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then the issue of *devisavit vel non* is raised and must go to the superior court to be tried by a jury.[29] Nothing in the opinion conflicts with the original statement of Chief Justice Ruffin,[30] and this intermediate procedure, standing between probate in common form and formal caveat, as defined in 1834 and clarified one hundred and eighteen years later, will bridge the gap confronting persons who seek to get the *validity* of a will settled without having to wait for the three year limitations period on caveats to expire.[31] They may now force an early caveat or none at all, which is the converse of the situation dealt with in *Brissie v. Craig*,[32] where a prospective caveator was seeking to have the *invalidity* of a will settled. In completing the picture of will probates by the decisions in *Brissie v. Craig* and the *Ellis* case, the court has followed the path of logic with consistency and accuracy, and the way is now clear for rapid settlement of estates.

HARPER JOHNSTON ELAM, III.

Workmen's Compensation—Right of Employee to Bring Common Law Action Against Negligent Co-employee

Plaintiff was injured while riding in an automobile driven by the president of the corporation by which plaintiff was employed. The plaintiff was awarded compensation under the North Carolina Work-

[29] *In re* Will of Ellis, 235 N. C. 27, 32, 69 S. E. 2d 25, 28 (1952). The court cited as authority N. C. GEN. STAT. §1-273 (1943), which requires the clerk to transfer cases to superior court when issues of law and fact, or of fact, are raised before him *in civil cases*. In view of the constant reiteration by the court of the proposition that will probates are proceedings *in rem*, perhaps a stronger basis for the requirement of a jury trial on the issue of *devisavit vel non* is found in the following language from *In re* Will of Roediger, 209 N. C. 470, 476, 184 S. E. 74, 77 (1936): "A trial by jury cannot be waived by the propounder and the caveator. Nor can they submit to the court an agreed statement of facts, or consent that the judge may hear the evidence and find the facts determinative of the issue. The propounder and the caveator are not parties to the proceeding in the sense that they can by consent relieve the judge of his duty to submit the issue involved in the proceeding to a jury.

"In the instant case, it was error for the judge to render judgment on the facts agreed upon by the propounder and the caveator, and supplemented by the facts found by him, with their consent. The proceeding was *in rem*, and could not be controlled by the propounder and the caveator, even with the consent and approval of the judge. *In that respect it is distinguishable from a civil action.*" (Italics added.) See also *In re* Will of Morrow, 234 N. C. 365, 67 S. E. 2d 279 (1951).

[30] Respondents relied on the statement by Chief Justice Ruffin that "if he [the propounder] take out a decree and summon those in interest against him, 'to see proceedings,' they are concluded, whether they appear and put in an allegation against the will or not. . . ." The court did not concern itself with this point, but a reasonable interpretation of this language, and one which would reconcile it with the holding of the *Ellis* case, is that it means only that those interested persons cited are bound by the final disposition of the case, rather than that the parties are precluded from appealing to the superior court from the decision of the clerk.

[31] See REPORT OF THE COMMISSION ON REVISION OF THE LAWS OF NORTH CAROLINA RELATING TO ESTATES §2 (1939) (where it is suggested this procedure be provided by statute).

[32] See note 22 *supra*.

men's Compensation Act. Thereafter he brought a common law action against the president for negligence. In *Warner v. Leder*,[1] the supreme court held that the specific language of the Workmen's Compensation Act prohibited the action.[2]

Where an employee who is covered by a Workmen's Compensation Act is injured as a result of the negligence of a third party, the acts of most states make some provision for a common law action against this third person.[3] Most acts also provide for subrogation of the employer or his insurance carrier to the rights of the employee in such actions. This right of subrogation includes all amounts paid by the employer or carrier to the employee.[4]

In many cases the employee's injury will be due, as in the instant case, to the negligence of a fellow employee or superior employee in the organization. When this situation occurs, the question is presented as to whether this fellow employee or superior employee is a "third person" within the meaning of the statute allowing suits against third parties. This situation is covered by statute in many states. Some have statutes specifically granting immunity to all fellow employees,[5] others have been judicially construed as doing this even though the wording

[1] 234 N. C. 727, — S. E. 2d — (1952).

[2] "Every employer . . . *or those conducting his business* shall only be liable to any employee who elects to come under the article for personal injury or death by accident to the extent and in the manner herein specified." (Emphasis added.) N. C. GEN. STAT. §97-9 (1950).

In the cases of Tscheiller v. National Weaving Co., 214 N. C. 449, 199 S. E. 623 (1938) and McCune v. Rhodes-Rhyne Manufacturing Co., 217 N. C. 351, 8 S. E. 2d 219 (1940) (see note 9 *infra*) actions by employees against fellow employees were allowed. G. S. 97-9 was not mentioned in the opinions. The later cases of Warner v. Leder, 234 N. C. 727, — S. E. 2d — (1952); Essick v. Lexington, 232 N. C. 200, 60 S. E. 2d 106 (1950); and Bass v. Ingold, 232 N. C. 295, 60 S. E. 2d 114 (1950), relying on G. S. 97-9, modified and limited the decisions in the two previous cases.

[3] See *e.g.*, IND. ANN. STAT. §40-1213 (Supp. 1949), Pittsburgh, C., C. & St. L. R. Co. v. Keith, 89 Ind. App. 233, 146 N. E. 872 (1925); KAN. GEN. STAT. ANN. §44-504 (1949), Bittle v. Shell Petroleum Corp., 147 Kan. 227, 75 P. 2d 829 (1938); LA. REV. STAT. §23:1101 (1950), Lowe v. Morgan's Louisiana & T. R. & S. S. Co., 150 La. 29, 90 So. 429 (1922); N. Y. WORK. COMP. LAW §29 (1946), Caulfield v. Elmhurst Contracting Co., 268 App. Div. 661, 53 N. Y. S. 2d 25 (1945), *aff'd*, 294 N. Y. 803, 62 N. E. 2d 237 (1945); VA. CODE ANN. §65-38 (1950), Fauver v. Bell, 192 Va. 518, 65 S. E. 2d 575 (1951). Some acts have been construed as abolishing actions for damages as against third persons, except as expressly provided therein. See Note, 106 A. L. R. 1042 (1937). The acts of New Hampshire, Ohio, and West Virginia contain no provisions relative to employee or employer remedies against negligent third parties. See generally, Behrendt, *The Rationale of the Election of Remedies Under Workmen's Compensation Acts*, 12 U. OF CHI. L. REV. 231 (1945).

[4] See *e.g.*, N. C. GEN. STAT. §97-10 (1950). See Note, 106 A. L. R. 1053 (1937). In some jurisdictions the employer or insurer is held not entitled to indemnity. See Note, 19 A. L. R. 786 (1922).

[5] TEX. STAT. REV. CIV. art. 8306, §3 (1941), Grandstaff *et al.* v. Mercer, 214 S. W. 2d 133 (Tex. 1948); ACTS OF THE WEST VIRGINIA LEGISLATURE c. 136, art. 2, §6-a (1949), reprinted in SCHNEIDER, WORKMEN'S COMPENSATION STATUTES §2516(1)(6-a) (Upkeep service 1950); *cf.* N. Y. WORK. COMP. LAW §29 (1946), Pantolo v. Lane, 185 Misc. 221, 56 N. Y. S. 2d 227 (1945).

does not require such construction,[6] while others have no such statutes. Of these latter states the majority hold the fellow employee to be a third person and amenable to suit,[7] while a few grant immunity by judicial decision.[8] There appear to be no decisions dealing specifically with intentional torts by fellow employees.[9]

The "immunity clause" relied upon by the court in the instant case exempted the employer "and those *conducting* his business."[10] The question was not raised as to whether the defendant (being the president of the employer corporation) was "*conducting*" his employer's business. This might be important in some cases, as the generally accepted definition of "*conduct*," when so used, would not cover all fellow employees, but only those in a managerial position.[11] The North Carolina court has indicated in other cases that the immunity clause will be given

[6] See *e.g.*, N. C. GEN. STAT. §97-9 (1950), Warner v. Leder, 234 N. C. 727, — S. E. 2d — (1952) (See note 11, *infra.*); ORE. COMP. LAWS ANN. §102-1752 (Cum. Supp. 1947), Kowcun v. Bybee, 182 Ore. 271, 186 P. 2d 790 (1947); VA. CODE ANN. §65-38 (1950), Feitig v. Chalkley, 185 Va. 96, 38 S. E. 2d 73 (1946). The Illinois Act, while not entirely clear, would seem to prohibit a common law recovery against a fellow servant, but the courts have construed the Act otherwise and allowed such suits. ILL. ANN. STAT. c. 48, §166 (1950), Botthof v. Fenske, 280 Ill. App. 362 (1935), 7. U. OF CHI. L. REV. 362.

[7] Zimmer v. Casey, 296 Pa. 529, 146 Atl. 130 (1929) (leading case), 15 CORNELL L. Q. 148 (1930); Wells v. Lavitt, 115 Conn. 117, 160 Atl. 617 (1932); Echols v. Chatooga Mercantile Co., 74 Ga. App. 18, 38 S. E. 2d 675 (1946); Kimbro v. Holladay, 154 So. 369 (La. 1934); Webster v. Stewart, 210 Mich. 13, 177 N. W. 230 (1920); Behr v. Soth, 170 Minn. 278, 212 N. W. 461 (1927); Sylcox v. National Lead Co., 225 Mo. App. 543, 38 S. W. 2d 497 (1931); Rehn v. Bingaman, 151 Neb. 196, 36 N. W. 2d 856 (1949); Churchill v. Stephens, 91 N. J. L. 195, 102 Atl. 657 (1917); Hall v. Hill, 158 Misc. 341, 285 N. Y. S. 815 (1936), *overruled* by Puccio v. Carr, 177 Misc. 706, 31 N. Y. S. 2d 805 (1942); Judson v. Fielding, 227 App. Div. 430, 237 N. Y. S. 348 (1929) (decided prior to amendment, see note 5 *supra*); Tawney v. Kirkhart, 130 W. Va. 550, 44 S. E. 2d 634 (1947) (decided prior to amendment, see note 5 *supra*); McGonigle v. Gryphan *et al.*, 201 Wis. 269, 229 N. W. 81 (1930).

[8] Murphy v. Miettinen, 317 Mass. 633, 59 N. E. 2d 252 (1945); Rosenberger v. L'Archer, 31 N. E. 2d 700 (Ohio 1941).

[9] *Cf.* McCune v. Rhodes-Rhyne Manufacturing Co., 217 N. C. 351, 8 S. E. 2d 219 (1940) (The court indicated that an employee might maintain a suit against a fellow employee who wilfully injured him. Later cases have indicated that this decision is applicable where the injury was inflicted by a superior employee acting as alter ego of the employer.). Warner v. Leder, 234 N. C. 727, — S. E. 2d — (1952); Essick v. City of Lexington, 232 N. C. 200, 60 S. E. 2d 106 (1950). The fact that an injury is caused by the wilful act of the employer has the effect, in the majority of jurisdictions, of giving the employee the right to maintain an action for damages. HOROVITZ, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS, 336 (1944); see Note, 68 A. L. R. 301 (1930). From this it might be concluded that employees in the majority of jurisdictions, at least, would not be exempted from suit for intentional injury.

[10] See note 2 *supra.*

[11] *Conduct* means to manage; lead; carry on; direct. BLACK'S LAW DICTIONARY, 4th ed. (1951); WEBSTER'S NEW COLLEGIATE DICTIONARY, 2d ed. (1949). It might be difficult to apply this phrase to a fellow employee who is a ditch digger, or other common laborer. Thus, if this section be given a restricted interpretation, those employees who are generally considered to work in a directive capacity, such as foremen, supervisors, and managers would be protected under the "immunity clause," while common laborers would be liable. The injustice of this is obvious.

a "liberal construction," but has not defined its limits.[12]

However, the court did not rely solely upon the "immunity" statute, but further justified the decision on another theory. It was noted that if the injured employee, after receiving compensation, were allowed to recover from a negligent fellow employee, the employer would be subrogated to the extent of the compensation paid.[13] Thus, the burden of compensation, in such cases, would be shifted from the employer (and the industry) to the employee. Such result, reasoned the court, would violate the purpose of the Act.[14] Other North Carolina decisions would seem to sustain this theory.[15]

Fundamentally opposed to this reasoning is the argument advanced in cases where the Workmen's Compensation Act contains no such immunity clause. These courts state that the Compensation Law does not specifically relieve a fellow employee of his liability in tort and since there is no contractual relation between the two employees there is no reason for exempting one employee from liability for his torts against another employee.[16]

A great deal of sympathy must be accorded the idea that it was the intention of the legislature to have industry shoulder the burden of industrial accidents. Both the employee and employer make concessions under the Act, and while the employee gains more security, the compensation is often much less than might be recovered in a common law suit.[17]

Legislation might effectuate a compromise of two divergent views and still allow an employee adequate legal redress for his injuries. This could be done as follows: repeal any immunity clause pertaining to fellow employees and specifically provide for suit against any employee causing injury to his fellow employee; preclude an employer or his insurance carrier from subrogation to any rights an employee might have against his fellow employee; require the injured employee to exhaust his rem-

[12] Essick v. City of Lexington, 232 N. C. 200, 210, 60 S. E. 2d 106, 113 (1950).
[13] See note 4 *supra*.
[14] 234 N. C. at 733, —S. E. 2d —.
[15] "The philosophy which supports the Workmen's Compensation Act is 'that the wear and tear of human beings in modern industry should be charged to the industry just as the wear and tear of machinery has always been charged. And while such compensation is presumably charged to the industry, and consequently to the employer or owner of the industry, eventually it becomes a part of the fair money cost of the industrial product, to be paid for by the general public patronizing such products.' Cox v. Kansas City Refining Co., 108 Kan. 320, 195 P. 863 (1921)." Vause v. Vause Farm Equipment Co., 233 N. C. 88, 92, 63 S. E. 2d 173, 176 (1951). *Accord:* Chambers v. Union Oil Co., 199 N. C. 28, 31, 153 S. E. 2d 594, 596 (1930).
[16] Kimbro v. Holladay, 154 So. 369, 370 (La. 1934); Sylcox v. National Lead Co., 225 Mo. App. 543, 38 S. W. 2d 497 (1931); Zimmer v. Casey, 296 Pa. 529, 146 Atl. 130 (1929).
[17] For example, in *Warner v. Leder*, the recovery in the lower court was $40,000. See *A Survey of Statutory Changes in North Carolina in 1951*, 29 N. C. L. Rev. 351, 428 (1951).

edies under the Act before this right may be exercised; deduct any compensation recovered under the Act from the judgment recovered in the common law suit;[18] pay the balance to the injured employee. The employee would thus recover full damages for his injury without receiving a double recovery.[19] The spirit of the Act would not be violated, for industry would be shouldering the burden of industrial accidents to the extent that the legislature contemplated.[20] The co-employee's common law liability would be relieved to the extent that the employer was liable for compensation. However, any attempted statutory amendments, unless drawn with extreme care, might foster inequitable situations.[21]

CHARLES F. LAMBETH, JR.

Wrongful Death Action—Recovery for Breach of Warranty—Ex Delicto-Ex Contractu Distinction

Plaintiff executrix brought an action for wrongful death based upon breach of warranty of fitness on the part of defendant retailer in the sale of a drug to plaintiff's intestate. In a 4 to 3 decision,[1] the Florida Supreme Court ruled that the wrongful death statute of that state[2]

[18] In the present North Carolina Act, the amount of compensation paid by the employer, or the amount of compensation to which the injured employee or his dependents are entitled, shall not be admissible as evidence in any action against a third party. N. C. GEN. STAT. §97-10 (1950).

[19] Double recoveries occur where employees receive compensation under the Act and also recover at common law for the same injury. *See* Behrendt, *The Rationale of the Election of Remedies Under Workmen's Compensation Acts*, 12 U. OF CHI. L. REV. 231, 238 (1945).

[20] Industry (through the employer) would pay the compensation required by law and would be unable to recover this amount by subrogation.

[21] Suppose the following situation occurred: Employer and fellow employee (E_2) are each 50% negligent in causing the injury of plaintiff employee (E_1). E_1 receives $8,000 under the Act from the employer. Total damages to E_1, as assessed by a jury in a suit by E_1 v. E_2, amount to $50,000. As tortfeasors are jointly and severally liable for their torts in North Carolina (Cunningham v. Haynes, 214 N. C. 456, 199 S. E. 627 (1938)), E_1 could collect from E_2 full damages ($50,000) minus the $8,000 already received. E_2 could not have joined, nor would he have a right over against the employer, as would normally be true in the case of joint tortfeasors under N. C. GEN. STAT. §1-240 (1943). The injustice of this is apparent. To take care of this situation it would be necessary to enact a proviso to the effect that in cases of joint negligence on the part of a co-employee and an employer, the co-employee shall only be liable to the extent of his own negligence.

Again, suppose co-employees E_1 and E_2 are both injured in the course of their employment due to the negligence of E_2. Both receive $8,000 under the Act. E_1 is damaged to the extent of $16,000. Thereafter E_1 sues and recovers an additional $8,000 from E_2. Here we have an injured employee who receives nothing under the Act because he was negligent, though the Act relieves negligence as a bar to compensation. Is this an unduly harsh result, quaere?

[1] Whiteley v. Webb's City, Inc., 55 So. 2d 730 (Fla. 1951) (defendant retailer sold to plaintiff's intestate a drug known as "Westsal" which was to be used as a salt substitute, and the complaint alleged the use of this drug caused the death of intestate).

[2] FLA. STAT. ANN. §768.01 (1949).