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## Editorial Board/Notes and Comments

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## NOTES AND COMMENTS

### Administrative Law—Evidence before North Carolina Tribunals.

To the legalistic mind, strongly imbued with the common-law traditions governing court procedure and legal proof, it may be often unacceptable that evidence can be "competent" before any tribunal without complying with the strict rules long revered in court trials. That such compliance is not only unnecessary, but highly undesirable before administrative boards is the prevailing opinion currently expressed in statutes, decisions, and legal journals generally.<sup>1</sup> To insist upon the technical rules of evidence in administrative hearings is, to the pro-

<sup>1</sup> See generally STEPHENS, *ADMINISTRATIVE TRIBUNALS AND THE RULES OF EVIDENCE* (1933); 1 WIGMORE, *EVIDENCE* (3d ed. 1940) §§4a-f; Stephan, *The Extent to Which Fact-Finding Boards Should Be Bound by the Rules of Evidence* (1939) 18 ORE. L. REV. 229.

ponents of this view, inconsistent both with the nature of such tribunals and the causes which prompted their rise and promise their continued growth.<sup>2</sup> The majority of these rules, they insist, were designed to guide the untrained jury through *possible* sources of error and, at most, secure to judicial inquiry a probability rather than a guaranty of truth. On the other hand, the ability to discriminate between reliable and unreliable offers of proof is a fundamental tool in the expert equipment of administrative officers and, in fact, is the natural result of constant experience in hearing the same limited class of controversy.<sup>3</sup> Indeed, the inability of common-law courts, hampered by too frequent disputes over technical procedural and evidential tactics, to provide that expeditious settlement of complex social and commercial problems which modern society demands, contributed greatly to the rise of administrative boards—composed not alone of legal experts, but also of professional and business men, whose task it is to decide summarily according to the merits of a case and not according to “procedural etiquette”.<sup>4</sup> To enforce strictly the jury-trial rules would preclude litigants from themselves placing their cases before the boards and thus enjoying the full benefit of their remedy without the frequently prohibitive aid of counsel.<sup>5</sup> Their view is a challenge to the law and lawyers to keep abreast the times, to put their own house in order, perhaps to justify their continued existence as socially adequate institutions.<sup>6</sup> Yet these arguments are

<sup>2</sup> 1 WIGMORE, EVIDENCE (3d ed. 1940) §4b; Riedl, *Should Rules of Evidence Govern Fact-Finding Boards?* (1938) 23 MARQ. L. REV. 13, 19; Ross, *The Applicability of Common Law Rules of Evidence in Proceedings Before Workmen's Compensation Commissions* (1923) 36 HARV. L. REV. 263, 296; Stephan, *supra* note 1, at 230-237.

<sup>3</sup> 1 WIGMORE, EVIDENCE (3d ed. 1940) 35, 36.

<sup>4</sup> “Many courts would gain in modesty by reflecting upon the fact that it was their own deficiencies which led the whole country in one sweeping emphatic movement to set up specialized administrative tribunals to handle the complex problem of administering justice in great specialized branches of human activity.” Hanft, *Utilities Commissions as Expert Courts* (1936) 15 N. C. L. REV. 12, 40.

<sup>5</sup> Admittedly, administrative hearings have made possible serious inroads on lucrative sources of practice; but so long as attorneys exclude from their repertoire a skill in informally presenting cases, their services may become even less attractive to client and tribunal alike. A familiar consequence of this failure to comprehend the full significance of a specialized mode of trial, is reported as follows: “Of course many private attorneys, unaccustomed to certain novel variations in administrative procedure, will doubtless continue to protest that they are denied their ‘day in court,’ since the rules of evidence employed in ordinary judicial proceedings are not strictly adhered to by the NLRB. As a matter of administrative practice, NLRB attorneys have found it expedient in most cases to follow court rules of evidence in order to avoid interminable bickerings and delays on the part of employer counsel.” Davey, *Separation of Functions and the National Labor Relations Board* (1940) 7 U. OF CHI. L. REV. 328, 343, n. 53. Attorneys may find this a hollow victory.

<sup>6</sup> That many rules of evidence may have outlived their usefulness even in court trials seems to have been the motivation of many recent efforts to “clean house” on the part of bar associations and others. See *Report of the Committee on Improvements in the Law of Evidence* (1938) 63 A. B. A. REP. 570. Tentative Draft No. 1 of the American Law Institute’s Code of Evidence was submitted at the 1940 annual meeting.

not without their partially countervailing answers. Clearly, the jury-trial rules of evidence are the tested product of a long experience with judicial fact-finding; and a great many there are that have established themselves as indispensable aids to truth, whatever the nature of the fact-finding body. There are those, too, which are fundamental in the protection of substantive rights, wherever an issue is tried.<sup>7</sup> Furthermore, administrative officers are too frequently only theoretically expert—politically appointed and politically influenced, prone to decide on surmise and conjecture. The common-law rules of evidence become another device in the effort to restrict their too free discretion and to secure to litigants a justice according to law.<sup>8</sup>

Behind these conflicting views lies a common purpose—to adapt a time-honored science of proof to a new and growing system of trial, utilizing the advantages of both, but retaining the faults of neither. Naturally, reasonable reliability and certainty of evidence are desiderata whether the investigation is by an administrative body or court; and the character of evidence admitted in each forum should therefore be expected to be similar, but need not be identical. Necessarily following the paths of least resistance, the prevailing judicial and legislative attitudes are expressed in varying degrees of compromise.

A survey of the statutes creating the various North Carolina boards discloses a lack of definite policy in regard to evidence,<sup>9</sup> which is consistent with the haphazard treatment commonly accorded administrative procedure by our legislature.<sup>10</sup> Since none prescribe particular rules which must be enforced or may be violated, they may be examined only to determine broadly whether in each instance the jury-trial rules are essential or may be relaxed. A majority of the statutes ignore the question entirely; others treat it only by implication; a select few refer to it expressly. If, then, the policies which will finally be evolved are for the most part conjectural, conjecture in this field is not entirely without clearly discernible guides. *Maley v. Thomasville Furniture Co.*<sup>11</sup> is a landmark case in North Carolina and, although immediately concerned

<sup>7</sup> "But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended." *Interstate Com. Comm. v. Louisville & N. R. R.*, 227 U. S. 88, 93, 33 Sup. Ct. 185, 187, 57 L. ed. 431, 434 (1913).

<sup>8</sup> STEPHENS, *op. cit. supra* note 1, at 94-103; Collins, *The Extent to Which Fact-Finding Boards Should Be Bound by the Rules of Evidence* (1938) 12 CONN. B. J. 278, 282.

<sup>9</sup> The permissible use by an important tribunal of its own knowledge and judicial notice, a matter not within the scope of this note, is discussed in Hanft, *Utilities Commissions as Expert Courts* (1936) 15 N. C. L. REV. 12.

<sup>10</sup> Lack of legislative care in drafting administrative statutes in North Carolina has been frequently decried. Hanft and Hamrick, *Haphazard Regimentation Under Licensing Statutes* (1938) 17 N. C. L. REV. 1; Hoyt, *Shaping Judicial Review of Administrative Tribunals* (1937) 16 N. C. L. REV. 1.

<sup>11</sup> 214 N. C. 589, 200 S. E. 438 (1939).

with evidence admissible in hearings before the Industrial Commission, contains the following language which is probably of general application:

"The Industrial Commission is an administrative board, with *quasi-judicial* functions. The manner in which it transacts its business is a proper subject of statutory regulation and need not necessarily conform to court procedure *except where the statute so requires*,<sup>12</sup> or where, in harmony with the statute, or where it fails to speak, the Court of last resort, in order to preserve the essentials of justice and the principles of due process of law, shall consider rules similar to those observed in strictly judicial investigations in courts of law to be indispensable or proper."<sup>13</sup>

Furthermore, consistent with the fundamental conception that procedure before administrative tribunals should be informal, authorities elsewhere agree that relaxation of the jury-trial rules should be expected where

- (1) the statute does not expressly require them;
- (2) the statute empowers the board to enact its own rules of procedure, or provides that procedure "shall be as summary and simple as reasonably may be," etc.
- (3) the statute provides expressly that the board need not be bound "by common law or statutory rules of evidence," etc.<sup>14</sup>

Supporting clues may be found in the nature of the tribunal examined, the practicability of enforcing strict rules therein, and the extent of protection which is afforded by the method of appeal provided in each instance. Thus, it is hoped fairly to anticipate the general judicial attitude in North Carolina. Definite limitations to a policy of relaxation are found in few decisions, so far apparently confined to workmen's compensation cases.

## I

On one extreme, the legislature has provided that in hearings before the Utilities Commission "the rules of evidence shall be the same as in civil actions, except as provided by this chapter."<sup>15</sup> Clearly, the intention is to require a standard of proof equivalent to that obtaining in jury trials; and, presumably, the court would be compelled to so hold. In practice, however, the commission has apparently condoned and perhaps even encouraged a more liberal policy.<sup>16</sup> Although violating the

<sup>12</sup> Italics supplied.

<sup>13</sup> *Maley v. Thomasville Furniture Co.*, 214 N. C. 589, 594, 200 S. E. 438, 441 (1939).

<sup>14</sup> This summary is substantially in accord with that outlined in 1 WIGMORE, EVIDENCE (3d ed. 1940) §4c. See also STEPHENS, *op. cit. supra* note 1, at 86 (with cited cases). Cases and statutes *re* workmen's compensation are reviewed in Ross, *supra* note 2, at 263.

<sup>15</sup> N. C. CODE ANN. (Michie, 1939) §1093.

<sup>16</sup> STEPHENS, *op. cit. supra* note 1, at 77 contains the following letter received by the author in answer to a questionnaire sent the North Carolina commission regarding its practice in receiving evidence: "Our statute requires that the same

express command of the statute, this practice should not be condemned; for not only is the North Carolina requirement out of line with that most commonly applicable to utilities commissions elsewhere,<sup>17</sup> but also the extensive review provided on appeal from the North Carolina commission seems to render it unnecessary. The supreme court has interpreted the statute<sup>18</sup> as allowing a jury trial *de novo* on question of fact, and a hearing before a judge on questions of law, on appeal to the superior court.<sup>19</sup> A complete new trial is manifestly adequate to correct any errors in the admission of evidence below,<sup>20</sup> and an erroneous ruling which affects substantial rights of a litigant may be found appealable as an error of law.<sup>21</sup> This tribunal, being one of the most active, has a peculiar claim to the advantages of a flexible procedure; and since some relaxation of the jury-trial rules is undoubtedly beneficial and desired by the officers comprising the commission, North Carolina stands to profit by a liberal amendment.

In proceedings to revoke or suspend the licenses of dentists,<sup>22</sup> mouth hygienists,<sup>23</sup> and osteopaths,<sup>24</sup> the charges must be heard "upon competent evidence". Conceivably, the court might construe the word "competent" not in its technical sense but as having a peculiar significance for administrative tribunals. That neither this word, nor any similar expression is used to describe the evidence admissible before any of the other myriad North Carolina licensing boards, of like or different

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rules of evidence shall be enforced in the court of the Corporation Commission [now Utilities Commission] as are enforced in the Superior Courts, but our Commission has never adhered strictly to this requirement when the ends of justice demanded a more liberal policy. We apply a great many rules, such as the rule against hearsay testimony and the rule as to secondary evidence, but we admit affidavits where the adverse party has an opportunity to answer them and petitions from the people without requirement of proof of signatures. We recall no specific instance where the omission to apply the rules of evidence has operated against obtaining an accurate understanding of the facts. Many petitioners before our Commission come without lawyers and where there are not lawyers on both sides we generally let down the bars, and accept any evidence which we think reliable and that can assist us in arriving at the facts. In such case we are sure that applying the strict rules of evidence would greatly handicap the parties in presenting their case and handicap us in arriving at the facts."

<sup>17</sup> Statutes compiled in STEPHENS, *op. cit. supra* note 1, at 9-15; 1 WIGMORE, EVIDENCE (3d ed. 1940) §4c, n. 68.

<sup>18</sup> N. C. CODE ANN. (Michie, 1939) §§1097, 1098.

<sup>19</sup> Corporation Comm. v. Seaboard A. L. & Sou. Ry., 161 N. C. 270, 76 S. E. 554 (1912); Utilities Comm. v. Carolina Scenic Coach Co., 218 N. C. 233, 10 S. E. (2d) 824 (1940). This type review is criticized in Hoyt, *loc. cit. supra* note 10.

<sup>20</sup> STEPHENS, *op. cit. supra* note 1, at 40, 87 (and cited cases); Collins, *supra* note 8, at 284.

<sup>21</sup> "As a legal conclusion, no one will deny that in any judicial proceeding the competency of testimony offered in support of or against any material fact is a question of law." Reck v. Whittlesberger, 181 Mich. 463, 467, 148 N. W. 247, 248 (1914). Under a relaxed policy violation of technical rules should not be so reviewable in absence of a clear showing of prejudice.

<sup>22</sup> N. C. CODE ANN. (Michie, 1939) §6649(21).

<sup>23</sup> *Id.* §6649(c) (procedure made same as for dentists).

<sup>24</sup> *Id.* §6708(a).

character, is strong indication that its use here was inadvertent. Since the jury-trial rules, as such, are not expressly required, some measure of relaxation could thereby be achieved.<sup>25</sup> The state board of dental examiners is granted the power to make necessary regulations, "not inconsistent" with the article, regarding "any matter" referred to there, and "for the purpose of facilitating the transaction of business by the . . . board."<sup>26</sup> Apparently the board is thus permitted to enact its own rules of procedure; and should the court adopt the suggested construction of "competent", this power, generally regarded as impliedly sanctioning an independence of the jury-trial rules,<sup>27</sup> would furnish authority for a liberal practice in hearings involving both dentists and mouth hygienists.<sup>28</sup> Although a like power is not granted to the state board of osteopathic examination and registration, there seem to be no characteristics peculiar to that board which justify the application of different evidence rules. The hearing on appeal from the dental board must conform to that employed in consent references;<sup>29</sup> whereas a jury trial is apparently proper on review of the osteopathic board.<sup>30</sup> For both, however, the record formed at the administrative hearing shall constitute the record on appeal. While the review is not so complete as that afforded on appeal from the Utilities Commission, it appears adequate to correct any errors which may have affected substantial rights of the parties and to discourage appeals upon purely technical grounds. Here, again, a liberal practice would seem more beneficial than dangerous. In fact, some modification of the jury-trial rules is inescapable, since to enforce them would necessitate an extensive legal education for the dentists and osteopaths comprising the boards.

A uniform procedure is provided<sup>31</sup> for the revocation or suspension by the appropriate tribunals of licenses issued to electrical contractors, contractors, accountants, embalmers, chiropodists, verterinarians, barbers, engineers and land surveyors, cosmetologists, tile contractors, plumbing and heating contractors, boiler inspectors,<sup>32</sup> and photographers.

<sup>25</sup> See note 14, *supra*.

<sup>26</sup> N. C. CODE ANN. (Michie, 1939) §6649(7).

<sup>27</sup> See note 14, *supra*.

<sup>28</sup> See note 23, *supra*. The State Board of Dental Examiners is the licensing board for mouth hygienists. N. C. CODE ANN. (Michie, 1939) §6649(a).

<sup>29</sup> N. C. CODE ANN. (Michie, 1939) §6649(20).

<sup>30</sup> *Id.* §6708(a); State v. Carroll, 194 N. C. 37, 138 S. E. 339 (1927) (general reference in statute to "right of appeal" entitles parties to jury trial).

<sup>31</sup> N. C. CODE ANN. (Michie, 1939) §6604(1)-(8). The uniform statute is reviewed in *A Survey of Statutory Changes in North Carolina in 1939* (1939) 17 N. C. L. REV. 327, 331. The author concludes that the statute "should prove an advantageous first step in bringing some order into the chaos of administrative procedure under North Carolina statutes."

<sup>32</sup> §6604(8) of the uniform act provides that "nothing in this chapter shall be construed to remove any additional procedural requirement . . . provided in the law creating either of the boards named. . .". For the purposes of this note, the only additional requirement of importance is found in N. C. CODE ANN. (Michie

Since substantially similar procedure is required in hearings before the Council of the North Carolina State Bar,<sup>33</sup> the statutes may be considered together in determining their probable effect on the rules of evidence. To begin with, the jury-trial rules are not required by any express provision. Furthermore, each tribunal is given power to enact rules and regulations governing its procedure,<sup>34</sup> which procedure must conform "as near as may be" to that "provided by law for hearings before referees in compulsory references".<sup>35</sup> On the face of the statutes, therefore, substantial relaxation is apparently authorized.<sup>36</sup> The matter is complicated, however, by a requirement in C. S. 576 that "trial by referees shall be conducted in the same manner as a trial by the court."<sup>37</sup> Arguably, the legislature did not intend to incorporate such an all-inclusive provision into administrative procedural requirements, being perhaps unaware of the resulting effect upon the rules of evidence. That this is not unlikely is largely substantiated by its usual disregard of evidence in licensing and other administrative statutes. Furthermore, the remainder of C. S. 576 relates only to the power to allow amendments, to compel the attendance of witnesses, to grant adjournments, and other attributes of a similar nature common to courts, leaving unmentioned the character of proof admissible. Moreover, except for the Council of the State Bar, it is inconceivable that successful administration of a requirement so exacting could be demanded or expected from boards comprised, as are these, of business and professional men, strangers to the law. Once the difficulty interjected by C. S. 576 is hurdled, a further argument for relaxation may be based on analogy to certain incidents of the appeal which is allowed on referees' reports. In both instances, a jury trial may be obtained in the superior court on the evidence taken below,<sup>38</sup> but many North Carolina decisions are to the effect that a referee's finding of facts, once approved by the trial court, are not subject to review on appeal to the supreme court if there is any competent evidence to support them.<sup>39</sup> If the analogy is sound,

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1939) §7312(10), which provides that on appeal to the board of boiler rules from revocation of inspectors' commissions by the Commissioner of Labor, the decision of the board shall be final.

<sup>33</sup> N. C. CODE ANN. (Michie, 1939) §215(11).

<sup>34</sup> *Id.* §215(11) (Bar Act); *id.* §6604(8) (Uniform Act).

<sup>35</sup> *Id.* §215(11) (Bar Act); *id.* §6604(1) (Uniform Act).

<sup>36</sup> See note 14, *supra*.

<sup>37</sup> Provisions concerning references and procedure before referees are found in N. C. CODE ANN. (Michie, 1939) §§573-579, 1421(a).

<sup>38</sup> N. C. CODE ANN. (Michie, 1939) §6604(4) (Uniform Act); *id.* §215(11) (Bar Act); *id.* §573 (references). In references, a jury trial on review is a right of which a party may avail himself by timely motion. Most often apparently, review is before the judge.

<sup>39</sup> "It is settled by all the decisions on the subject, with none to the contrary, that the findings of fact, made by a referee and approved by the trial judge, are not subject to review on appeal, if they are supported by any competent evidence."



therefore, abundant authority would sanction the admission of technically incompetent evidence in hearings before these tribunals, so long as such evidence was not the *sole* basis for the findings.<sup>40</sup> However, an enlightened attitude must still be encouraged on review in the superior court.

## II

Why the many remaining licensing boards should have been denied uniform procedure under C. S. 6604(1) is not apparent, nor is it made so by characteristics peculiar to any of them.<sup>41</sup> The procedure provided in each statute varies radically from board to board, but one feature is common to all—the jury-trial rules of evidence are not required by any express provisions. Also in some instances, power is granted to enact rules and regulations “necessary to enforce the provisions of [the] article”,<sup>42</sup> or “necessary and proper . . . for the performance of its duties”,<sup>43</sup> or “necessary for the regulation of its proceedings”.<sup>44</sup> The last mentioned provision seems expressly to empower the board to provide its own mode of procedure; and it is arguable that a similar power is implied where the other type provisions are employed. Therefore, general authority, supported by the dicta in the *Maley* case,<sup>45</sup> would authorize a policy of relaxation before all the remaining boards here considered, particularly in those instances where the tribunal may enact rules of procedure.<sup>46</sup> Similarly, many North Carolina tribunals, not performing strictly licensing functions, are free of any requirement expressly retaining the technical rules of evidence. Hearings before the State Bank

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*Kenney v. Balsam Hotel Co.*, 194 N. C. 44, 45, 138 S. E. 349, 350 (1927); *Holder v. Home Mortgage Co.*, 214 N. C. 128, 134, 198 S. E. 589, 592 (1938) (“... there must be some competent evidence to support the findings of the referee or the court below.”); see also *Dumas v. Morrison*, 175 N. C. 431, 435, 95 S. E. 775, 777 (1918); *Anderson v. McRae*, 211 N. C. 197, 199, 189 S. E. 639, 640 (1937); *Pack v. Katzin*, 215 N. C. 233, 235, 1 S. E. (2d) 566, 568 (1939) (“While some of the testimony in the form in which it was offered might be subject to criticism, there was ample evidence free from valid objection tending to support the findings and conclusions of the referee.”)

<sup>40</sup> Under N. C. CODE ANN. (Michie, 1939) §8081(ppp) findings of fact by the Industrial Commission are made “conclusive and binding”. The court has repeatedly held that such findings are conclusive in *both* supreme and superior courts if supported by competent evidence. *Aycock v. Cooper*, 202 N. C. 500, 163 S. E. 569 (1932) (except as to jurisdictional facts); *Perdue v. State Board of Equalization*, 205 N. C. 730, 172 S. E. 396 (1934); *Reed v. Lavender Bros.*, 206 N. C. 898, 172 S. E. 877 (1934).

<sup>41</sup> Undoubtedly a few tribunals have escaped this writer's attention. See lists of N. C. licensing boards compiled by Hanft and Hamrick, *loc. cit. supra* note 10.

<sup>42</sup> N. C. CODE ANN. (Michie, 1939) §5126(g) (*re* licensing collectors by the Insurance Commissioner).

<sup>43</sup> *Id.* §6697 (Board of Examiners in Optometry); *id.* §6714 (Board of Chiropractic Examiners).

<sup>44</sup> *Id.* §6654 (Board of Pharmacy).

<sup>45</sup> See note 13, *supra*.

<sup>46</sup> See note 14, *supra*.

Commission,<sup>47</sup> Revenue Commissioner,<sup>48</sup> State Board of Assessment,<sup>49</sup> State Board of Alcoholic Control,<sup>50</sup> State Highway and Public Works Commission,<sup>51</sup> Commissioner of Agriculture,<sup>52</sup> and Board of Commissioners of Navigation and Pilotage<sup>53</sup> may, therefore, be conducted under a liberal practice.

From many of these boards, however, no appeal at all is provided;<sup>54</sup> and from one, at least, the right is expressly denied.<sup>55</sup> From others, review may be obtained before a judge,<sup>56</sup> or, in some instances, before a jury<sup>57</sup> in the superior court, sometimes confined to the record compiled below<sup>58</sup> and sometimes not. Yet the frequently limited scope of

<sup>47</sup> N. C. CODE ANN. (Michie, 1939) §221(o) (commission empowered to enact rules and regulations as to hearings).

<sup>48</sup> *Id.* §7880(153), (155), (156) (income tax); §7880(156)r (sales tax); §7880(156)mm (gift tax); §7880(156)z (intangibles tax); §7880(189) (commissioner given power to enact rules and regulations "as may be needful to enforce" act).

<sup>49</sup> *Id.* §7971(108), (109), (162) (may prescribe "needful and proper" rules).

<sup>50</sup> *Id.* §3411(68). But no hearing is required for revocation or denial of permits to sell to county liquor stores. That perhaps none is necessary, because "state agencies are engaged in the purchase of goods and may do so on their own terms", is suggested in *A Survey of Statutory Changes in North Carolina in 1937* (1937) 15 N. C. L. REV. 321, 328. Certainly on the same principle, the strict rules of evidence should be relaxed wherever a hearing involves solely the granting or denying of governmental benefits.

<sup>51</sup> N. C. CODE ANN. (Michie, 1939) §3846(v)1 (settlement of contractors' claims against commission). Reviewed in *A Survey of Statutory Changes in North Carolina in 1939* (1939) 17 N. C. L. REV. 327, 340. The appeal being the same as provided in workmen's compensation cases under N. C. CODE ANN. (Michie, 1939) §8081(ppp), a similar policy of relaxation should obtain here. (See note 40, *supra*.)

<sup>52</sup> Many occasions arise for hearings before the Commissioner of Agriculture. See, for example, N. C. CODE ANN. (Michie, 1939) §4738 (violation of regulations concerning commercial feeding stuffs; commissioner may prescribe rules for conduct of hearings). Also, N. C. CODE ANN. (Michie, 1939) §4745 (violations of regulations concerning stock and poultry tonics); *id.* §4768(20) (foods, drugs, and cosmetics).

<sup>53</sup> N. C. CODE ANN. (Michie, 1939) §6943(k). Procedure must conform "as nearly as may be to procedure provided by law in courts of justices of the peace." Since appeals (to the superior courts of New Hanover or Brunswick counties) are as "appeals on judgments of justices of the peace", a jury trial *de novo* is evidently intended; so relaxation of the jury-trial rules of evidence would hardly be dangerous. (See note 20, *supra*.)

<sup>54</sup> N. C. CODE ANN. (Michie, 1939) §§4985-4998 (Board of Architectural Examination and Registration); *id.* §§4999-5003 (revocation of auctioneers' licenses by Insurance Commissioner); *id.* §§5185-5193 (building and loan associations' licenses by Insurance Commissioner); *id.* §5205 (land and loan associations subject to same regulations as building and loan associations); *id.* §§5237-5241 (supervision of credit unions); *id.* §§6729-6739 (Board of Nurse Examiners); *id.* §§6650-6686(e) (Board of Pharmacy); *id.* §§6710-6728 (Board of Chiropractic Examiners).

<sup>55</sup> N. C. CODE ANN. (Michie, 1939) §6618 (Board of Medical Examiners).

<sup>56</sup> For example, *id.* §6300 (appeal from revocation of agents' licenses by Insurance Commissioner to "any judge of the superior court of Wake County. . .").

<sup>57</sup> Often, as in revocation of licenses issued to employment agencies by Commissioner of Labor under N. C. CODE ANN. (Michie, 1939) §7312(q), the statute merely refers generally to the "right of appeal". The court has held in *State v. Carroll*, 194 N. C. 37, 138 S. E. 339 (1927) that such general reference entitles the parties to a jury trial.

<sup>58</sup> For example, N. C. CODE ANN. (Michie, 1939) §5126(f) (appeal from Insurance Commissioner on revocation of collectors' permits).

review presents no conclusive obstacle. Even where no appeal is available, the common-law writ of *certiorari* may be employed to correct any arbitrary or illegal action;<sup>59</sup> and a decision wholly unsupported by evidence may constitute such reviewable error.<sup>60</sup> As before mentioned, where the appeal is confined to questions of law, flagrant violations of the more fundamental legal rules may be reviewed.<sup>61</sup> Here again, lay commissioners cannot be expected to enforce rigidly the formal rules of evidence.

### III

Representing the clearest intention to relax the jury-trial rules, the North Carolina Unemployment Compensation Act provides: "... the conduct of hearings and appeals shall be in accordance with rules prescribed by the commission for determining the rights of the parties, *whether or not such rules conform to common law or statutory rules of evidence and technical rules of procedure*";<sup>62</sup> and again, to remove all possible doubt: "... The commission shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure but shall conduct hearings in such manner as to ascertain the substantial rights of the parties."<sup>63</sup> The Workmen's Compensation Act, after empowering the Industrial Commission to enact necessary rules, specifies that "... processes and procedure under this article shall be as *summary and simple as reasonably may be*";<sup>64</sup> and also that "The commission ... shall hear the parties ... and shall determine the dispute in a summary manner."<sup>65</sup> The findings of fact by both commissions are made conclusive on appeal.<sup>66</sup>

Only the workmen's compensation provision has been construed by the court, and the resulting principle, broadly stated, is that the admission of incompetent evidence before the Industrial Commission will not require the reversal of an award if there is other competent evidence

<sup>59</sup> See *Board of Commissioners v. Smith*, 110 N. C. 417, 418, 14 S. E. 972 (1892); *Taylor v. Johnson*, 171 N. C. 84, 85, 87 S. E. 981, 983 (1916); *Walls v. Strickland* 174 N. C. 298, 301, 93 S. E. 857, 858 (1917). Accord: *State v. Scott*, 182 N. C. 865, 879, 109 S. E. 789, 797 (1921). For pertinent discussion see Note (1934) 19 IOWA L. REV. 609.

<sup>60</sup> See Note (1934) 19 IOWA L. REV. 609, 613 (and cited cases).

<sup>61</sup> See note 21, *supra*. A suitable method of review to accompany a policy of relaxation is suggested in note 97, *infra*.

<sup>62</sup> Italics supplied. N. C. CODE ANN. (Michie, 1939) §8052(6).

<sup>63</sup> *Id.* §8052(11).

<sup>64</sup> Italics supplied. N. C. CODE ANN. (Michie, 1939) §8081(jjj).

<sup>65</sup> *Id.* §8081(nnn).

<sup>66</sup> See note 40, *supra* (*re* Industrial Commission). C. S. §8052(6) (*re* Unemployment Compensation Commission) seems to have substantially incorporated the judicial interpretation of the workmen's compensation provision as follows: "... the findings of the commission as to the facts, if there is evidence to support it, and in the absence of fraud, shall be conclusive, and the jurisdiction of [the] court shall be confined to questions of law."

sustaining it.<sup>67</sup> The view is one of compromise. The court is willing to relax, but not abandon, the technical rules. It sanctions the admission of incompetent evidence, but evidence which conforms to standards of proof required in court trials must be the basis of the commission's findings. Although the wording of the Unemployment Compensation Act would appear to permit a greater degree of relaxation, the majority of cases throughout the country indicates that substantially the same effect will be attributed to it.<sup>68</sup> Hence, in reviewing the cases to determine definite limitations to the North Carolina policy, a similar result may be anticipated here, bearing in mind the possibility of a more liberal treatment if and when the unemployment compensation provision comes before the court.<sup>69</sup>

The North Carolina cases have largely involved the admission of hearsay testimony and, specifically, declarations of deceased persons as to the cause of their injuries. In *Maley v. Thomasville Furniture Co.*,<sup>70</sup> the claim was based upon death from blood poisoning as the result of an injury allegedly sustained by decedent while operating a trim saw in defendant employer's plant. Other than testimony based on what deceased had told witnesses, the only evidence indicating an injury arising out of and in the course of employment was the testimony of a fellow-employee that he had seen deceased on the day of the alleged injury operating the saw, his arm freshly bleeding. Sustaining the award of compensation, the court, while considering the hearsay as properly in the case since unobjected to at the first hearing, expressly states "that the findings and award will not be disturbed because of the presence in the case of hearsay testimony where there is other competent evidence, of sufficient probative force, upon which to base the findings."<sup>71</sup> The circumstantial evidence relating to the injury, considered alone sufficient to sustain the award, constituted the "other com-

<sup>67</sup> *Maley v. Thomasville Furniture Co.*, 214 N. C. 589, 200 S. E. 438 (1939); *MacRae v. Unemployment Compensation Commission*, 217 N. C. 769, 9 S. E. (2d) 595 (1940).

<sup>68</sup> Compilation of statutes and decisions in 1 WIGMORE, EVIDENCE (3d ed. 1940) §4c, n. 70, n. 71. See also Ross, *supra* note 2, at 276, 285 (decisions under each type statute reviewed). Where a policy of relaxation obtains, decisions may be classified roughly into two categories: (1) incompetent evidence cannot constitute the sole support of a finding; (2) findings may be based solely on incompetent evidence if reasonably probative. Either view may result under either type statute, the decisive factor being the judicial attitude in the particular jurisdiction.

<sup>69</sup> Since the statute expressly obviates the necessity of applying the "common law or statutory rules of evidence", the court could hardly be expected to adopt a less liberal policy. Indeed, where courts under similarly worded statutes have required findings to be supported by only *some* competent evidence, the decisions have been considered as "in spite of [the] statute". See *Report of the Committee on Administrative Agencies and Tribunals* (1939) 64 A. B. A. REP. 407, 422.

<sup>70</sup> 214 N. C. 589, 200 S. E. 438 (1939). <sup>71</sup> *Id.* at 595, 200 S. E. at 442.

petent evidence" here, and was properly to be corroborated or explained by hearsay.

A somewhat similar case is *Plyler v. Charlotte Country Club*,<sup>72</sup> where the claim was based upon death from blood poisoning as the result of an injury allegedly sustained by deceased while caddying at defendant employer's golf course. The evidence established that deceased was not injured when he returned from his first assigned round of the afternoon; and the only indication that he again acted as caddy that day was his father's testimony that, on calling for him, he was seen near the caddy house carrying a bag, walking on the side of his foot, and that his toe was bleeding when he came to the car, the latter point being substantiated by a brother of deceased. Over defendant's objection evidence that deceased stated he was injured while caddying was admitted. Holding all plaintiff's evidence insufficient to support an award, the court emphasizes that findings must be based on *some* competent evidence, and states further: "It must not only appear by competent evidence that the injury was received in the course of the employment, but also that it arose out of the employment as well. Hearsay evidence is not competent to establish either fact."<sup>73</sup> Under the court's view, the circumstantial evidence, although competent, was not adequately probative of either fact; in the *Maley* case, stronger circumstantial proof established both. Thus, the distinction between the two cases is based alone upon the sufficiency of the competent evidence adduced, and the presence of hearsay was a decisive factor in neither.<sup>74</sup> *Brown v. Asheville Ice Co.*<sup>75</sup> and *Johnson v. Charlotte Bagging Co.*<sup>76</sup> are earlier cases involving declarations of deceased employees which bear out the same general proposition. In the former such evidence alone was held insufficient to support a finding;<sup>77</sup> in the latter, where the court found sufficient supporting evidence, admission of the incompetent ev-

<sup>72</sup> 214 N. C. 453, 199 S. E. 622 (1938).

<sup>73</sup> *Id.* at 455, 199 S. E. at 623.

<sup>74</sup> The *Maley* case establishes the rule that the hearsay will be considered in the case unless objected to during the stage of the proceedings at which it was introduced. If objection is not timely, therefore, otherwise incompetent hearsay might become the sole basis for a finding, although the point is apparently not squarely presented by a North Carolina case. In this decision (214 N. C. 589, 596, 200 S. E. 438, 442 (1939)) it is said: "The principle on which hearsay evidence is excluded by rules of evidence relates to its competency, not to its relevancy. That it has probative force is unquestioned and there are numerous exceptions to the rule of exclusion." In the *Plyler* case (214 N. C. 453, 456, 199 S. E. 622, 623 (1938)) however, the court says: "That hearsay evidence is not admissible and has no probative force in the proof of an essential fact at issue is so well established that we need not discuss the same or cite authorities in support thereof."

<sup>75</sup> 203 N. C. 97, 164 S. E. 631 (1932).

<sup>76</sup> 203 N. C. 579, 166 S. E. 586 (1932).

<sup>77</sup> A similar well-known case is *Carroll v. Knickerbocker Ice Co.*, 218 N. Y. 435, 113 N. E. 507 (1916).

idence was not reversible error.<sup>78</sup> These decisions are in accord with authority elsewhere.<sup>79</sup>

Numerous other decisions, not always clear as to the type of evidence involved, contain language consistent with the general rule that findings must be supported by competent evidence.<sup>80</sup> However, since the North Carolina decisions to date are not very comprehensive, two questions remain unanswered by precise holdings: (1) Are there any types of incompetent evidence the admission of which may be considered sufficiently prejudicial to require reversal although there is other competent evidence on the point? (2) Are there any types of evidence, incompetent before a court of law, which could be the sole basis for a finding?

An affirmative answer to the former is suggested by the recent case of *Logan v. Johnson*<sup>81</sup> in which, along with other evidence tending to establish the extent of claimant's disability, a doctor was permitted to base his testimony in part upon an unsigned letter, said to have been a report received by him from another doctor. This letter was included in the record on appeal, and its use assigned as error by defendant. Although unnecessary to the decision, the court concluded its opinion as follows: "As the case goes back to the Industrial Commission it is appropriate to say that *even though there may be other testimony to the*

<sup>78</sup> Indicating a commissioner's attitude toward the value of relaxing the common-law rules, the court quotes the following remark of the hearing commissioner: "... I know it [hearsay] is not competent, but I am going to admit it for what it might be worth, in helping me find the facts, give plaintiff an exception." *Johnson v. Charlotte Bagging Co.*, 203 N. C. 579, 582, 166 S. E. 586, 587 (1932).

<sup>79</sup> See compilation of cases in Ross, *loc. cit. supra* note 2. See Stephan, *supra* note 1, at 243 where it is said, "It is unreasonable to suspect a general rule that deceased, before death, will make false statements so that relief may accrue to his family. If this type of hearsay evidence is excluded, the legislative aims are to such an extent defeated." But see *Report of the Committee on Administrative Agencies and Tribunals* (1939) 64 A. B. A. REP. 407, 423 where Stephan's reasoning is deemed "superficial"; but the report recognizes the movement to relax the rule by "admitting statements of a person since deceased, if made in good faith and before the commencement of litigation, and upon personal knowledge of the declarant". This relaxation, applicable as well to court trials, was recommended in *Report of the Committee on Improvements In the Law of Evidence* (1938) 63 A. B. A. REP. 570, 584. Also see Ross, *supra* note 2, at 298.

<sup>80</sup> In *Russell v. Western Oil Co.*, 206 N. C. 341, 174 S. E. 101 (1934) and *Carlton v. Bernhardt-Seagle Co.*, 210 N. C. 655, 188 S. E. 77 (1936) findings were held properly supported by accident reports submitted by employers to the Industrial Commission. In the former case such report was considered an admission, in the latter a declaration against interest, and thus competent under an exception to the hearsay rule. Accord: *Reck v. Whittlesberger*, 181 Mich. 463, 148 N. W. 247 (1914). But see Ross, *supra* note 2, at 280 ("... it is doubtful whether such a report is an admission..."). Other cases: *Reed v. Lavender Bros.*, 206 N. C. 898, 172 S. E. 877 (1934); *Hildebrand v. McDowell Furniture Co.*, 212 N. C. 100, 193 S. E. 294 (1937); *Lassiter v. Carolina Tel. & Tel. Co.*, 215 N. C. 227, 1 S. E. (2d) 542 (1939); *Porter v. Noland Co., Inc.*, 215 N. C. 724, 2 S. E. (2d) 853 (1939); *Tindall v. American Furniture Co.*, 216 N. C. 306, 4 S. E. (2d) 894 (1939); *Blassingame v. Southern Asbestos Co.*, 217 N. C. 233, 7 S. E. (2d) 478 (1940); *MacRae v. Unemployment Comp. Comm.*, 217 N. C. 769, 9 S. E. (2d) 595 (1940); *McGill v. Lumberton*, 218 N. C. 586, 11 S. E. (2d) 873 (1940).

<sup>81</sup> 218 N. C. 200, 10 S. E. (2d) 653 (1940).

same effect,<sup>82</sup> the unsigned copy of [the] letter . . . to which defendant excepted, is incompetent, and has no place in the record and evidence in the case."<sup>83</sup> If taken to mean that reversal might have resulted on this point alone, the suggestion is contra to the established North Carolina rule, unless a peculiar prejudicial effect, not common to the types of incompetent evidence previously considered by the court, is to be attributed to this use of an unsigned letter. But, of course, the point is not squarely presented, and perhaps the court was merely indicating what it considered a more prudent procedure. An earlier case, *Citizens Bank and Trust Co. v. Reid Motor Co.*,<sup>84</sup> suggests the correctness of the latter interpretation. There plaintiff's witness, who had been convicted of the employee's murder, refused to answer any material questions on cross-examination; whereupon, the commissioner ordered the transcript of testimony given by the witness in the criminal proceeding to be included in the record of the hearing, and denied defendant's motion to strike both the testimony given on direct examination and the transcript. The supreme court reversed the award of compensation, but in emphasizing that plaintiff's case was supported only by this objectionable testimony, strongly implied that the presence of competent evidence would have rendered reversal unnecessary.<sup>85</sup> This being true, it represents a significant concession to administrative procedure. It is difficult to imagine an admittedly erroneous practice more fraught with the possibility of prejudice than the direct denial of the jealously guarded right of cross-examination. Certainly, the use of an unsigned letter is no more so. A definite answer to the question must, of course, await appropriate cases. However, so long as the court insists that each finding be supported by a residuum of competent evidence and is discreet in its application of the rule,<sup>86</sup> severe infractions of the jury-trial rules may be safely tolerated, provided no practice is sanctioned whose advantages are outweighed by the dangers of a failing confidence in the Industrial Commission as a tribunal of fair play.

The second question, whether some types of legally incompetent evidence might be considered proper as the sole support of a finding, becomes vitally important. Unless perhaps such evidence were received

<sup>82</sup> Italics supplied.

<sup>83</sup> *Logan v. Johnson*, 218 N. C. 200, 203, 10 S. E. (2d) 653, 655 (1940).

<sup>84</sup> 216 N. C. 432, 5 S. E. (2d) 318 (1939).

<sup>85</sup> *Id.* at 435, 5 S. E. (2d) at 321.

<sup>86</sup> Given a proper case, the rule may become dangerous if the court looks only to see if there is a "scintilla" of competent evidence to support the commission's findings; yet to search the complete record for a preponderance is undesirable. Hoyt, *supra* note 10, at 7 aptly suggests ". . . that the administrative findings of fact should stand unless unsupported by evidence or unless arbitrary or capricious." Under a statute so worded, the court might review questions of law and "look into the record if there was something seriously wrong with the findings of fact, without requiring the court to weigh the evidence for a mere preponderance."

without timely objection,<sup>87</sup> the North Carolina decisions without exception deny this possibility, and promise a consistent application of the "legal residuum" rule.<sup>88</sup> This view, however, has been the object of convincing criticism.<sup>89</sup> To Professor Wigmore, it is "decidedly not the wise and satisfactory rule for general adoption"<sup>90</sup> since it not only rests upon the fallacious assumption "that the 'legal' evidence is *always* credible and sufficient, while the 'illegal' evidence is *never* credible nor sufficient",<sup>91</sup> but also in its ultimate application "virtually requires the tribunal to test its proceedings by the jury-trial rules",<sup>92</sup> thus retaining the objectionable features incident to that requirement.<sup>93</sup> Yet, clearly, the rule is valuable. While frequently the requirement of "some competent evidence" may be no more than a legal fetish, quite often it protects substantial interests, securing litigants against fictitious claims; and to sanction the admission of legally incompetent evidence reduces the number of technical reversals, and greatly liberalizes the administrative practice. Furthermore, no rule, by whatever name called, could escape for all cases the necessity of a legal residuum. Certainty, reliability and fairness should be the essentials of proof in common-law court or administrative tribunal. Obviously, numerous jury-trial rules are the best guaranty of these ends. The desideratum, therefore, is to abandon the rule wherever a legal residuum would add nothing to the probative character of the evidence adduced, although none of it be competent in the strict legal sense. In short, insist only upon that residuum best secured by compliance with those rules found essential in court and commission alike.<sup>94</sup> The North Carolina court might well relax its view to conform to this policy, and any rule so designed would best be

<sup>87</sup> See note 74, *supra*.

<sup>88</sup> This expression, often seen as the "New York 'legal residuum' rule", was apparently taken from *Carroll v. Knickerbocker Ice Co.*, 169 App. Div. 450, 155 N. Y. Supp. 1 (3d Dep't 1915).

<sup>89</sup> See dissenting opinions in *Carroll v. Knickerbocker Ice Co.*, 218 N. Y. 435, 113 N. E. 507 (1916); 1 WIGMORE, EVIDENCE (3d ed. 1940) §4b, 39; Stephan, *supra* note 1, at 247.

<sup>90</sup> 1 WIGMORE, EVIDENCE (3d ed. 1940) §4b, 42.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Id.* at 40.

<sup>93</sup> Important among these objectionable features, according to Wigmore, is "the temptation to practitioners to employ the whole arsenal of technical weapons and secure a record full of 'errors'." *Ibid.* But, of course, the errors will be unavailing on appeal under the "legal residuum" rule if, nonetheless, there is some competent evidence to support the findings.

<sup>94</sup> For a survey of specific jury-trial rules, suggesting which should be retained and which abandoned in administrative hearings, see Stephan, *The Extent to Which Fact-Finding Boards Should Be Bound by the Rules of Evidence* (1939) 18 ORE. L. REV. 229. This article won the Ross Memorial essay prize of the American Bar Association in 1938. Also see *Report of the Committee on Administrative Agencies and Tribunals* (1939) 64 A. B. A. REP. 407, 421; Collins, *The Extent to Which Fact-Finding Boards Should Be Bound by the Rules of Evidence* (1938) 12 CONN. B. J. 278, 285. An excellent work in the general field is STEPHENS, ADMINISTRATIVE TRIBUNALS AND THE RULES OF EVIDENCE (1933).



couched in broad terms of "reasonableness",<sup>95</sup> so as not to fetter unduly either the court or the commission. As individual jury-trial rules are proven undesirable, they may be eliminated by specific statutes.<sup>96</sup>

#### CONCLUSION

Administrative procedure requires an *administrative* law of evidence. Yet, in North Carolina, certain statutes and legalistic habits of thought, which impose the traditional law, must first be hurdled. Amendment may be often necessary; certainly the strict requirements in the utilities commission statute can be avoided in no other way. But even where the statute presents no obstacle, the law should be clarified by a definite expression of policy in order to assure a liberal attitude on appeal. Once achieved, specific limitations to this policy may be expected to be governed by the "legal residuum" rule applied in workmen's compensation cases; but even this rule may often impose a requirement which is not essential to fair and accurate fact-finding by administrative officers. Rules designed primarily to guide an untrained jury are excess baggage in the hands of skilled commissioners. A uniform act, covering in so far as possible all North Carolina tribunals, should combine a rule of "reasonableness" as regards evidence with a mode of procedure that may be supplemented by commission rules, and should clearly define a suitable scope of review on appeal.<sup>97</sup> Besides protecting interests of litigants,

<sup>95</sup> The American Bar Association Committee on Administrative Agencies and Tribunals for 1939 considered the problem "altogether too broad to permit of a categorical answer", and made no recommendations due to the diversity of administrative hearings and rules of evidence that one general rule or a code would have to cover. As to hearsay, however, the committee considered the "rule of reason" as "the only rule that can be sensibly laid down . . . ; that, generally speaking, a finding which is essential to the board's power to make any order at all should not be permitted to rest wholly upon hearsay evidence, but that as to facts which are merely subsidiary, the enforcement or relaxation of the hearsay rule should rest in the sound discretion of the tribunal—having regard to questions of convenience, expense and the availability of better types of evidence." Other rules of evidence were "subject to the same general comment". *Report of the Committee on Administrative Agencies and Tribunals* (1939) 64 A. B. A. REP. 407, 421-425, 431. See also Stephan, *supra* note 94, at 247-249 (recommendations center around the broad standard of "fairness, necessity, availability, and reasonableness"). Notice the "reasonableness" implications in the dicta from the *Maley* case, note 13, *supra*.

<sup>96</sup> California statutes combine statement of policy with treatment of specific rules. See 1 WIGMORE, EVIDENCE (3d ed. 1940) §4c, n. 70. See also Ross, *supra* note 2, at 298 where it is said: "The declaration of a general policy is not enough. The best type of provision that may be found is a provision expressly authorizing the commission to admit in evidence and use as a basis of its findings declarations of a deceased party made in good faith and before suit was brought; and a further provision giving the commission the power to make rules as to the extent of and mode of proof required, such power to include the power to establish a rule permitting the use of common law 'hearsay evidence'. . . . The danger of a possible abuse of the power does not off-set its value."

<sup>97</sup> A mode of review aptly designed to resolve conflicting considerations as to the proper appeal would permit a hearing before a judge, without a jury, on the record compiled before the tribunal, and restricted to questions of law unless the findings of fact were unsupported by substantial evidence or clearly erroneous.

such an act would secure more fully the advantages for which a specialized administrative system of trial was first created and, at the same time, offer a testing-ground for those technical rules long considered of doubtful utility even in courts of law.<sup>98</sup> In this field particularly, the ultimate success of any statute properly depends upon its full comprehension and intelligent application not only by competent commissioners, but by judges and counsel as well.

E. H. SEAWELL.

### Deeds—Construction—Conflict Between Premises and Subsequent Clauses.

Where the premises of a deed read: "to [A] and her heirs by her husband [B]", while all subsequent clauses inconsistently read: "to the parties of the second part, their heirs and assigns",<sup>1</sup> held that A took a fee tail special which by statute<sup>2</sup> was converted into a fee simple. Two dissenting justices favored the plaintiff's contention that A took as tenant in common with her children, who were living at the time the deed was executed, and that under C. S. 1739<sup>3</sup> the word heirs as used in the premises should be interpreted to mean "children".

The majority found conclusive intention in the technical meaning of the words used in the premises, thus attaching little or no importance to the subsequent clauses of the deed. Reliance was placed on *Harrington v. Grimes*.<sup>4</sup> However, an examination of this case reveals no inconsistency between the clauses of the deed in question; rather, a fee tail special was clearly conveyed, with no ambiguity clouding the intent

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See Hoyt, *loc. cit supra* note 10. The case should be remanded for taking additional evidence where counsel shows reasonable grounds for so doing. These provisions are included in the uniform act recommended in *Report of the Committee on Administrative Agencies and Tribunals* (1939) 64 A. B. A. REP. 407, 432. In *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 229, 59 Sup. St. 206, 217, 83 L. ed. 126, 140 (1938) the court defines "substantial evidence" as "... more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Where, however, a constitutional issue is involved, as in *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287, 40 Sup. Ct. 527, 64 L. ed. 908 (1920), the court must be given an opportunity to substitute its independent judgment on a full review of the facts.

<sup>98</sup> "Fact-finding boards may be the crucible from which will emerge improvements in the formal rules themselves more speedily than the judicial system can itself evolve [them] without danger to its administration by breaking too quickly with the continuity of the past." Collins, *supra* note 94, at 292.

<sup>1</sup> *Whitley v. Arenson*, 219 N. C. 121, 12 S. E. (2d) 906 (1941) (italics supplied).

<sup>2</sup> N. C. CODE ANN. (Michie, 1939) §1734.

<sup>3</sup> N. C. CODE ANN. (Michie, 1939) §1739. "A limitation by deed, will or other writing, to the heirs of a living person, shall be construed to be to the children of such person, unless a contrary intention appear by the deed or will."

<sup>4</sup> 163 N. C. 76, 79 S. E. 301 (1913).

of the grantor. The majority also refused to apply C. S. 1739 on the ground that a precedent estate was limited to the ancestor.<sup>5</sup>

At common law the premises of a deed were said to control all subsequent clauses in the event of repugnancy between them, yet this rule was not inflexible unless the nature of the limitation in the premises was expressly denominated, and in the absence of such specification the quantum of the estate conveyed might be determined by the language of the habendum.<sup>6</sup> The present tendency is to view the instrument as a whole and to utilize subsequent clauses in interpreting the premises. Hence later clauses may be accorded a preponderating influence in the interpretation of a deed.<sup>7</sup> This view has prevailed in North Carolina since the decision of *Triplett v. Williams*.<sup>8</sup> Frequently it has been held that if the whole instrument indicates that the grantor intended the habendum to lessen, enlarge, restrict or qualify the estate named in the granting clause, then such intent will prevail.<sup>9</sup> Again it is a familiar rule of construction that inconsistencies are, if possible, to be reconciled in such a way as to give effect to all the parts.<sup>10</sup>

A study of the inconsistencies in the present deed offers but one possible interpretation which will give effect to all parts of the instrument, with each word given its normal meaning, *i.e.* that *A* became a tenant in common with her children who were living at the time of the conveyance. Thus full effect would be given to the persistent use of the plural designation of the grantees in the subsequent clauses. The alternative is to treat this as inadvertence only, which appears unwarranted in the light of its repeated use.

The majority opinion follows the rule that technical terms such as "heirs" and "heirs of the body" must be accorded their legal effect, although it is conceded that this rule is subject to modification should it clearly appear from the instrument that such terms are used in some other permissible sense. The North Carolina court has often found the word "heirs" to be used other than as a word of limitation.<sup>11</sup> One frequent instance is the use of "heirs" as *descriptio personarum*. In *Acker v. Pridgen*<sup>12</sup> where the premises read: "unto the parties of the

<sup>5</sup> Similar procedure in *Marsh v. Griffin*, 136 N. C. 333, 48 S. E. 765 (1904) and in *Jones v. Ragsdale*, 141 N. C. 200, 53 S. E. 842 (1906).

<sup>6</sup> 4 TIFFANY, REAL PROPERTY (3d ed. 1939) §980.

<sup>7</sup> *Ibid.*

<sup>8</sup> 149 N. C. 394, 63 S. E. 72 (1908).

<sup>9</sup> *Condor v. Secrest*, 149 N. C. 201, 62 S. E. 921 (1908); *Williams v. Williams*, 175 N. C. 160, 95 S. E. 458 (1918); *Roper Lumber Co. v. Harrington*, 183 N. C. 85, 110 S. E. 656 (1922); *Seawell v. Hall*, 185 N. C. 80, 116 S. E. 189 (1923).

<sup>10</sup> *Gudger v. White*, 141 N. C. 507, 54 S. E. 386 (1906); *Goode v. Hearne*, 180 N. C. 475, 105 S. E. 5 (1920); *Willis v. Mutual Loan and Trust Co.*, 183 N. C. 267, 111 S. E. 163 (1922); *Seawell v. Hall*, 185 N. C. 80, 116 S. E. 189 (1923).

<sup>11</sup> *Smith v. Proctor*, 139 N. C. 314, 51 S. E. 889 (1905); *Campbell v. Everhart*, 139 N. C. 503, 52 S. E. 201 (1905); *Harrington v. Grimes*, 163 N. C. 76, 79 S. E. 301 (1913); *Williamson v. Cox*, 218 N. C. 177, 10 S. E. (2d) 662 (1940).

<sup>12</sup> 158 N. C. 337, 74 S. E. 335 (1912).

second part [*A* and *B*] and to their heirs and assigns forever", yet the habendum read: "to have and to hold the said property unto *A* and *B* during their natural lives and after their death to their children [naming the children]", the court ruled that the habendum clearly revealed an intention to grant an estate in remainder to the children, and accordingly the word "heirs" in the premises should be interpreted as meaning "children". Thus a later clause was allowed to control the premises to the extent of divesting a fee granted therein.<sup>13</sup>

In the instant case an intention to use "heirs of the body" as *descriptio personarum* rather than as a technical term of limitation fully appears. Application of C. S. 1739 is unnecessary in order to establish *A* as tenant in common with her children.

By its refusal to construe the present deed as a whole, and by its rigid reliance on the technical meaning of words in the premises, the North Carolina court has apparently reverted to the strict rule of the common law.<sup>14</sup> It has done so in the face of preponderant authority to the effect that the intention of the grantor, as evidenced by the *whole* must be given paramount consideration in the construction of a deed.<sup>15</sup>

JAMES H. POULBAILEY.

### Injunction—Usury—Public Nuisance

In an action<sup>1</sup> brought by the Solicitor General of the State of Georgia it was shown that defendants were engaged in the small loan business, operating under the guise of purchasing salary assignments from necessitous borrowers; that usurious rates were being charged, in violation of the small loan law; that the requirements of the salary purchase act were not being complied with; and that defendants were not licensed as required by that act. In Georgia the taking of usury and the violation of various provisions of the small loan law are misdemeanors.<sup>2</sup> An injunction and receiver were sought against this illegal conduct, on the grounds that the acts constituted an injury to the social interest and general welfare of the people of the state, that the acts amounted to a public nuisance, and that the legal remedy was

<sup>13</sup> Accord: *Rowland v. Rowland*, 93 N. C. 214 (1885); *Triplett v. Williams*, 149 N. C. 394, 63 S. E. 76 (1908); *Willis v. Mutual Loan & Trust Co.*, 183 N. C. 267, 111 S. E. 163 (1922); 4 TIFANY, REAL PROPERTY (3d ed. 1939) §981.

<sup>14</sup> Cf. *Jefferson v. Jefferson*, 219 N. C. 333, 13 S. E. (2d) (1941) in which doubt is cast upon the approach of the court in the principal case. *Whitley v. Arenson* was cited by the minority.

<sup>15</sup> *Campbell v. Everhart*, 139 N. C. 503, 52 S. E. 201 (1905); *Gudger v. White*, 141 N. C. 507, 54 S. E. 386 (1906); *Perrett v. Bird*, 152 N. C. 220, 67 S. E. 507 (1910); *Beacom v. Amos*, 161 N. C. 357, 77 S. E. 407 (1913); *Shoemaker v. Coats*, 218 N. C. 251, 10 S. E. (2d) 810 (1940). In *Gudger v. White (supra)* it was said that the rule was inflexible.

<sup>1</sup> State *ex rel.* *Boykin v. Ball Investment Co.*, 12 S. E. (2d) 574 (Ga. 1940).

<sup>2</sup> GA. CODE (Harrison, 1933) §§ 25-301 *et seq.*

inadequate. *Held*, injunction and receiver denied: this was not a suit by the state because the solicitor general, without the governor's authorization, could not represent the state's interest, and therefore the injury to the social interest and the general welfare could not be considered; this misconduct did not amount to a public nuisance under the statutory definition of a nuisance, the mere violation of a penal statute not falling in this category; and the statutory penalty provided must be deemed to be sufficient, any change in enforcement proceedings being exclusively within the province of the legislature.

Usurious practices have sometimes been enjoined as a public nuisance<sup>3</sup> or as inimical to the public welfare.<sup>4</sup> These decisions illustrate the ascendancy of injunction over the civil or criminal penalty as a protector of the social interests of the state.<sup>5</sup> Most cases, however, are characterized by a hesitancy on the part of equity courts to act.<sup>6</sup>

The reasons for this hesitancy are probably threefold: (1) Equity should not be used to enforce the police power.<sup>7</sup> But as a practical

<sup>3</sup> *State ex rel. Goff v. O'Neil*, 205 Minn. 366, 286 N. W. 316 (1939), noted in (1939) 38 MICH. L. REV. 279, see note 27, *infra*; cf. *State v. Diamant*, 73 N. J. L. 131, 62 Atl. 286 (Sup. Ct., 1905); *State v. Martin*, 77 N. J. L. 652, 73 Atl. 548 (1909) (direct proceeding by state allowed in form of an indictment against the nuisance of maintaining a disorderly house). *Contra*: *Commonwealth v. Mutual Loan & Trust Co.*, 156 Ky. 299, 160 S. W. 1042 (1913) (suit brought on disorderly house theory. N. J. cases distinguished in that usury is penalized in that state and therefore is contrary to law, but no penalty provided in Ky.); *State ex rel. Thompson v. Dixie Finance Co.*, 152 Tenn. 306, 278 S. W. 59 (1925); *Ex parte Hughes*, 133 Tex. 305, 129 S. W. (2d) 270 (1939).

<sup>4</sup> *State ex rel. Moore v. Gillian*, 141 Fla. 707, 193 So. 751 (1940) (demurrer overruled); *State v. McMahon*, 128 Kan. 772, 280 Pac. 906 (1929), noted in (1929) 30 COL. L. REV. 125, (1930) 15 CORN. L. Q. 472, (1930) 43 HARV. L. REV. 499, (1930) 14 MINN. L. REV. 690, (1930) 39 YALE L. J. 590; *State ex rel. Beck v. Basham*, 146 Kan. 181, 70 P. (2d) 24 (1937); *Commonwealth ex rel. Grauman v. Continental Co., Inc.*, 275 Ky. 238, 121 S. W. (2d) 49 (1938), noted in (1940) 28 KY. L. J. 255. But cf. *Means v. State*, 75 S. W. (2d) 953 (Tex. Civ. App. 1934).

<sup>5</sup> See 5 POMEROY, EQUITY JURISDICTION (2d ed. 1919) §1893.

<sup>6</sup> Illustrative of this are *State v. O'Leary*, 155 Ind. 526, 58 N. E. 703 (1900); *State v. Schweickardt*, 109 Mo. 496, 19 S. W. 47 (1892); *State v. Ehrlick*, 65 W. Va. 700, 64 S. E. 935 (1909); see *Sheridan v. Colvin*, 78 Ill. 237, 247 (1875); *Gee v. Pritchard*, 2 Swans. 402, 413, 36 Eng. Rep. 670, 674 (Ch. 1818) (Lord Eldon: "I have no jurisdiction to prevent the commission of crimes. . .").

<sup>7</sup> This seems to be the import of many of the cases in this field. *Dean v. State*, 151 Ga. 371, 106 S. E. 792 (1921); *Bentley v. Board of Medical Examiners*, 152 Ga. 836, 111 S. E. 379 (1922); *Bennett v. Bennett*, 161 Ga. 936, 132 S. E. 528 (1926); see *People v. Condon*, 102 Ill. App. 449, 457 (1902) ("A court of equity has no jurisdiction in matters merely criminal or merely immoral. It leaves the correction of these offenses to the criminal courts. The remedy at law under the statute is presumed to be adequate, for it is what the law has provided. If it be inadequate, relief is to be had from the law-making power and not from the courts."); *State v. Maltby*, 108 Neb. 578, 584, 188 N. W. 175, 178 (1922) ("If the punishment provided is not sufficient, recourse should be had to the Legislature, and not to the equity side of the courts."); *State v. Ehrlick*, 65 W. Va. 700, 711, 712, 64 S. E. 935, 940, 941 (1909) "That criminal procedure and remedies are adequate to maintain and uphold the public right in so far as moral and political principles and general state policy are involved, is perfectly obvious. . . . If we should sustain an injunction on the ground that the act is immoral as well as criminal, we would be bound to award it in all criminal cases, for, in every instance,

matter there should be no objection to injunctive enforcement of legislative policies where the penalties prescribed prove ineffective. (2) Where civil penalties are provided, the enforcement of these penalties or the procurement of injunctive relief in case of their inadequacy is limited to the individual harmed.<sup>8</sup> But the state is not seeking to protect an individual's rights by injunction, it is instead seeking protection of the social interests of the community as a whole. (3) To enjoin criminal conduct would be unconstitutionally to deprive the defendant of a jury trial.<sup>9</sup> In support of this contention it is said that the injunction adds nothing to the prohibition of the statute,<sup>10</sup> and that in determining a violation of the injunction, the court does without a jury exactly what should be done with a jury in a criminal court.<sup>11</sup> But no one is entitled to violate the criminal law merely to have the privilege of a jury trial.<sup>12</sup> The statutory prohibition is general, while the injunction is specifically directed to the individual.<sup>13</sup> The purpose of the injunc-

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there is some reason, affecting the body politic, for prohibiting acts and making the commission thereof criminal.").

<sup>8</sup> *United States v. San Jacinto Tin Co.*, 125 U. S. 273, 8 Sup. Ct. 850, 31 L. ed. 747 (1887); see *In re Debs*, 158 U. S. 564, 586, 15 Sup. Ct. 900, 907, 39 L. ed. 1092, 1103 (1895) ("... it is not the province of the government to interfere in the mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another..."). The idea is hinted at in *Notes* (1930) 43 HARV. L. REV. 499, 500; (1930) 28 MICH. L. REV. 939. See also *Zimmerman v. Boyd*, 97 Cal. App. 406, 275 Pac. 509 (1929); *Pritchett v. Mitchell*, 17 Kan. 355 (1876).

<sup>9</sup> CHAFEE, *THE INQUIRING MIND* (1928) 74 *et seq.*; Mack, *The Revival of Criminal Equity* (1903) 16 HARV. L. REV. 389; dissenting opinion of Caldwell, J., in *Hopkins v. Oxley Stave Co.*, 83 Fed. 912 (C. C. A. 8th, 1897). This argument has most frequently arisen in connection with statutes making certain statutory violations public nuisances, enjoined in equity—the commonest situation being liquor laws. Upholding the constitutionality of such statutes: *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. ed. 205 (1887); *United States v. Reisenweber*, 288 Fed. 520 (C. C. A. 2d, 1923); *Carleton v. Rugg*, 149 Mass. 550, 22 N. E. 55 (1889). *Contra*: *Hedden v. Hand*, 90 N. J. Eq. 583, 107 Atl. 285 (1919), 5 A. L. R. 1474 (1920). See for discussion of the problem (1929) 15 CORN. L. Q. 269.

In Georgia and North Carolina jury trial is available at final hearing in injunction cases as of right, with a binding verdict on issues of fact framed by the pleadings. GA. CODE (Harrison, 1933) §37-1104, *Lamar v. Allen*, 108 Ga. 158, 33 S. E. 958 (1899); N. C. CONST. art. IV, §§1, 13; N. C. CODE ANN. (Michie, 1939) §556, *Ely v. Early*, 94 N. C. 1 (1886). But, with one exception in Georgia—in case of order or decree to pay money, and defendant contends he does not have control over the money to be paid—there is no right to a jury trial on the hearing for contempt. GA. CODE (Harrison, 1933) §24-105; *Baker v. Cordon*, 86 N. C. 116 (1882); *In re Brown*, 168 N. C. 417, 84 S. E. 690 (1915); *State v. Little*, 175 N. C. 743, 94 S. E. 680 (1918).

<sup>10</sup> Dissenting opinion of Field J., in *Carleton v. Rugg*, 149 Mass. 550, 22 N. E. 55 (1889); *Dunbar, Government By Injunction* (1897) 13 L. Q. REV. 347.

<sup>11</sup> See Mack, *The Revival of Criminal Equity* (1903) 16 HARV. L. REV. 389, 399 *et seq.*

<sup>12</sup> Opinion of Valliant, J., in *State ex rel. Crow v. Canty*, 207 Mo. 439, 460, 105 S. W. 1078, 1085 (1907).

<sup>13</sup> Caldwell, *Injunctions Against Crime* (1931) 26 ILL. L. REV. 259, 274.

tion is to prevent harmful conduct, not to punish it,<sup>14</sup> contempt proceedings being merely a mode of making the prevention effective.<sup>15</sup>

To escape the effect of these arguments, the courts have developed the policy that a public nuisance may be enjoined even though it is also a statutory violation.<sup>16</sup> Another way of stating the same rule is that criminal conduct will not be enjoined unless the conduct also amounts to a public nuisance.<sup>17</sup> As a corollary it is sometimes said that a mere statutory violation is not a public nuisance.<sup>18</sup> To apply this rule, there must be some workable conception of what a public nuisance is.<sup>19</sup> The conventional definitions to be gleaned from the cases may be roughly classified as a use of property which is harmful or offensive,<sup>20</sup>

<sup>14</sup> *Murphy v. United States*, 272 U. S. 630, 47 Sup. Ct. 218, 71 L. ed. 446 (1926); *Ex parte Wood*, 194 Cal. 49, 227 Pac. 909 (1924); *Minke v. Hopeman*, 87 Ill. 450 (1877); *Stead v. Fortner*, 255 Ill. 468, 99 N. E. 680 (1912); *Respass v. Commonwealth*, 131 Ky. 807, 115 S. W. 1131 (1909).

<sup>15</sup> *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. ed. 1092 (1895); *State v. Howat*, 109 Kan. 376, 198 Pac. 686 (1921); *Hanbury v. Benedict*, 60 App. Div. 662, 146 N. Y. Supp. 44 (2d Dep't 1914); *Board of Medical Examiners v. Blair*, 57 Utah 516, 196 Pac. 221 (1921).

<sup>16</sup> *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. ed. 1092 (1895); *Edison v. Ramsey*, 146 Ga. 767, 92 S. E. 513 (1917); *State v. Lindsay*, 85 Kan. 79, 116 Pac. 207 (1925); *Kentucky State Board of Dental Examiners v. Payne*, 213 Ky. 382, 281 S. W. 188 (1926).

<sup>17</sup> *Commonwealth v. Smith*, 266 Pa. 511, 109 Atl. 786 (1920); *State v. Ehrlick*, 65 W. Va. 700, 64 S. E. 935 (1909).

<sup>18</sup> *Dean v. State*, 151 Ga. 371, 106 S. E. 792 (1921), 40 A. L. R. 1132 (1926) (unlicensed chiropractor); *Bentley v. Board of Medical Examiners*, 152 Ga. 836, 111 S. E. 379 (1922) (unlicensed physician); *Bennett v. Bennett*, 161 Ga. 936, 132 S. E. 528 (1926) (unlicensed money lender); *State ex rel. C. B. & Q. Ry. v. Woolfolk*, 269 Mo. 389, 190 S. W. 877 (1916) (liquor law); *State ex rel. Alton v. Salley*, 215 S. W. 241 (Mo. 1919) (liquor law); *State v. Maltby*, 108 Neb. 578, 188 N. W. 175 (1922) (unlicensed chiropractor); *People v. Vandewater*, 250 N. Y. 83, 164 N. E. 864 (1928) (liquor law); cf. quotation from *State v. Crawford*, *infra*, note 20. In most of these cases the court seemed to rely more on a presumed adequacy and exclusiveness of the legal remedy than on the non-existence of a nuisance. See discussion of statutory violations made nuisance by statute, *supra*, note 9.

<sup>19</sup> "Nuisance" is a good word to beg a question with. It is so comprehensive a term, and its content is so heterogeneous, that it scarcely does more than state a legal conclusion that for one or another of widely varying reasons the thing stigmatized as a nuisance violates the rights of others." Thayer, *Public Wrong and Private Action* (1914) 27 HARV. L. REV. 317, 326. For examples, see definitions in 46 C. J. 645.

<sup>20</sup> Cases following this restricted view are probably based on Chancellor Kent's dictum in *Attorney-Gen'l. v. Utica Ins. Co.*, 2 Johns. Ch. 371, 380 (N. Y. 1817): "It is an extremely rare case, and may be considered, if it ever happened, as an anomaly, for a court of equity to interfere at all, and much less preliminarily by injunction, to put down a public nuisance which did not violate the rights of property, but only contravened the general policy." *State v. Uhrig*, 14 Mo. App. 413 (1883); see *Sheridan v. Colvin*, 78 Ill. 237, 247 (1875); *State v. Schweickardt*, 109 Mo. 496, 515, 19 S. W. 47, 53 (1892) (this and the Uhrig case probably overruled by *State ex rel. Crow v. Canty*, *infra*). If the requisite property interest cannot be found on the plaintiff's side, then the use of property by the defendant is accepted as a substitute. *Columbian Athletic Club v. State*, 143 Ind. 98, 40 N. E. 914 (1895); *State v. Crawford*, 2 Kan. 727, 42 Am. Rep. 182 (1882) ("every

which endangers the public health, safety, or physical well-being,<sup>21</sup> or which affronts the public morals or sense of decency.<sup>22</sup> This method of defining a public nuisance is, however, unnecessarily technical and superficial.<sup>23</sup> A definition more in keeping with the public need might be: conduct so endangering the social interests of a sufficiently large segment of the public that injunctive restraint would be more appropriate than resort to statutory sanctions.<sup>24</sup> Unless the state is seeking to protect its own property,<sup>25</sup> this represents the only true basis for public injunction.<sup>26</sup>

place where a public statute is openly, publicly, repeatedly, continuously, persistently and intentionally violated is a public nuisance"); *Commonwealth v. McGovern*, 116 Ky. 212, 75 S. W. 261 (1903); *Respass v. Commonwealth*, 131 Ky. 807, 115 S. W. 1131 (1909); *Carleton v. Rugg*, 149 Mass. 550, 22 N. E. 55 (1889); *People v. Vandewater*, 250 N. Y. 83, 164 N. E. 864 (1928). Compare *State ex rel. Crow v. Canty*, 207 Mo. 439, 105 S. W. 1078 (1907) with *Commonwealth v. McGovern*, *supra*. See Caldwell, *Injunctions Against Crime* (1931) 26 ILL. L. REV. 259 for analysis of cases on which Chancellor Kent based his dictum in *Attorney-Gen'l. v. Utica Ins. Co.*, *supra*.

<sup>21</sup> *Baltimore v. Board of Health*, 139 Md. 210, 115 Atl. 43 (1921); *Attorney-Gen'l. v. Jamaica Pond Aqueduct Co.*, 133 Mass. 361, (1882); *Pine City v. Munch*, 42 Minn. 342, 44 N. W. 197 (1890); *Attorney-Gen'l. v. Paterson*, 58 N. J. Eq. 1, 42 Atl. 749 (Ch., 1899); *Southampton v. Scott*, 91 N. J. Eq. 443, 110 Atl. 587 (Ch., 1920); see *State v. Ehrlick*, 65 W. Va. 700, 709, 64 S. E. 935, 939 (1909) where it is said that there is a property interest to be found in protection of public health.

<sup>22</sup> *Stead v. Fortner*, 255 Ill. 468, 99 N. E. 680 (1912); *State ex rel. Crow v. Canty*, 207 Mo. 439, 105 S. W. 1078 (1907).

<sup>23</sup> The classificatory method of looking at the public nuisance seems to be a fairly common one. For examples, see *Hart v. Leonard*, 42 N. J. Eq. 416, 7 Atl. 865 (1886); *Hedden v. Hand*, 90 N. J. Eq. 583, 107 Atl. 285 (1919); *State v. Ehrlick*, 65 W. Va. 700, 64 S. E. 935 (1909). For criticism of this method, see Chafee, *Progress of the Law—Equitable Relief Against Torts* (1921) 34 HARV. L. REV. 388, 391.

<sup>24</sup> This is really a statement of the basis for equity's action. It may be that whenever it takes this sort of action it should be deemed to be enjoining a public nuisance. This seems to be Walsh's view. "But equity's protection of public interests is limited to cases of public nuisances as outlined above, including any continuous business or activity which will be a continuous or indefinitely repeated menace to the public health and safety, or to the public morals or public sense of decency, and other cases in which prevention by equitable action is better than punishment." (Italics supplied) WALSH, *EQUITY* (1930) 207. Caldwell, however, seems not to think that the concept of public nuisance need be extended this far in order to give equitable relief. Caldwell, *Injunctions Against Crime* (1931) 26 ILL. L. REV. 259, 269. See note 29, *infra*. See *People ex rel. Dyer v. Clark*, 268 Ill. 156, 162, 180 N. E. 994, 996 (1915).

<sup>25</sup> *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 13 How. 518, 14 L. ed. 249 (U. S. 1851); *Florida v. Anderson*, 91 U. S. 667, 23 L. ed. 290 (1875); *United States v. Luce*, 141 Fed. 385 (C. C. Del. 1905); *People v. Truckee Lumber Co.*, 116 Cal. 397, 48 Pac. 374, 39 L. R. A. 581 (1897); *People v. Monterey Fish Products Co.*, 195 Cal. 548, 234 Pac. 398, 38 A. L. R. 1186 (1925).

<sup>26</sup> WALSH, *EQUITY* (1930) §§38, 39; Caldwell, *Injunctions Against Crime* (1931) 26 ILL. L. REV. 259. The interests of the state as a juristic person are public interests, while the interests of the community at large are social interests, according to Pound, *Interests of Personality* (1915) 28 HARV. L. REV. 343, 344.

Of course there is always the question of adequacy of the legal remedy. If the statutory procedure is adequate, clearly, under established equity practice, the injunction should not be granted. *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. ed. 1092 (1895); *People v. Universal Chiropractors' Ass'n.*, 302 Ill. 228, 134



If the definition of public nuisance is limited to certain specific uses of land, then the social interests which equity may protect are likewise limited. If, however, the court realizes the true basis and reason for its action, and defines public nuisance accordingly, as suggested, it is limited in the interests it will protect only by their relation to the social welfare and the preferability from the social standpoint of injunctive prevention to legal penalties. This seems a preferable concept of the public nuisance. If the court follows this broad concept, there would seem to be no good reason why usury should not be denominated a public nuisance and so enjoined. Certainly it is a material violation of the social interests in economic security. And civil and criminal penalties have been notoriously ineffective.<sup>27</sup>

If the statutory definition of public nuisance will not conceivably include usury,<sup>28</sup> or if the court, operating on the common law theory, cannot bring itself to call usury a public nuisance, the state can still proceed on the theory of a suit for injunction to protect the public welfare.<sup>29</sup> This is nothing more than the liberal public nuisance theory stripped of its historical limitations to uses of land, and parading as what it is—a suit to protect the state's social interests where specific injunction as a prevention would be better than general statutory prohibition and punishment procedure.<sup>30</sup> Certainly, usurious practices could be reached on this basis.

N. E. 4 (1922); *State v. Maltby*, 108 Neb. 578, 188 N. W. 175 (1922); *Attorney-Gen'l. v. Brown*, 24 N. J. Eq. 89 (Ch. 1873); see *State v. Ehrlick*, 65 W. Va. 700, 705, 64 S. E. 935, 937 (1909).

<sup>27</sup> For an excellent survey of the entire problem, see 8 LAW & CONTEMP. PROB., No. 1 (Winter, 1941).

<sup>28</sup> *People v. Seccombe*, 103 Cal. App. 306, 284 Pac. 725 (1930) (injunction denied). The California statute requires an injury to health, offense to the senses, obstruction in the free use of property, or purpresture. Clearly usury does not fall within any of these and could not have been enjoined as a public nuisance. Noted in (1930) 18 CAL. L. REV. 328. In Minnesota the statute includes "doing an act . . . which shall annoy, injure, or endanger the safety, health, comfort, or repose of any considerable number of persons." MINN. STAT. (Mason, 1927) §10241. This has been held to include usury. *State ex. rel. Goff v. O'Neil*, 205 Minn. 366, 286 N. W. 316 (1939), noted in (1939) 38 MICH. L. REV. 279.

<sup>29</sup> This theory is probably based on the famous dictum in *In re Debs*, 158 U. S. 564, 584, 15 Sup. Ct. 900, 906, 39 L. ed. 1092, 1102 (1895): "Every government, entrusted by the very terms of its being with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other. . . . The obligation which it is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court." Cases following this theory: *United States v. Am. Bond & Mortgage Co.*, 31 F. (2d) 448 (N. D. Ill., 1929), *aff'd* 52 F. (2d) 318 (C. C. A. 7th, 1931); *State v. Howat*, 109 Kan. 376, 198 Pac. 686, 25 A. L. R. 1210 (1921); *Kentucky State Board of Dental Examiners v. Payne*, 213 Ky. 382, 281 S. W. 188 (1926); *People v. Federated Radio Corp.*, 216 App. Div. 250, 214 N. Y. Supp. 670, (2d Dep't 1926); *State Bar v. Retail Credit Ass'n.*, 170 Okla. 246, 37 P. (2d) 954 (1934); *Board of Medical Examiners v. Blair*, 57 Utah 516, 196 Pac. 221 (1921). See note 4, *supra*.

<sup>30</sup> Of course, the arguments set forth above as to equitable enforcement of the

In the instant case the only theory considered was that of public nuisance. The court's reasoning on this subject is not clear. It states that usury does not fall within its statutory definition of a public nuisance, which is admittedly merely declaratory of the common law.<sup>81</sup> But it is very heavily implied that the existence of a statutory penalty was determinative of the court's inability to act.<sup>82</sup> This sounds like the police power argument.<sup>83</sup> Although the court explicitly recognizes the policy that "equity will enjoin an existing nuisance although the acts to be enjoined constitute crimes",<sup>84</sup> its conception of nuisance is apparently restricted to uses of land. Perhaps the court viewed the legal penalty provided as adequate. It was clearly shown, however, that the borrowers and the community were menaced by the defendants' conduct, and that other remedies were ineffective.<sup>85</sup> To this the court replied, "If the penalties there provided be not a sufficient check to the abuses described in the instant case, the appeal should be made to the lawmakers, and not to a court of equity, whose powers can never be invoked where the law has provided what it deems to be an adequate remedy."<sup>86</sup> This is an abdication of equity's most important function of developing new remedies to meet new social needs.

SAMUEL R. LEAGER.

### Jurisdiction—Service of Summons on Foreign Corporations.

Plaintiff, a Tennessee resident, brought suit in North Carolina against a Tennessee corporation, doing business as a common carrier in North Carolina, to recover damages for personal injuries arising out of a collision in Tennessee. Service of process was made upon the process agent in North Carolina, appointed by defendant in pursuance of U. S.

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police power and of civil and criminal penalties may be advanced against this theory, but if the test for equitable action is used of the preferability of prevention to punishment, the theory would seem to stand up. See Caldwell, *Injunctions Against Crime* (1930) 26 ILL. L. REV. 259, 270-275 for limitations on equity's action in this field. For problem where statute makes criminal conduct enjoined, similar to statutes making criminal conduct a public nuisance, see *State Bar v. Retail Credit Ass'n.*, 170 Okla. 246, 37 P. (2d) 954 (1934); *Board of Medical Examiners v. Blair*, 57 Utah 516, 196 Pac. 221 (1921).

<sup>81</sup> GA. CODE (Harrison, 1933) §§72-101, 72-102.

<sup>82</sup> *Dean v. State*, 151 Ga. 371, 106 S. E. 792, 40 A. L. R. 1132 (1921); *Bentley v. State Board of Medical Examiners*, 152 Ga. 836, 111 S. E. 379 (1922); *Bennett v. Bennett*, 161 Ga. 936, 132 S. E. 528 (1926) are cited. See note 18, *supra*. See also *People v. Universal Chiropractors' Ass'n.*, 302 Ill. 228, 134 N. E. 4 (1922); *Redmond v. State*, 152 Miss. 54, 118 So. 360 (1928); *State v. Maltby*, 108 Neb. 578, 188 N. W. 175 (1922).

<sup>83</sup> See note 7, *supra*.

<sup>84</sup> See notes 16 and 17, *supra*.  
<sup>85</sup> Borrowers were usually so ignorant of their rights, or of such limited means, that they were unable to enforce them.

<sup>86</sup> 12 S. E. (2d) 574, 581 (GA. 1940).

C. A. Title 49, sec. 321(c)—an act regulating interstate carriers. *Held*: Such service is not sufficient on a cause of action arising in another jurisdiction.<sup>1</sup>

At common law a corporation could not be served with process outside the state in which it was incorporated.<sup>2</sup> The theory was that the corporation, just as an individual, could be served only where found, and as a legal entity the corporation had no existence outside the state of its creation.<sup>3</sup> Injustice to plaintiff parties resulted, and two theories developed to justify service upon a foreign corporation: (1) The presence theory, and (2) the consent theory.<sup>4</sup> The presence theory has as its basis the idea that a foreign corporation is present in any state in which it does business.<sup>5</sup> The consent theory arose out of two factors: (1) The fact that a corporation may voluntarily submit to personal jurisdiction in any state,<sup>6</sup> and (2) the fact that a state may absolutely exclude the corporation from doing business within its bounds<sup>7</sup> (unless the business is solely of an interstate nature),<sup>8</sup> and thus a state may impose conditions upon doing such business.<sup>9</sup> This may take the form of a statute requiring a foreign corporation to provide an agent upon whom process may be served;<sup>10</sup> or a statute might set out itself, within limits, agents of the corporation upon whom service may be made.<sup>11</sup> If a foreign corporation does business within the state without complying with such statute, then there may be a provision appointing an officer of the state to act as process agent for the corporation.<sup>12</sup> Doing business within the state is regarded as an acceptance of such a statutory provision.<sup>13</sup>

In order to satisfy federal due process for service upon a foreign corporation, it must appear: (1) That the corporation is doing business

<sup>1</sup> *King v. Motor Lines*, 219 N. C. 223, 13 S. E. (2d) 233 (1941).

<sup>2</sup> 1 KYD, CORPORATIONS (1793) 272.

<sup>3</sup> *Ibid.* *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. ed. 274 (U. S. 1839).

<sup>4</sup> BALLANTINE, MANUAL OF CORPORATION LAW AND PRACTICE (1930) §291.

<sup>5</sup> *International Harvester Co. v. Kentucky*, 234 U. S. 579, 34 Sup. Ct. 944, 58 L. ed. 1479 (1913).

<sup>6</sup> *New England Mutual Life Ins. Co. v. Woodworth*, 111 U. S. 138, 4 Sup. Ct. 364, 28 L. ed. 379 (1884); *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U. S. 93, 37 Sup. Ct. 344, 61 L. ed. 610 (1917); *Flour City Ornamental Iron Co. v. General Bronze Corp.*, 21 F. Supp. 112 (D. Minn. 1937).

<sup>7</sup> *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357 (U. S. 1868).

<sup>8</sup> *International Text-book Co. v. Pigg*, 217 U. S. 91, 30 Sup. Ct. 481, 54 L. ed. 678 (1910); *Lemke v. Farmers' Grain Co.*, 258 U. S. 50, 42 Sup. Ct. 244, 66 L. ed. 458 (1922).

<sup>9</sup> BEALE, FOREIGN CORPORATIONS (1904) ch. VII (Collection of these statutes).

<sup>10</sup> N. C. CODE ANN. (Michie, 1939) §1137.

<sup>11</sup> N. C. CODE ANN. (Michie, 1939) §483(1).

<sup>12</sup> N. C. CODE ANN. (Michie, 1939) §1137.

<sup>13</sup> *Anderson v. United States Fidelity Co.*, 174 N. C. 417, 90 S. E. 948 (1917); BEALE, FOREIGN CORPORATIONS (1904) §266.

within the state where service is sought,<sup>14</sup> and (2) that service is had upon a proper agent, present in the state.<sup>15</sup>

Since a state may not refuse to allow a corporation engaged solely in interstate commerce to come within its bounds, and since it cannot require a license for such activity,<sup>16</sup> it would seem, at least under the "consent" theory, that interstate commerce within the state does not constitute doing business for the purposes of service. But the United States Supreme Court has held that service made upon the agent designated by state statute is valid, though the business of the corporation be solely interstate.<sup>17</sup>

No detailed account of what "doing business" means for the purposes of service is attempted here;<sup>18</sup> for in its last analysis it is a question of fact to be determined largely by the circumstances of each individual case, rather than by fixed, definite, and precise rules.<sup>19</sup> In the principal case no question was raised as to the defendant's doing business in North Carolina.

When the cause of action arose in the state, the question of a proper agent is not as difficult as when the cause of action arose outside the state. Clearly in the former case an agent appointed specifically for the purpose by the defendant is a proper one.<sup>20</sup> Where service is made upon

<sup>14</sup> *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. ed. 451 (U. S. 1855); *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. ed. 222 (1882); *Goldney v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. ed. 517 (1894) (even when service of summons is made upon the president of the corporation within the state, it is not sufficient unless the corporation is doing business in the state); *Greer v. Mathieson Alkali Works*, 190 U. S. 428, 23 Sup. Ct. 807, 41 L. ed. 1122 (1903); *Hunter v. Mutual Reserve Ins. Co.*, 218 U. S. 573, 31 Sup. Ct. 127, 54 L. ed. 1155 (1910); *Herndon-Carter Co. v. James N. Norris, Son & Co.*, 224 U. S. 496, 32 Sup. Ct. 550, 56 L. ed. 857 (1912); *St. Louis S. W. R. R. v. Alexander*, 227 U. S. 218, 33 Sup. Ct. 245, 57 L. ed. 486 (1913); *Philadelphia & Reading Ry. v. McKiblin*, 243 U. S. 264, 37 Sup. Ct. 280, 61 L. ed. 710 (1917).

<sup>15</sup> *Connecticut Mutual Life Ins. Co. v. Spratley*, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. ed. 569 (1899); *Herndon-Carter Co. v. Norris & Co.*, 224 U. S. 496, 32 Sup. Ct. 550, 56 L. ed. 857 (1912); *Philadelphia & Reading Ry. v. McKiblin*, 243 U. S. 264, 37 Sup. Ct. 280, 61 L. ed. 710 (1917); *Frawley, Bundy & Wilcox v. Pa. Casualty Co.*, 124 Fed. 259 (C. C. M. D. Pa. 1903); *Grant v. Cananea Consolidated Copper Co.*, 117 App. Div. 576, 102 N. Y. Supp. 642 (1st Dep't 1907); *State v. Rutledge*, 331 Mo. 1015, 56 S. W. (2d) 28 (1932).

<sup>16</sup> *International Text-book Co. v. Pigg*, 217 U. S. 91, 30 Sup. Ct. 481, 54 L. ed. 678 (1910); *Lemke v. Farmers' Grain Co.*, 258 U. S. 50, 42 Sup. Ct. 244, 66 L. ed. 458 (1922).

<sup>17</sup> *International Harvester Co. v. Kentucky*, 234 U. S. 579, 34 Sup. Ct. 944, 58 L. ed. 1479 (1913).

<sup>18</sup> *Osborne, Arising Out of Business Done in the State* (1923) 7 MINN. L. REV. 380; *Isaacs, An Analysis of Doing Business* (1925) 25 COL. L. REV. 1018.

<sup>19</sup> See *Ivey Rivers Land Co. v. National Fire Ins. Co.*, 192 N. C. 115, 119, 133 S. E. 424, 426 (1926).

<sup>20</sup> *New England Mutual Life Ins. Co. v. Woodworth*, 111 U. S. 138, 4 Sup. Ct. 364, 28 L. ed. 379 (1884); *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U. S. 93, 37 Sup. Ct. 344, 61 L. ed. 610 (1917); *Robert Mitchell Furniture Co. v. Seldon Breck Const. Co.*, 257 U. S. 213, 42 Sup. Ct. 84, 66 L. ed. 201 (1921); *Morris v. Skandinavia Ins. Co.*, 279 U. S. 405, 49 Sup. Ct. 360, 73 L. ed. 762 (1929).

an agent of the corporation, not appointed by it as process agent, then the agent must be "representative of the company and its business" and may not be a subordinate employee or a person performing a single transaction.<sup>21</sup> But it is not necessary that the agent be connected with the business in the state where served, for service upon a resident director was held valid, though his duties were performed in the state of incorporation alone.<sup>22</sup> And where the controlling statute provides that service may be made upon an officer of the state if the corporation does not specify an agent, the fact that the statute makes no provision for actual notice to be sent the corporation does not render it invalid for want of due process.<sup>23</sup> It is said that the corporation consents to the terms of the statute by doing business within the state.<sup>24</sup>

However, when the cause of action is not domestic, even if the agent is appointed by the defendant in compliance with a statute, the United States Supreme Court has held that, in the absence of compelling language in the statute or a local decision to the contrary, such appointment does not include consent to be served in such a foreign cause of action.<sup>25</sup> But in *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*,<sup>26</sup> jurisdiction was sustained, although the cause of action did not arise in the state, since the statute under which the agent was appointed was construed to include consent to service in such a case. So there is no constitutional objection here, once the statute in question is so construed.

In cases where the corporation does business in the state without appointing an agent for service of process, and the statute provides that service shall be made upon a state official, the fact that the cause of action is foreign has a definite bearing. In *Old Wayne Life Ins. Co. v. McDonough*<sup>27</sup> and *Simon v. Southern Ry.*,<sup>28</sup> the United States Supreme

<sup>21</sup> *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. ed. 451 (U. S. 1855); *Mutual Life Ins. Co. v. Spratley*, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. ed. 569 (1899); *St. Louis S. W. Ry. v. Alexander*, 227 U. S. 218, 33 Sup. Ct. 245, 57 L. ed. 486 (1913); *Frawley, Bundy & Wilcox v. Pa. Casualty Co.*, 124 Fed. 259 (C. C. M. D. Pa. 1903); *Moore v. Freeman's Nat. Bank*, 92 N. C. 590 (1885); *Platt v. Michael*, 214 N. C. 665, 200 S. E. 429 (1939); see *St. Clair v. Cox*, 106 U. S. 350, 356, 1 Sup. Ct. 354, 362, 27 L. ed. 222, 226 (1882).

<sup>22</sup> *Lumbermen's Ins. Co. v. Meyer*, 197 U. S. 407, 25 Sup. Ct. 483, 49 L. ed. 810 (1904).

<sup>23</sup> *Washington ex rel. Bond & Goodwin & Tucker, Inc. v. Superior Ct.*, 289 U. S. 361, 53 Sup. Ct. 624, 77 L. ed. 1256 (1933). <sup>24</sup> *Ibid.*

<sup>25</sup> *Robert Mitchell Furniture Co. v. Seldon Breck Const. Co.*, 257 U. S. 213, 42 Sup. Ct. 84, 66 L. ed. 201 (1921); *Morris & Co. v. Skandinavia Ins. Co.*, 279 U. S. 405, 49 Sup. Ct. 360, 73 L. ed. 762 (1929).

<sup>26</sup> 243 U. S. 93, 37 Sup. Ct. 344, 61 L. ed. 610 (1916).

<sup>27</sup> 204 U. S. 8, 27 Sup. Ct. 236, 51 L. ed. 345 (1907); cf. *Mass. Bonding & Ins. Co. v. Concrete Steel Bridge Co.*, 37 F. (2d) 695 (C. C. A. 4th, 1930); *O'Neil v. Long Transportation Corp.*, 19 F. Supp. 477 (D. Nev. 1937).

<sup>28</sup> 236 U. S. 115, 35 Sup. Ct. 255, 59 L. ed. 492 (1914); cf. *Mass. Bonding & Ins. Co. v. Concrete Steel Bridge Co.*, 37 F. (2d) 695 (C. C. A. 4th, 1930); *O'Neil v. Long Transportation Corp.*, 19 F. Supp. 477 (D. Nev. 1937).

Court limited service of this sort on the grounds that the corporation's consent to be served was confined to domestic causes of action. In the *McDonough* case the court said: "While the highest considerations of public policy demand that an insurance corporation, entering a state in defiance of a statute which lawfully prescribes the terms upon which it may exert its powers there, should be held to have assented to such terms as to business there transacted by it, it would be going very far to imply, and we do not imply, such assent as to business transacted in another state, although citizens of the former state may be interested in such business."<sup>29</sup> If such a holding is based on the "presence" theory, it would seem that if the corporation is amenable to process for a domestic cause of action, personal jurisdiction should not fail merely because the cause of action arose elsewhere. If based upon the "consent" theory, probably the distinction is justified by saying that the corporation, by doing business in the state without authorization, impliedly consented to be served in actions growing out of that business; but not as to actions arising elsewhere which might necessitate inconvenience and added expense to the corporation.

At any rate it should apparently follow that where an agent of the corporation itself is served (the corporation not having appointed him as process agent) the holding would be the same as in cases where a state official is served; for there is no express consent in either case. But the Supreme Court of the United States has upheld service where a representative agent of the corporation is served, even though the cause of action be foreign and there is no express consent to service.<sup>30</sup> No reasoning to distinguish this sort of case from the ones where service was made upon a state officer has been found. Perhaps the court had in mind actual notice to the corporation; but this problem seems to be the same regardless of where the cause of action arose.

The fact that the plaintiff is a non-resident does not necessarily defeat the action.<sup>31</sup>

Thus as far as due process is concerned, the determining factor as to service in a cause of action arising outside the state apparently is the type of agent served. Of course the court of a state may not entertain

<sup>29</sup> 204 U. S. 8, 22, 27 Sup. Ct. 236, 241, 51 L. ed. 345, 351 (1907).

<sup>30</sup> *Baltimore & Ohio R. R. v. Harris*, 12 Wall. 65, 20 L. ed. 354 (U. S. 1870); *N. Y., S. E. & W. R. R. v. Estill*, 147 U. S. 591, 13 Sup. Ct. 444, 37 L. ed. 292 (1893); *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. ed. 964 (1897); *Denver & R. G. W. R. R. v. Terte*, 284 U. S. 284, 52 Sup. Ct. 152, 76 L. ed. 295 (1932) *semble*.

<sup>31</sup> *Douglas v. New York, N. H. & H. R. R.*, 279 U. S. 377, 49 Sup. Ct. 355, 73 L. ed. 747 (1928) (a state may by statute discriminate against *non-residents*; though under the privileges and immunities clause of the Federal Constitution a state may not discriminate against *citizens* of another state). In the principal case since process was served on an agent appointed under an act of Congress, there is no question of statutory discrimination by a state.

a foreign cause of action if it is not a transitory one<sup>32</sup> or if it would violate the public policy of the state of forum to do so,<sup>33</sup> irrespective of the question of service.

But if the corporation is engaged in interstate commerce, due process may be satisfied and still the action fail if entertaining it would unduly burden interstate commerce. Here we are not concerned with the type of agent served, as in the case of due process when the cause of action is not domestic; but with three factors: (1) Whether the plaintiff is a resident or non-resident, (2) whether the cause of action arose outside or within the state, and (3) whether the corporation is operating within the state. "Operating" as used here is to be distinguished from "doing business". The former, in the case of a railroad company, refers to whether the company has trackage in the state. A corporation may be doing business within the state without operating therein. As seen, in the case of due process the first and third of these factors apparently have no effect, but when the doctrine of interstate commerce is applied all of them are of potential importance as they appear in different combinations.

The question of interstate commerce was first raised in *Davis v. Farmers' Co-operative Co.*<sup>34</sup> There the United States Supreme Court held unconstitutional a state statute providing for service on a foreign corporation as applied to a cause of action arising outside the state and brought by a non-resident plaintiff against a corporation not operating within the state. Previous similar cases were distinguished on the grounds that in those cases the only question raised was that of due process.<sup>35</sup> Since the *Davis* case, most courts have held that although the plaintiff is a resident, the other factors being the same, to entertain jurisdiction constitutes an undue burden on interstate commerce.<sup>36</sup> But where the plaintiff is not a resident, and the cause of action is foreign, and the defendant is operating in the state, most decisions have upheld jurisdiction.<sup>37</sup> *A fortiori* where the plaintiff is a resident, and the cause

<sup>32</sup> *Ellenwood v. Marietta Chair Co.*, 158 U. S. 105, 15 Sup. Ct. 771, 39 L. ed. 913 (1894); *Carr v. Lewis Coal Co.*, 96 Mo. 149, 8 S. W. 907 (1888); *Davenport v. Gannon*, 123 N. C. 362, 31 S. E. 858 (1898); *Conant v. Deep Creek & Curlew Irr. Co.*, 23 Utah 627, 66 Pac. 188 (1901).

<sup>33</sup> 3 BEALE, THE CONFLICT OF LAWS (1935) 1647.

<sup>34</sup> 262 U. S. 312, 43 Sup. Ct. 556, 67 L. ed. 996 (1923); *Atchison, T. & S. Ry. v. Wells*, 265 U. S. 101, 44 Sup. Ct. 469, 68 L. ed. 928 (1924).

<sup>35</sup> See *Davis v. Farmers' Co-operative Co.*, 262 U. S. 312, 317, 43 Sup. Ct. 556, 558, 67 L. ed. 996, 999 (1923).

<sup>36</sup> *Michigan Cent. R. R. v. Mix*, 278 U. S. 492, 49 Sup. Ct. 207, 73 L. ed. 470 (1928); *Denver & R. G. W. R. v. Terte*, 284 U. S. 284, 52 Sup. Ct. 152, 76 L. ed. 295 (1932); *Miele v. Chicago, M., S. & P. R. R.*, 151 Misc. 137, 270 N. Y. Supp. 788 (N. Y. City Cts., 1934). *Contra*: *Griffin v. Seaboard Air Line Ry.*, 28 F. (2d) 998 (W. D. Mo. 1928); *Cressez v. Erie R. R.*, 278 Mass. 284, 180 N. E. 160 (1932).

<sup>37</sup> *Harris v. Amer. Ry. Exp. Co.*, 12 F. (2d) 487 (App. D. C. 1926); *McWhorter v. Williams*, 228 Ala. 632, 155 So. 309 (1934); *Boright v. Chicago R. R.*

of action is foreign, and the defendant is operating in the state, jurisdiction has been sustained.<sup>38</sup> A similar result has been reached where the plaintiff is a resident, and the cause of action is not foreign, and the defendant is not operating in the state.<sup>39</sup> Though the language in some cases is to the effect that the residence or non-residence of the plaintiff is not to be disregarded,<sup>40</sup> it may be said, at least in view of the cases so far, that the other two factors are of much more importance.

In the application of the interstate commerce doctrine it is not clear whether each case might, to a certain extent, depend on its own facts or whether the three factors in certain combinations will give an automatic result. For example, if it is not shown that there would be any inconvenience in transporting witnesses or added burden of any sort on the corporation, would service in a foreign cause of action against a defendant not operating in the state necessarily fail because a burden on interstate commerce? This question has not been answered. Although the court will not investigate the relative inconvenience to the parties to determine whether jurisdiction shall be retained, it seems that the defendant should be compelled to show that some burden will be placed upon interstate commerce.<sup>41</sup>

In the principal case the decision was solely upon the ground of due process. It may have been thought that since the defendant was operating in North Carolina, the question of interstate commerce was not open. However, since Congress has power to regulate interstate commerce, the question, if presented, would be whether the act was intended to extend to such a situation and not whether an unconstitutional burden was cast on interstate commerce.

In the principal case the court relied on *Old Wayne Life Ins Co. v. McDonough* and *Simon v. Southern Ry.* As seen, those cases, unlike the principal case, were ones where the defendant was doing business in the state without authority. And there, service was had upon an officer of the state, and not upon an agent appointed by the defendant. Since the instant defendant appointed an agent for service of process

180 Minn. 52, 230 N. W. 457 (1930); *Steele v. Telegraph Co.*, 206 N. C. 220, 173 S. E. 583 (1934). *Contra*: *Panstwowe Zaklady Gradowzone v. Automobile Ins. Co.*, 36 F. (2d) 504 (S. D. N. Y. 1928); *Iron City Produce Co. v. Amer. Ry.*, 22 Ohio App. 165, 153 N. E. 316 (1926).

<sup>38</sup> *Denver & R. G. W. R. R. v. Terte*, 284 U. S. 284, 52 Sup. Ct. 152, 76 L. ed. 295 (1932); *Amer. Ry. Exp. Co. v. Rouw Co.*, 173 Ark. 810, 294 S. W. 401 (1927); *Cohen v. Del.*, S. & W. R. R., 150 Misc. 450, 269 N. Y. Supp. 667 (Sup. Ct., 1934).

<sup>39</sup> *Mo. ex. rel. St. Louis, B. & M. Ry. v. Taylor*, 266 U. S. 200, 45 Sup. Ct. 47, 69 L. ed. 247 (1924); *Pere Marquette Ry. v. Tifton Produce Co.*, 48 Ga. App. 286, 172 S. E. 727 (1934).

<sup>40</sup> See *Int. Milling Co. v. Columbia Co.*, 292 U. S. 511, 520, 54 Sup. Ct. 797, 799, 78 L. ed. 1396, 1401 (1933).

<sup>41</sup> *Denver & R. G. W. R. R. v. Terte*, 284 U. S. 284, 52 Sup. Ct. 152, 76 L. ed. 295 (1932).



pursuant to an act of Congress, it seems that those cases concerned with appointment of an agent under state statutes would be more pertinent. In those cases the United States Supreme Court has held that appointment would not include consent to service in a foreign cause of action in the absence of compelling language in the statute or a local decision to the contrary. Accordingly it would seem that the North Carolina Court should have determined whether such compelling language appeared in the Congressional act. In any event, it does not seem that the United States Supreme Court cases make it imperative that service in the principal case be found to violate due process irrespective of statutory construction. Further, the court distinguished the principal case from *Steele v. Telegraph Co.*,<sup>42</sup> where process was upheld, solely upon the ground that that case did not involve service upon an agent designated by defendant in compliance with an act of Assembly or of Congress. While service has been upheld in cases similar to the *Steele* case,<sup>43</sup> it seems that where the defendant himself designates a process agent there is stronger basis for upholding jurisdiction than where the agent is designated by statute.

As far as convenience is concerned, the result reached in the principal case is a desirable one, but the North Carolina position does need clarifying.

PHILIP E. LUCAS.

### Limitation of Actions—Torts—Accrual of Right of Action for Negligence.

In *Powers v. Trust Co.*,<sup>1</sup> defendant leased to plaintiff a house infected with germs of pulmonary tuberculosis. Defendant knew but failed to disclose to the plaintiff that the prior occupant had died of the disease only a month before. Plaintiff, previously robust and healthy, manifested severe symptoms of tuberculosis approximately eighteen months after date of exposure, hospitalization being necessary. Suit for damages for negligent breach of duty to disclose was brought some two and one-half years from the time of the discovery of the disease. *Held*, that recovery was barred by the three-year statute of limitations<sup>2</sup> which began to run at the time of the original breach of duty, and not from the time of the first manifestation of harm.

North Carolina thus reaffirms<sup>3</sup> its agreement with the practically

<sup>42</sup> 206 N. C. 220, 173 S. E. 583 (1934). <sup>43</sup> See note 30, *supra*.

<sup>1</sup> 219 N. C. 254, 13 S. E. (2d) 431 (1941).

<sup>2</sup> N. C. CODE ANN. (Michie, 1939) §441(2).

<sup>3</sup> The precedents cited by the court in the principal case are: *Daniel v. Grizzard*, 117 N. C. 105, 23 S. E. 93 (1895) (right of action against register of deeds held to accrue at time of failure to register and index mortgage, not at time of damage resulting therefrom); *Bank of Spruce Pine v. McKinney*, 209 N. C. 668, 184 S. E.

universal rule that, in negligence cases, the right of action for damages accrues at the time of the negligent act or omission, and that the statute of limitations begins to run at once.<sup>4</sup> It is immaterial that the damage or the right of action resulting from the negligent act or omission is not discovered until later. The gist of the action is the breach of duty, without regard to concurrence of substantial injury making suit practicable. The purpose of this arbitrary rule is said to be the suppression of fraud and the prevention of the recurrence of stale claims prejudicial to the defendant due to loss of evidence or obscuring of facts by lapse of time or removal of witnesses.<sup>5</sup> The rule has been applied in a variety of situations,<sup>6</sup> of which the professional malpractice cases are perhaps the best-known example. It is believed that in many such cases the courts, by blind adherence to precedent and an unnecessarily technical interpretation of a "right of action", have wrought injustice, and permitted a negligent tortfeasor to escape liability by reason of his own silence and the insidious nature of the injuries inflicted.

It is essential to recognize this discussion as confined only to those cases in which a technical right of action precedes the incidence of damage, and the injuries or right of action do not become known until later. Limited to this group of cases, the general rule has seldom been contradicted. Only one decision, not based on a statute, directly contra has been found.<sup>7</sup> Many courts, however, conscious of the frequent hardships incident to the rule, have resorted to legalistic devices in an effort to avoid inequity. In malpractice cases, several jurisdictions have held that the statute does not begin to run until the termination of the relationship of physician and patient, reasoning that no right of action accrued until the termination of the doctor's "continuing duty" to disclose the negligence to the plaintiff.<sup>8</sup> A second avenue of escape, the

506 (1936); *cf.* *Blount v. Parker*, 78 N. C. 128 (1878) (defendant's lack of knowledge did not prevent running of statute against an action for the conversion of personal property); *Gordon v. Fredle*, 206 N. C. 734, 175 S. E. 126 (1934) (right of action for slander accrues at time of utterance, not at time of plaintiff's identification of slanderer).

<sup>4</sup> KELLY, CODE LIMITATIONS (1903) §§103, 104; 2 WOOD, LIMITATIONS (4th ed. 1916) §179. For collections of cases supporting the general rule, see 17 R. C. L. 763-765 (1917); Notes (1909) 13 Ann. Cas. 696; (1909) 126 Am. St. Rep. 944.

<sup>5</sup> *Mask v. Tiller*, 89 N. C. 423, 426 (1883); Note (1934) 12 TEXAS L. REV. 478.

<sup>6</sup> 17 R. C. L. 763-765 (1917). As to physician's malpractice, see Notes L. R. A. 1917C 1172; (1931) 74 A. L. R. 1317; (1937) 35 MICH. L. REV. 839; (1934) 13 TENN. L. REV. 131. As to malpractice of attorneys, see *Sullivan v. Stout*, 120 N. J. L. 304, 199 Atl. 1 (1938); Note (1939) 118 A. L. R. 215. As to negligent acts of public officials, see *State v. Walters*, 31 Ind. App. 77, 66 N. E. 182 (1903); Note (1909) 126 Am. St. Rep. 944.

<sup>7</sup> *Hahn v. Claybrook*, 130 Md. 179, 100 Atl. 83 (1917) (cause of action against physician held to accrue at time of discoloration of skin, not at time physician was first negligent in use of the discoloring agent).

<sup>8</sup> *Schanil v. Branton*, 181 Minn. 381, 232 N. W. 708 (1930); *Conklin v. Draper*, 254 N. Y. 620, 173 N. E. 892 (1930); *Gillette v. Tucker*, 67 Ohio St. 106, 65 N. E. 865 (1902); *Lotten v. O'Brien*, 146 Wis. 258, 131 N. W. 361 (1911).

"fraudulent concealment" exception to the main rule, will be treated later. Both these constructions represent attempts to compromise the harshness of the rule with the natural dictates of justice, rather than directly to challenge the rule itself.

However, there are analogous situations which support the humanitarian view that the statute should not begin to run until the right of action is discovered or substantial damage occurs. The rule laid down in two of North Carolina precedents cited by the court has not gone uncontradicted. It has been held that where a register of deeds fails correctly to record a conveyance, the cause of action against him accrues when the vendee is deprived of the property, not when the negligence occurred.<sup>9</sup> In workmen's compensation cases the weight of authority seems to be that the statute begins to run, not from the time of exposure to the occupational disease, but from the time of the physical manifestation thereof.<sup>10</sup> It has been held that the right of action against an attorney for failure to maintain fire insurance on a client's house ran from the time of destruction by fire, and not from the time the attorney allowed the policy to lapse.<sup>11</sup> Where money is paid by mistake, it is generally held that the statute does not begin to run until the mistake is discovered, although the payee was exposed to a right of action from the time of the receipt of the funds.<sup>12</sup> Nor does the statute begin running on an action against an attorney for misappropriation of monies collected by him for his client until the latter has received notice of such collection.<sup>13</sup> For breach of covenants against encumbrances and of seisin and title, the majority rule is that, although the right of action for nominal damages accrues at the time of the technical breach, the statute does not begin to run until the sustaining of substantial damage. A technical breach at the time the deed is given is usually recognized, but "if the damages do not then result, it is misleading and mischievous to treat this mere technical breach as constituting the plaintiff's cause of action."<sup>14</sup> In cases of trespass to land by "seepage" it is held that "owing to the uncertainty of its course and extent, and the length of time required after the construction of such properties for it to develop as to

<sup>9</sup> *State v. McClellan*, 113 Tenn. 616, 85 S. W. 267 (1905), approved in *Aachen Ins. Co. v. Morton*, 156 Fed. 654 (C. C. A. 6th, 1907).

<sup>10</sup> *Notes* (1933) 86 A. L. R. 524; (1936) 24 CALIF. L. REV. 594, 596.

<sup>11</sup> *Carey v. Commonwealth Bldg. & Loan Ass'n.*, 145 La. 1, 81 So. 734 (1919).

<sup>12</sup> *McKimmon v. Caulk*, 170 N. C. 54, 86 S. E. 809 (1915); *Henofer v. Realty Loan & Guaranty Co.*, 178 N. C. 584, 101 S. E. 265 (1919); *Note* (1894) 39 Am. St. Rep. 504.

<sup>13</sup> *Bromberg v. Sands*, 127 Ala. 411, 30 So. 510 (1900); *Jett v. Hempstead*, 25 Ark. 462 (1867); *Crissman v. Lee*, 132 Ark. 32, 200 S. W. 133 (1918); *McClurg v. Hill*, 7 Mo. App. 579 (1879); *Donahue v. Bragg*, 49 Mo. App. 273 (1892); *Note* (1939) 118 A. L. R. 211.

<sup>14</sup> *Seibert v. Bergman*, 91 Texas 411, 413, 44 S. W. 63, 64 (1898), quoting from *Post v. Campua*, 42 Mich. 90, 94, 3 N. W. 272, 274 (1879); *In re Hamlin's Estate*, 113 Wis. 140, 113 N. W. 411 (1907).

its uncertain course and slow stage of career under the ground, depending on the condition of the earth . . . [adoption of] the rule that the statute . . . begins to run from the date the lands *were first visibly affected and injured* by the seepage . . . *is not only in compliance with the strict letter of the statute, but a rule which will prove the most equitable, fair and just to all.* . . ."<sup>15</sup> Finally, and of less importance, are the lateral support cases, in which the right of action is held not to accrue until actual displacement of the land.<sup>16</sup> Although this latter type of case has been termed the best analogy to follow,<sup>17</sup> it is doubtful if according to some decisions the analogy is valid, since there is probably no invasion of the plaintiff's right, no technical breach of duty, prior to the subsidence itself.<sup>18</sup>

The general exception to the principal rule occurs in cases of the defendant's "fraud" or "fraudulent concealment" of the right of action, in which case the running of the statute is tolled until the right of action or damage is discovered, or in the exercise of reasonable care should have been discovered.<sup>19</sup> A respectable argument can be advanced for bringing the present case within this exception, although mere "silence" has sometimes been deemed insufficient to toll the statute. Some courts would hold that when the facts are peculiarly and exclusively within the knowledge of one party and the plaintiff is not in a position to discover the facts for himself, failure to disclose amounts to active concealment or fraud.<sup>20</sup> A defendant miner's failure to disclose his own underground trespass has been held to constitute "constructive fraud".<sup>21</sup> A physician's failure to notify his patient of his negligence in leaving gauze in an incision was held to be a continuing negligence and "fraudulent concealment".<sup>22</sup> In a variety of situations mere non-disclosure has been

<sup>15</sup> *Post v. Campua*, 42 Mich. 90, 94, 3 N. W. 272, 274 (1879) (italics supplied). Herein Judge Cooley intimates (p. 94) that, since damage occurred not at the time of the technical breach, but years later, enforcement of the rule that claimant's right of action arose at the time of the technical breach "involves this manifest absurdity: that the claimant's remedy was barred before he was damnified,—a result that can scarcely be consistent with any just or proper rule of law."

<sup>16</sup> *Pratt v. Dorman*, 161 Ala. 389, 49 So. 849 (1909); *Smith v. Seattle*, 18 Wash. 484, 51 Pac. 1057 (1898); *Backhouse v. Bonomi*, 9 H. L. Cas. 503, 11 Eng. Reprint 825 (1861); Note (1905) 68 L. R. A. 673.

<sup>17</sup> Darwin, *Fraudulent Concealment & Statutes of Limitation* (1933) 31 MICH. L. REV. 875, 903, n. 82.

<sup>18</sup> *Pratt v. Dorman*, 161 Ala. 389, 49 So. 849 (1909); *Rector v. Paterson Extension Ry.*, 66 N. J. L. 218, 49 Atl. 1030 (1901).

<sup>19</sup> RESTATEMENT, TORTS (1938) §551(1), (2)a; Notes (1934) 23 CALIF. L. REV. 105; (1937) 25 CALIF. L. REV. 366; (1894) 25 L. R. A. 564; (1935) 33 MICH. L. REV. 839.

<sup>20</sup> *Tyler v. Savage*, 143 U. S. 79, 12 Sup. Ct. 340, 36 L. ed. 82 (1892); *Farrar v. Churchill*, 135 U. S. 609, 10 Sup. Ct. 771, 34 L. ed. 246 (1890); *Corry v. Sylvia Y Cia*, 192 Ala. 550, 68 So. 891 (1915); *Colvin v. Warren*, 44 Ga. App. 825, 163 S. E. 268 (1932); HARPER, TORTS (1933) 450.

<sup>21</sup> *Tom Reed Gold Mines Co. v. United Eastern Mining Co.*, 39 Ariz. 533, 8 P. (2d) 449 (1932); *Lewey v. Fricke Coke Co.*, 166 Pa. 536, 31 Atl. 261 (1895).

<sup>22</sup> *Burton v. Tribble*, 189 Ark. 58, 70 S. W. (2d) 503 (1934); *Bryan v. Aven*, 32 Ga. App. 721, 124 S. E. 553 (1924). Justification for both these cases must be

held to bring the case within the "fraud" exception<sup>23</sup> in order to prevent individual injustices. Therefore to classify the principal case as one meriting the invocation of the fraudulent concealment exception would not violate authority and would establish a less arbitrary standard of justice to apply in situations similar to the present one.

Suppose, in the instant case, the plaintiff's symptoms had remained invisible for three years, or the source of the disease unknown to him for that length of time. Strict application of the rule would have barred plaintiff from recovery even before the damage or its source was discovered. This rule produces the frequent and unconscionable anomaly of a plaintiff's right of action having vanished before, as a practical matter, there could have been a recovery. "The theoretical existence of a cause of action is of little comfort to a plaintiff who has no actual knowledge of the operative facts enabling him to bring suit."<sup>24</sup> Such a rule is particularly vicious in malpractice cases, where the plaintiff's ignorance of his rights may be due to justifiable reliance on assurances of his physician, and his own lack of technical medical knowledge. As one judge puts it, "[I] . . . cannot approve a decision whereby a surgeon can set an agency such as radium in action in the body of a person and escape liability because it takes more than two years for the dangerous substance to accomplish the inevitable end, the death of the patient."<sup>25</sup> Even if the technical breach is known at the time, making eventual damage inevitable, still prospective damages are notoriously hard to prove, and the statutory period may have run before they become sufficiently tangible.<sup>26</sup>

Besides the two discussed alternatives to the arbitrary result reached in the principal case—the "fraudulent concealment" exception and the various analogous cases which might have been followed as precedents—there is the possibility of statutory amendment of the rule. Missouri has adopted a provision which is submitted as a model:

" . . . *Provided*, [in civil actions, that] . . . the cause of action shall not be deemed to accrue when the wrong is done or the technical breach

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found, if at all, in the attempt of the court to dispense justice in the individual case, rather than to adhere to a mandatory rule.

<sup>23</sup> Darwin, *Undiscovered Fraud & Statutes of Limitation* (1933) 31 MICH. L. REV. 591, 611, n. 55; Darwin, *Fraudulent Concealment & Statutes of Limitation* (1933) 31 MICH. L. REV. 875, 918.

<sup>24</sup> Note (1937) 35 MICH. L. REV. 839. The general rule is also criticized in OPPENHEIMER, *MEDICAL JURISPRUDENCE* (1935) 113, where it is said: ". . . promptness of action presupposes the knowledge of the existence of conditions which warrant such action, and it is unreasonable to expect a person to bring suit for malpractice until he has actual knowledge of facts which constitute the wrong."

<sup>25</sup> *Graham v. Updegraph*, 144 Kan. 46, 54, 58 P. (2d) 475, 480 (1936) (dissent).

<sup>26</sup> Those under disabilities have their right to sue preserved to them until they become *sui juris*. Logically, is there any reason why the law should be more solicitous of their rights than those of an innocent plaintiff, who, through no fault of his own, is unaware of his right of action?

of contract or duty occurs, but when the damage resulting therefrom is sustained and capable of ascertainment, and, if more than one item of damage, then the last item, so that all resulting damage may be discovered, and full and complete relief obtained."<sup>27</sup>

This statute, at least for the purpose of the statute of limitations, seems to retain no remedy whatsoever for the mere technical breach,<sup>28</sup> the right of action being made concurrent with the incidence of damage. Technical breach gives way to damage as the gist of the action. The unjust results arrived at by slavish adherence to the old rule are eliminated without violating the original purpose of the limitations act. The Missouri cases interpreting the above provision indicate that it has achieved the results herein advocated, with perhaps one exception.<sup>29</sup> Louisiana, heir to the French system, has adopted code provisions which are substantially similar, in effect if not in form, to the Missouri statute.<sup>30</sup> North Carolina and other states would do well to follow in these pioneering footsteps and eliminate, by legislative action, the possibility of harsh results continuing to flow from an arbitrary application of an unreasonable rule.

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<sup>27</sup> Mo. STAT. ANN. §860. The quoted portion was added in 1919.

<sup>28</sup> Logically, it could not be intended to apply, save for statute of limitation purposes, to those causes of action, such as trespass to land, where a right to sue for "nominal" damages is necessary to prevent the acquisition of prescriptive rights.

<sup>29</sup> *Fichtner v. Mohr*, 223 Mo. App. 752, 16 S. W. (2d) 739 (1929); *Strong v. Frerichs*, 116 S. W. (2d) 533 (Mo. App., 1938). The exception occurs in *Allison v. Missouri Power & Light Co.*, 59 S. W. (2d) 771 (Mo. App., 1933), which seems, by too strict interpretation, to defeat the very purpose for which the statute was designed. Plaintiff sustained a severe blow on the nose from swinging machinery, the bones actually being crushed, but the company doctor told plaintiff at the time "no damage had been done". Later severe complications set in, but on suit for damages the court held that the right of action accrued at the time of the physical contact, even though consequential damage had not become certain and substantial damage making suit feasible had not occurred until after the running of the statute. Aside from this interpretation, the representations of the physician to one entitled to rely on his assurances, presented grounds for tolling of the statute due to "fraudulent concealment".

<sup>30</sup> LA. CIVIL CODE ANN. (Dart, 1932) §3537. *Jones v. Texas & P. Ry.*, 125 La. 542, 51 So. 582 (1910) is an unusual case in which defendant's locomotive collided with plaintiff's mule, apparently only slight injuries being sustained. Suit was instituted for the slight injuries, but meanwhile the mule, although apparently recovered, suddenly died from latent injuries. On a second suit for total damages, the court declared: "Had the plaintiff brought this suit before the death of the mule, a complete defense would have been that, for all that was known, the mule was as valuable as ever, barring flesh wound, which would, doubtless, soon be healed. Until the fatal nature of the mule's injury revealed itself, therefore, the plaintiff had no cause of action, and prescription did not run"! Although the case reaches the desired result, under the statute, the language appears a little ambiguous, especially since the court admits that a second action for consequential damages could have been successfully maintained subsequent to the recovery for the skin injuries.

### Parent and Child—Liability for Torts of Child.

Two recent cases put a heavy strain on North Carolina's common law rule that "a parent is not liable, merely because of relation, for the torts of his child, whether the same are negligent or willful."<sup>1</sup> *Bowen v. Mewborn*<sup>2</sup> involved an action for willful and lustful assault, with the parent of the tortfeasor joined as defendant. Upon allegations that he "had advised and counselled the son . . . to indulge in illicit sexual intercourse" and had thereby "instigated and influenced his said son to maliciously assault and abuse the plaintiff", and that the son represented to the plaintiff in his advances upon her that his father "had told him to do such things", the lower court overruled the father's demurrer. In reversing this decision the supreme court held that a criminal assault could not have been reasonably foreseen from "such unnatural and vicious advice", probably given at a remote time in the past, hence the declaration neither stated a cause of action against the father in negligence, nor one of actual participation in the criminal assault by aiding, abetting, or counselling his tortfeasor son. In *Staples v. Bruns*<sup>3</sup> the plaintiff alleged that he had been run over by defendant's son who was driving his bicycle upon the city sidewalks with his hands off the handle bars, in express violation of a municipal ordinance; that the defendant father knew his son often rode in such a manner yet negligently failed to either restrain or admonish him; and that defendant employed a negro attendant to accompany his son, who knew of the boy's habitual violation of the ordinance and was present at the time of the collision, yet did nothing to interrupt his criminal course of conduct, negligent *per se*. Again reversing the order overruling defendants demurrer, the supreme court held that "the allegations contained in the complaint are not sufficient to take the plaintiff's case out of the general rule that a parent is not liable for the torts of his minor child."

At the common law a parent was liable for the torts of his child only on such grounds as would make him liable for the torts of any other person.<sup>4</sup> Thus the parent was liable if he participated in the tort,<sup>5</sup> if the child acted as his agent,<sup>6</sup> or if the parent's own negligence

<sup>1</sup> 1 COOLEY, TORTS (3d ed. 1906) 180. *Brittingham v. Stadiem*, 151 N. C. 126, 66 S. E. 128 (1909); *Linville v. Nissen*, 162 N. C. 95, 77 S. E. 1096 (1913); *Taylor v. Stewart*, 172 N. C. 203, 90 S. E. 134 (1916). See HARPER, LAW OF TORT (1933) §619.

<sup>2</sup> 218 N. C. 423, 11 S. E. (2d) 372 (1940).

<sup>3</sup> 11 S. E. (2d) 460 (N. C. 1940). <sup>4</sup> 1 COOLEY, TORTS (3d ed. 1906) 180.

<sup>5</sup> A parent has been held for participation in the child's tort where he: (1) directed the act. *Trahan v. Smith*, 239 S. W. 345 (Tex. Civ. App. 1922); (2) consented to its commission. *Ryley v. Lafferty*, 45 F. (2d) 641 (N. D. Idaho 1930); *Sharpe v. Williams*, 41 Kan. 56, 20 Pac. 497 (1889); or (3) ratified it by accepting its benefits. *Howell v. Norton*, 134 Miss. 616, 99 So. 440 (1924). Although these cases might well have been decided on the theory of agency, "the courts have treated them as special bases of liability . . . governed by their own peculiar principles." HARPER, LAW OF TORT (1933) 623.

<sup>6</sup> *Broadstreet v. Hall*, 168 Ind. 192, 80 N. E. 145, 10 L. R. A. (n. s.) 933 (1907);

resulted in the commission of the tort by the child.<sup>7</sup> And the historic rule seems to be that the parental relation affords no "strengthening inferences"<sup>8</sup> such as will "make the acts of the child any more binding upon the parent than the acts of any other person".<sup>9</sup> However, whether the basis be participation, agency, or negligence of the parent, there is a present tendency to enlarge the scope of the parent's liability.<sup>10</sup>

On the basis of agency the parent is liable for the torts of his child committed while employed in the parent's business,<sup>11</sup> in the same manner as if the employee were not his child. But a great extension of liability on an agency basis is to be found in the family automobile doctrine, which conclusively implies an agency relation whenever a child with his parent's permission drives an automobile purchased for family use.<sup>12</sup> This doctrine does no slight violence to fundamental rules of respondeat superior<sup>13</sup> in creating an agency "more illusory than substantial".<sup>14</sup> Yet the doctrine has been widely adopted and finds its *raison d'être* in the justice of holding the owner of a particularly dangerous instrumentality liable for injuries inflicted thereby by a financially irresponsible member of his family.<sup>15</sup> Save for the fact that

Lemke v. Ady, 159 N. W. 1011 (Iowa 1916); Taylor v. Stewart, 172 N. C. 203, 90 S. E. 134 (1916); Schaeffer v. Osterbring, 67 Wis. 495, 30 N. W. 922 (1886).

<sup>7</sup> Brittingham v. Stadiem, 151 N. C. 299, 66 S. E. 128 (1909). See Green v. Smith, 153 Va. 675, 677, 151 S. E. 282, 283 (1930). HARPER, LAW OF TORT (1933) 622: "This of course is not a case of responsibility of a parent for the child's tort, but liability for his own."

<sup>8</sup> Forsythe v. Rexroot, 234 Ky. 173, 27 S. W. (2d) 695 (1930).

<sup>9</sup> Cerchio v. Mullins, 33 Del. 245, 138 Atl. 277, 279 (Del. Super. 1927).

<sup>10</sup> MADDEN, PERSONS AND DOMESTIC RELATIONS (1931). Harper and Kime, *Duty to Control Conduct of Another* (1934) 43 YALE L. J. 886, 893-895; Notes (1932) 17 CORN. L. Q. 178, (1934) 19 CORN. L. Q. 643, (1934) 2 DUKE B. A. J. 15, (1921) 16 ILL. L. REV. 163, (1934) 32 MICH. L. REV. 872.

<sup>11</sup> HARPER, LAW OF TORT (1933) 619, 620 and cases cited.

<sup>12</sup> "Under this doctrine the owner of an automobile, which is purchased and maintained for the pleasure of his or her family, is held liable for injuries inflicted by his machines while it is being used by members of the family for their own pleasure." McCall, *The Family Automobile* (1930) 8 N. C. L. REV. 256, 263. Apparently adopted by a majority of American Jurisdictions. 2 BLASHFIELD'S CYCLOPEDIA OF AUTOMOBILE LAW (1927) 1464 and cases cited. See Note (1927) 6 N. C. L. REV. 78. Recognized in North Carolina. Linville v. Nissen, 162 N. C. 78, 77 S. E. 1096 (1913); Watts v. Lefler, 190 N. C. 722, 130 S. E. 630 (1925). Recognized in Washington as making a parent liable for injuries inflicted by his nineteen-year-old son when driving an automobile purchased from his own income. Robinson v. Ebert, 80 Wash. Dec. 346, 39 P. (2d) 992 (1935).

<sup>13</sup> Van Blaricom v. Dodgeson, 220 N. Y. 111, 113, 115 N. E. 443, 444 (1917) (suggesting that the liability should be sought by legislation). It has been suggested that the courts "seem to start out with the assumption that . . . there should be an agency . . . relationship . . . and proceed to find such a relationship in order to hold the car owner liable." McCall, *The Family Automobile* (1930) 8 N. C. L. REV. 256, 263. See Payne v. Leninger, 160 Minn. 76, 77, 199 N. W. 435, 437 (1924). Note (1922) 8 A. B. A. J. 362 collects legislative solutions of the automobile problem.

<sup>14</sup> Van Blaricom v. Dodgeson, 220 N. Y. 111, 113, 115 N. E. 443, 444 (1917).

<sup>15</sup> The Tennessee court observes: "We think that the practical administration of justice between the parties is more the duty of the court than the preservation



injuries by means of them are less common little reason appears why the family purpose doctrine should not be extended to include motorcycles and bicycles; for they too are (1) classed as potentially dangerous instrumentalities,<sup>16</sup> (2) are used upon the highways where the public is peculiarly exposed to danger, and (3) are capable of inflicting considerable damage when driven improperly.<sup>17</sup> Such an extension would have sustained a recovery in the principal case of *Staples v. Bruns*.

Similarly, where the basis for liability is participation by the parent, some cases fall within the ordinary scope of participation, but others enlarge it. Within the usual bounds of the doctrine appear such cases as those holding the parent liable for directing his child in the act of killing plaintiff's hog,<sup>18</sup> for consenting to his son's tort in permitting him to use the parent's wagon in successive thefts of plaintiff's wood,<sup>19</sup> and for assisting his son in an assault upon the plaintiff.<sup>20</sup> *Ryley v. Laferty*,<sup>21</sup> however, indicates an extension of the doctrine of participation. There defendants knew of their ten-year-old son's vicious disposition to beat small boys, but refused to restrain or reprove him. In granting recovery to a victimized child, the court held that the parent's rejection and resentment of complaints about their son's conduct "would amount to assent and participation of the parents in the tort. . . ."<sup>22</sup> A comparable extension was reached in *Sharpe v. Williams*<sup>23</sup> where a parent, although stating disapproval of a ducking his son and four friends were planning for their teacher, agreed to pay half of any resulting damages, provided they would secure the consent of X to pay the rest. The boys acted without securing X's consent. Judgment was rendered against the

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of some esoteric theory concerning the law of principal and agent." *King v. Smythe*, 140 Tenn. 217, 226, 204 S. W. 296, 298, L. R. A. 1918 F. 293, 296 (1918).

<sup>16</sup> By a decided majority of the decisions an automobile is not an inherently dangerous instrument but may become dangerous in the hands of an incompetent. *Gardiner v. Solomon*, 200 Ala. 115, 75 So. 621 (1917); *Tyree v. Tudor*, 183 N. C. 340, 111 S. E. 714 (1922); *Elms v. Flick*, 100 Ohio St. 186, 126 N. E. 66 (1919); *Cohen v. Meador*, 119 Va. 429, 89 S. E. 876 (1916). Bicycles, matches, and air rifles have been similarly classified as potentially dangerous instruments. *Steinberg v. Cauchois*, 249 App. Div. 518, 293 N. Y. Supp. 147 (2d Dep't 1937) (bicycle); *Highsaw v. Creech*, 69 S. W. (2d) 249 (Tenn. Ct. of App. 1933) (air rifle); *Thibodeau v. Cheff*, 24 Ont. L. Rep. 214, 7 B. R. C. 8, Ann. Cas. 1912 A 582 (1912) (matches). Apparently only one jurisdiction classifies the automobile as an instrumentality dangerous in its operation and use, thereby making the owner strictly liable for its use. *Southern Cotton Oil Co. v. Anderson*, 80 Fla. 441, 86 So. 629 (1920).

<sup>17</sup> These are the arguments of expediency for recognizing the family purpose doctrine as a matter of "practical justice." See particularly *King v. Smythe*, 140 Tenn. 267, 204 S. W. 296, L. R. A. 1918 F. 293 (1918). See note 12, *supra*.

<sup>18</sup> *Trahan v. Smith*, 239 S. W. 345 (Tex. Civ. App. 1922); *cf. Harrington v. Hull*, 22 Del. 72, 63 Atl. 875 (1906); *Smith v. Jordan*, 211 Mass. 269, 97 N. E. 761 (1912). See Note (1930) *Col. L. Rev.* 563.

<sup>19</sup> *Beedy v. Reding*, 16 Me. 362 (1839).

<sup>20</sup> See *Normington v. Neely*, 70 P. (2d) 396, 399 (Idaho, 1937).

<sup>21</sup> 45 F. (2d) 641 (N. D. Idaho 1930).

<sup>22</sup> *Id.* at p. 644.

<sup>23</sup> 41 Kans. 56, 20 Pac. 497 (1889).

parent on the ground that he aided and abetted in the ducking despite the conditional nature of his approval; that the boys had acted upon his "suggestion" was held sufficient to render him a participant. A few courts have labelled as consent and participation a parent's failure to restrain his child from "continuing in a course of conduct . . . which is likely to produce injury to others";<sup>24</sup> although liability for failure to restrain a child is ordinarily approached in terms of negligence by those courts which recognize such a duty.<sup>25</sup> At least two of these decisions imply that knowledge of a vicious propensity or disposition may be presumed from the parental relation alone.<sup>26</sup> Thus those few courts which hold failure to restrain to be participation might well find participation in the instant case of *Bowen v. Mewborn*. For counselling a course of action goes much farther than failure to restrain it.

A third common basis for parental liability is negligence of the parent. It has been settled that it is negligence for a parent to give a *dangerous weapon* or an instrument dangerous *per se*<sup>27</sup> to a minor child, incompetent to handle it because of age, lunacy or intoxication; or, upon proof that the parent knew of the incompetence of the recipient and could therefore foresee plaintiff's injury, to give a *potentially dangerous* instrument to such a child.<sup>28</sup> And numerous decisions have imposed liability upon a parent for his failure to exercise an exceptionally high degree of care in keeping firearms and other dangerous instruments<sup>29</sup> where circumstances make it foreseeable that an infant child may secure

<sup>24</sup> *Johnson v. Glidden*, 11 S. D. 237, 240, 76 N. W. 933, 935 (1898).

<sup>25</sup> *Ryley v. Lafferty*, 45 F. (2d) 641 (N. D. Idaho 1930); *Davis v. Gavalos*, 37 Ga. App. 242, 139 S. E. 577 (1927); *Stewart v. Swartz*, 57 Ind. App. 249, 106 N. W. 719 (1914); *Kuchlik v. Feuer*, 239 App. Div. 338, 267 N. Y. Supp. 256 (1st Dep't 1933); *Norton v. Payne*, 154 Wash. 241, 281 Pac. 991 (1929).

<sup>26</sup> *Baker v. Holdeman*, 24 Mo. 219 (1857); cf. *Norton v. Payne*, 164 Wash. 241, 281 Pac. 991 (1929).

<sup>27</sup> *Dickens v. Barnham*, 69 Colo. 349, 194 Pac. 356 (1920) (rifle); *Parman v. Lemmon*, 119 Kan. 323, 244 Pac. 227, 44 A. L. R. 1500 (1926) (shotgun); *Meers v. McDowell*, 110 Ky. 926, 62 S. W. 1013 (1901) (giving liquor to minor son with rifle); *Taylor v. Sirl*, 120 Wis. 32, 97 N. W. 498 (1903). Same rule applied where dealer sells cartridges to minor in violation of statute. *Binford v. Johnston*, 82 Ind. 427, 42 Am. Rep. 508 (1882). *Contra*: *Clarine v. Addison*, 182 Minn. 310, 234 N. W. 295 (1931) (no liability in absence of evidence that it was unsafe for defendant to intrust child with a gun); *Herndobler v. Ripperm*, 75 Ore. 22, 146 Pac. 140 (1912); *Misch v. Montgomery*, 200 Atl. 1003 (R. I. 1938). See Notes (1921) 12 A. L. R. 812, (1926) 44 A. L. R. 1509.

<sup>28</sup> *Gardiner v. Solomon*, 200 Ala. 115, 75 So. 621, L. R. A. 1917 F 380 (1917); *Broadstreet v. Hall*, 168 Ind. 192, 80 N. E. 145, 10 L. R. A. (n. s.) 933 (1907) (velocipede); *Robertson v. Aldridge*, 185 N. C. 292, 116 S. E. 742 (1923); *Archibald v. Jewell*, 70 Pa. Super. Ct. 247 (1918) (air gun); *Hopkins v. Droppers*, 184 Wis. 400, 198 N. W. 738, 36 A. L. R. 1156 (1924); *Thibodeau v. Cheff*, 24 Ont. L. Rep. 211, 7 B. R. C. 8, Ann. Cas. 1912 A 582 (1911). HARPER, LAW OF TORT (1933) 622. See Note (1924) 36 A. L. R. 1164.

<sup>29</sup> *Dickens v. Barnham*, 69 Colo. 349, 194 Pac. 356, 12 A. L. R. 809 (1920); *Whitesides v. Wheeler*, 158 Ky. 121, 164 S. W. 335, 50 L. R. A. (n. s.) 1104 (1914); *Brittingham v. Stadiem*, 151 N. C. 299, 66 S. E. 128 (1909); *Salisbury v. Crudale*, 41 R. I. 33, 102 Atl. 731 (1918).

them and negligently inflict injury. But a few courts rule that in neither of the above situations would a parent be liable for injury willfully inflicted by the child,<sup>30</sup> there being a strong presumption that one cannot foresee the willful act of another. However, a parent is liable for the willful injuries inflicted by such an instrument intrusted to his child, when the parent might foresee such an act through his knowledge of a vicious propensity of the child,<sup>31</sup> or when the general demented and malignant disposition<sup>32</sup> of the child affords him notice. In all of these instances the parental liability is based on personal affirmative acts of negligence, just as if no parental relation existed—defendant's parenthood presumably affording no strengthening inferences of negligence.

A strong contingent of the courts now recognize in the parent an affirmative legal duty to "perform definite acts to control the child when . . . he should recognize that such control is necessary to prevent the child's injuring third persons."<sup>33</sup> Thus a parent has been held negligent in failing (1) to take from his child a potentially dangerous instrument from which injury to others can be reasonably foreseen;<sup>34</sup> (2) to restrain a child with a known vicious propensity from exercising it to the injury of the public;<sup>35</sup> (3) to interfere with a particular use of a not inherently dangerous instrument when such use threatens injury to others;<sup>36</sup> and (4) to interfere with a child's known habit or course of conduct which threatens to do damage.<sup>37</sup> And in exceptional cases it has

<sup>30</sup> *Halsey v. Hightower*, 44 Ga. App. 455, 161 S. E. 664 (1932) (long-bladed knife given to fifteen-year-old son); *Haggerty v. Powers*, 66 Cal. 368, 5 Pac. 622, 56 Am. Rep. 101 (1885) (suggests that parent is not liable unless agency or participation is alleged). *Contra*: *Sousa v. Irome*, 219 Mass. 273, 106 N. E. 998 (1914).

<sup>31</sup> *Gudziewski v. Stemplesky*, 263 Mass. 103, 160 N. E. 334 (1928) (propensity of child to shoot gun recklessly); *Johnson v. Glidden*, 11 S. D. 237, 76 N. W. 933 (1898); *Norton v. Payne*, 154 Wash. 241, 281 Pac. 991 (1929) (seven-year-old child's propensity to strike playmates with sticks); *Hoverson v. Noker*, 60 Wis. 511, 19 N. W. 382 (1884); *Thibodeau v. Cheff*, 24 Ont. L. Rep. 211, 7 B. R. C. 8, Ann. Cas. 1912 A 582 (1912) (giving matches to child known to have propensity to play with them recklessly).

<sup>32</sup> *Capps v. Carpenter*, 129 Kans. 462, 283 Pac. 655 (1929); *cf.* *Paul v. Hummel*, 43 Mo. 119, 97 Am. Dec. 381 (1868). See Note (1930) 78 U. of PA. L. REV. 1032.

<sup>33</sup> *Norton v. Payne*, 154 Wash. 241, 281 Pac. 991, 992 (1929). Compare RESTATEMENT, TORTS (1934) 858: "A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent (a) knows or has reason to know that he has the ability to control his child, and (b) knows or should know of the necessity and opportunity for exercising such control."

<sup>34</sup> *Gudziewski v. Stemplesky*, 263 Mass. 103, 160 N. E. 334 (1928); *Johnson v. Glidden*, 11 S. D. 237, 76 N. W. 933 (1898); *Hoverson v. Noker*, 60 Wis. 511, 19 N. W. 382 (1884). See Note (1929) 23 ILL. L. REV. 830.

<sup>35</sup> *Ryley v. Lafferty*, 45 F. (2d) 641 (N. D. Idaho 1930); *Kuchlik v. Feuer*, 239 App. Div. 338, 267 N. Y. Supp. 256 (1st Dep't 1933); *Norton v. Payne*, 154 Wash. 241, 281 Pac. 991 (1928). See Notes (1930) 30 COL. L. REV. 269, (1931) 17 CORN. L. Q. 178, (1930) 15 IOWA L. REV. 507, (1930) 28 MICH. L. REV. 627.

<sup>36</sup> *Stewart v. Swartz*, 57 Ind. App. 249, 106 N. E. 719 (1914) (parent knew that child had stretched rope swing across highway).

<sup>37</sup> *Davis v. Gavalos*, 37 Ga. App. 242, 139 S. E. 577 (1922).

been suggested that a parent might be under a duty to curb a child's vicious or demented disposition by which the public has in the past and may in the future be harmed.<sup>38</sup> Obviously each of these cases recognizes a duty peculiar to parenthood and as such represents a departure from the strict common law rule.

A few early decisions defined a parent's duty to restrain his child in terms of the broad doctrine that "he who does not prevent a wrong when he is able to do so ratifies it",<sup>39</sup> thereby placing upon the parent a duty to prevent those torts of his child which he could specifically foresee. Generally, however, the courts have refused to adopt such a rule, preferring to retain the common law definitions and develop the law of parental liability by expanding these definitions to meet the exigencies of individual cases.<sup>40</sup> But if failure to restrain a child is negligence, either by application of the broad rule or by the noted exceptions to the common law doctrine, recovery could have been allowed in each of the principal cases. For there is an obvious failure to restrain in *Staples v. Bruns*; and in *Bowen v. Mewborn* the parent's conduct was the active negligence of advising a child to commit an act from which injury could be foreseen.<sup>41</sup>

There is considerable authority for holding a parent liable for failure to restrain a child from committing criminal acts which constitute negligence *per se*.<sup>42</sup> Thus a parent is deemed negligent in permitting his child to drive an automobile or motorcycle in violation of the statutory age limit.<sup>43</sup> And *Davis v. Gavalos*<sup>44</sup> imposed liability for just such an omission as was the alleged cause of action in the instant case of *Staples v. Bruns*, permitting a child to ride a velocipede upon the sidewalks at

<sup>38</sup> *Paul v. Hummel*, 43 Mo. 119, 97 Am. Dec. 381 (1868) (parent not liable for son's assault with knife unless she knew of his "vicious disposition and habits"); *Cluthe v. Svendsen*, 9 Dec. Rep. 458 (Ohio 1885) (father not liable for assault of demented and dangerous son unless aware of his condition and knowingly permitting him to be at large and unwatched); *Salisbury v. Crudale*, 41 R. I. 33, 102 Atl. 731 (1918). See *Haunert v. Speier*, 214 Ky. 46, 281 S. W. 998, 999 (1926).

<sup>39</sup> *Beedy v. Reding*, 16 Me. 362 (1839); cf. *Dunks v. Grey*, 3 Fed. 862 (C. C. E. D. Pa. 1880) (parent cited for contempt for permitting son, manager in business for which defendant was salesman, to sell certain patented articles which defendant had been enjoined from selling).

<sup>40</sup> *Smith v. Jordan*, 211 Mass. 269, 97 N. E. 761 (1912); cf. *Elms v. Flick*, 100 Ohio St. 186, 126 N. E. 66 (1920). See especially note 10, *supra*.

<sup>41</sup> That participation of a parent in the tort of the child may constitute positive negligence is the theory of at least two cases. *Ryley v. Lafferty*, 43 F. (2d) 641 (N. D. Idaho 1930); *Johnson v. Glidden*, 11 S. D. 237, 76 N. W. 933 (1898). Criticized in Note (1931) 17 CORN. L. Q. 178, 179.

<sup>42</sup> *Paschall v. Sharp*, 110 So. 387 (Ala. 1926); *Eller v. Dent*, 203 N. C. 439, 166 S. E. 330 (1932); *Miller v. Semler*, 137 Ore. 610, 2 P. (2d) 233 (1931).

<sup>43</sup> *Hopkins v. Droppers*, 184 Wis. 400, 198 N. W. 738, 36 A. L. R. 1156 (1924).

<sup>44</sup> 37 Ga. App. 242, 139 S. E. 577 (1922). *Contra*: *Steinberg v. Cauchois*, 249 App. Div. 518, 293 N. Y. Supp. 147 (2d Dep't 1937) (strong dissent to effect that: "when a child uses an instrument having potentiality for harm to others when unlawfully used and such use is unrestrained by parents, who have knowledge of such use, the responsibility . . . should be borne by the parents . . .").

night in direct violation of a municipal ordinance. In *Bowen v. Mewborn* a criminal act was not merely unrestrained but counselled.

Thus under liberal expansions of well-known doctrines both of the principal cases might have been decided otherwise. It may be objected that in *Bowen v. Mewborn* the father did not counsel the particular crime committed. True, but his counsel could have been carried out only by the commission of some crime, such as fornication, adultery, or rape. Should not the father's liability extend to the crimes included within the scope of his perverted advice? Should he escape liability because he did not know which crime the son would select, nor the person whom he would offend?

The Anglo-American legal system, in withholding parental liability for torts of children, stands opposed to many other legal systems which impose liability<sup>45</sup> on the theory that ". . . paternal responsibility for torts is the consequence of paternal authority."<sup>46</sup> Neither extreme is desirable. Early cases in Louisiana evidence the injustice of holding a parent liable for the torts of his child regardless of his incapacity to prevent them.<sup>47</sup> And a strict application of the common law rule is manifestly more unjust to society than is the Louisiana rule to the parent, since it requires a class absolutely powerless to command, restrain, or correct a child to assume responsibility for its torts. A tempting solution is offered by the French Code which holds a parent liable for the torts of his child unless he "should prove that [he] could not prevent the act which gives rise to his liability".<sup>48</sup> For no injustice would be perpetrated by requiring a parent to prove that he has properly exercised his exclusive parental authority to restrain, correct, or advise his child against committing a tort which can be foreseen. But if adoption of the rule of the French Code is not likely by reason of the stubborn nature

<sup>45</sup> See Notes (1920) 14 ILL. L. REV. 648, (1925) 19 ILL. L. REV. 202.

<sup>46</sup> *Toca v. Rojas*, 152 La. 317, 325, 93 So. 108, 110 (1922).

<sup>47</sup> The Louisiana Revised Civil Code, Art. 2318, providing that "the father, or after his decease, the mother, are responsible for the damage occasioned by their minor or unemancipated children residing with them . . .", omits the restriction placed upon parental liability by the French Code (see note 48, *infra*). Early decisions in Louisiana ruled that this omission was intended "to make the liability of the parent absolute. . . ." *Johnson v. Butterworth*, 152 So. 166, 168 (La. App. 1934). But much injustice was perpetrated by this doctrine. *Mullins v. Blaise*, 37 La. Ann. 92, 44 La. 59 (1885); *Sutton v. Champayne*, 141 La. 469, 75 So. 209 (1917) ("It seems illogical and hard that a mother should be liable in damages for the consequences of the act of somebody else in intrusting a dangerous weapon to her inexperienced child out of her presence and without her knowledge.") And in *Johnson v. Butterworth*, 180 La. 586, 157 So. 121 (1934) (reversing *Johnson v. Butterworth*, 152 So. 166 (La. App. 1934)) the Louisiana Supreme Court by judicial construction ruled that a parent is only liable for the torts of his minor son when the parent is himself negligent. See Notes (1934) 19 CORN. L. Q. 643, (1932) 7 TULANE L. REV. 119. For comparable statutes in other jurisdictions see Notes (1891) 10 L. R. A. (n. s.) 944, (1931) 17 CORN. L. Q. 178, 179, n. 5.

<sup>48</sup> FRENCH CIV. CODE (Cachard's Tr. 1930) Art. 1384. See *Johnson v. Butterworth*, 180 La. 586, 157 So. 121, 123 (1934).

of our existing views, at least liberalization along the lines already marked out in other jurisdictions should go forward in North Carolina.

V. LAMAR GUDGER.

**Procedure—Federal Rules of Civil Procedure—Validity of Rule 35a—Physical and Mental Examination of Persons.**

The United States Supreme Court in a recent case<sup>1</sup> upheld rule 35a<sup>2</sup> of the New Federal Rules of Procedure which provides for physical and mental examination of a party whose condition is in controversy. The petitioner sued for personal injuries. Respondent denied the allegations of the complaint, and moved for an order requiring the petitioner to submit to a physical examination by a court-appointed physician to determine the nature and extent of her injuries. The court gave the order and when compliance was refused, committed her for contempt. Plaintiff contended that the court was without power to enter the order, since rule 35a was invalid as contrary to the provision of the Enabling Act<sup>3</sup> that "said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant." The circuit court of appeals<sup>4</sup> affirmed the conviction and on appeal it was *Held*: The contempt order was improper but the rule was valid. It was also stated that any of the provisions set out in rule 37<sup>5</sup> might have been used to enforce the order.

Petitioner admitted that the rule was procedural, for to have contended that it was substantive would have meant that the state rule<sup>6</sup> would have been applied.<sup>7</sup> But it was argued that by the prohibition against abridging substantive rights, congress intended "substantive" to mean "important" or "substantial" rights. The court rejected this argument saying that the test must be whether the rules really regulate procedure. It was pointed out that adoption of the suggested criterion would result in endless confusion.

The cases of *Union Pacific Railway v. Botsford*<sup>8</sup> and *Camden and*

<sup>1</sup> *Sibbach v. Wilson & Company*, 61 Sup. Ct. 422, 85 L. ed. Adv. Ops. 349 (1941).

<sup>2</sup> 35a of the Federal Rules of Civil Procedure (1938), "In an action in which the mental or physical condition of a party is in controversy, the court . . . may order him to submit to a physical or mental examination by a physician."

<sup>3</sup> 48 STAT. 1064 (1934), 28 U. S. C. A. 723b (1941).

<sup>4</sup> 108 F. (2d) 415 (C. C. A. 7th, 1939).

<sup>5</sup> Rule 37 (b) (2) (i), (ii), (iii) of the Federal Rules of Civil Procedure (1938).

<sup>6</sup> *South Bend v. Turner*, 156 Ind. 418, 60 N. E. 271 (1901); *Lake Erie & W. R. R. v. Griswold*, 72 Ind. App. 265, 125 N. E. 783 (1920).

<sup>7</sup> *Erie Railroad v. Tompkins*, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. ed. 1188 (1937).

<sup>8</sup> 141 U. S. 250, 11 Sup. Ct. 1000, 35 L. ed. 734 (1890). Action for injuries by concussion of the brain; order requiring the plaintiff to submit to an examination in a proper manner reversed although the defendant alleged that he had no other evidence of the plaintiff's condition. The plaintiff's person is to be maintained inviolate, and no inspection can be compelled.

*Suburban Railway v. Stetson*<sup>9</sup> decided the federal courts lacked inherent power to order physical examination of a party. Therefore, the problem in the instant case was whether the federal courts had been given this power by statute. There is no question but that a statute may grant such a power.<sup>10</sup> The question is, did the Enabling Act together with the rules promulgated thereunder grant such a power?

It is well settled that congress may delegate to the courts power to enact rules of procedure,<sup>11</sup> and that when such rules are thus enacted they have the same force and effect as statutes. Obviously, however, the rules enacted must fall within the scope of the authority granted.<sup>12</sup> The court in the present case traced the history of the rules and found that the rule was within the scope of the Enabling Act. Four justices dissented on the ground that the rule was not within this scope. They contended that the *Botsford* case should have been followed in the absence of an express statute by congress as the rule was too radical a departure from existing practice.<sup>13</sup>

Thus the federal courts have at last reached by this rule the same result that a majority of the state courts<sup>14</sup> have heretofore held to be an

<sup>9</sup> 177 U. S. 172, 20 Sup. Ct. 617, 44 L. ed. 721 (1899). *Botsford* case approved, but here the New Jersey law allowing compulsory examination was held applicable to a federal trial there. There was no state law in the *Botsford* case.

<sup>10</sup> *Ibid.*, and also see *McGovern v. Hope*, 63 N. J. L. 76, 42 Atl. 830 (Sup. Ct., 1899); *Lyon v. Manhattan Ry.*, 142 N. Y. 298, 32 N. E. 113, 25 L. R. A. 402 (1894).

<sup>11</sup> *Wayman v. Southard*, 10 Wheat. 1, 6 L. ed. 253 (U. S. 1825); *Beers v. Houghton*, 9 Pet. 329, 9 L. ed. 145 (U. S. 1835).

<sup>12</sup> *Barresueta v. Sword Steamship Line, Inc.*, 27 F. Supp. 935 (S. D. N. Y. 1939); *Oklahoma ex rel. Vassar v. Missouri-Kansas-Texas R. R.*, 29 F. Supp. 968 (W. D. Okla. 1939).

<sup>13</sup> This specific rule was attacked and defended before the committees of the two Houses. Hearings before the Committee on the Judiciary, H. Rep., 75th Cong., 3rd Sess., pp. 117, 141; Hearings before a Subcommittee of the Committee on the Judiciary, U. S. Sen., 75th Cong., 3rd Sess., pp. 36-37, 39, 51.

<sup>14</sup> *Alabama G. S. Ry. v. Hill*, 90 Ala. 71, 8 So. 90 (1880); *Sibley v. Smith*, 46 Ark. 275 (1885); *Johnston v. Southern Pacific Co.*, 150 Cal. 535, 89 Pac. 348 (1907); *Western Glass Mfg. Co. v. Schoeninger*, 42 Colo. 357, 94 Pac. 342 (1908); *Cook v. Miller*, 103 Conn. 267, 130 Atl. 571 (1925); *Richmond & D. R. R. v. Childress*, 82 Ga. 719, 9 S. E. 602 (1889); *South Bend v. Turner*, 156 Ind. 418, 60 N. E. 271 (1901); *Schroeder v. Chicago, R. I. & Pac. R. R.*, 47 Iowa 375 (1877) (leading and often quoted case); *Atchison, T. & S. F. R. R. v. Thul*, 29 Kan. 466 (1883); *Belt Electric Line Co. v. Allen*, 102 Ky. 551, 44 S. W. 89 (1898); *United Ry. & Elec. Co. v. Cloman*, 107 Md. 681, 69 Atl. 379 (1908); *Graves v. Battle Creek*, 95 Mich. 266, 54 N. W. 757 (1893); *Wanek v. Winona*, 78 Minn. 98, 80 N. W. 851 (1899); *Shepard v. Missouri Pac. Ry.*, 85 Mo. 629 (1885); *State ex rel. Parmenter v. Troup*, 98 Neb. 333, 152 N. W. 748 (1915); *Flythe v. Eastern Carolina Coach Co.*, 195 N. C. 777, 143 S. E. 865 (1928); *Brown v. Chicago, M. & St. P. Ry.*, 12 N. D. 61, 95 N. W. 153 (1903); *M. & M. Turnpike Co. v. Bailey*, 37 Ohio St. 104 (1881); *Carnine v. Tibbets*, 158 Ore. 51, 74 P. (2d) 974 (1937); *Cohen v. Phila. Rapid Tr. Co.*, 250 Pa. 15, 95 Atl. 315 (1915); *Williams v. Chatanooga Iron Works*, 131 Tenn. 683, 176 S. W. 1031 (1915); *Lane v. Spokane Falls & N. Ry.*, 21 Wash. 119, 57 Pac. 367 (1899); *White v. Milwaukee City Ry.*, 61 Wis. 536, 21 N. W. 524 (1884). See *Murphy v. Southern Pac. Co.*, 31 Nev. 120, 142, 101 Pac. 322, 331 (1926); *Tugman v. R. & D. R. Cotton Mills*, 144 Va. 473, 495, 132 S. E. 179, 185 (1926). For further cases and extended discussion see WIGMORE, EVIDENCE (3rd ed. 1940) §2220, note 13.

inherent power of the court. Generally four reasons have been assigned for the majority view: (1) A party to an action should have the right to demand that all evidence within the control of the court be produced, where it is essential to the attainment of exact justice, and the needs of justice should outweigh any notions of delicacy which might arise in this situation.<sup>15</sup> (2) A plaintiff who brings an action impliedly agrees to disclose any information necessary for the accomplishment of complete justice.<sup>16</sup> (3) Since the plaintiff is privileged to exhibit his injuries to the court or jury for the purpose of showing their nature and extent, the court ought to have the power for the same purpose to require him to do so.<sup>17</sup> (4) Since a court has power in annulment suits, where impotence is alleged, to order an examination of a party by a doctor appointed by the court, the court should have the same power in personal injury cases, in order to protect the defendant against possible fraud.<sup>18</sup> This last reason has had long standing in the English courts.<sup>19</sup>

The minority view seems to have resulted from a lack of precedent in common law civil actions and failure to recognize a need for this procedure in spite of the increasing popularity of the personal injury action. Considerations of personal liberty have been regarded as more important than the good to be accomplished from a court made rule; and further, these courts feel that any great need will be made manifest by appropriate legislative action.<sup>20</sup> Indeed, eight states have expressly conferred the power by legislation where it has been denied by the court.<sup>21</sup>

<sup>15</sup> *South Bend v. Turner*, 156 Ind. 418, 60 N. E. 271 (1901); *Wanek v. Winona*, 78 Minn. 98, 80 N. W. 851 (1898); *Schroeder v. Chicago, R. I. & Pac. Ry.*, 47 Iowa 375 (1877).

<sup>16</sup> *Richmond & D. R. R. v. Childress*, 82 Ga. 719, 9 S. E. 602 (1889); *Graves v. Battle Creek*, 95 Mich. 266, 54 N. W. 757 (1893); *White v. Milwaukee City Ry.*, 61 Wis. 536, 21 N. W. 524 (1884).

<sup>17</sup> *Schroeder v. Chicago, R. I. & Pac. R. R.*, 47 Iowa 375 (1877); see also *Brewer, J.*, dissenting in *Union Pacific Ry. v. Botsford*, 141 U. S. 250, 259, 11 Sup. Ct. 1000, 1004, 35 L. ed. 734, 740 (1890).

<sup>18</sup> *Alabama G. S. Ry. v. Hill*, 90 Ala. 71, 8 So. 90 (1890); *Cook v. Miller*, 103 Conn. 267, 130 Atl. 571 (1925); *Wanek v. Winona*, 78 Minn. 98, 80 N. W. 851 (1899).

<sup>19</sup> WIGMORE, EVIDENCE (3rd ed. 1940) §2220 (6).

<sup>20</sup> *Richardson v. Nelson*, 221 Ill. 254, 77 N. E. 583 (1906); *Stack v. New York, New Haven and Hartford R. R.*, 177 Mass. 155, 58 N. E. 686 (1900); *Yazoo & M. V. R. R. v. Robinson*, 107 Miss. 192, 65 So. 241 (1914); *Atchison, T. & S. F. R. R. v. Melson*, 40 Okla. 1, 134 Pac. 120 (1913); *Easler v. R. R.*, 60 S. C. 117, 38 S. E. 258 (1901); *Austin & N. W. R. R. v. Cluck*, (Tex. Civ. App.) 73 S. W. 569 (1903). See *Kennedy v. New Orleans R. & L. R.* 142 La. 879, 883, 77 So. 777, 778 (1918).

Wigmore severely criticises the attitude of the minority by asking this question: "Why is it that courts have to be perpetually pricked into progress by jabs of legislative operations on judicial procedure, instead of spontaneously making their own improvements in their own constitutional fields?" He also extends this criticism to restrictive interpretations of power and of legislative sanction given by some of the majority courts to this problem. WIGMORE, EVIDENCE (3rd ed. 1940) §2220 (6).

<sup>21</sup> Arizona, Delaware, Florida, Montana, New Jersey, New York, Rhode Island



The language of the federal rule is broad, but there is no indication in the present case as to what limits the court may place on it in future construction. It has been decided by a lower federal court<sup>22</sup> that a motion in a libel suit for any order to require the plaintiff to be examined should be overruled. The action was based on statements that the plaintiff was suffering from various physical and mental conditions. Truth was alleged as a defense. The court said the physical and mental conditions in question were not immediately in controversy; they were incidental and collateral. Historically, it was pointed out, this type of law has dealt with personal injury cases. This holding is questionable. Doesn't the issue of a statement relating to one's condition put that condition in controversy?

Another question recently decided by the circuit court of appeals<sup>23</sup> is whether, under this rule, a mother and child may be compelled to submit to a blood grouping test in a suit in which paternity is an issue. Three things have to be found before the rule is complied with in this instance. (1) That the physical condition of the mother is "in controversy". The court pointed out that the defendant offered his denial of paternity in support of the demand for blood tests and the plaintiff asserted his paternity and thereby denied by necessary implication, that the blood groupings which were in question were or might be inconsistent with it. That conflict brought the groupings "in controversy". (2) That the blood test is properly within the term "physical condition". The court answered this by saying that the characteristics of one's blood is as much a part of "physical condition" as congenital blindness, or any other condition existing from birth. (3) That the child is a party to the action. Although the child is not a party in form it certainly is one in substance. The interests of mother and child do not conflict but rather merge in a common interest. Provision is made in the rules for suit by the child and, further, said the court, rule 17 (a)<sup>24</sup> provides "a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought." Thus it would seem that a blood test in this type of case should come within the rule. Blood tests have been recognized sufficiently in scientific circles to be of great benefit in the courts when they are properly applied.<sup>25</sup>

and South Dakota. Washington also has a statute but the court has reached the same result prior to its enactment.

<sup>22</sup> *Wadlow v. Humberd*, 27 F. Supp. 210 (W. D. Mo. 1939), noted in (1938) 34 ILL. L. REV. 103.

<sup>23</sup> *Beach v. Beach*, 114 F. (2d) 479, noted in (1940) 29 GEO. L. J. 114.

<sup>24</sup> Rule 17 (a) of the Federal Rules of Civil Procedure (1938).

<sup>25</sup> WIGMORE, EVIDENCE (3rd ed. 1940) §§165a, b, 2220; Britt, *Blood Grouping Tests and the Law: The Problem of "Cultural Lag"* (1937) 21 MINN. L. REV. 836.

State statutes, with one notable exception,<sup>26</sup> and decisions are confined to personal injury actions. However, within the confines of the personal injury action the state courts have been liberal in their orders as to the scope of the examinations. The more recent cases generally hold that a reasonable examination includes a physical examination, X-rays,<sup>27</sup> blood test<sup>28</sup> and a test of the urine, feces, or sputum.<sup>29</sup> If the examination may imperil the plaintiff's health, cause serious pain, or require an anaesthetic, the court may refuse to order it.<sup>30</sup> There are at present no decisions on this element of the problem under the federal rule but it is to be hoped that the federal courts will adopt the liberal attitude which the language of the rule warrants.

A unique feature of the federal rule, not found in the state decisions or statutes, is the provision for mutuality of disclosure. This is secured by the requirement that if the party examined requests and obtains the physician's report of the examination ordered by the court, he must, on request, give the other party a report of any other examination which has been or may be made relevant to the same mental or physical condition.<sup>31</sup> Also, the rule provides that by requesting and obtaining the physician's report the party waives any privilege he may have regarding the testimony of any other person who has examined or may examine him.<sup>32</sup>

Federal rule 37 makes adequate provision for enforcement of rule 35. Where a party refuses to obey an order for an examination the court may under rule 37 (b) (2) (i) "Issue an order that the examination . . . be taken to be established . . . in accordance with the claim of the party obtaining the order," or (ii) "Issue an order . . . prohibiting the disobedient party from introducing evidence of physical or mental condition," or (iii) "Issue an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action, or rendering judgment by default against the disobedient party."

The federal courts are expressly prohibited from issuing a contempt order in this instance.<sup>33</sup> This is permitted in some of the state courts

<sup>26</sup> South Dakota Code 1939, 36.0602-36.0604. This statute is practically identical with the Federal Rule.

<sup>27</sup> *Gimenez v. Great A. & P. Tea Co.*, 236 App. Div. 804, 259 N. Y. Supp. 597 (2d Dep't 1932). See *Depfer v. Walker*, 123 Fla. 862, 866, 169 So. 660, 662 (1935).

<sup>28</sup> *Hoyt v. Brewster, Gordon & Co.*, 199 App. Div. 68, 191 N. Y. Supp. 176 (4th Dep't 1921), noted in (1921) 31 YALE L. J. 664.

<sup>29</sup> See *Depfer v. Walker*, 123 Fla. 862, 866, 169 So. 660, 662 (1935); *Cleveland St. Ry. v. Huddleston*, 151 Ind. 540, 545, 46 N. E. 678, 680 (1897).

<sup>30</sup> *Stearns Coal & Lumber Co. v. Williams*, 177 Ky. 698, 198 S. W. 54 (1917); *Grill v. Mathieson Alkali Works*, 243 App. Div. 853, 278 N. Y. Supp. 775 (4th Dep't 1935); *Andrus v. Fomfara*, 3 N. J. Misc. 261, 127 Atl. 788 (Sup. Ct., 1925).

<sup>31</sup> Rule 35 (b) (1) of the Federal Rules of Civil Procedure (1938).

<sup>32</sup> Rule 35 (b) (2) of the Federal Rules of Civil Procedure (1938).

<sup>33</sup> Rule 37 (b) (2) (iv) of the Federal Rules of Civil Procedure (1938).

on the theory that this is the normal manner of enforcing an order of the court.<sup>34</sup> However, by the procedure most widely adopted the court will abate the proceeding until the examination is made, and if the plaintiff refuses to submit, will either dismiss the action or enter a judgment *non pros*.<sup>35</sup>

There are two cases in North Carolina on the point of physical examination. The first<sup>36</sup> held that where the plaintiff exhibited an injury to the jury that defendant had the right to have the injury examined by an expert in the jury's presence and the extent of examination was in the discretion of the trial judge. This situation is to be distinguished from the present problem. In this instance exhibition to the jury of an injury by the plaintiff constituted a waiver and as a matter of right the defendant may have a physician appointed to make an examination in the jury's presence. In the second case<sup>37</sup> defendant moved, after the jury had been impanelled, for an order requiring plaintiff to submit to an X-ray examination by an expert appointed by the court. The motion was refused and on appeal this was upheld. However, the court was careful to point out that power to compel such an examination is an inherent power of the court which should be left to the discretion of the trial judge. There was found to be no abuse of discretion in this instance because the motion was not seasonably made. The motion should have been made before the trial term.

The prevailing practice in this state has been to allow a motion for physical examination where it is seasonably made. Frequently attorneys agree, thus making a motion unnecessary. Defendant's attorney often has a powerful impellent where he refuses to consider settlement of a case until an examination is had. No cases appear in the North Carolina reports of an order for physical or mental examination in other than personal injury cases. There would seem to be a need for a statute in this state if the procedure is to be extended to other types of cases.

ROBERT CRAIG MCINNES.

### Torts—Res Ipsa Loquitur—Malpractice—Burden of Proof

Plaintiff recovered judgment for injuries allegedly sustained from negligence of defendant surgeons in leaving a gauze sponge buried in her hip. Defendants appealed contending that their motion for nonsuit was improperly refused, because (1) *res ipsa loquitur* has no application to the facts of the case, and (2) even if applicable, the presumption

<sup>34</sup> See *Schroeder v. Chicago, R. I. & P. R. R.*, 47 Iowa 375, 381 (1877).

<sup>35</sup> *Brown v. Hutzler Bros. Co.*, 152 Md. 39, 136 Atl. 30 (1927); *Williams v. Chattanooga Iron Works*, 131 Tenn. 683, 176 S. W. 1031 (1915); *Lane v. Spokane Falls & N. Ry.*, 21 Wash. 119, 57 Pac. 367 (1899).

<sup>36</sup> *Fleming v. Holman*, 190 N. C. 449, 130 S. E. 171 (1925).

<sup>37</sup> *Flythe v. Eastern Carolina Coach Co.*, 195 N. C. 777, 143 S. E. 865 (1928).

of negligence raised by it is fully met when upon trial an adequate explanation is given with regard to the matter and the facts made fully known (defendants having introduced evidence that great care had been exercised in the usual and customary manner to prevent leaving any sponges in the wound.) *Held*, affirmed; motion for nonsuit properly denied.<sup>1</sup>

The application of *res ipsa loquitur*<sup>2</sup> to malpractice cases is limited. It may not be invoked merely because a patient is not cured or aggravation follows treatment, for common experience teaches that cure is never certain and aggravation is possible even though proper care is used.<sup>3</sup> A doctor is neither a warrantor of cures nor an insurer.<sup>4</sup> Where reasonable doubt exists as to the proper treatment to pursue, no inference of negligence is ordinarily raised from honest mistakes or errors in judgment.<sup>5</sup> Put broadly, a physician or surgeon is held to "the requisite degree of learning, skill and ability necessary to the practice of his profession, and which others similarly situated ordinarily possess," and must apply those faculties with ordinary care and diligence in every case.<sup>6</sup> To recover for default in these respects, specific acts of negligence must be established.<sup>7</sup> Liability may attach even for errors in judgment if so gross as to contravene the requisite norm of skill and diligence.<sup>8</sup>

However, as said in the principal decision, ". . . there should be no reasonable argument against the availability of the doctrine [*res ipsa*] in medical and surgical cases involving negligence, just as in other negligence cases, where the thing which caused the injury does not

<sup>1</sup> Mitchell v. Saunders, 219 N. C. 178, 13 S. E. (2d) 242 (1941).

<sup>2</sup> The doctrine asserts that "Whenever a thing which produced an injury is shown to have been under the control and management of the defendant, and the occurrence is such as in the ordinary course of events does not happen if due care has been exercised, the fact of injury itself will be deemed to afford sufficient evidence to support a recovery in the absence of any explanation by the defendant tending to show that the injury was not due to his want of care." White v. Hines, 182 N. C. 275, 287, 109 S. E. 31, 37 (1921); Harris v. Mangum, 183 N. C. 235, 238, 111 S. E. 177, 178 (1922); Ridge v. R. R., 167 N. C. 510, 518, 83 S. E. 762, 766 (1914). The maxim literally means, "The thing speaks for itself." The injured party is deemed in no position to explain the cause while the party charged, having more favorable opportunity, is in a position to explain and show himself free from negligence if such be the case. If the plaintiff has equal knowledge or superior means of information, the doctrine does not apply. Note (1928) 53 A. L. R. 1494, 1495.

<sup>3</sup> Note (1930) 26 ILL. L. REV. 350.

<sup>4</sup> Pendergraft v. Royster, 203 N. C. 384, 166 S. E. 285 (1932); Davis v. Pittman, 212 N. C. 680, 194 S. E. 97 (1937).

<sup>5</sup> Brewer v. Ring, 177 N. C. 476, 99 S. E. 358 (1919); Thornburg v. Long, 178 N. C. 589, 101 S. E. 99 (1919).

<sup>6</sup> Mullinax v. Hord, 174 N. C. 607, 611, 94 S. E. 426, 428 (1917); Nash v. Royster, 189 N. C. 408, 416, 127 S. E. 356, 360 (1925).

<sup>7</sup> Ferguson v. Glenn, 201 N. C. 128, 159 S. E. 5 (1931); Michem v. James, 213 N. C. 673, 197 S. E. 127 (1938).

<sup>8</sup> Nash v. Royster, 189 N. C. 408, 127 S. E. 356 (1925).

happen in the ordinary course of things, where proper care is exercised."<sup>9</sup> In the great majority of states, the doctrine is commonly applied to situations where a surgeon leaves in the body of his patient a foreign substance that causes injury or damage.<sup>10</sup> Previously the North Carolina Court has applied *res ipsa loquitur* where metal probes were left in the pleural cavity of a patient,<sup>11</sup> and where glass was passed from patient's womb some time after operation thereon.<sup>12</sup> These precedents furnish clear support for the principal decision.

Recently, the North Carolina Court stated that *res ipsa* might be applied in any case where the result reached was "grotesquely contrary to all human experience."<sup>13</sup> The potentialities of this formula are unpredictable, yet no wide extension seems presaged. *Res ipsa loquitur* will not be invoked: "(1) Where more than one inference can be drawn from the evidence as to the cause of the injury;<sup>14</sup> (2) where the existence of negligent default is not the more reasonable probability, and where the proof of the occurrence, without more, leaves the matter resting only in conjecture; (3) where the injury results from accident as defined and contemplated by law."<sup>15</sup>

Although the plaintiff need show no actual negligence, he must offer a minimum of circumstantial evidence, sufficient to convince the

<sup>9</sup> Mitchell v. Saunders, 219 N. C. 178, 182, 13 S. E. (2d) 242, 245 (1941).

<sup>10</sup> Note (1930) 65 A. L. R. 1023. For fact situations in other jurisdictions, see Notes (1940) 28 Geo. L. J. 708, (1931) 26 Ill. L. Rev. 350, (1929) 3 So. Calif. L. Rev. 131, (1930) 64 U. S. L. Rev. 608, (1928) 14 Va. L. Rev. 490.

<sup>11</sup> Blaine v. Lyle, 213 N. C. 529, 196 S. E. 833 (1938); cf. Smith v. McClung, 201 N. C. 648, 161 S. E. 91 (1931).

<sup>12</sup> Pendergraft v. Royster, 203 N. C. 384, 166 S. E. 285 (1932).

<sup>13</sup> Covington v. James, 214 N. C. 71, 197 S. E. 701 (1938) (where patient's leg, after being set, was allowed to abscess, swell, and burst and then to twist in such a manner that it became practically useless).

<sup>14</sup> Taken literally this statement that if the situation presents more than one inference the doctrine is inapplicable, seems directly contradicted by the fact that our courts hold that the doctrine when applicable presents a two inference situation to the jury. (See quotation from *Womble v. Grocery Co.*, p. 00.) However, this seeming conflict may be reconcilable if we assume that the court means to permit only one inference as to the actual physical cause of the injury, while two inferences are permissible to the jury, not as to the cause of the injury, but as to the negligence of the defendant (i.e. either he was or he was not negligent). (For examples of cases wherein more than one inference could be drawn as to the physical cause of the injury, see note 15, *infra*.)

<sup>15</sup> Smith v. McClung, 201 N. C. 648, 161 S. E. 91 (1931), citing Springs v. Doll, 197 N. C. 240, 148 S. E. 251 (1929). Possibly illustrative examples are: (1) Lippard v. Johnson, 215 N. C. 384, 1 S. E. (2d) 889 (1939) (since allergy and the varying conditions of human systems make the reaction of a particular person to a specific drug in large measure unpredictable, *res ipsa loquitur* did not apply to raising of blister and black tissue after injection of novocain for local anesthetic.) (2) McLeod v. Hicks, 203 N. C. 130, 164 S. E. 617 (1932) (*res ipsa* improper where patient lost his eye through deterioration some three years after an incision for the removal of a cataract made at the proper place and in the proper manner, there being evidence that disease pre-existed the operation and caused the loss of the eye.) (3) Smith v. McClung, 201 N. C. 648, 161 S. E. 91 (1931) (held not a *res ipsa* situation where novocain needle in hands of dentist broke off in the patient's gum).

judge that the jury is entitled to consider whether the defendant has acted as a reasonably prudent man. Assuming *res ipsa* applicable, there arises the controverted problem of its weight before the jury. Authority divides in three directions: (1) an inference of negligence, so that the jury may, but are not required to, find that the defendant was negligent; (2) a rebuttable presumption of law of negligence so that the jury is required to find for the plaintiff in the absence of any explanation, thereby shifting to the defendant the burden of going forward with the evidence; (3) a burden of proof, in the strictest sense, placed upon the defendant to convince the jury that he was free from negligence.<sup>16</sup>

It is not unusual to find *res ipsa* given each of these three effects within a single jurisdiction, without any adequate analysis of the problem involved. North Carolina, however, has steadfastly clung to the first view which, although giving the doctrine the least effect, is considered by the majority of the courts to be the most reasonable solution of the problem.<sup>17</sup> Thus, in *Womble v. Grocery Co.*,<sup>18</sup> it was said that "*res ipsa loquitur* . . . carries the question of negligence to the jury, not relieving the plaintiff of the burden of proof, and not . . . raising any presumption in his favor, but simply entitling the jury, in view of all the circumstances and conditions, as shown by the plaintiff's evidence, to infer negligence. . . ." Again, in *White v. Hines*:<sup>19</sup> "In some of our decisions the expressions *res ipsa loquitur*, *prima facie* evidence, *prima facie* case, and presumption of negligence have been used as practically synonymous. As thus used, each expression signifies nothing more than evidence to be considered by the jury." After the plaintiff makes out such a *prima facie* case, the burden of going forward with the evidence is said to shift to the defendant, but only in the sense that his practical chances of winning lie in such action rather than in inertly risking an adverse verdict, and not that any literal burden of proof is shifted to him.<sup>20</sup> Viewed in this light, the principal decision seems but an affirmation of principles already laid down.<sup>21</sup>

<sup>16</sup> Heckel and Harper, *Effect of the Doctrine of Res Ipsa Loquitur* (1928) 22 ILL. L. REV. 724, 730 (containing a review of states applying the different views); HARPER, TORTS (1933) §77. For additional citations of jurisdictions applying each type of effect, see 9 WIGMORE, EVIDENCE (3rd ed. 1940) §2509, n. 2; Carpenter, *The Doctrine of Res Ipsa Loquitur in California* (1937) 10 SO. CALIF. L. REV. 166, 171; Notes (1932) 12 CALIF. L. REV. 138, (1938) 3 MO. L. REV. 173, (1931) 80 U. OF PA. L. REV. 311, (1928) 53 A. L. R. 1494.

<sup>17</sup> The United States Supreme Court, in *Sweeney v. Erving*, 228 U. S. 233, 33 Sup. Ct. 416, 57 L. ed. 815 (1912) adopted this view and specifically approved the North Carolina cases. See Note (1928) 53 A. L. R. 1494.

<sup>18</sup> 135 N. C. 474, 485, 47 S. E. 493, 497 (1904).

<sup>19</sup> 182 N. C. 275, 288, 109 S. E. 31, 38 (1921).

<sup>20</sup> *Harris v. Mangum*, 183 N. C. 235, 111 S. E. 177 (1922).

<sup>21</sup> For additional citation of authority in this state, see Note (1928) 53 A. L. R. 1494, 1511.

It is notable, however, that three justices only concurred in the majority opinion, not being in accord with all that was said as to the presumptive effect of the doctrine.<sup>22</sup> Yet their citation of authority apparently bears out the majority opinion, with the exception of a suggestion that the defendant might explain away the plaintiff's *prima facie* case by evidence that the injury was not due to his want of care.<sup>23</sup> Thus, the concurring opinion intimates that the majority attribute too much weight to *res ipsa loquitur*, and is perhaps attempting to leave room in the future, should a proper occasion arise, to nonsuit the plaintiff. True, the general rule in North Carolina is that on a motion for nonsuit the evidence of the defendant, unless favorable to the plaintiff, is not to be taken into consideration, except that evidence not in conflict with the plaintiff's testimony may be used to explain or amplify that which has been offered by the plaintiff.<sup>24</sup> However, there are reasonable grounds for urging that if a case should arise in which the defendant does not contradict the plaintiff's evidence, but by unimpeached testimony explains away the basis of his *prima facie* case of *res ipsa loquitur*, a nonsuit might be granted. Some authorities so hold.<sup>25</sup>

Nevertheless, the majority view in the instant case probably expresses the weight of authority. "The credibility of the explanation and its sufficiency were questions for the jury and the *prima facie* case of the plaintiff is not necessarily overthrown by uncontradicted evidence that the appliances were constructed and operated in a proper manner."<sup>26</sup>

<sup>22</sup> Mitchell v. Saunders, 219 N. C. 178, 184, 13 S. E. (2d) 242, 246 (1941).

<sup>23</sup> 20 AM. JUR. 215; 20 R. C. L. 187.

<sup>24</sup> Funeral Home v. Ins. Co., 216 N. C. 562, 5 S. E. (2d) 820 (1939), and cases cited.

<sup>25</sup> So, in Stott v. Power Co., 47 Cal. App. 242, 190 Pac. 478, 479 (1920), it was said in reversing a refusal of nonsuit "In cases where the bare circumstances of an occurrence as to the cause of which negligence is charged are shown, if a defendant by uncontradicted evidence clearly shows that he has used the degree of care required of him in the circumstances, the plaintiff must fail of recovery." In Mattox v. Woolworth Co., 8 Cal. App. (2d) 489, 47 Pac. (2d) 805 (1935), it was said that the trial court might direct a verdict if the occurrence is satisfactorily explained so as to show lack of negligence on the part of defendant. In Ryder v. Kinsey, 62 Minn. 85, 64 N. W. 94 (1895), the falling of a wall, injuring plaintiff, was said to raise a *prima facie* presumption, in the absence of explanatory circumstances. Yet the court said that where such explanatory circumstances are given in evidence, and the cause of the fall of the building is established, and there is nothing in the evidence tending to connect such cause with the owner's negligence, the burden rests on the party asserting such negligence to establish lack of ordinary care. See also Lawson v. Electric Co., 204 Ala. 318, 85 So. 257 (1920); and Highland v. Ins. Co., 171 Wash. 34, 17 Pac. (2d) 631 (1932).

<sup>26</sup> Warren v. Tel. Co., 196 Mo. App. 549, 556, 196 S. W. 1030, 1033 (1917). In Stewart v. Carpet Co., 138 N. C. 60, 67, 50 S. E. 562, 565 (1905), it was said that "The proof in this case does not disclose any distinct act of negligence on the part of defendant, nor does it show any specific defect in the elevator [which fell]. . . . But the evidence must be submitted to the jury, because the rule of *res ipsa loquitur* gives the plaintiff the advantage of a footing in the case or of a basis for recovery and calls for proof from the defendant." See also Kohner v. Traction Co.,

In view of the relative disposition of authority and the apparently insufficient explanation<sup>27</sup> offered by the defendant, the disposal of the instant case may be accepted as correct. However, the concurring opinion is commendable in keeping alive the suggestion made in *Turner v. Power Co.*,<sup>28</sup> that although the application of *res ipsa loquitur* is not displaced by testimony which, if accepted by the jury, would exonerate the defendant since the credibility of the evidence is for the jury, still "There may be cases where the explanation offered . . . is so full and satisfactory that a court would be justified in charging the jury, 'If they believe the evidence, the defendants are entitled to their verdict.'"<sup>29</sup> Though there is some likelihood that the concurring justices might in an appropriate case desire to go even further and accept the viewpoint of the minority, taking the credibility as well as the weight of the evidence away from the jury, and directing a verdict for defendant.<sup>30</sup>

HARVEY A. JONAS, JR.

### **Trial—Courts—Evidence—Trial Judge's Destruction of Stenographer's Notes.**

At the April 14th (1941) term of the Superior Court of Mecklenburg County, plaintiff contractor entered suit against the Carolinas branch of the Associated General Contractors of America and eleven individual contractors for damages occasioned by his expulsion from

22 App. D. C. 181, 189, 62 L. R. A. 875, 877 (1903), where it is said: "Unless . . . we are to adopt the theory that the plaintiff's *prima facie* case only lasts until the defendant has offered some explanation, and that such explanation, whether true or false, destroys the presumption of negligence raised by the plaintiff's proof, and casts upon the plaintiff the necessity of proving by additional testimony in rebuttal that, notwithstanding the explanation, there was in fact negligence . . . there is no escape from the conclusion that the case must be submitted to a jury. But we find no warrant in reason or in adjudicated cases for such a theory. . . . It does not follow that, because an explanation is sufficient in law, therefore it is true; nor does it follow that, because it is true, it is sufficient to exonerate the defendant. The explanation may be true as far as it goes, and yet it may not be sufficient to overcome the presumption of negligence raised from the circumstances of the accident." To the same effect, the court, in *Paducah Traction Co. v. Baker*, 130 Ky. 360, 113 S. W. 449, 453 (1908), said "Nor is the fact that the defendant, in cases of this character, may introduce direct evidence conducing to establish that there was no negligence . . . sufficient to warrant the court in taking the case from the jury, as the jury might infer, notwithstanding this evidence, that there was negligence."

<sup>27</sup> Since by the general rule it is not sufficient for the physician or surgeon to show merely that he acted according to the usual and ordinarily approved methods. *Pendergraft v. Royster*, 203 N. C. 384, 394, 166 S. E. 285, 290 (1932).  
<sup>28</sup> 154 N. C. 131, 69 S. E. 767 (1910).      <sup>29</sup> *Id.* at 139, 69 S. E. at 770.

<sup>30</sup> Of course, under no circumstances would the North Carolina court direct a verdict for the plaintiff, since he carries the burden of proof under the doctrine of *res ipsa loquitur*. Our court has established an absolute rule that a verdict may never be directed in favor of the party bearing the burden of proof, since the judge is forbidden to comment on the weight of the evidence. *McIntosh*, NORTH CAROLINA PRACTICE AND PROCEDURE (1929) §574.



the association and certain alleged activities of individuals which impaired his business. Defendants set up a counterclaim for sums allegedly misappropriated by plaintiff from the association. At the close of plaintiff's evidence, defendants' motion for nonsuit was allowed; and in the judgment as finally signed and consented to, there was incorporated an agreement by the parties not to institute any further suit against one another on account of any matters set forth in the complaint or counterclaim.

Apparently feeling that appeal and further suit were effectually precluded by this judgment, the presiding judge requested that all the stenotype notes on the evidence given at trial be turned over to him to be destroyed and that no transcript of them be made. His reason for so doing appears from his statement reportedly made at the time: "I want all these men to patch up their differences, go on about their work peacefully, forget about all this stuff and not continue to argue and antagonize about it in the future."<sup>1</sup>

Assuming that the stenographer's notes at this stage of trial are at least an inchoate part of the record,<sup>2</sup> some measure of control over them would seem to be sanctioned by those cases which hold that the judge has an inherent power of control over the record—which power must be exercised with discretion.<sup>3</sup> In those cases, however, none of which have gone so far as to say that the judge may summarily destroy the entire minutes of trial, the question arises where there is the possibility of an appeal or perhaps a further suit by the original parties. No case has been found which directly defines the court's power over the stenographer's notes where further litigation between the parties is precluded. For purposes of the particular litigation, they are apparently no longer useful, although in some subsequent action they might become important in determining what had there been decided.

These notes may become pertinent, however, where the evidence suggests the propriety of an investigation of a public nature or a possible prosecution for perjury. The testimony in the present case, for example, strongly implied the prevalence of certain lobbying and contract-

<sup>1</sup> *Loftis v. Carolinas Branch of Assoc. Gen. Contractors of America et al.*, News and Observer (Raleigh, N. C.), April 26, 1941, p. 1.

<sup>2</sup> See generally *Cressler v. Asheville*, 138 N. C. 482, 51 S. E. 53 (1905).

<sup>3</sup> See, for example, *Gow v. Dubuque County*, 213 Iowa 92, 94, 238 N. W. 578, 579 (1931) ("the records of the trial court are peculiarly within the control of that court . . ."). An early New York case contains the following language: "Assuming the power of the court to remove its records from the clerk's office, for the purpose of destruction, it is apparent that it is a power to be exercised with the greatest caution, and only in the most exceptional cases. Of course, affidavits and documents not properly part of the records of the court, and filed by mistake, would properly be directed to be removed. So, also, the court should not suffer its records to be used to publish libels, and scandalous accusations wholly irrelevant to the cause should be suppressed." *Schecker v. Woolsey*, 2 App. Div. 52, 37 N. Y. Supp. 292, 293 (2d Dep't 1896)

ing practices of a doubtful character, offensive to expressed public policy.<sup>4</sup> It is submitted that a judge should not be extended the power to destroy the only available record of such evidence which, because of the solemn circumstances under which it was obtained, may not only afford the best beginning point for a healthy investigation, but may also serve as convincing evidence in a later prosecution. Indeed, the duty should be enjoined upon the judge, as a part of his obligations to his office and to the public, to apprise the proper officers where such suggestive testimony is given.<sup>5</sup> Since a judgment of the type rendered in this case prevents further suit by the parties, destruction of the stenographer's notes could add little to the permanency or peacefulness of the settlement. It contributes greatly, however, to the difficulty of discovering and suppressing illegal practices which are peculiarly elusive.

E. H. SEAWELL.

<sup>4</sup> Matter which courts strike from their files as "scandalous" usually gets in by way of the briefs or pleadings, and is of an apparently different nature from the matter involved here. "Scandal", for these purposes, has been defined as "an unnecessary statement which bears cruelly upon the moral character of an individual, or the statement of anything which is contrary to good manners, or anything which is unbecoming the dignity of the court to hear." *Nadeau v. Texas Co.*, 104 Mont. 558, 575, 69 P. (2d) 586, 595 (1937). See collection of cases in Note (1937) 111 A. L. R. 879.

<sup>5</sup> See *News and Observer* (Raleigh, N. C.), April 26, 1941, editorial entitled "When the 'Not Serious' is Very Serious"; also *id.*, April 25, 1941, editorial entitled "No Longer Private Quarrel".