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Notes and Comments

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Bills and Notes—Intentional Cancellation of Instrument as Discharge of Obligation

H bought sixteen bonds of a series issued by defendants in 1912. In 1939, after the bonds had long been in default as to both principal and interest, *H* was advised by her financial agent, the plaintiff here, that they were worthless and she then burned them. When, ten years later, defendants were undergoing bankruptcy proceedings for reorganization, the plaintiff realized that the bonds were not without value and tried to recover as *H's* conservator. *Held:* There could be no recovery because the destruction of the instruments was intentional, and therefore the obligation was discharged.[1]

In reaching this decision the United States Court of Appeals for the Tenth Circuit gives the strictest possible interpretation to the language of the controlling Oklahoma statute which reads: "A negotiable instrument is discharged . . . (3) By the intentional cancellation thereof by the holder;"[2] which wording is identical with that of the Uniform Negotiable Instruments Law.[3]

The question squarely presented here is: In order to effect a discharge of the obligation itself, does the "intentional cancellation" referred to by the statute, require that only the *act* of destroying the instrument be intentional, or must there also be a further intent to renounce all rights under the debt?

The cases which have dealt with this problem, both before and since the Uniform Negotiable Instruments Law was enacted, apparently leave the matter still unsettled.

Only one case is found expressly construing the wording of the statute, which decision was relied on in the principal case.[4] There the payee of the note "made away with it," and although there was some

[1] State Street Trust Co. v. Muskogie Electric Trust Co., 204 F. 2d 920 (10th Cir. 1953). If by being in default the court means the bonds had matured, it would appear this action brought over ten years later would be barred by Oklahoma's five year statute of limitations. OKLA. STAT. ANN. tit. 12, § 95(1) (1937). It would make no difference that the bonds might be under seal for Oklahoma has abolished all distinctions between sealed and unsealed instruments. OKLA. STAT. ANN. tit. 15, § 139 (1937).

[2] OKLA. STAT. ANN. tit. 48, § 95(3) (1937).

[3] NEGOTIABLE INSTRUMENTS LAW § 119(3), found at N. C. GEN. STAT. § 25-126 (1953). THE UNIFORM COMMERCIAL CODE § 3-605 changes the language slightly: "(1) The holder of an instrument may even without consideration discharge any party (a) by intentionally cancelling the instrument or the party's signature by destruction or mutilation."

[4] McDonald v. Loomis et al., 233 Mich. 174, 206 N.W. 348 (1925).

showing of intent to forgive the debt by the destruction of the note, the court ruled that under the statute there is no need for a showing of intent beyond that simply to destroy the instrument. The court reasoned this to be the best rule, for if a holder who intentionally destroyed the primary evidence of his debt were allowed to still maintain an action, endless frauds would be invited for the courts to test.[5]

In the other decisions wherein it has been found that an intentional cancellation of the instrument is effective as a discharge of the debt, there was also present the further intent to actually forgive the obligation itself.[6]

There is, however, a group of cases in which no intent could be shown beyond that to destroy the instrument, and no cancellation of the obligation was found. Thus, it was held that where the parties to the note agreed to cancel it, but also expressly agreed that the debt was to remain in existence, the destruction of the note did not work a cancellation of the debt for the reason that the parties did not intend it to so operate.[7] The same result was reached where it was held to be a question for the jury to determine whether a note was torn with intent to relinquish the right to collect the money, even though it was intentionally destroyed during a fit of anger following a quarrel.[8] Again, it was held to be no discharge of the debt when the payee-wife intentionally tore her note after a quarrel with the maker-husband.[9] The rule announced by these cases would seem to be that though the

[5] *Id.* at 184, 206 N.W. at 351, relying on Vanauken v. Hornbeck, 14 N. J. Law 178 (Sup. Ct. 1833), wherein plaintiff, in anger, burned a note. It was held that there can be no action on the note for it ". . . would open a door to frauds without number—there may be memorandums, indorsements, attesting witnesses, or matters apparent on the face of the instrument, very important to the rights of the other party; and to get rid of which, may be the motive for carelessness or destruction." 14 N. J. Law 178, 182 (Sup. Ct. 1833).

[6] Darland v. Taylor, 52 Iowa 503, 3 N.W. 510 (1879) (destruction of note to forgive maker of obligation itself); Norton v. Smith, 130 Me. 58, 153 Atl. 886 (1931) (same); Wilkins v. Skoglund, 127 Neb. 589, 256 N.W. 31 (1934) (father gave a car to son A, and wanting to make a similar gift to son B, destroyed a note payable to him by B); Henson v. Henson, 151 Tenn. 137, 268 S.W. 378 (1925) (destruction of note to forgive obligation); *accord,* Jones' Adm'rs v. Coleman, 121 Va. 86, 92 S.E. 910 (1917) (no explanation offered for destruction of the note, but it was presumed that the burning was intentional and done to cancel the instrument).

[7] Gardner v. Rutherford, 57 Cal. App. 2d 874, 136 P. 2d 48 (1943).

[8] Greene v. Doz, 182 N. Y. Supp. 900 (Sup. Ct. 1920).

[9] Schlemmer v. Schendorf, 20 Ind. App. 447, 49 N.E. 968 (1898). The court here relied on Riggs v. Tayloe, 9 Wheat. 483 (U. S. 1824), where it was held there would be an action if the destruction, "even though voluntary" (intentional?), occurs through some mistake, and on Bagley v. McMickle, 9 Cal. 430 (1858), where it was held that if the plaintiff's claim be free from all suspicion of fraud, then the motive for the destruction becomes controlling as to whether or not secondary evidence will be admitted to prove the existence of the debt. *Accord,* Cockell v. Cawthon, 110 S.W. 2d 636 (Texas 1937), where although dealing with renunciation, the court ruled that even though the payee delivered a release as well as the notes themselves to the maker, if the payee did not intend to thereby effect a renunciation, the court would find none.

destruction of the instrument be an intentional act, if there be no intent thereby to discharge the obligation itself, and if clearly no circumstances are present which raise a suspicion of fraud, then the plaintiff ought to be allowed his action.[10] It should be noted that in these cases which have held the destruction of the instrument to be no discharge of the obligation, the action apparently was on the instrument, nothing being said as to whether or not any action remained on the original debt.[11]

It would seem that this distinction could validly be made, for when dealing with a material alteration of an instrument the courts look to see if the alteration was fraudulently made, and if it was not, then though the *instrument* is cancelled, there still exists an action on the original debt.[12] Were this principle extended to cases involving destruction, it would seem that so long as there are no circumstances suggesting fraud, and there is no intent to cancel the obligation, the court could find that the *instrument* is cancelled, but still allow the holder to sue on the obligation itself.

A somewhat analogous situation to destruction of an instrument is presented when the holder of a note or check marks it "Paid," thereby ostensibly discharging the instrument,[13] and later discovers it to be actually unpaid. Thus, where a partial payment only was made and the holder marked the note "Paid," the court found the holder still had an action.[14] In this area the courts are apparently willing to find that the obligation is not discharged on the ground that the holder usually is acting under some mistake.[15] The Uniform

[10] Blade v. Noland, 12 Wend. 173 (N. Y. 1834). Here no explanation was given for the destruction of the note. However, strong language is used by the court indicating that had there been evidence refuting any suspicion of fraud, an action could have been maintained, but in the absence of such evidence the court would not presume an honest purpose.

[11] However, in Greene v. Doz, *supra* note 8, the court, referring to an intent "to give up the right to collect the moneys represented by the notes," possibly implied that had there been present no intent to discharge the obligation, there would be an action on the original debt. This distinction, of course does not concern us when the court, as in the principal case, says the destruction of the instrument is also a discharge of the debt.

[12] Born v. Lafayette Auto Co., 196 Ind. 399, 145 N.E. 833 (1924); Perry v. Mfg. Nat. Bank of Lynn, 305 Mass. 368, 25 N.E. 2d 730 (1940); Catching v. Ruby, 91 Ore. 506, 178 Pac. 796 (1919).

[13] Washington Loan & Trust Co. v. Colby et al., 108 F. 2d 743 (D. C. Cir. 1939), relying on District of Columbia v. Cornell, 130 U. S. 655, 658 (1888), wherein it was said: "It is immaterial whether the cancellation is by destroying the instrument, or by writing or stamping words or lines in ink upon its face, provided the instrument . . . unequivocally shows that it has been cancelled."

[14] First Nat. Bank of Vicksburg v. Drexler, 184 So. 607 (La. 1938).

[15] Banks v. Marshall, 23 Cal. 223 (1863) (Where plaintiff received less interest than the note called for, but surrendered the note to the maker thinking it was fully paid, it was held that an action still existed on the note.); Drake Lumber Co. v. Semple, 100 Fla. 1757, 130 So. 577 (1930) (Bank thought the maker was paying his note and marked it paid. Actually the maker was buying the note as an assignee's agent. No discharge was found as none of the parties intended such.); Manufacturer's National Bank v. Thompson, 129 Mass. 438

Negotiable Instruments Law expressly provides that the cancellation is inoperative when made by mistake,[16] but the analogy remains in that just as in the principal case the holder intended to destroy the bonds, so in the case of the note or check the holder intended to mark the particular instrument "Paid."

The plaintiff here attempted to show that the bonds were destroyed through mistake, but the court found only an error in judgment not protected by the statute.[17] The mistake in the check and note cases, where relief was granted, consisted of the holder erroneously thinking the maker *had* money, while in the principal case, the holder thought the defendants would have *no* money. When the holder destroyed the bonds the defendants did not have the money to pay, but in time they acquired some funds. Obviously the plaintiff was mistaken as to the skill of the defendants' financial manager and as to the economic conditions surrounding the defendants' return to solvency. It is only questioned whether, under such circumstances, to conclude that a maker will have no funds in the future, is any less a mistake than to conclude the maker now has funds available, when both conclusions prove to be wrong.

In examining the reasoning of the court in the principal case, we find language which seems to question the court's own ruling. While the court concludes that it is unnecessary to find an intent to forgive the obligation, it reasons that the act of destruction is the highest

(1880) (Plaintiff, thinking maker of note had funds available, marked the note paid but the maker did not have funds. An action was found to exist.); Gleason v. Brown, 129 Wash. 196, 224 Pac. 930 (1924) (Payee cashed a check after maker's death. Upon advice he restored the money to the estate, and the court held that the payee still had an action as the cancellation occurred through a mistake of law.)

To the same effect are Prince v. Oriental Bank Corp., Eng., 3 App. Cas. 325 (1878); Warwick v. Rogers, Eng., 5 Man. & G. 340, 134 Eng. R. 595 (1843); Raper v. Birkbeck, Eng., 15 East 17, 104 Eng. R. 750 (1812); Ward v. Wray, Can., 23 Ont. W.N. 710, 9 Dom. L.R. 2 (1913).

North Carolina reaches the same result in Dewey v. Bowers, 26 N. C. 538 (1844). There defendant paid his note with a draft. Several days later, thinking the draft had been paid, plaintiff surrendered the note to defendant. No discharge was found, the court looking to the intent of the parties. *But cf.* Hood System Industrial Bank of High Point v. Dixie Oil Co., 205 N. C. 778, 172 S.E. 360 (1934).

Contra: Broad and Market Nat. Bank v. N. Y. & E. R. Co., 102 Misc. Rep. 82, 168 N. Y. Supp. 149 (Sup. Ct. 1917) (Plaintiff, thinking defendant had funds available, accepted his check in payment of a note and marked the note paid. A good discharge was found in that there was no fraud or mistake. However, the court recognized the discharge would have been inoperative had the check been accepted only on condition that it had to be honored before payment was valid.)

[16] NEGOTIABLE INSTRUMENTS LAW § 123, found at N. C. GEN. STAT. § 25-130 (1953). "A cancellation made unintentionally, or under a mistake or without the authority of the holder, is inoperative. . . ."

[17] State Street Trust Co. v. Muskogie Electric Trust Co., 204 F. 2d 920, 923 (10th Cir. 1953).

evidence of such an intent.[18] Had the court chosen to follow this line of reasoning, there seems little doubt that the plaintiff would have recovered, for the court admits there was *no* intent present to forgive the debt itself. However, the court simply chooses to conclude that regardless of the holder's over-all intent, so long as he intentionally destroyed the instrument, the whole obligation is forgiven.

It would seem that under this strict interpretation of the statute, even where the parties agreed to destroy the instrument but also expressly agreed that the debt should remain in existence, a discharge of the obligation would nevertheless result because only the act of destruction is looked to, and if that be intentional, the debt is discharged. It would further seem that even if a clear mistake of law or fact were present, this rule would compel the discharge to be effective if the act of cancelling the note is intentional, flying directly in the face of the section of the statute that provides the discharge shall be inoperative if made through mistake.[19] Surely the court would not intend to sanction such a result.

It is seriously questioned whether such a narrow interpretation is desirable. The results indeed appear harsh. The maker has done nothing in reliance on the destruction—in fact he was even ignorant of the act. Therefore he would be done no harm had the court simply said he was still liable. Whereas, by saying his liability was at an end, the effect is to make a gift to him, while the holder certainly did not intend to make a gift. The holder simply thought he would be unable to collect the debt, and from this the court's conclusion in effect would say that because he knowingly destroyed the instrument, he no longer wanted to collect the debt. It is felt that justice would best be served if, in each case, we were to look behind the destruction to discover the true motive for it, rather than to apply the automatic rule of absolute discharge announced here.

DONALD R. ERB

Bills and Notes—Renunciation of Rights by Holder Conditioned Upon Holder's Death—Effect as Discharge of Parties Liable on Instrument

"There is some obscurity in the provisions of our statute," said a New York court in its decision of a 1905 case[1] which hinged on the interpretation of a section of the statute on negotiable instruments then in force in that state[2]—a section virtually identical with the present Section 122 of the Negotiable Instruments Law.[3] A recent Virginia

[18] *Id.* at 922.

[19] See note 16 *supra.*

[1] Leask *et al.* v. Dew, 102 App. Div. 529, 92 N. Y. S. 891 (1st Dep't 1905).
[2] N. Y. Laws 1897, c. 612, § 203.
[3] "The holder may expressly renounce his rights against any party to the

case, *Farmer* et al. *v. Farmer*,[4] has called attention to the fact that a half-century of judicial interpretation of Section 122 has not brought forth much certainty as to what it does and does not allow the holder of negotiable paper to accomplish by an attempted renunciation of his rights against any party to the instrument. The problem before the court was this: the payee-holder of a promissory note made by a nephew and the nephew's wife, feeling that his death was relatively imminent and not desiring that any payments on the instrument (an installment note containing an acceleration clause) be made after his death, consulted his attorney and upon the latter's advice made this notation on the instrument itself: "At my death this note is to be cancelled and not to be collected. 5/1/48 [signed] P. W. Farmer." He subsequently made a similar notation on the mortgage deed of trust securing the note, and died about a year later. His ancillary administrator filed a bill in equity to have the note declared valid as against the makers, the entire amount then being due under the acceleration clause because one payment had not been made. The Supreme Court of Appeals, brushing aside the trial court's conclusions that the renunciation was ineffective because it was testamentary in character and because it did not meet the requirements of a valid gift inter vivos, reversed a decree that the obligation was still enforceable, and held (1) that the death of the payee-holder had consummated a valid discharge begun by the payee-holder's conditional renunciation, and (2) that Section 6-475 of the Virginia Code, the equivalent of N. I. L. § 122, does not deprive a renunciation of its effect merely because it is conditional, the condition having occurred.[5]

Obviously, the first problem posed by Section 122 is one of definition: what does the word "renounce" mean, as applied to a holder's rights on a negotiable instrument? At English common law, before the enactment of the Bills of Exchange Act of 1882,[6] it was quite well

instrument, before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon."

[4] —— Va. ——, 77 S.E. 2d 415 (1953).

[5] The court did not decide whether the payee-holder could have revoked his renunciation had he changed his mind prior to his death, or what the results might have been had he sued for the entire amount upon the default in payment which accelerated the maturity; it did indicate that, whatever its answers to those problems might be, they would not influence the result reached in a situation such as that presented by the *Farmer* case.

[6] 45 & 46 VICT., c. 61 (1882). Section 62, quite similar to N. I. L. § 122, reads as follows:

"Express Waiver.—(1) When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor the bill is discharged.

settled that the holder of negotiable paper could discharge a party liable thereon even by an *oral* statement of his intention so to do, with or without consideration in return.[7] American courts, prior to the N. I. L., never went so far as to validate an oral discharge made by the holder without consideration.[8] Even attempts at gratuitous discharge evidenced by a writing were held to be of no effect, the common law of gifts being applied to find that there was no valid transfer of title if the instrument itself were not delivered up.[9] The single case allowing effect to a gratuitous renunciation arrived at its result only by treating what was actually "past" consideration as value sufficient to support the discharge.[10] Thus both Section 62 of the Bills of Exchange Act and Section 122 of the N. I. L. changed the law as it had existed previously. These enactments purported to allow a "renunciation" of the holder's rights against parties to negotiable instruments when that renunciation was evidenced by a writing or by a surrender of the instrument itself. In the light of the cases just considered, the result was a restriction of the previous English doctrine of renunciation, and an expansion of the American doctrine.

But did the "renunciation" referred to mean (1) a gratuitous abandonment of rights, (2) an abandonment of rights supported by a consideration, or (3) either type of abandonment? The first really thorough consideration of the question did not come until 1932, and the case then decided, *Gannon v. Bronston*,[11] is still the best available judicial discussion of the subject.[12] Bronston, one of three makers of a note, attempted, when sued by the holder, to set up as a defense an oral

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"The renunciation must be in writing, unless the bill is delivered up to the acceptor.

"(2) The liabilities of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity; but nothing in this section shall affect the rights of a holder in due course without notice of the renunciation."

The use of the word "acceptor" rather than "holder" would seem at first glance to restrict the application of Section 62 to bills of exchange only, and to exclude promissory notes. Such is not the case, for Section 89(2) states: "In applying these provisions the maker of a note shall be deemed to correspond to the acceptor of a bill. . . ."

[7] Foster v. Dawber, 6 Exch. 839, 155 Eng. Rep. 785 (1851). In Whatley v. Tricker, 1 Camp. 35, 170 Eng. Rep. 867 (1807), the court held that, while the fact that the renunciation in issue was oral did not alone deprive it of effect as a discharge, the fact that it was not absolute and unconditional made it ineffective, thus foreshadowing one of the problems faced by the Virginia court in the *Farmer* case, one hundred and forty-six years later.

[8] Bradley v. Long, 33 S. C. Law (2 Strob.) 160, Book 14 S. C. Reports 161 (1847); Griffin *et al.* v. Simmons *et al.*, 61 Tenn. 19 (1872).

[9] Hart *et al.* v. Strong *et ux.*, 183 Ill. 349, 55 N.E. 629 (1899); Bragg v. Danielson, 141 Mass. 195, 4 N.E. 622 (1886).

[10] Lowrey v. Danforth, 95 Mo. App. 441, 69 S.W. 39 (1902).

[11] 246 Ky. 612, 55 S.W. 2d 358 (1932).

[12] "The most notable thing in the case is the learned and thorough way in which it was handled. It is believed that this is, perhaps, the most erudite opinion to be found in the Kentucky Reports." Note, 22 Ky. L. J. 445, 448 (1934).

discharge supported by consideration. The precise question facing the court, therefore, was whether the words "renounce" and "renunciation," as used in N. I. L. Section 122, referred to discharges for a valuable consideration and required such discharges to be in writing. Collecting all the cases on the problem that it could find, the court decided that the majority and preferable view was that "renunciation" meant only the *gratuitous* abandonment of a right.[13] Such is still the majority view today.[14] The minority view is that "renunciation" describes the abandonment of a right *with or without* consideration, and that even discharges for a valuable consideration—that is, a consideration other than that which the instrument itself promises to give—must be in writing or evidenced by a surrender of the instrument if they are to be effective.[15] The only North Carolina case passing on the point adopts the minority view.[16] No decisions handed down since *Gannon v. Bronston* have espoused the minority view,[17] and the predominant contemporary American view is that a "renunciation," under Section 122, is the gratuitous giving up of a right. The few law re-

[13] The rationale of the majority view seems to lean heavily on the history of the common law "release." Such a "release" was a discharge, under seal, of some existing obligation, the seal being used to import consideration and make possible a gratuitous but legally effective giving up of rights on negotiable paper or other contractual obligations. 6 WILLISTON, CONTRACTS § 1820 (1938). The English concept of gratuitously renouncing rights on negotiable paper seems, at least in part, to have developed from an imitation of the law of France, where the practice was known at a relatively early date and later codified. "Les obligations s'éteignent, par la paiement, par la novation, par la remise volontaire." ("Obligations are extinguished by payment, by novation, and by voluntary release.") FRENCH CIVIL CODE, Ann. by Blackwood Wright, c. 5, art. 1234. Such were the germs of the renunciation provisions of the Bills of Exchange and Negotiable Instruments Acts, runs the argument of the majority, and so the modern statutory renunciation is held to be the gratuitous surrender of a right. As we have seen, *supra* note 7, the English common law advanced to the point of giving effect to an oral renunciation; the statutory requirement of a writing seems to have been imported from the law of Scotland. 6 WILLISTON, CONTRACTS § 1832 (1938).

[14] McCoun v. Shipman, 75 Ind. App. 212, 128 N.E. 683 (1920); Cardoza *et al.* v. Leveroni, 233 Mass. 310, 123 N.E. 672 (1919); McGlynn v. Granstrom, 169 Minn. 164, 210 N.W. 892 (1926); Hazlehurst Oil Mill and Fertilizer Co. v. Booze *et al.*, 160 Miss. 136, 133 So. 120 (1931); Barber v. Mallon *et ux.*, 168 S.W. 2d 177 (Mo. App. 1943); English *et al.* v. Evans, 157 S.W. 2d 793 (Mo. App. 1942); Nelson v. Hudson *et al.*, 221 Mo. App. 211, 299 S.W. 1111 (1927); Bank of Amsterdam v. Welliver *et al.*, 215 Mo. App. 247, 256 S.W. 130 (1923); Shaffer v. Akron Products Co., 91 Ohio App. 535, 109 N.E. 2d 24 (1952); Johnston & Larimer Dry Goods Co. v. Helf *et al.*, 178 Okla. 527, 63 P. 2d 681 (1936); Soab v. Clawson, 138 Okla. 126, 280 Pac. 598 (1929); Beach v. Bello *et al.*, 58 R. I. 445, 193 Atl. 526 (1937); Kohn *et al.* v. Zaludek, 38 S.W. 2d 110 (Tex. Civ. App. 1931).

[15] Whitcomb v. National Exch. Bank of Baltimore, 123 Md. 612, 91 Atl. 689 (1914); Portland Iron Works v. Siemens *et al.*, 135 Ore. 219, 295 Pac. 463 (1931); Pitt *et al.* v. Little, 58 Wash. 355, 108 Pac. 941 (1910); Baldwin v. Daly *et al.*, 41 Wash. 416, 83 Pac. 724 (1906).

[16] Manly v. Beam, 190 N. C. 659, 130 S.E. 633 (1925).

[17] See note 15 *supra*.

view notes dealing with the subject consider this the preferable definition.[18]

Whatever their view as to the proper definition of "renunciation," all of the cases decided under the N. I. L., save for two,[19] hold that a written, gratuitous, unconditional abandonment by a holder of his rights against a party to negotiable paper will, except under certain rather extraordinary circumstances,[20] discharge that party to the extent of the renunciation. Generally, the cases also hold that the renunciation *must* be in writing in order to be effective, although a few decisions have pointed out specific common-sense exceptions from this requirement.[21]

We have only three American cases dealing with *conditional* renunciation in general, as distinguished from renunciation conditioned upon death. In *Dickinson v. Vail*,[22] the defendant surety, Vail, had been discharged in writing (whether for or without a consideration is not clear) upon the express condition that he was to pay the full amount of the note if a suit were instituted against another surety and no recovery was had. Such an action was in fact begun, but the plaintiff holder recovered nothing, because of her own negligence in failing to give notice of appeal. An action was then brought against Vail, who pleaded the written discharge. In a brief opinion, the court held that Vail had been discharged despite the fact that the renunciation was conditional and, interpreting the meaning of the word "unconditional" in Section 122, said: "But this does not hinder such holder from conditionally releasing any of the parties to the note, including the principal debtor. The statute merely affirms the effect of an absolute and unconditional renunciation to the principal debtor, but it does not prevent a renunciation that is not absolute and unconditional."[23]

[18] Notes, 22 U. OF CIN. L. REV. 412 (1953), 9 U. OF CIN. L. REV. 90 (1935), 22 KY. L. J. 445 (1934), 25 MICH. L. REV. 782 (1927), 4 TULANE L. REV. 117 (1929).

[19] In Arnold v. Darby, 49 Ga. App. 629, 176 S.E. 914 (1934), the court held that no discharge was valid without consideration. In Danis v. Angelo, 283 Mass. 324, 186 N.E. 558 (1933), there is dictum to the effect that a written renunciation will not operate to discharge an instrument if the instrument itself is not delivered up. The N. I. L. has been in effect in Georgia since 1924, and in Massachusetts since 1898, and both states have the standard renunciation section. GA CODE ANN. § 14-904 (1933); MASS. LAWS ANN. c. 107, § 145 (1946). Clearly, both decisions were inadvertent.

[20] Renunciation made under a mistake of fact does not discharge the instrument. Berryman v. Dore *et al.*, 43 Idaho 327, 251 Pac. 757 (1926). To the same effect, although no negotiable instrument involved, see United Fruit Co. v. United States, 186 F. 2d 890 (1st Cir. 1951).

[21] Estoppel may operate to make an oral renunciation effective as a discharge. Bullock v. First Nat. Bank of Galva, 196 Iowa 522, 194 N.W. 930 (1923). Oral renunciation, if made in open court, constitutes a valid discharge. Ginnet v. Greene, 87 Wash. 40, 151 Pac. 99 (1915). A written renunciation which has been subsequently destroyed may be proved by competent evidence. Roth v. Roth, 142 S.W. 2d 818 (Mo. App. 1940).

[22] 199 Mo. App. 458, 203 S.W. 635 (1918). [23] *Id.* at 458, 203 S.W. at 636.

In *Bank of U. S. v. Manheim,*[24] a court dealing with an entirely different problem—an oral discharge supported by consideration—remarked in passing that "renunciation, unsupported by a consideration, can be effected only by such writing as demonstrates a present, absolute, and unconditional intention to renounce."[25]

In 1950, the United States Court of Appeals for the Second Circuit, speaking through Judge Learned Hand, reached a decision on the "unconditional" issue which, squarely supported by *Dickinson v. Vail,*[26] and opposed only by the *dictum* in *Bank of U. S. v. Manheim,*[27] may well be considered reputable authority on the effect of the "unconditional" segment of Section 122. The case was *New York, N.H. & H. R. Co. v. Reconstruction Finance Corporation.*[28] The railroad sought to be allowed to discharge at four per cent certain of its obligations held by the finance corporation and calling for an interest of five per cent. A letter written several years previously to the railroad by the finance corporation, stating that four per cent would be accepted if all the notes were paid, was introduced by the railroad as the basis of its claim that only the lesser amount of interest was owed. *Dickinson v. Vail*[29] had given judicial approval to a partial renunciation. But the finance corporation contended that the conditional character of the renunciation, in view of Section 122 of the N. I. L., made it ineffective as a discharge of any part of the railroad's obligation. The court thought otherwise:

> The question . . . is whether the limitation upon a renunciation, contained in the second sentence, should be imputed to the first sentence, whenever the renunciation is at or after maturity. The result of this would be either to limit the first sentence to the period before maturity, or to make its words have one meaning before, and another after, maturity. Neither hypothesis is permissible. The sentence expressly applies after maturity; and the same words cannot change their meaning. Hence, *even though the result may be to make the second sentence redundant,* we must give the first sentence the unlimited scope to which the words are entitled, and hold that it covers a conditional renunciation after maturity, unless the authorities have construed it otherwise.[30] (Italics supplied.)

The only authorities the court found were *Dickinson v. Vail,*[31] which

[24] 264 N. Y. 45, 189 N.E. 776 (1934).
[25] *Id.* at 48, 49, 189 N.E. at 776, 777.
[26] 199 Mo. App. 458, 203 S.W. 635 (1918).
[27] 264 N. Y. 45, 189 N.E. 776 (1934).
[28] 180 F. 2d 241 (2d Cir. 1950).
[29] 199 Mo. App. 458, 203 S.W. 635 (1918).
[30] 180 F. 2d 241, 245 (2d Cir. 1950).
[31] 199 Mo. App. 458, 203 S.W. 635 (1918).

it noted as being consistent with its opinion, and *Bank of U. S. v. Manheim.*[32] The court emphasized the fact that, in the latter case, there was really no problem involving a renunciation to be passed on, although "apparently the judge did suppose that all renunciations under § 122 had to be unconditional."[33] This holding was disapproved: "With deference," said Hand, "this was plainly inadvertent; and we cannot follow it."[34]

All in all, the *New Haven* case seems to embody a well-considered interpretation of the statute, although it is clear that Learned Hand's typically subtle use of pure logic in writing off the "unconditional" sentence of Section 122 as mere surplusage flies in the face of the reasonable assumption that the writers of statutes do not generally include entire sentences, and particularly sentences which partially contradict their own context, merely for decorative effect.[35] Unfortunately, an examination of three editions of the negotiable instruments statute as annotated by Mr. John J. Crawford, the draftsman of the Uniform Act, affords us scant information as to what Mr. Crawford had in mind when he created Section 122.[36]

In reaching its result in *Farmer v. Farmer,* the Virginia court gave great weight to Judge Learned Hand's decision.[37] But the result in the Virginia case represents a departure from the previous norm in American cases where the renunciation was conditioned upon the holder's death, assuming that the small number of cases we have in the subject can be said to have formulated any norm.[38] Only two such

[32] 264 N. Y. 45, 189 N.E. 776 (1934).
[33] 180 F. 2d 241, 245 (2d Cir. 1950).
[34] *Ibid.*
[35] One interpretation which seems sound and which at least partially explains the apparent conflict within Section 122 has been offered in a work now out of date but certainly worth quoting on this point: "The second sentence provides for discharge of the *entire instrument* where the renunciation is in favor of the 'principal debtor,' and made *'at or after maturity.'* If made *before maturity* the effect would be to discharge the principal debtor under the first sentence; with the consequences provided in § 120(5), namely, that by release of the principal debtor all parties are discharged, but not so as to affect the rights of a holder in due course should the instrument thereafter be re-issued and circulated before maturity." BIGELOW, THE LAW OF BILLS, NOTES, AND CHECKS § 580 (3d ed. by Lile, 1928).
[36] CRAWFORD, NEGOTIABLE INSTRUMENTS LAW ANNOTATED § 203 (1897); CRAWFORD, NEGOTIABLE INSTRUMENTS LAW ANNOTATED § 203 (3d ed. 1908); CRAWFORD, NEGOTIABLE INSTRUMENTS LAW ANNOTATED § 122 (Rev. ed. 1916).
[37] —— Va. ——, 77 S.E. 2d 415, 418, 419 (1953).
[38] The *Farmer* case is, however, in accord with certain English cases decided before the adoption of the Bills of Exchange Act. In Wekett v. Raby, 2 Bro. P.C. 386, 1 Eng. Rep. 1014 (1724), the deceased holder had left the note in an envelope which also contained, on a separate paper, this written declaration of renunciation: "I have Raby's bond, which I keep; I don't deliver it up, for I may live to want it more than he; but when I die he shall have it, he shall not be asked or troubled for it." The court held that the debt was discharged. In Aston v. Pye, 5 Ves. 350, 31 Eng. Rep. 528 (1788), the renunciation was at least impliedly conditioned upon the holder's death. He had made an addition

cases, to which the N. I. L. could be applied, seem to have been reported prior to the Virginia decision, and both were decided by the same intermediate appellate court.

Dimon v. Keery[39] involved the writing on a note by the payee-holder, at the time of its making, of the words: "At my death the above note becomes null and void. Stephen C. Dimon." The court completely failed to consider the quite obvious possibility that the notation might have been an actual term of the contract represented by the instrument.[40] Nor was the then-prevailing New York statute on negotiable instruments[41] (in which the renunciation section,[42] but for two harmless extra commas, was identical with the present Section 122 of the N. I. L.) mentioned at all. Without admitting that the occurrence of the condition—the death of the holder—had operated to make the note null and void, the court stated that, even if this were so, the pre-existing obligation which the note had been issued to cover still existed. Applying the common law of gifts, it thought the renunciation ineffective because it indicated mere donative intent, not consummated by delivery. Clearly this decision ought not to be cogent precedent in any future conditional renunciation case, since (1) it cited no common law author-

to his will, stating that the maker "pays no interest, nor shall I ever take the principal unless greatly distressed." The writing was held not valid as a disposition of property by will, apparently for lack of the requisite formality, but it was held effective as a discharge of the maker's obligation on the note, the holder having died. These results are not surprising when we remember the generally liberal English common law attitude toward the renunciation of contract rights. (See notes 7 and 13 *supra.*)

Under the Bills of Exchange Act, one English case has denied effect to a renunciation which was perhaps impliedly, but certainly not expressly, conditioned upon the holder's death. *Re* George, Francis v. Bruce, L.R. 44 Ch. D. 627 (1890). There the deceased holder had desired to destroy the instrument, but was not able to find it; he therefore had his nurse make a written memorandum of his desires: "It is by Mr. George's dying wish that the cheque for £2000 money lent to Mrs. Francis be destroyed as soon as found." Although this writing was signed only by the nurse, the court did not decide whether the signature of the holder himself was one of the requirements for a valid renunciation. The principal reason advanced for denying effect to the renunciation was that, as far as the court was concerned, it could have been revoked by the deceased at any time prior to his death—the precise point which the Virginia court, in the *Farmer* case, did not decide and thought unimportant. At any rate, as a New York court which later considered the English case was quick to note, the renunciation involved was actually unconditional. Leask *et al.* v. Dew, 102 App. Div. 529, 92 N. Y. S. 891 (1st Dep't 1905).

[39] 54 App. Div. 318, 66 N. Y. S. 817 (1st Dep't 1900).

[40] When the contract of making states that the note is to be discharged as against certain parties upon the death of some human being (usually the holder), the death will operate as a discharge. This is a matter of simple contract law. Pyle v. East *et al.*, 173 Iowa 165. 155 N.W. 283 (1915); De Lapp *et al.* v. Anderson's Adm'r., 305 Ky. 336, 203 S.W. 2d 389 (1947); Daugherty v. Preuitt, 113 Okla. 66, 242 Pac. 529 (1925). Clearly the inclusion of such a condition in an instrument conditions the promise to pay and renders the instrument non-negotiable. N. I. L. § 1(2).

[41] N. Y. Laws 1897, c. 612. The Uniform Act was not adopted in New York until 1909. N. Y. Laws 1909, c. 43.

[42] N. Y. Laws 1897, c. 612, § 203.

ity for its conclusion, and (2) it did not even purport to be an interpretation of the negotiable instruments statute.

Five years later the same court, in *Leask* et al. *v. Dew*,[43] faced almost exactly the same problem, and reached the same result, using somewhat better reasoning in the process.[44] The deceased holder of a note had left it in an envelope, along with a dated, signed, and witnessed written notation on a separate piece of paper: "The enclosed note I wish to be cancelled in case of my death, and if the law does not allow it I wish you to notify my heirs that it is my wish and orders." The court recognized the common law holding in *Wekett v. Raby*[45] that such an attempt at discharge might be effective, and frankly admitted that the renunciation section of the applicable New York statute[46] was not clear in its terms. The fact that the deceased had used the precatory word "wish," rather than some more forceful expression, was seized upon in order to support the argument that there was really no "renunciation." But the major reason for the court's denying effect to the renunciation seems to have been its feeling that the note might have been enforced anyway by the holder before his death, if he had simply changed his mind. "Had it been delivered to the defendant during the lifetime of the testator, it would not have precluded the latter at any time upon maturity from enforcing the note."[47] The possibility that this might have happened seems to be a specter that rises before the courts in all of these cases. At any rate, this was the last reported decision, prior to the *Farmer* case, dealing with renunciation conditioned upon the holder's death.[48]

[43] 102 App. Div. 529, 92 N. Y. S. 891 (1st Dep't 1905).

[44] In both cases, the court was composed of five justices and handed down a unanimous decision. Justice Ingraham, who wrote the opinion in Dimon v. Keery, 54 App. Div. 318, 66 N. Y. S. 817 (1st Dep't 1900), sat on the court which decided Leask *et al.* v. Dew, 102 App. Div. 529, 92 N. Y .S. 891 (1st Dep't 1905), as did two other judges who had concurred in the decision of the former case. One of those two, Justice Hatch, wrote the opinion in the latter. Thus three-fifths of the court sitting on the 1905 case had a rather compelling reason—personal consistency—for deciding as they had in the earlier case. Hence, it would be quite inaccurate to say that two different courts have ruled against the effectiveness of the renunciation conditioned upon death.

[45] 2 Bro. P.C. 386, 1 Eng. Rep. 1014 (1724), discussed *supra* note 36.

[46] N. Y. Laws 1897, c. 612, § 203.

[47] 102 App. Div. 529, 92 N. Y. S. 891, 895 (1st Dep't 1905).

[48] Interesting cases dealing with closely related problems have arisen. One line of English cases reveals a method of effecting renunciations which an American attorney, when confronted with the proper fact situation, might at least want to test. The English courts have held that the naming of the maker of a negotiable instrument as executor of the holder will discharge the instrument in law at the holder's death, to avoid the possible anomaly of the maker's bringing an action against himself to enforce the obligation, and that the maker is then liable only in equity, there to account for the amount of the instrument in an administration proceeding. *In re* Bourne, [1906] 1 Ch. 697; Freakley v. Fox, 9 B. & C. 130, 109 Eng. Rep. 49 (1829); Cheetham v. Ward, 1 B. & P. 630, 126 Eng. Rep. 1102 (1797); Wankford v. Wankford, 1 Salk. 299, 91 Eng. Rep. 265 (1699?). Section 61 of the Bills of Exchange Act, providing that an

One North Carolina case, *Parker v. Mott*,[49] has dealt with a renunciation which, while not in the main conditioned upon death, was certainly made in contemplation of death. The payee-holder went to an attorney's office, related her intention to make a gift of the principal to the makers, and pursuant to the attorney's advice made a signed notation on the instrument: "This note is hereby assigned, the interest to be paid me during my life, and at my death the note is to be delivered." The Supreme Court held that the makers were discharged of their obligation to pay the principal as soon as the notation was made, and of their obligation to pay the interest, the holder having died. The immediate transfer of "title" to the principal was said to validate the transaction under the law of gifts, it not being necessary to transfer the note itself since such transfer would have been inconsistent with the holder's desire to take the interest for life.[50] Whether the notation meant to say that interest should be paid during the holder's entire life, even after the maturity date of the note if the holder had lived for such a length of time, was a point not raised; until we have a judicial answer to the question, makers of notes might do well to refuse the holder's "gift" made on such terms, where there is reason to suspect that the holder may live for a considerable period. At any rate, *Parker v. Mott* seems to give North Carolina attorneys an effective means of accomplishing what was achieved in the *Farmer* case, but with the rather severe limitation that the immediate assignment of principal used

instrument may be discharged by the maker's coming into possession of it "in his own right"—language much like that of N. I. L. § 119(5)—has been held not to exclude discharge by his coming into possession "in a representative capacity." Jenkins v. Jenkins, [1928] 2 K.B. 501. (Here, the note in question was made by several parties, only one of whom had been named executor of the deceased holder. Nevertheless, the court held that all the makers were released at law, but indicated that the executor could probably bring them in for contribution when he accounted in equity to the holder's estate.

One English case, not involving a negotiable instrument, has held that the executor debtor can avoid even the obligation to account in equity by introducing any competent evidence, including oral statements of the deceased, to show that the deceased testator-creditor did not intend that the obligation should be enforced after his death. *In re* Applebee, [1891] 3 Ch. 422. And it has been held immaterial whether the making of the will preceded or was subsequent to the incurrence of the debt. Jenkins v. Jenkins, [1928] 2 K.B. 501.

The application of these rules in a proper case might well allow discharge by methods far more flexible than even a liberal interpretation of the negotiable instruments statutes taken alone would seem to make possible. However, one American case has held that a party is not discharged under N. I. L. § 119(5) by acquiring an instrument "purely in a representative capacity." Schwartzman v. Post *et al.*, 84 N. Y. S. 922, 924 (Sup. Ct. 1903).

[49] 181 N. C. 435, 107 S.E. 500 (1921).

[50] To say that "title" passes when a creditor forgives a debtor his obligation leaves something to be desired insofar as accuracy in expressing what actually happens is concerned. Speaking of "title" as if the obligation were a material entity seems to involve an unnecessary venture into the realm of metaphysics. The point is a small one, but the court would have been more accurate if it had referred to what took place as an "immediate, absolute, unconditional renunciation of the holder's right to collect the principal from the maker."

in *Parker v. Mott* precludes the holder's subsequently changing his mind and enforcing the entire obligation. Whether a holder who had renounced conditionally could still enforce his note we do not know, but certainly he could *not* do so when he had already passed "title" to the principal. Therefore it would seem that the safest means of effecting a conditional renunciation revocable on change of mind before death would be for the holder to include in his will a provision leaving the note to the maker,[51] since a will is generally revocable at any time before the testator's death.[52]

It is submitted that the Virginia court's decision in the *Farmer* case is commendable. The *New Haven* case,[53] while it did not dispel all doubts about the meaning of Section 122, is certainly reputable authority for the proposition that conditional renunciations in general ought to be held effective when the condition has occurred. There is no good reason for drawing a distinction in cases where the renunciation is conditioned upon the holder's death, the only immediately obvious difference being that the introduction of the element of death into any sort of transfer traditionally raises the issue of "testamentary disposition." But this issue the Virginia court, probably wisely, did not consider material for the purposes of its decision.[54] True, the conditional renunciation, even if itself revoked, would, if written on the instrument or known to a prospective holder, prabably destroy negotiability in fact, if not in law, but the destruction of negotiability is the holder's risk, and in any event is no detriment to a dead holder whose intention while he lived was that the note should not be paid after his death. The question of whether a conditional renunciation, once made, can be revoked before the occurrence of the condition, can be answered when and if it arises, but neither the answer nor its contemplation ought to block the giving of effect to the desires of a holder who has died without revoking.

So long as Section 122 of the N. I. L. retains its present wording, it will be a source of confusion in many of the cases to which it will be applied. A carefully phrased replacement section is called for, and the proposed Uniform Commercial Code discloses one possibility.[55]

[51] For an example of the use of this method of discharge, see Feulner v. Gillam, 211 Ill. App. 348 (1918).

[52] ATKINSON, WILLS § 152 (1937).

[53] 180 F. 2d 241 (2d Cir. 1950).

[54] "We are not concerned with whether the notations are 'testamentary in character,' or whether the transaction meets the requirements of a valid gift *inter vivos* to the makers of the balance due on the note at the holder's death. The single issue is whether the notations on the note and deed of trust, or either of them, satisfy the requirements of Code, § 6-475, so as to constitute a renunciation by the holder of his rights against the makers." —— Va. ——, 77 S.E. 2d 415, 417 (1953).

[55] "Cancellation and Renunciation.

The recent Virginia decision represents the broad and salutary general philosophy that the courts, absent some clear restriction of law or of public policy, ought not to block the attainment of human desires. For so long a time as we shall have to operate under the present Section 122, it is to be hoped that this philosophy will prevail in its interpretation.

J. V. HUNTER

Criminal Law—Banishment

Recently a sentence of two years on the roads was suspended on condition that the defendant leave the State of North Carolina for two years. The Supreme Court of this State held that this was in all practical effect a sentence of banishment, and as such, was void.[1] What then is banishment, and how does it fit into our legal scheme of things?

In one form or another, banishment, or transportation,[2] has been known in Europe from ancient times as a punishment for crime. In one form, *deportatio,* it was introduced by Augustus into the Roman law of that age and, gradually superceding exile,[3] was by no means an uncommon punishment.[4] In another form, *abjuration,* it was known in the kingdoms founded upon the wreckage of Imperial Rome[5] and later appeared in the early Anglo-Saxon laws of Alfred.[6] The accused would flee to a sanctuary, which generally was holy ground, where he would confess his crime and swear to leave the realm, on no occasion to return without permission from the Crown. This, Blackstone points out, was not strictly a punishment, but rather was in the nature of a

"(1) The holder of an instrument may even without consideration discharge any party
(a) by intentionally cancelling the instrument or the party's signature by destruction or mutilation, or by writing 'cancelled' or equivalent words across the instrument or against the signature; or
(b) by renouncing his rights by a signed writing or by surrender of the instrument to the party to be discharged.
"(2) Neither cancellation nor renunciation without surrender of the instrument affects the title thereto." Uniform Commercial Code, § 3-605 (Official Draft 1952). Subsection (2) is difficult to comprehend and might well be clarified or omitted in future drafts.

[1] State v. Doughtie, 237 N. C. 368, 74 S. E. 2d 923 (1953).

[2] It is unnecessary to distinguish here between banishment and transportation since the result in each is the same. Technically, however, banishment "is inflicted principally upon political offenders, 'transportation' being the word used to express a similar punishment of ordinary criminals. Banishment, however, merely forbids the return of the person banished before the expiration of the sentence, while transportation involves the idea of deprivation of liberty after the convict arrives at the place to which he has been carried." BLACK'S LAW DICTIONARY, *Banishment* (4th ed. 1951).

[3] BUCKLAND, A TEXT-BOOK OF ROMAN LAW 98 (1921).

[4] 1 PIKE, A HISTORY OF CRIME IN ENGLAND 16 (1876).

[5] 3 HOLDSWORTH, HISTORY OF ENGLISH LAW 303 (3rd ed. 1923).

[6] Laws of Alfred, c. 5, cited in 3 HOLDSWORTH, HISTORY OF ENGLISH LAW 303 (3rd ed. 1923).

condition to pardon.[7] Because abjuration offered a means of escaping, with one's head, the consequences of his crime, it became more an incentive to crime than a deterrent, and for this reason it was abolished in 1604.[8] It had one important effect, however: it established the validity of the sovereign's attaching to a pardon the condition that one pardoned leave a prescribed place, either for a specified term or for life.[9]

From the reign of Charles II, banishment became a not infrequent condition and has consistently been held valid since that time in the courts of both Great Britain[10] and the United States.[11] The usual approach by the bench in recognizing its validity as a condition is that the power of the sovereign (or in the United States, the executive) to grant a pardon includes the lesser power to grant a conditional pardon, so long as it is neither immoral, illegal, nor impossible of performance.[12] Since such a condition is obviously neither immoral nor impossible, it was argued in Ex parte *Snyder*[13] that a condition that the parolee leave the State of Oklahoma for twenty years was in conflict with the Constitution of that State, which provides that "no person shall be transported out of the state for any offense committed within the state. . . ."[14] It was held, however, that this was not involuntary transportation. Rather, "the parole with all the conditions set forth therein was a matter which

[7] 4 BLACKSTONE'S COMMENTARIES 332 (Sharswood's Ed. 1885); 8 C.J.S., *Banishment* p. 385 (1938).

[8] "So much of all statutes as concerneth abjured persons and sanctuaries... shall stand repealed and be void." 1 JAMES I, c. 25, §34 (1604). See also 20 JAMES I, c. 18 (1624).

[9] 8 C. J. S., *Banishment* p. 385 (1938). See also 7 BACON'S ABRIDGMENT 412, as quoted in 4 BLACKSTONE'S COMMENTARIES 40 (Sharswood's Ed. 1885). "It seems agreed that the king may extend his mercy on whatever terms he pleases, and consequently may annex to his pardon any condition that he thinks fit."

[10] In one of the very earliest reported cases, the condition was that the criminal "go beyond the seas for five years." Copeland's Case, J. Kel. 45, 84 Eng. Rep. 1075 (1665).

[11] State v. Fuller, 1 McCord 178 (S. C. 1821); State v. Chancellor, 1 Strob. 347 (S. C. 1847); State v. Barnes, 32 S. C. 14, 10 S. E. 611, 17 Am. St. Rep. 832 (1889); *Ex parte* Hawkins, 61 Ark. 321, 33 S.W. 106 (1895); *Ex parte* Snyder, 81 Okla. Cr. Rep. 34, 159 P. 2d 752 (1945). The above pardons were all granted on condition that the prisoner leave the state. Perhaps the most interesting condition was that "on or before the last of the said month of April," the prisoner was to "depart from and out of the United States of America, and never return to the same"—this from a state court. It was upheld on the ground that, while the governor's authority did not extend beyond the borders of the state, it was sufficient validly to impose such a condition. People v. Potter, 1 Parker, C. R. 47 (N. Y. 1845). The same conclusion has been reached in a Federal court. Kavalin v. White, 44 F. 2d 49 (10th Cir. 1930).

[12] Kavalin v. White, *supra* note 11. The power to grant pardons is provided the governor by every state constitution. Power to grant conditional pardons is generally granted by statute, but may be found in some state constitutions. For example, the governor of North Carolina may grant pardons "subject to such conditions, restrictions, and limitations as he thinks proper and necessary. . . ." N. C. CONST. Art. III, § 6; N. C. GEN. STAT. § 147-23 (1952).

[13] *Ex parte* Snyder, 81 Okla. Cr. Rep. 34, 159 P. 2d 752 (1945).

[14] OKLA. CONST. Art. II, § 29.

the petitioner could accept or reject. He *voluntarily* [italics added] left the state," hence, a lawful condition. It is upon this peg that most courts hang their decisions.

On the other hand, *banishment* as a direct punishment has found a less ready acceptance in the English-speaking world, although it is today an integral part of the law of several nations, among which are Spain,[15] France,[16] Italy,[17] and the Philippines.[18] While it was definitely known as a punishment in England in the Twelfth and Thirteenth Centuries, it had become obsolescent by 1300, not being revived until the practice of transporting criminals to the colonies was begun in 1597.[19] In that year a statute was passed providing that convicted rogues, vagabonds, and beggars "be banyshed out of this realm and all domynions thereof."[20] From that time until 1864, Parliament at frequent intervals passed new statutes reaffirming the use of this punishment.

In the United States, however, banishment has not found even that passing measure of acceptance. American decisions have held invalid not only banishment from the country[21] and the state,[22] but also banishment from the county,[23] city,[24] and neighborhood[25] as well. In fact,

[15] Legarda v. Valdez, 1 Philippine 146 (1902).

[16] *Ibid.* [17] *Ibid.* [18] *Ibid.*

[19] 3 HOLDSWORTH, HISTORY OF ENGLISH LAW 304 (3rd ed. 1923).

[20] 39 ELIZ. I, c. 4 (1597); see also 14 CAR. II, c. 12, §§ 16, 23 (1662), reenacting the original statute. At this early date (1662), America was the principal recipient of banished convicts. After a lapse of forty-six years, transportation to America was restored on a greatly extended scale by 4 GEO. I, c. 11 (1717), but was of course halted by the American Revolution. This practice was continued, Australia being the chief recipient, until it was gradually abolished between 1853 and 1864, primarily because of objections by the colonies themselves to receiving convicts sentenced to them. IVES, A HISTORY OF PENAL METHODS 109, 146 (1914). See also 1 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 482 (1883).

[21] In People v. Lopez, 81 Cal. App. 100, 253 Pac. 169 (1927), the trial court declared that "after sentence has been served, the defendant is to be deported to Mexico." The appellate court said, "there is no authority of law by which the state courts can make a valid order of this character. . . . It follows, therefore, that the judgment is void." *Id.* at 103, 253 Pac. at 171.

[22] People v. Baum, 251 Mich. 187, 231 N.W. 95 (1930). The defendant was ordered by the trial court to "leave the State of Michigan within thirty days and not return for the period of probation," which was five years. The Supreme Court said (in reversing) in unequivocal terms that "to permit one state to dump its convict criminals into another would entitle the state believing itself injured thereby to exercise its police and military power, in the interest of its own peace, safety, and welfare, to repel such an invasion. It would tend to incite dissension, provoke retaliation, and disturb that fundamental equality of political rights among the several states which is the basis of the Union itself." *Id.* at 189, 231 N.W. at 96.

[23] *Ex parte* Scarborough, 76 Cal. App. 2d 648, 173 P. 2d 825 (1946). "The same principle which prohibits the banishment of a criminal from a state or from the United States applies with equal force to a county or city." *Id.* at 652, 173 P. 2d at 827.

[24] *Ibid.*

[25] People v. Smith *et al.*, 252 Mich. 4, 232 N.W. 397 (1930). The defendants were placed on probation and ordered to move out of the neighborhood in which they lived. Held, that part of the order "was without authority of law." *Id.* at 5, 232 N.W. 397.

the constitutions of several states expressly forbid it,[26] and in states not having such provisions, it is recognized that historically, banishment was unknown to the common law[27] and must therefore have statutory sanction before being legally imposed.[28] While no state has such a statute, there seems to be little doubt that in those states having no constitutional prohibitions against it, such a statute would receive approval in the courts, as several cases and text-writers have intimated.[29] It is not likely that a statute of this type would be held unconstitutional on the ground that it authorizes cruel and unusual punishment, since it has been established on numerous occasions that, while as a punishment banishment is *unusual,* it cannot be considered *cruel.*[30] Chief among the objections that would probably arise would be that it is contrary to sound public policy[31] and that it violates Article IV, § 2, of the United States Constitution, dealing with the rights of citizenship. It is highly doubtful whether such a sentence would serve any practical purpose, however, since once beyond the borders of the state, the convict would be beyond any effort of the state either to restrain him or to aid in his rehabilitation.

The practical equivalent of banishment has of course been accomplished by means other than direct sentence, a practice which has led to conflicting and sometimes confusing decisions. This is as true in North Carolina as elsewhere. For example, where the defendant's sentence was suspended for thirty days upon payment of costs with the further provision that "if thereafter the defendant be found within the State of North Carolina, *capias* shall issue . . . and upon apprehension the defendant shall be committed to serve the sentence imposed,"[32] the court held that this was not a suspension of sentence on condition that the defendant leave the state to avoid imposition of the sentence.[33] Again, where the court ordered that the defendants "be imprisoned for twelve months in the county jail, but if the defendants leave the state

[26] ARK. CONST. Art. II, § 21; GA. CONST. Art. I, § 7; ILL. CONST. Art. II, § 11; KANS. CONST., Bill of Rights, § 12; N. C. CONST. Art. I, § 17; OHIO CONST. Art. I, § 12; OKLA. CONST. Art. II, § 29; TEX. CONST. Art. I, § 20.

[27] BISHOP, CRIMINAL LAW § 939 (7th ed. 1882). See also Rex v. Lewis, 1 Moody, C. C. 372, 168 Eng. Rep. 1308 (1832); Bullock v. Dodds, 2 Barn. and Ald. 258, 106 Eng. Rep. 361 (1819).

[28] 15 AM. JUR., *Criminal Law* § 453 (1938); 24 C. J. S., *Criminal Law* § 1991 (1941).

[29] Millsaps v. Strauss, 208 Ark. 265, 185 S.W. 2d 933 (1945); *Ex parte* Scarborough, 76 Cal. App. 2d 648, 173 P. 2d 825 (1946); People v. Baum, 251 Mich. 187, 231 N.W. 95 (1930); *Ex parte* Sheehan, 100 Mont. 244, 49 P. 2d 438 (1935); Note, 26 ILL. L. REV. 81 (1931); 24 C. J. S., *Criminal Law* § 1991 (1941).

[30] *Ex parte* Sheehan, *supra* note 29; Legarda v. Valdez, 1 Philippine 146 (1902).

[31] The court said in People v. Baum, 251 Mich. 187, 189, 231 N.W. 95, 96 (1930), "Such a method is . . . impliedly prohibited by public policy."

[32] State v. McAfee, 189 N. C. 320, 127 S.E. 204 (1925).

[33] *Ibid.*

within thirty days, no *capias* to issue,"[34] the court held that this was not a sentence of banishment.[35] But recently in *State v. Doughtie,*[36] the court said,

> A sentence of banishment is undoubtedly void. A sentence suspended on condition that the defendant leave the State of North Carolina is in all practical effect a sentence of banishment. It gives the defendant no opportunity to avoid serving the road sentence except by exile.

This would seem to indicate a trend by the court away from sentences and conditions that by subtle interpretation result in banishment.[37] It certainly seems to recognize the fact that the place for the State's criminals is within the borders of the State. Otherwise, these unwilling expatriates would be foisted upon the no less unwilling citizens of other states and any duty to restrain or rehabilitate them would go unattended.

MYRON C. BANKS

Labor Law—the Bargainability of Company Housing

Is company housing a subject of mandatory collective bargaining within the purview of the terms "wages" and "conditions of employment" as used in Section 9 (a) of the Labor-Management Relations Act?[1] In recent cases before the Courts of Appeals, a conflict has arisen, the Fourth Circuit holding that company housing is[2] and the Fifth Circuit that it is not[3] bargainable.

[34] State v. Hatley *et al.*, 110 N. C. 522, 14 S.E. 751 (1892). See also *Ex parte* Hinson, 156 N. C. 250, 252, 72 S.E. 310, 311 (1911), where defendant was told that if she left the county and did not return, she would not be imprisoned, and the clerk was directed not to issue *capias* for fifteen days, the court said, "The opportunity which withholding of the *capias* afforded defendant to escape was not a decree of banishment. There was nothing requiring her to leave. If she left, it was of her own free will and accord." Could this course be called strictly voluntary, when the only other course open to the defendant is a term in jail?

[35] State v. Hatley *et al.*, 110 N. C. 522, 14 S.E. 751 (1892).

[36] 237 N. C. 368, 74 S.E. 2d 923 (1953).

[37] Yet the court indicates that this decision does not bear directly on the decisions reached in State v. Hatley, 110 N. C. 522, 14 S.E. 751 (1892); *Ex parte* Hinson, 156 N. C. 250, 72 S.E. 310 (1911); and State v. McAfee, 189 N. C. 320, 127 S.E. 204 (1925).

For other reasons holding invalid a suspension of sentence on condition that the defendant leave a specified locale, see: *Ex parte* Scarborough, 73 Cal. App. 2d 648, 173 P. 2d 825 (1946) ("Unlawful increase of punishment not provided by statute"); *Ex parte* Sheehan, 100 Mont. 244, 49 P. 2d 438 (1935) ("In nature of a pardon on condition . . . the court sought to exercise a power which the Constitution reposes in the Governor and the board of pardons"); State v. Doughtie, *supra* note 36 ("It is not sound public policy").

[1] 29 U. S. C. § 159 (a) (Supp. 1952).

[2] N. L. R. B. v. Portland Cement Co., 205 F. 2d 821 (4th Cir. 1953).

[3] N. L. R. B. v. Bemis Bros. Bag Co., 206 F. 2d 33 (5th Cir. 1953). The Fifth Circuit did conclude, however, that the subject might be bargainable under proper circumstances.

Company housing is the outgrowth of the development of the factory system in New England. It dates back to the year 1791 when the growing concentration of job-producing machines and the immobility of the worker made it necessary to furnish housing facilities in order to secure an adequate working force. From this has grown the present company-owned village, which is most prevalent today in the mining, metallurgical, lumber, and textile industries. The percentage of employees using company houses varies from a low of fifteen percent in the copper and gold mining industries, to a high of near seventy percent in Southern textiles.[4]

The popularity of company housing, from the employers' viewpoint, stems from a need for certain types of emergency employees near the work location, a desire for a more stable labor supply, and a belief that a more efficient labor force is secured.[5] From the employees' viewpoint the reasons most frequently given are that it provides homes near the job, low rentals, and special favors such as decreasing, deferring, or cancelling the rental during sickness or shutdown.[6]

Presently there is a movement on the part of Southern textile manufacturers to rid themselves of company housing. This is being accomplished primarily through the sale of such houses to employees. By 1940, of over eight hundred textile concerns owning company houses in the Carolinas, Virginia, Georgia, and Alabama, approximately sixteen percent had sold either all or part of such holdings.[7] Advocates advance the following reasons for this movement: company housing is no longer needed in order to secure an adequate supply of trained labor; capital tied up may be freed for use in the enterprise itself; maintenance costs place the company at a competitive disadvantage; higher wages have made home ownership more practicable; workers not so housed complain of the unfairness of having to house their families elsewhere at a greater expense; industrial managers should not be burdened with real estate problems; paternalism of the mill village is no longer needed; and the houses have long since been written off the company books for tax purposes. Further, it is hoped that home ownership will make for more responsible citizens and better communities and lessen the workers' interest in union activities since a worker in the act of purchasing a home may hesitate to risk security for possible gains through union affiliation.[8]

[4] MAGNUSSON, *Housing by the Employers in the United States*, BUREAU OF LABOR STATISTICS BULL. No. 263 (1920). See also LAHNE, THE COTTON MILL WORKER (1944), where author concludes percentage in Southern textiles during early forties to be nearer 60%.

[5] MAGNUSSON, *supra* at 15.

[6] Regarding such practice in Southern textiles see LAHNE, *supra* at 39.

[7] HERRING, PASSING OF THE MILL VILLAGE 123 (1949).

[8] *Id.* at 126, 127. Houses have been sold almost exclusively to employees at prices well below fair market value, and payments extended over periods varying from five to twelve years.

Does the duty of the employer to bargain collectively as to "rates of pay, wages, hours of employment, or other conditions of employment" under Sections 8 (a) (5) and 9 (a) of the Taft-Hartley Act, extend to company housing?[9]

This question was first before the National Labor Relations Board under Section 8 (3) of the Wagner Act which provided, as does the present Taft-Hartley Act, that there should be no discrimination by the employer "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."[10] The question was presented in the *Great Western Mushroom Company* case[11] in 1940. The company furnished rent-free housing to its employees only during their employment tenure, and when threatened by union activity promptly sought from all employees an agreement not to strike, or in the alternative, to face eviction. The Board found this a discriminatory labor practice, and that the housing constituted a part of the employees' "wages."

The question was again before the Board the following year in the *Abbott Mills* case.[12] Company housing was furnished only to employees, and at a rental approximately one-third that of the surrounding area, and leases provided for immediate eviction in any except temporary lay offs. The Board, in ordering reinstatement in jobs and houses, held occupancy by the employees to be "in effect a part of their wages and . . . a term and condition of their employment . . ."[13]

In 1943,[14] the Board faced a situation in which the employer, who maintained company houses solely for the use of his employees during employment, discharged employees for union activities and after such discharge evicted them from their company houses. The Board found discrimination and required reinstatement of the employees in jobs and homes, and ruled that the "use and occupancy of such company owned houses" was "a right and privilege of their former employment."[15] These latter words have since been construed by the Board to mean "conditions of employment" within the purview of Section 9 (a) of the Taft-Hartley Act.[16]

Although the Taft-Hartley Act of 1947 made no changes in the text of the Wagner Act as to the subject matter of compulsory bargain-

[9] 29 U. S. C. A. 158 (a) (5) and 159 (a) (Supp. 1952).
[10] 49 STAT. 449, 29 U. S. C. § 158 (3) (1946) (N. L. R. A.); 29 U. S. C. A. § 158 (a) (3) (Supp. 1952) (L. M. R. A.).
[11] 27 N. L. R. B. 352 (1940).
[12] 36 N. L. R. B. 545 (1941) enforcement granted, 127 F. 2d 438 (1st Cir. 1942).
[13] *Id.* at 556.
[14] Industrial Cotton Mills Co., 50 N. L. R. B. 855 (1943).
[15] *Id.* at 855.
[16] Bemis Bros. Bag Co., 96 N. L. R. B. 728, 730, n. 4 (1951).

ing, the Board and the courts in the *Inland Steel*[17] (pensions) and *W. W. Cross*[18] cases, extended the scope of bargainable subjects by broad interpretations of the statutory terms "wages" and "conditions of employment."[19]

In the *West Bolston* case[20] of 1949 the Board for the first time clearly held company housing to be a subject of mandatory collective bargaining. In this instance the company promised to consult the union before deciding to evict any employees from their company-owned homes during an existant strike. The company, however, took affirmative action without consulting the union, and upon protest, the union was told the matter was not a subject of collective bargaining. The Board held this a refusal to bargain on the part of the employer.[21]

Soon thereafter, in the *Weherhaeuser Timber Co.* case,[22] the Board clarified its interpretation of the terms "wages" and "conditions of employment." The employer sought to raise meal prices in camp dining rooms where a substantial number of employees ate one or more meals per day. The distances to facilities in the nearest towns varied from five to twenty miles. The Board language used here has characterized later decisions concerning company housing.

The Board left no doubt that the term "conditions of employment" applies not only to conditions under which the employee is forced to work, but also to non-compulsory aspects of the employer-employee relationship. The fact that the disputed condition might be considered a convenience to the employee will not remove it from the scope of the Act; nor is it relevant in this respect that it meet a personal need. As to "wages," the scope of the term is not limited to remuneration received by employees for the actual performance of work or productive activity. It includes "emoluments resulting from employment in addition to or supplementary to actual rates of pay."[23] The Board in speaking of the availability of meals concludes that the "privilege itself" constitutes an emolument of value and may properly be considered a part of the employees' "wages."

The *Elgin Brick Company* case[24] of 1950 afforded a second clear holding by the Board that company housing must be considered a subject of mandatory collective bargaining. Here an employer refused

[17] Inland Steel Co. v. N. L. R. B., 170 F. 2d 247 (7th Cir. 1948).
[18] W. W. Cross and Company v. N. L. R. B., 174 F. 2d 875 (1st Cir. 1949).
[19] Note, 58 YALE L. J. 803 (1948-49).
[20] West Bolston Manufacturing Co. of Alabama, 87 N. L. R. B. 808 (1949).
[21] See J. A. Bently Lumber Co., 83 N. L. R. B. 803 (1949) where employer maintaining quarters for logging crews was found guilty of violating Section 8 (a) (3) of the Act, by attempting to evict employees during strike. Board held occupancy of the houses to be a condition of employment.
[22] Weyerhaeuser Timber Co., 87 N. L. R. B. 672 (1949).
[23] *Id.* at 675.
[24] Elgin Standard Brick Mfg. Co., 90 N. L. R. B. 1467 (1950).

to bargain concerning oppressive lease provisions. The Board found this to be an unfair labor practice in as much as the privileged quarters constituted a part of the employees' wages and a condition of their employment.[25]

In the *Hart Cotton Mills* case,[26] of 1951, the Hart Cotton Mills, Inc., of Tarboro, North Carolina, maintained company houses for the exclusive use of its employees. The rental price was well below that for similar houses in the immediate area, housing was difficult to locate thereabouts, and it was admittedly necessary for the employer to furnish cheap housing in order to secure and maintain a full working crew. The employer was found guilty of an unfair labor practice as a result of his refusal to bargain at any time concerning the sale or rental of the company owned houses.[27] Upon petition for enforcement of the Board order, the Fourth Circuit reversed the Board on other grounds, company housing here being only a small part of a complicated labor problem. But in dealing with the housing phase of the problem presented, the court held that a refusal to bargain concerning company housing was in this instance an unfair labor practice. It emphatically stated that such houses are often a necessary part of the enterprise, and are maintained by the employer and rented at such rates as to represent a substantial part of the employees' wages. In conclusion it asserted the subject "to be one in which the employees have so great an interest in connection with their work that it should be a subject of collective bargaining."[28]

In 1953 the Fourth Circuit Court of Appeals once again considered the bargainability of company housing. The *Le High Portland Cement* case[29] involved an employer who maintained company houses for the exclusive use of his employees in an area where other housing was rarely available. The rent was below prevailing rates in the area, and had not been changed since the year 1937. On refusal of the employer to submit proposed rent increases to collective bargaining, the Board found an unfair labor practice,[30] and the court sustained its ruling. In clarification of its former decision, the court held it unnecessary that company houses be an "essential part of the enterprise or that their occupancy affect the workers pay." It determined a case to be suf-

[25] See W. T. Carter and Bro., 190 N. L. R. B. 2020 (1950), and Indianapolis Wire Bound Box Co., 89 N. L. R. B. 617 (1950), where Board held eviction from company houses to be in violation of Section 8 (a) (3), after it had determined occupancy of such houses to be a "term and condition of employment."

[26] N. L. R. B. v. Hart Cotton Mills, Inc., 190 F. 2d 964 (4th Cir. 1951).

[27] Hart Cotton Mills, Inc., 91 N. L. R. B. 728 (1950).

[28] *Id.* at 972.

[29] N. L. R. B. v. Le High Portland Cement Co., 205 F. 2d 821 (4th Cir. 1953).

[30] Le High Portland Cement Co., 101 N. L. R. B. 1010 (1952).

ficiently established by a showing that ownership and management of the houses materially affected the conditions of employment. Low rent plus living near the plant, concluded the court, gave occupants substantial advantages which affected their wages and conditions of employment.

These views were in harmony with those of the Board in the *Bemis Brothers Bag Company* case[31] of 1951 where refusal to bargain concerning rent increases for company houses was held to be a violation of Section 8 (a) (5). The houses were maintained strictly for employees. A statement in the lease provided that the premises were a part of the plant facilities of the lessor. Tenancy was on a week to week basis, and rent, water and light bills were often, though not always deducted from employees' pay checks. On termination of employment, houses were to be vacated. Housing was available in a nearby town, and public transportation afforded a speedy means of reaching the plant. Rentals were approximately the same as in the town. There was, however, a waiting list of eighty families seeking company homes.

On petition for enforcement of the Board order, however, the Fifth Circuit Court of Appeals in *N. L. R. B. v. Bemis Brothers Bag Company,*[32] held company housing, under the stated circumstances, to be outside the scope of mandatory collective bargaining. In reaching its conclusion, the Court emphasized a Board finding that only thirty-five percent of the employees in the bargaining unit were involved, and found that the language of the Act "clearly contemplates matters and things which arise out of, and may properly be considered a part of the employment relation,—the business in which the employer and employee participate as necessary and essential components in the furtherance of the enterprise."[33] The Court conceded, however, that if rent prices were so low as to constitute the savings on rent a part of the wage structure, or employees were forced by circumstance or by the employer to reside in company-owned houses, they could properly be held "wages" or "conditions of employment." It noted provisions of the lease which restricted and controlled occupancy of the homes, but concluded that lease provisions could not solely control the bargainability of company housing, otherwise they could be changed and the source of power destroyed by its exercise. To support a previously suggested criterion, the Court found company housing in this case to relate only incidentally to the business and the employment and held such a subject to concern only living conditions during off hours when an employee is free to pursue his personal life as he may prefer.

[31] Bemis Bros. Bag Co., 96 N. L. R. B. 728 (1951).
[32] N. L. R. B. v. Bemis Bros. Bag Co., 206 F. 2d 33 (5th Cir. 1953).
[33] *Id.* at 37.

Standards of living conditions, concluded the Court, affect a person's job efficiency, but do not make living expenses and means of residence conditions of employment. A contrary holding would mean all employees, whether in company houses or not would be able to bargain for living quarters.

Notwithstanding the factual differences between the *Bemis Bag* case and those that have gone before, it is submitted that the Fifth Circuit Court of Appeals reached the wrong decision. As to the fact that only thirty-five percent of the employees were involved, the court failed to realize that the duty to bargain collectively is for the protection of minority groups as well as the majority and that smallness of number affected is not a factor.[34] Nor does the fact that housing was available in a nearby town at rents comparable to those in the mill village justify the holding that the latter were not bargainable. The issue was a rent increase, amounting in effect to a wage cut for the tenants of company houses. Living in the town meant transportation costs. Eighty applicants stood ready to fill the next vacancy in a 300 unit mill village. In the light of the advantages to the employer, of company housing,[35] it does not seem improper to conclude that company houses are "necessary and essential components in the furtherance of the enterprise," as distinguished from a wholly personal, off-hour facility.

LACY H. THORNBURG

Pleading and Procedure—Counterclaims Exceeding the Jurisdictional Limit of the Court—Remedies

A potentially troublesome problem is illustrated by the following hypothetical case: Automobiles belonging respectively to *A* and *B* are involved in a collision. The automobile of *A* sustains damage in the amount of $50.00 and the automobile of *B* in the amount of $500.00. Before *B* can institute suit in the superior court to recover his damages, *A* sues *B* before a Justice of the Peace to recover damages in the amount of $50.00.[1]

Does *B* have to seek recovery of damages sustained by his automobile by entering a counterclaim[2] to *A's* cause of action at the risk of

[34] Weyerhaeuser Timber Co., 87 N. L. R. B. 672 (1949); Steele v. Louisville and Nashville Railroad Co., 323 U. S. 192 (1944).
[35] Notes 4 and 5 *supra*.

[1] Justices of the Peace have concurrent jurisdiction with the superior court of civil actions in tort when the amount in controversy does not exceed fifty dollars. N. C. GEN. STAT. § 7-122 (1953).

[2] Counterclaim is used herein to mean a claim of the defendant in which an affirmative judgment against the plaintiff is prayed for. Generally the scope of this comment is limited to those counterclaims that exceed the plaintiff's claim. For distinctions and definitions in the area of counterclaims, recoupments and set-offs see: MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE IN CIVIL CASES § 463 (1929).

losing his right to recovery if he does not? If so is his claim limited to $50.00? If he does not counterclaim will the decision of the Justice bar his subsequent independent action even if it is not adverse to him or inconsistent with his claim? Can he bring an independent suit while *A's* cause is still pending? If not, what if the statute of limitations bars his claim? If he can bring an independent action while the first action is still pending, what if the first action finally determines that his negligence was the proximate cause of the collision? Does he have to litigate two suits in different courts at the same time? Is there any way that he can have the whole controversy litigated in one action and not have to diminish his own demands for relief? Does the code provide a clear and adequate procedure by which the whole controversy may be adequately determined when the first claim is filed in a Justice's court, and the defendant has a claim arising out of the same transaction that exceeds the jurisdiction of that court?

No clear answer to the foregoing questions is found in the North Carolina law. North Carolina General Statute, § 1-135[3] provides that in the superior court the answer of the defendant must contain a statement of any new matter constituting a defense or counterclaim. G. S. § 1-137[4] states that a counterclaim must be a cause of action arising out of, or connected with the same contract or transaction[5] forming the basis of plaintiff's claim. The courts have construed these acts generally to allow a defendant to counterclaim or not at his option.[6] Such construction is in accord with decisions of other jurisdictions in which similar or identical code provisions have been construed.[7] The "must" in § 1-135 does not mean that the defendant

[3] N. C. GEN. STAT. § 1-135 (1953).

[4] N. C. GEN. STAT. § 1-137 (1935). "The counterclaim mentioned in this article must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of one of the following causes of action: (1). A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action. (2). In an action arising on contract, any cause of action arising also on contract, and existing at the commencement of the action." It is necessary to note that the second part of this statute was not referred to in the discussion as it is not applicable to collision-type counterclaims.

[5] Adverse claims arising out of the same collision clearly arise out of the same transaction. McLean Trucking Co. v. Carolina Scenic Stages, 95 F. Supp. 437 (M. D. N. C. 1951); Todhunter v. Smith, 219 Cal. 690, 28 P. 2d 916 (1934); Allen v. Salley, 179 N. C. 147, 101 S. E. 545 (1919).

[6] Union Trust Co. v. McKinne, 179 N. C. 328, 102 S.E. 385 (1920) (distinguishes Allen v. Salley, 179 N. C. 147, 101 S.E. 545 [1919]). Francis v. Edwards, 77 N. C. 271 (1877). See also Brandis, *A Plea for Adoption by North Carolina of the Federal Joinder Rules*, 25 N. C. L. REV. 245 (1947).

[7] Note, 8 A. L. R. 694 (1920). There are many states with counterclaim provisions similar to those of North Carolina (see notes 3 and 4, *supra*) and also a few with provisions identical to North Carolina's. Cf. N. D. REV. CODE § 28-0710 and § 28-0714 (1943); S. C. CODE § 10-652 and § 10-703 (1942); WASH. REV. CODE § 4.32.080 and § 4.32.100 (1951).

must plead his available counterclaim, but rather, if he does choose to plead his available counterclaim he *must* plead it in his answer. Similarly, the rules of procedure of the Justice's courts state that a counterclaim may be interposed.[8] While the rules of procedure for the Justice's courts are separate from those of the superior court they must borrow from G. S. § 1-137 for effect and meaning.[9] In *Allen v. Salley*,[10] and subsequent decisions,[11] our court said that the claims of both plaintiff and defendant in an automobile collision are a single cause of action and must be settled in one action. There can be but one judgment for the defendant or for the plaintiff. In such a situation, the defendant is bound to counterclaim or his claim will be barred.[12] Although the rule as to collisions,[13] and several other situations,[14] may not be consistent with the general rule it has been restated by cases[15] and recognized by commentators[16] so often that it cannot be disregarded.

The weight of authority is to the effect that absent an express rule or statute there cannot be a compulsory counterclaim.[17] There may be a bar to the defendant's claim, however, based on the ground that the decision in the initial suit is inconsistent with the claims in the second suit.[18] Under the federal practice the defendant must counterclaim any cause which at the time of the service of the pleading, he

[8] N. C. GEN. STAT. § 7-149 rule 3 (1953).

[9] No definition of *counterclaim* is contained in N. C. GEN. STAT. § 7-149 rule 3 (1953) nor is there a definition within the rules of practice for justice's courts.

[10] Allen v. Salley, 179 N. C. 147, 101 S.E. 545 (1919).

[11] Dwiggins v. Parkway Bus Co., Inc., 230 N. C. 234, 52 S.E. 2d 892 (1949); Johnson v. Smith, 215 N. C. 322, 1 S.E. 2d 834 (1939).

[12] Allen v. Salley, 179 N. C. 147, 101 S.E. 545 (1919).

[13] See, Brandis, *A Plea for Adoption by North Carolina of the Federal Joinder Rules*, 25 N. C. L. REV. 245 (1947).

[14] See note 6 *supra*.

[15] McLean Trucking Co. v. Carolina Scenic Stages, 95 F. Supp. 437 (M. D. N. C. 1951); Dwiggins v. Parkway Bus Co., Inc., 230 N. C. 234, 52 S.E. 2d 892 (1949); Johnson v. Smith, 215 N. C. 322, 1 S.E. 2d 834 (1949); Allen v. Salley, 179 N. C. 147, 101 S.E. 545 (1919).

[16] Note, 22 A. L. R. 2d 621 (1952). Brandis, *A Plea for Adoption by North Carolina of the Federal Joinder Rules*, 25 N. C. L. REV. 245 (1947). Note, 33 HARV. L. REV. 857 (1920).

[17] Note, 8 A. L. R. 694 (1920). RESTATEMENT, JUDGMENTS § 58 comment b and illustration 1 (1942). For the result under an express compulsory counterclaim rule or statute compare RESTATEMENT, JUDGMENTS § 58 comment f (Supp. 1948), and Note 22 A. L. R. 2d 621 (1952).

[18] RESTATEMENT, JUDGMENTS § 58 comment d and illustration 9 (1942). 2 FREEMAN, JUDGMENTS § 787 at page 1670 (5th ed. 1925). "The test of one's right to recover in a second action, after having waived his cross-claim in the first, is, Can all the facts necessary to support the judgment rendered against him exist at the same time with the facts necessary to support the cross-claim sought to be enforced in the second suit? For if, in order to recover in the first action, the plaintiff must have shown the falsity of the allegations made by defendant in the second suit, then the former judgment is a bar." This is on the theory that a final judgment cannot be collaterally attacked. (The above, of course, assumes no compulsory counterclaim situation.)

has against the opposing party if it arises out of the same transaction or occurrence.[19] Admittedly the Federal Rules apply only to the federal district courts,[20] which can render verdicts unlimited in amount. Nevertheless, it is, in a sense, a court of limited jurisdiction in that there is a minimum amount required before jurisdiction attaches.[21] This limitation does not apply to compulsory counterclaims, for they are treated as ancillary to the plaintiff's claim and if the court has jurisdiction of the plaintiff's claim it derives jurisdiction of the compulsory counterclaim.[22] It is interesting to note, however, that no state follows the logic of the district courts by giving unlimited jurisdiction of counterclaims to Justices.[23] In North Carolina the limited jurisdiction is not relaxed on appeal to the superior court,[24] for on appeal, even though the trial is de novo,[25] the jurisdiction is derivative and if the justice did not have jurisdiction over the counterclaim neither does the superior court.[26] Nor, in the superior court, can a remittitur of a counterclaim in excess of the jurisdictional limit of the justice be effected[27] or a new counterclaim in excess of the justice's jurisdictional amount be interposed.[28]

Several of the states have statutes or rules based on Federal Rule 13 (a)[29] or of similar effect.[30] Generally these states have some clear

[19] FED. R. CIV. P. 13 (a). [20] See, FED. R. CIV. P. 1.

[21] Generally, see: 28 U. S. C. A. § 1331 and § 1332 (1950).

[22] Jurisdiction over a compulsory counterclaim is regarded as ancillary to the plaintiff's claim. 3 MOORE, FEDERAL PRACTICE ¶ 13.15 (1948). *But see*, 3 MOORE, FEDERAL PRACTICE ¶ 13.19 (1948) (permissive counterclaims generally need independent jurisdictional amount).

[23] 24 R. C. L., *Set-Off and Counterclaim*, § 6 (1919); Duresen v. Blackman, 117 Minn. 206, 135 N.W. 530 (1912); Note, 37 L. R A. (N. S.) 606 (1912). See also: Singer Sewing Machine Co. v. Burger, 181 N. C. 241, 247, 107 S.E. 14, 17 (1921). "It has been held with us in a number of instances that any counterclaim, coming within the purview of the statute, regardless of its amount, may be set up in a justice's court for the purpose of set-off and recoupment as a bar or defense to the plaintiff's cause of action. But, of course, an affirmative judgment could not be entered in this court unless it fell within the jurisdiction of a justice of the peace."

[24] If the justice did not have jurisdiction, then the superior court will have none on appeal since the jurisdiction is derivative. Stacey Cheese Co. v. Pipkin, 155 N. C. 394, 71 S.E. 442 (1911). MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE IN CIVIL CASES § 703 (4) p. 817 (1929). Note, 37 L. R. A. (N. S.) 606, 616 (1911).

[25] N. C. GEN. STAT. § 1-299 (1953).

[26] Perry v. Pulley, 206 N. C. 701, 175 S.E. 89 (1934). See note 20 *supra*.

[27] Perry v. Pulley, 206 N. C. 701, 175 S.E. 89 (1934).

[28] Meneely v. Craven, 86 N. C. 364 (1882) (defendant not permitted to extend amount demanded beyond the jurisdiction of the justice's court by amendment in the superior court).

[29] ARIZ. CODE ANN. § 21-437 (Supp. 1951); COLO. STAT. ANN. c. 2 rule 13 (a) (Supp. 1952); FLA. STAT. ANN. § 52.11 (1) (1941); IOWA CODE R. CIV. P. rule 29 (1950); Mo. ANN. STAT. § 509.420 (Vernon 1949); N. M. STAT. ANN. § 19-101 (13) (a) (Supp. 1951); TEX. STAT., R. CIV. P. rule 97 (a) (Supp. 1948); UTAH CODE ANN., R. CIV. P. rule 13 (a) (1953).

[30] ARK. STAT. ANN. § 27-1121 (4) (1947); CAL. CODE CIV. PROC. § 439 (1949); IDAHO CODE ANN. § 5-614 (1947); NEV. COMP. LAWS § 8604 (1929). With the

and definite provision for the problem posed in our hypothetical. There are three approaches to the general problem: (1) The defendant does not have to plead his counterclaim before the justice for the provisions apply only to a court of unlimited original jurisdiction;[31] (2) The defendant does not have to plead his counterclaim if it exceeds the jurisdictional limit of the court;[32] or (3) The defendant must plead his counterclaim, but he does not have to plead it in the justice's court if he shows it will exceed in amount the court's jurisdiction.[33] Upon tender of the counterclaim or certification that it will exceed the court's jurisdiction as to amount the case is removed to a court of original jurisdiction, unlimited as to amount, where it is tried as if it had originated there. It does not appear that North Carolina has any such clear-cut remedy. We do not seem to be in the first category because our courts have not construed the requirement of counterclaiming as a mandate of General Statute § 1-135,[34] or otherwise applicable only to superior courts.[35] Perhaps North Carolina is in the second category since the justice does not have jurisdiction of a counterclaim in excess of his jurisdictional limit.[36] There is no statute to reply upon, however, and no decision directly in point. Likewise we have no statute to put us clearly in the third category.

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exception of Arkansas the above code sections are merely additions to sections similar to the North Carolina provisions as to counterclaims, notes 3 and 4 *supra*. The California provision is typical: "If the defendant omits to set up a counterclaim upon a cause arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor."

The scope of this note does not include rules or statutes of very limited application. For instance: N. H. REV. LAWS c. 391 § 14 and § 15 (1942); N. J. REV. STAT. § 2:26-191 (1937); W. VA. CODE ANN. § 4977 and § 4978 (1949). Similarly, MONT. REV. CODES ANN. § 93-3408 (1947), which appears at first blush to be like the California code, is not included for the counterclaim to which it refers must be one that tends to diminish or defeat the plaintiff's claim (and is technically only a set-off). See note 2 *supra*.

[31] ARIZ. CODE ANN. § 21-201 (1939); ARK. STAT. ANN. § 26-401 (1947) (but *see*, ARK. STAT. ANN. § 27-102 (1947)); NEV. COMP. LAWS § 8573 (1929); N. M. STAT. ANN. 19-101 (1) (1941).

[32] CAL. CODE CIV. PROC. § 396 (1949); MO. ANN. STAT. § 517.240 (Vernon 1949); TEX. STAT. R. CIV. P. rule 97 (a) (1948).

[33] COLO. STAT. ANN. c. 2 rule 13 (1) (1935); FLA. STAT. ANN. § 52.12 (1951); IDAHO CODE ANN. § 16-1409 (1947); IOWA CODE ANN., R. CIV. P. rule 355 (1950); UTAH CODE ANN., R. CIV. P. rule 13 (k) (1953).

[34] It is essential to note that the North Carolina cases, as Allen v. Salley, 179 N. C. 147, 101 S.E. 545 (1919), do not construe the counterclaim statutes as expressly requiring the defendant in an auto collision suit to counterclaim. The rule, not being limited to the statute, is apparently not limited in application to the superior courts. By way of comparison, Arkansas which has a counterclaim statute which would not appear on its face to demand a counterclaim has construed the statute (applicable to their "superior court") to be a compulsory counterclaim statute. In the cases so holding there is a great deal of reliance placed on the legislative history of the act. Shrieves v. Yarborough, 220 Ark. 256, 247 S.W. 2d 193 (1952); Adams v. Henderson, 197 Ark. 907, 125 S.W. 2d 472 (1939); Morgan v. Rankin, 197 Ark. 119, 122 S.W. 2d 555 (1938) (all three of these cases are auto collision suits.)

[35] See notes 15 and 16 *supra*. [36] See notes 23 and 24 *supra*.

Our Supreme Court will probably formulate a procedure applicable to our hypothetical if it faces such a situation. If our court holds that a defendant does not lose his right to sue on his claim by failure to assert it in the first action, will the statutory defense of pendency of a prior action between the same parties for the same cause be available to the plaintiff of the first action to dismiss the defendant's suit?[37] Such is the rule of *Allen v. Salley*,[38] although in that case there was no complication of the first court's not having jurisdiction to determine the full amount of the defendant's claim. If the rule of *Allen v. Salley* applies, then the defendant would have to await final adjudication of the first suit before he could bring his action.[39] If there were a judgment adverse to him, and also inconsistent with his claim then he would be barred from bringing his claim by ordinary principles of res judicata.[40] If there were not a judgment adverse to him he could bring his independent action if the statute of limitations did not bar it.[41] Conversely, if the rule of *Allen v. Salley* was not applicable, the defendant would have to litigate two actions, for if the first determined were adverse to him he would be barred in the second.[42] Of course, there

[37] N. C. GEN. STAT. § 1-127 (3) (1953) (grounds for demurrer) or N. C. GEN. STAT. § 1-133 (1953) (provisions of § 1-127 available by answer when they do not appear on the face of the complaint).

[38] Allen v. Salley, 179 N. C. 147, 101 S.E. 545 (1919). See also note 11 *supra*.

[39] See Note, 33 HARV. L. REV. 857 (1920). It appears that generally the second action is not dismissed because of pendency of a prior action between the same parties for the same cause unless there is a compulsory counterclaim requirement. When the defendant has the option to counterclaim or not as he sees fit, the fact that the parties are reversed in the second action is sufficient to disallow a dismissal. Conley v. Marshall, 304 Ky. 745, 202 S.W. 2d 382 (1947) (collision: second action not dismissed); State ex rel. McHenry v. Cahoun, 87 Ohio App. 1, 93 N.E. 2d 317 (1950) (collision: second action in justice's court not dismissable); Republic Automobile Ins. Co. v. Maedel, 253 Mich. 663, 235 N. W. 819 (1931) (collision: second action not dismissed). See notes 29 and 30 *supra*.

[40] RESTATEMENT, JUDGMENTS § 58 comment c and illustration 5 (1942). 2 FREEMAN, JUDGMENTS § 787 at page 1670 (5th ed. 1925). Once the fact that one party was guilty of negligence which was the proximate cause of the accident has been finally adjudicated by a competent court it seems clear that the matter cannot be collaterally attacked by contentions in another action concerning the same transaction and between the same parties. *Compare*, RESTATEMENT, JUDGMENTS § 71 comment d (1942). However, in RESTATEMENT, JUDGMENTS § 71 reviser's notes in comment d (Supp. 1948) this was formally retracted: "the suggestion of the comment was that a court (of jurisdiction limited in amount) does not have jurisdiction to consider a claim for a greater amount and, therefore, its adjudication of such a claim when set up by way of defense to a claim within its jurisdiction should not be conclusive in a subsequent action between the parties involving the larger claim. It appears that the great weight of authority . . . is to the contrary effect."

[41] See note 17 *supra*.

[42] 2 FREEMAN, JUDGMENTS § 719 (5th ed. 1925). "Where two actions involving the same issue or issues, between the same parties or their privies, are pending at the same time, so that a final judgment in one would be res judicata or a bar in the other, when the judgment in one becomes final it may be urged in the other by appropriate proceedings, regardless of which action was begun first. It is the first final judgment, although it may be in the second suit, that renders

might be a consolidation at the superior court level, but if in the second action the question of whether the rule of *Allen v. Salley* applied were appealed, before an adjudication of the merits,[43] the defendant would find it difficult to restrain the first action until the second could be decided on that point and remanded.

Perhaps our court might say, notwithstanding the fact that there is no statute to such effect, that if the whole cause cannot be adequately determined in the justice's court it is mandatory for the justice to remove it, and that the action should be removed to the superior court where it should be tried as if it originated there.[44] That seems the only really satisfactory course to take unless the action in the justice's court could be enjoined, by application to the superior court, in order to have the whole controversy determined in one action.[45]

Of the possible courses which could be allowed the defendant in our hypothetical, it seems that the inadequacy of most of them and the uncertainty of all of them demand a statute to prescribe an adequate procedure for determining the whole controversy in one action. The following statute is proposed as a much-needed addition to our code:

> General Statute § 1-137 (a). **Counterclaims Exceeding the Juristiction of Courts of Jurisdiction Limited in Amount** —When a counterclaim arising out of the same contract or transaction forming the basis of plaintiff's claim[46] is tendered, before evidence is introduced, in a court of jurisdiction limited in amount, and because of such limitation, the court does not have

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the matter res judicata in the other suit . . . So where, pending an action for damages begun by one party to a collision, against the other, the latter sues the former in another court for damages arising from the same collision, and obtains a judgment, while this judgment may not be pleaded in bar of the first action, it may be urged as res judicata as to the issues adjudicated, such as the negligence of one party and the other's freedom from negligence." See note 40 *supra*.

[43] Allen v. Salley, 179 N. C. 147, 101 S.E. 545 (1919). It appears from the report of the case that the point went up on appeal to the supreme court before there was an adjudication on the merits even though the decision of the superior court was against dismissing the second action. Certainly if the trial court ruled in favor of dismissing the second action there would be difficulty in restraining the first action until the point could be determined and remanded. Also, of course, there could be no consolidation unless the first and second actions were both in the same county.

[44] *Compare* notes 23, 24, 26, 27, and 28 *supra*.

[45] Note, 125 A. L. R. 337 (1940). Otis v. Graham Paper Co., 188 Ga. 778, 4 S.E. 2d 824 (1939) (collision: permissive counterclaims: first action in a court of jurisdiction limited in amount enjoined).

[46] It is noted that the intent of the proposed statute is to allow removal of counterclaims "arising out of the contract or transaction," which exceed the jurisdiction of the court, pleaded by the defendant. The reasons that "claims required to be pleaded in the first action" is not suggested as the criterion for removal are: (1) The practical impossibility of foreseeing all situations to which the court may apply the mandatory counterclaim rule; and (2) The difficulties inherent in administering a rule so closely drawn.

jurisdiction, the entire action shall be removed to the superior court of the same county upon the filing by the counterclaiming defendant of such bond as would be required for appeal to the superior court if there were a verdict adverse to him for the full amount of the claim by the plaintiff. The removal is mandatory upon the filing of the bond and the superior court is to have complete power to render any adequate verdict and judgment, regardless of amount.[47]

DANIEL L. BELL, JR.

Real Property—Easements—Implication from Description in Deed

The owner of a tract of land fronting on a city street conveyed out of the tract two lots bordering on the street. One deed called for a 10-foot alley as the eastern boundary of the lot conveyed; the other called for the alley as the western boundary. The owner later conveyed a third lot in the rear, the deed to which described it as fronting on a 10-foot alley running from the street and between the two lots previously conveyed. The plaintiffs, owners of the western front lot and rear lot, brought an action to determine whether they have an easement in the alley, since quitclaimed to defendants by heirs of the original grantor. The North Carolina Supreme Court *held* that bare references to the alley for descriptive purposes, being the only evidence of an intent of the grantor to establish the easement, were insufficient standing alone to create an easement by implication or otherwise.[1]

[47] The proposed statute treats the plaintiff as if he had obtained a favorable judgment in the justice's court, and does not deprive him of any rights he has under the present law. The only change is that a counterclaiming defendant is now entitled to plead his claim in full provided he follows a defined procedure.

Neither does the statute deprive the justice's courts of jurisdiction in any case. The effect of "exclusive original jurisdiction" in contract actions, where the amount of the plaintiff's demand is less than $200.00, N. C. GEN. STAT. § 7-22 (1953), is unchanged: no superior court can acquire jurisdiction, except on appeal or removal from a justice. See also N. C. GEN. STAT. § 7-21 (1953) (concurrent jurisdiction with the superior court in other actions where amount claimed is less than $50). See N. C. CONST. Art. IV, § 27 (as changed 1875): "The several Justices of the Peace shall have jurisdiction, under such regulations as the General Assembly shall prescribe, of civil actions, founded on contract, wherein the sum demanded shall not exceed two hundred dollars (The Constitutional Convention of 1875 changed "exclusive original jurisdiction" to "jurisdiction.") . . . And the General Assembly may give to the Justice of the Peace jurisdiction of other civil actions wherein the value of the property in controversy does not exceed fifty dollars . . . The party against whom the judgment is given may appeal to the superior court from the same."

[1] Green v. Barbee, 238 N. C. 77, 76 S.E. 2d 307 (1953). The reference to the alley in the deed to the plaintiffs' front lot was: "Beginning at a 10-foot alley on . . . corner . . . thence in an east direction 105 feet to a stake on a 10-foot alley to the beginning. . . ." The reference in the defendants' deed was: ". . . west 210 feet to an alley; thence with the east side of said alley north 210 feet to . . . line. . . ." Transcript of Record, pp. 17-18, Green v. Barbee, *supra*.

The court determined: (1) that the alley was not a way of necessity to either of the front lots at the time they were originally conveyed, since they fronted on a street; (2) that there was no allegation that the alleyway was the only means of access to the rear lot when it was originally conveyed; and (3) that there was no allegation that, at the time of the original conveyance, "the use of the alley had been so long continued and so obvious or manifest as to show that it was meant to be permanent; or that the easement was necessary to the beneficial enjoyment of the lot conveyed, . . . as being essential to the creation of an easement upon the severance of an estate."[2]

Facts similar to those in the principal case arose in *Milliken v. Denny*,[3] a prior North Carolina case, in which it was held that the mere description of land in a deed as bounded by an alley was not sufficient to create an easement in such alley. The court there ruled that the language in the deed did not estop the grantor from closing the alley, and that the testimony at the trial left nothing to guide them as to the grantor's intention save the deed itself, thus inferring that the grantor's intention would control if it could be determined. It was also noted that there was no evidence that the alley affected the value of the property, or that there was any declaration of easement by the grantors. In *Harris v. Carter*,[4] where plaintiff's land had been bounded on a public road which was later discontinued, the defendants were held to be equitably estopped from obstructing the road, but the court relied on the fact that buildings were erected, business was being conducted, and that the value of the lot would be seriously impaired by an obstruction of the road.

Jurisdictions other than North Carolina generally hold that where land is conveyed by deed describing it as bounded by a street or way, an easement in the street or way passes to the grantee by implication of law.[5] The easement so created is usually based on the theory that

[2] Green v. Barbee, 238 N. C. 77, 81, 76 S.E. 2d 307, 310 (1953).

[3] 141 N. C. 224, 225, 53 S.E. 867, 868 (1906), the court stated: ". . . the mere fact that the deed . . . called for 'a stone,' thence north 84 degrees and 22 minutes west 340 feet along the south side of the ten-foot alley, was not *per se* sufficient to impose an easement upon the ten feet of land referred to as an alley, which passed to the owners of the lot conveyed."

[4] 189 N. C. 295, 127 S.E. 1 (1925).

[5] Malone v. Jones, 211 Ala. 461, 100 So. 831 (1924); Crute v. Hyatt, 220 Ark. 537, 249 S.W. 2d 116 (1952); Petitpierre v. Maguire, 155 Cal. 242, 100 Pac. 690 (1909); Hamil v. Pone, 160 Ga. 774, 129 S.E. 94 (1925); Iseringhausen v. Larcade, 147 La. 515, 85 So. 224 (1920); Teal v. Jagielo, 327 Mass. 156, 97 N.E. 2d 421 (1951); Casella v. Sneirson, 325 Mass. 85, 89 N.E. 2d 8 (1949); Haab v. Moorman, 332 Mich. 126, 50 N.W. 2d 856 (1952); Carlin v. Paul, 11 Mo. 32 (1847); McPherson v. Monegan, 120 Mont. 454, 187 P. 2d 542 (1947); Lindsay v. Jones, 21 Nev. 72, 25 Pac. 297 (1890); Hughes v. Lippincott, 56 N. M. 473, 245 P. 2d 390 (1952); *In re* Thirty-First (Patterson) Ave., 152 Misc. 849, 273 N. Y. Supp. 757 (Sup. Ct. 1934); Walters v. Smith, 186 Va. 159, 41 S.E. 2d 617 (1947). For a collection of cases, see 2 THOMPSON, REAL PROPERTY § 479 n. 25 (Perm. Ed. 1939).

having so described the land as bounded by a way, the grantor and those claiming under him are *estopped* to deny the existence of such a way or the grantee's rights therein.[6] Some courts hold the easement passes by *implied grant,* without relying on estoppel,[7] and the rationale of estoppel has been criticized as improperly applied to create this type of easement.[8] It has been stated however, that it is immaterial whether the easement operates "as an implied grant, covenant, warranty, or estoppel"; the question is whether the way was intended by the grantor as a boundary of the land conveyed.[9]

Where the street or way is not designated as a boundary but is referred to only for the purpose of description, the general rule does not apply, and no easement will be found,[10] as where the way is only coincident with the line described, the reference to the way having been made for the purpose of description "as any other mark or monument might have been referred to."[11] Nor does the rule apply where the description is false,[12] where the grantor does not own the fee in the

[6] See note 5 *supra.*

[7] *E.g.,* Tursi v. Parry, 135 Pa. Super. 285, 5 A. 2d 399 (1939), where the court also recognized authority holding that there was an implied covenant that a way existed as described in the conveyance and would be continued for the use of the grantee and those claiming under him.

Some of the cases mention both estoppel and an implied covenant as the basis for the rule: *E.g.,* Petitpierre v. Maguire, 155 Cal. 242, 100 Pac. 690 (1909); Casella v. Sneirson, 325 Mass. 85, 89 N.E. 2d 8 (1949). See 3 TIFFANY, REAL PROPERTY § 799, p. 307 (3rd ed., Jones, 1939), where it is said: "The statement . . . that the reference to a street involves an 'implied covenant' on the part of the grantor that there is such a street, appears ordinarily to mean merely that he is precluded from denying the existence of the street."

[8] See discussion in 3 POWELL, REAL PROPERTY § 409, p. 412 (1952), where it is stated: "The fact remains, that the easement exists because of the combined effect of a pegphrase in the conveyance and of the circumstances of the conveyance. It is, therefore, understandable that some courts speak of such an easement as arising from 'implication.' It is neither accurate nor useful to speak of these easements as created by 'dedication' or by 'estoppel.'"

[9] Lankin v. Terwilliger, 22 Ore. 97, 100, 29 Pac. 268, 269 (1892), where the court says that the easement "rests upon the fact that the grantor, by describing the land as bounded by a way . . . intends thereby to confer upon the grantee, as appurtenant to the granted premises, the right to use such way. . . ."

The easement so sought is to be distinguished from easements arising by implication of law as ways of necessity. Casella v. Sneirson, 325 Mass. 85, 89 N.E. 2d 8 (1949). It is also to be distinguished from easements arising where there is an existing use at the time of severance of the estate. Hughes v. Lippincott, 56 N. M. 473, 245 P. 2d 390 (1952).

[10] Bates v. Johnson, 217 Ky. 673, 290 S.W. 474 (1927); Lankin v. Terwilliger, 22 Ore. 97, 29 Pac. 268 (1892); *see* Malone v. Jones, 211 Ala. 461, 100 So. 831 (1924); Talbert v. Mason, 136 Iowa 373, 113 N.W. 918 (1907).

[11] Lankin v. Terwilliger, 22 Ore. 97, 102, 29 Pac. 268, 270 (1892). The deed described the land by metes and bounds: ". . . commencing at a point on the west side of the country road at the . . . corner of . . . the 'Old Cemetary,' . . . thence with the meander of said road. . . ." *See* Talbert v. Mason, 136 Iowa 373, 113 N.W. 918 (1907); *cf.* Bates v. Johnson, 217 Ky. 673, 290 S.W. 474 (1927) (To a point "near" a road and running "just below" a road, held a reference for the purpose of description).

[12] Teasley v. Stanton, 136 Ala. 641, 33 So. 823 (1903). The description by courses and distances showed the lot was 105 feet distant from the "reserve"

way,[13] or where there are "peculiar facts and circumstances";[14] but the fact that the land was bounded by the "side" of a road is not such an exception, and an easement will be found.[15]

The principal case[16] would thus seem to indicate that North Carolina is *contra* the general rule, and does not recognize an easement where land is described in the deed as being bounded by a way. The court holds in effect that the intention of the grantor was to mention the alley only for descriptive purposes. And though a reference only for descriptive purposes is an exception to the rule,[17] the court speaks of the deed as calling for an alley as a boundary of the lot conveyed, and this type of description falls within the general rule. In the opinion of the court in the *Green* case[18] neither the general rule nor the principle of estoppel were referred to, although the court did recognize that there was authority elsewhere running contrary to their holding.

The principal case, as well as *Milliken v. Denny*,[19] indicates that the reference to an alley in a deed, bounding the lot conveyed by the alley, will not suffice to create an easement by implication, nor will it estop the grantor and those claiming under him from closing the alley, but that there must be something in addition, showing an intention on the part of the grantor to create an easement.[20] That the court would apply estoppel even if it were shown that the grantee bought the land on the representation that there was a right of way, and that the value of the land was affected by the alley as an easement, seems doubtful where the facts are such as are involved in the principal case, since the defendants there ostensibly had no notice of any representation

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on which it was fronted in the deed. No implied covenant arose, the description being false.

[13] *See* Talbert v. Mason, 136 Iowa 373, 113 N.W. 918 (1907).

[14] *In re* Opening One Hundred and Sixteenth Street, 1 App. Div. 436, ——, 37 N. Y. Supp. 508, 516 (1st Dep't 1896), where the "conveyance of a comparatively small triangular piece of land did not grant as an appurtenance to it the beneficial use of a piece of property many times its size and value, and all for the consideration of one dollar."

[15] Casella v. Sneirson, 325 Mass. 85, 89 N.E. 2d 8 (1949). It was held that such a description was just as effective to pass an easement as one bounding the land "by or on" a way although the rule had been held not to apply in an earlier Massachusetts case, McKenzie v. Gleason, 184 Mass. 452, 69 N.E. 1076 (1904), where the land was bounded by the "side" of a road.

[16] Green v. Barbee, 238 N. C. 77, 76 S.E. 2d 307 (1953).

[17] See note 10 *supra*.

[18] Green v. Barbee, 238 N. C. 77, 76 S.E. 2d 307 (1953).

[19] 141 N. C. 224, 53 S.E. 867 (1906).

[20] In North Carolina, when the grantor sells lots with reference to a plat or map on which there are streets and alleys laid out, he and those claiming under him are held to be estopped to deny the existence of an easement in the alley and the right of the grantee to use it. Broocks v. Muirhead, 223 N. C. 227, 25 S.E. 2d 889 (1943). See Note, 31 N. C. L. Rev. 202 (1953).

See 3 Powell, Real Property § 409 (1952), where easements created by the general rule and those passing by reference to a plat or map are discussed jointly and correlated to the same principle.

made by the original grantor. In view of these decisions, reliance should not be placed on a description in a deed of a way as a boundary, and perhaps the advice given in *Milliken v. Denny* should be followed: "If purchasers wish to acquire a right of way or other easement over other lands of their grantor, it is very easy to have it so declared in the deed of conveyance."[21]

CALVIN C. WALLACE

State Torts Claims Act—Right of Subrogation[1]

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

[21] 141 N. C. 224, 231, 53 S.E. 867, 870 (1906).

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

For a discussion of the Federal Tort Claims Act see, Baer, *Suing Uncle Sam in Tort,* 26 N. C. L. REV. 119 (1948); Fisher, *The Federal Tort Claims Act after Five Years,* 3 MERCER L. REV. 263 (1952); Hiley, *A Review of the Federal Tort Claims Act,* 14 GA. B. J. 301 (1952); Jackson, *The Tort Claims Act—The Federal Government Assumes Liability in Tort,* 27 NEB. L. REV. 30 (1947); Woolston, *Federal Tort Claims Act Digest,* 28 DICTA 143 (1951); Note, 4 WYO. L. J. 96 (1949); Comments, 42 ILL. L. REV. 344 (1947), 56 YALE L. J. 534 (1947).

For a comparison of the Federal Act and the English Act see Street, *Tort Liability of the State: The Federal Tort Claims Act* and *The Crown Proceedings Act,* 47 MICH. L. REV. 341 (1949).

See generally for discussions of tort liability of various states, Oberst, *The Board of Claims Act of 1950,* 39 KY. L. J. 35 (1950) (Kentucky); Troxell, *Tort Responsibility of the District of Columbia,* 19 B. A. D. C. 504 (1952) (District of Columbia); Note, 8 MONT. L. REV. 45 and 97 (1947) (Montana); Comments, 23 IND. L. REV. 468 (1948) (Indiana), 47 N. W. U. L. REV. 914 (1953) (Illinois), 90 OHIO ST. L. J. 501 (1948) (Ohio), 23 So CALIF. L. REV. 507 (1950) (California), 27 TEX. L. REV. 337 (1949) (Texas).

Also see Borchard, *Tort Claims against Government: Municipal, State and Federal Liability,* 3 A. B. A. J. 221 (1947); Smith, *Municipal Tort Liability,* 48 MICH. L. REV. 41 (1949).

In regard to subrogation generally, see, Gleason and Intrater, *A New Trend in Subrogation,* 38 GEO. L. J. 646 (1950); Mullen, *The Equitable Doctrine of Subrogation,* 3 MD. L. REV. 201 (1939). Also, see generally, 50 AM. JUR. *Subrogation* §§ 1-147 (1944).

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

For a summary of the North Carolina Act see, *A Survey of Statutory Changes in North Carolina in 1951,* 29 N. C. L. REV. 351, 416 (1951).

Supreme Court in *Lyon & Sons, Inc. v. N. C. State Board of Education and/or Sampson County Board of Education.*[3] In deciding this case of first impression,[4] the Court turned to the decisions of the federal and state courts on the question.

This same question, with reference to Section 931 of the Federal Tort Claims Act,[5] caused much conflict in decisions of the lower federal courts. In some instances, the subrogee's cause of action was dismissed on the ground that the Act being in derogation of sovereign immunity and thus to be strictly construed could not, in the absence of express authorization, be interpreted as including subrogees.[6] On the other hand, motion to dismiss the subrogee was in most cases overruled on the ground that even if statutes waiving immunity to suit must be strictly construed, they must also be interpreted in the light of legislative intent and if the intention were to include subrogees, then in the absence of express exemption they are included.[7] Thus two time

[3] 238 N. C. 24, 76 S.E. 2d 553 (1953).

[4] This was an action for damages to the plaintiff's automobile, resulting from negligence of a state employee, wherein recovery was also sought upon the subrogated rights of the plaintiff's insurer, which had paid a portion of the damage.

[5] 60 STAT. 843 (1946), as amended, 28 U. S. C. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2412, 2671 to 2680 (Supp. 1950).

Most of the litigation concerned 28 U. S. C. § 931 (1946) of the old Judicial Code, which under the revision of the Judicial Code (effective Sept. 1, 1948, PUB. L. No. 773, 80th Cong., 2d Sess. [June 25, 1948]) is now divided and with immaterial changes appears at 28 U. S. C. §§ 1346 (b), 2674 (Supp. 1950).

28 U. S. C. § 931 (1946) provided in pertinent part that: ". . . the United States District Court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred . . . sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States for money only . . . on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission or any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this chapter, the United States shall be liable in respect to such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances. . . ."

[6] Aetna Casualty & Surety Co. v. United States, 76 F. Supp. 333, 335 (E. D. N. Y. 1948) ("What counts is a specific grant by Congress to a specific person of the right to bring a specific form of action against the United States, which were it not for that statute would be barred."); Cascade County, Montana v. United States, 75 F. Supp. 850, 852 (D. Mont. 1948) ("Sovereignty . . . raises a presumption against suability, unless it is clearly shown; . . . courts should not enlarge the liability conferred beyond what the language requires"); *accord,* Bewick v. United States, 74 F. Supp. 730 (N. D. Tex 1947); Old Colony Ins. Co. v. United States, 74 F. Supp. 723 (S. D. Ohio 1947); Rusconi v. United States, 74 F. Supp. 669 (S. D. Cal. 1947); *cf.* Gray v. United States, 77 F. Supp. 869 (D. Mass. 1948) (subrogee's cause of action dismissed on grounds he was not "real party in interest").

[7] South Carolina State Highway Dept. v. United States, 78 F. Supp. 594 (E. D. S. C. 1948); Town of Amherst v. United States, 77 F. Supp. 80 (W. D. N. Y. 1948); Ins. Co. of North America v. United States, 76 F. Supp. 951, 952 (E. D. Va. 1948) ("Well established and readily admitted is the rule that statutes waiving the immunity . . . must be strictly construed. But just as impelling is the duty of the court to follow the intent of the Congress to make the United

honored canons of construction met head-on.[8]

The conflict in the district courts as to the interpretation of the Federal Tort Claims Act as applied to subrogated claims was clarified somewhat in the Courts of Appeals. In ten cases decided on appeal in eight circuits the subrogee's right to sue in his own name was sustained in eight decisions,[9] and in only one was the subrogee's cause of action denied altogether. That decision was later re-argued and modified to

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States fully liable. . . ."); Niagara Fire Ins. Co. and Commissioners of State Ins. Fund v. United States, 76 F. Supp. 850 (S. D. N. Y. 1948); Forrester v. United States, 75 F. Supp. 272 (E. D. Wis. 1947); Wojciuk v. United States, 74 F. Supp. 914, 916 (E. D. Wis. 1947) ("It would be a strained and unwarranted interpretation of the intention of Congress to say it planned to give the district courts jurisdiction of cases brought by claimants originally suffering loss, but to reserve to itself the consideration of the claims of those standing in the shoes of the original claimants by operation of law."); Hill v. United States, 74 F. Supp. 129 (N. D. Texas 1947); *accord*, Grace to use of Grangers Mut. Ins. Co. v. United States, 76 F. Supp. 174 (D. Md. 1948) (held that derivative claims as such are not allowed but the damaged party could join the subrogee as an equitable party who would be entitled to some part or the whole of the recovery).

[8] Wojciuk v. United States, 74 F. Supp. 914, 916 (E. D. Wis. 1947) (Congress took great care in designating twelve different categories of claims which the Tort Claims Act was not intended to cover and none of the twelve categories includes subrogees; therefore the doctrine of *expressio unius est exclusio alterius* may be invoked). *But see* Cascade County, Montana v. United States, 75 F. Supp. 850, 853 (D. Mont. 1948). The doctrine of statutory construction, *expressio unius est exclusio alterius* is well recognized. See, *e.g.*, Rybbott v. Jarrett, 112 F. 2d 642, 645 (4th Cir. 1940). See also 50 AM. JUR., *Statutes* § 434 (1944) and cases there cited. For a discussion of strict construction of statutes waiving sovereign immunity see, 49 AM. JUR., *States, Territories, and Dependencies*, § 97 (1943).

[9] State Farm Mut. Liability Ins. Co. v. United States, 172 F. 2d 737 (1st Cir. 1949), *reversing* Gray v. United States, 77 F. Supp. 869 (D. Mass. 1948); South Carolina State Highway Dept. v. United States, 171 F. 2d 893 (4th Cir. 1948), *affirming* South Carolina State Highway Dept. v. United States, 78 F. Supp. 594 (E. D. S. C. 1948); Yorkshire Ins. Co. v. United States and Home Ins. Co. v. United States, 171 F. 2d 374 (3rd Cir. 1948), *reversing* Yorkshire Ins. Co. v. United States and Home Ins. Co. v. United States, Civil No. 10417 and 10418, D. N. J., Nov. 13, 1947, *cert. granted* 336 U. S. 960 (1949); United States v. Chicago, R. I. & P. Ry., 171 F. 2d 377 (10th Cir. 1948); National American Fire Ins. Co. v. United States, 171 F. 2d 206 (9th Cir. 1948), *reversing* National American Fire Ins. Co. v. United States, Civil No. 872, S. D. Cal., Nov. 21, 1947; Aetna Casualty & Surety Co. v. United States, 170 F. 2d 469 (2d Cir. 1948), *reversing* Aetna Casualty & Surety Co. v. United States, 76 F. Supp. 333 (E. D. N. Y. 1948), *cert. granted*, 336 U. S. 960 (1949); Old Colony Ins. Co. v. United States, 168 F. 2d 931 (6th Cir. 1948), *reversing* Old Colony Ins. Co. v. United States, 74 F. Supp. 723 (S. D. Ohio 1947); Employer's Fire Ins. Co. v. United States, 167 F. 2d 655 (9th Cir. 1948) (subrogee's motion to intervene granted), *reversing* Rusconi v. United States, 74 F. Supp. 669 (S. D. Cal. 1947).

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

Congress has demonstrated that it can find the requisite language to bar a subrogee's suit. See Foreign Claims Act, 55 STAT. 880 (1943), as amended 31 U. S. C. § 224(d) (1946) (". . . to consider . . . and make payments . . . of claims, including claims of insured but excluding claims of subrogees. . . .").

allow the subrogee to join as an equitable party or sue in the name of the subrogor.[10]

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

As decisions were handed down by the lower federal courts the numerical majority allowed suit by the subrogee[14] until the United States Supreme Court finally laid the question to rest in 1949 by holding in *United States v. Aetna Casualty & Surety Co.*[15] that the subrogee could sue and recover in his own name. In that case the "Anti-Assignment" Act was not asserted by the Government as a complete bar to the derivative claim of the subrogee, but only to require that suit be brought in the name of the insured for the use of insurer to protect the procedural rights of the United States.[16] That argument

[10] United States v. Hill, 171 F. 2d 404 (5th Cir. 1948), *reversing* Hill v. United States, 74 F. Supp. 129 (N. D. Tex. 1947), *re-argued and modified* 174 F. 2d 61 (5th Cir. 1949). The "Anti-Assignment" Act, which is discussed *infra*, was on re-argument held to bar recovery by the subrogee in his own name.

[11] REV. STAT. § 3447 (1853), 31 U. S. C. § 203 (1946), as amended, 61 STAT. 501, 508 (1947), 31 U. S. C. § 203 (Supp. 1950). The Act, commonly called the "Anti-Assignment" Act, prohibits the assignment of claims against the United States.

[12] See note 17 *infra*.

[13] State Farm Mut. Liability Ins. Co. v. United States, 172 F 2d 737 (1st Cir. 1949); South Carolina State Highway Dept. v. United States, 171 F. 2d 893 (4th Cir. 1948); North American Fire Ins. Co. v. United States, 171 F. 2d 206 9th Cir. (1948) (assignment surplusage since claim arose by operation of law); Wojciuk v. United States, 74 F. Supp. 914 (E. D. Wis. 1947) (subrogation differs from assignment or transfer since it is an act of law, and a creature of equity and justice); Ins. Co. of North America v. United States, 76 F. Supp. 951 (E. D. Va. 1948); Forrester v. United States, 75 F. Supp. 272 (E. D. Wis. 1947). *Contra:* Cascade County, Montana v. United States, 75 F. Supp. 850 (D. Mont. 1948); Bewick v. United States, 74 F. Supp. 730 (N. D. Tex. 1947). See Annotation, 12 A. L. R. 2d 460 (1950) for examples of transfers barred by the "Anti-Assignment" Act.

[14] See notes 6, 7, 9, and 10 *supra*.

[15] 338 U. S. 366 (1949).

[16] *Id.* at 371. It was stated that the purpose of invoking the "Anti-Assignment" Act was two-fold: (1) to avoid involving the United States in litigation as to the existence or extent of subrogation; and (2) to insure that suits would be brought in the names of the original claimants so that the United States could avail itself of its statutory rights in respect of venue, and of counter-claim and offset on account of any cross-claims it might have against the original claimants. It was further contended that the congressional intent was that the "Anti-Assignment" Act should apply.

was rejected by the Court and the "Anti-Assignment" Act held inapplicable.[17] In commenting on the doctrine of strict construction of statutes waiving sovereign immunity, the Court felt that the congressional attitude in passing the Tort Claims Act was reflected by Justice Cordozo when he said in speaking of a waiver of immunity statute of New York: "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."[18]

Few state decisions have dealt with the question raised in the principal case.[19] In a suit by a subrogated claimant under a South Carolina statute[20] in 1930, the court held that statutes waiving sovereign immunity must be strictly construed and in the absence of express provision for subrogated claims they must fail.[21] Cothran, J. concurred in the result of the decision in that the claim should fail because of failure to file a claim within the time specified by the statute[22] but dis-

[17] United States v. Aetna Casualty & Surety Co., 338 U. S. 366, 372, 374, 376 (1949). The Court held that even the limited application of the "Anti-Assignment" Act contended for was untenable because of the uniform interpretation for the past 75 years that assignments by operation of law are not within the prohibition of the Act [See, *e.g.*, Western Pacific R. Co. v. United States, 268 U. S. 271, 275 (1925); National Bank of Commerce v. Downie, 218 U. S. 345, 356 (1910); Price v. Forrest, 173 U. S. 410, 421 (1899); Goodman v. Niblack, 102 U. S. 556, 560 (1880)], and because of many affirmative indications of Congressional intent that subrogated claims should not be excluded from suit in the name of the subrogee under the Tort Claims Act. These indicia included the allowance of subrogated claims under the old Small Claims Act, 42 STAT. 1066, 31 U. S. C. § 215 (1922), which was repealed by the present Tort Claims Act [See, *e.g.*, 21 COMP. GEN. 341 (1941); 36 OPS. ATTY. GEN. 553 (1932); H. R. Rep. No. 5065, 72 Cong., 1st Sess (1932)], and the explicit exclusion of subrogees from the Foreign Claims Act, 55 STAT. 880 (1942), as amended, 57 STAT. 66 (1943), 31 U. S. C. § 224 (d) (1946).

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

[18] Anderson v. John L. Haynes Construction Co., 243 N. Y. 140, 147, 153 N.E. 28, 29 (1926).

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

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

[21] United States Casualty Co. v. State Highway Dept., 155 S. C. 77, 151 S.E. 887 (1930).

[22] "If the claim of the insurance company to subrogation could be sustained, it could only be to the cause of action which the owner of the car may have had against the department, and, the complaint containing no allegation that a claim was filed within the time required, it is lacking in an essential element of a cause of action under the Act." *Id.* at 87, 151 S.E. at 891.

sented in that it would be an illogical conclusion to construe the statute so as to exclude *all* subrogated claims.[23] This South Carolina decision was quoted and followed by the Kansas Supreme Court[24] and then the South Carolina and Kansas decisions were followed by the Supreme Court of Alabama.[25]

In 1950 the question of the validity of subrogated claims again came before the South Carolina Supreme Court in the *Jeff Hunt Machinery* case,[26] wherein the court in substance reversed its position by holding that a plaintiff could bring an action notwithstanding the fact that he had been reimbursed for his loss by an insurer and was bringing the action for the insurer's benefit. The court pointed out that it had uniformly held that statutes waiving the State's immunity from suit, being in derogation of sovereign immunity, must be strictly construed, and that the state could be sued only in the manner and upon the terms and conditions prescribed by statute. However, it added that statutes of that kind are not to be construed to such an extent as to defeat the legislative intent, as the rule of strict construction is subject to the principle that all rules of statutory interpretation are merely for the purpose of ascertaining the intention of the legislature as expressed in the statute.[27]

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

[24] American Mut. Liability Ins. Co. v. State Highway Commission, 146 Kan. 239, 69 P. 2d 1091 (1937).

[25] Turner v. Lumbermen's Mut. Ins. Co., 235 Ala. 632, 180 So. 300 (1938).

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

[27] Jeff Hunt Machinery Co. v. State Highway Dept., 217 S. C. 423, 426, 60 S.E. 2d 859, 860 (1950).

Referring to the case at hand, the court said that to say the person sustaining

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

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

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

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

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damage may not bring an action because he has been compensated for the loss by his insurer would necessitate writing into the statute an exception entirely foreign to its spirit and purpose and thereby limit its meaning without sense or reason. *Id.* at 427, 60 S.E. 2d at 860.

[28] Note 2 *supra.*

[29] Note 5 *supra.*

[30] Note 20 *supra.*

[31] United States Casualty Co. v. State Highway Dept., 155 S. C. 77, 87, 151 S.E. 883, 891 (concurring and dissenting opinion). See note 23 *supra.*

[32] Jeff Hunt Machinery Co. v. State Highway Dept., 217 S. C. 423, 60 S.E. 2d 859 (1950).

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

[34] *Id.* at 33, 76 S.E. 2d at 559.

[35] *Id.* at 33, 76 S.E. 2d at 560.

dictions will deal with the right of a subrogee to sue under Tort Claims Acts remains to be seen as proper cases for determination arise, but it would seem that the trend clearly points towards liberal construction of such Acts and the allowance of suit either by the subrogor for the use of the subrogee or by the subrogee in his own name.

Z. CREIGHTON BRINSON

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

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

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

[1] David W. Hughes, P-H 1953 TC MEM. DEC. ¶ 53,285 (1953).

[2] INT. REV. CODE § 41, provides in part: "The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income."

[3] *Ibid.*

[4] U. S. Treas. Reg. 118, § 39.22 (c)-1 (1953), provides in part: "In order to reflect the net income correctly, inventories at the beginning and end of each taxable year are necessary in every case in which the production, purchase, or sale of merchandise is an income-producing factor."

[5] Note 1 *supra.*

[6] U. S. Treas. Reg. 118, § 39.41-2 (1953), provides in part: ". . . in any case in which it is necessary to use an inventory, no method of accounting in regard to purchases and sales will correctly reflect income except an accrual method."

decide which method is necessary to reflect clearly the taxpayer's net income is not unlimited and will be reviewed when abuse is clearly shown.[7]

Under the cash system of reporting only receipts and disbursements of cash or its equivalent are considered in determining income.[8] Sales on credit, giving rise to accounts receivable, are not reported as income until payment is received. Therefore, when the Commissioner requires the taxpayer to change to the accrual method,[9] the balance of accounts receivable at the beginning of the year of change represents unreported sales made in prior years. The collection of these accounts would be excluded from income, since under the accrual method, sales are recognized as income in the year in which they are made. To avoid this result the Commissioner has attempted to add the amount of accounts receivable at the beginning of the year of change to the income computed on the accrual basis for the year as was done in the principal case. The effect is to pyramid income into one year.[10]

There is a similar problem with regard to inventory at the beginning of the year of change. This inventory represents purchases which have been deducted as expenses in prior years whenever payment was made for the merchandise. If the opening inventory is included in the cost of goods sold, the taxpayer will receive the advantage of a double deduction of this expense. Since under the accrual method the opening inventory is used in determining the cost of goods sold (opening inventory + purchases − closing inventory = cost of goods sold) the Commissioner has attempted to add the inventory value at the beginning of the year to the income computed on the accrual basis. The effect of this adjustment is to eliminate the use of the opening inventory in determining the cost of goods sold, further bunching income into a single year.[11]

The reception given by the courts to the Commissioner's attempt to bunch income is reflected in decisions lacking in clarity and con-

[7] Brown v. Helvering, 291 U. S. 193, 203 (1934); Lucas v. American Code Co., 280 U. S. 445, 449 (1930); Hardy v. Commissioner, 82 F. 2d 249, 250 (2nd Cir. 1936).

[8] The receipts and disbursements may be actual or constructive. For a discussion of the cash method, see I MONTGOMERY'S FEDERAL TAXES, pp. 1116-1118, (1952).

[9] The accrual basis ordinarily ignores the receipts and disbursements of cash or its equivalent as the basis for determining income. Under the accrual system, income is recognized whenever the right arises to receive cash or other property, regardless of when collection or other receipt actually occurs. A deduction from income is generally recognized during the accounting period in which the liability is incurred, regardless of when payment is made. For a discussion of the accrual method, see I MONTGOMERY'S FEDERAL TAXES, pp. 1118-1120 (1952).

[10] For a brief discussion of the pyramiding aspects and other effects of a change from an incorrect cash basis to a proper accrual basis see, Note, 37 A. B. A. J. 694 (1951).

[11] *Ibid.*

sistency.[12] The decisions upholding the Commissioner have been based on the principle that it is within the Commissioner's discretion in changing the method of accounting to add income that would otherwise escape taxation.[13]

Beginning with *Commissioner v. Mnookin's Estate*[14] in 1950, the courts began to distinguish between a change of accounting method and a change of reporting method.[15] If the taxpayer properly kept his books on the accrual basis but erroneously reported on the cash basis the Commissioner could not pyramid income in the year of change.[16]

[12] For a collection of cases and discussion, see Rabkin and Johnson, FEDERAL INCOME, GIFT AND ESTATE TAXATION, § 12.03 (3) (1953).

[13] Carver v. Commissioner, 173 F. 2d 29 (6th Cir. 1949); Hardy v. Commissioner, 82 F. 2d 249 (2nd Cir. 1936); Michael Lovallo, P-H 1950 TC MEM. DEC. ¶ 50,184 (1950); Schuman Carriage Company v. Commissioner, 43 B. T. A. 880 (1941); Alameda Steam Laundry Association v. Commissioner, 4 B. T. A. 1080 (1926); Appeal of John G. Barbas, 1 B. T. A. 589 (1925).

[14] 184 F. 2d 89 (8th Cir. 1950). In this case the taxpayer kept his books on the accrual basis. However, in the tax returns the amount of uncollected credit sales (accounts receivable) at the end of each taxable year were excluded from income. The Commissioner changed the method of reporting and in the year of change added the beginning balance of accounts receivable to the proper income computed on the accrual basis. The court, relying on Greene Motor Company v. Commissioner, 5 T. C. 314 (1945), held that the Commissioner had no power to pyramid income in this situation and distinguished this case from Carver v. Commissioner 173 F. 2d 29 (6th Cir. 1949), Hardy v. Commissioner, 82 F. 2d 249 (2nd Cir. 1936) and Schuman Carriage Company v. Commissioner, 43 B. T. A. 880 (1941) on the basis that here the books were kept on the proper basis and no change in the method of accounting was required, there being merely a change in the method of reporting.

The facts in Carver v. Commissioner, *supra,* were almost identical with the facts in Commissioner v. Mnookin's Estate, *supra,* but an opposite result was reached. In Carver the taxpayer changed his method of keeping books to the accrual basis sixteen years prior to the year in which the Commissioner required the change in reporting while in Mnookin the taxpayer apparently had always kept his books on the accrual basis. This difference does not appear to be significant.

In Greene Motor Company v. Commissioner, *supra,* the taxpayer kept its books and reported its income on the accrual basis. The taxpayer set up unwarranted reserve accounts and took some admittedly improper deductions as additions to these reserves in 1938. The Commissioner sought to include the amount of these reserves in the taxpayer's income for 1939. The Tax Court held that there was no change in method of accounting involved and that the Commissioner had no power to increase the income of one year by an amount erroneously deducted in a prior year.

In Mnookin the error was in reporting sales on a cash basis while in Greene Motor Company the error was merely in taking an improper deduction in the prior year. Hence Mnookin appears distinguishable because there was a change in accounting method as to sales while in Greene Motor Company there was only an attempt to include in income an improper deduction of the prior year.

[15] For a full discussion of this development see Dixon, *Pyramiding Income In Changing From a Cash To an Accrual Method Of Accounting,* 8 TAX L. REV. 355 (1953).

[16] Commissioner v. Cohn, 196 F. 2d 1019 (2d Cir. 1952); Commissioner v. Schuyler, 196 F. 2d 85 (2nd Cir. 1952); Commissioner v. Frame, 195 F. 2d 166 (3rd Cir. 1952); Commissioner v. Mnookin's Estate, 184 F. 2d 89 (8th Cir. 1950); George V. Gilbert, P-H 1952 TC MEM. DEC. ¶ 52,183 (1952). In these cases the books were kept on the accrual basis but in reporting income the unpaid accounts receivable were omitted or the inventory was excluded so that as to these items the cash basis was improperly used.

However, if the taxpayer incorrectly kept his books on the cash basis and reported income on the cash basis then the Commissioner's adjustments were proper.[17] This distinction was based on the fact that Section 41 of the Internal Revenue Code refers to "the method of accounting regularly employed in keeping the books." Therefore, when a change was required only in the method of reporting income, the Commissioner did not have the discretionary power conferred by this section to recompute the income and add the amounts of accounts receivable and inventory at the beginning of the year of change.

A further refinement of this distinction was made in later cases so that taxpayers who kept books *or records* from which a computation could be made of proper income on the accrual basis were not penalized when the change to the accrual method was required.[18] The theory of these cases is that a change in keeping books is not required since the proper income could be computed from the books and auxiliary records. A change in reporting method was all that was required.

Even though income escapes taxation the principle invoked by the cases prohibiting the bunching of income is that neither income nor deductions may be taken out of the proper accounting period for the benefit of the government or the taxpayer.[19] Moreover, the discretion which the Commissioner has under Section 41 of the Internal Revenue Code to recompute income when it is not clearly reflected by the taxpayer's method of accounting does not give him authority to include items of income attributable to earlier years or to disallow proper deductions which were also (erroneously) taken in prior years.[20] This would follow since the net income is to be computed on an annual basis to reflect the net result of operations during a fixed accounting period.[21]

In *Commissioner v. Dwyer*,[22] the taxpayer incorrectly kept his books on the cash basis and reported income on the cash basis. The Tax Court held that, since inventories were recorded and available, sufficient information was available to compute the income on the proper

[17] David W. Hughes, P-H 1953 TC MEM. DEC. ¶ 53,285 (1953); Iley v. Commissioner, 19 T.C. 631 (1952); Koby v. Commissioner, 14 T.C. 1103 (1950), *appeal dismissed.*

[18] Caldwell v. Commissioner, 202 F. 2d 112 (2d Cir. 1953) (card file of accounts receivable); Welp v. United States, 201 F. 2d 128 (8th Cir. 1953) (constructed inventory figures).

[19] Security Flour Mills v. Commissioner, 321 U. S. 281, 285, 287 (1944); Commissioner v. Mnookin's Estate, 184 F. 2d 89, 92 (8th Cir. 1950); Ross v. Commissioner, 169 F. 2d 483, 492 (1st Cir. 1948).

[20] Welp v. United States, 201 F. 2d 128, 133 (8th Cir. 1953); Commissioner v. Mnookin's Estate, 184 F. 2d 89, 93 (8th Cir. 1950); Clifton Manufacturing Co. v. Commissioner, 137 F. 2d 290, 293 (4th Cir. 1943).

[21] Burnet v. Sanford and Brooks Company, 282 U. S. 359 (1931).

[22] 203 F. 2d 522 (2nd Cir. 1953), *affirming* Cornelius J. Dwyer, P-H 1951 TC MEM. DEC. ¶ 51,206 (1951).

basis and consequently the Commissioner was not justified in attempting to bunch income. This was clearly in accord with the distinction developed in prior cases. However, the Eighth Circuit in affirming went further and overruled the case of *Hardy v. Commissioner*,[23] on which the Commissioner had relied in all of the cases involving involuntary changes of methods of accounting, and based the decision on the following principle:

> Although there have been exceptions, it is established by the great weight of authority that, if a taxpayer has not misrepresented or suppressed the facts, the statute of limitations not only prevents any reassessment of the tax after the prescribed period has passed; but that the Treasury may not assess a tax for a later year to make up for a credit erroneously allowed, or a charge erroneously omitted, in an earlier year.[24]

The court recognized that distinctions had grown up concerning the method of keeping books and the method of reporting but rejected them as being without merit.

Clearly these refinements which have been made and to which the court refers in *Dwyer* are without merit.[25] For example, the innocent who keep books and report on the cash basis would be penalized while a taxpayer who keeps his books on the proper basis but who reports on the cash basis would be rewarded with a windfall in the form of tax-free income whenever the proper change is required. It appears that both parties are equally at fault and that both should be treated equally before the courts.[26]

The confusion in this field may soon be eliminated by the decision in the *Dwyer* case. The clear-cut rule would seem to be that the Commissioner may not pyramid income when an involuntary change of

[23] 82 F. 2d 249 (2nd Cir. 1936). In this case the taxpayer, a corporation, which kept its books and reported income on the cash basis, requested the Commissioner to allow it to change to the proper accrual method in 1926. The Commissioner granted the request but required the taxpayer to make the change in 1925. The Commissioner added the accounts receivable and inventory at the beginning of 1925 to the income for that year. The court approved the Commissioner's action in this language: "In putting the petitioner on the accrual basis in 1925, the commissioner, bound to do it in a way that would clearly reflect its income, was not required to adhere strictly to a stereotyped accrual form of accounting. It is obvious that there must be some leeway in making the change from the cash basis in order that the income for the first taxable period under the changed method of reporting will be reflected accurately." 82 F. 2d at 251.

[24] Commissioner v. Dwyer, 203 F. 2d 522, 524 (1953).

[25] For a collection of cases and discussion, see Rabkin and Johnson, FEDERAL INCOME, GIFT AND ESTATE TAXATION, § 12.03 (3) (1953).

[26] In regard to a taxpayer who incorrectly reported interest on a cash basis, one court said: "The failure of the petitioner to make its returns consistently upon the accrual basis may place it in an unfortunate position. But for this situation the petitioner is alone to blame." Schuman Carriage Company v. Commissioner, 43 B. T. A. 880, 889 (1941).

accounting method is imposed. However, the decision in the *Hughes*[27] case may be an indication that the Commissioner and the Tax Court will continue to embrace the distinction in regard to methods of accounting and methods of reporting. Such a course would only prolong the adjustment of an unsatisfactory situation.

On the premise that all taxpayers who are required to change from the cash to the accrual basis should be treated alike, the next consideration is whether or not the result of the *Dwyer* decision is desirable in our self-assessing tax system. It must be noted that when the taxpayer requests permission to change from the cash to the accrual basis, the taxpayer and Commissioner must agree to conditions under which the change is to be made.[28] The implication is clear that the Commissioner may not consent unless the omitted income is included and the duplicate deductions are excluded. Therefore, it seems that after following *Dwyer* to its logical conclusion there would still be a different result in changing accounting methods depending on whether the Commissioner or the taxpayer initiates the change. Again, there is no logical reason for this difference. Why should the taxpayer who recognizes that he is on the wrong reporting basis and who attempts to make the proper change be penalized while the taxpayer who waits until he is forced to make the change is rewarded?

It must be recognized that in changing from the cash to the accrual basis of reporting there may be amounts which will be duplicated or entirely omitted as a result of the change. A coherent tax policy would require the taxing of this income in all cases regardless of who initiated the change in accounting method. Perhaps the most equitable method of adjustment would be to recompute income for the prior years in which the sales arose and the inventory was paid for, even where the statute of limitations would otherwise prevent any reassessment of tax. An alternative would be to spread the additional income over a reasonable number of tax years. Legislation has been proposed which would accomplish this uniform result.[29] It seems clear that this in-

[27] Note 1 *supra*.

[28] U. S. Treas. Reg. 118, § 39.41-2 (c) (1953), provides in part: "A taxpayer who changes the method of accounting employed in keeping his books shall, before computing his income upon such new method for purposes of taxation, secure the consent of the Commissioner. . . . The application shall be accompanied by a statement specifying the classes of items differently treated under the two methods and specifying all amounts which would be duplicated or entirely omitted as a result of the proposed change. Permission to change the method of accounting will not be granted unless the taxpayer and the Commissioner agree to the terms and conditions under which the change will be effected."

[29] *Cf.*, 66 HARV. L. REV. 187, 188 (1952), where the author refers to a proposed statute (A. L. I. FED. INCOME TAX STAT. §§ X330, X332, Tent. Draft No 6, 1952) which would give the taxpayer the option of reconstructing previous years' income or spreading the additional income over a three year period.

come should not be pyramided into the year of change inasmuch as it is income attributable to other accounting periods.

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Workmen's Compensation—"Accidental" Injury—an Anachronism

A 1953 Mississippi decision[1] has added one more drop to the ocean of confusion concerning the legal meaning of the word "accident." There a baker contracted a skin allergy from the use of a baker's pad in handling hot pans of bread. After testimony by a dermatologist to the effect that the employee was allergic to some material or chemical in the pad, the attorney-referee awarded compensation on the basis of "accidental" injury and the entire Commission affirmed.[2] On appeal the Mississippi Supreme Court refused to overturn the finding, agreeing that this was an "accidental" injury within the purview of the Mississippi statute.[3]

To understand the decision, it is first necessary to briefly examine the theory underlying Workmen's Compensation. In an economic society containing as one of its basic essentials a large group of laborers, it is desirable for the well being of all integrated society to protect this group from industrial accidents which seem inevitable in the industrial machine.[4] To accomplish this end the economic burden is placed upon industry rather than upon workers and their dependents, who might otherwise well become wards of the State.[5] And since this benefit is *directly* for the laborer and only *indirectly* for the society, Workmen's Compensation Acts should be construed liberally in favor of the employee.[6]

[1] Hardin's Bakeries, Inc. v. Ranager, 64 So. 2d 705 (Miss. 1953).

[2] Under Mississippi procedure, hearings may be conducted by a Commissioner or a representative of the Commission, who grants or denies compensation and then files his decision with the Commission. This decision is final unless within twenty days a request or petition for review by the full Commission is made. Appeal may be made from the Commission's finding within thirty days to the Circuit Court of the county in which the injury occurred, this appeal being based only upon the record as made before the Commission. Finally, appeal may be taken to the Supreme Court of Mississippi. MISS. LAWS 1948, c. 354, §§ 18,20.

[3] MISS. LAWS 1948, c. 354, *as amended by* MISS. LAWS 1950, c. 412.

[4] Bowen v. Hockley, 71 F. 2d 781 (4th Cir. 1934).

[5] Tedars v. Savannah River Veneer Co., 202 S. C. 363, 25 S.E. 2d 235 (1943)

[6] Employers Mutual Liability Ins. Co. of Wis. v. Konvicka, 197 F. 2d 691 (5th Cir. 1952); Beck v. National Sur. Corp., 171 F. 2d 862 (5th Cir. 1949); Peterson v. Moran, 111 Cal. App. 2d 766, 245 P. 2d 540 (1952); Danziger v. Industrial Accident Comm., 109 Cal. App. 71, 292 Pac. 525 (1930); Shockley v. King, 31 Del. 606, 171 Atl. 280 (1922); Di Giorgio Fruit Corp. v. Pittman, 49 So. 2d 600 (Fla. 1950); Guevara v. Inland Steel Co., 120 Ind. App. 47, 88 N.E. 2d 398 (1949); Forcade v. List and Clark Const. Co., 172 Kan. 119, 238 P. 2d 549 (1951); Alexander v. Chrysler Motor Parts Corp., 167 Kan. 711, 207 P. 2d 1179 (1949); Jurich v. Cleveland-Cliffs Iron Co., 233 Minn. 108, 46 N.W. 2d 237 (1951); Brookhaven Steam Laundry v. Watts, 214 Miss. 569, 55 So. 2d 381 (1951); McWilliams v. Southern Bleaching and Printing Works, 216 S. C. 121, 57 S.E. 2d 26 (1949); Thornton v. R. C. A. Service Co., 188 Tenn. 644,

But even liberality must have its boundaries, if law is truly to produce justice. Thus, we find irritated Justinians admonishing: "(The court) may not add to, nor detract from, the statute. The court must take the statute as it is, not as it may think it should be."[7] Again: "We cannot reconstruct the act, we can only interpret it."[8] Or even further: "The statute should be given a liberal interpretation, but liberality should not be stretched into extravagance."[9]

What then has been the occasion for this controversy? Basically it would seem to be a conflict between a liberal construction in order to effectuate the purpose of the Acts and common law notions of legal liability. To go into all the possible ramifications of this conflict is not the purpose here.[10] Rather we seek to examine one of the most controversial areas—what constitutes an "accident" as referred to in the statutes and as related to the principal case.

Under most Workmen's Compensation Acts,[11] not only must the injury arise out of and in the course of the employment,[12] but in the majority of the Acts it must also be accidental.[13] Some courts have interpreted "accident" as an unlooked for and untoward event, not expected or designed;[14] it has been called a "fortuitous" event;[15] or "a quality or condition . . . of happening, coming by chance or without design, or taking place unexpectedly or unintentionally";[16] often, but

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221 S.W. 2d 954 (1949); Industrial Accident Board v. Miears, 149 Tex. 270, 227 S.W. 2d 571 (1950); Jones v. California Packing Corp., 244 P. 2d 640 (Utah 1952).

[7] Royal Indemnity Co. v. J. G. White Engineering Corp., 120 Misc. 332, 337, 198 N. Y. Supp. 264, 269 (Sup. Ct. 1923).

[8] Paterno's Case, 266 Mass. 323, 327, 165 N.E. 391, 392 (1929).

[9] *In re* Sickles, 171 App. Div. 108, 109, 156 N. Y. Supp. 864, 865 (3d Dep't. 1916). See also Matlock v. Industrial Commission, 70 Ariz. 25, 215 P. 2d 612 (1950); Kennecott Copper Corp. v. Industrial Commission, 69 Ariz. 280, 212 P. 2d 1001 (1950); Sanderson and Porter v. Crow, 214 Ark. 416, 216 S.W. 2d 796 (1949); *In re* Martinelli, 219 Mass. 58, 106 N.E. 557 (1914); Deemer Lumber Co. v. Hamilton, 211 Miss. 673, 52 So. 2d 634 (1951); Simon v. Standard Oil Co., 150 Neb. 799, 36 N.W. 2d 102 (1949); Henry v. A. C. Lawrence Leather Co., 231 N. C. 477, 57 S.E. 2d 760 (1950); *In re* Trent's Claim, 68 Wyo. 146, 231 P. 2d 180 (1951).

[10] For a comprehensive study of accidental injury, see 1 LARSON, WORKMEN'S COMPENSATON LAW §§ 37.00-42.24 (1st ed. 1952).

[11] For a compilation of all Workmen's Compensation statutes, see SCHNEIDER, WORKMEN'S COMPENSATION STATUTES, 6 vols. (Perm. ed. 1939-1949).

[12] 1 LARSON, WORKMEN'S COMPENSATION LAW, § 6.10, pp. 41-43 (1st ed. 1952).

[13] 1 LARSON, WORKMEN'S COMPENSATION LAW, §37.10, pp. 511-512 (1st ed. 1952).

[14] New Amsterdam Casualty Co. v. Humphrey, 47 F. 2d 57 (5th Cir. 1931); Fidelity and Casualty Co. of New York v. Industrial Accident Comm. of Calif., 177 Cal. 614, 171 Pac. 429 (1918); Jefferson Printing Co. v. Industrial Comm., 312 Ill. 575, 144 N.E. 356 (1924); Woodruff v. Howes Const. Co., 228 N. Y. 276, 127 N.E. 270 (1920); Withers v. Black, 230 N. C. 428, 53 S.E. 2d 668 (1949).

[15] Benjamin F. Shaw Co. v. Musgrave, 189 Tenn. 1, 222 S.W. 2d 22 (1949); Zappala v. Ind. Ins. Comm., 82 Wash. 314, 144 Pac. 54 (1914).

[16] Gulf Oil Corp. v. Rouse, 202 Okla. 395, 397, 214 P. 2d 251, 253 (1949).

not necessarily, accompanied by a manifestation of force.[17] Other courts have added as a valuable ingredient a definite time, place, and occasion.[18] Or it may simply be interpreted as an "accident" in the popular sense of the word.[19]

How do these definitions apply to the principal case? Certainly the allergy was unexpected, undesigned, untoward, unintentional, and fortuitous. No definite time can be ascertained, but courts vary as to what constitutes a definite time and place. Some say an accident does not happen over an entire day, others hold that it may require six months for an accident to culminate.[20] "No stated period can be given . . . as applied to each case, each must naturally depend on its own circumstances."[21]

But what of the requirement of the ordinary, popular sense of the word? Justice Cardozo once dealt with the problem in *Connally v. Hunt Furniture Co.*,[22] where an embalmer's helper was infected by poison entering an abrasion on his hand while working on a corpse. In the majority opinion, affirming an award, Cardozo wrote:

> "Germs may indeed be inhaled through the nose or mouth, or absorbed into the system through normal channels of entry. In such cases their inroads will seldom, if ever, be assignable to a determinate or single act, identified in space or time. . . . For this, *as well as for the reason that the absorption is incidental to a bodily process both natural and normal, their action presents itself to the mind as a disease, and not as an accident* (italics added). Our mental attitude is different when the channel of infection is abnormal or traumatic, a lesion or cut."[23]

Several early cases have also applied such a distinction. Thus compensation was denied where infection followed from an employee's dipping his hand into a staining solution, there being no evidence of a scratch or abrasion;[24] where a plumber contracted an infection of the eye from a particle falling into it, or by wiping his face with an infected towel—again no prior abrasion;[25] where infection resulted from use of a chemical solution in developing photographic plates;[26] and where

[17] Winkelman v. Boeing Airplane Co., 166 Kan. 503, 203 P. 2d 171 (1949).
[18] Liberty Mut. Ins. Co. v. Thompson, 171 F. 2d 723 (5th Cir. 1948); Great Atlantic and Pacific Tea Co. v. Sexton, 242 Ky. 266, 46 S.W. 2d 87 (1932).
[19] Winkelman v. Boeing Airplane Co., 166 Kan. 503, 203 P. 2d 171 (1949).
[20] 4 SCHNEIDER, WORKMEN'S COMPENSATION 387 (Perm. ed. 1945).
[21] S. H. Kress and Co. v. Burkes, 153 Fla. 868, 870, 16 So. 2d 106, 107 (1944).
[22] 240 N. Y. 83, 147 N.E. 366 (1925).
[23] Connally v. Hunt Furniture Co., 240 N. Y. 83, 85, 147 N.E. 366, 367 (1925).
[24] Jenner v. Imperial Furniture Co., 200 Mich. 265, 166 N.W. 943 (1918).
[25] Voelz v. Industrial Comm., 161 Wis. 240, 152 N.W. 830 (1915).
[26] Jeffreys v. Charles H. Sager Co., 233 N. Y. 535, 135 N.E. 907 (1922), affirming 198 App. Div. 446, 191 N. Y. Supp. 354 (3rd Dep't 1921).

dermatitis resulted from washing out ink cans with a solution of caustic soda.[27]

Several later cases have turned on similar grounds. In 1936, the Ohio Supreme Court refused compensation from irritations to an employee's face caused by peach stains in a towel on the basis of a lack of causal relation, but by way of dictum stated that even were the causal relation present, there was no accident, for the *unusual* or *exceptional* physical condition of the employee was not a legal trauma.[28] A 1944 Florida decision refused compensation where a bakery employee developed knots in her wrists from mixing dough, baking bread, and scrubbing pans. The court based its finding on the lack of an *unexpected,* or *unusual, sudden* injury, as the Act required.[29] In a 1952 Missouri case, an employee sustained injuries to his face, right side, and ear by dust and dirty cotton lodgin to which he was exposed in a cotton warehouse. In denying recovery, the court said there was no impact, and that the exposure was *usual.*[30]

However, Cardozo's distinction between the normal and the abnormal channels as a guide to the common meaning of "accident" has, for the most part, given way to other legal interpretations, *with the real question centering around causal connection.* Thus lung cancer from inhaling dust,[31] back injury where the strain was usual,[32] cerebral hemorrhage from excitement[33] or exertion,[34] coronary thrombosis caused by nervousness while driving at night in a dense fog,[35] skin disease from exposure to the sun,[36] coughs spreading germs,[37] and sunstroke[38]

[27] Cheek v. Harmsworth Brothers, 4 W. C. C. 3 (Eng. 1901).

[28] Industrial Comm. of Ohio v. Zelmanovitz, 53 Ohio App. 92, 4 N.E. 2d 265 (1936).

[29] FLA. STAT. ANN. § 440.02 (1952); S. H. Kress and Co. v. Burkes, 153 Fla. 868, 16 So. 2d 106 (1944). The Florida Court on the same grounds refused compensation in Travelers Ins. Co. v. Shepard, 20 So. 2d 903 (Fla. 1945) (dermatitis from packing oranges); City of Tallahassee v. Roberts, 21 So. 2d 712 (Fla. 1945) (injured vertebra). *But see* Meehan v. Crowder, 28 So. 2d 435, 437 (Fla. 1946), where compensation was granted for an injury over a *three* day period, the court saying: "The event here is the sudden entry of the poisonous fumes into Crowder's body."

[30] Rogers v. Sikeston Compress and Warehouse Co., 248 S.W. 2d 672 (Mo. 1952).

[31] Scobey v. Southern Lumber Co., 218 Ark. 671, 238 S.W. 2d 640 (1951).

[32] Nelson v. Ford Motor Co., 13 N. J. Super. 56, 80 A. 2d 235 (1951).

[33] St. Dept. of Revenue v. Snelling, 84 Ga. App. 238, 65 S.E. 2d 822 (1951).

[34] Bealer v. Town of Amherst, 278 App. Div. 993, 105 N. Y. S. 2d 772 (3d Dep't 1951).

[35] McNess v. Cincinnati St. Ry. Co., 90 Ohio App. 223, 101 N.E. 2d 1 (1951).

[36] Pan American Airways v. Willard, 99 F. Supp. 257 (S. D. N. Y. 1951).

[37] McRae v. Unemployment Compens. Comm., 217 N. C. 769, 9 S.E. 2d 595 (1940), commented on in 39 MICH. L. REV. 834 (1941). In view of this case it would seem that the North Carolina Court takes a liberal view as to what constitutes an "accident" as applied to Workmen's Compensation, for the Court there found a cough which spread disease germs to be an "accident." Whether the same liberality would be evidenced on the facts of the principal case is open to conjecture. But the step from a cough to wearing gloves is not a large one,

are but a few of the recently classified "accidents," when all, or certainly most, would not be so classified in common parlance.

Thus, it is seen that in the application of the word "accident" there has grown up in the courts a legal and judicial meaning far different from the layman's definition and understanding, which the legislatures probably intended in first using the term. The principal case is but one more example of this. To the layman, the baker's injury would not be an accident, nor would it be an occupational disease, as it is not peculiar to bakers or to their working environment—it would simply be what it was, a skin disease caused by the employment. For if this were an accident, then almost any action, even a prolonged one, with an unfortunate result could logically be deemed the same. However, where there is a causal connection between the employment and the injury, the legal trend is unmistakably toward such a result; to refuse to recognize this or to advocate reversal is to play the role of the ostrich and the sand.

The effect then is to render the word "accident" practically useless in compensation cases, except as rationale to circumvent a statute saying such is necessary. Courts responding to economic, political, and social trends of the past thirty years have to that effect legislated. And though, as Justice Cardozo wrote, there are "interstitial" areas where judicial legislation becomes desirable,[39] there is a constant danger of judicial legislation being substituted for judicial interpretation.

In light of the aforementioned trend, the principal case reaches a sound result. In actuality it carries rationalization one step further to reach a desired result. It would be far more desirable if Workmen's Compensation Acts did not include the element of accident (as some do not),[40] for it presents a roadblock to the sociological purpose of the Acts, which is becoming less effective with more liberal interpretations, but which, at the same time, has created an unhealthy trend toward

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for allergy from pads is far less common and unexpected than disease spread by coughs. For a compilation of North Carolina cases on accidental injury, see N. C. W. C. A. ANN. § 97.2 (F) (1952).

[38] Commissioner of Tax and Finance v. Wickwire Spencer Steel Co., 279 App. Div. 1124, 112 N. Y. S. 2d 527 (3d Dep't 1952).

[39] CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, pp. 98-141 (5th ed. 1925).

[40] MICH. STAT. ANN. § 17.141 (1950); OHIO GEN. CODE ANN. § 1465-37 (1946); TEX. REV. CIV. STAT. ANN. art 8306 (1925); W. VA. CODE ANN. § 2494 (1949); WYO. COMP. STAT. ANN. § 72-101 (1943). But even the courts of these states have read "accident" into the Acts. See Marlow v. Huron Mountain Club, 271 Mich. 107, 260 N.W. 130 (1935); Malone v. Industrial Commission, 140 Ohio St. 292, 43 N.E. 2d 266 (1942); Middleton v. Texas Power and Light Co., 108 Tex. 96, 185 S.W. 556 (1916); Martin v. St. Compensation Commissioner, 107 W. Va. 583, 149 S.E. 824 (1929); *In re* Scrogham, 73 P. 2d 300 (Wyo. 1937). For a vigorous dissent to judicial inclusion of the word accident, see Hagopian v. Highland Park, 313 Mich. 608, 22 N.W. 2d 116 (1920).

legal rationalization[41] which may become infectious and spread to other areas of the law.

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[41] Some courts are more pointed: "It (the injury) cannot be attributed to the occupation because it is not a disease which men in that occupation are subject to contract; it is not a disease known to be incidental to that particular employment. *Then it is the result of the accident or else we have a situation under the Workmen's Compensation Act where an employee contracts a disease out of and in the course of his employment, and, yet not compensable* (italics added). Vogt v. Ford Motor Co., 138 S.W. 2d 684, 687 (Mo. App. 1940).