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Notes and Comments

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offense concluded against the statute, *State v. Jim, supra,* dictum. If, however, the indictment concluded both at common law and against the statute and the offense was a common law offense the conclusion "against the form of the statute" was rejected as surplusage. *State v. Lamb,* 65 N. C. 420 (1871), *State v. Bryson,* 79 N. C. 652 (1878), *State v. Harris,* 106 N. C. 682 (1890), *State v. Craft,* 168 N. C. 208 (1914).

(2) In 1854 the revised code, c. 35 §20 provided that "no judgment upon an indictment . . . shall be staid or reversed . . . for the insertion of the words *against the form of the statutes* instead of the words *against the form of the statute* or vice versa nor for omission of the words *against the form of the statute* or *against the form of the statutes.* N. C. ANN. CODE (Michie, 1927) §4625. In *State v. Kirkman,* 104 N. C. 911 (1889) these words were declared unnecessary in the indictment and in *State v. Peters,* 107 N. C. 876 (1890) they were rejected as surplusage.

III. It is apparent that the above section is a codification of our law.

ALBERT COATES.

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NOTES AND COMMENTS

Air Law—Liability for Injuries by Aircraft

Eight modern cases involving either actual or threatened injury to persons or property from aircraft have been noted in this country.[1] Two were cases of criminal trespass.[2] In both, the charge was dismissed because no statute applied. Four were cases in which damages were asked. In one of these, a dirigible flying below five hundred feet frightened a team, causing it to run away and to injure the

[1] For bibliographies on the field of Air Law, consult: Hirschberg, *Bibliography of the Law of Aviation* (1929) 2 So. CALIF. L. REV. 455; and Hotchkiss, *Select Bibliography of Air Law* (1930) 16 A. B. A. J. 264.

[2] Unreported case in Punxsutawney, Pennsylvania, comment in (1922) 2 WIS. L. REV. 58; Commonwealth v. Nevin and Smith, Court of Quarter Sessions of Jefferson County, Pennsylvania, April 1922 (unreported), comment in (1922) 71 U. OF PA. L. REV. 88.

plaintiff. Recovery was allowed.[3] In two cases, fair boards had engaged aviators to exhibit at fairs and spectators were injured. The Wisconsin court refused to allow recovery because the board was exercising governmental functions. It indicated, too, that in a proper case it would require proof of negligence.[4] In the New York case, the board was held liable under local statutes because it failed to provide a safe place for spectators.[5] In the fourth case, defendant's plane fell on the plaintiff's lawn. The Minnesota court allowed damages and, though refusing a permanent injunction against flight at any altitude, granted a temporary injunction restraining flights at altitudes lower than prescribed by the local flight statute.[6] In the last two of the eight cases under review, plaintiffs, owners of country estates adjoining airports, sought injunctions against flight over their land at less than the statutory standard of five hundred feet. The Massachusetts court found such flights to constitute trespass but failed to find sufficient damage to sustain an injunction.[7] The federal court, however, granted an injunction against flights below this altitude, even though made in taking off and landing.[8]

Though decisions in this field are few, statutory provisions are numerous. In the two fair-board cases, cited above, the courts indicated that recovery must depend upon the plaintiff's ability to prove negligence.[9] The difficulty of doing this in the case of aircraft is obvious.[10] Therefore, at least seventeen states, including North Carolina, have made owners and operators of aircraft absolutely liable for any damage caused while in flight.[11] Although these

[3] Neiswonger v. Goodyear Tire and Rubber Co., 35 F. (2d) 761 (N. D. Ohio 1929); (1930) 8 N. C. L. REV. 281; (1930) 78 U. OF PA. L. REV. 633; (1930) 43 HARV. L. REV. 837; (1930) 28 MICH. L. REV. 756.

[4] Morrison v. Fisher, 160 Wis. 621, 152 N. W. 475 (1915).

[5] Platt v. Erie Co. Agricultural Society, 164 App. Div. 99, 149 N. Y. Supp. 520 (1914).

[6] Johnson v. Curtiss Northwest Airplane Co., district court of Ramsey County, Minnesota (1923), reported in 1928 UNITED STATES AVIATION REVIEW 42.

[7] Smith v. New England Aircraft Co., 170 N. E. 385 (Mass. 1930); (1930) 16 VA. L. REV. 714.

[8] Swetland v. Airport Co., 41 F. (2d) 929 (N. D. Ohio 1930).

[9] *Supra*, note 2.

[10] LOGAN, AIRCRAFT LAW MADE PLAIN (1928), 44.

[11] Seventeen states: Vermont, Delaware, Indiana, Pennsylvania, Michigan, Rhode Island, North Dakota, South Dakota, Utah, Nevada, Tennessee, Arizona, North Carolina, South Carolina, Mississippi, and Wisconsin; UNIFORM AERONAUTICS ACT, §5; N. C. PUB. LAWS (1929), c. 190, §8.5; N. C. ANN. CODE (Michie, Supp. 1929), §191 (n) (Provision makes owner and operator

statutes do not regulate noise and, in the last case stated the court refused an injunction against an airport on the grounds that there was no unnecessary noise, a constant and unnecessary disturbance will probably be dealt with by the courts as a nuisance.[12]

The most frequent cause of litigation is low flight of aircraft.[13] Under statutory flight rules, it is unlawful to fly at less than five hundred feet, except while taking off and landing.[14] The courts in the Massachusetts and Ohio cases, however, go a step farther and hold that, even while taking off and landing, actual interference with the use of land below will be regarded as trespass.[15] This means that planes must reach the five hundred foot level before passing from the airport over adjoining land,[16] or, in other words, that about three thousand five hundred feet be added to each dimension of the present average airport.[17]

G. A. LONG.

of every aircraft absolutely liable for injuries to person or property caused by the ascent, descent, or flight of aircraft or dropping of any object therefrom unless injury is caused in whole or in part by negligence of person injured or owner of property injured). See also c. 90, §§3 and 4; N. C. ANN. CODE (Michie, Supp. 1929) §191 (aa, bb) (operation of aircraft while intoxicated made a crime).

[12] LOGAN, *op. cit. supra* note 10, at 24.

[13] It must be noticed that the courts have refused to rule that any flight above another's land is trespass, although that would seem to be required by the common-law maxim, *cujus est solum ejus est usque ad caelum.* This question has been settled in many states by statute. UNIFORM AERONAUTICS ACT, §3; N. C. PUB. LAWS (1929) c. 190, §3; N. C. ANN. CODE (Michie, Supp. 1929), §191 (e) (Places the ownership of superincumbent space in the landowner but subject to the right of flight). *Caelum* actually means a space beginning only a short distance above the earth. (1928) 62 AM. L. REV. 887. But see criticism of this view by Bogert, *Problems in Aviation Law* (1920), 6. CORN. L. Q. 271. Wandsworth Bd. of Works v. United Telegraph Co. (1889), L. R. 13 Q. B. Div. 904; Erickson v. Crookston, 100 Minn. 481, 111 N. W. 391 (1903).

[14] 44 STAT. 569 (1926), 49 U. S. C. A. §173 (1929) (Secretary of Commerce given power to establish rules of aviation). Air Commerce Regulations, Chap. 5, §81 (g). (Prohibits flights under five hundred feet, except in landing or taking off.) In Swetland v. Airport Co., *supra* note 8, the court based its decision on whether there was interference with effective possession where flights occurred at less than five hundred feet.

[15] *Supra* notes 7 and 8. UNIFORM AERONAUTICS ACT, §4. N. C. PUB. LAWS (1929), c. 190, §4. N. C. ANN. CODE (Michie, Supp. 1929), §191 (m). (Providing that flights at such low altitude as to interfere with the then existing use of the property or so conducted as to be imminently dangerous to any person thereon is unlawful.)

[16] (1930) 3 So. CALIF. L. REV. 413, 415; 30 COL. L. REV., 579, 581.

[17] TIME, Vol. 30, no. 5, at page 51; AMERICAN CITY, Vol. 43 at page 165.

Constitutional Law—Power of Administrative Officer to Revoke Driver's Permit—Personal Fitness as Test

In a recent Virginia case a portion of an ordinance authorizing the chief of police to revoke the permit of any driver who "in his opinion" becomes unfit to drive was held void, since it failed to lay down any rule determining the fitness of the driver, and thereby delegated a power of arbitrary discrimination to the officer.[1]

The broad principle covering this type of cases is that an ordinance which vests arbitrary discrimination in an officer with respect to the practicing of an ordinary lawful business without preserving a uniform rule of action is unconstitutional.[2]

The decisions are by no means uniform as to what constitutes a sufficient rule of action. Any attempt to determine the sufficiency of the rule by reference to the words employed will result in hopeless confusion. However it has been held that when a general delegation of the power of determination follows specific delegations on the same subject the latter should be construed as limited to the field of the former;[3] also if the courts decide that a more detailed rule would tend to confuse rather than enlighten the officer, they will consider this as a factor favoring the sufficiency of the rule as laid down.[4] The courts themselves recognize the impracticability of reference to the wording alone as a standard, especially where personal qualifications are involved.[5] As a result they tend to uphold a seemingly arbitrary delegation of power to officials in this particular class of cases.

A review of those cases construing 'personal fitness' ordinances reveals that the courts resort to many factors outside the ordinance itself in determining whether or not it lays down a sufficient rule of action. There is a very apparent tendency to consider closely the public interest to be subserved in the granting or refusal of a particular license. As the occupation or business approaches the borderline of privilege wherein a license is fraught with danger to public interest[6] the courts uphold a wider range of discretion than when the

[1] Thompson v. Smith, Chief of Police, 154 S. E. 579 (Va. 1930).
[2] Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. ed. 220 (1886).
[3] Forman v. State Board of Health, 157 Ky. 123, 162 S. W. 796 (1914).
[4] *Ex Parte* Kreutzer, 187 Wis. 463, 204 N. W. 595 (1925).
[5] Hall v. Geiger-Jones Co., 242 U. S. 539, 37 Sup. Ct. 217, 61 L. ed. 480 (1916); *Ex Parte* Kreutzer, *supra* note 4.
[6] Bizzell v. Goldsboro, 192 N. C. 348, 357, 135 S. E. 50 (1926). (Clarkson, J. distinguishes between those occupations or activities in which the "right" to engage is a mere privilege and those activities in which the practitioner has

occupation is purely a matter of private interest, subject to only a limited degree of legislative restriction.[7] It is submitted that the present case was rightly decided since the individual has something in the nature of a vested right to drive his private car.

One court, in considering whether or not a certain ordinance imposed an arbitrary power in an officer, considered, among other factors, the hardship a refusal of the permit would impose on the applicant.[8]

The tendency of the courts to become more liberal in the construction of this type of statute can, to some extent, be attributed to the growing complexity of our administrative government, necessitating a grant of greater discretionary powers to local authorities.[9]

WEX S. MALONE.

Constitutional Law—Taxation—Chain Store Tax

The recent case of *The Great Atlantic and Pacific Tea Company et al. v. Maxwell*[1] held valid under both state and federal Constitutions a statute[2] declaring every person, firm or corporation operating or maintaining two or more stores or mercantile establishments under the same general management, supervision, or ownership to be a chain store operator *per se,* and as such subject to a license tax, for the privilege of engaging in such business, of fifty dollars ($50.00) on each and every store operated in the state in excess of one. The

a vested right); Brunswick-Balke Co. v. Mecklenburg Co., 181 N. C. 386, 107 S. E. 317 (1921) (Operation of billiard parlor held privilege).

[7] In the following cases ordinances laying down apparently arbitrary powers of discrimination were held valid: Sumner v. Ward, 126 Wash. 75, 217 Pac. 502 (1923) (peddlers); Minces v. Schoenig, 72 Minn. 528, 75 N. W. 711 (1898) (gift, fire, and bankrupt sales); State v. Cohen, 73 N. H. 543, 63 Atl. 928 (1906) (dealers in junk); Gundling v. Chicago, 177 U. S. 183 (1900) (sale of cigarettes); Clark v. McBride, 101 N. J. L. 213, 127 Atl. 550 (1925) (employment agencies).

[8] Matthews v. Murphy, 23 Ky. L. Rep. 750, 63 S. W. 785, 786 (1901).

[9] Leach v. Daugherty, 73 Cal. App. 83, 238 Pac. 160 (1925); *Ex parte* Kreutzer, *supra* note 4.

[1] The Great Atlantic and Pacific Tea Company et al v. Maxwell, Commissioner of Revenue of North Carolina, 199 N. C. 433 (1930).

[2] "*Branch or Chain Stores.* Every person, firm or corporation engaged in the business of operating or maintaining in this State, under the same general management, supervision, or ownership, two or more stores or mercantile establishments, where goods, wares, and/or merchandise is sold or offered for sale at retail shall be deemed a branch or chain store operator, shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business of a branch or chain store operator, and shall pay for such license fifty dollars ($50.00) on each and every store operated in this State in excess of one." N. C. PUB. LAWS (1929), c. 345, §162.

statute obviously was passed to remedy the defects of the 1927 chain store tax[3] which was declared void in *The Great Atlantic and Pacific Tea Company v. Doughton.*[4] The present statute differs from the former one in that it is not retroactive,[5] and the classification is between operators of one store and operators of more than one store.

The right of the state to tax trades for the purpose of raising revenue and to classify for the purpose of taxation is no longer questioned. The only requirements under the Fourteenth Amendment are that such classifications be reasonable and not arbitrary, for the Amendment was not intended to compel the State to adopt an iron rule of equal taxation.[6]

Due to the campaign being waged in the press and over the radio against chain stores, it is inevitable that various types of legislation directed at chain stores will be passed.[7] To date, with the exception of North Carolina, only two such statutes have been before the courts. The Supreme Court of Kentucky declared an Act requiring a "cash and carry" grocery store to pay a higher tax than a regular service grocery store to be unconstitutional on the basis that there was no reasonable grounds for the distinction.[8] The Federal District Court recently held an Indiana Act taxing mercantile store operators by a

[3] *"Branch or Chain Stores.* That any person, firm, corporation, or association operating or maintaining within this State, under the same general management, supervision or ownership, six or more stores or mercantile establishments, shall pay a license tax of $50.00 for each such store, or mercantile establishment in the State, for the privilege of operating or maintaining such store or mercantile establishments." N. C. PUB. LAWS (1927), c. 80, §162.

[4] The Great Atlantic and Pacific Tea Company *et al.* v. Doughton, Commissioner of Revenue of North Carolina, 196 N. C. 145, 144 S. E. 701 (1928). An excellent article dealing with this case and the chain store tax in general is —Becker and Hess, *The Chain Store License Tax and the Fourteenth Amendment* (1929), 7 N. C. L. REV. 115. Also commented on in (1929) 3 TEMPLE L. Q. 322, and (1929) 7 TENN. L. REV. 316.

[5] Clarkson, J., concurring in Tea Co. v. Doughton, *supra* note 4: "The vice of the license tax to my mind is in the fact that when the sixth store is taxed it is retroactive, and not only is the sixth store taxed but the first five also."

[6] This question is fully discussed by Becker and Hess, *op. cit. supra* note 4. Cases dealing with discrimination in license tax based on different methods used in same kind of business annotated in NOTE (1926) 43 A. L. R. 592.

[7] In a recent address before the Kansas Retail Grocers Association, Governor Theodore Christianson of Minnesota said that where ten years ago only four per cent of the country's retail business was done by chain stores, today more than twenty per cent of the total retail business was done by them. He also said that there are now in America over 100,000 chain stores having annual sales of more than $8,000,000,000. U. S. DAILY, Oct. 24, 1930 at 2587. Such a radical change in the economic life of the nation will necessarily call for some kind of regulatory legislation.

[8] City of Danville v. Quaker Maid, Inc., 211 Ky. 677, 278 S. W. 98, 43 A. L. R. 590 (1925).

graduated scale based on the number of stores owned to be unconstitutional.[9] The judge in so holding said, "All persons engaged in the operation of one or more stores or mercantile establishments within the state of Indiana belong to the same class for occupational tax purposes, as the plaintiff."

The North Carolina decision is opposed to the above holdings, but it is submitted that the result is correct. The court recognizes as a proper basis for classification the protection of the independent merchant class.

MOORE BRYSON.

Criminal Law—Automobiles—Manslaughter—Failure to Stop at Highway Intersection.

Defendant, in violation of a statute,[1] failed to stop before turning into a highway from a side road. Just as his car straightened out in the highway it was struck from the rear by a bus. The bus skidded, turned over, and a passenger was killed. Defendant was charged with manslaughter. The pavement was slippery with snow and ice, and the defendant's car was first seen by the bus driver when it was five or ten feet away. A person coming into the highway from the side road could see to the left—the direction from which the bus came—for a distance of 175 yards. *Held,* the purpose of the statute is to allow motorists to gain a knowledge of conditions on the highway. Since the defendant already had such knowledge, the purpose of the statute had been accomplished, and there was no proximate

[9] Jackson v. State Board of Tax Commissioners of Indiana *et al.*, 38 F. (2d) 652 (S. D. Ind. 1930). ACTS IND. 1929, c. 207, §5, (The validity of the classification in such section being the main question of the case.) is as follows: "Every person, firm, corporation, association, or copartnership opening, establishing, operating or maintaining one or more stores or mercantile establishments, within this state, under the same general management, supervision, or ownership, shall pay the license fees hereinafter prescribed for the privilege of opening, etc. . . .

The license fees hereinafter prescribed shall be as follows:

(1) Upon one store the annual license fee shall be three dollars for each such store;

(2) Upon two stores or more, but not to exceed five stores, the annual license fee shall be ten dollars for each such additional store;

(3) Upon each store in excess of five, but not to exceed ten, the annual license fee shall be fifteen dollars for each such additional store;

(4) Upon each store in excess of ten, but not to exceed twenty, the annual license fee shall be twenty dollars for each such additional store;

(5) Upon each store in excess of twenty, the annual license see shall be twenty-five dollars for each such additional store."

[1] N. C. ANN. CODE (Michie, 1927), §2621 (63).

causal relation between the breach of the statute and the death of the passenger.[2]

A majority of the courts, frequently on the basis of a statutory definition of the crime, hold that a simple violation of a statute, resulting in a homicide, will support a conviction of manslaughter.[3] Others hold there must in addition be an element of reckless disregard for human life.[4] There is no statutory definition of manslaughter in North Carolina. The supreme court of this state has taken the view that a simple violation of a statute will support such a conviction if the statute was designed to prevent injury to the person.[5] It has been intimated by the court that traffic regulations meet this condition.[6] The general purpose of the particular regulation here involved, which authorizes the Highway Commission to designate through highways by erecting stop signs at entrances thereto, and makes a failure to stop at signs so erected unlawful, seems to bring it within the qualification. Apparently, this is assumed in the decision.

In construing the statute, the court comes to the conclusion that its purpose is simply to give a driver on a side road an opportunity to inform himself of conditions on an intersecting highway. It logically follows that if this particular driver already had such knowledge, compliance with the statute would have been a useless procedure without effect on the situation, and the violation was not the proximate cause of the accident.

However, one might differ with the court's construction, which practically nullifies this remedial statute as to "open" intersections. The view might be taken that the duty imposed on the defendant was not only to inform himself of conditions on the highway, but also to act on such information; that the duty was not only to *determine* whether he could enter the highway with reasonable safety to himself and others, but also *not to enter* unless it could be done with such reasonable safety. It seems likely that the legislative intent was to

[2] State v. Satterfield, 198 N. C. 682, 153 S. E. 155 (1930).

[3] Kimmel v. State, 198 Ind. 444, 154 N. E. 16 (1926); State v. Schaeffer, 96 Ohio St. 215, 117 N. E. 220 (1917); McBride v. State, 20 Ala. App. 434, 102 So. 728 (1925).

[4] People v. Falkovitch, 280 Ill. 321, 117 N. E. 398 (1917); People v. Barnes, 182 Mich. 179, 148 N. W. 400 (1914).

[5] State v. Vines, 93 N. C. 493 (1885) (pointing gun in sport); State v. Turnage, 138 N. C. 566, 49 S. E. 913 (1905) (pointing gun); State v. Stitt, 146 N. C. 643, 61 S. E. 566, 17 L. R. A. (N. S.) 308 (1918) (pointing pistol); State v. Whaley, 191 N. C. 387, 132 S. E. 6 (1926) (violating speed law).

[6] State v. Whaley, *supra* note 5.

give traffic on a through highway the right of way[7] and prevent just what happened in this case—a car turning from a side road into a highway immediately in front of a car thereon. The court says, ". . . the object of the statute is not to delay or impede travel. . . ." This is no doubt true. In fact, it is probable that the legislature was seeking to speed up travel. But it is also probable that it had in mind travel on the main highway.

If it be admitted that the purpose of the statute was to give traffic on main highways the right of way, the instant situation then becomes similar to that in the New York case of *Shirley v. Larkin Co.*,[8] in which *X* entered an intersection immediately in front of *Y*, who had the right of way. The court there said that in disregard of the statute, *X* "recklessly went on when it was his duty to wait for the other car" and "precipitated the accident."

It is a familiar rule of bailments that when a carrier has deviated from his proper course, and goods in his possession have been damaged, ". . . he cannot set up as an answer to the action the bare possibility of a loss if his wrongful act had never been done."[9] It is interesting to speculate as to what would be the result if a rule analogous to this were applied in situations like the present one, and a defendant were required to show that compliance with the statute would not have prevented the result complained of instead of the prosecution being required to show that compliance would have prevented such result.[10]

HUGH L. LOBDELL.

Damages—Measure of Recovery on Dissolution of Injunction Restraining Foreclosure Sale

A recent North Carolina case raises the interesting question as to the measure of damages that should be allowed to a defendant who has been restrained from selling land under a power contained in a deed of trust.[1]

[7] See Roe v. Kurtz, 203 Iowa 906, 210 N. W. 550 (1926).

[8] 239 N. Y. 94, 145 N. E. 751 (1924). A fact situation very similar to the instant case is involved in Lasene v. Syvanen, 123 Ore. 629, 263 Pac. 59 (1928). But *cf.* Teissier v. Stewart, 11 La. App. 164, 123 So. 174 (1929).

[9] Davis v. Garrett, 6 Bing. 716 (1830).

[10] In Conrad v. Springfield Con. Ry. Co., 240 Ill. 12, 88 N. E. 180 (1909) it is said that one charged with a tort resulting from violation of an ordinance may show *in defense* that compliance would not have prevented the injury complained of.

[1] Gruber v. Ewbanks, 199 N. C. 335, 154 S. E. 318 (1930).

In North Carolina, an undertaking is required as a condition precedent to obtaining a restraining order or an injunction "to the effect that the plaintiff will pay to the party enjoined such damages . . . as he sustains by reason of the injunction, if the court finally decides that the plaintiff was not entitled to it."[2] Subject to certain limitations to be set forth, the injunction defendant may recover all damages which are the natural and proximate results of the wrongful issuance of the injunction. In the situation where a mortgagee is restrained from selling land under the mortgage, one of the chief elements of damage is loss of security. Any such loss may be recovered provided that the amount realized, or to be realized at the sale, is inadequate to satisfy the mortgagee's interest—i. e., the debt, interest thereon to the time of sale, and costs.[3] The language used by most courts in prescribing the measure of damages for loss of security is loose and ambiguous.[4] It seems that any diminution in value occurring between the time the sale would have taken place but for the injunction and the time it actually has or, in the exercise of due diligence after the dissolution, should have taken place is a result of the injunction. Accordingly, recovery should be allowed for the difference between the amount actually realized, or to be realized, at the later sale and what would have been realized at the one enjoined.[5] The postponement of the sale has delayed the mortgagee in the receipt of money which he was entitled to. He should thus recover interest on the money he would have received at the enjoined sale until the time of the actual sale[6] and interest on the difference between the

[2] N. C. ANN. CODE (Michie, 1927) §854; Davis v. Champion Fiber Co., 175 N. C. 25, 94 S. E. 671 (1918) (Held damages might be recovered where there was a partial dissolution of the injunction.).

[3] Fidelity and Deposit Co. of Md. v. Walker, 158 Ala. 129, 48 So. 600 (1909); Schening v. Cofer, 97 Ala. 726, 12 So. 414 (1893); Foster v. Goodrich, 127 Mass. 176 (1879); Edwards v. Bodine, 4 Edw. Ch. 292 (N. Y. 1843).

[4] Hill v. Thomas, 19 S. C. 230 (1882) (during delay of the sale); Belmont Mining Co. v. Costigan, 21 Colo. 465, 42 Pac. 650 (1895) (from issuance to dissolution); Gibson v. Reed, 54 Neb. 309, 75 N. W. 1085 (1895) (during the time the injunction is in force); Meysenburg, Trustee for Sternberger v. Schlieper, 48 Mo. 426 (1871) (during the time the sale is suspended).

[5] This diminution in value may be caused by any of several things. Gibson v. Reed, *supra* note 4 (depreciation in value of the property); Osage Oil Refining Co. v. Chandler, 287 Fed. 848 (C. C. A. 2nd, 1923) (decline in value of stock); Aldrich v. Reynolds, 1 Barb. Ch. 613 (N. Y. 1846) (removal of emblements); Moore v. Maryland Casualty Co., 280 Pac. 1008 (Cal. 1929); De St. Aubin v. King, 209 Ill. App. 419 (1918); White v. Brooke, 11 Wash. 99, 39 Pac. 237 (1895) (sale of property under another mortgage).

[6] Hill v. Thomas, *supra* note 4; Johnson v. Moser, 72 Iowa 654, 34 N. W. 459 (1887); Holthaus v. Hart, 9 Mo. App. 1 (1880); Aldrich v. Reynolds,

two amounts from the time of the actual sale until the time of judgment on the injunction bond.[7] When the mortgagee is entitled to receive the rents and profits of the land as additional security and is restrained from collecting these, the reasonable value thereof should be allowed during the period of restraint.[8]

Other items of damage not dependent upon injury to the mortgagee's interest and unrestricted by the limitation that no more than the debt, interest and costs may be recovered, are allowed. These include the cost of the enjoined sale[9] and the reasonable value of the use of the land where the mortgagee can prove to a reasonably certain degree that he would have purchased at the enjoined sale.[10] North Carolina refuses recovery for attorney's fees[11] and expenses[12] incurred in obtaining a dissolution of the injunction. But these items are permitted by a majority of the states.[13]

supra note 5; Pepper v. Dunlap, 19 La. 491 (1841) (no recovery for interest on notes falling due after the injunction issues); Belmont Mining and Milling Co., *supra* note 4 (error to allow interest on whole debt in the absence of a showing that the property would have brought as much).

[7] Aldrich v. Reynolds, *supra* note 5.

[8] Schening c. Cofer, *supra* note 3 (recoverable if debt is not satisfied by the sale); Metz v. Brodfuehrer, 214 Ill. App. 458 (1919) (reasonable rental value and not amount of rents actually received); Curry v. American Freehold Land Mortgage Co., 124 Ala. 614, 27 So. 454 (1900) (no recovery because a receiver could and should have been appointed to collect the rents).

[9] De St. Aubin v. King, *supra* note 5; Edwards v. Bodine, *supra* note 3; Alliance Trust Co. v. Stewart, 115 Mo. 236, 21 S. W. 793 (1893).

[10] Belmont Mining and Milling Co. v. Costigan, *supra* note 4 (court willing to assume claimant would have bought in the absence of proof that others would have, but not allowed because no evidence of the value of possession); Holthaus v. Hart, *supra* note 6 (as purchaser at the foreclosure sale he might have demanded the rent at once); Johnson v. Moser, *supra* note 6 (no recovery because the sale did not take place and it is impossible to know who would have bought); Bullard v. Harkness, 83 Iowa 373, 49 N. W. 855 (1891) (too speculative).

[11] Midget v. Vann, 158 N. C. 128, 73 S. E. 801 (1912). The federal courts and a respectable minority of the states also refuse recovery for this item. Oelrichs v. Spain, 15 Wall. 211, 21 L. ed. 43 (1872); Note (1927) 55 A. L. R. 452. The leading North Carolina case, Hyman v. Devereaux, 65 N. C. 588 (1871), permits recovery for counsel fees fixed by statute at that time, but refuses to allow them if fixed by the parties.

[12] Midget v. Vann, *supra* note 11 (refusing recovery for expenses in attending the hearing on the injunction); Gruber v. Ewbanks, *supra* note 1 (refusing the expense of obtaining the presence of a non-resident witness).

[13] Permitting recovery for counsel fees: Jesse French Piano and Organ Co. v. Porter, 134 Ala. 302, 32 So. 678, 92 AM. ST. REP. 31 (1902); Burglass v. Villere, 129 So. 209 (La. 1930); Oklahoma Cotton Growers Ass'n v. Hooven, 272 Pac. 852 (Okla. 1928); Aldrich v. Reynolds, *supra* note 5. Permitting recovery for reasonable expenses: Waldauer v. Parks, 141 Miss. 617, 106 So. 881 (1926) (expenses in preparing for and attending trial); Alliance Trust Co. v. Stewart, *supra* note 9 (cost of taking a deposition out of the state); Bartram v. Ohio and B. S. Ry. Co., 141 Ky. 100, 132 S. W. 188 (1910) (refusing value of time spent in attending trial but allowing traveling expenses).

In all cases where malice or want of probable cause is absent, no liability exists apart from the injunction bond and recovery is limited to the penal sum thereof.[14] In North Carolina, the judgment dissolving the injunction carries with it a judgment for damages against the parties procuring it and the sureties on the undertaking, to be ascertained by reference or otherwise as the judge directs.[15] But there can be no assessment of damages until the final determination of the cause in which the injunction is obtained.[16] A motion for damages must be made at or before the time the final judgment is entered and no separate action can be maintained upon the bond.[17] This procedure raises difficult problems where a foreclosure sale is restrained and the injunction continues until the final adjudication. In such cases it will be necessary to assess damages before there can be a sale. It must be shown that the debt, interest, and costs will not be realized on a sale and that the value of the security has been impaired. An actual sale is the easiest and most reliable way to establish this. The difficulty is obviated by permitting a separate action on the bond after the sale has taken place.[18]

T. C. SMITH, JR.

Equity—Injunction to Prevent Garnishment of Wages—Effect of Usury

In a recent Georgia case,[1] a wage earner sought an injunction against the enforcement of a "sale of wages" given as a security for a loan alleged to have been usurious, on the ground that the plaintiff would lose his job if garnishment proceedings were brought. The

[14] 10th Ward Rd. District v. Texas and Pac. Ry. Co., 12 F. (2d) 245; 45 A. L. R. 1513 (C. C. A. 5th, 1926); Mark v. Hyatt, 135 N. Y. 306, 31 N. E. 1099; 18 L. R. A. 275 (1892); McAden v. Williams, 191 N. C. 105, 131 S. E. 375 (1926); Nausemond Timber Co. v. Rountree, 122 N. C. 51, 29 S. E. 61 (1898).

[15] N. C. ANN. CODE (Michie, 1927) §855.

[16] Raleigh and Western Ry. Co. v. Glendon and Gulf Mining and Manufacturing Co., 117 N. C. 191, 23 S. E. 181 (1895); Thompson v. McNair, 64 N. C. 448 (1870) (an injunction is an ancillary remedy and until the final determination of the cause, it cannot be said as a matter of law that the order was not rightfully obtained).

[17] Crawford v. Pearson, 116 N. C. 718, 21 S. E. 561 (1895); Shute v. Shute, 180 N. C. 386, 104 S. E. 764 (1920). See McCall v. Webb, 135 N. C. 356, 365, 42 S. E. 802, 805 (1904).

[18] Okla. Cotton Growers Ass'n v. Hooven, *supra* note 13; Belmont Mining Co. v. Costigan, *supra* note 4; Gibson v. Reed, *supra* note 4. In the absence of a statute permitting damages to be recovered in the same action, they cannot be allowed. Chicago, R. I. & P. Ry. Co. v. Dey, 76 Iowa 278, 41 N. W. 17 (1888); American Bonding Co. v. State, 120 Md. 305, 87 Atl. 922 (1913).

[1] Lawrence v. Patterson, 153 S. E. 29 (Ga. 1930).

defendants filed demurrers, pleas and counter-claims for the full amount of the wages assigned. Upon an auditor's finding in favor of defendants, *held,* injunction denied unless plaintiff first pay principal and lawful interest, as "he who comes into equity must do equity"; and lenders' counter-claim allowed. The Chief Justice dissented.

Nearly all of the decisions agree with the principal case that when a debtor seeks to enjoin the enforcement of a usurious loan, he "must do equity" by paying into court the amount lawfully due, including principal and the legal rate of interest.[2] And the same view is taken whether the security given is an assignment of wages[3] or a mortgage. On its face, this might seem fair enough. There were in the principal case, however, a number of factors which cast doubt on the fairness of this requirement in wage assignment cases generally.

It should first be noted, however, that the announced condition to an injunction that the plaintiff pay the legal rate of interest as well as the principal, when the Georgia statutes[4] provide for the forfeiture of all interest on usurious loans, is misleading. This was uttered in connection with a finding that the loan was not usurious. And the judgment on the counter-claim, actually affirmed, did not speak in terms of principal and interest but was for the total wages for a given period on the theory that the title thereto had passed to the defendants and that the plaintiff by taking the wages had converted them. This assumes, as does the defendants' own description of themselves as "buyers of salaries" that the loans were never expected to be paid.

The statute permitted but 3½% per annum on loans of less than $300.00. It was alleged that the usury came into the case by the method of charging for renewals of loans in short periods of less than thirty days, and that "petitioner signed papers for the defendants without reading the same, knowing that they were made out as only a part of a scheme and a device to defeat the usury laws, by signing

[2] Mortgage Securities Corp. v. Levy, 11 F. (2d) 270 (C. C. A. 5th, 1926); Polite v. Williams, 149 Ga. 726, 10 S. E. 791 (1920); Poulk v. Cario Banking Co., 158 Ga. 338, 12 S. E. 292 (1924); Carver v. Brady, 104 N. C. 220, 10 S. E. 565 (1889); Owens v. Wright, 161 N. C. 127, 76 S. E. 735, ANN. CAS. 1914D, 1021 (1912); LAWRENCE, EQ. JUS. (1929) §1089; POMEROY, EQ. JUS. (4th ed.) §§391, 937.

There is some authority for the proposition that a penalty for usury provided by statute may be deducted from the principal and legal rate of interest. Lewis v. Hickman, 200 Ala. 672, 77 So. 46 (1917); Union Bank v. Bell, 14 Ohio St. 200 (1862); Yonack v. Emery, 13 S. W. (2d) 677 (Tex. 1929).

[3] Patterson v. Moore, 146 Ga. 364, 91 S. E. 116 (1917); Roberts v. Penn. Loan and Trust Co., 39 Pa. Super. Ct. 358 (1909); *cf.* Cox v. Hughes, 10 Cal. App. 553, 102 Pac. 956 (1909).

[4] GA. ANN. CODE (Michie, 1926) §§3438, 3439.

the same because he needed the money." There were eight of these "buyers of salaries" from whom the plaintiff had borrowed a number of sums ranging from $5.00 to $15.00 each over a year's time. Although the defendants in their counter-claim had raised a legal issue on which plaintiff was by the Constitution entitled to a jury,[5] the case was referred to an auditor. The plaintiff excepted on the ground, among others, that the auditor was prejudiced against enforcement of the small loans of the state, and was disqualified because other loan companies were clients of his law office. Finally, it was alleged that the service of the wage assignment on the employer would cause plaintiff to lose his position. The court objected that the allegation was too general, in that it did not set out facts to show petitioner would lose his position or be irreparably injured. But in an earlier Georgia case,[6] plaintiff had failed although he set out a contract of employment in which the plaintiff was to be discharged, if garnishment or wage assignment papers were ever served.

This characteristic failure[7] to investigate the actualities of economic duress and of the effects of garnishment proceedings in connection with the small loan business is, doubtless, the reason for remedial legislation in Massachusetts[8] and Minnesota[9] and for the drastic action of the California[10] and Kansas[11] courts, which last year, upon injunction proceedings brought by the Attorney General, stopped the operation of a "loan-shark" business as a public nuisance.

H. B. PARKER.

Equity—Injunction to Restrain Enforcement of Municipal Ordinance

An ordinance imposed an occupation tax upon persons engaged in the business of delivering gasoline and oils from wagons or trucks. Plaintiff failed to pay this tax and defendant caused a levy to be made

[5] GA. CONST., §18, par. 1; CLARK, CODE PLEADING (1928) 64.
[6] Patterson v. Moore, *supra* note 3.
[7] Lisle, *A Widespread Form of Usury: The "Loan-Shark"* (1912) 3 J. CRIM. L. 167; Hodson, *Ideal Anti-Loan Shark Statute* (1919) 10 J. CRIM. L. 129.
[8] ACTS MASS. (1911) c. 727, §13; Thomas v. Bunce, 223 Mass. 311, 111 N. E. 871 (1916).
[9] MINN. STAT. (Mason, 1927) §7040; Trauernicht v. Kingston, 136 Minn. 445, 195 N. W. 278 (1923).
[10] People *ex rel* Stephens v. Seccombe, 284 Pac. 725 (Cal. App. 1930); (1930) 18 CALIF. L. REV. 328.
[11] State v. McMahon, 280 Pac. 906 (Kan. 1929); (1929) 15 CORN. L. Q. 472; (1929) 43 HARV. L. REV. 499; (1929) 28 MICH. L. REV. 939.

upon certain of plaintiff's property. Prosecutions were also begun against plaintiff's agents, and defendant threatened to continue to prosecute. *Held,* the refusal of the lower court to enjoin the prosecutions and executions was error, equitable intervention being necessary to protect property rights and to prevent a multiplicity of actions.[1]

The courts have repeatedly laid down the general rule that equity will not restrain the enforcement of a municipal ordinance, saying that an adequate remedy is available at law by setting up the invalidity or inapplicability of the ordinance as a defense to a criminal prosecution. And most courts accordingly deny relief in the bulk of the cases.[2]

Well-recognized exceptions to the rule, however, are where injunctive relief is necessary to prevent irreparable injury to property, or the necessity of defending a multiplicity of prosecutions.[3] Thus, injunctive relief has been granted to restrain the enforcement of an ordinance making it unlawful to operate a baseball park in a certain district;[4] prescribing paved floors and sewerage connections for all stables wherein more than one animal is kept;[5] providing an occupation tax of $300.00 for ice dealers, and $100.00 additional for each wagon used;[6] prescribing certain safety appliances for street cars, under penalty of $100.00 or thirty days in jail, where the city was also threatening to stop cars and to arrest employees operating cars without the prescribed appliances;[7] prohibiting the erection or maintain-

[1] Wofford Oil Co. v. City of Boston, 154 S. E. 145 (Ga. 1930).

[2] City of Savannah v. Granger, 145 Ga. 578, 89 S. E. 690 (1916); Jones v. Carlton, 146 Ga. 1, 90 S. E. 278 (1916); Steinberg v. City of Savannah, 149 Ga. 69, 99 S. E. 36 (1919); Burton v. City of Toccoa, 158 Ga. 63, 122 S. E. 603 (1924); Deloney v. Village of Columbia, 142 La. 291, 76 So. 717 (1917); City of Dallas v. Cluck and Murphey, 234 S. W. 528 (Tex. Civ. App. 1921); Los Angeles Title Insurance Co. v. City of Los Angeles, 52 Cal. App. 152, 198 Pac. 1001 (1921); Giglio v. Barrett, 207 Ala. 728, 92 So. 668 (1922); Edwards v. DeVance, 138 Miss. 580, 103 So. 194 (1925).

[3] 4 POMEROY, EQUITY (4th ed., 1919) §1777; 2 LAWRENCE, EQUITY (1929) §972; 2 DILLON, MUNICIPAL CORPORATIONS (5th ed., 1911) §§650, 1573; McQUILLAN, MUNICIPAL CORPORATIONS (2nd ed., 1928) §851, citing many cases and illustrations; Notes (1893) 21 L. R. A. 84; (1906) 2 L. R. A. (N. S.) 631; (1910) 25 L. R. A. (N. S.) 193; (1911) 34 L. R. A. (N. S.) 454; (1912) 35 L. R. A. (N. S.) 193; L. R. A. 1916C 263.

[4] New Orleans Baseball & Amusement Co. v. City of New Orleans, 118 La. 228, 42 So. 784, 7 L. R. A. (S. C.) 1114 (1907).

[5] Board of Comm'rs. of Mobile v. Orr, 181 Ala. 308, 61 So. 920, 45 L. R. A. (N. S.) 575 (1913).

[6] Williams v. Mayor and Council of Waynesboro, 152 Ga. 696, 111 S. E. 47 (1922). See also Southern Express Co. v. Town of Ty Ty, 141 Ga. 421, 81 S. E. 114 (1914).

[7] Mahoning & S. Ry. & Light Co. v. City of New Castle, 233 Pa. 413, 82 Atl. 501 (1912).

ance of more than one crematory to a township;[8] of a licensing ordinance for peddlers;[9] of an ordinance prohibiting the driving of any "engine or heavy machinery" over paved streets, in a suit by the owner of a machine shop who could not otherwise reach the railway station;[10] prohibiting commercial advertising on the outside of street cars;[11] prohibiting the maintainance of any hospital within the city for the treatment of contagious or infectious diseases;[12] providing a penalty for each day plaintiff gas company failed to maintain a minimum pressure, in the face of a failing supply;[13] providing for the erection of safety gates by railroad companies;[14] regulating the speed of trains through the town;[15] of an ordinance of a city the limits of which embraced considerable rural territory, prohibiting the keeping of hogs within the city.[16] In many of these ordinances, each day of violation constituted a separate offense.

The North Carolina court has been extremely conservative in allowing injunctive relief against the enforcement of ordinances. In the early case of *Cohen v. Goldsboro,*[17] the plaintiff was arrested, fined, and forced to suspend business for violation of an ordinance regulating the sale of fresh meat. Injunction was denied, the court saying that if the ordinance was invalid plaintiff had an adequate remedy at law in an action for damages as often as he was arrested.[18] In *Wardens v. Washington*[19] the court refused to pass on the validity of an ordinance prohibiting the burial of the dead within the town except on permit, and ruled likewise in *Scott v. Smith,*[20] in which plaintiff sought to restrain the enforcement of an ordinance prohibiting the playing of baseball in town without the mayor's permission.

[8] Abbey Land Improvement Co. v. San Mateo County, 167 Cal. 434, 139 Pac. 1068 (1914).
[9] Ideal Tea Co. v. City of Salem, 77 Ore. 182, 150 Pac. 852 (1915).
[10] Brown v. Nichols, 93 Kan. 737, 145 Pac. 561 (1915).
[11] Pacific Rys. Advertising Co. v. City of Oakland, 98 Cal. App. 165, 276 Pac. 629 (1929).
[12] San Diego Tuberculosis Ass'n v. City of East San Diego, 186 Cal. 252, 200 Pac. 393 (1921).
[13] Kansas City Gas Co. v. Kansas City, 198 Fed. 500 (W. D. Mo. 1912).
[14] Chesapeake & O. Ry. Co. v. Harmon, 163 Ky. 669, 156 S. W. 121 (1913).
[15] Lusk v. Town of Dora, 224 Fed. 650 (N. D. Ala. 1915).
[16] Dibrell v. Town of Coleman, 172 S. W. 550 (Tex. Civ. App. 1914). But *cf.* Brown v. City of Thomasville, 156 Ga. 260, 118 S. E. 854 (1923); Upchurch v. City of LaGrange, 159 Ga. 113, 125 S. E. 47 (1924).
[17] 77 N. C. 2 (1877).
[18] Since a town is not liable to respond in damages for attempting to exercise a misconceived governmental power, and since arresting officers are usually insolvent, the inadequacy of this remedy is readily apparent.
[19] 109 N. C. 21, 13 S. E. 700 (1891).
[20] 121 N. C. 94, 28 S. E. 64 (1898).

Actions seeking to test the validity of ordinances regulating saloons and providing for forfeiture of license on conviction,[21] and providing for the removal of all telegraph or light poles to within twenty-four inches of the curb,[22] were similarly dismissed. However, the past five years have witnessed a tendency on the part of the court to relax the rigidity of these earlier decisions,[23] reliance being placed upon a line of Federal decisions beginning with *Truax v. Raich*.[24] In a suit to enjoin the enforcement of an ordinance prohibiting the sale of meats within a defined area except at the municipal market, Clarkson, J., went into the merits of the case and held the ordinance valid, but intimated that injunction would otherwise lie.[25] And in *Advertising Co. v. Asheville*[26] an injunction was granted to restrain the enforcement of an alleged confiscatory taxing ordinance.

It is submitted that courts should liberalize the use of the injunction to test the validity and construction of town ordinances.[27] The

[21] Paul v. Washington, 134 N. C. 363, 47 S. E. 763 (1904).

[22] R. R. v. Morehead City, 167 N. C. 118, 83 S. E. 259 (1914). In this case, however, Hoke, J., goes into the merits, although denying that injunction would lie to restrain prosecutions, and holds the ordinance valid.

[23] Clark, C. J., in Express Co. v. High Point, 167 N. C. 103, 83 S. E. 254 (1914): "I concur that an injunction does not lie to restrain the State against executing its criminal law. The defendant has a full remedy by raising any objection to the validity of the law upon the trial of the indictment for the criminal offense. Equity never interferes, especially by injunction, when there is a full remedy at law." To this same unqualified language of Clark, C. J., in Turner v. New Bern, 187 N. C. 541, 122 S. E. 469 (1924) Hoke, Stacy and Adams, JJ., registered their dissent, saying that equity would intervene if required for the adequate protection of property rights, but concurred in the result, holding the ordinance valid.

[24] 239 U. S. 33, 36 Sup. Ct. 7, 60 L. ed. 131, L. R. A. 1916D 545 (1915). Pierce v. Society of Sisters, 268 U. S. 510, 45 Sup. Ct. 571, 69 L. ed. 1070 (1925); Terrace v. Thompson, 263 U. S. 197, 44 Sup. Ct. 15, 68 L. ed. 255 (1923).

[25] See Angelo v. Winston-Salem, 193 N. C. 207, 212, 136 S. E. 489, 492, 52 A. L. R. 663, 666 (1926).

[26] 189 N. C. 738, 128 S. E. 149 (1925). But *cf.* Crawford v. Town of Marion, 154 N. C. 73, 69 S. E. 763, 35 L. R. A. (N. S.) 193 (1910) in which the court granted the injunction, but denied the question of restraining the enforcement of the criminal law was involved.

[27] See (1923) 9 A. B. A. J. 168, in which Mr. Simon Fleischman directs an argument in favor of the use of the injunction after the violation but before the trial. This seems to stop far short of the full usefulness of the remedy.

The situation in Elizabeth City v. Aydlett, 198 N. C. 585, 152 S. E. 681 (1930) is just the opposite of that in the instant case. The city had prosecuted defendant criminally for violation of an ordinance. A local court held the ordinance invalid and discharged defendant, leaving the city with no right of appeal. The city then sought to enjoin a further violation of the ordinance, but the relief asked for was denied, the court apparently relying largely on decisions to the effect that equity would not enjoin the *enforcement* of ordinances.

same policy behind the move to empower courts to render declaratory judgments furnishes a sound argument. The use of this method would spare the plaintiff whom the ordinance effects the necessity of choosing between a curtailment of operations to conform to the ordinance or the stigma of defending a criminal prosecution and risking an adverse result, with consequent fine or sentence.[28] One who tries in good faith to obey valid laws and ordinances should not be forced by the courts to become a lawbreaker in order to protect his constitutional rights, on the now exploded assumption that such a procedure constitutes an "adequate remedy" at law.

PEYTON B. ABBOTT, JR.

Evidence—Impeaching Witness by Showing Religious Belief

Can a witness be impeached by inquiring into his religious faith? This is one of the principal questions raised in *State v. Beal*,[1] the dramatic murder trial growing out of the recent Gastonia strike disturbances. The opinion expressly avoids a definite answer, but general phases of the problem may profitably be considered.

Competency and Credibility

The common law idea of purging the witness box of prejudiced and inferior witnesses has been superseded by a more enlightened technique. Those qualities which formerly prevented the witness from testifying at all—interest, infamy, and coverture—are now considered on the question of how much credit, conceding him to be competent, is to be given to the witness by the triers of fact.[2] This change has been facilitated by the broad scope of the theory of testimonial impeachment. All matters which give rise to an inference or chain of inferences leading to the conclusion that the witness is presently lying are relevant.[3] The grounds of attack most commonly accepted as thus relevant are those which formerly formed the basis

[28] In the recent case of Standard Oil Co. v. City of Charlottesville, 42 F. (2d) 88 (C. C. A. 4th., 1930), plaintiff sought to enjoin the enforcement of an ordinance intended to be a substitute for a zoning ordinance, which the city was without power to pass under the circumstances. The District Court held the ordinance valid, denied the injunction. Reversed, with instructions that the injunction would lie, because the penalty provided for violation was so great that it would be dangerous to test the validity in a criminal prosecution. Parker, Circuit Judge, quotes from Terrace v. Thompson, *supra* note 24, to the effect that "the legal remedy must be as complete, practical and efficient as that which equity could afford."

[1] 199 N. C. 276, 154 S. E. 604 (1930).

[2] 2 WIGMORE, EVIDENCE (1923) § 876.

[3] *Ibid.*, §877.

for excluding the witness: 1. Defects of organic capacity. 2. Character. 3. Bias, interest, and corruption.[4] But difference of opinion exists as to what phases of these generalized qualities—particularly of character—are relevant; and the whole problem is complicated by a mass of detailed rules, predicated on varying reasons of policy, as to how these qualities shall be evidenced.

The religious belief of the witness fits anomalously into this scheme of changing emphasis from the exclusionary to the impeaching process. It has not been so generally removed as a testimonial disqualification[5] as have interest, infamy, and coverture, and the question of its relevancy for impeachment purposes is not so readily solved.

In Jurisdictions with Religious Test for Competency

North Carolina is one of the minority jurisdictions retaining the common law rule which required the witness to believe in a God who will punish false swearing in this world or the next as a requisite of competency.[6] In such jurisdictions logically it should be allowable

[4] *Ibid.*, c. XXX.

[5] Wigmore (§§518 and 1816) propounds the theory that religious belief has never been considered strictly a testimonial qualification. Such belief is significant only as a qualification to take the oath, and the oath exists to subject a person possessed of the faculties (testimonial qualifications) considered inherently necessary for a *capacity* to tell the truth to the stimulus to tell it. At common law the oath requirement—"a prophylactic rule"—was important enough to exclude all testimony which was not generated from its impulse. This elusive distinction might have a practical application in construing at least one of a fairly common type of statute. N. M. ANN. STAT. §2165 provides: "Hereafter in the courts of this state no person shall be disqualified to give evidence on account of any disqualification known to the common law, but all such common law disqualifications may be shown for the purpose of affecting the credibility of any such witness and for no other purpose. . . ." A legitimate construction would be that want of religious belief was not a testimonial disqualification and is thus not covered by the statute. However, the express wording of the following unfortunate statutes would have to be disregarded to prevent impeachment by religious belief: NEV. REV. LAWS §5419 (". . . Facts which by the common law would cause the exclusion of witnesses may still be shown for the purpose of affecting their credibility. . . ."); NEB. COMP. STAT. (1922) §8845; IOWA CODE (1927) §3637, State v. Elliott, 45 Iowa 486 (1877); Searcy v. Miller, 57 Iowa 613, 10 N. W. 912 (1881).

[6] Shaw v. Moore, 49 N. C. 25 (1856); Omichund v. Barker, 1 Ark. 45 (1744); Note (1899) 42 L. R. A. 553; Biggs, *Religious Belief as Qualification of a Witness* (1929) 8 N. C. L. REV. 31. In State v. Pitt, 166 N. C. 268, 80 S. E. 1060 (1914) it was held that the ruling of competency of the trial judge was conclusive, although the proffered witness had stated that he did not know what would happen to him for lying other than imprisonment. Adams, J., in Lanier v. Bryan, 184 N. C. 235, 114 S. E. 6 (1922) interprets this decision as retaining the common law requirements in their pristine vigor. The finding of the trial court is conclusive, he argues, because it implies a finding of the "requisite facts," and he quotes the language of Pearson, J., in Shaw v. Moore, to the effect that one of the requisite facts is fear of punishment by the laws of God.

to impeach a witness by showing a lack of the exact theological belief required for competency, and his statements should be open to contradiction on the ground that the matter is not collateral.[7] Practically this exact information could not be elicited from the witness or proved extrinsically without opening up a broader inquiry, particularly when the course pursued consisted in contradiction. The cases abound with examples of crudely inquisitorial examinations of the witness' religious beliefs.[8] The abuses to which this course of questioning is subject by its inevitable appeal to the jury's prejudices furnish a cogent reason to exclude all evidence of religious belief for impeachment purposes. A better solution would be to remove the logical necessity by abolishing religious belief as one of the requisites of competency. New Hampshire, the only state retaining religious belief as a testimonial qualification which was found to rule on the form of impeachment in issue, properly disallows it. But the reason assigned—repugnance to the spirit of American institutions—is naïve.[9]

In Jurisdictions without Religious Test for Competency

The vast majority of states have abolished the testimonial disqualification of want of belief in a God who punishes for perjury. The weight of authority in these jurisdictions is against allowing inquiry into the religious belief of a witness as a form of impeachment. Statutes in Georgia, Indiana, Iowa, Massachusetts, Nebraska, Nevada, and Tennessee allow it.[10] It is disallowed by statute in Arizona, Connecticut, Michigan, Oregon, Pennsylvania, Vermont, and Washington.[11] In California, Kansas, and Kentucky constitutional and statutory provisions removing religious belief as a requisite

[7] 2 WIGMORE, EVIDENCE (1923) §§1003 and 1020 as to what matter is collateral.

[8] E.g., Louisville & N. Ry. Co. v. Mayes, 26 Ky. Law Rep. 187, 80 S. W. 1096 (1904).

[9] N. H. PUB. LAWS (1926) c. 336, §23; Free v. Buckingham, 59 N. H. 219 (1879).

[10] GA. ANN. CODE (Michie, 1926) §5857, Donkle v. Kohn, 44 Ga. 266 (1871); IND. ANN. STAT. (Burns, 1926) §§560-1, Snyder v. Nations, 5 Blackf. 295 (Ind. 1840); Iowa, *supra* note 5; MASS. GEN. LAWS (1921) c. 233, §19; Hunscom v. Hunscom, 15 Mass. 184 (1818); Com. v. Buzzell, 16 Pick. 153 (1834); Com. v. Burke, 16 Gray 33 (1860); Allen v. Guarante, 253 Mass. 152, 148 N. E. 461 (1925); Nebraska, *supra* note 5; Nevada *supra* note 5; TENN. ANN. CODE (Shannon, 1917) §5593. See Odell v. Kopper, 52 Tenn. 73, 77 (1871).

[11] Ariz. Const. II, §12; CONN. GEN. STAT. (1918) §5705 (disallowed by clear implication); MICH. COMP. LAWS (Cahill, 1915) §4336, People v. Jenness, 5 Mich. 305 (1858); ORE. LAWS (Olson, 1920) §731; PA. STAT. (West, 1920) §21834; VT. GEN. LAWS (1917) §1895; Wash. Const. I, §11.

of competency—along with constitutional guaranties of enjoyment of civil capacities irrespective of religious faith and freedom of religious worship—have been held to disclose a legislative intent to exclude such evidence for impeachment purposes.[12] England rules against it on the ground of its prejudicial effect.[13] The Maine court considers unfair surprise of the impeached witness as a reason *inter alia* for its exclusion.[14] Louisiana intimates categorically that it should be excluded,[15] while Illinois excludes it on the threefold ground of repugnance to constitutional guaranties, irrelevance, and prejudice.[16] The question must be regarded as unsettled in New York,[17] Ohio, and South Carolina,[18] and the other states appear not to have ruled on it.

[12] People v. Copsey, 71 Cal. 548, 12 Pac. 721 (1887); Dickinson v. Beal, 10 Kan. App. 233, 62 Pac. 724 (1900); L. & N. Ry. Co. v. Mayes, *supra* note 8; Bush v. Com., 80 Ky. 244 (1882).

The provisions of the North Carolina Constitution guaranteeing freedom of religious worship (I, §26) and disqualifying for office those who deny the existence of Almighty God (VI, §8) would seem to bear no logical connection with the problem in hand. However, Pearson, J., in Shaw v. Moore, *supra* note 6, at 31, said *arguendo* that had the strict common law excluding Jews and Christians who did not believe in future rewards not been changed to admit them by Omichund v. Barker, *supra* note 6, it would have been so changed by I, §26 (then §19 of declaration of rights). If this tenuous premise be accepted, it follows that *a fortiori* this provision would operate to admit atheists. Its supposed curative power might also be easily extended the next step to prevent the form of impeachment in issue, particularly in view of the looseness of the original idea that to exclude Jews and Christians of irregular conviction as to the hereafter would be unconstitutional because it would be "to degrade and persecute them for 'opinion's sake.'" This argument must be rejected at its first step. It is untenable to hold that to exclude a witness on religious grounds is to deprive him of worshipping as he pleases.

[13] Darby v. Ouseley, 1 H. & N. 1, 156 E. R. 1093 (1856). But *cf.* Bradlaugh v. Edwards, 11 C. B. N. S. 377, 142 E. R. 843 (1861).

[14] Holley v. Webster, 21 Me. 461 (1842) (Held improper to show that witness had said that he intended now to serve the devil as long as he had served the Lord; that he had a pack of cards with him which he carried about in his pocket and called them his bible.) The Me. statute is ambiguous. "No person is an incompetent witness on account of his religious belief, but he is subject to the test of credibility." Me. Rev. Stat. (1916) c. 87, §111.

[15] See State v. Dyer, 154 La. 379, 97 So. 563, 564 (1923).

[16] Starks v. Schlensky, 128 Ill. App. 1 (1906).

[17] People v. McGarren, 17 Wend. 460 (1837) (allowed); see Stanbro v. Hopkins, 28 Barb. 265 (N. Y. 1858) (dictum that it is allowable). But see Gibson v. Am. Mutual Life Ins. Co., 37 N. Y. 580, 584 (1868) (dictum that it is not allowable); Brink v. Stratton, 176 N. Y. 150, 68 N. E. 148, 150 (1903) (inconsistent dicta in *seriatim* opinions). In People v. Most, 128 N. Y. 108, 27 N. E. 970 (1891) the objection was held frivolous.

[18] Clinton v. State, 33 Ohio St. 27 (1877) (Defendant questioned on cross-examination as to his belief in God and future state of rewards and punishments. *Held*, prior inconsistent statements could not be shown); State v. Turner, 36 S. C. 534, 15 S. E. 602 (1892) (similar holding). Under the true rule as to the matters on which prior contradictory statements may be shown, these decisions are capable of two interpretations: 1. Religious belief is a proper inquiry for impeachment, but may be shown only by the witness. 2. The

Wigmore dismisses the problem summarily.[19] On the whole the decisions reveal no tendency to resolve the issue rationally into a question of relevancy.

It is generally held allowable to impeach the credibility of the declarant of a dying declaration by showing a lack of religious faith, and the reason underlying the exceptional admission of this hearsay testimony would seem to justify such a course.[20] Also it seems generally allowable to use evidence of religious belief substantively,[21] although the possibility of prejudice inherent in such evidence would seem equal to that in evidence of defendant's insurance in a personal injury action. The familiar ban on the latter might be extended to cover both.

No argument has been made that testimony of religious belief is proper for impeachment as character evidence. Language in the instant case gives opening for such an argument,[22] and it might find support in jurisdictions like North Carolina where the witness is impeached by evidence of his general character rather than his veracity-character.[23] However, belief is not so clearly an element of character that the admission of this prejudicial evidence is required.

It is fair to conclude that those jurisdictions which allow inquiry into the witness' religious faith to discredit him have lost sight of the fact that the impeaching process is limited by the principle of relevancy. Unorthodox religious convictions, even though they extend to the extremes of agnosticism and atheism, may quite often exist because of honest intellectual doubts. It is untenable to argue that there is a correlation between this kind of unorthodoxy and inveracity. That correlation which may exist between what Pope calls "blind unbelief" and untruthfulness is so slight that the value of the evidence is outweighed by the possibilities for prejudice with which it is pregnant. Furthermore, it might be safely assumed that such effect

contradiction is error, because the evidence was inadmissible in the first instance. See note 7.

[19] 2 WIGMORE, EVIDENCE (1923) §936.

[20] Note (1922) 16 A. L. R. 411; (1929) 8 TENN. L. REV. 56.

[21] State v. Dyer, *supra* note 15 (Held proper to show to what religion witness belonged to show improbability of his having been at a certain church). But *cf.* Brundige v. State, 49 Tex. Cr. Rep. 596, 95 S. W. 527 (1906).

[22] State v. Beal, *supra* note 1, at 301. "It has been said that a man is what he thinks, 'For as he thinketh in his heart, so is he.' Prov. 23:7." Compare language of Hunt, C. J., in Gibson v. Am. Mutual Life Ins. Co., *supra* note 17, at 584. "Conduct and life, as distinguished from belief, give the standard of character."

[23] Note (1927) 5 N. C. L. REV. 340.

as it does have will appear in the witness' reputation for veracity or his general reputation in the community—a familiar inquiry.

Conclusion

The witness box should not be made more forbidding to persons of potential value as witnesses by the fear of a scrutiny of their personal thoughts. The 1931 Legislature should adopt the remedy accepted by the majority of American states by removing religious belief as a test of competency and prohibiting evidence of it to impeach. The Pennsylvania statute is a desirable model: "No witness shall be questioned in any judicial proceeding concerning his religious belief; nor shall any evidence be heard upon the subject for the purpose of affecting either his competency or credibility."[24]

JAMES H. CHADBOURN.

Federal Procedure—Transfer of Cases Between Law and Equity Sides of Court

The case of *Clarksbury Trust Co. v. Commercial Casualty Co.*[1] was an action at law in a Federal District Court for West Virginia to recover on a bond issued by the defendant to cover a deposit of the plaintiff in a Pennsylvania bank. The deposit in question was upon a time certificate and was the only one contemplated in the security transaction; the bond, however, clearly applied only to deposits subject to check. The plaintiff's declaration alleged that this was due to a mutual mistake of law as to the meaning of the coverage clause in the bond. The trial court directed a verdict for the defendant. Held, on appeal, reversed and remanded with directions to transfer the case to the equity side for reformation, with leave to amend the pleadings and to introduce further evidence.

The questions of transfer between the law and equity sides of the Federal Courts arise under the Judicial Code, section 274a,[2] which provides: "That in case any of said courts (courts of the United States) shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to

[24] PA. STAT. (West, 1920) §21834.
[1] 40 F. (2d) 626 (C. C. A. 4th, 1930).
[2] 38 STAT. 956 (1915), 28 U. S. C. A., §397 (1928).

obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment, if preserved, shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form." This provision, together with equity rules 22 and 23,[3] and section 274b Judicial Code[4] which provides that equitable defenses may be interposed in actions at law by answer, plea or replication, greatly facilitates the fusion of law and equity in the Federal Courts.[5]

The Court of Appeals of the Fourth Circuit has directly considered section 274a in eight cases. The court first construed the statute in 1916 shortly after its passage.[6] Judge Pritchard, though not deciding the case solely upon these grounds stated that the statute (section 274a) "relates only to the power of the court in a case where a suit has been improperly brought either on the equity or law side, and authorizes amendments to have the pleading conform to the proper practice." Thus Judge Pritchard narrowly interpreted the statute as applying to actions brought on the proper side of the court but with the wrong type of pleadings. The next case in this circuit[7] did not consider section 274a, but decided under equity rule 22 that the case should not be transferred to law as a cause of action in equity had been set out. Beginning with the case of *Fidelity and Casualty Co. v. Glenn*[8] the court indicates a more liberal attitude. In speaking

[3] Rule 22: "If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential." Rule 23 provides: "If in a suit in equity a matter ordinarily determinable at law arises, such matter shall be determined in that suit according to the principles applicable, without sending the case or question to the law side of the court." Rule 22 was promulgated to relieve the situation which §274a finally cured, and rule 23 was intended to obviate the old practice of sending feigned issues to the law side of the court for trial by jury. The latter does not restrict the operation of the former.

[4] 38 STAT. 956 (1915), 28 U. S. C. A., §397 (1928).

[5] McCormick, *The Fusion of Law and Equity in United States Courts* (1928) 6 N. C. L. REV. 283; McBaine, *Equitable Defenses to Actions at Law in the Federal Courts* (1929) 17 CALIF. L. REV. 591.

[6] Waldo v. Wilson, 231 Fed. 654 (C. C. A. 4th, 1916), reversed 221 Fed. 505, and *certiorari* denied, 241 U. S. 673, 36 Sup. Ct. 724, 60 L. ed. 1231 (1916).

[7] Gatewood v. New River Consol. Coal & Coke Co., 239 Fed. 65 (C. C. A. 4th, 1916) (Plaintiff improperly sued in equity for breach of contract, but set out that, as agent for defendant company, he was entitled to certain commissions for products sold in his territory. He did not know the quantity of the product sold nor its price. He prayed for a discovery of the facts and for an accounting).

[8] 3 F. (2d) 913 (C. C. A. 4th, 1925) (Action at law against surety on penal bond securing performance of contract. Defendant interposed equitable de-

of section 274b it says: "These statutes are remedial in character, and should be liberally construed, to the end, if possible, of a single, direct, and speedy trial and conclusion of the issues involved in the litigation." The instant case was the first to arise in the Fourth Circuit, after the leading case of *Liberty Oil Co. v. Condon Bank*[9] where Chief Justice Taft construed section 274b, and in a dictum pointed the direction in which the construction of section 274a should go. In the remaining five cases which have arisen in the Fourth Circuit, the court has consistently followed this liberal and progressive tendency. Singularly enough all of the cases have arisen on the law side of the court and the Circuit Court of Appeals has either transferred them to equity as in the principal case;[10] treated the writ of error as an appeal in equity;[11] affirmed judgment because it appeared that the result reached in law was what should have been reached in equity,[12] or sustained the lower court because the complaint stated no ground for relief either at law or in equity.[13]

The usual way to take advantage of the statute is by motion,[14] but motions to amend or to introduce new evidence tending to establish an equitable case have also been construed as within the intent of the statute.[15] Also, the trial judge may, of his own motion, transfer

fense of fraud. Trial court refused to transfer case under authority of §274 b. C. C. A. refused new trial in equity because result would be same as that reached at law).

[9] 260 U. S. 235, 43 Sup. Ct. 118, 67 L. ed. 202 (1922) (The defendant, in an action at law, for money had and received claimed to be merely a stake-holder of the money in question and offered to pay it into court when the other claimants were joined. On appeal the C. C. A. treated the case as an action at law. Reversed by the Supreme Court and remanded to C. C. A. under authority of §274b, for consideration and determination as an appeal in equity. Throughout, the opinion expresses an attitude much more favorable to justice for the litigant than adherent to strict rules of procedure); Twist v. Prairie Oil & Gas Co., 274 U. S. 684, 47 Sup. Ct. 755, 71 L. ed. 1297 (1927).

[10] Hutchings v. Caledonian Ins. Co. of Scotland, 35 F. (2d) 309 (C. C. A. 4th, 1929).

[11] National Surety Co. v. County Board of Education, 15 F. (2d) 993 (C. C. A. 4th, 1926) (Surety on a contractor's bond, after default, attempted to establish at law an equitable lien arising under the contract of suretyship. The pleadings being proper, the C. C. A. decided the case as in equity).

[12] Great American Ins. Co. v. Johnson, *et al.*, 25 F. (2d) 847 (C. C. A. 4th, 1928) (Agent of insurance company erroneously made out policy in corporate name, instead of name of the individual owning the property insured. Property destroyed and individual sues at law and procures judgment. The result was correct, the method wrong); Fidelity and Casualty Co. v. Glenn, *supra* note 8.

[13] Southern Surety Co. v. Plott, 28 F. (2d) 698, 701 (C. C. A. 4th, 1928).

[14] Liberty Oil Co. v. Condon Bank, *supra* note 9; Fidelity and Casualty Co. v. Glenn, *supra* note 8; National Surety Co. v. County Board of Education, supra note 11.

[15] Hutchings v. Caledonian Ins. Co. of Scotland, *supra* note 10.

the case.[16] The circuit courts, however, have split on this question. The Court of Appeals for the First Circuit in the recent case of *American Land Co. v. City of Keene,*[17] sustained the District Court's refusal to transfer the case, "even if it were proper under section 274a," because plaintiff had made no such request to the trial court. The court interpreted the litigant's failure to make a motion for transfer as an election or waiver on his part. "This court will not compel a litigant to transfer its action from equity to law or vice versa against his will." Cases from the Second,[18] Seventh,[19] and Eighth[20] Circuits were relied upon. It would seem that the attitude of the Fourth Circuit is more reasonable. The court in the case of *National Surety Co. v. County Board of Education* declared that on motion of parties, or by the court *ex mero motu* a cause may be transferred from one side of the Federal courts to the other,[21] and in the principal case the court remanded the cause for further proceedings in equity upon argument of counsel that if a cause of action in law had not been stated then one in equity had. The Fourth Circuit, alone, has seen fit to resort in this connection to the act of February 26, 1919 (U. S. C. A. section 391) which enables the circuit court to give complete justice in the particular case by requiring, "that on the hearing of an appeal, to give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." It is submitted that such a construction is more in accord with the remark of Chief Justice Taft: "To be sure, these sections do not create one form of civil action as do the codes of procedure in the states, but they manifest a purpose on the part of Congress to change from a suit at law to one in equity and the reverse with as little delay and as little insistence on form as possible, and are long steps toward code practice."[22]

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[16] National Surety Co. v. County Board of Education, *supra* note 11; Great American Ins. Co. v. Johnson *et al.*, *supra* note 12.
[17] 41 F. (2d) 484 (C. C. A. 1st, 1930).
[18] Procter & Gamble Co. v. Powelson, 288 Fed. 299 (C. C. A. 2nd, 1923).
[19] Mobile Shipbuilding Co. v. Federal Bridge and Structural Co., 280 Fed. 292 (C. C. A. 7th, 1922).
[20] Fay v. Hill, 249 Fed. 415 (C. C. A. 8th, 1918).
[21] 15 F. (2d) 993 (C. C. A. 4th, 1926).
[22] Liberty Oil Co. v. Condon Bank, *supra* note 9.

Fraud and Deceit—Rescission of Contract—Scienter as Element

The defendant, a real estate broker, induced the plaintiff to buy a stone veneer house by falsely representing it to be a genuine stone house, perfectly constructed. The plaintiff sued for damages and to rescind the contract. The jury found that the defendant had no knowledge of the falsity of his representations. *Held,* that defendant's want of scienter precludes a recovery on either count.[1]

The English View

The law of England is settled that an action of deceit cannot be maintained unless the defendant had knowledge of the falsity of his representation, *i.e.,* unless the defendant was a conscious liar.[2] A particular mental attitude is the main essential of liability.[3] But it is well established that for purposes of rescission this question is wholly immaterial.[4] The rationale of this distinction is subject to exception. Both remedies are designed to put the parties back *in statu quo,*—generally and so far as money can do it, in the one case; specifically and exactly in the other. It is difficult to see why the victim of an innocent untruth should not be entitled to compensation, since he can get no greater damages than he would be entitled to if the action were for breach of warranty or contract. Furthermore, from the point of view of the representee, the injury to him is the same, whatever the motive of the representor was.[5]

The American Views

A majority of American jurisdictions follow the English law in both particulars,[6] and the distinction has been defended by many legal writers.[7] The equity rule, requiring no scienter for the purpose of rescission, is almost universally established,[8] but there has been much

[1] Ebbs v. Trust Co., 199 N. C. 242, 153 S. E. 858 (1930).
[2] Derry v. Peek, 14 App. Cas. 337 (1889).
[3] Jenks, *On Negligence and Deceit in the Law of Torts* (1910) 26 L. Q. Rev. 159, 166.
[4] Derry v. Peek, *supra* note 2, 359; Re Metropolitan Coal Consumers' Assn., Wainwright's Case, 63 L. T. Rep. (N. S.) 427 (1890); Bower, Actionable Misrepresentation (1911) §250.
[5] *Ibid.,* §§471, 472.
[6] Halsey v. Minn.-S. C. Land and Timber Co., 28 F. (2d) 720 (C. C. A. 4th, 1928).
[7] 2 Black, Recission and Cancellation (1916) §102. Distinct and separate theories. 2 Lawrence, Equity Jurisprudence (1928) §842. In equity the emphasis shifts from wrongful act of defendant to injury to plaintiff. 2 Pomeroy, Equity Jurisprudence (4th ed., 1918) §885. Actual fraud in equity not necessarily immoral; also constructive fraud basis.
[8] Black, *op. cit. supra* note 7, §102.

divergence and modification of the rule requiring scienter in an action of deceit.

A minority of the American courts have completely rejected the rule requiring conscious dishonesty as a basis for an action of deceit and permit a recovery against a defendant who had no knowledge of the falsity of his representation.[9] These courts have applied the rule in equity to actions of deceit, thus making the legal and equitable conception of fraud identical.[10] This is a rational and desirable result, and gives a logical consistency to the law governing misrepresentation.[11]

Other jurisdictions have purported to follow the rule requiring scienter, but have imposed liability for misrepresentations made without knowledge of their falsity by such fictions as the imputation or conclusive presumption of knowledge.[12] While the result is desirable, the use of fictions as a legal technique is not.[13]

Negligence as a Test of Liability

The most recent development in the law of misrepresentation is tort liability for the negligent use of words. Words are a form of voluntary behavior, and there is no good reason why, by analogy, negligent words, as well as negligent deeds, should not be actionable if injury proximately results from them.[14] In cases of misrepresentations, made without knowledge of their falsity, liability has quite properly been based upon general principles of negligence, including contributory negligence as a defense.[15] This extension of the law of

[9] Gulf Elect. Co. v. Fried, 218 Ala. 684, 119 So. 685 (1929); Becker v. McKinnie, 106 Kan. 426, 186 Pac. 496 (1920); Rosenberg v. Cyrowski, 227 Mich. 508, 198 N. W. 905 (1924), privity of contract between the parties required; Lundy v. Hazlett, 146 Miss. 499, 112 So. 591 (1927); Donelson v. Michelson, 104 Neb. 666, 178 S. W. 219 (1920); Bradley v. Fagula (Tex. Civ. App.) 25 S. W. (2d) 255 (1930); Hastings v. Bain, 151 Va. 976, 145 S. E. 735 (1928); Trust Co. v. Fletcher, 152 Va. 868, 148 S. E. 785 (1929), unjustly criticised in (1929) 16 VA. L. REV. 90, as applying the rule in equity to an action of deceit; McDaniel v. Crabtree, 143 Wash. 168, 254 Pac. 1091 (1927); Ohrmundt v. Spigelhoff, 175 Wis. 214, 184 N. W. 693 (1921).

[10] (1929) 16 VA. L. REV. 90.

[11] Williston, *Liability for Honest Misrepresentation* (1911) 24 HARV. L. REV. 415, 434: "Consideration should be given chiefly to two things: (1) logical consistency with itself in all parts of the law governing misrepresentation; (2) the inherent justice of the rule proposed."

[12] Fairfield Finance and Mfg. Co. v. Griffin, 144 Atl. 43 (Conn. 1928); Watson v. Jones, 41 Fla. 241, 25 So. 678 (1899); Williams v. Hume, 83 Ind. App. 608, 149 N. E. 355 (1925); Horton v. Tyree, 104 W. Va. 238, 139 S. E. 737 (1927).

[13] GRAY, NATURE AND SOURCES OF LAW (2nd ed., 1927) 30, 35.

[14] Smith, *Liability for Negligent Language* (1900) 14 HARV. L. REV. 187.

[15] Weston v. Brown, 131 Atl. 141 (N. H. 1925); International Products Co. v. Erie R. R., 244 N. Y. 331, 155 N. E. 662 (1927); Note (1928) 28 COL. L.

negligence is inherently sound.[16] In at least three states, this result may be reached under statutes providing that an action of deceit will lie for "the assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true."[17]

There is an authoritative basis for such a holding in North Caroline. In an action for damages, recovery was allowed for negligent assurances that a message had been delivered, when in fact it had not been delivered. It was expressly conceded that there was no liability for failure to deliver the message in the particular case.[18] It seems that this direct holding has never been followed.

The North Carolina Cases

North Carolina has never drawn the well established distinction, discussed above, between actions at law for deceit and suits in equity for rescission, as to the requirement of scienter. In both, the rule requiring that the misrepresentations be made with knowledge of their falsity has been followed.[19] Although there are general statements that scienter and intent to deceive are essential elements of fraud,[20] it is well recognized that it is not always necessary for the establishment of actionable fraud that a false representation should be knowingly made. These cases fall in the following classes: (1) Where reckless or positive assertions are made by one in a position to know, and expected to know, to one who is not in an equal position with reference to the misrepresentation, the one having a duty to investigate and the other having reasonable grounds for reliance.[21]

REV. 216; Courteen Seed Co. v. Hong Kong and Shanghai Banking Corp., 245 N. Y. 377, 157 N. E. 272 (1927); (1927) 41 HARV. L. REV. 105.

[16] Bohlen, *Misrepresentation as Deceit, Negligence, or Warranty* (1929) 42 HARV. L. REV. 733.

[17] MONT. REV. CODE: (Choate, 1921) §7575; N. D. COMP. LAWS ANN. (1913) §5944; S. D. REV. CODE (1919) §1293; Roper v. Noel, 32 S. D. 405, 143 N. W. 130 (1913), construing statute. Question is whether defendant had reasonable ground for making representation.

[18] Laudie v. Tele. Co., 126 N. C. 431, 35 S. E. 810 (1900).

[19] Tarault v. Seip, 158 N. C. 363, 74 S. E. 3 (1912) (Allen, J., in dissenting opinion makes plea for the distinction); Bell v. Harrison, 179 N. C. 190, 102 S. E. 200 (1920); Ebbs v. Trust Co., *supra* note 1; Hinsdale v. Phillips, 199 N. C. 563 (1930) (No rescission for promissory misrepresentations honestly made).

[20] Ebbs v. Trust Co., *supra* note 1.

[21] Whitehurst v. Insurance Co., 149 N. C. 273, 62 S. E. 1067 (1908) (insurance agent's statements regarding policy to an illiterate person); Case Threshing Mach. Co. v. Feezer, 152 N. C. 516, 67 S. E. 1004 (1910) (statements made by agent of manufacturer); Briggs v. Insurance Co., 155 N. C. 73, 70 S. E. 1068 (1911) (unequal position); Unitype Co. v. Ashcraft, 155 N. C. 230, 71 S. E. 61 (1911) (statements by inventor); Pate v. Blades, 163 N. C. 267, 79 S. E. 608 (1913) (unequal position); Bell v. Harrison, *supra* note 19 (con-

(2) Where false statements are published by the directors as to the condition of their bank, a duty to speak the truth is imposed.[22]

Conclusion

In the principal case, the defendant volunteered positive assertions of material facts, susceptible of knowledge, with the intention that the plaintiff act upon them. He knew neither the falsity nor the truth of his statements. Modern artifical constructions defy detection by the inexpert examiner. The defendant was a real estate broker, an expert, while the plaintiff was a mere purchaser of a home. The defendant was in position to know, and the plaintiff had reasonable grounds to rely upon the statements of the defendant as importing verity. It is submitted that under the North Carolina decisions, liability should have been imposed.[23] If the North Carolina decisions are to be so restricted, then the requirement of scienter should be abolished completely; or, alternatively, liability should be determined according to the general principles of negligence, for which, our court has a precedent in its own decisions.

J. GLENN EDWARDS.

Husband and Wife—Torts—Right of Wife to Sue Husband for Negligent Injury

Under married women statutes[1] permitting married women to hold all their property of every description for their separate use as though they were unmarried and permitting them to sue and be sued as though unmarried, it was held, in an action for personal injury from the negligent driving of an automobile, that a wife could not recover from her husband though the action had been started before the marriage.[2]

This would be the result at common law,[3] since on marriage the woman's choses in action may be reduced to possession by the hus-

fidential relationship); Evans v. Davis, 186 N. C. 41, 118 S. E. 845 (1923); Corley Co. v. Griggs, 192 N. C. 171, 134 S. E. 406 (1926) (scienter not necessary in all cases). But *cf.* Peyton v. Griffin, 195 N. C. 685, 143 S. E. 525 (1925) (no positive assertion of knowledge); (1928) 7 N. C. L. REV. 90, as to what constitutes reasonable reliance.

[22] Tate v. Bates, 118 N. C. 287, 24 S. E. 482 (1896) (knowledge presumed by fiction); Solomon v. Bates, 118 N. C. 311, 24 S. E. 478 (1896); Houston v. Thornton, 122 N. C. 265, 29 S. E. 827 (1898) (duty to speak truth imposed).

[23] *Supra* note 21.

[1] D. C. CODE (1924) §§1154, 1155.

[2] Spector v. Weisman, 40 F. (2d) 792 (Ct. or App. D. C. 1930).

[3] Peters v. Peters, 42 Iowa 182 (1875); Phillips v. Barnet, 1 Q. B. D. 436 (1876); Abbott v. Abbott, 67 Me. 309 (1877).

band and this union in one person of the right-duty relation discharges the duty as a matter of substance, and since the husband has a right to the services[4] and earnings of the wife she could suffer no pecuniary loss. There is also the procedural difficulty in that the husband would be both plaintiff and defendant. The result of this is usually expressed in the fiction of unity of person and merger of identity.[5] This is a result and not the reason, however, and was not recognized outside of the common law. It had exceptions even there in criminal matters.[6]

The statutes in question would seem to make applicable the legal maxim, *cessante ratione legis, cessat et ipsa lex.* The courts have shown a variegated inconsistency in the construction of such statutes. Some permit a tort action for a willful injury[7] and some will permit it for a negligent injury.[8] The majority will permit a contract action,[9] but not a tort action.[10] The reason seems to be one of policy, as either line could be logically followed. The court in the principal

[4] Buckley v. Collier, 1 Salk. 114 (1701); Warren, *Husband's Right to Wife's Services* (1925) 38 HARV. L. REV. 421, 622.

[5] 1 BL. COMM. (1765) 430-433.

[6] Queen v. Jackson, 1 Q B. D. 671 (1891); State v. Oliver, 70 N. C. 60 (1874) (assault); State v. Dowell, 106 N. C. 722, 11 S. E. 525, 8 L. R. A. 297, 19 AM. ST. REP. 568 (1890); State v. Fulton, 149 N. C. 485, 63 S. E. 145 (1908).

[7] Brown v. Brown, 88 Conn. 42, 89 Atl. 889, 52 L. R. A. (N. S.) 185 (1914); Note (1914) 23 YALE L. J. 613; 12 MICH. L. REV. 473; Gillman v. Gillman, 78 N. H. 4, 95 Atl. 657 (1915), Note (1916) 1 CORN. L. Q. 289; Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917), Note (1920) 5 CORN. L. Q. 171 (1918) 27 YALE L. J. 1081.

[8] Bushnell v .Bushnell, 103 Conn. 583, 131 Atl. 432, 44 A. L. R. 785 (1925), Note (1926) 24 MICH. L. REV. 618; 10 MINN. L. REV. 439; 1 NOTRE DAME LAW. 195; Waite v. Pierce, 191 Wis. 202, 209 N. W. 475, 48 A. L. R. 276 (1926); Note (1926) 4 WIS. L. REV. 37; 26 COL. L. REV. 895; 12 IOWA L. REV. 93; 11 MINN. L. REV. 79; 11 MARQUETTE L. REV. 55.

[9] Adams v. Custis, 4 Lans. 164 (N. Y. 1870); Benson v. Morgan, 50 Mich. 77, 14 N. W. 705 (1883); Kennedy v. Knight, 174 Pa. 408, 34 Atl. 585 (1896); DeBaun v. DeBaun, 119 Va. 85, 89 S. E. 239 (1916).

[10] Lillienkamp v. Rippetoe, 133 Tenn. 57, 179 S. W. 628 (1915), L. R. A. 1916 B 881 (assault and battery); Woltman v. Woltman, 153 Minn. 217, 189 N. W. 1022 (1922). Note (1923) 21 MICH. L. REV. 473 (negligence); Newton v. Weber, 119 Misc. 240, 196 N. Y. Supp. 113 (1922); Note (1922) 36 HARV. L. REV. 346, 32 YALE L. J. 196 (negligence); Austin v. Austin, 136 Miss. 61, 100 So. 591 (1924); Note (1924) 19 ILL. L. REV. 198 (negligence); Allen v. Allen, 246 N. Y. 571, 159 N. E. 656 (1927); Note (1928) 37 YALE L. J. 834; 28 COL. L. REV. 818. But *cf.* Schubert v. Schubert Wagon Co., 249 N. Y. 253, 164 N. E. 42 (1928) (permits husband's employer to be held liable, although the husband himself is not liable and thus shows N. Y. to be interpreting the statute on grounds of policy). *Contra:* Maine v. Maine & Sons Co., 198 Iowa 1278, 201 N. W. 20, 37 A. L. R. 161.

case felt bound by an earlier decision[11] which denied the right through fear of disturbing the harmony of the home and due to a strict construction of the statute, since it was in derogation of the common law. That decision left the wife with a remedy in the divorce court and in the criminal court, but such a right is not here presented, as this is a negligent injury and not a willful one.

North Carolina and Wisconsin have adopted the liberal construction of their married women acts and permit tort actions by the wife, whether the injury is willful[12] or negligent.[13] New York, on the other hand, under a similar statute has refused the tort action.[14]

It is submitted that the right of action should not be denied the wife because of vague public policy based on *a priori* reasoning which experience in other states has demonstrated to be unfounded. The married women statutes are remedial in character and should be liberally construed.[15] There should be no procedural limitations on married women, as such. Instead, the right of a married woman to recover against her husband should be governed by reasonable limitations of substantive law, consistent with the relation of the parties.[16]

HUGH BROWN CAMPBELL.

Judgments—Setting Aside Judgment for Neglect of Attorney Not Residing in County of Trial

In a recent North Carolina case plaintiff instituted suit in Ashe County against defendant who lived in Gaston County. Defendant filed a verified answer but neither he nor his attorney appeared for trial. Judgment was rendered against defendant. Under §600 of

[11] Thompson v. Thompson, 218 U. S. 611, 31 Sup. Ct. 111, 54 L. ed. 1180, 30 L. R. A. (N. S.) 1153, 21 ANN. CAS. 921 (1910); Note (1913) 22 YALE L. J. 250; 9 MICH. L. REV. 440 (It is to be noted that the remarks concerning property actions are against the great weight of authority).

[12] Crowell v. Crowell, 180 N. C. 516, 105 S. E. 206 (1920), 181 N. C. 66, 106 S. E. 149 (1921); Note (1921) 19 MICH. L. REV. 659, 7 VA. L. REV. 476.

[13] Roberts v. Roberts, 185 N. C. 566, 118 S. E. 9, 29 A. L. R. 1479 (1923); Note (1923) 33 YALE L. J. 315, 2 N. C. LAW REV. 113, 10 VA. L. REV. 161; Waite v. Pierce, *supra* note 8; Earle v. Earle, 198 N. C. 411, 151 S. E. 884 (1930).

[14] Newton v. Weber, *supra* note 10. It is to be noted that the N. C. statute does not expressly permit the wife to sue her husband in tort but such a result is derived by construction only. N. C. ANN. CODE (Michie, 1927) §§454, 2506, 2513.

[15] BLACK, INTERPRETATION OF LAWS (2d ed. 1911) 375-378.

[16] See Mathewson v. Mathewson, 79 Conn. 23, 37, 63 Atl. 285, 287, 5 L. R. A. (N. S.) 611 (1906); Brown v. Brown, *supra* note 7. For excellent treatment of the subject see McCurdy, *Torts Between Persons in Domestic Relation* (1930) 43 HARV. L. REV. 1030.

the Code defendant moved to set the judgment aside for excusable neglect. The judge denied the motion upon the following finding of facts only: that defendant employed counsel in Gaston County who did not regularly attend the courts of Ashe County. *Held,* Judgment set aside. The negligence of the attorney is not imputed to the defendant who was not negligent in employing Gaston County counsel. The filing of a verified answer alleging facts which, if true, would constitute a meritorious defense makes such a finding unnecessary.[1]

The great majority of jurisdictions hold the neglect of an attorney in permitting a judgment to be entered against his client to be the neglect of the client and no ground for relief unless excusable.[2] North Carolina holds the neglect of counsel in the performance of profession duties[3] not attributable to the party[4] if he himself is not negligent.[5]

Should a party employing counsel not regularly practicing in the county of trial be himself held negligent and no relief granted him if his attorney negligently permits judgment to be entered against him?

The clerk has no legal obligation to notify either the party or his attorney that a case is set for trial.[6] Because of this, the former difficulty of transportation and communication caused North Carolina to hold a party negligent for employing counsel outside the county of trial and to refuse to set aside a judgment secured through counsel's

[1] Sutherland v. McLean and Faysoux, 199 N. C. 345, 154 S. E. 662 (1930).

[2] Note (1910) 27 L. R. A. (n. s.) 858; 1 FREEMAN, JUDGMENTS (1925) §248; Delewski v. Delewski, 76 Ind. App. 37, 131 N. E. 228 (1921); Nitsche v. City of Chicago, 280 Ill. 132, 117 N. E. 500 (1917); Guardia v. Guardia, 48 Nev. 230, 229 Pac. 386 (1924); Patterson v. Uncle Sam Oil Co., 101 Kan. 40, 165 Pac. 661 (1917); Carlson v. Bankers' Discount Co., 107 Ore. 686, 215 Pac. 986 (1923); Munroe v. Dougherty, 196 Mo. App. 124, 190 S. W. 1022 (1917). Where defendant is his own attorney his negligence will not excuse, Pac. Acceptance Co. v. McCue *et al,* 71 Mont. 99, 228 Pac. 761 (1924).

[3] See Seawell v. Parsons Lumber Co., 172 N. C. 320, 90 S. E. 241 (1916) (if attorney acting as a mere agent to employ another attorney—an act which the client could perform—his neglect is that of the client).

[4] Grandy v. Products Co., 175 N. C. 511, 95 S. E. 914 (1918); Helderman v. Hartsell Mills Co., 192 N. C. 626, 135 S. E. 627 (1926); Gaylord v. Berry, 169 N. C. 733, 86 S. E. 623 (1915); Grill v. Vernon, 65 N. C. 76 (1871) (defendant is not required to examine the records to see if his attorney has filed answer).

[5] A party must always give to his litigation the attention which a man of ordinary prudence would give to his important business. Osborn v. Leach, 133 N. C. 428, 45 S. E. 783 (1903); Kercher v. Baker, 82 N. C. 169 (1880).

[6] Cahoon v. Brinkley, 176 N. C. 5, 96 S. E. 650 (1918); McLeod v. Gooch, 162 N. C. 122, 78 S. E. 4 (1913); Pulaski Oil Co. v. Conner, 62 Okla. 211, 162 Pac. 464 (1927); Baker v. Hunt & Co., 66 Okla. 42, 166 Pac. 891 (1917); McCord v. Harrison, 207 Ala. 480, 93 So. 428 (1922); Dallister v. Pilkington, 185 Iowa 815, 171 N. W. 127 (1919).

neglect.[7] At other times she has not so held.[8] The instant case marshalls the former decisions and expressly abrogates the rule that due care requires a party to employ local counsel. In view of the present transportation and communication facilities the reason for the former holdings fails and, under the rule that the negligence of an attorney is not imputed to the client, it is submitted that this is a logical and correct result. It is also submitted that the majority holding that the negligence of the attorney is excusable only when that of the party would be[9] is much the better rule and would save the court much future embarrassment.

Plaintiff in the instant case did all that the law has heretofore required of him and the dissenting judge asks what more he must do to secure a valid judgment.[10] Is the answer, let him notify both the non-resident defendant and his attorney that the case is set for trial? This suggestion is placing an unusual burden upon plaintiff and is not a necessary result of the case as the point the court intended to decide was that defendant was not negligent in employing non-resident counsel, and it did not squarely meet the issue raised by defendant's failure to attend court himself.

The case further holds that the filing of a verified answer removes the necessity of a specific finding of a meritorious defense. If no answer has been filed, defendant's contentions are not before the court and such a finding is indispensable[11] for unless defendant has a valid defense it would be a vain thing to disturb the judgment already entered.[12] By the weight of authority a verified answer suffices for an affidavit of merits[13] and the affidavit need show only a

[7] Allen v. McPherson, 168 N. C. 435, 84 S. E. 766 (1915); Hardware Co. v. Buhmann, 159 N. C. 511, 75 S. E. 731 (1912); Ham v. Finch, 173 N. C. 72, 91 S. E. 605; McLeod v. Gooch, 162 N. C. 122, 78 S. E. 4 (1913); Hyde County Board & Lumber Co. v. Thomasville Chair Co., 190 N. C. 437, 130 S. E. 12 (1925).

[8] Seawell v. Parsons Lumber Co., *supra* note 2; Helderman v. Hartsell Mills Co., *supra* note 3; Osborn v. Leach, *supra* note 4; Sutherland v. McLean, 199 N. C. 345, 351, ("To follow the decisions now existing, it would be necessary to possess the double head of Janus, and such trancsendent qualification ought not to be required of trial judges.")

[9] See note 1. In McCord v. Harrison and Stringer, 207 Ala. 480, 93 So. 428 (1922) the court reaches an opposite conclusion from the instant case on similar facts.

[10] Sutherland v. McLean, *supra* note 7, at 353.

[11] Bowie v. Tucker, 197 N. C. 671, 150 S. E. 200 (1929); School v. Peirce, 163 N. C. 424, 79 S. E. 687 (1913).

[12] 34 C. J. Judgments, §550.

[13] Maden v. Dunbar *et al*, 52 N. D. 74, 201 N. W. 991 (1924); Huebner v. Farmers Ins. Co., 71 Iowa 30, 32 N. W. 13 (1887); State v. District Court of Second Judicial District, 38 Mont. 415, 100 Pac. 207 (1909); Eherhart v.

prima facie meritorious defense, which cannot be controverted by counter-affidavits.[14] It might be argued that the judge having found no meritorious defense is presumed to have had before him facts sufficient to negative it.[15] The answer, however, speaks for itself as a part of the record of which the court will take judicial notice[16] and from which the court will review the conclusions of the judge.[17]

The cases cited in the dissent on this point are all cases in which no answer had been filed or no facts at all were found relative to the negligence.[18] While good practice may require the judge to set out findings relative to a meritorious defense, any other holding, it is submitted, would have been over technical and not in harmony with the highly remedial purpose of §600.[19]

SUSIE SHARP.

Libel—Negotiable Instruments—Injury to Business Reputation by Altering Check

Plaintiff, a corporation operating a general merchandise store, gave defendant, a wholesale meat packing corporation, a post-dated check for $54.99 to settle an account, as agreed. Defendant sent the check in for collection with the date altered, making it payable at once. The check was returned by the bank due to insufficient funds. The plaintiff, having deposited enough to pay the check, sued the defendant for damage to its credit and business reputation caused by defendant's negligent, wanton, and willful premature presentation of the check causing the bank to give false information that the plaintiff had drawn a check without funds. A jury verdict of $2,000 was affirmed, the plaintiff being entitled to such substantial damages as would compensate for the injury as well as such punitive damages as were proper punishment for such willful wrong.[1]

This case is without precedent or direct authority and was decided by analogy to suits against banks for the wrongful dishonor of customers' checks. The situations, while generally similar, are different

Salogar *et al*, 71 Cal. App. 290, 235 Pac. 86 (1925). 1 FREEMAN, JUDGMENTS (1925) §286.

[14] 1 FREEMAN, JUDGMENTS, §289; 34 C. J. Judgements, §571 (3).

[15] Holcomb v. Holcomb, 192 N. C. 505, 135 S. E. 332 (1926).

[16] 23 C. J., Evidence, §1918; N. C. ANN. CODE (Michie, 1927) §1412; Wilson v. Beaufort County Lumber Co., 131 N. C. 164, 42 S. E. 565 (1902).

[17] Norton v. McLaurin, 125 N. C. 185, 34 S. E. 269 (1898).

[18] Sutherland v. McLean, *supra* note 7, at page 352.

[19] (1927) 5 N. C. L. REV. 269.

[1] St. Charles Mercantile Co. v. Armour & Co., 153 S. E. 473 (S. C. 1930).

in the respect that the latter cases are usually brought for injury to plaintiff's credit with the company taking the check in payment while here the injury is a loss of credit principally with the bank. The wrongful act of the defendant resulted in a tort[2] similar to slander of title or disparagement of goods, in that it injured business reputation by injuring credit. The bank was an innocent agent, and the defendant's act was the proximate cause of the false information.

The plaintiff was blameless in issuing a post-dated check.[3] Although it is held by some jurisdictions that a post-dated check is the same as if it hadn't been issued until the date thereof,[4] the weight of authority is that a post-dated check is not only a valid but a negotiable instrument before its date.[5] A post-dated check raises a presumption that the maker has an inadequate fund in the bank at the time of giving the check but that he will have a sufficient deposit at the date of presentation.[6]

A merchant or trader having a check wrongfully dishonored by a bank is entitled to substantial damages[7] without proof of actual loss or damage, the injury to the credit and commercial standing of the former being presumed.[8] Where the non-payment is actuated by fraud, gross negligence, or oppression, punitive damages also may be

[2] Winthrop v. Allen, 116 S. C. 388, 108 S. E. 153 (1921); Jackson v. Chambers, 24 Ga. App. 285, 100 S. E. 659 (1919); Rich v. New York Cent. & H. R. R. R., 87 N. Y. 382 (1882); Oliver v. Perkins *et al.*, 92 Mich. 304, 52 N. W. 609 (1892).

[3] State v. Winter, 98 S. C. 294, 82 S. E. 419 (1914); State v. Crawford, 198 N. C. 522, 152 S. E. 504 (1930); Neidlinger v. State, 17 Ga. App. 811, 88 S. E. 687 (1916). *Contra:* People v. Bercovitz, 163 Cal. 636, 126 Pac. 479, 43 L. R. A. (N. S.) 667 (1912); State v. Avery, 111 Kan. 588, 207 Pac. 838, 23 A. L. R. 453 (1922); People v. Westerdahl, 316 Ill. 86, 146 N. E. 737 (1925).

[4] Merchants' & Farmers' Nat. Bank v. Clifton Mfg. Co., 56 S. C. 320, 33 S. E. 750 (1890); *In re* Brown, 4 Fed. Cas. No. 1985, 2 Story 502, 6 Law Rep. 508 (1843); Symonds v. Riley, 188 Mass. 470, 74 N. E. 926 (1905).

[5] American Nat. Bank v. Wheeler, 45 Cal. App. 118, 187 Pac. 128 (1920); Wilson v. McEachern, 9 Ga. App. 584, 71 S. E. 946 (1911); Albert v. Hoffman, 64 Misc. 87, 117 N. Y. Supp. 1043 (1909); Breckenridge, *Negotiability of Post-dated Checks* (1929) 38 YALE L. J. 1063; *Premature Payment of Post-dated Checks* (1930) 64 U. S. L. REV. 297.

[6] Lovell v. Eaton, 99 Vt. 255, 133 Atl. 742 (1925); State v. Crawford, *supra* note 3; Clarke Nat. Bank v. Albion Bank, 52 Barb. 592 (N. Y. 1868).

[7] Wilson v. Palmetto Nat. Bank, 113 S. C. 508, 101 S. E. 841 (1920). "The authorities agree that the plaintiff is entitled to something more than nominal damages; but that the recovery should be temperate in amount." J. M. James Co. v. Bank, 105 Tenn. 1, 58 S. W. 261, 51 L. R. A. 255, 80 Am. St. Rep. 857 (1900) "Substantial, though temperate, damages, measured by all the facts in the case"; Svendson v. Bank, 64 Minn. 40, 65 N. W. 1086, 58 Am. St. Rep. 522, 31 L. R. A. 552 (1896). "General compensatory damages."

[8] Lorick v. Palmetto Bank & Trust Co., 74 S. C. 185, 54 S. E. 206 (1906); Third Nat. Bank of St. Louis v. Ober, 178 Fed. 678, 102 C. C. A. 178 (C. C. A. 8th, 1910); Levin v. Savings Bank, 133 La. 492, 63 So. 601 (1913).

awarded.[9] The facts of this case tend to show that some agent of the defendant acted with a fraudulent motive or else with such gross negligence as to display a reckless disregard for the plaintiff's rights. In view of the aggravated nature of the offense of altering the check and the fact that the altered instrument operated to charge plaintiff with the crime of issuing a check without funds, it is submitted that the jury verdict may be upheld, although the actual loss to the plaintiff through loss of credit and damage to business reputation probably was slight under the circumstances.[10]

TRAVIS BROWN.

Marriage and Divorce—Annulment—Marriage in Jest

Infant plaintiff brought an equitable petition by her next friend for the purpose of annuling her marriage to the defendant. She alleged that she was fifteen years old and that the defendant was nineteen, and that both resided with and were dependent upon their respective parents. While attending a dinner dance, in a spirit of fun, braggadocio, and levity, the parties began to dare each other to get married. They drove across the state line into Alabama, procured a license from a probate judge by means of falsifications by the defendant as to their ages, and were married. Plaintiff alleged that she returned home and had never lived with the defendant. Defendant entered a general demurrer for want of equity and on the ground that the court of equity "was without jurisdiction or power to annul a marriage under any circumstances." *Held,* demurrer sustained.[1]

Two questions are presented in the case. The first, whether or not a court of equity has jurisdiction to annul a marriage, had never been adjudicated in Georgia and was left open by the court. There are many cases which have decided that equity has such jurisdiction.

[9] 2 MORSE, BANKS AND BANKING (5th ed., 1917) §458. See Winkler v. Citizens' State Bank, 89 Kan. 279, 131 Pac. 597, 598 (1913); American Nat. Bank v. Morey, 113 Ky. 857, 24 Ky. Law Rep. 658, 69 S. W. 759, 760, 101 AM. ST. REP. 379, 58 L. R. A. 956 (1902); McCormick, *Some Phases of the Doctrine of Exemplary Damages* (1930) 8 N. C. L. REV. 129.

[10] The plaintiff was insolvent at the time of the alleged occurrences leading to the suit. It was not proved that the defendant's action contributed any substantial part to the plaintiff's going into bankruptcy thereafter.

[1] Hand v. Berry, 154 S. E. 239 (Ga. 1930).

Some of them hold that the power is inherent,[2] others that it is conferred upon the courts by statute,[3] and still others that it is a part of the general power of a court of equity over contracts.[4]

The second question presented is whether or not on the facts the marriage could be set aside if jurisdiction existed. The law of the place of contracting governs with regard to matrimonial capacity of parties as well as with respect to the manner or form of solemnization or annulment.[5] It appears that the parties were capable of contracting a valid marriage in Alabama.[6] The fraud of defendant in falsifying their ages in order to secure a license without the written consent of their parents did not render the marriage voidable on that ground.[7] But, granting the capacity of the parties and assuming that the court had jurisdiction, it held that the facts did not constitute grounds for annulment. The basis for the decision is that the state has decreed that when capable parties consent to the pronouncement of a certain ceremony by the proper official that they are united as man and wife. A very strong majority opposes this view on the ground that it is real consent to assume the obligations and rights of that status which validates the contract.[8] The words are the external manifestation of intention, but mere words without any intention corresponding to them cannot make a marriage or any other civil contract, unless they are justifiably and reasonably taken at their face value.[9] The legal forms are not a substitute for legal consent, they are but modes of declaring and substantiating it.[10] Actual mutual consent and a bona fide agreement are fundamental and essential

[2] Meredith v. Shakespeare, 96 W. Va. 229, 122 S. E. 520 (1924); Dorgelah v. Murtha, 92 Misc. Rep. 279, 156 N. Y. Supp. 181 (1915).

[3] Johnson v. Kincade, 37 N. C. 470 (1843).

[4] Corder v. Corder, 141 Md. 114, 117 Atl. 119 (1922); Clark v. Field, 13 Vt. 460 (1841).

[5] Powell v. Powell, 282 Ill. 357, 118 N. W. 786 (1918); Great Northern v. Johnson, 254 Fed. 683 (C. C. A. 8th, 1918).

[6] Ala. Code (1923) §8999. But see: Quigg v. Quigg, 42 Misc. Rep. 48, 85 N. Y. Supp. 550 (1903); Kellog v. Kellog, 122 Misc. Rep. 734, 203 N. Y. Supp. 757 (1924); Swenson v. Swenson, 179 Wis. 536, 192 N. W. 70 (1923).

[7] Smith v. Smith, 205 Ala. 503, 88 So. 577 (1921); Bays v. Bays, 105 Misc. Rep. 492, 174 N. Y. Supp. 212 (1918); Fodor v. Kunie, 92 N. J. Eq. 301, 112 Atl. 598 (1920).

[8] Crouch v. Wartenberg, 86 W. Va. 664, 104 S. E. 117 (1920); Note (1921) 11 A. L. R. 215.

[9] McClurg v. Terry, 21 N. J. Eq. 225 (1870); Regina v. Millis, 10 Clark & F. 534 (1844).

[10] 1 BISHOP, MARRIAGE, DIVORCE, AND SEPARATION (1921) §§296 and 337; SPENCER, DOMESTIC RELATIONS (1923) §§37 and 82.

elements,[11] without them the marriage is voidable,[12] unless it is ratified by consummation.[13]

The cases preponderate in favor of annulment of marriages contracted in jest.[14] Social policy dictates that a contract of such importance to the race shall not be unintentionally assumed. Where it appears that the parties never had the intention of fulfilling the obligations of the contract, it would seem to be more just to both the state and to the parties to restore them to *statu quo*.

C. E. REITZEL.

Negligence—Automobiles—Duty of Guest

Two actions (consolidated by consent) were brought against the owner of an automobile and his wife, who was driving, to recover damages for personal injuries sustained by a guest, and caused by the alleged negligence of the driver while operating the car. Judgment against the wife was sustained, the court holding that the owner was relieved of any liability by the finding of the jury that his wife was not operating the car as his agent. Testimony of caution by the guest to the driver was held competent on the question of the driver's negligence.[1]

The above statement of the owner's liability raises serious doubt in view of the court's previous adoption of the "family purpose" doctrine.[2] There is no indication that the court is overruling the previous holding of modifying the doctrine, although the language would seem to restore the owner's liability to an agency basis.[3]

The testimony as to the warning is admissible either to show a compliance with the guest's duty to warn, if any,[4] or as evidence tending to show negligence on the part of the driver.[5] Such a state-

[11] Crouch v. Wartenberg, *supra* note 9.
[12] McClurg v. Terry, *supra* note 10; Hall v. Hall, 24 Times L. R. 756 (1908).
[13] Brooke v. Brooke, 60 Md. 524 (1883); Macri v. Macri, 164 N. Y. Supp. 112, 177 App. Div. 292 (1917); Arado v. Arado, 281 Ill. 123, 117 N. E. 816, 4 A. L. R. 28 (1917); Martin v. Otis, 233 Mass. 491, 124 N. E. 294 (1919); Americus Co. v. Coleman, 16 Ga. App. 17, 84 S. E. 493 (1915).
[14] Note (1921) 11 A. L. R. 215.
[1] Teasley *et al.* v. Burwell *et al.*, 199 N. C. 18, 153 S. E. 607 (1930).
[2] Goss v. Williams, 196 N. C. 213, 145 S. E. 119 (1928); (1927) 5 N. C. L. REV. 252; (1928) 6 N. C. L. REV. 78; McCall, *The Family Automobile* (1930) 8 N. C. L. REV. 256.
[3] Linville v. Nissen, 162 N. C. 96, 77 S. E. 1096 (1913); Tyree v Tudor, 183 N. C. 340, 111 S. E. 714 (1922); Watts v. Lefler, 190 N. C. 722, 130 S. E. 630 (1925).
[4] McAdd v. Shea, 10 La. App. 733, 122 So. 879 (1929).
[5] Hiller v. De Sautels, 169 N. E. 494 (Mass. 1929).

ment is not hearsay, for it is offered, not to prove the truth of the facts asserted, but merely to show that the assertion was made.

The rulings relative to the duty which a guest in an automobile must discharge to entitle him to sue his host or a negligent third party,[6] range all the way from holding that he must exercise a degree of care coextensive with that of the driver[7] to holding that he must remain silent and passive.[8] Between these two extremes lie more moderate interpretations of the duty to exercise ordinary care under the circumstances.[9] Opposite theories exist as to his duty to maintain a lookout. A New York holding[10] denies recovery to a guest who failed to keep a lookout at a railroad crossing, while an Oregon case[11] permits a guest to recover, although he gave the driver a mistaken direction. The application of this question is often resolved into the issue of whether the guest may read,[12] sleep,[13] or converse.[14] Even though the duty to keep a lookout may be denied,

[6] McGeever v. O'Byrne, 203 Ala. 266, 82 So. 508 (1919).

[7] Read v. New York Cent. & H. R. R. Co., 219 N. Y. 660, 114 N. E. 1081 (1915).

[8] Alost v. J. Moock Wood and Drayage Co., Inc., 10 La. App. 57, 120 So. 791 (1929); Lawrason v. Richard, 129 So. 250 (La. 1930); Bolton v. Wells, 225 N. W. 791 (N. D. 1929); Telling Belle Vernon Co. v. Krenz, 34 Ohio App. 499, 171 N. E. 357 (1928); Schlossstein v. Bernstein, 293 Pa. 245, 142 Atl. 324 (1928); Yturria v. Everton, 4 S. W. (2d) 210 (Tex. 1928); see Southern Pacific Co. v. Wright, 248 Fed. 261, 264 (C. C. A. 9th, 1918).

[9] Wicker v. Scott, 29 F. (2d) 807 (C. C. A. 6th, 1928); McDermott v. Sibert, 218 Ala. 670, 119 So. 681 (1928); Graves v. Jewel Tea Co., 23 S. W. (2d) 972 (Ark. 1930); Switzler v. Atchison, T. & S. F. Ry. Co., 285 Pac. 918 (Cal. 1930); Fairchild v. Detroit, G. H. & M. Ry. Co., 250 Mich. 252, 230 N. W. 167 (1930); Lewis v. Kansas City Public Service Co., 17 S. W. (2d) 359 (Mo. 1929); Hocking Valley Ry. Co. v. Wykle, 122 Ohio St. 391, 171 N. E. 860 (1930).

[10] Read v. N. Y. C. & H. R. R. Co., *supra* note 7. *Accord:* Norfolk & W. Ry. Co. v. Wellons' Adm'r., 154 S. E. 575 (Va. 1930).

[11] Peters v. Johnson, 264 Pac. 459 (Ore. 1928).

[12] Kilpatrick v. Philadelphia Rapid Transit Co., 290 Pa. 288, 138 Atl. 830 (1927) (Held not to be contributory negligence for guest to be reading a paper, though the automobile was on the trolley track).

[13] Oppenheim v. Barkin, 159 N. E. 628 (Mass. 1928) (Held contributory negligence for guest to sleep, knowing driver had been without sleep for a long time); Krueger v. Krueger, 197 Wis. 588, 222 N. W. 784 (1929) (same, knowing driver had been subjected to extreme hardships). But in the absence of special circumstances it is generally held that the mere fact that the guest was asleep does not constitute contributory negligence. Bushnell v. Bushnell, 103 Conn. 583, 131 Atl. 432, 44 A. L. R. 785 (1925); McAndrews v. Leonard, 134 Atl. 710 (Vt. 1926).

[14] Semellie v. Southern Pacific Co., 269 Pac. 657 (Cal. 1928) (guest held contributorily negligent when he said at railroad crossing, "it's all clear; let's go," and an accident ensued); McAdd v. Shea, *supra* note 4 (statement by guest, "it is pretty fast for a new car," held to relieve him of contributory negligence); Peters v. Johnson, *supra* note 11 (guest allowed to recover although he mistakenly directed driver).

there is a clear duty to warn of perceived dangers[15] or violations of the law,[16] unless the driver appears to be aware of the same or striving to avoid them.[17]

In actions by a guest against the host, the guest assumes the risk of defects, not known to the host.[18] In actions either against the host or negligent third parties, the guest assumes the dangers incident to the known incompetency or inexperience[19] or habits[20] of the driver. All the authorities are to the effect that it is contributory negligence, precluding recovery, for one to ride knowingly with an intoxicated driver, if he is injured as a result of the driver's negligence.[21] Whether or not the passenger knew of the driver's condition is a question for the jury.[22] A guest is also bound by his acquiescence in obvious negligence or recklessness in handling the car,[23] and he assumes the risks naturally incident to the purpose and character of the trip.[24]

The various factual aspects which bring up the general question suggest the inadvisability of crystallized rules. It is impractical to try to limit the duty of a guest to exercise due care under the circumstances by any fixed rules of law. To attempt to lay down any rule requiring a guest to give warning would undoubtedly prove in-

[15] Minnich v. Easton Transit Co., 267 Pa. 200, 110 Atl. 273, 18 A. L. R. 296 (1920); Kilpatrick v. Phila. Rapid Transit Co., *supra* note 12.

[16] Renner v. Tone, Rec'r., 273 Pa. 10, 116 Atl. 512 (1922) (driving on wrong side of street against the current of traffic); Wagenbauer v. Schwinn, 285 Pa. 128, 131 Atl. 699 (1926) (driving recklessly and in disregard of circumstances); Morningstar v. Northeast Pennsylvania R. Co., 290 Pa. 14, 137 Atl. 800 (1927) (crossing railroad track without stopping); Alperdt v. Paige, 292 Pa. 1, 140 Atl. 555 (1928) (driving in front of a rapidly approaching automobile which has the right of way).

[17] United States Can Co. v. Ryan, 39 F. (2d) 445 (C. C. A. 8th, 1930); Jerko v. Buffalo R. & P. Ry. Co., 275 Pa. 459, 119 Atl. 543 (1923).

[18] Lewellyn v. Shott, 155 S. E. 115 (W. Va. 1930); O'Shea v. Lavoy, 175 Wis. 456, 185 N. W. 525, 20 A. L. R. 1008 (1921).

[19] Cleary v. Eckhart, 191 Wis. 114, 210 N. W. 267, 51 A. L. R. 576 (1926); Thomas v. Steppert, 228 N. W. 513 (Wis. 1930).

[20] Livaudias v. Black, 127 So. 129 (La. 1930).

[21] Lynn v. Goodwin, 170 Cal. 112, 148 Pac. 927, L. R. A. 1915 E, 588 (1915); Kirmse v. Chicago, T. H. & S. E. Ry. Co., 73 Ind. App. 537, 127 N. E. 837 (1920); Winston Adm'r. v. City of Henderson, 179 Ky. 220, 200 S. W. 330, L. R. A. 1918 C, 646 (1918); Jensen v. Chicago, M. & St. P. Ry. Co. *et al.*, 133 Wash. 208, 233 Pac. 635 (1925). To the effect that voluntary intoxication does not relieve of contributory negligence, see Schwartz v. Johnson, 152 Tenn. 586, 280 S. W. 32 (1926).

[22] Fitzpatrick v. Civitis, 139 Atl. 639 (Conn. 1927).

[23] Joyce v. Brockett, 237 N. Y. 561, 143 N. E. 743 (1923); Hill v. Philadelphia Rapid Transit Co., 271 Pa. 232, 114 Atl. 634 (1921); Krause v. Hall, 195 Wis. 565, 217 N. W. 290 (1928).

[24] Sommerfield v. Flury, 198 Wis. 163, 223 N. W. 408 (1929).

advisable. Experience tells us that back seat suggestions as to the handling of a car are disconcerting and irritating to the driver (more so as between husband and wife). Indeed this is one case where silence is generally golden. At present the cases seem to make no distinction between the liability of a host and that of a third party. The burdens of generosity should not be so great. It is submitted that the legislature should relieve the situation by a statutory change, and thereby relieve the host of part of his present burden.[25]

MILLS SCOTT BENTON.

Procedure and Practise—Relation Between Survival and Wrongful Death Statutes Where Death Follows Injury

Two recent decisions construing the North Carolina survival[1] and wrongful death[2] statutes have aroused speculation as to what actions for personal injuries survive to the personal representative. In both cases the decedent was injured by the defendant's alleged negligence. In the state case[3] decedent died before the termination of his suit, but did not die from the injuries sustained by the defendant's negligence. In the federal case[4] the jury found that the decedent was injured by the defendant's negligence, and awarded damages, but found, also, that the decedent's death was not caused by the injuries inflicted by the defendant's negligence. In these cases it was held that the cause of action for personal injuries not resulting in death survived.

At common law no right of action for personal injuries survived the death of the injured or injuring party. Our survival statute[5] provides that all causes of action survive except those specifically declared not to survive. Since the amendment[6] of our survival statute, it is now clear that if the injured party dies without a recovery, compromise, or settlement, and not as a result of the defendant's negligence, the cause of action survives.[7] Also, the cause of action

[25] For discussion of proposed statute to meet this situation, see p. 47.
[1] N. C. ANN. CODE (Michie, 1927) §§159, 162, 163.
[2] *Ibid.*, §§160, 161.
[3] Fuquay, Adm'x v. A. & W. R. R. Co., 199 N. C. 499 (1930).
[4] James Baird Co., Inc., v. Boyd, 41 F. (2d) 578 (C. C. A. 4th, 1930).
[5] *Supra* note 1.
[6] REV. (1905) §157 (2), as amended by N. C. PUB. LAWS (1915), c. 38. *Infra* note 16.
[7] Fuquay, Adm'x v. A. & W. R. R. Co., *supra* note 3; *cf.* Bolick v. R. R. Co., 138 N. C. 370, 50 S. E. 689 (1905).

survives, under like circumstances, against the personal representative of a deceased defendant.[8]

The question of interest is raised by the situation in which the injured party dies from the injuries sustained through the defendant's negligence. Does the personal representative have one cause of action for the decedent's injury and suffering under the survival statute, and another cause of action for the wrongful death under the wrongful death statute?[9] It is settled in this state and by the majority opinion in this country, and in England[10] that a recovery, compromise, or settlement, prior to the death of the injured party will bar an action by the personal representative for the wrongful death. The reason for this rule is that the specific wording of the statute requires that the injured party have a cause of action against the defendant at the time of the former's death.[11] But, under the strict wording of our statutes, why should not a cause of action for unrecompensed injuries survive when there is a cause of action for the wrongful death. In some jurisdictions where there are both survival and wrongful death statutes, two separate causes of action exist to the personal representative and may be prosecuted concurrently.[12] The Federal Employers Liability Act provides for two separate causes of action, and treats them as capable of being joined by the personal representative.[13] Our court says that our law differs from the federal law on this subject[14] and holds that after the injured party's death there is only one cause of action, and that is for the wrongful death. This ruling seems to be based on decisions before the change of the statute.[15]

It would appear that the North Carolina statute of the survival of personal injury causes is independent of the wrongful death stat-

[8] Tonkins, Adm'r v. Cooper, 187 N. C. 570, 122 S. E. 294 (1924); *cf.* Watts v. Vanderbilt, 167 N. C. 567, 83 S. E. 813 (1914).

[9] *Supra* note 2.

[10] Edwards, Adm'r v. Interstate Chemical Co., 170 N. C. 551, 87 S. E. 635, L. R. A. 1916D, 121 (1915); Littlewood v. The Mayor, Etc., 89 N. Y. 24, 42 AM. REP. 271 (1882); Sou. Bell Tele. Co. v. Cassin, 111 Ga. 575, 36 S. E. 881, 50 L. R. A. 694 (1900); Thompson v. R. R. Co., 97 Tex. 590, 80 S. W. 990 (1904); Mich. Cent. R. R. Co. v. Vreeland, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. ed. 417 (1912); Mellon v. Goodyear, 277 U. S. 335, 48 Sup. Ct. 541, 72 L. ed. 906 (1927); Read v. Great East. R. R. Co., L. R. 3 C. Q. B. 555 (1868).

[11] Edwards v. Chem. Co., and Mellon v. Goodyear, *supra* note 10.

[12] Sou. Bell Tele. Co. v. Cassin, *supra* note 10; Mahoning Valley R. R. Co. v. Van Alstine, 77 Ohio St. 395, 83 N. E. 601, 14 L. R. A. (n. s.) 893 (1908).

[13] St. Louis, Iron Mtn. & Sou. R. R. Co. v. Craft, 237 U. S. 648, 35 Sup. Ct. 704, 59 L. ed. 1160 (1914).

[14] Cobia, Adm'x v. A. C. L. R. R. Co., 188 N. C. 487, 125 S. E. 18 (1924).

[15] Gurley v. Power Co., 172 N. C. 690, 696, 90 S. E. 943 (1916).

ute, and, if the cause of action not resulting in death should survive, that the cause of action resulting in death should also survive.[16] This is apparently the view of the court in the principal federal case[17] and it is submitted as correct.

JAMES A. WILLIAMS.

Workmen's Compensation—Measure of Compensation for Loss of Member

In the workmen's compensation laws of various jurisdictions are found provisions for temporary total disability caused by industrial accidents and for specific injuries,—such as loss of fingers. For total disability of temporary or permanent character it is uniformly stipulated that the compensation shall run during such liability, or for the statutory period.[1] The three types of statute dealing with specific injuries are: (1) Those which provide that compensation for specific injuries shall "be in lieu of all other compensation,"[2] or its practical equivalent, that the compensation period shall begin to run from the date of the injury;[3] (2) Those which provide that compensation under one section of the law shall be in addition to other compensation;[4] (3) Those which simply set up a scale of compensation, or indemnity, and leave the court to work out a proper interpretation of the whole statute as best it can.[5]

Court decisions interpreting these provisions of the statutes likewise fall into fairly well defined groups. One group of courts holds that during the healing period while the workman is unable to work, he may recover for total disability, and then, when he has returned to work, he is to receive the full statutory amount for the specific

[16] Prior to the amendment of REV. (1905) §157 (2) by N. C. PUB. LAWS (1915) c. 38, striking out the clause, "where such injury does not cause the death of the injured party," the cause of action for personal injuries abated, and only the cause of action for the wrongful death remained. Bolick v. R. R. Co., *supra* note 7; MCINTOSH, N. C. PRACTICE AND PROCEDURE IN CIVIL CASES (1929) §424.

[17] James Baird Co., Inc. v. Boyd, *supra* note 4.

[1] N. Y. CONS. LAWS (Cahill's 1923) c. 66, §15; IOWA CODE (1927) §1394; N. C. PUB. LAWS (1929) c. 120, §29.

[2] GA. ANN. CODE (Michie, 1926) §3154 (32); KY. STAT. (Carroll, 1922) §4899.

[3] IOWA CODE (1927) §1396.

[4] MASS. GEN. LAWS (1921) c. 152, §36; COLO. ANN. STAT. (Courtright's Mills, 1927) §1853.

[5] N. C. PUB. LAWS (1929) c. 120, §31; N. C. ANN. CODE (Michie, Supp. 1929) §8081 (MM).

injuries sustained.[6] A second group holds that he may recover total disability compensation only until the extent of the specific injury is determined, and thereafter for the full amount provided for such injury.[7] A third rule is that under no circumstances may an employee who has suffered a specific injury provided for by the statute recover more than the bare amount thus stipulated.[8] Still other courts hold that while in the case of such specific injury the statutory period of compensation may not be lengthened, the employee is entitled to total disability compensation until such time as the extent of the specific injury can be determined, the number of weeks such compensation was received to be deducted from the statutory period during which compensation for the specific injury was to run.[9] Thus a man who is disabled for nine weeks before it is determined that amputation of a finger is necessary will, under a statute which provides that compensation for the loss of a finger shall be a certain percentage of his wages for thirty-five weeks, receive compensation for total disability during nine weeks and for the loss of his finger during the remaining twenty-six weeks of the statutory period. The New York Court of Appeals and at least one Federal Court hold that even when there are several injuries arising out of the same accident the employee may recover only for that injury for which compensation runs over the longest period of time.[10]

It is impossible to tell by reading the statute of a given state what interpretation will be given to it by the court. Under identical statutes the holdings of various courts differ radically.[11] Under statutes that are not, on the face of them, at all alike the rule laid down by different courts is sometimes exactly the same.[12] In one instance a

[6] Coca-Cola Bottling Works v. Lilly, 140 Atl. 215 (Md. 1925); Gobble v. Clinch Valley Lumber Co., 141 Va. 303; Western Steel Erecting Co. v. Luckenbill, 287 Pac. 724 (Okla. 1930).

[7] Addison v. Wood, 207 Mich. 319, 174 N. W. 149 (1919); Poast v. Omaha Merchants' Express and Transfer Co., 107 Neb. 516, 186 N. W. 540 (1922); Phillip's Case, 123 Me. 501, 124 Atl. 211 (1924).

[8] Fame Armstrong Laundry Co. v. Brooks, 226 Ky. 25, 10 S. W. (2nd) 479 (1928); Georgia Casualty Co. v. Jones, 156 Ga. 664, 119 S. E. 721 (1923); Moses v. National Union Coal Co., 194 Iowa 819, 184 S. W. 746 (1921).

[9] Jack v. Knoxville Fertilizer Co., 154 Tenn. 292, 289 S. W. 500 (1926).

[10] Texas Employer's Insurance Association v. Sheppeard, 32 F. (2d) 300 (S. D. Tex. 1929); Marhoffer v. Marhoffer, 220 N. Y. 543, 116 N. E. 372 (1917).

[11] Georgia Casualty Co. v. Jones, *supra* note 8; Gobble v. Clinch Valley Lumber Co., *supra* note 6; GA. ANN. CODE (Michie, 1926); §3154 (32); VA. CODE ANN. (1924) §1887 (32).

[12] Hardin v. Higgins Oil & Fuel Co., 147 La. 453, 85 So. 202 (1920); Wirth Lang Co. v. Mece, 211 Ky. 520, 277 S. W. 834 (1925); KY. STAT. (Carroll, 1922) §4899; LA. PUB. LAWS (1922) act 43, §(d).

court modified its former ruling, stating that it did so in order to conform to the rule of another state which had an identical statute. As a matter of fact the rule in that other state was, at that time diametrically opposite to the rule then being promulgated.[13]

The Supreme Court of North Carolina, in attempting to construe an ambiguous statute which merely sets up one scale of compensation for total disability in one section and another scale for specific injuries in another section of the law lays down the rule that the provisions of these sections are not mutually exclusive, and holds that recovery may be had consecutively under each of them.

In a recent case it has held that when an employee sustained a badly lacerated hand, necessitating immediate amputation of fingers, he was entitled to compensation for total disability during the healing period, and to full compensation for the loss of his fingers after the wounds had healed.[14] It is submitted that this is a sound result. Under any other interpretation of the law it is quite possible that in case of a long healing period after the extent of the specific injuries has been determined, the statutory period will have run before the injured man is able to return to work. In such case the employee would not only lose a good share of his earnings over a long period of time but would return to industry without a cent of indemnity for the injury that was permanent in character—a result that could hardly have been within the contemplation of the legislature in passing the act. There is no indication within the statute itself that it was intended that the two sections construed in the principal case should be mutually exclusive. The decision serves well what seems to be the underlying purpose of all Workmen's Compensation Laws.

ALLEN LANGSTON.

Workmen's Compensation—Recovery for Injuries Resulting from Horseplay

The North Carolina Workmen's Compensation Act[1] provides that compensable injuries are only those injuries "by accident arising out of *and* in the course of the employment." An employee was injured by the accidental discharge of a gun in the hands of a fellow-employee. The injured man took no part in the "horseplay," but was

[13] Gobble v. Clinch Valley Lumber Co., *supra* note 6.
[14] Rice v. Denny Roll and Panel Co., 199 N. C. 154, 154 S. E. 69 (1930).
[1] N. C. PUB. LAWS (1929) c. 120, §2 (f); N. C. ANN. CODE (Michie, Supp. 1929) §8081 (i).

at the time busily at work. *Held,* the injury arose out of the employment, and recovery allowed.[2]

When an employee at work sustains an injury due to some playful act of his fellow-employees, he is the victim of "horseplay."[3] "With practical uniformity, the courts hold, both under the English act and also under the various American statutes, that an injury occasioned by some sportive act of a fellow-workman does not arise out of the employment within the meaning of the governing statute, and consequently that its compensatory provisions are not thereby invoked."[4] Upon this reasoning, recovery has been denied in a great many instances.[5] In some cases denying a right to compensation, it has been regarded as immaterial that the injured party took no part in the horseplay.[6] But in a number of cases, the right to compensation has been sustained, where an employee who was injured through horseplay took no part in the proceedings, but was attending to his duties.[7] In a few instances, compensation has been allowed

[2] Chambers v. Oil Co., 199 N. C. 28, 153 S. E. 594 (1930).

[3] (1930) 18 CALIF. L. REV. 560.

[4] Re Loper, 64 Ind. App. 571, 116 N. E. 324 (1917).

[5] Coronado Beach Co. v. Pillsbury, 172 Cal. 682, 158 Pac. 212 (1916) (Employee known to co-workers to be very ticklish. Tickled in ribs by one of them, while he was carrying a bucket downstairs.); Great Western Power Co. v. Industrial Accident Commission, 187 Cal. 295, 201 Pac. 931 (1921) Employee while in performance of duties struck on leg by fellow-workmen who were wrestling.); Tarpper v. Weston-Mott Co., 200 Mich. 275, 166 N. W. 857 (1918) (Plaintiff while working was injured by air hose used by fellow-employee in spirit of play.); Federal Mut. Liability Ins. Co. v. Industrial Acc. Com. of California, 187 Cal. 284, 201 Pac. 920 (1921) (Employee sweeping floor struck in eye by grape thrown by fellow-employee.); Lee's Case, 240 Mass. 473, 134 N. E. 268 (1922) (Employee standing in line to punch time clock, pushed down by other employees indulging in horseplay.); Hulley v. Moosbrugger, 88 N. J. L. 161, 95 Atl. 1007 (1915) (Plaintiff engaged in duties fell while trying to avoid blow aimed at hat by fellow-employee); Fishering v. Pillsbury, 172 Cal. 690, 158 Pac. 215 (1916) (Toy factory employee posed before trick camera held by another employee and injured by the spring it ejected.); Pierce v. Boyer-Van Kuran Co., 99 Neb. 321, 156 N. W. 509 (1916); Payne, Dir. Gen. of Ry. v. Industrial Commission, 295 Ill. 388, 129 N. E. 122 (1920); Federal Rubber Mfg. Co. v. Havolic, 162 Wis. 301, 156 N. W. 143 (1916); Washburn's Case, 123 Me. 402, 123 Atl. 180 (1924); Hazelwood *et al.* v. Standard Sanitary Mfg. Co., 208 Ky. 618, 271 S. W. 687 (1925); Stuart v. Kansas City, 102 Kan. 307, 171 Pac. 913 (1918); Ward *et al.* v. Industrial Acc. Com. of California, 175 Cal. 42, 164 Pac. 1123 (1917).

[6] Hulley v. Moosbrugger, Pierce v. Boyer-Van Kuran Co., Stuart v. Kansas City, Tarpper v. Weston-Mott Co., all *supra* note 5.

[7] Chicago, I. and L. Ry. Co. v. Clendenin, 81 Ind. App. 323, 143 N. E. 303 (1924) (Car inspector injured by rock thrown by fellow-employee to frighten him when it rolled off car.); Newport Hydrocarbon Co. v. Ind. Acc. Com. of Wisconsin, 167 Wis. 630, 167 N. W. 749 (1918) (Fellow-workman jokingly connected electric wire to employee's machine.); Knopp v. American Car and Foundry Co., 186 Ill. App. 605 (1914) (Employee operating trip hammer injured while trying to remove can from under same, placed there by bystander.);

where the injured person took part in the horseplay, but was attending to his duties at the same time.[8] But this seems as far as any of the courts have gone in allowing recovery. In the cases of injuries occasioned through horseplay which was commonly carried on with the consent or at least the acquiescence of the employer, compensation has been allowed in some instances.[9]

As said in the instant case, it is practically inevitable that workmen, even of mature years, will indulge in a moment's diversion from work to joke with or play a prank on a fellow-workman. Such risks are incident to business and industry, and grow out of them. The common law put the burden of such risk upon the employee. But the compensation acts are designed for the very purpose of eliminating fault as a basis of liability,[10] and to insure the employee against the ordinary risks of the employment. The burden of proof is upon the employer to prove that the injury was not caused by risk of the employment. A very satisfactory rule, which should not tend to increase horseplay in industry, has been expressed by the Oklahoma Court. This rule denies compensation to the workman who is injured while indulging in horseplay, but grants it to the workman who

Leonbruno v. Champlain Silk Mills, 229 N. Y. 470, 128 N. E. 711 (1920) (Working employee struck in eye by apple thrown by another employee at a third.); Industrial Commission v. Weigandt, 102 Ohio St. 1, 130 N. E. 38 (1921) (Employee struck in eye by file which flew from its handle during a scuffle between other employees.); Boyce v. Burleigh, 112 Neb. 509, 199 N. W. 785 (1924) (Employer kept gun to shoot pigeons. Employee shot by accidental discharge of the weapon in the hands of a fellow-employee.); Pekin Cooperage Co. v. Industrial Board, 277 Ill. 53, 115 N. E. 128 (1917) (Employee standing in line to receive check thrown down and injured by horseplay on the part of other employees.); Hollenbach v. Hollenbach, 181 Ky. 262, 204 S. W. 152 (1918) (Employee killed by live wire run to washbasin for horseplay.); Markel v. Daniel Green Felt Co., 221 N. Y. 490, 116 N. E. 1060 (1917); Socha v. Packing Co., 105 Neb. 691, 181 N. W. 706 (1921); Willis v. State Industrial Commission, 78 Okla. 216, 190 Pac. 92 (1920); Keen v. New Amsterdam Casualty Co., 34 Ga. App. 257, 129 S. E. 174 (1925); Marland Refining Co. v. Colbaugh *et al.*, 110 Okla. 238, 238 Pac. 831 (1925); May Chevrolet Co. v. Armstrong, 82 Ind. App. 547, 146 N. E. 847 (1925).

[8] Kansas City Fibre Box Co. v. Connell, 5 Fed. (2nd) 398 (1925) (Employee operating machine, injured while resisting interference by fellow-workman, while continuing his duties.); Martin v. Georgia Casualty Co., 30 Ga. App. 712, 119 S. E. 337 (1923) (Convict guard on duty playfully toyed with another guard's pistol. Latter, while attempting to readjust same, accidentally shot first guard.); Stark v. State Ind. Commission, 103 Ore. 80, 204 Pac. 151 (1922).

[9] *In re* Loper, *supra* note 4; State v. District Court, 140 Minn. 75, 167 N. W. 283 (1918); White v. Kansas City Stockyards Co., 104 Kan. 90, 177 Pac. 522 (1919); Stuart v. Kansas City, *supra* note 5; Kokomo Steel and Wire Co. v. Irick, 80 Ind. App. 610, 141 N. E. 796 (1923); Glenn v. Reynold's Spring Co., 225 Mich. 693, 196 N. W. 617, 36 A. L. R. 1464 (1924).

[10] Chambers v. Oil Co., *supra* note 2.