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seem to amount to an unnecessary procedural delay caused by an absurd prerequisite.

Yet, perhaps it is best that the Supreme Court be given the opportunity in every case to review the record on these important questions of due process which so often involve fundamental rights. But, since a denial of certiorari simply means that fewer than four members of the court deemed it desirable to review a decision of a lower court, and in no way is an adjudication on the merits, the discretionary power of the lower federal courts to entertain petitions for writs of habeas corpus should not be disturbed. By keeping the doors of the lower federal courts open the chances of injustice are thereby reduced to a minimum. Therefore, if a state prisoner believes his case still has merit after certiorari has been denied, he should not hesitate to petition the lower federal courts for a writ of habeas corpus. But, if in the meantime, new evidence has been discovered, then it would be advisable for him to first seek a determination of the question in the state court as suggested in *Stonebreaker v. Smyth.*

Thus, it would seem, that if this procedure is left open for a state prisoner to follow, not only will the doctrine of comity be promoted, but also the benefits of the "great writ" will be preserved.

**WILLIAM L. MILLS, JR.**

Limitation of Actions—Effect of Part Payment of Principal or Interest on Non-Paying Obligor

In North Carolina a part payment by one of a number jointly or jointly and severally bound, will start the statute of limitations running anew as to all others of the same class, but if the payment is made after the remedy is barred it will not bind those not making the pay-

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23 Agoston v. Pennsylvania, 71 Sup. Ct. 9 (1950); Maryland v. Baltimore Radio Show, 338 U. S. 912, 917 (1950) (denial of certiorari means "that fewer than four members of the Court deemed it desirable to review a decision of the lower court as a matter of sound judicial discretion.

24 163 F. 2d 498 (4th Cir. 1947).

1 Davis v. Alexander, 207 N. C. 417, 177 S. E. 417 (1934) (payment by maker); Dillard v. Farmer's Mercantile Co., 190 N. C. 225, 129 S. E. 598 (1925) (part payment by maker); Barber v. Absher Co., 175 N. C. 602, 96 S. E. 43 (1918) (part payment by maker); Houser v. Fayssoux, 168 N. C. 1, 83 S. E. 692 (1914) (part payment by principal); Garrett v. Reeves, 125 N. C. 529, 34 S. E. 636 (1899) (part payment by principal); Copeland v. Collins, 122 N. C. 619, 30 S. E. 315 (1898) (part payment by maker); Le Duc v. Butler, 112 N. C. 458, 17 S. E. 428 (1893); Moore v. Beamann, 111 N. C. 328, 16 S. E. 177 (1892) (part payment by one obligor); Moore v. Goodwin, 109 N. C. 218, 13 S. E. 772 (1891) (part payment by principal); Green v. Greensboro College, 83 N. C. 449 (1888) (payment of interest by principal). See also McIntosh, *North Carolina Practice and Procedure* §134 (1929).
The same rule applies to sureties on a promissory note or bond, since, as between the maker and the surety, and as between co-sureties, there is said to be a community of interest and a common obligation, and a part payment by either maker or surety before the statute has run will toll the statute as to the others not making the payment. The reasoning of the court seems to be that the surety is primarily liable along with the maker of the instrument and is, therefore, included within the rule applicable to joint makers.

One exception to the rule that a part payment by the maker will bind the surety is the liability of a surety on a guardian's bond. The court has held that the liability of such a surety is a conditional liability and secondary, dependent upon the failure of the guardian to pay the damages caused by his breach. The payment of principal or interest renews the obligation of the guardian on the amount due his ward and sets the statute running over as to the guardian but not as to the surety. The reason for the exception is not clear, since the liability of any surety is dependent upon the principal's failure to pay.

In an early decision it was held that a payment by a principal before the statute had run operated as a renewal as to indorsers, but this is no longer the rule as to indorsers of a promissory note or bond. The court has since held that the maker of a note and an indorser are not in the same class, and a payment by the maker before the statute has run will not start the statute running anew as to accommodation indorsers. See also N. C. GEN. STAT. §1-27 (1943).

An action must be brought against the surety on a guardian's bond within three years after the breach thereof. N. C. GEN. STAT. §1-52(6) (1943). There seem to be no North Carolina cases on part payment of principal or interest of executor's, administrator's or collector's bonds, but it is suggested that the same rule should apply to sureties on these bonds since the language of the statute providing for a guardian's bond, N. C. GEN. STAT. §33-13 (1943), and of the statute providing for executor's, administrator's and collector's bonds, N. C. GEN. STAT. §28-34 (1943), is practically identical and since N. C. GEN. STAT. §1-52(6) (1943) applies to sureties of executors, administrators, collectors and guardians.

Garrett v. Reeves, 125 N. C. 529, 34 S. E. 636 (1899).
dorsers or payee indorsers, since they are secondarily liable and in a different class. The same rule applies to a drawer when a drawee has made a payment on the bill. The drawee and the drawer are in a different class since the "drawer's liability is a conditional liability, dependent upon presentation to the drawee and notice of his failure [to honor] to the drawer." There seems to be one exception to the rule that a payment by the maker will not stop the running of the statute as to indorsers. Where there is an agreement that the parties remain bound notwithstanding an extension of time granted the maker and there were payments of interest, by the maker, the statute does not begin to run in favor of indorsers until the maturity date under the last extension agreement.

The rule that a part payment by the maker will not stop the running of the statute as to indorsers applies to guarantors. The court has held that a guarantor and a maker are not in the same class since the contract of guaranty is collateral to the main debt and a payment by the maker is a payment on the note, evidencing the principal debt, and not upon the contract of guaranty which determines the liability of guarantors.

In regard to instruments under seal, the ten year statute of limitations applies as against the principal thereto. The court has held that a guarantor and a maker are not in the same class since the contract of guaranty is collateral to the main debt and a payment by the maker is a payment on the note, evidencing the principal debt, and not upon the contract of guaranty which determines the liability of guarantors.

To make indorsers sureties, appropriate words must appear upon the instrument itself or in some writing attached thereto. A resolution passed by a board of directors which stated that as between the maker and the indorsers all would be jointly and severally liable for the payment of the note was held not to be sufficient to make indorsers primarily liable along with the maker. Waddell v. Hood, 207 N. C. 250, 176 S. E. 558 (1934). See also Meyers Co. v. Battle, 170 N. C. 168, 86 S. E. 1034 (1915); Houser v. Fayssoux, 168 N. C. 1, 83 S. E. 692 (1914); Perry v. Taylor, 148 N. C. 362, 62 S. E. 423 (1908).

N. C. GEN. STAT. §25-69 (1943) provides that a person placing his signature upon an instrument, otherwise than a maker, drawer, or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity. Appropriate words must appear upon the instrument itself or in some writing attached thereto. Waddell v. Hood, 207 N. C. 250, 176 S. E. 558 (1934). Of course, this does not prevent an indorser from showing that his indorsement was an accommodation indorsement or from showing that the relation of indorsers as between themselves for purposes of contribution. Gillam v. Walker, 189 N. C. 189, 126 S. E. 424 (1925).
that this statute does not apply to a surety on a sealed instrument, even though his seal is affixed,\textsuperscript{13} since the use of the word "principal" and the omission of the word "surety" clearly indicates this to be the legislative intention,\textsuperscript{14} therefore, the three year period applies to a surety. This raises the problem whether or not a principal and a surety are in the same class, and if they are, will a payment by the principal bind the surety. If a payment is made before the three year limitation period has run in favor of the surety, such payment will bind the surety.\textsuperscript{15} This rule is applied without discussing whether the principal and the surety, in this situation, are in the same class. It would seem that they are not, since the limitation period is different as to each. In one case, payments made by the principal after the three year statute had run in favor of the surety did not revive the statute as to the surety, although the remedy was not barred as against the principal—the ten year statute being applicable to him.\textsuperscript{16} It should be pointed out that as to a guaranty under seal, the contract of a guarantor is his own separate contract and he is, therefore, a principal to the guaranty—a sealed instrument—and this being a separate contract under seal, the suit against the guarantor is not barred until ten years after the cause of action accrued.\textsuperscript{17} The problems which arise when there is a surety on a sealed instruments do not arise when the guaranty is under seal, since a payment by the principal will not stop the running of the statute as to guarantors.

The North Carolina rule follows the old English rule that a payment of principal or interest by one of two or more joint or joint and several debtors will make a new running point for the statute as to all the other debtors.\textsuperscript{18} The only apparent difference is that the English rule was based upon the theory that a payment by one was a payment for all, the one acting as agent for the others, while the North Carolina rule is based on the theory that there is a community of interest and a

\textsuperscript{13} Barnes v. Crawford, 201 N. C. 434, 160 S. E. 464 (1931); Redmond v. Pippen, 113 N. C. 90, 18 S. E. 50 (1893).

The three-year statute of limitations applies to accommodation indorsers even though their signatures are under seal. Howard v. White, 215 N. C. 130, 1 S. E. 2d 356 (1939).

\textsuperscript{14} Barnes v. Crawford, 210 N. C. 434, 160 S. E. 494 (1931).

N. C. Gen. Stat. §1-52(1) (1943) is applicable to sureties and an action against them is limited to three years.

\textsuperscript{15} Davis v. Alexander, 207 N. C. 417, 177 S. E. 417 (1934); Redmond v. Pippen, 113 N. C. 90, 18 S. E. 50 (1893).

\textsuperscript{16} Davis v. Alexander, 207 N. C. 417, 177 S. E. 417 (1934).

If a person whose signature appears on the face of a sealed instrument is sued as principal thereto, as between the payee and the signers, he may prove by parol evidence that to the knowledge of the payee he signed the instrument as surety and not as maker and as to him the three-year statute applies. Davis v. Alexander, supra.

\textsuperscript{17} Coleman v. Fuller, 105 N. C. 328, 11 S. E. 175 (1890).

\textsuperscript{18} Whitcomb v. Whiting, 2 Doug. K. B. 652, 99 Eng. Reprint 413 (1781).
common obligation among them. The English courts seem to have recognized the hardship of the rule and applied it with considerable reluctance, until it was abolished by statute in 1856.

The majority of American jurisdictions have repudiated the old English rule, without the aid of statutes, and hold that a part payment of principal or interest by one of two or more joint or joint and several debtors sets the statute running anew only as to the person making the payment. Some states have statutes expressly providing that one joint debtor shall not lose the benefit of the statute of limitations by reason of a part payment by a co-obligor. A few states still apply the old English rule.

Most of the courts of this country, before abolishing the rule entirely, made a distinction between cases where the statute had fully run and where it had partially run. North Carolina, by statute, has preserved this distinction. The statute provides that no act, admission, or acknowledgment by one of the makers of a promissory note or bond after the statute has barred the same, is evidence to repel the statute except as against the maker doing the act or making the admission.

It is hard to understand how, in any case, the unauthorized payment by one party, though he be jointly or jointly and severally bound, can

21 MERCANTILE LAW AMENDMENT ACT, 19 & 20 Victoria, c. 97, §14 (1856).
22 COLO. STAT. c. 102, §§25, 26 (1935); ME. REV. STAT. c. 99, §108 (1944); MASS. ANNO. LAWS c. 260, §§14, 15 (1933); MICH. STAT. ANNO. c. 27, §§817, 618 (1935); VT. STAT. c. 82, §§1708, 1709 (1947).
24 W. I. WILLISTON ON CONTRACTS §193 (1936).
25 N. C. GEN. STAT. §1-27 (1943).
be admitted to enlarge or extend the obligation of another jointly or jointly and severally bound. Logically and upon principle there can be but one answer. No such authorization or agency exists, or can be implied, from the joint contract as will authorize one to act for and bind the others so as to renew or extend their liability, where the relationship is merely that of joint debtors. If resort were had to principle instead of precedent it is difficult to see how the unauthorized payment by one could bind his co-debtor. It also appears that there is no practical reason why a part payment by the principal should toll the statute as to a surety but not as to a guarantor, since both the surety and the guarantor, in the real sense, serve the same purpose—to secure the debt of the debtor. Since N. C. Gen. Stat. §1-27 (1943) is piecemeal legislation, it is suggested that the statute be amended to provide that a payment by a party to an obligation, whether payment be made before or after the statute of limitations has barred the obligation, shall set the statute running over again only as to the party making the payment.

Perry C. Henson.

Pleadings—General Allegation of Negligence

Until recently it was a settled rule in North Carolina that a general allegation that defendant was negligent was an insufficient pleading of the facts which constituted plaintiff's cause of action, and as such was subject to demurrer. This rule underwent a change in the recent case of Davis v. Rhodes, a negligent wrongful death action. There the questioned allegation was "that defendant unlawfully, recklessly and negligently struck and collided" with the motor scooter on which the intestate was riding. This general allegation was held sufficient.

This change was discussed in a recent note, where it was pointed

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1 Whitehead v. Carolina Telephone & Telegraph Co., 190 N. C. 197, 129 S. E. 602 (1925) (plaintiff used phone to report fire but could not secure connections; an allegation that defendant was negligent in not responding to his call was held insufficient); Thomason v. Durham & Northern R. R., 142 N. C. 318, 55 S. E. 205 (1906) (allegation that plaintiff suffered damage "from smoke, noise, odors and vibrations resulting from operation of defendant's railroad"; held, no cause of action stated); Conley v. Richmond & Danville Ry., 109 N. C. 692 14 S. E. 303 (1891) (averment stated that intestate was killed and slain by the negligence of defendant; held too general); cf. Lanier v. Roper Lumber Co., 177 N. C. 200, 98 S. E. 593 (1919) (plaintiff alleged that he was "induced to sign a deed by fraud"; held, insufficient); Citizens Bank v. Cahagan, 210 N. C. 464, 187 S. E. 580 (1936) (allegation that a certain sum was then due and owing held insufficient).

2 "The defendant may demur to the complaint when it appears upon the face thereof that the complaint does not state facts sufficient to constitute a cause of action." N. C. Gen. Stat. §1-127 (1943).

3 231 N. C. 71, 56 S. E. 2d 43 (1949).

4 29 N. C. L. Rev. 89 (1950).