# Notes and Comments

North Carolina Law Review

# NOTES AND COMMENTS

## Administrative Law—Notice and Opportunity for Hearing—Tax Assessment Statute

It is a fundamental concept of constitutional law that a person shall not be deprived of his property without due process of law.[1] Notice and an opportunity for a hearing are essential to due process. As applied to the field of taxation the same principle obtains, but it is obvious that what constitutes adequate notice and hearing in a strict judicial sense is not necessarily the form that is required in view of the exigencies of taxation. Accordingly the rule of general application is that the taxpayer, at some point before the assessment becomes irrevocably fixed, must be apprised of it and must have an opportunity to be heard as to its validity and amount.[2] The Supreme Court of the United States in construing this principle has held it does not require notice before the original assessment is made.[3] While some of the court's language would seem to require the notice to be provided for in

[1] U. S. CONST. AMEND. XIV §1: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

N. C. CONST. Art. I §17: "No person ought to be taken, imprisoned, or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property, but by the law of the land."

[2] Nickey v. Mississippi, 292 U. S. 393 (1934); McGregor v. Hogan, 263 U. S. 234 (1923); Wells, Fargo & Co. v. Nevada, 248 U. S. 165 (1918); Security Trust Co. v. Lexington, 203 U. S. 323 (1906); Weyerhauser v. Minnesota, 176 U. S. 550 (1899); Hagar v. Reclamation District No. 108, 111 U. S. 701 (1883); Davidson v. New Orleans, 96 U. S. 97 (1877); State Tax Commission v. Bailey & Howard, 179 Ala. 620, 60 So. 913 (1912); Powell v. Gleason, 50 Ariz. 542, 74 P. 2d 47 (1937); People v. Skinner, 18 Cal. 2d 349, 115 P. 2d 488 (1941); Town of West Hartford v. Coleman, 88 Conn. 78, 89 Atl. 1120 (1914); Jones v. City of Arcadia, 147 Fla. 571, 3 So. 2d 338 (1941); Anderson v. City of Ocala, 67 Fla. 204, 64 So. 775 (1914); Hardin v. Reynolds, 189 Ga. 534, 6 S. E. 2d 328 (1939); Barnett v. Cook County, 388 Ill. 251, 57 N. E. 2d 873 (1944); Chicago & N. W. Ry. v. Board of Sup'rs of Hamilton County, 182 Iowa 60, 162 N. W. 868, *on rehearing*, 165 N. W. 390 (1917); Board of Com'rs of Shawnee County v. Wright, 153 Kan. 19, 109 P. 2d 184 (1941); Draffen v. City of Paducah, 215 Ky. 139, 284 S. W. 1027 (1926); State v. Standard Oil Co. of Louisiana, 188 La. 978, 178 So. 601 (1937); Henry v. Manzella, 356 Mo. 305, 201 S. W. 2d 457 (1947); Thomas v. Oklahoma Tax Comm'n, 192 Okla. 409, 136 P. 2d 929 (1943); Obion County v. Coulter, 153 Tenn. 469, 284 S. W. 372 (1924); Texas Pipe Line v. Anderson, 100 S. W. 2d 754 (Tex. 1937); Elkins v. Millard County Drainage District No. 3, 77 Utah 303, 294 P. 307 (1930); Clark v. City of Burlington, 101 Vt. 391, 143 Atl. 677 (1928); Snohomish County v. Andrews, 144 Wash. 320, 259 P. 851 (1927).

[3] Nickey v. Mississippi, 292 U. S. 393 (1934); McGregor v. Hogan, 263 U. S. 234 (1923); Wells, Fargo & Co. v. Nevada, 248 U. S. 165 (1918); Security Trust Co. v. Lexington, 203 U. S. 323 (1906).

the tax statute,[4] later cases have held that it is sufficient for due process if the taxpayer has the right to contest the tax in an action for its collection or in a suit to enjoin the tax.[5] In short, so long as the taxpayer can present his case as a matter of right, before the court, whether by the tax statute, a separate statute, or by the holdings of the court, he has been afforded due process of law even though he had no notice and hearing before the tax authorities.[6]

In the case of *Bowie v. Town of West Jefferson*[7] the Supreme Court of North Carolina had an opportunity to consider specifically what were the requirements of due process concerning a statute relating to real property evaluation and taxation. The Town of West Jefferson undertook to revalue the property within its corporate limits pursuant to authority to do so conferred upon itself and another town by Chapter 627, Session Laws, 1947. Previously the municipality had used the valuation placed thereon by the county authorities, namely $9,674.00.[8] The new valuation determined by the town through its newly created board of assessment was $72,379.00. The municipal authorities had in fact given the taxpayer notice and an opportunity to be heard but the statute under which they acted did not require them to do so. The taxpayer paid the town tax under protest and made a written demand for the return of the difference between what he paid and what the tax would have been upon the valuation set by the county. Upon the town's refusal, the taxpayer brought suit under N. C. GEN. STAT. §105-406 (1943).[9] The trial judge, sitting without a jury, ruled the statute under

[4] Central of Georgia Ry. v. Wright, 207 U. S. 127 (1907).

[5] Nickey v. Mississippi, 292 U. S. 393 (1934); McGregor v. Hogan, 263 U. S. 234 (1923).

[6] Security Trust v. Lexington, 203 U. S. 323 (1906); Pittsburgh & Ry v. Board of Public Works of West Virginia, 172 U. S. 32 (1898); Hagar v. Reclamation District, 111 U. S. 701 (1884); McMillen v. Anderson, 95 U. S. 37 (1877).

[7] 231 N. C. 408, 57 S. E. 2d 369 (1950).

[8] N. C. GEN. STAT. §105-333 (1943) says: ". . . All cities and towns not situated in more than one county shall accept the valuations fixed by the county authorities, as modified by the state board of assessment. . . ."

[9] N. C. GEN. STAT. §105-406 (1943): "Unless a tax or assessment, or some part thereof, be illegal or invalid, or be levied or assessed for an illegal or unauthorized purpose, no injunction shall be granted by any court or judge to restrain the collection thereof in whole or in part, nor to restrain the sale of any property for the nonpayment thereof; nor shall any court issue any order in claim or delivery proceedings or otherwise for the taking of any personalty levied on by the sheriff to enforce payment of such tax or assessment against the owner thereof. Whenever any person shall claim to have a valid defense to the enforcement of a tax or assessment charged or assessed upon his property or poll, such person shall pay such tax or assessment to the sheriff; but if at the time of such payment, he shall notify the sheriff in writing that he pays the same under protest, such payment shall be without prejudice to any defenses or rights he may have in the premises, and he may, at any time within thirty days after such payment, demand the same in writing from the treasurer of the state, or of the county, city, or town, for the benefit or under the authority or by the request of which the same was levied; and if the same shall not be refunded within ninety days there-

which the town acted unconstitutional as denying due process. The supreme court affirmed saying that a statute which creates a board to evaluate property for tax purposes must also provide the procedure by which notice and an opportunity to be heard are afforded the taxpayer. The court ignores the fact that the protesting taxpayer had been before a trial court of general jurisdiction where his grievances could have been heard and his rights protected pursuant to the statute under which the action was brought.

In *Caldwell Land & Lumber Co. v. Smith*[10] the county officials as permitted by statute listed personal assets where the taxpayer had omitted them. The taxpayer sought an injunction complaining that he had not been given any notice or opportunity to be heard on the assessment. The statute made no provision for notice or opportunity to be heard at any time. The trial judge made no findings of fact but continued the injunction until final hearing. The Supreme Court of North Carolina in affirming this order asserted as to the lack of notice: "We are clearly of the opinion that either the assessment is void and should be so declared or that the plaintiff should have an opportunity to contest all the questions in the court which would have been open to it if notice had been given at the inception of the matter." The court further suggested that the legislature consider amending the statute to provide for notice to the taxpayer. However, all the court decided in the absence of any finding of fact by the trial judge was that the injunction be continued. On a later appeal of the same case it was held that since the taxpayer had been given a hearing in the court below his objection to lack of notice was no longer valid.[11]

In *Kinston v. Loftin*[12] the municipal authorities proceeded under a statute which provided for a special assessment but made no provision for notice to the taxpayer. The statute did, however, provide that the city could bring action for the collection of the assessment and that in such suit the taxpayer could raise any defense available to him.[13] The board of aldermen gave no notice or opportunity for the taxpayer to appear before them until after the assessment was made. The court

after, may sue such county, city, or town for the amount so demanded, including in his action against the county both state and county tax; and if upon the trial it shall be determined that such tax or any part thereof was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid or excessive, judgment shall be rendered therefore. . . ." For similar statute see N. C. GEN. STAT. §105-267 (1943).

[10] 146 N. C. 199, 59 S. E. 653 (1907).

[11] Caldwell Land and Lumber Co. v. Smith, 151 N. C. 70, 65 S. E. 641 (1909).

[12] 149 N. C. 255, 62 S. E. 1069 (1908).

[13] Private Laws 1905, c. 338 which said taxpayer ". . . shall have the right to deny the whole, or any part, of the amount claimed to be due by the city, and to plead any irregularity in reference to the assessment or any fact relied upon, to question the legality of the assessment, and the issues raised shall be tried, and the cause disposed of according to law. . . ."

held that the opportunity afforded by the statute to contest the assessment in the suit for collection satisfied the requirements of due process.[14]

While the cases of *Caldwell Land & Lumber Co. v. Smith* and *Kinston v. Loftin* appear to follow the rule that a hearing provided at any stage whether before the court or the taxing authority constitutes due process, later North Carolina cases tend to introduce some confusion into our law. In *Markham v. Carver*[15] the State Tax Commission had raised the value of personal property reported by the taxpayer. It was held that the assessment could not be increased without notice and a hearing as this was a denial of due process. The court, however, did not consider whether the hearing could be had before the court apart from the provisions of the tax statute. The decision would seem to indicate that the opportunity afforded for a hearing must be before the taxing authorities.

Likewise in *Lexington v. Lopp* in a per curiam opinion,[16] a special assessment statute was held unconstitutional because the statute made no sufficient provision for notice and an opportunity to be heard. It would seem that the latter decisions and the principal case have concerned themselves solely with the question whether the assessment statute provides for notice and an opportunity to be heard before the taxing authorities. They have omitted discussion of whether any method existed under our law apart from the statute itself for the parties to get a hearing on the assessment. Nor have they considered whether the hearing may be before a court as well as before the taxing authority. While these cases might seem to indicate that the requirements of due process were more stringent in North Carolina than in other jurisdictions, actually they tend to introduce obscurity into our body of law. It would be desirable for statutes to provide for notice and an opportunity for a hearing before the taxing authorities for they are the expert bodies which should make an initial decision after hearing. Where no such statutory provision is made, our court is not clear on whether notice and hearing provided by another statute, or required by court decision, as part of the process of judicial review, is sufficient.

KENNETH R. HOYLE.

[14] For case involving the same statute, see Kinston v. Wooten, 150 N. C. 295, 63 S. E. 1061 (1909); a similar statute, see Tarboro v. Staton, 156 N. C. 504, 72 S. E. 577 (1911).

[15] 188 N. C. 615, 125 S. E. 409 (1924).

[16] 210 N. C. 196, 185 S. E. 766 (1936).

**Declaratory Judgments—Requisites for Jurisdiction of Federal Question Cases—Suit by Alleged Patent Infringer**

Under the Federal Declaratory Judgment Act,[1] any court of the United States may declare the rights and other legal relations of any interested party seeking such declaration in a case of actual controversy within its jurisdiction. As a condition precedent to the use of this procedural device, the controversy must be one within the jurisdiction of the federal court.[2] Article III, Section 2 of the United States Constitution declares that this power shall extend to all cases ". . . arising under this Constitution, (or) the laws of the United States. . . ." Congress has declared that the district courts shall have original jurisdiction over these "federal question cases."[3]

The exercise of jurisdiction by the district courts over "federal question cases" is controlled by several well settled rules promulgated by the Supreme Court. First, the federal question must form an essential and original ingredient in such cases; i.e., it must appear that the federal right asserted may be defeated by one construction of the Constitution or laws of the United States and sustained by the opposite construction.[4] Second, not only must the federal right be an essential ingredient of the cause of action, but it must also be set out in the plaintiff's complaint.[5] The third rule qualifies the second in that the plaintiff's cause of action itself must present a federal question, unaided by allegations of anticipatory replies to probable defenses.[6] It will be noted that these rules restrict the jurisdictional limits of the federal courts and narrow the opportunities for entrance into them.

In *Skelly Oil Co. v. Phillips Petroleum Co.*,[7] M Pipe Line Company entered into a contract with P, prior to the construction of a natural gas pipe line, whereby the latter was to negotiate a series of contracts to secure an adequate reserve of gas. The Natural Gas Act

[1] 48 STAT. §955 (1934), 28 U. S. C. §2201 (1948).

[2] The operation of the Declaratory Judgment Act is procedural only and does not attempt to change the essential requisites for the exercise of federal jurisdiction. Colegrove v. Green, 328 U. S. 549 (1946); Great Lakes Dredge & Dock Co. v. Huffman, 319 U. S. 293 (1943); Aetna Life Ins. Co. v. Haworth, 300 U. S. 227 (1937); Ashwander v. T.V.A., 297 U. S. 288 (1935); Southern Pac. Co. v. McAdoo, 82 F. 2d 121 (9th Cir. 1936).

[3] 18 STAT. §470 (1875), 28 U. S. C. §1331 (1948). For historical discussion and development of these cases see: Bergman, *Reappraisal of Federal Question Jurisdiction*, 46 MICH. L. REV. 17 (1947); Chadbourn and Levin, *Original Jurisdiction of Federal Question*, 90 U. OF PA. L. REV. 639 (1942); Forrester, *Federal Question Jurisdiction and Section 5*, 18 TULANE L. REV. 263 (1943); Forrester, *The Nature of a Federal Question*, 16 TULANE L. REV. 362 (1942).

[4] Osborn v. Bank of the United States, 9 Wheat. 738 (U. S. 1824).

[5] Tenn. v. Union & Planters' Bank, 152 U. S. 454 (1894); Metcalf v. City of Watertown, 128 U. S. 586 (1888).

[6] Taylor v. Anderson, 234 U. S. 74 (1913); Louisville & Nashville R. R. v. Mottley, 211 U. S. 149 (1908). These rules were reiterated by Mr. Justice Cardozo in Gully v. First Nat. Bank, 299 U. S. 109 (1936).

[7] 70 Sup. Ct. 876 (1950).

prohibits the construction of such pipe lines unless a certificate of public convenience and necessity has been issued by the Federal Power Commission, and a prerequisite to the issuance of such a certificate is an adequate reserve of gas.[8] The contracts negotiated by P with the sellers all contained similar provisions allowing the sellers to terminate their obligations thereunder if such certificate had not been issued to M Company before a specific date. Notice of issuance of the certificate was released two days prior to the cancellation date, but the actual content of the order was not made public until the cancellation date. The sellers served notice of termination, claiming no certificate had been "issued" since issuance was conditional upon certain terms of the order.[9] Thereupon M Company and P brought suit against the sellers, seeking a declaratory judgment that the contracts were still in effect and binding upon the parties thereto. Jurisdiction was invoked on the ground that this was a controversy arising under a federal law because the Natural Gas Act and an order by the Federal Power Commission had to be constructed and interpreted. The lower court held that it had jurisdiction and granted the declaratory judgment.[10] The Supreme Court granted certiorari to determine whether this case was "within the jurisdiction" of the district court so as to enable it to render the declaratory relief sought. The Court, with Mr. Justice Frankfurter writing the majority opinion, held that "not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit."[11] Had the plaintiff sought damages or specific performance, he could have raised no federal question because such a suit would arise under the state law governing the contract sued upon. Likewise he could raise no federal question in a declaratory action on the contract since the contract itself is the basis of the suit, and not some right or immunity created by a federal law belonging to the plaintiff. Since there was no diversity and the matter in controversy arose under state law rather than under the laws of the United States, the Court concluded that the case was not originally within the jurisdiction of the district court and that court had no authority to render a declaratory judgment. Mr. Justice Frankfurter stated that the Declaratory Judgment Act was merely an enlargement of the remedies available in the federal courts; that it could only be used in a case of actutal controversy already within the jurisdiction of the federal court; and that

[8] 56 STAT. §83 (1942); 15 U. S. C. §717f (c) (1948).

[9] The issuance order was conditional upon M Company's obtaining approvals of operation from the State of Wisconsin, and the communities to be served therein, of its proposed financing by the S.E.C., and of its rate schedule. 70 Sup. Ct. 876, 878 (1950).

[10] 174 F. 2d 89 (10th Cir. 1949). The decision of the district court was not filed for publication.

[11] Quoting from Gully v. First Nat. Bank, 299 U. S. 109, 115 (1936).

jurisdictional requirements were not altered by the Act. He reviewed the three prerequisites to jurisdiction of "federal question cases" in coercive actions and held that these requirements must also be present in a complaint which seeks a declaratory judgment.[12] Thus, the result seems to be that the plaintiff in "federal question cases," whether seeking a declaratory or coercive judgment, must allege in his complaint as an essential element of his cause of action a federally protected right, which belongs to him and which is questioned, as a basis of jurisdiction. Neither the defendants' answer nor an anticipatory reply, asserted in the complaint, to a probable defense can aid in determining the jurisdictional question.

This decision clearly does not destroy all "federal question" jurisdiction in declaratory judgment proceedings. A plaintiff may still seek a declaratory judgment if he asserts in his complaint a federal right which is questioned and is essential to his cause of action.[13] It is rather in those cases in which the plaintiff has no such right, but in his complaint alleges, as a basis of federal jurisdiction, an anticipatory reply to some probable defense that this decision denies federal jurisdiction.[14] This seems a logical result since Congress, in creating this new remedy, stated that it may be used in those cases *within the jurisdiction* of the district court.[15] The language used by the Court in the principal case to defeat jurisdiction is by no means new to declaratory proceedings, as the lower federal courts have often adopted similar language in such proceedings.[16]

[12] "To sanction suits for declaratory relief as within the jurisdiction of the district court merely because, as in this case, artful pleading anticipates a defense based on federal law, would contravene the whole trend of jurisdictional legislation by Congress, disregard the effective functioning of the federal judicial system and distort the limited procedural purpose of the Declaratory Judgment Act." 70 Sup. Ct. 876, 880 (1950).

[13] Great Lakes Co. v. Huffman, 319 U. S. 293 (1942) (interstate commerce); Regents of N. M. College v. Albuquerque Broadcasting Co., 158 F. 2d 900 (10th Cir. 1947) (F.C.C.); Bradford v. City of Somerset, Ky., 138 F. 2d 308 (6th Cir. 1943) (right asserted under Civil Rights Act); Smith v. Am. Asiatic Underwriters, Federal, 127 F. 2d 754 (9th Cir. 1942) (China Trade Act); Fox v. 34 Hillside Realty Corp., 79 F. Supp. 832 (S. D. N. Y. 1948) (Rent Control Act; federal question raised, but action dismissed because less than $3000 involved); Wyoming v. Franke, 58 F. Supp. 890 (D. Wyo. 1945) (suit brought by a state); Sunshine Mining Co. v. Craver, 34 F. Supp. 274 (N. D. Idaho 1940) (F. L. S. A.); Dixon v. Cleveland, 31 F. Supp. 1010 (W. D. S. C. 1940) (National Bankruptcy Act).

[14] One writer has stated that this rule should not apply to declaratory actions. Note, 44 ILL. L. REV. 827, 831 (1950).

[15] Diggs v. Pa. Public Utility Comm., 180 F. 2d 623 (3rd Cir. 1950); West Publishing Co. v. McColgan, 138 F. 2d 320 (9th Cir. 1943); Hary v. United Elec. Coal Co., 8 F. Supp. 655 (E. D. Ill. 1934); BORCHARD, DECLARATORY JUDGMENTS 233 (2nd ed. 1941).

[16] Magic Foam Sales Corp. v. Mystic Foam Corp., 167 F. 2d 88 (6th Cir. 1948); Wells v. Universal Pictures Co., 166 F. 2d 690 (2nd Cir. 1948); Atlantic Meat Co. v. R.F.C., 166 F. 2d 51 (1st Cir. 1948); State Auto. Ins. Ass'n v. Parry, 123 F. 2d 243 (8th Cir. 1941); Love v. U. S., 108 F. 2d 43 (8th Cir.

Probably the greatest effect of this decision, if carried to its logical conclusion, will be upon declaratory actions commenced by an alleged infringer to have the defendant's patent declared invalid and not infringed upon by the plaintiff. Generally, in such cases, the defendant patent holder is disrupting the plaintiff's business by threatening the plaintiff with a patent infringement suit, and by writing the plaintiff's customers that the plaintiff is infringing his patent and that if they continue to deal with him, they will also be guilty of infringement. Before the passage of the Declaratory Judgment Act, the alleged infringer had no remedy in the federal courts, since he could assert no right or immunity, created by the laws of the United States, belonging to him.[17] But, since the passage of the Act in 1934, the lower federal courts have consistently held that such declaratory actions "arise under" the patent laws, and thus are within their jurisdiction, since an essential ingredient of the plaintiff's cause of action is the nonexistence of a federal right in the defendant.[18] The court of appeals in *Edelmann & Co. v. Triple-A Specialty Co.*,[19] recognizing that the owner of the patent might sue to enjoin infringement, stated that ". . . now the alleged infringer may sue. . . . It is of no moment, in the determination of the character of the relief sought, that the suit is brought by the alleged infringer instead of by the owner."[20] It is to be noted in these actions that the defendant's patent must be an essential element of the cause of action for jurisdiction to prevail; it is not sufficient that it be lurking in the background.[21]

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1939); McCarth v. Watt, 89 F. Supp. 841 (D. Mass. 1950); Money v. Wallin, 88 F. Supp. 980 (E. D. Pa. 1950); Ambassade Realty Corp. v. Winkler, 83 F. Supp. 227 (D. Mass. 1949); Minneapolis Grain Exchange v. Farmers Union Grain Terminal Ass'n, 75 F. Supp. 577 (D. Minn. 1947); Meredith v. Carter, 49 F. Supp. 899 (N. D. Ind. 1943); Carlson v. Betmar Hats, 47 F. Supp. 86 (S. D. N. Y. 1942); Los Angeles Soap Co. v. Rogan, 14 F. Supp. 112 (S. D. Cal. 1936).

[17] Am. Wells Works Co. v. Layne Co., 241 U. S. 257 (1916).

[18] Measurement Corp. v. Ferris Instru. Corp., 159 F. 2d 590 (3rd Cir. 1947); Grip Nut Co. v. Sharp, 124 F. 2d 814 (7th Cir. 1941); Chicago Metallic Mfg. Co. v. Edward Katzinger Co., 123 F. 2d 518 (7th Cir. 1941); Hook v. Hook & Ackerman, 89 F. Supp. 238 (W. D. Pa. 1950); Tuthill v. Wilsey, 85 F. Supp. 586 (N. D. Ill. 1949); Adorjan Newman Co. v. Richelieu Corp., 81 F. Supp. 763 (S. D. N. Y. 1948); Keyes Fibre Co. v. Chaplin Corp., 76 F. Supp. 981 (D. Me. 1947); Petesime Incubator Co. v. Bundy Incubator Co., 43 F. Supp. 446 (S. D. Ohio 1942); Ice Plan Equip. Co. v. Martocello, 43 F. Supp. 281 (E. D. Pa. 1941); Bakelite Corp. v. Lubri-Zol Development Corp., 34 F. Supp. 142 (D. Del. 1940); Mitchell & Weber v. Williamsbridge Mills, 14 F. Supp. 954 (S. D. N. Y. 1936), 45 YALE L. J. 1287; Lionel Corp. v. De Filippis, 11 F. Supp. 712 (E. D. N. Y. 1935); Zenie Bros. v. Miskend, 10 F. Supp. 779 (S. D. N. Y. 1935).

[19] 88 F. 2d 852 (7th Cir.), *cert. denied*, 300 U. S. 680 (1937).

[20] In only one case did a district court hold that this type case did not arise under the patent laws. International Harvest Hat Co. v. Caradine Hat Co., 17 F. Supp. 79 (E. D. Mo. 1935). The *Edelmann* case declined to follow this decision.

[21] Eckert v. Braun, 155 F. 2d 517 (7th Cir. 1946) (patent obtained from plaintiff by fraud); Karen Inc. v. Perlitch, 87 F. Supp. 784 (S. D. N. Y. 1949) (contract for royalties under a patent); Atlas Imperial Diesel Engine Co. v. Lanova

The principal case seems to exclude these declaratory actions by the alleged infringer from the district court's jurisdiction by stating that the plaintiff's claim itself must present a federal question unaided by anything alleged in anticipation of a defense that the defendant may set up. Certainly an alleged infringer can assert no claim which presents a federal question. Does this decision thus shut the doors of the federal courts to such actions and place the alleged infringer again in the position he occupied before the enactment of the Declaratory Judgment Act?

Assuming that it does, what relief would be obtainable in a state court by the alleged infringer? The district court in *Zenie Bros. v. Miskend*[22] discussed some of the remedies available. They are: (1) suit for unfair competition;[23] (2) petition to the Attorney General to bring suit in behalf of the United States to revoke the patent for fraud;[24] and (3) suit for damages to business caused by a threat to sue under the patent laws.[25] The court recognized that none of these remedies are adequate since they do not settle the fundamental rights of the parties or the validity of the defendant's patent.

One of the primary reasons for restricting the limits of federal jurisdiction in the ordinary situation is the fact that an adequate remedy lies in the state courts, and the federal courts do not wish to interfere with them. But here, there is no adequate state remedy, and if the federal courts deny relief, the alleged infringer has no adquate relief in any court and is powerless to prevent the destruction of his business. This factor seems sufficient to justify federal courts in retaining jurisdiction of this type suit. Other considerations bolster this conclusion. The intent of Congress was to create a haven in the federal courts for all cases which arise under the patent laws.[26] Writers are in accord that such controversies are within the jurisdiction of the federal courts.[27]

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Corp., 79 F. Supp. 1002 (D. Del. 1948) (contract in re patent); Bettis v. Paterson-Ballagh Corp., 16 F. Supp. 455 (S. D. Cal. 1936) (contract of assignment of patent).

[22] 10 F. Supp. 779, 782 (S. D. N. Y. 1935).

[23] This is available to plaintiff only if he can prove that the defendant's threats were made without the intent to follow them up with an infringment suit. Racine Paper Goods Co. v. Dittgen, 171 Fed. 631 (7th Cir. 1909); Adriance Platt & Co. v. Nat. Harrow Co., 121 Fed. 827 (2nd Cir. 1903); Emack v. Kane, 34 Fed. 46 (C. C. N. D. Ill. 1888).

[24] This it not a remedy of the plaintiff, and he has no way to compel such a suit. U. S. v. Am. Bell Telephone Co., 167 U. S. 224 (1896).

[25] Am. Wells Works Co. v. Layne Co., 241 U. S. 257 (1916).

[26] It was not the intention of Congress to permit patent owners in patent controversies to avoid the application of the declaratory judgment statute. Bakelite Corp. v. Lubri-Zol Development Corp., 34 F. Supp. 142 (D. Del. 1940). 36 STAT. §1092 (1911), 28 U. S. C. §1338 (1948).

[27] "The defendant has really raised the issue and the plaintiff seeks only formal adjudication. Any other view would be extraordinary." BORCHARD, DECLARATORY JUDGMENT 809 (2nd ed. 1941). ". . . the Act enables the plaintiff to state an

It may be noted that the Supreme Court in the principal case did not mention the problem, but it did cite with approval a note on the development of declaratory judgments, which, on the very page cited by the Court, approves of federal jurisdiction of a suit for declaration of non-infringement and invalidity of defendant's patent.[28] The Supreme Court has had previous opportunities to review these declaratory actions by the alleged infringer, but has denied such review.[29]

Although the language of the principal case seems to withdraw from federal jurisdiction declaratory actions brought by an alleged infringer, it is suggested that they should retain jurisdiction of such actions. A suit to have a patent declared invalid is one arising under the patent laws in substance just as much as the ordinary suit for infringement since the validity of the patent is the immediate as well as the ultimate issue in the case.[30] The inadequacy of state remedies, and other factors previously considered, would seem to be sufficient for the federal courts to make an exception of these suits,[31] and to retain jurisdiction over them, although logically they fall within the language of the principal case.

WILLIAM E. GREENE.

**Domestic Relations—Loss of Consortium from Injury to Spouse**

Plaintiff brought suit to recover damages for loss of consortium resulting from the negligent injury of her husband. The United States Court of Appeals for the District of Columbia circuit in *Hitaffer v. Argonne Co.*,[1] allowed recovery, declining to align itself with unanimous authority to the contrary in other jurisdictions.

original cause of action which is directly based on the invalidity of the defendant's patent. . . ." Note, 45 YALE L. J. 1287, 1289. MOORE, COMMENTARY ON THE U. S. JUDICIAL CODE 149 (1949). TOULMIN, HANDBOOK OF PATENTS 506 (1949).

[28] Note, *Developments in the Law—Declaratory Judgments—1941-1949*, 62 HARV. L. REV. 787, 803 (1949).

[29] Jungersen v. Ostby & Barton Co., 335 U. S. 560 (1948) (jurisdiction not mentioned); Crosley Corp. v. Westinghouse Elec. & Mfg. Co., 130 F. 2d 474 (3rd Cir.), *cert. denied*, 317 U. S. 681 (1942); Edelmann & Co. v. Triple-A Specialty Co., 88 F. 2d 852 (7th Cir.), *cert. denied*, 300 U. S. 680 (1937); Petesimo Incubator Co. v. Bundy Incubator Co., 43 F. Supp. 446 (S. D. Ohio 1942), *aff'd*, 135 F. 2d 580, *appeal dismissed*, 320 U. S. 805 (1943).

[30] Zenie Bros. v. Miskend, 10 F. Supp. 779 (S. D. N. Y. 1935).

[31] A well settled exception to the rule that the plaintiff must assert a federal right which belongs to him is an action to remove a cloud upon plaintiff's title where the alleged cloud arises from a federal grant to the defendant. ". . . the existence and invalidity of the instrument or record sought to be eliminated as a cloud are essential parts of the plaintiff's cause of action and must be alleged in the bill." Hopkins v. Walker, 244 U. S. 486, 490 (1917).

[1] Hitaffer v. Argonne Co., 183 F. 2d 811 (D. C. Cir.), *cert. denied*, 71 Sup. Ct. 80 (1950).

Consortium has been variously defined[2] and confusion has arisen as to its exact meaning. In general terms it is an interest of a spouse in that relationship which exists between husband and wife who have been united by some form of marriage which the law recognizes. Consortium originated as an exclusive right of the husband.[3] The husband's interest in the marital relationship was the first to receive recognition and was based on his wife's services to him as his servant.[4] Over a period of time this interest grew into a broader concept including services, society, and the right to the exclusive sexual intercourse of the wife. Modern law has added the fourth element of conjugal affection, but the right to exclusive sexual intercourse may be properly thought of as being embraced within the meaning of the term conjugal affection. As the concept expanded, attempts were made to divide the component parts into services on the one hand and "sentimental" elements on the other, and to permit recovery for the former but not for the latter.[5] But in recent years there has been a shift in emphasis from loss of services which earlier was indispensable, and now in general interference with any one of these elements will give rise to a cause of action in a jurisdiction recognizing the interest. The married women's acts confronted courts with additional problems as to whether consortium had become a mutual right inherent in the relationship of marriage or had been destroyed altogether. Further complicating the question, attempts have been made to distinguish between invasions of the consortium classed as negligent (personal injury to the other spouse which concomitantly injures the marital interest) and intentional or direct invasions (alienation of affections and criminal conversation). Consequently the concept has become clouded with uncertainty.[6]

At common law, an injury to the person of the wife gave rise to two causes of action: (1) that of the wife individually for personal loss and injuries, enforced through the husband; and (2) that of the husband for damages to his marital interests such as loss of his wife's services,

[2] "The word consortium includes aid, society, companionship, assistance, and affection, and the law does not attempt to separate these elements of damages." Little Rock Gas & Fuel Co. v. Coppege, 116 Ark. 334, 172 S. W. 885 (1915); "The right of the husband and wife respectively, to the conjugal fellowship, company, cooperation and aid of the other."—Bouvier; "The companionship or society of a wife."—Black.

[3] BL. COMM. 142.

[4] See Warren, *Husband's Right to Wife's Services*, 38 HARV. L. REV. 421 (1925).

[5] Blair v. Seitner Dry Goods Co., 184 Mich. 304, 151 N. W. 724 (1915) (recovery according to pecuniary value of lost services only allowed). Golden v. R. L. Greene Paper Co., 44 R. I. 231, 116 Atl. 579 (1922) (testimony by husband that he could no longer have sexual intercourse with wife as a result of injuries sustained by her ruled inadmissible).

[6] See Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1 (1923); Lippman, *The Breakdown of Consortium*, 30 COL. L. REV. 651 (1930).

society, and earnings; or for damages by reason of his being put to expense. The wife had no corresponding right to sue for injury to her husband.

At common law, the wife had no right of action for either the intentional or the negligent invasion of the consortium.[7] The reasons for this are not altogether clear, but essentially it would seem to have been the result of the merger of her legal identity into that of her husband to such an extent that the right was extinguished; or the fact that she could not sue for any purpose except through her husband. This latter procedural impediment would have led to considerable difficulty. In cases of injury to him, he had his own cause of action for personal injury and if the wife had been permitted to sue for loss of consortium as a result of this injury, the husband would have been joined as plaintiff, and would have collected the damages in both actions. It would have been simpler merely to have allowed the husband to collect in one action rather than two. Furthermore, in suits based on alienation of affections or criminal conversation, the wife would have been forced to sue through the husband, who was himself a wrongdoer, and he would have been entitled to the proceeds of the suit and would have thus profited by his own wrong. On the other hand, the husband had an unlimited right of action for either the intentional or negligent injury to his consortium[8] because he was entitled to his wife's services and earnings as a matter of proprietary right and could recover for their loss.

The effect of the married women's acts and other equalizing and enabling legislation has necessarily influenced courts in their attempts to settle the present status of the right of recovery for injury to the consortium. The authorities have taken divergent views. The great weight of authority allows the husband to recover for either the negligent or the intentional injury to the consortium,[9] but allows the wife to recover only for the intentional or legally malicious injury to the

[7] ". . . the inferior hath no kind of property in the company, care, or assistance of the superior, . . . and therefore can suffer no loss or injury." 3 BL. COMM. 142.

[8] *E.g.*, Lindsey v. Kindt, 221 Ala. 169, 128 So. 143 (1930) (provided husband not contributorily negligent); Union Pac. Ry. v. Jones, 21 Colo. 340, 40 Pac. 891 (1895); Newhirter v. Hatten, 42 Iowa 288, 20 Am. Rep. 618 (1875); Blair v. Chicago & A. Ry., 89 Mo. 334, 1 S. W. 367 (1886); Bedell v. Mandel, 108 N. J. L. 22, 155 Atl. 383 (Sup. Ct. 1931); Robinson v. Lockridge, 230 App. Div. 389, 244 N. Y. S. 663 (4th Dep't 1930); Cook v. Atlantic Coast Line Ry., 196 S. C. 230, 13 S. E. 2d 1 (1941).

[9] *E.g.*, Southern Ry. v. Crowder, 135 Ala. 417, 33 So. 335 (1902) (that wife must sue alone for personal injury does not prevent husband recovering for loss of consortium); Louisville & N. R. v. Kinman, 182 Ky. 597, 206 S. W. 880 (1918) (wife's right of action for injuries personal to her does not preclude husband's right for loss of consortium); Mageau v. Great Northern Ry., 103 Minn. 290, 115 N. W. 651 (1908); Omaha & R. V. Ry. v. Chollette, 41 Neb. 578, 59 N. W. 921 (1894); Booth v. Manchester St. Ry., 73 N. H. 529, 63 Atl. 578 (1906); Baltimore & O. Ry. v. Glenn, 66 Ohio St. 395, 64 N. E. 438 (1902); Elling v. Blake-McFall Co., 85 Ore. 91, 166 Pac. 57 (1917).

consortium.[10] Since the trend in legislation has been toward legal equality between husband and wife, it would seem to follow that if the husband is allowed the right, the wife ought also be allowed it. But courts which are not inclined to accept this view point out the following distinctions between the husband and wife which were not altered by the married women's statutes: the husband is still the head of the household and represents its interests; he has the legal duty to support his wife and children; he still has a limited though substantial right to his wife's services; and she is entitled to his support and will profit indirectly by any recovery he may have. The married women's acts are strictly construed as being in derogation of the common law; and since the wife did not have the right at common law and since it has not been conferred upon her by statute, she does not now have the right. Courts which emphasize the service element of consortium point out that the wife still has no right to her husband's services.

Other courts follow the same reasoning as to the wife's right, but in deference to the intent of the legislature to put both husband and wife on an equal basis, now deny the husband's right for negligent injury also,[11] upon the premise that his common law right was based upon loss of services, and while the other elements of consortium might be considered in aggravation of damages, standing alone they do not constitute a cause of action. Therefore, since the married women's acts secure to the wife the right to her earnings from services outside the household or business of the husband, the true basis of his former right is now removed.

The majority of courts, however, which allow the husband to recover take two approaches: (1) the theory that loss of services is not the essential element of consortium and the husband can recover whether the invasion involved one or the other elements because the action itself was *per quod consortium amisit*, not *per quod servitum*; (2) even if loss of services were considered essential, the husband is still entitled to his wife's services rendered in his household or business, just as she is entitled to his support, and since the enabling and equalizing statutes do not deal with the remedies of which the husband may avail himself, he has all the remedy he ever had, in so far as his right still exists.[12]

In North Carolina, the Constitution of 1868 and subsequent statutes[13] wiped away the conception of ownership of the wife by the

[10] Emerson v. Taylor, 133 Md. 192, 104 Atl. 538 (1918).

[11] Marri v. Stamford St. Ry., 84 Conn. 9, 78 Atl. 582 (1911); Whitcomb v. New York, etc. Ry., 215 Mass. 440, 102 N. E. 663 (1913); Blair v. Seitner Dry Goods Co., 184 Mich. 304, 151 N. W. 724 (1915).

[12] Guevin v. Manchester St. Ry., 78 N. H. 289, 99 Atl. 298 (1916).

[13] N. C. CONST. Art. X, §6.

N. C. GEN. STAT. §52-1 (1943): "The real and personal property of any female in this state, acquired before marriage, and all property, real and personal, to

husband. They provided that the wife could own real and personal property; that she was entitled to earnings from her services; that damages for personal injuries belonged to her; and that damages for torts against her could be recovered by her suing alone.[14] Therefore the husband cannot sue to recover damages for torts committed on the wife, nor can the wife sue for damages for torts committed on the husband.

The Supreme Court of North Carolina has furnished some landmark decisions on this question. Three cases[15] recognized the common law right of the husband to recover even though based on negligence and the implication of these cases seems to be that injury to the non-service elements of consortium should be recognized as giving rise to a cause of action. It is significant that one of these[16] was decided after the 1913 statute (N. C. GEN. STAT. §52-10) to which no reference was made. And in an epic opinion written by Chief Justice Clark in *Hipp v. Dupont*,[17] the first decision of its kind to be reported, the wife recovered damages for loss of consortium resulting from the negligent injury of her husband. The important distinction was made between recovery by one spouse for torts committed on the other, and recovery by either spouse for injury to the consortium arising out of this tortious injury. The cause of action was not for injury to the husband, but for injury to the wife which she suffered as a member of the marital union and as a result of the injury received by the husband. It was said that the wife sustained damages which, though flowing from the injury to her husband, are entirely separate and distinct, personal and direct, and not remote or consequential, arising out of the nature of the mar-

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which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations or engagements of her husband, and may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried."

[14] 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."

[15] Bailey v. Long, 172 N. C. 661, 90 S. E. 809 (1916) (wife contracted pneumonia and died due to negligence of defendant, husband recovered for expenses, mental sufferings and injury to his feelings in witnessing wife's suffering, ". . . and in the act and article of death resulting therefrom."); Kimberly v. Howland, 143 N. C. 399, 55 S. E. 778 (1906). (If injury to wife is such that the husband receives a separate loss or damage, as where he is put to expense, *or* is deprived of the society or the services of his wife, he is entitled to recover); Holleman v. Harward, 119 N. C. 150, 25 S. E. 972 (1896) (defendants, druggists, sold laudanum to wife, knowing that she was using it as a beverage, over the warnings and protests of the husband, as a result of which she became a mental and physical wreck, causing loss to husband of her companionship and services; *held*, husband may recover).

[16] Bailey v. Long, 172 N. C. 661, 90 S. E. 809 (1916).

[17] Hipp v. Dupont, 182 N. C. 9, 108 S. E. 318 (1921).

riage relationship. They were damages for which the husband could not recover.

Three years later, after the death of Chief Justice Clark, and with two new justices on the court, the question was faced again in a case identical in all important particulars with the *Hipp* case. Yet recovery unfortunately was denied in *Hinnant v. Tidewater Power Co.*[18] The court held that under the doctrine of marital equality, either husband or wife may sue only for loss of consortium due to direct and intentional invasion. It is not made clear why this was thought to be so, except that the court felt that the husband had been deprived by statute of his common law right, presumably the right arising from the negligent injury alone. As to recovery for loss of consortium by the wife, the *Hipp* case was overruled. The *Hipp* case distinction as to the nature of the injury involved was not dealt with; the court refusing to recognize that loss of consortium is a direct injury to either spouse. In the latest North Carolina decision[19] it was held that N. C. GEN. STAT. §52-10 had the effect of depriving the husband of his common law cause of action for loss of the consortium due to negligent injury to the wife. This equalizes the rights of the spouses, the wife having been denied an action in the *Hinnant* case.[20]

The *Hitaffer* case asserts that the separation of consortium into services and companionship and the emphasis upon services, which some jurisdictions have seized upon to deny recovery, is a result of redundant common law pleading rather than conscious, reasoned division; the separation being without precedent in common law decisions. It discounted the reasoning of courts which hold that the sentimental or non-service elements (essentially the only ones remaining after the married women's acts) are too indirect and consequential to be compensable under the law of damages in negligence cases, pointing out that this reasoning is not followed where the husband is allowed the right of action for loss of consortium, or in actions for alienation of affections and criminal conversation where loss of services is not involved.

Two views can be fairly taken on this question. Either both husband and wife must be denied the action on the grounds that there is no such protectable interest as consortium, or the interest must be recognized as being protectable and *mutual*, allowing both the cause of action.

MARVIN P. HOGAN.

[18] 189 N. C. 120, 126 S. E. 307 (1924).

[19] Helmstetler v. Duke Power Co., 224 N. C. 821, 32 S. E. 2d 611 (1945) (the court regarded the statute as controlling, yet cited Bailey v. Long, 172 N. C. 661, 90 S. E. 809 (1916) which was decided after the statute was passed).

[20] 189 N. C. 120, 126 S. E. 307 (1924). The *Hipp* case was cited only for the proposition that "the two are on a parity in respect to such suits" (p. 825).

**Habeus Corpus—Right of State Prisoner to Seek Writ in Federal Courts**

When a North Carolina prisoner, during the course of his trial, raises a constitutional question based on denial of due process, it is well established that this question may be presented to the state supreme court on appeal.[1] Upon failure to raise the question during the trial, he may, by timely motion, move for a new trial[2] at which time the question may be raised. Only until recently, however, was there a "judicial intimation" of the procedure which he should follow once he failed to make such timely motion. This suggestion by the court was to petition for a writ of error *coram nobis*.[3] The uncertainty encompassing the propriety of this petition has since been removed,[4] and an old common law writ of procedure has been revived, through which such questions may now reach the state's highest court. But if relief is denied there, then what?

It is settled law that state prisoners must exhaust their state remedies before petitioning the federal courts for a writ of habeas corpus, based upon a question of due process; and where more than one procedural remedy is available in the state court, only one need be exhausted before relief is sought in the federal courts.[5] What constitutes an exhaustion of one's state remedies, however, has not been so clear.

In Ex parte *Hawk*[6] it was held that the state remedy included an application for a writ of certiorari to the Supreme Court of the United States, and that *ordinarily* a petition for a writ of habeas corpus would not be entertained by the lower federal courts until all the state remedies had been exhausted. The Judicial Conference of Senior Circuit Judges later proposed a statute, which since has been enacted into law,[7] in which the Conference intended to incorporate this doctrine.[8] Actually the Conference intended that the statute should close the doors of the

[1] N. C. GEN. STAT. §15-180 (1943).
[2] N. C. GEN. STAT. §§15-174, 1-207 (1943).
[3] *In re* Taylor, 229 N. C. 297, 49 S. E. 2d 749 (1948), Note, 27 N. C. L. REV. 254 (1949).
[4] State v. Daniels, 231 N. C. 17, 56 S. E. 2d 2 (1949) (application must be made to the supreme court for permission to apply for writ in the superior court in which case was tried); State v. Daniels, 231 N. C. 341, 56 S. E. 2d 646 (1949) (petition must present prima facie substantial merit sufficient to bring it within purview of writ); State v. Daniels, 232 N. C. 196, 59 S. E. 2d 430 (1950) (petition must be based on matters "extraneous to the record").
[5] Wade v. Mayo, 334 U. S. 672 (1947); see Application of Middlebrooks, 88 F. Supp. 943 (S. D. Cal. 1950) (where prisoner is in custody of one state for extradition to another, he need exhaust only the remedies of one state).
[6] 321 U. S. 114 (1944); *accord*, White v. Ragen, 324 U. S. 760 (1945).
[7] 62 STAT. 967 (1948), 28 U. S. C. §2254 (Supp. 1949) (Reviser's note—"This new section is declaratory of existing law as affirmed by the Supreme Court.").
[8] See Parker, *Limiting the Abuse of Habeas Corpus*, 8 F. R. D. 171, 177 (1948) ("One of the incidents of the state remedy is right to apply to the Supreme Court for certiorari."); *accord*, Holiday v. Maryland, 177 F. 2d 844 (4th Cir. 1949).

lower federal courts in all cases to state prisoners petitioning for a writ of habeas corpus based on denial of due process,[9] until the state remedies had been exhausted,[10] except in cases where no adequate state remedy was available. Eleven days prior to the passage of this statute the Court, in *Wade v. Mayo*,[11] handed down a decision contrary to its holding in Ex parte *Hawk*, indicating that a petition for certiorari from the judgment in the state court would no longer be a prerequisite to the filing of an application for habeas corpus in the federal district court.[12] But recently in *Darr v. Burford*,[13] the Court, when faced with the new statute for the first time, interpreted it as requiring an application for certiorari to the Supreme Court before a prisoner may petition a lower federal court,[14] except in cases of "exceptional circumstances."[15] Although *Wade v. Mayo* was not overruled, the majority opinion made it clear that any deviation in the *Wade* case from the now established rule was to be abandoned.

Thus it seems that a state prisoner seeking a writ of habeas corpus in the federal courts, must first petition the Supreme Court for a writ of certiorari.[15a] But where does the prisoner stand when the Supreme

[9] 28 U. S. C. C. S. 1684 (1948); see Parker, *supra* note 7, at 178 (". . . there should be no more cases where proceedings of state courts, affirmed by the highest courts of the state, with denial of certiorari by the Supreme Court of the United States, will be reviewed by federal circuit or district judges.").

[10] 62 STAT. 967 (1948), 28 U. S. C. §2254 (Supp. 1949) provides that a prisoner "shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented."

[11] 334 U. S. 672 (1948).

[12] Wade v. Mayo, 334 U. S. 672, 681 (1948) ("Where it is apparent or even possible that such [denial] would be the disposition of a petition for certiorari from the state court's judgment, failure to file a petition should not prejudice the right to file a habeas corpus application in a district court."); *accord*, Miller v. Hudspeth, 176 F. 2d 111 (10th Cir. 1949) (The court here says that an analysis of *Wade v. Mayo* leads to the conclusion that a petition for writ of certiorari to the Supreme Court is not part of the state remedy and that 28 U. S. C. §2254 does not contain anything which would require a different decision.).

[13] 70 Sup. Ct. 587 (1950).

[14] Darr v. Burford, 70 Sup. Ct. 587, 594 (1950). The court says that it is immaterial as a matter of terminology whether review in the Supreme Court is considered a part of the state judicial process or a part of the federal procedure.

[15] See White v. Ragen, 324 U. S. 760 (1945) (conviction obtained by false testimony, and prisoner denied assistance of counsel); Chambers v. Florida, 309 U. S. 227 (1940) (confession obtained by coercion); Brown v. Mississippi, 297 U. S. 278 (1936) (confession obtained by coercion and brutality); Moore v. Dempsey, 261 U. S. 86 (1923) (trial conducted under influence of mob violence); Sharpe v. Kentucky, 135 F. 2d 974 (6th Cir. 1943) (death sentence had been imposed); Murphy v. Murphy, 108 F. 2d 861 (2nd Cir. 1940) (Court says, " 'Exceptional circumstances of peculiar urgency' alone can justify intervention" of a federal district court.); *but cf.* Frank v. Mangum, 237 U. S. 309 (1915) (trial conducted under influence of mob violence, but second trial conducted under different conditions and circumstances).

[15a] Of course the prisoner may appeal as a matter of right where the question involves the validity of a treaty or statute of the United States and the decision is against its validity, or where the question involves the validity of a state statute on the grounds that it is repugnant to the Constitution, treaties or laws of the United States and the decision is in favor of its validity. 62 STAT. 929 (1948), 28 U. S. C. §1257 (Supp. 1949).

Court denies his writ? In *Darr v. Burford* the court refused to answer this question.[16]

It is universally recognized that res judicata does not apply to applications for writs of habeas corpus;[17] yet, upon filing a petition in the district court for a writ of habeas corpus the record undoubtedly will reveal the prior denial of certiorari by the Supreme Court, and the district court might well refuse to entertain the petition in the absence of a new basis for relief. Should the petitioner find additional grounds for his claim, it would then be mandatory that he start over in the state courts, for he would not have exhausted his state remedies.[18] This procedural circle would therefore in effect, negative the habeas corpus jurisdiction which the federal courts have had since 1867,[19] and leave the prisoner in somewhat of a dilemma.

The argument favoring inclusion of a petition for a writ of certiorari from the final state judgment in the "state remedy" is based on the preservation and amelioration of the doctrine of comity, which, as between the state and federal courts, has become "a principle of right and of law."[20] Those who would abolish certiorari as part of the "state remedy," including the dissenters in *Darr v. Burford*, contend that the final result of a denial of certiorari by the Supreme Court must be one of two unsatisfactory alternatives: either (1) the Supreme Court must consider the case as if it had granted the request for certiorari, and its decision be based on the merits of the case; or (2) the denial, as in other cases, would have no legal significance.[21] It is readily apparent that under the first alternative the work load of the Supreme Court would become so burdensome that this alone makes such a procedure prohibitive.[22] Whereas, under the second alternative the result would

[16] Darr v. Burford, 70 Sup. Ct. 587, 595 (1950).

[17] Darr v. Burford, 70 Sup. Ct. 587 (1950); Salinger v. Loisel, 265 U. S. 224 (1923); Rosso v. Aderhold, 67 F. 2d 315 (5th Cir. 1933); Carter v. McClaughry, 105 F. 614 (C. C. D. Ka. 1900).

[18] Stonebreaker v. Smyth, 163 F. 2d 498 (4th Cir. 1947), Note, 26 N. C. L. REV. 217 (1948).

[19] 14 STAT. 385 c. XXVIII (1867), now incorporated into 62 STAT. 964 (1948), 28 U. S. C. §2241 (Supp. 1949), as amended, 63 STAT. 105 (1949), 28 U. S. C. §2241 (Supp. 1950).

[20] See Covell v. Heyman, 111 U. S. 176, 182 (1884).

[21] Darr v. Burford, 70 Sup. Ct. 587, 607 (1950) (dissenting opinion).

[22] See Parker, *supra* note 7, at 172. "Statistics compiled by the Administrative Office of the United States Courts show that in the years 1943, 1944, and 1945, there were filed in the lower federal courts 1556 petitions by federal prisoners and 1570 by state prisoners." 18 U. S. L. WEEK 3019 (July 5, 1949) and 3345 (June 20, 1950) gives the following statistical summary of the Supreme Court's work for the period 1946-1949:

| October Term | 1946 | 1947 | 1948 | 1949 |
|---|---|---|---|---|
| Total cases | 1524 | 891 | 903 | 880 |
| Cases disposed of | 1366 | 772 | 748 | 757 |
| Cases remaining | 158 | 119 | 155 | 123 |

seem to amount to an unnecessary procedural delay caused by an absurd prerequisite.

Yet, perhaps it is best that the Supreme Court be given the opportunity in every case to review the record on these important questions of due process which so often involve fundamental rights. But, since a denial of certiorari simply means that fewer than four members of the court deemed it desirable to review a decision of a lower court, and in no way is an adjudication on the merits,[23] the discretionary power of the lower federal courts to entertain petitions for writs of habeas corpus should not be disturbed. By keeping the doors of the lower federal courts open the chances of injustice are thereby reduced to a minimum. Therefore, if a state prisoner believes his case still has merit after certiorari has been denied, he should not hestitate to petition the lower federal courts for a writ of habeas corpus. But, if in the meantime, new evidence has been discovered, then it would be advisable for him to first seek a determination of the question in the state court as suggested in *Stonebreaker v. Smyth.*[24]

Thus, it would seem, that if this procedure is left open for a state prisoner to follow, not only will the doctrine of comity be promoted, but also the benefits of the "great writ" will be preserved.

WILLIAM L. MILLS, JR.

## Limitation of Actions—Effect of Part Payment of Principal or Interest on Non-Paying Obligor

In North Carolina a part payment by one of a number jointly or jointly and severally bound, will start the statute of limitations running anew as to all others of the same class,[1] but if the payment is made after the remedy is barred it will not bind those not making the pay-

[23] Agoston v. Pennsylvania, 71 Sup. Ct. 9 (1950); Maryland v. Baltimore Radio Show, 338 U. S. 912, 917 (1950) (denial of certiorari means "that fewer than four members of the Court deemed it desirable to review a decision of the lower court as a matter 'of sound judicial discretion.' . . . The court has said this again, and again; again and again the admonition has to be repeated.").

[24] 163 F. 2d 498 (4th Cir. 1947).

[1] Davis v. Alexander, 207 N. C. 417, 177 S. E. 417 (1934) (payment by maker); Dillard v. Farmer's Mercantile Co., 190 N. C. 225, 129 S. E. 598 (1925) (part payment by maker); Barber v. Absher Co., 175 N. C. 602, 96 S. E. 43 (1918) (part payment by maker); Houser v. Fayssoux, 168 N. C. 1, 83 S. E. 692 (1914) (part payment by principal); Garrett v. Reeves, 125 N. C. 529, 34 S. E. 636 (1899) (part payment by principal); Copeland v. Collins, 122 N. C. 619, 30 S. E. 315 (1898) (part payment by maker); Le Duc v. Butler, 112 N. C. 458, 17 S. E. 428 (1893); Moore v. Beaman, 111 N. C. 328, 16 S. E. 177 (1892) (part payment by one obligor); Moore v. Goodwin, 109 N. C. 218, 13 S. E. 772 (1891) (part payment by principal); Green v. Greensboro College, 83 N. C. 449 (1880) (payment of interest by principal). See also MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE §134 (1929).

ment.[2] The same rule applies to sureties on a promissory note or bond, since, as between the maker and the surety, and as between co-sureties, there is said to be a community of interest and a common obligation, and a part payment by either maker or surety before the statute has run will toll the statute as to the others not making the payment.[3] The reasoning of the court seems to be that the surety is primarily liable along with the maker of the instrument and is, therefore, included within the rule applicable to joint makers.[4]

One exception to the rule that a part payment by the maker will bind the surety is the liability of a surety on a guardian's bond. The court has held that the liability of such a surety is a conditional liability and secondary, dependent upon the failure of the guardian to pay the damages caused by his breach. The payment of principal or interest renews the obligation of the guardian on the amount due his ward and sets the statute running over as to the guardian but not as to the surety.[5] The reason for the exception is not clear, since the liability of *any* surety is dependent upon the principal's failure to pay.

In an early decision it was held that a payment by a principal before the statute had run operated as a renewal as to indorsers,[6] but this is no longer the rule as to indorsers of a promissory note or bond. The court has since held that the maker of a note and an indorser are not in the same class, and a payment by the maker before the statute has run will not start the statute running anew as to accommodation in-

[2] Davis v. Alexander, 207 N. C. 417, 177 S. E. 417 (1934); Dillard v. Farmer's Mercantile Co., 190 N. C. 225, 129 S. E. 598 (1925). See also N. C. GEN. STAT. §1-27 (1943).

[3] Dillard v. Farmer's Mercantile Co., 190 N. C. 225, 129 S. E. 598 (1925) (signatures appeared on the back of the note, but the court found that the signers intended to be bound as sureties). A part payment by the surety binds the principal. Copeland v. Collins, 122 N. C. 618, 30 S. E. 315 (1898).

[4] "A surety is an original maker, and becomes primarily and absolutely liable, as much so as the maker. . . ." Rouse v. Wooten, 140 N. C. 557, 560, 53 S. E. 430, 432 (1906). See also Tar Heel Bond Co. v. Krider, 218 N. C. 361, 11 S. E. 2d 291 (1940); Dry v. Reynolds, 205 N. C. 571, 172 S. E. 351 (1933); Wachovia Bank and Trust Co. v. Clifton, 203 N. C. 483, 166 S. E. 334 (1932); Broadway Bank v. Noble, 203 N. C. 300, 165 S. E. 722 (1932); Raleigh Bank and Trust Co. v. York, 199 N. C. 624, 155 S. E. 263 (1930); Barber v. Absher Co., 175 N. C. 602, 96 S. E. 43 (1918); Roberson-Ruffin Co. v. Spain, 173 N. C. 23, 91 S. E. 361 (1917).

[5] Finn v. Fountain, 205 N. C. 217, 171 S. E. 85 (1933). See also Copley v. Scarlet, 214 N. C. 31, 197 S. E. 623 (1938).

An action must be brought against the surety on a guardian's bond within three years after the breach thereof. N. C. GEN. STAT. §1-52(6) (1943).

There seem to be no North Carolina cases on part payment of principal or interest of executor's, administrator's or collector's bonds, but it is suggested that the same rule should apply to sureties on these bonds since the language of the statute providing for a guardian's bond, N. C. GEN. STAT. §33-13 (1943), and of the statute providing for executor's, administrator's and collector's bonds, N. C. GEN. STAT. §28-34 (1943), is practically identical and since N. C. GEN. STAT. §1-52(6) (1943) applies to sureties of executors, administrators, collectors and guardians.

[6] Garrett v. Reeves, 125 N. C. 529, 34 S. E. 636 (1899).

dorsers[7] or payee indorsers,[8] since they are secondarily liable and in a different class. The same rule applies to a drawer when a drawee has made a payment on the bill. The drawee and the drawer are in a different class since the "drawer's liability is a conditional liability, dependent upon presentation to the drawee and notice of his failure [to honor] to the drawer."[9]

There seems to be one exception to the rule that a payment by the maker will not stop the running of the statute as to indorsers. Where there is an agreement that the parties remain bound notwithstanding an extension of time granted the maker and there were payments of interest, by the maker, the statute does not begin to run in favor of indorsers until the maturity date under the last extension agreement.[10]

The rule that a part payment by the maker will not stop the running of the statute as to indorsers applies to guarantors. The court has held that a guarantor and a maker are not in the same class since the contract of guaranty is collateral to the main debt and a payment by the maker is a payment on the note, evidencing the principal debt, and not upon the contract of guaranty which determines the liability of guarantors.[11]

In regard to instruments under seal, the ten year statute of limitations applies as against the principal thereto.[12] The court has held

[7] Barber v. Absher Co., 175 N. C. 602, 96 S. E. 43 (1918); Houser v. Fayssoux, 168 N. C. 1, 83 S. E. 692 (1914).

[8] Le Duc v. Butler, 112 N. C. 458, 17 S. E. 428 (1893).

[9] "To give this effect [payment by one binds all in the same class] to the act of one, there must be a community of interest and a common obligation among them. They must be obligors on a bond, makers of a promissory note, drawers or acceptors of a bill, or joint indorsers of either. Thus if one of several joint acceptors promises to pay as directed in the statute, or makes a payment, his associate acceptors are bound by what he does; but the drawers are not because there is no such common interest and responsibility as gives legal force to the act." Wood v. Barber, 90 N. C. 76, 80 (1883).

[10] Nance v. Hulin, 192 N. C. 665, 135 S. E. 774 (1926). See also The Fidelity Bank v. Hessee, 207 N. C. 71, 175 S. E. 826 (1934).

To make indorsers sureties, appropriate words must appear upon the instrument itself or in some writing attached thereto. A resolution passed by a board of directors which stated that as between the maker and the indorsers all would be jointly and severally liable for the payment of the note was held not to be sufficient to make indorsers primarily liable along with the maker. Waddell v. Hood, 207 N. C. 250, 176 S. E. 558 (1934). See also Meyers Co. v. Battle, 170 N. C. 168, 86 S. E. 1034 (1915); Houser v. Fayssoux, 168 N. C. 1, 83 S. E. 692 (1914); Perry v. Taylor, 148 N. C. 362, 62 S. E. 423 (1908).

N. C. GEN. STAT. §25-69 (1943) provides that a person placing his signature upon an instrument, otherwise than a maker, drawer, or acceptor, is deemed to be an indorser, unless he clearly indicates by *appropriate words* his intention to be bound in some other capacity. Appropriate words must appear upon the instrument itself or in some writing attached thereto. Waddell v. Hood, 207 N. C. 250, 176 S. E. 558 (1934). Of course, this does not prevent an indorser from showing that his indorsement was an accommodation indorsement or from showing that the relation of indorsers as between themselves for purposes of contribution. Gillam v. Walker, 189 N. C. 189, 126 S. E. 424 (1925).

[11] Wachovia Bank and Trust Co. v. Clifton, 203 N. C. 483, 166 S. E. 334 (1930). See also cases cited in footnote 4.

[12] N. C. GEN. STAT. §1-47(2) (1943).

that this statute does not apply to a surety on a sealed instrument, even though his seal is affixed,[13] since the use of the word "principal" and the omission of the word "surety" clearly indicates this to be the legislative intention,[14] therefore, the three year period applies to a surety. This raises the problem whether or not a principal and a surety are in the same class, and if they are, will a payment by the principal bind the surety. If a payment is made before the three year limitation period has run in favor of the surety, such payment will bind the surety.[15] This rule is applied without discussing whether the principal and the surety, in this situation, are in the same class. It would seem that they are not, since the limitation period is different as to each. In one case, payments made by the principal after the three year statute had run in favor of the surety did not revive the statute as to the surety, although the remedy was not barred as against the principal—the ten year statute being applicable to him.[16] It should be pointed out that as to a guaranty under seal, the contract of a guarantor is his own separate contract and he is, therefore, a principal to the guaranty—a sealed instrument—and this being a separate contract under seal, the suit against the guarantor is not barred until ten years after the cause of action accrued.[17] The problems which arise when there is a surety on a sealed instruments do not arise when the guaranty is under seal, since a payment by the principal will not stop the running of the statute as to guarantors.

The North Carolina rule follows the old English rule that a payment of principal or interest by one of two or more joint or joint and several debtors will make a new running point for the statute as to all the other debtors.[18] The only apparent difference is that the English rule was based upon the theory that a payment by one was a payment for all, the one acting as agent for the others, while the North Carolina rule is based on the theory that there is a community of interest and a

[13] Barnes v. Crawford, 201 N. C. 434, 160 S. E. 464 (1931); Redmond v. Pippen, 113 N. C. 90, 18 S. E. 50 (1893).

The three-year statute of limitations applies to accommodation indorsers even though their signatures are under seal. Howard v. White, 215 N. C. 130, 1 S. E. 2d 356 (1939).

[14] Barnes v. Crawford, 210 N. C. 434, 160 S. E. 494 (1931).

N. C. GEN. STAT. §1-52(1) (1943) is applicable to sureties and an action against them is limited to three years.

[15] Davis v. Alexander, 207 N. C. 417, 177 S. E. 417 (1934); Redmond v. Pippen, 113 N. C. 90, 18 S. E. 50 (1893).

[16] Davis v. Alexander, 207 N. C. 417, 177 S. E. 417 (1934).

If a person whose signature appears on the face of a sealed instrument is sued as principal thereto, as between the payee and the signers, he may prove by parol evidence that to the knowledge of the payee he signed the instrument as surety and not as maker and as to him the three-year statute applies. Davis v. Alexander, *supra*.

[17] Coleman v. Fuller, 105 N. C. 328, 11 S. E. 175 (1890).

[18] Whitcomb v. Whiting, 2 Doug. K. B. 652, 99 Eng. Reprint 413 (1781).

common obligation among them.[19] The English courts seem to have recognized the hardship of the rule and applied it with considerable reluctance,[20] until it was abolished by statute in 1856.[21]

The majority of American jurisdictions have repudiated the old English rule, without the aid of statutes, and hold that a part payment of principal or interest by one of two or more joint or joint and several debtors sets the statute running anew only as to the person making the payment.[22] Some states have statutes expressly providing that one joint debtor shall not lose the benefit of the statute of limitations by reason of a part payment by a co-obligor.[23] A few states still apply the old English rule.[24] Most of the courts of this country, before abolishing the rule entirely, made a distinction between cases where the statute had fully run and where it had partially run.[25] North Carolina, by statute, has preserved this distinction. The statute provides that no act, admission, or acknowledgment by one of the makers of a promissory note or bond *after* the statute has barred the same, is evidence to repel the statute except as against the maker doing the act or making the admission.[26]

It is hard to understand how, in any case, the unauthorized payment by one party, though he be jointly or jointly and severally bound, can

[19] Dillard v. Farmer's Mercantile Co., 190 N. C. 225, 129 S. E. 598 (1925); Wood v. Barber, 90 N. C. 76 (1883).

[20] Atkins v. Tredgold, 2 Barn. & C. 23, 107 Eng. Reprint 291 (1823); Brandran v. Wharton, 1 Barn. & Ald. 463, 106 Eng. Reprint 170 (1818).

[21] MERCANTILE LAW AMENDMENT ACT, 19 & 20 Victoria, c. 97, §14 (1856).

[22] Mohas v. Kasiska, 47 Idaho 179, 276 Pac. 315 (1929) (the court had before it a statute similar to N. C. GEN. STAT. §1-26 (1943); held, payment of interest or principal is equivalent to a new promise in writing duly signed and the written promise binds only the person signing it, therefore payment necessarily binds only the person who makes it); Northwest Thresher Co. v. Dahltorp, 104 Minn. 130, 116 N. W. 106 (1908) (guarantors, sureties, joint makers); Monidah Trust Co. v. Kemper, 44 Mont. 1, 118 Pac. 811 (1911) (joint obligors, joint and several obligors, sureties; held, the effect of part payment is no greater than a written acknowledgment and a written acknowledgment could only bind the party making it); Hall v. Rogers, 113 Neb. 290, 202 N. W. 908 (1925) (surety, joint obligors); White v. Pittsburgh Vein Coal Co., 266 Pa. 145, 109 Atl. 873 (1920) (joint debtors); Peoples Bank v. Hastings, 263 Pa. 260, 106 Atl. 308 (1919) (surety); Butts v. Georgetown Mutual Bldg., 142 S. C. 353, 140 S. E. 700 (1927) (joint debtors).

[23] COLO. STAT. c. 102, §§25, 26 (1935); ME. REV. STAT. c. 99, §108 (1944); MASS. ANNO. LAWS c. 260, §§14, 15 (1933); MICH. STAT. ANNO. c. 27, §§617, 618 (1935); VT. STAT. c. 82, §§1708, 1709 (1947).

[24] Meisner v. Pattee, 170 Ark. 217, 279 S. W. 787 (1926) (payment of interest by joint maker); Hunter v. Robertson, 30 Ga. 479 (1860); Hooper v. Hooper, 81 Md. 155, 31 Atl. 508 (1895) (joint makers); Highland Invest. Co. v. Kansas City Computing Scales Co., 277 Mo. 365, 209 S. W. 895 (1919) (payment of interest by principal); Smith v. Dowden, 92 N. J. L. 317, 105 Atl. 720 (1919); Mason v. Kilcourse, 71 N. J. L. 472, 59 Atl. 21 (1904); Ford v. Schall, 110 Ore. 21, 221 Pac. 1052 (1924) (payment of interest by joint maker); Woonsocket Institution for Savings v. Ballou, 16 R. I. 351, 16 Atl. 144 (1888) (payment by maker).

[25] 1 WILLISTON ON CONTRACTS §193 (1936).

[26] N. C. GEN. STAT. §1-27 (1943).

be admitted to enlarge or extend the obligation of another jointly or jointly and severally bound. Logically and upon principle there can be but one answer. No such authorization or agency exists, or can be implied, from the joint contract as will authorize one to act for and bind the others so as to renew or extend their liability, where the relationship is merely that of joint debtors. If resort were had to principle instead of precedent it is difficult to see how the unauthorized payment by one could bind his co-debtor.[27] It also appears that there is no practical reason why a part payment by the principal should toll the statute as to a surety but not as to a guarantor, since both the surety and the guarantor, in the real sense, serve the same purpose—to secure the debt of the debtor. Since N. C. GEN. STAT. §1-27 (1943) is piecemeal legislation, it is suggested that the statute be amended to provide that a payment by a party to an obligation, whether payment be made before or after the statute of limitations has barred the obligation, shall set the statute running over again only as to the party making the payment.

PERRY C. HENSON.

**Pleadings—General Allegation of Negligence**

Until recently it was a settled rule in North Carolina that a general allegation that defendant was negligent was an insufficient pleading of the facts which constituted plaintiff's cause of action,[1] and as such was subject to demurrer.[2] This rule underwent a change in the recent case of *Davis v. Rhodes*,[3] a negligent wrongful death action. There the questioned allegation was "that defendant unlawfully, recklessly and negligently struck and collided" with the motor scooter on which the intestate was riding. This general allegation was held sufficient.

This change was discussed in a recent note,[4] where it was pointed

[27] Campbell v. Brown, 86 N. C. 376 (1882).

[1] Whitehead v. Carolina Telephone & Telegraph Co., 190 N. C. 197, 129 S. E. 602 (1925) (plaintiff used phone to report fire but could not secure connections; an allegation that defendant was negligent in not responding to his call was held insufficient); Thomason v. Durham & Northern R. R., 142 N. C. 318, 55 S. E. 205 (1906) (allegation that plaintiff suffered damage "from smoke, noise, odors and vibrations resulting from operation of defendant's railroad"; *held*, no cause of action stated); Conley v. Richmond & Danville Ry., 109 N. C. 692 14 S. E. 303 (1891) (averment stated that intestate was killed and slain by the negligence of defendant; held too general); *cf.* Lanier v. Roper Lumber Co., 177 N. C. 200, 98 S. E. 593 (1919) (plaintiff alleged that he was "induced to sign a deed by fraud"; *held*, insufficient); Citizens Bank v. Cahagan, 210 N. C. 464, 187 S. E. 580 (1936) (allegation that a certain sum was then due and owing held insufficient).

[2] "The defendant may demur to the complaint when it appears upon the face thereof that the complaint does not state facts sufficient to constitute a cause of action." N. C. GEN. STAT. §1-127 (1943).

[3] 231 N. C. 71, 56 S. E. 2d 43 (1949).

[4] 29 N. C. L. REV. 89 (1950).

out that perhaps the change was not too drastic, concluding that in the future the court would possibly hold general allegations sufficient only in negligence actions, and might further restrict such general pleading to negligence actions involving wrongful death. Thus, future pleaders of negligence actions, not involving wrongful death, were left in doubt as to whether a cause of action could be stated by alleging negligence generally. Following the *Davis* decision, the court could have further liberalized its requirements so as to attain that degree of conciseness allowed by the federal courts.[5]

However, in *Fleming v. Carolina Power & Light Co.*,[6] the court did not see fit to so liberalize; instead it reverted to the old rule that a general allegation is insufficient.[7] In this case, the plaintiff owned a warehouse to which defendant supplied electric current. During a storm some of the electric wires outside the warehouse broke; there were red hot wires going into the structure, and flashing wires dangling loose. Suddenly, plaintiff's warehouse burst into flames from a fire of unknown origin starting on the inside of the structure.[8] Action was brought on two theories of negligence; first, a very particularized allegation that the defendant was negligent in not shutting off the current, and, second, a general allegation "that defendant negligently permitted electric current in such volume as to set fire to plaintiff's warehouse to pass through its wires." At the trial, plaintiff proceeded only with respect to the first theory and did not introduce evidence to substantiate the second theory. The trial judge refused to charge the jury on the second theory.[9] After a verdict was rendered for defendant on the first theory, plaintiff appealed, contending the judge erred in refusing to charge the jury on the second.[10]

[5] "A pleading . . . shall contain a short and plain statement of the claim showing the pleader is entitled to recover." 28 U. S. C. §8 (1950). This allows an allegation of negligence to take on this form: ". . . defendant negligently drove a motor vehicle against the plaintiff" who was thereby injured. FED. R. CIV. P., form 9.

[6] 232 N. C. 457, 61 S. E. 2d 364 (1950).

[7] "A complaint must contain a plain and concise statement of the facts constituting a cause of action." N. C. GEN. STAT. §1-122 (1943).

[8] It seems the doctrine of res ipsa loquitur might apply to these facts. See, McAllister v. Pryor, 187 N. C. 832, 123 S. E. 177 (1922); Turner v. Southern Power Co., 154 N. C. 131, 69 S. E. 767 (1910). However, plaintiff could not successfully invoke this doctrine here because he could not show that the fire originated from electricity. The doctrine of res ipsa loquitur will not lie where more than one inference can be drawn as to the cause of the injury. See, Corum v. R. J. Reynold's Tobacco Co., 205 N. C. 213, 171 S. E. 78 (1933); Springs v. Doll, 197 N. C. 240, 148 S. E. 251 (1929).

[9] "Where there is any evidence to support a plaintiff's claim it is the duty of the judge to submit the question to the jury, who are the judges of its weight." Wittkowsky & Ritch v. Wasson, 71 N. C. 451, 454 (1874).

[10] It is not enough to say that there was some evidence, a mere scintilla, for there must be evidence on which the jury might reasonably conclude that there was negligence. Smith v. Duke University, 219 N. C. 628, 14 S. E. 2d 643 (1941); Jones v. Bagwell, 207 N. C. 378, 177 S. E. 170 (1934).

The court affirmed for two reasons; that the allegation did not specify wherein the negligence consisted,[11] and, as plaintiff had offered no proof to substantiate the allegation, he could not proffer an efficacious appeal because "an appeal ex necessitate follows the theory of the trial."[12] Hence, plaintiff had no basis for an appeal.[13]

This latter reason alone would be sufficient to defeat plaintiff, and the reason that the allegation is too general was not necessary, yet, it was powerfully stated. Consequently, it seems probable that the court inserted it to serve notice on future pleaders that a general allegation of negligence is an insufficient pleading of a cause of action.

In the future, the *Davis* case will probably be limited to its facts and North Carolina will probably require specific allegations of negligence. It should be noted, however, that the *Fleming* case made no mention of the *Davis* case, and the latter was decided on demurrer while the former was not. Even so, cautious pleaders of negligence should make specific allegations of the manner in which the defendant was negligent.

RICHARD L. GRIFFIN.

**Pleadings—Overruling of Demurrer for Misjoinder of Parties and Causes—Effect of Reversal on Appeal**

The question was recently presented[1] as to whether an action was still pending after the North Carolina Supreme Court had reversed the lower court's judgment[2] overruling a demurrer for misjoinder of parties and causes of action.[3]

After the first opinion was certified down, but before the lower court had acted in accordance therewith,[4] plaintiffs moved for leave to file an amended complaint.[5] When the motion came before him, the resident judge concluded that the Supreme Court had sustained the

[11] The complaint did set out a cause of action on another theory of negligence.
[12] Fleming v. Carolina Power & Light Co., 232 N. C. 457, 463, 61 S. E. 2d 364, 369 (1950).
[13] Coral Gables, Inc. v. Ayres, 208 N. C. 426, 181 S. E. 263 (1935); Edgerton v. Perkins, 200 N. C. 650, 158 S. E. 197 (1931).

[1] Teague v. Siler City Oil Co., 232 N. C. 469, 61 S. E. 2d 345 (1950).
[2] Teague v. Siler City Oil Co., 232 N. C. 65, 59 S. E. 2d 2 (1950).
[3] N. C. GEN. STAT. §1-123 (1943) determines what causes of action may be joined. For a thorough discussion of joinder of parties and causes, see Brandis, *Permissive Joinder of Parties and Causes in North Carolina*, 25 N. C. L. REV. 1, 16 (1946).
[4] See MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE IN CIVIL CASES §694 (1929) for the disposition of a case on appeal.
[5] N. C. GEN. STAT. §1-163 (1943) allows amendments in the discretion of the court. N. C. GEN. STAT. §1-131 (1943) which gives the right to move for leave to amend when a demurrer is sustained, has no application to cases in which the action has been dismissed for misjoinder of parties and causes. Grady v. Warren, 202 N. C. 638, 163 S. E. 679 (1932).

demurrer and that this had the legal effect of dismissing the action. Hence he denied the motion for want of authority.[6] The basis of the decision appealed from seems to lie in the often repeated rule that a demurrer must be sustained and the action dismissed when there is a misjoinder of parties and causes.[7] There can be no division of the action to eliminate the misjoinder,[8] and after the demurrer has been sustained and the action dismissed, an amendment will not be allowed.[9]

On appeal from the refusal to hear the motion, the Supreme Court, while recognizing the dismissal rule, stated that the effect of its order reversing the judgment of the lower court overruling the demurrer was not to sustain the demurrer, but was an order to the lower court to do so. As the order did not expressly dismiss the action, it was pending and open to motion until the lower court rendered final judgment.

The Supreme Court has the discretion to enter final judgment or to allow the lower court to do so upon receipt of its opinion.[10] In previous cases where the appeal was from an order overruling a demurrer for misjoinder of parties and causes, the Supreme Court has rarely dismissed the action upon reversing.[11] Likewise, it has not often expressly

[6] No appeal lies to the Supreme Court from the exercise of a discretionary power of the superior court in the absence of palpable abuse. But if the exercise of its discretion is refused upon the ground that it has no power to grant a motion addressed to its discretion the ruling of that court is reviewable. Hooper v. Glenn, 230 N. C. 571, 53 S. E. 2d 843 (1949); Gilchrist v. Kitchen, 86 N. C. 20 (1882).

[7] Beam v. Wright, 222 N. C. 174, 22 S. E. 2d 270 (1942); Wingler v. Miller, 221 N. C. 137, 19 S. E. 2d 247 (1942); Burleson v. Burleson, 217 N. C. 336, 7 S. E. 2d 706 (1940); Smith v. Land Bank, 213 N. C. 343, 196 S. E. 481 (1938); Town of Wilkesboro v. Jordon, 212 N. C. 197, 193 S. E. 155 (1937); Atkins v. Steed, 208 N. C. 245, 179 S. E. 889 (1935); Carswell v. Whisenant, 203 N. C. 624, 166 S. E. 793 (1932); Sasser v. Bullard, 199 N. C. 562, 155 S. E. 248 (1930); Citizens Nat. Bank of Baltimore v. Angelo Brothers, 193 N. C. 576, 137 S. E. 705 (1927); Rose v. Fremont Warehouse and Improvement Co., 182 N. C. 107, 108 S. E. 389 (1921); Thigpen v. Kinston Cotton Mills, 151 N. C. 97, 65 S. E. 750 (1909); Morton v. Western Union Telegraph Co., 130 N. C. 299, 41 S. E. 484 (1902).

[8] N. C. GEN. STAT. §1-132 (1943), which provides for division of actions after a demurrer has been sustained for misjoinder of causes of action, does not apply when there is also a misjoinder of parties. Moore County v. Burns, 224 N. C. 700, 32 S. E. 2d 225 (1944); Southern Mills, Inc. v. Summit Yarn Co., 223 N. C. 479, 27 S. E. 2d 289 (1943); Rose v. Fremont Warehouse and Improvement Co., 182 N. C. 107, 108 S. E. 389 (1921); Roberts v. Utility Mfg. Co., 181 N. C. 204, 106 S. E. 664 (1921); Thigpen v. Kinston Cotton Mills, 151 N. C. 97, 65 S. E. 750 (1909); Morton v. Western Union Telegraph Co., 130 N. C. 299, 41 S. E. 484 (1902); State *ex rel.* Cromartie v. Parker, 121 N. C. 198, 28 S. E. 297 (1897); Mitchell v. Mitchell, 96 N. C. 14, 1 S. E. 648 (1887).

[9] Grady v. Warren, 202 N. C. 638, 163 S. E. 679 (1932).

[10] It is not the practice to render final judgment in the Supreme Court unless it is necessary to protect some right of the litigant parties in danger of *ad interim* defeat, or where it is demanded by public convenience or welfare. Ordinarily, the opinion of the court is certified down to the superior court of the county from which the appeal came, where a judgment in accordance with the opinion is entered. Goodson v. Lehmon, 225 N. C. 514, 35 S. E. 2d 623 (1945). McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE IN CIVIL CASES §694(6) (1929).

[11] Southern Mills, Inc. v. Summit Yarn Co., 223 N. C. 479, 27 S. E. 2d 289 (1943); Town of Wilkesboro v. Jordon, 212 N. C. 197, 193 S. E. 155 (1937).

remanded the action with directions for further proceedings.[12] Ordinarily, upon finding that the lower court erred in not sustaining the demurrer, it has repeated the dismissal rule and simply reversed, giving no clear indication whether an amendment to the pleadings could or could not thereafter be allowed.[13]

That the action remains open for motion seems to be a desirable decision. Plaintiffs are given opportunity to cure a defect which is otherwise fatal,[14] thus allowing the action to continue, to be decided on its merits.[15] While dismissal for "dual misjoinder" is ordinarily without prejudice, and plaintiffs may begin a new action or actions,[16] there is some advantage to plaintiffs in avoiding dismissal. By being allowed to continue, plaintiffs are able to avoid paying the costs in the original action,[17] and save the time and expense involved in starting a new action.

The question was raised but was not decided in the present opinion as to the effect of affirming a judgment which sustained a demurrer for "dual misjoinder." In such case, authority seems to indicate that the action is no longer pending and open to motion for leave to amend.[18] If the order which sustained also dismissed, it is clear that no cause

[12] Beam v. Wright, 222 N. C. 174, 22 S. E. 2d 270 (1942); Shore v. Holt, 185 N. C. 312, 117 S. E. 165 (1923); Street v. Tuck, 84 N. C. 605 (1881).

[13] Foot v. Davis Co., 230 N. C. 422, 53 S. E. 2d 311 (1949); Moore County v. Burns, 224 N. C. 700, 32 S. E. 2d 225 (1944); Burleson v. Burleson, 217 N. C. 336, 7 S. E. 2d 706 (1940); Smith v. Land Bank, 213 N. C. 343, 196 S. E. 481 (1938); Atkins v. Steed, 208 N. C. 245, 179 S. E. 889 (1935); Williams v. Gooch, 206 N. C. 330, 173 S. E. 342 (1934); Citizens Nat. Bank of Baltimore v. Angelo Brothers, 193 N. C. 576, 137 S. E. 705 (1927); Rogers v. Rogers, 192 N. C. 50, 133 S. E. 184 (1926); Roberts v. Utility Mfg. Co., 181 N. C. 204, 106 S. E. 664 (1921); Morton v. Western Union Telegraph Co., 130 N. C. 299, 41 S. E. 484 (1902).

[14] See note 7 *supra.*

[15] It is the policy of the code system to be liberal in allowing amendments to pleadings so that causes may be tried upon their merits. See Page v. McDonald, 159 N. C. 38, 41, 74 S. E. 642, 643 (1912); Cheatham v. Crews, 81 N. C. 343, 345 (1879); Bullard v. Johnson, 65 N. C. 436, 438 (1871).

[16] Burleson v. Burleson, 217 N. C. 336, 7 S. E. 2d 706 (1940); Weaver v. Kirby, 186 N. C. 387, 119 S. E. 564 (1923). N. C. GEN. STAT. §1-25 (1943), which allows a new action to be brought within one year after nonsuit, reversal, or arrest of judgment, if the original suit was commenced within the time prescribed therefor, applies to the new action. Blades v. Southern Ry., 218 N. C. 702, 12 S. E. 2d 553 (1940).

[17] A new action may be brought under N. C. GEN. STAT. §1-25 (1943) only if the costs in the original action have been paid by the plaintiff prior thereto, unless the original suit was brought *in forma pauperis.*

[18] Wingler v. Miller, 221 N. C. 137, 19 S. E. 2d 247 (1942) held that the order sustaining a demurrer to cross actions for misjoinder of parties and causes worked a dismissal of the cross actions. It was, therefore, improper to sustain the demurrer and at the same time retain the cross actions for amendment. As pointed out in the principal case, "the asserted cross actions were not pleadable in that action so that an amendment could not serve to remedy the defect." Furthermore, an answer rather than a complaint was involved. However, it is doubtful that these possible distinctions detract from the authority of Wingler v. Miller, *supra,* as setting forth a rule of general application. The opinion in the case clearly dealt with the problem just as if it had been presented by a complaint.

is pending after the order is affirmed.[19] In a few cases, after affirming a judgment sustaining a demurrer, the court has remanded the case to allow an amendment.[20] These cases are exceptions to the dismissal rule.[21]

An awkward situation now exists. Assuming that a complaint contains a misjoinder of parties and causes, the principal case holds that if the lower court overrules a demurrer, and the judgment is reversed on appeal, plaintiffs have opportunity to move for leave to amend until the time final judgment is entered in the superior court. But if the lower court sustains the demurrer and dismisses the action, and the judgment is affirmed on appeal, plaintiffs have no chance to cure the defect as no action is pending.[22] The same result is probable when the order merely sustains the demurrer. Thus the rights of the parties are materially affected by the opinion of the trial judge as to what constitutes a misjoinder of parties and causes. That is, if an appeal is taken in each case, a proper sustaining of the demurrer is to the advantage of the defendants, while an erroneous order overruling the demurrer works to the obvious advantage of the plaintiffs. If this discrepancy is to be regretted, it must be noticed that nothing short of abrogating the dismissal rule or overruling the present decision is likely to cure it.

The decision in the present case is a liberal one. In allowing plaintiffs the opportunity to eliminate the objectionable features after the Supreme Court has found a misjoinder of parties and causes, it is a recognition that it is feasible to allow severance of the causes, rather than to require dismissal of the action, upon the sustaining of a demurrer.[23] However, in view of its long standing, it can hardly be said that an indication has been given that the dismissal rule will be changed.

STEPHEN P. MILLIKIN.

[19] Grady v. Warren, 202 N. C. 638, 163 S. E. 679 (1932).

[20] Gattis v. Kilgo, 125 N. C. 133, 34 S. E. 246 (1899); Mitchell v. Mitchell, 96 N. C. 14, 1 S. E. 648 (1887); Logan v. Wallis, 76 N. C. 416 (1877). In Robertson v. Robertson, 215 N. C. 562, 2 S. E. 2d 552 (1939) the court dismissed only as to the parties causing misjoinder.

[21] See Brandis, *Permissive Joinder of Parties and Causes in North Carolina*, 25 N. C. L. REV. 1, 50 (1946).

[22] Grady v. Warren, 202 N. C. 638, 163 S. E. 679 (1932).

[23] The court has allowed the misjoinder defect to be eliminated after a demurrer was interposed, but before a decision was made sustaining it. Sparks v. Sparks, 230 N. C. 715, 55 S. E. 2d 477 (1949); Walker v. Standard Oil Co. of New Jersey, 222 N. C. 607, 24 S. E. 2d 254 (1943); Campbell v. Washington Light and Power Co., 166 N. C. 488, 82 S. E. 842 (1914).

**Taxation—Depreciation and Inclusion in Equity Invested Capital—Assets Transferred to Attract Industry**

Transfers of property and cash from community and civic groups have become a common method of inducing industry to locate and do business in areas seeking to progress industrially and commercially. Even courts adopting a stringent view of these transfers for the purpose of settling connected taxation questions do not deny the validity and necessity of supporting them legally. Such transfers benefit both the transferor, by improving the community financially, and the transferee, by easing the burden of organization and location expenses.

Recently, in *Brown Shoe Company v. Commissioner*,[1] the United States Supreme Court clarified its position in regard to tax problems arising from these transfers. Petitioner, pursuant to the terms of written contracts, had received land, cash, and buildings and equipment from civic groups in twelve communities, and had agreed to perform various promises in return, *e.g.*, enlarging existing plants, or building new ones, and maintaining them at minimum payrolls for a stipulated numbers of years. Only one transaction, a donation of $10,000 cash for "organization expenses," was without any contractual basis. In every instance where cash was involved, the cash received was less than the outlay required to perform the contract. Two problems were presented by these transfers: First, whether the company could deduct depreciation on buildings transferred and on buildings and equipment acquired or enlarged with cash received; and second, whether the company could include in its equity invested capital credit for purposes of excess profits taxation the total amount of cash and property contributed.[2] The court allowed both the deduction for depreciation and the inclusion in equity invested capital.

This decision eliminated a trend in the cases which had been a matter of concern to businessmen and the accounting profession since the decision of *Detroit Edison Company v. Commissioner*.[3] The Detroit Edison Company had charged its consumers for the cost of extending

[1] 70 Sup. Ct. 820 (1950).

[2] The 1940 excess profits tax, which had much in common with prior excess profits taxes, was aimed only at swollen profits which are caused by wartime conditions. Two bases for applying the tax were provided, after a specific exemption of $5,000. First, the taxpayer could deduct from the net income, subject to the ordinary income tax, the average of earnings for a given base period. Or it could take as a credit an amount equal to eight percent of its invested capital. In other words, Congress evidently considered a return of eight percent on invested capital a fair return under normal business conditions. It is obvious that if the latter basis is used, it is to the taxpayer's advantage to include as much as it could in invested capital, since the amount of the tax is in inverse proportion to the size of invested capital. The 1940 tax was repealed in 1945, but in view of present world conditions that or a similar tax may once again be imposed. REVENUE ACT OF 1940, 201, 54 STAT. 975 (1940).

[3] 319 U. S. 98 (1942).

electric current distribution facilities and claimed as a base for computing its depreciation the full cost of the installations.[4] The Court decided that the funds were neither a gift nor a contribution to capital, and the company was denied depreciation on that portion of the cost which it had shifted to its consumers.

Nothing in the *Detroit Edison Company* case should alarm a taxpayer who happened to be involved in the kind of transactions which were under consideration in the *Brown Shoe Company* case, because the situations are totally different. The funds received by the Detroit Edison Company were payments for service which would directly benefit the one making the payments. In no sense could it be contended that the purpose of the payments was to enlarge the capital of the company; while this was the desired result of the transactions in the *Brown Shoe Company* case. The only benefit to the civic groups was that which might ultimately arise from the financial betterment of the community. Only indirectly would there be any form of compensation for the funds expended.[5]

The disconcerting element, before the distinction made by the Court in the *Brown Shoe Company* case became binding upon all circuits, was that the Tax Court had considered itself bound by the *Detroit Edison Company* decision in the *Brown Shoe Company* case,[6] in *McKay Products Corporation v. Commissioner*,[7] and in *Downey v. Commissioner*.[8] It disallowed both depreciation and inclusion in invested capital. The Tax Court was reversed by the Third Circuit Court of Appeals in the *McKay* case,[9] but was affirmed by the Eighth Circuit Court of Appeals in the *Brown Shoe Company* case[10] and the *Downey* case.[11] This conflict was the basis for the Court's granting certiorari in the *Brown Shoe Company* case.[12] Had the Court chosen to adopt the view of the Eighth Circuit, an immediate result would have been the diminution in value of such transfers to the transferee, and possibly to the transferor, who might finally be forced to make up the difference. However, the Court's adoption of the view of the Third Circuit has limited the *Detroit Edison Company* case to its factual context, and the way is now clear for the full realization of the value to be derived.

An analysis of the factors and theories involved in these decisions discloses three major divisions of approaches to the problem of invested capital. One approach may properly be termed the "purchase" theory.

[4] INT. REV. CODE §§113(a)(2), 113(a)(8)(B).
[5] This distinction is utilized in both the principal case and in McKay Products Corporation v. Commissioner, 178 F. 2d 639 (3rd Cir. 1949).
[6] 10 T. C. 291 (1948).
[7] 9 T. C. 1082 (1947).
[8] 10 T. C. 837 (1948).
[9] 178 F. 2d 639 (3rd Cir. 1949).
[10] 175 F. 2d 305 (8th Cir. 1949).
[11] 172 F. 2d 810 (8th Cir. 1949).
[12] 70 Sup. Ct. 820 (1950).

Under this theory, the consideration furnished by the company for the transfer is regarded as payment for the property. Accordingly, the property could not be considered invested capital, any more than the general assets could be. This approach overlooks the intent of the framers of the 1940 Excess Profits Tax Act.[13] In comparing this statute with the previous act of 1917,[14] it will be noted that the italicized words were added: "The equity invested capital . . . shall be the sum of the following amounts, reduced as provided in subsection (b) . . . (2) . . . Property (other than money) previously paid in (regardless of the time paid in) for stock, or as paid-in surplus, *or as a contribution to capital.*"[15] Congress probably thus indicated an intention to adopt the view that invested capital was no longer to be confined to funds received from persons with a proprietary interest in the company, because such funds were already includible as paid-in surplus.[16] In the *Brown Shoe Company* case the point is made that such assets are additions to "capital" as that term has long been understood in business and accounting practice.[17]

The second approach is the "gift" theory. It is based upon the concept that the transaction between the transferor and the transferee is a "gift subject to a condition."[18] To support this classification it has been urged that the bargain element is lacking, and that the transferor is saying, in effect, "Move here, and we will *give* you valuable property." (Emphasis supplied.)[19] While such an interpretation may be very desirable to a promisor wishing to avoid legal liability, if followed to its logical conclusion it would have a company spending large sums to locate and build a plant on the mere chance that it will receive a "gift" of land or other property, subject to the whim or caprice of the promisor. While it is useless to argue intent without a given situation, it will suffice to point out that the usual profitable, desirable business enterprise could hardly be supposed to have based such a substantial expenditure of the stockholders' funds on the hazards of a promise which is legally unenforceable. If the reply is made that the gift is to occur before the outlay, then it will forever remain in the realm of speculation as to how this "Alphonse and Gaston" routine will end: one

[13] REVENUE ACT OF 1940, §201, 54 STAT. 975 (1940).
[14] REVENUE ACT OF 1917, §200, 39 STAT. 1000 (1917).
[15] REVENUE ACT OF 1940, §201, 54 STAT. 975 (1940).
[16] One case where funds contributed by stockholders would be neither money paid in for stock nor paid-in surplus would arise where stockholders contribute funds to erase a capital deficit. But in view of the broad language used in adding to the definition of invested capital in the statute, it can hardly be supposed that Congress intended so narrowly to restrict the addition. Such restrictive language could easily have been inserted instead of the inclusive phrase, "contributions to capital."
[17] 70 Sup. Ct. 820, 823 (1950).
[18] 27 TAXES 741 (1949).
[19] 27 TAXES 741, 744 (1949).

party saying, "After you give, Alphonse"; the other saying, "After you move, Gaston." It cannot be denied that only two interpretations are reasonable. Either there is a bilateral contract, with the company promising to move, build, and maintain the plant for a certain period at a certain minimum payroll and the civic group promising to convey the property; or there is a unilateral contract, which came into existence upon the company's performance of the conditions contained in the offer, *i.e.*, moving and building. The former has the advantage of greater probability. The gift theory seems insupportable when examined with regard to the intent of the parties and the rules of contract which govern their relations.

The recognition of an enforceable contract between the parties gives rise to the third theory, which may be called the "contract-cost" theory. This theory requires the inclusion of the assets in invested capital. It recognizes the obvious fact that there is "cost" to the taxpayer, in that there is an expenditure consequent upon performance of that contract. But the fact that the assets "cost" the taxpayer does not prevent their being invested capital any more than the issuance of stock keeps the funds paid in from being so regarded. It is true that the contributor of the assets may profit, even if only remotely, but so may the purchaser of stock through the increase in value of the stock.

The "contract-cost" theory has the best of the legal logic. It says, in effect, "Of course there is 'cost' to the taxpayer, but that does not prevent the assets from being 'contributions to capital,' since the intent of the parties was that they be such, and since there is no inherent reason why 'contributions to capital' may not arise from a contract. The application of this theory is unnecessary to resolve the inclusion in invested capital of cash or property truly donated, as was one of the amounts in the *Brown Shoe Company* case, since there is no problem of actual cost to the taxpayer. If the premise that "contributions" to capital may originate from outside the business is conceded, then the conclusion is inescapable that the term "contribution" includes by its plain meaning genuine gifts, be they cash or property.

As to depreciation, the irreconcilable decisions of the courts simply reflect the deeply rooted conflict over the true nature of depreciation. This conflict transcends legal considerations, and has long been a matter of controversy among accountants, businessmen, and scholars. The older school of thought regards depreciation's true function as the charging off of the original investment; in other words, the "return of the investment." The newer viewpoint is that depreciation allowances are made to provide for the replacement of the asset, leaving the original investment as representative of the equity of the original stockholders.

Fortune, in the guise of an enlightened Congress, has saved the courts from the necessity of having to adopt either viewpoint as correct. In providing for a corporation income tax, Congress clearly indicated that the replacement theory should be used. Only this interpretation can explain the provisions for a substituted depreciation basis in certain situations. That is, in cases where depreciation clearly should be allowed, as in the case of a gift or donation, but no actual cost basis exists, the donee-taxpayer is allowed to use the basis of the donor, limited to the fair market value at the time of the transfer.[20] If Congress had intended the older view of depreciation to prevail, the taxpayer would be held to a strict cost basis, and having no cost, would be denied depreciation in many instances where his right to take it is undisputed today. In the light of this conclusion, how realistic is the argument that depreciation should be denied because there is no ascertainable cost to the taxpayer?

No distinction should be made taxwise between property acquired directly and property purchased with funds acquired. In each instance the Brown Shoe Company was required to perform certain obligations concerning the property, thus plainly contemplating that the company already owned such property, or would purchase it with the funds acquired, or would receive it by the terms of the contract. Any distinction made merely goes to the form of the transaction, and not to its substance. If this distinction were permitted to effect a different treatment from a tax standpoint, the only result would be a change in the form of all subsequent transactions. Such a result would benefit neither the government nor the taxpayer.

The Court in the *Brown Shoe Company* case adopts a liberal attitude in allowing depreciation on the assets and their inclusion in equity invested capital. The type of transaction involved serves a useful purpose in community development, and this helpful attitude on the part of the Court should go far in preserving the value of such transactions for both the community and the industries which it seeks to attract.

HARPER JOHNSTON ELAM, III.

**Taxation—Exempt Organizations—Income Derived from Unrelated Business**

Under §101 of the Internal Revenue Code certain organizations have been granted exemption from the income tax. These exemptions remained substantially unchanged from the original Act of 1913,[1] until the Revenue Act of 1950.[2] During the interim an increasing number

[20] INT. REV. CODE §113(a)(2).

[1] 38 STAT. 166 (1913).
[2] Pub. L. No. 814, 81st Cong., 2d Sess. §301 (Sept. 23, 1950).

of organizations engaging in competitive businesses acquired exemption through judicial expansion of §101.[3] Due to the resulting injurious effect on competition additional legislation became desirable.[4]

The expansion of the exemptions under §101 of the Code was started by the Supreme Court of the United States in the case of *Trinidad v. Sagrada Orden de Predicadores*.[5] There it was held that a charitable organization did not lose its exemption because engaged in selling non-competitive articles,[6] such sales being incidental to the work of the organization. The court stated that the destination rather than the source of the income was the ultimate test of exemption. This principle was later extended to exempt organizations actively engaged in competitive businesses.[7] In *Roche's Beach, Inc. v. Commissioner*,[8] a further step was taken when a corporation was held exempt, which did not itself engage in charitable activities, but which was organized for the purpose of providing income for a charitable organization.

In order to claim the exemption under the principle of *Roche's Beach* the "feeder" organization must have been organized and operated "exclusively" for one or more of the specific purposes enumerated in §101 of the Code. Two recent decisions have expressed conflicting views as to what constitutes organization "exclusively" for an exempt purpose. In each case the stock of a business corporation was transferred to an exempt organization and the charter amended providing, in effect, that the corporation would be operated exclusively for charitable and educational purposes. While both courts recognized the validity of *Roche's Beach*, the corporation in *Universal Oil Products v. Campbell*[9] was held not to be exempt as it was not *originally* organized exclusively for educational purposes; whereas the corporation in *Home Oil Mills v. Willingham*[10] was held to be exempt on the theory that there had been a legal rebirth of the corporation by the amendment to its charter, and that, therefore, it was organized exclusively for charitable purposes.

Although the Bureau announced in 1942 it would no longer follow

[3] Finkelstein, *Freedom from Uncertainty in Income Tax Exemption*, 48 MICH. L. REV. 449, 453 (1950).

[4] SEN. REP. No. 2375, 81st Cong., 2d Sess. 35 (1950).

[5] 263 U. S. 578 (1924).

[6] The organization derived income from the sale of wine, chocolate, and other articles purchased and supplied for use in its churches, missions, and schools.

[7] Bohemian Gymnastic Ass'n Sokal v. Higgins, 147 F. 2d 774 (2d Cir. 1945) (operated a bar and restaurant); Sand Springs Home v. Commissioner, 6 B. T. A. 198 (1927) (sold food and oil products); Appeal of Unity School of Christianity, 4 B. T. A. 61 (1926) (operated an inn and published books).

[8] 96 F. 2d 776 (2d Cir. 1938) (the corporation operated a beach house).

[9] 181 F. 2d 451 (7th Cir.), *cert. denied*, 71 Sup. Ct. 78 (1950) (the court also found that the corporation was not operated exclusively for educational purposes as the organizers retained the right to use its patents without payment of royalties).

[10] 181 F. 2d 9 (5th Cir.), *cert. denied*, 71 Sup. Ct. 80 (1950).

*Roche's Beach*,[11] the courts adhered to it.[12] Recently, however, in *Mueller Co. v. Commissioner*[13] the Tax Court refused to follow *Roche's Beach*, and thereby narrowed the scope of exemption granted by §101. *Mueller* involved facts similar to *Universal* and *Home Oil Mills*. New York University Law School purchased all of the stock of a profitable business corporation and merged it with a new corporation, the charter of which stated that it was organized exclusively for educational purposes. It was further specified that all of its income should inure to the benefit of the Law School. The Court held §101(6) of the Code exempted only organizations actually and principally engaged in an activity of the kind mentioned in the Code and did not include a corporation, the principal activity of which was engaging in competitive commercial business for profit. Thus *Mueller* represented the first departure from the apparently settled doctrine of *Roche's Beach* and was in conflict with many decisions that had cited the latter case with approval.[14]

The Internal Revenue Act of 1950, however, settled for the future the uncertainty brought about by *Mueller*. A paragraph added to §101 of the Internal Revenue Code states that an organization operated primarily to carry on a trade or business for profit may not claim exemption solely on the ground that all of its profits are payable to one or more organizations exempt under that section. The underlying reason for this amendment is that such a business organization is not carrying out an exempt purpose and is in direct competition with taxable organizations.[15] While the amendment denies a corporation the right to claim exemption from taxation on the ground that all of its income is payable to an exempt organization, presumably a subsidiary corporation of an exempt organization may still claim exemption if its activities are related to the function for which its parent was granted exemption.

This amendment is only applicable to taxable years beginning after December 31, 1950. Cases involving a taxable year prior to this date must be decided without drawing any inference from the amendment.[16]

It would seem that if income is to be taxed when earned by a subsidiary of an educational or charitable organization, it should also be taxed when earned directly by such an organization. In both cases the

[11] G. C M. 23063, 1942-1 CUM. BULL. 103.

[12] Orton v. Commissioner, 173 F. 2d 483 (6th Cir. 1949); Debs Memorial Radio Fund v. Commissioner, 148 F. 2d 948 (2d Cir. 1945) (The court said that it would continue to follow *Roche's Beach* until instructed to do otherwise by final authority.); Estate of Louise v. Simpson, 2 T. C. 963 (1943).

[13] 14 T. C. —— (May 25, 1950).

[14] See note 10, *supra*.

[15] H. R. REP. No. 2319, 81st Cong., 2d Sess. 41 (1950); SEN. REP. No. 2375, 81st Cong., 2d Sess. 35 (1950).

[16] Pub. L. 814, 81st Cong., 2d Sess. §303 (Sept. 23, 1950) (Apparently this provision was intended to avoid a retroactive effect.).

type of business function is the same and the income used for the same purposes. If the law were otherwise the business carried on by the subsidiary could easily be transferred to the parent and thereby escape taxation. Apparently in an attempt to close any loophole that might result from such action by an exempt corporation, the Congress amended Chapter 1, Supplement U of the Internal Revenue Code, in the Revenue Act of 1950.

Under this amendment certain organizations exempt under §101 of the Code are made subject to the income tax on income from the operation of business enterprises *unrelated* to the purpose for which such an organization received its exemption.[17] Many organizations, however, now exempt under §101 of the Code are not affected by the amendment, and the application of the new tax is restricted by numerous exceptions and limitations.

The new tax applies only to the unrelated business income of labor, agricultural, and horticultural organizations exempt under §101(1) of the Code; literary, scientific, religious (other than churches or associations of churches), educational and charitable organizations exempt under §101(6); the business and trade associations exempt under §101(7); and title holding companies exempt under §101(14) if their income is payable to section 101 (1), (6), or (7) organizations.[18]

The act defines unrelated income as income derived from a trade or business "regularly carried on" and "not substantially related" (aside from the need of income) to the purpose for which the organization was granted exemption under §101 of the Code.[19] Sporadic activities such as the operation of a sandwich stand during the week of an annual county fair would not be considered a business regularly carried on. Athletic activities of schools would be considered substantially related to their educational functions.[20]

The Supplement U tax is not applicable to a business in which all of the work is performed without compensation; a business carried on, by an organization exempt under §101(6), for the convenience of its members, students, patients, or employees; or a business in which all of the merchandise sold was acquired by the organization as a gift or contribution.[21]

Although money received by an exempt organization is within the definition of unrelated business income it may not be subject to the

[17] INT. REV. CODE §421.
[18] INT. REV. CODE §421(b).
[19] INT. REV. CODE §422.
[20] SEN. REP. No. 2375, 81st Cong., 2d Sess. 107 (1950).
[21] INT. REV. CODE §422(b). The Senate Finance Committee illustrates the type of businesses excluded under this section as (1) an exempt orphanage running a second-hand clothing store by means of volunteer workers, (2) a university laundry operated for the convenience of the students. (3) a thrift shop operated by an exempt organization. SEN. REP. No. 2375, 81st Cong., 2d Sess. 107 (1950).

Supplement U tax if derived from dividends, interest, annuities, royalties, rents, gains from the sale of property, or research.[22] Such income is not taxable because it is considered to be passive in nature and not to have a harmful effect on competition.[23]

The new law does not deprive an organization of its tax exemption or require it to dispose of its unrelated business.[24] The tax is imposed only on unrelated business income in excess of $1,000.[25] The related income of an exempt organization will continue to be exempt as under the old law.[26]

The new tax became effective with taxable years beginning after December 31, 1950.[27] Organizations taxable as corporations will pay the normal rate of 25 per cent on their unrelated business income and a surtax of 20 per cent on such income over $25,000;[28] however, these rates may be changed by current legislation proposing increases in corporation tax rates and an excess profits tax. Organizations taxable as trust will be taxed at the same rate as individuals.[29] Also of importance is the fact that the tax is imposed on the net unrelated income in order that losses on one unrelated venture may be offset against gains on another.[30]

ROBERT M. WILEY.

**Torts—Malpractice—Liability of Physician for Acts of Substitute**

The liability of a physician[1] to a patient for malpractice is dependent upon the existence of a physician-patient relationship, or upon a relationship based on contract. Absent a special contract to the contrary, a physician-patient relationship is brought into existence upon acceptance of the patient for treatment, and such relationship may be terminated by mutual consent, dismissal of the physician by the patient, determination by the physician that his services are no longer needed, or reasonable notice to the patient in order that that patient may have an

[22] INT. REV. CODE §422(a). Rents from real property (including personal property leased with real property) are excluded from the Supplement U Tax. However, income from a lease of a term of five years or more will be taxed in the proportion that any unpaid debt on the rented property at the close of the taxable year bears to the adjusted basis of such property. A gain from the sale of property is defined as property other than stock in trade or property held for sale to customers. Research, as used in this section is defined as research performed for the United States or its agencies, or any state or subdivision thereof, research performed by any university or hospital for any person, and research done for any person by an organization designed to carry on fundamental research if the results are made available to the public.

[23] SEN. REP. No. 2375, 81st Cong., 2d Sess. 30 (1950).

[24] SEN. REP. No. 2375, 81st Cong., 2d Sess. 29 (1950).

[25] INT. REV. CODE §421(c).

[26] INT. REV. CODE §421(b)(1).

[27] INT. REV. CODE §421(a).

[28] INT. REV. CODE §421(a)(1).

[29] INT. REV. CODE §421(a)(2).

[30] INT. REV. CODE §422(a)(6).

[1] Reference to physicians throughout this article also includes surgeons.

opportunity to engage the services of another.[2] It has also been held, though there is little authority on the point, that a physician, who possesses no peculiar personal qualifications and no special knowledge of the patient's malady, may discharge his patient by substituting in his place another physician who possesses a proper amount of skill and is a duly careful person.[3] This seems to be the general rule and a substitution under these circumstances severs the physician-patient relationship between the first physician and his patient, and thereby relieves the first physician of liability for the negligence or malpractice of the substitute. But where the substitution is not made in accordance with this rule, liability may be incurred by the first physician for the negligence of the substitute.

This question of liability of a physician for the acts of a substitute physician arose in the early North Carolina case of *Nash v. Royster*.[4] There, after an operation, the attending physician left town for a period of two weeks and upon leaving, turned his patient over to the care of another physician without notice to, or the consent of, the patient. In an action brought against the first physician for the negligence of the substitute, the court held that a physician is not liable for the acts of a substitute physician, unless the substitute acts as his agent in performing the service, or due care is not exercised in selecting the substitute. The case further held that neither the consent of the patient, nor the lack of consent, is the determining factor as to whether the relation of principal and agent existed between the two physicians, but whether agency in fact had been created was to be determined by the relations actually existing between the parties under their agreements or acts.

In a leading case on this question, the Texas court declared that the substitute was in effect an independent contractor, reasoning that the nature of his work required him to exercise his own judgment and skill.[5] A similar result was reached in a New Jersey case,[6] where it was pointed out that no business relation existed between the two physicians and emphasis was placed on the distinct and independent character of the substitute's work.

It has been said that where one desiring to employ another to perform a service in his stead is obliged by law to employ a licensed person

[2] Fortner v. Koch, 272 Mich. 273, 261 N. W. 762 (1935); Grove v. Myers, 224 N. C. 165, 29 S. E. 2d 553 (1944); Swan, *The California Law of Malpractice of Physicians, Surgeons, and Dentists*, 33 CALIF. L. REV. 248 (1945); see Note, 56 A. L. R. 818 (1928).

[3] Gross v. Robinson, 203 Mo. App. 118, 218 S. W. 927 (1920); Myers v. Holburn, 58 N. J. L. 193, 33 Atl. 389 (1895); Nash v. Royster, 189 N. C. 408, 127 S. E. 356 (1925); Lee v. Moore, 162 S. W. 436 (Tex. Civ. App. 1913); see Notes, 21 R. C. L. 395 (1918); 46 A. L. R. 1154 (1927).

[4] Nash v. Royster, 189 N. C. 408, 127 S. E. 256 (1925).

[5] Lee v. Moore, 162 S. W. 436 (Tex. Civ. App. 1913).

[6] Myers v. Holburn, 58 N. J. L. 193, 33 Atl. 389 (1895).

(as is the case with physicians), he is not responsible for the negligent, defective, or improper execution of the work of such person as the relation of master and servant does not exist.[7] This, however, seems to be too broad a rule. Although it may indicate, as in any other case in which skill is involved, that such master and servant relationship is not contemplated, the relationship may in fact exist. This is true even though the law requires the selection of persons for the particular work to be made from a limited class, irrespective of how limited the class may be.[8] The question of whether agency in fact existed is one for the jury to determine upon a consideration of the relations actually existing between the parties under their agreements or acts in the light of local custom.[9]

The general rule that a physician must exercise due care in selection of a substitute was recognized in *Nash v. Royster*.[10] In a Nebraska case[11] where a physician with thirty years specialized practice turned his patient over to a substitute physician of only four years experience, the principal physician was held liable on grounds of abandonment. It was pointed out by the court that the patient was in fact employing a specialist, and for the principal physician to substitute another physician of little experience without notice to or agreement by the patient was a violation of duty and abandonment of the case. It would seem that under the rule of *Nash v. Royster* requiring the exercise of due care in the selection of a substitute, North Carolina might reach the same result as the Nebraska case.

An analogous problem arises as to the liability of non-charitable[12] hospitals for the negligence and malpractice of physicians of the hospital. It seems that here though, a special situation is confronted in which liability arises out of contract and depends on whether the hospital has undertaken responsibility for the part of the treatment in which the

[7] Myers v. Holburn, 58 N. J. L. 193, 33 Atl. 389 (1895); WOOD, MASTER AND SERVANT §311 (1877).

[8] RESTATEMENT, AGENCY §223 (1933).

[9] Nash v. Royster, 189 N. C. 408, 127 S. E. 356 (1925); Tetting v. Hotel Pfister, 221 Wis. 141, 266 N. W. 249 (1936) (Defendant hotel did not ask to have submitted to the jury any question of fact with reference to the status of employment of a masseur, who, while an employee of the hotel, rendered negligent treatment to a customer; but on appeal contended that as a rule of law a licensed masseur cannot be a servant because the law requires his selection to be from a limited class and that such employees are not subject to control as to the details of their work. *Held:* That this is not a rule of law which would preclude the conclusion that a masseur may be a servant or agent.). In determining whether one acting for another is a servant or an independent contractor, see RESTATEMENT, AGENCY §220 (1933).

[10] See note 4 *supra*.

[11] Stohlman v. Davis, 117 Neb. 178, 220 N. W. 247 (1928).

[12] Hoke v. Glenn, 167 N. C. 594, 83 S. E. 807 (1914) (charitable institutions are exempt from liability under a special doctrine of public policy); Note, 19 N. C. L. REV. 245 (1941).

negligence occurred.[13] Where the hospital admits patients for treatment and the patient chooses his own physician, or where the hospital only acts as an agency for recommending or employing such physician, the hospital has been held not liable for the negligence or malpractice of such physician. But it may be liable for negligence in recommending or selecting such physician.[14] When the hospital contracts to render a certain treatment, or to perform a particular operation for a contracted price, and then undertakes to perform its part of the contract through its own physician employees, the physicians may be liable for their own negligence or malpractice, and the hospital may incur liability predicated upon contract.[15] Under the same doctrine it has been held that a company or employer who agrees to furnish medical benefits to its employees is liable only for the negligent appointment of a physician.[16] But in some jurisdictions where the employer contracts to furnish medical benefits, and then attempts to furnish such treatment in its own company hospital or infirmary and through its own company physician employees, the employer has been held liable on the same basis as hospitals which incur liability by contract.[17]

While it is true a physician may incur liability by contract, in addition to liability for his own negligence or malpractice, the physician-patient relationship does not necessarily rest on contract.[18] The physician may render his services gratuitously,[19] or at the request of some third person for the benefit of the third person only;[20] but the physician will still be liable to the patient because of the physician-patient relationship.[21] Where there is no specific contract between the patient and physician to the contrary, the physician does not guarantee to effect a cure,[22] nor is he obliged to stay on the case until his services

[13] See Note, 4 A. L. R. 191 (1919).

[14] Robinson v. Cratwell, 175 Ala. 194, 57 So. 23 (1911); Smith v. Duke University, 219 N. C. 628, 14 S. E. 2d 643 (1941); Penland v. Hospital, 199 N. C. 314, 154 S. E. 406 (1930); Johnson v. Hospital, 196 N. C. 610, 146 S. E. 573 (1929); see Note, 22 A. L. R. 346 (1923).

[15] Brown v. La Société Française, 138 Cal. 475, 71 Pac. 516 (1903); Jenkins v. Charleston Gen. Hospital, 90 W. Va. 230, 110 S. E. 560 (1922); *see* Smith v. Duke University, 219 N. C. 628, 635, 14 S. E. 2d 643, 648 (1941); see Note, 22 A. L. R. 346 (1923).

[16] McMahan v. Spruce Co., 180 N. C. 636, 105 S. E. 439 (1920); Woody v. Spruce Co., 176 N. C. 643, 97 S. E. 610 (1918); Barden v. R. R., 152 N. C. 318, 67 S. E. 971 (1910).

[17] Knox v. Ingalls Shipbuilding Corp., 158 F. 2d 973 (5th Cir. 1947); Kain v. Ariz. Copper Co., 14 Ariz. 566, 133 Pac. 412 (1913); see Note, 33 A. L. R. 1193 (1924).

[18] Thaggard v. Vafes, 218 Ala. 603, 119 So. 647 (1928); Du Bois v. Decker, 130 N. Y. 325, 29 N. E. 313 (1891); People v. Murphey, 101 N. Y. 126, 4 N. E. 326 (1886); see Note, 21 R. C. L. 375 (1918).

[19] Thaggard v. Vafes, 218 Ala. 603, 119 So. 647 (1928); Du Bois v. Decker, 130 N. Y. 325, 29 N. E. 313 (1891).

[20] People v. Murphey, 101 N. Y. 126, 4 N. E. 326 (1886).

[21] See note 19 *supra*.

[22] Davis v. Pittman, 212 N. C. 680, 194 S. E. 97 (1937); Pendergraft v. Royster, 203 N. C. 384, 166 S. E. 285 (1932), Note, 19 N. C. L. REV. 617 (1941).

are no longer needed. He may release himself, as has been noted, by giving sufficient notice to the patient to secure the services of another,[23] or by turning the case over to another physician, provided of course, he exercises due care in selecting such substitute.[24]

As a generalization, then, it seems that the prevailing view, with which North Carolina is apparently in accord, is that a physician or surgeon can relieve himself of liability for the negligent acts and omissions of a substitute physician or surgeon, provided: (1) he is under no contract which would create greater liability than that which rises out of the mere physician and patient relationship, (2) due care is exercised in selecting such substitute, (3) by the relations actually existing among the parties under their agreements or acts, agency between the physicians in fact did not exist.

HUGH P. FORTESCUE, JR.

**Torts—Negligence—Intervening Criminal Act**

When the deceased entered the defendant's store, the defendant's fourteen-year-old son pulled a pistol from under the counter and pointed it at the deceased. Though requested to put it away, he discharged it, inflicting a fatal wound.

A suit was instituted for the wrongful death against both the defendant and his son. The plaintiff alleged that the defendant, who knew that his son had brandished the pistol at other customers, was negligent in leaving the pistol where his son could obtain possession of the dangerous instrumentality. It was further alleged that the son maliciously shot the deceased and also that the son's act was negligent. The Georgia court held that the demurrer as to the defendant should have been sustained since the son's intervening act was criminal and superseded the defendant's negligence. As to the son, the court said a cause of action, in negligence, had been stated.[1]

The statement of the general rule applicable to such cases, that a subsequent, independent and unforeseeable criminal or negligent act supersedes the original party's negligence and renders that party not liable, is followed by the Georgia court. Whether stated in terms of liability or non-liability for intervening acts, the problem of these cases is not the statement of the rule but rather the application of the rule to the facts of a particular case.

The case did not reach a jury, and the holding of the Georgia court is partially explainable under peculiar local rules of pleading. When a petition is attacked by demurrer in that state, the facts alleged are taken

[23] See note 2 *supra*. [24] See note 3 *supra*.

[1] Skelton v. Gambrell, 80 Ga. App. 880, 57 S. E. 2d 694 (1950).

as true;[2] however, unlike the general rule, the petition is construed most strongly against the pleader.[3] Following these rules, the court interpreted the petition as alleging that the son's act was malicious and intentional which would subject the son to criminal prosecution for murder or manslaughter.[4] Furthermore, Georgia is one of the states which consistently hold intervening criminal acts unforeseeable,[5] unless the original party had definite knowledge that the intervening party was of a vicious disposition.[6] The holding in the case under consideration is not inconsistent with previous decisions of the Georgia courts.

On the facts it seems that the plaintiff should recover; however, the petition omitted material allegations, *e.g.*, that the deceased was a business invitee to whom the defendant owed a duty to provide a reasonably safe place in which to shop.[7]

In an Oregon case, the proprietor of a restaurant was held liable, on grounds of negligence, when a guest was assaulted by another guest who was known by the proprietor to create trouble.[8] It was so held even though the intervening act was criminal and the intervening party had not previously committed a similar crime.[9] Consequently, it seems

[2] Readon v. Bland, 206 Ga. 633, 58 S. E. 2d 377 (1950).

[3] Thornton v. Hardin, 205 Ga. 215, 52 S. E. 2d 841 (1949).

[4] Skelton v. Gambrell, 80 Ga. App. 880, 57 S. E. 2d 694, 697 (1950). "We think the plaintiffs' allegation that the defendants . . . knew that W. C. Skelton, Jr., had pointed the pistol at other customers . . . was not sufficient to show notice on their parts that W. C. Skelton, Jr., would commit the criminal offense of murder or manslaughter."

[5] Andrews & Co. v. Kinsel, 114 Ga. 390, 40 S. E. 300 (1901) (repairman negligently left side of building in such condition that thieves entered and stole plaintiff's goods; *held*, not liable, the subsequent intervening criminal act being unforeseeable); Henderson v. Dade Coal Co., 100 Ga. 568, 28 S. E. 251 (1897) (defendant, in charge of a convict under a convict lease system, was held not liable when the felon escaped and raped plaintiff; the court holding the criminal act unforeseeable even though the prisoner was known to be of "violent passions, prone to desire for sexual intercourse"); Pinnell v. Yellow Cab Co., 77 Ga. App. 73, 47 S. E. 2d 774 (1948) (defendant's servant negligently picked up drunk passenger after plaintiff had hired the taxicab; the second passenger shot the first; *held*, plaintiff could not recover since the subsequent criminal act was unforeseeable); Hulsey v. Hightower, 44 Ga. App. 455, 161 S. E. 664 (1931) (defendant gave his son a knife with which he intentially inflicted a serious wound upon plaintiff; *held*, defendant could not forsee that his son, who was known to have a reckless and negligent disposition, would commit the crime of attempted murder).

[6] Henderson v. Molting First Mortgage Corp., 184 Ga. 724, 193 S. E. 347 (1937) (defendant's servant, an apartment house janitor, maliciously shot plaintiff, *held*, there could be no recovery on respondeat superior, but there was a cause of action for defendant's negligence in retaining a servant known to be of a vicious character).

[7] Fanelty v. Rogers Jewelers, 230 N. C. 694, 55 S. E. 2d 493 (1949); Ross v. Sterling Drug Store, 225 N. C. 226, 34 S. E. 2d 64 (1945) (plaintiff injured due to a defective "door check" which applied force to close the front door of defendant's store; *held*, judgment for plaintiff reversed because of instructions which could be interpreted to mean a storekeeper has absolute liability for injuries sustained by business invitees). See Note 18 N. C. L. Rev. 163 (1939) for a discussion of the positive duty owed a business invitee.

[8] Peck v. Gerber, 154 Ore. 126, 59 P. 2d 675 (1936).

[9] While the assaulting guest had attempted to hit others, it was not shown that he had done so.

the defendant in the principal case might have been held liable on the theory that he had failed to provide a safe shopping place for the deceased, a business invitee. The previous pointing of the pistol and the probability of a continuation of this practice, as long as the pistol was lying around, had rendered the place unsafe.

There was no allegation as to who was in charge of the store when the injury was inflicted. If the defendant was present, support is lent to the argument that he failed to use reasonable care in providing a safe shopping place for the deceased since there is nothing to show that he attempted to prevent the discharge of the pistol. If the defendant was not present, it is possible that the son was in charge of the store. This raises the question of defendant's liability based on respondeat superior. In fact, the court itself raised this question, but held the allegations insufficient to show an agency.[10]

It has been suggested that the proprietor of a store be held absolutely liable for intentional torts committed by their servants.[11] This, however, has not been done except in cases involving common carriers[12] and public service corporations.[13] Nevertheless, a proprietor will be held liable if he does not use reasonable care in the selection and retention of servants and refrain from putting the customer in a position where it is likely that a tort will occur.[14] The latter statement seems particularly applicable to the principal case if an agency could be established.

Not only did the plaintiff omit material allegations in his petition, but the allegations are inconsistent. The plaintiff alleged that the son's act was both malicious[15] and negligent.[16] As pointed out above, the court construing the petition against the petitioner held the son's act criminal and this in the face of the court's subsequent conclusion that a cause of action in negligence was stated against the son.

In a jurisdiction which construes pleadings most strongly in favor of the pleader, the decision would probably have been contra, since the allegations are capable of the construction that the defendant was negli-

[10] Skelton v. Gambrell, 80 Ga. App. 880, 57 S. E. 2d 694, 697 (1950). "Nor do we think the mere allegation 'that said store was owned and operated by the defendants named herein,' was sufficient to show that the son was acting as servant or agent of the parents and within the scope of their employment."

[11] *See* Robinson v. Sears, Roebuck & Co., 216 N. C. 322, 324, 4 S. E. 2d 889, 890 (1939) (dissenting opinion).

[12] Daniel v. Railroad, 117 N. C. 592, 23 S. E. 327 (1895).

[13] Munick v. City of Durham, 181 N. C. 188, 106 S. E. 665 (1921).

[14] See Note 18 N. C. L. REV. 163, 166.

[15] In the second allegation, the plaintiff alleged, "that this suit is brought for the malicious homicide of petitioners' mother, and wife. . . ." Skelton v. Gambrell, 80 Ga. App. 880, 57 S. E. 2d 694, 695 (1950).

[16] Plaintiff in his eighteenth allegation alleged, "That the defendant W. C. Skelton, Jr., was negligent in the following. . . ." Skelton v. Gambrell, 80 Ga. App. 880, 57 S. E. 2d 694, 695 (1950).

gent in failing to foresee the intervening negligence of the son, who had previously pointed the pistol at people in the store.[17]

North Carolina follows the general rule that an intervening and foreseeable negligent act will not insulate the original party's negligence.[18] There are very few cases in this state dealing with intervening criminal acts[19] and in only one case was defendant held liable.[20]

In cases of intervening negligence of third parties, there are North Carolina cases which make a distinction between the active and the passive negligence of the defendant. Where the negligence of the intervening third party is active at the time of the accident and the defendant's negligence is passive, defendant has been relieved from liability.[21]

In the principal case, defendant's negligence might be regarded as passive, unless it can be argued that there was a continuing duty to protect the business invitee. Justice Seawell's opinion to the effect that storekeepers should be responsible to customers for all acts of their employees, criminal as well as negligent, is not applicable to the Georgia case under discussion because there was no allegation that the son was an employee or agent.

It is doubtful whether the Georgia court would deny the general proposition that if the intervening act and resultant injury could reasonably have been foreseen by the defendant, he remains liable. The problem is one of the extent or scope of protection which the law affords in these cases of intervening criminal or negligent acts. If the proprietor of a store creates or maintains a risk of danger to his customers, it would not be unreasonable to hold him responsible for the intervening

[17] Sullivan v. Creed, [1904] 2 K. B. 317 (defendant left gun inside hedge where minor son found it and negligently shot the plaintiff).

[18] Rulane Gas Co. v. Montgomery Ward & Co., 231 N. C. 270, 56 S. E. 2d 689 (1949); Henderson v. Powell, 221 N. C. 239, 19 S. E. 2d 876 (1942); Horton v. Tel. Co., 141 N. C. 455, 463, 54 S. E. 299, 302 (1906). ". . . the test . . . is whether the intervening act and the resultant injury is one that the author of the primary negligence could have reasonably foreseen and expected."

[19] Ward v. Southern Railway Co., 206 N. C. 530, 174 S. E. 443 (1934) (plaintiff was killed when struck by a piece of coal thrown from defendant's car; *held*, assuming defendant was negligent in allowing thieves to be on the train, nevertheless, the plaintiff cannot recover since the intervening criminal act was unforeseeable); Chancey v. Norfolk & Western Ry., 174 N. C. 351, 93 S. E. 834 (1917) (plaintiff, who was robbed due to defendant's negligence in not properly lighting its cars, was denied recovery since the intervening criminal act was unforeseeable).

[20] Britton v. Atlanta & Charlotte Air-Line Ry., 88 N. C. 536 (1883) (defendant held liable when his servant failed to protect plaintiff, a Negro, from an assault by other passengers known to the servant to be reckless and dissatisfied with plaintiff's presence).

[21] Montgomery v. Blades, 222 N. C. 463, 23 S. E. 2d 844 (1943), *rehearing denied*, 223 N. C. 331, 26 S. E. 2d 567 (1943) (plaintiff injured when driver of car in which she was riding negligently ran into a pillow constructed in the street by defendants; *held*, defendants' negligence was static while the drivers negligence was active but for which the injury would not have occurred, therefore, defendant not liable); Haney v. Town of Lincolnton, 207 N. C. 282, 176 S. E. 573 (1934); see Note 13 N. C. L. Rev. 245 (1935).

act which might be foreseen as likely to happen as a result of that risk. It has never been a requirement that the exact nature of the intervening act be foreseeable.

PAUL K. PLUNKETT.

**Torts—Liability of Parent for Willful Injury to Child**

By the overwhelming weight of authority in this country an unemancipated minor may not bring an action for personal tort against his parent.[1] The Supreme Court of Oregon has recently engrafted an exception on this general rule, holding that an unemancipated minor may maintain an action against his parent for a willful or malicious tort.[2]

In the Oregon case, a father, intoxicated and accompanied by his brother and son as passengers, drove his pickup truck at high speed at night over a mountainous highway. An accident ensued which resulted in the death of all the occupants of the truck. The court held that the father's estate could be sued for the wrongful death of the unemancipated minor, the majority regarding the case as one presenting "willful misconduct" for which the father should be held liable to his son.

With this decision another inroad has been made into the general rule disallowing tort actions between unemancipated minors and their parents. The action has been allowed heretofore in the case of a minor but emancipated child;[3] where the child was of legal age but continued to live at home with his parents;[4] where the suit was brought by or against one *in loco parentis*;[5] and in negligence cases where the defendant is protected by liability insurance.[6] An unemancipated minor has

[1] Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891); Small v. Morrison, 185 N. C. 577, 118 S. E. 12 (1923); McKelvey v. McKelvey, 111 Tenn. 388, 77 S. W. 644 (1903); see Note, 71 A. L. R. 1071 (1931). "Proprietary torts" between parent and minor in matters affecting property and contract seem always to have been freely recognized. Lamb v. Lamb, 146 N. Y. 317, 41 N. E. 26 (1895); Myers v. Myers, 47 W. Va. 487, 35 S. E. 868 (1900); PROSSER, HANDBOOK OF THE LAW OF TORTS 905 (1941).

[2] Cowgill v. Broock, 218 P. 2d 445 (Ore. 1950).

[3] Wood v. Wood, 135 Conn. 280, 63 A. 2d 586 (1948); Fowlkes v. Ray-O-Vac Co., 52 Ga. App. 338, 183 S. E. 210 (1935); Oliveria v. Oliveria, 305 Mass. 297, 25 N. E. 2d 766 (1940); Taubert v. Taubert, 103 Minn. 247, 114 N. W. 763 (1908); Cafaro v. Cafaro, 14 N. J. Misc. 331, 184 Atl. 779 (Sup. Ct. 1936); Crosby v. Crosby, 230 App. Div. 651, 246 N. Y. Supp. 384 (1930); Detwiler v. Detwiler, 162 Pa. Super. 383, 57 A. 2d 426 (1948).

[4] Ledgerwood v. Ledgerwood, 141 Cal. App. 538, 300 Pac. 144 (1931); Farrar v. Farrar, 41 Ga. App. 120, 152 S. E. 278 (1930); Ponder v. Ponder, 157 So. 627 (La. App. 1934); Weyan v. Weyan, 165 Miss. 257, 139 So. 608 (1932); Taylor v. Taylor, 232 S. W. 2d 382 (Mo. 1950).

[5] Treschman v. Treschman, 28 Ind. App. 206, 61 N. E. 961 (1901); Dix v. Martin, 171 Mo. App. 266, 157 S. W. 133 (1913); Clasen v. Pruhs, 69 Neb. 278, 95 N. W. 640 (1903); Stiber v. Norris, 188 Wis. 366, 206 N. W. 172 (1925).

[6] Dunlap v. Dunlap, 84 N. H. 352, 150 Atl. 905 (1930); Lusk v. Lusk, 113 W. Va. 17, 166 S. E. 538 (1932); Worrell v. Worrell, 174 Va. 11, 4 S. E. 2d 343 (1939); Fidelity & Cas. Co. v. Marchland, [1924] (Can.) S. C. R. 86, 13 B. R. C. 1135. For a discussion of this problem, see Note, 11 N. C. L. REV. 352 (1933).

also been allowed to sue his mother under a wrongful death statute for the death of the minor's father resulting from the mother's negligent operation of an automobile.[7]

To this list may now be added actions in which the injury sustained is the result of a willful or malicious tort. Authority on this point is meager. A New York court, although denying recovery on a showing of mere negligence, has indicated that an action would lie upon a showing of willful or malicious conduct.[8] In Missouri the action has been allowed on a showing of mere negligence.[9]

The policy of seeking to preserve domestic tranquility is the reason most frequently given for denying the action.[10] Some courts seem to fear a breakdown of the family unit and a blow to parental discipline and control.[11] Others rely on the complete lack of adjudicated cases at common law as precedent and would require action on the part of the legislature to change the old rule.[12] Other reasons given for denying the action are possibility of fraud[13] and depletion of the family treasury.[14]

The general rule, in so far as it tends to preserve the peace and tranquility of the home, seems to be a wholesome one. Mere legal prohibitions alone, however, will not hold together the family life.[15] The rule should not be exalted above ordinary common sense, or applied to all factual situations in tort actions between a minor child and his parent. As the Oregon court points out, it can hardly be said that an uncompensated tort makes for peace in the family and respect for the parent, especially if it be rape,[16] a brutal beating,[17] or as in the present case, a termination of the relation itself by death as the result of a wild drunken ride down a dark mountain road. The other reasons advanced by the court for nonliability are of doubtful validity, even with regard to ordinary torts.[18] But, assuming their validity, they do not

[7] Hale v. Hale. 312 Ky. 867, 230 S. W. 2d 610 (1950); Minkin v. Minkin, 336 Pa. 49, 7 A. 2d 461 (1939); Munsert v. Farmers Mut. Auto. Ins. Co., 229 Wis. 581, 281 N. W. 671 (1938).

[8] *See* Meyer v. Ritterbush, 196 Misc. Rep. 551, 553, 92 N. Y. S. 2d 595, 598 (Sup. Ct. 1949). Also, an unemancipated minor has been allowed to sue his unemancipated minor sister in New York. 281 N. Y. 106, 22 N. E. 2d 254 (1939).

[9] Wells v. Wells, 48 S. W. 2d 109 (Mo. 1932); Dix v. Martin, 171 Mo. App. 266, 157 S. W. 133 (1913).

[10] Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905); Wick v. Wick, 192 Wis. 260, 212 N. W. 787 (1927); *see* McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1056 (1930).

[11] Small v. Morrison. 185 N. C. 577, 118 S. E. 12 (1923).

[12] Fidelity Sav. Bank v. Aulik, 252 Wis. 602, 32 N. W. 2d 613 (1948).

[13] Treschman v. Treschman, 28 Ind. App. 206, 61 N. E. 961 (1901).

[14] Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905).

[15] Rozell v. Rozell, 281 N. Y. 106, 22 N. E. 2d 249 (1939).

[16] Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905).

[17] McKelvey v. McKelvey, 111 Tenn. 388, 77 S. W. 644 (1903).

[18] *See* McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV L. REV. 1030, 1072-1077 (1930).

seem persuasive enough to justify denying a child recovery for an injury willfully and maliciously inflicted upon him by his parent.

The North Carolina Supreme Court adopted the general rule of nonliability in *Small v. Morrison*,[19] a negligence case, notwithstanding the vigorous dissent of Chief Justice Clark, which closely parallels the opinion of the majority of the court in the Oregon case.[20] However, the question as to whether an unemancipated minor may sue his parent for a willful or malicious tort does not seem to have been yet presented in this state. The Oregon court, by refusing to apply a hard and fast rule of nonliability to the facts in this case, has recognized a trend which the North Carolina court should seriously consider when the question is presented in this state.

EARL W. VAUGHN.

**Trusts—Exercise by Will of a Reserved Power of Revocation**

In *Cohn v. Central National Bank of Richmond*[1] the revocation clause in an insurance trust agreement read:

> "The right is reserved to the insured [settlor]; to revoke or annul this agreement in whole or in part, and to modify the terms in any respect . . . on the written demand of the insured, the trustee shall deliver to him any or all of the policies held under the terms of this agreement."

Held, the attempted exercise by will of the reserved power of revocation was ineffectual to revoke the trust.

It is clear that a settlor may validly reserve a power to revoke a trust and stipulate the manner in which such power is to be exercised.[2] When a particular mode of revocation is specified in the reserved power of revocation, however, it is essential that it be strictly complied with in order to make the revocation effective.[3] When the revocation pro-

[19] 185 N. C. 577, 118 S. E. 12 (1923), 2 N. C. L. REV. 113 (1924).

[20] Clark argues that neither the common law nor statutes deny the child a right to sue his parent in tort and that the court should never create a precedent upon a supposed public policy which will deprive anyone of just rights.

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[1] 191 Va. 12, 60 S. E. 2d 30 (1950).

[2] *E.g.*, Nichols v. Emery, 109 Cal. 323, 41 Pac. 1089 (1895); Cramer v. Hartford-Conn. Trust Co., 110 Conn. 22, 147 Atl. 139 (1929); Kelley v. Parker, 181 Ill. 49, 54 N. E. 615 (1899); Jones v. Old Colony Trust Co., 251 Mass. 309, 146 N. E. 716 (1925); Nat. Newark & E. Banking Co. v. Rosahl, 97 N. J. Eq. 74, 128 Atl. 586 (1925); Richardson v. Stephenson, 193 Wis. 89, 213 N. W. 673 (1927). The settlor may reserve a power to revoke the trust only during his lifetime, or he may reserve also a power to revoke by will. 3 SCOTT, TRUSTS §330.8 (1939). The settlor has power to revoke the trust if and to the extent that by the terms of the trust he reserved such power. RESTATEMENT, TRUSTS §330(1) (1935).

[3] Hill v. Cornwall & Bro.'s Assignee, 95 Ky. 512, 26 S. W. 540 (1894) (power to revoke by deed is not exercised when deed is undelivered); Brown v. Fidelity Co., 126 Md. 175, 94 Atl. 523 (1915) (settlor reserved power of revocation upon

vision is ambiguously worded, as in the principal case, then the problem is one of interpretation by the courts as to whether the agreement contemplated a revocation only during the settlor's lifetime or included revocation at death by his will.[4]

The landmark case of *Chase National Bank v. Tomagno*,[5] where the trust agreement provided for "a written revocation filed with the trustee, executed by the settlor," indicates the criteria and factors to be taken into account in determining the modes of revocation actually reserved. The court there said: "This trust indenture does not specifically provide whether these powers of modification must be exercised during the lifetime of the settlor or whether they may be exercised by will. However, this indenture provides that the power reserved shall be exercised by filing with the trustee a written notice of the revocation, modification or change. In such circumstances it seems clear that the settlor intended that the power should be exercised only during her lifetime." In the recent case of *Leahy v. Old Colony Trust Co.*[6] the revocation provision read: "The trust indenture may be amended or revoked at any time during the lifetime of the said J. M. L. by an instrument in writing signed by her, and also by A. A. C. if she be living." The court said that "it is settled that a power to revoke 'during the lifetime' of the settlor, means a revocation taking effect before the death of the settlor, and it cannot be exercised by a will that in the nature of things cannot take effect before the death of the testator."

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giving 20 days' notice, same to be executed in office of trustee under hand and seal, properly attested and acknowledged; settlor sent letter evidencing intent to revoke and took no further action, held to be no revocation); *In re* Solomon's Estate, 332 Pa. 462, 2 A. 2d 825 (1938) (where two settlors reserved to themselves power to modify jointly a trust agreement, the power was extinguished when one of the settlors died and the trust was deemed irrevocable); Reese's Estate, 317 Pa. 473, 177 Atl. 742 (1935) (where the settlor reserved a right to revoke by giving 60 days' notice, gave the notice, but died before the 60 days had elapsed. there was no valid revocation); 4 BOGERT, TRUSTS AND TRUSTEES §996 (2d Ed. 1948); 3 SCOTT, TRUSTS §330.8 (1939); RESTATEMENT, TRUSTS §330, comment j (1935).

[4] Gall v. Union Nat. Bank of Little Rock, 203 Ark. 1000, 159 S. W. 2d 757 (1942) (reserved right to revoke by giving written notice at least six months in advance; *held*, notice must be given in lifetime and there can be no valid revocation by will); Broga v. Rome Trust Co., 151 Misc. 641, 272 N. Y. Supp. 101 (1934) (revocation provision was "grantor may, by instrument in writing, delivered to the trustee, modify or alter this agreement"; attempted revocation by will was ineffective); *In re* Shapley's Deed of Trust, 53 D. & C. 123, *aff'd*, 353 Pa. 499, 46 A. 2d 227 (1945) (right to revoke limited "to a proper instrument or instruments in writing executed by me and lodged with the trustee"; lodging of probated will so revoking held not a sufficient compliance); *In re* Lyon's Estate, 164 Pa. 140, 63 A. 2d 415 (1947) (trust agreement provided that 30 days' notice be given to trustee, same not revoked by settlor's will); RESTATEMENT, TRUSTS §330, comment j (1935).

[5] 172 Misc. 560, 14 N. Y. S. 2d 759 (1939). For case in accord both as to facts and law see Kelley v. Snow, 185 Mass. 288, 70 N. E. 89 (1904).

[6] 93 N. E. 2d 238 (Mass. 1950).

In the principal case[7] the same reasoning was followed as the revocation provision was said to "carry with it the thought that whatever is done to effect a revocation must be done in the lifetime of the settlor." The court found no language authorizing the revocation of the trust agreement by will, or from which an inference to that effect could be drawn.

Conversely, where the settlor reserves a power to revoke only by will, an attempted revocation during his lifetime is ineffective as it is not in accord with the mode specified by the reserved power of revocation.[8]

A third situation exists where a power of revocation is reserved without specifying the manner in which it is to be exercised. An example of this type of reserved power in its simplest form is "this trust shall be revocable." It seems that this would allow the settlor to exercise his reserved power in any manner which clearly evidences his intention to revoke.[9]

In the cases where a settlor attempts to revoke an inter vivos trust by his will, or by an act during his life, and fails because he has not reserved the power to revoke in the manner attempted, his latest intention has been thwarted. The remedy, however, was within the grasp of the original draftsman. The settlor should be instructed as to his right to reserve a power to revoke by an inter vivos transaction or by his will. If the settlor is uncertain at the time as to which mode he will in the future prefer to exercise, the draftsman, by clear and concise language, should include both modes in the reserved power of revocation. This would leave no possibility of ambiguity. By the use of this method the settlor's intent as to the mode of future revocations could be effectuated, and the courts would be spared the troublesome problem of interpreting such agreements.

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## Wills—Pretermission Statute—Sufficiency of Life Insurance As Provision for After-Born Child

Under the North Carolina pretermission statute,[1] children born after

[7] Cohn v. Central Nat. Bank of Richmond, 191 Va. 12, 60 S. E. 2d 30 (1950).
[8] Underhill v. U. S. Trust Co., 227 Ky. 44, 13 S. W. 2d 502 (1929); Dickey v. Goldsmith, 60 Misc. 258, 111 N. Y. Supp. 1025 (1908).
[9] Security Trust Co. v. Spruance, 20 Del. Ch. 195, 174 Atl. 285 (1934); Hoffa v. Hough, 181 Md. 472, 30 A. 2d 761 (1943); Lambdin v. Dantzebecker, 169 Md. 240, 181 Atl. 353 (1935); Barnard v. Gantz, 140 N. Y. 249, 35 N. E. 430 (1893). *But cf.* Mayer v. Tucker, 102 N. J. Eq. 524, 141 Atl. 799 (1928); Stone v. Hackett, 12 Gray 227 (Mass. 1858).

[1] N. C. GEN. STAT. §31-45 (1943): "Children born after the making of the parent's will, and whose parent shall die without making any provision for them, shall be entitled to such share and portion of the parent's estate as if he or she had died intestate, and the rights of any such after-born child shall be a lien on every part of the parent's estate, until his several share thereof is set apart in the manner prescribed in §28-153 to 28-158."

the making of the parent's will, for whom no provision is made, are entitled to share in the testator's estate as if he had died intestate. Recently in *Williamson v. Williamson*[2] the question was raised as to whether the procurement of a life insurance policy, naming as beneficiary a child born after the execution of the parent's will, constituted the making of "any provision" for such child within the meaning of the statute.

Under the facts of this case, the testator had one child living at the time he executed a will devising his entire estate to his wife, but subsequently another child was born to the testator. Neither child was mentioned nor provided for in the will. Later, however, the testator procured a double indemnity life insurance policy under which the two children were named as beneficiaries and each received $4,000 at his death. The court, interpreting the statute, held that the benefits of the policy did not constitute a provision for the after-born child. Had the case not been decided on other grounds, the court would have reached the absurd result of permitting the after-born to receive an intestate share in the parent's estate to the exclusion of the other child.

In the instant case, the court based its decision on the earlier case of *Sorrell v. Sorrell*,[3] stating that the facts of both were on "all fours." Yet, upon examination the two cases seem to be distinguishable. In the principal case, the testator had a natural child living at the execution of his will, while in the *Sorrell* case the testator had no children at the time the will was executed, but later adopted one child prior to the birth of another. Thus in the latter case, the facts strongly support the contention that the testator did not entertain any idea whatsoever of children at the time he executed his will. In the *Williamson* case, however, it is arguable that since the testator was cognizant of his living child upon execution of the will, his intention was to exclude or disinherit all his children as a class.[4] Some jurisdictions, when presented a fact situation similar to the instant case, have reached this result in construing their pretermisison statutes.[5] Still, it must be noted that in

[2] 232 N. C. 54, 59 S. E. 2d 214 (1950).
[3] 193 N. C. 439, 137 S. E. 306 (1927).
[4] Leonard v. Enochs, 17 S. W. 437, 438 (Ky. 1891) (". . . it would be an anomaly to hold that all the testator's living children—infants and all—were intentionally excluded as a class in the interest of the testator's wife, and the child thereafter born, by reason of the accidental time of its birth, was not intentionally omitted").
[5] ILL. ANN. STAT. c. 39, §10 (1935): "If, after making a last will and testament, a child shall be born to any testator, and no provision be made in such will for such child, the will shall not on that account be revoked; but unless it shall appear by such will that it was the intention of the testator to disinherit such child, the devises and legacies by such will granted and given, shall be abated in equal proportions to raise a portion for such child equal to that which such child would have been entitled to receive out of the estate of such testator if he had died intestate. . . ." Froelich v. Minwegen, 304 Ill. 462, 136 N. E. 669

jurisdictions so holding, the pertinent statutes are more susceptible to such interpretation than is the North Carolina statute.[6]

Even if it be conceded that the two cases are not distinguishable and the statutes of other jurisdictions more clearly permit the disinheritance theory, why has the North Carolina Supreme Court held that the benefits of an insurance policy are not an adequate provision for after-born children? In the principal case, the court speaks of the inherent unsuitability of life insurance as a provision because of its indirectness as *ex parentis provisione* since it is not of reasonable substance and

(1922) (testator had 2 children living at the time he made his will leaving everything to his wife, and thereafter 6 other children were born; court held that testator manifested his intention to disinherit after-born children); Peet v. Peet, 229 Ill. 341, 82 N. E. 376 (1907) (testator had a son living at time will was executed leaving estate to his wife and another son was born thereafter; the court found that will disclosed an intention that neither should take any interest in the estate but that both should be cared for by their mother); Hawhe v. Chicago & W. I. Ry., 165 Ill. 561, 46 N. E. 240 (1897) (testator had 2 children living at execution of will and another child born subsequently; court held fact that testator had 2 children at time of making will to whom he made no allusion was sufficient to show an intention to disinherit not only living children, but also after-born children).

KY. REV. STAT. §394.380(2) (1948): "If a will is made when a testator has a child living, and a child is born afterward, such after-born child, or any descendant of his, if not provided for by any settlement, and neither provided for nor expressly excluded by the will, but only pretermitted, shall succeed to the portion of the testator's estate that he would have been entitled to if the testator had died intestate . . . ," Leonard v. Enochs, 92 Ky. 186, 17 S. W. 437 (1891) (where testator had a child living at the time will was executed leaving his estate to his wife and another child was born 2 months after his death, court found that since the living child was excluded by intentional omission, it was evident that the exclusion was not intended to apply to the particular living child, but to all testator's children as a class).

TENN. CODE ANN. §8131 (Williams 1934): "A child born after the making of a will, either before or after the death of the testator, inclusive of a mother testatrix, not provided for nor disinherited, but only pretermitted, in such will, and not provided for by settlement made by the testator in his lifetime, shall succeed to the same portion of the testator's estate as if he had died intestate." Fleming v. Phoenix Trust Co., 162 Tenn. 511, 39 S. W. 2d 277 (1931) (testator had 2 children living at time of execution of will leaving everything to his wife, and another child was born shortly thereafter; court held that statute not applicable as it clearly appeared from will that testator intended to confer his estate upon his wife and omitted all his children as a class, not merely the living ones); Reeves v. Hager, 101 Tenn. 712, 50 S. W. 760 (1899) (testatrix had child living at time will was made leaving everything to husband, and another child was born subsequently; court found that testatrix, by failing to mention the two children, disinherited them in favor of their father).

WIS. STAT. §238.10 (1949): "Where any child shall be born after the making of his parent's will and no provision shall be made therein for him, such child shall have the same share in the estate of the testator as if he had died intestate; and the share of such child shall be assigned to him as provided by law in case of intestate estates unless it shall be apparent from the will that it was the intention of the testator that no provision should be made for such child." *In re* Read's Will, 180 Wis. 497, 193 N. W. 382 (1923) (where testator had 5 children living at time he made will leaving entire estate to wife and child born after that date, court found testator manifested an intention to exclude all children from sharing in the estate since it would be unreasonable that he would be more solicitous for after-born children than for those he knew at the making of will).

[6] See notes 1 and 5 *supra*.

value *in presenti* but only a possibility which must be fed to be kept alive. This precise point has been raised in the New York court. That court has held that although the possibility of the after-born child receiving the benefit of a provision is wholly contingent, it is still a sufficient provision to prevent the operation of the pretermission statute.[7] In construing a statute[8] very similar to the North Carolina statute, the New York Court of Appeals reasoned that since a testator may meet the possibility of after-born children by mere mention or a very general provision in the will, as is also the law in North Carolina,[9] "it would be somewhat idle, if not inconsistent, to hold that in order to be effective as a 'provision' a bequest or devise must be vested, certain and adequate."[10] Accordingly, that jurisdiction has liberally interpreted its statute so as not to defeat the intention of the testator and has held that an after-born child, not mentioned in the will, is provided for within the meaning of the statute by life insurance,[11] trust,[12] and Totten trust.[13]

Both the language in early North Carolina cases declaring the purpose of the statute, and a "plain-meaning" interpretation thereof, lead to the conclusion that the court could well have reached the New York view in the principal case. The court has stated that the statute was not designed to control a parent as to the provision he should make, and that it was only intended to apply when the omission to provide for

[7] *In re* Kirk's Estate, 191 Misc. Rep. 473, 80 N. Y. S. 2d 378 (1948); *In re* Kreutz' Will, 49 N. Y. S. 2d 402 (1944); *In re* Hagendorn's Will, 41 N. Y. S. 2d 491 (1943); *In re* Jones' Will, 134 Misc. Rep. 26, 234 N. Y. Supp. 316 (1929); McLean v. McLean, 207 N. Y. 365, 101 N. E. 178 (1913). *Contra:* Minot v. Minot, 17 App. Div. 521, 45 N. Y. Supp. 554 (1897).

[8] N. Y. DECEDENT ESTATE LAW §26: "Whenever a testator shall have a child born after the making of a last will, either in the lifetime or after the death of such testator, and shall die leaving such child, so after-born, unprovided for by any settlement, and neither provided for, nor in any way mentioned in such will, every such child shall succeed to the same portion of such parent's real and personal estate, as would have descended or been distributed to such child, if such parent had died intestate, and shall be entitled to recover the same portion from the devisees and legatees, in proportion to and out of the parts devised and bequeathed to them by such will." *In re* Bryant's Estate, 121 Misc. Rep. 102, 201 N. Y. Supp. 60 (1923) (court construed the word "settlement" as meaning "to provide for" or "to make provision for").

[9] Rawls v. Durham Realty & Ins. Co., 189 N. C. 368, 127 S. E. 254 (1925).

[10] McLean v. McLean, 101 N. E. 178, 180 (N. Y. 1913).

[11] *In re* Kirk's Estate, 191 Misc. Rep. 473, 80 N. Y. S. 2d 378 (1948); *In re* Kraston's Will, 58 N. Y. S. 2d 364 (1945); *In re* Kreutz' Will, 49 N. Y. S. 2d 402 (1944); *In re* Hagendorn's Will, 41 N. Y. S. 2d 491 (1943); *In re* Backer's Estate, 148 Misc. Rep. 318, 266 N. Y. Supp. 47 (1933); *In re* Froeb's Estate, 143 Misc. Rep. 660, 257 N. Y. Supp. 851 (1931); *In re* Bryant's Estate, 121 Misc. Rep. 102, 201 N. Y. Supp. 60 (1923).

[12] *In re* Von Finckenstein's Will, 179 Misc. Rep. 375, 39 N. Y. S. 2d 108 (1943); *In re* Curry's Will, 21 N. Y. S. 2d 544 (1940); *accord, In re* Bostwick's Will, 78 Misc. Rep. 695, 140 N. Y. Supp. 588 (1912).

[13] *In re* Hartman's Estate, 55 N. Y. S. 2d 791 (1945).

an after-born child was from inadvertence or mistake.[14] Also it has been said that such provision as contemplated by the statute may be made for the child by the parent either by will, gift, or by settlement, before, contemporaneous with, or after the will is made.[15] Further, the use of the term "any provision" in the statute would seem to furnish the basis for a holding by the court that the benefits of an insurance policy are a sufficient provision within the meaning of the statute.[16] Nevertheless, the court has continued to adhere to a strict construction of the statute, thereby defeating its purport and intent. Alhough it has been stated that the adequacy of the provision is not to be determined by the court but by the testator,[17] it appears that the North Carolina Supreme Court has in effect determined that insurance is not an adequate provision under the pretermission statute.

As the court in the principal case expressed its obligation to stare decisis, it would seem that a statutory amendment is necessary to alleviate the harsh result and the strict interpretation that has developed in construing the after-born statute. Such action is desirable if the original purpose and intent of the statute are to be effectuated. The following statutory amendment is proposed:

> Children born *or adopted* after the making of the parent's will, and whose parent shall die without making any provision for them *whatsoever in such will or otherwise or without indicating in such will an intent to exclude them therefrom,* shall be entitled to such share and proportion of the parent's estate as if he or she had died intestate, and the rights of any such after-born child shall be a lien on every part of the parent's estate, until his several share thereof is set apart in the manner prescribed in §28-153 to 28-158.[18]

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[14] Flanner v. Flanner, 160 N. C. 126, 75 S. E. 936 (1912); Thompson v. Julian, 133 N. C. 309, 45 S. E. 636 (1903); Meares v. Meares, 26 N. C. 192 (1843).

[15] Flanner v. Flanner, 160 N. C. 126, 75 S. E. 936 (1912).

[16] See Meares v. Meares, 26 N. C. 192, 197 (1843) (". . . the statute only provides for the case where the parent dies without having made provision for the child, which means, without making *any* provision . . ." [italics supplied]).

[17] King v. Davis, 91 N. C. 142 (1884); Meares v. Meares, 26 N. C. 192 (1843).

[18] Proposed changes to N. C. GEN. STAT. §31-45 (1943) are indicated by italics. See Second Report of the Commission on the Revision of the Laws of North Carolina Relating to Estates (1939), p. 87.