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Civil Procedure—Deposition and Discovery—Availability of Adversary's File Under the Federal Rules of Civil Procedure

Is the material gathered by an attorney in anticipation of or in preparation for trial a proper subject of discovery under the Federal Rules of Civil Procedure?[1] Since the Federal Rules were promulgated, the answers to this question have been plentiful and greatly diverse. By result, of course, they fall into two groups: (1) discovery denied, (2) discovery allowed.

[1] 28 U. S. C. A. following §723c.

Three reasons have been advanced for denying discovery: (1) The material sought would be only "hearsay" and not admissible in evidence.[2] (2) Allowing discovery would penalize careful and thorough preparation and put a premium on laziness.[3] (3) The material gathered by an attorney in preparation for trial is privileged and, therefore, excluded from discovery.[4] The second and third reasons overlap. To avoid expanding "privilege," it seems that some courts adopted the second reason.

The courts allowing discovery have rejected each of these reasons at one time or another. The admissibility in evidence as a test has been completely rejected.[5] To place the issue beyond question, the Supreme Court has approved[6] a proposed amendment to Rule 26(b) which reads: "It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."

Though considerable weight has been given to the argument that to allow discovery would be unfair, penalize the diligent, and put a premium on laziness,[7] it has been ably pointed out that the public interest in having *all* the facts of cases ascertained by the court outweighs this argument.[8] It would seem that this squarely answers the argument with

[2] *In re* Citizens Casualty Co. of New York, 3 F. R. D. 171 (S. D. N. Y. 1942); Matthies v. Peter F. Connolly Co., 2 F. R. D. 277 (E. D. N. Y. 1941); Maryland, for Use of Montvila, v. Pan-American Bus Lines, 1 F. R. D. 213 (D. Md. 1940); Poppino v. Jones Store Co., 1 F. R. D. 215 (W. D. Mo. 1940); Rose Silk Mills, Inc. v. Insurance Co. of North America, 29 F. Supp. 504 (S. D. N. Y. 1939); Kenealy v. Texas Co., 29 F. Supp. 502 (S. D. N. Y. 1939); Sonken-Galamba Corp. *et al.* v. Atchison, T. & S. F. Ry. *et al.*, 30 F. Supp. 936 (W. D. Mo. 1939); Slydell v. Capital Transit Co., 1 F. R. D. 15 (D. C. 1939).

[3] Sano Petroleum Co. v. Shell Oil Co., 3 F. R. D. 467 (E. D. N. Y. 1944); Stark v. American Dredging Co., 3 F. R. D. 300 (E. D. Pa. 1943); Courteau v. Interlake S. S. Co. *et al.*, 1 F. R. D. 525 (W. D. Mich. 1941); Stern *et al.* v. Exposition Greyhound, 1 F. R. D. 696 (E. D. N. Y. 1941); Conneway v. City of New York, 32 F. Supp. 54 (E. D. N. Y. 1940); McCarthy v. Palmer *et al.*, 29 F. Supp. 585 (S. D. N. Y. 1939); Murphy v. New York & Porto Rico S. S. Co., 27 F. Supp. 878 (S. D. N. Y. 1939).

[4] Walling v. J. Friedman & Co. *et al.*, 4 F. R. D. 384 (S. D. N. Y. 1944); Sano Petroleum Corp. v. Shell Oil Co., 3 F. R. D. 467 (E. D. N. Y. 1944); Byers Theaters, Inc. v. Murphy, 1 F. R. D. 286 (W. D. Va. 1940); *see* Colpak *et al.* v. Hetterick *et al.*, 40 F. Supp. 350 (E. D. N. Y. 1941).

[5] Hercules Powder Co. v. Rohm & Haas Co., 3 F. R. D. 302 (D. Del. 1943); Blank v. Great Northern Ry., 4 F. R. D. 213 (D. Minn. 1943); Hoffman v. Palmer *et al.*, 129 F. (2d) 976 (C. C. A. 2d, 1942); Mackerer v. New York Cent. R. R., 1 F. R. D. 408 (E. D. N. Y. 1940).

[6] Pursuant to 28 U. S. C. A. §723c, the proposed amendments were approved by the Supreme Court and transmitted to the Attorney General who reported them to Congress at the beginning of the 80th regular session. By Rule 86 these amendments will become effective on the day which is three months subsequent to the adjournment of the first regular session, but, if that day is prior to September 1, 1947, then these amendments will become effective on September 1, 1947. Amendments to Federal Rules of Civil Procedure, 6 F. R. D. 229, 249, 91 L. ed. 380, 391 (1947).

[7] 2 MOORE'S FEDERAL PRACTICE (1946 Cum. Supp.) §26.12, p. 162.

[8] Hoffman v. Palmer *et al.*, 129 F. (2d) 976 (C. C. A. 2d, 1942); Seligson v. Camp Westover, 1 F. R. D. 738 (S. D. N. Y. 1941).

the exception of the expense involved in the preparation for trial. The proposed amendment to Rule 30(b) would add expense as a basis for a court order protecting the parties or deponents.[9] The Supreme Court did not accept this amendment, but it would seem that protection from expense may be included within a liberal interpretation of "oppression" as now provided in Rule 30(b).

On the matter of privilege some distinctions have been drawn between agents of insurance companies and attorneys. The argument of privilege has been rejected as to insurance investigators,[10] even though the results of the investigation have been turned over to an attorney.[11] Some courts have restricted privilege to its evidential meaning and have allowed examination of an adversary's file.[12] It has been held generally that reports made in the regular course of business are subject to discovery.[13]

Against this background of inconsistent, diverse, and confusing answers to this important question, the recent case of *Hickman v. Taylor et al.*[14] becomes very significant. This was an action for death of plaintiff's decedent. The death occurred from drowning after the sinking of defendants' tug under unusual circumstances. The plaintiff served interrogatories on the tug owners and asked in the thirty-eighth interrogatory that the statements of all crew members be attached, or, if oral, be set forth in detail. Defendants and defendants' counsel refused to answer said thirty-eighth interrogatory. The District Court for the Eastern District of Pennsylvania, sitting *en banc,* found the question proper and ordered both the defendant tug owners and their counsel Mr. Fortenbaugh to answer said interrogatory and to "produce all written statements of witnesses obtained by Mr. Fortenbaugh, as counsel and agent for Defendants; state in substance any fact concerning this case which Defendants learned through oral statements made by witnesses to Mr. Fortenbaugh whether or not included in his private memoranda and produce Mr. Fortenbaugh's memoranda containing

[9] Advisory Committee Report of Proposed Amendments to Rules of Civil Procedure, June 1946 (Government Printing Office, Washington: 1946), p. 39, 5 F. R. D. 433, 456 (1946).

[10] Kulich v. Murray *et al.,* 28 F. Supp. 675 (S. D. N. Y. 1939); Bough *et al.* v. Lee *et al.,* 28 F. Supp. 673 (S. D. N. Y. 1938).

[11] Blank v. Great Northern Ry., 4 F. R. D. 213 (D. Minn. 1943); Colpak *et al.* v. Hetterick *et al.,* 40 F. Supp. 350 (E. D. N. Y. 1941); Price v. Levitt *et al.,* 29 F. Supp. 164 (E. D. N. Y. 1939); Bough *et al.* v. Lee *et al.,* 29 F. Supp. 498 (S. D. N. Y. 1939).

[12] Leach v. Greif Bros. Cooperage Corp., 2 F. R. D. 444 (S. D. Miss. 1942); Kane v. News Syndicate Co., Inc. *et al.,* 1 F. R. D. 738 (S. D. N. Y. 1941).

[13] Thiel v. Southern Pac. Co., 6 F. R. D. 219 (N. D. Cal. 1946); Dowd v. American S. S. Co., 5 F. R. D. 240 (W. D. N. Y. 1945); Eiseman v. Pennsylvania R. R., 3 F. R. D. 338 (E. D. Pa. 1944); Stark v. American Dredging Co., 3 F. R. D. 300 (E. D. Pa. 1943); Kane v. News Syndicate Co., Inc. *et al.,* 1 F. R. D. 738 (S. D. N. Y. 1941).

[14] —— U. S. ——, 67 Sup. Ct. 385, 91 L. ed. 330 (1947).

statements of fact by witnesses or to submit these memoranda to the Court for determination of those portions which should be revealed to Plaintiff."[15] Upon refusal, the defendants and defendants' counsel were adjudged in contempt.[16] The Circuit Court of Appeals for the Third Circuit, also sitting *en banc,* found the material sought to be privileged and reversed the judgment of contempt.[17] It should be noted, however, that the court expressly rejected the argument that to allow discovery would be unfair and would penalize the diligent and put a premium on laziness.[18] The importance of the problem and the great diversity of views among the district courts led to a grant of *certiorari.*[19]

Though the proper procedure was not followed by the plaintiff,[20] the court recognized that the rules create integral procedural devices and took up the question on its merits. The reversal of the district court was unanimously affirmed, but not on the basis of privilege. While the scope is not delineated, the court expressly excludes from privilege information an attorney secures from witnesses, memoranda, briefs, or other writings prepared by counsel for his own use in prosecuting his client's case, and writings which reflect an attorney's mental impressions, conclusions, opinions, or legal theories.[21]

The basis of the court's decision is that no party as a matter of right can have discovery of the files and mental impressions of the opposing party's counsel. Relevant and non-privileged facts are not to remain hidden in counsel's files, but to inquire into them it must be shown that denial of such production would unduly prejudice the preparation of petitioner's case or cause him hardship or injustice. The problem is to balance the two extremes—the degree of privacy essential to the effective work of a lawyer, and the reasonable and necessary inquiries supported by public policy.

This problem has been a source of great controversy among the members of the bar. The Advisory Committee on Rules for Civil Procedure recognized the unsatisfactory state of the district court decisions. After leaving the matter entirely at the discretion of the court in the

[15] *Id.* at ——, 67 Sup. Ct. at 388, 91 L. ed. at 333.
[16] Hickman v. Taylor *et al.,* 4 F. R. D. 479 (1945).
[17] Hickman v. Taylor *et al.,* 153 F. (2d) 212 (1945).
[18] "Nor do we balk at the notion that the hare may by discovery avail himself of the diligence of the tortoise." *Id.* at 219.
[19] *Cert. denied,* —— U. S. ——, 66 Sup. Ct. 961, 90 L. ed. 848 (1946), *but granted on rehearing,* —— U. S. ——, 66 Sup. Ct. 1337, 90 L. ed. 1068 (1946).
[20] Petitioner thought that he was proceeding under Rule 33. The district court based its order on both Rules 33 and 34. The circuit court of appeals found that Rule 26 was the principal rule involved, though it recognized that Rule 33 was involved as far as the defendants were concerned. The Supreme Court states that the proper procedure would be to take the defendants' attorney's deposition under Rule 26 and to attempt to force production of the material by a subpoena *duces tecum* under Rule 45.
[21] —— U. S. ——, ——, 67 Sup. Ct. 385, 392, 91 L. ed. 330, 337 (1947).

preliminary draft,[22] the committee submitted the following proposed amendment to the Supreme Court:

> "The court shall not order the production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial unless satisfied that denial of production or inspection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or injustice. The court shall not order the production or inspection of any part of the writing that reflects an attorney's mental impressions, conclusions, opinions, or legal theories, or, except as provided in Rule 35, the conclusions of an expert."[23]

After spirited debate, both the Assembly and the House of Delegates of the American Bar Association in convention at Atlantic City voted their opposition to this amendment as proposed.[24] The committee on the Bill of Rights of the Association filed a brief *amicus curiae* upholding the decision of the circuit court of appeals.[25] The brief requested the court not to act on the proposed amendment until the bar as a whole had an opportunity to reach a more satisfactory solution.

The Supreme Court did not promulgate the proposed amendment to Rule 30(b). They found the amendment unnecessary. In the majority opinion Mr. Justice Murphy said:

> "But the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order. That burden, we believe, is necessarily implicit in the rules as now constituted.
>
> "Rule 30(b), as presently written, gives the trial judge the requisite discretion to make a judgment as to whether discovery should be allowed as to written statements of witnesses."[26]

The court feels that forcing the production of oral statements made to an attorney would greatly lower the standards of the profession.

In a concurring opinion Mr. Justice Jackson points out that even though a literal interpretation of the rules would permit the result reached by the district court, all the history of discovery would deny this result. "Certainly nothing in the tradition or practice of discovery

[22] Armstrong, *Advisory Committee Recommendations,* 66 F. Supp. Advance Sheet No. 3, Sept. 2, 1946, XIX at XXXV.
[23] Committee report, cited *supra* note 9; also *id.* at XXXVI.
[24] (1947) 33 A. B. A. J. 149.
[25] (1946) 32 A. B. A. J. 882.
[26] —— U. S. ——, ——, 67 Sup. Ct. 385, 394, 91 L. ed. 330, 339 (1947).

up to the time of these Rules would have suggested that they would authorize such a practice as here proposed."[27]

A strong argument has been made for amending Rule 30(b) to the effect that no court shall order the production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation or litigation or in preparation for trial.[28] Such an amendment would seem to provide a means of hiding relevant and non-privileged facts in the investigator's file. This result would clearly defeat the purpose of a judicial trial. The attorney held in contempt in the *Hickman* case has suggested that the court should distinguish between the objective facts and the subjective facts.[29] The objective facts should be produced no matter where they may be found. The subjective facts represent the work of counsel on the objective facts—the so-called "work product of a lawyer," and should be protected from discovery.

The general objection raised to leaving the matter within the discretion of the trial judge is that under the pressure of an overloaded docket of motions and trials the court will tend to establish a set rule and allow all discovery motions or deny all of them.[30] This objection hardly seems sound. Since the promulgation of the Rules, a showing of "good cause" has been required for a production of original documents under Rule 34. Any attempt to avoid the exercise of the discretion of the trial judge may very well be an attempt to restrict justice by eliminating the consideration of the facts peculiar to each case.

The question is not yet settled. In summary, the present situation may be described as follows:

1. By the proposed amendment to Rule 26(b) the argument that the matter sought by deposition is not admissible in evidence is no longer a valid reason for denying discovery.[31]

2. By the Supreme Court's decision in the *Hickman* case the plea of privilege is clearly restricted to privilege as the term applies in evidence.

3. The privacy essential to the effective work of an attorney makes it necessary for a party to show "good cause" before discovery of an adversary's file will be permitted.

"Good cause" will undoubtedly vary with the presiding judge. Like "due process," it may be best to define "good cause" only "by the grad-

[27] *Id.* at ——, 67 Sup. Ct. at 397, 91 L. ed. at 343 (1947).
[28] *Discovery Procedure Symposium,* 5 F. R. D. 403 *et seq.*
[29] *Id.* at 410.
[30] *Id.* at 415; 2 MOORE'S FEDERAL PRACTICE (1946 Cum. Supp.) §26.12, p. 164.
[31] By the proposed amendments which have been approved by the Supreme Court and submitted to Congress the scope of the examination under Rule 26(b) and the protection of the parties under Rule 30(d) are made applicable to Rules 33 and 34.

ual process of judicial inclusion and exclusion, as the cases presented for decision may require."[32] In the *Hickman* case the court has by dictum included a situation where the witnesses are no longer available or can be reached only with difficulty,[33] and by inference it has excluded a situation where all of the witnesses are employees of the opposing party. Whether or not in a specific case an attorney will be forced to reveal his files is at the present writing unknown. If the court finds "good cause" the Supreme Court's answer apparently is "yes"; if no "good cause" is found, the answer is "no."

The result would seem to be that a district judge may find "good cause," a circuit court of appeals may find no "good cause" and the ultimate decision will rest with the Supreme Court as to whether or not "good cause" exists. While such a situation may be undesirable, it would seem to be unavoidable, if the sanctity of an attorney's files is to be invaded or not depending on the existence of "good cause."

WILLIAM A. DEES, JR.

Civil Procedure—Service of Process—Suability of Unincorporated Associations in North Carolina

North Carolina has consistently followed the common law rule that, in the absence of an enabling statute, an unincorporated association has no capacity to sue or to be sued in its common name; for the reason that, in the absence of statutes recognizing it, such association has no legal entity apart from that of its members.[1]

In 1943, the General Assembly of North Carolina, by amendment to G. S. 1-97, added subsection (6), which provides, in part: "Any unincorporated association or organization, whether resident or nonresident, desiring to do business in this state by performing any of the acts for which it was formed, shall . . . appoint an agent in this state upon whom all processes and precepts may be served. . . . If said unincorporated association or organization shall fail to appoint the process agent pursuant to this subsection, all precepts and processes may be served upon the secretary of state of North Carolina. . . . Service upon the process agent appointed pursuant to this subsection . . . shall be legal and binding on said association . . . and any judgment recovered in any action . . .

[32] Mr. Justice Miller in Davidson v. New Orleans, 96 U. S. 97, 104 (1877).
[33] Hickman v. Taylor *et al.*, —— U. S. ——, ——, 67 Sup. Ct. 385, 394, 91 L. ed. 330, 339 (1947).

[1] Hallman v. The Wood, Wire and Metal Lathers' International Union *et al.*, 219 N. C. 798, 15 S. E. (2d) 723 (1941); Citizens' Co. v. Typographical Union, 187 N. C. 42, 121 S. E. 31 (1924); Tucker v. Eatough, 186 N. C. 505, 120 S. E. 57 (1923) noted (1932), 10 N. C. L. REV. 313; Kerr v. Hicks, 154 N. C. 265, 70 S. E. 468 (1911); Nelson v. Relief Department, 147 N. C. 103, 60 S. E. 724 (1908); *but see* Winchester v. Brotherhood of R. R. Trainmen, 203 N. C. 735, 167 S. E. 49 (1932).

shall be valid and may be collected out of any real or personal property belonging to the association or organization."[2]

Although the writer has been unable to find any suits that have been attempted either by or against an unincorporated association in its common name under this subsection, it is obvious that when such suits do arise, the immediate question will be whether this subsection does, in fact, authorize them to be brought in the name of the association.

The title of G. S. 1-97 is "Service by copy"; and its preamble states that "the manner of delivering summons in the following cases shall be as hereinafter stated." Now, subsection (4) of G. S. 1-97 provides for the service of process upon unincorporated associations "issuing certificates and/or policies of insurance"; and, in the "Parties" section of the General Statutes, G. S. 1-70 provides that "Any and/or all unincorporated, beneficial organizations, fraternal benefit orders, associations, etc., issuing certificates and/or policies of insurance, foreign or domestic, now or hereafter doing business in this state, shall have the power to sue and/or be sued in the name commonly known and/or used by them in the conduct of their business. . . ." There is no comparable provision in the "Parties" section of the General Statutes relating to such unincorporated associations as are contemplated by G. S. 1-97(6).

Whether the failure to enact a statute specifically providing that unincorporated associations, generally, shall have the power to sue or be sued in this state, on proper service of process, was due to inadvertence on the part of the legislature, or whether it was due to an attempt on the part of some legislators to achieve the end of making such organizations suable without encountering the opposition of varying interests,

[2] N. C. GEN. STAT. (1943) §1-97 (6): "Any unincorporated association or organization, whether resident or nonresident, desiring to do business in this state by performing any of the acts for which it was formed, shall, before any such acts are performed, appoint an agent in this state upon whom all processes and precepts may be served, and certify to the clerk of the superior court of each county in which said association or organization desires to perform any of the acts for which it was organized the name and address of such process agent. If said unincorporated association or organization shall fail to appoint the process agent pursuant to this subsection, all precepts and processes may be served upon the secretary of state of the state of North Carolina. Upon such service, the secretary of state shall forward a copy of the process or precept to the last known address of such unincorporated association or organization. Service upon the process agent appointed pursuant to this subsection or upon the secretary of state, if no process agent is appointed, shall be legal and binding on said association or organization, and any judgment recovered in any action commenced by service of process, as provided in this subsection, shall be valid and may be collected out of any real or personal property belonging to the association or organization.

"Any such unincorporated association or organization, now performing any of the acts for which it was formed, shall within thirty days from the ratification of this subsection, appoint an agent upon whom processes and precepts may be served, as provided in this subsection, and in the absence of such appointment, such processes and precepts may be served upon the secretary of state, as provided in this subsection. Upon such service, the secretary of state shall forward a copy of the process or precept to the last known address of such unincorporated association or organization."

seems of little practical importance in the construction of this subsection.

It seems obvious that any construction of the subsection other than that it authorizes suit against unincorporated associations in their common name, in proper cases, would be to deprive the words of the legislature of any force or effect whatsoever. Suability of and service of process upon unincorporated associations "issuing certificates and/or policies of insurance" is adequately provided for in G. S. 1-70 and in G. S. 1-97(4). Therefore, it cannot reasonably be contended that G. S. 1-97(6) was intended to concern itself with such associations. And to say that one may have service of process upon an unincorporated association, thus subjecting the association to the jurisdiction of the court, and at the same time, to say that such association has no legal capacity to be sued in its common name, would seem an illogical conclusion. Furthermore, elementary principles of fairness surely dictate that, if one had capacity to be sued, he must also have capacity to sue in the same manner.

Even if it be assumed that an interpretation of the subsection to the effect that it provides merely for the service of process would not, of itself, be illogical, the clear and unambiguous words of the statute itself may not be so easily disposed of. The last sentence of paragraph one of G. S. 1-97(6) provides: "Service upon the process agent appointed pursuant to this subsection or upon the secretary of state if no process agent is appointed, shall be *legal and binding* on said associations . . . and any *judgment recovered*[3] in any action commenced by service of process, as provided in this subsection shall be valid and may be collected out of any real and personal property belonging to the association. . . ."

It is a well settled rule in North Carolina that the caption and preamble of a statute may be used in aid of construction, where the meaning of its provisions is vague; but the language of neither will be permitted to control when the meaning of the text is clear.[4] Further, it seems an equally well settled rule of statutory construction that, in ascertaining the intention of the legislature, effect must be given to every word, phrase, and provision of the statute.[5]

In *ex parte Hill*,[6] the Supreme Court of Alabama was confronted

[3] Italics supplied.

[4] Bersio v. United States, 124 F. (2d) 310, 314 (C. C. A. 4th, 1941); The City of Raleigh v. Mechanics & Farmers Bank, 223 N. C. 286, 26 S. E. (2d) 573 (1943); Dunn v. Dunn, 199 N. C. 535, 155 S. E. 165 (1930); State v. Bell, 184 N. C. 701, 115 S. E. 190 (1922); Blue v. McDuffie, 44 N. C. 131 (1852).

[5] Richmond Guano Co. v. Walston, 187 N. C. 667, 122 S. E. 663 (1924); Board of Agriculture v. Drainage District, 177 N. C. 222, 98 S. E. 597 (1919); State v. Burnett, 173 N. C. 750, 91 S. E. 597 (1917); Pullen v. Corporation Commission, 152 N. C. 548, 68 S. E. 155 (1910); Nance v. Southern Railway, 149 N. C. 366, 63 S. E. 116 (1908); Fortune v. Commissioners, 140 N. C. 322, 52 S. E. 950 (1905).

[6] 165 Ala. 365, 51 So. 786 (1910).

with the question whether the language of the title of an act of the Alabama legislature: "An act to stipulate how the service of process may be effected upon certain unincorporated organizations or associations" was sufficiently broad to embrace that part of the body of the act which provided that certain unincorporated associations were suable in that state. In the course of its opinion the court used these words:

"To provide for the service of process implies the power to issue such process; and the power to issue or serve judicial process implies an action or suit pending or to be commenced by such process. The power to serve judicial process upon an individual, association, or corporation implies necessarily that such individual, corporation, or association is suable or subject to the process of the court for which such process issues. . . .

"The suing out or service of a summons is the commencement of an action. . . .[7] This being true, it certainly implies that an action against it (unincorporated association) is maintainable, or it intends to provide for the bringing of actions against such associations."

Another possible construction of the subsection that would reach the same result would be one similar to that of the *Coronado Coal* case[8]—i.e., that, even though the statute does not, of itself, confer the power to sue and to be sued upon such unincorporated associations, it does so recognize the legal entity of such associations as to justify a holding that they are suable in North Carolina courts. Admittedly, such a construction would be weak, since the *Coronado* case ruling was based, not upon recognition of the legal entity of the association in a single federal statute, but upon its recognition in numerous federal statutes, as well as the wording of the Sherman Antitrust Act.

Certainly, an enactment by the legislature of North Carolina of a statute similar to G. S. 1-70, specifically providing that unincorporated associations, generally, shall have the power to sue and be sued in North Carolina, would be the preferable method of resolving any possible question as to the true import of G. S. 1-97(6).

Assuming, for the moment, that G. S. 1-97(6) does, in fact, confer the power to sue and be sued upon unincorporated associations in North Carolina, the constitutionality of such an enabling statute is hardly open to question.[9] Indeed, the *Coronado* case, *supra,* and the subsequent embodiment of its rule into the Federal Rules of Civil Procedure,[10] seem to put the question at rest.

[7] N. C. GEN. STAT. (1943) §1-14.

[8] United Mine Workers of America v. Coronado Coal Co., 259 U. S. 344 (1922).

[9] Jardine v. Superior Court in and for Los Angeles County, 213 Cal. 301, 2 P. (2d) 756, 79 A. L. R. 291 (1931); United States Heater Co. v. Iron Moulders' Union, 129 Mich. 354, 88 N. W. 889 (1902); Appeal of Baylor, 93 S. C. 414, 77 S. E. 59 (1913); F. R. Patch Mfg. Co. v. Capeless, 78 Vt. 1, 63 A. 938 (1906); *see* Operative Plasterers', Etc., Ass'n v. Case, 69 App. D. C. 43, 93 F. (2d) 56 (1937), noted (1938) 37 MICH. L. REV. 141; WRIGHTINGTON, UNINCORPORATED ASSOCIATIONS AND BUSINESS TRUSTS (2nd ed., 1923) 436.

[10] FED. RULES CIV. PROC., Rule 17(b): "Capacity to Sue or Be Sued:—The

Furthermore, there apparently is no valid objection to the constitutionality of the method of service of process as prescribed in G. S. 1-97(6).[11] In *Winchester v. Brotherhood of R. R. Trainmen*,[12] the Supreme Court of North Carolina held that service on the resident secretary of the fraternal insurance association was valid service on the association. (This without specific enabling statute.) And G. S. 1-105, which provides that the Commissioner of Motor Vehicles of North Carolina shall be the process agent for non-resident motorists in North Carolina, has been held constitutional.[13]

In the majority of the later cases where service of process on an unincorporated association has been provided for by statute, the question arises whether there has been service upon an agent of the association whose relationship to the association is such that it could reasonably be expected that he would give notice of the suit to the association.[14] The answer to the question is, of course, largely determined by the facts of the particular case. This question could hardly arise under the method of service prescribed in G. S. 1-97(6), for the only persons who may be served are the process agent appointed by the association and the Secretary of the State of North Carolina.

Another question that is likely to arise in the event of a suit against an unincorporated association under subsection (6) is that of the proper construction of the words, ". . . association or organization . . . desiring to do business in this state, by performing any of the acts for which it was formed. . . ." Both the federal courts and the North Carolina Supreme Court, in deciding whether a corporation is "doing business" within a state, do so under the general rule that the business must be of such a nature and character as to warrant the inference that the corporation or other business entity has subjected itself to the local juris-

capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held; except that a partnership or other unincorporated association, which has no such capacity by the law of the state, may sue or be sued in its common name for the purpose of enforcing for or against it some substantive right existing under the Constitution or laws of the United States."

[11] See note 8 *supra*.

[12] 203 N. C. 735, 167 S. E. 49 (1932).

[13] Wynn v. Robinson, 216 N. C. 347, 4 S. E. (2d) 884 (1939); Bigham v. Foor, 201 N. C. 14, 158 S. E. 548 (1931); Ashbey v. Brown, 198 N. C. 369, 151 S. E. 725 (1930). For a discussion of due process in such non-resident motorists statutes, see Culp, *Process in Actions Against Non-Resident Motorists* (1933) 32 MICH. L. REV. 325.

[14] Brotherhood of R. R. Trainmen v. Agnew, 170 Miss. 604, 155 So. 205 (1934); Bowers v. Grand I. B. of Locomotive Engineers, 187 Minn. 626, 245 N. W. 362 (1933); *see* Operative Plasterers', Etc., Ass'n v. Case, 69 App. D. C. 43, 93 F. (2d) 56 (1937); Winchester v. Brotherhood of R. R. Trainmen, 203 N. C. 735, 167 S. E. 49 (1932).

diction.[15] The application of this rule also requires an interpretation of the facts of each particular case.

The enabling statutes of a number of states provide, in effect, that unincorporated associations shall be suiable in their associate name, judgment to be executed upon the association's property, and service of process to be made on an agent or officer of the association.[16] Under this type of statute, the question whether the association is "doing business" within the state does not arise. But a few states provide, in effect, that when two or more persons are associated in any business which is transacted in a common name, such association may be sued in its common name.[17] It has been determined in at least one of the latter states that the association need not be engaged in commercial business in order to be sued in the common name;[18] and in Oklahoma, the phrase "transacting business" is simply disregarded, and suit against trade unions is allowed without discussion.[19]

In any event, it would seem a reasonable interpretation of G. S. 1-97(6) that, by including the words "by performing any of the acts for which it was formed," the legislature has effectively precluded any question as to whether the activities of the association must be of a commercial nature in order to be subject to service of process in the manner prescribed.

In concluding his opinion in *Hallman v. The Wood, Wire & Metal Workers International Union,*[20] Justice Clarkson wrote:

"The defendant . . . having no legal entity, the attempted service in any way is null and void. . . . This type of action denotes a chaotic and

[15] Peoples' Tobacco Co. v. American Tobacco Co., 246 U. S. 79 (1918); Carnegie Office Appliance Co. v. Thomas A. Edison Co., 28 F. (2d) 626 (M. D. N. C., 1928); Ivy River Land and Timber Co. v. National Fire and Marine Insurance Co., 192 N. C. 115, 133 S. E. 434 (1926); Cape Fear R. R. v. Coble, 190 N. C. 375, 129 S. E. 828 (1925); Lunceford v. Commercial Travelers Mutual Accident Association, 190 N. C. 314, 129 S. E. 805 (1925).

[16] ALA. CODE (1940) 7-142-3; CONN. GEN. STAT. (1930) §5490; DEL. REV. CODE (1935) §467b; MD. ANN. CODE GEN. LAWS (Flack Code 1939) art. 23, §1109-15; MICH. COMP. LAWS (1929) §14020; N. Y. (McKinney 1942) GEN. ASSOC. LAW §13; N. D. REV. CODE (1943) 28-0609; R. I. GEN. LAWS (1938) c. 530 §1-14; S. C. CIV. CODE (1942) §7796-7798; TEX. STAT. (Vernon, Centennial ed., 1936) §6133-8; VA. CODE (Michie, *et al.*, 1942) §6058.

For a further compilation and treatment of such statutes, see WARREN, CORPORATE ADVANTAGES WITHOUT INCORPORATION (1929) 542.

[17] CAL. CODE CIV. PROC. §388; MINN. GEN. STAT. (1923) 2 Mason 1927, §9180; MONT. REV. CODE §90 (1935); OKLA. STAT. (1941) 12-182; NEV. COMP. LAWS (Hillyer, 1929) §8564.

[18] Deeney v. Hotel and Apartment Clerks' Union, 57 Cal. App. (2d) 1023, 134 P. (2d) 328 (1943); Herald v. Glendale Lodge, 46 Cal. App. 325, 189 Pac. 329 (1920).

[19] United Brotherhood of Carpenters and Joiners of America v. McMurtrey, 179 Okla. 575, 66 P. (2d) 1051 (1937). *Contra:* Bowers v. Grand I. B. of Locomotive Engineers, 187 Minn. 626, 246 N. W. 362 (1933) (in which case the court allowed a union to be sued in its common name, only on evidence that the union was actually engaged in commercial business).

[20] 219 N. C. 798, 15 S. E. (2d) 723 (1941).

nebulous condition—such as the world was in until the Supreme Commander said, "Let there be light, and there was light."

It is herewith submitted that the General Assembly of North Carolina has, with any reasonable interpretation of the effect of G. S. 1-97(6), provided the requisite "light."

JOE H. BARRINGTON, JR.

Constitutional Law—Due Process of Law—Waiver of Right to Counsel in State Courts

In a recent case, *Carter v. People of State of Illinois*,[1] the Supreme Court of the United States held that failure by a state court to appoint counsel for accused who pleaded guilty to murder did not constitute a denial of due process where the record showed that accused, with his rights fully explained to him, did not request that court appoint counsel, and the record contained no evidence which would indicate that the defendant was incapable of intelligently waiving his right to counsel.

The petitioner, Roy Carter, Negro, had pleaded guilty without the aid of counsel when arraigned on an indictment for murder in 1928. He received a ninety-nine-year sentence and in 1945 he brought a petition for his release on writ of error in the Supreme Court of Illinois claiming that the conviction on which his confinement was based was vitiated by the denial of his right to the assistance of counsel under the Fourteenth Amendment. Petitioner did not allege that he had requested counsel be appointed or that he was ignorant of his right to counsel. Carter was, in fact, represented by counsel on the day of sentence, appointed by the court without his request.[2] At the time of the relevant events in 1928 Carter was thirty years of age and although he could read and write, he had no formal education. He was of average mentality, quiet and industrious, had worked as a cook and mechanic for the eleven years preceding and had never before run afoul of the law. Although these facts do not appear in the common law record, they do appear in a transcript of testimony in connection with a hearing on mitigation of the offense which was attached to the record. The Illinois Supreme Court[3] affirmed the judgment of the trial court, and dismissed the writ stating that the right to be represented by counsel is one which the defendant may claim or waive as he shall determine, as no duty rests upon the court to provide legal assistance for an accused unless he states

[1] Carter v. People of State of Illinois, —— U. S. ——, 67 Supp. Ct. 216, 91 L. ed. 157 (Adv. Ops.) (1946). For cases on the general subject "Right to Counsel" see Note (1940) 84 L. ed. 383.

[2] *Id.* at ——, 67 Sup. Ct. at 219, 91 L. ed. at 160. Canizio v. People of State of New York, 327 U. S. 82 (1946). Appointment of counsel on day of sentence cured earlier defect of denial of right to counsel; a noncapital offense.

[3] People v. Carter, 391 Ill. 594, 63 N. E. (2d) 763 (1945).

under oath his inability to procure counsel and expresses a desire to have the court appoint one for him,[4] and as there was no bill of exceptions in the record and it did not appear that the defendant sought to have an attorney appointed, assignment of error on the question could not be sustained.[5]

The Supreme Court of the United States in affirming the judgment of the Illinois court restricted its view to the record before the state court on writ of error, i.e., the common law record which included indictment, judgment on plea of guilty, minute entry bearing on sentence and the sentence. Justice Frankfurter, writing the opinion for the majority stated that the Illinois court followed local practice in restricting its review to the common law record, that such practice constitutes allowable state appellate procedure[6] and that there was no showing of a denial of due process on that record, but intimated that petitioner should bring a proper action in the state court in order to place the pertinent facts, referred to above, before the court. Only after exhausting available state remedies can the petitioner come into a federal court.[7] Decision on whether or not the whole case including the above-mentioned facts would show a denial of due process was consequently reserved until such facts were properly before the court.

In a dissent by Justice Douglas in which Justices Black and Rutledge concur, it is agreed that there is no showing of a denial of the right of counsel on the common law record, but doubt is expressed as to the true basis for the state decision and it is concluded that the least that can be done is to remand the decision to the state court so that any state

[4] ILL. CONST. Art. II, §9: "In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, . . ." ILL. REVISED STAT. 1943, c. 38, §730: "Every person charged with crime shall be allowed counsel, and when he shall state upon oath that he is unable to procure counsel, the court shall assign him competent counsel, who shall conduct his defense."

[5] People v. Stubblefield, 391 Ill. 609, 63 N. E. (2d) 762 (1945); People v. Stack, 391 Ill. 15, 62 N. E. (2d) 807 (1945); People v. Braner, 389 Ill. 190, 58 N. E. (2d) 869 (1945).

[6] Frank v. Mangum, 237 U. S. 309, 340 (1915): ". . . Repeated decisions of this court have put it beyond the range of further debate that the 'due process' clause of the Fourteenth Amendment has not the effect of imposing upon the States any particular form or mode of procedure, . . ." Brown v. New Jersey, 175 U. S. 172, 175 (1899): "The State has full control over the procedure of its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution." McKane v. Durston, 153 U. S. 684 (1893): "It is therefore clear that the right of appeal may be accorded by the State to the accused upon such terms as in its wisdom may seem proper."

[7] *Ex parte* Hawk, 321 U. S. 114 (1944), holding a state should deny all remedies to a person whom it holds in prison in violation of the Constitution of the United States, the federal courts would be available to provide a remedy to correct such wrong. Kantok v. Clark, 68 F. Supp. 595 (D. N. H. 1946) held an application for habeas corpus by one detained under state court judgment of conviction will be entertained by a federal court only when it affirmatively appears that applicant has exhausted his remedies in the state courts and there is no adequate remedy available under the state law.

procedural question may be untangled from the question arising under the Federal Constitution.[8] Justice Douglas further states, however, that if the evidence contained in the transcript was properly before the court then there would be a showing of a denial of due process.

Justice Murphy, in a separate dissent, contends that even on the common law record there is a clear showing of a denial of due process as there is no affirmative evidence that petitioner understood the necessary consequences of his plea, or that, fully appreciating all of his legal rights, he intelligently waived his right to counsel.

In the *Scottsboro* case,[9] Justice Southerland, writing the opinion for the majority, made the often repeated statement, ". . . in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeblemindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law."[10] This language has created much doubt as to just what requirements the due process clause of the Fourteenth Amendment places upon the state courts in a capital case.[11] Where the accused pleads guilty to a crime in a state court there is a duty upon the court to inform him of the meaning and consequences of such a plea, and the Supreme Court of the United States has held that there is a duty upon the state court to inform the defendant of his right to counsel.[12] The question then arises, is there a duty upon the court to appoint counsel after explaining to the accused the meaning of the plea of guilty and his right to counsel? If requested, the duty of appointment is clear.[13] It is where the accused in a capital case fails to make a request that the difficulty arises. Does his failure to speak constitute a waiver? The Supreme Court of the United States has never defined the scope of waiver in a capital case in a state court but has in several cases held certain circumstances not to constitute a waiver.[14]

The court in the instant case did not undertake to define waiver, but

[8] *Cf.* State Tax Commissioners of Utah v. Van Colt, 306 U. S. 511 (1939).
[9] Powell v. Alabama, 287 U. S. 45 (1932).
[10] *Id.* at 71.
[11] *Cf.* Betts v. Brady, 316 U. S. 455, 458 (1942). Certiorari granted because of conflicting decisions on the question of an accused's right to counsel.
[12] Rice v. Olson, 324 U. S. 786 (1945); Tompkins v. Missouri, 323 U. S. 486 (1945).
[13] Williams v. Kaiser, 323 U. S. 471 (1945). *Cf.* Betts v. Brady, 316 U. S. 455 (1942). Counsel not appointed at accused's request; noncapital offense and held not to constitute a denial of due process.
[14] De Meerleer v. People of State of Michigan, —— U. S. ——, 67 Sup. Ct. 596, 91 L. ed. 471 (Adv. Ops.) (1947). Petitioner not advised of the consequences of plea of guilty or of his right to counsel; Woods v. Niersthumer, —— U. S. ——, 66 Sup. Ct. 996, 90 L. ed. 931 (Adv. Ops.) (1946) (coercion in plea of guilty); Hawk v. Olson, 326 U. S. 271 (1945) (petitioner not permitted to consult with attorney in period between arraignment and the impaneling of the jury); Rice v. Olson, 324 U. S. 786 (1945) (plea of guilty is not a waiver of right of counsel;

its decision did result in declaring a waiver in the circumstances of this case by holding that when the accused has been made aware of his right to counsel and then fails to request that the court appoint counsel to assist him with his defense, such failure constitutes a waiver and there is a presumption that such waiver was competently and intelligently made. It is clear then, that the defendant, on a subsequent attack on the judgment contending that he was denied due process by the failure of the court to appoint counsel for him, must place sufficient evidence before the court to overcome the presumption that the waiver was intelligently and competently made. This holding seems to be in accord with the general proposition that the burden of proof is upon him who claims injury. Justice Murphy, however, at least in capital cases, would start with the assumption that any trial in a state court, where the accused was tried and convicted without the aid of counsel, raises a presumption of a lack of due process and places the burden upon the state of overcoming this presumption and showing that the defendant did intelligently and competently waive his right to counsel. This view, most certainly, appeals to one's sense of justice and fairness but it is contrary to the above-mentioned proposition that the burden of proof is with him who claims injury, and from a practical point of view would place a tremendous burden upon the state.

Since no test has been laid down by the Supreme Court as to what constitutes an intelligent and competent waiver of the right to counsel in a state court proceeding, it would seem pertinent to examine the federal cases on this point. In the case of *Erwin v. Sanford,*[15] the petitioner on writ of habeas corpus alleged that he had been denied his constitutional right of assistance of counsel. The court dismissed the writ stating that the evidence showed that the petitioner freely and voluntarily entered a plea of guilty of the offense charged in the indictment, that no request for counsel was made by him and that the entry of his plea of guilty, since freely and voluntarily entered, was an intelligent and competent waiver of his right to assistance of counsel, and therefore, failue of the court to appoint counsel for him was not a denial of his constitutional right.[16] In the case of *Parker v. Johnson*[17] it was

noncapital offense); White v. Regan, 324 U. S. 760 (1945) (coerced plea of guilty); House v. Mayo, 324 U. S. 42 (1945) (forced to plead without the advice of his counsel whose presence he requested); Tompkins v. Missouri, 323 U. S. 485 (1945) (petitioner ignorant of his right to counsel); Williams v. Kaiser, 323 U. S. 471 (1945) (petitioner requested aid of counsel and request was refused).

[15] Erwin v. Sanford, 27 F. Supp. 892 (N. D. Ga. 1939).

[16] *Accord:* Adkins v. Sanford, 120 F. (2d) 471 (C. C. A. 5th, 1941); Franzeen v. Johnston, 111 F. (2d) 817 (C. C. A. 9th, 1940); Cooke v. Swope, 109 F. (2d) 955 (C. C. A. 9th, 1940); Sedorko v. Hudspeth, 109 F. (2d) 475 (C. C. A. 10th, 1940); Harpin v. Johnston, 109 F. (2d) 434 (C. C. A. 9th, 1940); *cert. denied,* 310 U. S. 624 (1940); Moore v. Hudspeth, 109 F. (2d) 475 (C. C. A. 10th, 1940); McDonald v. Hudspeth, 108 F. (2d) 475 (C. C. A. 10th, 1940); Towne v. Hudspeth, 108 F. (2d) 676 (C. C. A. 10th, 1939); Cundiff v. Nicholson, 107 F. (2d)

held that the accused had waived his right to counsel even though the court failed to explain this right to him. Furthermore it did not appear that petitioner was otherwise conscious of his right to counsel. The court reasoned that since the evidence showed that the accused would have pleaded guilty even had he been informed of his right to counsel and therefore the lack of knowledge concerning the existence of his right was not prejudicial, his free and voluntary plea of guilty constituted a competent waiver.[18]

It would seem then that in the federal courts a free and voluntary plea of guilty constitutes an intelligent and competent waiver. The right to counsel in the federal courts is specifically guaranteed by the Sixth Amendment,[19] and is also covered by the due process clause of the Fifth Amendment.[20] As the right to counsel in a state court does not come under the provisions of the Sixth Amendment, and is covered only by the due process clause of the Fourteenth Amendment,[21] it would seem to follow, and the Supreme Court has so held, that the right of the accused to counsel is afforded a greater protection in the federal courts than in the state courts.[22]

In the instant case, the accused, with his rights fully explained to him, including his right to counsel, freely and voluntarily pleaded guilty. Nevertheless, nineteen years after sentence was imposed, the Supreme Court has granted Carter the right to place before the court, in a proper action, pertinent facts concerning himself in order that it may then be determined whether he was capable of intelligently and competently waiving his right to counsel. The Supreme Court in granting Carter this right, irrespective of the outcome, has, in this case, afforded greater protection to an accused in a state court, than is afforded in the federal

162 (C. C. A. 4th, 1939); McCoy v. Hudspeth, 106 F. (2d) 810 (C. C. A. 10th, 1939). *Cf.* Adams v. United States *ex rel.* McCann, 317 U. S. 269 (1942); Walker v. Johnston, 312 U. S. 275, 286 (1941); Johnson v. Zerbst, 304 U. S. 458, 468-469 (1938); Roberts v. United States, 158 F. (2d) 150 (C. C. A. 4th, 1946).

[17] Parker v. Johnson, 29 F. Supp. 829 (N. D. Cal. 1939).

[18] *Accord:* O'Kieth v. Johnson, 129 F. (2d) 889 (C. C. A. 9th, 1942).

[19] U. S. CONST. AMEND. VI: "In all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel."

[20] U. S. CONST. AMEND. V: ". . . nor shall be deprived of life, liberty, or property, without due process of law. . . ."

[21] Betts v. Brady, 316 U. S. 455 (1942). The due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment, although a denial by a state of rights or privileges specifically embodied in that and others of the first eight amendments may, in certain circumstances, or in connection with other elements, operate, in a given case, to deprive a litigant of due process of law in violation of the Fourteenth Amendment.

[22] Compare Avery v. Alabama, 308 U. S. 444 (1940) with Glasser v. United States, 315 U. S. 60 (1942); *cf.* Betts v. Brady, 316 U. S. 455 (1942). Mr. Justice Roberts, speaking for the majority in holding that refusal of the court to appoint counsel in that situation did not constitute a denial of due process, stated, however, that if the trial had been in a federal court, the Sixth Amendment would have made the appointment of counsel mandatory.

courts where a free and voluntary plea of guilty is held to constitute an intelligent and competent waiver. It is submitted that should Carter succeed in getting before the Supreme Court of the United States the fact that he had no formal education, and was wholly unfamiliar with court procedure, it will be held that he did not intelligently and competently waive his right to counsel.[23]

WILLIAM H. BURTON, JR.

Constitutional Law—Schools and School Districts—School Bus Transportation for Parochial School Students

The United States Supreme Court, in *Everson v. Board of Education of Ewing Township*,[1] held it not unconstitutional for a state to provide transportation to students attending private schools. A New Jersey statute[2] authorized the boards of education of the school districts of the state to make rules and contracts for the transportation of children to and from school when the children lived remote from any schoolhouse. The statute specifically included transportation for school children to and from school other than a public school, except such school as is operated for profit in whole or in part. The township of Ewing had no school past the eighth grade, after which grade children attended schools in nearby communities. The township provided no transportation to the other schools but, pursuant to the statute, the school board adopted a resolution recommending the transportation of pupils to three public high schools and to *Catholic schools* by way of public carrier.[3] In accordance with this resolution, the school board periodically reimbursed parents of children attending the three public high schools and Catholic schools outside the township for fares expended for transportation. The plaintiff, as a district taxpayer, challenged the constitutionality of the statute and the resolution of the board of education pursuant to it. The Court of Errors and Appeals, reversing[4] the Supreme Court[5]

[23] The four dissenting justices stated that the record, with these facts included, shows a denial of due process, although the majority withheld an opinion on this point until such time as the question was properly before the court.

[1] —— U. S. ——, 67 Sup. Ct. 504, 91 L. ed. (Adv. Ops.) 472 (1947).

[2] NEW JERSEY LAWS 1941, c. 191, p. 581; N. J. REV. STATS. 18:14-8 NJSA.

[3] (Italics supplied.) An interesting difference in viewpoints concerning this resolution developed. Mr. Justice Black, for the majority, was of the opinion that, since the appellant did not allege, and there was nothing in the record to show, that there were any children in the township who attended or would have attended, but for want of transportation, any but public and Catholic schools, the statute and resolution would not be found unconstitutional on a postulate neither charged nor proved but which rested on nothing but a possibility. Mr. Justice Rutledge was of the opinion that it could not be assumed that there were no such children, but the resolution should be held discriminatory on its face unless it were positively shown that no other sects sought, or were available to receive, the same advantages.

[4] 133 N. J. L. 350, 44 A. (2d) 333 (1945).

[5] 132 N. J. L. 98, 39 A. (2d) 75 (1944).

of the state by a majority of six to three, held that neither the statute nor the resolution violated the Constitution.

From this decision the plaintiff appealed to the United States Supreme Court, alleging that the statute and resolution violated the due process clause of the Fourteenth Amendment in that public funds were used to carry out private purposes; and the First Amendment in that the taxpayer was forced to contribute to the support and maintenance of the schools dedicated to teach the Catholic Faith. The majority of the court sustained the Court of Errors and Appeals. Four justices dissented.[6]

The rationale of the court's opinion was that the New Jersey legislature and highest court had concluded that a public need was to be served by using the tax-raised funds to pay the bus fares of school children,[7] and the fact that the object of the law and the desires of those most directly affected by the law coincided was an inadequate reason for the court to say that the state legislature had erroneously appraised the public need. Further, the legislation in question having been determined to be public welfare legislation, individual citizens could not be excluded from its benefits because of their faith or lack of it. The First Amendment prohibiting the establishment of a religion does not make it more difficult for parochial or private schools to operate; and it does not bar services such as this, "so separate and so indisputably marked off from the religious function."[8]

Every state has some form of compulsory educational statute requiring parents, or those in control of children, to provide a suitable education for them.[9] It has been held that a statute compelling attendance at public schools is an unreasonable interference with the liberty of parents and guardians to direct the upbringing of their children.[10] If the private school meets the requirements of the law in the particular state with respect to standards of education, the parent has the constitutionally protected right to send his child to that school.[11] Nor does it seem that, in exercising this right to send his child to the school of his preference, the parent, who is a citizen of the state, should be deprived of his participation in those benefits which may accrue to him as a citizen.[12]

[6] Justices Jackson, Rutledge, Frankfurter, Burton.

[7] Violation of the equal protection clause because of discrimination between private schools not operated for profit and those operated for profit in whole or in part was not urged by the appellant and had not been passed on in New Jersey; hence, it was held to have no relevancy to any constitutional question presented.

[8] —— U. S. ——, 67 Sup. Ct. 504, 512, 91 L. ed. (Adv. Ops.) 472, 481 (1947).

[9] State v. Jackson, 71 N. H. 552, 53 A. 1021, 60 L. R. A. 739 (1902). *See* State v. Wolf, 145 N. C. 440, 59 S. E. 40 (1907). *See* N. C. CONST., Art. IX, §11, and N. C. GEN. STAT. (1943) §115-302.

[10] Pierce v. Society of Sisters, 268 U. S. 510 (1925).

[11] *Ibid. Cf.* N. C. GEN. STAT. (1943) §115-302.

[12] *See* Chance v. Mississippi T. R. and P. Board, 190 Miss. 453, 467, 200 So. 706, 710 (1941).

Therefore, the question to be answered is whether a citizen, by virtue of his citizenship, may participate in an appropriation to transport children to school. This question would seem answered by determining whether such an appropriation is in furtherance of a public need. At least fifteen states[13] have concluded that it is in furtherance of a public need to see that all children, whatever school they attend, are transported when necessary. The interest of the state in the health of the child and in protecting him from the dangers of highway traffic on his way to and from school in compliance with the compulsory educational statute are matters of public concern.[14] But some states have held to the contrary on the ground that carrying parochial school children to school is giving aid to a religious organization.[15] However, the effect of these decisions has been overcome in New York by constitutional amendment,[16] and in Kentucky by legislation which appropriated money

[13] California, CAL. EDUC. CODE (Deering, 1944) §§16624, 16257, held constitutional in Bowker v. Baker, 73 Cal. App. (2d) 653, 167 P. (2d) 256 (1946). Illinois, ILL. ANN. STAT. (Smith-Hurd, 1936) Ch. 122 §128a. Indiana, IND. ANN. STAT. (Burns, 1933) §28-2805. Kansas, KAN. GEN. STAT. (Corrick, Supp. 1943) §72-606. Kentucky, Ch. 156, Acts 1944, held constitutional in Nichols v. Henry, 301 Ky. 434, 171 S. W. (2d) 963 (1946). Louisiana, LA. GEN. STAT. (Dart, 1939) §2248. Maryland, Ch. 185, Laws 1937, held constitutional in Board of Education of Baltimore County v. Wheat, 174 Md. 314, 199 A. 628 (1938), and in Adams v. County Commissioners, 180 Md. 550, 26 A. (2d) 377 (1942). Massachusetts, c. 390, STATS. 1936. Michigan, MICH. STATS. ANN. (Henderson, 1937) §392, as amended by Pub. Acts 1939, No. 38. Missouri, MO. REV. STATS. ANN. (1939) §10326, as amended by Laws 1939, p. 718. New Hampshire, N. H. REV. LAWS (1942) c. 135 §9. New Jersey, see notes 1 and 2 *supra*. New York, N. Y. CONST. Art. XI, §4. Oregon, ORE. COMP. LAWS ANN. (1940) §111-874. Washington, Chap. 141, Sec. 13, Laws of 1945, p. 399.

In two states, Mississippi and Louisiana, textbooks are provided for all school children without regard to attendance at private or public schools. In Louisiana, see Act No. 100 of 1928, held constitutional in Cochrane v. Louisiana State Board of Education, 168 La. 1005, 123 So. 655 (1929) *affirmed*, 281 U. S. 370 (1930). In Mississippi, see Chap. 202, Sec. 23, Laws 1940, held constitutional in Chance v. Mississippi T. R. and P. Board, 190 Miss. 453, 200 So. 706 (1941). *But cf.* Smith v. Donahue, 202 App. Div. 656, 195 N. Y. S. 715 (1922).

[14] Board of Education v. Wheat, 174 Md. 314, 199 A. 628 (1938); Adams v. County Commissioners, 180 Md. 550, 26 A. (2d) 377 (1942). *See* Bowker v. Baker, 73 Cal. App. (2d) 653, 167 P. (2d) 256 (1946); Note (1938) 51 HARV. L. REV. 935.

[15] Judd v. Board of Education, 278 N. Y. 200, 15 N. E. (2d) 576, 118 A. L. R. 789 (1938); State *ex rel.* Traub v. Brown, 36 Del. 181, 172 Atl. 835 (1934); Mitchell v. Consol. Sch. Dist., 17 Wash. (2d) 61, 135 P. (2d) 79, 146 A. L. R. 612 (1943); Gurney v. Ferguson, 190 Okla. 254, 122 P. (2d) 1002 (1941); Sherrard v. Jefferson County Bd. of Ed., 294 Ky. 469, 171 S. W. (2d) 963 (1942); State *ex rel.* Van Straten v. Milquet, 180 Wis. 109, 192 N. W. 392 (1923); *cf.* Hlebanja v. Brewe, 58 S. D. 351, 236 N. W. 296 (1931); Schlitz v. Picton, 66 S. D. 301, 282 N. W. 519 (1938); *but see* Chance v. Mississippi T. R. and P. Board, 190 Miss. 453, 469, 200 So. 706, 710 (1941) where the court said, ". . . The freedom inherent in the mutual independence of the church and the state includes the right of the state to freedom from unwarranted hinderance in the name of religion. Eternal vigilance is not exhibited by injecting false issues into a question which concerns only the general welfare of all its citizens."

[16] Judd v. Bd. of Ed., 278 N. Y. 200, 15 N. E. (2d) 576, 118 A. L. R. 789 (1938) held unconstitutional a statute designed to give transportation to all schools legally attended (Sec. 206 of Education Laws as amended by ch. 541 of the Laws

from one fund rather than from another.[17] Attempts have been made in Washington and Wisconsin to overcome the effects of earlier decisions by changing the language of applicable statutes.[18] Thus the majority opinion is amply supported by judicial precedent and legislative action.

Indeed, it is difficult to understand how the court could have held otherwise without in effect overruling its previous decisions. A parent may comply with compulsory educational laws by sending his child to a parochial school.[19] The state may supply textbooks to all students without regard to attendance at public or private schools,[20] on the basis that the aid is to the student and not to the school. If there is a difference between supplying textbooks and furnishing transportation it would seem to be one of words.[21]

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of 1936). Following this decision, the Constitution was amended to include "but the legislature may provide for transportation to and from any school or institution of learning." (N. Y. CONST. Art. XI, §4.)

[17] In Sherrard v. Jefferson County Bd. of Ed., 294 Ky. 469, 171 S. W. (2d) 963 (1942) the court held appropriations from the public school fund unconstitutional, whereupon the legislature enacted Ch. 156, 1944 Acts (KY. REV. STAT. 158.115), permitting the county to supplement the school fund from the general fund. This was held constitutional in Nichols v. Henry, 301 Ky. 434, 191 S. W. (2d) 930 (1946).

[18] Mitchell v. Consol. Sch. Dist., 17 Wash. (2d) 61, 135 P. (2d) 79 (1943) held unconstitutional a provision, Chap. 51, Laws of 1941, p. 120, entitling parochial and private school students to transportation when the school is along or near the route designated by the school board. Expenses were to be taken from the permanent school fund. Four justices held the statute unconstitutional as an aid to religion; four held that it was constitutional. Grady, J., in deciding with the majority, affirmed the lower court on the ground that the statute was unconstitutional only because the fund used was the school fund, when the Constitution prohibited use of this fund for any purpose other than for common schools, and not because it was in aid of religion. The legislature then enacted Chap. 141, Sec. 13, Laws of 1945, p. 399, entitling all children attending school under the compulsory school attendance law to use transportation facilities provided by the school district in which they reside. It is not apparent to the writer how this is to overcome the objection raised by Grady, J.

In *Van Straten v. Milquet,* 180 Wis. 109, 192 N. W. 392 (1923), the appropriation was from the county general fund and was held unconstitutional. Amendments were enacted to §4034 (1) WIS. STATS., to enable *all* children to be eligible for transportation where found necessary. This statute was declared not to extend to parochial school students in 23 OPINIONS ATTORNEY-GENERAL of Wisconsin 622. However, in *Rutz v. Marek,* in a circuit court of the state, Wickham, Judge, declared the statute did extend to parochial students. (SCHOOL BUS TRANSPORTATION LAWS IN THE UNITED STATES, by National Catholic Welfare Conference, Legal Dept., p. 251 (1946)) Wisconsin defeated a proposal to amend the Constitution to provide free transportation for private school students. N. Y. *Times,* Nov. 7, 1946, p. 12, col. 5.

[19] See note 10 *supra.*

[20] Cochrane v. Louisiana State Bd. of Ed., 168 La. 1005, 123 So. 655 (1929); *affirmed,* 281 U. S. 370 (1930); Chance v. Mississippi T. R. and P., 190 Miss. 453, 200 So. 706 (1941). In the *Cochrane* case, on appeal, the issue did not concern the effect of the state's action with respect to the First Amendment but, under the due process clause, whether the state was engaged in a private function. Since the religious issue was brought up in the state court it must be considered to have been waived on appeal.

[21] In appellant's brief in the *Cochrane* case it was argued, "If the furnishing of textbooks free is not considered an aid to such private schools, but as incidental

One aspect of the case offers a field for future litigation, and demands an investigation of the North Carolina Constitution[22] and of pertinent state statutes.[23] The principal case holds that the state cannot exclude individuals, because of their faith or lack of it, from receiving the benefits of public welfare legislation.[24] Some of the court's language indicates it will consider legislation to transport school children as public welfare legislation.[25] Yet the court declares that it does not mean to intimate that a state cannot provide transportation only to children attending public schools.[26] It is possible that this question will be left to the state's discretion and if the state does transport private school children no one can be heard to complain. Nor can anyone complain if transportation is not furnished. However, if a state provides transportation for public school children, as is done in many states, the legislature having determined that expenditures therefor fill a public need, it is at least doubtful, under the present holding, whether the state may discriminate against children attending non-profit private schools, without encroaching upon the equal privileges guaranteed to all under the Fourteenth Amendment.

MILES J. MCCORMICK.

Courts—Jury—Exclusion of Women from the Jury List

In *Ballard v. United States*,[1] a mother and son were convicted in the Federal District Court in the Southern District of California for

to the state educational system, then it logically follows that . . . their [the children's] transportation to and from such schools could be paid. . . ." Cochrane v. Louisiana State Bd. of Ed., 281 U. S. 370, 372 (1930).

[22] N. C. CONST. Art. IX, §1: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Art. IX, §4: "The proceeds . . . shall be faithfully appropriated for establishing and maintaining in this state a system of free public schools, and for no other uses and purposes whatsoever." Art. IX, §11: "The General Assembly is hereby empowered to enact that every child . . . shall attend the public schools . . . unless educated by other means."

[23] N. C. GEN. STAT. (1943) §115-302: "Every parent, guardian or other person in the state having charge or control of a child between the ages of seven and sixteen, shall cause such child to attend school. . . . The term 'school' as used in this section is defined to embrace all public schools and such private schools as have tutors or teachers and curricula that are approved by the superintendent of public instruction or the State Board of Education." §115-374: "The control and management of all facilities for the transportation of public school children shall be vested in the State of North Carolina under the direction and supervision of the State Board of Education. . . . The tax levying authorities in the various counties of the state are authorized and empowered to provide in the capital outlay budget adequate buildings and equipment for the storage of all school busses. . . . The use of school busses shall be limited to the transportation of children to and from school for the regularly organized school day."

[24] Everson v. Ewing Township, —— U. S. ——, 67 Sup. Ct. 504, 512, 91 L. ed. (Adv. Ops.) 472, 480 (1947).

[25] —— U. S. ——, 67 Sup. Ct. 504, 513, 91 L. ed. (Adv. Ops.) 472, 481.

[26] —— U. S. ——, 67 Sup. Ct. 504, 513, 91 L. ed. (Adv. Ops.) 472, 481. —— U. S. ——, 67 Sup. Ct. 504, 512, 91 L. ed. (Adv. Ops.) 472, 480.

[1] —— U. S. ——, 67 Sup. Ct. 261, 91 L. ed. (Adv. Ops.) 195 (1946).

promoting a fraudulent religious organization through the use of the mails. The defendants moved to quash the indictment and also challenged the array of petit jurors on the ground that women, who are eligible for jury duty in California,[2] had been "intentionally and sytematically" excluded from the panel. Both motions were denied. The United States Supreme Court in reversing the Circuit Court of Appeals, which had affirmed the rulings of the trial court; *held,* the indictment must be dismissed because the "purposeful and systematic" exclusion of women from the panel was a departure from the scheme of jury selection which Congress had adopted.[3]

Generally, the qualifications and exemptions of federal jurors are to be determined by the laws of the state in which the federal court is located.[4] Congress has specifically provided that citizens will not be disqualified as grand and petit jurors in any court of the United States because of race, color, previous conditions of servitude[5] or party affiliation.[6] But there is no federal statute which guarantees women a right to serve on a federal jury. Neither the Fourteenth[7] nor the Nineteenth Amendment[8] to the Constitution of the United States requires the states to place women on jury lists. On the other hand, the Sixth Amend-

[2] CAL. CODE OF CIVIL PROCEDURE (Deering, 1941) §198.

[3] A five to four decision. This case had previously been before the Supreme Court of the United States on a different issue. Ballard v. United States, 322 U. S. 78 (1944).

The result in the instant case is not surprising in view of the dictum in *Glasser v. United States,* 315 U. S 60 (1941). The court in that decision strongly indicated that it would have held the jury illegally constituted had there not been such a short time since the state law making women eligible for jury duty had come into force. United States v. Roemig, 52 F. Supp. 857 (N. D. Iowa 1943) followed the dictum in *Glasser v. United States* and sustained a motion to quash an indictment because women, although eligible for jury duty in Iowa, had been systematically excluded from the jury. In Thiel v. Southern Pac. Co., —— U. S. ——, 66 Sup. Ct. 984, 90 L. ed. (Adv. Ops.) 922 (1946) petitioner's motion to strike out the jury panel because "day laborers" had been excluded was denied by the district court and this ruling was affirmed by the circuit court of appeals but the Supreme Court of the United States reversed this ruling and granted a new trial.

[4] JUDICIAL CODE §276 (1917), 28 U. S. C. A. §412. Both grand and petit jurors are selected by the clerk of the court and a jury commissioner from the lists of eligible voters as determined by state law. JUDICIAL CODE §277 (1911), 28 U. S. C. A. §413.

[5] JUDICIAL CODE §278 (1911), 28 U. S. C. A. §415.

[6] JUDICIAL CODE §276 (1917), 28 U. S. C. A. §412.

[7] U. S. v. Roemig, 52 F. Supp. 857 (N. D. Iowa 1943); *see* Strauder v. West Virginia, 100 U. S. 303, 310 (1880). Miller, *The Woman Juror* (1922) 2 ORE. L. REV. 30, 32.

It is a violation of the Fourteenth Amendment of the Constitution of the United States for states to exclude Negroes from jury lists because of race, color or previous condition of servitude. Hill v. Texas, 316 U. S. 400 (1941); Carter v. Texas, 177 U. S. 442 (1900). Excluding members of the Catholic faith from a grand jury was held to be a violation of the Fourteenth Amendment. Juarez v. State, 102 Tex. Crim. Rep. 297, 277 S. W. 1091 (1925).

[8] United States v. Ballard, 35 F. Supp. 105 (S. D. Calif. 1940); Hall v. State, 136 Fla. 644, 187 So. 392 (1939); Powers v. State, 172 Ga. 1, 157 S. E. 195 (1931); Browning v. State, 120 Ohio St. 62, 165 N. E. 566 (1929); State v. Emery, 224 N. C. 581, 31 S. E. (2d) 858 (1944).

ment[9] does not prevent the states from making women liable for jury duty. Therefore, each state is free to determine whether women are eligible jurors or not.[10] The majority of the states either permit or require women to serve on juries, while sixteen states have not placed this public duty on women.[11]

After a state has determined by law those qualified to serve as jurors,[12] the federal courts will decide whether the selection of federal juries from the names of those qualified is proper.[13] Even though no constitutional issue is at stake, the United States Supreme Court may exercise its power of supervision of justice in the federal courts to prevent women from being excluded from federal juries in those states where women are eligible jurors.[14] An indictment by a grand jury or a verdict rendered by a petit jury drawn from a panel in which a qualified class or group has been excluded as such is subject to dismissal without regard to whether the rights of the defendant were prejudiced.[15]

Mr. Justice Douglas speaking for the majority in *Ballard v. United States* stated:

> "The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection. The systematic and intentional exclusion of women, like the exclusion of a racial group . . . or an economic class . . . deprives the jury system of the broad basis it was designed by Congress to have in our democratic society."[16]

The United States Supreme Court, however, has recognized that complete representation of all eligible groups on every federal jury would be impossible and, consequently, no such standard is required.[17] Neither is it objectionable for a state to exempt by law particular groups because

[9] United States v. Wood, 299 U. S. 123 (1936), *rehearing denied*, 299 U. S. 624; Tynam v. United States, 297 Fed. 177 (C. C. A. 9th, 1923), *certeriori denied*, 266 U. S. 604 (1924). The Sixth Amendment provides in part: "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury. . . ."

[10] Ballard v. United States, —— U. S. ——, 67 Sup. Ct. 261, 91 L. ed. (Adv. Ops.) 195 (1946). A state law creating an unlawful qualification is not binding in the selection of federal jurors. Thiel v. Southern Pac. Co., —— U. S. ——, 66 Sup. Ct. 984, 90 L. ed. (Adv. Ops.) 922 (1946).

[11] (1947) 33 A. B. A. J. 113, 114, Alabama, Florida, Georgia, Maryland, Massachusetts, Mississippi, New Hampshire, New Mexico, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Virginia, West Virginia and Wyoming.

[12] The majority rule is that where the primary qualification of a juror is that he be an elector, the conferring upon women of the right of suffrage also makes them eligible as jurors. Note (1945) 157 A. L. R. 461, 472.

[13] Ballard v. United States, —— U. S. ——, 67 Sup. Ct. 261, 91 L. ed. (Adv. Ops.) 195 (1946); Thiel v. Southern Pac. Co., —— U. S. ——, 66 Sup. Ct. 984, 90 L. ed. (Adv. Ops.) 922 (1946).

[14] *Ibid.*

[15] *Ibid.*

[16] —— U. S. ——, 67 Sup. Ct. 261, 265, 91 L. ed. (Adv. Ops.) 195, 199 (1946).

[17] Thiel v. Southern Pac. Co., —— U. S. ——, 66 Sup. Ct. 984, 90 L. ed. (Adv. Ops.) 922 (1946).

of competing public interests.[18] Federal courts have no authority to interfere with state courts which permit women as an eligible group to be systematically and intentionally excluded from the jury lists but it is likely that the strict policy pursued by the federal courts will have a wholesome influence on state courts.[19]

What effect will the decision in *Ballard v. United States* have on the federal courts in North Carolina? In 1944 the Supreme Court of North Carolina in *State v. Emery*[20] held that under Article I, §13 of the state constitution women in this state were ineligible to serve on the jury. This decision was nullified in 1946 by the adoption of a constitutional amendment.[21] Article I, §§13 and 19 were changed to read as follows:

Sec. 13. Right of jury. No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful *persons* in open court. . . .

Sec. 19. Controversies at law respecting property. In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people and ought to remain sacred and inviolable. *No person shall be excluded from jury service on account of sex.*[22]

What effect do these changes in the North Carolina Constitution have on the eligibility of women to serve as jurors? (1) The substitution of "persons" for "men" in Article I, §13 removes the objection upon which the decision in *State v. Emery* was based. But it does not follow that this change alone would require that women be included on jury lists. (2) The effect of adding the provision "No person shall be excluded from jury service on account of sex" to Article I, §19 is to make women, otherwise eligible, subject to jury duty on an equal basis with men. (3) Neither of these sections, as amended, is self-executing. Legislation[23] is necessary to impose jury duty on women in criminal

[18] Rawlins v. Georgia, 201 U. S. 638 (1906). (1947) Session N. C. General Assembly, H. B. No. 87 which amended N. C. GEN. STAT. (1943) §9-19 and exempted practicing attorneys at law from jury duty.

[19] In 1941 a committee appointed by Chief Justice Stone recommended passage of a federal law establishing uniform national standards for selection of jurors in all federal courts. It was also recommended that women be eligible for federal jury duty in all states. (1947) 33 A. B. A. J. 113.

[20] 224 N. C. 581, 31 S. E. (2d) 858, 157 A. L. R. 441 (1944), noted in 23 N. C. L. REV. 152. The trial jury consisted of ten men and two women. The regular panel had been exhausted and the two women were selected as tales jurors. The defendant, convicted of violating the prohibition laws, was granted a new trial.

[21] The word "persons" was substituted for "men" in Art. I, §§1, 7, 11, 13, and 26 and in Art. VI, §1. The provision "No person shall be excluded from jury service on account of sex" was added to Art. I, §19. This amendment was certified to the Secretary of State by the Governor December 10, 1946 and became effective on that date. (1945) Session Laws of N. C., Chapter 634, §5.

[22] N. C. CONST., Art. I, §§13 and 19. Italics supplied.

[23] The Attorney General said that this constitutional amendment making women subject to jury duty only established the principle and that it did not provide the

cases. Inasmuch as G. S. 9-1 has been apparently interpreted to be inapplicable to women[24] it would seem that this section would have to be amended to comply with the constitutional mandate that "No person shall be excluded from jury service on account of sex." Recent legislation has been acted to accomplish each of these purposes.[25]

G. S. 9-1 was amended in 1947 to require county commissioners to select the names of persons of sufficient intelligence and good moral character to serve on grand and petit juries not only from the tax lists but also from a list of names of persons who do not appear upon the tax lists who are residents of the county and over twenty-one years of age. The clerk of the board of county commissioners or jury commission, in making the list to lay before the board or commission, may secure lists of persons from sources of information deemed reliable. The only groups excluded are those who have been adjudged to be *non compos mentis* and those who have been convicted of any crime involving moral turpitude.[26]

The intent of the General Assembly to give women an equal opportunity with men to serve on juries[27] appears to be manifested in several 1947 statutory provisions which supersede the common-law rule in

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detailed laws necessary to put the principle into courtroom practice. News and Observer (Raleigh, N. C.), March 23, 1947. Art. VI, §6 of the ARIZ. CONST. provides "A trial by jury shall be drawn and summoned from the body of the county. . . ." This provision was construed by the court not to be self-executing. Subsequent legislation limiting jury service to men was ruled to be valid in *McDaniels v. State*, —— Ariz. ——, 158 P. (2d) 151 (1945). In 1945 the legislature of Arizona changed its policy and jury service for women is now optional by statute. ARIZ. CODE (1939) (Cum. Pocket Supp. 1945), §37-102.

[24] N. C. GEN. STAT. (1943) §9-1 prior to 1947 amendments provided that the county commissioners shall select jury lists from the "names of all such persons as have paid all the taxes assessed against them for the preceding year. . . ." But Chief Justice Stacy speaking for the majority in *State v. Emery* rejected the proposal that this provision was intended to apply to women. In the course of his opinion he said: "It were better that the controlling voice should speak again before adopting the interpretation which would impose the obligation of jury service on all women, otherwise qualified, under the provisions of this ancient statute. Obviously, we should think some exemptions would want to be provided, and other changes made." State v. Emery, 224 N. C. 581, 587, 31 S. E. (2d) 858, 863, 157 A. L. R. 441, 449 (1944).

[25] (1947) Session of N. C. General Assembly, S. B. No. 5; H. B. No. 87.

[26] (1947) Session of N. C. General Assembly, H. B. No. 87. Prior to passage of this bill, N. C. GEN. STAT. (1943) §9-1 provided that the jury lists would be taken from persons who had paid their taxes during the preceding year. N. C. GEN. STAT. (1943) §9-16 provided, in part, that it shall not be a valid cause of challenge that a juror called from those whose names are drawn from the box is not a freeholder, or has not paid the taxes assessed against him during the preceding two years. The 1947 legislation considerably increased the number of persons eligible for jury duty by in effect including all persons over twenty-one whether taxpayers or not. Persons engaged in certain specified occupations are exempt from jury service by law. N. C. GEN. STAT. (1943) §9-19 as amended in 1947.

[27] The following was printed on the ballot submitted to the voters November 5, 1946:

☐ For Amendment making Constitution equally applicable to men and women..

☐ Against amendments making the Constitution applicable to men and women.

this state that juries are not to be separated.[28] Judges of the superior court are now authorized, in their discretion, to permit separation of the jury in any criminal case.[29] Moreover, superior court judges are authorized to permit members of the jury of opposite sexes to be provided separate rooming accommodations when not actually engaged in deliberations as jurors and pending the bringing in of a verdict.[30]

The 1947 legislation provides that registered and practical nurses in active practice are exempt from jury duty.[31] When any woman is summoned to serve on any regular or tales jury, she or her husband may appear before the clerk of the superior court and certify that she desires to be excused from jury service for one of the following causes: (1) that she is ill and unable to serve; (2) that she is required to care for her children [who may be] under twelve years of age; (3) that some member of her family is ill and requires her presence and attention; whereupon the clerk in his discretion may excuse her from jury service and so notify the judge of the superior court upon convening the court.[32]

These changes in the North Carolina jury laws have removed certain practical objections to women serving on juries, and have placed them on an equal status with men as eligible jurors. Although the provisions for excusing women from jury duty are liberal, there is nothing in any of these statutes which expressly or impliedly authorizes county commissioners intentionally and systematically to exclude women from the jury lists.

Under the present practice of the federal courts, it is clear that after the effective date of these statutes[33] which confer upon women the

[28] State v. McKenzie, 166 N. C. 290, 81 S. E. 301 (1914); State v. Perry, 44 N. C. 330 (1853); State v. Tilghman, 33 N. C. 513 (1850); State v. Miller, 18 N. C. 500 (1836). In criminal cases, particularly capital offenses, the common law rule against separation of juries has been more rigidly enforced than in civil cases. Separation in a capital case does not as a matter of law vitiate the verdict and the judge is permitted to determine if the jurors were influenced by one outside the jury.

Burns v. Laundry, 204 N. C. 145, 167 S. E. 573 (1933). The jury was allowed to separate for four days but a new trial was granted because the minds of the jurors were not refreshed on the charge when the trial was resumed.

Lerch v. McKinne, 187 N. C. 419, 122 S. E. 9 (1924); Lumber Co. v. Lumber Co., 187 N. C. 417, 121 S. E. 755 (1924). The jury after rendering a verdict and separating were allowed to reassemble on their own request and correct a clerical error in their verdict in the absence of any showing that the jurors had been influenced by outsiders.

[29] (1947) Session of N. C. General Assembly, H. B. No. 87 which amends N. C. GEN. STAT. (1943) §9-17.

S. B. No. 5 which amends N. C. GEN. STAT. (1943) §11-11 no longer requires the jury officer to take an oath to keep the jury together.

[30] *Ibid.*

[31] *Ibid.* Amends N. C. GEN. STAT. (1943) §9-19.

[32] *Ibid.*

[33] N. C. GEN. STAT. (1943) §9-1 as amended in 1947 requires boards of county commissioners for the several counties, at their regular meetings on the first Monday in June in the year 1947, to prepare jury lists and every two years thereafter.

civic duty to service on juries, a defendant in a federal court in this state can successfully move to quash an indictment or challenge an array if it can be shown that women were systematically and purposefully excluded from the grand or petit jury, and it will not be necessary that he show that his rights were thereby prejudiced. However, it is not certain that a defendant in a state court will be equally successful. Will he have to show that the exclusion of women was prejudicial to his rights? The Supreme Court of North Carolina has frequently held that statutes which prescribe the manner of selecting jury lists are for the most part "directory" only and in the absence of prejudice, fraud or bad faith on the part of local officials,[34] have refused to sustain a motion to quash the indictment or to sustain a challenge to the array. These cases, however, are not necessarily indicative of the attitude the highest court in this state will take when the question of intentional and systematic exclusion of women from the jury lists comes before it: (1) Generally, these cases are concerned with those irregularities resulting from a deviation from the mechanical processes prescribed by statute for the selection of names for the jury lists;[35] (2) the systematic exclusion of approximately half of those eligible for jury duty is a more serious question. For instance, suppose all men are excluded from the jury lists and only women are subject to be drawn for jury duty in a particular county; (3) repeated instances in which the names of only men appear on jury lists are more likely to be the result of "bad faith" on the part of selecting officials than mere chance;[36] (4) the provision in Article I, §19 of the Constitution that "No person shall be

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The same applies to counties which have jury commissioners or other legally constituted body charged by law with the duty of drawing names of persons for jury service.

The Attorney General of North Carolina advised that the best means to test the legality of women jurors was to select women as tales jurors now. Moreover, it would give women an opportunity to serve before jury lists were prepared in June, 1947. News and Observer (Raleigh, N. C.), March 23, 1947. N. C. GEN. STAT. (1943) §9-11 requires that tales jurors be freeholders.

[34] State v. Mallard, 184 N. C. 667, 114 S. E. 17 (1922); Lanier v. Town of Greenville, 174 N. C. 311, 93 S. E. 850 (1917); State v. Paramore, 146 N. C. 604, 60 S. E. 502 (1908); State v. Banner, 149 N. C. 519, 63 S. E. 84 (1908); Moore v. Guano Co., 130 N. C. 229, 41 S. E. 293 (1902); State v. Perry, 122 N. C. 1018, 29 S. E. 384 (1898); State v. Durham Fertilizer Co., 111 N. C. 658, 16 S. E. 231 (1892). Note (1934) 92 A. L. R. 1109. Irregularity in drawing names for a jury panel as ground of complaint by defendant in criminal prosecution.

[35] 3 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION (3d ed. by Frank E. Horack, Jr. 1943) 122. Although the statutes regulating the selection of juries evince an intent to place great safeguards around their selection, minor irregularities, in the absence of fraud and where no injury is shown, are usually construed to be substantial compliance with the statutes and reversible error is thereby avoided.

[36] A distinction must be kept in mind between exclusion from a jury list and not being drawn for jury duty from the list. No doubt, there will be many legitimate juries on which there are no women; and, conceivably, there will be juries on which there are no men. People v. Manuel, 41 Cal. App. 153, 182 Pac. 306 (1919), (women convicted of forgery by an all woman jury).

excluded from jury duty on account of sex" should operate to make statutes passed pursuant thereto mandatory rather than "directory."[37]

Although some state courts require the defendant to show that his rights were prejudiced,[38] the opposing view and the one adopted by the Supreme Court of the United States appears to be the better one. It is logical to conclude that, in a state where trial by jury for the most part[39] has meant trial by a jury of men only, one who has been tried by a jury composed of eligible men received a "fair trial" even though women eligible for jury duty had been intentionally excluded from the jury lists. Nevertheless, the more important consideration is whether or not there has been an intentional violation of the state laws by local officials in the selection of jurors. It is submitted that, when it is shown in a North Carolina court that women were intentionally and systematically excluded from the jury list, defendant's motion to quash the indictment or challenge the array should be sustained.[40]

WILLIAM B. AYCOCK.

Insurance—Fidelity Bonds—Renewals as Affecting the Liability of Surety

On July 10, 1929, the plaintiff indemnity company issued to the defendant bank its fidelity bond covering any loss, not exceeding $10,000, which defendant might sustain as a result of the defalcations of its cashier "while in any position in the continuous employ of the employer after 12 noon 15 July 1929 but before the employer shall become aware of any default on the part of the employee and discovered before the expiration of three years from the termination of such employment or cancellation of this bond, whichever may first happen." The bond could

[37] Art. I, §13 of the N. C. CONST. which states "No person shall be convicted of any crime but by unanimous verdict of a jury . . ." has been construed to guarantee to every person whether a citizen of this state or not a trial by jury (except in petty misdemeanors). State v. Cutshall, 110 N. C. 538, 544, 15 S. E. 261, 262 (1892).

[38] People v. Parman, 14 Cal. (2d) 17, 92 P. (2d) 387 (1939); State v. James, 96 N. J. L. 132, 114 A. 553 (1921). *Contra:* Walter v. State, 208 Ind. 231, 195 N. E. 268 (1935). Noted (1935-36) 11 IND. L. J. 386.

[39] Mr. Justice Devin dissenting in *State v. Emery* stated: "In some counties [in North Carolina] the names of qualified women are included in the jury lists. So that if we should hold now that women were qualified to serve on the jury, it would effect no change, but would only give added authority to a practice already grown up." 224 N. C. 581, 591, 31 S. E. (2d) 858, 865 (1944).

[40] It is questionable if mandamus by a voter to require the county commissioners to prepare a jury list without excluding women will lie inasmuch as N. C. GEN. STAT. (1943) §9-1, as amended in 1947, gives the commissioners a certain amount of discretion in selecting the jury list from the names of those eligible to serve. Board of Education of Alamance County v. Board of Com'rs of Alamance County, 178 N. C. 305, 100 S. E. 698 (1919); Dula v. Board of Graded School Trustees of Lenoir, 177 N. C. 426, 99 S. E. 193 (1919); State *ex rel.* Passer v. County Bd., 171 Minn. 177, 213 N. W. 545, 52 A. L. R. 916 (1927) (specifically denying mandamus when women were excluded). *Contra:* Davis v. Arthur, 139 Ga. 74, 76 S. E. 676 (1912) (a religious group had been excluded).

be cancelled by the employer giving written notice to the surety and by the surety giving thirty days notice to the employer. The bond was kept in force by payment of a stipulated annual premium until the closing of the bank in February 1942. After the bank closed, it was discovered that the cashier was short $297,735.51. The defendant, having ascertained the years in which the defalcations occurred, filed a claim for $81,731.00 on the theory that each renewal of the bond constituted a new bond and covered losses during each succeeding year to the extent of the penal sum of the bond. Plaintiff tendered $10,000, contending that its bond was for a single penalty of $10,000 for any and all defalcations occurring during the life of the bond from 1929 to 1942 and instituted an action for a declaratory judgment. *Held:* The bond guarantees payment of any loss not exceeding $10,000 sustained by defendant at any time during the continuous service of the cashier. The language is clear and unambiguous. It covered losses occurring during the life of the bond to the extent of $10,000. It must be presumed the parties intended what the language used clearly expresses and the contract must be construed to mean what on its face it purports to mean.[1]

This question of whether a fidelity bond and renewals thereof constitute separate and distinct contracts, or only one continuous contract usually arises in two different ways. It may arise, as in the principal case, where the insured is attempting to hold the surety liable for the face penalty of the bond for each year, so that its total potential liability is the penalty multiplied by the number of terms or years for which the bond has been in effect.[2] The rationale of the insured is that if a loss occurs to the full amount of the bond during some year, he would be entitled to that amount whether he had a bond thereafter or not; therefore unless the bonds for later years cover later losses to the extent of the amount of the later bonds he is receiving nothing for the later premiums.

However, the question arises just as often with the employer and the surety on the opposite sides of the fence. Most fidelity bonds contain a "discovery of default" provision which provides that the surety is only liable for losses discovered during the currency of the bond or within a limited period after its termination. Here the insured often

[1] Hartford Accident & Indemnity Co. v. Hood, 226 N. C. 706, 40 S. E. (2d) 198 (1946).

[2] Aetna Casualty & Surety Co. v. First National Bank of Weatherly, Pa., 103 F. (2d) 977 (C. C. A. 3d, 1939); Massachusetts Bonding & Ins. Co. v. Board of County Com'rs, 100 Colo. 398, 68 P. (2d) 555 (1937); Quinlan & Tyson v. National Casualty Co., 311 Ill. App. 369, 36 N. E. (2d) 470 (1941); Michigan Mortgage-Investment Corp. v. American Employers' Ins. Co., 224 Mich. 72, 221 N. W. 140 (1928); Krey Packing Co. v. Employers' Liability Assur. Corp., —— Mo. App. ——, 127 S. W. (2d) (1939); Hood, Comr. of Banks v. Simpson, 206 N. C. 748, 175 S. E. 193 (1934); Bradley v. Fidelity & Casualty Co. of New York, 141 Pa. S. 85, 14 A. (2d) 894 (1940).

invokes the rule of one continuous contract in order to hold the surety for losses occurring under the early periods of the bond which would otherwise be barred by the discovery clause or the statute of limitations.[3] Hence, a holding, as in the principal case, that the bond and renewals constitute but one continuous contract is not in all cases adverse to the interest of the insured.

The primary question in each case has not been, as often stated, whether a renewal creates a new contract, but rather what liability as a matter of fact the parties intended to create.[4] Did they intend the penalty named to be the maximum liability, regardless of the number of renewal premiums paid; or did they intend a separate liability for each renewal premium? It has been said that no conflict exists among the jurisdictions on this subject; that each court has faced the problem of construing a particular instrument; the terms of that instrument being the governing factor.[5] However, it appears from the excerpts of the terms of the bonds that there is some difference in the matter of interpretation.[6]

The answer to this question whether the parties intended successive yearly liabilities to be added together, or only one continuous liability for the duration of the bond, is usually found in the terms of the bond itself, or in the language of the renewal certificates. The compensated surety has never been regarded as a favorite of the law. The rule of *strictissimi juris,* applicable to ordinary suretyship agreements is not applied in the case of a compensated surety, hence where the language is ambiguous, that meaning is adopted which is most favorable to the insured.[7] (If

[3] Proctor Coal Co. v. United States Fidelity & Guaranty Co., 124 F. 424 (C. C. A. 5th, 1903); Chatham Real Estate & I. Co. v. United States Fidelity & Guaranty Co., 18 Ga. App. 583, 90 S. E. 88 (1916); Rankin v. United States Fidelity & Guaranty Co., 86 Ohio 267, 99 N. E. 314 (1912); Jernette v. Fidelity & Casualty Co. of New York, 98 Ky. 558, 33 S. W. 828 (1896); Green v. United States Fidelity & Guaranty Co., 135 Tenn. 117, 185 S. W. 726 (1916); American Indemnity Co. v. Mexia Independent School District, —— Tex. Civ. App. ——, 47 S. W. (2d) 682 (1932).

[4] Aetna Casualty & Surety Co. v. Commercial State Bank of Rantoul, 13 F. (2d) 474, 476 (E. D. Ill. 1926): "Whether a formal new contract is made at the end of the year, however, is manifestly not the test, . . . So the question here is what did the defendant buy the first year, what did he buy the second year, and what did he buy the third year." Michigan Mortgage-Investment Corp. v. American Employers' Ins. Co., 244 Mich. 72, 221 N. W. 140 (1928), the majority of the court, admitting the existence of two contracts, held that extension of liability beyond the penalty named would render the "aggregate liability" clause meaningless (a clause limiting the aggregate liability under successive bonds to the face amount of one).

[5] Note (1926) 42 A. L. R. 834.

[6] For example, compare Aetna Casualty & Surety Co. v. Commercial State Bank of Rantoul, 13 F. (2d) 474 (E. D. Ill. 1926) with Lenord v. Aetna Casualty & Surety Co., 80 F. (2d) 205 (C. C. A. 4th, 1935), both construing bonds which contained no termination date.

[7] ARANT, SURETYSHIP (1931) §40; Bank of England, Ark. v. Maryland Casualty Co., 293 F. 787 (E. D. Ark. 1923); Hardford Accident & Indemnity Co. v. Swedish Methodist Aid Ass'n, 92 F. (2d) 649 (C. C. A. 7th, 1937).

this principle were followed, it would seem that the result would depend on which construction the employer were asserting.) However, there is no question of construction where the bond specifically states that it shall be non-cumulative or where there is an unambiguous provision limiting recovery to a single stated amount, which is often the case.[8] However, the bond may be a "statutory bond," in which case, the statutory requirements will be read into the bond and determine the liability.[9] The answer may also be determined by the terms of the bond, as construed by the acts of the parties.[10] Many courts determine whether the fidelity bond or contract has within it a termination date, and if there is such a termination date, each renewal is considered to be a new contract, and liability is cumulative.[11] But where the bond is for an indefinite term, providing for a yearly premium, there is a single continuous contract, and liability is not cumulative, but limited to the amount stated in the bond.[12] One court stated that if the surety had on the record the actuarial statistics on which the premium was based, it would materially assist a determination of what the premiums bought.[13] However, it doesn't seem that this valuable aid has ever been furnished the courts.

Some courts, in holding the bond and renewals to be one continuous contract, have drawn an analogy between the situation and insuring and renewing insurance on a house against fire, where on renewal, the insured does not secure fire insurance protection to double the face amount of the policy.[14] However, there is a difference which destroys the effect

[8] United States Fidelity & Guaranty Co. v. Barber, 70 F. (2d) 220 (C. C. A. 6th, 1934); Sheetz v. J. R. Dager & Co., 46 Ohio App. 32, 187 N. E. 637 (1933); Michigan Mortgage-Investment Corp. v. American Employers' Ins. Co. of Boston, 224 Mich. 72, 221 N. W. 140 (1928); Jacksonville v. Bryan, 196 N. C. 721, 147 S. E. 12 (1929); Bradley v. Fidelity & Casualty Co. of New York, 141 Pa. S. 85, 14 A. (2d) 894 (1940); Maryland Casualty Co. v. Farmers State Bank & Trust Co., —— Tex. Civ. App. ——, 258 S. W. 584 (1924).

[9] Jaeger Mfg. Co. v. Massachusetts Bonding & Ins. Co., 229 Iowa 158, 294 N. W. 268 (1940) (since statute required a new bond each year, the court disregarded an "aggregate liability" clause and held liability to be cumulative); Hood, Com'r of Banks v. Simpson, 206 N. C. 748, 175 S. E. 193 (1934).

[10] Brulatour v. Aetna Casualty & Surety Co., 80 F. (2d) 834 (C. C. A. 2d, 1938), where the insured remained silent in the face of an "aggregate liability" clause.

[11] Maryland Casualty Co. v. First Nat. Bank of Montgomery, Ala., 246 F. 892 (C. C. A. 5th, 1917); Standard Accident Insurance Co. v. Collingdale State Bank, 85 F. (2d) 375 (C. C. A. 3d, 1936); Mayor of Brunswick v. Harvey, 114 Ga. 733, 40 S. E. 754 (1902); United States Fidelity & Guaranty Co. v. Williams, 96 Miss. 10, 49 So. 742 (1909); Alex Campbell Milk Co. v. United States Fidelity & Guaranty Co., 146 N. Y. S. 92 (1914); Bradley v. Fidelity & Casualty Co. of New York, 141 Pa. S. 85, 14 A. (2d) 894 (1940).

[12] Aetna Casualty & Surety Co. v. First Nat. Bank, 103 F. (2d) 977 (C. C. A. 3d, 1939); State Bank v. Fidelity Co., 206 Wis. 413, 240 N. W. 154 (1932).

[13] Brulatour v. Aetna Casualty & Surety Co., 80 F. (2d) 834 (C. C. A. 2d, 1936).

[14] Lenord v. Aetna Casualty & Surety Co., 80 F. (2d) 205 (C. C. A. 4th, 1935); National Bank of North Hudson at Union City v. National Surety Co., 105 N. J. Law 330, 144 A. 576 (1929); State of Okla. *ex rel.* Freeling v. New Amsterdam Casualty Co., 110 Okla. 23, 236 P. 603 (1925); Fourth & First Bank & Trust Co. v. Fidelity & Deposit Co. of Maryland, 153 Tenn. 176, 281 S. W. 785 (1926).

of the analogy as far as it has any bearing on the intent of the parties. When the owner of the house renews, he usually knows at the time there has been no loss under the policy during the previous year. However, where the employer renews a fidelity bond there may have already been a loss, without his knowledge. Hence it cannot be said that the employer intends only one liability as the insured obviously does in fire insurance. Further, there is normally the certainty of a new risk in the case of the fire policy, whereas in that of the surety bond if the full amount is already recoverable under the old bond there is no risk covered by the new unless the bonds are cumulative.

The rationale of the insured, mentioned above, to the effect that his premiums paid subsequent to a loss exceeding the amount of the bond would buy him nothing unless liability is to be cumulative has been accepted by some courts as a basis for holding that the parties intended liability to be cumulative.[15] One court, feeling that it could not hurdle an "aggregate liability" clause held the surety liable for only one penalty, but did accept this rationale in ordering the surety to refund the premiums collected subsequent to the defalcation on the ground of mutual mistake.[16] However, the employer is not getting absolutely nothing for his money even if there was a prior defalcation; he is getting an extension of the time in which to discover and report the loss. This is hardly the full measure of what he paid for, but in many instances it gives the employer an advantage of which he makes use.[17]

The principal case is not the first case in which this question has been before the North Carolina Supreme Court. In *Jacksonville v. Bryan,*[18] the court held the surety liable for only one penalty where the bond contained an "aggregate liability" clause. The court recognized that the insured, no doubt, thought he had paid for cumulative liability, and recommended relief by the surety companies or the legislature.

In *Hood, Com'r of Banks v. Simpson,*[19] which was distinguished in the principal case, the North Carolina court held that a fidelity bond, renewed annually when the cashier was elected and was required to execute a bond, was not a continuous contract, but every renewal thereof constituted a separate and distinct contract imposing cumulative

[15] Aetna Casualty & Surety Co. v. Commercial State Bank of Rantoul, 13 F. (2d) 474 (E. D. Ill., 1926); Standard Acc. Ins. Co. v. Collingdale State Bank, 85 F. (2d) 375 (C. C. A. 3d, 1936); Hood, Com'r of Banks v. Simpson, 206 N. C. 748, 175 S. E. 193 (1934).

[16] Hack v. American Surety Co. of New York, 96 F. (2d) 939 (C. C. A. 7th, 1938).

[17] Proctor Coal Co. v. United States Fidelity & Guaranty Co., 124 Fed. 424 (C. C. A. 5th, 1903); Florida Cent. & P. R. v. American Surety Co. of New York, 99 Fed. 674 (C. C. A. 2d, 1900); Ladies of Modern Maccabees v. Illinois Surety Co., 196 Mich. 27, 163 N. W. 7 (1917); Green v. United States Fidelity & Guaranty Co., 135 Tenn. 117, 185 S. W. 726 (1916).

[18] 196 N. C. 721, 147 S. E. 12 (1929).

[19] 206 N. C. 748, 175 S. E. 193 (1934).

liability on the surety. Even though the cases are factually distinguishable, the court in the *Simpson* case reiterated the principle that such contract should be liberally construed to accomplish the purpose for which they were made, and quoted with approval the view that the parties could not have intended the second and third year's premium to buy nothing if there were a defalcation during the first year to the extent of the penalty. The court quoted from *Aetna Casualty & Surety Co. v. Commercial State Bank of Rantoul*[20] as follows: "No sane man would say that this was the intention of the defendant, and the court is most loathe to believe that this was the intent of the plaintiff, a widely known insurance company, dependent upon the good will and esteem of the public and its customers for its commercial welfare, so to frame its contract of indemnity as to extract premiums from the insured without giving anything in return. Brief indeed would be its life of business prosperity and public esteem, were it known that it would be guilty of such a game of 'heads I win, tails you lose.'" The case quoted from involved a bond which contained no termination date, just as the bond in the principal case. However, the North Carolina court in the principal case, apparently rejects this view, for the court did not hesitate to make the imputation, but held that such an intent was clearly expressed in the bond. The position of the North Carolina court then, seems to be that the presence, or absence, of a termination date is the deciding factor, although most of the cases cited in support of the result reached are cases involving bonds which contain an express unambiguous limitation of liability.[21]

As a result of this case we have the anomalous situation in North Carolina of many employers paying sizable yearly premiums for nothing but time in which to discover a prior loss, and the surety, not assum-

[20] 13 F. (2d) 474 (E. D. Ill., 1926).

[21] Bank of England, Ark. v. Maryland Casualty Co., 293 Fed. 783 (E. D. Ark. 1923), "This bond may be renewed from year to year at the option of the employer by and with the consent of the company and in case of any such renewal the company's liability on behalf of the employee shall be in all respects as though this bond had been originally written for a term including the period of such renewal." Brulatour v. Aetna Casualty & Surety Co., 80 F. (2d) 834 (C. C. A. 2d, 1936), renewal schedule explicity provided that "this list shall be deemed a part of the original bond and not a new obligation, nor shall it create a cumulative liability"; Hack v. American Surety Co. of New York, 96 F. (2d) 939 (C. C. A. 7th, 1938): "We, however, have been unable to hurdle or circle a clause of the contract in the instant case which provides that 'in no event shall the aggregate liability of the surety for any one or more defaults of the principal during any one or more years of the suretyship exceed the amount specifically set forth in said bond'"; Chatham Real Estate & Improvement Co. v. United States Fidelity & Guaranty Co., 18 Ga. App. 588, 90 S. E. 88 (1916). Continuation certificate read: "hereby continues in force Bond No. 1052-5 . . . subject to all covenants and conditions of said original bond"; Jacksonville v. Bryan, 196 N. C. 721, 147 S. E. 12 (1929), the bond contained an aggregate liability clause; State *ex rel.* Freeling v. New Amsterdam Casualty Co., 100 Okla. 23, 236 P. 603 (1925): "the receipt expresses on its face that it is the payment of the second annual premium on a certain and distinct bond, No. 112."

ing the risk of a loss, but the risk of a discovery. As pointed out above, this is hardly the full measure of what the employer intends to pay for.

Several remedies have been suggested in this field.[22] However, these remedies serve only to give the insured cumulative liability and as seen above, he must have, not only separate coverage for each year, but a longer time in which to make discovery, in order to be completely covered. This desired coverage could be obtained, in the case of bank employees by the Commissioner of Banks, in so far as he is required to approve the form of the bond.[23] However, in the case of the ordinary employer, legislative action would be required in the form of a "standard fidelity bond."

J. T. RENDLEMAN.

Landlord and Tenant—Trade Fixtures—Right of Lessee of Deceased Life Tenant to Remove

In *Haywood v. Briggs*,[1] the North Carolina Supreme Court held that the lessees of a deceased life tenant did not have the right as against the remaindermen to remove from the leased land two large tobacco warehouses erected thereon by the lessees pursuant to the terms of the lease which provided that all improvements, fixtures and property placed thereon were to remain the property of the lessees and were to be removable at the termination of said lease, but in which lease the remaindermen had not joined. The lessees based their claim to the right of removal on the right of a tenant to remove trade fixtures; and no claim was made on the basis of the right reserved in said lease which admittedly was not binding on the remaindermen, but which clearly indicated the intent of the parties thereto. In consideration of the uncertainty of the estate of the lessor, bond was given by the lessor to protect the peaceful possession of the lessees for the term; which bond was to become of full force and effect if the lessees were ousted during the term by reason of the death of the lessor or for any reason not the fault of the lessees. However, if the bond were enforced, the improvements were to become the property of the lessor. Although it was seven months after the death of the lessor when the right of removal was sought to be invoked, the lessees without having reached an agreement with the remaindermen were still in possession, having retained the use of the warehouses for a complete tobacco season.

Although it is somewhat difficult to conceive of large warehouses as

[22] Note (1928) 27 MICH. L. REV. 442 suggests legislative action to prohibit use of aggregate liability clause; also suggests practical solution of bonding with a different surety each year to secure cumulative liability.

[23] N. C. GEN. STAT. (1943) §53-90.

[1] Haywood v. Briggs *et al.*, 227 N. C. 108, 41 S. E. (2d) 289 (1947).

removable fixtures,[2] yet the authorities seem to agree that the character of the structure, the size thereof, the material of which constructed, and the manner of attachment to the land are not to be considered in ascertaining whether it be a trade fixture.[3] If it be placed on the land with the intent that it be for the purpose of trade, manufacture,[4] or mixed trade and agriculture[5] and that it should not become a part of the land,[6]

[2] Buildings which have been held removable: Van Ness v. Pacard, 2 Pet. (U. S.) 137 (1829) (two story building); Kleinschmidt v. Brown, 28 F. Supp. 86 (E. D. Ark. 1939) (C. C. C. Camp houses); *In re* Montello Brick Works, 163 Fed. 624 (E. D. Pa. 1908) (large factory and brick kilns); Brown v. Reno Electric L. & P. Co., 55 Fed. 229 (C. C. Nev. 1893) (generating plant and building); R. Barcraft & Sons v. Cullen, 217 Cal. 708, 20 P. (2d) 665 (1933) (steel filling station); Murr v. Coon, 87 Cal. App. 478, 262 Pac. 768 (1927) (filling station); Earle v. Kelly, 21 Cal. App. 480, 132 Pac. 262 (1913) (livery stable); Security L. & T. Co. v. Willimette Steam M. L. & M. Co., 99 Cal., 636, 34 Pac. 321 (1893) (office building); Rare Metals M. & M. Co. v. Western Colo. Power Co., 73 Colo. 30, 213 Pac. 124 (1923) (large mill and reduction plant buildings); Updegraff v. Lensem, 15 Colo. App. 297, 62 Pac. 342 (1900) (mining shaft house); Texas Co. v. Cason, —— Ga. App. ——, 193 S. E. 898 (1937) (steel filling station); Armour & Co. v. Block, 147 Ga. 639, 95 S. E. 228 (1918) (large commercial smoke house); Ray v. Young, 160 Iowa 613, 142 N. W. 393, 46 L. R. A. (N. S.) 947 (1913) (garage and repair shed); Union Terminal Co. v. Wilmar & S. F. R., 116 Iowa 392, 90 N. W. 92 (1903) (large railroad repair shop); Lawson v. Southern Fire Ins. Co., 137 Kan. 591, 21 P. (2d) 387 (1933) (large airplane hangar); Farmer v. Golden Rule Oil Co., 130 Kan. 803, 287 Pac. 706 (1930) (filling station); Russell v. Richards, 10 Me. 429, 25 Am. Dec. 254 (1833) (saw mill building); Smith v. Whitney, 147 Mass. 479, 18 N. E. 229 (1888) (engine house); Ottney v. Taylor, 308 Mich. 252, 13 N. W. (2d) 280 (1944) (filling station); Biallas v. March, 305 Mich. 401, 9 N. W. (2d) 655 (1943) (large dance hall); Cameron v. Oakland County G. & O. Co., 277 Mich. 442, 269 N. W. 227, 107 A. L. R. 1142 (1936) (filling station); Waldaner v. Parks, 141 Miss. 617, 106 So. 881 (1926) (stable and barn); Zeigler v. Lexington C. & O. Co., 105 Miss. 820, 63 So. 220 (1913) (storage shed); Idalia Realty & Dev. Co. v. Norman, —— Mo. App. ——, 183 S. W. 348 (1916) (saw mill buildings); King v. Morris, 74 N. J. L. 810, 86 Atl. 162, 14 L. R. A. (N. S.) 439 (1913) (factory building); Firth v. Rowe, 53 N. J. Eq. 520, 32 Atl. 1064 (1895) (livery stable); Interstate Lien Corp. v. Schmidt, 180 Misc. 910, 44 N. Y. S. (2d) 709 (1943) (service station); Carters' Wharf v. Valvoline Oil Co., 204 App. Div. 840, 196 N. Y. S. 815 (1922) (garage and two sheds); Dubois v. Kelly, 10 Barb. (N. Y.) 496 (1851) (storehouse and sheds for tavern); Western N. C. R. R. v. Deal, 90 N. C. 110 (1884) (railroad depot); Wittenmeyer v. Board of Education, 10 Ohio C. C. 119, 6 Ohio C. D. 258 (1895) (school building); White's Appeal, 10 Pa. 252 (1849) (engine house); Couch v. Welsh, 24 Utah 36, 66 Pac. 600 (1901) (boarding house); Snow v. Snow, 86 Vt. 58, 83 Atl. 269 (1912) (machine shop); Welsh v. McDonald, 64 Wash. 108, 116 Pac. 589 (1911) (saw mill buildings); Shields v. Hanson, 201 Wis. 349, 230 N. W. 51 (1930) (filling station); Dougan v. H. J. Grell Co., 174 Wis. 17, 182 N. W. 350 (1921) (butter and cheese factory building).

[3] Van Ness v. Pacard, 2 Pet. (U. S.) 137 (1829); Cameron v. Oakland County G. & O. Co., 277 Mich. 442, 269 N. W. 227, 107 A. L. R. 1142 (1936); Western N. C. R. R. v. Deal, 90 N. C. 110 (1884); McClintock & I. Co. v. Aetna Explosive Co., 260 Pa. 191, 103 Atl. 622, Ann. Cas. 1918E 1078 (1918).

[4] Van Ness v. Pacard, 2 Pet. (U. S.) 137 (1829); Ray v. Young, 160 Iowa 613, 142 N. W. 393, 46 L. R. A. (N. S.) 947 (1913); Cameron v. Oakland County Oil & Gas. Co., cited *supra* note 3; Western N. C. R. R. v. Deal, cited *supra* note 3; *see* Belvin v. Paper Co., 123 N. C. 138, 31 S. E. 655 (1898); Overman v. Sasser, 107 N. C. 432, 12 S. E. 64 (1890); Pemberton v. King, 13 N. C. 376 (1884).

[5] Overman v. Sasser, 107 N. C. 423, 12 S. E. 64 (1890); *see* Van Ness v. Pacard, 2 Pet. (U. S.) 137 (1829); Western N. C. R. R. v. Deal, cited *supra* note 3. Not agricultural alone: McCullough v. Irvine, 13 Pa. 438 (1850); Elwes v. Mawe, 3 East 38, 102 Eng. Rep. 510; *see* Overman v. Sasser, *supra*. *Contra:* Waldauer v. Parks, 141 Miss. 617, 106 So. 881 (1926).

[6] Van Ness v. Pacard, 2 Pet. (U. S.) 137 (1829); Western N. C. R. R. v.

and that it be designed for such purpose;[7] it is a trade fixture and removable by the annexing party during the term of his right to possession,[8] if such removal will not substantially injure the freehold.[9]

This rule is liberally and frequently invoked in favor of a tenant against his landlord,[10] allowing the removal by the tenant of trade fixtures placed on the land by the tenant. It seems never to be invoked in favor of the personal representative of the owner of the land against said owner's heirs,[11] since the owner,[12] vendee,[13] or mortgagor[14] of the land seems conclusively presumed to intend that the annexation be a permanent improvement thereof. As between the personal representative or lessee of a tenant for life and the remaindermen, the rule has been invoked to allow the removal of trade fixtures by the personal representative[15] or lessee.[16] However, the decisions pertaining to this relationship of the parties are neither numerous nor in accord,[17] each case being decided on its own facts with the courts looking more closely (but in favor of the personal representative or lessee)[18] to those elements

Deal, cited *supra* note 3; Cameron v. Oakland County G. & O. Co., cited *supra* note 3; Standard Oil Co. v. LaCrosse Auto Service, 217 Wis. 237, 258 N. W. 791, 99 A. L. R. 60 (1935); *see* Overman v. Sasser, cited *supra* note 5; Horne v. Smith, 105 N. C. 322, 11 S. E. 373 (1890); Moore v. Vallentine, 77 N. C. 188 (1877).

[7] Van Ness v. Pacard, 2 Pet. (U. S.) 137 (1829); Cameron v. Oakland County G. & O. Co., cited *supra* note 3; *see* Western N. C. R. R. v. Deal, cited *supra* note 3.

[8] Hughes v. Kershaw, 42 Colo. 210, 93 Pac. 1116, 15 L. R. A. (N. S.) 723 (1908); Bedlow v. N. Y. Floating Drydock Co., 112 N. Y. 263, 19 N. E. 800, 2 L. R. A. 629 (1889); Causey v. Orton, 171 N. C. 375, 88 S. E. 513 (1916); Pemberton v. King, 13 N. C. 376 (1828); *see* Spring v. Refining Co., 205 N. C. 444, 171 S. E. 635 (1933); Western N. C. R. R. v. Deal, cited *supra* note 3.

[9] Van Ness v. Pacard, 2 Pet. (U. S.) 137 (1829); Ray v. Young, 160 Iowa 613, 142 N. W. 393, 42 L. R. A. (N. S.) 947, Ann. Cas. 1915D 258 (1913); Frost v. Schenkel, 121 Neb. 784, 238 N. W. 659 77 A. L. R. 1381 (1931); Pennington v. Black, 261 Ky. 728, 88 S. W. (2d) 969 (1935); Olympia Lodge v. Keller, 142 Wash. 93, 252 Pac. 121 (1927). In general see 22 AM. JUR. FIXTURES §61; 36 C. J. S. FIXTURES §38; I MORDECAI'S LAW LECTURES (2d ed. 1916) 475; TIFFANY, REAL PROPERTY (3d ed. 1939) §617; AMOS AND FERARD, FIXTURES (2d ed. 1855) 123.

[10] Causey v. Orton, cited *supra* note 8; Overman v. Sasser, cited *supra* note 5; Western N. C. R. R. v. Deal, cited *supra* note 3; Pemberton v. King, cited *supra* note 8; *see* note 2 *supra*.

[11] *See* Van Ness v. Pacard, 2 Pet. (U. S.) 137 (1829); Johnson v. Wiseman, 4 Met. (Ky.) 357, 83 Am. Dec. 475 (1863); Overman v. Sasser, cited *supra* note 5; Kittredge v. Woods, 3 N. H. 503, 14 Am. Dec. 393 (1826).

[12] Jenkins v. Floyd, 199 N. C. 470, 154 S. E. 733 (1930); Best v. Hardy, 123 N. C. 226, 31 S. E. 391 (1899); Horne v. Smith, 105 N. C. 322, 11 S. E. 373 (1890); Bond v. Coke, 71 N. C. 97 (1890); *see* Overman v. Sasser, cited *supra* note 5.

[13] Moore v. Vallentine, 77 N. C. 188 (1872).

[14] Brown v. N. C. Joint Stock Land Bank, 213 N. C. 594, 191 S. E. 141 (1938); Foote v. Gooch, 96 N. C. 265, 1 S. E. 525 (1887).

[15] Overman v. Sasser, cited *supra* note 5.

[16] Ray v. Young, cited *supra* note 9.

[17] Allowing removal: Ray v. Young, cited *supra* note 9; Overman v. Sasser, cited *supra* note 5. Denying removal: White v. Arndt, 1 Whart. (Pa.) 91 (1836); Cannon v. Hare, 1 Tenn. Ch. 22 (1872).

[18] Overman v. Sasser, cited *supra* note 5; *see* Van Ness v. Pacard, 2 Pet. (U. S.) 137 (1829); Elwes v. Mawe, 3 East 38, 102 Eng. Rep. 510.

which would deny removal—i.e., the use of the erection for trade purposes, the exercise of the right of removal during the term, and the resulting damage to the freehold occasioned by the removal thereof. The instant case falls within this class, and the scope of this note is limited thereto.

It is clear that if the fixture be other than for the purpose of trade, the right of removal, therefore, depending solely on the right to remove reserved in the contract with the life tenant, would not be enforceable against the remaindermen who have not joined in the contract.[19] In the instant case the court,[20] conceding that the buildings in question could under the above rules be regarded as trade fixtures, said that the right of removal existing in such event would have to be exercised during the term and before the death of the lessor, and was not now enforceable against the remaindermen who by the operation of the law of property were entitled as of the death of the tenant for life to the land and all annexations which had become a part thereof. The previous North Carolina decisions, however, would seem to indicate that trade fixtures do not in contemplation of law become a part of the realty but remain the personal property of the annexing party, and would not, therefore, pass with the land.[21]

The only previous case in the aforesaid class, *Overman v. Sasser*,[22] granted to the personal representative of a deceased life tenant by curtesy a reasonable time after the termination of the estate to remove trade fixtures placed on the land by the life tenant. The court further indicated[23] that the right to remove within a reasonable time existed whenever the duration of the particular estate or the term of a lease was uncertain and not fixed. The authorities elsewhere which deny the lessee of a life tenant the right to remove within a reasonable time trade fixtures put upon the land by the lessee, do so on the basis that the lessee has no greater rights than the lessor life tenant who does not have the right of removal through his personal representative.[24] It would seem to follow, applying such reasoning, that where the tenant for life through his personal representative has the right to remove trade fixtures within a resonable time after the termination of the estate, such right would

[19] Demby v. Parse, 53 Ark. 526, 14 S. W. 899 (1890) (dwelling house); Haflick v. Stober, 11 Ohio St. 482 (1860) (agricultural fixtures); Jones v. Shuffin, 45 W. Va. 729, 31 S. E. 975, 72 Am. St. Rep. 848 (1898) (rental building).

[20] Haywood v. Briggs *et al.*, 227 N. C. 108, 111, 41 S. E. (2d) 289, 292 (1947).

[21] Woodworking Co. v. Southwick, 119 N. C. 611, 26 S. E. 253 (1896); *see* Spring v. Refining Co., 205 N. C. 444, 171 S. E. 635 (1933); Belvin v. Paper Co., 123 N. C. 138, 31 S. E. 655 (1898); Western N. C. R. R. v. Deal, cited *supra* note 3; Moore v. Vallentine, cited *supra* note 13. *Contra: Ex parte* Makepeace, 31 N. C. 91 (1848) (within meaning of tax act); Pemberton v. King, cited *supra* note 8 (part of realty until severed).

[22] Overman v. Sasser, cited *supra* note 5.

[23] *Id.* at 437, 12 S. E. at 66.

[24] White v. Arndt, cited *supra* note 17; Cannon v. Hare, cited *supra* note 17.

be granted a lessee who, by contract binding upon the tenant for life and his estate, has the rights of the lessor.

The nature and size of the trade fixtures in the instant case, and the acts of the lessees in retaining possession and use of the warehouse for the next complete tobacco season following the death of their lessor and in providing for a remedy through the lessor's bond conditioned upon the exact contingency which occurred, undoubtedly had their effect upon the decision. Whether the absence of these elements would have altered the result would be mere speculation.

The impact of the instant case upon the previous existing law is difficult to ascertain since the court did not discuss the former case of *Overman v. Sasser*.[25] It is clear, however, that the court did not hold that the warehouses in question were not trade fixtures. The result would seem to be that the personal representative of a tenant for life has as against the remaindermen the right to remove trade fixtures placed on the land by the tenant for life within a reasonable time after the termination of the life estate;[26] but the lessee of such tenant for life has as against the remaindermen the right to remove trade fixtures placed on the land by the lessee only during the term of the lease.[27]

LOUIS J. POISSON, JR.

Taxation—Capital Gains and Losses—Sale of Life Interest in Testamentary Trust.

Testator's will set up a trust fund of $100,000, the income of which was to be paid to his son, *A*, for life, and upon *A*'s death without issue, to *A*'s wife, *B*, for her life, and upon her death the residue was to go to the testator's wife, *C*, and to his other son, *D*, thus terminating the trust. The testator died in 1926 and his widow died in 1935. *A* died without issue in 1937. His widow, *B*, found his assets insufficient to pay the debts of his estate. She had only corporate stock which was then unsaleable at a fair market price. Testator's will and codicil contained provisions which clearly indicated that he did not desire the life beneficiaries to dispose of their interests. To end "extended family litigation" and to obtain the necessary funds, *B* petitioned the New Jersey Court of Chancery to end the trust. In the petition, she stipulated that she would release all interest in the trust and consent to its termination in consideration of a payment to her of $55,000 by *D*, the remainderman, and his promise to purchase her stock for a specified amount. (The stock purchase does not otherwise figure in the case.) The parties consented and the court so decreed. In her 1940 income tax return, *B* re-

[25] Overman v. Sasser, cited *supra* note 5.
[26] *Id.*
[27] Haywood v. Briggs *et al.*, cited *supra* note 20.

ported a capital loss of $8,790.20 on this transaction, which was the difference between the amount she received, $55,000, and the value of the life estate she had released, $63,790.20, computed under an appropriate Income Tax Unit Ruling.[1] The commissioner disallowed this loss and made a deficiency assessment based on his reasoning that the $55,000 received by the taxpayer was taxable as gross income under Internal Revenue Code Section 22(a).[2] This was upheld by the United States Tax Court (formerly the Board of Tax Appeals).[3] In *McAllister v. Commissioner of Internal Revenue,*[4] the circuit court of appeals, in a 2 to 1 decision, reversed the Tax Court and held the $55,000 was a receipt from the sale of a capital asset, taxable under Internal Revenue Code Section 117(a)(1).[5] Because the parties were in conflict as to the valuation of the life estate, the case was remanded to the Tax Court for computation.

This decision was recently followed in *Allen v. First National Bank and Trust Company in Macon.*[6]

In the *McAllister* case, the court determined the issue to be whether the case was within the rule of *Blair v. Commissioner of Internal Revenue*[7] or *Hort v. Commissioner of Internal Revenue,*[8] and, after deciding that the *Blair* case controlled, Judge Clark, speaking for the majority, stated, "Petitioner's right to income for life from the trust estate was a right in the estate itself. Had she held a fee interest, the assignment would unquestionably have been regarded as the transfer of a capital asset; we see no reason why a different result should follow the transfer of the lesser, but still substantial, life interest."

These words aptly indicate that any determination of the fundamental issue in the principal case depends upon the answer to the inquiry—what is the nature of the beneficiary's interest in an estate from which she has the right to receive yearly income for life from a fund held in trust? The interest of the beneficiary would hardly seem to extend beyond the right to receive such payments for her life and the right to obtain them from the trustee. As to whether the beneficiary's interest is solely *in personam* against the trustee or whether it also extends in some intangible fashion into the corpus, which in the principal case would go to the remainderman upon the death of the life beneficiary, has aroused much legal discussion. The prevailing view is that the beneficiary's interest is a dual one—partly *in personam* and partly *in*

[1] I. T. 2076, III-2 CUM. BULL. 18 (1924).
[2] 26 U. S. C. A. §22(a).
[3] Beulah E. McAllister, 5 T. C. 714 (1945).
[4] 157 F. (2d) 235 (C. C. A. 2d, 1946).
[5] 26 U. S. C. A. §117(a)(1).
[6] 157 F. (2d) 595 (C. C. A. 5th, 1946).
[7] 300 U. S. 5 (1937).
[8] 313 U. S. 28 (1941).

rem.[9] It thus appears that even the holder of the right to receive income from the corpus for life has an equitable interest in that corpus which may be defined as a "property."[10]

The sale, surrender or assignment of the life interest in the income of a trust for adequate consideration can well be the anticipation of future income in addition to the giving up of a valuable property right. If viewed as anticipation of future income, it would appear that the consideration received by the taxpayer in the principal case would be taxable under the broad provisions of Section 22(a) as in the *Hort* case. In that case, the question was whether the amount received for the cancellation of a lease of realty acquired by bequest was taxable as ordinary income, or as a capital return as the petitioner therein contended. The Supreme Court held the amount to be taxable as ordinary income. While indicating that the amount in question was a form of rental payment,[11] rents being specifically included in the provisions of Section 22(a), the court, nevertheless, regarded the lease as a "property."[12]

Many transfers of "property" have been held to be outside the provisions of the capital gains section when they begin to take on the color of advance payments of future income.[13] Thus, deemed to be without the capital provisions were a payment of a deposit for the breaking of a lease,[14] the amount received for the sale of partnership interests where the vendor had contributed no capital to the formation of the legal firm,[15] payments made to a partner for the use of his stock exchange seat which was never carried as an asset on the partnership books,

[9] 1 BOGERT, TRUSTS AND TRUSTEES (1935) §183; RESTATEMENT, TRUSTS (1935) §§130, 132; Scott, *The Nature of the Rights of the Cestui Que Trust* (1917) 17 COL. L. REV. 269, 289; see Stone, *The Nature of the Rights of the Cestui Que Trust* (1917) 17 COL. L. REV. 467.

[10] Allen v. First National Bank and Trust Co. in Macon, cited *supra* note 6; McAllister v. Com'r of Int. Rev., cited *supra* note 4; Bell's Estate v. Com'r of Int. Rev., 137 F. (2d) 454 (C. C. A. 8th, 1943), noted (1944) 57 HARV. L. REV. 382; *accord:* Blair v. Com'r of Int. Rev., cited *supra* note 7; Helvering v. Horst, 311 U. S. 112 (1940); Brown v. Fletcher, 235 U. S. 589 (1915); Irwin v. Gavit, 268 U. S. 161 (1925); Senior v. Braden, 295 U. S. 422 (1934).

[11] 313 U. S. 28, 31 (1941).

[12] *Ibid.*

[13] *See* McAllister v. Com'r of Int. Rev., 157 F. (2d) 235, 237 (C. C. A. 2d, 1946) (dissenting opinion).

[14] Warren Service Corp. v. Com'r of Int. Rev., 110 F. (2d) 723, 725 (C. C. A. 2d, 1940); *cf.* Com'r of Int. Rev. v. Langwell Real Estate Corp., 47 F. (2d) 841 (C. C. A. 7th, 1931).

[15] Helvering v. Smith, 90 F. (2d) 590, 592 (C. C. A. 2d, 1937); *accord:* Doyle v. Com'r of Int. Rev., 102 F. (2d) 86 (C. C. A. 4th, 1939); *cf.* Williams v. McGowan, 152 F. (2d) 570 (C. C. A. 2d, 1945) (where sale of a business including cash on hand, merchandise, fixtures, notes and bills receivable was held not the sale of a single property and the gains and losses were to be computed on each item, then classified as capital or ordinary). *But cf.* Bull v. United States, 295 U. S. 247, 254 (1934); Hill v. Com'r of Int. Rev., 38 F. (2d) 165 (C. C. A. 1st, 1930); McClelland v. Com'r of Int. Rev., 117 F. (2d) 988 (C. C. A. 2d, 1941); Stilgenbaur v. United States, 115 F. (2d) 532 (C. C. A. 9th, 1940). See note (1946) 15 FORDHAM L. REV. 135.

which payments were under the agreement due him as additional compensation regardless of whether or not his old seat was returned,[16] and proceeds of the sale of the right to collect dividends already declared on certain stock, but not yet payable.[17]

The term "property" can have far too many meanings to be determinative of the nature of the transfer in every situation. The *Hort* case and the principal case can be distinguished. The Board of Tax Appeals, in its holding in the *Hort* case,[18] which was affirmed,[19] suggests two distinguishing points. The taxpayer in the *Hort* case could establish no separate basis for gain or loss on the lease apart from the basis of the property leased, while in the principal case, the basis of the taxpayer's life estate was fixed by statute[20] and a valuation provided for in Income Tax Unit Ruling 2076. And in the former case, there was no sale or exchange of the lease; only an extinguishment. The taxpayer still had the property to rent again. In the principal case, the taxpayer's right to receive income was sold completely to the remainderman.

From a tax standpoint, the holder of a life estate has a chameleon-like interest. The income from his estate is included in gross income.[21] If his life estate be acquired by gift, bequest or inheritance, his income cannot be diminished by deductions for shrinkage due to the lapse of time or by any other deductions except those allowed in Internal Revenue Code Sections 23(l) and 23(m).[22] He has an alienable property interest in the absence of restriction.[23] The unadjusted basis of a life estate is determined by statute depending upon whether acquired by purchase,[24] gift,[25] transfer in trust[26] or by bequest, devise or inheritance,[27]

[16] Levinson v. Com'r of Int. Rev., 154 F. (2d) 60 (C. C. A. 2d, 1946). *But cf.* Munson v. Com'r of Int. Rev., 100 F. (2d) 363 (C. C. A. 2d, 1938).

[17] Rhodes' Estate v. Com'r of Int. Rev., 131 F. (2d) 50 (C. C. A. 6th, 1942).

[18] 39 B. T. A. 922, 925-926 (1939).

[19] 112 F. (2d) 167 (C. C. A. 2d, 1940) (memorandum opinion).

[20] INTERNAL REVENUE CODE §113(a)(5), 26 U. S. C. A. §113(a)(5).

[21] INTERNAL REVENUE CODE §22(b)(3), 26 U. S. C. A. §22(b)(3); Irwin v. Gavit, 268 U. S. 161 (1925).

[22] INTERNAL REVENUE CODE §24(d), 26 U. S. C. A. §24(d); Codman v. Miles, 28 F. (2d) 823 (C. C. A. 4th, 1928), *cert. denied,* 278 U. S. 654 (1928); Friend v. Com'r of Int. Rev., 119 F. (2d) 959 (C. C. A. 7th, 1941).

REGULATIONS III, §29.24-8 says, "Amounts paid to the holder of a life or terminable interest acquired by gift, bequest or inheritance shall not be subject to any deduction for shrinkage (whether called depreciation or any other name) in the value of such interest due to the lapse of time. In other words, the holder of such an interest so acquired may not set up the value of the expected future payments as corpus or principal and claim deductions for shrinkage or exhaustion thereof due to the lapse of time. (See section 113(a)(5)).

"However, in the case of property held by one person for life with remainder to another person and in the case of property held in trust, see section 23(l) as to depreciation and section 23(m) as to depletion."

[23] Bell's Estate v. Com'r of Int. Rev., 137 F. (2d) 454 (C. C. A. 8th, 1943); Estate of Camden v. Com'r of Int. Rev., 139 F. (2d) 697 (C. C. A. 6th, 1943); Sayers F. Harman, 4 T. C. 335 (1944); Elmer J. Keitel, 15 B. T. A. 903 (1929).

[24] INTERNAL REVENUE CODE §113(a), 26 U. S. C. A. §113(a).

[25] *Id.,* §113(a)(2), 26 U. S. C. A. §113(a)(2).

[26] *Id.,* §113(a)(3), 26 U. S. C. A. §113(a)(3).

[27] *Id.,* §113(a)(5), 26 U. S. C. A. §113(a)(5).

such basis being adjusted as in Section 113(b).[28] Until a sale by the holder of such interest, few of the aspects of capitalization have been allowed, but upon sale, the interest blooms into a full-fledged capital asset.[29] On the other hand, the vendee of a life estate can exhaust his investment by deduction of charges against income over its duration.[30]

Whether there is an element of tax avoidance in allowing the sale of a life estate to be considered as the sale of a capital asset would depend upon a great many factors. In the *McAllister* case, while the life beneficiary would no longer receive taxable income from the trust, the remainderman's income would be swelled by that amount and he may or may not be taxed in the higher brackets. If the life estate had been sold to several diverse parties rather than the single remainderman, there would certainly be a loss of revenue. A primary factor bearing on avoidance in such cases would be what adjustments, if any, the remainderman would be able to make to the statutory unadjusted basis provided for him by Section 113(a)(5),[31] which would be the fair market value of the property at the time of acquisition—date of the death of the decedent,[32] subject to a special rule where the property was valued at the optional, year later valuation date under Section 811(j).[33] Whether any depreciation would be allowed would be another complicating factor bearing on the determination of gain upon the sale of the property.[34] As pointed out previously, nothing in Section 24(d) prevents the vendee of a life estate from reducing income received by the deductions therein provided, but some doctrine of merger may prevent this. It does not seem that it should prevent it from an income tax standpoint[35] since the estates could be treated separately and the re-

[28] *Id.*, §113(b), 26 U. S. C. A. §113(b).

[29] Allen v. First National Bank in Macon, 157 F. (2d) 595 (C. C. A. 5th, 1946); Bell's Estate v. Com'r of Int. Rev., 137 F. (2d) 454 (C. C. A. 8th, 1943); Estate of Camden v. Com'r of Int. Rev., 139 F. (2d) 697 (C. C. A. 6th, 1943); Sayers F. Harman, 4 T. C. 329 (1944); *cf.* Quigley v. Com'r of Int. Rev., 143 F. (2d) 27 (C. C. A. 7th, 1944) (an unusual case wherein taxpayer agreed with her brothers not to contest a will which had set up spendthrift trusts for them, in consideration of certain annuities to be paid to her by them from the income and her later surrender of the right to receive these payments for a lump sum was deemed a capital transaction).

[30] Elmer J. Keitel, 15 B. T. A. 903 (1929) (taxpayer, who owned one-half life interest in a co-partnership and who was also one of six remaindermen, purchased the other part of the life estate in consideration of monthly payments and was allowed to deduct yearly exhaustion spread over the vendor's life expectancy under §214(a)(8) of Revenue Act of 1921); Floyd M. Shoemaker, 16 B. T. A. 1146 (1929) (where life tenancy in a going business was purchased by taxpayer for an annuity, the court said that the amount paid each year should be deducted under §214(a)(8) of Revenue Act of 1921).

[31] See note 20 *supra.*

[32] REGULATIONS III, §29.113(a)(5)-1.

[33] Internal Revenue Code §811(j), 26 U. S. C. A. §811(j).

[34] *Id.*, §114(a), 26 U. S. C. A. §114(a).

[35] Elmer J. Keitel, 15 B. T. A. 903 (1929); *cf.* Citizen's National Bank of Kirksville, Mo. v. Com'r of Int. Rev., 122 F. (2d) 1011 (C. C. A. 8th, 1941).

mainderman has at least purchased the present right to receive income, an interest which he did not have before. Notwithstanding the possible merger feature of the principal case, if the sale of a life interest to a third party be the sale of a capital asset, it offers possibilities for loss of revenue to the government, and should be subject to close scrutiny by the courts, especially when a family transaction and in spite of conceivable hardship cases such as the principal case.

The instant decision is doubtlessly deeply rooted in the substantive law. Regardless of any tax avoidance problem, the decision still may have a questionable effect upon the trusts field which heretofore has been a spawning ground for tax devices. Under the present ruling, the settlor of a testamentary or *inter vivos* trust now has the knowledge that whenever his life beneficiary of income desires to sell such interest for a lump sum consideration, the transaction will be taxable only as the sale of a capital asset—a small gain; conceivably a loss. This could be a stimulus to seek court action to circumvent the provisions in wills such as the one in the principal case directing that the beneficiary's interest be not transferred, assigned or encumbered or subject to anticipation or sale. The question, however, of whether or not such an interest is assignable or saleable under the will is a matter for the state court based on local law and its decision is conclusive upon the federal court dealing with the tax question.[36]

THOMAS G. DILL.

[36] Blair v. Com'r of Int. Rev., cited *supra* note 7; McAllister v. Com'r of Int. Rev., cited *supra* note 4. *But cf.* Craig v. United States, 69 F. Supp. 229, 239 (W. D. Pa. 1946) (an income tax case turning on the interpretation of a will wherein the court indicates that by virtue of the recent family partnership cases, the law has been modified so that the state court's decisions of questions over which they have the final say, cannot decide issues of federal tax law and thus hamper the effective enforcement of a valid federal tax; it was therefore necessary for the federal court to interpret the will as a step toward the uniformity of federal tax laws).