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Credit Transactions—Some Statutory Changes in 1961*

CONDITIONAL SALES AND PURCHASE MONEY CHATTEL MORTGAGES—RIGHT OF INSTALLMENT BUYERS TO POSSESSION

The Supreme Court of North Carolina has repeatedly said that in this state a conditional sale is a chattel mortgage.[1] This view has value,[2] but it leads to one unfortunate conclusion. In many states, including North Carolina, title to a mortgaged chattel passes to the mortgagee, and with title goes the right to possession.[3] In a conditional sale the secured creditor, corresponding to the mortgagee, is the seller. Therefore the North Carolina court has said[4] that the conditional vendor had the right to possession.

In the case of conditional sales of articles sold on installment payment, this law was completely out of touch with the transactions it was supposed to govern. Enormous numbers of articles, such as automobiles, refrigerators and television sets, are sold on conditional sale. The device is widely favored because the buyer is able to use the property while paying for it; and it is the general understanding of the commercial world as well as the usual rule in other jurisdictions that the buyer has the right to possession so long as he keeps up his payments and is not otherwise in default.[5]

Fortunately the North Carolina court's view that the conditional vendor had the right to possession even though the vendee was not

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* The purpose of this comment is to acquaint the bar in a summary form with important recent enactments in the area of credit transactions and their significance.

[1] State v. Stinnett, 203 N.C. 829, 832, 167 S.E. 63, 64 (1933); Harris v. Seaboard A. L. Ry., 190 N.C. 480, 482, 130 S.E. 319, 321 (1925); Notes, 21 N.C.L. REV. 387 (1943); 11 N.C.L. REV. 321 (1933).

[2] Note, 21 N.C.L. REV. 387, 391 n.20* (1943). In Bogert, *The Evolution of Conditional Sales Law in New York*, 8 CORNELL L.Q. 303, 305 (1923), Professor Bogert said: "It is to be regretted that the transactions have not been treated as legally identical."

[3] Note, 21 N.C.L. REV. 387, 392 (1943).

[4] State v. Stinnett, 203 N.C. 829, 832, 167 S.E. 63, 64 (1933); Harris v. Seaboard A. L. Ry., 190 N.C. 480, 483, 130 S.E. 319, 321 (1925); Note, 21 N.C.L. REV. 387 (1943). In one case, however, the court held that the conditional vendee had the right to possession because there was an implied agreement to that effect. Grier v. Weldon, 205 N.C. 575, 172 S.E. 200 (1934), commented upon in Note, 12 N.C.L. REV. 254 (1934).

[5] Notes, 21 N.C.L. REV. 387 (1943); 11 N.C.L. REV. 321 (1933).

in default was generally ignored. Conditional vendors did not make it a practice to take their automobiles or refrigerators from vendees who were keeping up their payments. Nevertheless, the rule giving the vendors that right was capable of doing harm. If a seller repossessed on the ground that the buyer had defaulted, and the buyer proved there was no default, still the repossession would not be invalid because in this state the seller had the right to possession regardless of default.

The same violation of general understanding and business practice is to be found in the rule that a chattel mortgagee has the right to possession, when that rule is applied to purchase money chattel mortgages to secure installment payments. The North Carolina court was right in putting conditional sales and purchase money chattel mortgages in the same boat, but in the case of security for time payments it was the wrong boat. Instead of the seller having the right to possession in the case of either security, he should have it in neither one, unless the buyer defaults. Accordingly, the legislature enacted a statute as follows:

> If any chattel is sold or agreed to be sold, and it is agreed between the parties to the sale that part or all of the price is to be paid in one or more installments, which are secured either by conditional sale, purchase money chattel mortgage, purchase money chattel deed of trust, or similar security, on the chattel sold, and possession of the chattel is by consent of the parties placed in the buyer, it shall be deemed to be the intention of the parties, in the absence of an express agreement to the contrary, that he shall have the right to retain such possession until he defaults by failing to make a payment as agreed or otherwise failing to comply with the terms of the sale or security, or by failing to provide care and maintenance of the chattel in such a manner as to cause damage or injury to it, or by using the chattel for any purpose prohibited by law.[6]

Mortgages and Deeds of Trust on Real Estate—Effect of Unauthorized Dealings Between Mortgagee and Grantee

When mortgaged land is sold, and the grantee assumes and agrees to pay the mortgage, the general rule outside of North Caro-

[6] N.C. Gen. Stat. § 45-3.1 (Adv. Leg. Serv. Supp. No. 2, 1961).

lina is that the grantee becomes the principal debtor and the mortgagor a surety.[7] As a consequence, if the mortgagee without the mortgagor's consent gives the grantee a binding extension of time on the secured obligation, the mortgagor is released;[8] and if the mortgagee without the consent of the mortgagor releases part or all of the security, the mortgagor is released to the extent of the value of the property released.[9] If the property is sold subject to the mortgage, but the grantee does not assume and agree to pay it, the grantee has no personal liability; but the land is the primary source of payment, and the mortgagor is a surety to the extent of the value of the land. Beyond that he remains the principal debtor.[10] Therefore, if the mortgagee without the mortgagor's consent gives the grantee a binding extension of time, the mortgagor is discharged to the extent of the value of the land;[11] and if the mortgagee releases any of the property without the mortgagor's consent, the mortgagor is discharged to the extent of the value of the land released.[12]

However, it has been held in North Carolina that where at the instance of an assuming grantee the mortgagee released part of the land from the mortgage without the mortgagor's consent, the mortgagor still remained fully liable.[13] The court reasoned that the mortgagor was a surety and the grantee the debtor only as between themselves, not as to the mortgagee. This reasoning is unconvincing. By dealing with the grantee and releasing part of the property at his instance the mortgagee recognizes the transaction between the mortgagor and the grantee, for it is only by virtue of that transaction that the grantee holds the land. Moreover, the result of the decision was unjust because the mortgagee by releasing

[7] Union Mut. Life Ins. Co. v. Hanford, 143 U.S. 187 (1892) (applying the law of Illinois); OSBORNE, MORTGAGES 743 (1951) [hereinafter cited as OSBORNE].

[8] Union Mut. Life Ins. Co. v. Hanford, *supra* note 7; OSBORNE 749; Notes, 13 N.C.L. REV. 337 (1935); 11 N.C.L. REV. 96 (1932).

[9] See Mann v. Bugbee, 113 N.J. Eq. 434, 167 Atl. 202, 206 (Ct. Ch. 1933); OSBORNE 754.

[10] Murray v. Marshall, 94 N.Y. 611 (1884); OSBORNE 712; Comment, 19 MICH. L. REV. 351 (1921).

[11] Sime v. Lewis, 112 Minn. 403, 128 N.W. 468 (1910); Murray v. Marshall, *supra* note 10; OSBORNE 751-52; Comment, 19 MICH. L. REV. 351 (1921).

[12] First Nat'l Bank & Trust Co. v. Strong, 112 Conn. 412, 152 Atl. 575 (1930); OSBORNE 754.

[13] Brown v. Turner, 202 N.C. 227, 162 S.E. 608 (1932). In this case a deed of trust was involved, but the principle is the same as in the case of a mortgage, and the court discusses the transaction as if it were a mortgage. This case is criticized in Note, 11 N.C.L. REV. 96 (1932).

a portion of the land put it beyond the mortgagor's reach. Save for the mortgagee's action, the mortgagor, when he paid, could have fallen back on the security.[14]

The North Carolina court has also held that a binding extension of time given an assuming grantee by the mortgagee without the mortgagor's consent does not constitute a defense to the mortgagor, pursuant to the same reasoning that the mortgagor remains a debtor, and does not become a surety so far as the mortgagee is concerned.[15] This enables the mortgagee and the grantee to tamper with the bargain to the possible prejudice of the mortgagor without his consent.

The legislature removed these injustices and brought the North Carolina law into accord with that of other jurisdictions by enacting a statute[16] which applies to real estate mortgages and deeds of trust, and to situations where there is no consent by the mortgagor, or grantor of a deed of trust, to an extension or release. The statute provides in substance that where there is an assuming grantee an extension of time to him or his release by the secured creditor discharges the mortgagor or grantor, and a release of any of the security property by the creditor or the trustee acting for him releases the mortgagor or grantor to the extent of the value of the property released. When the property is sold expressly subject to the mortgage or deed of trust, but the grantee does not assume it, the binding extension of time releases the mortgagor or grantor to the extent of the value of the property; and the release of any of the security property releases the mortgagor or grantor to the extent of the value of the property released.

Security Interests in Motor Vehicles

The preamble to chapter 835 of the Session Laws of 1961 recites, among other things, that the motor vehicle certificate of title "often regarded as absolute, is not conclusive as to liens and may not be relied upon to show good title. . . ." The reason for such unreliability is that the Supreme Court of the state has held that encumbrances on motor vehicles duly recorded are valid even though

[14] See Travers v. Dorr, 60 Minn. 173, 62 N.W. 269 (1895); Murray v. Marshall, 94 N.Y. 611 (1884); Osborne 701, 712; Note, 11 N.C.L. Rev. 96, 98 (1932).

[15] Commercial Nat'l Bank v. Carson, 207 N.C. 495, 77 S.E. 335 (1934), criticised in Note, 13 N.C.L. Rev. 337 (1935).

[16] N.C. Gen. Stat. § 45-45.1 (Adv. Leg. Serv. Supp. No. 3, 1961).

not shown on the certificate of title.[17] To remedy this situation chapter 835 contains detailed provisions to insure that security interests in motor vehicles are entered on the title certificate. Unless perfected as required in the chapter the security interest is not valid against creditors of the owner or subsequent transferees or lien holders.[18] Such perfection is not required as to security interests created by a manufacturer or dealer who holds the vehicle for resale, but a buyer in the ordinary course of trade from the manufacturer or dealer takes free of the security interest.[19]

A certificate of title, when issued by the Department of Motor Vehicles showing a lien or encumbrance, is deemed adequate notice to all creditors and purchasers that a security interest exists in the vehicle, and "recordation of such reservation of title, lien or encumbrance in the county wherein the purchaser or debtor resides or elsewhere" is not necessary.[20] This is an express negation of the North Carolina rule that even though an encumbrance is shown on the vehicle title certificate, it is not good against subsequent purchasers or lienholders unless recorded in the appropriate county.[21]

UNIFORM TRUST RECEIPTS ACT

By the enactment of the Uniform Trust Receipts Act, North Carolina adopted an important statute[22] already in force in a majority of the states.[23] A full discussion of the act and all the changes it makes in the law of this state is beyond the scope of this comment.[24] North Carolina lawyers reading the act are likely to be in accord with the statement: "The provisions of the UTRA are, unfortunately, quite complicated, often unclear, and sometimes almost meaningless unless read in the light of the history and purposes

[17] Southern Auto Fin. Co. v. Pittman, 253 N.C. 550, 117 S.E.2d 423 (1960).

[18] N.C. GEN. STAT. § 20-58(a) (Adv. Leg. Serv. Supp. No. 6, 1961).

[19] N.C. GEN. STAT. § 20-58.9(3) (Adv. Leg. Serv. Supp. No. 6, 1961).

[20] N.C. GEN. STAT. § 20-58.2 (Adv. Leg. Serv. Supp. No. 6, 1961).

[21] Carolina Discount Corp. v. Landis Motor Co., 190 N.C. 157, 129 S.E. 414 (1925).

[22] N.C. GEN. STAT. §§ 45-46 to -66 (Adv. Leg. Serv. Supp. No. 4, 1961).

[23] Thirty-five states are listed as of 1960 as having adopted the act. 9C U.L.A. 74 (Supp. 1960). It is noted, however, that in two of the states listed the act has been superseded by the adoption of the Uniform Commercial Code to take effect in 1961. *Id.* at 75.

[24] More extensive discussions of the act are to be found in Wineberg & Borowitz, *The Ohio Uniform Trust Receipts Act,* 19 OHIO ST. L.J. 680 (1958); White, *Act 63 of 1959 Arkansas General Assembly: Uniform Trust Receipts Act,* 14 ARK. L. REV. 121 (1960); 9C U.L.A. 220-29 (1957).

of the act."[25] It is plain, however, that the act governs trust receipt transactions, and it expressly, though by no means simply, states what trust receipt transactions are.[26] For good measure it also contains a section on attempted pledges without delivery of possession.[27]

A typical trust receipt transaction is one in which a dealer or manufacturer buys goods from a distant seller, who is paid by the buyer's financier, which financier receives title to the goods, but turns possession over to the buyer in exchange for trust receipts which recite that the goods are the financier's and that the trustee holds them for some limited purpose, such as to sell them and turn the proceeds over to the financier to the extent of his advances.[28] In North Carolina a transaction of this variety has been held to be a conditional sale, and subject to the requirements of the recordation statute.[29] Under the uniform act such a security is a "trust receipt transaction" and will be governed by the terms of the act.[30] One of the results will be that instead of each such security transaction having to be recorded, it will be sufficient to file a notice, in the form specified in the statute, that the entruster is engaged, or expects to be engaged, in financing under trust receipt transactions the acquisition by the trustee of goods of a described kind.[31]

The following are a few examples of changes made by the act in North Carolina law. The act differs from the mortgage recordation statute[32] by making the trust receipt transaction valid as to all

[25] Weinberg & Borowitz, *supra* note 24, at 680. The complexity of the act has been widely commented upon. White, *supra* note 24, at 121 n.3.

[26] N.C. GEN. STAT. § 45-47 (Adv. Leg. Serv. Supp. No. 4, 1961). Since a trust receipt transaction is declared to be one in which an entruster and a trustee are parties, the definition of "entruster" in § 45-46 is important.

[27] N.C. GEN. STAT. § 45-48 (Adv. Leg. Serv. Supp. No. 4, 1961).

[28] VOLD, SALES 351 (2d ed. 1959). See also 9C U.L.A. 220 (1957).

[29] General Motors Acceptance Corp. v. Mayberry, 195 N.C. 508, 142 S.E. 767 (1928), cited with approval in McCreary Tire & Rubber Co. v. Crawford, 253 N.C. 100, 106, 116 S.E.2d 491, 496 (1960).

[30] 9C U.L.A. 223 (1957). Ordinary mortgages and conditional sales, however, are not included in the uniform act. *Id.* at 224. In B-W Acceptance Corp. v. Benjamin T. Crump Co., 199 Va. 312, 99 S.E.2d 606 (1957), the court held that a trust receipt given on merchandise acquired by the trustee the previous year was a chattel mortgage and not within the uniform act.

[31] N.C. GEN. STAT. § 45-58 (Adv. Leg. Serv. Supp. No. 4, 1961). The North Carolina statute deviates from the uniform act in providing for filing in the office of the register of deeds for the appropriate county, rather than in a single office for the entire state. *Compare* N.C. GEN. STAT. § 45-58(c) (Adv. Leg. Serv. Supp. No. 4, 1961), *with* the UNIFORM TRUST RECEIPTS ACT § 13, *and* 9C U.L.A. 225 (1957).

[32] N.C. GEN. STAT. § 47-20 (Supp. 1959).

creditors of the trustee for thirty days without any filing,[33] and by requiring filing as to lien creditors "without notice of such interest."[34] Hitherto actual notice has not dispensed with the requirement of record notice.[35] If the entruster allows the placing of the goods subject to a trust receipt transaction in the trustee's stock in trade or in his sales or exhibition rooms, this has the effect of granting the trustee liberty of sale.[36] This provision is far more in accord with business practice and common understanding than is the North Carolina rule that recorded mortgages on the stock in trade of dealers are good against their customer's.[37] Probably few customers, even lawyers and judges, when they buy an automobile, a television set, or a suit of clothes, search the records to see if the merchant has mortgaged these articles.

The result is incongruity in the North Carolina law. If a customer buys an article from a dealer whose stock is covered by trust receipt transactions, the customer takes free of the claim of the entruster. If the customer buys an automobile held for resale by a dealer who has created a security interest in the vehicle, the customer again takes free from the claim of the security holder, as brought out earlier in this comment.[38] But if a customer buys some other kind of article from a dealer whose stock is covered by a security, duly recorded, but not a trust receipt transaction, the customer takes subject to the security. Plainly the legislature should go all the way, and provide that if any holder of security on goods in the possession of a dealer allows the goods to be placed in the dealer's stock in trade or in his sales or exhibition rooms, the security shall not be valid against a purchaser from the dealer in the ordinary course of the dealer's business.

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[33] N.C. GEN. STAT. § 45-53(a) (Adv. Leg. Serv. Supp. No. 4, 1961).
[34] N.C. GEN. STAT. § 45-53(b) (Adv. Leg. Serv. Supp. No. 4, 1961).
[35] Comment, 7 N.C.L. REV. 95, 98 (1928).
[36] N.C. GEN. STAT. § 45-54(b)(3) (Adv. Leg. Serv. Supp. No. 4, 1961).
[37] Whitehurst v. Garrett, 196 N.C. 154, 144 S.E. 835 (1928); Note, 7 N.C.L. REV. 306 (1929).
[38] See note 19 *supra*.

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Effect of Release Given Tortfeasor Causing Initial Injury in Later Action for Malpractice Against Treating Physician

In 1936, our Supreme Court in *Smith v. Thompson*[1] held that a general release given by an injured person to a tortfeasor inflicting the initial personal injury operated to release a physician who was guilty of malpractice in later treating the injury. In 1958, the court decided *Bell v. Hankins*.[2] An administrator had sued a motorist for the wrongful death of his decedent and during the litigation had entered into a consent judgment which stated that its payment would operate as a full and final settlement of all claims against the motorist. Subsequently, the administrator brought another action for wrongful death against the attending physician predicated on malpractice. The Supreme Court held that the consent judgment in the action against the motorist barred the later action against the doctor. The judgment was said to have the same effect as the release in the *Smith* case.

In reaching these results, the North Carolina Supreme Court was following the decided numerical weight of authority in this country.[3] There is, however, a very respectable minority view contra which has been espoused in various jurisdictions[4] and has, in fact, been adopted by some jurisdictions which formerly applied the majority rule.[5]

In 1961 the North Carolina General Assembly enacted G.S. § 1-540.1. Its brief language follows:

> The compromise, settlement or release of a cause of action against a person responsible for a personal injury to another

[1] 210 N.C. 672, 188 S.E. 395 (1936).

[2] 249 N.C. 199, 105 S.E.2d 642 (1958).

[3] See, *e.g.*, Sams v. Curfman, 111 Colo. 124, 137 P.2d 1017 (1943); Edmondson v. Hancock, 40 Ga. App. 587, 151 S.E. 114 (1929); Keown v. Young, 129 Kan. 563, 283 Pac. 511 (1930); Smith v. Mann, 184 Minn. 485, 239 N.W. 223 (1931); Adams v. De Yoe, 11 N.J. Misc. 319, 166 Atl. 485 (Sup. Ct. 1933); Milks v. McIver, 264 N.Y. 267, 190 N.E. 487 (1934); Retelle v. Sullivan, 191 Wis. 576, 211 N.W. 756 (1926); and numerous other authorities collected in Annot., 40 A.L.R.2d 1075 (1955).

[4] Ash v. Mortensen, 24 Cal. 2d 654, 150 P.2d 876 (1944); Dickow v. Cookingham, 123 Cal. App. 2d 81, 266 P.2d 63 (Dist. Ct. App. 1954); Couillard v. Charles T. Miller Hospital, Inc., 253 Minn. 418, 92 N.W.2d 96 (1958); Wheat v. Carter, 79 N.H. 150, 106 Atl. 602 (1919); Daily v. Somberg, 28 N.J. 372, 146 A.2d 676 (1958).

[5] Couillard v. Charles T. Miller Hospital, Inc., *supra* note 4, overruling Smith v. Mann, 184 Minn. 485, 239 N.W. 223 (1931); Daily v. Somberg, *supra* note 4, disapproving Adams v. De Yoe, 11 N.J. Misc. 319, 166 Atl. 485 (Sup. Ct. 1933).

> shall not operate as a bar to an action by the injured party against a physician or surgeon or other professional practitioner treating such injury for the negligent treatment thereof, unless the express terms of the compromise, settlement or release agreement given by the injured party to the person responsible for the initial injury provide otherwise.

It is to be noted that the statute says nothing about actions for wrongful death. It is clear, however, that the effect of the statute is to place North Carolina in line with the current minority in those cases where the person injured has released the initial tortfeasor and then wishes to sue the physician for malpractice. Two questions are immediately presented. (1) Should the statute be construed to apply to wrongful death cases? In short, should we say the statute not only reverses the law of *Smith v. Thompson* but also the law of *Bell v. Hankins?* (2) If it is determined that, since the statute changes existing law it is to be construed strictly and will not be held to apply to wrongful death cases, should the statute be amended so as to make it cover the wrongful death situation involved in the *Bell* case?

Before attempting to answer these questions, let us look into the reasons which have led several courts to adopt the minority view and which unquestionably must have had some influence in leading our legislature to enact the statute. When two motorists are guilty of concurrent negligence as a result of which a third party is injured, the motorists are clearly joint tortfeasors. They are both responsible for one and the same injury. Satisfaction of the injured's claim received from one, whether by way of a judgment or settlement and release, is held to bar the action against the other. Repeatedly, we find the courts saying that the injured shall have but one satisfaction for his injury.[6] Realism compels us to recognize,

[6] Typical of the mass of decisions which have held that a release of one joint tortfeasor bars action against the other on the theory that the release imports full satisfaction is Sircey v. Rees, 155 N.C. 242, 71 S.E. 353 (1911), quoted and relied upon in Smith v. Thompson, 210 N.C. 672, 188 S.E. 395 (1936). This rule of law, first declared by the English courts, was generally adopted in the United States. For an excellent historical account of the development of the rule with an unusually keen criticism of it, see Breen v. Peck, 28 N.J. 351, 146 A.2d 665 (1958). There is a growing minority which refuses to accept the common law rule and which gives to the general release no greater force than a covenant not to sue. See in addition to the *Breen* case, just cited, the excellent opinion of Associate Justice Rutledge in McKenna v. Austin, 134 F.2d 659 (D.C. Cir. 1943), in the course of which he said: "Whether words of 'release' or of 'covenant' are used, the effect

however, that many a release is given to one of two joint tortfeasors for an amount which is far from satisfying the claim but which may be all the claimant can hope to extract from an impecunious tortfeasor. Recovery against the other tortfeasor is hoped for with credit to be given for the amount received from the first.

The well advised injured will, in such a case, execute a covenant not to sue as to the first joint tortfeasor, thus leaving himself free to go against the other. By the use of the general release he finds himself foreclosed in most jurisdictions notwithstanding the fact that far from full compensation was received in payment for the release. It is for this reason that some jurisdictions have in recent years declared by judicial decision that hereafter releases given to one of two joint tortfeasors are to have the same effect as covenants not to sue.[7] Presumably, the North Carolina legislature did not wish to go that far when it enacted the statute under consideration and there is no indication that the North Carolina Supreme Court will take such a step on its own initiative.[8] We must therefore face

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should be the same. . . . The rule's results are incongrous. . . . Wrongdoers who do not make or share in making reparation are discharged, while one willing to right the wrong and no more guilty bears the whole loss. . . . Many [claimants], not knowing this [effect of release as a bar], accept less only to find later they have walked into a trap." *Id.* at 662.

[7] In reaching this result, the New Jersey Supreme Court in Breen v. Peck, *supra* note 6, at 358, 146 A.2d at 669, said: "The distinction between releases and covenants not to sue has properly been described as an artificial one which looks to form rather than substance and which tends to trap the unwary."

Scholarly criticism of the common law rule holding that a release of one joint tortfeasor bars action against the other has been very substantial. See, *e.g.*, Note, *Release To One Joint Tortfeasor*, 17 ILL. L. REV. 563 (1923); COOLEY, TORTS § 30, at 183 (rev. ed. Throckmorton 1930); and PROSSER, TORTS § 46, at 244 (2d ed. 1955), wherein Dean Prosser said: "the rule seems at best an antiquated survival of an arbitrary common law procedural concept. . . ." See also Havighurst, *The Effect of a Settlement With One Co-Obligor Upon the Obligation of the Others*, 45 CORNELL L.Q. 1-2 (1959), where Professor Havighurst in referring to the common law rule said: "It appears as a survival from an older day when the law for the most part was less concerned, as we think, about giving effect to the intentions of the parties and less sensitive to considerations of fairness in the administration of justice."

[8] However, should the court determine to do so, there is excellent authority and sound reasoning in support of such action. See, *e.g.*, the language of the New Jersey court in Breen v. Peck, 28 N.J. 351, 365, 146 A.2d 665, 673 (1958), where that court in departing from the old common law rule which it found unsound said: "There can hardly be any question as to the court's power to remould the English common-law rule, or as to the total absence of any reliance which might persuasively call for the application of the rule of *stare decisis*."

the statute and the problems raised by it on the hypothesis that under current law in this state a general release to one joint tortfeasor imports satisfaction of the claim and releases the other tortfeasor as a matter of law.

We have been considering the case of two motorists simultaneously causing the same injury to a third person. We have seen that, even in that type of case, the injured in releasing the one tortfeasor may have been under the impression he could collect the balance of his damage from the other. But, whatever the injured party had in mind, it is certain he was settling with the one tortfeasor for the *very same injury* for which he now wishes to collect damages from the other. When, however, for the sake of illustration, we find the injured had his arm broken by a negligent motorist and subsequently while being treated by a physician suffered severe burns due to negligence in the use of x-ray, we have quite a different situation. There is not only no simultaneous aspect to the acts of negligence, but there is *neither the same injury involved.*

The injured layman, not skilled in the idiosyncracies of the law, would assume that the negligent motorist is responsible for his broken arm. He would also assume that the doctor alone would be responsible for the x-ray burn. He would probably be surprised to learn from his attorney that not only is the motorist liable for the broken arm but also for the burns inflicted by the physician. In fact, even the physician might be pleasantly surprised to learn that the general release given by the injured to the motorist, who broke the arm, also operated to release the physician who had burned the injured, albeit the doctor had not contributed a dime to the settlement. In this situation when the injured releases the motorist it is not unreasonable to assume that he is settling merely for the broken arm believing in his own mind that he still can proceed against the physician for the burns the latter inflicted. It is this realistic approach which has led some courts to adopt the minority view even though in their former case law they applied the rule of the majority.[9] And it is the appreciation of this factor which undoubtedly led to the adoption of G.S. § 1-540.1.

Now let us look at the situation presented in *Bell v. Hankins.* The injured has died. The administrator has sued the motorist charging him with being responsible for the wrongful death. A consent judgment has been entered in the action. Now the admin-

[9] See cases cited *supra* note 5.

istrator wishes to sue the doctor, not for some other loss, but for the very same wrongful death. The damages for this death are neither more nor less, whether the motorist or the doctor is held responsible. This is quite a different situation from that presented in the *Smith* case. Had the death action against the motorist been tried and a judgment for damages entered on the jury verdict and paid, there could be no question but that the administrator had received satisfaction for the death and could not thereafter proceed against any other person responsible for the same death. Double recovery for the same loss will not be permitted. As long as the distinction between a covenant not to sue and a general release is maintained in this state as to joint tortfeasors, then it would seem to follow that whether a general release of the wrongful death claim is given the motorist, or a consent judgment against him entered, the effect of either is to bar a subsequent action against the physician as well as against any other motorist who may have concurrently brought about the decedent's death.

Hence, answering the two questions put at the outset of this paper, the writer believes that both should be answered in the negative.[10] G.S. § 1-540.1 should not be construed to apply to cases where the administrator has released the initial tortfeasor for the wrongful death and then wishes to proceed to recover for the same wrongful death against the negligent physician. Neither should the statute be amended so as to permit such second action and thus overrule *Bell v. Hankins.*

This, by no means, however, disposes of the myriad of problems which may arise in cases where the injured motorist has been negligently treated by a physician. Before determining what, if any, amendments are to be made to the statute in question one should consider the various fact situations that may arise. These are many because an administrator or executor, in additon to having an action for wrongful death, in an appropriate case may also have a survival action for the losses incurred by the injured in his lifetime.[11] Let us examine some of the possibilities.

[10] While this conclusion seems inescapable as long as our court adheres to the common law rule that a release of one joint tortfeasor releases the other, the writer in no way wishes to imply approval of that rule. His views, as evidenced in this paper, are quite to the contrary.

[11] Hoke v. Greyhound Corp., 226 N.C. 332, 38 S.E.2d 105 (1946). However, satisfaction for the injury received by the decedent in his lifetime, either by way of judgment against the tortfeasor or general release, bars

(1) The injured may execute a general release to the initial tortfeasor and subsequently wish to sue the physician for malpractice. This is *Smith v. Thompson* and is expressly covered by the statute.

(2) The injured may execute a general release to the initial tortfeasor and before bringing an action against the physician for malpractice die of causes unrelated to the accident or malpractice. Clearly, within the spirit of the G.S. § 1-540.1, the personal representative of the decedent should be free to sue the physician for the malpractice claim which survived the death. Appropriate amendment should be made to expressly so provide.

(3) The injured may execute a general release to the physician and subsequently wish to sue the initial tortfeasor. Clearly here the recovery against the physician would only be for the damage done by him and the action could proceed against the initial tortfeasor for the initial damage.

(4) The injured may execute a general release to the physician and die from causes unrelated to the initial injury or malpractice without having sued the original tortfeasor. Clearly here, also, the personal representative would have a survival action against the initial tortfeasor and his recovery would be for the initial damage unaffected by the malpractice.

(5) The injured might die from causes unrelated to the initial injury or the malpractice before releasing anybody. Both the causes of action against the initial tortfeasor and the physician survive. Hence, a general release given by the personal representative to the initial tortfeasor should not, within the spirit of the statute, bar action by the representative against the physician.

(6) The injured might die from causes unrelated to the initial injury or the malpractice before releasing anybody. A general release given by the personal representative to the physician should not bar action by the representative against the initial tortfeasor for the initial damage.

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any action by the personal representative for wrongful death. Edwards v. Interstate Chem. Co., 170 N.C. 551, 87 S.E. 635 (1916).

(7) The injured may have died by reason of the malpractice. This results in liability for the death on both the initial tortfeasor and the physician. A judgment in a wrongful death action against either party or a general release on account of the death to either the initial tortfeasor or the physician should bar an action for said death against the other. This is *Bell v. Hankins.*

(8) The injured may have died by reason of the malpractice prior to releasing anyone. A release given by the personal representative to either the initial tortfeasor or the physician on account of the wrongful death should not bar the action of the representative against either the initial tortfeasor or physician for such losses (pain and suffering for example) as the deceased suffered in his lifetime. It will be recalled that the recovery under the death act goes to the next of kin while the recovery under the survival action goes to the benefit of the general estate.[12]

Other situations may be imagined that are not covered by the above illustrations. Enough has been said, however, to indicate the problems which may arise in conjunction with G.S. § 1-540.1. It is respectfully submitted that the statute should be re-examined in the light of the matters brought out in this paper. Surely some clarification is in order. The best and simplest remedy would be to go all the way and enact a statute providing that the release of one tortfeasor, be he denominated joint or otherwise, does not bar action against another.[13] Double recovery shall not be permitted, however, and any amount paid by one tortfeasor on account of the same loss, be it personal injury, property damage or death,

[12] Hoke v. Greyhound Corp., *supra* note 11.

[13] Such statutes have been enacted in various jurisdictions in recent years. They will be found set out and applied by the courts in the following cases: Giem v. Williams, 215 Ark. 705, 222 S.W.2d 800 (1949), applying ARK. STAT. ANN. § 34-1004 (1948); Raughley v. Delaware Coach Co., 47 Del. (8 Terry) 343 (Super. Ct. 1952), applying 10 DEL. CODE ANN. § 6304 (1953); and Conover v. Hecker, 317 Mich. 285, 26 N.W.2d 774 (1947), applying MICH. STAT. ANN. § 27.1683(2) (Supp. 1959).

Whether the remedial action is to be taken by the courts as in Breen v. Peck, 28 N.J. 351, 146 A.2d 665 (1958), and McKenna v. Austin, 134 F.2d 659 (D.C. Cir. 1943), or by the legislature as in Arkansas, Delaware and Michigan, it seems clear that relief in one form or another should be given.

shall be credited in assessing damages against the other party responsible for said loss. Such a statute would not alter the accepted rule that when an action is litigated and damages for the loss are assessed by a jury or judge (not consented to) payment of the judgment is to be deemed full satisfaction for the loss in question.

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