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Notes and Comments

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NOTES AND COMMENTS

Threats Inducing Emotional Reactions.

Showing blackjacks, the defendants threatened the plaintiffs with physical harm, and because this offer to commit immediate bodily harm generated great fear and distress, the plaintiffs became ill. On demurrer to the complaint, of which the above is a paraphrase, the court held that: (1) there was no assault and (2) there was no action for the alleged illness.[1]

As to the assault, there are many statements in the books which seem to support the result since there was no allegation of an "overt act." "Mere words do not constitute an assault" has been stated frequently by text writers[2] and stated or implied by the courts. There appears to be no satisfactory explanation for such a result where the parties are face to face.[3] The plaintiffs believed that the defendants would carry out immediately their manifested intent of striking them unless their orders were obeyed. These facts spell civil assault at common law. There is in fact little judicial authority for the requirement of a threatening movement. In many of the cases, including the one cited by the court,[4] the statement that "mere words" are not sufficient is the merest dictum.[5] In some of the cases, it is said that there must be an offer of corporeal harm, an ambiguous expression taken from textbooks.[6] Again these statements are mostly dicta.[7] The largest number of cases in which the expression is used involve criminal assaults[8] and, despite an occasional case to the contrary,[9] it is generally recognized that the

[1] Cucinotti v. Ortman, 339 Pa. 26, 159 A.2d 216 (1950).

[2] 1 HARPER & JAMES, TORTS § 3.5 (1956); RESTATEMENT, TORTS § 31 (1934).

[3] See PROSSER, TORTS § 10 (2d ed. 1955).

[4] Bechtel v. Combs, 70 Pa. Super. 503 (1918) (telephone threat).

[5] Kramer v. Ricksmeier, 159 Iowa 48, 139 N.W. 1091 (1913) (telephone threat); Johnson v. Sampson, 167 Minn. 203, 208 N.W. 814 (1926) (no force was threatened); Continental Cas. Co. v. Garrett, 173 Miss. 676, 161 So. 753 (1935) (threats by trespasser causing illness; recovery allowed).

[6] As in 1 COOLEY, TORTS § 95 (4th ed. 1932).

[7] Brown v. Crawford, 296 Ky. 249, 177 S.W.2d 1 (1943); Tinkler v. Richter, 295 Mich. 396, 295 N.W. 201 (1940); Jenkins v. Kentucky Hotel, 261 Ky. 419, 87 S.W.2d 951 (1935) (dictum).

[8] State v. Daniel, 136 N.C. 571, 48 S.E. 544 (1904), is typical; holding that it was incorrect for the trial court to charge that "if the defendant cursed the prosecutor, Alston, and ordered him to come to him and Alston obeyed through fear, the defendant was guilty of an assault," the court said: "Mere words, however insulting or abusive, will not constitute an assault, nor will a mere threat or violence menaced, as distinguished from violence begun to be executed. . . . [T]he defendant must have committed some act in execution of his purpose." State v. Daniel, *supra* at 573, 574, 48 S.E. at 544, 545.

[9] Texas Bus Lines v. Anderson, 233 S.W.2d 961 (Tex. Civ. App. 1950) (where plaintiff was denied entrance to a bus but refrained from getting near enough to be struck). See also Stark v. Exler, 58 Ore. 262, 117 Pac. 276 (1911), in which, in a civil action for a battery, the court gratuitously says that a civil assault is the intentional attempt to do violence to another.

two species of assault have quite different elements. At common law, criminal assault does not involve knowledge by the plaintiff of the defendant's conduct, as is true of civil assault; the latter, in turn, does not involve an attempt to commit a battery,[10] a usual requirement in criminal assault. It may be that the distinction commonly made in the criminal law between attempts and preparation, throws the cases involving only words into the latter category.[11] On the other hand, without making an exhaustive survey of the cases, I have found a few which support the position that activity by the defendant is evidence, but not the only evidence, of the defendant's intent to strike immediately and of the plaintiff's apprehension.[12] The Advisors for the *Restatement of Torts, Second,* have recommended a statement to that effect.[13]

The second issue involved a far more important matter than the question whether a contemporaneous movement by the defendant is a requirement for a technical assault. By its decision the court has placed itself squarely against the progress made by the courts in the last half century. There is here not merely an interference with the peace of mind for which some other courts allow an action under similar circumstances, even though not resulting in physical harm.[14] The action is not one based upon negligence or other tortious conduct directed towards third persons which causes a mental shock with resulting physical harm to the plaintiff who in some states is denied a cause of action.[15] This result is at least arguable, since otherwise an inadvertent defendant might become liable to a large number of spectators witnessing a catastrophe.

[10] RESTATEMENT, TORTS §§ 21, 28 (1934).

[11] As in Fennell v. State, 164 Ga. 54, 137 S.E. 762 (1927); Merritt v. Commonwealth, 164 Va. 653, 180 S.E. 395 (1935) (not an attempt to point a pistol at plaintiff).

[12] Republic Steel & Iron Co. v. Self, 122 Ala. 402, 68 So. 328 (1915) (stated that whether language constitutes an assault depends upon the manner and tone of the speaker); Haup v. Evenson, 125 Iowa 634, 101 N.W. 520 (1904) (instruction found not bad which stated that assault is a menace by word or act, where there was evidence of an apparent intent to carry ont the threat); Cressey v. Republic Creasoting Co., 108 Minn. 342, 122 N.W. 484 (1909) (instruction that a wrongful threat to do bodily violence with present ability is good).

[13] RESTATEMENT (SECOND), TORTS § 31 (Tent. Draft No. 1 1957): "Words do not make the actor liable for assault unless, together with other acts or circumstances, they put the other in reasonable apprehension of an imminent harmful or offensive contact with his person."

[14] State Rubbish Collectors v. Silignoff, 38 Cal.2d 330, 240 P.2d 282 (1952), in which both compensatory and punitive damages were awarded for the mental suffering with facts similar to the ones here dealt with. To avoid useless litigation, recovery is properly limited to outrageous conduct. Gillianss v. Eastern Air Lines, 194 F.2d 774 (5th Cir. 1952); Wallace v. Shoreham Hotel Corp., 49 A.2d 81 (Munic. Ct. App. D.C. 1946).

[15] Waube v. Warrington, 276 Wis. 603, 258 N.W. 497 (1935) (as a matter of social expediency). The courts are more apt to find liability where the defendant's act, although directed against a third person, is intentionally wrongful. Rogers v. Willard, 144 Ark. 587, 223 S.W. 15 (1920) (assault on plaintiff's husband in plaintiff's presence).

Again, our principal case is not one in which the defendant has been negligent to the plaintiff but has not caused an impact, in which situation the Pennsylvania courts have consistently denied damages for the physical harm resulting from the fear suffered by the plaintiff.[16] Again the result is arguable. Negligence does not necessarily connote personal fault; it may result from a momentary inadvertence, to which all are subject, or from ingrained stupidity, from which one cannot escape. There is danger of fake testimony which, with the aid of partisan expert witnesses, may mislead jurors into making a mountain out of a molehill. Further, if there has been no impact upon the plaintiff, the defendant may not even be aware of the incident for some time and hence be unable to recall it or to get witnesses. It is clear that such cases require careful and expert handling by the courts. But most courts have reached the conclusion that an action should be allowed if the proof is clear.[17]

Whatever we may think about the negligence cases, it is obvious that they afford no precedent for denying recovery in such a case as the present in which the defendants deliberately set about disturbing the plaintiffs' minds for the purpose of causing them serious worry. Beginning at least in 1897, the courts have allowed recovery where a defendant did an act or said words, intended by him to distress the plaintiff and which he should have realized might affect the plaintiff's health. Many of the cases involve misguided "practical jokers."[18] There are also the many cases, involving the recently protected right of privacy, where there may be only bad judgment as to the proper limits to publicizing facts about the plaintiff[19] or the overzealous acts of creditors who exceed the bounds of propriety and whom the debtor can hold liable although he has suffered only chagrin or embarrassment.[20] This type of conduct is bad but certainly far less so than threats with blackjacks. It is arguable that mere threats without resulting physical harm should not be the subject of a civil action. But where the plaintiffs have become ill from the threats (as we must assume from the pleading that they did), the court should not leave them without redress. In fact the court in

[16] This is true even though the evidence of the plaintiff's physical deterioration as a result of the fear is beyond question, as in Bosley v. Andrews, 303 Pa. 161, 142 A.2d 263 (1958), where plaintiff suffered a heart attack caused by fear of defendant's trespassing and threatening bull (a case mentioned by Mr. Justice Musmanno in hopelessly dissenting).

[17] The prevailing view is presented in Orlo v. Connecticutt Co., 128 Conn. 231, 21 A.2d 402 (1941). See the review of cases in 2 HARPER & JAMES, TORTS § 18.4 (1956).

[18] Wilkinson v. Downton, [1897] 2 Q.B. 57 (a "practical joker" told plaintiff that her husband had been badly injured); Bielitzki v. Obadisk, 65 D.L.R. 627 (1922) (similar).

[19] Leverton v. Curtis Publishing Co., 192 F.2d 974 (3d Cir. 1951) (photograph of plaintiff in disheveled clothes, two years after the accident of which she was the victim).

[20] Housh v. Peth, 165 Ohio St. 35, 133 N.E.2d 340 (1956) (said to be an invasion of privacy).

effect is telling the modern highwaymen how to ply their trade without civil liability,[21] except for their plunder. The formula is simple: "Show your blackjacks, but don't move them or touch your victims."

WARREN A. SEAVEY*

Conflict of Laws—Tort and Partial "Release" in Different Jurisdictions—What Law Governs Construction of Instrument.

At common law a release of one joint tort-feasor results in the release of all others. It makes no difference whether the respective acts of the several tort-feasors were in concert, merely concurrent, or even successive;[1] it matters only that the combined acts produced a single, indivisible injury.[2] The reason generally assigned for this result is that a single injury represents a single cause of action, which cannot be split by being released as to one tort-feasor while being preserved as to another. A release is thus regarded as an absolute, unconditional extinction of a cause of action.[3] This reasoning gave rise to the judicial presumption that a release, even if granted to less than all who were (allegedly) jointly responsible for the injury, was executed only in exchange for a complete satisfaction of the claim. It was the view of the courts, therefore, that to allow the injured party to release one joint tort-feasor and subsequently to recover a judgment from another theoretically would permit the victim to recover more than he had lost.[4] Assuming the soundness of this reasoning at the time at which it evolved, it is nevertheless highly questionable whether the use of this irrebuttable presumption is a just method of preventing excessive recoveries now.

[21] I assume that the defendants might have been bound over to keep the peace or been charged with an attempt at extortion.

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[1] Intentional torts by their very definition at common law must have been concurrent in order to give rise to joint tort-feasorship. See Garrett v. Garrett, 228 N.C. 530, 46 S.E.2d 302 (1948); PROSSER, TORTS § 46, n. 29 (2d ed. 1955).

[2] Sheppard v. Atlantic States Gas Co., 72 F. Supp. 185 (E.D. Pa. 1947); Morris v. Diers, 134 Colo. 39, 298 P.2d 957 (1956); PROSSER, *op. cit. supra* note 1, § 46. A few American jurisdictions have attempted to make a common-law distinction (both in negligent and intentional torts) between tort-feasors who act in concert and those whose acts are merely concurrent. Husky Refining Co. v. Barnes, 119 F.2d 715 (9th Cir. 1941) (Idaho law); Bee v. Cooper, 217 Cal. 96, 17 P.2d 740 (1932). There is a considerable variance between the laws of the several jurisdictions as to the effect of a release given to one who is subsequently adjudged not to have been jointly liable with those charged with the injury. See, *e.g.*, Bolton v. Ziegler, 111 F. Supp. 516 (N.D. Ind. 1953); Pellett v. Sonotone Corp., 26 Cal.2d 705, 160 P.2d 783 (1945); Holland v. Southern Pub. Util. Co., 208 N.C. 289, 180 S.E. 592 (1935); Howard v. J. H. Harris Plumbing Co., 154 N.C. 225, 70 S.E. 285 (1911); Harris v. City of Roanoke, 179 Va. 1, 18 S.E.2d 303 (1942); Papenfus v. Shell Oil Co., 254 Wis. 233, 35 N.W.2d 920 (1949).

[3] Roper v. Florida Pub. Util. Co., 131 Fla. 709, 179 So. 904 (1938); PROSSER, *op. cit. supra* note 1, § 46.

[4] Lysfjord v. Flintkote Co., 135 F. Supp. 672 (S.D. Cal. 1955); Morris v. Diers, 134 Colo. 39, 298 P.2d 957 (1956).

Today the situation often arises where one of several joint tort-feasors wishes to settle his share of the injured party's claim without resorting to the courts. The consideration paid for such a settlement is usually the settling tort-feasor's fractional share of the total amount claimed by the victim or a lesser amount agreed upon through compromise. In many American jurisdictions a general release given to the settling tort-feasor, even where the instrument specifically reserves the injured party's rights against other alleged tort-feasors, will still result today in a complete extinction of the cause of action and a bar to further recovery.[5] This has led to the development and use of the covenant not to sue, by which the settling tort-feasor can be protected from further action by the plaintiff,[6] leaving the plaintiff free to seek the remainder of his damages from the other joint tort-feasors.[7] The practical difference between a release and a covenant is virtually nil[8] as far as the settling tort-feasor is concerned. Many courts, however, continue to adhere rigidly to the technical distinctions, finding a common law release wherever the traditional form and language appear, even though the intent of the parties may otherwise be indicated plainly to the contrary.[9] Some jurisdictions, however, have enacted statutes eliminating the presumption and automatic extinction of the cause of action.[10] Others have greatly lessened the harshness of the common law rule in many instances by construing instruments as covenants, especially where there is a specific reservation of rights against other joint tort-feasors or an otherwise clear indication that the settlement was not made in complete satisfaction of the injury.[11] Apparently only Virginia still adheres to the rule that any settlement with one or all joint tort-feasors conclusively presumes a complete satisfaction which bars any further recovery on the claim.[12]

[5] Butler v. Norfolk So. Ry., 140 F. Supp. 601 (E.D.N.C. 1956); PROSSER, *op. cit. supra* note 1, § 46 and cases therein cited.

[6] What effect the settlement might have upon the other tort-feasors' right to contribution from the settling tort-feasor varies among the jurisdictions. At common law the right to contribution was not recognized, but many states have enacted contribution statutes with widely varying effect. The UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 5 provides that the settling tort-feasor may be liable to the other tort-feasors for his fractional share of the judgment rendered against them, less the consideration paid for the release. To date this Act has been adopted in Arkansas, Delaware, Maryland, New Mexico, Pennsylvania, Rhode Island, and South Dakota.

[7] Lysfjord v. Flintkote Co., 135 F. Supp. 672 (S.D. Cal. 1955).

[8] Pellett v. Sonotone Corp., 26 Cal.2d 705, 160 P.2d 783 (1945).

[9] See generally PROSSER, *op. cit. supra* note 1, § 46.

[10] *E.g.*, W. VA. CODE ANN. § 5481; MO. ANN. STAT. § 537.060 (1953). For those states which have enacted the UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 4, see note 6 *supra*.

[11] United States *ex rel* Marcus v. Hess, 154 F.2d 291 (3d Cir. 1946); McKenna v. Austin, 134 F.2d 659 (D.C. Cir. 1943); Lysfjord v. Flintkkote Co., 135 F. Supp. 672 (S.D. Cal. 1955); Rector v. Warner Bros. Pictures, Inc., 102 F. Supp. 263 (S.D. Cal. 1952); Gilbert v. Finch, 173 N.Y. 455, 66 N.E. 133 (1903).

[12] Shortt v. Hudson Supply & Equip. Co., 191 Va. 306, 60 S.E.2d 900 (1950);

With these varying attitudes among the several jurisdictions, a problem arises where an injury occurs in one jurisdiction and a settlement is executed in another. Such a problem was presented in *De Bono v. Bittner*.[13] The defendant, Bittner, a resident of New York, was injured in an automobile accident in Virginia when struck head-on by another motorist, also from New York, and immediately thereafter from the rear by a Pennsylvania driver. Bittner and his two passengers, also New York residents, settled their respective claims with the first driver.[14] They executed general releases in favor of the driver while specifically reserving their respective rights of action against all other joint tortfeasors. The settlement was executed in New York, the resident jurisdiction of all parties thereto, and apparently all were represented and advised by New York counsel who addressed themselves to New York law. Clearly such an instrument would be regarded in New York, by judicial interpretation, not as a common law release but as a covenant not to sue.[15] In this case Bittner's two passengers sued him, alleging that he was jointly liable with the first driver for their injuries. The court, recognizing that the situation presented a case of first impression, held that under Virginia law the instrument had the legal effect of a common law release and was thus a bar to further recovery by the plaintiffs. Also recognizing that New York law was apparently contemplated in the execution of the "release" (and that therefore the parties did not intend to extinguish their claims), the court nevertheless held that the instrument was so related to the tort as to be a matter of substantive right[16] and "that this [right to enforce a tort claim] must therefore be governed by the law of the situs of the tort."[17]

Bland v. Warwickshire Corp., 160 Va. 131, 168 S.E. 443 (1933). *Compare* Haney v. Cheatham, 8 Wash. 2d 310, 111 P.2d 1003 (1941) *and* Richardson v. Pacific Power & Light Co., 11 Wash. 2d 288, 118 P.2d 985 (1941) *with* Tucker v. Brown, 20 Wash. 2d 740, 150 P.2d 604 (1944). Pennsylvania apparently applied the presumption rule to all settlements prior to the enactment of PA. STAT. ANN. tit. 12, § 2085 (Supp. 1958), in 1951, which incorporates the *Uniform Contribution Among Tortfeasors Act*. Sheppard v. Atlantic States Gas Co., 72 F. Supp. 185 (E.D. Pa. 1947); Smith v. Roydhouse, Arey & Co., 244 Pa. 474, 90 Atl. 919 (1914). This rule would seem to have been abrogated under the act. But *compare* Wilbert v. Pittsburgh Consolidation Coal Co., 385 Pa. 149, 122 A.2d 406 (1956) *with* Caplan v. Pittsburgh, 375 Pa. 268, 100 A.2d 380 (1953).

[13] 13 Misc. 2d 333, 178 N.Y.S.2d 419 (Sup. Ct. 1958), *aff'd mem.* 10 App. Div. 2d 556, 196 N.Y.S.2d 595 (1960).

[14] The settlements were actually made with the driver's estate, the driver being fatally injured in the accident.

[15] Gilbert v. Finch, 173 N.Y. 455, 66 N.E. 133 (1903).

[16] Plaintiff argued that the contract was independent of the tort, that the *lex fori* should govern. The court said that a release went to the very right to maintain a tort action and was consequently substantive in nature. While it did not specifically so state, the court was apparently relying upon the concept embodied in the *Restatement, Conflict of Laws* to the effect that in the enforcement of tort claims, the law of the situs of the tort can govern the substantive rights of the parties. See note 19 *infra*.

[17] 178 N.Y.S.2d at 420.

The same result was reached in *Bittner v. Little*,[18] a case growing out of the same accident involved in *De Bono*. The defendant in the latter case was here suing the Pennsylvania driver in the federal district court in that state. Thus the case was heard by a court sitting in a jurisdiction connected with neither the situs of the tort nor the place of settlement. Nevertheless, and in spite of the fact that the Pennsylvania state court had never previously decided the issue, the court reached the same result as that in *De Bono* and on much the same reasoning, apparently relying upon its interpretation of the *Restatement, Conflict of Laws*.[19]

It is significant that not once in the trial or appellate phases of either of these cases did any court discuss another important aspect of the conflict of laws problem, to wit: the *lex loci contractus*, the law of the place of contracting, generally governs the construction of a contract.[20] While the *lex loci delicti*, the law of the tort situs, may determine the rights of the parties as affected by a release or covenant, it does not seem necessarily to follow that such jurisdiction's laws should govern the *construction* of the instrument. Here the construction would involve the determination of whether the instrument is a release or a covenant not to sue. Certainly in this respect the law contemplated by the parties (usually the *lex loci contractus*) should be paramount to the law of the tort situs which, in these cases, is extremely fortuitous. It is submitted that the rule applied in the above two cases constitutes an unwarranted and unnecessary extension of the "vested rights" theory of the conflict of laws.[21] It would seem that a more just result could be obtained if such an instrument were construed in the light of the law under which it was drawn.[22] After the legal nature of the instrument had been thus ascer-

[18] 270 F.2d 286 (3d Cir. 1959), *affirming* 168 F. Supp. 30 (E.D. Pa. 1958).

[19] The court cited *Restatement, Conflict of Laws* § 389 (1934): "A liability to pay damages for a tort can be discharged or modified by the law of the state which created it." *Quaere* whether this or any other section of the *Restatement* makes this an *exclusive* power of the tort situs jurisdiction.

[20] As was mentioned in note 16 *supra*, the trial court in *De Bono* did discuss the plaintiffs' contention that the *lex fori* should prevail, but even counsel apparently failed to couch his argument in terms of the law as contemplated by the parties.

[21] The so-called vested rights theory conceives that the law of the jurisdiction wherein the injury occurs vests in the victim a right of action which he may enforce in any appropriate forum but entirely subject to the law which gave him the right. It is upon this theory that the appropriate sections of the *Restatement* are predicated. See 2 BEALE, THE CONFLICT OF LAWS §§ 378.1, .2, 389.1 (1935); GOODRICH, CONFLICT OF LAWS §§ 6-9 (1949); Ehrenzweig, *Release of Concurrent Tortfeasors in the Conflict of Laws*, 46 VA. L. REV. 712 (1960). See generally RESTATEMENT, CONFLICT OF LAWS §§ 311-390 (1934).

[22] In Western Spring Serv. Co. v. Andrew, 229 F.2d 413, 418 (10th Cir. 1956), the court said in relation to a settlement in a multiple tort-feasor case: "These contracts were made in Nebraska and would be controlled by the law of that state. Whether they be construed as a release or a covenant not to sue . . . depends upon the intent of the parties since that is the controlling factor." *Cf.* Combined Ins. Co. of America v. Bode, 247 Minn. 458, 77 N.W.2d 533 (1956). Unfortunately the rule in the principal cases has been followed more often than not. See, *e.g.*,

tained, its effect upon the rights of the parties to the tort action could be determined by applying the *lex loci delicti.* In this way the laws of the respective jurisdictions would receive their due weight in the determination of the overall effect of the settlement on the rights of the plaintiff and the tort-feasors.[23]

Although it might not have altered the result in these two cases, due to Virginia's isolated position on all tort settlements, the application of this rule could make a very decisive difference in other jurisdictions. In North Carolina, for example, covenants not to sue are recognized, but great significance is attached to the technical form and language used in the instrument.[24] *Shapiro v. Embassy Dairy*[25] involved a situation which was substantially similar to that in the two cases just discussed. In this case the plaintiffs, New York residents, were injured in North Carolina in a collision between the automobile in which they were riding and the defendant's truck. Prior to this action they had settled with their own driver, apparently also a New York resident. The settlement was negotiated and executed in New York with an instrument, very like the ones in *De Bono* and *Bittner,* which released the driver while specifically reserving the plaintiffs' rights against the other tort-feasors.[26] The federal district court which tried the case conceded that a "release" with reservation of a right of action had never confronted the North Carolina court, but it determined that this state would construe the instrument to be an absolute release of all joint tort-feasors.[27] And

Smith v. Atchinson, T. & S.F. Ry., 194 Fed. 79 (8th Cir. 1912) ("the contract by its terms is tied to the tort"); Preine v. Freeman, 112 F. Supp. 257 (E.D. Va. 1953); Goldstein v. Gilbert, 125 W. Va. 250, 23 S.E.2d 606 (1942).

[23] The question then might arise as to what law should govern the right of the remaining tort-feasors to contribution from the one who settled. Since it is the *lex fori* which ultimately creates any right to contribution that may exist, through the rendering of a judgment against the tort-feasors, it would seem just and consistent to allow this law to control the creation and extent of such a right. This seems particularly appropriate since this is a right which can never be affected by any agreement between the plaintiff and the settling tort-feasor.

[24] Butler v. Norfolk So. Ry., 140 F. Supp. 601 (E.D.N.C. 1956).

[25] 112 F. Supp. 696 (E.D.N.C. 1953).

[26] "I . . . remise, release and forever discharge the said Joseph J. Kirch [the plaintiff's driver] and the Maryland Casualty Company [from any claim] . . . I ever had, now have or may have . . . upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of these presents. . . . I hereby expressly reserve all my rights against Embassy Dairy, Ins. [sic.] and/or Augustus B. Bunce, arising out of accident which occurred on February 13, 1949, on U.S. Route 301, near Wilson, N. C." 112 F. Supp. at 697.

[27] The federal district court claimed to find support for its conclusion by way of a dictum in Howard v. Harris Plumbing Co., 154 N.C. 224, 227, 70 S.E. 285, 286 (1911), where the North Carolina Supreme Court quoted Judge Cooley: "where the bar accrues in favor of some of the wrongdoers by reason of what has been received from or done in respect to one or more others, . . . the bar arises not from any particular form that the proceeding assumes, but from the fact that the injured party has actually received satisfaction, or what in law is deemed the equivalent. Therefore, if he accepts the satisfaction voluntarily made by one, that is a bar to all. And so a release of one releases all, although the release expressly stipulates that the other defendants shall not be released." There is no other

while acknowledging that under New York law the instrument would be regarded as a covenant, the court nonetheless applied its version of the North Carolina law to *construe* it as well as to determine its legal effect upon the rights of the parties in the tort action. Again, this decision was based solely upon the reasoning that since North Carolina was the situs of the tort its laws should govern all phases of the determination of the substantive rights in the tort action. Thus there exists the anomaly of having one jurisdiction, which clearly recognizes technical covenants not to sue, failing to give such effect to an instrument which meets all of the requirements of a covenant in the jurisdiction in which it was drawn and executed. This decision is objectionable for two reasons. First, it unduly extends the vested rights concept. Second, it ignores the clear intentions and expectancies of the parties. The North Carolina law, as pronounced by this court, continues to follow the common-law rule of presuming complete satisfaction whenever the word "release" appears in an instrument. If this be the true state of our law, it is submitted that a statute ought to be enacted to require the courts to look further than the mere technical form and language of an instrument in determining if it has been executed in exchange for complete satisfaction.

It should be emphasized that an inflexible application of the *lex loci contractus* in construing the instrument of settlement is no more to be advocated than a similar application of the *lex loci delicti.* Certainly in adopting a conflicts rule the courts should be guided as much by a desire for flexibility to meet unusual situations as by the desire for uniformity and certainty of result.[28] It would seem, however, that the paramount consideration should be what law the parties contemplated in executing the settlement and release. Conceivably, a specific stipulation as to the law intended by the parties to govern the transaction would be controlling unless such law were repugnant to the *lex fori* or the *lex loci delicti.*[29] Absent some clear indication of the governing law, the construction should be made with regard to the law of the jurisdiction which has had the most significant contacts with the settlement and release. In the instant cases, as in most, this would be the *lex loci contractus.*[30]

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language in the *Shapiro* case to indicate that the court considered that the plaintiff had received satisfaction in his settlement with the driver. In 1929, eighteen years after the *Howard* case was decided, N.C. Gen. Stat. § 1-240 (1953) was amended to allow contribution among tort-feasors. In view of this, *quaere* whether the above quotation represents the law in North Carolina today.

[28] Cook, The Logical and Legal Bases of the Conflict of Laws 340-41 (1929).

[29] The choice of law should not be unlimited however; the law stipulated should be that of a jurisdiction which has some significance with respect to the transaction. See, *e.g.*, Combined Ins. Co. of America v. Bode, 247 Minn. 458, 77 N.W.2d 533 (1956).

[30] Ironically, this approach has received its greatest support from the New York courts. See, *e.g.*, Smith v. American Flange Mfg. Co., 139 F. Supp. 917

In conclusion, it is submitted that any conflict of laws rule which requires the application of a particular law irrespective of other relevant factors is unsound. In a situation where a tort occurs in one jurisdiction and a partial settelment in another, the inflexible administration of the *lex loci delicti* in the construction of the legal nature of the instrument of settlement will frequently work a substantial injustice through the defeat of the plainly-expressed intent of the parties even where such intent is not repugnant to the laws of either the forum or the situs of the tort. This supremacy of the *lex loci delicti,* for which the courts claim to find support in the *Restatement,* is nothing more nor less than a sacrifice of justifiable flexibility for the sake of mere uniformity.

ALLAN W. MARKHAM

Demurrer Ore Tenus—Amendment—Relation Back.

In *Stamey v. Rutherfordton Elec. Membership Corp.*[1] the plaintiff alleged separate causes of action for wrongful death and for pain and suffering. The defendant answered, and the trial court sustained the plaintiff's motion to strike several of the defenses alleged. On appeal before the supreme court the defendant demurred *ore tenus* on the ground that the complaint did not state facts sufficient to constitute a cause of action. The demurrer *ore tenus* was sustained without prejudice to the plaintiff's right to move for leave to amend.

Twenty-five months after the accident the plaintiff amended the complaint. The defendant demurred to the amended complaint on the ground that the amendment constituted new matter and therefore was barred by the statute of limitations. The trial court sustained the demurrer. On appeal[2] the supreme court refused to allow the amendment to relate back and held that the cause of action for wrongful death was vulnerable to a proper plea of the statute of limitations.[3]

In many prior decisions the North Carolina court has classified a plaintiff's complaint as either a "defective statement of a good cause of action" or a "statement of a defective cause of action."[4] The court has

(S.D.N.Y. 1956); New Amsterdam Cas. Co. v. Stecker, 1 App. Div. 2d 629, 152 N.Y.S.2d 879 (1956); Kaufman v. American Youth Hostels, Inc., 13 Misc. 2d 8, 174 N.Y.S.2d 580 (Sup. Ct. 1957); *cf.* Bierman v. Marcus, 140 F. Supp. 66 (D. N.J. 1956).

[1] 247 N.C. 640, 101 S.E.2d 814 (1958).

[2] 249 N.C. 90, 105 S.E.2d 282 (1958).

[3] Since the statute of limitations can never be taken advantage of by demurrer, Lewis v. Shaver, 236 N.C. 510, 73 S.E.2d 320 (1952), the court vacated the order sustaining the demurrer and remanded the cause.

[4] The substantive distinction between a defective statement of a good cause and a defective cause is discussed in 1 MCINTOSH, NORTH CAROLINA PRACTICE & PROCEDURE § 1189, at 644 (2d ed. 1956). A good definition of the two terms is set out in *Davis v. Rhodes,* 231 N.C. 71, 73, 56 S.E.2d 43, 45 (1949): "When the defect goes to the substance of the cause and not to the form of the statement, it is a defective cause of action which cannot be made good by adding other allegations

enunciated various rules with respect to these terms, and it appears that the holding of the principal case on the first appeal is inconsistent with these rules regardless of whether the plaintiff's complaint was in fact a defective statement of a good cause or a statement of a defective cause.

All defects in a complaint except lack of jurisdiction over the subject matter and failure to state a cause of action are waived by the defendant when he answers the complaint on the merits instead of demurring.[5] The rule that the defendant may object at any time for failure to state a cause of action is not absolute. There are numerous decisions to the effect that the ability to raise this objection *ore tenus* will depend upon whether the complaint is a statement of a defective cause of action or a defective statement of a good cause of action.[6] If the complaint is a statement of a defective cause of action the objection is not waived and a demurrer may be interposed at any time.[7] However, a demurrer to a defective statement of a good cause of action comes too late after answer and should be overruled.[8] Further, since the court has held that a final judgment dismissing the action is mandatory where there is a defective cause of action,[9] it follows a fortiori that an amendment should be allowed *only* where there is a defective statement of a good cause of action.

Thus, regardless of whether the complaint was in fact a defective statement or a defective cause an inconsistency is present. If in fact the complaint was a defective statement, though there is consistency in allowing the amendment, there is inconsistency in the sustaining of the demurrer. If in fact the complaint was a defective cause, though there is consistency in sustaining the demurrer, there is inconsistency in allowing amendment.

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not included in the original complaint. It is in no event, however expertly stated, an enforceable cause of action. . . .

"When, however, there is an enforceable cause of action stated but the statement thereof is inartificially expressed, or is in general terms, or the facts are not clearly and definitely stated, or it is lacking in some material allegation, it constitutes a defective statement of a good cause. . . ."

[5] N.C. GEN. STAT. § 1-134 (1953); City of Raleigh v. Hatcher, 220 N.C. 613, 18 S.E.2d 207 (1942); Schnibben v. Ballard & Ballard Co., 210 N.C. 193, 185 S.E. 646 (1936); Hitch v. Commissioners, 132 N.C. 573, 44 S.E. 30 (1903); Baker v. Garris, 108 N.C. 218, 13 S.E. 2 (1891).

[6] Bailey v. McGill, 247 N.C. 286, 100 S.E.2d 860 (1957); Gurganus v. McLawhorn, 212 N.C. 397, 193 S.E. 844 (1937); Bader v. Garris, 108 N.C. 218, 13 S.E. 2 (1891); 1 McINTOSH, NORTH CAROLINA PRACTICE & PROCEDURE § 1194, at 653 (2d ed. 1956).

[7] Howze v. McCall, 249 N.C. 250, 106 S.E.2d 236 (1958); Hall v. Queen City Coach Co., 224 N.C. 781, 32 S.E.2d 325 (1944).

[8] Johnson v. Graye, 251 N.C. 448, 111 S.E.2d 595 (1959); Davis v. Rhodes, 231 N.C. 71, 56 S.E.2d 43 (1949); Eddleman v. Lentz, 158 N.C. 65, 72 S.E. 1011 (1911); Garrison v. Williams, 150 N.C. 674, 64 S.E. 783 (1909).

[9] Mills v. Richardson, 240 N.C. 187, 81 S.E.2d 409 (1954). *Accord*, Adams v. Flora Macdonald College, 247 N.C. 648, 101 S.E.2d 809 (1958); Burrell v. Dickson Transfer Co., 244 N.C. 662, 94 S.E.2d 829 (1956); Lindley v. Yeatman, 242 N.C. 145, 87 S.E.2d 5 (1955).

In considering the effect of the plaintiff's amendment filed subsequent to the decision on the first appeal, the court on the second appeal failed to take notice of the rule that "if the amendment is germane to the original cause of action, deals with the same transaction, and does not introduce a new cause of action, it relates back to the commencement of the action, and prevents the running of the statute of limitations . . . ."[10] In deciding whether or not the statute of limitations had run as to the amended complaint the court did not consider the substantive content of the amendment as this rule requires.[11] The court instead applied a technical rule, enunciated by *Webb v. Eggleston,*[12] that when a demurrer for failure to state a cause of action is sustained, this becomes the "law of the case"—that the original complaint did not state a cause of action and that any amended complaint necessarily states a "new cause of action." In applying the *Webb* case the court concluded that since the "new cause of action" was filed after the running of the statute of limitations it was barred by a proper plea of the statute.

In viewing the decisions of the court on both appeals, it appears that an obvious inequity may result if they are followed. When the supreme court sustains a demurrer *ore tenus* after answer, allows an amendment, and then applies the "law of the case rule," it would seem that the defendant is given an unwarranted advantage with respect to the running of the statute of limitations. A defendant with an attorney who realizes the cause of action is defective and who has no compunction about using delaying tactics can answer instead of filing a demurrer. Should the jury return a verdict against him, the defendant can then appeal the decision and demur *ore tenus* in the supreme court. Should the court fail to apply the defective statement-defective cause rules requiring waiver or dismissal, and sustain the demurrer without prejudice to amend,[13] the defendant will be able to set up the law of the case rule. Thus, the defendant may be permitted to take his chances with the jury and, upon losing, to delay the plaintiff out of court.

[10] McLaughlin v. Raleigh, C. & S. Ry., 174 N.C. 182, 186, 93 S.E. 748, 749 (1917). *Accord,* Ray v. French Broad Elec. Membership Corp., 252 N.C. 380, 113 S.E.2d 806 (1960); Picket v. Atlantic Coast Line R.R. 153 N.C. 148, 69 S.E. 8 (1910).

[11] It might be noted that on the second appeal both attorneys argued whether the amendment was germane and material. Nevertheless, the court refused to use these criteria in deciding the issue. Brief for Plaintiff, pp. 9-12, Brief for Defendant, pp. 17-20, Stamey v. Rutherfordton Elec. Membership Corp., 249 N.C. 90, 105 S.E.2d 282 (1958).

[12] 228 N.C. 574, 46 S.E.2d 700 (1948).

[13] This is basically what happened in Perkins v. Langdon, 231 N.C. 386, 57 S.E.2d 407 (1950). The defendant answered and verdict and judgment were for the plaintiff. The defendant appealed the holding, demurred *ore tenus,* and his demurrer was sustained without prejudice. However, the subsequent appeal on the effect of the amendment was decided on the basis of whether the amendment was germane and material. Perkins v. Langdon, 233 N.C. 240, 63 S.E.2d 565 (1951).

It is not discernible when the court will or will not apply the defective statement-defective cause rules. It is apparent, however, that an alert attorney should amend as early as possible after the sustaining of a demurrer and not rely on relation back.[14] Similarly, should he discover a defect in his complaint, he would be wise to amend and not to rely on waiver.

H. MORRISON JOHNSTON, JR.

Food—Sales—Implied Warranty of Fitness for Human Consumption.

In *Adams v. Great Atl. & Pac. Tea Co.*[1] plaintiff purchaser of a box of corn flakes sued defendant retailer for damages for breach of an implied warranty. While eating the corn flakes plaintiff bit down on an extremely hard object and broke off part of a tooth, the remainder of which was subsequently extracted. Plaintiff alleged that the food, sold in the original sealed container, was unwholesome and unfit for human consumption.[2] A chemical analysis showed that the object causing the harm was part of a grain of corn that had partially crystalized into a state as hard as quartz. In affirming an involuntary nonsuit, the North Carolina court held as a matter of law that the presence of the harmful object was not a breach of the implied warranty. The court predicated

[14] In the principal case the death occurred February 26, 1956; the defendant's demurrer *ore tenus* was sustained January 31, 1958; and the plaintiff's attorney did not ask leave to amend until March 7, 1958. If he had immediately moved for leave to amend instead of relying upon relation back, he could have averted the situation which defeated the cause of action for wrongful death.

[1] 251 N.C. 565, 112 S.E.2d 92 (1960).

[2] Where the article is sold for human consumption, the existence of the implied warranty between vendee and his immediate vendor is firmly established in North Carolina. Davis v. Radford, 233 N.C. 283, 63 S.E.2d 822 (1951); Williams v. Elson, 218 N.C. 157, 10 S.E.2d 668 (1940); Rabb v. Covington, 215 N.C. 572, 2 S.E.2d 705 (1939). See generally Note, 32 N.C.L. REV. 351 (1954).

It is not clear in North Carolina whether the vendee could sue the manufacturer on implied warranty. An initial dictum stated that the manufacturer could be held liable. Ward v. Morehead City Sea Food Co., 171 N.C. 33, 87 S.E. 958 (1916). In Thomason v. Ballard & Ballard Co., 208 N.C. 1, 179 S.E. 30 (1935) the court expressly rejected this theory for the reason that there was no contractual relation between the manufacturer and the consumer to which implied warranty could attach. This requirement of privity was followed in subsequent cases. Enloe v. Charlotte Coca-Cola Bottling Co., 208 N.C. 305, 180 S.E. 582 (1935); Caudle v. F. M. Bohannon Tobacco Co., 220 N.C. 105, 16 S.E.2d 680 (1941). The present trend in other jurisdictions is toward eliminating this requirement of privity. See generally Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960); Spruill, *Privity of Contract as a Requisite for Recovery on Warranty*, 19 N.C.L. REV. 551 (1941).

Plaintiff may sue the manufacturer for negligence. Ward v. Morehead City Seafood Co., *supra*. The value of the warranty action is that negligence need not be proved, implied warranty being a form of liability without fault. Existence of the warranty does not eliminate the necessity for proof that the product was defective when it left the manufacturer's hands. Great Atl. & Pac. Tea Co. v. Adams, 213 Md. 521, 132 A.2d 484 (1957). See generally DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER §§ 2.15, 4.1 (1951); PROSSER, TORTS § 84 (2d ed. 1955).

the decision on its finding that the harmful object was natural to the corn flakes and that a consumer of the product should be expected to anticipate its presence.

This appears to be the first North Carolina decision on whether or not the presence in food of a harmful substance natural to the product is a breach of the implied warranty of fitness for human consumption.[3] In similar cases other jurisdictions have differed as to both the test for liability and the result obtained. As background for an analysis of *Adams* some of those decisions from other states will be examined.[4]

In *Mix v. Ingersoll Candy Co.*[5] plaintiff, while eating a chicken pie in defendant's restaurant, was injured by a fragment of chicken bone. On appeal defendant's demurrer was sustained, the court stating: "It is sufficient if it may be said that as a matter of common knowledge chicken pies occasionally contain chicken bones. . . . Bones which are natural to the type of meat served cannot legitimately be called a foreign substance, and a consumer who eats meat dishes ought to anticipate and be on his guard against the presence of such bones."[6] The rationale of *Mix* appears to be that food suppliers are not held to a standard of perfection and that consumers ought to anticipate the occasional presence of substances which are natural constituents of the food even though such substances are normally removed during preparation for consumption. This reasoning has been followed in a number of cases[7] where the factual circumstances have been analogous to *Mix*.

[3] "The case is apparently one of first impression in North Carolina." Brief for Appellee, p. 2. Compare Hanrahan v. Walgreen Co., 243 N.C. 268, 90 S.E.2d 392 (1955), 34 N.C.L. REV. 394 (1956) (sale of hair rinse); Droughon v. Maddox, 237 N.C. 742, 75 S.E.2d 917 (1953), 32 N.C.L. REV. 351 (1954) (sale of cow at public auction); Davis v. Radford, 233 N.C. 283, 63 S.E.2d 822 (1951), 30 N.C.L. REV. 191 (1952) (alleged poisonous ingredients in salt substitute); Walker v. Hickory Packing Co., 220 N.C. 158, 16 S.E.2d 668 (1941) (spoiled and rancid lard); Williams v. Elson, 218 N.C. 157, 10 S.E.2d 668 (1940) (glass in sandwich); Rabb v. Covington, 215 N.C. 572, 2 S.E.2d 705 (1939) (metal in encased sausages).

[4] Both warranty and negligence cases are utilized in this discussion. The purpose of this note is to determine on what basis courts find food to be "unfit for human consumption" due to the presence of some "natural object." A finding of unfitness is essential to either action. On the similarities of the two actions, see Bryer v. Rath Packing Co., 221 Md. 105, 156 A.2d 442 (1959); Hertzler v. Manshum, 228 Mich. 416, 200 N.W. 155 (1924). See generally DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER § 1.11 (1951); 2 HARPER & JAMES, TORTS § 28.22 (1956); PROSSER, TORTS § 84 (2d ed. 1955); 5 WILLISTON, CONTRACTS § 1505 (1937); Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960).

[5] 6 Cal. 2d 674, 59 P.2d 144 (1936).

[6] *Id.* at 681, 59 P.2d at 148.

[7] *E.g.*, Shapiro v. Hotel Statler Corp., 132 F. Supp. 891 (S.D. Cal. 1955) (fish bone in "Hot Barquette of Seafood Mornay"); Lamb v. Hill, 112 Cal. App. 2d. 41, 245 P.2d 316 (Dist. Ct. App. 1952) (splinter of bone in chicken pie); Norris v. Pig'n Whistle Sandwich Shop, Inc., 79 Ga. App. 369, 53 S.E.2d 718 (1949) (bone in barbecued pork sandwich); Goodwin v. Country Club, 323 Ill. App. 1, 54 N.E.2d 612 (1944) (turkey bone in creamed chicken); Brown v. Nebiker, 229 Iowa 1223, 296 N.W. 366 (1941) (bone fragment in pork chop). In Silva v. F. W. Woolworth Co., 28 Cal. App. 2d 649, 83 P.2d 76 (Dist. Ct. App. 1938) (turkey

Other cases, however, have placed less reliance on the naturalness of the object as a test in itself, but instead have determined liability by looking at the nature of the final product, the circumstances normally surrounding its consumption and the customary habits and common knowledge of mankind.[8] The test applied in these cases is what the average consumer could reasonably expect to find in his food. Thus in *Betehia v. Cape Cod Corp.*[9] the court reversed a dismissal of plaintiff's complaint which was based on the presence of a sliver of chicken bone in a chicken sandwich. Discussing *Mix* at length, the opinion stated:

> Naturalness of the substance to any ingredients in the food served is important only in determining whether the consumer may reasonably expect to find such substance in the particular type of dish or style of food served. . . . The test should be what is reasonably expected by the consumer in the food as served, not what might be natural to the ingredients of that food prior to preparation.[10]

Adams appears to follow the rationale of *Mix*.[11] Assuming that the substance was natural to the corn flakes, the holding is consistent with other cases following *Mix*.[12] The validity of the court's assumption[13] of

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bone in roast turkey and dressing), the court cited *Mix* as controlling. The opinion stated that the criterion for determining liability was whether the object causing the injury was foreign; this apparently disregards part of the *Mix* rationale, but under the facts the result follows *Mix*.

[8] *E.g.*, Bryer v. Rath Packing Co., 221 Md. 105, 156 A.2d 442 (1959) (chicken bone in chow mein prepared from "ready to serve boned chicken"); Lore v. De Simone Bros., 172 N.Y.S.2d 829 (Sup. Ct. 1958) (fragment of bone in salami); Allen v. Grafton, 170 Ohio St. 249, 164 N.E.2d 167 (1960) (oyster shell in fried oysters); Wood v. Waldorf Sys., Inc., 79 R.I. 1, 83 A.2d 90 (1951) (fragment of bone in chicken soup); Betehia v. Cape Cod Corp., 10 Wis. 2d 323, 103 N.W.2d 64 (1960) (sliver of bone in chicken sandwich). In Wieland v. C. A. Swanson & Sons, 223 F.2d 26 (2d Cir.), *cert. denied*, 350 U.S. 862 (1955), the court held that whole chicken bones are anticipated in packaged chicken cut up for fricassee, and that therefore they could not be the basis for liability; the court indicated that bone slivers in the same product would sustain an action. While *Lore, supra*, and *Wood, supra*, discuss the issue in terms of the naturalness of the object, they clearly have departed from the *Mix* rationale, as they hold that fragments of bone natural to meat are not natural to the final products involved.

[9] 10 Wis. 2d 323, 103 N.W.2d 64 (1960).

[10] *Id.* at —, 103 N.W.2d at 67, 69. Compare Allen v. Grafton, 170 Ohio St. 249, 258-59, 164 N.E.2d 167, 174 (1960): "However, the fact, that something that is served with food and that will cause harm if eaten is natural to that food and is not a 'foreign substance' will usually be an important factor in determining whether a consumer can reasonably anticipate and guard against it."

[11] The opinion cites with apparent approval the *Mix* case and most of the cases which have followed *Mix*.

[12] These cases have uniformly decided the issue of liability as a matter of law. *E.g.*, Shapiro v. Hotel Statler Corp., 132 F. Supp. 891 (S.D. Cal. 1955) (fish bone in seafood); Norris v. Pig'n Whistle Sandwich Shop, Inc., 79 Ga. App. 369, 53 S.E.2d 718 (1949) (bone in barbecued pork sandwich); Goodwin v. Country Club, 323 Ill. App. 1, 54 N.E.2d 612 (1944) (turkey bone in creamed chicken); Brown v. Nebiker, 229 Iowa 1223, 296 N.W. 366 (1941) (bone fragment in pork chop). Allen v. Grafton, 170 Ohio St. 249, 164 N.E.2d 167 (1960), expressly rejected the *Mix* doctrine but looking at all the circumstances decided as a matter of law that a piece of oyster shell in fried oysters is to be anticipated.

[13] The opinion at the outset stated that "Plaintiff's case is based upon the pres-

naturalness is, however, open to question. It is arguable that the "metamorphosis" undergone by the grain of corn in the process of its preparation changed its character in such a way that it was no longer natural to either corn or corn flakes. This crystalized grain is distinguishable from bones, oyster shells, cherry pits and other substances which, although not removed from food, retain their original composition and characteristics. In *Adams* there was certainly a basic change in the corn. The finely processed nature of the final product in *Adams,* the changed character of the particle of corn, and the manufacturer's claims as to the fitness of his product as a breakfast food for children cast doubt upon the soundness of the court's finding as a matter of law that the object was "natural" to the corn flakes.[14]

In *Gimenez v. Great Atl. & Pac. Tea Co.,*[15] a case analagous to *Adams,* the plaintiff's stomach was lacerated as a result of eating canned crab meat which contained stone-like, jagged, struvite crystals. These crystals had formed subsequent to canning by a union of the chemicals found in the natural juices of the meat. On appeal plaintiff's recovery for breach of implied warranty was sustained, the New York court finding that the crystals were "dangerous" and "deleterious." Neither the appellate division nor the court of appeals stated whether the crystals were natural or foreign.[16] The variance in result from that in *Adams* would seem to lie in the difference in rationale since the New York court did not look to the test of naturalness.[17] As contrasted with the preparation of meat, seafood, poultry, and fruit dishes, *Adams* and *Gimenez*[18] are instances where it is contemplated that the entire ingredient will be made suitable for human consumption by a system of processing. Whenever the processing creates changes in the condition of the ingredient so as to make the food in fact harmful, naturalness would seem to have little bearing on fitness for human consumption.

If North Carolina had followed the reasoning of some of the more recent cases, the result obtained in *Adams* might have been reached

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ence in the corn flakes . . . of a substance natural to the corn flakes, and not removed thereform in the process of its preparation for human consumption. . . . His is not a case of a foreign object . . . ." 251 N.C. at 566-67, 112 S.E.2d at 94.

[14] Would the manufacturer, if joined, have contended that the object was natural to the product and was to be anticipated and guarded against by the average consumer?

[15] 240 App. Div. 238, 269 N.Y.S. 463, *aff'd,* 264 N.Y. 390, 191 N.E. 27 (1934).

[16] Plaintiff's complaint was framed on the theory that the product contained a deleterious substance other than crab meat.

[17] It is not clear what specific legal principles the court applied to determine liability but it is doubtful that the decision rested on the consumer-expectation approach.

[18] Bones were not involved in the *Gimenez* case. The entire crab meat, as canned, was expected to be eaten.

without the questionable finding on the naturalness of the object.[19] The court in its estimation of common knowledge might have held as a matter of law that one who eats corn flakes should anticipate the presence of an occasional hard object derived from corn.[20] However, it is equally conceivable that the court would have left the question of reasonable fitness to the jury.[21]

The present trend is toward using naturalness as only one factor among others in order to determine what the consumer should expect. Other jurisdictions have rejected the limitations of the *Mix* rule with or without factual distinctions from the *Mix* case. *Adams* is factually more distinguishable from *Mix* than the other holdings which follow its rationale. It is submitted that reliance upon the consumer-expectation rationale would provide a sounder basis for determining liability in future cases arising in this area.

JOHN H. P. HELMS

Res Judicata—Consent Judgment in Favor of Infant as Bar to Litigation Between Joint Tortfeasors.

In *Pack v. McCoy*[1] the plaintiff brought suit to recover for his personal injuries and property damage arising out of a motorcycle-bus collision. Plaintiff was the operator of the motorcycle and defendants were the bus driver and the bus company. In a previous personal injury action a bus passenger, an infant, had sued the bus company, the bus driver, and the motorcycle operator as joint tort-feasors. The infant's suit was settled by a consent judgment entered in her favor against all defendants. The defendants in *Pack* pleaded res judicata, asserting that the prior judgment was a final adjudication of the issue of negligence between the present parties. The supreme court reversed the trial court's order striking the defense.[2]

[19] Naturalness would be relevant in some cases, but in others this test properly could be omitted and the decision placed on what the consumer should expect, with other criteria determining the issue.

[20] See Allen v. Grafton, 170 Ohio St. 249, 164 N.E.2d 167 (1960), where the court took the case from the jury on the ground that common knowledge requires that consumers of fried oysters anticipate the presence therein of an occasional piece of oyster shell.

[21] In most of the recent cases which have used "naturalness" only in conjunction with other criteria, the question of reasonable fitness has been left to the jury. *E.g.*, Bryer v. Rath Packing Co., 221 Md. 105, 156 A.2d 442 (1959); Lore v. De Simone Bros., 172 N.Y.S.2d 829 (Sup. Ct. 1958); Wood v. Waldorf Sys., Inc., 79 R.I. 1, 83 A.2d 90 (1951); Betchia v. Cape Cod Corp., 10 Wis. 2d 323, 103 N.W.2d 64 (1960). *Contra*, Allen v. Grafton, 170 Ohio St. 249, 164 N.E.2d 167 (1960).

[1] 251 N.C. 590, 112 S.E.2d 118 (1959).

[2] There was a dissent. Judge Bobbitt (Judge Parker joining) thought there had not been an adjudication of the negligence between the former defendants, that the defense should not be allowed, and that precedents to the contrary should be over-ruled. 251 N.C. at 593, 112 S.E.2d at 121.

Two defendants may settle a plaintiff's claim out of court, and this settlement will not be res judicata as to their rights and liabilities *inter se* if they subsequently litigate their own claims.[3] Also, a plaintiff's voluntary non-suit taken after an extra-judicial settlement of his claim will not bar future litigation between the original defendants.[4] But if the plaintiff in the original action happens to be an infant, the present decision indicates that the necessary court approval of the settlement,[5] as evidenced by the consent judgment, will bar any further action between the former defendants.

In the principal case the court expressly relied on *Lumberton Coach Co. v. Stone*,[6] which held that a previous consent judgment in favor of an adult plaintiff barred a suit between the former defendants. In following this precedent the court adhered to the rule that "a judgment for the plaintiff against two or more defendants charged with joint and concurrent negligence establishes their negligence and may be pleaded in bar by one defendant against the other in a subsequent action between them based on the negligent acts at issue in the first cause."[7] It is true that in a subsequent suit between the defendants to collect contribution the issue of the defendants' negligence to the plaintiff is res judicata.[8] This situation, however, is clearly distinguishable from that presented in either *Lumberton Coach Co.* or the principal case. In the latter two instances the second action is based upon the damage allegedly caused one defendant by the negligence of the other, and the recovery sought is not a pro rata share of the damages owed the original plaintiff but the damages sustained by the former defendant himself.

Since North Carolina holds that a consent judgment in favor of the plaintiff constitutes res judicata in any later action between the defendants, it would seem to follow that a judgment on the merits in the first suit would bar the subsequent action. Where the first action has resulted in a verdict on the merits, the great majority of courts hold that a second action (between the original defendants) is not barred by the first judgment.[9] This is true in all jurisdictions except New York,

[3] Penn Dixie Lines, Inc. v. Grannick, 238 N.C. 552, 78 S.E.2d 410 (1953).

[4] Mercer v. Hilliard, 249 N.C. 725, 107 S.E.2d 554 (1959).

[5] An infant's contract may be avoided. Chandler v. Jones, 172 N.C. 569, 90 S.E. 580 (1916). Thus it is necessary that a court pass on any settlement where a party is a minor. Where the judgment recites an investigation by the court and a finding that the compromise is just, the judgment is binding in the absence of fraud. Oates v. The Texas Co., 203 N.C. 474, 166 S.E. 317 (1932).

[6] 235 N.C. 619, 70 S.E.2d 673 (1952).

[7] 251 N.C. at 593, 112 S.E.2d at 120.

[8] Under N.C. GEN. STAT. §1-240 (1953), each defendant found to be a joint tortfeasor is liable to the plaintiff for a proportionate amount of the judgment rendered; if any defendant pays more than his proportionate part, he can obtain contribution from the other joint tortfeasors.

[9] *E.g.*, Hellenic Lines v. The Exmouth, 253 F.2d 473 (2d Cir. 1957); Kimmel v. Yankee Lines, 224 F.2d 644 (3d Cir. 1955); St. Paul Fire & Marine Ins. Co. v. Dowdell, 109 So. 2d 151 (Ala. 1959); Casey v. Balunas, 19 Conn. Supp. 365, 113

where the decisions are in conflict.[10] The majority of courts[11] reason that in the first suit the co-defendants were not adverse parties and their rights and liabilities as between themselves were not put in issue nor litigated.[12] Where the co-defendants were actually adverse parties in the first suit and the issue of their negligence to each other was litigated, the judgment rendered therein will act as a bar to further litigation between them.[13] In North Carolina where the defendants are joined in the first suit they could never be true adverse parties since our court has held that one defendant may not cross claim another in an action where the plaintiff has sued both as joint tortfeasors.[14] Since the issue of negligence as between the defendants cannot properly be adjudicated in the first suit, the judgment should not be res judicata as to such negligence.

In the principal case the consent judgment appears to be the result of a friendly suit to facilitate the settlement of the infant's claims.[15] The North Carolina court has said, "The law favors the settlement of controversies out of court."[16] It is submitted that settlements in court should also be encouraged. The court should recognize, as it has in the

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A.2d 867 (1955); Clark's Adm'x v. Rucker, 258 S.W.2d 9 (Ky. 1953); Bunge v. Yager, 236 Minn. 245, 52 N.W.2d 446 (1952); Boston & M.R.R. v. Sargent, 72 N.H. 455, 57 Atl. 688 (1904); Wiles v. Young, 167 Tenn. 224, 68 S.W.2d 114 (1934); Ray v. Consolidated Freightways, 4 Utah 2d 137, 289 P.2d 196 (1955); Byrum v. Ames & Webb, Inc., 196 Va. 597, 85 S.E.2d 364 (1955). A fortiori a consent judgment would not bar the second action.

[10] Holding that the prior suit is not res judicata are Israel v. Krupa, 180 Misc. 995, 43 N.Y.S.2d 113 (Sup. Ct. 1943); Glasser v. Huette, 232 App. Div. 119, 249 N.Y.S. 374 *aff'd mem.* 256 N.Y. 686, 177 N.E. 193 (1931). For cases *contra*, see Moyle v. Cronin, 189 N.Y.S.2d 96 (Broome County Ct. 1959); James v. Saul, 184 N.Y.S.2d 934 (N.Y. Munic. Ct. 1958).

[11] The North Carolina court is in the minority and admits, "It must be conceded, however, there is authority in conflict with . . . *Lumberton Coach Co. v. Stone*. . . . However, adhering to our rule, we conclude the trial court committed error in striking the further defense." 251 N.C. at 593, 112 S.E.2d at 121.

[12] "The rendition of a judgment in an action does not conclude parties to the action who are not adversaries under the pleadings as to their rights inter se upon matters which they did not litigate, or have an opportunity to litigate, between themselves." RESTATEMENT, JUDGMENTS § 82 (1942) (often quoted in majority opinions).

[13] Vaughn's Adm'r v. Louisville & N.R. Co., 297 Ky. 309, 179 S.W.2d 441 (1944); *accord*, Simodejka v. Williams, 360 Pa. 332, 62 A.2d 17 (1948). See generally the dissenting opinion by Clark, J., in Hellenic Lines v. The Exmouth, 253 F.2d 473 (2d Cir. 1957) (the majority held the defendants not to be adverse parties in the first suit).

[14] Bell v. Lacey, 248 N.C. 703, 104 S.E.2d 833 (1958); Clark v. Pilot Freight Carriers, Inc., 247 N.C. 705, 102 S.E.2d 252 (1958). But where one defendant has another brought in for purposes of contribution, the second defendant may cross claim against the original defendant for his own injuries or property damage. Norris v. Johnson, 246 N.C. 179, 97 S.E.2d 773 (1957).

[15] Brief for Appellee, pp. 2-3, Pack v. McCoy, 251 N.C. 590, 112 S.E.2d 118 (1959).

[16] Penn Dixie Lines, Inc. v. Grannick, 238 N.C. 552, 555, 78 S.E.2d 410, 413 (1953).

past,[17] that a consent judgment merely evidences the agreement of the parties and is not an adjudication of negligence.

In view of *Pack* it seems almost impossible in North Carolina for two parties to settle a third-party-infant's claim and at the same time protect their right to litigate the issue of damages between themselves. Either the out-of-court settlement with the infant will be open to later disaffirmance, or the in-court settlement will bar future litigation between the defendants.[18] There is a possibility of a separate consent judgment in favor of the infant against each of the defendants, as an injured party may sue one or all joint tortfeasors.[19] It is submitted that it should not be necessary to use this cumbersome and uncertain procedure. The writer believes that the North Carolina court should follow the reasoning of the dissent in *Pack,* which would allow all parties to a controversy to litigate their claims while at the same time encouraging the settlement of suits by an infant.

CHARLES E. DAMERON III

Rule Against Perpetuities—Commercial Leases.

A leasehold to commence after the completion of a building was declared void *ab initio* by the California District Court of Appeals in the recent case of *Haggerty v. City of Oakland*[1] as a violation of the rule against perpetuities.[2] The City of Oakland and one Goodman entered into a written contract whereby the city was to build a building and lease it to Goodman for a term of years. The term was not to commence until the first day of the second month after completion of the building. The lease contained no specified date for beginning construction on the building but did provide that the city "shall and will in good faith immediately after the execution of this lease proceed with plans for

[17] The North Carolina Supreme Court, in holding an Ohio divorce decree not to be a consent judgment, stated, "A judgment by consent is the agreement of the parties. . . . It is not a judicial determination of the rights of the parties and does not purport to represent the judgment of the court, but merely records the pre-existing agreement of the parties." McRary v. McRary, 228 N.C. 714, 719, 47 S.E.2d 27, 31 (1948).

[18] The holding in the principal case does not apply to actions involving a contract. Stanley v. Parker, 207 N.C. 159, 176 S.E. 279 (1934).

[19] Denny v. Coleman, 245 N.C. 90, 95 S.E.2d 352 (1956); Charnock v. Taylor, 223 N.C. 360, 26 S.E.2d 911 (1943). Since there can be only one recovery for an injury, satisfaction of the infant's first consent judgment would bar a suit against the second tortfeasor. Bell v. Hawkins, 249 N.C. 199, 105 S.E.2d 642 (1958). Likewise, a release of one tortfeasor will bar an action against the other. King v. Powell, 220 N.C. 511, 17 S.E.2d 659 (1942); Smith v. Thompson, 210 N.C. 672, 188 S.E. 395 (1936).

[1] 161 Cal. App. 2d 407, 326 P.2d 957 (Dist. Ct. App. 1958).

[2] Dallapi v. Campbell, 45 Cal. App. 2d 541, 114 P.2d 646 (Dist. Ct. App. 1941); Spicer v. Moss, 409 Ill. 343, 100 N.E.2d 761 (1951); Johnson v. Preston, 226 Ill. 447, 80 N.E. 1001 (1907); McQueen v. Branch Banking & Trust Co., 234 N.C. 737, 68 S.E.2d 831 (1952).

the construction . . . and shall thereafter prosecute the same to completion with all *due diligence.*"[3] (Emphasis added.)

Haggerty, taxpayer of the City of Oakland, brought suit to have the lease declared void, *inter alia,* on grounds that it violated the common law rule against perpetuities[4] as embodied in a California statute.[5] The court so held, reasoning that since there was an uncertain and unfixed commencement date for the lease, a possibility existed that the estate might not vest within twenty one years. This holding reflects generations of judicial adherence to the rule against perpetuities.

The classic definition of the rule against perpetuities, as stated by Gray,[6] is as follows: "No interest is good unless it must vest, if at all, not later than twenty one years after some life in being at the creation of the interest." Basically the rule is one invalidating *interests* which vest too remotely, so that postponement of possession or enjoyment is not affected.[7] If the time of the commencement of the interest is indefinite, then the rule applies.[8] It is not a rule of construction but a positive mandate of law to be obeyed irrespective of intention and to be applied even if accomplishment of the expressed intent of the grantor is made impossible thereby.[9]

The ultimate purpose of the rule is to prevent the tying up of the title to real property and to facilitate the use of land in commerce.[10] Thus the rule concerns rights in real property only and does not affect the making of contracts which do not create such rights.[11] The authorities are in conflict as to whether a lease is a contract, a conveyance, or a conveyance with contractual obligations superimposed.[12] However

[3] 161 Cal. App. 2d at —, 326 P.2d at 966.

[4] If the time within which a contingency must occur is not annexed to a life in being, the period allowed for vesting is twenty one years from the interest's creation. See Estate of McCollum, 43 Cal. App. 2d 313, 110 P.2d 721 (Dist. Ct. App. 1941); Smith v. Renne, 382 Ill. 26, 46 N.E.2d 587 (1943); Leach, *Perpetuities in a Nutshell,* 51 HARV. L. REV. 638 (1938).

[5] CAL. CIV. CODE § 715.2: "No interest in real or personal property shall be good unless it must vest, if at all, not later than twenty one years after some life in being at the creation of the interest . . . . It is intended by the enactment of this section to make effective in this State the American common-law rule against perpetuities."

[6] GRAY, THE RULE AGAINST PERPETUITIES § 201 (4th ed. 1942).

[7] McEwen v. Enoch, 167 Kan. 119, 204 P.2d 736 (1949); Forbringer v. Romano, 10 N.J. Super. 175, 76 A.2d 825 (App. Div. 1950); McQueen v. Branch Banking & Trust Co., 234 N.C. 737, 68 S.E.2d 831 (1952).

[8] TIFFANY, REAL PROPERTY § 268 (Abr. ed. 1940) and cases there cited.

[9] Emerson v. Campbell, 32 Del. Ch. 178, 84 A.2d 148 (1951); Monarski v. Greb, 407 Ill. 281, 95 N.E.2d 433 (1950); Mercer v. Mercer, 230 N.C. 101, 52 S.E.2d 229 (1949); Crockett v. Scott, 199 Tenn. 90, 284 S.W.2d 289 (1955).

[10] GRAY, THE RULE AGAINST PERPETUITIES §§ 1, 4, 235 (4th ed. 1942).

[11] Todd v. Citizens' Gas Co., 46 F.2d 855 (7th Cir.), *cert. denied,* 283 U.S. 852 (1931); First Nat'l Bank & Trust Co. v. Purcell, 244 S.W.2d 458 (Ky. 1951); First Nat'l Bank v. Gideon-Broh Realty Co., 139 W. Va. 130, 79 S.E.2d 675 (1953); West Virginia-Pittsburgh Coal Co. v. Strong, 129 W. Va. 832, 42 S.E.2d 46 (1947).

[12] See generally 25 N.C.L. REV. 516 (1946).

the lease be classified in legal theory, if in fact it does create definite rights in realty, then it must follow that the rule against perpetuities applies. There seem to be relatively few cases discussing the rule as applied to leases *in futuro*[13] but the leading text-writers agree[14] that no legally defined interest is vested and that, if a lease of a term for years is to take effect on a condition precedent which may not occur within the period of the rule, it violates the rule and must fall.

There was a strong dissent in *Haggerty* based upon the proposition that, under modern conditions and concepts, there could be no question of the lease's failure to vest in interest within twenty one years. The dissent said, "To hold that under modern economic conditions there is even a bare possibility that a landlord and tenant . . . would ever wait over twenty one years for their lease to take effect is unrealistic, fantastic and even absurd."[15] Rather, the dissent chose to emphasize the "reasonable performance" feature of the lease agreement. The dissenting judge would have followed an accepted rule of the law of contracts and allowed the court to construe the phrase "with all due diligence" as requiring performance within a "reasonable time."[16]

At first blush this seems to be the logical solution, but as the majority points out, "This argument is deceptively simple, and is unsound."[17] Had the language of the instrument in the principal case been such as to create a lease *in præsenti*[18] then the argument of the dissent would have been in point. The lessee would have had a present right of possession in the property, and the construction provision would have been an incidental part of the lease. In a proper action the court could enforce this contractual part of the lease agreement by determining what would be a "reasonable time"[19] for completion of the building. No case has been found, however, where such concepts of contract law have been applied in resolving the question of when the lease vests an interest in the lessee.

[13] This note is dealing with a specific type of commercial interest, a lease limited to commence *in futuro*, and does not explore the whole field of future interests to which the rule against perpetuities is applicable.

[14] GRAY, THE RULE AGAINST PERPETUITIES § 320.1 (4th ed. 1942); 3 SIMES & SMITH, FUTURE INTERESTS § 1242 (2d ed. 1956); 2 TIFFANY, REAL PROPERTY § 406 (3rd ed. 1939).

[15] 161 Cal. App. 2d at ——, 326 P.2d at 967-68.

[16] 17 C.J.S. *Contracts* § 360 (1939).

[17] 161 Cal. App. 2d at ——, 326 P.2d at 966.

[18] A grant *in præsenti* imports a transfer, subject to the limitations mentioned, of a present possessory interest in the lands designated. Van Wych v. Knevals, 106 U.S. 360 (1882).

[19] *E.g.*, Florence Gas, Elec. Light & Power Co. v. Hanby, 101 Ala. 15, 13 So. 343 (1893), contract to erect an electric light plant "as soon as possible"; Stark v. Shaw, 155 Cal. App. 2d 171, 317 P.2d 182 (Dist. Ct. App. 1957), *cert. denied*, 356 U.S. 937 (1958), where contract for roofing houses contained no commencement date, but it was held that a promise to perform within a reasonable time was implied; Western Land Roller Co. v. Schumacher, 151 Neb. 166, 36 N.W.2d 777 (1949), a contract to complete a well and install pump "as quickly as possible."

The decision in the principal case has been criticized as hampering land development under current commercial conditions.[20] The parties clearly contemplated the active use of the land for purposes beneficial both to themselves and to the public generally.[21] Consequently the point has been made that the rule against perpetuities—itself aimed at freeing the use of land for such purposes—has here been so applied as to do just the opposite.[22] This view seems to attach more importance to the execution of commercial agreements than to the settlement of outstanding interests in land. The same sentiment is expressed by the dissent, which finds some support from Simes & Smith.[23] The latter authority, however, in turn rests upon three cases where the facts are clearly distinguishable.[24] Each of these cases involved a trust, the subject matter of which was currently in existence. In *Haggerty* the subject of the lease was only a contemplated building which might never come into existence. If the lessor-builder experienced hardship and could not perform, the lessee might insist upon "standing on his rights" under the lease, take no legal action whatsoever, but refuse to dissolve the contract. Should the lessor later desire to convey the land which the building was to occupy, his prospective purchaser could reasonably object that the title was encumbered.[25] Thus it can be seen how realty

[20] 47 CALIF. L. REV. 197 (1959); 73 HARV. L. REV. 1318 (1960); 10 HASTINGS L.J. 439 (1959); 6 U.C.L.A.L. REV. 165 (1959). The editor in 35 N.D.L. REV. 170 (1959) favored the majority decision. In a brief comment on the case, the editor in 35 N.Y.U.L. REV. 401 (1960) finds no fault with the result. He points out to be safe this type of lease should have a provision for completion which complies with the rule, but he describes both the majority and dissent as "well-reasoned opinions."

[21] "Haggerty and the city were obviously both satisfied with the arrangement, so the city constructed the building and the management company is now operating it under a slightly changed arrangement. The only losses, apart from Haggerty's, are the professional reputation of the municipal attorney who drafted the instrument and the lessee's attorney who accepted it." 73 HARV. L. REV. 1318, 1323 (1960).

[22] Commentary cited note 20 *supra*.

[23] 3 SIMES & SMITH, FUTURE INTEREST § 1228 (2d ed. 1956). The author states: "Occasionally one finds cases where vesting is, in effect, to take place 'in a reasonable time,' and the court sometimes presumes that a reasonable time will necessarily be within twenty-one years. If, in light of the surrounding circumstances, as a matter of construction, 'a reasonable time' is necessarily less than twenty-one years, then such holdings are not subject to criticism." 3 SIMES & SMITH, *op. cit. supra* at 122.

[24] See Brandenburg v. Thorndike, 139 Mass. 102, 28 N.E. 575 (1885), where trustees were to make gift effective three years after wife's death, or at such time, earlier or later, as in their discretion would be expedient and practicable for settlement of the estate; Plummer v. Brown, 315 Mo. 627, 287 S.W. 316 (1926), where trustees were to sell and distribute trust when it could be done to advantage and without injury to the estate or beneficiaries; West Texas Bank & Trust Co. v. Matlock, 212 S.W. 937 (Tex. Com. App. 1919), where trust was created to pay a bonus to the first railroad passing through certain property within a reasonable time.

[25] It is not altogether clear what interests or rights the would-be lessee does have under a lease *in futuro*, but it has been suggested that by the common law he would have an *interesse termini*. And this is only a right to an estate at best, a mere interest in the term. TIFFANY, REAL PROPERTY 68 (Abr. ed. 1940).

might become tied up for an indefinite period of time. In such a situation the rule against perpetuities provides the obvious solution, dissolving any rights the lessee might have had.

While the precise issue litigated in the principal case appears never to have been before the North Carolina Supreme Court, there are indications that our court would reach the same result. The common law rule against perpetuities is recognized and enforced in this state.[26] A fact situation similar to that in the principal case was before the North Carolina court in *Manufacturing Co. v. Hobbs*.[27] The action at the trial level was conducted altogether on a question of fact as to whether fraud had been committed by the plaintiff in inducing the contract.[28] The contract was for the sale of timber and contained a provision which allowed the plaintiff "the full term of five years within which to cut and remove the timber hereby conveyed, said term to commence from the time said party of the second part begins to manufacture said timber into wood or lumber."[29] The court did not comment on the fraud issue but simply stated that "there is on the face of the pleadings an insuperable obstacle to recovery on the part of the plaintiff . . . ."[30] This obstacle was the fact that the interest might never become vested. That the court had in mind a violation of the rule against perpetuities appears obvious from a portion of the opinion which states, "It is evident from the reading of the contract that the fee in the land was not to pass, and yet no one can tell how long the land and other timber upon it may remain useless to the defendants and to the Commonwealth under the indefinite and uncertain time at which the lease is to begin."[31]

This statement of the court sums up the necessity for the majority decision in the principal case. Without a clear holding that the lease violates the rule against perpetuities, the land might be tied up indefinitely. It is submitted that courts in North Carolina, if faced with a similar issue, would be on firm ground in following the majority in *Haggerty*. To insure the validity of commercial leases of the type herein discussed, it would seem advisable for the draftsmen always to insert a saving clause in such leases. This clause should state that "if the completion of the building takes more than twenty years, then this lease and contract are to be null and void." While such leases are not entirely new to the business world,[32] they are used much more frequently in

[26] Mercer v. Mercer, 230 N.C. 101, 52 S.E.2d 229 (1949). See also N.C. CONST. art. I, § 31: "Perpetuities . . . ought not to be allowed."
[27] 128 N.C. 46, 38 S.E. 26 (1901).
[28] *Id.* at 47, 38 S.E. at 26.
[29] Ibid.
[30] Ibid.
[31] Id. at 48, 38 S.E. at 26.
[32] An agreement to build and lease a garage, construction to start *at once*, was the commercial transaction in the not too recent case of Monger v. Lutterloh, 195 N.C. 274, 142 S.E. 12 (1928).

this era of supermarkets and shopping centers; and under the holding of the principal case, they are certainly of questionable validity without such a saving clause.

C. EDWIN ALLMAN, JR

Specific Performance—Oral Contracts to Devise—Statute of Frauds.

In a recent Kentucky decision,[1] an illegitimate daughter brought suit against her father's estate on his oral promise to devise real property to her in consideration of her mother's foregoing the institution of bastardy proceedings against him. The trial court held the oral contract unenforceable under the Statute of Frauds, but awarded damages on the basis of *quantum meruit,* measured by the value of the property promised to be devised. On appeal, the court of appeals remanded with directions to enter a decree for specific performance of the contract if the property was still vested in the heirs of the decedent and still available for transfer to the plaintiff.

Uniformly, it is held that oral contracts to devise realty are within the section of Statute of Frauds relating to contracts for the transfer of real property.[2] However, the majority of jurisdictions will grant specific performance of the contract on the theory of part performance where there has been a performance by the promisee which is incapable of monetary evaluation.[3] The rationale of these courts is that the Statute of Frauds, which was designed to prevent fraud, should not be used to perpetuate a fraud and that the equity of the promisee who has performed in reliance upon the oral contract requires the specific deliverance of the thing promised.[4]

Prior to the decision in the principal case Kentucky had repudiated the doctrine of part performance as taking the oral contract out of the

[1] Miller v. Miller, 335 S.W.2d 884 (Ky. 1960).

[2] *E.g.,* Pocius v. Fleck, 13 Ill. 2d 420, 150 N.E.2d 106 (1958); Griggs v. Oak, 164 Neb. 296, 82 N.W.2d 410 (1957); Gales v. Smith, 249 N.C. 263, 106 S.E.2d 164 (1958); Hill v. Luck, 201 Va. 586, 112 S.E.2d 858 (1960); 49 AM. JUR. *Statute of Frauds* § 215 (1943).

[3] Jones v. Adams, 67 Idaho 402, 182 P.2d 963 (1947); Jatcko v. Hoppe, 7 Ill. 2d 479, 131 N.E.2d 84 (1956); Betterly v. Granger, 350 Mich. 651, 87 N.W.2d 330 (1957); Randall v. Tracy Collins Trust Co., 6 Utah 2d 18, 305 P.2d 480 (1956); Patton v. Patton, 201 Va. 705, 112 S.E.2d 849 (1960). The courts have varied widely in terminology and in description of the particular acts necessary to take the oral contract out of the statute. See Parker v. Solomon, 171 Cal. App. 2d 125, 340 P.2d 353 (Dist. Ct. App. 1959) (equitable estoppel); Hurd v. Ball, 128 Ind. App. 278, 143 N.E.2d 458 (1957) (fraud). See generally Annot., 101 A.L.R. 923 (1936); Comment, 36 U. DET. L.J. 316 (1959).

[4] Monarco v. Lo Greco, 35 Cal. 2d 621, 220 P.2d 737 (1950); Anselmo v. Beardmore, 70 Idaho 392, 219 P.2d 946 (1950); Gladville v. McDole, 247 Ill. 34, 93 N.E. 86 (1910); Gossett v. Harris, 48 S.W.2d 739 (Tex. Civ. App. 1932).

Statute.[5] North Carolina,[6] Mississippi,[7] and Tennessee[8] have also rejected the doctrine of part performance. The question arises whether the reasoning used by the Kentucky court in reversing its position would be persuasive if and when the North Carolina Supreme Court is faced with the problem presented by the instant case. In examining this question it is necessary to consider the rules existing in Kentucky at the time of the decision as compared with the present North Carolina holdings.

Kentucky has held that, although the oral contract is unenforceable, the party performing the contract is entitled to recover the reasonable value of his services, where they are capable of monetary evaluation.[9] Where the performance by the promisee was not susceptible of monetary evaluation, Kentucky had awarded the party performing the value of the land promised to be devised.[10] In the instant case the Kentucky court concluded that awarding the plaintiff the value of the land promised to be devised but refusing to give the plaintiff the land itself was unreasonable and illogical. The court stated:

> Where the statute of frauds is so circumvented as to allow proof of the terms of an oral contract and recovery of the value of the property agreed to be devised or conveyed then to say that 'though the thing itself cannot be recovered nor the contract specifically enforced' . . . because the statute is still applicable is pure sophistry. . . . Originating in Victorian circumlocution, the fiction does not measure up to the practical requirements of justice and common sense.[11]

[5] Vest v. Searce's Adm'r, 312 Ky. 181, 226 S.W.2d 942 (1950); Rudd v. Planters Bank & Trust Co., 283 Ky. 351, 141 S.W.2d 299 (1940); Bowling v. Bowling's Adm'r, 222 Ky. 396, 300 S.W. 876 (1927); Doty's Adm'r v. Doty's Guardian, 118 Ky. 204, 80 S.W. 803 (1904); Grant v. Craigmiles, 4 Ky. (1 Bibb) 203 (1808).

[6] Gales v. Smith, 249 N.C. 263, 106 S.E.2d 164 (1958); Stewart v. Wyrick, 228 N.C. 429, 45 S.E.2d 764 (1947); Daughtry v. Daughtry, 223 N.C. 528, 27 S.E.2d 446 (1943); Price v. Askins, 212 N.C. 583, 194 S.E. 284 (1937). For earlier discussions of *quantum meruit* in North Carolina as a basis of recovery where the oral contract is unenforceable because of the Statute of Frauds see Notes, 1 N.C.L. REV. 48 (1922) and 15 N.C.L. REV. 203 (1936).

[7] Collins v. Dunn, 233 Miss. 636, 103 So. 2d 425 (1958); Milam v. Paxton, 160 Miss. 562, 134 So. 171 (1931); Howie v. Swaggard, 142 Miss. 409, 107 So. 556 (1926); Fisher v. Kuhn, 54 Miss. 480 (1877); McGuire v. Stevens, 42 Miss. 724 (1869). Where the promisor has executed a will devising the property to the promisee, it cannot subsequently be revoked. Johnston v. Tomme, 199 Miss. 337, 24 So. 2d 730 (1946). See Note, 18 MISS. L.J. 328 (1947).

[8] Burce v. Scruggs Equip. Co., 194 Tenn. 129, 250 S.W.2d 44 (1952); Goodloe v. Goodloe, 116 Tenn. 252, 92 S.W. 767 (1906); Newman v. Carroll, 11 Tenn. 18 (1832).

[9] Vest v. Searce's Adm'r, 312 Ky. 181, 226 S.W.2d 942 (1950); Carpenter v. Carpenter, 299 Ky. 738, 187 S.W.2d 282 (1945); Rudd v. Planters Bank & Trust Co., 283 Ky. 351, 141 S.W.2d 299 (1940).

[10] Bowling v. Bowling's Adm'r, 222 Ky. 396, 300 S.W. 876 (1927); Doty's Adm'r v. Doty's Guardian, 118 Ky. 204, 80 S.W. 803 (1904); Benge v. Hiatt's Adm'r, 82 Ky. 666 (1885).

[11] Miller v. Miller, 335 S.W.2d 884, 889 (Ky. 1960).

North Carolina has consistently held that neither specific performance nor damages may be awarded on the oral contract to devise or to convey realty.[12] Although the contract itself is unenforceable, monetary relief has been awarded on a *quantum meruit* basis in order to prevent unjust enrichment where the promisee has performed.[13] If the promisee's performance has been in the nature of services which were capable of monetary evaluation, the measure of damages is the value of the services.[14] Where the performance is incapable of monetary evaluation, the North Carolina position is not clear. *Redmon v. Roberts*[15] presented facts almost identical to those in the principal case. There an illegitimate daughter brought suit against the estate of her deceased father to recover on his oral promise to adopt her and to leave her a part of his estate if the plaintiff's mother would not bring bastardy proceedings against him. The court stated, in a dictum,[16] that the measure of damages would be the value of the property agreed to be devised, and cited a Kentucky case as authority for the rule. In *Hager v. Whitener*,[17] the plaintiff moved his family to the deceased's home, worked the land, and took care of the deceased in his old age in consideration of the promise by the deceased to devise all of his property to the plaintiff.[17a] The court adopted the dictum in *Redmon v. Roberts* and awarded the plaintiff the value of the land promised to be devised although the services were apparently capable of monetary evaluation. In a later case, *Grantham v. Grantham*,[18] the plaintiff also rendered personal services in consideration of the deceased's oral promise to devise realty. The court reversed its position taken in the *Hager* case, holding that the promisee was entitled to the value of the services, but that the

[12] Gales v. Smith, 249 N.C. 263, 106 S.E.2d 164 (1958); Jamerson v. Logan, 228 N.C. 540, 46 S.E.2d 561 (1948); Neal v. Wachovia Bank & Trust Co., 224 N.C. 103, 29 S.E.2d 206 (1944); Grantham v. Grantham, 205 N.C. 363, 171 S.E. 331 (1933); Ballard v. Boyette, 171 N.C. 24, 86 S.E. 175 (1915); Hall v. Fisher, 126 N.C. 205, 35 S.E. 425 (1900); East v. Dolihite, 72 N.C. 562 (1875); Albea v. Griffin, 22 N.C. 9, (1838).

[13] Jamerson v. Logan, *supra* note 12; Stewart v. Wyrick, 228 N.C. 429, 45 S.E.2d 764 (1947); Daughtry v. Daughtry, 223 N.C. 528, 27 S.E.2d 446 (1943). Plaintiff is entitled to nominal damages even though there is no allegation or proof as to the reasonable value of the services. Gales v. Smith, *supra* note 12.

[14] Stewart v. Wyrick, *supra* note 13 (plaintiff rendered services to and advanced money in behalf of the deceased); Price v. Askins, 212 N.C. 583, 194 S.E. 284 (1937).

[15] 198 N.C. 161, 150 S.E. 881 (1929).

[16] The defendant failed to reserve the question for appeal so it was not before the court.

[17] 204 N.C. 747, 169 S.E. 649 (1933).

[17a] It has been held that such performances are not susceptible of monetary evaluation. Walker v. Calloway, 99 Cal. App. 2d 675, 222 P.2d 455 (Dist. Ct. App. 1955); Hanson v. Urner, 206 Md. 324, 111 A.2d 649 (1954). The general rule, however, is that such performances may be adequately compensated for in money. Hays v. Herman, 213 Ore. 140, 322 P.2d 119 (1958); Gossett v. Harris, 48 S.W.2d 739 (Tex. Civ. App. 1932). See generally 49 Am. Jur. *Statute of Frauds* § 524 (1943); Annot., 101 A.L.R. 923, 1101-05 (1936).

[18] 205 N.C. 363, 171 S.E. 331 (1933).

value of the land might be admitted only as evidence to be considered by the jury in determining the reasonable value of the services. In *Grantham,* however, as well as in all of the later decisions in which the rule of the *Grantham* case has been applied,[19] the court has been concerned with cases in which the performance by the promisee was capable of monetary evaluation. Thus it is questionable whether the *Grantham* decision would be a repudiation of the dictum in the *Redmon* case since in *Redmon* the performance by the promisee was not capable of monetary evaluation.

Should the *Redmon* dictum be applicable on its facts, the prior Kentucky rule and the existing North Carolina rule would be the same. This should add to the persuasiveness of the Kentucky decision. However, should our court decide that the *Grantham* rule applies also to the cases in which the performance is not capable of monetary evaluation, it is arguable that the North Carolina and prior Kentucky rules are distinguishable. That is, whereas Kentucky awarded the value of the land as damages, North Carolina has determined that the value of the land is only evidence of the value of the performance. It has been suggested that such a distinction is without substance because the jury will ordinarily accept the standard set by the parties as the reasonable worth of the performance by the promisee.[20]

In considering cases presenting facts similar to the instant case, two questions are posed: "(1) whether the policy of the statute [in preventing fraud] is saved, and (2) whether there is something in the particular case that calls for dispensing with a formal compliance with the statute, its policy being saved, and makes it more equitable to go forward and complete what the parties have begun."[21] The Kentucky court discerned the inconsistency of its answer to these questions. Its prior decisions had required a strict adherence to the Statute in holding the contract unenforceable. Yet, the court would, in effect, enforce the oral contract by awarding damages measured by the terms of the contract.

Where the performance by the promisee is not susceptible of monetary evaluation, there is no way to determine the value of the performance without accepting, or at least considering, the value set by the parties themselves. Thus practicality requires dispensing with strict

[19] Gales v. Smith, 249 N.C. 263, 106 S.E.2d 164 (1958); Jamerson v. Logan, 228 N.C. 540, 46 S.E.2d 561 (1948); Stewart v. Wyrick, 228 N.C. 429, 45 S.E.2d 764 (1947); Coley v. Dalrymple, 225 N.C. 67, 33 S.E.2d 477 (1945); Grady v. Faison, 224 N.C. 567, 31 S.E.2d 760 (1944), Neal v. Wachovia Bank & Trust Co., 224 N.C. 103, 29 S.E.2d 206 (1944); Daughtry v. Daughtry, 223 N.C. 528, 27 S.E.2d 446 (1943); Price v. Askins, 212 N.C. 583, 194 S.E. 284 (1937); Lipe v. Citizens Bank & Trust Co., 206 N.C. 24, 173 S.E. 316, *aff'd on rehearing,* 207 N.C. 794, 178 S.E. 665 (1935).

[20] 4 PAGE, WILLS 895 (3d ed. 1941).

[21] Pound, *The Progress of the Law, 1918-1919—Equity,* 33 HARV. L. REV. 929, 944 (1920).

adherence to the Statute and admission of the terms of the oral contract for the purpose of measuring damages. Since this does not violate the policy and purpose of the Statute, it would seem more logical and equitable to award the specific thing promised rather than to attempt its measurement in damages. In doing so, the statutory policy and purpose would be preserved equally as well. It is submitted that the Kentucky court has adopted the preferable position.

J. LEVONNE CHAMBERS

Workmen's Compensation—Neutral Risks—Causal Relation Between Employment and Injury.

The workman's compensation statutes of most states prescribe as one of the requirements of compensability that an injury must "arise out of" the employment[1] of the worker, thus demanding a causal relation between the job and the injury. Professor Larson has adopted a useful threefold classification of the tests employed by the courts to determine if an injury meets this requirement. Risks are designated as personal, job related and neutral.[2] An injury resulting from personal risk is one completely unrelated to the employment and therefore not compensable.[3] The injury from a job related risk is strictly confined to the hazards of employment and is always compensable.[4] The third category, neutral risk, includes all risks not personal or job related.[5] The establishment of the causal relation, the "arising out of" the employment, is a difficult problem in these neutral risk injuries. In determining compensability in such cases the courts have used three theories—increased risk, actual risk and positional risk. This note will examine each of these theories and will attempt to determine the present position of North Carolina in this area.

In *Pope v. Goodsen*[6] a carpenter took shelter during a storm in a partially completed building. He was wet from the rain and had a nail pouch around his waist. As he stood near the window, lightning struck the house, traveled down the window frame and passed through

[1] *E.g.*, N.C. GEN. STAT. § 97-2(6) (1958); S.C. CODE § 72-14 (Supp. 1959); VA. CODE ANN. § 65-7 (1950). *Contra*, N.D. REV. CODE § 65-0102(8) (1957); UTAH CODE ANN. § 35-1-44 (1953). For a discussion of "arising out of," see Vause v. Vause Farm Equip. Co., 233 N.C. 88, 63 S.E.2d 173 (1951).

[2] 1 LARSON, WORKMEN'S COMPENSATION § 7 (1952).

[3] Compensation was denied to an employee assaulted while working, where the assault was motivated by domestic difficulties. Harden v. Thomasville Furniture Co., 199 N.C. 733, 155 S.E. 728 (1930).

[4] Compensation is so clearly appropriate that the issue is seldom litigated. For instance, if an operator of a saw were injured by a malfunction in that tool, the risk is clearly job related.

[5] In neutral risks the cause of the harm may be known or unknown; this note treats only the former type cases.

[6] 249 N.C. 690, 107 S.E.2d 524 (1959).

the nail pouch and the legs of the carpenter, causing his death. In allowing compensation under the statute[7] the court stated:

> The generally recognized rule is that where the injured employee is by reason of his employment peculiarly or specially exposed to risk of injury from lightning—that is, one greater than other persons in the community,—death or injury resulting from this source usually is compensable as an injury by accident arising out and in the course of the employment.[8]

The court followed the well-established majority rule[9] in allowing compensation because of the increased risk to the employee. The determining factor in granting compensation under the increased risk is the greater likelihood of injury to the worker than to the general public; if his employment subjected the employee to the additional danger, compensation is allowed.

There is no uniformity among courts which adhere to the increased risk theory; opposite results have been reached on indistinguishable fact situations,[10] due to differences in defining the scope of the term "general public." The Massachusetts court denied compensation to a laborer whose foot was frozen while working outside before dawn in extremely cold weather. The court stated, "In the performance of his work, there is nothing to show that the employee was exposed to any greater risk of freezing his foot than the ordinary person engaged in outdoor work in cold weather."[11] On the other hand, in allowing compensation to the widow of an employee who died from a heatstroke, the Texas court took a more liberal view: "In the case before us the very work which the deceased was doing for his employer exposed him to greater hazard from heatstroke than the general public was exposed to for the simple reason that the general public were not pushing wheelbarrow loads of sand in the sun on that day."[12]

Increased risk has been found where the employment of the worker has merely exposed him to the elements (or whatever the harmful force). Thus, increased risk of sunstroke was found by the Oklahoma court

[7] N.C. GEN. STAT. § 97-2(6) (1958).

[8] 249 N.C. at 692, 107 S.E.2d at 525. Deceased was "specially exposed" because he was wet and wearing a nail pouch.

[9] *E.g.*, Bales v. Covington, 312 Ky. 551, 228 S.W.2d 446 (1950); Kaiser v. Industrial Comm'n, 136 Ohio St. 440, 26 N.E.2d 449 (1940); Hiers v. Brunson Const. Co., 221 S.C. 212, 70 S.E.2d 211 (1952). See generally 58 AM. JUR. *Workmen's Compensation* § 260 (1948); 71 C.J. *Workmen's Compensation* § 469 (1935); 99 C.J.S. *Workmen's Compensation* § 249 (1958).

[10] An employee took shelter under a tree during a thunder storm and was struck by lightning; increased risk was found in Nelson v. Country Club, 329 Mich. 479, 45 N.W.2d 362 (1951). *Contra,* DeLuca v. Board of Park Comm'rs, 94 Conn. 7, 107 Atl. 611 (1919).

[11] Robinson's Case, 292 Mass. 543, 545-46, 198 N.E. 760, 761 (1935).

[12] American Gen. Ins. Co. v. Webster, 118 S.W.2d 1082, 1085-86 (Tex. Civ. App. 1938).

when the work merely required that the employee be in the sun.[13] In most cases, however, there is an additional hazard more directly connected with the job. Heat from molten lead,[14] reflected heat and deflected breeze,[15] and objects which attract lightning[16] have been found to be such additional factors. In the single case[17] involving heatstroke which has reached the North Carolina Supreme Court, the evidence showed that the employee had been working with molten lead which had raised slightly the surrounding temperature. The court allowed compensation but indicated that had the additional factor not been present recovery would have been denied. The increased risk theory has received general acceptance throughout the United States and has been applied to accidents caused by lightning,[18] exposure,[19] windstorms,[20] earthquakes,[21] and other neutral risks.[22]

While professing to follow the increased risk rule, some courts[23] have developed the contact-with-the-premises exception.[24] Under this exception when the worker has been injured by contact with part of his occupational surroundings, regardless of the actuating force, sufficient causal relation has been established and increased risk need not be shown. This doctrine is illustrated by the statement, "If the bomb injures a

[13] The truck driven by the employee ran out of gas, and he suffered a sunstroke while walking to a service station. Garfield County v. Best, 289 P.2d 677 (Okla. 1955).

[14] Fields v. Tompkins-Johnston Plumbing Co., 224 N.C. 841, 32 S.E.2d 623 (1945).

[15] McNeil v. Omaha Flour Mills Co., 129 Neb. 329, 261 N.W. 694 (1935).

[16] Stout v. Elkhorn Coal Co., 289 Ky. 736, 160 S.W.2d 31 (1942).

[17] Fields v. Tompkins-Jenkins Plumbing Co., 224 N.C. 841, 32 S.E.2d 623 (1945).

[18] Fort Pierce Growers Ass'n v. Storey, 158 Fla. 192, 29 So. 2d 205 (1947); Stout v. Elkhorn Coal Co., 289 Ky. 736, 160 S.W. 2d 31 (1942); Bauer's Case, 314 Mass. 4, 49 N.E.2d 118 (1943); State v. Ramsey County Dist. Court, 129 Minn. 502, 153 N.W. 119 (1915); Sullivan v. Roman Catholic Bishop, 103 Mont. 117, 61 P.2d 838 (1936).

[19] Vukovich v. Industrial Comm'n, 76 Ariz. 187, 261 P.2d 1000 (1953); Larke v. John Hancock Mut. Life Ins. Co., 90 Conn. 303, 97 Atl. 320 (1916); Murphey v. I.C.U. Constr. Co. 158 Kan. 541, 148 P.2d 771 (1944); Nelson v. District Court, 138 Minn. 260, 164 N.W. 917 (1918).

[20] Reid v. Automatic Elec. Washer Co., 189 Iowa 964, 179 N.W. 323 (1920); Merrill v. Penasco Lumber Co., 27 N.M. 632, 204 Pac. 72 (1922); Scott County School Bd. v. Carter, 156 Va. 815, 159 S.E. 115 (1931); Scandrett v. Industrial Comm'n, 235 Wis. 1, 291 N.W. 845 (1940).

[21] London Guar. & Acc. Co. v. Industrial Acc. Comm'n, 202 Cal. 239, 259 Pac. 1096 (1927); Enterprise Dairy Co. v. Industrial Acc. Comm'n, 202 Cal. 247, 259 Pac. 1099 (1927).

[22] Borgeson v. Industrial Comm'r, 368 Ill. 188, 13 N.E.2d 164 (1938) (stray bullet); Lexington Ry. Sys. v. True, 276 Ky. 446, 124 S.W.2d 467 (1939) (stray bullet); Plemmons v. White's Serv., Inc., 213 N.C. 148, 195 S.E. 370 (1938) (bitten by mad dog).

[23] Caswell's Case, 305 Mass. 500, 26 N.E.2d 328 (1940); Dunnigan v. Clinton Falls Nursery Co., 155 Minn. 286, 193 N.W. 466 (1923); Industrial Comm'n v. Hampton, 123 Ohio St. 500, 176 N.E. 74 (1931); Brooker v. Borthwick & Sons (Australasia), Ltd., [1933] A.C. 669 (N.Z.).

[24] This exception could fit the actual risk theory also, but only courts following the increased risk rule have utilized it. Courts using positional risk would find causation from the fact that the employee was on the job.

workman directly he must show special exposure; if it injures him indirectly by bringing the roof down on him, he can recover unconditionally."[25]

While the contact-with-the-premises exception has not been applied in North Carolina to an injury caused by an act of God, the court apparently used this theory in allowing recovery in *Perkins v. Sprott.*[26] In that case the employee suffered an injury when a baseball broke the window of the truck he was driving and the shattered glass struck him in one eye. In its brief opinion the court did not mention increased risk but stressed the fact that the glass rather than the baseball actually caused the injury. The decision clearly implies that compensation would not have been allowed if the baseball itself had struck the employee.[27] However, in *Walker v. J. D. Wilkins, Inc.*[28] an employee was injured when a tornado blew down the building in which he was working. The injuries were caused by the falling debris, but compensation was not granted because no increased risk was found.[29] This decision would seem to be in conflict with the position taken in *Sprott,* but in *Walker* neither the opinion of the court nor the briefs of the parties mentioned the contact-with-the-premises exception.

The actual risk theory is a more liberal approach to the problem of determining causal relation. Recovery is allowed if the employment exposed the worker to a risk of the injury, and the likelihood of similar harm to others in the community is not examined.[30] This theory is especially applicable to exposure cases, as the danger of freezing or sunstroke is common to many people in a designated area. An employee who suffers a heatstroke while working in the hot sun might be denied recovery under the increased risk theory, since everyone in the area is subjected to the same risk.[31] The actual risk theory would allow com-

[25] Brooker v. Borthwick & Sons (Australasia), Ltd., [1933] A.C. 669, 678 (N.Z.).

[26] 207 N.C. 462, 177 S.E. 404 (1934).

[27] "The injury to the plaintiff employee was the glass that hit him in the eye. The baseball did not hit him." *Id.* at 464, 177 S.E. at 405. Compensation was denied in two similar cases where a bullet struck the employee's eye directly. Bain v. Travora Mfg. Co., 203 N.C. 466, 166 S.E. 301 (1932); Whitley v. Highway Comm'n, 201 N.C. 539, 160 S.E. 827 (1931).

[28] 212 N.C. 627, 194 S.E. 89 (1937).

[29] The contact-with-the-premises exception was utilized in allowing recovery on similar facts in Caswell's Case, 305 Mass. 500, 26 N.E.2d 328 (1940).

[30] Harding Glass Co. v. Albertson, 208 Ark. 866, 187 S.W.2d 961 (1945) (glass cutter died from heat stroke); McKiney v. Reynolds & Manley Lumber Co., 79 Ga. App. 826, 54 S.E.2d 471 (1949) (worker in lumber yard struck by lightning); Hughes v. Saint Patrick's Cathedral, 245 N.Y. 201, 156 N.E. 665 (1927) (grave digger suffered heat stroke); Deziley v. Semet-Solvay Co., 272 App. Div. 985, 72 N.Y.S.2d 809 (1947) (struck by lightning while going to job); Eagle River Bldg. & Supply Co. v. Peck, 199 Wis. 192, 225 N.W. 690 (1929) (foot frozen in extreme weather).

[31] In denying compensation to a coalheaver who suffered a sunstroke, the court stated, "It is urged that physical labor has a tendency to induce sunstroke. No doubt it has, but physical labor is not a hazard peculiar to a coalheaver." Lewis v. Industrial Comm'n, 178 Wis. 449, 453; 190 N.W. 101, 102 (1922).

pensation because the employment required the employee to work in the sun and subjected him to the danger of sunstroke.[32] This theory eliminates the problem found in the increased risk doctrine of defining the scope of the term "general public."

The positional risk theory is the third and most liberal approach to the problem; compensation is allowed when the employment caused the worker to be in the position where the injury was received, irrespective of the risk involved.[33] The Colorado court in *Aetna Life Ins. Co. v. Industrial Comm'n*[34] allowed recovery for the death of a farm hand killed by lightning. A concurring opinion summarized the holding and illustrated this theory by stating:

> An affirmance . . . established the rule that when one in the course of his employment is reasonably required to be at a particular place at a particular time and there meets with an accident, although one which any person then and there present would have met irrespective of his employment, that accident is one "arising out of" the employment of the person so injured.[35]

The North Carolina Supreme Court has been presented with two cases[36] in which the application of the positional risk doctrine would have allowed recovery.[37] In both an employee had been struck by a stray bullet, and in both compensation was denied because of the absence of increased risk.

In summary, North Carolina has adhered to the increased risk theory by using comparative danger between the worker and the general public to determine if causation exists between the injury and the employment.[38] The term "general public" has been interpreted liberally, how-

[32] In granting compensation to an employee who suffered a heatstroke, the court stated, "Although the risk may be common to all who are exposed to the sun's rays on a hot day, the question is whether the employment exposes the employee to the risk." Hughes v. St. Patrick's Cathedral, 245 N.Y. 201, 202, 156 N.E. 665 (1927).

[33] Aetna Life Ins. Co. v. Industrial Comm'n, 81 Colo. 233, 254 Pac. 995 (1927) (farm hand struck by lightning); Harvey v. Caddo De Soto Cotton Oil Co., 199 La. 720, 6 So.2d 747 (1942) (cyclone demolished building and injured employee); Gargiulo v. Gargiulo, 24 N.J. Super. 129, 93 A.2d 598 (1952) (struck by arrow shot by child); Nash-Kelvinator Corp. v. Industrial Comm'n, 266 Wis. 81, 62 N.W.2d 567 (1954) (assaulted by fellow employees for signing peace petition).

[34] 81 Colo. 233, 254 Pac. 995 (1927).

[35] *Id.* at 236, 254 Pac. at 996.

[36] Bain v. Travora Mfg. Co., 203 N.C. 466, 166 S.E. 301 (1932); Whitley v. Highway Comm'n, 201 N.C. 539, 160 S.E. 827 (1931).

[37] See Truck Ins. Exch. v. Industrial Accident Comm'n, 147 Cal. App. 2d 460, 305 P.2d 55 (Dist. Ct. App. 1957); Gargiulo v. Gargiulo, 24 N.J. Super 129, 93 A.2d 598 (1952).

[38] Special danger was found where a night watchman was killed by an unknown assailant. West v. East Coast Fertilizer Co., 201 N.C. 556, 160 S.E. 765 (1931). Compensation was denied on the ground that the risk was common to the neighborhood in Lockey v. Cohen, Goldman & Co., 213 N.C. 356, 196 S.E. 342 (1938) (employee slipped on fruit peel in employer's parking lot). Increased risk was found in Pope v. Goodsen, 249 N.C. 690, 107 S.E.2d 524 (1959), and Fields v. Tompkins-Johnston Plumbing Co., 224 N.C. 841, 32 S.E.2d 623 (1945).

ever to mean all persons in the general vicinity, not just those doing the same or similar work.[39] The status of the contact-with-the-premises exception is unclear due to an apparent conflict in holdings.[40] Neither the actual[41] nor the positional[42] risk theory has been adopted by the court.

JAMES H. CARSON, JR.

Wrongful Death—Measure of Damages—Evidence of Retirement Income.

In the recent case of *Bryant v. Woodlief*[1] the North Carolina Supreme Court held that evidence of railroad retirement payments received by the decedent is admissible on the issue of damages in a wrongful death action.[2] This holding[3] and the court's incidental discussion of the measure of damages in North Carolina raises two questions. First, how far will the court extend the holding in *Bryant,* which seemingly is in conflict with prior decisions, to other types of income similar to that involved in the principal case? Secondly, what inference can be drawn from the inconsistency reflected in the court's discussion in *Bryant?*

The evidence admitted in the principal case is difficult to reconcile with the tacit rule of past cases that wrongful death damages in North

[39] See Pope v. Goodsen, *supra* note 38; Fields v. Tompkins-Jenkins Plumbing Co., *supra* note; 38 Plemmons v. White's Serv., Inc., 213 N.C. 148, 195 S.E. 370 (1938).

[40] Perkins v. Sprott, 207 N.C. 462, 177 S.E. 404 (1934); Whitley v. Highway Comm'n, 201 N.C. 539, 160 S.E. 827 (1931). The application of the exception could leave the court in an illogical position if a case ever arose where one eye was injured directly by an object and the other eye injured by shattered glass from a window. Apparently compensation would be awarded for injury to one eye under the premises exception but disallowed for the other under the increased risk theory.

[41] The language in Fields v. Tompkins-Johnston Plumbing Co., 224 N.C. 841, 32 S.E.2d 623 (1945), strongly indicates that no recovery would be allowed for a heatstroke suffered on a hot day unless some additional harmful factor were present. The actual risk theory would require nothing more than labor in the hot sun. Compare Hughes v. St. Patrick's Cathedral, 245 N.Y. 201, 156 N.E. 665 (1927).

[42] Utilization of the positional risk doctrine would have allowed compensation in Whitely v. Highway Comm'n, 201 N.C. 466, 160 S.E. 827 (1931).

[1] 252 N.C. 488, 114 S.E.2d 241 (1960).

[2] Heskamp v. Bradshaw's Adm'r, 294 Ky. 618, 172 S.W.2d 447 (1943), was relied upon in the principal case. Kentucky's death statute, KY. REV. STAT. § 411.130 (1959), has been construed to provide recovery for "loss to the estate." Chesapeake & O. Ry. v. Bank's Adm'r, 153 Ky. 629, 156 S.W. 109 (1913). The North Carolina statute, N.C. GEN. STAT. § 28-174 (1950), is given the same construction. Rea v. Simowitz, 226 N.C. 379, 38 S.E.2d 194 (1946).

[3] Other jurisdictions have reached the same result; Kowtko v. Delaware & Hudson R.R., 131 F. Supp. 95 (M.D. Penn. 1955) (training subsistence payments from the Veterans Administration); Barrow v. Lence, 17 Ill. App. 2d 527, 151 N.E.2d 120 (1958) (monthly pension); Trust Co. v. Cummings, 320 Ill. App. 437, 51 N.E.2d 616 (1943) (old age assistance); Jessee v. Slate, 196 Va. 1074, 86 S.E.2d 821 (1955) (monthly social security payments). And the measure of damages used is not determinative of the question of the admissibility of such evidence. Virginia, for example, allows such evidence and its measure is "loss to certain near relatives." Conrad v. Thompson, 195 Va. 714, 80 S.E.2d 561 (1954).

Carolina are to be based on loss of income expected from probable future exertions of the decedent. Although never formally stated, this rule has developed around the phrase, "from his own exertions during his life expectancy," which relates to the determination of net pecuniary value of decedent's life. This value is ascertained by deducting probable living costs of the decedent from his probable gross income expected to be derived *from his own exertions during his life expectancy.*[4] The use of the words "exertions during his life expectancy" would seem to mean exertions during that time the decedent would have had earnings *but for* the wrongful act. To be admissible, therefore, the probable income must be due to exertions of the decedent which would have been performed had the decedent lived out his life expectancy. Under this interpretation it is clear that the rewards from exertions prior to death are not to be considered; thus the phrase would not seem to comprehend retirement pensions. Such rewards from past earnings would be a part of the decedent's accumulated capital rather than a part of his probable future earnings.

In essence the question before the court in *Bryant* was whether the evidence was to be restricted to decedent's probable future earnings or whether probable earnings plus income from other sources should be admitted. By admitting evidence of retirement income the court decided in favor of the latter alternative. Thus the court drew no distinction between the income expected from future earnings and that attributable to past earnings. The only restriction placed on the admissibility of evidence of income from sources other than future earnings by the court in *Bryant* is that the income must be of such a nature as to stop upon the death of the decedent.[5] The court adopted the theory that a pension is a substitute for earning power. This may be so in practical result; but the legal theory of the tacit or unexpressed rule does not seem to be satisfied thereby. The court should have stated that they could find no sound basis for excluding evidence of pension income which is attributable to the past exertions of the decedent while allowing consideration of income from probable future exertions. Although the court has never held that income like that in *Bryant* was inadmissible, the language of the previous decisions[6] would not seem logically to warrant the result in the principal case. If the plain meaning of these previous cases is not to be followed, then it should be so stated. Other-

[4] Journigan v. Little River Ice Co., 233 N.C. 180, 184, 63 S.E.2d 183, 186 (1951); Rea v. Simowitz, 226 N.C. 379, 38 S.E.2d 194 (1946); Carpenter v. Asheville Power & Light Co., 191 N.C. 130, 131 S.E. 400 (1926); Russell v. Windsor Steamboat Co., 126 N.C. 961, 36 S.E. 191 (1900).

[5] 252 N.C. at 494, 114 S.E. at 246, "[W]e do not understand that the general rule in this respect would exclude the inclusion of income from an annuity, life estate, retirement pay, or other income for life only, in arriving at the pecuniary loss sustained by reason of wrongful death."

[6] Cases cited note 4 *supra.*

wise, *Bryant* will stand as dubious precedent for any type of life income rather than pensions.

Whatever might be said about the apparent conflict with precedent, the principal case does, this writer submits, reach a sound result. There seems to be no valid reason why evidence of probable future earnings should be admitted and evidence of future income from past earnings excluded. The time of the actual exertion does not seem significant. Indeed whether the income was derived from any exertion at all does not logically affect what the estate of the decedent has lost by his wrongful death because the loss of a life income in any form is a pecuniary loss which the estate of the decedent has suffered.[7] Also, as was pointed out in *Bryant*,[8] it is more reasonable to assume that a pension will continue until the pensioner's death than that salary or wages would continue. The problem is how far should the court go in admitting evidence of income other than that attributable to past or future exertions and to what extent it will feel bound by its language in previous cases.

The court intimated that it will admit evidence of any kind of life income which death has cut short, to wit: "an annuity, life estate, retirement pay or other income for life only."[9] Conceivably, however, some problems may arise in applying this broad statement to differing fact situations. If the annuity, for example, is of the survivorship type providing larger payments to the decedent than to his widow it may not be readily apparent what the estate has lost.[10] If the life estate, to use another illustration, was held jointly by the decedent and another, the question is also a closer one than that in the principal case.

Because of the unexpressed rule it is even possible, although the court in *Bryant* does not say so, that in future cases an inquiry will be made into how the decedent acquired the life estate or right to a life income, so that evidence of a gift of such an interest could be excluded. It is submitted, however, that such a result should not be encouraged because nothing in *Bryant* requires the courts to look beyond the life income itself. Rather the opinion seems to establish only one criterion to use in the admission of evidence of income, and that is whether the wrongful death terminated income or property rights which the decedent would have had for the remainder of his life. Under this rule it would not

[7] Of course, if the property which produced the income is owned by the decedent, e.g., a trust fund, there is no ground for admitting such income because it is not affected adversely by the death of the decedent. The rule that investment income is not admissible demonstrates the application of this principle. See, *e.g.*, White v. North Carolina R.R., 216 N.C. 79, 3 S.E.2d 310 (1939); Underwood v. Old Colony St. Ry. Co., 33 R.I. 319, 80 Atl. 390 (1911).

[8] 252 N.C. at 497, 114 S.E.2d at 248.

[9] *Id.* at 494, 114, S.E.2d at 246.

[10] A sum equal to the difference in the two payments would seem one logical answer. Nevertheless it is clear that where the estate (or beneficiary) receives less than the decedent would have had he lived, a sum equal to that difference is ascertainable and should be included in the computation of probable future earnings.

matter that the decedent had been given his life income as a gift or that he had purchased the same with capital savings, salary earnings, or windfall receipts like remote inheritances or raffle prizes.

If this interpretation of the court's statements and holding in *Bryant* is correct, it seems clear that they amount to a repudiation of the tacit rule.[11] On the other hand, regardless of the outcome of any future controversy concerning the source of the income, the mere admission of evidence of the product of previously earned income is an extension of that rule.

The second question raised by the opinion in the *Bryant* case concerns the proper measure of damages for wrongful death in North Carolina.

The common law gave no remedy for wrongful death since the decedent's rights for tortious injury were considered to be personal and to terminate upon his death.[12] England in 1846[13] and North Carolina in 1854[14]—changed this situation by giving to the personal representatives of the deceased a statutory right of action for wrongful death.

Today there are three different views of what constitutes a proper measure of damages for wrongful death.[15] One view regards the proven pecuniary loss sustained by certain members of the family as the proper measure. Under this rule the plaintiffs may prove loss of financial assistance from the decedent[16] and loss of services of a pecuniary value by reason of decedent's death.[17] Competent evidence includes the health of the plaintiffs,[18] their life expectancy and financial condition[19] and their relationship to the decedent.[20] The "loss to the family" measure is the majority rule[21] and is the measure used by the English courts.[22] It is also the rule adopted under the Federal Employer's Liability Act.[23]

Another view, held by a small minority, is that the size of the recovery depends upon the degree of the defendant's culpability and is unrelated to pecuniary loss.[24]

[11] See text accompanying note 4 *supra.*
[12] Armentrout v. Hughes, 247 N.C. 631, 101 S.E.2d 793 (1958).
[13] Lord Campbell's Act, 1846, 9 & 10 Vict., c. 93.
[14] N.C. Pub. Laws 1854, ch. 39. The present statute is N.C. GEN. STAT. § 28-173 (1950).
[15] McCORMICK, DAMAGES § 95 (1935).
[16] Meekin v. Brooklyn Heights R.R., 164 N.Y. 145, 58 N.E. 50 (1900).
[17] Lichtenstein v. L. Fish Furniture Co., 272 Ill. 191, 111 N.E. 729 (1916).
[18] Simoneau v. Pacific Elec. Ry., 166 Cal. 264, 136 Pac. 544 (1913).
[19] Francis v. Atchison, T. & S.F. Ry., 113 Tex. 202, 253 S.W. 819 (1923).
[20] Pierce v. Conners, 20 Colo. 178, 37 Pac. 721 (1894).
[21] McCORMICK, DAMAGES § 106 (1935). See generally 44 HARV. L. REV. 980 (1931).
[22] Barnett v. Cohen, [1921] 2 K.B. 461; 28 HALSBURY LAWS OF ENGLAND § 110 (3d ed. 1959).
[23] Kansas City So. Ry. v. Leslie, 238 U.S. 599 (1915); Gulf, Colo. & Santa Fe R.R. Co. v. McGinnis, 228 U.S. 173 (1913).
[24] MASS. ANN. LAWS c. 229, § 2C (1955); Macchiaroli v. Howell, 294 Mass. 144, 200 N.E. 905 (1936).

By the third view, which is followed in North Carolina,[25] what is sought is compensation for the pecuniary loss to the decedent's estate. This loss is usually determined by deducting probable future personal living expenses from probable future gross income of the decedent. Under this measure it would not seem to matter whether there are any next of kin of the decedent since the recovery would—under the North Carolina view[26]—escheat to the state as would intestate property where decedent leaves no relatives.

The reason a question about the North Carolina measure is raised by the *Bryant* opinion is that the court cites early North Carolina cases in conflict with the "loss to the estate" rule. These early cases are to the effect that the proper measure of damages is the loss to the family of the decedent. In *Collier v. Arrington*,[27] the court said that the only question was "how much has the plaintiff [widow] lost by the death of the person injured." And in *Kesler v. Smith*[28] the language used was, "what was the reasonable expectation of pecuniary advantage to the family of the deceased from the continuance of his life." There are several other early cases using similar language,[29] and there is even judicial expression to the effect that such cases were following the English rule.[30]

Another and more recent group of cases employ the phrase "loss to the estate of the decedent" as stating the proper measure.[31] In other recent cases, however, the court seems to have returned to the principle of "loss to the family." *Hanks v. Norfolk & W. Ry.*[32] was such a case; the court allowed evidence of a guilty plea by the decedent in a non-support action on the theory that it showed decedent's character. It was the defendant's intention thus to show how little the decedent's family had lost, in a pecuniary sense, by the decedent's death. In *Lamm v. Lorbacher*[33] the trial judge charged the jury to "arrive at the pecuniary

[25] McCoy v. Atlantic Coast Line Ry., 229 N.C. 57, 47 S.E.2d 532 (1948); Carpenter v. Asheville Power & Light Co., 191 N.C. 130, 131 S.E. 400 (1926); Russell v. Windsor Steamboat Co., 126 N.C. 961, 36 S.E. 191 (1900). It is interesting to note that while the proceeds of a wrongful death recovery are to be disbursed in accordance with the statute of distribution, such funds are not part of the decedent's estate so as to be subject to decedent's debts. N.C. GEN. STAT. § 28-173 (1950).

[26] McCoy v. Atlantic Coast Line Ry., 229 N.C. 57, 47 S.E.2d 532 (1948); Warner v. Western N.C. R.R., 94 N.C. 250 (1886).

[27] 61 N.C. 356, 358 (1867).

[28] 66 N.C. 154, 157 (1872).

[29] *E.g.*, Carter v. Railroad, 139 N.C. 499, 52 S.E. 642 (1905); Mendenhall v. North Carolina R.R., 123 N.C. 275, 31 S.E. 480 (1898); Burton v. Wilmington & Weldon R.R., 82 N.C. 505 (1880).

[30] Purnell v. Rockingham R.R., 190 N.C. 573, 130 S.E. 313 (1925).

[31] *E.g.*, Carpenter v. Asheville Power & Light Co., 191 N.C. 130, 131 S.E. 400 (1926); Horton v. Seaboard Air Line Ry., 175 N.C. 472, 95 S.E. 883 (1918).

[32] 230 N.C. 179, 52 S.E.2d 717 (1949). This case and the earlier North Carolina decisions on this point are discussed in Note, 28 N.C.L. REV. 106 (1949).

[33] 235 N.C. 728, 71 S.E.2d 49 (1952).

worth of the deceased to her family or estate."[34] The court held that the use of the word "family" in the connection in which it was used may be understood as meaning "estate" and thus the charge was not in error. It is doubtful that the jury understood the word in other than its common meaning. Then in *Armentrout v. Hughes*[35] the court said, "Our statute has from its passage been interpreted to accord with the interpretation given by the English courts to Lord Campbell's Act."[36] This broad statement evidently overlooked *Russell v. Windsor Steamboat Co.*,[37] wherein it was pointed out that North Carolina has a measure of damages different from that used by the English courts.

In the principal case the court quotes with approval the language of three of the early North Carolina cases previously mentioned herein.[38] Also the court cites[39] an English case which held that a father who had a reasonable expectation of benefit from the continuance of his son's life could maintain an action for damages for his wrongful death. This result seems quite proper under the English or "loss to the family" rule, but it could not follow from the North Carolina or "loss to the estate" rule.

It is not clear what the court sought to achieve in *Bryant* by its collection of seemingly contradictory authority, but it is possible that a change in the law is contemplated. There is, however, an expression in the opinion to the effect that no former opinion is sought to be altered, modified, or overruled.[40] In spite of this disclaimer there does seem to be a shift towards the English or majority rule. There also possibly emerges a trend away from the judicially self-imposed test of "income derived from deceased's *own exertions*" and back to the language of the statute itself which is: "fair and just compensation for the pecuniary injury resulting from such death."[41]

In summary it can only be said that *Bryant* perpetuates the confusion surrounding this area of the law, even if it does not alter precedent.

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[34] *Id.* at 729, 71 S.E.2d at 50.
[35] 247 N.C. 631, 101 S.E.2d 793 (1958).
[36] *Id.* at 632, 101 S.E.2d at 795.
[37] 126 N.C. 961, 36 S.E. 191 (1900).
[38] Mendenhall v. North Carolina RR., 123 N.C. 275, 31 S.E. 480 (1898); Kesler v. Smith, 66 N.C. 154 (1872); Collier v. Arrington, 61 N.C. 356 (1867).
[39] 252 N.C. at 496, 114 S.E.2d at 247.
[40] *Id.* at 498, 114 S.E.2d at 248.
[41] N.C. GEN. STAT. § 28-174 (1950).