 422; SOUTHERLAND, CODE PLEADING (1910) §529; Reppy, *The Anomaly of Payment As An Affirmative Defense* (1924) 10 CORN. L. Q. 269; Alden, *The Defense of Payment Under the Code System* (1909) 19 YALE L. J. 647.

[29] See Note (1932) 31 MICH. L. REV. 132.

[30] CLARK, CODE PLEADING (1928) 422.

[31] Ellison v. Ricks, 85 N. C. 77 (1881).

[32] In Dean v. Boyd, 86 Miss. 204, 38 So. 297 (1905) the court, on demurrer to the bill, stated categorically that "payment should be set up by plea or answer, not by demurrer."

[33] Confield v. Tobias, 21 Calif. 349 (1863) (Plaintiff brought action for goods sold, and, anticipating the defense of payment based upon notes given by the defendant, alleged fraud on the defendant's part to avoid the effect of payment. Defendant's answer alleged payment by notes referred to in complaint but did not deny allegations concerning fraud. The case was submitted on the pleadings and plaintiff had judgment. *Held,* allegations of complaint in reference to transaction claimed to operate as payment were not material allegations requiring a denial, and were not therefore admitted by failure of defendant to deny them).

[34] Wakelin v. London and Southwestern Ry. Co., L. R. 12 A. C. 41, 51 (1886); SALMOND, LAW OF TORTS (6th ed. 1913) §9; BURDICK, LAW OF TORTS (4th ed. 1926) §65. For support of opposite doctrine see CLERK AND LINDSELL, TORTS (7th ed. 1921) 510 n (e).

[35] Olson v. City of Butte, 86 Mont. 24, 283 Pac. 222 (1929) (must be pleaded as a defense unless plaintiff's evidence shows his own negligence); Smith v. Odd Fellows Building Assoc., 46 Nev. 48, 205 Pac. 796 (1922); Duffy v. Atlantic and N. C. R. Co., 144 N. C. 26, 56 S. E. 557 (1907) (must be pleaded by defendant unless facts stated in complaint which as a matter of law show contributory negligence); Rosenthal v. Reed, 129 Ore. 203, 276 Pac. 684 (1929) (not available as a defense where not pleaded); Missouri P. R. Co. v. Watson, 72 Tex. 631, 10 S. W. 731 (1889); SPEARMAN AND REDFIELD, NEGLIGENCE (1913) §109; BURDICK, LAW OF TORTS (1926) §65 (455); HARPER, LAW OF TORTS (1933) §135. See also (1920) 6 IOWA L. BULL. 55; (1931) 44 HARV. L. REV. 292.

specially pleaded and proved by the defendant. There is an exception to the above general rule which seems to be substantiated by a majority of the courts; that is, if contributory negligence is patent upon the face of the complaint, it need not be specially pleaded; instead, a demurrer will suffice to present the issue.[36] The instant case allows the defendant to take advantage of such a defense by way of demurrer and is thus in accord with the majority view. The court, in allowing the issue to be raised, by demurrer, relied upon *Burgin v. Richmond and Danville R. R. Co.*,[37] but the case of *Smith v. Southern Ry. Co.*[38] reached the directly opposite result upon an identical set of facts. Unfortunately, however, the later case did not specifically overrule the *Flemington* case, as no authority was cited for the position taken by the court. A strict interpretation of statute,[39] making this an affirmative defense, would preclude the result of the principal case. The same conclusion could be supported by the argument that to permit the issue to be raised by demurrer fosters the use of a defense of which the plaintiff is not informed. However, if the plaintiff's contributory negligence operates as a complete bar to recovery as a failure to state a cause of action, then indisputably the use of the demurrer should be sanctioned. In corroboration of this position, it might be further said that if the pleader, who undoubtedly is in a better position to state his cause of action, can do no more than state facts in a complaint, which on its face shows that there is no cause of action, then the demurrer should be allowed.

STATON P. WILLIAMS.

[36] Adams v. Mayor of City of Waycross, 114 Ga. 712, 40 S. E. 699 (1902); Dorsey v. Columbus Ry. Co., 121 Ga. 697, 49 S. E. 698 (1905); Hendrix v. Jones, 28 Ga. App. 335, 111 S. E. 81 (1922); Wynne v. So. Bell Tel. and Tel. Co., 129 Ga. 623, 126 S. E. 388 (1925); Tybee Amusement Co. v. Odum, 51 Ga. App. 1, 179 S. E. 415 (1933); Mason v. Frankel, 49 Ga. App. 145, 174 S. E. 546 (1935); Smith v. Oregon Short Line Ry. Co., 47 Idaho 604, 277 Pac. 570 (1929); Pipher v. Carpenter, 7 P. (2d) 589 (Idaho 1932); Favre v. Louisville and N. Ry. Co., 91 Ky. 541, 16 S. W. 370 (1891); Stillwell v. South Louisville Land Co., 22 Ky. 785, 58 S. W. 696 (1900); Clark v. Chicago, Milwaukee and St. Paul Ry. Co., 28 Minn. 69, 9 N. W. 75 (1881); Eaton v. Wallace, 287 S. W. 614 (Mo. 1926); Frye v. Omaha and Council Bluffs Street Ry. Co., 106 Neb. 333, 183 N. W. 567 (1921); Morgan v. Hudson River Telephone Co., 50 Misc. Rep. 388, 100 N. Y. Supp. 539 (1906); Duffy v. A. and N. C. R. R. Co., 144 N. C. 26, 56 S. E. 557 (1907) ("Defense of contributory negligence must be set up in answer as we find no facts stated in the complaint which as a matter of law constitute contributory negligence."); Smith v. Southern Ry. Co., 80 S. C. 1, 61 S. E. 205 (1908); City of Winchester v. Carroll, 99 Va. 727, 40 S. E. 37 (1901); Baker v. Butterworth, 119 Va. 402, 89 S. E. 849 (1916).

[37] 115 N. C. 673, 20 S. E. 473 (1894) (plaintiff's pleadings showed that he stepped from a moving train. *Held*, demurrer properly sustained).

[38] 129 N. C. 374, 40 S. E. 86 (1901) (plaintiff's pleadings showed he stepped from a moving train. *Held*, contributory negligence is a defense to be pleaded by way of answer).

[39] N. C. CODE ANN. (Michie, 1935) §523.