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NOTES AND COMMENTS

Administrative Law—Criminal Law—Powers of Administrative Boards

By North Carolina statute[1] any District Health Board was given authority to "make such rules and regulations, . . . and enforce such penalties as in its judgment shall be necessary to protect and advance the public health." One of the Boards provided[2] that for the violation of its various ordinances the court should have power to punish by fine, imprisonment, or both. In reversing a conviction under a Health Board ordinance making it unlawful to sell milk in the District without a permit, the court said that if the Board were authorized by statute to make both the regulation and the penalty "it would run counter to the principle that the legislature cannot delegate its power to make a law."[3]

This case opens an inquiry as to what administrative boards are permitted to do in the field of criminal law. Approaching the problem logically the questions that may be raised are: (1) whether the administrative board acted within its statutory authorization, and, if so, (2) is the statute under which it acted valid. The first question is one of statutory construction and will not be discussed in detail here.[4] The attitude of the majority of courts has been that when there is criminal liability attached, the regulation should clearly be warranted by the legislative act.

The second question may be divided into four types of problems: (A) Was the administrative body legally given authority to make the regulation? (B) Did the legislature say that the violation of the regulation was to be a crime or was authority to do this given to the administrative agency? (C) Did the legislature fix the penalty or did it authorize the administrative agency to do so? (D) Was it the court or the administrative body which was authorized to determine guilt or innocence and assess the penalty?

(A) This problem involves the constitutionality of legislation authorizing the administrative body to make rules and regulations for carrying out a statute. Except as to municipal corporations, most of the courts adhere to the theory that under the doctrine of separation of powers a true legislative function cannot be delegated; but they feel that admin-

[1] N. C. GEN. STAT. §130-66(4) (1945 Supp.).
[2] §16, Public Health Service Ordinance of the District Board of Health of the Counties of Burke, Caldwell, and McDowell.
[3] State v. Curtis, 230 N. C. 169, 52 S. E. 2d 364 (1949).
[4] See Schwenk, *The Administrative Crime*, 42 MICH. L. REV. 51, 66 (1943).

istrative authority to make regulations is not such a function.[5] If the act which gives the right to make the regulations sets forth the legislative policy and the general standards for the administrative body to follow, it will be called either no delegation of legislative power[6] or a constitutional delegation.[7] Although the test which the legislative act must meet is not always stated the same way,[8] the decisions have uniformly upheld the act when sufficient standards were provided.

Since the result of a case may depend on whether or not the court finds there has been a delegation of legislative power, it is best to realize that there are, in effect, two types of legislative power—one to determine policies and the other to fill in details. When courts say that legislative functions are non-delegable they are thinking of the former; then in an attempt to reconcile these statements on non-delegability with the need for administrative regulations, they have often said that the latter power is one that is not legislative. But administrative regulations, which have the force and effect of law, are certainly substantially the same as legislation. The Wisconsin court made a clear analysis of the situation, saying, in part, "When, however, the Legislature has laid down these fundamentals of a law [its general purpose or policy and the limits of its operation], it may delegate to administrative agencies the authority to exercise such legislative power as is necessary to carry into effect the general legislative purpose; . . . . It only leads to confusion and error to say that the power to fill up the details and promulgate rules and regulations is not legislative power."[9]

The fact that the violation of the regulations will be a crime does not seem to vary the approach of a court in determining whether regulations can be made under a particular statute. Although aware that the regulations define the elements of a crime, the courts usually discuss the authority to make regulations in the same manner as they do when there is a civil penalty, adding only that a criminal penalty for the violation does not change the result. A leading illustration of this is

[5] Yakus v. United States, 321 U. S. 414 (1944).

[6] United States v. Grimaud, 220 U. S. 506 (1910); United States v. Tishman, 99 F. 2d 951 (7th Cir. 1938), *cert. denied*, 306 U. S. 636 (1939); State v. Dudley, 182 N. C. 822, 109 S. E. 63 (1921).

[7] Lotto v. United States, 157 F. 2d 623 (8th Cir. 1946); Oklahoma v. U. S. Civil Service Commission, 153 F. 2d 280 (10th Cir. 1946), *aff'd*, 330 U. S. 127 (1947).

[8] (1) The legislature can make a law to delegate a power to determine some facts or state of facts upon which the law makes, or intends to make, its own action depend. United States v. Grimaud, 220 U. S. 506 (1910); State v. Curtis, 230 N. C. 169, 52 S. E. 2d 364 (1949). (2) After declaring its policy and fixing a primary standard, the legislature may leave the administrative officers power to fill up the details by prescribing rules. Panama Refining Co. v. Ryan, 293 U. S. 388 (1935); Motsinger v. Perryman, 218 N. C. 15, 9 S. E. 2d 511 (1940).

[9] State *ex rel.* Wisconsin Inspection Bureau v. Whitman, 196 Wis. 472, 505, 220 N. W. 929, 941 (1928).

United States v. Grimaud,[10] wherein Congress had set the standards within which the Secretary of Agriculture could make regulations to preserve the forests and had declared that violations of the regulations would result in criminal liability. The Supreme Court, in upholding the defendants' conviction over the objection that it was unconstitutional for an administrative board to declare what should be a crime, said: ". . . nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offense." North Carolina has not altered its decisions as to the validity of the grant of regulation-making power by reason of the fact that violation of the regulations is a crime.[11]

(B) It is the normal procedure for a legislature to declare that any violations of the administrative regulations will be a crime, and there is no question as to the validity of this. This method was approved in the *Grimaud* case where the Court relied heavily on the point that Congress, rather than the administrative officer, had said that the failure to obey the regulations would be a crime.

On the other hand, the authorities agree that it is unconstitutional for the legislature to give an administrative agency power to decide whether actions contrary to its rules should be crimes. In *People v. Grant*[12] the legislature said that the violation of any rule of the state alcoholic board should be a misdemeanor if such rule so provided. In reversing the defendant's conviction for one of these administratively created crimes the court said: "The declaration of the crime and the prescription of the penalty for the violation rest in the ultimate discretion of the Legislature." The same view was adopted by the California court[13] which said in a suit against a port authority that "no such board or commission may declare a violation of such rules or regulations . . . to be a crime."

A method by which an administrative board may be given a share in prescribing what shall be a crime is to grant it the power to dispense with or suspend the operation of a law.[14] In doing this the crime is set forth by the legislature and the only power given to the agency is the discretion to say when or upon what conditions it shall be enforced. Such a power in an agency is not considered in the same category as the making of a crime; therefore it is permitted when there is a sufficient standard to control the agency's discretion.

[10] 220 U. S. 506 (1910). Discussed in 1 N. C. L. REV. 50 (1922).

[11] State v. Dudley, 182 N. C. 822, 109 S. E. 63 (1921); State v. Hodges, 180 N. C. 751, 105 S. E. 417 (1920); State v. R. R., 141 N. C. 846, 54 S. E. 294 (1906); Express Co. v. R. R., 111 N. C. 463, 16 S. E. 393 (1892).

[12] 242 App. Div. 310, 275 N. Y. S. 74 (3d Dep't. 1934), *aff'd*, 267 N. Y. 508, 196 N. E. 553 (1935).

[13] Gilgert v. Stockton Port District, 7 Cal. 2d 384, 60 P. 2d 847 (1936).

[14] 87 U. OF PA. L. REV. 201 (1938) contains a discussion of this power in various fields.

(C) Closely related to the problem of making the violation of a regulation a crime is that of determining the penalty for a violation. The usual legislative act includes the penalties along with the statement that violations of the regulations are to be crimes, and there is no question as to the legality of this technique. On the issue of whether administrative boards can set the penalties there has been little litigation, and much of that has dealt with civil rather than criminal penalties.[15] The cases on administrative determination of civil penalties are important because the same court would probably have a stricter attitude toward permitting steps which would subject a person to criminal punishment.

In a California case[16] the board had been empowered to set penalties, not exceeding a certain amount per violation, for disobedience of its rules and regulations. The court held that although the board could make regulations, "the penalty for the violation of such rules and regulations is a matter purely in the hands of the legislature." The fact that there was a maximum set by the legislature did not alter the opinion of the court.

In *Zuber v. Southern R. R.*[17] the Georgia Court of Appeals undertook to interpret an earlier opinion of the Georgia Supreme Court[18] which had approved the fixing of civil penalties by an administrative agency. It said that the supreme court must have felt that the legislative act with which it was faced made it mandatory for the agency to provide penalties for the disobedience of its regulations, and that therefore the agency was doing what was merely an administrative action when it determined the amount of these penalties. Nevertheless, the court of appeals thought that unless the legislature had given at least a general sanction to the prescription of civil or criminal penalties, no administrative board could take steps to prescribe them. It recognized that even with the legislative directive the supreme court's decision was an extension of the *Grimaud* doctrine.

In the instant case[19] the legislature did not specify either that the violation of the regulations was to be a crime or that certain penalties were to be imposed for a violation; and since these determinations were left to the discretion of the administrative board, the decision reversing the conviction is in accord with the authorities above discussed. These defects had been remedied by the legislature after the conviction below, but the court would give no indication as to the result under the new statute.

[15] The language of the *Grant* case, quoted in the previous section, indicates that the prescribing of a criminal penalty is considered to be a legislative function.
[16] Board of Harbor Commissioners v. Excelsior Redwood Co., 88 Cal. 491. 26 Pac. 375 (1891).
[17] 9 Ga. App. 539, 71 S. E. 937 (1911).
[18] Southern R. R. v. Melton, 133 Ga. 277, 65 S. E. 665 (1909).
[19] State v. Curtis, 230 N. C. 169, 52 S. E. 2d 364 (1949).

(D) The determination of guilt and the imposition of punishment for a crime are ordinarily done by the courts, with the administrative board only instigating the prosecution of the defendant for the violation of its rules and regulations. Whether or not an administrative board will be permitted to impose a criminal penalty seems to depend on whether the penalty is one that is flexible or inflexible. When an administrative agency is given power to impose an inflexible penalty, it amounts to nothing more than its ordinary process of finding the facts and determining whether there has been a violation. The Supreme Court has given its approval to the adminstrative imposition of this type penalty.[20] On the other hand, a flexible penalty was held unconstitutional in *Wong Wing v. United States*,[21] where the Commissioner of Immigration placed a punishment upon the defendant in addition to ordering him to be deported. In *Tite v. State Tax Commission*,[22] where the problem was considered at length, the Utah court said that it was permissible for an administrative board to impose a set penalty, but not a discretionary one. If a board does undertake to hear a case its procedure must meet the constitutional requirement of due process.[23]

Today administrative boards are given the right to impose many civil penalties which are in effect the same or worse than criminal ones. A fine brings an equivalent result whether levied by a board or a court, and a license revocation by a board is often more damaging than a court fine would be. A striking example of a civil penalty having the effect of a criminal one is *Helvering v. Mitchell*,[24] where a taxpayer had to pay a fraud penalty although he had previously been acquitted on criminal charges of willfully attempting to evade the income tax. When a revenue officer determines that there has been fraud or the like, he is doing something which is thought of as judicial, yet the courts have not balked at permitting such determinations. Likewise in workmens' compensation statutes there is often authorization for the board to impose penalties to facilitate the functioning of the act.[25] To public utilities commissions, immigration officials, the Securities and Exchange Commission, etc., are given broad powers to impose monetary penalties for failure to obey the statutes and rules. Since an administrative agency will be cognizant of the forces at work in its field, it should be able to do an intelligent job of imposing the necessary penalties.

[20] Oceanic Steam Navigation Co. v. Stranahan, 214 U. S. 320 (1909); Passavant v. United States, 148 U. S. 214 (1892); Bartlett v. Kane, 16 How. 263 (1853).

[21] 163 U. S. 228 (1895).

[22] 89 Utah 404, 57 P. 2d 734 (1936).

[23] Morgan v. United States, 304 U. S. 1 (1938); National Labor Relations Board v. Prettyman, 117 F. 2d 786 (6th Cir. 1941).

[24] 303 U. S. 391 (1938).

[25] N. C. GEN. STAT. §§97-18(e), 92(e) (1943); GELLHORN, ADMINISTRATIVE LAW CASES AND COMMENTS 334 (2d ed. 1947).

Notwithstanding the fact that they may validly be given authority to impose penalties, administrative boards have not yet been given the power to order imprisonment. There is little need for administrative boards to operate in this area, and public opinion would be strongly against executive officials prescribing such punishment.[26] In the *Wong Wing* case[27] the Court felt that a person should have a judicial trial before he could be punished by having his liberty taken away.

MARSHALL T. SPEARS, JR.

Corporations—Foreign—Suability After Dissolution

Under the common law the dissolution of a corporation extinguished its debts, actions against it were abated, its real property reverted to its grantors, and its personal property escheated to the King.[1] The event was likened to the death of a natural person.[2] This rule was tolerated so long as there were only municipal, ecclesiastical, and eleemosynary corporations in existence. But with the growth of business corporations, accompanied by their shareholders and creditors, the harshness of such a rule was manifest, and the equity courts were persuaded that the assets of a dissolved corporation should be declared a trust fund for the satisfaction of claims by creditors and other interested parties.[3] A later development was the almost universal adoption of statutes which extended the life of a corporation after dissolution so that it could bring and defend actions in the corporate name for the purpose of "winding up" its affairs.[4]

But extension statutes have not been completely effective, for much confusion still exists when an action is brought involving as a party a foreign corporation which has been dissolved by the state which created it. In such a case the general rule is said to be that the law of the creating state governs, and that when the corporation's very existence is terminated by the state of domicile it cannot be a party to a suit elsewhere.[5] Similarly, if the law of the creating state extends the life of the corporation after dissolution for a winding up period, it may generally sue or be sued in other jurisdictions because it still exists as an entity for that purpose.[6] On the other hand, these extensions may be

[26] GELLHORN, *op. cit. supra note* 25, 348.
[27] 163 U. S. 228 (1895).

[1] See Life Ass'n. of America v. Fassett, 102 Ill. 315 (1882); 2 BEALE, CONFLICT OF LAWS 742 (1935); 17 FLETCHER CYCL. CORP. 775 (1942); Note, 97 A. L. R. 483 (1935).
[2] See Chicago Title Co. v. Wilcox Bldg. Corp., 302 U. S. 120, 124 (1937).
[3] Marcus, *Suability of Dissolved Corporations*, 58 HARV. L. REV. 675 (1945).
[4] 16 FLETCHER CYCL. CORP. 930 (1942).
[5] 2 BEALE, *op. cit. supra* note 1, at 742; Note, 47 A. L. R. 1288, 1557 (1927).
[6] Harris-Woodbury Lumber Co. v. Coffin, 179 Fed. 257 (W. D. N. C. 1910), *aff'd*, 187 Fed. 1005 (4th Cir. 1911).

termed only procedural remedies, to be controlled by the law of the forum.[7] When the law of the forum expressly extends the life of a dissolved foreign corporation, a judgment obtained under it will be good, at least within the jurisdiction,[8] on the theory that a state may exclude foreign corporations completely or impose what conditions it chooses to their admittance. Consequently, the state may force the submission to suits after dissolution as a requisite to entrance.[9] This power may also derive from the absolute control a state has over property within its jurisdiction, which control is not subject to the laws or acts of another state.[10] Difficulties arise because the majority of the extension statutes do not expressly state whether they are applicable to foreign corporations or only to domestic corporations. Further, in many states an important exception to the statutory control is the rule that local creditors may get at local assets of the dissolved foreign corporation by *in rem* proceedings.[11]

In a recent District of Columbia case,[12] the plaintiff sought to enforce a money claim in the District's municipal court against a Pennsylvania insurance corporation which had been dissolved under Pennsylvania law; and at the same time the plaintiff attached automobiles and funds of the corporation in the District of Columbia. Under the Pennsylvania law, title to the corporation's property was vested in a statutory liquidator without providing for any subsequent actions in the corporate name.[13] The District of Columbia Code provided that dissolved corporations might be sued in their corporate name for causes accruing

[7] Peoria Engineering Co. v. Streator Cold Storage Door Co., 221 Iowa 690, 266 N. W. 548 (1936).

[8] Life Ass'n. of America v. Fassett, 102 Ill. 315 (1882); Hanger v. International Trading Co., 184 Ky. 794, 214 S. W. 438 (1919); Stetson v. City Bank of New Orleans, 2 Ohio St. 167 (1853); Dupont Engineering Co. v. John P. Harvey Const. Co., 156 Va. 582, 158 S. E. 891 (1931); *cf.*, Rogers v. Adriatic F. Ins. Co., 148 N. Y. 34, 42 N.E. 515 (1895) (New York refused to give full faith and credit to an Illinois judgment because taken against a dissolved New York corporation, but the court recognized the validity of the judgment in Illinois); RESTATEMENT, CONFLICT OF LAWS §158, Comment d (1934). For a suggestion that such judgments should be entitled to full faith and credit everywhere, see Marcus, *supra* note 3, at 694.

[9] See Washington v. Superior Court, 289 U. S. 361 (1933). There are exceptions to this power in the case of interstate commerce and federal business.

[10] McGoon v. Scales, 9 Wall. 30 (U. S. 1870); City Ins. Co. v. Commercial Bank, 68 Ill. 348 (1873).

[11] Clark v. Williard, 294 U. S. 211 (1935); Watts v. Southern Surety Co., 216 Iowa 150, 248 N. W. 347 (1933) (garnishment); Hibernia Nat. Bank v. Lacombe, 27 Hun. 166 (N. Y. 1880), *aff'd*, 84 N. Y. 367 (1881). The *in rem* proceedings also involve a determination by the local court that the corporation exists, to the extent that it owns the property, and the cases make no distinction in the reasoning between this and an *in personam* proceeding in so far as the existence of the corporation as a party is concerned.

[12] Sedgwich v. Beasley, 173 F. 2d 918 (D. C. Cir. 1949); *cf.*, Beasley v. Fox. 173 F. 2d 920 (D. C. Cir. 1949) (abatement of an action against the same defendant though it was pending at the time of dissolution).

[13] 40 P. S. PA. §206 (1930).

prior to dissolution.[14] The Pennsylvania liquidator had an ancillary receiver appointed in the Federal District Court for the District of Columbia, who attacked plaintiff's action on the ground that the corporation was not suable because of its dissolution in Pennsylvania. The District Court ordered that the receiver take over the attached property and that plaintiff not proceed with his action, but this to be "without prejudice to any lien, priority or preference" he might assert in the receivership. On appeal the order was affirmed on the ground that plaintiff's suit and attachment was null and void because the Pennsylvania statutes did not preserve a right of action, and that in the absence of such an extension, the corporation was "dead," just as if it were a natural person. The District of Columbia Code was held not applicable to foreign corporations.

The Court cites leading cases likening dissolution to the death of a natural person, but none involved foreign corporations.[15] The only case cited holding that the law of the creating state controls involved an action *brought by* a dissolved foreign corporation in the District of Columbia,[16] and that Code by its terms applies only to suits *against* dissolved corporations; therefore, it could not have been applicable. The case is silent regarding *which* receivership plaintiff is relegated to, and the general rule has the ancillary receiver transmit assets direct to the primary receiver in Pennsylvania.[17] This is subject to the court's right to protect local creditors,[18] but at best the plaintiff has lost some rights, because he is not in the same position that he would be in if he had obtained a judgment. An attachment should constitute a prior lien if made before the foreign liquidator asserts his title, even though subsequent to the vesting of his title at the corporation's domicile.[19] It is interesting to note that had the court looked to the Pennsylvania law applicable to such a situation, with a mind to the retaliatory decisions prevalent in this intergovernmental sphere, it would have found that the Pennsylvania local law would have been applied to permit the action against the dissolved foreign corporation.[20]

[14] D. C. CODE §29-718 (1940).

[15] Chicago Title Co. v. Wilcox, 302 U. S. 120 (1937) (dissolution as a bar to a bankruptcy petition); Oklahoma Natural Gas Co. v. Oklahoma, 273 U. S. 257 (1927) (domestic corporation); National Bank v. Colby, 21 Wall. 609 (U. S. 1874) (a federal corporation).

[16] Glennan v. Lincoln Inv. Corp., 110 F. 2d 130 (D. C. Cir. 1940) (policy considerations favoring local creditors are not involved when the action is by the dissolved foreign corporation).

[17] *In re* Stoddard, 242 N. Y. 148, 151 N. E. 159 (1926). See Note, 45 A. L. R. 632 (1926).

[18] See note 17 *supra*.

[19] Clark v. Williard, 294 U. S. 211 (1935); Kruger v. Bank, 123 N. C. 16, 31 S. E. 270 (1898). See Note, 98 A. L. R. 351 (1935).

[20] Nazareth Cement Co. v. Union Indemnity Co., 116 Pa. Super. 506, 177 Atl. 64 (1935) (Louisiana dissolution receiver has no extraterritorial powers except through comity, and that not extended when local creditors would be hurt); Dehue v. Hillman Inv. Co., 110 F. 2d 456 (3d Cir. 1940).

The basic dispute stems from a conflict beween the desire to insure a pro rata distribution of the assets among all creditors by a central receiver, and a desire to protect local creditors so that they will not have to go to a foreign jurisdiction to prove their claim. The courts that apply the law of the forum to permit suits against the dissolved foreign corporation are not uniform in their reasoning. The law of the forum may be termed remedial and thus controlling;[21] the court may presume the foreign law is similar when it is not shown otherwise in the record;[22] the constitutional provision for equal protection of the laws may be held to require the same treatment for foreign as for domestic corporations;[23] the public policy of the forum in protecting its citizens may deny effect to the foreign law;[24] or a general statute may prohibit any discrimination in favor of foreign corporations.[25] Suability is also obtained by: attacking the jurisdiction of the dissolving court;[26] declaring the dissolution not effective until judicially enforced in the forum;[27] ruling that the receiver's appearance waives his objection;[28] allowing the action as an *in rem* proceeding, attachment, or garnishment;[29] or by refusing to accept the analogy to death and cessation of existence, and thereby allowing suit against those who stand in the corporation's place in the corporate name.[30]

Much of the authority cited as holding that the foreign law governs

[21] Peoria Enginering Co. v. Streator Cold Storage Door Co., 221 Iowa 690, 266 N. W. 548 (1936); Stetson v. New Orleans City Bank, 2 Ohio St. 167 (1853).

[22] Baid's, Inc. v. Frankel, 56 Ohio App. 305, 10 N. E. 2d 787 (1937).

[23] Crown Central Petroleum Corp. v. Speer, 206 Ark. 216, 174 S. W. 2d 547 (1943).

[24] Vladikovkazski R. R. v. New York Trust Co., 263 N. Y. 369, 189 N. E. 456 (1934).

[25] Van Schaick v. Parsons, 11 F. Supp. 654 (D. Mont. 1935) (Nebraska judgment against dissolved New York corporation enforced in Montana); Castle v. Acrogen Coal Co., 145 Ky. 591, 140 S. W. 1034 (1911); Frink v. National Mut. F. Ins. Co., 90 S. C. 544, 74 S. E. 33 (1912); McCrary Refrigerator Sales Corp. v. Davis, 140 S. W. 2d 477 (Tex. Civ. App. 1940), *rev'd on other grounds*, 136 Tex. 296, 150 S. W. 2d 377 (1941) (action proper until the corporation's ten year certificate expired); DuPont Engineering Co. v. John P. Harvey Const. Co., 156 Va. 582, 158 S. E. 891 (1931).

[26] Olds v. City Trust, S. D. & Surety Co., 185 Mass. 500, 70 N. E. 1022 (1904).

[27] Hammond v. National Life Ass'n., 58 App. Div. 453, 69 N. Y. S. 585 (1901).

[28] McGoon v. Scales, 9 Wall. 23 (U. S. 1870); Trounstine v. Baur, Pogue & Co., 44 F. Supp. 767 (S. D. N. Y. 1942), *aff'd*, 144 F. 2d 379 (2d Cir. 1944), *cert. denied*, 323 U. S. 777 (1944).

[29] Clark v. Williard, 294 U. S. 211 (1935); Alwart Bros. Coal Co. v. Pittsburgh F. Ins. Co., 253 Ill. App. 361 (1930); City Ins. Co. v. Commercial Bank, 68 Ill. 348 (1873); Watts v. Southern Surety Co., 216 Iowa 150, 248 N. W. 347 (1933); Zacher v. Fidelity Trust & Safety Vault Co., 109 Ky. 441, 59 S. W. 493 (1900); Rawlings v. American Oil Co., 173 Miss. 683, 161 So. 851 (1935); Hibernia Nat. Bk. v. Lacombe, 27 Hun. 166 (N. Y. 1880), *aff'd*, 84 N. Y. 367 (1881); Nazareth Cement Co. v. Union Indemnity Co., 116 Pa. Super. 506, 177 Atl. 64 (1935); Davis v. Amra Grotto M.O.V.P.E.R., 169 Tenn. 564, 89 S. W. 2d 754 (1936); 8 THOMPSON, CORPORATIONS §6518 (3d ed. 1927).

[30] James & Co. v. Second Russian Insurance Co., 239 N. Y. 248, 146 N. E. 369 (1925).

is found to come from cases in which the foreign law applied extends the corporation's existence,[31] or is in agreement with the local law in doing so, thus conforming to a policy of suability and actually leaving some sort of entity to sue or be sued.[32] Of the few cases holding that the foreign law works a bar to suits by or against the dissolved foreign corporation in the local courts, the great majority specifically point out that the local claimant has an equitable remedy against local assets.[33] One California case denied an action to a Nevada corporation, which would have had capacity under California law, because its Nevada dissolution was by way of a penalty for law violations, but this theory should not be applicable to suits *against* the corporation.[34] Michigan denied an action against a corporation because it deemed full faith and credit must be accorded its Pennsylvania dissolution,[35] but the United States Supreme Court has held that this does not prevent local attachment of the corporation's property even though title to it has passed to a statutory liquidator by operation of the foreign law.[36]

North Carolina has a satute which extends dissolved corporations for a winding up period of three years,[37] but no state case has decided

[31] Pendleton v. Russell, 144 U. S. 640 (1892); Treemond Co. v. Schering Corp., 122 F. 2d 702 (2d Cir. 1941); Dundee Mortg. Trust Inv. Co. v. Hughes, 89 Fed. 182 (C. C. Ore. 1898); Action v. Washington Times Co., 12 F. Supp. 257 (D. Md. 1935); Kratky v. Andrews, 244 Minn. 486, 28 N. W. 2d 624 (1947); Lehrich v. Sixth Ave. Bancorporation, 250 App. Div. 391, 296 N. Y. S. 358 (1937); Kelly v. Internat'l. Clay Products Co., 239 Pa. 383, 140 Atl. 143 (1928); Riddell v. Rochester German Ins. Co., 35 R. I. 45, 85 Atl. 273 (1912); STEVENS, CORPORATIONS 851 (1936); BALLENTINE, CORPORATIONS 731 (1946).

[32] Lyman v. Knickerbocker Theatre Co., 5 F. 2d 538 (D. C. Cir. 1925); Forcite Powder Co. v. Herdien, 162 Ill. App. 425 (1911); New England Auto Inv. Co. v. Andrews, 47 R. I. 108, 130 Atl. 863 (1925); Floerchinger v. Sioux Falls Gas Co., 68 S. D. 543, 5 N. W. 2d 55 (1942); Miller Management Co. v. State, 140 Tex. 370, 167 S. W. 2d 728 (1943); Swing v. Parkersburg Veneer & Panel Co., 45 W. Va. 288, 31 S. E. 926 (1898).

[33] Marian Phosphate Co. v. Perry, 74 Fed. 425 (5th Cir. 1896); U. S. to use of Colonial Brick Corp. v. Federal Surety Co., 72 F. 2d 961 (4th Cir. 1934), *cert. denied*, 294 U. S. 741 (1934); *Ex parte*, Davis 240 Ala. 668, 162 So. 306 (1935); Fitts v. Nat'l. L. Ass'n., 130 Ala. 413, 30 So. 374 (1901); Trust Co. v. Mortgage-Bond Co., 203 Ga. 461, 46 S. E. 2d 883 (1949) (domestic statute not used because the New York corporation had not done business in Georgia); United States Truck Co. v. Pennsylvania Surety Co., 259 Mich. 422, 243 N. W. 311 (1932); Hirson v. United Stores Corp., 263 App. Div. 646, 34 N. Y. S. 2d 122 (1942); Note, 27 ILL. L. REV. 310 (1932). Cases not mentioning any relief; Ralfe v. Rundle, 103 U. S. 222 (1880); Gulledge Bros. Lumber Co. v. Wenatchee Land Co., 115 Minn. 491, 132 N. W. 992 (1911); McDonald v. Pacific States Life Ins. Co., 344 Mo. 1, 124 S. W. 2d 1157 (1939).

[34] Fidelity Metals Corp. v. Risley, 77 Cal. App. 2d 377, 175 P. 2d 592 (1946).

[35] United States Truck Co. v. Pennsylvania Surety Corp., 259 Mich. 422, 243 N. W. 311 (1932).

[36] Clark v. Williard. 249 U. S. 211 (1935).

[37] N. C. GEN. STAT. §55-132 (1943) "All corporations whose charters expire by their own limitation or are annulled by forfeiture or otherwise, shall continue to be bodies corporate for three years after the time when they would have been dissolved, for purpose of prosecuting and defending actions . . . to settle and close their concerns. . . ."

whether it covers foreign corporations.[38] One federal case from North Carolina held the statute was not applicable to a dissolved New Jersey corporation suing here, but that corporation was extended indefinitely for winding up by the law that dissolved it and the result was to permit the suit here six years after dissolution, whereas the North Carolina statute would have barred the action if it had been held applicable.[39] A federal court in New York disallowed North Carolina judgments presented there as having no extraterritoriality because they were taken against a dissolved foreign corporation, but presumably they would have been good in North Carolina and perhaps in a third state against assets of the corporation.[40] North Carolina refers to foreign corporations as being *domesticated* when they do business here and might use that theory to apply our statute to foreign corporations.[41] Certain foreign corporations are required to deposit funds with the state before being admitted, and these funds should be available to local creditors even after the foreign dissolution of their depositor.[42] North Carolina freely allows statutory service of process against foreign corporations which have withdrawn from the state, and might do the same when they are dissolved on the theory that the agency for service, *i.e.*, the Secretary of State, is not revocable as to prior causes of action.[43] Our statutory service of process has been applied in the case of dissolved

[38] In Kruger v. Bank of Commerce, 123 N. C. 16, 31 S. E. 270 (1898), the court held that a New York dissolution and appointment of receiver had no effect on an attachment by local creditors of the corporation's property in North Carolina. Judge Clark concludes with this: "This sums up the doctrine as almost universally recognized, and especially is this so in states like ours, in which by statute the existance of corporations is continued for the benefit of creditors and winding up affairs, for a prescribed time after the charter has expired or been declared forfeited. *Life Asso. v. Fossett*, 102 Ill., 315." The case cited expressly applies a domestic extension statute to a foreign corporation.

[39] Harris-Woodbury Lumber Co. v. Coffin, 179 Fed. 257 (C. C. W. D. N. C. 1910), *aff'd*, Coffin v. Harris-Woodbury Lumber Co., 187 Fed. 1005 (4th Cir. 1911).

[40] Robinson v. Mutual Reserve Life Ins. Co., 182 Fed. 850 (C. C. S. D. N. Y. 1910), *aff'd*, 189 Fed. 347 (1911); Van Schaick v. Parsons, 11 F. Supp. 654 (D. Mont. 1935).

[41] John P. Nutt Corp. v. Southern Ry., 214 N. C. 19, 197 S. E. 534 (1938); Smith-Douglass Co. v. Huneycutt, 204 N. C. 219, 167 S. E. 810 (1933); Troy & N. C. Gold Mining Co. v. Snow Lumber Co., 173 N. C. 593, 92 S. E. 494 (1917). In Debnam v. Southern Bell Tel. Co., 126 N. C. 831, 36 S. E. 269 (1900), the court said that our license statute in effect created a new domestic corporation, so as to deny it removal to the federal court. This holding was limited in Southern Ry. Co. v. Allison, 190 U. S. 326 (1903), but that opinion is carefully limited in scope to the issue of denial of federal jurisdiction. *Cf.* Central Motor Lines, Inc. v. Brooks Transp. Co., 225 N. C. 733, 36 S. E. 2d 271 (1945), where our court speaks of the Debnam case as being over-ruled, in deciding that a New Jersey corporation which had withdrawn from the state could not be served on a cause of action that arose elsewhere.

[42] N. C. GEN. STAT. §54-37 (1943) (bldg. & loan ass'n.); N. C. GEN. STAT. §58-188.4 (1947 Cum. Supp.) (alien life insurance company).

[43] Harrison v. Corley, 226 N. C. 184, 37 S. E. 2d 489 (1946); State Highway Comm. v. Diamond Steamship Transportation Corp., 225 N. C. 198, 34 S. E. 2d 78 (1945).

domestic corporations, and since it expressly covers foreign corporations, service would be no problem if the corporation was found to be extended, either by the North Carolina statute or the foreign law.[44]

The consideration of federal jurisdiction of these cases is important because nearly all of them could go to the federal courts on diversity of citizenship. If Federal Rule of Civil Procedure 17(b)[45] is controlling, the question presented here is foreclosed because the rule provides that the capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. The principal case refers to this as being "merely expressive of the general law," pointedly refraining from citing it as controlling. The difficulty arises from the dictum of *Angel v. Bullington*[46] that a Federal court in a diversity case is just another state court and cannot entertain causes that the state court would not entertain.[47] Similar reasoning would not allow removal on diversity of citizenship to defeat a remedy which the plaintiff had in the state court.[48] If, under its conflict of laws rule, North Carolina regarded its local statute as controlling the extension of the local existence of a dissolved foreign corporation, then the Federal court in North Carolina would be bound by the rule of the forum[49] and *Rule 17(b)* would again be of doubtful value as a defense to the dissolved corporation. And though constitutional questions of full faith and credit, equal protection of laws, and impairment of contracts have been raised in these actions, they would not be in the complaint against a foreign corporation in the state court; therefore, the corporation could not get removal to the Federal court on the grounds of a federal question at issue in order to defeat the diversity difficulty.[50] There is the additional possibility that removal on diversity grounds might also be lost if the suggestions made in federal bankruptcy cases are followed to the effect that when a corporation is dissolved it can be brought in as an unincorporated association,[51] as every member might not have complete diversity. This approach is exemplified by the treatment of a dissolved foreign corporation as a domestic de facto corporation to allow suit.[52]

[44] Sisk v. Old Hickory Motor Freight, 222 N. C. 631, 24 S. E. 2d 488 (1943). N. C. GEN. STAT. §55-38 (1943) (if foreign corporation fails to appoint a process agent, service may be had on the Secretary of State). N. C. GEN. STAT §58-50 (1943) (statutory process agent for a foreign insurance company is irrevocable).

[45] See 58 HARV. L. REV. 675, 691 for criticism of the rule.

[46] 330 U. S. 183 (1946).

[47] In United States v. Standard Oil Co., 332 U. S. 301, 307 (1947), the court carefully limits the scope of this rule.

[48] 3 MOORE'S FEDERAL PRACTICE 1397-98 (2d ed. 1948).

[49] Klaxon Co. v. Stentor Elec. Co., 313 U. S. 487 (1941).

[50] Tennessee v. Union and Planter's Bank, 152 U. S. 454 (1894).

[51] Peer Manor Bldg. Corp., 143 F. 2d 769 (7th Cir. 1944), *cert. denied*, 323 U. S. 757 (1944). *Contra:* Matter of Midwest Athletic Club, 161 F. 2d 1005 (7th Cir. 1947). 6 COLLIER, BANKRUPTCY ¶4.05 [5] (14th ed. 1942).

[52] Life Ass'n of America v. Fassett, 102 Ill. 315 (1882); Rogers v. Adriatic F. Ins. Co., 148 N. Y. 34, 42 N. E. 515 (1895).

The free dissolution, both voluntary and involuntary, of modern corporations should not defeat their suability in other sovereign states.[53] The analogy of dissolution to natural death in its old aspect is fallacious, in that it carries forward the common law conception of evaporation of the corporation, whereas today there are shareholders, assets, and successors to wind up its affairs and they should answer to suits brought in the corporate name. The corporate entity does not extend beyond the borders of its creating state until another state admits it, and when so admitted, *some* new sort of entity is *reincorporated* which should not be said to "die" when the other state dissolves that which it created.[54] The local forum can subscribe to pro rata distribution of assets and still protect local creditors by giving them their share out of local assets, and thus not force them to go to the creating jurisdiction with their claim.[55] Corporations should no longer be able to defeat civil and criminal actions brought against them by working a dissolution in the creating state, only to reappear the next day in identical form with a new charter.[56] With the present ability of corporations to shop for the most advantageous state corporation law, the only other real solution would be the drastic legislation already introduced in Congress requiring a federal charter for all corporations engaging in interstate commerce.[57]

EDWARD B. HIPP.

Corporations—Taxation—Status of Payments to Hybrid Security Holders

It often becomes necessary for a court to determine whether certain hybrid securities are in fact stocks or bonds.[1] This determination is frequently essential in order to ascertain whether periodic payments by a corporation to the holders of its securities should be classified as interest on indebtedness, which is deductable from gross income for income tax purposes,[2] or as dividends to stockholders, which are not

[53] See note 3 *supra.*
[54] HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 278 and 313 (1923).
[55] Notes, 35 CALIF. L. REV. 306 (1947), 13 N. Y. U. L. Q. REV. 283 (1936).
[56] See note 3 *supra.*
[57] U. S. News & World Report, Oct. 14, 1949, p. 30. *Cf.* English Companies Act (1929) §338(2) (providing that foreign corporations be wound up as unregistered companies despite dissolution by the creating state).

[1] The distinction between these securities must in many cases be ascertained in order for the court to establish the priority between a certificate holder and general unsecured or subsequent secured creditors of the corporation. Warren v. King, 108 U. S. 389 (1883) (foreclosure proceeding); Mathews v. Bradford, 70 F. 2d 77 (6th Cir. 1934) (receivership proceeding); Spencer v. Smith, 201 Fed. 647 (8th Cir. 1912) (bankruptcy proceeding); Phoenix Hotel Co., 13 F. Supp. 229 (E. D. Ky. 1935) (reorganization proceeding).

[2] INT. REV. CODE §23. "In computing net income there shall be allowed as deductions: (b) Interest.—All interest paid or accrued within the taxable year on indebtness, except on indebtness incurred or continued to purchase or carry obli-

deductable.[3]

In the recent case of *Bowersock Mills and Power Company v. Commissioner of Internal Revenue*,[4] the court was faced with this issue. In that case, a closely held corporation,[5] so that it might be in a position to obtain bank credit, issued preferred stock to its bondholders (the Bowersock Trust, hereinafter referred to as the Trust) in payment of the bonds with accrued interest. The Trust further agreed to release the first deed of Trust on the corporation's assets. The above-mentioned stock was to be preferred both as to dividends and as to assets; bear cumulative dividends of three per cent payable annually if the net earnings at the time should be sufficient to pay such dividends; carry voting rights equal to those carried by common stock in the case of sale, mortgage or pledge of the fixed assets of the corporation and in case of other fundamental changes in the corporation; be retirable at par plus accrued dividends on call of the corporation; provided that if any dividends in excess of three per cent were declared on the common in any year, one half of such excess was to be paid on the preferred stock as an additional dividend.

Simultaneously with the issuance of the stock, the common stockholders entered into a contract with the Trust whereby the common stockholders agreed to buy and the Trust to sell the preferred stock, a certain number of shares per year, provided the corporation had not redeemed that amount within the prescribed period. To insure payment of the dividends and repurchase of the preferred stock, the common stockholders agreed to put their stock in trust, on condition that in the event of default of the corporation on the dividends for a period of six months, or the failure of the common stockholders to cause the corporation to purchase the stock as provided in the contract, the common stock would be transferred to the Bowersock Trust as liquidated damages.

The majority opinion of the court held that inasmuch as the corporation was closely held, considering the two contracts together was obligatory. By so doing, it became evident that the real intention of the parties was merely to change the form of the indebtedness, thereby subordinating it to bank credit, and that the parties intended to and did retain a debtor-creditor relationship. Following this reasoning, the court held that the payments fell into the category of interest and were therefore deductable.

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gations (other than obligations of the United States issued after September 24, 1917, and originally subscribed for by the taxpayer) the interest upon which is wholly exempt from the taxes imposed by this chapter."

[3] 4 MERTENS, LAW OF FEDERAL INCOME TAXATION §26.10 (1942).

[4] 172 F. 2d 904 (10th Cir. 1949).

[5] All of the outstanding stock was held by one family.

The dissenting judge felt that the contract between the corporation and the Trust clearly created a shareholder relationship and that the second contract did not alter this relation, as that contract was solely between the common stockholders and the Trust.

A persuasive argument is advanced by the majority in that it is more realistic to disregard the corporate entity in the case of a closely held corporation. It is recognized that in a proper case it is equitable to look behind the corporate entity,[6] but it is submitted that this is not such a case. The corporation neither assumed any liabilities nor obtained any benefits under the contract between the common stockholders and the Trust. Furthermore, the corporation and its stockholders are taxed separately and it would, therefore, seem more logical to consider only the contract between the corporation and the Trust in determining the tax liability of the corporation.

Furthermore, there is authority in support of the proposition that where the payment of dividends on, or the redemption of, preferred stock is guaranteed by one other than the issuing corporation, the undertakings are separate and the stockholder relationship does not become a creditor relationship.[7] Some cases so hold even where the issuing corporation guarantees the payment of the periodic dividends.[8]

In deciding whether the payments are interest or dividends, the "traditonal approach" is to consider the factors indicating a shareholder relationship and those indicating a debtor-creditor relationship and to conclude that the security more nearly resembles, and therefore should for all purposes be treated as bonds or as stocks.[9]

Evaluation of the weight assigned by the courts to each individual factor is difficult. Occasionally a particular element is pronounced decisive, but more often a combination of the elements present in the case sways the judgment. The determining factors are usually listed as: the name given to the certificates;[10] the presence or absence

[6] As was stated by Judge Sanborn in United States v. Milwaukee Refrigerator Co., 142 Fed. 247, 255 (7th Cir. 1905) "A corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons."

[7] Hazel Atlas Glass Co. v. Van Dyke and Reeves, 8 F. 2d 716 (2d Cir. 1925), *cert. denied sub nom* Van Dyke v. Young, 269 U. S. 570 (1925) (guaranteed by Ellis and Reeves, principal stockholders); Northern Refrigerator Lines, Inc. v. Commission of Internal Revenue, 1 T. C. 824 (1943) (guaranteed by another corporation holding the common stock); McCoy-Garten Realty Co., 14 B. T. A. 853 (1928). See note 88 A. L. R. 1131, 1143 (1934) and cases cited.

[8] Leasehold Realty Co., 3 B. T. A. 1129 (1926); see 1 MACHEN, MODERN LAW OF CORPORATIONS §542 (1908) where it is pointed out that "courts construe such a guaranty to apply only to payment out of funds legally available for dividends."

[9] 4 MERTENS, LAW OF FEDERAL INCOME TAXATION §26.10 (1942). A recent case following this approach is Jordan Co. v. Commissioner of Internal Revenue, 5 C. C. H. 1949 Fed. Tax Rep. ¶9372 (D. C. 1949).

[10] The courts vary as to the amount of weight they will give to the name of

of a definite maturity date with a right to enforce the payment of principal and interest;[11] status equal to or inferior to that of regular corporate creditors;[12] the presence or absence of voting rights;[13] the right to participate in dividends after common stock has received a percentage equal to preferred;[14] the circumstances surrounding the issuance of the certificates;[15] and the intention of the parties.[16]

The majority of the court in the principal case did not specifically follow the "traditional approach," but they did appear to make the factors of intention and circumstances surrounding the issuance of the certificates controlling.[17]

It is submitted that it would be better not to follow the "traditional approach" of balancing the provisions of the security as a whole and discovering whether the security more nearly resembles bonds or shares

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the security. Some cases appear to give it little; see Jewel Tea Co. v. United States, 90 F. 2d 451 (2d Cir. 1937), while others appear to give it considerable weight. Mathews v. Bradford, 70 F. 2d 77 (6th Cir. 1934) ("intention to create debt must be clear and convincing where called stock"); Spencer v. Smith, 201 Fed. 647 (8th Cir. 1912); Leasehold Realty Co., *supra* note 8.

There are certain cases in which the corporation should be estopped to deny that the certificate is something other than the name given it. *E.g.*, creditors may have extended credit relying on the fact that outstanding securities labeled preferred stock were stock and not bonds and that the holders therefore had a claim on the corporate assets inferior to his claim. *Cf.* Gallatin Farmers Co. v. Commissioner of Internal Revenue, 132 F. 2d 706 (9th Cir. 1942); 1 MACHEN, MODERN LAW OF CORPORATIONS §547 (1908).

It is submitted that the courts could follow, in tax cases, the rule that the corporation was aware of the taxable consequences of the label placed on the certificates and that it should be bound by its election except in cases where the form used was obviously fictitious on its face. This rule would have the advantage of facilitating the disposition of the cases without allowing a corporation to evade taxes by giving the security an artificial name.

[11] Finance and Investment Corp. v. Burnet, 57 F. 2d 444 (App. D. C. 1932). Some cases treat this factor as the most important. As was stated in United States v. South Ga. Ry., 107 F. 2d 3, 5 (5th Cir. 1939) "There is, thus, an entire absence here of the most significant, if not the essential feature of a debtor and creditor and opposed to a stockholder relationship, the existence of a fixed maturity for the principal with the right to force payment of the sum as a debt in the event of default."

[12] Helvering v. Richmond, F. and P. Ry., 90 F. 2d 971 (4th Cir. 1937).

[13] This factor seems to be frequently discussed but seldom given much weight. Although the voting privilege is usually extended only to shareholders, preferred stock is often issued with an express provision that it is to have no voting rights. 11 FLETCHER, CYCLOPEDIA CORPORATIONS, §5301 (perm. ed. 1931).

[14] See Cass v. Realty Securities Co., 148 App. Div. 96, 132 N. Y. Supp. 1074 (1941).

[15] See Miller v. Ratterman, 47 Ohio St. 141, 24 N. E. 496 (1890) (certificates were issued under a statute which authorized issuance of preferred stock but not certificates of indebtness. Therefore, held to be certificates of preferred stock even though contained many elements of indebtness).

[16] Schmoll Fils Associated v. Commissioner of Internal Revenue. 39 B. T. A. 411 (1939).

[17] Had the court, in the principal case, held that the two contracts were separate, the securities would clearly have been stocks under the traditional approach. They were called preferred stock; dividends were payable only out of earnings; they had no fixed maturity date; they carried voting rights for certain purposes; and they were to an extent participating—all of which are characteristics of stocks rather than bonds.

of stock with a view to imposing all the legal consequences generally associated with the particular label given the security. This approach may cause a decision to rest on considerations not necessarily relevant to the question before the court. *E.g.*, in the principal case the factors of intention and circumstances surrounding the issuance of the certificates do not seem to be necessarily relevant in determining whether or not the periodic payments are a definite and fixed obligation on the part of the corporation regardless of earnings.

It would appear to be a sounder approach to limit the inquiry to the characteristics of the security material to the particular question before the court and cause the judgment to depend not on the entire complex of attributes but on those aspects determined to be pertinent to the particular issue under consideration.

Under this analysis the court, in cases involving the taxability of periodic payments made by a corporation to its security holders and guaranteed by a third party, could narrow the issue to: Are these payments a definite obligation of the corporation regardless of earnings? The guaranty by the third party should be disregarded in that the corporation and the third party are taxed individually and only the tax liability of the corporation is involved.

RODDEY M. LIGON, JR.

Courts—Venue—Inconvenient Forum Considerations and Special Venue Provisions Under the New Judicial Code*

The new Judicial Code,[1] effective September 1, 1948, gave the federal courts in §1404(a)[2] the power to transfer a civil action to any other district or division where it might have been brought if necessary for the convenience of witnesses and in the interest of justice. Prior to this revised code, there was no provision in the federal statutes for the transfer of venue from one district to another district; but where more than one venue was available to a plaintiff, the federal courts could exercise the equitable right to dismiss a case without prejudice and thus force the plaintiff to sue over again somewhere else.[3] Both before and after final approval of §1404(a), there was speculation by writers as to the effect of this new power on actions arising under special venue

* For some interesting discussions of other problems presented by §1404(a), see Mangan, *Federal Legislation*, 37 GEO. L. J. 394, 400 (1949); Marcus, *The Supreme Court and the Antitrust Laws*, 37 GEO. L. J. 341, 356 (1949); Notes, 60 HARV. L. REV. 424 (1947), 23 IND. L. J. 82 (1947); and materials listed in footnote 4 *infra*.

[1] Title 28 U. S. C. C. S.

[2] "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

[3] Gulf Oil Corp. v. Gilbert, 330 U. S. 501 (1947); Koster v. Lumbermen's Mutual Casualty Co., 330 U. S. 518 (1947); Rogers v. Guaranty Trust Co., 288 U. S. 123, 130-131 (1932).

provisions[4] where the rule enunciated had been that special venue statutes created an absolute right not subject to interference either by injunction or in any other manner except legislation.[5]

Taking advantage of the new provisions of §1404(a) the federal district courts, presented with motions subsequent to September 1, 1948, to transfer the causes in several Federal Employer's Liability Act cases and an antitrust action, almost without exception[6] held that §1404(a) applied to the special venue provisions of the FELA and the antitrust law.[7]

In the early summer of 1949, the United States Supreme Court construed §1404(a) in three cases, two involving FELA actions[8] and one involving an antitrust action.[9] In all three the result was an express declaration by the majority of the court[10] that the phrase "any civil action" as used in §1404(a) is not limited as embracing only those actions for which venue requirements are prescribed in 28 U. S. C. §§1391-1406, but means just what it says—*any civil action.*

In arriving at this conclusion, the court said that "the reach of 'any civil action' is unmistakable. The phrase is used without qualification,

[4] Barnard and Zlinkoff, *Patents, Procedure and the Sherman Act—The Supreme Court and a Competitive Economy, 1947 Term,* 17 GEO. WASH. L. REV. 1, 10-18 (1949) (thought §1404(a) should not apply to antitrust suits in absence of clearer and more specific evidence of congressional intent to accomplish such a result); Braucher, *The Inconvenient Federal Forum,* 60 HARV. L. REV. 908 (1947) (if enacted and sympathetically interpreted, §1404(a) should go far to relieve the federal judiciary of self-imposed obstacles to the efficient administration of the law governing place of trial); Note, 28 N. C. L. REV. 248 (1949) (hope expressed that §1404(a) would be held applicable in cases arising under general and special venue provisions); Comment, 44 ILL. L. REV. 75 (1949) (feels that §1404(a) should apply to FELA suits); Comment, 56 YALE L. J. 1234, 1249 n. 115 (1947) (thought §1404(a), if enacted, would be a legislative overruling of the court's interpretation of special venue provisions of the FELA); Note, 56 YALE L. J. 482 (1949) (thinks §1404(a) should apply to antitrust suits); 62 HARV. L. REV. 707 (1949) (§1404(a) should apply to antitrust suits); 47 MICH. L. REV. 438 (1949) (application of §1404(a) to FELA suits is proper); 33 MINN. L. REV. 536 (1949) (§1404(a) should apply to FELA special venue provisions).

[5] United States v. National City Lines, 334 U. S. 573 (1948); Baltimore & Ohio R. R. v. Kepner, 314 U. S. 44 (1941).

[6] Pascarella v. New York Cent. R. R., 81 F. Supp. 95 (E. D. N. Y. 1948) (held that §1404(a) was applicable only to actions brought under §§1391-1406 of Title 28 and not to actions under special venue statutes).

[7] United States v. E. I. Du Pont De Nemours & Co., 83 F. Supp. 233 (D. D. C. 1949) (antitrust suit); Brainard v. Atchison T. & S. F. Ry., 81 F. Supp. 211 (N. D. Ill. 1948) (court accepted application of §1404(a) to a FELA suit, but exercised its discretion to decide that the case should not be delayed by transfer to another forum); Scott v. New York Cent. R. R., 81 F. Supp. 815 (N. D. Ill. 1948) (FELA suit); Nunn v. Chicago, M., St. P. & P. Ry., 80 F. Supp. 745 (S. D. N. Y. 1948) (FELA suit); United States v. National City Lines, 80 F. Supp. 734 (S. D. Cal. 1948) (antitrust suit); White v. Thompson, 80 F. Supp. 411 (N. D. Ill. 1948) (FELA suit); Hayes v. Chicago, R. I. & P. Ry., 79 F. Supp. 821 (D. Minn. 1948) (FELA suit).

[8] *Ex parte* Collett, 69 Sup. Ct. 944 (1949); Kilpatrick v. Texas & P. Ry., 69 Sup. Ct. 953 (1949).

[9] United States v. National City Lines, 69 Sup. Ct. 955 (1949).

[10] 7 to 2 decisions, Justices Black and Douglas dissenting in all three cases.

without hint that some should be excluded."[11] The majority also used the legislative history of §1404(a) and the Reviser's Notes to show that FELA actions were within the scope of the new power.[12] As to why there was no reference in the Reviser's Notes to the court's decision that the antitrust law special venue provisions created an absolute right, the court pointed out that the Reviser's Notes were printed in 1947 and the first ruling by the court on the absolute right of the antitrust venue provisions was handed down on June 7, 1948.[13] Further, it was held that §1404(a) did not repeal the special venue provisions of the FELA[14] as those provisions defined the proper forum and §1404(a) deals with the right to transfer an action properly brought.[15] Said the court, "An action may still be brought in any court, state or federal, in which it might have been brought previously."[16]

The dissenting justices felt that to follow the holding of the majority would work too drastic a change in too many statutes to be the product of a mere revision of the code. *E.g.*, the special venue provisions of the Sherman Act, FELA, Suits in Admiralty Act, Jones Act, Merchant Marine Act of 1936, Securities Act, Securities Exchange Act, Public Utility Holding Company Act, Investment Company Act, and perhaps other statutes too. Therefore, the dissent would make §1404(a) applicable only to any civil action as to which venue provisions are codified in revised Title 28.[17]

Three cases dealing with only two special venue situations may not be grounds for a final answer to the problem, but from the rationale of these decisions it would seem that the new transfer provisions would apply to all special venue statutes. Thus, while an action can still be brought as it might have been brought previously, the power given in §1404(a) may be used to transfer the action to another district or division whether the venue is prescribed by general or special venue provisions.

JOHN M. SIMMS.

[11] *Ex parte* Collett, 69 Sup. Ct. 944, 946 (1949).

[12] *Id.* at 947-952. In the Reviser's Notes to §1404(a), the *Kepner* case, *supra* note 5, was cited as an example of the need for such a provision.

[13] United States v. National City Lines, 334 U. S. 573 (1948).
The concurring opinion of the late Justice Rutledge, 69 Sup. Ct. 959 (1949), expressed his doubts as to congressional knowledge of the effect of §1404(a) on antitrust suits, but notwithstanding his doubts that Congress intended to go so far as the majority held, he acquiesced in the court's decision.

[14] 36 STAT. 291 §6 (1910), 45 U. S. C. §56 (1946).

[15] "Section 1404(a) does not limit or otherwise modify any right granted in §6 of the Liability Act or elsewhere to bring suit in a particular district." *Ex parte* Collett, 69 Sup. Ct. 944, 947 (1949).

[16] *Ex parte* Collett, 69 Sup. Ct. 944, 947 (1949).

[17] United States v. National City Lines, 69 Sup. Ct. 955, 958 (1949) (dissenting opinion).

Criminal Law—Infamous Offenses—Attempted Burglary Punishable as a Felony

"All misdemeanors," says the North Carolina Statute,[1] "where a specific punishment is not prescribed shall be punished as misdemeanors at common law; but if the offense be infamous, or done in secrecy and malice, or with deceit and intent to defraud, the offender shall, except where the offense is a conspiracy to commit a misdemeanor, be guilty of a felony and punished by imprisonment in the county jail or state prison for not less than four months nor more than ten years, or shall be fined." In *State v. Surles*,[2] with one justice dissenting, the Supreme Court of North Carolina, construing this statute, held an attempt to commit burglary infamous, and therefore a felony; thus affirming the sentence of the trial judge that defendant be imprisoned in the State's Prison for a term of ten years. Had the Court held the offense a misdemeanor, to be punished as at common law, the maximum penalty would have been a fine, or imprisonment in the county jail, or both. Imprisonment in such case could not exceed two years.[3]

The offense of attempt to commit burglary has never been the subject of legislation in North Carolina,[4] but in *State v. Jordan*[5] our Court held it to be a common law misdemeanor.[6] At the time of this decision the above statute covered only offenses made misdemeanors by statute, and therefore the question of infamy was not raised therein.[7]

The real difficulty in applying the above statute lies in the want of

[1] N. C. GEN. STAT. §14-3 (1943).

[2] 230 N. C. 272, 52 S. E. 2d 880 (1949).

[3] State v. Wilson, 216 N. C. 130, 45 S. E. 2d 440 (1939); "Recurring to the many decisions imposing sentence for misdemeanors, we find none where a sentence of more than two years has been approved." State v. Tyson, 223 N. C. 492, 494, 27 S. E. 2d 113, 115 (1943).

For a general discussion of North Carolina's penal policy see, Coates, *Punishment of Crime in North Carolina*, 17 N. C. L. REV. 205 (1939).

[4] Certain attempts have by statute been made felonies: "Attempted arson," N. C. GEN. STAT. §14-67 (1943); "Attempted train robbery," N. C. GEN. STAT. §14-89 (1943); "Attempted carnal knowledge of married woman," N. C. GEN. STAT. §14-24 (1943).

[5] 75 N. C. 27 (1876); *but see* State v. Harris, 120 N. C. 577, 579, 26 S. E. 774, 775 (1897) where the Court said: "Attempts to commit any of the four capital offenses were formerly felonies, but during the prosecution for 'Kuklux' troubles the offense of assault with intent to commit murder was reduced to a simple misdemeanor." The Court seems to infer that an attempt to commit burglary, one of the four capital offenses, has always been a felony.

[6] "All such parts of the common law as were heretofore in force and use within this state, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with the freedom and independence of this state and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this state." N. C. GEN. STAT. §4-1 (1943).

[7] In 1905, the statute was partially rewritten so as to cover "all misdemeanors," without regard to whether they arose at common law or were created by legislative fiat. N. C. REV. STAT. §3293 (1905).

a rule by which infamous crimes may be designated with definiteness. Two different tests have, in the past, been employed in determining this question, and, as might be expected, have led to conflict in the decisions as to what crimes are infamous. Under the earlier decisions,[8] both in England and this country, the courts inclined to the doctrine that it is the nature of the crime, and not the character of the punishment, which renders it infamous. But it is now well settled that the test to be applied by federal courts, in determining whether an offense is an infamous crime, is the character of the punishment which may be inflicted.[9] The North Carolina Court[10] and other state courts[11] have also adopted the "character of the penalty" test, holding an infamous crime to be one which subjects the offender to an infamous punishment. However, this test is inoperative as a key to the meaning of the term as used in the above statute, for the statute specifically applies only to those misdemeanors for which no punishment is prescribed.

The federal doctrine and the doctrine heretofore applied in this State being inapplicable, apparently the Court attempted to apply the common law test, namely, the nature of the crime. This is evidenced by the fact that the opinion stated that "infamous," as used in the statute "necessarily refers to the degrading nature of the offense, and not to the measure of punishment then being set down."[12]

At common law, the term infamous was applied to crimes disqualifying convicts as witnesses and causing the suppression of their political rights.[13] They were enumerated as treason, felony, and the *crimen falsi*.[14] The latter term would seem to cover "infamous misdemeanors," as used in the above statute. In the Roman Law, from which the term was borrowed, *crimen falsi* is used to describe that class of crimes which involve falsification, that is to say, forgery, false declarations or false oaths such as perjury.[15] Such an element is not present in an attempt

[8] Drazen v. New Haven Taxicab Co., 95 Conn. 500, 111 Atl. 861 (1920); People v. Sponsler, 1 Dak. 289, 46 N. W. 459 (1876); State v. Vashon, 123 Me. 412, 123 Atl. 511 (1924).

[9] *Ex parte* Wilson, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89 (1885); "It is not the character of the crime but the nature of the punishment which renders the crime infamous." Weeks v. U. S., 216 Fed. 292, 298 (2d Cir. 1914).

[10] Gudger v. Penland, 108 N. C. 593, 13 S. E. 168 (1891).

[11] "Whether a crime is infamous or not is to be determined by the nature of the punishment inflicted." Perry v. Bingham, 265 Ky. 133, 137, 95 S. W. 2d 1099, 1101 (1936); O'Hara v. Montgomery, 275 Mich. 504, 267 N. W. 550 (1936).

[12] State v. Surles, 230 N. C. 272, 276, 52 S. E. 2d 880, 883 (1949).

[13] U. S. v. Barefield, 23 Fed. 136, 137 (E. D. Texas 1885); UNDERHILL, CRIMINAL EVIDENCE 332 (3rd ed. 1923); 1 WHARTON, CRIMINAL LAW 41 (11th ed. 1912); CLARK AND MARSHALL, CRIMES 10 (4th ed. 1940).

[14] U. S. v. Sims, 161 Fed. 1008, 1012 (C. C. N. D. Ala. 1907). Drazen v. New Haven Taxicab Co., 95 Conn. 500, 111 Atl. 861, 862 (1920).

[15] "Infamous crimes are every species of the crimen falsi, such as forgery, perjury. subornation of perjury, and offenses affecting the public administration of justice." Wick v. Baldwin, 51 Ohio St. 51, 56, 36 N. E. 671, 672 (1894); State v. Clark, 60 Kan. 450, 56 Pac. 767 (1889); 1 GREENLEAF, EVIDENCE 373 (13th ed. 1876); 1 BOUVIER, LAW DICTIONARY (3rd rev. ed. 1914) 730.

to commit burglary. Neither is it present in an attempt to commit *buggery*; nevertheless, that was held to be an infamous misdemeanor in *State v. Spivey*,[16] the Court construing the same statute. In neither the *Surles* case nor the *Spivey* case did the Court advance any criteria by which one might determine other infamous crimes. In the *Surles* case, the majority of the Court, through Chief Justice Stacy, said that an attempt to commit burglary is "an act of depravity, which involves moral turpitude, reveals a heart devoid of social duties and a mind fatally bent on mischief," and therefore infamous. If this was intended to be a definition of the term infamous, it seems the Court has given birth to a new meaning of the term. This is especially true in view of *State v. Tyson*[17] where, in remanding a judgment, rendered under this same statute, that defendant be confined for not less than eight nor more than ten years, following a plea of guilty to assault upon a female, it was said: "while his Honor found that the assault was aggravated, shocking, and outrageous to the sensibilities and decencies of right-thinking citizens, the Court did not find the offense to be infamous."

In order to further strengthen its decision, the Court pointed out that not only is the crime of burglary a felony,[18] but that the mere preparation to commit burglary is likewise made a felony by statute.[19] "In between mere preparation and actual commission lies the crime of attempt, which, if not a felony," said the Court, "undoubtedly arises from an artless omission in the statutes."[20] It is submitted, by the writer, that such is not necessarily an artless omission. The gravamen of the offense of preparation to commit burglary is the possession of burglar's tools without lawful excuse[21] which seems to indicate that the statute was designed to enable law enforcing officers to apprehend the professional burglar before the consummation of any crime. Even, if it be conceded that there would be a discrepancy in the statutes if an attempt to commit burglary was not a felony, it is submitted that the discrepancy still exists since the maximum penalty possible for an attempt to commit burglary is ten years while a sentence of twenty-five to thirty years has been upheld under the statute against preparation.[22] Besides, it would seem that the duty to correct any such inconsistency, if such exists, lies with the legislature and not the judiciary.

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[16] 213 N. C. 45, 195 S. E. 1 (1937).
[17] 223 N. C. 492, 493, 27 S. E. 2d 113, 114 (1943).
[18] N. C. GEN. STAT. §14-1 (1943).
[19] N. C. GEN. STAT. §14-55 (1943).
[20] State v. Surles, 230 N. C. 272, 277, 52 S. E. 2d 880, 883 (1949).
[21] State v. Vicks, 213 N. C. 235, 195 S. E. 779 (1938).
[22] State v. Cain, 209 N. C. 275, 183, S. E. 200 (1936).

Damages—Wrongful Death—Evidence of Improvident Attitude of Decedent

Garfield Hanks was convicted of non-support and ordered to pay $10 per week for support of his children. Later Hanks filed a complaint for absolute divorce, alleging an agreement respecting custody and support of the three minor children. The next day, and before service of this summons and complaint, Hanks was killed when struck by the defendant's train at a crossing. His wife as administratrix successfully brought an action for wrongful death, and put in evidence the gross earnings of deceased for the past several years and his average weekly wage at the time of his death. The defendant excepted to exclusion of the non-support judgment and the summons and complaint for divorce, as well as to exclusion of its offer of the inventory of Hanks' estate. On the appeal, by a 4-3 decision, the North Carolina Supreme Court held that exclusion of the evidence was error.[1]

There are two main theories in general use for determining the amount of recovery in a wrongful death action:[2] (1) loss to surviving relatives, or the amount of money and services these relatives would have received had the deceased lived out his life expectancy, and (2) loss to the estate, which, depending upon the jurisdiction, is (a) present worth of probable gross earnings less personal expenses had death not occurred, (b) present worth of probable savings of deceased had death not occurred, or (c) gross earnings during the life expectancy which was cut short.

The North Carolina statutes provide for an action for wrongful death, in which a fair and just compensation for the pecuniary injury may be awarded and disposed of in the manner of personal property in case of intestacy.[3] The statutes do not detail the manner in which this pecuniary injury shall be measured, but leave this question to judicial determination. As to this measure of damages, North Carolina can be placed in category (2) (a), namely, the present worth of probable gross earnings less personal expenses had death not occurred.[4]

[1] Hanks v. Norfolk & W. Ry., 230 N. C. 179, 52 S. E. 2d 717 (1949).

[2] McCORMICK, DAMAGES §95 (1935).

[3] N. C. GEN. STAT. §28-174 (1943): "The plaintiff in such action may recover such damages as are a fair and just compensation for the pecuniary injury resulting from such a death." N. C. GEN. STAT. §28-173 (1943): ". . . The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, except as to burial expenses of the deceased, but shall be disposed of as provided in this chapter for the distribution of personal property in case of intestacy."

[4] Rea v. Simowitz, 226 N. C. 379, 38 S. E. 2d 194 (1946); White v. N. C. R. R., 216 N. C. 79, 3 S. E. 2d 310 (1939); Gurley v. Southern Power Co., 172 N. C. 690, 90 S. E. 943 (1916); Mendenhall v. N. C. R. R., 123 N. C. 275, 31 S. E. 480 (1898) ("The measure of damages is the present value of the net pecuniary worth of the deceased to be ascertained by deducting the cost of his own living and expenditures from the gross income, based upon his life ex-

North Carolina decisions have made it perfectly clear that there is a marked distinction between the North Carolina statute based on present worth of the net pecuniary value of the life of the deceased, and statutes of other jurisdictions, including the Federal Employer's Liability Act, based on the pecuniary loss sustained by the beneficiaries;[5] that the number and age of children dependent upon deceased is inadmissible on the damage issue in a wrongful death action;[6] that whether or not deceased would have accumulated anything should not be considered;[7] that the cause of action did not belong to the deceased, and that those entitled to receive damages do not claim through him;[8] and that the personal expenses of deceased which are to be deducted from gross earnings to arrive at expected net income do not include contributions to the support of his family or dependents.[9] These decisions indicate that North Carolina has confined the question of damages in a wrongful death action to finding out (1) how much money decedent would have made if he had lived, and (2) how much of this he would have spent on himself alone, independently of family expense. After this is done, the personal expenses are subtracted from gross income. The present worth of this sum is then the dollar and cents amount recovered.[10] According to the majority opinion, the abandonment and non-support order, the complaint for divorce with custody agreement, and the inventory of the decedent's estate were offered in evidence "to show the character of the deceased and his disinclination to provide for dependent members of his family." A number of North Carolina decisions contain statements that character evidence is admissible in a wrongful death action.[11] These opinions do

pectancy."); Benton v. N. C. R. R., 122 N. C. 1007, 30 S. E. 333 (1898) ("The measure of damages for loss of life of plaintiff's intestate is the present value of his net income, and this is to be ascertained by deducting the cost of living and expenditure from his net gross income and then estimating the present value of the accumulation from such net income, based upon his expectation in life.").

[5] Carpenter v. Asheville Power & Light Co., 191 N. C. 130, 131 S. E. 400 (1925); Horton v. Seaboard A. L. Ry., 175 N. C. 472, 95 S. E. 883 (1918).

[6] Bradley v. Ohio R. & C. R. R., 122 N. C. 972, 30 S. E. 8 (1898).

[7] Roberson v. Greenleaf Johnson Lumber Co., 154 N. C. 328, 70 S. E. 630 (1911).

[8] Hood v. American T. & T. Co., 162 N. C. 92, 77 S. E. 1094 (1913).

[9] Rigsbee v. Atlantic C. L. R. R., 190 N. C. 231, 129 S. E. 580 (1925).

[10] "Under the state law, the damages for the pecuniary worth of the deceased are to be ascertained by deducting the probable cost of his own living and usual or ordinary expenses from the probable gross income derived from his own exertions based upon his life expectancy (*Purnell v. Railroad*, 190 N. C. 573, 130 S. E. 313). And, in ascertaining these damages, the jury is at liberty to take into consideration the age, health, and expectancy of life of the deceased, his earning capacity, his habits, his ability and skill, the business in which he was employed, and the means he had for making money—the end of it all being to enable the jury fairly to determine the net income which the deceased might reasonably have been expected to earn, had his death not ensued." Carpenter v. Asheville Power & Light Co., 191 N. C. 130, 131 S. E. 400 (1925). "If a man's net earnings are but $100 per annum, that is his pecuniary value to his family, whether large [family] or small." Kesler v. Smith, 66 N. C. 154 (1872).

[11] Hancock v. Wilson, 211 N. C. 129, 189 S. E. 631 (1936); Poe v. Raleigh

not deal with whether or not character evidence is admissible generally, or for a specific purpose, but in at least one case it is stated that evidence of the character of the deceased was relevant only on the question of his earning capacity.[12] The dissent in the principal case states that any evidence not excluded by a specific rule of law and having a logical tendency to show either probable gross income of deceased or probable costs of deceased's own living and personal expenses should be admitted. The view of the dissent would seem to be correct, as evidence of character or otherwise which tended to show probable earnings or spendings of the deceased would bear upon the question of expected net income of the deceased. It is submitted, however, that unless character evidence does tend to show either probable earnings or personal expenditures of the deceased, it is irrelevant on the issue of damages in a wrongful death action in North Carolina.

The majority opinion would admit the evidence to show the character of the deceased because it tended to show a lack of a provident attitude by the deceased toward his family. Following this viewpoint, the court seems to be adopting a loss to the beneficiaries theory, for it is self-evident that a family whose husband and father had been quite generous in providing for their needs and desires has lost by his death more from a financial standpoint than a family whose husband and father was niggardly in his support. But if those designated by statute to receive the recovery receive an amount dependent only upon the father's probable earnings and personal expenditures, provident attitude or lack of one would be immaterial.

A great deal of the language used in a number of earlier North Carolina decisions on the measure of damages in wrongful death actions would seem to indicate that the measure of damages in North Carolina is the pecuniary advantage which might be expected from continuance of deceased's life *by the family*,[13] or pecuniary worth *to the family*.[14] The first of these, the case of *Kesler v. Smith*,[15] was decided in 1872 and the opinion in the case states that the statute under which the action was brought provided that the amount recovered in a wrongful death action should be for the exclusive and sole benefit of the widow and issue of the deceased[16] in all cases where they are surviving. Conse-

& Augusta A. L. R. R., 141 N. C. 525, 54 S. E. 406 (1906); Mendenhall v. N. C. R. R., 123 N. C. 275, 31 S. E. 480 (1898).

[12] Speight v. Seaboard A. L. Ry., 161 N. C. 81, 76 S. E. 684 (1912).

[13] Burton v. Wilmington & W. R. R., 82 N. C. 505 (1880).

[14] Burns v. Asheboro & M. R. R., 125 N. C. 304, 34 S. E. 495 (1899); Mendenhall v. N. C. R. R., 123 N. C. 275, 31 S. E. 980 (1898); Kesler v. Smith, 66 N. C. 154 (1872).

[15] 66 N. C. 154 (1872).

[16] Actually, though this wording was enacted in 1855, N. C. Pub. Laws 1868-69, c. 113, §72 had changed this provision to read that recovery would be disposed of as provided for personal property in case of intestacy.

quently the term, "injury to the family" was used in that case, and later cases merely repeated it. Later cases seem to omit the phrase "to the family," and in a more recent case[17] it is stated that the recovery for the value of a child's life is not what his services might have been worth to someone else during his minority, but what his entire life would have been worth to *himself* if he had lived. In *Queen City Coach Co. v. Lee*[18] the judge's charge was "pecuniary worth (of deceased) to his estate," and this was held to be in accordance with North Carolina authorities. If there is no family or next of kin to take the recovery, the University of North Carolina is entitled to the recovery[19] indicating clearly that the recovery does not depend on loss to the family of the decedent.

Evidence of the provident attitude of the deceased was admited in one case[20] when offered by the plaintiff, but it was considered that the evidence of deceased's having been a good provider for his family showed a constant attention to his business, and thus was admitted to show earning capacity. In the principal case, the non-support order, the divorce complaint, and the inventory do tend to show lack of a provident attitude by deceased, but tend very remotely, if at all, to show earning capacity or decedent's own living expenses. When the evidence on non-support, however, is coupled with the inventory of decedent's estate there is an indication of the decedent's personal expenditures, and on this ground these two offers could be relevant, for if a man has given his family a small amount of his wages and his estate shows almost nothing, then a high degree of probability exists that personal expenditures were high. But as pointed out by the dissent, there was nothing in the record to show that deceased's contributions to his family were controlled by the support order. Accordingly this combination of evidence has little probative value.

Inasmuch as the majority opinion would permit the excluded evidence to come in to show lack of provident attitude, this case seems to be out of line with the other North Carolina cases holding to a strict net-income theory and rejecting the loss to beneficiaries theory.

BASIL SHERRILL.

Domestic Relations—Actions—Wife's Tort Liability to Husband

In *Scholtens v. Scholtens*,[1] plaintiff husband brought an action against his wife to recover damages for personal injuries which he received in an automobile accident allegedly caused by her negligence. Thus the

[17] Russell v. Windsor Steamboat Co., 126 N. C. 961, 36 S. E. 191 (1900).
[18] 218 N. C. 320, 11 S. E. 2d 341 (1940).
[19] Warner v. Western N. C. R. R., 94 N. C. 250 (1886).
[20] Hicks v. Love, 201 N. C. 773, 161 S. E. 395 (1931).

[1] 230 N. C. 149, 52 S. E. 2d 350 (1949).

question of whether a husband may maintain an action against his wife for a personal tort committed during coverture was presented for the first time in this state. The North Carolina Supreme Court held that the husband had no right to maintain such an action.

It is well known that at common law the husband and wife became one by marriage.[2] The legal existence of the wife was suspended during coverture and incorporated into that of her husband, she being unable to sue or be sued without his joinder. As one could not sue himself, neither spouse could sue the other. The majority of states still recognize the common law disability of husband and wife to maintain personal tort actions *inter se*,[3] the reasons advanced being similar in most jurisdictions denying liability. One reason is that the various Married Women's Acts, some of which purport to allow the wife to sue and be sued as if she were single, are said to be in derogation of the common law and thus to be strictly construed. Suits between husband and wife are declared to be against public policy in that they tend to break up the family unit. It is also reasoned that husband and wife have an adequate remedy in the criminal and divorce laws.

In 1868 the common law disability of a wife to sue was partially removed in North Carolina by a statute allowing her to sue without her husband's joinder under certain circumstances.[4] This was held to mean that a wife might sue her husband when the action concerned her separate property.[5] In 1913 another statute further enlarged married

[2] Thompson v. Thompson, 218 U. S. 611 (1910); Peters v. Peters, 156 Cal. 32, 103 Pac. 219 (1909); Aldrich v. Tracy, 221 Iowa 84, 269 N. W. 30 (1936); Drake v. Drake, 145 Minn. 388, 177 N. W. 624 (1920); Austin v. Austin, 136 Miss. 61, 100 So. 591 (1924); Butterfield v. Butterfield, 195 Mo. App. 37, 187 S. W. 295 (1916); Roberts v. Roberts, 185 N. C. 566, 118 S. E. 9 (1923).

[3] Thompson v. Thompson, *supra* note 2; Ewald v. Lane, 104 F. 2d 222 (D. C. Cir. 1939); Cubbison v. Cubbison, 73 Cal. App. 2d 437, 166 P. 2d 387 (1946); Carmichael v. Cirmichael, 53 Ga. App. 663, 187 S. E. 116 (1936); Broaddus v. Wilkenson, 281 Ky. 601, 136 S. W. 2d 1052 (1940); Harvey v. New Amsterdam Casualty Co., 6 So. 2d 774 (La. Ct. of App. 1942); Anthony v. Anthony, 135 Me. 54, 188 A. 724 (1937); Callow v. Thomas, 322 Mass. 550, 78 N. E. 2d 637 (1948); Kircher v. Kircher, 288 Mich. 669, 286 N. W. 120 (1939); Keralis v. Keralis, 213 Minn. 31, 4 N. W. 2d 632 (1942); Scales v. Scales, 168 Miss. 439, 151 So. 551 (1934); Mullally v. Langenberg Bros. Grain Co., 339 Mo. 582, 98 S. W. 2d 645 (1936); Lang v. Lang, 24 N. J. Misc. 26, 45 A. 2d 822 (1946); Tanno v. Elby, 78 Ohio App. 21, 68 N. E. 2d 813 (1946); Fisher v. Diehl, 156 Pa. Super. Ct. 476, 40 A. 2d 912 (1945); Lunt v. Lunt, 121 S. W. 2d 445 (Tex. Civ. App. 1938); Comstock v. Comstock, 106 Vt. 50, 169 A. 903 (1934); Staats v. Co-operative Transit Co., 125 W. Va. 473, 24 S. E. 2d 916 (1943); McKinney v. McKinney, 59 Wyo. 204, 135 P. 2d 940 (1943).

[4] N. C. CONSOL. STAT. §454 (1941): "When a married woman is a party, her husband must be joined with her, except that—1. When the action concerns her separate property, she may sue alone. 2. When the action is between herself and her husband, she may sue or be sued alone. In no case need she prosecute or defend by a guardian or next friend." This statute was deleted in the codification of the North Carolina General Statutes of 1943 as having been superseded by Chapter 52 entitled *Married Women.*

[5] Graves v. Howard, 159 N. C. 594, 75 S. E. 998 (1912); Perkins v. Brinkley, 133 N. C. 154, 45 S. E. 536 (1903); Robinson v. Robinson, 123 N. C. 136, 31 S. E. 371 (1898); McCormac v. Wiggins, 84 N. C. 278 (1881); Manning v. Manning, 79 N. C. 293 (1878); Shuler v. Millsaps, 71 N. C. 297 (1874).

women's rights to sue in tort.[6] Under these two statutes a wife was allowed recovery against her husband for a willful assault.[7] In 1923 the North Carolina Supreme Court held for the first time in the United States that a wife might sue her husband in tort for negligent injury.[8] Now it is well settled in North Carolina that such an action will lie.[9]

In North Carolina the husband has been allowed to sue the wife for negligent tort where the cause of action arose prior to their marriage, since by statute the subsequent marriage cannot affect her antenuptial liability.[10] In that case the court referred to, but expressly refused to decide, the question presented in the *Scholtens* case. In the *Scholtens* case the court reasoned that, since there is no statutory authorization for the husband to sue his wife for personal injury inflicted during coverture, the husband had only his common law rights against the wife. The decision is based to some extent upon the fact that the statute of 1868 was deleted in the adoption of the General Statutes of 1943.[11] Since this statute of 1868 specifically enabled a married woman to sue *or be sued* alone when the action was between herself and her husband, it thus implied that the husband could indeed sue the wife. There is some doubt as to whether the result of the *Scholtens* case would have been the same had this statute not been deleted.

The question presented by the principal case has been decided on similar facts in two other jurisdictions, Wisconsin and West Virginia. The Wisconsin statute purports to allow a married woman to bring an action in her own name for any personal injury as if she were *sole*.[12] Under this statute it was held that a wife might sue her husband for personal injuries caused by his negligence.[13] The Supreme Court of Wisconsin recognized that by statute the wife's rights were superior to

[6] N. C. GEN. STAT. §52-10 (1943): "The earnings of a married woman by virtue of any contract for her personal service, and any damages for personal injuries, or other tort sustained by her, can be recovered by her suing alone, and such earnings or recovery shall be her sole and separate property as fully as if she had remained unmarried."

[7] Crowell v. Crowell, 180 N. C. 516, 105 S. E. 206 (1920), *rehearing denied*, 181 N. C. 66, 106 S. E. 149 (1921) (husband infected his wife with a venereal disease).

[8] Roberts v. Roberts, 185 N. C. 566, 118 S. E. 9 (1923) (negligent automobile accident). See also Roberts v. Guaranty Co., 188 N. C. 795, 125 S. E. 611 (1924) (husband held entitled to recover on his indemnity policy the amount of his wife's judgment against him in Roberts v. Roberts, *supra*; questions of public policy and sound morals were addressed to the Legislature).

[9] Bogen v. Bogen, 219 N. C. 51, 12 S. E. 2d 649 (1940); Alberts v. Alberts, 217 N. C. 443, 8 S. E. 2d 523 (1940); York v. York, 212 N. C. 695, 194 S. E. 486 (1937); Earle v. Earle, 198 N. C. 411, 151 S. E. 884 (1930).

[10] Shirley v. Ayers, 201 N. C. 51, 158 S. E. 840 (1931).

[11] N. C. CONSOL. STAT. §454 (1941). See note 4 *supra*.

[12] WIS. STAT. §246.07 (1947) (". . . And any married woman may bring and maintain an action in her own name for any injury to her person or character the same as if she were sole. . . .").

[13] Wait v. Pierce, 191 Wis. 202, 209 N. W. 475 (1926).

those of her husband[14] and, when the question of the principal case was presented, held that the husband had only his common law rights against his wife.[15] As a result of this decision the Wisconsin Legislature passed a statute giving the husband the right to maintain an action against his wife "for recovery of damages for injuries sustained to his person caused by her wrongful act, neglect or default."[16] In West Virginia, where the statute provided that a married woman might sue or be sued as if she were single,[17] the decision was also against the husband. The Court reasoned that the only effect of the statute was to make it possible for a married woman to sue or be sued by third persons without her husband's joinder, not to authorize the husband to sue the wife.[18]

There are certain practical considerations which may have influenced the Court's decision in the *Scholtens* case. In most tort actions between husband and wife, especially the automobile accident cases, the real defendant is an insurance company. The danger of collusion between the insured and the person injured, present in liability insurance cases, is considerably increased by the relationship of the parties. Hence the Court may not have wished to further extend liability. This element of collusion, however, has not hampered the wife's cause of action against her husband, and there is certainly no more danger of collusion when the husband sues the wife. Also the conventional public policy argument that such actions split the family is not applicable in the insurance cases, since neither spouse is in fact paying the bill.

It is submitted that the result of the *Scholtens* case is illogical and that had the Court so desired, it had legitimate grounds for allowing the suit. That North Carolina has been liberal in this field heretofore is well illustrated by the fact that it was the first state to recognize the wife's cause of action against the husband for negligent tort.[19] Judging by the majority opinion of Chief Justice Clark in *Crowell v. Crowell*,[20] it seems that he would have no trouble reaching a different result in the principal case. He recognized that we have by statute adopted the common law except as it has been "abrogated, repealed or become *obso-*

[14] *See* Singer v. Singer, 245 Wis. 191, 197, 14 N. W. 2d 43, 47 (1944).

[15] Fehr v. General Accident Fire & Life Insur. Corp., Ltd., 246 Wis. 228, 16 N. W. 2d 787 (1944).

[16] WIS. STAT. §246.075 (1947): "A husband shall have and may maintain an action against his wife for the recovery of damages for injuries sustained to his person caused by her wrongful act, neglect or default." New York also changed its common law rule by a statute enabling husband and wife to sue each other for personal tort (N. Y. DOM. REL. LAW §57) under which it was held that a husband might sue his wife for malicious prosecution of a divorce action. Weidlich v. Weidlich, 177 Misc. 246, 30 N. Y. S. 2d 326 (1941).

[17] W. VA. CODE ANN. §4749 (1943).

[18] Poling v. Poling, 116 W. Va. 187, 179 S. E. 604 (1935); *accord*, Staats v. Co-operative Transit Co., 125 W. Va. 473, 24 S. E. 2d 916 (1943).

[19] Roberts v. Roberts, 185 N. C. 566, 118 S. E. 9 (1923).

[20] 180 N. C. 516, 105 S. E. 206 (1920), *rehearing denied*, 181 N. C. 66, 106 S. E. 149 (1921).

lete."[21] In view of the wife's rights against her husband at the present time in North Carolina, it seems that these common law principles as to the husband's rights against his wife are clearly antiquated. Our Court has said that the legislature in passing the Married Women's Act intended to equalize the legal status of husband and wife.[22] If applying the common law as to the husband's rights gives the wife rights superior to those of her husband, the common law in this respect is obsolete and should not be the law. Further our court has long recognized that the common law unity of husband and wife no longer exists, having been changed by statute.[23] Since the wife by statute is no longer a part of the unit, but is separate enough even to sue her husband for personal tort, it is a mere fiction to say they are one for purposes of the husband's suit against his wife.

Since the court clearly indicated in the principal case that legislative action will be necessary to change the rule enunciated, it is urged that the Legislature of North Carolina enact a statute specifically enabling the husband to sue his wife for personal injuries caused by her during coverture.

MASON P. THOMAS, JR.

Domestic Relations—Child's Interest in the Parental Relation—Suit by Infant for Enticement of Mother

The authorities are recent and in conflict on the question of whether a minor child has a cause of action against an outsider for damages suffered as a result of the outsider's enticement of the child's parent from the family home.

The Supreme Court of North Carolina has no decision on this question. It is, however, in accord with the view that damage to relational interests[1] is the true basis of similar actions of alienation of affections[2]

[21] N. C. GEN. STAT. §4-1 (1943). Italics added.

[22] Helmstetler v. Duke Power Co., 224 N. C. 821, 825, 32 S. E. 2d 611, 614 (1944) "The effect of the legislation on the subject is to equalize the legal status of husband and wife. . . . But if the legislative intent of equality is to prevail, the same cause of action which is denied to the wife may not be retained or preserved to the husband"; Hipp v. Dupont, 182 N. C. 9, 108 S. E. 318 (1921).

[23] Roberts v. Roberts, 185 N. C. 566, 569, 118 S. E. 9, 11 (1923) "The unity of person in the strict common-law sense no longer exists in this jurisdiction, because many of the common law disabilities have been removed. This change relates to remedies as well as rights."

[1] Green, *Relational Interests*, 29 ILL. L. REV. 461, 462 (1934). "Relational interests are distinct interests. They extend beyond the personality, and are not symbolized by any tangible thing which can legitimately be called property. . . The situation is this: the plaintiff stands in relation to some other person; defendant hurts plaintiff's relation with that person. This is a hurt done to a relational interest."

[2] Chestnutt v. Sutton, 207 N. C. 256, 176 S. E. 743 (1934); Cottle v. Johnson, 179 N. C. 426, 102 S. E. 759 (1920) (holding that the gravamen of the cause of action for alienation of affections of the plaintiff's wife is the deprivation of the plaintiff of his conjugal rights to the society, affection, and assistance of his wife).

and abduction and seduction of a minor child.[3] It has recognized that a child has protectible rights in the parent-child relationship in allowing the child to sue its parent directly for support.[4]

The first suit reaching an appellate court for an outsider's enticement of the mother from the home[5] was brought on the theory that the wrongful interference with the family unit gave the injured member a right of action. The cause of action was disallowed for the reasons that the crux of an action for alienation of affections was injury to *consortium*[6] given only by the contract of marriage, that to uphold the cause would give a right of action to every family member resulting in a "flood of litigation," and in duplicated damages since the number and ages of the children are considered in awarding damages in the father's suit for alienation of his wife's affections.[7]

The first recognition of the cause of action was where the father was enticed from the home and the child was allowed to recover for the resulting loss of parental support and maintenance, "as well as other damages for the destruction of other rights which arise out of the family relationship. . . ."[8]

It was emphasized that the basis of the cause of action was the relational interests rather than support when it was allowed although the enticed father was already furnishing support under a court order.[9] The concept of the family as a legal unit with correlative rights and duties[10] entitling the child to the affection, moral support, and guidance of both parents, justified an action against an outsider who stopped these benefits by inducing the parent to leave the home.

More recently the cause of action for loss of these benefits has been

[3] Little v. Holmes, 181 N. C. 413, 107 S. E. 577 (1921); Howell v. Howell, 162 N. C. 283, 78 S. E. 22 (1913) ("The real ground of action is compensation for the expense and injury and 'punitive damages for the wrong done him in his affections and the destruction of his household,' [cases cited]."). For an historical account of the basis of this action from the feudal incident of marriage to parent's right to child's services see Note, 13 AM. DEC. 715 (1879).

[4] Pickelsimer v. Critcher, 210 N. C. 779, 188 S. E. 313 (1936); Green v. Green, 210 N. C. 147, 185 S. E. 651 (1936), 15 N. C. L. REV. 67 (1937).

[5] The issue of whether an adult son could recover against another member of the family for interference with his mother's affections was presented collaterally in Coulter v. Coulter, 73 Colo. 144, 214 P. 400 (1923) and in Cole v. Cole, 277 Mass. 50, 177 N. E. 810 (1931). Opinion on the issue was withheld and dismissals in both cases were sustained on other grounds.

[6] The right of the husband and wife respectively to the conjugal fellowship, company, cooperation and aid of the other. BOUVIER, LAW DICTIONARY 621 (Rawle's 3d ed. 1914).

[7] Morrow v. Yannantuono, 152 Misc. 134, 273 N. Y. Supp. 912 (Sup. Ct. 1934).

[8] Daily v. Parker, 152 F. 2d 174 (7th Cir. 1945). This decision provoked national comment. *E.g.*, Notes, 46 COL. L. REV. 464 (1946), 32 CORN. L. Q. 432 (1947), 59 HARV. L. REV. 297 (1946), 30 MINN. L. REV. 310 (1946), 19 So. CAL. L. REV. 455 (1946).

[9] Johnson v. Luhman, 330 Ill. App. 598, 71 N. E. 2d 810 (1947).

[10] *Id.* at 605, 71 N. E. 2d at 813.

denied for reasons of policy,[11] prohibitive statute,[12] and lack of a prior legal provision to support the cause.[13]

The decision in the recent case of *Miller v. Monsen*[14] establishes the wrongful interference with a beneficial relationship as the true basis of this cause of action. In that case the plaintiff, a minor child, sued by her guardian ad litem to recover damages allegedly sustained as a result of defendant's enticing her mother from the family home. Prior to the date of the mother's departure plaintiff lived with her father, mother, brother, and sister as a family, receiving the mother's love, affection, care, and services. As a result of defendant's enticement the then existing relationship between the plaintiff and her mother was destroyed, causing her the loss of those benefits flowing from that relationship. Verdict was for the plaintiff and on appeal by the defendant the court held that a child has legally protected rights in the maintenance of the family relationship against interference by outsiders, and enticement by an outsider of the parent from the family home constitutes an invasion of the child's rights for which it may maintain an action for damages.

An evaluation of the soundness and desirability of recognizing this cause of action allowing a child to recover damages for loss of parental guidance, companionship, care and counsel necessitates consideration of its legal basis and its material effects on society.

The doctrinal objections to this cause of action have come from the common law concept of the family unit—wherein all actions for the protection of the family belonged to the father.[15] The concept of the modern family as "a cooperative enterprise with correlative rights and duties among all the members"[16] seems more realistic.

It is obvious that a child has interests in the parental relationship.[17] The child's interest in the pecuniary benefits have been recognized by allowing it to enforce support by proceeding directly against the parent,[18] to recover from a third person for injury to its means of support resulting from that person's sale of liquor to parent, or to another who injured

[11] McMillan v. Taylor, 160 F. 2d 221 (D. C. Cir. 1946); Taylor v. Keefe, 134 Conn. 156, 56 A. 2d 768 (1947).

[12] Rudley v. Tobias, 84 Cal. App. 2d 454, 190 P. 2d 984 (1948) (statute listing rights of personal relations was amended to omit prohibition of abduction of parent from child).

[13] Garza v. Garza, 209 S. W. 2d 1012 (Tex. Civ. App. 1948).

[14] —— Minn. ——, 37 N. W. 2d 543 (1949).

[15] COOLEY, TORTS 464 (3d ed. 1906).

[16] See note 10 *supra*.

[17] Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177, 185 (1916).

[18] Green v. Green, 210 N. C. 147, 185 S. E. 651 (1936), 15 N. C. L. REV. 67 (1937); *cf.* Paxton v. Paxton, 150 Cal. 667, 89 P. 1083 (1937) (duty imposed by poor person's statute enforced in equity by adult child); Meyers v. Meyers, 169 Misc. 860, 8 N. Y. Supp. 2d 262 (Sup. Ct. 1938) (statute allowing child to petition for enforcement of support).

parent as result of intoxication,[19] and in some states to sue for the wrongful death of the parent.[20]

The child's interests in the intangible benefits of the parental society, affection, and comfort are similar to those protected in a spouse's action for alienation of affections. The basis of that cause is *consortium* arising from the marriage contract. It does not follow that such interests arise only from the marital relationship, or that they are protected only by a *consortium* action.

The child has been allowed recovery of damages for violation of intangible interests growing out of the parent-child relationship whose benefits are less substantial than those of the instant cause of action. A child, after it has reached maturity, has recovered damages for offenses to his sensibilities through improper treatment of the dead body of his parent,[21] and for belated delivery of a death telegram preventing his attending the parent's funeral.[22] In actions for the wrongful death of a parent the jury, in fixing damages, may consider the child's loss of parental care, nurture, and moral education which it probably would have received.[23]

Indeed, the modern view is that in closely analagous actions protection of the relationship is the true basis of the cause. Thus in a parent's action for the abduction or seduction of a minor child, the fictional basis of loss of services is eliminated.[24] And the effect of Married Women's legislation,[25] securing to the wife the right to her earnings and services,

[19] Horan v. Cooke Brewing Co., 178 Ill. App. 652 (1913); Taylor v. Carroll, 145 Mass. 95, 13 N. E. 348 (1887); Note, 14 NOTRE DAME LAW. 295 (1939).

[20] 4 VERNIER, AMERICAN FAMILY LAWS §266 (1931).

[21] Spiegel v. Evergreen Cemetery Co., 117 N. J. Law 90, 186 A. 585 (1936); Finley v. Atlantic Transport Co., 220 N. Y. 249, 115 N. E. 715 (1917); Koerber v. Patek, 123 Wis. 453, 102 N. W. 40 (1905); *accord*, Brownlee v. Pratt, 77 Ohio App. 533, 68 N. E. 2d 798 (1948) (plaintiff recovered from defendant stepmother who placed body of her second husband in vault constructed by plaintiff's father for the bodies of the plaintiff, father, and mother); *see* Hamilton v. Individual Mausoleum Co., 149 Kan. 216, 220, 86 P. 2d 501, 504 (1939); *cf.* Crenshaw v. O'Connell, 235 Mo. App. 1085, 150 S. W. 2d 489 (1941) (plaintiff recovered from defendant coroner who performed illegal autopsy on body of plaintiff's husband).

[22] Medlin v. Western Union Tel. Co., 169 N. C. 495, 86 S. E. 366 (1915); Western Union Tel. Co. v. Mang, 100 S. W. 2d 158 (Tex. Civ. App. 1937); Western Union Tel. Co. v. Mobley, 220 S. W. 611 (Tex. Civ. App. 1923); Western Union Tel. Co. v. Fulton, 211 S. W. 285 (Tex. Civ. App. 1919); *cf.* Russ v. Western Union Tel. Co., 222 N. C. 504, 23 S. E. 2d 681 (1943) (death of plaintiff's brother). *Contra:* Vaigneur v. Western Union Tel. Co., 34 F. Supp. 92 (D. C. E. D. Tenn. 1940) (applying federal rule to interstate telegram); Western Union Tel. Co. v. Conway, 57 Ariz. 208, 112 P. 2d 857 (1941) (state court applying federal rule to interstate telegram); *see* Connell v. Western Union Tel. Co., 116 Mo. 34, 22 S. W. 345 (1893) (death of plaintiff's child).

[23] *See* Note, 74 A. L. R. 11, 95 (1931).

[24] *See, e.g.*, Montgomery v. Crum, 199 Ind. 660, 161 N. E. 251 (1928); Tavlinsky v. Ringling Bros. Circus, 113 Neb. 632, 204 N. W. 388 (1925); Pickle v. Page, 252 N. Y. 474, 169 N. E. 650 (1930); Howell v. Howell, 162 N. C. 283, 78 S. E. 222 (1913); Idleman v. Groves, 89 W. Va. 91, 108 S. E. 485 (1921); *see* Soper v. Igo, 121 Ky. 550, 553, 89 S. W. 538, 539 (1905).

[25] 3 VERNIER, *op. cit. supra* note 22, §167.

is that in a *consortium* action by either spouse the recovery is for injuries to the relationship.[26]

Wrongful interference with a beneficial relationship as the basis of the child's cause of action for the enticement of its parent has an appealing simplicity and avoids the possible difficulties of *consortium* and support.[27] Giving legal protection on this basis does no violence to similar domestic actions nor to the law of reasonable expectancy.[28]

Those courts denying the cause of action admit their power to recognize it but refuse to do so as a matter of policy and because of practical objections.[29] These reasons range from the fear that upholding the cause would open the courts to "a flood of litigation that would inundate them"[30] to the feeling that the fewness of cases indicates the absence of need for such relief.[31]

The validity of the objections is not settled,[32] but their persistence is evidence of a genuine concern beyond traditional caution of the courts. This concern is rooted in the necessity of protecting society from spurious litigation. It underlies the objections that recognizing the validity of the cause would: (1) give a right of action to every member of the family causing multiple suits; (2) result in duplicated damages since the age and number of children are considered in the father's action for alienation of affections;[33] (3) result in extortionary litigation because of the tenuousness of the relationship. Further objections are that: (1) the court is unable to define at what point the child's right

[26] Hinnant v. Tidewater Power Co., 189 N. C. 120, 126 S. E. 309 (1925); 3 N. C. L. REV. 98 (1925) (by implication in refusing recovery for loss of husband's services by negligent injury); Holcomb, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1 (1923); Lippman, *The Breakdown of Consortium*, 20 COL. L. REV. 651 (1930).

[27] Johnston v. Johnston, 213 N. C. 255, 195 S. E. 807 (1938) held that loss of support was a proper element of damages in wife's suit for the alienation of her husband's affections. Should not the same rule apply in the child's action when the legal duty of support is on the enticed parent?

[28] *See, e.g.*, Deon v. Kirby Lumber Co., 162 La. 671, 111 So. 55 (1926) (plaintiff had cause of action for defendant's acts depriving plaintiff of the society of friends and neighbors); Schechter v. Friedman, 141 N. J. Eq. 318, 57 A. 2d 251 (1948) (third person interferor held liable even though the contract might have been unenforceable); Silva v. Bonafide Mills, Inc., —— Misc. ——, 182 N. Y. Supp. 2d 155 (Sup. Ct. 1948) (plaintiff had cause of action for interference even though the contract with the party induced to breach contained a cancellation clause).

[29] *See* Taylor v. Keefe, 134 Conn. 156, 158, 56 A. 2d 768, 769 (1948); Morrow v. Yannantuono, 152 Misc. 134, 273 N. Y. Supp. 912 (Sup. Ct. 1934); *cf.* Rudley v. Tobias, 84 Cal. App. 2d 454, 190 P. 2d 984, 987 (1948); *see* Garza v. Garza, 209 S. W. 2d 1012, 1015 (Tex. Civ. App. 1948).

[30] Morrow v. Yannantuono, 152 Misc. 134, 273 N. Y. Supp. 912, 913 (Sup. Ct. 1934).

[31] Taylor v. Keefe, 134 Conn. 145, 163, 56 A. 2d 768, 771 (1948).

[32] Johnson v. Luhman, 330 Ill. App. 598, 71 N. E. 2d 810 (1947); Notes, 20 CORN. L. Q. 255 (1945), 13 U. OF CHI. L. REV. 375 (1935).

[33] Morrow v. Yannantuono, 152 Misc. 134, 273 N. Y. Supp. 912 (Sup. Ct. 1934).

would cease;[34] (2) paucity of cases indicates the lack of need for such relief; and (3) heart balm legislation[35] indicates that the present trend is to disfavor such suits.[36]

To the favorite objection that allowing the cause would produce a flood of litigation, the court in the instant case gives a dual answer:

"Assuming it to be true . . . that fact would be no valid reason for denying the right . . . if such enticement constitutes a legal wrong, there should be a remedy to obtain redress. But the contention lacks factual basis. . . . Sufficient time has elapsed since the decisions in the Daily and Johnson cases (which allowed the cause) for a reasonable trial period. There has been no *flood* of such litigation. This is true, for the obvious reason that there are not enough such enticements to cause even a burdensome increase of such litigation, much less a flood of it."[37] The court eliminates objections not inherent in the cause itself with the statement:

"We also deem the reason, sometimes given for denying liability . . . that courts are incapable of defining the child's rights and that juries are incapable of assessing its damages . . . to be without merit. . . . Courts and juries are required to do precisely those things in certain cases, and do so with complete success (cases cited)."[38]

Social policy favors protecting and fostering the family unit. It is not to be supposed that this cause of action purports to give complete protection by its deterring effect on future enticements. It is a step toward that end to allow a cause of action for loss of intangible but real benefits which legal machinery is unable to secure in other ways.

In the last analysis the policy problem is one of balancing the interests of society against those of the individual member of the family. Certainly the court which allows the child to recover for the injuries from the destruction of its home and the enticement of its parent has likewise a grave responsibility to prevent abuse of the cause of action by looking to the worthiness of the individual case, since the very purpose of courts is "to separate the just from the unjust cause."[39]

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[34] Note, 83 U. OF PA. L. REV. 276 (1935).

[35] This legislation, begun in 1935 and adopted in 12 states, generally forbids actions for breach of promise of marriage, alienation of affections, criminal conversation, and seduction. It has been criticized as "flurry" legislation promoted by newspaper sensationalism rather than by judicial need. Generally, see Heck v. Schupp, 394 Ill. App. 296, 68 N. E. 2d 464 (1946) (declaring the Illinois statute unconstitutional); KEEZER, MARRIAGE AND DIVORCE 1049 (3d ed. 1946); Feinsinger, *Legislative Attack on "Heart Balm,"* 33 MICH. L. REV. 979 (1935); Kane, *Heart Balm and Public Policy*, 5 FORD. L. REV. 63 (1936); Note, G. M. W., *Twelve Years with the "Heart Balm Acts,"* 33 VA. L. REV. 314 (1947).

[36] Taylor v. Keefe, 134 Conn. 156, 158 A. 2d 768 (1948).

[37] Miller v. Monsen, —— Minn. ——, ——, 37 N. W. 2d 543, 546 (1949).

[38] *Ibid.*

[39] Wilder v. Reno, 43 F. Supp. 727, 729 (M. D. Pa. 1942).

Domestic Relations—Illegitimates—Father's Duty to Support

In the recent North Carolina case of *Allen v. Hunnicutt*[1] it was held, in effect, that an illegitimate child may not compel its father to furnish it support by means of a civil action, but that only by the procedure outlined in the "bastardy" statute[2] may the child enforce "such rights as it may have"[3] against the putative father.

The direct question presented in *Allen v. Hunnicutt* has rarely confronted the courts. In Alabama and Virginia it has been ruled that without express statutory authorization an illegitimate may not maintain a civil suit for support against its putative father.[4] But in Kansas the common law rule which denies that the father has any duty to support his illegitimate child has been changed, the bastardy statute held to provide an inadequate remedy, and a civil action by the child permitted.[5]

The problem has often received the indirect consideration of the courts, and the frequent reassertion of the common law rule doubtless explains the infrequence of cases contesting the possibility of a civil suit by the child. Cases abound commenting that the father has no duty to support his illegitimate children except as provided by statute,[6] that such statutes are to be strictly construed,[7] and that the rights and remedies they provide are exclusive.[8]

In North Carolina the disparity between legitimate and illegitimate children with respect to support and maintenance is striking. The

[1] 230 N. C. 49, 52 S. E. 2d 18 (1949).

[2] N. C. GEN. STAT. §§49-1 through 49-4 (1943). The term "bastardy" statute is misleading, bastardy being the mere begetting of an illegitimate child. Bastardy alone is no crime in North Carolina; there must be in addition willful non-support of the child. State v. Bowser, 230 N. C. 330, 53 S. E. 2d 282 (1949); State v. Stiles, 228 N. C. 137, 44 S. E. 2d 728 (1947).

[3] In the absence of contract, the child's only right to support from its putative father is that created by the bastardy statute. See discussion, post.

[4] Simmons v. Bull, 21 Ala. 501, 56 Am. Dec. 257 (1852); Brown v. Brown, 183 Va. 353, 32 S. E. 2d 79 (1944).

[5] Doughty v. Engler, 112 Kan. 583, 211 Pac. 619 (1923); amplified in Myers v. Anderson, 145 Kan. 775, 67 P. 2d 542 (1937).

[6] Albanese v. Richter, 67 F. Supp. 771 (S. D. N. J. 1946); Law v. State, 238 Ala. 428, 191 So. 803 (1939; Myers v. Harrington, 70 Cal. App. 680, 234 Pac. 412 (1925); Washington v. Martin, 75 Ga. App. 466, 43 S. E. 2d 590 (1947); State v. Lindskog, 175 Minn. 533, 221 N. W. 911 (1928); State v. Porterfield, 222 Mo. App. 553, 292 S. W. 85 (1927); Carlson v. Bartels, 143 Neb. 680, 10 N. W. 2d 671 (1943); Wynder v. Daniels, 72 N. Y. S. 2d 314 (1947); State v. Zimmerman, 67 Ohio App. 272, 36 N. E. 2d 808 (1941); State v. Boston, 69 Okla. Crim. 307, 102 P. 2d 889 (1940); Kordoski v. Belanger, 52 R. I. 268, 160 Atl. 205 (1932); Beaver v. State, 96 Tex. Crim. 179, 256 S. W. 929 (1923); Brown v. Brown, 183 Va. 353, 32 S. E. 2d 79 (1944). For collection of cases prior to 1923, see Note, 30 A. L. R. 1069 (1924).

[7] Albanese v. Richter; Washington v. Martin; State v. Lindskog; Wynder v. Daniels; State v. Zimmerman; *supra* note 6. For collection of cases prior to 1923, see Note, 30 A. L. R. 1069 (1924).

[8] State v. Lindskog; Wynder v. Daniels; State v. Boston; Brown v. Brown; *supra* note 7. For collection of cases prior to 1923, see Note, 30 A. L. R. 1069 (1924).

father is charged with primary liability for the support of his legitimate children,[9] whether or not they have property,[10] and the duty is said to exist until the child reaches twenty-one, at least,[11] unless there has been a complete emancipation by mutual assent.[12] His liability is not affected by divorce, even though the mother is awarded custody.[13] The duty may be enforced in a civil suit brought by the mother[14] or by the child,[15] or by motion in the cause by a divorced wife;[16] and criminal penalties are provided for its breach.[17] On the other hand, in the absence of contract[18] the illegitimate child's only right to support from its father is that created by the bastardy statute.[19] The only means for enforcing this right is by criminal prosecution,[20] which may be instituted by the mother or her representative, or the superintendent of public welfare (if the child is likely to become a public charge), but apparently not by the child itself.[21] The father's duty terminates when the child reaches fourteen, and may terminate when it reaches three.[22] In the litigation, the child is seriously handicapped. Every element—paternity, non-support, and willfulness—must be proved beyond a reasonable doubt,[23] and the right to appeal is denied except as granted to the state in other criminal cases.[24]

At early English common law, the illegitimate was a stranger to its

[9] Wells v. Wells, 227 N. C. 614, 44 S. E. 2d 31 (1947); Note, 26 N. C. L. REV. 202 (1948).

[10] Burke v. Turner, 85 N. C. 500, 504 (1881); Haglar v. McCombs, 66 N. C. 346, 351 (1872); Walker v. Crowder, 37 N. C. 478, 487 (1843).

[11] Wells v. Wells, 227 N. C. 614, 44 S. E. 2d 31 (1947).

[12] Honycutt v. Thompson, 159 N. C. 29, 74 S. E. 628 (1912). For what constitutes mutual assent, see James v. James, 226 N. C. 399, 38 S. E. 2d 168 (1946). Mutual assent is not required if the child marries or enlists in the armed services, the new relationship being inconsistent with the continuance of the parent-child relationship.

[13] Green v. Green, 210 N. C. 147, 185 S. E. 651 (1936); Sanders v. Sanders, 167 N. C. 319, 83 S. E. 490 (1914).

[14] Wells v. Wells, 227 N. C. 614, 44 S. E. 2d 31 (1947).

[15] Green v. Green, 210 N. C. 147, 185 S. E. 651 (1936).

[16] Winfield v. Winfield, 228 N. C. 256, 45 S. E. 2d 259 (1947).

[17] N. C. GEN. STAT. §14-322 (1943), as amended by N. C. Sess. Laws 1949, c. 810; N. C. GEN. STAT. §14-325 (1943).

[18] Regarding the father's contract to support his illegitimate child, see Conley v. Cabe, 198 N. C. 298, 151 S. E. 645 (1930); Redmon v. Roberts, 198 N. C. 161, 150 S. E. 881 (1929); Thayer v. Thayer, 189 N. C. 502, 127 S. E. 553 (1925).

[19] Allen v. Hunnicutt, 230 N. C. 49, 52 S. E. 2d 18 (1949). And even this right was created incidentally, said the court, the purpose of the statute being to prevent illegitimates from becoming public charges.

[20] Allen v. Hunnicutt, *supra* note 19.

[21] N. C. GEN. STAT. §49-5 (1943) seems to be exclusive, but the point has not yet been decided by the North Carolina Supreme Court.

[22] N. C. GEN. STAT. §49-4 (1943), as revised by N. C. Sess. Laws 1945, c. 1053.

[23] State v. Ellison, 230 N. C. 59, 52 S. E. 2d 9 (1949); State v. Spillman, 210 N. C. 271, 186 S. E. 322 (1936); State v. Cook, 207 N. C. 261, 176 S. E. 757 (1934).

[24] State v. Morris, 208 N. C. 44, 179 S. E. 19 (1935).

parents, neither owing it any duty of support.[25] In most jurisdictions today the courts have imposed a non-statutory duty upon the mother.[26] But the common law rule as to the father has been altered by judicial action in only one state.[27]

To mitigate the harshness of the common law, legislation has been enacted in almost every state, affording various means of compelling the father to contribute to the support of his illegitimate child. A great many states have adopted bastardy laws somewhat similiar to those in North Carolina.[28] The action is usually civil in nature, though brought in the name of the state, and usually is instituted by the mother, or by the public authorities. Trial by jury is almost universal, and the mother is always a competent witness. North Carolina seems to be unique in making willful non-support an essential element; in other states the only issue is the question of paternity. The consequence of "conviction" is an order to support the child, enforceable by imprisonment, contempt proceedings, and attachment levied under execution. Often provision is made for release from prison after taking the pauper's oath.

Eight states have adopted variously modified versions of the Uniform Illegitimacy Act.[29] This act in detail imposes upon both parents

[25] Murrell v. Industrial Commission, 291 Ill. 334, 126 N. E. 189 (1920); Doughty v. Engler, 112 Kan. 583, 211 Pac. 619 (1923); State v. Tieman, 32 Wash. 294, 73 Pac. 375 (1903). A few cases have indicated an opinion that at common law the mother has always had the responsibility of maintaining her child. State v. Porterfield, 222 Mo. App. 553, 292 S. W. 85 (1927).

[26] Davis v. Herrington, 53 Ark. 5, 13 S. W. 215 (1890); Beckett v. State, 5 Ind. App. 136, 30 N. E. 536 (1892); State v. Porterfield, *supra* note 25; Jaffe v. Deckard, 261 S. W. 390, 397 (Tex. Civ. App. 1924). It has been held, however, that in the absence of statute neither parent has the duty of support. Murrell v. Industrial Commission, *supra* note 25.

[27] Doughty v. Engler, 112 Kan. 583, 211 Pac. 619 (1923). In Barrett v. Barrett, 44 Ariz. 509, 39 P. 2d 621 (1934) the court used language suggesting that had not the legislature already legitimatized all children, it might have followed *Doughty v. Engler* and changed the common law in Arizona.

[28] ALA. CODE ANN. tit. 6, §§1 *et seq.* (1940); ARK. STAT. ANN. §§34-701 *et seq.* (1947); COLO. STAT. ANN. c. 20, §§1 *et seq.*, c. 83, §§1 *et seq.* (1935); CONN. REV. GEN. STAT. §§8178 *et seq.* (1949); DEL. REV. CODE §§3558 *et seq.* (1935); FLA. STAT. ANN. §§742.01 *et seq.* (1944); GA. CODE ANN. §§74-301 *et seq.* (1935); ILL. ANN. STAT. c. 17, §§1 *et seq.* (1934); KAN. GEN. STAT. ANN. §§62-2301 *et seq.* (1935); KY. REV. STAT. §§406-010 *et seq.* (1948); ME. REV. STAT. c. 153, §§23 *et seq.* (1944); MD. ANN. CODE GEN. LAWS art. 12, §§1 *et seq.* (1939); MASS. GEN. LAWS c. 273, §§11 *et seq.* (1932); MICH. STAT. ANN. §§25.451 *et seq.* (Henderson 1937); MINN. STAT. §§257.18 *et seq.* (Henderson 1945); MISS. CODE ANN. §§383 *et seq.* (1942); MONT. REV. CODE ANN. §§12267 *et seq.* (1935); N. H. REV. LAWS c. 128, §§1 *et seq.* (1942); OHIO GEN. CODE ANN §§12110 *et seq.* (1938); OKLA. STAT. ANN. tit. 10, §§71 *et seq.* (1936); ORE. COMP. LAWS ANN. §§28-901 *et seq.* (1940); PA. STAT. ANN. tit. 18, §4732 (1945); R. I. GEN. LAWS c. 424, §§1 *et seq.* (1938); S. C. CODE ANN. §§1726 *et seq.* (1942); TENN. CODE ANN. §11936 (Williams 1934); UTAH CODE ANN. §§14-2-1 *et seq.* (1943); VT. STAT. §§3265 *et seq.* (1947); WASH. REV. STAT. ANN. §§1970 *et seq.* (1931); W. VA. CODE ANN. §§4770 *et seq.* (1943); WIS. STAT. §§166.01 *et seq.* (1947).

[29] IND. ANN. STAT. §§3-623 *et seq.* (Burns 1933); IOWA CODE §§675.1 *et seq.* (1949); NEV. COMP. LAWS ANN. §§3405 *et seq.* (1929); N. M. STAT. ANN. §§25-401 *et seq.* (1941); N. Y. DOM. REL. LAW §§119 *et seq.* (1941); N. D. REV. CODE §§32-3601 *et seq.* (1943); S. D. CODE §§37.2101 *et seq.* (1939); WYO. COMP. STAT. ANN. §§58-401 *et seq.* (1945).

the duty to support their illegitimate children, enabling the mother or third parties to maintain a civil action against the putative father to force him to contribute to support, or to recover for support furnished. Liability is extended to the father's estate under certain conditions. The act contains full and effective means for enforcing the father's duty, and is well adapted to meet the problem of the absconding father.

Broad statutory duties are imposed in California and New Jersey.[30] In Louisiana the statute says that fathers owe "alimony" to their illegitimate children "when they are in need."[31] In Nebraska the father has the same duty as if the children were legitimate, after paternity has been judicially established.[32] And in Arizona every child is the legitimate child of its natural parents and is entitled to support and education as if born in lawful wedlock.[33]

Modern conceptions of social obligations are far advanced from those in the days when the common law was formulated. A reexamination of the basic considerations underlying the discrimination between legitimate and illegitimate children would not seem inappropriate. Various arguments have been advanced in support of the common law rule. It has been said that "the reason for the rule that the putative father could not be made to support his bastard child was the uncertainty of its paternity."[34] The difficulty of establishing fatherhood is recognized. The question of what degree of proof should be required and what evidence should be admissible is not within the scope of this note; but once paternity has been established, the difficulty of doing so seems an unsatisfactory basis for further discrimination.

It has been argued that the policy of discrimination between illegitimate and legitimate children fosters the institution of marriage, and serves as a deterrent to illicit cohabitation.[35] If so, its effect has been negligible.[36] Logic reasons and experience demonstrate that a more likely stimulus would be provided by direct action against the offenders. Perhaps it was supposed that vicarious suffering would torture the conscience of the wrongdoers. But to punish innocent children, on the unreasonable hope that their suffering would touch the unscrupulous heart, would seem a rather barbarous way of enforcing social concepts.

[30] CAL. CIV. CODE §196a (1941); N. J. REV. STAT. ANN. tit. 9, §§16-1 *et seq.* (1939).

[31] LA. CIV. CODE ANN. art. 202 through 212, art. 238 through 245 (1945).

[32] NEB. REV. STAT. §§13-101 *et seq.* (1943).

[33] ARIZ. CODE ANN. §§27-401 *et seq.* (1939).

[34] Jaffe v. Deckard (Tex. Civ. App.), 261 S. W. 390, 397 (1924); Kimbrough v. Davis, 16 N. C. 71, 76 (1827).

[35] Flintham v. Holder, 16 N. C. 345, 348 (1829).

[36] The North Carolina Bureau of Vital Statistics reports that in 1948 there were 108,834 births reported, 8,254 of which were illegitimate. 7.58 percent of the children born in 1948 were illegitimate at birth. This figure does not include children of marriages which are void *ipso facto*, or declared void *ab initio*, nor those children who are later bastardized by proof of non-access of the husband.

It has been argued that the duty to support grows out of the marital relation, not out of parentage. If so, it is difficult to see why the burden of support is cast upon the unwed mother. North Carolina holds that the duty to support legitimate children is the natural consequence of parenthood, and arises from the mere act of bringing the child into the world unable to care for itself.[37] This reasoning is equally applicable to illegitimate children. As the Kansas court said in *Doughty v. Engler*,[38] "A sufficient reason for holding parents to be under a legal obligation, apart from any statute, to support their legitimate child while it is too young to care for itself, is that the liability ought to attach as a part of their responsibility for having brought it into being. If that reason is not found convincing it would be useless to seek others; and it does not in the least depend for its force upon the fact that the parents were married to each other."

Finally, it has been suggested that the duty to support is the reciprocal of the right to custody.[39] This view has been expressly repudiated by some courts.[40] The duty to support one's children should be regarded as part of the responsibility of parenthood, not as the price the parent must pay for custody.[41]

Aside from its logical inconsistency and its injustice to the child, the systematic discrimination which characterizes our legislative policy toward illegitimates is seriously detrimental to the public welfare. Economically it is a policy which tends to pauperize North Carolina citizens. Socially we have added to inevitable ridicule and ostracism, legal burdens and disadvantages more likely to create menaces to, than useful members of, society. It is submitted that the responsibility for having brought the illegitimate child into being, coupled with its inability to care for itself, constitute sufficient reasons for imposing upon both parents the duty of supporting it.

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[37] Wells v. Wells, 227 N. C. 614, 44 S. E. 2d 31 (1947); *accord*, Barrett v. Barrett, 44 Ariz. 509, 39 P. 2d 621 (1934); Doughty v. Engler, 112 Kan. 583, 211 Pac. 619 (1923); Buckminster v. Buckminster, 38 Vt. 248, 88 Am. Dec. 652 (1865).

[38] 112 Kan. 583, 211 Pac. 619 (1923).

[39] Jaffe v. Deckard (Tex. Civ. App.), 261 S. W. 390, 397 (1924); *see* Doughty v. Engler, 112 Kan. 583, 211 Pac. 619 (1923).

[40] Barrett v. Barrett, 44 Ariz. 509, 39 P. 2d 621 (1934) ("We believe that the enlightened legal concept of the present day is that parentage in and of itself imposes a legal duty of support to minor children."); Gibson v. Gibson, 18 Wash. 489, 51 Pac. 1041 (1898).

[41] It will be noted that in North Carolina when the mother is awarded the custody of legitimate children in a divorce action, the father's primary liability for their support is unaffected. Green v. Green, 210 N. C. 147, 185 S. E. 651 (1936).

Evidence—Criminal Prosecutions—Rule Excluding Other Crimes

Defendant was indicted for murder. Evidence was admitted, over objection, that the defendant had confessed that he was an escaped prisoner from the South Carolina Penitentiary where he was under life sentence for murder. The trial judge charged the jury to consider such evidence only as it might bear on the motive and intent of the defendant in relation to the alleged killing. The defendant offered no evidence. Upon conviction and appeal, *held*, error to admit such evidence because "the record is barren of any evidence to connect the offense charged with the defendant's past criminal record"; judgment reversed, case remanded for new trial.[1] *State v. Kelly*,[2] where evidence of previous escape was held properly admitted, was expressly modified although the court suggested that "distinguishing differences" existed.[3]

In the principal case the court states the rule excluding evidence of other crimes or acts of misconduct in criminal prosecution as a broad rule of exclusion[4] with certain "well recognized" exceptions.[5] The exceptions, upon close analysis, prove to be the criteria in the determination of the relevancy of the previous offense to the offense charged; that is, design or plan, knowledge or belief, intent, motive, identity, or other acts which are an inseparable part of the whole deed.[6] The basic rule of relevancy favors the admissibility of all facts affording any reasonable inference to the act charged with the exception of the character rule which excludes conduct tending and offered to show bad moral character or disposition.[7] Obviously, the court has inverted the criteria of relevancy through which the basic rule operates into categories of exceptions to a broad rule of exclusion. In place of the inquiry, "Is this evidence relevant otherwise than merely through propensity (to

[1] State v. Fowler, 230 N. C. 470, 53 S. E. 2d 853 (1949). The State contended that this evidence shows or reasonably infers that defendant's *motive* was his fear that the deceased knew about his escape from the South Carolina prison. See Brief for the State-Appellee, p. 6. On second trial, defendant's plea of guilty to accessory before the fact was accepted by State. Minute Docket 30, p. 405, August 1949 Criminal Term of the Superior Court of Moore County.

[2] 216 N. C. 627, 6 S. E. 2d 533 (1940). See note 15 *post*.

[3] State v. Fowler, 230 N. C. 470, 475, 53 S. E. 2d 853, 857 (1949).

[4] "We start with the general rule that evidence of one offense is inadmissible to prove another and independent crime, the two being wholly disconnected and in no way related to each other." *Id.* at 473, 53 S. E. 2d at 855.

[5] "To this general rule, however, there is the exception as well established as the rule itself, that proof of the commission of other like offenses is competent to show the *quo animo*, intent, design, guilty knowledge or *scienter*, or to make out the *res gestae*, or to exhibit a chain of circumstances in respect of the matter on trial, when such crimes are so connected with the offense charged as to throw light upon one or more of these questions." *Ibid.*

[6] 1 WIGMORE, EVIDENCE §§217, 218 (3d ed. 1940). The six criteria listed in the text are the most common ones; for others, see *ibid.* See also STANSBURY, NORTH CAROLINA EVIDENCE §92 n. 62 (1946 ed.).

[7] 1 WIGMORE, EVIDENCE §§10, 194, 216 (3d ed. 1940).

commit a similar crime)?" there is substituted the inquiry, "Does this evidence fall within any exceptions to the rule of exclusion?" In so doing, the court's statement of the rule has, in the past, tempted judges to dispense altogether with the test of relevancy, even though the question still must be asked under the latter inquiry, "Is the evidence offered *relevant* to show intent, etc.?"[8] The resulting confusion has admittedly beclouded the rule itself by making its application more difficult and uncertain.[9] The premise upon which the rule was founded is directed toward the prevention of proof of guilt by proof of propensity to commit similar crimes.[10] Yet this very object of the rule excluding evidence of similar crimes in criminal prosecutions when relevant merely to show propensity is forgotten and the test of relevancy is by-passed when courts pay too close attention to the list of exceptions.[11] The courts are prone to use the categorical exceptions as catch-alls where it is felt that substantial justice has been accomplished in the light of the accused's character: "He's a bad character anyway!" Such a disposition on the part of the courts is assuredly not in accord with what has been called one of the distinguishing features of the Anglo-American criminal law—the recognition and avoidance of the deep tendency of human nature to punish, not because the victim is guilty of the crime charged, but because he is a bad man, and may as well be condemned now that he is caught.[12]

Although Mr. Chief Justice Stacy, in the principal case, formulates the rule of exclusion in its troublesome context, he has rendered a distinguished service toward the clarification of the confusion that existed in the application of the rule by recalling that, "The exception requires a more relevant base than the mere disposition of the accused to commit such crimes. . . . The touchstone is logical relevancy as distinguished from certain distraction."[13] Thus, he reinstates the principles of relevancy and the doctrines of auxiliary policy[14] in the rule excluding evidence of other crimes offered in criminal prosecutions in North Carolina.

At the same time he recognizes with admirable frankness that a number of North Carolina cases have been inconsistent in the application of the rule. The four cases[15] selected by the Chief Justice for this

[8] Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988, 1005 (1938).
[9] *Ibid.*; State v. Fowler, 230 N. C. 470, 473, 53 S. E. 2d 853, 855 (1949).
[10] 1 WIGMORE, EVIDENCE §194 (3d ed. 1940).
[11] Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988, 1006 (1938).
[12] 1 WIGMORE, EVIDENCE §§57, 194 (3d ed. 1940).
[13] State v. Fowler, 230 N. C. 470, 473, 53 S. E. 2d 853, 855 (1949).
[14] 2 WIGMORE, EVIDENCE §1906 (3d ed. 1940).
[15] State v. Edwards, 224 N. C. 527, 31 S. E. 2d 516 (1944) (defendant charged with incest and carnal knowledge of his daughter; evidence that defendant had

criticism are striking reminders of that jurisprudential reasoning which blindly applies the exceptions to a broad rule of exclusion as though the exceptions were nothing more than well worn cliches used to cloak the particular court's personal estimate of the defendant. Relevancy is ignored; the object of the rule defeated.

Approximately seventy cases in North Carolina have involved the rule excluding evidence of other crimes in criminal prosecution; of that number fifty-two cases admitted the evidence and eighteen cases held the evidence inadmissible.[16] One might wish that the Chief Justice had mentioned several other North Carolina decisions that confuse the pic-

made improper advances of a similar nature to older daughter on prior occasions admitted by trial court to show "intent or guilty knowledge"; affirmed by Supreme Court as evidencing "intent *as well as the unnatural lust of the defendant* in attempting to commit the crimes charged in the bill" [emphasis supplied]; State v. Biggs, 224 N. C. 722, 32 S. E. 2d 352 (1944) (defendants charged with murder in commission of robbery; evidence tending to show that the three defendants on a date twenty-seven days after the homicide perpetrated a hold-up and robbery in same manner and same method as used in first robbery admitted by trial court on the question of "intent, guilty knowledge and identification"; affirmed by Supreme Court as "competent for the purpose to which limited . . . to show the identity of the persons . . ."; evidence of an attempt of one of the defendants to escape from jail while awaiting trial was admitted by trial court and not questioned by Supreme Court); State v. Kelly, 216 N. C. 627, 6 S. E. 2d 533 (1940) (defendants charged with murder in commission of robbery; evidence that one of the defendants was an escaped prisoner and that he had escaped with a co-conspirator killed in the robbery admitted by trial court and approved by Supreme Court to "show *quo animo*, intent, design, or guilty knowledge . . ."); State v. Flowers, 211 N. C. 721, 192 S. E. 110 (1937) (defendants charged with conspiracy to rob by means of assault with firearms; evidence that a week after the alleged robbery the state's witness and defendant conspired to burn and did burn an automobile to defraud insurance company admitted by trial court to "show identity or guilty knowledge"; affirmed by Supreme Court without specifying which exception to rule of exclusion applicable).

[16] The following cases represent decisions applying the rule of exclusion in North Carolina and supplement those cases cited in Note, 16 N. C. L. REV. 24 (1937):

A. Evidence held inadmissible:

State v. Choate, 228 N. C. 491, 46 S. E. 2d 476 (1948) (abortion and murder; evidence tending to show commission by defendant of other distinct and independent offenses of similar nature admitted originally by trial judge but subsequently jury instructed to disregard; reversible error); State v. Godwin, 224 N. C. 846, 32 S. E. 2d 609 (1945) (conspiracy to murder; evidence: defendant's profane comments on previous fire); State v. Wilson, 217 N. C. 123, 7 S. E. 2d 11 (1940) (embezzlement; evidence: statements by judge and foreman of grand jury suggesting irregularities in public guardianship account and order of court removing defendant as public guardian on grounds of mismanagement); State v. Lee, 211 N. C. 326, 190 S. E. 234 (1937) (maliciously burning a barn; evidence: indictment of defendant on previous occasion for assault with a deadly weapon).

B. Evidence held admissible:

State v. Davis, 229 N. C. 386, 50 S. E. 2d 37 (1948) (fornication and adultery; evidence: similar attempts on another person); State v. Biggs, 224 N. C. 722, 32 S. E. 2d 352 (1944) (facts stated in note 15 *supra*); State v. Edwards, 224 N. C. 527, 31 S. E. 2d 516 (1944) (facts stated in note 15 *supra*); State v. Harris, 223 N. C. 697, 28 S. E. 2d 232 (1947) (murder; evidence: that defendant shot and killed three people at same place in a matter of seconds); State v. Batson, 220 N. C. 411, 17 S. E. 2d 511, 139 A. L. R. 614 (1941) (attempt to commit barratry; evidence: testimony that defendant had urged others to enter into suits); State v. Kelly, 216 N. C. 627, 6 S. E. 2d 533 (1940) (facts stated in note 15 *supra*);

ture and becloud the application of the broad rule of exclusion;[17] but an even more commendable desire is that the principal case may be used as a precedent for the reaffirmation in principle of the basic rule favoring the admissibility of all relevant facts, with the character rule exception, unhampered by the illogical and inconsistent applications of the so-called exceptions to a broad rule of exclusion. The result would merely be the adaptation of the court's understanding of the present phraseology of the rule of exclusion to that statement of the basic rule already accepted by many state courts,[18] the federal courts,[19] the *Model Code of Evidence*[20] and by leading text-writers on evidence:[21]

> *"Evidence of other offenses is inadmissible if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; but if it tends to prove any other relevant fact it will not be excluded merely because it also shows him to have been guilty of an independent crime."*[22]

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State v. Payne, 213 N. C. 719, 197 S. E. 573 (1938) (murder of highway patrolman in process of escaping from him; evidence: subsequent escapes by defendants from highway patrolmen involving a shooting duel, weapons taken from defendant's car 4½ months after murder exhibited to jury piece by piece); State v. Smoak, 213 N. C. 79, 195 S. E. 72 (1938) (murder of daughter by strychnine poisoning; evidence: insurance on life of daughter, defendant had insured lives of first and second wives successively and had collected insurance after second wife died of strychnine poisoning, first wife in last illness stated in defendant's presence that she had been poisoned, a third person upon whose life defendant had taken out insurance policy had serious but not fatal attack of strychnine poisoning); State v. Flowers, 211 N. C. 721, 192 S. E. 110 (1937) (facts stated in note 15 *supra*); State v. O'Higgins, 178 N. C. 708, 100 S. E. 438 (1919) (elopement with married woman; evidence: abandonment of motherless child by defendant to elope with woman); State v. Wade, 169 N. C. 306, 84 S. E. 768 (1915) (fornication and adultery; evidence: previous sexual intercourse); State v. Broadway, 157 N. C. 598, 72 S. E. 987 (1911) (incest; evidence: other acts of intercourse); State v. White, 89 N. C. 462 (1883) (larceny of hogs; evidence: neighbors of defendant lost hogs about same time that defendant had sold dressed hogs, defendant had denied and admitted the sale in same conversation).

[17] *E.g.*, State v. Davis, 229 N. C. 386, 50 S. E. 2d 37 (1948) (fornication and adultery; evidence: testimony of another child in orphanage of which defendant was superintendent that he had made similar attempts on her admitted by trial court to show "attitude, animus and purpose." Affirmed by Supreme Court); State v. Batson, 220 N. C. 411, 17 S. E. 2d 511, 139 A. L. R. 614 (1941) (attempt to commit barratry; evidence: incitements to litigation other than those specifically charged held admissible to show "intent, motive and scienter"); State v. Payne, 213 N. C. 719, 197 S. E. 573 (1938) (murder of a highway patrolman in process of escaping from him; evidence: subsequent escapes from highway patrolmen involving a shooting duel admitted as "tending to show the state of mind of the defendants at the time of the killing." Evidence of weapons captured in car with defendants 4½ months after killing admitted, weapon by weapon, before jury).

[18] *E.g.*, cases collected in Note, 22 TEMP. L. Q. 459 (1949); Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988 (1938).

[19] Lovely v. United States, 169 F. 2d 386 (C. C. A. 4th 1948); Note, 22 TEMP. L. Q. 459 (1949).

[20] MODEL CODE OF EVIDENCE, Rule 311 (1942).

[21] 1 WIGMORE, EVIDENCE §216 (3d ed. 1940); STANSBURY, NORTH CAROLINA EVIDENCE §91 (1946 ed.).

[22] STANSBURY, NORTH CAROLINA EVIDENCE §91 (1946 ed.).

Federal Jurisdiction—Constitutional Law—Diversity of Citizenship for District of Columbia and Territories

An insurance company, incorporated in the District of Columbia, brought action in the Federal District Court for the District of Maryland. Plaintiff based its claim to federal jurisdiction on a 1940 Act of Congress which amended the JUDICIAL CODE.[1] The District Court, refusing to accept the jurisdiction conferred by Congress in this statute, dismissed the action on the premise that the statute grants judicial power not authorized by the Constitution of the United States.[2] This decision was affirmed by the court of appeals, with Judge John J. Parker dissenting, on essentially the same ground upon which the District Court relied.[3] A divided Supreme Court reversed the decision of the lower courts and held the 1940 Act constitutional.[4]

The Judiciary Article of the Constitution nowhere recites that federal jurisdiction is extended to citizens of the District of Columbia or of the territories by reason of diversity of citizenship.[5] In 1792, the Supreme Court in *Hayburn's* case[6] laid down the proposition that judicial power of federal courts is derived exclusively from the Judiciary

[1] The 1940 Act provided that district courts have original jurisdiction of suits of a civil nature where the matter in controversy is between citizens of different states, "or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any state or territory . . . ," 54 STAT. 143 (1940). Prior to the 1940 Act the JUDICIAL CODE provided that district courts should have original jurisdiction of suits of a civil nature where the matter in controversy ". . . is between citizens of different states . . . ," and made no mention of either District of Columbia or the territories. The Committee on the Judiciary of the House of Representatives, reporting the 1940 Statute, stated, "It gives to the citizens of the District of Columbia and of Hawaii and Alaska the same right to bring a suit in a Federal district court of any State on the ground of diversity of citizenship as now obtains in the case of a citizen of a state." H. R. REP. No. 1756, 76th Cong., 3rd Sess. (1940).

[2] No opinion filed by District Court which relied upon its former decision in Feely v. Sidney S. Schupper Interstate Hauling System, Inc., 72 F. Supp. 663 (D. Md. 1947). Eleven Federal courts had previously considered the question. Eight held the 1940 Act unconstitutional: Mutual Ben. Health & Acc. Ass'n. v. Dailey, 75 F. Supp. 832 (D. Mass. 1948); Feely v. Sidney S. Schupper Interstate Hauling System, Inc., 72 F. Supp. 663 (D. Md. 1947); Willis v. Dennis, 72 F. Supp. 853 (W. D. Va. 1947); Wilson v. Guggenheim, 70 F. Supp. 417 (E. D. S. C. 1947); Central States Co-op. v. Watson Bros. Transportation Co., 165 F. 2d 392 (7th Cir. 1947) (Judge Evans dissenting); Ostrow v. Samuel Brilliant Co., 66 F. Supp. 593 (D. Mass. 1946); Behlert v. James Foundation, 60 F. Supp. 706 (S. D. N. Y. 1945); McGarry v. Bethlehem, 45 F. Supp. 385 (E. D. Pa. 1942). *Contra:* Duze v. Wooley. 72 F. Supp. 422 (D. Hawaii 1947); Glaeser v. Acacia Mut. Life Ass'n., 55 F. Supp. 925 (N. D. Cal. 1944); Winkler v. Daniels, 43 F. Supp. 265 (E. D. Va. 1942).

[3] National Mut. Ins. Co. v. Tidewater Transfer Co., 165 F. 2d 531 (4th Cir. 1947).

[4] National Mut. Ins. Co. v. Tidewater Transfer Co., 69 Sup. Ct. 1173 (1949); Siegmund v. General Commodities Corp., 175 F. 2d 952 (9th Cir. 1949).

[5] See U. S. CONST. Art. III, §2. Citizens of the District of Columbia and the territories have always had federal jurisdiction on grounds other than diversity of citizenship. See DOBIE, FEDERAL PROCEDURE 186 n. 43 (1928).

[6] 2 Dall. 409 (U. S. 1792).

Article.[7] In 1804, Mr. Chief Justice Marshall in *Hepburn v. Ellzey*[8] supplemented this proposition with the hypothesis that the term "states," as used within that Article, excludes the District of Columbia and the territories.[9] Messrs. Justices Jackson, Burton and Black in the majority opinion, while affirming the construction placed on the term "states" by Mr. Chief Justice Marshall, reached the conclusion that the Judiciary Article of the Constitution is not the exclusive source of judicial power for federal courts. In direct conflict with the conception stated in *Hayburn's* case, *supra*, they found the requisite authority to sustain the 1940 statute elsewhere in the Constitution. The late Messrs. Justices Rutledge and Murphy, on the other hand, in a concurring opinion affirmed the proposition set forth in *Hayburn's* case; and by defining the term "states" to include the District of Columbia and the territories, they overruled the opposite construction by Chief Justice Marshall in *Hepburn v. Ellzey* and held the 1940 Act valid.[10]

These divergent positions favoring the validity of the 1940 Act are necessarily supported by independent arguments. *First*, the unusual preciseness of terminology of the provisions and the great talent of the drafters emphasize that if the authors had desired Article III of the Constitution to be the exclusive source of federal judicial power, they would have so stated. They did not. On the contrary, in Articles I and IV of the Constitution they conferred blanket power upon Congress over the citizens of the District of Columbia and the territories, including power over the judicial function.[11] From this grant of judicial power it is inferred that Congress may enlarge the jurisdiction of any federal court to that extent necessary to protect the rights of these citi-

[7] Gordon v. United States, 117 U. S. 697 (1864); United States v. Ferreira, 13 How. 40 (U S. 1851); Hodgson and Thompson v. Bowerbank, 5 Cranch 303 (U. S. 1809); *cf.*, Mayor v. Cooper, 6 Wall. 247, 252 (U. S. 1867); Sheldon v. Sill, 8 How. 441, 449 (U. S. 1850); Mossman v. Higginson, 4 Dall. 12, 14 (U. S. 1800).

[8] 2 Cranch 445 (U. S. 1804).

[9] New Orlans v. Winter, 1 Wheat. 91 (U. S. 1816); Barney v. Baltimore, 6 Wall. 280 (U. S. 1868); Hooe v. Jamieson, 166 U. S. 395 (1897); *In re* Massachusetts, 197 U. S. 482 (1905); *cf.*, Watson v. Brooks, 13 F. 540 (C. C. Ore. 1882) (doctrine criticized).

[10] Six of the justices favored the doctrine in *Hayburn's Case*, including Justices Rutledge, Murphy, Frankfurter, Reed, Vinson and Douglas. Seven of the justices favored the construction in *Hepburn v. Ellzey*, including Justices Jackson, Burton, Black, Frankfurter, Reed, Vinson and Douglas. The decisison resulted from the fact that five of the justices, Jackson, Burton, Black, Rutledge and Murphy, concurred in result, though they disagreed on the basis for the result.

[11] U. S. CONST. Art. I, §8, cl. 9 states that Congress shall have power to constitute tribunals inferior to the Supreme Court; U. S. CONST. Art. I, §8, cl. 17 gives Congress power "to exercise exclusive legislation in all cases whatsoever, over such district . . . as may . . . become the seat of the government of the United States . . ."; U. S. CONST. Art. IV, §3, cl. 2 gives Congress power "to dispose of and make all needful rules and regulations respecting the territory . . . belonging to the United States . . ."; U. S. CONST. Art. I, §8, cl. 18 gives Congress power to make all laws which shall be necessary and proper for carrying into execution these powers.

zens.[12] The extension of diversity jurisdiction is a valid and reasonable exercise of this power.[13]

Second, by defining "states" to include the District of Columbia and the territories for the purpose of diversity jurisdiction, the source of judicial power remains the Judiciary Article of the Constitution. Further, the changing needs of a growing nation have undermined the foundation of Mr. Chief Justice Marshall's holding in *Hepburn v. Ellzey* that the term "states" does not include the District of Columbia and the territories for diversity purposes. That holding is now supported only by its great age and the prestige of Chief Justice Marshall's name, and it should now be overruled as the simplest way to achieve an admittedly fair objective.

Both of these arguments are bolstered by a practical consideration. If diversity jurisdiction for citizens of states is desirable, which has been questioned,[14] it would seem equally desirable to make that jurisdiction available to citizens of the District and the territories. By the 1940 Act these citizens, when no other basis for federal jurisdiction is available, are made eligible to sue citizens of states in federal courts instead of being compelled to sue in state courts. This is the principal advantage granted by the Act to the citizens in question. Concededly, this result may be accomplished by creation of special statutory courts to hear these cases.[15] Instead, Congress adopted the less expensive and more practical expedient of vesting that jurisdiction in existing federal courts. The means is justified in accomplishing an end admittedly within the power of Congress.

The dissenting justices, Messrs. Frankfurter, Reed, Vinson and Douglas, would continue unimpaired both the proposition of *Hayburn's* case and the construction of the term "states" in *Hepburn v. Ellzey*. Their argument for the invalidity of the Act proceeds on the theory

[12] This construction is not without implied judicial sanction. *E.g.*, judges of courts of the District of Columbia (which were created under U. S. CONST. Art. I, §8) come under the protection of U. S. CONST. Art. III, §1. O'Donoghue v. United States, 289 U. S. 516 (1933). Judgments of the courts of the District are to be accorded "full faith and credit" under U. S. CONST. Art. IV, §1. Embry v. Palmer, 107 U. S. 3 (1882). Congress may impose a direct tax on the District of Columbia, but not an oppressive tax, by reason of U. S. CONST. Art. I, §2. Loughborough v. Blake, 5 Wheat. 317 (U. S. 1820).

[13] C. J. Marshall gave color to this interpretation in a statement in Hepburn v. Ellzey, 2 Cranch 445, 453 (U. S. 1804) made in reference to lack of diversity jurisdiction for citizens of the District: ". . . this is a subject for *legislative*, not for judicial consideration (italics supplied)."

[14] See Mr. Frankfurter, *Distribution of Judicial Power between United States and State Courts*, 13 CORNELL L. Q. 499, 525 (1928): "The various types of diversity litigation call for concrete scrutiny in the light of present day conditions and the demands upon federal courts by peculiarly federal litigation. The right to remove to the federal court a litigation between two non-residents in a state court will not survive analysis."

[15] U. S. CONST. Art. I, §8, cls. 17 and 18 (District of Columbia); U. S. CONST. Art. IV, §3, cl. 2 (territories).

that (a) the Judiciary Article is the exclusive source of federal jurisdiction, and (b) the Article does not provide for federal diversity jurisdiction over citizens of the District of Columbia and the territories. They contend that the language of Article III is explicit;[16] the authors were distinguished lawyers capable of scrupulously exact draftsmanship; the subject-matter is technical; each facet of judicial power authorized was contested among the framers and distinctly circumscribed;[17] and it is manifest, on the one hand, that Article III was not intended to be one of those sections to which time and experience were to give content, and, on the other hand, that it was to be the sole source of federal judicial power. Article III does not purport to authorize federal diversity jurisdiction for citizens of the District of Columbia or the territories; nor is there any indication that the term "states" means anything other than those component parts forming the union which alone have the power to amend the Constitution.[18] From these premises it follows that an act of Congress attempting to grant federal judicial privileges to the citizens in question violates the Judiciary Article of the Constitution and is invalid. Buttressing the logical argument is the practical consideration that the detriment which will result from holding the Act valid outweighs the advantages which will accrue to citizens of the District and the territories. The already overheavy workload of the federal courts will be increased. More serious is the possibility that Congress might use the precedent now established to further extend federal jurisdiction to include other duties heretofore considered precluded by the Judiciary Article.[19] Though it may be desirable to assure to all citizens access to federal courts on an equal basis, that end would be better achieved by more appropriate means.[20]

Since the Supreme Court has upheld the 1940 Act it is pertinent to consider its wording in conjunction with the 1948 revision of this statute.

[16] The precise phraseology of U. S. CONST. Art. III is in striking contrast with phrases dealing with other vital aspects of government; *e.g.*, "due process of law," "commerce . . . among the several states," "necessary and proper."

[17] See Madison's defense of the Judiciary Article before the Virginia Convention, 5 WRITINGS OF JAMES MADISON 216-225 (Hunt. ed. 1900).

[18] In Hepburn v. Ellzey, 2 Cranch 445, 453 (U. S. 1804), C. J. Marshall in construing the first Judiciary Act to exclude citizens of the District of Columbia said: ". . . members of the American Confederacy only are the states contemplated in the Constitution."

[19] Justice Frankfurter asks: ". . . if the precise enumeration of cases as to which Article III authorized Congress to grant jurisdiction to the United States District Courts does not preclude Congress from vesting these courts with authority which Article III disallows, by what rule of reason is Congress to be precluded from bringing to its aid the advisory opinions of this Court or of the Court of Appeals? . . . Why is not Congress justified in conferring original jurisdiction upon this Court in litigation involving the exercise of its power to make all laws which shall be necessary and proper . . ." National Mut. Ins. Co. v. Tidewater Transfer Co., 69 Sup. Ct. 1173, 1196, 1197 (1949).

[20] A constitutional amendment and special statutory courts offer alternative solutions.

The 1940 Act changed the JUDICIAL CODE to provide that district courts have original jurisdiction of all suits of a civil nature where the matter in controversy ". . . is between citizens of different states, *or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any state or territory. . . .*"[21] Objections have been advanced that the Act is ambiguous and subject to several interpretations.[22] The 1948 revision[23] differs from the 1940 act on the question of federal diversity jurisdiction in two respects.[24] The words, "or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any state or territory," are omitted. The word "states," as used in the section, is defined to include "the territories and the District of Columbia." The 1948 revision leaves unchanged the basis upon which the Supreme Court reached their decision in the principal case. The Court referred to the 1948 revision as, in substance, re-enacting the 1940 Act.[25]

The result of the 1940 Act as revised and construed is that the citizens of the District of Columbia and the territories, on a showing of diversity of citizenship between the parties, may sue in the federal courts. Nevertheless, by means of a splitting of opinions,[26] the conception of the Judiciary Article as the exclusive source of federal judicial power and the limited construction of the term "states," as used in that Article, considered individually, remain intact. While the basis is as yet unsanctioned by legal principal approved by a majority of the justices, the Court by the purely mechanical device of a split majority accomplished the result they desired without the delay of a constitutional amendment or the complications attendant upon the creation of separate special courts.

CLYDE T. ROLLINS.

Sales—Technical Cash Transaction—Vendor's Right to Recover Property from Bona Fide Purchaser

Unless a contrary intention appears, promises for an agreed exchange which may be simultaneously performed are concurrently conditional.[1] It follows that, in a contract for the sale of a chattel where

[21] 54 STAT. 143 (1940). Italics supplied.

[22] A literal reading of the 1940 Act would indicate that, contrary to U. S. CONST. AMEND. XI, citizens of the District, Hawaii, and Alaska were authorized to sue any state or territory in the district courts. The Act seemingly authorized suits between two citizens of one territory in the federal courts. See McGarry v. City of Bethlehem, 45 F. Supp. 385 (E. D. Pa. 1942).

[23] 28 U. S. C. §1332 (1948).

[24] The revision removes the objection relating to a possible violation to U. S. CONST. AMEND. XI. The revision precludes federal jurisdiction over suits between two citizens of one territory.

[25] National Mut. Ins. Co. v. Tidewater Transfer Co., 69 Sup. Ct. 1173, 1174 (1949).

[26] See note 10, *supra*.

[1] RESTATEMENT, CONTRACTS §267 (1931).

nothing is said about the time of payment, payment, tender, or waiver of the purchase price is a condition on the right to demand delivery of the chattel.[2] It is recognized that title to the property will pass, if the parties so intend, upon completion of the contract irrespective of the time of payment,[3] and if so, then the vendor retains a possessory lien and delivery of the chattel in expectation of immediate payment is conditional on the payment being forthcoming.[4] In some jurisdictions this is the result where no evidence appears of any intention to extend credit; that is to say, title passes but a possessory lien is retained.[5] Elsewhere, in the absence of an intent to extend credit, the transaction is considered a "technical cash sale,"[6] and neither title nor right to possession passes to the buyer. Delivery to the buyer in expectation of immediate payment extinguishes neither the seller's title nor his right to possession.[7]

Independently of the above, in the absence of a special agreement to the contrary,[8] a check or draft given in payment of an obligation is conditional, not constituting payment unless it is itself paid upon due presentation.[9] This rule applies to obligations arising out of the immediate transaction as well as to the payment of antecedent debts.[10] If the check is not paid, the obligee may at his option recover on the instrument or on the original obligation.[11]

Although basically distinct,[12] this rule of payment has been incor-

[2] UNIFORM SALES ACT §42; Ames v. Moir, 130 Ill. 582, 22 N. E. 535 (1889); Wright v. Frank A. Andrews Co., 212 Mass. 186, 98 N. E. 798 (1912); Crumney v. Raudenbush, 55 Minn. 426, 56 N. W. 1113 (1893); Hughes v. Knott, 138 N. C. 105, 50 S. E. 586 (1905); Grandy v. Small, 48 N. C. 8 (1855); VOLD, SALES 418 (1931); 2 WILLISTON, SALES §448 (rev. ed. 1948).

[3] UNIFORM SALES ACT §19, rule 1.

[4] Merrill Furniture Co. v. Hill, 87 Me. 17, 32 Atl. 712 (1894).

[5] Warrick v. Liddon, 230 Ala. 253, 160 So. 534 (1935).

[6] VOLD, SALES 168 (1931).

[7] Davidson v. Furniture Co., 176 N. C. 569, 97 S. E. 480 (1918). It has been held, in either case, that the condition may be waived, the vendee's title becoming thereby absolute, by repeated efforts to obtain payment coupled with acquiescence in the vendee's continued possession. Merrill Furniture Co. v. Hill, 87 Me. 17, 32 Atl. 712 (1894); Frech v. Lewis, 218 Pa. 141, 67 Atl. 45 (1907).

[8] An agreement to accept a check as unconditional payment is not implied from the surrender of a note marked "Paid." Little v. Mangum, 17 F. 2d 44 (4th Cir. 1927); Philadelphia Life Ins. Co. v. Hayworth, 296 Fed. 339 (4th Cir. 1924); Hayworth v. Insurance Co., 190 N. C. 757, 130 S. E. 612 (1925); *cf.* South v. Sisk, 205 N. C. 655, 172 S. E. 193 (1933) (note marked "Paid" and mortgage "Cancelled"); Capital Automobile Co. v. Ward, 54 Ga. App. 873, 189 S. E. 713 (1936) (bill of sale marked "Paid by two checks" held evidence from which an innocent purchaser from the buyer might assume that checks had been accepted as absolute payment).

[9] Manufacturers Finance Co. v. Armstrong, 78 F. 2d 289 (4th Cir. 1935); Cleve v. Craven Chemical Co., 18 F. 2d 711 (4th Cir. 1927); Lumber Co. v. Hayworth, 205 N. C. 585, 172 S. E. 194 (1933).

[10] Standard Investment Co. v. Town of Snow Hill, 78 F. 2d 33 (4th Cir. 1935).

[11] Dewey v. Margolis, 195 N. C. 307, 142 S. E. 22 (1928).

[12] "There is confusion of thought in supposing that the condition in conditional payment by means of negotiable paper has any reference to the ownership of

porated into "cash sale" transactions[13] with the result that, in any event, whether intent for a cash sale is found expressed in the original agreement or is presumed from the absence of contrary provisions, and whether it is conceived that the vendor retains a lien on or the title to the property, it is held that delivery of the chattel in return for a check for the purchase price is conditional on the check being paid and that upon the dishonor of the instrument the vendor may regain possession of the property from the vendee or any other party with no greater equities.[14]

The controversial question arises whether the vendor in such a case may assert his right to the property as against a bona fide purchaser for value from the vendee without notice of the vendee's defect of title. By majority rule[15] the original vendor prevails in the absence of some conduct amounting to estoppel.[16] The minority hold that although, as between the original parties, delivery is conditional, the rule is inapplicable to subsequent purchasers for value in good faith.[17]

In a recent decision by the Georgia Court of Appeals,[18] where a check was given for the purchase price of an automobile at an auction sale and upon due presentment was returned marked "insufficient funds," it was held that, although, as between the original parties, no title passes until the check given for the purchase price in a cash sale is paid, unconditional delivery of the chattel to the vendee vests him with "external indicia" of the right of disposal, and that a subsequent sale to an innocent purchaser either divests the vendor of his title[19] or estops him

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property given in exchange for the paper. The condition relates to the creditor's right to revert to the money claim for which the negotiable paper was given." 2 WILLISTON, SALES 344 (rev. ed. 1948).

[13] "Without regard to the former presumption—that payment of the price is a condition precedent to the passing of title to the goods—in many jurisdictions it has been stated to be the rule at common law that a sale of goods is presumed to be a sale for cash unless the seller agreed to allow a period of credit, and the force of this presumption has been held to be unaffected by reason alone of the intermission between receiving and cashing a check for the goods." Collins, *Title to Goods Paid for with Worthless Check*, 15 So. CAL. L. REV. 340 at 343 (1942).

[14] First National Bank v. Griffin, 31 Okla. 382, 120 Pac. 595 (1911) (bank receiving the property with full knowledge of the transaction, at the same time refusing to cash the vendee's check, held to have no greater equities); McIver v. Williamson-Halsell-Frasier Co., 19 Okla. 454, 92 Pac. 170 (1907) (attaching creditor of the vendee).

[15] VOLD, SALES 174 (1931).

[16] Barksdale v. Banks, 206 Ala. 569, 90 So. 913 (1921); Clark v. Hamilton Diamond Co., 209 Cal. 1, 284 Pac. 915 (1930); Johnson v. Iankovetz, 57 Ore. 24, 110 Pac. 398 (1910); Young v. Harris-Cortner Co., 152 Tenn. 15, 268 S. W. 125 (1924).

[17] Crescent Chevrolet Co. v. Lewis, 230 Iowa 1074, 300 N. W. 260 (1941); Parr v. Helfrich, 108 Neb. 801, 189 N. W. 281 (1922); Comer v. Cunningham, 77 N. Y. 391, 33 Am. Rep. 626 (1879).

[18] Blount v. Bainbridge, 79 Ga. App. 99, 53 S. E. 2d 122 (1949).

[19] GA. CODE §96-207 (1933). "Where an owner has given to another such evidence of the right of selling his goods as, according to the custom of the trade or the common understanding of the world, usually accompanies the authority of disposal, or has given the external indicia of the right of disposing of his property, a sale to an innocent purchaser divests the true owner's title."

from asserting it.[20] The court based its decision on two statutes[21] in the alternative.

Although North Carolina has recognized both the technical cash sale doctrine[22] and the rule that a check is conditional payment until it is paid,[23] no local worthless check case has been found in which the vendor maintained an action against an innocent purchaser of the property. In *Parker v. Trust Company*,[24] however, where, under facts similar to those of the Georgia case,[25] an agent of the vendee had resold the chattel at a profit and remitted the proceeds to the administrator of the vendee who had meanwhile committed suicide, the court said that no title passed and that the vendor could either recover the specific property, if not estopped,[26] or ratify the subsequent resale and recover the proceeds thereof from the administrator who held them in trust for the vendor, such resale being a conversion of his property. Although the first of these alternatives is a dictum, under the circumstances of the case,[27] it is enough to indicate that the North Carolina court would not have reached the result of the Georgia decision. An endeavor will be made to determine the reason.

That ancient and embattled maxim of the common law, caveat emptor,[28] having experienced considerable insecurity in England,[29] seems to have taken refuge in a more hospitable America.[30] The con-

[20] GA. CODE §37-113 (1933). "When one of two innocent persons must suffer by the act of a third person, he who put it in the power of the third person to inflict the injury shall bear the loss."

[21] Notes 19 and 20, *supra*.

[22] Davidson v. Furniture Co., 176 N. C. 569, 97 S. E. 480 (1918); Hughes v. Knott, 138 N. C. 105, 50 S. E. 586 (1905).

[23] *E.g.*, Lumber Co. v. Hayworth, 205 N. C. 585, 172 S. E. 194 (1933).

[24] 229 N. C. 527, 50 S. E. 2d 304 (1948).

[25] Blount v. Bainbridge, 79 Ga. App. 99, 53 S. E. 2d 122 (1949).

[26] The vendor had assigned the certificate of title to the vendee. The action was for the proceeds of the resale which amounted to more than the original sale price.

[27] See note 26, *supra*.

[28] "Let the buyer beware." As between the immediate parties to a sale, this doctrine has been seriously encroached upon by the recognition of implied warranties of title, merchantability, and fitness for a particular purpose, but it remains a potent weapon in the hands of the legal owner of property to be used against a bona fide purchaser from one who has no title to convey.

[29] A most serious English exception to the general rule embodied in caveat emptor is market overt whereby a thief may convey a good title in a sale in an "open market." This product of the law merchant, resulting in the increased negotiability of goods, has been excused on the theory that the loser of goods is bound to look in the market place and find them. Pease, *The Change of the Property in Goods by Sale in Market Overt*, 8 COL. L. REV. 375 (1908). A similar civil law doctrine is expressed in words roughly translated as "possession equals title" wherein even a donee, accepting goods in good faith from one in possession, becomes the lawful owner. Franklin, *La Possession Vaut Titre*, 6 TULANE L. REV. 589 (1932).

[30] "But we are not aware that this Saxon institution of markets overt, which controls and interferes with the application of the common law, has ever been recognized in any of the United States, or received any judicial sanction." Ventress v. Smith, 10 Pet. 161, 176, 9 L. Ed. 382, 387 (1836).

flict which has inevitably necessitated the almost imperceptible recession of the doctrine has been attributed to the opposed considerations of the protection of the ownership of property and the encouragement of trade.[31] The growth of transportation and commerce, which has permitted industrial specialization and increased the interdependence of people for necessities as well as luxuries, has adversely affected caveat emptor by demanding a measure of security for the bona fide purchaser of goods.[32]

But if the increased negotiability of goods would encourage freedom of trade, it must be remembered that the transaction here under consideration involves commercial paper, the security of which is deemed essential to commerce as we know it.[33] Unlike a chattel, the value of a check is not embodied in the physical instrument but depends upon the protection the law gives it. A measure of this, at least, consists of the seller's recourse against the specific chattel in the event a check received therefor is not paid. If an increase in the negotiability of goods would adversely affect the security of this type of commercial paper,[34]

[31] "Security of property for the original owner has as a general rule been accounted of greater importance to the general welfare than the possible resulting freedom of commerce that might be achieved by protecting the transferee who acquires the goods from a transferor who cannot rightfully convey." VOLD, SALES 396 (1931). Speaking of the common law, as contrasted to the civil law: ". . . it is entirely conceivable that a legal system should choose to protect the security of acquisitions at the expense of the security of transactions. In an agricultural community where movable property is scarce, acquisition, not transaction, that is property rather than contract, looms." Franklin, *La Possession Vaut Titre*, 6 TULANE L. REV. 589, 601 (1932). Market overt applies only to centers of trade, principally in London. See Pease, *The Change of the Property in Goods by Sale in Market Overt*, 8 COL. L. REV. 375 (1908).

[32] Apparent ownership and apparent authority, as devices for protecting an innocent purchaser, go beyond ordinary rules of estoppel. VOLD, SALES 401 (1931). "In part, at least, they exemplify concessions to felt needs for more largely sustaining security of transactions for the advantage of trade and commerce, haltingly and gropingly made at the expense of security of property to the original owner. To some degree at least they thus represent a fresh example of gropingly replacing *caveat emptor* by *caveat dominus*." *Id.* at 402.

[33] It has been estimated that ninety per cent of all business transactions in this country are settled by check. As reported by the Federal Reserve Bulletin for August, 1949, the total amount of money in circulation, including coin and paper money of all denominations, reached a peak in November, 1948, of $28,331,000,000. The total bank debits to customers' deposits, exclusive of interbank deposits, during the year of 1948 is reported as $1,249,630,000,000.

[34] "We feel safe in saying that, as a matter of custom and convenience, most of the cash transactions of the country are paid with checks. A farmer brings in his cotton, tobacco, or wheat to town for sale and sells same, and, as a general rule, is paid by check, although all of such sales are treated as cash transactions. If, in such a case, the purchasers can immediately resell to an innocent party and convey good title, it would follow that vendors would refuse to accept checks and would require the actual money, which would result in great inconvenience and risk to merchants engaged in buying such produce, since it would require them to keep on hand large sums of actual cash. This would result in revolutionizing the custom of merchants in such matters." Young v. Harris-Cortner Co., 152 Tenn. 15, 268 S. W. 125 at 127, 54 A. L. R. 516, 526 (1924). For criticism of this reasoning see Notes, 28 KY. L. JOURNAL 322 (1940); 13 Mo. L. REV. 211 (1948).

the weight of such a consideration, when cast upon the scales in a worthless check case, would line up with caveat emptor, both being opposed to the negotiability of goods, and operate to deprive the innocent purchaser of the goods. The result is an anomalous situation wherein the security of acquisitions, rather than security of transactions, lends its support to the free movement of trade.

WILLIS C. BUMGARNER.

Torts—Federal Tort Claims Act—Servicemens' Suits

In 1946 Congress enacted the Federal Tort Claims Act.[1] This legislation is a sweeping waiver of governmental immunity from suits sounding in tort.[2] The Act makes the United States liable on "claims for injury or loss of property or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable. . . ."[3] The Government is not to be liable in twelve enumerated instances. Among these specific "exceptions" is a provision that the Act is to have no application to "any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."[4] The Act makes no mention of veterans' or servicemens' claims except for the indirect reference implicit in the language of this exception.

What is the status then of the serviceman-claimant under the Act? The Supreme Court was faced with this question in *Brooks v. U. S.*[5] Two soldiers, Welker and Arthur Brooks, were riding in an automobile when they were hit at a highway intersection by an Army truck. At the time of the accident the men were on leave and about their own private affairs. It was held that the fact that plaintiffs were servicemen would not preclude the maintenance of a suit under the Tort Claims Act.[6] "The statute's terms are clear," wrote Mr. Justice Murphy.

[1] 28 U. S. C. §§1291, 1346, 1402, 1504, 2110, 2401, 2411, 2412, 2671-2680 (1948).

[2] This legislation seems to have been passed with two main purposes in mind: (1) to relieve an over-burdened Congress from the necessity of considering hundreds of private bills yearly (the only remedy available to the private citizen before passage of the Act), and (2) to remove the previous barrier to suit against the Government in tort, a reform which had been sought by statesmen and jurists for more than a century. See generally, Baer, *Suing Uncle Sam in Tort*, 26 N. C. L. REV. 119 (1948); Gellhorn and Schenck, *Tort Actions Against the Federal Government*, 47 COL. L. REV. 722 (1947); Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation*, 35 GEO. L. J. 1 (1946); Note, 20 MISS. L. J. 354 (1949).

[3] 28 U. S. C. §1346(b) (1948).

[4] 28 U. S. C. §2680 (1948). The exceptions fall loosely into two categories: (1) claims which relate to certain governmental activities which should be free from the threat of damage suit, or (2) claims for which adequate remedies are already available. SEN. REP. No. 1400, 79th Cong., 2d Sess. 33 (1946).

[5] 69 S. Ct. 918 (1949).

[6] *Accord*, Alansky v. Northwest Airlines, 77 F. Supp. 556 (D. Mont. 1948) (death of officer in the military forces killed in plane crash while being trans-

"They provide for District Court jurisdiction over *any* claim founded on negligence brought against the United States. We are not persuaded that 'any claim' means 'any claim but that of servicemen.' "[7] All but two of the tort claims bills introduced in Congress between 1925 and 1935[8] had contained a clause excepting claims cognizable under either the Federal Employees' Compensation Act[9] or the World War Veterans' Act of 1924.[10] The Act of 1946 contained such an exception when introduced;[11] but the provision, without ascertainable explanation, was dropped from the Act as adopted.[12] It seems apparent from both the language and the legislative history of the Act that Congress did not intend to place such claims beyond the Act's coverage.[13]

It had been argued by the Government that since there already existed an elaborate and adequate system of pensions and benefits for servicemen,[14] it had not been intended to include such claims within the framework of the Act. But the Court said that there is nothing in the Act or the veterans' laws which provides for exclusiveness of remedy.[15] The Government then objected to recovery on the ground that it would put the United States in the position of having to pay twice for the same injury—the plaintiff Welker Brooks having been awarded a disability allowance of $27.60 per month, and the mother of the deceased Arthur Brooks having been paid a death benefit of $468 under the Veterans' Act. The Court made it plain, however, that it would not permit a double recovery, and the case was remanded to the Court of Appeals for its consideration of the problem of reducing the damages *pro tanto*. In other words, the substantial recovery obtained by the plaintiffs in the District Court[16] might be diminished by the modest amounts already paid out in the form of benefits under the Veterans'

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ported to Seattle where he was to be discharged); Samson v. U. S., 79 F. Supp. 406 (S. D. N. Y. 1947) (death of Army private whose injuries, not incident to military service, were sustained when he was a passenger on a bus operated by the War Dep't.).

[7] Brooks v. U. S., 69 S. Ct. 918, 919 (1949).

[8] For citation of these bills, see Brooks v. U. S., 69 S. Ct. 918 n. 2 (1949).

[9] 39 STAT. 742 (1916), 5 U. S. C. §751 *et seq.* (1946).

[10] 43 STAT. 607 (1924), 38 U. S. C. §§421-576 (1946).

[11] H. R. 181, 79th Cong., 1st Sess. (1945).

[12] The exceptions became §421 of the Legislative Reorganization Act, 28 U. S. C. §2680 (1948).

[13] See Judge John J. Parker, dissenting in U. S. v. Brooks, 169 F. 2d 840, 846 (4th Cir. 1948).

[14] These laws are too numerous to be cited individually. See generally, KIMBROUGH AND GLEN, AMERICAN LAW OF VETERANS (1946).

[15] *Contra*, Perucki v. U. S., 80 F. Supp. 959 (M. D. Pa. 1948); Wham v. U. S., 81 F. Supp. 126 (D. D. C. 1948), where it is said: "When the United States consents to be sued in tort, as it has by the Tort Claims Act, those members of a class for which a comprehensive system of compensation has otherwise been provided may not seek benefits under the Act."

[16] Welker was awarded $4,000; Arthur's estate $25,000.

Act.[17] It had also been argued that where a claimant has received compensation under either the Federal Employees' Compensation Act or the Veterans' Act, this would constitute an election of remedies and that recovery under the Tort Claims Act would therefore be barred.[18] But the Court said, "We will not call either remedy exclusive, nor pronounce a doctrine of election of remedies, when Congress has not done so."[19] And so the serviceman may accept compensation under the Veterans' Act and then proceed under the Tort Claims Act. Thus the more generous award is made available to the claimant.

The *Brooks* case is controlling only in cases in which the injuries are not incident to military service. The Court stated: "Were the accident incident to the Brooks' service, a wholly different case would be presented."[20] We can only speculate as to the result the Court will reach when it is squarely faced with a case in which the plaintiff's injuries are incident to his service. The literal language of the Act could easily embrace such injuries. The only section which feasibly could apply to claims of the serviceman is Section 2680(j) which excepts all claims "arising from combatant activities . . . during time of war."[21] Certainly there remains between the decision in the *Brooks* case and the literal language of Section 2680(j) a wide area of possible claims.

Some of the lower courts have already probed into this twilight zone. The District Court for the District of Maryland dealt with the problem of a service-connected injury in *Jefferson v. U. S.*[22] There an ex-soldier sued the United States for injuries sustained in an operation performed on him by an Army surgeon. A towel 2½ feet long by 1½ feet wide was negligently left in the plaintiff's abdomen and was

[17] Just before press time the two Brooks cases were considered on remand. U. S. v. Brooks, 176 F. 2d 482 (1949). The case of the deceased Arthur was disposed of, the Court deducting the $468 death benefit payment but refusing to deduct payments made through National Service Life Insurance. The case of the injured Welker was remanded to the District Court for further findings of fact since it did not appear to what extent, in making the award of damages, the District Judge took into account hospital and medical expenses and disability benefits.

[18] This argument is developed in Gottlieb, *The Federal Tort Claims Act*, 35 GEO. L. J. 1, 57 (1946). In Parr v. U. S., 78 F. Supp. 693 (D. Kan. 1948), a Government employee who had accepted compensation under the Federal Employees' Compensation Act later brought action under the Tort Claims Act. *Held:* acceptance of compensation under the former Act constituted an "election," and the present action was therefore barred. *Cf.* White v. U. S., 77 F. Supp. 316 (D. N. J. 1948), where employees of the War Dep't. recovered under the Federal Employees' Compensation Act before the effective date of the Tort Claims Act. *Held:* this did not constitute a waiver or an "election."

[19] Brooks v. U. S., 69 S. Ct. 918, 920 (1949).

[20] *Ibid.*

[21] In Skeels v. U. S., 72 F. Supp. 372 (W. D. La. 1947), "combatant activities" was defined as actual conflict, not mere training activities, and plaintiff was permitted to recover for death of his intestate (a civilian) who was killed when an iron object fell from an Army plane engaged in tow target practice over the Gulf of Mexico.

[22] 77 F. Supp. 706 (D. Md. 1948).

discovered nine months later when a similar operation was performed at Johns Hopkins. The complaint was dismissed. Relying on House and Senate Committee Reports[23] and after a consideration of the probable consequences of allowing such suits, the court reasoned that Congress had not contemplated the inclusion of claims for service-connected injury. In a more recent case, *Santana v. U. S.*,[24] the Court of Appeals for the First Circuit held, on the basis of the decision in the *Brooks* case, that the district court had jurisdiction, under the Tort Claims Act, of an action for wrongful death of a discharged serviceman whose death was allegedly caused by the negligence of Government employees at a Veterans Administration Hospital. Here the deceased was not in service at the time of the negligence complained of, and the court felt that inclusion of the claim could involve no problem of the "subversion of military discipline."[25] The Court further said, "With respect to the argument, that Congress presumably did not intend to include discharged veterans within the coverage of the Tort Claims Act, in so far as they already are covered by a 'comprehensive system of special statutory benefits,' the Supreme Court in its decision in the *Brooks* case . . . expressly discredited that argument, even as applied to servicemen."[26]

In *Perucki v. U. S.*[27] a United States district court sitting in Pennsylvania denied recovery to a veteran seeking damages for an injury allegedly received when he was undergoing examination in connection with an appeal from a decision reducing his rate of disability. Plaintiff said he had received painful burns when a Veterans Administration doctor tested his reflexes by applying lighted matches to both knees. The court held the claim to be within the "combatant activities" exception because "the basis of the claim could not have arisen if it had not been for the injury which the plaintiff sustained while engaged in the combatant activities of the military forces."[28] Since the negligence complained of occurred *after* discharge, it seems that the court came up with a very strained construction of the exception in order to disallow the plaintiff's claim.[29]

[23] SEN. REP. No. 1400, 79th Cong., 2d Sess. 33 (1946); H. R. REP. No. 1287, 79th Cong., 1st Sess. 6 (1946).

[24] 175 F. 2d 320 (1st Cir. 1949).

[25] In U. S. v. Brooks, 169 F. 2d 840 (4th Cir. 1948), the majority says at 845: "If soldiers could sue for such injuries as illness based on the alleged negligence of the company cook or mess sergeant, or if soldiers who contract sickness on wintry sentry duty had a right of action against the Government on the allegation of a negligent order given by the company commander, then the traditional grousing of the American soldier would result in the devastation of military discipline and morale."

[26] Santana v. U. S., 175 F. 2d 320, 322 (1st Cir. 1949).

[27] 80 F. Supp. 959 (M. D. Pa. 1948).

[28] *Id.* at 961.

[29] The District Court in the Santana case did not file an opinion for publication. The facts set out in the opinion of the Court of Appeals are meager, and so it is not possible to determine whether the deceased veteran in the Santana

Whatever the approach, whether by a narrowing of the literal language of the Act as was done in the *Jefferson* case, or by a strained interpretation of the "combatant activities" exception as in the *Perucki* case, the courts have shown little disposition to push the Government's liability as far as the literal language of the Act will admit. Undoubtedly the courts are concerned with the spectre of the floods of litigation that will almost surely result if they do not adopt some limitative criterion. Whether by accident or by design, the decisions to date indicate a trend toward a criterion akin to that adopted in the Crown Proceedings Act of 1947,[30] the British Act waiving sovereign immunity. The British Act exempts the Crown from liability when the serviceman is injured while on duty or when the injury is incurred on military premises.[31] This criterion, if incorporated directly into our Act, would hardly be open to the often-voiced objection that allowance of servicemen's claims will result in the subversion of military discipline, and at the same time it would quiet the courts' fears as to the possibility of floods of litigation.

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case was hospitalized in connection with a former combat injury or for some other reason. It may be, then, that the Santana and Perucki cases are distinguishable on the facts. Since the negligence complained of occurred after discharge in both cases, the original basis for hospitalization or treatment would seem immaterial.

[30] 10 & 11 GEORGE VI, c. 44, §10 (1947).

[31] Barnes, *The Crown Proceedings Act, 1947*, CAN. B. REV. 387, 393 (1948).