12-1-1953

Notes and Comments

North Carolina Law Review

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NOTES AND COMMENTS

Adverse Possession—Effect of Tenant’s Attornment to True Owner

In a recent decision, it was held that a tenant’s attornment to the true owner of land which was held adversely by tenant’s lessor, did not interrupt the running of the statute in favor of the adverse possessor, when the true owner had no notice of the tenancy relationship. The court based its opinion on the principles that the possession of the tenant is the possession of the landlord and that a tenant is estopped to deny the title of the landlord.

The North Carolina Supreme Court has defined adverse possession as: “actual possession, with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in the character of owner, in opposition to right or claim of any other person, and not merely an occasional trespass. It must be as decided and notorious as the nature of the land will permit, affording unequivocal indication to all persons that he is exercising thereon the dominion of owner.” Adverse possession consists of five essential elements: (1) the possession must be hostile and under claim of right; (2) it must be actual; (3) it must be open and notorious; (4) it must be exclusive; and (5) it must be continuous. If any one of these elements is lacking, the holding will not be effective to allow acquisition of title by adverse possession.

One holding land adversely may do so through his tenant, and the possession of the tenant will be the possession of the landlord. How-

1 Kimble v. Willey, 204 F. 2d 238 (8th Cir. 1953). A was record owner of property in controversy. B, in 1930, acquired title by deed from holder of a void tax deed, which at best, could serve only as color of title. B leased the land to C for one year for $1.00 with the proviso that any holding over by C would be a holding for B. In 1931, while the original term was still in effect, C solicited and obtained a lease from A.

2 Locklear v. Savage, 159 N. C. 236, 237, 74 S. E. 347, 348 (1912). In North Carolina, the statutes provide that one holding land adversely, may acquire title after twenty years uninterrupted holding, or after seven years uninterrupted holding under color of title. [N. C. GEN. STAT. §§ 1-38, 40 (1953)]. Other states have similar statutes with varying time limits. ARK. STAT. § 37-101 (1947), pleaded by defendant in the principal case, provides that no suit may be maintained for possession of lands after seven years adverse holding.


ever, the elements of adverse possession must still be present. If, then, the tenant voluntarily attorns\textsuperscript{5} to the true owner of the land, is not one of the essential elements destroyed? Voluntary attornment by the lessee of an adverse possessor to the record title holder would seem to divest the holding of its hostile character.\textsuperscript{9}

If the holding is to constitute an effective adverse possession, it must be continuous and uninterrupted on the part of the adverse claimant. Where a tenant who purports to be holding and acting for his landlord voluntarily attorns to the true owner, it would seem that this act would break the continuity of the holding.\textsuperscript{7}

The court, in the instant case, relied on the principle that a tenant is estopped to deny his landlord's title and applied it to a situation where the tenant voluntarily attorned to the true owner and where the true owner had no notice of the tenancy relationship.

In actions in ejectment or for collection of rent, there can be little doubt that the doctrine of estoppel as to tenants is sound,\textsuperscript{8} and the courts

\textsuperscript{5} Attornment has been variously defined as: "... the act of recognizing a new landlord. The word comes from a feudal law, where it signifies the transfer by the act of the lord with the consent of the tenant of all service, and homage of the tenant to some new lord who had acquired the estate." [Willis v. Moore, 59 Tex. 628, 636 (1883)] "... an acknowledgment or agreement by the tenant that the freehold is in another or that such person is his landlord." [Foster v. Morris, 10 Ky. 610, 611 (1821)] "... the acknowledgment by a tenant that he holds under a new lord who claims by title paramount, and not by grant of the reversion or as privy to the reversioner." [Rochester Sav. Bank v. Stoeltzer & Tapper, 176 Misc. 147, 26 N. Y. S. 2d 713, 716 (Sup. Ct. 1941).]

As to the proposition that a tenant's attornment to one holding paramount title in order to avoid litigation is equivalent to an actual ouster, see: Charles Merryman v. E. W. Bourne, 9 Wall. 592 (U. S. 1870); Beniah Morse v. Silas Goddard, 13 Metc. 177 (Mass. 1847); Renshaw v. Reynolds, 317 Mo. 384, 297 S. W. 374 (1925); In re O'Donnell, 240 N. Y. 99, 147 N. E. 541 (1925). See also III Am. Law of Property §15.9 (1952): "But it is clear, of course, that an attornment to the true owner by the tenant makes his possession that of such owner and therefore ends the adverse possession."

\textsuperscript{6} Because of the personal relationship of lord and tenant during the feudal system and the method of land holding then in vogue, it was necessary, to save the lord the expense and trouble of defending against disseisin, that a tenant not be allowed to deny his lord's title and acknowledge another as his lord. The principle was made statutory by 11 GEORGE II, c. 19, §11 (1738) which provided that attornment to a stranger should be void unless pursuant to a decree of court or with consent of the lessor. [I AMERICAN LAW OF PROPERTY, § 3.65 (1952).]

In actions for collection of rent or for possession, where a tenant has acquired possession of property, used it as his own without interference, and has received what he bargained for, he should not be relieved of his obligations merely by being
have so held in a substantial majority of the decided cases.\textsuperscript{9} But where the action involves only the title to land, a different situation arises. The purpose of the statutes concerning adverse possession is not to take property away from the true owner and give it to an adverse claimant, but to allow such an adverse claimant to acquire title to property which he has possessed and used as his own for the required number of years and which has been neglected by the true owner without any assertion of his rights of ownership.\textsuperscript{10}

Numerous cases hold that an attornment by an adverse possessor's tenant to a third party does not interrupt the running of the statute.\textsuperscript{11} Few situations, however, have come before the courts wherein the true owner had no notice of the tenancy relationship.

Generally, decisions on the question fall into three categories, wherein courts have held: (1) that an attornment by a tenant to another party does not interrupt the running of the statute in favor of tenant's lessor, regardless of the question of notice;\textsuperscript{12} (2) that such an attornment does


\textsuperscript{10}Thompson v. Pioche, 44 Cal. 508 (1872); Johnson v. Szumowicz, 63 Wyo. 211, 179 P. 2d 1012 (1947); Sailor v. Hertzogg, 2 Barr 182 (Pa. 1843) ("The statute protects the occupant, not for his merit, for he has none, but for the demerit of his antagonist in delaying the contest beyond the period assigned for it, when papers may be lost, facts forgotten, or witnesses dead.") See also 4 TIFFANY, REAL PROPERTY, § 1134 (3d Ed. 1939).


\textsuperscript{12}Kepley v. Scully, 185 Ill. 52, 57 N. E. 187 (1900) (attorney induced attornment and facts indicate that he had full knowledge of tenancy); Bailey v. Moore and Munn, 21 Ill. 165 (1859) (attorney acquired title by sheriff's deed subsequent to tenant's entry for landlord, court holding tenant could not attorn to one acquiring a title hostile to that of landlord); Clifton Heights Land Co. v. Randell, 82 Iowa 89, 47 N. W. 905 (1891) (attorney aware of tenancy); Ellsworth v. Eslick, 91 Kan. 287, 137 Pac. 973 (1914) (no indication that owner was aware of tenancy); Turner v. Thomas, 76 Ky. (13 Bush) 518 (1877) (attorney made as result of inducement by attorney who claimed under tax deed held to be invalid); Hayes v. Boardman, 119 Mass. 414 (1876) (no indication of whether attorney knew of tenancy); Blanchard v. Tyler, 12 Mich. 339 (1864) (attorney by tenant to party acquiring hostile title held of no effect. There attorney was advised by tenant of his tenancy); Farrar v. Heinrich, 86 Mo. 521 (1885); Louisiana & Texas Lumber Co. v. Alexander, 154 S. W. 233 (Tex. Civ. App. 1913) (where the court,
interrupt the running of the statute; and (3) that such an attornment interrupts the running of the statute if the true owner had no notice of the tenancy relationship.

It would seem that the distinction recognized by this third group of cases would tend to create an exception to the general rule that a tenant is estopped to deny his landlord’s title.

This would seem to follow, for where there is no evidence that the true owner has neglected his title or abandoned the property, and it comes to his attention that the property is occupied by one who voluntarily takes a lease from him or acknowledges his paramount title, the owner is not charged with more knowledge of the situation than could be inferred from the very fact of the possession or ascertained by reasonable inquiry.

feeling that evidence was clear that plaintiff’s agent was fully aware of the tenancy relationship, said: “We are not prepared to say that this rule (that the continuity of possession of an adverse claimant is not broken by the attornment of his tenant to another without his knowledge or consent) should apply where the attornment is to the owner of the property and is obtained without any notice that the person in possession, who makes the attornment, is holding under one claiming adversely to him. In order to perfect his title by limitation, the adverse claimant of land must give continuous notice of his claim by a visible occupancy and appropriation of the land for the time prescribed by statute. He must in this way keep his flag continuously flying; and while he may do this by tenant, if such tenant lowers the flag by attorning to the owner, who acts in good faith and without notice that the person in possession who attorns to him, is the tenant of the adverse claimant, it may be that such attornment would break the continuity of the adverse claimant’s possession. It would seem that in such case the owner has done all that could be required of him to protect his possession, and that the adverse claimant, who trusted his tenant to assert his claim for him, should suffer the consequences of his agent’s infidelity.”; Powell Lumber Co. v. Nobles, 44 S. W. 2d 774 (Tex. Civ. App. 1931) (citing and quoting with approval Louisiana & Texas Lumber Co. v. Alexander, this note supra).

Western Union Beef Co. v. Thurman, 70 Fed. 960 (5th Cir. 1895); Kaempfer v. Zeller, 28 F. Supp. 699 (W. D. La. 1938); Van Deventer v. Lott, 172 Fed. 574 (E. D. N. Y. 1909), aff’d, 180 Fed. 378 (2nd Cir. 1910); Russell v. Erwin’s Admnr., 38 Ala. 44 (1861); De Forest v. Walters, 47 N. E. 297 (N. Y. Ct. App. 1897); Koons v. Steele, 19 Pa. St. 203 (1852); Frank C. Schilling Co. v. Detry, 203 Wis. 109, 233 S. W. 635 (1930).

Thompson v. Floche, 44 Cal. 508 (1872); Turpin v. Saunders, 32 Grat. 27 (Va. 1879) (the court said: “It is but fair to presume that if Cecil had been informed that Simpkins was Saunders’ tenant, he would at once have taken necessary steps to protect his own rights.”) But cf. Powell Lumber Co. v. Nobles, 44 S. W. 2d 774 (Tex. Civ. App. 1931); Louisiana & Texas Lumber Co. v. Alexander, 154 S. W. 233 (Tex. Civ. App. 1913).

Such a distinction is suggested in 4 TIFFANY, REAL PROPERTY, § 1168 (3d ed. 1939) (“. . . in a few cases it has been decided that it (tenant’s acknowledgment of true owner’s title) causes such interruption if the rightful owner does not know of the relation of tenancy. These latter cases would seem to indicate the proper distinction in this regard. If the rightful owner has no reason to suspect that the person wrongfully in possession of his land is so in possession, not in his own behalf, but in behalf of another, he is justified in assuming that the person in possession has full power to characterize his possession as being hostile or the reverse, and if such person acknowledges the true owner’s title, the latter is not guilty of laches in failing to take legal proceedings.”). See also, 2 C. J. S., Adverse Possession, § 139 (1936).

See, E. g., Hulvey v. Hulvey, 92 Va. 182, 23 S. E. 233 (1895), where the court said: “No one is required to watch the clerk’s office to see that those in possession
The situation in the principal case has not come before the North Carolina courts. However, the North Carolina court has consistently held that a tenant cannot deny his landlord's title. Further, in *Wise v. Wheeler*, the court held as inadmissible in evidence the testimony of a tenant against his landlord in an action for possession instituted against the tenant where the landlord was substituted as defendant. In the case of *Lawrence v. Eller*, the court, by way of dictum, said: "It has been said that the estoppel referred to does not prevail in actions involving an issue as to title, but if such a limitation on the general rule prevails in this jurisdiction, it applies only to actions involving strictly the issue as to title, and does not extend to those where the possession and the right growing out of or incident to it are presented or in any way affected."

Where the true owner evidences his ownership by giving a lease to the only person he knows to be holding without authority from him and has no notice that the tenant is holding in behalf of another claiming adversely to the owner, it would seem that justice and a fair interpretation of the law would not deprive the owner of his title.

The view, expressed by the dissenting opinion in the principal case, that an attornment to the true owner by the tenant of an adverse possessor, where the true owner has no notice of the tenancy relationship, interrupts the running of the statute in favor of the adverse possessor, seems practical and just. If the true owner is aware of the tenancy of property in privity with him or in subordination to his title are not (sic) acquiring rights adverse to him," and *Thompson v. Pioche*, 44 Cal. 508 (1872), where, to the contention that the possession of the tenant was notice of the title of his landlord, the court replied that such possession was not of itself notice, but that it was sufficient to put a person dealing with the property upon inquiry and that it would be proof of notice, unless it be shown that the inquiry, after having been pursued with due diligence, did not disclose the title of the person in possession.


*28* N. C. 196 (1845). See also *Stansbury on Evidence*, § 175 (1946) ("Statements by a devisee are not competent as admissions against other devisees since their interests are not joint. . . . and the same is true of admissions of a tenant offered against his landlord.")

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relationship, his failure to resort to legal process to protect his title is sufficient to indicate his acquiescence in the adverse possession. The fact that he gives the tenant a lease when unaware of any other tenancy relationship, rather than resort to legal process, should not operate to deprive him of his legal title. To allow this result would seem to give an unfair supremacy to the relationship of landlord and tenant to the detriment of the holder of the legal title and would seem to be contrary to the purpose and reason for statutes allowing the acquisition of title to property by adverse possession.

NAOMI E. MORRIS

Constitutional Law—Due Process—Admissibility of Confessions

The decision in the "Reader's Digest Murder Case,"1 recently handed down by the United States Supreme Court, presents quite a dilemma to state courts in their determination of the admissibility of confessions. In a line of decisions beginning at least as early as 1936,2 the Supreme Court has set aside as violative of the Due Process Clause of the Fourteenth Amendment convictions in which "third degree" methods were used to extract confessions from the accused.3

The common law principle of exclusion of involuntary confessions rested on the theory that they were untrustworthy testimony; that the accused may have given an untrue confession to avoid or end present pain and coercion.4 A new test of what constitutes an involuntary confession has evolved in the last decade and, until the decision in the principal case, appeared to be becoming an established principle of constitutional law. While this test is not enunciated in any case as a uniform

1 Stein v. New York, 73 Sup. Ct. 1077 (1953). The case rose to the Supreme Court on writ of certiorari after the Court of Appeals of New York affirmed conviction. 303 N. Y. 856, 104 N. E. 2d 917 (1952).
2 Brown v. Mississippi, 297 U. S. 278 (1936). Involuntary confessions were excluded by federal courts on the ground that they were in violation of the Fifth Amendment privilege against self-incrimination as far back as the leading case of Bram v. United States, 168 U. S. 532 (1897). Judicial thinking tended then to consider involuntary confessions only in the light of the self-incrimination clause of the Fifth Amendment which, of course, was inapplicable to the states. But as Chief Justice Hughes said in Brown v. Mississippi; "Compulsion by torture to extort a confession is a different matter. The state is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. . . . The freedom of the state in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law." 297 U. S. 278, 285 (1936).
4 3 WIGMORE, EVIDENCE § 822 (3d ed. 1940).
standard, formulated as is a "prescription in pharmacopoeia," the principle relied upon is that the Due Process Clause of the Fourteenth Amendment proscribes the use against an accused of a confession which was extorted from him by inflicting physical or mental pain, regardless of the reliability of the confession. But as pointed out in a note in this Law Review, the test rests upon but a handful of opinions, and in all of the cases having full opinions there were strong dissents. Four of the cases were five-four decisions, while two others were six-three decisions. The permanence of the test became uncertain when, in the summer of 1949, death took two justices who had consistently sided with the majority, Justices Murphy and Rutledge. While three other cases have considered the problem of involuntary confessions and the Due Process Clause of the Fourteenth Amendment since the Watts, Turner, and Harris decisions were handed down in June of 1949, it was not until Stein v. New York that the tenuous constitutional rule was questioned by the majority of the court.

In the principal case, petitioners Stein, Cooper, and Wissner were convicted and sentenced to death for the felony murder of the companion of the driver of a Reader's Digest delivery truck, which petitioners robbed. Police had arrested petitioners after two months of investigation and had carried them separately and at different times to police barracks, where they were illegally held incommunicado and interrogated for periods of two to four days. Stein and Cooper made confessions, which they contended were extorted from them by force, but Wissner remained.


Note, 28 N. C. L. Rev. 393 (1950).


Stroble v. California, 343 U. S. 181 (1952) (conviction affirmed; record showed no evidence of coercion; in fact, it appeared that defendant was anxious to confess, although he claimed he was slapped once by arresting officer); Gallegos v. Nebraska, 342 U. S. 55 (1951) (conviction affirmed; no evidence to show coercion, although the confessions were obtained during a period of 25 days of illegal detention by federal and state officers before accused was brought before a magistrate and before counsel was appointed. While McNabb v. United States, 318 U. S. 332 (1942) proscribes the use in federal courts of evidence obtained by federal officers during illegal detention, the McNabb rule is not a limitation imposed by the Due Process Clause on the state courts. Lyons v. Oklahoma, 322 U. S. 596 [1944]); Johnson v. Pennsylvania, 340 U. S. 881 (1951) (per curiam; reversed on the basis of Turner v. Pennsylvania).

A homicide committed by a person engaged in the commission of a felony. It is first-degree murder and carries a mandatory death sentence unless the jury recommends life imprisonment. N. Y. Penal Law §§ 1044(2), 1045, 1045-a (McKinney, 1944).
When the confessions were offered in evidence at the trial, the defendants objected to their introduction on the grounds that they had been obtained through coercion. The trial court heard evidence in the presence of the jury as to the issue of coercion and left determination of the issue to the jury. While this New York practice of letting the confession go to the jury to determine its voluntariness is contrary to the general rule that admissibility of a confession is a question of law for the court, the Fourteenth Amendment does not forbid jury trial of the issue. Petitioners did not take the stand, and the issue of coercion rested on charges of their counsel and the circumstantial evidence of multiple bruises and injuries on petitioners' bodies the day after arraignment. The jury was instructed to consider the confessions only if it found them to have been voluntarily made. A general verdict of guilty was rendered by the jury.

As the Supreme Court points out, "under these circumstances, we cannot be sure whether the jury found the defendants guilty by accepting and relying, at least in part, upon the confessions or whether it rejected the confessions and found them guilty on other evidence." The court therefore held that the jury could properly have found the confessions not to have been obtained by physical force or threats or psychological coercion.

34 "Testimony by the prison doctor who examined them predicated mainly on the notes he made at the time was that Wissner had a broken rib and various bruises and abrasions on the side, legs, stomach and buttocks; Cooper had bruises on the chest, stomach, right arm, and both buttocks; Stein had a bruise on his right arm." Stein v. New York, 73 Sup. Ct. 1077, 1083 (1953).

35 Id. at 1085, note 11. The doctor testified that it was difficult to state exactly how long the bruises had been there; that the bruises on Cooper's body could have been there as long as six days (he had been in custody three days); and that Stein's bruises could have been sustained prior to arrest. Ibid.

36 The trial judge must exclude the confession if he is convinced that it was not freely made, or that the verdict that it was freely made would be against the weight of evidence, but if the issue of voluntariness presents a fair question of fact, he must receive the confession and leave to the jury, under proper instructions, the ultimate determination of its voluntary character and truthfulness. N. Y. CODE CRIM. PROC. § 395 (McKinney, 1945).

37 3 WIGMORE, EVIDENCE § 861 (3d ed. 1940). This rule is well recognized by the majority of jurisdictions, including the federal courts and 30 states, all of which are surveyed by Dean Wigmore. North Carolina is in accord with the majority rule. State v. Manning, 221 N. C. 70, 18 S. E. 2d 821 (1942).


39 Under New York law, if defendants had taken the witness stand to support the charges that the police had obtained the confession by coercion, they could have been subjected to general cross-examination. See People v. Trybus, 219 N. Y. 18, 113 N. E. 538 (1916). As the court points out, if they had testified, undoubtedly their previous criminal records would have been put in evidence, and by refusing to testify those records were not brought to the attention of the jury.

coercion, and that if the jury so resolved that the confessions were ad-
missible, it would not have been constitutional error.\textsuperscript{21} If the jury had 
rejected the confession as involuntary, however, the court held that the 
jury could constitutionally have based a conviction upon other sufficient 
evidence. The court thus resolved its own dilemma by finding that it 
was neither error if the jury admitted and relied on the confession, nor 
was it error if they rejected it and convicted on other evidence.\textsuperscript{22}

To this holding, Justices Black, Frankfurter, and Douglas filed vigor-
ous dissents. Justice Black declared, “beginning at least as early as 
Chambers v. Florida [1940], this court has set aside state convictions 
as violative of due process when based on confessions extracted by state 
police while suspects were held incommunicado. That line of cases is 
greatly weakened if not repudiated by today’s sanction of the arbitrary 
seizure and secret questioning of the defendants here. State police wish-
ing to seize and hold people incommunicado are now given a green 
light.”\textsuperscript{23} Justice Frankfurter in his dissent said “the court goes beyond 
a mere evaluation of the facts of this record. It makes a needlessly 
broad ruling of law which overturns what I had assumed was a settled 
principle of constitutional law.”\textsuperscript{24} He adds that “it is painful to be 
compelled to say that the court is taking a retrogressive step in the 
administration of criminal justice. I can only hope that it is a tempo-
rary, perhaps an \textit{ad hoc}, deviation from a long course of decisions.”\textsuperscript{25}
Justice Douglas echoes the alarm of the other dissenters and cites a body 
of opinion\textsuperscript{26} against the decision of the majority.\textsuperscript{27} While the court had

\textsuperscript{21} The court was impressed by the evidence that Stein and Cooper confessed after 
“only” 12 hours of intermittent questioning stretched over a 32-hour period, and 
that Cooper spent much of that time “driving a bargain” with police and parole 
officers that if he confessed, his brother would not be prosecuted for parole viola-
tion. \textit{Id.} at 1093.

\textsuperscript{22} The court also held that even if the confessions of Stein and Cooper were 
considered to have been involuntary, their use would not have violated any federal 
right of Wissner, who did not confess but was implicated by those who did. As 
for Wissner’s contention that his rights were infringed because he was unable to 
cross-examine accusing witnesses (the confessors, who did not take the stand), the 
court held that there is no right of confrontation under the Fourteenth Amendment, 
citing as authority West v. Louisiana, 194 U. S. 258 (1904), in which it was decided 
that the Federal Constitution did not preclude Louisiana from using affidavits on a 
criminal trial. As Justice Black points out in his dissent however, a later case, \textit{In re} Oliver, 333 U. S. 257 (1948), reversed a conviction, \textit{inter alia}, because the 
defendant was denied reasonable notice of the charge against him and the right to 

\textsuperscript{23} Stein v. New York, 73 Sup. Ct. 1077, 1099 (1953).

\textsuperscript{24} \textit{Id.} at 1100.

\textsuperscript{25} Ibid.

\textsuperscript{26} Stroble v. California, 343 U. S. 181 (1952) ; Gallegos v. Nebraska, 342 U. S. 
55 (1951) ; Haley v. Ohio, 332 U. S. 596 (1948) ; Malinski v. New York, 324 U. S. 
401 (1945) ; Lyons v. Oklahoma, 322 U. S. 596 (1944).

\textsuperscript{27} Douglas also contends in his dissent that in all of the cases in which the court 
has dealt with the practice of discrimination against Negroes in the selection of 
juries as violative of due process under the Fourteenth Amendment, from Neal v. 
Delaware, 103 U. S. 370 (1880) down to Avery v. Georgia, 73 Sup. Ct. 891 (1953), 
the determinative question was whether a constitutional right had been violated,
characterized these rulings as dicta, Douglas points out that Malinski v. New York was a square holding that if the admitted confession were found to be coerced a subsequent conviction would be set aside, even though the evidence apart from the confession might have been sufficient to sustain the jury’s verdict.\textsuperscript{28} and that the conviction in Malinski was reversed, even though other evidence might have supported the verdict.\textsuperscript{29} The holding in the Malinski case followed language in other cases\textsuperscript{30} similar to that used by Justice Roberts in Lisenba v. California: “The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false.”\textsuperscript{31}

The ruling in Stein v. New York that the jury could reject the confessions as involuntary and still base a conviction on other sufficient evidence, appears then to be a retreat from the precedent of the Supreme Court itself. It is interesting to note that Justices Douglas, Frankfurter, and Black, now dissenters, were with the majority in the Ashcraft, Malinski, Haley, Watts, Harris, and Turner decisions; while Justice Jackson, who here writes the majority opinion, was dissenting along with Justices Reed and Burton and Chief Justice Vinson in those cases. The new Justices, Clark and Minton, take the majority view in the instant case. As Douglas states, “from the undisputed facts it seems clear that these confessions would be condemned if the constitutional school of thought when Haley v. Ohio,\textsuperscript{32} Watts v. Indiana,\textsuperscript{33} Turner v.

and if there were other sufficient evidence to convict. In the Avery case, the court said if the jury commissioners failed in their duty to use a non-discriminatory method of selecting a jury, the conviction must be reversed, “no matter how strong the evidence of guilt.”\textsuperscript{34} Stein v. New York, 73 Sup. Ct. 1077, 1103 (1953) (dissenting opinion of Douglas, J.).

\textsuperscript{28} If all the attendant circumstances indicate that the confession was coerced or compelled, it may not be used to convict a defendant. And if it is introduced at the trial, the judgment of conviction will be set aside even though the evidence apart from the confession might have been sufficient to sustain the jury’s verdict.” Malinski v. New York, 324 U. S. 401, 404 (1945).

\textsuperscript{29} The ruling in Stein v. New York that the jury could reject the confessions as involuntary and still base a conviction on other sufficient evidence, appears then to be a retreat from the precedent of the Supreme Court itself. It is interesting to note that Justices Douglas, Frankfurter, and Black, now dissenters, were with the majority in the Ashcraft, Malinski, Haley, Watts, Harris, and Turner decisions; while Justice Jackson, who here writes the majority opinion, was dissenting along with Justices Reed and Burton and Chief Justice Vinson in those cases. The new Justices, Clark and Minton, take the majority view in the instant case. As Douglas states, “from the undisputed facts it seems clear that these confessions would be condemned if the constitutional school of thought when Haley v. Ohio,\textsuperscript{32} Watts v. Indiana,\textsuperscript{33} Turner v.

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\textsuperscript{30} The court recognizes that it cannot characterize the Malinski case as dictum, and expressly says that “except for the Malinski case the question raised here could not have been raised or decided.” Stein v. New York, 73 Sup. Ct. 1077, 1095 (1953). Without overruling or distinguishing the Malinski decision, the court states that against the factual background of its other decisions which it had called dicta, “we do not think our cases establish that to submit a confession to a state jury for judgment of the coercion issue automatically disqualifies it from finding a conviction on other sufficient evidence, if it rejects the confession.” Id. at 1095.

\textsuperscript{31} “If the confession which petitioner made in the District Attorney’s office was in fact involuntary, the conviction cannot stand, even though the evidence apart from the confession might have been sufficient to sustain the jury’s verdict.” Stroble v. California, 343 U. S. 181, 190 (1952). “The use of any confession obtained in violation of due process requires the reversal of a conviction even though unchal-

\textsuperscript{32} lenged evidence, adequate to convict remains.” Gallegos v. Nebraska, 342 U. S. 55, 63 (1951). “A coerced confession is inadmissible under the Due Process Clause even though statements in it may independently be established as true.” Watts v. Indiana, 338 U. S. 49, 50, note 2 (1949).

\textsuperscript{33} 314 U. S. 219, 236 (1941).

\textsuperscript{34} 332 U. S. 596 (1948).

\textsuperscript{35} 338 U. S. 49 (1949).
Pennsylvania,34 and Harris v. South Carolina35 were decided still was the dominant one.36 Those cases indicated that the Supreme Court had directed a “mandate” to the state courts37 that confessions be admitted only when free from any physical or psychological coercion. This was hailed by many as a salutary development in constitutional law and criminal procedure,38 and a trend in the direction of the English law, which is particularly sensitive to police abuses of the rights of the accused.39 Certainly, it demonstrated that much had been accomplished since 1931, when the Wickersham Commission reported that the extortion of confessions by the police by mental or physical pressure was widespread in this country,40 but that such methods still exist is shown by the cases which continue to appear. A survey of the methods that have been used to extort confessions tends to indicate that it has gradually taken a reduced showing of coercion to result in a finding by the Supreme Court of a violation of due process.41

35 338 U. S. 68 (1949).
37 "It is sufficient to here say that we have reached the conclusion that the instant confession was obtained under circumstances such as to constitute its use in evidence a denial of due process, under the decisions of the Supreme Court of the United States. Having so concluded, it is our duty to follow what we understand to be the mandate of that court. Prince v. Texas, 155 Tex. Cr. R. 108, 111, 231 S. W. 2d 419, 421 (1950).
38 "It is sufficient to here say that we have reached the conclusion that the instant confession was obtained under circumstances such as to constitute its use in evidence a denial of due process, under the decisions of the Supreme Court of the United States. Having so concluded, it is our duty to follow what we understand to be the mandate of that court. Prince v. Texas, 155 Tex. Cr. R. 108, 111, 231 S. W. 2d 419, 421 (1950)."
40 "Questioning of persons in custody; xlvii: a rigid instruction should be issued to the police that no questioning of a prisoner, or a person in custody, about any crime with which he is, or may be charged, should be permitted. (1) If a prisoner expresses a wish to make a voluntary statement, he should be cautioned, offered writing materials and left to write without being overlooked, questioned or prompted." Only obvious ambiguities in prisoner's statements may be cleared up by questions, which prisoner shall be free to answer or refuse to answer without any coaxing or pressure by the police. Royal Commission on Police Powers and Procedure, Cmd. no. 3297, at 144, as quoted in 3 Wigmore, Evidence § 847 (3rd ed. 1940).
42 Brown v. Mississippi, 297 U. S. 278 (1936) (confession obtained after accused was taken by a deputy and a mob to the woods, severely beaten and a noose placed around his neck; conviction reversed); Chambers v. Florida, 309 U. S. 277 (1940) (defendants jailed in atmosphere of mob violence, subjected to five days and nights of interrogation before they "broke" and confessed; conviction reversed); Ashcraft v. Tennessee, 322 U. S. 143 (1944) (accused subjected to 36 hours of continuous questioning, during which time he was denied food and sleep; conviction reversed); Lyons v. Oklahoma, 322 U. S. 596 (1944) (accused was subjected to 16 days of intermittent questioning and had a pan of human bones placed before him in order to obtain a confession; conviction affirmed, as a later confession was determined voluntary); Malinski v. New York, 324 U. S. 401 (1945) (defendant was arrested, stripped, and held incommunicado in order to coerce a confession; conviction reversed); Haley v. Ohio, 332 U. S. 596 (1948) (a fifteen-year-old Negro boy was interrogated from midnight until 5 a.m. and not permitted to see friends or counsel and a confession was obtained; conviction reversed); Watts v. Indiana, 338 U. S. 49 (1949) (accused was interrogated intermittently for six days, during which time he was not given adequate opportunities for sleep or a decent allowance of food; conviction reversed); Turner v. Pennsylvania, 338 U. S. 62 (1949) (accused was interrogated by relays of officers from four to six
But throughout these decisions there have been strong dissents, a major theme being that the Supreme Court was interfering with the states in their administration of criminal justice. The alarm that Jackson once expressed in his dissents over this "encroaching federal power" over state courts is now embodied in the majority opinion of the principal case. The court feels that the state courts may be abdicating their primary responsibility of determining the admissibility of confessions under their own rules, and that the conscience of the local administration of justice may become subordinated to a federal Supreme Court exercising its conscience over the details of state police procedure.

Thus the court, rather than deciding whether the confessions by petitioners in the instant case were voluntary, holds that the jury could have determined the issue either way and their verdict would be given

"Note, 28 N. C. L. Rev. 390 (1950)."
"decisive respect." But the court does not expressly overrule its previous holdings, for it further declares:

Of course, this court cannot allow itself to be completely bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding. It is only miscarriages of such gravity and magnitude that they cannot be expected to happen in an enlightened system of justice, or be tolerated by it if they do, that cause us to intervene to review in the name of the Federal Constitution, the weight of conflicting evidence to support a decision by a state court.  

This language has more of a familiar ring; it is found in previous cases which declare that the securing of a confession through the "denial of due process is the failure to observe that fundamental fairness essential to the principles of liberty and justice," and that the absence of such fairness "fatally infected the trial." Perhaps this indicates that the court is not abandoning but just contracting the radius of the protection of due process to cover only those instances in which extreme abuses by the police are employed to obtain confessions, or where the Supreme Court thinks there is insufficient evidence to convict without the use of the confession. Despite the concern of the dissent, there are no indications that the decision is a return to the old trustworthiness test, long since buried by newer constitutional principles. How retrogressive a step this case represents will be shown only by future decisions of the court. But until a more definitive opinion is handed down, state courts will face the problem of whether they can permit a conviction on the basis of other sufficient evidence when the question of the voluntariness of the confession goes to the jury.  

46 Id. at 1091.  
51 The language used by the court indicates that it will reverse in the future only when extreme abuses are found in the securing of the confession or when there is not other sufficient evidence to convict, regardless of whether the confession is determined voluntary by the jury or the judge. The court states, "of course, where the judge makes a final determination that a confession is admissible and sends it to the jury as a part of the evidence to be considered on the issue of guilt and the ruling admitting the confession is found on review to be erroneous, the conviction, at least normally, should fall with the confession." Stein v. New York, 73 Sup. Ct. 1077, 1096 (1953). Despite this statement, the whole tenor of the decision is that it will take a showing of extreme coercion before the Supreme Court will reverse a state court finding of guilt, irrespective of who determines the voluntariness of the confession. Not only are those jurisdictions in which the question is one of fact for the jury facing a dilemma in resolving the problem of admissibility of confes-
Due process as secured by the Fourteenth Amendment is very flexible, and can be enlarged or contracted according to the policy of the Supreme Court at a given time. Confessions cannot always be tested to fit a Procrustean bed, but must be measured in the light of a flexible due process requirement that state courts observe that fundamental fairness essential to the protection of the accused by refusing to use a confession obtained by physical or psychological coercion. It is to be hoped that we are not entering upon "a new regime of constitutional law,"\(^{52}\) in which the rights of the accused are valued less highly than is the efficient functioning of the machinery for the administration of justice, but rather that a resilient Due Process Clause will reassert in succeeding cases the principles that nearly a generation of decisions has evolved.

JAMES ALBERT HOUSE, JR.

Constitutional Law—Racial Restrictive Covenants—Recovery of Damages for Breach

Since 1948 when the Supreme Court held that racial restrictive covenants could not be specifically enforced by injunction in state or federal courts,\(^1\) legal writers have speculated\(^2\) and the courts have disagreed\(^3\) on the recovery of damages. Now the Supreme Court in Barrows v. Jackson\(^4\) has settled the issue by holding the award of damages by a state court for the breach of racial restrictive covenants to be state


3 See notes 10 and 11 infra.
action in violation of the Fourteenth Amendment, in that it deprives racial minorities of the equal protection of the laws.\(^5\)

The principal case involved an agreement between adjoining land owners in Los Angeles, each of whom covenanted that no part of his real property should "be used or occupied by any person or persons not wholly of the white or Caucasian race."\(^6\) Upon the sale by defendant to a non-Caucasian in 1950, plaintiffs instituted an action at law for damages against the seller. The Superior Court of Los Angeles County sustained defendant's demurrer to the complaint. On appeal to the District Court of Appeal, it was held that

a state may not by judicial process enforce private rights derived from consensual agreements of private individuals, where to do so would result in the infringement of civil liberties guaranteed by the Constitution of the United States; therefore the demurrer was properly sustained.\(^7\) In interpreting and extending the rule of the *Shelley* case, the California Court further stated: "The coercive device of retribution in the form of damages is as effective as the coercive effect of injunctive relief, although not as immediate."\(^8\)

On certiorari, the United States Supreme Court held:

(1) A state court in awarding damages for breach of a racial restrictive covenant is taking state action under the Fourteenth Amendment, and is acting in violation of the equal protection clause.

(2) A person defending the breach of a racial restrictive covenant may rely on the denial of constitutional rights of a racial minority group, although no member of the group is before the court.\(^9\)

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\(^5\) Until the *Shelley* case, it was assumed that damages could be recovered for the breach of racial restrictive covenants. Eason v. Buffaloe, 198 N. C. 520, 152 S. E. 496 (1930).

\(^6\) Barrows v. Jackson, 73 Sup. Ct. 1031, 1032 (1953).


\(^9\) The late Mr. Chief Justice Vinson dissented on this point, saying in part: "The majority identifies no non-Caucasian who has been injured or could be injured if damages are assessed against respondent for breaching the promise which she willingly and voluntarily made to petitioners. ... Because I cannot see how respondent can avail herself of the Fourteenth Amendment rights of total strangers—the only rights which she has chosen to assert—and since I cannot see how the Court can find that those rights would be impaired in this particular case by requiring respondent to pay petitioners for the injury which she recognizes she has brought upon them, I am unwilling to join the Court in today's decision." Barrows v. Jackson, 73 Sup. Ct. 1031, 1038, 1041 (1953).
(3) The refusal of a state court to enforce such covenants does not violate the constitutional guaranty against impairing the obligation of a contract, because that guaranty is only directed against legislative action.

(4) Plaintiffs are not themselves denied due process and equal protection by a refusal to enforce the covenants, because no one can demand state action which would result in a denial of equal protection of the laws to other individuals.

Before Barrows v. Jackson and after Shelley v. Kraemer, four courts had dealt with the problem of awarding damages in this type case; two granted damages\(^\text{10}\) and two denied recovery.\(^\text{11}\) Clearly, as a result of the Barrows decision, state courts and probably federal courts cannot enforce racial restrictive covenants in any form of action.\(^\text{12}\) The covenants themselves have not been held to be invalid; rather they are merely unenforceable in the courts.\(^\text{13}\) However, this decision does not preclude a later holding that racial restrictive covenants are void because opposed to the express public policy of the United States as set forth in the Civil Rights Act\(^\text{14}\) and in the Charter of the United Nations.\(^\text{15}\) The courts have thus far either rejected\(^\text{16}\) or ignored\(^\text{17}\) contentions that the covenants were invalid under these two sources of federal law.

\(^{10}\) Correll v. Earley, 205 Okla. 366, 237 P. 2d 1017 (1949) (where damages were granted in a suit against the original covenantor, an intermediate vendor, and the non-Caucasian vendee for a conspiracy to violate the covenant); Weiss v. Lacon, 359 Mo. 1054, 225 S. W. 2d 127 (1949). These decisions were criticized in Notes, 3 ALA. L. REV. 379 (1951), 4 ALA. L. REV. 289 (1952), 63 HARV. L. REV. 1062 (1950), 28 N. C. L. REV. 442 (1950), 13 U. PITTSBURGH L. REV. 647 (1952), 24 ROCKY MT. L. REV. 380 (1952), 38 VA. L. REV. 389 (1952).


\(^{12}\) These cases on the Fourteenth Amendment apply to all minority groups, although the cases have usually arisen in suits by Negroes. Amer v. Superior Court of California, 334 U. S. 813 (1948); Yin Kim v. Superior Court of California 334 U. S. 813 (1948); Kentucky v. Powers, 201 U. S. I, 33 (1905).

\(^{13}\) Barrows v. Jackson, 73 Sup. Ct. 1031, 1033 (1953).


\(^{15}\) CHARTER OF THE UNITED NATIONS, Arts. 55(c), 56 (1945).

\(^{16}\) The High Court of Ontario in Re Drummond Wren held racial restrictive covenants were void because opposed to Canadian public policy. In ascertaining that public policy, the court relied on the CHARTER OF THE UNITED NATIONS and the Atlantic Charter as well as Canadian Statutes. 4 D. L. R. 674 (1945) O. R. 778. However a later decision by the Supreme Court of Canada ignored these public policy considerations and held the covenants invalid as illegal restraints on alienation. Re Noble and Wolf, 1 D. L. R. 321 (1951) S. C. R. 64 (discussed in Comment, 29 CAN. BAR. REV. 969 [1951]). Similarly, a California Court held that restrictions under the Alien Land Law were invalid under the CHARTER OF THE UNITED NATIONS; but on appeal, the Supreme Court of California held that the UNITED NATIONS CHARTER was not self-executing and would not supercede inconsistent local laws, that the restrictions violated the Fourteenth Amendment. Fujii v. State. 97 Cal. App. 154, 217 P. 2d 481 (1950), aff'd on other grounds, 38 Cal. 2d 718, 242 P. 2d 617 (1952).

\(^{17}\) Judge Edgerton of the District of Columbia Court of Appeals vigorously asserted that the covenants should be void in his dissenting opinion in Hurd v. Hodge, 162 F. 2d 233, 235-246 (1947). But although the Supreme Court reversed the lower court's decision, it passed over this argument. Hurd v. Hodge, 334 U. S. 24 (1948).
nants are void as opposed to public policy, but it is possible that the decision in the segregation cases now pending before the Supreme Court will strengthen public policy against racial discrimination.

The Shelley case stated that acts of the executive and legislative branches of state governments are as much state action as are judicial acts.\(^{18}\) The recognition and enforcement of discriminatory zoning ordinances, passed and administered by county and municipal officials, has been held to be unconstitutional state action.\(^{19}\) Whether the Barrows case can be construed to bar purely administrative acts tending to effectuate racial restrictions, such as the recordation of deeds containing discriminatory covenants, is uncertain. The covenants are by recordation given official recognition, which tacitly implies that state government officials condone discriminatory practices, although they cannot positively enforce them. A possible analogy in reverse can be drawn between the function performed by a county registrar of deeds and that of a county registrar for voting. The Supreme Court in the latter situation has held that a refusal to register qualified Negroes is state action forbidden by the Fourteenth and Fifteenth Amendments.\(^{20}\) It would appear that the language in the Shelley case is broad enough to preclude the acts of administrative officers.\(^{21}\) Should such acts be challenged on the ground that they are acts of the state.

Yet so long as the covenants remain only "gentlemen's agreements" and are not brought into court, they can under the Barrows decision continue to flourish. The Court in Barrows v. Jackson very clearly retained the principle established in Corrigan v. Buckley\(^{22}\) and restated in Shelley v. Kraemer that "so long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the state and the provisions of the Amendment have not been violated."\(^{23}\)

However, the purposes of the covenants can (and undoubtedly will) be effectuated by extra-legal means. One of the most effective methods of discouraging prospective purchasers who are "undesirable" is by "visits" from a neighborhood committee, which suggests that another residential area might be found more congenial.\(^{24}\) In addition to social

\(^{18}\) Shelley v. Kraemer, 334 U. S. 1, 14 (1948).
\(^{19}\) Richmond v. Deans, 281 U. S. 704 (1930); Buchanan v. Warley, 245 U. S. 60 (1917); Clinard v. Winston-Salem, 217 N. C. 119, 6 S. E. 2d 867 (1940).
\(^{21}\) "The action of state courts and of judicial officers in their official capacities [italics added] is to be regarded as action of the state within the meaning of the Fourteenth Amendment." Shelley v. Kraemer, 334 U. S. 1, 14 (1948).
\(^{22}\) 271 U. S. 323 (1926).
\(^{23}\) 334 U. S. 1, 13 (1948).
\(^{24}\) For a description of some methods of social ostracism against Negroes who move into white neighborhoods, and a catalogue of extra-legal devices used, see 14 Popular Government (No. 6) 8, 11 (June 1948) (Institute of Government, Chapel Hill, N. C.); Frank, The United States Supreme Court: 1947-1948, 16 U. CHI. L. REV. 1, 21-28 (1948).
pressure, the refusal of real estate agents even to show Negroes houses in restricted residential areas, and the disinclination of banks to furnish loans for such purchases will serve to retain the effect of the restrictions for a long time to come.\textsuperscript{26} Other devices are the use of cash deposits, neighborhood clubs or corporations, options to repurchase, land trusts, and long-term leases.\textsuperscript{26} Only time, education, and the gradual disappearance of emotional prejudices can bring to an end these devices.

LINDSAY TATE

Contracts—Inducing Breach—Intentional Interference with Contractual Relations—Justification—Privilege

Plaintiff, a contract carrier, alleged that he had contracted with various persons to carry them to and from Camp Lejeune, and that defendant induced these named persons to break their contracts with plaintiff and ride on defendant’s bus instead. In sustaining an order overruling a demurrer to this cause of action, the court affirmed the general principle that a party may be held liable in damages for inducing another to breach his contract.\textsuperscript{1}

The principle of tort liability for inducing breach of contract is relatively new. The first significant case, \textit{Lumley v. Gye},\textsuperscript{2} held that the defendant’s inducement of a famous singer to breach her contract to sing at plaintiff’s theater was actionable.\textsuperscript{3} The principle was first recognized in North Carolina in \textit{Haskins v. Royster}\textsuperscript{4} where the defendant induced a servant of plaintiff to breach his employment contract with the plaintiff,\textsuperscript{5} and was affirmed and extended in \textit{Jones v. Stanly}\textsuperscript{6} where the de-

\textsuperscript{2} Scanlan, \textit{Racial Restrictions in Real Estate}, 24 \textit{Notre Dame Law.}, 157, 179 (1949).

It seems obvious that some of the means formerly employed are now outlawed by the \textit{Barrows} decision. Declaratory judgments and advisory opinions by state courts would be state action in violation of the Constitution. Also the inclusion of racial restrictions as conditions in a fee simple determinable or a conditional fee is probably now illegal, at least so far as enforcement is concerned. The effect of the \textit{Barrows} decision should be kept in mind when reading the articles cited throughout this note.

\textsuperscript{1} Bryant v. Barber, 237 N. C. 480, 75 S. E. 2d 410 (1953).
\textsuperscript{2} (1853) 2 Ell. & Bl. 216.
\textsuperscript{3} The chief significance of this case being a holding that the action would lie even though the means used \textit{were not tortious to the singer}, which had long been a requisite. (Italics supplied.) See: Garret v. Taylor, (1621) Cro. Jac. (K. B.) 567.
\textsuperscript{4} 70 N. C. 601 (1874).
\textsuperscript{5} It is said that rights to the performance of a contract are property rights. Second National Bank v. M. Samuel and Sons, 12 F. 2d 963 (2d Cir. 1926); Kock v. Burgess, 137 Iowa 727, 149 N. W. 858 (1914); Winston v. Lumber Co., 227 N. C. 339, 42 S. E. 2d 218 (1947).
\textsuperscript{6} 76 N. C. 355 (1877).
fendant induced a railroad company to refuse to transport freight in accordance with the terms of a contract between plaintiff and the railroad.

Intended interference with the contractual relations of another creates a prima facie tort, and the burden of showing justification rests upon the defendant.\(^7\) To establish justification as a defense the defendant must have been protecting an interest at least equal in value to the contract rights of the plaintiff.\(^8\) It has been said that “The question of privilege is of course as broad as the catalogue of possible interests involved. . .”\(^9\)

In *Bryant v. Barber*,\(^{10}\) the court applied the general rule that the privilege of free competition does not justify intentional interference with established contractual relations,\(^{11}\) refusing to recognize the defendant's contention that he was merely engaging in “legal competition.”\(^{12}\)

Efforts to eliminate business competitors, besides incurring criminal liability,\(^{13}\) are actionable if they interfere with contractual relations. Thus, where plaintiff had patented an attachment for hosiery machines and had assigned a one-fourth interest to the defendants, it was held to be an actionable wrong for the defendants to interfere with plaintiff's contract with another party to use the attachment on a partnership basis.\(^{14}\) Furthermore, the privilege of free competition will not justify inducing breach of a non-competitive agreement. In *Sineath v. Katzis*,\(^{15}\) where plaintiff bought a laundry and dry-cleaning establishment, including the previous owner's goodwill, and where part of the consideration for the purchase price was an agreement with the former owner not to compete anywhere in the county for 15 years, and where it was shown to the court's satisfaction that the defendant had induced the former owner to assist her in establishing and running a dry-cleaning establishment

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\(^{10}\) 237 N. C. 480, 75 S. E. 2d 410 (1953).

\(^{11}\) Westinghouse Electric Co. v. Diamond State Fibre Co., 268 Fed. 121 (D. C. Del. 1920); Sperry and Hutchinson Co. v. Pommer, 199 Fed. 309 (N. D. N. Y. 1912); Cumberland Glass Manufacturing Co. v. DeWitt, 120 Md. 381, 87 Atl. 927 (1913), aff'd, 237 U. S. 447 (1915); Beekman v. Marsters, 195 Mass. 205, 80 N. E. 817 (1907). But cf. Schonwald v. Ragains, 32 Okla. 223, 229, 122 Pac. 203, 210 (1912) where it was held that use of fair means with the primary object of bettering one's business which incidentally results in breach of plaintiff's contract is not actionable.

\(^{12}\) Brief for Appellants, p. 10, Bryant v. Barber, 237 N. C. 480, 75 S. E. 2d 410 (1953).

\(^{13}\) N. C. GEN. STAT. § 75-5 (1950), and N. C. GEN. STAT. § 75-13 (1950).

\(^{14}\) Coleman v. Whisnant *et al.*, 225 N. C. 494, 35 S. E. 2d 647 (1945). Relevant to the question before the court here was the fact that the defendants had also interfered with plaintiff's efforts to form other contracts. The court inferentially did not consider the defendants' assignment of plaintiff's patent rights of sufficient moment to justify the interference with plaintiff's contractual relations.

\(^{15}\) 218 N. C. 740, 12 S. E. 2d 671 (1941).
in the same city, contrary to his non-competitive agreement with the plaintiff, it was held that the defendant was liable.

Where a party has a contract of his own which conflicts with the contract of another, he is not precluded from acting to protect his own contract. One is also privileged to interfere with the contractual relations of another if he acts to protect the public health, safety, or morals, or to perform a duty owed a third person. There is a privilege to give disinterested advice even though it incidentally results in a breach of contract by one acting upon the advice, and there is a privilege to protect the ownership or condition of property. Furthermore, a principal is privileged to act in protection of his agent’s interests. And, of course, one is privileged if he is acting in obedience to a governmental order or regulation.

It has been said that the privilege to protect an interest equal to or greater than the plaintiff’s contract rights is conditional and is lost if exercised for the wrong purpose. North Carolina, however, for many years allowed intentional interference with contracts to convey interests in land, elevating in a series of decisions what could have more easily been considered privileged protection of interests, under the circumstances, to the status of an absolute right which could be asserted regardless of motive. Thus, in Holder v. Atlantic Joint Stock Land Bank, where plaintiff had contracted to sell a tract of land, and where defendant, holder of a deed of trust on the land, induced the prospective buyer to breach his contract, representing to him that the plaintiff could not pass good title and that the defendant would sell the land after the pending foreclosure proceedings to the buyer for less than the contracted


17 Brimelow v. Casson, (1924) 1 Ch. 302.


20 O’Brien v. Western Union, 62 Wash. 598, 114 Pac. 441 (1911).


22 Garcia Sugars Corp. v. N. Y. Coffee and Sugar Exchange, 7 N. Y. S. 2d 532 (1938).

23 Carpenter, Interference with Contractual Relations, 41 Harv. L. Rev. 728, 746 (1928).


25 Holder v. Atlantic Joint Stock Land Bank, 208 N. C. 38, 178 S. E. 861 (1935); Elvington v. Waccamaw Shingle Co., 191 N. C. 515, 132 S. E. 274 (1926); Biggers v. Mathews, 147 N. C. 299, 61 S. E. 55 (1908). Barnhill, J., in a concurring opinion in Bruton v. Smith, 225 N. C. 584, 36 S. E. 2d 9 (1945) inferred that these decisions were exceptions bottomed upon the force and effect of the North Carolina registration statute, i.e., that a party to an unregistered contract to convey land has no contract rights for the courts to protect anyway.

26 208 N. C. 38, 178 S. E. 861 (1935); see Note, 14 N. C. L. Rev. 112 (1935).
amount, it was held that the defendant had a legal right to compete with
the plaintiff for the buyer and could exercise the right regardless of
motive. Later decisions have given land sale contracts more protection
from outside interference, refusing to recognize, as privileged, action by
the defendant in protection of his less clearly defined "rights" when
the contract is registered as required by statute.\textsuperscript{28} In \textit{Winston v. Lumber Co.},\textsuperscript{29} allegations by plaintiff that he had executed a contract with \textit{S},
owner of a certain tract, and registered the contract, by the terms of
which \textit{S} agreed to sell certain timber on the tract, and that defendant
had unlawfully, wrongfully, and maliciously\textsuperscript{30} persuaded \textit{S} to break his
contract with plaintiff and convey to the defendant instead were held
sufficient as against a demurrer.\textsuperscript{31}

That a party is liable for inducing breach of contract when he entices
away employees\textsuperscript{32} who have employment contracts with their employers
is also well established.\textsuperscript{33} This is made a misdemeanor by statute,\textsuperscript{34}
which may account for the fact that the criminal indictment is apparently
more common in this situation than a civil action.\textsuperscript{35}

Although the general principle of liability for inducing\textsuperscript{36} breach of
contract has been discredited\textsuperscript{37} and limited\textsuperscript{38} in North Carolina decisions,
it is submitted that the recent decision of \textit{Bryant v. Barber},\textsuperscript{39} has affir-
266 (1949); \textit{Bruton v. Smith}, 225 N. C. 584, 36 S. E. 2d 9 (1945).
\textsuperscript{29}227 N. C. 339, 42 S. E. 2d 218 (1947).
\textsuperscript{30}"Malice" being the cornerstone of the basis of liability, meaning nothing more
than lack of legal justification or excuse. \textit{Holder v. Cannon Mfg. Co.}, 135 N. C.
392, 47 S. E. 481 (1904); \textit{Morgan v. Smith}, 77 N. C. 37 (1877); \textit{Jones v. Stanly},
76 N. C. 355 (1877); \textit{PROSSER, TORTS} 996 (1941).
\textsuperscript{31}It should be mentioned that knowledge of the existence of the contract by the
defendant is, of course, requisite to liability, \textit{Sineath et al. v. Katzis}, 218 N. C. 740,
12 S. E. 2d 671 (1941), and that it must be shown that the defendant's wrongful
Commission Co.}, 138 Mo. 439, 40 S. W. 93 (1897).
\textsuperscript{32}As regards liability for procuring an employee's discharge to his damage, see
\textit{Holder v. Cannon Mfg. Co.}, 135 N. C. 392, 47 S. E. 481 (1904). The question of
liability of a labor union for procuring breach of employment and related contracts is
extensive and complicated, and is not within the scope of this note.
\textsuperscript{33}\textit{Sears v. Whitaker}, 136 N. C. 37, 48 S. E. 517 (1904); \textit{Morgan v. Smith}, 77
N. C. 37 (1877); \textit{Haskins v. Royster}, 70 N. C. 601 (1874).
\textsuperscript{34}\textit{N. C. Gen. Stat.} § 14-347 (1953).
\textsuperscript{35}For decisions construing this statute see \textit{Annotations, N. C. Gen. Stat.} § 14-
347 (1953).
\textsuperscript{36}It has been said that mere negligence or non-feasance which results in a
breach of another's contract is not a basis for liability. \textit{Robins Dry Dock and
Repair Co. v. Flint}, 275 U. S. 303 (1927); \textit{Ford v. C. E. Wilson Co.}, 129 F. 2d
614 (2d Cir. 1942); \textit{Lamport v. 4175 Broadway}, 6 F. Supp. 923 (S. D. N. Y.
1934).
\textsuperscript{38}\textit{Bruton v. Smith}, 225 N. C. 584, 36 S. E. 2d 9 (1945).
\textsuperscript{39}237 N. C. 480, 75 S. E. 2d 410 (1953).
matively extended this doctrine to the area of everyday business competition where a contracting party’s competitor has attempted to appropriate the plaintiff’s contract rights for himself.  

R. G. HALL, JR.

Criminal Law—Search Warrants—Extension of the Law in North Carolina

In North Carolina, search warrants are authorized by statute to issue for the seizure of the following objects: (1) stolen property; (2) false or counterfeit coins, notes, bills, or bonds, and instruments used for counterfeiting them; (3) any personal property, tickets, books, papers, and documents used in connection with and in the operation of lotteries, gaming, and gambling; (4) liquor illegally possessed for the purpose of sale; (5) deserting seamen; (6) game taken in violation of the game laws; and (7) re-used bottles. A search warrant may not issue for any object not covered by statute, and its availability may not be extended by construction to any case not clearly covered by statute.

At common law, facts discovered by illegal searches and seizures could be used in evidence. In 1913, *State v. Wallace* recognized that

\[\text{A party is liable for any intentional, unprivileged interference with contractual relations of others. Jasperson v. Dominion Tobacco Co., (1923) A. C. 709, L. R. 92 P. C. 190. See also Philadelphia Record Co. v. Leopold, 40 F. Supp. 346, 348 (S. D. N. Y. 1941) (principle applicable to inducement to "tender spurious performance," where professional puzzle solvers sold contestants answers to plaintiff's puzzle series, where the contestants were under no contractual obligation to perform).}

For a detailed study of the whole subject of liability for procuring breach of contract see Annotation, 84 A. L. R. 43; Annotation, 26 A. L. R. 2d 1227; Carpenter, *Interference with Contractual Relations*, 41 Harv. L. Rev. 728 (1928); Sayre, *Inducing Breach of Contract*, 36 Harv. L. Rev. 663 (1923).

\[\text{N. C. Gen. Stat. § 15-25 (1953).} \]
\[\text{N. C. Gen. Stat. § 18-13 (1953).} \]
\[\text{N. C. Gen. Stat. § 14-351 (1953).} \]
\[\text{N. C. Gen. Stat. § 113-91(d) (1952).} \]
\[\text{N. C. Gen. Stat. § 80-28 (1950).} \]
\[\text{Ordinarily even the strong arm of the law may not reach across the threshold of one's dwelling and invade the sacred precinct of his home except under authority of a search warrant issued in accord with pertinent statutory provisions.} \]

\[\text{In re Walters, 229 N. C. 111, 113, 47 S. E. 2d 709, 710 (1948); People ex rel. Simpson Co. v. Kempner, 208 N. Y. 16, 101 N. E. 794 (1913); State v. Mann, 27 N. C. 45 (1844); MACHEN, THE LAW OF SEARCH AND SEIZURE § 2(1950); cf. Ltr. of Atty. Gen. of N. C. to Mr. J. K. Morris, 22 July 1952 ("it is seriously doubted if a search warrant would be the proper method of searching a tourist camp which is suspected of operating for immoral purposes.").} \]


\[\text{State v. McGee, 214 N. C. 184, 198 S. E. 616 (1938).} \]

\[\text{162 N. C. 623, 631, 78 S. E. 1, 4 (1913). The court approved the following statement of the rule: "It may be mentioned in this place that though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question."} \]
rule as existing in North Carolina. Under that doctrine, evidence seized by officers either under an invalid search warrant or without any search warrant could be admitted in evidence at trial, and the defendant would then be left to his right of civil action against the trespassing officer. Furthermore, under this doctrine it followed that evidence for which the statute did not authorize a warrant to issue (e.g., burglar tools or murder weapons) could be used in evidence when seized by means of an illegal search. An act of the General Assembly of 1937 altered this rule by providing that no facts discovered by means of an "illegal" search warrant could be used as evidence in the trial of any action. The statutory context of the word "illegal" indicates that it connotes a procedural defect in the warrant, such as the failure of the investigating officer to sign an affidavit under oath, or the failure of the magistrate to examine him in regard thereto before issuing the warrant. Thus if a search warrant were issued upon affidavit under oath and examination to authorize a search for narcotics, although there is no statutory authority for the issuance of such a warrant, quere as to whether any evidence discovered under such a warrant would not be admissible under the common law in spite of the 1937 amendment. In 1938, the Supreme Court in State v. McGee pointed out the ineffectiveness of the 1937 amendment in changing the common law rule admitting evidence obtained by illegal search and seizure. This decision held that since the 1937 amendment made no mention of articles seized in an unlawful search conducted without any warrant at all, evidence so obtained was still admissible. Then in 1951, the search warrant law was further amended by adding the following proviso:

Provided, no facts discovered or evidence obtained without a legal search warrant in the course of any search, made under conditions requiring the issuance of a search warrant, shall be competent as evidence in the trial of any action.

As for objects set out in the statutes for which search warrants are authorized to issue, it is clear that they may not be presented in evidence where they are discovered under an "illegal" search warrant or without

20 Riley v. Stone, 174 N. C. 588, 94 S. E. 434 (1917); Cohoon v. Speed, 47 N. C. 133 (1885).
22 "Any officer who shall sign and issue, or cause to be signed and issued a search warrant without first requiring the complainant or other person to sign an affidavit under oath and examining said person or complainant in regard thereto shall be guilty of a misdemeanor; and no facts discovered by reason of such illegal warrant shall be competent as evidence in the trial of any action..." N. C. Gen. Stat. § 15-27 (1953); see State v. Rhodes, 233 N. C. 453, 455, 64 S. E. 2d 287, 289 (1951).
23 214 N. C. 184, 198 S. E. 616 (1938) (held, that the amendment constituted a modification and not an abrogation of the common law rule).
any search warrant “where one is required.” *Quere* as to the admissibility of evidence obtained by a search made with or without a search warrant in a case where no search warrant is authorized by statute; *e.g.*, a search for instruments used in the commission of a felony, or for narcotics.15 The wording of the provision might be construed to mean that the statute contemplates only those situations where a warrant *may* issue, and not those situations where there is no provision for the issuance of a search warrant.16

Under the North Carolina law therefore, search warrants may not issue for property used in the commission of general felonies not covered by the existing statutes, or for illegal narcotics. Thus if an officer were to take it upon himself to search a suspect’s home without a search warrant, for instruments used in the commission of a murder and found the murder weapon, it is possible that the court would follow either of two courses of action in ruling on the admissibility of the evidence. The court might consider that the evidence was the result of an illegal search where a search warrant is required and was therefore inadmissible; or, on the other hand, the court might apply the common law doctrine to such a case and admit the evidence, leaving the defendant to his civil remedy. Since the passage of the 1951 amendment, the court has not been called upon to decide whether the common law doctrine admitting evidence obtained by illegal searches and seizures has been completely abrogated in North Carolina. In either of the above two instances, it would seem that the effective detection and prevention of crime is hampered in this State by the fact that our search warrant law does not make provision for issuance of search warrants to search for property used in the commission of a felony or for narcotics.

A survey of the search warrant laws of the several states reveals that fifteen states17 provide for the issuance of search warrants to search for

15 Also, *quere* as to the admissibility of evidence obtained by an unreasonable search under a legal search warrant.

16 The courts determine the competency of evidence irrespective of the method by which it was procured. An objection to an offer of proof made on the trial of a cause raises no other question than that of its competency, relevancy and materiality. On such objection the court cannot enter on the trial of a collateral issue as to the source from which the evidence was obtained, unless expressly required so to do by statute.” State v. McGee, 214 N. C. 184, 186, 198 S. E. 616, 617 (1938).

property used in the commission of a felony. Five states\(^\text{18}\) authorize the issuance of a warrant to search for property used in the commission of a misdemeanor or a felony. Federal Rules\(^\text{19}\) authorize the issuance of a search warrant for property “designed or intended for use or which is or has been used as the means of committing a criminal offense.” Ten of the fifteen states allowing the issuance of a search warrant for property used in the commission of a felony have an additional provision providing that search warrants may issue for property:

when it is in the possession of any person with the intent to use it as the means of committing a public offense, or in the possession of another to whom he may have delivered it for the purpose of concealing it or preventing its being discovered, in which case it may be taken on the warrant from such person, or from any place occupied by him or under his control, or from the possession of the person to whom he may have delivered it.\(^\text{20}\)

The Uniform Narcotics Act of North Carolina\(^\text{21}\) makes adequate provision for the punishment of violations of the Act and for seizure of the contraband and vehicles used in its transportation. It seems that an important means of enforcement is being withheld from the law enforcement officers of the state, however, in that there is no provision made for the issuance of a search warrant to search places where it is suspected that illegal traffic in narcotics is being carried on. A search of the pertinent statutes of the states reveals that thirteen states\(^\text{22}\) have specific

\(^{18}\) FLA. STAT. ANN. § 993.02(2)(a) (1941); OHIO GEN. CODE ANN. § 13430-1 (Supp. 1952); VT. REV. STAT. § 2447 (1947); WIS. STAT. § 363.02 (1951); WYO. COMP. STAT. ANN. § 10-201 (1945).


\(^{20}\) ARIZ. CODE ANN. § 44-3501(3) (1939); CAL. PEN. CODE § 1524(3) (1949); IDAHO CODE ANN. § 19-4402(3) (1947); IOWA CODE ANN. c. 36, § 7513(3) (1950); MONT. REV. CODES ANN. § 301-2(3) (1947); N. Y. CRIMINAL CODE AND PENAL LAW § 792(3) (1945); N. D. REV. CODE § 2902(3) (1943); OKLA. STAT. tit. 22, § 1222(3) (1947); OR. COMP. LAWS ANN. § 26-1702(3) (1940); UTAH CODE ANN. § 77-54-2(3) (1953).

\(^{21}\) N. C. GEN. STAT. § 90-86 et seq. (1950).

\(^{22}\) FLA. STAT. ANN. § 933.02(3) (1941); LA. REV. STAT. § 15:43 (1950); MASS. ANN. LAWS c. 94, § 214 (1946); MICH. STAT. ANN. § 1053 (1937); MINN. STAT. § 618.12 (1945); MISS. CODE ANN. § 6837 (1952); N. H. REV. LAWS c. 424, § 1 (1942); N. M. STAT. ANN. § 721 (VIII) (1941); TEX. CODE CRIM. PROC. ANN. art. 725b(16) (1925); UTAH CODE ANN. § 58-13-29 (1953); W. VA. CODE ANN. § 1385(19) (1949); WIS. STAT. § 363.02(7) (1951); WYO. COMP. STAT. ANN. § 46-214 (1945). "It shall be lawful for any Justice of the Peace to issue search warrants to search any building, house, premises, place, automobile, conveyance, or person, for any of the drugs mentioned in this act [§§ 46-201 to 46-224]. Provided, however, that no warrant for such search shall be issued except upon probable cause and when there shall have been filed with the Justice a complaint in writing under oath, particularly describing the building, house, premises, place, automobile, conveyance, thing or person to be searched, the person to be seized, and alleging substantially the offense in relation thereto, and that the complainant verily believes that drugs mentioned in this Act are kept in violation of law, or so concealed on such person, or in or about the place or thing to be searched. . . ." Ibid.
statutes authorizing search warrants relative to the enforcement of their narcotics law. It is also possible, of course, that search warrants may be issued in other states to search for narcotics, if the state has a statute authorizing the issuance of warrants to search for property “used in the commission of a felony.”

In order to help remove the doubt concerning the admissibility of evidence obtained without a search warrant in cases where no warrant may issue, and further, to aid the law enforcement officers of our State more effectively to enforce our laws in a legal manner, it is submitted that the search warrant statute, G. S. § 15-25, should be amended to allow the issuance of search warrants for property used in the commission of a felony; and that the Uniform Narcotics Act, G. S. § 90-110, should be amended to allow the issuance of search warrants to search for narcotics being held or possessed in violation of the narcotics law of North Carolina.

ELTON C. PRIDGEN

Federal Tort Claims Act—Discretionary Functions Exception

On June 8, 1953, the Supreme Court of the United States, in Dalehite v. United States, affirmed the judgment of the Court of Appeals for the 5th Circuit in the Texas City disaster cases. The District Court for the Southern District of Texas had found for the plaintiffs, and that judgment had been reversed and rendered for the United States by the court of appeals. Leave to file a petition for rehearing was denied on November 9, 1953.

24 The Federal cases distinguish between evidence of the offense being carried on and the instruments or fruits of the crime. Thus searches of one’s house, office, papers, or effects merely to get evidence to convict him of crime is considered a violation of the self-incrimination prohibition; but searches for and seizure of stolen property, counterfeit coins, burglar’s tools, illicit liquor and gambling apparatus is considered proper under the Federal law. U. S. v. Lefkowitz, 285 U. S. 452 (1932).
26 "The use of the search warrant to prevent and detect crime is a valid exercise of the police power of the state. The constitutional provisions have no application to reasonable rules and regulations adopted in the exercise of the police power for the protection of the public health, morals, and welfare.” 47 AM. JUR. Searches and Seizures § 13 (1938).

27 73 S. Ct. 956 (1953). Mr. Justice Reed delivered the prevailing opinion. Mr. Justice Clark and Mr. Justice Roberts took no part in the case. Mr. Justice Jackson submitted a dissenting opinion in which Mr. Justice Black and Mr. Justice Frankfurter concurred.
28 In re Texas City Disaster Litigation, 197 F. 2nd 771 (5th Cir. 1952). Three of the six judges, while agreeing with the decision to reverse the judgment of the district court, dissented from the decision to render judgment for the United States, being of opinion that the facts alleged in the complaint set up grounds for relief and that the cause should have been remanded for a new trial.
29 The litigants now, of course, attempt to secure remedy through special Congressional legislation.
A brief summary of the facts underlying this litigation may be useful. Shortly after the close of the second World War, the government of the United States undertook or authorized the manufacture of a product known as fertilizer grade ammonium nitrate, commonly referred to as FGAN. Since ammonium nitrate was an important component of explosives used by the armed forces, it had been manufactured during the war at a number of government-operated ordnance plants. It was therefore arranged that FGAN should be made in some fifteen otherwise deactivated ordnance factories. The project was to be carried out largely by private concerns, but they were to use government-approved formulae and to be under the direct control of the government as to plans and schedules of production, packaging, storage and shipping. Army personnel were assigned to supervise and direct the entire operation in all its details.

The FGAN thus made was mainly designed for shipment abroad for use in aiding in the agricultural rehabilitation of the occupied countries. As part of this program a considerable quantity of FGAN had been stored in Texas City where it was available for loading on ships sailing from that port. In April, 1947, two ships, the Grandcamp and the High Flyer, berthed in the harbor of Texas City, were being loaded with FGAN. On the morning of April 16 fire was discovered in the hold of the Grandcamp, and shortly thereafter the cargo of FGAN exploded with such terrific violence that hundreds of the residents of Texas City were killed, and millions of dollars of property damage caused. The fire spread to the High Flyer and subsequently that ship exploded also, with further loss of life and property damage.

As a result of this disaster, almost 8,500 plaintiffs were assembled with aggregate claims against the United States approximating $200,000,000. The alleged rights of all claimants were grounded on the Federal Tort Claims Act, and it was agreed that the validity of the rights of all should be tested in the case of Dalehite v. United States, here under discussion. If there was judgment for the plaintiff in that case, the only question in the other cases would be the amount of damages to be assessed in each instance; if judgment was rendered for the United States, all the other complaints would be dismissed.

In arriving at its determination that the judgment of the court of appeals in favor of the United States had been correct, the Supreme

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4 The proceedings in the district court and the court of appeals are ably reviewed, with pertinent comment, in 101 U. of Pa. L. Rev. 420-425 (December, 1952). It is, therefore, unnecessary to restate at length the contentions of the parties or the opinions of the judges in the lower courts.

Court considered two questions: first, were the situations antecedent to and leading up to the disaster covered affirmatively by the provisions of the Act; and second, did one or more of the exceptions set forth in the Act exempt the United States from liability under the circumstances.

The Court disposed of the contentions of the plaintiff on the first question by reference to the provision of the Act conferring upon the district courts "exclusive jurisdiction of civil actions on claims against the United States . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." (Emphasis provided.) It was pointed out that the plaintiff did not allege negligent or wrongful acts on the part of specified or named employees, which the wording of the Act, in the view of the Court, required. Plaintiff's theory that the government should be held strictly liable, in view of the allegation that it was, in effect, engaged in an inherently hazardous enterprise, was rejected on the ground that the Act requires proof of misfeasance or non-feasance, thus excluding liability without fault.

However, the critical determination of the Court dealt with the provisions of the Act defining situations in which the Act shall not apply. In this case the most important such exception is the one relating to discretionary acts worded to exclude any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved be abused." No serious question arose as to the power of the appropriate responsible administrative officers to make the initial decision to manufacture FGAN, nor was it contended that that decision, as such, involved the United States in liability, either under the terms of the Tort Claims Act or under the general principles of administrative law. The important questions

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7 The Court of Appeals for the 3rd Circuit, in Jackson v. United States, 196 F. 2d 725 (1952), held that the Act applied even where negligence was not proved as to a specific employee, since the government can act only through the agency of some employee. Therefore, if the government is negligent, it must be by reason of the negligence of some person. Also, in State of Maryland for the use of Pumphrey v. Manor Real Estate and Trust Co., et al., 176 F. 2d 414 (4th Cir. 1949), the government was held liable without the finding of negligence on the part of a specific employee. (This case is discussed further, infra, p. 124.) There are other cases that seem to apply the rule of general negligence, i.e., United States v. Hull, 195 F. 2d 64 (1st Cir. 1952), Phillips v. United States, 102 F. Supp. 943 (E. D. Tenn. 1952), Blaine v. United States, 102 F. Supp. 161 (E. D. Tenn. 1951), and Henson v. United States, 88 F. Supp. 148 (E. D. Mo. 1949).
9 For a discussion of the legal meanings and implications of discretionary as distinguished from non-discretionary or ministerial acts, see Freund, "Admnistrative
related to the exempt character of the decisions and actions of employees in the lower echelons of authority. On this point the Court said: "Where there is room for policy judgment there is discretion. If it were not so, the protection of § 2680(a) would fail at the time it would be needed, that is, when a subordinate performs or fails to perform a causal step, each action or nonaction being directed by the superior, exercising, perhaps abusing, discretion."

Hence the Court found that all the acts complained of by the plaintiff—alleged failure to complete investigations initiated to determine possible dangerous characteristics of FGAN, alleged negligent packaging of a combustible product in combustible containers at high temperatures, alleged failure to label the packages so as to give notice of the unstable, highly combustible and potentially explosive nature of the contents, and the alleged failure to warn handlers of the dangers of careless stowage—were all discretionary, at one level of responsibility or another, and, hence, not actionable under the provisions of the Act.

It is possible at this point to entertain the conclusion that the Court has significantly modified the general attitude of federal courts in interpreting the Tort Claims Act. By and large, the opinions of the courts in applying the law have tended in the direction of liberality. It is true that it has been authoritatively determined that members of the armed services, while on active duty, may not sue the government under the Act.\(^\text{10}\) But it has been held that military personnel may recover if on

twelve Powers over Persons and Property (1928) cc. V and VI. The general rule that discretionary administrative acts are not subject to judicial review or interference is too well established and too clearly understood to require extensive supporting citation. The rule has been applied in a number of cases arising under the Tort Claims Act. The following classes of cases will serve as examples:


b. Damage resulting from alleged wrongful official acts and decisions of members of the Securities Exchange Commission: Schmidt v. United States, 198 F. 2d 32 (7th Cir. 1952).


\(^{10}\) 28 U. S. C. § 2680(j) (1950) specifically exempts "Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." (Emphasis provided.) In Feres v. United States, 340 U. S. 135 (1950), the Supreme Court held that neither servicemen nor their personal representatives could sue under the Tort Claims Act for injuries or death caused by accidents occurring in non-combatant activities in time of peace. The reasoning was that the Court would not presume either that Congress intended to modify the traditional relationship between the government and the members of the armed forces, or that Congress intended to provide service personnel with redress other than that available through the normal pension and compensation provisions of existing law. Here the Court affirmed what had become the prevailing rule in the lower courts.
furlough, or if on liberty, even though still on the military reservation. In a number of cases civilians have been awarded damages for injuries resulting from negligent acts of military personnel, and in some such cases the courts have insisted that the circumstances fit both descriptive phrases in the section, namely, that the injuries arise out of "combatant activities" and "during time of war." Neither has it been true that the rule has been restricted to the torts of members of the non-commissioned ranks. The government has been found liable for the negligence of commissioned officers, although under the definition of discretion in the Dalehite case the officers might have been found to be acting in a discretionary capacity.

The United States has not been held liable for injuries to the wife of a soldier resulting from the refusal of the authorities of a military hospital to admit such person to care, but in another case it was decided that after a person in similar circumstances had actually been admitted responsible hospital employees would be held to a standard of reasonable care. Here again, the acts complained of could have been held to be discretionary by a strict construction of the word.

And in Johnson v. United States, 170 F. 2d 767 (9th Cir. 1948), it was held that damage resulting from the discharge of oil and other noxious substances from naval vessels anchored in Discovery Bay in 1946 was damage arising from non-combatant activities, and that it was therefore unnecessary to consider the question as to whether or not a state of war still existed at that time.

It must, of course, be recognized that at least in theory the rule of strict construction is applied to any statute modifying the sovereign immunity of the federal government from suit by private parties. As to suits on contracts, the rule was restated in United States v. Sherwood, 312 U. S. 584 (1941). In recent years, however, there have been occasional signs of judicial restiveness. Thus, in Portland Trust & Savings Bank v. United States, 24 F. Supp. 953 (D. Ore. 1938), the court voices the precaution that the rule should not be used "to violate an obvious purpose of Congress by a too rigid application of that canon of construction." Again, in Wallace v. United States, 142 F. 2d 240 (2d Cir. 1944), Judge Frank reveals a strong conviction that the rule that "The King can do no wrong" is repugnant to the spirit of a democracy. He applies the rule with obvious reluctance. Finally, in Herren v. Farm Security Administration, 153 F. 2d 76 (8th Cir. 1946), the court says that the rule of strict construction "is not entitled to be made a judicial vise to squeeze the natural and obvious import out of such a statute or to sap its language of its normal and sound legal meaning."

In construing the Tort Claims Act the rule was applied without qualification in the following cases: Cropper v. United States, 81 F. Supp. 81 (N. D. Fla. 1948),
Almost from the beginning, and with the approval of the Supreme Court, the courts have been willing to hold that insurers and others with similar interests might be subrogated to the rights of injured persons, although there is nothing in the Act which specifically authorizes such subrogation.\(^8\) In *St. Louis-San Francisco Ry. v. United States*\(^9\) the main issue was the right of plaintiff to be subrogated to the rights of its employees. However, the facts are interesting in connection with the question under discussion. A number of railway employees had been injured while handling certain defective military bombs which had been consigned to the railway by the government for shipment. The issue of liability was not directly before the court of appeals, but in reversing the decision of the district court on the question of subrogation and remanding the cause for a new trial, the court clearly intimated that in its opinion the plaintiff had a good cause of action.

Two cases deserve special mention as indicating the favorable attitude heretofore taken by the courts toward claimants under the Tort Claims Act, both on the issue of negligence and on the definition of discretion. The first is the case of *Lemaire v. United States*\(^10\) in which the complaint alleged that a well drilled by the government had, by reason of its depth and proximity, drained a water supply upon which plaintiff depended, and that as a result the value of her land had been adversely affected.

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Donovan v. McKenna, 80 F. Supp. 690 (D. Mass. 1948), and Long v. United States, 78 F. Supp. 35 (S. D. Cal. 1948). But in Bates v. United States, 76 F. Supp. 57 (D. Neb. 1948), the court, after stating the rule, says nevertheless that the Act "should receive that construction consistent, of course, with its terms, which will accord with a fair appraisal of its purposes, and within constitutional limitations, effectuate them." In the following instances the courts have been outspoken in opposition to the rule of strict construction: Employers' Fire Ins. Co. v. United States, 167 F. 2d 655 (9th Cir. 1948), and United States v. Rosati, 97 F. Supp. 747 (D. N. J. 1951). The Supreme Court has indicated a favorable attitude toward a liberal view in United States v. Yellow Cab Co., 340 U. S. 543 (1951). In that case, in discussing the purpose of the Tort Claims Act as indicated by Congressional hearings and discussions, and the history of legislation waiving the government's immunity from suit, the Court says: "Recognizing such a clearly defined breadth of purpose for the bill as a whole, and the general trend toward increasing the scope of the waiver by the United States of its sovereign immunity from suit, it is inconsistent to whittle it down by refinements."

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\(^8\) This question was settled by the Supreme Court in *Aetna Casualty and Surety Co. v. United States*, 338 U. S. 366 (1949), when on certiorari to the appropriate courts of appeals four cases involving the rights of insurers to be subrogated to the rights of plaintiffs under the Act were decided against the government and in favor of the insurers. It is interesting to note the conclusion of the late Chief Justice Vinson's opinion, in which he quotes with approval Judge Cardozo's statement in *Anderson v. Hayes Construction Co.*, 243 N. Y. 140, 147, 153 N. E. 28, 29-30 (1926): "The exemption of the sovereign from suit is hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."

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The Supreme Court of North Carolina, in *Lyon & Sons v. Board of Education*, 238 N. C. 34, 76 S. E. 2d 553 (1953), concurred in the liberal rule of construction followed by the federal courts, and held that the state tort claims act granted, by implication, the right of subrogation.

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\(^9\) 187 F. 2d 925 (5th Cir. 1951).

There was no allegation of negligence on the part of any federal employee. The court held that a good cause of action had been made out.

The second is the case of State of Maryland for the use of Pumphrey v. Manor Real Estate & Trust Co., et al.21 One of the unnamed defendants was the United States, and the complaint against the United States was the one entertained and discussed by the court. The Federal Housing Authority had rented a number of old semi-detached houses in the city of Baltimore and had converted them into apartments for the accommodation of war workers. Six families were sheltered in each house, all of them using the basement in common, among other purposes for the disposition of garbage and waste. The floors of the basements were of old and rotting wood. As the result of the combination of plentiful food and ideal facilities for nests and runways, the basements became heavily infested with active, fearless and well-fed rats. The condition was noted by the health authorities of the city of Baltimore, who called it to the attention of the Housing Authority. The Health Department issued no order and the Housing Authority took no action. In October, 1946, several months after the remodelling had been completed, two cases of typhus fever developed in the housing project. The United States Health Service, after an investigation, established to their satisfaction that the cases of typhus had been caused by the bites of infected fleas that had, in turn, been infected by the rats. The Health Service issued orders that the dens and runways of the rats be sealed off and that the vermin be denied further means of access to the buildings from the outside. The Housing Authority delegated the duty of carrying out this order to the private agency that had been hired to manage the houses. There was evidence that the work had been negligently done, but there was no evidence fixing negligence upon any particular federal employee or employees. In January, 1947, after the order just referred to had been issued, plaintiff's husband came down with typhus fever and died before the end of the month. The government cited § 2680(a) of the Tort Claims Act in defense, but the court rejected the contention of protective discretion. It was held that after the admittedly discretionary decision to take over the houses had been arrived at, the government was charged with the duty of keeping the premises safe for the tenants, and that its failure to do so made it liable under the Act.22

In the light of these cases, it is suggested that the Supreme Court has brought to an abrupt stop an observable tendency on the part of the

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21 176 F. 2d 414 (4th Cir. 1949).
22 For similar conclusions as to the meaning of § 2680(a), see the following cases: Somerset Seafood Co. v. United States, 193 F. 2d 631 (4th Cir. 1951), United States v. South Carolina Highway Department, 171 F. 2d 893 (4th Cir. 1948), Dishman v. United States, 93 F. Supp. 567 (D. Md. 1950), and Hodges v. United States, 98 F. Supp. 281 (S. D. Iowa 1948).
lower courts to apply the Tort Claims Act in a broad and liberal spirit. The rule laid down in Dalehite v. United States would certainly have reversed a number of the cases cited supra. However, there is perhaps no reason to assume that the rule in the Dalehite case will be carried to its ultimate, and logical, conclusion, namely, that the negligence of any federal employee, however humble, and including truck drivers, will be held to be exempt as a matter of discretion if the employee is acting under the orders or supervision of responsible superiors who have laid down a plan for the performance of his duties, but who, in the process, has decisions of his own to make.

Of course, in all such matters, practical considerations cannot be entirely ignored. Two hundred million dollars is a large sum of money, by any measure, and as a penalty for negligence it is unquestionably immense. There is nothing to indicate that this aspect of the situation influenced the Court, unless, translating freely, one might read such an intimation into the closing words of Mr. Justice Jackson's dissenting opinion: "Surely a statute so long debated was meant to embrace more than traffic accidents." If not, the ancient and discredited doctrine that 'The King can do no wrong' has not been uprooted; it has merely been amended to read, 'The King can do only little wrongs.'

MILTON E. LOOMIS

Privacy—Unauthorized Use of Photographs—Infringement of Personal and Property Rights

In a recent New York case, Haelan Laboratories, Inc. v. Topps, plaintiff manufacturer had contracts with certain major-league ball-players for the exclusive right to exploit the publicity value of their photographs in advertising its products. Defendant subsequently used the photographs of these same ballplayers in a competing merchandising and advertising scheme. In an action to secure damages and to enjoin...

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202 F. 2d 866 (2d Cir. 1953). Plaintiff had for several years been successfully merchandising and advertising its bubble gum by using pictures of big-league ball-players, which it obtained by exclusive contracts. Defendant, a competitor, attempted to use pictures of players under contract with plaintiff. Held, plaintiff has a cause of action for this infringement.

This use of a photograph is to be distinguished from "indorsement" or "testimonial" advertising. One who falsely claims an indorsement may subject himself to sec. 43(a) of the Lanham Act where a wrongdoer in cases of false advertising is "liable to a civil action ... by any person who believes that he is likely to be damaged by the use of any such false description or representation." 60 STAT. 441, 15 U. S. C. § 1125(a) (1946). See CALLMAN, UNFAIR COMPETITION AND TRADE MARKS, §§20.2(f) (2d ed. 1950); Callman, False Advertising as a Competitive Tort, 48 COL. L. REV. 876, 885 (1948).
the use of such photographs as an encroachment on plaintiff’s “rights of publicity” in these pictures, defendant argued, and the lower court so held, that a person has no legal interest in the publication of his picture other than his non-assignable right of privacy, consequently, plaintiff’s contracts constituted mere releases from liability to the ballplayers for his invasion of their privacy through use of their photographs. On appeal the court held that under New York law “... in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made ‘in gross,’ i.e., without an accompanying transfer of a business or of anything else.”

Prior to this decision a person might prevent the unauthorized commercial publication of his name or photograph by invoking his right of privacy. Consequently, he might “cash in” on his publicity value by the threat of a privacy suit. Privacy, however, was developed as the personal, non-assignable right of the individual to be let alone. While damages for injured feelings are a just compensation for the person who desires seclusion, an actress who has been in the limelight and whose feelings cannot be said to be injured by publicity can recover only nominal damages for invasion of her privacy. Although defendant violated the New York Privacy Statute, the plaintiff could show no loss and

\[N. Y. CIVIL RIGHTS LAW §§ 50, 51 (1938). \text{“Any person whose name, portrait or picture is used within this state for advertising purposes or purposes of trade without the written consent first obtained ... may maintain an equitable action ... against the person ... so using ... to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reasons of such use ...” This statute is the result of a rejection of the right of privacy at common law in Robertson v. Rochester Folding Box Co., 171 N. Y. 538, 64 N. E. 442 (1902). North Carolina, on the other hand, recognized the common law right of privacy in Flake v. Greensboro News Co., 212 N. C. 780, 195 S. E. 55 (1938) and relied on the able dissent of Judge Gray in the above New York case.}

\[Haelan Laboratories v. Topps, 202 F. 2d 866, 868 (2d Cir. 1953). There being some question of defendant wrongfully inducing a breach of contract, Chief Judge Swan concurred “... in so much of the opinion as deals with the defendant’s liability for intentionally inducing a ballplayer to breach a contract which gave a plaintiff the exclusive privilege of using his picture.”


recovered nothing for the commercial exploitation of her name and photograph. A professional entertainer may waive his right of privacy against the unauthorized and protested telecasting of his act to thousands of non-paying onlookers because at the time he was performing publicly. Thus, it has been submitted that privacy may be an inadequate remedy for those who desire publicity rather than to be let alone. A “right of publicity,” however, would assure damages commensurate with the commercial value of a celebrity’s name or photograph, and prior publicity would enhance the value of the right rather than constitute a waiver of a cause of action.

Defendant’s contentions, in the principal case, that one has no legal interest in the publication of his picture other than his right of privacy is based on an earlier New York case where plaintiff was denied protection of his contractual rights to the exclusive use of the photographs of certain motion picture actresses. However, specific reference was made to the fact that the complaint was predicated on the New York privacy statute, so the question of other rights, such as the “right of publicity,” was not before the court. Defendant’s argument overlooks the fact that a person may have a common law copyright in his photograph, and that contract rights have been enforced against a photographer for the unauthorized publication of a customer’s picture. Docitionally important in the Haelan case is the holding that the grant of the exclusive privilege to use a person’s photograph may validly be made “in gross,” i.e., without an accompanying transfer of a business or anything else. This is in direct opposition to a Fifth Circuit ruling involving the assignability of names of famous ballplayers, which relied strongly on

9 Harris v. H. S. Gossard Co., 194 App. Div., 688, 185 N. Y. Supp. 861 (1921). Actress sued to recover damages for the unauthorized use of her name and portrait for advertising and purposes of trade contrary to the New York Civil Rights Law. Since her name and portrait had frequently been published without objection on her part and since in this case she admitted that she was not averse to the publicity gained by such publications, and that it helped her in her profession, a verdict of six cents was held not insufficient.


11 Note, The Right of Privacy, 7 N. C. L. Rev. 435, 438 and n. 16 (1929).


15 Hanna Mfg. Co. v. Hillerich & Bardsky Co., 78 F. 2d 763 (C. C. M. D. Ga. 1935). Plaintiff, a manufacturer of baseball bats, contracted with certain famous ballplayers for the exclusive right to use their names in advertising its bats. The bats were marked with a player’s autograph, and each model became known to purchasers by the name it bore. Defendant, a competitor, without agreements with the players under contract with plaintiff, stamped the players’ names in block letters on its bats. One ground on which the District Court granted an injunction was that defendant’s practice violated plaintiff’s property right to the use of the names. The Circuit Court of Appeals reversed on this ground since a player has in his name no property right assignable in gross according to its holding. Re-
the general rule that a trade-mark, trade name or the good will of a business cannot be assigned apart from the business in which it is employed.\textsuperscript{16} This general rule, however, is not without exception\textsuperscript{17} and it has been suggested that a more sensible rule would recognize assignability where there is no likelihood of deception to the public.\textsuperscript{18}

The “right of publicity” has, by implication, been recognized in the exclusive right of an agent to sell the indorsement of a famous designer who attempted to breach her contract;\textsuperscript{19} in the good name, reputation, and good will of a hockey team which derived substantial revenues from the licensing of genuine photographs of the team by name in feature motion pictures;\textsuperscript{20} and in the exclusive right to use a person’s name in a manufacturing process.\textsuperscript{21} Other cases recognize a property right in a person’s photograph on the theory that the pecuniary value therefrom should belong to its owner rather than to one seeking to make an unauthorized use of it.\textsuperscript{22} Where an unauthorized publication has resulted in no injury to the personality of an individual and privacy is an inadequate remedy, some courts, by dicta, imply the possibility of recovery on quasi-contract or some other legal theory.\textsuperscript{23}
NOTES AND COMMENTS

The question of whether the "right of publicity" is recognizable, as such, has yet to be presented in North Carolina. In Flake v. Greensboro News Co.,\(^2\) however, a recognition of the right of privacy provided indirect protection to one's commercial interest in his name and photograph. Certain language in the Flake case in labeling rights in a person's photograph as a "property" right; in referring to the value in one's features as exclusively his until granted away; and in recognizing that modern advertising techniques consider the name or photograph of some people a valuable asset, indicates that a decision, if and when rendered, would be substantially in accord with the principal case. It is submitted that an action in privacy is inadequate protection to commercial interests in personality; and, in agreement with the Haelan case, the value of this commercial interest will be greatly diminished if, as an incident to a purchase, a legally protectible interest is not transferred as the "right of publicity."*

JOHN RANDOLPH INGRAM

Torts—Charitable Institutions—Liability to Paying Patients

In two recent cases\(^1\) the North Carolina Supreme Court held that a charitable hospital was not liable in damages to a paying patient for injuries caused by the negligence of employees of the hospital on the grounds that (1) The doctrine that a charitable institution may not be held liable to a beneficiary of a charity for the negligence of its servants or employees if it has exercised due care in their selection and retention is settled law in this jurisdiction and should not be lightly overruled or whittled away by the court and (2) On the basis of authority and reasoning, no exception should be made in the rule of immunity in favor of paying patrons of charitable institutions.

Justice Barnhill dissented saying that when a hospital charges and receives pay for services rendered a patient, it assumes an obligation to

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\(^{1}\) Williams v. Randolph Hospital, Inc., 237 N. C. 387, 75 S. E. 2d 303 (1953); Williams v. Union County Hospital Ass'n, 237 N. C. 395, 75 S. E. 2d 308 (1953) (The case was first before the Supreme Court in 234 N. C. 536, 67 S. E. 2d 662 (1951)).

\(^{2}\) 315 U. S. 823 (1942); Reed v. Real Detective Pub. Co., 63 Ariz. 294, 162 P. 2d 133 (1945); Gautier v. Pro-Football, Inc., 304 N. Y. 354, 107 N. E. 2d 485 (1952). For illustration of the reasonableness of such recovery see Holmes, quoting Readers Digest, Dec., 1941, p. 23 in O'Brien v. Pabst Sales Co., 124 F. 2d 167, 171 n. 6 (C. C. N. D. Tex. 1941) (dissenting opinion), "Illustrative of the value of the use of one's picture for advertising purposes, Gene Tunney says: 'While I was training for my second fight with Jack Dempsey I was offered $15,000 to endorse a certain brand of cigarettes. I didn't want to be rude, so, in declining, I merely said I didn't smoke. Next day the advertising man came back with another offer: $12,000 if I would let my picture be used with the statement that "Stinkies must be good, because all my friends smoke them."' (This offer also was refused.)."
exercise due care and should be subjected to the same responsibility that
is imposed on others.

The decisions on this question have been in almost hopeless conflict.
The paying patient has recovered against the hospital for negligence of
physicians, nurses, and employees, and for administrative negligence,
such as negligence of the superintendent, failure to provide safe equip-
ment, or failure to select competent nurses and employees. In other
cases he has been denied recovery against the hospital not only for negli-
gence of physicians, nurses, and employees, but also for administra-

2 Moeller v. Hauser, 54 N. W. 2d 639 (Minn. 1952).
2 Tucker v. Mobile Infirmary Ass'n, 191 Ala. 572, 68 So. 4 (1915); England v.
Hospital of the Good Samaritan, 14 Cal. 2d 791, 97 P. 2d 813 (1940); Silva v.
Providence Hospital, 14 Cal. 2d 762, 97 P. 2d 798 (1940); Durney v. St. Francis
Hospital, Inc., 83 A. 2d 753 (Del. 1951); Suwannee County Hospital Corp. v. Gol-
den, 56 So. 2d 911 (Fla. 1952); Nicholson v. Good Samaritan Hospital, 145 Fla. 360,
199 So. 344 (1940); Parrish v. Clark, 107 Fla. 598, 145 So. 848 (1933); Haynes v.
Presbyterian Hospital Ass'n, 241 Iowa 1269, 45 N. W. 2d 151 (1950); Borwege v.
City of Owatonna, 190 Minn. 394, 251 N. W. 915 (1933); Sisters of the Sorrowful
Mother v. Zeidler, 183 Okla. 454, 82 P. 2d 996 (1938); City of Pawhuska v. Black,
117 Okla. 108, 244 Pac. 1114 (1926); City of Shawnee v. Roush, 101 Okla. 60, 223
Pac. 354 (1926); Sessions v. Thomas Dee Memorial Hospital Ass'n, 94 Utah 460,
78 P. 2d 645 (1938); Gitzhoffen v. Sisters of Holy Cross Hospital Ass'n, 32 Utah
46, 88 Pac. 691 (1907); Pierce v. Yakima Memorial Hospital Ass'n, 260 P. 2d 765
(Wash. 1955).
4 O'Connor v. Boulder Colorado Sanitarium Ass'n, 105 Colo. 250, 96 P. 2d 835
(1939) (limited to nontrust funds); Robertson v. Executive Comm. of Baptist
Convention, 55 Ga. App. 469, 190 S. E. 432 (1937) (limited to funds from paying
patients); Morton v. Savannah Hospital, 148 Ga. 438, 96 S. E. 887 (1918) (limited
to funds from paying patients); Mississippi Baptist Hospital v. Holmes, 214 Miss.
906, 55 So. 2d 709 (Miss. 1952); Volk v. City of New York, 284 N. Y. 279, 30 N. E. 2d 596 (1940); Sheehan v. North Country Com-
nunity Hospital, 273 N. Y. 163, 7 N. E. 2d 28 (1937); City of Okmulgee v. Carl-
ton, 180 Okla. 605, 71 P. 2d 722 (1937); Galvin v. Rhode Island Hospital, 12 R. I.
411, 34 Am. Rep. 673 (1879) (rule changed by statute in 1896); Vanderbilt Uni-
versity v. Henderson, 23 Tenn. App. 135, 127 S. W. 2d 284 (1938) (limited to
liability insurance).
5 Dillon v. Rockaway Beach Hospital, 284 N. Y. 176, 30 N. E. 2d 373 (1940).
6 St. Luke's Hospital Ass'n v. Long, 125 Colo. 25, 240 P. 2d 917 (1952) (limited
to nontrust funds); Fields v. Mountainside Hospital, 22 N. J. Misc. 73, 35 A. 2d
701 (Cir. Ct. 1944); Gordon v. Harbor Hospital, 275 App. Div. 1047, 92 N. Y. S.
2d 101 (1949); Texas Medical & Surgical Memorial Hospital v. Cauthorn, 229
S. W. 2d 932 (Tex. 1949); Miller v. Sisters of St. Francis, 5 Wash. 2d 204, 105
P. 2d 32 (1940).
7 Georgia Baptist Hospital v. Smith, 37 Ga. App. 92, 139 S. E. 101 (1927); Hoke v. Glenn, 167 N. C. 594, 83 S. E. 807 (1914); Taylor v. Flower Deaconess
Home and Hospital, 104 Ohio St. 61, 135 N. E. 287 (1922); St. Paul's Sanitarium
v. Williamson, 164 S. W. 36 (Tex. Civ. App. 1914); Norfolk Protestant Hospital
v. Plunkett, 162 Va. 151, 173 S. E. 363 (1934); Miller v. Mohr, 198 Wash. 619,
89 P. 2d 807 (1939); Tribble v. Missionary Sisters of the Sacred Heart, 137 Wash.
326, 242 Pac. 372 (1926).
8 Union Pacific Ry. v. Artist, 60 Fed. 365 (8th Cir. 1894); Hearn v. Water-
bury Hospital, 66 Conn. 98, 33 Atl. 595 (1895); Schloendorff v. Society of N. Y.
Hospital, 211 N. Y. 125, 105 N. E. 92 (1914); Wharton v. Warner, 75 Wash. 470,
135 Pac. 235 (1913); Richardson v. Carbon Hill Coal Co., 10 Wash. 648, 39 Pac.
95 (1895). Most cases hold that the hospital is not liable because the physici-
an is not a servant of the hospital but more in the nature of an independent contractor.
9 Deming Ladies' Hospital Ass'n v. Price, 276 Fed. 668 (8th Cir. 1921); Pater-
lini v. Memorial Hospital Ass'n, 247 Fed. 639 (3rd Cir. 1918); Powers v. Mass.
Homeopathic Hospital, 109 Fed. 294 (1st Cir. 1901); Hallinan v. Prindle, 17 Cal.
Some courts have allowed\textsuperscript{12} or denied\textsuperscript{13} recovery to a patient without


\textsuperscript{12}Faterlini v. Memorial Hospital Ass'n, 247 Fed. 629 (3d Cir. 1918).

\textsuperscript{13}Ray v. Tucson Medical Center, 72 Ariz. 22, 230 P. 2d 220 (1951) (negligent employee); Mulliner v. Evangelischer Diakonissenverein, 144 Minn. 392, 175 N. W. 699 (1920) (negligent nurse); International Order of Twelve of Knights and Daughters v. Barnes, 204 Miss. 333, 37 So. 2d 487 (1948) (negligent selection); Welch v. Frisbie Memorial Hospital, 90 N. H. 337, 9 A. 2d 761 (1939) (negligent employee); Holtfuth v. Rochester General Hospital, 304 N. Y. 27, 105 N. E. 2d 610 (1952) (faulty equipment); Santos v. Unity Hospital, 301 N. Y. 153, 93 N. E. 2d 574 (1950) (administrative negligence).

\textsuperscript{14}Negligent physicians: Erwin v. St. Joseph's Mercy Hospital, 323 Mich. 114, 34 N. W. 2d 480 (1948); Bruce v. Henry Ford Hospital, 254 Mich. 394, 236 N. W. 813 (1931); Van Tassell v. Manhattan Eye & Ear Hospital, 67 Sup. Ct. Rep., N. Y.
any mention of whether he paid. Others have ruled that payment could not change the nature of the institution\textsuperscript{14} or the rule of liability.\textsuperscript{15} The

\textsuperscript{14}Powers v. Mass. Homeopathic Hospital, 109 Fed. 294 (1st Cir. 1901); Armstrong v. Wallace, 8 Cal. App. 2d 429, 47 P. 2d 740 (1935); Boardman v. Burlingame, 123 Conn. 646, 197 Atl. 761 (1938); Jensen v. Maine Eye & Ear Infirmary, 107 Me. 408, 78 Atl. 898 (1910); Downs v. Harper Hospital, 101 Mich. 555, 60 N. W. 42 (1894); Lindler v. Columbia Hospital, 98 S. C. 25, 81 S. E. 512 (1914); Madden v. Mohawk Valley, 19 Wash. 619, 89 P. 2d 807 (1939).

\textsuperscript{15}Hospital liable: Ray v. Tucson Medical Center, 72 Ariz. 22, 230 P. 2d 220 (1951); Durney v. St. Francis Hospital, Inc., 83 A. 2d 753 (Del. 1951); Taylor v. Flower Deaconess Home and Hospital, 104 Ohio St. 61, 135 N. E. 287 (1922); St. Paul's Sanitarium v. Williamson, 164 S. W. 36 (Tev. Civ. App. 1914). Hospital not liable: Deming Ladies' Hospital Ass'n, 276 Fed. 668 (8th Cir. 1921); Powers v. Mass. Homeopathic Hospital, 109 Fed. 294 (1st Cir. 1901); Southern Methodist Hospital & Sanatorium v. Wilson, 45 Ariz. 507, 46 P. 2d 118 (1935), \textit{overruled} by Ray v. Tucson Medical Center, supra as to liability but not as to effect of payment; Stonaker v. Big Sisters Hospital, 116 Cal. App. 375, 52 P. 2d 520 (1931); Burdell v. St. Luke's Hospital, 37 Cal. App. 310, 173 Pac. 1008 (1918); St. Vincent's Hospital v. Stine, 195 Ind. 350, 144 N. E. 537 (1924); Boardman v. City of Henderson, 182 Ky. 771, 207 S. W. 479 (1919); Thibodaux v. Sisters of Charity of the Incarnate Word, 11 La. App. 423, 123 So. 466 (1929); Howard v. South Baltimore General Hospital, 191 Md. 617, 62 A. 2d 574 (1948); Nicholas v. Evangelical Deaconess Home & Hospital, 281 Mo. 182, 219 S. W. 643 (1920); Adams v. University Hospital, 122 Mo. App. 675, 99 S. W. 458 (1907); D'Amato v. Orange Memorial Hospital, 101 N. Y. 61, 127 Atl. 340 (1925); Gable v. Sisters of St. Francis, 227 Pa. 254, 75 Atl. 1087 (1910); Enell v. Baptist Hospital, 45 S. W. 2d 395 (Tex. Civ. App. 1931); Gable v. Sisters of St. Francis, 227 Pa. 254, 75 Atl. 1087 (1910); Enell v. Baptist Hospital, 45 S. W. 2d 395 (Tex. Civ. App. 1931); Magnussen v. Swedish Hospital, 99 Wash. 399, 169 Pac. 828 (1918); Wharton v. Warner, 75 Wash. 470, 135 Pac. 235 (1913); Roberts v.
paying patient may not have recovered because he was a recipient of charity,\textsuperscript{16} his payment being merely a contribution to the charity rather than payment for services,\textsuperscript{17} or he may have recovered because he was not a recipient of charity.\textsuperscript{18}

Generally where the patient has sued for breach of contract, he has not recovered on the ground that where there is no recovery in tort there can be none in contract if the breach is essentially a tort.\textsuperscript{19} In other states he has recovered on breach of contract.\textsuperscript{20} Because of negligent service, a patient has been allowed to recover the money paid to the hospital\textsuperscript{21} and, where sued by the hospital for the value of services rendered, to set up the defense of negligent service.\textsuperscript{22}

In suits against company hospitals maintained by joint contributions of employees and the employer, the employee-patient has been either allowed recovery because the hospital is not a charity,\textsuperscript{23} or denied recovery because the hospital was a charity.\textsuperscript{24}


\textsuperscript{18} Silva v. Providence Hospital, 14 Cal. 2d 762, 97 P. 2d 798 (1940); Suwannee County Hospital Corp. v. Golden, 56 So. 2d 911 (Fla. 1952); Mississippi Baptist Hospital v. Holmes, 214 Miss. 906, 55 So. 2d 142 (1951), aff'd, 56 So. 2d 709 (Miss. 1952).


\textsuperscript{20} Tucker v. Mobile Infirmary Ass'n, 191 Ala. 572, 68 So. 4 (1915); Parrish v. Clark, 107 Fla. 598, 145 So. 848 (1933); Sessions v. Thomas Dee Memorial Hospital Ass'n, 94 Utah 460, 78 P. 2d 645 (1938).

\textsuperscript{21} Armstrong v. Wesley Hospital, 170 Ill. App. 81 (1912).

\textsuperscript{22} Beverly Hospital v. Early, 292 Mass. 201, 197 N. E. 641 (1935) (But he could not set up this defense by way of recoupment since a charitable hospital is not liable in Mass.).


\textsuperscript{24} Union Pacific Ry. v. Artist, 60 Fed. 365 (8th Cir. 1894); Nickolson v. Atchi-
Recovery by the paying patient has depended in part on whether he knew at the time he entered the hospital that it was a charitable institution.\(^25\) It has depended on whether the hospital carried liability insurance\(^26\) or whether it had other nontrust property.\(^27\) In most states the existence of liability insurance has had no effect on either liability or recovery.\(^28\)

Although the weight of older authority is definitely on the side of nonliability of charitable hospitals to patients for the negligence of hospital employees, the trend is toward liability. Of the 30 states that have passed on this precise question since 1930, 13 denied recovery,\(^29\) 12 allowed unconditional recovery,\(^30\) three allowed recovery limited to liability insurance or funds from paying patients,\(^31\) and two under statutory pro-

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\(^{27}\) Morton v. Savannah Hospital, 148 Ga. 438, 96 S. E. 887 (1918) (funds from paying patients); Robertson v. Executive Comm. of Baptist Convention, 55 Ga. App. 469, 190 S. E. 432 (1937) (funds from paying patients).

\(^{28}\) See Notes, 19 N. C. L. Rev. 245 (1941); 25 A. L. R. 2d 29, 139 (1952).

\(^{29}\) Evans v. Lawrence & Memorial Associated Hospitals, 133 Conn. 311, 50 A. 2d 443 (1946); Wilcox v. Idaho Falls Latter Day Saints Hospital, 59 Idaho 350, 82 P. 2d 849 (1938); Piper v. Epstein, 326 Ill. App. 400, 62 N. E. 2d 139 (1945); Ratcliffe v. Wesley Hospital & Nurses' Training School, 135 Kan. 307, 10 P. 2d 859 (1932); Erwin v. St. Joseph's Mercy Hospital, 323 Mich. 114, 34 N. W. 2d 480 (1948); Sibilia v. Paxton Memorial Hospital, 121 Neb. 860, 238 N. W. 751 (1931); Woods v. Overlook Hospital Ass'n, 6 N. J. Super. 47, 69 A. 2d 742 (1949); Williams v. Randolph Hospital, Inc., 237 N. C. 387, 75 S. E. 2d 303 (1953); Lakeside Hospital v. Kovar, 131 Ohio St. 333, 2 N. E. 2d 837 (1936); Gregory v. Salem General Hospital, 175 Ore. 464, 153 P. 2d 834 (1944); Baptist Memorial Hospital v. Marrable, 244 S. W. 2d 557 (Tex. Civ. App. 1951); Meade v. St. Francis Hospital, 74 S. E. 2d 405 (W. Va. 1953); Schau v. Morgan, 241 Wis. 334, 6 N. W. 2d 212 (1942).

\(^{30}\) Ray v. Tucson Medical Center, 72 Ariz. 22, 230 P. 2d 220 (1951) (expressly overruling prior decisions); England v. Hospital of the Good Samaritan, 14 Cal. 2d 791, 97 P. 2d 813 (1940) (overruling prior decisions); Durney v. St. Francis Hospital, Inc., 83 A. 2d 753 (Del. 1951); Suwannee County Hospital Corp. v. Golden, 50 So. 2d 911 (Fla. 1952); Haynes v. Presbyterian Hospital Ass'n, 241 Iowa 1269, 45 N. W. 2d 151 (1950) (expressly overruling prior decisions); Moeller v. Hauser, 54 N. W. 2d 639 (Minn. 1952); Mississippi Baptist Hospital v. Holmes, 214 Miss. 906, 55 So. 2d 142 (1951), aff'd, 56 So. 2d 709 (Miss. 1952) (expressly overruling prior decisions); Welch v. Frisbie Memorial Hospital, 90 N. H. 337, 9 A. 2d 761 (1939); Pivar v. Manhattan General, Inc., 279 App. Div. 522, 110 N. Y. S. 2d 786 (1952); City of Okmulgee v. Carlton, 180 Okla. 605, 71 P. 2d 722 (1937); Sessions v. Thomas Dee Memorial Hospital Ass'n, 94 Utah 460, 78 P. 2d 645 (1938); Pierce v. Yakima Memorial Hospital Ass'n, 260 P. 2d 769 (Wash. 1953) (expressly overruling prior decisions).

visions allowed suit directly against the insurance company although the hospital if sued could have set up its immunity from tort liability.\textsuperscript{32} Only three states within the last three years have denied recovery.\textsuperscript{33}

The North Carolina Court has said repeatedly that a charitable hospital is not liable to a beneficiary for negligence of its employees if carefully selected.\textsuperscript{34} In only the three cases following have the facts involved a charitable institution, a beneficiary, and negligence of a carefully selected employee.\textsuperscript{35}

In \textit{Barden v. Atlantic Coast Line Railway}\textsuperscript{36} the defendant railway operated a hospital for its employees and deducted small amounts monthly from their wages to help defray the cost of hospital care. In a suit by a patient, an employee of the railway, for injuries caused by the negligence of employees of the hospital, the hospital was held a charity and by the weight of authority in this country not liable for the negligence of its agents.\textsuperscript{37}

In \textit{Herndon v. Massey}\textsuperscript{38} the plaintiff, who had paid a $1 fee to enroll in a swimming class at the defendant YWCA, was injured by negligence of its employees. A motion to strike an allegation that the defendant charitable organization carried liability insurance was granted. In affirming, the Supreme Court said that North Carolina followed the majority rule that a charitable institution is not liable for negligence of


\textsuperscript{33} Williams v. Randolph Hospital, Inc., 237 N. C. 387, 75 S. E. 2d 303 (1953); Baptist Memorial Hospital v. Marrable, 244 S. W. 2d 567 (Tex. Civ. App. 1951); Meade v. St. Francis Hospital, 74 S. E. 2d 405 (W. Va. 1953).

\textsuperscript{34} Williams v. Union County Hospital Ass'n, 234 N. C. 536, 67 S. E. 2d 662 (1951); Smith v. Duke University 219 N. C. 628, 14 S. E. 2d 643 (1941) (hospital not liable because negligent physician was not an agent, the court stating that it was unnecessary to determine whether the hospital was charitable); Herndon v. Massey, 217 N. C. 610, 8 S. E. 2d 914 (1940); Cowans v. N. C. Baptist Hospitals, 197 N. C. 41, 147 S. E. 672 (1929) (charitable hospital liable to employee for negligence of another employee); Johnson v. City Hospital Co., 196 N. C. 610, 146 S. E. 573 (1929) (profit hospital not liable for negligence of physician who was not an agent of the hospital); Hoke v. Glenn, 167 N. C. 594, 83 S. E. 807 (1914) (charitable hospital liable to patient for negligence in selecting incompetent employee); Green v. Biggs, 167 N. C. 417, 83 S. E. 553 (1914) (profit hospital liable to patient for negligence of employee); Barden v. Atlantic Coast L. Ry., 152 N. C. 318, 67 S. E. 971 (1910).

\textsuperscript{35} Williams v. Union County Hospital Ass'n, 234 N. C. 536, 67 S. E. 2d 662 (1951) (first time before the Court); Herndon v. Massey, 217 N. C. 610, 8 S. E. 2d 914 (1940); Barden v. Atlantic Coast L. Ry., 152 N. C. 318, 67 S. E. 971 (1910).

\textsuperscript{36} 152 N. C. 318, 67 S. E. 971 (1910).

\textsuperscript{37} About half of the cases cited as authority were cases in which railroads had employed physicians for treatment of employees and in which the question of liability of a charitable institution was not raised. Those cases cited which dealt with the question of nonliability of charitable hospitals were based on McDonald v. Mass. General Hospital, 120 Mass. 432 (1876) which in turn was based on an early English case which had already been overruled. See Notes, 30 N. C. L. Rev. 67, n. 3 (1951); 25 A. L. R. 2d 29, 38 (1952).

\textsuperscript{38} 217 N. C. 610, 8 S. E. 2d 914 (1940).
employees and held that insurance would not affect the question of liability.

In *Williams v. Union County Hospital* the plaintiff, a paying patient in defendant hospital, was injured by the negligence of employees of the hospital. A demurrer to defendant’s answer that it was a nonprofit charitable corporation and therefore not liable was overruled. In affirming, the Court repeated the rule of nonliability to beneficiaries but said that it had not been applied in this state against one who is not a recipient of charity but who pays full compensation.

It was on the authority of these cases that the North Carolina Supreme Court in 1953 held that a charitable hospital was not liable to a paying patient for negligence of hospital employees.

Nowhere in the North Carolina decisions is there a precise statement of the reason, except authority, for the rule of nonliability to beneficiaries. Although the Court in two cases discusses the reasons which other courts have adopted, it does not indicate which, if any, it favors. The Court has also talked about the policy of effectuating the purposes for which charitable institutions are established and about being just before being generous.

If these are the criteria, it is interesting to see how the Court has applied them. An employee of a charitable hospital collected from the hospital for negligence of a fellow employee. A patient (whether pay or nonpay is not mentioned) collected from the hospital for its failure

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40 At the subsequent trial a nonsuit was granted at the close of the plaintiff’s evidence. The decision upholding this is the decision in note 1 supra.
41 See note 1 supra.
43 Hoke v. Glenn, 167 N. C. 594, 597, 83 S. E. 807, 809 (1914). “If they [charitable institutions] are permitted to employ those who are incompetent and unskilled, funds bestowed for beneficence are diverted from their true purpose, and, under the form of a charity, they become a menace to those for whose benefit they are established. It is, therefore, better for those committed to their care and for the institutions, and necessary to effectuate the purpose of their creation, to require the exercise of ordinary care in selecting employees, and in supervising them.”
44 Turnage v. New Bern Consistory, 215 N. C. 798, 3 S. E. 2d 8 (1939) (Defendant who was operating a theater and turning over the entire profits to a charitable organization was held liable to third party).
45 Cowans v. N. C. Baptist Hospitals, 197 N. C. 41, 147 S. E. 672 (1929).
to select competent employees. A third party collected from a theater which gave its entire profits to a charitable institution. On the other hand, a patient who had paid in part for his hospital service through deductions from his wages and the patients who had paid the regular hospital charges were denied recovery.

Thus the persons for whom the hospital was established and who have paid to receive its services are the ones who are without remedy when injured by negligence of the hospital’s employees. It is difficult to see why this is sound reason. To say that the patient who pays is merely making a contribution to charity or contracts only for carefully selected employees is patent fiction, contrary to both fact and popular understanding. To say that the hospital is in danger of destruction if held liable is to ignore the character and size of the modern hospital and the use of liability insurance as an ordinary expense of doing business. To say that the injured individual must bear his own loss is to ignore the trend in other fields toward distribution of risks through such means as Workmen’s Compensation or state and Federal tort claims acts.

Perhaps, as the Court suggested in *Williams v. Randolph Hospital, Inc.*, a change in the rule exempting the charitable hospital from liability is a question of policy to be pondered and resolved not by the courts but by the legislature. Recently legislatures in at least two states have partially changed the rule of immunity, not directly by making hospitals liable, but by allowing direct suit against the hospital’s insurance carrier and forbidding the carrier from setting up the hospital’s defense of immunity. The North Carolina Legislature, six weeks after the *Randolph Hospital* case, apparently reconsidered its policy as applied to state hospitals and adopted a rule of strict immunity for state hospitals although the state remains liable for injuries caused by other state agencies.

Thus it would appear that North Carolina through both its courts and its legislature has steadfastly set its face toward the nineteenth cen-

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49 See note 1 supra.
50 To say that most surgeons carry malpractice insurance is only a partial answer. Many injuries are caused by employees who are clearly servants of the hospital and who probably do not carry insurance.
51 But see N. C. Sess. Laws 1953, c. 1314 amending the 1951 State Tort Claims Act so as to make it inapplicable to persons injured by the negligence of physicians, nurses, and employees of state hospitals and other state medical institutions. Discussed in 31 N. C. L. Rev. 443 (1953).
53 See note 51 supra.
Torts—Physician and Surgeon—Liability for Acts of Assistants—Respondeat Superior

An action for damages, involving two appeals to the North Carolina Supreme Court,\(^2\) arose out of the death of plaintiff's intestate following an operation performed by defendant physician. At the trial stage non-suits were entered as to defendant's hospital and nurse, and a verdict was rendered in favor of the physician. On appeal\(^2\) the non-suits were affirmed\(^3\) and a new trial was ordered as to the physician because of error in the trial judge's charge to the jury.\(^4\) On retrial, a verdict was again rendered in favor of the physician. This was reversed and another trial ordered as to the physician,\(^6\) the court holding that the trial judge erred when he instructed the jury that the nurse was not an "employee" of the physician and that the physician would not be responsible for the negligence of the nurse, thus excluding the doctrine of respondeat superior from consideration.

The responsibility of a physician for the acts of his assistants has been the subject of litigation in other courts, and the resulting decisions make it clear that a physician may be liable in this situation (1) for his own negligence, in causing or allowing an assistant to injure a patient, or (2) for the assistant's negligence, which is imputed to the physician under the principles of agency.

A physician may be personally negligent in employing, retaining or using an incompetent assistant, as when he engages a layman to administer chloroform.\(^6\) It is his legal duty to see that the entire treatment of his patient is carried on correctly, but he may properly delegate simple tasks to his assistants, and thereby relieve himself of legal responsibility.\(^7\)


\(^3\) Id. at 225, 67 S. E. 2d at 60.

\(^4\) The judge instructed the jury in such a manner as to require expert testimony to establish the physician's liability, and this was held error. The court also held that the trial judge erred in not admitting a written report offered in evidence by the plaintiff. \(\text{Id. at 255, 67 S. E. 2d at 60.}\)

Thus a physician may authorize a nurse to place hot water bottles or hot flat-irons against the body of a patient after an operation, and he is not liable for the nurse's negligence in doing this.\(^8\) However, some courts will not allow the physician to escape responsibility by assigning an assistant the task of counting the gauzes or sponges used in a surgical operation, and relying on the assistant to determine that all the gauzes placed in the patient's body have been removed.\(^9\) Other courts are not so strict, and reason that the physician bears such complicated and varied responsibilities that he should be allowed to delegate more important tasks to his assistants, including the counting of gauzes.\(^10\) The physician is also liable for negligently instructing or supervising an assistant who is administering treatment, and the assistant is not liable in this situation when he does no more than carry out the specific instructions of the physician or otherwise meets the legal duty required of him.\(^11\)

In each of these situations, it is the physician's own negligence that is the basis for his liability, if any, and the doctrine of respondeat superior is not applied.

Whenever the issue is whether the physician is liable for the negligence of his assistants, the problem arises as to what establishes the relationship of principal and agent. If it appears that the assistant is in the pay of the physician, and is acting under the immediate control of the physician, the relationship is said to exist.\(^12\) Again, the relationship obviously exists whenever the assistant is in the pay of the physician and is carrying out his general duties, or following some general instruction of the physician, although not under his immediate control.\(^13\)

\(^{11}\) Miss. 306, 73 So. 49 (1916); Niebel v. Winslow, 88 N. J. L. 191, 95 Atl. 995 (1915); Stewart v. Manasses, 244 Pa. 221, 90 Atl. 574 (1914); Jackson v. Hansard, 45 Wyo. 201, 17 P. 2d 659 (1933); Jewison v. Hassard, 26 Man. L. R. 571, 28 Dom. L. R. 584 (Canada 1916).

\(^{12}\) Spears v. McKinnon, 168 Ark. 357, 270 S. W. 524 (1925); Ault v. Hall, 119 Ohio St. 422, 164 N. E. 518 (1928); Jackson v. Hansard, 45 Wyo. 201, 17 P. 2d 659 (1933); Walker v. Holbrook, 130 Minn. 106, 153 N. W. 305 (1915).


\(^{14}\) Davis v. Rodman, 147 Ark. 385, 227 S. W. 612 (1921); Kershaw v. Tilbury, 214 Calif. 679, 8 P. 2d 109 (1932); Everts v. Worrell, 58 Utah 238, 197 Pac. 1043 (1921); Lawson v. Crane, 83 Vt. 115, 74 Atl. 641 (1909); Miles v. Hoffman, 127 Wash. 653, 221 Pac. 316 (1923).

\(^{15}\) More specifically, this is the "employer-employee" relationship. Boetcher v. Budd, 61 N. D. 50, 237 N. W. 650 (1931); Aderhold v. Stewart, 172 Okla. 72, 46 P. 2d 340 (1935).

all decisions are so clear cut, however, there being many instances where the assistant who aids the patient’s physician is paid and retained by the hospital, or by the patient himself. The weight of authority in these situations is that the assistant is the agent of the physician when and if the latter is in “control” of the assistant.\textsuperscript{14}

The courts will ordinarily consider the physician in “control” when he is in charge of treatment, and is present in the room with the patient and the assistant during the administration of treatment.\textsuperscript{15} It is important that the physician be present in the room, and that the operation or treatment still be in progress, for there is no “control” whenever the physician is not present, or during “after-treatment,” even though the assistant, not an “employee,” may be acting in obedience to the physician’s orders.\textsuperscript{16} If the physician is liable under the doctrine of respondeat superior, it is of course necessary to show that the assistant was negligent, because this basis for liability is the negligence of the assistant which is imputed to the physician.

Cases wherein a physician’s liability is based on his own negligence in causing an assistant to injure a patient, and those where in liability is based on the negligence of his assistant, are often much alike.\textsuperscript{17} Therefore it is difficult to determine what reasoning the court has used in establishing the liability of the physician, unless the court specifically

\begin{itemize}
\item \textsuperscript{14} Ales v. Ryan, 8 Cal. 2d 82, 64 P. 2d 409 (1936); Jordon v. Touro Infirmary, 123 So. 726 (La. Ct. App. 1922), explained in Messina v. Societe Francaise, 170 So. 801, 803 (La. Ct. App. 1936); Efall v. Enid General Hospital, 194 Okla. 446, 152 P. 2d 693 (1944); Randolph v. Oklahoma City General Hospital, 180 Okla. 513, 71 P. 2d 607 (1937); McConnell v. Williams, 361 Pa. 355, 65 A. 2d 243 (1949).
\item \textsuperscript{15} Gray v. McLaughlin, 207 Ark. 191, 179 S. W. 2d 686 (1944); Ales v. Ryan, 8 Cal. 2d 82, 64 P. 2d 409 (1936); Jordon v. Touro Infirmary, 123 So. 726 (La. Ct. App. 1922), explained in Messina v. Societe Francaise, 170 So. 801, 803 (La. Ct. App. 1936); Noren v. American School of Osteopathy, 298 S. W. 1061 (Mo. Ct. App. 1927), aff’d in 223 Mo. App. 278, 2 S. W. 2d 215 (1928); Hall v. Enid General Hospital, 194 Okla. 446, 152 P. 2d 693 (1944); Aderhold v. Bishop, 94 Okla. 203, 221 Pac. 752 (1923); McConnell v. Williams, 361 Pa. 355, 65 A. 2d 243 (1949).
\item \textsuperscript{16} Hohenthal v. Smith, 114 F. 2d 494 (D. C. Cir. 1940); Harlan v. Bryant, 87 F. 2d 170 (7th Cir. 1936); Harris v. Fall, 177 Fed. 79 (7th Cir. 1910); Sheridan v. Quarrier, 127 Conn. 279, 16 A. 2d 479 (1940); Messina v. Societe Francaise, 170 So. 801 (La. Ct. App. 1936); Blackman v. Zeligs, 90 Ohio App. 304, 103 N. E. 2d 13 (1951); McConnell v. Williams, 361 Pa. 355, 65 A. 2d 243 (1949); Meadows v. Patterson, 21 Tenn. App. 283, 109 S. W. 2d 417 (1937).
\item \textsuperscript{17} Jackson v. Hansard, 45 Wyo. 201, 17 P. 2d 659 (1933) (Physician held liable for his own negligence in allowing an assistant to leave a gauze in a patient’s body); Armstrong v. Wallace, 37 P. 2d 467 (Cal. Ct. App. 1934) (Physician held liable for negligence of an assistant under his “control,” who left a gauze in the patient’s body.).
\end{itemize}
explains itself.\textsuperscript{18} The writer suggests that this distinction should be spelled-out, because it may have the very practical significance of determining whether a judgment will be ordered against the assistant, and in the absence of the agency relationship or the assistant’s negligence, the physician may be personally liable for a failure to exercise the proper degree of skill, care and judgment that he owes his patient.\textsuperscript{19}

The North Carolina decisions are fundamentally in accord with the weight of authority in other jurisdictions,\textsuperscript{20} except for a dictum in the principle case.\textsuperscript{21} There the court awarded a non-suit to the nurse on first appeal, and on later appeal found reversible error in the trial judge’s charge that the negligence of the nurse could not be imputed to the physician. This seems inconsistent because the non-suit indicated that the nurse was not negligent, but the dictum explained that under these circumstances the nurse need not stand responsible for his own “tortuous act,” although he might have been negligent and the physician might be liable for the nurse’s negligence under the doctrine of \textit{respondeat superior}.\textsuperscript{22} This was said to be an exception to the law of agency.\textsuperscript{23} A

\textsuperscript{18} Frequently the assistant is not joined in the action, and his liability, which would show whether he was negligent and help to determine whether the doctrine of \textit{respondeat superior} was a part of the court’s reasoning, is not in issue.


\textsuperscript{20} In Bowditch v. French Broad Hospital, 201 N. C. 168, 159 S. E. 350 (1931) where the hospital arranged for a nurse to serve a patient and help a physician, and the nurse was paid by the patient, the Court indicated that the nurse might be an independent contractor or an agent of the physician, but held that she was not the agent of the hospital.

Where a nurse placed an improper and harmful solution in a newborn baby’s eyes while the physician was occupied with the mother, the nurse was held not to be the agent of the physician. Covington v. Wyatt, 196 N. C. 367, 145 S. E. 673 (1928), discussed in 7 N. C. L. Rev. 330 (1929). This may mean that the court will apply the “control” test of agency in narrow fashion, or it may be explained that an emergency or complicated task destroys the physician’s “control” over the assistant. No cases were found in which a physician was held liable for the negligence of his assistant under the doctrine of \textit{respondeat superior}, although such a decision was explicitly authorized in Nash v. Royster, 189 N. C. 408, 412, 127 S. E. 356, 359 (1925).

In Byrd v. Marion General Hospital, 202 N. C. 337, 162 S. E. 738 (1932), a nurse, employed by a hospital but acting under the direction of an attending physician, injured a patient. The patient sued the managing physician of the hospital and the nurse, but not the attending physician. The court reversed a jury verdict against the managing physician only, and held that since the nurse was not negligent, the managing physician could not be liable. The court states the rule of the \textit{Byrd} case in these words: “. . . if the physician [referring to the attending physician who was not joined] is present and undertakes to give directions, or . . . stands by, approving the treatment administered by the nurse, unless the treatment is obviously negligent and dangerous, . . . in such event the nurse can then assume that the treatment is proper under the circumstances, and such treatment, when the physician is present, becomes the treatment of the physician and not that of the nurse.” \textit{Id.} at 343, 162 S. E. at 741.

\textsuperscript{21} Jackson v. Joyner, 236 N. C. 259, 72 S. E. 2d 589 (1952).

\textsuperscript{22} \textit{Id.} at 262, 72 S. E. 2d at 592 (“. . . it is observed that the principle . . . stands as an exception to the general rule that an agent who does a tortuous act is
possible explanation of this dictum is that the court took a decision indicating that a physician might be liable for his own negligence in causing an assistant to injure a patient, and read into it an application of the doctrine of respondeat superior.

It is submitted, in the light of decisions of this and other jurisdictions, that the test for determining the liability of any physician or any assistant, free from all exceptions, should be the ordinary one of whether each was negligent; or if the assistant alone is negligent, whether the agency relationship existed.

ROY W. DAVIS, JR.

Wills—Revocation—Attempted Revocation of Unexecuted Copy

The testatrix's notation of "Null and Void, S.H.K." at the top of an unexecuted carbon copy of her will was recently held by the Pennsylvania Supreme Court to be an effective revocation. The court found the notation to be "other writing" within the meaning of that jurisdiction's statutory provision regarding revocation of testamentary papers.

Although the intention of the testator to nullify may be evidenced by his words and actions, the privilege of execution or revocation of wills is granted by the state, and as a corollary, the testator must act in complete accord with the controlling statute in order to make or nullify a will. Ordinarily, the statutes provide three permissible methods of revocation of a will: (1) execution of a subsequent will or codicil; (2) making of some other writing declaring the will revoked; and (3) by tearing, burning, cancelling, or obliterating the document itself. Thus the distinction between a "cancellation" as a method of revocation and not relieved from liability by the fact that he acted at the command or under the direction of his principal.

2 Such an exception is clearly contradicted in Ybara v. Spangard, 25 Cal. 2d 486, 492, 154 P. 2d 687, 690 (1945): "Any defendant who negligently injured him [the patient], and any defendant charged with his care who so neglected him as to allow injury to occur, would be liable. The defendant employers would be liable for the neglect of their employees; and the doctor in charge of the operation would be liable for the negligence of those who became his temporary servants for the purpose of assisting in the operation." For a statement of the law applicable to situations herein discussed, see Hohenthal v. Smith, 114 F. 2d 494 (D. C. Cir. 1940).

3 PA. STAT. tit. 20, § 180.5 (1950).

5 The testatrix in the principal case did not have the original document but after writing on the carbon, she wrote her attorney stating that she had cancelled her will.

6 Parker v. Foreman, 252 Ala. 77, 39 So. 2d 574 (1949); Re Johannes' Estate, 170 Kan. 407, 227 P. 2d 148 (1951); Crampton v. Osburn, 356 Mo. 125, 201 S. W. 2d 336 (1947); Davis v. King, 89 N. C. 441 (1883); Churchill's Estate, 260 Pa. 94, 103 Atl. 533 (1918).

7 The North Carolina statute is typical. N. C. GEN. STAT. § 31-5 (1950).

8 Revocation by a subsequent will or codicil is not within the purview of this note. For a discussion of this, see Zacharias and Maschinot, Revocation and Revival of Wills, 25 CHI-KENT L. REV. 185, 201 (1947).
the use of some "other writing" for such a purpose is usually pointed up in the various state statutes by specifying the two methods of revocation in the alternative.\(^7\)

A cancellation or obliteration of a will is the doing of a physical act to the paper itself,\(^8\) and it is usually held that in order to be effective, some material part of the document or some of the words in the text of the will must be marked over.\(^9\) A mere notation in the margin or on the back of the paper is generally held insufficient to constitute this type of revocation.\(^10\)

The above discussed methods of revocation and their limitations also apply in the case of executed duplicate wills where the testator attempts to revoke by cancelling, tearing, or burning one of the two copies. The general rule throughout the United States is that when a testator tears or obliterates his copy, this works a revocation of the duplicate in the hands of someone else.\(^11\) Furthermore, when the testator was known to be in possession of a copy of a will and such copy is found after his death in a mutilated condition, there arises a rebuttable presumption that he acted \textit{animo revocandi}, and therefore, no other duplicate or conformal copy may be admitted to probate.\(^12\) This same principle applies when the testator's copy cannot be found after his death and it is known that there was a duplicate in his possession.\(^13\) However, the presumption is


\(^{13}\) \textit{Re} Holmberg's Estate, 400 Ill. 366, 81 N. E. 2d 188 (1948); \textit{In re} Beaney's Estate, 62 N. Y. S. 2d 341 (Surr. Ct. 1946); \textit{I Page, Wills}, § 437 (3rd ed. 1941); \textit{Atkinson, Wills}, p. 376 (1937). For a collection of cases to this effect, see, \textit{Note}, 48 A. L. R. 297 (1927).

\(^{11}\) See note 11 \textit{infra}; and note 13 \textit{infra}; but this presumption is not conclusive. See, \textit{E.g.}, \textit{Re} Walsh, 196 Mich. 42, 163 N. W. 70 (1917).

sufficiently rebutted when it can be proved that the mutilation or destruction was an accident, or that the testator was under the impression that the remaining copy would still be valid after the duplicate was destroyed.

In a majority of the decisions where revocation was found as a result of cancellation or other writings on duplicate wills, both copies had been executed. It is to be noted that this element of execution is lacking in the principal case, for there is obviously a material difference between a signed duplicate original and an unexecuted carbon copy of a will. Furthermore, in those jurisdictions where the question of revocation has arisen as to unsigned copies, the courts have generally been hesitant to extend the law to allow an attempted cancellation of an unexecuted copy.

In a leading case on this problem, In re Wehr's Will, the testator, having left the original will in the custody of his attorney, had in his possession a conformed copy which was found in a mutilated condition after his death. The Wisconsin Court there said in answer to the respondent's contention of revocation: "There is no authority whatever to the effect that destruction or mutilation of a copy of the will, conformed or otherwise, is effective to accomplish a revocation. . . . It seems to us that to hold that a mutilation of a conformed copy was a revocation would be to interpolate or add to the statute what plainly is not there or to establish a symbolic revocation by a judicial decree in the face of a statute which plainly does not mean to recognize it."

The courts differ as to what inference may be said to arise when the testator had possession of both copies, one of which is not found after his death, the more recent cases holding that there is no revocation and allowing the discovered duplicate to be probated. Phinizee v. Alexander, 210 Miss. 196, 49 So. 2d 250 (1950) (where one copy in a mutilated condition, it was held that there was no revocation on the grounds that if the testator had intended to have voided his will, he would have cancelled both duplicates); In re Mittelslaedt's Will, 280 App. Div. 163, 112 N. Y. S. 2d 166 (1st Dept. 1952) (one of two duplicates which had been in the testator's possession found and admitted to probate, the court holding there to be no revocation.) Contra: Atkinson, WILLS, p. 376 (1937); I PAGE, WILLS, § 437 (3rd ed. 1941), citing English decisions.

See notes 11-15 supra.

In re Kehr's Estate, 373 Pa. 473, 95 A. 2d 647 (1953).

In Hull v. Cartin, 61 Idaho 578, 105 P. 2d 196 (1940), the court said: "The copy . . . falls short of being a 'duplicate original' in the vital and essential particular that it was never executed by being signed and witnessed." See; In re Kehr's Estate, 373 Pa. 473, 95 A. 2d 647, 651 (1953) (dissent).

See notes 20, 21 infra; I PAGE, WILLS, § 437, p. 83 (1950 Supp.) ("Tearing, etc., an unexecuted copy of a will is not a revocation of such will.").

247 Wis. 98, 18 N. W. 2d 709 (1945).

In re Wehr's Will, 247 Wis. 98, 110, 18 N. W. 2d 709, 715 (1945). The Wehr case was cited with approval in In re D'Agostino's Will, 9 N. J. Super. 230,
Only one case is found which seems to concur with the principal case.\textsuperscript{22} There the court, by dictum, indicated that the revocatory writing was a valid nullification \textit{per se}, without giving any particular significance to the fact that the writing happened to be on an unexecuted copy of the will.

The North Carolina Court has never faced the problem involved in the \textit{Kehr} case but seems to concur with the majority rules as regards revocation of wills generally in that there must be a strict compliance with the statute.\textsuperscript{23} That parol evidence may not be introduced to add to or interpolate a written revocation,\textsuperscript{24} and that part of the will itself must be crossed through in order for a cancellation to be effective.\textsuperscript{25} In the only case in which the North Carolina Court has been faced with a problem involving duplicate wills, it was held that a presumption of revocation arose when one duplicate could not be found and that the jury should decide whether or not this presumption had been sufficiently rebutted.\textsuperscript{26}

In the principal case, the majority opinion readily concedes that the revocation there attempted could not be a cancellation, because the copy had no validity or life to be voided,\textsuperscript{27} but found the notation on the unexecuted copy to be effective as another writing.

The interpretation placed by the courts on the statutory phrase "other writing" varies, but in the majority of the jurisdictions the "other writing" must be executed with the same formalities required for the execution of the will in the first instance.\textsuperscript{28} The majority opinion in the principal case argues that this requirement has been met. However, it

\textsuperscript{22} \textit{In re Smith}'s Estate, 31 Cal. 2d 563, 191 P. 2d 413 (1948).
\textsuperscript{23} \textit{Davis v. King}, 89 N. C. 441 (1883).
\textsuperscript{24} \textit{ Ibid.}
\textsuperscript{25} \textit{In re Love}, 186 N. C. 714, 120 S. E. 479 (1923); \textit{In re Shelton}'s Will, 143 N. C. 218, 55 S. E. 705 (1906).
\textsuperscript{26} \textit{In re Will of Wall}, 223 N. C. 591, 27 S. E. 2d 728 (1943). No North Carolina case with more similar or closely analogous facts to those in the principal case is to be found. However, on related issues, North Carolina is in accord with those jurisdictions holding \textit{contra} to the principal case, and so it would appear that should the problem involved in the principal case be presented to the North Carolina Supreme Court, North Carolina would hold \textit{contra} to the decision in the \textit{Kehr} case.

\textsuperscript{27} \textit{In re Kehr}'s Estate, 373 Pa. 473, 95 A. 2d 647, 650 (1953).
\textsuperscript{28} Depending on the relevant state statute, this can mean that the testator must sign the revocation, and in some jurisdictions, it must be witnessed. See N. C. GEN. STAT. § 31-5 (1950); \textit{Dowling v. Gilliland}, 286 Ill. 530, 122 N. E. 70 (1919) (attempted revocation invalid because not witnessed); \textit{In re Konner}'s Estate, 101 N. Y. S. 2d 651 (Surr. Ct. 1950) (an invalid will held as an effective revocation of a prior will); \textit{In re William}'s Estate, 336 Pa. 235, 9 A. 2d 377 (1939) (no revocation because attempted revocatory writing not signed.) See also, \textit{ Note}, 3 A. L. R. 833 (1919).
seems that parol evidence would be needed to explain the notation as being meant to apply to the original executed will, while the generally accepted rule, both in Pennsylvania and elsewhere, is to the effect that the "other writing" must be self-sufficient, with parol evidence being used only to explain any ambiguous words employed, not to evidence what the testator intended the writing to mean.\(^\text{29}\)

The writer submits that the decision in the *Kehr* case is a substantial extension of the statutory right of revocation of wills, with far too much emphasis being placed on surrounding circumstances and insufficient stress being placed on the attempted revocatory act itself.

ROBERT C. VAUGHN, JR.