State Torts Claims Act -- Right of Subrogation

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made by the original grantor. In view of these decisions, reliance should not be placed on a description in a deed of a way as a boundary, and perhaps the advice given in *Milliken v. Denny* should be followed: "If purchasers wish to acquire a right of way or other easement over other lands of their grantor, it is very easy to have it so declared in the deed of conveyance."²

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State Torts Claims Act—Right of Subrogation¹

Does the right of subrogation exist under the provisions of the "Tort Claims against State Departments and Agencies Act"?² This question was recently answered affirmatively by the North Carolina

¹ The purpose of this note is not a detailed discussion of either subrogation or Tort Claims Acts but is merely to bring an important decision interpreting the Tort Claims Act of North Carolina to the attention of legal profession.


² *N. C. GEN. STAT.* §§ 143-291 to 143-300 (1952). The pertinent section, *N. C. GEN. STAT.* § 143-291 (1952), reads in material part as follows: "The State Industrial Commission is hereby constituted a court for the purpose of hearing and passing upon tort claims against the State Board of Education, the State Highway and Public Works Commission, and all other departments, institutions, and agencies of the State. The Industrial Commission shall determine whether or not each individual claim arose as a result of a negligent act of a State employee while acting within the scope of his employment and without contributory negligence on the part of the claimant or the person in whose behalf the claim is asserted. If the Commission finds that there was such negligence on the part of a State employee while acting within the scope of his employment proximately causing the injury and no contributory negligence on the part of the claimant or person in whose behalf the claim is asserted, the Commission shall determine the amount of damages the claimant is entitled to be paid, including medical and other expenses, ... but damage awarded shall not exceed $8,000."

Supreme Court in Lyon & Sons, Inc. v. N. C. State Board of Education and/or Sampson County Board of Education. In deciding this case of first impression, the Court turned to the decisions of the federal and state courts on the question.

This same question, with reference to Section 931 of the Federal Tort Claims Act, caused much conflict in decisions of the lower federal courts. In some instances, the subrogee's cause of action was dismissed on the ground that the Act being in derogation of sovereign immunity and thus to be strictly construed could not, in the absence of express authorization, be interpreted as including subrogees. On the other hand, motion to dismiss the subrogee was in most cases overruled on the ground that even if statutes waiving immunity to suit must be strictly construed, they must also be interpreted in the light of legislative intent and if the intention were to include subrogees, then in the absence of express exemption they are included.

3 238 N. C. 24, 76 S.E. 2d 553 (1953).
4 This was an action for damages to the plaintiff's automobile, resulting from negligence of a state employee, wherein recovery was also sought upon the subrogated rights of the plaintiff's insurer, which had paid a portion of the damage. 60 S. W. 843 (1946), as amended, 28 U. S. C. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2412, 2671 to 2680 (Supp. 1950).
6 Aetna Casualty & Surety Co. v. United States, 76 F. Supp. 333, 335 (E. D. N. Y. 1948) ("What counts is a specific grant by Congress to a specific person of the right to bring a specific form of action against the United States, which were it not for that statute would be barred."); Cascade County, Montana v. United States, 75 F. Supp. 850, 852 (D. Mont. 1948) ("Sovereignty ... raises a presumption against suability, unless it is clearly shown; ... courts should not enlarge the liability conferred beyond what the language requires"); accord, Bewick v. United States, 74 F. Supp. 730 (N. D. Tex 1947); Old Colony Ins. Co. v. United States, 74 F. Supp. 723 (S. D. Ohio 1947); Rusconi v. United States, 74 F. Supp. 669 (S. D. Cal. 1947); cf. Gray v. United States, 77 F. Supp. 869 (D. Mass. 1948) (subrogee's cause of action dismissed on grounds he was not "real party in interest").
7 South Carolina State Highway Dept. v. United States, 78 F. Supp. 594 (E. D. S. C. 1948); Town of Amherst v. United States, 77 F. Supp. 80 (W. D. N. Y. 1948); Ins. Co. of North America v. United States, 76 F. Supp. 951, 952 (E. D. Va. 1948) ("Well established and readily admitted is the rule that statutes waiving the immunity ... must be strictly construed. But just as impelling is the duty of the court to follow the intent of the Congress to make the United
honored canons of construction met head-on.\textsuperscript{8}

The conflict in the district courts as to the interpretation of the Federal Tort Claims Act as applied to subrogated claims was clarified somewhat in the Courts of Appeals. In ten cases decided on appeal in eight circuits the subrogee's right to sue in his own name was sustained in eight decisions,\textsuperscript{9} and in only one was the subrogee's cause of action denied altogether. That decision was later re-argued and modified to States fully liable. . . . "; Niagara Fire Ins. Co. and Commissioners of State Ins. Fund v. United States, 76 F. Supp. 850 (S. D. N. Y. 1948); Forrester v. United States, 75 F. Supp. 272 (E. D. Wis. 1947); Wojciek v. United States, 74 F. Supp. 914, 916 (E. D. Wis. 1947) ("It would be a strained and unwarranted interpretation of the intention of Congress to say it planned to give the district courts jurisdiction of cases brought by claimants originally suffering loss, but to reserve to itself the consideration of the claims of those standing in the shoes of the original claimants by operation of law."); Hill v. United States, 74 F. Supp. 129 (N. D. Texas 1947); accord, Grace to use of Grangers Mut. Ins. Co. v. United States, 76 F. Supp. 174 (D. Md. 1948) (held that derivative claims as such are not allowed but the damaged party could join the subrogee as an equitable party who would be entitled to some part or the whole of the recovery).\textsuperscript{8} Wojciek v. United States, 74 F. Supp. 914, 916 (E. D. Wis. 1947) (Congress took great care in designating twelve different categories of claims which the Tort Claims Act was not intended to cover and none of the twelve categories includes subrogees; therefore the doctrine of \textit{expressio unius est exclusio alterius} may be invoked). \textit{But see} Cascade County, Montana v. United States, 75 F. Supp. 850, 853 (D. Mont. 1948). The doctrine of statutory construction, \textit{expressio unius est exclusio alterius} is well recognized. See, e.g., Rybott v. Jarrett, 112 F. 2d 642, 645 (4th Cir. 1940).\textsuperscript{9} See also 50 Am. JuR., States, Territories, and Dependencies, § 97 (1943). \textsuperscript{8}


Holding in Old Colony Ins. Co. v. United States, 168 F. 2d 931 (6th Cir. 1948) that Congress intended that subrogees should be included in the Act, the court said: "If Congress had intended to exclude subrogees from the benefits of the Act, it could have readily included them in the list of twelve specific exemptions." 168 F. 2d at 933. See 28 U. S. C. § 2680 (Supp. 1950) for the claims expressly excluded from the Federal Tort Claims Act.

Congress has demonstrated that it can find the requisite language to bar a subrogee's suit. See Foreign Claims Act, 55 Stat. 880 (1943), as amended 31 U. S. C. § 224(d) (1946) ("... to consider ... and make payments ... of claims, including claims of insured but excluding claims of subrogues. . . .")
allow the subrogee to join as an equitable party or sue in the name of the subrogor.¹⁰

The Government in contesting the validity of derivative claims by subrogees under the Tort Claims Act contended that considerations other than the language of the Act itself barred action by subrogees, arguing that subrogation constituted "assignment" within the meaning of the Assignment of Claims Act.¹¹ The "Anti-Assignment" Act, however, as the Assignment of Claims Act is commonly called, has long been held to apply only to voluntary assignments,¹² while subrogation is essentially assignment by operation of law. Thus it was held that subrogated claims would not be barred by the "Anti-Assignment" Act.¹³

As decisions were handed down by the lower federal courts the numerical majority allowed suit by the subrogee¹⁴ until the United States Supreme Court finally laid the question to rest in 1949 by holding in United States v. Aetna Casualty & Surety Co.¹⁵ that the subrogee could sue and recover in his own name. In that case the "Anti-Assignment" Act was not asserted by the Government as a complete bar to the derivative claim of the subrogee, but only to require that suit be brought in the name of the insured for the use of insurer to protect the procedural rights of the United States.¹⁶ That argument

¹⁰United States v. Hill, 171 F. 2d 404 (5th Cir. 1948), reversing Hill v. United States, 74 F. Supp. 129 (N. D. Tex. 1947), re-argued and modified 174 F. 2d 61 (5th Cir. 1949). The "Anti-Assignment" Act, which is discussed infra, was on re-argument held to bar recovery by the subrogee in his own name.
¹¹See note 17 infra.
¹³See notes 6, 7, 9, and 10 supra.
¹⁴See 15338 U. S. 366 (1949).
¹⁵Id. at 371. It was stated that the purpose of invoking the "Anti-Assignment" Act was two-fold: (1) to avoid involving the United States in litigation as to the existence or extent of subrogation; and (2) to insure that suits would be brought in the names of the original claimants so that the United States could avail itself of its statutory rights in respect of venue, and of counter-claim and offset on account of any cross-claims it might have against the original claimants. It was further contended that the congressional intent was that the "Anti-Assignment" Act should apply.
was rejected by the Court and the "Anti-Assignment" Act held inapplicable. In commenting on the doctrine of strict construction of statutes waiving sovereign immunity, the Court felt that the congressional attitude in passing the Tort Claims Act was reflected by Justice Cardozo when he said in speaking of a waiver of immunity statute of New York: "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."

Few state decisions have dealt with the question raised in the principal case. In a suit by a subrogated claimant under a South Carolina statute in 1930, the court held that statutes waiving sovereign immunity must be strictly construed and in the absence of express provision for subrogated claims they must fail. Cothran, J. concurred in the result of the decision in that the claim should fail because of failure to file a claim within the time specified by the statute but dis-


The Court also pointed out the correct application of the Federal Rules of Civil Procedure to subrogation under the Tort Claims Act. This aspect of the problem is beyond the purview of this note. For discussions of the problem before the decision in the Aetna Casualty case, see Notes, 28 Neb. L. Rev. 430 (1949), 58 Yale L. J. 1395 (1949).


19 Lyon & Sons, Inc. v. N. C. State Board of Education and/or Sampson County Board of Education, 238 N. C. 24, 76 S.E. 2d 553 (1953).

20 Act of March 10, 1928, 35 STAT. L. p. 2055, now codified as S. C. Code § 5887 (1) (1942), which provides in part: "Any person, firm or corporation who may suffer injury to his or her person or damage to his, her, or its property by reason of a defect in any State Highway, or by reason of the negligent operation of any vehicle or motor vehicle in charge of the State Highway Department . . . may bring suit against the State Highway Department. . . ." The act also provided that in order to have a cause of action a claim must be filed with the State Highway Department within ninety days after the alleged injury or damage.


22 "If the claim of the insurance company to subrogation could be sustained, it could only be to the cause of action which the owner of the car may have had against the department, and, the complaint containing no allegation that a claim was filed within the time required, it is lacking in an essential element of a cause of action under the Act." Id. at 87, 151 S.E. at 891.
sented in that it would be an illogical conclusion to construe the statute so as to exclude all subrogated claims. This South Carolina decision was quoted and followed by the Kansas Supreme Court and then the South Carolina and Kansas decisions were followed by the Supreme Court of Alabama.

In 1950 the question of the validity of subrogated claims again came before the South Carolina Supreme Court in the Jeff Hunt Machinery case, wherein the court in substance reversed its position by holding that a plaintiff could bring an action notwithstanding the fact that he had been reimbursed for his loss by an insurer and was bringing the action for the insurer's benefit. The court pointed out that it had uniformly held that statutes waiving the State's immunity from suit, being in derogation of sovereign immunity, must be strictly construed, and that the state could be sued only in the manner and upon the terms and conditions prescribed by statute. However, it added that statutes of that kind are not to be construed to such an extent as to defeat the legislative intent, as the rule of strict construction is subject to the principle that all rules of statutory interpretation are merely for the purpose of ascertaining the intention of the legislature as expressed in the statute.

Justice Cothran felt that the fundamental error of the majority was the conclusion that the Act created a liability. In his opinion it merely provided a remedy where none existed before, thereby raising the controlling issue of whether the owner of a fixed claim and a fixed remedy under the Act had the right to assign his claim to his insurer. Under ordinary circumstances the right would not be questioned. Thus, Justice Cothran thought that to say, under a rule of strict construction, that because the act does not give the assignee of a claim the right to sue, he does not come within its protection, would be an exceedingly narrow and unjustified contradiction of the purpose of the act, which evidently was that the department should be held responsible for the consequences of its delicts. Aside from that, when a state vests one with a fixed right and a fixed remedy, it follows necessarily that it intended to vest in him every incident of those rights, one of which is the right to assign them. United States Casualty Co. v. State Highway Department, 155 S. C. 88, 89, 151 S.E. 891 (1930) (dissenting and concurring opinion).


Jeff Hunt Machinery Co. v. State Highway Dept., 217 S. C. 423, 60 S.E. 2d 859 (1950). When it was contended that the question had been concluded by United States Casualty Co. v. State Highway Dept., 155 S. C. 77, 151 S.E. 887 (1930), the Court admitted that that decision had been quoted and followed by the Courts of Kansas (see note 24 supra) and Alabama (see note 25 supra) but it also pointed out that a Texas court in Dickson v. State, 169 S.W. 2d 1005 (Tex. Civ. App. 1943) had doubted the soundness of the decision and had quoted with approval from the dissenting opinion. The court thought that the United States Casualty Case did not control the precise question as it was only authority for the proposition that derivative claims as such are not authorized by the statute; or in other words, that the proper plaintiff is the party actually damaged, but there is nothing in the statute to preclude him from bringing the action solely for the benefit of another who has paid his loss.


Referring to the case at hand, the court said that to say the person sustaining
It was in the light of these prior decisions in the state and federal courts that the question of the right of subrogation under the North Carolina Torts Claims Act was brought before the North Carolina Court. In reaching a decision it was pointed out by the court that the North Carolina statute\(^{28}\) is not a verbatim copy of the Federal Tort Claims Act\(^{29}\) nor of that of the State of South Carolina.\(^{30}\) However, the Court felt the logic and reasoning of the federal courts, of Cothran, J. in the first South Carolina decision,\(^{31}\) and of the South Carolina Court in its most recent decision,\(^{32}\) to be the better view and persuasive as applied to the North Carolina Tort Claims Act.\(^{33}\)

The court pointed out that subrogation is a remedy which is highly favored and, being broad and expansive, has a liberal application. Further, the court felt that if the defendants were private persons the right of subrogation would clearly exist, and if the legislature in relieving itself of passing on claims had desired to exclude subrogation it would have written that intention into the Act. Instead, the state waived its immunity and in so doing occupies the same position as any other litigant and is entitled to no special privileges.\(^{34}\)

So reasoning, the court held that the plaintiff could maintain a suit in its own name for the benefit of itself and its insurer, though the insurer is a proper party, and could be made a party by the Industrial Commission or the court at its discretion.\(^{35}\)

In holding that the right of subrogation exists under the North Carolina Tort Claims Act, it would appear that the North Carolina Court has adopted the better view, aligned with the decision of the Supreme Court in the *Aetna Casualty* case and the South Carolina Supreme Court in the *Jeff Hunt Machinery* case. Only four state courts have been called upon to decide the precise question, and now stand two for and two against subrogation under Tort Claims Acts. But it should be noted that the decisions of the two states denying the right of subrogation are based on the decision in the first South Carolina case, which has apparently been repudiated. How other juris-

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\(^{28}\) Note 2 supra.

\(^{29}\) Note 5 supra.

\(^{30}\) Note 20 supra.


\(^{33}\) Lyon & Sons, Inc. v. N. C. State Board of Education and/or Sampson County Board of Education, 238 N. C. 24, 32, 76 S.E. 2d 553, 559 (1953).

\(^{34}\) Id. at 33, 76 S.E. 2d at 559.

\(^{35}\) Id. at 33, 76 S.E. 2d at 560.
dictions will deal with the right of a subrogee to sue under Tort Claims Acts remains to be seen as proper cases for determination arise, but it would seem that the trend clearly points towards liberal construction of such Acts and the allowance of suit either by the subrogor for the use of the subrogee or by the subrogee in his own name.

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Taxation—Income—Involuntary Change from Cash to Accrual Basis of Accounting—Accounts Receivable and Inventory

Many small businessmen, unwary of tax pitfalls and without adequate accounting systems to record the operation of their businesses, are jolted when the tax lightning strikes with a substantial deficiency for a particular year due to the Commissioner’s changing their method of reporting income. In one of the typical situations, the partnership’s books were kept on the basis of cash receipts and cash disbursements. Accounts receivable reflecting credit sales were not included in the determination of income but inventories were used in determining the cost of goods sold. The Tax Court approved the Commissioner’s determination that the partnership should report its net income on the accrual basis and for the year of the change should add the amount of accounts receivable at the beginning of the year to the proper amount of income determined on the accrual basis.¹

The Internal Revenue Code requires that net income be computed on the basis of the taxpayer’s annual accounting period in accordance with the method of accounting regularly employed in keeping the books.² But if the method of keeping books does not clearly reflect the income, the Commissioner is authorized to make a recomputation on such basis as, in his opinion, will clearly reflect the income.³ Where inventories are required,⁴ as in the principal case,⁵ the accrual method of accounting must be used.⁶ However, the discretion given the Commissioner to

³ Int. Rev. Code § 41, provides in part: “The net income shall be computed upon the basis of the taxpayer’s annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income.”
⁴ U. S. Treas. Reg. 118, § 39.22 (c)-1 (1953), provides in part: “In order to reflect the net income correctly, inventories at the beginning and end of each taxable year are necessary in every case in which the production, purchase, or sale of merchandise is an income-producing factor.”
⁵ Note 1 supra.
⁶ U. S. Treas. Reg. 118, § 39.41-2 (1953), provides in part: “... in any case in which it is necessary to use an inventory, no method of accounting in regard to purchases and sales will correctly reflect income except an accrual method.”