UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 25 | Number 1 Article 6

12-1-1946

Notes and Comments

North Carolina Law Review

NOTES AND COMMENTS

The Hobbs Act—An Amendment to the Federal Anti-Racketeering Act

In *United States v. Local 807*[1] the Supreme Court of the United States held that it was not a violation of the Federal Anti-Racketeering Act of 1934[2] for members of a union to stop trucks entering New York City and by force and violence to compel payment of a day's wages to a member of the union whether his offer to drive the truck was accepted or refused.[3] Mr. Justice Byrnes in writing the majority opinion said, "This does not mean that such activities are beyond the reach of federal legislative control."[4] As a result, the Hobbs Bill was introduced in the House of Representatives as an amendment to the Federal Anti-Racketeering Act of 1934.[6] It was generally recognized in Congress that the Bill was inspired by the decision in *United States v. Local 807*.[7] Although introduced as an amendment, it was the intent of the author of the Hobbs Bill to "wipe out" the Act of 1934 and to substitute a new act in its place.[8] In spite of the opposition of labor leaders,[9] the Hobbs Bill became law on July 3, 1946.[10]

[1] United States v. Local 807 of the International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America, 315 U. S. 521, 62 Sup. Ct. 642, 86 L. ed. 1004 (1942). Local 807 and 26 individuals were also indicted for violation of §1 of the Sherman Act. Conviction was reversed by the Circuit Court of Appeals for the Second Circuit and the government did not seek review of this part of the judgment. Notes (1942) 11 FORDHAM L. REV. 204, 41 MICH. L. REV. 338, 19 N. Y. U. L. Q. REV. 440, 16 TEMPLE L. Q. 329, 90 U. OF PA. L. REV. 972.

[2] 48 STAT. 979 (1934), 18 U. S. C. A. §420a-e (Supp. 1945), "An Act to protect trade and commerce against interference by violence, threats, coercion, or intimidation," approved June 18, 1934; *held constitutional*, Nick v. United States, 122 F. (2d) 660 (C. C. A. 8th, 1941), 138 A. L. R. 791, 811 (1942), *certiorari denied* 314 U. S. 687, 62 Sup. Ct. 302, 86 L. ed. 550.

[3] Evidence indicated that in several cases the defendants either failed to offer to work or refused to work for the money when asked to do so. U. S. v. Local 807, 315 U. S. 521, 526, 62 Sup. Ct. 642, 644, 86 L. ed. 1004, 1008 (1942).

[4] *Id.* at 536, 62 Sup. Ct. 648, 86 L. ed. 1012.

[5] 89 CONG. REC. 3217 (1943). [6] 88 CONG. REC. 3101-2 (1942).

[7] 89 CONG. REC. 3201, 3217 (1943), 79 CONG. REC. December 11, 1945, at 12028, 79 CONG. REC. December 12, 1945, at 12085.

[8] 89 CONG. REC. 3217 (1943), 79 CONG. REC. December 12, 1945, at 12095.

[9] President William Green of the A. F. of L. urged the veto of the Hobbs Bill as "dangerous legislation." *American Federation of Labor Weekly News Service*, Washington, D. C., June 25, 1946.

[10] U. S. Code Congressional Service, Advance Sheet No. 6, p. 405, Pub. L. No. 486, Title 1, §2-5 (July 3, 1946).

The legislative history of the Hobbs Act began on March 27, 1942, 88 CONG. REC. 3101-2 (1942); passed the House of Representatives April 9, 1943, 89 CONG. REC. 3230 (1943); bill was not reported out of the Senate Judiciary Committee; next passed the House of Representatives on December 12, 1945, 79 CONG. REC., December 12, 1945 at 12106; became an amendment to the Case Bill on May 25, 1946, 79 CONG. REC., May 25, 1946 at 5837; vetoed as part of the Case Bill on June 11, 1946, 79 CONG. REC., June 11, 1946 at 6799; passed Senate as a separate measure June 21, 1946, 79 CONG. REC., June 21, 1946 at 7384; signed by the President on July 3, 1946, 79 CONG. REC., July 3, 1946 at 8487.

The Hobbs Act provides that whoever conspires, attempts, commits or threatens physical violence to any person or property, or in any way or degree obstructs, delays, or affects commerce, or the movement of any article or commodity in commerce, by robbery or extortion, shall be guilty of a felony.

Robbery is defined in the Hobbs Act in substantially the same words as those in the New York Penal Code[11] and extortion is defined in almost identical words with those used in the Anti-Racketeering Act of 1934.[12] Title 1 (b), (c) provides:

> The term "robbery" means the unlawful taking or obtaining of personal property, from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or anyone in his company at the time of the taking or obtaining.
>
> The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence,[13] or fear, or under color of official right.

Provisions in the Anti-Racketeering Act of 1934 designed to protect legitimate activities of labor were eliminated by the Hobbs Act and a safeguard for labor was provided in less extensive language. Instead of the provisions in the former Act[14] which stated that "payment of wages by a bona-fide employer to a bona-fide employee" were excluded from the coverage of the Act, and that no court shall construe or apply the provisions of the Act in such manner as "to impair, diminish, or in any manner affect the rights of bona-fide labor organizations in lawfully carrying out the legitimate objects thereof, as such rights are expressed in existing statutes of the United States," the Hobbs Act provides that nothing in the Act shall be construed to repeal, modify, or affect either the Sherman Act, the Norris-LaGuardia Act, the Railway Labor Act or the National Labor Relations Act.[15]

[11] The New York Penal Code defines robbery as ". . . the unlawful taking of personal property, from the person or in the presence of another, against his will, by means of force, or violence, or fear of injury, immediate or future, to his person or property, or the person or propety of a relative or member of his family, or of anyone in his company at the time of the robbery." N. Y. PENAL CODE, §2120, MCKINNEY'S CONSOL. LAWS OF N. Y., ANN., Book 39, Part 2, p. 533.

Congressman Hobbs gave as his reason for copying the New York definition of robbery was that most of these "hold-ups" occurred there. 89 CONG. REC. 3226 (1943).

[12] §420a(b) of the Anti-Racketeering Act of 1934 is as follows: "Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right"; 48 STAT. 979 (1934), 18 U. S. C. A. §420a(b) (Supp., 1945).

[13] U. S. Code Congressional Service, Advance Sheet No. 6, p. 405, Public Law 486, Title 1, §1(b), (c).

[14] 48 STAT. 979 (1934) U. S. C. A. §420a-e (Supp., 1945).

[15] Title II of the Hobbs Act is as follows: "Nothing in this Act shall be con-

Will members of a labor union be subject to punishment under the Hobbs Act for engaging in conduct similar to that of members of the Teamsters' Union in *United States v. Local 807*?[16] The decision in that case relied on the legislative history[17] and the specific exemptions[18] of the Anti-Racketeering Act of 1934. The legislative history of the Hobbs Act on the other hand clearly indicates an intent on the part of Congress to punish anyone committing the crimes of robbery and extortion in interstate commerce whether or not in the course of labor activity.[19] The removal of both grounds on which the Supreme Court based its holding that labor was exempt from prosecution under the Anti-Racketeering Act of 1934 makes it apparent that any attempt on the part of members of a labor union to exact "wages" through force and violence or threats thereof as was done in New York by the Teamsters' Union[20] will be punishable under the Hobbs Act.

Labor is apprehensive that the Hobbs Act holds the potential danger of judicial misconstruction and that it is the first "Trojan horse" in a campaign to weaken labor organizations.[21] Is the Hobbs Act anti-labor? Is labor justified in assuming that the Hobbs Act is a threat to its right to strike,[22] boycott and picket peacefully[23] for the obtainment of higher

strued to repeal, modify, or affect either section 6 or section 20 of an Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, or an Act entitled 'An Act to amend the judicial code and to define and limit the jurisdiction of the courts in equity, and for other purposes,' approved March 23, 1932, or an Act entitled 'An Act to provide for the prompt disposition of disputes between carriers and their employees, and for other purposes,' approved May 20, 1926, as amended, or an Act entitled 'An Act to diminish the causes of labor disputes burdening or obstructing interstate or foreign commerce, to create a National Labor Relations Board, and for other purposes,' approved July 5, 1935." U. S. Code Congressional Service, Advance Sheet No. 6, p. 405, Public Law 486 Title II (July 3, 1946).

[16] U. S. v. Local 807, 315 U. S. 521, 62 Supp. Ct. 642, 86 L. ed. 1004 (1942).

[17] U. S. v. Local 807, 315 U. S. 521, 528-530, 62 Sup. Ct. 642, 645, 86 L. ed. 1004, 1009 (1942).

[18] *Id.* at 535, 62 Sup. Ct. 647-8, 86 L. ed. 1012.

[19] 89 CONG. REC. 3217, 3222 (1943), 79 CONG. REC., December 12, 1945 at 12085.

[20] In 1943 the Head of the Office of Defense Transportation reported that over 1,000 trucks a night were being held up and robbed in the various cities of the United States and over 100 a day at the New York end of the Holland Tunnel. Congressman Hobbs stated that he had received over 1,000 letters and telegrams from farmers all over the country stating that the condition was worse in 1945 than it was in 1943. 79 CONG. REC., December 12, 1945, at 12095.

[21] 89 CONG. REC. 3223 (1943), 79 CONG. REC., December 12, 1945, at 12087. Statement of Daniel J. Tobin, President of the International Brotherhood of Teamsters (AFL) in *American Federation of Labor Weekly News Service*, Washington, D. C., June 25, 1946. See article by Joseph A. Padway, General Counsel for the A. F. of L. in AMERICAN FEDERATIONIST, September, 1946, at 19-20.

[22] 48 STAT. 449, 29 U. S. C. A. §151 *et seq.* (July 5, 1935), Section 7 of the National Labor Relations Act, provides: "Employees shall have the right to self-organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid and protection."

Section 13 provides: "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike."

[23] Bakery & Pastry Drivers & Helpers Local No. 802, v. Wohl, 315 U. S. 769,

wages, better working conditions and other legal objectives? The answer appears to be "No." The actual intent of Congress,[24] the express provisions in the Act itself,[25] and the unusual precaution on the part of the President of the United States in placing before Congress the Attorney General's construction of the Hobbs Act,[26] all indicate an improbability that any of the legitimate activities of labor will be made criminal by judicial construction of the Act.

The full significance of the Hobbs Act, however, cannot be ascertained until our courts answer the following question: To what extent, if any, does the Hobbs Act apply in situations in which labor employs its legal weapons; i.e., a right to strike, boycott, and picket to obtain illegal objectives? In *U. S. v. Compagna*[27] a threat to strike for an unlawful purpose was considered coercion within the meaning of the original Anti-Racketeering Act. It follows that in order to determine whether a strike is a legal economic weapon of labor or a wrongful use of concerted action it is first necessary to reach a conclusion as to the legality of the objective achieved by the use of a strike.

Is it lawful for a labor union to strike or boycott an employer for introducing labor saving devices in his business and thereby compel him to retain or hire unnecessary workers? The authorities are in conflict[28] on this question. In *U. S. v. Carrozo*[29] a strike in which the employer was given the choice of not using "truck cement mixers" or paying unnecessary workers met with the approval of the court. This decision, affirmed *per curiam* by the United States Supreme Court,[30] considered in connection with the right of labor to strike for lawful objectives indicates that the Hobbs Act will not apply in a similar set of circumstances. However, a different situation is presented in the case in which the strike was fraught with violence and the union was successful in caus-

62 Sup. Ct. 816, 86 L. ed. 1178 (1942); American Federation of Labor v. Swing, 312 U. S. 321, 61 Sup. Ct. 568, 85 L. ed. 855 (1940).

[24] 89 CONG. REC. 3218 (1943), 79 CONG. REC., December 11, 1945, at 12024, 79 CONG. REC., December 12, 1945, at 12085, 12089, 12095.

[25] U. S. Code Congressional Service, Advance Sheet No. 6 at 405, Public Law 486, Title II (July 3, 1946).

[26] President Truman approved the Hobbs Bill on the understanding that the bill according to its language and legislative history ". . . is not intended to deprive labor of any of its recognized rights, including the right to strike and picket, and to take other legitimate and peaceful concerted action," 79 CONG. REC., July 3, 1946, at 8417.

[27] United States v. Compagna, 146 F. (2d) 524 (C. C. A. 2nd, 1945), *certiorari denied*, 324 U. S. 867, 65 Sup. Ct. 912-913, 89 L. ed. 1422 (1945).

[28] U. S. v. Carrozo, 37 F. Supp. 191 (E. D. Ill. 1941) *affirmed per curiam* in U. S. v. International Hod Carriers & C. L. Dist. Council, 313 U. S. 539, 61 Sup. Ct. 839, 85 L. ed. 1508 (1941); *but see* Hopkins v. Oxley Stave Co., 83 Fed. 912 (C. C. A. 8th, 1897). Opera on Tour, Inc. v. Weber, 285 N. Y. 348, 34 N. E. (2d) 349 (1941), 136 A. L. R. 267, 282 (1942). Ludwig Teller, LABOR DISPUTES AND COLLECTIVE BARGAINING, I, §89.

[29] U. S. v. Carrozo, 37 F. Supp. 191 (E. D. Ill. 1941).

[30] *Ibid.*

ing the employer to pay unnecessary workers. Should the employer contend that he acceded to the demands of the union not from economic coercion but solely because of fear of violence or damage to his property, it might be shown that the "stand-by" workers who took money from the employer in the form of wages were guilty of ". . . obtaining property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear . . ."[31] and therefore subject to be prosecuted for extortion as defined in the Hobbs Act.

A threat to strike or a strike for the purpose of requiring an employer to pay a fine to the union for violating a union agreement has been held illegal.[32] Peaceful picketing has been enjoined[33] because the objective, which was to persuade the employer to pay the union initiation dues for non-union employees, was considered illegal. If unlawful objectives make a strike or picketing for those objectives a wrongful use of concerted action, the fact that an employer in these situations was thus deprived of his property might invoke the provisions of the Hobbs Act.

Labor leaders who use their position in the union to threaten "labor trouble" for the purpose of extorting fees[34] from an employer may be subject to prosecution under the Hobbs Act. Racketeering of this type was punishable under the Anti-Racketeering Act of 1934.[35] Conviction could be had even though the labor leader had a dual motive of improving the wages of the union members as well as extracting fees to feather his own nest.[36]

The sit-down strike presents a different problem. The question of the illegality of the objective is not material; instead, the illegality of the strike itself becomes important. The sit-down strike has been declared illegal.[37] But would the participants in a sit-down strike be subject to prosecution under the Hobbs Act? In *Apex Hosiery Co. v. Leader*[38] both employees and non-employees of the plant owner forcibly

[31] U. S. Code Congressional Service, Advance Sheet No. 6, p. 405, Public Law 486, Title 1, §1(c) (July 3, 1946).

[32] People v. Seefeldt, 310 Ill. 441, 141 N. E. 829 (1923); State v. Dalton, 134 Mo. App. 517, 114 S. W. 1132 (1908); People v. Barondess, 133 N. Y. 649, 31 N. E. 240 (1882).

[33] Silkworth *et al.* v. Local No. 575 of American Federation of Labor, 309 Mich. 746, 16 N. W. (2d) 145 (1944).

[34] U. S. v. Lanza, 85 F. (2d) 544 (C. C. A. 2nd, 1936) *certiorari denied*, 299 U. S. 609, 57 Sup. Ct. 235, 81 L. ed. 449. See Note (1937) *Legislation: Legal Implications of Labor Racketeering*, 37 COL. L. REV. 993.

[35] Nick v. United States, 122 F. (2d) 660 (C. C. A. 8th, 1941), U. S. v. Compagna, 146 F. (2d) 524 (C. C. A. 2nd, 1945), *certiorari denied*, 324 U. S. 867, 65 Sup. Ct. 912-913, 89 L. ed. 1422 (1945).

[36] Nick v. United States, cited *supra* note 35, at 669, 670, 138 A. L. R. at 804.

[37] N.L.R.B. v. Fansteel Metallurgical Corporation, 306 U. S. 240, 59 Sup. Ct. 490, 83 L. ed. 627, 123 A. L. R. 599 (1939). Because the strike was "unlawful" certain of the strikers lost the right to reinstatement with back pay which had been awarded them by the National Labor Relations Board.

[38] Apex Hosiery Co. v. Leader, 310 U. S. 469, 60 Sup. Ct. 982, 84 L. ed. 1311, 128 A. L. R. 1044, 1075 (1940).

seized the plant and did considerable damage to the property and machinery. The effort of the owner to recover his damages by prosecution under the Sherman Act[39] was unsuccessful. Whether another wave of sit-down strikes would produce indictments, where interstate commerce is affected, under the Hobbs Act is a matter of conjecture. Might not the owner's loss of use of his property or its destruction, by a sit-down strike, bring the case within the robbery or extortion provisions of the Hobbs Act?

The Antitrust Division, U. S. Department of Justice, for several years has considered the wrongful use of strikes, boycotts and threats thereof for the purpose of requiring payment of wages to "stand-by" workers when labor saving devices are used,[40] forcing the hiring of useless workers,[41] preventing the use of cheaper material,[42] or enforcing illegally fixed prices[43] as unlawful and subject to prosecution under the Sherman Act.[44] A series of recent decisions[45] by the United States Supreme Court have virtually given labor immunity from prosecution under the Sherman Act. In *Allen Bradley Company v. Local No. 3,* Justice Black said:

> "Our holding means that the same labor union activities may or may not be in violation of the Sherman Act, depending upon whether the union acts alone or in combinations with business groups. This, it is argued, brings about a wholly undesirable result—one which leaves labor unions free to engage in conduct which restricts trade. But the desirability of such an exemption of labor unions is a question for the determination of Congress."[46]

Now that many activities of labor which the Antitrust Division con-

[39] Act of July 2, 1890, c. 647, 26 STAT. 209, 15 U. S. C. A. §1 *et seq.* as amended.

[40] Hearings before Subcommittee No. 3 of the Committee on the Judiciary on H. R. 5218, H. R. 6752, H. R. 6872 and H. R. 7067, 77th Cong., 2d Sess. (1942) 408.

[41] *Id.* at 403.

[42] Miller, *Antitrust Labor Problems: Law and Policy* (1940) 7 LAW & CONTEMP. PROB. 82, 89.

[43] *Ibid.*

[44] Section 1 of the Sherman Act provides that "Every contract, combination in the form of trust or otherwise or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is declared to be illegal." Act of July 2, 1890, c. 647, 26 STAT. 209, 15 U. S. C. A. §1 *et seq.*, as amended.

[45] Hunt v. Crumbach, 325 U. S. 821, 65 Sup. Ct. 1545, 89 L. ed. 1954 (1945); Allen Bradley Company v. Local Union No. 3, 325 U. S. 797, 65 Sup. Ct. 1533, 89 L. ed. 1441 (1945); U. S. v. Hutcheson, 312 U. S. 219, 61 Sup. Ct. 463, 85 L. ed. 788 (1941); Apex Hosiery Co. v. Leader, 310 U. S. 469, 60 Sup. Ct. 982, 84 L. ed. 1311, 128 A. L. R. 1044 (1940). See Notes (1946) 19 CALIF. L. REV. 256 and (1941) 50 YALE L. J. 787.

[46] Allen Bradley Company v. Local Union No. 3, 325 U. S. 797, 809-810, 65 Sup. Ct. 1533, 1540, 89 L. ed. 1939, 1948 (1945). *See* Philadelphia Record Co. v. Manufacturing Photo-Engravers Ass'n of Philadelphia *et al.*, 155 F. (2d) 799 (C. C. A. 3rd, 1946). Labor union was enjoined from combining with a business association to prevent the plaintiff from producing photo-engraving products at night. Combination was declared to be in violation of the Sherman Act.

siders illegal cannot be prosecuted under the Sherman Act, the Hobbs Act may acquire a greater significance than it would have otherwise. It may be that henceforth the predominant question to arise in an analysis of the wrongful activities of labor will no longer be whether or not there was a restraint of trade under the Sherman Act, but rather whether or not there was robbery or extortion in interstate commerce as defined in the Hobbs Act.

WILLIAM B. AYCOCK.

Aviation—Liability of Airport for Low Flying—Flights Through Airspace as Taking of an Easement

With the end of World War II, there has been a great advance in the field of commercial aviation both on a national and international scale. This in turn will bring about an increasing amount of litigation over problems incident to air commerce, and result in further development of a body of law peculiar to this type of commerce.

A case of interest in this field was recently decided by the United States Supreme Court,[1] and although the case arose out of facts created by war conditions, the decision is significant as our highest court's first holding on a problem which will be present as long as we have airports and aircraft. That problem is the proper adjustment of the conflicting rights of adjacent landowners and airport operators.

This particular case was an action by one Causby against the United States for an alleged taking by the defendant of the plaintiff's home and chicken farm which was adjacent to the Greensboro, North Carolina, municipal airport, leased by the defendant for use as an Army and Navy air base. The taking complained of was caused by frequent flights of government aircraft at low altitudes while taking off and landing. The noise of the planes, and the glare of the landing lights at night made it impossible to use the land as a chicken farm, and the Court of Claims found that the plaintiff's property had depreciated in value as a result of this, and held that the United States had taken an easement in the airspace from the commencement of the lease, the value of which was $2,000.00.[2] The Supreme Court sustained the Court of Claims as to the taking of an easement for which plaintiff should be compensated,[3] but reversed the case in order that the nature of the easement

[1] United States v. Causby, 326 U. S. ——, 66 Sup. Ct. 1062, 90 L. ed. 971 (1946). (Justices Black and Burton dissenting.)

[2] Causby v. United States, 60 F. Supp. 751 (Ct. Cl. 1945). (Judge Madden dissenting.)

[3] This was not a taking of an easement by prescription, but an implied taking giving rise to a suit under the Tucker Act [24 STAT. 505 (1887), 28 U. S. C. §250(1) (1940)] which gives jurisdiction to the Court of Claims for actions against the United States ". . . founded upon the Constitution of the United States, . . . not sounding in tort. . . ." However, it would seem possible in the light of this

as to permanency could be more clearly determined and it could be decided whether the award made was proper.[4]

The legal basis for the decision is not new, for as the law of airspace rights has developed in this country, the general rule seems to be that the landowner's rights to the surface are subject to the public right of flight in the airspace above so long as it does not interfere with the effective use of the surface.[5] Under this theory repeated flights over the land of another at such low altitudes as to be dangerous to the health and life of the owner have been held to constitute a nuisance, and this is true though such low flights are necessary in order to use an adjoining airport.[6] However, unless actual damage to the property is shown

decision that if the low flights continued for the prescriptive period, the landowner would be without remedy. This is distinguishable from the negative easement of light and air which has never been recognized in this country. See 4 TIFFANY, REAL PROPERTY (3rd ed. 1939) §1194 and cases there cited; also Lindly v. Bank, 115 N. C. 553, 20 S. E. 621 (1894). Tiffany recognized that the taking of an easement by frequent flights over one's land would present difficulties since the flights of necessity would have to vary as to linear speace and altitude, but goes on to say: "But whether such reasons are sufficient to preclude in all cases the acquisition of a prescriptive right of way through the airspace is, it seems, doubtful." *Id.* §1203. *But see* Hinman v. Pacific Air Transport, 84 F. (2d) 755, 759 (C. C. A. 9th, 1936), *cert. denied*, 300 U. S. 654, 81 L. ed. 864, 57 Sup. Ct. 430 (1937) (where the court says ". . . it is not legally possible for appellees to obtain an easement by prescription through the airspace above the appellants' land").

[4] The Court of Claims found that the easement was permanent saying: ". . . that upon the expiration of its current lease, defendant no doubt intended to make some sort of arrangement whereby it could use the airport for its military planes whenever it had occasion to do so." 60 F. Supp. 751, 758. This language was looked at as conjecture, and it would seem justly so for the United States would hardly be expected to pay for an easement over the adjoining land after the lease of the airport had expired. The present case is not the first claim which has been made against the government for damages due to low flying army planes. In Decision of the Comptroller General, 3 Comp. Gen. 234, 1928 U. S. Av. Rep. 46 (Washington, 1923), a claim for damages due to frightening cattle by a low flying army plane was denied where no negligence was shown. This is in accord with the general rule that there can be no recovery for fright induced in an animal which spends itself in the animal as is seen in *Nebraska Silver Fox Corp. v. Boeing*, 1932 U. S. Av. Rep. 164 (D. C. D. Neb. 1931) where no recovery was allowed for fright to plaintiff's silver foxes allegedly caused by defendant's low flying planes and resulting in their aborting their young. However, when the negligence of the defendant in flying his dirigible below the statutory minimum was alleged to have frightened plaintiff's horses resulting in injury to plaintiff it was held that there was good cause of action. Neiswonger v. Goodyear Tire and Rubber Co., 35 F. (2d) 761 (D. C. N. D. Ohio, 1929). These cases are somewhat similar to the principal case in that it involved the frightening of the plaintiff's chickens; however, the recovery here was not the damage to the business for the loss of the chickens, but for the special value of the land due to its adaptability for use for this business.

[5] This is the theory set out by the Uniform Aeronautics Act which has been adopted in whole or in part by 22 states. See UNIFORM AERONAUTICS ACT, §§3, 4, 11 U. L. A. North Carolina adopted both of these sections verbatim; N. C. GEN. STAT. (1943) §§63-12, 63-13, and the Supreme Court recognizes that the holding that there is a taking here is in accord with the local law of North Carolina as set out in these statutes.

[6] Delta Air Corp. v. Kersey, 193 Ga. 862, 20 S. E. (2d) 245, 140 A. L. R. 1352 (1942) (where the facts were very similar to the present case in that the airport runway was so aligned that planes had to pass at low altitudes over plaintiff's house in landing and taking off, and the court reversed a nonsuit for in-

as a result of the low flights, no relief will be granted,[7] except where continued flights at altitudes less than the statutory minimum altitude are considered trespasses, and then injunction and nominal damages will be granted even though no actual damage is present.[8] After low flights have been going over the property for some time, the landowner will be enjoined from erecting spite structures which interfere with the flights and are dangerous to the occupants of the planes,[9] but he cannot be enjoined from using his land in a proper manner, and thus a power company could not be prevented from erecting power lines on their land adjoining an airport.[10] An airport will not be considered a nuisance *per se,* and no relief will be granted where the suit is brought in anticipation of a nuisance arising from the construction of an airport near the property of the plaintiff.[11] It may, however, become a nuisance if not operated in a proper manner.[12] Thus the result of the present case is in accord with existing principals, for the frequent passage of government planes over the land so interfered with its existing use that it depreciated in value, and this should entitle the owner to compensation whether it be on the theory that the flights are a nuisance or that they constitute a taking of an easement in denial of constitutional rights.[13]

junction and damages against the city of Atlanta on the theory that such low flights would constitute a nuisance and thus interfere with the owner's use of his land). Vanderslice v. Shawn, 27 A. (2d) 87 (Del. Ct. Ch. 1942) (where the low flights over the plaintiff's land were enjoined when they interfered with the "existing use" of the land).

[7] Thrasher v. City of Atlanta, 178 Ga. 514, 173 S. E. 817 (1934) (where the court said mere apprehension of injury from the low flights was not enough to give a right to recover).

[8] Burnham v. Beverly Airways, 311 Mass. 628, 42 N. E. (2d) 575, 135 A. L. R. 750 (1941); Smith v. New England Aircraft Co., 270 Mass. 511, 170 N. E. 385, 69 A. L. R. 300 (1930). The *Burnham* case recognizes that it is not in accord with the nuisance doctrine, where there is a right until it actually interferes with the existing use of the property. The view of these cases is recognized in the Restatement of Torts (1938) §159, comment e, and §194. There would seem to be little reason for calling flights across a person's land at altitudes below statutory minimum in order to take off and land, trespasses and enjoining them unless there was some injury to the surface, particularly in the light of the public nature of aviation in these times. Thus the Massachusetts view would seem to be somewhat out of line with the law of most jurisdictions.

[9] United Airport Co. v. Hinman, 1940 U. S. Av. Rep. 1 (U. S. D. C. S. D. Cal. 1939); Penn. *ex rel.* Schnader v. Bestecki, 1937 U. S. Av. Rep. 1 (Ct. Comm. Pleas, Dauphin County, Pa., 1937); Tucker v. Iowa City, 1936 U. S. Av. Rep. 10 (D. C. Johnson County, Iowa, 1935).

[10] Guith v. Consumer's Power Co., 36 F. Supp. 21 (E. D. Mich. 1940); Capital Airways v. Indiana Power and Light Co., 215 Ind. 462, 18 N. E. (2d) 776 (1939).

[11] Warren v. City of Detroit, 308 Mich. 460, 14 N. W. (2d) 134 (1944); Batchellor v. Commonwealth, 176 Va. 109, 10 S. E. (2d) 529 (1940).

[12] See note 6 *supra;* 2 C. J. S. Aerial Navigation, §29.

[13] The dissenting opinion of Justice Black (326 U. S. ——, ——, 66 Sup. Ct. 1062, 1069, 90 L. ed. 971, 978) takes the view that this is not the taking of property in a constitutional sense, but a suit in tort for damages due to a nuisance and thus the Court of Claims was without jurisdiction. (See note 3 *supra.*) This year Congress passed the Federal Tort Claims Act, part 3 of which gives the federal district courts jurisdiction, sitting without jury, to hear and adjudge any claim against the United States for money only, arising ". . . on account of

Since such an easement of flight has been recognized as a property interest in eminent domain proceedings by the Federal Government,[14] the holding that it is also protected by the Fifth Amendment[15] seems logically to follow.

Since an increasing number of airports are now owned by either municipal or county governments,[16] the decision in this case creates a new remedy for the landowner adjoining these airports, for if damages can be shown to his property by low flying planes he may be able to prove a taking entitling him to compensation under the Fourteenth Amendment,[17] whereas in the past he has been limited to suit on either the nuisance[18] or trespass[19] theories. The fact that the airports are owned by the city or county, however, gives them certain remedies for protecting the airport approaches which can prevent a suit of this nature ever arising; for since it is generally held that the operation of an airport by a city or county is for a public purpose,[20] or even in the nature of a public utility,[21] certain rights accrue to them which would not ordinarily be given to a privately owned airport.

The first and obvious remedy to prevent suits of this nature would be to acquire enough land by purchase or eminent domain proceedings

damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment. . . ." The act also provides for appeal either to the circuit court of appeals or the Court of Claims by the losing party. Chap. 753, Public Law 601, Title IV, United States Code Congressional Service, Advance Sheet No. 6 (1946). Under this law it would seem that should a person wish to bring a suit of this nature against the Federal Government he could bring it either under the theory of the principal case or merely as a suit in tort for damages under the nuisance theory. If it were brought under the latter theory, however, he would be limited to damages, for the consent to be sued is for money only, and this would not include injunctive relief.

[14] United States v. 357.25 Acres of Land, 55 F. Supp. 461 (W. D. La. 1944) (where the government recognized that such an easement existed as a property right by bringing condemnation proceedings to procure an easement of navigation above 25 feet over property adjoining an airport). In this case all compensation was denied the landowner, since there was already a zoning ordinance which restricted the use of the land above 25 feet and thus the property owner suffered no further damage from the condemnation of the easement.

[15] UNITED STATES CONST. AMEND. V.

[16] Rhyne, AIRPORTS AND THE COURTS, National Institute of Municipal Law Officers, (1944) Chap. I-III.

[17] U. S. CONST. AMEND. XIV, §1.

[18] See note 6 *supra.*

[19] See note 8 *supra.*

[20] Krenwinkle v. City of Los Angeles, 4 Cal. (2d) 611, 51 Pac. (2d) 1098 (1935); People *ex rel.* Curren v. Wood, 391 Ill. 237, 62 N. E. (2d) 809 (1945); Wichita v. Clapp, 125 Kan. 100, 263 Pac. 12 (1928); Dysart v. City of St. Louis, 321 Mo. 514, 11 S. W. (2d) 1045 (1928); Heese v. Rath, 249 N. Y. 436, 164 N. E. 342 (1928); Turner v. Reidsville, 224 N. C. 42, 29 S. E. (2d) 211 (1944); Airport Authority v. Johnson, 226 N. C. 1, 36 S. E. (2d) 803 (1946); Clintock v. City of Roseburg, 127 Oregon 698, 273 Pac. 331 (1929).

[21] State v. Johnson, 117 Neb. 301, 220 N. W. 273 (1928); State v. City of Cleveland, 26 Ohio App. 265, 160 N. E. 241 (1927); Pierce v. Storms, 191 Okla. 410, 130 P. (2d) 523 (1942); and in *Thrasher v. City of Atlanta,* cited *supra* note 7, the court speaks of airports as "indispensable public utilities."

at the initial planning stage so that the airport approaches would be protected and there would never be any question of interference with the adjoining landowners. There are a great number of cases upholding municipalities' right to condemn land under eminent domain proceedings for the purpose of building airports on the theory that it is for a public use,[22] and this is expressly authorized by statute in some jurisdictions.[23] As a practical matter this may not work out, though, for acquisition of complete title to land adjoining the airport would result in a great deal of unnecessary expense.

A second, less expensive, and increasingly popular method is merely to procure the airspace rights above a certain altitude over the adjacent land by purchase or eminent domain. The latter of these two methods is exemplified in a proceeding brought by the Federal Government in Louisiana to acquire such rights over land adjoining an airport which was being built.[24] A substantial number of states now provide for this by statute, either as a general power given to municipalities in addition to their power to condemn the land for the airport itself,[25] or as a part of a law for zoning the approaches to airports.[26] The only difficulty with this type of remedy is in determining the value of the rights acquired in order to compensate the owner of the land over which the easement is taken. The result of this type of remedy is similar to the

[22] Burnham v. Mayor and Aldermen of Beverly, 309 Mass. 388, 35 N. E. (2d) 242, 135 A. L. R. 750 (1941) (where a statute gave city the right to establish municipal airport, but did not expressly give power of eminent domain for this purpose; the court implied the power to condemn property under general powers given city to condemn property for any public purpose). *See also* Howard v. City of Atlanta, 190 Ga. 730, 10 S. E. (2d) 190 (1940); *In re* Airport of City of Utica, 134 Misc. 60, 234 N. Y. S. 668 (1929); Spokane v. Williams, 157 Wash. 120, 288 Pac. 258 (1930); and Central Hanover Bank and T. Co. v. Pan American Airways, 137 Fla. 808, 188 So. 820 (1939) (where the court allowed a private corporation to condemn land for use as an air terminal).

[23] This is provided for in the Uniform Airports Act, Section 3 of which has been adopted by Florida, Georgia, Minnesota, South Carolina, and Utah. UNIFORM AIRPORTS ACT §3, 11 U. L. A. North Carolina expressly provides that an airport is for a public purpose and that cities have the right to acquire lands for them by eminent domain. N. C. GEN. STAT. (1943) §65-5. For a general discussion of this problem and the laws applicable to different states see Rhyne, *op. cit. supra,* note 16, Chap. II; and Hunter and Ulman, *Airport Legal Developments* (1942) 13 JOURNAL AIR LAW 116.

[24] United States v. 357.25 Acres of Land, cited *supra* note 14.

[25] Laws Del. 1945, c. 300, §2; CODE OF IOWA (1946) §330.5; GEN. STAT. KAN. (Corrick, 1945 Supp.) §3-113; MINN. STAT. (1941) §360.28; NEB. REVISED AIRPORTS ACT (1945) §11(2); OHIO GEN. CODE (Page, 1938) §3939; CODE OF S. C. (Michie, 1942) §7112-37.

[26] CODE OF ALA. (1940) tit. 4, §30; Colo. Laws (1945) c. 4, §8(a); ILL. STAT. ANN. (Smith-Hurd, 1942 Supp.) c. 15½, §46; LA. GEN. STAT. (Dart, 1946 Supp.) §27.49; REVISED STAT. ME. (1944) c. 21, §15; Laws of Mont. 1945, c. 152, §19; REVISED LAWS OF N. H. (Rumford, 1942) c. 51, §86; N. M. STAT. ANN. (1941) §47.210; 23 CONSOL. LAWS OF N. Y. (McKinney, 1946 Supp.) §§355, 356; N. C. GEN. STAT. (1943) §63-36; OKLA. STAT. ANN. (1946 Supp.) §3-113; PA. STAT. ANN. (Purdon, 1945 Supp.) §1563; Laws of S. D. 1943, c. 2, §9; TENN. CODE ANN. (Williams, 1945 Supp.) §2726.38; UTAH CODE ANN. (Moore, 1943) §4-0-59; VA. CODE ANN. (Michie, 1946 Supp.) §3775; Laws of Wash. 1945, c. 174, §13.

result reached in the principal case, in that after the condemnation proceedings are complete the landowner is compensated for the right of flight over his land, and the political subdivision which is operating the airport acquires an easement for the benefit of the general public.

A third way to protect the approaches to airports and thus in effect acquire easements over adjoining land is the passage of zoning legislation restricting the height of structures within certain distances from the airport. A number of states have passed this type of statute now as a practical and inexpensive solution to the airport approach problem.[27] Statutes of this type do not completely prevent the result reached in the principal case, however, for it is conceivable that even though the landowner complied with the zoning ordinances and did not build a structure above the maximum height, if the low flights over the land constituted a nuisance and caused his land to materially depreciate as a result, it would still seem to constitute a taking under the theory of the principal case. This would not be so in the second remedy mentioned, for where there is an outright condemnation of the easement, the owner is compensated for the right of flight over the land, and its interference with his use of the land and possible nuisance effect would be considered in determining the amount of compensation he should get for easement. The fact that these zoning ordinances limit the activity of the landowner on the surface by limiting the height to which he can build within a certain distance from the airport in effect places a servitude on the land which might well be called an easement for the benefit of the general public. There seem to be no appellate decisions questioning the constitutionality of these statutes,[28] but they would seem to fall within the

[27] Twenty-six states have passed these statutes. See: CODE OF ALA. (1943 Supp.) tit. 4, §20(14); ARKANSAS STAT. (Pope, 1941 Supp.) p. 979; FLA. STAT. ANN. (1943) §149.10; ILL. STAT. ANN. (Smith-Hurd, 1942 Supp.) c. 15½, §38 *et seq.;* IND. STAT. ANN. (Burns, 1943 Supp.) §14-606; LA. GEN. STAT. (Dart, 1946 Supp.) §27.40 *et seq.;* REVISED STAT. ME. (1944) c. 21, §8 *et seq.;* ANN. CODE MD. (1939) Art. 1-A, §58; ANN. LAWS MASS. (1945 Supp.) c. 90, §40; MICH. CODE ANN. (Henderson, 1945 Supp.) §10.251; MISS. CODE ANN. (1942) §7540; Laws Mont. 1945, c. 152, §19; REVISED LAWS OF N. H. (Rumford, 1942) c. 51, §78 *et seq.;* N. M. STAT. ANN. (1941) §47.201 *et seq.;* 23 CONSOL. LAWS OF N. Y. (McKinney, 1946 Supp.) §§355, 356; N. C. GEN. STAT. (1943) §63-29 *et seq.;* OKLA. STAT. ANN. (1946 Supp.), §3-101 *et seq.;* OREGON COMPILED LAWS ANN. (1943 Supp.) §45-505; PA. STAT. ANN. (Purdon, 1945 Supp.) §1550 *et seq.;* Laws of S. D. 1943, c. 2, §1 *et seq.;* TENN. CODE ANN. (Williams, 1945 Supp.) §2726.47 *et seq.;* Laws of Vt. 1945, No. 50; UTAH CODE ANN. (Moore, 1945 Supp.) §4-0-68 *et seq.;* Laws of Wash. 1945, c. 174, §1 *et seq.;* Laws of Wis. 1945, c. 235, §59-97; Laws of Wyo. 1941, c. 110. For a discussion of the Model Airports Zoning Act as adopted in North Carolina, see (1941) 19 N. C. L. REV. 548.

[28] In *Mutual Chemical Co. v. City of Baltimore,* 1939 U. S. Av. Rep. 11 (Cir. Ct. Baltimore, 1939) the court held unconstitutional the Maryland zoning act as a violation of the Fourteenth Amendment of the United States Constitution in that it restricted the use of private property without compensation and was thus a taking of the property. This case would seem to overlook the fact that airports are considered to be for a public purpose when operated by a municipality for the use of the general public (see note 20 *supra*), and thus the adjoining landowners would have to yield some rights for public safety and public transportation.

same classification as other zoning ordinances which have been upheld on the basis that they are authorized restrictions on the individual's land for the benefit of the general public under the police power of the state.[29] These ordinances do not affect existing structures above the limited height, since such would be a taking of property without due process of law, but they generally have a provision that any structure in the zoned area above the limited height may be condemned and the owner compensated therefor.[30]

It is seen then, that the result of the principal case is not one which is new in our law, for it has been recognized by statute in a majority of our states that an easement of avigation is a necessity, both to protect the general public from hazards surrounding airports and to protect the adjacent landowners from invasions due to low flights over their land in taking off and landing. It is submitted, however, that litigation of this type may be avoided in the future by the use of remedies available to municipalities as agents of the states operating the airports for a public purpose. Should a similar case arise against the Federal Government, it would now be unnecessary to bring it on the implied taking theory, for the Federal Tort Claims Act[31] gives the consent of the Government to be sued in tort, and the litigant could bring his suit on the theory that the low flights damaged his property as a nuisance.

C. D. HOGUE, JR.

Federal Declaratory Judgments in Disability Insurance Cases—Determination of Jurisdictional Amount

The federal district courts have jurisdiction of cases involving a federal question and of diverse citizenship cases only where the "matter in controversy" exceeds, exclusive of interest and costs, the sum or value of $3,000.[1]

In suits by and against insurance companies under the Federal Declaratory Judgment Act the federal courts are not in accord on the question of what constitutes the "matter in controversy." The problem centers around the inclusion or exclusion of future benefits in determining whether the matter in controversy exceeds $3,000; *i.e.*, shall benefits due to date of suit only be considered, or shall the value of the matter in controversy be determined by benefits accrued plus future benefits, based on the life expectancy of the insured? Two recent decisions in the Circuit Court of Appeals for the Fifth and Ninth Circuits serve to illustrate this problem.

[29] Village of Euclid v. Ambler Realty Co., 272 U. S. 365, 47 Sup. Ct. 114, 71 L. ed. 303 (1926).
[30] See note 26 *supra*.
[31] See note 13 *supra*.

[1] 36 STAT. c. 91 (1911), 28 U. S. C. A. §41(1).

In *Fowles v. Commercial Casualty Insurance Co.*[2] suit was brought under the Federal Declaratory Judgment Act for the purpose of obtaining a declaration of the defendant's liability to pay weekly disability benefits and hospital expenses under the provisions of its insurance policy. The plaintiff alleged that benefits were due which amounted to less than $3,000; his life expectancy of twenty-nine years, and that he would be entitled to receive, under the terms of the policy, benefits amounting to $38,000 if he lived the expectancy period. The plaintiff further alleged that the defendant refused to pay, claiming that the plaintiff had lost his right to disability benefits by reason of changing his occupation. The district court held that plaintiff's claimed right under the policy to disability benefits during his life if permanently and totally disabled was placed in doubt by the company's claim that it had been lost because the insured had changed his occupation. The district court concluded that this right was the matter in controversy and the value of this right exceeded the $3,000 jurisdictional requirement. The Circuit Court of Appeals for the Ninth Circuit reversed this decision, holding that "no right to such future benefits existed at the time the action was commenced. No one at that time knew or could have known whether such a right would ever exist. Therefore, as to such future benefits, there was, and could have been at that time, no controversy."[3] The court did not mention the plaintiff's allegation that the defendant refused to pay because it claimed the plaintiff lost his right as a result of a change of occupation.

Travelers Insurance Co. v. Greenfield[4] was another action under the Federal Declaratory Judgment Act to determine the insurer's liability for disability benefits. Only $515 in accrued benefits plus a reasonable attorney's fee was alleged to be due at the time the suit was filed. The plaintiff proved his life expectancy of six years, and showed that assuming he would fulfill his life expectancy, he would be entitled to benefits of not less than $3,100. Plaintiff also alleged that payment of premiums was waived under the terms of the policy if disability existed, but that defendant denied plaintiff's total disability, and threatened to consider the policies lapsed if plaintiff failed to pay. Plaintiff alleged that such

[2] 59 F. Supp. 693 (E. D. Wash. 1945).

[3] Commercial Casualty Ins. Co. v. Fowles, 154 F. (2d) 884 (C. C. A. 9th, 1946).

[4] 154 F. (2d) 950 (C. C. A. 5th, 1946). In *New York Life Ins. Co. v. Greenfield*, 154 F. (2d) 953 (C. C. A. 5th, 1946), suit was brought to recover $1,250 accrued benefits plus a reasonable attorney's fee. The district court took jurisdiction but the circuit court of appeals reversed the decision with instructions to the lower court to dismiss the complaint for lack of jurisdiction. It does not appear that any evidence was offered as to the actuarial value of future benefits if any should become payable and the circuit court of appeals held no reasonable attorney's fee could bring the amount claimed over $3,000. The Federal Declaratory Judgment Act was not involved.

a threat is equivalent to a threat of cancellation of the policy and thereby brings into controversy the entire face value of the policy which exceeded $3,000. The court held that the allegation attempting to measure the amount in controversy by disability payments during the life expectancy of the insured, plus the reserve it is alleged the company must set aside, plus the amount of premiums to be waived in the future, in the absence of an attempt by the insurer to cancel the policy, are insufficient to show a present, or actual controversy involving an amount in excess of $3,000.

These two cases illustrate the need for a clear definition of the "matter in controversy" to avoid the loss of time and expense involved in prosecuting such suits through the district and circuit courts, and the delay in deciding petitions for removal to the federal courts. In each case the district court had determined that the "matter in controversy" exceeded $3,000, and in each case the circuit court of appeals held otherwise. The plaintiffs must now commence their actions anew in the state courts if they wish a final determination of their claims.

The federal courts have variously interpreted the phrase "matter in controversy" when applying this language to suits involving disability benefits under insurance policies. There is a conflict as to whether the legal necessity of maintaining a reserve in excess of $3,000 to meet disability claims satisfies the jurisdictional requirement.[5] There is also a conflict as to whether future payments should be considered in determining the jurisdictional amount.[6]

[5] The following cases held legal reserve incidental and collateral to suit and not the matter in controversy: Berlin v. Travelers Ins. Co. of Hartford, Conn., 18 F. Supp. 126 (Md. 1937); Eddleman v. Travelers Ins. Co. of Hartford, Conn., 21 F. Supp. 209 (Md. 1937); Small v. New York Life Ins. Co., 18 F. Supp. 820 (N. D. Ala. 1937); Shabotsky v. Mass. Mut. Life Ins. Co., 21 F. Supp. 166 (S. D. N. Y. 1937); Huey v. Prudential Ins. Co. of America, 23 F. Supp. 708 (N. D. Ala. 1938); Stockman v. Reliance Life Ins. Co. of Pittsburgh, Pa., 28 F. Supp. 446 (W. D. S. C. 1939); Travelers Ins. Co. v. Wechsler, 34 F. Supp. 721 (S. D. Fla. 1940); Asbury v. New York Life Ins. Co., 45 F. Supp. 513 (E. D. Ky. 1942); Mutual Life Ins. Co. of N. Y. v. Moyle, 116 F. (2d) 434 (C. C. A. 4th, 1940).

Contra: Jensen v. New York Life Ins. Co., 50 F. (2d) 512 (C. C. A. 8th, 1931); Ross v. Travelers Ins. Co., 18 F. Supp. 819 (E. D. S. C. 1936); Struble v. Conn. Mut. Life Ins. Co. of Hartford, 20 F. Supp. 779 (S. D. Fla. 1937); Penn. Mut. Life Ins. Co. of Philadelphia v. Joseph, 5 F. Supp. 1003 (Minn. 1934); Thackelson v. Aetna Life Ins. Co., 9 F. Supp. 570 (Minn. 1934).

[6] The following cases support view that future payments are included: Thompson v. Thompson, 226 U. S. 551, 57 L. ed. 347, 33 S. Ct. 129 (1913) (suit by wife for alimony payments). The court held the jurisdictional requirement met by regarding the actuarial value of possible future payments as the matter in controversy. Brotherhood of Locomotive Firemen & Enginemen v. Pinkston, 293 U. S. 96, 79 L. ed. 219, 55 S. Ct. 1 (1934); Ballard v. Mutual Life Ins. Co. of N. Y., 109 F. (2d) 388 (C. C. A. 5th, 1940); Penn. Mut. Life Ins. Co. of Phila. v. Joseph, 5 F. Supp. 1003 (Minn. 1934); Franzen v. E. I. Du Pont de Nemours & Co., Inc., 36 F. Supp. 375 (N. J. 1941), *aff'd,* 146 F. (2d) 837 (C. C. A. 3d, 1944).

Contra: Wright v. Mutual Life Ins. Co. of New York, 19 F. (2d) 117 (C. C. A. 5th, 1926), *aff'd,* 226 U. S. 602; Equitable Life Assur. Soc. of U. S. v. Wilson,

The starting premise in these cases is that the collateral or probative effect of the judgment is not to be considered in determining the value of the matter in controversy. This rule was laid down by the Supreme Court in an analogous situation in *Town of Elgin v. Marshall*[7] and seems to influence those courts which limit the matter in controversy to accrued benefits. However, the Supreme Court has in *Thompson v. Thompson*[8] and *Brotherhood of Locomotive Firemen v. Pinkston*[9] approved an actuarial valuation of a claim as the test. These decisions guide the courts broadly construing "matter in controversy" to include future payments.

In the *Pinkston* case the Supreme Court made a distinction between actions at law to recover overdue installments and a suit in equity to

81 F. (2d) 657 (C. C. A. 9th, 1936) (complaint seeking $750 benefit due under $2,500 policy; *held:* jurisdictional amount could not be attained by adding face of policy to such payments even though answer alleged lapse of policy for nonpayment of premiums); Colorado Life Co. v. Steele, 95 F. (2d) 535 (C. C. A. 8th, 1938); Mutual Life Ins. Co. of N. Y. v. Moyle, 116 F. (2d) 434 (C. C. A. 4th, 1940); La Vecchia v. Conn. Mut. Life Ins. Co. of Hartford, Conn., 1 F. Supp. 588 (S. D. N. Y. 1932); Hines v. Fidelity Mut. Life Ins. Co., 6 F. Supp., 692 (E. D. N. Y. 1934); Moon v. Pacific Mut. Life Ins. Co., 28 F. Supp. 199 (S. D. W. Va. 1939); Asbury v. New York Life Ins. Co., 45 F. Supp. 513 (E. D. Ky. 1943); Mitchell v. Mutual Life Ins. Co. of N. Y., 31 F. Supp. 441 (W. D. La. 1940); Burton v. Mutual Life Ins. Co. of N. Y., 48 F. Supp. 168 (W. D. Ky. 1943) (where the court recognized that it was departing from its own ruling in two previous cases neither of which had been reported).

Sometimes the form of the state judgment given in like cases may determine whether the "matter in controversy" includes future payments. Thus in *Franzen v. E. I. Du Pont de Nemours & Co., Inc.*, 36 F. Supp. 375 (N. J. 1941), *aff'd*, 146 F. (2d) 836 (C. C. A. 3d, 1944) the court held, where plaintiff was suing under the Louisiana Workmen's Compensation Act, that in that state a judgment under the Act for weekly benefits until death or remarriage is erroneous; proper judgment being for death benefits for the full period of 300 weeks, and the fact that death or remarriage would cut off future benefits is immaterial. Hence judgment for 300 weeks at $14.30 per week, or $4,270, met federal jurisdictional requirement. Only $729.30 was due at the time suit was brought.

However, in Asbury v. New York Life Ins. Co., 45 F. Supp. 513 (E. D. Ky. 1942), the federal court held that the unique Kentucky rule whereby if plaintiff succeeded in establishing his claim of permanent disability, he gets a declaratory judgment in respect to his right to waiver of future premiums did not apply in determining the "matter in controversy" in a federal jurisdictional controversy.

[7] 106 U. S. 578, 27 L. ed. 304, 2 Sup. Ct. 1 (1882) (suit to recover $1,660.75 allegedly due on coupons detached from municipal bonds issued by defendant). Although judgment would include the disputed liability on principal sum, not yet due, the court declined to take jurisdiction, holding that statute limiting federal jurisdiction had reference to the matter directly in dispute, and not the collateral or probative effect of the judgment.

[8] 226 U. S. 551, 57 L. ed. 347, 33 Sup. Ct. 129 (1913) (suit by wife for alimony payments). The court held the jurisdictional requirement met by regarding the actuarial value of possible future payments as the matter in controversy.

[9] 293 U. S. 96, 79 L. ed. 219, 55 Sup. Ct. 129 (1934) (suit brought by a widow to preserve her right to participate in a fund from which she was entitled to pension so long as she did not remarry). The court held that the amount in controversy was the present value of her interest calculable from the amount of her monthly payment and her life expectancy. The court said that this was not an action at law to recover overdue installments, but a suit in equity to preserve and protect a right to future participation in the fund, and if the value of that right exceeds $3,000, the district court has jurisdiction.

preserve and protect a right to future participation in a fund. This distinction has generally been accepted in the insurance cases. Thus in ordinary suits at law for accrued benefits, the generally accepted rule is that only the amount due is considered in determining the jurisdictional amount.[10] This result is reached by applying the rule that the collateral or probative effect of the judgment is not the test. However, when the validity of the policy is in issue, as in suits to cancel the policy for fraud, the face amount of the policy, or the maximum liability is the test.[11] When this distinction is made, the apparent conflict between many of the decisions is reconciled. However, the failure of some of the federal courts to make this distinction accounts to some extent for the conflict.

Hence in suits under disability policies, where the only issue is the fact of disability, the only "matter in controversy" is the amount of accrued benefits. In this type of case, the insurer merely denies that the insured has met the conditions prescribed in the policy. Future benefits are not in issue. However, if the insurer relies on any other defense, such as fraud or non-coverage, the matter in controversy would be the maximum possible liability if the insurer's position is not upheld. Here the insurer is not merely denying that the insured has met the conditions of the policy, but that, assuming he has, he is still not entitled to benefits, past or future. The insurer, by this defense, puts the insured's right to future benefits in issue. However, in cases of this latter type, the criterion is not the face amount of the policy, but the amount of benefits both past and future to which the insured would be entitled so long as he is disabled. The use of the insured's life expectancy in evaluating the matter in controversy is no more speculative than considering the face amount of the policy[12] which is the generally accepted test in suits to cancel ordinary life insurance policies.

In *Fowles v. Commercial Casualty Insurance Co.*,[13] since the insurer did not merely put in issue the fact of disability, which would be a proper case for limiting the amount in controversy to accrued benefits, but went further and maintained that the insured had lost his right to all benefits, it seems that the case is a proper one for measuring the "matter in controversy" by both past and future benefits. The insurer was not merely denying the insured's right to past benefits, but also denying that insured would ever have any right to disability benefits. Thus it is clear that the accrued disability benefits were not the sole

[10] Mutual Life Ins. Co. of N. Y. v. Moyle, 116 F. (2d) 434 (C. C. A. 4th, 1940); Stevenson v. Equitable Life Assur. Soc., 92 F. (2d) 406 (C. C. A. 4th, 1937); Shabotsky v. Mass. Mut. Life Ins. Co., 21 F. Supp. 166 (S. D. N. Y. 1937).

[11] Anno: 81 L. ed. 214-216.

[12] See note (1943) 8 MISSOURI L. REV. 131, criticizing use of face value of policy as test.

[13] See note 2 *supra*.

"matter in controversy," but in fact the maximum liability of the insurer for past and future disability payments was at stake.

Travelers Ins. Co. v. Greenfield[14] seems to be a proper case for limiting the "matter in controversy" to accrued benefits. Here the only controversy was over the question of disability; the insured claiming that he was totally disabled, and the insurer denying this claim. By a mere denial of disability the insurer did not put future benefits in issue, but merely denied insured's right to accrued benefits. There was no controversy as to future benefits, hence the court properly excluded them in determining the value of the "matter in controversy." The court, although not specifically mentioning the alleged threat of the insurer to cancel the policy, did not consider the face value of the policy as the matter in controversy. This result is in accord with the Supreme Court's ruling in *N. Y. Life Ins. Co. v. Viglas*.[15] There the insurer denied the insured's claimed disability and consequently refused to waive the payment of premiums. When the insured failed to pay a premium, the insurer noted on its records that the policy had lapsed. The insured treated this as a repudiation of the entire contract and brought suit for damages. The insured attempted to measure the damages by the surrender value of the policy plus the future benefits to become due under the terms of the policy if the insured remained totally disabled. The Supreme Court held that the action of the insurer, even though mistaken, did not amount to a repudiation of its entire contract but only to a breach of the obligation to pay benefits. Hence the damages recoverable by the insured did not exceed the benefits due at the commencement of the suit.

In the *Greenfield* case, the alleged threat of the insurer to cancel the policy, even if disability were established by the insured, would amount to no more than a breach of the obligation under the disability provisions of the policy. This breach of the contract would be only as to accrued benefits, since the insurer based his action solely on the belief that the insured was not totally disabled. The insurer had not repudiated its obligation to pay benefits in the future if the insured became totally disabled.

It is suggested that the "matter in controversy" in suits brought under the Federal Declaratory Judgment Act should depend on the nature of the defense of the insurer just as it depends on the nature of its claim if it initiates the action. If the defense is a mere denial of disability, then accrued benefits are only to be considered. However, if the insurer denies liability on any other ground, then the actuarial value of the disability provisions in the policy should govern.

J. T. RENDLEMAN.

[14] See note 4 *supra*.
[15] 297 U. S. 672, 80 L. ed. 971, 56 Sup. Ct. 615 (1936).

Pleading—Amendments Changing the Cause of Action—Limitations of Action—New Statute Proposed

In a recent West Virginia case[1] the plaintiff, a town employee, sued to recover for personal injuries sustained when he fell from the back of the town garbage truck, alleging the negligence of the town in furnishing defective equipment and the negligence of the driver, also a town employee. A demurrer to the complaint was sustained on the grounds of immunity in the performance of governmental function. The West Virginia Supreme Court affirmed.[2] Plaintiff amended his complaint to state a cause of action for failure to maintain the streets.[3] The defendant moved to strike that portion of the amendment which alleged failure to maintain the streets as it stated a new cause of action, and demurred to the remainder. The motion was granted and the demurrer sustained. On appeal the court followed the West Virginia rule that an amendment stating a new cause of action cannot be allowed. The original complaint stated a cause of action at common law and the amendment stated a cause of action under the statute.

This case raises the questions: (1) What is an admendment that changes the cause of action? and (2) When will an amendment that changes the cause of action be allowed?

A prerequisite to answering the first question is a discussion of the much debated and variously defined term "cause of action." The authorities can be divided into two general categories:

(1) The liberal view—Judge Charles E. Clark says: "The cause of action under the code should be viewed as an aggregate of operative facts which give rise to one or more relations of right-duty between two or more persons."[4] The essence of this view is that the *facts* of a transaction or occurrence, instead of the right or rights violated, constitute the cause of action and that each cause is limited only by trial convenience, not by the rights involved.

(2) The strict view—Professor John N. Pomeroy says: "The cause of action . . . will . . . always be the facts from which the plaintiff's primary right and the defendant's corresponding primary duty have arisen, together with the facts which constitute the defendant's delict or act of wrong."[5] The essence of this view is that the right violated

[1] Hayes v. Town of Cedar Grove, ——, W. Va. ——, 37 S. E. (2d) 450 (1946).

[2] 126 W. Va. 828, 30 S. E. (2d) 726, 156 A. L. R. 702 (1944).

[3] W. VA. CODE ANN. (1943) §1597 (9). (Makes the town liable for failure to properly maintain the streets.)

[4] Clark, *The Code Cause of Action* (1924) 33 YALE L. J. 817, 837. Various definitions of the code cause of action are also discussed in CLARK, CODE PLEADING (1928) §19. For a critical analysis of Clark's view see Wheaton, *The Code "Cause of Action": Its Definition* (1936) 22 CORN. L. Q. 1.

[5] POMEROY, CODE REMEDIES (5th ed. 1929) §347. In the same section it is said, ". . . the primary right and duty and delict or wrong combined constitute the

constitutes the cause of action and that each cause is limited to one primary right and the violation thereof.

In determining whether or not an amendment states a new cause of action, over the years the North Carolina Supreme Court has repeatedly adopted the liberal view. Dissenting in *Jones v. Mial*[6] (1878) Chief Justice Smith pointed out, "The complaint which supersedes the declaration is required to contain only a plain and concise statement of the facts constituting a cause of action. . . ." This dissent led to a reversal on rehearing.[7] In *Lassiter v. Norfolk & C. R. R.*[8] (1904) Chief Justice Clark said, "The 'cause of action' is the 'statement of facts,' upon the happening or non-happening of which the plaintiff bases his action." In *McLaughlin v. Raleigh, C. & S. Ry.*[9] (1917) after citing five North Carolina cases Justice Allen said, "These authorities and others also hold that the cause of action is the wrong done—here, the burning of the lumber. . . ." As recently as 1944, in *Nassaney v. Culler,*[10] Justice Seawell said, "But in applying the test [whether an amendment states a new cause of action] we must regard the factual situation and the manner in which it develops rather than technical labels."

The rule that a defective statement of a good cause of action may be cured by amendment,[11] and the rule that the original complaint may

cause of action in the legal sense of the term, and as it is used in the codes of the several states."

Judge Phillips appears to place the same emphasis on the right-duty relationship. "The formal statement of operative facts showing [plaintiff's] right and [defendant's] delict shows a cause for action on the part of the state and in behalf of the complainant, and is called, in legal phraseology, a cause of action." PHILLIPS, CODE PLEADING (2d ed. 1932) §187.

Prof. McCaskill: "It is that group of operative facts which, standing alone, would show a single right in the plaintiff and a single delict to that right giving cause for the state, through its courts, to afford relief to the party or parties whose right was invaded." McCaskill, *Actions and Causes of Actions* (1925) 34 YALE L. J. 614, 638.

[6] 79 N. C. 164, 168 (1878).

[7] 82 N. C. 252 (1880). Plaintiff was allowed to plead a special contract and recover on *quantum meruit* without amendment.

[8] 136 N. C. 89, 90, 48 S. E. 642, 643 (1904). Plaintiff's intestate was killed in Virginia. In this action for wrongful death, plaintiff failed to allege the Virginia statute. Trial court denied plaintiff's motion to amend and set forth Virginia statute as such an amendment was a new cause of action. *Held:* Amendment should be allowed to perfect the statement of a good cause of action. *Note:* Since passage of N. C. GEN. STAT. §8-4 in 1931, this problem would not arise. This statute requires the courts to take judicial notice of the laws of other states. 223 N. C. 360, 26 S. E. (2d) 911 (1943).

[9] 174 N. C. 182, 185, 93 S. E. 748, 749 (1917). The trial court allowed one plaintiff to withdraw and permitted an amendment alleging sole ownership in the remaining plaintiff. *Affirmed.* "The cause of action is the negligence." Headnote, *id.* at 183.

[10] 224 N. C. 323, 327, 30 S. E. (2d) 226, 229 (1944). The trial court allowed amendment setting forth conduct of the defendant subsequent to filing the original complaint. *Affirmed.* "The fact that, if standing alone, it might form the basis of a separate suit, if indeed it had that completeness, is not determinative."

[11] 37 C. J., Limitation of Actions §509.

be enlarged, narrowed, amplified, or fortified by amendment without changing the cause of action[12] have been frequently applied by the North Carolina court. Application of the first rule does not require the adoption of the liberal view of cause of action. The results in the cases when the second rule was applied, however, seem to be consistent only with the view that an aggregate of operative facts giving rise to one or more relations of right-duty constitutes the cause of action. Under the first rule the North Carolina Supreme Court allowed the following amendments: (a) to perfect a statement of a cause of action for divorce where the original complaint failed to to allege facts beyond the language of the statute;[13] (b) to perfect a statement of a good cause of action for breach of contract where plaintiff failed to allege readiness and ability to pay;[14] (c) to perfect a statement of a cause of action to recover embezzled money where plaintiff failed to allege clearly that money received by the defendant was from that embezzled;[15] (d) to perfect the statement of a cause of action for wrongful death by alleging the law of another state;[16] (e) to perfect a cause of action under the Federal Employer's Liability Act by alleging that the plaintiff was employed in interstate commerce at time of injury.[17] Under the second rule the North Carolina Supreme Court has held that the following amendments did not change the cause of action: (a) to allege permanent injury to land where plaintiff originally declared for injury to crops;[18] (b) in an action to establish materialmen's liens, to allege an agreement between owner and contractor whereby the owner agreed to pay for materials and labor required to complete the building when the contractor was financially unable to complete his contract after a referee found that the owner had paid the contractor more than was due on the contract price;[19] (c) to allege fraud and deceit where original com-

[12] 41 Am. Jur., Pleading §305.
[13] Ladd v. Ladd, 121 N. C. 118, 28 S. E. 190 (1897).
[14] Blalock v. Clark, 133 N. C. 306, 45 S. E. 642 (1903).
[15] Fidelity v. Jordan, 134 N. C. 236, 46 S. E. 496 (1904).
[16] Lassiter v. Norfolk & C. R. R., 136 N. C. 89, 48 S. E. 642 (1904) cited *supra* note 8.
[17] Renn v. Seaboard Air Line Ry., 170 N. C. 128, 86 S. E. 964 (1915). Two judges dissented, contending that the original complaint stated a cause of action at common law and the amendment stating a new cause of action should not be allowed after the statute of limitations had run. On appeal to U. S. Supreme Court this case was affirmed, holding that the amendment merely expanded or amplified the original cause which was under the act of Congress. 241 U. S. 290, 36 S. Ct. 567, 60 L. ed. 1006 (1916).
[18] Pickett v. Atlantic Coast Line R. R., 153 N. C. 148, 69 S. E. 8 (1910). "We do not think the amendment added a new cause of action, but related to quantum of damages. The cause of action was the injury to the land, and the consequent damages." *Id.* at 149, 69 S. E. at 9.
[19] Carolina Hardware Co. v. Raleigh Banking & Trust Co., 169 N. C. 744, 86 S. E. 706 (1915), "The policy of code procedure as to the allowance of amendments is very liberal, the leading purpose being to have actions tried upon their merit and avert a failure of justice." *Id.* at 747, 86 S. E. at 708.

plaint was to recover purchase price of land because of defective title;[20] (d) to allege facts raising an estoppel after referee found defendants not liable in an action to collect on defendants' notes;[21] (e) in an action for claim and delivery, to allege title by gift *inter vivos* where in the original complaint plaintiff alleged title by virtue of an allotment in her year's allowance as widow.[22]

On the grounds that a new cause of action would be stated the court refused the following amendments: (a) to allege facts to recover the penalty for usury where original action was to recover an overpayment of interest made by mistake and ignorance;[23] (b) in an action for wrongful arrest and malicious prosecution in a court of the justice of the peace, to allege that the defendant influenced and procured a bill sent to the grand jury.[24] On the same grounds the court refused to allow the following amendments to relate back to the beginning of the action: (a) to allege a contract between defendant and a third party for the sale of logs, plaintiff to be paid a certain amount from the sale of the timber sawed therefrom, where original action was based on a sale and delivery of sawed timber;[25] (b) to allege a cause of action for wrongful death under the statute of another state where the original action was brought under the Federal Employers Liability Act;[26] (c) to allege facts constituting negligence of defendant railroad where original complaint stated facts showing co-defendant only was negligent.[27] Many other illustrations could be cited, but these will suffice to demonstrate the difficulty of determining the status the amendment will be given.

Is it practicable to devise some tests to determine when an amendment states a new cause of action? In *Lumberman's Mutual Insurance Co. v. Southern Ry.*[28] the court expressed approval of two such tests: (1) inquire whether a recovery had upon the original complaint would be a bar to any recovery under the amended complaint, or (2) whether the amendment could have been cumulated with the original allegations. Other tests have been devised, including: (1) Would the same evidence

[20] Currie v. Malloy, 185 N. C. 206, 116 S. E. 564 (1923); Dockery v. Fairbanks, 172 N. C. 529, 90 S. E. 501 (1916).

[21] Bank of Ash v. Sturgill, 223 N. C. 825, 28 S. E. (2d) 511 (1943).

[22] James v. James, 226 N. C. 399, 38 S. E. (2d) 168 (1946). There can be no question that the court properly sustained the amendment. It seems, however, that the court adopted the strict view of "cause of action" to achieve the usual result of the liberal view. Here the court allowed a change in the statement of facts.

[23] Gillam v. Life Ins. Co. of Va., 121 N. C. 369, 28 S. E. 470 (1897).

[24] Cooper v. Southern Ry., 165 N. C. 578, 581, 81 S. E. 761, 763 (1914), "The trial judge cannot, without consent of parties, so amend, change, or modify the pleadings in a pending action as to substantially make it a new one."

[25] Sams v. Price, 121 N. C. 392, 28 S. E. 486 (1897).

[26] Capps v. Atlantic Coast Line R. R., 183 N. C. 181, 111 S. E. 533 (1922).

[27] George v. Atlanta & C. A. L. Ry., 210 N. C. 58, 185 S. E. 431 (1936).

[28] 179 N. C. 255, 260, 102 S. E. 417, 420 (1920).

support both of the pleadings? (2) Is the measure of damages the same in each case? (3) Are the allegations of each subject to the same defenses?[29] The desirability of such a simple solution is appreciated, but even a cursory examination of the cases reveals that no such solution is readily attainable and that attempts to apply the suggested tests give diverse results.[30] The question so frequently boils down to one of degree that each case must be considered on its own merits. Adopting the definition that an amendment which changes the cause of action is one which alleges facts involving a transaction or situation other than the one originally declared on, this test can be established: does the amendment state facts involving a transaction or situation other than the one in the original complaint? Such a test is necessarily general. A similar determination, however, is required in applying the statute on joinder of causes,[31] and in joinder of parties and causes questions.[32] The North Carolina court actually applied this test in at least one case involving amendments.[33]

The second question raised by the principal case is when will an amendment that changes the cause of action be allowed. Allowance of amendments has been a subject of legislation since the fourteenth century.[34] The codes and statutes of the various jurisdictions have their own particular rules.

While the North Carolina statute adopts a strict practice of amending by right,[35] it adopts a very liberal practice of allowing amendments at the discretion of the trial court,[36] having only two restrictions: (1) the amendment will not be allowed if it is for the purpose of delay,[37] and (2) if the amendment is for the purpose of conforming the pleading to

[29] 37 C. J., Limitations of Acts §512.

[30] After carefully appraising the suggested tests, one writer concludes: "The result of these cases leads to the conclusion that no one rule can be set forth as a general criterion; it is submitted, however, that a more nearly applicable test would be: Does the amendment institute a matter materially different in substance or historical form, thereby appreciably altering the primary rights and obligations of the parties to the prejudice of the defendant?" Note (1928-29) 7 TEX. L. REV. 144, 150.

[31] N. C. GEN. STAT. (1943) §1-123, "The plaintiff may unite in the same complaint several causes of action, of legal or equitable nature, or both, where they all arise out of—

1. The same transaction or transaction connected with the same subject of action."

[32] Atkins v. Steed, 208 N. C. 245, 179 S. E. 889 (1935); Trust Co. v. Pierce, 195 N. C. 717, 143 S. E. 524 (1928).

[33] See note 43 *infra*.

[34] 14 Edw. III, c. 6 (1327-77); SHIPMAN, COMMON-LAW PLEADING (Ballantine, 3rd ed. 1923) §163.

[35] N. C. GEN. STAT. (1943) §1-161; see also §1-129.

[36] From an examination of the cases, it has been found that the trial courts are very liberal in their exercises of discretion. The few occasions where the court refused the amendment was for the reason that the court belived it to be beyond his discretionary powers.

[37] N. C. GEN. STAT. (1943) §1-161; see Biggs v. Moffitt, 218 N. C. 601, 11 S. E. (2d) 870 (1940).

the facts proved, it must not change substantially the claim or defense.[38] Even though the statute clearly avoids using the term "cause of action," the court has generally construed the word "claim" to mean "cause of action."[39] A confusion of the rule was observed by Professor McIntosh: "The statute permits an amendment in the discretion of the court—'when the amendment does not change substantially the claim or defense.' This is found in connection with the amendment to make the pleading conform to the proof, but it has been applied generally to all amendments made under order of court."[40] More recently, however, a more liberal rule has been adopted which allows amendments stating a new cause of action with the limitation that such amendments cannot relate back to defeat the statute of limitations.[41] Such a new cause would necessarily have to comply with the joinder of causes statute,[42] and there is some suggestion that this is true where the plaintiff attempts a substitution.[43] Even before this more liberal rule was established, the court, on the theory that the cause of action was not changed, allowed

[38] N. C. GEN. STAT. (1943) §1-163. For power of Supreme Court to amend see §7-13, discussed in Deligny v. Furniture Co., 170 N. C. 189, 86 S. E. 980 (1914).

[39] Lefler v. Lane, 170 N. C. 181, 183; 86 S. E. 1022, 1023 (1915), ". . . the power of amendment has been very broadly conferred and may and ordinarily should be exercised in 'furtherance of justice,' unless the effect is to add a new cause of action or change the subject matter thereof. . . ." See also Hardware Co. v. Banking Co., cited *supra* note 19. "It is well settled that the court cannot, except by consent, allow an amendment which changes the pleadings so as to make substantially a new action, . . ." citing Ely v. Early, 94 N. C. 1; Craven v. Russell, 118 N. C. 564.

[40] McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE (1929) §487.

[41] Capps v. Atlantic Coast Line R. R., 183 N. C. 181, 187; 111 S. E. 533 (1922). "It is the general rule, and consistently held with us, that a new cause of action may be introduced by way of amendment to the original pleading; but established limitation on the operation of its relation to the commencement of the suit is that if the amendment introduce a new matter, or cause of action different from the one propounded, and with respect to which the statute of limitations would then operate as a bar, such defense or plea will have the same force and effect as if the amendment were a new and independent suit."

Nassaney v. Culler, 224 N. C. 323, 30 S. E. (2d) 226 (1944) quotes the above with approval and then distinguishes the amendment in this case as being not a new and distinct cause of action.

By the language used in G. S. §1-164, the legislature clearly intended not to forbid the introduction of a new cause of action by amendment. The section begins: "When the complaint is so amended as to change the nature of the action and the character of the relief demanded. . . ." It seems that the court had frequently overlooked the implication of this language.

[42] N. C. GEN. STAT. (1943) §1-123. Hatcher v. Williams, 225 N. C. 112, 114, 33 S. E. (2d) 617, 618 (1945). Action for an accounting. Plaintiff allowed to allege fraud. "To say the amendment undertakes to join an action in tort with one on contract in the same complaint is to regard the proceeding strictly as an action at law rather than a suit in equity. Even so, they [the tort and contract] both arise out of the same transaction, or transactions connected with the same subject of action; G. S. 1-123. Where such is true, they may be joined in the same complaint."

[43] Reynolds v. Mt. Airy & Eastern Ry., 136 N. C. 345, 347, 48 S. E. 765, 766 (1904). "If the plaintiff could have added to his present cause of action another one sounding in tort, why should he not be allowed to substitute the latter for the former, as it will not be a new cause of action in any sense if it is one based upon the same transaction or connected with the subject of the action."

amendments to change the action from contract to tort,[44] and from law to equity.[45] Very soon after the code was adopted, the court recognized that the test to determine a change in the cause of action was not the test applied at common law to determine a change in the form of action.[46]

Since one of the primary advantages plaintiffs seek in amending the complaint is to avoid the statute of limitations, the liberality of the court in allowing amendments is governed primarily by the determination of whether the amendment states a new cause of action. The North Carolina court has generally regarded one wrongful act as creating one cause of action and even in the face of a plea of the statute of limitations has allowed plaintiff to amend to allege permanent injury to land where the complaint alleged damages to crops[47] and to allege that the injury occurred in interstate commerce where the complaint declared only on negligence.[48] The court clearly rejected the argument that one wrongful act causing damage to person and property of plaintiff creates two causes of action, saying that the plaintiff cannot split his cause of action exposing the defendant to the vexation of multiple suits.[49] These decisions are illustrative of the liberal policy of the court and demonstrate the court's determination to have cases justly determined on their merits. With its liberality, however, the court refused to allow the plaintiff to amend and recover under a state statute when the complaint declared on a federal statute because the amendment stated a new cause of action which was barred by the statute of limitations, even though the injury was caused by one wrongful act.[50] If the statute of limitations has run, the North Carolina court would probably reach the same result the West Virginia court reached in the principal case, even though the amendment was offered in the pleading stage. Such a ruling would seem, however, to be reverting back to the old days when changes in the form of the action were forbidden. Whether plaintiff's injury is due to defendant's common law negligence or to its breach of statutory

[44] *Id.*

[45] Woodcock v. Bostic, 128 N. C. 244; 38 S. E. 881 (1901).

[46] Oates, etc. Co. v. Kendall, 67 N. C. 241 (1872).

[47] Pickett v. Atlantic Coast Line R. R., 153 N. C. 148, 69 S. E. 8 (1910), cited *supra* note 18.

[48] Renn v. Seaboard Air Line Ry., 170 N. C. 128, 86 S. E. 964 (1915), cited *supra* note 17.

[49] Eller v. Carolina & N. Ry., 140 N. C. 140, 52 S. E. 305 (1905); *cf.* Underwood v. Dooley, 197 N. C. 100, 147 S. E. 686 (1929).

[50] Capps v. Atlantic Coast Line R. R., 183 N. C. 181, 111 S. E. 533 (1922), Chief Justice Clark wrote a very strong dissent. In *Fuquay v. Atlantic & W. Ry.*, 199 N. C. 499, 155 S. E. 167 (1930) the same theory of two causes of action was followed to plaintiff's advantage. Here the court held that a previous trial resulting in judgment of non-suit for failure to prove that the injury occurred in interstate commerce as alleged was not *res judicata* against a second suit alleging intrastate commerce. It would seem that the same result would be reached even under the theory of one cause of action, the issue of negligence having not been determined.

duty in failing to properly maintain its streets, there has been one occurrence resulting in plaintiff's damage. Defendant's victory is not based on a result of a determination of the case on its merits nor on the delay of plaintiff in prosecuting his claim. It is based on plaintiff's failure to select his proper remedy—strongly analogous to suing in trespass instead of case.

The North Carolina amendment statutes are liberal. They are designed to facilitate and expedite trials and at the same time preserve the rights of the defendant. The rights of the defendant, however, should not include technicalities giving the defendant an advantage. The purpose of the statute of limitations is to prevent a plaintiff from taking advantage of a defendant by instigating a claim arising out of a transaction or conduct which occurred so long before as to place the defendant at a disadvantage in defeating the claim or defending himself. The statute can be tolled by a summons sketchily defining the transaction or conduct complained of.[51] It would seem that the greatest liberality in amending the pleading would be called for in this situation for the sake of fairness to all parties. In speaking to this very point Mr. Justice Holmes said, "Of course an argument can be made on the other side, but when the defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist, and we are of the opinion that a liberal rule should be applied."[52]

It has been suggested that the desired liberality may be attained by changing the rule rather than liberally defining the term "cause of action."[53] Several states and the federal courts have done so.[54] The

[51] Webster v. Sharpe, 116 N. C. 466, 21 S. E. 912 (1895).

[52] N. Y. Cent. R. R. v. Kinney, 260 U. S. 340, 346, 43 S. Ct. 122, 123, 67 L. ed. 294, 296 (1922). The court allowed an amendment changing from state statute to federal statute. Followed without opinion in *McCabe v. Boston Terminal Co.*, 309 U. S. 624; 60 S. Ct. 725; 84 L. ed. 986 (1939).

[53] Gavit, *The Code Cause of Action* (1930) 30 COL. L. REV. 802, 819, "The obvious remedy is not to change the definition of the 'cause of action,' but it is to change the rule."

[54] FED. RULES CIV. PROC. (1938), Rule 15. Amendments and Supplemental Pleadings.

ALA. CODE ANN. (Michie, 1928) §9513.

ILL. ANN. STAT. (Smith-Hurd, 1936) c. 110, §170(2). "The cause of action . . . set up in any amended pleading shall not be barred . . . under any statute or contract prescribing or limiting the time within which any action may be brought or right asserted, if the time prescribed or limited had not expired when the original pleading was filed and if it shall appear from the original and amended pleading that the cause of action asserted . . . in the amended pleading grew out of the same transaction or occurrence set up in the original pleading . . . any such amendment to any such pleading shall be held to relate back to the date of the filing of the original pleading so amended." Illinois followed a very strict rule prior to this statute. See 240 Ill. 259, 88 N. E. 651, commented on in (1927) 76 U. PA. L. REV. 756.

2 WASH. REV. STAT. ANN. (Remington, 1932) §308-3. "A cause of action which would not have been barred by the statute of limitations if stated in the original complaint or counterclaim shall not be so barred if introduced by amend-

North Carolina amendment statutes are closely in accord with the Federal Rules[55] except in connection with the all important matter of relation back. The relation back provision of the Federal Rules is as follows:

"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."[56]

This rule does not defeat the legitimate use of the statute of limitations. It does, however, prevent the defendant from defeating the plaintiff's claim on a technicality in the pleading. This is the desired result and avowed purpose of modern pleading. The adoption of the above provision from the Federal Rules by the North Carolina legislature would clarify the present confusion on this issue and place the North Carolina rules of pleading in accord with the liberal and just practice of modern pleading.

WILLIAM A. DEES, JR.

Survival of Personal Injury Actions in North Carolina

In a recent case,[1] the North Carolina Supreme Court held that where a person is injured by the actionable negligence of another, and later dies as the result of such injuries, a cause of action for consequential damages sustained by the injured person between the date of the injury and the date of the death survives to the personal representative of such deceased person. Prior to 1915, it was the unquestioned[2] law of this jurisdiction that such causes of action did not survive. Causes of action for personal injury not causing death were expressly denied survival by the statute.[3] It was held that the legislature, in denying survival to causes of action where the injury did not cause the death

ment at any later stage of the action, if the adverse party was fairly apprised of its nature by the original pleading, and that the plaintiff was claiming thereunder, provided no new party is added thereby."

[55] Compare N. C. GEN. STAT. §1-161 with Fed. Rule 15(a); compare N. C. GEN. STAT. §1-163 with Fed. Rule 15(b); compare N. C. GEN. STAT. §1-167 with Fed. Rule 15(d); see Nassaney v. Culler, 224 N. C. 323, 30 S. E. (2d) 226 (1944); cited *supra* note 10.

[56] Applied with approval in Tiller v. Atlantic Coast Line R. R., 323 U. S. 574, 65 S. Ct. 421, 89 L. ed. 465 (1944). See also MOORE, FEDERAL PRACTICE §15.08; Notes (1944) 23 N. C. L. REV. 141, 145; (1930) 40 YALE L. J. 311.

[1] Hoke v. Atlantic Greyhound Corp. *et al.*, 226 N. C. 332, 38 S. E. (2d) 105 (1946).

[2] *But cf.* Peebles v. N. C. R. R., 63 N. C. 238 (1869). Prior to enactment of survival statute, causes of action for personal injury were held to survive under REVISED CODE (1868), c. 1, §1; now N. C. GEN. STAT. (1943) §1-22.

[3] N. C. REVISAL (1905) §157(2); now, as amended, N. C. GEN. STAT. (1943) §28-175.

and in creating a new cause of action by the wrongful death statute where the injury did cause the death, intended to deny survival to all causes of action for personal injury.[4] An amendment in 1915[5] struck from the list of actions denied survival the following: ". . . or other injuries to the person where such injury does not cause the death of the injured party." Prior to the principal case, it was held[6] that under the amendment causes of action for personal injury arising from a negligent act, the injury not causing death, survived; and by *obiter dicta* that all such causes of action for personal injury, regardless of the cause of death, would survive. In the principal case, the court following this *dicta* and supported by a federal case[7] in accord held that where a person dies as the result of injuries sustained by the actionable negligence of another, the right of action for personal injury existing in the deceased at the time of death survives to the personal representative of the deceased persons; the damages recoverable—i.e., such damages as were sustained by the deceased during his lifetime—are an asset of the estate to be administered as other property possessed by the deceased at his death; and the survival of such right of action does not affect the accrual of the cause of action under the wrongful death statute.

By a combination of the holdings of the two cases[8] construing the survival statute as amended, and from the terms of the survival statute,[9] it is clear that where a right of action exists as the result of injuries sustained by negligence and either the injured person or the negligent tortfeasor dies, the right of action for personal injury survives to or against the personal representative of the deceased person. The death of the tortfeasor, either before or after the accrual of a cause of action for wrongful death, would not affect the death action due to the provision of the wrongful death statute that such actions can be maintained against the personal representative of a deceased tortfeasor.[10]

The result of these two holdings, then, is to place rights of action for personal injury within the terms of the general section[11] rather than the excepting section[12] of the survival statute. It follows, therefore, that all rights of action for personal injury survive to and against the personal representative unless otherwise denied survival by the statute.

[4] Edwards v. Interstate Chemical Co., 170 N. C. 551, 87 S. E. 635, L. R. A. 1916 D. 635 (1915); Watts v. Vanderbilt, 167 N. C. 567, 83 S. E. 813 (1914); Bolick v. Southern Ry., 138 N. C. 370, 50 S. E. 689 (1905).

[5] N. C. Pub. Laws 1915, c. 38.

[6] Fuquay v. A. & W. R. R., 199 N. C. 499, 155 S. E. 167 (1930).

[7] James Baird & Co. v. Boyd, 41 F. (2d) 578 (C. C. A. 4th, 1930).

[8] Hoke v. Atlantic Greyhound Corp., 226 N. C. 332, 38 S. E. (2d) 105 (1946); Fuquay v. A. & W. R. Co., 199 N. C. 499, 155 S. E. 167 (1930).

[9] N. C. GEN. STAT. (1943) §§28-172 and 28-175.

[10] Tonkins v. Cooper, 187 N. C. 570, 122 S. E. 294 (1924).

[11] N. C. GEN. STAT. (1943) §28-172.

[12] N. C. GEN. STAT. (1943) §28-175.

Since the excepting section denies survival to rights of action for assault and battery,[13] it would seem that rights of action for personal injury arising out of an assault and battery would not survive. Whether this will be held to extend to all wilful injury cases, and thereby limit the present holdings to negligence cases, remains open for decision. If the present holdings are so limited, there will probably be further legislation, since it would seem unjust to allow survival against a negligent tortfeasor and deny survival against a wilful tortfeasor.

The court went to pains to make it clear that the right of the injured person to sue for personal injury of any kind was separate and distinct from the right of the personal representative to sue under the right of action conferred by the wrongful death statute. The former right is personal to the deceased during his lifetime, and upon death survives as an asset of his estate to his personal representative; while on the other hand, the latter right accrues to the personal representative at the date of death, not as an asset of the estate, but for the benefit of a particular class of beneficiaries. It was further pointed out that although both rights of action have as a basis the same wrongful act, there is no overlapping of damages recoverable since the measure of damages in each case is determinable upon separate elements of damage. It will be noted that the court refers to and distinguishes two rights of action. Does this mean, as to the personal representative, that there is one cause of action or two?

It is clear that the personal representative is the only person who can sue on either claim,[14] and there is but one wrongful act giving rise to both claims. Furthermore, it is clear that ordinarily when two personal rights of the same person are infringed upon by the same wrongful act but one cause of action exists.[15] However, there are here numerous grounds for distinction. The rights involved in the issue at hand have separate and distinct sources,[16] each accrues as against the tortfeasor at different times,[17] each is subject to a different limitation,[18] each recovery involves different elements of damage,[19] each

[13] N. C. GEN. STAT. (1943) §28-175(2).

[14] Personal injury: N. C. GEN. STAT. (1943) §28-172; Suskin v. Maryland Trust Co., 214 N. C. 347, 199 S. E. 276 (1938). Wrongful death: Hanes v. Southern Pub. Util. Co., 191 N. C. 13, 131 S. E. 402 (1925); Hood v. Amer. Tel. & Tel. Co., 162 N. C. 70, 77 S. E. 1096 (1913).

[15] Eller v. Carolina & N. W. R., 140 N. C. 140, 52 S. E. 305, 3 L. R. A. (N. S.) 225 (1905); *cf.* Underwood v. Dooly, 197 N. C. 100, 147 S. E. 686, 64 A. L. R. 656 (1929) (one cause of action exists, but insurer may sue on subrogation).

[16] The right against personal injury is a natural common law right, while the right against death is purely statutory.

[17] The personal injury action accrues at the date of the injury, while the death action accrues at the date of death. Hoke v. Atlantic Greyhound Corp., 226 N. C. 332, 337, 38 S. E. (2d) 105, 109 (1946).

[18] The injury action is subject to a three year limitation. N. C. GEN. STAT. (1943) §1-52(5); while the death action must be commenced within one year of the death as a condition precedent to the action, Curlee v. Duke Power Co., 205

recovery is for a different purpose,[20] and the decedent never possessed the right to sue for wrongful death.[21] Furthermore, it is held that rights given by a statute, as compared with natural rights or rights given by other statutes, give rise to an independent cause of action.[22] It would seem, therefore, that two causes of action exist.[23]

Assuming then, that two causes of action exist, may they be properly joined in one action? In the principal case the two actions had been joined, but this joinder was not questioned on appeal, and the court made no comment thereon. Under the joinder statute,[24] a joinder of causes of action arising out of the same transaction is permissive. It is evident that the causes of action in question arise out of the same transaction—i.e., the wrongful act of the tortfeasor—and could, therefore, be joined. Question, however, might arise as to the joinder of the parties, since the personal representative is suing in two different fiduciary capacities.[25] However, he is the only person permitted to maintain either action.[26] It would seem that in view of the announced purpose of allowing a joinder of all actions existing between the parties whenever possible,[27] the dual capacity of the personal representative would not prevent a joinder of the actions,[28] since the dual capacity in itself could not prejudice the defendant. There would also seem to be a question as to the present standing of the line of cases holding that the personal representative cannot, by amending a personal injury action

N. C. 644, 172 S. E. 329 (1933); Trull v. Seaboard Air Line Ry., 151 N. C. 545, 66 S. E. 586 (1909).

[19] The damages recoverable in the injury action are those suffered by the injured party during his lifetime, Hoke v. Atlantic Greyhound Corp., 226 N. C. 332, 337, 38 S. E. (2d) 105, 109 (1946); while the damages recoverable in the death action are the compensation for the injury resulting from the death. N. C. GEN. STAT. (1943) §28-174.

[20] The damages recovered in the injury action are an asset of the estate, Hoke v. Atlantic Greyhound Corp., 226 N. C. 332, 337, 38 S. E. (2d) 105, 109 (1946); while the damages recovered in the death action are for a particular class of beneficiaries. N. C. GEN. STAT. (1943) §28-173.

[21] Hoke v. Atlantic Greyhound Corp., 226 N. C. 332, 38 S. E. (2d) 105 (1946).

[22] Fuquay v. A. & W. Ry., 199 N. C. 499, 155 S. E. 167 (1930); Capps v. A. C. L. R. R., 183 N. C. 181, 111 S. E. 533 (1922).

[23] Murphy v. St. L. I. M. & S. R. R., 92 Ark. 159, 122 S. W. 636 (1909); Stewart v. Electric Light & Power Co., 104 Md. 332, 65 Atl. 49, 8 L. R. A. (N. S.) 384, 118 Am. St. Rep. 410 (1906); Bowen v. City of Boston, 155 Mass. 344, 29 N. E. 633, 15 L. R. A. 365 (1892); Gorman v. Columbus & So. Ohio Electric Co., 144 Ohio St. 593, 60 N. E. (2d) 700 (1944); May Coal Co. v. Robinette, 120 Ohio St. 110, 165 N. E. 576, 64 A. L. R. 441 (1929); Brown v. Chicago & N. W. R. R., 102 Wis. 137, 77 N. W. 748, 44 L. R. A. 579 (1898).

[24] N. C. GEN. STAT. (1943) §1-123.

[25] In the personal injury action he is suing for the benefit of the estate, while in the death action he is suing for the benefit of a special class of beneficiaries. See note 20 *supra*.

[26] See note 14 *supra*.

[27] Gregory v. Hobbs, 93 N. C. 1 (1885); Hamlin v. Tucker, 72 N. C. 502 (1875).

[28] Moyer v. City of Oshkosh, 151 Wis. 586, 139 N. W. 378 (1913); Nemecek v. Filler & Stowell Co., 126 Wis. 71, 105 N. W. 225 (1905).

commenced by the deceased, allege a cause of action for wrongful death.[29] When this rule was laid down, the action commenced by the deceased abated at death, and the amendment was not a mere joining of two causes of action but a substitution of one action for the other. Today, since the personal representative may continue the suit commenced by his deceased, and the amendment would be a mere joining thereto of the death action, it would seem that such joinder should be allowed.[30] However, the date of the amendment would have to be within one year of the death, as the death action could not date from the comemncement of the prior action.[31]

If, then, there be two causes of action which may be joined, would a recovery, release, or bar in one action by the personal representative bar a recovery on the other action under the doctrine of *res judicata*? It is well established in this jurisdiction and elsewhere that a recovery or release by the injured person will bar the accrual of the death action.[32] This holding would not necessarily apply when the personal representative has recovered on one cause or has given a release, since the basis of the former holding was laid on the terms of the wrongful death statute and not on *res judicata*.[33] A judgment is decisive between the parties as to all points raised by the pleadings, or which might properly be predicated upon them,[34] but this does not embrace any matter which might have been brought into the litigation, or any causes of action which might have been joined, but which in fact were neither joined nor embraced in the pleadings.[35] In order to support a plea of *res judicata*, there must be identity of parties, subject matter, and issues.[36] The court in the principal case clearly pointed out that the issue of damage

[29] Edwards v. Interstate Chemical Co., 170 N. C. 551, 87 S. E. 635, L. R. A. 1916D 121 (1915); Bolick v. Southern Ry., 138 N. C. 370, 50 S. E. 689 (1905).

[30] The cases cited *supra* note 29 have language to the effect that a joinder would not be possible since the death action has not accrued at the commencement of the prior action; however, the court has held that this fact would not in itself preclude such an amendment, provided the pleadings as amended do not allege a wholly distinct claim which does not stem out of the original transaction. Nassaney v. Culler, 224 N. C. 323, 30 S. E. (2d) 226 (1944).

[31] *Ibid.*

[32] Edwards v. Interstate Chemical Co., 170 N. C. 551, 87 S. E. 635, L. R. A. 1916D 121 (1915); see TIFFANY, DEATH BY WRONGFUL ACT (2nd ed.) §124, and cases there cited. *But see* Schumacher, *Rights of Action Under Death and Survival Statutes* (1924) 23 MICH. L. REV. 114, 119.

[33] Edwards v. Interstate Chemical Co., 170 N. C. 551, 87 S. E. 635, L. R. A. 1916D 121 (1915) (the terms of the wrongful death statute ". . . such as would, if the injured party had lived, have entitled him to an action for damages therefor" require the existence of a right of action in the deceased at the date of death as a condition precedent to the accrual of the action).

[34] Jefferson v. Southern Land Sales Corp., 220 N. C. 76, 16 S. E. (2d) 462 (1941); Burton v. Carolina Light & Power Co., 217 N. C. 1, 6 S. E. (2d) 822 (1939).

[35] Stancil v. Wilder, 222 N. C. 706, 24 S. E. (2d) 527 (1942); Whitaker v. Garren, 167 N. C. 658, 83 S. E. 759 (1914); Ledwick v. Penny, 158 N. C. 104, 73 S. E. 228 (1911).

[36] Leary v. Va.-Car. Land Bank, 215 N. C. 501, 2 S. E. (2d) 570 (1939).

in each case is determinable upon separate and distinct elements of damage, and there could be no overlapping of damages recoverable. Therefore, it would seem that unless the pleadings in the action brought by the personal representative embraced all the points necessary for determining the elements of damage in both actions, and all the elements were submitted on the issue of damages, there would be no identity of issues.[37] However, it is clear that the issues determined in the action would be not open to question in the second action.[38] It follows, therefore, that an adverse verdict on the issue of negligence would bar the second action. The effect of a release by the personal representative would depend upon the terms of the release, and whatever rights were released in the contemplation of the parties would be barred.[39] Furthermore, as to the personal representative, it would seem that neither the bar of the statute of limitations on the personal injury action nor the failure to bring the wrongful death action within one year of the death would bar a recovery on the other action, since each action is separate and distinct, and subject to a different limitation.[40] It follows therefore, that a recovery, release or bar as to either of the causes of action by the personal representative will not bar a recovery on the other cause of action under the doctrine of *res judicata.*[41]

Inquiring further into the nature of the surviving action, is a cause of action for personal injury, standing alone, an asset in this jurisdiction such as would support the establishment of an ancillary administration of a deceased nonresident injured within this jurisdiction? It has been repeatedly held that the cause of action for wrongful death is an asset which will support the establishment of an ancillary administration.[42] The basis of this holding is laid on the premise that, although the recovery in the wrongful death action is not an asset of the estate, to hold otherwise would defeat the purpose of the statute. The same result would more logically follow as to the cause of action surviving under the survival statute since the recovery thereon is an asset of the estate. Furthermore, a cause of action for personal injury is a chose in action;[43]

[37] Connor v. Connor, 223 N. C. 664, 28 S. E. (2d) 240 (1943).
[38] Leary v. Va.-Car. Land Bank, 215 N. C. 501, 2 S. E. (2d) 570 (1939).
[39] Electric Supply Co. v. Burgess, 223 N. C. 97, 25 S. E. (2d) 390 (1943); Merrimon v. Postal Tel. & Cable Co., 207 N. C. 101, 176 S. E. 246 (1934).
[40] See note 18 *supra.*
[41] Murphy v. St. L. I. M. & S. R. R., 92 Ark. 159, 122 S. W. 636 (1909); Stewart v. United Electric Light & Power Co., 104 Md. 332, 65 Atl. 49, 8 L. R. A. (N. S.) 384, 118 Am. St. Rep. 410 (1906); Mahoning Valley Ry. v. Van Alstine, 77 Ohio St. 395, 83 N. E. 601, 14 L. R. A. (N. S.) 893 (1908); *see* Brown v. Chicago & N. W. R. R., 102 Wis. 137, 77 N. W. 748, 44 L. R. A. 579 (1898).
[42] Fann v. N. C. R. R., 155 N. C. 136, 71 S. E. 81 (1911); Vance v. R. R., 138 N. C. 460, 50 S. E. 860 (1905).
[43] Northern Texas Traction Co. v. Hill, —— Tex. Civ. App. ——, 297 S. W. 778 (1927); Sharp v. Cincinnati N. O. & T. P. Ry., 133 Tenn. 1, 179 S. W. 375 (1915).

a chose in action[44] or a right of action is property;[45] and property is an asset.[46] Thus whether the court follow its result as to the wrongful death action or apply the foregoing logic, it would seem that a cause of action for personal injury, standing alone, is an asset which will support the establishment of an ancillary administration.

If the court should not reach this result, it would seem that a right of action surviving under the statute to a nonresident would be of no value if service or recovery could not be had elsewhere. It is clear that where a right of action for personal injury accrues in a state other than the domicil of the deceased, the law of the scene of the injury decides whether there is a survival of the right of action.[47] Since a personal injury action is transitory,[48] if the action survive, it may be prosecuted in a state other than the scene of the injury, and that state will enforce the right provided jurisdiction may be had of all the necessary parties, and the enforcement of such right is not contrary to the public policy of the forum[49] or the laws of the forum are not so different from the laws of the scene of the injury as to work an injustice on the defendant.[50] It is evident, therefore, that where a nonresident is injured in this jurisdiction and later dies, and either service cannot be obtained on the tortfeasor in the domiciliary state, or the laws of that state are such that there can be no recovery on the surviving right of action, the personal representative must proceed either in this state, where the right accrued, or in some state where service and recovery may be had. Since a foreign administrator or executor cannot sue in this jurisdiction,[51] it would be necessary for ancillary administration to be established here.

Finally, what is the measure of consequential damages recoverable? The court in broad terms lays down the general measure: those damages resulting to the deceased during his lifetime.[52] The court made it clear, however, that the various elements of the consequential damages constitute but one cause of action.[53] The elements of damage would seem

[44] *Ibid.*; *In re* Morace, 111 Md. 372, 74 Atl. 375 (1909).

[45] Chubbuck v. Holloway, 182 Minn. 225, 234 N. W. 314 (1931); Loucks v. Standard Oil Co., 224 N. Y. 99, 120 N. E. 189 (1918).

[46] See "Assets," BLACK'S LAW DICTIONARY (3rd ed. 1933), p. 153. In general see 4 WORDS AND PHRASES, p. 464; 21 AM. JUR., p. 475.

[47] Chubbuck v. Holloway, 182 Minn. 225, 234 N. W. 314 (1931); Potter v. First Nat. Bank of Morristown, 107 N. J. Eq. 72, 151 Atl. 546 (1930); see BEALE, THE CONFLICT OF LAWS (1935) §309.1.

[48] MacGovern & Co. v. A. C. L. R. R., 180 N. C. 219, 104 S. E. 534 (1920).

[49] Chubbuck v. Holloway, 182 Minn. 225, 234 N. W. 314 (1931). *But see* Clough v. Gardiner, 111 Misc. 244, 182 N. Y. S. 803 (1920).

[50] Higgins v. N. Y. & N. E. R. R., 155 Mass. 176, 29 N. E. 534, 31 Am. St. Rep. 544 (1892); Rodwell v. Camel City Coach Co., 205 N. C. 292, 171 S. E. 100 (1933).

[51] Hall v. Southern Ry., 149 N. C. 108, 65 S. E. 899 (1908); Monfils v. Hazlewood, 218 N. C. 215, 10 S. E. (2d) 67 (1940) (such holding does not abridge U. S. Const.).

[52] Hoke v. Atlantic Greyhound Corp., 226 N. C. 332, 38 S. E. (2d) 105 (1946).

[53] *Id.* at 338, 8 S. E. (2d) at 110.

to include actual expenses for nursing and medical service; loss of income;[54] suffering, both mental and physical;[55] and any other injury which naturally and directly are proximate consequences of the wrongful act[56] and which are not elements of damage in the death action. Punitive damages should not be awarded.[57] If there were an injury to the property of the injured person as a result of the wrongful act, such property damages must be recovered in the same action with the personal injury damages.[58] It would seem that such elements of damage as permanency of injuries and loss of earning capacity would not be included since these elements are a part of the elements of damage resulting from the death.[59] It is clear that neither interest[60] nor attorney fees[61] are recoverable as damages.

Only those questions which it is felt the court will of necessity be called upon to answer in the near future have been brought within the scope of this note. Since the principal case clarifies the existence of a cause of action which prior to 1915 did not exist and since 1915 evidently was not understood by the bar to exist, it is certain that many other questions will be presented for determination.

LOUIS J. POISSON, JR.

Gifts of Corporate Stock—Transfer on Corporation Books to Donor and Donee Jointly

In *Buffaloe v. Barnes*[1] a purchaser of 70 shares of corporate stock directed that the certificate be issued in the names of himself and his niece "as joint tenants with right of survivorship, and not as tenants in common." He told the broker handling the transaction that he wanted it that way so that if he pre-deceased her it would belong outright to her, and if she pre-deceased him it would belong outright to him. The certificate was delivered to him and was found at his death in his safety deposit box. A dividend check payable to both had been indorsed by her and delivered to him. Alleging a gift *inter vivos,* she claimed the shares as survivor in the joint tenancy. In an action by the executor

[54] Ledford v. Valley River Lumber Co., 183 N. C. 614, 112 S. E. 421 (1922); Rushing v. Seaboard Air Line Ry., 149 N. C. 158, 62 S. E. 890 (1908).

[55] Britt v. Carolina Northern R. R., 148 N. C. 37, 61 S. E. 601 (1908), *rehearing denied,* 149 N. C. 581, 64 S. E. 1135 (1908) (physical injury must accompany mental suffering).

[56] Lane v. Southern Ry., 192 N. C. 287, 134 S. E. 855, 51 A. L. R. 1114 (1926).

[57] Rippey v. Miller, 33 N. C. 247 (1850).

[58] See note 15 *supra.*

[59] Poe v. Raleigh & A. A. L. R. R., 141 N. C. 525, 54 S. E. 406 (1906); Burton v. Wilmington R. R., 82 N. C. 505 (1880).

[60] Penny v. A. C. L. R. R., 161 N. C. 523, 77 S. E. 774, Ann. Cas. 1914D 992 (1913).

[61] Crutchfield v. Foster, 214 N. C. 551, 200 S. E. 395 (1938).

[1] 226 N. C. 313, 38 S. E. (2d) 222 (1946), *petition to rehear denied,* 226 N. C. app. (Oct. 9, 1946).

to determine title to the 70 shares, heard on an agreed statement of facts, the parties conceded that she was entitled to one half of the stock in any event. The trial judge's ruling, based on the agreed facts, that she had title to all the stock was reversed on appeal, two justices dissenting. The court said that the facts agreed upon were insufficient to support that conclusion; that "it would not seem to follow [from the agreed facts] as a necessary conclusion of law that a present gift was intended."

The well known general requirements for making a valid gift of personalty are donative intent, delivery, and acceptance.[2] Where the subject of the gift is capable of manual delivery, actual delivery is necessary to consummate a gift; otherwise there must be such delivery as the nature of the property and the surrounding circumstances reasonably permit, clearly showing the donor's intention to part with title and possession and vest the same in the donee.[3] In cases where manual delivery is impossible or impracticable, delivery may be symbolical or constructive.[4] A delivery is symbolical when another object or token representing the property is handed over instead of the thing itself.[5] A constructive delivery is delivery of the means of obtaining possession and control of the subject matter of the gift, or the relinquishment in any manner to the donee of the donor's control and dominion over the property. A simple example of constructive delivery is a gift of property that is locked away by a delivery of the key.[6]

It is agreed that delivery need not necessarily be directly to the donee. It may be to a third person for him,[7] or the donor may constitute himself trustee for the donee.[8] Another rule is that the gift must be fully executed in the present, and not be intended to take effect in the future.[9] But if a valid gift be made, the fact that the donee's enjoyment of the gift is postponed until some future time, and that the donor retains possession to receive the income from the property during his lifetime do not invalidate the gift.[10] Acceptance of the gift is generally held to be a requisite,[11] but acceptance of a gift beneficial to the donee will be presumed.[12]

[2] 24 AM. JUR., Gifts §§21, 24, 40; BROWN, A TREATISE ON THE LAW OF PERSONAL PROPERTY (1936 ed.) §37.
[3] Hudgens v. Tillman, 227 Ala. 672, 151 So. 863 (1933).
[4] Newman v. Bost, 122 N. C. 524, 29 S. E. 848 (1898); Brown, *op. cit. supra* note 2, §41.
[5] Lavender v. Pritchard, 3 N. C. 337 (1805).
[6] Newman v. Bost, cited *supra* note 3; Brown, *op. cit. supra* note 2.
[7] Payne v. Tobacco Trading Corp., 179 Va. 156, 18 S. E. (2d) 281 (1942).
[8] 38 C. J. S., Gifts §26.
[9] Pomerantz v. Pomerantz, 179 Md. 436, 19 A. (2d) 713 (1941).
[10] Smith v. Commissioner of Internal Revenue, 59 F. (2d) 533 (C. C. A. 9th, 1932); Lynch v. Lynch, 124 Cal. App. 454, 12 P. (2d) 741 (1932).
[11] 24 AM. JUR., Gifts §40.
[12] Grissom v. Sternberger, 10 F. (2d) 764 (C. C. A. 4th, 1926).

The law applies these same age-sanctioned rules to gifts of choses in action, including corporate stock, although much difficulty is encountered due to the dissimilarity in subject matter.[13] Therefore, a gift of stock may be made by delivery of the certificate with or without indorsement to the donee, if a present gift be intended.[14] The usual statutory provision that transfer be made on the corporation books is uniformly considered to be for the benefit of the corporation only, and does not affect the validity of the gift as between the parties.[15]

The conflict in the decisions arises over the question whether transfer on the corporation books without delivery of the certificate to the donee can constitute constructive delivery sufficient to pass title.[16] With no outside evidence of delivery in its traditional sense available, the question of donative intent becomes vital.[17] An examination of the cases discloses that the results reached reflect in most instances the varying amounts of evidence present either supporting or negativing the existence of donative intent.[18] For this reason it clarifies the problem to classify the cases according to whether or not they contain evidence regarding donative intent.[19]

[13] See Mechem, *Gifts of Corporation Shares* (1925) 20 ILL. L. REV. 9.

[14] Grissom v. Sternberger, 10 F. (2d) 764 (C. C. A. 4th, 1926); Jones v. Waldroup, 217 N. C. 178, 7 S. E. (2d) 366 (1940).

[15] Cases cited *supra* note 14.

[16] Annotations: 99 A. L. R. 1080; 152 A. L. R. 427.

[17] Ball v. Forbes, 314 Mass. 200, 49 N. E. (2d) 898 (1943).

[18] Cases cited *infra* note 19.

[19] **Cases upholding gifts containing evidence of donative intent:**

Gifts to donor and donee jointly: Abegg v. Hirst, 144 Iowa 196, 122 N. W. 838 (1909); Bunker v. Fidelity National Bank and Trust Co., 335 Mo. 305, 73 S. W. (2d) 242 (1934); Benton v. Smith, —— Mo. App. ——, 171 S. W. (2d) 767 (1943); Jones v. Waldroup, 217 N. C. 178, 7 S. E. (2d) 366 (1940); *In re* Hutchison's Estate, 120 Ohio St. 542, 166 N. E. 687 (1929); Simonton v. Dwyer, 167 Ore. 50, 115 P. (2d) 316 (1941).

Gifts of entire ownership: Jean v. Jean, 207 Cal. 115, 277 Pac. 313 (1929); Lynch v. Lynch, 124 Cal. App. 454, 12 P. (2d) 741 (1932); Thomas v. Thomas, 70 Colo. 29, 197 Pac. 243 (1921); Chicago Title & Trust Co. v. Ward, 332 Ill. 126, 163 N. E. 319 (1928); *In re* Dayton's Estate, 121 Neb. 402, 237 N. W. 303 (1931); *In re* Brady's Estate, 228 App. Div. 56, 239 N. Y. Supp. 5 (1930); Crouse v. Judson, 41 Misc. 338, 84 N. Y. Supp. 755 (1903); Ellsworth v. Ellsworth, 151 S. W. (2d) 628 (Tex. 1941); Payne v. Tobacco Trading Corp., 179 Va. 156, 18 S. E. (2d) 281 (1942); Moore v. Van Tassell, 58 Wyo. 121, 126 P. (2d) 9 (1942).

Cases upholding gifts where there was no evidence regarding donative intent except the transfer on the corporation books:

Gifts to donor and donee jointly: Irvine v. Helvering, Commissioner of Internal Revenue, 99 F. (2d) 265 (C. C. A. 8th, 1938); Eisenhardt v. Lowell, 105 Colo. 417, 98 P. (2d) 1001 (1940); *In re* Martin's Estate, 266 S. W. 750 (Mo. App. 1924); East Rutherford Savings, Loan & Bldg. Assn. v. McKenzie, 87 N. J. Eq. 375, 100 Atl. 931 (1917); Manning v. United States National Bank of Portland, 174 Ore. 118, 148 P. (2d) 255 (1944).

Gifts of the entire ownership: Marshall v. Commissioner of Internal Revenue, 57 F. (2d) 633 (C. C. A. 6th, 1932); Whitney v. Whitney Elevator & Warehouse Co., 121 Misc. 461, 200 N. Y. Supp. 792 (1923); Francis v. New York and B. E. Ry., 108 N. Y. 93, 15 N. E. 192 (1888); Sparks v. Hurley, 208 Pa. 166, 57 Alt. 364, 101 Am. St. Rep. 926 (1904); Robert's Appeal, 85 Pa. 84 (1877); Copeland v. Craig, 193 S. C. 484, 8 S. E. (2d) 858 (1940); Phillips v. Plastridge, 107 Vt. 267,

The theory of some of the cases ruling the gifts invalid is that the transfer on the books is ineffective unless the certificate be delivered to the donee, on the view that as long as the owner holds the certificate he retains dominion and control over the stock and can revoke the gift at will; that it is an attempt to make a gift to take effect *in futuro*.[20] They say that, as far as appears, the owner had the transfer made for his own convenience rather than as a gift, and there is no evidence that he intended a present irrevocable transfer of title.[21] But significantly, in most of the cases holding this way there was evidence tending to show that there was actually no donative intent, which was the controlling element; although some of them also stated that even if a gift was intended, this transaction was ineffective as delivery.[22] Moreover, a fair proportion of these opinions declared that transfer on the books would have been a perfectly good way to make delivery except for the absence of donative intent.[23]

For example, in *Besson v. Stevens*[24] every indication was that the donor did not intend a present irrevocable gift, and it was accordingly held that such transfer was not delivery and that the donor could have revoked the gift at any time and compelled the company to re-transfer the stock to him. But the court said that that case was not inconsistent with an earlier New Jersey case[25] which upheld a similar transfer to donor and donee jointly where there was nothing to disprove donative

179 Atl. 157, 99 A. L. R. 1074 (1935); *In re* King's Estate, 49 Wyo. 453, 57 P. (2d) 675 (1936).

Cases denying the validity where there was evidence disproving donative intent:

Southern Industrial Institute v. Marsh, 15 F. (2d) 347 (C. C. A. 5th, 1926); Hudgens v. Tillman, 227 Ala. 672, 151 So. 863 (1933); Hart v. Hart, 272 Ky. 488, 114 S. W. (2d) 747 (1938); White v. White, 17 S. W. (2d) 733 (Ky. 1929); Bauernschmidt v. Bauernschmidt, 97 Md. 35, 54 Atl. 637 (1903) (joint ownership); Dover Cooperative Bank v. Tobin's Estate, 86 N. H. 209, 166 Atl. 247 (1933); Zimmerman v. Nauhauser, 119 N. J. Eq. 424, 183 Atl. 820 (1936); Crane v. I. Seymour Crane, Inc., 100 N. J. Eq. 400, 135 Atl. 782 (1927); Besson v. Stevens, 94 N. J. Eq. 549, 120 Atl. 640 (1923); Reiley v. Fulper, 93 N. J. Eq. 112, 115 Atl. 661 (1921); Frazier v. Oklahoma Gas & Electric Co., 178 Okla. 512, 63 P. (2d) 11 (1936); Figuers v. Sherrell, 181 Tenn. 87, 178 S. W. (2d) 629, 152 A. L. R. 420 (1944); Swan v. Swan's Ex'r, 136 Va. 496, 117 S. E. 858 (1923).

Cases denying the validity of gifts where there was no evidence regarding donative intent:

Speaker v. Keating, 122 F. (2d) 706 (C. C. A. 2nd, 1941); Witthoft v. Commercial Development & Investment Co., 46 Idaho 313, 268 Pac. 31 (1928); Getchell v. Biddeford Savings Bank, 94 Me. 452, 47 Atl. 895, 80 Am. St. Rep. 408 (1900); Matter of Crawford, 113 N. Y. 560, 21 N. E. 692, 5 L. R. A. 71 (1889).

[20] See note 19 *supra*.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] 94 N. J. Eq. 549, 120 Atl. 640 (1923) (corporation president transferred stock to daughter on books, certificate remaining in company safe; he took an assignment back from her with an irrevocable power of attorney for him to transfer the stock on the books to him or his nominee; told her he had "put it in her name," wanted it to come back to him if she died first, and at his death to come back to the estate to enable equal distribution to all children).

[25] East Rutherford Savings, Loan & Bldg. Assn. v. McKenzie, 87 N. J. Eq. 375, 100 Atl. 931 (1913).

intent; perhaps implying that gifts of joint estates are exempt from the rule announced in the *Besson* case. In a Virginia case where the showing was clearly against donative intent[26] the court held that it was not a gift, but declared that this transaction was exactly the right way to pass title, making the donee prima facie owner; and in the absence of proof contrary to donative intent the latter would be entitled to it. Other cases presented in the footnote involve similar situations.[27]

A few of the opinions cited in the principal case involved joint bank deposits,[28] which have been even more fruitful of litigation than stock transfers.[29] In one case where the evidence was that no executed gift was intended[30] the court said that such a deposit certificate was prima facie evidence of donative intent, and, in the absence of facts disproving it, would be sufficient delivery make a valid gift.[31] A Massachusetts case said that the transaction with the bank would constitute delivery and effect a present gift if that result were intended; but that it was still open to the donor's executor to show by attendant facts and circumstances that a present gift was not intended.[32]

Four cases were found ruling the gifts invalid where there were no facts disproving donative intent, two of them being stock transfers.[33]

[26] Swan v. Swan's Ex'r, 136 Va. 496, 117 S. E. 858 (1923) (husband transferred stock to his wife and kept certificate, voted stock, collected dividends, listed it among his assets, made a will attempting to dispose of income from it, and erased the "s" from "Mrs." in the certificate).

[27] Southern Industrial Institute v. Marsh, 15 F. (2d) 347 (C. C. A. 5th, 1926) (shareholder directed transfer on corporation books but had the company return the certificate to him because he wanted to deliver it personally and exact an agreement from the donee reserving the dividends for life; he died before delivery).

Hudgens v. Tillman, *227* Ala. 672, 151 So. 863 (1933) (stockholder threatened with alimony suit transferred stock to daughter's name, sent certificate to son-in-law with letter disclaiming donative intent, asking latter to keep both in his safety deposit box and tell no one).

Figuers v. Sherrell, 181 Tenn. 87, 178 S. W. (2d) 629, 152 A. L. R. 420 (1944) (bank shareholder had certificate issued in nephew's name, kept certificate, had bank deliver dividend checks and a stock dividend to him, voted and pledged stock, signing nephew's name to dividend checks, proxy, assignment, and power of attorney, all unknown to nephew). Similar evidence is found in the cases disallowing gifts in cases cited *supra* note 19.

[28] Jones v. Fullbright, 197 N. C. 274, 148 S. E. 229 (1929); Nannie v. Pollard, 205 N. C. 362, 171 S. E. 341 (1933); Thomas v. Houston, 181 N. C. 91, 106 S. E. 466 (1921).

[29] See Harold C. Havighurst, *Gifts of Bank Deposits* (1936) 14 N. C. L. REV. 129; annotations: 48 A. L. R. 189; 66 A. L. R. 881; 103 A. L. R. 1123; 135 A. L. R. 993, 149 A. L. R. 879.

[30] Trenton Saving Fund Society v. Byrnes, 110 N. J. Eq. 617, 160 Atl. 831 (1932).

[31] *Id.*

[32] Ball v. Forbes, 314 Mass. 200, 49 A. (2d) 898 (1943).

[33] Speaker v. Keating, 122 F. (2d) 706 (C. C. A. 2nd, 1941) (a mother assigned mortgages to herself and daughter as joint tenants, had them recorded and kept them, taking from the daughter an authority to collect interest); Witthoft v. Commercial Development and Investment Co., 46 Idaho 313, 268 Pac. 31 (1928) (shareholder had certificates issued in names of various relatives and gave them to a business associate, telling him "I want you to be my trustee, and in case of death deliver these to the parties they are made out to"; they were kept in safe

The leading case is *Getchell v. Biddeford Savings Bank*,[34] which stated that as far as appeared the transfer was made for the donor's own convenience, or so that the donee might receive it after his death; and that if a gift was intended it was not perfected by delivery.

On the other hand there are numerous cases sustaining such gifts on the ground that transfer on the books is the equivalent of constructive delivery.[35] In about half of them the facts showed donative intent, whereas in the rest there was again merely the written transaction with the corporation, without any declarations or conduct on the part of the donor showing what had been his intention in directing the transfer.[36]

The North Carolina court sustained the survivor's right to the stock under a transfer quite similar to that in the instant case in *Jones v. Waldroup*, where, however, there was donative intent shown and the certificates were in the possession of the donee.[37] The court observed that *Taylor v. Smith*[38] decided that a joint tenancy in personalty with right of survivorship may be created by contract,[39] and it construed the Waldroup transaction as creating a joint tenancy with survivorship. Further, our court has held that a gift may be made presently passing title to the principal of a note without actual delivery, the donor keeping the note to collect the interest for life.[40] It was said there that the fact that the donee's enjoyment of the gift was postponed until the donor's death did not render the gift revocable or testamentary.

A case on all fours with the principal case is *Eisenhardt v. Lowell*,[41] where the Colorado court upheld the gift, saying that the "unequivocal

to which both had access); Getchell v. Biddeford Savings Bank, 94 Me. 452, 47 Atl. 895, 50 Am. St. Rep. 408 (1900); Matter of Crawford, 113 N. Y. 560, 21 N. E. 692, 5 L. R. A. 71 (1889) (bearer bonds were registered in donee's name, donor retaining certificate and collecting interest).

[34] 94 Me. 452, 47 Atl. 895, 80 Am. St. Rep. 408 (1900) (a bank officer and stockholder had certificates issued in his wife's name, keeping them in the bank vault, drawing dividends and receipting for them in his own name, it not appearing that she knew of the transaction; after her death he induced the bank to reissue them to him. *Held*, her estate was not entitled to the stock).

[35] See note 19 *supra*.

[36] See note 19 *supra*.

[37] 217 N. C. 178, 7 S. E. (2d) 366 (1940) (certificates were issued to "R. M. Waldroup or H. L. Waldroup," his wife; witnesses testified that he had made declarations of gift, and there was testimony that the stock had been purchased with the donee's funds).

[38] 116 N. C. 531, 21 S. E. 202 (1895).

[39] *Id.* It was held there that the statute [N. C. GEN. STAT. (1943) §41-2] abolishing survivorship in joint tenancies does not prohibit persons from contracting as to personalty so as to make the future rights of the parties depend on the fact of survivorship.

That such a joint tenancy may be created by conveyance from one to himself and another, see Irvine v. Helvering, 99 F. (2d) 265 (C. C. A. 8th, 1938).

[40] Parker v. Mott, 181 N. C. 435, 107 S. E. 500, 25 A. L. R. 637 (1921).

[41] 105 Colo. 417, 98 P. (2d) 1001 (1940) (stockholder surrendered his certificate to the corporation and had it re-issued to himself and wife "as joint tenants with right of survivorship, and not as tenants in common"; it was delivered to him and found in his safety deposit box after his death, with no indication that the wife knew of it).

declarations" in the certificate are prima facie evidence of donative intent, and in the absence of contrary proof vest a present right in the stock in the donee, even though the right of enjoyment of the whole is postponed.[42] A South Carolina case, *Copeland v. Craig*,[43] is also identical with the principal case, except that the gift was entire instead of joint, and the court there ruled in favor of the gift. It was said in a Fourth Circuit Court of Appeals decision: "Even if the certificates were not delivered to the new shareholders, the transfers on the books were sufficient to vest the title in the new owners if made by Von Ruck with that intention."[44] And the Vermont court in *Phillips v. Plastridge*[45] upheld the gift even though the certificate was not detached from the stock book and remained in the corporation's custody.[46] Thus in all of the cases examined where there were no signposts pointing in either direction to aid in the search for intent, only a very few ruled against the gift.[47] Of these only two involved stock transfers, and in neither of them was it a transfer in joint ownership.

In all this quarrel over delivery it is appropriate to recall what function delivery has traditionally been supposed to serve; namely, to be the operation whereby the donor parts with title and dominion and vests them in the donee.[48] In view of this, it is suggested that the rule in *Eisenhardt v. Lowell, supra,* that transfer on the books in joint ownership is valid constructive delivery, adequately accomplishes this purpose, especially because of the nature of the joint estate created.[49]

The transfer on the corporation books is not a barren transaction. As between the corporation and the transferee the latter comes into privity with the corporation and assumes the status of a shareholder, having the right to vote in the control of the corporation and share in

[42] *Id.*

[43] 193 S. C. 484, 8 S. E. (2d) 858 (1940) (a father had his certificate re-issued in his daughter's name, and the certificate was found in his safety deposit box at his death; she indorsed dividend checks to him, as in the principal case).

[44] Schoenheit v. Lucas, 44 F. (2d) 476, 487 (C. C. A. 4th, 1930).

[45] 107 Vt. 267, 179 Atl. 157, 99 A. L. R. 1074 (1935) (a father transferred stock to daughter's name without her knowledge, no other evidence appearing).

[46] *Id.* The court said, "Phillips had divested himself of all right and title to the stock, and the complete ownership had passed to his daughter. It was his voluntary act, affording an inference of the existence of donative intent."

In *Simonton v. Dwyer*, 167 Ore. 50, 115 P. (2d) 316 (1941) (a father retained certificates taken out in children's names) in holding it a valid gift the court said that by the transfer the donor "thereby irrevocably placed the stock beyond his control. . . . He thus placed himself in a position that any interference by him with the stock without the consent of the plaintiffs would be unauthorized and unlawful."

[47] See note 33 *supra.*

[48] See Mechem, *The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments* (1926) 21 Ill. L. Rev. 341, 354.

[49] Cases cited *supra* note 19; see Mechem, *Gifts or Corporation Shares* (1925) 20 Ill. L. Rev. 9, 27.

its benefits.[50] Now it was seen that some of the cases say that until delivery of the certificate to the donee the donor still has control over the stock and can compel the company to transfer it back to him, and can deal with it as he wishes.[51] However, he has induced the corporation to accept the donee as a stockholder, with resulting rights and liabilities on both sides.[52] Thenceforth, if the transfer was made with donative intent, it is wrongful on the part of the donor or the corporation to deal with the stock without the assent of the transferee; and throughout the cases upholding such gifts[53] it is reiterated that the donor by the transfer has put it beyond his power lawfully to sell or assign the stock or have the company re-issue it to him without the signature and consent of the donee.[54]

The fact that the donor reserves the right to the dividends during his lifetime does not invalidate the gift.[55] As one court stated it, the reservation of dividends "was merely a limitation on the quantity of the contemplated gift, and in no way affected its validity."[56] Of course, if there never was an intended gift the owner is able to have the stock re-issued to him;[57] but it has been held, where valid gifts were made in this manner and the donor later repudiated the gift, that the donee may compel the donor or the corporation to restore the stock to him.[58]

When we come to gifts creating joint ownership in donor and donee, transfer on the corporation books seems to fulfill the requirements of delivery even more adequately than in the case of a gift of the entire interest, because delivery of the new certificate back to the donor is in effect delivery to one of two joint tenants, and delivery to one is delivery

[50] Webster v. Upton, 91 U. S. 65, 23 L. ed. 384 (1875); Thomas v. Thomas, 70 Colo. 29, 197 Pac. 243 (1921); 6 THOMPSON ON CORPORATIONS (3rd ed.) §§4394, 4335; 11 FLETCHER CYCLOPEDIA CORPORATIONS §5092.

[51] Cases cited *supra* note 19.

[52] Francis v. New York & B. E. Ry., 108 N. Y. 93, 15 N. E. 192 (1888).

[53] See note 19 *supra*.

[54] Marshall v. Commissioner of Internal Revenue, 57 F. (2d) 633 (C. C. A. 6th, 1932); Lynch v. Lynch, 124 Cal. App. 454, 12 P. (2d) 741 (1932); Chicago Title & Trust Co. v. Ward, 332 Ill. 126, 163 N. E. 319 (1928); Benton v. Smith, —— Mo. App. ——, 171 S. W. (2d) 767 (1943); Whitney v. Whitney Elevator & Warehouse Co., 121 Misc. 461, 200 N. Y. Supp. 792 (1923); Francis v. New York & B. E. Ry., 108 N. Y. 93, 15 N. E. 192 (1888); Simpnton v. Dwyer, 167 Ore. 50, 115 P. (2d) 316 (1941); Manning v. U. S. Nat'l Bank of Portland, 174 Ore. 118, 148 P. (2d) 255 (1944); Robert's Appeal, 85 Pa. 84 (1877); Copeland v. Craig, 193 S. C. 484, 8 S. E. (2d) 858 (1940); Ellsworth v. Ellsworth, 151 S. W. (2d) 628 (Tex. 1941); Phillips v. Plastridge, 107 Vt. 267, 179 Atl. 157, 99 A. L. R. 1074 (1935); CHRISTY, THE TRANSFER OF STOCK (1929) §220; 2 COOK ON CORPORATIONS (8th ed.) §308; MACHEN, MODERN LAW OF CORPORATIONS (1908 ed.) §1006.

[55] Grissom v. Sternberger, 10 F. (2d) 764 (C. C. A. 4th, 1926).

[56] Smith v. Commissioner of Internal Revenue, 59 F. (2d) 533 (C. C. A. 9th, 1932).

[57] Hotaling v. Hotaling, 187 Cal. 695, 203 Pac. 745 (1922).

[58] Jean v. Jean, 207 Cal. 115, 277 Pac. 313 (1929); Lynch v. Lynch, 124 Cal. App. 454, 12 P. (2d) 741 (1932); Chicago Title & Trust Co. v. Ward, 332 Ill. 126, 163 N. E. 319 (1928).

to both, just as possession of one is possession of both.[59] Moreover, since in this situation the donor is not giving away his entire interest in the property, but is retaining an undivided one-half interest with right of survivorship, it is not at all inconsistent with a valid gift for him to retain dominion and control to the extent of his interest,[60] as long as he does not exercise sole dominion; and this he cannot do because the donee's assent is necessary for any disposition he makes of the stock.[61] If the donee indorse dividend checks to him, he receives the proceeds by the donee's act and not from the corporation, thus recognizing the donee's ownership.[62]

Thus it seems that transfer in joint ownership accomplishes what actual delivery is supposed to do—provide the donee with means of obtaining dominion over the gift, as far as the nature of the property and the extent of the gift allow.[63] Of course, if there is anything present to cast doubt on the donative intent, the transaction is ineffective to pass title, just as would be actual delivery of a chattel without donative intent.[64] But in our problem, lacking any evidence on intent, the language of the certificate itself should permit an inference sufficient in the absence of a contrary showing to make a prima facie case of donative intent.[65] It should testify that the donor has consciously attempted to create a present joint estate.[66] When this intent is translated into delivery by transfer on the books, the donor has performed an act changing the character of his possession from that of sole owner to that of a co-tenant.[67]

[59] Abegg v. Hirst, 144 Iowa 196, 122 N. W. 838 (1909); Benton v. Smith, —— Mo. App. ——, 171 S. W. (2d) 767 (1943); East Rutherford Savings, Loan & Bldg. Assn. v. McKenzie, 87 N. J. Eq. 375, 100 Atl. 931 (1917); Mechem, *supra* note 13, at 27.

[60] Cases involving joint gifts cited *supra* note 19. In *East Rutherford Savings, Loan & Bldg. Assn. v. McKenzie,* cited *supra* note 59, the court said that the donor, "as joint tenant with right of survivorship, had such an interest in his right of survivorship as permitted him to hold and manage the joint property for the best advantage of all concerned."

[61] See note 54 *supra.*

[62] Lynch v. Lynch, 124 Cal. App. 454, 12 P. (2d) 741 (1932); Copeland v. Craig, 193 S. C. 484, 8 S. E. (2d) 858 (1940).

[63] See Mechem, *supra* note 13, at 27; Mechem, *Delivery in Gifts of Chattels* (1926) 21 ILL. L. REV. 341, 354.

[64] See note 2 *supra.*

[65] Edmonds v. Commissioner of Internal Revenue, 90 F. (2d) 14 (C. C. A. 9th, 1937); Lynch v. Lynch, 124 Cal. App. 454, 12 P. (2d) 741 (1932); Eisenhardt v. Lowell, 105 Colo. 417, 98 P. (2d) 1001 (1940); East Rutherford Savings, Loan & Bldg. Assn. v. McKenzie, 87 N. J. Eq. 375, 100 Atl. 931 (1917); Copeland v. Craig, 193 S. C. 484, 8 S. E. (2d) 858 (1940); Simton v. Dwyer, 167 Ore. 50, 115 P. (2d) 316 (1941); Manning v. U. S. Nat'l Bank of Portland, 174 Ore. 118, 148 P. (2d) 255 (1944).

[66] In *Eisenhardt v. Lowell,* cited *supra* note 65, the court said, "The unequivocal declarations of the new certificate are taken as *prima facie* disclosing the apparent intention of Mr. Lowell to create a joint estate." In *Manning v. U. S. Nat'l Bank of Portland,* cited *supra* note 65, it was said, "We find in the written instruments convincing proof of the existence of such intent."

[67] Napier v. Eigel, 350 Mo. 111, 164 S. W. (2d) 908 (1942).

This rationale was not followed in the principal case; rather it was intimated that even if donative intent were conceded, this transaction fell short of the requisite delivery.[68] It is submitted that the decision contains an inconsistency. While the majority opinion recognized that a joint tenancy in personalty may be created by contract,[69] it ruled that the donee was not entitled to all the stock as survivor, but granted her the half interest which had been conceded by the parties.[70] But in order for any part of the title to vest in her by gift there must have been donative intent and delivery.[71] By conceding her the half interest the parties conceded donative intent and delivery; and although the court was only determining title to that portion of the stock which was in dispute, yet this concession of the parties created a necessary inference which was a part of the agreed case. Therefore, if donative intent and delivery were present it would be an executed gift in joint ownership, and she should take all by the right of survivorship incorporated in the instrument creating the gift.[72]

In the final analysis, the parties here stipulated certain facts. Whether there was constructive delivery with donative intent was the crucial fact to be determined, the answer being an inference of fact. The dissent said that the majority opinion conceded that there were permissible inferences of fact yet undetermined,[73] but ruled against the donee because not enough facts were stipulated on which to base a definite decision.[74] The dissent contended that the cause should have been remanded for further proceedings to determine fully the facts, citing cases in which that was done when the case agreed did not state enough

[68] In a memorandum in *226* N. C. app. stated not to be binding on the court, but rather in explanation of the denial of the petition to rehear, it was said, "A joint tenancy in stock with a provision for survival of ownership, where the donor retains custody of the stock, nothing else appearing, in our opinion, does not meet the definition of a gift *inter vivos*. The possession of a joint tenant is not that exclusive, absolute, and unconditional possession contemplated in a gift *inter vivos*."

[69] Citing Taylor v. Smith, 116 N. C. 531, 21 S. E. 202 (1895).

[70] The court said, "We note that appellants concede that Rossie Mae Barnes was entitled to one half interest in the 70 shares, upon the view that the statute (G. S. 41-2) converted the joint tenancy into tenancy in common, and that by virtue of his right to partition under G. S. 46-42, the testator retained control over his property to the extent of his interest therein."

G. S. §41-42, however, does not convert joint tenancies into tenancies in common; it merely abolishes survivorship as an incident to existing joint tenancies where it would occur by operation of law, and does not prohibit persons from contracting in such manner as to create survivorship. (See note 39 *supra*.) And as the dissent stated, the fact that G. S. §46-42 gives a joint tenant the right to petition for partition has no bearing on the question of delivery or whether the joint estate was created. He had that right no matter who held the certificate and regardless how the estate was created. "The estate created and not the retention of the certificate gave him the right."

[71] Newman v. Bost, 122 N. C. 524, 29 S. E. 848 (1898).

[72] Jones v. Waldroup, 217 N. C. 178, 7 S. E. (2d) 366 (1940).

[73] Buffaloe v. Barnes, cited *supra* note 1, at 319.

[74] *Id.* at 324 (dissenting opinion).

facts for a fair conclusion of law to be drawn.[75] If the gift is not to be approved under the theory suggested herein, then it would seem preferable to take the action urged by the dissenting opinion.[76] If no additional facts could be stipulated, it would be an appropriate case for a jury to determine whether there was donative intent and delivery.[77]

LOGAN D. HOWELL.

[75] Trustees of Elon College v. Elon Banking & Trust Co., 182 N. C. 298, 109 S. E. 6 (1921); Briggs v. Asheville Developers, 191 N. C. 784, 133 S. E. 3 (1926). To the same effect see Hood v. Johnson, 208 N. C. 77, 178 S. E. 855 (1935); Sedbury v. Southern Express Co., 164 N. C. 363, 79 S. E. 286 (1913).

However, in the court's memorandum denying the petition to rehear, cited *supra* note 68, it was said that even if donative intent or other inferences were drawn from further findings of fact, it could not cure the lack of absolute delivery of the stock to the donee which is necessary in a gift *inter vivos*.

[76] In *Zollicoffer v. Zollicoffer*, 168 N. C. 326, 84 S. E. 349 (1915), our court allowed the question of delivery to go to the jury when the evidence on the whole tended to show that there had been no delivery. And in *Grissom v. Sternberger*, 10 F. (2d) 764 (C. C. A. 4th, 1926), it was held error for the trial judge to rule as a matter of law that there was no gift; it was for the jury to say what inferences were to be drawn.

[77] The opinion in the principal case did not refer to the applicability of the Uniform Stock Transfer Act [N. C. GEN. STAT. (1943) §§55-81 to 55-104], enacted in North Carolina in 1941. The general purpose of the Act is to confer attributes of negotiability upon stock certificates; as a corollary, the importance of the transfer on the corporation books is diminished. For discussion of the general problem see Mechem, *supra* note 13, at 28; Notes (1941) 19 N. C. L. REV. 469, (1939) 37 MICH. L. REV. 480, 48 YALE L. J. 897.