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sition.¹² The principal case is the first direct decision in North Carolina that this rule against excess duration of an indestructible private trust operates to make a vested trust estate void. Heretofore, North Carolina has declared that the Rule against Perpetuities as applied in this state is the rule against remoteness of vesting,¹³ and that it is concerned only with the vesting of estates, not with their enjoyment or possession.¹⁴

The North Carolina court has frequently stated that the Rule against Perpetuities does not apply to charitable trusts, and this is repeated in the principal case. What is meant, however, is that a charitable trust will not fail for excessive duration,¹⁵ because of the countervailing public gain. For the rule against remoteness of vesting does apply to charitable trusts, except where the property vests in one charity after another charity.¹⁶ Indeed, in the principal case, the power of appointment that was concededly stricken by the rule against remoteness was a power to leave the property to charity in the alternative.

ROBERT L. HINES.

Wrongful Death—Amendment of the Pleadings after the Limitation Period Has Run

In a recent case¹ the plaintiff sued to recover for the wrongful death of her husband, alleging that as he was driving along the highway in a careful manner the defendant "negligently and carelessly" ran into him from the rear and killed him. The defendant entered a demurrer *ore tenus* at the trial, which was sustained on the ground that the complaint did not state any fact constituting negligence. The plaintiff was granted permission to amend. She then enumerated items of negligence, and was awarded a judgment of \$6550 on a jury verdict of negligence. On appeal the North Carolina Supreme Court stated the rule that an amendment which introduces a new cause of action will not relate back to the

¹² *Pulitzer v. Livingston*, 89 Me. 359, 36 Atl. 635 (1896); *RESTATEMENT, PROPERTY* §378 (1944); *RESTATEMENT, TRUSTS* §62(k) (1935).

¹³ *Vinson v. Gardner*, 185 N. C. 193, 116 S. E. 412 (1923); *Springs v. Hopkins*, 171 N. C. 486, 88 S. E. 774 (1916); *O'Neal v. Borders*, 170 N. C. 483, 87 S. E. 340 (1915).

¹⁴ *Springs v. Hopkins*, 171 N. C. 486, 88 S. E. 774 (1916); *accord*, *Story v. First Nat'l Bank & Trust Co.*, 155 Fla. 436, 156 So. 101 (1934); *Hawkins v. Ghent*, 154 Md. 261, 140 Atl. 212 (1928) (where the four appointees, given life estates in trust, were unborn at creation of power of appointment and estates were held valid); *Loring v. Blake*, 98 Mass. 253 (1867). *GRAY, op. cit. supra* note 3, §121.5; 1 *PERRY, op. cit. supra* note 8, §383.

¹⁵ *Penick v. Bank of Wadesboro*, 218 N. C. 686, 12 S. E. 2d 253 (1940); *State ex. rel. Wardens v. Gerard*, 37 N. C. 210 (1842); N. C. GEN. STAT. §36-21 (1943); 2 *BOGERT, op. cit. supra* note 9, §352; 1 *PERRY, op. cit. supra* note 8, §384; 3 *SCOTT, op. cit. supra* note 11, §365.

¹⁶ *Williams v. Williams*, 215 N. C. 739, 3 S. E. 2d 334 (1939); 2 *BOGERT, op. cit. supra* note 9, §§ 342-349; *GRAY, op. cit. supra* note 3, §594; 3 *WALSH, op. cit. supra* note 3, §341; *see Reynolds Foundation v. Trustees of Wake Forest College*, 227 N. C. 500, 513, 42 S. E. 2d 910, 918 (1947).

¹ *Webb v. Eggleston*, 228 N. C. 574, 46 S. E. 2d 700 (1948).

original complaint, and held that as the plaintiff's amended complaint first stated a cause of action more than one year after her intestate's death, thereby failing to meet the requirements of the Wrongful Death Act,² the judgment must be reversed. In a dissenting opinion Mr. Justice Seawell took the position that the plaintiff had only defectively stated a good cause of action and that the amendment should relate back to the original complaint.

A recent Note in this LAW REVIEW³ discussed the question of amendments which change the cause of action, and after demonstrating the difficulties involved in determining the status an amendment will be given, entered a plea for the adoption of the provision of the Federal Rules⁴ for the relation back of amendments. Clearly under this rule the instant case would have had a different result, for the negligence alleged in general terms and that set forth in detail both arose out of the same occurrence.⁵ The difficulty is not in the rule that an amendment stating a new or different cause of action will not relate back, but rather in determining when to apply it.⁶ The North Carolina Supreme Court has declared the purpose of the one year limitation in the Wrongful Death Act to be the giving of notice to the defendant so that he can prepare himself, and this is done by the institution of the action.⁷ To construe the perfecting of a bad complaint as the statement of a new cause of action is to unduly favor the wrongdoer, who has been given notice of the claim against him.

The authorities advocate liberal application of the rule allowing the amendment to relate back. Judge Charles E. Clark, in speaking of allowing amendments to relate back in wrongful death actions, says: "But now in all but a few jurisdictions the amendment is allowed if it refers to the same general aggregate of operative facts upon which the complaint was based."⁸ Professor McIntosh says the North Carolina rule allows relation back when "the amendment is intended to perfect

² N. C. GEN. STAT. §28-173 (1943) ("... an action ... to be brought within one year after such death.").

³ Note, *Amendments Changing the Cause of Action—Limitations of Actions*, 25 N. C. L. REV. 76 (1946).

⁴ FED. R. CIV. P., 15(c) ("Relation back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.").

⁵ 16 AM. JUR., Death §289 ("... a petition alleging negligence in general terms may be amended so as to set forth the facts, although the period of limitation for the bringing of the action has expired when the amendment is made.").

⁶ TIFFANY, DEATH BY WRONGFUL ACT 187 (2d ed. 1913).

⁷ See *Trull v. Seaboard Airline Ry.*, 151 N. C. 545, 548, 66 S. E. 586, 587 (1909). Note, 4 Mo. L. REV. 49 (1933) (a plea for the adoption of a notice-giving test rather than the "cause of action" test for relation back of amendments because of the present conflicting authorities).

⁸ CLARK, CODE PLEADING 729 (2d ed. 1947). *Id.* at 731 ("And unless there has been so great a change in the material operative facts that an entirely different fact situation is presented, the amendment should be allowed."). See also *id.* §118.

the cause of action or defense which was imperfectly stated, or is germane to the original cause, deals with the same transaction, and does not state a new cause of action."⁹

In the principal case the court recognizes the unfortunate situation in which the plaintiff finds himself. The careful defense counsel can delay his test of the sufficiency of the pleadings at law until the trial, and if the limitation period has intervened, it will thus be too late for the plaintiff to avail himself of an amendment.¹⁰ He may elect to stand on his complaint at the risk of being dismissed if the demurrer is sustained.¹¹ If he amends his complaint rather than taking an appeal on the demurrer, he risks having the first demurrer called the law of the case, as not having stated a cause of action, and subsequent amendments would be barred as stating a new cause of action.¹² But the court feels bound by its previous decisions, and in similar cases it is unlikely that it will allow amendments to relate back where a complaint first fails to state a cause of action.

Yet, North Carolina has respectable authority for an opposite result.¹³ In *Lassiter v. Norfolk & C. R. R.* the court allowed an amendment to show the Virginia Death Statute after it had been denied by the trial court as stating a new cause of action. Chief Justice Clark said, "The rounding out of the complaint to cure a defective complaint even in material matters is not changing a cause of action, nor adding a new cause, but merely making a good cause out of that which was a defective statement of the cause of action. . . . If the cause of action were not defectively stated, there would be no need for amendment."¹⁴

The application and policy of North Carolina's "Saving Statute"¹⁵

⁹ McINTOSH, N. C. PRACTICE AND PROCEDURE §492 (1929). See also Notes, 30 MICH. L. REV. 795 (1932), 82 U. OF PA. L. REV. 657 (1934), 4 MERCER BEASLEY L. REV. 204 (1934), 171 A.L.R. 1087 (1947).

¹⁰ Note, *The Demurrer Ore Tenus*, [1947] Wis. L. REV. 426.

¹¹ *Ballinger v. Thomas* 195 N. C. 517, 142 S. E. 761 (1928).

¹² *George v. Atlanta & C.A.L.R.R.*, 210 N. C. 58, 185 S. E. 431 (1936) (same case earlier dismissed when defendant's demurrer sustained, 207 N. C. 457, 177 S. E. 324 (1934)). The court said the first demurrer became the law of the case, not to be questioned. *Capps v. Atlantic C. L. Ry.*, 183 N. C. 181, 111 S. E. 533 (1922) (first action brought under the Federal Employer's Liability Act; amendment to bring it under the Virginia Wrongful Death Act denied. But see Chief Justice Clark dissenting at 195, 111 S. E. at 540: "An action for a serious wrong in a court of justice ought not to be denied upon metaphysical distinctions, or ingenious discussions based upon a matching of wits between counsel.").

¹³ *Lassiter v. Norfolk & C. R. R.*, 136 N. C. 89, 48 S. E. 642 (1904); *Renn v. Seaboard A. L. R. R.*, 170 N. C. 128, 86 S. E. 964 (1915), *aff'd*, 241 U. S. 290 (1916); *Lefler Bros. v. Lane*, 170 N. C. 181, 86 S. E. 1022 (1915).

¹⁴ 136 N. C. 89, 92, 48 S. E. 642, 644 (1904). Walker concurring, *id.*, at 96, 48 S. E. at 645 ("The right of amendment is denied only when the court can see that it is impossible for the cause of action to be perfected, or . . . when it appears affirmatively that there is not, and cannot be, a cause of action.").

¹⁵ N. C. GEN. STAT. §1-25 (1943) ("If an action is commenced within the time prescribed therefore, and the plaintiff is nonsuited, or a judgment therein reversed on appeal, or is arrested, the plaintiff . . . may commence a new action within one year. . . .").

are in conflict with the rule of the principal case. The effect of this statute is to extend the limitation period an extra year for any action which is nonsuited, reversed, or arrested,¹⁶ and it has been applied to conditions annexed to the cause of action as well as to ordinary Statutes of Limitation.¹⁷ Under this section the court has allowed a new action after a demurrer *ore tenus* had been sustained in the first action for failure to state facts constituting a cause of action.¹⁸

In *Blades v. Southern R. R.*¹⁹ the court extended this statute beyond any rigid requirement of form in holding that a new action for wrongful death brought eighteen months after plaintiff's intestate died could relate back to a prior cross-complaint which had been dismissed as not germane to the action in which it was filed.

In *Woodcock v. Bostic*²⁰ the complaint failed to state a cause of action and the "Saving Statute" was applied to allow a "new action" after the Statute of Limitations had run. Since the section would have been no protection against the Statute of Limitation if a new cause of action had been alleged, the court expressly held that bringing a new action after a failure to state a cause of action was not the statement of a new cause of action. In 1828 Justice Ruffin said of the section, "The plaintiff, therefore, shall be heard, until he can get a trial on the merits, provided he has been diligent enough in the first instance to sue before time barred him."²¹

The principal case will serve to curtail seriously the valuable right to amend pleadings, and will allow such amendments to relate back to the original pleading only where it would have been good against a demurrer in the first place. The plaintiff is thus required to stand or fall on his first pleading if the Statute of Limitations has run, and such was not the contemplation of our liberal amendment statute.²² A remedy could be found either in the adoption of the Federal Rule,²³ or in the application of the "notice test"²⁴ to our rule of relation back.

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¹⁶ *Meekins v. Norfolk & S. R. R.*, 131 N. C. 1, 42 S. E. 333 (1902).

¹⁷ *Ibid.*

¹⁸ *Webb v. Hicks*, 125 N. C. 201, 34 S. E. 395 (1899).

¹⁹ 218 N. C. 702, 12 S. E. 2d 553 (1940).

²⁰ 128 N. C. 243, 38 S. E. 881 (1901) (the "new action" was in fact an amendment to the first complaint, and was allowed to spare the delay and expense of a new action).

²¹ *Morrison v. Connelly*, 13 N. C. 233, 239 (1828). See Note, 40 COL. L. REV. 1440 (1940) criticizing a West Virginia case which refused to apply the Saving Statute to a wrongful death action because the limitation was a condition precedent. The principal case also accents the substantive nature of the limitation, but expressly indicates that the same rule on relation back would apply to ordinary Statutes of Limitation.

²² N. C. GEN. STAT. §1-163 (1943). "The judge may . . . amend any pleading . . . by inserting other allegations material to the case."

²³ See note 4 *supra*.

²⁴ See note 7 *supra*.